IN THE REVENUE APPEALS TRIBUNAL ESWATINI

JUDGMENT

CASE NO: RATE/IT004/22

In the appeal between:

RATE/IT004/22 **APPELLANT**

And

ESWATINI REVENUE SERVICES - **RESPONDENT**

THE COMMISSIONER GENERAL

Neutral Citation:	RATE/IT004/22 *v Eswatini Revenue services, The Commissioner General for Eswatini Revenue Services (004/22) (2023) RATE 004* (May 2023)
Coram:	Mr John Henwood, Ms Khethiwe Dlamini, Ms Ntombenhle Shongwe (Members)
Heard:	11 May 2023
Delivered:	This judgment is to be handed down electronically by circulation to the parties' legal representative by email and uploaded on email platform. The date for hand-down is deemed to be 12 June 2023

Summary: **Tax Issue: Waiver and abatement of Penalty-**

The Appellant made an error in the calculation of its employees P.A.Y.E tax, by calculating the tax based on the employees' net pay as opposed to the employees' gross earnings. This resulted in an understatement of the P.A.Y.E tax due to the Respondent. Upon realising the error, the Appellant reached out to the Respondent to alert them about the error and made the shortfall payment. The Respondent acknowledged the payment but returned to the Appellant with a revised account summary in which it had imposed both a penalty and an interest charge in accordance with Order. The Appellant held the view that to impose the maximum penalty available was a harsh response by the Respondent and therefore sought a waiver. Citing mainly that it voluntary complied with its non-compliance and caused no loss to the fiscus. The Respondent denied the waiver request. On its insistence that the penalty is not fair, the Appellant approached the Tribunal to consider its waiver request in light of its circumstances, which it argues warrant a lesser penalty.

The Respondent argues mainly that a waiver of penalties imposed in terms of Section 58, read together with Paragraph 2 of the second schedule of the Income Tax Order (IT0), may only be considered ***where the Commissioner General (CG) is satisfied that the employer's failure to remit the amount was not due to an intent to postpone the payment or evade the obligation under the Order.*** The Respondent denied the waiver request. Which from context is translated to mean the Respondent was not convinced of the lack of the Appellants intention not to postpone the payment or evade its obligation under the Order.

JUDGMENT

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1) The Appellant is RATE/IT004/22, a holding company and one of three shareholders of the company Montigny X. The company is holding company duly registered in terms of the laws of Eswatini, having its principal place of business at ABC.

2) The Respondent is described as Eswatini Revenue Service, a semi-autonomous revenue administration agency on behalf of the state, established through the Revenue Authority Act No. 1 of 2008. This organisation operates within the broad framework of government but outside of the civil service. The CG cited herein in his official capacity as the Chief Executive Officer of Eswatini Revenue Service, a legal body charged with the responsibility of revenue collection on behalf the Government of Eswatini.

3) A brief history of the matter is set in the paragraphs that follow; RATE/IT004/22 (hereinafter referred to as Appellant) is a holding company and one of three shareholders of the company X. X operates as a diversified timber company and services approximately 40% of the regional wet-off-saw timber market and have diverse timber-trading interests in South Africa, Eswatini, Mozambique, Namibia, Angola, Zambia and Japan. RATE/IT004/22 is the majority shareholder of X, where it holds a 53.85% share, while the other shares are held by the Public Enterprise 1 and Public Enterprise 2.

4) ESwatini Revenue Service (hereinafter referred to as the Respondent) is a semi-autonomous revenue administration agency, established through the Revenue Authority Act No. 1 of 2008. It operates within the broad framework of Government but outside of the civil service. The Respondents' primary mandate is the assessment and collection of all revenue on behalf of the Government.

5) The Appellant in an email, dated 21 November 2022, submitted to the Respondent a corrected PAYE return wherein the Appellant indicated that the initial P.A.Y.E. tax return for July 2022 was erroneously captured which then resulted in it understating its P.A.Y.E tax. The email also shows that the issue had been deliberated by the two parties prior to the payment. The Appellant also reiterates in its submissions that the July 2022 P.A.Y.E. tax return erroneously captured net amounts instead of gross amounts, as a result understating the tax payable. This is reflected in the letters addressed to Respondent through which it sought a waiver of the penalty.

