140/1958

C.P.-S.134917-1955-6-1,000. U.D.J. 219.

140/1958

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE [redacted] Division.)
([redacted] Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

COMMISSIONER FOR INLAND REVENUE Appellant,

versus

MICHAEL McNEIL Respondent.

Appellant's Attorney / Prokureur vir Appellant Naude & Naude *Respondent's Attorney / Prokureur vir Respondent* Webber

Appellant's Advocate / Advokaat vir Appellant ~~A.B. Harcourt, Q.C.~~ + R.G. Reuter *Respondent's Advocate / Advokaat vir Respondent* B. Hardman

Set down for hearing on / Op die rol geplaas vir verhoor op Tuesday, 2nd Dec., 1958.

(DCLD) ~~1.3.5.9.10~~ (A)

9.45 – 12.50 } CAV
2.15 – 3.5 }

JUDGMENT:

WEDNESDAY, 10th DECEMBER, 1958.

Appeal dismissed with costs.

Coram: [illegible] C.J., Steyn, Beyers, Hall (Acting) et [illegible] A.JJ.A.

[illegible]
REGISTRAR
10/12/58

Record

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

THE COMMISSIONER FOR INLAND REVENUE Appellant

and

MICHAEL McNEIL Respondent

Coram: Schreiner A.C.J., Steyn, Beyers JJ.A., Hall et Price AJJA.

Heard: 2nd December, 1958. Delivered: 10 - 12 - 1958

J U D G M E N T

SCHREINER A.C.J.:- For the years ended 30th June 1950 to 1955 inclusive, the respondent was assessed to tax under the Income Tax Act (No. 31 of 1941) and to provincial personal/and income/tax under Ordinance 17 of 1928(N). He paid the amounts assessed but in 1957 the Commissioner issued additional assessments, estimating, under section 64, the respondent's taxable income and income subject to super tax. Also during 1957 the Commissioner estimated the respondent's income in respect of the year ended 30th June 1956, and issued an assessment and, to correct an arithmetical error, a revised assessment. The notices of assessment included provincial personal and provincial income tax. The notices

further/.....

furthermore showed certain sums as additional tax charged under section 65. Included in these sums were amounts added to the figures for provincial income tax, and calculated on the basis of a percentage of the additional tax charged under section 65. The respondent paid all these additional sums but in respect of the additions to the figures for provincial income tax did so under protest. It was common cause that ~~Since~~ the procedure by way of appeal to the Special Court for hearing Income Tax appeals ~~does~~ did not cover this case ~~of this kind~~, and the respondent applied to the Durban and Coast Local Division for an order declaring that the assessments were wrong in so far as they included in the amount of provincial income tax sums calculated as percentages of the additional tax payable under section 65. The respondent also asked for repayment of the amounts paid under protest, totalling £805. 2. 2., with interest and costs. JAMES J. granted the order as prayed and the Commissioner now appeals, the parties having agreed in writing to the appeal being brought direct to this Court.

The material portions of section 65 of the Income Tax Act, in the form applicable in the years in question, read -

"65(1)/.....

"65(1) A taxpayer shall be required to pay, in addition to the tax chargeable in respect of his taxable income or income subject to super tax -

(a)if he makes default in rendering a return in respect of any year of assessment, an amount equal to twice the tax chargeable in respect of his taxable income or income subject to super tax for the year of assessment; or

(b)if he omits from his return any amount which ought to have been included therein, an amount equal to twice the difference between the tax as calculated in respect of the taxable income or income subject to super tax returned by him and the tax properly chargeable in respect of his taxable income or income subject to super tax as finally determined after including the amount omitted;

(c)if he makes any incorrect statement in any return rendered by him which results or would,if accepted, result in the assessment of the normal or the super 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 properly chargeable if the incorrect statement had not been made.....

(2) If the Commissioner is satisfied that the default in rendering the return was not due to any intent either to defraud the revenue or to postpone the payment by the taxpayer of the tax chargeable or that any such omission .....was not due to any intent to evade taxation on the part of the taxpayer he may remit such part or all of the said additional charge as he may think fit.

(3) The additional amounts of tax for which provision is made under this section shall be chargeable in cases where the taxable income or income subject to super tax or any part thereof is estimated by the Commissioner...."

The/.....

The operative provision of Ordinance 17 of 1928 (N.) was at all material times to be found in Ordinance 5 of 1945 (N.), with an amendment of the percentage; it substituted for section 3 a section which, so far as material and as amended, reads -

"3(1).....there shall be charged and levied annually in respect of the year of assessment -

A. A tax (to be known as the income tax) upon the income of every person resident in the Province liable for income tax at the rate of thirty per centum, calculated on each completed shilling, of the amount paid or payable by such person in respect of normal tax or super tax, or both normal and super tax, under the Income Tax Act in respect of the year of assessment.

....."

