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University of the Witwatersrand, Johannesburg

An analysis of Tax Administration in South Africa, procedural rights and its impact on Taxpayers

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

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Declaration

I declare that this research report is my own unaided work. It is submitted for the degree of Master of Commerce at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination in any other university. Any uses made within it of the work of authors in any form (e.g. ideas, quotations, text, tables) are properly acknowledged at the point of their use. A full list of the references has been included.

Shalima Mahadevey
0512252E
1 September 2016

……

To my family

with sincere thanks

for their love and encouragement

during the writing of this research report

Abstract

The Tax Administration Act 28 of 2011 (TAA) came into effect on the 1 October 2012 and brought with it significant changes to the South African tax administrative regime, extending the powers of South African Revenue Service (SARS) while also indirectly emphasising taxpayers' rights. This research report examines the impact that this 'new legislation' has had on taxpayers, more especially the procedural and administrative rights of taxpayers. This research report evaluates inherent procedural rights of taxpayers as contained in the Constitution of the Republic of South Africa versus the current provisions in TAA and the remedies available to taxpayers should their rights be infringed upon. The research report extends to instances of good tax administrative practices in a few OECD countries and finally concludes with comments on the future of tax administration in South Africa.

Key words: tax administration, Tax Administration Act, constitutional rights, procedural rights, taxpayers' rights, remedies.

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Abbreviations and Acronyms

Constitution	Constitution of the Republic of South Africa, 1996
CRA	Canadian Revenue Agency
ENSAfrica	Edward Nathan Sonnenbergs Africa
HRMC	HM Revenue and Customs
IRS	Internal Revenue Service
ITA	Income Tax Act 58 of 1962
MO	Memorandum on the objects of the Tax Administration Laws Amendment Bill, 2014
NZ	New Zealand
OECD	Organisation for Economic Co-Operation and Development
PAIA	Promotion of Access to Information Act 2 of 2000
PAJA	Promotion of Administrative Justice Act 3 of 2000
PwC	PricewaterhouseCoopers Incorporated
TAA	Tax Administration Act 28 of 2011
TAAG	SARS Short Guide to Tax Administration Act, 2011 – 5 June 2013
TALAA	Tax Administration Laws Amendment Act
TALAB	Tax Administration Laws Amendment Bill
Tax Ombud	Tax Ombud, Judge Bernard Noepe as appointed in terms of the Tax Administration Act No. 28 of 2011
s	Section (namely section of an Act)
SARS	South Africa Revenue Service's
SMMO	SARS Service and Monitoring Panel
ss	Sub-section (namely sub-section of an Act)
SSO	senior SARS official
UK	United Kingdom
USA	United States of America
VAT	Valued-Added Tax
VAT Act	Value-Added Tax Act 89 of 1991

Chapter One: Exordium

1.1 Preamble

The introduction of the Tax Administration Act (TAA) has bought with it significant controversies in the tax administration regime in South Africa and this is evident in the *Tax Law Review* commentary issued in November 2012 soon after the promulgation of the TAA with the following comment (PricewaterhouseCoopers Inc., 2012:5):

> Many commentators —including PwC— claim that this "balance" has not been achieved. Rather, the TAA remains skewed in favour of SARS and compliant taxpayers do not (in some cases) have sufficient protection against potential abuses of power by individual SARS officials.

The enforcement of tax administration remains with SARS, and in certain circumstances elaborated in this report compliant taxpayers are faced with insufficient protection against the misuse of power by SARS officials (PricewaterhouseCoopers Inc., 2012:5). It thus begs the question whether the introduction of TAA has fundamentally changed the tax administration landscape in South Africa to the detriment of taxpayers.

Section 2 of the TAA implies that the introduction of this legislation will improve the balance between the powers of SARS and the rights of taxpayers in order to ensure a fair, efficient and cost effective tax regime thereby ultimately culminating in increased revenue collection. The TAA has attempted to centralise all the administrative tax provisions (with the exclusion of Customs and Excise), thereby housing all administrative provisions in one single Act to allow for more efficient tax administration (TAAG, 2013:4). The TAA will therefore apply to the following Acts:

- Transfer Duty Act, 1949
- Estate Duty Act, 1955
- Income Tax Act, 1962
- Value-Added Tax Act, 1991
- Skills Development Levy Act, 1998
- Unemployment Insurance Contributions Act, 2002
- Diamond Export Levy Act, 2007
- Diamond Export Levy (Administration) Act, 2007
- Securities Transfer Tax Act, 2007

- Securities Transfer Tax Administration Act, 2007
- Mineral and Petroleum Resources Royalty Act, 2008
- Mineral and Petroleum Resources Royalty Administration Act, 2008
- Voluntary Disclosure Programme and Taxation Laws Second Amendment Act 2010.

This research report purports to ascertain whether taxpayers' rights are sufficiently protected against specific unjust practices and procedures utilised by SARS through the evaluation of the changes to the tax administration regime in South Africa since the promulgation of the TAA. In order to effectively evaluate whether the rights of taxpayers have in fact been negatively impacted by the introduction of the TAA, one has to initially turn attention to the legislation that prescribes these rights, that being; the Constitution of the Republic of South Africa of 1996 (the 'Constitution'). The Constitution refers to right to equality, property, and privacy to name a few pertinent rights; however, few battles have been won against SARS on this basis (Croome, 2010:185). This research report will evaluate the rights of taxpayers contained in the TAA with specific reference to the procedural rights contained in the Constitution in order to determine if taxpayers' rights have indeed been negatively impacted by the TAA.

1.2 Background to the research area

During 1994, the Republic of South Africa saw the end of the apartheid and the country became a constitutional democracy. This resulted in the introduction of the Interim Constitution and Bill of Rights[1]. In 1996 Constitutional Court certified the Constitution which was adopted on 8th May 1996, amended on 11th October 1996 by the Constitutional Assembly, and promulgated on 18 December 1996. It finally took effect on 4th February 1997. In the case of *First National Bank of SA Ltd t/a Wesbank v C:SARS* 2002 (7) JTLR 250 the court highlighted that SARS is subject to the Constitution,

[1] The Constitution of South Africa is the supreme law of the country of South Africa. It provides the legal foundation for the existence of the Republic, sets out the rights and duties of its citizens, and defines the structure of the government. The current constitution, the country's fifth, was drawn up by the Parliament elected in 1994 in the first non-racial elections. It was promulgated by President Nelson Mandela on 10 December 1996 and came into effect on 4 February 1997, replacing the Interim Constitution of 1993.

> [N]o matter how indispensable fiscal statutory provisions were for the economic well-being of the country, they were not immune to the discipline of the Constitution and had to conform with its normative standards. (*First National Bank of SA Ltd t/a Wesbank v C:SARS* at 252)

It must be stressed that the Constitution does not specifically confer upon the state the right to impose taxes but section 228 of the Constitution read with provisional legislature indicates that:

- Taxes, levies and duties other than income tax, value-added tax, general sale tax, rates on property or customs duties; and
- Flat-rate surcharges on the tax bases of any tax, levy or duty imposed by national legislature, other than the tax bases of corporate income tax, value-added taxes, rates on property or customs duties. (Croome, 2010c:8-9)

The government requires funding to finance its administration and its objectives; however it is essential that the collection of taxation be administered in accordance with the Constitution. SARS, much like all organs of the state should not exceed its powers. The sub-paragraphs that follow will provide a first introduction to taxpayers procedural that will be critically evaluated later in this research report. These procedural rights comprise the following:

- Access to information (section 32 of the Constitution);
- Access to just administrative action (section 33 of the Constitution); and
- Access to the courts (section 34 of the Constitution).

It is imperative to highlight at this stage that the rights mentioned above are not absolute, rather are limited in terms of section 36 of the Constitution. Therefore when Constitutional matters are decided, consideration is firstly given to the right in terms of the Bill of Rights, thereafter determination to whether the right has been justifiably and reasonably limited. Section 36 states that:

> **36.** Limitation of rights.- (1) 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.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights

In essence, the Constitutional Court has to be satisfied that an action has limited the constitutional rights of taxpayers. The limitation will be evaluated against the five factors in section 36 to determine whether the said action is reasonable or justifiable within the context of just and equitable administrative action. The five factors are; the nature of the right, the importance of the purpose of limitation, nature and extent of limitation, relationship between the limitation and its purpose and less restrictive means. Thus throughout this research report the two-stage analysis must resonate with the arguments raised on the Constitutionality of the practices and procedures of SARS in relation to taxpayers under the TAA.

1.3 Problem Statement

The introduction of the TAA has resulted in additional focus being placed on this new piece of legislation and the lack of understanding thereof by taxpayers, especially to the extent to which procedural rights of taxpayers have been affected. While the intention for the TAA was to improve administrative efficiencies and enhance the rights of taxpayers, there are contrasting views on whether this is actually the case in practice. The manner in which the TAA was introduced and the various provisions contained within this Act could be seen to be biased in favour of SARS especially the sentiment that was expressed by the taxpayers at large (PricewaterhouseCoopers Inc., 2012:5,8). This research report purports to determine if the TAA negatively impacts on the procedural rights of taxpayers in favour of SARS to the extent that it can be considered unconstitutional.

- The first sub-problem is that the TAA contains specific procedural provisions that do not encourage the taxpayers inherent procedural rights contained in sections 32, 33 and 34 of the Constitution. This will be evaluated by comparing the inherent rights in the Constitution to specific provisions in the TAA that specifically inhibit taxpayers' procedural rights.
- The second sub-problem is that the taxpayer's right to access to information may have been limited by the introduction of the TAA. Whilst, the TAA may have enhanced SARS's information gathering powers to the extent that may be detrimental to the taxpayer. In order to establish whether this is indeed the case, a detailed evaluation of taxpayer's right to information in terms of the TAA needs

to be considered in contrast to SARS's information gathering powers that the TAA currently confers. This will be done by comparing the provisions in the TAA that allow for taxpayers to request for information versus the provisions that allow SARS to request information from taxpayers. This will enable one to determine if there is a balance of power or if taxpayers' right to access information have been adversely impacted.

- The third sub-problem is that SARS may abuse its power of making administrative decisions due to specific provisions contained in the TAA affording SARS substantially more powers. This problem will be researched by the evaluation of specific administrative provisions in the current TAA where SARS is able to apply its discretion when making decisions significantly hindering the taxpayer's right to just administrative action as prescribed by the Constitution. An evaluation to the amendments to the TAA (in the form of the Tax Administration Laws Amendment Act 23 of 2015 GG 39586 – released on 8 January 2016) will be explored to determine if SARS has suggested and implemented further administrative provisions with the intention of skewing the TAA in its favour. Hence the research of the current and further amendments to the TAA provide further evidence whether SARS advocates unjust practices for its own benefit that do not constitute 'just administrative practices' as laid out in the Constitution.
- The final research sub-problem is that the tax administration practices in South Africa under the TAA deviates from what is considered '*best practices*' with regards to tax administration internationally. The research report will evaluate specific practices in certain OECD countries (USA, UK, New Zealand and Canada) that are considered '*best practices*' from a tax administrative perspective compared to the current provisions contained in the TAA.

1.4 Purpose Statement

The purpose of the study:

- Evaluation of the taxpayer's right to access to information has been limited by the introduction of the TAA, whereas enhanced SARS's information gathering powers to the extent that may be detrimental to the taxpayer;

- Evaluation whether the TAA contains provisions that do not promote just administrative practices thereby permitting SARS significant powers to the detriment of taxpayers' procedural rights;
- To understand and analyse the impact of the above procedural changes to taxpayers' rights;
- To comment and make recommendations of remedies available at the disposal of the taxpayer; and
- To comment on the future of tax administration in South Africa.

1.5 Research Objectives

The study will be guided by the following research objectives:

- To understand the impact the TAA has had on the taxpayers' procedural rights in South Africa;
- To interrogate the effects of the change in legislation;
- To identify and comment on potential problem areas which are contained currently in the TAA and to comment on potential recommendations for the taxpayer; and
- To deliberate on the future of tax administration for taxpayers in South Africa.

1.6 Importance and benefits of the study

The introduction of the TAA has brought about a great deal of uncertainty amongst people within the tax profession and its impact thereof on the taxpayers more especially on the rights of taxpayers. Numerous articles were released by prominent persons within the tax fraternity emphasising the bias that the TAA has brought into the tax administration regime in South Africa in favour of SARS.

Thus this research report attempts to critically evaluate the impact the TAA has had on taxpayers' procedural rights to determine if such a bias does indeed exist. It will put into perspective inherent rights available to all taxpayers and provide guidance on the remedies available in other pieces of legislation if the taxpayers' procedural rights are unjustly limited or breached. The benefit of such a study will allow for a greater awareness to be created surrounding taxpayers' rights which will allow for just administrative practices to prevail.

SARS has since the introduction of the TAA been stringently applying the provisions of the TAA, thus it is imperative for all taxpayers to be cognisant of their right as well as remedies that exist within the TAA and in other pieces of legislation beyond the TAA.

From a theoretical perspective, it will also provide an initial conversation for corrective measures of the TAA to be generated to allow for a balance of power to exist and taxpayers' rights to be protected. From a practical perspective the audit, accounting and tax practitioners can also benefit from this study thereby putting into perspective the procedural rights and remedies both in terms of the TAA and the Constitution.

1.7 Research Methodology

Research has been undertaken as a literature review with a view to analyse and evaluate the TAA with respect to procedural rights contained in the Constitution of South Africa. The sources of information include the South African tax legislation, publications by the South African Revenue Service, books, journals, articles, publications, websites, decided cases and any other information relevant to the research. The findings of this literature review have been used to compile this report.

1.8 Assumptions

- All the section references refer to the TAA unless otherwise specified;
- Taxpayers are honest and want to comply with all the provisions of the TAA;
- It is assumed that taxpayers are not fully aware of their rights and remedies in terms of the TAA, the Constitution and the interrelationship thereof as the TAA is a new piece of legislation that was promulgated in 2012;
- Tax Administration is a key compliance aspect for all businesses both large and small.

1.9 Limitation of Scope

- This study is limited to the analysis of specific procedural rights contained in Section 32, 33 and 34 of the Constitution (limited by Section 36) with reference to pertinent sections of the TAA;

- The focus of the study will be from a South Africa stand point**;**
- Unjust administrative practices have only been evaluated with reference to jeopardy assessments, period of prescription, suspension of payments and legal privilege;
- Limited research is performed on the tax administration practices in the OECD countries. Consequently this research report does not extend to every aspect of efficiencies of tax administration rather highlighting the aspects that are lacking thereof in the South African tax regime are considered necessary for consideration by emphasising '*best practices*' that exist in other tax jurisdictions;
- The necessary data and information for this research report will be collated purely from a literature review**;**
- The procedural rights outlined in this research report are based purely on a literature review that has been limited to the following databases: Sabinet, ProQuest, EcoHost, Emerald and Google Scholar as well as literary resources highlighted in the bibliography. Thus anything beyond these sources has not been considered for comment in this report;
- Any changes to the TAA after 31 December 2015 (with the exception of specific aspects of the amendments to the Tax Administration Laws Amendment Act 23 of 2015 GG 39586 deliberated in this report) have been excluded from the scope of this research paper.

Chapter Two: Access to Information

2.1 Introduction

David Hume (Hume, 1752) in his writings appropriately sums up the sentiment of taxpayers as follows:

> Every man, to be sure, is desirous of pushing off from himself the burden of any tax, which is imposed, and if laying it upon others: But as every man has the same inclination, it is upon the defensive; no set of men can be supposed to prevail altogether in this context.

The present times are no different to the era that Hume speaks of as legislation still regulates taxes payable by citizens to their government to enable it to meet its obligations. The relationship between SARS and taxpayers is unequal as the revenue authority attempts to maximise their tax collection (specifically evidenced by Section 80A-80L ITA) whilst taxpayers regularly seek to minimise their tax payable (*IRC v Duke of Westminister*)[2]. The purpose of this chapter is therefore to discuss the procedural rights at the disposal of taxpayers in order to ultimately determine whether those rights have been infringed upon as a result of the powers conferred on SARS by the introduction of the TAA.

Chapter 5 of the TAA contains the general administration provisions in respect of inspections, field audits and criminal investigations. In many respects the new provisions of the TAA are similar to the previous provisions of Section 74 of the Income Tax Act (ITA), but it introduces additional provisions that contribute to the rights of taxpayers. In terms of the SARS Short Guide to Tax Administration Act (TAAG) time is wasted by SARS on prolonged debates on SARS' entitlement to information rather than the view that the focus should be on the collection of the correct amount of tax, based on timely accessible information. The TAAG elaborates further that 'taxpayer's rights are amplified and made more explicit to counterbalance SARS's new information gathering powers' (2013:23).

The TAA permits SARS officials to collect relevant information using the following methods (TAAG, 2013:23), namely:

- Request for information;
- Production of relevant material in person during an interview at a SARS office;

[2] *IRC v Duke of Westminister* [1936], a leading case on a taxpayer's right to lawfully reduce his / fiscal obligation

- A field audit or criminal investigation at the premises of a person;
- Formal inquiry before a presiding officer;
- Search and seizure.

Therefore it is imperative for one to determine if taxpayer's right to access to information have been limited thereby affording SARS boundless powers skewing the TAA in its favour.

2.2 SARS information gathering procedures

2.2.1 Commissioners power to call for information from third parties

The SARS modernisation process to become a more efficient revenue authority has made it possible for electronic information reporting by third parties. Section 26 of the TAA permits the Commissioner by public notice within a predetermined time, to require a person who employs, pays amounts to, receives amounts on behalf of or otherwise transacts with another person to submit a return to SARS. The return submitted through the various channels warrants the matching of the information received from third parties to the taxpayer and is an extremely effective tool for the screening of tax returns in order to detect any under declaration and to encourage the correct reporting of taxable income. In addition the information provided to SARS not only serves as a due diligence process it however serves as a medium for SARS to provide information in terms of the international standard for the exchange of information.

