Income Tax and the Double Jeopardy Defence:  
**ITC 1825**

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1 Introduction

Although most people understand the need for imposing taxes, this does not mean that they do not find it a painful exercise when they have to pay tax. Paying tax is even more painful if a penalty is imposed. It is thus understandable that taxpayers will try all possible arguments to get the South African Revenue Service (‘SARS’) to waive the penalty. One such defence is the ‘double jeopardy defence’. However, a recent decision by the Gauteng Tax Court poured cold water on such a defence. An analysis of the decision indicates that it raises more question than answers.

2 **ITC 1825**

Briefly, the facts in *ITC 1825* (70 SATC 68) were that the taxpayer was charged under s 75 of the Income Tax Act 62 of 1958 (‘the Act’) in the magistrate’s court for failure to render tax returns for five years, and paid an admission of guilt fine. When SARS eventually assessed him, it imposed additional tax under s 76 equal to twice the amount of the taxes payable under each assessment. The taxpayer considered that the imposition of additional taxes after he had paid an admission of guilt fine in respect of an offence committed under s 75 of the Act infringed his right not to be tried for an offence for which he had already been convicted, as guaranteed under s 35(3)(m) of the Constitution of the Republic of South Africa, 1996 (‘the Constitution’). The Court disagreed and held that s 35(3)(m) was applicable to a person facing criminal prosecution or called upon to answer a criminal charge. As the imposition of additional tax under s 76 is an administrative penalty, no double jeopardy arose where an admission of guilt fine had previously been paid in respect of the same conduct.

It is submitted that this decision takes too limited a view of the double jeopardy defence and is likely to be overturned. To understand the judgment it is necessary to provide some background to SARS’s authority to impose penalties.

3 Different Types of Penalties

At the time of the judgment, SARS lacked the general authority to impose administrative penalties for income tax violations: the only remedy then available to SARS in respect of the provision of penalties was to rely on s 75
or 104 of the Act. These sections provide for penalties on default, in other words, for circumstances in which a taxpayer commits an offence and on conviction is liable to a fine or to imprisonment. Contrary to popular belief, SARS does not impose penalties under these sections, but merely lays a complaint with the National Prosecuting Authority, which in turn institutes the criminal proceedings. This view accords with s 179 of the Constitution, which provides that only the National Prosecuting Authority may institute criminal proceedings.

As a court of law convicts a taxpayer, the penalty under s 75 of the Act is thus clearly a criminal, not an administrative sanction.

The authority to impose general administrative penalties was granted to SARS only in 2008, in s 75B introduced by s 15 of the Taxation Laws Second Amendment Act 4 of 2008. In essence, s 75B provides that the Commissioner may issue regulations to provide for the imposition of administrative penalties. A second set of Draft Regulations was issued by SARS for public comment late in 2008. These regulations put it beyond doubt that the purpose of the penalties imposed under s 75B is not only ‘to ensure the widest possible compliance with the provisions of the Act and the effective administration of the tax system’, but also that penalties are ‘imposed impartially, consistently and proportionately to the seriousness of the non-compliance’ (see reg 2).

Apart from these criminal and civil penalties, s 76 of the Act provides for the circumstances in which SARS may impose tax equal to twice the difference between the tax assessed and the tax that would have been payable if the circumstances provided for in the section had not existed. (Additional tax imposed under s 76 is commonly known as ‘triple tax’.) Unlike the equivalent section in the Value-Added Tax Act 89 of 1991, which provides that such additional tax shall be deemed to be a tax, s 76 of the Income Tax Act is silent on the nature of the additional taxes. Despite the reference in s 76(2) of the Income Tax Act to ‘additional charge’, the Appellate Division held (in Israelsohn v Commissioner for Inland Revenue 1952 (3) SA 529 (A) at 539-40) that the additional charge imposed under s 76 is in essence a penalty.

However, on the assumption that an additional charge imposed under s 76 is a penalty, not a tax, it should be clear that it is not a criminal penalty. Additional charges are imposed by SARS and not as the result of successful criminal proceedings by the National Prosecuting Authority.

