IN THE TAX COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Case number: 13380

Date: 27 January 2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

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DATE SIGNATURE

In the matter between:

Mrs X **APPELLANT**

and

THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE **RESPONDENT**

JUDGMENT

PRETORIUS J,

(1) This is an appeal against the penalty of R5 456 484.60 levied in terms of section 76 of the **Income Tax Act, 58 of 1962** ("ITA") where the court is requested to remit the levy as a whole, alternatively to such an extent which the court deems reasonable and that the additional income tax assessment for 2009 be altered in accordance with the aforementioned decision, in terms of section 129(2)(*b*) of the **Tax Administration Act, 28 of 2011**, ("TAA"). The appeal against section 89*quat*(2) interest has been withdrawn. However, to the extent that the penalty or part thereof is remitted, the interest will have to be adjusted accordingly.

POINT *IN LIMINE*:

(2) A point *in limine* was argued on 19 November 2015, a week before the hearing commenced and a ruling was made on 23 November 2015.

(3) The two points *in limine* argued were the incidence of the burden of proof pertaining to the imposition of the additional tax and whether the duty to commence the proceedings is on the applicant or on the respondent.

(4) Section 76(1)(*c*) of the ITA provides:

> *"A taxpayer shall be required to pay in addition to the tax chargeable in respect of his taxable income—*
>
> *(a) …*
>
> *(b) …*
>
> *(c) If he makes an incorrect statement in any return rendered by him which results or would if accepted*

result in the assessment of the normal tax at an amount which is less than the tax properly chargeable, an amount equal to twice the difference between the tax as assessed in accordance with the return made by him and the tax which would have been properly chargeable."

(5) The Commissioner may remit such a penalty in terms of section 76(2):

"The Commissioner may remit the additional charge imposed under sub-section (1) or any part thereof as he may think fit: Provided that, unless he is of the opinion that there were extenuating circumstances, he shall not so remit if he is satisfied that any act or omission of the taxpayer referred to in paragraph (a), (b) or (c) of sub-section (1) was done with intent to evade taxation."

(6) On 1 October 2012 this section was repealed by section 271 of the TAA. Section 270(2)(*d*) of the TAA provides:

"(2) The following actions or proceedings taken or instituted under the provisions of a tax Act repealed by this Act but not ***completed by the commencement date*** *of the comparable provisions of this Act,* ***must be continued and concluded under the provisions of this Act as if taken or instituted under this Act****:*

(*a*) *…*

(*b*) *…*

(*c*) *…*

(*d*) *an objection, appeal to the tax board, tax court or higher court, alternative dispute resolution, settlement discussions or other related High Court application"* (Court's emphasis)

(7) Section 102(2) of the TAA provides:

"(2) The burden of proving whether an estimate under section 95 is reasonable or the facts, on which SARS based the imposition of an understatement penalty under Chapter 16, is upon SARS."

(8) Section 129(3) of the TAA provides:

"(3) In ***the case of an appeal against an understatement penalty imposed by SARS under a tax Act****, the tax court must decide the matter on the basis* ***that the burden of proof is upon SARS*** *and may reduce, confirm or increase the understatement penalty."* (Court's emphasis)

(9) Section 82 of the ITA, dealing with the incidence of the onus in tax matters, was repealed by section 271 of the TAA on 1 October 2012. The respondent imposed a 100% additional tax in terms of section 76 of the ITA. This decision by the respondent was done in terms of the law as it prevailed at the time, prior to 1 October 2012. It is common cause that the objection, disallowance of the objection and appeal were all lodged prior to 1 October 2012 when the TAA came into operation. In terms of section 82 of the ITA the burden of proof was

always on the taxpayer. Section 82 provided *inter alia*:

> *"The burden of proof that any amount is exempt from or not liable to any tax chargeable under this Act or is subject to any deduction, abatement or set-off in terms of this Act, shall be upon the person claiming such exemption, non-liability, deduction, abatement or set-off, and upon the hearing of any appeal from any decision of the Commissioner, the decision shall not be reversed or* ***altered unless it is shown by the appellant that the decision is wrong****."* (Court's emphasis)

(10) In ***S v Mhlungu and Others*** **1995(3) SA 867 (CC)** Kentridge JA set out the position where a new law effects changes in procedure at paragraph 66:

> *"There is a different presumption where a new law effects changes in procedure.* ***It is presumed that such a law will apply to every case subsequently tried 'no matter when such case began or when the cause of action arose****' - Curtis v Johannesburg Municipality 1906 TS 308 at 312. It is, however, not always easy to decide whether a new statutory provision is purely procedural or whether it also affects substantive rights. Rather than categorising new provisions in this way, it has been suggested, one should simply ask whether or not they would affect vested rights if applied retrospectively."* (Court's emphasis)

