

Consequences for Non-Payment of PAYE and VAT Compared

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Abstract

This article shows that, whereas a bilateral legal relationship exists between the South African Revenue Service (SARS) and a vendor in relation to value-added tax (VAT), a tri-partite legal relationship exists among the SARS, employees and employers in relation to Pay As You Earn (PAYE). This article shows further that employers are, as withholding agents of PAYE, in the same legal position as vendors as regards VAT, namely, they are not in a trust or agency relationship with the SARS. Rather, this article argues that PAYE is in the nature of trust funds held by employers on behalf of employees from whose remuneration it is deducted. Since the employees retain ownership of the PAYE deducted, this article argues that employees have *locus standi* to lay a charge of theft against employers who misappropriate PAYE. Such a charge of theft is not grounded in tax administration. This article shows further that, as the law presently stands, a charge of theft falls outside the ambit of the remedies available to the SARS against employers and vendors who default in remitting PAYE or VAT. The *Tax Administration Act*, 2011 read with the *Income Tax Act*, 1962 and *Value-Added Tax Act*, 1991 codified only a limited range of criminal sanctions and administrative penalties that may be imposed against a defaulting employer or vendor. If theft is to be included, then a legislative amendment is required.

Keywords

Agent; employees' tax; PAYE; remuneration; tax administration; trust relationship; value-added tax.

.....

1 Introduction

The Covid-19 pandemic is, arguably, the most formidable challenge that South Africa has faced in a century.¹ With the aim of slowing the transmission of the novel Coronavirus, the South African government introduced measures to lock down the country.² This involved *inter alia* the cessation of trading under risk assessment level five, except for businesses providing essential services or goods. Businesses that could operate remotely from home were allowed to do so. Severe travel restrictions were also imposed. The lockdown measures resulted in damage to businesses and SA's economy. This led *inter alia* to compensation claims for business interruption.³ The legality of the lockdown was also challenged.⁴ To mitigate the liquidity problems endured by businessmen owing to their turnover's being substantially reduced, even wiped out in some cases, the government granted certain targeted tax relief.

On 23 March, 2020 President Cyril Ramaphosa announced ways in which the tax system would be utilised to cushion the financial blow.⁵ For example, he announced that businesses generating an annual turnover of less than fifty million rand would be permitted, first, to defer the payment of twenty per cent of their monthly employees' tax liabilities for a period of four months without incurring interest and penalties under the *Tax Administration Act*

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¹ *One South Africa Movement v President of the RSA* 2020 3 All SA 856 (GP) para 1.

² By way of GN 312 in GG 43096 of 15 March 2020, a national disaster was declared pursuant to ss 15(1)(aA) read with 23(8) of the *Disaster Management Act* 57 of 2002 (DMA). On the same day, by way of GN 313 in GG 43096 of 15 March 2020, the Covid-19 pandemic was declared a national state of disaster. Subsequently, by way of GN 318 in GG 43107 of 18 March 2020, and acting under s 27(2) of the DMA, the Minister of Co-Operative Governance and Traditional Affairs issued regulations that *inter alia* prohibited gatherings of more than 100 persons. By way of GN R398 in GG 43148 of 25 March, 2020 the regulations were amended by the introduction of what has become known as the "lockdown regulations". These were amended by GN R419 in GG 43168 of 26 March 2020, for example.

³ See *Café Chameleon CC v Guardrisk Insurance Company Ltd* (WCC) (unreported) case number 5736/2020 of 26 June 2020.

⁴ See *CD v Department of Social Development* (WCC) (unreported) case number 5570/2020 of 14 April 2020; *Freedom Front Plus v President of the RSA* (GP) (unreported) case number 22939/2020 of 6 July 2020; *De Beers v Minister of Co-operative Governance and Traditional Affairs* (GP) (unreported) case number 21542/2020 of 2 June 2020; *Mohamed v President of the RSA* 2020 7 BCLR 865 (GP).

⁵ The Presidency 2020 <https://www.gov.za/speeches/president-cyril-ramaphosa-escalation-measures-combat-coronavirus-covid-19-pandemic-23-mar>.

(TAA);⁶ secondly, a portion of the provisional tax due under the *Income Tax Act* (ITA)⁷ would be deferred for six months. Apart from the turnover requirement, qualification for these benefits was restricted to tax compliant businesses.⁸

Consistent with this governmental policy, the South African Revenue Service (SARS) introduced value-added tax (VAT) relief on imported goods. Under section 7(1)(b) of the *Value-Added Tax Act* (VAT Act),⁹ VAT is imposed "on the importation of any goods into the Republic" at the rate of fifteen per cent on the "value of ... the importation". A vendor¹⁰ who pays VAT on imported goods is entitled to claim the payment as an input tax credit,¹¹ subject to the vendor's having all the supporting documentation required by section 16(2) of the VAT Act. In addition to the problem of a lack of access to adequate funds to be paid as VAT due to the effects of the lockdown, importers are able to claim VAT refunds only during a VAT reporting cycle and then on condition that the goods were released in accordance with the *Customs and Excise Act*.¹²

Section 13(3) of the VAT Act permits the exemption of imported goods listed in Schedule 1. On 27 March, 2020 the SARS announced that the importation of "essential goods" would be exempted pursuant to item 412.11/00.00/01.00 of Schedule 1. Broadly speaking, "essential goods" include food, cleaning and hygiene products, medical and hospital supplies, and fuel.¹³ To qualify for exemption under this item, the requirements were: firstly, at the time when imported goods are cleared for consumption, an importer must possess a certificate issued by the International Trade Administration Commission; secondly, goods imported under this item may not be disposed to persons who do not enjoy the privileges under this item.

2 Problem statement and the object of the article

The Covid-19 tax relief on its own will not solve the cash flow problems experienced by businesses. Those that do not qualify for the relief remain cash-strapped. As regards employees' tax, colloquially referred to as Pay

⁶ *Tax Administration Act* 28 of 2011 (TAA).

⁷ *Income Tax Act* 58 of 1962 (ITA).

⁸ SARS 2020 <https://www.sars.gov.za/Media/Pages/Tax-Relief-measures.aspx>.

⁹ *Value-Added Tax Act* 89 of 1991 (VAT Act)

¹⁰ See the definition of "vendor" in s 1 of the VAT Act.

¹¹ See the definition of "input tax" in s 1 of the VAT Act.

¹² *Customs and Excise Act* 91 of 1964.

¹³ Annexure B in GN R398 in GG 43148 of 25 March 2020.

As You Earn (PAYE),¹⁴ a twenty per cent deferment for four months still means that qualifying taxpayers must pay eighty per cent of their monthly PAYE liabilities at a time when, on the one hand, their incomes are severely cut but, on the other, they are committed, in the interest of national unity, to pay their staff remuneration, or part thereof. A practical problem faced by employers is that fulfilling the ideal of corporate social responsibility means that they expose themselves to a potential PAYE liability, together with interest and penalties if late payment is made. This problem is aggravated by the decision in *ITC 1928*,¹⁵ namely that liquidity problems do not excuse the duty to remit PAYE.

