

**UNIVERSITY OF KWAZULU-NATAL**

**FACULTY OF LAW**

**DISSERTATION COVER SHEET**

<b>STUDENT NUMBER</b>	<b>9706284</b>
<b>MODULE NAME</b>	<b>ADVANCED TAXATION LAW II</b>
<b>NAME OF SUPERVISOR / MODULE CO-ORDINATOR</b>	<b>MR C. SCHEMBRI</b>
<b>TITLE OF DISSERTATION</b>	<b>The new Tax Administration Act ("TAA") came into effect on 1 October 2012. The TAA is intended to simplify and provide a greater consistency in terms of South African tax administration law. Comment on this statement taking into account the implications for the taxpayer, in comparison with the preceding administrative provisions that existed in Act 58 of 1962, pitfalls and possible problems for the taxpayer and challenges that may arise for the taxpayer in the Constitutional Court.</b>
<b>DATE SUBMITTED</b>	<b>2014-01-31</b>

**UNDERTAKING:**

1. I acknowledge that this research paper is my own work and I have not copied the work of another student or author.
2. I acknowledge that the written work is entirely my own except where other sources are acknowledged.
3. I acknowledge that collaboration in the writing of this assignment or the copying of another student's work constitutes cheating for which I may be excluded from the University.
- 4.
5. I certify that this research paper has not been submitted in this or similar form in another module at this or any other University.

Name           Laurell Lucelle Nadas  
Signature      *Laurell*  
Date           2014-01-31

## **Declaration**

I, Laurell Lucelle Nadas, certify that the whole dissertation, unless specifically indicated to the contrary in the text, is my own work. It is submitted as the dissertation component, which counts for 50% of the degree in partial fulfilment of the requirements for the degree of Masters of Law in the Faculty of Law, University of KwaZulu-Natal for the year 2014.

## ACKNOWLEDGEMENTS

I would like to thank the Lord for giving me this opportunity and providing me with the strength and perseverance to complete this dissertation. Thank you, Jesus.

I extend my heartfelt appreciation to my supervisor, Mr Chris Schembri, for his patience, supervision, and support throughout my Masters Degree. Thank you for taking the time to respond to my questions and queries and for going beyond the call of duty to help me complete this dissertation.

Most importantly, I thank my loving parents, Mr Selvan Nadas and Mrs Charmaine Nadas for their love, support, patience, endurance, and encouragement even when I was ready to give up. Thank you for always supporting my academic career, believing in me, and for providing me with all the opportunities to do my best and believe in myself.

I would also like to extend my appreciation to Professor Marita Carnelley for her support and time in ensuring that I completed my Masters Degree despite the obstacles encountered.

Finally, thank you to Ms Deanne Collins, who edited this dissertation.

## **TABLE OF CONTENTS**

## **PAGE NUMBER**

<b>DECLARATION.....</b>	<b>1</b>
<b>ACKNOWLEDGEMENTS.....</b>	<b>2</b>
<b>ABSTRACT.....</b>	<b>5</b>
<b>CHAPTER 1 : INTRODUCTION.....</b>	<b>7</b>
<b>CHAPTER 2 : OVERVIEW OF THE ONUS OF PROOF PROVISIONS CONTAINED IN THE INCOME TAX ACT AND THE TAX ADMINISTRATION ACT RELATING TO JUST ADMINISTRATIVE ACTION</b>	
<b>2.1 Difference between the onus of proof provision contained in the Income Tax Act and the Tax Administration Act.....</b>	<b>10</b>
<b>2.2. Administration Non-Compliance penalties.....</b>	<b>11</b>
<b>2.3 Criminal Non-Compliance penalty.....</b>	<b>12</b>
<b>2.4 Administration Understatement Penalty.....</b>	<b>14</b>
<b>2.5 Practical effect of the new onus of proof provision where an administrative understatement penalty is imposed.....</b>	<b>15</b>
<b>CHAPTER 3 : THE TAXPAYER'S RIGHT TO JUST ADMINISTRATIVE ACTION.....</b>	<b>18</b>

<b>CHAPTER 4 : THE TAXPAYER IS RIGHT TO PRIVACY. DOES SARS PROTECT OR INVADE A TAXPAYER'S PRIVACY?.....</b>	<b>26</b>
4.1 Search and Seizure procedures. Are these a violation of the right to privacy and just administrative action?.....	28
4.2 Pay now argue later provision - The right not to be deprived of property and just administrative action.....	31
4.3 Appointment of an agent - The right to property and just Administrative action.....	32
4.4 Legitimate Expectation Doctrine - The right to just Administrative action.....	35
4.5 Remedies for the taxpayer when decisions, actions, and conduct of SARS are found to be unconstitutional.....	36
<b>CHAPTER 5: "PAY NOW ARGUE LATER" RULE PRIOR TO AND FOLLOWING THE PROMULGATION OF THE TAA.....</b>	<b>37</b>
<b>CHAPTER 6 : CONSTITUTIONAL PROTECTION FOR THE TAXPAYER.....</b>	<b>44</b>
<b>CHAPTER 7 : CONCLUSION.....</b>	<b>52</b>
<b>BIBLIOGRAPHY.....</b>	<b>57</b>

## ABSTRACT

This dissertation examines the new Tax Administration Act (TAA), which came into effect on 1 October 2012<sup>1</sup> and the constitutionality of the right to just administrative action.<sup>2</sup> The intention of the TAA is to simplify and provide greater consistency in South African tax administration law.<sup>3</sup> The Constitution of the Republic of South Africa (1996 Constitution)<sup>4</sup> affords sufficient protection for taxpayers against certain practices and procedures utilised by the South African Revenue Service (SARS) to collect taxes. Explicit authority has been granted to SARS to carry out its functions. The media has noted concerns regarding the relationship between the taxpayer and SARS. This dissertation investigates the equilibrium between SARS's duty to collect taxes and the right of every taxpayer to the just administration of the collection of taxes in terms of the TAA.<sup>5</sup>

The right to fair and just administrative action indicates the manner in which disputes can be resolved between SARS and the taxpayer.<sup>6</sup> This right takes into account the legitimate expectations in terms of which SARS should act in compliance with its own notes and rulings enacted by tax legislation.<sup>7</sup> An effective, just, and equitable tax system requires adherence to certain vital principles in order to achieve a balance between the interests of taxpayers and the interests of government. The 1996 Constitution mandates government with the authority to tax.<sup>8</sup> However, the 1996 Constitution also imposes certain procedural and substantive limitations and challenges to government's power to tax.<sup>9</sup> The Bill of Rights

---

<sup>1</sup> SARS Short Guide to the Tax Administration Act ('SARS Guide'). Available at

[http://www.jutalaw.co.za/media/filestore/2013/06/SARS\\_Guide\\_-\\_Short\\_Guide\\_to\\_the\\_Tax\\_Administration\\_Act\\_2011\\_-\\_External\\_Guide.pdf](http://www.jutalaw.co.za/media/filestore/2013/06/SARS_Guide_-_Short_Guide_to_the_Tax_Administration_Act_2011_-_External_Guide.pdf), accessed 16 April 2013.

<sup>2</sup> Section 33 of the Constitution of Republic of South Africa Act 108 of 1996 (1996 Constitution).

<sup>3</sup> SARS Guide 4.

<sup>4</sup> In determining whether the Bill of Rights has been breached by SARS one must therefore have regard to the specific rights contained in Chapter 2 and whether such right has been breached.

<sup>5</sup> Tax Administration Act 28 of 2011 (TAA) 4.

<sup>6</sup> 1996 Constitution.

<sup>7</sup> Editorial SARS Interpretation Notes (March 2003) *The Taxpayer* 45. Available at <http://www.sars.gov.za/Legal/Interpretation-Rulings/.../Find-a-General-Note.as...>, accessed 18 December 2013.

<sup>8</sup> 1996 Constitution.

<sup>9</sup> Croome BJ *Taxpayers' Rights in South Africa*: An analysis and evaluation of the extent to which the power of the South African Revenue Service comply with the constitutional right to property, privacy, administrative justice, access to courts and access to information. Available at [upetd.up.ac.za/thesis/available/etd-09052012-174757/.../dissertation.pdf](http://upetd.up.ac.za/thesis/available/etd-09052012-174757/.../dissertation.pdf), accessed 16 April 2013.

contained in the 1996 Constitution affords taxpayers' various rights that impose limitations on SARS.<sup>10</sup> One of the most important taxpayers' rights is the right to just administrative action, which is the focus of this dissertation. As an organ of state, SARS has the executive power to make and implement decisions whereas legislation grants SARS the power to use its discretion when exercising its authority.<sup>11</sup> The question that one needs consideration is taxpayers' rights against unlawful, unreasonable, or unfair practices on the part of SARS despite recent amendments to tax legislation.

The aim and purpose of this dissertation is to:

- Outline the onus of proof provisions contained in the Income Tax Act 58 of 1962 (ITA) and the TAA relating to just administrative action;
- Focus on the right of taxpayers to just administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and the procedural and substantive requirements for enforceability of such rights;
- Discussion on taxpayers' rights to privacy and whether or not SARS protects or invades such privacy;
- Discussion on the 'pay now, argue later' principle prior to and following the promulgation of the TAA; and
- Examination of the protection offered to taxpayers' in the 1996 Constitution.

The method employed by the study, involved an analysis of the Constitution, legislation, case law, books and published journal articles relevant to the issues set out above. This method is appropriate as it sets out the legal position pertaining to the significant issues identified. It must be borne in mind that the chapters overlap and, while some information seems repetitive, this was necessary in order to link the information to the research question and address the research topic adequately.

---

<sup>10</sup> Editorial *SARS Interpretation Notes* (note 7 above), states that in terms of the principle of estoppel, a taxpayer may be able to prevent SARS from making an assessment that is against the rules. This is not discussed in this dissertation.

<sup>11</sup> South African Service Act (SARS Act). Section 4(2) states that '*SARS must perform its functions in the most cost-efficient and effective manner in accordance with the values and principles mentioned in section 195 of the Constitution*'.

## CHAPTER 1

### I. INTRODUCTION

Taxes have been part of human existence for many centuries.<sup>12</sup> They provide essential resources for governments to perform their duties.<sup>13</sup> Government has the responsibility to cater for the socio-economic needs of society and taxes enable the implementation of socio-economic projects.<sup>14</sup> The collection of taxes enables the government to improve the country's economy and create employment.<sup>15</sup> SARS is an organ of state created and empowered to administer taxes in terms of the South African Revenue Service Act 34 of 1997 (SARS Act).<sup>16</sup> These taxes consist of, *inter alia*, income tax, value added tax, transfer duty, and estate duty.<sup>17</sup>

Taxpayers have several rights that include, but are not limited to the right of access to information,<sup>18</sup> just administrative action,<sup>19</sup> and access to courts,<sup>20</sup> which considers taxpayers' basic procedural rights.<sup>21</sup> The TAA, which was first, mooted in 2005, only promulgated on 4 July 2012, and took effect on 1 October 2012.<sup>22</sup> Despite providing a straightforward, consolidated, and codified presentation of the law, the TAA contains novel substantive law concerning the administration of taxes.<sup>23</sup> It aims to establish a more stable relationship between the powers and duties of SARS and the rights and obligations of taxpayers and to make this relationship more trustworthy than in the past.<sup>24</sup> This equilibrium will ensure that tax administration is a fair process.<sup>25</sup> The SARS Guide states 'international experience has demonstrated that if taxpayers perceive and experience the tax system as fair and equitable,

---

<sup>12</sup> Croome BJ *Taxpayers' Rights in South Africa*. (2010) Juta & Co Ltd: Cape Town.

<sup>13</sup> Croome (2010) 3.

<sup>14</sup> Croome (2010) 8.

<sup>15</sup> Croome (2010) 3.

<sup>16</sup> Section 3 and 4 of SARS Act.

<sup>17</sup> SARS Guide para 2.4.

<sup>18</sup> See section 32 of the 1996 Constitution.

<sup>19</sup> See section 33 of the 1996 Constitution.

<sup>20</sup> See section 34 of the 1996 Constitution.

<sup>21</sup> Croome BJ *Taxpayers' Rights in South Africa*. (2010) Juta & Co Ltd: Cape Town 185.

<sup>22</sup> South Africa: *New Fiscal Legislation Bring Important Changes to Tax System*. Available at <http://totallyexpat.com/news/south-africa-fiscal-legislation-bring-important-tax-system>, accessed on the 15 April 2013.

<sup>23</sup> Croome (2010) 2.

<sup>24</sup> SARS Guide 4.

<sup>25</sup> SARS Guide 4.



they will be more inclined to fully and voluntarily comply with it.<sup>26</sup> SARS is therefore compelled to act in a lawful, reasonable, and procedurally fair manner that complies with its constitutional duties.<sup>27</sup> The 1996 Constitution relating to just administrative action provides remedies to taxpayers' in line with the 1996 Constitution, and these will be discussed in more detail in the following chapter.<sup>28</sup>

Chapter 2 provides an overview of the onus of proof provisions in the ITA and TAA with regard to just administrative action and the constitutionality of these provisions.

Chapter 3 provides a detailed discussion of the taxpayers' right to just administrative action, entrenched in section 33 of the Constitution. This discussion also covers the doctrine of legitimate expectation, whether SARS can be compelled and bound by its' rulings and interpretation notes. The latter part of the chapter examines the taxpayers' right to just administrative action and the applicability and enforceability of PAJA.

Chapter 4 focuses on the taxpayers' right to privacy, whether SARS invades or protects such privacy. It examines search and seizure procedures taking into account whether these violate the right to privacy and just administrative action. The 'pay now, argue later' principle is briefly discussed in terms of the ITA and TAA, as well as the right not to be deprived of one's property and the right to just administrative action. An examination of appointment of an agent, the right to property and just administrative action, including the legitimate expectation doctrine in line with just administrative action is analysed. Finally, the chapter considers the remedies available to a taxpayer when the decisions, conduct and actions of SARS are unconstitutional.

Chapter 5 includes an in-depth discussion of the 'pay now, argue later' principle prior to and following the promulgation of the TAA. It also compares the ITA and the TAA in order to establish whether this principle has any constitutional implications.

---

<sup>26</sup> SARS Guide 4.

<sup>27</sup> The Tax Administration Act: *Taxpayers' Rights and SARS Audits*. Available at <http://www.thesait.org.za/news/116517/The-Tax-Administration-Act-Taxpayers-rights-and-SARS-Audits-The-SA-Institute-of-Tax-Practitioners>, accessed on 16 April 2013.

<sup>28</sup> Section 33 of the 1996 Constitution.

Chapter 6 consolidates the findings of the previous chapters and examines the constitutional protection of taxpayers', taking into account the ITA, TAA, PAJA, and the 1996 Constitution. It includes a synopsis of the various amendments and the rights and duties of SARS to protect the taxpayer and perform its duties in line with the 1996 Constitution and its own policies and procedures.

## CHAPTER 2

### OVERVIEW OF THE ONUS OF PROOF PROVISIONS CONTAINED IN THE INCOME TAX ACT AND THE TAX ADMINISTRATION ACT RELATING TO JUST ADMINISTRATIVE ACTION

This chapter considers the objective of the right to just administrative action whether it constitutes fair and just treatment for a taxpayer subjected to administrative penalties<sup>29</sup> or criminal sanctions<sup>30</sup> in the TAA. The uncertainty in this respect is whether the new onus of proof provisions will add value in ensuring that taxpayers receive justice rather than becoming victims of injustice. If the contrary is established then the principles of justice and fairness required by the 1996 Constitution will be satisfied. A brief overview of the differences (if any) between the onus of proof provisions contained in the ITA and the TAA, follows.

#### 2.1 DIFFERENCES BETWEEN THE ONUS OF PROOF PROVISIONS CONTAINED IN THE INCOME TAX ACT AND THE TAX ADMINISTRATION ACT

The reverse onus of proof provisions contained in the ITA and applied prior to 1 October 2012 may lead to the unfair estimation of taxes and could result in the Commissioner imposing unjust and unfair administrative penalties on the taxpayer.<sup>31</sup> The general reverse onus of proof provision in the ITA<sup>32</sup> have a significant effect when applied in combination with the reverse onus of proof provisions or presumptions for the imposition of additional tax or penalties, whether in terms of section 76 or section 104 of the ITA. Section 82 of the ITA contains the general onus of proof provision that forms part of the TAA.<sup>33</sup>

The new onus of proof provisions in the TAA seems to have qualified the relationship between SARS and the taxpayer.<sup>34</sup> In terms of the administrative penalty<sup>35</sup> and criminal

---

<sup>29</sup> Section 210 and 211 of the TAA.

