



SOUTH AFRICAN REVENUE SERVICE

INTERPRETATION NOTE NO. 27

DATE: 4 February 2005

ACT : INCOME TAX ACT, 1962 (the Act)
SECTION : THE FOURTH SCHEDULE TO THE ACT
SUBJECT : PERSONAL LIABILITY OF EMPLOYERS, REPRESENTATIVE EMPLOYERS, SHAREHOLDERS AND DIRECTORS FOR OUTSTANDING EMPLOYEES' TAX

1. Purpose

The purpose of this interpretation note is to highlight the personal liability of certain employers, representative employers, shareholders and directors where the employer or representative employer failed to deduct or withhold employees' tax or where employees' tax has been deducted or withheld but not paid over to the South African Revenue Service (SARS) within the required period.

2. Background

Under the pre-amended legislative framework the right of SARS to recover outstanding employees' tax from -

- an employer who paid or became liable to pay remuneration in a fiduciary capacity or capacity as a trustee in an insolvent estate, an executor or an administrator of a benefit fund, pension fund, provident fund, retirement annuity fund or any other fund, was limited to the extent of the assets belonging to the administered entity; and
- a representative employer who paid or was liable to pay remuneration in its representative capacity was limited to the extent of the assets belonging to the represented entity.

3. The law

3.1 The amendments

- Subparagraphs (1) and (2) of paragraph 16 of the Fourth Schedule have been amended by section 86(a) of Revenue Law Amendment Act, No. 45 of 2003.
- Paragraphs 16(2A), (2B), (2C) and (2D) were introduced into the Fourth Schedule by section 86(b) of the Revenue Laws Amendment Act, No. 45 of 2003 and these subparagraphs are applicable with effect from 22 December 2003.

3.2 The relevant provisions in the Fourth Schedule read as follows:

3.2.1 The liability to deduct employees' tax and pay over to SARS is regulated by 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 by way of employees' tax an amount which shall be determined as provided in paragraph 9, 10, 11 or 12, 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 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 he ceased to be an employer, or in either case within such further period as the Commissioner may approve."

3.2.2 The personal liability of the employer is governed by paragraphs 4 and 5 (1) of the Fourth Schedule

"4. Any amount required to be deducted or withheld in terms of paragraph 2 shall be a debt due to the State and the employer concerned shall save as otherwise provided be absolutely liable for the due payment thereof to the Commissioner.

5.(1) Subject to the provisions of sub-paragraph (6) any employer who fails to deduct or withhold the full amount of employees' tax as provided in paragraph 2 shall be personally liable for the payment to the Commissioner of the amount which he fails to deduct or withhold, and shall, subject to the provisions of sub-paragraph (2), 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."

3.2.3 The word "employer" - as defined in paragraph 1 of the Fourth Schedule

"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, provident fund, retirement annuity fund or any other fund) who pays or is liable to pay to any person any amount by way of remuneration, and any person responsible for the payment of 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;"

3.2.4 The term "representative employer" as defined in paragraph 1 of the Fourth Schedule

(a) in the case of any company, the public officer of that company, or, in the event of such company being placed in liquidation or under judicial management, the liquidator or judicial manager, as the case may be;

(b) in the case of any divisional council, municipal council, village management board or like authority or any body corporate or unincorporate (other than a company or a partnership) any manager, secretary, officer or other person responsible for paying remuneration on behalf of such council board, authority or body;

(c) in the case of a person under legal disability, any guardian, curator, administrator or other person having the management or control of the affairs of the person under legal disability; or

(d) in the case of any employer who is not ordinarily resident in the Republic, any agent of such employer having authority to pay remuneration,

who is a resident, but nothing in this definition shall be construed as relieving any person from any liability, responsibility or duty imposed upon him by this Schedule."