On the VAT front, the problem experienced is that tax relief was limited, by and large, to importers of "essential goods" and the SARS' undertaking to expedite VAT refund payments. No VAT payment holiday was granted. As a result, vendors remained liable for their capital VAT on an invoice basis in terms of section 9(1) of the VAT Act, even if payment was not received from a recipient of a supply. This state of affairs exacerbated their liquidity problems and it exposed vendors to the risk that the SARS would impose interest and penalties for the late (or non-) payment of VAT.

In the poor economic climate described above, it is conceivable that a "taxpayer", within the broad definition of this term in section 151 of the TAA, may not pay to the SARS monies withheld or deducted as PAYE or money collected as VAT, but may rather retain those funds and utilise them for operational costs.¹⁶ This raises the question which is sought to be answered

¹⁴ Paragraph 1 of the Fourth Schedule in the ITA defines "employees' tax" to mean "the tax required to be deducted or withheld by an employer in terms of paragraph 2 from remuneration paid or payable to an employee."

¹⁵ *ITC 1928* 82 SATC 252 para 32 (hereafter *ITC 1928*).

¹⁶ As a general principle, facts indicating that a taxpayer is non-compliant with one statute can be used to extrapolate the existence of a risk that the taxpayer, its management or owners are non-compliant with another statute, thereby justifying the exercise by the SARS of its power under s 40 of the TAA, namely, to select a person for audit or other compliance-related investigation. See *Carte Blanche Marketing CC v CSARS* (GP) (unreported) case number 26244/2015 of 31 August 2020 paras 102-107 (hereafter *Carte Blanche*). The selection of a taxpayer for an audit and a decision to initiate an investigation into a taxpayer's affairs is not reviewable administrative action. See *Carte Blanche* paras 61, 66. Provided the aim of an audit or investigation is to pursue the aims of tax administration, "there is no limitation to the considerations on which a decision to select a taxpayer is to be founded" (*Carte Blanche* para 44). A taxpayer ought first to make use of the process permitted by s 42 of the TAA, namely, to make representations to the SARS. It is only once that process is exhausted that the SARS decision is ripe for review. See *Carte Blanche* paras 66-74. In a review, a SARS decision must be tested for reasonableness. For the factors to be considered in this regard, see *Mr X v CSARS* (TC) (unreported) case number 13720 of 27 March 2020 paras 30-31 (hereafter *Mr X v CSARS*).

here: What are the comparative civil and criminal consequences for non-payment of PAYE and VAT to the SARS?

3 Roadmap of the discussion

The ensuing discussion is structured as follows: firstly, an overview is given of the statutory scheme and administration of the PAYE and VAT systems. Secondly, a discussion is undertaken of the civil and criminal sanctions that may be imposed against employers and vendors who breach their duty to pay VAT collected and PAYE deducted. Thirdly, the nature of the legal relationships arising from the PAYE and VAT systems is discussed with reference to the decisions in *Director of Public Prosecutions, Western Cape v Parker*¹⁷ and *Grayston Technology Investment (Pty) Ltd v S*.¹⁸

In *Parker* the VAT Act was held to not create a trust or agency relationship between the SARS, as the creditor, and vendors, as involuntary tax collectors. Consequently a common law charge of theft was held not to be a competent charge against vendors who failed to pay VAT to the SARS. However, in *Grayston* a contrary view was expressed in relation to PAYE. *In casu* Spilg J held that in theory an employer may be charged with theft of credit in relation to PAYE deducted but unremitted to the SARS.

The conclusion will distil the thrust of the main submissions made in support of the central hypothesis of this article, namely, having regard to the statutory scheme and administration of the PAYE and VAT systems, and taking into account certain basic principles of income tax and trust law, PAYE deducted is, like VAT collected, not held as trust money for the SARS. Instead, its true owner is the employee from whose remuneration the monies concerned were deducted and who is, under the ITA, liable for employees' tax thereon. As such, if a trust relationship exists then, in law, such a relationship exists between an employer and its employee.

¹⁷ *Director of Public Prosecution, Western Cape v Parker* 2015 4 SA 28 (SCA) (hereafter *Parker*)

¹⁸ *Grayston Technology Investment (Pty) Ltd v S* 2016 4 All SA 908 (GJ) (hereafter *Grayston*).

4 Administration of the PAYE and VAT systems

4.1 Statutory role and function of SARS

The *South African Revenue Service Act* (SARS Act)¹⁹ establishes the SARS "as an organ of state within the public administration"²⁰ responsible for "the efficient and effective collection of revenue"²¹ in a manner that is "most cost-efficient and effective".²² In this context, revenue means

... income derived from taxes, duties, levies, fees, charges, additional tax and any other moneys imposed in terms of legislation, including penalties and interest in connection with such moneys.²³

As a creation of statute, the SARS is imbued with only those powers and functions conferred on it by law.²⁴ To this end, section 4(1)(a)(i) of the SARS Act provides that it is responsible for the "widest possible enforcement of" those statutes listed in Schedule 1 thereof. These include the ITA and VAT Act. Section 4(1)(a)(ii) provides that SARS must administer "any other legislation concerning the collection of revenue that may be assigned to" it by law. The TAA is an example of such a law. In terms of section 4(1) thereof, its provisions bind the SARS and apply to everyone who is liable, whether personally or on behalf of another, to comply with a provision of a "tax Act" as defined.

Section 3(1) of the TAA reads:

SARS is responsible for the administration of this Act under the control or direction of the Commissioner.

In terms of section 6(1) of the TAA, the duty arising from section 3(1) and any power conferred on the SARS "may be exercised for purposes of the administration of a tax Act". The SARS cannot exercise a TAA power or perform a duty for a purpose beyond the ambit of the "administration of a tax Act" as defined in section 3(2) of the TAA. This emerges clearly from

¹⁹ *South African Revenue Service Act* 34 of 1997 (SARS Act).

²⁰ Section 2 of the SARS Act. For a discussion of SARS's role as an organ of state, see *CSARS v Trend Finance (Pty) Ltd* 2007 6 SA 117 (SCA) para 25; *Pearse v CSARS* (GP) (unreported) case number 10498/11 of 4 May 2012 paras 49-51.

²¹ Section 3 of the SARS Act.

²² Section 4(2) of the SARS Act.

²³ See the definition of "income" in s 1 of the SARS Act. For the relevant factors when determining if income is a tax, see *South African Reserve Bank v Shuttleworth* 2015 5 SA 146 (CC) para 48.

²⁴ *AM Moolla Group Ltd v CSARS* 2005 JOL 15456 (T) 3; *Lifman v CSARS* 81 SATC 289 para 16.

sections 2(c) and (d) of the TAA quoted below. Thus, in section 6(1), linguistically, "may" has the same effect as "must".²⁵

In terms of section 2 of the TAA, its purpose is, *inter alia*,

... to ensure the efficient and effective collection of tax²⁶ by – ... (c) prescribing the powers and duties of persons engaged in the administration of a tax Act; and (d) generally giving effect to the objects and purposes of tax administration.

