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**AN APPRAISAL OF SELECTED TAX-ENFORCEMENT POWERS OF THE SOUTH
AFRICAN REVENUE SERVICE IN THE SOUTH AFRICAN CONSTITUTIONAL
CONTEXT**

by

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SUMMARY

There is tension between the South African Revenue Service's duty to collect taxes on the one hand, and its duty to respect taxpayers' rights on the other. An environment where there is clearly respect for the rights of the taxpayer may indeed result in increased voluntary compliance.

This thesis constitutes a comparative appraisal of whether the following enforcement powers of the South African Revenue Service ("SARS") in the South African constitutional context, namely (i) SARS' power to conduct searches and seizures in order to verify compliance and investigate the commission of offences; (ii) the "pay now, argue later" rule; and (iii) the appointment of a third party on behalf of a taxpayer are in accordance with the Constitution of the Republic of South Africa, 1996 ("Constitution"). It is argued that these powers do not necessarily conform to the Constitution's values and the fundamental rights contained in the Bill of Rights in Chapter 2 of the Constitution.

To address the apparent shortcomings in the current dispensation, the thesis compares these enforcement powers of SARS with similar powers afforded to the revenue authorities of Canada, Australia, New Zealand and Nigeria. Important conclusions are drawn from this comparative review and a number of recommendations for law reform are proposed which, if implemented, would align these enforcement powers with the provisions of the Constitution. The recommendations entail, *inter alia*, that the seizure component of a search and seizure process should be treated separately, that half of the payment obligation should be suspended until the dispute is heard by an impartial forum, and that an objective measure must be in place to ensure that a taxpayer is able to afford basic necessities when a third party appointment is made.

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“I can do all things through Christ which strengtheneth me.”

(Philippians 4:13)

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LIST OF ACRONYMS

ADJRA	Administrative Decisions (Judicial Review) Act, 1997
ATO	Australian Tax Office
BORA	Bill of Rights Act, 1990
CCA	Customs Control Act 31 of 2014
CDA	Customs Duty Act 30 of 2014
CEA	Customs and Excise Act 19 of 1964
CIA	The Combines Investigation Act r.s.c 1970
CITA	Canadian Income Tax Act RSC 1985, c 1 (5th supp)
CPA	Criminal Procedure Act 51 of 1977
CRA	Canadian Revenue Authority
FCAA	Federal Court of Australia Act,1976
FIRS	Federal Inland Revenue Service
FIRSEA	Federal Inland Revenue Service (Establishment) Act, 2007
ICCPR	The International Covenant on Civil and Political Rights,1976
IGT	The Inspector-General of Taxation
IRD	Inland Revenue Department
ISA	Insolvency Act 24 of 1936
ITA	Income Tax Act 58 of 1962
NOPA	Notice of Proposed Adjustment
NOR	Notice of Response
NTAA	New Zealand Tax Administration Act 166 of 1994
OECD	Organisation for Economic Co-operation and Development
PAJA	The Promotion of Administrative Justice Act
SARFU	<i>South African Rugby Football Union</i>
SARS	South African Revenue Service

SIUSTA	Special Investigating Units and Special Tribunals Act 74 of 1996
SSA	Search and Surveillance Act 24 of 2012
T(IOEP)A	Taxation (Interest on Overpayments and Early Payments) Act, 1983
TAA	Tax Administration Act 28 of 2011
TAB	Tax Administration Bill
TALAA, 2014	Tax Administration Laws Amendment Act 44 of 2014
TALAA, 2015	Tax Administration Laws Amendment Act 23 of 2015
TAT	Tax appeal tribunal
TLSAA	Taxation Laws Second Amendment Act 18 of 2009
VAT Act	Value-added Tax Act 89 of 1991

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PART 1 CONTEXTUAL SETTING

CHAPTER 1 – INTRODUCTION

1.1 BACKGROUND

Allegations of an illegal “rogue” investigating unit set up by the South African Revenue Service (“SARS”) made headlines in South Africa between 2014 and 2016. As part of the public debate on this matter, the powers afforded to SARS to enforce tax compliance come under scrutiny again.¹ From these allegations and the public debate, a primary question emerges: What is SARS empowered to do in terms of the law?² When considering the powers afforded to SARS in terms of the Tax Administration Act (“TAA”)³ and the Customs and Excise Act (“CEA”),⁴ the answer appears – at first glance – to be alarming. For example, “SARS can pretty much do anything; even pick up the floorboards – if necessary”.⁵ Moreover, when SARS has a reasonable suspicion that a crime in terms of the CEA has been committed, it may follow, stop and search a person in connection with this suspected crime.⁶ Another power of SARS is that it may request an employer or a bank to pay over money that is due to the taxpayer or held on the taxpayer’s behalf.⁷ Also, SARS does not have to wait for a dispute relating to an assessed tax to be resolved before it may proceed with enforcement actions.⁸

¹ For further reading with regard to these allegations, see Sikhane *Investigation report – conduct of Mr Johan Hendrikus van Loggerenberg South African Revenue Service* (5 Nov. 2014) 5-7; Author unknown “Rogue SARS unit did exist, and spied on South Africans between 1999 and 2009” (4 Oct. 2015) *The South African.com* available at <http://bit.ly/2mlfySy> (accessed 4 July 2016); Olifant, Hunter & Jika “Pravin Gordhan faces ‘imminent arrest’” (15 May 2016) *Sunday Times* available at <http://bit.ly/251K2t5> (accessed 4 July 2016). See also The Press Ombudsman and a Panel of Adjudicators “Johann van Loggerenberg vs. Sunday Times” (16 Jan. 2016) available at <http://bit.ly/2rKZ0mQ> (accessed 7 June 2017) where the Press Ombudsman ruled that, amongst other things, the Sunday Times should retract all the texts relating to the rogue unit due to the fact that the stories were not based on facts that were “true or substantially true”.

² Rabkin “The Pillay case tests the limits of what SARS can or cannot do in law” (2 March 2015) *Business Day live* available at <http://bit.ly/1EuGy4J> (accessed 4 July 2016).

³ 28 of 2011.

⁴ 91 of 1964.

⁵ Subban as quoted in Rabkin (2 March 2015) *Business Day live* available at <http://bit.ly/1EuGy4J> (accessed 4 July 2016). See s 4(4)-4(6) of the CEA in this regard. SARS is also authorised to conduct a search in terms of ss 59-63 of the TAA.

⁶ Subban as referred to in Rabkin (2 March 2015) *Business Day live* available at <http://bit.ly/1EuGy4J> (accessed 4 July 2016).

⁷ Section 179 of the TAA; s 114A of the CEA.

⁸ Section 164 of the TAA; s 77G of the CEA.

Apart from journalistic reports on SARS' powers, South African tax scholars have also participated in the discussion regarding SARS' powers in a number of published articles⁹ and books.¹⁰ At a doctoral level the focus has been on analysing certain constitutional issues that affect taxpayers' rights¹¹ and on dissecting the rights of taxpayers in relation to the legislative powers afforded to SARS.¹² These discussions emphasise the tension between SARS' duty to administer and collect taxes¹³ on the one hand, and its duty to respect taxpayers' rights on the other.

SARS is afforded enforcement powers as not all taxpayers voluntarily comply with tax legislation,¹⁴ while such compliance is ideal for the proper functioning of the

⁹ See, amongst others, Joffe "*Hindry v Nedcor Bank Limited: another constitutional attack on an income tax provision fails*" (Dec. 1999) *Insurance and Tax Journal* 16; Olivier "Tax collection and the Bill of Rights" (2001) *TSAR* 193; Van Schalkwyk "Constitutionality and the Income Tax Act" (2001) *Meditari Accountancy Research* 285; Williams "An important decision on the taxpayer's rights in respect of search and seizure warrants under the Income Tax Act and the Value-Added Tax Act" (2001) *SALJ* 118; Silke "Taxpayers and the Constitution: a battle already lost" (2002) *Acta Juridica* 282; Croome "Constitutional law and taxpayer's rights in South Africa – an overview" (2002) *Acta Juridica* 1; Editorial "Appointment of taxpayer's agent by SARS" (March 2005) *The Taxpayer* 41; Goldswain "Are some taxpayers treated more equally than others? A theoretical analysis to determine the ambit of the constitutional right to equality in South African tax law" (2011) *Southern African Business Review* 1; and Erasmus "Can SARS customs enter premises without a warrant?" (Apr. 2013) *Tax ENSight* available at <http://bit.ly/25aXhaV> (accessed 18 May 2016).

¹⁰ Klue, Arendse & Williams *Silke on tax administration* (2009); Croome *Taxpayers' rights* (2010); Croome & Olivier *Tax administration* (2015).

¹¹ Goldswain *The winds of change – an analysis and appraisal of selected constitutional issues affecting the rights of taxpayers* (unpublished PhD thesis, University of South Africa (2012)); Erasmus *An analysis of challenging the Commissioner's discretionary powers invoked in terms of section 74A and 74B of the Income Tax Act 58 of 1962, in light of the Constitution of the Republic of South Africa 108 of 1996* (unpublished PhD thesis, University of KwaZulu-Natal (2013)).

¹² Croome *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 courts* (unpublished PhD thesis, University of Cape Town (2008)). This study was conducted prior to the commencement of the TAA on 1 October 2012.

¹³ The powers of SARS are conferred in terms of ss 3 and 4 of the SARS Act 34 of 1997. Nienaber *The expectation gap between taxpayers and tax practitioners in a South African context* (unpublished PhD thesis, University of Pretoria (2013)) 40 correctly indicates that the SARS Act determines the nature and entity of SARS and does not specifically deal with the imposition of taxes or the administrative powers relating to the collection of tax.

¹⁴ See Hessing, Elffers, Robben & Webley "Does deterrence deter? Measuring the effect of deterrence on tax compliance in field studies and experimental studies" in Slemrod (ed) *Why people pay taxes: tax compliance and enforcement* (1992) 304; Nienaber (2013) 86 where it is indicated that taxpayers can be divided into three categories. Firstly, the taxpayers who pay taxes under all circumstances. Taxpayers in this category voluntarily comply with paying taxes. This means that these taxpayers pay "the correct amount of tax without the exercise of administrative/judicial enforcement powers". See Burton "Democratic tax administration" in McKerchar & Walpole *Further global challenges in tax administration* (2006) 107; Devos "Tax evasion behaviour and demographic factors: an exploratory study in Australia" (2008) *Revenue Law Journal* 3 in this regard. The second category comprises of taxpayers who try and pay taxes

state. In the event that SARS has to enforce compliance,¹⁵ as opposed to taxpayers voluntarily complying, there are additional cost implications for the revenue authority¹⁶ which include time and financial and human resources. It is clearly more beneficial for the state if taxpayers were to comply with tax laws voluntarily. Consequently, to the fullest extent possible, revenue authorities should encourage voluntary compliance.¹⁷

Even though it is difficult to determine to what extent taxpayers do not comply with tax legislation voluntarily, as non-compliant taxpayers would generally not announce this fact, there are some indicators of non-compliance in South Africa. For instance, from 1 October 2012 until 27 July 2015 more than 7 000 taxpayers¹⁸ have applied to disclose non-compliance in terms of the voluntary disclosure plan provided for in Chapter 16 of the TAA. Another indicator that not all taxpayers in South Africa may be complying with fiscal legislation voluntarily is that in the 2014/2015 financial year 256 taxpayers were convicted of tax-related offences amounting to R196 million.¹⁹ SARS has also announced a special voluntary disclosure programme in relation to offshore assets and income in order for more taxpayers to regularise their tax affairs.²⁰ The impact of this special voluntary programme is yet to be seen.

in most instances. The last category consist of those taxpayers who refrain from paying taxes whenever opportunity arises. This last category consists of taxpayers who evade paying taxes and those who avoid paying taxes. Tax avoidance occurs when a taxpayer, as described in *IRC v Duke of Westminster* (1936) AC 1 19, “orders his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be”. Tax evasion, on the other hand, refers to an intentional undertaking of illegal activities to obtain a tax benefit. See Nienaber (2013) 86; Kujinga *The efficacy of the South African general anti-avoidance rule in curbing impermissible tax avoidance - a comparative analysis* (unpublished LLD thesis, University of Pretoria (2013)) 15 for recent discussions of the difference between tax evasion and tax avoidance. Croome (ed) *Tax law: an introduction* (2013) 488 states that even though tax avoidance is not illegal, it is still frowned upon because the *fiscus* receives less revenue.

¹⁵ Enforced compliance, for purposes of this study, constitutes the actions or powers taken by or afforded to SARS to ensure the collection of taxes in instances where the taxpayer has failed to comply voluntarily.

¹⁶ Kirchler, Hoelzl & Wahl “Enforced versus voluntary tax compliance: the ‘slippery slope’ framework” (2008) *Journal of Economic Psychology* 220. See also Slemrod (1992) 1-2.

¹⁷ Anyaduba, Eragbhe & Kennedy “Deterrent tax measures and tax compliance in Nigeria” (2012) *European Journal of Business and Management* 41.

¹⁸ SARS Appendix 1 data summary VDP 1 and 2 at 27 July 2015 obtained through electronic correspondence from Mr Maluleke, SARS 8 March 2016. Copy of electronic correspondence available on request.

¹⁹ SARS *Media release: Huge successes in criminal convictions for tax crimes in 2014/15* (23 May 2015) available at <http://bit.ly/2eCR9jc> (accessed 9 Nov. 2016).

²⁰ National Treasury “Media statement – special voluntary disclosure programme in respect of offshore assets and income: request for public comments” (12 Apr. 2016) available at

There are multiple reasons why taxpayers do not comply with tax laws voluntarily.²¹ One reason for possible non-compliance is that an unequal relationship exists between revenue authorities and taxpayers, as this relationship is governed by legislation and paying taxes is compulsory.²²

Another reason is the way in which South African taxpayers perceive taxes.²³ Perceptions regarding taxes include that collected revenue is not used to achieve the government's economic objectives,²⁴ as confirmed by various media reports.²⁵ This perception resonates with the fiscal exchange theory which entails that taxpayers want to receive value (public goods) for their money (tax). Where they perceive this

<http://bit.ly/1sw0sZ4> (accessed 21 May 2016). This special disclosure programme is open for applications from 1 Oct. 2016 - 31 Aug. 2017. For further detail in this regard, see SARS *Special Voluntary Disclosure Programme - external guide* available (date unknown).

²¹ Friedman "Sending them a message: culture, tax collection and governance in South Africa" (2003) *Policy: Issues & Actors* 8 states that voluntary compliance does not necessarily mean that taxpayers are keen to pay taxes, it might simply point out that there is a culture of tax compliance which resonates from certain values and relationships.

²² Croome (2010) 1; Steyn *A conceptual framework for evaluating the tax burden of individual taxpayers in South Africa* (unpublished PhD thesis, University of Pretoria (2012)) 33. Barker "The three faces of equality: constitutional requirements in taxation" (2006-2007) *Case W. Res. L. Rev* 1 posits that the power to tax may be the most important power of a government. Barker furthermore indicates that if government did not have the power to tax (and generate revenue) the other powers of the government would, from a practical point of view, not be possible. See Nienaber (2013) 35 for further reading on the relationship between government and taxpayers.

²³ It must be borne in mind that "perception is reality". Hence, it is not important whether these perceptions are true or not. What is important is that South African taxpayers perceive this to be true. Nienaber (2013) 22 highlights that various factors may influence perceptions and that perceptions are based on a state of mind. See Nienaber (2013) 22 for a discussion relating to the definition of perceptions. See also Oberholzer *Perceptions of taxation: a comparative study of different population groups in South Africa* (unpublished DCom thesis, University of Pretoria (2007)) for a further discussion of perceptions regarding taxation in South Africa. Kirchler *The economic psychology of tax behaviour* (2007) 65 indicates that a if a person perceives others to act in accordance with socially accepted rules (norms), he or she will adopt this behaviour. This means that if the taxpayer perceives others, who do not comply with tax legislation, to act in an acceptable manner, he or she will adopt similar behaviour.

²⁴ Coetzee "Reluctance to pay tax: what do people expect from a tax system in the new South Africa" (Nov.–Dec. 1993) *Accountancy SA* 5; Goldswain (2012) 226. In Clegg "Is it your moral and patriotic duty to bow to SARS" (Sept 2006) *Moneyweb's Tax Breaks* 3 the author opines that even if a taxpayer is unhappy with the manner in which tax funds are distributed, in a democratic country the taxpayer has to accept the disadvantages of the system together with its advantages.

²⁵ See Lamprecht "Betaal jy vir ANC-reklame? 'Desperate party waag kanse'" (26 Nov. 2013) *Beeld* available at <http://bit.ly/29gmoPx> (accessed 5 July 2016) where it is reported that in Gauteng more than R2 million of taxpayers' money per month is used for the ruling party's advertisements; Seale "Road to Nkandla cost taxpayers R290m" (4 Dec. 2013) *The Star* available at <http://bit.ly/1kUkh1J> (accessed 17 May 2016) where it is reported that the road linking the president's hometown to a neighbouring town cost the taxpayers R290 million.

not to be the case, taxpayers may decide not to comply or comply fully with their tax obligations.²⁶

A perception in the South African context, namely, that SARS is infected with corruption, fraud and bribery,²⁷ is also reflected in newspaper and television headlines.²⁸ In accordance with the political legitimacy theory, when a government and revenue authority are perceived as untrustworthy it erodes the culture of trust in government and the acceptance of the need to pay taxes.²⁹

Mikesell and Birskyte provide further insight as to why taxpayers may elect not to pay taxes.³⁰ In terms of the compliance lottery theory,³¹ a taxpayer weighs the advantage of not paying taxes³² against the perceived likelihood of being caught as well as the penalties and other consequences linked to the latter.³³ Hence, if the probability of the revenue authority discovering the non-compliance is low and the penalties associated with non-compliance are meagre, a taxpayer may elect to take

²⁶ In terms of this theory, the taxpayer attempts to balance the perceived inequity by evading taxes. For further reading, see Hasseldine & Bebbington "Blending economic deterrence and fiscal psychology models in the design of responses to tax evasion: the New Zealand experience" (1991) *Journal of Economic Psychology* 305; Fjeldstad, Schulz-Herzenberg & Sjørnsen "Peoples' views of taxation in Africa: a review of research on determinants of tax compliance" (2012) *CMI Working paper* 4-6.

²⁷ Sawyer "State to lose billions because of tax fraud" (12 Nov. 1998) *The Star* 6; Goldswain (2012) 226.

²⁸ See Hog "Two SARS officials caught red-handed receiving a solicited bribe" (15 Mar. 2007) *Moneyweb* interview available at <http://bit.ly/1dMFUOX> (accessed 17 May 2016); SAPA "7 SARS officials nabbed for extortion" (7 Nov. 2013) *City Press* available at <http://bit.ly/1bPv8ru> (accessed 5 Dec. 2013 – no longer available); SABC News "SARS Commissioner resigns over misconduct charges" (12 Jul 2013) video link available at <http://bit.ly/19RRG7X> (accessed 17 May 2016); Teke "More than 100 SARS staff corruption cases probed" (24 Sept. 2013) *Daily news* available at <http://bit.ly/1jh3j1L> (accessed 17 May 2016).

²⁹ See Tyler "Psychological perspectives on legitimacy and legitimation" (2005) *Annu. Rev. Psychol.* 393; Fjeldstad, Schulz-Herzenberg & Sjørnsen (2012) *CMI Working paper* 7.

³⁰ Mikesell & Birskyte "The tax compliance puzzle: evidence from theory and practice" (2007) *International Journal of Public Administration* 1046.

³¹ The compliance lottery view is also referred to as the economic deterrence model.

³² The advantage of not paying taxes would be that the taxpayer may keep the money for personal use.

³³ Other consequences could entail that tax evaders' or avoiders' names are published. Hasseldine & Bebbington (1991) *Journal of Economic Psychology* 301 indicate that a taxpayer may incur costs when (attempting to) avoid or evade paying taxes. These costs may include paying professional fees and setting-up structures to increase the probability of successfully evading the payment of taxes. These costs should also be taken into account when a taxpayer is contemplating whether the benefit of evading tax exceeds the risks.

a calculated risk by not paying taxes.³⁴ Nevertheless, in some instances stricter enforcement powers may lead to taxpayers going to even greater lengths to avoid or evade paying taxes.³⁵

Whether there are identifiable reasons for the unwillingness to pay taxes voluntarily or not, taxes cannot be collected only from those taxpayers who comply voluntarily.³⁶ This brings one back to the point that any revenue authority, including SARS, must be afforded enforcement powers that will enable it to collect tax revenue to which it is entitled efficiently, timeously and in a lawful manner.³⁷

In 1988, the Organisation for Economic Co-operation and Development (“OECD”) pointed out that the manner in which revenue authorities enforce compliance is crucial as it has a direct impact on taxpayers’ confidence in the fairness of the tax system and their approach to compliance.³⁸ Consequently, revenue authorities’ enforcement powers have to be effective to ensure compliance by unwilling taxpayers, but it should not be too overzealous as such an approach could negatively impact on taxpayers’ attitude towards compliance. Thus, a balance must be achieved.

Irrespective whether SARS exercises its enforcement powers in a manner that may impact positively or negatively on voluntary compliance, these enforcement powers must be exercised within the confines of the Constitution of the Republic of South

³⁴ Mikesell & Birskyte (2007) *International Journal of Public Administration* 1046. See also Hasseldine & Bebbington (1991) *Journal of Economic Psychology* 302; Hasseldine & Li “More tax evasion research required in new millennium” (1999) *Crime, Law & Social Change* 94 for a discussion of the compliance lottery model. For a discussion of the shortcomings associated with the compliance lottery model, see Smith & Kinsey (1987) *Law & Society Review* 642; Murphy “Aggressive tax planning: differentiating those playing the game from those who don’t” (2004) *Journal of Economic Psychology* 308.

³⁵ Mikesell & Birskyte (2007) *International Journal of Public Administration* 1066. See Lewis *The psychology of taxation* (1982) 154–155 who demonstrates that stricter enforcement procedures may not inevitably enhance compliance. He remarks that stricter enforcement procedures without a positive change in tax attitude may result in a decline in compliance.

³⁶ Thompson & Green *Handbook of public finance* (1998) 188.

³⁷ Muller *A framework for wealth transfer taxation in South Africa* (unpublished LLD thesis, University of Pretoria (2010) 63.

³⁸ OECD *Administrative responsiveness and the taxpayer* (Feb 1988) 5. Burton (2006) 107 endorses this view. See also Anyaduba, Eragbhe & Kennedy (2012) *European Journal of Business and Management* 37 who state that enhancing taxpayers’ morale tax will have a positive effect on tax compliance.

Africa, 1996 (“Constitution”).³⁹ The Constitution is the supreme law of South Africa and therefore any law or conduct inconsistent with the Constitution is invalid.⁴⁰ This means that even though SARS acquires its enforcement powers from legislation, these powers are not beyond reproach. If the legislation affording SARS these powers and the administrative actions it performs to enforce payment unreasonably and unjustifiably limit⁴¹ a taxpayer’s constitutional rights, the specific offending provision(s) or action(s) will be declared unconstitutional by the High Court,⁴² Supreme Court of Appeal⁴³ or Constitutional Court.⁴⁴ It is indeed SARS’ wide-ranging powers in the context of South Africa as a constitutional state that constitute the focus of this thesis.

Goldswain identifies the following rights as having specific relevance in the realm of taxation: equality (section 9 of the Constitution); human dignity (section 10), privacy (section 14), freedom of trade, occupation and profession (section 22), property (section 25(1)), access to information (section 32), just administrative action (section 33), access to courts (section 34) and the rights associated with arrested, detained and accused persons (section 35).⁴⁵

Even though all of these rights are important and should be protected, this thesis mostly focuses on the rights to privacy, just administrative action and access to courts.⁴⁶ The reason for focusing on these specific rights is that this thesis considers

³⁹ The Citation of Constitutional Laws Act 5 of 2005 provides that no Act number must be associated with the Constitution of the Republic of South Africa as this Act was not passed by Parliament, but was adopted by the Constitutional Assembly.

⁴⁰ Section 2 of the Constitution.

⁴¹ The limitation clause is provided for in s 36 of the Constitution. See Ch 2, par 2.8.7 where this section is discussed.

⁴² In terms of s 169(1) of the Constitution. See also Ch 2, fn 262 where the jurisdiction of the High Court is mentioned.

⁴³ Section 169(1) read with s 168(3)(b) of the Constitution. See Ch 2, fn 261 where the jurisdiction of the Supreme Court of Appeal is mentioned.

⁴⁴ In terms of s 167(1)(b) of the Constitution. Section 167(5) of the Constitution provides that when the High Court or the Supreme Court of Appeal (or a court of similar status) has declared any conduct or legislation to be unconstitutional, the Constitutional Court has to confirm the decision before the order has any force.

⁴⁵ Goldswain (2012) 4.

⁴⁶ See Ch 2, para 2.8.3; 2.8.5; 2.8.6 in this regard. The other rights, where relevant, are also mentioned.

selected enforcement powers of SARS which *prima facie*⁴⁷ infringe on these three rights. The selected enforcement powers are SARS' power to (i) conduct searches and seizures, (ii) proceed with enforcement actions even though the matter is subject to dispute resolution; and (iii) appoint a third party on behalf of a taxpayer.⁴⁸

These three powers of SARS have been the subject of various court cases.⁴⁹ For example, *Hindry v Nedcor Bank Ltd*,⁵⁰ *Mpande Foodliner CC v Commissioner of SARS*⁵¹ and *Smartphone SP (Pty) Ltd v Absa Bank Ltd*⁵² considered SARS' power to appoint a third party on behalf of a taxpayer.⁵³ In turn, the constitutionality of not suspending a payment obligation pending an objection or an appeal, also known as the "pay now, argue later" rule, was raised or discussed *inter alia* in *Metcash Trading Ltd v Commissioner of SARS*,⁵⁴ *Mokoena v Commissioner of SARS*⁵⁵ and *Capstone 556 (Pty) Ltd v Commissioner of SARS*.⁵⁶ Furthermore, SARS' power to search premises and seize property of taxpayers to verify compliance with fiscal legislation, especially when it is conducted without first obtaining a warrant, was the subject of judicial scrutiny.⁵⁷ Some of the cases that dealt with the power to search and seize were *Deutschmann, Shelton v Commissioner of SARS*⁵⁸ and *Gaertner v Minister of Finance and Commissioner of SARS*.⁵⁹

This thesis contributes to the existing jurisprudence and scholarly discourse on the topic. First, it focuses on the delicate balance between enforcement powers that will ensure effective collection of taxes and various fundamental rights of taxpayers in the South African context. Thereafter the thesis critically evaluates the relevant laws

⁴⁷ Author unknown *Black's Dictionary* available at <http://bit.ly/1MhARXS> (accessed 9 Nov. 2016) defines *prima facie* as "at first sight; on the first appearance; on the face of it; so far as can be judged from the first disclosure; presumably".

⁴⁸ See Ch 3, par 3.1; Ch 5, par 5.1 and Ch 7, 7.1 where the reason for selecting each of these powers is discussed.

⁴⁹ See Silke (2002) *Acta Juridica* 282-334 for a discussion of some of the case law.

⁵⁰ 1999 (2) All SA 38 (W).

⁵¹ (2000) 63 SATC 46.

⁵² 2004 (3) SA 72 (W).

⁵³ See Ch 7 where SARS' power to appoint a third party on behalf of a taxpayer is examined.

⁵⁴ 2001 (1) SA 1109 (CC).

⁵⁵ 2011 (2) SA 556 (GSJ).

⁵⁶ 2011 ZWCHC 297. See Ch 5 where the "pay now, argue later" rule is dealt with.

⁵⁷ See Ch 3 where SARS' power to search and seize is examined.

⁵⁸ 2000 (5) BCLR 571.

