The personal circumstances of the taxpayer as a defence or as a plea of "extenuating circumstances" for the purposes of remission of penalties in income tax matters[1]

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Abstract

Heavy penalties may be imposed on a defaulting taxpayer in terms of section 76(1) of the Income Tax Act, 58 of 1962 (the "Act"), unless "extenuating circumstances" are found to prevail, in which case any penalty imposed may be remitted partly or even *in toto*.

This article examines the defence or plea of adverse personal circumstances, such as education, intelligence, financial means, hardship, age, influence of others, provocation and the death, insolvency or liquidation of a taxpayer, and whether such adverse personal circumstances could be considered to be "extenuating" for the purposes of section 76(2)(a) of the Act and lead to a remission of the penalties imposed.

Key words

Penalties,
Section 76 of the Income Tax Act, 58 of 1962
Additional tax
Extenuating circumstances
Mitigating circumstances

Trefwoorde

Versagtende omstandighede

1 This article is based on a chapter of the author's dissertation entitled "Remission of Penalties in Income Tax Matters" that was submitted for the degree of Magister Computationis at the University of South Africa.

1 Introduction

"You can have a Lord, you can have a King, but the man to fear is the tax collector." This proverb about the tax collector was inscribed on several clay tablets excavated at Lagash, in Sumer, the fertile area between the Tigris and Euphrates rivers in what is now known as Iraq. The clay tablets date back some six thousand years (Adams 1999:2–3). Times have not really changed! Most taxpayers still fear the tax man and for good reason.

In terms of section 76(1) of the Income Tax Act, 58 of 1962 (the "Act"), various tax offences are stipulated, ranging from the mere late submission of a tax return to an incorrect statement made on the return, which may or may not involve the intention on the part of the taxpayer to evade taxes. The maximum penalty that may be imposed in such circumstances is an amount equalling 200% of the tax properly chargeable.

Although section 76(1) refers to additional tax (rather than a penalty), the judiciary, in hearing appeals against the imposition of additional tax, generally refer to such additional tax as "in essence a penalty" (*CIR v McNeil*, (22 SATC 374 at 382) and *CIR v Da Costa*, (47 SATC 87)). For the purposes of this article, the words "additional tax" and "penalties" are used interchangeably, as appropriate.

However, section 76(2)(a) of the Act, as well as the common law, recognise that any penalty or sanction that ought to be imposed for a taxation offence may be remitted in cases in which "extenuating circumstances" exist.

In a previous article in this research journal, the current author examined the general meaning of the term "extenuating circumstances" as it relates to taxation matters (Goldswain 2001a:123–135) and it is not the intention of this article to re-examine the general concept. It was concluded in that article (without discussion in detail) that a number of "extenuating circumstances" have influenced the level of the penalties or sanctions that have been imposed by our courts in taxation matters (Goldswain 2001b:133–134), namely:

- ☐ Reliance on a tax advisor, bookkeeper, accountant or member of staff.
- ☐ Conduct, character, attitude and behaviour.
- ☐ Personal circumstances, lifestyle, financial means and age.
- ☐ Illiteracy and naiveté.
- ☐ Effect on the offender.
- ☐ Supervening death of the taxpayer and insolvency.
- ☐ Ignorance of the law.
- ☐ Negligence and carelessness.

Two other articles written by the current author, and also published in this research journal, examine, in some detail, the plea or defence that the taxpayer relied on his tax advisor, bookkeeper, accountant or member of staff (Goldswain 2001b:137–154) as well as the part the taxpayer's conduct, character, attitude and behaviour before, during and after committing a tax offence, play in mitigating any penalty imposed (Goldswain 2002:71–85).

The conclusions reached in those two articles are that:

- Members of the judiciary are fairly consistent in regarding the taxpayer's reliance on advisors and staff as either a complete defence to the imposition of penalties or as an "extenuating circumstance" for the purposes of remitting penalties; and
- The conduct of the taxpayer, including his motives, character, attitude and behaviour, before, during and after committing an offence can, in the appropriate circumstances, be regarded as "extenuating" for the purposes of the remission of penalties, both in terms of section 76 of the Act and the common law.

