

JUDGMENT

IN THE TAX COURT

CASE NO: 11398

BEFORE THE HONOURABLE MR JUSTICE B H MBHA PRESIDENT

Y WAJA

ACCOUNTANT MEMBER

E TAYOB

COMMERCIAL MEMBER

In the matter between:

Appellant

and

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

Respondent

Heard in Johannesburg 18/11/2004

JUDGMENT

Judgment: 03/05/2005

MBHA. J:

[1] This is an appeal referred to this court in terms of section 83A(13)(a) of Income Tax Act, Act 58 of 1962 (*"the Act"*), as amended, which was heard *de novo* in terms of the provisions of section 83A(14) of the Act.

[2] In his statement of grounds of appeal dated 18 November 2004 the appellant seeks the following order:

- "5. *The appellant pray (sic) to this Tax Court to direct the Commissioner for South African Revenue Service (SARS) to condone the appellant late application (sic) in respect of 1991-1992 tax years.*
6. *The appellant pray (sic) to this Court to direct the Commissioner for South African Revenue Service (SARS) to reopen the appellant assessment (sic) in respect of 1993-1994 tax years."*

[3] The appellant is a taxi owner/permit holder residing at T.

[4] The respondent raised assessments against the appellant for the years of assessment 1991 to 1995 as follows:

- 4.1 The respondent raised revised assessments for the 1991 to 1992 tax years against the appellant to include certain undeclared interest income and disallowed certain expenses claimed by the appellant in his tax returns. The assessments amounted to R19 329,46 for the 1991 tax year and R11 262,30 for the 1992 tax year.
- 4.2 On 2 July 1993 the appellant lodged an objection in writing against the aforementioned assessments. In support of the objection a letter by the "T" United Taxi Association was submitted in which the respondent was advised that the appellant was only a permit holder of eight taxi permits four of

which were donated to his brothers while the other four were rented out at either R400,00 or R200,00 a month. It was also alleged that the money which was in the appellant's bank account in fact belonged to a syndicate which appellant and other people not mentioned had formed.

- 4.3 On 21 March 1994 the respondent requested certain information and/or documentation in respect of the objections and proof of expenditure claimed.
- 4.4 The requested information and/or documentation was not furnished and on 4 July 1994 the respondent accordingly disallowed the objection.
- 4.5 On 20 March 2000 the appellant filed a new objection and simultaneously applied for condonation for the late filing of the objections against the assessments in respect of all the years of assessment namely 1991 to 1995.
- 4.6 On 19 September 2000 the respondent disallowed the objections and refused to grant the condonation requested.

[5] On 1 July 1995 the respondent raised revised assessments disallowing certain expenses claimed by the appellant in respect of the 1993 to 1994 tax

years. These assessments amounted to R34 923,31 for the 1993 tax year and R36 812,97 for the 1994 tax year.

[6] On 15 March 1996 the appellant objected against the assessments on the grounds that the expenses were incurred in the production of income.

[7] On 11 June 1996 the respondent disallowed the objections in terms of section 11 (a) read with section 23(g) of the Act.

[8] On 20 March 2000 the appellant filed a new objection and simultaneously applied for condonation for the late filing of the objections against the assessments in respect of the 1991 to 1995 assessments.

[9] On 19 September 2000 the respondent disallowed the objection and refused to grant the condonation requested.

[10] On 30 January 2001 the appellant lodged a new objection against all the aforesaid assessments and also sought condonation for the late filing of that objection in terms of section 81 of the Act. On 10 July 2001 the appellant submitted income statements and requested the respondent to reopen the assessments in terms of section 79 of the Act to enable him to deduct certain expenses for the 1991 to 1994 years of assessment.

[11] On 26 August 2003 the respondent wrote to the appellant advising that the objection has been disallowed and that the application for condonation was declined. The basis of the disallowance was that there was no proof of the expenses incurred by the appellant. Furthermore, the objection was raised almost six years after the date of assessment whereas the Act prescribed that objections had to be raised within thirty days from the date of the assessment. The respondent also refused to reopen the assessment as requested by the appellant.

[12] On 26 September 2003 the appellant filed a notice of appeal referred to in paragraph [2] hereof.

[13] The appellant's grounds of appeal are that the respondent did not properly exercise his discretion when he disallowed the expenses claimed and when he refused to reopen the assessment. In this respect the appellant contends that respondent did not follow his own guidelines as set out in a document called "*Interpretation Note 15*" by which the following factors have to be considered before a decision is taken:

- 13.1 The prospects of success on the merits;
- 13.2 The reasons for the delay;
- 13.3 The length of the delay; and
- 13.4 Any other relevant factor.