⁵⁹ *Gaertner v Minister of Finance & Commissioner of SARS* 2014 (1) SA 442 (CC).

and procedures in four carefully selected countries to determine in what way, if any, the legislation affording the enforcement powers to SARS can be improved. Focusing on the collection of taxes, and more specifically SARS' enforcement powers associated with it, is also critical from a taxpayers' rights point of view. This is because one of the factors that should be considered when determining whether a taxpayer's rights are reasonably and justifiably limited is whether there are less invasive means available to achieve the purpose of effective tax collection.⁶⁰ These less invasive means may relate to the mechanisms that SARS uses to collect and enforce tax. Consequently, this thesis critically reviews and analyses the nature and scope of the existing legislative enforcement powers of SARS and investigates whether there are less invasive alternatives available to SARS to collect taxes efficiently.

1.2. RESEARCH OBJECTIVE AND RESEARCH QUESTIONS

The objective of this thesis is to determine the constitutionality of the selected enforcement powers of SARS and to propose plausible solutions for those situations where the current laws and practices may not pass constitutional muster.

In order to achieve this objective, the following questions are asked:

- i) What are the constitutional parameters within which SARS must exercise its enforcement powers?
- ii) To what extent are the selected enforcement powers afforded to SARS within the parameters of the Constitution?
- iii) Can the South African law and procedures benefit from the laws and procedures of the revenue authorities of Australia, Canada, New Zealand and Nigeria regarding their corresponding enforcement powers?

Based on the answers to the aforementioned questions, conclusions are reached and recommendations are made.

⁶⁰ In terms of s 36(1)(e) of the Constitution.

1.3 COMPARATIVE COUNTRIES

Thuronyi correctly states that a “study of other systems paradoxically helps you better think about your own and can provoke insights that lead to breakthroughs in understanding”.⁶¹ A comparative study may provide insight as to which procedures or practices may be adopted and used to improve⁶² SARS’ enforcement powers. The countries that form part of this comparative study are Canada, Australia, New Zealand and Nigeria. The reasons for selecting these jurisdictions are discussed below.

1.3.1 Canada

Canada is also confronted with balancing the Canadian Revenue Authority’s (“CRA”) duty to collect taxes on the one hand and taxpayers’ constitutional rights on the other. In this regard Li states that the honesty of taxpayers is dependent on whether the tax system in reality treats taxpayers in a fair manner as well as the taxpayers’ perceptions thereof.⁶³ In order to ensure that taxpayers are treated (and perceived to be treated) fairly, taxpayers’ rights must be respected and protected against misuse or abuse by the CRA.⁶⁴ Despite recognising that taxpayers’ rights should be respected in order to improve voluntary compliance, Canada in 2005 decidedly embarked on a strategy that focuses on the enforcement of taxes.⁶⁵ Consequently, Canada also has to contend with balancing an effective tax enforcement approach with respecting taxpayers’ rights.

The CRA’s enforcement powers, with its focus on enforcement, makes for an interesting comparison as these powers must be conducted in accordance with

⁶¹ Thuronyi *Comparative Tax Law* (2003) 1.

⁶² Legwaila *The suitability of the South African corporate tax regime for the use of South African resident intermediary holding companies* (unpublished LLD thesis, University of Pretoria (2010)) 11. See Arnold “Responses to tax avoidance” in Gammie (ed) “Striking the balance: tax administration, enforcement and compliance in the 1990’s” (1993) *Institute for Fiscal Studies Sixth Residential Conference* 202 who cautions that when engaging in tax comparisons it must be kept in mind that the practices or procedures operate in a country’s specific context. As such, one should be careful to not simply transplant practices and procedures from other countries without taking cognisance of the specific South African context within which the enforcement powers should function.

⁶³ Li “Taxpayers’ rights in Canada” in Bentley *Taxpayers’ rights: an international perspective* (1998) 89.

⁶⁴ Li (1998) 90.

⁶⁵ Thuronyi (2003) 207; Arnold “Canada” in Ault & Arnold *Comparative income taxation – a structural analysis* (2010) 37.

Canada's Charter of Rights and Freedoms ("Charter").⁶⁶ This comparison is useful from a South African perspective as the Bill of Rights contained in the South African Constitution closely resembles the Charter.⁶⁷ In addition, the Charter came into operation in 1982, which means that Canada has had more time than South Africa⁶⁸ to grapple with the question how constitutional rights and taxation should be balanced. As a result, Canada has relevant jurisprudence and scholarly discourse available which may assist South Africa in balancing the rights of taxpayers and the duties of SARS.

1.3.2 Australia

The Australian Tax Office ("ATO"), in addressing the tension between taxpayers and itself, aims to ensure that taxpayers understand their obligations and rights and that tax enforcement occurs on a level playing field.⁶⁹ Furthermore, the ATO strives to promote a trustworthy relationship between itself and taxpayers.⁷⁰ Bentley remarks that this relationship, which is based on service and voluntary compliance, must be balanced by an effective collection system.⁷¹ This balance should be achieved through tax administration that "optimise[s] collections under the law in a way that instils the community's confidence in the administrator and the system".⁷²

Furthermore, Australia's income tax assessment procedure is similar to that of South Africa.⁷³ Thus, the manner in which payment of the determined income tax is established in South Africa would be comparable to the manner in which it is done in Australia. Another aspect which makes the comparison between Australia and South Africa insightful is that taxpayers' rights and interests in Australia are not protected

⁶⁶ The Charter of Rights and Freedoms is contained in Part 1 of the Canadian Constitution Act, 1982 and is available at <http://bit.ly/1hjSW8Z> (accessed 18 May 2016).

⁶⁷ Goldswain (2012) 223.

⁶⁸ See Chapter 2, par 2.6 where South Africa's constitutional dispensation is discussed.

⁶⁹ ATO "Strategic Statement 2006–10" (2006) available at <http://bit.ly/1R6K05Y> (accessed 17 May 2016) 1.

⁷⁰ ATO (2006) 5 available at <http://bit.ly/1R6K05Y> (accessed 17 May 2016). See also ATO (2011) available at <http://bit.ly/1Jm26Un> (accessed 17 May 2016).

⁷¹ Bentley "The significance of declarations of taxpayers' rights and global standards for the delivery of tax services by revenue authorities" (6 May 2002), paper delivered at International symposium of Japan's tax reform available at <http://bit.ly/1rS3BCF> (accessed 17 May 2016).

⁷² Carmody "The art of tax administration: two years on" in Fisher & Walpole *Global challenges in tax administration* (2005) 5.

⁷³ Williams "Taxpayers' rights in South Africa" in Bentley *Taxpayers' rights: an international perspective* (1998) 282.

by a constitution.⁷⁴ It would be interesting to see whether Australia, where taxpayers' rights are embedded in common-law principles,⁷⁵ provides more or less protection of taxpayers' rights than South Africa, where the relevant rights are contained in a constitution that is the supreme law.⁷⁶

1.3.3 New Zealand

In 1999, Sawyer drew attention to the fact that there is a shift in focus relating to tax administration because modern tax systems require greater cooperation from taxpayers.⁷⁷ Evidence of this shift in New Zealand may be found in the Statement of Principles,⁷⁸ which sets out principles to encourage voluntary compliance⁷⁹ and the Taxpayers' Charter,⁸⁰ which outlines the Inland Revenue Department's relationship with New Zealand's taxpayers.⁸¹ Despite an apparent shift to encourage taxpayer cooperation as opposed to rigid enforcement, taxpayers in New Zealand do not enjoy the same entrenched constitutional rights as taxpayers in South Africa. The reason is that New Zealand's Constitution comprises of a number of statutes, court decisions and constitutional conventions.⁸² One of the relevant statutes is the Bill of Rights Act, 1990 ("BORA"), which aims to "protect, and promote human rights and fundamental freedoms in New Zealand".⁸³ The rights contained in the BORA are

⁷⁴ See McSweeney *Section 263 and 264 of the Income Tax Assessment Act 1936: a privacy perspective and review of overseas experience* (unpublished Masters of Business in Accounting and Finance dissertation, University of Victoria (1993)) 77.

⁷⁵ *Citibank Ltd v Commissioner of Taxation* [1988] FCA 306 par 2.

⁷⁶ See Ch 2, par 2.6 where South Africa's constitutional dispensation is discussed.

⁷⁷ Sawyer "A comparison of New Zealand taxpayers' rights with selected civil law and common law countries – have New Zealand taxpayers been 'short-changed'?" (1999) *Vanderbilt Journal of Transnational Law* 1346.

⁷⁸ Baker & Groenhagen "The protection of taxpayers' rights – an international codification" (2001) *European Financial Forum* 17. This Statement of Principles was established in 1984.

⁷⁹ Sawyer (1999) *Vanderbilt Journal of Transnational Law* 1373.

⁸⁰ The Taxpayers' Charter was published in 1992 and is available at <http://bit.ly/QDXcru> (accessed 17 May 2016).

⁸¹ Croome (2002) *Acta Juridica* 22.

⁸² Keith "Cabinet Manual: on the Constitution of New Zealand: an introduction to the foundations of the current form of government" (2008) available at <http://bit.ly/1BshaVX> (accessed 11 Nov. 2016); Morris, Boston & Butler *Reconstructing the Constitution* (2011) 125; Gupta "Inland Revenue's powers of search and seizure and taxpayers' constitutional rights" (2013) *Journal of Australian Taxation* 133; Gupta "Rights against unreasonable search and seizure in tax cases: Canadian and New Zealand approaches compared" (2013) *New Zealand Journal of Taxation Law and Policy* 222.

⁸³ Preamble to the BORA.

neither entrenched nor supreme law.⁸⁴ It makes for an interesting comparison to ascertain how New Zealand protects taxpayers' interests in the absence of constitutionally entrenched rights.

New Zealand is also an interesting comparative country from an enforcement perspective as New Zealand still has to enforce the collection of taxes from taxpayers who, despite the focus on taxpayer cooperation, do not comply with fiscal legislation voluntarily.

1.3.4 Nigeria

Nigeria, like South Africa, is classified as a developing/emerging economy.⁸⁵ Furthermore, both countries are situated in Africa and have ratified the African Charter on Human and Peoples' Rights (the "African Charter"),⁸⁶ which aims "to promote and protect human rights and basic freedoms in the African continent".⁸⁷ In terms of article 1 of the African Charter this means that South Africa and Nigeria must "adopt legislative and other measures" that will give effect to the rights and duties provided for in the African Charter. Consequently, South Africa and Nigeria must, in terms of the African Charter, ensure that every individual is treated equally before the law and⁸⁸ that every individual's case may be heard,⁸⁹ meaning that an individual has the right to appeal to a competent forum when a fundamental right is

⁸⁴ Morris, Boston & Butler (2011) 125; Gupta (2013) *Journal of Australian Taxation* 133. Gupta (133) explains that accordingly the BORA can be repealed or amended with a simple majority of Parliament. The reason why no specific protection is afforded to the provisions of the BORA may be because the Act does not create any new rights and merely confirms existing common-law rights. (Ministry of Justice "Guidelines to the Bill of Rights Act" available at <http://bit.ly/29RCst3> (accessed 14 July 2016)). See also s 2 of the BORA where it is specifically indicated that the rights are affirmed. Gupta (2013) *Journal of Australian Taxation* 134 indicates that even though the BORA is an ordinary statute, it serves the same function as a constitutionalised Bill of Rights. It is agreed that it might serve the same function but the problem lies in the fact that it does not have the same protection as an entrenched or supreme Bill of Rights. Section 4 of the BORA provides that a court cannot declare an Act invalid on the grounds that it is inconsistent with a provision of the BORA.

⁸⁵ World Bank "List of developing/emerging countries" (May 2010) available at <http://bit.ly/1WeRsnQ> (accessed 24 May 2016).

⁸⁶ African Commission on Human and Peoples' Rights "Ratification table: African Charter on Human and Peoples' Rights (2016) available at <http://bit.ly/1IObnUQ> (accessed 20 May 2016).

⁸⁷ African Commission on Human and Peoples' Rights "African Charter on Human and Peoples' Rights" (unknown) available at <http://bit.ly/QIzRuG> (accessed 20 May 2016).

⁸⁸ Article 3 of the African Charter.

⁸⁹ Article 7 of the African Charter.

violated⁹⁰ and to be presumed innocent until proven guilty by a competent court.⁹¹ Therefore, South Africa and Nigeria have similar obligations in relation to taxpayer's rights.⁹² Interestingly, in terms of the African Charter, individuals in both countries have the duty to pay taxes that are imposed by law as it is in the interest of society.⁹³

1.4 LIMITATION OF STUDY

The thesis focuses on only three enforcement powers, namely, the power to (i) conduct searches and seizures, (ii) proceed with enforcement actions even though the matter is subject to dispute resolution; and (iii) appoint a third party on behalf of a taxpayer, and this may be viewed as a limitation. However, each of these powers is discussed in relation to other connected enforcement powers in order to provide sufficient context. Despite limiting the thesis to these three powers, overarching issues in relation to SARS' enforcement powers are also dealt with.

The selected enforcement powers are only discussed in relation to income tax, value-added tax and customs duties. It is pointed out that the scope of a specific enforcement power of SARS may indeed differ in relation to different types of tax. When discrepancies occur in the manner in which different taxes are enforced, the nature and context of the specific tax might compel such a divergence. Consequently, the arguments made in this thesis relating to SARS' enforcement powers with regard to income tax, value-added tax and customs duties may indeed also apply to corresponding powers to collect other types of taxes, provided that the context of the specific tax is borne in mind.

The thesis constitutes a critical, qualitative legal analysis of the enforcement powers of SARS. Therefore, an in-depth analysis of the rich and important behavioural economics and psychology literature on taxpayer behaviour is inappropriate.⁹⁴

⁹⁰ Article 7.a of the African Charter.

⁹¹ Article 7.b of the African Charter.

⁹² Due to a dearth of literature and case law pertaining to the Nigerian Federal Inland Revenue Service's enforcement powers, the comparison with Nigeria is not as detailed as the analysis of the other countries.

⁹³ Article 29.6 of the African Charter.

⁹⁴ For further reading on the behavioural economics and psychological perspectives relating to non-compliance by taxpayers, see Ali, Fjeldstad & Sjursen "To pay or not to pay? Citizens' attitudes toward taxation in Kenya, Tanzania, Uganda, and South Africa" (2014) *World Development* 828-

Finally, the thesis does not take into account any development in the law that occurred after 31 January 2017.

1.5 EXPOSITION

The thesis comprises of 5 parts which are divided into 9 chapters. The first part, which comprises of Chapters 1 and 2, provides the contextual setting. Chapter 1 introduces the research objective and explains its importance, whereas Chapter 2 establishes a constitutional framework within which SARS must exercise its enforcement powers.

Part 2 of the thesis deals with searches and seizures aimed at verifying and investigating whether taxpayers are compliant with tax legislation. Chapter 3 examines the South African search and seizure procedure in relation to income tax, value-added tax and customs duties. Chapter 4 compares the South African search and seizure provisions to the other jurisdictions that have been selected for the comparative study.⁹⁵

Part 3 examines whether a taxpayer's obligation to pay tax is suspended pending dispute resolution. Chapter 5 deals with the South African position regarding income tax, value-added tax and customs duties, whilst Chapter 6 deals with the situation in the selected jurisdictions.

In Part 4, which comprises of Chapters 7 and 8, the revenue authorities' power to appoint a third party on behalf of a taxpayer comes under scrutiny. Chapter 7 considers the South African provisions relating to this power and Chapter 8 compares the South African provisions to those of the other jurisdictions.

842; Ali, Fjeldstad & Sjørnsen "Factors affecting tax compliant attitude in Africa: evidence from Kenya, Tanzania, Uganda and South Africa" (2013) *Centre for the Study of African Economies Conference, Oxford* 17-19; Nienaber (2013) 100; Kirchler, Hoelzl & Wahl (2008) *Journal of Economic Psychology* 211-225; Cummings, Martinez-Vazquez, McKee & Torgler "Effects of tax morale on tax compliance: experimental and survey evidence" (2006) *Berkeley program in Law and Economics, Working Paper Series* 1-36; Slemrod "Why people pay taxes: Introduction" in Slemrod (ed) *Why people pay taxes* (1992) 1-2.

⁹⁵ See Ch 1, par 1.3.

Finally, Part 5 comprises of Chapter 9. Chapter 9 draws overarching conclusions and provides recommendations for law reform to ensure that SARS' enforcement powers are exercised within the parameters of the Constitution.

CHAPTER 2 - CONTEXTUAL SETTING OF TAXATION

2.1 INTRODUCTION

This chapter provides the context in which SARS administers the collection of taxes. From the onset and to provide proper context for the in-depth discussion of taxpayer rights and enforcement powers, it is important first to review and discuss the concept “tax” as well as the purpose of taxation. Furthermore, this chapter illustrates that although SARS has the important duty of enforcing the payment of taxes, this duty must be performed within the context of the Constitution. Accordingly, the South African constitutional dispensation, which establishes a framework in which SARS must conduct its enforcement powers, is discussed in some detail. In the subsequent chapters this framework is used to determine whether or not SARS’ enforcement powers are excessive and in need of curtailment.

2.2 THE TAX CONCEPT

The question “What is ‘tax’?” is not easy to answer. Some authors indicate that defining tax can be tricky because tax can be seen as abstract and pliable.¹ Discussions regarding the tax concept refer to dictionary definitions, public finance literature, legal literature and case law.²

In 1821, Say defined tax as the “transfer of a portion of national products from the hands of individuals to those of the government, for the purpose of meeting the public consumption or expenditure”.³ This definition refers to one of the purposes of a tax, namely, to raise revenue for the government. This revenue can then be used to fund the expenditure that government incurs when providing public goods and

¹ Thuronyi *Comparative Tax Law* (2003) 45; Muller *A framework for wealth transfer taxation in South Africa* (unpublished LLD thesis, University of Pretoria (2010)) 14; Croome (ed) *Tax Law: an introduction* (2013) 5. Nienaber *The expectation gap between taxpayers and tax practitioners in a South African context* (unpublished PhD thesis, University of Pretoria (2013)) 35 argues that it is difficult to define the concept “tax” as it is dependent on different legal contexts.

² For further detail relating to the definition of tax see Steyn *Conceptual framework for evaluating the tax burden of individual taxpayers in South Africa* (unpublished PhD thesis, University of Pretoria (2012)) 30; Nienaber (2013) 33.

³ Say *A treatise on political economy or the production, distribution and consumption of wealth* (1821) 341. Thuronyi (2003) 46 confirms that a tax is a payment made to support government expenditure.

services.⁴ Bird and Tsiopoulos extend Say's definition of tax by indicating that taxes are mandatory but "not related to any *specific* benefit or government service".⁵

Another characteristic of a tax is that the payment of taxes should have a public benefit. Accordingly, the collected revenue should be used to provide collective services to the community.⁶ In *The Maize Board v Epol (Pty) Ltd* ("the Maize Board")⁷ the court held that a specific levy cannot be classified as a tax if it is not for public benefit. In this matter it was held that it is not for public benefit if only a few would benefit from this levy.⁸ Therefore, it follows that a tax is not concerned with providing a direct *quid pro quo* for the payment thereof or providing an exclusive benefit in exchange for payment.⁹

Steyn, after considering the definition of tax contained in numerous sources, defines tax as a compulsory impost with a purpose "to raise revenue for government, where the revenue is intended for funding general expenditure in the provision of public goods and services, to the shared benefit of the public as a whole".¹⁰ Thus, the essential characteristics of tax are that (i) it raises revenue; (ii) it is compulsory; and (iii) it is for public benefit.¹¹

2.3 PURPOSE OF TAXATION

The first characteristic of a tax also refers to the first purpose of taxation, namely, to raise revenue. It is important that sufficient revenue is raised in order to finance

⁴ Steyn (2012) 34.

⁵ Bird & Tsiopoulos "User charges for public services: potentials and problems" (1997) *Canadian Tax Journal* 38 available at <http://bit.ly/1nMWUxl> (accessed 17 June 2014). Own emphasis added. Muller (2010) 15 indicates that a tax should also not be for a specific defined benefit. Contributions made to government for a specific benefit would be redistributions or consumption levies.

⁶ Gildenhuis *Owerheidsfinansies* (1989) 263.

⁷ 2009 (3) SA 110 (D).

⁸ *The Maize Board* par 27.

⁹ Gildenhuis (1989) 263; Thuronyi (2003) 45; Steyn (2012) 34.

¹⁰ Steyn (2012) 35.

¹¹ Williams & Morse *Davies principles of tax law* (2000) 3 also identified these three characteristics of a tax. It is interesting to note that Kujinga *The efficacy of the South African general anti-avoidance rule in curbing impermissible tax avoidance – a comparative analysis* (unpublished LLD thesis, University of Pretoria (2013)) 12 states that there is no specific *quod pro quo* as a separate characteristic. However, it is submitted that it emanates from the fact that taxes should be used for public benefit and consequently it does not create a separate characteristic.

government expenditure.¹² Government expenditure can be financed, amongst other ways, through taxation, user charges,¹³ administrative fees¹⁴ and borrowing.¹⁵ Taxation in South Africa yields a significant percentage of government revenue.¹⁶ For example, in the 2011/2012 fiscal year, 97.1 per cent of revenue comprised of collected taxes.¹⁷

Taxation is also used to redistribute resources when these are not evenly distributed.¹⁸ The extent of how even or uneven resources are distributed is determined using the so-called gini index.¹⁹ A gini index of zero would indicate that everyone receives the same or equal income, whilst an index of 100 would indicate that income goes to one person and the rest of the people receive nothing. South Africa's gini index of 63.1 in 2009²⁰ and approximately 70 in 2013²¹ indicates that the distribution of resources in South Africa is substantially unequal. In fact, South Africa has one of the highest gini indices in the world.²² Muller indicates that since South

¹² Steenekamp "Introduction to taxation and tax equity" in Black, Calitz & Steenekamp *Public Economics* (2015) 210.

¹³ See Steyn (2012) 36–42 for a discussion of the inherent characteristics of a user charge. Steyn indicates that a user charge is aimed at recovering costs incurred by government. This has the effect that a user charge is a *quid pro quo* for an exclusive benefit received by the person paying the user charge. Steenekamp (2015) 210 adds that a user charge can only be charged in instances where those who are not willing to pay the user charge can be excluded. Examples of user charges are payments in respect of ambulance services and public swimming pools.

¹⁴ According to Steenekamp (2015) 210 an administrative fee is comparable with a user charge but the services received in exchange for the administrative fee is broad and imprecise. Examples of administrative fees include payments for motor vehicle licenses and business licences.

¹⁵ Steenekamp (2015) 210 indicates that money can be borrowed from either citizens or overseas. However, it is important to note that because borrowed funds must be repaid (with interest), borrowed money may result in deferred taxes.

¹⁶ Steenekamp (2015) 163.

¹⁷ StatsSA "Understanding the national government sources of revenue pattern" 1 available at <http://bit.ly/1mDAPLa> (accessed 1 July 2014 – no longer available).

¹⁸ Williams & Morse (2000) 4–5; Muller (2010) 38–41; Croome (Ed) (2013) 8–9. Muller (2010) 38 indicates that redistribution through taxation can be achieved by increasing the tax payable by the more wealthy members of society by way of progressive tax and wealth taxes.

¹⁹ Bird & Zolt "Redistribution via taxation: the limited role of the personal income tax in developing countries" (2005) *UCLA Law Review* 1628; *World Bank* "Gini index" available at <http://bit.ly/TLu3fJ> (accessed 10 Nov. 2016). In order to measure the equality or inequality, the cumulative percentages of total national income are plotted against the cumulative number of recipients, starting with the poorest (Lorenz Curve). The gini index measures the area between the Lorenz curve and a diagonal line of absolute equality which is expressed as a percentage of the maximum area under the line. See *World Bank* available at <http://bit.ly/TLu3fJ> (accessed 10 Nov. 2016).

²⁰ *World Bank* available at <http://bit.ly/TLu3fJ> (accessed 10 Nov. 2016).

²¹ OECD "OECD Economic Surveys South Africa" (March 2013) 20 available at <http://bit.ly/1pSFRHs> (accessed 10 Nov. 2016).

²² OECD (March 2013) 20 available at <http://bit.ly/1pSFRHs> (accessed 10 Nov. 2016). Rawson "South Africa's gini coefficient is the highest in the world" (11 Dec. 2012) available at

Africa is burdened with poverty and inequality, the redistribution of income is a common goal of tax policy in South Africa.²³

In 2015 Nene, the then Minister of Finance,²⁴ pointed out another objective of taxation, namely, to change certain behaviour.²⁵ He indicated that levying taxes alone may not lead to behavioural changes, but in combination with other measures behaviour could change. For example, excise duty on tobacco coupled with legislation prohibiting smoking in public areas could reduce smoking.²⁶ Another example of taxation aimed at changing certain behaviour is the employment tax incentive,²⁷ which is aimed at encouraging the employment of young people.²⁸

2.4 POWER TO TAX AND TO COLLECT TAXES

The United States Supreme Court indicated that “[t]he power of ... taxation, operates on all the persons and property belonging to the body politic” and that the power to tax “has its foundation in society itself”.²⁹ Barker, referring to this decision,

<http://bit.ly/1INp9u2> (accessed 10 Nov. 2016) even goes so far as to indicate that it is the highest in the world. It could not be established whether this is the case as the gini indices of all the countries in the world are not available.

²³ Muller (2010) 39. Zolt “Revenue design and taxation” in Moreno-Dodson & Wodon *Public finance for poverty reduction – concepts and case studies from Africa and Latin America* (2007) 59 indicates that there are economic costs involved in the redistribution of resources.

²⁴ Nene was appointed as Minister of Finance of South Africa on 25 May 2014 and removed by President Zuma on 9 December 2015, He was replaced with Van Rooyen. The financial markets reacted negatively with a historical low of R16/\$ and soon thereafter Van Rooyen was replaced by former Finance Minister Gordhan. For further reading in this regard see amongsts other Hog “Zuma says people overreacted to Nenegate” (11 Jan. 2016) *BizNews* available at <http://bit.ly/2rBQ5UM> (accessed 5 June 2017); Claymore “Zuma thinks it’s ‘normal’ that his decision to fire Nene cost the PIC R99 billion” (14 July 2016) *The South African* available at <http://bit.ly/2qPv2wN> (accessed 5 July 2017).

²⁵ Nene “South Africa’s tax system and the tax reform agenda for 2015 and beyond BER Conference” (12 June 2015) available at <http://bit.ly/22EjWv2> (accessed 27 March 2016). See also Williams & Morse (2000) 4–5; Zolt (2007) 58; Muller (2010) 38–41; Croome (Ed) (2013) 8–9; Davis Tax Committee “The tax system and inclusive growth in South Africa: a discussion document” (Dec. 2014) 84 available at <http://bit.ly/1SpXlu6> (accessed 17 March 2016).

²⁶ Nene (12 June 2015) available at <http://bit.ly/22EjWv2> (accessed 27 March 2016). Lemboe & Black “Cigarettes taxes and smuggling in South Africa: causes” (May 2012) *Stellenbosch Economic working papers: 9/12* 4 indicate that even though sin tax may result in a decline in the consumption of legal cigarettes, it serves as an incentive to obtain illegal cigarettes, which are not subject to tax. These authors also indicate that this results in cross-border smuggling. Sin taxes may therefore *prima facie* achieve their purpose of curbing certain behaviour but may lead to negative externalities such as an increase in illegal activities.

²⁷ This incentive is provided for by the Employment Tax Incentive Act 26 of 2013.

²⁸ Nene (12 June 2015) available at <http://bit.ly/22EjWv2> (accessed 27 March 2016).

²⁹ *Providence Bank v Billings* 29 U.S. (4 Pet.) (1830) 514 563.

understands the power to tax to be an inherent power of sovereignty.³⁰ This view was also highlighted in the matter of *Attorney-General of Trinidad and Tobago v Ramesh Dipraj Kumar Mootoo*³¹ where the court held that

“[t]he power to tax rests upon necessity, and it is inherent in any sovereignty. The legislature of every free State possesses it under the general grant of legislative power, whether particularly specified in the Constitution among the powers to be exercised or not”.³²

In South Africa neither the Constitution nor any other statute contains an explicit provision imposing the power to tax on the national government.³³ As such the South African government’s power to tax on a national level appears to be an implied power.³⁴ Croome indicates that this power to tax is implied as section 213(1) of the Constitution establishes a National Revenue Fund into which all money received by the national government must be paid.³⁵ Also, section 77 of the Constitution, which deals with money bills, specifically refers to a bill that imposes national taxes.

