REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)

CASE NO: IT 24819

In the matter between:

ABC (PTY) LTD **APPELLANT**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **RESPONDENT**

JUDGMENT DELIVERED ON 19 December 2019

GOLIATH DJP

Introduction

[1] On 6 January 2018 the respondent imposed a penalty assessment of R1 064 607.69 on the appellant in terms of paragraph 6(1) of the Fourth Schedule and section 89*bis*(2) of the Income Tax Act of 1962 ("the ITA"), for the late payment of payroll taxes. The appellant requested a remittance of the penalty in terms of section 217(3) of the Tax Administration Act ("TAA"). The request was rejected by the respondent. The appellant objected against the imposition of interest and penalty in a Notice of Objection and the respondent disallowed the appellant's objection. The appellant lodged an appeal against the respondent's disallowance of their objection. The main issue to be decided is whether there are reasonable grounds

which exist for the non-compliance for the late payment of the employees' tax to SARS by the appellant.

Background

[2] The appellant is the registered company that provides products and services related to scaffolding and formwork to contractors in the construction industry. The appellant submitted its EMP201 Monthly Declaration for 2017/12 PAYE Return on Monday 18 December 2017 declaring an amount of R10 648 340.93 payable to the respondent. The appellant initiated an eFiling payment of R10 648 340.93 on SARS eFiling on the same day and the payment was going to be presented by SARS to B Bank on 3 January 2018. The amount was due and payable to SARS in terms of this return within 7 days after the end of December 2017.

[3] The cash book administrator and accountant of the appellant relied on cash-flow forecasts in ensuring that there was sufficient credit available for payment on or before the end of the week of 7 January 2018. However the appellant was unable to authorise the release of request for payment on 3 January 2018 as there were not sufficient funds available to make the payment. The appellant explained that on Friday 5 January 2018, the day on which the appellant had intended to release the payment of the declared amount to the respondent, it ran into an unexpected shortage of credit of R5 924.00 in the relevant bank account and the payment to the respondent could not be released. The unforeseen credit shortage only became apparent on 5 January 2018 after 19h00. The appellant was only able to credit the bank account with the amount which would enable the release of the payment on Monday 8 January 2018, after authorisation of payment in the sum of R20 000.00 was authorised by appellant's holding company. The SARS request for payment of R10 648 340.93 was therefore only authorised by appellant on 8 January 2018. On 6 January 2018, the respondent imposed a penalty assessment of R1 064 607.69 on the appellant.

[4] The respondent imposed a penalty of 10% in terms of paragraph 6(1) of the Fourth Schedule of the ITA and interest in terms of section *89bis*(2) of the ITA for the late payment of the employees' tax read together with section 213 of the TAA as follows:

Period	**December 2017**
Declaration	R 10 287 432.69 – PAYE R 188 770.96 – SDL R 177 137.28 – UIF
	R 10 653 340.93 – TOTAL

Penalty @ 10%	**R 1 064 607.69**
Interest @ 10.25%	**R 8 968.95**

Appellant's submissions

[5] The appellant raised a point in law at the hearing of this matter and argued that upon a correct interpretation of the law, the period within which the declared amount had to be paid only expired on 8 January 2018, and accordingly the penalty should not have been imposed at all, and for that reason it should be remitted completely.

[6] The appellant had initially been of the view that the declared amount had been payable on 7 January 2018, but indicated that in preparing for this matter, held the view that the amount was only due on 8 January 2018. The appellant relied on the wording of paragraph 2(1) of the Fourth Schedule read with section 4 of the Interpretation Act 33 of 1957 ("the Interpretation Act"). Section 4 of the Interpretation Act provides that where any particular number of days are prescribed for the doing of any act, the days must be counted exclusive of the first day and inclusive of the last day of the period within which to do so, unless the last day happens to fall on a Sunday or public holiday. In that case the last day must be excluded from the reckoning and the next Monday or holiday counted as the last day.

