UNIVERSITY OF THE WITWATERSRAND

FACULTY OF COMMERCE, LAW AND MANAGEMENT

BALANCING TAXPAYER CONFIDENTIALITY AND THE PUBLIC'S RIGHT TO KNOW

Dario Milo

A research report submitted to the Faculty of Commerce, Law and Management, University of the Witwatersrand, Johannesburg, in partial fulfilment of the requirements for the degree of Master of Commerce (specialising in Taxation)

Johannesburg, 2018

Abstract

This research report considers whether the provisions which protect taxpayer confidentiality in the Tax Administration Act (TAA) and the Promotion of Access to Information Act (PAIA) strike the appropriate constitutional balance between privacy and the efficiency of the tax system, and competing rights. These competing rights are freedom of expression, freedom of the media, access to information and open justice. These rights concern the public's right to know information of public interest.

The question that is examined is whether the taxpayer confidentiality provisions qualify as reasonable and justifiable limitations on the competing rights.

It is submitted that in relation to the prohibition against disclosure of taxpayer information (section 67(3) of the TAA), a public interest defence is required to ensure that the prohibition is constitutional. In relation to requests for taxpayer information in terms of PAIA, the public interest override should apply to section 35 as it does with all other grounds of refusal under PAIA, resulting in taxpayer information of public interest being made available to requesters. Finally, adjudications before the Tax Court should generally take place in public, in contrast to the position adopted in terms of section 124 of the TAA.

Keywords: Taxpayer confidentiality; Tax secrecy; Taxpayer secrecy; Tax privacy; Transparency; Openness; Tax returns; Promotion of Access to Information Act; freedom of expression; freedom of the media; open justice; Tax Court; history of tax confidentiality; rationales for tax confidentiality

Declaration

I declare that this research report is my own unaided work. It is submitted for the degree of Master of Commerce in the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination in any other university.

____

Dario Milo

Acknowledgments

I would like to thank Professor Alwyn de Koker, my supervisor, for his encouragement and support in my completion of this research report.

This research report necessitated me giving up many days, nights and weekends to complete the thinking, research and writing required to attempt to do justice to an important project such as this one. I thank my wife and children for their patience and my wife for her constant support and encouragement.

Table of contents

Chapter 1: Introduction

Jacques Pauw is one of South Africa's leading investigative journalists. His work for *Vrye Weekblad*, the famous anti-apartheid newspaper, included dangerous exposés of apartheid's death squads in the late 1980s. He has won CNN's African Journalist of the Year award twice and he is the author of six books, three of which have been shortlisted for major literary awards.[1] Yet because of some of the revelations contained in his latest book, *The President's Keepers: Those Keeping Zuma in Power and Out of Prison*, the South African Revenue Service ("SARS") claims that he is a criminal and is seeking a court order declaring him to be in breach of the Tax Administration Act (TAA).[2] SARS alleges that there are a number of chapters of the book "*which disclose taxpayer information ... in contravention of Chapter 6 of the TAA*",[3] and details the specific extracts which it is aggrieved by. Mr Pauw alleges for instance that former President Zuma was not tax compliant in various respects, including in relation to paying fringe benefit tax for the upgrade to his private residence at Nkandla, and declaring income received by him while president, of R1 million for at least four months from a Durban security company, Royal Security.[4] SARS seeks a declaratory order that Mr Pauw acted unlawfully by disclosing taxpayer information.[5] If indeed Mr Pauw acted unlawfully, he could face a criminal prosecution and jail time of a maximum of two years.[6]

The journalists at the amaBhungane Centre for Investigative Journalism are largely responsible for the award–winning and groundbreaking reportage known as the

---

[1] Cover page, Jacques Pauw *The President's Keepers: Those Keeping Zuma in Power and Out of Prison* (Cape Town: NB Publishers, 2017).
[2] Case No 22520/ 17 (High Court, Western Cape Division, Cape Town) issued on 8 December 2017. A copy of the court application is annexure A to the research report.
[3] Para 30.1 of (suspended) SARS Commissioner Thomas Moyane's founding affidavit (see annexure A).
[4] The specific extracts of the book alleged to contravene the TAA are documented in paragraphs 31 – 37 of the founding affidavit, attached as Annexure A. The case is ongoing.
[5] SARS also alleges that Mr Pauw disclosed confidential SARS information (see below), but for purposes of this research report, the focus is on taxpayer information.
[6] Section 236 of the TAA.

#GuptaLeaks, which has exposed the extent of the capture of the state by the Gupta family.[7] Like Mr Pauw, they have also incurred the wrath of SARS, which has issued a summons against the journalists and the *Mail & Guardian* newspaper (which published the relevant amaBhungane article) and where in addition to damages for defamation of R2 million,[8] SARS seeks a declaratory order that the journalists breached the TAA.[9] The article, entitled "*SARS Wars: Moyane's Empire Strikes Back*", claimed that the SARS Commissioner, Tom Moyane, had installed his second-in-command, Jonas Makwakwa, to control a key revenue -generating division dealing with large corporations and wealthy individuals (the Large Business Centre). The journalists alleged that the design was to stop enforcement actions targeting the ANC, former president Jacob Zuma (in relation to the upgrades to his Nkandla residence) and the Gupta family. The article also alleges that questions have been raised in relation to Mr Makwakwa's engagements with certain named taxpayers in reaching settlement agreements.

As with Mr Pauw, if amaBhungane breached the TAA, it could lead to criminal prosecution and a maximum two year jail term.

In both of these cases, SARS claims to be vindicating the main secrecy provision in the TAA, section 67(3), which prohibits the public disclosure of "*taxpayer information*", namely "*any information provided by a taxpayer report obtained by SARS in respect of the taxpayer, including biometric information.*"[10]

The next pillar of the tax secrecy regime is section 35 of the Promotion of Access to Information Act ("PAIA"),[11] which provides SARS with an immutable ground of refusal when requests are made under PAIA for access to taxpayer information.

These secrecy provisions are buttressed by the fact that significant disputes between taxpayers and SARS are adjudicated on appeal in the Tax Court,[12] but in terms of

---

[7] The #GuptaLeaks articles are collected on the amaBhungane website: http://www.amabhungane.co.za.
[8] In addition to damages of R1 million each claimed by the former Chief Officer: Business and Individual Taxes, Jonas Makwakwa, and the suspended commissioner, Thomas Moyane.
[9] Case No 10538/16 (High Court, Gauteng Local Division, Johannesburg), issued 29 March 2016. The particulars of claim and the article are attached as Annexure B. The case is ongoing.
[10] Section 67(1)(b) of the TAA. "*SARS confidential information*" (see below) may also not be disclosed.
[11] Act 1 of 2000.
[12] Section 107(1) of the TAA.

section 124(1) of the TAA, these adjudications are generally *in camera*, subject to the president of the Tax Court permitting access to third parties in exceptional circumstances.

This statutory secrecy in relation to taxpayer information and tax disputes forms one of the foundations of our system of taxation and that of many countries around the world. While there are some statutory exceptions to the secrecy regime, none of these exceptions permit disclosures by parties other than SARS and taxpayers themselves to the public at large. This research report considers whether, and if so, in what circumstances, a public disclosure exception and an open Tax Court may be constitutionally required to protect the public's right to know.

The structure of this report is as follows:

Chapter 2 discusses the relevant provisions which collectively create the regime of tax secrecy in the TAA and PAIA and explain in what circumstances they permit public disclosure.

In Chapter 3, the rationales for tax secrecy will be unpacked, with reference to both the modern and historic rationales for confidentiality of taxpayer information, being taxpayer privacy and the public policy consideration that privacy leads to compliance with tax laws.

Chapter 4 considers the countervailing rights and values at stake, and in particular the rights to freedom of expression and the media, access to information and open justice.

Chapter 5 considers how the optimal balance should be struck under our Constitution between the rights and values that lie at the heart of the secrecy regime, and the countervailing rights and values which would require maximum transparency and disclosure. Learning in foreign jurisdictions will also be considered in this chapter where relevant. It will ultimately be contended that writers such as Mr Pauw and the journalists at amaBhungane should be protected because their publications are manifestly made in the public interest. The tax secrecy regime should yield in these contexts to the demands of openness and transparency. In relation to access to the Tax Court, there is no justification for the default secrecy which the current provision mandates and it will be submitted that instead, a default access provision would more optimally balance the demands of open justice and taxpayer confidentiality, with checks and balances to protect confidential information where appropriate.

Chapter 6 draws conclusions as to the constitutionality of the tax secrecy regime in the TAA and PAIA and proposes how they ought to be changed to optimally balance tax secrecy with the right to freedom of expression, media freedom, access to information and open justice.

Chapter 2: The tax secrecy regime and its exceptions

2.1 Taxpayer information

There are various provisions in the TAA dealing with the confidentiality of taxpayer information: they are generally contained in chapter 6 of the TAA. It will be seen that while there are limited exceptions, the general rule is that public disclosure of taxpayer information by anyone other than the taxpayer itself is strictly prohibited.

The starting point is the definition of "*taxpayer information*", which is "*any information provided by a taxpayer or obtained by SARS in respect of the taxpayer, including biometric information*".[13]

In addition, confidentiality extends to "*SARS confidential information*", which is information relevant to the administration of a tax Act that falls within any one of 11 categories.[14] The vast majority of these categories is not directly related to taxpayer information, and is outside of the scope of this report. The category of "*SARS confidential information*" which could well also involve information concerning a taxpayer (and therefore of interest here) is:

> "*information related to the operations of SARS, including an opinion, advice, report, recommendation or an account of the consultation, discussion or deliberation that has occurred if -*
> *(i)* *the information was given, obtained or prepared by or for SARS for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law; and*
> (ii) *the disclosure of this information could reasonably be expected to frustrate the deliberative process in SARS*"[15]

---

[13] Section 67(1)(b) of the TAA.
[14] Section 68(1)(a)-(k) of the TAA. These categories include information that is subject to legal professional privilege, information supplied in confidence by a third party to SARS where the disclosure could reasonably be expected to prejudice the future supply of similar information; and information relating to the verification or audit selection procedure or method used by SARS which could reasonably be expected to jeopardise the effectiveness thereof.
[15] Section 68(1)(e).

2.2 Section 67(3) of the TAA and its exceptions

Section 67(3) lies at the heart of the secrecy regime: it states that "*in the event of the disclosure of SARS confidential information or taxpayer information contrary to this chapter, the person to whom it was so disclosed may not, in any manner, disclose, publish or make it known to any other person who is not a SARS official*". This is to be read with section 69(1) which states that "*A person who is a current or former SARS official must preserve the secrecy of taxpayer information and may not disclose taxpayer information to a person is not a SARS official*".

This prohibition is buttressed by section 236 of the TAA, which provides that a person who contravenes the provision commits a criminal offence and may be subjected to a fine or imprisonment of a maximum of two years.

On the face of it, section 67(3), read with section 69(1), means that any information which SARS has in its possession about a taxpayer, whether provided to it by the taxpayer or otherwise, cannot be published by any person who acquires possession of the information through an unauthorized disclosure. For example, if the journalists from amaBhungane or Jacques Pauw acquired the information about the taxpayers mentioned in their publications from a person who disclosed it to them contrary to the TAA, section 67(3) prohibits the journalists from "*disclos[ing], publish[ing] or mak[ing] [the taxpayer information] known*", including to the public at large. Indeed, it is this specific provision which is alleged to be breached by SARS in its litigation against Mr Pauw and amaBhungane described above.

In this research report, the prohibition in section 67(3) of the TAA, read with sections 69(1) and section 236, will be referred to as the "TAA disclosure prohibition".

It is important to consider the circumstances in which disclosures of taxpayer information are permitted under the TAA despite the prohibition in section 67(3).[16] As this analysis will make clear, the TAA permits disclosure in very limited circumstances, and generally only *by SARS* to specified government bodies which have a legal interest, duty or right to know the information.[17] Aside from a few very narrow exceptions which will be dealt with immediately below, there is no general permission by persons other than the taxpayer to disclose taxpayer information to journalists or to the public at large.

Section 67(5) of the TAA is one of the few provisions in the TAA which expressly contemplates public disclosure. It states as follows:

> "*The Commissioner may, for purposes of protecting the integrity and reputation of SARS as an organisation, and after giving the taxpayer at least 24 hours' notice, disclose taxpayer information to the extent necessary to counter or rebut false allegations or information disclosed by the taxpayer ... and published in the media or in any other manner*".

The express terms of this provision make it plain that public disclosure of taxpayer information by the Commissioner of SARS can only occur under this section if there is a need to protect the integrity and reputation of SARS to counter or rebut false allegations or information made public by the taxpayer concerned.

A recent example of the Commissioner invoking this provision is the media statement of SARS of 2 August 2013 which sought to rebut allegedly false public statements about the state of his tax affairs made by Mr Julius Malema, the leader of the opposition party, the Economic Freedom Fighters.[18] In the statement, SARS seeks to respond to what it claims were false allegations by Mr Malema that SARS had breached a compromise

---

[16] In respect of "*SARS confidential information*", section 68(3) of the TAA permits disclosure by a current or former SARS official only if the information is: public information; authorised by the Commissioner; authorised under any other Act which expressly provides for the disclosure; access has been granted under PAIA; or ordered by a High Court. Professor Pierre de Vos argues that, following the disclosures by Mr Pauw in *The President's Keepers*, the Commissioner of SARS should act in the public interest by invoking this provision to authorize the release of former President Zuma's tax information for the past 15 years. P de Vos 'President's Keepers: Why Tom Moyane might have a Legal Duty to Publish President Jacob Zuma's Tax Records' *Daily Maverick* 8 November 2017.

[17] A taxpayer, of course, can never be prevented from disclosing its own information.

[18] Available at http://www.sars.gov.za/Media/MediaReleases/Pages/2-August-2013---SARS-Media-Release-%E2%80%93-Responding-to-Mr-JS-Malema.aspx (last accessed 24 March 2018).

agreement with him in relation to the repayment of his outstanding tax liabilities due to political interference.[19]

Of course, section 67(5) of the TAA will not be applicable where it is a third party - someone other than the taxpayer or SARS, such as a journalist – who wishes to publicly disclose taxpayer information, as opposed to SARS itself.[20]

The only other circumstances in which it is conceivable that an authorised disclosure to a journalist or the public by a SARS official could occur is in terms of section 69(2)(c) and (d) of the TAA.[21] In terms of the former provision, a current or former SARS official may disclose taxpayer information by order of the High Court. It is therefore conceivable that a former or current SARS official armed with information of public interest – for instance, information which forms part of the disclosures in *The President's Keepers* about former President Zuma's alleged tax non-compliance - could apply to court for permission to disclose this information to the journalist and/or the public. However, in practice, such an application is extremely unlikely and has never occurred.

In terms of section 69(2)(d), taxpayer information that is public information can be disclosed by SARS.

Neither section 69(2)(c) nor section 69(2)(d) of the TAA provide comfort to journalists wishing to disclose taxpayer information of public interest to the public.

---

[19] An interesting sequel to the dispute was that another compromise agreement was reached between SARS and Mr Malema in 2014. In 2015, SARS alleged that it was not bound by the compromise agreement because Mr Malema had failed to make a full and frank disclosure to it. Mr Malema then sought a declaratory order against SARS that it is bound by the compromise agreement. This dispute was referred to an oral hearing see *Malema v South African Revenue Services* [2016] ZAGPPHC 263 (29 April 2016); *South African Revenue Services v Malema* [2017] ZAGPPHC 452 (6 February 2017) (SARS' application for leave to appeal refused).

[20] There is a possible indirect role for the media and the public in this context. If, for example, a public statement is made by former President Jacob Zuma that he is tax compliant and this is false, the SARS Commissioner should make a statement under section 67(5) refuting this. If the media eg calls upon the Commissioner to do so, based on the allegations in the public domain, and he declines, his decision could be challenged under the Promotion of Administrative Justice Act 3 of 2000. Cf *Maharaj and Others v MandG Centre for Investigative Journalism NPC and Others* 2018 (1) SA 471 (SCA) in relation to a challenge to a decision by the National Director of Public Prosecutions not to release information of public interest about a high profile public official.

[21] Section 69(2)(b) permits disclosure if it is permitted under any other Act which expressly provides for the disclosure of taxpayer information despite the provisions in Chapter 6 of the TAA. The author is not aware of any such legislation. The provisions of PAIA are discussed below.

If taxpayer information is already public (as contemplated by section 69(2)(d)), then there may be disclosure by SARS,[22] but the thrust of the enquiry here is the disclosure of taxpayer information which is not known to the public. For instance, until the publication of *The President's Keepers*, no one knew about the allegation that former President Jacob Zuma was the recipient of an undeclared salary from a security company for at least four months while he was president.

Section 69(2)(c) of the TAA contemplates that the court may be approached to authorize disclosure by SARS of taxpayer (and SARS confidential) information. Conceivably a current or former SARS official could himself apply to court for this permission, but this will be of no utility if a former or current SARS official wishes to remain anonymous in providing information to the media or the public. Thus amaBhungane's article ("*SARS Wars: Moyane's Empire Strikes Back*") attributes some of its allegations to "*[s]enior South African Revenue Service (SARS) insiders ...*" who are anonymous.[23] Similarly, in *The President's Keepers*, Mr Pauw refers to his SARS "*deep throats*", anonymous sources who provided him for instance with information about the tax affairs of former President Zuma.[24] The point is that none of these SARS sources would wish to bring a public application to court for permission to disclose information about taxpayers to the media, as this will necessarily mean they will lose anonymity.

The question is whether the media could themselves bring this application to court to authorize disclosure. Such an application must be brought by providing prior notice to SARS of at least 15 business days unless the court allows a shorter period on the basis of urgency.[25] SARS may oppose such an application on the basis that the disclosure may seriously prejudice the taxpayer concerned or prejudice a civil or criminal tax investigation by SARS.[26] And a court hearing the application may not grant an order

---

[22] And indeed, disclosure by any person should be permitted if the information is in the public domain, as confidentiality has been lost.
[23] amaBhungane (2016).
[24] Pauw (2017) at 106. See also at 111, 113 - 4, 115, 123, 127, 134, 136 and 138. There is legal precedent recognising the significance of protecting confidential sources from a media freedom perspective. See eg *Bosasa Operation (Pty) Ltd v Basson and another* 2013 (2) SA 570 (GSJ).
[25] Section 69(3).
[26] Section 69(4).

authorizing disclosure unless it is satisfied under section 69(5) of the TAA that the following circumstances of relevance apply:

> *"(a) the information cannot be obtained elsewhere;*
>
> *(b) the primary mechanisms for procuring evidence under an Act or rule of court will yield or yielded no or disappointing results;*
>
> *(c) the information is essential to the case. ..."*

It appears that what the legislature had in mind in enacting this provision is the typical scenario that arises in some common law cases (which are discussed in chapter 3) where a litigant – for instance, a party to divorce – applies to court to obtain taxpayer information about the other litigant, alleged to be relevant to the case, about the other litigant. It is, however, conceivable that the media could take advantage of this provision because, in compliance with the requirements in section 69(5), the information they seek cannot be obtained elsewhere, and the only other mechanism for procuring the "evidence" (in this case taxpayer information) would be a PAIA request, which would not bear any fruit in light of section 35 of PAIA (see below). The requirement that the information be "*essential to the case*" is more difficult to apply (as there is no "*case*" which the media need the information requested for) and this strongly suggests that the media are not the intended beneficiaries of these provisions.

