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SCHOOL OF ACCOUNTANCY

University of the Witwatersrand, Johannesburg

The impact of the Tax Administration Act and aspects of the Constitution of South Africa on SARS' ability to collect taxes

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

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Date:	31 March 2015

Declaration

I declare that this research report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Commerce (specialising in Taxation) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination at any other institution.

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31 March 2015

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Date

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1. ABSTRACT

As the framework for the collection of revenue by SARS evolves to ensure taxpayer compliance, the protection of taxpayers' fundamental rights should not be overlooked. This research will evaluate certain provisions of the recently enacted Tax Administration Act (the Act) against the background of the taxpayers' rights to privacy, property and just administrative action. These rights are contained in the Constitution of South Africa, the supreme law of the land. The analysis suggests that the conduct of SARS in exercising its statutory powers as well as some of the provisions of the Act may conflict with taxpayers' constitutional rights and that the remedies available in such situations are limited or do not offer taxpayers an effective mechanism to obtain remedial action.

Key words: Bill of Rights, Constitution, Constitution of South Africa, constitutional right, just administrative action, legislation, Ombud, PAJA, Promotion of Administrative Justice Act, privacy, property, remedies, SARS, tax, tax administration, Tax Administration Act, Tax Ombud, taxation, taxpayer, taxpayer compliance.

Chapter 1 - Introduction

> Our new Constitution is now established, and has an appearance that promises permanency; but in this world nothing can be said to be certain, except death and taxes. – Benjamin Franklin[1]

The first democratic elections held in 1994 brought about significant changes to the Republic of South Africa. One of these changes was the move from a 'Parliamentary' state, where Parliament reigned supreme, to a 'Constitutional' state, where the Constitution,[2] as opposed to Parliament, reigned supreme. The Constitution is the supreme law of the Republic and any law or conduct that is inconsistent with it will be regarded as invalid.[3] The Interim Constitution[4] introduced the Bill of Rights which enshrines the rights of all people and affirms the values of human dignity, equality and freedom. The current Constitution of 1996,[5] subsequently replaced the Interim Constitution.[6]

The Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa (The Katz Commission) was appointed in 1994 to look into, amongst others, the implications of the Interim Constitution on the tax system. The Commission noted that the tax system is subject to the Constitution.[7]

The drafting of the Tax Administration Act[8] (the Act) was announced by the Minister of Finance in the 2005 *Budget Review.*[9] The Act was then promulgated on the 4 July 2012[10] and came into operation on 1 October 2012. The Act aims to incorporate into one piece of legislation, the administrative provisions that are generic to all tax acts and currently duplicated in the different tax acts.[11]

As South Africa is a Constitutional Democracy, all legislation and organs of state must uphold the rights contained in the Constitution,[12] subject to certain limitations[13] and any law or conduct inconsistent with it can be regarded as invalid.[14] As such the provisions of the Act, being legislation, as well as the powers conferred on the South African Revenue Service ('SARS'), being an organ of the state,[15] have to comply with the rights contained in the Constitution.

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[1] Benjamin Franklin in a Letter to Jean-Baptiste Leroy (13 November 1789), from Bigelow, J. 1887-1888, *Complete Works,* vol. 10.
[2] Constitution of the Republic of South Africa Act 108 of 1996, hereafter referred to as the Constitution.
[3] Constitution of the Republic of South Africa Act 108 of 1996, Chapter 1, s 2.
[4] Interim Constitution of the Republic of South Africa Act 200 of 1993.
[5] Sections to the Constitution mentioned in this report refer to the final Constitution and references to the Interim Constitution will be noted as such.
[6] The Constitution was promulgated by President Nelson Mandela on 10 December 1996 and came into effect on 4 February 1997, replacing the Interim Constitution of 1993.
[7] Katz Commission, 1994, *Interim Report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa*, para (e) p. 9, cited in Croome, B.J., 2008, *Taxpayers' Rights in South Africa: An analysis and evaluation of the extent to which the powers of the South African Revenue Service comply with the Constitutional rights to property, privacy, administrative justice, access to information and access to the courts,* PhD thesis, Dept. of Commercial Law, University of Cape Town, p. 11.
[8] Tax Administration Act 28 of 2011.
[9] National Treasury, 2005, *Budget Review*, Pretoria, South Africa, Chapter 4, p. 98.
[10] SARS, 2013, *Short Guide to the Tax Administration Act 2011,* p. 4.
[11] The Tax Administration Act 28 of 2011 does not apply to the administration of the Customs and Excise Duty Act 91 of 1964 from SARS, 2013 p. 8.
[12] Constitution of the Republic of South Africa Act 108 of 1996, Chapter 2, s 7.
[13] Constitution of the Republic of South Africa Act 108 of 1996*,* s 36.
[14] Constitution of the Republic of South Africa Act 108 of 1996, Chapter 1, s 2.
[15] The South African Revenue Service, hereafter referred to as 'SARS' is an organ of the state per the South African Revenue Service Act 34 of 1997, s 2.

These rights[16] include the right to:

- privacy (s 14 of the Constitution) where everyone has the right not to have their person or home or property searched, their possessions seized or the privacy of their communications infringed;
- property (s 25 of the Constitution) where no one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of property; and
- just administrative action (s 33 of the Constitution) where everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

Certain provisions of the Act may appear to be inconsistent with the Constitution which could impact on taxpayers' rights. In such instances, taxpayers need to be aware of the remedies available and whether these remedies can provide cost-effective, timeous and appropriate remedial action. These remedies can be found in the establishment of the office of the Tax Ombud contained in Chapter 2 of the Act, the dispute resolution procedures contained in Chapter 9 of the Act, the SARS Service Monitoring Office which addresses issues primarily of an administrative nature,[17] the remedies contained in the Constitution itself as well as legislation enacted to give effect to constitutional rights such as the Promotion of Administrative Justice Act.[18]

1.1 Purpose of this study

1.1.1 Problem and purpose statement

The research will analyse and evaluate certain provisions of the Act with regard to certain rights contained in the Constitution. This is to determine whether these provisions uphold the rights contained in the Constitution and where they may not, the remedies available to the taxpayer and the effectiveness thereof. In particular, the research will focus on certain provisions of the Act with regard to the constitutional rights to privacy, property and just administrative action.

1.1.2 The sub-problems

The first sub-problem will be to identify certain new provisions of the Act as well as changes that have been made to certain provisions existing prior to the introduction of the Act;[19] that may possibly not uphold the Constitution. The Act aims to incorporate the administrative provisions that are generic and duplicated across the different acts into one piece of legislation.[20] This process has resulted in new provisions being incorporated into the Act as well as changes being made to certain provisions existing prior to the introduction of the Act. The impact of these changes will also be evaluated.

[16] Rights contained in the Constitution of the Republic of South Africa Act 108 of 1996.
[17] SARS, 2014a, 'Lodge a Complaint', in *SARS*, viewed 08 December 2014, from <http://www.sars.gov.za/Contact/How-Do-I/Pages/Lodge%20a%20complaint.aspx>.
[18] Promotion of Administrative Justice Act 3 of 2000, hereafter referred to as 'PAJA'.
[19] Provisions existing in the Income Tax Act 58 of 1962 and VAT Act 89 of 1991, prior to the introduction of the Tax Administration Act 28 of 2011.
[20] SARS, 2013, p. 4.

The second sub-problem will be to determine whether certain of these new provisions and the changes that have made to certain provisions existing prior to the introduction of the Act; uphold or conflict with certain rights contained in the Constitution. In particular, the constitutional rights to privacy (s 14 of the Constitution), property (s 25 of the Constitution) and just administrative action (s 33 of the Constitution) will be considered.

The third sub-problem will be to assess the remedies available to the taxpayer in the event that potential conflicts exist between the Act and certain rights contained in the Constitution and whether these remedies provide the taxpayer with cost-effective, timeous and appropriate remedial action when dealing with SARS.

1.2 Research Methodology

The research method adopted is of a qualitative, interpretive nature, based on an interpretation and analysis of amongst other things, the Constitution,[21] the Act[22] and applicable case law.

A literature review and analysis will be undertaken that includes the following sources:

- Books
- Cases
- Electronic databases
- Electronic resources - internet
- Journals
- Magazine articles
- Publications
- Statutes

1.3 Scope and Limitations

The research will analyse and evaluate certain provisions of the Act with regard to the constitutional rights to privacy (s 14 of the Constitution), property (s 25 of the Constitution) and just administrative action (s 33 of the Constitution). There may be other provisions of the Act that also impact on these or other constitutional rights but these fall out of the scope of this research.

[21] Constitution of the Republic of South Africa Act 108 of 1996.
[22] Tax Administration Act 28 of 2011.

Chapter 2 - The Constitution of South Africa and the Tax Administration Act

The adoption of the Constitution[23] was one of the turning points in the history of the struggle for democracy[24] in the Republic of South Africa. The Constitution became the supreme law of the Republic and any law or conduct that is inconsistent with it is invalid.[25] It has also been regarded as the 'birth certificate'[26] of the South African nation, a text adopted by over 85% of the Constitutional Assembly[27] and one of the most advanced in the world.

The Interim Constitution preceded the Final Constitution and introduced the Bill of Rights which guarantees the rights protected by international human rights conventions and is regarded as the 'cornerstone of democracy' in South Africa.[28] The Interim Constitution became the South African law's touchstone.[29] The Constitutional Court that it established became the highest legal authority in the land in all constitutional matters.

The first session of the Constitutional Court was opened by then President Nelson Mandela on the 14 February 1995. He told the court:[30]

> The last time I appeared in court was to hear whether or not I was going to be sentenced to death. Fortunately for myself and my colleagues we were not. Today I rise not as an accused, but on behalf of the people of South Africa, to inaugurate a court South Africa has never had, a court on which hinges the future of our democracy.

A court of lower status than a High Court may not enquire into or rule on the constitutionality of any legislation[31] and the Supreme Court of Appeal or a High Court may make an order concerning the constitutional validity of an act of Parliament but an order of constitutional invalidity has no force unless confirmed by the Constitutional Court.[32]

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[23] A constitution is defined as a body of fundamental principles or established precedents according to which a state or other organisation is acknowledged to be governed. It is the product of negotiations between political parties that were at war with each other. It constitutes a political agreement between the mandated leaders about what the most basic law in the land should be, as per the Oxford online dictionary n.d., *Constitution*, viewed 04 November 2014, from <http://www.oxforddictionaries.com/definition/english/constitution last>.

[24] Constitutional Court of South Africa n.d., 'The Constitution: The History of the Constitution', in *Constitutional Court of South Africa*, viewed 04 November 2014, from <http://www.constitutionalcourt.org.za/site/theconstitution/history.htm>.

[25] Constitution of the Republic of South Africa Act 108 of 1996, Chapter 1, Founding Provisions.

[26] Comment by Cyril Ramaphosa, current Vice-President of the Republic of South Africa, speaking at the celebrations marking the 15th anniversary of the signing of the Constitution at Constitution Hill, in Johannesburg on the 11 December 2011.

[27] Ebrahim, H., 2011, 'The South African Constitution: Birth Certificate of a Nation', paper presented at the *Constitution-making forum: A Government of Sudan Consultation*, Khartoum, Sudan, May 24-25, 2011.

[28] Constitution of the Republic of South Africa Act 108 of 1996.

[29] Constitutional Court of South Africa n.d., 'About the court: History of the Court', in *Constitutional Court of South Africa,* viewed 09 November 2014, from <http://www.constitutionalcourt.org.za/site/thecourt/history.htm>.

[30] The Constitutional Court was formally opened by President Nelson Mandela on the morning of the 14 February 1995 from Constitutional Court of South Africa n.d., 'About the court: History of the Court', in *Constitutional Court of South Africa,* viewed 09 November 2014, from <http://www.constitutionalcourt.org.za/site/thecourt/history.htm>.

[31] Constitution of the Republic of South Africa Act 108 of 1996, s 170.

[32] Constitution of the Republic of South Africa Act 108 of 1996, s 172(2)(*a*).

The intention behind drafting the Act[33] was to incorporate into one piece of legislation, certain generic provisions that were duplicated across different tax acts,[34] to simplify these requirements and provide a single piece of legislation wherein all administrative requirements for tax administration in South Africa are contained.[35] The scope of the Act was extended to also be a preliminary step to re-writing the Income Tax Act[36] where 25% comprises of administrative provisions.[37] The Act also seeks to provide a single body of law that outlines the common procedures, rights and remedies and to achieve a balance between the rights and obligations of both SARS and the taxpayer in a transparent relationship.[38]

The Act forms part of the legislative framework for the levying of tax in South Africa.[39] It is legislation that is sub-ordinate to the Constitution[40] and will therefore need to uphold the rights contained in, as well as the purpose and spirit of the Constitution. In the case of *First National Bank of SA Ltd t/a Wesbank v Commissioner: South African Revenue Service and Another,*[41] it was stated that:

> even fiscal statutory provisions, no matter how indispensable they may be for the economic well-being of the country – a legitimate governmental objective of undisputed high priority – are not immune to the discipline of the Constitution and must conform to its normative standards.

Section 39(2) of the Constitution provides that:

> When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

Both natural and juristic persons are protected by the Bill of Rights and all organs of state, which includes SARS, are bound by it.[42] These rights are not absolute and are subject to the limitation of rights provision contained in s 36 of the Constitution.

The limitation of rights provision indicates that rights contained in the Bill of Rights may be limited only in terms of a law of general application that is reasonable and justifiable in an open and democratic society based on human dignity and freedom.

The law of general application has two components.[43] Firstly, the limitation must be authorised by law which includes all forms of legislation, common law and customary law.[44] Secondly, the law must be general in its

[33] Tax Administration Act 28 of 2011.
[34] SARS, 2009, *Tax Administration Bill Draft for Public Comment,* Pretoria, South Africa.
[35] SARS n.d., *History of the Tax Administration Act*, viewed 02 December 2014, from <http://www.sars.gov.za/Legal/TaxAdmin/Pages/History.aspx>.
[36] Income Tax Act 58 of 1962, referred to in-text as the Income Tax Act.
[37] SARS, 2009, *Draft Explanatory memorandum on the Draft Tax Administration Bill 2009*, Pretoria, South Africa.
[38] SARS, 2009.
[39] Klue, S., Arendse, J.A. & Williams, R.C., 2009, *Silke on Tax Administration,* 1st ed., Lexis Nexis, Durban, s 1.2.
[40] Klue *et al*, 2009.
[41] *First National Bank of SA Ltd t/a Wesbank v Commissioner: South African Revenue Service and Another* 2002 (7) BCLR 702 (CC); [2002] 64 SATC 471*; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* (CCT19/01) [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (16 May 2002).
[42] Klue *et al,* 2009, s 3.5.
[43] Currie, I. & De Waal, J., 2005, *The Bill of Rights Handbook*, 5th ed., Juta and Company Ltd, Cape Town, p. 168.
[44] Currie & De Waal, 2005, p.169.

application meaning that the law must apply impersonally; it must apply equally to all and must not be arbitrary in its application.[45] In the case *of President of the Republic of South Africa and Another v Hugo*[46] it was stated that 'a person should be able to know of the law, and be able to conform his or her conduct to the law. Further, laws should apply generally, rather than targeting specific individuals.' It is therefore submitted that tax legislation, will be by general application[47] as it applies to all taxpayers generally, impersonally and equally.

In order for the limitation to be reasonable and justifiable, it should not invade rights any further than it needs to in order to achieve its purpose.[48] It must be shown that the law in question serves a constitutionally acceptable purpose and that there is sufficient proportionality between the harm done by the law (the infringement of the right) and the benefit it attempts to achieve (the purpose of the law).[49] In order to balance the proportionality, all relevant factors need to be taken into account as was stated in the case of *S v Makwanyane and Another:*[50]

> The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality…This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.

Therefore, s 36 of the Constitution recognises that there are instances where a limitation of rights may be constitutional where it serves a purpose that is compellingly important, will achieve its designed purpose and that there is no other realistically available way in which the purpose can be achieved without restricting rights.[51]

The subsequent chapters will discuss certain rights contained in the Bill of Rights of the Constitution and whether these rights are upheld by certain provisions of the Act. In instances where the Act seems to be in conflict with the rights contained in the Constitution, the s 36 limitation of rights[52] provision will be considered to determine whether these limitations can be considered reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

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[45] Currie & De Waal, 2005, p.169.
[46] *President of the Republic of South Africa and Another v Hugo* (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997).
[47] Klue *et al,* 2009, ss 3 – 21.
[48] Currie & De Waal, 2005, p. 176.
[49] Currie & De Waal, 2005, p. 176.
[50] *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).
[51] Currie & De Waal, 2005, p. 164.
[52] Constitution of the Republic of South Africa Act 108 of 1996, s 36.