This section of the TAA has far reaching consequences, not only does it advocate the breach of confidentiality between the taxpayer and the third party as there is no onus placed on the third party to notify the taxpayer that information has been submitted to SARS. Furthermore, the taxpayer is at a risk of an audit or other more stringent measures by SARS such as search and seizure or a preservation order being imposed on the taxpayer if the information provided by the third party is not a true reflection of the taxpayer's tax liability. This could not only hinder the taxpayer's business but also negatively impact intangible and invaluable assets such as reputational risks, thereby resulting in potentially disastrous consequences.

2.2.2 The enquiry into the taxpayers affairs (inspection, verification, audit, & criminal investigation)

The information gathering powers of SARS and the changes in respect thereof are initially evident in Part A of Chapter 2 of the TAA. In terms of the old section 74A of the ITA, the Commissioner or any officer was allowed to request the taxpayer, or any other person, to supply 'any information, document or thing' (orally or verbally), for purposes of administrating the ITA. Section 40 of the TAA provides an insight to the extension of SARS's information gathering powers evidenced by the deliberate wording of this section. The wording has regard to the basis upon which SARS may select a person for inspection, verification or audit, section 40 now grants SARS very broad powers by referring to the ability of SARS to request 'any relevant consideration' and the selection basis could include 'a random or a risk assessment basis'. Thus the selection basis can be anything that is relevant to SARS's duty to administer the tax act and includes a random or risk assessment basis.

The TAAG (2013:24) further explains what is meant by the random and risk basis selection methods:

- A selection is simply performed by random spot checks on, for example, every 10th taxpayer on the tax register.
- A risk based selection is to target taxpayers demonstrating a certain risk profile. This attempts to ensure that SARS obtains real-time information to address tax risks and provide timely feedback.

The TAAG (2013:23) appears to limit the 'prescribed' selection methods to only random and risk assessment based. On the one hand the, TAAG does not discuss the possibility of selection powers wider than these two methods. On the other hand there is no restriction on how wide 'risk assessment' can be interpreted. For example, the TAAG notes that 'obtaining real time information' not only 'from taxpayers', but also 'about taxpayers from third parties' are both 'key to effective risk management' (PricewaterhouseCoopers Inc., 2012:29).

In terms of section 41 of the TAA, a SARS official must obtain and present an authorisation letter from a senior SARS Official (SSO) in order to conduct a field audit or criminal investigation. The rules on the authorisation for audits (section 41 TAA) are largely the same as the old provisions contained in sections 74 and 74B(4) ITA, namely that written

authorisation is required and that the SARS official undertaking the action must present the authorisation letter. The question that is raised is twofold:

- Who is regarded as a senior SARS official (SSO)?; and
- Whether the above requirement is only applicable to field audits and criminal investigations and not to inspections?

The first point brings us to the discussion of this new concept of a SSO that was introduced for the first time in the TAA. It appears that (except for the Commissioner) the question of whether a SARS official is a 'senior' SARS official is not determined specifically with reference to the individual's designation, ranking or grade per se within the SARS organisation only, the Commission also has the discretion to designate a senior SARS official with reference to his/her role, function or duty. Section 1 read with section 6(3) of the TAA provides this guidance on the purpose and duty of a senior SARS official. The bias in the TAA is advocated by virtue of the fact that if the Commissioner specifically authorises any SARS official (not a designated senior SARS official in terms of their position) to do something that can only be done by an SSO, like (say) represent SARS in the Tax Court (section 12(1)), then that person is automatically promoted to the level of SSO —not by virtue of the fact that the person receives the specific promotion to or designation as 'senior SARS official', but rather by virtue of the fact that he/she was instructed to do something that can only be done by a SSO. Thereafter it seems that the SSO is entitled to do anything else that is reserved for SSO's for example to withdraw a SARS notice (section 9(1)(*b*)) or carry out a warrantless search order (section 63(1)). It is unclear how taxpayers will verify or determine that a power has been delegated to a specific official or post, since an ordinary 'SARS official' can, by definition, also include a contractor —and taxpayers are not likely to be privy to title designations within SARS (PricewaterhouseCoopers Inc., 2012:13); and

Secondly if the letter is not produced, members of the public are entitled to assume that the person is not a duly authorised SARS official (PricewaterhouseCoopers Inc., 2012:30). Again this is problematic as this section does not provide sufficient clarity of the consequences should the taxpayer refuse to provide information to an unauthorised individual nor does it protect the taxpayer's right against an administrative action imposed by the unauthorised individual. Therefore ultimately this provision is open for abuse by the SARS due to the lack of clarity.

2.2.3 Request for relevant information

Sections 46 and 47 of the TAA grant SARS the right to request information from a taxpayer or third party in order to fulfil its objectives. The new rules (in sections 46 and 47 TAA) governing SARS's 'request for relevant information' is also an extension of the old section 74B ITA rules. In practise the information requested is normally done by way of a written notice to the taxpayer or third party for 'relevant material' for the purpose of tax administration and is not limited to a formal audit or investigation per the TAAG. The information requested by SARS is limited only to the following extent (TAAG, 2013:26):

- A request for information must be related to and within the ambit of the administration of the Tax Acts for example in the case of a request for income tax information the request must be related to the ITA;
- The request for information may only be used to obtain relevant material;
- The request for information is limited to the records maintained or that should reasonably be maintained by a person. The person is accordingly not obliged to obtain or gather information outside such records in order to comply with an information request;
- Relevant material required by SARS in the request for information, must be referred to in the request with reasonable degree of specificity; and
- Relevant material requested by SARS for revenue estimation purposes are limited to the information in this regard that a taxpayer has available.

Section 46(4) obligates a taxpayer to submit the relevant material to SARS as complete as possible and within a specified time and manner requested. The taxpayer will be afforded the opportunity to extend the specified time on reasonable grounds for the extension which are provided to the senior SARS official.

Prior to the enactment of the TAA, the Commissioner would perform what was termed 'lifestyle questionnaires' which required taxpayers to disclose the details of their assets, liabilities, annual expenditure on holidays, food and schools to name a few. The taxpayers were under no obligation to submit this information by law; however since the enactment of the TAA and specifically section 46 thereof have brought to question the constitutionality of this section (Croome, 2015:118).

Additionally, section 46 has also given SARS significant powers by providing a wide meaning of 'relevant material'. Firstly is must be highlighted that the meaning of 'relevant material' is broadly defined within the TAA as:

> any information, document or thing that in the opinion of SARS is foreseeably relevant for the administration of the tax Act as referred in section 3.

A further definition in the Memorandum on the Objects of the Tax Administration Laws Amendment Bill (SARS, 2014:42), 'foreseeably relevant' follows the following broad grounds:

- whether at the time of the request there is a reasonable possibility that the material is relevant to the purpose sought;
- whether the required material, once provided, actually proves to be relevant is immaterial;
- an information request may not be declined in cases where a definite determination of relevance of the material to an ongoing audit or investigation can only be made following receipt of the material;
- there need not be a clear and certain connection between the material and the purpose, but a rational possibility that the material will be relevant to the purpose; and
- the approach is to order production first and allow a definite determination to occur later.

The definition still remains wide, however from the above extract it can be surmised that the power to request information and the relevance thereof remains with SARS. Notwithstanding this there still has to be a causal nexus between the information being requested and the taxpayers' affairs (Croome & Olivier, 2015:118). The scope of material that may be requested and inspected by SARS is broadened in two ways. Firstly, the discretion to determine whether material is relevant; is entrusted to SARS (TALAB, 2014). Secondly, SARS may request any material that is foreseeably relevant as listed in Section 3 of the TAA. This however seems to afford SARS more power than is afforded to taxpayers. This is further evidenced by the specific provisions contained in the section indicating that (PricewaterhouseCoopers Inc., 2012:32-33):

- The target population that may be approached to furnish the information is broadened substantially. Not only is it the taxpayer, but it could also be "another person" —meaning obtaining information about a taxpayer from some other person (s 46(1)). Furthermore, the respondent need not be identified specifically by name, as long as the person is "otherwise objectively identifiable" (e.g. "the owner", or the "manager"?).

- Information could be requested (by a SSO) in respect of an objectively identifiable "class" of taxpayers (s46(2)). For example, could a jeweller be asked for information about his/her clients?
- Information could be required orally, i.e. an interview (s46(1)). Furthermore, a SSO may request that the information be provided under oath or solemn declaration (s46(7)).
- A person may be required to attend an interview at a time and place designated by SARS (s47). The stated intention is that such an interview should aim to avert or obviate the need for further verification or audit (and should not relate to a criminal investigation). The interviewed person may also be required to present actual relevant material at the interview. Section 47(4) permits a person to decline the interview if the venue specified by SARS is too far from the person's home or business. (The Commissioner is to prescribe acceptable distance.)
- The only safeguard that is provided for taxpayers is that the relevant material required by SARS must be referred to in the request "with reasonable specificity" (s46(6) & s47(3)). In other words, a targeted person may reject vague or generic (non-specific) requests.

Section 46 also refers to a 'reasonable period', this means that this provision allows for SARS to request a taxpayer to provide information over a number of tax years and across the various tax types due to the wide scope. The 'reasonable period' was inserted into the provision to ensure that SARS does not engage on a fishing expedition and that the scope of the request is reasonable in terms of the period under question (Croome & Olivier, 2015:119).

As already mentioned above, SARS may request information from any person other than the taxpayer (section 46(3)). In these instances the information which SARS may request is limited to the records kept or which ought reasonably to be kept by the person concerned in relation to the taxpayer (TAAG, 2013:26).

Where a person receives a request for relevant material from SARS under section 46 they must make that material available to SARS at the place and within the time period specified in the request (section 46(4) as amended). It has further been a further requirement that the taxpayers submit the information to SARS in a format that is reasonably accessible to the taxpayer. This is best illustrated by way of an example, prior to the introduction of section 46(4) taxpayers could refuse to submit information to SARS electronically, thus this amendment seeks to ensure where the taxpayer receives a request for relevant information that the information be provided electronically. It must be noted that SARS cannot insist that records that are kept in the manual form be provided to them electronically. The information provided to SARS ought to be in a format that is reasonably accessible to the taxpayer and

the taxpayer should not be permitted to manipulate the data in order to provide it to SARS and in a particular format that is not readily available or accessible to the taxpayer (Croome, 2015:120).

The request for relevant information demanded by SARS under s 46 must be done with reasonable specificity. The term 'specificity' is not defined in the TAA thus one needs to refer to the literal meaning. The Concise Oxford Dictionary does not define 'specificity' however 'specific' is defined as

> adj. 1 clearly defined or identified. Precise and clear
> n. a precise detail

This effectively means that SARS must provide the taxpayer with adequate detail and describe precisely the information it seeks from the taxpayer (Croome, 2015:121).

Section 46(8) of the TAA now confers the authority on SARS to obtain information about imminent tax payments in order to forecast revenue to supply better estimates to National Treasury.

PricewaterhouseCoopers (2012) in their report goes on to specifically mention that:

> The "relevant material" definition is very subjective and substantially increases the scope of this provision. Furthermore the compulsion to provide information for statistical purposes is to be lamented as this provides a further inconvenience and cost to taxpayers e.g. SARS requesting the taxpayer to provide detailed forecasts shortly before SARS's own year end. As regards presenting oneself for an interview, no provision is made for cost-reimbursement, nor that (at the very least) the interview should be at the closest SARS office —especially where it is about another person's tax affairs. It also does not provide for ancillary matters such as where witnesses are involved where employers are compelled to provide leave for such a person to appear, thus arguably forcing the employee to take unpaid leave. No provision is made for the person to receive minutes of what was said at the interview or that it should be recorded.

The pivotal role that information plays in SARS's compliance is evident from the following passages contained in the latest SARS Strategic Plan (2014/15-2018/19 Strategic Plan, South African Revenue Service):

> The automation of our systems has enabled us to receive, review and process large volumes of taxpayer and trader data and/or information. We have an opportunity to improve our analytical

> capability to manage compliance risks more intelligently by predicting for example taxpayers/traders' propensity to file their returns on time or to declare and pay what they owe fully. This will give us the ability to intervene much earlier if required and with the right kind of compliance intervention.
>
> We receive, process and hold large quantities of taxpayer and trader data in our data warehouse from multiple sources. This presents us with an opportunity to improve our analytical capability to manage compliance risks more intelligently and use our resources more efficiently.
>
> By increasing and integrating data from multiple sources, we will be able to gain a complete economic understanding of taxpayers and traders across all tax types and in all areas of economic activity. Moreover, by moving from a transactional to an economic view of taxpayers and traders, SARS will be able to provide a more appropriate service and detect inaccuracies in declarations as well as identify those who have attempted to stay outside the tax net. Over the next five years we will ensure that the design and development of our new systems and processes take into account our intentions to have a complete and dynamic economic view of taxpayers and traders at all times, and not just when they submit a return or clear an import transaction.

SARS' ability to further empower itself and extend its request for information is demonstrated by the new amendments to section 46. The full amendments to this section are contained in Appendix A. SARS motivation to the amendments to the section is for the following reasons (Swanepoel, 2015:96):

- Requests for information do not currently cover items that should reasonably be expected to be kept by a third party;
- Foreign information requests are not currently dealt with; and
- A minimum time period for such requests is not currently in place.

The effect of the amendments is the use of the work 'kept' which over extends SARS's powers in that a document that record that is kept does not imply that the person is legally entitled to be in possession thereof. In addition a third party may not be able to verify the correctness of the said documents. Furthermore SARS may end up with irrelevant or erroneous documents to the detriment of the taxpayer, as the taxpayer may not be privy to the documents and would need to take additional steps to defend its position. The new section 46(9) restricts the taxpayer's ability to discharge the argument that it should not be subject to tax. If taxpayers were legitimately not able to access documents and later wish to rely on them, such taxpayer will be subject to costly court applications. This also places an

unnecessary burden on our courts and therefore ought not to be included in the final bill (Swanepoel, 2015:98).

2.2.4 Search and Seizure

Search and seizures represents the fourth area of the TAA that has been identified as an additional mechanism that affords SARS a great deal of power in information gathering. The analysis below provides an insight to the evolution of this tool in the favour of SARS.

2.2.4.1 Search and Seizure prior to the enactment of the TAA

Prior to the enactment of the TAA, section 74D of the ITA regulated search and seizure operations conducted by SARS when requiring information from taxpayers. Under section 74D of the ITA, the Commissioner could search the taxpayers premises without prior notice if he obtained a search and seizure warrant. Section 74(3) of the ITA, before amendment by s14 of the Revenue Laws Amendment Act 46 of 1996, afforded the Commissioner the power to authorise members of his staff to conduct a search and seizure without a warrant from a judge (Croome & Olivier, 2010:120). This section over the years has been criticized for its violation of a taxpayer's right to privacy. The court decided in *Bernstein and Others v Bester NO and Others* (CCT23/95) [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751 that the right to privacy extended only to private possessions and did not cover the documents and records affecting the business affairs of the liquidated company (Croome & Olivier, 2015:143). It has further been argued that the power to search premises and seize documents is a necessary part of the Commissioner's armoury to ensure tax compliance. Therefore it is essential that a judge oversees the powers granted and decides whether the Commissioner has just and reasonable cause to conduct such a search and seizure (Croome & Olivier, 2015:144).

Since search and seizure procedures remain an integral part of SARS's ability to gather information prior to the risk of distraction by taxpayers, the provisions have been retained in the TAA and to a certain degree extended. In respect of the application for a warrant to conduct a search and seizure, the following changes from the old provisions were brought into effect in terms of sections 59 and 60 of the TAA:

- A magistrate is now also allowed to approve an application for a warrant, but only to the extent that the tax dispute does not exceed the jurisdiction set for Tax Board cases. This power was previously only granted to a judge of the High Court.
- The period during which a warrant may be executed is limited to 45 business days. This period may be extended if SARS can demonstrate good cause for the period to be extended. Previously, no time limit was specified in Section 74D of the ITA.

It must be noted at this point that the minimum content of lawful warrants has been determined by the Constitutional Court and it is noted that those requirements are wider than the minimum set in the TAA. Warrants issued under the TAA might therefore have to meet the extended criteria set by the court in order to be valid (PricewaterhouseCoopers Inc., 2012:35)

2.2.4.2 Search and Seizure procedures with a search warrant:

Section 61 of the TAA brings into effect the following changes in respect of the execution of a warrant:

- A person may refuse access if the SARS official fails to present a warrant (section 61(2) of the TAA). However, when the owner or manager of the premises is not present, the official must attach a copy of the warrant in a noticeable place on the premises, which effectively allows the SARS official to search the premises without the owner being present. There are also circumstances in terms of Section 63 where no warrant is required. Refer to paragraph 2.2.4.4 below. Previously, the Commissioner was permitted to carry out a search and seizure at any time and without prior notice. Section 74D did not contain similar requirements to section 61(2) of the TAA.
- The TAA lists steps that a SARS official may take when performing a search and seizure in section 61(3) and includes:
    - Opening of things that the official suspects to contain relevant material.
    - Retaining computers and storage devices.
    - Copying of relevant material.
    - Requesting a person to explain relevant material.

- Stopping and boarding of aircrafts, vessels or vehicles.

In terms of the old section 74D(1)(*c*) of the ITA, any officer referred to in the warrant was permitted to open or remove anything which he may suspect to contain any information, documents or things that may provide evidence of the non-compliance by the taxpayer with his obligations under a tax act. Section 74D(1) did not specify any other actions that the officer may take in conducting the search and seizure operation.

