

**DRAFT INTERPRETATION NOTE**

DATE:

**ACT : INCOME TAX ACT 58 OF 1962**  
**SECTION : PARAGRAPHS 1, 2, 5, 6, 28 AND 29 OF THE FOURTH SCHEDULE AND PARAGRAPHS 2(f), 2(h), 11 AND 13 OF THE SEVENTH SCHEDULE**  
**SUBJECT : CONSEQUENCES OF AN EMPLOYER’S FAILURE TO DEDUCT OR WITHHOLD EMPLOYEES’ TAX**

**Contents**

Preamble ..... 1

1. Purpose..... 2

2. Background ..... 2

3. The law..... 2

4. Discussion of the law..... 2

4.1 Employer’s employees’ tax obligations ..... 3

4.2 Employee’s income tax obligations..... 3

4.3 Personal liability of the employer ..... 4

4.4 Consequences of an employer’s failure to deduct or withhold employees’ tax..... 5

4.4.1 Consequences for the employer ..... 5

4.4.2 Consequences for the employee ..... 7

4.4.3 Is there double taxation? ..... 12

5. Conclusion ..... 13

***Preamble***

In this Note unless the context indicates otherwise –

- **“employee”** bears the meaning ascribed to it in paragraph 1;
- **“employer”** bears the meaning ascribed to it in paragraph 1;
- **“employees’ tax”** means the tax required to be deducted or withheld from an employee’s remuneration under paragraph 2(1);<sup>1</sup>
- **“income tax”** means “normal tax” as defined in section 1(1), which is the tax levied under section 5(1) on taxable income received or accrued during a year of assessment;
- **“paragraph”** means a paragraph of the Fourth Schedule to the Act;

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<sup>1</sup> Known colloquially as Pay-As-You-Earn, or PAYE.

- “**Schedule**” means a Schedule to the Act;
- “**the Act**” means the Income Tax Act 58 of 1962;
- “**TA Act**” means the Tax Administration Act 28 of 2011; and
- any other word or expression bears the meaning ascribed to it in the Act.

## 1. Purpose

This Note explains how certain of the employees’ tax obligations of an employer and the income tax obligations of an employee operate in relation to each other when an employer incurs personal liability for failing to deduct or withhold employees’ tax.

## 2. Background

The employees’ tax system was introduced into the Act in 1963 by the addition of the Fourth Schedule.<sup>2</sup> It obliges employers to deduct or withhold employees’ tax from remuneration<sup>3</sup> paid or payable to employees, and to pay such amounts over to SARS.

It may occur that an employer does not comply with its obligation to deduct or withhold employees’ tax. The employer’s non-compliance will normally create additional obligations for both the employer and the employee. This Note discusses these obligations.

## 3. The law

For ease of reference, the relevant paragraphs of the law are quoted in **Annexure A**.

## 4. Discussion of the law

Employees are taxpayers,<sup>4</sup> and must, under section 5(1) of the Act, pay income tax annually for the benefit of the National Revenue Fund<sup>5</sup> on the taxable income received by or accrued to them during each year of assessment. Section 5(1) of the Act is specifically made subject to the provisions of the Fourth Schedule.

Paragraph 28 provides that employees’ tax deducted or withheld by an employer must be set off against the employee’s income tax liability that has been assessed by SARS. Paragraph 28A provides that the employees’ tax deducted or withheld is in respect of the employee’s income tax liability, whether or not that liability has been determined at the date that the employees’ tax is paid by the employer.<sup>6</sup> Paragraph 2(1) provides that an employer must deduct or withhold employees’ tax “in respect of the liability for normal tax” of an employee.

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<sup>2</sup> By section 19 of the Income Tax Amendment Act 6 of 1963.

<sup>3</sup> As defined in paragraph 1.

<sup>4</sup> As defined in section 1 of the TA Act.

<sup>5</sup> As contemplated in section 213 of the Constitution of the Republic of South Africa, 1996.

<sup>6</sup> This rule was previously contained in section 89*bis*(1), which provided for payments of employees’ tax and provisional tax. It was included in paragraph 28A when section 89*bis*(1) was repealed with the introduction of the TA Act.

These provisions make it clear that the purpose of the employees' tax system is to facilitate the collection of income tax from employees, and that employees' tax payments are advance payments against the employee's final liability for income tax that are collected and paid over to SARS by an employer.

#### 4.1 Employer's employees' tax obligations

Paragraph 2(1) imposes two obligations on an employer<sup>7</sup> that pays or becomes liable to pay remuneration to an employee. The first obligation is that the employer must deduct or withhold from that remuneration an amount by way of employees' tax. The second obligation is that the employer must pay the amount so deducted or withheld to SARS within seven days following the month in which it was deducted or withheld. The tax required to be deducted or withheld by the employer is a debt due to the State for which the employer is absolutely liable to SARS.<sup>8</sup>

#### 4.2 Employee's income tax obligations

As was explained in 4, employees are taxpayers and are liable to pay income tax on their taxable income on assessment by SARS. Under paragraph 28, the employees' tax that an employer has deducted or withheld during the year of assessment must be offset against the employee's tax liability as determined on assessment.

