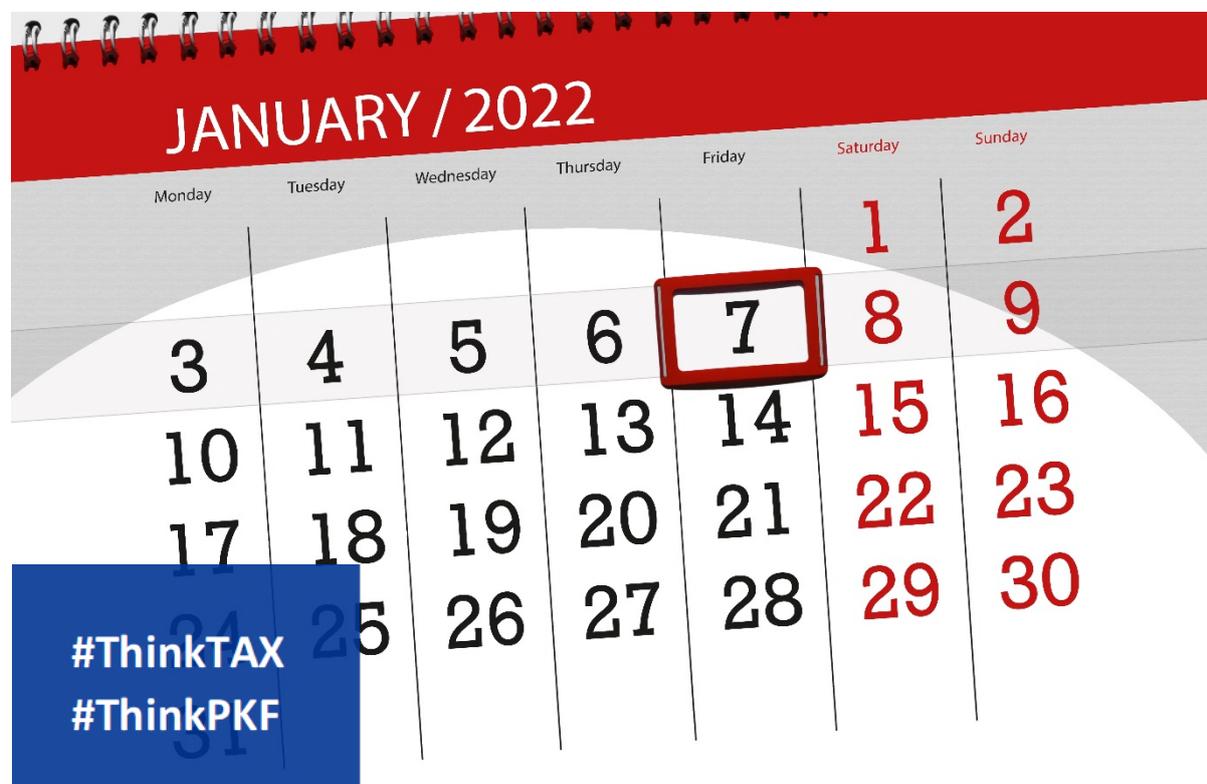


Holiday season is coming: Remember PAYE to be paid by 7 January 2022!

TAX ARTICLE – DECEMBER 2021



On 23 August 2021, the Cape High Court handed down judgement in the case of *PERI Formwork Scaffolding Engineering v CSARS*. The case concerned the applicability of a 10% penalty (amounting to R1.6 million) and interest thereon in respect of the late payment of employees' tax by the taxpayer.