(11) In ***Fredericks and Others v MEC for Education and Training* 2002(2) SA 693 (CC)** at 703 F O'Regan J held:

> *"It is not always easy to tell whether a statutory provision is purely procedural in effect or not. To avoid confusion, therefore, many statutes that repeal other statutes expressly regulate their transitional effect."*

(12) Section 270 of the TAA is a provision regulating transitional matters, such as the present matter and deals with procedural matters as well. Section 270(2)(*d*) *supra* provides clearly that an appeal which was launched prior to 1 October 2012 and not completed before 1 October 2012 is to be concluded under the provisions of the TAA. The respondent's submission is that all the enquiries, verification and submissions made, as well as the audit of the taxpayer's tax affairs took place prior to 1 October 2012 and therefor section 270(6) of the TAA should apply.

(13) Section 270(6) provides:

> *"Additional tax, penalty or interest may be imposed or levied as if the repeal of the legislation in Schedule 1 had not been effected and may be assessed and recovered under this Act, if—*
>
> *(a) additional tax, penalty or interest which but for the appeal would have been capable of being imposed, levied, assessed or recovered by the commencement date of this Act, has not been imposed, levied,*

assessed or recovered by the commencement date of this Act."

And that section 270(6A) provides:

"For the purposes of subsection (6), 'capable of being imposed' means that the verification, audit or investigation necessary to determine the additional tax, penalty or interest had been completed before the commencement date of this Act."

(14) It is quite clear that in this instance the additional tax had been imposed, assessed and levied at the commencement of the Act. The appeal proceedings to the tax court are not included. Therefore, section 270(6A) does not assist SARS in its argument.

(15) As we are only now dealing with the appeal three years after section 270(2)(*d*) came into operation, I find that the provisions of section 270(2)(*d*) is applicable. The result is that the provisions of section 102(2) and 129(3) of the TAA, pertaining to the burden of proof is applicable when dealing with penalties imposed and apply to the current proceedings.

(16) Due to this finding the rules promulgated under section 103 of the TAA apply to the procedure in these proceedings. Rule 44(1) is apposite in these proceedings as it provides:

"At the hearing of the appeal, the proceedings are commenced by the appellant unless –

(a) The only issue in dispute is … the facts upon which an understatement penalty is imposed by SARS

under section 222(1)."

(17) The provisions of section 102(2) of the TAA have reversed the onus and SARS has to prove the case.

(18) This is exactly what the sole issue in the present appeal is. Therefore the ruling was made as follows in regard to the point *in limine*:

"The court finds that:

(1) The burden of proof pertaining to the imposition of additional tax is upon the Respondent in terms of section 102(2) read with section 129(3) of the Tax Administration Act No. 28 of 2011.

(2) The duty to commence the proceedings is on the Respondent."

BACKGROUND:

(19) The applicant derived income as beneficiary of four inter vivos trusts, namely the A Trust, the B Trust, the C Trust and the D Trust. Her tax affairs for the 2009 tax year were subjected to an audit by the respondent and it was found that the applicant had under-declared her income for 2009. Mrs X had admitted through her tax representative to having omitted approximately R27 million income in the 2009 tax year. This amount is not in dispute. The only issue in dispute is the quantum of the additional taxes levied by SARS, as a result of the under-declaration.

(20) It is common cause that a penalty of R5 456 484.60 was imposed on the appellant on 15 September 2011 by the respondent's Objection

Committee in terms of section 76(1)(*c*) of the ITA when the committee decided to reduce the penalty by 50% and levied a 50% penalty, after SARS had imposed a 100% penalty. This section was repealed with effect from 1 October 2012 in terms of Schedule 1 of the TAA.

LEGAL FRAMEWORK:

(21) Section 270(6)(*a*) of the TAA provides:

> *"Additional tax, penalty or interest may be imposed or levied as if the repeal of the legislation in Schedule 1 had not been effected and may be assessed and recovered under this Act, if—*
>
> *(b) additional tax, penalty or interest which but for the appeal would have been capable of being imposed, levied, assessed or recovered by the commencement date of this Act, has not been imposed, levied, assessed or recovered by the commencement date of this Act."*

(22) In ***Commissioner for Inland Revenue v Da Costa*** **1985(3) SA 768 (A)** the court found that the tax court must exercise its own, original discretion, irrespective of the penalty imposed by the Commissioner. It entails that the tax court must deal with the matter without having regard to the findings of the Commissioner. The court further held, obiter, at 777 A-B:

> *"The key words of s 76(2) (a) are 'any act or omission of the taxpayer … done with the intent to deceive', and it is certainly*

arguable that this phrase applies only to an actual – and not also an imputed – intention of the taxpayer. However, in view of the conclusion at which I have arrived, I find it unnecessary to decide this point."

