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AANTEKENINGE

THE TAX TREATMENT OF A VICTIM OF THEFT – SHOULD IT BE “IF YOU SNOOZE, YOU LOSE”?

OPSOMMING

**Die belastinggevolge vir 'n slagoffer van diefstal – as jy nalaat om 'n verlies te eis,
moet dit neusie verby vir jou wees?**

Hierdie aantekening oorweeg die belastinggevolge van 'n slagoffer van diefstal waar die slagoffer eers jare na die diefstal van die verlies bewus word. Spesifieke aandag word gegee aan die feit dat in die algemeen 'n persoon 'n verlies moet eis as 'n toelaatbare aftrekking in die jaar wat dit “werklik aangegaan” is. Verder dui hierdie aantekening aan dat die meeste ander belastingverligtingsopsies ook buite so 'n slagoffer se bereik is. Aldus argumenteer ek dat dit ook nodig is om in hierdie geval af te wyk van die algemene belastingbeginsels soos wat die Hoofste Hof van Appèl gedoen het in *MP Finance Group CC (in liquidation) v Commissioner, South African Revenue Service* 2007 5 SA 521 (SCA), welke beslissing gehandel het oor onwettige ontvangstes.

1 Introduction

Hildegard Steenkamp stole R537 million over a period of 12 years from her employer (Pheto “R537-million theft: Hildegard Steenkamp spent more than R67m at one casino” (16 Aug 2023) <https://www.news24.com/news24/southafrica/news/r537-million-theft-hildegard-steenkamp-spent-more-than-67m-at-one-casino-20230816> (accessed 03-04-2024)). Similarly, Steinhof investors lost R200 billion as a result of fraud committed through accounting manipulation (Cronje “SA Reserve Bank attaches Markus Jooste’s Hermanus house, Lanzerac” (18 Oct 2022) <https://www.news24.com/fin24/companies/just-in-sa-reserve-bank-hits-markus-joostes-hermanus-house-lanzerac-20221018> (accessed 03-04-2024)). These are just two recent examples of vast amounts of money stolen in South Africa. Following the decision of the Supreme Court of Appeal in *MP Finance Group CC (in liquidation) v Commissioner, South African Revenue Service* 2007 5 SA 521 (SCA), the beneficiaries of such illegal income will be subject to income tax. This is so because they intended to benefit from such theft (para 11). This subjective approach to illegal income receipts departs from the general objective approach where a receipt should be on a taxpayer’s own behalf and for the taxpayer’s own benefit for it to be included in gross income (*Geldenhuys v CIR* 1947 3 SA 256 (C) 266; for criticism of this deviation, see Classen “Legality and income tax – is SARS ‘entitled to’ levy income tax on illegal amounts ‘received by’ a taxpayer?” 2007 *SA Merc LJ* 534; Goldswain “Illegal activities: Taxability of proceeds” 2008 (22) *Tax Planning* 143; Muller “The taxation of illegal receipts: a pyramid of problems! A discussion on ITC 1789 (Income Tax Court – Natal)” 2007 *Obiter* 166; Venter, Uys & Van Dyk “MP Finance Group CC (in liquidation) v C:SARS: Adding to the financial hardship of victims of illegal transactions” 2015 *Southern African Business Review* 121).

The tax treatment of illegal receipts in the hands of the criminal is not the sole tax-related question regarding illegal activities. The tax implications for the victim must also be considered (SARS *Interpretation note 80 – The income tax treatment of stolen money* (5 Nov 2014) 2). The South African courts have grappled in several instances with whether the loss suffered by a victim of theft qualifies as a loss “in the production of income”, a requirement under the general deductions’ formula (s 11(a) read with s 23(g) of the Income Tax Act 58 of 1962 (ITA)). In this respect, the courts have identified that for such a loss to be “in the production of income”, there needs to be a risk of loss associated with the specific business (*Cot v Rendle* 1965 1 SA 59 (SRA); *ITC 952 24 SATC 547 (F)*; *ITC 1383 46 SATC 90 (T)*; *Lockie Bros Ltd v CIR* 1922 TPD 42). In this respect, SARS acknowledges that these days theft, embezzlement, and fraud by senior managers have become more prevalent (SARS (5 Nov 2014) 7). Thus, it may be easier than before to prove that the losses as a result of the commercial crimes of senior managers are incurred “in the production of income”.

