THE APPLICATION OF SECTION 105 OF THE TAA AND THE TAX COURT'S JURISDICTION TO REVIEW

By

Jana de Clerk

2631887

Submitted in partial fulfilment of the requirements for the degree of

Master of Laws by Coursework and Research Report

at the University of the Witwatersrand, Johannesburg

Supervisor

Carika Fritz

DECLARATION

I, **Jana de Clerk,** with student number **2631887**, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

ACKNOWLEDGMENTS

First and foremost, I would like to express my deepest gratitude to my supervisor, Carika Fritz, for her invaluable guidance, support, and insightful feedback throughout the entire duration of this research project. Her expertise, encouragement, and mentorship have been instrumental in the shaping of this report.

I am also immensely thankful to my parents for their unwavering love, encouragement, and support throughout my academic journey. Their belief in me, sacrifices, and constant encouragement have been a great source of motivation.

Finally, I would like to extend my appreciation to Jualeen Swanepoel for her friendship, continued support and shared commitment to academic excellence.

This research would not have been possible without the support and contributions of these individuals, and for that, I am truly grateful.

ABSTRACT

Section 105 of the Tax Administration Act 28 of 2011 sets out the forum of disputing an assessment or decision taken by the South African Revenue Service. This section provides that a taxpayer who wishes to dispute an assessment, or a ‘decision’ as described in s 104 of the Tax Administration Act, may only do so in accordance with the dispute resolution procedure contained in the Tax Administration Act, *unless* a High Court directs otherwise. Therefore, before a tax matter can be heard by the High Court, a directive first needs to be obtained. The wording of s 105 is deceptively simple, however, it is exactly its brevity which has been the cause of significant ambiguity and uncertainty amongst taxpayers, as illustrated in a host of judgments recently handed down by the Supreme Court of Appeal. An area of particular uncertainty is the scope and application of s 105 in the context of review applications brought under the Promotion of Administration Justice Act 3 of 2000 and the principle of legality. This research report seeks to untangle this web of ambiguity and endeavours to define and interpret the correct scope of s 105, particularly how it can be reconciled with the Promotion of Administrative Justice Act and the Constitution of the Republic of South Africa, 1996. In conclusion, it is argued that s 105 cannot be interpreted to apply to applications for judicial review on the basis that the Tax Court lacks jurisdiction under these circumstances. Furthermore, the quality of exceptionality introduced by case law is flawed and the omission of this standard from the wording of the section arguably implies that it was not the intention of the legislature that this standard be satisfied by taxpayers. However, it is ultimately the view of the author that the Constitutional Court's intervention is imperative to elucidate the parameters of s 105 and to establish the threshold which must be satisfied by taxpayers where this section indeed finds application.

TABLE OF CONTENTS

I. INTRODUCTION

The importance of providing for a dispute resolution framework within the tax system which allow taxpayers to challenge the decisions and actions of a revenue authority is an internationally recognised principle.[1] The taxpayers' right to appeal is regarded as fundamental to the fairness of the tax system.[2] In the South African context, the dispute resolution framework is established under Chapter 9 of the Tax Administration Act ('TAA').[3] The purpose of this Chapter is to provide for the default route which tax disputes have to follow. Stated differently, taxpayers who are aggrieved by an assessment issued by the South African Revenue Service ('SARS') or the decisions listed under s 104 of the TAA, may only dispute the relevant assessment or decision by following the dispute resolution procedures contained under Chapter 9 of the TAA. The process commences with a notice of objection (which may be preceded by a request for reasons).[4] In the event of the objection being disallowed either partially or as a whole, the taxpayer is entitled to lodge an appeal with the Tax Board or Tax Court, depending on the quantum of the tax debt in dispute.

However, there are certain deviations and exceptions, where the dispute resolution process will not take its ordinary course. Arguably, one of the most material deviations is contained in s 105 of the TAA which recognises that taxpayers may choose to resort to the High Court as the forum of first instance to dispute an assessment. That said, s 105 is written in restrictive terms and states that a taxpayer will be limited to Chapter 9 (the objection route) *unless* a High Court directs otherwise. On a cursory reading of the section, the provision is relatively straightforward. Ironically, however, the limited use of words in the section is exactly what creates its ambiguity. The manner in which taxpayers must engage the High Court to obtain its direction is uncertain. More importantly, it is not clear which requirements must be satisfied before the High Court will exercise its discretion and hear a tax matter.

The uncertainty is made apparent by a number of cases recently heard by the Supreme Court of Appeal ('SCA') including *C:SARS v Rappa Resources (Pty) Ltd*[5] ('*Rappa'*), *United Manganese of Kalahari (Pty) Ltd v C:SARS*[6] ('*UMK'*) and C:SARS v *Richards Bay Coal*

[1] South African Revenue Service: *Dispute Resolution Guide: Guide on Rules Promulgated in Terms of Section 103 of the Tax Administration Act, 2011* Issue 3 (2023) at 14.
[2] Ibid.
[3] Tax Administration Act 28 of 2011.
[4] Section 104 of the TAA.
[5] Case no 1231/2021 [2023] ZASCA 29 (24 March 2023).
[6] Case no 1231/2021 [2023] ZASCA 29 (24 March 2023).

Terminal (Pty) Ltd[7] ('*RBCT*'). The High Court judgment in *ABSA Bank v C:SARS*[8] ('*ABSA'*) was also taken on appeal to the SCA, however, as at the date of writing, the SCA's judgment on this matter is still pending.

Generally, in these and other relevant cases,[9] SARS adopts a restrictive stance. According to SARS, a taxpayer wishing to approach the High Court directly must specifically make out a case for a directive to be issued under s 105.[10] Furthermore, it must do so on the premise that the High Court route is only reserved for the utmost exceptions. In other words, no matter on what basis the taxpayer challenges the assessment (including complaints relating to procedural fairness), the Chapter 9 dispute resolution process ought to serve as the default route. The taxpayers' arguments in the relevant cases were nuanced. But generally, they hold a different view to SARS with regard to the application of s 105 in instances where decisions relating to the making of an assessment is at issue.[11] More directly, where an application is brought to challenge the making of an assessment under the Promotion of Administrative Justice Act[12] ('PAJA') or the doctrine of legality, the taxpayer may do so without going through s 105. As argued below, in these cases, the High Court is the default forum, and the Tax Court lacks jurisdiction.[13]

The judgments in *Rappa* and *UMK* were handed down on 24 March 2023 whilst *RBCT's* judgment was handed down a week later. Even though the judgments thus far were all delivered by Ponnan ADP, they are fundamentally divergent. In *Rappa* and *UMK*, the SCA essentially accepted SARS' argument that the dispute process, and ultimately the Tax Court, remains the default route in tax disputes, even if the taxpayers' grievance relates to the administrative actions of SARS and are based on PAJA or the principle of legality. In these cases, the taxpayers lost, as they pinned their arguments on the notion that s 105 was not applicable. Also, the SCA found that their alternative argument (that their cases are nevertheless deserving of a s 105 directive) was insufficient as the taxpayers failed to make out a proper case as to why the High Court should issue the direction.[14] However, 'lost' in the context of the taxpayers' High Court applications does not necessarily mean these taxpayers are left without recourse.

