

https://dspace.org/

Whistleblowing Incentives and Design Considerations for a Tax Whistleblowing Programme in South Africa

Carika Keulder

https://hdl.handle.net/10539/43627
IBSS

Downloaded from a DSpace repository. https://dspace.org/

RESEARCH ARTICLE

Carika Keulder

Associate Professor, School of Law, University of the Witwatersrand
ORCID: https://orcid.org/0000-0002-3995-6646

DOI: https://doi.org/10.38140/jjs.v49i2.8032

ISSN 2415-0517 (Online)

Journal for Juridical Science 2024:49(2):1-17

Date Published: 31 December 2024

WHISTLEBLOWING, INCENTIVES, AND DESIGN CONSIDERATIONS FOR A TAX WHISTLEBLOWING PROGRAMME IN SOUTH AFRICA

SUMMARY

The significance of whistleblowing extends beyond its role in promoting public sector accountability; whistleblowers also play a crucial role in safeguarding tax compliance. Evidence suggests that a tax whistleblowing program with a financial incentive leads to less aggressive tax filing and improves the quantity and/or quality of information compared to a program without an incentive. This article explores arguments for and against whistleblowers, as well as incentivising disclosure. Additionally, it discusses design considerations for a tax whistleblowing, aiming to initiate a discussion on the ideal structure for such an incentive programme in South Africa.

1. INTRODUCTION

The Transparency International's 2022 Corruption Perceptions Index ranked South Africa 72nd out of 180 countries with a score of 43.[1] Unfortunately, it is not only perceived corruption in South Africa as the reports of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State in South Africa (also known as the Zondo Commission), spanning over 5437 pages, set out details of state capture in South Africa.[2] In this respect,

1 A score of zero indicates a country is highly corrupt and at the other end a score of 100 points to a country being "very clean".

2 According to Martini "State capture an overview" https://knowledgehub.transparency.org/assets/uploads/helpdesk/State_capture_an_overview_2014.pdf (accessed on 4 March 2024) "state capture" is when "companies, institutions or powerful individuals use corruption such as the buying of laws, amendments, decrees or sentences, as well as illegal contributions to political parties and candidates, to influence and shape a country's policy, legal environment and economy to their own interests".

Published by the UFS
http://journals.ufs.ac.za/index.php/jjs

© Creative Commons With Attribution (CC-BY)

OPEN ACCESS

the Zondo Commission highlighted the importance of whistleblowers generally in exposing corrupt and other activities as it described whistleblowers as "the final defence against corruption and state capture".[3]

However, the significance of whistleblowing extends beyond its role in promoting public sector accountability; whistleblowers are also crucial in safeguarding tax compliance. This is attributable to the inherent information asymmetry present in the taxpayer-revenue authority relationship. In this relationship the revenue authority is at an initial disadvantage in accessing comprehensive, accurate, and reliable information due to the tendency of taxpayers to provide "incomplete, inaccurate and sometimes misleading" information.[4] Although the South African Revenue Service (hereafter SARS) has specific information gathering powers in terms of Chapter 5 of the *Tax Administration Act*,[5] it may not be sufficient to gather the required information as "there are certain kinds of tax noncompliance cases that the Service may have difficulty identifying without the help of a knowledgeable insider".[6]

In addition to highlighting the importance of whistleblowers, the Zondo Commission recommended in general that whistleblowers should be incentivised to make disclosures by way of a monetary reward based on a percentage of the proceeds recovered as a result of such information.[7]

In this article, I first briefly discuss arguments for and against whistleblowers in general before narrowing the focus to arguments for and against incentivising whistleblowers. With this background and based on the assumption that a tax whistleblowing incentive programme is desirable for South Africa, this article then considers some design elements of such a whistleblowing programme. While there may be many other important aspects to consider in this respect, this article aims to initiate the discussion regarding the design of a tax whistleblowing incentive for South Africa by exploring whether the incentive should be mandatory or at the discretion of SARS, how the amount should be determined, how to ensure effective recourse for a whistleblower in terms of the incentive award, and considerations regarding the character of the whistleblower. This is done by drawing on other jurisdictions that incentivise tax whistleblowers. In this regard some reference is made to the approaches in Canada and the United Kingdom (hereafter UK) where applicable, but most of the discussion centres around the United States of America's (hereafter US) experience. The reason for significantly relying on the US is that it has been incentivising tax whistleblowing since 1867, which underwent amendments in 2006. As such, the US has "experimented extensively" with whistleblower awards.[8] Canada has benefitted from this experimentation since Canada moulded their whistleblowing programme on

3 Judicial Commission of Inquiry into State Capture 2022:196.
4 *Ferucci v Commissioner of the South African Revenue Service* 2002 JOL 9664 (C):3.
5 28/2011.
6 Whitlock & Coder 2007:99 as quoted in West *et al*. 2012:27.
7 Judicial Commission of Inquiry into State Capture 2022:848.
8 Nyreröd & Spagnolo 2021:82.

the US model.[9] Thus, the US experience might equally provide insights in how South Africa should approach (or refrain from approaching) tax whistleblowing incentives. In this respect, the article does not advocate for a blanket adoption of the US programme but considers it in the South African context.