[14] The other grounds relied upon for the appeal are the following:

- 14.1 In arriving at his decision the respondent failed to comply with the requirements for the administration of justice contained in section 33 of the Constitution read with the Promotion of Administration Justice Act, No 3 of 2000;
- 14.2 The appellant's previous tax adviser ill-advised him on tax issues. As such he contends he should not be held responsible for all the assessed tax as he is not knowledgeable in tax matters;
- 14.3 The appellant has disposed of all the documentation and/or information requested as he is only obliged to keep documentation for a period of five years in terms of section 75(1) of the Act;
- 14.4 The respondent ought to have reopened the appellant's assessment in terms of section 79 of the Act seeing that it was not the appellant's fault that it took him almost six years to object and appeal. Furthermore, his appointed representatives kept him uninformed of progress and are the ones to be blamed; and

14.5 The respondent wrongly assessed tax on interest income earned by the appellant.

[15] The issues that are in dispute in this matter are the following:

15.1 Whether the respondent was correct in his decision rejecting the appellant's application for condonation of the late filing of the objection and/or appeal in terms of sections 81 (2) and/or 83(1A) of the Act;

15.2 Whether the respondent was correct in his decision not to reopen the appellant's assessment in terms of section 79(1) of the Act read together with section 3(2) of the Act; and

15.3 Whether the respondent was correct in disallowing the expenses claimed by the appellant in terms of section 11 (a) of the Act read together with section 23(g) of the Act;

[16] Section 81(1) of the Act provides that:

"Objections to any assessment made under this Act may be made within 30 days after the date of the assessment... by any taxpayer who is aggrieved by any assessment in which he is interested."

[17] Section 81 (2) of the Act provides that:

"No objection shall be entertained by the Commissioner which is not delivered at his office or posted to him in sufficient time to reach him on or before the last day appointed for lodging objections, unless the Commissioner is satisfied that reasonable grounds exist for the delay in lodging the objection."

[18] Section 79(1) of the Act provides that:

"If at any time the Commissioner is satisfied that any amount which was subject to tax and should have been assessed to tax under this Act has not been assessed to tax, ... he shall raise an assessment or assessments in respect of the said amount or amounts, ...: Provided that the Commissioner shall not raise an assessment under this subsection -

- (i) after the expiration of three years from the date of the assessment...*
- (aa) unless the Commissioner is satisfied that the amount which should have been assessed to tax was not so assessed or the fact that the full amount of tax chargeable was not assessed, was due to fraud or misrepresentation or non-disclosure of material facts."*

[19] Section 3(2) of the Act provides that:

"Any decision made and any notice or communication issued or signed by any such officer or person may be withdrawn or amended by the Commissioner or by the officer concerned...: Provided that a decision made by such an officer in the exercise of any discretionary power under the provisions of this Act... shall not be withdrawn or amended after the expiration of three years from the date of the written notification of such decision or of the notice of assessment giving effect thereto, if all the material facts were known to the said officer when he made his decision."

[20] Section 82(b) of the Act provides that:

"The burden of proof that any amount 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 the decision of the Commissioner, the decision shall not be reversed or altered unless it is shown by the Appellant that the decision is wrong."

[21] Section 83(7)(a) of the Act provides that:

"Every notice of appeal shall be in writing and shall be lodged with the Commissioner within a period of 30 days after the notice mentioned in Section 81 (4) or if the Commissioner has in terms of the provisions of Section 106(4) withdrawn the last mentioned notice and sent it anew, the date of the notice so sent anew."

[22] As far as the 1991 and 1992 tax years are concerned it is clear that the appellant failed and/or neglected to object within the thirty days period as required by section 81(1) of the Act. After the objection was lodged albeit out of time the respondent requested appellant to furnish information and/or documentation as proof of his expenditure. The appellant failed to furnish the requested documentation after which his objection was disallowed by the Commissioner on 4 July 1994. The appellant only noted an appeal against such allowance on 25 September 2003. This was nine years after his objection was disallowed. No valid grounds for this inordinate delay have been furnished.

[23] In respect of the 1993 and 1994 years of assessment appellant lodged an objection on 15 March 1996. The appellant's initial objection was noted about seven months out of time. The objection was disallowed by the Commissioner on 11 June 1996. The appellant noted a new objection on 20 March 2000 and after this was disallowed he only noted an appeal against this disallowance on 25 September 2003. Again no valid reasons for this inordinate delay were advanced.

[24] The appellant was correctly taxed on interest income as it constitutes part of his revenue which should be included in his gross income in terms of section 1 of the Act as defined.

[25] Section 82 of the Act provides that the burden of proof that any amount is subject to any deduction shall be upon the person claiming such deduction. The appellant failed to provide proof of the expenses which he claims.

[26] There is nothing that shows that the respondent did not apply his mind properly in exercising his discretion to disallow the objections and in refusing to reopen the assessment. The appellant's attempt to shift the blame onto his tax adviser does not assist him at all. In paragraph 6.8 of his grounds of appeal he himself refers to the interpretation note number 15 which reads *"Employing the services of a tax consultant/accountant does not absolve the taxpayer from his/her responsibility to comply with the provisions of the Act"*.

[27] We are thus of the view that the respondent was correct in disallowing the the appellant's objections on the basis that the appellant failed to provide proof of the expenses claimed. The respondent was correct in his decision not to entertain the objections on the basis that they were lodged out of time. The respondent was correct in his decision not to reopen the assessments. Section 79 of the Act does not empower the taxpayer to reopen an assessment.

Conclusion

The appeal is dismissed.



B H MBHA - PRESIDENT

ON BEHALF OF

MR Y WAJA (ACCOUNTANT MEMBER)

MR E TAYOB COMMERCIAL MEMBER AND MYSELF

Mr R Tsele, represented the Commissioner for the South African Revenue Service.

Mr R P Matsheru, appeared on behalf of the Appellant.