[7] Case no 1299/2021 [2023] ZASCA 39 (31 March 2023).
[8] [2021] ZAGPPHC 127; 2021 (3) SA 513 (GP).
[9] See *Commissioner for the South African Revenue Service v Langholm Farms (Pty) Ltd* [2019] ZASCA 163; and *Forge Packaging (Pty) Ltd v The Commissioner for the South African Revenue Service* (21634/2021) [2022] ZAWCHC 119 (13 June 2022) ('*Forge Packaging*').
[10] *Rappa* supra note 5 paras 4-5. *UMK* supra note 6 para 7.
[11] *Rappa* supra note 5 para 4 and *UMK* supra note 6 para 8.
[12] Act 3 of 2000.
[13] *UMK* supra note 6 para 8.
[14] *Rappa* supra note 5 para 24.

Although not the most desirable outcome, the dispute resolution procedure under the TAA (and therefore an appeal in the Tax Court) remains available to the taxpayers.

RBCT's judgment is more aligned with the notion that jurisdiction to hear a review application is reserved for the High Court, unless specifically assigned to another court or tribunal, and that s 105 cannot curtail a taxpayer's right to enforce their right to just administrative action. It must be noted that *RBCT's* case related to an appeal under the Customs and Excise Act ('CEA'), which falls outside the purview of the TAA. However, this is not sufficient cause for the irreconcilable judgments, as shall be illustrated in the sections that follow.

It is anticipated that the SCA will deal with the scope and substance of s 105 in *ABSA*, specifically the form and manner to request a directive, and secondly, the circumstances that would permit such a directive to be issued. In *ABSA*, the High Court issued a directive under s 105 and allowed the review to proceed without insisting on the exhaustion of internal remedies by the taxpayers.[15] The High Court in *ABSA* held that a request for a directive and the main review application may be heard concurrently and further held that a dispute which turns purely on a point of law meets the threshold for a High Court to 'otherwise direct'.

Based on this brief depiction, it is submitted that the interpretation and application of s 105 is a matter that remains unresolved, and which creates uncertainty for taxpayers. Beyond the scant wording of the section itself, the judgments handed down to date raise more questions than they answer. These judgments implicate not only the scope of s 105 in isolation but also other important legal questions such as the interplay between the TAA, PAJA, the doctrine of legality and by implication the Constitution of the Republic of South Africa[16] ('the Constitution') which establishes the right to administrative action, which is lawful, reasonable and procedurally fair. These questions relate to the High Court's inherent jurisdiction and the Tax Court's jurisdiction to adjudicate review applications in the traditional sense.

The purpose of this paper is therefore to define the scope and application of s 105 and to give a view on what the ultimate outcome of the relevant cases ought to be. The next section will consider the recent case law in more detail and define the scope and application of s 105 after the judgments were delivered by the SCA. The following section will critically assess the SCA's interpretation of the scope of s 105 with the purpose of expressing a view on the correct scope and interpretation in the context of the jurisdiction of the High Court and the Tax Court

[15] *ABSA* supra note 8 para 18.
[16] Constitution of the Republic of South Africa, 1996.

and also how s 105 ought to be reconciled with PAJA, legality and the relevant provisions of the Constitution. Flowing from this, the substantive application of s 105 will be considered with a particular focus on the quality of exceptionality which has been introduced by case law. Based on these findings, the author will proffer a view on what the correct decisions ought to be in the cases under consideration.

From the outset it is noted that this research report has only considered case law up to 30 July 2023. Therefore, any judgments which were handed down after this date were not taken into account in the views expressed herein.

II. SECTION 105 OF THE TAA

Section 105 of the TAA contains the forum of disputing an assessment or decision taken by SARS. The initial version of the section provided that taxpayers may only dispute assessments or decisions listed under s 104 in accordance with the dispute resolution proceedings contained in Chapter 9 of the TAA, or by instituting an application for review in the High Court.[17]

The wording of s 105 was subsequently amended by s 52 of the Tax Administration Laws Amendment Act,[18] pursuant to which s 105 currently provide: 'A taxpayer may only dispute an assessment or "decision" as described in section 104 in proceedings under this Chapter, unless a High Court otherwise directs.'[19]

The amendment makes it clear that taxpayers must first apply to the High Court and request it to exercise its discretion to hear a tax matter. In other words, before the taxpayer can proceed with this course of action, the High Court must condone the deviation. The amendment therefore effectively introduces an intermediate step (interlocutory application) which taxpayers must overcome before a tax matter will be considered by the High Court. Examples where taxpayers may wish to approach the High Court directly rather than following the procedure in Chapter 9, include the scenario where a dispute turns entirely around a point of law or where a taxpayer seeks declaratory relief.[20] The Explanatory Memorandum on the Tax Administration Laws Amendment Bill, 2015 ('the EM') clarifies that the justification behind

[17] In addition to objecting to an assessment, s 104(2) further provides that decisions taken by SARS which taxpayers can also object and/or appeal to include (a) the decision to refuse the extension of the period within which the taxpayer may lodge their objection; (b) the decision to not allow the extension of the period within which an appeal must be lodged; and (c) any other decision in terms of which taxpayers may object or appeal against in terms of any tax Act, as defined.
[18] Act 23 of 2015.
[19] Section 105 of Act 28 of 2011.
[20] In terms of s 21 of the Superior Courts Act No. 10 of 2013 the High Court has jurisdiction to provide declaratory relief without any consequential relief sought

the amendment was to make sure that taxpayers first exhaust internal remedies before approaching the High Court for relief. The EM further provides that the wording of s 105's predecessor wrongfully conveyed the perception that a tax dispute emerging from Chapter 9 of the TAA can either be brought in front of the Tax Court (or Tax Board), *or* the assessment may be referred to a High Court for review.[21]

The scope and interpretation of s 105 in its current form has recently been the subject of a host of cases heard by the High Court and the SCA. The first case is *ABSA*.[22]

(a) ABSA

In this matter the taxpayers launched an application in the High Court whereby it sought to review two decisions which were taken by the Commissioner. The first decision pertained to SARS' refusal to comply with the taxpayers request in terms of s 9 of the TAA to withdraw s 80J notices to the taxpayer.[23] The second decision forming the basis of the review application, is SARS' decision to issue the letters of assessment which imposed a tax liability.[24] Citing *Metcash*[25] the taxpayers contended that the court has previously heard tax disputes which dealt with points of law without requiring the aggrieved taxpayers to first exhaust the internal remedies contained in the TAA before approaching the High Court. The taxpayers argued that the court should consider disputes which revolve purely around a point of law as –

