

National Treasury moves to increase the potential criminal liability for errant taxpayers

By [Dr Albertus Marais](#)

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A number of actions may lead to taxpayers being held criminally liable, with recent proposed tax changes raising the stakes significantly for taxpayers who may now get caught in the criminal net. These offences apply to VAT vendors, employers withholding PAYE, as well as taxpayers in general for specific offences listed in the Tax Administration Act. The wording in all these provisions has the one consistent test that for a taxpayer to be held criminally liable, the State must show that the person in question acted "wilfully and without just cause".



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This threshold test for criminal liability is, legally speaking, something of a paradox. A person acting "without just cause" is seen as acting in a manner which, objectively, can be said to be negligent. Compared to this, a person acting wilfully does so with intent and which, in terms of the South African legal system, is determined subjectively (in other words, by looking at person's state of mind).

The test therefore is potentially contradictory in that it requires persons to be both (objectively) negligent and (subjectively) intentional when attending to their tax affairs before potentially being held criminally liable. In terms of the 2020 draft Tax Administration Laws Amendment Bill published earlier this year, National Treasury proposes to delete the words "wilfully and" from the criminal liability test. In other words, the threshold requirement for criminal liability is proposed to be reduced to involve only whether a person has acted "without just cause". The matter has been met with outcry and is considered highly controversial amongst tax practitioners.

There appears to be consensus that the proposed test would involve solely one of negligence, in other words, whether a taxpayer has acted in a manner that is different from how the reasonable person would have acted in similar circumstances. By reducing the test to an objective one only and removing intent as a requirement to be held criminally liable, the fear is that prosecution of taxpayers may ensue en masse. From the workshops held with National Treasury, it is apparent that Treasury is intent to push forward with the suggested amendments, and which are expected to become effective by the end of this year.

Some commentators have expressed concern that the proposed amendments would lack constitutional validity and it remains to be confirmed whether this is indeed the case, or whether Treasury will even continue with its proposed reform. What is clear though is that there is an increased focus on tax compliance and which focus is no doubt driven by Sars. It is arguably for this reason that Philip Truter, recently convicted for his involvement in the VBS scandal, was charged, in addition to the various other offences linked to the VBS debacle, with the crime of failing to submit his 2018 income tax return. While this may be perceived as a minor charge compared to the other offences that he has been convicted of, it is clear that Sars, in collaboration with the NPA, seeks to emphasise that tax related offences will not be treated as minor offences, and that a renewed focus in practice will be placed on policing tax compliance-related matters.

While it is understandable that Government can only collect taxes where it receives the necessary information to allow it to assess taxpayers on taxes due to it, it is questionable whether negligence is an appropriate threshold whereby fault may be determined on the part of taxpayers to the extent that they may potentially face imprisonment or a fine as a result.

ABOUT THE AUTHOR

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