<sup>30</sup> Section 234 of the TAA.

<sup>31</sup> Goldswain GK The application and constitutionality of the so-called 'reverse onus' of proof provisions and presumptions in the Income Tax Act: the revenue's unfair advantage *Meditari Accountancy Research* (2009) Vol 17 No 2, 62. Available at [http://www.uir.unisa.ac.za/handle/10500/9358/thesis\\_goldswain\\_gk.pdf](http://www.uir.unisa.ac.za/handle/10500/9358/thesis_goldswain_gk.pdf) 106, accessed 16 April 2013.

<sup>32</sup> Section 82 of the ITA.

<sup>33</sup> Section 102(1) (a), 102 (1) (b) and 102(1) (f) of the TAA.

<sup>34</sup> Section 102 (2) of the TAA.

penalty,<sup>36</sup> the onus is now on SARS to justify the imposition of the penalty rather than the taxpayer, having to prove why the penalty, should not be imposed. The current law has removed the reverse onus and replaced it with the 'evidentiary burden', that is, the taxpayer now needs to prove that there is a reasonable possibility that he or she was ignorant of the falsity of a fraudulent statement and that such ignorance was not due to negligence.<sup>37</sup> The TAA provides for penalties and sanctions for taxpayers who evade paying their taxes provided for in the Act and this includes the administrative non-compliance penalty<sup>38</sup>, the criminal non-compliance penalty<sup>39</sup>, the administrative understatement penalty,<sup>40</sup> and the criminal tax evasion penalty, discussed hereunder.<sup>41</sup>

## 2.2 ADMINISTRATIVE NON-COMPLIANCE PENALTIES

Sections 210 and 211 of the TAA provide for compulsory administrative penalties to be applied by SARS to taxpayers for non-compliance offences, for example, non-submission of a return by a certain date.<sup>42</sup> The penalty is a fixed amount determined by the assessed loss or taxable income of the taxpayer for the preceding year.<sup>43</sup> Sections 210 and 211 of the TAA are the same as section 75B of the ITA.

There is however no reference in either section 75B of the ITA or the new sections 210 and 211 of the TAA that point specifically to sections 210<sup>44</sup> and 211.<sup>45</sup> The provisions merely state that where a non-compliance offence is committed in terms of subsection (2), an 'appropriate' penalty must be imposed by SARS.<sup>46</sup> Only under 'exceptional circumstances' will the penalty be revoked completely or in part.<sup>47</sup> These 'exceptional circumstances' are listed in the TAA.<sup>48</sup> One can therefore assume that the onus of proof would be on SARS to

---

<sup>35</sup> Chapter 15 of the TAA.

<sup>36</sup> Chapter 17 of the TAA.

<sup>37</sup> Section 221 definition of 'understatement' –means any prejudice to SARS or the *fiscus* in respect of a tax period as a result of those categories mention in (a-d).

<sup>38</sup> Section 210 to Section 211 of TAA.

<sup>39</sup> Section 234 TAA.

<sup>40</sup> Section 222 and Section 223 TAA.

<sup>41</sup> Section 235 TAA.

<sup>42</sup> Section 216 (b) of the TAA.

<sup>43</sup> Section 211 TAA.

<sup>44</sup> Section 210 (non-compliance subject to penalty clause).

<sup>45</sup> Section 21 (fixed amount penalty table).

<sup>46</sup> Section 210 (1) of the TAA.

<sup>47</sup> Section 216 of the TAA.

<sup>48</sup> Section 218(2) of the TAA.

prove any non-compliance issues that a taxpayer may dispute. The TAA prescribes this in the form of the objection or appeal procedure that a taxpayer can initiate to resolve any dispute that may arise from an assessment.<sup>49</sup> With the onus of proof resting with SARS, and taking into account the example above relating to the non-submission of a tax return, the onus then falls on SARS to prove that the return had not been submitted, or received, if contested by the taxpayer.

If the taxpayer contends that, the return submitted was by e filing, SARS has the resource to retrieve this information, and qualified staff questioned on whether the computer records show whether the return submitted was electronically or not.<sup>50</sup> The submission of the tax return would then shift to the taxpayer to prove that the return was submitted, and if he or she can produce acknowledgement from SARS of the tax return, this would discharge the onus and resolve the dispute.<sup>51</sup> Pursuant to the reversal of onus provision on the taxpayer, the judiciary will possibly be called upon to rule on a constitutional issue, such as the onus of proof on the imposition of administrative non-compliance penalties in terms of sections 210 and 211 of the TAA unconstitutional.

## **2.3 CRIMINAL NON-COMPLIANCE AND TAX EVASION PENALTIES AND SANCTIONS**

Section 75 of the ITA stipulates that when a taxpayer convicted by a court of law of certain non-compliance offences, non-disclosure of income or other related tax issues, penalties can be imposed. The criminal sanction imposed was a fine or a period of imprisonment for a period not exceeding twenty-four months.<sup>52</sup> There was no reverse onus of proof provision in terms of section 75 of the ITA and therefore no constitutional issues would have arisen in this regard. While the ITA made provision for criminal tax fraud and tax evasion, section 75 of the ITA did not cover non-compliance issues or offences.<sup>53</sup> Thus, there was some overlapping of sections 75 and section 104 of the ITA dealing with fraudulent activities. Section 104 of the ITA, stipulates that the penalty that could be imposed on conviction was somewhat severe, resulting in a fine or a period of imprisonment not exceeding five years. Section 234

---

<sup>49</sup> Section 104 of the TAA.

<sup>50</sup> Section 29 (2) (a) of the TAA – duty to keep records, to submit a return for the tax period or (b) is required to submit a return for the tax period and has not submitted a return for that period.

<sup>51</sup> Section 30 (1) (b) of the TAA.

<sup>52</sup> Section 75 of the ITA.

<sup>53</sup> Section 104 of the ITA.

of the TAA on the other hand now covers the criminal non-compliance aspects that were previously covered by section 75 of the ITA; section 235 includes offences relating to tax evasion previously covered by section 75 and fraudulent activities incorporated in section 104 of the ITA. Hence, in terms of section 234 of the TAA, there can be no criminal conviction for any non-disclosure offence unless SARS can prove beyond reasonable doubt that the taxpayer intentionally committed the tax offence without reasonable justification.<sup>54</sup> Section 234 of the TAA includes a sanction, previously incorporated in section 75 of the ITA, for a fine or a period of imprisonment for a period not exceeding two years. Since there is no reverse onus or assumption regarding the culpability of the taxpayer in the TAA,<sup>55</sup> no constitutional issue arises.

The Katz Report<sup>56</sup> suggested that section 104 of the ITA should be amended to place the onus of proof on SARS. Section 235 of the TAA now places the onus on SARS to prove that the taxpayer intended to evade paying taxes.<sup>57</sup> If one does not consider these matters from a constitutional perspective, there will be no constitutional issue, however if a taxpayer ignores the constitutional aspect then the taxpayer will be disadvantaged and prejudiced in this regard.<sup>58</sup> Section 235(2) adds that any person, who makes a declaration with the intention of avoiding paying taxes or assists another person, may be guilty of tax evasion. The taxpayer will have to 'prove that there is a reasonable possibility that he or she was ignorant of the falsity of the statement and that the ignorance was not due to negligence on his or her part.'<sup>59</sup>

SARS justifies this unfair presumption by stating:

*"This does not result in a so-called 'reverse onus', but only places on the accused an evidentiary burden in relation to statements made by him. If discharged the onus would remain on the state to prove beyond reasonable doubt knowledge of, or negligence in relation to, the falsity of the statement. While it may limit the fundamental right to silence, it does so only in relation to facts, which are peculiarly within the knowledge of the accused and in*

<sup>54</sup> SARS Guide para 16.5.6.

<sup>55</sup> Section 234 of the TAA.

<sup>56</sup> Katz Commission Report *Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa* (1994), Pretoria: Government Printer.

<sup>57</sup> Section 235(3) of the TAA.

<sup>58</sup> Goldswain (note 31 above) 110.

<sup>59</sup> Section 235(2) of the TAA.

*respect of which it would not be unreasonable to require the accused to discharge an evidentiary burden”.*<sup>60</sup>

Accordingly, Goldswain states, “it may be safe to state that section 235 of the TAA may not pass constitutional muster if challenged by a taxpayer in future.”<sup>61</sup> This leads us next to the discussion on administrative understatement penalty included in the onus of proviso.

## **2.4 ADMINISTRATIVE UNDERSTATEMENT PENALTY**

Section 76 of the ITA was amended by the substitution of sections 221 to 223 of the TAA. Section 76(5) of the ITA, ‘created a reverse onus of proof provision that, together with section 82 of the ITA, led to injustice and unfairness for the taxpayer when the matter of administrative penalties was considered.’<sup>62</sup> According to Goldswain, these provisions could be construed in all probability to be unconstitutional.<sup>63</sup> Goldswain suggested that section 76(5) of the ITA, deeming provision, should be deleted, or changed to bring it in line with what is constitutionally acceptable.<sup>64</sup>

Sections 221 to 223 of the TAA stopped SARS and the Commissioner from imposing ‘additional tax,’ in the form of fines for late submissions or non-payment of taxes, which were previously set as high as 200% in the ITA.<sup>65</sup> The TAA<sup>66</sup> produced an understatement penalty diagram with the objective of ‘ensuring consistent treatment of taxpayers in comparable circumstances.’<sup>67</sup> The penalty decided, is on taking the circumstances of each case into account and placing it in a table, which generates the percentage attached to the penalty and this is included in the taxes due in respect of understatement of taxable income by the taxpayer.<sup>68</sup>

However in terms of the TAA, ‘the burden of proving if an estimate under section 95 is reasonable or the facts on which SARS based the imposition of an understatement penalty

---

<sup>60</sup> SARS Guide para 17.3.

<sup>61</sup> Goldswain (note 31 above) 111.

<sup>62</sup> Goldswain (note 31 above) 66.

<sup>63</sup> Goldswain (note 31 above) 79.

<sup>64</sup> Goldswain (note 31 above) 77.

<sup>65</sup> Section 76 of the ITA.

<sup>66</sup> Section 223 of the TAA.

<sup>67</sup> SARS Guide para 16.1.

<sup>68</sup> SARS Guide para 16.1.

under Chapter 16, is upon SARS'.<sup>69</sup> Therefore only in exceptional cases where the taxpayer has been 'obstructive or where it is a repeat case' of intentional tax evasion, will SARS be able to impose a 200% penalty.<sup>70</sup> Nonetheless, the Tax Court retains the power to exercise its 'own, original discretion' should the taxpayer object or appeal against the imposition of penalties by SARS.<sup>71</sup> The onus then rests on SARS, to prove that the taxpayers' behaviour fits within one of the relevant categories in the table.<sup>72</sup> This would appear to be different from the provisions of the ITA, adding to the protection of taxpayers' rights in general. The following section compares the possible effects of the imposition of additional tax in terms of section 76 of the ITA with the imposition of penalties in terms of section 223 of the TAA, taking into account the difference in the onus of proof provisions discussed above.

## **2.5 PRACTICAL EFFECT OF THE NEW ONUS OF PROOF PROVISION WHERE AN ADMINISTRATIVE UNDERSTATEMENT PENALTY IS IMPOSED**

The unfair imposition of administrative penalties by the Commissioner could lead to taxpayers' registering an objection or appeal with the Tax Court. The Court will be asked to declare such penalties unconstitutional, set them aside, or order that they be repaid.<sup>73</sup> An administrative penalty imposed in terms of section 76(5) of the ITA placed the taxpayer at a disadvantage, especially if he or she was unable to prove his or her innocence in terms of the ITA,<sup>74</sup> in which case the Commissioner was automatically entitled to include additional tax or penalties.<sup>75</sup> In terms of section 76(5), the onus of proof was on the taxpayer to refute this section on the basis that he or she had in fact not perpetrated the offence for which the administrative penalty was imposed.<sup>76</sup> Therefore, it can be concluded that the change in the onus of proof in the TAA under administratively imposed, understatement penalties, is a positive change when compared with the old onus of proof system in the ITA.<sup>77</sup> The taxpayer is protected from any unreasonable, unfair, or unjust decision by SARS with regard to the

<sup>69</sup> Section 102(2) of the TAA.

<sup>70</sup> Section 223(1) of the TAA. Item 4 'intentional tax evasion'.

<sup>71</sup> *Da Costa v CIR* 47 SATC 87 at 95.

<sup>72</sup> Section 223(1) of the TAA.

<sup>73</sup> Section 107 (1) of the TAA.

<sup>74</sup> Section 82 of the ITA.

<sup>75</sup> Section 76 of the ITA.

<sup>76</sup> Section 76 (5) of the TAA.

<sup>77</sup> Budget Review 2013. Available at <http://www.treasury.gov.za/.../national%20budget /2013/review/Full Review .pdf>, accessed 18 December 2013.



imposition of penalties. The penalties imposed by SARS under the TAA should be aligned to any penalty imposed by the judiciary should the matter proceed to court on appeal.

This chapter discussed and analysed the application and constitutionality of the general onus of proof provision contained in section 82 of the ITA, the supposition in favour of the State when sanctioning criminal penalties on a taxpayer in terms of section 104(2) of the ITA and the administrative or additional taxes in section 76(1) (b) of the ITA. Goldswain concludes on this, that the reverse onus presumption, as provided for in terms of section 104(2) of the ITA, was unconstitutional.<sup>78</sup> Therefore, section 36 of the Constitution could not salvage it, as it was considered not to be a limitation that was reasonable and justifiable in an open and democratic society.<sup>79</sup> Sections 76(1) (b) and 76(5) of the ITA, read together with section 82, created a reverse onus of proof that violated the right to just administrative action.<sup>80</sup> Goldswain simply summarizes the comparison of the reversal of proof onus in the ITA and the TAA as follows:

- Section 102 has not changed the general reverse onus of proof provision contained in section 82 of the ITA, but there are questions surrounding its constitutionality. However, if challenged in a court of law it would probably be regarded as constitutional;<sup>81</sup>
- Section 234 of the TAA remains the same as section 75 of the ITA relating to criminal non-compliance. There is yet no evidence or case law suggesting that there is no reverse onus of proof presumption or provision in this section;<sup>82</sup>
- Constitutional issues surrounding section 235 of the TAA, which is similar to section 104 of the ITA. The TAA makes provision for criminal penalties and fines to be imposed on a defaulting taxpayers'.<sup>83</sup> Section 235(2) of the TAA includes a presumption 'that the taxpayer is guilty of tax evasion unless he or she can prove that there is a reasonable possibility that he or she was ignorant of the falsity of the statement and that the ignorance was not due to negligence on his or her part.'

---

<sup>78</sup> Section 35(3) of the 1996 Constitution.

<sup>79</sup> Goldswain (note 31 above) 119.

<sup>80</sup> Section 33 of the 1996 Constitution.

<sup>81</sup> Goldswain (note 31 above) 120.

<sup>82</sup> Goldswain (note 31 above) 120.

<sup>83</sup> Section 234 of the TAA.

Although SARS dismisses this constitutional concern, calling it a mere 'evidentiary burden', the constitutional implications still have to be decided upon by the judiciary<sup>84</sup>; and

- The onus of proof provision contained in sections 221 to 223 of the TAA include the administrative penalties that will be imposed by SARS for under-declaring taxable income. Section 102(2) of the TAA shifts the onus to SARS to show cause, that any penalty imposed in terms of the table in section 223(1) is justifiable. Goldswain also points out that "it will also lead to a fairer and more equitable regime that is in line with the founding principles of the Constitution."<sup>85</sup>

Therefore, the change in the onus of proof provision regarding the imposition of administrative understatement penalties protects the taxpayer from unjust administrative action, decisions, and conduct by the Commissioner.<sup>86</sup> Section 33 of the 1996 Constitution guarantees this right. Goldswain contends, "that a foreseeable concern still remains in regard to the reverse presumption created by section 235(2) of the TAA, where criminal penalties and sanctions are imposed on defaulting taxpayers."<sup>87</sup> The judiciary will then have to determine the constitutionality of this new legislation, which could prove favourable to the taxpayer.<sup>88</sup>

This chapter investigated and compared the onus of proof provisions in the ITA and TAA and reached conclusions on their constitutionality that are relevant to the following chapter on the taxpayers' right to just administrative action.