The other remaining categories where SARS is entitled to disclose taxpayer information are very narrow and carefully regulated. Thus SARS current or former officials are entitled to disclose taxpayer information in the course of performance of duties under a tax Act or customs and excise legislation, including disclosure to the South African Police Service of the National Prosecuting Authority in relation to a tax offence, or as a witness in civil or criminal proceedings under a tax Act.[27]

Moreover, section 70 of the TAA makes provision for the disclosure by a senior SARS official of taxpayer information to various entities in specific circumstances, including to: a commission of enquiry established by the President where the commission is authorised by law to have access to the information;[28] the Governor of the South African

[27] Section 69(2)(a)(i) and (ii).
[28] Section 70(2)(c).

Reserve Bank;[29] the Financial Services Board;[30] and the Financial Intelligence Centre.[31] Section 71 states that if so ordered by a judge, a senior SARS official must disclose to the National Commissioner of the South African Police Service or the National Director of Public Prosecutions information that reveals evidence: that a (non-tax) offence may have been committed where a sentence of more than 5 years may be imposed; or that may be relevant to an investigation or prosecution of the offence; or of an imminent and serious public safety or environmental risk.[32]

A useful summary of the disclosures that are permitted under the TAA is provided by the *SARS Short Guide to the Tax Administration Act*:

> *"Disclosure provisions may... be justified where the public benefit derived from the lawful disclosure of relevant information outweighs concerns about individuals' privacy. It is, therefore, accepted, in South Africa and internationally, that exceptions to the obligation to protect taxpayer information are necessary because information collected by a revenue authority can be vital to other arms of government in performing their functions properly. Specifically, it is recognised that in the context of law enforcement—*
>
> > *• where certain taxpayer information is likely to be of value to a criminal investigation, it is in the public interest that the information is available to law enforcement agencies within certain limits; and*
> >
> > *• such limited disclosure will ensure that there is a potential for information flow in two directions, i.e. between a revenue authority and law enforcement agencies and* vice versa." [33] (emphasis added)

At all events, what is clear from this analysis is that statutory secrecy is the rule, there are very limited exceptions, and public disclosure of taxpayer information by anyone other than the taxpayer themselves or by SARS in response to such a disclosure (and then only if the information made public by the taxpayer is false), is not countenanced by the TAA.

---

[29] Section 70(3)(a).
[30] Section 70(3)(b).
[31] Section 70(3)(c).
[32] Section 71(1) and (2).
[33] *SARS Short Guide to the Tax Administration Act, 2011 (Act No. 28 of 2011)* (28 March 2018) at para 6.2.

What this means is that where the media receive taxpayer information from a former or current SARS official who is not authorised to make the disclosure (which would almost always be the case, in the absence of a court order obtained by the SARS official), on the face of it, the media would risk breaching section 67(3) of the TAA. The consequence of such a breach is serious: section 236 of the TAA provides that a person who contravenes this provision is guilty of an offence and may be subjected to a fine or imprisonment for a period not exceeding two years.

2.3 Section 35 of PAIA: Access to taxpayer information

The statutory secrecy which has been described above is buttressed by section 35(1) of PAIA. It states as follows:

> *"[T]he information officer of the South African Revenue Service...must refuse a request for access to a record of that Service if it contains information which was obtained or is held by that Service for the purposes of enforcing legislation concerning the collection of revenue..."*

This protection clearly covers a wide scope of information including taxpayer information, as defined in the TAA.[34]

The statutory protection for taxpayer information under PAIA is rendered even more potent if one appreciates that PAIA's public interest override - section 46 of PAIA - does not apply to taxpayer information. What this means is that if a request for access to information is made of SARS in respect of a particular taxpayer (say, for instance, former president Jacob Zuma), SARS must refuse this request in terms of section 35(1) of PAIA, and it is irrelevant if the requester can show that the information would reveal evidence of "*a substantial contravention of, or failure to comply with, the law*".[35]

[34] In the latter case, no question of a punishment for disclosure arises in relation to PAIA requests because the document would simply not be provided to the requester. In other words, the former disclosure prohibition contemplates the prohibition of the disclosure of information which eg has been leaked to the media; the latter disclosure prohibition would be triggered if eg the media make a request for taxpayer information under PAIA.
[35] Section 46(i) of PAIA.

This is in sharp contrast to all the other categories of information held by public bodies. For instance, even in relation to information which is legally privileged - a time-honoured and constitutionally recognized ground of confidentiality[36] that is protected in terms of section 40 of PAIA - the record must be made available if the public interest override applies.[37]

Section 35 of PAIA is referred to in this report as the "PAIA disclosure prohibition".

2.4 Section 124 of the TAA: Access to Tax Court hearings

The final level of protection for taxpayer information in the TAA relates to adjudications before the Tax Court.[38] This is referred to in this report as the "Tax Court access prohibition".

The TAA provides that a taxpayer who is aggrieved by an assessment may object to the assessment.[39] If SARS disallows the objection in whole or in part, the taxpayer may appeal to either the Tax Board or the Tax Court.[40] The Tax Court functions for all intents and purposes as ordinary courts do in South Africa: it is a statutorily created court of record,[41] and its procedures resemble that of the High Court - there is an exchange of pleadings, discovery of documentation, notices of expert witnesses, a pre-trial conference, subpoenas of witnesses the application of the ordinary rules of evidence, and closing argument is heard.[42] Tax court also hears various interlocutory and other applications.[43]

---

[36] See eg *Thint (Pty) Ltd v National Director of Public Prosecutions and others; Zuma v National Director of Public Prosecutions and others* 2009 (1) SA 1 (CC) at paras 183-5.
[37] Cf *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T).
[38] A Tax Court consists of a judge or acting judge of the High Court, who is the president of the Tax Court, an accountant selected from the panel of appointed members and a representative the commercial community selected from the panel of appointed members: section 118 of the TAA.
[39] Section 104(1) of the TAA.
[40] Section 107(1). This report focuses on the Tax Court but the same principles apply to the Tax Board : adjudications before the Tax Board (which deals with smaller disputes) are also closed to the public (see section 110(2) read with section 124 of the TAA).
[41] Section 116(2) of the TAA. The detailed procedures which govern proceedings before the Tax Court are set out in Part E of the rules promulgated under section 103 of the TAA (GN 550 *Government Gazette* 37819 of 11 July 2014).
[42] Part E of the Tax Court rules op cit.
[43] Part F of the Tax Court rules op cit.

Section 124 of the TAA states as follows:

> *"(1) The tax court sittings for purposes of hearing an appeal under section 107 are not public.*
>
> *(2) The president of the tax court may in exceptional circumstances, on request of any person, allow that person or any other person to attend the sitting but may do so only after taking into account any representations that the "appellant" and a senior SARS official ... appearing in support of the assessment or "decision", wishes to make on the request."*

Unlike other courts, then,[44] the general rule in terms of section 124 of the TAA is that the hearing before the Tax Court takes place *in camera*. Access by any person not involved in the litigation – for instance the media – is expressly only permitted in exceptional circumstances.

The confidentiality of taxpayer information therefore extends to adjudications where SARS and the taxpayer are in dispute as to whether tax is payable to the *fiscus*. While the rule against access is not a blanket one –in contrast to the position in the past under section 83(11) of the Income Tax Act[45] – the bar is set very high for third parties, such as members of the media, to obtain access to the proceedings: they must satisfy the president of the Tax Court that this is an exceptional case where access ought to be granted.

Of course, if the decision of the Tax Court is appealed to the full bench of the High Court or the Supreme Court of Appeal and/or the Constitutional Court,[46] and also where there is any judicial review of a decision of SARS which is not the subject of an appeal to the Tax Court (for instance a decision to refuse a request for suspension of payment of tax pending the objection and appeal process under section 164 of the TAA),[47] these

---

[44] See eg section 32 of the Superior Courts Act 10 of 2013; section 5 of the Magistrates' Court Act 32 of 1944 and section 152 of the Criminal Procedure Act 51 of 1977.

[45] Section 83(11) of the Income Tax Act 58 of 1962 ("Income Tax Act") provided as follows until its repeal by section 124 of the TAA: "*The sittings of the tax court shall not be public, and the court shall at any time on the application of the appellant exclude or require to withdraw from such sitting all or any persons whomsoever whose attendance is not necessary for the hearing of the appeal under consideration*".

[46] As is permitted in terms of section 133 of the TAA.

[47] Cf *Metcash Trading Ltd v Commissioner for the South African Revenue Service and another* 2001 (1) SA 1109 (CC) at para 42 (review of decision to not suspend the payment of tax in the High Court is competent).

court proceedings will generally take place in open court, and so the taxpayer loses the secrecy at this stage of the proceedings.[48]

But if the Tax Court case is never appealed or there is never a judicial review, and the dispute ends at the Tax Court stage, it is most unlikely that the public would be made aware of the details of the dispute, or indeed even that there is a dispute between SARS and the taxpayer.

This report refers to the TAA disclosure prohibition, the PAIA disclosure prohibition and the Tax Court access prohibition, as "the tax secrecy regime".

In the next chapter, the rationales for this extensive tax secrecy regime in respect of taxpayer information and disputes are explored.

---

[48] Beric Croome & Lynette Olivier *Tax Administration* 2nd edn (Juta & Co: Cape Town, 2015) 330.

Chapter 3 - Rationales for taxpayer secrecy

3.1 The historic protection of taxpayer information

Most jurisdictions around the world protect taxpayer confidentiality.[49] This was not always the case, however. For instance, when the first income tax was introduced in America in 1861 by Congress, this was closely followed a year later by legislative provisions ensuring public access to tax returns.

In sharp contrast to the position in the United States of America today, where not even President Donald Trump, for example, can be compelled to make public his tax returns,[50] in the past the *New York Times* published a regular front-page news story, *Our Internal Revenue*, listing income tax liabilities of prominent New Yorkers.[51]

While the position in relation to public access changed over various periods of history in the United States, the current confidentiality rules contained in section 6103 of the Internal Revenue Code – which is largely similar in structure to the South African rules – were crafted as a response to alleged abuses by President Richard Nixon who had sought to use tax return information of specific individuals for illegal ends.[52]

In contrast to the position in the United States, in the United Kingdom, tax secrecy has been a part of the legislative landscape since 1799; it was introduced by Prime Minister

[49] Croome & Olivier (2015) cite Sweden as a jurisdiction that "*would appear to be the only exception amongst open democratic societies that does not regard taxpayer information as confidential*" (at 199). For the position in some other jurisdictions, see eg SJ Troope & AL Young 'The Confidentiality of Tax Returns under Canadian Law' (1982) 27 McGill LJ 479; s 18 of the Commissioners for Revenue and Customs Act 2005 (United Kingdom); Division 355 of the Taxation Administration Act No 1 of 1953 (Australia); 26 US Code section 6103 (United States of America). See also Eleonor Kristoffersson, Michael Lang, Pasquale Pistone, Josef Schuch, Claus Staringer and Alfred Storck (eds) *Tax Secrecy and Tax Transparency: the Relevance of Confidentiality in Tax Law Part 1 and 2* (Peter Lang GmbH, 2013).
[50] Cf D Hemel 'Can New York Publish President Trump's State Tax Returns? (2017) 127 *Yale Law Journal Forum* 62. An NGO, Electronic Privacy Information Centre is litigating against the Internal Revenue Service (IRS) in terms of the United States' Freedom of Information Act to seek to access president Trump's tax returns from 2010 onwards. The NGO was unsuccessful before the US District Court for the District of Columbia and has appealed to the US Court of Appeals for the DC Circuit. See http://www.epic.org (last accessed 10 April 2018).
[51] JD Blank 'In Defense of Individual Tax Privacy' (2011) 61 *Emory LJ* 265 at 275.
[52] Blank (2011) op cit at 278-9.

William Pitt who had passed an income tax as a temporary war measure. His true rationale is said to have been the following:

> *"Pitt was interested in getting his tax accepted; it would not unless the bugbear of disclosure was out faced. So, secrecy became part of the income tax code."*[53]

In South Africa, the protection of taxpayer information has an even longer history than that of the United States of America: the first secrecy provision was introduced over a century ago in the Income Tax Act of 1914.[54]

The scope of the secrecy provisions has narrowed over the years, largely to afford SARS the power to disclose taxpayer information to other government bodies in limited circumstances,[55] such as those that are now codified in sections 69, 70 and 71 of the TAA.[56]

In one material respect, however, the scope of the secrecy provisions broadened over the years. Whereas previous iterations of the confidentiality provisions focused on the obligations of officials tasked with administering tax legislation to keep taxpayer information secret, in 1989, a new provision was introduced.[57] Section 4(2A) of the Income Tax Act, stated as follows:

> "*No person shall in any manner publish or make known to any other person (not being an officer carrying out his duties under the control, direction and supervision of the Commissioner) ... any information concerning the tax matters of a taxpayer or class of taxpayers.*"

The Explanatory Memorandum on the Income Tax Bill, 1989,[58] which introduced the new section 4(2A), did little to clarify the rationale behind the provision, merely stating that the new subsection "*supplements the existing provisions of section 4(1) which*

---

[53] Hubert Monroe *Intolerable Inquisition? Reflections on the Law of Tax* (London: Stevens & Sons, 1981) at 11, quoted in O Mbha 'Transparency and Accountability of Tax Administration in the UK: the Nature and Scope of Taxpayer Confidentiality' (2012) 2 *British Tax Review* 187 at 204.

[54] Act 28 of 1914. An excellent survey of the history of the secrecy provisions in our tax laws up to 2002 is provided in RG Bricout "The Preservation of Secrecy Provisions: Still Worth it?" 2002 *Acta Juridica* 247.

[55] Bricout (2002) 279-80.

[56] See § 2.2 above.

[57] By section 3(a) of Income Tax Act 70 of 1989. Thus prior to 1989, if a journalist in the position of Jacques Pauw or amaBhungane in the examples mentioned above were to be leaked and published taxpayer information, it could not be alleged that they breached the secrecy provisions then in force in the Income Tax Act, because there was no explicit offence that covered third party disclosure.

[58] Explanatory Memorandum on the Income Tax Bill, 1989 [W.P.2 - '89].

provide for secrecy to be observed by such officers in regard information coming to their knowledge in the course of their duties".[59] A contemporaneous editorial stated as follows:

> *"The exceptions notwithstanding, the scope of this section is far too wide and its nature draconian ... The general secrecy provisions were designed to prevent the revenue from disclosing information relating to the affairs of taxpayers. Section 4(2) extends secrecy provisions to the entire public and can place Revenue conduct above scrutiny. For these reasons it is submitted that the new secrecy provisions are wrong in principle and should not have been introduced into our law.*[60]

Section 4(2A) was the provision which was the closest equivalent to the current section 67(3) of the TAA, and indeed it was only replaced when the TAA came into force in 2012.

What has remained constant over this history in South Africa is the general principle which postulates that taxpayer information is private and this confidentiality must be upheld by SARS within narrow exceptions. It is a principle which is of almost universal acceptance, with most countries around the world protecting taxpayer information, albeit subject to limited statutory exceptions.

3.2 Pronouncements on taxpayer information secrecy

The reasons for tax confidentiality have frequently been articulated.

3.2.1 The OECD

A useful starting point is the guidance provided by the Organisation for Economic Co-Operation and Development ("OECD"). In the Practice Note prepared by the OECD Committee of Fiscal Affairs Forum on Tax Administration, the comment is made that a basic taxpayers' right is that "*the information available to the tax authorities on the*

---

59 Explanatory Memorandum (1989) at p 7

60 'Editorial" *The Taxpayer* (1989) 38 p 101 at 103. Cf "Editorial' *The Taxpayer* (2012) 61 at 141.

affairs of a taxpayer is confidential and will only be used for the purposes specified in tax legislation".[61] The OECD regards confidentiality of taxpayer information as:

> "*a fundamental cornerstone of tax systems. In order to have confidence in their tax system and comply with their obligations under the law, taxpayers need to have confidence that the often sensitive financial information is not disclosed inappropriately, whether intentionally or by accident.*"[62]

3.2.2 The Katz Commission

The Katz Commission[63] located the protection then to be found in section 4 of the Income Tax Act (the predecessor to the secrecy provisions in the TAA) as founded on the right to privacy, a right which has long existed at common law and was then constitutionally protected in terms of section 13 of the (interim) Constitution of the Republic of South Africa.[64] The Katz Commission considered that the narrow limitations to the right of privacy would probably be justified in terms of section 33 of the interim Constitution, which was then the limitations clause.[65] As the Katz Commission put it:

> "*The protection of secrecy is only breached where necessary to facilitate clearly acceptable objectives of a democratic government for preventing mischief which undermined the entire basis of the [Income Tax] Act, namely, evasion of tax*".[66]

In its Third Interim Report, the Katz Commission recommended that the basic rights of taxpayers be articulated in a Statement of Taxpayer Rights, which would include the right of privacy, i.e. that taxpayers are entitled to have the information which they supply for purposes of the compliance with tax laws used only for that purpose.[67]

---

[61] *Taxpayers' Rights and Obligations - Practice Note*, OECD Committee of Fiscal Affairs Forum on Tax Administration (1990) at para 12.
[62] *Keeping It Safe: the OECD Guide on the Protection of Confidentiality of Information Exchange for Tax Purposes* (2012), available at https://www.oecd.org/ctp/exchange-of-tax-information/keeping-it-safe-report.pdf (last accessed 25 March 2018) at 5.
[63] Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa (chaired by Prof Michael Katz) (1994) at para 6.3.23.
[64] The Constitution of the Republic of South Africa Act 200 of 1993 ("the interim Constitution").
[65] On the limitation of constitutional rights, see Chapter 5 below.
[66] Katz (1994) at para 6.3.23.
[67] Third Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa (chaired by Prof Michael Katz) (1997) at paragraph 12.2.20. The Katz Commission considered that

Ultimately, this led to the publication of the SARS Client Charter in 2005, which stated, inter alia, that taxpayers are entitled to expect SARS to respect their constitutional rights and privacy by "*keeping your private affairs strictly confidential*".[68]

3.2.3 The Davis Tax Committee

More recently, in September 2017, the Davis Tax Committee argued for the acceptance of an enforceable Taxpayer Bill of Rights, which would include the right to privacy and confidentiality.[69] The Committee stated as follows:

> "*This is a very crucial and fundamental right. The extent of the right is debatable. ... However, as a minimum, such information should be kept confidential by the tax authority.*" [70]

The Davis Committee reflected that the right to privacy and confidentiality is already respected in the TAA through the confidentiality provisions.[71]

3.2.4 The Explanatory Memorandum to the Tax Administration Bill

This focus on the privacy rationale for the protection of taxpayer information also emerges when regard is had to the Explanatory Memorandum accompanying the Tax Administration Bill, 2011.

The Explanatory Memorandum provides as follows:

> "*The information protection laws of most countries are based on the basic principle that personal information should not be used for purposes incompatible with the purpose for which it was collected. In South Africa a citizen's right to privacy is entrenched in a constitution that regulates the right to protection of privacy. Taxpayers have a right to expect that any information provided by them is treated in confidence and used for tax purposes only and that their affairs will not be disclosed to third parties, including other organs of state. ...*

---

the existing provisions of the legislation already catered for this right, but that it would be important to emphasise that in this Statement of Taxpayer Rights.

