A South African Perspective to the Pay Now Argue Later Tax Liability Principle: Lessons to Learn for Botswana

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Abstract

The Pay Now Argue Later principle is central to the administration of taxes in many jurisdictions. The principle requires that an aggrieved taxpayer wishing to object or appeal decisions of the revenue authority should pay the tax liability imposed for the very assessment they wish to contest. In its rudimentary form, Pay Now Argue Later posits that the aggrieved taxpayer's liability is undisputed and the outcome of their objection or appeal can only result in a variance of the liability undoubtedly imposed.

This article examines the Botswana and South African approach to the principle of Pay Now Argue Later. The examination of the said notion is in the Income Tax Acts and Value Added Tax Acts of both jurisdictions. This article concedes that although the rule is often riddled with criticism and speculations of the inherent 'unfairness', it is a necessary tool for the revenue authorities to effectively perform their duty without room for the taxpayer to use frivolous and vexatious tactics to avoid tax liability.

In light of this, this article seeks out the 'best' way to apply the principle with regard to the taxpayers' rights and the revenue authority's rights. The article posits that the South African perspective can provide a platform for Botswana to learn and appreciate a better way to apply the Pay Now Argue Later rule regarding the rights of the parties involved and the legitimacy of the objections and appeal process.

INTRODUCTION

The Pay Now Argue Later (PNAL) principle is 'one which has been adopted in many open and democratic societies.'[1] It is further suggested that since it is so widely adopted, it is a concept that is accepted as being reasonable

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1 *Metcash Trading Ltd v Commissioner, South African Revenue Service and Another* [2001] 1 SA 1141.

in open and democratic societies based on freedom, dignity and equality.[2] According to its proponents, the PNAL principle's rationale lies in the need to prevent taxpayers from manufacturing disputes that are frivolous and vexatious as dilatory tactics.[3] Additionally, it is seen as a necessary tool available for a revenue authority to ensure that it performs its duty to effectively collect taxes without placing the government under dire financial constraints.

The controversy of this principle cannot be understated because it is a bold deviation from the common-law notion that suspends the payment of a judgment debt, pending any review of appeal lodged against it. Therefore, the PNAL principle embodied in tax legislation appears *prima facie* 'unfair'.

For purposes of this discussion, the PNAL principle is critiqued in the Income Tax Act and Value Added Tax (VAT). The reason for this examination stems from the two radical perspectives taken in respect of the application of the principle in the ambit of VAT and Income Tax. For VAT, the 'real' taxpayers are the consumers but the tax is remitted to the revenue authority by the vendors or 'businesses' that act as agents for the revenue authority. It follows therefore that, unlike Income Tax, the remittance of VAT is of money that never belonged to the agent and therefore the revenue authority has a 'stronger' right to request for that payment to be made before raising an objection or appeal.

This suggests that the PNAL principle finds stronger support in the realm of VAT. In fact, in the *Metcash* case, the court conceded that Income Tax was a more complex tax and the 'scope of conflict regarding the interpretation of statute or accounting practices is far greater' in the realm of Income Tax.

This article aims to provide lessons for Botswana based on the South African Approach to the PNAL principle. It is trite that South Africa is Botswana's big brother at law. From as early as 1891 when a proclamation was issued declaring that the law in Bechuanaland (now Botswana) shall be the law applied at the Cape Colony (South African colony) *mutatis mutandis*.[4] Therefore, from the very conception of law inherited by Botswana from its colonial masters, South Africa was the benchmark. This has followed throughout the years and many statues, such as the 1973 Botswana Income Tax Act, were almost an identical copy of the South African legislation.[5] In fact, section 88 of the Botswana Income Tax Act encapsulating the PNAL

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2 *Metcash Trading Ltd v Commissioner, South African Revenue Service and Another* [2001] 1 SA 1141.

3 *Capstone 556 (Pty) Ltd v CSARS* and *Kluh Investements (Pty) Ltd v CSARS* [2011] ZAWCHC 297.