Yet, as a result of the complexities associated with commercial crimes (for the characteristics of these crimes, see Budhram & Geldenhuys “A losing battle? Assessing the detection rate of commercial crime” 2017 *SA Crime Quarterly* 7–8), the victims of these crimes may become aware of the criminal mastermind’s conduct only years after the crimes have been committed. Could victims of theft deduct revenue losses that they have suffered while carrying on a trade once they become aware of these losses? To answer this, I consider in this note that, generally, a deduction must be claimed in the year in which it has been “actually incurred”. I also show that most other relief options would also be out of the victim’s reach. I argue that it is necessary to deviate in this scenario from the general principles for deductions insofar as it relates to a loss suffered by a victim as a result of the illegal actions of another.

2 Loss or expense “actually incurred”

Even though there is no legislative requirement when a revenue loss or expense that has been actually incurred may be claimed, many court decisions have considered whether deductions can be claimed in tax year(s) after the expenses or losses have actually been incurred. In *ITC 47 2 SATC 120 (C)*, the taxpayer held a property on a lease terminable on the death of the holder of a life interest in the property. The taxpayer was required by the local authority to pull down and re-erect part of the buildings leased. Whilst the building was completed in 1922, the taxpayer claimed the deduction in the subsequent year when the tenant passed away and the lease agreement terminated. The court held that a loss should be deducted in the year in which it was actually incurred. Similarly, in *Concentra (Pty) Ltd v CIR* 12 SATC 95, where travel expenses relating to a period before the year of assessment were claimed, the court held:

“The basis of the income tax law is the assessment of the yearly income; the amounts earned and the expenses incurred. If a taxpayer because of shortage of funds could postpone the payment of liabilities incurred and by so doing take them out of the year of assessment for income tax purposes the entire system of taxation would be affected” (98).

Accordingly, a taxpayer cannot postpone its liabilities and the incurring of the expense or loss to a more appropriate time for the taxpayer. Allowing the taxpayer to do so could have a detrimental effect on how income tax functions, as a taxpayer can, for example, then “elect” to incur expenses or losses in a year with a lower

income in order to ensure an assessed loss. Accordingly, Legwaila *et al* (*Tax law: An introduction* (2020) 187) conclude that even though there is not an explicit “in the year of assessment” requirement in the general deductions formula, when one considers the case law and the overall scheme of the ITA, which operates on an annual basis, such a requirement is indeed implied. As such, the “actually incurred” requirement is the trigger for claiming deductions in terms of the general deductions’ formula. If a taxpayer fails to claim the deduction at this stage (snoozes), the taxpayer loses the claim.

It is thus essential to determine exactly when an expense or loss is “actually incurred”. In terms of the case law, “actually incurred” requires that there is an “unconditional liability” to pay an amount (*PE Tramways Company LTD v CIR* 8 SATC 13; *ITC 674* 16 SATC 235; *Nasionale Pers Bpk v Kommissaris van Binnelandse Inkomste* 1986 3 SA 549 (A)). Although the court in *Plate Glass and Shatterprufe Industries (Finance Company) (Pty) Ltd v Secretary for Inland Revenue* 41 SATC 103 held that this principle “applies equally to losses”, determining when a loss has actually been incurred is not straightforward (De Koker & Williams *Silke on South African income tax* (looseleaf, last update Sept 2023 – SI 73) § 7.5). It is harder to determine when an unconditional liability has been incurred for a loss, as a loss is seen as “an involuntary deprivation” as opposed to an expense that is a “voluntary payment of money” (*Joffe & Co Ltd v CIR* 13 SATC 354 360). Accordingly, a taxpayer might not necessarily have been aware that an event or activity has taken place that led to a loss.

At what point can a loss be seen to constitute an unconditional liability (and as such having been actually incurred)? Considering it from the opposite perspective, a liability is seen to be *conditional* when the existence of the liability is “dependent upon the happening of an event after the tax year in question” (*Edgars Stores Ltd v Commissioner for Inland Revenue* 50 SATC 81 95). Consequently, for there to be an unconditional liability, the liability must be certain in the relevant year of assessment in order for it to be “actually incurred”. However, this certainty does not relate to whether the amount of the liability can be correctly determined at the end of the year of assessment: “where the existence of the liability is certain and established within the tax year in question, but the amount of the liability cannot be accurately determined at the tax year-end, ... the liability is nevertheless regarded as having been incurred in the tax year in question” (84).