Section 1 defines a "tax Act" as including every statute falling within the ambit of section 4 of the SARS Act. Consequently, the TAA applies to the administration of the PAYE and VAT systems under the ITA and VAT Act respectively.

Sections 3(2)(a) to (j) of the TAA contain a comprehensive meaning of the phrase "administration of a tax Act".²⁷ It includes *inter alia* the duty imposed on the SARS (i) to determine the liability of persons for PAYE and VAT; (ii) to collect unpaid taxes; and (iii) to investigate whether an offence has been committed in relation to PAYE or VAT and, if so, then to lay a criminal charge and provide assistance to the State in its investigation and prosecution of an offence. As such, under the TAA the SARS is not only empowered to use all available legal mechanisms to collect unremitted taxes, but "it is legally enjoined to do so".²⁸

4.2 Statutory framework

To understand the obligations arising from registering as a vendor for VAT or as an employer for PAYE purposes, it is necessary to consider the overall scheme and structure of the PAYE and VAT systems. This discussion is undertaken here as it lays a foundation for the discussion below in part 6 as regards the nature of the legal relationships arising from these systems.

²⁵ For the circumstances when "may" can have the effect of "shall" or "must", see *Stroud Riley & Co Ltd v SIR* 36 SATC 143 151; *Van Rooyen v S* 2002 5 SA 246 (CC) paras 180-182.

²⁶ Section 1 of the TAA defines "tax" as "for purposes of administration under this Act, includes a tax, duty, levy, royalty, fee, contribution, penalty, interest and any other moneys imposed under a tax Act." In this context "includes" has the effect that this definition is not finite or exhaustive. See *De Reuck v DPP, Witwatersrand Local Division* 2004 1 SA 406 (CC) para 18.

²⁷ When defining "[a]dministration of a tax Act", the legislature uses the phrase "means to ...". The word "means" indicates that the list of activities comprising tax administration in ss 3(2)(a) to (i) is finite. See *Rogut v Rogut* 1982 3 SA 928 (A) 937G.

²⁸ *Carte Blanche* para 39.

4.2.1 PAYE

The PAYE system is established by the Fourth Schedule of the ITA and aims

... to create an efficient mechanism for the collection of taxes from the vast majority of individuals who are subject to tax and who are likely only to have a single source of non-exempt taxable income.²⁹

Paragraph 2(1) of the Fourth Schedule creates the duty on employers to withhold employees' tax from an employee's "remuneration", a term defined in paragraph 1. The relevant extract of that definition for present purposes reads

... any amount of income which is paid or is payable³⁰ to any person by way of any salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument, pension, superannuation allowance, retiring allowance or stipend, whether in cash or otherwise and whether or not in respect of services rendered.³¹

Under paragraph 2(1), every tax resident employer,³² irrespective of whether or not it is registered for PAYE under paragraph 15 of the Fourth Schedule,

... who pays or becomes liable to pay any amount by way of remuneration to any employee³³ shall, unless the Commissioner has granted authority to the contrary,³⁴ deduct or³⁵ withhold from that amount, or, where that amount constitutes any lump sum contemplated in paragraph 2(1)(b) of the Second Schedule, deduct from the employee's benefit or minimum individual reserve

²⁹ *Grayston* para 101. The aim of PAYE is explained in *ITC 1928* para 24 as: "The purpose of PAYE is to ensure that an employee's income tax liability calculated on remuneration is settled at the same time that the remuneration is earned."

³⁰ In the context of "remuneration", "or" distinguishes "paid" from "payable". It follows that these terms bear separate meanings in this context. See *Singh v CSARS* 2003 4 SA 520 (SCA) para 52. Having regard to its distinction from amounts "paid", in the context of "remuneration", "payable" envisages a future or prospective liability.

³¹ Whereas the definition of "remuneration" includes, in an employee's taxable earnings, various specific items of income mentioned in sub-paragraphs (a), (b), (bA), (c), (cA), (cB), (cC), (d), (e), (f) and (g), it expressly excludes from its remit, *inter alia*, certain pension monies, disability grants, and earnings of a qualifying independent contractor.

³² For the definition of "employer", see para 1 of the Fourth Schedule of the ITA.

³³ The definition of "employee" in para 1 of the Fourth Schedule of the ITA includes a person "who receives any remuneration or to whom any remuneration accrues".

³⁴ The "authority" envisioned is catered for in para 11 of the Fourth Schedule of the ITA.

³⁵ "Or" has a disjunctive effect. It distinguishes different scenarios. See *Master Currency (Pty) Ltd v CSARS* 2014 6 SA 66 (SCA) para 15 (hereafter *Master Currency*). In the context of para 2(1) of the Fourth Schedule of the ITA, "or" distinguishes "deduct" from "withhold". Thus, it follows that these words bear separate meanings in para 2(1).

as contemplated in that paragraph, by way of employees' tax an amount which shall be determined as provided in paragraph 9, 10 or 11 or section 95 of the Tax Administration Act, whichever is applicable, in respect of the liability for normal tax of that 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 in the case of a person who ceases to be an employer before the end of such month, within seven days after the day on which that person ceased to be an employer, or in either case within such further period as the Commissioner may approve.

The obligation created in paragraph 2(1) is peremptory (not directory) in nature. This is clear from the legislature's use of the word "shall" to impose the duty to "deduct or withhold" employees' tax.³⁶ In this scheme it is submitted that employers are intermediaries appointed to facilitate the more efficient payment and collection of PAYE from SA's large workforce.

The imperative nature of the duty created in paragraph 2(1) is underscored by paragraph 3(1) of the Fourth Schedule, which provides that employees' tax is a first-charge against an employee's monthly taxable remuneration. This is reinforced by paragraph 3(2), which provides that the duties imposed by paragraph 2(1)

... shall apply in respect of all amounts payable by way of remuneration, notwithstanding the provisions of any law which provide that any such amount shall not be reduced or shall not be subject to attachment.

This legal position is underscored by paragraph 7, which declares void *ab initio* any agreement absolving an employer from the duty to deduct or withhold PAYE. Accordingly, the duty created by paragraph 2(1) is sacrosanct ("absolute").³⁷

Paragraph 2(4) of the Fourth Schedule stipulates that PAYE is computed "on the balance of remuneration remaining after deducting therefrom" all permissible deductions under sub-paragraphs (4)(a), (b), (bA) or (f).³⁸ The PAYE to be withheld or deducted is determined according to tables prescribed in paragraph 9(1). Employers compute the taxable part of employee's gross remuneration, including non-cash remuneration. The PAYE to be paid to the SARS is withheld or deducted from the cash component of an employee's remuneration. To this end, an employer is a

³⁶ See *Mohamed v Ally* 1999 2 SA 42 (SCA) 48.

³⁷ *Grayston* para 96d. Having regard to the context and language of para 2(1), exact compliance is required. See *SIP Project Managers (Pty) Ltd v CSARS* (T) (unreported) case number 11521/2020 of 30 April 2020 para 25.