4 John Kiggundu, *Company and Partnership Law in Botswana* (Bay Publishing 2008); see also Thatshisiwe Ndlovu, 'Fiscal Histories of Sub-Saharan Africa: The Case of Botswana' <http://47zhcvti0ul2ftip9rxo9fj9.wpengine.netdna-cdn.com/wp-content/uploads/2017/05/160826-Fiscal-Histories-Botswana-final-compressed.pdf> accessed 7 June 2018.

5 Botswana Accountancy College, *Botswana Taxation ACCA F6 Guide* (BAC2014).

principle reads like the erstwhile section 88 of the South African Income Tax Act.

Therefore, the interpretation of South Africa's fiscal legislation and the decisions of the South African courts always provide strong persuasive authority in Botswana's jurisprudence.[6] In light of this, it is submitted that this article is warranted in using the South African approach as the springboard for lessons to learn on the application of the Pay Now Argue Later principle in Botswana.

THE BOTSWANA PNAL POSITION

In Botswana's Income Tax Act[7], the PNAL is encapsulated by the proviso to section 88(1) and section 94. Section 88(1) relates to the right of a taxpayer to object to an assessment given by the Commissioner General in respect of their tax liability. It provides that any aggrieved person may, by notice in writing to the Commissioner General, object to an assessment made in respect of such person within sixty days of such assessment.

After affording any aggrieved party the right to object to an assessment the proviso to the section states that:

> Provided that no objection shall be considered unless-
> (a) a tax return for the tax year to which the assessment relates has been furnished; and
> (b) tax due on the taxable income declared has been paid.[8]

Part (b) of the proviso to section 88(1) expressly states that no objection, the right to which is granted under section 88(1), will be considered unless the tax due on the taxable income declared has been paid. Simply, the aggrieved party must pay first before they can pursue an objection ie PNAL. The same principle is extended to instances where the objection is made in respect of an additional assessment or a reduced assessment, provided such additional or reduced assessment imposes a fresh tax liability. In such a scenario, PNAL will only extend to the extent of the fresh tax liability.[9]

Section 88(4) gives meaning to what amounts to a person being aggrieved by an assessment. In the simplest form, it relates to a situation where the Commissioner General includes an amount as part of a person's taxable income effectively increasing their taxable liability.[10] PNAL herein dictates that, a taxpayer, who has the right to object to an increased taxable liability, must first pay such increased taxable liability before they can argue its

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6 *Natal Joint Municipal Pensions Fund v Endumeni Municipality* [2012] 4 SA 593.

7 CAP 52:01 Law of Botswana available at <http://www.elaws.gov.bw/> accessed 7 June 2018.

8 [Emphasis added].

9 Section 88(2) Botswana Income Tax Act.

10 Section 88(4)(a).

legitimacy. The notion does not only require the taxpayer to pay the amount *they* declare as owing, but the very amount they wish to object to.

Section 88(4) (b) provides a less clear-cut scenario. Therein, it provides that a disallowance of a claimed deduction may also warrant an objection. The increased tax liability will result in the disallowed amount being added back to a taxpayer's gross income, assessable income or chargeable income, thereby increasing their taxable income and tax liability. Similarly, PNAL requires that such increased tax liability should be paid before an objection is lodged under section 88(1).

After a successful objection has been made the Commissioner General is required to make a decision in respect of such objection.[11] If the aggrieved party is still dissatisfied with the decision of the Commissioner General post the objection made under section 88(1), they may appeal the decision to the Board of Adjudicators under section 91.

In light of such an appeal, section 94 categorically states:

> The obligation to pay any tax chargeable under an assessment *shall not be suspended* by reason of any notice of objection or appeal having been given against such assessment, and the *tax charged may be recovered as if no such notice of objection or appeal* had been given. [Emphasis added].

It is submitted that this is the very core of the PNAL principle in the Botswana Income Tax Act. The section expressly provides that whether an objection is made under section 88(1), or an appeal is mounted under section 91 the obligation to pay the very tax that is being contested, shall not be suspended. The provision uses the term 'shall' and not the permissible 'may' to indicate the mandatory position imposed by the statute with respect to the PNAL principle.