This article focuses on another aspect of the "extenuating circumstances" referred to above, namely the personal circumstances of the taxpayer and related issues.

2 The objective of this article

The objective of this article is to examine the defence or plea of adverse personal circumstances, such as education, intelligence, financial means, hardship, age, influence of others, provocation and the death, insolvency or liquidation of a taxpayer, and whether such adverse personal circumstances can be considered to be "extenuating" for the purposes of section 76(2)(a) of the Act and lead to a remission of the penalties imposed.

3 Research method

The research method adopted comprises a literature review, analysis of the relevant provisions of the Act and the common law together with court decisions, both local and foreign, which relate, directly and indirectly, to the objective. As far as local court decisions are concerned, a comprehensive search was done on the *Butterworths Intranet Resource for Students and Lecturers*, Commercial Resources, South African Tax Cases Reports (http://www.butterworths.co.za). The appropriate cases that relate to the personal circumstances of the taxpayer in penalty situations were selected. The keywords used in the search were: Section 76 of the Income Tax Act; penalties, extenuating circumstances, mitigating circumstances, and "versagtende omstandighede".

4 The approach of the courts

4.1 *Introduction*

The personal circumstances of the taxpayer may play an important part in determining the magnitude of the penalty to be imposed in terms of section 76 of the Act. The following circumstances are included under this category: education; literacy; low intelligence and naivete; financial means; ability to pay; loss of employment; hardship; insolvency and reliance on the taxpayer by dependants; age; infirmity; sickness; general poor health; anxiety and sanity; gender; lifestyle; intoxication; drugs; influence of others and provocation; previous good character

(first offence) and loss of the respect of the community; and the death, insolvency or liquidation of the taxpayer.

4.2 *Education, literacy, low intelligence and naivete*

As a general proposition, a person is not legally responsible for a contravention of a law if, at the time of the contravention, that person was subject to a defect of mind that is recognised by law as sufficient to relieve him or her of responsibility for his actions (Gardiner and Landsdown 1939:30). The taxpayer, depending on the severity of the defect of the mind, may plead such a reason as a defence or as an "extenuating circumstance" for the purposes of section 76 of the Act.

However, for this defence to succeed, there should be some evidence that the disability of the mind was an operative cause of the failure to comply with the Act. This will be difficult to demonstrate when the surrounding evidence establishes that the accused otherwise functioned well in the business world.

In *CIR v Da Costa*, (47 SATC 87 at 96), the court recognised the fact that the taxpayer only had "four to five years of schooling" and a "naivete, semi-literacy and simple-minded" confidence in an apparently reputable firm of accountants as constituting "strong extenuating circumstances". The penalty imposed by the Commissioner was substantially reduced from R15 500 (a 100% penalty) to R3 000 by the Special Court (and confirmed on review by the Appellate Division).

In *ITC 1576* (56 SATC 225), the judge took into account, as an "extenuating circumstance", the fact that the taxpayer had only reached standard eight at school and could not read financial statements. The Commissioner's original penalty of 125% of the tax payable on the income that had not been disclosed (the taxpayer had only disclosed some 12% of the income that he had received), plus interest payable in terms of section 89*quat*, was reduced by the Special Court, on appeal, to a flat 50% penalty. In addition, the judge precluded the Commissioner from raising a section 89*qua*t interest charge as he was of the opinion that, in the circumstances, the 50% penalty was sufficient. The taxpayer also pleaded that he had relied on his bookkeeper, who had been negligent.

In *ITC 1331* (43 SATC 76), the taxpayer was born in a foreign country, had no regular schooling, could not even read his mother tongue and could not understand Afrikaans nor speak much English. The Special Court regarded these factors as "extenuating". However, the judge confirmed the Commissioner's penalty of approximately R81 000, an effective penalty of some 63,7% of the tax on the income omitted. The taxpayer had also pleaded that he had merely perpetuated a fraudulent system of accounting devised by his uncle and his bookkeeper.