Chapter 3 - The constitutional right to privacy

Section 14 of the Constitution states that:[53]

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

The right to privacy also exists in the common law and has been described by Currie & De Waal[54] as follows:

> The common law recognises the right to privacy as an independent personality right which the courts considered to be part of the concept of a person's "dignitas." At common law, the breach of a person's privacy constitutes an injuria. It occurs when there is an unlawful and intentional acquaintance with private facts by outsiders contrary to the determination and will of the person whose right is infringed, such acquaintance taking place by intrusion or by disclosure.

It was further stated in *Bernstein and Others v Bester NO and Others*[55] that:

> In South African common law the right to privacy is recognised as an independent personality right which the courts have included within the concept of dignitas. Privacy is an individual condition of life characterised by seclusion from the public and publicity. This implies an absence of acquaintance with the individual or his personal affairs in this state.

The Constitutional right to privacy does not revoke the common law right to privacy but rather, builds upon it.[56] The right to be free from intrusion from the government is also included in the right to privacy.[57]

Certain provisions of the Act will now be compared to the constitutional right to privacy to ascertain whether these provisions uphold or may violate a person's constitutional right to privacy.

Where information has been obtained by the Tax Ombud about the taxpayer, the extent to which the Tax Ombud may disclose information to SARS and whether this information can then be used by SARS in any proceedings against the taxpayer (s 21 of the Act).

The establishment of the Tax Ombud[58] is a significant step towards balancing the powers of SARS with the rights of taxpayers. The Act also sets out the mandate and limitations on authority of the Tax Ombud.

[53] Constitution of the Republic of South Africa Act 108 of 1996, s 14.
[54] Currie & De Waal, 2013, p. 296.
[55] *Bernstein and Others v Bester NO and Others* (CCT23/95) [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751 (27 March 1996).
[56] Klue *et al*, 2009, s 3.8.
[57] Klue *et al*, 2009, s 3.10.
[58] An Ombudsman is an official appointed to investigate complaints against a company or organisation especially a public authority. From Oxford Online Dictionary n.d., viewed 26 November 2014, from <http://www.oxforddictionaries.com/definition/english/ombudsman>.

Section 21(3) of the Act indicates that the Tax Ombud may not disclose information of any kind to SARS, 'except to the extent required for the purpose of the performance of functions and duties under this Part.'

The Office of the Tax Ombud Complaints Procedure[59] indicates that the Tax Ombud holds all communications with taxpayers in strict confidence 'unless authorised otherwise'.

The *SARS Guide*[60] also indicates that taxpayers have a right to expect that any information provided by them or about them under the tax acts is treated in confidence, will not be disclosed to third parties and is used for tax purposes only.[61] The *SARS Guide* goes on to state that 'disclosure provisions may, however, be justified where the public benefit derived from the lawful disclosure of relevant information outweighs concerns about individuals privacy'.[62]

The Confidentiality of Information provisions contained in Chapter 6 of the Act applies to the powers and duties of the Tax Ombud. This chapter indicates SARS' duty to preserve the secrecy of taxpayer information as well as the circumstances under which confidential taxpayer information may be disclosed to other entities or under the provisions of any other act.[63] By referencing the provisions of Chapter 6 of the Act in its entirety, s 21 of the Act indicates that the Tax Ombud may be compelled to make certain disclosures under the provisions of Chapter 6 of the Act to the specific state entities or to protect the integrity and reputation of SARS.[64] This also indicates that under the necessary circumstances, information can be passed from the Tax Ombud to SARS.

The Act as well as The Office of the Tax Ombud Complaints Procedure[65] do not seem to indicate the circumstances under which, as well as the extent to which information may be communicated from the office of the Tax Ombud to SARS. The legal status of the information acquired by SARS via the Tax Ombud and whether it can be used in proceedings against the taxpayer[66] is also not clearly defined.

The s 21(3) provision of the Act, where information about the taxpayer shared with the Tax Ombud confidentially may be required to be shared with SARS, may undermine taxpayers' confidence in the office of the Tax Ombud. This will also constitute a breach of the taxpayers' constitutional right not to have the privacy of their communications infringed and the limitation provisions contained in s 36 of the Constitution will need to be considered.

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[59] Office of the Tax Ombud n.d., *'Complaints Procedure',* viewed 03 December 2014, from <http://www.treasury.gov.za/comm_media/press/2014/2014040701%20-%20Tax%20Ombud%20-%20Complaints%20Procedure%20Brochure.pdf>, p. 4.
[60] SARS, 2013, p. 33.
[61] SARS, 2013, p. 33.
[62] SARS, 2013, p. 33.
[63] Such as the Prevention of Organised Crime Act, 2000; the Financial Intelligence Centre Act 2001 or the Drugs and Drug Trafficking Act, 2001.
[64] Mandy & Mollagee (PWC), 2012, p. 19.
[65] Office of the Tax Ombud n.d., *'Complaints Procedure',* viewed 03 December 2014, from <http://www.treasury.gov.za/comm_media/press/2014/2014040701%20-%20Tax%20Ombud%20-%20Complaints%20Procedure%20Brochure.pdf>.
[66] Mandy & Mollagee (PWC), 2012, p. 19.

In the case of *S v Bhulwana,*[67] the following was stated regarding the s 36[68] limitation of rights provision:

> In sum, therefore, the court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.

It is accepted, in South Africa and internationally, that exceptions to the obligation to protect taxpayer information are necessary where it can be vital to both the Revenue Service and other arms of government in performing their functions properly. Specifically, it is recognised that in the context of law enforcement:

- where certain taxpayer information is likely to be of value to a criminal investigation, it is in the public interest that the information is available to law enforcement agencies within certain limits; and
- such limited disclosure will ensure that there is a potential for information flow in two directions, that is, between a revenue authority and law enforcement agencies and vice versa.

It can be argued that information disclosed under these circumstances is necessary for the proper functioning of SARS in order to collect revenues efficiently as well as for other arms of government to fulfil their duties. It is also important for SARS not to undermine the legal system of the country by withholding such information. Both the Tax Ombud and SARS officials have an obligation to treat taxpayer information with the utmost confidentiality and they are also required to take an oath in this regard.[69] The purpose of this is to enable the fullest information to be supplied and obtained by SARS.[70] The courts have also been slow to grant orders for the disclosure of information that the taxpayer does not want to be disclosed.[71] In the case of *Welz and Another v Hall and Others,*[72] the courts indicated:

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

In the case of *Receiver of Revenue, Lebowa and Another v De Meyer NO*[73] it was held that the court is entitled to weigh the strict preservation of privacy and secrecy against the exposure of corrupt practises and the maintenance of clean administration.[74]

Information should therefore only be passed on where the lawful disclosure of relevant information outweighs concerns about individuals' privacy and it is compellingly important to violate the right to privacy.

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[67] *S v Bhulwana, S v Gwadiso* (CCT12/95, CCT11/95) [1995] ZACC 11; 1996 (1) SA 388; 1995 (12) BCLR 1579 (29 November 1995).
[68] Constitution of the Republic of South Africa Act 108 of 1996, s 36.
[69] Tax Administration Act 28 of 2011, s 67(2)(*a*).
[70] Klue *et al*, 2014, s 3.16.
[71] Klue *et al*, 2014, s 3.16.
[72] *Welz and Another v Hall and Others* 1996(4) SA 1073 (C) 59 SATC 49 at 54.
[73] *Receiver of Revenue, Lebowa and Another v De Meyer NO* (257/92) [1993] ZASCA 80; 1993 (4) SA 13 (AD); 1993 (4) SA 13 (AD); [1993] 2 All SA 462 (A) (28 May 1993) [1993] 2 All SA 462 (A) (28 May 1993).
[74] Klue *et al*, 2014, s 3.16.

Thus, the disclosure of information from the Tax Ombud to SARS will violate the taxpayers' right not to have the privacy of their communications infringed. This violation is by law of general application[75] as it is by law and applies equally to all taxpayers. This violation in the instances mentioned also seems to be reasonable and justifiable in an open and democratic society and will therefore be a justifiable limitation on the right to privacy. This disclosure should also only take place when it is compellingly important to do so and where such disclosure outweighs the right to privacy. It is recommended nonetheless that National Treasury specifies the instances under which information can be passed from the Tax Ombud to SARS and what the status of this information is, in order to ensure that taxpayers are fully aware of the instances where their confidential information given to the Tax Ombud, will be disclosed to SARS.

Where a SARS official may arrive without prior notice to conduct an inspection at a premises; the restrictions (if any) applicable to this inspection (s 45 of the Act).

The rules governing the physical inspection of the premises of a taxpayer are contained in s 45 of the Act and replace the rules previously contained in s 74B of the Income Tax Act.[76] The changes that have been made are as follows:

Section 74B of the Income Tax Act[77]	**Section 45 of the Tax Administration Act[78]**
Required an authorisation letter in order to conduct an inspection. An authorisation letter was defined as 'a written authorisation granted by the Commissioner to an officer to inspect, audit, examine or obtain, as contemplated in s 74B, any information, documents or things'. The taxpayer was able to insist that the authorisation letter be presented when the inspection was conducted.	No mention of an authorisation letter to conduct an inspection.
The taxpayer was given reasonable prior notice in order to furnish the Commissioner with any information required.	The SARS Official is permitted to arrive at the premises without prior notice.
The inspection was only allowed to take place during the taxpayers' normal business hours.	No restriction as to when the inspection can take place.
The inspection could take place for the purposes of the administration of the Income Tax Act.	The scope of the inspection is more restrictive and indicates three instances where an inspection can occur: • To determine the identity of the person occupying the premises

[75] Constitution of the Republic of South Africa Act 108 of 1996, s 36.
[76] Income Tax Act 58 of 1962.
[77] Income Tax Act 58 of 1962.
[78] Tax Administration Act 28 of 2011.

	• whether the person occupying the premises is registered for tax or • Whether the person is complying with s 29 and s 30 of the Act being the duty to keep records and the forms of records to be kept or retained.

The previous s 74B of the Income Tax Act included provisions such as the necessity of an authorisation letter, providing reasonable prior notice and conducting the inspection during business hours, the absence of which is conspicuous in s 45 of the Act. The stated purpose of the inspection in s 45 of the Act is to determine the identity of the person occupying the premises; whether the person occupying the premises is registered for tax or whether the person is complying with keeping the necessary records. The powers of SARS to obtain this information have been significantly enhanced which may result in an unannounced inspection without any confirmation of authorisation taking place at any time, including outside of business hours. It can be argued that the same level of power yielded by SARS in s 74B of the Income Tax Act could have been maintained to achieve the same objective.

The *SARS Guide*[79] indicates that SARS' information gathering powers are extended or supplemented by the Act to address the problem that too many requests for information by SARS result in protracted debates as to SARS' entitlement to certain information, which is a valid concern.

The conduct of an inspection at one's premises is a violation of the constitutional right to privacy, which needs to be balanced with SARS' requirement to corroborate information provided by the taxpayer to ensure compliance with the tax system. Therefore, it needs to be determined whether this limitation will meet the requirements of the limitation provision contained in s 36 of the Constitution.

The previous s 74B of the Income Tax Act contained provisions to ensure that the invasion of privacy was reasonable and justifiable in an open and democratic society. Section 45 of the Act, has omitted these provisions but has also made the instances under which an inspection can be carried out much more specific. These specifications, as long as they are complied with, are by law of general application and make the limitation of the right to privacy both reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. It is recommended nonetheless that SARS consider amending the wording of the legislation, more in line with what was previously contained in s 74B of the Income Tax Act, to ensure that they are not using a sledgehammer to crack a nut, as was stated in the case of *S v Manamela and Another*[80] 'Section 36, however, does not permit a sledgehammer to be used to crack a nut'.

[79] SARS, 2013, p. 23.
[80] *S v Manamela and Another* (Director-General of Justice Intervening) (CCT25/99) [2000] ZACC 5; 2000 (3) SA 1; 2000 (5) BCLR 491 (14 April 2000).

Where no person may refuse to give access or assistance as required by SARS to conduct an audit or investigation or where a person may not refuse to answer a question during an inquiry on the grounds that it may incriminate a person (ss 49, 57 and 72 of the Act).

The provisions for field audits or criminal investigations contained in ss 48 - 49 of the Act replace the previous s 74B of the Income Tax Act. Section 57 of the Act relating to incriminating evidence replaces s 74C of the Income Tax Act, whilst s 72 of the Act is similar to the previous s 4(1B) of the Income Tax Act. These sections contain many changes in their incorporation into the Act.

Section 49 of the Act provides that the person on whose premises an audit or criminal investigation is carried out, must provide reasonable assistance as is required by SARS to conduct the audit or investigation and no person may without just cause, obstruct a SARS official from carrying out the audit or investigation or refuse to give assistance as may be required.

The actual status of 'the person' on whose premises the audit or criminal investigation is carried out is unclear. It could be the owner of the premises or the person with right of use of the premises.[81] It is also vague as to whether the 'no person may refuse to give assistance' refers to the same person on whose premises the audit or criminal investigation is carried out or any other person on the premises.

The *SARS Guide*[82] indicates that no person on the premises may obstruct a SARS official from carrying out the audit or investigation or refuse to give access or assistance as may be required. The *SARS Guide* therefore indicates that any person on the premises may be required to provide assistance.

Under s 57 of the Act, a person may not refuse to answer a question during an inquiry on the grounds that it may incriminate a person. Sections 49 and 57 of the Act therefore seem to indicate that any person on the premises, irrespective of their relation to the taxpayer, is obliged to provide assistance as required by SARS and may not refuse to answer a question on the grounds of self-incrimination. The person who may be questioned and their relation to the taxpayer, the type of assistance required or the types of questions that can be asked are unclear, for example, it could be access to the computer systems during times where business activities are being carried out. This could impact on the operations of the business. It could be questions relating to confidential information relating to purchase of goods and services by the taxpayer[83] during business operations when customers are present. These types of requests may impact on the taxpayers business and may not be specifically related to the tax issue at hand. At the same time, 'the person' may be forced to answer and provide assistance in terms of the requirements of s 57 of the Act.

Section 72(1) of the Act states that a taxpayer may not refuse to comply with their obligations in terms of legislation to complete and file a tax return or an application on the grounds that to do so might incriminate him, and an admission by the taxpayer contained in a return, application or other document submitted to

[81] Mandy & Mollagee (PWC), 2012, p. 34.
[82] SARS, 2013, p. 28.
[83] Croome, 2008, p. 83.

SARS by a taxpayer *is* admissible in criminal proceedings against the taxpayer unless a competent court directs otherwise.

Both ss 57 and 72 of the Act negate any privilege against self-incrimination.[84] Section 57(2)(*c*) of the Act states that 'incriminating evidence obtained under this section is not admissible in criminal proceedings unless the proceedings relate to the failure to answer questions lawfully put to the person, fully and satisfactorily'. Section 72(2) of the Act states that an admission by the taxpayer of the commission of an offence under Chapter 5 (being the chapter under which ss 49 and 57 fall), is not admissible in criminal proceedings against a taxpayer 'unless a competent court directs otherwise'. Both of these caveats place ss 57 and 72 of the Act back into the ambit of self-incrimination. Both these sections indicate that no person may refuse to answer questions or comply with SARS, whilst at the same time, the information obtained may be admissible in criminal proceedings, resulting in self-incriminating evidence being used against the taxpayer.

The previous s 74C of the Income Tax Act did not provide that self-incriminating answers could be used in evidence in any subsequent criminal proceedings against the examinee; the use of such incriminating answers was limited to a criminal prosecution for perjury in respect of giving untruthful answers to questions (s 74C(13)(*b*)); this is now provided for under certain circumstances under s 57(2) of the Act.

Whilst an audit is a violation of the right to privacy, an audit by revenue authorities has been accepted by various democracies (such as Canada and Germany) as a reasonable and necessary violation of a taxpayers' right to privacy.[85]

The provisions regarding self-incrimination are also a violation of the right to privacy. It is therefore necessary to determine whether this self-incrimination infringement is reasonable and justifiable in an open and democratic society.

SARS is of the view (as indicated by the *SARS Guide*[86]*)* that s 72 of the Act does not limit any constitutional right, and in particular the right against self-incrimination as it applies to all taxpayers when they submit standard returns or applications. It is therefore not applicable to either persons arrested or accused as referred to in s 35 of the Constitution. The *SARS Guide* does not deal with the rights of the examinee,[87] which would be every taxpayer who is not an accused or arrested person. In *Bernstein and Others v Bester NO and Others,*[88] it was indicated that an examinee should not be compelled to answer a question which would result in the infringement of a fundamental right contained in the Constitution.