³⁸ Paragraph 9(6) of the Fourth Schedule of the ITA provides for additional deductions from amounts withheld or deducted. For the test to determine if payments constitute taxable fringe benefits of expatriate employees, see *BMW South Africa (Pty) Ltd v CSARS* 2020 1 SA 484 (SCA).

"taxpayer" within the meaning of this term in section 151(c) of the TAA, that is, "a withholding agent".³⁹ As such, employees' tax may be described as a withholding tax.

Section 157(1) of the TAA provides for the personal liability of withholding agents, *inter alia* for taxes withheld but unremitted to the SARS. Under section 157(2), employees' tax is remitted to the SARS on behalf of an employee "in respect of his or her liability under the relevant tax Act". Therefore, vis-à-vis the SARS, in substance, employers are agents of their employees. The latter are the principal "taxpayer[s]" within the meaning of this term in section 151(a) of the TAA, namely, "a person chargeable to tax".⁴⁰

Sections 151 and 157 of the TAA and their impact, were not considered in *Grayston*. This is a material omission that contributed in part to the court's conclusion, incorrectly so, that Grayston, as employer withholding PAYE, is a SARS agent. In law, employee's tax is income tax levied on employees. Employers are dutybound to collect the tax and then pay it to the SARS. In this context an employer is a mere conduit through which a tax debt owed by an employee flows to the SARS. This system avoids the SARS's having to directly collect PAYE on a monthly basis from a multitude of individual employees. As such, the PAYE system streamlines tax collection, which allows for the more efficient and effective administration thereof.

The argument made in this article that employers are, in law, their employees' agents is bolstered by the following considerations emerging from the Fourth Schedule in the ITA: firstly, paragraph 2(1) stipulates that PAYE is "in respect of the liability for normal tax of that employee". Secondly, paragraph 5(3) provides that an employer who pays PAYE from its own funds

... shall have a right of recovery against the employee in respect of the amount paid by the employer in terms of sub-paragraph (1) in respect of that employee, and such amount may in addition to any other right of recovery be deducted from future remuneration which may become payable by the employer to that employee, in such manner as the Commissioner may determine.⁴¹

³⁹ The TAA defines "withholding agent" to mean "a person who must under a tax Act withhold an amount of tax and pay it to SARS" (s 156).

⁴⁰ The TAA defines "person chargeable to tax" to mean "a person upon whom the liability for tax due under a tax Act is imposed and who is personally liable for the tax" (s 152).

⁴¹ In terms of para 5(4) of the Fourth Schedule of the ITA, pending such recovery, an employee "shall not be entitled to receive from the employer an employees' tax

Thirdly, paragraph 28A provides

Payments by way of employees' tax ... must, for the purposes of this Act and subject to the provisions of paragraph 28, be regarded as having been made in respect of the taxpayer's liability for tax whether or not the liability has been ascertained or determined at the date of any payment.

Fourthly, paragraph 28(3) provides that where PAYE has not been withheld, and an employee has been wrongly credited for unremitted PAYE, then

... the employer and the employee shall be jointly and severally liable to pay to the Commissioner the amount which should not have been so applied and such amount shall be recoverable under this Act as if it were a tax.

The PAYE withheld must be reported monthly on a self-assessment EMP201 "return" and remitted to the SARS by the seventh day of the month following the PAYE period in respect of which the tax was withheld.⁴² Such payment is an advance payment towards an employee's anticipated income tax liability for a particular tax year.⁴³ Payments made to the SARS by way of PAYE are then set off against such income tax liability when determined by the SARS in a notice of assessment issued under the TAA.⁴⁴

Under paragraph 13 of the Fourth Schedule, employers are obliged, within a prescribed period after the end of each tax year, to deliver an IRP5 tax certificate to each employee, which must reflect *inter alia* the employee's aggregate remuneration earned during the tax year concerned and the sums deducted or withheld as PAYE.⁴⁵ To fulfil this duty, an employer must ("shall") "maintain a record" of the items of information listed in paragraphs 14(1)(a) to (d) of the Fourth Schedule. Every such record "shall be retained by the employer and shall be available for scrutiny by the Commissioner."⁴⁶

No IRP5 certificate can be delivered prior to an employer's accounting to the SARS by way of an EMP501 "return".⁴⁷ On this form, employers account to the SARS for the following: all employees' remuneration paid or payable during a particular tax year; the PAYE withheld from employees' remuneration; and the PAYE remitted to the SARS. Any shortfall computed must be paid to the SARS which, in turn, is obliged to refund any excess

certificate in respect of that amount". In terms of para 5(5), any amount unrecovered is deemed to be a non-deductible penalty.

⁴² Paragraph 14(2), Fourth Schedule of the ITA.

⁴³ ITC 1928 para 24.

⁴⁴ Paragraph 28(1), Fourth Schedule of the ITA.

⁴⁵ Paragraph 28(2), Fourth Schedule of the ITA provides that an IRP5 certificate is *prima facie* proof that an employer deducted or withheld the PAYE reflected thereon.

⁴⁶ Paragraph 14(1), Fourth Schedule of the ITA.

⁴⁷ Paragraph 14(5), Fourth Schedule of the ITA.

PAYE remitted to it. For the purposes of rendering its reconciliation in an EMP501 form, the records maintained under paragraphs 14(1)(a) to (d) of the Fourth Schedule are important. To enable the SARS to monitor compliance, by virtue of section 29(1)⁴⁸ of the TAA, employers are obliged to maintain proper accounting records and retain all supporting documents for the periods stipulated in section 29(3).

4.2.2 VAT

Whereas employees' tax is, as explained above, a regular, monthly payment towards the settlement of an employee's annual liability for tax on remuneration, VAT is "a tax on added value".⁴⁹ The VAT system, created by section 7(1) of the VAT Act, levies VAT (i) on the "supply"⁵⁰ of "goods"⁵¹ or services"⁵² by a registered vendor "in the course or furtherance of any enterprise";⁵³ (ii) on the importation of any goods; and (iii) on the supply of any imported services.⁵⁴ Presently, VAT is calculated at the standard rate of fifteen per cent of the value of a taxable supply or importation.⁵⁵

For the purposes of the VAT Act,

... a supply of goods or services shall, except as otherwise provided in this Act, be deemed to take place at the time an invoice is issued by the supplier or the recipient in respect of that supply or the time any payment of consideration is received by the supplier in respect of that supply, whichever time is earlier.⁵⁶

As concerns goods, VAT is levied at each successive stage along its commercial production and distribution line as the goods are on-sold from person to person. The tax is imposed from the goods' original source until

⁴⁸ Section 29(1) of the TAA reads: "A person must keep the records, books of account or documents that — (a) enable the person to observe the requirements of a tax Act; (b) are specifically required under a tax Act or by the Commissioner by public notice; (c) enable SARS to be satisfied that the person has observed these requirements."

⁴⁹ *Metcash Trading Ltd v CSARS* 2001 1 SA 1109 (CC) para 12 (hereafter *Metcash*).

⁵⁰ See the definition of "supply" in s 1 of the VAT Act.

⁵¹ See the definition of "goods" in s 1 of the VAT Act.

