PL MINES (PVT) LTD

versus

ZIMBABWE REVENUE AUHORITY

SPECIAL COURT FOR INCOME TAX APPEALS

KUDYA J

HARARE 24 September 2014 and 21 May 2015

**Tax Appeal**

*AP de Bourbon*, for the appellant

*T Magwaliba*, for the respondent

KUDYA J: This is an appeal against the decision of the respondent declining to remit in full the penalty imposed against the appellant for erroneously claiming capital redemption allowances in its tax returns between 2007 and 2012.

Background

The appellant was subjected to tax audits for the period between 2004 and 2010 that resulted in some tax adjustments. Apparently, the failure to comply with the prevailing tax laws emanated from certain undertakings made by the Ministry of Mines to exempt the appellant from paying certain taxes that it would otherwise have paid. A number of interactions between the parties before me took place. The appellant conceded that it was proper for the respondent to impose normal taxes on the putative exemptions as such undertakings were not strengthened by legal instruments in the form of statutory instruments or legislative provisions.

On 28 September 2012, the appellant objected to the imposition of additional tax and interest charged on principal taxes on the delayed payments. The Commissioner General of the respondent partially allowed the objection on the additional tax after he “found no justification in waiving the full penalty considering that appellant was well aware of the correct position as advised by the Authority but based on the circumstances surrounding this case, (he) further reduced the penalty to 5%”. The objection on interest was disallowed in full and was appealed to the High Court and is therefore not before me for consideration.

In terms of s 65 of the Income Tax Act [*Chapter 23:06]* the appellant filed the notice of appeal on 4 January 2013, as supplemented by the amended notice of appeal filed by consent on 1 July 2014 and duly granted on 10 July 2014. The appeal is against the partial reduction of the additional tax imposed by the appellant from 8 per cent to 5 per cent. The appellant seeks full remission of the additional tax.

The grounds of appeal

The appellant raised 13 grounds of appeal. It accepted calculating its income tax liability between 2001 and 2011 under the aegis of the Fifth Schedule rather than the Twenty Second Schedule of the Income Tax Act. It averred the absence of any intention to defraud the revenue, postpone liability and evade tax and claimed to have acted in good faith by believing the undertakings made in 1994 that were reinforced in 2001 by the Government of Zimbabwe of a favourable tax dispensation that was to be promulgated into law. It further averred several other factors that allegedly justified full remission of the penalty. These were that it had a legitimate expectation that the Government of Zimbabwe would keep its word; that it had fully co-operated and timeously re-computed its income tax liability and additional profits tax in response to theissues raised during audit and that it had made open and full disclosure of the Capital Redemption Allowances, CRA, in its returns over the 12 years. It further pleaded that the penalty was heavy and burdensome in view of the severe deterioration in the economic environment since 14 January 2013and that the imposition of interest in a substantial amount fully compensated the fiscus for the time value of the additional tax chargeable. Lastly, it averred that in the absence of any misstatement, fraud or misrepresentation personal deterrence was inapplicable as it was a law abiding corporate citizen.

The facts

The facts in this matter are common ground. They are gleaned from both the appellant and respondent’s cases and the rule 11 documents. The rule 11 documents must be filed with the respondent’s case. This was not done. At the hearing of this matter on 24 September 2014, Mr *Magwaliba*, for the respondent applied to file these documents by end of business on 3 October 2014. Mr *de Bourbon*, for the appellant, consented to the application. I duly granted the application. The documents were only filed by the Commissioner on 8 April 2015. The attitude of the respondent in regards to the filing of rule 11 is unacceptable. The respondent must comply with the rules. These documents constitute the basic record of proceedings of the Commissioner on which his decision to fully or partially allow or disallow an objection raised by a taxpayer is based. They represent the record of the interaction between the taxman and the taxpayer culminating in the response to the objection appealed against. Rule 11`documents assist the appeal court to appreciate the factual and legal contentions made by each party that give rise to the appeal in this Court. It is imperative, in all cases, for the Commissioner to comply with the rules.

The facts are therefore these.

1. The appellant mines and processes platinum group metals consisting of platinum, palladium, rhodium, gold, nickel, copper and cobalt in two districts in Zimbabwe in terms of a special mining lease number 1, SML1, covering the geographic area of approximately 6 373 hectares issued under the Mines and Minerals Act [*Chapter 21:05]* on 24 August 1994 (Annexure 1 and its attached schedule A to the appellant’s case)and supplemented by a mining agreement, MA, executed on the same date, annexure 2).
2. The two documents sought to accord certain stated special and preferential privileges and concessions to the joint venture company between the majority shareholder ABC Minerals Zimbabwe (Pty) Ltd and the minority shareholder, the appellant. In regards to taxation the parties agreed that the appellant would be subject to the fiscal regime applicable to the mining sector in general where this regime was more favourable than that applicable to special mining leases.
3. The joint venture failed and the majority shareholder withdrew from the project in 1999.The appellant acquired the interest of the majority shareholder and invited two South African companies; a major mining house and a financial institution, to take equity in the joint venture. One of the two new shareholders agreed to finance the project. The two new shareholders and the appellant were enticed by written undertakings from the Government of Zimbabwe, represented by the Ministry of Mines and Energy to participate and remain in the project. The sweetheart deal was memorialised on 20 December 1994 in the Framework for an Agreement between the holding company of the appellant and the Government of Zimbabwe, annexure 3 to the appellant’s case. It was further reaffirmed in letters from the Ministers of Mines and Energy of 9 March 2001, annexures 4 and 5 addressed to the boards of directors of the two South African companies and of 7 September 2001, annexure 6, addressed to the board of the appellant. In terms of the definitions of companies and lessee in Clause 1.1and Clause 23.1, 23.4, 23.7 and 29.5 of the Mining Agreement the successors and permitted assigns and assignees of the initial parties to the agreement automatically became parties to the agreements.
4. Clause 7.1 of the Mining Agreement provided for the conditions that had to be fulfilled before the appellant could invoke the most favoured status. The first was that these were to be legislated. The second was that pending such legislation, the parties were to agree on utilising existing legislation to implement the envisaged most favoured status set out in Clause 7.2 and 7.3 of the Mining Agreement. The third was that pending the interim agreement and legislation the prevailing taxation provisions in the Income Tax Act applied to the appellant.
5. The sweetheart undertakings in the three letters, annexures 4, 5 and 6promised to accord the appellant a fiscal dispensation applicable to the general mining sector in those instances where it was more favourable than in the special mining lease. Paragraph 1.4 of the Framework Agreement stated that:

“The Government of Zimbabwe shall provide a legal and fiscal regime acceptable to the appellant and its financiers, either by way of the proposed new fiscal legislation for the mining industry or by way of existing legislation pertaining to the joint venture, but extended to include the operations of the NOM.”