---

<sup>84</sup> Goldswain (note 31 above) 121.

<sup>85</sup> Goldswain (note 31 above) 121.

<sup>86</sup> Goldswain (note 31 above) 122.

<sup>87</sup> Goldswain (note 31 above) 122.

<sup>88</sup> Goldswain (note 31 above) 122.

## CHAPTER 3

### THE TAXPAYER'S RIGHT TO JUST ADMINISTRATIVE ACTION

Chapter 2 focussed on the constitutionality of the onus of proof provisions in the ITA and TAA. This chapter investigates whether the procedures set out by SARS are in line with the taxpayer's right to just administrative action. PAJA also directs how tax administration affects taxpayers' rights.<sup>89</sup> Many of the stipulations in the ITA and TAA hinder a person's right to protection in terms of sections 7 to 39 of the 1996 Constitution. For example, the taxation of income violates a person's right not to be deprived of his or her property.<sup>90</sup> In *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA (CC)<sup>91</sup>, the court stated that the legislative and executive authorities of each sector are controlled by the rule, 'that they should not exercise power or perform duties not conferred upon them by law.'<sup>92</sup>

Taxpayers have unlimited rights, including, the basic right of access to information,<sup>93</sup> just administrative action,<sup>94</sup> and access to courts,<sup>95</sup> that develop their procedural rights.<sup>96</sup> SARS is accountable for the administration and collection of taxes together with its delegated officials, it has the power to make and implement decisions.<sup>97</sup> Therefore, in order to establish whether taxpayers' rights to just administrative action have been upheld, one has to consider the judgment exercised by SARS in making decisions, and whether this constitutes just administrative action.<sup>98</sup> Just administrative action is pursued by means of judicial review, regulated by PAJA and the Constitution. A court will only intervene if it is of the view that a decision implemented by SARS has not properly been considered, and not all the facts were taken into account when the decision was made by PAJA.<sup>99</sup>

---

<sup>89</sup> SARS Guide 8.

<sup>90</sup> Section 25 of the 1996 Constitution.

<sup>91</sup> *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* (supra ) para 58.

<sup>92</sup> Hoexter C. (2012). *Administrative Law in South Africa*. Second Edition. Juta & Co: Cape Town 29.

<sup>93</sup> Section 32 of the 1996 Constitution.

<sup>94</sup> Section 33 of the 1996 Constitution.

<sup>95</sup> Section 34 of the 1996 Constitution.

<sup>96</sup> Croome BJ (2010) *Taxpayers' Rights in South Africa*. Juta & Co : Cape Town 185.

<sup>97</sup> ITA and TAA, see chapters 3 and 4.

<sup>98</sup> Croome BJ (2010) *Taxpayers' Rights in South Africa*. Juta & Co: Cape Town 204-205.

<sup>99</sup> Chapter 5 of PAJA.

Legislation allows SARS to collect information<sup>100</sup> by means of audits, inquiries and search and seizure procedures, which are in conflict with the right to privacy envisaged in the Constitution.<sup>101</sup> Goldswain expresses the view that even if legislation seems to infringe a person's rights, it does not necessarily mean it is unlawful, as some rights are limited by section 36 of the 1996 Constitution.<sup>102</sup> Section 36's 'limitation of right clause' is a significant obstacle for taxpayers who wish to contest legislation that breaches one or all of the rights contained in the Bill of Rights.<sup>103</sup> The search and seizure provisions, for example, in section 74D of the ITA, now in sections 59 to 62 of the TAA, have seemingly evaded constitutional debate.<sup>104</sup>

Section 33 sets out the right to just administrative action and guarantees the taxpayer this right. It reads as follows:

*"Section 33 Just Administrative Action:*

- (1) Everyone has the right to administrative action that is lawful, reasonable, and procedurally fair.*
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.*
- (3) National legislation must be enacted to give effect to these rights, and must –*
  - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;*
  - (b) impose a duty on the state to give effect to the rights in subsection (1) and (2);*  
*and*
  - (c) promote an efficient administration."*<sup>105</sup>

<sup>100</sup> See Chapter 5 of the TAA that sets out the rules for inspection, verification, audit and criminal investigation.

<sup>101</sup> Section 14 of the 1996 Constitution.

<sup>102</sup> Ibid (note 31 above) 125.

<sup>103</sup> Section 7 to Section 39 of the 1996 Constitution.

<sup>104</sup> *Investigating Directorate: SEO v Hyundai Motor Distributors* (2001(1) SA 545 (CC)).

<sup>105</sup> The history of section 33 of the 1996 Constitution will not be discussed in this dissertation. For a discussion on the history of section 33, refer to Currie I & Klaaren J *The Promotion of Administrative Justice Act Benchbook* (2001) 4.

In order for just administrative action to be relevant and implemented in tax matters, certain substantive requirements must be fulfilled;

- The decision taken must amount to administrative action;
- The 'administrative action' is not 'lawful, reasonable and procedurally fair'; and
- The 'right' must be 'adversely affected.'<sup>106</sup>

The right to just administrative action is distinct from PAJA.<sup>107</sup> PAJA cannot operate without considering the founding principles of the 1996 Constitution however, if these prerequisites oppose section 33 of the 1996 Constitution then the 1996 Constitution would supersede the basis of any constitutional challenge compared with PAJA, and this may prove unlawful in a dispute.<sup>108</sup> Thus, when a taxpayer is of the view that the definition of 'administrative action' in section 1 of PAJA is restricted and infringes the right to just administrative action in section 33 of the 1996 Constitution, PAJA will be disputed because it contravenes section 33 of the 1996 Constitution.<sup>109</sup> Section 6(2) of PAJA sets out guidelines for a taxpayer to use, when he or she wishes to question an administrative action by SARS, where it appears to be unjust and thereby unlawful.

To depend on the right to just administrative action, a taxpayer must show that the Commissioner's actions in terms of section 33(1) amounted to 'administrative action.' Devenish<sup>110</sup> states that in order to decide whether 'administrative action' is procedurally fair, one has to consider the common law principles of natural justice that will be applicable. He further contends that because the legislature used the words 'procedurally fair' in section 33(1), the test could be much wider than the rules of natural justice.

---

<sup>106</sup> Croome BJ *Taxpayers' Rights in South Africa*. (2010) Juta & Co: Cape Town.

<sup>107</sup> Currie I *The Promotion of Administrative Justice Act: Commentary*. Second Edition (2007) Cape Town: Siber Ink 34, 35.

<sup>108</sup> *Ibid* (note 107 above).

<sup>109</sup> *Ibid* (note 107 above) 35.

<sup>110</sup> Devenish GE *A Commentary on the South African Bills of Rights*. (1999) Durban: Butterworths 472.

In ITC 1470 (1989) 52 SATC 88 the court held that:

*“The very fact that the commissioner has to be ‘satisfied’ implies the performance of an act from which legal consequences flow. The performance of that act involves the exercise of an administrative discretion.”<sup>111</sup>*

If a provision grants SARS the authority to make a decision while exercising its discretion, and SARS, together with its officials, fail to do so, such failure may signify administrative action, as set out in PAJA. Croome<sup>112</sup> explains that:

*“It seems that a taxpayer may rely on PAJA only once the Commissioner has actually taken or failed to take a decision. Where the taxpayer anticipates that the Commissioner will make a decision it is not possible to invoke the provisions of PAJA before the decision is made.”<sup>113</sup>*

The arbitrators of numerous cases reinforced SARS discretion in determining if the decision taken amounted to just administrative action.<sup>114</sup> Section 33 of the 1996 Constitution and section 3(1) of PAJA specify the right to just administrative action if it affects taxpayers’ rights negatively. While an objection or appeal is available to a taxpayer, ‘a final determination adversely affecting taxpayers’ rights is not yet determined.’<sup>115</sup>

---

<sup>111</sup> De Koker A, et al. *Silke on the South African Income Tax Act*. (2010) Service 42. Durban Lexis Nexis 92, 18-70-1.

<sup>112</sup> Croome BJ *Taxpayers’ Rights in South Africa* : An analysis and evaluation of the extent to which the powers of the South African Revenue Service comply with the Constitutional rights to property, privacy, administrative justice, access to information and access to courts (2008) Unpublished thesis for LL.D. Cape Town: UCT.

<sup>113</sup> Croome BJ *Taxpayers’ Rights in South Africa*. (2008) Juta & Co: Cape Town 157.

<sup>114</sup> *Commissioner, South Africa Revenue Service v Trend Finance (Pty) Ltd* 2007 (6) SA 117 (SCA), *Commissioner South African Service v Saleem* 2008 (3) SA 655 (SCA). The seizure of goods by SARS under section 88 of the Customs and Excise Act 91 of 1994, pending investigation into the forfeiture being held to be ‘administrative action’, as cited by Hoexter C (2012) *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, 196.

<sup>115</sup> *Juta’s Income Tax Commentary*. (2012) commenting on section 88 of the ITA. Cape Town: Juta (subscriber service UKZN).

In this regard, Croome contends that:

*“A decision made by the Commissioner or by his officials invariably affects the taxpayer’s patrimony. I contend that a taxpayer’s patrimony constitutes a right as envisaged in section 33(2) of the Constitution on the ground that a decision made by the Commissioner may affect the income tax payable by the taxpayer, the timing of payment, and whether such tax is subject to interest or additional tax.”*<sup>116</sup>

The 1996 Constitution allows a taxpayer who is not satisfied with a decision made by SARS and its officials to, firstly, attempt to prove that the administrative action was unlawful, unreasonable, and procedurally unfair; and secondly, that section 6 of PAJA is relevant in proving the taxpayer’s case.<sup>117</sup> Hoexter points out that the right to just ‘administrative action’ contained in section 33(1) of the 1996 Constitution ensures that the taxpayer is provided with written reasons for any decision reached by the Commissioner and whether such decisions are procedurally fair.<sup>118</sup>

Section 3 of PAJA provides that an administrator must notify a taxpayer before a decision taken, of the procedure available in respect of administrative action.<sup>119</sup> If SARS fails to comply with this requirement, the resolution reached would be procedurally unfair administrative action.<sup>120</sup> The Commissioner must act in accordance with section 3(4) of PAJA and with the procedure set down in section 3(2) (b) of PAJA. Section 3(2) (a) of PAJA states that the merit of each case is dependant on the correct administrative procedure.

Therefore, if the Commissioner requests further information from the taxpayer, this will constitute an administrative action under section 3 of PAJA. A taxpayers’ failure to provide SARS with the requested information can activate the non-compliance penalty in the TAA.<sup>121</sup> In *Spasslied (Pty) Ltd v FCT* (3) [2000] FCA 490, the Australian court had to decide if a subpoena issued by the Tax Commission requiring additional information within six days was

---

<sup>116</sup> Croome BJ *Taxpayers’ Rights in South Africa*. (2008) 147 and Croome BJ *‘Taxpayers’ Rights in South Africa’* (2010) 153.

<sup>117</sup> Croome BJ *Taxpayers’ Rights in South Africa*. (2008) 147 and B J Croome *Taxpayers’ Rights in South Africa*. (2010) 151, and Currie I *The Promotion of Administrative Justice Act: A commentary* (2007) 15, 16.

<sup>118</sup> Hoexter C *Administrative Law in South Africa* (2007) 424.

<sup>119</sup> Section 5 of PAJA states that adequate notice must be given and sets out five grounds relating to adequate notice.

<sup>120</sup> Section 3 of PAJA.

<sup>121</sup> Chapter 15 of the TAA.

fair and practical. The court held that in this case, the deadline of six days was ‘oppressive’ and set the subpoena aside.

An administrative action has to be equitable, under PAJA and taxpayers are required to request an extension of time if the deadline is unreasonable.<sup>122</sup> PAJA also requires the Commissioner to advise the taxpayer of the reasons for the ‘proposed administrative action,’ which is in line with the *audi alteram partem* rule.<sup>123</sup> This section further emphasises that the Commissioner must inform the taxpayer of the impending decision before it puts it into action, so that the taxpayer can make submissions before a final decision is made.

A significant right afforded to a taxpayer is the right to request reasons, which arises from section 3(2) (a) (v) of PAJA. Section 5 sets out the procedure that needs to be followed should a taxpayer wish to ask for adequate reasons. Currie and Klaaren<sup>124</sup> state, “the Commissioner must give the taxpayer proper and reasonable notice of their right to request reasons and should seek to also furnish sufficient information that places a taxpayer in a situation of understanding of the decision undertaken”.

Once the Commissioner has reached a decision, the taxpayer can approach a court for reconsideration of the decision.<sup>125</sup> However, if a decision is exercised at the discretion of SARS and its delegated officials and it is proved reasonable, section 6(2) (h) of PAJA is utilized in this regard. Croome confirms that the official has to consider all the facts presented by the taxpayer and not request information that will not be used to prove the taxpayers’ case.<sup>126</sup>

Bearing section 6(2) (h) of PAJA, Croome points out that,

*“Where a taxpayer can show that the decision made by the Commissioner bears no relation to the facts under consideration a court should set such a decision aside. PAJA requires that the official seriously and properly consider the taxpayer’s representations and not call for facts that he intends to disregard.”*

---

<sup>122</sup> Section 6(2) (a) of PAJA.

<sup>123</sup> Section 3(2) (b) (i) of PAJA.

<sup>124</sup> Currie I and Klaaren J *The Promotion of Administrative Justice Act Benchbook* (2001) para 3.10.

<sup>125</sup> Section 6 of PAJA.

<sup>126</sup> Croome BJ *Taxpayers’ Rights in South Africa* (2008) 194.



Section 3(3) of PAJA provides additional procedures that the Commissioner must follow to determine whether an administrative action was procedurally fair. However, a decision made by an administrator not to allow a certain procedure in section 3(3) of PAJA will be subject to review.<sup>127</sup> Section 3(3)(a), allows the taxpayer to obtain assistance from the Commissioner to deal with complicated tax matters;<sup>128</sup> if the Commissioner refuses the taxpayer this right, this will constitute procedural unfairness. The Commissioner can also request the taxpayer to appear in person and answer any questions that the Commissioner may have regarding the return.<sup>129</sup> Section 3(2) (b) sets out five elements for the Commissioner to follow in order for the administrative action to be procedurally fair:

- Adequate notice of the nature and purpose of the proposed administrative action;
- A reasonable opportunity to make representations;
- A clear statement of the administrative action;
- Adequate notice of any right of review; and
- Adequate notice in terms of the right to request reasons.<sup>130</sup>

The Commissioner must abide by these requirements in order for an administrative action to be fair.<sup>131</sup> Currently, under the “pay now, argue later” rule, the TAA requires the taxpayer to pay the tax due before the appeal is lodged.<sup>132</sup> Similarly, under sections 59 to 62 of the TAA, the Commissioner has the authority to conduct a search and seizure without notifying the taxpayer. Notifying the taxpayer may lead to a lack of trust in the power given to the Commissioner to conduct such an operation, and in turn lead to a reasonable limitation of a taxpayers’ right to just administrative action.<sup>133</sup> These powers are prevalent in other open and democratic societies such as the United Kingdom and Canada, therefore section 36

---

<sup>127</sup> Currie I and Klaaren J *The Promotion of Administrative Justice Act Benchbook* (2001) para 3.14.

<sup>128</sup> Ibid (note 127 above) para 3.14.

<sup>129</sup> Section 3(3) (b) of PAJA.

<sup>130</sup> Section 3(2) (b) of PAJA.

<sup>131</sup> Section 3(1) of PAJA.

<sup>132</sup> Section 169 of the TAA.