68 The SARS Client Charter, which is apparently being revised, is quoted in Report on Tax Administration (chaired by Judge Dennis Davis) (2017) at para 10.

69 The enforceability of the Taxpayer Bill of Rights would distinguish it from the SARS Client Charter: see Davis (2017) at para 11.

70 para 14.3.

71 Ibid at para 20.2.

> *However, in several developed jurisdictions it is recognised that it is important that tax information is available to other organs of state within proper limits. Specifically, it is recognised that in the context of law enforcement:*
>
> *(a) Where certain information is likely to be of value to a criminal investigation, it is in the public interest that tax information is available to law enforcement agencies within certain limits.*
>
> *(b) Such limited disclosure will ensure that there is a potential for information flow in two directions, i.e. between a revenue authority and law enforcement agencies and vice versa."*[72]

3.3 The right to privacy

It is not surprising that the pronouncements considered above consider the right to privacy to encompass taxpayer information. The right to privacy has long been protected under common law, well before our Constitution came into force.[73] This right extended at common law to protect financial information whether held by individuals or corporates.[74]

One of the leading privacy cases at common law is *Financial Mail (Pty) Ltd and others v Sage Holdings and another.*[75] Some companies within the Sage group of companies brought an interdict application against *The Financial Mail* in respect of an article it wished to publish about Sage's business activities. The article was based on a confidential company document and unlawfully intercepted phone calls, which had been leaked to the journalist. The first point resolved by the Appellate Division was that the right to privacy could be invoked by corporations as well as natural persons.[76] The court then considered the information sought to be published and how that information was sensitive and confidential concerning Sage's internal affairs and delicate business

---

[72] Memorandum accompanying the Tax Administration Bill, 2011 at para 2.2.6.
[73] Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution").
[74] J Sharman 'Privacy as roguery: Personal financial information in an age of Transparency' (2009) 87 *Public Administration* 1 at 2-3.
[75] 1993 (2) SA 451 (A).
[76] *Financial Mail* supra at 462.

negotiations; it was the kind of information that deserved protection from public disclosure.[77]

In *Janit and another v Motor Industry Fund Administrators (Pty) Ltd and another*,[78] a similar outcome was reached in relation to unlawful recordings of board meetings: Eksteen JA for the Appellate Division held that the *respondents "have a right to conduct the meetings of the board of directors in strict confidence that any matters affecting the company may be discussed freely and openly"*.[79]

Of course, while these cases concern corporate financial information, the protection of an individual's financial information – such as one's tax position – is an *a fortiori* case, and clearly capable of being protected by the right to privacy.[80] Indeed, it is instructive that "*information relating to [a person's] financial... history*" falls within the definition of "*personal information*" relating to natural persons and where applicable juristic persons, in terms of the Protection of Personal Information Act.[81]

Following the enactment of the interim constitution, a rich jurisprudence on the right to privacy has developed. One of the most significant decisions of the Constitutional Court on privacy generally, and specifically in a business context, is *Bernstein and others v Bester and Others NNO.*[82] Ackermann J for the Court stated the test as follows: "*[T]he scope of a person's privacy extends only to those aspects in regard to which a legitimate expectation of privacy can be harboured.*"[83] And:

---

[77] At 465. The position may have been different if the information was on a matter of public interest, which on the facts the court rejected.
[78] 1995 (4) SA 293 (A).
[79] *Janit* supra at 303.
[80] Cf *GS George Consultants and Investments (Pty) Ltd and others v Datasys (Pty) Ltd* 1988 (3) SA 726 (W) at 736; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at para 42; Mark Warby QC, Nicole Moreham & Iain Christie (eds) *The Law of Privacy and the Media* 2nd edn (Oxford University Press: Oxford) (2011) at 249.
[81] Act 4 of 2013 ("POPI"); definition of "personal information" in section 1. Apart from certain provisions such as those setting up the Information Regulator, POPI has not yet been brought into force. Once it is fully in force, it will be applicable to public bodies (such as SARS) as well as private bodies. The implications of POPI for SARS' handling of personal information of taxpayers is beyond the scope of this research report, but it suffices to say that many of the conditions for lawful processing of personal information would likely be met by SARS (for instance, section 11 of POPI permits processing to comply with an obligation imposed by law on the responsible party).
[82] 1996 (2) SA 751 (CC).
[83] *Bernstein* supra at para 75.

> *"[I]t is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. ... Privacy is acknowledged in the truly personal realm, but as a person moves intercommunal relations and activities such as business and social interaction, the scope of personal space rinks accordingly."*[84]

The Court in *Bernstein* also said the following about corporations and privacy:

> *"The establishment of a company as a vehicle for conducting business on the basis of limited liability is not a private matter. It draws on a legal framework endorsed by the community and operates through the mobilization of funds belonging to members of that community. Any person engaging in these activities should expect that the benefits inherent in this creature of statute, will have concomitant responsibilities. These include, amongst others, the statutory obligations of proper disclosure and accountability to shareholders."*[85]

In *Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and others*,[86] the Constitutional Court clarified this dictum. Privacy is a right "*which becomes more intense the closer it moves to the intimate personal sphere of the life of human beings, and less intense as it moves away from that core ... Juristic persons therefore do enjoy the right to privacy, although not to the same extent as natural persons.*"[87]

Thus the right to privacy resonates more strongly in the case of natural persons than juristic persons. The implication of this is that, as a matter of constitutional principle, taxpayer information about juristic persons may not be as robustly protected as taxpayer information about natural persons.

O'Regan J explained the significant protection for natural persons' privacy in another seminal Constitutional Court decision (in relation to medical information),[88] *NM and others v Smith and others (Freedom of Expression Institute as Amicus Curiae)*:

> *"The first reason for asserting the value of privacy ... lies in our constitutional understanding of what it means to be a human being. An implicit part of this aspect of privacy is the right to choose what personal information of ours is released into the public space. The more intimate*

---

[84] *Bernstein* supra at para 67.
[85] *Bernstein* supra at para 85.
[86] 2001 (1) SA 545 (CC).
[87] *Hyundai* supra at para 18.
[88] The facts of the *NM* case involved the public disclosure (in a biography of politician Patricia de Lille) of the HIV status of the three plaintiffs, who had not consented to such public disclosure.

> *that information, the more important it is in fostering privacy, dignity and autonomy that an individual makes the primary decision whether to release the information. That decision should not be made by others. ...*
>
> *Secondly, we value privacy as a necessary part of a democratic society and as a constraint on the power of the state."* [89]

Applying the general principles developed in the common law and following the enactment of the Constitution, it is clear that taxpayer information is in principle protected by the constitutional right to privacy.[90]

Other jurisdictions have also approached taxpayer secrecy through the prism of the right to privacy or confidentiality. In one of the most recent judgements in the United Kingdom in this context, *R (on the application of Ingenious Media Holdings plc and another) (Appellants) v Commissioners for Her Majesty's Revenue and Customs (Respondent)*,[91] the Supreme Court considered the scope of the duty of confidentiality owed by Her Majesty's Revenue and Customs (HMRC) in respect of the affairs of taxpayers.

The Permanent Secretary for Tax in HMRC gave an off the record interview to two financial journalists from *The Times* in which he imparted information about the tax activities of the founder of a company involved in certain film schemes (the companies controversially utilized certain tax relief provisions). The only reason given for the disclosure was that it was generally in HMRC's interests to try establish good relations with the financial press and the interview provided a way of emphasizing to the general public HMRC's views on elaborate tax avoidance schemes.[92]

The Supreme Court held that the statutory duty of confidentiality owed by HMRC to taxpayers "*is not something which sprang fresh from the mind of the legislative drafter.*" Instead:

> *"It is a well established principle of the law of confidentiality that where information of a personal confidential nature is obtained or received in the exercise of a legal power or in furtherance of a public duty, the recipient will in general owe a duty to the person from whom it was*

[89] *NM* supra at paras 131-2.
[90] See also Croome (2010) 165.
[91] [2016] 1 WLR 4164.
[92] At para 13.

> *received or to whom it relates not to use it for other purposes. ... HMRC's entitlement to receive and hold confidential information about a person or company's financial affairs is for the purpose of enabling it to assess and collect (pay) what is probably due from (or to) the tax payer."*[93]

The Supreme Court held that the justifications put forward by HMRC for speaking to the journalists could not possibly justify discussing the affairs of individual taxpayers with the media.[94] Moreover, the fact that the discussion had taken place "*off the record*" was legally irrelevant: "*the whole idea of HMRC officials supplying confidential information about individuals to the media on a non-attributable basis is, or should be, a matter of serious concern.*"[95]

3.4 The public policy rationale in encouraging frank communication to SARS

It is curious that while the Explanatory Memorandum on the TAA focuses on the protection of taxpayer privacy, *SARS' Short Guide to the Tax Administration Act* (2018) instead approaches the issue from a different angle: the public policy considerations agued to animate the secrecy provisions, which favour the *fiscus*. It states: "*The public policy in South Africa behind the secrecy provisions is to encourage taxpayers to register and make full and proper disclosure of the income.*"[96]

It is this public policy objective - that the purpose of taxpayer confidentiality is to encourage taxpayers to register for tax and make full disclosure, as opposed to justifying taxpayer secrecy from the perspective of the taxpayer, – that has been emphasized by our courts when considering the predecessor to section 67(3), i.e. the TAA disclosure prohibition. In the next section of the report, the leading cases concerning the predecessors to the secrecy regime contained in the TAA are examined.[97]

---

[93] *Ingenious* supra at para 17.
[94] At para 34.
[95] At para 35.
[96] SARS Short Guide (2018) at para 6.2.
[97] No cases have yet been reported in relation to the secrecy regime contained in the TAA. At the time the cases to which reference will be made below were litigated, the relevant formulation of section 4(1) of the Income Tax Act was as follows: *'Every person employed in carrying out the provisions of this Act*

None of the cases that examined the predecessors to the tax secrecy regime in the TAA concerned public disclosure of taxpayer information in the public interest, which is the central concern of this research report. However, some of the cases are useful in articulating the policy rationale assumed to underlie the secrecy regime.[98] Interestingly, as will be seen, in none of these cases is the protection of privacy of the taxpayer cited as a primary reason for the statutory secrecy; instead, the focus is on the benefits of the secrecy regime for the *fiscus*.

The leading appellate case on the issue is *Estate Dempers v Secretary for Inland Revenue*.[99] The question before the court concerned whether the proposed use by Inland Revenue of unreported judgements of the specialized tax court was prohibited by the tax secrecy provisions (then contained in section 4 of the Income Tax Act), in circumstances where the details of the dispute and the identities of the taxpayers would then become known in open court. Corbett JA (as he then was) for the Appellate Division endorsed the reasoning of one of the first court decisions to consider taxpayer confidentiality, *Silver v Silver*:[100]

> *"it is necessary for the purpose of administering the [Income Tax] Act that the fullest information be available to the Department of Inland Revenue; and that if such information is to be obtained there must be some guarantee as to secrecy. For this reason the courts do not readily grant orders, against the will of the taxpayer, for the disclosure of information from within the terms of sec[tion] 4".*[101]

---

shall preserve and aid in preserving secrecy with regard to all matters that may come to his knowledge in the performance of his duties in connection with those provisions, and shall not communicate any such matter to any person whatsoever other than the taxpayer concerned or his lawful representative nor suffer or permit any such person to have access to any records in the possession or custody of the Commissioner except in the performance of his duties under this Act or by order of a competent court' (emphasis added).

[98] A comprehensive survey of the case law is set out in Bricout (2002) 254 - 277; Croome & Olivier (2015) 195-199; and Jackie Arendse & Bob Williams *Silke on Tax Administration* (Durban: Lexis-Nexis Butterworths, loose-leaf, last updated 2017) at para 3.16. See also Beric Croome *Taxpayers' Rights in South Africa* (Juta & Co: Cape Town, 2010) at 157-162; Beric Croome & Lynette Olivier *Tax Administration* (Juta & Co: Cape Town, 2010) at 12-16.

[99] 1977 (3) SA 410 (A).

[100] 1937 NPD 129. *Silver v Silver* concerned a subpoena served on the Department of Inland Revenue which requested taxpayer information regarding one of the parties to a divorce action. The court refused to compel the Department to make the information available: "*It is obvious that if courts were to be in the habit of making orders requiring such information to be disclosed in suits between private individuals, there could be no guarantee at all as to secrecy, and the difficulties of the Department of Inland Revenue would be greatly increased*" (at 134).

[101] *Estate Dempers* supra at 420.

The Appellate Division held that making use of unreported tax judgements where the taxpayer has not consented to the use would breach the tax secrecy provisions.[102]

The next Appellate Division case to deal with the tax secrecy provision was *Ontvanger van Inkomste, Lebowa v De Meyer NO*.[103] The facts concerned a commission of inquiry into alleged maladministration in Lebowa, including the appropriation of the Lebowa revenue fund. The Receiver had been subpoenaed to give evidence at the commission but had objected on the grounds that the testimony would conflict with the provisions of section 4 of the Income Tax Act. The chairperson of the enquiry then applied to court for an order directing the receiver to make all records and documents as well as files of taxpayers available for purposes of the commission of inquiry. The Appellate Division quoted with approval the rationale for secrecy in the *Estate Dempers* case;[104] it would damage confidence between the taxpayers and the Department of Inland Revenue if the secrecy provisions did not apply, which could lead to a lack of disclosure of information and accordingly hamper the activities of the Department.[105]

In granting the application, the Appellate Division held that the judge in the lower court was entitled under section 4(1) of the Income Tax Act to weigh up against each other the conflicting interests of the strict preservation of secrecy and the interest of disclosure of otherwise confidential files for purpose of investigating corrupt practices and irregularities.[106] The judge had correctly concluded that the balance favoured the interests of clean administration and in that regard the fact that the commission would not be able to carry out its mandate without the files, and that there were sufficient guarantees to preserve secrecy, were relevant.[107]

Four later High Court decisions in relation to the predecessor to the disclosure prohibition are instructive.

---

[102] At 421.
[103] 1993 (4) SA 13 (A).
[104] *De Meyer NO* supra at 26.
[105] At 27.
[106] Ibid at 27.
[107] Idem.

The first, *Jeeva and others v Receiver of Revenue, Port Elizabeth, and Others*[108] is significant because the parties invoked the interim constitution, which had recently been passed into law. It was an application in terms of section 23 of the interim Constitution, the right of access to information.[109] An order was sought principally by directors and officers of two companies (which were in the process of being liquidated and where a section 417 enquiry had begun) against the Receiver of Revenue to provide the applicants with tax information related to the two companies. The Receiver had refused to make the information available on the grounds that the information was covered by taxpayer secrecy, as crystallized in section 4 of the Income Tax Act. Jones J held that the preservation of secrecy:

> *"is designed to enable a free flow of information between tax collector and the taxpayer. The purpose is to ensure that all tax due by the taxpayer is collected without the taxpayer running any risk of another government department or private individual been given access to information relating to his private affairs."*[110]

The court then cited with approval the function of taxpayer secrecy as explained in the leading text *Silke*:

> *"[It] is the function of section 4 to ensure that secrecy is rigorously maintained about the details of a taxpayers affairs and so encouraging him to be truthful in reporting those details to Inland Revenue, even if he cannot afford the disclosure to his personal business associates, competitors or even some other department of the Government."*[111]

On the facts of the case, however, the court held that the information should be disclosed because the directors and officers were the ones who gave the information to the Receiver in the first place, the information concerned themselves in conducting the affairs of the two companies, and there was no realistic possibility of information coming to the knowledge of third parties.[112]

---

[108] 1995 (2) SA 433 (SE).
[109] Access to information is now regulated by section 32 of the Constitution and the provisions of PAIA.
[110] *Jeeva* supra at 458.
[111] Quoting *Silke on South African Income Tax* (11th edition) Vol 2 at para 18.2. See also *Sackstein NO v South African Revenue Service and others* 2000 (2) SA 250 (SE) at 257.
[112] *Jeeva* supra at 458-9.

The next High Court case is *Welz and another v Hall and others*.[113] The context of the case was a defamation action brought by Mr Hall against *Nosweek*. The magazine had published an article alleging amongst other things that Mr Hall had unlawfully evaded payment of tax. Against this context, there was an application by *Noseweek* in terms of section 4(1) of the Income Tax Act to permit the Receiver of Revenue to provide the magazine with information about the tax affairs of Mr Hall. Conradie J (as he then was) had this to say about the policy motivation for taxpayer secrecy:

> *"It is well-established law that a Court will not lightly direct an official of the Revenue to divulge information imparted to him by a taxpayer. One reason for this reluctance is found in public policy. The Legislature has thought it desirable to encourage full disclosure of their affairs by taxpayers, even by those who carry on illegal trades or have illegally come by amounts qualifying as gross income. This object might easily be defeated ... if orders were freely made for disclosure of those communications."*[114]

Conradie J refused the application. He set out policy guidelines of relevance to preserving taxpayer secrecy, including the following.

(a) A court will be most reluctant to order disclosure of information if that information can be obtained elsewhere;

(b) the information sought from the *fiscus* must be central to the applicant's case;

(c) the attitude of the Receiver does not necessarily dictate the outcome of the case; and

(d) the court will attempt to balance the competing interests of the litigants and the Revenue, and each party is likely to achieve less than he might have desired.[115]

The third High Court case that must be considered is *Hyundai Motor Distributors (Pty) Ltd and others v Smit and others*.[116] The main applicants were companies carrying on

---

[113] 1996 (4) SA 1073 (C).
[114] *Hall* supra at 1076.
[115] At 1077-8. Conradie J welcomed the abandonment of reliance on section 4(2A) of the Income Tax Act (see above), commenting that the section (which punishes, it will be recalled, third party disclosures) "*is an extraordinary one ... I cannot think what the Legislature could have wanted to achieve by this section*" (at 1084).

the business of manufacturing and distributing Hyundai and Volvo cars. Search warrants were issued by the National Prosecuting Authority and the applicants sought the reviewing and setting aside of the warrants, inter alia on the basis that they were obtained from information obtained unlawfully from the Commissioner for Inland Revenue in contravention of sections 4(1) and 4(2A) of the Income Tax Act. Of particular importance to the current research problem, the court held that the National Directorate of Public Prosecutions had committed an offence under section 4(2A) of the Income Tax Act in publishing information to journalists about the taxpayers which it had unlawfully received from the Commissioner's office.[117]

What these cases illustrate is that courts accept a larger public policy rationale for the protection of taxpayer confidentiality - that it facilitates or at least encourages tax compliance. The theory is that if a taxpayer knows that its financial information is not to be disclosed by SARS to others, whether competitors, curious members of the public, or other government agencies without a duty or interest in knowing, taxpayers will be incentivised to declare their financial position truthfully. As the United States National Treasury has put it, in the absence of confidentiality:

> *"Taxpayers who view the IRS as a resource for a variety of other interests will be less inclined to voluntarily turn over sensitive financial information out of fear of where it will ultimately land."*[118]

However, as the scholarly literature reveals, *"the role of privacy and its effect on a taxpayer's willingness to comply has received little direct attention"*.[119] Indeed, there is a respectable and growing body of academic work which cogently argues the opposite

---

[116] 2000 (2) SA 934 (T). The Constitutional Court overturned aspects of the High Court's order but the appeal did not concern those parts of the judgement dealing with the secrecy provisions in the tax legislation: *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and others* 2001 (1) SA 545 (CC).

