

TAX ADMINISTRATION BILL, B11 - 2011
STANDING COMMITTEE ON FINANCE
BRIEFING NOTE: SEARCH WITHOUT WARRANT: CLAUSE 63

Background

The Bill seeks to enhance tax compliance in order to achieve equity and maintain confidence in the integrity of the tax system. Inadequate investigation of tax evaders is unfair to taxpayers who comply with the law. If such a problem were allowed to persist, it would undermine public confidence in the tax system and would reduce voluntary compliance by the majority of taxpayers, which compliance is an integral feature of an effective tax system.

Over the years it has become apparent that stricter enforcement powers are required to target increasingly sophisticated and aggressive tax evaders and tax evasion schemes. In the criminal economy, for example illegal gambling business, it is very likely that any delay in the investigation will result in the destruction of records and documents.

Although the necessity of the power to search premises without a warrant was initially contested by commentators, most eventually conceded that it is necessary, but with the necessary checks and balances. For example, the South African Institute for Professional Accountants on 29 September 2011 released a statement on the Bill, which included the comment that:

“Some are unhappy with the extension of powers, such as the provision allowing SARS to conduct a search and seizure of documentation without a warrant. Perhaps surprisingly, it is a power which SAIPA believes is necessary.”

Current Proposal

Clause 63 only permits a warrantless search if a senior SARS official (in other words an official specifically delegated for this purpose on the basis of seniority and experience) on reasonable grounds is satisfied that:

- There may be an imminent removal or destruction of ‘relevant material’ (a defined concept in the Bill) likely to be found on the premises;
- If SARS applies for a search warrant under its statutory power to do so, a search warrant will be issued; and
- The delay in obtaining a warrant would defeat the object of the search and seizure.

Furthermore, among other safeguards:

- The search may only be carried out in the same manner and subject to the same statutory limitations as a search in terms of a warrant (clauses 61(4) – (9)); and
- A SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for purposes of trade, without the consent of the occupant.

Any abuse of this power by SARS should be addressed by the general remedies of taxpayers in the Bill, SARS administrative complaints resolution and the Tax Ombud, as well as under the Promotion of Administrative Justice Act, 2000.

A person searched will almost invariably know immediately that he has been searched and would be entitled to apply to court on an urgent basis for such relief as he or she deems fit. A warrantless search will be justiciable by the Court, which can inquire into the grounds and decide whether they are reasonable. A court could also be approached on an urgent basis for interlocutory relief regarding the custody or sealing of the documents pending an application to set aside the search and seizure.

Comparative Overview: Domestic Law

South African Legislation

The power to conduct warrantless searches currently exists in at least 17 statutes, both criminal and non-criminal. These are the:

- Health Professions Act, 1974 - section 41A(h)
- Criminal Procedure Act, 1977 - section 22
- South African Police Service Act, 1995 - section 13(6)
- Counterfeit Goods Act, 1997 - section 5(2)
- National Prosecuting Authority Act, 1998 - section 29(10)
- Inspection of Financial Institutions Act, 1998 - section 4
- National Forest Act, 1998 - section 67
- Competition Act, 1998 - section 47
- National Veld And Forest Fire Act, 1998 - section 27
- Nuclear Energy Act, 1999 - section 38
- Firearms Control Act, 2000 - section 115(4)
- Immigration Act, 2002 - section 33(9)
- International Trade Administration Act, 2002 - section 44
- Explosives Act, 2003 - section 6(6)
- Anti-Personnel Mines Prohibition Act, 2003 - section 19
- Second-Hand Goods Act, 2009 - section 29(5)
- Civil Aviation Act, 2009 - section 34

As an example, the power of the Financial Services Board to conduct warrantless search and seizures is contained in section 4 of the Inspection of Financial Institutions Act, 1998, which provides as follows (emphasis added):

- “4. Powers of inspectors relating to institutions.—(1) In carrying out an inspection of the affairs of an institution under section 3 an inspector may—
- (a) administer an oath or affirmation or otherwise examine any person who is or formerly was a director, servant, employee, partner, member or shareholder of the institution;
 - (b) at any time without prior notice enter and search any premises occupied by the institution and require the production of any document relating to the affairs of that institution;
 - (c) open any strongroom, safe or other container in which he or she suspects any document of the institution is kept;
 - (d) examine and make extracts from and copies of any document of the institution or, against the issue of a receipt, remove such document temporarily for that purpose;
 - (e) against the issue of a receipt, seize any document of the institution which in his or her opinion may afford evidence of an offence or irregularity;...”