Nonetheless, an aspect in relation to tax that is expressly provided for in legislation, more specifically the South African Revenue Service Act (“SARS Act”),³⁶ is that SARS has the power to collect and enforce the payment of taxes. One of SARS’

³⁰ Barker “The three faces of equality: constitutional requirements in taxation” (2006–2007) *W .Res. L. Rev* 1.

³¹ (1976) 28 WIR 304.

³² *Attorney-General of Trinidad and Tobago v Ramesh Dipraj Kumar Mootoo* 326.

³³ The Interim Constitution of the Republic of South Africa Act 200 of 1993, which was repealed by the Constitution, also did not contain a specific provision authorising the national government to levy taxes. However, ss 228 and 229 of the Constitution expressly provide that provinces and municipalities may impose taxes.

³⁴ Croome *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 courts* (unpublished PhD thesis, University of Cape Town (2008)) 15; Croome *Taxpayers’ rights in South Africa* (2010) 8. See also Croome (2010) 8–10 for a discussion of provincial and municipal legislatures’ power to impose taxes.

³⁵ Croome (2008) 15. Section 195 of the Interim Constitution also provided for the establishment of a National Revenue Fund.

³⁶ 34 of 1997.

objectives is to collect taxes efficiently and effectively³⁷ by enforcing national legislation concerning the collection of revenue.³⁸

Even though the Commissioner of SARS (“Commissioner”), as the chief executive officer and accounting authority of SARS,³⁹ is enjoined with specific powers in terms of legislation,⁴⁰ these powers may be delegated.⁴¹ This delegation results in more people being able to exercise the discretion conferred on the Commissioner. The ability of the Commissioner to delegate his or her powers could assist SARS in ensuring the effective and efficient collection of taxes.

In addition to collecting taxes effectively and efficiently, SARS must, in terms of section 4(2) of the SARS Act, conduct its enforcement duty in accordance with the provisions of section 195 of the Constitution, which relates to the basic principles and functions governing public administration. The reason why SARS must adhere to principles and functions of public administration is that SARS, as an organ of state,⁴² forms part of the public administration.⁴³

Section 195(1) of the Constitution provides that an organ within the public administration⁴⁴ must adhere to the values and principles enshrined in the

³⁷ Section 3(a) of the SARS Act. The other objective as provided for in s 3(b) of the SARS Act is to control “the import, export, manufacture, movement, storage or use of certain goods” efficiently and effectively.

³⁸ Section 4(1) of the SARS Act. See Schedule 1 to the SARS Act for a list of national legislation which SARS must enforce. However, this list is not exhaustive as s 4(1)(a)(ii) of the SARS Act provides that other legislation may also be assigned to SARS for enforcement purposes.

³⁹ See s 9(d) of the SARS Act in this regard.

⁴⁰ For example, see Ch 3, para 3.2.1 where it is indicated that the Commissioner of SARS had the discretion whether a search and seizure could be conducted in terms of the ITA and VAT Act; Ch 5, para 5.2.1; 5.3.1 where the Commissioner had the discretion to determine whether a taxpayer’s payment obligation could be suspended in terms of the ITA, VAT Act and the CEA; Ch 7, para 7.2.1; 7.3.1.1 where it is indicated that the Commissioner had the discretion to appoint a third party on behalf of a taxpayer.

⁴¹ See s 3(1) of the ITA; s 5(1) of the VAT Act; s 3 of the CEA; s 6(2) read with s 10 of the TAA. Section 10(1)(a)–(b) of the TAA provides that in order for the Commissioner to delegate his or her powers, the delegation must be in writing and will only be effective once it has been signed by the Commissioner. The delegation is also subject to the conditions which the Commissioner may impose (s 10(1)(c) of the TAA).

⁴² Section 2 of the SARS Act.

⁴³ Section 195(2)(b) of the Constitution.

⁴⁴ Section 2 of the SARS Act explicitly provides that SARS is an organ of state within the public administration.

Constitution.⁴⁵ Furthermore, such an organ must be governed by, amongst other principles, the efficient, economic and effective use of resources⁴⁶ and the requirement that services must be provided in an impartial, fair, equitable and unbiased manner.⁴⁷ Organs within the public administration must also be accountable⁴⁸ and act in a transparent manner.⁴⁹

It must be noted that section 195(1) of the Constitution does not confer a justiciable enforceable right.⁵⁰ In *Chirwa v Transnet Ltd* (“*Chirwa*”)⁵¹ the court recognised that section 195(1) serves an interpretative purpose.⁵² In *Joseph v City of Johannesburg* (“*Joseph*”)⁵³ the court went further by indicating that if an organ within the public administration does not exercise its powers in line with the values contained in section 195(1) of the Constitution, an affected person may take the matter on review.⁵⁴

2.5 CANONS OF TAXATION

2.5.1 General

The characteristics of a good tax, commonly referred to as “the canons of taxation”, were identified by Smith in 1776 and comprise of equity, certainty, convenience and efficiency.⁵⁵ Subsequently, the canons of taxation have been acknowledged in several reports in South Africa⁵⁶ and elsewhere.⁵⁷

⁴⁵ For example, the rule of law as discussed in Ch 2, par 2.7.

⁴⁶ Section 195(1)(b) of the Constitution.

⁴⁷ Section 195(1)(d) of the Constitution. See Ch 2, par 2.8.5.1 where the link between s 195(1)(d) of the Constitution and the Promotion of Administrative Justice Act 3 of 2000 is discussed.

⁴⁸ Section 195(1)(f) of the Constitution.

⁴⁹ Section 195(1)(g) of the Constitution.

⁵⁰ *Institute for Democracy in South Africa v African National Congress* 2005 (5) SA 39 (C) par 64.

⁵¹ 2008 (3) BCLR 251 (CC).

⁵² *Chirwa* par 75.

⁵³ 2010 (3) BCLR 212 (CC).

⁵⁴ *Joseph* par 41.

⁵⁵ Smith *An inquiry into the nature and causes of the wealth of nations* (1776) available at <http://bit.ly/1nCHpXo> (accessed 19 Nov. 2016). Mohr & associates *Economics for South African students* (2015) 293 indicate that over time more modern criteria such as neutrality and simplicity have been added to the principles of a good tax. It is submitted that the more modern criteria essentially form part of the original criteria identified by Smith. Accordingly, the modern criteria do not warrant a separate discussion and are incorporated in the discussion of the original canons of taxation.

⁵⁶ Margo (Chair) *Report of the Commission of Inquiry into the Tax Structure of the Republic of South Africa* (1986) para 4.42–4.50; Katz (Chair) (1994) par 1.5.4(a); Katz (Chair) *Fourth Interim*

Even though the canons of taxation is concerned with tax policy, the discussion that follows indicates that these canons also apply to tax enforcement.

2.5.2 Equity

According to Smith, equity means that “[t]he subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state”.⁵⁸ His understanding of the concept “equity” refers to a principle known as the ability to pay,⁵⁹ which essentially views taxation as “a sacrifice levied upon some kind of ‘personal economic well-being’”.⁶⁰

The ability-to-pay principle has two dimensions.⁶¹ In the first place, people with the same ability to pay, should be treated similarly by paying the same amount of tax. This is known as horizontal equity.⁶² In the second place, vertical equity requires that people with different economic conditions should be treated differently. Consequently, a person with a greater ability to pay should pay more taxes.⁶³

Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa (1997) para 1.4–1.5; Croome (2008) 6.

⁵⁷ See Alley & Bentley “Remodelling of Adam Smith’s tax design principles” (2005) *Australian Tax Forum* 586–588 for a useful table of how these canons are reflected in other reports.

⁵⁸ Smith (1776) par I available at <http://bit.ly/1nCHpXo> (accessed 19 Nov. 2016).

⁵⁹ Buehler “Ability to pay” (1945–1946) 1 *Tax L. Rev.* 247 indicates that this quote from Smith has been interpreted by some (without indicating who) to refer to the “user pays” principle, others have seen it to refer to both use and ability, whilst another group identifies it as part of the “ability-to-pay” principle. He, however, endorses the view that it refers to the “ability-to-pay” principle. See Williams & Morse (2000) 6–7 for a discussion of the controversies and problems associated with the “ability-to-pay” principle. See also Musgrave PB & Musgrave RA *Public Finance in theory and practice* (1973) 242–250 for a discussion relating to the “ability-to-pay” principle and the choice of tax base.

⁶⁰ Muller (2010) 45; Croome (ed) (2013) 10.

⁶¹ Williams & Morse (2000) 6; Muller (2010) 45; Croome (ed) (2013) 10.

⁶² Williams & Morse (2000) 6; Bird & Zolt “Introduction to tax policy design and development” (2003) *World Bank* 15–16; Zolt (2007) 62; Muller (2010) 45; Croome (ed) (2013) 10; Stiglitz & Rosengard *Economics of the public sector* (2015) 523. See Zolt (2007) 63 regarding the problems associated with horizontal equity.

⁶³ Bird & Zolt (2003) *World Bank*; Zolt (2007) 63; Muller (2010) 45; 16. See Muller (2010) 47–49 for a discussion of the manner in which vertical equity has evolved. See Musgrave RA “Horizontal equity, once more” (June 1990) *National Tax Journal* 113; Stiglitz & Rosengard (2015) 525 for problems associated with vertical equity. Applying vertical equity would also assist in redistribution wealth which was identified in par 2.3 as a purpose of taxation.

According to Buehler, the phrase “ability-to-pay” suggests that the ability can be measured and that taxpayers will then share the tax burden accordingly.⁶⁴ This ability can be determined by measuring their income, wealth and consumption.⁶⁵ Both Buehler and Steenekamp identify income as the method commonly used to measure the ability to pay, but indicate that this method is not without flaws.⁶⁶ They indicate that income does not necessarily reflect a person’s ability or capacity to pay.⁶⁷ Rosen illustrates the deficiency of the ability-to-pay principle by providing an example of two people with the same wage rate and consequently the same earning ability. Due to the one working more hours, hence earning a larger income, they do not pay the same amount of tax. In this situation the income does not illustrate the ability of the taxpayers but rather the outcome of people’s choices, namely, to work harder or not.⁶⁸ Although determining a taxpayer’s ability to pay may not be straightforward, the ability-to-pay principle assists in furthering the aim of redistributing resources.⁶⁹

Apart from the ability-to-pay to pay principle, there is another approach that is considered equitable in respect of taxation, namely, the “user pays” principle.⁷⁰ In terms of this principle, taxpayers should pay taxes in accordance with the benefit they receive from government.⁷¹ An example of the “user pays” principle is a fuel tax that is used to finance roads. The more a person uses the road, the more fuel is bought and as a result the more tax is paid.⁷²

However, the “user pays” principle cannot be seen as a comprehensive approach to equity. Firstly, this principle fails to address an important aim of taxation in South

⁶⁴ Buehler (1945–1946) *Tax L. Rev.* 243.

⁶⁵ Muller (2010) 45; Croome (ed) (2013) 10.

⁶⁶ Buehler (1945–1946) *Tax L. Rev.* 251; Steenekamp (2015) 217–218. Buehler (251) specifies that the net income is used to measure the ability to pay.

⁶⁷ Buehler (1945–1946) *Tax L. Rev.* 251; Steenekamp (2015) 218.

⁶⁸ Rosen *Public Finance* (1992) 348.

⁶⁹ Muller (2010) 47.

⁷⁰ See Musgrave & Musgrave (1973) 239–242 for a discussion relating to the “user pays” principle, which is also known as the benefit principle.

⁷¹ Muller (2010) 44. Mikesell *Fiscal administration – analysis and applications for the public sector* (2003) 288 indicates that the “user pays” principle complements the exchange economy in relation to private goods.

⁷² Mikesell (2003) 288; Nsingo “Public provision of goods and services, and key sources of government revenue” in Moeti (ed) *Public finance fundamentals* (2014) 39.

Africa, namely, the redistribution of resources.⁷³ This principle may in effect prevent underprivileged people from consuming goods and services provided by government as the tax levied thereon may make it unaffordable for them to do so.⁷⁴ Also, determining the users and apportioning the benefit may prove to be difficult.⁷⁵ Furthermore, establishing who is using government goods and services, and to what extent, is difficult, as people who are not within the tax jurisdiction may indirectly use/benefit from these goods or services.⁷⁶

In addition, governments generally provide goods and services that are non-excludable as they are public in nature. Thus, apportioning these goods and services can be problematic. How would the use of, for instance, policing be apportioned?⁷⁷ On the one hand, one may argue that the rich have more property to lose and may use/benefit more from policing, while on the other hand, the poor are in need of protection as they may be in a more vulnerable situation.⁷⁸

As the concept of fairness is subjective⁷⁹ the “ability-to-pay” approach and the “user pays” approach, even though fundamentally different, both reflect values relating to what could be considered a fair basis for taxation.⁸⁰

The matter of *City Council of Pretoria v Walker* (“*Walker*”)⁸¹ shows that the canon of equity also applies to the collection of taxes. In this matter the Constitutional Court indicated that selective enforcement is unconstitutional as it infringes upon a person’s right to equality as envisaged in section 9 of the Constitution.⁸² Also, in

⁷³ Steenekamp (2015) 216; Muller (2010) 44.

⁷⁴ Steenekamp (2015) 216.

⁷⁵ Buehler (1945–1946) *Tax L. Rev.* 245.

⁷⁶ Muller (2010) 44.

⁷⁷ Steenekamp (2015) 216.

⁷⁸ Steenekamp (2015) 216.

⁷⁹ Steenekamp (2015) 215.

⁸⁰ Steenekamp (2015) 215.

⁸¹ 1998 (3) BCLR 257 (CC).

⁸² *Walker* par 81. See Ch 2, par 2.8.2 where s 9 of the Constitution is discussed. In *Walker* (par 6) the municipality tried to collect levies from a formerly advantaged suburb in Pretoria but intentionally did not collect the levies from formerly disadvantaged communities. As the conduct of the municipality was questioned and not a law of general application, the selective enforcement could not serve as a reasonable and justifiable limitation of the right to equality (par 82). See also Goldswain Goldswain “Are some taxpayers treated more equally than others? A

terms of section 195(1) of the Constitution, SARS, as part of the public administration has a duty to act in an impartial, fair, equitable and unbiased manner.⁸³ This duty may be complied with if SARS were to collect taxes within the framework created by the Bill of Rights.⁸⁴

2.5.3 Certainty

Smith, commenting on the importance of certainty in taxation, states that it is “a matter of so great importance that a very considerable degree of inequality, it appears, I believe, from the experience of all nations, is not near so great an evil as a very small degree of uncertainty”.⁸⁵ He indicates that the time and manner of payment as well as the amount payable should be clear and not arbitrary, otherwise taxpayers would be at the mercy of the tax authorities.⁸⁶

Likewise, the enforcement of taxes should be certain and not arbitrary. Enforcement should be done in terms of the law and SARS may not exercise any power which it is not allowed to use in terms of the law.⁸⁷ Enforcement should also be done in a consistent manner. In addition to inconsistent enforcement being possibly harmful to taxpayer morality,⁸⁸ the matter of *Walker* also highlights that inconsistent (selective) enforcement could be unconstitutional.⁸⁹

theoretical analysis to determine the ambit of the constitutional right to equality in South African tax law” (2011) *Southern African Business Review* 12 where this case is discussed.

⁸³ Section 195(1)(d) of the Constitution. See Ch 2, par 2.4 a discussion relating to s 195 of the Constitution. Gordon “Law of tax administration and procedure” in Thuronyi *Tax Law: design and drafting* (1999) 96 also indicates that enforcement powers should be exercised in a fair manner.

⁸⁴ See Ch 2, par 2.8 for a discussion relating to the Bill of Rights. Barker “The ideology of tax avoidance” (2009) *Loyola University of Chicago Law Journal* 239 indicates that tax avoidance also has an effect on equity between taxpayers. He indicates that when someone avoids paying taxes, dutiful taxpayer’s are saddled with an additional tax burden.

⁸⁵ Smith (1776) par II available at <http://bit.ly/1nCHpXo> (accessed 19 Nov. 2016).

⁸⁶ Smith (1776) par II available at <http://bit.ly/1nCHpXo> (accessed 19 Nov. 2016). According to Smith this may lead to extortion and corruption. See also Morse & Williams (2000) 7; Muller (2010) 50.

⁸⁷ Currie & De Waal *The Bill of Rights handbook* (2013) 11 indicate that in terms of the rule of law, the state may not exercise a power that is not authorised by law. See Ch 2, par 2.7 for a discussion of the rule of law.

⁸⁸ Morse & Williams (2000) 7.

⁸⁹ *Walker* par 81.

2.5.4 Convenience

The third canon dictates that tax should be convenient for taxpayers to pay.⁹⁰ Tax should be levied in a convenient manner and at a convenient time.⁹¹ Epstein indicates that this suggests that tax should rather be levied in cash as opposed to in kind.⁹² Muller adds, in the context of wealth taxation, that a taxpayer's liquidity should be borne in mind and as such tax should rather be levied on the value of realised assets.⁹³

The level of convenience to pay taxes is associated with tax enforcement. A more convenient manner or time of paying taxes (that is, reduced compliance cost) may result in taxpayers more readily complying without requiring SARS to initiate enforcement mechanisms.⁹⁴ Lower compliance costs should improve voluntary compliance which will likely result in reduced administration costs.⁹⁵

2.5.5 Efficiency

Smith's fourth canon, that of efficiency, requires that the cost of a tax should be in proportion to the revenue collected thereby.⁹⁶ Cost associated with taxation, apart from paying the tax itself, comprises of economic efficiency costs and operating costs.⁹⁷

⁹⁰ Smith (1776) par III available at <http://bit.ly/1nCHpXo> (accessed 19 Nov. 2016).

⁹¹ Smith (1776) par III available at <http://bit.ly/1nCHpXo> (accessed 19 Nov. 2016).

⁹² Epstein "Taxation in a Lockean world" (1987) *Social Philosophy and Policy* 58.

⁹³ Muller (2010) 51.

⁹⁴ Author unknown "Taxation principles" available at <http://bit.ly/22QCchv> (accessed 27 March 2016).

⁹⁵ Anyaduba, Eragbhe & Kennedy "Deterrent tax measures and tax compliance in Nigeria" (2012) *European Journal of Business and Management* 41. For reading relating to the importance of voluntary compliance in relation to tax see Kirchler, Hoelzl & Wahl "Enforced versus voluntary tax compliance: the 'slippery slope' framework" (2008) *Journal of Economic Psychology* 211–225; Slemrod "Why people pay taxes: Introduction" in Slemrod (ed) *Why people pay taxes* (1992) 1–2. See also Ch 1, par 1.1 where the importance of voluntary compliance is indicated.

⁹⁶ Smith (1776) available at <http://bit.ly/1nCHpXo> (accessed 19 Nov. 2016). See also Muller (2010) 52.

⁹⁷ Evans "The operating costs of taxation: a review of the research" (June 2001) *Economic Affairs* 5.

Economic efficiency relates to the effect that tax may have on the behaviour of taxpayers as they may consume and work less to avoid paying taxes.⁹⁸ Such distortive behaviour should be avoided as it prevents the optimal allocation of resources and creates a so-called “excess burden”.⁹⁹ Consequently, taxes should be neutral, that is to say, have a minimum possible effect on relative prices, in order to allow consumers to maximise utility and producers to maximise profit.¹⁰⁰

Operating costs are divided in two components, namely, administration costs and compliance costs.¹⁰¹ Administration costs relate to government expenditure incurred in the administration and collection of taxes, which include the costs to run the revenue authority, such as the payment of salaries.¹⁰² Evans also attributes the costs incurred in enacting tax legislation¹⁰³ and judicial costs associated with tax disputes to administration costs.¹⁰⁴

SARS, being mandated to ensure the effective and efficient collection of taxes,¹⁰⁵ should strive to collect taxes in a cost-efficient manner. The duty to act in such a manner is indirectly provided for by section 195(b) of the Constitution which provides that organs of public administration must use resources in an efficient, economic and effective manner.

The other component of operating costs, that of compliance costs, is the costs incurred by taxpayers or a third party in order to comply with the tax system.¹⁰⁶ This would include the cost of time used to self-assess (in respect of value-added tax for

⁹⁸ Davis Tax Committee “*The tax system inclusive growth in South Africa (executive summary)*” (June 2015) 4 available at <http://bit.ly/1U9ou88> (accessed 17 March 2015). See also Stiglitz & Rosengard (2015) 513 regarding the behavioural effects of taxation.

⁹⁹ Excess burden can also be referred to as the welfare cost or deadweight loss. See Muller (2010) 52; Davis Tax Committee (June 2015) 4 available at <http://bit.ly/1U9ou88> (accessed 17 March 2015). See also Rosen (1992) 306–310 for a detailed explanation relating to excess burden.

¹⁰⁰ Steenekamp (2015) 238; Mohr & associates (2015) 293.

¹⁰¹ Evans (June 2001) *Economic Affairs* 5; Mohr & associates (2015) 294.

¹⁰² Evans (June 2001) *Economic Affairs* 5.

¹⁰³ The costs to enact tax legislation would include the costs of designing the policy.

¹⁰⁴ Evans (June 2001) *Economic Affairs* 5.

¹⁰⁵ Section 3(a) of the SARS Act.

¹⁰⁶ Sandford, Godwin & Hardwick *Administrative and compliance cost of taxation* (1989) 10.

example), to complete tax returns and the cost of acquiring the services of a tax specialist.¹⁰⁷

2.5.6 Applying the canons of taxation

Williams and Morse depict the canons of taxation as a paradox by stating that

“[t]he simpler the rules are, the less fair they are (because they ignore justified differences). But the fairer they are, the more complex they are. The more complex they are, the harder they are to understand and put into effect. Therefore they are less certain and, arguably, less fair. If both simplicity and complexity lead to unfairness, is there a happy medium?”¹⁰⁸

Flowing from this, it seems that the canons of taxation may be in conflict with one another. It appears that in order to achieve equity, another canon such as certainty may be compromised.¹⁰⁹ Then again, some of the canons may function together quite easily, for example, a tax that is certain implies that liability can be more easily determined, which could also make it more cost effective.¹¹⁰ Also, for example, if a tax is levied when an asset is realised, and thus more convenient for the taxpayer to pay, the compliance cost of the taxpayer may be lower.

It may be difficult for one form of tax to comply with all the characteristics of a good tax. Hence, a “good” tax system will inevitably consist of a mixture of direct and indirect taxes¹¹¹ and should strive to comply with these canons collectively.¹¹² Therefore, various tax bases¹¹³ are generally used to best comply with these canons

¹⁰⁷ Stiglitz & Rosengard (2015) 517–518; Steenekamp (2015) 244. See Nienaber (2013) 44–50 regarding the reasons why a taxpayer would seek the services of a tax practitioner. See Williams & Morse (2000) 8 who discuss other hidden compliance costs such as the cost for the employer to withhold taxes or the cost incurred by a trader to comply with the value-added tax system. See also Muller (2010) 54 who refers to the costs associated with tax planning etc. as unproductive costs.

¹⁰⁸ Williams & Morse (2000) 7.

¹⁰⁹ Carter (Chair) *The Royal Commission of taxation* (1966) 3 as cited in Muller (2010) 55.

¹¹⁰ Meade (Chair) Report of the Institute of Fiscal Studies *The dtructure and teform of direct taxation* (1978) 20. See also Muller (2010) 52.

¹¹¹ Gildenhuis (1989) 284 indicates that direct taxes refer to taxes that are levied directly on the income or wealth, whilst indirect taxes are taxes that are levied on goods and services.

¹¹² Croome (2008) 7; Croome (2010) 10.

¹¹³ Muller (2010) 15 indicates that a tax base is “the collective value of taxable assets or taxable activities subject to the levying of taxation”.

in a collective manner.¹¹⁴ In a South African context this means that the taxation of income, consumption and wealth should be used in combination to address the canons of taxation.¹¹⁵

In addition to considering the canons of taxation when tax policy is designed and legislation drafted, the Constitution plays a crucial role when dealing with taxation in South Africa. The remainder of this chapter considers the role of the Constitution when dealing with taxation.

2.6 FROM PARLIAMENTARY SUPREMACY TO CONSTITUTIONAL SUPREMACY

For a proper understanding of the impact of the Constitution, it is necessary to provide a brief overview of the dispensation prior to the implementation of the Constitution. Prior to 27 April 1994, South Africa was a parliamentary state. This meant that parliament had the power to enact any law and not even the courts had authority to question the substance of these laws.¹¹⁶ A court could only question whether an Act was passed in accordance with the correct procedure and not whether it violated an individual's rights.¹¹⁷

The courts' common-law power to review a matter "where a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty"¹¹⁸ could also not be seen as sufficient protection of individuals' rights. This is because the parliament could amend the common law as it wished.¹¹⁹ Consequently, the courts'

¹¹⁴ Asprey (Chaired) *Report of the Australia Taxation Review Committee* (1975) 14; Gammie (Chair) *Report of the Capital Taxes Group of The Institute for Fiscal Studies Setting Savings Free: a proposal for the taxation of savings and profits* (1994) 7; Sandford *Taxation* (1970) 37; Muller (2010) 37.

¹¹⁵ See Muller (2010) 16–36; Croome (2013) 6–8; Nsingo (2014) 35–40 for a discussion of these bases of taxation.

¹¹⁶ Currie & De Waal (2013) 3.

¹¹⁷ Croome (2010) 6.

¹¹⁸ *Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council* 1903 TS 115. The court held that this inherent power to review is not provided for in terms of legislation, but is an inherent right of the court.

¹¹⁹ Currie & De Waal (2013) 3. See also Hoexter *The new constitutional & administrative law* (2002) 5; Croome (2010) 4.

common-law power to review was in some instances impeded by an ouster clause.¹²⁰ Such a clause prevented a court from exercising the power to review.¹²¹

Therefore, in the parliamentary dispensation, the courts could not question legislation and in some instances even their inherent review power was hampered. From a fiscal perspective this meant that the power to tax and the enforcement of these taxes were not subject to limitations and could be done without “fear of judicial intervention”.¹²²

With the implementation of the Interim Constitution on 27 April 1994, South Africa's dispensation changed from a parliamentary state to a constitutional state. Section 4(1) of the Interim Constitution stipulated that “[t]his Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency”.¹²³

Mureinik explains the change from a parliamentary dispensation to a dispensation where the Constitution is supreme as a bridge from a past which was based on coercion and authority to a culture of justification.¹²⁴ According to Currie and De Waal this culture of justification lies therein that within a constitutional dispensation government's powers are limited to those contained in the Constitution.¹²⁵

¹²⁰ Hoexter (2002) 5.

¹²¹ Hoexter (2002) 305. An example provided by Hoexter is s 29(6) of the Internal Security Act 74 of 1982 which provided that “[n]o court of law shall have jurisdiction to pronounce on any action taken in terms of this section, or to order the release of any person detained in terms of the provisions of this section”. Hoexter (306) comments that ouster clauses most probably will not pass constitutional muster.

¹²² Croome (2008) 10.

¹²³ See Currie & De Waal (2013) 8 for further reading regarding constitutional supremacy.

¹²⁴ Mureinik “A bridge to where? Introducing the interim Bill of Rights” (1994) *SAJHR* 32. The coercion and authority refers to parliament (government) that had absolute power, whilst the culture of justification refers to the government's powers that are subject to the Interim Constitution which places limitations on these powers.

¹²⁵ Currie & De Waal (2013) 8.