Section 94 provides for no exceptions to the PNAL rule. Therefore, there are no instances where the PNAL requirement may or will be suspended, revoked, or waived. The PNAL in the Income Tax Act imposes an unequivocal liability on an aggrieved person wishing to object or appeal their assessment.

In the Botswana VAT Act, the PNAL principle is captured under section 30(4)(a) and 30(4)(b). The principle springs from the right to object under section 30(1) of the VAT Act which affords an aggrieved person a right to lodge an objection to the appealable decision of the Commissioner General within thirty days.

Thereafter section 30(4) provides that

> In the case of an objection to an assessment, the Commissioner General may consider the objection only if—

[11] Section 89 Botswana Income Tax Act.

> (a) the person assessed has paid the tax due under the assessment; or
> (b) the Commissioner General is satisfied that the person objecting is unable to pay the full amount of tax due and has given sufficient security for the amount of tax unpaid and any penalty that may become payable

Two possible permutations are given for the application of the PNAL in the VAT Act. Firstly, the objection will only be considered once the person assessed has paid the tax due. This is similar to the requirements under the Botswana Income Tax Act, which make it express and mandatory that the tax should be paid before any objection or appeal is entertained.

However, the second permutation in the VAT Act provides, in express terms, that the Commissioner General may allow an objection even when the full amount of tax due is not paid. This is a vital departure from the position in the Income Tax Act which includes a mandatory *shall* for the application of the PNAL principle. This departure, delivered by section 30(4)(b) of the VAT Act allows an aggrieved person, through the discretion of the Commissioner General, to provide sufficient security for the tax due. The question of what amounts to sufficient is left to the assessment of the Commissioner General. It is worthy to note that the provision does not provide for the complete suspension of payment of the tax. Therefore, the aggrieved taxpayer still hypothetically 'pays first', even if it is in the form of sufficient security.

THE SOUTH AFRICAN PERSPECTIVE

The Legislation

The PNAL principle in South Africa is housed in section 164 of the South African Tax Administration Act 28 of 2011 (the TAA). It states that

> (1) Unless a senior SARS official otherwise directs in terms of subsection (3)—
> (a) the obligation to pay tax; and
> (b) the right of SARS to receive and recover tax,
> will not be suspended by an objection or appeal or pending the decision of a court of law pursuant to an appeal under section 133

Unlike the Botswana PNAL, the South African position starts by giving latitude for the PNAL principle to be eroded. The provision is couched in such a way that it starts with a concession, or provides for the flexibility of a senior South African Revenue Service (SARS) official to direct otherwise. Furthermore, section 164(2) of the TAA stipulates that the taxpayer may request that the payment of tax or a portion of the tax due, be suspended if the taxpayer disputes the liability to pay.

The suspension by the senior SARS official of the tax due or a portion of it, takes into account the following relevant factors: whether the recovery of the disputed tax will be in jeopardy or whether there will be a risk of dissipation of assets; the compliance history of the taxpayer with SARS; whether fraud is *prima facie* involved in the origin of the dispute; whether payment will result in irreparable hardship to the taxpayer not justified by the prejudice to SARS or the fiscus, if the disputed tax is not paid or recovered; or whether the taxpayer has tendered adequate security for the payment of the disputed tax and whether accepting the request for suspension of the tax liabilityis in the interest of SARS or the fiscus.[12]

The list of factors provided by section 164(3) of the TAA is not exhaustive since it says the senior SARS official takes into account the relevant factors including those given. A taxpayer may therefore provide other factors not given in the statute that the senior SARS official may look into to suspend the tax due or a portion thereof. Section 164(4) of the TAA gives instances where the suspension of the PNAL principle may be revoked. These are when no objection is subsequently lodged or an objection or appeal that is lodged is disallowed.

However, the suspension of the tax is not automatic, it can be denied under section 164(5) of the TAA in which case the PNAL principle takes its full effect. If the request for the tax or a portion of it to be suspended is denied, then the taxpayer falls into section 164(1) of the TAA. The tax must then be paid before an objection or appeal is lodged. The reasons for the senior SARS official denying the request include *inter alia* the realisation that the objection or appeal is frivolous or vexatious or that the taxpayer is employing dilatory tactics in conducting the objection or appeal.