- Section 61(3) of the TAA therefore broadens the scope of the permissible conduct during any search and/or seizure process.
- The SARS official is required in terms of section 61(4) to keep an inventory of all material seized, in a form and manner that is practical under the circumstances, and to provide a copy thereof to the affected person. Previously, no such obligation was placed on the officer conducting the search and seizure operation. As such, section 61(4) restricts the powers of the SARS official conducting the search and seizure to a limited extent.
- Section 61(5) of the TAA states that a SARS official should conduct the search and seizure operation with a strict regard to decency and order. Section 74D of the ITA did not make any similar reference, except that the search of any person must be conducted by an officer of the same gender as the taxpayer.
- In terms of section 66(4), the court may authorise SARS to keep copies of the original material seized even if the warrant is subsequently set aside by the court. This provision is considered to be unconstitutional since it effectively allows the execution of a warrant which was questionable *ab initio* (PricewaterhouseCoopers Inc., 2012:36).

On the one hand, the provisions in terms of the TAA with regards to the execution of warrants introduced a few positive changes as compared to the old provisions, in that the TAA now clearly sets out the actions that a SARS official may exercise and is required to take (refer to sections 61(4) and 62(5) of the TAA).

On the other hand, the scope of legally permissible actions while carrying out a search and seizure is also broadened (refer sections 61(3) and 66(4) of the TAA).

2.2.4.3 Search of premises not identified in warrant:

Section 62 permits relevant material referred in section 60(1)(*b*) being searched and if required seized on the premises however if not separately identified in the warrant, nor can a warrant be obtained in time and there is a risk of destruction of records affords SARS the right to enter the premises and search as if a warrant has indeed been issued. This section is extremely subjective and to a certain degree allows SARS to engage in a 'fishing expedition', whilst legally enabling it to carry out such a search. No remedies are mentioned in the TAA that affords taxpayers protection against abuse of the powers of SARS save that only the domestic premises may not be entered into by the SARS official/s.

2.2.4.4 Search and Seizure procedures without a search warrant:

Section 63 of the TAA goes further and has far reaching consequences as it allows for search and seizures without a warrant. Warrantless search and seizure operations are allowed in one of the following circumstances:

- The person agrees to the search and seizure in writing.
- The SSO has reasonable grounds to believe that:
  - there is a possibility that the relevant material will be destroyed or removed;
  - a search warrant would have been issued, had one been applied for; and
  - the time delay to obtain the warrant will defeat the purpose of the search and seizure.

Section 66 of the TAA contains provisions for circumstances where damages were caused to property during a search and seizure. The affected person may request that SARS to reimburse damages caused to property or apply to the High Court if SARS dismisses the request. No such provision was previously contained in Section 74D of the ITA. Section 66(4) provides that should the court set aside a warrant, the court may nevertheless authorise SARS to retain the original or a copy of any relevant information in the 'interest of justice'. Some commentators are questioning the constitutional validity of section 66(4), after the SCA judgment in *Ivanov v North West Gambling Board* [2012] ZASCA 92 (31 May 2012) where the court held that if a search warrant is set aside the search and seizure becomes unlawful from the time

when it was executed. Thus it would appear that section 66(4) might be attempting to enable the court to permit the unlawful seizure and retention of the material. The common law principle (*ex turpi causa non oritur actio*) that a court cannot sanction an illegal act is confirmed as part of the Constitution in *S v Jordan and others* 2002 (6) SA 642 (CC) (PricewaterhouseCoopers Inc., 2012:36).

Apart from the abovementioned cost for damages no other provisions are currently present in the TAA extending the rights of taxpayers to prevent abuse from SARS officials. It is therefore worthy of mention that a recent decision of the Cape High Court in *Gaertner v Minister of Finance* [2013] ZAWHC 54, examines the constitutionality of the search and seizure provisions in the Customs and Excise Act. Although this particular act is not governed by TAA however the relevance to this report is to provide examples of the extent to which SARS is willing to go when sourcing information from taxpayer.

The *Gaertner* case, pertained to a company that was in the business of importing and distributing bulk frozen foodstuffs. SARS officials conducted a warrantless search of the company's premises and proceeded to search the home of one of the company's directors. Shortly after the search the director made an application to the High Court requesting that the process followed by SARS to conduct a 'warrantless, targeted, non-routine' search be declared unconstitutional. The basis of their argument was that section 14 of the Constitution states that –

> Every person has the right to privacy, which includes the right not to have –
>
> a. their person or home searched;
> b. their property search;
> c. their possessions seized;
> d. the privacy of their communications infringed.

The taxpayer further argued that routine searches could, constitutionally, be made without a warrant, but that non-routine search (that to say, those precipitated by a suspicion of non-compliance with the Act) were unconstitutional in the absence of a warrant. The Court held that due to the nature of the Act is 'premised on a system of self-accounting and self-assessment' and that there is no viable method by the Commissioner to track all imported dutiable goods and automatically collect the duty.

As a result these searches are necessary more especially in instances of suspected tax evasion. Rogers J said that based on the above that collection of information was necessary to ensure that the taxes were declared and paid, however a warrantless targeted search of someone's home would not pass constitutional muster. The court ruled (at paragraph [103]) that –

a. Warrantless routine searches are justifiable under the Act in respect of the business premises of persons registered in terms of s 59A, of persons licensed under Chapter VIII, of person registered under s 75(10) and of persons who operate pre-entry facilities, to the extent that the search relates to the business for which such person is registered or to the business for which such premises are licensed or registered or to the business of operating the pre-entry facility.
b. Warrantless non-routine searches are justifiable under the Act in respect of pre-entry facilities, licensed warehouses and rebate stores, to the extent that the search relates to the business of operating the pre-entry facility or to the business of the licensed warehouse or rebate store.
c. Searches without judicial warrant are not justifiable in other cases.

As illustrated above SARS is prepared to exert focus and push the Act to the extreme in order to collect taxes. Fortunately though the TAA provides that, with the exception of the Customs and Excise issues, warrantless searches do not permit SARS officials to search a domestic or private dwelling.

2.2.5 Call for information from the taxpayer subject to legal privilege

The Tax Administration Act introduces a new principle of legal privilege during search and seizure procedures. This is not a new concept in legal terms. It is just a new development with regards to tax administration practices in South Africa. This section has been deliberated extensively in the tax arena and this issue will be elaborated on the discussion that follows.

The underlying purpose of the doctrine of legal professional privilege was described by Botha JA in the case of *S v Safatsa* [1988] (1) SA 868 (A), where it was affirmed that for the better functioning of the law, it was necessary that there should be freedom of communication between an attorney and his client for the purpose of giving and receiving legal advice as well as for the purpose of litigation and that this entailed immunity from disclosure of such communications between them. The doctrine of legal professional

privilege is regarded as a fundamental common law right. The doctrine is derived from the common law, it is not necessary to replicate this right in legislation. In interpreting SARS' powers to access information from a taxpayer, it has been held that the doctrine of legal professional privilege overrides these powers.

Section 64 of the TAA provides that if SARS foresees the need to search and seize relevant material that may be alleged to be subject to legal professional privilege, SARS must arrange for an attorney from the panel appointed under section 111 of the TAA to be present during the execution of the warrant. Section 64 of the TAA provides further that if during the execution of a search and seizure by SARS, a person alleges the existence of legal professional privilege in respect of relevant material and an attorney from the panel appointed under section 111 of the TAA is not present, SARS must seal the material and hand over such material to the attorney. Furthermore, the attorney must within 21 business days make a determination as to whether the privilege is applicable and may do so in the manner the attorney deems fit, including considering representations made by the taxpayer and his attorney.

Not all tax practitioners will be or are attorneys; therefore not all of these opinions will be legally privileged. Where opinions are written by registered tax practitioners who are attorneys or advocates then these opinions may or may not be legally privileged (ENSAfrica, 2013b).

In practice SARS is known to agree with taxpayers on how evidentiary material which may be subject to a legal professional privilege should be dealt with. Often agreement is reached such that the material which may be privileged be made available to an advocate selected from a panel agreed to by the parties, to review the material in issue and determine if it is in fact covered by legal privilege. It is recommended by Croome & Olivier in the second edition of Tax Administration 2015 that chapter 5 of the TAA be amended to deal with legal professional privilege in all cases and not only when SARS conducts a search and seizure procedure (Croome & Olivier., 2015:165).

The extent to which legal privilege became applicable was recently raised in the Western Cape High Court, to establish whether certain documents were subject to legal privilege. The case of *A Company and Others v Commissioner for the South African Revenue Services*

(16360/2013) [2014] ZAWCHC 33; 2014 (4) SA 549 (WCC), the court was asked to determine a dispute between a taxpayer and SARS regarding the obligation by a taxpayer to supply information requested by SARS in terms of section 46 of TAA. There were two issues addressed in the trial, namely;

- The first was whether there is legal privilege in respect of attorney's fee notes; and
- Secondly whether legal privilege extended to information within a document that is not otherwise entitled to the protection of legal advice privilege.

The Court referred to two New Zealand decisions that indicated that an attorney's fee note is directly related to their performance and a blanket rule cannot be applied to fee notes and other document will not obtain legal privilege unless the advice, if provided or contains sufficient particularity to constitute secondary evidence of the substance of the advice.

The abovementioned judgment does clarify the position, however SARS despite having recognized this provision in the TAA, has further introduced an amendment to the TAA in the form of section 42A included in Appendix B. This section suggests that SARS is in a position to determine if a document should be afforded the right to legal privilege. Firstly this suggestion is absurd as it goes against the very reason for it being read into the TAA, that being to preserve legal professional privilege by ensuring that the panel appointed is independent of both SARS and the taxpayer.

The comments from Deloitte from a recent Tax Update adequately sum up the opinions about this section as follows (Swanepoel, 2015:95):

- Asserting privilege will amount to a constructive waiver thereof
- Constitutionality of amendment is questionable
- Recommendation to delete paragraphs (e) (f) (h) and (i) of Section 42A subparagraph 1, not necessary in order to determine legal privilege

This once again provides support for the argument that SARS desires control and affords to itself extensive powers to access documents even having legal privilege, for its own benefit. This goes against the purpose for the TAA as set out is section 2 of the Act.

2.3 Taxpayers ability to obtain information from SARS

The TAA also affords taxpayers an opportunity to gather information from SARS. The manner in which information may be gathered is through communications during audit proceedings and a newly inserted provision in the TAA being the 'request for reasons'. These sections have been elaborated below in order to demonstrate the extent to which taxpayer's right to access to information are contained in the TAA, more especially the recognition of taxpayer's right to access information within the tax administrative regime in South Africa.

2.3.1 Keeping the taxpayer informed of the audit

SARS had section 74A of the ITA at its disposal (which is now repealed by the TAA) which provided that the Commissioner or any officer may, for the purposes of the administration of the Income Tax Act and in relation to any taxpayer, require such taxpayer or any other person to furnish such information (whether orally or in writing) including documents or things as the Commissioner or such officer may require. The ITA contained no further rules relating to the timeline of an audit. A taxpayer could potentially be left in a state of uncertainty and subject to on-going requests for information, documents or things as already explained at the beginning of this chapter. If a taxpayer were to argue that an audit had to be completed within a reasonable time, SARS's counter stance might be that reasonability must be weighed up against the available (limited) resources of the fiscus (Robert & Silke, 2012).

Section 42 of the TAA however now provides that a taxpayer must be kept informed by SARS during tax audits. A SARS official involved in or responsible for an audit must, in the form and in the manner as may be prescribed by the Commissioner provide the taxpayer with a report indicating the stage of completion of the audit.

It has been recommended by SARS that its officials must follow the process below during and after an audit in order to keep taxpayers up to date on the progress of the audit.

I. Stage of completion of the audit

   A taxpayer has the right to be informed of the stage of the audit, at intervals and in the manner and form prescribed by the Commissioner in a public notice. This includes the following information in respect of the audit (TAAG (2013:24):

   - present scope;
   - stage of completion; and
   - outstanding relevant material required.

II. Outcome of the audit

In terms of the TAAG (2013:24), SARS must issue a letter of findings, within 21 business days (or an extended period depending on the complexity of the audit) from completion of the audit, informing the taxpayer that:

- the audit rendered insufficient audit evidence; or
- a potential material adjustment was identified along with the grounds for the proposed assessment or decision. The taxpayer is allowed to respond in writing within 21 business days from receipt of the letter of findings.

TAAG (2013:25) emphasises that the obligation to keep taxpayers informed are limited to so-called 'in depth audits or criminal investigations'. The TAA does not expressly contain the concept of 'in depth audits' so there may be some debate around what this provision refers to. (It is possible that it might mean 'field audits' in contradistinction to 'verification'- the latter sometimes colloquially referred to by tax practioners as 'desk audits') (PricewaterhouseCoopers Inc., 2012:30). This further evidences the fact that SARS has attempted to enhance the rights of taxpayers; however the limitation remains in that the taxpayer is left uncertain of the right to be informed due to the nature of the audit. This therefore allows SARS the discretion to determine if an audit is regarded as 'depth' to warrant communications of the completion status to the taxpayer.

In addition section 42 is flawed as it does not prescribe a remedy for the taxpayer should the SSO not keep the taxpayer informed of the stage of completion of the audit. Therefore there appears to be no adverse implications if SARS simply delays or ignores the deadline period for providing the grounds to the taxpayer. Another escape hatch that has been devised by SARS is a discretion to 'reasonable belief' that the purpose, progress or outcome of the audit will be 'impeded or prejudiced' by keeping the taxpayer informed of the progress and/or by providing an audit outcome document, then SARS is not obliged to fulfill those reporting requirements (section 42(5)). SARS would be permitted to go directly to the assessment/decision stage, without first informing the taxpayer that the audit was complete and/or what the outcome was (section 41(6)). In this case, section 41(6) also requires SARS to subsequently provide the taxpayer with the grounds of assessment, either within 21 business days of the assessment/decision or within an extended period that may be necessitated by the 'complexities of the audit'. The wide discretion to dispense with the

obligation to keep the taxpayer informed is considered objectionable. It would appear to serve no purpose other than to permit an urgent additional assessment where SARS becomes concerned at the fact that an original assessment will prescribe before they've completed their investigations. Furthermore, even if the urgent assessment is considered potentially reasonable, the subsequent 21 business days grace period (more than 4 weeks) before the taxpayer receives the grounds of assessment letter, is considered unnecessarily long given that the assumption must be that (ostensibly) the grounds would already have been formulated at the time of the assessment (PricewaterhouseCoopers Inc., 2012:30).

Sections 43 and 44 of the TAA are new provisions that aim to provide protection for taxpayers' rights in the course of criminal investigations. If the SARS official suspects a taxpayer of committing a serious tax offence during the course of an audit, the matter must be referred to an SSO responsible for making the decision whether a criminal investigation must be launched or not. The requirement for the separation of information has been criticized as being too subjective, as no written referral is required, and nor is there a requirement for a listing/catalogue of the information gathered up to such date. It thus creates significant scope for dispute over when the referral was done and which information was gathered after the referral, however the TAA clearly provides a timeline when the matter must be referred namely 'when it appears that the taxpayer may have committed a serious tax offence'. This however leaves the taxpayer with the hurdle that such timeline would only be determinable on cross examination of the relevant SARS Officials as to when they first believed that such offence may have been committed (PricewaterhouseCoopers Inc., 2012:31).

In essence despite the introduction of the abovementioned provisions there continue to be limitations which are unfortunately at the discretion of SARS to determine the extent to which information is provided to the taxpayer.

2.3.2 Request for reasons

Rule 3, promulgated in terms of section 107A (now repealed) of the ITA had provided that a taxpayer who is aggrieved by an assessment or decision of SARS was permitted to request reasons for the assessment or decision. The TAA together with the new rules for dispute resolution promulgated under the TAA on 11 July 2014 (Rules), govern the resolution of disputes between taxpayers and SARS. Section 104 of TAA indicates that a taxpayer who is

aggrieved by an assessment may object to such assessment. In terms of rule 6(1), the taxpayer may, before lodging an objection, 'request SARS to provide reasons for the assessment required to enable the taxpayer to formulate an objection'. In terms of rule 9(1), after considering the objection SARS must notify the taxpayer of the allowance or disallowance of the objection 'and the basis thereof'. Rule 9(1) overlaps to the extent with section 106(4) of the TAA which provides that SARS must, by notice, inform the taxpayer of its decision to disallow or allow in whole or in part. Section 106(5) states, in part that SARS's notice 'must state the basis for the decision'.

The section existed before the TAA and continues to exist since its promulgation therefore has not significantly altered the rights of a taxpayer to gain access to information in terms of the assessment, objection and appeal process.

2.4 Taxpayers access to information in the TAA compared to SARS information gathering powers

As is already evident from the discussion above, SARS information gathering powers have been significantly extended by the introduction of the TAA especially with regard to provisions that solely require the discretion of an SSO. The question remains if the extension of SARS powers in any way specifically limits the taxpayer's right to access information. What is obvious is that SARS has utilised the provisions of the TAA for its benefit in order to legalise its information gathering powers. The right to gain access information is an inherent right that is applicable to all citizens of South Africa and flows from Section 32 of the Constitution which reads as follows:

1) Everyone has the right of access to –
    a. any information held by the state; and
    b. any information that is held by another person and that is required for the exercise protection of any rights.
2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

It follows from the section 32 that a taxpayer has a right to information that is inherent in the Constitution, limited only by section 36 of the Constitution. Notwithstanding the fact that SARS has extensive powers to gather information, constitutionally does not limit the taxpayer's right to access information.

Although SARS has utilised the provisions in the TAA to its best advantage in order to exert control over the taxpayer, the situation can be remedied by the taxpayer by reference to section 32 of the Constitution. Procedurally the taxpayer would need to determine if they can request information directly from SARS based the section 32 of the Constitution. In terms of the extract above that taxpayers can rely on section 32 in order for the taxpayer to 'protect its rights' in terms of the Bill of Rights enshrined in the Constitution. It has been argued that taxpayers should primarily rely on the provisions contained in the Promotion of Access to Information Act 2 of 2000 ('PAIA') (Croome, 2010c:188 and Croome & Olivier, 2015:616). This is reiterated in TAAG where taxpayers in need for information outside the provisions in the TAA should in fact place reliance on PAIA (TAAG, 2013:25,28,31,33,36).