> 'an appropriate rationale to hear and dispose of the controversy, in preference to condemning the parties to a protracted slog through all the internal steps towards the special tax court and then, if necessary, to a court of law to which the parties could have approached directly at the outset.'[26]

In response to the taxpayers' review application, SARS argued that s 105 provides for a confined arena within which tax disputes must be resolved. However, the court rejected this notion and found that the inclusion of the phrase 'otherwise direct' in s 105 clearly caters for an environment of dispute resolution whereby more than one process can be followed.[27] Furthermore, based on this inclusion, the court is afforded with a discretion by which it can condone departure from what could be described as the default route when assessments or

[21] Explanatory Memorandum on the 2015 Tax Administration Laws Amendment Bill at 52-33.
[22] *ABSA* supra note 8.
[23] A s 80J notice refers to the notice SARS issues to taxpayers under s 80J of the Income Tax Act No58 of 1962, to inform them of the reasons why it believes the general anti-avoidance provisions contained in Part IIA of Chapter III of the ITA, to apply to an arrangement.
[24] *ABSA* supra note 8 para 4-6.
[25] *Metcash Trading Ltd v Commissioner for South African Revenue Service* 2001 (1) SA 1109 (CC) para 43.
[26] *ABSA* supra note 8 para 18.
[27] Ibid para 25.

decisions as described under s 104 are disputed.[28] Furthermore, with regard to the permission which taxpayers must obtain before deviating from the default dispute resolution route of the TAA, the court held in *ABSA* that no logical reasons exist as to why the permission cannot be sought concurrently in the review proceedings, subject to an *appropriate* case being made out.[29]

Sutherland ADJP recognised that an 'appropriate case may be regarded as 'exceptional circumstances' for purpose of s 105, and where such appropriate case is made out, the court held that departure from the default or 'normal' dispute resolution route would be justified.[30] Moreover, when defining the quality of exceptionally which has to be present, the court clarified that 'exceptionality' does not necessarily have to entail something exotic, bizarre or rare but may on a proper interpretation simply mean, conditions which reasonably justify an alternate route. This would be satisfied where the dispute revolves entirely around a point of law.[31] Consequently, the court found that s 104 and s 105 of the TAA did not adversely affect the taxpayers' course of action and therefore held that the review application may proceed in the High Court.[32]

The High Court's judgment in *ABSA* is important for two reasons. First it confirmed that a tax dispute which solely revolves around a pure point in law would satisfy the quality of exceptionality and departure from the default dispute resolution procedure, as outlined in Chapter 9 of the TAA would be justified. Secondly, it asserted that taxpayers may seek the High Court's approval for the matter to be brought before the High Court together with the main (review) application. The taxpayer is therefore not required to bring a separate application before instituting the review proceedings. However, SARS has subsequently appealed to the SCA, although, as noted above, this judgment is still pending at the date of writing.

In addition to SARS' appeal to the SCA in *ABSA*, the SCA recently heard three more cases in quick succession, wherein the taxpayers in these matters had sought to engage the High Court's jurisdiction directly to challenge SARS' actions in raising assessments.

(b) *Rappa*

SARS issued assessments to the taxpayer for the payment of value added tax, penalties, and interest. The taxpayer subsequently launched a review application to the High Court for the assessments to be reviewed and set aside wherein it contended that decision to issue the

[28] Ibid para 25.
[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] Ibid

assessments is reviewable under PAJA.[33] The taxpayer also launched an opposed interlocutory application under rule 30A in the review application, wherein it primarily sought an order directing SARS to file a complete record of all documents which related to the decision which was the subject of the review application. The review application was based on 30 different grounds under s 6 of PAJA as well as ten grounds in support of a legality review.[34] In the alternative to PAJA, the taxpayer sought an order declaring that SARS' decision to issue the assessments was in dissonance with the principle of legality, particularly ss 2 and 172 of the Constitution and therefore, unconstitutional, unlawful and invalid.[35]

In its application before the High Court, the taxpayer initially did not apply for an order under s 105 as it contended that such an order was not required on the basis that the section only applies to disputes which fall under Chapter 9 and the Tax Court lacked jurisdiction to hear a review based on PAJA or one based on the principle of legality.[36] However, after SARS objected to this, the taxpayer sought approval to amend its notice of motion by including an order under s 105 of the TAA, to the extent that the section applies.[37]

Dippenaar J ordered that the amendment to the notice of motion be allowed, and that SARS should deliver the records requested by the taxpayer. However, no direction was made under s 105 and the applicability of s 105 was postponed, to be considered simultaneously with the taxpayer's main application for review.[38] On 8 November 2021, Dippenaar J granted SARS leave to appeal to the SCA and appropriately noted the importance of the matter in that SARS contends that –

> 'Central to this application is the respondent's contention that the respondent's right to review only vests once a directive is issued in terms of s 105 of the TAA… The respondent's sole basis for opposition to the r 30A application was that the respondent had no right to seek the record absent a directive in terms of s 105 of the TAA, which directive is contented should be refused.'[39]

In its appeal to the SCA, SARS argued that the High Court erred in that it could not have ordered SARS to produce the record unless it had jurisdiction to review.[40] Therefore, it must *first establish its jurisdiction* to review before it can make an order to compel.[41] It contended

[33] *Rappa Resources (Pty) Ltd and Another v C:SARS* (20/18875) [2020] ZAGPPHC (5 November 2020) para 4.
[34] Ibid.
[35] Ibid para 5-7.
[36] Ibid.
[37] Ibid para 4-7.
[38] Ibid para 5.
[39] *Commissioner of South African Revenue Service v Rappa Resources (Pty) Ltd* (Leave to Appeal) [2021] JOL 51977 (GJ) para 4.
[40] *Rappa* supra note 5 para 8.
[41] Ibid.

further that taxpayers can only dispute an assessment by lodging an objection and a subsequent appeal under ss 104 and 107 respectively, unless a High Court exercises its discretion and directs otherwise. However, prior to issuing this direction, the High Court does not have the jurisdiction to review.[42]

The taxpayer countered by arguing that the dispute resolution procedures of the TAA may be circumvented where a taxpayer takes an assessment on review to the High Court, where the attack on the assessments is based on the legality thereof as opposed to the merit.[43] Ponnan ADP observed that the purpose of s 105 is to emphasise that as a general rule, unless a High Court has directed otherwise, taxpayers may only dispute an assessment by utilising the Chapter 9 dispute resolution procedure.[44] Furthermore, the High Court will only allow a departure from the default route where exceptional circumstances are present.[45] The SCA subsequently found that the High Court, at the stage of the interlocutory Rule 30A application, was not empowered to order SARS to produce the record to the taxpayer without first establishing that it had the requisite jurisdiction to try the review application as required by section 105 of the TAA.[46] Accordingly, SARS was successful in their appeal and the High Court's judgment was set aside.[47]

(c) UMK

From 24 March 2017, SARS conducted an income tax audit in respect of UMK's 2011, 2012 and 2012 years of assessment and issued the letter of audit findings, together with the additional assessments, on 31 January 2020.[48] On 17 February 2020, UMK gave notice to SARS under s 11(4) of the TAA, notifying SARS of its intention to institute legal proceedings. In its application to the High Court, UMK sought the following relief –

- Review relief in that the additional assessments to be reviewed and set aside.
- Declaratory relief regarding the meaning of the term 'managed or controlled' as contained in the definition of 'connected persons' under s 1 of the Income Tax Act[49] ('the ITA').

