



to a situation where something was obtained by theft, as that is a unilateral act that confers no right on the taker of the thing. The Court held that the receipt depended not only on the intention of the taxpayer, but also on the intention of the person who passed the money to him. In that case it was clear that the money was passed to the taxpayer not for his own benefit and it was never intended that he could do with it as he pleased. The Court accordingly held that he was not subject to tax on the stolen money.

Turning to the facts of this case, keep in mind that the investment scheme run by Mr D was illegal. This fact could be important in determining whether any amounts received by Mr D and amounts received by the investors as returns constitute a receipt for purposes of the definition of 'gross income'.

In the early eighties, South Africa saw the emergence of a milk-culture scheme, the so-called Kubus scheme, whereby the taxpayer operated a scheme involving the buying and selling of dried milk cultures. He (and later a company to whom he had sold the business) would sell a dried milk culture to members of the public, who would then use an activator to grow a milk culture which they would then be able to sell back to the company. The company milled the culture together with the envelope in which it was sent and resold it as activators. It is clear from the description of the scheme that it was a pyramid scheme which could only continue for as long as more growers were recruited. As soon as the sales of activators to new growers dropped to the point where the company could no longer afford to pay the existing growers for their crop, the scheme was bound to collapse. The Court in ITC 1545 assumed, without deciding on the matter, that the scheme constituted a lottery in terms of the Gambling Act and that the sales in

terms of which the growers were paid for the crop was void from the outset. The Court, however, held that a void transaction did not mean that any amounts received by a taxpayer on his own behalf and for his own benefit was not amounts received within the ordinary meaning of the word.

The facts of Mr D's case remind one strongly of the facts in ITC 1789. In that case, the taxpayer ran a scheme whereby she solicited funds from investors and promised them enormous returns on their money. The scheme was not only in contravention of the regulations published in terms of the Consumer Affairs (Unfair Business Practices) Act, but was also an unlawful pyramid scheme. As in the case of ITC 1545 (supra) and indeed every other pyramid scheme, investments by new investors were used to fund payments to existing investors and the scheme was therefore bound to collapse as soon as the flow of new investors stopped.

SARS issued revised assessments for three tax years in terms of which the amounts paid by the various investors were included in the taxpayer's income. The taxpayer appealed on the basis that, because the contract with an investor was illegal from the outset, the *condictio ob iniustam causam* was applicable; the taxpayer did not have the right to retain the money so received and was under an obligation to refund it. There was therefore not an actual receipt for the purposes of calculating the gross income. The taxpayer based this submission on the decision in CIR v Genn (supra), where the court said that borrowed money could never be regarded as money received for the purposes of calculating income.

The Natal Tax Court found that it was necessary to look at the nature of the receipt before determining whether it forms part of gross income. One of the factors the Court referred to as relevant was the

intention of the recipient. It found that the taxpayer in this case clearly intended to benefit from her ill-gotten gains and that it would therefore be wrong to say that the monies received were not income merely because the transactions were unlawful. The Court based its finding on the decision in ITC 1545 (supra) and referred to a few other decisions where the same principle was applied, namely CIR v Delagoa Bay Cigarette Co Ltd and CIR v Insolvent Estate Botha (t/a Trio Kulture). The Court therefore found that, notwithstanding the illegal nature of the transactions and the subsequent consequences between the parties, the monies paid to the taxpayer by the investors did constitute receipts within the definition of 'gross income' and held that the Commissioner correctly assessed them as such.

On appeal by the taxpayer to the Supreme Court of Appeal, the Court re-affirmed that an illegal contract is not without all legal consequences and that it can have fiscal consequences. The taxpayer clearly had the intention to retain the monies paid for its own benefit and they therefore constituted receipts within the meaning of the Act, despite the fact that they were immediately repayable. The Court therefore confirmed the decision in the earlier case and dismissed the appeal.

Conclusion

Following these judgments, it appears evident that despite the investment scheme being illegal, the funds paid to Mr D by investors were funds received for purposes of the definition of 'gross income'. These funds will therefore be taken into account when determining his tax liability.