The facts of the case are as follows:

- Employer reconciliation was due on 31 December 2017 and was filed on 18 December 2017. An amount of R10.6 million PAYE was due by the taxpayer in terms of this return.
- On the date of filing (18 December 2017), the taxpayer instructed Nedbank to make payment of the PAYE liability on 3 Jan 2018.
- The office of the taxpayer was closed from 15 December 2017 to 3 January 2018.
- On 3 January 2018, the payment administrator was unable to make payment of the PAYE as insufficient cash was available, rather full payment was made and received by SARS on Monday, 8 January 2018.
- The reason provided by the taxpayer for the payment on 8 January 2018 was that it was waiting for the payment of debtors and in line with its usual practice and projections it was understood that there would be sufficient cash available on 3 January 2018. When it became apparent on 3 January 2018 that sufficient cash was not available, the taxpayer requested a R5m overdraft from Nedbank which was

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approved on 5 January 2018. There remained a shortfall of R100k – which the taxpayer had expected would be paid by outstanding debtors on 5 January 2018, but this amount was not received in time.

- On 6 January there was a shortfall of R6,000, as a result of which the payment to SARS did not go through.
- The payment administrator then requested payment from other group entities of R20k on Monday, 8 January, after which payment of the PAYE liability could be made.

The Taxpayer raised the following arguments in favour of the late payment penalty not being applicable:

- When correctly considering the time-periods involved – it was not late in respect of the payment of employees' tax.
- In terms of legislation, PAYE is due 7 days after the end of the month in respect of which it applies. If the 7th falls on a Saturday, Sunday or public holiday – the payment must be made on the last business day before that date.
- The taxpayer argued, however, that one must use the statutory interpretation method of determining days – which would mean that the day after the weekend is the date upon which the payment must be made. - i.e., 8 January 2018.
- Alternatively, the taxpayer argued that, if the PAYE was held to be paid late - there are reasonable grounds for the late payment and the penalty is accordingly excessive. In particular, it was argued that the taxpayer innocently relied on the reasonable cash flow projections of its bookkeeper. In addition, the fact that the debtors failed to pay significant amounts to the taxpayer by 3 January 2018 was highly improbable.

SARS argued:

- Employers are in a fiduciary relationship as relates to PAYE funds – which are held on behalf of SARS with an obligation to pay such funds to SARS within the required period.
- The taxpayer failed to insulate PAYE funds deducted from salaries from business income – therefore these funds became subject to cash flow forecasts, trade debtor behaviour etc.
- Money collected on behalf of SARS cannot be used in business operations and should be insulated.
- In the circumstances there were no “reasonable grounds” for the late payment of the PAYE.
- If there is late payment of employees' tax, the legislation provides that SARS must levy a 10% penalty and it has no discretion to levy a lesser penalty in circumstances where the payment is made only 1 day late.

High Court:

- The tax legislation is clear: employees' tax is to be paid by 7th of the month following the month in which the liability arises, if such date falls on a holiday or weekend – the payment is to be made the last business day prior thereto. The court held that there was no reason to go further and look at more general statutory interpretation rules regarding the meaning of “days”. Accordingly, the employees' tax payment was late.

- The High Court did not agree with SARS that an employer is in a fiduciary relationship towards SARS as relates to employees' tax deducted from employee salaries. Rather, the court indicated that this relationship was more akin to the relationship of a debtor and creditor, for example: when a client deposits funds at a bank and the bank holds funds on behalf of client.
- The High Court was therefore not persuaded that the PAYE funds need to be isolated from business income.
- In addition, the High Court confirmed that the legislation provides for a 10% penalty and no possibility exists of a lesser percentage penalty if the payment is only a few days late. The court indicated that, should this be permitted, this would open up flood gates for many arguments and court proceedings arguing lesser penalty percentages.
- The court then proceed to consider whether reasonable grounds exist to remit the penalty. In this regard the court considered the manner in which the taxpayer tried to rectify the position – for example, it gave instruction for payment on 3 January 2018, organised an overdraft when it became evident that sufficient cash would not be available on such date etc. In addition, it was clear that the taxpayer did not act in bad faith.
- As a result, the High Court held that there were reasonable grounds for the remission of the penalty. The appeal by the taxpayer was therefore upheld.

Despite the reasonable grounds for the late payment of the PAYE in the circumstances of the case, taxpayers should take heed that the dates upon which PAYE liability is to be settled is clear. To prevent a potentially significant late-payment penalty – taxpayers should ensure sufficient liquidity in order for employees' tax to be paid within the required timeframe.

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