[7] The appellant contends that in applying sections 1 and 4 of the Interpretation Act to the wording of paragraph 2(1) of the Fourth Schedule when one calculates the seven-day period within which payment of the declared amount were to be made, one would clearly exclude the last day of December, starting the calculation of the seven days on 1 January 2018 at the earliest.

[8] With reference to *Azisa (Pty) Ltd v Azisa Media CC and Another* [2002] 2 All SA 488 (C) the appellant argued that when the word *"after"* was used in statutes, this generally indicated that the first day should be excluded from the calculation of the time period, premised on the well-established principle of construction that the aim of the interpretation of statues should be to ascertain the intention of the legislature from the language employed by it in the context in which it is used. Furthermore, the court found that the word *"date"* usually means that the calculation of the period should start from the day following the date specifically referred to, and the literal meaning of *"after"* could only refer to the time which commences after the event had occurred, and could not include a period of time *"before"*, the event and the law does not recognise fractions of days.

[9] The appellant argued that the relevant date or event is the last day of December 2017. Premised on the approached followed in *Azisa supra*, the counting of the seven-day period starts on 1 January 2018, and the last day of the seven-day period will thus be the seventh day after the last day of December 2017 is Sunday 7 January 2018. Due to the fact that the last day of the period is on a Sunday, the following *"ordinary"* day is inclusively taken to be the last day of the period. Consequently the seven day period within which the appellant was allowed to make payment of the declared amount did not expire on 7 January 2018, as it was not counted in terms of section 4 of the Interpretation Act. It therefore only expired on the seventh day, being the following *"ordinary day"* on 8 January 2018. The appellant therefore contends that it was compliant with the provisions of the Fourth Schedule and the TAA, and the penalty should not have been imposed at all.

[10] The appellant further contends that if this court finds that, in law, the declared payment was made out of time, the appellant's case is that the circumstances that lead to the slightly late payment of the declared amount establishes objectively reasonable grounds for its non-compliance with paragraph 2(1) of the Fourth Schedule.

[11] The appellant submits that on the facts of this matter, the respondent should completely remit the penalty, or at least 90% thereof, as the appellant's circumstances are exactly the sort which the calls for the remittance remedy in section 217(3), and for which the remedy was created. To impose the maximum penalty available to the respondent is a disproportionate response to the seriousness and the duration of the appellant's non-compliance with the Fourth Schedule.

[12] The appellant's case is further that not only are the reasons for its non-compliance objectively reasonable, but the respondent's approach to the appellant's remittance request is these circumstances is so disproportional to the seriousness and the duration of the appellant's non-compliance, that it is offensive to the purpose and the objectives of Chapter 15 of the TAA to a point of being irrational.

Respondent's submissions

[13] The respondent contends that a proper interpretation of section 244(1) of the TAA directs that the deadline for payment was due on the last business day before the Saturday or Sunday, which was Friday 5 January 2018. The respondent submits that the payment made by the appellant on 8 January 2018 was made late and the penalty of 10 percent was correctly imposed in terms of paragraph 6(1) of the Fourth Schedule.

[14] The respondent also took issue with the fact that appellant belatedly introduced a dispute regarding the deadline for payment since the parties had agreed as set out in the statement of facts, that the dispute would be confined to *"whether in terms of section 217(3)(b) of the TAA there are reasonable grounds which exist for the late payment of employees' tax"*. The appellant contends that the deadline of the declared payment has been disputed *ab initio* and stated that it was not a new ground of appeal.

[15] The respondent referred to paragraph 30(1)(*b*) of the Fourth Schedule which states that *"Any person who wilfully and without just cause – (b) 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"*.

[16] The respondent also referred to paragraph 30(2) which states that *"For the purposes of item (b) of sub-paragraph (1) 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 under paragraph 2"*.