On the other hand, the judges in *ITC 1489* (53 SATC 99) and *ITC 1351* (44 SATC 58), rejected as "extenuating" the fact that the taxpayers were unskilled in the task of keeping accounts. In the former case, the judge referred to the fact that the taxpayer was a "shrewd and successful businessman" (at p.106) whilst in the latter case the judge found that the taxpayer's "shifting of ground" (at p.61) during evidence was not satisfactory.

Also in *ITC 1540* (43 SATC 76), the court rejected the defence of the taxpayer that he was an immigrant and was not fluent in the English language. The Special Court confirmed the 85% penalty that had been imposed by the Commissioner on the grounds that, although he was an immigrant, he had been in South Africa for some thirty years, he had shown some great business acumen and his lack of fluency had not hampered him. The taxpayer in this case had also, to some extent, based his defence on his reliance on his bookkeeper.

4.3 *Financial means, ability to pay, loss of employment, hardship, insolvency and reliance by dependants on the taxpayer*

The poor financial circumstances of a taxpayer are generally regarded as "extenuating". A fine should not "crush the accused and his family" (*R v Thistle*, ([1974] C.TC 798 (Ont. Co. Ct.), a Canadian Court decision).

In *Da Costa's* case (47 SATC 87 at 98), it was acknowledged that "the means of the taxpayer clearly may be – and in the present case were – a relevant factor in determining the quantum of the reduced penalty". In *ITC 1295*, (42 SATC 19), a judgement delivered prior to the *Da Costa* decision, the judge acknowledged that a factor to be taken into account is the ability of each of the appellants to pay the amount of the penalties.

ITC 1430 (50 SATC 51) raised an interesting problem. Before the taxpayer's appeal could be heard in the Special Court, he passed away. Evidence was led by the executor that the taxpayer's estate was insolvent. The judge was of the opinion that the decision to remit penalties involves three factors: Punishment of the taxpayer, the deterrent effect upon him and the deterrent effect on other taxpayers.

He held that the court was not restricted to the factors present at the time of the assessment or the imposition of the penalties, but could also consider the circumstances of the taxpayer from the time of the assessment or imposition of the penalty to the time that the matter was heard in the Special Court, because the hearing before the Special Court is a *de novo* hearing, as had been held in the *Da Costa* judgement. According to van Heerden JA, the Special Court, in deciding on the quantum of penalties to be imposed in terms of section 76 of the Act, is called upon "to exercise its own, original discretion . . ." (at p.95). This decision put an end to the controversy and conflicting decisions surrounding the role of the Special Court in imposing and remitting penalties in terms of section 76 of the Act.

Because of the intervening death of the taxpayer, the first two factors regarding the remission of penalties, namely, the punishment of the taxpayer and the deterrent effect upon him, were no longer applicable. In regard to the third factor, namely the deterrent effect upon other taxpayers, he was of the opinion that the remission of the penalties was hardly likely to come to the attention of many other taxpayers and, therefore, also was not applicable.

The judge commented on the fact that if the penalties that the Commissioner had imposed were to be remitted, the estate would just be solvent. However, the

insolvency of the estate did not take into account the administration and liquidation expenses nor "has any provision been made for possible claims for maintenance by the taxpayer's four minor children" (at p.58). The judge was of the opinion that the concurrent creditors of the estate or even the minor children of the deceased taxpayer would be punished instead of the deceased taxpayer if the estate were not solvent as a result of the fact that the penalties were not remitted. He remitted the penalty *in toto,* except for the amount of interest lost to the *fiscus*, an amount of approximately R21 000, as opposed to the original penalty imposed of approximately R97 000, which was, in effect, a 100% penalty.

The judge also commented that the Australian Income Tax Assessment Act provided for a "hardships committee", which could remit penalties in "serious hardship" or "ruinous circumstances" (at p.58).