Most recently, a similar power was afforded to an investigator under section 34 of the Civil Aviation Act, 2009, which provides as follows (emphasis added):

“34. Search and seizure by appointed investigators.—(1) In the execution of the authority contemplated in section 33 an investigator may search and seize any property or item, including medical records, recorders and air traffic service recordings of an aircraft accident or aircraft incident without a warrant.

(2) An investigator in respect of this Act is considered to have been appointed as a peace officer by the Minister for Justice and Constitutional Development in terms of section 334 of the Criminal Procedure Act for the Republic, and for the purpose of exercising the powers contemplated in sections 40, 41, 44, 45, 46, 47, 48, 49 and 56 of the Criminal Procedure Act.

(3) In the execution of the authority contemplated in section 33 an investigator may without a warrant search and seize any property or item, including medical records, recorders and air traffic service recordings of an aircraft accident or aircraft incident—

- (a) if the person concerned consents...; or
- (b) if he on reasonable grounds believes—
 - (i) that a search warrant will be issued to him if he applies for such warrant; and
 - (ii) that the delay in obtaining such warrant would defeat the object of the search without a warrant.

(4) An investigator may use the powers in terms of this section only to serve the purposes of this Act and matters incidental thereto, and must take the necessary steps to secure the safekeeping of the property or items seized.”

South African Case Law

Critically, our courts have emphasised that narrow exceptions to the warrant requirement are appropriate.

As discussed below, the Constitutional Court has on two occasions, in *Mistry v Interim Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (CC) and *Magajane v Chairperson, North West Gambling Board and Others* 2006 (5) SA 250 (CC) declared warrantless search and seizure powers unconstitutional.

It should be noted, however, that almost none of the safeguards and limitations in the Bill existed in the provisions declared to be unconstitutional. Importantly, these cases are authority that warrantless searches, with the necessary safeguards, *are* constitutionally permissible.

In the *Mistry* case, section 28(1) of the Medicines Act, 1965, permitted inspectors to search “any premises, place, vehicle, vessel or aircraft” for any medicine or scheduled substance. The Constitutional Court held that that the most striking feature of section 28(1) was the lack of qualification of the powers of entry and inspection given to the inspectors. The single criterion for entering “any premises, place, vehicle, vessel or aircraft”, including a home, was that any medicine or scheduled substance was there or was reasonably suspected of being there. The statute also authorised inspection and seizure of objects that appeared to provide evidence of contravention of the Medicines Act, 1965. The Court concluded as follows (emphasis added):

“Irrespective of legitimate expectations of privacy which might be intruded upon in the process, and without any predetermined safeguards to minimise the extent of such intrusions where the nature of the investigations made some invasion of privacy necessary, s 28(1) gave the inspectors *carte blanche* to enter any place, including private dwellings, where they reasonably suspected medicines to be, and then to inspect documents which might be of the most intimate kind. The extent of the invasion of the important right to personal privacy authorised by s 28(1) was substantially disproportionate to its public purpose; the section was clearly overbroad in its reach and accordingly failed to pass the proportionality test laid down in respect of s 33 of the interim Constitution...The Act contemplated an active role for the inspectors which went well beyond the limited one of monitoring the premises of health professionals.”

In the *Magajane* case, provisions of North West Gambling Act, 2001, authorised warrantless searches and were aimed at obtaining evidence for criminal prosecution. The provisions also did not have any of the traditional safeguards required for warrantless search and seizure and were overbroad. The Constitutional Court held that, in the context of warrantless searches aimed at obtaining evidence for criminal prosecution, the overbreadth created an impermissible threat to the right to privacy. In reaching this conclusion, the Court dealt at length with the nature and purpose of the warrant requirement. It emphasised the importance and merits of requiring a warrant, but pointed out that:

“Of course, the law recognises that there will be limited circumstances in which the need of the State to protect the public interest compels an exception to the warrant requirement.”