[17] The respondent's view is that the deeming provisions contained in paragraph 30(2) of the Fourth Schedule, relating to an evidential burden operating in the prosecution of criminal offences perpetrated under the Fourth Schedule, is applicable to this request for remission of an administrative non-compliance penalty imposed under paragraph 6(1) of the Fourth Schedule. According to the respondent, due to the fact that the declared amount was not paid by 6 January 2018, the appellant is deemed to have used or applied the declared amount for purposes other than the payment to the respondent, until the contrary is proved by the applicant by virtue of the deeming provisions contained in a statutory offence. The burden of proof is thus on the appellant to demonstrate that the amounts deducted or withheld had not been used or applied for the purposes other than the payment of such amount to the respondent.

[18] The respondent argues that the grounds that the appellant offers as reasons for the late payment, being that *"the employer was waiting for the debtors to make payment"* and unexpectedly low payment by debtors on 5 January 2018, does not discharge the deeming provision's evidential *onus* borne by the appellant, and it in fact demonstrates that the appellant had used the declared amount for purposes other than payment to the respondent. The respondent expressed the view that the appellant's explanation does not amount to reasonable grounds for non-compliance, but rather demonstrate that the appellant took

"reasonable steps" to remedy the non-compliance. It follows that no reasonable grounds can exist for the appellant's non-compliance. In terms of section 217(3)(*b*)1 of the TAA, the respondent is accordingly not satisfied that reasonable grounds exist for the non-compliance and the penalty remains payable.

Point in *limine*

[19] At the start of the hearing the appellant raised a point in *limine* and contended that the declared amount had to be paid at the latest before the last instant of 8 January 2018. The respondent contends that it was due on 6 January 2018. Paragraph 2(1) of the Fourth Schedule requires payment of declared amounts *"within seven days after the end of the month during which the amount was deducted or withheld"*. Given the onerous penalty regime under the Fourth Schedule, it is in the best interest for employers to always fully comply with its obligations.

[20] Section 244 of the TAA makes provision for deadlines for payment as follows:

> "If—
>
> (*a*) a day notified by SARS or specified in a tax Act for payment, submission or other action; or
>
> (*b*) the last day of a period within which payment, submission or other action under a tax Act must be made,
>
> falls on a Saturday, Sunday or public holiday, the action must be done not later than the last business day before the Saturday, Sunday or public holiday."

[21] The ITA and the TAA do not define what a *"day"* is, but paragraph 6(1) of the Fourth Schedule to the ITA refers to both a *"day"* and a *"business day"*. In terms of section 1 definition, a *" 'business day'* means *a day which is not a Saturday, Sunday or public holiday, and for purposes of determining the days or a period allowed for complying with the provisions of Chapter 9, excludes the days between 16 December of each year and 15 January of the following year, both days inclusive"*. It is therefore clear that *"day*" must take its ordinary meaning which is:

> "Noun: day; plural noun: days
>
> 1. each of the twenty-four-hour periods, reckoned from one midnight to the next, into which a week, month, or year is divided, and corresponding to a rotation of the earth on its axis."

[22] The appellant contends that section 4 of the Interpretation Act 33 of 1957 is applicable in this matter with regard to the deadline for payment. Section 4 provides that:

> "4. When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last

> day, unless the last day happens to fall on a Sunday or on any public holiday in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday."

Section 1 of the Interpretation Act provides:

> "The provisions of this Act shall apply to the interpretation of every law in force… unless there is something in the language or context of law, by-law, rule, regulation or order repugnant to such provisions or unless the contrary intention appears therein."

[23] The applicant therefore submits that in applying sections 1 and 4 of the Interpretation Act to the wording of paragraph 2(1) of the Fourth Schedule when one calculates the seven day period within which payment of the declared amount were to be made, one would exclude the last day of December 2017, starting the calculation of the seven days on 1 January 2018 and the seventh day is accordingly on Sunday 7 January 2018. In this case the last day of the period happens to fall on a Sunday. Consequently the seven day period did not expire on Sunday 7 January 2018, but on the following ordinary day, Monday 8 January 2018, hence the payment was not late.