2. ARGUMENTS FOR AND AGAINST A TAX WHISTLEBLOWING INCENTIVE PROGRAMME

Some view whistleblowers as snitches,[10] or "skunks at a picnic".[11] The negativity towards whistleblowers stems from the notion that a whistleblower digging up dirt would often also have some dirt on their own hands. Or as Radack *et al* state "promoters of tax shelters and tax fraud are not surrounded by boy scouts and angels."[12] Often the whistleblower was a participant who no longer wants to be part of the tax evasion scheme.[13] In addition, whistleblowers do not necessarily disclose information to protect the tax system. In some instances, they blow the whistle out of retaliation on employers and spouses when those relationships turn sour.[14]

On the other end, some view tax whistleblowers as heroes protecting the tax system,[15] even though blowing the whistle could come at a high personal cost.[16] The personal cost can include social ostracism, psychological toll, unemployment or in some cases even death. [17]

Whistleblowing in the context of taxation is important for several reasons. Relevant information disclosed by whistleblowers can correct the initial information asymmetry between taxpayers and the revenue authority. In addition to bringing to the fore past and current tax evasion practices of a taxpayer, the disclosed information could make the revenue authority aware of potential future schemes. Furthermore, the disclosed information can bring taxpayers who were previously not part of the tax system into the tax system. An example of this is when the whistleblower discloses information which shows that a person meets the threshold to register as a value-added tax vendor and that taxpayer would then need to account for value-added tax from then onwards.

9 National Whistleblower Centre "Canadian whistleblower reward laws" https://www.whistleblowers.org/canada-whistleblower-reward-laws/ (accessed 24 January 2024).
10 Davis-Nozemack & Webber 2012:81.
11 Grassley 2011:8.
12 Radack *et al.* 2011:3.
13 Davis-Nozemack & Webber 2012:81.
14 Givati 2016:43.
15 Davis-Nozemack & Webber 2012:81.
16 Givati 2016:44.
17 Givati 2016:44: Gavin "Murder of South African whistleblowers illustrates dangerous status quo" https://www.cfr.org/blog/murder-south-african-whistleblower-illustrates-dangerous-status-quo (accessed 13 August 2023).

Additionally, using whistleblower information requires fewer resources to gather information than gathering information without it.[18] For instance, the revenue authority would be able to conduct more targeted audits.[19] In the South African context, this is pertinent as SARS is obliged, in terms of sec. 195(1)(*b*) of the *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*), to use resources in an efficient, economic and effective manner. Nonetheless, the direct cost associated to a whistleblowing programme would need to be considered. These costs would include the cost of implementing and maintaining the whistleblowing programme and examining the whistleblowers information.[20]

Moreover, the known use of whistleblower information could in general affect taxpayers' decision whether to pay taxes or not. This is because the compliance lottery theory states that a taxpayer weighs the advantage of not paying taxes, on the one hand, against the likelihood of getting caught together with relevant penalties and other consequences, on the other hand.[21] When there is a possibility that a whistleblower may alert the revenue authority of non-compliance, it impacts the likelihood of the taxpayer getting caught, which could tip the scale in favour of paying the required taxes. The possibility of whistleblowing thus deters tax evasion due to the perceived higher detection risk.[22] This deterrence effect applies to taxpayers who were previously caught and penalised,[23] as well as other "innocent" taxpayers.[24] Significantly, a study on whistleblowing found that the increased collections resulting from the establishment of a whistleblowing programme can mostly be attributed to its deterrent effect (indirect increase) rather than the strength of the disclosed information (direct increase).[25] However, these increases may only be for the short-term.[26]

Berger *et al* found that a whistleblowing programme with a financial reward, results in less aggressive tax filing. [27] Similarly, another study found that the quantity and/or the quality of information received from whistleblowers where there was a financial incentive available was better than instances where such an incentive was absent.[28] Furthermore, a study regarding leniency, fines and rewards in the formation and pricing of cartels, found that most reporting occurred when there is a possibility of a reward as opposed to leniency for self-reporting or fines respectively.[29]

18 Davis-Nozemack & Webber 2015:324; Berger *et al*. 2020:3.
19 Bazart *et al*. 2020:48.
20 Austin 2020:67.
21 Mikesell & Birskyte 2007:1046-1048.
22 Berger *et al*. 2020:4.
23 Wilde 2017:248.
24 Berger *et al*. 2020:10; Mealem *et al*. 2010:308.
25 Amir *et al*. 2018:940.
26 Amir *et al*. 2018:940; Nyreröd & Spagnolo 2021:87.
27 Berger *et al.* 2020:28.
28 Dyck *et al*. 2010:2247. The Dyck *et al*. study considered the health care sector, which provides for monetary incentives with non-health care sectors, which does not have a monetary incentive. Amir *et al.* 2018:940 indicate that an increase in tax collections in the health sector could be ascribe to the fact that it may be more more prone to tax evasion.
29 Bigoni *et al*. 2012:370.

Despite the positive findings regarding financial incentives, would the fact that the whistleblower is incentivised not negate the cost-effectiveness benefit of whistleblowing as discussed above? In this respect, Givati remarks that even if whistleblowers were to be incentivised for disclosing pertinent information, the argument of using less resources would still apply. This is because a whistleblower incentive will not be the use of "real resources", but rather a transfer of wealth from the collected proceeds to the whistleblower. [30]

Nonetheless, providing an incentive for whistleblowing may lead to "false claims made by opportunistic whistleblowers".[31] In this regard, there seems to be only a few fraudulent and malicious whistleblowers' claims in the US, which could possibly be ascribed to the fact that a whistleblower can be found guilty of perjury in terms of sec. 7623(*b*)(6)(C) of the *Inland Revenue Code*.[32]

Another counterargument for incentivising whistleblowers is the fact that whistleblowers may not be so-called boy scouts or angels. Should we still incentivise them to disclose tax information? In this respect, Davies offers an interesting perspective. She asks whether one should rather not pursue taxpayers who evaded tax, thereby enabling the taxpayers to reap the rewards of their unlawful actions and avoid the resultant repercussions, than provide some incentive to a whistleblower whose hands might not be completely clean.[33]

Although it makes sense to choose the lesser of two evils in this regard, that is incentivising a whistleblower with unclean hands and/or intentions, the negative perception towards whistleblowers signifies that the disclosed information should be handled with the necessary circumspect and the revenue authority should still investigate the accuracy of the disclosed information.