PAIA creates a mechanism to enable taxpayers to request information from SARS in order to protect rights including its right to administrative justice. PAIA sets out circumstances in which this information can be requested and is provided for in Section 11 as illustrated below are met:

1) A requester must be given access to a record of a public body if-
    a. that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and
    b. access so that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.
2) A request contemplated in subsection (1) includes a request for access to a record containing personal information about the requester.
3) A requester's right of access contemplated in subsection (I) is, subject to this Act, not affected by-
    a. any reasons the requester gives for requesting access; or
    b. the information officer's belief as to what the requester's reasons are for requesting access.

Taxpayers, in exercising their Constitutional right to access of information, may call for 'records' held by the Commissioner about the taxpayer for the protection of their rights, which include, the right to property, privacy and administrative justice. PAIA imposes no obligation on the Commissioner to create records at the request of the taxpayer but instead obliges the Commissioner to make available records requested by the taxpayer. A taxpayer is further entitled to request information held by the Commissioner about himself or herself and this information may be requested before the commencement of any civil or criminal

proceedings (Croome & Olivier, 2015:617-618). The taxpayer, based on the above, is placed in a position to access information from SARS; however SARS also has instances where it can refuse access to the records on the following grounds:

- Protection of privacy of a third party
- Protection of certain records of the Commissioner
- Protection of commercial information of a third party
- Protection of certain confidential information and protection of certain other confidential information of a third party
- Protection of police dockets in bail proceedings, and protection of law enforcement proceedings; and
- Protection of records privileged by legal proceedings. (PAIA Manual)

The right to request information should not be viewed in isolation from the right to administrative justice contained in section 33 of the Constitution (to be deliberated in the chapter that follows) as the primary purpose to access is to justify the administrative action that has been taken. The information a taxpayer successfully obtains from the Commissioner under PAIA may assist a taxpayer in understanding the Commissioner's reasons for decisions made (Croome & Olivier, 2015:631).

2.5 Conclusion

As already mentioned above, the provisions in the TAA enhance SARS's access to information by SARS and ultimately its power. The TAA unfortunately provides limited means for taxpayers to access to information in terms of the TAA. Despite the fact that the TAA includes limited sections in favour of the taxpayer's right to information do not deem the TAA unconstitutional in terms of section 32 of the Constitution. It just provides further evidence that the TAA (this is evident by the amendments in the 2015 TALAA) is biased in the favour of SARS.

The provisions in the TAA that refer to the access to information currently recommend procedures that SARS officials should follow such as, keeping the taxpayer informed during an audit process. There are currently no provisions contained in the TAA that specifically determine the consequences on those SARS officials who do not follow the procedures as laid out in the TAA. The TAA also contains provisions that are solely at the discretion of the

Commissioner, such as items that constitute ‘relevant material’, allowing for the Commissioner within the bounds of the TAA to engage in ‘fishing expeditions’. The Commissioner is also given the opportunity to seek relevant information from ‘any party’ not just limited to the taxpayer. This could not only prejudice the confidentiality of information however it could also destroy relationships that the taxpayers have with other parties in commerce and potentially negatively impacting the economy. SARS is also empowered to obtain information from taxpayers in a manner that is considered to be draconian, due to the accessibility of such provisions (searching without a warrant) rather than building relationships with taxpayers and requesting the information on more amicable terms. Furthermore, there are limited provisions in the current TAA awarding the taxpayer’s right to information. Taxpayers in order to defend their position will need to have knowledge to query their case on a constitutional basis and secondly will need to expend exorbitant amounts of money defending the current position as well as the matters in the constitution courts.

It is recommended that the TAA be supplemented to contain additional provisions enabling taxpayers to access information. It would appear that the current position results in compliant taxpayers are being punished on account of the few that attempt to evade tax. In order for SARS and taxpayers to have a better relationship going forward additional provisions are required to enhance the rights of taxpayers to turn to the TAA to find a solution as opposed resorting to statutes such as the Constitution. These provisions would include remedies to the taxpayer contained within the TAA if SARS officials do not follow procedures in accordance with the TAA. The TAA should also contain more provisions to allow for taxpayers to access information from SARS.

Chapter Three: Access to Just Administrative Practices

3.1 Introduction

> It is a perversion of terms to say, that a charter gives rights. It operates by a contrary effect, that of taking rights away. Rights are inherently in all the inhabitants; but charters, by annulling those rights in the majority, leave the right by exclusion in the few hands of a few ‒ Thomas Paine, *Rights of Man*

Thomas Pain in his well-known book titled the '*Rights of Man*' in the abovementioned quote describes that rights are limited when new statues are included which is resonated in the sentiments by taxpayers at large with the introduction of the TAA (PricewaterhouseCoopers Inc., 2012:5). The view is held that the provisions that have been included in this piece of legislation are deliberate on the part of SARS for its own benefit and inconsistent with the objectives of the TAA set out in Chapter 2. As a result compliant taxpayers are left with little or no remedy due to limited sections that offer protection within the TAA against the excessive power that can be exerted by SARS and its officials (PricewaterhouseCoopers Inc., 2012:6).

This Chapter purports to demonstrate the extent of SARS powers as at a result of the introduction of the TAA and the remedies that are available to taxpayers in order to obtain relief in such instances.

3.2 Analysis of aspects in the TAA that allow for unjust practices to prevail

3.2.1 Jeopardy Assessments

The first instances of such practices that are worth mentioning are jeopardy assessments that have been introduced for the first time in the TAA. A 'jeopardy assessment' is explained in section 94(1) of the TAA as an assessment that is made even before the date that the return is normally due. Jeopardy assessments are in addition to other powers granted to SARS in the TAA that may be applied if the collection of tax is in jeopardy, these also known as 'protective assessments' (TAAG, 2013:43). The concept of a jeopardy assessment is new to the South African Tax regime however is an internationally well recognized concept (Croome & Olivier, 2015:241).

Since the purpose of a jeopardy assessment is to raise a liability on an urgent basis, the assessment may be an estimate based on information readily available to SARS. Although a

jeopardy assessment can be issued without following the ordinary audit route, the basis on which it is believed that the collection of tax is in jeopardy will be stated on the notice of assessment in terms of section 96 of the TAA. Internationally no notice is required to be provided to the taxpayer prior to the issue of a jeopardy assessment (Croome & Olivier, 2015:241). The issue of a jeopardy assessment is a narrow exception to the ordinary assessment procedure and is subject to the following limitations and rights of the affected taxpayer:

- SARS must satisfy that a jeopardy is necessary;
- The affected taxpayer may apply to the High Court for a review of the assessment on the basis that –
    - The amount is excessive; or
    - The circumstances on which SARS relied to justify the making of the jeopardy assessment do not exist;
- If the taxpayer challenges a jeopardy assessment in a High Court, then SARS has the burden of showing that the making of the jeopardy assessment was reasonable in the circumstances; and
- The normal objection and appeal procedure is still available to the taxpayer (TAAG, 2013:43).

This new provision in the TAA has not been well received by taxpayer it was held that raising of a jeopardy assessment at a stage before any tax return is due is clearly a drastic measure. A jeopardy assessment potentially enables SARS to quantify, assess and collect in respect of an alleged tax debt before the taxpayer has even rendered any return related to the income/gain that SARS has subjected to tax via such assessment. (Cliffe Dekker Hofmeyr, 2012).

There have not been any decided cases yet with regards to jeopardy assessments. One needs to draw from history and indeed a decision that at this stage is appropriate to quote is that of *Hindry v Nedcor Bank Limited* 1999 (2) SA 757 (W) (decided under the repealed section 99 of the ITA), that challenged section 99 and the constitutionality of the Commissioner to appoint an agent of the taxpayer and compelled that agent to collect outstanding tax due and to pay it over to SARS out of monies held on behalf of the agent of the taxpayer. The court held that:

> The section did not violate the Constitution for the following reasons: the taxpayer had ample opportunity for a later judicial determination of his legal rights; the section was an example of summary proceedings to secure prompt performance of pecuniary obligations to the government; the purpose of the section was to avoid the assets of the taxpayer being beyond SARS' reach; the section was no more than a form of garnishment and was a legitimate expectation of the taxpayer's rights in terms of s36 of the Constitution and was reasonably and necessary in an open and democratic society.

The case refers to different facts, but the concept remains the same. The court held that the processes that had been followed by SARS were not unconstitutional and has been considered reasonable and fair. It must be borne in mind that although one example did not create a precedent or legitimate expectation (to be deliberated later in this chapter) it is noteworthy that the entire decision is left to the discretion of SARS and remains biased in its favour.

It is therefore submitted that a taxpayer who is aggrieved, on the merits, in respect of the Commissioner's decision not to amend or set aside the assessment, must first exercise its right to object to the assessment raised failing which the taxpayers' rights under PAJA (see remedies later in this report) should be invoked to contest the fairness and rationality of the decision.

3.2.2 Suspension of Payment

South African tax assessment law is premised on the principle of 'pay now, argue later'. This effectively means that in a dispute between the taxpayer and SARS, the South African Tax legislation provides that the taxpayer is legally obliged to pay the disputed tax upfront unless the SSO decides otherwise (Soloman, 2015). It is true that if the taxpayer eventually succeeds and the assessment is set aside, the disputed amount will be refunded to the taxpayer with interest. The payment of the tax generally places the taxpayer at a disadvantage as it may have to fund the tax payment for a number of years whilst it pursues its various remedies (ENS, 2014). This principle was nevertheless upheld by the courts and evident in the case of *Capstone 556 (Pty) Ltd v Commissioner for the South African Revenue Service* 2011 ZAWCHC 297 that:

> [T]he considerations underpinning the "pay now, argue later" concept include the public interest in obtaining full and speedy settlement of tax debts and the need to limit the ability of recalcitrant taxpayers to use objection and appeal procedures strategically to defer payment of their taxes.

The court went on to say the following:

> There are material differences distinguishing the position of self-regulating vendors under the value-added tax system and taxpayers under the entirely revenue authority-regulated income tax dispensation. Thus the considerations which persuaded the Constitutional Court to reject the attack on the aforementioned provisions of the VAT Act in Metcash might not apply altogether equally in any scrutiny of the constitutionality of the equivalent provisions in the [Income Tax] Act.

The main issue is that not every taxpayer has the appetite for a constitutional court challenge to the 'pay now, argue later' principle. Instead, taxpayers generally wish to understand the provisions set out in the TAA dealing with a suspension of their obligation to make payment to SARS (ENSAfrica, 2014). Section 164 provides that a taxpayer should request a senior SARS official to suspend the payment of tax or a portion thereof due under an assessment if such taxpayer intends to dispute or disputes his liability to pay the tax. Under section 88 of the ITA the Commissioner for SARS could accede to a request to suspend the payment of tax. This section has now been repealed and replaced with section 164 of the TAA, thereby authorising senior SARS officials to approve such requests. As with section 88 of the ITA, the taxpayer will be required to motivate and satisfy certain criteria in order for the request to be granted in terms of section 164 of the TAA, and great care should be taken in ensuring that the taxpayer complies with section 164 and properly motivates the request. This list of factors has recently been amended in section 50 of the Tax Administration Laws Amendment Act of 2014, which amendment took effect on 20 January 2015. Consideration of the impact of some of the changes below:

Prior to its amendment, section 164(3) (emphasis added) provided as follows:

> 3. A senior SARS official may suspend payment of the disputed tax or a portion thereof **having regard to —**
>
> a. the compliance history of the taxpayer;
>
> b. the amount of tax involved;
>
> c. the risk of dissipation of assets by the taxpayer concerned during the period of suspension;

d. **whether the taxpayer is able to provide adequate security for the payment of the amount involved;**

e. **whether payment of the amount involved would result in irreparable financial hardship to the taxpayer;**

f. whether sequestration or liquidation proceedings are imminent;

g. whether fraud is involved in the origin of the dispute; or

h. whether the taxpayer has failed to furnish information requested under this Act for purposes of a decision under this section.

The section does not require that the taxpayer must 'tick the box' for every criterion listed in this section. SARS is required to take into account the taxpayer's circumstance and evaluate the position holistically in determining whether the request to suspend the tax in dispute or not (Croome & Olivier, 2015:378). This includes the consideration of compliance, history of the taxpayer, quantum of tax due, risk that the taxpayer will dissipate assets and security paid to SARS. This section also refers to the question as to whether the payment of tax in dispute will cause irreparable financial hardship to the taxpayer or if the taxpayer faces imminent liquidation. Finally section 164(3) requires an enquiry as to whether the taxpayer had failed to supply any information request by SARS for the purpose of its decision under section 164.

Section 164(3), **following its recent amendment**, provides (emphasis added) as follows:

3. A senior SARS official may suspend payment of the disputed tax or a portion thereof having regard to relevant factors, **including —**

    a. **whether the recovery of the disputed tax will be in jeopardy** or there will be a risk of dissipation of assets;

    b. the compliance history of the taxpayer with SARS;

    c. whether fraud is prima facie involved in the origin of the dispute;

    d. **whether payment will result in irreparable hardship to the taxpayer not justified by the prejudice to SARS or the fiscus if the disputed tax is not paid or**

recovered; or

e. **whether the taxpayer has tendered adequate security for the payment of the disputed tax and accepting it is in the interest of SARS or the fiscus**.

The first obvious change to section 164(3) is that the list of factors for the suspension of payment has been shortened. It is evident however, from the use of the word 'including' in the introductory portion of section 164(3) that the criteria listed in subsection (3) are not the only criteria that a senior SARS official is required to consider when deciding whether or not to grant a suspension of payment of disputed tax. Rather, all relevant criteria (including those mentioned in section 164 prior to its amendment) and circumstances of the taxpayer must be deliberated. This change therefore appears to be beneficial to the taxpayer making the application to SARS (Soloman, 2015).

The next amendment the section is the change requirement of security to be provided by the taxpayer to SARS. Prior to the amendment, one of the factors which the senior SARS official had to consider was whether the taxpayer was able to provide adequate security for the tax liability in question. This requirement has been amended in include an enquiry as to whether the taxpayer has tendered adequate security in its application. It is now a more onerous requirement for a taxpayer to meet, as the actual offer of security (as opposed to the mere ability to provide security) will be considered as a factor by the SARS official in the assessment of the suspension of payment application. The difficulty to comply with this requirement is the fact that it is not clear what type of security will be accepted as 'adequate' security by SARS (Soloman, 2015).

In respect of the term 'irreparable hardship' is not defined in any of the relevant tax legislation, however having regard to the ordinary meaning of hardship, it will be irreparable if any subsequent action (i.e. should a taxpayer be successful upon appeal) would not place a taxpayer in the same position that it has been in prior to enduring such hardship. It is emphasised that the word 'financial' has been removed from the requirement which indicates that the Legislature acknowledges that a taxpayer can suffer irreparable hardship that is not necessarily financial. The broadening of this requirement may therefore be seen as a positive change for taxpayers (Soloman, 2015). To show irreparable hardship is difficult but a taxpayer should not be forced to dissipate his or her assets which he or she has held as an investment for a long period of time, which will cause the taxpayer financial loss which may

never be recoverable. The wording used in section 164(3)(*d*) is difficult to interpret and it is unclear what is meant by 'prejudice to SARS' (Croome & Oliver, 2015:379).

The final amendment in this section is the inclusion of a requirement relating to the recovery of tax being in 'jeopardy', in which case a SARS official may be entitled to refuse to grant an application for suspension of payment. Section 164 does not define or otherwise provide guidance as to when recovery of disputed tax will be regarded as 'jeopardy'. Although section 94 of the TAA gives SARS the power to make jeopardy assessments (discussed in at the beginning of this chapter) if the Commissioner for SARS is satisfied that it is required to secure the collection of tax that would otherwise be in jeopardy, the TAA does not stipulate when the collection of tax would be considered to be 'in jeopardy' for the purposes of section 94 or at all. It appears from the TAAG that SARS regards the collection of tax as being in jeopardy if there is evidence to support a conclusion that there is a real risk that the tax will not be collected from the taxpayer. If it can be demonstrated that no risk as regards collection of the tax exists, this is a requirement which can easily be addressed by the taxpayer (Soloman, 2015).

Making an application in terms of section 164 is an important that the taxpayer manage the financial consequences of being involved in what is frequently protracted tax litigation with SARS. It must be emphasised that SARS consider all relevant factors contained in the legislation and circumstances of the taxpayer must be thoroughly addressed in the suspension of payment application. As the taxpayer has no right of objection should SARS decline the suspension of payment application, it is vital that the application is full and complete in all respects (Soloman, 2015).

An example of SARS abuse if its power is evident by the fact that SARS delayed issuing response letters to taxpayer that submitted a request for suspension of payment in terms of section 164 until March 2015 when the section had been amended. It was unfortunate that the amendment was not retrospective in that it applied only to those applications for suspension filed on or after 20 January 2015. It was procedurally unfair that SARS appears to have delayed making decisions on applications before 20 January 2015 and then demanded that taxpayers resubmit a fresh application under the amended working of the section (Croome & Olivier, 2015:380).

The suspension of payment provisions are designed to counter the harsh reality of the 'pay now argue later rule', however the introduction of section 164 and its subsequent

amendments indicate that the control and the decision making power remains very much in the hands of SARS. Introductions of words that are undefined and list that is subjective of 'test' to be met rather that point to consider mean that the section has over time already become more restrictive. It is again indicative if the every diminishing rights of the taxpayer in comparison to the power that SARS is able to exert.

3.2.3 Prescription

Section 99 of the TAA regulates the period within which SARS may issue an assessment to a taxpayer. Prescription refers to the period based on section 99(1)(*e*) after which SARS is precluded from issuing any further assessments under Chapter 8 of the TAA. Previously these rules were contained in section 79 of the ITA before the TAA took effect. The provisions of section 79 ought to continue to apply to assessments issued by SARS prior to 1 October 2012. In summary, taxpayers filing income tax returns prescription is three years (not in the case of VAT and PAYE that would constitute a self-assessment return the five year prescription period would apply therein).