[42] Ibid para 8.
[43] Ibid para 12.
[44] Ibid para 17.
[45] Ibid para 17.
[46] Ibid para 26.
[47] Ibid para 27.
[48] Ibid para 1-3.
[49] Act 58 of 1962.

- Procedural relief in so far as it may be required, that it is exempted from exhausting internal remedies in terms of s 7(2) of PAJA and that the High Court adjudicates on the relief sought.

SARS raised a point in limine wherein it contended that the jurisdiction of the High Court is expressly conditional in the context of s 105 to prevent tax related matters from being brought to the High Court as opposed to the Tax Court.[50] The court agreed with SARS and held that taxpayers may only dispute an assessment in the Tax Court, except if a High Court has directed otherwise, and such direction would only be made where a case for deviation was clearly made out. As UMK did not make out a case for deviation to the High Court there was no justification for the matter to be heard by the High Court.[51] As a result, the court dismissed the application based on SARS' point in limine.[52]

UMK appealed against the decision of the High Court to the SCA, wherein Ponnan ADP confirmed the judgment handed down in the High Court. He cited from his own judgment handed down in *Rappa* and reiterated that the default route for disputing an assessment is through the objection and appeal process contained in the TAA. The purpose of s 105 is to ensure that tax disputes are directed to the Tax Court and by virtue of the wording of this section, the High Court does not have jurisdiction in tax disputes, unless it has (expressly) directed otherwise.[53] Subsequent to these judgments, s 105 was tested again in the High Court in *Trustees of the CC Share Trust v C:SARS*[54] ('*CC Share Trust'*).

(d) *CC Share Trust*

The taxpayers in this case sought to review and set aside assessments, alleging that SARS made them unlawfully on the basis of non-compliance with legislation. SARS contended that the matter should be dismissed solely on the basis that the taxpayers ought not to be entertained in the High Court as they did not exhaust the internal remedies available to them under the TAA prior to approaching the court.[55] The disputes between the parties were; (i) whether the taxpayers were assessed correctly, (ii) whether the correct process was followed by SARS in

---

[50] *UMK* supra note 6 para 7.
[51] Ibid para 7.
[52] Ibid para 10.
[53] Ibid para 11.
[54] [2023] ZAGPPCH 597.
[55] Ibid para 2.

the issuance of the assessments; and (iii) whether the taxpayers had the obligation to exhaust the internal remedies of the TAA before approaching the High Court.[56]

Following an audit conducted by SARS, a s 80J notice was issued to the taxpayer in terms of which the taxpayer was requested to provide reasons as to why the general anti-avoidance rules ('GAAR') should not be applied by SARS ('the first letter').[57] The taxpayers subsequently responded to the notice wherein it also highlighted alleged errors contained therein. SARS did not concede and on 25 March 2021 it issued a letter rejecting the taxpayers' responses and explaining why it believed that the GAAR should be applied ('the second letter'). This second letter also include a table which summarise the proposed adjustments.[58] On the same day SARS issued an assessment presenting the relevant adjustments together with penalties.[59]

After receiving the second letter, the taxpayer requested that SARS withdraw the letter on the basis that it does not comply with s 42(2)(b) of the TAA,[60] which request was refused by SARS.[61] The taxpayers subsequently approached the High Court to review and set aside (i) the decision to issue the second letter as well as the assessment; and (ii) SARS' subsequent decision to refuse to withdraw the letter, which, the taxpayers argued amounted to unlawful administrative action.[62] In relying on PAJA, or legality in the alternative, the taxpayers contented that they were denied the right to be heard in that SARS followed an incomplete process by not issuing a notice under s 42(2)(*b*).[63] The taxpayers argued that their right to be heard was compromised in that they had the right to receive an audit outcome letter, to have an opportunity to consider the contents of the letter; to provide a response to the letter and to have SARS consider their response.[64] On SARS' account, the first notice is purportedly compliant with both s 80J of the ITA[65] and s 42(2)(*b*) of the TAA.[66] SARS argued that although these two

---

[56] Ibid para 1-2.
[57] Ibid para 6.
[58] Ibid para 16.
[59] Ibid para 16
[60] Section 42(2)(b) of the TAA requires that, upon the conclusion of an audit or criminal investigation wherein potential material adjustments were identified, SARS must provide the taxpayer with a document which should contain the outcome of the audit as well as the grounds for the proposed assessment or decision. The notice must be provided within 21 business days, depending on the complexities of the audit concerned. The taxpayer has a right to respond to both a s 80J notice as well as a notice under s 42(2)(b) of the TAA.
[61] Ibid para 17.
[62] Ibid para 18.
[63] Ibid para 19.
[64] Ibid para 19.
[65] Supra note 23.
[66] Supra note 60.

sections would suggest that two separate notices be issued to a taxpayer, they are acceptably similar to justify combining these sections in a single notice.[67]

SARS further countered the taxpayers' application for review and argued that it is incompetent as the matter cannot be considered by the High Court under s 105 without obtaining its prior direction and secondly without the taxpayers first exhausting their internal remedies.[68] Similar to *Rappa* and *UMK*, the taxpayers in *CC Share Trust* also did not address s 105 in their founding affidavit by requesting the High Court to exercise its discretion and to hear the review application. Only after it was raised by SARS did the taxpayers include a prayer to this effect in their notice of motion.[69]

In considering the qualification imposed by s 105, which required a case for direction to be made out, Manoim J observed that although the wording of the section does not stipulate what the threshold of the test should be, this has subsequently been clarified in *Rappa.*[70] Manoim J confirms that the High Court will only permit a deviation from the default route where exceptional circumstances have been made out and goes further, stating that *Rappa* has overturned the argument that a dispute which revolves around a pure point of law would amount to exceptional circumstances.[71]

The taxpayers' application for review was consequently dismissed on the basis that they failed to make out a case as to why the matter should be heard by the High Court as required under s 105 nor why they have not exhausted the internal remedies contained within the TAA, and therefore also falls foul of s 7(2) of PAJA.[72]

(e) *The scope and application of s 105 after* Rappa

Should the judgment handed down in *Rappa* stand, taxpayers would be required to approach the High Court for a direction under s 105 of the TAA before they would be entitled to launch a review application under PAJA or the principle of legality in that court. Stated differently, the High Court would not have the required jurisdiction to entertain applications for judicial review in relation to tax matters without first issuing the directive and any order made prior to establishing jurisdiction would be invalid. The scope of s 105 and the intermediate step

[67] *CC Share Trust* supra note 54 para 12.
[68] Ibid para 32.
[69] Ibid para 36-37.
[70] Ibid para 37-36.
[71] Ibid para 45.
[72] Ibid para 73.

introduced by it therefore extends to all disputes concerning tax matters regardless of the basis of the grievance.