The enabling statute supporting this provision is the Financial Relations Consolidation and Amendment Act (Act 38 of 1945), the material portions of which read -

"1. In this Act, unless the context otherwise indicates - 'income', 'income subject to super tax','taxable income' .....have the meanings respectively assigned thereto in the Income Tax Act 1941.....

,.....

8(2)Unless and until Parliament by law otherwise provides, a provincial council shall have power to raise revenue by way of taxation through the sources specified in the First Schedule and through no other source whatever anything to the contrary notwithstanding in sections eighty-one and eighty-five of the South Africa Act 1909.

.....

(4)/.....

(4) .....

(b) In the case of income tax on the incomes of persons, other than companies, the tax shall be levied by a province only on persons who have been resident within the province for not less than ninety consecutive days during the year of assessment, and shall be in the form of a percentage of the whole or any portion of the amount payable by any such person in respect of normal or super tax or both normal and super tax under the Income Tax Act 1941 (Act 31 of 1941) in respect of the year of assessment which forms the basis of the levy.

.....

(7) The power conferred upon provincial councils by this Act to levy a tax on incomes of persons other than companies includes, subject to the provisions of this section, the power to impose a tax based on the super tax payable by any person under the Income Tax Act 1941, notwithstanding that such super tax may be levied in whole or in part upon -

(a) amounts which do not fall within the definition of 'income' contained in the Income Tax Act, 1941; or

(b) dividends distributed by companies deriving income from mining operations.

.....

FIRST SCHEDULE

.....

Item 8. Subject to the provisions of subsection (4) of section eight.....

(a) a personal tax on persons.....

(b) an income tax on the incomes of persons other than companies..... "

In considering the effect of these

provisions/.....

provisions it must be observed in the first place that the Ordinance ~~[illegible]~~ follows the language of the enabling Act. If there were any difference in the language which might result in the net of the Ordinance being wider than what the enabling Act allows, to the extent of such widening the Ordinance would be invalid. It is sufficient therefore for present purposes to examine the language of the enabling Act in relation to that of the Income Tax Act, in order to see whether the additional tax or charge for ~~[illegible]~~ which section 65 provides falls within the meaning of the enabling provisions, namely, an income tax on the incomes of persons other than companies, in the form of a percentage of the amount payable by the taxpayer in respect of normal or super tax, or both.

The enabling provisions only authorise an income tax on the incomes of persons, which, in short, means, in terms of section 7 of the Income Tax Act, their receipts and accruals, not being capital and less exemptions. Before 1945 the taxing powers of Provincial Councils had been before Parliament repeatedly when the successive Financial Relations Acts were enacted, and in relation to taxation on incomes, questions arose in the courts as to what was covered by "income" in the different

Ordinances/.....

Ordinances and their enabling Acts. Such questions were, for instance, considered by this Court in Commissioner for Inland Revenue v. Estate Garlick (1934 A.D.263) and Brownstein v. Commissioner for Inland Revenue (1939 A.D. 156). When Act 38 of 1945 by section 8(4)(b) required that a provincial income tax or tax on income should take the form of a percentage of the taxpayer's normal or super tax or both, it did not loosen the general restriction contained in section 8(2) and item 8 of the First Schedule; the tax had to be on income as defined. Section 8 (4)(b) added a further restriction. Provincial Councils could not embark on their own system of income taxation with their own scheme of deductions or abatements; they were compelled to keep to the system provided in the Income Tax Act. This followed from the requirement that their taxation must take the form of exacting a percentage of the normal and super tax payable. But provincial income taxes still had to be taxes on income as defined, unless Parliament should make some other enabling extension.

Such an extension is to be found in section 8(7). That subsection shows that Parliament was fixing precisely the kinds of receipts or accruals that Provincial Councils might tax as income. Where Parliament

intended/.....

intended to allow them to go outside the definition of income in the Income Tax Act it said so expressly. It is significant that by contrast nothing was done through definition or other elucidation to bring the "additional tax" or "additional charge" imposable under section 65 within the notion of income that might be the subject of provincial taxation. Even if, as counsel for the Commissioner contended, section 8(7) did no more than make assurance doubly sure, the inference remains that, if Parliament had intended to make the impositions provided for in section 65 taxable by Provincial Councils, it would in all probability have done so expressly when it was enacting subsection (7).

It cannot be questioned that the additional tax is in a sense a tax. The fact that under section 65(2) the Commissioner may remit, supports the view that it is an unusual kind of tax, but, although it is called in that subsection a charge, in subsection (3) it is called a tax. And it was treated by this Court in Israelsohn v. Commissioner for Inland Revenue (1952(3)S.A.529) as a tax for the purposes of section 85 of the Income Tax Act. Obviously it is largely a question of the use of words and it must be accepted that the additional tax is a tax for present purposes.

But/.....