The letters of 9 March 2001 invoked the immediate application of “the new fiscal framework already enacted in relation to 25 per cent income tax rate and any future lower rates for both income tax and additional profits tax, capital allowances, indefinite carry forward of assessed income tax losses, debt to equity ratio of 3:1, arm’s length interest rates and Minerals Marketing Corporation of Zimbabwe exemptions. In annexure 6 to appellant’s case the Minister indicated that the most favoured status had not yet been enacted in the new fiscal regime and concluded the letter by stating that the “mining operations of the appellant will be accorded more favourable fiscal benefits applicable to the entire mining sector as and when such benefits are granted”.

1. On 23 August 2005, the Secretary for the Ministry of Mines and Mining Development (Annexure A to the Commissioner’s case)in response to the appellant’s correspondence of 17 June 2005 on the issue of non-resident shareholders withholding tax in respect of dividend distribution from mining operations of the appellant clarified the effect of the undertakings in the agreements of 24 August 1994, the Framework Agreement of 20 December 1994 and the three letters of 9 March and 7 September 2001. He stated that the undertakings were subject to legislation. He further indicated that the best endeavours of the Executive arm of Government (both Ministries of Finance and Mines) failed to move parliament to pass such legislation as envisaged in Appendix A to the Agreement. The effect of such failure being that the appellant was not granted the most favoured status envisaged in the undertakings. It remained subject to the prevailing fiscal provisions in the Income Tax Act. He indicated that he had written to the respondent to collect the relevant tax due from the appellant and recommended to the Ministry of Finance to amend GN 451 of 1996 to substitute the appellant for the original owners as the approved holder of the special mining lease. He called upon appellant to initiate review of clause 7 and the agreement and thus invoke the interim arrangements envisaged in those provisions in order to utilise existing legislation to achieve the most favoured taxation status.
2. The letter to the respondent, annexure B to the Commissioner’s case, copied to the Secretary for Finance, essentially indicated that the appellant was in regards to the withholding tax subject to existing legislation pending promulgation of legislation incorporating the provisions in the 1994 agreements and 2001 letters. It pointed out that existing legislation GN 451 of 1996 did not cover non-resident shareholders tax envisaged in Appendix A to the agreement. In conclusion, the letter indicated that the appellant was liable for taxation under the provisions of the Income Tax Act applicable to special mining leases.
3. The appellant duly paid the withholding tax it had hitherto disputed on the basis of the undertakings in accordance with prevailing legislation.
4. It was common cause that since 2001, in computing its taxable income, assessed losses, capital redemption allowances and deductions, the appellant applied the provisions of the Income Tax Act applicable to general mining operations where these were more favourable than those applicable to special mining leases. Since commencing operations in 2001 it was claiming capital redemption allowances under the 5th Schedule to the Income Tax Act and deducting capital expenditure in full in the year the expenditure was incurred. This was contrary to s 15(ff) and s 22 of the Income Tax Act under which capital redemption allowances deductions are claimed in quarterly instalments over four years. This was exposed by the 2012 investigative audit conducted by the respondent.
5. On 14 January 2013 the respondent reduced the penalty from 8 per cent to 5 per cent but declined to waive interest payment.
6. In para 20 of its case the appellant averred that “the use, and not the abuse, of the tax provisions applicable to general mining operations was undertaken by the appellant with full disclosure to the respondent and was applied consistently over the period 2001 to 2011, with the full knowledge of the Government of Zimbabwe and the respondent.” The averment was disputed by the respondent. The appellant did not submit proof of such disclosure. The onus was on the appellant to establish on a balance of probabilities that it made full disclosure as alleged. It failed to discharge the evidential onus in this respect. I find that it did not make such disclosure to the respondent in its returns over the period in issue.
7. The original agreement of 24 August 1994 came into effect on the understanding that clause 7.1 would be fulfilled. The lease (Clause 1) was to operate for the lesser period between 25 years and the estimated life of the mine. It was (Clause 2) subject to renewal if the life of the mine exceeded 25 years for the lesser of 10 years or the remaining period of the estimated life of the mine on one year notice provided that the lessee remained in good standing (compliant with the agreement and other laws of the country) with a further 10 year renewal on the same conditions as the first renewal. The Mining Affairs Board was obliged to notify the lessee of its reasons for declining renewal to enable representations to be made before final refusal could be made.
8. The resolution of any dispute arising from the agreement was governed by Clause 28. The parties envisaged that all disputes would in the first instance be determined by negotiation failing which some would be referred to conciliation and others to arbitration. An arbitration tribunal constituted in terms of the mining agreement was mandated to determine disputes between the appellant and the Government of Zimbabwe. The agreement also provided that disagreements on financial plans and loans (Clause 9.20)and on commercial competitive prices for sale of minerals between the appellant and the Minerals Marketing Corporation of Zimbabwe(Clause 10.1.7) and on fair market prices and fair market values for metals and corollary services such as processing, transportation, marketing and disposals (Clause 11.3) would be referred to a Sole Expert as defined in Clause 1.1 at the instance of any party 60 days after negotiation had failed. The appointment method and qualifications of arbitrators and the seat of arbitration which included the involvement of The London Court of International Arbitration were spelt out.
9. The clauses that governed taxation issues were mainly clause 6.1.d of the mining agreement that defined the appellant’s total tax liability as the “tax liability of the companies for Income Tax and APT based exclusively on income derived from mining operations under the SML to which this agreement relates”; clause 7 that I will shortly reproduce in full and clause 17.5 that provided that “taxation statutes take precedence over accounting and auditing procedures agreed”. Clause 7 states that:

“Clause 7: Taxation

7.1 The companies understand and accept that Government shall take appropriate steps, within a period of six (6) months after the date of this agreement, or such longer period as the parties may agree, to amend the Income Tax Act [Chapter 181] as necessary with effect from the effective date, to provide for a special income tax and APT regime to be applicable to all companies carrying out mining operations under or pursuant to special mining leases, including the lessee and the two companies which are signatory to the agreement. The legislation will reflect the main principles set out in a document entitled “ MAIN PRINCIPLES OF PROPOSALS FOR TAXATION ARRANGEENTS FOR HOLDERS OF SPECIAL MINING LEASES TO BE REFLECTED IN LEGISLATION” attached as annexure A to the letter of even date with this agreement to the lessee and the companies from the Ministry of Mines and accepted by them. The following sub-clauses 7.2 and 7.3 are therefore agreed subject to the promulgation of the relevant amendments as anticipated. In the event that such legislation is not promulgated within the agreed period, the parties, in good faith shall review this clause 7 and the provisions of the agreement affected by non-promulgation of the amendments, and seek to agree on a mechanism, within the scope of existing legislation, to achieve substantially the same economic and fiscal effect. Pending agreement on such mechanism the provisions of the Income Tax Act [Chapter 181] shall apply.

2. During the initial term of this agreement, if in respect of any tax year for which APT is not payable, the applicable rate of income tax with respect to special mining leases exceeds the rate of income tax applicable to special mining leases on the effective date the parties agree to make the necessary adjustments to the relevant provisions of this agreement to ensure that the combined liability for royalty and income tax of the companies is restored to the level of liability which would have been incurred if the rate of income tax applicable on the effective date of this agreement had applied.