In *Ferreira v Levin and Vryenhoek v Powell,*[89] the court considered the implications of s 417(2)(*b*) of the Companies Act, which (since amended) required an examinee to answer under pain of fine or imprisonment,

[84] Mandy & Mollagee (PWC), 2012, p. 39.
[85] Croome, 2008, p. 82.
[86] SARS, 2013, p. 37.
[87] Mandy & Mollagee (PWC), 2012, p. 39.
[88] *Bernstein and Others v Bester NO and Others* (CCT23/95) [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751 (27 March 1996)
[89] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC).

any question put to him, notwithstanding that the answer might incriminate him and notwithstanding that the answer might be used as evidence in subsequent criminal proceedings against the examinee.[90] The Constitutional Court held that this provision violated the right of an individual not to be compelled to testify in an investigatory proceeding with a view to possible subsequent prosecution in the absence of a legislative assurance that any evidence obtained as a result of his testimony cannot be used against him in such a prosecution. It was held that s 417(2)(*b*) of the Companies Act infringed the rule against self-incrimination and therefore impacted on the right to a fair trial.[91]

Section 35 of the Constitution provides protection for the rights of those persons that are arrested, detained and accused. This section states that everyone who is arrested for allegedly committing an offence has the right to remain silent or to be informed promptly of the right to remain silent and not to be compelled to make any confession or admission that could be used in evidence against that person. Also, s 219A of the Criminal Procedure Act[92] states that the only requirement that needs to be met before an admission will be accepted into evidence is that it must be made voluntarily, that is, without having been induced by a promise or threat proceeding from a person in authority.[93] It was also stated in *R v Duetsini*[94] that a forced admission or confession would be contrary to the right not to incriminate oneself. Therefore, the right to remain silent has been recognised by the Constitution and admissions of guilt will only be admissible in criminal trials where they have been provided voluntarily.

SARS is required to obtain and verify information about taxpayers and their businesses to ensure efficient tax collection and compliance with the taxation system. SARS is therefore obliged to carry out audits and pose pertinent questions and similar powers are granted to other revenue authorities. As such, it can be argued that the statutory powers are constitutionally justifiable where they go no further than similar powers granted to the revenue authorities in other open and democratic societies.[95] An audit is therefore a justifiable limitation on one's right to privacy.

The provisions regarding self-incrimination on the other hand, may be excessively widely framed in legislation, in which event the provision could *pro tanto* be in breach of the Constitution.[96] Whilst these provisions will be in terms of law of general application, it can be argued that compelling a taxpayer to provide self-incriminating information may be unreasonable and not justifiable in an open and democratic society based on human dignity, equality and freedom. There may be less restrictive means to obtain this information, such as other provisions contained in the Act, or including a provision that a taxpayer may have his lawyer present when asked any questions by SARS. Information regarding the taxation affairs of the business should also be asked of the taxpayer himself and it may be unreasonable to compel any person on the premises to provide information to SARS. The provisions regarding self-incrimination may therefore construe a breach of the constitutional right to privacy and may not survive the limitation of rights provision if challenged in the courts.

[90] Klue *et al*, 2014, s 3.17, LexisNexis online.
[91] Klue *et al*, 2014, s 3.17, LexisNexis online.
[92] Criminal Procedure Act 51 of 1977.
[93] Currie & De Waal, 2005, p. 763.
[94] *R v Duetsini* 1950 (3) SA 674 (A).
[95] Klue *et al*, 2014, s 3.12, LexisNexis online.
[96] Klue *et al*, 2014, s 3.12, LexisNexis online.

Amendments to the search and seizure provisions, now including the ability to search without a warrant (ss 59 – 66 of the Act).

The search and seizure and warrant provisions are now contained in Part D of Chapter 5 of the Act and replace the old s 74D of the Income Tax Act together with many additions and amendments.

In the case of *Minister for Safety & Security v Van der Merwe & Others,*[97] it was indicated that search and seizure warrants by their very nature implicate at least two constitutional rights, namely the right to dignity and the right to privacy.

In the *Magajane* case,[98] it was held that a person's privacy may be impaired by a warrant only in the least intrusive manner and on justifiable grounds. Open democratic societies elsewhere in the world have fashioned the warrant as the mechanism to balance the public interest in combating crime with the individual's right to privacy.[99]

It the case of *National Director of Public Prosecutions v Zuma,*[100] it was stated that a warrant is no more than a written authority to perform an act that would otherwise be unlawful.

It has therefore been accepted by the courts that a search and seizure is a violation of the constitutional right to privacy and warrants are aimed at ensuring that the violation of this right is done so in the least intrusive manner and on justifiable grounds.

The courts have also stated specific information that a warrant must contain in order to be valid. Some of these requirements have not been included in the Act.

Section 74D(1) of the Income Tax Act enabled a judge to issue a warrant authorising the officer named therein to enter and search any premises. The new Part D of the Act does not make such a distinction. In the case of *Minister for Safety & Security v Van der Merwe & Others,*[101] the requirements for a valid warrant were stated which included that the warrant identifies the searcher.

Section 66(4) of the Act states that if the court sets aside the warrant issued or orders the return of the seized material, the court may nevertheless authorise SARS to retain the original or a copy of any relevant material in the interests of justice. In the case of *Ivanov v North West Gambling Board and Others,*[102] it was held that where a search warrant is declared invalid, it operates retrospectively.

[97] *Minister for Safety & Security v Van der Merwe & Others* [2011] ZACC 19.
[98] *Magajane v Chairperson, North West Gambling Board and* Others [2006] ZACC 8; 2006 (5) SA 250 (CC); 2006 (10) BCLR 1133 (CC).
[99] *Magajane v Chairperson, North West Gambling Board and* Others [2006] ZACC 8; 2006 (5) SA 250 (CC); 2006 (10) BCLR 1133 (CC).
[100] *National Director of Public Prosecutions v Zuma* 2008 (1) SACR 258 (SCA) para 76.
[101] *Minister for Safety & Security v Van der Merwe & Others* [2011] ZACC 19.
[102] *Ivanov v North West Gambling Board and Others* (312/2011) [2012] ZASCA 92; 2012 (6) SA 67 (SCA); 2012 (2) SACR 408 (SCA); [2012] 4 All SA 1 (SCA) (31 May 2012).

Harms DP stated in *Cadac (Pty) Ltd v Weber-Stephen Products Co,*[103] that the declaration of invalidity operates retrospectively and not prospectively. This means that once a warrant is set aside it is assumed that it never existed, and everything done pursuant thereto was consequently unlawful.

In the recent case of *Huang and Others v Commissioner: South African Revenue Service and Another,*[104] an inquiry had been convened, which was preceded by a search and seizure by SARS.[105] Prior to the inquiry beginning, but after the search and seizure had been carried out, the applicants brought an application to have the granting of the search and seizure warrant reconsidered. Pending the outcome of the reconsideration, the applicants applied to the court on an urgent basis for the postponement of the inquiry and the prevention of the use of documents and information obtained in the search and seizure from being used in the examination of any witness in the inquiry proceedings.

The court stated that 'SARS has broad powers under ss 59 - 64 of the Act… but such a search and seizure can only take place under the authority of a warrant issued by a judge or a magistrate'. SARS must apply in terms of s 59(2) of the Act, ex parte for such a warrant and special procedural rules apply to such ex parte applications including that a person may apply for reconsideration of the ex parte order which was the case in point. As such, the court hearing the reconsideration application may uphold the attack on the warrant application and set the warrant aside. That court may, if it upholds the attack, also direct that some or all the seized material be returned to the applicants. A court may have regard to the fact that amongst the material seized under the hypothetically invalid warrant is material which the taxpayer ought, under the Act, to have made available to SARS upon its request.

The court declared that the applicants were excused from giving evidence at the inquiry and that no document or information derived from the search and seizure pursuant to the warrant be employed in the examination of any witness at the inquiry.

These cases therefore indicate that material seized during the execution of an invalid warrant may not be admissible in the courts.

Section 63 of the Act is new section that enables a search without a warrant in certain circumstances and states that:

> A senior SARS official may without a warrant exercise the powers referred to in section 61 (3)—
> (*a*) if the owner or person in control of the premises so consents in writing; or
> (*b*) if the senior SARS official on reasonable grounds is satisfied that—
> (i) there may be an imminent removal or destruction of relevant material likely to be found on the premises;
> (ii) if SARS applies for a search warrant under section 59, a search warrant will be issued; and

[103] *Cadac (Pty) Ltd v Weber-Stephen Products Co* 2011 (3) SA 570 (SCA) para. 18.
[104] *Huang and Others v Commissioner: South African Revenue Service and Another, In Re; Commissioner: South African Revenue Service v Huang and Others* (SARS 4/2013) [2013] ZAGPPHC 370 (18 November 2013).
[105] Rogers, C. & McCormack, M., 2014, 'Unreported judgment with case number: SARS 4/2013', in *Tax ENSight*, viewed 03 December 2014, from <http://www.ensafrica.com/news/unreported-judgment-with-case-number-SARS-42013?Id=1357&STitle=tax%20ENSight>.

(iii) the delay in obtaining a warrant would defeat the object of the search and seizure.

(2) A SARS official must, before carrying out the search, inform the owner or person in control of the premises—
(*a*) that the search is being conducted under this section; and
(*b*) of the alleged failure to comply with an obligation imposed under a tax act or tax offence that is the basis for the search.

From the above it is clear that the circumstances under which a warrantless operation may be conducted are stringent[106] and can only be carried out under exceptional circumstances.

The previous search and seizure provisions, prior to s 74D of the Income Tax Act and s 57D of the VAT Act,[107] did not make provision for a warrant. The Commissioner was allowed to authorise and conduct a search and seizure operation. The Katz Commission then expressed that:

> In terms of s 74(3) of the Act powers are conferred upon officers engaged in carrying out the provisions of the act to search and seize a variety of items. This section prima facie violates section 13 of the (interim) Constitution and would require justification in terms of the limitation clause.[108]

In the case of *Park-Ross and Another v The Director Office for Serious Economic Offences*,[109] Tebbutt J held that s 6 of the Investigation of Serious Economic Offences Act[110] constituted a violation of the right to privacy embodied in the Constitution. He held that the value protected by the law of search and seizure, as in the United States and Canada, is privacy rather than property. He then concluded that s 6 of the Serious Economic Offences Act was not a justifiable limitation of the privacy right.[111] In this case, the offices of a company were raided and documents were seized in terms of s 6 of the Investigation of Serious Economic Offences Act 117 of 1991 which did not require the intervention of the judiciary to conduct a search and seizure operation.[112] This act[113] has since been repealed.

In the case of *Mistry v Interim Medical and Dental Council of South Africa*,[114] the decision in the *Park-Ross* case was upheld and the Constitutional Court struck down the provisions of s 28(1) of the Medicines and Related Substance Control Act[115] because it gave inspectors control to enter any place where they reasonable suspected medicines to be and there were no safeguards in this act to minimise the extent of the intrusion on privacy.[116]

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[106] Gad, R. & Bovijn, S., 2011, 'New Tax Administration Bill introduces new search and seizure provisions', in *Tax ENSight*, viewed 03 December 2014, from <http://www.ensafrica.com/news/new-tax-administration-bill-introduces-new-search-and-seizure-provisions?Id=237&STitle=tax%20ENSight>.
[107] Being the previous s 74(3) of the Income Tax Act 58 of 1962 and s 57(1) of the Value Added Tax Act 89 of 1991.
[108] Katz Commission, 1994, *Interim Report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa*, p. 75, cited in Croome, 2008, p. 84.
[109] *Park-Ross and Another v Director: Office for Serious Economic Offences* 1995 (2) BCLR 198 (C); 1995 (2) SA 148 (C).
[110] Investigation of Serious Economic Offences Act 117 of 1991, s 6.
[111] Currie & De Waal, 2013, p. 307.
[112] Croome, B.J. & and Olivier, L., 2010, *Tax Administration*, Juta, Cape Town, p. 122.
[113] Investigation of Serious Economic Offences Act 117 of 1991.
[114] *Mistry v Interim Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC).
[115] Medicines and Related Substance Control Act 101 of 1965.
[116] Currie & De Waal, 2005, p. 326.

As a result of the recommendations of the Katz Commission and the decision in the *Park-Ross* case, s 74(3) of the Income Tax Act and s 57(1) of the VAT Act were repealed and replaced by s 74D into the Income Tax Act and s 57D into the VAT Act in 1996.[117] There was accordingly a development from a warrantless search and seizure at the absolute discretion of the Commissioner to the requirement of a warrant. The new s 63 of the Act seems to bring the search and seizure without a warrant back into legislation.

In the recent case of *Gaertner and others v Minister of Finance, the Commissioner: South African Revenue Service and others,*[118] SARS conducted searches at the taxpayer's business premises as well as at his private residence in terms of s 4(4) of the Customs and Excise Act,[119] which allows for such a search without a warrant. SARS conceded in this case that the provisions could be constitutionally invalid but the extent of such invalidity remained disputed.[120] The court declared that s 4(1)(*a*)(i) and (ii), s 4(4)(*b*), s 4(5) and s 4(6) of the Customs and Excise Act are inconsistent with the Constitution and invalid and gave the legislature 18 months to remedy the defective provisions, until which time the court's conclusions and suggested guidelines have to be read into the Customs and Excise Act.[121]

It has been accepted by the courts that search and seizure is an invasion of privacy and that this invasion may be impaired by a warrant only in the least intrusive manner and on justifiable grounds. The minimum requirements for a warrant to be valid have been determined by the courts but the Act does not seem to conform to this. The courts have stated that where a warrant has been declared invalid, it applies retrospectively which seems to be contradicted by the Act. The previous sections of the Income Tax and VAT Act allowing for warrantless search and seizures were repealed in light of their violation of the Constitution but have since been brought back into legislation via this Act. History and the courts therefore seem to indicate that should these search and seizure provisions be tested in the Constitutional Court, they may be declared unconstitutional as they may not be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

[117] Gad & Bovijn, 2011.
[118] *Gaertner and Others v Minister of Finance and Others* (12632/12) [2013] ZAWCHC 54; 2013 (6) BCLR 672 (WCC); 2013 (4) SA 87 (WCC); [2013] 3 All SA 159 (WCC) (8 April 2013).
[119] Customs and Excise Act 91 of 1964.
[120] Louw, H., 2013, 'Search and Seizure: With or Without a Warrant?' in *SAIT, South African Institute of Tax Professionals,* viewed 03 December 2014, from <http://www.thesait.org.za/news/124055/SARS-News--Tax-Administration-Search-and-Seizure-With-or-Without-a-War.htm>.
[121] Louw, 2013.

Chapter 4 - The constitutional right to property

Section 25 of the Constitution confers a right to property as follows:

> (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

Currie and De Waal[122] state that:

> There are at least three possible meanings for the word property as used in s 25. First, the clause could refer to property itself, to those things with respect to which legal relations between people exist. Second, the term could refer to the set of legal rules governing the relationship between individuals and property-what the common law terms property rights, Third, the term could refer to any relationship or interest having an exchange value.[123]

Ackermann J in *First National Bank of SA Ltd t/a Wesbank v Commissioner: South African Revenue Service and Another*[124] stated the following regarding the meaning of property in s 25 of the Constitution:

> The details …ought to be borne in mind whenever section 25 is being construed, because they emphasise that under the 1996 Constitution the protection of property as an individual right is not absolute but subject to societal considerations. At this stage of our constitutional jurisprudence it is, for the reasons given above, practically impossible to furnish – and judicially unwise to attempt – a comprehensive definition of property for purposes of section 25….Here it is sufficient to hold that ownership of a corporeal movable must – as must ownership of land – lie at the heart of our constitutional concept of property, both as regards the nature of the right involved as well as the object of the right and must therefore, in principle, enjoy the protection of section 25.

It was also stated that the meaning of s 25 of the Constitution has to be determined, in each specific case, within an interpretative framework taking cognisance of the inevitable tensions which characterize the operation of the property clause. This tension between individual rights and social responsibilities has to be the guiding principle in terms of which the section is analysed, interpreted and applied in every individual case.[125]

It is clear that the meaning of property can be widely interpreted and also relates to several rights held by a taxpayer.

