

## CRIMINAL INVESTIGATION IN RELATION TO A SERIOUS TAX OFFENCE: WHAT DOES THE TAA REQUIRE?

The Tax Administration Act, No. 28 of 2011 (TAA) took effect on 1 October 2012.

In light of SARS's strong emphasis on compliance, this article considers the procedures SARS should follow where it believes that a serious tax offence might have been committed.

A 'serious tax offence' is defined as "a tax offence for which a person may be liable on conviction to imprisonment for a period exceeding two years without the option of a fine or to a fine exceeding the equivalent amount of a fine under the Adjustment of Fines Act, 1991 (Act no. 101 of 1991)."

Should SARS, while conducting a tax audit, realise that a serious tax offence may have been committed, the starting point would be s43 of the TAA. It provides:

*"If at any time or during the course of an audit it appears that a taxpayer may have committed a serious tax offence, the investigation of the offence must be referred to a senior SARS official responsible for criminal investigations for a decision as to whether a criminal investigation should be pursued."*

Where a criminal investigation does follow on the s43(1) 'referral', s43(2) comes into play. It provides: "Relevant material obtained under this Chapter from the taxpayer after the referral, must be kept separate from the criminal investigation."

The SARS Guide on the TAA explains (at p 25):

*"If a taxpayer is being audited and it appears that a serious tax offence has been committed, then the SARS auditor must refer the matter to a senior SARS official responsible for criminal investigations. Although the audit may continue, any information gathered from the taxpayer under a Chapter 5 audit after referral must be kept separate from a criminal investigation and is not admissible in criminal proceedings. Material obtained before this referral can be used in a criminal investigation and material obtained in the course of an investigation can be used in civil and in criminal proceedings."* (emphasis added)

The above means that, once the senior SARS official has decided that a criminal investigation should be pursued:

- any post-referral audit information must be kept separate from the criminal investigation; and
- such post-referral audit information would not be admissible in criminal proceedings.

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Section 44 sets out the manner in which a criminal investigation into an alleged serious tax offence should be conducted. In essence:

- The taxpayer's Constitutional rights as a suspect in a criminal investigation should be recognised (s44(1)). Those rights are detailed in the SARS Guide (at p 25) and include the right to remain silent, the right not to be compelled to make any confession/admission and so on.
- SARS may only make use of the relevant material obtained during the audit "... prior to the referral referred to in section 43" (s44(2)).
- Information obtained during the criminal investigation may, however, be used in both civil and criminal proceedings (s44(3)).

The prohibition against passing audit information into the criminal investigation channel (post the s43(1) referral) is clearly set out in the diagram in the SARS Guide (at p 25).

Section 72 of the TAA deals with "Self-incrimination". Section 72(2) provides:

*"An admission by the taxpayer of the commission of a tax offence obtained from a taxpayer under Chapter 5 (in terms of SARS's information-gathering powers, which include s43) is not admissible in criminal proceedings against the taxpayer, unless a competent court directs otherwise."*

The SARS Guide states as follows (at pp 37 – 38):

*"The purpose of §72(2) is to protect the right against self-incrimination of taxpayers compelled to provide information to SARS under Chapter 5 under threat of criminal sanction. Interventions by SARS under its information gathering powers for purposes of, for example an audit or investigation, are specific to identified taxpayers – rather than the general body of taxpayers – and are closer to cases where the Constitutional Court had struck down legislation that provided for the use of evidence obtained under compulsion in criminal proceedings. Section 72(2) preserves some residual power for the Court to depart from the default position and direct that, in a specific case, admissions gathered using SARS's information gathering powers may be used. In the context of verification, inspection or audit under Chapter 5, a taxpayer is not a suspect. However, if it appears during such verification, inspection or audit that a serious tax offence has been committed and the matter is referred for criminal investigation under the Act, the taxpayer can then be regarded as a suspect and SARS is then obliged to conduct the investigation with due recognition of the*

*taxpayer's constitutional rights as a suspect in a criminal investigation. Only once SARS has laid a criminal charge, will the taxpayer become an arrested, detained and accused person invoking the full protection afforded by the fair trial rights under the Constitution.*" (emphasis added)

The reality is that SARS's actions would be *ultra vires* and *mala fide* should it seek to conduct a 'tax audit' when, in truth, the real intention is to gather information/evidence to be used in the criminal prosecution of a suspected serious tax offence. The position under the TAA therefore appears to be:

- Once it appears to the SARS auditor that the taxpayer may have committed a serious tax offence, the auditor 'must' refer the matter to a senior SARS official for a decision whether to pursue a criminal investigation (s43(1)).
- After such referral, all audit information gathered subsequently must be kept separate from the criminal investigation (s43(2)).
- Where a decision was taken to pursue a criminal investigation into the serious tax offence, SARS may only make use (in the criminal investigation process) of the audit information obtained prior to the referral (s44(2)).
- Although the audit may continue (post the referral), any post-referral information gathered from the taxpayer under a Chapter 5 audit, must be kept separate from the criminal investigation and such audit information would not be admissible in criminal proceedings.
- While SARS conducts an audit under Chapter 5, a taxpayer is not a suspect. Should it appear, however, during such audit that a serious tax offence may have been committed and the matter is referred for criminal investigation, the taxpayer could then be regarded as a suspect. SARS would then be obliged to conduct the criminal investigation with due recognition of the taxpayer's Constitutional rights as a suspect in a criminal investigation (refer SARS Guide at p 25).
- An admission by the taxpayer of the commission of a tax offence obtained from a taxpayer during the audit process conducted under Chapter 5 (SARS's information-gathering powers, including s43) would not be admissible in criminal proceedings against the taxpayer, unless a competent court directs otherwise (s72(2)).

Section 235 deals with "*Criminal offences relating to evasion of tax*".

Section 235(3) provides: "*A senior SARS official may lay a complaint with the South African Police Service or the National*

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*Prosecuting Authority regarding an offence under this section."*

The SARS Guide states (at p 84):

*"Offences may be separated into tax offences and serious tax offences. Serious tax offences relate to intentional tax evasion, and one distinction to a "non-compliance" offence is that the period of imprisonment for a serious tax offence is a sentence of up to five years. The investigation of a serious tax offence will be carried out with regard to the rights that a suspect has by suitably qualified and experienced SARS officials. An investigator must have authority from a senior SARS official to investigate, and only a senior SARS official may lay a complaint with the police concerning an offence related to tax evasion." (emphasis added)*

From the above it is clear that the TAA, read with the SARS Guide, is highly prescriptive regarding:

- The decision to investigate a serious tax offence.
- The manner in which same should same be investigated.
- Who can lay a charge with the SAPS or the NPA.

The SARS Guide also expressly mentions that the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA) applies 'implicitly' with regard to actions taken by SARS under the TAA (refer Guide at p10):

*"The Constitutional Court has held that all statutes that authorise administrative action must now be read together with PAJA unless the provisions of the statutes in question are inconsistent with PAJA. It is, therefore, not necessary for the Act itself to spell out all the relevant aspects of administrative justice. This is implicit given the overriding application of PAJA, under which the unreasonable exercise of a power or performance of a function is a ground for review."*

According to the SARS Guide the right to administrative justice under the Constitution is given effect to in PAJA, which essentially mandates in the context of tax administration, that tax administrative actions which materially and adversely affect taxpayer rights must, in the absence of exceptions provided for in PAJA, adhere to fairness requirements such as:

- Prior notice of the intended decision.
- A prior hearing before the decision is taken.
- Clear grounds for the decision.

- Adequate notice of the right to request reasons for the decision.

A decision by a senior SARS official (under s43(1)) that a criminal investigation should be pursued (which could possibly result in a later prosecution) could materially and adversely affect that taxpayer's rights. For example, s46(7)(b) of the TAA provides that:

*"A senior SARS official may direct that relevant material if required for purposes of a criminal investigation, be provided under oath or solemn declaration and, if necessary, in accordance with the requirements of section 212 or 236 of the Criminal Procedure Act, 1997 (Act No. 51 of 1977)." [Note: this is the wording of sec 46(7)(b) in the Tax Administration Laws Amendment Bill, B40 - 2013].*

Accordingly, the questions that arise here are whether, or not, a taxpayer in such a situation should not be given:

- Prior notice that a s43(1) referral is being contemplated, i.e. the matter is being referred to senior SARS official to decide whether to potentially pursue a criminal investigation?
- Prior hearing (*audi alterem* opportunity) before the senior SARS official actually makes the decision?

Where an adverse decision is taken under s43(1), that is, to pursue a criminal investigation into the alleged serious tax offence, the taxpayer should also be provided with clear grounds for that decision.

A taxpayer who is unaware that a s43(1) referral has taken place, would be oblivious that an adverse decision might be taken by the senior SARS official.

That taxpayer would therefore also not be in a position to assert his Constitutional rights such as the right to remain silent.

It is accordingly imperative that any taxpayer facing a SARS decision under s43(1) should, firstly, be given prior notice of the s43(1) referral and, secondly, notice that the senior SARS official has made an adverse decision (SARS will pursue a criminal investigation).

Unless the above happens, the taxpayer will remain unaware of the decision to launch a criminal investigation and could, to his detriment, provide information to SARS or even co-operate with SARS under the illusion that SARS is still merely conducting a TAA Chapter 5 tax audit.

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