6) The Appellant's documents show that a PAYE tax return submitted in July 2022 had reflected a taxable income of SZL 825 000 (Eight Hundred and Twenty-Five Thousand Emalangeni) and the payable PAYE Tax amount of SZL 275 000 (Two Hundred and Seventy-Five Thousand Emalangeni). However, the corrected PAYE return reflected a taxable income of SZL 1 235 000 (One Million Two Hundred and Thirty-Five thousand Emalangeni) which brought the payable PAYE tax amount to SZL 411 666.67 (Four Hundred and Eleven thousand Six Hundred and Sixty-Six Emalangeni and Sixty-Seven

Cents). The Appellant then made the payment for the shortfall to the Respondent on 21 November 2022. The proof of payment of the shortfall was also attached on the email sent on the same date.

7) On 23 November 2022 an account summary of the amended July 2022 PAYE return was issued by the Respondent to the Appellant advising them of a penalty (at 20%) and interest (at 18%) charges that had been imposed on the Appellant. This was on account of their error in filing their PAYE tax return, which resulted in an understatement as well as late payment of their P.A.Y.E. tax, which attract additional tax under the Income Tax Order.

8) On 29 November 2022, the Appellant sought a waiver of the penalty and interest charges from the Respondent pursuant to Section 40 (3) of the Income Tax Order of 1976 ("the Order") on the grounds that the correction of the error was on the Appellant's own volition and was done in good faith as soon the mistake was picked up.

9) In seeking the waiver, the Appellant advanced the argument that it was of the view that the Respondent ought not to have imposed the maximum penalty available, as this was unnecessarily harsh on the Respondent considering their cooperation in rectifying the issue. The Respondent stated further that this went against the basic tenets of taxation which is fairness.

10) The Respondent confirmed having received Appellant's request for waiver of penalties and interest for July 2022 PAYE return where the factual background in support of the request has carefully been advanced. The Respondent responded to the request where the last two paragraph of a letter dated 12 December 2022; states as follows:

> ***".....You will note that a waiver of penalties imposed in terms of the aforesaid provision may only be considered in circumstances where the CG is satisfied that the employer's failure to remit the amount was not due to an intent to postpone the payment or evade the obligation under the Order. We do note that you paid the difference on the date of the return amendment,***

unfortunately your waiver application has been declined and the penalty and interest remain due and payable".

11) The Respondent responded to the Appellant's request for a waiver to state that its waiver application has been denied but it gave no reason for such decision. The Appellant addressed a letter to the Respondent expressing its disappointment at the content of the letter advising it that the waiver request has been declined.

12) The Appellant was dissatisfied with the Commissioner General's decision; thus, an appeal was lodged to the Tribunal under section 15 (1) of the Revenue Appeals Tribunal Act No. 13 of 2019 (RATE), for a proper adjudication on the decision to decline waiver of the penalty and interest charges through a notice of appeal filed to the Tribunal by the Appellant on 22 December 2022.

13) The Appellant has raised the following grounds of appeal and submitted as follows:

14.1 That it was put to the Commissioner that the Appellant erroneously captured net amounts instead of gross amounts, thus understating the P.A.Y.E Tax.

14.2 That the Appellant picked up the mistake on their end and then reached out in good faith to Respondent by paying the understated amount.

14.3 That The Appellant was of the view that the penalty and interest charged is harsh given that the Appellant did this correction out of their own volition, and

14.4 That there was no loss to the fiscus.

14) The main subjects of discussion in this appeal by the Tribunal, is to determine whether the Appellant sufficiently established lack of intent either to defraud the revenue or to postpone the payment by the Appellant of the tax chargeable on the part of the Appellant to sufficiently satisfy the CG to waive the penalties in part or in full.

15) Appellant's submission

16.1 The Appellant in the above cases advances the following main arguments as to its case;

16.2 The Appellant submits that indeed it made an error in calculation, when computing its employees due Pay As You Earn ("PAYE") tax. This error was occasioned by a mistake in capturing net pay amounts as opposed to gross pay amounts, thereby calculating the PAYE tax on the wrong amounts. Thus, arriving at a lesser PAYE tax than that which was due to the Respondent. This Resulted in an understatement of the PAYE Tax remitted to the Respondent.

16.3 The Appellant further explained that at the time of the occurrence of the error it did not have a payroll system in place but instead utilized an excel spreadsheet in computing employment tax, which is considered a good tool, especially since its employee numbers are very small in the Appellants' company. The Appellant conceded however, that the downfall of the excel tool is when using it, one is prone to making errors which go unrealized. The Appellant further stated that at the time only one officer conducted payroll and there was no supervisor to double check the entries. With all this having been explained the Appellant owned up to the error as committed.