Furthermore, the High Court would only exercise its discretion and condone a deviation from the default dispute resolution route where a case for exceptional circumstances have been made out. Regarding what would constitute exceptional circumstances in the context of this section, it has been confirmed by the High Court that a dispute revolving around a pure point of law, as previously confirmed in *ABSA*, would no longer suffice.

III. THE SCOPE OF SECTION 105

The section assesses whether the scope of s 105 as interpreted by the SCA in *Rappa* and as applied *in UMK* and *CC Share Trust* is correct.

This report does not seek to determine which decisions taken by SARS constitute 'administrative action' as defined under s 1 of PAJA,[73] but rather to examine the extent to which SARS may argue a lack of jurisdiction of the High Court under s 105 where a taxpayer's dispute relates to administrative action taken by SARS. It is therefore deemed that, where reference is made to administrative action in the context of PAJA, the definition is satisfied.

(a) Administrative law in South Africa

Administrative law in the South African context can broadly be defined as the law which controls the decisions and activities of entities which exercise public powers or perform public functions.[74] The right to just administrative action stems from s 33 of the Constitution. This section provides that everyone is entitled to administrative action which is exercised in a manner which 'is lawful, reasonable and procedurally fair.'[75] Section 33(3) of the Constitution further stipulates that national legislation may be promulgated to give effect to these rights and to cater for the review of administrative action by a court or tribunal.[76] To this extent PAJA was promulgated.[77]

[73] Section 1 of PAJA defines administrative action, in the context of an organ of state, as 'any decision, or the 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'. The definition is subject to certain specific exclusions.
[74] Cora Hoexter & Glenn Penfold *Administrative Law in South Africa* 3 ed (2021) at 2.
[75] Section 33(1) of the Constitution.
[76] Section 33(3) of the Constitution.
[77] Preamble to PAJA.

Section 6(1) of PAJA provides that if a person regards administrative action as unjust, that person is entitled to bring an application to a 'court' or 'tribunal' for the decision or action under consideration to be reviewed.[78] Where a court or tribunal reviews administrative action, that court or tribunal is able to set aside administrative action in terms of the grounds noted in s 6(2) of PAJA. These grounds include the lack of authority on the part of the administrator to make the decision in question;[79] the prescribed procedure as described in the empowering provisions of the relevant legislation was not complied with;[80] the administrator made an error in law;[81] the reason advanced for the action taken does not comprise a reason as listed under the relevant empowering provision;[82] an ulterior motive was involved when the decision was made;[83] the decision was made arbitrarily or in other word without a clear or reasoned basis;[84] or the administrator took irrelevant factors into account when making the decision.[85] Section 8 of PAJA contains the remedies which are available when administrative decisions are reviewed by a court (or tribunal). These remedies include requiring the administrator to present reasons for the decision,[86] or setting aside the relevant administrative action and referring the decision back to the administrator for reconsideration.[87]

Although appeals and reviews are both ways to reconsider a decision, they have different functions.[88] Appeals are the appropriate remedy where it is a person's view that the decision-maker came to the wrong decision or conclusion based on the facts or the law.[89] Therefore, appeals are concerned with the merits of the matter and the decision may be declared to be right or wrong. Conversely, reviews are not concerned with the merits of the case, rather it seeks to establish whether the decision was derived in the correct manner.[90] The review therefore focusses on the process.[91] Importantly, a decision may be set aside on an application

[78] Section 6(1) of PAJA.
[79] Section 6(2)(*a*)(i) of PAJA.
[80] Section 6(2)(*b*) of PAJA.
[81] Section 6(2)(*d*) of PAJA.
[82] Section 6(2)(*e*)(i) of PAJA.
[83] Section 6(2)(*e*)(ii) of PAJA.
[84] Section 6(2)(*e*)(vi) of PAJA.
[85] Section 8(1)(*c*) of PAJA.
[86] Section 8(1)(*a*) of PAJA.
[87] Section 8(1)(*c*) of PAJA.
[88] Hoexter op cit note 74 at 108.
[89] Hoexter op cit note 74 108.
[90] Hoexter op cit note 74 at 108.
[91] *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commissioner for Conciliation, Mediation and Arbitration* 20027 (1) SA 576 (ZAASCA) at 31.

for review, notwithstanding the fact that the review court (or tribunal) is certain that the decision that was reached is correct.[92]

(b) Tax Court jurisdiction to review

In *Rappa,* the SCA created confusion by noting that the Tax Court can better be described as a *court of revision*, rather than a court of appeal due to the wide powers afforded to it under the TAA,[93] thereby implying that this should be the first port of call for taxpayers when instituting and application for review. The court held that the wide revision powers of the Tax Court include the power to conclude on the validity of an assessment issued by SARS on review.[94] As a point of departure, we have to consider the constitutional provisions which establish the judicial authority of the courts. Section 166(c) of the Constitution established the High Court of South Africa its powers are described in s 169(1).

The jurisdiction of the High Court is wide, and, unless the Constitutional Court has agreed that the matter will be heard directly by it or jurisdiction has been assigned to another court, the High Court has the jurisdiction to hear (and decide) any constitutional matter.[95] Therefore, the High Court will have jurisdiction to hear an application for review *unless* that jurisdiction has been assigned to another court. The term 'assign' as contained in s 169(1)(*a*)(ii) of the Constitution could be interpreted to refer to exclusivity.[96] Therefore, by implication, if a constitutional matter has not been 'assigned' or placed within the exclusive jurisdiction of another court or specialised forum, the High Court's jurisdiction is not ousted.[97] It is settled that review applications, regardless of whether they are based on PAJA or the principle of legality, are constitutional matters.[98]

Consequently, the High Court will have jurisdiction to decide on these matters, *unless* the jurisdiction has been assigned to another court of similar status (i.e the Tax Court in the context of reviews in tax matters). It is also well recognised that the ouster of the High Court's jurisdiction must be irrefutable and furthermore that there is a strong presupposition against

---

[92] Hoexter op cit note 74 at 109.
[93] *Rappa* supra note 5 para 13.; See also *Africa Cash and Carry (Pty) Ltd v C:SARS* 2020 (2) SA 19 (SCA) para 52 wherein the court noted that '[t]he point of departure should always be that a Tax Court is a court of revision and *"not a court of appeal in the ordinary sense"'*.
[94] *Rappa* supra note 5 para 14.
[95] *Competition Commission of South Africa v Group Five Construction Ltd* [2022] ZACC 36; 2023 (1) BCLR 1 (CC) ('*Group Five*') para 115.
[96] Ibid para 122.
[97] Ibid para 122.
[98] Ibid para 121.