⁵² See the definition of "services" in s 1 of the VAT Act. For the distinction between "goods" and "services" in a VAT context, see *ITC 1922 81 SATC 390* paras 23-39.

⁵³ See the definition of "enterprise" in s 1 of the VAT Act.

⁵⁴ For a consideration of whether services rendered at designated "duty free areas" at South African airports are exempted from VAT, see *Master Currency* paras 12-21.

⁵⁵ For the rules governing the computation of VAT payable, see s 16 of the VAT Act. For an overview of the legislative framework concerning VAT, see *ABC (Pty) Ltd v CSARS (TC)* (unreported) case number VAT 1626 of 3 March 2020 paras 13-22.

⁵⁶ The VAT consequences of a supply are determined with reference to the contract under which the supply is made. See *CSARS v Respublica (Pty) Ltd* 81 SATC 175 paras 12-13.

they reach the end user (ultimate consumer).⁵⁷ In this process, "everyone making up the sales chain is first a recipient, then a supplier".⁵⁸ Each supplier usually increases the goods' selling price for profitability reasons. Consequently, at each link in the chain VAT is levied and is to be calculated on the increased transactional value of the goods delivered less the "input tax"⁵⁹ that was imposed on the goods when it was purchased by the new supplier thereof.⁶⁰ As the capital value of the goods increases, an increased VAT liability is incurred by each vendor in the chain of supply. Therefore, VAT is a multi-stage tax that recurs at each successive supply of the same goods.

No VAT is levied on exempted goods under section 12, nor on goods vatable at a zero rating under section 11 of the VAT Act. If a supplier is unregistered as a vendor under section 23, then no "output tax"⁶¹ may be charged on the supply of any goods.⁶² Registration as a vendor is, however, not a prerequisite to be a vendor. Section 1 of the VAT Act includes within the ambit of this term "any person who ... is required to be registered under this Act".

Section 23(4) of the VAT Act stipulates that a person liable to register as a vendor who fails to do so is deemed to be a vendor from a date determined by the Commissioner for the SARS (CSARS). Under section 64(1), output tax is deemed to be included in any price charged for a taxable supply of goods, irrespective of whether "the vendor has included tax in such price".

Under section 15(1), unless otherwise provided in the VAT Act, "every vendor shall account for tax payable on an invoice basis".⁶³ The word "every" casts the net of its intended subject extremely wide.⁶⁴ As a result, section 15(1) permits only those exceptions authorised by the legislature. In the light hereof, VAT is not accounted to the SARS in the tax period when

⁵⁷ *Metcash* para 12.

⁵⁸ *Metcash* para 13.

⁵⁹ See the definition of "input tax" in s 1 of the VAT Act.

⁶⁰ The Court in *Metcash* para 14 held: "Being a tax on added value, VAT is not levied on the full price of a commodity at each transactional delivery step it takes along the distribution chain. It is not cumulative but merely a tax on the added value the commodity gains during each interval since the previous supply. To arrive at this outcome a supplying vendor, when calculating the VAT payable on the particular supply, simply deducts the VAT that was paid when the particular goods were supplied to it in the first place."

⁶¹ See the definition of "output tax" in s 1 of the VAT Act.

⁶² *Metcash* paras 16-17.

⁶³ A valid invoice is one that contains the particulars specified in s 20 of the VAT Act.

⁶⁴ *Arprint Ltd v Gerber Goldschmidt (SA) Ltd* 1983 1 SA 254 (A) 261; *Southern Life Association Ltd v CIR* 47 SATC 15 18-19.

the output tax is received. Like income tax, VAT is accounted on an accrual basis.⁶⁵ However, unlike income tax, which requires a notice of assessment to be issued to a taxpayer under sections 96 read with 97 of the TAA before a tax liability can arise, a VAT liability is not dependent on the issuance of an assessment by the SARS.⁶⁶

For every VAT period determined in accordance with section 27 of the VAT Act, a vendor must submit a VAT201 return on which information is disclosed *inter alia* of the aggregate taxable turnover invoiced, the total zero-rated supplies, the total exempt supplies, the total output tax accrued, and the total input tax claimed as a deduction against the output tax. By virtue of section 29(1) of the TAA, a vendor must maintain proper accounting and other records for this purpose. On the VAT201 form, a vendor computes the VAT payable to the SARS or refundable by it. The following basic mathematical formula applies for this determination: output tax less input tax = VAT due or refundable. This is clearly distinguishable from the rules governing the computation of PAYE. In terms of section 28(1) of the VAT Act, VAT must be remitted to the SARS by the twenty-fifth day of the month following the relevant period to which the VAT201 form relates.⁶⁷

5 Statutory sanctions for the non-remission of PAYE and VAT

In SA, taxes are the main source of revenue to finance government activities. When taxes are unremitted, then the SARS suffers prejudice "in the form of the opportunity cost".⁶⁸ The ITA and VAT Act, as read with the TAA, provide civil and criminal sanctions for non-compliance with PAYE and VAT obligations arising under the legal framework discussed above in 4.2. The sanctions are designed, on the one hand, to promote enhanced compliance while, on the other, to protect the public's interest in unpaid taxes by providing an efficient and effective mechanism for their recovery, as well as for combatting non-compliance. As discussed above in 4.1, under section 3(2) of the TAA the SARS's responsibility includes the duty to take steps against employers and vendors who default in paying any taxes due.

⁶⁵ Grayston para 84.

⁶⁶ In *Metcash* para 16, the Court pointed out key differences between the structure and accounting of VAT as compared to income tax. For the differences identified between VAT and PAYE, see *Grayston* paras 84, 88, 89, 90, 93, 96d and 96e.

⁶⁷ Section 244 of the TAA deals with deadlines for payments to the SARS. For a discussion of its provisions, see *ITC 1928* paras 19-27.

⁶⁸ *ITC 1908* 80 SATC 299 para 41 (hereafter *ITC 1908*).

The ensuing discussion summarises the network of statutory provisions catering for the imposition of civil and criminal sanctions against persons who collect PAYE or VAT but fail to remit the tax to the SARS.

5.1 Civil law remedies

Chapter 15 of the TAA regulates the civil sanctions arising from the non-payment of VAT and PAYE. Section 209 stipulates that this chapter has a two-fold purpose: firstly, to ensure the widest possible compliance with, and effective administration of, the provisions of every "tax Act" (as defined); secondly, to ensure that an administrative non-compliance penalty is imposed impartially, consistently and proportionately "to the seriousness and duration of the non-compliance". Even though it may be compensatory in effect, an administrative penalty is punitive in nature.⁶⁹ Thus, its imposition must satisfy basic norms and standards of fairness.