16.4 It was submitted by the Appellant that upon realising that it had mis-captured the amounts and consequently paid less tax than it ought to, of its own volition reached out to the Respondent, in good faith to alert the Respondent of the error and paid all shortfall amounts to this end in full. The Appellant submits that following the payment the Respondent informed the Appellant that it was due to pay a 20% penalty on the amount paid, this would be over and above the interest on the unpaid amount.

16.5 The Appellant requested that within the ambit of its power, the Respondent waive the penalty in considering that it voluntary corrected the error with no audit having even been conducted on it. As such there was no loss to the fiscus and no material prejudice had been suffered by the Respondent. To this end the Appellant viewed the imposition of both the interest and the maximum penalty of 20% of the unpaid amount as a harsh response by the Respondent.

16.6 The Appellant therefore requested that the penalty be waived by the Respondent, who responded to maintain its position. The Appellant therefore approached the Tribunal seeking that they consider the unfairness of the imposition of the penalty as imposed by the Respondent.

16) The Respondent's submission

17.1 The Respondent submits in response as follows;

17.2 That the penalties as imposed by the Respondent were done as per paragraph (6) 2 of the Income Tax Order and are therefore valid.

17.3 Reasons why penalties are imposed has been dealt with by the courts and to this end cited the case of ***CBA (Pty) Ltd v CSARS 24674 (SATC)*** which states the main purpose to be "to ensure, if possible, that returns shall be honest and accurate".

17.4 The Respondent submits that the Appellant assertion that, there was no loss to the fiscus occasioned by its error is not correct. Stating further that in fact the correct way to view the loss to the fiscus is, in considering that any due date placed for collection of Taxes has a financial implication on the states budgeting processes. In that the budgetary process is based on the proposition that taxes will be paid at the time when they are due to be paid. The Respondent contended that cases such as ***Mr. and XYZ vs CSARS[1] and VAT1426 (SATC)*** canvass in detail what the loss to the fiscus entails and as such should be considered.

17.5 The Respondent in finality argues that to overturn the penalty would set a wrong precedent and as such prays that the Tribunal dismiss the Appeal.

17) Members Analysis

18.1 It is now pertinent in the evidence presented before the Tribunal to put things in their proper perspective and to emphasise what this appeal is all about. With the above structural arguments from both the Appellant and Respondent, the Tribunal will apply its reasoning by looking at the issues raised in line with the applicable legislation.

[1] IT 13725

18.2 According to the parties the issue in dispute is whether Appellant sufficiently established lack of intent either to defraud the revenue or to postpone the payment by the Appellant of the tax chargeable on the part of the Appellant to sufficiently satisfy the Commissioner General (CG) to waive the penalties in part or in full.

18.3 Turn to the evidence of the Appellant to determine whether they were correct to submits that indeed it made an error in calculation, when computing its employees due Pay as You Earn ("PAYE") tax.

18.4 In addressing the issues for determination, we will commence by looking at the applicable law in relation to the deduction and remittance of employee's tax. In relation to the deduction and remittance of employee's tax, Section 58 of the Order, together with paragraph 2 of the Second Schedule provides as follows:

> ***"Every person who pays or become liable to pay any amount by way of remuneration to any employee, shall deduct or withhold from such amount by way of employees tax in respect of the liability for normal tax of such employee and shall pay the amount so deducted or withheld to the Commissioner within seven days after the end of the month during which the amount was deducted or withheld or within such further period as the Commissioner may approve".***

18.5 The Appellant in this case submitted that, indeed they complied with the above section by deducting and withholding the Pay As You Earn but failed to pay or remit the amount they have deducted as PAYE because of an error that was occasioned by a mistake in capturing net pay amounts as opposed to gross pay amounts, thereby calculating the PAYE tax on the wrong amounts. Thus, arriving at a lesser PAYE tax than that was due to the Respondent. They submitted that this resulted in an understatement of the PAYE tax remitted to the Respondent.

18.6 In the event that a taxpayer fails to pay employee's tax, Part II (6)(1) of the Second Schedule (under section 58) of the Order kicks in and states that;

> ***"If an employer fails to pay any amount of employee's tax for which he is liable within the period allowed for payment thereof in terms of paragraph (2) he shall,***

in addition to any other penalty or charge for which he may be liable under this Order, pay a penalty equal to 20 per centum of this amount (Amended A. 7/1992)

The Commissioner may,If he is satisfied that the employer's failure to pay the amount of employee's tax was not due to an intent to postpone payment of such tax or otherwise evade his obligation under this order and was not designed to enable the employee concerned to evade such employee's obligations, remit the whole or any part of the penalty imposed under sub-paragraph (1).

