

**Practice Note: No. 5 – 1 April 1987**  
**Income Tax and Sales Tax: Section 105a of the Income Tax Act and Section 44a of the Sales Tax Act: reporting of unprofessional conduct**

*INCOME TAX*

In terms of section 105A of the Income Tax Act, No 58 of 1962, the Commissioner for Inland Revenue may, where it appears to him that a professional person has in respect of the taxation affairs of a taxpayer acted unprofessionally, lodge a complaint with the controlling body of such person's profession.

Concern has been expressed that this provision could be invoked against a professional person who has assisted his client in carrying out a legitimate tax avoidance scheme. This Practice Note is issued to remove uncertainty in this regard.

Sub-section (2) reads as follows:

- “(2) Where any person who carries on any profession, calling or occupation in respect of which a controlling body has been established has, in relation to the affairs of any taxpayer, done or omitted to do anything which in the opinion of the Commissioner—
- (a) was intended to enable or assist such taxpayer to avoid or unduly postpone the performance of any duty or obligation imposed on such taxpayer by or under this Act, or by reason of negligence on the part of such person resulted in the avoidance or undue postponement of the performance of any such duty or obligation; and
  - (b) constitutes a contravention of any rule or code of conduct laid down by the controlling body which may result in disciplinary action being taken against such person by that body,

the Commissioner may lodge a complaint with the said controlling body.”

Paragraph (a) contemplates the avoidance or undue postponement of a duty or obligation imposed on the taxpayer under the Act. The duties and obligations contemplated here are those explicitly imposed by the Act, such as the duty to make a full and true return of income and the obligation to pay tax when due. A taxpayer who has carried out a legitimate tax avoidance scheme, i.e. who has arranged his affairs so as to minimise his tax liability, in a manner which does not involve fraud, dishonesty, misrepresentation or other actions designed to mislead the Commissioner, will have met his duties and obligations under the Act if he fully and honestly completes his income tax return and fully and honestly answers any queries raised by the Commissioner. His professional adviser will therefore not be subject to action under section 105A, and this will remain so even if the scheme itself is successfully attacked by the Commissioner under section 103.

It is appreciated that questions of degree may be involved and it is not the intention that any complaint be lodged unless it appears that the professional adviser is guilty of a serious or persistent dereliction of duty involving dishonesty or subterfuge or the circumstances indicate an intention to obstruct or mislead revenue officials in the performance of their duties under the Act. It may also be mentioned that the section will be invoked only by the Commissioner personally.

*SALES TAX*

The wording of the provisions of section 44A of the Sales Tax Act, No. 103 of 1978, is similar to the wording of section 105A of the Income Tax Act, and what is stated above, except as respects the provisions of section 103 of that Act (which has no counterpart in the Sales Tax Act), applies *mutatis mutandis* for sales tax purposes.