

THE NATURE OF VAT AND IS THE FAILURE TO PAY VAT EQUAL TO COMMON LAW THEFT

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VAT is an indirect tax, which is levied, collected and paid to SARS by an intermediary (in the case of the VAT Act a 'vendor').

The term '*intermediary*' probably best describes the vendor in this role, because when using the loose term '*agent*' to label the vendor one would either expect to see SARS or the person on whom the VAT is levied (the actual taxpayer) as the principal, which is rather confusing.

It is often said that the vendor is also in a kind of fiduciary capacity regarding the VAT collected, from which the vendor can deduct input taxes, to determine the amount payable to SARS.

This aspect was considered in the case of Director of Public Prosecutions, Western Cape v Parker¹.

Parker, being the sole representative of Step-in-Time Supermarket CC ('the CC'), and the CC, a registered VAT vendor, were both charged in the regional court, Bellville, Western Cape with a number of counts under the Income Tax Act and the VAT Act, respectively.

Apart from the aforementioned charges, they were charged with 16 counts of (common law) theft of money allegedly collected in respect of VAT.

The magistrate, for purposes of sentence, had grouped the convictions and had sentenced Parker, *inter alia*, to five years' imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act (the CPA) in respect of the sixteen charges of common law theft.

The Western Cape High Court (*per* Dlodlo J and Van Staden AJ) held that Parker did not commit theft of the VAT, essentially on the basis that the money in question had belonged to the vendor and not to the SARS and the convictions for theft were consequently set aside together with the sentence in terms of s 276(1)(i) of the CPA.

The State then lodged an appeal and requested the Supreme Court of Appeal (SCA) to decide the following legal question: Whether a VAT vendor who had misappropriated an amount of

¹ 77 SATC 224

VAT which it had collected on behalf of SARS could be charged with the common law crime of theft?

Counsel for the State explained that the reason why it approached the SCA was because the penalty and punishment prescribed by the AVT Act were too lenient for certain cases of misappropriation of VAT. It follows that a conviction for theft would pave the way for sterner sanctions and that is what the prosecuting authority sought.

The State submitted the VAT vendor acted as an agent for SARS and it followed that a VAT vendor who used VAT for purposes other than to pay to SARS misappropriated those funds and was therefore guilty of theft, despite the fact that the vendor may have been the owner of that money.

The State sought to rely on the proposition that where X holds money in trust on Y's behalf or receives money from Y with instructions that it be used for a specific purpose and X misappropriates that money by using it for a different purpose, X commits theft of the money and in these types of cases the rule that one cannot steal one's own money is no bar to a conviction.

In the Supreme Court of Appeal Pillay JA said that:

'I do not believe, however, that section 7(1) of the [VAT Act] either expressly or impliedly creates a relationship of trust. On the contrary, it is clear to me that the relationship created by the [VAT Act] is one of a debtor and his creditor.'

And:

'The argument based on Metcash² misconstrued and quotes out of context the comments made by Kriegler J. What Kriegler J said in paragraph [15], after broadly discussing what the [VAT Act] compels the registered vendor to do in calculating and paying VAT, was that 'In the result vendors are entrusted with a number of important duties in relation to VAT'. In this sense 'entrusted' might very well be replaced with 'burdened with'. In other words the vendor is expected to comply with various sections of the [VAT Act] which serve to safeguard the operation thereof and minimise the effects of its weaknesses. The learned Judge certainly did not suggest that a trust relationship, or

² 63 SATC 13

one resembling that as between a trustee and a beneficiary of a trust, had been created.

And:

'Confronted with these difficulties, counsel for the State then changed tack by suggesting that the relationship of trust arises every time the vendor collects VAT and uses that money for purposes other than paying it over to SARS. This proposition again created problems of its own as is shown by the following example. If the vendor sells an article for R100 together with R14 VAT it would, on counsel's argument, be guilty of theft of the R14 if it uses it for another purpose, unless it has a liquid fund to enable him to repay. The fact that on the next day his indebtedness is cancelled out by input tax would make no difference. Neither would the fact that it would be able to pay whatever VAT becomes payable on the twenty-fifth day of the month following the tax period.

In the light of this example, the concept of a trust relationship between the vendor and SARS which forms the bedrock of the State's argument is clearly unsustainable. The answer to these difficulties suggested by counsel, namely, that the Director of Public Prosecutions would never charge the vendor under the circumstances contemplated in the example, provides no answer at all to the question whether a crime has been committed. The law cannot depend on whether or not the DPP decides to enforce it.'

And:

'It is clear that the [VAT Act] is a scheme with its own directives, processes and penalties. The relationship it creates between SARS and the registered vendor is sui generis – one with its own peculiar nature. The [VAT Act] does not confer on the vendor the status of a trustee or an agent of SARS. If it did, the vendor would either have to keep separate books of account or alternatively, would have to be sufficiently liquid at any given time in order to cover the outstanding VAT. The [VAT Act] makes no provision for this situation nor does it seek to compel a vendor to keep separate books of account in respect of VAT.

To find that the [VAT Act] creates a trust relationship (in whatever form) would require an innovative approach.'

Pillay finally held that as the VAT Act did not incorporate theft as an offence and for the courts to extend the crime of theft to resolve the State's difficulties, would be contrary to the principle of *nullum crimen, nulla poena sine praevia lege poenali* (without a law, no charge is possible).

The Tax Administration Act, which from 1 October 2012 provided for criminal offences relating to non-compliance with tax Act, still does not incorporate theft as an offence.

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