The Tax Administration Laws Amendment Act, 2015 (TALAA 2015) extended the aforementioned time periods by introducing a new sections (3) and (4) to section 99 of the TAA (see Appendix C for extract of section 99). In terms of the new section (3) the Commissioner for SARS may, by prior notice of at least 30 days to the taxpayer may extend the prescription period arising from either:

- a failure by a taxpayer to provide all relevant material requested under section 46 of the TAA; or
- resolving an information entitlement dispute, including legal proceedings.

The new section 99(4) provides that the Commissioner for SARS may, by prior notice of at least 60 days to the taxpayer, extend any of the aforementioned periods, before expiry thereof, by three years in the case of an assessment by SARS or two years in the case of self-assessment, where an audit or investigation under Chapter 5 of the TAA (per Memorandum on the Objects of the TALAB 2015) relates to:

- the application of the doctrine of substance over form;

- the application of Part IIA of Chapter III of the Income Tax Act, 58 of 1962 (ITA) (the general anti-avoidance rule (GAAR)), section 73 of the Value-Added Tax Act, 89 of 1991 or any other general anti-avoidance provision under a tax Act;
- the taxation of hybrid entities or hybrid instruments; or
- Section 31 of the ITA (the transfer pricing provisions contained in the ITA).

According to the Memorandum on the Objects of the TALAB 2015, too many of SARS' resources are spent on information entitlement disputes which result in insufficient time for SARS to ensure that it has all relevant information at its disposal to make a correct assessment. The Memorandum states that the failure by taxpayers to provide information or information entitlement disputes is often tactical or vexatious, given that taxpayers are aware of the period within which SARS must finalise the audit and issue additional assessments. It is further said that information entitlement disputes are often based on convoluted or strained interpretations of the relevant provisions of the TAA and some matters subject to audit may be so complex that it is impossible to meet the prescription deadline, particularly in the context of audits requiring SARS to consider the application of the GAAR or transfer pricing audits. It has also been held that the amendments to section 99 of the TAA seek to address these issues by providing for an extension of the existing prescription period before the existing prescription period comes to an end. This is to allow the taxpayer an opportunity to make representations as to why the existing prescription period should not be extended.

Despite the conviction portrayed by SARS in the Memorandum on the Objects of the TALAB 2015, this sentiment is not shared by those in the tax industry. This is evident by a view that was contributed by the team from Webber Wenzel on the *TaxTalk* website before the promulgation of the TALAA 2015 as follows (Cronin, Keyser, & Singh, 2015):

> The new provision is clearly intended as a means for SARS to circumvent the procedure of having to agree with the taxpayer to extend prescription in matters dealing with the submission of relevant information. In light of this we believe it would be prudent to advise clients to consider providing SARS with substantial amounts of information with a view to ensuring that the potential for SARS to extend prescription is narrow.
>
> Our view is that the amendment will likely make this provision more, and not less, litigious. We believe a better alternative would have been to view an original assessment as a self-assessment (as envisaged in the 2015 Budget Speech), making the prescription period five years, instead of imposing an uncertain discretionary regime.

In addition to a recent Tax Update attended, the following comments were expressed as the view from Deloitte. (Swanepoel, 2015:107):

- Against the principle of natural justice
- Undermines equality before the law by tipping the scales heavily in favour of SARS in relation to taxpayers
- It is not clear why the general 3 year prescription period is not sufficient times for SARS to include any investigations they have undertaken
- SARS already has the power to enter into a prescription agreement where this becomes an issues
- Should taxpayers refuse to enter into such an agreement SARS will be able to issue an estimated assessment under section 95
- This amendments should be deleted, SARS has sufficient power in this regard

It is therefore submitted that SARS has yet again turned to a provision in the tax administrative regime for its own benefit despite the negative impact on taxpayers as illustrated above. The prescription provisions is a right that is awarded to taxpayers to mitigate against the potential abuse by SARS, by raising assessments over an indefinite period, however the fact that SARS have promulgated a section awarding itself more power in the TAA detracts from the rights that have been awarded to taxpayers and is further evidence of the unfairness that is prevalent in the TAA.

3.3 Remedies available to taxpayer in terms of PAJA (Promotion of Administrative Justice Act)

Prior to the advent of the constitutional era in South Africa, taxpayers had no right to just administrative action in their dealings with the SARS. Taxpayers were entitled to expect that SARS would comply with the general principles of administrative law and common law principles of judicial review of administrative acts. It would appear that taxpayers did not challenge the exercise of SARS's powers on administrative grounds prior to the enactment of the right to just administrative action. One of the fundamental rights that have been guaranteed in the Constitution is the right to administrative justice (Croome, 2010:21).

The introduction of the TAA highlights administrative provisions in South African tax statue and the question of just administrative practices comes to the forefront. As already illustrated in all but three aspects of the TAA, namely jeopardy assessment, suspension of payment and

prescription SARS has engaged in questionable administrative practices. Through the examples above it is very obvious that the TAA affords SARS supremacy to make administrative decisions at its own potential peril and the *Tax Law Review* describes the extent of power that has been awarded to SARS as 'absurd' (PricewaterhouseCoopers Inc., 2012:8).

Section 33 of the Constitution confers the right to just administrative action inter alia, taxpayers in the following manner:

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

This section is important to analyse and understand as it has been established that decisions made by SARS constitute 'administrative action' (Croome 2010:205). Section 33 above requires that 'administrative action' must be 'lawful, reasonable and procedurally fair'. These words have a profound meaning and one needs only look to the Oxford Dictionary for the literal meaning in order to appreciate its impact on South African legislation:

'Lawful' – Conforming to, permitted by, or recognized by law or rules

'reasonable' – Having sound judgement; fair and sensible

'procedurally fair' – Treating people equally without favouritism or discrimination

In effect, for an action to be procedurally fair is has to conform to the law that has been laid down and the decision has to be reasonable and fair. This will be debated in greater detail shortly in the paragraphs that follow. Section 33 of the Constitution is given effect through the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The Promotion of Administrative Justice Act (PAJA) and its robust interpretation by the courts have added a significant new dimension to taxpayers' rights and provide a substantial counterweight to SARS's draconian statutory powers (PricewaterhouseCoopers Inc., Synopsis 2012). To rely

on the remedies provided in PAJA a taxpayer must show that the action or inaction in question falls within the definition in section 1:

> [A]ny decision taken, or any failure to take a decision, by-
>
> a. an organ of state, when –
>
> i. exercising a power in terms of the Constitution or a provincial constitution; or
>
> ii. exercising a public power or performing a public function in term of any legislation; or
>
> …

Since SARS is an organ of state as envisaged in section 239 of the Constitution, PAJA applies to decisions of the Commissioner and his officials (Croome, 2010:209). Section 1 of PAJA defines 'decision' as

> [A]ny decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to –
>
> a. making, suspending, revoking or refusing to make an order, award or determination;
> b. giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
> c. issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
> d. imposing a condition or restriction;
> e. making a declaration, demand or requirement;
> f. retaining, or refusing to deliver up, an article; or
> g. doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly.

Therefore it appears that a taxpayer may rely on PAJA once the Commissioner has actually taken a decision or failed to take a decision as the case may be. Where the taxpayer anticipates that the Commissioner will make a decision, it is not possible to invoke the provisions of PAJA until the decision is made. Section 1 of PAJA defines 'failure' as follows: 'in relation to the taking of a decision, [it] includes a refusal to make a decision (as in the instance with the suspension of payment requests referred above) (Croome, 2010:210).

It would therefore seem that the taxpayer may only rely on PAJA once SARS has actually taken a decision or failed to do so. In the *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1(CC) it was decided that 'the focus of the enquiry as to whether conduct is *administrative action* is not on the arm of government to which relevant actor belongs, but on the nature of the power he or she is exercising.'

Accordingly, when determining the administrative nature of a decision, the character of the decision should be examined and not the body exercising the decisions (Croome, 2010:204). These decisions that have been discussed in this research report such as:

- Issue of jeopardy assessment;
- Allowance / denial of suspension of payments;
- Documents that Constitute Legal Privilege; and
- Decision to extend prescription.

The taxpayer must show that the 'decision' made by SARS 'adversely affects' his or her rights. Further, the 'decision' must have an external impact on the taxpayer (Croome, 2010:211). In *Corpclo 2290 CC t/a U-Care v Registrar of Banks* [2012] ZASCA 156 held in effect that a decision by an organ of state to conduct an investigation does not, in and of itself, 'adversely affect the rights of the person concerned or have a direct, external legal effect' and it therefore does not constitute administrative action that can be the subject of judicial review in terms of PAJA. It follows that a decision by SARS to embark on an audit of the taxpayer would not, in and of itself, constitutes a 'decision', as defined in PAJA, and therefore would not trigger the procedural and substantive provisions of that Act. Of course, once it is under way or complete, the 'process' of the audit (as distinct from its outcome) can be the subject of constitutional challenge, either under the Constitution itself or under PAJA. Such a challenge could take the form of an application for judicial review, for example, on the grounds that the manner in which the audit was conducted constituted 'conduct' that violated the taxpayer's constitutional right to the privacy of confidential or privileged information. The results of the audit, when incorporated into an assessment, can of course be challenged on the merits by way of objection and appeal (PricewaterhouseCoopers Inc., Synopsis 2012).

Despite the fact that the unfairness has been highlighted in the preceding paragraphs pertaining to administrative actions that have been taken by SARS, it is not sufficient to simply consider the above sections as unconstitutional and contrary to PAJA. It follows that the fundamental rights may be limited by a law of general application but only to the extent that the limitation is both reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The fundamental rights are not absolute rights. In judging the lawfulness of a limitation, all relevant factors must be taken into account,

including the nature of the fundamental right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose, and the possible less restrictive means of achieving this purpose. Furthermore, in the interpretation of any legislation, when developing laws and setting precedents the courts must promote the spirit, purport and objects of the Bill of Rights (Potgieter, 2015:17).

This is illustrated by the *Metcash Trading Ltd v Commissioner, South African Revenue Services* 2001 (1) SA 1109 (deliberated in detail in Chapter 4 of this research report), where SARS issued *The Media Release 27 of 2000* where section 36 of the Constitution was discussed with specific reference to 'pay now argue later' rule discussed in paragraph 3.2.2 above. The Constitutional Court held that the relevant provisions, to be constitutional, as follows:

> The Constitutional Court held that the VAT system requires vendors themselves to collect and pay tax on their transactions, which mean that an assessment necessarily involves a finding of dishonesty (or error) on the part of the vendor. The Special Court is geared to deal with such cases and a "pay now argue later" rule is not unfair. In any event, to the extent that there is a restriction on the right of access, it is only partial and temporary and is subject to at least some judicial control. Having regard to the pressing national interest in enforcing honest and prompt payment of VAT, such limitation of the right of access to courts as the "pay now argue later" rule may constitute is justified under s 36 of the Constitution.

Constitutional Court in this instance confirmed that taxpayers are entitled to just administrative practices as enshrined in section 33 of the Constitution; however these rights are not absolute and are limited by section 36. The main argument was the 'pay now argue later' rule is justified as it is a method that SARS resorts to in order to collect revenue which would not have otherwise been possible.

It is possible for a law to permit an administrative functionary to exercise a discretionary power that has the effect of limiting individual rights. However, an empowering law will lack the quality of general application if it simply grants an administrator a wide unconstrained discretion to limit such rights. Consequently legislation conferring discretionary powers on administrative officials to limit rights must be tempered by guidelines on the proper exercise of such discretion. It has been submitted in the *The Bill of Rights Handbook* that legislation cannot simply leave it in the discretion of administrative

officials to determine arbitrarily when it will be constitutionally justifiable to limit the right and when not to do so (Currie & de Waal, 2013:161-162).

This principle that the Constitution seeks to avoid is best illustrated by reference in *CSARS v Tradex (Pty) Ltd* [2014] ZAWCHC 142, a critical review from PricewaterhouseCoopers Inc. *Synopsis* publication issued in November / December 2014 that:

> This judgment reflects very poorly on SARS.
>
> Particularly damning was Rogers J's observation that he gained the impression that the real reason why SARS had applied for a preservation order was not to preserve the respondents' assets, but to put pressure on them to get their tax affairs in order. Also significant was Rogers J's warning (at para [73]) that SARS should not 'frame preservation orders on a one size fits all basis'– as SARS has apparently been doing, for the judge cited another matter where SARS had sought an order in similar terms, and he said that similar orders had been 'sought and granted to SARS in several matters in Gauteng'.
>
> Overall, the judgment exposes SARS's conduct in this case as heavy-handed and bullying, in unnecessarily resorting to a preservation order when there were no grounds for suspecting that the respondent taxpayers were dissipating assets, and in rejecting their reasonable tender to provide security for their tax liabilities.
>
> Instead, SARS had crafted a preservation order so draconian that it could have brought the taxpayers' business to an end, for in terms of the preservation order sought by SARS, all the respondents' assets were to vest in the *curator bonis*, who was to take control of their assets and have the power to realise the assets. Moreover, the order was capable of being interpreted as empowering the *curator bonis* not to permit payment of ordinary business expenses out of the cash flow.
>
> More serious still is that the judgment implicitly casts doubt on SARS's ethics in seeking a preservation order for an improper purpose and on its commitment to the fair use of its draconian statutory powers.

Thus what is clear from the judgment is that the Courts seek to ensure that administrative justice will prevail within the prescripts of the Constitution. It is also imperative to note that despite the fact that no specific remedies are provided within the TAA for the benefit of the taxpayer that the TAAG makes reference to PAJA, and the applicability thereof for taxpayers in order to achieve remedial action as follows (TAAG, 2013:10):

> The right to administrative justice under the Constitution is given effect to in the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) (PAJA). PAJA essentially mandates in the context of tax administration that tax administrative actions that materially and adversely affect

taxpayer rights must, in the absence of exceptions provided for in PAJA, adhere to fairness requirements such as—

- Prior notice of the intended decision;
- A prior hearing before the decision is taken;
- Clear grounds for the decision; and
- Adequate notice of the right to request reasons for the decision.

Exceptions under which SARS may depart from the requirements such as prior notice and prior hearing provided for in PAJA includes—

- Where such departure is reasonable and justifiable in the circumstances of a specific matter; and
- Where SARS is empowered by empowering provisions to follow procedures that are fair, but different from the listed fairness requirements.

During the commentary period on the Tax Administration Bill, 2011, various comments were made that specific sections should contain administrative fairness provisions that require SARS officials to act reasonably or otherwise protect a taxpayer from the abuse of power. The concerns that SARS officials will act unreasonably, unless the Act requires them to act reasonably, however, are incorrect as PAJA applies in any event. The Constitutional Court has held that all statutes that authorise administrative action must now be read together with PAJA unless the provisions of the statutes in question are inconsistent with PAJA.

It is, therefore, not necessary for the Act itself to spell out all the relevant aspects of administrative justice. This is implicit given the overriding application of PAJA, under which the unreasonable exercise of a power or performance of a function is a ground for review.

3.4 Conclusion

It is evident from this chapter that unjust administrative practices by SARS or any of its officials could prevail due to the discretionary nature of the TAA as well as the fact that certain provisions contained in the TAA are deliberately skewed to favour SARS. All the contentious provisions cannot be deemed unconstitutional and are rather determined on a case by case basis, depending on the facts of each case and more importantly by reference to section 36 of the Constitution. Therefore it is the responsibility of the taxpayer to understand and appreciate that 'just administrative practices' are recognised in the Constitution of South Africa and that the onus is on the taxpayer to be aware that such provisions do in order to hold SARS account to unfair or unjust practices.

Chapter Four: Access to Courts

4.1 Introduction

> Equal justice under law is not merely a caption on the facade of the Supreme Court building; it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists . . . it is fundamental that justice should be the same, in substance and availability, without regard to economic status. – *Justice Lewis F. Powell, Jr., U.S. Supreme Court Justice (Ret.), during his tenure as president of the American Bar Association (August 1976)*

The above quote adequately sums up the judiciary not only in the United States of America, but rather as an ideal for all economies around the world. South Africa also places emphasis and encourages its citizens to have access to courts; this will be illustrated in the discussion that follows.

4.2 Access to Courts conferred by the Constitution

The Constitution in Section 34 confers the right to access to courts:

> Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

Thus an aggrieved taxpayer has the right to approach a court if he is of the opinion that the powers afforded to SARS unreasonably and unjustifiably limits the taxpayers' procedural rights. In *Bernstein and Others v Bester NO and Others* (CCT23/95) [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751 (27 March 1996) Ackermann J interpreted section 22 of the Interim Constitution (preceding the enactment of section 34) presided over the fact that the rights to access courts is aimed at protecting individuals by separating the powers of the judiciary from the executive and legislative arms of the state (Croome, 2010: 254) as follows:

> When section 22 read with section 96(2), which provides that '[t]he judiciary should be independent, impartial and subject only to this Constitution and the law', the purpose of section 22 seems to be clear. It is to emphasise and protect generally, but also specifically for the protection of the individual, the separation of powers, particularly the separation of the judiciary from the other arms of the State. Section 22 achieves this by ensuring that the courts and other *fora* which settle justifiable disputes are independent and impartial. It is a provision fundamental to the upholding of the rule of law, the constitutional state, the '*regstaatidee*', for it prevents legislatures, at whatever level from turning themselves by acts of legerdemain into 'courts'. One recent notorious example of this was the High Court of Parliament Act. By constitutionalising the requirements of independence and impartiality the

> section places the *nature* of the courts or other adjudicating *fora* beyond debate and avoids the dangers alluded to by Van den Heever JA in the *Harris* case.