Paragraph 28 caters for the situation in which the employees' tax deducted or withheld by the employer<sup>9</sup> exceeds or falls short of the employee's income tax liability as determined on assessment. Amounts deducted or withheld in excess of the employee's income tax liability must be refunded to the employee by SARS.<sup>10</sup>

However, should there be a shortfall, the employee remains responsible for payment of that shortfall to SARS. Paragraph 28(1)(b) provides that the amount of any excess (that is, the amount by which the employee's total liability for income tax exceeds the sum of the employees' tax and provisional tax credits available for set-off) "shall be payable by the taxpayer to the Commissioner" (underlining added). A "taxpayer" is, under section 151 of the TA Act read with the "taxpayer" definition in section 1 of that Act, a person that is or may be chargeable to tax. The person chargeable to income tax is the employee,<sup>11</sup> and so the "taxpayer" referred to in paragraph 28(1)(b) as being liable to settle the income tax shortfall to the Commissioner, is the employee.

This proposition is supported by case law. In *Estate Late GA Pitje v Commissioner for South African Revenue Service*,<sup>12</sup> the taxpayer had been employed in the Office of the Premier of the erstwhile Northern Province. The employer had not deducted or withheld sufficient employees' tax to offset the employee's full income tax liability, and SARS assessed the taxpayer's deceased estate for the shortfall. The executrix of the estate

<sup>7</sup> For purposes of this Note, the distinction between a resident employer and a non-resident employer is ignored.

<sup>8</sup> Paragraph 4.

<sup>9</sup> And any provisional tax paid by the employee. However, the operation of the provisional tax system is beyond the scope of this Note.

<sup>10</sup> Paragraph 29 prohibits any refund of employees' tax other than by SARS on assessment for income tax. Employers are not permitted to refund any employees' tax to employees.

<sup>11</sup> Under section 5(1), income tax is levied on the taxable income received by or accrued to or in favour of any person, which in this case is the employee.

<sup>12</sup> 66 SATC 219 (W).

objected, arguing that SARS's remedy was to recover any shortfall from the employer. Ponnann J (as he then was), writing for the full court, held as follows:

“It is thus clear, even on a superficial reading of paragraph 5 in its entirety, that the ultimate liability to pay income tax rests with an employee. It follows, in my view, that the collection mechanism created by the Act to give efficacy to the legislation and in particular the pivotal role played by the employer in that scheme, does not extinguish the liability of the employee.”<sup>13</sup>

The learned judge concluded<sup>14</sup> that the legislature had, in paragraph 28(1)(b), in clear and unambiguous language, placed the burden for the payment of the shortfall on the taxpayer, that is, the employee.

### **Example 1 – Employee responsible for any shortfall**

#### *Facts:*

X, who is under the age of 65 and an employee of Y (Pty) Ltd, derives monthly remuneration of R54 217 paid or payable by Y (Pty) Ltd. For the 2023 year of assessment, X's taxable income was R650 604. He was employed by Y (Pty) Ltd for the full 2023 year of assessment.

In accordance with the tax deduction tables published under paragraph 9, the monthly employees' tax required to be deducted or withheld from X's remuneration was R13 153. The employer inadvertently deducted or withheld R12 153 every month, for the full year of assessment.

#### *Result:*

On assessment, the income tax liability of X was R157 898,56. The employees' tax deducted or withheld by Y (Pty) Ltd of R145 836 (R12 153 × 12) was offset against X's income tax liability. X therefore had a shortfall of R12 062,56. In accordance with paragraph 28(1)(b), X was required to pay to SARS an amount of R12 062,56 by the due date of the assessment, being the amount by which X's income tax liability exceeded the sum of the employees' tax credits standing in X's favour.

### **4.3 Personal liability of the employer**

Before the enactment of the TA Act, paragraph 5(1) established personal liability for an employer if the employer failed to deduct or withhold employees' tax as required by paragraph 2. With the introduction of the TA Act, the circumstances in which an employer may incur personal liability have been widened. Currently, the TA Act establishes an employer's personal liability under section 157(1), which stipulates the liability of a “withholding agent”<sup>15</sup> as follows:

“A withholding agent is personally liable for an amount of tax—

- (a) withheld and not paid over to SARS; or
- (b) which should have been withheld under a tax Act but was not so withheld.”

<sup>13</sup> In 11 of the judgment. Paragraph 5 of the Fourth Schedule is discussed in more detail below.

<sup>14</sup> In 12 of the judgment.

<sup>15</sup> Section 156 defines a “withholding agent” to mean “...a person who must under a tax Act withhold an amount of tax and pay it to SARS”, which includes an employer in respect of employees' tax.

Paragraph 5(1) applies to both paragraphs (a) and (b) of section 157(1) of the TA Act. However, it is clear from the context of the remaining sub-paragraphs of paragraph 5<sup>16</sup> that they apply only to personal liability imposed under section 157(1)(b), that is, due to the employer having failed to deduct or withhold employees' tax; and not personal liability imposed under section 157(1)(a). What will be further examined in this Note, are the consequences under paragraph 5 of the employer having incurred personal liability under section 157(1)(b).

#### 4.4 Consequences of an employer's failure to deduct or withhold employees' tax

An employer's failure to deduct or withhold employees' tax will have consequences for both the employer and the employee. The process will ordinarily commence with SARS making an original or additional employees' tax assessment<sup>17</sup> for the under-deducted employees' tax arising from the employer's failure to deduct or withhold the required amounts.