the ouster of its jurisdiction.[99] In the context of administrative action, as mentioned above, s 6(1) of PAJA allows persons who regard administrative action to be unjust or unfair as described in that section, to approach a 'court' or 'tribunal' for judicial review.[100] In turn, s 1 of PAJA defines a 'court' as the Constitutional Court, a high court or any other court which has a similar status (to that of a high court) or a magistrate's court for any regional division. A 'tribunal', on the other hand refers to independent and impartial tribunals which has been established by legislation for purposes of reviewing administrative action in terms of PAJA.[101]

Section 117 defines the jurisdiction of the Tax Court and provides that it has jurisdiction to hear tax *appeals* which are lodged in terms of s 107.[102] The TAA does not bestow on it the jurisdiction to entertain constitutional matters and I opine that this is perhaps deliberately so. It is trite that the Tax Court is a creature of statute, which is formed under s 116 of the TAA. In other words, it is unable to exercise any powers other than those which are expressly contained within the parameters of the TAA. It follows that the Tax Court is neither a High Court nor a court of similar status on the basis that s 117 of the TAA restricts its jurisdiction to tax appeals and its remedial powers to those listed in s 129.[103] Similarly, it cannot be concluded that the Tax Court is a 'tribunal' for purposes of PAJA, as it is not established for the direct purpose of judicially reviewing administrative action taken by SARS.

On this basis it is submitted that, to the extent that a review application is based on PAJA, the Tax Court would have no jurisdiction to determine it. Furthermore, as the Tax Court was not assigned the power to hear review applications of this nature, it is argued that the High Court's inherent jurisdiction in this regard has neither been expressly nor implicitly ousted by s 105 of the TAA. This is not an unusual argument and both the Tax Court, and the High Court have previously held that the Tax Court cannot hear and decide on applications for judicial review. In *ITC 1866*, the Tax Court found that 'relief based upon a Review which can only be launched in terms of PAJA is beyond the jurisdiction of this court.'[104] Similarly, in *Gold Kid Trading CC v C:SARS*,[105] the High Court held that –

[99] *Metcash* supra note 25 para 43. See also *Group Five* supra note 95 para 115.
[100] Section 6(1) of PAJA.
[101] Section 1 of PAJA.
[102] Section 117 of the TAA.
[103] The Tax Court's remedial powers under s 129 of the TAA include the power to confirm an assessment or 'decision'; to order the assessment back to SARS for further examination and assessment; to order an alteration to the assessment or 'decision'; or to make an appropriate order in a procedural matter. Furthermore, it does not have the jurisdiction to determine constitutional matters.
[104] *ITC 1866* 75 SATC 268 para 272.
[105] [2018] ZAGPJHC 710.

'[t]he Tax Court does not have the power to consider whether an assessment made by SARS, is reviewable on the basis of abuse of power, and illegality, or any reviewable grounds envisaged under PAJA or the common law.'[106]

It is therefore my opinion that the SCA erred in finding that taxpayers are required to first make out a case as to why the High Court should exercise its discretion and establish its jurisdiction *before* the court will be allowed to hear an application for judicial review. It is submitted that the High Court is the *only* forum in which taxpayers can launch an application for review under PAJA or the principle of legality.

(c) Suggested interpretation of s 105

The effect of the SCA's interpretation of s 105 of the TAA in *Rappa* and *UMK* is such that taxpayers' right to administrative justice and access to courts are dependent on the exercise of a discretion by the High Court. This interpretation could potentially render s 105 unconstitutional. The Constitutional Court has confirmed that the underlying canon of statutory interpretation is that the words in a statute or legislation must be assigned their ordinary grammatical meaning, unless in doing so the result would be an absurdity.[107] The three most important elements to the general principle are that statutory provisions should be properly contextualised and interpreted purposefully and in a manner which is consistent with the Constitution whilst preserving their constitutional validity.[108]

Properly considered in its context and purpose, the meaning of the wording contained in s 105 is clear; assessments and decisions falling within the ambit of s 104 may only be disputed in accordance with the provisions and proceedings of Chapter 9 of the TAA, unless a High Court directs otherwise. It is submitted that the direction which is required to be obtained under s 105, can only contemplate a scenario in which a taxpayer seeks to have a dispute concerning the merits of an assessment (or any other decision under s 104) to be heard in the High Court, *as opposed to* the Tax Court. In other words, a situation where both courts have jurisdiction. As stated, these types of disputes cannot be interpreted to refer to a judicial review under PAJA or the principle of legality as the Tax Court lacks jurisdiction in those instances. Only the High Court would have jurisdiction to entertain a judicial review.

[106] Ibid para 64.
[107] *Cool Ideas 1186 CC v Hubbard and another* [2014] ZACC 16, 2014 (4) SA 474 (CC), 2014 (8) BCLR 869 (CC) at 28. See also *SATAWU and another v Garvas and others* [2012] ZACC 13; 2013 (1) SA 83 (CC) 2012 (8) BCLR 840 (CC) para 37; and *Dadoo Ltd and others v Krugersdorp Municipal Council* 1920 AD 530 at 543.
[108] *Cool Ideas* supra note 107 para 29.

Furthermore, where it is possible to assign more than one interpretation to a legislative provision and one of those interpretations would render the provision unconstitutional and the other not, the interpretation which is compatible with the Constitution must be adopted.[109] An interpretation that suggests that while a taxpayer may not bring a PAJA or legality review under the TAA or in the Tax Court, it must nonetheless obtain direction from the High Court to pursue a review, arguably results in an absurdity and unreasonably infringes on taxpayers' constitutional right to just administrative action and access to courts, rendering s 105 unconstitutional. As discussed above, s 105 should be interpreted to exclude judicial reviews.

Moreover, the SCA's interpretation of s 105 also does not consider the difference between the objectives sought to be achieved by a judicial review in the High Court and an appeal brought in the Tax Court. A judicial review seeks to scrutinise the exercise of public power[110] and in the pursuit to a person's constitutional right of administrative justice.[111] Conversely, by bringing an appeal in the Tax Court a taxpayer seeks to rectify a decision or an assessment on its merits.[112]

In *RBCT*, which also handed down by Ponnan ADP only five days after the judgments in *Rappa* and *UMK* were delivered, it was held that the taxpayer was not limited to the wide appeal remedy as provided for under the CEA,[113] and could also review the tariff determination under PAJA and the principle of legality.[114] In this matter the taxpayer concurrently launched an internal appeal and a review application in the High Court. Opposing the application, SARS contended that the taxpayer could not institute review proceedings in the High Court as it was confined to the internal appeal process contained under s 47 of the CEA.[115] However the SCA rejected this argument and held that there is a 'strong presumption against the ouster or curtailment of a court's jurisdiction.'[116] Interpreting s 47(9)(*e*) as argued by SARS' would not only render the section in contradiction with s 33 of the Constitution, it would also result in s 47(9)(e) being in conflict with the rule of law and s 169 of the Constitution as well as s 172 which provides that the High Court has jurisdiction to issue declaratory orders.[117] Therefore, on account of SARS' interpretation of the section, affected taxpayers would be denied their

