The conduct of the taxpayer – Can the conduct of the taxpayer affect the level of the penalty or sanction imposed in income tax matters?

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Abstract  
An offending taxpayer may plead “extenuating circumstances” in order to reduce the penalty or sanction that may be imposed in terms of section 76(1) of the Income Tax Act. The objective of this article is to examine whether the conduct of the taxpayer before, during and after the commission of an offence (usually tax evasion), in terms of section 76(1) of the Act or of the common law, can affect the level of the penalty or sanction imposed. The conclusion that can be reached is that, in appropriate circumstances, the conduct of the taxpayer can affect the level of a penalty imposed in terms of section 76(1).

Key words  
Section 76 of the Income Tax Act  
Additional Tax  
Remission of penalties  
Extenuating and mitigating circumstances

1 Introduction  
The Latin word for a tax collector is an “exactor” and the English word “exaction” derives from it. “Exaction” is defined in the Concise Oxford Dictionary as including *inter alia* an “illegal or exorbitant demand, extortion”, and indicates the basic meaning of the word “taxation”. It is therefore understandable that there is an analogy between the tax collector and a robber. This perception is enhanced by the threats and intimidation that are inherent in the operations of the tax authorities, even today.
It is generally accepted that the higher the taxes, the greater will be the tax evasion practised by taxpayers. South Africa is no exception, and the South African revenue authorities (like any other revenue authority) attempt to prevent tax evasion by imposing harsh penalties (up to 200% of the tax correctly chargeable) in terms of section 76(1) of the Income Tax Act, No. 58 of 1962, (the “Act”) and even by charging taxpayers criminally for fraud under the common law.

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, where applicable.

Section 76(2) 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 when “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, G.K., Meditari Accountancy Research, Volume 9, 2001, pp.123-135). 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 imposed (pp.133-134), namely:

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

In a previous article in this research journal, the current author also examined in some detail the plea or defence raised that the tax payer relied on his or her tax advisor, bookkeeper, accountant or member of staff (Goldswain, G.K., Meditari Accountancy Research, Volume 9, 2001, pp.137-154). The conclusion reached was

1 Refer to the “Interim Report of the Commission of Enquiry into Certain Aspects of the Tax Structure in South Africa”, Pretoria, South Africa, Government Gazette, 1994 (generally known as the “Katz Report”), page 62. In 1994, the tax gap or leakage was estimated to be approximately R3 billion per annum for Value Added Tax (“VAT”) (14.6% of the potential VAT revenue). The gap, as far as income tax is concerned, is not quantified in the Katz Report, but is estimated to be as high as 30% of the potential revenue from that source. Extrapolating these figures, the amounts involved are probably double the aforementioned figures in today’s rand equivalent.
that the courts are fairly consistent in regarding the reliance on advisors and staff as either a complete defence to the imposition of penalties or as an “extenuating circumstance” for the purpose of remitting penalties.

This article will focus on one of the other possible “extenuating circumstances” mentioned above, namely the conduct of the taxpayer.

2 The objective of this article

The objective of this article is to examine whether the conduct of the taxpayer before, during and after committing an offence in terms of section 76(1) of the Act or of the common law can affect the level of the penalty or sanction imposed.

3 Research method

The research method adopted, comprises a literature review and an 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 the 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/livepublish@butterworths.co.za) and appropriate cases concerning the conduct of the taxpayer were selected. The keywords used in the search were:

- Section 76 of the Income Tax Act
- Penalties
- Extenuating circumstances
- Mitigating circumstances
- Versatende omstandighede

4 Approach of the courts

4.1 Introduction

The following factors were examined to establish whether any or all of them constitute extenuating circumstances or are regarded as aggravating factors: planning of a tax offence, the period for which it continued and its magnitude; the money available and how it was used; the motive of the taxpayer; assistance given to the authorities during the investigation; a plea of guilty at the first opportunity; an indication of remorse; and how quickly the taxpayer settled his tax liability.

Although the case of Van Der Walt v S (52 SATC 186, 1989 (2) SA 212(W)) did not deal directly with section 76(1) of the Act, but rather with the common law principles to be applied in dealing with cases of tax evasion after the Commissioner has imposed a 200% penalty in terms of section 76(1), it is informative regarding
what factors or circumstances the judiciary considers as extenuating or aggravating for both statutory and common law purposes.

