Taxation of ill gotten gains in south africa

Countries

It has recently been reported in the press that SARS has lodged a claim for R183 million in income tax against the estate of the slain mining magnate, Brett Kebble inrespectof the R2 billion allegedly stolen by him from the mining companies of which he was a director. It is further reported that the Master of the High Court has rejected the claim on the grounds that the amounts on which SARS sought to levy tax constitutedmoneystolen by Kebble, and that stolen money is not subject to income tax. It has been reported that SARS is to take the Master? s decision in this regard on review.

Why the issue is being contested on the basis of review, as distinct from the ordinary process of assessment followed by objection and appeal, is not clear. A review is concerned only with the regularity of the process by which a decision was reached, not with the correctness of the decision itself. A moot point of tax law The Kebble case raises an interesting and unresolved tax issue and, in view of the large sum at stake, it may be a case that will go all the way to the Supreme Court of Appeal and bring long-overdue certainty to the law.

The Income Tax Act No. 58 of 1962 (the Act) is of no assistance in determining the issue. Section 23(o) states that payments that are illegal in terms of Chapter 2 of the Prevention and Combating of Corrupt Activities Act No. 12 of 2004 or that constitute a fine or penalty for any unlawful activity carried out in the Republic (or in any other country if that activity would be unlawful if carried out in the Republic) are not deductible for income tax purposes.

There is, however, nothing in the Act to say that the recipient of corrupt or illegal payments is (or is not) subject to income tax on such amounts, and this issue must, therefore, be resolved by the application of common law, that is to say, in terms of principles laid down by the courts. In COT v G [1981] (43 SATC 159) the Appellate Division of Zimbabwe held that a person who steals money does not " receive" it in the sense contemplated in the definition of " gross income" in the Act, because he does not acquire the money " on his own behalf and for his own benefit".

If this is correct, then the question of whether or not such an amount " is income" does not arise, since it is only once an amount has been received or accrued that the issue arises as to whether it is income or capital. However, the correctness of this decision is suspect. Certainly, from the thief? s perspective, the reason why he stole the money was precisely to acquire it " for his own benefit" and the interpretation that the judge accorded this phrase is, with respect, legalistic, artificial and unsupported by authority.

In ITC 1789 (67 SATC 205), where the taxpayer in question had solicited millions of rand from a multitude of investors in a fraudulent and unlawful scheme, the court held that those moneys had been " received" as contemplated in the definition of ? gross income?. If both of these decisions are good law, it would mean that (as was held in ITC 1789) a person who systematically cheats others out of money is subject to income tax on his booty, but that (as was held in G v COT) a person who actually steals money in a systematic way is not taxable.

This, it is submitted, is a preposterous and untenable distinction. The true issue was whether the amounts were " income" It is submitted that both these cases ought to have been decided on the basis of whether, in the particular circumstances, the amounts in question had the character of " income" in the hands of the felon, rather than on the issue of whether or not the moneys had been " received" by him. Beneficial receipt was surely self-evident in both cases.

It can hardly be seriously contended that a thief or confidence trickster does not intend to acquire the victim? s money for his own benefit, and treat it as his own. The issue of whether money that has been stolen or is otherwise tainted with illegality is " income" in the hands of the recipient and is therefore subject to income tax, raises many thorny issues, never to date fully addressed let alone resolved by our courts.

Some of the aspects of the issue as to whether illegal receipts are taxable as income are ? •Illegal receipts range from those that are tainted with a mere technical illegality, such as those derived from trading without a licence, to morally reprehensible receipts such as the proceeds of drug-dealing or a fee paid to a hit-man for carrying out an assassination. In the tax context, do the same principles apply to every kind of illegal receipt? •If SARS were to take a slice of an illegal receipt, would this not make the State complicit in the illegality? If income tax were to be imposed on the recipient of stolen money, this would reduce the funds available to repay the rightful owner. It needsto be rememberedthat, in law, ownership of the money has passed to the thief, and all that the owner has is a claim in personam against the thief for repayment. If the thief has spent the money and is unable to repay it, the

victim is merely a concurrent creditor in the thief? s insolvent estate. SARS, by contrast, has a preferential claim, in terms of the Insolvency Act, for any taxes due.

If income tax were payable on the stolen money, it is thus conceivable that SARS would recover all or some of the tax, but that the victim would not get his money back. This, it is submitted, is an unpalatable result. Should SARS get involved at all? There is a strong argument that, where illegal payments are concerned ? certainly in regard to stolen money ? it would be preferable for tax law to stand aloof, attach no tax consequences to the receipt of the money, and let the whole matter be decided in terms of criminal law. However, in view of the uncertainty in the law on this point, SARS can hardly be faulted for asserting a claim.