The focus of this article now shifts to consider how a tax whistleblowing incentive programme in South Africa could work.

3. CONSIDERATIONS REGARDING FINANCIAL INCENTIVES FOR TAX WHISTLEBLOWERS

Introducing the discussion regarding the design of a tax whistleblowing incentive for South Africa, this section examines whether the incentive should be mandatory or at the discretion of SARS, how the award amount should be determined, how to ensure effective recourse for a whistleblower in terms of the incentive award, and considerations regarding the character of the whistleblower.

3.1 Mandatory versus discretionary award

Before the amendments in 2006, sec. 7623 of the *US Internal Revenue Code* provided the Internal Revenue Service (hereafter the IRS) with a discretion to give an incentive to a tax whistleblower. As the allocation thereof was

30 Givati 2016:43.
31 Howse & Daniels 1995:526.
32 Nyreröd & Spagnolo 2021:92.
33 Davies 2022.

completely within the IRS's discretion, a whistleblower had no right to this incentive.[34] When exercising this discretion, in terms of IRS policy, the IRS assessed the value of the information provided by the whistleblower.[35]

Stock[36] highlights that the discretionary tax whistleblowing incentive in the US left whistleblowers without any certainty as to whether they qualify for an incentive.

This issue regarding a purely discretionary programme in the US, would also be relevant in South Africa. The rule of law, which in terms of sec. 1 of the *Constitution,* is a founding value, requires government and organs of state, such as SARS, to act according to "pre-announced, clear and general rules".[37] Thus, the rule of law necessitates certainty.

Apart from the fact that the rule of law requires certainty, the UK experience points to another important consideration regarding certainty. In the UK, the HM Revenue & Customs has incentivised some whistleblowers,[38] but this discretionary payment has been described as "little-known bounty payments".[39] Since there is very little certainty whether an incentive would be paid or any information regarding the incentive, the effectiveness of a whistleblowing incentive programme could be compromised. Thus, the deterrence effect of having a whistleblower programme may not be optimallly used.

Valuable insights into the current discussion of mandatory versus discretionary awards are provided by the US amendment in 2006, transitioning from a purely discretionary award to a (mostly) mandatory award programme. This transition was introduced by sec. 406 of the *Tax Relief and Health Care Act*,[40] which draws a distinction between discretionary and mandatory incentives. In this regard, the discretionary incentive was retained and renumbered as sec. 7623(*a*) and sec. 7623(*b)* of the *Internal Revenue Code* was inserted, which contains a mandatory incentive.

With regards to the discretionary incentive, sec. 7623(*a*) stipulates that the IRS has a discretion to incentivise whistleblowers for information that assisted in "(1) detecting underpayments of tax, or (2) detecting and bringing to trial and punishment person guilty of violating the internal revenue laws or conniving at the same". Importantly, the discretionary incentive in sec.

34 *Destefano v The United States* 2002 52 Fed. Cl. 291.
35 Department of The Treasury Internal Revenue Service 2004:733.
36 Stock 2015:823.
37 *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (5) BCLR 837 (CC):842; *Affordable Medicines Trust v Minister of Health of the RSA* 2005 (6) BCLR 529 (CC):par. 108.
38 Protect "Whistleblowing – A rewarding act?" https://protect-advice.org.uk/whistleblowing-a-rewarding-act/#:~:text=Whistleblowers%20can%20be%20given%20up%20to%20a%20maximum,including%20fraud%20related%20to%20the%20COVID-19%20relief%20schemes (accessed 24 January 2024).
39 The Telegraph "Bounty of the financial crisis: Whistle-blowers on tax evasion paid £1m" https://www.telegraph.co.uk/finance/financialcrisis/9439452/Bounty-of-the-financial-crisis-whistle-blowers-on-tax-evasion-paid-1m.html (accessed 24 January 2024).
40 2006, P.L. 109-432.

7623(*a*) is only considered when the payment of an incentive is not provided elsewhere. Thus, the starting point for tax whistleblower incentives in the US after the 2006 amendments is to consider whether the information provided falls within the ambit of the mandatory incentive contained in sec. 7623(*b*).

Although the requirement of certainty in the context of the rule of law can be adhered to either by having a clearly described discretionary incentive or mandatory incentive, I suggest that an approach similar to the US is adopted to provide for the mandatory award as the starting point. This suggestion is based on the fact that there has been "[a] [m]assive [f]ailure of [i]ntegrity and [g]overnance"[41] at SARS from 1 April 2014 to 31 March 2018.[42] This has severely hampered people's trust in SARS, which is evident from a study indicating that 49 per cent of South Africans do not trust government institutions, of which SARS forms part.[43] Even if SARS regains the trust of the public, which could lead to whistleblowers coming to the fore even if the award is in SARS' discretion, in the US there has been an increase in whistleblower claims submitted since the mandatory reward was introduced.[44] Introducing a mandatory reward as the point of departure in South Africa could potentially yield similar positive results.