> In Australia there is by statute a 'Hardships Committee' which may remit assessed taxes wholly or in part. In terms of s 265 of the Income Tax Assessment Act 1974, this committee may even release a taxpayer from assessed tax where he has suffered such a loss or is in such circumstances that payment of the full amount of the tax would entail serious hardship. Furthermore, in the case of the death of the taxpayer, tax may be remitted where payment thereof would entail serious hardship to his dependants. In terms of s 226 of that Act, however, the Commissioner has the power, similar to that conferred by s 76(2)(a) of our Act, to remit in whole or in part additional tax imposed as a penalty 'for reasons which he thinks sufficient.' One of the grounds upon which such remission has been granted, was where the penalty would 'prove a ruinous imposition.' Jolly v Federal Commissioner of Taxes (1935) 35 CLR at 214.

Perhaps it is time for South Africa to introduce legislation to provide for the creation of a "hardships committee". If, for example, such a committee had been in existence in the then Rhodesia (now Zimbabwe) the taxpayer in *S v Lennon*, (35 SATC 101) would, perhaps, have been treated differently. In that case, the taxpayer had attempted to import a motor vehicle into Rhodesia without paying customs duty. He was an employee of the Rhodesian Railways and a senior official of the Rhodesian Railway Workers Union. He was due to retire in five years at the end of which period he would be entitled to a pension. In terms of prevailing legislation, no person who had been convicted of an offence involving theft, fraud or dishonesty and had been fined $100 or more, could be an official of any trade union in Rhodesia within a period of five years from the date of his conviction. Because he was fined $300, in addition to forfeiting his motor vehicle valued at $1 800 and having to pay customs duty of $603, he was not able to complete his period of employment and as a result thereof he lost his pension. The total financial loss in this respect was estimated to be some $50 000.

The taxpayer appealed against the $300 fine on the grounds that the combined direct and indirect effects of the sentence were excessive and unreasonable in that they were disproportionate to the criminal conduct displayed by him and they failed to have sufficient regard for the mitigating features of the evidence.

The majority of the court held that the fine of $300 did not induce a sense of shock and, therefore, confirmed the $300 fine. No account was taken of the indirect consequences of the taxpayer's conduct as being a mitigating factor.

Beadle, in his minority judgement, summed up the situation perfectly. It is submitted that his approach is in line with the way a South African court should and

would approach the matter if it were faced with a similar set of circumstances. He quoted with approval (at p. 105) the general principle expounded by the Appellate Division in *Ex parte Minister of Justice: in re Rex v Berger and Another,* (1936 AD 334 at p.339) that in assessing punishment "Everything that adversely affects the accused in his person, his occupation or his property is part and parcel of the punishment inflicted upon him".

He also came to the conclusion that the "rule of *Berger's* case" was confirmed by the Appellate Division in *R v Riley*, (1957(2) SA 407(AD)) and consistently applied thereafter in the various Provincial Divisions of the South African Supreme Court (now referred to as the High Court). Nevertheless, Beadle CJ was of the opinion that the general rule should be tempered by approaching the matter as follows (at p.107):

> If the moral blameworthiness of the crime is such that a court might reasonably impose a punishment which would not have the effect of bringing into force the provisions of the Act, then the court should impose such a punishment, rather than impose a punishment which might have such drastic financial consequences to the accused. If, on the other hand, the moral blameworthiness of the crime is so great that no court could reasonably impose a punishment which would not have the effect of bringing into operation the provisions of the Act, then a punishment which brings such provisions into operation must be imposed, notwithstanding the consequences to the accused.

Beadle, in effect, came to the conclusion that the difference in moral blameworthiness between an offence that warrants a punishment of a fine of $200 or $300 and one that warrants a fine of $90 is not so great "as to suggest that in the one case it is fitting that the appellant should forfeit another $50 000 while in the other case it is not" (at p.112). He accordingly recommended a fine of $90 rather than the $300 decided upon and imposed by the majority of the court.

Perhaps the taxpayer in this case was a victim of justice rather than a recipient of justice.

