

## **NO PAYE LIABILITY TILL YOU PAY SALARIES: By Jonathan Hore**

Due to the current pandemic, business is low for some sectors of the economy and some employers are even failing to pay salaries. Failure to pay salaries is stressful enough but employers will also have more pressure as they worry that they would not have paid PAYE in time. You may have stumbled across discussions where people stated that 'withholding taxes in Botswana are triggered by payment.' Allow me to clarify what the law says about this and why employers need not to worry about PAYE when salaries are not paid. In this article, words importing the masculine shall be deemed to include the feminine.

### **The concept**

Before I get into much detail, it is imperative that we understand the basic concept of PAYE and how the tax arises. I am sure we are all aware that as a matter of fact, it is the employer's obligation to ensure that PAYE is paid to BURS. However, this does not mean that the tax burden is borne by the employer unless an arrangement to gross-up salaries is in place. Essentially, PAYE is generally a tax that is payable by employees on remuneration they earn under employment contracts. The tax is deducted by employers and paid to BURS before the net amount is paid to employees. As you can see, it is axiomatic that employers play an agency role in collecting tax from individuals under their employ on behalf of BURS. On the other hand, the obligation to pay employees' their salaries remains alive regardless of whether funds are sufficient or not. Now, a quandary that hits some employers is whether PAYE is due and payable on accrual of the salaries or when the salaries are actually paid. Allow me to dissect this matter from a legal perspective and find out what the law says.

### **Enter PAYE**

The Income Tax Act prescribes that every employer is required to deduct PAYE 'from the remuneration paid to his employees'. The Act further provides that 'tax deducted or deductible' from remuneration paid to an employee should be paid on or before the 15<sup>th</sup> day of the month following payment of salaries. As you can see it is apparent that an obligation to deduct and pay PAYE to BURS arise only when an employer has 'paid' remuneration to employees. Consequently, this nullifies the payment of tax to BURS based on the accrual concept. Put differently, PAYE is a withholding tax that is only triggered by payment of employees' emoluments. This simply means that if an employer is struggling to pay salaries, they do not have an obligation to deduct and pay PAYE from such amounts. The tax will only arise as and when the payment of the salaries is actually made to the employees. This technically means that an employer who shuts down business today but with P1m owing in salaries will not owe BURS as the salaries would not have been 'paid' to the employees. The extracts from the Act above makes this point very categoric and no subject to debate through the use of the words, 'paid.'

### **Let's sum it up**

It is vital that employers understand that PAYE is a tax borne by employees, technically implying it is a withholding tax. As such, the obligation to remit the tax to BURS is only triggered when the payment of salaries is effected. Employers should be cognisant of the fact that payment of PAYE to BURS is not related to the accrual of salaries in the books of accounts. This same concept also applies to other-withholding taxes such as payment of rent, consultancy fees and commission, i.e. the tax obligation is only triggered by payment of the dues to the respective payee.

Well folks, I hope that was insightful. As Yours Truly says goodbye, remember to pay to Caesar what belongs to him. If you want to join our Tax WhatsApp group or to know about our 9 Tax e-books, send me a text on the cell number below.