3.2 Determination of the award amount

Generally, a whistleblower is awarded a percentage of the proceeds collected. For instance, in the US, the Whistleblowers Office must determine the relevant percentage in the provided range (generally 15-30 per cent) that should be applied to the collected proceeds[45] by taking into account "the extent the individual [whistleblower] substantially contributed to such action".[46] For the Offshore Tax Informant Program in Canada, 5-15 per cent of the additional federal tax collected because of the whistleblowers information is awarded to the whistleblower.[47]

In order to determine the correct percentage positive and negative factors are considered.[48] Positive factors that could lead to a higher percentage in this range, are *inter alia*: (i) how promptly the whistleblower made the non-compliance known; (ii) the information reveals issues or transactions that the

41 Commission of Inquiry into Tax Administration and Governance by SARS 2018:197.
42 Commission of Inquiry into Tax Administration and Governance by SARS 2018:21.
43 Edelman "Edelman Trust Barometer" https://bit.ly/3pHdsyu (accessed 2 May 2023).
44 Nyreröd & Spagnolo 2021:87.
45 *The Internal Revenue Code:* sec. 7623(*b*)(1).
46 Own insertion added.
47 National Whistleblower Centre "Canadian whistleblower reward laws" https://www.whistleblowers.org/canada-whistleblower-reward-laws/ (accessed 24 January 2024).
48 Although the factors discussed below are provided for in relation to the US whistleblowing programme, Canada also applies these factors. National Whistleblower Centre "Canadian whistleblower reward laws" https://www.whistleblowers.org/canada-whistleblower-reward-laws/ (accessed 24 January 2024).

IRS were previously unaware of, (iii) it would have been unlikely for the IRS to detect or difficult to detect the behaviour of the taxpayer, which has been identified by the whistleblower's information; and (iv) whether the information reveals "connections between transactions, or parties to transactions, that enabled the IRS to understand tax implications that might not otherwise have been understood by the IRS".[49]

Negative factors that could lead to a lower percentage in the specified range, are *inter alia*: (i) if the whistleblower delayed notifying the IRS of the noncompliance, especially if this delay negatively impacted the IRS's ability to proceed with action; (ii) the whistleblower played a role in the underpayment or non-compliance or benefitted from it; (iii) when the whistleblower acted contrary to a confidentiality agreement; and (iv) when the provided information was false or misleading.[50]

Givani remarks that the personal cost of whistleblowing should also play a role when determining the size of whistleblower rewards.[51] Unfortunately, in the South African context, the personal cost of whistleblowing is exacerbated by the fact that the current pieces of legislation aimed at protecting whistleblowers are deficient.[52] The deficiencies include that the *Protected Disclosures Act*[53] does not contain a clear procedure to blow the whistle, there are inadequate undertakings that the disclosures will be protected and it does not provide physical protection to the whistleblowers.[54] Although a motivation for introducing a tax whistleblowing incentive is the personal cost associated with blowing the whistle, careful consideration should be given to the extent to which the personal cost should play a role in determining the award amount. A financial incentive cannot negate the responsibility of ensuring whistleblowers are adequately protected. A financial incentive is not of any value if the whistleblower is murdered for disclosing information regarding another's tax affairs. Instead, the incentive and whistleblowing protections should work in tandem to ensure optimal circumstances to make disclosures.

In determining the award amount for the mandatory incentive in the US, the proceeds collected is focal, as the percentage of the award amount should be applied to it.[55] Similarly in Canada the award is linked to the additional federal tax that has been collected.[56] This specific focus requires further discussion.

---

49 Treasury, Regulation 26 CFR 301.7623-4.
50 Treasury, Regulation 26 CFR 301.7623-4.
51 Givani 2018:123.
52 Judicial Commission of Inquiry into State Capture 2022:807; 851.
53 26 of 2000.
54 Department of Justice and Constitutional Development 2023:5.
55 "Proceeds collected" does not only relate to the actual tax, but in terms *The Inland Revenue Code:* sec. 7623(*c*),also includes penalties, interest, criminal fines and civil forfeitures. Accordingly, the concept "proceeds collected" is interpreted widely to include all monies obtained from the taxpayer based on the information provided by the whistleblower.
56 National Whistleblower Centre "Canadian whistleblower reward laws" https://www.whistleblowers.org/canada-whistleblower-reward-laws/ (accessed 24 January 2024).

If one follows the reasoning outlined earlier that whistleblowing is seen as a transfer of wealth instead of pure expense for the revenue authority, one may want to instinctively link the incentive to the collected proceeds. This would ensure that the whistleblowing programme is efficient in that SARS does not incentivise more than what SARS gained from the information.

Nonetheless, linking the incentive to collected proceeds means that the whistleblower claim can only be determined after the proceeds are collected, which in the US can take up to seven years for a straightforward tax case.[57] Although SARS is constitutionally obliged to perform its duties with diligence and without delay in terms of secs. 33 and 237 of the *Constitution*, considering the tax dispute resolution process which could include various appeals, finalising a tax case and collecting the relevant proceeds, it could also take several years even when SARS acts without delay.