4.2 Interaction between sanctions imposed in terms of section 76 of the Act and the common law - the case of Van der Walt v S

Until 1987, it was not the policy of the South African tax authorities to impose penalties in terms of section 76 of the Act and to recommend to the Attorney-General that the tax offender be prosecuted for common law fraud for the same offence (Van Der Walt v S (52 SATC 186 1989(2) SA 212(W))). However, in 1987, the tax authorities decided to do just that!

In Van Der Walt v S (52 SATC 186, 1989(2) SA 212(W)), the Commissioner imposed the full 200% penalty in terms of section 76(1), read with section 76(2)(a) of the Income Tax Act, on a taxpayer who had prepared false books of account and records, submitted false income tax returns and thereby evaded income tax, and in the circumstances defrauded the Treasury. The Commissioner imposed the maximum 200% penalty because, in his opinion, he could not find any extenuating factors in the taxpayer’s favour. Section 76(2) permits the Commissioner to remit only the 200% penalty or part thereof in cases in which the taxpayer had the intention to evade taxes, if he is satisfied that extenuating circumstances exist. The penalty amounted to some R423 000. The taxpayer, foolishly, did not object to the imposition of the full 200% penalty.

The Commissioner thereafter decided to take the matter further and the taxpayer was charged with fraud under the common law. The taxpayer pleaded guilty in the magistrate’s court. He was convicted and sentenced to pay a fine of R50 000 or serve a term of imprisonment of twelve and a half years. In addition, he was given a suspended sentence of an effective twelve and a half years imprisonment. He appealed to the Witwatersrand Local Division of the Supreme Court (now known as the High Court) against the additional fine and suspended sentence.

In the course of the judgement, Schwartzman AJ remarked that he had not been referred to nor could he personally find any similar case in which a taxpayer had been punished in terms of section 76 of the Act and thereafter charged with, and found guilty on the same facts, of common law fraud. Nevertheless, the taxpayer having pleaded guilty to the fraud claim, the judge was of the opinion that it was his duty to decide on an appropriate sentence in the circumstances.

He detailed both the “extenuating” and “aggravating” factors that were found by the magistrate in the court a quo to be present and that influenced the punishment imposed on the taxpayer in the court concerned. Regarding the conduct of the taxpayer, the magistrate in the court a quo had found (p.189):

That when the investigations into his affairs started in 1982, he confessed to the police, and thereafter assisted the Department in its investigations. When he came to court, he pleaded guilty and has shown remorse for his crimes. As a result of the publicity which followed upon
his being charged, he suffered a punishment in that he lost the position of eminence and respectability in the community which he had earned over the years.

The magistrate then went on to have regard to the seriousness of the offence, the fact that it had been planned and executed over a number of years and for the sole purpose of benefiting the appellant at the expense of the fiscus, and that it was in the circumstances a crime that affected the economic interests of the State and thereby the interests of the community.

The judge confirmed that he agreed with the magistrate’s finding in respect of the factors present (both extenuating and aggravating), which would influence the punishment. The judge continued as follows (p.192):

By reason of the provisions of s 76 of the Income Tax Act, the State has not only recovered the whole of its loss, but will also, at the expense of the appellant, receive payment of a further amount of R423 466 by way of the penalty imposed. This latter payment to the State, exceeds in my judgment any fine which a court would impose for a fraud involving an amount of R211 733.

Apart from his dishonest conduct towards the fiscus, there is no suggestion that over the years in question he was guilty of any dishonesty towards his clients for whom he had acted as a bookkeeper and internal auditor. In fact, and from the references and letters included in his written statement in mitigation of sentence, some of his clients and those with whom he was associated in public life, regard him as a respected and honourable member of society.

The sentence of the Magistrate was set aside and substituted by a five-year sentence, suspended for five years.

Since the decision in the Van der Walt case, South Africa has a new Constitution (Constitution of the Republic of South Africa Act, No. 108 of 1996) and it is therefore apposite at this stage to examine the constitutionality of trying a taxpayer twice for the same offence.