Deprivation of property was said to be, in the *First National Bank*[126] case:

> any interference with the use, enjoyment or exploitation of private property in respect of the person having title or right to or in the property concerned …'viewed from this perspective section 25(1) deals with all "property" and all

[122] Currie & De Waal, 2013, p. 535.
[123] Currie & De Waal, 2013, p. 535.
[124] *First National Bank of SA Ltd t/a Wesbank v Commissioner: South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* (CCT19/01) [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (16 May 2002).
[125] *First National Bank of SA Ltd t/a Wesbank v Commissioner: South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* (CCT19/01) [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (16 May 2002).
[126] *First National Bank of SA Ltd t/a Wesbank v Commissioner: South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* (CCT19/01) [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (16 May 2002).

> deprivations (including expropriations). If the deprivation infringes (limits) section 25(1) and cannot be justified under section 36 that is the end of the matter. The provision is unconstitutional.

A limitation of the right to property is justifiable in terms of the s 36 limitation of rights provision[127] if the limitation is by law of general application to the extent that it is reasonable and justifiable in an open and democratic society. The wording of s 25 of the Constitution[128] already includes that no one may be deprived of property except in terms of law of general application, therefore indicating that s 25 can be infringed by means *other* than a law of general application.[129]

Section 25 of the Constitution further states that no law may permit the arbitrary deprivation of property. Arbitrary, implies that there is insufficient reason for the deprivation.[130] In the *First National Bank*[131] case it was stated that 'a deprivation of property is "arbitrary" as meant by section 25 when the "law" referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair'. Therefore, if the law is permits a deprivation of property without sufficient reason, it would construe a violation of s 25 of the Constitution.[132] To justify this limitation in terms of s 36 of the Constitution would require showing that a measure taken arbitrarily, that is without sufficient or good reason, is reasonable and justifiable, which has already been indicated to the contrary within the wording of s 25 of the Constitution itself.

Therefore as was stated by Currie & De Waal,[133] it seems as though s 36 of the Constitution can have no meaningful application to s 25 of the Constitution as these rights have been qualified to such an extent that is it unlikely that any violation of these rights can be justified.[134] Therefore, if one is able to discharge the extreme burden of showing that the rights in s 25 of the Constitution have been violated, it is unlikely that this violation will be justified in terms of s 36 of the Constitution.[135]

This chapter will discuss certain sections of the Act that may impact on the constitutional right to property.

Preservation Orders, where SARS may apply to the High Court for an order for the preservation of any assets of a taxpayer or other person, or SARS may seize the assets immediately (s 163 of the Act).

Section 163 of the Act states that a senior SARS official may authorise an ex parte application to the High Court for an order for the preservation of any assets of a taxpayer or other person prohibiting any person from dealing with the assets to which the order relates.

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[127] Constitution of the Republic of South Africa Act 108 of 1996, s 36.
[128] Constitution of the Republic of South Africa Act 108 of 1996, s 25.
[129] Currie & De Waal, 2005, p. 561.
[130] Currie & De Waal, 2005, p. 562.
[131] *First National Bank of SA Ltd t/a Wesbank v Commissioner: South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* (CCT19/01) [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (16 May 2002).
[132] Currie & De Waal, 2005, p. 562.
[133] Currie & De Waal, 2005, p. 562.
[134] Currie & De Waal, 2005, p. 562.
[135] Currie & De Waal, 2005, p. 562.

Prior to the inclusion of this section into the Act, SARS was required to apply for a preservation order under the common law, as the Income Tax Act did not contain a mechanism whereby SARS could apply for a preservation order to ensure the preservation of assets.[136]

The High Court recently adjudicated on the application of s 163 of the Act in the case of *Commissioner: South African Revenue Service v Van Der Merwe and Others.*[137] In this case, a provisional preservation order was granted ex parte to the Commissioner under the provisions of s 163 of the Act. The Court reviewed the provisions of s 163 of the Act and confirmed that the preservation order is granted to prevent realisable assets from being disposed of or removed which may frustrate the collection of tax. It was stated that:

> Whilst the grant of a preservation order may be considered harsh, there are compelling reasons within the context of our constitutional democracy why steps which assist the fiscus securing the collection of tax are required, which include court orders to preserve assets to secure the collection of tax…in making the assessment as to whether to grant the order or not, the court must be apprised of the available facts in order to arrive at a conclusion, reasonably formed on the material before it, as to whether a preservation order is required or not to secure the collection of tax. It is not required of the court to determine whether the tax is, as a matter of fact, due and payable by a taxpayer or other person contemplated in s163(1) which will be determined by later enquiry. Rather, at the preservation stage sufficient information is to be placed before the court to enable the court to determine whether such an order is required against the persons against whom it is sought.[138]

The court concluded that the provisional preservation order granted in terms of s 163 (3) of the Act be confirmed.

In the case of *Commissioner: South African Revenue Service v Tradex (Pty) Ltd and Others*[139] it was held that SARS was not entitled to a preservation order as it was not 'required' to secure the collection of the taxes that could have become due in that instance. Rogers J indicated that he did not think the legislature intended that a preservation order would routinely be available to SARS in every case of an actual or anticipated tax liability. The court indicated that there must be a material risk that assets will be dissipated in order to justify the granting of a final preservation order.[140] Rogers J stated:

> While I can understand SARS' frustration, that is not the purpose of the preservation application. There are other statutory mechanisms available to SARS to deal with taxpayers who fail to provide information, to render returns or to make payment of tax (see, in particular, the information-gathering provisions of Chapter 5 of the TAA, SARS' power to issue estimated and so-called jeopardy assessments in terms of Chapter 8, the tax-recovery provisions of Chapter 11, the administrative non-compliance penalties which can be imposed in terms of Chapter 15 and the criminal offences created by Chapter 17).

The above cases indicate that while preservation orders can be used to secure the payment of taxes, SARS can also make use of other statutory mechanisms in order to secure the collection of taxes where they are

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[136] Croome, B.J., 2014b, 'Preservation Order Assists SARS in Tax Action', in *Tax Students make your mark*, viewed 04 December 2014, from <http://taxstudents.co.za/preservation-order-assists-sars-tax-action/>.
[137] *Commissioner: South African Revenue Service v Van Der Merwe; In Re: Commissioner: South African Revenue Service v Van Der Merwe and Others (*13048/13) [2014] ZAWCHC 59 (28 February 2014).
[138] *Commissioner: South African Revenue Service v Van Der Merwe; In Re: Commissioner: South African Revenue Service v Van Der Merwe and Others (*13048/13) [2014] ZAWCHC 59 (28 February 2014).
[139] *Commissioner: South African Revenue Service v Tradex (Pty) Ltd and Others* 2014 ZAWCHC (case number 12949/2013, as yet unreported).
[140] Croome, B.J., 2014d, 'Western Cape High Court Rules on Purpose of Preservation Orders', in *Dr Beric Croome*, viewed 04 December 2014, from <http://www.bericcroome.com/2014_11_01_archive.html>.

less restrictive means available. Preservation orders, by their very nature imply the deprivation of property but such a deprivation may be justified in certain instances.

If such a deprivation via a preservation order is warranted and therefore reasonable as was indicated in the case of *Commissioner: South African Revenue Service v Van Der Merwe and Others*,[141] it would then be an acceptable justification of the limitation of the right to property. If there are other less restrictive means to achieve the same purpose, as was indicated in the case of *Commissioner: South African Revenue Service v Tradex (Pty) Ltd and Others,*[142] then a preservation order may construe a violation of the constitutional right to property that is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Where SARS may require a third party who holds or owes money to the taxpayer to pay the money to SARS to settle a taxpayers debts or institute rights of recovery against the assets of the third party in settlement of the taxpayers debt (ss 179 – 184 of the Act).

The new provisions contained in Chapter 11 of the Act, regarding the collection of tax debts from third parties were previously contained in s 99 of the Income Tax Act (the 'agent' provisions) and are substantially expanded in the Act. These sections authorise SARS to appoint a third party who 'holds or owes' any money for or to a taxpayer, to pay such monies over to SARS in satisfaction of a taxpayers debt.[143]

Section 179(1) of the Act states that a senior SARS official may by notice to a person who holds or owes or will owe any money, including a pension, salary, wage or other remuneration, for or to a taxpayer, require the person the pay the money to SARS in satisfaction of the tax debt.

In practice, SARS uses this power to instruct banks to pay over funds in the taxpayers' bank account to liquidate the tax debts due to SARS.[144] SARS can also rely on this section to direct that an employer pays amounts to SARS in settlement of the taxes due by the employee out of the salary payable by the employer, or to direct a pension fund, provident fund or retirement annuity fund to use all or part of a lump sum or annuity of a taxpayer in settlement of taxes due to SARS.[145]

In the case of *Hindry v Nedcor Bank Ltd and Another*,[146] regarding the now repealed s 99 of the Income Tax Act, the Commissioner issued a notice to the taxpayer's bankers in an attempt to recover the tax due by Hindry. As a result, the bank had to pay over the amount owing to the Commissioner immediately or as soon as the funds were available in Hindry's bank account. The taxpayer contended that s 99 of the Income Tax Act was unconstitutional. The court found that any limitation of constitutional rights implicit in s 99 of the

[141] *Commissioner: South African Revenue Service v Van Der Merwe; In Re: Commissioner: South African Revenue Service v Van Der Merwe and Others* (13048/13) [2014] ZAWCHC 59.
[142] *Commissioner: South African Revenue Service v Tradex (Pty) Ltd and Others* 2014 ZAWCHC (case number 12949/2013, as yet unreported).
[143] Mandy & Mollagee (PWC), 2012, p. 61.
[144] Croome & Olivier, 2010, p. 232.
[145] Croome & Olivier, 2010, p. 233.
[146] *Hindry v Nedcor Bank Ltd and Another* 1999 (4) JTLR 77 (W) 61 SATC 163.

Income Tax Act is reasonable and necessary in an open and democratic society. Furthermore, the court rejected the argument that s 99 of the Income Tax Act violates the contractual relationship between a taxpayer and bank, finding that it does not infringe on the confidential nature of this relationship.[147] Wunsh J also dismissed the taxpayer's contention that his right to property had been violated on the basis that the garnishment of a debt may be viewed as a seizure of property.[148]

It can be argued that instituting rights of recovery against the assets of the third party in settlement of the taxpayers' debt is draconian but it is not unique to South Africa.[149] As such, in the appropriate circumstances, it is reasonable to enforce the payment of taxation by recovering this against a third party. The concern arises in the manner in which the Commissioner exercises his power.[150] If a taxpayer owes SARS tax, it is unlikely that a challenge to Chapter 11 of the Act based on a violation of the right to property contained in s 25 of the Constitution will succeed.[151]

Where SARS may compel a taxpayer to repatriate assets located outside of South Africa in order to satisfy a tax debt as well as to surrender his passport, withdraw his authorisation to conduct business and possibly to cease trading (s 186 of the Act).

Section 186(2) of the Act states that a senior SARS official may apply to the High Court for an order compelling the taxpayer to repatriate assets located outside the Republic within a period prescribed by the court in order to satisfy a tax debt.

According to the *SARS Guide*,[152] when a taxpayer has offshore assets that could be used to satisfy tax debts, SARS may apply to the High Court for an order to compel the repatriation of these assets. This is not an ex parte application, and accordingly notice of the application must be given to the taxpayer.[153] The application may only be made if the tax debtor does not have sufficient assets in South Africa to satisfy the tax debt in full.[154] The Court may impose certain sanctions where the taxpayer fails to comply with its order such as imprisonment based on contempt of court, the surrender of the taxpayers' passport, withdrawing the taxpayers' authority to conduct business in SA or requiring the taxpayer to cease trading.

The compelling of the taxpayer to repatriate assets does amount to a deprivation of property by law of general application, as such, the *arbitrary* deprivation of property, or lack of reasonableness thereof, needs to be considered.

Section 186(2) of the Act states that SARS would need to apply to the High Court to compel the repatriation. As such, the repatriation would be subject to the legal system under judicial oversight and not an arbitrary

[147] ENS, 2011, 'The appointment as a payment agent by the commissioner', in *Tax ENSight*, viewed 04 December 2014, from <http://www.ensafrica.com/news/the-appointment-as-payment-agent-by-the-commissioner?Id=468&STitle=tax%20ENSight>.
[148] Croome & Olivier, 2010, p. 235.
[149] Croome & Olivier, 2010, p. 236.
[150] Croome & Olivier, 2010, p. 236.
[151] Croome & Olivier, 2010, p. 236.
[152] SARS, 2013, p. 64.
[153] SARS, 2013, p. 64.
[154] SARS, 2013, p. 64.

action by SARS. It has been stated in the *First National Bank*[155] case that 'a deprivation of property is "arbitrary" as meant by section 25 when the "law" referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair'.

Procedural fairness means that the state should exercise its powers in terms of clear rules and principles set out in advance.[156] The exercise of power is arbitrary where it does not follow rules or precedents, where it is unpredictable.[157] Given that the order for the repatriation of assets will be subject to the legal system and not SARS' own accord, it can be inferred that the process for the repatriation of assets will not be arbitrary and will be procedurally fair. If the outcome by the court is that assets should be repatriated, it is unlikely that it would be considered an arbitrary deprivation of property.

At the same time, s 186(3) of the Act states that the court may require the taxpayer to surrender his passport, withdraw the taxpayers' authorisation to conduct business in the Republic and require the taxpayer to cease trading. These restrictions may impact on the taxpayers' ability to conduct business, earn a livelihood and support his family. The surrendering of one's passport impacts on the s 21 constitutional right to Freedom of movement and residence where everyone has the right to leave the Republic (s 21(2) of the Constitution) and every citizen has the right to a passport (s 21(4) of the Constitution). Furthermore, s 22 of the Constitution states that every citizen has the right to choose their trade, occupation or profession freely and the practise of a trade, occupation or profession may be regulated by law. As these decisions will be made by the court, there is a possibility that the court may rule that these restrictions impact on the taxpayer's constitutional rights. In determining whether the limitation of these constitutional rights are reasonable and justifiable the court may consider whether there are less restrictive means to achieve the purpose, being to satisfy a tax debt. It can be argued that there are less restrictive ways of satisfying a tax debt such as the measures mentioned by Rogers J in the case of *Commissioner: South African Revenue Service v Tradex (Pty) Ltd and Others:*[158]

> There are other statutory mechanisms available to SARS to deal with taxpayers who fail to provide information, to render returns or to make payment of tax (see, in particular, the information-gathering provisions of Chapter 5 of the TAA, SARS' power to issue estimated and so-called jeopardy assessments in terms of Chapter 8, the tax-recovery provisions of Chapter 11, the administrative non-compliance penalties which can be imposed in terms of Chapter 15 and the criminal offences created by Chapter 17).

In the event that these provisions of the Act are tested in the courts they may amount to a violation of constitutional rights that will not be reasonable and justifiable in an open and democratic society.

[155] *First National Bank of SA Ltd t/a Wesbank v Commissioner: South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* (CCT19/01) [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (16 May 2002).
[156] Currie & De Waal, 2013, p. 541.
[157] Currie & De Waal, 2013, p. 541.
[158] *Commissioner: South African Revenue Service v Tradex (Pty) Ltd and Others* 2014 ZAWCHC (case number 12949/2013, as yet unreported).

Chapter 5 - The constitutional right to just administrative action

Section 33 of the Constitution gives every citizen the right to just administrative action and is stated as follows:

> (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.

Administrative action has been described by Currie and De Waal[159] as the exercise of public power by any organ of state except the following: the legislatures (national, provincial, local) when exercising the legislative functions, the judiciary when exercising judicial functions, the President when exercising constitutional powers of the head of state, and the cabinet and provincial cabinets when making political decisions.[160]

In the case of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others,*[161] the court held:

> In section 33 the adjective "administrative" not "executive" is used to qualify "action". This suggests that the test for determining whether conduct constitutes "administrative action" is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function…The focus of the enquiry as to whether conduct is "administrative action" is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.

The case of *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others,*[162] indicated that administrative action is a sub-category of the wider category called exercise of public power.[163]

Lawfulness means that administrators must obey the law and must have authority in law for their decisions.[164] It includes compliance with the Constitution, with enabling legislation and the rules of common law.[165] Legislation therefore cannot oust a court's constitutional jurisdiction or deprive the courts of their review function to ensure the lawfulness of administrative action.[166]

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[159] Currie & De Waal, 2005, p. 653.
[160] Currie & De Waal, 2005, p. 654.
[161] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999).
[162] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000).
[163] Currie & De Waal, 2005, p. 645.
[164] Currie & De Waal, 2005, p. 672.
[165] Burns, Y. & Beukes, M., 2006, *Administrative laws under the 1996 Constitution,* LexisNexis Butterworths, Durban, p. 51.
[166] Hoexter, C., 2002, *The New Constitutional and Administrative Law*, Vol. 2, p. 136, cited in Currie & De Waal, 2005, p. 672.