Legislation, including fiscal legislation, had to be adapted to ensure that it conformed to this new dispensation of constitutional supremacy.¹²⁶ The Commission of Enquiry into Certain Aspects of the Tax Structure of South Africa, referred to as the “Katz Commission”,¹²⁷ pointed out numerous provisions in fiscal legislation that appeared to be contrary to the Interim Constitution.¹²⁸ These provisions included the provision that allowed a search and seizure without a warrant¹²⁹ and the practice of the Commissioner not to furnish reasons for discretionary decisions.¹³⁰ The Katz Commission’s report resulted in the repeal or amendment of some of the provisions and practices that were considered to be in conflict with the Interim Constitution.¹³¹

The Interim Constitution, as the title suggests, was meant to be an interim constitution until a (final) constitution was enacted.¹³² On 4 February 1997, the Constitution came into operation and repealed the Interim Constitution.¹³³ Like section 4 of the Interim Constitution, section 2 of the Constitution provided that in South Africa the Constitution is the supreme law. Van Schalkwyk remarks that the essence of the principles contained in the Interim Constitution remains applicable to the Constitution as the Constitution did not alter the spirit of the Interim Constitution’s

¹²⁶ Croome (2010) 5. See also Keulder *Does the Constitution protect taxpayers against the mighty SARS – an inquiry into the constitutionality of selected tax practices and procedures* (unpublished LLM dissertation, University of Pretoria (2011)) 4.

¹²⁷ The establishment of the Katz Commission was announced by Minister of Finance at that stage, Derek Keys, in the 1994 Budget Review. See Croome Constitutional law and taxpayer’s rights in South Africa – an overview” (2002) *Acta Juridica* 3; Croome (2008) 1; Croome (2010) 5.

¹²⁸ Katz (Chair) Chapter 6 “Implications of the Constitution of the Republic of South Africa” in *Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa Interim Report* (1994). For a discussion of some of the provisions indicated by the Katz Commission, see Van Schalkwyk “Constitutionality and the Income Tax Act” (2001) *Meditari Accountancy research* 285–298; Croome (2002) *Acta Juridica* 3–6; Croome (2008) 11–14; Croome (2010) 6–8.

¹²⁹ In terms of s 74 of the Income Tax Act 58 of 1962. Katz Commission *Interim Report* (1994) para 6.3.22–28 at 73–75. In this report, the Katz Commission observed that in the Canadian matter of *Hunter et al v Southman* 1984 (2) S.C.R. 145 similar provisions were held to be unconstitutional. This warrantless search provision was replaced with a new s 74 and s 74 A–D in terms of s 14 of the Revenue Laws Amendment Act 46 of 1996. See Ch 3, para 3.2.2; 3.2.2.3(e); 3.3.1; 3.3.2.2(a)–(b) for a discussion of warrantless searches.

¹³⁰ Katz (Chair) *Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa Commission* (1994) para 6.3.33–6.3.36 at 76 & 77. See also Croome (2008) 13; Croome (2010) 7 where Croome states that shortly after the Katz Commission’s interim report was published the Commissioner submitted that taxpayers would be privy to the reasons for decisions.

¹³¹ Muller (2010) 57. See Van Schalkwyk (2001) *Meditari Accountancy research* 294–297; Croome (2010) 7 for a brief discussion of the provisions which, contrary to the Katz Commission’s recommendations, were not repealed or amended.

¹³² Croome (2008) 19; Currie & De Waal (2013) 6

¹³³ Schedule 7 of the Constitution provides that the Constitution repealed the Interim Constitution.

provisions.¹³⁴ As South Africa became a constitutional state, where the Constitution is the supreme law, the Constitution also has an impact on the way legislation should be drafted, interpreted, implemented and administered. The interpretation of laws in the new dispensation is discussed below.

2.7 INTERPRETATION OF LEGISLATION IN THE CONSTITUTIONAL DISPENSATION

Generally, there are two approaches when interpreting statutes, namely, the literal and the purposive approach.¹³⁵ The literal approach advocates that if the meaning of the words in an Act is clear, it must be interpreted accordingly as the wording reflects the intention of the legislature.¹³⁶ When the wording of an Act is not clear, meaning that it is ambiguous, misleading or vague and would lead to absurd results, a court may deviate from the literal meaning in order to ascertain the intention of the legislature.¹³⁷ The purposive approach, on the other hand, focuses on the purpose of legislation. The context of the legislation, bearing in mind social factors and policy, is used to establish the purpose of the statute concerned.¹³⁸

After the enactment of the Interim Constitution, some case law indicated that the literal approach with its emphasis on the intention of the legislature would not suffice in the new constitutional dispensation.¹³⁹ In *Matiso v the Commanding Officer, Port Elizabeth Prison* (“*Matiso*”)¹⁴⁰ the court held that:

“The interpretative notion of ascertaining ‘the intention of the Legislature’ does not apply in a system of judicial review based on the supremacy of

¹³⁴ Van Schalkwyk (2001) *Meditari Accountancy research* 286. See also Currie & De Waal (2013) 6. Consequently, most jurisprudence and principles in relation to the Interim Constitution would also apply to the Constitution.

¹³⁵ Silke “The interpretation of fiscal legislation – canons of construction, recent judicial comments and new approaches” (1995) *Acta Juridica* 124.

¹³⁶ *Principal Immigration Officer v Hawabu* 1936 AD 26 30.

¹³⁷ *Venter v R* 1907 TS 910 914.

¹³⁸ Botha *Statutory Interpretation: an introduction for students* (2012) 50.

¹³⁹ *Matiso v The Commanding Officer, Porth Elizabeth Prison* 1994 (4) SA 592 (SE) 596. See also *Holomisa v Argus Newspaper Ltd* 1996 (2) SA 588 (W) 603 where the court stated that the “context” of legal decision-making in South Africa has changed thanks to the enactment of the Constitution. See also *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) 605 where the court held that the expression “the intention of the legislature” must be avoided.

¹⁴⁰ 1994 (4) SA 592 (SE).

the Constitution, for the simple reason that the Constitution is sovereign and not the Legislature. This means that both the purpose and method of statutory interpretation should be different from what it was before the commencement of the Constitution.”¹⁴¹

*Commissioner, SARS v Airworld CC (“Airworld”)*¹⁴² summarised the approach of the courts in relation to interpretation in the constitutional dispensation as follows:

“In recent years Courts have placed emphasis on the purpose with which the legislature has enacted the relevant provision. The interpreter must endeavour to arrive at an interpretation which gives effect to such purpose. The purpose (which is usually clear or easily discernible) is used in conjunction with the appropriate meaning of the language of the provision, as a guide to ascertain the legislature’s intention.”¹⁴³

The Constitution itself provides how legislation should be interpreted in the constitutional dispensation. Section 39(2) of the Constitution provides that when courts, tribunals and forums interpret any legislation “the spirit, purport and objects of the Bill of Rights” must be promoted. In *Batho Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism (“Batho Star”)*¹⁴⁴ the court provided clarity relating to how the “spirit, purport and objects of the Bill of Rights” should be promoted by stating that:

“The starting point in interpreting any legislation is the Constitution ... First, the interpretation that is placed upon a statute must where possible be one that would advance at least an identifiable value enshrined in the Bill of

¹⁴¹ *Matiso* 596.

¹⁴² 2008 (3) SA 335 (SCA).

¹⁴³ *Airworld* 345. See *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2004 (4) SA 490 (CC) par 49 where the court had to establish the meaning of the word “arbitrary” in s 25(1) of the Constitution and opted for a more comprehensive context than the mere wording of the section. The context referred to by the court included the context of other provisions of s 25, their historical context and the Constitution as a whole. The court also considered the grammatical meaning of the word “arbitrary”. See also Davis “Democracy – Its influences upon the process of constitutional interpretation” (1994) *SAJHR* 121 who concludes that a constitutional state must use a purposive approach when interpreting legislation.

¹⁴⁴ 2004 (4) SA 490 (CC).

Rights; and second, the state must be capable of such interpretation ... [legislation] must be interpreted purposively to promote the spirit, purport and objects of the Bill of rights ... [T]he emerging trend in statutory construction is to have regard to the context in which words occur, even where the words to be construed are clear and ambiguous.”¹⁴⁵

From this *dictum* it is apparent that in the constitutional dispensation a strict literal interpretation is inadequate. Furthermore, it is also apparent that the values enshrined in the Constitution should be advanced.¹⁴⁶ These values, as provided for in section 1 of the Constitution, are: human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism and non-sexism, universal adult suffrage, a national common voters’ roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.¹⁴⁷ In addition, the supremacy of the Constitution and the rule of law are also values enshrined in the Constitution.¹⁴⁸

Even though all these values are important, for present purposes the most pertinent value to consider when interpreting fiscal legislation is the rule of law. The rule of law necessitates that government’s conduct must conform to “pre-announced, clear and general rules”.¹⁴⁹ This means that SARS should respect the rights of taxpayers by acting in accordance with legislation and administrative procedures that ensure the protection of taxpayers’ rights. A broad discretionary power without any explicit

¹⁴⁵ *Batho Star* par 72, 80 and 90. See also Botha (2012) 54 who added emphasis to certain parts of the quote.

¹⁴⁶ See *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit* 2000 (10) BCLR 1079 (CC) par 22 (“*Hyundai Motor*”) where the court also held that when interpreting legislation in the constitutional dispensation, effect should be given to the founding values of the Constitution. See also *United Democratic Movement v President of the Republic of South Africa* 1 (2002) BCLR 1179 (CC) par 19; Mdumbe “Has the literal/intentional/textual approach to statutory interpretation been dealt the *coup de grace* at last?” (2004) *SAPR/PL* 472–481 in this regard.

¹⁴⁷ Sections 1(a), (b) & (d) of the Constitution.

¹⁴⁸ Section 1(c) of the Constitution.

¹⁴⁹ *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (5) BCLR 837 (CC) 842; *Affordable Medicines Trust v Minister of Health of the RSA* 2005 (6) BCLR 529 (CC) par 108; Bekink *Principles of South African Constitutional Law* (2012) 62. See also Dicey *Introduction to the study of the Law of the Constitution* (1959) 193; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC) 1482; *Pharmaceutical Manufacturers Association of SA: in re ex parte President of the RSA* 2000 (2) SA 674 (CC) para 19–20.

restrictions would be contrary to the rule of law as it would be unclear. The person affected by such a power would not know when he or she is entitled to remedies. Moreover, there must be a rational¹⁵⁰ link between conduct in terms of the law and a legitimate government purpose.¹⁵¹ This means that the conduct may not be arbitrary.

The question whether the selected powers of SARS can be considered to adhere to the rule of law is considered throughout the thesis. Another aspect that is central to this thesis concerns the rights contained in the Bill of Rights and whether the selected powers of SARS are unreasonably and unjustifiably impeding these rights.

2.8 BILL OF RIGHTS

2.8.1 General

Chapter 2 of the Constitution contains the Bill of Rights, a cornerstone of the South African democracy. It is founded on the values of human dignity, equality and freedom.¹⁵² The Bill of Rights applies to all law and is binding upon the legislature, the executive and the judiciary.¹⁵³ Consequently, the legislature should ensure that legislation, including fiscal legislation, protects the rights contained in the Bill of Rights. The Bill of Rights also applies to all organs of state.¹⁵⁴ Section 2 of the SARS Act provides that SARS is an organ of state, and therefore SARS has to respect the rights contained in the Bill of Rights.

¹⁵⁰ See *Pharmaceutical Manufacturers Association of SA: in re ex parte President of the RSA* par 90 where it is indicated that rationality should be determined objectively. Rationality sets a minimum threshold requirement when exercising power.

¹⁵¹ *New National Party v Government of South Africa* 1999 (3) SA 191 (CC) par 19; *Pharmaceutical Manufacturers Association of SA: in re ex parte President of the Republic of South Africa* par 85; Bekink (2012) 63; Rautenbach-Malherbe *Constitutional Law* (2012) 9. In *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* 2005 (3) SA 280 (CC) par 21 it was indicated that the values contained in s 1 of the Constitution do not confer an enforceable right in itself. However, Hoexter *Administrative Law in South Africa* (2012) 18–19 indicates that these founding values are linked to rights contained in the Bill of Rights. She indicates that the rule of law is reflected or implemented through, amongst other rights, the rights to just administrative action, as contemplated in s 33 of the Constitution, and access to courts, as contemplated in s 34 of the Constitution. See Ch 2, par 2.8.1–2.8.6 for a discussion of these and other rights.

¹⁵² Section 7(1) of the Constitution.

¹⁵³ Section 8(1) of the Constitution.

¹⁵⁴ Section 8(1) of the Constitution. It is submitted that there is no positive obligation on SARS to protect taxpayer's rights and as such it should merely respect taxpayers' rights by adhering to legislation that ensures taxpayers' rights are protected.

The Bill of Rights affords rights such as the right to equality,¹⁵⁵ the right to privacy,¹⁵⁶ the right to property,¹⁵⁷ the right to just administrative action¹⁵⁸ and the right of access to courts.¹⁵⁹ However, these rights are not absolute, meaning that in certain instances the application and scope of some of these rights may be limited. A discussion on rights contained in the Bill of Rights which are relevant for purposes of this thesis follows, after which the circumstances in which these rights may be limited are considered.

2.8.2 Right to equality

Section 9(1) of the Constitution provides that “[e]veryone is equal before the law and has the right to equal protection and benefit of the law”. Equality entails “the full and equal enjoyment of all rights and freedoms”.¹⁶⁰ Section 9(3) of the Constitution prohibits the state from unfairly discriminating against anyone in terms of the listed grounds.¹⁶¹ These grounds are race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.¹⁶²

It is also possible for unfair discrimination to occur on grounds not specifically listed in section 9(3) of the Constitution.¹⁶³ It is important to identify whether alleged unfair discrimination falls within one of the listed grounds or not as section 9(5) of the Constitution creates a rebuttable presumption that discrimination based on one of the listed grounds is unfair.¹⁶⁴

¹⁵⁵ Section 9(1) of the Constitution.

¹⁵⁶ Section 14 of the Constitution.

¹⁵⁷ Section 25(1) of the Constitution.

¹⁵⁸ Section 33(1) of the Constitution.

¹⁵⁹ Section 34 of the Constitution. In addition to the rights mentioned above, see Ch 1, par 1.1 regarding other constitutional rights that are also relevant to taxpayers.

¹⁶⁰ Section 9(2) of the Constitution.

¹⁶¹ See Goldswain (2011) *Southern African Business Review* 2 who indicates that there is a positive obligation on the state, which includes SARS, to promote and protect a person's right to equality.

¹⁶² Section 9(3) of the Constitution. Section 9(4) extends the prohibition against unfair discrimination to persons other than the state. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 was enacted to prevent and prohibit unfair discrimination.

¹⁶³ *Harksen v Lane* 1997 (11) BCLR 1489 (CC) par 46.

¹⁶⁴ See *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) par 28 where it is indicated that where the alleged unfair discrimination relates to a ground not listed in s 9(3) of the Constitution there is no presumption in favour of unfairness.

Westen comments that equality means that “things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalikehood”.¹⁶⁵ From the discussion that follows, it is apparent that the right to equality in South Africa has been interpreted to give credence to the idea that equality does not mean everyone is treated the same and that in some instances differentiation between people is allowed.

In *Harksen v Lane* (“*Harksen*”),¹⁶⁶ the court identified two ways to determine whether the right to equality has been infringed.¹⁶⁷ The first requires that there be a differentiation between people. If differentiation is present, it must be determined whether the differentiation has a legitimate government purpose.¹⁶⁸ Ackerman J in *Prinsloo v Van der Linde* (“*Prinsloo*”)¹⁶⁹ held that if the differentiation is arbitrary or irrational, in other words a legitimate government purpose is lacking, the right to equality is violated.¹⁷⁰ Albertyn adds that interpretation of the right to equality embodies an aspect of the rule of law, namely, that the exercise of public power should not be arbitrary.¹⁷¹ If there is a legitimate government purpose associated with the differentiation, the other way must be considered.¹⁷²

The second way in which the right to equality may be infringed, consists of two components. First, does the differentiation constitute discrimination? Second, if it constitutes discrimination, is the discrimination unfair? The first component will be met if the differentiation is based on one of the listed grounds. If the differentiation is based a ground other than those listed in section 9(3) of the Constitution, it would

¹⁶⁵ Westen “The empty idea of equality” (1982) *Harvard Law Review* 543 referring to Aristotle *Ethica Nichomacea* Book V.3 at 1131a–1121b. See also Albertyn “Equality” in Cheadle, Davis & Haysom *South African Constitutional Law: The Bill of Rights* (last updated Oct. 2015) Lexis Nexis internet version par 4.1 in this regard.

¹⁶⁶ 1997 (11) BCLR 1489 (CC). See Goldswain (2011) *Southern African Business Review* 16–20 for a discussion of this matter.

¹⁶⁷ *Harksen* was concerned with s 8(1) of the Interim Constitution. However, because the Interim Constitution and the Constitution are in essence the same, the ways identified in *Harksen* also apply to a constitutional scrutiny in terms of s 9(1) of the Constitution.

¹⁶⁸ *Harksen* par 53(a).

¹⁶⁹ 1997 (3) SA 1012 (CC).

¹⁷⁰ *Prinsloo* par 25.

¹⁷¹ Albertyn (last updated Oct. 2015) Lexis Nexis internet version par 4.6.1. See Albertyn (last updated Oct. 2015) Lexis Nexis internet version par 4.6.1.1 for further detail relating to the first stage.

¹⁷² *Harksen* par 53(a).

constitute discrimination if the differentiation is based on attributes which could potentially impair the human dignity of a person or if the person is adversely affected in a comparable serious manner.¹⁷³

Once it has been established that the differentiation constitutes discrimination, it must be ascertained whether the discrimination is unfair. In the event of the discrimination being on one of the listed grounds, the presumption of unfairness applies.¹⁷⁴ If the discrimination relates to grounds not listed in section 9(3) of the Constitution, the complainant must prove that the discrimination is unfair. Unfairness is concerned with the impact of the discrimination on the complainant and persons who are similarly situated.¹⁷⁵ Only in the event that the discrimination amounts to unfair discrimination would the right to equality be infringed.¹⁷⁶

From this brief discussion of the right to equality it is clear that the manner in which the right to equality is interpreted in South Africa resembles one of the canons of taxation, namely, equity. As indicated earlier,¹⁷⁷ horizontal equity requires people with the same ability to pay, to pay the same amount of tax, whilst vertical equity entails that people with different economic conditions should be treated differently.

2.8.3 Right to privacy

Section 14 of the Constitution provides that “[e]veryone has the right to privacy”. Specifically included in the right to privacy is the right of a person not to have his or

¹⁷³ *Harksen* par 53(b). See Goldswain (2011) *Southern African Business Review* 10 for a discussion of the link between the right to equality and the right to dignity, which is contained in s 10 of the Constitution.

¹⁷⁴ In terms of s 9(5) of the Constitution.

¹⁷⁵ *Harksen* par 53(b).

¹⁷⁶ *Harksen* par 53(c) indicates that only once it has been established that the right to equality has been infringed, can it be considered whether this infringement is reasonable and justifiable in terms of s 36 of the Constitution. See Ch 2, par 2.8.7 for a discussion relating to s 36 of the Constitution. Currie & De Waal (2013) 218 remark that it does not make sense to consider s 36 after s 9 of the Constitution has already been considered because “the s 9 rights are qualified by the same or similar criteria to those used to adjudicate the legitimacy of a limitation of rights in s 36”. Irrespective of this apparent senseless approach, Currie & De Waal note that the Constitutional Court nevertheless on every occasion when it determined that the right to equality was violated, proceeded to consider whether it is reasonable and justifiable in terms of s 36 of the Constitution. See Currie & De Waal (2013) 218 fn 38 for examples of cases where the court proceeded to consider s 36 of the Constitution.

¹⁷⁷ See Ch 2, par 2.5.2 in this regard.

her person, home or property searched, as well as the right not to have his or her possessions seized.¹⁷⁸

In *Bernstein v Bester* (“*Bernstein*”),¹⁷⁹ the court, dealing with when the right to privacy may be reasonably and justifiably limited, held as follows:

“A very high level of protection is given to the individual’s intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place. But this most intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual’s activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation.”¹⁸⁰

From this *dictum* it is clear that no law could be considered to reasonably and justifiably limit a person’s right to privacy in relation to his or her “intimate core of privacy”. In terms of *Bernstein* any law authorising the invasion of this “intimate core of privacy” would be unconstitutional. On the other hand, this *dictum* does not mean that once a person moves into a public sphere he or she does not have a right to privacy.¹⁸¹ Rather, in such an instance, the person’s right to privacy may be subject to reasonable and justifiable limitations.

Magajane v Chairperson, North West Gambling Board (“*Magajane*”)¹⁸² supported the *dictum* in *Bernstein* as it held that a person’s expectation of privacy at a residential premises is higher and accordingly requires additional protection.¹⁸³

¹⁷⁸ See s 14 of the Constitution.

¹⁷⁹ 1996 (2) SA 751 (CC).

¹⁸⁰ *Bernstein* par 77.

¹⁸¹ *Hyundai Motor* par 16. See Neethling “The concept of privacy in South African Law” (2005) *SALJ* 20 where *Bernstein*’s construction of the concept privacy is criticised for being too narrow.

¹⁸² 2006 (5) SA 250 CC. In this matter the constitutionality of warrantless inspections in terms of ss 65(1) and 65(2) of the North West Gambling Act 2 of 2001 was questioned. The pertinent aspects of these sections were that an inspector may enter “any licensed or unlicensed premises

2.8.4 Right to property

Section 25(1) of the Constitution provides as follows: “No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”¹⁸⁴

Some of the concepts contained in section 25(1) of the Constitution require further clarification. Mostert and Badenhorst remark that section 25(1) does not provide a comprehensive definition of “property”.¹⁸⁵ The only constitutional aid in defining the concept “property” can be found in section 25(4)(b). This section merely provides that property is not limited to land.

Accordingly, one would have to turn to the meaning which the courts have ascribed to “property” in this context. In *First National Bank of South Africa t/a Wesbank v The Commissioner for SARS (“First National Bank”)*,¹⁸⁶ the Constitutional Court held that “property” includes corporeal property, rights related to property or an interest that has an exchange value.¹⁸⁷ It is clear that the Constitutional Court construed the concept “property” broadly.¹⁸⁸ Van der Walt advocates such a broad construction to ensure that economically substantial intangible property interests are included in the protection afforded by section 25(1) of the Constitution.¹⁸⁹

Another concept that is in need of clarification is “deprivation”. This concept appears to be “somewhat misleading or confusing”.¹⁹⁰ Deprivation does not necessarily mean

which are occupied or being used for the purpose of any gambling activities on which it is suspected that”, amongst other things, gambling activities are conducted without a licence.

¹⁸³ *Magajane* para 66–67.

¹⁸⁴ Section 25(2) of the Constitution provides a mechanism for addressing the historically uneven distribution of property in South Africa. A discussion of expropriation by the State as envisaged in s 25(2) of the Constitution does not fall within the ambit of this study. See Currie & De Waal (2013) 533; Mostert & Badenhorst *Bill of Rights: compendium* (last updated Oct. 2015) Lexis Nexis internet version par 3FB1 where the history relating to s 25 of the Constitution is discussed. See Chapter 2, par 2.8.7 where “law of general application” is discussed.

¹⁸⁵ Mostert & Badenhorst (last updated Oct. 2015) Lexis Nexis internet version par 3FB6.

¹⁸⁶ [2002] JOL 9760 (CC).

¹⁸⁷ *First National Bank* para 55–56. See also Currie & De Waal (2013) 535.

¹⁸⁸ See also Mostert & Badenhorst (last updated Oct. 2015) Lexis Nexis internet version par 3FB6.

¹⁸⁹ Van der Walt “An overview of developments in constitutional property law since the introduction of the property clause in 1993” (2004) *SA Public Law Journal* 51.

¹⁹⁰ *First National Bank* para 57.

that property is taken away.¹⁹¹ In *First National Bank* the court attributed a general meaning to the concept “deprivation”, meaning an intrusion of a person’s use and enjoyment of property.¹⁹²

The concept “arbitrary” also requires clarification. Currie and De Waal remark that generally “arbitrary” involves not following fair procedure, being irrational or that no good reason exists.¹⁹³ In *First National Bank* the court concluded that “arbitrary” in that specific matter meant that there is not sufficient reason for the particular deprivation of property.¹⁹⁴ The court indicated that sufficient reasons would be established, for instance, by considering the relationship between the deprivation and the purpose of the provision.¹⁹⁵

In order for legislation or conduct to infringe upon the protection afforded by section 25(1) of the Constitution, all three components must be met, namely (i) a deprivation; (ii) of property; (iii) which is considered to be arbitrary. Croome’s discussion on whether the levying of tax infringes upon section 25(1) of the Constitution illustrates this. Croome indicates that taxation constitutes the deprivation of property.¹⁹⁶ This is because a part of the taxpayer’s salary or profit is taken away and the taxpayer can no longer enjoy the money. However, in general, as the state requires tax to meet its obligations, it is seen to be a sufficient reason to deprive a person of his or her

¹⁹¹ *First National Bank* par 57; *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bissett v Buffalo City Municipality*; *Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* (2005) 1 SA 530 (CC) par 32. See also Mostert & Badenhorst (last updated Oct. 2015) Lexis Nexis internet version par 3FB7.1.

¹⁹² *First National Bank* par 57.

¹⁹³ Currie & De Waal (2013) 540–547.

¹⁹⁴ *First National Bank* par 100. The court cautioned (par 66) that when establishing whether a provision is arbitrary for purposes of s 25(1) of the Constitution, the context of that provision must be taken into consideration. Consequently, just because the court in *First National Bank* found that s 114 of the CEA, which provided that SARS could sell goods belonging to a third party in order to satisfy debt owed by a customer debtor, was unconstitutional does not mean that any deprivation of property relating to taxation would lead to the same result.

¹⁹⁵ *First National Bank* par 100. See Van Der Walt (2004) *SA Public Law Journal* who indicates that the court’s interpretation of “arbitrary deprivation” requires more than merely establishing whether the deprivation is rational but that the threshold is not as high as the reasonable and justifiable criterion contained in s 36 of the Constitution.

¹⁹⁶ Croome (2010) 19.

property.¹⁹⁷ Consequently, the levying of taxes is not arbitrary¹⁹⁸ and a taxpayer would not be able to rely on section 25(1) of the Constitution to avoid paying taxes.

2.8.5 Right to just administrative action

2.8.5.1 General

Section 33(1) of the Constitution provides that “[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair”. The Promotion of Administrative Justice Act (“PAJA”)¹⁹⁹ was enacted to give further effect to this constitutional right.²⁰⁰ The right to just administrative action is considered to constitutionalise the rules of natural justice, *nemo iudex in propria causa* (“no one may be a judge in his or her own case”)²⁰¹ and *audi alteram partem* (“hear the other side”).²⁰² The right to just administrative action encapsulates the *nemo iudex in propria causa* rule as it indirectly prohibits a person from becoming a judge in its own case because section 6(2)(a)(iii) of PAJA provides that bias on the side of the administrator would constitute grounds for review. Furthermore, the right to just administrative action indirectly includes the *audi alteram partem* rule. This is because section 3(2)(b)(ii) of PAJA provides that an administrator must provide a person with reasonable opportunity to state his or her case when an administrative action is performed.

When SARS’ conduct complies with the provisions of PAJA, section 195(1)(d) of the Constitution will also be adhered to.²⁰³ It is submitted that PAJA provides guidance as to how SARS, which forms part of public administration, should conduct itself to ensure that its administrative actions are impartial, fair, equitable and unbiased. Accordingly, in the context of this thesis, PAJA also gives effect to section 195(1)(d) of the Constitution.

¹⁹⁷ Croome (2010) 23 indicates that the levying of taxes would be arbitrary if the property rights are affected in a way that is disproportionate to the objective.

¹⁹⁸ Croome (2010) 23.

¹⁹⁹ 3 of 2000.

²⁰⁰ Section 33(3) of the Constitution; Preamble to PAJA. See Corder “Administrative Justice” in Cheadle, Davis & Haysom *South African Constitutional Law: the Bill of Rights* (last updated Oct. 2015) Lexis Nexis internet version par 27.3 for further reading regarding the history of PAJA.

²⁰¹ Burns & Beukes *Administrative Law under the 1996 Constitution* (2003) 197.

²⁰² *Mpande Foodliner CC v Commissioner for South African Revenue Service* (2000) 63 SATC 46 par 43; Burns *Administrative Law* (2013) 352.