Turning specifically to a loss due to theft, SARS *Interpretation Note 80 The Income Tax Treatment of Stolen Money* (2014) 10 states that “[a] revenue loss as a result of embezzlement, fraud or theft must be claimed in the year of assessment in which the embezzlement, fraud or theft *occurs* and not in the year of assessment in which it is discovered” (emphasis added).

Before considering the content of this statement, it is important to deal with the status of interpretation notes generally. An interpretation note constitutes an official publication (s 1 of the Tax Administration Act 28 of 2011 (TAA)). This is relevant as the term “practice generally prevailing” connotes a “a practice set out in an *official publication* regarding the interpretation or application of a tax Act” (s 5(1) read with s 1 of the TAA (emphasis added)). In *Commissioner for the South African Revenue Service v Medtronic International Trading SARL* [2023] 2 All SA 297 (SCA) para 10, the Supreme Court of Appeal confirmed that this means that SARS must be consistent with its interpretation and application, and cannot make a determination contrary to a prevailing practice. Accordingly, SARS is bound by its own interpretation notes. However, as regards the role interpretation

notes should play in the court's interpretation, the Constitutional Court, in *Marshall NO v Commissioner for the South African Revenue Service* 2019 6 SA 246 (CC) para 10, held:

"Why should a unilateral practice of one part of the executive arm of government play a role in the determination of the reasonable meaning to be given to a statutory provision? It might conceivably be justified where the practice is evidence of an impartial application of a custom recognised by all concerned, ... but not where the practice is unilaterally established by one of the litigating parties. In those circumstances it is difficult to see what advantage evidence of the unilateral practice will have for the objective and independent interpretation by the courts of the meaning of legislation, in accordance with constitutionally compliant precepts. It is best avoided."

Important from the above, interpretation notes do not constitute law and the courts are not required to follow these interpretation notes. Returning to the present matter, this means that even though SARS' interpretation note states that the loss as a result of theft should be claimed as a deduction in the year in which the theft occurred, this does not mean that a court will come to the same conclusion, as the court is not bound by how SARS has interpreted this scenario.

Whilst I have not come across any case law that directly suggest that the "actually incurred" can be postponed until such time as a taxpayer becomes aware of a loss that was suffered, there is case law that suggest that "actually incurred" may not always be in the year where the relevant triggering event or activity took place. In *Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd* 1993 4 SA 110 (A), in which case a taxpayer's liability to deliver shares to an employee was disputed, the court held that only in the year when the dispute was finalised was the liability "actually incurred" for tax purposes – not when the obligation originally arose. The basis for this decision is that the "liability is contingent in that sense in a case where there is a claim which is disputed, at any rate genuinely disputed and not vexatiously or frivolously for purposes of delay" (118).

Although the scenario under discussion does not involve a dispute over whether the taxpayer has a liability, *Golden Dumps* shows that where there is a *bona fide* reason as to why an unconditional liability is not yet certain, the expense (or loss) can be claimed at a later stage when the liability is confirmed. An argument can be made that the actual incurral did not occur when the event or activity of theft took place, but has been postponed for a *bona fide* reason as this involuntary deprivation (loss) was detected only in subsequent years. This is distinguishable from a situation akin to *Concentra* where the taxpayer attempted to postpone its liabilities (and consequently the incurral of the expense) to a more appropriate time for the taxpayer. Instead, we are dealing with a taxpayer who was unaware of a loss as a result of theft and so could not have claimed the loss when it took place, as the taxpayer did not know that it had suffered a loss at that stage.

3 Other relief for the victim

The current interpretation of the phrase "actually incurred" as discussed above is detrimental to the taxpayer not only in terms of the general deductions formula. Other deductions also require an expense or loss to have been "actually incurred". Moreover, provisions in section 11 of the ITA that do not require actual incurral relate to very specific situations (such as a claim for wear and tear of capital assets (s 11(e)), and an allowance for leasehold improvements (s 11(f)), which would not apply to the present scenario under consideration.