[117] *Hyundai* supra at 970. The court shared Conradie J's view in *Hall* (supra) as to the complexity of section 4(2A) (at 956 of the *Hyundai* judgment), but nevertheless issued an order based on the provision, stating that "*despite their obscurity these provisions oblige the [respondents] to protect the secrecy of all information relating to the applicants tax and VAT affairs*" (at 972).

[118] Office of Tax Policy: Department of the Treasury *Report to Congress on Scope and Use of Taxpayer Confidentiality and Disclosure Provisions: Vol 1: Study of General Provisions* (October 2000) at p 34.

[119] SW Mazza "Taxpayer Privacy and Tax Compliance" (2003) 51 *U Kansas LR* 1065, 1068.

proposition: i.e. that "*by shining sunlight on individuals tax returns, the government may encourage taxpayers to report their taxes honestly*".[120]

It is also of some significance that the courts in England, while treating taxpayer confidentiality as a matter of clear public interest, appear to have abandoned the argument that confidentiality encourages frankness in the disclosure of one's tax affairs [121] Lord Justice Leggatt in *Lonrho plc v Al Fayed (No 4)* put the point persuasively:

> "*Apart from his own honest instincts, a person makes a truthful tax return not on the faith that the Inland Revenue will keep it confidential but because if he gives false information or conceals any part of his income, he can be prosecuted.*"[122]

Moreover, as New Zealand's Inland Revenue recently noted in discussing the rationales for taxpayer confidentiality:

> "*A further consideration is changing public expectations. In the international, revenue – specific context, there is a significant increase in the information shared, and increasing public expectation that information is available.*"[123]

The trend towards greater tax transparency, particularly at the international level as between regulators and banking institutions (spearheaded by the OECD),[124] suggests that it is transparency as opposed to confidentiality which allows regulators around the world to ensure compliance with tax laws: *"Tax transparency and exchange of*

---

[120] Blank (2011) at 282-3, summarising and criticising the views of various proponents of public disclosure. See also JD Blank 'The Timing of Tax Transparency' (2017) 90 *S Cal LR* 449, 461-8; P Schwartz 'The Future of Tax Privacy' (2008) 61 *National Tax J* 883 at 883 - 892 (summarising the debates for and against access to taxpayer information).

[121] *Lonrho Plc v Al-Fayed (No.4)* [1994] QB 775 (CA) at 787, accepting Lord Reid's observation in *Conway v Rimmer* [1968] AC 910 at 946 : "*In* Re Joseph Hargreaves Ltd. *[1900] 1 Ch 347 the Inland Revenue objected to producing documents submitted to them in connection with income tax. That seems to me to have nothing to do with candour. If the state insists on a man disclosing his private affairs for a particular purpose it requires a very strong case to justify that disclosure being used for other purposes*" (emphasis added).

[122] *Lonrho* supra at 792.

[123] New Zealand's Inland Revenue Inland Revenue Discussion Document *Making Tax Simpler – Proposals for Modernising the Tax Administration Act* (2016) ch 2.

[124] See eg the OECD's *Tax Transparency 2017 Report on Progress* (Global Forum on Transparency and Exchange of Information for Tax Purposes).

information are at the heart of the global effort aimed at tackling tax evasion and compliance", the OECD boldly declares in its 2017 Tax Transparency Report.[125]

This approach - that it is transparency that provides the link with compliance – directly contradicts the proposition endorsed by the cases discussed above that taxpayer confidentiality is an integral part of the functioning of an efficient tax system.[126]

Professor Blank - one of the leading scholars on tax privacy internationally – argues for a different defence of individual tax privacy that has not yet received any traction in the US courts: that privacy enables the government to engage in strategic publicity, by publicizing specific examples of its tax enforcement strengths but not its weaknesses. It is argued by Professor Blank that this function may cause individual taxpayers to develop inflated perceptions of the government's ability to detect tax offences and punish perpetrators, which will in turn encourage voluntary compliance.[127]

The difficulty with Professor Blank's justification is that the public policy rationale he advocates for tax privacy essentially permits and encourages a deception on the public: that the revenue authority is more capable than it actually is at tax enforcement and therefore there is an incentive to comply. This type of deception would not be countenanced in our democracy and, it is submitted, falls to be rejected as a viable justification of taxpayer privacy.

However, where the literature in relation to the rationales for taxpayer privacy is valuable is its teaching that the repeated public policy justification that privacy leads to tax compliance must not necessarily be accepted without further analysis and empirical evidence, as the South African courts have done (and as the English courts, for example, have rejected).

---

[125] Executive Summary op cit at p 2. For a discussion of the continued importance of confidentiality safeguards in relation to the international exchange of information, see V Etsebeth 'The International Exchange of Tax Information: Realising the Promise, Managing the Threat' 2010 *Stell LR* 45.

[126] See the discussion on the significance of transparency to tax compliance both domestically and internationally by LCB Altafulla 'The Link between Tax Secrecy and Tax Transparency' in Petruzzi & Spies (2014) at 423 et seq.

[127] Blank (2011) at 264-5. See also Mazza (2003) 1076; cf the somewhat different approach in relation to corporations advocated by Blank (2014); see also D Kamin, JD Blank, A Christians, RS Avi-Yonah, PA Barnes 'Should Corporate Tax Returns Be Public?' (2014) 11 *New York U J L & Bus* 159.

This is particularly instructive in relation to any constitutional challenge to the tax secrecy regime, because it would fall to the government as the defender of the tax secrecy regime to justify the limitation on other fundamental rights (considered in Chapter 5 below). At the very least, it is submitted that the rationale for taxpayer confidentiality based on a taxpayer's fundamental right to privacy is a more powerful rationale in principle than the rationale articulated by our courts to date, that of promoting tax compliance.

3.5 Conclusion on history and rationales for taxpayer secrecy

The jurisprudence and other pronouncements that have been considered above in relation to the tax secrecy provisions illustrate a number of fundamental principles:

(a) First, the protection of the confidentiality of taxpayer information is a cornerstone of South Africa's tax system and that of most other countries around the world;

(b) Secondly, there appear to be two primary objectives underlying this protection. The first is the taxpayer's right to privacy. This has been a common law right for centuries, and is now given constitutional protection in section 14 of the Constitution. The second objective - which the case law articulates –is the public policy of facilitating taxpayers' full disclosure of information to SARS, so that it is able to ensure that all taxes due are collected. The first objective protects the taxpayer; the second protects the *fiscus*. These dual rationales are crisply articulated by the Minister of Finance[128] in his plea to the conditional counter – claim by the amaBhungane journalists and the Mail & Guardian in amaBhungane (2016), which challenges the constitutionality of section 67(3):

> "*Section 67(3) of the TAA, read with the definition of "taxpayer information", protects the right to privacy of taxpayers [and], read with the definition of "SARS confidential information", protects the legitimate governmental purpose of effective revenue collection by [SARS].*"[129]

[128] Then Minister Pravin Gordhan.
[129] Third party's' Plea to Defendants' Conditional Claim in Reconvention, 24 June 2016, at paras 5 and 6.

(c) Thirdly, the fact that a request by a third party for taxpayer information under PAIA will fail, and that as a general principle the Tax Court hears disputes between taxpayers and SARS in private are regarded as a logical consequence of the protection of taxpayer information provided to SARS. Therefore the rationales for the privacy of the adjudication proceedings are the same as the rationales that apply to the protection of taxpayer information;[130]

(d) Fourthly, despite the formidable protection that is afforded to the confidentiality of taxpayer information, recognized exceptions exist – many of which have now been codified in the TAA. In addition, courts are able to determine whether an exception to taxpayer secrecy should be permitted within the confines of the TAA, which they do by balancing the competing public policy considerations on a fact-specific basis; and

(e) Fourthly, and critically for our purposes, none of the cases have concerned the position of taxpayer information being sought to be distributed to the public at large, for instance by the media. All of the cases have concerned nuanced circumstances in which a limited disclosure of taxpayer information was being sought: for example, a spouse in the context of divorce proceedings;[131] a defendant in the context of defamation proceedings;[132] directors and officers in preparing for a section 417 enquiry;[133] and the provision of information to a commission of enquiry into maladministration and corruption.[134] The courts have never considered an application to permit disclosure to the media for purposes of it disclosing the information to the public, still less has there been any prosecution of the media for breaching either section 67(3) of the TAA, or its predecessor, section 4(2A) of the Income Tax Act.

In the next chapter, the countervailing rights and principles which potentially clash with the tax secrecy regime are explored.

---

[130] *Estate Dempers* supra.
[131] *Silver v Silver* supra.
[132] *Hall* supra.
[133] *Jeeva* supra.
[134] *De Meyer NO* supra.

Chapter 4 - The public's right to know

In the previous two chapters of this research report, the tax secrecy regime was described and contextualized. These provisions give effect to taxpayers' right to privacy and are argued to have the public policy rationale of encouraging frank and complete disclosure of information to SARS.

However, on the face of it, the tax secrecy regime may fall foul of other fundamental pillars of our constitutional democracy.

Our democracy is founded on values which include "*accountability, responsiveness and openness*".[135] In terms of section 32(1) of the Constitution, everyone has the right of access to any information held by the state. The national legislation enacted pursuant to section 32(2) of the Constitution is PAIA; its preamble boldly proclaims that it has been enacted to "*foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information*".

Section 16(1) of the Constitution guarantees to everyone the right to freedom of expression, including freedom of the press and other media[136] and the freedom to receive or impart information or ideas.[137]

And the constitutional principle of open justice emerges from "*a cluster ... of related constitutional rights which include, in particular, freedom of expression and the right to a public trial, and which may be termed the right to open justice*".[138]

Sections 67(3) and 69(1) of the TAA (the TAA disclosure prohibition), section 35 of PAIA (the PAIA disclosure prohibition) and section 124 of the TAA (the Tax Court access prohibition), clearly restrict the right to freedom of expression in section 16(1) of the Constitution; the right of access to information in section 32(1) of the Constitution; and, in the case of the closed Tax Court, the constitutional principle of open justice. It is

---

[135] Section 1 of the Constitution.
[136] Section 16(1)(a).
[137] Section 16(1)(b).
[138] *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services; Freedom of Expression Institute Intervening as Amicus Curiae In re: Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC) at para 39.

the task of Chapter 5 to consider how to best reconcile the competing rights. However, the purpose of this chapter is to analyze the rationales for the competing rights, in order to properly inform the exercise of balancing the rights in the following chapter.

4.1 The right to freedom of expression and freedom of the media

Section 16 of the Constitution provides as follows:

> "*(1) Everyone has the right to freedom of expression, which includes —*
>
> *(a) freedom of the press and other media;*
>
> *(b) freedom to receive or impart information or ideas;*
>
> *(c) freedom of artistic creativity; and*
>
> *(d) academic freedom and freedom of scientific research.*
>
> *(2) The right in subsection (1) does not extend to —*
>
> *(a) propaganda for war;*
>
> *(b) incitement of imminent violence; and*
>
> *(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.*"

Our Constitution is structured such that our courts are bound to give a broad interpretation to what constitutes "*expression*": provided the speech in question does not constitute propaganda for war, incitement of imminent violence or hate speech (i.e. the excluded categories of speech in section 16(2) of the Constitution), the speech is protected as a point of departure.[139] This methodology is best illustrated by the *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and others* decision,[140] which concerned the criminalization of child pornography. Langa DCJ for the Constitutional Court stated that:

> "*Section 16(1) expressly protects the freedom of expression in a manner that does not warrant a narrow reading .... The criminalisation of the creation, production, importation, distribution and possession of the*

[139] *Laugh-It-Off Promotions CC v SAB International (Finance) BV t/a Sabmark International and another* 2006 (1) SA 144 (CC) at para 47.
[140] 2004 (1) SA 406 (CC).

> *material that falls within the definition of child pornography... limits the right to freedom of expression. Whether the limitation is justifiable remains to be considered under a limitation analysis*."[141]

As a point of departure, it follows that even child pornography falls within the broad ambit of the right to "*freedom of expression*"; the focus on the value of the speech in issue relative to other competing societal values is considered at the next stage, the limitations analysis.[142]

Once expression is protected, it falls to the limitations clause in section 36 of the Constitution to interrogate whether the limitation on freedom of expression is justifiable [143] Unlike the position in the United States, our courts have frequently reminded us that no right, including the right to freedom of expression, is absolute or always trumps competing rights. Kriegler J may have put it best on this score in *S v Mamabolo*[144] when he commented that "*with us it [freedom of expression] is not a pre-eminent freedom ranking above all others. It is not even unqualified right. ... [F]reedom of expression does not enjoy superior status in our law*".[145]

What this means as a point of departure is that the freedom to publish news stories and books, for example, which contain taxpayer information would as a departure point be protected by section 16(1) of the Constitution. Because section 67(3) read with the other provisions in Chapter 6 of the TAA criminalizes the publication of taxpayer information, it necessarily restricts the right to freedom of expression (and the right to freedom of the media, where it is the media that wishes to make such publication).[146] This, of course, is not the end of the enquiry, as the limitation may well be reasonable and justifiable, which is the topic chapter 5 concerns itself with.

Just as with the right to privacy which lies at the heart of the taxpayer confidentiality provisions, the rationales for freedom of expression are important to articulate. All of

---

[141] *De Reuck* (supra) at paras 48 and 50.
[142] For a comprehensive discussion of the manner in which the two-stage approach to rights adjudication works under our constitution, see S Woolman and H Botha 'Limitations' in Woolman et al (eds) (2011) ch 34.
[143] See chapter 5 below.
[144] 2001 (3) SA 409 (CC).
[145] *Mamabolo* supra at para 41.
[146] See below for discussion of the rationale for media freedom.

the three dominant rationales in free-speech literature and jurisprudence - the search for truth, the importance of free speech to our democracy, and the value of human autonomy and dignity - have been accepted by our Constitutional Court. In an early freedom of expression case, *South African National Defence Union v Minister of Defence*,[147] the Court held as follows, in terms that have been repeatedly endorsed:[148]

> *"Freedom of expression lies at the heart of democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally."*[149]

The media's critical role in our democracy has also frequently been pronounced upon. In *Khumalo v Holomisa*, the place of the media in a democracy was eloquently stated to by O'Regan J for a unanimous court):

> *"The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate. ... The media thus rely on freedom of expression and must foster it. In this sense they are both bearers of rights and bearers of constitutional obligations in relation to freedom of expression."*[150]

As the Supreme Court of Appeal recently had occasion to reiterate, '*[o]ur courts recognise that the media play a key role in a democratic society in ensuring that members of the public are informed about issues that are in the public interest.*' [151] And the importance of media freedom is not just or even primarily for the benefit of the media, but for the benefit of the public.[152] Therefore, if our law intervenes to protect the right of Jacques Pauw to publish taxpayer information of public interest (for instance

---

[147] 1999 (4) SA 469 (CC).
[148] See eg *Democratic Alliance v African National Congress and Another* 2015 (2) SA 232 (CC) at para 122.
[149] *Mamabolo* (supra) at para 7.
[150] *Khumalo v Holomisa* 2002 (5) SA 401 (CC) at paras 22-3; *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) at para 54 ("*[o]ne might even consider the press to be a public sentinel*").
[151] *Maharaj and Others v MandG Centre for Investigative Journalism NPC and Others* 2018 (1) SA 471 (SCA) at para 27.
[152] *Van Breda v Media 24 and Others* 2017 (5) SA 533 (SCA) at para 10.

concerning former President Jacob Zuma), it does so not primarily to protect the right of a journalist or of the media, but to protect the right of the public to receive information on matters of public interest.

4.2 The right of access to information

Section 32(1) of the Constitution protects the right of access to information. It is however the national legislation enacted to give effect to the right, PAIA, that must be the principal focus when a citizen or journalist seeks access to information of a public body (such as SARS). This approach is based on the constitutional principle of subsidiarity, which holds that allowing a litigant to rely directly on a fundamental right – such as section 32 – rather than on legislation enacted in terms of the Constitution to give effect to that right, defeats the purpose of the Constitution.[153] An implication of this principle is that if PAIA contains shortcomings, a litigant must challenge PAIA directly.[154]

The importance of the right of access to information has frequently been discussed in our courts.[155] The Constitutional Court has had occasion to state that it is access to information that gives effect to the founding values of our democracy:

> *"It is impossible to hold accountable a government that operates in secrecy. The right of access to information is also crucial to the realisation of other rights in the Bill of Rights ... For without access information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined."*[156]

The Constitutional Court has also described the importance of access to information to the media:

> "*[A]ccess to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas. As the present case illustrates, Mr Brümmer, a journalist, requires information in order to report accurately on the story that he is*

---

[153] *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) at para 160.
[154] *My Vote Counts* at para 163.
[155] See generally Ronee M Robinson *Access to Information* (Lexis-Nexis Butterworths : Durban, 2016).
[156] *President of the Republic of South Africa and Others v M & G Media Ltd* 2012 (2) SA 50 (CC) at para 10.

> *writing. The role of the media in a democratic society cannot be gainsaid. Its role includes informing the public about how our government is run, and this information may very well have a bearing on elections. The media therefore has a significant influence in a democratic state. This carries with it the responsibility to report accurately. The consequences of inaccurate reporting may be devastating. Access to information is crucial to accurate reporting and thus to imparting accurate information to the public."*[157]

And PAIA itself proclaims in its preamble that it is enacted in order to:

> *"foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information;*
>
> *actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights".*[158]

As indicated above, section 35 of PAIA has the effect that any request made of SARS for taxpayer information must be refused. There is no public interest override that applies, as is the case with all the other grounds of refusal in PAIA.[159] To the extent that section 35 of PAIA coupled with the absence of a public interest override does not reasonably and justifiably limit the constitutional right of access to information, this provision would have to be challenged as not being constitutionally compliant. This issue is canvassed in chapter 5 below.

4.3 The principle of open justice

The principle of accountability of public authorities is fundamental to our Constitution. It is listed in section 1(d) as a founding value of the Constitution. The Constitutional Court has ruled:

> *"Accountability of those exercising public power is one of the founding values of our Constitution and its importance is repeatedly asserted in the Constitution.... The value of accountability is asserted not only for the State, but also for all organs of State and public enterprises."*[160]

---

[157] *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) at para 63.
[158] Preamble to PAIA.
[159] For discussion of the PAIA public interest override, see chapter 5 below.
[160] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at paras 73-76.

SARS is an organ of state in terms of section 239 of the Constitution.[161] It exercises public power and is part of the public administration.