But when its true nature is examined it becomes difficult to regard it as a form of tax on income. It is not a part of the taxpayer's "receipts or accruals" taken by the State in order to meet the expenses of government. It is "in essence "a penalty" (Isaacsohn v. Commissioner for Inland Revenue - supra - at pages 539 to 540); it is there to ensure, if possible, that returns shall be honest and accurate. Its amount depends only indirectly on the size of the taxpayer's income; directly it depends on the size of his default. It does not conform with ordinary usage to speak of a tax on misconduct as a kind of tax on income. Where a tax takes the form of a percentage of a tax on income it is natural to regard it as itself a tax on income. But a percentage of a penalty imposed for failure to make a return or for an omission from a return or for an incorrect statement in a return is not at all like a tax on income.

It is necessary, however, to examine certain arguments advanced by counsel for the Commissioner.

In support of his contention that the additional tax was, in effect, an increased normal or super tax, counsel referred us to the wording of section 6F(1) as it was before a new subsection was introduced by Act 47 of 1944. In its original form the subsection pro-

vided/.....

-vided for the charging of a "treble rate of tax" in certain cases of default. Although the essentially penal nature of the provision was equally present in the original form of the subsection, it was on its face more consonant with the idea that increased income or super tax must be paid because of the default. The fact that Parliament made a change is *prima facie* against the Commissioner. We do not know why the change was made, but it is natural to suppose that one reason at least was in order to register a change of intention or a clarification of meaning; in particular it seems fair to suppose that Parliament wished to ensure that the distinction should be clear between normal and super tax on the one hand and the additional tax or charge on the other. Though they were to be collected together by the same machinery their essential difference was to be maintained and clarified by more appropriate language.

In the court below JAMES J. was invited on behalf of the Commissioner to attach importance to the words "in respect of" appearing in section 8(4)(b) of Act 38 of 1945 and in section 3 (1) B. of the Ordinance. The learned judge rejected the Commissioner's submission for reasons into which it is unnecessary to enter. The argument

was/.....

was apparently to the effect that in a wide sense the additional tax might be said to be a charge "in respect of" normal or super tax. In this Court counsel for the Commissioner abandoned the argument, and rightly, since the words "in respect of" in the provisions in questions merely serve to provide a grammatical link between the amount paid or payable and normal or super tax. It has no bearing on the relationship between the additional tax and normal and or super tax.

In this Court, however, counsel for the Commissioner did stress the association in section 65 of the additional tax with the taxpayer's taxable income and his income subject to super tax. Counsel sought to strengthen the inference that additional tax is really additional normal or super tax by referring to other kinds of tax imposed by the Income Tax Act. These other kinds, he pointed out, all have distinct names, while the additional tax, it was suggested, had none but is simply annexed to normal and super tax. I am unable to draw any inference from the failure to use any name other than additional tax, and so far as the factor of association with normal and super tax is concerned this only follows from the method of

calculation/.....

calculation and of collecting the additional tax; it does not indicate that the latter was being treated by Parliament as if it was of the same nature as normal or super tax for the purpose of such an enquiry as the present one.

Counsel also contended that as Provincial Councils are like the Union Parliament interested in the furnishing of proper returns, it must be presumed that the right to impose additional tax is part of their right to impose a tax on incomes. There is no sound basis for such a presumption. Without express or implied provision to the contrary fines and penalties go to the Union fiscus. This argument carried the general question no further.

Finally counsel for the Commissioner relied on Case No.1 in Volume 4 of the Commonwealth Taxation Board of Review Decisions (4 C.T.B.R. 1). Under a provision broadly similar to our section C5 the majority of the Board of Review held that a sum imposed by way of additional tax was deductible from the taxpayer's income as being "income "tax payable in respect of taxable income". There the taxpayer successfully claimed that the additional tax, despite its penal nature, was also in the nature of income tax. Reference was made in the majority judgments to certain cases

in/.....

in the High Court of Australia which were mentioned in Israelsohn's case (supra). It is unnecessary in my view to investigate the bases of the decision of the Board of Review more closely than to say that there clearly were differences in the enactments there in question which might well lead to a different conclusion from the one that our own statutes would support.

In the present case it is the Commissioner and not the taxpayer who is attempting to establish that additional tax is income tax in the form of a percentage of the amount payable in respect of normal or super tax. In case of doubt the construction would be against the larger imposition (Borcherds N.O. v. Rhodesia Chrome and Asbestos Co.,1930 A.D. 112 at page 119, quoted in Israelsohn's case,supra at page 540). But I do not consider that this is a case of doubt. On the proper interpretation of the provisions in question it seems to me that JAMES J. was right in granting the application. The form of the order granted is not in dispute.

The appeal is dismissed with costs.

Steyn J. .
Beyers, J.A. } Concur.
Hall, A.J.A.
Price, A.J.A.

O. R. Schreiner
9.12.58