18.7 In this matter, it is not incontestable as to whether or not the Appellant is liable for non-compliance with Section 58, together with paragraph 2 of the Order, which then entitled the Respondent to impose penalty and interest charges. The Appellant herein concedes that it was out of time for its payment of its P.A.Y.E tax obligation in full as directed by the Order. This is evidenced by the contents of its letter (in the form in which it was written) addressed to the Respondent setting out the Appellant's stance throughout this matter on 29 November 2022, in which it states;

"4. We are cognizant of the fact that we submitted the corrected version after the deadline date...".

18.8 It was submitted by the Appellant that upon realising that it had mis-captured the amounts and consequently paid less tax than it ought to, it of its own volition reached out to the Respondent, in good faith to alert the Respondent of the error and paid all shortfall amounts to this end in full. The Appellant submits that following the payment, the Respondent informed the Appellant that it was obliged to pay a 20% penalty on the amount paid, this would be over and above the interest on the unpaid amount.

18.9 The Tribunal is in full support of the last point in the preceding paragraph, that the Appellant is liable to additional tax as stipulated by the Order, and that the Respondent is entitled at law, to charge a percentage-based penalty, which is meant to encourage compliance. Accordingly, the question as to the liability to pay and charge of a percentage-based penalty in the context of the facts of this case is vividly answered by the nature and effect of the Order which provide a more rational foundation for determining what additional tax is.

18.10 It was submitted by the Appellant that upon realising that it had mis-captured the amounts and consequently paid less tax than it ought to, it of its own volition

reached out to the Respondent, in good faith to alert the Respondent of the error and paid all shortfall amounts to this end in full. The Appellant submits that following the payment the Respondent informed the Appellant that it was due to pay a 20% penalty on the amount paid, this would be over and above the interest on the unpaid amount.

18.11 The Appellants' only contention and reason for this appeal is that it holds the view that the Respondent was harsh in imposing the maximum penalty leviable on the Appellant for an error which Appellant discovered of its own volition and in good faith rectified without the Respondent having to accrue any loss. This is construed from the Appellant's letter cited above, where it continues to state that;

> ***"…but we are disappointed to be meted out the maximum penalty and interest as we did this correction out of our own volition".***

18.12 The Appellant submitted before the Tribunal that following the payment of the shortfall taxes, the Respondent informed the Appellant that it was obliged to pay a 20% penalty on the amount paid, this would be over and above the interest on the unpaid amount. It was on that thought that Appellant applied for a waiver of the penalty and interest in which again it was denied by the Respondent.

18.13 It is convenient at this juncture for the Tribunal to set out the relevant statutory framework. With regards to the waiver of penalties, Section 40 (3) (a) of the Order provides as follows;

> ***"If the Commissioner is satisfied 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 chargeable or that any such omission or incorrect statement was not due to any intent to evade taxation on the part of the taxpayer, he may waive or remit such part or all of such additional charge as he may think fit; (Amended A. 6/1994.)"***

18.14 Therefore, the Tribunal is vested with the question whether the Appellant meets the legal requirement to qualify for the waiver that the Order clearly makes

available to the Appellant in both sections 40 (3) and Part II (6)(1) of the Second Schedule of the Order, where the circumstances under which the Commissioner General may waive or remit a penalty are clearly spelt out.

18.15 It is necessary to emphasise that for a waiver to be granted, the Commissioner General must satisfy himself 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 chargeable or that any such omission or incorrect statement was not due to any intent to evade taxation on the part of the taxpayer.

18.16 The Tribunal has noted with displeasure that there is no evidence at least from the Commissioner General's letter, indicating that indeed he applied his mind after having considered all the surrounding circumstances and the relevant legislation before denying the waiver request in the matter. It is entirely unfortunate that the Respondent alludes to this fact in its response to the Appellant, but then neglects to give details as to whether it has indeed considered whether the Appellant's intention was to defraud the revenue or postpone the payment. Or whether its omission or incorrect statement was due to an intention to evade of tax on the part of the Appellant.

