

Requests for relevant material: a delicate balance between SARS' powers and taxpayers' rights

Author: **Jerome Brink of ENSafrica**

The world economy is still in a fragile state and battling to gain momentum as many developed countries continue to feel the after-effects of the global financial crisis and several developing nations continue to grapple with inherent inefficiencies. South Africa is no different, with The South African Reserve Bank's forecast growth outlook for 2015 being revised down from 2.5 per cent to 2.2 per cent, and that for 2016 from 2.9 per cent to 2.4 per cent. Concomitant to this is the 2012 figures from the World Bank, which ranks South Africa as having the ninth highest tax: GDP ratio at 26.5% of GDP.

Notwithstanding the further domestic issues such as corruption and wasteful expenditure, it is clear that SARS is coming under increasing pressure to collect more revenue to fund government spending. With this increased pressure comes the propensity for SARS to perhaps utilise its powers contained in the Tax Administration Act, 28 of 2011 ("**the TAA**") with a little more might. This trend is apparent from the recent amendment to the definition of "relevant material" contained in section 1 of the TAA.

The Tax Administration Laws Amendment Act, 44 of 2014 ("**TALAA**") amended the definition to now read as follows:

"means any information, document or thing that in the opinion of SARS is foreseeably relevant for the administration of a tax Act as referred to in section 3"

Prior to the amendment, the definition did not contain a

reference to “**in the opinion of SARS**” but was more reflective of an objective enquiry. The Explanatory Memorandum on the TALAA states that the reason for the amendment is to:

“prevent protracted disputes around entitlement of information and the consequent waste of resources... the proposed amendment aims to clarify that the statutory duty to determine the relevance of any information, document or thing is that of SARS and the term foreseeable relevance does not imply that taxpayers may unilaterally decide relevance and refuse to provide access thereto, which is what is happening in practice.”

The Explanatory Memorandum continues the justification for the amendment:

“It must be recognised that information is the lifeblood of a revenue authority’s taxpayer audit activity, and the whole rationale of taxation would break down and the whole burden of taxation would fall only on diligent and honest taxpayers if a revenue authority had no effective powers to obtain confidential information about taxpayers who may be negligent or dishonest.”

It is unquestionable that the information gathering powers of SARS must be meted out with the appropriate authority, efficiency and effectiveness in order to dispense with the obligation to collect revenue. Having said that, SARS must act in accordance with the Bill of Rights which specifically provides for the right to fair and just administrative action as set out in section 33 of the Constitution of the Republic of Africa, 1996 (“**the Constitution**”).

The Explanatory Memorandum states that the test for what is foreseeably relevant should have a low threshold and that the following considerations should be applied:

- Whether, at the time of the request, there is a reasonable possibility that the material is relevant to

- the purpose for which it is sought;
- Whether the material, once provided, actually proves to be relevant is immaterial;
- A request may not be declined in cases where a definite determination of the relevance of the material requested for an ongoing audit or investigation can only be made following receipt of the material;
- There need not be a clear and certain connection between the material requested and the purpose for which it is requested, but a rational possibility that the material will be relevant to the purpose; and
- The approach is to first produce the material and allow a definite determination to occur later.

With the movement towards a much broader and robust test for relevance comes the risk of the potential abuse of SARS powers in this regard. It is at the very least questionable whether it is possible to determine in advance whether all documents made available or requested by SARS will fulfil the relevancy requirements specified in the TAA.

Practically, relevance can only be determined at the time that the information is requested and such information must remain within the scope of the audit. Only once SARS has undertaken to conduct the process in such a manner can it apply its mind and dispense with its statutory obligation to act in accordance with section 33 of the Constitution. As an example; while a board pack may contain relevant information in respect of a specific audit, it does not follow that the entire document is foreseeably relevant as there will be extensive compartments of information contained therein which is completely unrelated to the scope of the SARS' audit, yet very sensitive for a number of reasons. It could surely not have been the intention of the legislature that the information gathering powers of SARS could amount to a potential 'fishing expedition' into a taxpayer's affairs.

The Explanatory Memorandum implies that taxpayers have been

unilaterally deciding whether information is relevant or not, which is certainly not the correct approach. While the inference is that the proposal of instituting an appropriate mechanism whereby independent parties could be called upon to determine relevance is time consuming and costly, this process would go a long way towards ensuring the delicate balance between SARS powers and taxpayer's rights are justly observed. Nevertheless, against the backdrop of the current socio-economic climate it is clear that the amendment may allow slightly more unfriendly tactics to obtain information and it is important that taxpayers remain aware of their rights in this regard and seek professional assistance in order to ensure no potential abuse of powers leads to the improper obtaining of sensitive information.