TAXATION AND THE HAND OF JUDGE PRESIDENT KIRBY:

A CURSORY GLANCE

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ABSTRACT

This article discusses five cases from the Court of Appeal (COA)[1] in Botswana handed down in years 2016 and 2017. A common denominator amongst these cases is that they all pertain to issues of taxation in Botswana and have been decided by the apex court being the COA. Since the COA is at the apex in the hierarchical structure of the courts, discussing cases solely from it means that the law in these cases represents the current and true position of the law in Botswana with regards to that particular issue. An even more pivotal similarity is that all the decisions analysed in this article were handed down by Judge President Kirby whilst at the COA. This critical similarity cuts to the gist of the article which aims to pay tribute to Judge President Kirby albeit in a small way. Effectively, this article does not purport to speak authoritatively over all the decisions taken by Judge President Kirby but it contends that even by a simple examination and analysis of five decisions handed down in two years it is demonstrable that Judge President Kirby's legacy in tax adjudication at the COA is one of refinement and clarification.

1. INTRODUCTION

This article discusses five cases from the Court of Appeal (COA)[2] in Botswana handed down in years 2016 and 2017. A common denominator amongst these cases is that they all pertain to issues of taxation in Botswana and have been decided by the apex court being the COA. Since the COA is at the apex in the hierarchical structure of the courts, discussing cases solely from it means that the law in these cases represents the current and true position of the law in Botswana with regards to that particular issue. An even more pivotal similarity is that all the decisions analysed in this article were handed down by Judge President Kirby whilst at the

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[1]The COA is the successor to the one set up by an Order in Council in 1954 for the three territories of Bechuanaland, Basutoland and Swaziland. The Botswana COA Act was enacted in 1973 as a final court and where appeals are heard as a last resort for Botswana. It is constituted under Section 99 of the Constitution of the Republic of Botswana. See C M Fombad *The Botswana Legal System* (2nd Edition, Lexis Nexis 2013).

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This legacy, this article further submits, is well-placed in a jurisdiction that has a growing number of tax litigants coming before its courts. The article examines the cases under themes being income tax, value added tax, time limits for assessment and the issuance of tax certificates. It is important to elucidate that the themes are a construction of the author for better presentation but have not been so categorised by Judge President Kirby in his rulings. The article adopts these categorisations with the sole purpose of demonstrating that the refinement and clarity of Judge President Kirby cuts across different facets of taxation. This article does not, however, allege that the judgements discussed herein are unscathed. In fact, the article opines that, in some circumstances, Judge President Kirby could have explored certain concepts further to better their understanding as precedents from the highest court.

2. INCOME TAX

In the *Debswana Diamond Company* v *Commissioner General of Botswana Unified Revenue Services*[3] (hereinafter the *DDC case*), the Botswana Unified Revenue Authority (BURS) had undertaken an audit exercise and issued tax assessments which effectively found that Debswana Diamond Company (DDC) was in arrears in the sum of P14 556 708 (Fourteen Million Five Hundred And Fifty Six Pula) arising out of alleged underpayment of withholding tax in respect of its employees over a period of four years (i.e. 2008-2011). DDC had unsuccessfully objected to this assessment before the Commissioner, the Board of Adjudicators and the High Court bringing the matter for final pronouncement before the COA.

The main issue for determination was whether the Car Benefit Scheme (CBS) utilised by DDC entitled its employees to be taxed on the private use of the vehicle as determined by the tax tables or a cash amount equivalent to the sum foregone by the employees from their salary package in exchange for the car use. If the COA upholds the former position then the liability alleged by BURS would not be sustainable. However, if the COA was to uphold the

[3] Unreported Court of Appeal Decision CACGB-042-16.

latter position, the effect would be that DDC had in fact fallen short in its payment of withholding tax. The BURS would then be right to allege that the DDC was in arrears.

The CBS was a car scheme afforded to senior employees of the DDC.[4] Simply, qualifying participants (i.e. those falling within certain salary bands) of the CBS would get a leased company car in exchange for which they would sacrifice an amount of their salary equal to the rent payable by DDC on the lease. The lessor was Avis operating under a full maintenance lease agreement with DDC. The employees who opted for the CBS were entitled to use the vehicle for both business and personal use. It is noted however that there was no direct contractual relationship between Avis and the DDC employees. The contractual linkage was between the DDC and Avis.

These facts brought for assessment a timing issue the determination of which would indicate when the salary foregone by the employee who enjoys this benefit should be taxed. The first possible time was when the salary was issued to the employee. If this argument succeeded then the result would be an increase the liability as alleged by the BURS. In the alternative, being the argument advanced by DDS, is for the court to find that the salary sacrifice undertaken was valid and thus a different tax liability would accrue to the non-cash benefit the employee gains in the CBS.

In essence, this article finds that this case brought for final clarity and resolve the understanding of the concept of accrual and the concept of salary sacrifice in Botswana's tax jurisprudence.