3. For the purpose of assessment of liability for APT under the Income Tax Act [Chapter 181], the first accumulation rate shall be twenty (20) per cent and the second accumulation rate shall be twenty-five (25) per cent.

4. Except as provided hereinabove and clause 6, the lessee and the companies shall be subject to taxes and charges in effect in Zimbabwe from time to time that are of general application and that are applicable, on a non-discriminatory basis, to holders of special mining leases and companies carrying out mining operations

(Underlining my own for emphasis)

**THE LAW**

Legislative provisions

The imposition of additional tax is found in s 46 of the Income Tax Act. It reads:

“**46 Additional tax in event of default or omission**

(1) A taxpayer shall be required to pay, in addition to the tax chargeable in respect of his taxable income—

(*a*) not applicable –default return

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

(*c*) if he makes any incorrect statement in any return rendered by him which results or would, if accepted, result in the calculation of the tax at an amount which is less than the tax properly chargeable, an amount of tax equal to the difference between the tax as calculated in accordance with the return made by him and the tax properly chargeable if the incorrect statement had not been made;

(*d*) (not applicable) if he fails to *disclose* in any return made by him any facts which should be disclosed and the failure to disclose such facts results in the calculation of the tax at an amount which is less than the tax properly chargeable, an amount of tax equal to the difference between the tax as calculated in accordance with the return made by him and the tax properly chargeable if the disclosure had been made;

(*e*) not applicable

(*f*) not applicable

(1a) Where a taxpayer, having previously been required to pay any additional tax in terms of subsection (*a*), (*b*), (*c*), (*d*) or (*e*) of subsection (1), makes any default or omission or does any act or thing that would again render him or her liable for payment of additional tax in terms of the same or a different paragraph of that subsection, he or she shall be required, in addition to the tax chargeable in respect of his or her taxable income, to pay an amount of tax equal to twice the amount payable in terms of subsection (1)(*a*), (*b*), (*c*), (*d*), (*e*) or (*f*) as the case may be.

(3) The powers conferred upon the Commissioner by this section shall be in addition to any right conferred upon him by this Act to take proceedings for the recovery of any penalties for evading or avoiding assessment or the payment of tax or attempting to do so.

(4) Any taxpayer who, in determining his taxable income as disclosed by his return, deducts any amount the deduction of which is not permissible under the provisions of this Act, or shows as an expenditure or loss any amount which he has not in fact expended or lost, shall be deemed for the purposes of this section to have omitted such amount from his return.

(6) If the Commissioner considers that the default in rendering the return was not due to any intent either to defraud the revenue or to postpone the payment by the taxpayer of the tax as chargeable, or that any such omission incorrect statement or failure to disclose facts was not due to any intent to evade tax on the part of the taxpayer, he may remit such part or all of the said additional amount for which provision is made under this section as he may think fit.”

In my view, the provisions of s 46 (1)(a) to (f) are disjunctive. This view is further reinforced by the wording of subs (1a). Section 46 (1) (b) and (c) as read with subs (4) apply to the present matter. The appellant omitted from his return the amount deducted as capital redemption allowances in the year it was incurred instead of spreading it over a four year period (omission).As a result, it also submitted an incorrect statement (1) (c). In addition, it would also be liable if it failed to disclose information or facts (non-disclosure) which would result in a lesser charge (1) (d.)

Notwithstanding contrary averments in paras 30, 31 and 37 of the Commissioner’s case that the appellant intended to evade tax by relying on the undertakings after the letter of 23 August 2005 from the Secretary of Mines in respect of the payment of non-resident shareholders withholding tax, which it then paid thereafter and in subsequent years, Mr *Magwaliba* conceded on the facts and in argument that the appellant did not intend to defraud the revenue, or to postpone the payment of the tax or evade tax. The concession was in line with the attitude of the respondent in the meeting held with the appellant on25 September 2012 (see letter of 28 September 2012 page 6 and 7) where the Commissioner first agreed to impose an 8 per cent penalty before reducing it to 5 per cent. In response to the letter of objection of 28 September 2012, the respondent determined in regards to penalties that:

“According to the information submitted to me, the appellant was subjected to tax audits between 2004 and 2010 resulting in some tax adjustments. The main reason advanced by the appellant for non-compliance was that it relied on undertakings made by the Ministry of Mines to grant tax exemptions of which this did not materialise. During these audits, there were a number of interactions between the appellant and the Zimbabwe Revenue Authority. In this case, it was highlighted to the appellant that the tax exemption undertakings made by the Ministry of Mines did not constitute Statutory Instruments and are therefore of no effect at law.

In the light of the above I am of the view that the appellant should have caused some tax adjustments in all affected areas after that awareness, in order to regularise the position and to comply with the Income of the Income Tax provisions.

I have therefore found no justification in waiving the full penalty considering that the appellant was well aware of the correct position as advised by the Authority. However, based on the circumstances of this case, I have further reduced the penalty to 5%. The ground of objection is hereby partly allowed to the extent of this reduction.”

The import of s 46(6) is that the Commissioner cannot reduce the penalty where the taxpayer defaulted in rendering a tax return with intent to defraud the revenue or postpone the payment of tax chargeable or omitted to render a return or submitted an incorrect return or failed to disclose facts with intent to evade tax. The import of imposing an 8 per cent penalty that was subsequently reduced to 5 per cent was an admission by the Commissioner of the absence of any intention by the appellant to evade tax as contemplated in s 46 (1) (b) and (c). The above sentiments find resonance in the local case of *ITC No 1334* (1981) 43 SATC 98 at 106 where Squires J observed that:

“The statement that the vehicle was part of appellant’s assets for the 1976 financial year therefore being incorrect, the next issue is whether it has been shown that this was not done with intend to evade the payment of tax. Counsel were agreed, rightly in my view that if this was the intent, then the commissioner, and therefore the court, has no discretion to remit any part of the penalties: but that if there were no special intent, then a discretion to leave the penalties in force either in full or in part, would nevertheless remain.”

In *CSARS* v *Brummeria Renaissance (Pty) Ltd & Ors* 2007 (6) SA 601 (SCA) at paras 26 and 27 Cloete JA held that:

“[26] It seems to me that these competing contentions must be resolved by having regard to the purpose underlying ss 79(1) and 81(5), which is obviously to achieve finality. To uphold either of the Commissioner's contentions would undermine that purpose. It is obviously in the public interest that the Commissioner should collect tax that is payable by a taxpayer. But it is also in the public interest that disputes should come to an end - interest *rei publicaeut sit finis litium*; and it would be unfair to an honest taxpayer if the Commissioner were to be allowed to continue to change the basis upon which the taxpayer were assessed until the Commissioner got it right - memories fade; witnesses become unavailable; documents are lost. That is why s 79(1) seeks to achieve a balance: it allows the Commissioner three years to collect the tax, which the Legislature regarded as a fair period of time; but it does not protect a taxpayer guilty of fraud, misrepresentation or non-disclosure. If either of the Commissioner's arguments were to be upheld, this balance would be unfairly tilted against the honest taxpayer.