In the criminal context, where a search aimed at criminal prosecution constitutes a significantly greater intrusion than a regulatory inspection aimed at compliance, the Court held that even in such context:

“There may, however, be instances where warrantless searches are justified, such as those provided for in the Criminal Procedure Act.”

The Court then quoted section 22 of the Criminal Procedure Act, 1977, which provides:

“A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20—

...

- (b) if he on reasonable grounds believes—
- (i) that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and
 - (ii) that the delay in obtaining such warrant would defeat the object of the search.”

Similarly, the Supreme Court of Appeal has in *Raliphaswa v Mugivhi and Others* 2008 (4) SA 154 (SCA) not criticised this provision of the Criminal Procedure Act, 1977, but described it as being “designed to protect rights to privacy against abuse of power by members of the SAPS”.

A similar provision also appears in the National Prosecuting Authority Act, 1998. In *Thint (Pty) Ltd v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC) both the majority and minority of the Constitutional Court mentioned this provision without any adverse comment.

In the High Court, provisions¹ in the Inspection of Financial Institutions Act, 1998, authorising the FSB to conduct warrantless search and seizures, came under constitutional scrutiny in *Platinum Asset Management (Pty) Ltd v Financial Services Board* 2006 (4) SA 73 (W). The Witwatersrand Local Division (as it then was) held that the limitation of the right to privacy by the search and seizure provisions is justifiable in terms of section 36 of the Constitution. In the justification analysis, the Court *inter alia* held:²

- In the context of the financial regulatory environment, the predominant purpose of the inspection is to enforce compliance with statutory requirements. Its goal of protecting the public and our economy is a goal of paramount importance. The protective role common to all [financial regulatory] legislation referred to, gives a special character to such bodies which must be recognised when assessing the way in which their functions are carried out under their respective Acts.
- The impugned provisions are not to be analysed in isolation, but rather in their regulatory context, and what it seeks to protect. The inspections envisaged are purely administrative in nature and do not adjudicate upon the guilt or innocence of the subject of the inspection.
- The powers of search and seizure conferred by the Inspection of Financial Institutions Act, 1998, are not unconstrained. There are restrictions imposed by the Act itself, and PAJA will be used to determine the fairness of the inspection. An aggrieved institution can also appeal in terms of the Financial Services Board Act, 1990. The regulation does not punish financial institutions; instead it controls their operations so that they comply with the respective legislation.

The impact of the recent case of *Minister for Safety and Security v Van Der Merwe and Others* 2011 (5) SA 61 (CC) has been raised by the Committee. The main question in this case was “whether search and seizure warrants are valid despite their failure to mention the offences to

¹ Sections 3(1), 3(2), 4(1)(b) to (f).

² Paragraphs 129 – 137

which the search relates.” The Constitutional Court went on to find that; “A warrant can thus not be reasonably intelligible if the empowering legislation and the offence are not stated in it.”

This issue does not arise under the Bill, since clause 60 specifically requires that a warrant issued under the clause contains “the alleged failure to comply or offence that is the basis for the application.” The impact of the finding on a warrantless search is a novel question in South African law. Nevertheless, there is a case to be made that explicit effect should be given to the principle that “the person whose premises are being invaded should know the reason why.” Although it would be innovative in the context of similar provisions in the comparative statutes in South Africa, SARS recommends that an additional provision, as set out below, be inserted in clause 63.

A SARS official must, before carrying out the search, inform the owner or person in control of the premises—

- (a) that the search is being conducted under this section; and
- (b) of the alleged failure to comply with an obligation imposed under a tax Act or tax offence that is the basis for the search.

Comparative Overview: International Law

The OECD Forum on Tax Administration’s *Comparative Information Series (2010)* provides an overview of the information and access powers that are used by revenue bodies in OECD and selected non-OECD countries to administer their tax systems. The information provided shows:³

- Revenue bodies in most surveyed countries have broad powers of access to taxpayers’ business premises to verify or establish tax liabilities. Out of the 49 countries surveyed, a search warrant is required to enter business premises in 12 countries for any purpose and in 2 countries only in criminal cases.
- Revenue bodies that do not require a warrant may enter premises to obtain information to verify or establish tax liabilities and nearly half of the revenue bodies surveyed may seize taxpayers’ documents without a warrant.
- Revenue bodies’ access powers are narrowed with regard to dwellings in surveyed countries. A search warrant is required to enter taxpayers’ dwellings for any purpose in over half of surveyed bodies and in 2 countries only for fraud or criminal cases. There are exceptions in a few countries (e.g. Ireland and Hungary) that apply where parts of the dwelling are used for business purposes.