##### 4.4.1 Consequences for the employer

The employer's failure to deduct or withhold employees' tax triggers the employer's personal liability under section 157(1)(b) of the TA Act. The employer will be required to pay the amount specified in the notice of assessment by the date set out in such notice.<sup>18</sup>

However, paragraph 5(1) provides that the employees' tax that the employer failed to deduct or withhold must be paid by the date that it *should have been paid* if the tax had in fact been deducted or withheld as required by paragraph 2(1). Even though the notice of assessment may prescribe a later date for payment of the tax assessed, the amount will, under paragraph 5(1), be considered a late payment of employees' tax. The amount will thus be subject to a penalty imposed under paragraph 6,<sup>19</sup> and interest charged under section 89*bis*(2).<sup>20</sup>

#### **Example 2 – Employer liable for penalty and interest**

*Facts:*

SARS conducted an audit on L (Pty) Ltd to assess its compliance with the provisions of a tax Act. It found that L (Pty) Ltd had failed to correctly deduct or withhold employees' tax from the remuneration of 15 of its employees for the tax periods May 2022, June 2022, July 2022, and August 2022.

SARS made additional assessment on 15 May 2023, and prescribed in the notice of assessment a due date for payment set at 15 June 2023. L (Pty) Ltd paid the amount due under the assessment on 15 June 2023.

<sup>16</sup> Paragraphs 5(2) to 5(6).

<sup>17</sup> Under Chapter 8 of the TA Act.

<sup>18</sup> The dispute resolution rules under Chapter 9 of the TA Act are not considered here. For purposes of this Note, the amount due under the notice of assessment is presumed to be correct and the assessment final.

<sup>19</sup> Paragraph 6 provides for the imposition, in accordance with Chapter 15 of the TA Act, of a late payment penalty if an employer fails to pay employees' tax due "within the period allowable for payment thereof in terms of paragraph 2".

<sup>20</sup> Section 89*bis*(2) provides for interest on unpaid or underpaid employees' tax if the amount due is not paid in full "within the period of seven days prescribed for payment of such amount by paragraph 2(1)".

*Result:*

L (Pty) Ltd is personally liable for the tax due under section 157(1)(b). Paragraph 5(1) directs that an employer must pay the amount not later than the date on which payment should have been made if the employees' tax had in fact been deducted or withheld. The due date for payment for each respective tax period was on or before the seventh day of the month following the month in which the employees' tax was required to be deducted or withheld. So, payment for May 2022 was due on 7 June 2022, for June 2022 it was due on 7 July 2022, for July 2022, it was due on 5 August 2022,<sup>21</sup> and for August 2022 it was due on 7 September 2022.

Notwithstanding the due date for payment in the notice of assessment, because of the prescripts of paragraph 5(1), there are therefore late payments for each of the tax periods, and a penalty of 10% is leviable under paragraph 6(1) for each tax period. Further, under section 89bis(2), interest is payable for each tax period, as the amounts were unpaid after the prescribed seven-day period. The tax due, penalty charged, and interest payable, will have been incorporated into the notice of assessment, and the due date for payment, being 15 June 2023, will be for the full amount of tax, penalty, and interest.

If the employer has not been absolved of its personal liability,<sup>22</sup> paragraph 5(3) grants the employer a statutory right to recover the amount of tax paid to SARS in respect of an employee, from that employee.<sup>23</sup> This statutory right is in addition to any other right that the employer may have to recover that amount from the employee, for example, under the terms of the employment contract or by means of a common law enrichment claim.

Paragraph 5(3) also grants the employer a right to recover the amount of tax from any future remuneration that may become payable to the employee. However, the employer must first obtain a directive from the Commissioner as to the manner in which such deductions<sup>24</sup> are to be made.

The employer's statutory right to recover an amount of tax from an employee under paragraph 5(3) is automatic and arises by operation of law immediately when the employer incurs personal liability. Should the employer wish to recover the debt from the employee's future remuneration, all that the employer requires is the directive from SARS. The fact that the employer may recover directly from the employee's remuneration with the permission of the Commissioner is a clear indication that the word "recovery" in paragraph 5(3) must be given the wider meaning of "recover", as contemplated in *Lekhari v Johannesburg City Council*,<sup>25</sup> of "obtaining by any legal

<sup>21</sup> Under section 244(1)(b) of the TA Act, if the last day of a period within which payment under a tax Act must be made, falls on a Saturday, Sunday or public holiday, the payment must be made not later than the last business day *before* the Saturday, Sunday or public holiday.

<sup>22</sup> Under paragraph 5(2). The requirements for granting absolution are beyond the scope of this Note.

<sup>23</sup> No right of recovery is granted for any penalty, interest, or understatement penalty that the employer may be required to pay.

<sup>24</sup> Section 34(1)(b) of the Basic Conditions of Employment Act 75 of 1997 provides that a deduction by an employer from an employee's remuneration is not prohibited if such deduction is permitted by law.

<sup>25</sup> 1956 (1) SA 552 (A).

means” rather than the ordinary legal meaning of “obtain by a civil process culminating in a judgment”.<sup>26</sup>

Paragraph 5(4) provides that an employee is not entitled to an employees’ tax certificate<sup>27</sup> until the employee has paid “any amount which is due to the employer in terms of sub-paragraph (3)”, which indicates that the amount becomes due by the employee to the employer the moment the paragraph 5(3) right to recover arises, that is, simultaneously with the employer incurring personal liability. The employee thus automatically becomes indebted to the employer for the tax. It is not necessary to commence legal proceedings or to place the employee in *mora* for the debt owing.