Such a time lapse could lead to the incentive losing some of its initial appeal. This is not necessarily altogether detrimental. The time delay inadvertently ensures that the possibility of obtaining an incentive is not the only reason for blowing the whistle. Instead, the imperative of guaranteeing compliance with tax laws should compel the whistleblower to disclose information. Consequently, the incentive would function as a supplementary reward for upholding the law. The time delay diminishes the probability of individuals adopting a profession of seeking incentives (bounty hunting) and providing unsubstantiated information to SARS.

As such, linking the reward to the collected proceeds undoubtable has efficiency advantages. Even so, one needs to consider the underlying motivation for encouraging whistleblowers to come forward. Is it only to collect more revenue, or also to bring previously unregulated taxpayers into the tax system, and detect and prevent criminal (tax) activities? Moreover, the disclosed information may be valuable, but the taxpayer who has transgressed could be insolvent meaning that SARS would collect less than the taxpayer's tax liability or nothing at all. As such, the whistleblower's claim would be equally reduced or extinguished.

Given the drawbacks of linking the incentive to collected proceeds, the rationale behind the US having a discretionary fallback incentive is not contingent on the collected proceeds becomes evident. Consequently, I recommend that in South Africa such a discretionary fallback incentive should also be used, provided that clear parameters are established to ensure that the rule of law is adhered to.

If this recommendation is followed, it raises the question of where the funding would come from if there are no collected proceeds resulting from a whistleblower's information. Ideally one would want the incentives to not be an additional expense on the side of the revenue authority but also a type of transfer. In this respect, Labuschagne suggests that the current tax framework should be used, for instance by allowing a whistleblower a rebate as regards their income tax liability.[58] In addition to not increasing expenditure, there will

57 IRS 2011:15.
58 Labuschagne 2023.

not be an outflow of money. This is relevant as any possibility of outflow of money, given the perceived and confirmed corruption in South Africa, creates an opportunity for further corrupt activities.

3.3 Effective recourse

In his critique, Stock raised another point against the initial purely discretionary award in the US.[59] Generally, whistleblowers previously had no recourse if they disagreed with the IRS's decision regarding the incentive, as this discretion could not be challenged in court—except when there was a contract between the IRS and the whistleblower (special agreement), not merely due to the IRS not complying with its own policy.[60]

The 2006 amendment in the US recognised the importance of recourse as a whistleblower may within 30 days after a mandatory incentive determination has been made, appeal the determination at the Tax Court.[61] Although it is commendable that there is now recourse for a whistleblower in the US, it still poses some problems. As the IRS is required to keep taxpayer returns and return information confidential as per sec. 6103 of the *Inland Revenue Code*, it cannot inform a whistleblower of a taxpayer's tax liability, whether the taxpayer is "examined or subject to other investigation or process", or if any tax has been imposed on the taxpayer. Because of this secrecy requirement, generally the only communication a whistleblower will receive from the IRS regarding their whistleblowing claim is whether the claim has been opened, rejected, accepted and closed.[62] Even if the whistleblower has evidence that the IRS proceeded with actions against the relevant taxpayer, the whistleblower will still need to prove that the disclosed information made a substantial contribution to the IRS's case. This would be difficult for a whistleblower to prove as they would not be privy to the "scope and effect of various investigative techniques" of the IRS.[63] Farag and Dworkin indicate that even the whistleblower rejection letter does not contain reasons as to why the claim is rejected because the IRS considers providing reasons to violate their obligation of keeping taxpayer information confidential.[64]

The South African context necessitates recourse for the whistleblower when dissatisfied with the incentive decision. To give effect to "the right to a fair hearing before a court lay at the heart of the rule of law",[65] a person's right to access to courts in terms of sec. 34 of the *Constitution* should be respected. Sec. 34 provides that:

> "(e)veryone 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."

59 Stock 2015:824.
60 Stock 2015:824.
61 *The Inland Revenue Code*: sec. 7623(*b*)(4).
62 Farag & Dworkin 2016:45.
63 Morse 2009:24.
64 Farag & Dworkin 2016:45.
65 *De Beer NO v North Central Local Council and South Central Local Council and Others* 2001) (11) BCLR 1109 (CC):1108.

Iles indicates that to rely on this specific right, there must be a "dispute capable of resolution by law" and it should not fall within the ambit of another constitutional right.[66] When a whistleblower disputes SARS' assertion that the information disclosed by the whistleblower does not fall within the mandatory incentive requirements, the threshold would be met as it is an issue in law and would not fall within the ambit of another right in the *Constitution*.

Yet, when the dispute relates to whether a discretionary incentive (which this article advocates for as a fall-back incentive) should be awarded, the whistleblower would not be able to rely on sec. 34 of the *Constitution* to have the matter resolved by an impartial forum. Rather, the whistleblower would be able to seek recourse in terms of sec. 33 of the *Constitution*. Sec. 33(1) of the *Constitution* stipulates that "[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair".[67]

At the core of this right is "administrative action", which is defined in sec. 1 of *PAJA* as:

> "any 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 terms of any legislation; …
>
> which adversely affects the rights of any person, and which has a direct, external legal effect."