3.2.5 Personal liability of other persons and representative employers - paragraph 16 of the Fourth Schedule

- "16.(1) Every representative employer shall as regards the remuneration which the employer whom he or she represents pays or is liable to pay to any employee or which is paid or payable by the representative employer in his or her representative capacity, be subject in all respects to the same duties, responsibilities and liabilities under this Schedule as if that remuneration were remuneration paid or liable to be paid by him or her in his or her personal capacity.
- (2) Any employees' tax or interest on employees' tax or any penalty imposed under this Part of any person who in terms of the definition of "employer" in paragraph 1 is an employer by virtue of his having paid or become liable to pay remuneration 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, provident fund, retirement annuity fund or any other fund, or from the representative employer, shall be limited to the extent only of any assets belonging to the person, body, trust, estate or fund represented or administered by him which may be in his possession or under his management, disposal or control.
- (2A) Every representative employer or other person who is personally liable as contemplated in subparagraphs (2), (2B) or (2C), who, as such, pays any employees' tax, additional tax, penalty or interest due under this Act shall be entitled to recover the amount so paid from the person on whose behalf it is paid, or to retain out of any moneys that may be in his or her possession or may come to the representative employer in his or her representative capacity, an amount equal to the amount so paid.
- (2B) Every representative employer and person contemplated in subparagraph (2) shall be personally liable for the payment of any employees' tax, additional tax, penalty or interest payable by that representative employer or person in his or her representative capacity to the extent that the representative employer or person, while it remains unpaid, -
- (a) alienates, charges or disposes of any money received or accrued in respect of which the tax is chargeable; or
 - (b) disposes of or parts with any fund or money belonging to the employer whom he or she represents which is in his or her possession or comes to him or her after the employees' tax, additional tax, penalty or interest has become payable, if such employees' tax, additional tax, penalty or interest could legally have been paid from or out of such fund or money.
- (2C) 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 the employees' tax, additional tax, penalty or interest for which the company is liable.
- (2D) Notwithstanding subparagraph (2), the employees' tax, additional tax, penalty or interest for which any representative employer or other person is liable in terms of subparagraph (2B) or (2C) shall be fully recoverable by the Commissioner from that representative employer or other person to the extent that it remains unpaid by the employer."

3.2.6 The recovery provision – paragraph 31 of the Fourth Schedule

“31. Any amount of employee’s tax, provisional tax, penalty or additional tax payable in terms of this Schedule, and any amount of interest payable in terms of section *eighty-nine bis* of this Act shall when it becomes due or is payable be a debt due to the State and may be recovered by the Commissioner in the manner prescribed in section *ninety-one* for the recovery of tax and interest due or payable under this Act.”

3.2.7 The offences – paragraphs 30(1)(a), (b) and 30(2)

“30.(1) Any person who—

- (a) makes or becomes liable to make any payment of remuneration and who fails to deduct or withhold therefrom any amount of employees’ tax or to pay such amount to the Commissioner as and when required by paragraph 2; or
- (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.

- (2) 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.”

4. Application of the law

The provisions of the Fourth Schedule relating to the liability to deduct or withhold employees’ tax and the liability to pay the employees’ tax to SARS apply to employers, representative employers, directors and shareholders as follows:

4.1 Employer

4.1.1 Liability to deduct and pay over to SARS

Any resident employer (or representative employer in the case of a non-resident employer) who pays or becomes liable to pay remuneration to an employee is liable to -

- deduct or withhold employees' tax from remuneration; and
- pay the employees' tax to SARS within the prescribed period¹.

4.1.2 Personal liability – failure to deduct

An employer who fails to deduct or withhold the correct amount of employees' tax incurs a personal liability for the payment to SARS of the amount which it failed to deduct or pay over.²

4.1.3 Personal liability – failure to pay over to SARS

- Any amount of employees' tax that is required to be deducted or withheld is a debt due to the State and the employer is absolutely liable for the payment thereof to the State.³
- The personal liability of an employer who pays remuneration -
 - in a fiduciary capacity; or
 - as a trustee of an insolvent estate; or
 - as an executor; or
 - as an administrator of a benefit fund, pension fund, provident fund, retirement annuity fund or any other fund,is generally limited to the extent of assets belonging to the entity it represented or administered.
However, where such an employer -
 - alienates, charges or disposes of any money received or accrued in respect of which the tax is chargeable; or
 - disposes of any fund or amount of money belonging to the represented employer which is in its possession or comes to him or her after the tax has become payable and if such tax could legally have been paid from or out of such fund or money,

¹ Paragraph 2(1) of the Fourth Schedule

² Paragraph 5(1) of the Fourth Schedule

³ Paragraph 4 of the Fourth Schedule

that employer shall be personally liable for the payment of employees' tax, additional tax, penalty or interest to SARS⁴, and SARS may recover the outstanding amounts from that employer⁵.

4.1.4 The employer's right to recover

- An employer who incurred a personal liability as a result of its failure to deduct the correct amount of employees' tax and who has not been absolved from this liability has a right to recover the amount from the employee in respect of whom the employees' tax was paid. The amount may be recovered from future remuneration which becomes payable by the employer to the employee.⁶

- An employer who incurred a personal liability as a result of its failure to pay the amount of employees' tax which it has deducted over to SARS has no right of recovery. This is so, because it has already deducted the employees' tax from the relevant employee(s), but failed to pay it over to SARS.