#### 4.4.2 Consequences for the employee

Paragraph 28(1) provides for the offset of employees’ tax deducted or withheld from an employee’s remuneration, against the employee’s income tax liability on assessment. As explained in 4.2, the employee is ultimately responsible for payment of his or her income tax liability. The employee will thus be liable to pay any tax due on assessment, on the amount that the employer failed to deduct or withhold employees’ tax from.

Payment by an employer in discharge of its personal liability, or recovery of the amount by SARS through its recovery processes, is considered to be a payment on behalf of the employee for the employee’s income tax liability under the Act.<sup>28</sup> The employee bears the burden to prove<sup>29</sup> that employees’ tax was deducted or withheld in order to offset any amount against the income tax liability under paragraph 28(1).

Although an employees’ tax certificate is *prima facie* proof of the employees’ tax so deducted or withheld, paragraph 5(4) provides that, until the employee has repaid the amount due under paragraph 5(3) to the employer, the employee is not entitled to an employees’ tax certificate. Only amounts of employees’ tax that were actually deducted or withheld from the employee’s remuneration may be offset against the employee’s income tax liability. If an employer fails to deduct or withhold employees’ tax as required, no tax will have actually been deducted or withheld by the employer. The employee will not be in possession of an employees’ tax certificate, and also will not be able to prove that any employees’ tax was actually deducted or withheld. The employee will therefore not be able to claim any employees’ tax credit on assessment and will be liable to SARS for any shortfall in taxes due.

The purpose of paragraph 5(4) is to prevent the employee from claiming any employees’ tax credit on assessment when no taxes were paid via the employees’ tax systems during the course of the year. To the extent that the rule under section 157(2) of the TA Act, which provides that the payment by the employer in discharge of its personal liability is a payment on behalf of the employee for the employee’s liability for income tax, is in conflict with paragraph 5(4) and paragraphs 28(1) and (2), the provisions of the Fourth Schedule will prevail<sup>30</sup> to prevent any tax credit being claimed by the employee.

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<sup>26</sup> At 567.

<sup>27</sup> Colloquially known as the IRP5 certificate.

<sup>28</sup> Section 157(2) of the TA Act.

<sup>29</sup> Paragraph 28(2).

<sup>30</sup> Under section 4(3) of the TA Act, if there is any inconsistency between the TA Act and the Act, the provisions of the Act must prevail.

The employer's right to recover from the employee, and the employee's debt due to the employer arise automatically by operation of law when the employer incurs personal liability. The tax amount is thus a debt owing by the employee to the employer.

A taxable benefit arises<sup>31</sup> if an employee incurs any debt in favour of an employer and no interest is charged on that debt, or if interest is charged, the rate is less than the "official rate of interest".<sup>32 33</sup> Since the employee incurs a debt to the employer when the employer incurs personal liability to SARS, a taxable benefit arises if the employer fails to charge interest on that debt, or charges interest below the "official rate of interest".

If the employer releases the employee from the obligation to pay the debt owing to the employer, or if the debt is extinguished by prescription, a further taxable benefit arises in the hands of the employee.<sup>34</sup>

The cash equivalent of the value of both of these taxable benefits is remuneration,<sup>35</sup> and the employer is also required to deduct or withhold employees' tax from *these* amounts. If the employer fails in this obligation, it will again incur personal liability, and the reiteration of the taxable benefit described above will repeat. To simplify this recurring calculation for the taxable benefit, SARS accepts that the "gross-up formula" set out in **Annexure B** correctly determines the additional tax liability.

### **Example 3 – Taxable benefit arising from an interest-free debt**

#### *Facts:*

On 1 June 2023, M Ltd incurred personal liability to SARS for its failure to deduct or withhold employees' tax from the remuneration of an employee in a total amount of R19 000. M Ltd paid the amount to SARS on 30 June 2023.

No action was taken by M Ltd to recover the amount from the employee until 31 October 2023 when, after receiving a directive from SARS, the amount due was recovered from the employee's remuneration. M Ltd did not charge any interest on the debt.

#### *Result:*

Due to M Ltd incurring personal liability for payment of the amount of employees' tax that it failed to deduct or withhold, the employee simultaneously incurs a debt in favour of M Ltd. As no interest is charged by the employer, a taxable benefit arises in the hands of the employee for the debt incurred by the employee in favour of M Ltd, for the period that the debt remains unpaid.

<sup>31</sup> Definition of "taxable benefit" in paragraph 1 read with paragraph 2(f) of the Seventh Schedule.

<sup>32</sup> Defined in section 1(1) to mean the South African repurchase rate (the repo rate) plus 100 basis points for debts denominated in SA currency, or if the debt is denominated in a foreign currency, a rate equivalent to the repo rate in that foreign currency, plus 100 basis points.

<sup>33</sup> Refer to "Interest Rates – Table 3" available on the SARS website for the official rates of interest applicable to these taxable benefits.

<sup>34</sup> Under paragraph 2(h) of the Seventh Schedule.

<sup>35</sup> As defined in paragraph 1.