<sup>133</sup> Horwath and Moas *Taxpayer’s Rights and Revenue Powers* (2004) para 5.3.3.

limitations of rights would assist the Commissioner in carrying out the duties set out in sections 59 to 62 of the TAA.<sup>134</sup>

Baker and Groenhagen<sup>135</sup> “propose that tax legislation and tax administration should adhere to the rule of law.” They express the view that all “acts of tax administration should have a legal basis.” It is therefore clear that the right to just administrative action contained in section 33 of the Constitution achieves the purpose of treating taxpayers fairly. The Australian Courts have taken the view that the wording of their Constitution does confer certain rights on taxpayers, but not all rights’.<sup>136</sup> The Australian Courts distinguish taxpayers’ rights as due process or the rules of natural justice emerging from the separation of powers.<sup>137</sup> In Canada, the right to administrative action is considered more constricted than in other countries.<sup>138</sup> Section 2(e) of the Canadian Bill of Rights guarantees ‘the right to a fair hearing with the principles of fundamental justice, similar to that in South Africa.’

In summarizing this chapter, it is evident that taxpayers’ have a right to just administrative action in their interactions with SARS. Section 33 of the Constitution together with PAJA affords taxpayers remedies for unjust treatment by SARS. The following chapter discusses whether SARS invades or protects the right to privacy.

---

<sup>134</sup> Li *Taxpayers’ Rights in Canada*. Bentley *Taxpayers’ Rights: An international Perspective* (1998) 114.

<sup>135</sup> P Barker and AM Groenhagen *The Protection of Taxpayers’ Rights* (2010) - *An International Codification*. London: European Policy Forum 38.

<sup>136</sup> Hanks *et al Australian Constitutional Law materials and commentary* (2004) para 11.3.23.

<sup>137</sup> *Ibid* (note 136 above) 11.3.23.

<sup>138</sup> Section 7 of the Canadian Constitutional Act of 1982.

## CHAPTER 4

### THE TAXPAYER'S RIGHT TO PRIVACY: DOES SARS PROTECT OR INVADE A TAXPAYER'S PRIVACY?

The previous chapter examined the taxpayer's right to just administrative action, including a brief discussion on search and seizure and the "pay now, argue later" rule. This chapter discusses the taxpayer's right to privacy including:

- 1) Search and seizure procedures- Are these a violation of the right to privacy and just administrative action?
- 2) The "pay now, argue later" rule - right not to be deprived of property and just administrative action;
- 3) Appointment of agent - right not to be deprived of property and the right to just administrative action;
- 4) Legitimate expectation doctrine - right to just administrative action;
- 5) Remedies for taxpayers when the decisions, actions, and conduct of SARS are found to be unconstitutional.

Whenever SARS uses legal provisions to calculate and collect taxes, its actions must adhere to the procedural requirements of the legislation that it is applying, as well as common law rights, including the concept of natural justice, available to a taxpayer that were discussed in the previous chapter. The 1996 Constitution embraces, embodies and extends the administrative and common law principles developed over the years.<sup>139</sup>

Thus, for example, in relation to adherence by SARS to the *audi alteram partem* principle as well as considering whether the legitimate expectation doctrine should be applied, it is said that the concept is founded on the basic principle that, "*every man (woman) shall have his (her) day in court, and the benefit of the general law which proceeds only upon notice and which the court hears and considers before judgment is rendered*".<sup>140</sup>

---

<sup>139</sup> *Pharmaceutical Manufacturers Association of SA: In re: Ex Parte President of the Republic of South Africa* (2000 (2) SA 674 (CC).

<sup>140</sup> *In State v. Green*, (232 S.W.2d 897, 903 (Mo. 1950).

In *Vaughn v. State*, 3 Tenn.Crim.App. 54, 456 S.W.2d 879 at 883, the court indicated that due process means ‘fundamental fairness and substantial justice’. Section 33 of the 1996 Constitution, personified in PAJA, follows the same notion of fairness and justice. Section 33(1) provides that “*everyone has the right to administrative action that is lawful, reasonable and procedurally fair*”. Many cases have been won by taxpayers on the basis of just administrative action, especially those associated with search and seizure.<sup>141</sup> Even when SARS follows the strict procedural requirements of the legislation, their conduct may be found to be unconstitutional; for example, where SARS has failed to consider the principles of natural justice before injudiciously applying the law.<sup>142</sup>

In *Deacon v Controller of Customs and Excise* 61 SATC 275, the taxpayer reported to the Controller of Customs and Excise that there had been possible irregularities relating to the importing of a vehicle in the taxpayer’s possession. It was stated that the taxpayer was not accountable for the irregularities and the controller confirmed that the taxpayer could maintain possession of the vehicle until the facts relating to the importing of the vehicle had been established. No further investigation was conducted and there was no engagement with the taxpayer; the controller then sent a letter to the taxpayer stating the vehicle was liable for forfeiture in terms of section 87 of the Customs and Excise Act. In order to avoid the forfeiture of the vehicle, the taxpayer undertook to pay the controller the amount due in respect of the penalties owing, which payment the controller refused to accept. The taxpayer then applied for and obtained an interim court order allowing him to keep possession of the vehicle pending a final determination by the court.

The taxpayer claimed, *inter alia*, that the controller had not given sufficient reasons for the decision to seize the vehicle and that the controller had made an incorrect assessment based on the true facts. The taxpayer also argued that the controller had followed a flawed procedure and had failed to follow the rules of natural justice. The controller argued that he had complied with the provisions of the legislation, which obliged him to take possession of the vehicle and that there was no need for him to apply the rules of natural justice. The court held that, although not all administrative actions are subject to the rules of natural justice, any official making a decision that adversely affects individuals, must keep the rules of natural justice, the spirit and object of the 1996 Constitution and particularly the section 33 rights to just administrative justice in

---

<sup>141</sup> *Haynes v CIR* (64 SATC 321); *Ferucci and others v C: SARS and another* (65 SATC 470); *Minister for Safety and Security v Van der Merwe and Others* [2011] ZACC 19 (CC).

<sup>142</sup> *Deacon v Controller of Customs and Excise* 61 SATC 275.

mind. The court was not convinced by the controller's argument, that he was obliged to seize the vehicle and that he had no choice in the matter. The court held that if this argument succeeded, it would mean that individuals whose rights had been infringed would not be entitled to the protection of the 1996 Constitution. This was against the principles of fairness underlying the 1996 Constitution, especially since the controller was aware of the taxpayer's innocence. The court further held that the taxpayer ought to have been properly heard by the controller before any attachment of the vehicle was considered. The legitimate expectation doctrine surrounding the principles of natural justice was an issue based on the breach of the contract between the parties.

#### **4.1 SEARCH AND SEIZURE PROCEDURES. ARE THESE A VIOLATION OF THE RIGHT TO PRIVACY AND JUST ADMINISTRATIVE ACTION?**

There is an old saying that, 'an Englishman's home is his castle'. A skeptical person may say 'that what one pays taxes on can be invaded with no remorse by the government' this proverb has its origins in English law, which commands that no-one may enter the home of another person unless by invitation.<sup>143</sup> Coke articulated this concept as 'For a man's house is his castle, *et domus sua cuique et tutissimum refugium* [and each man's home is his safest refuge]'.<sup>144</sup> Although this was briefly discussed in the previous chapter, it is elaborated on further in the discussion on the taxpayer's right to just administrative action.

Section 14 of the 1996 Constitution provides that "*every person has the right to privacy*". This includes the right not to have his or her person or property searched, and his or her possessions seized.<sup>145</sup> The search and seizure provisions contained in section 74D of the ITA have been integrated into sections 59 to 62 of the TAA. The wording is practically the same. SARS noted it was necessary to include a warrantless search and seizure provision, now contained in the TAA.<sup>146</sup>

In the Canadian case of *Hunter et al v Southam*<sup>147</sup>, the Supreme Court confirmed that provisions that are similar to the provisions in section 74 of the ITA are unconstitutional.<sup>148</sup>

---

<sup>143</sup> Coke E: *The Institutes of the Laws of England* (1628) .Available at: <http://www.phrases.org.up/meanings/an-englishmans-home-is-his-castle.html>, accessed 18 December 2013.

<sup>144</sup> Ibid (note 143 above).

<sup>145</sup> Section 14 (a) and (c) of the 1996 Constitution.

<sup>146</sup> Section 63 of the TAA.

<sup>147</sup> *Hunter et al v Southam* [1984] 2 S.C.R. 145.

In *Deutschmann No And Others v C:SARS; Shelton v C:SARS* 62 SATC 191, while the court found that section 74 D of the ITA contained mechanisms to protect a taxpayer, these were not strictly enforced by the judiciary. The taxpayers appeared to have approached the court with false information and no facts to support their application to overturn a search and seizure warrant granted by a judge in favour of SARS. This is inferred from the finding of the court that the taxpayers had not shown reasons why their information and documents that had been seized should be returned.

The court decided that not all the procedural and official requirements of section 74D search and seizure provisions needed to be adhered to for the warrant to be valid. In the cases of *Haynes v CIR (supra)*; *Minister for Safety and Security v Van der Merwe and Others (supra)* and *Ferucci and Others v C: SARS and Another (supra)*, the distinctive features of all three cases were the facts provided at the hearing by the various taxpayers. The judgment handed down by the Constitutional Court in *Van der Merwe (supra)* set a precedent for all lower courts dealing with future applications for a search and seizure warrant and found that the taxpayers right to privacy must be safeguarded.

In *Ferucci (supra)*, the court went a step further and held that from a constitutional point of view, SARS had to make a convincing case for why it required a search to be conducted at the taxpayers' premises and the judge issuing the warrant had to decide whether the ITA provided a less harsh method. The court held that SARS could have used section 74A to request that information, documents or other items be furnished to it. The Commissioner is also given the authority to visit the taxpayers' premises and request his or her consent to examine any documents or information in terms of section 74B or, alternatively, convene a board of inquiry in terms of section 74C, and call on the taxpayer to attend the inquiry and answer any questions put to him or her.

Only after such options have been exhausted can an application for a search and seizure warrant be sought. In this case, these other options had not been considered and the warrant was defective, as the offence was not stated, nor was there a description of the documents that should be seized. The court held that the search and seizure warrants should be set aside and that all information, documents or objects seized by the Commissioner prior to the warrant being obtained should be returned to the taxpayer.

---

<sup>148</sup> Ibid (note 147 above) 145.

The new provision in the TAA has now been inserted to enable SARS to take appropriate action to prevent tax evaders from destroying information and concealing evidence during the delay caused if the warrant was applied for in terms of the normal procedure. However, restrictions and protective mechanisms are incorporated in the new provision. A search without a warrant is only permitted if the owner or person in control of the premises consents in writing to the search or, if no consent is given, a senior SARS official is satisfied 'on reasonable grounds' that:<sup>149</sup>

- The removal or destruction of relevant material likely to be found on the premises is imminent;<sup>150</sup>
- SARS would have obtained a warrant had it applied for one;<sup>151</sup> and
- The delay in obtaining a warrant would defeat the object of the search and seizure.<sup>152</sup>

SARS may not enter a taxpayers' residence ("dwelling-house or domestic premises") without the consent of the taxpayer.<sup>153</sup> However, where the residence is used for business, such part may be searched without a warrant provided that the three requirements set out above have been complied with. Any decision to enforce the provisions of taxation law without SARS conducting a proper inquiry or analysis of the rules could be tantamount to a violation of the right to administrative justice. The constitutionality of the 'pay now, argue' later provisions, are discussed in the following section.

## **4.2 "PAY NOW, ARGUE LATER" RULE – THE RIGHT NOT TO BE DEPRIVED OF PROPERTY AND JUST ADMINISTRATIVE ACTION**

This provision was contained in sections 88 and 91 of the ITA and is now embodied in sections 164 and 169 of the TAA. The "pay now, argue later" rule, could result in the violation of the right not to be deprived of property.<sup>154</sup>

In terms of section 91 of the ITA, now contained in section 169 of the TAA, SARS can collect any amount of tax due by a taxpayer through an *ex parte* application to a judge.<sup>155</sup> A

---

<sup>149</sup> Section 63 (1) (a-b) of the TAA.

<sup>150</sup> Section 63(b) (i) of the TAA.

<sup>151</sup> Section 63(b) (ii) of the TAA.

<sup>152</sup> Section 63(b) (iii) of the TAA.

<sup>153</sup> Section 63 (4) of the TAA.

<sup>154</sup> Section 25 of the 1996 Constitution.

declaration will be filed with the Magistrate's Court that has jurisdiction over the taxpayer.<sup>156</sup> SARS is compelled to obtain the judgment order against the taxpayer by filing a statement confirming the amount of tax due by the taxpayer with the clerk or registrar of any competent court.<sup>157</sup> The enquiry is treated as if it was handed down by a competent court.<sup>158</sup> However, the taxpayer has a right to apply to the court to have the judgment rescinded once he or she has been informed that there is a judgment against him or her.<sup>159</sup>

Although the search and seizure provisions contained in the Value Added Tax Act 89 of 1991 (VAT Act) violate the taxpayers right of access to the courts,<sup>160</sup> and the right not to be deprived of one's property,<sup>161</sup> these provisions were found to be constitutional in *Metcash Trading Ltd v C: SARS*, 63 SATC 130, 'where the evidence suggested that the taxpayer could have been involved in fraudulent activities'. The reasons given by the court for coming to its conclusion will not be discussed in this dissertation, although it involved an attack on the constitutionality of the legislation rather than an attack on the conduct or actions of SARS.

The TAA has practically adopted the two provisions of the ITA when read together, these comprise the so-called "pay now, argue later" provision that is thus regarded as constitutionally effective when SARS issues an assessment that differs from the return submitted by the taxpayer, in effect, SARS has made an administrative decision. In terms of section 5 of the PAJA, SARS has to provide written reasons for its decision to the taxpayer.

In *Singh v C: SARS*<sup>162</sup>, the judiciary was seen to have saved an 'innocent' taxpayer and protected the taxpayer from the "pay now, argue later" rule of the VAT Act by finding, based on natural justice principles and thus an application for an interdict based on the founding values of the 1996 Constitution, that he was not in default of the payment of his taxes.<sup>163</sup> It is clear that where the taxpayer has been truthful and has sound facts to support his or her application, he or she is able to approach the judiciary for protection. Where the taxpayer is in default of the payment of his or her taxes, SARS may appoint an agent to collect the taxes

---

<sup>155</sup> Section 50(1) of the TAA.

<sup>156</sup> Section 173 (1) of the TAA.

<sup>157</sup> Section 172 (1) and (2) of the TAA.

<sup>158</sup> Section 174 of the TAA.

<sup>159</sup> *Trace Marketing (Pty) Ltd and Another v Minister of Finance and Another* 60 SATC 526.

<sup>160</sup> Section 34 of the 1996 Constitution.

<sup>161</sup> Section 25 of the 1996 Constitution.

<sup>162</sup> *Singh v C: SARS* 65 SATC 203.

<sup>163</sup> *Singh v C: SARS* (*supra*) 162.



due from the taxpayer on its behalf.<sup>164</sup> Therefore, it is important to examine the provisions that allow SARS to appoint an agent to collect taxes on its behalf. The “pay now, argue later” rule is discussed in a separate chapter in this dissertation.

#### 4.3 APPOINTMENT OF AN AGENT – THE RIGHT TO PROPERTY AND THE RIGHT TO JUST ADMINISTRATIVE ACTION

In terms of section 99 of the ITA now contained in section 156 of the TAA, the Commissioner can declare any person to be the agent of any other person. The person declared an agent may be required to make payment of any tax, interest or penalty due from any moneys, including a pension, salary, wages or any other remuneration, which might have been held by him or due by him to the person whose agent he is declared to be.<sup>165</sup>

Thus, in terms of section 99 of the ITA, SARS could, without any proof of taxes owing, appoint an agent to collect the alleged taxes on its behalf. The judiciary did not need to be approached for permission to appoint the agent and the section was silent on whether prior notice was required before appointing a person as an agent.<sup>166</sup> Can we then assume that if SARS withdraws money from a taxpayer’s account, the taxpayers’ rights have been infringed? However in terms of section 25 of the 1996 Constitution “*no person may be deprived of property...*”<sup>167</sup> The difficulty would lie in proving whether the money withdrawn from the taxpayer’s bank account is classified as property.

While the 1996 Constitution does not clarify the meaning of the term ‘property’, Currie and De Waal<sup>168</sup> are of the view that its definition is broad and does not necessarily refer to land only, but corporeal movables, incorporeal, commercial interest and intellectual property.<sup>169</sup> It can therefore be concluded that the attachment of money from a taxpayer’s bank account constitutes dispossession of property, which is a well-established right in terms of section 25 of the Constitution. From section 99 of the ITA, it is apparent that the appointment of an

---

<sup>164</sup> Section 156 of the TAA and previously section 99 of the ITA.