2.1 The Concept of Accrual

As a tax principle, the concept of accrual is undoubtedly one of fundamental importance. It is also not in dispute that it is a concept which has been subject to many years of debate in tax-advanced jurisdictions like South Africa.[5] Swart[6], when discussing the *Commissioner of Inland Revenue* v *People's Stores (Walvis Bay)*[7] case, submitted that accrual was a controversial question of tax law which after being analysed for many years in South Africa, required understanding and closure for purposes of defining gross income.[8]

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[4] Paragraph 3 of the Judgement.
[5] From as early as 1926 with *WH Lategan* v *Commissioner for Inland Revenue* [1926] CPD 203, *Commissioner of Inland Revenue* v *Delfos* [1933] AD 242, *Hersov's Estate* v *Commissioner of Inland Revenue* [1957] 1 SA 471, *Rishworth* v *Secretary for Inland Revenue* [1964] 4 SA 493, *Mooi* v *Secretary for Inland Revenue* [1972] 1 SA 675.
[6] G. J. Swart, 'The Accrual of Income-Some Answers,' (1990) *South African Mercantile Law Journal* 97
[7] 1990 case 244/88.
[8] G. J. Swart, 'The Accrual of Income-Some Answers' (1990) *South African Mercantile Law Journal* 97

In that particular case (*Walvis Bay case)*, the taxpayer was a retailer who had sold goods valued at R1.3 million including credit sales worth R341 281 (Three Hundred and Forty-One Thousand Two Hundred and Eighty-One). The main issue therein was whether the amount in the credit sales had accrued to the taxpayer in the tax year such that it be subject to income tax[9].

The court took the liberty to explore and respond to some of the more general anomalies associated with the concept of accrual. Firstly, it found that with accrued income, the amount need not be a fixed monetary amount but can be every form of property earned by the taxpayer whether corporeal or incorporeal. This is to say that even when the exact valuation of such amount may be subject to some further complexities, it is, for purposes of the concept of accrual, still a valid amount.[10]

Secondly, with doubtful debts it was a finding of the court that a debt cannot be said to have accrued only if it is payable in the year of assessment. Herein, the court was drawing a distinction between a debt being simply 'due' and being 'due and payable.' In both scenarios, the debt is deemed to have accrued and thus part of gross income.[11]

Lastly, the court examined whether the interpretation extended above would not result in double taxation in the year the debt became due and the year the debt is paid. The court found that this was misguided and a more imaginary than realistic possibility since the concept of accrual did not speak of receipt or payment of the debt.

In the *DDC case,* the concept was analysed within the context of Section 9 and 10 of the Income Tax Act of Botswana (Botswana ITA) as read with Section 32 of the Botswana ITA which relate to the accrual of income for the purposes of calculating gross income and employment income. Section 9 of the Botswana ITA provides that;

> "subject to Part IV and VIII, the gross income of every person for each tax year shall be the total amount, whether cash or otherwise, accrued or deemed to have accrued to him or her in that tax year […]"

Section 9 above introduces accrual and deemed accrual in the calculation of gross income. Additionally, Section 9 also speaks to amounts accruing as cash or otherwise which is also an important facet of the calculation of employment income as will be reflected in the

[9] 1990 case 244/88.
[10] *Ibid.*
[11] *Ibid.*

discussion below. Section 10 of the Botswana ITA sets out when accrual is considered to have taken place. It provides that;

> "For purposes of this Act (i.e. the Botswana ITA), an amount which accrues to a person shall be deemed to have accrued-
>
> a) "in the case of employment, at the time it is-
>
> i)received by him or her;
>
> ii) due and payable even though not actually paid to him or her; or
>
> iii) credited in account, re-invested, accumulated, carried to reserve, or otherwise disposed of by him or her on his or her behalf;
>
> b) –
>
> c) –"

Therefore, the court in the *DDC case* was called upon to determine whether the amount contributed as a result of the CBS policy had accrued to them to be able to form part of their gross and more specifically employment income for income tax purposes. The facts demonstrated that the DDC employees taking part in the CBS policy had agreed to forego an amount equal to the lease amount. The two incontestable questions highlighted by His Lordship Judge President Kirby were *how can an amount which has been foregone be said to have accrued to the DDC employees?* In contradistinction, the parallel question was *how can the DDC employees sacrifice something which had not accrued to them?*

Unlike in the Walvis Bay case where the court took the opportunity to respond to the ambiguities surrounding accrual, in the *DDC case* the COA, under the hand of Judge President Kirby, did not. In fact, the court did not give much audience to assessing the concept of accrual but for the making a determination of whether accrual had or had not occurred for the DDC employees. Speculatively, this could be because the finding of the case, (detailed below) ultimately circumvents the operation of the concept accrual. It may very well have been His Lordship's contention that, because of this, the case did not require a detailed breakdown and analysis of the application of the concept of accrual.

However, this article begs to differ. This article also submits that this omission is a missed opportunity for a jurisdiction with a sparsity of tax decisions on fundamental issues at the COA. As noted above, the court may have thought to not engage further with accrual since its finding points to no such accrual occurring, even so, it is submitted that the very non-occurrence of the accrual is in itself worthy of a discussion. This is to say that this article finds that even the

circumvention or deviation adopted by the court towards the concept of accrual could have been discussed more comprehensively to pave the way for future adjudication around the concept of accrual in Botswana.