In order for administrative action to be reasonable, it must be rational.[167] This means that the decision must be justifiable in light of the information available to the administrator and the reasons provided for that decision.[168] In the *Pharmaceutical Manufacturers Association*[169] case, it was stated that 'rationality is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries.'

Procedural fairness is aimed at securing justice for the individual.[170] It also entrenches the common law right to natural justice[171] which is based on two maxims: *audi alteram partem* (persons affected by a decision should be given a fair hearing by the decision-maker prior to the making of the decision) and *nemo iudex in sua causa* (the decision-making must be, and must be reasonably perceived to be, impartial).[172] The object of procedural fairness is therefore to ensure a proper hearing for aggrieved persons.[173] In the case of *Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal,*[174] O'Regan J stated:

> to permit the implementation of retroactive decisions without, for example, affording parties an effective opportunity to make representations would flout another important principle, that of procedural fairness…Citizens are entitled to expect that government policy will ordinarily not be altered in ways which would threaten or harm their rights or legitimate expectations without their being given reasonable notice of the proposed change or an opportunity to make representations to the decision-maker.

The Promotion of Administrative Justice Act ('PAJA')[175] is legislation enacted under s 33(3) of the Constitution to 'gives effect' to this constitutional right. The means that the Act makes the right effective by providing a detailed account of the right to just administrative action and providing remedies to uphold them.[176]

Section 1(*a*) of PAJA defines administrative action to be:

> 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.

Section 3(1) of PAJA indicates that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

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[167] Hoexter, C., *Administrative Law in South Africa*, 2007, p. 307, cited in Croome & Olivier, 2010, p. 25.
[168] Croome & Olivier, 2010, p. 25.
[169] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000).
[170] Burns & Beukes, 2006, p. 214.
[171] Currie & De Waal, 2005, p. 663.
[172] Currie & De Waal, 2005, p. 663.
[173] Currie & De Waal, 2005, p. 224.
[174] *Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal* (CCT10/98) [1998] ZACC 20; 1999 (2) SA 91; 1999 (2) BCLR 151 (2 December 1998).
[175] The Promotion of Administrative Justice Act 3 of 2000.
[176] Currie & De Waal, 2005, p. 649.

In the case of *Chirwa v Transnet Ltd and Others*[177] it was held that in order to constitute administrative action under PAJA, seven requirements must be met:

1. There must be a decision
2. By an organ of state
3. Exercising a public power or performing a public function
4. In terms of any legislation
5. That adversely affects someone's rights
6. Which has a direct, external, legal effect and
7. That does not fall under of the exclusions listed in s 1 of PAJA.[178]

Section 1 of PAJA states that administrative action also includes the failure to take a decision. A decision that has a direct external legal effect indicates that the decision must be legally binding, it must be a final one[179] and the person affected has to be someone other than the administrator.[180]

Section 2 of the South African Revenue Service Act,[181] states that SARS is established as an organ of state as such, the provisions of PAJA do apply to SARS. The *SARS Guide*[182] also indicates that PAJA applies to tax administration and that all statutes that authorise administrative action must now be read together with PAJA.

Certain provisions of the Act that may impact on the constitutional right to just administrative action will now be discussed.

Jeopardy assessments, where an assessment is made in advance of when it is due in order to secure the collection of tax that would otherwise be in jeopardy (s 94 of the Act).

Section 94 of the Act introduces a new concept of jeopardy assessments. This section states that SARS may make a jeopardy assessment in advance of the date on which the return is normally due, if the Commissioner is satisfied that it is required to secure the collection of tax that would otherwise be in jeopardy.

This appears to be an extreme measure to secure the collection of tax and can be prejudicial to a taxpayer.[183] The instances or circumstances under which a jeopardy assessment can be issued are not indicated.

The *SARS Guide*[184] indicates that jeopardy assessments may be issued where the taxpayer, for example, tries to place assets beyond the reach of SARS' collection powers when an investigation into the taxpayers

[177] *Chirwa v Transnet Ltd and Others* (CCT 78/06) [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) ; [2008] 2 BLLR 97 (CC) ; (2008) 29 ILJ 73 (CC) (28 November 2007).
[178] *Chirwa v Transnet Ltd and Others* (CCT 78/06) [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) ; [2008] 2 BLLR 97 (CC) ; (2008) 29 ILJ 73 (CC) (28 November 2007).
[179] Currie, I. & Klaaren, J., 2001, *The Promotion of Administrative Justice Act Benchbook*, Siber Ink, Cape Town, p. 210.
[180] Currie & De Waal, 2005, p. 662.
[181] South African Revenue Service Act 34 of 1997.
[182] SARS, 2013, p. 10.
[183] Cliffe Dekker Hofmeyr, 2012, 'SARS Jeopardy Assessments', in *SAICA Integritax,* viewed 04 December 2014, from <http://www.saica.co.za/integritax/2012/2064._SARS_jeopardy_assessments.htm>.

affairs is initiated or where a tax debtor is about to leave SA without satisfying tax debts. In such circumstances, it can be argued, that it is necessary for SARS to implement measures to protect the collection of taxes.

The United Kingdom (UK) case of *Revenue and Customs Commissioners v Ali* [185] does not deal directly with jeopardy assessments but it gives some insight into how UK courts regard the relationship between the assessment process and the risk that a taxpayer might dissipate assets.[186] Warren J held:

> I consider that HMRC have sufficient immediate and present interest to support this relief. The particular important point is that HMRC are properly to be seen as a creditor. Their debt is not contingent, albeit it is payable, at a time, and a short time at that, in the future. The special feature of this debt makes it right that where it is just and equitable to grant the relief the court should be able to do so…. I see no reason not to find support in that when applied to the statutory functions of HMRC to collect tax and if they can see a taxpayer who is going to dissipate his assets to avoid compliance with an assessment on which they cannot, because of the 30-day time limit, yet sue him to judgment, I see no reason why that is not a factor properly to be taken into account.[187]

The judge indicated the following factors that should be considered when making a freezing order:[188]

- The chances of success of the taxpayer's tax appeal
- The risk of dissipation which, in turn, strongly hinges on the taxpayer's honesty, alternatively dishonesty
- The delay in seeking relief, that is, the party fearing dissipation should act expeditiously ('A failure to seek relief promptly might be seen as indicating a lack of concern, suggesting that there is really no risk of dissipation at all'[189]).

Issuing a jeopardy assessment does constitute administrative action and is therefore subject to the s 33 constitutional requirement to be lawful, reasonable and procedurally fair. This will also be subject to PAJA and the *SARS Guide*[190] also indicates that the Act is subject to the overriding application of PAJA. In certain impactful provisions of the Act, administrative fairness provisions have also been codified, for example, regarding assessments, SARS must give grounds for the need for a jeopardy assessment.[191]

Therefore detailed grounds and the factors taken into account in deciding to issue a jeopardy assessment need to be provided by SARS to the taxpayer when issuing a jeopardy assessment. In the *Revenue and Customs Commissioners v Ali*[192] case, the court provided factors to be taken into account when considering the making of a freezing order. Similarly, SARS should publish the factors to be taken into account when issuing a jeopardy assessment, to pro-actively ensure that this would only be raised in the appropriate circumstances.[193]

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[184] SARS, 2013, p. 43.
[185] *Revenue and Customs Commissioners v Ali* [2012] STC 42 / [2011] EWHC 880 (Ch).
[186] Cliffe Dekker Hofmeyr, 2012.
[187] Cliffe Dekker Hofmeyr, 2012.
[188] Cliffe Dekker Hofmeyr, 2012.
[189] Cliffe Dekker Hofmeyr, 2012.
[190] SARS, 2013, p. 10.
[191] SARS, 2013, p. 10.
[192] *Revenue and Customs Commissioners v Ali* [2012] STC 42 / [2011] EWHC 880 (Ch).
[193] Cliffe Dekker Hofmeyr, 2012.

Section 94 of the Act also indicates that a review application against the jeopardy assessment may be made in the High Court, where the amount is excessive or circumstances that justify a jeopardy assessment do not exist, enabling the taxpayer to object to the assessment in court. The burden of proof, that the making of the jeopardy assessment is reasonable under the circumstances, in the High Court is borne by SARS. The *SARS Guide*[194] also indicates that the normal objection and appeal procedure is still available to the taxpayer.

When SARS issues a jeopardy assessment, grounds for the issuance will be provided to the taxpayer. The taxpayer is also able to object to it through the normal objection and appeal procedure as well as in the expensive manner of approaching the High Court. In the High Court, the onus of proof will be borne by SARS. While the 'pay-now-argue-later' principle will apply, if the taxpayer is successful in his objection to the jeopardy assessment, he will be refunded his taxes in dispute together with interest. Therefore, while the jeopardy assessment is an extreme measure to secure the payment of tax, if these provisions are followed, it is likely that the issuance of jeopardy assessments will amount to administrative action that is lawful, reasonable and procedurally fair.

Clear guidelines regarding the factors to be taken into account by SARS when issuing a jeopardy assessment should to be published nonetheless, to ensure that the taxpayer is aware of the circumstances under which this intrusive power of SARS will be implemented.

The burden of proof provision, which has extended the taxpayers' onus in dispute resolution (ss 102-103 of the Act).

Section 102 of the Act incorporates the 'burden of proof' provisions and replaces s 82 of the Income Tax Act. This section has also extended the taxpayer's onus to proving:[195]

- The rate of tax applicable to a transaction, event, item or class of taxpayer (s 102(1)(*c*))
- That an amount qualifies as a reduction of tax payable (s 102(1)(*d*))
- That a valuation is correct (s 102(1)(*e*)) or
- Whether a decision that is subject to objection and appeal under a tax act, is incorrect (s 102(1)(*f*)).

In the case of *Commissioner: South African Revenue Service v Pretoria East Motors (Pty) Ltd,*[196] SARS conducted an audit of the taxpayer and at the conclusion raised various additional income tax and VAT assessments. The taxpayer objected to these assessments and the penalties raised at the maximum rate of 200%. SARS relied on s 82 of the Income Tax Act and s 37 of the VAT Act which stated that the burden of proof, in the case of a dispute, lies with the taxpayer. Ponnan JA stated that:

> The present appeal must therefore be approached on the basis that the onus was on the taxpayer to show on a preponderance of probability that the decisions of SARS against which it appealed were wrong. That, however, is not to suggest that SARS was free to simply adopt a supine attitude. It was bound before the appeal to set out

[194] SARS, 2013, p. 43.
[195] Mandy & Mollagee (PWC), 2012, p. 50.
[196] *Commissioner: South African Revenue Service v Pretoria East Motors (Pty) Ltd* (291/12) [2014] ZASCA 91; [2014] 3 All SA 266 (SCA); 2014 (5) SA 231 (SCA) (12 June 2014).

> the grounds for the disputed assessments and the taxpayer was obliged to respond with the grounds of appeal and these delineate the disputes between the parties.

The court also confirmed, as per the *Barnato Holdings Ltd v Secretary for Inland Revenue*[197] case that, 'the onus resting upon the taxpayer is a "formidable and difficult" one to discharge'.

The Court criticised the approach by SARS, stating:

> Ms Victor's approach was that if she did not understand something she was free to raise an additional assessment and leave it to the taxpayer to prove in due course at the hearing before the Tax Court that she was wrong. Her approach was fallacious. The raising of an additional assessment must be based on proper grounds for believing that, in the case of VAT, there has been an under declaration of supplies and hence of output tax, or an unjustified deduction of input tax. In the case of income tax it must be based on proper grounds for believing that there is undeclared income or a claim for a deduction or allowance that is unjustified. It is only in this way that SARS can engage the taxpayer in an administratively fair manner, as it is obliged to do…. all the additional assessments raised by her were subject to penalties at the maximum rate of 200 per cent, absent any explanation as to why the taxpayer's conduct was said to be dishonest or directed at the evasion of tax…That approach was untenable, for, it left the taxpayer none the wiser as to what was truly in issue and what needed to be produced in order for it to discharge the burden of proof that rested upon it…..It must be stressed that SARS is under an obligation throughout the assessment process leading up to the appeal and the appeal itself to indicate clearly what matters and which documents are in dispute so that the taxpayer knows what is needed to present its case.

The court subsequently set aside some of the assessments raised and the penalties that had been imposed.

In the case of *AMI Forwarding (Pty) Ltd v Government of the Republic of South Africa (Department of Customs & Excise) & another,*[198] the court had to determine whether the burden of proof provision in s 102(4) of the Customs and Excise Act[199] extended to an allegation of fraud made by SARS.[200] The court rejected SARS contention and upheld the long established principle that the party who alleges and pleads fraud must prove it.[201] Therefore, where SARS raises the possibility of fraud, SARS may bear the onus of proving the existence thereof.[202]

In an assessment or additional assessment issued, SARS may disallow some of the information provided by the taxpayer in his tax return. The onus of proof then shifts to the taxpayer to prove that the information provided is justified. Whilst such administrative action may be considered lawful, reasonable and procedurally fair, the above cases indicate that the burden of proof provision is not an excuse for SARS to shift the onus to the taxpayer unnecessarily and then adopt a 'supine attitude'. In order for SARS to fulfil its constitutional duty of just administrative action, SARS is obliged to clearly indicate what matters and which documents are in dispute in writing, so that the taxpayer knows what is required of him in discharging his onus. By doing so, the taxpayer will be fully aware of his onus and may be able to discharge it and SARS would have fulfilled its duty to provide administrative action that is lawful, reasonable and procedurally fair.

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[197] *Barnato Holdings Ltd v Secretary for Inland Revenue* 1978 (2) SA 440 (A) at 454A-B).
[198] *AMI Forwarding (Pty) Ltd v Government of the Republic of South Africa (Department of Customs & Excise) & Another* [2010] JOL 25382 (SCA).
[199] Customs and Excise Act 91 of 1964.
[200] ENS, 2010, 'The reverse onus provisions and fraud', in *Tax ENSight*, viewed 04 December 2014, from <http://www.ensafrica.com/news/the-reverse-onus-provisions-and-fraud?Id=332&STitle=tax%20ENSight ENSight>.
[201] ENS, 2010.
[202] ENS, 2010.

The failure to provide such reasons by SARS on the other hand, can be construed as administrative action that does not adhere to the taxpayers' constitutional right to administrative action that is lawful, reasonable and procedurally fair. Section 33 of the Constitution further states that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. Therefore the taxpayer should invoke the objection and appeal provisions in the Act and request that SARS clearly indicate what matters and which documents are in dispute in order for him to dispel the burden of proof. Where the taxpayer has exhausted these avenues and SARS still fails to provide adequate reasons, the taxpayer can then approach the courts and invoke the provisions of PAJA. Section 5(1) of PAJA indicates that any person whose rights have been materially and adversely affected by administrative actions can request that the administrator (being SARS) furnish written reasons for the actions and s 8(1)(*a*)(i) of PAJA indicates that the court may grant any order directing the administrator (being SARS) to give reasons[203] in order for the taxpayer to dispel the onus.

The payment of tax pending objection or appeal - 'Pay-Now-Argue-Later' principle (s 164 of the Act).

The 'pay-now-argue-later' principle is now contained in s 164 of the Act and replaces s 88 of the Income Tax Act and s 36 of the VAT Act.[204]

This principle in the VAT Act was upheld in the *Metcash Trading Ltd v Commissioner: South African Revenue Service*[205] case where it was stated:

> In other words the 'pay-now-argue-later' rule applicable to a vendor who is aggrieved by an assessment under our VAT legislation does not infringe such vendor's constitutional right to due adjudication or if it does, the limitation is justified.

In the case of *Capstone 556 (Pty) Ltd v Commissioner: South African Revenue Service and Another,*[206] it was stated that:

> 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 IT Act. In this respect I have the effect of the pay first, argue later' provisions pending the determination of the Commissioner of an objection (as distinct from pending the determination by the Tax Court of an appeal) to an income tax assessment particularly in mind as an aspect that might well receive a different treatment if challenged, particularly in the context of the fundamental right to administrative justice.

The *Capstone 556 (Pty) Ltd* [207] case therefore indicates that a different conclusion may be reached from that of the *Metcash Trading Ltd*[208] case with regards to the Income Tax Act particularly regarding the right to just administrative action.

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[203] Klue *et al*, 2014, s 3.29, LexisNexis online.
[204] Value Added Tax Act 89 of 1991.
[205] *Metcash Trading Ltd v Commissioner: South African Revenue Service and Another* (CCT3/00) [2000] ZACC 21; 2002 (4) SA 317; 2002 (5) BCLR 454 (24 November 2000).
[206] *Capstone 556 (Pty) Ltd v Commissioner: South African Revenue Service and Another, Kluh Investments (Pty) Ltd v Commissioner: South African Revenue Service and Another* (26078/2010, 8274/2011) [2011] ZAWCHC 297; 2011 (6) SA 65 (WCC) (22 June 2011).

