

The cheque is in the mail

 By [Graeme Palmer](#)

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In the recent case *Stabilpave (Pty) Ltd v South African Revenue Services (SARS)*, the taxpayer (Stabilpave) was due a tax refund of R728,474 plus interest. The banking details of the taxpayer were not available to SARS and they therefore posted a cheque for the refund.



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The cheque was stolen by a Mr Mtima, who, through a shrewd and fraudulent scheme, orchestrated that the funds were paid to him instead of the taxpayer. The taxpayer, having not received the tax refund, instituted action against SARS for payment.

SARS admitted that a refund was due, but defended the action saying that the taxpayer had been paid. SARS raised an alternative defence based on the wording of the tax assessment, which was that by not providing banking details, the taxpayer accepted payment could be made by cheque. By "requesting" SARS to settle the refund by sending a cheque through the post, the taxpayer agreed to run the risk in the transit. The taxpayer, on the other hand, contended that SARS had not fulfilled its obligation because in law there is no payment if a cheque is posted and lost before it reaches the creditor.

Taxpayer not given a choice

Having been unsuccessful in the High Court, the taxpayer took the matter to the Supreme Court of Appeal (SCA). According to the SCA the decisive question was whether the tax assessment gave the taxpayer a choice as to the mode of payment, and if it did, whether the taxpayer made a choice (expressly or impliedly) that SARS should effect payment by cheque through the post.

The SCA concluded that the assessment form did not give the taxpayer a choice as to the mode of payment. There was no invitation to the taxpayer to furnish banking particulars, nor was there a cut-off date within which banking details were to be

supplied by the taxpayer if it wanted payment by electronic fund transfer. No choice was afforded to the taxpayer, the method of payment being dictated to entirely by SARS. Accordingly, the risk of loss of the cheque was not assumed by the taxpayer and remained with SARS.

Although, in this instance, the taxpayer was successful as SARS was ordered by the SCA to pay the tax refund, it is advisable to make sure SARS has your correct banking details to avoid cheques going astray in the mail.

ABOUT GRAEME PALMER

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