- Where an employer who pays remuneration -
 - in a fiduciary capacity; or
 - as a trustee of an insolvent estate; or
 - as an executor; or
 - as an administrator of a benefit fund, pension fund, provident fund, retirement annuity fund or any other fund,is personally liable for the payment of employees' tax, additional tax, penalty or interest, he or she will be entitled to recover the amount paid from the person on whose behalf the amount was paid. Such an employer may recover the amount by retaining any money that may be in his or her possession or may come to him or her in his or her representative capacity.⁷

⁴ Paragraph 16(2B) of the Fourth Schedule

⁵ Paragraph 31 of the Fourth Schedule

⁶ Paragraph 5(3) of the Fourth Schedule

⁷ Paragraph 16(2A) of the Fourth Schedule

4.2 Representative employer

4.2.1 Liability to deduct and pay over to SARS

Every representative employer is subject to the same duties, responsibilities and liabilities under the Fourth Schedule as if the remuneration which the represented employer pays or which the representative employer pays in its representative capacity were remuneration paid in its personal capacity.⁸ Effectively, this means that a representative employer is jointly and severally liable to -

- deduct or withhold employees' tax from remuneration; and
- pay the employees' tax to SARS within the prescribed period.

4.2.2 Personal liability – failure to deduct

Although a representative employer has a duty to deduct the correct amount of employees' tax⁹, no personal liability is created in respect of an amount that it failed to deduct. However, the employer who it represents remains personally liable for the payment to SARS of any amount which the representative employer failed to deduct or withhold from remuneration¹⁰.

4.2.3 Personal liability – failure to pay over to SARS

A representative employer who deducted employees' tax but failed to pay it over to SARS is personally liable for the payment thereof to SARS, but generally only to the extent of the assets belonging to the person it represents which are in the representative employer's possession, management, disposal or control¹¹.

However, where the representative employer -

- alienates, charges or disposes of any money received or accrued in respect of which the tax is chargeable; or
- disposes of any fund or amount of money belonging to the represented employer which is in his or her possession or comes to him or her after the tax has become payable and if such tax could legally have been paid from or out of such fund or money,

⁸ Paragraph 16(1) of the Fourth Schedule

⁹ Paragraph 16(1) of the Fourth Schedule

¹⁰ Paragraph 5(1) of the Fourth Schedule

¹¹ Paragraph 16(2) of the Fourth Schedule

the representative employer shall be personally liable for the payment of employees' tax, additional tax, penalty or interest payable by him or her in his or her representative capacity,¹² and SARS may recover the outstanding amounts from the representative employer to the extent that it remains unpaid by the employer¹³.

4.2.4 The representative employer's right to recover

Where a representative employer is personally liable for the payment of employees' tax, additional tax, penalty or interest to SARS, it will be entitled to recover the amount paid to SARS from the person on whose behalf the amount was paid. Recovery may take place by retaining any money that may be in its possession or may come to it in the representative capacity.

4.3 Shareholders and directors

4.3.1 Personal liability – failure to pay over to SARS

Where the employer is a company, every shareholder and director who -

- controls; or
- is regularly involved in the management of the company's overall financial affairs,

is personally liable for the employees' tax, additional tax, penalty or interest for which the company is liable¹⁴. Any outstanding employees' tax, additional tax, penalty or interest is fully recoverable from the relevant shareholders and/or directors to the extent that it remains unpaid by the employer.¹⁵

4.3.2 The shareholder's or director's right to recover

Where a shareholder or director is personally liable for the payment of employees' tax, additional tax, penalty or interest, and paid it as such, the shareholder or director will be entitled to recover the amount paid to the Commissioner from the person on whose behalf it was paid. Recovery may

¹² Paragraph 16(2B) of the Fourth Schedule

¹³ Paragraph 16(2D) of the Fourth Schedule

¹⁴ Paragraph 16(2C) of the Fourth Schedule

¹⁵ Paragraph 16(2D) of the Fourth Schedule

take place by retaining any money that may be in its possession or may come to it in its representative capacity.¹⁶

5. General overview

Paragraph 30(1)(a) and (b) provide for a fine and imprisonment on conviction of any person who -

- fails to deduct or withhold the correct amount of employees' tax from remuneration; or
- fails to pay such amounts over to SARS within the prescribed period; or
- uses or applies any employees' tax for purposes other than the payment thereof to SARS.

This, together with the amendments to paragraph 16 of the Fourth Schedule will assist efforts to reduce opportunities for employers and representative employers to evade their responsibility to deduct or withhold employees' tax and pay it over to SARS.

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¹⁶ Paragraph 16(2A) of the Fourth Schedule