The decision by SARS to enforce the payment of tax pending an objection or appeal constitutes an administrative action and this was confirmed by Krieger J in the *Metcash Trading Ltd*[209] case:

> As in the case of section 88 of the Income Tax Act…, section 36 is not concerned with an appeal against a judgment, but with a statutory form of revision of an administrative decision according to a special procedure……. It has long been accepted that when the Commissioner exercises discretionary powers conferred upon him (or her) by statute, the exercise of the discretion constitutes administrative action which is reviewable in terms of the principles of administrative law.

Therefore the decisions by SARS not to suspend the payment of tax pending objection or appeal will be subject to the s 33 constitutional right to just administrative action read together with the provisions of PAJA. Section 3 of PAJA states that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair, whilst s 6 of PAJA states that any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

When a taxpayer requests a postponement of the payment of tax pending an objection or appeal, SARS, under the principles of administrative law, must properly exercise discretion by taking into account all the relevant facts and may not abruptly dismiss the request.[210]

Krieger J also indicated in the *Metcash Trading Ltd*[211] case that:

> The Act gives the Commissioner the discretion to suspend an obligation to pay. It contemplates, therefore that notwithstanding the "pay now, argue later" rule, there will be circumstances in which it would be just for the Commissioner to suspend the obligation to make payment of the tax pending the determination of the appeal. What those circumstances are will depend on the facts of each particular case. The Commissioner must, however, be able to justify his decision as being rational. The action must also constitute "just administrative action" as required by section 33 of the Constitution and be in compliance with any legislation governing the review of administrative action.

In the case of *Deacon v Controller of Customs and Excise*,[212] it was indicated that where a government official, in the exercise of a discretionary function, has not had regard for the provisions of s 33 of the Constitution, the court can set aside the decision of the government official.[213]

In the case of *Shell's Annandale Farm (Pty) Ltd v Commissioner: South African Revenue Service,*[214] Davis J dismissed the Commissioner's preliminary objection and accepted that declaratory relief was competent in cases where a taxpayer wished to challenge an assessment.[215]

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[207] *Capstone 556 (Pty) Ltd v Commissioner: South African Revenue Service and Another, Kluh Investments (Pty) Ltd v Commissioner: South African Revenue Service and Another* (26078/2010, 8274/2011) [2011] ZAWCHC 297; 2011 (6) SA 65 (WCC) (22 June 2011).
[208] *Metcash Trading Ltd v Commissioner: South African Revenue Service and Another* (CCT3/00) [2000] ZACC 21; 2002 (4) SA 317; 2002 (5) BCLR 454 (24 November 2000).
[209] *Metcash Trading Ltd v Commissioner: South African Revenue Service and Another* (CCT3/00) [2000] ZACC 21; 2002 (4) SA 317; 2002 (5) BCLR 454 (24 November 2000).
[210] Croome & Olivier, 2010, p. 37.
[211] *Metcash Trading Ltd v Commissioner: South African Revenue Service and Another* (CCT3/00) [2000] ZACC 21; 2002 (4) SA 317; 2002 (5) BCLR 454 (24 November 2000).
[212] *Deacon v Controller of Customs and Excise* 1999 (2) SA 905 (SE)
[213] Klue *et al*, 2009, s 3.22.
[214] *Shell's Annandale Farm (Pty) Ltd v Commissioner: South African Revenue Service* 2000 (3) SA 564 (C).

In the case of *Carephone v Marcus NO and others*[216] Froneman DJP indicated the following regarding a test for reasonableness*:*

> It seems to me that one will never be able to formulate a more specific test other than, in one way or another, asking the question: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at?

The 'pay-now-argue-later' provisions are by law of general application and exist in a number of open and democratic societies.[217] It can also be considered reasonable and justifiable as SARS is required to ensure the efficient collection of tax to fund the proper functioning of government.[218] If the taxpayer is successful in his appeal and has already paid the taxes he is disputing, complying with s 164 of the Act,[219] the taxpayer will be refunded together with interest on the overpayment.[220]

On the other hand, if SARS decides to enforce the payment of tax unreasonably pending the hearing of a tax appeal or denies a taxpayers' request for the suspension of payment without exercising the necessary discretion, the taxpayer may consider taking the action to court as SARS would be undertaking administrative action that is not lawful, reasonable and procedurally fair.[221] If the taxpayer can show that SARS acted unreasonably, a court may set SARS' decision aside.[222] The Commissioner must properly exercise his discretion and a taxpayer can challenge the exercise of that discretion, or failure to exercise such discretion in the courts[223] in line with his s 33 constitutional right.

Where SARS may apply for a civil judgment for the recovery of tax and may not give the taxpayer prior notice if such notice would prejudice the collection of tax. SARS may also institute sequestration, liquidation or winding-up proceedings of a person for a tax debt whether or not that person is in the Republic (ss 172 - 178 of the Act).

The recovery of tax provisions are now contained in Chapter 11 of the Act and replace s 91 of the Income Tax Act with some changes.

Section 172 of the Act states that if a taxpayer fails to pay tax when it is payable, SARS may file with the clerk or registrar of a competent court a certified statement setting out the amount of tax payable and the effect of filing thereof must be treated as a civil judgment for the recovery of tax.[224]

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[215] *Metcash Trading Ltd v Commissioner: South African Revenue Service and Another* (CCT3/00) [2000] ZACC 21; 2002 (4) SA 317; 2002 (5) BCLR 454 (24 November 2000).
[216] *Carephone v Marcus NO and others* (JA52/98) [1998] ZALAC 11 (1 September 1998).
[217] Opinion prepared by BJ Arnold at para B1.3.2 - B1.3.4 of Annexure H to the affidavit filed by the Commissioner for Inland Revenue at CCT/22/96 cited in Croome, B.J., 2010, *Taxpayers' Rights in South Africa*, Juta & Co, Ltd, Cape Town, p. 39.
[218] Croome, 2010, p. 39.
[219] Tax Administration Act 28 of 2011, s 164.
[220] Croome, 2010, p. 40.
[221] Croome & Olivier, 2010, p. 226.
[222] Croome & Olivier, 2010, p. 226.
[223] Croome & Olivier, 2010, p. 226.
[224] Tax Administration Act 28 of 2011, s 174.

The previous s 91 of the Income Tax Act did not require SARS to inform the taxpayer of the filing of the judgment whilst the new s 172 of the Act indicates that SARS may apply for a civil judgment only after giving the taxpayer at least 10 business days' notice. SARS is not required to give the taxpayer notice where SARS is satisfied that giving such notice would prejudice the collection of tax.

The previous s 91(1)(*b*) of the Income Tax Act allowed for the filing of a judgment if a person fails to pay any tax or any interest, when such tax or interest becomes due or is payable by him. The new s 172(1) of the Act allows for the filing of a judgment if a person fails to pay tax only when it is payable, therefore omitting the requirement for the tax to become due.

The word 'payable' was considered in the case of *Singh v Commissioner: South African Revenue Service*[225] in the context of the VAT Act. It was stated that:

> The Act does not couple the word due and payable, in s 40, with and. They are distinguished by or. It follows that a separate meaning must be given to the two terms…'due' must be given, in s 40 of the Act, the meaning of ' . . . a liquidated money obligation presently claimable by the creditor for which an action could presently be brought against the debtor'. 'Payable' in order to distinguish it from 'due' must be given the meaning of a ' . . . future or contingent liability.

The court also indicated that:

> Pending finalisation of the objection procedures the respondent (SARS) may not apply for judgment in terms of s 40(2)(a). Pending such finalisation, the amount in dispute is neither due, because it is not immediately claimable: the obligation to pay is suspended pending the finalisation of the objection procedures. The amount is also not payable, because, not being finalised, it is not immediately but only contingently payable.[226]

In terms of common law, the court will only grant a judgment for the payment of a debt when the amount of debt is certain and not subject to further determination.[227] As such, SARS may be attempting to obtain a judgment against a taxpayer before the debt becomes an unconditional obligation.

Section 172(2) of the Act further states that SARS may file the statement irrespective of whether or not the amount of tax is subject to an objection and appeal.

In the case of *Mokoena v Commissioner: South African Revenue Service,*[228] SARS obtained judgment against the taxpayer based on the estimated assessment, despite the taxpayer having raised an objection against the assessment. The following was stated about the old s 91 of the Income Tax Act, the powers conferred on SARS and the issuance of the judgment pending an objection and appeal:

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[225] *Singh v Commissioner: South African Revenue Service* (500/2001) [2003] ZASCA 31 (31 March 2003).
[226] *Singh v Commissioner: South African Revenue Service* (500/2001) [2003] ZASCA 31 (31 March 2003).
[227] Lewis, A., 2013, 'Recovery of taxes a constitutional problem for SARS', in *SAIT South African Institute of Tax Professionals,* viewed 17 November 2014, from <http://www.thesait.org.za/news/119609/Recovery-of-Taxes-A-Constitutional-Problem-for-SARS.htm>.
[228] *Mokoena v Commissioner: South African Revenue Service* (05/20445) [2010] ZAGPJHC 79; 2011 (2) SA 556 (GSJ) (31 August 2010).

> While it is clearly competent in terms of the provisions...for the Commissioner to demand and collect even through an appointed agent payment of the assessed capital sum… it is not done under a judgment but by reason of the acceptance of the pay now argue later principle adopted in section 88(1) read with sections 99 and 100 of the IT Act. It is self-evidently incompetent, having regard to the rights of objection and appeal, to obtain judgment in the interim. It is inconsistent with the framework of the Act and its provisions, e.g. the express right to collect tax despite an objection and appeal would be unnecessary if judgment could be obtained in the interim. Since the judgment could not be lawfully obtained having regard to the objection that was noted and not finalised, it is a nullity and falls to be set aside.

Section 177 (2) of the Act states that SARS may institute proceedings for the sequestration, liquidation or winding-up of a person for a tax debt whether or not the person is present in the Republic or has assets in the Republic.

In the case of *Oceanic Trust Co. Ltd NO v Commissioner: South African Revenue Service,*[229] the taxpayer sought a declaratory order that it was not a resident of South Africa and did not carry on a business in South Africa through a permanent establishment.[230] SARS had raised an assessment of R1.5 billion on the basis that the taxpayer's place of effective management was in South Africa. SARS appointed the taxpayers South African bank as an agent under the previous s 99 of the Income Tax Act and the bank paid R20 million to SARS. SARS then sought to recover the outstanding amount in terms of the previous s 91(1)(*b*) of the Income Tax Act against which the taxpayer made an urgent application to the court.[231] This taxpayer may have been resident of Mauritius and not conducted business through a place of effective management in South Africa, but until the taxpayers objection and appeal was considered, the taxpayer was out of pocket of R20 million and subject to civil judgment given the previous s 91(1)(*b*) of the Income Tax Act.

Section 177(3) of the Act states that if the tax debt is subject to an objection and appeal, the proceedings (for sequestration, liquidation or winding-up proceedings) may only be instituted with leave of the court before which the proceedings are brought.

In the case of *Commissioner: South African Revenue Service v Miles Plant Hire (Pty) Ltd,*[232] the court was required to decide on whether s 177(3) of the Act requires that, when SARS seeks an order for the winding-up of a taxpayer, there must be two separate applications – first an application for leave to institute winding-up proceedings and next if the leave is granted, whether there must be a further application for the actual winding up of the taxpayer.[233] The court stated that 'discretion is best exercised once, with full knowledge of all the relevant facts and circumstances.'[234] The court indicated that the term 'the proceedings may only be instituted with the leave of the court before which the proceedings are brought' means that the disputed tax debt is not recoverable under the 'pay-now-argue-later' rule during winding-up proceedings, unless the court

[229] *Oceanic Trust Co. Ltd NO v Commissioner: South African Revenue Service* 2011 74 SATC 127 22556/09 (13 June 2011).
[230] Brinker, E. & Louw, H., 2011, 'Challenging Environment for Taxpayers', in *DLA Cliffe Dekker Hofmeyr Tax Alert,* viewed 08 December 2014, from <http://www.cliffedekkerhofmeyr.com/export/sites/cdh/news/files/CDH-Tax-Alert-01-July-2011.pdf>. p. 3.
[231] Brinker & Louw, 2011, p. 3.
[232] *Commissioner: South African Revenue Service v Miles Plant Hire (Pty) Ltd* 2014 (3) SA 143 (GP).
[233] Cliffe Dekker Hofmeyr, 2014, 'Setting aside business rescue', in *SAICA Integritax Issue 173,* viewed 04 December 2014, from <http://www.saica.co.za/integritax/2014/2277.Setting_aside_business_rescue.htm>.
[234] Rogers, C., 2014, 'Interpretation of the Tax Administration Act in the context of SARS' powers to recover tax', in *Tax ENSight,* viewed 23 November 2014, from <https://www.ensafrica.com/news/interpretation-of-the-Tax-Administration-Act-in-the-context-of-SARS-powers-to-r?Id=1468&STitle=tax%20ENSight>.

before which those proceedings serve, permits it. The court upheld SARS' claim that two separate applications are not required.

This issuance of a civil judgment will amount to administrative action and will be subject to the s 33 constitutional right to just administrative action read together with the provisions of PAJA.[235] The *SARS Guide*[236] indicates that in certain provisions, the Act limits administrative fairness rights, as permitted under PAJA such as where SARS is not required to give the taxpayer prior notice of an application for a civil judgment for the recovery of tax if SARS is satisfied that giving notice would prejudice the collection of tax.[237]

In an opinion prepared by BJ Arnold of Canada for the Commissioner for Inland Revenue, he stated that:

> Section 91 of the Income Tax Act is both reasonable and justifiable in an open and democratic society. Moreover, the ability of the government to take collection action does not result in the denial of any constitutional rights.[238]

SARS is charged with administering the fiscal statutes and is required to enforce action to ensure the efficient collection of taxes and compliance with the tax system. In such instances where other measures have been exhausted, it is unlikely that the issuance of a judgment will impact on one's constitutional right to just administrative action.

Where the taxes have not yet been finalised, it can be argued that the issuance of civil judgment may amount to administrative action that is not lawful, reasonable or procedurally fair. SARS is still able to enforce the 'pay-now-argue-later' principle and therefore has other measures available, as opposed to issuing a civil judgment. In such instances, the taxpayer may approach the courts to challenge the civil judgment on the basis of the constitutional right to just administrative action read together with ss 3[239] and 6[240] of PAJA.

The new penalty regimes introduced where penalties can be imposed for non-compliance and understatement (ss 208- 224 of the Act).

The new penalty regimes are contained in Chapter 15 and Chapter 16 of the Act and were previously imposed under ss 75B, 76 and 80S of the Income Tax Act. The Act now provides for both administrative non-compliance penalties and understatement penalties. Administrative non-compliance penalties relate to failures to comply with administrative requirements of tax acts.[241]

[235] Promotion of Administrative Justice Act 3 of 2000, s 3(1).
[236] SARS, 2013, p. 10.
[237] SARS, 2013, p. 11.
[238] Croome, 2010, p. 37.
[239] Section 3(1) of the Promotion of Administrative Justice Act 3 of 2000 states that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.
[240] Section 6(1) of the Promotion of Administrative Justice Act 3 of 2000 states that any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.
[241] SARS, 2013, p. 73.