### 4.3 The constitutionality of charging a taxpayer twice for the same offence

The effect of the above-mentioned judgement is that a taxpayer can be found guilty of the common law offence of fraud in addition to being penalised in terms of the penal sections of the Income Tax Act. The question that now arises, is whether the South African Constitution allows a person to be “tried” twice for the same offence? Section 35(3)(m) of the Constitution of the Republic of South Africa, No. 108 of 1996, provides for a person “[n]ot to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted.”

Having penalties imposed in terms of section 76 of the Act is neither a conviction nor an acquittal. It is an administrative action, which is regulated by the judiciary. On a strict reading, therefore, there can be no violation of the Constitution in this regard. The Canadian Constitution or “Charter”, on which the South African Constitution is loosely based, has a similar provision that guarantees that a person will not be punished twice for the same offence. In Re Vespoli and R ((1985), 32 A.C.W.S. (2nd) 423(B.C.S.Ct.)), the issue was whether civil and criminal fines could be imposed on a taxpayer for the same tax offence. The British Columbia
Supreme Court held that the dual system of civil and criminal penalties did not offend the Charter.

The approach of the judge in the *Van Der Walt* case (52 SATC 186, 1989 (2) SA 212(W)) was, it is submitted, a practical way to deal with the matter. Although the case was decided some time before the introduction of the new South African Constitution, the judge did, in effect, apply the principle that a person should not be punished twice for the same offence. He made the valid point that any financial penalty imposed in terms of the common law would go into the same financial coffers as a penalty that is imposed in terms of section 76 of the Act. It differs from the situation in which a person commits fraud against a third party. The offender can validly be charged under the common law (criminal sanctions) as well as be sued by the person he has defrauded (civil sanctions). These actions also do not offend the Constitution.

Predictably, since the *Van der Walt* case (52 SATC 186, 1989 (2) SA 212(W)), the Commissioner has not, as far as the author has been able to establish, attempted to prosecute a tax offender under the common law crime of fraud as well as impose penalties under section 76, because no further effective sanctions were imposed on the taxpayer by the Supreme Court. However, it is still theoretically possible for the Commissioner to pursue this route. It is submitted that when the Commissioner considers that it is time to warn taxpayers of the harsh penalties awaiting them for tax evasion, he could attempt to obtain the most effective publicity for his cause by prosecuting a high profile tax offender under the common law, rather than under the provisions of the Income Tax Act, especially when there is a case to be made for a jail sentence to be imposed.

It is submitted that the general approach of the magistrate (although he misguidedly imposed a heavy fine) and the judge in regard to what constitutes ‘extenuating’ and ‘aggravating’ factors for the purposes of punishing tax offenders, was and remains the correct approach.\(^2\)

\(^2\) It is submitted that if the taxpayer had appealed against the imposition by the Commissioner of the 200% penalty in terms of section 76(1) to the Special Court for Hearing Income Tax Appeals, the Special Court would probably have taken into account the extenuating and aggravating factors found by the magistrate and confirmed by the judges in the Witwatersrand Local Division of the Supreme Court to be present in the case and would have reduced the 200% penalty. “A sentence should not be excessive. A maximum punishment is intended for the worst offences of the class for which the punishment is provided. A court, in sentencing for an offence, should consider whether it may not be likely that far worse instances of the same class may in future come before it, and should keep some penalty in reserve in order to be able more severely to punish the greater offender.” Gardiner, F G and Lansdown, C W H, South African Criminal Law and Procedure, Vol. 1, 4th ed., Juta &Co, Cape Town and Johannesburg, 1939, p. 498.
4.4 The specific approach of the courts in terms of section 76 of the Act

4.4.1 Planning, deliberation and duration of evasion

The Canadian case of *R v Bertrand* ((1967), 67 DTC 5245 (Que. S. C.): p.5247) illustrates why a person who is a professional in the income tax area and who systematically commits income tax fraud should be treated more severely than an inexperienced taxpayer who occasionally tries to evade paying tax. The judge remarked:

- Whereas the offender is an accountant, who is not only acquainted with the Income Tax Act, but knows all the requirements and technicalities thereof, as it is an instrument which he uses in exercising his profession for the preparation of income tax returns for his clients;
- Whereas he deliberately falsified his returns for seven consecutive years;
- Whereas there is ground to distinguish between an unexperienced taxpayer who occasionally tries to evade part of his obligations and a professional, expert in the matter, who deliberately and systematically contravenes the Act.