**Calculation of the taxable benefit:**

	R
Debt owing:	19 000
Official rate of interest: 8,25% + 100 basis points = 9,25%	
Cash equivalent of the value of the taxable benefit (per annum):	
R19 000 × 9,25%	1 757,50
Monthly taxable benefit: R1 757,50 / 12	146,45
Cash equivalent of the value of the taxable benefit to be included in the employee's monthly remuneration for the period the debt remained unpaid (June 2023 to October 2023):	
R146,45 × 5 months	<u>732,25</u>

**Example 4 – Gross up calculation of taxable benefit arising from release of obligation to repay a debt: Same tax bracket***Facts:*

P Ltd failed to deduct or withhold employees' tax from the remuneration of an employee, below the age of 65, for the full 2023 year of assessment. The employee's remuneration for that year was R360 000. The amount of employees' tax that P Ltd failed to deduct or withhold was R59 440.

P Ltd incurred personal liability for its failure to deduct or withhold employees' tax. The employee simultaneously incurred a debt to P Ltd for the tax amount paid. P Ltd paid the amount owing to SARS and released the employee from the obligation to repay the debt owed to it.

*Result:*

The taxable benefit that accrued to the employee may be calculated using the gross up formula in **Annexure B**.

- (a) Calculate the income tax payable (after the primary rebate) on the untaxed remuneration:

Tax on R360 000 is **R59 440**

- (b) Multiply the tax determined in step (a) by  $100 \div (100 - \text{marginal tax rate applicable to the employee})$

**R59 440** [step (a)] × **100 ÷ (100 – 31)** [marginal tax rate applicable to the employee] = **R86 144,92**

- (c) Untaxed remuneration of **R360 000 + R86 144,92** [step (b)] = **R446 144,92** grossed-up remuneration after iteration.

- (d) **R446 144,92** falls within the same tax bracket as R360 000 (from R353 101 to R488 700), thus the calculations in steps (e), (f), and (g) are not required.

- (e) Not applicable

- (f) Not applicable  
 (g) Not applicable  
 (h) Taxable benefit derived by the employee = **R86 144,92** [step (b)] + **Rnil** [step (g)]  
 = **R86 144,92**

Total taxable income was R360 000 + R86 144.92 = **R446 144,92**.

Tax due on R446 144,92 was **R86 144,92**.

R446 144.92 less R86 144.92 equalled **R360 000** (the untaxed remuneration paid by the employer).

**Example 5 – Gross up calculation of taxable benefit arising from release of obligation to repay a debt: Next tax bracket**

*Facts:*

Q Ltd failed to deduct or withhold employees' tax from the remuneration of an employee, below the age of 65, for the full 2023 year of assessment. The employee's remuneration for that year was R400 000. The amount of employees' tax that Q Ltd failed to deduct or withhold was R71 840.

Q Ltd incurred personal liability for its failure to deduct or withhold employees' tax. The employee simultaneously incurred a debt to Q Ltd for the tax amount paid. Q Ltd paid the amount owing to SARS and released the employee from the obligation to repay the debt owed to it.

*Result:*

The taxable benefit accruing to the employee may be calculated using the gross up formula in **Annexure B**.

- (a) Calculate the income tax payable (after the primary rebate) on the untaxed remuneration:

Tax on R400 000 is **R71 840**

- (b) Multiply the tax determined in step (a) by  $100 \div (100 - \text{marginal tax rate applicable to the employee})$

**R71 840** [step (a)]  $\times 100 \div (100 - 31)$  [marginal tax rate applicable to the employee] = **R104 115,94**

- (c) Untaxed remuneration of **R400 000 + R104 115,94** [step (b)] = **R504 115,94** grossed-up remuneration after iteration.

- (d) **R504 115,94** falls in a higher tax bracket than R400 000 (from R488 701 to R641 400), so steps (e), (f), and (g) must be performed.

- (e) Tax on grossed-up remuneration of **R504 115,94** [as calculated in (c) above] = **R104 886,73**

- (f) Tax [step (e)] – figure calculated in step (b) = **R104 886,73 – R104 115,94** = **R770,79**

(g) **R770,79** [step (f)]  $\times 100 / (100 - 36)$  (new marginal rate applicable to employee) = **R1 204,35**

(h) Taxable benefit derived by the employee = **R104 115,94** [step (b)] + **R1 204,35** [step (g)] = **R105 320,29**

Total taxable income was R400 000 + R105 320,29 = **R505 320,29**.

Tax due on R505 320,29 was **R105 320,29**.

R505 320,29 less R105 320,29 equalled **R400 000** (the untaxed remuneration paid by the employer).

The formula is applied slightly differently (although the principle remains the same) when an employer deducts or withholds employees' tax from only a portion of an employee's remuneration, for example, when a salary is taxed but the employer fails to tax an allowance or taxable benefit as required.

#### **Example 6 – Gross up calculation involving remuneration taxed in part and not taxed in part**

##### *Facts:*

R Ltd failed to deduct or withhold employees' tax from a housing allowance of R2 000 per month, paid as remuneration to an employee below the age of 65, for the full 2023 year of assessment. The employee's remuneration for that year excluding the housing allowance was R360 000, from which R Ltd deducted employees' tax of R59 440. The amount of employees' tax that the employer failed to deduct or withhold from the housing allowance was R7 440.

R Ltd incurred personal liability for its failure to deduct or withhold employees' tax. The employee simultaneously incurred a debt to R Ltd for the tax amount paid. R Ltd paid the amount owing to SARS and released the employee from the obligation to repay the debt owed to it.