2.2 The Concept of Salary Sacrifice

Novel to Botswana's tax jurisprudence was Judge President Kirby discussion of the concept of salary sacrifice as it affects income tax liability. To begin with, he accepted that the concept of salary sacrifice was well recognised as part of the South African[12] and English law to be lawful provided that a genuine agreement was in place and not a sham pursuing some unlawful benefit. To this end, a definition attributed to salary sacrifice is that it involves the substitution of a taxable component of an employee's remuneration package in favour of a non-taxable or reduced taxable component.[13] Salary sacrifice is also known as salary structuring.[14]

It is important to emphasise that salary sacrifice is a lawful concept. This is to say that it is permissible for an employee to sacrifice a portion of his/her salary in exchange for some *quid pro quo* from the employer which has the effect of reducing the employee's tax liability.[15] In the *DDC case*, Judge President Kirby accepts this premise and stresses that the underlying principle is that one is lawfully allowed to design and align their affairs to maximise tax effectiveness.[16]He further accepted that a salary sacrifice scheme becomes a useful tool for maximising the tax effectiveness of an employee's emoluments if the tax regime of their employ attributes differential rates of tax payable on the cash amount and the non-cash benefit.[17] The non-cash benefits arising from the a salary sacrifice scheme have also been referred to as employee fringe benefits.[18]His Lordship noted further that it is only when the salary sacrifices or salary structuring is not pursued legitimately that the lawfulness or otherwise of the scheme is brought into question.

The test for the legitimacy of the salary sacrifice is whether the practice and the result are sanctioned by a consensual framework.[19]A consensual network means that the undertaking by the employer and employee to implement a salary sacrifice should be the true intention of

[12] To this end, he refers to *ITC 1663* [1999] 61 SATC 363.
[13] A Lockem, 'Ensuring that Employee Payment Structures Meet the Tax Tests' (2007) *Without Prejudice* 14.
[14] *Ibid*.
[15] *Ibid*.
[16] *Paragraph 43 embodying the Westminister Principle; See also Commissioner for Inland Revenue Services v Estate Kohler & Others* [1953] 3 SA 584.
[17] *Ibid*.
[18] L Olivier, 'Salary Sacrifice Schemes: The End of the Road'(2000) 117 (2) *South African Law Journal*178
[19] A Lockem, 'Ensuring that Employee Payment structures meet the tax tests", *Without Prejudice* (2007) 17

the parties.[20] Resultantly it is imperative to look out for factors which usually indicate that the agreement conceals the true intention of parties. According to Olivier such factors include;

> "the salary structuring that is not supported by a change in the contract of employment; no negotiations between the parties took place and the employee was merely informed that a particular expenditure would be deducted from his or her salary prior to the calculation of employees' tax, one or both parties to the agreement understands that it will enable an employee to deduct an otherwise non-deductible expenditure, the collective agreement concluded in a Bargaining Council or a former Industrial Council, which stipulates that the remuneration package, was not legally revisited by such Council, a reduction in salary not reflected in a lower leave and bonus payment, and contributions based on a fixed percentage of an employee's salary(for example union membership fees, unemployment benefits and an employer's contribution under the Occupational Injuries and Diseases Fund) have not been adjusted accordingly."[21].

According to this account the test is therefore an objective one based on the facts of each case.[22]In South Africa, the *ITC 1663*[23] case is an example of a matter where the court found that the salary sacrifice adopted did not reflect the true intentions of the parties and thus failed the test of legitimacy.

In the *DDC case*, the court found that, on the facts, it made commercial sense for not only the DDC and Avis to have the lease agreement in place but also it was commercially beneficial for the DDC employees. His Lordship Judge President Kirby concluded by finding that;

> "All in all, the whole arrangement made perfect business sense to those who participated in it. It was openly conducted, and there was no question of there being any underlying simulated transaction. The fact that there were tax advantages to the employees who opted for the scheme, (but not, I observe, for the appellant) does not make it unlawful. Nor was it untoward that Debswana attempted as far as possible to recover the cost to it of a scheme designed largely for the benefit of its senior employees, from such

[20] L Olivier 'Salary Sacrifice Schemes: The End of the Road,' *South African Law Journal,* (2000) 117(2) 178, 180.
[21] *Ibid.*
[22] Judge President Kirby accepts this at paragraph 45 of the DDC judgement.
[23] *ITC 1663* [1999] 61 SATC 363.

employees, or to insulate itself as far as possible from risks arising from the scheme, by obtaining counter-indemnities from those participating."[24]

Furthermore, Judge President Kirby accepted that a reading of the provisions relating to employment earnings in the Botswana Income Tax Act[25] indicates that it is conceivable for the concept of salary sacrifice to be a part of Botswana law. This is because the said provisions foresee a situation where an employee's earnings or remuneration can be any other cash or non-cash benefits excluding wages or salaries.[26]

Additionally Section 32 of the Botswana ITA defines employment income to include not only amounts accrued by way of wages, salary, leave pay , severance pay, bonus or gratuity but also to include 'the value of any other benefit granted to an employee in respect of his or her employment'.[27] By this, Judge President Kirby pronounced on the presence of salary sacrifice within the fabric of our tax law. Since the salary sacrifice adopted in the *DDC case* was found to be legitimately pursued, the case also represents a yardstick which all subsequent cases can be measured against.