<sup>165</sup> Section 158 of the TAA.

<sup>166</sup> Section 99 of the ITA.

<sup>167</sup> Section 25 of the 1996 Constitution allows ‘deprivation of property in terms of law of general application. This refers to the expropriation of land and is not applicable when SARS appoints another person an agent of a taxpayer’.

<sup>168</sup> Currie I and De Waal J *The Bill of Rights Handbook* (2005) at 536. See also ‘Issues of Interpretation’. Available at <http://butterworths.up.ac.za/nxt/gateway.d11/2b/zc/una/4v61a/5v61a/dw61a?=template>, accessed 16 December 2013.

<sup>169</sup> *Ibid* (note 168 above).

agent does amount to administrative action, as it fulfills the requirements set out in section 99 of the ITA and now section 169 of the TAA.

This point was further emphasized in *Hindry v Nedcor Bank Ltd and Another* 1999 (2) SA 757 (W), the taxpayer received a refund of taxes from SARS in error, but when the taxpayer was requested to repay the refund, he failed to respond. SARS then appointed the taxpayer's banker as its agent in terms of section 99 of the ITA to recover the amount on its behalf, without informing the taxpayer. The court was requested by the taxpayer to declare section 99 unconstitutional on the basis that it violated his right not to be deprived of his property as provided for in terms of section 25 of the 1996 Constitution. At the same time, the actions and conduct of the Commissioner in appointing an agent to collect the outstanding taxes were questioned constitutionally in terms of the right to just administrative action in section 33.

The court found that the decision to appoint an agent to collect taxes on behalf of SARS is constitutional. Although no prior notification was given to the taxpayer, the court held that SARS had frequently corresponded with the taxpayer regarding the erroneous refund and had requested repayment. The taxpayer chose to ignore such correspondence. Accordingly, the court held that there was no need for a prior hearing as the taxpayer knew from the correspondence that SARS wanted the money repaid. Thus, neither the taxpayers' right to just administrative action nor the right not to be deprived of his property had been violated.

In the case of *Contract Support Services (Pty) Ltd v SARS* <sup>170</sup> a taxpayers' agent was appointed on the same day that a VAT assessment was made.<sup>171</sup> The taxpayer made an application to the court for the appointment of the agent to be rescinded on the grounds that it contravened the *audi alteram partem* principle.<sup>172</sup> The court held that the obligatory duty to pay tax is present even without an assessment.<sup>173</sup> The court stated that:

*"A prior hearing would defeat the very process of the notice. It would alert the defaulting VAT-payer to the intention to require payment from the latter's debtor and to enable the taxpayer to spirit such funds away. Where prior notice and a hearing*

---

<sup>170</sup> *Contract Support Services (Pty) Ltd v SARS* 1999 61 SATC 338.

<sup>171</sup> Section 47 of the VAT Act 89 of 1991.

<sup>172</sup> Editorial Appointment of Taxpayer's Agent by SARS (March 2005) *The Taxpayer* 41.

<sup>173</sup> *Ibid* (note 172 above) 42. This decision is contrary to the decision of *Singh v CSARS* 2003 (4) SA 520 (SCA), where it was decided that notice should be given prior to the taking of a judgment.

would render the proposed act nugatory, no such prior notice or hearing is required".<sup>174</sup>

The court further held that not all administrative actions entail observance of the *audi alteram partem* principle and that 'procedurally fair administrative action' must be assessed within the scope of PAJA; therefore the *audi alteram partem* principle is not unconditional.<sup>175</sup>

It is submitted that the decision in *Mpande Foodliner CC v C: SARS and Others*, 63 SATC 46 was in line with the provisions of the 1996 Constitution. It can be concluded that the appointment of an agent infringes on the right of a taxpayer not to be deprived of property as well as the right to just administrative action. In this case, Patel set aside a notice for the appointment of an agent for the taxpayer based on the disregard of the *audi alteram partem* principle. He further stated that this disregard amounted to an infringement of section 33 of the 1996 Constitution. In *Smartphone SP (Pty) Ltd v Absa Bank Ltd*<sup>176</sup> Ponnann differed with the decision in *Mpande Foodliner* and considered the fact that the taxpayer had other options; for example, an objection or appeal against the appointment of an agent upholds a taxpayers right to just administrative action.<sup>177</sup>

It has been ascertained that the appointment of a taxpayers' agent is not unconstitutional. However, this procedure infringes the taxpayer's right to just administrative action as there is no prospect of the taxpayer giving his or her version of the case in adherence with the *audi alteram partem* principle. Considering the above discussion, it appears that the appointment of a taxpayers' agent is constitutional. Section 36 of the 1996 Constitution,<sup>178</sup> is essential in that, subject to a *caveat* on the taxpayers bank account, SARS informs the taxpayer by way of notice of its intention to freeze the taxpayers' account pending the outcome of the matter.<sup>179</sup> The next section examines the doctrine of legitimate expectation in considering the right to just administrative action.

---

<sup>174</sup> *Contract Support Services (Pty) Ltd (supra)* 350.

<sup>175</sup> *Gardener v East London Transitional Local Council* 1996 (3) SA 99 (E) 116.

<sup>176</sup> *Smartphone SP (Pty) Ltd v Absa Bank Ltd* 2004(3) SA 65 (W) 72.

<sup>177</sup> *Smartphone SP (Pty) Ltd (supra)* 72.

<sup>178</sup> Limitation clause as a less intrusive manner to achieve a goal.

<sup>179</sup> Editorial (March 2003) *The Taxpayer* 42.

#### 4.4 LEGITIMATE EXPECTATION DOCTRINE – THE RIGHT TO JUST ADMINISTRATIVE ACTION

Section 3 of the PAJA identifies the doctrine of legitimate expectation by providing that: “*any administrative action that materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.*” This was emphasized in the decision of *Plasma View Technologies (Pty) Ltd v C: SARS 72 SATC 44*, which gave certainty to the doctrine. The Commissioner for SARS had determined that certain plasma screens were video monitors and qualified for a full rebate of duty when imported, but later made a further contrary and retrospective determination. The Commissioner then demanded payment of duties under the new heading. The taxpayer suffered financial prejudice as a result of the Commissioner’s ‘*volte-face*’.

The taxpayer asked for a review and the setting aside of the administrative action in terms of PAJA. The court held that the determination constituted ‘administrative action’ and that the Commissioner was bound by the provisions of section 3 of the PAJA to take administrative action that was procedurally fair. The taxpayer had made a proper case for the decision to be reviewed and set aside. The Commissioner was not permitted to demand payment of retrospective duties as a result of the new determination.<sup>180</sup> Section 3(2) elaborates on the exercise of powers and performance of duties by the Commissioner, while section 76B relating to provisions for the issuing of advance tax rulings of the ITA, acknowledges the legitimate expectation doctrine.

Where SARS violates the right to just administrative action as embodied in the PAJA, the remedies that may be sought by the taxpayer to protect his or her rights are detailed in section 8 of PAJA. A taxpayer must utilize these remedies before resorting to any other steps. Where fundamental rights are violated, the taxpayer can ask the court for permission to apply directly to the Constitutional Court in terms of section 172 of the 1996 Constitution to obtain the appropriate relief. The following section briefly discusses the remedies available in terms of PAJA when a decision, action or conduct of SARS is not just, fair or reasonable.

---

<sup>180</sup> *Plasma View Technologies (Pty) Ltd v C: SARS 72 SATC 44.*

#### 4.5 REMEDIES FOR TAXPAYERS WHEN DECISIONS, ACTIONS AND CONDUCT OF SARS ARE FOUND TO BE UNCONSTITUTIONAL

Section 8 of PAJA provides for relief that a court may award a taxpayer to remedy any unjust administrative action on the part of SARS. The remedy may also be found in common law; for example, a delictual claim for the wrongful seizure of documents, records or even assets or contained in revenue legislation, such as the objection and appeal processes.<sup>181</sup>

The remedies include:

- A declaratory order;<sup>182</sup>
- A temporary interdict to prevent SARS from following a certain course of action; for example, preventing SARS from executing a judgment order against the taxpayer;<sup>183</sup>
- Preventing the seizure of goods;<sup>184</sup> and
- Halting the continuation of a search and seizure warrant.<sup>185</sup>

This chapter analyzed and evaluated the rights of taxpayers to privacy. It is concluded that SARS should not go on so-called “fishing expeditions” and should certainly not use the warrantless search provisions provided for in the TAA unless they are able to fully meet all the prerequisites of the provision prior to embarking on the search. It is evident from the above discussion that the decisions, actions and conduct of SARS are now being deliberated and contested from a constitutional standpoint.

---

<sup>181</sup> Section 8 of PAJA.

<sup>182</sup> *University of South Africa v C: SARS* 63 SATC 197.

<sup>183</sup> *Mpande Foodliner CC v C: SARS and Others* 63 SATC 46.

<sup>184</sup> *Deacon v Controller of Customs and Excise* 61 SATC 275.

<sup>185</sup> *Ferucci and Others v C: SARS and Another (supra)*.

## CHAPTER 5

### “PAY NOW, ARGUE LATER” RULE PRIOR TO AND FOLLOWING THE PROMULGATION OF THE TAA

The preceding chapters focussed on the right to just administrative action and the constitutionality of the enactment of the TAA. The focus of this chapter is the constitutionality of the “pay now, argue later” rule which, although proven to be constitutionally lawful, still poses some constitutional issues. The discussion will illustrate that the courts are trying to move away from this provision. Section 164 versus section 36 rule will be discussed, to determine the constitutional position of these two sections. SARS has the power to administer and recover taxes and VAT Act is one such tax.<sup>186</sup> A taxpayer can lodge an objection or appeal if he or she is of the opinion that SARS’s assessment was unfair.<sup>187</sup> The Commissioner may then decide to either alter the assessment or overrule the objection<sup>188</sup> and inform the taxpayer of the decision.<sup>189</sup>

If the taxpayer is dissatisfied with the Commissioner's decision, he or she may appeal against the decision.<sup>190</sup> When an appeal is lodged, the dispute can either, be referred to alternative dispute resolution (ADR), the Tax Board or the Tax Court.<sup>191</sup> Due to SARS’s responsibility to collect taxes, the legislature bestows it with the power to ensure efficient and timeous collection<sup>192</sup> and limits taxpayers’ use of objection or appeal procedures to delay payment of their taxes.<sup>193</sup> One of the powers accorded to SARS is the “pay now, argue later” rule. This rule was present in terms of section 36 of the VAT Act<sup>194</sup> and is currently made mention of in terms of section 164 of the TAA. Under the “pay now, argue later” rule, a taxpayer who disagrees with SARS ruling regarding the assessment is obliged to pay the assessed amount

---

<sup>186</sup> Silver and Beneke VAT Handbook 3. Even though the ‘pay now, argue later’ rule relates to all forms of tax, the focus is on VAT, because the application of the “pay now, argue later” rule is similar irrespective of the form of tax.

<sup>187</sup> Section 32(b) of the VAT Act.

<sup>188</sup> Section 31(4) of the VAT Act.

<sup>189</sup> Section 31(4) of the VAT Act.

<sup>190</sup> Section 33(1) of the VAT Act. S 33(1) ‘furthermore states that time periods prescribed in s 107A relating to appeals will also apply to appeals in terms of the VAT Act’.

<sup>191</sup> See section 33A of the VAT Act and SARS: *SARS Guide on Tax Dispute Resolution* (2004) 13.

<sup>192</sup> Muller EA Framework for Wealth Transfer Taxation in South Africa (LLD thesis UP 2010).

<sup>193</sup> *Capstone 556 (Pty) Ltd v CSARS* 2011 ZAWCHC 297 para 9.

<sup>194</sup> Hereafter referred to as ‘the section 36 rule’.

despite an objection to the assessment having been lodged.<sup>195</sup> Since section 34 of the 1996 Constitution affords every person the right of access to court, the question that arises is whether this rule is constitutional, as it seems not to allow access to the court before payment is made.<sup>196</sup> Similarly, if the “pay now, argue later” rule was not introduced by SARS, it would be of benefit for a taxpayer to question an assessment, which the taxpayer might not otherwise have done.<sup>197</sup> This could lead to unnecessary objections<sup>198</sup> and SARS and the South African government losing revenue. It is therefore obvious that a balance must be created between taxpayers’ rights and SARS’s duty to collect taxes efficiently. In this regard, the case of *Metcash Trading Ltd v Commissioner for the South African Revenue Service*,<sup>199</sup> the Constitutional Court stated that such a balance had been achieved and declared the “pay now, argue later” rule relating to VAT to be constitutionally sound.

As noted in previous chapters, the TAA was enacted to assist SARS to collect taxes.<sup>200</sup> It aimed to align ‘the administration of the tax Acts’,<sup>201</sup> and specifically deals with the situation where payment of tax is required pending an objection or appeal. From 1 October 2012, the “pay now, argue later” has been dealt with in terms of section 164 of the TAA. This section specifies that the responsibility of a taxpayer to pay taxes will not be postponed pending the outcome of an objection or appeal unless a senior SARS official suggests otherwise.<sup>202</sup> A taxpayer may request a senior SARS official to postpone the payment if the taxpayer anticipates lodging an objection or appeal against an assessment.<sup>203</sup>

SARS officials will have to consider various factors. These include the amount involved, the history of the taxpayer in submitting returns on time, whether the taxpayer might consider disposing of his or her assets during the postponement of payment, whether the outcome of the objection and appeal will cause undue financial hardship to the taxpayer, and if there are

---

<sup>195</sup> Section 105 of the TAA, which was promulgated on 4 July 2012, provides that the “pay now, argue later” rule is applicable to an objection to an assessment and the lodging of an appeal against the disallowance of an objection. Pato and Spira (2009) Available at [www.saica.co.za](http://www.saica.co.za) on the amendments to section 88 of the ITA, which is similar to section 36 of the VAT Act.

<sup>196</sup> *Metcash Trading Ltd (CC) (supra)* 29.

<sup>197</sup> Arnold BJ Opinion Prepared for the Commissioner for Inland Revenue (Attached as Annexure H to the Affidavit of the Commissioner for Inland Revenue in an Application to the Constitutional Court, CCT/22/96).

<sup>198</sup> *Ibid* (note 197 above).

<sup>199</sup> *Metcash Trading Ltd (CC) (supra)* 29.

<sup>200</sup> Section 2 of the TAA.

<sup>201</sup> Section 2(a) of the TAA.

<sup>202</sup> Section 164(1) of the TAA.

<sup>203</sup> Section 164(2) of the TAA.

any sequestration or liquidation proceedings pending.<sup>204</sup> The official will also take into account whether the taxpayer provided all the information requested and if any fraud was committed.<sup>205</sup> After the Constitutional Court judgement,<sup>206</sup> SARS issued a media release that set out the circumstances under which the Commissioner has the discretion to defer a payment, which may well protect the taxpayer.<sup>207</sup> The "pay now, argue later" rule was further clarified by amending section 88 of the ITA and section 36 of the VAT Act.<sup>208</sup>

If a taxpayers' application is denied or the request for postponement of payment is rejected for inconsequential reasons and the taxpayer has used this as a tactic to delay payment, the postponement can be revoked by the SARS official based on the change in circumstances that the official has become aware of.<sup>209</sup> SARS is not permitted to raise any recovery proceedings on the day that it receives an application for suspension, or withdraws the deferral previously obtained.<sup>210</sup> This means that, once the taxpayer has requested a postponement in terms of section 164(2), the enforcement proceedings, which could include a statement procedure and the appointment of a taxpayers' agent are not permitted until ten days after SARS has made its decision to disallow a postponement application or cancel a postponement. SARS can also proceed with the collection of taxes if it has reasonable suspicion that the taxpayer may dispose of assets.<sup>211</sup>

If an assessment is changed by SARS because of the objection or appeal, SARS will affect the necessary changes.<sup>212</sup> Accordingly, in terms of section 164 of the TAA, the "pay now, argue later" rule will be used by SARS. Section 36 enforces the rule that payment of tax will not be postponed depending on the outcome of the objection or appeal unless the

<sup>204</sup> Section 88 of the ITA and section 36 of the VAT Act. See also SARS Date Unknown Available at [www.sars.gov.za](http://www.sars.gov.za); Pato and Spira (2009) Available at [www.saica.co.za](http://www.saica.co.za); Croome (2011) Available at [www.bericcroome.com](http://www.bericcroome.com); Edward Nathan Sonnenbergs (2009) Available at [www.saica.co.za](http://www.saica.co.za); Goldberg De Villiers (2012) Available at [www.goldbergdevilliers.co.za](http://www.goldbergdevilliers.co.za); Mukuwane Date Unknown Available at [www.belldewar.co.za](http://www.belldewar.co.za); Daya and Gers (2011) [www.ens.co.za](http://www.ens.co.za); Sapa (2011) [mybroadband.co.za](http://mybroadband.co.za); and Williams 2012 Synopsis 6.