This section introduces a new dimension of fairness to the PNAL principle. Unlike the Botswana position, the South African perspective under section 164 of the TAA gives the view that the PNAL principle is not cast in stone and can be eroded as long as such erosion does not prejudice the rationale behind the adoption of the principle.

Section 164 of the TAA came into operation on 1 October 2012. Before the enactment of the TAA, the PNAL principle was in various statutes such as section 88 of the South African Income Tax Act and section 36 of the South African VAT Act.

Although it is important to have an analytical account of the statutory provisions relating to PNAL, it is equally vital to have an account of the court's interpretation of the legislation.

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[12] Section 164(3) South African Tax Administration Act 28 of 2011.

The Courts

Metcash Trading Limited v CSARS

The erstwhile Section 36 of the South African VAT Act came under scrutiny in the *Metcash Trading Limited v Commissioner, South African Revenue Service.*[13] Herein, the Constitutional Court was tasked to determine whether the PNAL principle, as outlined in section 36 of the *then* VAT Act of South Africa, was unconstitutional. The matter came before the Constitutional Court for confirmation or dismissal where the High Court had previously found that the section of the Act infringed the fundamental right of access to the courts afforded to everyone under section 34 of the South African Constitution, and that such unconstitutionality could not be justified under section 36 of the South African Constitution.[14]

The High Court had authoritatively referred to the *Lesapo v North West Agricultural Bank and Another*[15] and held that 'the prospects that an eventual successful appeal might reverse the situation is no answer to the actual infringement which endures until then.' This was the basis which the High Court had held that the application of the rule resulted in the infringement of section 34 of the South African Constitution.

However, the Constitutional Court did not confirm the findings in the court *a quo* but instead held that the infringements were reasonable and justifiable under section 36 of the South African Constitution.[16] One of the pertinent issues had been that the Commissioner was 'his own judge' because he had the discretion to suspend payment of the tax or follow the collection process under section 40 of the then VAT Act to ensure its payment. The Constitutional Court held that the exercise of such discretion was reviewable as an administrative action and therefore could not be seen as arbitrary.[17]

The Constitutional Court drew a clear distinction between the 'appeal' procedure anticipated and referred to tax legislation from reviews and appeals in the ordinary course before common law courts. Additionally, the court invested in outlining the disparity between VAT and Income Tax assessments. With VAT, which was in dispute herein, the court discerned that the vendors remitting the tax are in effect involuntary collectors of tax that has always belonged to the state. This is unlike income tax which is often only paid once a year after an assessment is made. It appears from the case that challenging an income tax assessment will require a slightly different approach than the one adopted in VAT assessments.

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13 [2000] 1 SA 1109.
14 ibid.
15 *Lesapo v North West Agricultural Bank and Another* (CCT23/99) [1999] ZACC 16; [2000] 1 SA 409; [1999] 12 BCLR 1420.
16 Beric Croome and Lynette Olivier, *Tax Administration* (Juta 2015).
17 ibid.

Moreover, the fact that VAT is remitted regularly ensures that the state is able to receive a steady and accurate stream of revenue that requires the Commissioner to be more vigilant in its collection.[18] Thus, the provision was held to be constitutionally sound in that although it did infringe the right enshrined under section 34 of the Constitution, it was deemed reasonable and justifiable under section 36 of the Constitution.

Capstone 556 (Pty) Ltd v CSARS[19]

In the context of income tax, the *Capstone* case provides guidance on the PNAL principle. It must be expressly noted however that, unlike in *Metcash,* the unconstitutionality of section 88 of the Income Tax Act (IT Act) was not in dispute. It is submitted therefore that the *Capstone* case provides little assistance in this regard. However, the court conceded that the VAT provisions in the *Metcash* case were direct equivalents of section 88 of the IT Act.