This article supports the finding in the *DDC case* and further finds that it aligns with the South African Supreme Court of Appeal decision in *Anglo Platinum Management Services v SARS.*[28] Although the COA did not refer to it in the *DDC case* it is important to highlight this case for two reasons. Firstly, it was decided eleven months before the *DDC case* on 30 November 2015 whereas the *DDC case* was decided on 26 October 2016. This qualifies it as persuasive authority from a common law jurisdiction if one is to follow the common law principle of *stare decisis.*

Secondly, the facts bear some similarity to those in the *DDC case.* Herein, like in the *DDC case,* the appellant had a motor vehicle scheme available for its employees wherein the employee would forego a portion of their cash remuneration in return for the use of the motor vehicle. Unlike in the *DDC case*, once the employee chooses the car they wish to have, the appellant would buy the car and enter it into its assets register as its own vehicle and claim depreciation on it. The ownership of the car would remain the appellants until the employee settles the cost of purchase of the vehicle through monthly, pre-determined instalments

[24] Paragraph 63 DDC case.
[25] CAP 52:01 Laws of Botswana.
[26] Fifth schedule definition of remuneration which is referred to by at paragraph 31.
[27] Section 32 Income Tax Act.
[28] [2015] ZASCA 180.

deducted as a portion of the employee's salary. The legitimacy of this salary sacrifice scheme came before the South African Supreme Court of Appeal as an appeal from the Tax Court.

In the Tax Court, it has been decided that the scheme outlined above amounted to a sham, disguised to conceal its true nature and had thus been dismissed. In the Supreme Court of Appeal however, the court analysed the features of the salary scheme to determine whether it was fictitious and amounted to a sham. The court submitted that the assessment was not merely one to determine the subjective intents of the parties in a substance over form argument but further that it was imperative to prove that the documents relied on show that a genuine salary sacrifice scheme was concluded as a matter of fact. To this end, the South African Supreme Court of Appeal held that;

> "The following features of the scheme indicate that it was properly designed and implemented: The taxpayer purchased the motor vehicles, owned and claimed depreciation on them. The recovery of their total cost, including their running expenses was obtained from the salary sacrifice, not from the employees. In return for the amount they had foregone, the employees received a taxable benefit; i.e. the use of the vehicles"[29]

In the end, this article submits that the reading and examination of both the *DDC case* and the *Anglo Platinum Management Services case* presents a two-pronged assessment of salary sacrifice schemes. The assessment is therefore both objectives (based on the facts and the documents in support of the scheme) as well as subjective (looking at the real intention of the parties undertaking such salary sacrifice scheme). Although this was not expressly stated in the *DDC case* and thus doesn't represent the current state of Botswana law with respect to salary sacrifice, this article opines that a proper reading of Judge President Kirby's test in the *DDC case* could lead to this inference.

2.3 The Concepts of Accrual and Salary Sacrifice in Botswana Tax Law

Ultimately the court in the *DDC case* found that what had been sacrificed by the employees of DDC was the future right to receive a part of their salary. In effect, since it was the future right that was foregone then the portion of the salary that was sacrificed was never a part of the employees' package and thus had not accrued to such employee. This article submits that the application of the principles in the case not only speaks to the concepts of accrual and salary sacrifice as independent concepts but takes it a step further to examine a blend of the two

[29] Paragraph 35 of the judgement.

concepts. The case speaks to a sacrifice of a future right which then circumvents the coming into operation of the concept of accrual. This finding cements the reasoning put forth that the concept of accrual was deserving of a more lucid account bearing in mind that it can be independently applied, blended, or circumvented.

The DDC case also validates the conviction that Judge President Kirby's legacy is not only with regards to new and foreign concepts in our law but also touches on the metamorphosis of established notions like the concept of accrual

3 VALUE ADDED TAX

Value Added Tax (VAT) is a multistage tax on the value added at each stage of the product's production, distribution or retail sale.[30] Supporters of VAT perceive it to be a painless tax since often times the consumer does not know they are paying it whilst it also does not harm business profits and is a high revenue raiser for the government.[31] On the other hand, concerns on VAT highlight that it is a regressive tax with its entire burden being on the consumer.[32] VAT applies to all business transactions by which goods or services are supplied except where some special relief is given.[33]What is considered a VAT supply is usually defined in the context within which it operates.[34] VAT was first introduced in the European Union in 1967 as a sales tax on goods and services to be used across the community.[35]

In Botswana, the VAT Act was enacted in 2001 but entered into effect in July 2002.[36] It was designed as a general consumption tax with a single positive rate and a rate zero applied to exports of goods and services and supplies deemed similar to exports.[37] At conception, zero-rated goods were sorghum and maize meal whilst exempt supplies included some financial services, some prescription drugs, health services and education services.[38]The present VAT rate in Botswana is 14%.[39]

3.1 Pay-Now-Argue-Later

[30] C Price & T Porcano, 'Value Added Tax'(1992) *Journal of Accountancy* 44.
[31] *Ibid.*
[32] P Lawton, 'Value Added Tax', *British Tax Review,* 171.
[33] *Ibid.*
[34] *ibid*
[35] S White, 'What is VAT?' (1996) *Journal of Financial Crime*255.
[36] International Monetary Fund 'Reforms to Mobilize Domestic Revenues: Botswana' https://www.elibrary.imf.org/downloadpdf/journals/002/2017/250/article-A002-en.xml.
[37] *Ibid.*
[38] *Ibid.*
[39] Ministry of Finance and Economic Development '2022 Budget Speech'.