When SARS exercises a discretion to award an incentive, it would be of an administrative nature and in terms of an empowering provision.[68] Regarding the required "adversely affected rights", a decision to award a lower percentage or no discretionary incentive at all would clearly have a negative consequence on the whistleblower's financial position. Furthermore, such decisions will have "direct external legal effect" as the decision is final and impact someone other than the administrator who has made the decision.[69]

Since exercising its discretion constitutes "administrative action", SARS is required to exercise this discretion in a reasonable manner as required in terms of sec. 33(1) of the *Constitution*. "Reasonable" requires the decision to be rational.[70] Thus, there must be a link between "the material properly available to … [the decision maker] and the conclusion he or she eventually arrived at".[71] In this regard, sec. 6(2)(e)(iii) of *PAJA*, which provides that the grounds of judicial review, indicates that administrative action can be taken

66 Iles 2013:711.

67 *The Promotion of Administrative Justice Act* 3/2000 (hereafter *PAJA*) was enacted to give further effect to this constitutional right as required in terms of the *Constitution*, sec. 33(3). See the Preamble to *PAJA* in this regard.

68 If the suggestion for a whistleblowing incentive in South Africa is followed, this should be clearly stipulated in legislation.

69 Klaaren & Currie 2001:82.

70 *Metcash Trading Ltd v Commissioner of SARS* (2001) 1 SA 1109 (CC):1134.

71 *Carephone Ltd v Marcus* (1998) 11 BLLR 1093 (LAC):par. 37.

on review when irrelevant factors were taken into account or relevant factors were not taken into account. Thus, even if the allocation of a whistleblowers claims is discretionary (but in terms of "pre-announced, clear and general rules" to adhere to the rule of law), the whistleblower would still have recourse to take this administrative action on review to a court.

Despite the constitutionally protected rights of access to courts and just administrative action, providing effective recourse to whistleblowers in South Africa would be as challenging as it is in the US. Similar to a US whistleblower, a whistleblower in South Africa would need to ascertain what has happened to the implicated taxpayer's tax affairs as it is paramount in establishing the worthiness of the whistleblowers' information and if there were "collected proceeds". However, SARS is also prohibited from disclosing certain information.[72] Specifically for purposes of the current discussion, SARS may not disclose information obtained or held "for the purposes of enforcing legislation concerning the collection of revenue".[73]

Nonetheless, in *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v SARS*, the Constitutional Court held that in instances where disclosing information held by SARS would reveal evidence of a contravention or failure to comply with the law and the public's interest in having the information exposed outweighs the harm of a taxpayers' affairs being revealed, such information should be disclosed.[74]

In general, it is difficult to draw the line of what would be in the public interest for purposes of tax. In this regard, Rose states "[c]ould you say 'public interest' would allow disclosing information if the individual owed taxes of more than R5m, for example? Or would the number of years of tax evasion count? Or if the person is a public figure, such as a CEO or a government official?"[75]

Should disclosing to a whistleblower what exactly happened with the investigation into a taxpayers' affairs on the strength of information provided by the whistleblower automatically be seen as an instance where the

72 See The *Tax Administration Act*: secs. 67-69; The *Promotion of Access to Information Act* 2/2000 (hereafter *PAIA):* sec. 35(1).

73 *PAJA*: sec. 35(1). Unless it is the taxpayer requesting this information as per *PAJA*: sec. 35(2). However, the *Tax Administration Act* specifies instances where SARS may disclose confidential information. For instance, in terms of sec. 68(3)(*a*) where the information is already public. Furthermore, SARS may disclose confidential information to certain entities in terms of sec, 70 of the *Tax Administration Act* for instance to the Statistician-General. However, none of these instances could be interpreted to include disclosing the information to a whistleblower.

74 (2023) CCT 365/21 ZACC 13 (30 May 2023). In this matter the court held that in essence the public interest overrides as contained section 46 of PAJA should apply to records held by SARS. Thus, the current public interest override that does not include SARS' records was held to be unconstitutional. For a discussion of the relevant provisions, the facts of the case and criticism of the court a quo's approach which corresponds with the Constitutional Court judgment, see Fritz & Van Zyl, 2022. For a further reading regarding the constitutional court matter, see De Lange 2023; Tredoux 2023.

75 Rose "Kebble shows tax laws need revamp" https://allafrica.com/stories/200511210733.html (accessed 14 August 2023).

disclosure would be in the public interest? I don't think so. Individuals might exploit a broad disclosure policy for whistleblowers to obtain access to a taxpayer's information. Their stated intention could be to verify the accuracy of percentage allocations, but the real motive might be different. On the other side of the spectrum, an absolute ban on providing some information to the whistleblowers would be unjustifiable given the rights to just administrative action and access to courts. Accordingly, legislative provisions would need to be enacted to provide the required balance. This could, for instance, require that some taxpayer information is redacted, whilst ensuring that the whistleblower receives sufficient details about the role the disclosed information played in possible tax collection.[76]

3.4 Character of whistleblower

As discussed under 2 above, the whistleblower might have some dirt on their hands and may not be a boy scout. As such, it is pertinent that a revenue authority carefully scrutinises the correctness of the information and does not simply rely on the information on face value. A whistleblowing programme does not negate the revenue authority's obligation to gather information and verify compliance.

The US has recognised that in some instances the whistleblower may have a somewhat questionable character. As such, in the US when a whistleblower planned and initiated the underpayment of tax or criminal offence, the incentive may be appropriately lowered. When the whistleblower is convicted of criminal conduct for their role in the actions, sec. 7623(*b*)(3) of the *Inland Revenue Code* provides that no incentive may be allocated to the whistleblower. Thus, a whistleblower who is "no boy scout" would not receive the maximum available incentive.