Despite such concession the court categorically stated that the manner of interpretation adopted by the Constitutional Court in *Metcash* would not be applied to the IT Act without regard for the applicability of the different taxes. This is in support of the position adopted in *Metcash.*

Like in *Metcash,* the court accepted the PNAL principle as trite and noted that the rationale underpinning the application of the concept includes 'the public interest in obtaining full and speedy settlement of tax debts and the need to limit the ability of recalcitrant taxpayers to use objection and appeal procedures to strategically defer payment of their taxes.'[20]

The court's decision in effect was to support the PNAL if the objection or appeal was considered frivolous or vexatious. The court also noted that the current applicants had not mounted enough evidence to establish that there would be prospects of success if the decision of the Commissioner was reviewed.

It has been submitted that the South African courts have not established proper guidance with respect to provisions dealing with the PNAL principle.[21] It is submitted that such submission fails to take into account that the differing positions adopted by the court are the very guidance to the application of the PNAL principle. The submission seeks uniformity in the application of the principle but the courts have highlighted the importance of disparity in applying the PNAL in different contexts. The courts have also agreed on the importance of the principle and the rationale for its adoption.

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18 Beric Croome and Lynette Olivier, *Tax Administration* (Juta 2015).

19 [2011] ZAWCHC 29.

20 ibid para 9 of judgment.

21 Hulisan Tseise, 'A Critical Analysis of the Implementation of the "Pay Now, Argue Later" Principle by SARS as Provided by Section 164 of the Tax Administration Act 28 of 2011' (LLM Dissertation, University of Cape Town 2017).

LESSONS LEARNT FOR BOTSWANA

The first lesson is incidental to the PNAL principle and is not substantively based on it. The South African perspective demonstrates, through the TAA a consolidated approach to tax administration in South Africa. When the TAA was launched in the 2005 South African Budget Review, it was to incorporate into one piece of legislation certain generic administrative positions which are currently duplicated in different tax Acts.[22] In light of this it is submitted that the PNAL principle is duplicated in both the Botswana Income Tax Act and the VAT Act. It is perhaps the reason why there is an inconsistency in the application of the PNAL principle in the Income Tax and VAT Act.

Secondly, it is submitted that Botswana should learn from the South African experience that the PNAL principle is far more complex and has the inherent problem of infringement of rights. Botswana should therefore welcome and open up the discussion on the possibility of the infringement of rights embodied in the Botswana Constitution.

Additionally a critical lesson to learn is that the problems arising from the PNAL principle cannot be solved by a mere amalgamation of provisions from previous statutes but should involve an in-depth analysis considering less aggressive means to address the infringement.

Another important lesson for Botswana to learn is that the PNAL principle may and should be suspended taking into account several factors. Botswana legislation does not envision the possibility of complete suspension of the PNAL principle. It is submitted that the possibility of its suspension reduces the aggressiveness associated with the rule. It also takes into account the rights of the parties involved.

Lastly, Botswana's lesson may be to consider a revision of the provisions relating to the PNAL principle embodied in the legislation to accommodate the lessons noted above.

CONCLUSION

In summary this article takes note and emphasises the importance of the PNAL principle in the administration of tax. This importance also finds support from the courts including the Constitutional Court of South Africa which concedes that the PNAL principle is trite especially against taxpayers that want to use appeal procedures as strategies to defer payment of tax.

Despite this concession, this article has also highlighted the sensitivity of the PNAL principle in relation to the erosion of taxpayer rights. It realises that the very existence of the principle gives rise to an erosion of taxpayer rights. Ideally, the principle should be couched such that it uses less aggressive means to tackle the inherent infringement. In so doing, the article concluded that both the South African and Botswana positions require an in-depth analysis regarding the rights of the parties involved.

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22 Croome and Olivier (n 16).

Ultimately, the assessment requires a balancing of rights with the revenue authority on the one end and the taxpayer on the other.

The article also demonstrates noteworthy strides that the South African legislators have taken in the crafting and application of the PNAL principle. Central to this is the holistic approach to tax administration in the TAA. Subsequently, the South African position provides for latitude in section 164 of the TAA. The holistic nature avoids duplication and inconsistent application as seen in the Botswana position. The latitude places taxpayer rights at the forefront in the application of the PNAL principle.