4.4 *Age, infirmity, sickness, general poor health, anxiety and insanity*

Extreme old age or youth, infirmity, sickness, general poor health, anxiety or insanity can constitute "extenuating circumstances" for the purposes of section 76(2)(a). The pleading of such circumstances by a taxpayer may indicate that:

- ☐ The taxpayer did not fully understand his responsibilities in terms of the Act; or
- ☐ The anxiety suffered by the taxpayer during an investigation by the revenue authorities led to an emotional breakdown.

Age or general malaise due to sickness should not, in itself, automatically be regarded as an "extenuating circumstance". In fact, section 9(3) of the Constitution of South Africa Act, 108 of 1996 (the "Constitution"), prohibits discrimination *inter alia* on the basis of age. Rather, the taxpayer should lead evidence to the effect that the disability was an operative cause of the failure to comply with the provisions of the Act. For example, an eight year old child would not be expected to know or

understand his obligations in terms of the Act. Neither would a fifty year old know his obligations in terms of the Act if he has deteriorated to an advanced state of Alzheimer's disease.

Nevertheless, the mere fact that the taxpayer is advanced in years has been regarded as being a mitigating factor. In *Da Costa's* case, (47 SATC 87), the fact that the taxpayer was a man of 59 years of age was regarded as one of the mitigating factors. The effect of his age in itself and its influence upon the penalty imposed in that case was probably minimal. Nevertheless, it was a starting point for finding that "extenuating circumstances" existed for the purposes of remission of penalties.

In the British case of *R v Richards*,([1971] Crim. L.R. 176), the Court of Appeal recognised that the age of the taxpayer, who was 67 years old, and the fact that he was in poor health, could constitute mitigating factors. The Canadian courts also recognise this principle (*R v Kresanowski*, ((1982), 83 D.T.C. 5393)).

In addition, the British courts have acknowledged that a long delay by the revenue authorities in determining a penalty or in bringing the matter to court, can cause anxiety to the taxpayer and even lead to an emotional breakdown. Such a situation could then be regarded as "mitigating" (*R v Francis,* ([1979] Crim. L. R. 261)). Although the South African courts have not, to the author's knowledge, been faced with this novel plea in tax matters, it is inevitable that it will eventually be pleaded and, it is submitted, it may be recognised as an "extenuating circumstance".[2]

4.5 *Gender, lifestyle, intoxication, drugs, influence of others and provocation*

Section 9(3) of the Constitution provides that the state may not unfairly discriminate "against anyone on one or more grounds including, race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth". It may be argued that if a court does take such factors into account, then someone else is being discriminated against. For example, a female should theoretically not have

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2 Support for this submission can be found in section 33 ("just administrative action") read together with section 35 ("arrested, detained and accused persons") of the Constitution.

In addition, para. 12.2.8 of the *Third Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa*, (Government Printer, Pretoria, 1995, at p. 133), recommends that a principle of "timeousness" be recognised legislatively or at least in a "Code of Conduct" whereby "taxpayers have a right to expect that their affairs will be dealt with expeditiously". This recommendation has not been adopted in the South African Revenue Services' "Client Charter", a copy of which is attached to every taxpayer's return. The "Charter" states that the obligation is on the taxpayer to "timeously submit full and accurate information" without acknowledging the corresponding obligation on the revenue services to deal with the taxpayer's matters timeously.

a lower penalty imposed on her than her male counterpart who commits the same tax offence, merely because she is a female.

Until a few years prior to the adoption of the Constitution, the income of a married woman was treated, for income tax purposes, as part of her husband's income. Since the change to separate taxation there has been no reported case, as far as the author can establish, in which a female taxpayer has had penalties imposed on her in terms of section 76 of the Act by the Special Court. This could be as a result of the fact that no errant female taxpayers have been identified, a highly unlikely phenomenon, or it could be as a result of the fact that the penalties imposed by the Commissioner are regarded as so reasonable and sufficiently low that such taxpayers do not appeal to the Special Court to have the penalties reviewed. If this is the case and the Commissioner is treating errant female taxpayers differently and with greater leniency than their male counterparts, then he is probably acting in terms of the reverse of what is known as "gender bias".