Section 195(1) of the Constitution sets out the "Basic values and principles governing public administration":

> *"(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles: ....*
>
> *(f) Public administration must be accountable.*
>
> *(g) Transparency must be fostered by providing the public with timely, accessible and accurate information...."*

Open justice, the idea that justice should not only be done but should be seen to be done,[162] flows from this principle of accountability of public bodies (which of course includes the courts). It is of ancient lineage. Indeed, "*[s]ince time immemorial and in many divergent cultures it has been accepted that the business of adjudication concerns not only the immediate litigants but is a matter of public concern which, for its credibility, is done in the open we all can see.*"[163]

The Constitutional Court has in essence clothed the principle of open justice with the status of a constitutional right. In *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: in re Masetlha v President of the Republic of South Africa and Another*,[164] Moseneke DCJ for the majority of the Constitutional Court held as follows:

> *"There exists a cluster or, if you will, umbrella of related constitutional rights which include, in particular, freedom of expression and the right to a public trial, and which may be termed the right to open justice. The constitutional imperative of dispensing justice in the open is captured in several provisions of the Bill of Rights. First, section 16(1)(a) and (b) provides in relevant part that everyone has the right to freedom of expression, which includes freedom of the press and other media as well as freedom to receive and impart information or ideas. Section 34 does not only protect the right of access to courts but also commands that*

---

[161] See also section 2 of the South African Revenue Service Act 34 of 1997, which establishes SARS "*as an organ of state within the public administration*".

[162] Jeremy Bentham wrote "*Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial.*' (Quoted in *City of Cape Town v South African National Roads Authority Ltd and Others* 2015 (3) SA 386 (SCA) at para 16).

[163] *Mamabolo* (supra) at para 29.

[164] 2008 (5) SA 31 (CC).

> *courts deliberate in a public hearing. This guarantee of openness in judicial proceedings is again found in section 35(3)(c) which entitles every accused person to a public trial before an ordinary court. ...*
>
> *This systemic requirement of openness in our society flows from the very founding values of our Constitution, which enjoin our society to establish democratic government under the sway of constitutional supremacy and the rule of law in order, amongst other things, to ensure transparency, accountability and responsiveness in the way courts and all organs of state function. ...*
>
> *From the right to open justice flows the media's right to gain access to, observe and report on, the administration of justice and the right to have access to papers and written arguments which are an integral part of court proceedings subject to such limitations as may be warranted on a case-by-case basis in order to ensure a fair trial".*[165]

Where secrecy thrives, as in the case of closed hearings, there can be no accountability. The public are unable to know why and how a particular decision was made, what evidence was considered, and whether the decision was justifiable.

The most obvious application of the principle of open justice is to court proceedings (ie proceedings of the magistrates and high courts, and the appellate courts): they are generally open to the public, subject to narrow exceptions, such as cases involving children and family matters.[166] Similarly, again subject to narrow exceptions, there may be full reportage of matters before courts (including the names of parties and the details of the case),[167] and court documents are effectively regarded as public documents once they have been filed.[168] The Tax Court is a court of record and thus the principle of open justice applies to it.

In any event, the principle of open justice is not only applicable to court proceedings. In the last decade, there been a number of decisions of our courts which have affirmed that open justice also applies to quasi-judicial tribunals and proceedings. Indeed, in these instances, one may argue that the open justice principle is buttressed by the

---

[165] *Independent Newspapers* (supra) at paras 39 - 41.
[166] The general access rule and its restrictions are dealt with in Milo & Stein (2013) 80-89.
[167] Milo & Stein (2013) 92 - 95.
[168] *City of Cape Town* (supra) at para 47.

constitutional obligation that organs of state must foster transparency by "*providing the public with timely, accessible and accurate information*".[169]

Thus the courts have ordered that hearings of the Judicial Service Commission in relation to the complaint by the Constitutional Court judges against Judge President Hlophe should be held in public, where it had not been shown that there was "good cause" to exclude the media.[170]

The disciplinary enquiry by the National Prosecuting Authority into former prosecutor Glynnis Breytenbach was ordered to be open to the public and televised following an application by the media,[171] with the court stating:

> *"The guiding principle in all cases is whether the constitutional imperative of ensuring transparency and accountability from public bodies will be served by opening the doors to the particular forum in question*".[172]

The court also ordered that the disciplinary enquiries of employees of the Department of Public Works who were implicated in the Nkandla upgrades scandal should also be held in public,[173] and a senior Commissioner ordered that the Commission for Conciliation, Mediation and Arbitration arbitration between SARS and it former spokesperson, Adrian Lackay, should be public.[174]

In the next chapter, the optimal constitutional balance is explored between the right to privacy of tax information and the important public policy of ensuring full and frank disclosure of tax affairs, on the one hand, and freedom of expression, access information and open justice, on the other.

---

[169] Section 195(1)(g) read with section 195(2)(b) of the Constitution.

[170] *e-TV (Pty) Ltd and Others v Judicial Service Commission and Others* 2010 (1) SA 537 (GSJ); *Mail & Guardian Ltd and Others v Judicial Service Commission and Others* 2010 (6) BCLR 615 (GSJ); [2010] 1 All SA 148 (GSJ) The Judicial Service Commission Act 9 of 1994 now provides in section 29(3) that "*[T]he Tribunal President may, if it is in the public interest and for the purposes of transparency, determine that all or any part of the hearing of the Tribunal must be held in public*".

[171] *Media24 Limited and Others v National Director of Public Prosecutions; Electronic Media Network Limited v National Director of Public Prosecutions and Another* [2012] JOL 29172 (GNP).

[172] *Media 24* (supra) at para 41.

[173] *Media 24 (Pty) Ltd and Others v Department of Public Works and Others* [2016] 3 All SA 870 (KZP).

[174] http://serve.mg.co.za/content/documents/2015/11/03/151030ccmaamabrulingonmediaaccess.pdf (last accessed 2 April 2018). The ruling is consistent with the ruling of the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) at para 124, where O'Regan J held that CCMA proceedings must be fair and public hearings as required by section 34 of the Constitution.

Chapter 5 - The optimum constitutional balance

In Chapter 3 of this research report, the rationales is underpinning the tax secrecy regime were identified. The first rationale is based on the constitutional right to privacy which protects both natural and juristic persons. The second rationale is to protect SARS by encouraging frank and full disclosure of taxpayer information.

In Chapter 4, the countervailing constitutional rights and principles were discussed, together with their rationales. The constitutional right to freedom of expression and of the media, the constitutional right to access information and the constitutional principle of open justice were delineated and analysed.

What needs to be explored next is how one best or optimally balances or reconciles the countervailing rights and objectives in issue. This is necessary because, as has been explored above, the tax secrecy regime – the TAA disclosure prohibition in section 67(3) of the TAA, the PAIA disclosure prohibition in section 35 of PAIA, and the Tax Court access prohibition in section 124 of the TAA – clearly limit the rights to freedom of expression and the media, access to information and (in the case of section 124) open justice.

This chapter first considers the general principles involved where there is a constitutional challenge to legislation on the basis that it restricts fundamental rights. The principles of constitutional interpretation will be briefly addressed, and then the limitations analysis described. The domestic and, where relevant to tax information, foreign jurisprudence, in the specific context of reconciling privacy and other values with freedom of expression and access information, and open justice, will then be considered. Finally, the chapter will apply this jurisprudence to the tax secrecy regime and conclude that the secrecy provisions will likely be struck down by the Constitutional Court in an appropriate case (for instance the amaBhungane (2016) litigation, or the litigation against Jacques Pauw). The chapter concludes with the proposal as to how the secrecy provisions may be amended to ensure that they are constitutionally compliant.

5.1 The principles of constitutional interpretation

Section 39(2) of the Constitution states that "*when interpreting any legislation... every court... must promote the spirit, purport and objects of the Bill of Rights.*"

The most significant principle of interpretation that flows from this provision is that if a legislative provision is reasonably capable of two interpretations, one of which would render it unconstitutional but not the other, the courts will adopt the interpretation that is compatible with the Constitution.[175] Thus if sections 67(3) and 124 of the TAA, and section 35 of PAIA, can be interpreted in a constitutional manner, this ought to be the approach of a court seized with a constitutional challenge to the provisions.

It is submitted that it is difficult to contend for an interpretation of the provisions underlying the secrecy regime that would render them compatible with the Constitution. For instance, section 35 of PAIA contains a blanket ban on the disclosure by SARS of taxpayer information. This clearly limits the right to access information (and freedom of expression) and it is difficult to conceive of how the provision might be interpreted to render it constitutionally valid.

The same applies to section 67(3) of the TAA: in effect, this provision bans any third party such as the media from publishing taxpayer information regardless of the context and content of that information, and none of the exceptions directly apply (although section 69(2)(c), which allows a court to authorize disclosure, could potentially be interpreted in a manner compliant with the Constitution to permit the media to make an application for disclosure against SARS: even so, it is submitted that section 67(3) would remain unconstitutional).

The only secrecy provision which might arguably benefit from a robust interpretation in accordance with section 39(2) is the Tax Court access prohibition, section 124 of the TAA - but only if there is a relaxation to a significant degree of what would constitute in ordinary nomenclature an "*exceptional circumstance*" justifying access to the court. On

---

[175] *Hyundai* (CC) (supra) at paras 22-3. The leading case in relation to the general principles of interpreting a statute (and indeed any legal document), is *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

balance, it is submitted that this provision, too, cannot be saved on the basis of the *Hyundai* principle of constitutional interpretation.

5.2 The limitations analysis

It follows from the principle that no right in our Bill of Rights is absolute that certain restrictions or limitations on fundamental rights will be accepted in our democracy.[176] The methodology by which our Constitution distinguishes justifiable limitations on constitutional rights from unconstitutional limitations is set out in section 36 of the Constitution, the limitations analysis. Section 36(1) stipulates as follows:

> *"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -*
>
> *(a) the nature of the right;*
>
> *(b) the importance of the purpose of the limitation;*
>
> *(c) the nature and extent of the limitation;*
>
> *(d) the relation between the limitation and its purpose; and*
>
> *(e) less restrictive means to achieve the purpose."*

In *S v Manamela and Another (Director – General of Justice Intervening)*,[177] the Constitutional Court summarized the exercise involved in the limitations analysis:

> *"Although section 36(1) differs in various respects from section 33 of the interim Constitution, its application continues to involve the weighing up of competing values on a case-by-case basis to reach an assessment founded on proportionality. Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. The proportionality of a limitation must be assessed in the context of its legislative and social setting. Accordingly, the factors mentioned in section 36(1) are not exhaustive. They are key considerations, to be used in conjunction with any other relevant factors, in the overall determination whether or not the limitation of a right is justifiable."*[178]

[176] Currie & de Waal (2013) at 171.
[177] 2000 (3) SA 1 (CC).
[178] *Manamela* (supra) at para 33.

Nugent JA for the Supreme Court of Appeal in *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)*[179] has also provided very useful guidance in relation to the limitations enquiry:

> "*Where constitutional rights themselves have the potential to be mutually limiting – in that the full enjoyment of one necessarily curtails the full enjoyment of another and vice versa – a court must necessarily reconcile them. They cannot be reconciled by purporting to weigh the value of one right against the value of the other and then preferring the right that is considered to be more valued, and jettisoning the other, because all protected rights have equal value. They are rather to be reconciled by recognising a limitation upon the exercise of one right to the extent that it is necessary to do so in order to accommodate the exercise of the other (or in some cases, by recognising an appropriate limitation upon the exercise of both rights) according to what is required by the particular circumstances and within the constraints that are imposed by s 36 ….*
>
> *In determining the extent to which the full exercise of one right or the other or both of them might need to be curtailed in order to reconcile them what needs to be compared with one another are the 'extent of the limitation' that is placed upon the particular right, on the one hand, and the 'purpose, importance and effect of the intrusion', on the other hand. To the extent that anything needs to be weighed in making that evaluation it is not the relative values of the rights themselves that are weighed (I have said that all protected rights have equal value) but it is rather the benefit that flows from allowing the intrusion that is to be weighed against the loss that the intrusion will entail. It is only if the particular loss is outweighed by the particular benefit, to an extent that meets the standard that is set by s 36, that the law will recognise the validity of the intrusion.*"[180] (our emphasis).

5.3 The limitations analysis in practice

The limitations analysis may be illustrated in two analogous contexts which have come before the Constitutional Court. In the first case, involving access to and reporting on a refugee appeals hearing, the question was whether blanket confidentiality to protect the privacy of asylum applicants was a constitutional limitation on the right to freedom of expression. The second concerned the constitutionality of a provision of the Divorce

---

[179] 2007 (9) BCLR 958 (SCA).
[180] *Midi TV* supra at paras 9 and 11.

Act[181] which prohibited the publication of any information in divorce proceedings, apart from the parties and the order to protect the privacy of the children involved.

The first case is *Mail and Guardian Media Ltd and others v Chipu NO and others.*[182] The Constitutional Court struck down section 21(5) of the Refugees Act which provided that proceedings of the Refugee Appeals Board (RAB) are confidential.[183] The facts concerned an appeal to the RAB by the controversial Czech national Radovan Krejcir ("Krejcir")[184] whose application for asylum had been rejected. Journalists had requested permission from the chairman of the RAB to attend the appeal by Krejcir. This request was refused and the journalists then brought proceedings in court to challenge the relevant legislation, which simply provided that "*the confidentiality of asylum applications and the information contained therein must be ensured at all times*".[185]

The argument was that section 21(5) unjustifiably limited freedom of expression.[186] Confidentiality was designed to protect the privacy of applicants for asylum, and it was accepted that as a point of departure, confidentiality is justified given the nature of refugees' vulnerability. But the difficulty, argued the media, was that the protection was absolute: there was no discretion permitting the RAB to allow access.[187]

The Court then applied the five factors set out in section 36 of the Constitution to the facts:[188]

(a) The nature and importance of the right being limited - the right to freedom of expression - was clear. "*The terms in which this Court has described the right*

---

[181] Act 70 of 1979.
[182] 2013 (6) SA 367 (CC).
[183] Section 21(5) of the Refugees Act 130 of 1998.
[184] Mr Krejcir has since the case been convicted of kidnapping, attempted murder and dealing in drugs and is currently serving a 35 year prison sentence: see eg 'Krejcir sentenced to 35 years in prison' *News 24*, 23 February 2016 (available at https://www.news24.com/SouthAfrica/News/krejcir-sentenced-to-35-years-in-prison-20160223 (last accessed 13 April 2018). SARS' seizure and auction of Mr Krejcir's assets for his tax debts is also well-publicised: see eg J van Loggerenberg (with A Lackay) *Rogue: The Inside Story of SARS's Elite Crime-busting Unit* (Jonathan Ball: Johannesburg & Cape Town, 2016) at 101 - 105.
[185] Section 21(5) of the Refugees Act.
[186] The case was also argued on the basis of the principle of open justice, but the Court did not find it necessary to deal with this issue (see at para 53).
[187] *Chipu* supra at para 45.
[188] Paras 49 - 64.

to freedom of expression show how vitally important the right … is to a democracy".[189]

(b) The purpose of the limitation was, inter alia, to encourage applicants for asylum to disclose information truthfully in the knowledge that only those who officially need to deal with asylum applications will have access to the information. This was to protect the applicants and their families in their countries of origin from possible dangers or threats to their lives or safety. The Court accepted that the purpose of the confidentiality provision was vitally important.

(c) In relation to the nature and extent of the limitation, the Court observed that the confidentiality is absolute. It meant that even a publication which revealed information which did not disclose the identity of the applicant or that was in the public domain, could not be published.

(d) There was clearly a relation between the confidentiality provision and its purpose.

(e) In considering less restrictive means to protect the purpose of confidentiality, the Court asked rhetorically what the purpose of the confidentiality provision would be if an applicant for asylum (like Krejcir) had widely publicized why he had left his country of origin and other information. The media argued that a less restrictive means of achieving the purpose would be to allow the RAB a discretion to allow access to the media in appropriate cases. What is required by the limitations clause is proportionality, not certainty, so even though an absolute confidentiality regime created certainty, this is not determinative.[190]

The Court in *Chipu* also noted that even in the context of children involved in litigation, South African statutes do not impose blanket confidentiality on these proceedings. Taking all these factors into account, the Constitutional Court unanimously held that section 21(5) was unconstitutional in that the limitation on freedom of expression did not satisfy the limitations clause. Absolute confidentiality is not essential, and a very

---

[189] *Chipu* supra at para 51.
[190] At para 64.

important factor in determining whether access to the asylum appeal should be granted is *'whether granting access would be in the public interest'*.[191]

The second case that provides a useful analogy is *Johncom Media Investments Ltd v M and others*.[192] The purpose of section 12(1) of the Divorce Act was to protect divorcing parties' rights and those of their children to privacy and dignity. It sought to do this by prohibiting the publication of information that may come to light during divorce proceedings, except for the identity of the parties, the fact that a divorce action was pending, and the final order of the court.

The applicant in the *Johncom* case was the proprietor of the *Sunday Times* newspaper who wished to publish a story about a civil case where the plaintiff sued his ex-wife alleging that she had misrepresented to him that he was the father of her son (the plaintiff also claimed a partial rescission of the divorce order, hence the case was subject to the Divorce Act).

The Court swiftly ruled that section 12(1) limited the right of the *Sunday Times* to freedom of expression (as it could not publish any details of the civil case), and turned its attention to the limitations analysis.

Of particular interest for present purposes is the manner in which the Court dealt with the proportionality enquiry: while the objective of the law was to protect the privacy and dignity of parties and especially children in divorce cases, the chosen method for protecting these interests went too far. A less restrictive means of protecting these interests would be to prohibit publication of the identity of the parties and children involved, but allow full reportage of the other information in the divorce case.[193] The Court made an order to this effect building in a discretion on the part of the court to allow identification of the parties in exceptional cases:

> "*Subject to the authorisation granted by a court in exceptional circumstances, the publication of the identity of, and any information that*

---

[191] At para 93 - 4.
[192] 2009 (4) SA 7 (CC).
[193] *Johncom* supra at para 30.

> *may reveal the identity of, any party or child in any divorce proceeding before any court is prohibited.*" [194]

5.4 The limitations analysis applied to the tax secrecy regime

The three legislative provisions that cumulatively constitute the secrecy regime will now be assessed against the factors in the limitations analysis, bearing in mind that the list of factors in section 36 of the Constitution is not exhaustive and that the critical issue is whether the limitation is "*reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom*". As a general principle, the value of openness in a democratic society permeates the limitations analysis. As indicated in Chapter 3 above, this value underpins the Constitution.[195] In the recent words of the Supreme Court of Appeal, "*[d]emocracy in South Africa is predicated on open government in which all citizens participate*".[196]

The first legislative provision to be considered is the TAA disclosure prohibition, section 67(3) of the TAA (read with section 69(1) and the criminal offence, section 236). As has been detailed in Chapter 2 above, this provision prohibits the public disclosure of taxpayer information, not only by SARS' current and former officials, but also by any member of the public. This provision clearly limits the constitutional rights to freedom of expression (including freedom of the media, where it is the media that seeks to disclose the information) and access to information.

In similar vein from a different perspective is the second legislative provision, the PAIA disclosure prohibition, section 35 of PAIA. This prohibits SARS from allowing access to any records that contain information obtained or held by SARS for the purposes of enforcing legislation concerning the collection of revenue. This would include taxpayer information. This provision also limits freedom of expression (including freedom of the media) and the public's right of access to information.