##### *Result:*

The taxable benefit accruing to the employee may be calculated using the gross up formula in **Annexure B**.

(a) Calculate the income tax payable (after the primary rebate) on the untaxed remuneration:

Tax on R24 000 is **R7 440** (at a marginal rate of 31%)

(b) Multiply the tax determined in step (a) by  $100 \div (100 - \text{marginal tax rate applicable to the employee})$

**R7 440** [step (a)]  $\times 100 \div (100 - 31)$  [marginal tax rate applicable to the employee] = **R10 782,60**

(c) Untaxed remuneration of **R24 000 + R10 782,60** [step (b)] = **R34 782,60** grossed-up remuneration after iteration.

(d) **R34 782,60 plus R360 000 = R394 782,60**, which falls within the same tax bracket as the remuneration that was taxed (from R353 101 to R488 700), thus the calculations in steps (e), (f), and (g) are not required.

(e) Not applicable

(f) Not applicable

(g) Not applicable

(h) Taxable benefit derived by the employee = **R10 782,60** [step (b)] + **Rnil** [step (g)]  
= **R10 782,60**

Total taxable income was R360 000 + R24 000 + R10 782,60 = **R394 782,60**.

Tax due on R394 782.60 was **R70 222,60**.

Employees' tax already deducted was R59 440. R70 222.06 less R59 440 = **R10 782,60** (the additional grossed up liability).

#### 4.4.3 Is there double taxation?

Under paragraph 5(5), the amount that the employer has not recovered from the employee is deemed to be a penalty for purposes of section 23(d) of the Act, and therefore it is prohibited as a deduction. This penalty is not deemed to be a penalty for purposes of Chapter 15 of the TA Act,<sup>36</sup> nor is it a penalty imposed by SARS in accordance with the Act. It is therefore not a "penalty" as defined in section 208 of the TA Act. It is merely deemed to be a penalty for purposes of section 23(d). The remission of penalty rules in Part E of Chapter 15 of the TA Act may therefore not be relied on to remit the penalty.

Numerous tax practitioners have suggested to SARS<sup>37</sup> that requiring employees to pay the income tax due on the same amounts that an employer is personally liable to pay as employees' tax, due to the employer's failure to correctly deduct or withhold employees' tax, amounts to double taxation. This is simply not correct. Double taxation is the taxing of the same amount of income twice in the hands of the same person.<sup>38</sup> It is not double taxation if the same amount is taxed in the hands of different persons, on different grounds.<sup>39</sup>

An employee that is liable for any tax shortfall on assessment, is, firstly, a different person to the employer, and secondly, is liable to SARS on different grounds to the employer's liability.<sup>40</sup> Further, for the employer, the amount is not a tax. If the employer fails to recover the amount owing from the employee concerned, paragraph 5(5) deems the amount not so recovered, to be a penalty in the employer's hands. To the

<sup>36</sup> Such as the late payment penalty imposed under paragraph 6, which is deemed to be a penalty imposed under Chapter 15 of the TA Act.

<sup>37</sup> In the course of, or following, audits or investigations of their clients that will result or has resulted in additional assessments being made against the employers.

<sup>38</sup> *ITC 1364* (1980) 45 SATC 23 (T); *Commissioner for Inland Revenue v Delfos* 1933 AD 242, 6 SATC 92; *Isaacs v Commissioner for Inland Revenue* 1949 (4) SA 561 (A), 16 SATC 258.

<sup>39</sup> *Orkin Bros (Pretoria) Ltd v Commissioner for Inland Revenue* 1935 AD 9, 7 SATC 179, per Wessels CJ.

<sup>40</sup> The employee is liable to pay tax on amounts received or accrued in his or her own right, as a taxpayer and due to the provisions of paragraph 28(1). The employer is liable to pay the tax in its own right, in discharge of its personal liability under paragraph 5(1) and section 157(1)(b) of the TA Act.

extent that the employer does recover the amount from the employee concerned, the employer is not out of pocket and no question of double taxation can arise.

#### **Example 7 – Employer recovery from employee**

*Facts:*

A Ltd incurred personal liability under section 157(1)(b) of the TA Act for failing to deduct or withhold employees' tax from the remuneration of 25 of its employees for the tax period May 2021. The amount of employees' tax which was required to be deducted or withheld amounted to R4 000 for each of the 25 employees. A Ltd made payment of the outstanding employees' tax in discharge of its personal liability of R100 000 (R4 000 × 25).

In June 2021, A Ltd obtained a tax directive from SARS and recovered the amount from each of the employees from the future remuneration payable to them.

*Result:*

A Ltd was not prohibited from deducting the R100 000 that it paid to SARS under its personal liability obligations when it was assessed for the 2022 year of assessment, as it had recovered the amount from the respective employees.<sup>41</sup>

## **5. Conclusion**

Amounts required to be deducted or withheld by an employer by way of employees' tax from remuneration paid or payable to employees are advance payments in respect of the income tax liability of the employees. The employer has an obligation to deduct or withhold employees' tax and a general obligation to pay over the amount so deducted or withheld to SARS. If the employer fails to deduct or withhold, or to pay over, the employer incurs a personal liability to SARS.

An employee incurs a debt owing to the employer at the same time that the employer incurs personal liability to SARS, for the same amount of tax. A taxable benefit may arise in the hands of the employee if the employer does not charge interest on this debt, or if the employer releases the employee from the obligation to repay the debt. The gross up formula in **Annexure B** may be used to calculate the correct tax liability under these circumstances.