Nothing in the Act itself prohibits SARS from simultaneously instituting all three penalties for the same wrongdoing. Section 76(4) of the Act, eg, provides that additional taxes may be imposed in addition to any other penalties. Where SARS imposes more than one type of penalty, the question arises whether a taxpayer can raise the double jeopardy defence.

4 The Double Jeopardy Defence

The double jeopardy defence is internationally accepted. Not only is it entrenched in the constitutions of several countries (see, eg, s 11(h) of the
Canadian Charter of Rights and Freedoms and the Fifth Amendment to the United States Constitution), but it is also accepted as inherent in the right to a fair trial (Jay A Sigler Double Jeopardy: The Development of a Legal and Social Policy (1969) at v). The defence is also firmly entrenched in South African law (see s 83 of the Criminal Procedure Act 51 of 1977; s 35(3)(m) of the Constitution).

Under s 35(3)(m), an accused person may not be criminally convicted twice for the same offence. The aim of the defence is clearly to prevent a person from being harassed by successive prosecutions in respect of the same offence. It also advances the general public interest in finality and fairness (Iain Currie & Johan de Waal Bill of Rights Handbook 5 ed (2005) at 788).

The Appellate Division held that the plea of double jeopardy (or of autrefois acquit) is available not only where an accused has been previously acquitted or convicted of an identical offence, but also where he has been acquitted of a ‘substantially similar offence’ (S v Ndou & Others 1971 (1) SA 668 (A)).

The first question that needs to be answered is whether the double jeopardy defence can be a valid defence in civil proceedings where a person has previously been criminally charged. It is submitted that the answer to the question lies in the wording of s 35(3)(m) of the Constitution. Section 35(3) provides ‘every accused person’ with a right to a fair trial, and subs (3)(m) refers to ‘an offence . . . for which that person has been previously been either convicted or acquitted’: this is clearly terminology used in criminal proceedings.

This interpretation is supported by a decision of the competition tribunal in Federal-Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission & Another ([2005] 1 CPLR 50 (CAC) at 68) in which it was held that:

‘The rights set out in section 35(3) of the Constitution are reserved for those people who have been charged in criminal matters and who are likely to be sentenced to a term of imprisonment. It is the imprisonment aspect, which deprives a charged or accused person of his liberty, which is sought to be protected by the entrenchment of the rights, set out in section 35(3). It is thus the threat of imprisonment which triggers off the rights set out in section 35(3).

As the double jeopardy defence is available only to a person who has been twice criminally prosecuted for the same conduct, it is submitted that it is extremely limited.

The crucial question to be answered is whether the fact that a civil, but highly punitive, penalty aimed at retribution and deterrence (in other words, a civil penalty aimed not at recovering losses but at punishment) has been imposed will make the double jeopardy defence available to the defendant. Although no authoritative South African case law could be found on the distinction between criminal and civil penalties, there is relevant case law from Canada, the United Kingdom, and the United States of America.

4.1 Canada

In Wigglesworth v R ((1987) 32 CRR 219 (SCC) in par 33), the Supreme Court of Canada held that a true penalty provision consists of a imprisonment
or a fine ‘which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity’. The conclusion that can be drawn from this decision is that it is not the monetary value of the penalty that is decisive, but the aim of the penalty. The monetary value of the penalty is only relevant as far as it gives an indication of the aim of the penalty. Where the aim of the penalty is to punish a person who has wronged the community, it is a criminal penalty; but where the aim is to enforce internal procedures, it is a civil penalty. In another decision by the Supreme Court of Canada, the test used to distinguish between criminal and civil penalties was framed as whether a person is called twice by the state to answer to society for the offence (R v Shubley [1990] 1 SCR 3 (SCC)).

4.2 The United Kingdom

Recently in Han & another v Commissioners of Customs and Excise; Martins & another v Commissioners of Customs and Excise; Morris v Commissioners of Customs and Excise ([2001] 4 All ER 687 (CA)), the Court of Appeal held that civil penalties under VAT law were in fact criminal charges within the meaning of art 6 of the European Convention on Human Rights. It is submitted that this decision is of general application because it is based on a specific definition of the term ‘criminal charge’ in the Convention.