---

194 At para 44.
195 Section 1(d) of the Constitution.
196 *Primedia Broadcasting (a division of Primedia (Pty) Ltd) and Others v Speaker of the National Assembly and Others* 2017 (1) SA 572 (SCA) at para 1.

The third legislative provision is the Tax Court access prohibition, section 124(1) of the TAA, which creates a default rule of confidentiality in all proceedings before the Tax Court. It limits the open justice principle, and also the constitutional rights to freedom of expression and access to information.

It is convenient to consider all the prohibitions together, as similar arguments apply in each case.

5.4.1 The nature of the rights that are limited

The first factor to be considered is the nature of the right being limited. The importance of the constitutional rights to freedom of expression, freedom of the media, access to information and open justice, which are all limited by the tax secrecy regime, are the subject of Chapter 4 of this research report. Suffice to say that while none of these rights is absolute, as this report has detailed, our courts have given these rights prominent and powerful protection both at common law and under the Constitution.

5.4.2 The importance and the purpose of the limitation

The second factor is the importance and the purpose of the limitation. This is essentially an enquiry into the rationales for taxpayer secrecy, and it is the subject of detailed treatment in Chapter 3 of this research report. In summary, in South African law, taxpayer secrecy has two overlapping but conceptually distinct justifications. First, secrecy gives effect to the taxpayer's right to privacy over its financial information. Second, confidentiality is regarded as being a powerful incentive to encourage taxpayers to frankly and honestly disclose their financial position.

While both of these justifications are significant, some important nuances should be emphasized.

<u>First</u>, insofar as the right to privacy is concerned, as has been discussed in Chapter 3 above, while corporations have a right to privacy, this is not protected to the same

extent as an individual's right to privacy.[197] A tax secrecy regime that protects individuals' privacy is therefore easier to defend than a tax secrecy regime that protects to the same extent corporations' private information; conversely, in general a restriction on corporate privacy is probably easier to defend that a restriction on individuals' privacy.

The leading scholar on tax confidentiality in the United States, Professor Blank, proposes that "*as much corporate tax return information as possible should be publicly accessible*",[198] in contrast to the position in relation to individual's tax information, which in his view should remain private except when the government engages in a public tax enforcement action.[199]

For present purposes, the point is simply this: while taxpayer privacy is an important value to protect, much will depend on the facts as to how intense the privacy right is.

Second, as has been submitted in Chapter 3 above, it has been submitted that the rationale which postulate a direct causal link between taxpayer confidentiality and better tax enforcement may not be as powerful as was once envisaged in our case law. Certainly, there is a distinct lack of empirical evidence for and much academic criticism of this causal link. Moreover, the global move towards tax transparency has brought into question the veracity of the link between tax confidentiality and compliance; indeed, the opposite causal relationship is argued to exist.

In the balancing analysis through the prism of the limitations clause, it is submitted that the tax compliance rationale may well feature less prominently in the limitations analysis compared to the right to privacy.

---

[197] See eg *Bernstein* supra; *Hyundai* supra.

[198] JD Blank 'Reconsidering Corporate Tax Privacy' (2014) 11 *NYU JL & Bus* 31 at 85. Professor Blank goes on, however, to argue that certain items should be exempt from public disclosure that would encourage benchmarking and reverse engineering by corporations, and expose private information to competitors (see at 88-98).

[199] Blank (2012) at 273-4.

5.4.3 The nature and extent of the limitation

Section 67(3) of the TAA

As was the case in the *Chipu* decision involving Mr Krejcir, here too the disclosure provision amounts effectively to a blanket ban on publication. This is because in terms of section 67(3) no third party can publish taxpayer information to the public regardless of the nature of that information. The only party that may do so is SARS, and then either by order of court[200] or in the very limited circumstances envisaged in section 67(5) of the TAA (to correct public misrepresentations by the taxpayer).

And even if the media is entitled under section 69(2)(b) of the TAA to bring an application to court to compel the disclosure by SARS of taxpayer information,[201]such an application suffers from a number of legal and practical difficulties.

Practically, such applications are very costly and likely to be resolved several months after they are instituted, and years if there are appeals. The newsworthiness of the information sought may well be impacted upon by the time delay. In the *Print Media* case, where the Constitutional Court struck down an administrative requirement that the publisher of certain publications had to first apply for classification from the Film and Publication Board, this point was highlighted by the Court:

> *"[The provision] also creates the immediate and long-term effects of delaying the flow of expression, which in some instances may drastically impede the ability of the right-bearer from receiving information or ideas."*[202]

Legally, the option of the media seeking a court order to justify publication of information which would by then typically be in its possession, as opposed to taking the approach of "publish and be damned", also raises the issue of prior restraints on publication. Our Constitutional Court has described why prior restraints on publication are anathema to our democracy:

---

[200] Section 69(2)(c) of the TAA.
[201] See §2.2 above.
[202] *Print Media* supra at para 64.

> *"The case law recognises that an effective ban or restriction on a publication by a court order even before it has 'seen the light of day' is something to be approached with circumspection and should be permitted in narrow circumstances only."*[203]

In sum, it is submitted that the intrusion on the rights of freedom of expression and access to information which results from section 67(3) is drastic; it is effectively a blanket ban.

The intrusiveness of the disclosure prohibition on the countervailing rights is exacerbated by the fact that the penalty for non-compliance with section 67(3) is a criminal sanction, with a maximum two year jail term.[204] In rejecting the common law crime of defamation, the Zimbabwean Constitutional Court commented as follows in relation to the chilling effect on freedom of expression which a criminal sentence created; the same principle applies in this case:[205]

> *"I take the view that the harmful and undesirable consequences of criminalising defamation, viz. the chilling possibilities of arrest, detention and two years imprisonment, are manifestly excessive in their effect. Moreover, there is an appropriate and satisfactory alternative civil remedy that is available to combat the mischief of defamation. Put differently, the offence of criminal defamation constitutes a disproportionate instrument for achieving the intended objective of protecting the reputations, rights and freedoms of other persons".*[206]

Section 35 of PAIA

Similarly, section 35 of PAIA imposes a blanket rule on SARS that it is not entitled to reveal taxpayer information to a requester in any circumstances. There are no exceptions and the public interest override explicitly does not apply to this category of records. Again, the blanket ban on access to these records is a severe limitation on the rights of freedom of expression and access to information.

---

[203] *Print Media SA* supra at para 44.
[204] Cf Van der Westhuizen J in *Print Media SA* supra at para 101, reflecting on the severity of a provision of the Films and Publications Act that criminalised the non-submission of certain publications to the Film and Publication Board for classification, on pain of a maximum five year prison sentence.
[205] *Madanhire and Another v Attorney-General* CCZ78/12 (12 June 2014), available at: https://globalfreedomofexpression.columbia.edu/cases/madanhire-v-attorney-general/ (last accessed 14 April 2018).
[206] At p 16 of judgment.

It can therefore be concluded that the nature and extent of the limitation on the rights in respect of the disclosure prohibition and the PAIA access prohibition are severe.

Section 124 of the TAA

In respect of the Tax Court access prohibition, there is a different analysis in regard to this limitations factor for two reasons: first, while the default rule is that there is a prohibition of access to the Tax Court, if the third party (for example the media) is able to satisfy the president of the Tax Court that it should be granted access given exceptional circumstances of the case, such access will be granted.[207] Thus, unlike the facts in *Chipu* and *Johncom v M*, there is here no blanket prohibition on access and reportage of what happens in the Tax Court. Secondly, the issue of a criminal sanction does not arise, simply because the sanction is simply that access is refused.

Nevertheless, it is submitted that the restriction on the right to open justice, and the associated rights of freedom of expression, the media and access to information, remains severe. This is so not least because the standard which needs to be satisfied by the third party is an extremely high one – that of "*exceptional circumstances*". While this is also the threshold endorsed by the Constitutional Court in the *Johncom v M* case ("*exceptional circumstances*"),[208] there the interest being protected was predominantly the privacy and dignity of children involved in divorce cases. In cases before the Tax Court, in contrast, the interest being protected is the privacy of the taxpayer and the public policy that postulates a (disputed) link between this privacy and tax compliance. This is a far cry from the privacy and dignity of children.

Moreover, none of the statutes which have default access prohibition rules –the Children's Court, the Child Justice Court, the Maintenance Court and courts hearing domestic violence matters,[209] set such a high standard which must be satisfied by the third party seeking access. And as we have seen in the *Chipu* case - which involves the vulnerability of asylum seekers certainly a class of persons with far greater privacy concerns than taxpayers – the Constitutional Court endorsed an interim arrangement

---

[207] Section 124 of the TAA.
[208] *Johncom* supra at para 44.
[209] Milo & Stein (2014) at 89 - 92.

providing that the chairperson of the RAB has the discretion to provide access to its appeal hearings based on a number of factors, including the public interest and whether the information was in the public domain.[210] Even in this context, it is not suggested that the applicant must overcome a threshold requirement that exceptional circumstances warrant access.

Thus while the Tax Court access prohibition is, unlike (in effect) the TAA and PAIA disclosure prohibitions, not an absolute prohibition, the wording of the provision makes it clear that it will only be in very few cases indeed that access will be granted: those cases will have to be "exceptional". Thus the nature and extent of the limitation is almost as severe as a blanket ban on access.

5.4.4 The relation between the limitation and its purpose

Given that the purpose of the limitation is, inter alia, to protect the privacy of taxpayers, there is indeed a relation between the limitation – being the disclosure prohibitions and the Tax Court access prohibition – and its purpose.

5.4.5 Less restrictive means to achieve the purpose

This is often a critical factor in the limitations enquiry, and no less so in this instance. In this case, the question is whether the privacy of taxpayers (as well as any public policy purpose based on compliance and disclosure) can be achieved in a manner which is less restrictive of the rights to freedom of expression, media freedom, access information and open justice, than the impugned provisions.

It is submitted that several less restrictive alternatives are indeed available. The alternatives for each of the statutory secrecy provisions are discussed next, along with analogous foreign case law.

---

[210] *Chipu* supra at paras 93-4.

5.4.5.1 Section 67(3) of the TAA: Need for public interest defence

In relation to section 67(3) of the TAA, it is argued that a public interest justification for disclosure by third parties coming into possession of the information would optimally harmonise the rights concerned. Third parties such as the media who are provided, whether confidentially or otherwise, with taxpayer information on a matter of public interest, should have a defence under section 67(3) to disclosing this information to the public. Such a defence would not denude the protection of the privacy of taxpayer information where there is no public interest in relation to the information – which would mean in the vast majority of cases, taxpayer information will remain secret. But in those cases where a clear public interest arises, the right of the public to know the taxpayer information must take precedence over the general confidentiality rule.[211]

The public interest defence has a clear pedigree in our common law.[212] The net effect of its application in recognised contexts means, as pithily put by Sutherland J in a case concerning the media's right to publish legally privileged information, that:

> *"Any relief sought from the court to protect any form of confidential information is subject to any recognised public interest override, an exercise which requires a balancing of contending values in the fact that specific context"*.[213]

The defence of public interest provides a defence to claims for defamation and privacy in our common law. A useful analogous illustration is provided by *Malema v Rampedi and others*,[214] which concerned the private financial information of the politician Julius Malema. The *City Press* intended to publish an article about funds deposited in Mr

---

[211] In the amaBhungane litigation (2016), the argument that is made on behalf of the journalists is that if indeed section 67(3) prohibited the publication of aspects of the article that was published, that provision is unconstitutional and violates the right to freedom of expression in section 16(1) and the right to access to information in section 32(1) of the Constitution: para 4 of the Defendant's Conditional Counter-Claim of 16 May 2016.

[212] The notion of 'public interest' is wide. It suffices for present purposes to rely on the helpful working definition given by the Supreme Court of Appeal in *National Media Ltd V Bogoshi* 1998 (4) SA 1196 (SCA) at 1208: "*information and criticism about every aspect of public, political, social and economic activity and thus contribute to the formation of public opinion*".

[213] *South African Airways Soc v BDFM Publishers (Pty) Ltd and Others* 2016 (2) SA 561 (GJ) at para 53.4. The judge concluded in that case that the controversy about SAA and its dependence on taxpayer funds meant that the public interest in being informed about its alleged precarious financial position outweighed the right of SAA to confidentiality in the contents of the legally privileged document (para 65).

[214] 2011 (5) SA 631 (GSJ).

Malema's family trust, alleging that these payments were the fruit of corruption. In refusing to interdict the article, the Court held:

> *"At present there is discussion in the press concerning whether or not [Mr Malema's] income justifies his expenses. The question of the income of [Mr Malema] is topical and is relevant to that issue. The public is entitled in general terms to full disclosures concerning person to stand in a public position and were high-profile personalities, who invite comment about themselves."*[215]

Indeed, even in circumstances where the media has obtained the information from a source who acquired it unlawfully and even when the media itself acted unlawfully in possessing the information, a public interest defence permits publication in appropriate circumstances. Two cases illustrate this high water-mark.

In the case concerning confidential company information, *Financial Mail v Sage*, the Appellate Division held as follows:

> *"It might well be that, if in the case of information obtained by means of an unlawful intrusion the nature of the information were such that there were overriding grounds in favour of the public being informed thereof, the Court would conclude that publication of the information should be permitted, despite its source or the manner in which it was obtained.*[216]

Tshabalala-Msimang and Another v Makhanya and Others[217] concerned the medical records of the former Minister of Health which were argued to reveal, with other information, that she was a hypocrite who preached against alcoholism while being an alcoholic herself. Despite what the court held was a breach of the National Health Act[218] by the newspaper (in that medical records were disseminated without permission of the patient),[219] the High Court held as follows in relation to the newspaper's right to publish:

---

[215] At 637-8.

[216] At 463. See also *MEC for Health, Mpumulanga v M-Net* 2002 (6) SA 714 (T) at para 27 (public interest in broadcasting illegal adoptions via hidden camera despite the privacy interests of the hospital and its staff).

[217] 2008 (6) SA 102 (W).

[218] Act 61 of 2003. Section 14 of this legislation prohibits the disclosure of health information unless the user consents to the disclosure, a court order requires the disclosure or nondisclosure represents a serious threat to public health.

[219] As result of this breach, the court ordered that the medical records should be returned to the hospital concerned (at para 33).

> "*This is a case where the need for the truth, is in fact overwhelming... The overwhelming public interest points in the direction of informing the public about the contents incorporated in the medical records in relation to the first applicant, albeit that the medical records may have been unlawfully obtained.*[220]

These are the general principles which would be applied to the factual scenario of the disclosure of taxpayer information: as is always the case, this will turn on the facts as to whether there is a public interest in the publication. A publisher who publishes where there is ultimately found to be no public interest will have to face the consequences, including criminal liability.

There is very little foreign case law on the specific issue which is considered here – namely whether there is a public interest defence for the public disclosure of taxpayer information - especially by third parties such as the press.

The United Kingdom

In respect of the United Kingdom, the leading privacy text in that jurisdiction cites an unreported case where Lord Levy failed to obtain an injunction against *The Times* of details of his tax affairs on the basis that the disclosure was in the public interest.[221]

[220] At para 50. English breach of confidence law also recognises a public interest defence: see generally Warby, Moreham & Christie (eds) ch 12; Rosemary Pattenden & Duncan Sheehan *The Law of Professional – Client Confidentiality: Regulating the Disclosure of Confidential Information* (Oxford University Press: Oxford, 2nd ed, 2016) ch 9. In the classic case, *Lion Laboratories Ltd v Evans* [1985] QB 526 (CA), the court confirmed a public interest defence to claims for breach of confidentiality (at 536): "*There is confidential information which the public may have a right to receive and others, in particular the press, now extended to the media, may have a right and even a duty to publish, even if the information has been unlawfully obtained in flagrant breach of confidence and irrespective of the motive of the informer*". The court allowed the publication of confidential internal correspondence of a company which manufactured a device used by the government to test for alcohol consumption by drivers. The internal correspondence cast doubt on the reliability of the device.

[221] Warby, Moreham & Christie (eds) (2011) at 249. The newspaper article 'Judge: Strong Public Interest' *The Guardian* 26 June 2000 (available at http://www.theguardian.com/politics/2000/jun/26/uk.labour (last accessed 14 April 2018) recounts that the application took place over telephone at 11 pm, with Toulson J handing down his decision just before midnight. The judge is reported to have stated that although the information about Lord Levy's tax affairs was confidential and private, there was an overriding public interest for the information to be made public.

The European Court of Human Rights

In *Fressoz and Roire v France*,[222] the European Court of Human Rights was concerned with information gleaned from tax assessments about a public figure. A satirical newspaper in France published an article revealing that the Peugeot boss had given himself a 45.9% pay rise over the last two years. Three recent tax assessments which had come into the possession of the newspaper allowed it to reveal the managing director's total salary over the three-year period. The article was illustrated with a box which produced a photocopy of the relevant portion of each of the notices of assessment. Criminal proceedings were instituted against the editor and journalist, based on tax secrecy provisions and the French Criminal Code, and they were fined.

On application to the European Court of Human Rights, the Court analyzed whether the freedom of expression provision in the European Convention on Human Rights, article 10, had been breached. The court held that the conviction was not necessary in a democratic society. Of significance for the court - and this distinguishes the case from the position in South Africa - was that the relevant legislation allowed access to any member of the public to details of the taxpayer's taxable income and tax liability (although that information could not be disseminated).[223] Thus the information the tax assessments contained was not confidential. The right to freedom of expression protected the journalist's right to produce documents in the story such as tax assessments to ensure credibility.[224]

More recently, in *Satakunnan Markkinapörssi Oy and Satamedia y v Finland*,[225] the Grand Chamber of the European Court of Human Rights considered the publication of individuals' publicly accessible taxable income and assets in a newspaper.[226] The data

---

[222] (1999) 5 BHRC 654.
[223] *Fressoz* supra at para 53.
[224] At para 54.
[225] (2018) 66 EHRR 8.
[226] The Court commented that Finland is one of the very few Council of Europe member states which provides for extensive public access to taxation data (at para 192), and the court could take into account when assessing the overall balance struck the fact that Finland "*somewhat exceptionally, as a matter of constitutional choice and, in the interests of transparency, has chosen to make taxation data accessible to the public*" (at paragraph 195). The decision is criticised by Dirk Voorhoof 'No Journalism Exception for Massive Exposure of Personal Taxation Data' *Strasbourg Observers* (5 July 2017) (blog available at

published in 17 editions of the newspaper, each focusing on the certain geographic area of the country, included the names and surnames of approximately 1.2 million natural persons whose annual taxable income exceeded certain thresholds, the amounts of their earned and unearned income, and taxable net assets. The Finnish Data Protection Board had prohibited the newspaper from processing taxation data by publication in the newspaper. When internal appeals in the Finnish courts failed, the newspaper lodged an application with the European Court of Human Rights, complaining that the Finnish decisions violated their right to freedom of expression under article 10 of the European Convention.

The European Court rejected the complaint. The Court distinguished between public interest in the form of matters which affect the public to such an extent that they may legitimately take an interest in them because they affect the well-being of citizens for the life of the community. This was to be contrasted with "*the public's thirst for information about the private life of others, or ... an audience's wish for sensationalism or even voyeurism*".[227]

While permitting public access in Finland to official documents, including taxation data, was designed to secure the availability of information for the purpose of enabling debate on matters of public interest, this did not mean that the newspaper's mass publication of tax data itself contributed to a debate of public interest:[228]

> *"Taking the publication as a whole and in context... the Court... is not persuaded that publication of taxation data in the manner and to the extent done by applicant companies contributed to such a debate or indeed that its principal purpose was to do so."*[229]

The United States of America

In the United States of America, two cases are noteworthy.

