GENERAL

2054. Additional assessments; practice prevailing

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The judgment of the Tax Court (Western Cape), in Cases No 12760, 12828 and 12756 (decided on 14 September 2011 not yet reported) is relevant for a number of reasons. One of the issues considered by the Court was whether SARS was precluded from issuing additional assessments pursuant to proviso (iii) to section 79(1) of the Income Tax Act, No 58 of 1962 (the Act). This section provides that SARS is not entitled to raise an assessment if the amount which should have been assessed to tax was (in accordance with the practice generally prevailing at the date of the assessment), not assessed to tax.

In CIR v SA Mutual Unit Trust Management Co Ltd [1990] (52 SATC 205), it was indicated that a practice generally prevailing is one that is applied generally in the different offices of SARS in the assessment of taxpayers. It is not sufficient merely to show that the practice was applied in one or two offices. The concept of "practice" has been interpreted to be "a habitual way or mode of acting". It is therefore not sufficient to show that a certain attitude had been adopted by assessors concerned only in some instances. Ultimately, a practice generally prevailing is one known to the Commissioner and authorised by him for application, and duly applied by the various assessment offices throughout the country. It was also indicated that a taxpayer must show that the failure originally to assess in a particular manner was attributable to the practice generally prevailing.

Should one consider the evidence that was led in Case Number 12760, 12828 and 12756, the relevant employer company testified that various delivery schemes were common from the mid-1990's to the early 2000's. A remuneration consultant also indicated that he was not aware of any other so-called deferred delivery schemes that had been assessed to employees' tax. SARS in turn also called a witness (Mr A). Mr A indicated that he could not dispute the evidence of the taxpayer that the deferred delivery schemes were common.

Even though queries were raised by the acting Commissioner and he instructed the relevant division to look into share incentive schemes, nothing came of such instruction. During cross-examination Mr A indicated that, should taxpayers have been assessed otherwise on deferred delivery schemes, he would have been aware of it. In view of the fact that it was a widely applied practice not to tax deferred delivery schemes (the evidence of the remuneration consultant was that at least 60 companies had deferred delivery schemes and none of them were assessed to tax), the Court accepted the existence of the practice generally prevailing. Evidence was also led of a directive that was issued by the Commissioner to a specific employer that had implemented a deferred delivery scheme.

The Court also cautioned against the risk of conflating the issue pertaining to non-disclosure in income tax returns with a practice generally prevailing. On this basis the Court accepted

the practice generally prevailing, which then only changed when correspondence originated between SARS and the taxpayer and the issuing of the grounds of assessment by SARS.

The judgment is important in view of the fact that it held that a taxpayer could in certain circumstances rely upon a practice generally prevailing. Even though it would be very difficult to discharge the burden of proof, the decision not to tax taxpayers on a certain basis, may well be decisive even though SARS is well aware of the type of transaction that is entered into.

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IT Act: s 79(1) (iii)s 82