The English court in the case of *R v Woodley* ((1979) 1 Cr. App. R. (S.) 141) dealt with the abuse of a special position by certain taxpayers who were directors and executives of a company. The difficulty faced by the court was to balance the need to, on the one hand, impose a severe sentence in order to reflect the seriousness of tax fraud and, on the other hand, to give the correct weight to mitigating factors. The court had the following to say (p. 143):

- . . . those who are directors and executives of limited companies and the like, those who by reason of their occupation enjoyed the privileges conferred by expense account facilities, as, indeed, they must do, are enjoying something which is denied to their fellows who are also taxpayers and they are under a heavy moral and legal obligation not to abuse their position . . .

In the final analysis the business of tax collecting cannot function in a complicated community such as ours save on the footing that the taxpayer will do his duty and tell the truth. That duty has been shamefully and extensively breached in the present case.

The South African courts have applied a similar philosophy when weighing up the aggravating factors against the extenuating circumstances brought to the attention of the court for the purposes of punishment. This philosophy was clearly followed in *ITC 1540* (54 SATC 400) in which the taxpayer “creamed off” large sums of money over a period of five years until he was investigated. During that period he invested in property, which he registered in his own name. In mitigation, he pleaded that, because he had registered the properties in his own name, it indicated that he did not appreciate that what he was doing was wrong. The court rejected this argument as a mitigating factor, but found the fact that the taxpayer had shown great business acumen, which, together with the fact that he had been in the country

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3 See *Van Der Walt v S* (52 SATC 186, 1989 (2) SA 212(W)) in which case the court faced the same dilemma.

4 Although it was not specifically stated, this plea was probably regarded as a neutral factor and therefore not taken into account.
for almost thirty years, negated his further plea that he is an immigrant who is not fluent in the English language.

In *ITC 1295* (42 SATC 19), the court regarded the cumulative effect of “innocent” omissions as an aggravating factor although no actual or implied intention to evade taxation was imputed to the taxpayer. The court observed (p. 32) that:

...although there are explanations as to the individual omissions, one must, in my view, look at the cumulative effect of all the omissions. The investigation, although it might have started off as being only into the question of the profits from the sale of the B properties, gave rise to other disclosures – some of a trivial nature, others of a more serious nature. Therefore, while looked at individually there are explanations as to these omissions, one cannot, to my mind, lose sight of the fact that in the case of each of the appellants the omissions went further than simply the profits on the sale of the B properties.

The appeal in this case involved two taxpayers and the judge remarked on the divergent business capabilities of the two taxpayers as follows (pp.28-29):

The first appellant certainly gave us the impression of being a reasonably astute businessman and a businessman of above average intelligence. He clearly has more than a working knowledge of the intricacies of operating holiday flats and of property transactions and would appear to have some knowledge, albeit perhaps limited knowledge, of some of the basic principles of taxation. The impression which we gained is that the first appellant either deliberately refrained from taking advice on whether or not these profits were taxable or was totally indifferent to the question of taking advice on this question since, having himself decided that the profits were not taxable, he no doubt had no desire whatever to be disillusioned by anybody on this score. We do accept, however, that he was bona fide of the belief that these profits would not attract tax.

In so far as the second appellant is concerned, he knew very little, if anything, about the C profits and the transactions giving rise to them, since he left this entirely in the hands of the first appellant. We accept this evidence. It is quite clear that whilst the second appellant is no doubt a successful restaurateur and knows the business which he operates very well and runs very successfully, he is a person who has never paid much attention to the administrative and accounting side of any of the businesses with which he is concerned. He is a person who seems to us to have limited knowledge of accounting and matters connected therewith and is no doubt correct when he says that he has really paid very little attention to the balance sheets of the business, he being mainly concerned with the tangible profits made by him.

The penalty originally imposed by the Commissioner on the second appellant was some 15% lower than that imposed on the first appellant. Presumably, the Commissioner was of the opinion that the blameworthiness of the second appellant was not as serious as that of the first appellant. In referring to the divergent business capabilities of the appellants, the judge, in confirming the penalties imposed by the Commissioner, was presumably also weighing up the blameworthiness of the appellants’.