[27] In my view, once the Commissioner changed the entire basis of the assessment in the further revised assessments, he allowed Brummeria's objection to the revised assessments in full as contemplated in s 81(5) and, as no fraud, misrepresentation or non-disclosure is relied upon, that is the end of the matter. I therefore consider that the Commissioner was precluded by the provisions of s 79(1) read with s 81(5) of the Act from raising the assessments against Brummeria for the tax years 1996, 1997, 1998 and 1999 which he did in the further revised assessments.”

The attempt in the respondent’s case to breach the limits of his findings by suggesting that the appellant did so with intent to evade tax or attempted to evade tax, from the sentiments expressed in *Brummeria’s* case, appears impermissible. The dilemma I face in this matter is based on the other submission made by the appellant based on the sentiments of Davis J in *ITC No 1725,* (2000) 64 SATC 223 at 235 that:

“On appeal this court is obliged to determine the matter according to its own discretion. *Commissioner for Inland Revenue v Da Costa* 1985 (3) SA 768 (A), 55 SATC 198 at 206.The section envisages two enquiries-

1. Was there an intention to evade
2. If so, there can be no remission unless extenuating circumstances have been found”

See Melamet J in *ITC 1331* (1981) 43 SATC 76 at 83. Davis J did not decide whether the taxpayer intended to evade tax but assumed that the Commissioner correctly found that the taxpayer lacked such an intention. He, however, dismissed the submission that illiteracy justified the reduction of the penalty imposed of 67.3% of the additional tax chargeable. To the same effect was Conradie J in *ITC 1489* 53 SATC 99 at 103.

While in South Africa the Commissioner or on appeal the Special Court is required to investigate the existence of extenuating circumstances, in Zimbabwe once the intention to evade tax is found, in the words of Squires J in *ITC 1334* above, there would be no remission. My reading of *ITC 1725* is that I am in an appeal of this nature, which is a full and unrestricted rehearing, not bound by the findings of the Commissioner. Rather, I am obliged to enquire and make a finding on whether the appellant intended to evade tax.

The only useful discussion I have found that assists me determine this question is found in the head note of the South African case, *ITC 1577,* 56 SATC 236. The full judgment is in Afrikaans, a language I am not conversant with. In that case, the Commissioner found extenuating circumstances and imposed the penalty of 100 per cent of the additional tax chargeable in the sum of R135 757 and interest in the sum of R85 744. On appeal Howie J confirmed both the penalty and the interest. He held that a taxpayer intends to evade tax if:

1. it is his aim to so act and thereby bring about tax evasion-“direct intent”; or
2. he acts in circumstances which that intention where evasion is not his closest aim but when achieving his aim it is necessary or certain or unavoidable-“awareness of certainty” or
3. he acts with that intention when evasion is a possible result of achieving his aim and in spite of that possibility pursues his objective, that is he reconciles himself to the risk of evasion possibly occurring-“awareness of possibility”.

The approach of Howie J reminds me of the modern test for actual and legal intention in murder cases set out by Chidyausiku CJ in *S* v *Mugwanda* 2002 (1) ZLR 574 (S) at 581A-F. All one has to do is to substitute tax evasion for murder and lower the onus from beyond a reasonable doubt to a balance of probabilities. The direct intent would equate with the actual desire of the taxpayer while awareness of certainty would be the same as substantial certainty and awareness of certainty would be much like subjective foresight exercised with reckless abandon.

It seems to me that my duty on appeal is not to review the decision of the Commissioner but to exercise my own discretion. In doing so I will seek to evaluate whether on the facts the appellant intended to evade tax notwithstanding the contrary admission of the Commissioner and concession of Mr *Magwaliba*.

I agree with the appellant’s submission that while s 46 of the Income Tax Act does not use the word penalty but refers to additional tax, it is now settled law that this additional tax is in essence, an administrative non-compliance penalty. It is imposed for deliberate evasion, careless and inadvertent omissions and misstatements on the part of the taxpayer. In *CIR* v *Di Ciccio* 1985 (3) SA 989 (T) at 993E-G Nestadt J held that no particular form of *mens rea* was required. All that the Court has to decide is whether objectively, an amount which ought to have been included was omitted or whether an incorrect statement was rendered. See also *CIR* v *McNeil* 1959 SA (1) 481 at 487E-G and *Israelsohn* v *CIR* 1952 (3) SA 529 (A) at 539-40.

The issue

The issue referred to trial on 10 July 2014 was whether or not the penalty imposed was justified in the circumstances.

The onus

Mr *Magwaliba* both in his written heads of argument and oral submissions submitted that the onus was on the taxpayer to establish that the respondent either misdirected himself or made an error of law or acted *mala fides* in arriving at the penalty he did. He contended that since these factors were not alleged and proved, the decision of the respondent should remain intact. He relied firstly on s 63 of the Income Tax Act which reads:

“**63 Burden of proof as to exemptions, deductions or abatements**

In any objection or appeal under this Act, the burden of proof that any amount is exempt from or not liable to the tax or is subject to any deduction in terms of this Act or credit, shall be upon the person claiming such exemption, non-liability, deduction or credit and upon the hearing of any appeal the court shall not reverse or alter any decision of the Commissioner unless it is shown by the appellant that the decision is wrong.”

In dealing with a similar provision in the South African Act, Mullins J stated in *ITC 1430* (1988) SATC 50 at 56 that:

“Admittedly we are not simply restricted to deciding whether the Commissioner was right or wrong. This is a rehearing of the matter during which evidence can be led and other admissible evidence placed before us. In my view, in an appeal in terms of s 76 (2) (b), it is the duty of the Special Court itself to decide whether or not there was an intention to evade taxation as envisaged by s 76 (2), and, if so, whether extenuating circumstances are present…….In the present case, however, we have to decide not whether the Commissioner’s decision was correct or not, but how we should exercise our discretion. There seems therefore to be no logical reason why we should not consider the facts existing as at the date of the appeal in exercising our powers on appeal, under s 83 (13) (b), whether ‘to reduce, confirm or increase the amount of the additional charge imposed.”

This approach was in this jurisdiction confirmed by Smith J who stated in *ITC 1508* (1991) 53 SATC 442 at 452 that:

“Her failure to include the income from the sale of the car in her income tax return was not because she wanted to evade the payment of income tax but because she was unaware that it would, or could, be regarded as part of her gross income. ……It was not necessary for the court to find that the respondent’s decision was unreasonable before setting it aside. In hearing the appeal, the court was required to make the decision which it felt was appropriate in the circumstances. In *CIR v Da Costa* 1985 (3) SA 768 (A) at 774I Van Heerden JA said:

“It seems clear, therefore, that in cases involving the exercise of discretion by the Commissioner the Special Court on appeal to it is called upon to exercise its own, original discretion and the views expressed by Friedman J are not well-founded.”