²⁰³ See Ch 2, par 2.4.

2.8.5.2 *Administrative action*

In order to comprehend what the right to just administrative action entails, it is necessary to establish what would constitute “administrative action”.²⁰⁴ Section 1 of PAJA defines “administrative action” as

“any decision taken, or any failure to take a decision, by—

(a) an organ of state, when—

- (i) exercising a power in terms of the Constitution or a provincial constitution; or
- (ii) exercising a public power or performing a public function in terms of any legislation; ...

which adversely affects the rights of any person and which has a direct, external legal effect”.²⁰⁵

The following elements can be extracted from this definition: (i) a decision, or failure to make a decision; (ii) by an organ of state; (iii) a person’s right(s) must be adversely affected; and (iv) it should have a direct, external, legal effect.

²⁰⁴ Corder (last updated Oct. 2015) Lexis Nexis internet version par 27.3.1 points out that “what is administrative action?” is a delineation question when dealing with administrative law in any modern system.

²⁰⁵ Par (b) of the definition of administrative action relates to persons other than an organ of state. As this thesis is concerned with SARS, an organ of state, par (b) is irrelevant. The following actions are explicitly excluded from the definition of administrative action contained in s 1 of PAJA:

- “(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k), 85(2)(b), (c),(d) and (e), 91(2), (3), (4) and(5), 92(3), 93, 97, 98, 99 and 100 of the Constitution;
- (bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121(1)and (2), 125(2)(d), (e) and (f), 126, 127(2),132(2), 133(3)(b), 137, 138, 139 and 145(1) of the Constitution;
- (cc) the executive powers or functions of a municipal council;
- (dd) the legislative functions of Parliament, a provincial legislature or a municipal council;
- (ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;
- (ff) a decision to institute or continue a prosecution;
- (gg) a decision relating to any aspect regarding the nomination, selection, or appointment of a judicial official or any other person, by the Judicial Service Commission in terms of any law;
- (hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or
- (ii) any decision taken, or failure to take a decision, in terms of section 4 (1).”

A brief discussion of what each of these elements entails, is necessary. Firstly, PAJA defines “decision” as “any decision of an administrative nature, proposed to be made, or required to be made, as the case may, be under an empowering provision”.²⁰⁶ Two further elements may be gleaned from the above definition, namely, that the decision must be administrative in nature and made under an empowering provision. In the absence of a statutory definition of “administrative nature”, the court in *The President of the Republic of South Africa v South African Rugby Football Union (“SARFU”)*²⁰⁷ held that “administrative in nature” does not refer to “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 question is whether the task itself is administrative or not”.²⁰⁸ Burns and Beukes state that an action would be administrative in nature when it is public law²⁰⁹ in nature and a relationship of inequality exists. This means that the action is not based on an equal private footing, but rather due to one legal subject standing in a position of authority over another legal subject.²¹⁰ As regards the second element, section 1 of PAJA defines “empowering provision” as “a law, a rule of common law, customary law or an agreement, instrument or other document”.²¹¹ Consequently, when SARS exercises a discretion in terms of the TAA or CEA it would constitute a “decision” in terms of PAJA.

²⁰⁶ Section 1 of PAJA. The decision specifically includes a decision relating to—
“(a) making, suspending, revoking or refusing to make an order, award or determination;
(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
(d) imposing a condition or restriction;
(e) making a declaration, demand or requirement;
(f) retaining, or refusing to deliver up, an article; or
(g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly”.

See also Hoexter (2012) 197.

²⁰⁷ (2000) 1 SA (CC).

²⁰⁸ *SARFU* par 141.

²⁰⁹ Burns & Beukes (2003) 22. Burns and Beukes explain that this should be distinguished from, for instance, a contract of sale concluded between a municipality and a private person as that relates to private law as opposed to public law.

²¹⁰ Burns & Beukes (2003) 87–88.

²¹¹ Hoexter (2012) 205 indicates that this concept is defined rather broadly.

The following element is that the person exercising the administrative action must be an organ of state.²¹² SARS is an organ of state and thus complies with this element.²¹³

Furthermore, an action would only be an administrative action if it adversely affects the rights of any person.²¹⁴ Currie and Klaaren note that this element is concerned with the consequence of the administrative action.²¹⁵ According to them, “adversely” refers to imposing a burden.²¹⁶ They understand it to be a burden when a person has to do or tolerate something, when a person’s right is removed or when an adverse determination is made in relation to a person’s rights.²¹⁷ Hoexter comments that due to the requirement of “adversely” a person who has benefited from administrative conduct would not fall within the definition of administrative action.²¹⁸

The concept “affects” may be construed in two ways. Firstly, “affects” could mean the deprivation of a person’s established rights.²¹⁹ Secondly, “affects” could relate to determining a person’s rights.²²⁰ Hoexter indicates that PAJA does not provide a conclusive answer and, as such, the wording of section 33 of the Constitution should clarify how “affects” should be construed.²²¹ Furthermore, she remarks that because administrative action in section 33 of the Constitution does not contain restrictions, the definition of administrative action in PAJA should reflect the wider meaning of

²¹² Par (b) of the definition of administrative action in s 1 of PAJA indicates that a decision can constitute an administrative action if it is taken by a natural or juristic person. Par (b) of the definition is, however, not applicable to this study.

²¹³ See Ch 2, par 2.4 in this regard.

²¹⁴ See De Ville *Judicial review of administrative action in South Africa* (2003) 51–54 for a discussion of the history of this requirement.

²¹⁵ Currie & Klaaren *The Promotion of Administrative Justice Act benchbook* (2001) 75.

²¹⁶ Currie & Klaaren (2001) 75.

²¹⁷ Currie & Klaaren (2001) 75. Currie & Klaaren’s understanding of the concept “adversely” accords with *Oxford Dictionaries* (available at <http://bit.ly/1UcS3oK>, accessed 15 March 2016) which defines “adversely” as “harmfully or unfavourably”.

²¹⁸ Hoexter (2012) 227.

²¹⁹ Currie & Klaaren (2001) 76; Hoexter (2012) 221.

²²⁰ Currie & Klaaren (2001) 77; Hoexter (2012) 221.

²²¹ Hoexter (2012) 221. Currie & Klaaren (2001) 77 hold a similar view as they point out that PAJA is intended to give effect to the constitutional right contained in s 33(1) of the Constitution. Hoexter (2012 fn 390) states that the term “rights” is used instead of “interest” and “legitimate expectations” to point towards established rights being required. However, she considers “decision” to include refusing to give permission or issue a license, which is indicative of an interpretation in terms of which “affects” relates to determining rights.

administrative action as envisaged in section 33 of the Constitution.²²² Consequently, she argues that “affects” should refer to the deprivation of established rights and the determination of rights.²²³

Devenish, Govender and Hulme rely on section 39(2) of the Constitution to assign a liberal dictionary meaning of “influence” to the concept “affects” instead of a literal meaning.²²⁴ Therefore, they are also of the opinion that “affects” should include the determination of rights.

The last important concept to consider under the element of “adversely affects the rights of any person” is “rights”. Importantly the “rights” do not necessarily have to be the rights of the applicant, as the provision clearly states the “rights of *any* person”.²²⁵ Also, the concept “rights” does not only refer to constitutional rights. Other statutory or common-law rights are also included.²²⁶

The last two elements for a decision to constitute administrative action, namely, “adversely affecting rights” and having “direct external legal effect”, appear to be closely related.²²⁷ More specifically the concept “legal effect” overlaps with the requirement of adversely affecting rights.²²⁸ “Legal effect”, like “adversely affecting rights,” implies that someone’s rights must be determined, changed or withdrawn.²²⁹

²²² Hoexter “Just administrative action” in Currie & De Waal *Bill of Rights handbook* (2013) 661.

²²³ In addition to relying on the s 33 of the Constitution, Hoexter (661 fn 85) argues that if “affects” connoted a deprivation of existing rights, explicit wording such as “deprivation” or “existing rights” should have been used instead of “affecting” and “rights”.

²²⁴ Devenish, Govender & Hulme *Administrative Law and justice in South Africa* (2001) 127. See Ch 2, par 2.7 where it is indicated that s 39(2) of the Constitution requires legislation to be interpreted “to promote the spirit, purport and objects of the Bill of Right”.

²²⁵ Own emphasis added.

²²⁶ Currie & Klaaren (2001) 79–80; Burns & Beukes (2003) 29. Burns & Beukes (27) indicate that based on the common-law doctrine of legitimate expectations, the rights referred to in PAJA are expanded to include legitimate expectations. Section 3(1) of PAJA also provides that administrative action which substantially and adversely affects the rights or legitimate expectations of a person must be procedurally fair. See also *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) BCLR 151 (CC) par 41; *Joseph* par 41 in this regard.

²²⁷ The Parliamentary Committee added this last element at a late stage. See Pfaff & Schneider “The Promotion of Administrative Justice Act from a German perspective” (2001) *SAJHR* 59 for further reading relating to the history of this element which is derived from art 35 of the German Federal Law of Administrative Procedure of 1976.

²²⁸ Currie & Klaaren (2001) 75; Burns & Beukes (2003) 27, 31; De Ville (2003) 55; Hoexter (2012) 229.

²²⁹ Currie & Klaaren (2001) 82.

“Direct effect” in the concept “direct external legal effect” alludes to finality²³⁰ as it appears to underpin the idea that an administrative decision must be “ripe” before it can be reviewed.²³¹ This common-law idea entails that a complainant should approach a court when the transgression or decision is final. This ensures that a court does not consider “half-formed” decisions.²³²

Finally, the concept “external effect” entails that the decision must affect someone other than the organ of state who made this decision.²³³

2.8.5.3 *Lawful, reasonable and procedurally fair administrative action*

As section 33(1) of the Constitution provides that a person has a right to administrative action that is lawful, reasonable and procedurally fair it is important to consider what the concept of “lawful, reasonable and procedurally fair” entails.

“Lawful” signifies that the administrative action should be done within the confines of the empowering provision,²³⁴ which essentially means that the administrative action should adhere to the principle of the rule of law. If the empowering provision indicates that certain requirements must be adhered to, the person exercising the administrative action must adhere to these requirements.

“Reasonable” is construed to mean that the decision should be rational.²³⁵ In *Carephone (Pty) Ltd v Marcus* (“*Carephone*”)²³⁶ it was held that rationality is concerned with whether there is an “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”.²³⁷ Furthermore, reasonableness

²³⁰ Currie & Klaaren (2001) 82; Burns & Beukes (2003) 30; De Ville (2003) 55; Hoexter (2012) 231. See Burns & Beukes (2003) 30 regarding the problems associated with the fact that administrative action refers to a final decision.

²³¹ Hoexter *Administration Law in South Africa* (2007) 206.

²³² Hoexter (2012) 585–587.

²³³ Currie & Klaaren (2001) 82; Burns & Beukes (2003) 31; De Ville (2003) 58; Hoexter (2007) 208.

²³⁴ De Ville (2003) 99.

²³⁵ *Metcash Trading Ltd v Commissioner of SARS* 2001 (1) SA 1109 (CC) 1134; Hoexter (2012) 340.

²³⁶ [1998] 11 BLLR 1093 (LAC).

²³⁷ *Carephone* par 37. This matter was concerned with whether a decision of a commissioner of the Commission for Conciliation, Mediation and Arbitration (CCMA) not to postpone arbitration

requires there to be proportionality.²³⁸ Hoexter states that proportionality aims “to avoid an imbalance between the adverse and the beneficial effects ... of an action”.²³⁹ She further indicates that the administrator should take into account the necessity of the action and whether there are less invasive ways to achieve the desired objective.²⁴⁰

Lastly, the administrative action should be procedurally fair. Section 3(2)(b) of PAJA provides that administrative action is considered procedurally fair if (i) adequate notice is given relating to the nature and purpose of the proposed administrative action; (ii) the person affected by the possible administrative action has a reasonable opportunity to make representations; (iii) a clear statement of the administrative action is given; (iv) where applicable, adequate notice regarding the right to review or internally appeal is given; and (v) adequate notice pertaining to the right to request reasons is given.

However, section 3(4)(a) of PAJA provides that the administrator, for purposes of this thesis SARS, may deviate from the requirements of section 3(2)(b) in instances where it would be reasonable and justifiable to do so. When determining whether there may be a deviation, the administrator must consider relevant factors which include the purpose of the limiting provision, the nature and purpose and the necessity to take the administrative action, the effect the administrative action may possibly have, whether the matter or the need to take the administrative action is urgent and the necessity of providing efficient administration and good governance.²⁴¹

proceedings can be seen as reasonable. See also Hoexter (2012) 340–343 for a discussion of what rationality entails.

²³⁸ *Minister of Health v New Clicks SA (Pty) Ltd (Treatment Action Campaign and Innovative Medicines SA as Amici Curiae)* 2006 (1) BCLR 1 (CC) 637.

²³⁹ Hoexter “Standards of review of administrative action: review of reasonableness” in Klaaren (ed) *A delicate balance: the place of the judiciary in a constitutional democracy* (2006) 64.

²⁴⁰ Hoexter (2006) 64. See also Ch 2, par 2.8.7 where it is indicated that one of the factors to consider when establishing whether a limiting provision is constitutional, is whether there are less invasive means available (s 36(1)(e) of the Constitution).

²⁴¹ Section 3(4)(b) of PAJA.

2.8.5.4 *Grounds for review and remedies available*

Section 6(1) of PAJA provides that a person who considers administrative action to be unreasonable, unjustifiable or procedurally unfair may approach a court or tribunal for the judicial review of the action in question. Judicial review in an administrative sense²⁴² is concerned with a court or tribunal's power to set administrative action aside based on certain grounds.²⁴³

Section 6(2) of PAJA provides that the grounds of judicial review include the fact that the administrator did not have the authority to exercise this action;²⁴⁴ the prescribed procedure indicated in the empowering provision was not complied with;²⁴⁵ an error in law was made;²⁴⁶ the action taken was not for a reason indicated by the empowering provision,²⁴⁷ the decision was taken for an ulterior motive,²⁴⁸ the decision was taken arbitrarily,²⁴⁹ and irrelevant factors were taken into account or relevant factors were not take into account.²⁵⁰

Section 8 of PAJA provides the remedies available when a court reviews an administrative action, for example, that the court directs the administrator to provide reasons²⁵¹ or sets aside the administrative action and refers the matter back to the administrator to reconsider.²⁵²

2.8.6 Right to access to courts

Section 34 of the Constitution provides that “(e)veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”.

²⁴² See Hoexter (2012) 113 where judicial review in the constitutional sense is discussed.

²⁴³ Hoexter (2012) 113. Section 7 of PAJA contains the procedural requirements that must be met to institute review proceedings.

²⁴⁴ Section 6(2)(a)(i) of PAJA.

²⁴⁵ Section 6(2)(b) of PAJA.

²⁴⁶ Section 6(2)(d) of PAJA.

²⁴⁷ Section 6(2)(e)(i) of PAJA.

²⁴⁸ Section 6(2)(e)(ii) of PAJA.

²⁴⁹ Section 6(2)(e)(vi) of PAJA.

²⁵⁰ Section 6(2)(e)(iii) of PAJA.

²⁵¹ Section 8(1)(a) of PAJA.

²⁵² Section 8(1)(c) of PAJA.

In *Bernstein* the court indicated that the purpose of the right to access to courts is to separate “the judiciary from the other arms of the State”.²⁵³ As a result of this separation, the legislature is prevented from becoming the judge and the rule of law is upheld.²⁵⁴ Similarly, in *Chief Lesapo v North West Agricultural Bank* (“*Chief Lesapo (CC)*”)²⁵⁵ the court recognised the link between section 34 of the Constitution and the rule of law. The court held that the right to access to courts prevents a person from taking the law into his or her own hands.²⁵⁶ Accordingly, section 34 of the Constitution prevents self-help which is inimical to a legal system founded on the rule of law.²⁵⁷

The High Court decision in *Chief Lesapo v North West Agricultural Bank* (“*Chief Lesapo (HC)*”)²⁵⁸ highlights another aspect of the right to access to courts. The court indicated that section 34 of the Constitution embodies the *nemo iudex in sua causa* rule.²⁵⁹ Thus, one of the aims of section 34 of the Constitution is to prevent a person from being a judge in a matter to which he or she is a party.

In order to give effect to the right to access to courts, South Africa has various courts available to resolve disputes. Section 166 of the Constitution provides that these courts are the Constitutional Court,²⁶⁰ the Supreme Court of Appeal,²⁶¹ High Courts of South Africa,²⁶² Magistrates’ Courts²⁶³ and other courts established in terms of legislation.

²⁵³ *Bernstein* par 105.

²⁵⁴ *Bernstein* par 105. *Bernstein* dealt with the right to access to courts in terms of s 22 of the Interim Constitution.

²⁵⁵ 1999 (12) BCLR 1420 (CC) 1429.

²⁵⁶ *Chief Lesapo (CC)* par 11.

²⁵⁷ *Chief Lesapo (CC)* par 11.

²⁵⁸ [1999] JOL 5319 (B).

²⁵⁹ *Chief Lesapo (HC)* 13.

²⁶⁰ In terms of s 167(3) of the Constitution, the Constitutional Court is the highest court in South Africa and has the jurisdiction to determine constitutional matters. Section 2 of the Constitution Seventeenth Amendment Act, 72 of 2012, extended the Constitutional Courts’ jurisdiction to include any matter, provided that the Constitutional Court grants leave to appeal, provided that the specific matter raises an arguable point of law of general public importance which should be considered by the Constitutional Court.

²⁶¹ Section 168(3)(a) of the Constitution provides that the Supreme Court of Appeal may decide appeals emanating from the High Court of South Africa or a court with a similar status, except labour or competition law matters. The Supreme Court of Appeal is not a court of first instance and may only decide on appeals and issues related to appeals.

²⁶² In terms of s 169(1) of the Constitution, the High Courts of South Africa may hear any constitutional matter, provided that the Constitutional Court has not decided to hear the matter

An example of legislation establishing a court other than those provided for in the Constitution is the TAA. Section 116 of the TAA establishes a Tax Court that may be approached in relation to an assessment, or a decision of SARS not to extend the period to lodge an objection or an appeal.²⁶⁴ In addition to this specialised court for tax matters, a taxpayer may also have his or her dispute resolved by an impartial forum called the Tax Board.²⁶⁵

2.8.7 Limitation of rights in the Bill of Rights

When dealing with the rights contained in the Bill of Rights, two aspects must be borne in mind. First, not all the rights in the Bill of Rights apply to everyone. Rights are afforded to juristic persons to the extent that the nature of the rights allows it.²⁶⁶ Currie and De Waal recognise that this means that the nature of a right may prevent a juristic person from enjoying such a right,²⁶⁷ for example, the right to life and physical integrity.²⁶⁸ Rights contained in the Bill of Rights are also not afforded to everyone when the wording of the specific section restricts the application of that right to a narrower group of beneficiaries. For instance, section 19(3)(a) of the Constitution confers the right to vote in elections to adult citizens.²⁶⁹ Another

directly or the matter does not fall within the ambit of a court of a status similar to the High Court. Furthermore, the High Court may hear any other matter not specifically assigned in terms of legislation to another court.

²⁶³ Section 170 of the Constitution provides that a magistrate's court may not consider the constitutionality of legislation or conduct. In terms of s 46(2) of the Magistrates' Courts Act 32 of 1944, a magistrate's court may not consider matters concerning the validity or interpretation of a will, the mental capacity of a person, where specific performance is sought (except in limited circumstances) or where a decree of perpetual silence is sought.

²⁶⁴ S 117(1) read with ss 107, 101 and 104(2) of the TAA. For a discussion of objections and appeals, see Ch 5, par 5.1.

²⁶⁵ Section 107(1) of the TAA. Section 109(1) of the TAA provides that an appeal may be heard by the Tax Board if the amount of tax in dispute does not exceed the amount determined by the Minister of Finance. In terms of GN 1196 in *Government Gazette* 39490 (17 Dec. 2015) from 1 Jan. 2016 the amount is R1m. Prior to 1 Jan. 2016 the monetary jurisdiction of the Tax Board was R500 000 as indicated in GN 271 in *Government Gazette* 29742 (28 Mar. 2007).

²⁶⁶ Section 8(4) of the Constitution. Woolman "Application" in Woolman *et al* (ed) *Constitutional Law of South Africa* (loose-leaf last updated 2015) 31–39 contends that determining whether a specific right is afforded to a juristic person is an interpretation issue and not one of application.

²⁶⁷ Currie & De Waal (2013) 36.

²⁶⁸ Currie & De Waal (2013) 36. See also *Woolman* (loose-leaf last updated 2015) 31–40, 31–41 for further examples of rights that are not extended to juristic persons.

²⁶⁹ An adult in South Africa is someone 18 years and older.

example of where a right itself restricts the group of beneficiaries is contained in section 28 of the Constitution which confers specific rights on children.²⁷⁰

The second aspect that must be borne in mind when dealing with the Bill of Rights is that the rights contained in it are not absolute and are subject to limitations.²⁷¹ A right may be limited if the limitation complies with section 36 of the Constitution. Section 36 of the Constitution provides that a law of general application may limit a right contained in the Bill of Rights if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

In order for a limitation to be in terms of law of general application, it needs to comply with the following features: parity of treatment, accessibility, clarity and non-arbitrariness.²⁷² Parity of treatment refers to treating similarly “situated persons the same”²⁷³ whilst accessibility refers to when the law is publicly available.²⁷⁴ The third feature of a law of general application, to wit clarity, requires that the law must be of such a nature that a society would be able to regulate themselves.²⁷⁵ The fourth feature, non-arbitrariness, amounts to a clear standard that must be set regarding when the law would apply.²⁷⁶

Cheadle recognises that as only a “law of general application” may limit a constitutional right, effect is given to an aspect of the rule of law.²⁷⁷ Specifically, “law of general application” requires a law to not apply arbitrarily and ensures that the rule of law is adhered to.²⁷⁸

²⁷⁰ Section 28(3) of the Constitution provides that for purposes of s 28 a child is a person younger than 18 years.

²⁷¹ See s 36 of the Constitution; Croome (2008) 16, Keulder (2011) 5.

²⁷² Woolman & Botha “Limitations” in Woolman *et al* (ed) *Constitutional Law of South Africa* (loose-leaf last updated 2015) 34–61.

²⁷³ Woolman & Botha (loose-leaf last updated 2015) 34–61. Burns & Beukes (2003) 30 indicate that the law must apply to a number of people and should not apply to an individual case.

²⁷⁴ Woolman & Botha (loose-leaf last updated 2015) 34–62. Woolman & Botha indicate that the minimum standard for a law to be publicly available is that it is published.

²⁷⁵ Woolman & Botha (loose-leaf last updated 2015) 34–63.

²⁷⁶ Woolman & Botha (loose-leaf last updated 2015) 34–65.

²⁷⁷ Cheadle “Limitation of rights” in Cheadle, Davis & Haysom *South African Constitutional Law: The Bill of Rights* (last updated Oct. 2015) Lexis Nexis internet version par 30.4.1.

²⁷⁸ Cheadle (last updated Oct. 2015) Lexis Nexis internet version par 30.4.1. See also Ch 2, par 2.7.

Furthermore, a limitation can only be considered "law of general application" if this practice is conducted in terms of law. Law refers to legislation, subordinate legislation, the common law and customary law.²⁷⁹ This means that the conduct of SARS not provided for in terms of law cannot be justified in terms of section 36 of the Constitution.²⁸⁰

Apart from requiring the limiting provisions to be law of general application, section 36 of the Constitution requires the limitation to be reasonable and justifiable. In order to determine whether the limitation is reasonable and justifiable the following factors should be considered: the nature of the right; how important the purpose of the limitation is, the nature and extent of the limitation, the relationship between the limitation and its purpose, and whether there are less restrictive means available to accomplish the purpose of the limitation.²⁸¹

2.9 CONCLUSION

Although the importance of taxes is not disputed as they raise revenue for public benefit, the fact that it is not voluntary means that SARS requires enforcement powers to ensure the effective and efficient collection thereof.

A balance between the powers of SARS and the rights of taxpayers has to be struck for tax administration to function optimally. Now that South Africa has a constitutional dispensation, finding a balance requires various constitutional considerations. Firstly, legislation, and consequently fiscal legislation, should be interpreted to give effect to the purpose of the legislation by taking into consideration "the spirit, purport and objects of the Bill of Rights".²⁸² Secondly, SARS, as part of the public administration, must adhere to the values and principles provided for in section 195(1) of the Constitution. This can be achieved by SARS acting in accordance with the provisions of PAJA and respecting the rights of taxpayers as contained in the Bill of Rights.

²⁷⁹ Cheadle (last updated Oct. 2015) Lexis Nexis internet version par 30.4.1.

²⁸⁰ *Walker* par 82. See also Goldswain (2012) 131 for a discussion regarding the difference between conduct and law of general application. For purposes of this thesis the focus is on powers afforded to SARS in terms of legislation and not the conduct of SARS not provided for in terms of legislation.

²⁸¹ Section 36(1)(a)–(e) of the Constitution.

²⁸² Section 39(2) of the Constitution.

However, the rights of taxpayers are not absolute. In terms of section 36 of the Constitution the fundamental rights of a taxpayer must be weighed-up against the purpose of the limiting provision, which relates to SARS' duty to enforce compliance of the tax laws. Gordon, considering tax administration, refers to this weighing-up process when he states that "[t]here may be a potential conflict between the use of these powers to minimise tax evasion and avoidance and to ensure that all taxpayers are fairly treated, with the need to respect the rights of the individual taxpayers".²⁸³

In the ensuing chapters, the contextual setting discussed in this chapter and specifically the balance that must be struck between SARS' powers and taxpayer's rights provide the basis for the in-depth discussion of the specific enforcement powers of revenue authorities that have been selected for purposes of this thesis.

²⁸³ OECD *Taxpayers' rights and obligations – a survey of the legal situation in OECD countries* (1990) 10.

PART 2 SEARCHES AND SEIZURES

CHAPTER 3 – SEARCHES AND SEIZURES CONDUCTED BY SARS

3.1 INTRODUCTION

In *Ferucci v Commissioner of the South African Revenue Service* (“*Ferucci*”)¹ the court stated that “[a] situation which no doubt frequently arises is that information furnished by taxpayers is incomplete, inaccurate and sometimes misleading”.² Due to the risk of taxpayers submitting incomplete, inaccurate or misleading information to SARS, it needs to verify the compliance by taxpayers. This verification includes confirming whether a return or declaration is truthful, determining a person’s correct tax liability, auditing the affairs of the taxpayer, collecting taxes owed and investigating and obtaining evidence relating to tax offences that may have been committed.³

SARS can verify whether a taxpayer has complied with fiscal legislation by gathering information⁴ and then comparing it to the information furnished by the taxpayer.⁵ The

¹ [2002] JOL 9664 (C).

² *Ferucci* 3.

³ SARS *Short guide to the Tax Administration Act, 2011 (28 of 2011)* (5 June 2013) 23.

⁴ The Tax Administration Act 28 of 2011 (TAA) refers to this information as “relevant material”. Section 1 of the TAA defines “relevant material” as “any information, document or thing that in the opinion of SARS is foreseeably relevant for the administration of a tax Act as referred to in section 3”. Section 3(2) of the TAA provides that the administration of a tax Act *inter alia* means obtaining information relating to a person’s tax liability, determining the tax liability of a person, collecting tax debts, investigating whether a tax offence has been committed; enforcing SARS’ obligations and powers under a tax Act and any other administrative functions in terms of a tax Act. Section 1 of the TAA defines “tax Act” as “this Act or an Act, or portion of an Act, referred to in section 4 of the SARS Act, excluding the Customs and Excise Act”. Section 4 of the SARS Act refers to Schedule 1 which lists the following tax Acts: Union and Southern Rhodesia Death Duties Act 22 of 1933, Transfer Duty Act 40 of 1949, Estate Duty Act 45 of 1955, Income Tax Act, CEA, Value-added Tax Act 89 of 1991, s 39 of the Taxation Laws Amendment Act 20 of 1994, ss 56 & 57 of the Income Tax Act 21 of 1995, Tax on Retirement Funds Act 38 of 1996, Uncertificated Securities Tax Act 31 of 1998, Demutualisation Levy Act 50 of 1998, Skills Development Levies Act 9 of 1999, Unemployment Insurance Contributions Act 4 of 2002, Small Business Amnesty and Amendment of Taxation Laws Act 9 of 2006, Second Small Business Amnesty and Amendment of Taxation Laws Act 10 2006, Diamond Export Levy Act 15 of 2007, Diamond Export Levy (Administration) Act 14 of 2007, Securities Transfer Tax Act 25 of 2007, Securities Transfer Tax Administration Act 26 of 2007, Employment Tax Incentive Act 26 of 2013, Voluntary Disclosure Programme and Taxation Laws Second Amendment Act 8 of 2010, the TAA and any regulation, proclamation, government notice or rule issued in terms of the abovementioned legislation or any agreement entered into in terms of this legislation or the Constitution of the Republic of South Africa, 1996.

