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TAX

SARS to get a new stick

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Section 34 of the draft Tax Administration Laws Amendment Bill, 2020 proposes to amend section 234 of the Tax Administration Act, 2011 (TA Act), to remove the willfulness (i.e. intention) from the range of acts that constitute an offence under the TA Act, which are subject to a maximum penalty of two years' imprisonment. This is a concerning erosion of the safeguards against criminalising inadvertent mistakes by taxpayers.

Section 234 of the TA Act provides that a person may be guilty of an offence if he or she willfully and without just cause fails or neglects to perform a number of acts, including but not limited to notifying SARS of a change in registered details (addresses, bank accounts and email addresses), a change in public officer, submitting a return or document to SARS, responding to a request for documents or information from SARS, maintain records or pay taxes when due.

In Memorandum of Objects of the draft bill, the government submits that the current wording of section 234 of the TA Act, requiring proof of intention by a taxpayer, substantially undermines the ability of SARS to ensure compliance based on the objective standard expected of the reasonable person, and hampers the criminal prosecution of noncompliant taxpayers by the National Prosecuting Authority in seeking to prove the elements of the crime.

However, it has always been the case that a wide variety of crimes require proof of intent. While a person's subjective intent may be difficult to establish in some circumstances, it is often inferred from the person's conduct.

Further, the presumption that a statutory crime requires proof of intention, instead of negligence, or strictly liability, is in order to avoid the injustice and hardship that may result from the serious punishment that may imposed in the event that the accused is found guilty.

These considerations do not appear to concern the government, and it is likely that if passed, the threat of criminal sanction will be used by SARS to force taxpayers to comply with their obligations, particularly relating to the filing of returns and payment of tax debts.

However, regardless of SARS's intentions this proposal is particularly concerning, in light of common occurrences such as:

- Supporting documents being misplaced, or clerical errors, which result in adjustments to VAT returns by SARS. As VAT is a self-assessed tax, any adjustments to the return inevitably results in the taxpayer having failed to pay VAT to SARS timeously;
- Late payments of VAT or PAYE by businesses, where a payment is only released late on a Friday night, and is not received by SARS until the next day; and
- Taxpayers that are unaware that may have a tax liability due to increasing complex provisions of the tax Acts, and fail to pay the correct amount of VAT or PAYE to SARS timeously.

In all of these circumstances, SARS is able to impose penalties on taxpayers (as it often does), which makes the need for the amendments to section 234 of the TA Act, and additional criminal sanctions, questionable.

Further, while it has, in the last few years, been uncommon for SARS to seek criminal prosecution of taxpayers except in the most egregious cases of non-compliance, we should all be concerned that this position could change at any time if the amendments to the TA Act are passed, and taxpayer's could be criminally liable for inadvertent errors.



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