Whilst it is acknowledged that a person might be motivated to fabricate information to retaliate against a taxpayer or in hope of "getting lucky" with a reward, the design of the whistleblower incentive programme can address this. The extent to which the information provided contributed to collecting proceeds or exposing a scheme needs to be considered when allocating the relevant percentage. Thus, a whistleblower simply retaliating or trying their luck will not be incentivised. Nonetheless, a stream of fabricated information will lead to unnecessary cost implications as SARS would need to examine all the information. In this regard, the US approach where a whistleblower can be found guilty of perjury,[77] provides a solution to this.

4. CONCLUSION

This article has shown that the questions regarding providing a monetary incentive to whistleblowers do not simply end with whether South Africa should follow this recommendation of the Zondo Commission. If South Africa is to

76 For a discussion on whether an "evading" taxpayer has a right to access to the name of the whistleblower, see Botha & Fritz 2019.

77 *The Inland Revenue Code*: sec. 7623(*b*)(6)(*C*).

implement a tax whistleblowing incentive, the design of such a whistleblowing programme requires careful thought. This article considered some of the initial aspects that should be decided when establishing such a tax whistleblowing incentive programme.

I argued that the whistleblowing programme should be designed to allow a mandatory incentive as a starting point, with a discretionary award which is clearly defined as a fallback option. This nuanced approach would ensure that the rule of law is adhered to whilst incentivising whistleblowers whose disclosure led to collected proceeds and those whose disclosures are otherwise worthy of being incentivised. In this regard, this article addressed initial policy considerations regarding mandatory versus discretionary and what should be considered when determining the amount. Once these are considered and adopted, the focus would need to shift to what percentage range would be appropriate and what the requirements would be to qualify for the mandatory award. Research into these questions would then need to be conducted.

This article also highlighted the importance of recourse for whistleblowers regarding their whistleblower claims. Given the constitutional rights that ensure access to courts and just administrative action, a whistleblower should have the possibility to question the decision of SARS regarding the awarding of a monetary incentive. Still, to protect taxpayer confidentiality, one would need to carefully consider what information should be made available to a whistleblower regarding their whistleblower claims.

Lastly, this article reflected on the whistleblowers' character and measures that can be put in place to address the fact that the whistleblower's hands might have some dirt on them.

BIBLIOGRAPHY

AMIR E, LAZAR A & LEV S

2018. The deterrent effect of whistleblowing on tax collections. *European Accounting Review* 27(5):939-954. https://doi.org/10.1080/09638180.2018.1517606

AUSTIN J

2020. To reward or not to reward: A cross-jurisdictional comparison of the reasons why securities regulators have adopted or rejected policies to pay whistleblowers. In Lombard S, Brand V and Austin J (eds). Corporate whistleblowing regulation - Theory practice and decision: Springer:65-96. https://doi.org/10.1007/978-981-15-0259-0_3

BAZART C, BEAUD M AND DUBOIS D

2020. Whistleblowing vs. random audit: An experimental test of relative efficiency. *Kyklos* 73(1): 47-67. https://doi.org/10.1111/kykl.12215

BEINART B

1962. The rule of law. *Acta Juridica*:99-138.

BERGER L, JOSHI P AND THORNE L
2020. The efficacy of tax whistleblowing programs: A mixed methods investigation. *Proceedings. Annual Conference on Taxation and Minutes of the Annual Meeting of the National Tax Association* 113: 1-49.

BIGONI M, FRIDOLFSSON S, ELECOQ C AND SPAGNOLO G
2012. Fines, leniency, and rewards in antitrust. *RAND Journal of Economics* 43(2): 368-390. https://doi.org/10.1111/j.1756-2171.2012.00170.x

BOTHA M AND FRITZ C
2019. Whistle-blowing for reward –friend or foe? Exploring a possible tax whistle-blowing programme in South Africa. Obiter:65-104.

COMMISSION OF INQUIRY INTO TAX ADMINISTRATION AND GOVERNANCE BY SARS
2018. *Final Report*.

DAVIES T
2022. *What's blowing in the wind? Whistle blowing directions in South Africa.* University of the Witwatersrand Law Conference.

DAVIS-NOZEMACK K AND WEBBER S
2012. Paying the IRS whistleblower: Critical analysis of collected proceeds. *Virginia Tax Review* 32(1):77-132. https://doi.org/10.2139/ssrn.1967699

DAVIS-NOZEMACK K AND WEBBER S
2015. Lost opportunities: The underuse of tax whistleblowers. *Administrative Law Review* 67:321-367. https://doi.org/10.2139/ssrn.2483064

DE LANGE S
2023. Secrecy of Taxpayer Information and the Disclosure thereof by an Order of Court in Terms of the Tax Administration Act 28 of 2011 and the Promotion of Access to Information Act 2 of 2000. *Journal for Juridical Science* 48(2):195-218. https://doi.org/10.38140/jjs.v48i2.7909

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT
2023. *Discussion document on proposed reforms for the whistleblower protection regime in South Africa*

DEPARTMENT OF THE TREASURY INTERNAL REVENUE SERVICE
2004. *IRS rewards for information given by individuals to the Internal Revenue Service* https://www.unclefed.com/IRS-Forms/2004/p733.pdf (accessed 10 July 2023).

DYCK A, MORSE A AND ZINGALES L
2010. Who blows the whistle on corporate fraud?. *The Journal of Finance* LXV(6):2213-2253. https://doi.org/10.1111/j.1540-6261.2010.01614.x

EDELMAN
2023. *Edelman Trust Barometer.* https://bit.ly/3pHdsyu (accessed 2 May 2023).