⁵ Britz *Does the Tax Administration Act sufficiently protect the taxpayers’ right to privacy or provide the taxpayer with a right to be informed?* (unpublished MCom dissertation, University of Cape Town (2014)) 5.

information gathered can be obtained when SARS invokes its information gathering powers.⁶ These powers include inspecting a business premises,⁷ requesting relevant material from a taxpayer or a third party,⁸ requiring a person to produce relevant material in person⁹ and conducting an audit.¹⁰ Furthermore, SARS' information gathering powers include conducting an enquiry before a presiding officer¹¹ and searching and seizing a taxpayer's property.¹²

Even though all the information gathering powers may infringe taxpayers' rights, this chapter focuses only on SARS' power to search and seize as this specific information gathering power potentially has the most significant impact on taxpayers' constitutional rights. In *Haynes v Commissioner for Inland Revenue* ("Haynes")¹³ the court held that in order for a search to be in line with the Constitution, the other information gathering powers should have been exhausted.¹⁴ Baker and Groenhagen regard searches to be "[t]he most extreme form of interference with a taxpayer's right to privacy".¹⁵ Due to the "extreme" nature of the interference, taxpayers may feel that they are treated unfairly in order to ensure the efficient collection of taxes.

⁶ Provided for in ch 5 of the TAA and s 4 of the CEA.

⁷ In terms of s 45 of the TAA.

⁸ In terms of s 46 of the TAA. See Vogelmann & Muller "The extensive powers of SARS in requesting 'relevant material'" (23 Apr. 2014) *Tax ENSight* available at <http://bit.ly/1xzsnYs> (accessed 9 Nov. 2016) for a discussion of s 46 of the TAA. Section 4(12)A of the CEA affords SARS the power to request a person to furnish it with information relating to the export of goods.

⁹ In terms of s 47 of the Tax Administration Act.

¹⁰ In terms of s 48 of the Tax Administration Act. See Erasmus *An analysis of challenging the Commissioner's discretionary powers invoked in terms of sections 74A and 74B of the Income Tax Act 58 of 1962, in light of the Constitution of the Republic of South Africa 108 of 1996* (unpublished PhD thesis, University of KwaZulu-Natal (2013)) as regards conducting an audit prior to the enactment of the TAA.

¹¹ In terms of s 51 of the TAA and s 4(7) of the CEA.

¹² In terms of ss 59–63 of the TAA and s 4(4) of the CEA.

¹³ 2000 (6) BCLR 596 (Tk).

¹⁴ *Haynes* 644. The court referred to the information gathering powers provided for by ss 74A and 74B of the Income Tax Act and ss 57A and 57B of the Value-Added Tax Act, which have since been repealed. See also *Huang v Commissioner of SARS* unreported case no SARS 1/2013 of 13 Aug. 2014 para 48–49, which dealt with the Tax Administration Act's power to search and seize, where the court indicated that it should be determined by the court whether there are not less invasive means available to gather the required information.

¹⁵ Baker & Groenhagen "The protection of taxpayers' rights – an international codification" (2001) *European Financial Forum* 48.

The aim of this chapter is to establish whether the search and seizure provisions afforded to SARS in terms of the relevant tax laws achieve a proper balance between effective tax administration and the fundamental rights of taxpayers. This chapter consists of two separate parts. First, income tax and value-added tax-related searches and seizures come under scrutiny, followed by customs duty-related searches. The reason for this separate discussion lies in the fact that income tax and value-added tax-related searches and seizures are currently conducted in terms of the TAA, whilst customs duty-related searches and seizures are currently conducted in terms of the CEA. Apart from the searches and seizures being governed by two different Acts, their history and development also differ.

3.2 DEVELOPMENT OF INCOME TAX AND VALUE-ADDED TAX-RELATED SEARCHES AND SEIZURES

Prior to the enactment of the TAA on 1 October 2012, the Income Tax Act (“ITA”)¹⁶ contained provisions dealing with income tax-related searches and seizures¹⁷ and the Value-Added Tax Act (“VAT Act”)¹⁸ contained provisions for value-added tax-related searches and seizures.¹⁹ Even though the TAA repealed the search and seizure provisions in terms of the ITA and the VAT Act,²⁰ it is important to consider the repealed provisions as the development of these provisions and relevant case law inform the manner in which the search and seizure provisions in terms of the TAA should be interpreted and understood.²¹

The discussion regarding income tax and value-added tax-related searches and seizures firstly focuses on the initial provisions, after which the amendments relating

¹⁶ 58 of 1962.

¹⁷ Section 74(3) of the ITA.

¹⁸ 89 of 1991.

¹⁹ Section 57(1) of the VAT Act. The provisions relating to searches and seizures contained in both the ITA and VAT Act are largely identical. Consequently, any discussion relating to search and seize provisions of the one Act applies *mutatis mutandis* to the provisions of the other Act, unless indicated otherwise.

²⁰ Section 271 of the TAA read together with Sch 1 item 64 and 141 of the TAA.

²¹ Section 2(a) of the TAA provides that the one of the purposes of the TAA is to align and consolidate the administrative provisions of tax Acts. Consequently, the aim of the TAA is not to provide a complete overhaul of sections that applied prior to its enactment. For further information relating to what constitutes a “tax Act”, consult Ch3, fn 4. In terms of s 1 of the TAA read with s 4 of the SARS Act, the TAA does not apply to customs-related matters and also not to provincial and municipal taxes.

to income tax and value-added tax-related provisions are discussed in order to align them with the Constitution. This is followed by a discussion of the search and seizure provisions contained in the TAA.

3.2.1 Searches and seizures in terms of the ITA and the VAT Act

3.2.1.1 Initial provisions

Section 74(3) of ITA and section 57(1) of the VAT Act, before amendment, afforded the Commissioner the power to authorise members of staff in writing or by telegram to conduct a search and seizure.²² Such a member could enter any premises and search for money and documents without prior notice.²³ When a search was conducted, articles could be opened if the authorised member suspected that he or she would find money or documents.²⁴ Furthermore, money or documents could be seized if the staff member was of the opinion that they could be used as evidence.²⁵

These provisions were criticised for being arbitrary and unfair.²⁶ A point of criticism raised by Mosupa was that section 74(3) of the ITA was vague because it did not identify the purpose of the search and seizure and did not provide guidelines to be adhered to when a search and seizure was carried out.²⁷ Tulwana also criticised the vagueness of the provisions. He indicated that the ambit of searches was broad, as any premises, including non-trade premises, could be searched without first

²² For a discussion of the initial search and seizure provisions, see Croome *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 courts* (unpublished PhD thesis, University of Cape Town (2008)) 84–86; Croome *Taxpayers' Rights* (2010) 136; Croome & Olivier *Tax administration* (2015) 139; Bovijn *Warranted and warrantless search and seizure in South African income tax law: the development, operation, constitutionality and remedies of a taxpayer* (unpublished MCom dissertation, University of Stellenbosch (2011)) 18; Bovijn & Van Schalkwyk "Concerns regarding new search and seizure powers granted to the SARS in terms of the Tax Administration Act" (2012) *Stell LR* 509.

²³ Section 74(3)(a) of the ITA; s 57(1)(a) of the VAT Act.

²⁴ Section 74(3)(b) of the ITA; s 57(1)(b) of the VAT Act.

²⁵ Section 74(3)(c) of the ITA; s 57(1)(c) of the VAT Act.

²⁶ Editorial "The Constitution and the Commissioner" (Oct. 1994) *The Taxpayer* 182; Mosupa "Constitutional validity of search and seizure provisions: a perspective on section 74 of the Income Tax Act 58 of 1962" (2001) *Stell LR* 318; Tulwana *The constitutional validity of the search and seizure provisions in the fiscal laws and how they impact on the taxpayer's constitutional right* (unpublished MCom dissertation, University of KwaZulu-Natal (2002)) 4.

²⁷ Mosupa (2001) *Stell LR* 318. Mosupa (317) also indicates that taxpayers can only rely on common-law remedies if they are of the opinion that the provisions of an Act are unfair. See Ch 2, par 2.6 for a discussion on the limited protection offered by the common-law remedies.

obtaining the consent of the taxpayer.²⁸ Perhaps the strongest criticism against the search provisions of the ITA and the VAT Act was that these searches could be conducted without obtaining a warrant from a judge or magistrate. This led to SARS being able to determine on its own whether a search and seizure could be conducted. This was contrary to a rule of natural justice, namely, the *nemo iudex in propria causa* rule which means that no one may be a judge in his or her own case.²⁹

The criticism levelled against section 74(3) of the ITA and section 57(1) of the VAT Act became even more relevant with the enactment of the Constitution, as the Constitution specifically provides persons³⁰ with the right to access to courts,³¹ privacy³² and just administrative action.³³

The Katz Commission indicated that conducting searches and seizures without judicial authorisation would be problematic in a constitutional dispensation.³⁴ The power to conduct a warrantless search and seizure allowed SARS to act as a judge in a matter to which it was a party by determining whether and when a search could be conducted. Consequently, a taxpayer's right to access to courts was infringed as no impartial person adjudicated the matter.³⁵ A taxpayer's right to privacy was also infringed as no consideration was given to the taxpayer's expectation of privacy in each specific instance and there was no provision in either section 74(3) of the ITA

²⁸ Tulwana (2002) 4.

²⁹ *Mpande Foodliner CC v Commissioner for South African Revenue Service* (2000) 63 SATC 46 par 43; Burns *Administrative Law* (2013) 352. See Ch 2, par 2.8.5.1 for further detail relating to the maxim *nemo iudex in propria causa*.

³⁰ In terms of s 8(4) of the Constitution "persons" include natural and juristic persons. Juristic persons are entitled to the rights provided for in the Bill of Rights to the extent that the nature of the right and the duty it imposes are applicable. See Ch 2, par 2.8.7 in this regard.

³¹ Section 34 of the Constitution. See Ch 2, par 2.8.6 for a discussion of the right to access to courts.

³² Section 14 of the Constitution. See Ch 2, par 2.8.3 for a discussion of the right to privacy.

³³ Section 33(1) of the Constitution. See Ch 2, par 2.8.5 for a discussion of the right to just administrative action. Even though a taxpayer may be deprived of his or her property when a seizure is done, it is submitted that the seizure would not fall within the confines of the right to property. The seizure would not be arbitrary as there is a good reason for the seizure, namely, to collect evidence. See Ch 2, par 2.8.4 for a discussion relating to the right to property as contained in s 25(1) of the Constitution.

³⁴ Katz (Chair) Ch 6 "Implications of the Constitution of the Republic of South Africa Act 200 of 1993 for Tax System" in *Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa Interim Report* (1994) para 6.3.22 to 28 at 73–75.

³⁵ See Ch 2, par 2.8.6 where the right to access to courts is discussed.

or section 57(1) of the VAT Act with regard to limiting the scope of the search and seizure.

Some case law, dealing with warrantless searches in terms of other legislation, held that a search and seizure conducted without judicial oversight is not a reasonable and justifiable limitation of a person's rights. In *Park-Ross v Director: Officer for Serious Economic Offences* ("*Park-Ross*")³⁶ the court dealt with the question whether section 6 of the Investigation of Serious Economic Offences Act,³⁷ which allowed the Director for Serious Economic Offences or another authorised person to enter and search premises and seize property such as books and documents without authorisation, unreasonably violated a person's right to privacy.³⁸ The court held this provision to be in conflict with the Constitution.³⁹

Another matter in which warrantless searches and seizures were declared unconstitutional is *Mistry v Interim National Medical and Dental Council of South Africa* ("*Mistry*").⁴⁰ In this matter the constitutionality of section 28(1) of the Medicines and Related Substances Control Act,⁴¹ which authorised inspectors to conduct a warrantless search and seizure at any premises, came under scrutiny.⁴² The court pointed out that the provision contained no restriction on this power as any premises could be searched as long as there were or were suspected to be medicine or scheduled substances at that premises. This meant that inspectors could enter any residential premises where aspirin or ointments were kept.⁴³ Sachs J commented on this by stating that "[t]he existence of safeguards to regulate the way in which State officials may enter the private domains of ordinary citizens is one of the features that distinguish a constitutional democracy from a police State".⁴⁴ The court also pointed out that this section provided an instant warrantless search power as it did not

³⁶ 1995 (2) BCLR 198 (C).

³⁷ 117 of 1991.

³⁸ *Park-Ross* 202. The right to privacy was, at that stage, contained in s 13 of the Interim Constitution of 1993.

³⁹ *Park-Ross* 222.

⁴⁰ 1998 (4) SA 1127 (CC).

⁴¹ 101 of 1965.

⁴² It was questioned whether this provision does not unreasonably and unjustifiably infringe a person's right to privacy as contained in s 13 of the Interim Constitution of the Republic of South Africa.

⁴³ *Mistry* par 21.

⁴⁴ *Mistry* par 25.

require the search and seizure to be authorised by a warrant.⁴⁵ Based on this, section 28(1) was held to be unconstitutional.

The South African Association of Personal Injury Lawyers v Heath (“Heath”)⁴⁶ illustrates that not all warrantless search provisions in South Africa are unconstitutional. In this matter the court considered whether section 6 of the Special Investigating Units and Special Tribunals Act (“SIUSTA”)⁴⁷ justifiably limited a person’s right to privacy.⁴⁸ The reason for the deviation from the other judgments is that section 6 of SIUSTA, as a starting point, allows for searches and seizures authorised by warrants.⁴⁹ A search and seizure may only in exceptional circumstances be conducted without a warrant.⁵⁰ In *Magajane* the court added that in the exceptional circumstances when a warrantless search and seizure may be allowed in a constitutional dispensation, legislation must provide adequate guidelines as to how this must be done.⁵¹

When considering relevant case law relating to warrantless searches, it is apparent that section 74(3) of the ITA and section 57(1) of the VAT Act were unconstitutional as warrantless searches and seizures were allowed from the onset and the absence of adequate guidelines gave SARS broad powers when exercising its search and seizure powers. These broad powers afforded to SARS were contrary to the rule of law, which is one of the founding principles of the Constitution.⁵²

The Katz Commission provided a solution to the unreasonable infringement of a person’s right to access to courts and privacy by recommending that an impartial person capable of acting judicially should provide prior authorisation, where possible, to execute a valid search. The Katz Commission’s recommendation further

⁴⁵ *Mistry* par 28.

⁴⁶ 2000 (10) BCLR 1131 (T).

⁴⁷ 74 of 1996.

⁴⁸ *Heath* 1165–1168.

⁴⁹ *Heath* 1166. See also Bovijn & Van Schalkwyk (2012) *Stell LR* 522.

⁵⁰ Section 6(6)(a) and (b) of the Special Investigating Units and Special Tribunals Act restricts the circumstances in which a warrantless search may be conducted to when a person has consented to a search and seizure or when a member of the Special Investing Unit, on reasonable grounds, believes that (i) if the member applied for a warrant it would have been issued; and (ii) a delay in obtaining the warrant would defeat the purpose of the search.

⁵¹ *Magajane v Chairperson, North West Gambling Board* 2006 (5) SA 250 CC para 73–77.

⁵² See Ch 2, par 2.7 for a discussion of the rule of law.

suggested that this impartial person should at the very least, before issuing the warrant, on reasonable and proper grounds believe that an offence has been committed and that evidence would be found at the place of the search.⁵³ The right to access to courts would be protected as judicial authorisation by way of a warrant ensures that an impartial person has considered whether the grounds for the issuing of a warrant have been met. It prevents a person who has the power to conduct a search and seizure to take the law into his or her own hands. A warrant would also provide parameters for the search and seizure which ensure that a person's expectation of privacy is taken into consideration.

In addition to warrantless search and seizure powers infringing on taxpayers' rights to access to courts and privacy, the right to just administrative action also became relevant as the decision to conduct a search and seizure constitutes "administrative action".⁵⁴ A taxpayer's right to just administrative action was limited because two of the requirements for procedurally fair administrative action, as envisaged in section 3(2)(b) of PAJA, were not complied with. One, a taxpayer did not have the opportunity to state his or her case relating to why a search and seizure should not be conducted at his or her premises.⁵⁵ Two, the relevant sections did not provide that a taxpayer must receive notice of the nature and purpose of the search and seizure.⁵⁶ However, as indicated earlier,⁵⁷ when it is reasonable and justifiable to do so, SARS is allowed to deviate from the requirements for administrative action to be

⁵³ Katz (Chair) (1994) para 6.3.22–28 at 73–75. The Commission indicated that s 74(3) of the ITA *prima facie* violates the right to privacy. Nevertheless, the Commission pointed out that in some instances the right to privacy may be limited. The Commission did not indicate whether the search and seizure provision is an instance where the right to privacy may be reasonably and justifiably limited. In *Rudolph v CIR* (1994) 56 SATC 249; (1996) 58 SATC 183; (1996) 58 SATC 219; (1997) 59 SATC 399, the taxpayer questioned the constitutionality of s 74(3) of the ITA. The Constitutional Court held that because the searches were conducted before the enactment of the (Interim) Constitution it is irrelevant whether this provision is contrary to the right to privacy. The reason for this is that the Interim Constitution did not operate retroactively. It was referred back to the then Appellate Division to determine whether the provisions were invalid on common-law grounds. These grounds were that written authority was not personally given by the Commissioner, the authority was unclear and that a second search and seizure was conducted based on the original authorisation. The court rejected these arguments as being without substance. See Olivier "The new search and seizure provisions of the Income Tax Act" (1997) *De Rebus* 195, Silke "Taxpayers and the Constitution: a battle already lost" (2002) 17 *Acta Juridica* 284; Croome (2010) 139; Croome & Olivier (2015) 140 for a discussion of the Rudolph saga.

⁵⁴ See Ch 2, par 2.8.5.2 where the elements of "administrative action" are discussed.

⁵⁵ Section 3(2)(b)(ii) of PAJA.

⁵⁶ Section 3(2)(b)(i) of PAJA.

⁵⁷ See Ch 2, par 2.8.5.3 in this regard.

considered procedurally fair. It is submitted that an argument could have been made that in some instances providing the taxpayer with advance notice of a search and seizure that would be conducted at a later stage would have frustrated efficient administration by SARS. Consequently, it would not have been a foregone conclusion that a taxpayer's right to just administrative action would be unreasonably limited.

3.2.1.2 *Amendment of section 74(3) of the ITA and section 57(1) of the VAT Act*

In 1996 section 74(3) of the ITA and section 57(1) of the VAT Act were repealed and substituted with 74D and section 57D respectively.⁵⁸ Section 74D(1), which dealt with searches and seizures, provided that

“[f]or the purposes of the administration of this Act, a judge may, on *ex parte* application by the Commissioner or any officer contemplated in section 74 (4), issue a warrant, authorising the officer named therein to, without prior notice and at any time -

- (a) (i) enter and search any premises; and
- (ii) search any person present on the premises, provided that such search is conducted by an officer of the same gender as the person being searched, for any information, documents or things, that may afford evidence as to the non-compliance by any person with his obligations in terms of this Act;
- (b) seize any such information, documents or things; and
- (c) in carrying out any such search, open or cause to be opened or removed and opened, anything in which such officer suspects any information, documents or things to be contained.”⁵⁹

The amended sections enabled SARS to conduct a search and seizure only once a warrant had been issued by a judge.⁶⁰ This meant that searches and seizures were

⁵⁸ It was amended by s 14 of the Revenue Laws Amendment Act 46 of 1996.

⁵⁹ The wording of s 57D of the VAT Act was identical except that it referred to s 57(4) of the VAT Act instead of s 74(4) of the ITA.

⁶⁰ Section 74D(1) of the ITA; s 57D(1) of the VAT Act.

subject to judicial intervention. After obtaining the warrant, the authorised official could conduct a search and seizure without prior notice.⁶¹

a) *Ex parte application*

At the outset, section 74D(1) of the ITA⁶² provided that the application for a warrant had to be an *ex parte* application.⁶³ Bovijn remarks that with *ex parte* applications there are two conflicting interests. On the one hand, it may be necessary for SARS to bring this type of application as it needs to surprise a taxpayer.⁶⁴ The element of surprise may be necessary to ensure that a taxpayer does not have the opportunity to dispose of or tamper with evidence. On the other hand, it may lead to the infringement of a taxpayer's rights.⁶⁵ A taxpayer's right to just administrative action, which includes a person's right to state his or her case, may be violated with an *ex parte* application as the taxpayer would not receive any notice of the application and would not be present during the application. The section was later amended to remove the words "*ex parte*".⁶⁶

The removal of the words "*ex parte*" led to some confusion as to whether a taxpayer should have received notice of the application for a warrant. This confusion was evident in the matter of *Deutschmann; Shelton v Commissioner of SARS* ("*Deutschmann; Shelton*").⁶⁷ The applicants argued that the removal of the words meant that an *ex parte* application could only be brought if it fell within the situations that would normally necessitate an *ex parte* application.⁶⁸ These are instances where the relief sought would only affect the applicant; where the relief is preliminary to bring interested parties before court; if the identity of the respondent is not readily ascertainable; where the nature of the relief is such that a notice would render the

⁶¹ Section 74D(1)(a) of the ITA; s 57D(1)(a) of the VAT Act.

⁶² See also s 57D of the VAT Act.

⁶³ In *Investec Employee Benefits Ltd v Electrical Industry KwaZulu-Natal Pension Fund* (2010) 1 SA 446 (W) par 83 the court stated that *ex parte* applications are applications where the person against whom relief was sought did not receive notice of the application and the relief is sought in this person's absence. See also Harms "Civil Procedure: Superior Courts" in Joubert & Faris (eds) *The Law of South Africa* 4 (2012) par 125.

⁶⁴ Bovijn (2011) 63.

⁶⁵ Bovijn (2011) 63.

⁶⁶ It was amended by s 29 of the Income Tax Act 28 of 1997 and s 49 of the Taxation Law Amendment Act 27 of 1997.

⁶⁷ 2000 (6) BCLR 571 (E).

⁶⁸ *Deutschmann; Shelton* 581.

relief nugatory; or when due to urgency, notice cannot be given as this will result in imminent harm.⁶⁹

However, the court in *Deutschmann; Shelton*⁷⁰ agreed with the judgment in *Ferela (Pty) Ltd v CIR* (“*Ferela*”).⁷¹ In the latter matter it was held that if prior notice was required, section 74D(9) of the ITA would be redundant.⁷² This section allowed a person to apply to the High Court for the return of information, documents or things seized in terms of section 74D. The court reasoned that if prior notice was given to a taxpayer to state his or her case, it would not be necessary for a provision allowing for the return of seized things. Bovijn questions this reasoning as she points out that irrespective of whether prior notice was given or not, a person should still be allowed to apply for the return of seized material.⁷³ Furthermore, the court held that the removal of the words *ex parte* is not significant because section 74(D)(1) of the ITA expressly provides that no prior notice needs to be given of an application for a warrant.⁷⁴

In *Haynes*, the court disagreed with the decisions in *Deutschmann; Shelton* and *Ferela*. Firstly, the court disagreed that the removal of the words *ex parte* is insignificant.⁷⁵ The court considered the removal of the words as important since the amended section allowed the person whose rights were adversely affected to be given a hearing.⁷⁶ Only in instances where a good reason existed should this be departed from and may the application be brought by way of an *ex parte* application.⁷⁷ Furthermore, the court held that the words “without prior notice” apply to the actual search and seizure and not to the application for a warrant.⁷⁸

⁶⁹ Harms (2012) par 125. Bovijn (2011) 57 identifies the last two instances as instances which may possibly be applicable in search and seizure scenarios.

⁷⁰ In *Deutschmann; Shelton* 581.

⁷¹ (1998) 60 SATC 513.

⁷² *Ferela* 284. Section 57D(9) of the VAT Act contains the analogous provision.

⁷³ Bovijn (2011) 59.

⁷⁴ *Ferela* 524.

⁷⁵ *Haynes* 624.

⁷⁶ *Haynes* 626.

⁷⁷ *Haynes* 626. This is similar to the view expressed by the applicants in *Deutschmann; Shelton*.

⁷⁸ *Haynes* 624.

According to my understanding of *Haynes* it meant that the taxpayer would be aware of the application for a warrant, and could oppose it, but should not be notified of when the search and seizure would occur. This reasoning is peculiar. If the taxpayer was informed of the imminent application for a warrant, he or she would have had time to discard objects that may be subject to the search and seizure. Thus, it would be insignificant whether the taxpayer receives notice of when the search and seizure would take place as he or she would already have had the opportunity to frustrate the purpose of the search and seizure.

b) Grounds for and content of the warrant

Section 74D(2) of the ITA and section 57D(2) of the VAT Act provided that an application for a warrant must be supported by information supplied under oath by the applicant.⁷⁹

A judge could issue this warrant when he or she on reasonable grounds believed that (i) a person has either failed to comply with obligations in terms of the Act or has committed an offence in terms of the Act; (ii) there was information, documents or things that were likely to be found to afford evidence thereof; and (iii) the information, documents or things were likely to be found at the premises specified in the application.⁸⁰

The sections also prescribed the information to be contained in the warrant. Firstly, it had to refer to the alleged non-compliance or offence pursuant to which the warrant was issued.⁸¹ The premises to be searched also had to be identified together with the person who had allegedly failed to act in accordance with the provisions of the Act or who had committed an offence.⁸² Lastly, the information, documents or things to be searched had to be reasonably specified.⁸³ In *Ferucci* the court elaborated on

⁷⁹ In *Oberholzer v Commissioner of SARS* unreported decision case no 8714/98 (C) of 20 May 1999 par 4 the court indicated that a failure by the applicant to disclose previous outstanding tax, interest and penalties when applying for a warrant was not material as it would only strengthen the Commissioner's case. Due to the irrelevance of this information the court held that the warrant was valid. See also Croome (2008) 88, Croome (2010) 143 for a discussion of this matter.

⁸⁰ Section 74D(3) of the ITA; s 57D(3) of the VAT Act.

⁸¹ Section 74D(4)(a) of the ITA; s 57D(4)(a) of the VAT Act.

⁸² Section 74D(4)(b) & (c) of the ITA; ss 57D(4)(b) & (c) of the VAT Act.

⁸³ Section 74D(4)(d) of the ITA; s 57D(4)(d) of the VAT Act.

the last aspect. The court indicated that the person executing the searches and seizures should with reasonable accuracy be able to ascertain what documents were subject to the searches and seizures by referring to the warrant.⁸⁴

In general, the court in *Ferucci* held that the requirements pertaining to the content of the warrant served as a constitutional safeguard as the detail required in the warrant ensured that the parameters of the searches and seizures were provided by a judicial officer and not by the person executing the warrant.⁸⁵ If the requirements relating to the content of the warrant were not met the warrant could be set aside.⁸⁶

Croome criticised section 74D(2) of the ITA and section 57D(2) for not stipulating a period during which a warrant was valid. This meant that a warrant could be issued and the search could only occur months later. He recommended that a warrant should be valid for a restricted period as is the case with warrants issued in terms of the Competition Act.⁸⁷

c) Power to search and seize

In terms of the warrant, an authorised officer had the power to enter and search the identified premises and person in order to find the information, documents or things which might constitute evidence of non-compliance.⁸⁸ Furthermore, this officer could seize information and open or cause to open or remove and open anything which the officer suspected might contain such information.⁸⁹

Section 74D(5) of the ITA extended the power of the authorised officer beyond the scope of a warrant,⁹⁰ when an officer had reasonable grounds to believe that documentation or other things identified in the warrant was situated at a premises

⁸⁴ *Ferucci* 19. The court indicated that in some instances it may be impractical to itemise the documents subject to the search individually.