---

https://strasbourgobservers.com/2017/07/05/no-journalism-exception-for-massive-exposure-of-personal-taxation-data/ (last accessed 30 March 2018).

227 *Satakunnan* supra at para 171.

228 *Satakunnan* supra at para 174.

229 Idem.

The first is a United States Supreme Court case from 1925, *United States v Dickey.* [230] This was a case where the owner and editor of several newspapers in Missouri were indicted for publishing the names of taxpayers and the amounts of their income taxes. At the time, public inspection of tax returns was permissible in the United States. The owner and editor argued that this meant that tax returns constitute public records available to the general public and therefore this was a matter for news publication; if this were not so, the First Amendment to the United States Constitution, the freedom of speech clause, would be contravened. [231]

The Supreme Court ruled that whatever the wisdom of either secrecy or publicity in respect of tax returns, that is a matter "*addressed to the discretion of the lawmaking department, with which the courts are not concerned so long as no constitutional right or privilege of the taxpayer is invaded, and there is no contention that there is any such invasion here*".[232]

In the only other First Amendment case involving tax disclosures, *US v Ritchey*,[233] a former IRS employee was convicted for disclosing to the press information about federal income tax return of a judge. The context of his disclosure was that Mr Ritchey, who had after retiring from the IRS joined a private tax preparation service, was indicted for conspiracy to defraud the government in a tax shelter scheme. The judge presiding at his trial had been assessed for additional tax by Mr Ritchey when he worked for the IRS. After the jury found Mr Ritchey guilty, and the judge sentenced him to a term of probation, he was asked by a reporter why he thought the judge had imposed probation on him. He responded "*when I worked for the IRS I once audited [the judge's] taxes and further that I found discrepancies in his tax returns .... I kind of get the feeling that [the judge] wanted retribution*".

[230] 268 US 378 (1925).
[231] *Dickey* at 384.
[232] *Dickey* supra at 386. *Dickey* should not, it is submitted, be read as an endorsement of the constitutionality of tax publicity laws: first, at that point in the history of the United States, publicity was authorised by Congress; secondly the constitutional law of privacy had not yet emerged in the United States.
[233] 924 F.2d 857 (US Court of Appeals, 9th Cir) (1991).

When Mr Ritchey was indicted with wilfully disclosing tax return information, his defence was that the criminal prohibition violated his First Amendment right to freedom of expression.

The court rejected this defence. While, as a citizen, Mr Ritchey has an interest in commenting on matters of public concern, which includes the potential bias of a judge, this had to be weighed against the government's competing interest in the confidentiality of tax information.[234] This government interest was based on two factors: that confidentiality is necessary to ensure compliance with the tax structure, which is based on self–reporting; and the interest, asserted on behalf of the government's taxpayers, to ensure their right to privacy.[235] On the facts, Ritchey's interest in commenting on matters of public concern had to give way to the governmental interests.[236]

In a powerful dissenting judgement, Circuit Judge Reinhardt made the following instructive comments:

> *"Confidentiality of tax return information is a critical component of the tax system based on self – reporting of income....But this only serves to establish the validity of the statute in general. He does not tell us when an exception is or is not warranted in order to preserve constitutional principles....While we must remain aware of the importance of the government's general interest in nondisclosure and proceed cautiously, were countervailing First Amendment interests exist the Constitution obligates us to look carefully at the particular harm to the individual involved as well as the general harm to First Amendment values that would result from suppression of the specific speech at issue".*[237]

What this brief comparative survey reveals is that there is a need for a balancing exercise to take place between taxpayer privacy and public's right to know. While the balance may be struck differently if the discloser is a current or former employee of the

---

[234] *Ritchey* supra at para 18.
[235] *Ritchey* supra at paras 19 - 20. These are of course the same two rationales which have been accepted in South African law.
[236] *Ritchey* supra at para 24.
[237] *Ritchey* supra at para 48. For commentary on the case, see CC Pagano 'Constitutional Law - United States v Ritchey: Disclosure of Tax Information by Former IRS Agent not Protected by the First Amendment' (1992) 22 *Golden Gate U LR* 143, who argues that the dissent is the better judgment, and that it matters not in principle that Ritchey is a former IRS employee as oppose to other citizens (at 170-1).

revenue authority as opposed to the media (as in *Ritchey*), the critical point of departure is to appreciate that taxpayer privacy is not absolute and may in appropriate circumstances yield to the public's right to know. It is not proposed in this report that there should be transparency in relation to all taxpayer information: the proposition is the more limited one that that the TAA disclosure prohibition in section 67(3) cannot be justified in an open and democratic society unless a public interest defence is built in to the provision.

The practical result of this would mean that the disclosures by Jacques Pauw and amaBhungane, which are clearly, it is submitted, in the public interest,[238] would be protected. On the other hand, the media would not be able to disclose taxpayer information with impunity because if no public interest is found to exist (for example on the facts of the *Satakunnan* case as opposed to *Fressoz*), criminal liability may ensue. This will function as an appropriate check on the conduct of the media, just as the possibility of making the wrong decision inculcates caution from the media and other publishers in the context of defamation and privacy law, and in other contexts such as requests for information covered by grounds of refusal under PAIA.

Conceptually, the exception to the disclosure prohibition based on the public's right to know the information is similar in principle to the other public policy exceptions that have been codified in the TAA or that arise, as has been discussed above, where the court is asked to order disclosure of tax information to a specified entity or litigant. It is precisely this kind of balancing exercise that would apply where secrecy is sought to be weighed against the public's right to know:

5.4.5.2 Section 35 of PAIA: The need for a public interest override

PAIA itself provides the less restrictive means which is required to render section 35 of PAIA constitutional. It is the public interest override in section 46 of PAIA. This provision provides as follows:

---

[238] de Vos (2017).

> *"Despite any other provision in this chapter the information officer of a public body must grant a request for access to a record of the body contemplated in [various sections of PAIA] if:*
>
> *(a) the disclosure of the record would reveal evidence of:*
>
> *(i) a substantial contravention of or failure to comply with the law, or*
>
> *(ii) an imminent and serious letter safety or environmental risk; and*
>
> *(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question".*

This provision ensures that there is a constitutional balancing exercise between the right to access to information in respect of the particular record sought, on the one hand, and the other competing interests, on the other. As one court has put it:

> *So, the legitimate expectations of society are given effect to, and are expressed in, the 'public interest' as contemplated in s 46. In this sense neither the legitimate expectations of society nor the public interest is concerned with trivial group interests, idle gossip or immaterial issues of public interest. ... The 'public interest' is 'material in which the public has an interest', as opposed to 'material which is interesting to the public'. The 'public interest' contemplated by s 46 therefore ... embraces all those interests necessary for a structured and orderly society.*[239]

The public interest provision applies to override every single one of the grounds of refusal in denying access to a document, except for taxpayer information.

The anomalous result is that the crystallised grounds of justification - commercial confidentiality, trade secrets, privacy of third parties, contractual obligations, and even national security and legal privilege - may all be overridden on the facts if there is a public interest in disclosure. But this does not apply to taxpayer information (protected by the ground of refusal in section 35 of PAIA), because the public interest override (section 46 of PAIA),[240] specifically does not apply to taxpayer information.

It is submitted that it is entirely indefensible that competing values as important as national security and legal privilege may rightly be overridden by public interest, and yet taxpayer information is afforded absolute protection. This scheme of absolute protection, as opposed to a balancing exercise on the facts of the case, is plainly at

---

[239] *Centre for Social Accountability v Secretary of Parliament and Others* 2011 (5) SA 279 (ECG) at para 103.

[240] And, for public bodies, section 70 of PAIA.

odds with our Constitution and its approach to the balancing of rights.[241] In essence, section 35 of PAIA - as with section 67(3) of the TAA - creates a hierarchy of rights, where the privacy of taxpayer information always trumps other countervailing interests, such as the public's right to know. It is submitted that this cannot pass constitutional muster.

The less restrictive alternative in relation to section 35 of PAIA is therefore clear: the ground of refusal must be subject to the public interest override, which will be adjudicated by the SARS Information Officer, the Information Regulator [242]and the courts, on a case by case basis.[243]

5.4.5.3 The default position for Tax Court access should be openness

As has been discussed above, the Tax Court is generally closed to the public and the media, unless the president of the court grants access in exceptional circumstances. As indicated above, this model – a default secrecy rule with the grant of access as an exception is not common in South Africa, except for cases involving vulnerable persons such as children, certain family matters or refugees.[244] It is submitted that tax cases – which concern financial information of individuals or corporations – can never belong in the same category as cases involving vulnerable individuals.[245]

---

[241] *Midi TV* supra at para 11.
[242] Under schedule to POPI that will amend aspects of PAIA.
[243] This is for instance the position in India, where the relevant freedom of information law permits a public interest defence where confidential information is sought by a requester, including in principle taxpayer information: *Naresh Trehan v Rajesh Kumar Gupta* (Case No 85/ 2010, 156/ 2010 and 5560/2011, Delhi High Court, 24 November 2014); *Gandhi v Central Information Commission* (Case No 8753 of 2013, Bombay High Court, 11 June 2015).
[244] See Chapter 4 above.
[245] As discussed above, the predecessor to section 124 of the TAA, being section 89 of the Income Tax Act, was a blanket prohibition on access which was clearly unconstitutional. The constitutionality of hearings before the Special Court (as it was then named) was affirmed in *Metcash* supra at para 47, but only from the perspective of whether it met the criteria of section 34 of the Constitution, namely the right to a fair trial (the taxpayer argued that this was not the case). Kriegler J commented obiter in footnote 81 that ironically for the taxpayer, "*the one and only significant respect in which a tax appeal departs from the constitutional norms is that tax cases are heard behind closed doors, a provision for the protection of the confidentiality of the taxpayer's business*".

This is not to say that all information in a tax case should be made public, but that can be addressed in a manner far less restrictive of the rights of open justice, access to information and freedom of expression: namely, reporting restrictions, the filing of confidential affidavits and documentation where this is justified, and even excluding the public from certain aspects of the case (for instance testimony which would be useful to a competitor of the taxpayer). All of this is far less restrictive than a default secrecy rule which can only be overcome in exceptional cases, and which necessarily means - as is the case in practice - that very few if any Tax Court cases are attended by the public and reported on.[246]

The less restrictive measure which is therefore available in relation to the Tax Court is a general rule of access (which would vindicate the constitutional right of access to information, freedom of expression and open justice), subject to a discretion on the part of the president of the Tax Court to close a hearing, or to rule that certain information may not be reported. In other words, the current provision in section 124 of the TAA should be reversed. The optimal constitutional balance between the countervailing rights is best struck in these cases with a general rule of access to the Tax Court, but permitting reasonable restrictions on access and reporting.

Thus this is how it works in the vast majority of South African criminal and civil cases: general access, with the discretion by the court to exclude access and to impose reporting restrictions. For example, section 153(1) of the Criminal Procedure Act states that a judge or magistrate has a discretion to exclude the public from attending proceedings "*in the interests of the security of the State or of good order or of public morals or of the administration of justice*". This means that even cases involving national security are as a point of departure open to the public. An attempt to exclude the public from such a case failed in *S v Geiges and Others (M&G Media Ltd and Others Intervening)*,[247] where Labuschagne J held that the blanket ban sought by the

---

[246] The author is not aware of any instance where this has occurred. See also Croome & Olivier (2015) at 330.
[247] 2007 (2) SACR 507 (T).

state was overbroad and that the proceedings would only be closed where there were "compelling reasons" to do so.[248]

In civil cases, too, the general rule of access will not easily be disturbed. An illustration of this is *Prinsloo v RCP Media t/a Rapport*,[249] where two advocates applied to court to prevent the publication of photographs of themselves involved in sexual activity. They asked for the hearing to be closed to the public. Van der Westhuizen J pointed out that the case was by no means special:

> *"Intimate personal details are often disclosed out in courtrooms in front of members of the public and the media. This is unfortunate for the individuals involved, but their privacy is in such cases outweighed by values such that courts in a democratic country function with transparency, so that any member of the public can see that justice is being done. It is not uncommon for a nervous, embarrassed and emotionally fragile plaintiff in a divorce court to have to explain under oath in a courtroom filled with a large number of onlookers, how a spouse committed adultery or how alcoholism, drug abuse, family violence, or even incest wrecked a marriage, and for the victims of violent crime to have to explain in front of the public and the media how the death, rape or mutilation of oneself or a loved one, such as a child, was experienced and how it may have ruined people's lives."*[250]

So it the question can therefore be asked rhetorically that if the media and public are entitled as a departure point to attend cases involving divorces, national security, gruesome murders and sexual assault cases, why can they not attend hearings of the Tax Court?

One answer to that question might be that if tax cases proceed to the High Court, the Supreme Court of Appeal or the Constitutional Court on appeal from the Tax Court, the case will be open to the public and the media.[251] This is a partial answer, but it does not cure the restriction on open justice which flows from the secrecy of the Tax Court, not least because it is only in the minority of cases that appeals proceed to the appellate courts.

Another answer seeking to distinguish the Tax Court might be that its proceedings are not those of a true court, but rather in effect a tribunal which is an internal remedy for

---

[248] *Geiges* supra at para 80.
[249] 2003 (4) SA 456 (T).
[250] *Prinsloo* supra at 462.
[251] Croome & Olivier (2015) at 330.

the dispute resolution process between a taxpayer and SARS. The difficulty with this argument is that the Tax Court is expressly stated to be a "*court of record*" in section 116(2) of the TAA, where it is established. In any event, the principle of open justice applies not only to courts but also to tribunals. Moreover, a useful analogy may be provided by proceedings before the Competition Tribunal, as competition cases also typically raise issues of commercial confidentiality. Yet these proceedings take place in public.[252] The public may be excluded under section 52(3) of the Competition Act if the evidence to be presented is confidential information, and parties are able to agree confidentiality regimes to protect confidential information from public disclosure.[253] There is no reason why a similar regime should not apply in tax cases before the Tax Court.

A third distinguishing factor might be that the Tax Court's confidentiality should be guaranteed because this necessarily follows from the reasons which animate granting confidentiality to taxpayers in respect of information they provide to SARS. This report has considered the veracity of the rationales justifying taxpayer privacy and confidentiality above, and while these rationales are of course also significant in seeking to justify continued secrecy in the Tax Court, it is submitted that at the stage that the dispute reaches the Tax Court, confidentiality must yield to open justice (subject to any reasonable reporting restrictions). This is because the case for confidentiality is even weaker once a dispute has reached the level of the Tax Court. It is at this stage that SARS will have typically have dismissed objections by taxpayers against additional assessments which have been issued by SARS, a process of alternative dispute resolution would have failed or was not appropriate, and the machinery of a judge and two assessors is required to resolve the dispute. At the heart of any tax dispute will be a claim by SARS that additional amounts of tax (as well as interest and frequently penalties) are owed to SARS, which the taxpayer disputes. This is clearly a public issue and the adjudication of the issue ought to be a public one. Again, this does not mean that all details of the dispute need to be revealed. A process of reduction of confidential

---

[252] Section 52(2)(a) of the Competition Act 89 of 1998.
[253] Cf *Competition Commission v Unilever plc and Others* 2004 (3) SA 23 (CAC).

information can occur, much like the manner in which Tax Court cases are currently reported. But this does not justify a general ban on access to the proceedings.

The manner in which the equivalent tribunal in the United Kingdom functions is instructive in this context. The departure point there is the opposite of the South African position under section 124 of the TAA: in terms of rule 32(1) of the Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules,[254] tax case hearings must be in public. The First-Tier Tribunal ("FTT") has the discretion to direct that all or part of the hearing be in private in various instances, including the protection of a person's right to respect for the private and family life, to maintain the confidentiality of sensitive information, and because not to do so would prejudice the interests of justice.[255]

The leading case is *Commissioner for Her Majesty's Revenue and Customs v Banerjee.*[256] A taxpayer lost an appeal to the High Court. She requested that the judgement be anonymized so that her identity would not be revealed to the public. The court held that although the starting point is that a person's financial and tax affairs of private and confidential, the fundamental principle of public justice decisively outweighed these interests.[257] Henderson J held as follows:

> *"I think, that taxation always has been, and probably always will be, a subject of particular sensitivity both for the citizen and for the executive arm of government. It is an area where public and private interests intersect, if not collide; and for that reason there is nearly always a wider public interest potentially involved in even the most mundane-seeming tax dispute. Nowhere is that more true, in my judgment, than in relation to the rules governing the deductibility of expenses for income tax. Those rules directly affect the vast majority of taxpayers, and any High Court judgment on the subject is likely to be of wide significance, quite possibly in ways which may not be immediately apparent when it is delivered. These considerations serve to reinforce the point that in tax cases the public interest generally requires the precise facts relevant to the decision to be a matter of public record, and not to be more or less heavily veiled by a process of redaction or anonymisation. The inevitable degree of intrusion into the taxpayer's privacy which this involves is, in all normal circumstances, the price which has to be paid for the resolution of*

[254] SI 2009/273.
[255] Rule 32(1). For a useful discussion of the more recent cases, in this context, see A Redston & S Margulies 'Practice Guide – Confidentiality and Privacy and Tax Cases' (2017) 1353 *Tax J* 8.
[256] [2009] EWHC 1299 (Ch).
[257] *Banerjee* supra at para 34.

> *tax disputes through a system of open justice rather than by administrative fiat.*[258]

In a number of cases before the FTT, public figure taxpayers have bought applications to have the case heard in private, on the basis that disclosure would harm their reputation. The FTT has made it clear that this will not override the importance of the hearing before the FTT taking place in public. It therefore rejected an application by well-known broadcaster who HMRC argued was involved in a tax avoidance scheme which generated a tax loss unmatched by an economic loss.[259]

The FTT also rejected an application by the actor Martin Clunes that his dispute should be heard in private: it concerned the deductibility of the cost of his cosmetic treatment. The FTT had "*some sympathy with Mr Clunes in that I recognise that the revelation of his identity does have the potential to cause him some collateral embarrassment*", but this did not justify a private hearing or a reporting restriction.[260]

And the entertainer Peter Andrea also failed in an attempt to close a hearing of the FTT; the case concerned the deductibility of his legal and professional expenses in connection with defamation proceedings brought by him against his ex-wife.[261] The FTT rejected the argument that the entertainer's financial privacy should trump the principle of open justice.[262]

It is submitted that the UK model of access is a far less restrictive alternative as contemplated in section 36 of the Constitution than the default rule of secrecy that applies under section 124 of the TAA. The access model has the result that members of the public and the media can attend Tax Court hearings in the same way they would attend other court proceedings. It will necessarily be the case that because sensitive commercial information will frequently be involved, mechanisms to protect such information should be adopted by the Tax Court including ensuring that certain

---

[258] At para 35.
[259] *A v The Commissioners for Her Majesty's Revenue and Customs* [2012] UKFTT 541 (TC).
[260] *Clunes v Revenue and Customs Commissioners* [2017] UKFTT 0204 (TC) at para 11.
[261] *Andrea v The Commissioners for Her Majesty's Revenue and Customs* [2017] UKFTT 0850 (TC).
[262] *Andrea* supra at para 109.

information is not made public,[263] and even excluding the media and the public from certain aspects of the case, if necessary.