The significant changes are as follows:

Income Tax Act[242]		**Tax Administration Act**[243]	
Section 75B	If the Commissioner was satisfied that non-compliance existed; he *may* have imposed the appropriate penalty.[244]	Sections 210 and 213.	If SARS is satisfied that non-compliance exists, SARS *must* impose the appropriate penalty therefore does not seem to have any discretion in this regard.
Section 75B	Specified the list of non-compliances for which a penalty could be charged.[245]	Section 213	Only requires that an amount of tax was not paid as and when required under a tax act.
Section 75B	SARS had the discretion to remit the whole or a portion of an administrative non-compliance penalty imposed.[246]	Section 217	SARS may remit the penalty, up to an amount of R2 000 subject to certain conditions such as if the non-compliance is remedied within 5 business days.
Section 76	SARS at its discretion *may* impose additional tax of up to 200%, having regard to the circumstances surrounding the case.[247]	Section 222	The taxpayer *must* pay the understatement penalty.
Section 76	The Commissioner was able to remit the additional tax levied provided that he was satisfied that the taxpayer did not have any intention to evade taxation.[248]	Sections 223(3) and 224	SARS may remit a penalty imposed only for a *substantial*[249] understatement if SARS is satisfied that: • the taxpayer made full disclosure of the arrangement and • Is in possession of an opinion by a registered tax practitioner that was issued by no later than the date that the relevant return was due. There seems to be no remittance for an understatement penalty but s 224 of the Act provides that a decision by SARS not to remit an understatement penalty is

[242] Income Tax Act 58 of 1962.
[243] Tax Administration Act 28 of 2011.
[244] Croome, B. & Strydom, E., 2013, 'Commissioners Discretion to levy or remit penalties under the Tax Administration Act', in *Tax ENSight*, viewed 08 December 2014, from <https://www.ensafrica.com/news/Commissioners-discretion-to-levy-or-remit-penalties-under-the-Tax-Administratio?Id=943&STitle=tax%20ENSight>.
[245] Farrand, H. & Geldenhuys, E., 2012, 'An overview of the administrative non-compliance penalties under the Tax Administration Act', in *Tax ENSight*, viewed 23 November 2014, from <https://www.ensafrica.com/news/an-overview-of-the-administrative-non-compliance-penalties-under-the-Tax-Admini?Id=762&STitle=tax%20ENSight>.
[246] Croome & Strydom, 2013.
[247] Croome & Strydom, 2013.
[248] Croome & Strydom, 2013.
[249] According to s 221 of the Tax Administration Act 28 of 2011, substantial understatement means a case where the prejudice to SARS or the *fiscus* exceeds the greater of 5% of the amount of tax properly chargeable or refundable under a tax Act for the relevant period, or R1 million.

			subject to objection and appeal.

The new penalty regime can be regarded as more transparent and easier to understand.[250] At the same time, it provides for much less discretion by SARS, resulting in little or no reasonability being applied regarding the enforcement of a penalty. The instances where SARS may remit penalties have been considerably limited compared to the previous sections. The new penalty regime also has a much wider application, adopting a 'catch-all' attitude.

Should the taxpayer make an error when completing his tax return resulting in a substantial understatement, the taxpayer may not be able to have the penalty remitted under s 223(3) of the Act as the taxpayer would not have obtained the necessary tax opinion.[251] In the *2013 Budget Review,*[252] it was stated that the understatement penalty provisions will be refined and relief will be provided for bona fide errors.

In effecting the previous s 76 of the Income Tax Act, SARS was required to take cognisance of all relevant factors before imposing a penalty, such as the taxpayer's ability to pay, the effect that the penalty had on the taxpayer and the extenuating circumstances involved.[253] In ITC 1576,[254] the tax court indicated that the penalty imposed should not attempt to burden the taxpayer to such an extent that he cannot continue to be an economically effective member of the community.[255] In ITC 1331,[256] it was indicated that no general rule can be laid down for penalties and that each case has to be decided on its own merits and this view was confirmed in the case of *KBI v Mabotsa.*[257] In ITC 1430,[258] it was indicated that three factors place a role in deciding the extent of the penalty: 'punishment of the taxpayer, the deterrent effect on the taxpayer himself and the deterrent effect on others'. All of these cases indicate, that the under s 76 of the Income Tax Act, a level of discretion was required for the imposition of a penalty. The removal of this discretion from the new penalty sections is a cause for concern. This can also result in more than one penalty being applied to the same instance of non-compliance, again being applied without any discretion.[259]

The imposition of a penalty by SARS will constitute an administrative action. Fiscal statutes around the world contain provisions where the revenue authority can impose fines and penalties to improve taxpayer compliance, change behaviour and therefore ultimately increase revenue collection.[260] As such, penalties can be considered reasonable and necessary in order to ensure the timeous collection of taxes and will not construe a violation of the right to just administrative action.

[250] Ger, B., 2013, 'Overview of SARS new penalty regime', in *KPMG Research Tax and Legal Publications*, viewed 08 December 2014, from <http://www.kpmg.com/za/en/issuesandinsights/articlespublications/tax-and-legal-publications/pages/overview-of-sars-new-penalty-regime.aspx>.
[251] Croome & Strydom, 2013.
[252] National Treasury, 2013, *Budget Review,* Pretoria, South Africa, p. 63.
[253] Croome & Olivier, 2010, p. 174.
[254] ITC 1576 [1992] 56 SATC 225, cited in Croome & Olivier, 2010, p. 178.
[255] Croome & Olivier, 2010, p. 177.
[256] ITC 1331 [1980] 43 SATC 76, cited in Croome & Olivier, 2010, p. 178.
[257] *KBI v Mabotsa* 1993 55 SATC 98, cited in Croome & Olivier, 2010, p. 178.
[258] ITC 1430 [1987] 50 SATC 51, cited in Croome & Olivier, 2010, p. 178.
[259] Ger, 2013.
[260] Croome & Olivier, 2010, p. 188.

On the other hand, the lack of discretion in applying penalties or failure to remit a penalty where it may have been incorrectly or unfairly imposed or that multiple penalties may be applied to the same offence may have a severe financial impact on the taxpayer and may construe administrative action that is not lawful, reasonable or procedurally fair.

In such instances, the taxpayer should request reasons for the imposition of the penalties as he is entitled to under the provisions of PAJA. In terms of s 3(2)(b)(i) of PAJA, 'fair administrative procedure' expressly requires that an administrator gives adequate notice of 'proposed' administrative action together with a reasonable opportunity to make representations. In *Minister of Safety & Security v Moodley,*[261] the court confirmed what was mentioned in *Administrative Law in South Africa* by Hoexter:[262]

> Hoexter rightly states that notice of impending administrative action to an affected party is essential in South African law. Turning to the adequacy of the required notice the learned author suggests that it implies sufficient information to enable a person to exercise his or her rights. She states the following:
> As far as information about the proposed action is concerned, it seems clear that its nature and purpose must be described with sufficient particularity, or the right to make representations will be illusory rather than real.[263]

In the case *of Trend Finance (Pty) Ltd and Another v Commissioner: South African Revenue Service and Another,*[264] where SARS had determined that there had been an underpayment of Customs Duty and VAT and imposed penalties regarding the underpayment, it was stated:

> As neither of the applicants nor their attorney possessed any knowledge that the Controller considered exercising the said discretion against them, and were furthermore not afforded any opportunity to make representations thereanent…I incline to the view that the requirements of procedural fairness were violated. The failure to have notified the applicants that the Controller was considering exercising his discretion against the applicants and without having given them an opportunity to make representations beforehand, clearly offended against the mandatory requirements of subs 3(2)(b)(a) and (b) of PAJA.

The Australian case of *Ansett Transport Industries (Operations) (Pty) Ltd and Another v Wraith and Others*[265] was quoted in the case of *Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd,*[266] where the court had to decide whether the Minister had supplied sufficient reasons.[267] The Australian case stated that:

> the decision-maker needs to explain his decision in a way that will enable a person aggrieved to say, in effect: 'Even though I may not agree with it, I now understand why the decision went against me. I am now in the position to decide whether that decision has involved an unwarranted finding of fact, or an error of law which is worth challenging'… The decision-maker should set out his understanding of the relevant law, any finding of fact on which his conclusions depend (especially if those facts have been in dispute) and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation.

[261] *Minister of Safety & Security v Moodley* (429/10) [2011] ZASCA 93; [2011] 4 All SA 47 (SCA) (31 May 2011).
[262] Klue *et al*, 2014, s 3.26.
[263] Hoexter, C., *Administrative Law in South Africa,* 2007, p. 333, quoted In *Minister of Safety & Security v Moodley* (429/10) [2011] ZASCA 93; [2011] 4 All SA 47 (SCA) (31 May 2011).
[264] *Trend Finance (Pty) Ltd and Another v Commissioner: South African Revenue Service and Another* 2005 67 SATC 334.
[265] *Ansett Transport Industries (Operations) (Pty) Ltd and Another v Wraith and Others* (1983) 48 ALR 500 cited in Croome, 2010, p. 227.
[266] *Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd,* 2003 (6) SA 407 (SCA).
[267] Croome, 2010, p. 227.

If the reasons provided by SARS are not adequate, the taxpayer should follow the objection and appeal process contained in the Act to dispute the penalties. The *SARS Guide*[268] also indicates that the burden of proof for the basis of imposing an understatement penalty will lie with SARS. These objections raised by the taxpayer can take place after the penalty was imposed and still construe just administrative action as was indicated in the case of *Mamabolo v Rustenburg Regional Local Council:*[269] 'In certain instances a court may accept as sufficient compliance with the rules of natural justice a hearing held after the decision has been taken'.

Should the taxpayer exhaust the objection and appeal avenues available in the Act and still not be satisfied with the imposition of the penalty or the failure to remit a penalty by SARS, the taxpayer can approach the court on the basis of the rights contained in PAJA as the imposition of a penalty or failure to remit a penalty will construe administrative action that materially and adversely affects the rights of the taxpayer and is therefore required to be procedurally fair.

[268] SARS, 2013, p. 47.
[269] *Mamabolo v Rustenburg Regional Local Council* (229/98) [2000] ZASCA 45; 2001 (1) SA 135 (SCA); [2000] 4 All SA 433 (A) (26 September 2000).

Chapter 6 – The remedies available to the taxpayer

Taxpayers' rights have changed tremendously since the introduction of the Constitution. At the same time, the powers of SARS also keep increasing. One of the objectives of the Act is to promote a balance between the powers and duties of SARS and the rights and obligations of taxpayers.[270] It is therefore necessary to determine what remedies are available to the taxpayers when dealing with SARS and whether these remedies provide the taxpayer with cost-effective, timeous and appropriate remedial action.

The office of the Tax Ombud (ss 14 - 21 of the Act).

The Act establishes the office of the Tax Ombud and indicates that his mandate is to review and address any complaint by a taxpayer regarding a service matter or a procedural or administrative matter arising from the application of the provisions of a tax act by SARS. The *SARS Guide* indicates that the Tax Ombud will provide taxpayers with a cost effective mechanism to address administrative difficulties.[271]

A media release issued by SARS indicated that the Tax Ombud's office draws on comparable institutions in Canada and the United Kingdom.[272] According to the Canadian *Taxpayers' Ombudsman Annual Report:*[273]

> An ombudsman is an independent and impartial officer who deals with complaints about an organization or agency…because complaints to an ombudsman are confidential, he or she may hear about issues that the organization is not aware of or simply not motivated to resolve.

This indicates that the office of the Tax Ombud should be independent and that information passed on to the Tax Ombud is to be treated with confidentiality.

The *Government of Canada Office of the Taxpayers' Ombudsman ('OTO')* website[274] indicates that:

> In order to complete a full review of your service-related complaint, the OTO may need to share your personal information with the Canada Revenue Agency (CRA). In addition, the OTO may need to request personal information from the CRA to complete the review of your complaint. The shared and/or requested information is treated with confidentiality, and will only be shared and/or requested with your consent.

According to s 21(3) of the Act, the Tax Ombud may be required to disclose information to SARS to the extent required for the performance of the Tax Ombud's duties. It is unclear what type of information can be passed on to SARS or whether this information can then be used by SARS in proceedings against the taxpayer.[275] It

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[270] SARS, 2013, p. 4.
[271] SARS, 2013, p. 15.
[272] SARS, 2014b, 'Minister Gordhan officially launches Tax Ombud's office', in *SARS Media Releases,* viewed 10 November 2014, from <http://www.sars.gov.za/Media/MediaReleases/Pages/7-April-2014---Minister-Gordhan-Officially-Launches-Tax-Ombud%E2%80%99s-Office.aspx>.
[273] Minister of Public Works and Government Services Canada, 2009, *Taxpayers' Ombudsman Annual Report 2008-2009,* Ottawa, Canada. p. 8.
[274] Government of Canada, 2013, 'Privacy Notice for Electronic Complaint Form', in *Office of the Taxpayers' Ombudsman*, viewed 08 December 2014, from <http://www.oto-boc.gc.ca/sbmttng/prvcyntc-eng.html>.
[275] Mandy & Mollagee (PWC), 2012, p. 19.

therefore seems as though the mandate for the South African Tax Ombud differs from that of the Canadian Ombud under which it was modelled. The requirement that the Tax Ombud may pass on information to SARS may also impact on the Tax Ombud's ability to resolve a matter efficiently and effectively.[276]

The Act indicates that the Tax Ombud will be appointed by the Minister for a renewable term of three years who will also determine his remuneration and allowances. The Tax Ombud may also be removed by the Minister for misconduct, incapacity or incompetence. Section 15 of the Act further states that the staff of the office of the Tax Ombud must be employed in terms of the SARS Act[277] and seconded to the office of the Tax Ombud at the request of the Tax Ombud in consultation with the Commissioner. The expenditure connected with the functions of the office of the Tax Ombud is also paid out of the funds of SARS. All of the above factors question the independence of the Tax Ombud from SARS, which is one of the characteristics of an Ombudsman.

In the case of *Justice Alliance of South Africa v President of Republic of South Africa and Others*,[278] it was stated that:

> It is well established that a non-renewable term of office is a prime feature of independence… Non-renewability fosters public confidence in the institution of the judiciary as a whole, since its members function with neither threat that their terms will not be renewed nor any inducement to seek to secure renewal.

The remuneration for the judiciary is also determined by the Judges' Remuneration and Conditions of Employment Act[279] to ensure that executives do not affect the independence of the judiciary by determining remuneration and benefits.[280] Both of these factors do not seem to have been taken into account with regards to the Tax Ombud.

Section 17 of the Act sets out the limitations on authority and indicates that the Tax Ombud may not review:

- legislation or tax policy
- SARS policy or practise other than a service, procedural or administrative matter
- a matter subject to objection and appeal, except for an administrative matter or
- a decision of, or matter before the Tax Court.

Section 18(4) of the Act indicates that the Tax Ombud may only review a request if the available complaints resolution mechanisms of SARS have been exhausted, unless there are compelling circumstances for not doing so. There is no indication as to what the internal complaints mechanisms are or when they can be considered to have been exhausted. The factors to consider regarding compelling circumstances contained in

[276] Mandy & Mollagee (PWC), 2012, p. 19.
[277] South African Revenue Service Act 34 of 1997.
[278] *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* (CCT 53/11, CCT 54/11, CCT 62/11) [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC) (29 July 2011).
[279] Judges' Remuneration and Conditions of Employment Act 47 of 2001.
[280] Mandy & Mollagee (PWC), 2012, p.17.

s 18(5) of the Act also do not seem to provide definitive guidance as to when compelling circumstances exist. The *SARS Guide*[281] similarly does not provide much guidance in this regard.

Section 20(2) of the Act provides that the Tax Ombud's recommendations are not binding on taxpayers or SARS.

These provisions question whether the Tax Ombud will provide an effective and timeous remedy to the taxpayer in his dealings with SARS. As the recommendations of the Tax Ombud are not binding on taxpayers or SARS, it does not seem as though they will provide much relief as taxpayers will still have to approach the courts to obtain remedial action. The decisions of other Ombudsmen, such as the Ombudsmen for Short-term Insurance,[282] Long-Term Insurance[283] and Banking Services,[284] operate independently and their decisions do have determinative powers. They may also make monetary awards and their decisions are given the same effect as a court order.[285] In order to refer the tax matter to court, as the Tax Ombud does not have determinative powers, the taxpayer will first be required to exhaust all internal remedies now including approaching the Tax Ombud. This will result in a longer process and possibly added costs.[286] These factors indicate that the Tax Ombud may not provide taxpayers with cost-effective, timeous and appropriate remedial action and the taxpayer may still be required to approach the court to obtain remedial action.

Dispute Resolution Procedures (ss 101 – 150 of the Act).