If the reason for a lower penalty is merely the fact that the taxpayer is a female, all other circumstances being the same, then the fact that her male counterpart has a higher penalty imposed on him, such higher penalty imposed could be regarded as unconstitutional and would, it is submitted, be altered on appeal to the Special Court.

Nevertheless, such a plea could be accepted by the courts, especially if it could be proved that a female taxpayer was under the influence of someone else, for example, a spouse, a lover or an employer, and for that reason certain income was not disclosed in her return.

The lifestyle of the taxpayer and the fact that the taxpayer's family might suffer as a result of a heavy penalty imposed, have also been regarded as "extenuating" (*Da Costa*, (47 SATC 87) and *ITC 1430*, (50 SATC 51)). The courts, it is submitted, would strive to ensure that their penalty will have an impact on the taxpayer and not on the family. This does not mean that a rich person should have a more severe penalty imposed on him because he is more able to pay or has a higher profile in society. Rather, taxpayers should be treated equally, but an adjustment should be made for hardship where necessary.

The effect of alcohol or drugs removes or weakens the restraints and inhibitions that normally govern conduct and impairs the faculty to appreciate the consequences of an act. It is also conducive to negligence. But, unlike insanity, there is no diseased mind.

In the case of a taxpayer, this type of defence would be difficult, if not impossible, to plead in view of the fact that an intoxicated or drugged person would eventually become sober or drug free and thereafter have the faculties to reflect on his actions. If, for example, he filled in his tax return whilst being intoxicated and omitted income from the return, and perhaps even submitted the return in an intoxicated state, he would, when he became sober, be able to reflect on what he had done and approach the revenue authorities to correct the return. If he did nothing when he became sober and reflected on the matter, knowing that he had

submitted false information, then at the very least his actions would be negligent, if not fraudulent.

Provocation is based essentially on the emotion of anger. Anger, in itself, is not an excuse for committing an offence. However, it may be a factor that mitigates the punishment. For example, it may not be inconceivable for a taxpayer in circumstances such as those outlined in the *Lennon* case (35 SATC 101), in which the indirect financial consequences of the penalty imposed were out of all proportion to his actions (it might have led to him becoming destitute in his retirement), to have been so bitter, twisted and irrational that he made it a purpose in his life to cheat on his taxes as far as he could. It is submitted that if the taxpayer had thereafter again been caught for tax evasion and pleaded provocation as a defence, a future tax court, although having to treat the matter very seriously as it constituted a second offence by the taxpayer, may have taken into account the old adage that "two wrongs do not make a right but they make a good excuse", and remitted substantially any penalty imposed.

4.6 *Previous good character (first offence) and loss of the respect of the community*

The fact that the offending taxpayer was previously of good character and that the offence is his first offence[3], could be a motivating factor that justifies a less severe penalty than would otherwise be imposed, especially in a case in which there is a possibility of a custodial sentence.

In *Van der Walt v S*, (52 SATC 186 at 192), a case which is comprehensively discussed in one of the current author's previous articles in this research journal (Goldswain 2002:71–85), the magistrate had regard to the fact that the taxpayer was not guilty of any dishonesty towards his clients and that his clients and those with whom he was associated in public life regarded him as a respected and honourable member of society. The magistrate believed that these factors contribute towards mitigating the level of the penalty that he would impose on the defendant for common law fraud. The Supreme Court, on appeal, agreed that these factors constituted mitigating circumstances to be taken into account in sentencing the defendant on the common law charge of fraud.

As regards the loss of the respect of the community in which the defendant operates, Rabie and Strauss (1981:26), in their book *"Punishment"* are of the opinion that:

> In fact, merely being convicted of a crime is already for many persons a sufficient punishment to deter them from future criminal behaviour.