The norms of impartiality, consistency and proportionality operate over and above those emerging from section 33 of the Constitution⁷⁰ and the *Promotion of Administrative Justice Act* (PAJA).⁷¹ A decision to impose a penalty is reviewable administrative action in terms of the PAJA.⁷² A review application must be brought within the statutorily prescribed period, or within a reasonable period thereafter provided good reasons exist for any delay.⁷³

Non-payment of VAT and PAYE constitutes "non-compliance", a term defined in section 210(2) of the TAA to mean "failure to comply with an obligation that is imposed by or under a tax Act". Any such breach is punishable by a "non-compliance penalty", a term defined in section 208 as a penalty levied under Chapter 15 of the TAA, but excluding an understatement penalty,⁷⁴ which is dealt with in Chapter 16. By virtue of the

⁶⁹ *Mr A & XYZ CC v CSARS* (KZD) (unreported) case numbers IT13725, VAT1426, IT13727 and VAT1096 of 18 February 2018 para 41; *Mr X v CSARS* para 29.

⁷⁰ In terms of s 33(1) of the *Constitution of the Republic of South Africa*, 1996 (the Constitution), every taxpayer is entitled to administrative action that is lawful, reasonable and procedurally fair. For a discussion of the meaning of "reasonableness" in a tax administration context, see *Africa Cash and Carry (Pty) Ltd v CSARS* 2020 2 SA 19 (SCA) paras 67-69 (hereafter *Africa Cash and Carry*).

⁷¹ *Promotion of Administrative Justice Act* 3 of 2000 (PAJA).

⁷² *South Atlantic Jazz Festival (Pty) Ltd v CSARS* 2015 6 SA 78 (WCC) 89E-90C; *Wingate-Pearse v CSARS* 2019 6 SA 196 (GJ) para 41 (hereafter *Wingate-Pearse*).

⁷³ For the rules governing delays in a review, see *Wingate-Pearse* paras 68-80.

⁷⁴ The imposition of an understatement penalty is dependent on the extent of a taxpayer's blameworthiness. See *ITC 1908* paras 46-74; *ITC 1902* 80 SATC 77 paras 164-171. For a discussion of the statutory regime regulating understatement penalties, see *Purlish Holdings (Pty) Ltd v CSARS* 81 SATC 204 paras 12-25; *Mr X v CSARS* paras 27-40.

express wording in section 213(1), failure to remit VAT and PAYE is non-compliance to which section 213 applies. Therefore, the fixed amount penalty table provided in section 211 would be inapplicable. In terms of section 213(1), the *quantum* of a non-compliance penalty is "equal to the percentage of the amount of unpaid tax as prescribed in the tax Act."

Paragraph 6(1) of the Fourth Schedule in the ITA states that if employees' tax is not paid as prescribed by law, then "SARS must" impose a penalty equal to ten per cent of the unpaid PAYE. Section 39(1) of the VAT Act provides likewise for unpaid VAT. Section 89bis(2) of the ITA also imposes interest on unpaid PAYE. Section 39(3) of the VAT Act provides likewise for unpaid VAT. A non-compliance penalty is levied via a written penalty assessment.⁷⁵ This aligns with the principle that the unexpressed thoughts of a revenue official are not an assessment. It requires a "formal act".⁷⁶ A taxpayer may request a remittance of a penalty provided that good reason exists for a late payment.⁷⁷

Section 213(1) of the TAA states that "SARS must" impose a non-compliance penalty. When interpreted grammatically, this duty is couched in peremptory language.⁷⁸ Its compulsory nature means that SARS lacks discretion in this regard. It is obliged to impose the penalty, provided only that the pre-requisites of section 213(1) are met, namely, "SARS is satisfied that an amount of tax was not paid as and when required under a tax Act."

The words "is satisfied" confer a subjective discretion on the SARS which is not unfettered.⁷⁹ When challenged on review, a court will not confine its

⁷⁵ The TAA (s 208) defines a "penalty assessment" to mean "an assessment in respect of — (a) a 'penalty' only; or (b) tax and a 'penalty' which are assessed at the same time". For TAA purposes, "tax" is defined in s 1 as including "a tax, duty, levy, royalty, fee, contribution, penalty, interest and any other moneys imposed under a tax Act".

⁷⁶ *Africa Cash and Carry* para 33. "Assessment" is defined in s 1 of the TAA to mean "the determination of the amount of a tax liability or refund, by way of self-assessment by the taxpayer or assessment by SARS". See *ITC 1903* 80 SATC 149 para 18. S 96 of the TAA lists the detail required to be contained in a "notice of assessment".

⁷⁷ In *ITC 1928* para 32, it was held: "The appropriate test concerning 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. As a general rule, bad debts do not amount to a reasonable excuse, since they are an inherent risk for most types of business." In terms of ss 220 read with 224 of the TAA, a decision not to remit a penalty is objectionable and appealable. For a discussion of SARS's decisions that are subject to objection or appeal, see *Rampersadh v CSARS* 81 SATC 163 paras 17-21; *CSARS v Danwet 202 (Pty) Ltd* 81 SATC 91 paras 9-19.

⁷⁸ *Mohamed v Ally* 1999 2 SA 42 (SCA) 48.

⁷⁹ *Wingate-Pearse* para 61.

enquiry into the decision-maker's *ipse dixit*. The SARS will have to show that, when viewed objectively, the subjective opinion relied on for its exercise of the power in section 213(1) was "based on reasonable grounds".⁸⁰

5.2 Criminal law remedies

In terms of section 58(d) of the VAT Act, a vendor who "wilfully and without just cause" fails to pay the VAT due is guilty of an offence and, upon conviction, is liable to be sentenced to a fine or imprisonment for a period not exceeding 24 months. Similarly, as regards PAYE, paragraph 30(1)(b) of the Fourth Schedule provides that

[a]ny person who wilfully and without just cause ... uses or applies any amount deducted or withheld by him by way of employees' tax for purposes other than the payment of such amount to the Commissioner ... shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months.⁸¹

Offending employers and vendors may also be charged with an offence contained in sections 234 or 235 of the TAA. Sections 234(a) to (p) create offences pertaining to non-compliance with a "tax Act" for which a taxpayer may, upon conviction, be sentenced to a fine or imprisonment for a period not exceeding two years. In relation to PAYE and VAT, section 234(p) provides that a taxpayer commits a crime if he

... wilfully and without just cause ... fails or neglects to withhold and pay to SARS an amount of tax as and when required under a tax Act.

Section 235 of the TAA creates offences pertaining to the evasion of tax and obtaining tax refunds by fraud or theft for which a taxpayer may, upon conviction, be sentenced to a fine or imprisonment for a period not exceeding five years. In relation to PAYE and VAT, section 235(1)(c) and (d) is of importance. In terms thereof, a taxpayer commits a crime if he

⁸⁰ *Walele v City of Cape Town* 2008 6 SA 129 (CC) para 60. When determining if a decision is reasonable, relevant considerations include *inter alia* the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved, and the impact of the decision on the lives and well-being of those affected. See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism* 2004 4 SA 490 (CC) para 45.

⁸¹ In terms of para 30(1)(c) of the Fourth Schedule of the ITA, "an amount which has been deducted or withheld by any person from remuneration shall until the contrary is proved be deemed to have been used or applied by such person for purposes other than the payment of such amount to the Commissioner if such amount is not paid to the Commissioner within the period allowed for payment."