⁸⁵ *Ferucci* 20.

⁸⁶ *Ferucci* 13, 28. See also *Ivanov v North West Gambling Board* [2012] 4 All SA 1 (SCA) 7 where the court also concluded that if a warrant is too vague, the warrant could be set aside.

⁸⁷ 89 of 1998. In terms of s 46(3)(d) of the Competition Act, a warrant is valid for 30 days after it has been issued. See Croome (2010) 147 in this regard.

⁸⁸ Section 74D(1)(a) of the ITA; s 57D(1)(a) of the VAT Act. When a person is searched it must be done by an officer of the same gender.

⁸⁹ Section 74D(1)(b) & (c) of the ITA; s 57D(1)(b) & (c) of the VAT Act.

⁹⁰ The corresponding provisions are contained in s 57D(5) of the VAT Act.

that was not indicated in the warrant and the documentation or other things were about to be removed. This section also required that there should not have been sufficient time to obtain a warrant before the removal or destruction of the documentation or things. If these conditions were met, the officer could conduct the search as if such premises had been identified in the warrant.⁹¹

Section 74D(6) of the ITA also extended the power of the authorised officer beyond the scope of a warrant as this section enabled an officer who executed a warrant to seize additional documents or things not provided in the warrant. This could be done if the officer on reasonable grounds believed that it would constitute evidence of non-compliance with the ITA or the commission of an offence.⁹²

Croome cautioned that the extended power in terms of section 74D(5) and 74D(6) of the ITA could result in an abuse of power and added that it would be preferable that another warrant specifying the premises or the things subject to the search must be issued.⁹³ Klue *et al* contend that section 74D(6) eroded the safeguard established by the issuing of a warrant as the authorised officer could extend the ambit of the warrant without any judicial intervention.⁹⁴

d) After the search and seizure

Sections 74D(8), (9) and (10) dealt with the situation after a search and seizure was conducted.⁹⁵ The Commissioner had to take reasonable care to ensure that the seized information, documents or things were preserved. Furthermore, the Commissioner could retain the seized items until the investigation relating to non-compliance or an offence had been concluded or until they were required in any legal proceedings in terms of the ITA, whichever event occurred last.⁹⁶

⁹¹ See also s 57D(5) of the VAT Act. Bovijn (2011) 82 indicates that this is not comparable to a warrantless search as there is some form of judicial control present in this instance as a warrant had been obtained for the original search.

⁹² See also s 57D(6) of the VAT Act.

⁹³ Croome (2010) 143.

⁹⁴ Klue, Arendse & Williams *Silke on tax administration* (Last updated May 2015) LexisNexis Butterworth's internet version par 3.15.

⁹⁵ The corresponding sections are contained in ss 57D(8), (9) & (10) of the VAT Act.

⁹⁶ Section 74D(8) of the ITA; s 57D(8) of the VAT Act.

Section 74D(9) and (10) dealt with the remedies available to a person who had been subject to a search and seizure in terms of section 74D(1) of the ITA. Firstly, a person who had been subject to a search and seizure could have applied to the High Court for the return of anything that was seized.⁹⁷ The court could then, upon good cause shown, make any order it deemed fit.⁹⁸ In *Shelton v Commissioner of SARS* (“*Shelton*”)⁹⁹ the Supreme Court of Appeal held that because the section did not provide what would constitute as “good cause”, a wide discretion was conferred upon the court.¹⁰⁰ The court also had a wide discretion relating to the order as section 74D(9) provided that the court could make an order it deemed fit. In *Ferela* the court considered section 74D(9) as a mechanism to correct any injustice or hardship that was caused in terms of section 74D(1) of the ITA.¹⁰¹ Klue *et al* remark that even though this section did not explicitly enable the taxpayer to have the warrant set aside, the court’s wide discretion empowered the court to set aside a warrant.¹⁰²

3.2.2 Searches and seizures in terms of the TAA¹⁰³

On 1 October 2012, the second major change regarding income tax and value-added tax-related searches and seizures occurred when the TAA came into operation and repealed section 74D of the ITA and section 57D of the VAT Act.

Income tax and value-added tax-related searches and seizures are now regulated by sections 59 to 63 of the TAA. These provisions, mostly similar to the provisions of section 74D of the ITA and section 57 of the VAT Act, provide that, in general, a warrant must be obtained to conduct a search and seizure. The most prevalent

⁹⁷ Section 74D(9)(a) of the ITA; s 57D(9)(b) of the VAT Act.

⁹⁸ Section 74D(9)(b) of the ITA; s 57D(9)(b) of the VAT Act.

⁹⁹ Case no 142/2000.

¹⁰⁰ *Shelton* par 5. *Shelton* appealed against the joint judgment of *Deutschmann; Shelton* to the Supreme Court of Appeal.

¹⁰¹ *Ferela* 524. Botha J (525) indicated that instances where s 74D(9) would possibly be used included where a party concerned required documentation that has been seized, if the seized documents were not relevant to the taxpayer’s affairs, if the documents that were seized were not specified in the warrant and when a warrant was deficient.

¹⁰² Klue, Arendse & Williams (Last updated May 2015) par 3.15.

¹⁰³ Portions of this discussion regarding the TAA, especially the warrantless searches and seizures, are based on Keulder “What’s good for the goose is good for the gander – warrantless searches in terms of fiscal legislation” (2015) *SALJ* 819–848.

change introduced by the TAA appears to be that a search and seizure may, in limited circumstances, be conducted without a warrant.¹⁰⁴

3.2.2.1 Applying for a warrant

Section 59(1) provides that “[a] senior SARS official may, if necessary or relevant to administer a tax Act, authorise an application for a warrant under which SARS may enter a premises where relevant material is kept to search the premises and any person present on the premises and seize relevant material”.

“Senior SARS official” means either “the Commissioner, a SARS official who has specific written authority from the Commissioner to do so or a SARS official occupying a post designated by the Commissioner for this purpose”.¹⁰⁵ Moosa argues that the concept of “senior SARS official” is a misnomer because the TAA does not contain any criteria for a person to qualify as such. Rank, qualification and expertise do not necessarily play a role in conferring the status of a senior SARS official on an official.¹⁰⁶ Even though the concept of “senior SARS official” does not necessarily mean that the official will be senior in rank, qualification or expertise, this official still has to comply with an additional requirement, namely, having specific written authority to act as such or occupying a post of a senior SARS official, to be elevated to the status of a senior SARS official.¹⁰⁷

¹⁰⁴ Section 63 of the TAA.

¹⁰⁵ Section 6(3) of the TAA. See Moosa “The power to search and seize without a warrant under the Tax Administration Act” (2012) *SA Merc LJ* 342 who argues that as a “SARS official” is *inter alia* defined in s 1 as “a person contracted by SARS”, a SARS official is not necessarily employed by SARS. If it is also taken into consideration that a senior SARS official can be a SARS official who has received written authority from the Commissioner or occupies a designated position, it is possible that a person who is not an employee of SARS can be elevated to the status of a senior SARS official. Moosa indicates that it would be permissible as even as an independent contractor such a person would be subject to the provisions of the TAA.

¹⁰⁶ Moosa (2012) *SA Merc LJ* 344.

¹⁰⁷ Support for this argument can be found in Bovijn & Van Schalkwyk (2012) *Stell LR* 511 who indicate that when considering the definitions of “senior SARS official” and “SARS official” it is clear that powers conferred on a ‘senior SARS official’ are to be exercised by a limited category of persons. Also, as legislative interpretation dictates that every word is important, the inclusion of the word “senior” in the concept “senior SARS official” is not redundant. For further reading in this regard, see Botha *Statutory Interpretation: an Introduction for students* (2012) 112. However, the current definition of “senior SARS official is not clear regarding where the seniority of these officials is.

This senior SARS official may only provide authorisation if a search and seizure would be necessary or relevant to administer a tax Act.¹⁰⁸ Administering a tax Act involves obtaining full information relating to a taxable event,¹⁰⁹ the obligation of a person to comply with a tax Act or anything that may affect a person's tax liability.¹¹⁰ Furthermore, the administration of a tax Act comprises of ascertaining whether a person has filed or submitted correct returns, information or documents as required by a tax Act.¹¹¹ It also includes establishing the identity of a person in order to ascertain his or her tax liability,¹¹² determining a person's tax liability,¹¹³ collecting tax and refunding tax overpayment.¹¹⁴ In addition, it relates to investigating whether an offence has been committed in terms of a tax Act,¹¹⁵ enforcing SARS' powers and duties as provided for in a tax Act,¹¹⁶ providing assistance under an international tax agreement¹¹⁷ as well as any other necessary administrative function.¹¹⁸

Section 59(1) of the TAA seems to deviate from the situation before the enactment of the TAA. This is because section 59(1) of the TAA provides that before an application for a warrant may be brought it must be authorised by a senior SARS official. Neither the ITA nor the VAT Act contained a similar requirement. This creates the impression that there is now a screening process to ensure that an application for a warrant will be made only in certain instances, namely, when it is necessary or relevant to administer a tax Act. However, due to the wide ambit of the concept "to administer a tax Act", it cannot be said that as a search and seizure must be necessary or relevant to administer a tax Act, the power of SARS is curbed as to when an application for a warrant may be authorised.

¹⁰⁸ See Ch 3, fn 4 above with regard to what qualifies as a "tax Act".

¹⁰⁹ Section 1 of the TAA defines taxable event as "an occurrence which affects or may affect the liability of a person to tax".

¹¹⁰ Section 3(2)(a) of the TAA.

¹¹¹ Section 3(2)(b) of the TAA.

¹¹² Section 3(2)(c) of the TAA.

¹¹³ Section 3(2)(d) of the TAA.

¹¹⁴ Section 3(2)(e) of the TAA.

¹¹⁵ Section 3(2)(f) of the TAA. This section provides that if it is established that an offence has been committed, the administration of a tax Act would also include laying criminal charges and providing assistance with further investigations and prosecution.

¹¹⁶ Section 3(2)(g) of the TAA.

¹¹⁷ Section 3(2)(i) of the TAA.

¹¹⁸ Section 3(2)(h) of the TAA. See Bovijn (2011) 39 who considers this section to be a catch-all provision.

Also, the fact that SARS' search and seizure power only relates to relevant material does not truly restrict the instances of when an application for a warrant may be authorised.¹¹⁹ "Relevant material" is defined as "any information, document or thing that in the opinion of SARS is foreseeably relevant for the administration of a tax Act".¹²⁰ This concept is fairly broad because the definition of "relevant material" refers to the administration of a tax Act, which, as discussed in the previous paragraph, encompasses a wide array of actions. Moreover, "relevant material" is a broad concept as material will be relevant if it is "foreseeably relevant". The National Treasury indicated that "foreseeably relevant" is a low threshold and what has to be considered is whether "at the time of the request there is a reasonable possibility that the material is relevant to the purpose sought".¹²¹ Whether the material, once provided, is relevant does not matter.¹²² Also, there does not need to be a clear link "between the material and the purpose, but a rational possibility that the material will be relevant to the purpose".¹²³

Another point of deviation is that prior to the TAA, an application for a warrant could only be brought by the Commissioner or a delegated official.¹²⁴ The TAA does not provide who should bring this application. Only an indication of who should authorise this application is given. It is submitted that the reason for restricting the persons who could apply for a warrant prior to the TAA was to ensure that there were no frivolous applications for warrants. It is submitted that the same result is achieved by stipulating that a senior SARS official must authorise the application for a warrant. Hence, it is argued that the situation relating to the application for a warrant is essentially the same.

¹¹⁹ See s 59(1) of the TAA in this regard.

¹²⁰ Section 1 of the TAA. See Ch 3, par 3.1 fn 4.

¹²¹ National Treasury *Memorandum of the objects of the Tax Administration Laws Amendment Bill, 2014* (2014) 42.

¹²² National Treasury (2014) 42.

¹²³ National Treasury (2014) 42.

¹²⁴ See Ch 3, par 3.2.1.

3.2.2.2 *Ex parte application*

The TAA furthermore provides that a judge must hear an *ex parte* application for a warrant. A magistrate may also hear the application where the estimated amount in dispute is less than R500 000.¹²⁵

This application procedure departs from the position prior to the TAA in two ways. First, it explicitly provides that this application should be *ex parte*. Thus, the uncertainty in this regard is resolved.¹²⁶ Some may argue that explicitly providing that the application must be brought on an *ex parte* basis broadens SARS' powers when conducting a search and seizure. This is because it is no longer necessary to consider whether the specific applications fall within one of the circumstances in which an *ex parte* application is allowed in terms of procedural law.¹²⁷ As the taxpayer would not receive any notice of the application for a warrant and would not have the opportunity to state his or her case, the taxpayer's rights to just administrative action and access to courts are violated from the start.

Although SARS does not have to prove that there are grounds for bringing an *ex parte* application, it is submitted that the fact that the application should be brought without providing a taxpayer the opportunity to state his or her case does not broaden SARS' powers. This submission is based on the nature of the relief that SARS seeks with the application for a warrant. It seems implausible that there will be a situation where informing the taxpayer of a forthcoming application for a search warrant, would not render the relief nugatory as such a notice would provide a

¹²⁵ Subsections 59(2) & (3) of the TAA. In terms of s 59(3) read together with s 109(1)(a) of the TAA and GN 271 in *Government Gazette* 29742 (28 Mar. 2007), which was implemented on 1 May 2007. According to SARS "Dispute resolution guide: guide on the rules promulgated in terms of section 103 of the Tax Administration Act, 2011" (28 Oct. 2014) 54) this amount is still applicable.

¹²⁶ See Ch 3, par 3.2.1(a).

¹²⁷ See Ch 3, par 3.2.1(a) where the circumstances in which an *ex parte* application may be brought are discussed. Bovijn (2011) 63 offers an alternative interpretation regarding the explicit provision of an *ex parte* application. She interprets it to mean that a basis for bringing an *ex parte* application would have to be laid by the Commissioner or authorised official when bringing such an application. This is not correct. If this interpretation is to be preferred, the question arises why s 59(2) specifically provides that SARS *must* apply for a warrant by way of an *ex parte* application? Such an interpretation might have been possible if the section provided SARS with a discretion to use this type of application. In such an instance, SARS could then exercise its discretion to bring an *ex parte* application if there were grounds to substantiate it. However, SARS does not have a discretion regarding which procedure to use and therefore it is submitted that SARS would not need to lay a basis for bringing an *ex parte* application. Support for this argument can be found in *Huang v Commissioner of SARS* (13 Aug. 2014) par 66.

taxpayer with the opportunity to discard relevant material. In the event of SARS bringing an application on grounds that are factually incorrect, which would result in a judge or magistrate issuing a warrant that he or she would not have issued had the taxpayer been able to present evidence to the contrary,¹²⁸ the taxpayer may take the matter on review.

The second way in which the application procedure departs from the situation in terms of the ITA and VAT Act is that a magistrate may now hear an application for a warrant where the amount in dispute is less than R500 000. During the report-back hearings relating to the Tax Administration Bill (“TAB”), which later became the TAA, a comment was made that warrants should only be issued by a judge and not a magistrate because of the severe invasion that a search and seizure has on a person’s right to privacy.¹²⁹ SARS recommended that this comment should not be accepted because both judges and magistrates act independently from SARS.¹³⁰ Moreover, SARS indicated that the Criminal Procedure Act (“CPA”)¹³¹ provides that a magistrate may issue a warrant to search and seize even though criminal law-related searches and seizures may be more invasive than those conducted in terms of the TAA.¹³² It is submitted that there is no reason why the power to authorise a search and seizure should not have been expanded to include magistrates. On the contrary, this expansion is commendable as it may ensure that applications for warrants are dealt with more efficiently as there are more judicial officers available to hear these applications.

3.2.2.3 *Grounds for and content of warrant*

A judge or magistrate hearing the application for a warrant has a discretion in this regard.¹³³ It may be issued if the judge or magistrate has reasonable grounds to believe that a person has not complied with an obligation imposed under a tax Act or

¹²⁸ Klue, Arendse & Williams (Last updated May 2015) par 8.6.1. Klue *et al* put forward vexatious tip-offs from estranged spouses as a possible source of incorrect facts.

¹²⁹ Standing Committee on Finance “Report back hearings, Tax Administration Bill, 11 of 2011” (21 Sept. 2011) *Response Document* 37.

¹³⁰ Standing Committee on Finance (21 Sept. 2011) *Response Document* 37.

¹³¹ 51 of 1977.

¹³² Standing Committee on Finance “Report back hearings, Tax Administration Bill, 11 of 2011” (21 Sept. 2011) *Response Document* 37.

¹³³ Section 60(1) of the TAA.

has committed a tax offence.¹³⁴ Also, the judge or magistrate should on reasonable grounds believe that relevant material which may provide evidence of the commission of the offence or failure to comply, is likely to be found on the premises indicated in the application.¹³⁵

Some tax cases have dealt with the meaning of the “reasonable grounds” criterion. *Haynes*, which dealt with the erstwhile search and seizure provisions contained in the ITA, held that in order for this criterion to be met, SARS must illustrate that it was able to establish non-compliance or the commission of an offence by exercising its power to require the production of relevant material from the taxpayer¹³⁶ or conducting an inspection.¹³⁷ Also, SARS would need to show that it was unable to obtain the information, documents or things by requesting the relevant material.¹³⁸ In essence, *Haynes* held that conducting a search and seizure should be the last resort.

The matter of *Huang v Commissioner for SARS (“Huang II”)*,¹³⁹ which dealt with the TAA’s power to search and seize, stands in contrast to *Haynes*. In *Huang II*, the court pointed out that there is no obligation on SARS to indicate whether there are less intrusive means available to obtain the information. It is rather the judge or magistrate who should establish whether it is reasonable for SARS to conduct a search and seizure or whether there are less invasive means available to gather the required information.¹⁴⁰ “Reasonable grounds” is an objective test and require that “on the total picture presented by SARS in the warrant application” there are reasonable grounds to believe that the taxpayer has not complied with his or her

¹³⁴ Section 60(1)(a) of the TAA. Section 1 of the TAA defines “tax offence” as “an offence in terms of a tax Act or any other offence involving fraud on SARS or on a SARS official relating to the administration of a tax Act”. *Huang v Commissioner for SARS* (13 Aug. 2014) par 57 indicates that reasonably believing that a single act of non-compliance or the commission of one offence has occurred, will be sufficient.

¹³⁵ Section 60(1)(b) of the TAA.

¹³⁶ Previously this was provided for by s 74A of the ITA and s 57A of the VAT Act. Currently it is provided for by s 46 of the TAA.

¹³⁷ Previously this was provided for by s 74B of the ITA and s 57B of the VAT Act. Currently it is provided for by s 45 of the TAA.

¹³⁸ *Haynes* 630.

¹³⁹ Unreported case no SARS 1/2013 of 13 Aug. 2014.

¹⁴⁰ *Huang II* para 48–49.

obligations or has committed an offence.¹⁴¹ It is submitted that the decision in *Huang II* is more acceptable than that in *Haynes*. If the search and seizure was meant to be used only once all the other information gathering powers had been exhausted, the legislation should have provided so explicitly.

The warrant issued by the judicial officer must in terms of section 60(2) of the TAA indicate “(a) the alleged failure to comply or offence that is the basis for the application; (b) the person alleged to have failed to comply or to have committed the offence; (c) the premises to be searched; and (d) the fact that relevant material ... is likely to be found on the premises”.

Contrary to the situation before its enactment, the TAA does not require the warrant to be reasonably specific with regard to the relevant material to be searched. It should simply indicate that relevant material is likely to be found on the premises. The absence of this requirement is alarming. A judge or magistrate should reasonably believe that relevant material is likely to be found when a search and seizure is conducted. If objective facts are provided to convince the judicial officer that there is relevant material on the premises that will constitute evidence of non-compliance or an offence, why is it not disclosed what exactly is considered to be the relevant material? Of course, there may be instances where it will be impractical to itemise the documents subject to the search individually.¹⁴² However, the mere fact that in some instances it may be impractical should not result in a warrant never having to indicate what information, documents or things are subject to the search.¹⁴³ A taxpayer will be uncertain as to what the parameters of the search and seizure are and a possible area for abuse by SARS is created. Such vagueness is contrary to the rule of law.¹⁴⁴ In light of the decision in *Joseph v City of Johannesburg* (“*Joseph*”),¹⁴⁵ a taxpayer would be able to have a search and seizure reviewed based on the fact that the extent of what SARS could search and seize was vague

¹⁴¹ *Huang II* para 45–46. See also Bovijn (2011) 72–78 where the reasonable grounds criterion is discussed.

¹⁴² *Ferucci* 19. See Ch 3, par 3.2.2.2(b).

¹⁴³ *Ferucci* 19.

¹⁴⁴ See Ch 2, par 2.7 for a discussion of the rule of law.

¹⁴⁵ 2010 (3) BCLR 212 (CC) par 41. See Ch 2, par 2.4 for a discussion of *Joseph* and s 195 of the Constitution.

and that SARS also failed to act in a transparent manner as required by section 195(1)(g) of the Constitution.

3.2.2.4 *Power to search and seize*

The fact that SARS does not have to specify the information, documents or things that are subject to the search and seizure create more opportunities for abuse by SARS than was the case under the erstwhile ITA and VAT Act.¹⁴⁶ The ITA and VAT Act only allowed SARS to search and seize unspecified information, documents or things in special circumstances.¹⁴⁷

Section 62 of the TAA, like section 74D(5) of the ITA and section 57D(5) of the VAT Act, provides for the extension of SARS' search and seizure powers to a premises not identified in the warrant. This extended power can be exercised when a senior SARS official has reasonable grounds to believe that relevant material included in the warrant is at a premises not identified in the warrant and that this material may be removed or destroyed. Furthermore, there should not be enough time to obtain a warrant before the removal or destruction of the relevant material. Lastly, a delay in obtaining a warrant would defeat the object of the search.¹⁴⁸ The application of this section excludes a dwelling-house or domestic premises. The aforementioned premises may, however, be subject to the extension if part of the premises is used for purposes of a trade or if the occupant has consented thereto.¹⁴⁹

Searches and seizures at premises not identified in the warrant require some further consideration. First, it refers to relevant material "included in a warrant".¹⁵⁰ It is uncertain what is meant by these words as section 60(2)(d) of the TAA does not require that the relevant material which is subject to the search be specified. A further point for consideration is that section 62(1)(a) of the TAA requires that the

¹⁴⁶ See Ch 3, par 3.2.2.1 where Croome and Klue *et al* criticised searches and seizures relating to unspecified information, documents or things as it could lead to an abuse of power.

¹⁴⁷ In terms of s 74D(6) of the ITA; s 57D(6) of the VAT Act. See Ch 3, par 3.2.2.2(c) where it is indicated that these special circumstances refer to the instances where the SARS official conducting the search believes on reasonable grounds that other information, documents or things will provide evidence of non-compliance or an offence.

¹⁴⁸ Sections 62(1)(a)–(c) of the TAA.

¹⁴⁹ Section 62(2) of the TAA.

¹⁵⁰ See s 62(1)(a) of the TAA.

relevant material “may be removed or destroyed” whilst the ITA and VAT Act required that the information, documents or things are “about to be removed or destroyed”.¹⁵¹ Bovijn correctly considers this difference to be beneficial to SARS as the scope to conduct searches and seizures at unidentified premises is broader in terms of the TAA. This is because situations where relevant material may be removed may occur more often than situations where material is about to be removed.¹⁵²

The final consideration regarding searches and seizures at unidentified premises is that a dwelling-house or domestic premises, excluding a part thereof used for trade purposes, may now only be entered with the consent of the occupant.¹⁵³ Even though “dwelling-house” and “domestic premises” are not defined in the TAA, it is suggested that this refers to a private residence.¹⁵⁴ The TAA also does not define “consent”. Dictionaries define consent as “agreement, sanction, approval”¹⁵⁵ and as “permission for something to happen or agreement to do something”.¹⁵⁶ In order for the consent to be valid it should be informed consent. Accordingly, the occupant should (i) give consent voluntarily; (ii) be capable of understanding the implication of giving consent; (iii) have complete knowledge of and appreciate the possible extent of the risks; and (iv) give actual consent.¹⁵⁷ This requires the SARS official conducting the search to indicate to the occupant that he or she has a choice as to whether a search of the residence may be conducted. Furthermore, the occupant should understand the risks involved in providing consent. It is submitted that this risk links to the procurement of relevant material that may indicate tax non-compliance or that a tax offence was committed. If relevant material is seized and non-compliance is proved the taxpayer may be subject to penalties,¹⁵⁸ whilst if the

¹⁵¹ See s 74D(5)(a)(ii) of the ITA; s 57D(5)(a)(ii) of the VAT Act.

¹⁵² Bovijn (2011) 49.

¹⁵³ Section 62(2) of the TAA.

¹⁵⁴ Bovijn (2011) 90.

¹⁵⁵ Author unknown *Collins Dictionary* available at <http://bit.ly/YSq840> (accessed 9 Nov. 2016).

¹⁵⁶ Author unknown *Oxford Dictionaries* available at <http://bit.ly/1uH3O89> (accessed 9 Nov. 2016).

¹⁵⁷ These requirements emanate from the common law. See Neethling & Potgieter *Law of Delict* (2015) 111–114 as to how these requirements are applied in the area of delict. See Snyman *Criminal Law* (2015) as to how these requirements are applied in the area of criminal law. See also Bovijn & Van Schalkwyk (2012) *Stell LR* 511 who applied these requirements of consent in relation to warrantless searches.

¹⁵⁸ See ch 15: administrative non-compliance penalties and ch 16: understatement penalties of the TAA regarding the specific penalties that can be imposed.

relevant material is seized and it is proved that an offence was committed the taxpayer may be subject to a fine or imprisonment.¹⁵⁹ Lastly, the occupant should give the necessary consent. The specific section does not provide that written consent is required but if the requirements of consent, as mentioned above, is applied, written consent may be required. The reason is that the occupant may then indicate that he or she understands what he or she is consenting to. Also, if consent is not given in writing disputes may be difficult to settle without any documentary proof of the circumstances of the consent.

The fact that the TAA requires the consent of a person before a search may be conducted at a private residence is a move towards ensuring that a taxpayer's right to privacy is not infringed more than is reasonably necessary. The right to privacy is protected as a private residence can now only be searched in terms of a warrant, which should have established parameters for the search, or with the necessary consent.

Another positive change that occurred with the enactment of the TAA is that Croome's criticism relating to the absence of a validity period for a warrant in terms of the previous legislation¹⁶⁰ has been addressed. Section 60(3) of the TAA deals with this concern as it provides that the warrant must be exercised within 45 business days.¹⁶¹ This period may be extended when a judge or magistrate deems it appropriate on good cause shown.¹⁶²

¹⁵⁹ See ch 17: criminal offences of the TAA regarding the penalty or imprisonment that may be imposed.

¹⁶⁰ See Ch 3, par 3.3.2.2(b).

¹⁶¹ Section 1 of the TAA defines business days as "a day which is not a Saturday, Sunday or public holiday". The remainder of the definition of business days deals with the meaning of business.

¹⁶² Section 60(3) of the TAA. At this stage there is no case law dealing with the meaning of "good cause" in terms of the TAA. Other case law provides a general view of what would be considered "good cause". In *Cohen Bros v Samuels* 1906 TS 221 224 the court indicated that it is undesirable for a court to attempt to define the term "good cause". The court held that it must be decided on a case to case basis. In *Shelton* par 5 the court stated that "good cause" confers a wide discretion on the court.