Extracts from the legislation of Australia, Canada, New Zealand and the United Kingdom are attached as Annexure A to illustrate revenue bodies’ powers in these countries.

Conclusion

In view of the above, SARS is of the view that clause 63 is not unconstitutional as it only provides a narrow exception to the requirement that searches and seizures occur pursuant to a warrant. As set out, such narrow exceptions occur frequently in our law, and our courts, including the Constitutional Court, have emphasised that such narrow exceptions to the warrant requirement are appropriate.

This view is bolstered by the number of similar provisions in South African enacted post-constitutionally, the number of foreign countries that allow warrantless searches by revenue bodies and the importance of a provision such as this in the South African tax context.

SARS
6 October 2011

³ See <http://www.oecd.org/dataoecd/2/37/47228941.pdf> page 251

Comparative Overview: International Law Legislative Examples

Australia

Section 263 of the Income Tax Assessment Act, 1936, provides as follows:

- “(1) The Commissioner, or any officer authorised by him in that behalf, shall at all times have full and free access to all buildings, places, books, documents and other papers for any of the purposes of this Act, and for that purpose may make extracts from or copies of any such books, documents or papers.
- (2) An officer is not entitled to enter or remain on or in any building or place under this section if, on being requested by the occupier of the building or place for proof of authority, the officer does not produce an authority in writing signed by the Commissioner stating that the officer is authorised to exercise powers under this section.
- (3) The occupier of a building or place entered or proposed to be entered by the Commissioner, or by an officer, under subsection (1) shall provide the Commissioner or the officer with all reasonable facilities and assistance for the effective exercise of powers under this section.”

The practice of the Australian Taxation Office (ATO) in applying the above provision is set out in the *Access and Information Gathering Manual*.⁴ The manual provides that the access without notice provisions should be used only in exceptional circumstances and are limited to three situations:

- A genuine belief that documents may be destroyed if notice is given about the access;
- A well-founded concern that fraud or evasion is taking place; or
- If there is inappropriate secrecy by the taxpayer.

Canada

In terms of section 231 of Part XV of the Canadian Income Tax Act, 1985, a warrant is only required to enter a private dwelling.

- “231.1 (1) **Inspections.** An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Act,
- (a) inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by the taxpayer under this Act, and
- (b) examine property in an inventory of a taxpayer and any property or process of, or matter relating to, the taxpayer or any other person, an examination of which may assist the authorized person in determining the accuracy of the inventory of the taxpayer or in ascertaining the information that is or should be in the books or records of the taxpayer or any amount payable by the taxpayer under this Act, and for those purposes the authorized person may
- (c) subject to subsection 231.1(2), enter into any premises or place where any business is carried on, any property is kept, anything is done in connection with any business or any books or records are or should be kept, and
- (d) require the owner or manager of the property or business and any other person on the premises or place to give the authorized person all reasonable assistance and to answer all proper questions relating to the administration or enforcement of this Act

⁴ See http://www.ombudsman.gov.au/files/onlineATO_access-without-notice_20100211.pdf page 3

and, for that purpose, require the owner or manager to attend at the premises or place with the authorized person.

(2) **Prior authorization.** Where any premises or place referred to in paragraph 231.1(1)(c) is a dwelling-house, an authorized person may not enter that dwelling-house without the consent of the occupant except under the authority of a warrant under subsection 231.1(3).