... with intent to evade or to assist another person to evade tax or to obtain an undue refund under a tax Act ... (c) prepares, maintains or authorises the preparation or maintenance of false books of account or other records or falsifies or authorises the falsification of books of account or other records; (d) makes use of, or authorises the use of, fraud or contrivance.

Apart from a taxpayer's being susceptible to prosecution for a statutory offence for failing to pay the VAT or PAYE collected, the question also arises whether a common law charge for theft is competent.⁸²

In *Parker*⁸³ the SCA authoritatively held that such a charge is impermissible against a vendor. The underlying premise for its decision lay in the finding that, under the VAT Act, no trust or agency relationship of whatever form arises between a vendor, as a collector of output tax, and the SARS, as a creditor. Instead, a debtor-creditor relationship arises – it is "*sui generis* – one with its own peculiar nature".⁸⁴ The nub of the court's reasoning was

[15] ... The Act does not confer on the vendor the status of a trustee or an agent of SARS. If it did, the vendor would either have to keep separate books of account or alternatively, would have to be sufficiently liquid at any given time in order to cover the outstanding VAT. The Act makes no provision for this situation nor does it seek to compel a vendor to keep separate books of account in respect of VAT.

In the light of the foregoing, before a vendor pays VAT to the SARS the latter is not its owner, nor does it have a special proprietary right or interest to the VAT.⁸⁵ In *Grayston*⁸⁶ Spilg J held that PAYE withheld or deducted stands on an entirely different legal footing. This aspect is discussed in the next part.

6 Analysing the true nature of SARS's relationship with employers

Monies withheld from employees' remuneration is an identifiable fund. This is so even if there is only "a single pool of funds available in the employer's bank account".⁸⁷ *In casu*, Spilg J held that, for criminal law purposes, this

⁸² Theft is the unlawful and intentional appropriation of another's property (*S v Boesak* 2000 3 SA 381 (SCA) para 96) (hereafter *Boesak*). Theft can also be committed in relation to "special property" or "special interest" in property (*R v Von Elling* 1945 AD 234 236). Appropriation is a flexible concept that includes the "dissipation of a protectable right or interest" (*Grayston* para 20).

⁸³ *Parker* paras 9-16.

⁸⁴ *Parker* paras 9, 15.

⁸⁵ *Grayston* para 85.

⁸⁶ *Grayston* paras 117-120.

⁸⁷ *Grayston* para 98.

fund is "consumable",⁸⁸ is property of an incorporeal nature,⁸⁹ and is "capable of being held in trust".⁹⁰ After analysing the legal framework created by the Fourth Schedule of the ITA as discussed above at 4.2.1, Spilg J held that there is more than just a debtor-creditor relationship between the employer, the employee and SARS.⁹¹ In this context, an employer stands

... in the shoes of an agent in respect of either a statutory or civil law obligation of debtor and creditor pursuant to which relationship it attracted an obligation to pay over in specie to SARS or to account for the money actually received or its proceeds.⁹²

Spilg J held that once employers withhold PAYE, it is trust money held for the SARS.⁹³ As a result, he expressed the opinion that there exists in SARS's favour

... a special property or interest either in the available funds in an account (*per Rorke*) or to the credit entry that is passed to evidence it (*per Graham*).⁹⁴

The correctness of this view is questionable. Determining the nature of the tri-partite relationship between the three actors in the PAYE system is a legal issue involving the interpretation of statutory provisions.⁹⁵ The cumulative effect of the undermentioned provisions read holistically, purposively and contextually support a finding that, in law, there exists a debtor-creditor relationship between employers and the SARS; not a trust relationship.

Firstly, paragraph 4 of the Fourth Schedule provides that an amount withheld as PAYE is "a debt due to the State". Secondly, section 169(1) of the TAA provides that an "amount of tax due or payable in terms of a tax Act is a tax debt due to SARS". Thirdly, under section 169(3) of the TAA, in recovery proceedings related to PAYE, the "SARS is regarded as the

⁸⁸ Grayston para 72.

⁸⁹ Grayston para 98.

⁹⁰ Grayston para 96. Also see para 94.

⁹¹ Grayston para 96e.

⁹² Grayston para 105. Also see para 96e.

⁹³ Grayston para 96.

⁹⁴ Grayston para 69. Also see para 104. At para 98 Spilg J held: "Perhaps the strongest evidence in order to establish whether there is a special right or interest in monies that are deducted from the employees for PAYE is if an employee would be entitled to interdict the employer from dissipating funds up to that value which are available in its account prior to paying the amount over to SARS."

⁹⁵ For a collation of the rules of statutory interpretation, see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) paras 18-20; *Independent Institute of Education (Pty) Ltd v KwaZulu Natal Law Society* 2020 2 SA 325 (CC) paras 14-25, 38-53; *Eke v Parsons* 2016 3 SA 37 (CC) paras 29-30.

creditor".⁹⁶ Fourthly, paragraph 28(1)(a) of the Fourth Schedule confers on employees an entitlement to claim refunds of excess PAYE paid to the SARS. Fifthly, the personal liability of employers as withholding agents of PAYE under section 157 of the TAA does not absolve employees of their liability to the SARS.⁹⁷

Other considerations militating against a finding that a trust relationship exists between employers and the SARS are: (i) as with VAT, employers do not keep monies withheld as PAYE in a separate trust account. There is also nothing in the tax laws obliging them to do so;⁹⁸ (ii) neither the ITA nor TAA nor any other tax statute require employers to maintain adequate liquidity to cover outstanding PAYE liabilities; (iii) the finding of a trust relationship between employers and the SARS conflicts with the trite principle sourced from SA's common law, namely, that such a relationship can exist in law provided *inter alia* that there is defined trust property in which a named or ascertainable beneficiary has a vested or contingent right or interest.⁹⁹ This principle was not applied nor referred to in *Grayston*.

Spilg J held, correctly so, that at the time when an employer withholds PAYE the money vests in the employee from whose remuneration it is withheld.¹⁰⁰ This ownership is consistent with an employer's having an

... unconditional liability towards the employee for full payment of the gross amount of the remuneration in respect of the services rendered.¹⁰¹

As a result, PAYE withheld is part of an employee's patrimony for "gross income" purposes, namely amounts "received by or accrued to"¹⁰² the relevant employee. By virtue of this ownership, a finding that PAYE withheld is trust money of the SARS is untenable as a matter of law. It can hardly be that the legislature intended that competing legal rights or interests exist at

⁹⁶ *CSARS v Hawker Air Services (Pty) Ltd: In re CSARS v Hawker Aviation Services Partnership* 2006 4 SA 292 (SCA) para 17; *CSARS v Beginsel* 2013 1 SA 307 (WCC) paras 21-35.

⁹⁷ *Estate Late GA Pitje v CSARS* 66 SATC 219 paras 8-10.

⁹⁸ *Pyott Ltd v CIR* 1945 AD 128.

⁹⁹ *Olivier Trust Law and Practice* 33.

¹⁰⁰ *Grayston* para 96a.

¹⁰¹ *ITC 1928* para 28.