[263] This is also the approach which appears to be adopted in the United States of America in respect of its specialist tax court. See MM Walsh 'The Anonymous Taxpayer: what the Tax Court Failed to Reveal in *Anonymous v Commissioner*' (2008) 61 *Tax Lawyer* 999; A Gesiko 'The Protection of Taxpayer's Federal Tax Return Information in the Internet Age – Is Tax Return Information Being Afforded Proper Confidentiality and Privacy Protections? (2008) 62 *Tax Lawyer* 175 at 183-186.

Chapter 6 - Conclusion

This research report has critically analysed the three pillars of the tax secrecy regime in South African law: the criminal prohibition against disclosure of taxpayer information; the rule that tax information cannot be disclosed if a request is made of SARS under PAIA; and the default position that Tax Court cases take place in secret.

The rationales underpinning the tax secrecy regime were explored and it was posited that in South Africa, the protection is largely based on taxpayer privacy rights (for individuals and corporates), as well as the historic public policy justification that confidentiality facilitates full and frank disclosure to SARS. In relation to corporate privacy and in relation to the historic justification concerning disclosure, these rationales do not resonate as strongly as they do in relation to individual privacy protection. Furthermore, the increasing trend in favour of tax transparency and the international exchange of tax information (albeit subject to confidentiality undertakings as between regulators) undermines the proposition that compliance and confidentiality are causally linked.

The legal provisions which protect taxpayer confidentiality restrict other important rights in our democracy. In particular, the TAA and PAIA disclosure prohibitions restrict freedom of expression and the media, and the right of access to information. The Tax Court access prohibition restricts these rights as well as the constitutional principle of open justice. All of these countervailing rights are constitutionally protected and are of great significance in our democracy.

The challenge is to optimally balance the protection of taxpayer confidentiality with the countervailing rights, which broadly protect the public's right to know information of public interest. The limitations analysis under our Constitution provides a framework for negotiating this balancing exercise.

It was submitted that all three of the statutory restrictions in issue – sections 67(3) and 124 of the TAA, and section 35 of PAIA - are unconstitutional restrictions on the rights to freedom of expression and the media, access information, and (in the case of section

124 of the TAA) open justice. The nature and extent of the limitation on these rights is severe and intrusive, and in the case of section 67(3) of the TAA, exacerbated by the sanction of the potential two year jail sentence. Moreover, in each case there are less restrictive means to achieve the objective of taxpayer confidentiality.

It was submitted that section 67(3) of the TAA would be compliant with the Constitution if it incorporated a defence based on the public interest where third parties publish taxpayer information. An amendment to the TAA to codify this defence is required. The defence of public interest has a strong pedigree in our common law and is also gaining traction in relation to statutory offences. Illustrations of how this would work in practice are provided by the case studies with which this research report began, namely the litigation by SARS against amaBhungane and Jacques Pauw: both publications are clearly in the public interest and ought not to be prohibited. Indeed, the mere fact that SARS has sought relief against the publications in these cases itself proves the public interest in the case, because in order to obtain the declaratory relief sought by SARS, it must concede that the taxpayer information - eg in relation to former President Zuma - is accurate. If this is so, this effectively proves that former President Zuma has not paid taxes that he ought to have, and SARS has done nothing about it. There can be no doubt that this is of manifest and compelling public interest.

In relation to section 35 of PAIA, this research report argues that the blanket ban on disclosure would only be rendered constitutional if the public interest override which applies to all other categories of information under PAIA is also amended so that it is applicable to requests for access to taxpayer information. This would have the result that if taxpayer information implicates the public interest, it would have to be disclosed to the requester in the interests of transparency and openness in our democracy.

In relation to section 124 of the TAA, the approach of default secrecy (subject to access on an exceptional basis) offends the principle of open justice (inter alia) which requires, as a starting point, that adjudication on matters of public interest by courts and tribunals should take place in the open. A less restrictive means is available, namely the general rule that court proceedings are open to the public, subject to a court's discretion to close the hearing if particular circumstances are present, and/or to impose a reporting ban, for example in relation to confidential information. There are also practical and legally recognised mechanisms to protect confidential information in a court process which are well known in our law (for example in the context of competition law) and these could also be employed to ensure an optimum balance of the competing rights.

REFERENCE LIST

Legislation and related material

Administrative Appeals Tribunal Act No 91 of 1975 (Australia)

Commissioners for Revenue and Customs Act 2005 (United Kingdom)

Competition Act 89 of 1998

Constitution of the Republic of South Africa Act 200 of 1993

Constitution of the Republic of South Africa Act 108 of 1996

Criminal Procedure Act 51 of 1977

Divorce Act 70 of 1979

European Convention on Human Rights

Explanatory Memorandum on the Income Tax Bill, 1989 [W.P.2 - '89]

Explanatory Memorandum accompanying the Tax Administration Bill, 2011

Income Tax Act 58 of 1962

Income Tax Act, 1970 (Isle of Man)

Income Tax Act 70 of 1989

Judicial Service Commission Act 9 of 1994

Magistrates' Court Act 32 of 1944

National Health Act 61 of 1993

Protection of Personal Information Act 4 of 2013

Refugees Act 130 of 1998

Rules promulgated under section 103 of the Tax Administration Act 28 of 2011 (GN 550 Government Gazette 37819 of 11 July 2014)

SARS Client Charter

SARS Short Guide to the Tax Administration Act, 2011 (28 March 2018)

South African Revenue Service Act 34 of 1997

Superior Courts Act 10 of 2013.

Tax Administration Act 28 of 2011

Taxation Administration Act No 1 of 1953 (Australia)

Tribunal Procedure (First – Tier Tribunal) (Tax Chamber) Rules 2009 (S.I.2009/273 (L.1)) (United Kingdom)

United States Constitution

26 US Code section 6103 (United States of America)

<u>Books</u>

Jackie Arendse & Bob Williams *Silke on Tax Administration* (Durban: Lexis-Nexis Butterworths, loose-leaf, last updated 2017)

Philip Coppel *Information Rights: Law and Practice* (Oxford: Hart Publishing, 3 edn, 2010)

Beric Croome & Lynette Olivier *Tax Administration* (Cape Town: Juta & Co, 2nd ed, 2015)

Beric Croome *Taxpayers' Rights in South Africa* (Juta & Co: Cape Town, 2010)

Beric Croome & Lynette Olivier Tax Administration (Juta & Co: Cape Town, 2010)

Iain Currie & Johan de Waal *The Bill of Rights Handbook* 6 edn (Cape Town: Juta & Co, 2013)

Eleonor Kristoffersson, Michael Lang, Pasquale Pistone, Josef Schuch, Claus Staringer and Alfred Storck (eds) *Tax Secrecy and Tax Transparency: the Relevance of Confidentiality in Tax Law Part 1and 2* (Peter Lang GmbH, 2013)

John MacDonald QC & Ross Crail *Macdonald on the Law of Freedom of Information* 3rd edn (Oxford: Oxford University Press, 2016)

Dario Milo & Pamela Stein *A Practical Guide to Media Law* (Durban: Lexis-Nexis Butterworths 2013)

Hubert Monroe *Intolerable Inquisition? Reflections on the Law of Tax* (London: Stevens & Sons, 1981)

Raffaele Petruzzi & Karoline Spies (eds) (Linde Verlag GmbH: Scheydgasse, 2014) *Tax Policy Challenges in the 21st-Century* (Linde Verlag GmbH: Scheydgasse, 2014)

Rosemary Pattenden & Duncan Sheehan *The Law of Professional – Client Confidentiality: Regulating the Disclosure of Confidential Information* (Oxford University Press: Oxford; 2 ed; 2016)

Jacques Pauw *The President's Keepers: Those Keeping Zuma in Power and out of Prison* (Cape Town: NB Publishers, 2017)

Ronee M Robinson *Access to Information* (Lexis-Nexis Butterworths : Durban, 2016)

Johann van Loggerenberg (with Adrian Lackay) *Rogue: The Inside Story of SARS's Elite Crime-busting Unit* (Jonathan Ball: Johannesburg & Cape Town, 2016)

Stuart Woolman, Michael Bishop and Jason Brickhill (eds) *Constitutional Law of South Africa* (Juta & Co: Cape Town, 2nd edn (revision service 3), 2011)

<u>Journal articles</u>

B Bittkler 'Federal Income Tax Returns – Confidentiality vs. Public Disclosure' (1980-1) 20 *Washburn LJ* 479

JD Blank 'In Defense of Individual Tax Privacy' (2011) 61 *Emory LJ* 265

JD Blank 'United States National Report on Tax Privacy" (2013) *New York University Law and Economics Working Papers* Paper 332

JD Blank 'Reconsidering Corporate Tax Privacy' (2014) 11 *NYU JL & Bus* 31

JD Blank 'The Timing of Tax Transparency' (2017) 90 S Cal LR 449

RG Bricout 'The Preservation of Secrecy Provisions: Still Worth it?' 2002 *Acta Juridica* 247

B Croome 'Sounds of Silence: Secrecy Provisions' (2009) 23 *Tax Planning* 2

'Editorial' (1989) 38 *The Taxpayer* 101

'Editorial: An Absolute Disgrace' (2012) 61 *The Taxpayer* 141

V Etsebeth 'The International Exchange of Tax Information: Realising the Promise, Managing the Threat' (2010) 21 *Stell LR* 45

A Gesiko 'The Protection of Taxpayer's Federal Tax Return Information in the Internet Age – Is Tax Return Information Being Afforded Proper Confidentiality and Privacy Protections? (2008) 62 *Tax Lawyer* 175

D Hernel 'Can New York Publish President Trump's State Tax Returns?' (2017) 127 *Yale LJ Forum* 62

D Kamin, JD Blank, A Christians, RS Avi-Yonah, PA Barnes 'Should Corporate Tax Returns Be Public?' (2014) 11 *New York U J L & Bus* 159

SW Mazza "Taxpayer Privacy and Tax Compliance" (2003) 51 U Kansas LR 1065,

O Mbha 'Transparency and Accountability of Tax Administration in the UK: The Nature and Scope of Taxpayer Confidentiality' [2012] *British Tax R* 187

CC Pagano 'Constitutional Law – United States v. Richey: Disclosure of Tax Information by Former IRS Agent not Protected by the First Amendment' (1992) 22 *Golden Gate U LR* 143

P Schwartz 'The Future of Tax Privacy' (2008) 61 *National Tax J* 883

SJ Troope & AL Young 'The Confidentiality of Tax Returns under Canadian Law' (1982) 27 *McGill LJ* 479

MM Walsh 'The Anonymous Taxpayer: what the Tax Court Failed to Reveal in *Anonymous v Commissioner*' (2008) 61 *Tax Lawyer* 999

<u>OECD documents</u>

Keeping It Safe: the OECD Guide on the Protection of Confidentiality of Information Exchange for Tax Purposes (2012)

Taxpayers' Rights and Obligations - Practice Note, OECD Committee of Fiscal Affairs Forum on Tax Administration (1990)

Tax Transparency 2017 Report on Progress (Global Forum on Transparency and Exchange of Information for Tax Purposes).

<u>Commissions of inquiry and related documents</u>

Inland Revenue Discussion Document (New Zealand) *Making Tax Simpler – Proposals for Modernising the Tax Administration Act* (2016)

Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa (chaired by Prof Michael Katz) (1994)

Third Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa (chaired by Prof Michael Katz) (1997)

Office of Tax Policy: Department of the Treasury *Report to Congress on Scope and Use of Taxpayer Confidentiality and Disclosure Provisions: Vol 1: Study of General Provisions* (October 2000) (United States of America)

Report on Tax Administration (chaired by Judge Dennis Davis) (2017)

Newspaper articles, media statements and blogs

P de Vos 'President's Keepers: Why Tom Moyane might have a Legal Duty to Publish President Jacob Zuma's Tax Records' *Daily Maverick* 8 November 2017

C McKune & S Sole 'SARS Wars: Moyane's Empire Strikes Back' *Mail & Guardian* 19 February 2016

'Krejcir sentenced to 35 years in prison' *News 24*, 23 February 2016

'Judge: Strong Public Interest' *The Guardian* 26 June 2000

SARS media statement, 2 August 2013

Dirk Voorhoof 'No Journalism Exception for Massive Exposure of Personal Taxation Data' *Strasbourg Observers* (5 July 2017) (blog available at https://strasbourgobservers.com/2017/07/05/no-journalism-exception-for-massive-exposure-of-personal-taxation-data/

Cases - South Africa

Bernstein v Bester 1996 (2) SA 751 (CC) FULL

Bosasa Operation (Pty) Ltd v Basson and another 2013 (2) SA 570 (GSJ)

Brümmer v Minister for Social Development and Others 2009 (6) SA 323 (CC)

Centre for Social Accountability v Secretary of Parliament and Others 2011 (5) SA 279 (ECG)

City of Cape Town v South African National Roads Authority Limited and Others [2015] ZASCA 58; 2015 (3) SA 386 (SCA)

Competition Commission v Unilever plc and Others 2004 (3) SA 23 (CAC)

De Meyer NO 1993 (4) SA 13 (A)

Democratic Alliance v African National Congress and Another 2015 (2) SA 232 (CC)

De Reuck 2004 (1) SA 406 (CC)

Estate Dempers 1977 (3) SA 410 (A)

e-TV (Pty) Ltd and Others v Judicial Service Commission and Others 2010 (1) SA 537 (GSJ)

Financial Mail v Sage 1993 (2) SA 451 (A)

Hyundai Motor Distributors (Pty) Ltd and others v Smit and others 2000 (2) SA 934 (T)

Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa and Another 2008 (5) SA 31 (CC)

Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and others 2001 (1) SA 545 (CC)

Janit and another v Motor Industry Fund Administrators (Pty) Ltd and another, 1995 (4) SA 293 (A)

Johncom Media Investments Limited v M and Others 2009 (4) SA 7 (CC)

Khumalo v Holomisa 2002 (5) SA 401 (CC)

Laugh-It-Off Promotions CC v SAB International (Finance) BV t/a Sabmark International and another 2006 (1) SA 144 (CC)

Mail & Guardian Ltd and Others v Judicial Service Commission and Others 2010 (6) BCLR 615 (GSJ); [2010] 1 All SA 148 (GSJ)

Maharaj and Others v MandG Centre for Investigative Journalism NPC and Others 2018 (1) SA 471 (SCA)

Malema v Rampedi and others 2011 (5) SA 631 (GSJ).

Malema v South African Revenue Services [2016] ZAGPPHC 263 (29 April 2016)

S v Geiges and Others (M&G Media Ltd and Others Intervening) 2007 (2) SACR 507 (T)

South African Revenue Services v Malema [2017] ZAGPPHC 452 (6 February 2017)

M&G Media Ltd v Chipu NO 2013 (6) SA 367 (CC)

MEC for Health, Mpumulanga v M-Net 2002 (6) SA 714 (T)

Media24 Limited and Others v National Director of Public Prosecutions; Electronic Media Network Limited v National Director of Public Prosecutions and Another [2012] JOL 29172 (GNP)

Media 24 (Pty) Ltd and Others v Department of Public Works and Others [2016] 3 All SA 870 (KZP)

Metcash Trading Ltd v Commissioner for the South African Revenue Service and another 2001 (1) SA 1109 (CC)

Midi Television t/a eTV v Director of Public Prosecutions 2007 (5) SA 540 (SCA)

Moyane v M & G Case No 10538/16 (High Court, Gauteng Local Division, Johannesburg) (court papers)

Moyane & others v Pauw Case No 22520/ 17 (High Court, Western Cape Division, Cape Town) (court papers)

My Vote Counts NPC v Speaker of the National Assembly and Others 2016 (1) SA 132 (CC)

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)

National Media Ltd V Bogoshi 1998 (4) SA 1196 (SCA)

President of the Republic of South Africa and Others v M & G Media Ltd 2012 (2) SA 50 (CC)

Primedia Broadcasting and Others v Speaker of the National Assembly and Others 2017 (1) SA 572 (SCA)

Prinsloo v RCP Media t/a Rapport 2003 (4) SA 456 (T)

Print Media South Africa and Another v Minister of Home Affairs and Another 2012 (6) SA 443 (CC)

Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC)

S v Mamabolo [2001] ZACC 17, 2001 (3) SA 409 (CC)

Sackstein NO v South African Revenue Service and others 2000 (2) SA 250 (SE)

Shinga v The State and Another [2007] ZACC 3

Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24 (CC)

Silver v Silver 937 NPD 129

South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others 2007 (1) SA 523 (CC)

South African Revenue Services v Malema [2017] ZAGPPHC 452 (6 February 2017)

Thint (Pty) Ltd v National Director of Public Prosecutions and others; Zuma v National Director of Public Prosecutions and others 2009 (1) SA 1 (CC)

Tshabalala-Msimang and Another v Makhanya and Others 2008 (6) SA 102 (W)

Van Breda v Media 24 Ltd 2017 (2) SACR (SCA)

Van Niekerk v Pretoria City Council 1997 (3) SA 839 (T).

Weltz v Hall 1996 (4) SA 1073 (C)

<u>Foreign Cases</u>

<u>India</u>

Naresh Trehan v Rajesh Kumar Gupta (Case No 85/ 2010, 156/ 2010 and 5560/2011, Delhi High Court, 24 November 2014)

Gandhi v Central Information Commission (Case No 8753 of 2013, Bombay High Court, 11 June 2015)

United Kingdom

A v The Commissioners for Her Majesty's Revenue and Customs [2012] UKFTT 541 (TC)

Andrea v The Commissioners for Her Majesty's Revenue and Customs [2017] UKFTT 0850 (TC)

Clunes v Revenue and Customs Commissioners [2017] UKFTT 0204 (TC

Conway v Rimmer [1968] AC 910 (HL)

Commissioner for Her Majesty's Revenue and Customs v Banerjee [2009] EWHC 1299 (Ch)

In re Joseph Hargreaves Ltd. [1900] 1 Ch 347

Lonrho Plc v Al-Fayed (No.4) [1994] QB 775 (CA)

R (on the application of Ingenious Media Holdings plc and another) (Appellants) v Commissioners for Her Majesty's Revenue and Customs (Respondent) [2016] UKSC 54

Privy Council

Mount Murray Country Club Ltd v Department of Transport (Isle of Man) [2003] UKPC 53; [2003] STC 1525

Zimbabwe

Madanhire and Another v Attorney-General CCZ78/12 (12 June 2014)

United States of America

United States v Dickey 268 US 378 (1925)

US v Ritchey 924 F.2d 857 (US Court of Appeals, Ninth Circuit) (1991)

European Court of Human Rights

Fressoz and Roire v France (1999) 5 BHRC 654

Satakunnan Markkinapörssi Oy and Satamedia y v Finland (2018) 66 EHRR 8

<u>Theses</u>

Anna-Maria Hambre *Tax Confidentiality: A Comparative Study and Impact Assessment of Global Interest* (Örebro University PhD thesis, 2015) ISBN 978-91-7529-078-2