[24] The framework of the Fourth Schedule is directed at requiring the employer to pay over to SARS within the week the exact amount of PAYE is deducted or withheld from the employee's salary or wage. The employees' tax is withheld from the remuneration and paid over to SARS on a monthly basis. 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. The advantage of this system is that the liability for the year of assessment is settled over the course of that whole year. The employer who pays becomes liable to pay the amount and deduct the amount for PAYE from the remuneration every month.

[25] In *Commissioner, SARS v Executor Frith's Estate* 2001 (2) SA 261 SCA at 273 para [2] the court stated that:

> "The primary rule in construction of statutory provisions is (as is well established) to ascertain the intention of the legislator and (as is well established) one seeks to achieve this, in the first instance, by giving the words of the enrichment under consideration their ordinary grammatical meaning, unless to do so, would lead to an absurdity so glaringly that the Legislature could not have contemplated it."

[26] It is evident that the Interpretation Act excludes Sundays and public holidays, whereas section 244(1) of the TAA includes Saturdays, Sundays and public holidays in calculating the dues. It must be borne in mind that the funds had already accrued to SARS upon on payment of an employees' salary, and the seven day period is merely an indulgence to facilitate payment by the employer. It can therefore reasonably be concluded that the intention of the

legislature with regard to deadlines, envisaged that a deadline should be calculated in days, inclusive of Saturdays, Sundays and public holidays. The TAA envisages that a deadline may expire on a Saturday, Sunday or public holiday and directs that the last business day before the Saturday, Sunday or public holiday becomes the deadline, by calculating backwards. It must be borne in mind that the employees' tax had accrued to SARS at the end of the previous month, and calculating the dues backwards would not prejudice the employer in any manner.

[27] The intention of the legislature was clearly not to extend the period beyond seven days, but to calculate backwards in the event that a deadline falls on a Sunday or public holiday. I am satisfied that a proper interpretation of section 244(1) of the TAA directs that the deadline for the payment that was due should have been made on the last business day before the Saturday or Sunday, which was Friday 5 January 2018. This approach is consistent with the intention, purpose and scope of the legislation.

Discussion

[28] Employee's tax, refers to the tax required to be deducted by an employer from an employee's remuneration paid or payable. The Employees liability towards the SARS for income tax is determined from the gross amount that is payable by the employer to the employee. This means that the employer has an unconditional liability towards the employee for full payment of the gross amount of the remuneration in respect of the services rendered from which the funds are deducted. The process of deducting or withholding tax from remuneration as it is earned by an employee is commonly referred to as Pay-As-You-Earn, or PAYE. If an employer is personally liable for the payment of employees' tax under Chapter 10 of the TAA, the employer shall pay that amount to the Commissioner not later than the date on which payment should have been made if the employees' tax had in fact been deducted or withheld in terms of para 2 (para 5(1) and Interpretation Note No 27)). The para 2 liability to withhold employees' tax is deemed to be discharged if the employer made payment of the outstanding employees' tax to the Commissioner (para 5(1A)). In terms of paragraph 2(1)(*a*) of the Fourth Schedule, every employer must, *"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".* An employer who misses a deadline in respect of their obligations to pay PAYE are subject to a percentage based penalty.

[29] Paragraph 6 of the Fourth Schedule provides that if an employer fails to pay employees' tax, they would be liable for a penalty in accordance with Chapter 15 of the TAA which provides that SARS must impose a penalty equal to 10% of such amount. The TAA provides for a remedy for such a penalty:

Section 217(3) reads:

> "(3) In the case of a penalty imposed under section 213, SARS may remit the 'penalty', or a portion thereof, if SARS is satisfied that—
>
> (*a*) the 'penalty' has been imposed in respect of a 'first incidence' of the noncompliance described in section 210, 212 or 213, or involved an amount of less than R2 000;
>
> (*b*) reasonable grounds for the non-compliance exist; and
>
> (*c*) the non-compliance in issue has been remedied."