4.3 The United States of America

Although the United States Supreme Court originally held that the double jeopardy defence applies to both civil and criminal proceedings (United States v Halper 490 US 435 (1989)), its current view is that the defence is applicable only where a person is criminally prosecuted twice for the same conduct (Hudson v United States 522 US 93 (1997); see also Securities and Exchange Commission v Palmisano 135 F3d 860 (2nd Cir., 1998)).

In the Halper case it was held that the double jeopardy defence is also applicable to civil penalties. Although the Court agreed that in most cases, a civil penalty will not be regarded as criminal punishment merely because the penalty exceeds actual damages suffered by the Government, in certain instances the penalty may be so extreme, and so divorced from the damages suffered by the Government, that it constitutes punishment (par 11 at 441-2). On the facts of the case the Court found that, under the double jeopardy defence, a person who has already been punished in criminal prosecution may not be subjected to an additional civil remedy based upon the same conduct where the civil remedy constitutes punishment (par 4 at 448-9).

In reaching this conclusion, the Court rejected the view that the previous decision in Helvering v Mitchell (303 US 391 (1938)) laid down a general rule that the imposition of a civil penalty subsequent to criminal sanction taken can never lead to the application of the double jeopardy defence. In Helvering v Mitchell (supra) it was held that a 50 per cent additional amount imposed by
the Inland Revenue for tax evasion does not amount to punishment. The Court concluded that the sanction of additional tax to be paid was remedial and primarily intended to serve as a safeguard for the protection of revenue and to reimburse the Government for its expenses in investigating fraud and the resulting loss from fraud. From the Halper judgment it is clear that although the ‘Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages, without being deemed to have imposed a second punishment for the purposes of double jeopardy analysis’ (United States v Halper supra in par 1 at 446), in certain instances the sanction imposed is so disproportionate to the damages suffered by the Government that rough justice becomes clear injustice. The Government argued that ‘punishment’ for the purposes of the double jeopardy defence was relevant only in criminal proceedings. It was held that the intrinsic values that the double jeopardy defence aims to protect demand that ‘[t]he valuation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of state’ (in par 2 at 447).

A few years later, the decision in United States v Halper (supra) was overturned in Hudson v United States (supra). There it was held that the Court in United States v Halper (supra) had interpreted previous case law incorrectly and that the aim of a penalty should not be the only factor used to decide whether a civil penalty should be regarded as a criminal penalty. In addition, it was held that the view in the Halper decision had proved to be ‘unworkable’ because all civil penalties have some deterrent effect (see in par 4 at 101-2).

4.4 South Africa

Despite previous uncertainty, South African law is now clear that the imposition of a fine by a body other than a court of law would be an administrative matter and would not qualify as a conviction by a competent court. In other words, administrative penalties do not constitute criminal penalties (S v Odendaal 1995 (2) SACR 449 (T)). It is submitted that the Odendaal decision can be reconciled with the test laid down in the Harper decision: that the aim of an administrative fine is not to punish the wrongdoer, but to maintain the effectiveness of the tax system and the timeous submission of tax returns. From the discussion of penalties imposed under s 75B(3) of the Act it is clear that the object of these penalties is not to punish or deter the wrongdoer, but to ensure that the effectiveness of the tax system is maintained. In addition, the definition of the term ‘tax’ in s 1 of the Act makes it clear that administrative penalties are regarded as a tax, not a penalty. The result is that any actions by SARS after the imposition of administrative penalties under s 75B will not allow the taxpayer to raise the double jeopardy defence.

It is doubtful whether the Court’s view in ITC 1825 (supra) that additional tax is an administrative penalty is correct. The question is whether
additional taxes are imposed to punish a taxpayer for the wrongs done to the community and not to enforce the effective administration of the tax system. As additional taxes are imposed under s 76, not under s 75B, they are not covered by the regulations issued under s 75B(3), and additional taxes do not form part of the sanctions provided by Parliament to SARS to maintain the effectiveness of the tax system. As s 76 provides for the imposition of 200 per cent additional tax, it can be argued that the aim of the penalty is to punish a taxpayer and not merely to ensure that a taxpayer complies with the provisions of the Act. However, it does not follow that additional taxes will always be regarded as a penalty provision. Where SARS exercises its discretion and imposes additional taxes at a percentage lower than 200 per cent, the facts of each case will indicate whether the aim of the additional tax was to punish or to compensate.