Imbedded in the application and operation of VAT, as is the case with other forms of tax, is the principle known as the pay-now-argue-later.[40] Pay-now-argue-later refers to the notion that requires taxpayers to first pay the tax liability attributed to them by the revenue authority's assessments before disputing its legitimacy. It is accepted that the rationale for this principle lies in the need to prevent taxpayers from manufacturing disputes that are frivolous and vexatious as dilatory tactics for non-payment of tax.[41] An assessment of the correctness or otherwise of this principle goes beyond the parameters of this article. This article accepts that it is a well-established and applied principle in tax.

The application of this principle in a VAT scenario came before the COA in the matter of *Commissioner General: Botswana Unified Revenue Service* v *Electronic Amusements (Pty) Ltd.* Therein, the matter related to the VAT liability of the owner of coin-operated juke boxes and similar devices which were provided to taverns and cafes in exchange for a share of the take. The merits of the matter were not canvassed however reference to the pay-now-argue later principle was made to the effect that it is a well-established and endorsed by the South African Constitutional Court in *Metcash Trading Ltd* v *Commissioner, South African Revenue Services & Another*[42] and in Botswana in cases for example *Masitara Investments* v *Botswana Unified Revenue Services*[43].

In the *Metcash Trading case,* the provisions of the South African VAT Act encompassing the pay-now-argue-later principle were brought for constitutional review to determine whether they infringed the fundamental right to access the courts afforded to everyone in terms of Section 34 of the South African Constitution. The facts in this case were that Metcash Trading Ltd conducted and continues to conduct business as a wholesaler and is a wholly owned subsidiary of Metro Cash and Carry Limited. Metcash is classified as a wholesaler of fast-moving consumer goods and a liquor retailer. It, at the material time, employed some 8500 people with a hundred and sixty-two outlets throughout South Africa. Metcash was estimated to have a turnover of approximately R6 000 000 000 (Six Billion Rands). Metcash had been brought before the courts by the South African Revenue Services (SARS) which was not satisfied with the VAT returns for Metcash for the period 1996-1997.

[40] A Masuku, 'A South African Perspective to the Pay Now Argue Later Tax Liability Principle: Lessons to Learn for Botswana' (2081) *CILSA* 380.
[41] *Ibid.*
[42] [2001] 1 SA 1109.
[43] [2009] 1 SA 321.

The total amount for the assessments in dispute was R265 000 000 (Two Hundred and Sixty-Five Million Rands).

Metcash had objected to these assessments and requested that it be given time to make payments only when the dispute had been settled. The Commissioner had, through their correspondence denied this request and ultimately given Metcash a deadline of forty-eight hours to make payment as required by the pay-now-argue-later principle embodied in the VAT Act.[44] It is on the backdrop of this ultimatum that Metcash filed an urgent application before the South African High Court to block the threatened action by the Commissioner to demand payment within forty eight hours. At the High Court, the court found that the provisions of the VAT Act in question infringed the fundamental right to access the courts. Following this, the Constitutional Court was tasked with confirming or denying the order by the High Court that the pay-now-argue-later principle embodied in the VAT Act was unconstitutional.

The Constitutional Court did not confirm the finding of the High Court but instead held that the infringements in question were reasonable and justifiable in terms of Section 36(1) of the South African Constitution. Section 36(1) of the South African Constitution is the proportionality and limitation clause that allows for deviations or infringements of certain rights to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

The Constitutional Court in the *Metcash case* found that VAT remitted regularly ensures that the state is able to receive a steady and accurate flow of income that requires the Commissioner to be more vigilant in its collection. The Commissioner could then not allow the unreasonable postponement of this form of tax liability as such would interfere with the steady and accurate flow of income it ought to receive from tax. The Court went on to explain that this is more overt with VAT since in such instance the businesses (including Metcash) are involuntary collectors of tax that always belonged to the state.

In Botswana, the COA through the hand of Judge President Kirby, found, in the *Electronic Amusement case*, that the bringing of judicial intervention by way of review did not undermine the pay-now-argue-later principle. This article finds no fault in this assessment and applauds His Lordship for the succinct and decisive position taken in this regard. It is however observed that His Lordship did not take the opportunity, at the COA, to present further on the

[44] Section 36(1), (2)(a) and (5) and Section 40.

pay-now-argue later principle and possibly indicate instances where the pay-now-argue-later principle may be perceived to be undermined.

This is not inconceivable because even the *Metcash Trading,* which was duly referred to by His Lordship, has been subject to analysis resulting in observations which could have been clarified for Botswana's context. One such observation is that the decision stands as it does because the tax in question was VAT and not income tax.[45] This is because with VAT vendors act as collectors of tax on behalf of the state.[46] Accordingly, the VAT collected and in dispute is already at conception 'due' to the state.[47] Consequently, the argument is that had it been income tax in dispute in *Metcash* then the decision may have been decided differently since income tax is more complex.