5 The judge in *ITC 1295* (42 SATC 19) was criticised by the court in *CIR v Da Costa*, (47 SATC 87) for applying a wrong principle in regard to how the Special Court should approach an appeal for a remission of penalties. In spite of this criticism, it is submitted that the value of this case is not negated as regards the aspect of comparing the blameworthiness of taxpayers in similar circumstances but with differing business acumen.
Generally, it may be said that a sophisticated, premeditated, planned and businesslike evasion of taxes over a long period of time should be contrasted with an isolated, impulsive and unsophisticated evasion of taxes (R v Bertrand (1967), 67 DTC 5245 (Que. S. C.)), ITC 1540, (54 SATC 400)). Similarly, an “innocent” cumulative omission of income should be contrasted with a once-off “innocent” omission (ITC 1295, (42 SATC 19)). Taxpayers who are capable of planning sophisticated tax evasion over a long period of time or are able to abuse their special position to evade paying taxes, constitute a greater danger to the fiscus by reason of their greater capabilities (R v Bertrand ((1967), 67 DTC 5245 (Que. S. C.)), Van Der Walt v S, (52 SATC 186, 1989 (2) SA 212(W)), R v Woodley, ((1979) 1 Cr. App. R. (S.) 141)). Their sophisticated planning gives them more time to reflect before they act. It indicates that there has been a deliberate choice to engage in tax evasion. Premeditated tax evasion or abuse of a special position is generally treated in a more serious light than a once-off opportunity in which the offender merely takes advantage of an opportunity offered to him without any planning. It can be regarded as an aggravating factor or a factor that diminishes other compelling extenuating factors (Van Der Walt v S, (52 SATC 186, 1989 (2) SA 212(W)).

4.4.2 Magnitude of the evasion

In criminal law, the magnitude of the crime affects the punishment that is ultimately imposed by a court. A petty theft, such as shoplifting, that involves only a few hundred rand, cannot be compared to a bank robbery that involves millions of rand. The latter crime will dictate a more serious response by the courts. It indicates a deliberate intention to engage in criminal activities in which even a loss of life could be contemplated, as opposed to petty theft in which the thief seizes an opportunity while knowing full well that it is highly unlikely that loss of life could result from the crime.

Likewise, the magnitude of the tax involved in an offence committed under section 76(1) of the Act indicates a deliberate intention to evade the payment of tax rather than an innocent omission of taxable income. It accordingly elicits a more serious response from the court. This applies even where all other factors are equal.

In effect, section 76(1) entrenches this principle in respect of tax offences committed in terms of that section. The penalty to be imposed when all other factors are equal is directly dependent on the magnitude of the tax evaded.

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6 See ITC 1540, 54 SATC 400 in which the taxpayer “creamed off” hundreds of thousands of rands on which tax of R653 234 was evaded. A penalty of 85% was upheld by the Special Court, which commented that the penalty erred on the side of leniency. In a very similar case, the taxpayer in ITC 1331 (43 SATC 76) defrauded the fiscus of an amount of R126 590 on which a lesser penalty of 63,7% was imposed.
4.4.3 The use to which evaded taxes are put

The use to which evaded taxes are put, could disclose extenuating circumstances or, conversely, aggravating circumstances. For example, the courts will normally distinguish between money spent on high living or building up an asset portfolio and money spent for other purposes such as medical expenses or the support of dependents living on the breadline.

In *ITC 1540* (54 SATC 400:406), Melamet J. had the following to say regarding the purpose for which the evaded taxes were used:

> It is clear that the appellant was taking large sums of cash out of the butchery and using such cash to acquire assets in the name of a company and in his own name. . . It would appear therefore on the evidence that the appellant, over the years, creamed off large sums of money from his business to the detriment of the fiscus to build up investments for himself. It was suggested in argument that the fact that the properties were registered in his own name showed that he did not appreciate that he was doing wrong. This is a non sequitur if regard is had to the fact that the fiscus is dependent on accurate returns on which to base its assessments. I should point out further, that rental received from his properties was not included in his returns and it was therefore not possible from this source to establish the existence of the properties. The full amount of interest was also not included in the appellant’s returns of income.