The employer has a statutory right to recover the amount paid to SARS under its personal liability, from the employee. Until this occurs, the employee is not entitled to an employees' tax certificate, and may not claim any tax credit for the shortfall on assessment.

Any amount paid by an employer under its personal liability is deemed to be a penalty and is not deductible in the determination of the taxable income of the employer, if the employer does not recover those amounts from the employee concerned.

<sup>41</sup> Such deduction will however have to comply with any other requirements for deductibility under the Act.

The employer making payment under its personal liability, and the employee also paying an income tax liability on the untaxed remuneration, does not amount to double taxation, as the amounts are taxed in the hands of different persons, on different grounds.

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## Annexure A – The law

### Paragraph 1 of the Fourth Schedule – Definitions

“**employee**” means —

- (a) any person (other than a company) who receives any remuneration or to whom any remuneration accrues;
- (b) any person who receives any remuneration or to whom any remuneration accrues by reason of any services rendered by such person to or on behalf of a labour broker;
- (c) any labour broker;
- (d) any person or class or category of person whom the Minister of Finance by notice in the *Gazette* declares to be an employee for the purposes of this definition
- (e) any personal service provider; or
- (f) .....
- (g) .....

“**employer**” means any person (excluding any person not acting as a principal, but including any person acting in a fiduciary capacity or in his capacity as a trustee in an insolvent estate, an executor or an administrator of a benefit fund, pension fund, pension preservation fund, provident fund, provident preservation fund, retirement annuity fund or any other fund) who pays or is liable to pay any amount by way of remuneration to any person under the provisions of any law or out of public funds (including the funds of any provincial council or any administration or undertaking of the State) or out of funds voted by Parliament or a provincial council;

### Paragraph 2(1) of the Fourth Schedule

2(1) Every—

- (a) employer who is a resident; or
- (b) representative employer in the case of any employer who is not a resident,

(whether or not registered as an employer under paragraph 15) who pays or becomes liable to pay any amount by way of remuneration to any employee shall, unless the Commissioner has granted authority to the contrary, deduct or 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 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, or, if such remuneration is paid or payable to an employee who is married and such remuneration is under the provisions of section 7(2) of this Act deemed to be income of the employee’s spouse, in respect of such liability of that spouse, and shall, subject to the Employment Tax Incentive Act, 2013, 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.

### Paragraph 5 of the Fourth Schedule

5(1) Subject to the provisions of subparagraph (6), if an employer is personally liable for the payment of employees' tax under Chapter 10 of the Tax Administration Act, 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 paragraph 2.

(1A) The liability of the employer as contemplated in paragraph 2 must be deemed to have been discharged if the employer made payment of the outstanding employees' tax in terms of subparagraph (1).

(2) Where the employer has failed to deduct or withhold employees' tax in terms of paragraph 2 and the Commissioner is satisfied that the failure was not due to an intent to postpone payment of the tax or to evade the employer's obligations under this Schedule, the Commissioner may, if he is satisfied that there is a reasonable prospect of ultimately recovering the tax from the employee, absolve the employer from his liability under sub-paragraph (1) of this paragraph

(3) An employer who has not been absolved from liability as provided in sub-paragraph (2) 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

(4) Until such time as an employee pays to his employer any amount which is due to the employer in terms of sub-paragraph (3), such employee shall not be entitled to receive from the employer an employees' tax certificate in respect of that amount.

(5) Any amount which an employer is required to pay in terms of sub-paragraph (1) and which the employer does not recover from the employee shall, insofar as the employer only is concerned, for the purposes of section 23(d) be deemed to be a penalty due and payable by that employer.

(6) The provisions of sub-paragraph (1) shall not apply in respect of any amount or any portion of any amount of employees' tax which an employer has failed to deduct or withhold and in respect of which the provisions of sub-paragraph (3) of paragraph 28 apply.

### Paragraph 6 of the Fourth Schedule

6(1) If an employer fails to pay any amount of employees' tax for which the employer is liable within the period allowable for payment thereof in terms of paragraph 2 SARS must, in accordance with Chapter 15 of the Tax Administration Act, impose a penalty equal to ten per cent of such amount.

### Paragraph 28 of the Fourth Schedule

28(1) There shall be set off against the liability of the taxpayer in respect of any taxes (as defined in subparagraph (8)) due by the taxpayer, the amounts of employees' tax deducted or withheld by the taxpayer's employer during any year of assessment for which the taxpayer's liability for normal tax has been assessed by the Commissioner and the amounts of provisional tax paid by the taxpayer in respect of any such year, and if—

- (a) the sum of the said amounts of employees' tax and provisional tax exceeds the amount of the taxpayer's total liability for the said taxes, the excess amount shall be refunded to the taxpayer; or
- (b) the taxpayer's total liability for the aforesaid taxes exceeds the sum of the said amounts of employees' tax and provisional tax, the amount of the excess shall be payable by the taxpayer to the Commissioner.



(1)bis . . . . .

(2) The burden of proof that any amount of employees' tax has been deducted or withheld by his employer shall be upon the taxpayer and any employees' tax certificate shall be *prima facie* evidence that the amount of employees' tax reflected therein has been deducted by the employer.