<sup>205</sup> Section 164(3) of the TAA.

<sup>206</sup> *Metcash Trading Ltd (CC) (supra)*.

<sup>207</sup> SARS Media Release 27. Available at [www.sars.gov.za/home.asp](http://www.sars.gov.za/home.asp), accessed 18 December 2013.

<sup>208</sup> Magolego M (2009) "Pay Now, Argue Later" – SARS Shed Some Light for Taxpayer's Benefit [www.polity.org.za/article/pay-now-argue-later-sars-shed-some-light-for-the-taxpayers-benefit-2009-11-17](http://www.polity.org.za/article/pay-now-argue-later-sars-shed-some-light-for-the-taxpayers-benefit-2009-11-17), accessed 18 December 2013.

<sup>209</sup> Section 164(5) of the TAA.

<sup>210</sup> Section 164(6) of the TAA.

<sup>211</sup> Section 166(4) of the TAA.

<sup>212</sup> Section 164(7) of the TAA.



Commissioner directs otherwise.<sup>213</sup> A taxpayer can request postponement of the payment of tax.<sup>214</sup> The Commissioner can disallow a taxpayer's request, or cancel the decision to defer the payment of tax, if he or she is satisfied that the objection or appeal is inconsequential; if the taxpayer uses this as a delaying tactic, the SARS official based on the change in circumstances can revoke the postponement.<sup>215</sup> Unlike the section 36 rule, the section 164 rule gives SARS additional powers to implement the collection of taxes due and these include, amongst others, the appointment of a third party as an agent of the taxpayer<sup>216</sup> and the statement procedure.<sup>217</sup>

It is therefore crucial to take note of the fact that, if a taxpayers' obligation to pay taxes is dependent on the objection or appeal which is not suspended, SARS can take the necessary steps to enforce the collection of taxes. This raises the question of whether there are any differences between the section 36 rule, and the section 164 rule. Both sections provide for the use of the "pay now, argue later" rule and their phrasing is the same. There are two differences between the section 164 rule and the section 36 rule. Firstly, in terms of the section 164 rule, a senior SARS official has the power to postpone the payment of tax, whilst with the section 36 rule only the Commissioner has this power. Secondly, section 164(6) of the TAA contains a unique section, which states that, SARS is not permitted to engage in any collection of taxes while the application is under consideration including the ten days after submitting a notice of cancellation of the postponement.<sup>218</sup> What needs to be established is whether these changes in terms of section 164(6) of the TAA resolve the problems regarding the "pay now, argue later" rule in terms of section 36 of the VAT Act.

Olivier's main point of criticism at the constitutional problem was, directed at the section 36 rule.<sup>219</sup> He firstly stated that the jurisdiction of the court at the time the rule is applied is excluded, and the question that Olivier raises 'is if SARS is allowed to enforce its collection

<sup>213</sup> Section 36(1) of the Vat Act.

<sup>214</sup> Section 36(2) of the VAT Act. See 2.4.4.1 herein regarding factors that the Commissioner may consider in deciding whether to grant a suspension or not. These factors were inserted by way of the Taxation Laws Second Amendment Act 18 of 2009 – hereafter "the TLSA".

<sup>215</sup> Section 36(4) of the TAA.

<sup>216</sup> Section 179 of the TAA. This section is similar to the section 47 procedure in terms of the VAT Act.

<sup>217</sup> Section 172 of the TAA. This section is similar to the section 40(2)(a) procedure in terms of the VAT Act.

<sup>218</sup> Vanek M (2012) Big Tax Changes You Should be Aware Of. Available at <http://www.moneywebtax.co.za/moneywebtax/view/moneywebtax/en/page1/page34677?oid=71806&sn=Detail&pid=1>, accessed 18 December 2013.

<sup>219</sup> Olivier L *Tax collection and the Bill of Rights* 2001 TSAR 193-200.

procedures despite an objection or appeal being lodged.<sup>220</sup> Secondly, Olivier indicates that there might be a less invasive means to achieve a balance between SARS's duty and the taxpayers' right of access to the courts.<sup>221</sup> Section 164(1) of the TAA allows a senior SARS official, instead of the Commissioner, to defer the payment of tax pending an objection or appeal which has the effect of assigning the Commissioner's powers. It does not address the problem relating to the fact that SARS is permitted to enforce the collection of tax even though an objection or appeal has been lodged. Furthermore, permitting a senior SARS official to consider postponing payment does not render the process less intrusive if the application to have the payment deferred is disallowed. Therefore, the first suggestion in terms of the "pay now, argue later" rule will not have a drastic impact on a taxpayers right of access to the courts.

However the change in the TAA provides that a taxpayer now has a level of legal clarity, because the taxpayer is assured that SARS will not proceed with the collection of taxes, as such collection is stayed for this period.<sup>222</sup> As a result, SARS is under a duty and obligation to ensure that it reaches a decision regarding the application for postponement of payment pending an objection or an appeal, therefore ensuring that it continues to collect taxes. SARS will still need to reach a quick decision, in order to proceed with the collection of taxes as soon as the request for postponement of payment is rejected. This could result in senior SARS officials not considering all the relevant information.<sup>223</sup> If this is indeed the case, taxpayers will be forced to take these decisions on review.<sup>224</sup> Furthermore, section 164(6) does not explore the fact that there might be less invasive means available. It appears that the change in the terms of section 164(6) of the TAA does not assist in resolving any of the problems previously identified.

The guidelines provided for in terms of the Taxation Laws Amendment Act (TLSA) have also been subject to criticism.<sup>225</sup> One point of view is that SARS acts as the judge in a matter to which it is a party.<sup>226</sup> Section 164(3) of the TAA replicates the guidelines in the TLSA. It

---

<sup>220</sup> Ibid (note 219 above).

<sup>221</sup> Ibid (note 219 above).

<sup>222</sup> Section 164(6) of the TAA.

<sup>223</sup> In terms of section 6(e) (iii), this will constitute a ground for judicial review in terms of PAJA.

<sup>224</sup> See section 8 of PAJA and the remedies available when a matter is taken on review.

<sup>225</sup> Taxation Laws Second Amendment Act 18 of 2009 – hereafter the "TLSA".

<sup>226</sup> *Metcash Trading Ltd (CC)* (supra) 327.

has been noted that section 36(3) includes factors that still need to be complied with in respect of the section 164 rule. Accordingly, the section 164(3) rule does not address the problems identified previously.<sup>227</sup> The TAA however, does address the confusion that arose, in *Mokena v C: SARS*<sup>228</sup> regarding whether or not SARS may proceed with the collection of tax even though an objection or appeal has been lodged. Section 172(2) of the TAA specifically states that SARS may proceed even though an objection or appeal has been lodged, provided that the obligation has not been suspended in terms of section 164 of the TAA.

An examination of the constitutionality of the "pay now, argue later" rule reveals that a balance needs to be achieved between the speedy collection of taxes and the taxpayers right to approach the court.<sup>229</sup> The court held in *Metcash Trading Ltd (CC) (supra)* that this balance is in fact achieved and, accordingly, that the "pay now, argue later" rule is constitutional.<sup>230</sup> However, two issues should be borne in mind. Firstly, *Metcash Trading Ltd (CC) (supra)* dealt with the "pay now, argue later" rule in terms of the VAT Act.<sup>231</sup> Therefore, it does not create a precedent regarding income tax matters.<sup>232</sup> The court still needs to determine whether the "pay now, argue later" rule in income tax matters will require constitutional scrutiny and open the door to for government, parliament and the judiciary to debate this issue.

Secondly, the courts will be bound by the *Metcash Trading Ltd (CC) (supra)* decision unless it can be shown that this decision was wrong.<sup>233</sup> Since 1 October 2012, the "pay now, argue later" rule has been provided for in terms of section 164 of the TAA. The question that arises is whether the problems identified with regard to the section 36 rule will be addressed by section 164 of the TAA. Owing to the fact that the phrasing is fairly similar to that of section 36 of the VAT Act, the section 164 rule does not address the problems. In fact, it is possible that the new rule will lead to other problems. It is thus submitted that the legislature has failed

<sup>227</sup> Williams RC *Unresolved aspects of the "pay now, argue later rule"* January 2012 Synopsis 5.

<sup>228</sup> *Mokena v CSARS* 2011 2 SA 556 (GSJ).

<sup>229</sup> Section 34 of the 1996 Constitution.

<sup>230</sup> *Metcash Trading Ltd (CC)(supra)* 6.

<sup>231</sup> *Metcash Trading Ltd (CC) (supra)* 9, 10, 13. See also Olivier and Croome *Tax Administration* 224.

<sup>232</sup> The court stated that the considerations that influenced the court in arriving at this decision in relation to VAT would not necessarily lead to the same conclusion in income tax matters.

<sup>233</sup> Vorster H *"Self-help and the fiscus – Metcash Trading Ltd (CC)(supra) ( Unreported)"* January 2001 De Rebus 47.

to make productive use of the opportunity to draft legislation that would achieve a balance between SARS's duty and a taxpayers' right of access to the courts. The court therefore held the section 36 rule to be constitutional, and that this rule does in fact constitute administrative action. The fact that the "pay now, argue later" rule constitutes administrative action, now means that a taxpayer may use the review procedure<sup>234</sup> incorporated in PAJA when aggrieved by an assessment. The court concluded that the "pay now, argue later" rule was unconstitutional, and making use of this review procedure in PAJA might be an alternative for an aggrieved taxpayer.<sup>235</sup>

---

<sup>234</sup> Moodley M Date Unknown "Pay Now, Argue Later". Available at [nattymoodley.com/tax.htm](http://nattymoodley.com/tax.htm), accessed 18 December 2013.

<sup>235</sup> Olivier indicates that the fact that review proceedings are an option does not mean that a provision can be constitutional.

## CHAPTER 6

### CONSTITUTIONAL PROTECTION FOR THE TAXPAYER

The preceding chapters focused on the TAA and the important provisions that have been amended and affect taxpayers. This chapter considers the constitutionality of the rights of taxpayers. The rights of all natural and legal persons are set out in the Bill of Rights in chapter 2 of the 1996 Constitution. In terms of the 1996 Constitution<sup>236</sup>, the State shall respect, protect, promote and fulfill the rights contained in the Bill of Rights. However, section 7(3) places a restriction on these rights by citing the restrictions contained in section 36<sup>237</sup> or other sections in the Bill of Rights. In order to disprove a provision in tax legislation, one must prove that a right contained in the Bill of Rights has been violated and is not in accordance with the 1996 Constitution and the Bill of Rights.

The principles of equality, human dignity, and privacy could be violated merely by Parliament passing legislation or administrative decisions taken by SARS were not usually accessible, even if such decisions were unreasonable, unfair or failed to follow the rules of natural justice.<sup>238</sup> When inquiring into allegedly unjust and uninformed legislation or the actions and decisions of SARS, the judiciary often relied on the saying that, “there is no equity about tax”<sup>239</sup> to justify a finding in favour of SARS.

With the dawn of the new constitutional order in 1994, parliamentary supremacy gave way to constitutional supremacy in terms of section 2 of the 1996 Constitution, which states that the 1996 Constitution is “the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.<sup>240</sup> However, it is important to note that the scope and ambit of many of the protective measures available to taxpayers, especially those enshrined in the 1996 Constitution, have not yet been fully interpreted and applied. The interpretation and application of the 1996 Constitution and, accordingly, the

---

<sup>236</sup> Section 7(2) of the 1996 Constitution.

<sup>237</sup> Section 36 limitation clause.

<sup>238</sup> *KBI v Gekonsolideerde Central Ondernemingsgroep (Edms) Bpk* (58 SATC 273); *Welz and Another v Hall and Others* (59 SATC 49); *Ferucci and Others v C: SARS and Another* (65, SATC 470); *ITC 1725* (64 SATC 223); *ITC 1758* (65 SATC 396); *ITC 1489* (53 SATC 99).

<sup>239</sup> *CIR v Simpson* (16 SATC 268 at 285; *New Union Goldfields Limited v CIR* (17 SATC 1 ); *CIR v Nemojin (Pty) Ltd* (45 SATC 241 at 267).

<sup>240</sup> Section 2 of the 1996 Constitution.

scope and ambit of the protection of a person's fundamental rights, is a task specifically assigned to the judiciary by the 1996 Constitution.<sup>241</sup> The 1996 Constitution also requires that organs of state allocate and spend tax revenue efficiently, economically and effectively.<sup>242</sup> If SARS approaches tax evasion with the attitude that taxpayers are deceitful, SARS should assume that taxpayers are innocent as required by the 1996 Constitution.<sup>243</sup> Section 33 of the 1996 Constitution is specific and provides SARS with a constitutional mechanism for the right to just administrative action and to formulate decisions that are based on 'reasonableness'.

Even if SARS is reluctant to formally acknowledge its obligations to uphold the fundamental rights of taxpayers, the judiciary is there to protect the taxpayer.<sup>244</sup> Therefore, this chapter focuses on the rights of taxpayers that require further research, taking into account the values reinforcing the 1996 Constitution, which is the supreme law of the land.<sup>245</sup> The starting point of any legislation is strict adherence to the decree of the 1996 Constitution.<sup>246</sup> The 1996 Constitution is the centre of the South African legal system and it prescribes how statutes are to be interpreted.<sup>247</sup> It also sets out the scope and sphere of any executive or administrative action that may be taken by government.<sup>248</sup>

The interpretation of statutes in terms of the 1996 Constitution requires an approach by the judiciary that takes the founding values of the 1996 Constitution into account, namely the right of every person to protect his or her property<sup>249</sup> and the enforcement of the principles of human dignity<sup>250</sup>, equality,<sup>251</sup> and the right to just administrative action.<sup>252</sup> Until 2011, China allowed the death penalty to be retrospectively imposed on those who evaded paying taxes.<sup>253</sup> However, in South Africa, the death penalty is considered unconstitutional for any crime; this

---

<sup>241</sup> Section 165 of the 1996 Constitution.

<sup>242</sup> Section 195(1)(b) of the 1996 Constitution.

<sup>243</sup> Section 35(3)(h) of the 1996 Constitution.

<sup>244</sup> Section 165 of the 1996 Constitution.

<sup>245</sup> Chapter 2 of the 1996 Constitution.

<sup>246</sup> Section 39(2) of the 1996 Constitution.

<sup>247</sup> Section 39(2) of the 1996 Constitution.

<sup>248</sup> Section 33 of the 1996 Constitution.

<sup>249</sup> Section 25 of the 1996 Constitution.

<sup>250</sup> Section 10 of the 1996 Constitution.

<sup>251</sup> Section 9 of the 1996 Constitution.

<sup>252</sup> Section 33 of the 1996 Constitution.

<sup>253</sup> Hands off Cain 2012. Available at: <http://www.handsoffcain.info/bancadati/schedastato.php?idstato=16000210>, accessed 18 December 2013.

principle is reinforced in the Constitution,<sup>254</sup> “no one has the right to take life”.<sup>255</sup> Croome<sup>256</sup> is one of the few authors to focus on taxpayers’ rights, the right to equality and the violation of this right.<sup>257</sup> Croome<sup>258</sup> concludes that:

*“Based on the decisions of the courts in India and the latitude afforded to the State in choosing what policies to adopt, taxpayers may face difficulties satisfying a court that a particular fiscal provision should be struck down on the basis that it unlawfully violates section 9 of the Constitution.”*

Hence, a taxpayer is able to challenge any legislation that does not live up to the founding principles of the 1996 Constitution. When legislation is found to be unlawful, it should be declared unconstitutional.<sup>259</sup> The State will have to use section 36 of the 1996 Constitution to provide reasons why such a right is unfair and unjust, especially in an open and democratic society like South Africa that is based on human dignity, equality and freedom.