On the other hand, the judge in *CIR v Da Costa* (47 SATC 8:96), quoting with approval from the judgement of the Special Court, referred to the taxpayer’s limited “means”, “life-style” and “. . . single-minded devotion to the task of making a living for his wife and children.”

4.4.4 Motive

The motive or intention with which a person commits a tax offence can have a bearing on the level of the penalty imposed in terms of section 76(1) of the Act. In *ITC 148* (53 SATC 99:106) Conradié J remarked in this regard:

> A full bench of the Transvaal Provincial Division held, in Commissioner for Inland Revenue v Di Cicco, 1985 (3) SA 989 (T) (per Nestadt J as he then was) that no particular form of mens rea was required for a contravention of the provisions of s 76(1). The learned judge stated that as a general proposition it would suffice for the imposition of additional tax that an omission from a return was due to carelessness or inadvertence on the part of the taxpayer. ‘The question is’ the learned judge said ‘simply whether, objectively considered, there was an omission of an amount which ought to have been included or an incorrect statement.

However, when the time comes for a court to decide on the extent of the penalty to be imposed, the establishment of the taxpayer’s motive (or lack of motive) as to why the offence was committed plays an important part. *ITC 1306* (42 SATC 147) illustrates the point that when the taxpayer has no motive or intention to evade taxes, he will be treated leniently. The taxpayer wanted to liquidate his company and declare the capital reserves of the company as a liquidation dividend. Liquidation dividends were not subject to tax at that time. The auditors, when approached to deal with the matter, distributed the assets as a dividend and then deregistered the Company instead of formally liquidating the company in terms of the provisions of the Company’s Act and thereafter declaring a liquidation dividend. In his tax return, the taxpayer did not declare the liquidation dividends as
having been received. The Commissioner imposed a penalty for this omission on the taxpayer. The taxpayer appealed against the penalty to the Special Court. The court held that a dividend received on the deregistration of a company, even if declared out of capital profits, did not qualify for exemption from normal taxation. However, because the auditors were to blame for following the wrong procedure, the court held that there was no motive or intention to evade taxes and therefore the penalty should be remitted in toto.

Similarly, in *ITC 1609 (59 SATC 72)*, the Commissioner imposed a 100% penalty (subsequently reduced by him to 30%) on the taxpayer for failing to declare commissions which, in the opinion of the Commissioner, had accrued in the year prior to their reporting. The court found that the commissions had accrued in the prior year, but remitted the penalty in toto, because there was no intention to evade taxes, nor was there any negligence on the part of the taxpayer and that to impose a penalty in such circumstances would be inappropriate.

On the other hand, it is submitted that a deliberate intent to evade taxes can reduce the moral blameworthiness of a taxpayer, depending on the bona fide and justifiable motives of the taxpayer. Although the taxpayer lost the appeal in *ITC 1423 (49 SATC 85)*, he raised a unique defence. He admitted that he deliberately under-declared his income, but his motive for doing so was political. He contended that during the time of the liberation struggle in Zimbabwe, he had been approached by the liberation forces (Zanla) and ordered not to pay taxes to the government of the day, because they were using the revenue from the taxes collected to prosecute the war against the liberation forces; that he did not sympathise with the government of the day and, in order to deprive the Government of revenue that would in turn be used to combat the achievement of independence for Zimbabwe, he had deliberately set out to underdeclare taxable income; that he gave a substantial sum of his income (in cash and material) to the liberation forces, which fact could not be revealed to the revenue authorities as this would have meant automatic prosecution of the taxpayer. The taxpayer did not keep any record of his donations to the liberation forces on the ground that he feared prosecution if the records were found by the government of the day.

Several credible witnesses testified on behalf of the taxpayer, including a former terrorist (freedom fighter) to whom he had given food and money on a regular basis and who, at the time of the trial, held a high political office in the new Zimbabwean government. The judge nevertheless found that the taxpayer had not discharged the onus of proof that he qualified for indemnity from taxes and penalties in terms of legislation introduced subsequently by the new government. Accordingly, he confirmed the penalty imposed by the Commissioner. No reference was made in the case to the effect that the political convictions of the taxpayer constituted extenuating circumstances for the purposes of remission of penalties.