¹⁰² For the meaning of "received by", see *CIR v Genn & Co (Pty) Ltd* 1955 3 SA 293 (A) 301; *MP Finance Group CC (in Liquidation) v CSARS* 2007 5 SA 521 (SCA) 523-524. For the meaning of "accrued to", see *CIR v People's Stores Walvis Bay (Pty) Ltd* 1990 2 SA 353 (A) 367; *CSARS v Executor, Frith's Estate* 2001 2 SA 261 (SCA) paras 5-6.

the same time in the PAYE withheld. This aspect was not canvassed in *Grayston*.

A trust relationship can exist only if recognised as such in law.¹⁰³ Merely because employers are entrusted to withhold PAYE and pay the monies to the SARS does not in and of itself mean that a trust relationship is created with the SARS. Applying general principles of trust law,¹⁰⁴ the following requirements must be met for a trust relationship to exist between employers and the SARS under the Fourth Schedule of the ITA: (i) the trust property must be clearly defined; (ii) the trust must serve a lawful purpose; (iii) the trust property must be in the lawful possession of or under the lawful control of an employer in his capacity as trustee; (iv) the SARS must be entitled to a defined right or interest recognised in law *qua* beneficiary; and (v) the existence of a trust must emerge from the legislature's intention in the ITA having regard to the scheme of the PAYE system. Having regard to the legal framework discussed above at 4.2.1, it is submitted that these requirements have not been met.

As stated above at 4.2.1, paragraphs 14(1)(a) to (d) of the Fourth Schedule oblige employers "to maintain a record showing" information relevant to the PAYE deducted or withheld. Spilg J held that this refers to the "accounting records"¹⁰⁵ of an employer in which PAYE is recorded as a credit.¹⁰⁶ Although the SARS does not, as a matter of law, own the PAYE possessed by, or in the control of, an employer for the reasons outlined above, Spilg J nevertheless held that it has a special proprietary right or interest in the funds represented by the credit entry which may be stolen.¹⁰⁷ According to Spilg J, the theft may occur either by an employer withdrawing the funds, or by its engaging in dishonest accounting, or by its failing to account at all.¹⁰⁸

¹⁰³ *Brookes Lemos Ltd v CIR* 1947 2 SA 976 (A) 983.

¹⁰⁴ *Olivier Trust Law and Practice* 33.

¹⁰⁵ *Grayston* paras 96c, 96f, 98.

¹⁰⁶ Lamont J, in *S v Ndebele* 2012 1 SACR 245 (GSJ) 254E (hereafter *Ndebele*), described the nature of property created by electronically generated credit entries as follows: "The credits exist electronically and constitute a cash value sounding in money." Although Lamont J dealt with entries in bank accounts, this description is appropriate whenever a right to monetised value is represented through credits in electronic form (such as, in Pastel software).

¹⁰⁷ *Grayston* paras 98-99. To succeed with a charge of theft, the State must prove beyond reasonable doubt that (i) PAYE is unremitted to the SARS, (ii) an amount was deducted or withheld from remuneration which an employer was obliged to account to the SARS, and (iii) there was a fraudulent omission to account, or a failure to make a proper entry in the employer's books of account. See *Grayston* para 106.

¹⁰⁸ *Grayston* paras 19, 22, 71, 98, 103-104.

The high-water mark of Spilg J's conclusion is that PAYE used for purposes other than that contemplated by the ITA renders an employer potentially susceptible to a charge of common law credit theft.¹⁰⁹ This crime is committed

... when an agent for collection, nominee or person in a relationship of trust appropriates or dissipates funds which, if regard is had to proper accounting practice represents 'a credit entry in books of account' held on behalf of a principal or in respect of which, to his knowledge, another person has a special proprietary right or interest despite the fact that the former can access the funds in question or exercise a degree of control over them.¹¹⁰

7 Conclusion

This article shows that, whereas a bilateral legal relationship exists between the SARS and a vendor in relation to VAT, a tri-partite legal relationship exists among the SARS, employees and employers in relation to PAYE. The article shows further that employers are, as withholding agents of PAYE, in the same legal position as vendors regarding VAT, namely, they are not in a trust or agency relationship with the SARS. Rather, this article demonstrates that PAYE constitutes "trustee funds"¹¹¹ held by employers for employees from whose remuneration it is deducted. Since the employees retain ownership of the PAYE deducted, this article shows that employees have *locus standi* to lay a charge of theft against an employer who wrongfully and unlawfully appropriates an employees' property in the form of PAYE withheld. Since such a charge is not related to tax administration, it matters not that no provisions are made for theft as a sanction against defaulting employers. Furthermore, in the event of the non-payment of PAYE, the SARS may recover the unremitted tax from either the

¹⁰⁹ Common law theft is grounded "on the fraudulent physical appropriation of real rights in corporeal property or a physical manifestation of a component of such right, the most obvious being the right of possession" (*Grayston* para 23). However, this crime has evolved so that it now extends to incorporeals such as, electricity (see *Ndebele* 254I-255A) and to a credit entry in accounting records (see *R v Herholdt* 1957 3 SA 236 (AD) 257E). Also see *R v Satisky* 1915 CPD 574 578-579; *S v Graham* 1975 3 SA 569 (A) 576F-577A (hereafter *Graham*).

¹¹⁰ *Grayston* para 73. The taking and consumption of PAYE in an employer's business is "incontrovertible evidence of an intention to permanently deprive the complainant [SARS] of the property in question" (*Grayston* para 72), even if an employer intends to return or replace the money (*R v Milne and Erleigh* 1951 1 SA 791 (AD) 865F-H; *Graham* 577A-B; *S v Heller* 1971 2 SA 29 (A) 46A). In *Boesak* para 96 it was held that the requisite *animus furandi* is present if an accused (i) intentionally effects an appropriation, (ii) with intention to deprive the property owner permanently of his property or control over his property, (iii) knowing that the property is capable of being stolen, and (iv) knowing that his conduct is unlawful.

¹¹¹ *ITC 1928* para 35.

employee or the employer concerned because, as shown above, both are in law jointly and severally liable for unremitted PAYE.

This article shows further that, as the law presently stands, a charge of theft falls outside the ambit of the remedies available to the SARS against defaulting employers and vendors. *Grayston* and *Parker* confirm that the TAA read with the ITA and VAT Act codified only a limited range of criminal sanctions and administrative penalties that may be imposed. If theft is to be included as a remedy, a legislative amendment is required. This accords with the principle of the separation of powers. Any such extension of the available remedies brought about by judicial activism would not be interpretation but legislating through judicial fiat.

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List of Abbreviations

CIR	Commissioner for Inland Revenue
CSARS	Commissioner for the SARS
DPP	Director of Public Prosecutions
DMA	Disaster Management Act 57 of 2002
ITA	Income Tax Act 58 of 1962
PAJA	Promotion of Administrative Justice Act 3 of 2000
PAYE	Pay As You Earn
SARS	South African Revenue Service
SARS Act	South African Revenue Service Act 34 of 1997
TAA	Tax Administration Act 28 of 2011
VAT	Value-Added Tax
VAT Act	Value-Added Tax Act 89 of 1991