Whether similar sentiments can be expressed in Botswana remains unknown because the court did not engage in further analysis in the *Electronic Amusements case.* Additionally, *Metcash, Masitara* and *Electronic Amusements* cases all examine VAT which means that no logical inference can be drawn to suggest that had an income tax matter come before the court, the pay-now-argue-later principle would receive a different treatment.

3.2 VAT liability in Sales of Execution

Still within the realm of VAT, the issue of VAT liability in sales of execution was brought before COA in the case of *Bvindi* v *Botswana Unified Revenue Services*[48](Bvindi case) Like all the COA judgements analysed in this article, the decision was handed down by Judge President Kirby. Herein, the appeal related to the sale and purchase by auction of immovable property in Gaborone (captured in the judgement as Lot 37434). The appellants in the matter are husband and wife who successfully participated in an auction to acquire the aforementioned Lot. The auction sale they took part in arose from a default by the erstwhile owners of the property to service a mortgage they had taken against the property with First National Bank Botswana (FNBB). The auction sale was therefore a sale in execution duly conducted by a Deputy Sheriff.

The main issue to be decided was where the VAT liability lay in sales of this nature. Two arguments sat at the forefront of the court's discussion, the first being whether the Deputy

[45] C Keudler, 'Pay Now Argue Later Rule-Before and After the Tax Administration Act'(2013) *Potchefstroom Electronic Law Journal*124.
[46] *Ibid.*
[47] *Ibid.*
[48] Unreported judgement CACGB 191-16 (Unreported) (CA).

Sheriff was acting on behalf of FNBB in execution and this FNBB, being the VAT registered entity should charge VAT. The second argument was that since the Deputy Sheriff was not a VAT registered entity, there should not be any VAT liability arising from the sale of the property.

The matter had come before the *court a quo* as a review application wherein the court held that although the Deputy Sheriff was not an auctioneer as defined in the VAT Act he did carry on a taxable activity as he regularly conducted sales of execution in his trade. Beyond the parameters of the Bvindi case, a similar matter had come before the High Court of Botswana in the case *Conferred (Pty) Ltd* v *Botswana Building Society*[49] Therein, the court had found that the Deputy Sheriff was neither an auctioneer nor did he carry on a taxable activity.

In effect, two contrasting decisions stood at the High Court and it was upon the COA to bring uniformity, certainty and clarity to what the position of the law was in this regard. For his part Judge President Kirby started by analysing the levying of VAT as a form of consumer tax governed by the VAT Act. Section 7 of the VAT Act provides for when the tax shall be levied and the percentage to be levied.[50]Hid Lordship also analysed the definition of a taxable activity[51], a supply of goods[52] and who registered persons are in terms of the VAT Act.

Judge President Kirby confirmed there is no room for the proposition that the Deputy Sheriff was conducting the sale as a 'mere veneer' or agent of the creditor. This was a point which even the High Court decisions agreed on.[53]The Deputy sheriff does not act as agent but sells in his own name, acting in his official capacity as an officer of the Court.

On the differing point, the COA by the hand of Judge President Kirby provided that;

> "I hold that, depending upon his or her own particular programme or activities, there may occasionally be a Deputy Sheriff who is required to register under the VAT Act. Probably the vast majority of Deputy Sheriffs and Messengers of Court will not have the necessary training to render the complex and regular financial returns required under the Act, and nor will they usually meet the financial threshold for registration".[54]

[49] [2013] 1 BLR 481.
[50] At the material time the VAT rate was 12% but it has since been revised to 14% in 2021.
[51] Section 5(1) VAT Act.
[52] Section 4 VAT Act.
[53] Paragraph 25 of the Judgement.
[54] Paragraph 31 of the judgement.

Resultantly, it was held that VAT shall not be chargeable on sales of execution for sales conducted by non-registered Deputy Sheriffs. This is to say that the position is that liability to make VAT returns and payments is directed at individuals and not at particular transactions. The Deputy Sheriff would in the course of his regular dealings, if such dealings meet the financial threshold be required to register under the VAT Act.

4 Time Limits for Assessments

In the case *Knight Frank Botswana (Pty) Ltd* v *Commissioner General, Botswana Unified Revenue Service, Commissioner General, Botswana Unified Revenue Service* v *Supreme Furnishers (Pty) Ltd*[55] the court, under the hand of Judge President Kirby was tasked with determining the proper interpretation of Section 84(1) of the Botswana ITA. The taxpayers, both Knight Frank and Supreme Furnishers were defaulters and had not submitted returns for periods of up to four years. When the returns were ultimately made and submitted, losses had been recorded for the years in question and the taxpayer carried forward the losses to subsequent years to offset the profits that had then been realised. As a result, if the losses from those years were to be carried forward to the profit-making years this had the overall effect of limiting tax liability. More importantly, both matters (i.e. *Knight Frank case* and *Supreme Furnishers case)* had come before the High Court and had resulted in contrasting decisions.