FARAG D AND DWORKIN T
2016. A taxing process: Whistleblowing under the I.R.S. reward program. *Southern Law Journal* XXVI: 19-58.

FRITZ C AND VAN ZYL S
2022. Tax administration, confidentiality of information, the Promotion of Access to Information Act 2 of 2000, and public figures: a matter of former president Zuma's tax affairs - Arena Holdings (Pty) Ltd t/a Financial Mail v SARS (88359 of 2019) [2021] (ZAGP). *Journal of Contemporary Roman-Dutch Law* 85(4):586-598.

GAVIN M
2021. *Murder of South African whistleblowers illustrates dangerous status quo.* https://www.cfr.org/blog/murder-south-african-whistleblower-illustrates-dangerous-status-quo (accessed 13 August 2023).

GIVATI Y
2016. A theory of whistleblower rewards. *Journal of Legal Studies* 45: 43-72. https://doi.org/10.1086/684617

GIVATI, Y
2018. Of snitches aand riches: Optimal IRS and SEC whistleblower rewards. *Harvard Journal of Legislation* 55:105-146.

GRASSLEY C
2011. *Letter to to Doublas Shulman, Commissioner, Internal Revenue.*

HOWSE R AND DANIELS R
1995. *Rewarding whistleblowers: The costs and benefits of an incentive-based compliance strategy.* https://repository.upenn.edu/server/api/core/bitstreams/9999a8b2-b304-4a1b-9259-04627b0829d1/content (accessed 15 January 2024).

ILES K
2013. Access to courts. In Currie and De Waal:710.

INLAND REVENUE SERVICE
2011. *Whistleblower program annual report to the congress fiscal year 2010.*

JUDICIAL COMMISSION OF INQUIRY INTO STATE CAPTURE
2022. *Report: Part 1*. <https://www.gov.za/sites/default/files/gcis_document/202201/judicial-commission-inquiry-state-capture-reportpart-1.pdf> 196 (accessed 14 August 2023).

KLAAREN J AND CURRIE I
2001. *The Promotion of Administrative Justice Act Benchbook*:Siber Inc.

LABUSCHAGNE M
2023. *Informal discussion*.

MEALEM Y, TOBOL Y AND YANIV G
2010. Whistle-blowers as a deterrent to tax evasion. *Public Finance Review* 38(3): 306-320. https://doi.org/10.1177/1091142110367857

MIKESELL J AND BIRSKYTE L
2007. The tax compliance puzzle: evidence from theory and practice. *International Journal of Public Administration* 30(10):1046-1081. https://doi.org/10.1080/01900690701221423

MARTINI M
2014. *State capture an overview.* https://www.transparency.org/files/content/corruptionqas/State_capture_an_overview_2014.pdf (accessed 14 August 2023).

MORSE E
2009. Whistleblowers and tax enforcement: Using inside information to close the tax gap. *Akron Tax Journal* 24:1-36.

NATIONAL WHISTLEBLOWER CENTRE
Canadian whistleblower reward laws. https://www.whistleblowers.org/canada-whistleblower-reward-laws/ (accessed 24 January 2024).

NYRERÖD T AND SPAGNOLO G
2021. Myths and numbers on whistleblower rewards. *Regulation & Governance* 15:82-97. https://doi.org/10.1111/rego.12267

PROTECT
2022. *Whistleblowing – a rewarding act?*. https://protect-advice.org.uk/whistleblowing-a-rewarding-act/#:~:text=Whistleblowers%20can%20be%20given%20up%20to%20a%20maximum,including%20fraud%20related%20to%20the%20COVID-19%20relief%20schemes. (accessed 24 January 2024).

RADACK J, COLEMAN-ADEBAYO M AND GREEN G
2011. *Letter to Doublas Shulman, Commissioner, Internal Revenue Service.*

ROSE R
2005. *Kebble shows tax laws need revamp.* https://allafrica.com/stories/200511210733.html (accessed 14 August 2023).

SERVICE, D
2004. *IRS rewards for information given by individuals to the Internal Revenue Service:*IRS Publication.

STOCK M
2015. Tax whistleblower statute: Obtaining meaningful appeals through the appropriate scope of review. *Florida State University Law Review*:819-842.

THE TELEGRAPH
2012. *Bounty of the financial crisis: whistle-blowers on tax evasion paid £1m.* https://www.telegraph.co.uk/finance/financialcrisis/9439452/Bounty-of-the-financial-crisis-whistle-blowers-on-tax-evasion-paid-1m.html (accessed 24 January 2024).

TREDOUX LG
2023. Taxpayer confidentiality versus access to information, freedom of expression, and the public interest in the tax affairs of a state president: Arena Holdings PTY LTD t/a Financial Mail & another v South African Revenue Service & others – "a giant leap for mankind" or the opening of another "pandora's box"? 48(2):17-53. https://doi.org/10.38140/jjs.v48i2.7910

WEST R, SKARBNIK J AND BRUNETTI F
2012. A primer for tax whistleblowers. *The Tax Magazine* 90:27-72.

WHISTLEBLOWERS OFFICE
2008. *IRS whistleblower program first report to congress*.

WHITLOCK S AND CODER J
2007. Conversations. *Tax Notes* 99.

WILDE J
2017. The deterrent effect of employee whistleblowing on firms' financial. *The Accounting Review* 92(5):247-280. https://doi.org/10.2308/accr-51661