The result is that, in the context of income tax, administrative penalties will be regarded not as criminal punishment, but as additional taxes and penalties imposed under s 75 and 104 of the Act. On this interpretation, s 76(4) of the Act, which puts it beyond doubt that additional taxes may be imposed in addition to any penalties, is thus unconstitutional because it infringes the double jeopardy rule in s 35(3)(m) of the Constitution.

However, even if because of its punitive character a civil penalty is classified as a criminal penalty, it does not necessarily follow that the double jeopardy defence will be available where a person has previously been civilly charged and has been subjected to a penalty akin to a criminal penalty. The reason is that s 35(3)(m) of the Constitution is available only to ‘an accused person’. The dictionary meaning of the term ‘accused’ is ‘a person or gang of people charged with a crime or on trial in a court of law’ (South African Concise Oxford Dictionary (2002)).

On the literal interpretation of 35(3)(m) of the Constitution, the defence will thus be available only to persons who are criminally charged in a court of law. However, the question may be asked whether Parliament did intend to limit the defence to proceedings before a criminal court and to exclude highly punitive proceedings merely because they are not heard by a criminal court.

Section 39 of the Constitution provides that the Bill of Rights has to be interpreted in accordance with international law, and also that in the interpretation of any legislation, ‘the spirit, purport and objects of the Bill of Right’ have to be promoted. If this provision is taken into account, it surely cannot be argued that the double jeopardy defence should be restricted to criminal proceedings merely because the word ‘accused’ was used in s 39(3)(m) of the Constitution. When rights such as human dignity (s 10 of the Constitution) and the inherent rights that the double jeopardy defence aims to protect are taken into account, the ‘spirit, purport and object’ of the double jeopardy defence is clearly that it should be available not only to accused persons in criminal proceedings, but also to persons who face civil penalties aimed not at making good a financial loss, but at punishment and deterrence.

In the decision in United States v Halper (supra in par 3 at 447-8) the
following was said regarding the distinction between criminal and civil proceedings:

‘[T]he labels “criminal” and “civil” are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. . . . The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads. . . . To that end, the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.’

Even if the decision in *ITC 1825* (supra) is correct, it does not follow that SARS has an unlimited discretion to impose the maximum punishment provided for under each of the sections. In *Van der Walt v S* (52 SATC 186 at 190-1) it was made clear that although SARS has both criminal and civil remedies at its disposal, the two remedies cannot be instituted completely independently. Where penalties have already been imposed under s 76 of the Act, they should be taken into account when a guilty finding is made in terms of criminal law. Although the decision in *Van der Walt* (supra) is clearly not authority for the view that a person may not be criminally and civilly prosecuted, it is clear authority for the view that whatever penalties are imposed should be reasonable.

5 Conclusion

The decision in *ITC 1825* (supra) raises a very important issue: the availability of the double jeopardy defence to taxpayers. The Gauteng Tax Court held that the double jeopardy defence provided for in s 35(3)(m) of the Constitution is applicable only to a person facing criminal prosecution or somebody called upon to answer a criminal charge. It is not available where SARS imposes both an administrative penalty and additional taxes under s 76 of the Act. It is submitted that the conclusion of the Court – that this defence is not available to taxpayers against whom both additional tax and criminal penalties have been imposed – is too limited a view of the defence. The traditional view is that this defence is available only where a person is twice confronted with a criminal charge; in this regard, a criminal charge is understood to refer to a charge for which a prison term could be imposed. However, in line with case law in other jurisdictions a strong argument may be made that this defence should not be restricted to criminal proceedings, but should also be applicable where a civil remedy aimed not at mere compensation but at punishment is imposed. In this regard, the facts of each case have to be analysed to determine the true nature of the penalty imposed.

However, it is doubtful whether *ITC 1825* (supra) carries any authority, because it was made clear in *ITC 1806* (68 SATC 117) that a tax court has no authority to adjudicate on the constitutionality of an Act of Parliament.