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7 The auditors, a branch of a large firm, but located in a small town, were ignorant of the technical differences between the taxation consequences of a dividend arising from a liquidation as opposed to the deregistration of a company.
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It is submitted that if a South African court were to be faced with a similar situation or set of circumstances, the court would probably regard the political convictions of the taxpayer with sympathy and regard them as extenuating for the purposes of section 76(2). Although the South African Constitution guarantees that a person should not be discriminated against, the nature of the government in power at the time that the case comes to court could determine the extent of the sympathy extended to the taxpayer by the court.

4.4.5 Remorse - assistance given to the revenue authorities during the investigation, including a plea of guilty at the first opportunity

The assistance given to the revenue authorities by the taxpayer during the investigation (ITC 1295, (42 SATC 19), ITC 1540, (54 SATC 400)) as well as the taxpayer’s admission at the first opportunity that he is guilty (Van Der Walt v S, (52 SATC 186, 1989 (2) SA 212(W)) are generally regarded as extenuating circumstances. On the other hand, obstruction, lies and false trails laid by the taxpayer during an investigation or even during a Special Court hearing will not endear the taxpayer to either the revenue authorities or the courts, but such actions should not be regarded as aggravating for the purposes of sentencing (Gardiner, F G, and Lansdown, C W H, South African Criminal Law and Procedure, Vol. 1, 4th edition, Juta & Co, Cape Town and Johannesburg, 1939, p.50). Nevertheless, the courts often refer to the unhelpfulness of the taxpayer during the course of their judgement, as in ITC 1351 (44 SATC 58) in which Friedman J referred to the evidence of the taxpayer as not entirely satisfactory. The taxpayer attempted to explain the increase in his capital as winnings on horse racing, but his explanations were found to be contradictory. He also tried to convince the court that he only spent about R400 per month on living expenses. The judge dismissed this contention as follows (p.61):

The appellant, during this period of time, was living with his wife in a flat some distance away from the A business. The appellant also had a son who, as I understood his evidence, was at least for some time in a boarding school. Bearing in mind rental, electricity, clothing, school fees, transport expenses, it is straining one’s credulity to believe that a husband, wife and child could have lived in the manner suggested by the appellant over this period of time, at a little over R400 per month. In these circumstances we were not satisfied, on the evidence of the appellant, that he received either of the two amounts to which his evidence relates, either in the manner described by him, or at all.

Reasons have been advanced as to why assistance to the revenue authorities and a plea of guilty at the first opportunity constitute mitigating factors for the purposes of punishment. One of the reasons advanced is that they are “manifestations of penitence”. Other reasons advanced include: the taxpayer should be rewarded for not embarking on a lengthy trial and thereby wasting the court’s time; a less heavy

8 A similar situation could arise, for example if all the members that belonged to a right-wing organisation deliberately decided not to pay any further taxes to the Government as a result of the fact that they believed that their political rights in South Africa were all but non-existent and that the government of the day rejected outright their demand for the creation of a “boerestaat”.

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penalty would encourage guilty pleas by other taxpayers; and that it is in the public’s interest since it saves the community a great deal of expense (See Gardiner, F.G. and Lansdown, C.W.H., South African Criminal Law and Procedure, Vol. 1, 4th edition, Juta & Co, Cape Town and Johannesburg, 1939, p.500).

See also *ITC 1540* (54 SATC 400) in which case the court took into account the co-operation of the taxpayer in the subsequent investigation as a mitigating factor as opposed to the way the taxpayer was treated in *ITC 1612* (59 SATC 187). In the latter case, the court found the taxpayer to be unreliable and devious and that he aggravated the position by cynically attempting to push his luck to the extreme – he showed no contrition, and the court confirmed the 200% penalty imposed by the Commissioner.

4.4.6 Remorse – the speed with which the taxpayer settled his liability
The Canadian case of *R v Maloney* ([1942] CTC 77 (Que. Sess. Ct.)) dealt with the question of the effect, if any, that the payment of the tax in question prior to sentencing should have on the sentence. The accused taxpayer had paid the tax assessments in question shortly after they had been issued. The Court held that the early payment should have little effect in mitigating the sentence.