That view has been accepted as correctly reflecting the position in Zimbabwe. In my view, the applicant has established that she genuinely was not aware that the purchase price she received on the sale of her car was an amount which she was obliged to reflect in her income tax return. On this aspect the probabilities support her *ipse dixit*.”

Mr *Magwaliba* sought further reliance on the purported approval in *Commissioner for Inland Revenue* v *Da Costa* 1985 (3) SA 768 (A) of the sentiments of Friedman J in *ITC No. 1295* at p. 30 that:

“The Secretary deals with a large number of cases of this kind. He has yardsticks by which to go and is in a far better position to decide upon appropriate remissions than this Court. Where, of course, the Secretary exercises his discretion on an incorrect basis or taking into account matters which he is not entitled to take into account, this Court will disregard the Secretary’s decision and be at large to itself decide upon an appropriate remission. Where however, the Secretary has properly exercised his discretion in a *bona fide* manner, then it seems to me that this Court will interfere only where there has been an unreasonable exercise by the Secretary of his discretion.”

I agree with Mr *de Bourbon* that Mr *Magwaliba* misconstrued the import of *Da Costa’s* case in regards to the sentiments of Friedman J both in the case he referred to and in *ITC 1351* at 63. Van Heerden JA who gave judgment for the court stated at 773I-775A that:

“ Section 76 (1) (b) provides that if a taxpayer omits from his return any amount which ought to have been included therein, he shall be required to pay in addition to the tax chargeable in respect of his taxable income,

‘an amount equal to twice the difference between the tax as calculated in respect of the taxable income returned by him and the tax properly chargeable in respect of his taxable income as determined after including the amount omitted.’”

Subsections 2 (a) and (b) read as follows:

“(a) The Commissioner may remit the additional charge imposed under ss (1) or any part thereof as he may think fit: Provided that, unless he is of the opinion that there were extenuating circumstances, he shall not so remit if he is satisfied that any act or omission of the taxpayer referred to in para (a), (b) or (c) of ss (1) was done with intent to evade taxation.

(b) In the event of the Commissioner deciding not to remit the whole of the additional charge imposed under ss (1), his decision shall be subject to objection and appeal."

Section 83 (13) (b) provides that, subject to the provisions of the Act, in the case of any appeal against the amount of the additional charge (the penalty) imposed under s 76 (1) the Special Court may reduce, confirm or increase the amount of the penalty.

With regard to the discretion conferred upon the Commissioner (previously the Secretary) by s 76 (2) (a), FRIEDMAN J said in *Income Tax Case No 1295* at 30:

“The Secretary deals with a large number of cases of this kind. He has yardsticks by which to go and is in a far better position to decide upon appropriate remissions than this Court. Where, of course, the Secretary exercises his discretion on an incorrect basis or by taking into account matters which he is not entitled to take into account, this Court will disregard the Secretary's decision and be at large to itself decide upon an appropriate remission. Where, however, the Secretary has properly exercised his discretion in a *bona fide* manner, then it seems to me that this Court will interfere only where there has been an unreasonable exercise by the Secretary of his discretion. In order, however, to decide what is or is not an unreasonable exercise of discretion, it is, as I have already indicated, necessary for this Court itself to decide what it regards as an appropriate remission and if there is a significant difference between that which this Court regards as appropriate and that which the Secretary has decided is appropriate, this Court is entitled to infer that there has been an unreasonable exercise by the Secretary of his discretion and will interfere.

In this regard it seems to me that the position is not entirely different from that of, for example, a Court of appeal hearing an appeal in a criminal case against a sentence imposed by a lower court,..."

In *Income Tax Case No 1351* at 63 Friedman J reiterated his view and added:

“It seems to me... that where one is concerned with a permitted appeal against the exercise by the Commissioner of a discretionary power, then the approach of this Court should be similar to that adopted by appeal Courts in general when considering appeals against decisions involving the exercise by the Court *a quo* of a discretion.”

In my view the above passages cannot be reconciled with the approach of this Court in *Rand Ropes (Pty) Ltd v Commissioner for Inland Revenue* 1944 AD 142. With reference to the provisions of the Income Tax Act 40 of 1925 CENTLIVRES JA said (at 150):

“That the Legislature apparently thought that it was necessary to give a special right of appeal in cases where a matter is left to the discretion of the Commissioner appears from a number of instances where that special right is conferred.... In all these cases it seems to me that the Legislature intended that there should be a re-hearing of the whole matter by the Special Court and that that Court could substitute its own decision for that of the Commissioner. For, as CURLEWIS JA pointed out in *Bailey v Commissioner for Inland Revenue* 1933 AD at 220, the Special Court is not a Court of appeal in the ordinary sense: it is a Court of revision.”

It seems clear, therefore, that in cases involving the exercise of a discretion by the Commissioner the Special Court on appeal to it is called upon to exercise its own, original, discretion and that the views expressed by FRIEDMAN J are not well-founded. That much was indeed common cause at the hearing of this appeal.”(Underlining my own for emphasis.) And since the appeal is directed against the penalty determined by the Court *a quo,* it is immaterial whether the Commissioner was entitled to delegate his function to the aforesaid committee.

It was also common cause that this Court will interfere with the determination of the extent of a penalty (or the exercise of any discretion) by a Special Court only on the limited grounds on which a value judgment of a court of first instance may be set aside or varied on appeal. Prior to the enactment of s 86A of the Act in 1976 (by virtue of Act 103 of 1976) such a determination would have been final unless it was erroneous in law: the *Rand Ropes* case at 150. Section 86A now provides for a full right of appeal against any decision of a Special Court on issues of fact or law. As was pointed out by TROLLIP JA in *Hicklin* v *Secretary for Inland Revenue* 1980 (1) SA 481 (A) at 485, such an appeal

“Is therefore a re-hearing of the case in the ordinary well-known way in which this Court, while paying due regard to the findings of the Special Court on the facts and credibility of witnesses, is not necessarily bound by them.”

Having pointed out that the section is silent about the powers of this Court in such an appeal, TROLLIP JA went on to say that it was manifestly the intention of the Legislature that this Court was to have those general powers that are conferred upon it by s 22 of the Supreme Court Act 59 of 1959. In my view, it is implicit in these *dicta* that in an appeal from a Special Court those powers should be exercised according to the principles and subject to the restrictions applicable to appeals in general. And there is indeed no reason to differentiate between an appeal from a Special Court and an appeal from a Local or Provincial Division. Unlike the position obtaining in a Special Court where a decision is given on facts which may not have been considered by the Commissioner, this Court hears an appeal from a Special Court on the record of the proceedings in that Court. It follows that, if a decision of a Special Court is based on the exercise of a discretion, this Court will interfere only if the Special Court did not bring an unbiased judgment to bear on the question, or did not act for substantial reasons, or exercised its discretion capriciously or upon a wrong principle: *Ex parte Neethling and Others* 1951 (4) SA 331 (A) at 335.”(Underlining my own for emphasis)

It is clear to me that the approach of Friedman J was given short shrift. The fact that the Appellate Division dismissed the appeal did not vindicate the sentiments of Friedman J on the powers of the Special Court in appeals from the decision of the Commissioner. It approved the penalty reduction from 100 per cent imposed by the Commissioner to 30 per cent by Berman J in the Special Court as a proper and reasonable exercise of his discretion.