Another potential avenue a victim of theft may consider is claiming an assessed loss. Taxpayers may set off their balance of assessed losses carried forward from the preceding tax year against their income in the current year (s 20 of the ITA). Even though the loss in the present scenario would relate to preceding tax years, it would not be possible to set it off against income in the current year, as the term “assessed loss” connotes “any amount by which the *deductions admissible under section 11* exceeded the income in respect of which they are so admissible” (s 20(2) *sv* “assessed loss” of the ITA; emphasis added). Consequently, to set off an assessed loss, the loss should have been deductible in terms of section 11, which, as I established above, is not possible.

Other relief that would be futile in this scenario would be to claim the loss as a bad debt. Section 11(i) of the ITA allows a deduction of “the amount of any debt due to the taxpayer which has during the year of assessment become bad, provided such amount is included in the current year of assessment or was included in previous years of assessment in the taxpayer’s income”. This relief has three requirements: a debt must have become bad; the debt must have become bad in the year of assessment; and the amount of the debt should have been included in the income of the taxpayer in the same year or before.

Cuccioolilo (“Requirements to claim bad debts as deductions” *South African Institute of Tax Professionals* (2013) <https://bit.ly/30zuvlR> (accessed 03-04-2024)) states that the first requirement entails that –

“[t]he taxpayer must prove to SARS that the debts are irrecoverable before a deduction will be granted. Its actions must show that all possible procedures were followed to encourage payment. Normally these methods will include settlement discounts, letters of demand, levying of interest, etc. If all these efforts fail, the debtor’s account must be handed over for legal prosecution.”

The second requirement is akin to how deductions are generally dealt with – the bad debt deduction must be claimed in the year in which the triggering event occurred.

The third requirement, necessitating that the debt should have been included in the income of the taxpayer, means that the debt amount should have been included in “gross income” and not be classified as “exempt income” in terms of a provision contained in the ITA.

When one applies the bad debt provision to the present scenario, it is important to note that there is not a debt or claim against the thief purely because the victim has suffered a loss because of theft. The victim would need to institute a claim against the thief, say, with the *condictio furtiva* in delict (see, eg, *Chetty v Italtile Ceramics* 2013 3 SA 374 (SCA)). Only once the court has granted a civil judgment against the thief will the victim have an enforceable debt or claim against the thief. If the victim obtains a judgment against the thief to recover the loss suffered, and if the sheriff, after executing the judgment, provides a *nulla bona* return, that should be sufficient to prove that the debt is irrecoverable (bad).

In respect of the third requirement, for the debt to have been included as income in the current year or before, there would need to have been a receipt or accrual (of a revenue nature) as required in terms of the definition of “gross income” (s 1 *sv* “gross income” of the ITA). As the debt is established when a judgment is obtained and the basis to claim relief for a bad debt is that it should be irrecoverable, there would not be a receipt for “gross income” purposes, because there is no physical acquisition of an amount in cash or otherwise for the victim’s “own behalf” and “own benefit” (*Geldenhuys* 266).

In relation to the other trigger for gross income, accrual requires the victim to become “unconditionally entitled” to the money (*WH Lategan v CIR* 2 SATC 16; *Commissioner for Inland Revenue v People’s Stores (Walvis Bay) (Pty) Ltd* 1990 2 SA 353 (A); *Mooi v Secretary for Inland Revenue* 34 SATC 1 (A)). Here one needs to distinguish between two situations – where the victim has not obtained judgment against the thief, and where the victim has obtained such judgment. In the first situation, without a judgment against the thief the victim will not have an enforceable claim. As such, the victim is not unconditionally entitled to the money, which means that there has not been an accrual. The third requirement for a bad debt is not met, as it did not previously form part of income. By contrast, where the victim has obtained judgment against the thief, the victim is unconditionally entitled to the money. This complies with the third requirement for a bad debt. Nonetheless, this also means that the victim needs to include the amount that has accrued to them as part of their gross income. Thus, the bad debt claim is cancelled out by the accrual in gross income. This means that the victim will still be left with the initial loss that has not been deducted. As such, when the victim can use the bad debt provision, it will still be futile in relation to the loss suffered.