The reverse onus of proof provisions of the ITA that provided for administrative penalties or additional tax to be imposed<sup>260</sup> as well as the imposition of criminal sanctions<sup>261</sup> was found to be constitutionally unsound and it was recommended that these sections be amended to bring them in line with the 1996 Constitution. No recommendation was made in respect of the general onus of proof provision contained in section 82 as it was concluded that this provision would probably pass constitutional muster as being reasonable and justifiable in an open and democratic society.<sup>262</sup>

The TAA replaced the administrative provisions of the ITA and several other revenue statutes with effect from 1 October 2012. The general onus of proof provision contained in section 82 of the ITA has been included, with similar wording, in section 102(1) of the TAA. This section therefore offers the same protection as prior to the promulgation of the TAA. There

---

<sup>254</sup> Section 11 of the 1996 Constitution.

<sup>255</sup> *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

<sup>256</sup> Croome BJ (2010) *Taxpayers’ Rights in South Africa*. Juta & Co. Ltd: Claremont.

<sup>257</sup> Ibid (note 256 above) 73-121.

<sup>258</sup> Ibid (note 256 above) 119.

<sup>259</sup> Ibid (note 219 above).

<sup>260</sup> Section 76(5) of the ITA.

<sup>261</sup> Section 104(2) of the ITA.

<sup>262</sup> Section 36 of the 1996 Constitution.

has been a much-needed shift in the onus of proof provisions of the ITA in terms of the imposition of administrative penalties or additional tax.<sup>263</sup>

Section 104(2) of the TAA provides that, as of 1 October 2012, the onus is on SARS to justify any administrative penalty imposed in terms of sections 221 to 223 of the Act. The behavioral table in section 223(1) stipulates the degree of the penalty to be imposed. Constitutional concerns remain regarding section 235 of the TAA, which provides for criminal penalties and fines to be compulsory and obligatory on a taxpayer who is involved in tax evasion. This new section<sup>264</sup> corresponds to section 104 of the ITA, which also provided for criminal sanctions to be levied against a taxpayer. Regrettably, section 235(2) of the TAA includes an assumption that the taxpayer is guilty of tax evasion unless he or she can show just cause that there is a justifiable reason and possibility that he or she was ignorant of the fact that the information provided was false and that the statement made was not due to negligence on his or her part.

Sections 221 to 223 of the TAA removed the extensive powers given to SARS and the Commissioner to institute 'additional tax' or a sanction of up to 200%.<sup>265</sup> Section 223 of the TAA incorporates an understatement penalty table whose purpose is, 'ensuring consistent treatment of taxpayers in comparable circumstances'.<sup>266</sup> An analysis of Section 223 (1) of the TAA behavioral table suggests that it will lead to a significant decrease in the sanctioning of administrative penalties that may be imposed by SARS.<sup>267</sup> The change in the onus of proof provision regarding the imposition of administrative understatement penalties protects the taxpayer from unjust administrative action, decisions and conduct by SARS.<sup>268</sup> The reverse onus of proof presumption created by section 235(2) of the TAA remains a matter for concern as well as the criminal penalties and sanctions that are imposed for tax evasion activities by the taxpayer, however, the Tax Court can 'exercise its own discretion' should the taxpayer opt to lodge an appeal against a penalty imposed on him or her by SARS.<sup>269</sup>

---

<sup>263</sup> Section 76 of the ITA.

<sup>264</sup> Section 235 of the TAA.

<sup>265</sup> Section 76 of the ITA.

<sup>266</sup> Section 223(1) of the TAA.

<sup>267</sup> Section 223 of the TAA.

<sup>268</sup> Section 102(2) of the TAA.

<sup>269</sup> *Da Costa v CIR* 47 SATC 87 95.



Where a person's fundamental rights have been affected, that person has to prove that his or her constitutional rights have been dishonored and infringed.<sup>270</sup> For example, the right to just administrative action in terms of section 33 of PAJA requires 'lawful', 'reasonable' and 'procedurally fair' action by SARS in the performance of its obligations and duties. A taxpayer must first present his or her case to the court before seeking relief on constitutional grounds.<sup>271</sup> In *City Council of Pretoria v Walker*, 1998(3) BCLR 257 (CC), the Constitutional Court stated that going the Constitutional Court route is not advisable; for example, if a taxpayer is aggrieved by an assessment, the TAA provides internal mechanisms for the taxpayer to follow before resorting to other methods to resolve the matter. If it is found that an Act or statute of parliament is unconstitutional, that finding would be irregular and not considered until the Constitutional Court renders it constitutional.<sup>272</sup>

If SARS exercises its power in a manner that amounts to administrative action, that power would generally have to be exercised in compliance with both the TAA and PAJA. This means that SARS actions and conduct would have to be justifiable in terms of section 6(2) (h) of PAJA. The judiciary is responsible for deciding whether SARS's conduct is aligned with the reasoning and decisions expected from such an organ of state, judges are said to subscribe to the notion that 'equity must come with clean hands'.<sup>273</sup> Therefore, if a taxpayer can show good cause that a decision, action or conduct by SARS was unlawful, unfair, unjust and irregular,<sup>274</sup> by presenting proper facts to the court to support their argument the taxpayer is likely to emerge victorious.

The onus will then shift to SARS to disprove the taxpayer's argument. SARS may try to resolve the matter by overturning its decision to a favorable outcome as was seen in *Ferucci* (*supra*). This case related to the basis on which SARS sought to obtain a warrant for a search and seizure. It stated in an affidavit that it required the warrant because the taxpayer had not paid its regional service levies and that taxpayers such as these usually evaded paying taxes.<sup>275</sup> When a taxpayer seeks assistance from the judiciary for relief from a decision or

---

<sup>270</sup> Section 38 of the 1996 Constitution.

<sup>271</sup> See *Fose v Minister of Safety and Security* (1997 (7) BCLR 851 (CC) and *S v Mhlungu* (1995 (3) SA 867 (CC)).

<sup>272</sup> Section 172(2)(a) of the 1996 Constitution.

<sup>273</sup> *Tinsley v Milligan* 1992 2 ALL ER 391.

<sup>274</sup> Section 6(1) of PAJA.

<sup>275</sup> *Ferucci* (*supra*).

action by SARS, for example, a decision to apply the so-called “pay now, argue later” rule<sup>276</sup>, the appointment of an agent to collect outstanding taxes on behalf of SARS<sup>277</sup>, obtaining a search and seizure warrant<sup>278</sup> or even deciding to search and seize the property of a taxpayer without a warrant as provided for in terms of section 63 of the TAA, the taxpayer is unlikely to obtain the relief sought if he or she is aware that requesting such assistance is being done under false pretenses and is unjust. There is one exception in that if SARS does not strictly adhere to its own policies and procedures, this amounts to procedural unfairness, in that SARS must consider the rules of natural justice that are accessible to a taxpayer.<sup>279</sup>

In response to appeals from SARS, the legislature included a warrantless search and seizure provision in the TAA.<sup>280</sup> This allows SARS to take urgent steps to prevent a taxpayer from disposing of information that SARS may have requested, or if SARS is aware that a taxpayer may dispose of certain assets if there is a delay in obtaining a warrant.<sup>281</sup> The taxpayer can protect his or her fundamental rights by applying to the High Court for the granting of remedies such as interdicts and declaratory orders against SARS<sup>282</sup> which remedies are now also provided for in terms of PAJA. It seems that the judiciary has come to the aid of a taxpayer by providing a mechanism to protect the taxpayer from the “pay now, argue later” rule, thus ensuring that he or she does not evade paying the taxes due to SARS. It should be noted that a court application is costly for an aggrieved taxpayer. The Tax Court currently has no jurisdiction to deal with constitutional issues or to grant remedies such as interdicts and declaratory orders.<sup>283</sup>

The question that remains is whether taxpayers’ rights are adequately protected. The above discussion suggests that further research is required on this issue, due to the fact that the TAA has incorporated new provisions and taxpayers need to be aware of their rights. However, SARS has a reciprocal duty to keep administrators up-to-date on administrative issues and to provide the citizens of South Africa with on-going knowledge and information in order to

---

<sup>276</sup> Section 88 and 91 of the ITA, now embodied in sections 164 and 169 of the TAA.

<sup>277</sup> Section 99 of the ITA, now embodied in section 156 of the TAA.

<sup>278</sup> Section 74D of the ITA, now embodied in sections 59 to 62 of the TAA.

<sup>279</sup> *Pharmaceutical Manufacturers Association of SA: In re: Ex Parte President of the Republic of South Africa* (2000 (2) SA 674 (CC)).

<sup>280</sup> Section 63 of the TAA.

<sup>281</sup> Sections 59 to 62 of the TAA.

<sup>282</sup> *Singh v C:SARS (supra)*.

<sup>283</sup> *ITC 1806* (68 SATC 117).

avoid SARS obtaining a judgment against them that they only discover when they apply for a loan or credit. Goldswain<sup>284</sup> suggests that further research should be conducted in the following areas:

- The information required from a taxpayer by SARS could be communicated by correspondence or in one-on-one consultations. This was previously incorporated in sections 74B and 74C of the ITA and is now contained in sections 45 to 58 of the TAA;<sup>285</sup>
- The search and seizure provisions need to be addressed more specifically using substantive law rather than procedural law;<sup>286</sup>
- The *audi alteram partem* rule and admission of hearsay evidence;<sup>287</sup>
- The fact that no authority is required from the judiciary regarding the freezing of a taxpayer's bank account;<sup>288</sup>
- The relevance of attorney-client privilege in terms of section 14(d) of the Constitution;<sup>289</sup>
- The taxpayer should be entitled to any, if not all the documents that SARS has in its possession to prove its case in terms of PAJA;<sup>290</sup>
- The changes to the Alternate Dispute Resolution procedures;<sup>291</sup>
- The Tax Court to consider the settlement of costs in litigation;<sup>292</sup>
- If a tax reprieve has been granted, does it have any constitutional effect?<sup>293</sup>
- The lifting of the corporate veil when companies are involved in combating tax avoidance and fraud;<sup>294</sup>
- The right not to incriminate oneself and invoke the provision of the right to remain silent in terms of section 35(1)(a) of the Constitution;
- The issue of criminal penalties being levied against tax payers;<sup>295</sup>

<sup>284</sup> Goldswain G.K (note 31 above) 244.

<sup>285</sup> Ibid (note 31 above) 244.

<sup>286</sup> Ibid (note 31 above) 244.

<sup>287</sup> Ibid (note 31 above) 244.

<sup>288</sup> Ibid (note 31 above) 244.

<sup>289</sup> Ibid (note 31 above) 244.

<sup>290</sup> Ibid (note 31 above) 244.

<sup>291</sup> Ibid (note 31 above) 244.

<sup>292</sup> Ibid (note 31 above) 244.

<sup>293</sup> Ibid (note 31 above) 244.

<sup>294</sup> Ibid (note 31 above) 244.

- In terms of section 34 of the 1996 Constitution, taxpayers' have the right to access courts directly without first exhausting SARS's internal remedies;<sup>296</sup>
- The issue of tax audits;<sup>297</sup>
- The right not to be charged twice for the same offence.<sup>298</sup>

This chapter examined the constitutional rights of taxpayers. Taxpayers should not only concern themselves with the ITA and TAA, but with the 1996 Constitution and the Bill of Rights to justify their rights when a dispute arises. The 1996 Constitution is the supreme law of the land and should never be regarded as a last resort for a taxpayer. The TAA has introduced a number of significant changes to the South African tax system, by giving SARS extensive powers but nevertheless incorporating provisions to protect the taxpayer.<sup>299</sup> This study emphasizes that SARS should comply with the duties conferred on it in section 237 of the 1996 Constitution.<sup>300</sup> SARS is bound to act with "professionalism, ethics, fairness, equality, is accountable and transparent without bias".<sup>301</sup>

---

<sup>295</sup> Ibid (note 31 above) 244.

<sup>296</sup> Ibid (note 31 above) 244.

<sup>297</sup> Ibid (note 250 above at 244).

<sup>298</sup> Ibid (note 31 above) 244.

<sup>299</sup> Taxpayers' rights, the TAA and the Constitution. Available at <http://www.fanews.co.za/article/front-page-features/25/featured-story/1147/taxpayer-...>, accessed 18 December 2013.

<sup>300</sup> Ibid (note 299 above) 2.

<sup>301</sup> Ibid (note 299 above) 2.

## CHAPTER 7

### CONCLUSION

The aim of this dissertation was not to provide an exhaustive analysis of the TAA. Rather, it focused on a comparison of the provisions of the ITA and the TAA and constitutional challenges that could arise from the amended provisions.

Richard Bird<sup>302</sup> observes that:

*“No one likes taxes. People do not like to pay them. Government does not like to impose them. But taxes are necessary both to finance desired public spending in a non-inflationary way and also to ensure that the burden of paying for such spending is fairly distributed. While necessary, taxes impose real costs on society. Good tax policy seeks to minimize costs.”*

Effective and ethical tax administration is not an easy administrative duty and is worthless if instituted ineffectively.<sup>303</sup> Bird and Zolt<sup>304</sup> state that, “the first task of any tax administration is to facilitate compliance.” There is no particular system to improve revenue at any level of government.<sup>305</sup> Bird adds that:

*“There is no single set of prescriptions - no secret recipe - that, once introduced, will ensure improved tax administration in any country. Developing countries exhibit a wide variety of tax compliance levels, reflecting not only the effectiveness of their tax administrations but also taxpayer attitudes toward taxation and toward government in general as well as many other environmental factors.”*<sup>306</sup>

---

<sup>302</sup> Bird RM (2003) *Administrative Dimensions of Tax Reform*. Available at <http://www-2.rotman.utoronto.ca/iib/ITP0302.pdf>, accessed 18 December 2013.

<sup>303</sup> Bird RM and Zolt EM (2003) “Introduction to Tax Policy Design and Development”. Notes for a course on *Practical Issues of Tax Policy in Developing Countries*, World Bank. Available at [www1.worldbank.org/.../WBI%20Module%201\(Bird&Zolt\)](http://www1.worldbank.org/.../WBI%20Module%201(Bird&Zolt)), accessed 18 December 2013.

<sup>304</sup> Bird RM and Zolt EM “Introduction to Tax Policy Design and Development” 25.

<sup>305</sup> Ibid (note 304 above) 9.

<sup>306</sup> Ibid (note 304 above) 3 to 25.

In respect of SARS, compliance with tax legislation is improved and achieved through three pillars in the value chain, namely *education, service and enforcement*.<sup>307</sup> Tax compliance will increase if:

- systems are properly adhered to, ensuring that taxpayers receive quality services, telephonic assistance and feedback;
- there is a commitment to taxpayer awareness through education and workshops by SARS;
- Problems and pitfalls with legislation are addressed effectively, thereby ensuring equality for all citizens; and
- Qualified officials are in place to administer taxes efficiently and effectively.<sup>308</sup>

Judicial decisions on whether the decisions, actions and conduct of SARS officials are consistent with the policies and procedures set out in the tax legislation must be taken in accordance with the founding principles of the 1996 Constitution. Goldswain suggests that “the judiciary would rather find a non-constitutional remedy first before resorting directly to constitutional remedies”.<sup>309</sup>

Therefore relief and remedy for the taxpayer exist in the constitutional and administrative arenas. The objections or appeal procedures set out in section 104 of the TAA in which the taxpayer can represent himself or herself, as well as other legislation such as the VAT Act enable the taxpayer to seek relief against an assessment. This process is cost-effective, especially in terms of the alternate dispute resolution process. If the taxpayer is still aggrieved, he or she could appeal to higher authorities. However, the Commissioner may still pursue the matter if the taxpayer fails to pay the tax. If the taxpayer is still aggrieved, it is at this stage that he or she can utilize the provisions laid down by PAJA; this is an administrative avenue of relief. If this fails, the taxpayer can approach the Constitutional Court if he or she believes that his or her constitutional right has been infringed.

---

<sup>307</sup> Wang, L. (2010) *A Review of the Determinants of Voluntary Compliance with Tax Laws by South African Taxpayers with Particular Reference to Businesses in South Africa*. Unpublished Phil: Taxation mini-dissertation, University of Pretoria.

<sup>308</sup> Ibid (note 302 above) 25.