(3) **Application.** Where, on *ex parte* application by the Minister, a judge is satisfied by information on oath that

(a) there are reasonable grounds to believe that a dwelling-house is a premises or place referred to in paragraph 231.1(1)(c),

(b) entry into the dwelling-house is necessary for any purpose relating to the administration or enforcement of this Act, and

(c) entry into the dwelling-house has been, or there are reasonable grounds to believe that entry will be, refused,

the judge may issue a warrant authorizing an authorized person to enter the dwelling-house subject to such conditions as are specified in the warrant but, where the judge is not satisfied that entry into the dwelling-house is necessary for any purpose relating to the administration or enforcement of this Act, the judge may

(d) order the occupant of the dwelling-house to provide to an authorized person reasonable access to any document or property that is or should be kept in the dwelling-house, and

(e) make such other order as is appropriate in the circumstances to carry out the purposes of this Act,

to the extent that access was or may be expected to be refused and that the document or property is or may be expected to be kept in the dwelling-house.”

New Zealand

Section 16 of the Tax Administration Act, 1994, provides as follows:

“16 COMMISSIONER MAY ACCESS PREMISES TO OBTAIN INFORMATION

16(1) [Access of Commissioner or authorised officer] Notwithstanding anything in any other Act, the Commissioner or any officer of the Department authorised by the Commissioner in that behalf shall at all times have full and free access to all lands, buildings, and places, and to all books and documents, whether in the custody or under the control of a public officer or a body corporate or any other person whatever, for the purpose of inspecting any books and documents and any property, process, or matter which the Commissioner or officer considers necessary or relevant for the purpose of collecting any tax or duty under any of the Inland Revenue Acts or for the purpose of carrying out any other function lawfully conferred on the Commissioner, or considers likely to provide any information otherwise required for the purposes of any of those Acts or any of those functions, and may, without fee or reward, make extracts from or copies of any such books or documents.”

United Kingdom

Part 2 of Schedule 36 to the Finance Act, 2008, provides as follows:

POWERS TO INSPECT BUSINESSES ETC

Power to inspect business premises etc

10(1) An officer of Revenue and Customs may enter a person's business premises and inspect—

(a) the premises,

(b) business assets that are on the premises, and
(c) business documents that are on the premises,
if the inspection is reasonably required for the purpose of checking that person's tax position.

(2) The powers under this paragraph do not include power to enter or inspect any part of the premises that is used solely as a dwelling.

(3) In this Schedule—

“business assets” means assets that an officer of Revenue and Customs has reason to believe are owned, leased or used in connection with the carrying on of a business by any person, excluding documents,

“business documents” means documents (or copies of documents)—

(a) that relate to the carrying on of a business by any person, and

(b) that form part of any person's statutory records, and

“business premises”, in relation to a person, means premises (or any part of premises) that an officer of Revenue and Customs has reason to believe are (or is) used in connection with the carrying on of a business by or on behalf of the person.

Power to inspect premises used in connection with taxable supplies etc

11...

Carrying out inspections

12(1) An inspection under this Part of this Schedule may be carried out only—

(a) at a time agreed to by the occupier of the premises, or

(b) if sub-paragraph (2) is satisfied, at any reasonable time.

(2) This sub-paragraph is satisfied if—

(a) the occupier of the premises has been given at least 7 days' notice of the time of the inspection (whether in writing or otherwise), or

(b) the inspection is carried out by, or with the agreement of, an authorised officer of Revenue and Customs.

(3) An officer of Revenue and Customs seeking to carry out an inspection under sub-paragraph (2)(b) must provide a notice in writing as follows—

(a) if the occupier of the premises is present at the time the inspection is to begin, the notice must be provided to the occupier,

(b) if the occupier of the premises is not present but a person who appears to the officer to be in charge of the premises is present, the notice must be provided to that person, and

(c) in any other case, the notice must be left in a prominent place on the premises.

(4) The notice referred to in sub-paragraph (3) must state the possible consequences of obstructing the officer in the exercise of the power.

(5) If a notice referred to in sub-paragraph (3) is given with the approval of the First-tier Tribunal (see paragraph 13), it must state that it is given with that approval.

Approval of First-tier Tribunal

13(1) An officer of Revenue and Customs may ask the First-tier Tribunal to approve an inspection under this Part of this Schedule.

(2) The First-tier Tribunal may not approve an inspection unless—

(a) an application for approval is made by, or with the agreement of, an authorised officer of Revenue and Customs, and

(b) the Tribunal is satisfied that, in the circumstances, the inspection is justified.

Restrictions and special cases

14 This Part of this Schedule has effect subject to Parts 4 and 6 of this Schedule.