Perhaps the reason why the Commissioner took the taxpayer in the *Van der Walt* case through the criminal court system and charged him with common law fraud in

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3 First offence in this context does not necessarily refer only to a tax offence in terms of the Act, but to all offences, especially serious criminal offences such as fraud. It would not include minor offences such as a traffic parking ticket.

addition to imposing a 200% penalty in terms of section 76(1) (without any remission) was to achieve this very purpose. Any punishment which he received in addition to the loss of respect in his local community, through the publicity involved, would probably have been regarded as a bonus to the revenue authorities.

4.7 *Death, insolvency or liquidation of the taxpayer*

The death of a taxpayer before a penalty is imposed by the Commissioner in terms of section 76(1), is considered to be a complete defence to the imposition of penalties. In *ITC 1461* (51 SATC 165 at pp.167–168), Leveson held that:

> The right to punish the wrongdoer passed on the death of the deceased and there is no provision, either at common law or in terms of the Income Tax Act, whereby the penalty is transmissible to the beneficiaries of the deceased's estate, ie the wrongdoer's estate and no basis upon which the penalty can be exacted from those beneficiaries or, for that matter, from the representative taxpayer.

Even after penalties have been imposed by the Commissioner and the taxpayer dies before any appeal is heard in the Special Court, the Special Court would be inclined to take this factor into account as an "extenuating circumstance", especially in cases in which there are minor dependants involved, (*ITC 1540*, (43 SATC 76)).

In *ITC 1699* (61 SATC 479), the Zimbabwean Special Court remitted the penalties *in toto* in the case in which the taxpayer, a company, went into liquidation during the period between the imposition of the penalty and the time that the Special Court heard the appeal against the imposition of penalties. It was held that the subsequent events in the case (the provisional liquidation) justified the remission of the penalties.

5 Conclusion

The personal circumstances of the taxpayer, especially when the taxpayer is deceased, can constitute a full defence against the imposition of penalties (*ITC 1461*, (51 SATC 165)). An impairment of a person's mind as a result of age (a minor) or a disease (Alzheimer's disease) can also constitute a complete defence, depending on the severity of the impairment, because in these cases the taxpayer does not have the necessary *mens rea* or intention to evade taxes.

Even when the taxpayer intended to evade taxes, the reasons behind the intention to evade could constitute "extenuating circumstances". This is especially applicable in cases of extreme provocation in which the taxpayer does not feel that he is being treated fairly by the revenue authorities.

The mere lack of intelligence or education or the existence of a language barrier, which does not affect the business acumen of the taxpayer, cannot constitute a full defence, but it may be regarded as an "extenuating circumstance" in the appropriate circumstances (*See Da Costa v CIR*, (47 SATC 87); *ITC 1576*, (56 SATC 225) and *ITC 1331*, (43 SATC 76) and compare to ITC 1489, (53 SATC 99), ITC 1351, (44 SATC 58) and ITC 1540, (43 SATC 76), in which the courts rejected these

pleas as "extenuating circumstances" and found the taxpayers to be shrewd and successful businessmen who were not hampered by language or education.)

The financial means of the taxpayer or the fact that the taxpayer has minor dependants, who rely on him for support, can also constitute "extenuating circumstances" (*ITC 1430*, (50 SATC 51), *Da Costa v CIR*, (47 SATC 8)).

The previous good character of the taxpayer and the loss of the respect of the community in which a person lives also constitute "extenuating circumstances" (*Van der Walt v S*, (52 SATC 186 at 192)).

Generally, it may be concluded that any adverse personal circumstance that the taxpayer may plead in a case that involves the imposition and remission of penalties in terms of section 76 of the Act can constitute "extenuating circumstances".

These personal circumstances are normally raised in addition to other acceptable "extenuating circumstances" such as reliance on an accountant, bookkeeper or member of staff and the conduct of the taxpayer before, during and after committing a tax offence.

It is submitted that the greater the number of "extenuating circumstances" that are found to prevail in a case, the greater will be the remission of the penalty.

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