In the *Supreme Furnishers case,* Supreme Furnishers (Pty) Ltd was a subsidiary of a large South African chain stores. Upon demand by BURS, Supreme Furnishers had submitted late income tax returns for the tax years 2004-2010. No explanation had been tendered by the taxpayer on why the returns had been furnished at such a late time. However, the taxpayer sought to off-set the losses it had incurred in those years with the profits it subsequently made. This request was denied by the Commissioner. On appeal of the Commissioner's decision to the Board of Adjudicators[56](the BOA), the BOA dismissed this appeal finding that the returns furnished late were out of time and time barred in terms of Section 84 of the Botswana ITA. The matter went on appeal at the High Court bringing forth a finding that Section 84 of the Botswana ITA did not impose time limits or result in the Commissioner being time-barred and unable to make assessments. The High Court herein further found that the Commissioner was obliged to demand a return from a defaulting taxpayer and assess the return however late it

[55] [2017] 1 BLR 84 (CA).
[56] The Board of Adjudicators is duly constituted under Section 90 of the ITA.

may be. Resultantly, the Commissioner was required to carry forward any such assessed losses and set them off against any subsequent profits if so realised.

The *Knight Frank case* had a similar set of facts where a defaulting taxpayer had furnished returns some five years after they had become due. Akin to the *Supreme Furnishers case* no explanation had been rendered on the reason for the five-year delay in submitting returns. On the same tangent as the *Supreme Furnishers case,* the taxpayer sought to have losses incurred during those years set off against profits realised in the subsequent years. The similarity of the cases is also observed with the decision of the BOA which found for BURS upholding the position that the returns had indeed been time barred in terms of Article 84 of the Botswana Income Tax Act.

However, this case differs from the *Supreme Furnishers* case at the High Court. When it was taken for further appeal it was held that Section 84 of the Botswana ITA does impose limitations on the assessments of returns including the said returns being time-barred as they were in the present case. Additionally, the High Court found that Section 84 affords the Commissioner the discretion to reject the setting off of losses incurred in the defaulting years with profits that are realised in subsequent years. The cases were consolidated and brought before the COA for final determination. Judge President Kirby was faced with two contrasting decisions and had to bring clarity on what the position of the law in Botswana with regards Section 84 of the Botswana ITA. The relevant portion of Section 84 provides that

> "(1) Subject to the provisions of this section, an assessment may be made in relation to any person under this Act at any time prior to the expiry of four years after the end of the tax year to which it relates
>
> (2) An assessment may be made at any time prior to the expiry of four years from the end of the four years specified in subsection (1) if the Commissioner General is satisfied that an amount which was subject to tax and should be assessed under subsection (1) has not been assessed because the person in relation to whom the assessment should have been made under the said subsection (1)-
>
> (a) has misrepresented certain material facts or neglected or failed to disclose such facts
>
> (b) has failed to furnish a tax return; or
>
> (c) has furnished an incorrect tax return […]"

His Lordship Judge President Kirby outlined that the proper interpretation of Section 84 is as accepted by the COA in *BCL Ltd v Commissioner General Botswana Unified Revenue Services*[57] being that the preferred construction is one which accords both with the language used in the context of the Act as a whole and with the purpose of the legislature when in enacting the provision in question. Further, the COA accepted that in the event of ambiguity where two competing but equally meritorious meanings may be attributed to a particular word or expression, then by the *contra fiscum rule*, the interpretation adverse to the fiscus (or the Commissioner General) is to be preferred.

Against this backdrop, Judge President Kirby found that Section 84(1) set out the general rule with the exceptions being in the subsequent sections. Simply, he found that the provision meant that apart from such exception (i.e. those specified in the subsequent subsections) an assessment may not be made at any time after the expiry of four years. He subsequently finds that both Supreme Furnishers and Knight Frank fall within the scope of Section 84(2) as defaulting taxpayers who were then prevailed upon by the Commissioner General to furnish their returns. The COA found further that the said Section 84(2) was designed to ensure that transgressors could not escape paying their taxes for any year by virtue of their transgressions and thus the phrase 'an amount subject to tax' could only mean a positive figure which could be taxed and not losses as was the case in this case. Accordingly, Judge President Kirby found that the High Court decision in the *Supreme Furnishers case* was in error and the correct interpretation to be adopted should be the one in the *Knight Frank case.*

This is a noteworthy finding for the COA not only because it bought clarity to the interpretation of Section 84 of the Botswana ITA but by further confirming the finding of the COA on the interpretation of tax statutes in Botswana.

5 ISSUANCE OF A TAX CLEARANCE CERTIFICATE

The Botswana Unified Revenue Services (BURS) introduced various initiatives to enhance tax administration in Botswana such as the *e-services* for VAT returns, individual income tax returns, company income tax returns and other withholding taxes.[58] Additionally, the BURS feeds into the public management reform programme which is aimed at the prudent management of public finances such as the requirement for a tax clearance certificate when

[57] [2012] 1 BLR 792.
[58] E Botlhale 'Tax and Customs Administration in Botswana' (2019) 91 *Botswana Notes and Records* 106.

submitting tender bids.[59] This requirement is coded into Section 112(1) of the Botswana ITA which provides that the Minister shall have the power to make it compulsory for a person or category of persons to produce a tax clearance certificate for a tender to be awarded in their favour. Section 112(3) requires the Commissioner General of the BURS to issue such tax clearance certificate if there is no liability against the taxpayer or arrangements have been made for the payment of the tax liability.