An appeal to this Court is a full re-hearing in which this Court exercises the same wide discretion vested in the Commissioner. This court does not exercise a restricted interference only where there is a significant discrepancy between its own decision and that of the Commissioner. See also *ITC No. 11 038* para 45 where it was held that:

“it has long been accepted that, in an appeal against the additional charge imposed under s 76 (1), the legislature intended that there should be a rehearing of the whole matter by the tax Court and that the tax Court can substitute its own decision for that that of the commissioner: i.e. the Tax Court on appeal to it is called upon to exercise its own original discretion- see *Rand Ropes (Pty) Ltd v CIR* 1944A 142 at 150; *CIR v Da Costa* 1985 (3) SA 768 (A) at 774G-J, *Meyerowitz on Income Tax* 2002.2003 para 32.40.”

The discretion is as wide “as he may think fit” with the surrounding belt of restriction being precedent and particular facts of the matter. All relevant considerations include even those at the time of hearing the appeal. In *ITC No. 1430*, 50 SATC 51 at 56 Mullins J said:

“Nor does it seem to me that the Special Court is restricted to evidence of facts existing as at the date of assessment or of imposition of the additional charges. This would be the situation in an ordinary civil or criminal appeal, where the court on appeal is confined solely to the record……There therefore seems to be no logical reason why we should not consider the facts existing as at the date of the appeal in exercising our powers on appeal…………It would, for example, require us to sit with blinkers if we were obliged to close our minds to the fact of the supervening death of the taxpayer, as well as to certain other facts to which I shall refer.”

In the present case, the meaning of clause 7 is clear to me. It precluded the appellant from claiming capital redemption allowances using the favourable tax regime in the 5th Schedule. Until the law was put in place by legislation or failing legislation, by negotiation it was obligated to apply the provisions of the 22nd Schedule in respect of claims for capital redemption allowances. The Special Mining Lease, the Mining Agreement, the Framework and the three letters of March and September 2001 did not permit the appellant to breach the Mining Agreement. Any lingering doubts the appellant may have had were dispelled by the letter from the Government of Zimbabwe of 23 August 2005. It reiterated the correct legal position.

I am satisfied that before 23 August 2005, the appellant lacked the intention to evade tax in any of the permutations discussed by Howie J in *ITC 1577*. The first two sentences in clause 7.1 of the Mining Agreement would have influenced the corporate mind of the appellant in thinking that the most favoured status though it would tarry would appear in the future backdated to the to the effective date of the agreement. The ministerial letters of 2001, the year in which operations actually commenced served to reassure the corporate mind of the appellant that the Government of Zimbabwe was pursuing the contemplated most favoured status legislation.

The letter of 23 August 2005 brought the appellant on notice that the Government of Zimbabwe had failed to promulgate the contemplated legal instruments that would usher in the most favoured tax status for the appellant. The letter directed the appellant to comply with the provisions set out in the last sentence of clause 7.1 of the Mining Agreement. The appellant partially did so by paying the non-resident shareholder withholding tax. The appellant did not pursue negotiation to review existing legislation to achieve substantially the same economic and fiscal effect nor did it deduct the capital redemption allowances in terms of the 22nd Schedule. The promise of new legislation was effectively dispelled by that letter of 23 August 2005. While the appellant may have lacked direct intent to evade tax, it cannot escape the awareness of certainty test. Its closest aim may have been to reduce the tax burden and stampede the Government of Zimbabwe to honour its promises but it must have been aware that it was in the process unavoidably evading existing taxation under the 22nd Schedule. If I am wrong in that the awareness of certainty possibility applies, it seems to me that the appellant cannot escape the awareness of possibility test. In pursuing its objective, the corporate mind of the appellant must have realised that its actions constituted tax evasion but acted in reckless disregard of that awareness. In my view, the appellant fell foul of the last two tax evasion tests propounded by Howie J in *ITC 1577, supra.* In my view, when it claimed deductions and omitted to make the proper amounts in its tax returns it must have known that it was acting unlawfully but nonetheless continued to do so with reckless abandon.

I would have found the appellant liable for payment of the double tax penalty and directed the respondent to re-assess it on that basis but for two reasons that I proceed to set out. The first is that even though Howie J found that the taxpayer in *ITC 1577* had failed to discharge the onus to establish his lack of intention to evade tax he did not upset the finding of the taxman. Rather, he used his finding as an aggravating feature for upholding the penalty and interest imposed by the taxman. The second is based on my understanding of the practice in the superior courts in regards to admissions made in pleadings by litigants and concessions seriously and deliberately made by counsel against the interest of their clients.

In regard to admissions made in pleadings by litigants, the position was set out with customary clarity by Makarau JA in *Mining Industry Pension Fund v DAB Marketing (Pvt) Ltd* SC 25/2012 atp8-9thus:

“A formal admission made in pleadings cannot be ignored by the Court before whom it is made. Unless withdrawn, it prevents the leading of any further evidence to prove or disprove the admitted facts. It becomes conclusive of the issue or facts admitted……The importance of the admission is that it is thus seen as limiting or curtailing the procedures before the Court in that where it is not withdrawn, it is binding on the Court and in its face, the Court cannot allow any party to lead or call for evidence to prove the facts that have been admitted.(See *Rance v Union Mercantile Co Ltd* 1922 AD 312*, Gordon v Tarnow* 1947 (3) SA 525 (AD), *Van Deventer v de Villiers*1953 (4) SA 72 (C*), Moresby-White v Moresby-White* 1972 (1) RLR 199 (AD) at 203E-H, 1972 (3) SA 222 (RAD) at 224, *DD Transport (Pvt) Ltd v Abbot* 1988 (2) ZLR 98 *and Liquidator of M& C Holdings (Pty) Ltd v Guard Alert (Pty) Ltd* 1993 (2) ZLR 299 (HC).

Section 36 of the Civil Evidence Act [*Chapter 8:01*] is to the same effect.

The admission in this case was apparent from the initial penalty imposed by the Commissioner of 8 percent that he later reduced to 5 per cent. It would be prejudicial and cause an injustice to the appellant were I to ignore the admission. Aligned to the concessions deliberately and seriously made by counsel, is the practice that a court is precluded from determining an issue before it based on case authority that was not referred to by any of the parties in submissions without first affording them an opportunity to make argument on it. I chanced upon *ITC 1577* while researching for this judgment. It was not referred to by any of the parties or their counsel. I accept that it would be prejudicial to the appellant were I to use it to circumvent the admission made by the respondent and the concession of his counsel.