EVIDENCE:

(23) Mr Y testified on behalf of the respondent that he is in the employ of SARS as an auditor, who is responsible for high value taxpayers. His evidence was that on 16 September 2010 a notice of assessment was issued, indicating that there was no tax payable. This was due to a system error by SARS and on 21 September 2010 the notice of assessment was furnished, which indicated that there was an amount of R1 542 406.69 due. On 22 July 2011 a further notice of assessment was issued which set out that the amount of tax payable was R24 519 355.89. A further notice of assessment was issued on 8 February 2012 which indicated that an amount of R10 423 071.95 was due to the taxpayer for the 2009 tax year. This was followed by the fifth assessment pertaining to the 2009 tax year, where it was indicated that an amount of R7 476 158.55 was owing to SARS on 9 April 2013.

(24) The evidence was that the assessment of 8 February 2012 was also due to an error on SARS' part. On 5 September 2011 the Objection Committee convened to consider the appellant's objection to the imposition of 100% additional taxes, due to the under-declaration of taxes. The decision was taken to reduce it to 50% after the committee

had considered the aggravating and mitigating factors. Mr Y's evidence was that the under-declaration was for 88% of the amount. The evidence was that the appellant's accountant engaged with SARS as the representative of the appellant. He indicated at various stages during the audit that when the first return was submitted the financial statements for the respective trusts had not been available yet. The return for the 2009 tax year was submitted during February 2010. A further incorrect tax return was submitted in September 2010 – six months after the first had been submitted and the correct return was only submitted during May 2011 – two years late.

(25) At the Objection Committee meeting the taxpayer was not represented, but her submissions were submitted to the committee by Mr Y. It was conceded by the witness that due to the fact that there was a refund of R8.6 million for the previous year, the audit was triggered to ascertain the risk in refunding the taxpayer. According to the witness there was no voluntary disclosure, but disclosure was made during the course of the on-going audit as and when requested. It was not conveyed to the committee that there was a credit to the taxpayer of approximately R13 million when the committee considered the reduction of the penalty from 100% to 50%. There was thus no loss to the *fiscus* at the time the committee considered the objection.

(26) Mr Y's evidence was that he did not deem this information of the approximately R13 million credit to SARS as relevant and therefor he did not include it in his submission. Mr Y did not know that Mr Z, the

appellant's accountant, had made a mistake on 1 September 2010 by choosing the file button, instead of the save button when completing the appellant's tax return. This was canvassed with the witness for the first time in court during cross-examination. At the meeting with Mr Z at the end of September 2010, Mr Z had conceded that the correct amount was omitted and that he had to collect it from the various accountants of the trust.

(27) The appellant is a lady aged 73 years, who is a retired housewife and mother. She is the beneficiary of the four trusts in issue. She is not only the beneficiary of the trusts, but also a trustee of all four trusts. According to her, Mr Z had to file her tax returns and he was solely responsible for doing so. She admitted to signing the financial statements of the trusts and receiving the money from the trusts, although she left the payment of taxes to her accountant. She conceded that a taxpayer has to declare all her taxes, but was of the opinion that the R5.4 million penalty was too much and "unfair". She placed the blame squarely on Mr Z's shoulders and her evidence was that although she was a trustee of the trusts, she had no knowledge of the responsibilities of a trustee. When she was confronted with Mr Z's "fault" her response was that she would never dream of reporting him, but will "take her loss and say goodbye". However, she conceded that although she pleaded ignorance, she knew that taxes had to be paid on time.

(28) Mr Z, a chartered accountant, was the appellant's accountant and had been involved in her financial affairs for ten years. His evidence that he had submitted the tax return on 1 September 2010 by error was the first time that this was conveyed to SARS. He did not alert SARS to the error immediately, as one would expect a reasonable, experienced accountant to do, by e-mail, fax or telephone call. His evidence was that when he sent the return in error he had known that there was still some information lacking, but failed to inform SARS immediately thereby giving the impression that nothing was owed.

(29) The under-declaration, according to him, was that all the documents from the various trusts had not yet been available. He testified that he was to blame for the under-declaration. He conceded that he had not requested an amendment of the return after he had filed it erroneously, but only informed SARS at the meeting at the end of September 2010.

