

# SARS casts its non-compliance net wide

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Readers should be alert of their exposure to potential criminal liability for the smallest tax transgressions following the removal of the element of wilful conduct (i.e. intention) in respect of a number of small non-compliance matters.

Prior to the latest tax amendment legislation becoming final, a taxpayer could only be liable for a fine or subject to imprisonment if the relevant transgression was committed “wilfully and without just cause”.

In terms of the Memorandum of Objects of draft legislation preceding the final amendment legislation, the National Prosecuting Authority was of the view “*that the current wording [i.e. requiring proof of intention] relating to criminal offences substantially undermines the ability of SARS to ensure compliance based on the objective standard expected of the reasonable person. Consequently, this may hamper the criminal prosecution of non-compliant taxpayers by the NPA in seeking to prove the elements of the crime.*”

Understandably, the proposed amendments were met with fierce resistance and were severely criticised by tax practitioners and civil society on the basis that the removal of the element of wilfulness would result in the erosion of the protections against the criminalisation of unintentional mistakes by taxpayers. This is because the proposed amendments would have effectively removed SARS’ obligation to prove intention before a taxpayer could be found guilty of these non-compliance offences.

Fast forward a few months, in terms of the final amendment legislation that was passed, rather than doing away with intent entirely, a differentiated approach has been adopted in terms of which the existing list of non-compliance offences has been split into two categories being (1) offences which require wilfulness, where the heavier burden of proof falls on SARS, and (2) offences in respect of which “negligence” will suffice to trigger potential criminal liability.

The offences can be summarised as follows:

| Offences which could give rise to criminal liability only if the taxpayer committed them with intent                                                                  | Offences which could give rise to criminal liability even if the taxpayer did not commit them with intent                                                        |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Submitting a false certificate or statement in relation to returns, records and reportable arrangements.                                                              | Failure to register for tax or to notify SARS of a change in registered particulars.                                                                             |
| Issuing an erroneous, incomplete or false document.                                                                                                                   | Failure to appoint a representative taxpayer or to notify SARS a change in representative taxpayer.                                                              |
| Failure to reply to or answer truly and fully any questions put to the person by a SARS official.                                                                     | Failure to register as a tax practitioner if required to do so.                                                                                                  |
| Obstructing or hindering a SARS official in the discharge of duties.                                                                                                  | Failure to submit a return or document to SARS or the failure to issue a document to a person as required under a tax Act.                                       |
| Refusal to give assistance during an audit or criminal investigation.                                                                                                 | Failure to retain records as required.                                                                                                                           |
| Holding oneself out as a SARS official.                                                                                                                               | Failure to furnish information or documents requested, excluding information requested for revenue estimations.                                                  |
| Dissipating assets or assisting another person to dissipate assets in order to impede the collection of tax.                                                          | Failure to give evidence when required.                                                                                                                          |
| Using any amounts deducted by way of employees’ tax for purposes other than paying it to SARS.                                                                        | Failure to comply with a SARS directive.                                                                                                                         |
| Issuing documents purporting to be employees’ tax certificates if not an employer or authorised to issue.                                                             | Failure to disclose to SARS material facts required.                                                                                                             |
| Declaring that the price chargeable in respect of supplies is subject to VAT, where in fact no VAT is payable or charging VAT in excess of the VAT properly leviable. | Failure to comply with tax payments including third party payments.                                                                                              |
| Issuing more than one tax invoice, credit note or debit note in respect of a VAT supply.                                                                              | Failure to comply with withholding tax obligations when required.                                                                                                |
|                                                                                                                                                                       | Failure to issue any employees’ tax certificates or to notify SARS of having ceased to be a registered employer.                                                 |
|                                                                                                                                                                       | Failure by an employer to deliver to any employee or former employee any employees’ tax certificate or notify SARS of having ceased to be a registered employer. |
|                                                                                                                                                                       | Failure to submit provisional tax estimates.                                                                                                                     |
|                                                                                                                                                                       | Failure to comply with the payment of VAT on imported services and otherwise. Failure to submit VAT returns and special records.                                 |
|                                                                                                                                                                       | Failure to include VAT in the advertised or quoted price or failure to separately indicate the VAT exclusive price and the VAT inclusive price.                  |
|                                                                                                                                                                       | Failure to keep sufficient records as required.                                                                                                                  |

Consequently, the defence of ignorance previously used by taxpayers will no longer be sufficient in respect of the less serious non-compliance offences in which “negligence” will now also trigger potential criminal liability.

The inclusion of the requirement of “negligence” (which is an objective test based on reasonableness), is an audacious move by SARS in that it enables SARS to broaden its non-compliance net in respect of less serious non-compliance offences to such an extent that even the slightest mistake could result in potential criminal liability and imprisonment. It is questionable whether it is reasonable for tax legislation to result in potential criminal liability of a taxpayer, absent the element of intent.

In our view it seems nonsensical and completely unjustifiable that SARS is required to prove the higher burden of “intention” in relation to more serious non-compliance offences (such as dissipating assets in order to impede the collection of tax etc.) before a taxpayer can be imprisoned, yet a taxpayer can potentially be imprisoned for merely forgetting to inform SARS of a change in registered particulars.

As a result of the lower burden of proof of negligence placed on SARS in respect of less serious non-compliance offences, it is advised now more than ever that taxpayers ensure that they are tax compliant at all times, respond to any and all SARS correspondence as soon as required and register for tax if required. If taxpayers are unsure of their tax positions they should take the time to make the relevant enquiries with SARS or seek professional advice from a qualified tax practitioner which may reduce their chances unintentionally, but negligently transgressing one of these non-compliance provisions.



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