<sup>309</sup> Ibid (note 31 above) 246.

Although the subject of this dissertation was the TAA, it focused on a particular theme surrounding the right to just administrative action and whether the South African taxpayer is protected by the law and the 1996 Constitution. It is concluded that SARS has become more involved in the lives of every person. This has increased its powers and it has the authority to prosecute those that break the law. In the cases cited in this dissertation, instances were noted where SARS used its powers subjectively without due consideration for the rights of individuals. The courts have also upheld taxpayers' allegations relating to the infringement of their rights. The 1996 Constitution and the Constitutional Court protect all South Africans against abuse of power and unfair practices. The enactment of the TAA has increased SARS's powers while at the same time securing taxpayers' rights.

Litigation is expensive and most people cannot afford exorbitant legal fees. If taxpayers are unable to take this route and SARS does not deal speedily with an issue, constitutional protection will have no meaning for the taxpayer. SARS therefore has to exercise caution when dealing with taxpayers and display professionalism, section 241 of the TAA provides for the reporting of unprofessional conduct. It is clear from the discussion that SARS has attempted to improve the services it renders to taxpayers by increasing the processes and procedures available to resolve disputes between SARS and the taxpayer. The new amendments to the TAA can save the taxpayer time and money. They emphasize that SARS is there to assist and support the taxpayer and that the taxpayer must be honest and truthful when submitting returns or providing information to SARS.

The 1996 Constitution protects the taxpayer from unreasonable legislation and calls for it to be declared unconstitutional. It is clear that the TAA has enabled SARS to improve its performance. However, it should be noted that much remains to be done to rid society of fraud and tax evasion. Marcus Tullius Cicero<sup>310</sup> explained the executive role of government as follows:

*“The administration of government, like a guardianship ought to be directed to the good of those who confer, not of those who receive the trust.”*

---

<sup>310</sup> Quoteland (2012) Marcus Tullius Cicero Quotes. [Online] Available at: <http://www.quoteland.com/rate/Marcus-Tullius-Cicero-Quotes/30756/>, accessed 18 December 2013. September.

Du Toit<sup>311</sup>, a member of the Katz Commission, summarizes the administrative role of SARS post-1994 as follows:

*“The overall job of revenue administration is not to get in the money at all costs; it is to administer our tax laws with efficiency and dispassionate objectivity. That involves both collection from, and protection for, the taxpayer.”*

Tax cannot be avoided and society needs it to function coherently. Therefore, the judiciary and SARS have to take taxpayers' rights into account in ensuring a fair, just and equitable system based on human dignity, equality and freedom. Finally, the remedies available to a taxpayer whose right to equality has been infringed can be classified into three categories; constitutional, non-constitutional and administrative. The revenue authorities cannot justify unfair, unreasonable conduct in an open and democratic society that upholds the values of the Constitution.

There have been new developments in the Tax Administration Laws Amendment Bill (TALAB) No. 40 of 2013, which was initiated into Parliament on 24 October 2013. It firstly requires that the President of South Africa apply his mind to the Bill. Once he has approved the Bill, it will then be published in the Government Gazette for public comment before it becomes an Act.<sup>312</sup> Croome alludes to some of the significant changes that might be made to various tax Acts, for example, section 270 of the TAA “to deal with the imposition of the understatement penalty as opposed to the additional tax which may have been levied under another tax Act”<sup>313</sup>

Croome further contends that while the Bill was being drafted, advice was sought from international professionals and specialists in the field of taxation from the International Monetary Fund, to analyse the constitutionality adds that, in applying section 270(6) of the

<sup>311</sup> Financial Mail Available at <http://www.financialmail.co.za/markets/1999/market-watch>, accessed 18 December 2013.

<sup>312</sup> Croome BJ *Amendments to the Transitional Rules dealing with penalties in the Tax Administration Act*. Available at <http://www.bericcroome.com>, accessed 16 January 2014.

<sup>313</sup> Ibid (note 312 above) 1.



TAA, there was uncertainty on whether additional tax should have been imposed on all returns filed that contained understatements before the TAA commenced.<sup>314</sup>

He points out that the revision of the TAA to the transitional rules that control the way penalties are imposed may reduce the distress experienced by taxpayers when understatement penalties are imposed in respect of tax returns submitted before 1 October 2012. The TAA seeks to ensure that taxpayers' rights are protected from the mighty SARS and it appears that this has been achieved in the TAA.

of the Bill together with expert constitutional counsel and state law advisors who have established that the Bill is constitutional. Croome

---

<sup>314</sup> *ibid* (note 312 above) 2.

## BIBLIOGRAPHY

### Principle references:

**Primary Sources** (cases, legislation, international instruments, etc)

#### International legislation

Li 'Taxpayers' Rights in Canada'. Bentley 'Taxpayers' Rights': *An international Perspective* (1998).

Barker, P and Groenhagen, A.M (2001). *The Protection of Taxpayers' Rights- An International Codification*. London: European Policy Forum.

Hanks (2004). Australian Constitutional Law materials and commentary.

#### Cases

*Da Costa v CIR* 47 SATC 87 at 95.

*Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA (CC).

*Investigating Directorate: SEO v Hyundai Motor Distributors* (2001(1) SA 545 (CC).

*Commissioner, South Africa Revenue Service v Trend Finance (Pty) Ltd* 2007 (6) SA 117 (SCA).

*Commissioner, South African Service v Saleem* 2008 (3) SA 655 (SCA).

*Pharmaceutical Manufacturers Association of SA: In re: Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

*In State v. Green*, (232 S.W.2d 897, 903 (Mo. 1950).

*Haynes v CIR* (64 SATC 321); *Ferucci and others v C: SARS and another* 65 SATC 470;

*Minister for Safety and Security v Van der Merwe and Others* [2011] ZACC 19 (CC).

*Deacon v Controller of Customs and Excise* 61 SATC 275.

*Hunter et al v Southam* [1984] 2 S.C.R. 145.

*Trace Marketing (Pty) Ltd and Another v Minister of Finance and Another* 60 SATC 526.

*Singh v C: SARS* 65 SATC 203.

*Contract Support Services (Pty) Ltd* 1999 61 SATC 338.

*Gardener v East London Transitional Local Council* 1996 (3) SA 99 (E).

*Smartphone SP (Pty) Ltd v Absa Bank Ltd* 2004(3) SA 65 (W) 72.

*Plasma View Technologies (Pty) Ltd v C: SARS* 72 SATC 44.

*University of South Africa v C: SARS* 63 SATC 197.

*Capstone 556 (Pty) Ltd v CSARS* 2011 ZAWCHC 297.

*Metcash Trading Ltd v Commissioner for the South African Revenue Service* 2001 1 BCLR 1 (CC)

*KBI v Gekonsolideerde Central Ondernemingsgroep (Edms) Bpk* 58 SATC 273.

*Welz and Another v Hall and Others* 59 SATC 49.

*Ferucci and Others v C: SARS and Another* 65 SATC 470.

*ITC 1725* 64 SATC 223.

*ITC 1758* 65 SATC 396.

*ITC 1489 53 SATC 99.*

*CIR v Simpson 16 SATC 268.*

*New Union Goldfields Limited v CIR 17 SATC 15.*

*CIR v Nemojin (Pty) Ltd 45 SATC 241.*

*S v Makwanyane and Another 1995 (3) SA 391 (CC).*

*Tinsley v Milligan 1992 2 ALL ER 391.*

*Mpande Foodliner CC v C: SARS and Others, 63 SATC 46.*

*Mokena v CSARS 2011 (2) SA 556 (GSJ).*

*Fose v Minister of Safety and Security (1997 (7) BCLR 851 (CC).*

*S v Mhlungu 1995 (3) SA 867 (CC).*

### **Legislation**

Constitution of the Republic of South Africa, Act 108 of 1996.

Tax Administration Act 28 of 2011.

South African Services Act 34 of 1997.

Income Tax Act 58 of 1962.

Taxation Laws Second Amendment Act 18 of 2009.

Promotion of Administrative Justice Act 3 of 2000.

Vat Act 89 of 1991.

**Secondary sources** (books, journals, unpublished theses, Law Commission reports, etc)

Croome, B.J (2008). Taxpayers' rights in South Africa : An analysis and evaluation of the extent to which the powers of the South African Revenue Service comply with the Constitutional rights to property, privacy, administrative justice, access to information and access to courts. Unpublished thesis for LLD. Cape Town: UCT.

Muller E.A (2010) Framework for Wealth Transfer Taxation in South Africa. LLD thesis UP.

Arnold, B.J Opinion Prepared for the Commissioner for Inland Revenue. (Attached as Annexure H to the Affidavit of the Commissioner for Inland Revenue in an Application to the Constitutional Court, CCT/22/96).

Wang, L. (2010). A Review of the Determinants of Voluntary Compliance with Tax Laws by South African Taxpayers with Particular Reference to Businesses in South Africa. Unpublished MPhil: Taxation mini-dissertation, University of Pretoria.

**Books**

Currie, L & De Waal, J. (2005). The Bill of Rights Handbook Fifth Edition Juta and Company Ltd: Lasdowne.

Croome, B.J. (2008) Taxpayers rights in South Africa, Cape Town :Juta & Co Ltd.

Croome, B.J. (2010) Taxpayers' Rights in South Africa, Cape Town: Juta & Co Ltd.

Katz Commission Report (1994). Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa. Pretoria: Government Printer.

Currie, I & Klaaren, J (2010) The Promotion of Administrative Justice Act Benchbook. Cape Town: Siber Ink.

Hoexter, C. (2007) Administrative Law in South Africa. Cape Town: Juta & Co.

Hoexter, C. (2012). Administrative Law in South Africa. Second Edition. Cape Town: Juta & Co.

Devenish, G.E. (1999). A Commentary on the South African Bills of Rights. Durban: Butterworths.

Currie, I (2007) The Promotion of Administrative Justice Act: A commentary. Second Edition. Cape Town: Siber Ink

Horwath and Moas (2004). Taxpayer's Rights and Revenue Powers.

Silver M and Beneke C (2009). Deloitte Vat Handbook. Seventh edition Butterworths Durban.

#### **Journals and Notes (thesis)**

Croome, BJ Taxpayers' Rights in South Africa. An analysis and evaluation of the extent to which the power of the South African Revenue Service comply with the constitutional right to property, privacy, administrative justice, access to courts and access to information. Available at [upetd.up.ac.za/thesis/available/etd-09052012-174757/.../dissertation.pdf](http://upetd.up.ac.za/thesis/available/etd-09052012-174757/.../dissertation.pdf). Accessed 16 April 2013.

Goldswain, GK 'The application and constitutionality of the so-called 'reverse 'onus of proof provisions and presumptions in the Income Tax Act: the revenue's unfair advantage' (2009) 17 (2) *Meditari Accountancy Research*.

De Koker A, .et al. (2010) *Silke on the South African Income Tax Act*. Service 42. Durban Lexis Nexis

### Reports

Juta (2012). *Juta's Income Tax Commentary on the Income Tax Act 58 of 1962*. Available at <http://www.jutalaw.co.za/media/filestore/2012/04/st2012018.pdf> Cape Town: Juta (subscriber service UKZN).

Olivier L (2001) *Tax collection and the Bill of Rights TSAR*.

### Internet sources

SARS "Short Guide to the Tax Administration Act". Available at [http://www.jutalaw.co.za/media/filestore/2013/06/SARS\\_Guide\\_-\\_Short\\_Guide\\_to\\_the\\_Tax\\_Administration\\_Act\\_2011\\_-\\_External\\_Guide.pdf](http://www.jutalaw.co.za/media/filestore/2013/06/SARS_Guide_-_Short_Guide_to_the_Tax_Administration_Act_2011_-_External_Guide.pdf). Accessed 16 April 2013.

Editorial "SARS Interpretation Notes" (March 2003) *The Taxpayer* 45. Available at <http://www.sars.gov.za>. Accessed 16 April 2013.

South Africa: New Fiscal Legislation Bring Important Changes to Tax System. Available at <http://totallyexpat.com/news/south-africa-fiscal-legislation-bring-important-tax-system>. Accessed on the 15 April 2013.

The Tax Administration Act, Taxpayers' rights and SARS Audits. Available at [http://www.thesait.org.za/news/116517/The-Tax-Administration-Act-Taxpayers-rights and SARS Audits-The SA Institute of Tax Practitioners](http://www.thesait.org.za/news/116517/The-Tax-Administration-Act-Taxpayers-rights-and-SARS-Audits-The-SA-Institute-of-Tax-Practitioners). Accessed on 16 April 2013.

Budget Review 2013. Available at <http://www.treasury.gov.za/.../national%20budget/2013/review/FullReview.pdf>. Accessed 18 December 2013.

Coke E : The Institutes of the Laws of England, 1628 Available at: <http://www.phrases.org.uk/meanings/an-englishmans-home-is-his-castle.html>. Accessed 18 December 2013.

Editorial "Appointment of Taxpayer's Agent by SARS" (March 2005) *The Taxpayer*.

SARS Guide on Dispute Resolution. Available at <http://www.sars.gov.za/...Guides/LAPD-TAdm-G05%20Tax%20Guide%...> Accessed 18 December 2013.

Pato T and Spira J 2009 Relief For Taxpayers: "Pay Now, Argue Later" Rule Clarified. Available at [www.saica.co.za/News/NewsArticlesandPressmediareleases/tabid/695/itemid/1867/language/en-US/Default.aspx](http://www.saica.co.za/News/NewsArticlesandPressmediareleases/tabid/695/itemid/1867/language/en-US/Default.aspx). Accessed 18 December 2013.

Edward Nathan Sonnenbergs 2009 Pay Now, Argue Later. Available at [www.saica.co.za/integritax/2009/1795\\_Pay\\_now\\_argue\\_later.htm](http://www.saica.co.za/integritax/2009/1795_Pay_now_argue_later.htm). Accessed 18 December 2013.

Goldberg De Villiers 2012 Pay Now, Argue Later – SARS 1, Tax Payers 2. Available at [www.goldbergdevilliers.co.za/news\\_articles.asp?NewsID=13](http://www.goldbergdevilliers.co.za/news_articles.asp?NewsID=13). Accessed 18 December 2013.

Mukuwane L : Date Unknown "Pay Now, and Argue Later". Available at [www.belldewar.co.za/pay-now-and-argue-later](http://www.belldewar.co.za/pay-now-and-argue-later). Accessed 18 December 2013.



Daya L and Gers C 2011 SARS Clarifies the ... Available at [www.ens.co.za/news/news\\_article.asp?iID=187&iType=4](http://www.ens.co.za/news/news_article.asp?iID=187&iType=4). Accessed 18 December 2013.

Williams R C "Unresolved aspects of the 'Pay Now, Argue Later' rule" January 2012 Synopsis 4.

SARS Media Release 27. Available at [www.http://www.sars.gov.za/home.asp](http://www.sars.gov.za/home.asp). Accessed 18 December 2013.

Magolego M 2009 , "Pay Now, Argue Later"– SARS Shed Some Light for Taxpayer's Benefit. Available at [www.polity.org.za/article/pay-now-argue-later-sars-shed-some-light-for-the-taxpayers-benefit-2009-11-17](http://www.polity.org.za/article/pay-now-argue-later-sars-shed-some-light-for-the-taxpayers-benefit-2009-11-17). Accessed 18 December 2013.

Vanek M (2012) Big Tax Changes You Should be Aware Of. Available at <http://www.moneywebtax.co.za/moneywebtax/view/moneywebtax/en/page1/page34677?oid=71806&sn=Detail&pid=1>. Accessed 18 December 2013.

Vorster H : Self-help and the fiscus – *Metcash Trading Ltd v the Commissioner for SARS* (CC) 24-11-2000 (CCT3/00 Unreported)" January 2001 De Rebus 47-47.

Moodley M Date Unknown "Pay Now, Argue Later". Available at [nattymoodley.com/tax.htm](http://nattymoodley.com/tax.htm). Accessed 18 December 2013.

Hands off Cain 2012. Available at: <http://www.handsoffcain.info/bancadati/schedastato.php?idstato=16000210>. Accessed 18 December 2013.

Taxpayers' rights, the Tax Administration Act (TAA) and the Constitution. Available at <http://www.fanews.co.za/article/front-page-features/25/featured-story/1147/taxpayer-...> Accessed 18 December 2013.