(30) It is quite evident from the evidence of Mr Z that he is taking the blame for the under-declaration of the appellant's income to SARS. The question is whether the appellant must be held accountable for the under-declaration, and if so, to what extent must she be held liable for paying the penalties. It is quite clear that Mr Z did not account for the tax timeously as after twenty months SARS still did not have the correct information.

(31) Counsel for SARS argued that the ultimate responsibility to submit the correct tax return timeously is that of the taxpayer. That is indeed so and there can be no exception to this at all.

(32) This court must agree that Mr Z's behaviour as an accountant in this matter was less than exemplary. The question is whether the appellant should be punished for Mr Z's dilatory behaviour, or only because she did not make enough enquiries as to whether the correct tax return had been submitted timeously and making sure that all was done to have the correct tax return furnished to SARS timeously.

(33) Although the appellant tried to convince the court that she was a clueless, retired housewife it is clear that she is the trustee of the trusts and had previously owned a business. She had a duty not to leave all her financial affairs in the hands of her attorney and her accountant, without overseeing their actions and ascertaining that all her taxes were paid timeously. She cannot rely on the fact that she thought they had dealt with her tax returns. There was a duty on her to ensure that the tax return was correct and submitted timeously to SARS. She had a duty to enquire from Mr Z whether her tax return had been submitted correctly, which she obviously failed to do. She further failed to enquire as to why her tax liability was so much less than the amounts she had paid the previous year.

(34) Counsel for SARS urged the court to impose 100% additional tax as, according to him, the Committee had erred by reducing the additional tax to 50%. It was submitted that all the facts were not placed before the Committee as it is common cause that it was not conveyed to the Committee that there was no loss to the fiscus of interest or otherwise as the appellant was in credit with the respondent. According to

counsel for the taxpayer this should be considered as an important mitigating fact when deciding on the amount of additional tax that must be paid.

(35) The court enquired from counsel for the taxpayer, whether the court must take cognisance of the amount to be paid, or to the percentage. It is so that R5 million is a vast amount of money, but so is R5 000 for a person whose income is far less and who has to pay 50% additional tax.

(36) The court has to be careful, especially in this instance, not to punish the appellant for her accountant's actions, but has to consider her actions in isolation in this regard. There is however a duty on taxpayers to ensure that the professionals they employ are diligent and not to leave it to the tax consultants. It is ultimately the duty of the taxpayer to ensure that the correct amount of tax is paid timeously.

(37) The court has considered all the facts, as well as the fact that SARS itself is not blameless, as it has admitted to two errors at two different times in the assessment of the appellant's taxes, namely on 16 September 2010 and again on 8 February 2012.

(38) The court finds in the present instance that due to the fact that the *fiscu*s did not lose any income and this fact was not placed before the Committee it is mitigating. Therefore this court is of the view that the 50% additional tax should be reduced to 35% additional tax.

(39) Counsel for the taxpayer, argued that SARS should pay the costs on

an attorney and client scale. This matter is distinguishable from IT 1821/2006 as no fraud or misrepresentation can be imputed to the taxpayer. We cannot find in this instance that SARS erred in imposing a penalty.

(40) In **ITC 1806 (68 SATC 117)** Southwood J found that the tax court has an unfettered discretion to order costs on an attorney and client scale. In ***Jhb City Council v Television and Electrical Distributors (Pty) Ltd and Another*** **1997(1) SA 157** at 177 D-E the court held:

> *"It was not disputed that in appropriate circumstances the conduct of a litigant may be adjudged 'vexatious' within the extended meaning that has been placed upon this term in a number of decisions, that is, when such conduct has resulted in 'unnecessary trouble and expense which the other side ought not to bear'."*

(41) We have considered all the cases we had been referred to, but do not find that SARS acted vexatiously or wrongly by contesting the appeal. Therefore the proper order would be to make no order as to costs as SARS does not seek costs.

(42) After having considered all the circumstances we hold the view that where the fiscus had no loss of revenue or interest and the fact that the taxpayer completely relied on her accountant, although she had a duty not to do so, additional tax of 35% of the assessed amount must be levied. The respondent indicated that it would not seek a cost order and it would be just and equitable, in the present circumstances if each

party were to be ordered to pay their own costs.

(43) In the result, the following order is made:

1. The appeal succeeds;
2. The decision of the Objection Committee is set aside and replaced with the following:

   "The appellant is directed to pay additional tax of 35% in the amount of R 3 819 539.00"
3. Each party is directed to pay their own costs.

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Judge C Pretorius

I agree.

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Mr Z Mabhoza (Assessor)

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Ms D Fisher (Assessor)

Case number: 13380

Matter heard on: 26 and 27 November 2015