DLA CLIFFE DEKKER HOFMEYR

TAX ALERT

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WHEN DOES A PENALTY CONSTITUTE A CRIMINAL SANCTION

The Canadian Tax Court delivered judgment in the interesting case of *Guindon v The Queen 2012 TCC 287* on 2 October 2012.

The interesting points flow from the facts, which are as follows:

Guindon, the appellant, was a lawyer practising in Ontario, Canada. She mainly practised family law and wills and estates law. She had no expertise in income tax law. In 2001, she was asked by certain principals to give an opinion on a rather complicated structure, called a leveraged donation structure, which was aimed at procuring a tax reduction for participants. The structure involved the purchase of timeshare units in a property scheme in the Turks and Caicos Islands through a Canadian trust, the distribution of the units to the beneficiaries and the donation by the beneficiaries of the units to a charitable organisation for a 'charitable donation tax receipt' for the fair market value of the units. The appellant signed the legal opinion.

The appellant was also the president of a particular charitable organisation, and the board of the charitable organisation agreed to participate in such a scheme in that it would issue tax receipts for units donated to it. However, the units were never properly created and never properly donated to the charitable organisation. The appellant, as president of the charitable organisation, in any event signed tax receipts (134 of them) in respect of the ostensible donations.

The Canadian Revenue Authority disallowed nearly all of the beneficiaries' claims in respect of the tax receipts and the attendant tax reductions.

They also took action against the appellant and penalties were imposed on her in terms of the Canadian tax legislation in the amount of $546,j747 for making false statements relating to a charitable donation arrangement.

The particular provision of the Canadian tax legislation penalises third parties (such as tax advisers) who knowingly or negligently make false statements in circumstances where the 'culpable conduct' is too serious for a normal penalty, but stopped just short of requiring a criminal prosecution

The appellant appealed against the imposition of the penalty on the basis that the imposition of such a substantial penalty is tantamount to punishment for a criminal offence and that she should be entitled to the protection afforded under s11 of the Canadian Charter of Rights. This provision entails the right to be presumed innocent unless the contrary is proved beyond a reasonable doubt.

The Canadian Revenue Authority had obviously used the civil standard of proof, ie a balance of probabilities, in reaching a conclusion as to her conduct and imposing the penalty.

The appellant relied on the Canadian Supreme Court case *R v Wigglesworth [1987] 2 SCR 541*, where the court held that s11 rights apply in the case of "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 court agreed with the argument and essentially held that the relevant provision should be regarding as creating a criminal offence because "it is so far-reaching and broad in scope that its intent is to promote public order and protect the public at large rather than to deter specific behaviour and ensure compliance with the regulatory scheme of the Act".

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The court accordingly upheld the appeal on the basis that the civil standard was used to impose the penalty and not the more onerous 'beyond reasonable doubt' standard. The assessment was overturned.

It is expected that the Canadian Revenue Authority will appeal the decision.

Alastair Morphet

CRIMINAL OFFENCES UNDER THE TAX ADMINISTRATION ACT: GUILTY UNTIL PROVEN INNOCENT

The Tax Administration Act, No 28 of 2011 (TAA) came into effect on 1 October 2012. The TAA makes provision for various criminal offences apart from the imposition of administrative non-compliance penalties and understatement penalties. These provisions are contained in Chapter 17 (s234 to s237) of the TAA.

Some of the most pertinent criminal offences relating to taxpayers in respect of administrative issues are where the taxpayer 'wilfully and without just cause' fails or neglects to:

- register in terms of a tax Act, such as for income tax or Value-added Tax (VAT)
- notify SARS of a change in particulars;
- submit a return or another document;
- appoint a representative taxpayer and notify SARS of such appointment or change in appointment;
- retain records as required; or
- issue a document to a person, as required under a tax Act, such as a VAT invoice.