18.17 The Respondent contended that the penalties as imposed were done as per paragraph (6) 2 of the Income Tax Order and are therefore valid. Reasons why penalties are imposed has been dealt with by the courts and to this end cited the case of ***CBA (Pty) Ltd v CSARS 24674 (SATC)*** which states the main purpose to be "to ensure, if possible, that returns shall be honest and accurate".

18.18 The Tribunal wishes to demonstrate that in the **CBA (Pty) Ltd** case, the occurrence was not as a result of a "*bona fide* inadvertent error" which would therefore establish wrongfulness and secondly, the case was uncovered by audits in which the Respondent was clearly prejudiced through loss of resources in uncovering the issues. It is therefore disingenuous for Respondent to rely on this case in the present circumstances. It will be recalled, as already alluded that Appellant upon realising that it had mis-captured the amounts and consequently paid less tax than it ought to, it of its own volition reached out to the Respondent, in good faith to alert the Respondent of the error and paid all shortfall amounts to

this end in full. The Tribunal is of the view that the Appellant's effort to make such declarations of the error by alerting the Respondent and pay all the shortfall taxes, that on its own was an action that falls way above a person of average caution in these circumstances.

18.19 At the hearing before the Tribunal, counsel for the Respondent was at pains, in response to a question posed to her by a member of the Tribunal, to explain why the letter by ERS did not explain in detail to the Respondent how the Commissioner General satisfied himself that, the omission was due to an intent to evade taxation on the part of the Appellant. This was because Respondent had adopted a resolute position to decline Appellant the waiver without giving reasons of him satisfying himself that indeed, there was an intention to defraud. Instead in its response the Respondent merely cites the provision and goes to deny the request without showing any considerations as to the reasons for the denial.

18.20 The Tribunal is of the view that the CG's response on the letter dated 12 December 2022 did not give any reason as to how he arrived at the decision to decline the request. Further the Tribunal is of the view that the letter did not disclose anything to show that he analysed the matter and applied his mind to it. It should never be lost from sight that this case is primarily concerned with the Commissioner General seen exercising his discretion upon being satisfied that the default was not due to any intent from the taxpayer. In view of the above, the Tribunal is again, of the view that the Respondent's determination of the waiver request without giving Appellant reasons was arbitrary, whimsical and if we may add, overbearing.

18.21 In its arguments, Respondent submitted that, the correct way to view the loss to the fiscus is, in considering that any due date placed for collection of taxes has a financial implication on the states budgeting processes. The Tribunal is cognisant of the fact that all tax systems have some form of interest and tax penalties. The Tribunal is also conscious of the fact that interest payable on any late or underpayment of tax seeks to protect the present value of the tax amount to the government budget, whereas penalties are intended to deter taxpayers from defaulting on their tax obligations and to punish them for non-compliance.

18.22 The Respondent further argued that the system is designed in such a way that, the interest should therefore accrue automatically from the time the liability arises, without the need for an assessment. This argument by Respondent is not fair and equitable as the Order set a reference to relief in the form of a waiver of penalty and interest in particular on voluntary disclosure. The Tribunal is of the view that the system mentioned by the Respondent should be designed to ensure that, sufficient considerations are considered or given so that taxpayers' interests are adequately protected. Accordingly, the Tribunal is of the idea that Respondent had authority to grant such waiver nor any duty to consider the request, which it believed was valid.

18.23 In advancing this argument, Respondent contended that to overturn the penalty would set a wrong precedent and as such prays that the Tribunal dismiss the appeal. In as much as Respondent is saying this, we are of the view that the above contention by the Respondent should not detain the Tribunal on considering Respondent' s right. This contention by Respondent is not helpful at all. The law did not place these considerations in the text of the law for mere decoration but had every intention to have them utilized where they may apply, the current circumstances being one of those cases. It is clear from the legal text that the intention of the Legislature was to accommodate cases in which imposing a maximum penalty could be reconsidered taking into account the circumstances. The Tribunal is of the idea that having the power to waive penalties or interest recognizes that, despite best efforts, circumstances may exist where a taxpayer is not able to file or pay on time.

18.24 A further inexplicable element in the Respondents approach, is that the Respondent has both a Guideline and Practice note that it approved specifically to guide it in cases of this nature. The Guidelines for Waiver and Abatement of Penalties/Additional Tax for Income Tax and Value Added Tax (2014) ("hereinafter the Guidelines") as well as the Practice Note for Voluntary Disclosure (2016) ("hereinafter the Practice Note")[2] both find application in the present case. It is therefore surprising that a blanket dismissal would be preffered by the Respondent in addressing the Appellants waiver application. The least it could

[2] Practice Note No: DT-IT/016-16

have done was give reasons why the circumstances set out in the guideline were not applied in the Appellants waiver request.