Thus even though I would have been inclined to find the appellant liable for evading tax, I accept that I am bound by the admission and concession made by and on behalf of the respondent. Accordingly, I proceed to determine the penalty based on the admission and concession that the appellant did not intend to evade tax.

The principles governing the imposition of a penalty are well developed in our criminal law. In the case of *S* v*Zinn*1969 (2) SA 537 (A) at 540G (approved by the Constitutional Court of South Africa in *S* v *M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) para (10) and (109) the triad of the crime, the offender and the interests of society were enunciated and envisaged to holistically embrace all considerations necessary in the imposition of any penalty. The case has been applied in Zimbabwe in such cases as *S* v *Gondo* 1990 (2) ZLR 171 (S) at 173A and *S* v *Mudzamiri & Anor* 1993 (2) ZLR 43 (S) at 48A. Since this appeal constitutes a rehearing, I am not restricted by the considerations of the Commissioner. I will take into account the all the factors raised by both counsel in their respective oral and written submissions.

The offender

The appellant after extensive negotiations with the Government of Zimbabwe made massive and substantial foreign direct investments in this country in two geographic areas in Zimbabwe from 2001 when it commenced mining operations. The figures indicated on page 13 of the rule 11 documents from 2001 to 2012 of US$58 525 499-00 exploration expenditure and US$ 897 402 585-00 development expenditure aggregating US$ 955 929 084-00 constitute one-quarter of the actual financial investments. In addition the second phase of one of its project envisaged expenditure of US$500 million that would increase annual production of their product from “the current 180 00 ounces to 270 000 ounces from 2014 and increase employment by 1000 to approximately 5 000 people. It remained loyal to Zimbabwe despite the withdrawal of its former majority joint partner. Instead of following suit it courted other foreign investors and financiers. It imported expensive machinery and equipment necessary for the mining operations. It brought in various experts into the country who imparted their knowledge and skills to locals. It employed many locals in its various operations and developed local human capital. It constructed mining and social infrastructure that altered the Zimbabwean landscape. In a nutshell, it fulfilled its part of the bargain spelt out in the Mining Agreement. It was generally a law abiding and responsible corporate citizen. The success it achieved and the downstream effect of its activities to the general economy and economic and social well-being of Zimbabwe cannot be gainsaid. These phenomenal successes, in all fairness also demonstrate that the Government of Zimbabwe fulfilled almost all the conditions set out in the Special Mining Lease, Mining Agreement, and Framework for an Agreement and later the Tribute Agreement between the appellant and the Government of Zimbabwe.

The appellant fully cooperated with the respondent from the commencement of the audit. The rule 11 documents indicate the respondent notified the appellant of its failure to comply with s 22 and 25 (2) ff as read with the 22nd Schedule to the Income Tax on 17 August 2012. On 24 August 2012 the appellant took the view that it was entitled to apply the provisions of the 5th Schedule in respect of capital redemption allowances on the basis of the undertakings made by the Government of Zimbabwe and averred that it had acted in good faith in breaking the law. The parties held a meeting on 29 August 2012. On 31 August 2012 the respondent requested six documents from the appellant which were duly supplied on 5September 2012. In that letter the appellant complied with the respondent’s request to recompute its income tax for the years 2001 to 2012 based on the provisions of the 22nd Schedule on a without prejudice basis. On 12 September 2012 the respondent remained adamant that the appellant was liable under the law and that the undertakings did not constitute such a law. The respondent agreed with the computations of the appellant that the principal income tax amount due was in accordance with the schedule on page 13 of the rule 11 documents in the sum of US$36 685 956-00. The taxes due over the period were US$64 808 370-00 of which US$28 122 414-00 had been paid. The respondent also notified the appellant that he was computing the penalty and interest amounts due for presentation in due course.

On 17 September 2012 the appellant filed its objection in response to the letter of 12 September 2012. It objected to the period of re-computation and levying of penalties and interest. For the first time it accepted that the undertakings were not law and conceded owing additional tax but disputed liability for the payment of penalties and interest “as the historical calculations were made in good faith and with full knowledge of Zimra”. The appellant further agreed with the amounts computed for the 11 year period but pleaded prescription for the six years from 2001 to 2006. It engaged an independent firm of tax experts to audit compliance and shared the results with the respondent. The parties met on 19 September 2012. On the following day the appellant wrote to the respondent. The respondent conceded in that meeting that the claim for the first six years from 2001 had under s 47 (1) (ii) of the Income Tax Act, prescribed. The appellant redid the computations of liability from 2007 to 2012 (page 43 of the rule 11 documents). The less 25 per cent development expenditure for the latter six years was the aggregate of exploration expenditure of US$56 366 074-00 and development expenditure of US$792 122 470-00 resulting in total capital redemption allowances of US848 488 544.00. The total tax liability for the period was US$56 961 973-00 for which US$ 23 209 382-00 was paid. The outstanding additional tax due was in the sum of US$ 33 752 591-00.The appellant agreed to recompute additional profits tax due. It fought that battle in *P Mines (Pvt) Ltd v Zimra*HH 244/2015 and lost. It proposed a 12 month plan to settle the additional tax due by forfeiting its monthly VAT refunds of US$3 million per month plus a cash payment of US500 000.00 per month until the full debt was liquidated. The plan was based on falling cash flows, driven by the effect of the Greek debt crisis in international prices of its products from US$1 800 per ounce in August 2001 to US$1 450 per ounce as at date of the letter and difficulties at the principal South African PGM producer. It proposed to pay US$3.5 million per month to liquidate the income tax and additional profits tax due commencing at the end of October 2012.

Pages 14 to 33 of rule 11 documents constitutes various assessments raised by the respondent against the appellant on 9 October 2014, 24 December 2014 and 23 February 2015. The penalties raised on 9 October 2014 on page 14 to 17 of US$ 415 824-18 were prescribed and apparently discharged together with the additional tax chargeable of US$8 7 32 307-74 on 24 December 2014 as shown on pages 22-25 of rule 11 documents but were all reinstated on 23 February 2015 on pages 30-33 of the rule 11 documents. On 9 October 2014 the respondent issued amended assessment showing penalties aggregating US$2 828 473-00(p 18-21 of r11 documents). The penalties were revised upwards in the amended assessment of 24 December 2014 to an aggregate of US$ 3 018 498-95 on the purported completion of investigations (p 26-29 of r 11 documents).

On 25 September 2012 the parties met. The issue of prescription was agreed to and the appellant duly withdrew objection to liability for the period 2001 to 2006. The respondent accepted the payment plan in the letter of 20 September 2012. The respondent charged a penalty of 8 per cent of the principal tax payable over 12 months. On 28 September 2012 the appellant filed an amended objection. It had a US$6.1 million APT liability for the years 2007 to 2012. It withdrew the objection for the first six tax years and objected to the imposition of penalty at 8 per cent.