[109] *Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) para 22-23.
[110] *Group Five* supra note 95 para 39.
[111] *RBCT* supra note 7 para 23.
[112] Ibid para 23.
[113] Act 91 of 1964.
[114] *RBCT* supra note 7 para 24.
[115] Ibid para 15.
[116] Ibid para 24.
[117] Ibid para 23.

right to just administrative action and decisions taken by SARS would be free from judicial review.[118]

In my opinion the SCA's approach and interpretation of s 47 of the CEA in *RBCT* is correct and it should have adopted the same reasoning when it interpreted s 105 of the TAA in *Rappa* and *UMK*. SARS is an organ of state[119] and an interpretation which potentially renders its decisions immune from judicial review is not only an absurdity but strips taxpayers from their right to 'administrative action, that is lawful, reasonable and procedurally fair.'[120]

IV. THE STANDARD OF EXCEPTIONALITY

As illustrated under the previous chapter, s 105 should only apply in circumstances where the Tax Court as well as the High Court has jurisdiction, such as a 'decision' under s 104 and the issuance of an assessment. However, s 105 should not apply where only the High Court has jurisdiction, such as judicial reviews launched under PAJA or the principle of legality. Whilst there are internal remedies available in the TAA to address decisions to which s 105 would apply, the duty to exhaust them is not rigid or absolute, as s 105 includes the phrase 'unless a High Court otherwise direct.' Section 105 therefore does not create a bar to the High Court dealing with the lawfulness of assessments or decisions under s 104. The contrary is true, it specifically preserves the power of the High Court to decide tax matters and to allow disputes regarding the merits of an assessment to be brought before it. The qualification simply provides that it is for the High Court to decide whether it is appropriate to do so in the context of the circumstances before it.

The next area of uncertainty which arises from the SCA judgments is how this application to the High Court must be brought. What is the threshold and which requirement should be satisfied for a taxpayer to be successful? In *Rappa* and *UMK,* the SCA cited *ABSA* and held that in order for the court to deviate from the default tax dispute resolution route contained in Chapter 9 of the TAA, the appropriate case needs to be made out and that such appropriate circumstances ought to be characterised as 'exceptional circumstances'.[121] Departure from the default route would therefore need to be justified, which (according to the court) would by definition be 'exceptional'.[122] However, the SCA stopped there and omitted the portion of ABSA where Sutherland DJP clarified that that standard of exceptionality does not have to be

[118] Ibid.
[119] Section 2 of the South African Revenue Service Act 34 of 1997.
[120] Section 33(1) of the Constitution.
[121] *Rappa* supra note 5 para 21; *UMK* supra note 6 para 11 and *ABSA* supra note 8 para 27.
[122] *Rappa* supra note 5 para 21.

interpreted to mean something 'exotic or rare or bizarre' and can merely be circumstances which justify that an alternate route be followed.[123]

The judgments delivered in *Rappa* and *UMK* therefore omitted commentary on the degree of exceptionality and whether a pure point of law would constitute exceptional circumstances. However, in *CC Share Trust,* the High Court held that the threshold test which must be made out in a taxpayer's case for direction in terms of s 105 has been clarified in *Rappa.*[124] On the point of exceptional circumstances the court held that a pure point of law on its own does not create exceptional circumstances.[125] Therefore, the case to be made out by taxpayers in this regard and the level of exceptionality which needs to be discharged by taxpayers before the High Court will exercise its discretion is more uncertain than ever.

It is submitted that where a High Court is faced with a tax dispute, it should issue the necessary s 105 direction and assume jurisdiction if the taxpayer concerned is able to demonstrate that a review rather than a tax appeal would be *appropriate* and not only in exceptional circumstances, as held in *Rappa*, *UMK* and *CC Share Trust.* The appropriateness requirement is suitable as s 105 does not expressly specify what threshold should be satisfied by a taxpayer wishing to approach the High Court directly. The standard of appropriateness has already been applied in the context of s 105 by Binnis-Ward J in *Forge Packaging* wherein he stipulated that a High Court should direct otherwise 'only when it is evident that the "default route" would be less appropriate.'[126] This correlates with the essence of the threshold adopted in *ABSA*. The direct application to the High Court may be appropriate where there are no material factual disputes between the taxpayer and SARS. In such cases there is arguably no reason to require the parties to go through a full trial process required on appeal before the Tax Court. Similarly, where a taxpayer asserts a deciding legal point, it would be prejudicial not only to the taxpayer but also to SARS and the administration of justice to insist that a taxpayer go through an extended legal trail in the Tax Court when the legal point could be decided by the High Court expeditiously. This is echoed in *ABSA.*[127]

Furthermore, the standard of exceptionality appears nowhere in the wording of s 105. A court can only imply words into a statute if the implication 'is a necessary one in the sense that without it effect cannot be given to the statute as it stands'.[128] It is submitted that an exceptional

[123] *ABSA* supra note 8 para 25.
[124] *CC Share Trust* supra note 54 para 38.
[125] Ibid para 45.
[126] *Forge Packaging* supra note 9 para 37.
[127] *ABSA* supra note 8 para 19.
[128] *National Director of Public Prosecutions v Mohamed NO* 2003 (4) SA 1 (CC) para 48.

circumstances standard is not required in order to give effect to s 105. The TAA expressly attaches the exceptional circumstances to provisions when it is to be adopted, such as ss 104(5)(*a*), 107(2)(b), 113(13), 124(2), 145(a)(iii) and 218. The omission of this standard from s 105 can be interpreted to imply that that is not the standard which is required.

V. CONSTITUTIONAL COURT

With regard to the interpretation of s 105 of the TAA, the High Court in *CC Share Trust* declared, somewhat ironically that after the judgment handed down in *Rappa* 'the law is now clear'.[129] However, as illustrated herein, clarity is required, first on whether s 105 applies to applications for judicial review and secondly what threshold must be satisfied before a matter (falling within the scope of s 105) will be heard by the High Court. These uncertainties can perhaps only be resolved by the Constitutional Court.

As it stands, the taxpayers in *Rappa* and *UMK* have filed applications for leave to appeal to the Constitutional Court. In addition to these two cases, the taxpayer in *Forge Packaging* also filed for leave to appeal the High Court's judgment dealing with substantially the same issue. SARS has also since filed its application to appeal the judgment in *RBCT*.[130] Furthermore, it is likely that based on the arguments advanced by SARS in *CC Share Trust*, the SCA's judgment in *ABSA* may also be expected to be appealed, irrespective of the outcome.