18.25 The Guidelines in section 5 (a) set out considerations to be made when processing a request to waive or reduce penalties or additional taxes, and states the following;

> ***"Consideration***
>
> ***i. The taxpayer, at the time of such application for a waiver, should be compliant in respect of all other tax obligations and requirements.***
>
> ***ii. The Taxpayer's compliance history should be considered.***
>
> ***iii. Where the taxpayer has applied for an extension of time in accordance with the Guidelines for Extension of Time and as such, additional days for submission of returns were granted to the taxpayer, such days should not have been exceeded.***
>
> ***iv. All surrounding circumstances of the case for waiver should be stated in the application.***
>
> ***v. Since it is an onerous burden to establish intent to defraud on the part of the taxpayer, it will suffice to impute intent to postpone or delay payment for declining of waiver penalties.***

18.26 None of these considerations are even mentioned let alone applied, as a basis for the Respondent's denial of the Appellants' waiver request. Instead, the Respondent in its response makes the point in paragraph 4, that it does note that the Appellant paid the difference on the date of the return amendment, which relates to the Appellant's voluntary compliance, which it advances as its ground for appeal. Here, the Respondent has a detailed practice note on how to treat matters in a manner that encourages Taxpayer "to come forward on their own volition to adhere to their statutory obligations as required by the Income Tax Order"[3].

18.27 The Tribunal has further looked at the definition section of the Practice Note which makes two definitions that find application in this case as options that the Commissioner General may have advanced to the Appellant, which are the following;

[3] Under the title; Purpose of Practice Note No: DT-IT/016-16

18.27.1 Voluntary disclosure – a program extended to eligible persons that waives penalties on unpaid Tax liabilities or unfulfilled filing requirements in exchange for their voluntary disclosure.

18.27.2 Voluntary disclosure relief – incentive that reduces the amount of additional tax owed by individuals or business entities.

18.28 Further having listed the instances in which additional tax will be payable by the taxpayer (in which the Appellant falls squarely), The Tribunal noted the Practice Note in its section 2, detailing the requirements for a valid voluntary disclosure, where its states the following;

> ***"To ensure that a voluntary disclosure application is valid, the disclosure must;***
>
> ***a) Be voluntary;***
>
> ***b) involve a default which has not previously been disclosed to the SRA by the applicant or representative of the person;***
>
> ***c) be full and complete in all material respects;***
>
> ***d) involve the potential imposition of an understatement penalty in respect of the default;***
>
> ***e) not result in a refund due by the SRA; and***
>
> ***f) be made in the prescribed form and manner."***

18.29 The Practice Note, in its Paragraph 9, further stipulates the instances to which the Voluntary disclosure relief is granted and states the following;

> ***"9. Voluntary disclosure relief***
>
> ***Voluntary disclosure relief is limited to defaults disclosed for which relief is granted as per the voluntary disclosure directive. The following relief is available;***
>
> ***a) Not to pursue criminal prosecution for any statutory offence under a tax Act arising from the disclosure***
>
> ***b) relief in respect of an administrative non-compliance penalty that was or may be imposed under section 40 of the Order. (emphasis)***

18.30 It is the Tribunal's view that the above section clearly captures the Appellant's case, which begs the question why it would not be considered. It is not denied that the ultimate discretion whether to grant a waiver or not lay with the Respondent, it is just questionable as to why it would not reference its own guidelines and practice note which are binding on the Respondent.

18.31 The Tribunal do however acknowledge that the Appellant did not follow the procedure laid down under paragraph 6 and the process in paragraph 7 of the Voluntary disclosure. Again, the Tribunal has noted that, this has however, not been stated by the Respondent as the reason for the waiver denial. In the same vein, the expected course of action would have been for the Respondent to guide the Appellant to the correct manner of applying for the Voluntary Disclosure rather than the bare denial of the waiver where such an avenue was open to them. The Tribunal is of the view that a distinction must be drawn from behaviours that ought to be sanctioned, the Tribunal is saying this because, it will be possible to legislate a rebuttable presumption of intent to evade tax if the taxpayer has not remitted PAYE a certain number of reporting periods.