In South Africa, however, the early payment or settlement of the outstanding taxes could be considered to fall within the general concept of evidence of remorse and thereby qualify as a mitigating factor (See Gardiner, F.G., and Lansdown, C.W.H., South African Criminal Law and Procedure, Vol. 1, 4th edition, Juta & Co, Cape Town and Johannesburg, 1939, p.500). This applies in particular if, for example, the taxpayer realises or liquidates his assets, especially assets that were honestly obtained and attempts to pay the outstanding taxes and penalties. After all, the behaviour of the taxpayer after a “crime” has been committed is usually a better indication of his character and attitude (remorse) than what he or his advisor says about him. It also is evidence of the fact that the taxpayer has not benefited from his crime, which is also regarded as a mitigating factor (*Van Der Walt v S* (52 SATC 186, 1989 (2) SA 212(W)).

It does not matter that the taxpayer evaded taxes with deliberate intent or avoided taxes as a result of negligence or carelessness or by failing to supervise his employees correctly. If an offence has been committed in terms of section 76(1), the principle of remorse still has an effect on the final punishment. In *ITC 1486* (53 SATC 39), the court weighed the fact that the taxpayer company had benefited from the fraud committed by the taxpayer’s employees against the fact that the taxpayer had already paid its tax liability. In effect, the settlement of the tax liability before appearance in court constituted a mitigating factor.

5 Summary and conclusion
The conduct of the taxpayer before, during and after committing a tax offence has been examined. It has been established that the conduct of the taxpayer can
influence the level of the penalty or sanction imposed, because the conduct of the taxpayer may constitute extenuating or even aggravating circumstances.

It is clear that, if the taxpayer systematically commits income tax fraud (ITC 1540, (54 SATC 400)) or even “innocently” omits income over a number of years (ITC 1295 (42 SATC 19), he or she will be treated in a far more serious light than someone who only occasionally attempts to evade the payment of taxes. Similarly, a professional or director of a company or businessman who evades taxes with a sophisticated, premeditated and businesslike approach is held to be more culpable than an inexperienced taxpayer who uses an impulsive and unsophisticated approach (ITC 1295 (42 SATC 19), R v Bertrand, ((1967), 67 DTC 5245 (Que. S. C.) and R v Woodley, ((1979) 1 Cr. App. R. (S.) 141)).

The magnitude of the evasion also has a decided effect on the extent of the penalty imposed. The larger the evasion, the more severe the penalty (Section 76(1) of the Act, ITC 1540, (54 SATC 400) and ITC 1331, (43 SATC 76)).

The use to which the evaded taxes are put, can constitute extenuating circumstances. If the evaded taxes were used to provide support needed by a taxpayer’s family rather than for “high” living, extenuating circumstances could be found to be present in the former case (compare CIR v Da Costa (47 SATC 87) to ITC 1540, (54 SATC 400)).

The motive of the taxpayer when evading taxes could also play a part (ITC 1306, (42 SATC 147) and ITC 1609, (59 SATC 72)). Even a political motive could, in the future, be regarded as extenuating, provided that the political motive is bona fide (ITC 1423, (49 SATC 85)).

There have been incidences in which the assistance given to the revenue authorities during an investigation, a plea of “guilty” at the first opportunity and the speed with which the tax liability is settled (Van Der Walt v S, (52 SATC 186, 1989 (2) SA 212(W)) and ITC 1486, (53 SATC 39)), indicated remorse by the taxpayer, which factors were regarded as extenuating. On the other hand, lies, obstruction, false trails or contesting a case without any real hope of succeeding or unnecessarily prolonging the trial of a relatively simple case, will not endear the taxpayer to the Court (ITC 1612, (59 SATC 187) and ITC 1351, (44 SATC 58)). The words of Watkins L.J. in R v Ford ((1981) 3 Cr. App. R. (S.) 15:17) are instructive in this matter. He said that a person who cheats the Receiver and lies when caught “must be led to expect punishment when the truth is laid bare”.

Generally, therefore, it may be concluded that the conduct of the taxpayer, including his motives and a show of remorse, can, in the appropriate circumstances, be regarded as “extenuating” for the purposes of remission of penalties, both in terms of section 76(2) of the Act and the common law.
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