(a) Jurisdiction of the Constitutional Court

The Constitutional Court's jurisdiction is outlined under s 167(3) to (7) of the Constitution, wherein it is provided that the court may decide on all constitutional matters as well as any other matter, provided that leave to appeal is granted.[131] In terms of s 167(3)(b)(ii) leave to appeal (on matters other than constitutional matters) may be granted where the matter under consideration (i) presents a point of law which is arguable and (ii) of general public importance which should be considered by the Constitutional Court.[132]

In *Paulsen and another v Slip Knot Investments 777 (Pty) Ltd*,[133] it was found that in order for a matter to be regarded as one that presents an arguable point of law, that point must

[129] *CC Share Trust* supra note 54 para 49.
[130] See list of cases awaiting directions 2023 available at *https://www.concourt.org.za/index.php/caseload/caseflow-summary?download=71:cases-awaiting-directions-2023*, accessed on 28 August 2023.
[131] Section 167(3)(b) of the Constitution.
[132] Section 167(3)(b) of the Constitution.
[133] [2015] ZACC 5 para 22.

have chances of success when argued.[134] On the other hand, the Constitutional Court has not defined or construed the measure of what would be regarded as general public importance. As such, other jurisdictions' interpretation of what this standard entails may be beneficial. For example, this phrase has been defined by the English courts to refer to a situation where the issue under consideration is important or relevant to a large portion of the public.[135]

When the application for leave to appeal is founded on a constitutional issue, that does not mean that leave will be granted automatically. The Constitutional Court still has a discretion, and the most important criteria would then be the interest of justice.[136]

(b) Application to s 105

In the context of s 105, I opine that the issues raised in this research report concerns the Constitutional Court's non-constitutional jurisdiction as well as the court's constitutional jurisdiction. From a constitutional perspective there is a concern regarding the extent to which s 105 (or at least the SCA's interpretation thereof) has limited the inherent jurisdiction of the High Court to hear applications for judicial reviews. The jurisdiction of the High Court and any limitation thereof is an established constitutional issue.[137] Furthermore, as has been illustrated herein, there is a concern that the SCA's interpretation of the section affects taxpayers' constitutional rights of access to courts and the right to just administrative action.

From a non-constitutional perspective, the correct interpretation of s 105 and the extent to which the High Court may hear review applications is an arguable point of law which should be interpreted by the Constitutional Court. SARS no doubt makes an abundance of administrative decisions which effects all taxpayers, many of which are challenged by courts. The question of which disputes are appropriate to be launched in the Tax Court and which in the High Court is therefore of paramount importance to the public.

VI. CONCLUSION

The recent judgments handed down by the SCA concerning the scope and application of s 105 of the TAA found that despite the Hight Court's inherent jurisdiction to hear review applications launched under either PAJA or the principle of legality, it is not permitted to (i)

[134] Ibid.
[135] *R v Wiltshire Primary Care Trust* [2008] ECWA Civ 749 para 16.
[136] *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 287 (CC).
[137] See *Fredericks v MEC for Education and Training, Eastern Cape* [2001] ZACC 6; 2002 (2) SA 693 (CC), *Chirwa v Transnet Ltd* [2007] ZACC 23; 2008 (4) SA 367 (CC) and *Group Five* supra note 95 para 19-20.

exercise the jurisdiction provided to it under the Constitution; or (ii) the jurisdiction expressly provided to it in terms of PAJA, without first being approached for, and subsequently granting a direction in terms of s 105. This interpretation is informed by the view that an application for review in which the taxpayer seeks to set aside the decision taken by SARS to issue an assessment, constitutes a dispute of an assessment as provided for under s 104 of the TAA. Therefore, an evident tension arises between taxpayers and SARS as a result of these judgments. The SCA's interpretation arguably unreasonably infringes on taxpayers' constitutional right to just administrative action as well as their right to access to courts.

It is my view that the Constitutional Court ought to intervene to first provide clarity regarding the scope of s 105 and specifically its applicability to applications for judicial review and whether the possible infringement on taxpayers' rights is justified. And secondly to provide what threshold must be satisfied by taxpayers in circumstances where the section does find application.

VII. BIBLIOGRAPHY

a. Books

Hoexter C & Penfold G *Administrative Law in South Africa* 3 ed (2021)

b. Internet References

https://www.concourt.org.za/index.php/caseload/caseflow-summary?download=71:cases-awaiting-directions-2023

c. Legislation

Constitution of the Republic of South Africa, 1996

Income Tax Act 58 of 1962.

Tax Administration Act 28 of 2011.

Promotion of Administrative Justice Act 3 of 2000.

South African Revenue Service Act 34 of 1997.

Superior Courts Act 10 of 2013.

d. Other

Explanatory Memorandum on the 2015 Tax Administration Laws Amendment Bill.

South African Revenue Service: Dispute Resolution Guide: Guide on Rules Promulgated in Terms of Section 103 of the Tax Administration Act, 2011 3 ed (2023)

e. Table of Cases

ABSA Bank v Commissioner of South African Revenue Service; 2021 (3) SA 513 (GP).

Chirwa v Transnet Ltd [2007] ZACC 23; 2008 (4) SA 367 (CC).

Competition Commission of South Africa v Group Five Construction Ltd; 2023 (1) BCLR 1 (CC).

Commissioner for the South African Revenue Service v Langholm Farms (Pty) Ltd [2019] ZASCA 163.

Commissioner of South African Revenue Service v Rappa Resources (Pty) Ltd Case no 1231/2021 [2023] ZASCA 29 (24 March 2023).

Commissioner of South African Revenue Service v Rappa Resources (Pty) Ltd (Leave to Appeal) [2021] JOL 51977 (GJ).

Commissioner of South African Revenue Service v *Richards Bay Coal Terminal (Pty) Ltd* Case no 1299/2021 [2023] ZASCA 39 (31 March 2023).

Cool Ideas 1186 CC v Hubbard and another, 2014 (4) SA 474 (CC).

Dadoo Ltd and others v Krugersdorp Municipal Council 1920 AD 530.

Forge Packaging (Pty) Ltd v The Commissioner for the South African Revenue Service (21634/2021) [2022] ZAWCHC 119 (13 June 2022).

Fredericks v MEC for Education and Training, Eastern Cape 2002 (2) SA 693 (CC).

Gold Kid Trading CC v Commissioner of South African Revenue Service [2018] ZAGPJHC 710.

Hyundai Motor Distributors (Pty) Ltd v Smit NO 2001 (1) SA 545 (CC).

ITC 1866 75 SATC 268

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

National Director of Public Prosecutions v Mohamed NO 2003 (4) SA 1 (CC).

R v Wiltshire Primary Care Trust [2008] ECWA Civ 749.

Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commissioner for Conciliation, Mediation and Arbitration 20027 (1) SA 576 (ZAASCA).

SATAWU and another v Garvas and others 2013 (1) SA 83 (CC) 2012.

S v Boesak 2001 (1) SA 912 (CC).

Trustees of the CC Share Trust v Commissioner of South African Revenue Service [2023] ZAGPPCH 597.

United Manganese of Kalahari (Pty) Ltd v Commissioner of South African Revenue Service Case no 1231/2021 [2023] ZASCA 29 (24 March 2023).