18.32 The idea of having to carefully consider an application for waiver or abatement of penalties is applied in other jurisdictions as well. The Tribunal relies on the South African jurisdiction for instance in the case of ***Peri Formwork Scaffolding Engineering (Pty) Ltd V Commissioner for South African Revenue Service***,[4] it was stated that an additional tax imposed for non-compliance may be waived if the Commissioner is satisfied that:

> ***"a. The additional tax has been imposed in respect of first incidence of non-compliance.***
>
> ***b. Reasonable grounds for the non-compliance exist.***
>
> ***c. The non-compliance in issue has been remedied".***

18.33 It is sufficiently clear that a certain degree of consideration should go into a request for waiver of a penalty, and in the Eswatini context even more so where there has been voluntary compliance. This is evidenced by the fact of the

[4] 84 SATC 91

Respondent going as far as adopting guidelines to guide the process of considering a request for a waiver of penalties as well as if the voluntary compliance has occurred in the context of the non-compliance. The Tribunal when going through the Appellant's statement of account submitted by the Respondent, concluded that the only inference that could be drawn from the evidence and chronological payment is that Appellant is a compliant taxpayer and a first offender. It is therefore, the Tribunal's conclusion that, such error could not have easily been picked up had the Respondent not disclosed.

18.34 In support of the stance taken by the Respondent, especially as regards voluntary compliance, it is obviously logical that no two cases are the same. If we for instance consider a case in which two identical cases of non-compliance occur, and of the two, one voluntarily complies, and the other does not voluntarily disclose any non-compliance until such time the Respondent assesses them only to uncover the non-compliance, would it truly be fair to subject the two cases to equal penalization, that is the same penalty? That is exactly what the Respondent did in this case by imposing the maximum available penalty on the Appellant notwithstanding its voluntary compliance.

18.35 Culpability as well as mitigating factors should be taken into account in determining the appropriate level of penalties. To this end it would be pertinent for the Tribunal in seeking to arrive at a balanced outcome, which gives full expression to the general principles of both fairness and equity, to consider the nature of the Appellant's case.

18.36 The Appellant explained that at the time of the occurrence of the error it did not have a payroll system in place and instead utilized an excel spreadsheet in computing employment tax, which is considered a good tool, especially since its employee numbers are very small in the Appellants company. The Appellant conceded however that the downfall of the excel tool is when using it one is prone to making errors which go unrealized. The Appellant further stated that at the time only one officer conducted payroll and there was no supervisor to double check the entries. With all this having been explained the Appellant owned up to the error as committed. This, the Tribunal finds it exceedingly easy to make a detailed enquiry why they are deserving of the waiver. From the submission they

have made, the Tribunal has fully established that the Appellant has given sufficient reasons of their "intention not to postpone or evade" as set out in the Order.

18.37 Yet case law in this area reveals that in their nature waivers are not meant to overlook errors caused by lack of reasonable care in completing returns. ***The case of Taxpayer W (Pty) Ltd V The Commissioner for The South African Revenue Service***,[5] makes specific reference to the need for an omission to be a bona fide inadvertent error to qualify for a waiver or abatement of a penalty pursuant to the South African Income Tax Act. In the above case,

> "*The Appellant had understated his income due to an error that occurred after effecting a change in its accounting policies, which affected the computation of depreciation. Having rectified the error, the Appellant decried that the Respondent meted out the maximum penalty and took the matter on appeal, where the Tax Court found that the type of error that had occurred would have not occurred if the Appellant had taken reasonable care in completing its return. This could have been simply achieved by verification of its tax computation against its financial statements. The Court held that "a diligent taxpayer would have picked up the error" and for this reason dismissed the appeal.*

18.38 A similar approach, albeit more refined, surfaced in the case of ***ABC (Pty) Ltd V The Commissioner for The South African Revenue Service,***[6] *where the court found that; where an error is one that could be reasonably foreseeable, then it could not amount to a reasonable excuse for purposes of a request for a waiver. In this case the Appellant made full payment on 8 January 2018, which is two days after the payment due date. The Respondent imposed a penalty and interest for the late payment. The reason for the late payment by the Appellant was that it had experienced cashflow problems, which meant that on the date of payment there were insufficient funds to run the debit that was meant to pay the Tax. When the debit was run it bounced due to insufficient funds. Thus, the Appellant deposited the required amount and re-ran the debit successfully on the 8th. The Appellant explained that the shortfall in the amount was attributed to waiting for its debtors to make payments.* The court held that this was a situation that was reasonably foreseeable and could be catered for in advance, stating further that;

[5] (IT 45672) [2021] ZATC 9; 84 SATC 268 (14 December 2021
[6] (VAT 1237) [2016] ZATC 1 (24 March 2016)

"…the appropriate test whether an insufficiency of funds amounts to a reasonable excuse is to examine if the underlying cause of the insufficiency is reasonably foreseeable or reasonably avoidable. If it was reasonably foreseeable or avoidable, it will not amount to a reasonable excuse".