The dispute resolution procedures are now contained in Chapter 9 of the Act. The Minister may, by public notice, make 'rules' governing the procedures to lodge an objection and appeal against an assessment or 'decision' and the conduct and hearing of an appeal before a Tax Board or a Tax Court.[287] New rules were promulgated in the *Government Gazette 37819* on the 11 July 2014.[288] These are more comprehensive than the old rules with some 68 rules whilst the old rules comprised of 29 rules.[289] These new rules replace the previous rules under s 107A of the Income Tax Act. Some of the changes include:[290]

- SARS has 45 days to provide the taxpayer with reasons for an assessment where adequate reasons were not provided – previously 60 days

[281] SARS, 2013, p. 16.
[282] The Ombudsman for Short-Term Insurance, 2012, 'What We Do', in *The Ombudsman for Short-Term Insurance*, viewed 08 December 2014, from <http://www.osti.co.za/ombudsman-about.html>.
[283] Ombudsman for Long-Term Insurance, 2013, 'The Ombudsman's Council', in *Ombudsman for Long-Term Insurance*, viewed 08 December 2014, from <http://www.ombud.co.za/about-us/council>.
[284] Ombudsman for banking services, 2014, 'Independence of the Ombudsman', in *Ombudsman for Banking Services*, viewed 08 December 2014, from <http://www.obssa.co.za/index.php/about-us/independence-obs>.
[285] Comment by Faber, P., Senior Manager National Tax Technical at PricewaterhouseCoopers, quoted in Lamprecht, I., 2013, 'Tax Ombud another toothless entity', in *Moneyweb*, viewed 08 December 2014, from <http://www.moneyweb.co.za/moneyweb-south-africa/tax-ombud-another-toothless-entity>.
[286] Comment by Retief, E., chairperson of the National Tax and Stakeholders Committees at the South African Institute of Professional Accountants (SAIPA) 2013, quoted in Lamprecht, 2013.
[287] Tax Administration Act 28 of 2011, s 103.
[288] Republic of South Africa, 2014, Minister of Finance in the *National Government Gazette Vol. 589*, No. 37819, Pretoria, South Africa.
[289] Croome, B.J., 2014a, 'New tax dispute resolution rules promulgated', in *Dr Beric Croome,* viewed 22 November 2014, from <http://www.bericcroome.com/2014/09/new-tax-disputes-resolutions-promulgated.html>.
[290] Paulsen, N. & Nyanin, G., 2014, 'SARS Guide on the new dispute resolution rules', in *Cliffe Dekker Hofmeyr Tax Alert*, viewed 06 December 2014, <from http://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2014/tax/downloads/Tax-Alert-31-October-2014.pdf>, p. 1.

- SARS has 60 days after the delivery of a taxpayer's objection to notify the taxpayer of the outcome of the objection – previously 90 days and
- The introduction of 'test cases' which gives effect to s 106(6) of the Act. The SARS official may designate an objection or appeal as a test case and similar cases are stayed until the test case is decided.[291] A test case will be heard in a Tax Court.[292]

A taxpayer can now elect to have their disputes resolved according to the alternative dispute resolution proceedings or where the tax in dispute does not exceed R500 000, the taxpayer can proceed to the Tax Board, if SARS and the taxpayer agree, which is less costly and less formal than the Tax Court.[293]

The new rules have initiated some noteworthy changes with regards to the treatment of taxpayers in their dealings with SARS. The new time frames proposed aim to provide taxpayers with a more timeous resolution in their dispute resolutions with SARS. A criticism of the old rules was that SARS often failed to adhere to the time frames contained therein. In order for these new rules to provide a cost-effective, appropriate and timeous remedial action, SARS will need to adhere to these new timelines.

SARS Service Monitoring Office.[294]

The SARS Service Monitoring Office ('SSMO') was launched[295] in order to deal with complaints from taxpayers of an administrative nature.[296] According to the SARS website,[297] the SSMO will fast track and follow up on complaints on procedural matters that cannot be resolved. The SSMO does not issue binding directives on how to resolve complaints and the SSMO has no legal authority to direct SARS to compensate a taxpayer for wasted costs due to SARS' conduct.[298] The SSMO will not look into issues where the complaints have been referred to the Public Protector or matters that have been before the courts or complaints about government or SARS policy and changes to legislation.[299] The *Annual Report* issued by SARS does not comment on the type of complaints received by the SSMO or how they are dealt with.[300] If the SSMO was able to issue directives on how complaints are to be resolved or suggest changes to legislation or the manner adopted by SARS, derived from the type of complaints received, the SSMO would probably be a more

[291] Croome, 2014a.
[292] Paulsen & Nyanin, 2014, p. 2.
[293] Croome, 2014a.
[294] SARS, 2014a.
[295] SARS, 2014a.
[296] Edward Nathan (Pty) Ltd, 2005, 'What remedy does a taxpayer have when SARS unduly delays a refund', in *SAICA Integritax Issue 72*, viewed 08 December 2014, from <https://www.saica.co.za/integritax/2005/1324_What_remedy_does_a_taxpayer_have_when_SARS_unduly_delays_a_refund_.htm>.
[297] SARS, 2014a.
[298] Croome, 2010, p. 310.
[299] SARS, 2014a.
[300] SARS, 2005 / 06, *Annual Report,* Lehae La SARS, Pretoria, South Africa, SARS, 2012 / 13, *Annual Report,* Lehae La SARS, Pretoria, South Africa, SARS, 2013 / 14*, Annual Report,* Lehae La SARS, Pretoria, South Africa.

impactful force in enabling taxpayers to resolve their disputes with SARS in a timeous, cost effective and appropriate manner, which is currently not the case.

The Internal Revenue Service in the United States of America recently (10 June 2014) adopted a Taxpayer Bill of Rights that is intended to become the cornerstone document providing the country's taxpayers with a better understanding of their rights.[301] This Bill of Rights combines the various existing rights imbedded in the Internal Revenue Code into ten categories to make them more visible and easier for taxpayers to find.[302] Establishing a Taxpayer Bill of Rights should also be considered by SARS to enable taxpayers to clearly understand their rights.

The Constitution.

The Bill of Rights contained in the Constitution[303] enshrines the rights of all people in South Africa.[304] Section 38 of the Constitution provides that anyone has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened and the court may grant appropriate relief. Section 172 of the Constitution further states that when a court is deciding on a constitutional matter within its power, a court must declare any law or conduct that is inconsistent with the constitution as invalid to the extent of its inconsistency, which needs to be confirmed by the Constitutional Court. The cost involved in approaching the courts though, is extremely high and beyond the pockets of most taxpayers.

The Public Protector – s 182 of the Constitution.

The Public Protector is appointed in terms of Chapter 9 of the Constitution.[305] The Public Protector is mandated to investigate any conduct in state affairs or in public administration in any sphere of government that is alleged or suspected to be improper or to result in any impropriety or prejudice; to report on that conduct and take appropriate remedial action.[306] The conduct of SARS therefore falls within the ambit of the Public Protector. This is also highlighted by the SSMO which states that the SSMO will not look into issues where the complaints have been referred to the Public Protector[307] and the website of the Tax Ombud[308] which indicates that 'where a taxpayer remains dissatisfied with a matter after having exhausted the SARS internal complaints process and the Tax Ombud complaints resolution mechanism, the taxpayer may lodge a complaint with the Public Protector'. Taxpayers' have historically not approached the Public Protector as they perceive the Public Protector to exist to investigate corruption in government and not taxation related issues or complaints against SARS.[309] The Broadcasting Complaints Commission of South Africa[310] is often heard

[301] Croome, B.J., 2014c, 'Should the South African Revenue Service adopt a Taxpayer Bill of Rights?' in *Dr Beric Croome,* viewed 08 December 2014, from <http://www.bericcroome.com/2014/07/should-south-african-revenue-service.html>.
[302] Croome, 2014c.
[303] Constitution of the Republic of South Africa Act 108 of 1996, Chapter 2.
[304] Constitution of the Republic of South Africa Act 108 of 1996, Chapter 2.
[305] Public Protector South Africa, 2009, 'History and Background to the Office of the Public Protector', in *Public Protector South Africa*, viewed 08 December 2014, from <http://www.pprotect.org/about_us/history_background.asp>.
[306] Constitution of the Republic of South Africa Act 108 of 1996, s 182.
[307] SARS, 2014a.
[308] Office of the Tax Ombud n.d., 'Make a complaint – Complaints about us', in *Office of the Tax Ombud*, viewed 08 December 2014, from <http://www.taxombud.gov.za/complaints-about-us.html>.
[309] Croome, 2010, p. 311.
[310] Broadcasting Complaints Commission of South Africa n.d., 'BCCSA Constitution', *in Broadcasting Complaints Commission of South Africa*, viewed 08 December 2014, from <http://www.bccsa.co.za/index.php?option=com_content&view=article&id=12>.

stating that if its broadcasting licensees do not adhere to the Code of Conduct, the public should contact the Broadcasting Complaints Commission. SARS could adopt similar practices to make the public aware of the Public Protector's Office as one of the methods available to the taxpayer to obtain an appropriate remedy if they do not obtain relief from the measures provided by SARS.

The Human Rights Commission –s 184 of the Constitution.
The Human Rights Commission was also established in terms of Chapter 9 of the Constitution. The Human Rights Commission is the national institution established to support constitutional democracy.[311] Like the Public Protector, taxpayers are not aware of their right to approach the Human Rights Commission although it can be argued that taxation is a specialist area and it is unlikely that an effective or appropriate remedy for taxation will be obtained from the Human Rights Commission.

PAJA, being legislation enacted to give effect to constitutional rights.

In order for PAJA to be applicable, there must be decision or a failure to take a decision, which is of an administrative nature, made in terms of an empowering provision, by an organ of state, that adversely affects rights and has a direct external legal effect.[312] Section 7(2) of PAJA indicates that no court or tribunal shall review an administrative action in terms of this act unless any internal remedy provided for in any law has first been exhausted. Therefore the taxpayer will have to exhaust the SARS internal remedies first before approaching the courts on the basis of PAJA. In order for PAJA to apply, the decision needs to be the final one. If the making of a decision requires SARS or the taxpayer to take several steps or decisions, and only the last step adversely affects taxpayers rights and has a legal effect, then only that last step is an administrative action that can be taken to court for judicial review.[313]

In order to enforce rights under the PAJA, the taxpayer will have to approach the courts for a judicial review and the application for judicial review must be made within 180 days of the date on which all internal remedies were exhausted. Approaching the courts is a costly and time-consuming process. It is therefore unlikely that a remedy under PAJA will be a cost-effective and timeous one.

Where a taxpayer cannot afford approaching the courts, SARS should consider providing free or reduced cost assistance or legal aid to these taxpayers, as is the case with criminal cases.[314] This will enable approaching the courts to be a more practical and cost-effective solution where all other avenues have been exhausted, especially as the rights contained in the Constitution and PAJA offer the greatest protection[315] but are often too costly for taxpayers.

[311] Human Rights Commission n.d., 'About the SAHRC', in *Human Rights Commission*, viewed 08 December 2014, from <http://www.sahrc.org.za/home/index.php?ipkContentID=1&ipkMenuID=28 HRC>.
[312] Currie & Klaaren, 2001, p. 206.
[313] Currie & Klaaren, 2001, p. 210.
[314] Croome, 2010, p. 320.
[315] Croome, 2010, p. 321.

Chapter 7 - Conclusion

The Constitution is the supreme law of the land therefore the Act needs to uphold the rights contained therein. These rights are not absolute and can be limited in terms of the limitation provisions contained in s 36 of the Constitution. Where the provisions of the Act appear to be in conflict with the Constitution, these limitation provisions need to first be considered, to determine whether there is a valid limitation of the right.

When considering the constitutional right to privacy, the disclosure of information from the Tax Ombud to SARS may be construed reasonable and justifiable under specific circumstances and the undertaking of physical inspections at taxpayers' premises may also be construed reasonable and justifiable as long as they take place for their intended purpose. SARS should nonetheless consider amending the wording of the legislation, more in line with what was previously contained in s 74B of the Income Tax Act. Whilst an audit has been accepted as a reasonable and justifiable violation of a taxpayers' right to privacy, the provisions regarding self-incrimination may be excessively widely framed and may construe a breach of the right to privacy that is not reasonable and justifiable if tested in the courts. The amendments to the search and seizure provisions, especially the warrantless search and seizure, may be construed as not reasonable and justifiable in an open and democratic society if tested in the courts.

When considering the constitutional right to property, the deprivation of property via a preservation order may be considered reasonable and justifiable where there are no less restrictive means available to achieve the same purpose. SARS' right of recovery against a third party may be considered reasonable and justifiable, but concern arises over the manner in which SARS exercises its powers. The repatriation of assets by a taxpayer in order to settle a tax debt will be subject to the legal system and therefore not amount to an arbitrary deprivation of property. Requiring a taxpayer to surrender his passport, withdrawing his authorisation to conduct business or possibly cease trading may be construed by the courts as a limitation that is not reasonable and justifiable as there may be less restrictive means to achieve the same purpose.

The right to just administrative action requires administrative action to be lawful, reasonable and procedurally fair. The issuance of a jeopardy assessment may be considered reasonable and justifiable in specific instances although clear guidelines should be provided by SARS regarding the factors to be taken into account when issuing a jeopardy assessment. The burden of proof provision is not an excuse for SARS to shift the onus to the taxpayer unnecessarily and then adopt a 'supine attitude'. Where a taxpayer requests the postponement of the payment of tax pending an objection or appeal ('pay-now-argue-later' provisions), SARS must properly exercise his discretion and a taxpayer can challenge the exercise of that discretion, or failure to exercise such discretion in the courts.[316] The issuance of a civil judgment where taxes have not yet been finalised, may not be in keeping with the right to just administrative action read together with the provisions of PAJA. Discretion needs to be exercised by SARS when implementing penalties and the Act needs to

[316] Croome & Olivier, 2010, p. 226.

expressly provide for this. Adequate reasons for the imposition of penalties also need to be provided to the taxpayer to ensure that it construes administrative action that is lawful, reasonable and procedurally fair.

It can be argued that taxpayers do not have an appropriate cost-effective and timeous remedy to resolve disputes when dealing with SARS. The shortened time frames regarding dispute resolution procedures, if adhered to, will provide taxpayers with a more timeous remedy. The establishment of the office of the Tax Ombud is a step in the right direction towards balancing the powers of SARS with the rights of taxpayers. It does nonetheless seem to lack the necessary independence and determinative powers to make this office an effective force for taxpayers. It will be interesting to see how the capability and powers of the Tax Ombud's office unravels. The most effective remedy still seems to lie in the courts, which is likely *not* to be timeous or cost-effective, often beyond the pockets of most taxpayers.

It must be noted, as was stated by *Silke*[317] in the aptly titled*: Taxpayers and the Constitution: A battle already lost,*[318]

> our courts have, as yet, been unwilling to rule against the constitutionality of any of the fiscal provisions with which they have been confronted, and these include some of the most draconian on the statute book…our courts have, up to now, taken the view, when confronted with a constitutional attack on a particular fiscal provision, that the relevant provisions of the Income Tax Act represent a legitimate expectation of a taxpayer's constitutional rights. The balance between the need of the Commissioner to recover taxes promptly and prevent a taxpayer's assets being put beyond his reach and the taxpayer's right to protection under the Constitution is a very fine one.

Therefore, in considering approaching the court, the taxpayer is advised by *Silke*[319] that 'much preparation and cost must go into a properly-prepared assault on a section of a fiscal statute, and the taxpayer is by no means assured of success.' In many of the provisions considered, the fiscal statues itself should withstand constitutional scrutiny, but the manner in which SARS exercises its statutory powers may result in the violation of constitutional rights,[320] or construe conduct which flouts the Constitution.[321] The Constitution[322] indicates that any law *or conduct* inconsistent with it is invalid. Therefore the conduct of SARS in exercising its powers also needs to conform to the spirit, purpose and rights contained in the Constitution. The taxpayer will more likely be able to succeed in approaching the court on the basis of SARS' conduct, rather than the striking down of legislation.

Chaskalson CJ stated in the case of *S and Others v Van Rooyen and Others* [323] that:

> any power vested in a functionary by the law (or indeed by the Constitution itself) is capable of being abused. That possibility has no bearing on the constitutionality of the law concerned. The exercise of the power is subject to constitutional control and should the power be abused the remedy lies there and not in invalidating the empowering statute.

[317] Jonathan Silke, Advocate of the High Court.
[318] Silke, J., 2002, 'Taxpayers and the Constitution: A battle already lost', *Acta Juridica,* 282-334.
[319] Jonathan Silke, Advocate of the High Court.
[320] Klue *et al*, 2009, s 3.42.
[321] Klue *et al*, 2009, s 3.11.
[322] Constitution of the Republic of South Africa Act 108 of 1996, Chapter 1, s 2.
[323] *S and Others v Van Rooyen and Others (*General Council of the Bar of South Africa Intervening) (CCT21/01) [2002] ZACC 8; 2002 (5) SA 246; 2002 (8) BCLR 810 (11 June 2002).

Balancing the duties and responsibilities of SARS with that of taxpayers' rights is a fine act that seems to be leaning in favour of SARS. The taxpayer needs to be aware of the rights afforded to him and the remedies available when dealing with SARS. In order to balance the scales more appropriately, it is recommended that the office of the Tax Ombud is made to be more independent from SARS and mandated to provide more determinative solutions to ensure that taxpayers are provided with a timeous, cost-effective and appropriate solution when dealing with the mighty SARS.

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