In addition to considering options in the ITA pertaining to how to deduct the victim’s loss, one must also consider whether a reduced assessment might not assist the victim. In terms of section 93 of the TAA, SARS may issue a reduced assessment when:

- “(a) the taxpayer successfully disputed the assessment under Chapter 9;
- (b) necessary to give effect to a settlement under Part F of Chapter 9;
- (c) necessary to give effect to a judgment pursuant to an appeal under Part E of Chapter 9 and there is no right of further appeal;
- (d) SARS is satisfied that there is a readily apparent undisputed error in the assessment by—
 - (i) SARS; or
 - (ii) the taxpayer in a return;
- (e) a senior SARS official is satisfied that an assessment was based on—
 - (i) the failure to submit a return or submission of an incorrect return by a third party under section 26 or by an employer under a tax Act;
 - (ii) a processing error by SARS; or
 - (iii) a return fraudulently submitted by a person not authorised by the taxpayer; or
- (f) the taxpayer in respect of whom an assessment has been issued under section 95(1), requests SARS to issue a reduced assessment under section 95(6)” (emphasis added).

For present purposes, section 93(d)(ii) of the TAA is relevant as the taxpayer made an error regarding its tax returns for the period during which the theft occurred, as they were unaware of the loss suffered. Despite there being an administrative process to rectify the situation, section 99 of the TAA limits the period for which assessments may be issued to three years after the date of an original assessment by SARS. The date of assessment is defined as the date of the issue of the notice of assessment (s 1 *sv* “date of assessment” of the TAA). Accordingly, a reduced assessment to correct an undisputed error, such as not claiming a loss when it took place, must be issued within three years after the date on which the original notice of assessment was issued. This may provide some relief for victims if they became aware of the theft within this limited period.

4 Concluding remarks

As a result of the complexities of commercial crimes, these crimes are often committed over a long period of time and the victims may become aware of their loss only much later, well after the crimes have been committed. Whilst the victims could in some cases be castigated for the lack of adequate checks and balances in the governance of their business, it is not the function of (income) tax to punish victims for not following due diligence. Instead, income tax is concerned with determining a taxpayer's income tax liability as stipulated in the ITA (*Silke* § 1.1).

In respect of illegal income, the Supreme Court of Appeal deviated from the general principles for beneficiaries of such income to be subject to tax, as they intended to benefit from such income. Equally, should a deviation not be made for a victim of a commercial crime who became aware of loss only in subsequent years of assessment? Whilst it is possible to have a reduced assessment issued based on an error, this is limited to instances where the victim becomes aware of the loss within three years of its occurrence. Should a victim not have an opportunity to claim the revenue loss as a result of theft once they become aware the loss? I believe so. With reference to *Golden Dumps*, a *bona fide* reason as to why an unconditional liability is not yet established could result in a deductible claim at a later stage once the liability is confirmed. Thus, in the present scenario, the actual incurrance was not when the event or activity of theft took place. Instead, it has been postponed for a *bona fide* reason as this involuntary deprivation (loss) was detected only in later years. Accordingly, in instances of theft where the victim becomes aware of the loss suffered only later, it should not be a case of if "you snooze, you lose".

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**CAN A SUBORDINATE COMPARATOR BE USED IN
AN EQUAL PAY CLAIM UNDER SECTION 6(4) OF THE
EMPLOYMENT EQUITY ACT 55 OF 1998?***

OPSOMMING

**Kan 'n ondergeskikte persoon as 'n vergelykbare persoon gebruik word in
'n gelyke betalingseis kragtens artikel 6(4) van die Wet op Gelyke Indiensneming
55 van 1998?**

Artikel 6(4) van die Wet op Gelyke Indiensneming 55 van 1998 (WGI) vereis dat 'n vergelyking getref moet word tussen die diensbepalings en -voorwaardes van die eiser en 'n vergelykbare persoon wat dieselfde werk, wesenlik dieselfde werk, of werk van gelyke waarde doen. Terwyl artikel 6(4) verwys na werknemers van dieselfde werkgewer (die eiser

* This note is based on part of my unpublished thesis *A comprehensive analysis of the law regulating equal pay in South Africa* (LLD thesis, University of South Africa 2023). I should like to acknowledge the support provided to me by the University of South Africa in the form of the Academic Qualification Improvement Programme Grant which allowed me to complete my doctorate. The opinions and conclusions expressed in this note should not be attributed to the University of South Africa; they are solely mine.



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- it is the author's own work and does not constitute plagiarism; and
- it has not been submitted for publication elsewhere.

The following contribution met these requirements and was published in 2024:

- C Keulder "The tax treatment of a victim of theft – should it be if you snooze, you lose?"
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