18.39 In the case before us, there is only one mention of the Appellant compliance history on the PAYE payment document which we have dealt with in the preceding paragraphs. No other evidence presented to us to the effect that the Appellant has no clean record with the Respondent. The Tribunal is of the view that due to lack of reasons for his decision to deny the waiver, we are not placed in a position to establish if indeed Appellant does not fully meet the requirements for a waiver as set out in both the Guidelines and Practice Note.

18.40 The Tribunal is of the view that a taxpayer making a formal disclosure through the set practice note and voluntary disclosure programme may be considered more favourably than a taxpayer who simply keeps quiet until Respondent pick the error through audits. The argument advanced in that case is that taxpayer was prompted by the actions of SARS to submit the application.

18.41 The Tribunal is of the view that the purpose of the request is to incentivise taxpayers to "come clean" so that Respondent can give them immunity. This can only happen if there is a full and proper disclosure, of which Respondent was unaware and which disclosure was not prompted by Respondent. This is a conclusion which arises by necessary implication from the terms of the provisions. Clearly it is not the intention of the legislature to reward involuntary conduct with exemptions conferred by the section.

18.42 The Appellant made every effort to comply with its obligation by voluntarily alerting the Respondent about the error and this should be considered in light of the Practice Note. Thus, its reasoning for the denial of the waiver or abatement must clearly set out that these aspects have been considered and why notwithstanding those factors, the Appellant is still deserving of the maximum penalty leviable.

18) CONCLUSION

19.1 Having considered the basis of the appeal as advanced by the Appellant, which is to consider whether the Appellant qualifies for a waiver of the penalties or whether the Respondent was correct to find that there was an intention to postpone payment of taxes in line with the Guidelines for the waiver and abatement of penalties and the Practice Note on voluntary disclosure, the Tribunal is convinced that the CG did not apply his mind to the request as required by paragraph 6(2) of the 2nd schedule , therefore it is our considered view that both the interest and the maximum penalty of 20% of the unpaid amount was indeed a harsh response by the Respondent and stands to be set aside.

19.2 In the absence of reasons for his impugned decision in a matter of public importance, the Tribunal has no hesitation to conclude that, it was a serious irregularity which makes the decision a nullity in law particularly in the case where taxpayer has voluntarily complied. This was going to inform interactions with the Respondent and more so the conduct of its tax affairs.

19.3 The Tribunal cannot ignore the fact that the Appellant reached out in good faith to the Respondent to self-correct its error (voluntary compliance), which is commendable, it shows being compliant with the provisions of the Order. In the light of the above analysis, it is clear that the Commissioner General's refusal to consider Appellant's request for the waiver of penalty and interest after the voluntary disclosure was without justification in law, in particular because Respondent only became aware of the default after Appellant's voluntary disclosure and did meet the requirements as set out in the Order and practice notes. For this reason, the Commissioner's decision must be set aside.

19.4 The Tribunal does not have sufficient information before it to apply the principles set out in the voluntary disclosure and request for waiver, which in any event the Respondent was best placed and legally obliged to do but elected no to do so. The Tribunal will not assume that responsibility in the circumstances of this case given the lack of information. Taking into account the bona fide that the Tribunal has found on the part of the Appellant, we therefore order as follows.

19) ORDER

The Tribunal therefore makes the following orders:

1. The Commissioner General's decision to deny the waiver application without reasons is hereby set aside.
2. The Appellants' request for a waiver and penalties is granted in toto.
3. The penalties and interest applied to the Appellant's account are to be reversed forthwith.
4. Each party to bear its own costs.

MR JOHN HENWOOD
CHAIRPERSON OF THE TRIBUNAL

I Agree.

_____
MS KHETHIWE DLAMINI
MEMBER OF THE TRIBUNAL

I Agree.

_____
MS NTOMBEHLE SHONGWE
MEMBER OF THE TRIBUNAL

Appearance

For Appellant: Mr Tom Mc Seveney (with him Sebenele Madzinane)

For Respondent: Ms Bongekile Singwane