Section 34 of the Constitution is a provision that is expressly designed to prevent a re-occurrence of practices from the apartheid era where state official's decisions were not reviewed by the courts for their decisions thereby allowing an abuse of power. This section provides that 'any dispute' maybe brought before the court or any other forum for a 'fair public hearing'. The definition of 'any dispute' is extremely wide, however it specifically excludes instances where the Commissioner has instituted criminal proceedings against the taxpayer (Croome, 2010c:254-255). Section 34 is therefore applicable if a taxpayer seeks to challenge the constitutional validity of a provision in a fiscal statute against the Commissioner for the decisions made by his officials (Croome & Olivier, 2015:349).

It is must be emphasised and as mentioned previously the right of access to courts is not an absolute right, it has to be read with section 36 of the Constitution. This is illustrated in the *Metcash* case, Snyders J commented on the manner in which sections 36 and 40 of the VAT Act and section 34 of the Constitution interacted. Sections 36 and 40 afforded the Commissioner the sole responsibility for determining the vendor's VAT liability without judicial intervention and effectively ousted the power of the court to intervene in the dispute regarding postponement of payment of tax with SARS. In this instance the judge concluded that the right to the access to courts is important and can only be limited in exceptional circumstances. Snyders J decided on this occasion that the limitation to the right of access to court was neither reasonable nor justifiable thereby rendering parts of section 36 and 40 of the VAT Act invalid and unconstitutional (now repealed and replaced with section 164 of TAA). The Commissioner was dissatisfied with this judgement as it negatively impacted on the collection of tax revenue and proceeded to raise the matter with the Constitutional Court. Judge Kreigler indicated that VAT is a self-assessment tax system and for practical purposes section 36(1) was afforded to the Commissioner as a means to apply his discretion in the collection of VAT. Kreigler indicated that the discretion afforded to the Commissioner does not preclude the decision from being reviewed by the court and therefore did not agree with the judgement laid down by Snyders J. He decided that to the extent that section 40(5) of the VAT Act may oust section 34 of the Constitution which is the right of access to courts; such limitation is justified under section 36 of the Constitution (Croome & Olivier, 2015:373). In this manner the Constitutional Court recognised that taxpayers have a right to seek

clarification from a court on fiscal legislation, however within the limits of section 36 of the constitution.

PAJA promotes procedural justice including the access to a judicial review in section 7(2) and reads as follows:

> (2)(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
>
> (b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
>
> (c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.

The constitutionality of section 7(2)(a) of the PAJA has itself been called into question in the past as it could be perceived that it infringes on a taxpayer's right of access to the courts by requiring that all internal remedies be exhausted first (Croome, 2010c:238). In the case of *Koyabe and Others v Minister for Home Affairs and Others* (CCT 53/08) [2009] ZACC 23; 2009 (12) BCLR 1192 (CC); 2010 (4) SA 327 (CC) it was noted by the Constitutional Court that the requirement to exhaust all internal remedies was not absolute and was not to be used by the administrator to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny. Furthermore, the court has the power to condone the non-exhaustion of internal remedies in exceptional circumstances and must consider the availability, effectiveness and adequacy of internal remedies.

Therefore PAJA endorses that in 'exceptional circumstances' the taxpayer will not be required to exhaust all internal remedies before the courts may be approached. An example of such an exceptional circumstance would be where the Commissioner exhibits bias against the taxpayer and the internal remedy will not assist the taxpayer (Croome & Olivier, 2015:348).

4.3 Access to Courts in the TAA

The TAA introduces new concepts closely linked with the 'access to courts' rule which was not specifically mentioned in tax statutes prior to its enactment. Most of these concepts were introduced by way of definitions by judges, magistrates, tax boards and tax courts to name a few. Section 105 of the TAA now explicitly recognises a taxpayer's right to approach the High Court for judicial review.

While the courts have the authority to condone the non-exhaustion of these internal remedies it would seem that the courts are reluctant to do so (refer *MTN International (Mauritius) Limited v CSARS*, 2011 23203/2011 (HC)). It is submitted that the reluctance of the courts to condone the circumvention of the internal remedies rule included in the dispute resolution process (Chapter 9 of TAA) arises because of the courts' view of the general availability, effectiveness and adequacy of the this process.

A PricewaterhouseCoopers publication Synopsis for March 2013 also brings an interesting subject which the Jurisdiction of the Tax Court and High Court when litigating against SARS. This highlights the principles that the taxpayer may have access to the court as a remedy. However the taxpayer may be without remedy if its advisor/s does not follow the correct legal procedure. The discussion in this paper highlights two judgements to illustrate this principle, namely the *MTN Case* and *Metcash*.

The jurisdiction of the Tax Court and the High Court was questioned in *MTN International (Mauritius) Ltd v CSARS*. The taxpayer a company registered in Mauritius which was a subsidiary of MTN Group Limited, a company listed on the Johannesburg Securities Exchange, requested a judicial review for alleged procedural defects by SARS in issuing assessments in terms of section 79 of ITA. The taxpayer sought to set aside the additional assessments issued by SARS. SARS argued that in terms of section 94 of the ITA the production of a document issued by the Commissioner that purports to be an extract from a notice of assessment is 'conclusive evidence of the making of such assessment' and the validity of the assessment could therefore not be challenged. Thus the issue at hand was whether the High Court had jurisdiction to determine the validity of the assessment in question.

In *Metcash Trading Ltd v Commissioner, South African Revenue Services* 2001 (1) SA 1109 (CC) Kriegler J, giving the judgment of Constitutional Court, said that –

> [44] Indeed, it has for many years been settled law that the Supreme Court has jurisdiction to hear and determine income tax cases turning on legal issues. Thus in *Friedman and Others NNO v Commissioner for Inland Revenue*: In re *Phillip Frame Will Trust v Commissioner for Inland Revenue* McCreath J . . .concluded as follows as to his competence to determine the case: 'I am in agreement with the finding of the Court in that case that where the dispute involved no question of fact and is simply one of law the Commissioner and the Special Court are not the only competent authorities to decide the issue - at any rate when a declaratory order such as that in the present case is being sought.

In the Metcash case, the taxpayer sought to impugn the validity of the additional assessments in terms of PAJA on the grounds (see paragraph [32] of the judgment) that SARS had acted mala fide in issuing the additional assessment and that the assessment was consequently invalid. Thlapi J held (at paragraph [32] of the judgment) that he was unable, in the present High Court proceedings, to determine the alleged *mala fides* of SARS in this regard because this would involve examining whether SARS had satisfied itself that it was, in the circumstances, proper to raise the additional assessment, and that this was an issue that had to be decided by the Tax Court. He therefore dismissed with costs the taxpayer's application to the High Court, in terms of PAJA, to impugn the validity of the assessment.

Tax Administration Act now provides in section 105 that –

> A taxpayer may not dispute an assessment or 'decision' as described in section 104 in any court or other proceedings, except in proceedings under this Chapter [that is to say, by way of objection and appeal or the other forms of dispute resolution provided for in Chapter 9 of the Tax Administration Act] or by application to the High Court for review.

The intent of this provision seems to be to ensure that a clear line is drawn between contesting an assessment on the merits – that is to say, whether the assessment correctly reflects the amount of tax due – and a constitutional attack (which includes an attack in terms of PAJA, which is itself a constitutional legislation) on the fairness or rationality of the process by which the assessment was arrived at. Section 104 provides, in effect, that an assessment can be contested on the merits only in the Tax Court, and that proceedings can be brought in the High Court only to contest the validity of the process whereby the assessment was made as distinct from the merits (PricewaterhouseCoopers Inc., 2013).

4.4 Does section 105 of the TAA negatively affect the rights of taxpayers of access to the courts?

Although section 105 of the TAA now recognises a taxpayer's right to approach the High Court for judicial review, section 7(2) of the PAJA places a burden on the taxpayer to first exhaust all internal remedies available to it before approaching the High Court, subject to the exceptional circumstances discussed earlier.

The constitutionality of section 7(2) of the PAJA has itself been called into question in the past as it may be said that it infringes on a person's right of access to the courts (Croome, 2010:238). In the case of *Koyabe v Minister for Home Affairs and Others*, 2010 SA 327/10 (CC) it was noted by the Constitutional Court that the requirement to exhaust all internal remedies was not absolute and was not to be used by the administrator to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny. Furthermore, the court has the power to condone the non-exhaustion of internal remedies in exceptional circumstances and must consider the availability, effectiveness and adequacy of internal remedies.

It is therefore submitted that the inclusion of the option to approach the High Court for review in section 105 of the TAA will arguably not change the court's approach when dealing with questions of fact and that an approach to the court for judicial review is only likely to be entertained where the grounds for review relate only to the constitutionality of an administrative action or decision by SARS or in circumstances where the enquiry relates solely to a question of law. It is therefore debatable whether the constitutional rights of the taxpayer are improved as a result of the inclusion of this option.

4.5 Conclusion

While the Constitutional Court has already found that the previous legislation governing the forum for the tax administrative provisions contained in the various tax acts did not specifically prohibit a taxpayer from approaching the courts for the judicial review of actions and decisions taken by SARS, the legislature has nonetheless thought it expedient and necessary to make this right explicit with the introduction of section 105 of the TAA. Therefore, while the provision does not add to a taxpayer's right to just administrative action

and access to courts, the provision is welcome as the rights are now clearly recognised within the TAA.

Taxpayers are entitled to access the courts, however this right should be considered in conjunction with the other rights to administrative justice. Under normal circumstances the Tax Court will address tax disputes in terms of section 103 of the TAA. Where the Commissioner fails to make a decision or refuses to exercise his discretion, a taxpayer should challenge the decision in terms of sections 6, 7 and 8 of PAJA. The current provisions contained in the TAA with specific reference to objections and appeals are better than those procedures that were previously in place. Therefore once both the taxpayers and Commissioner familiarise themselves with the new rules, the process will become more efficient and streamlined (Croome & Olivier, 2015:355).

Chapter 5: Remedies and International Practices

5.1 Introduction

This chapter expands on the rights of taxpayers in South Africa with recommendations being made about the future of tax administration. The enactment of the Bill of Rights in the Constitution has improved the position of taxpayers who had hitherto limited rights in their engagements with SARS prior to 1994. Taxpayers are afforded a few remedies as summarised below. It however, must be noted that our tax administrative practices should be progressive consequently an analysis is provided of what could be termed '*best practices*' in a few OECD countries.

5.2 Enforcing procedural rights under PAIA and PAJA

The procedural rights of taxpayers are embedded in the Constitution, namely, the right to access to information, administrative justice and access to courts, offer a more effective means of challenging the conduct of the Commissioner. In addition, the enactment of PAIA and PAJA creates mechanisms that taxpayers may use effectively against the Commissioner to access information and therefore administrative justice. The difficulty however, is that in order to obtain an effective remedy against the Commissioner, the taxpayer may need to approach a court for relief as already mentioned in detail in the preceding chapter of this report, as there is no administrative procedure available to a taxpayer that would result in an alternative remedy. Regrettably, the heavy costs of a court action means that frequently amounts in dispute or nature of the dispute will not justify seeking such relief (Croome, 2010:308).

Beric Croome, mentioned in his book *Taxpayers' Rights in South Africa* published in 2010, that:

> One of the problems facing the Commissioner is that his employees lack full knowledge of the provisions of the Constitution, PAIA and PAJA and the way they affect the administration of tax laws. The Commissioner only recently released the SARS Service Charter, but both his staff and taxpayers generally need comprehensive education about its content. In all correspondence with taxpayers the Commissioner's officials should advise them of their rights because they can only seek fair treatment if they are aware of these rights.

Six years since this book was published, it does not appear that the officials at SARS are better placed with regards to knowledge on these statues. This is evidenced by the numerous cases decided since the enactment of TAA, some of which have been mentioned in this

report. It is therefore recommended that in order to improve adherence with the Constitution, PAIA and PAJA, that the Commissioner engage in training his staff and also providing feedback to taxpayers with regards to these statues. This should also be supplemented in addition to TAAG with a manual on the application of PAIA and PAJA with specific reference to the tax provisions.

5.3 Relief from SARS Service and Monitoring Office ('SSMO')

Furthermore, taxpayers who are dissatisfied with the manner in which the Commissioner has dealt with his or her affairs and the severity of the matter does not require judicial review may approach the SMMO. In order to approach the SMMO the taxpayer will be required to follow internal procedures of SARS. Therefore the taxpayer is required to lodge a complaint with the SARS official or the SARS official's manager dealing with the matter. Where a taxpayer remains dissatisfied he or she must complain to the SARS call centre. If the compliant remains unresolved the taxpayer may lodge a complaint with the SSMO (SARS, 2005).

5.4 Tax Ombud to assist with tax administrative matters

The Minister of Finance Pravin Gordhan, officially launched the SA Tax Ombud on the 7 April 2014 with the objective to review and address complaints by taxpayers regarding service, procedural or administrative issues relating to their dealings with SARS. As announced in October 2013, retired Judge Bernard Ngoepe is the Tax Ombud. The Minister, whet on to say that (SARS, Media Releases (7 April 2014 - Minister Gordhan Officially Launches Tax Ombud's Office)):

> The Tax Ombud is an additional and free avenue to deal with complaints by taxpayers that cannot be resolved through SARS's internal mechanisms. The Tax Ombud's office draws on comparable institutions in Canada and the United Kingdom.
>
> The Ombud is intended to be a simple and affordable remedy to taxpayers who have legitimate complaints that relate to administrative matters, poor service or the failure by SARS to observe taxpayer rights.

The office of the Tax Ombud is welcome relief to all taxpayers, as section 16 of the TAA provides the mandate of the Tax Ombud as follows:

> (2) In discharging his or her mandate, the Tax Ombud must—
>
> a) review a complaint and, if necessary, resolve it through mediation or conciliation;

b) act independently in resolving a complaint;

c) follow informal, fair and cost-effective procedures in resolving a complaint;

d) provide information to a taxpayer about the mandate of the Tax Ombud and the procedures to pursue a complaint;

e) facilitate access by taxpayers to complaint resolution mechanisms within SARS to address complaints; and

f) identify and review systemic and emerging issues related to service matters or the application of the provisions of this Act or procedural or administrative provisions of a tax Act that impact negatively on taxpayers.

Whilst it is beneficial to taxpayers and their procedural rights it must be noted that the Office of the Tax Ombud is limited by way of section 17 of the TAA as follows:

The Tax Ombud may not review—

a) legislation or tax policy;

b) SARS policy or practice generally prevailing, other than to the extent that it relates to a service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS;

c) a matter subject to objection and appeal under a tax Act, except for an administrative matter relating to such objection and appeal; or

d) a decision of, proceeding in or matter before the tax court.

Despite its limitations above it was reported in the Tax Ombud Annual Report 2014/15 that:

> Of the 6003 contacts received during the year, 1277 were complaints, of which 409 fell within our mandate. More than 75% of these were finalised in favour of taxpayers. Unfortunately, a number of cases fell outside our mandate or were prematurely sent to us before SARS complaints resolution mechanisms were exhausted. As a result, we had to reject 861 complaints. The positive factor of this scenario is that the declined complaints have helped us to gain a clearer understanding of areas where taxpayers do not fully understand SARS processes or the mandate of this Office. Where possible, we will incorporate these insights into our awareness and outreach campaigns.

Therefore taxpayers should take comfort in the fact that the Tax Ombud is available for remedial action against any unjust SARS practices.

5.5 Tax Administration in USA, UK, Canada and New Zealand (OECD countries):

Tax administration is a world-wide practice to enable countries to collect revenue from taxpayers in order for the respective governments to function efficiently. In order to draw a yardstick to where South Africa ranks procedurally, a comparison is drawn pertaining to tax administrative practices between South Africa and a few the Organisation for Economic Co-Operation and Development (OCED) countries. The tables below examines the practices and guidelines as identified by the OECD and only extended to specific examinations of the tax practices employed by Canada, New Zealand , the United Kingdom (UK), and the United States of America (USA). The research report serves to evaluate tax administrative practices in developed countries as well as countries that National Treasury normally looks to adopt similar tax provisions. This will allow for comparison of what is considered '*best practices*' abroad to the current provisions in the TAA to determine if a balance of power exists between SARS obligations and taxpayers rights in the paragraphs that follow.

5.5.1 Analysis of Access to information in OECD countries:

Country	Access to Information
United States of America (USA)	In the USA taxpayer may request information other than that protected from disclosure under the Freedom of Information Act, from the Internal Revenue Service (IRS). The IRS may authorise the release of tax return information to taxpayers, unless that disclosure will jeopardise federal tax administration. US legislation contains administrative and judicial remedies for persons who request information are denied (Croome, 2010:200-210). This is different to the South Africa law where the information is not specifically contained in the TAA and the taxpayer is forced to venture outside of the TAA in order to obtain and answer.

United Kingdom (UK)	The United Kingdom enacted the Freedom of Information Act in 2000, prescribing procedures for taxpayers wishing to request information from HM Revenue and Customs. Individuals may request information about their personal affairs but not about other taxpayers. This is very similar to the PAIA. Taxpayers who are unhappy with the manner in which HM Revenue and Customs has dealt with their request for information may lodge a complaint with the Adjudicator's Office (Croome, 2010:200). This is similar to the Tax Ombud in South Africa.
Canada	Taxpayers in Canada have the right to access to information held by the revenue authority under the Privacy Act R.S.C 1985 and Access to Information Act R.S.C 1985, legislation similar to PAIA. The right to access is subject to confidentiality provisions contained in the Canadian fiscal legislation and excludes information that is subject to attorney-client privilege (Croome, 2010:201-202).
New Zealand (NZ)	In 1982 New Zealand enacted the Official Information Act, which provides that taxpayers may request official information unless there are sound reasons to deny the request. Taxpayers in New Zealand are entitled to call for information relating to themselves from the Inland Revenue Department, the only instance that information will be denied is to the extent that the information is confidential or subject to legal privilege (Croome, 2010:202)

South Africa - Comparison and concluding remarks	It would appear that South Africa is unique in providing taxpayers with a constitutional right of to access of information (section 32). Many of the countries have introduced legislation similar to PAIA. What has been argued by Croome is that PAIA, despite awarding taxpayer the right to access information continues to extremely restrictive and that legislation be introduced to extend the information that public bodies should publish (Croome, 2010:202).