[30] The parties are in agreement that the penalty imposed by the respondent is a non-compliance penalty contemplated in section 213 of the TAA; the late payment of the declared amount was a first incidence of non-compliance by the appellant as contemplated in sections 208 and 217(3)(*a*) of the TAA; and the appellant remedied any non-compliance on 8 January 2018 at 10h13 am as contemplated in section 217(3)(*c*) of the TAA.

[31] The appellant made full payment on 8 January 2018 which is two days after the due date. The respondent charged the appellant with the prescribed penalty and interest for the late payment. The appellant offered an explanation as to why it had found it difficult to make payment on time. The appellant experienced cash-flow problems which was attributed to waiting for debtors to make payments and relying on the cash-flow forecast prepared by the cash book administrator.

[32] 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.

[33] In its evidence the appellant presented to this court that an arrangement was made on 18 December 2017 with SARS to pay the declared amount of R10 648 340.93 by 3 January 2018 and Mr. X was responsible to manage the cash-flow for the period between 18 December 2017 and 8 January 2018.

[34] The methodology and assumptions that Mr. X used to predict the receipts of funds from debtors were clearly not plausible and yielded wrong estimates. Mr. X was acting merely as a functionary in monitoring the cash-flow from debtors and not as a professional expert or advisor. The negligence of Mr. X's advice cannot provide a defence to the appellant for non-compliance. The undertaking of paying employees' tax by 3 January 2018 was not honoured due to insufficient funds in the taxpayer's bank account. On realisation of this problem the appellant raised an additional loan of R5 000 000 but these funds were used to meet other operational costs of the business and hence there was again cash-flow problems of insufficient funds on the due date of 5 January 2018 to make the payment. Paragraph 16(2C) of the Fourth Schedule to the ITA provides as follows:

> "where an employer is a company, every shareholder and director who controls or is regularly involved in the management of the company's overall financial affairs shall be personally liable for employees' tax, additional tax, penalty and interest for which the company is liable."

[35] The rationale for this provision is that the amount of employees' tax due by the employer to the Commissioner constitute trustee funds (paras 2 and 16 (2C) of the Fourth Schedule to the ITA. It requires the director of the company to control or be regularly involved in managing the company's financial affairs and exercise her/his fiduciary duties as required by the Companies Act. In my view, the payment of the employees' tax should have been given preference to other payments of business debts. With regard to inspection of the various cash-flow forecasts, updated daily between 2 January 2018 and 5 January 2018, the following must further be noted that:

1) a cash-flow deficit was expected during the week of 3 January 2018;
2) a downward trend in debtors' collections was present and clearly notable on 4 January 2018;
3) sufficient funds, either in the form of cash, overdraft facilities or loan from external parties, was not available to fully discharge of the liability; and
4) as a result of the above, the PAYE was not paid on 5 January 2018.

[36] The following must also be noted with regards to the weeks before 5 January 2018:

a) The liability was known to the appellant as early as 18 December 2017 being the date on which the EMP201 return was filed;
b) The cash book administrator was tasked with the cash-flow management for this period;
c) Over-reliance was placed on the cash book administrator's responsibility. It is unclear whether she is the representative taxpayer;

d) That the appellant was aware of a downward spiral in the economy, which was clearly illustrated on the cash flow forecast;

e) That no other and alternative efforts, other than updating the cash flow forecast, were taken by the appellant to settle the liability.

[37] The lack of funds for payment of the declared amount could have been reasonably avoided, given the exercise of reasonable foresight, due diligence and proper regard for the fact that tax was due on 5 January 2018. The appellant was also unable to prove that reasonable steps, other than reliance on the cash-flow forecast, were taken before the payment deadline to discharge the PAYE liability. I am therefore satisfied that the appellant had failed to establish reasonable grounds for the late payment of employees' tax.

Order

[38] In the result the appeal is dismissed with costs.

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DEPUTY JUDGE PRESIDENT GOLIATH