(3) If the Commissioner is satisfied that the amount or any portion of the amount of employees' tax shown in any employees' tax certificate has not been deducted or withheld by the employer and the amount of employees' tax shown in such tax certificate has been applied as provided in subparagraph (1), 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.

(4) An employer who has under subparagraph (3) paid to the Commissioner an amount which has but should not have been applied under the provisions of subparagraph (1), may, if the amount was shown or included in the certificate because of a *bona fide* error, recover the amount so paid from the employee concerned, and in that case the provisions of subparagraph (3) of paragraph 5 shall *mutatis mutandis* apply.

(5) No employees' tax certificate shall be issued by the employer in respect of any amount recovered by him from the employee in terms of subparagraph (4) nor shall any such amount be included in any return rendered in terms of subparagraph (3) of paragraph 14.

(6) If the Commissioner is satisfied that the employee to whom an employees' tax certificate refers was directly or indirectly responsible for an incorrect amount being shown on such certificate he may absolve the employer from the liability imposed upon him by subparagraph (3), and in that case the employee shall be solely liable under that subparagraph.

(7) . . . . .

(8) For the purposes of this paragraph, "**taxes**" means the normal tax levied under this Act.

### Paragraph 29 of the Fourth Schedule

29. No refund of any amount of employees' tax or provisional tax shall be made to the taxpayer concerned otherwise than as provided in paragraph 28 or in such circumstances as may be determined by the Commissioner in any deduction tables prescribed by him or her under paragraph 9.

### Paragraph 2(f) of the Seventh Schedule

(f) a debt (other than a debt for purposes of the payment by the employee of any consideration in respect of any qualifying equity share contemplated in section 8B to comply with the minimum requirements of the Companies Act or the payment of any securities transfer tax payable in respect of that share, or a debt in respect of which a subsidy is payable as contemplated in subparagraph (gA)) has been incurred by the employee, whether in favour of the employer or in favour of any other person by arrangement with the employer or any associated institution in relation to the employer, and either—

(i) no interest is payable by the employee in respect of such debt; or

(ii) interest is payable by the employee in respect thereof at a rate of lower than the official rate of interest;

### Paragraph 2(h) of the Seventh Schedule

- (h) the employer has, whether directly or indirectly, paid any debt owing by the employee to any third person (other than an amount in respect of which item (i) or (j) applies), without requiring the employee to reimburse the employer for the amount paid or the employer has released the employee from an obligation to pay any debt owing by the employee to the employer: Provided that where any debt owing by the employee to the employer has been extinguished by prescription the employer shall be deemed to have released the employee from his or her obligation to pay the amount of such debt if the employer could have recovered the debt owing or caused the running of the prescription to be interrupted, unless the employer's failure to recover the debt owing or to cause the running of the prescription to be interrupted was not due to any intention of the employer to confer a benefit on the employee

### Paragraph 11(1) of the Seventh Schedule

11(1) The cash equivalent of the value of the taxable benefit derived in consequence of the debt owed by an employee in the circumstances contemplated in paragraph 2(f) shall be the amount of interest that would have been payable on the amount owing in respect of the debt in respect of the year of assessment if the employee had been obliged to pay interest on such amount during such year at the official rate of interest, less the amount of interest (if any) actually incurred by the employee in respect of the debt in respect of such year.

### Paragraph 13(1) of the Seventh Schedule

13(1) The cash equivalent of the value of the taxable benefit derived by reason of the payment of any amount by an employer in the circumstances contemplated in paragraph 2(h) shall be an amount equal to such amount and the cash equivalent of the benefit to an employee by reason of his release from the obligation to pay an amount owing, as contemplated in the said paragraph, shall be an amount equal to the amount that was owing.

### Section 156 of the TA Act

**156. Withholding agent.**—In this Act, withholding agent means a person who must under a tax Act withhold an amount of tax and pay it to SARS.

### Section 157 of the TA Act

**157. Personal liability of withholding agent.**—(1) A withholding agent is personally liable for an amount of tax—

- (a) withheld and not paid to SARS; or
- (b) which should have been withheld under a tax Act but was not so withheld.

(2) An amount paid or recovered from a withholding agent in terms of subsection (1) is an amount of tax which is paid on behalf of the relevant taxpayer in respect of his or her liability under the relevant tax Act.

**Annexure B – The gross up formula****Gross up formula****Steps**

- (a) Calculate the tax on the untaxed remuneration.
- (b) Multiply the tax determined in step (a) by  $100 \div (100 - \text{marginal tax rate applicable to the employee})$ .
- (c) Add the figure determined in step (b) to the untaxed remuneration to obtain the grossed-up salary after iteration.
- (d) If the grossed-up remuneration after iteration as determined in step (c) falls within the same tax bracket as the untaxed remuneration, the calculations in steps (e), (f) and (g) are not required.
- (e) If the grossed-up remuneration after iteration as determined in step (c) falls into a higher tax bracket than the tax bracket that applies to the untaxed remuneration derived by the employee, calculate the tax on the grossed-up remuneration after iteration from step (c).
- (f) Subtract the figure calculated in step (b) from the tax calculated in step (e).
- (g) Multiply the figure determined in step (f) by  $100 \div (100 - \text{marginal tax rate applicable to the employee})$ .

The taxable benefit derived by the employee is equal to the result of step (b) plus the result of step (g) – if applicable. The taxable benefit must be added to the employee's untaxed remuneration to arrive at the employee's taxable income.