5.5.2 Analysis of Just Administrative Practices in OECD countries:

Country	Access to Just Administrative Practices
United States of America (USA)	The USA acknowledges just practices in the form of the *Taxpayers Bill of Rights* (IRS, 2016): • The Right to Be Informed • The Right to Quality Service • The Right to Pay No More than the Correct Amount of Tax • The Right to Challenge the IRS's Position and Be Heard • The Right to Appeal an IRS Decision in an Independent Forum • The Right to Finality • The Right to Privacy • The Right to Confidentiality • The Right to Retain Representation • The Right to a Fair and Just Tax System The taxpayer's right to access information is further deliberated in point 5.5 of this research report.

United Kingdom (UK)	HM Revenue and Customs (HRMC) has adopted an administrative approach and released '*Your Charter*' during November 2009 that includes the principles the HRMC must be adhered to ensure that taxpayers are dealt with fairly. *'Your Charter'* sets out the following rights for taxpayers (HMRC, 2016:1): • respect; • help and support from the HMRC; • to be treated with honesty and fairness; • professionalism and integrity; • counteraction of people who do not adhere to the rules; • confidentiality of information; • representation by someone else; and • keep administrative costs to a minimum. In return the HMRC expects that taxpayers to be honest and respectful and take reasonable care when dealing with the HMRC (HMRC, 2016:1).

Canada	In Canada a decision maker who has power over a person's life, liberty or security must comply with the principles of 'fundamental justice'. In addition section 2(e) of the Canadian Bill of Rights guarantees 'the right to a fair hearing with the principles of fundamental justice and determination of his rights and obligations' (Croome, 2010:243-244). Furthermore, taxpayers' rights are formally defined in terms of the *Taxpayers Bill of Rights* that governs the relationship between taxpayers and the Canadian Revenue Agency (CRA). The taxpayer rights are summarised as follows (Office of Tax Ombudsman Canada, 2016): • the right to be treated professionally, courteously, and fairly (Article 5); • the right to complete, accurate, clear, and timely information from the CRA (Article 6); • the right to lodge a service complaint and to be provided with an explanation of the CRA findings (Article 9); • the right to have the costs of compliance taken into account when tax legislation is administered (Article 10); • the right to expect the CRA to be accountable (Article 11); • the right to expect the CRA to publish service standards and report annually (Article 13); • the right to expect the CRA to warn you about questionable tax schemes in a timely manner (Article 14); and • the right to be represented by a person of your choice (Article 15). Internationally Canada has taken the lead in providing taxpayers with adequate rights.

New Zealand (NZ)	New Zealand does not have a Constitution that protects fundamental human rights, which detracts from the protection of taxpayers' rights in the country; however taxpayers are entitled to a number of procedural rights under the Tax Administrative Act and the Tax Review Authorities Act. These rights include the right to confidentiality of information, limitations on the Inland Revenue Department's (IRD's) search and seizure powers, restrictions on audits conducted by the IRD and a process of appeals dealings with assessments issued by the IRD (Croome, 2010:279-280)
South Africa - Comparison and concluding remarks	Presently in South Africa taxpayers' rights are protected by the Bill of Rights included in the Constitution. In summary, taxpayers have secured an enforceable right in their dealings with SARS as a result of section 33 of the Constitution and the enactment of PAJA. Many of the decisions taken by the Commissioner in administering the tax system constitute administrative action and are consequently subject to PAJA (Croome, 2010:253). In this manner South Africa is aligned with developed countries with regard to the availability of these legal provisions within the tax administrative regime. The abuse by SARS and the negative impact of the TAA on taxpayers could also be as a consequence of a lack of understanding of section 33 of the Constitution and PAJA. It is recommended that the Commissioner should undertake extensive training of its personnel to improve the understanding of PAJA (Croome, 2010:253). In addition the OECD recommends that Revenue Authorities include a *Service Charter* or a *Taxpayer Charter*, as mentioned in the selected countries above. SARS unfortunately has removed the

	SARS Service Charter that was released in 2005 from the SARS webpage without providing notice thereof to taxpayers or the South African public or the reasons thereof. It is therefore recommended that the *SARS Service Charter* be updated to take into account of the tax administration amendments in the TAA before this document is released to the public. The CRA and HMRC are transparent and open about their commitment to ensure better service delivery to taxpayers through formal charters. It is further recommended that SARS adopt a *Taxpayer Bill of Rights* similar to the USA to promote the procedural rights of taxpayers in South Africa.

5.5.3 Analysis of the Access to courts

In the OECD countries taxpayers may appeal against decisions made by the tax authorities. The OECD summaries the position in the member countries as follows (Croome, 2010:263):

> In all countries taxpayers with a grievance have resort to a hierarchical range of appeals procedures which enable them to contest the merits of a tax assessment. The description of country practices in Part IV shows that normally an appeal will first be lodged with an administrative tribunal, in some cases consisting of lawyers and experts; in others specifically designated tax officials only.

In South Africa, s34 of the Constitution provides that the court can be approached to review an administrative act which is unjust and imposed by SARS provided that the duty to exhaust internal remedies before applying to the High Court for a review of a SARS decision in terms of PAJA has been complied with. The particular focus of this note is on section 7(2)(*a*) of PAJA, which provides that:

> [N]o court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

In *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining And Development Company Ltd* (2014 (3) BCLR 265 (CC); 2014 (5) SA138 (CC)) [2013] ZACC 52;[2013] ZACC 48, the Constitutional Court elaborated on the duty in terms of PAJA to exhaust internal remedies, saying that:

> [119] In clear and peremptory terms, section 7(2) prohibits courts from reviewing "an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted". Where, as in this case, there is a provision for internal remedies, the section imposes an obligation on the court to satisfy itself that such remedies have been exhausted. If the court is not satisfied, it must decline to adjudicate the matter until the applicant has either exhausted internal remedies or is granted an exemption. Since PAJA applies to every administrative action, this means that there can be no review of an administrative action by any court where internal remedies have not been exhausted, unless an exemption has been granted in terms of section 7(2)(c).

The PricewaterhouseCoopers November / December 2015 Synopsis publication seeks to clarify this matter by providing the following rationale:

> There are numerous unresolved questions regarding internal remedies available in terms of the Income Tax Act and the Value-Added Tax Act read with the Tax Administration Act and the Rules of the Tax Court….Section 98 of the Tax Administration Act permits the withdrawal of an assessment in appropriate circumstances, despite the fact that no objection has been lodged or appeal noted. In the circumstances that there may be no other internal remedy available, would the filing of an application under section 98 be sufficient to persuade a court that the taxpayer has exhausted all internal remedies? This issue has not yet come before a court… Nevertheless, it would appear that section 98 of the Tax Administration Act relieves a taxpayer from the requirement to exhaust the internal remedies of objection and appeal.

The Constitution entitles taxpayers to seek remedies from the court provided the provisions of PAJA are adhered to. A precedent on the requirement that internal remedies being exhausted prior to approaching the courts for relief has not been set, hopefully this will be elaborated on in future judgements. For now taxpayers can take comfort in the fact that they are able to benefit from judicial review as contained in the Constitution.

In addition to the analysis that has been drawn above, the OECD published a book titled *Tax Administration 2015: Comparative Information on OECD and Other Advanced and Emerging Economies to amplify the tax administrative practices in the various OECD countries.* The book provides a recommended 'Taxpayer Charter' (depicted in the table below) that contains a useful summary of both the rights of the taxpayer as well as their obligations. It is a recommended that the SARS Service Charter (currently removed from the SARS website, depicted in Appendix D) be revisited and factors with specific reference to procedural rights (Constitution, PAIA, PAJA and TAA) be updated so that the SARS Service Charter provides for a more transparent and efficient administrative regime. In addition SARS officials need to undergo extensive training in order to make them aware of the procedural rights contained in the various statutes and are held to account. The tax administrative regime in South Africa can only be improved if both the taxpayers and SARS officials are aware of their rights and obligations and comply with them.

Box 9.1. Illustrative Taxpayers' Charter: Description of taxpayers' rights and obligations

Taxpayers' Rights	Taxpayers' Obligations
Your right to be informed, assisted and heard: We will treat you with courtesy and consideration at all times and will, in normal circumstances, strive to help you to understand and meet your tax obligations; explain to you the reasons for decisions made by us concerning your affairs; finalise refund requests within ... days/[as quickly as possible] and, where the law allows, pay you interest on the amount; answer written enquiries within ... days/[as quickly as possible]; deal with urgent requests as quickly as possible; answer your telephone call promptly and without unnecessary transfer; return your telephone call as quickly as possible; keep your costs in complying with the law to a minimum; give you the opportunity to have your certified legal or taxation adviser present during any investigation; send you, within ... days/[as quickly as possible] of the completion of an investigation, written advice of the result of that investigation including the reasons for any decision and, where an assessment has been issued, details of how the assessment was calculated. **Your right of appeal** We will, in normal circumstances, strive to fully explain your rights of review, objection and appeal if you are unsure of them or need clarification; review your case if you believe that we have misinterpreted the facts, applied the law incorrectly or not handled your affairs properly; ensure that the review is completed in a comprehensive, professional and impartial manner by a representative who has not been involved in the original decision; determine your objection within ... days/[as quickly as possible], unless we require more information to do so, or the issues are unusually complex; give you reasons if your objection has been completely or partially disallowed; and request further information from you only where it is necessary to resolve the issues in dispute. **Your right to pay no more than the correct amount of tax:** We will act with integrity and impartiality in all our dealings with you, so that you pay only the tax legally due and that all credits, benefits, refunds and other entitlements are properly applied. **Your right to certainty** We will, in normal circumstances, strive to provide you with advice about the tax implications of your actions; let you know at least ... days/[as quickly as possible] before the conduct of an interview; advise you of the scope of an interview and our requirements; and arrange a suitable time and place for the interview and allow you time to prepare your records. **Your right to privacy** We will only make enquiries about you when required to check that you have complied with your tax obligations; only seek access to information relevant to our enquiries; and treat any information obtained, received or held by us as private. **Your right to confidentiality and secrecy** We will not use or divulge any personal or financial information about you unless you have authorised us in writing to do so or in situations where permitted by law; and only permit those employees within the administration who are authorised by law and require your personal or financial information to administer our programmes and legislation, to access your information.	**Your obligation to be honest** We expect you to provide complete and accurate information as and when required; declare all your assessable income in your income tax return; claim only deductions, rebates and credits to which you are entitled; answer questions completely, accurately and honestly; explain the full facts and circumstances when you seek tax advice or when you request a private ruling. **Your obligation to be co-operative** We expect you to co-operate with tax administrators and treat them with courtesy, consideration and respect, as we do in our dealings with you. **Your obligation to provide accurate information and documents on time:** We expect you to file correct returns and documents within time limits specified; provide complete and accurate information by certain dates; take reasonable care in preparing your tax returns, documents and information; inform us of relevant events such as incorporation, opening a business, correspondence address changes, moving the place of business, ceasing business, with required taxpayer identifiers in a timely manner so that we can administer tax legislation properly, efficiently and effectively. **Your obligation to keep records** We expect you to keep sufficient records and books to enable you to meet your tax obligations; keep sufficient records and books for the required retention period; take reasonable care in preparing your records and books; allow us access to records and books so that we can check your tax obligations. **Your obligation to pay taxes on time** We expect you to pay the full amount of your taxes by the due dates; pay the full amount of any balance outstanding resulting from assessment or reassessment; help us develop a mutually acceptable payment arrangement if you cannot pay any outstanding balance in full and have exhausted all reasonable possibilities of obtaining the necessary funds by borrowing or re-arranging your financial affairs; withhold and remit by due dates all taxes withheld or collected on behalf of others; advise us as soon as practical if some event beyond your control has affected your ability to pay your taxes on time so that appropriate arrangements can be put into place to assist you.

Source: Practice note: Taxpayers' Rights and Obligations (OECD CFA, July 2003).

Furthermore it is recommended that the tax administrative regime in South Africa not only include a SARS Service Charter, but rather expand on the Bill of Rights included in the Constitution of South Africa to have a *Taxpayer Bill of Rights*. This is a practice that has been adopted in the USA (see table below) to specifically elaborate the rights that are available to all taxpayers. This is to provide clarity to not only the taxpayers but also to SARS officials without having to draw reference to the Constitution, PAIA and PAJA. It should be a document that is communicated to SARS officials and taxpayers alike to promote a more just administrative tax regime in South Africa.

Box 9.3. United States: Taxpayer Bill of Rights

The Right to Be Informed

Taxpayers have the right to know what they need to do to comply with the tax laws. They are entitled to clear explanations of the laws and IRS procedures in all tax forms, instructions, publications, notices, and correspondence. They have the right to be informed of IRS decisions about their tax accounts and to receive clear explanations of the outcomes.

The Right to Quality Service

Taxpayers have the right to receive prompt, courteous, and professional assistance in their dealings with the IRS, to be spoken to in a way they can easily understand, to receive clear and easily understandable communications from the IRS, and to speak to a supervisor about inadequate service.

The Right to Pay No More than the Correct Amount of Tax

Taxpayers have the right to pay only the amount of tax legally due, including interest and penalties, and to have the IRS apply all tax payments properly.

The Right to Challenge the IRS's Position and Be Heard

Taxpayers have the right to raise objections and provide additional documentation in response to formal IRS actions or proposed actions, to expect that the IRS will consider their timely objections and documentation promptly and fairly, and to receive a response if the IRS does not agree with their position.

The Right to Appeal an IRS Decision in an Independent Forum

Taxpayers are entitled to a fair and impartial administrative appeal of most IRS decisions, including many penalties, and have the right to receive a written response regarding the Office of Appeals' decision. Taxpayers generally have the right to take their cases to court.

The Right to Finality

Taxpayers have the right to know the maximum amount of time they have to challenge the IRS's position as well as the maximum amount of time the IRS has to audit a particular tax year or collect a tax debt. Taxpayers have the right to know when the IRS has finished an audit.

The Right to Privacy

Taxpayers have the right to expect that any IRS inquiry, examination, or enforcement action will comply with the law and be no more intrusive than necessary, and will respect all due process rights, including search and seizure protections and will provide, where applicable, a collection due process hearing.

The Right to Confidentiality

Taxpayers have the right to expect that any information they provide to the IRS will not be disclosed unless authorised by the taxpayer or by law. Taxpayers have the right to expect appropriate action will be taken against employees, return preparers, and others who wrongfully use or disclose taxpayer return information.

The Right to Retain Representation

Taxpayers have the right to retain an authorised representative of their choice to represent them in their dealings with the IRS. Taxpayers have the right to seek assistance from a Low Income Taxpayer Clinic if they cannot afford representation.

The Right to a Fair and Just Tax System

Taxpayers have the right to expect the tax system to consider facts and circumstances that might affect their underlying liabilities, ability to pay, or ability to provide information timely. Taxpayers have the right to receive assistance from the Taxpayer Advocate Service if they are experiencing financial difficulty or if the IRS has not resolved their tax issues properly and timely through its normal channels.

Source: United States IRS website (September 2014).

5.6. Conclusion:

The research report recommends improvements to the TAA in order to enhance the relationship between taxpayers and SARS as well as adhere to what is considered to be international '*best practice*'. This will achieve the objective of striking a balance between the powers of SARS and the rights of taxpayers. It is advised that the TAA incorporate sufficient provisions to give effect to the protection of the taxpayers' rights to administrative fairness through more effective remedies mentioned above. Further research into the constitutionality of the current provisions of the TAA could also help to identify areas for improvement in this regard.

Chapter 6: Conclusion

Adam Smith was the first recorded writer to note that the canons of taxation, namely *equality, certainty, convenience, efficiency and neutrality*, internationally represents the characteristics of a good tax system. The promulgation of the TAA sought to centralise the administrative provisions within the South African tax regime to add efficiencies to the tax system. At this stage and from the research provided above, the current statue has not delivered this purpose in terms of section 2 of the TAA of a balance between the powers of SARS and the rights of taxpayers in order to ensure a fair, efficient and cost effective tax system.

Rather SARS has sought to utilise the provisions within the TAA to extend its powers to obtain more information from taxpayers. The TAA additionally contains questionable tax practices such as extension of prescription, SARS discretion to determine legal privileged and the scope to raise so called 'jeopardy assessments'. The difficulty with the TAA and the provisions thereof is that many taxpayers are not aware of the rights that they have in their dealings with SARS. Too often taxpayers accept SARS' interpretation of the tax Acts as correct and final without establishing from a legal point of view whether the statutory provisions and the manner in which SARS exercises its power fall within the boundaries set in the TAA and other tax Acts and comply with the Bill of Rights (Croome & Olivier, 2015:642).

Where SARS purports to exercise a power under the TAA, taxpayers should establish if the TAA confers that specific power on SARS. It would further appear that not all SARS officials are aware of the provisions in the TAA and the impact that the Bill of Rights has on the rights of taxpayers. SARS has a duty to comply with the Bill of Rights in its dealings with taxpayers and it should educate both taxpayers and its own staff about how the Constitution affects the manner in which SARS executes its statutory mandate under the SARS Act (Croome & Olivier, 2015:643). Therefore taxpayers are encouraged to understand the provisions in the TAA and their Constitutional rights equally in order to challenge unjust administrative practices by SARS.