In regards to interest it sought the respondent’s indulgence under s 71 (2) of the Income Tax Act to extend the time for payment of additional tax without charging interest from the date of the original returns to the dates set out in the payment plan. In the alternative, it sought complete waiver of interest under s 72 (11). The final objection was dealt with on 14 January 2013. The objection on penalties was partially allowed by the reduction from 8 per cent to 5per cent while the objection on interest was disallowed in full.

I have summarised the 45 paged rule 11 documents to demonstrate that the appellant at all times fully cooperated with the tax audit. The co-operation constitutes mitigation that will be weighed in the balance in assessing the appropriate penalty. See Melamet J in *ITC 1540* 54 SATC 400. A penalty is not meant to crush the taxpayer. Mr *de Bourbon* submitted the additional tax penalty that was in the region of US$1.3 million. My calculations indicate that as at 24 December 2014 the aggregate penalties were in the sum of US$3 018 498.95. The appellant did not plead inability to pay but suggested that any such payment would cripple its operations. It agreed to settle the additional penalties and made a payment plan, in itself a sign of remorse; which again is mitigatory. In addition I recognize that the cash flow of the appellant is constrained by the deteriorating economic environment in Zimbabwe and the falling international platinum prices which at the time of writing this judgment were at US$1 157 per ounce.

The offence

It was common cause that the purpose for the penalty is to punish errant taxpayers and deter prospective wrongdoers and encourage the rendering of honest and accurate returns and thereby avoid loss of revenue to the fiscus. This was clearly stated by Mullins J in *ITC 1430* (1988) SATC 51at 54 and by Friedman J in I*TC* 1351 (1982) 44 SATC 58 at 63. Mullins J further held at p 57 that unless a taxpayer is unversed and unintelligent in the preparation of simple statements of income and expenditure the fact that the Commissioner allowed years (from 1978 to 1983) to pass before he queried such obviously inaccurate figures in order to nip them in the bud and assist the taxpayer mend his way did not constitute strong mitigatory factors. The 12 years that passed or for this case 6 years that passed do not constitute mitigation especially after 23 August 2005 when the appellant became aware that the attitude of the Government of Zimbabwe through the Ministry of Mines was that it should pay taxes in accordance with the Income Tax Act.

In *ITC 1351* Friedman J correctly noted that the blameworthiness of each taxpayer depends on the particular facts of each case. The case before him was for non-disclosure where the undisclosed amount was in excess of the disclosed amount and discovery was due to investigation and not voluntary. He dismissed the appeal and confirmed the assessments on the ground that a high standard of diligence was required of the taxpayer in rendering his returns as the Commissioner entirely depends on them. In the present case the appellant failed to discharge the onus on it to show it made full disclosure. While it did not intend to evade tax, it certainly omitted the requisite information and in addition rendered an inaccurate statement. An objective assessment of its actions show that it was grossly negligent. In *ITC 1508* 53 (1999) SATC 442 Smith J set aside the penalty in full on the diplomat who did not include the proceeds of the car she imported into the country because he was satisfied from her *ipsedixit* that she genuinely was unaware that she was required to do so, and in *ITC 1608* 59 SATC 72 at 78 he accepted that the taxpayer was genuinely mistaken as to when the commissions it received accrued. He did not find any intention to avoid and delay the payment of tax or any negligence on these two taxpayers, respectively. In the present case the appellant did not avail itself of the avenues set out in the Mining Agreement of resolving the failure to legislate the undertakings. It simply decided to break the law. It was grossly negligent. Its moral blameworthiness for that reason was high. As Davis J, in my view, correctly observed in *ITC No 1725,* 64 SATC 223 (C) at 236 “there is a difference between an intention to evade and reasonable grounds”. The finding of gross negligence on the part of the appellant constitutes a serious infraction of the law that deserves punishment.

Interests of society

The broad interest of societal confidence in the justice delivery system requires that laws are obeyed and offenders appropriately prosecuted, denounced and penalised. The general objectives of penalties are retribution, deterrence, prevention and rehabilitation.

In my view, the reliance on the undertaking was not so reasonable as to compel the Commissioner to forego the penalty entirely as sought by the appellant. While the appellant lacked intention to evade payment of tax, it was clear to me that its motive was to pay less tax purportedly in terms of the undertakings. The Mining Agreement, the Framework for the Agreement, the letter of Minister of September 2001 and of 23 August 2005 indicate that further reliance on the undertakings was grossly negligent. The appellant in continuing to claim capital redemption allowances under the wrong schedule was no longer acting in good faith. Its moral blameworthiness was high. It is on that score that the present case is distinguishable from *ITC 1508*, ITC *1306* and *ITC 1609* where the taxpayers neither intended to evade tax nor exhibited negligence. The effect of this finding militates against full remission of the penalty.

The appellant contended that it be precluded from paying the penalty as it was obliged to pay interest on the additional tax from the date of the original assessment. Mr *de Bourbon* “let the cat out of the bag” that the appellant was contesting payment of interest in the High Court. Clearly, the appellant is unwilling to pay the interest in question. It cannot therefore be rewarded for making such payment under duress. The appellant correctly submitted in para 69 and 70 of its written heads of arguments that the payment of interest compensates the fiscus for the time value of the lost revenue. It is also correct that the South African cases such as *ITC 1489* 53 SATC 99, *ITC 1576,* 56 SATC 225 and *ITC 1725*, 64 SATC 223 have been loath to impose both interest and penalty where the facts warrant it and where very little blame is attached to the tax payer. The finding of gross negligence against the appellant distinguishes these cases from the present matter. In any event our legislature deliberately imposed both to underscore the seriousness of omitting to submit or in rendering inaccurate tax returns. It does not appear to me that payment of interest in the circumstances pertaining to the appellant warrants full remission of the penalty.

The Tax Amnesty

At the time of writing this judgment, there was a tax amnesty in existence. I express no opinion on whether that amnesty justifies full remission of the penalty in the absence of argument on the point. Accordingly, I leave that question open to proper argument by affected parties in future cases.

Conclusion

After weighing the mitigatory features against the aggravating features, it seems to me that that the penalty of 5 per cent is most appropriate. In my view, such a penalty is at the lower end of the punishment spectrum that could legitimately be imposed on the appellant. I do not accept the argument proffered by the appellant that imposing such a punishment, in the circumstances pertaining to this case, would deter foreign direct investment. I am unable to envisage a foreign direct investor who would be discouraged from investing in this country by such a low penalty. I believe that all foreign investors, just like local investors, appreciate and accept that they are subject to the laws of this country. In my view, the penalty of 5 per cent strikes a balance between the need to punish the appellant for breaking the law and its viability concerns.

In the result, the appeal is dismissed and the 5 per cent penalties imposed by the respondent for the tax years from 2007 to 2012 are confirmed. In line with the legal provisions in regards to costs, each party will bear its own costs.

*Dube, Manikai and Hwacha*, appellant’s legal practitioners