The introduction of this requirement is not unique to Botswana and has in fact been hailed as one of the most successful projects undertaken by the South African Revenue Services (SARS) as a measure to curb tax avoidance and improve tax compliance.[60] In South Africa this requirement is embodied by Section 256 of the South African Tax Administration Act. Similar to the Botswana requirement, SARS may only issue such confirmation or certificate where the taxpayer does not have any outstanding debt due to SARS or where the taxpayer has concluded an instalment agreement to extinguish its tax liability. Additionally, unlike in Botswana, the South African Tax Administration Act expressly provides that SARS may not issue the tax clearance certificate if a taxpayer has any return outstanding to SARS unless an arrangement has been made with respect to such return.

This article finds that although it is not overtly stated, this latter requirement may be read into Section 112 of the Botswana ITA because the tax liability of a taxpayer emanates from an assessment of their returns. Therefore, BURS would in any event not be in a position to issue a tax clearance certificate to a taxpayer that has an outstanding return because in such scenario the tax liability or lack thereof is unclear. The argument may be that the submission of outstanding returns may not give rise to tax liability but this factual revelation can only manifest of the return is submitted. It is submitted that it would be imprudent if any other construction of Section 112 in the Botswana ITA is adopted. Putting aside the variances and complexities that come from different jurisdictions, this article accepts as trite that a tender bid will only be complete and complaint, if it is submitted together with a tax clearance certificate.[61]

For his part, Judge President Kirby was tasked with determining whether to allow for the issuance of a tax certificate in *Mabiza Plant Hire* v *Botswana Unified Revenue Services,*

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[59] *Ibid.*
[60] R Cooper 'Tax Certificate Changes' (2006) *The Accountant*27.
[61] P Bolton, 'Disqualification for non-compliance with Public Tender Conditions' (2014) 17(6) *Potchefstroom Electronic law Journal* 2314.

Debswana Diamond Company (Pty) Ltd and Botswana Power Corporation[62] which involves a defaulting tax payer whose tax liability started with unpaid VAT obligations. In 2011 a consent order was issued by the High Court wherein certain vehicles and items of immovable property were pledged as security for the due payment of the liability referred to above. In terms of the consent order Mabiza was to pay monthly instalments of P300 000 (Three Hundred Thousand Pula) towards its VAT liability which at the material time was in excess of P2 000 000 (Two Million Pula). Some payments were made in line with this order but then Mabiza stopped to make payments before the liability was extinguished.

Subsequently, the relationship between BURS and Mabiza deteriorated because of non-compliance with the consent order and a continued accumulation of income tax, VAT and withholding tax liabilities. The court noted that Mabiza did not furnish any returns or pay any taxes for the subsequent years. During such time BURS sought to issue a distress order for the attachment of Mabiza's properties to be able to pay for its tax arrears but this was put in abeyance when Mabiza was placed under provisional liquidation in 2012. The matter came before the COA in 2017.Mabiza's prayer before the COA was for a declaration that the consent order requiring monthly instalments of P300 000 had finalised his tax liability and therefore the COA should direct BURS to issue Mabiza with a tax clearance certificate. Starting from the premise that Mabiza is an avid tax defaulter, the court denied this request finding that there is no way that the Commissioner General could possibly justify the issue to Mabiza of a renewed tax clearance certificate.

6. CONCLUSION

This article pays tribute to Judge President Kirby's contributions to taxation by examining five decisions he handed down in two years (i.e. 2016 and 2017). At the outset, this article projected an account that demonstrates clarity and refinement and this position has been reflected in the analysed judgements as the golden thread. However, this does not allege infallibility in His Lordship's judgements nor does it purport to authoritatively declare that this is the fate for all tax decisions he has given. In fact, with respect to the concept of accrual under income tax, this article finds that the opportunity could have been utilised in the *DDC case* to set out the precedence for this concept. Still under income tax, the article analyses the novel concept of salary sacrifice as it was discussed in the *DDC case.* The court accepted the existence of this

[62] Unreported case CACGB-046-16 (Unreported) (CA).

concept in Botswana's tax law because the wording in the Botswana ITA leaves room for the possibility that employees could receive non-cash remuneration.

Under VAT, the article discusses the pay-now-argue later principle and the importance of understanding its parameters. Herein the case in point is the *Electronic Amusement case* which endorsed the operation of the principle as it applies in South Africa. The issue noted from this endorsement is that the South African application has been challenged for constitutional validity vis-à-vis the South African Constitution in the *Metcash case.* This has however not occurred in Botswana. Resultantly, the findings set forth in the *Metcash case* have to be echoed with some reservation bearing in mind that the South African and Botswana Constitutions are not alike. The discussion on VAT also includes an analysis of the VAT liability in sales of execution. In the *Bvindi case,* the court found that Deputy Sheriffs who are able to meet the threshold should be required to be VAT registered persons.

Lastly the article looks at time limits for assessments and the issuance of a tax clearance certificate for tendering purposes. The article finds that Judge President Kirby's stance towards serial tax defaulters is stern. In both cases the court did not sympathise with the tax defaulters but held that they should be accountable for their arrears and not seek to benefit from them.