The recourses available to taxpayers are to report unjust administrative practices through the SSMO or seek the assistance of the Tax Ombud. An alternative remedy would be to approach the High Court for review by way of judicial review of SARS' conduct on the basis that SARS has failed to comply with the provisions of PAJA and the taxpayer's right to administrative justice contained in s33 of the Constitution. Unfortunately, the cost of litigation is high and time

consuming and often the nature of the disputes with SARS is not about substantial amounts of money to justify litigation as the legal cost exceed the tax in issue at hand. As a result, taxpayers are restrained from applying to the courts for relief where SARS has abused its powers (Croome & Olivier, 2015:643) and this defeats the objects of the law in place.

In conclusion, therefore, it is clear that SARS has extensive powers to take action against taxpayers who fail to adhere to the provisions of the fiscal laws of the country. It is most unfortunate that the TAA does not contain any specific sanction on SARS itself or its officials where obligations imposed on SARS and its officials are disregarded. It is hoped that the Tax Ombud will investigate the significant administrative frustrations currently experienced by taxpayers with the view to resolving systematic issues, thereby enhancing tax compliance in South Africa (Croome & Olivier, 2015:644).

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Appendices

Appendix A

Tax Administration Act, 2011 (Act 28 of 2011)

Chapter 5: Information Gathering

Part B: Inspection, request for relevant material, audit and criminal investigation

46. Request for relevant material

(1) SARS may, for the purposes of the administration of a tax Act in relation to a taxpayer, whether identified by name or otherwise objectively identifiable, require the taxpayer or another person to, within a reasonable period, submit relevant material (whether orally or in writing) that SARS requires.

(2) A senior SARS official may require relevant material in terms of subsection (1)—

(a) in respect of taxpayers in an objectively identifiable class of taxpayers; or

(b) held or kept by a connected person, as referred to in paragraph (d)(i) of the definition of 'connected person' in the Income Tax Act, in relation to the taxpayer, located outside the Republic.

[Subsection (2) amended by section 42(a) of the Tax Administration Laws Amendment Act, 2015 (Act No. 23 of 2015)]

(3) A request by SARS for relevant material from a person other than the taxpayer is limited to material maintained or kept or that should reasonably be maintained or kept by the person in respect of the taxpayer.

[Subsection (3) amended by section 42(a) of the Tax Administration Laws Amendment Act, 2015 (Act No. 23 of 2015)]

(4) A person or taxpayer receiving from SARS a request for relevant material under this section must submit the relevant material to SARS at the place, in

the format (which must be reasonably accessible to the person or taxpayer) and—

(a) within the time specified in the request; or

(b) if the material is held by a connected person referred to in subsection (2)(b), within 90 days from the date of the request, which request must set out the consequences referred to in subsection (9) of failing to do so.

[Subsection (4) amended by section 42(a) of the Tax Administration Laws Amendment Act, 2015 (Act No. 23 of 2015)]

(5) If reasonable grounds for an extension are submitted by the person or taxpayer, SARS may extend the period within which the relevant material must be submitted.

[Subsection (5) amended by section 42(a) of the Tax Administration Laws Amendment Act, 2015 (Act No. 23 of 2015)]

(6) Relevant material required by SARS under this section must be referred to in the request with reasonable specificity.

(7) A senior SARS official may direct that relevant material—

(a) be provided under oath or solemn declaration; or

(b) if required for purposes of a criminal investigation, be provided under oath or solemn declaration and, if necessary, in accordance with the requirements of section 212 or 236 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

[Subsection (7) amended by section 38 of the Tax Administration Laws Amendment Act, 2013 (Act No. 39 of 2012)].

(8) A senior SARS official may request relevant material that a person has available for purposes of revenue estimation.

(9) If a taxpayer fails to provide material referred to in subsection (2)(b), the material may not be produced by the taxpayer in any subsequent proceedings, unless a competent court directs otherwise on the basis of circumstances outside the control of the taxpayer and any connected person referred to in paragraph (d)(i) of the definition of 'connected person' in the Income Tax Act, in relation to the taxpayer.

[Subsection (9) inserted by section 42(b) of the Tax Administration Laws Amendment Act, 2015 (Act No. 23 of 2015)]

Appendix B

Tax Administration Act, 2011 (Act 28 of 2011)

Chapter 5: Information Gathering

Part A: General rules for inspection, verification, audit and criminal investigation

42A. Procedure where legal professional privilege is asserted

(1) For purposes of Parts B, C and D, if a person alleges the existence of legal professional privilege in respect of relevant material required by SARS, during an inquiry or during the conduct of a search and seizure by SARS, the person must provide the following information to SARS and, if applicable, the presiding officer designated under section 51 or the attorney referred to in section 64:

(a) a description and purpose of each item of the material in respect of which the privilege is asserted;

(b) the author of the material and the capacity in which the author was acting;

(c) the name of the person for whom the author referred to in paragraph (b) was acting in providing the material;

(d) confirmation in writing confirmation in writing that the person referred to in paragraph (c) is claiming privilege in respect of each item of the material;

(e) if the material is not in possession of the person referred to in paragraph (d), from whom did the person asserting privilege obtain the material; and

(f) if the person asserting privilege is not the person referred to in paragraph (d), under what circumstances and instructions regarding the privilege did the person obtain the material.

(2) A person must submit the information required under Part B to SARS at the place, in the format and within the time specified by SARS, unless SARS extends the period based on reasonable grounds submitted by the person.

(3) If SARS disputes the assertion of privilege upon receipt of the information—

(a) SARS must make arrangements with a practitioner from the panel appointed under section 111 to take receipt of the material;

(b) the person asserting privilege must seal and hand over the material in respect of which privilege is asserted to the practitioner;

(c) the practitioner must within 21 business days after being handed the material make a determination of whether the privilege applies and may do so in the manner the practitioner deems fit, including considering representations made by the parties;

(d) if a determination of whether the privilege applies is not made by the practitioner or a party is not satisfied with the determination, the practitioner must retain the relevant material pending final resolution of the dispute by the parties or an order of court; and

(e) any application to a High Court must be instituted within 30 days of the expiry of the period of 21 business days, failing which the material must be handed to the party in whose favour the determination, if any, was made.

(4) The appointed practitioner—

(a) is not regarded as acting on behalf of either party;

(b) must personally take responsibility for the safekeeping of the material;

(c) must give grounds for the determination under subsection (3)(d); and

(d) must be compensated in the same manner as if acting as chairperson of the tax board.

[Section 42A inserted by section 41 of the Tax Administration Laws Amendment Act, 2015 (Act No. 23 of 2015)]

Appendix C

Tax Administration Act, 2011 (Act No. 28 of 2011)

Chapter 8: Assessments

99. Period of limitations for issuance of assessments

(1) An assessment may not be made in terms of this Chapter—

(a) three years after the date of assessment of an original assessment by SARS;

(b) in the case of self-assessment for which a return is required, five years after the date of assessment of an original assessment—

(i) by way of self-assessment by the taxpayer; or

(ii) if no return is received, by SARS;

(c) in the case of a self-assessment for which no return is required, after the expiration of five years from the—

(i) date of the last payment of the tax for the tax period; or

(ii) effective date, if no payment was made in respect of the tax for the tax period;

(d) in the case of—

(i) an additional assessment if the—

(aa) amount which should have been assessed to tax under the preceding assessment was, in accordance with the practice generally prevailing at the date of the preceding assessment, not assessed to tax; or

[Subparagraph (aa) amended by section 59 of the Tax Administration Laws Amendment Act, 2012 (Act No. 21 of 2012)]

(bb) full amount of tax which should have been assessed under the preceding assessment was, in accordance with the practice, not assessed;

(ii) a reduced assessment, if the preceding assessment was made in accordance with the practice generally prevailing at the date of that assessment; or

(iii) a tax for which no return is required, if the payment was made in accordance with the practice generally prevailing at the date of that payment; or

(e) in respect of a dispute that has been resolved under Chapter 9.

[Subsection (1) amended by section 51(a) of the Tax Administration Laws Amendment Act, 2015 (Act No. 23 of 2015)]

(2) Subsection (1) does not apply to the extent that—

(a) in the case of assessment by SARS, the fact that the full amount of tax chargeable was not assessed, was due to—

(i) fraud;

(ii) misrepresentation; or

(iii) non-disclosure of material facts;

(b) in the case of self-assessment, the fact that the full amount of tax chargeable was not assessed, was due to—

(i) fraud;

(ii) intentional or negligent misrepresentation;

(iii) intentional or negligent non-disclosure of material facts; or

(iv) the failure to submit a return or, if no return is required, the failure to make the required payment of tax;

(c) SARS and the taxpayer so agree prior to the expiry of the limitations period;

(d) it is necessary to give effect to—

(i) the resolution of a dispute under Chapter 9;

(ii) a judgment pursuant to an appeal under Part E of Chapter 9 and there is no right of further appeal; or

(iii) an assessment referred to in section 93(1)(*d*) if SARS becomes aware of the error referred to in that subsection before expiry of the period for the assessment under subsection (1); or

(e) SARS receives a request for a reduced assessment under section 93(1)(*e*).

[Subsection 2 amended by section 51(b) of the Tax Administration Laws Amendment Act, 2015 (Act No. 23 of 2015).

(3) The Commissioner may, by prior notice of at least 30 days to the taxpayer, extend a period under subsection (1) or an extended period under this section, before the expiry thereof, by a period approximate to a delay arising from:

(a) failure by a taxpayer to provide all the relevant material requested within the period under section 46(1) or the extended period under section 46(5); or

(b) resolving an information entitlement dispute, including legal proceedings.

[Subsection (3) inserted by section 51(c) of the Tax Administration Laws Amendment Act, 2015 (Act No. 23 of 2015)]

(4) The Commissioner may, by prior notice of at least 60 days to the taxpayer, extend a period under subsection (1), before the expiry thereof, by three years in the case of an assessment by SARS or two years in the case of self-assessment, where an audit or investigation under Chapter 5 relates to—

(i) the application of the doctrine of substance over form;

(ii) the application of Part IIA of Chapter III of the Income Tax Act, section 73 of the Value-Added Tax Act or any other general anti-avoidance provision under a tax Act;

(iii) the taxation of hybrid entities or hybrid instruments; or

(iv) section 31 of the Income Tax Act.

[Subsection (4) inserted by section 51(c) of the Tax Administration Laws Amendment Act, 2015 (Act No. 23 of 2015)]

Appendix D

SARS SERVICE CHARTER

You are entitled to expect SARS:

To help you through

- self-explanatory leaflets and booklets as well as our website
- courteous and professional service at all times
- providing clear, accurate and helpful responses
- making clear what action you need to take and by when
- being accessible via our call centre and walk-in centres
- listening to your suggestions

To be fair by

- expecting you to pay only what is due under law
- treating everyone equally
- ensuring everyone pays their fair share

To respect your constitutional rights and privacy

- by keeping your private affairs strictly confidential
- furnishing you with reasons for decisions taken
- applying the law consistently and impartially

If you are not satisfied, you may

- request that your tax affairs be re-examined
- exercise your right to object and appeal
- request that we advise you of the procedures to be followed in our Alternate Dispute Resolution (ADR) process
- lodge a formal complaint at any of our offices
- lodge a complaint with the SARS Service Monitoring Office (SSMO)

In return, your obligations are to

- be honest
- submit full and accurate information on time
- pay your tax and/ or duties on time and in full
- encourage others to pay their tax and/ or duties
- report others who are not paying their fair share
- not encourage or be party to bribery or fraud in any form

The countdown to 2007 ...

A look at the service standards to be implemented in the next two years.

SARS Service Charter Booklet

Service Standards

1. Overview

   The new SARS Service Charter is intended to ensure that public expectations of service delivery are matched by achievable and measurable performance standards. The primary impact on our business, by creating and publishing appropriate service delivery measures, will positively influence the compliance climate in South Africa and -will also enable the organisation to benchmark itself against other leading Revenue and Customs agencies around the world.

   The primary business benefits are improved voluntary compliance resulting from adherence to published service delivery standards and at the same time upholding the rights and obligations of taxpayers'.

   The new service standards outlined below are in line with our transformation process and will be phased in over the next two years (2005-2007).

2. **Overall Approach**

   The new SARS Service Charter has been developed after consultation with our clients, (both internal and external) and covers all services that we provide.

This document sets out:

- How we will provide you with assistance
- The standards of service that you can expect
- How you can help us deliver an effective service and make suggestions for further improvement
- Where you can get information about your obligations, legal rights and other entitlements
- How to inform SARS if you are not satisfied with our service

2.1 Providing assistance to you

- Through a wide range of self-explanatory written leaflets and booklets that explain the particular aspects of each service offering and the circumstances in which they apply.
- Our SARS web site http://www.sars.gov.za contains detailed information on all tax types as well as the forms that apply to each.
- SARS Call Centres provide telephonic assistance by skilled agents and tax consultants.
- Skilled agents and consultants at our walk-in centres will endeavour to provide a one-stop resolution service.
- You can communicate with us using electronic or conventional mail or make use of the drop boxes that are available at any of our countrywide offices.

2.2 The standards that you can expect

However you contact us, we will endeavour to:

- provide a clear, accurate and helpful response
- make clear what action you need to take next and by what date
- be courteous and professional at all times

Our standards of service comprise the following:

If you telephone us we aim to:

- answer 90% of calls within 20 seconds

- provide first time resolution
- where first time resolution is not possible, you can expect to be advised of the next steps by the call centre agent

If you visit our walk-in centre we aim to:

- Attend to 95% of personal callers within 15 minutes of arrival (without an appointment), or
- be available at the scheduled time if you have made an appointment

If you write to us we aim to:

- respond to 80% of all correspondence (physical and electronic) received within 21 working days of receipt
- where a resolution is not possible within a reasonable time, to inform you why it is not possible and when you can expect a full reply.

When you submit your returns we aim to:

- process and assess 80% of correctly completed and signed Income Tax returns - within 90 working days from date of receipt during peak periods July to February) and within 34 working days of receipt in off-peak periods (March to June)
- process VAT and FAYE returns within 20 working days of receipt
- process 90% of all electronically submitted export and import returns within 4 hours of receipt and within 24 hours of receipt of manual submissions

Note:

If a representative is dealing with your tax affairs, it is vital that you ensure that we are informed thereof this is to protect you and to ensure that we do not compromise your privacy and confidentiality.

If a refund is due and owing to you, we aim to:

- process VAT refunds within 21 working days of receipt
- process Income Tax refunds within 30 working days from the assessment date

- process 90% of all customs refunds within 30 working days of receipt where a refund is subject to review, you will be notified within 39 working days

When you register or make any payment, we aim to:

- process your registration accurately within 10 working days
- process the payment accurately within 5 working days of receipt

In addition we aim to:

get every aspect of your interaction with SARS right the first time by making the best use of all of the information that is available to us deal with your enquiries and objections as expediently as possible (see paragraph 2.7 below)

2.3 Privacy and confidentiality

In handling your affairs we will:

deal with them on a strictly confidential basis, within the law respect your privacy arrange to conduct discussions in a private environment, where this is preferred

2.4 Any special requirements

If you have special requirements, such as a disability for example, we will endeavour to assist as far as is reasonably possible.

2.5 Your legal rights and our Code of Practice

Codes of Practice explain our approach and procedures in certain areas of work, especially in the area of tax investigations. These codes, which can be viewed on http://www.SARS.gov.za, explain your legal rights and our responsibilities in certain circumstances.

2.6 How you can assist us

To assist us deal with your returns and enquiries accurately and effectively, we may need your help and will ask you for more information. If we make such a request, please ensure that you provide what is being requested and forward the requested information to us on time.

If you contact us, please have your appropriate reference number on hand. (You will find this information on your return and correspondence that you may have had with us.)

You will also need to have some form of personal identification with you when calling at our walk-in centres.

Legally you must:

- keep proper records of your income and expenditure and any documents that relate to and/ or are included in your return
- accurately complete, attach supporting/referenced documents and sign the return that we send you and submit it on time
- even If you do not receive a return to complete, the onus is on you to declare any income or ins that have not been fully taxed
- pay the taxes and duties that are due on time.

2.7 If you disagree with us

If you disagree and lodge a formal objection against our interpretation of the law or the way in which SARS has applied the law to your particular circumstances, you need to inform us why you disagree. Once we have made a formal decision regarding your tax liability, and you are still dissatisfied, you are entitled to appeal. We will explain how you can appeal and also what Service Charter options are available to you if your appeal is not resolved.

Our Alternate Dispute Resolution (ADR) mechanism allows further communication and arbitration, the outcome of which will be binding on both parties in the dispute.

Should the dispute still not be resolved, a further appeal against the interpretation of the law can be made through the courts.

2.8 If you wish to report your dissatisfaction with our service

If you are dissatisfied with the way we have dealt with your returns or enquiries (for example, due to delays, errors, failure to act on the information that you have submitted, etc.) you should state your dissatisfaction in writing and submit it to your local SARS office. If the dispute cannot be resolved to your satisfaction you can then contact your local call centre where a skilled agent will assist you. If the problem is still not solved,

the call centre agent will register your complaint and provide you with a service request number. Your complaint will then be escalated to a consultant/manager to deal with. Once you have exhausted all these avenues you can contact our Service Monitoring Office at 0860 12 12 16.

What is considered to be a procedural concern:

- Delays in processing returns, decision making and the correction of administrative errors
- Failure to provide reasons for making adjustments to a return
- Failure to respond to queries, objections and appeals within the specified time period
- The conduct and attitude of any SARS employee/s

What is not considered as a procedural problem:

- Merits of disputes as to the amount of an assessment or schedules
- Complaints that have been referred to the public protector
- Matters that have been or are before the Courts
- Complaints about Government or SARS policy
- Changes to legislation

2.9 Listening to your suggestions/recommendations

We welcome your recommendations and will use them to improve our services and supporting processes.

We supplement these with:

- Regular performance measurement
- Publishing an annual update of our service achievements
- Periodic local and regional surveys
- Feedback from concerns raised

You are invited to send any suggestions or recommendations for improvement to your local SARS office. In cases where you feel that the SARS Charter is not being adhered to, please contact SARS at our call centre on 0860 1212 18.