In respect of other administrative interactions with SARS, it is a criminal offence not to:

- supply SARS with information, documents or things, as required;
- answer fully or truly any questions posed by a SARS official;
- take an oath or make a solemn declaration, as required, such as at an official enquiry;
- attend and give evidence;
- comply with a directive or instruction issued by SARS; or
- give assistance to SARS to conduct an audit or criminal investigation at the taxpayer's premises.

Under common law, fraud is defined as the intentional making of an unlawful misrepresentation that actually causes or potentially can cause another person to act to his or her detriment. Most cases of tax fraud would probably fall within the scope of this definition, however, the TAA provides specifically for certain fraud-like acts to constitute statutory crimes. These include the wilful submission of a false certificate or statement in respect of returns or financial statements or accounts. It also includes the wilful issue of an erroneous, incomplete or false document that is required to be issued under a tax Act (such as a VAT invoice).

The crimes mentioned thus far carry a penalty of a fine or maximum imprisonment of two years.

Staying in the realm of fraud, Chapter 17 also contains s235, which specifically deals with tax evasion and obtaining undue refunds. The section is virtually the same as its predecessor, s104 of the Income Tax Act No 58 of 1962 (ITA). Section 235 of the TAA provides that it is a criminal offence for a person, with the intent to evade tax or assist another person to evade tax or obtain an undue refund, to:

- make a false statement in a return or document, or sign a return or document containing such a false statement, without reasonable grounds for believing the statement to be true;
- give a false answer to a request for information from SARS;
- prepare, maintain or authorise the preparation or maintenance of false books of account or other records, or falsified or authorises the falsification of books of account or other records;
- make use of, or authorise the use of, fraud or contrivance; or
- make any false statement for the purposes of obtaining any refund of or exemption from tax.

The penalty in respect of such a crime is a fine or imprisonment of up to five years.

Section 235(2) of the TAA contains a so-called 'reverse onus' (the same as s104(2) of the ITA). It essentially provides that where a person is accused of making a false statement (as discussed above), that person will be regarded as guilty unless that person can prove that there is a reasonable possibility that he or she was ignorant of the falseness of the statement and that the ignorance was not due to negligence on his or her part.

This provision stands in direct contrast to s35(3)(h) of the Constitution, which specifically guarantees an accused person to be presumed innocent as part of his or her right to a fair trial.

It is alarming to note that SARS has decided to retain the reverse onus provision in the context of our Constitutional dispensation. This provision is sure not to go unchallenged in court.

Heinrich Louw

DLA CLIFFE DEKKER HOFMEYR

CONTACT US

For more information about our Tax practice and services, please contact:

Emil Brincker
Director
National Practice Head
T +27 (0)11 562 1063
E emil.brincker@dlacdh.com

Alastair Morphet
Director
T +27 (0)11 562 1391
E alastair.morphet@dlacdh.com

Andrew Seaber
Senior Associate
T +27 (0)11 562 1768
E andrew.seaber@dlacdh.com

Ben Strauss
Director
T +27 (0)21 405 6063
E ben.strauss@dlacdh.co

Heinrich Louw
Associate
T +27 (0)11 562 1085
E heinrich.louw@dlacdh.com

Johan van der Walt
Director
T +27 (0)11 562 1177
E johan.vanderwalt@dlacdh.com

Tessmerica Moodley
Associate
T +27 (0)21 481 6397
E tessmerica.moodley@dlacdh.com

Ruaan van Eeden
Director
T +27 (0)11 562 1086
E ruaan.vaneeden@dlacdh.com

Carmen Moss-Holdstock
Associate
T + 27 (0)11 562 1614
E carmen.moss-holdstock@dlacdh.com

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg

T +27 (0)11 562 1000 **F** +27 (0)11 562 1111 **E** jhb@dlacdh.com

CAPE TOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town

T +27 (0)21 481 6300 **F** +27 (0)21 481 6388 **E** ctn@dlacdh.com

www.cliffedekkerhofmeyr.com