3.2.2.5 Warrantless search and seizure provisions

As indicated earlier,¹⁶³ the amended ITA and VAT Act search and seizure provisions that applied before the TAA came into operation did not provide for a search and seizure to be conducted without a warrant. The inclusion of warrantless search and seizure in the TAA has been dubbed the “most controversial and radical”¹⁶⁴ provision relating to SARS’ search and seizure powers. This controversy relates to the fact that SARS can be seen as both the judge and the jury in these searches and seizures.¹⁶⁵ Accordingly, a taxpayer’s rights to just administrative action and access to courts come under fire when SARS is allowed to conduct searches and seizures without any judicial intervention.¹⁶⁶ However, a warrantless search may be seen as constitutional if it is authorised only in exceptional circumstances and there are adequate guidelines on how the search and seizure should be conducted.¹⁶⁷ Thus, it is not a foregone conclusion that the warrantless search and seizure provisions contained in the TAA are unconstitutional.

The TAA does not allow an instant warrantless search and seizure because from the onset searches and seizures must be authorised by a warrant. A senior SARS official may conduct a search and seizure without a warrant only in limited circumstances. Section 63 of the TAA allows for a warrantless search when the owner or person in control of the premises consents thereto in writing¹⁶⁸ or if a senior SARS official is reasonably satisfied of certain aspects.

As regards the first possibility, namely, where consent to search the premises was obtained, it is submitted that such consent should comply with the requirements of valid consent.¹⁶⁹ When a person consents to the invasion of his or her privacy, conducting a search and seizure cannot be considered an unreasonable limitation of

¹⁶³ See Ch 3, par 3.2.2.2.

¹⁶⁴ Bovijn (2011) 52; Gad & Bovijn The New Tax Administration Bill introduces new search and seizure provisions” (27 May 2011) *Tax ENSight* available at <http://bit.ly/1m81bHy> (accessed 10 Nov. 2016). Bovijn & Van Schalkwyk (2012) *Stell LR* 509 indicate that although the wording of s 63 of the TAA attempts to prevent an irresponsible application of this power, it is questionable whether these preventions will be applied in such a manner.

¹⁶⁵ Rawoot “SARS may act as ‘judge and jury’” (6 Nov. 2009) available at <http://bit.ly/1vJEeif> (accessed 9 Nov. 2016).

¹⁶⁶ See Ch 2, para 2.8.5; 2.8.6.

¹⁶⁷ See Ch 3, par 3.2.2.1.

¹⁶⁸ Section 63(1)(a) of the TAA.

¹⁶⁹ As discussed in the instance of a search at residential premises not specified in a warrant.

this right based on the principle of *volenti non fit iniuria*, which means that “a willing person is not wronged”.¹⁷⁰ Requiring consent is an objective criterion that can be verified objectively as the consent should be in writing.

Section 63(4) of the TAA specifically provides that when a search is conducted at a dwelling-house or domestic premises the consent of the occupant must be obtained.¹⁷¹ Consent is not required to search part of this said dwelling that is used for trade purposes.¹⁷² As this section respects a person’s inner sanctum, this section operates in favour of the taxpayer.¹⁷³ Even though section 63(4) of the TAA does not specifically provide that when a warrantless search is conducted at residential premises the consent should be in writing, the consent should be in writing as section 63(1) of the TAA, which deals with warrantless searches in general, provides that written consent is required. If written consent is generally required then surely such consent is also required in instances where a person’s inner sanctum is invaded.

The second instance when a search may be conducted without a warrant would be when a senior SARS official is satisfied on reasonable grounds¹⁷⁴ that certain requirements are met. The senior SARS official is required to believe 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
- (iii) the delay in obtaining a warrant would defeat the object of the search and seizure”.¹⁷⁵

¹⁷⁰ Neethling & Potgieter (2015) 108. This is only applicable to the extent in which the consent was given. See Ch 3, par 3.2.2.3(d) regarding the requirements for valid consent.

¹⁷¹ This consent should also adhere to the requirements of consent which was outlined in the discussion relating to residential premises not specified in a warrant.

¹⁷² Section 63(4) of the TAA.

¹⁷³ Bovijn (2011) 49.

¹⁷⁴ As stated in the discussion of reasonable grounds relating to when a judge or magistrate may issue a warrant, (Ch 3, par 3.2.2.3(c)) reasonable grounds connote that objective facts should be present at the time the discretion is exercised. It should not be a mere subjective belief of the officer that certain facts do indeed exist. See also Bovijn (2011) 78.

¹⁷⁵ Section 63(1)(b) of the TAA.

The first requirement entails that a senior SARS official must be satisfied that the removal or destruction of the relevant material is “liable to happen” or that it is “soon impending”.¹⁷⁶ The second requirement entails that SARS has to place itself in the position of a judge or magistrate in order to decide whether a warrant would have been issued in terms of section 59. The third requirement, namely, that the delay would defeat the object of the search and seizure, relates to whether waiting for a warrant to be authorised would frustrate the aim of obtaining relevant material to prove that a person has failed to comply with the provisions of a tax Act or that a tax offence has been committed.¹⁷⁷ This last requirement means that time must be of the essence.¹⁷⁸

Commentators have voiced their concern that the grounds upon which a senior SARS official must base his or her discretion are subjective. This discretion could be perceived as subjective as there are not objective factors to determine whether the official’s view was correct and could lead to an abuse of power by a senior SARS official when a search and seizure is done by this officer without the officer being satisfied on reasonable grounds of the stipulated requirements.¹⁷⁹ Another concern relating to warrantless searches based on a senior SARS official’s subjective discretion is that when a senior SARS official exercises this discretion, he or she remains an employee of one of the parties who has an interest in searches and seizures being conducted, namely, SARS. This is contrary to the *nemo iudex in propria causa* rule¹⁸⁰ as the official cannot be said to be acting impartially. As a result, this conflicts with the taxpayer’s rights of access to courts and just

¹⁷⁶ Author unknown *Collins dictionary* available at <http://bit.ly/1m7p5aT> (accessed 16 Sept. 2014).

¹⁷⁷ Bovijn (2011) 89; Bovijn & Van Schalkwyk (2012) *Stell LR* 512.

¹⁷⁸ See Bovijn (2011) 89; Bovijn & Van Schalkwyk (2012) *Stell LR* 513 who indicate that SARS cannot carry out a search in terms of s 63 if it created its own urgency.

¹⁷⁹ Standing Committee on Finance (21 Sept. 2011) *Response Document* 39 available at <http://bit.ly/1p47Bck> (accessed 20 Feb. 2014); Gad & Bovijn (27 May 2011) *Tax ENSight* available at <http://bit.ly/1m81bHy> (accessed 10 Nov. 2016); Bovijn (2011) 114; Bovijn & Van Schalkwyk (2012) *Stell LR* 524; SAIPA “New tax law on the books” (20 June 2012) available at <http://bit.ly/1iAzOVL> (accessed 6 June 2013).

¹⁸⁰ *Nemo iudex in propria cause* means that “no one may be a judge in his or her own case”. See Ch 2, para 2.8.5 & 2.8.6 in this regard.

administrative action.¹⁸¹ However, a taxpayer would be able to take this administrative decision on review.

3.2.2.6 Search and seizure safeguards

The TAA provides safeguards relating to how searches and seizures should be carried out. Some provisions apply only to searches and seizures conducted in terms of a warrant, others only apply to warrantless searches and seizures and some provisions apply irrespective of whether a search and seizure is conducted in terms of a warrant or not.

Section 61(1) and 61(2) of the TAA provide that the official executing the warrant must produce the warrant. If the official fails to do so a person may refuse access to the premises. These provisions clearly apply to searches and seizures conducted in terms of a warrant.

In instances where a search and seizure is conducted without a warrant, the SARS official must, prior to carrying out the search, inform either the person in control or the owner of the premises that it is a search conducted in terms of section 63.¹⁸² Also the ground(s) for the search must be indicated. This relates to the alleged failure to comply with an obligation imposed under a tax Act or the commission of an offence.¹⁸³

The guidelines contained in section 61(4)–(8) of the TAA apply to searches conducted with or without a warrant.¹⁸⁴ These sections provide that a SARS official should *inter alia* make an inventory of the seized material,¹⁸⁵ conduct the search in a decent and orderly manner¹⁸⁶ and may request assistance from a police officer.¹⁸⁷ As section 61(4)–(8) of the TAA refers to a SARS official and not specifically a senior

¹⁸¹ See *Hunter v Southam* [1984] 2 SCR 145 par 164 where the court had the same concerns in relation warrantless searches authorised by a person who is not impartial. See also Ch 4, par 4.2.1 for a discussion of this matter.

¹⁸² Section 63(2) of the TAA.

¹⁸³ Section 63(2) of the TAA.

¹⁸⁴ See s 63(3) of the TAA.

¹⁸⁵ In terms of s 61(4) of the TAA.

¹⁸⁶ In terms of s 61(5) of the TAA.

¹⁸⁷ In terms of s 61(6) of the TAA.

SARS official, it seems to be contrary to section 63(1) of the TAA, which explicitly provides that a warrantless search may only be conducted by a senior SARS official.¹⁸⁸ Moosa, irrespective of the fact that section 61(4)–(8) only refers to a SARS official, considers warrantless searches and seizures to be limited to senior SARS officials.¹⁸⁹ In addition to section 63(1) of the TAA’s explicit wording to this effect, he argues that the reference to “a SARS official” in section 61(4)–(8) only applies in instances where searches are authorised by a warrant.¹⁹⁰

As regards the specific safeguards relating to the carrying out of a search and seizure, the provisions contained of section 61(4)–(8) firstly provide that a SARS official must make an inventory of the relevant material seized in the form, manner and at the time that is reasonable in those circumstances. A copy of this inventory should also be provided to the owner or person in control of the premises.¹⁹¹ Furthermore, the seized material must be preserved and retained until either the investigation into the non-compliance or offence or legal proceedings under a tax Act or criminal proceedings have been concluded.¹⁹²

During the drafting of the TAA it was suggested that seized documents must be taken to a court for safekeeping and that the court then has to approve the seizure

¹⁸⁸ See Ch 3, par 3.2.2.3(a) where the definition of a “senior SARS official” is provided and discussed.

¹⁸⁹ Moosa (2012) *SA Merc LJ* 344.

¹⁹⁰ Consequently, Moosa (344) considers s 6(5) of the TAA, which provides that if the TAA does not specifically require the Commissioner or senior SARS official to exercise a specific power or duty, it may be exercised by a SARS official, not to be applicable in this instance. Moosa also relies on s 6(4) of the TAA which provides that any power ancillary to those powers assigned to the Commissioner or a senior SARS official may be exercised either by “an official under the control of the Commissioner or a senior SARS official” or an official who occupies a post where it is inevitable to perform ancillary tasks. Moosa did not elaborate on this argument but it is assumed that Moosa considers s 61(4)–(8) of the TAA to be ancillary to the main power of warrantless search and seizure which is afforded to a senior SARS official. It is difficult to understand how this section can support his view that these ancillary powers must be conducted by a senior SARS official. The difficulty lies in the fact that the pool of officials who may exercise these ancillary tasks is wider than the concept of a senior SARS official. This is because an officer who may perform ancillary tasks includes an officer who is under the control of the Commissioner or a senior SARS official whilst a senior SARS official is required to have written authority from the Commissioner and not simply to be under the control of the Commissioner or a senior SARS official.

¹⁹¹ Section 61(4) of the TAA.

¹⁹² Section 61(8) of the TAA. Bovijn (2011) 119 remarks that it is strange that criminal proceedings are mentioned as SARS is not concerned with conducting criminal prosecutions. She indicates that this may be understood to mean that SARS should hand over material relating to criminal prosecution to the State.

before SARS would be able to retain the seized material.¹⁹³ The Standing Committee on Finance rejected this suggestion because the requirements for a warrantless search and seizure contained in the then TAB was stricter than the requirements for warrantless searches contained in other South African legislation.¹⁹⁴ Bovijn and Van Schalkwyk compared the TAA warrantless search provisions to those in section 47 of the Competition Act and reached the conclusion that the latter Act's provisions are stricter than the provisions of the TAA.¹⁹⁵ I also established that the guidelines relating to warrantless searches in terms of the TAA do not compare favourably to the guidelines that apply when a warrantless customs-related search is conducted.¹⁹⁶ Another reason why the Standing Committee on Finance disallowed the suggestion of court intervention after objects were seized was that the warrantless search provisions were comparable to those in OECD member countries.¹⁹⁷

The guidelines relating to what should be done during a search and seizure also provide that there must be a regard for order and decency. This includes that a

¹⁹³ Standing Committee on Finance (21 Sept. 2011) *Response Document* 39–41 available at <http://bit.ly/1p47Bck> (accessed 20 Feb. 2014).

¹⁹⁴ Standing Committee on Finance (21 Sept. 2011) *Response Document* 39–41 available at <http://bit.ly/1p47Bck> (accessed 20 Feb. 2014). Other statutes that provide for warrantless searches, as indicated by the Standing Committee on Finance, are the Health Professions Act 56 of 1974; Criminal Procedure Act 51 of 1977; South African Police Service Act 68 of 1995; Counterfeit Goods Act 37 of 1997; National Prosecuting Authority Act 32 of 1998; Inspection of Financial Institutions Act 80 of 1998; National Forest Act 84 of 1998; Competition Act 89 of 1998; National Veld and Forest Fire Act 101 of 1998; Nuclear Energy Act 46 of 1999; Firearms Control Act 60 of 2000; Immigration Act 13 of 2002; International Trade Administration Act 71 of 2002; Explosives Act 15 of 2003; Anti-Personnel Mines Prohibition Act 36 of 2003; Second-Hand Goods Act 23 of 2009 and the Civil Aviation Act 13 of 2009.

¹⁹⁵ Bovijn & Van Schalkwyk 2012) *Stell LR* 524. This conclusion is based on two grounds. One, there is no requirement that SARS must provide identification before conducting a warrantless search and seizure. In terms of s 8(2) and 8(3) of the TAA, a SARS official must produce his or her identity card upon request by a member of the public. Upon failure to do so, a member of public may assume that a person is not a SARS official. Consequently, unlike the position under the Competition Act, if the person whose property is to be searched does not request identification, there is no obligation on the official to do so. Two, the Competition Act provides that a warrantless search should be conducted during business hours and only when it is justifiable and necessary may it be conducted at another time. The TAA does not provide any limitation with regard to when a warrantless search may be conducted.

¹⁹⁶ Keulder (2015) *SALJ* 845–848. Similarly to Bovijn and Van Schalkwyk's conclusion relating to the TAA and the Competition Act, the CEA provides that, as a point of departure, a warrantless search must be conducted during business hours.

¹⁹⁷ See Ch 4, para 4.2.3.2; 4.3.3.2; 4.4.3.2 where South Africa's search and seizure provisions are compared to Canada, Australia and New Zealand, who are all members of the OECD.

person may be searched if it is done by a person of the same gender.¹⁹⁸ The TAA fails to provide any further detail with regard to what is meant by order and decency. The Memorandum on the Objects of the Tax Administration Bill also does not provide more insight in this regard as it simply provides that requiring a search and seizure to have regard for order and decency provides additional protection to a taxpayer.¹⁹⁹

A SARS official may, when he or she considers it reasonably necessary, request the assistance of a police officer²⁰⁰ and section 61(7) of the TAA provides that no one may impede a SARS official or police officer from executing the warrant or refuse to provide the assistance which is required to execute the warrant without reasonable justification. It is puzzling how section 61(7) of the TAA can apply to warrantless searches as it specifically refers to the execution of the warrant and assistance required to execute the warrant. If there is no warrant, which is the case in a warrantless search, when can it be said that a person is impeding the execution thereof? Likewise, if there is no warrant, when can it be said that a person should provide assistance in the execution thereof? It may be that the reference to a warrant is a technical oversight. If this is the case, section 61(7) of the TAA could be interpreted to signify that a person should not hinder the SARS official or police officer from conducting a search and should assist them where possible. Nevertheless, this interpretation fails to recognise that this search should be done within certain parameters or boundaries. Without a warrant, a taxpayer has no point of reference to determine what should be done during this search and seizure and whether he or she has a reasonable excuse not to assist with the search and seizure.

Another puzzling aspect is that section 61(3) of the TAA does not apply when warrantless searches are conducted.²⁰¹ This section allows an official carrying out a search to open or remove anything that the official suspects would contain relevant

¹⁹⁸ Section 61(8) of the TAA.

¹⁹⁹ National Treasury "Memorandum on the objects of the Tax Administration Bill, 2011" (2011) 187.

²⁰⁰ Section 61(6) of the TAA.

²⁰¹ See s 63(3) of the TAA.

material,²⁰² to seize any relevant material,²⁰³ to take extracts from or copies of the said material and require a person to explain this material.²⁰⁴ It also empowers the official to seize and retain a computer or other storage device which contains relevant material.²⁰⁵ In instances where the authorised premises is a vessel, aircraft or vehicle, it may be stopped and boarded and a person present in the vessel, aircraft or vehicle may be questioned with regard to tax matters.²⁰⁶ Leaving out section 61(3) of the TAA from the provisions applicable to warrantless searches can be interpreted to mean that section 61(3) does not apply to warrantless searches. Support for this interpretation may be that when a search is conducted without a warrant, the official should not be entitled to the same powers as an official conducting a search and seizure authorised in terms of a warrant would have. On the other hand, other sections of the TAA refer to the seizure of goods without a warrant. These sections are 64(4)(b)(ii), which deals with legal professional privilege, and section 61(4), which provides that an inventory must be made of the seized material. The current situation leaves both taxpayers and SARS officials uncertain as to what powers SARS officials have when conducting a search without a warrant. This uncertainty is contrary to both the canon of certainty²⁰⁷ and the rule of law.²⁰⁸

3.2.2.7 *After the search and seizure*

Section 65 of the TAA allows a person whose affairs relate to the relevant material that was seized, to examine and copy such material. This should be done during normal business hours under the supervision of a senior SARS official.²⁰⁹

In terms of section 66(1) a person may request SARS to return relevant material that was seized and pay for physical damages relating to the carrying out of searches and seizures.²¹⁰ Only if SARS refuses to return the seized material or pay damages,

²⁰² Section 61(3)(a) of the TAA.

²⁰³ Section 61(3)(b) of the TAA.

²⁰⁴ Section 61(3)(d) of the TAA.

²⁰⁵ Section 61(3)(c) of the TAA.

²⁰⁶ Section 61(3)(e) of the TAA.

²⁰⁷ See Ch 2, par 2.5.3.

²⁰⁸ See Ch 2, par 2.7.

²⁰⁹ Section 65(2)(b) of the TAA.

²¹⁰ In terms of cl 53(7) of the first draft of the TAB, SARS was not liable for any damage to property which was necessitated by reason of the search. According to Bovijn (2011) 131, damage to property is considered to be necessitated by reason of a search when, for example, a taxpayer

may a person approach the High Court which may, if good cause is shown, make an order it deems fit.²¹¹ This includes having the warrant set aside.²¹²

In *Huang II*, the court indicated that when deciding whether a warrant should be set aside two aspects should be taken into account. First, whether the objective requirements contained in section 60(1) of the TAA were present at the time of the *ex parte* application. If these requirements were not present the court should set aside the warrant.²¹³ If the requirements were present the court has to consider the second aspect, namely, whether the judge or magistrate exercised his or her discretion properly.²¹⁴ This consideration is not concerned with whether the current judge would have reached a different conclusion.²¹⁵ Instead, it must be considered whether the discretion was exercised judicially or whether facts or legal principles were interpreted incorrectly.²¹⁶ The court also emphasised that because an application for a warrant is brought on an *ex parte* basis, SARS has a duty to act with

refuses to open a safe and by forcing it open SARS causes damages to the safe. Clause 66(1)(b) of the second draft of the TAB added that a person could request SARS to pay for physical damages caused whilst the search and seizure was conducted. Clauses 61(8) and 66(1)(b) of the third draft of the TAB provided that SARS will not be liable for damages to property which was necessitated by reason of the search but a person could request SARS to pay the physical damages caused by the search and seizure. Interestingly, the TAA simply provides that a person may request payment of physical damages. No mention is made of damages necessitated by reason of the search.

²¹¹ Sections 66(2) & (3) of the TAA. See Ch 3, par 3.2.2.2 for a discussion of similar provisions contained in the ITA and VAT Act. In *Huang v Commissioner of SARS* unreported case no SARS 4/2013 of 18 Nov. 2013 the applicants did not rely on s 66 of the TAA to have a search and seizure warrant set aside but instead opted to rely on rule 6(12)(c) of the Uniform Rules of Court. This rule provides that “a person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order”. Although the warrant was obtained with an *ex parte* application, the court correctly indicated that this rule was not applicable as the application for a warrant was not brought on an urgent basis (par 12). It was indicated that s 66(4) of the TAA would be the appropriate section to rely on. SARS accepted that rule 6(12)(c) and s 66 of the TAA are similar in substance. The matter accordingly proceeded in terms of s 66 of the TAA.

²¹² Section 66(4) of the TAA. Bovijn (2011) 127 notes that a discrepancy is created by the fact that an application for the return of seized material must be brought to the High Court. It seems to be illogical that an application for the issuing of a warrant can be brought in the Magistrate’s Court but an application to have that warrant set aside or to have seized goods returned should be brought in the High Court. She states that this creates inequality between SARS and the taxpayer as the taxpayer is burdened with a more comprehensive procedure in the High Court as well as with added time and cost implications.

²¹³ *Thint (Pty) Ltd v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) par 92, referred to in *Huang v Commissioner of SARS* (18 Nov. 2013) par 32–34.

²¹⁴ *Huang II* par 32.

²¹⁵ *Thint (Pty) Ltd v National Director of Public Prosecutions* par 92, referred to in *Huang v Commissioner of SARS* unreported case no SARS 4/2013 of 18 Nov. 2013 par 34.

²¹⁶ *Giddey v JC Barnard* 2007 (5) SA 525 (CC) par 19; *Thint (Pty) Ltd v National Director of Public Prosecutions* par 92; *Huang v Commissioner of SARS* (18 Nov. 2013) par 34.

the utmost good faith.²¹⁷ If the applicant can show that SARS withheld material facts in the *ex parte* application, that would constitute grounds to have the warrant set aside.²¹⁸ The court indicated that the rule of law necessitates that the exercising of any discretion must be in good faith, rational and non-arbitrary.²¹⁹

Even if a court sets aside a warrant or orders the return of seized material, section 66(4) of the TAA authorises “SARS to retain the original or a copy of any relevant material in the interest of justice”. Three aspects regarding this section can be identified. One, when the court decides to set aside a warrant does not necessarily follow that the court will order the return of seized material.²²⁰ Two, this section contains a contradiction as the court cannot order the return of seized documents whilst allowing SARS to retain the original documents. Bovijn submits that this section should provide that SARS may retain a copy of the relevant material if the court considers it to be in the interests of justice.²²¹ Lastly, *Huang v Commissioner of SARS*²²² provides some insight as to when it would be considered to be in the interests of justice to retain a copy of the relevant material. The court held that a court may consider whether the seized material would hypothetically be material which the taxpayer would be required to make available to SARS upon request.²²³

This concludes the discussion relating to income tax and value-added tax-related searches and seizures. Customs-related searches and seizures are discussed next.

²¹⁷ *Huang II* para 16–17.

²¹⁸ *Huang II* par 17.

²¹⁹ *Huang II* par 32.

²²⁰ *Huang v Commissioner of SARS* (18 Nov. 2013) par 17. See PwC “The tension between the Tax Administration Act and the Uniform Rules of Court” (Jan. 2014) *Synopsis 2*; Rogers & McCormack “Unreported judgment with case number: SARS 4/2013” (20 March 2014) *Lexology* available at <http://bit.ly/1dPRVCM> (accessed 9 Nov. 2016) for a discussion of this case.

²²¹ Bovijn (2011) 127.

²²² Unreported case no SARS 4/2013 of 18 Nov. 2013.

²²³ *Huang II* par 17. In other instances, South African law recognised that in certain instances irrespective of evidence being unlawfully seized, the evidence may be preserved. See s 35(5) of the Constitution; *Thint (Pty) Ltd v National Director of Public Prosecutions* para 220–230.

3.3 DEVELOPMENT OF CUSTOMS-RELATED SEARCHES AND SEIZURES²²⁴

The development of customs-related searches and seizures differs from that of income tax and value-added tax-related searches and seizures. Unlike the latter type of searches and seizures, the enactment of the Constitution did not result in any amendment of the search and seizure provisions provided for in the CEA. The decisions of the High Court in *Gaertner v Minister of Finance & Commissioner of SARS*²²⁵ (“*Gaertner (HC)*”) and the Constitutional Court in *Gaertner v Minister of Finance & Commissioner of SARS*²²⁶ (“*Gaertner (CC)*”) seventeen years after the enactment of the Constitution led to an amendment of the sections governing customs-related searches and seizures.

The discussion of customs-related searches and seizures firstly deals with the initial search and seizures provisions contained in the CEA and the matter of *Gaertner (HC)* and *Gaertner (CC)*. This first part provides context for the second part of the discussion, where the current search and seizure provisions in terms of the CEA as well as the provisions of the Customs Control Act (“CCA”) are discussed,²²⁷ which, once this Act comes into operation,²²⁸ will regulate customs-related searches and seizures.

3.3.1 Searches and seizures in terms of the CEA

3.3.1.1 Initial provisions

Section 4(4)–(6) of the CEA provided customs officials with the power to search premises and seize relevant documentation, books and things to verify whether the taxpayer had provided the correct information to SARS. In terms of section 4(4)(a)(1) an officer could, without any prior notice, enter any premises and make enquiries as

²²⁴ The discussion of customs-related searches and seizures is based on Keulder (2015) *SALJ* 819–848; Fritz “Customs searches – past, present and future” (2016) *JJS* 19–43.

²²⁵ 2013 (4) SA 87 (WCC).

²²⁶ 2014 (1) SA 442 (CC).

²²⁷ 31 of 2014. The CCA was assented to on 21 July 2014. National Treasury “Memorandum on objects of the Customs and Excise Amendment Bill, 2013” (2013) 33 indicates that the CCA aims to provide a structure to control imported and exported goods as well as regulate persons entering and leaving South Africa.

²²⁸ In terms of s 944(1) of the CCA, the CCA will only take effect on a date determined by the President. Section 944(2) states that this date may only be determined when “(a) the Customs Duty Act is amended by the addition of a Customs Tariff in an Annexure to that Act; and (b) the Excise Duty Act is amended by the addition of an Excise Tariff in an Annexure to that Act”.

he or she deemed necessary.²²⁹ The officer was not required to obtain a warrant before entering premises. As such section 4(4)(a)(i) of the CEA provided an instant warrantless power to the official.

Section 4(4)(a) further provided that a customs officer may

- “(ii) while he is on the premises or at any other time require from any person the production then and there, or at a time and place fixed by the officer, of any book, document or thing which by this Act is required to be kept or exhibited or which relates to or which he has reasonable cause to suspect of relating to matters dealt with in this Act and which is or has been on the premises or in the possession or custody or under the control of any such person or his employee;
- (iii) at any time and at any place require from any person who has or is believed to have the possession or custody or control of any book, document or thing relating to any matter dealt with in this Act, the production thereof then and there, or at a time and place fixed by the officer; and
- (iv) examine and make extracts from and copies of any such book or document and may require from any person an explanation of any entry therein and may attach any such book, document or thing as in his opinion may afford evidence of any matter dealt with in this Act”.

The customs official was also entitled to assistance from an assistant, a member of the police force,²³⁰ any person who conducted business on the premises and employees of the business.²³¹ The CEA did not specify what exactly the assistant and the member of the police force could assist with but provided that a person who conducted business on the premises and employees of the business had to assist by providing facilities required by the officer to enter the premises in order to conduct the search and seizure.²³²

²²⁹ Section 4(4)(a)(i) of the CEA.

²³⁰ Section 4(4)(b) of the CEA.

²³¹ Section 4(5) of the CEA.

²³² Section 4(5) of the CEA.

In terms of section 4(6) if an officer announced his or her capacity, indicated the reason for admission and demanded such an admission, but was refused admission, the officer and a person assisting him or her could “at any time, but at night only on the presence of a member of the police force, break open any door or window or break through any wall on the premises for the purpose of entry and search”.²³³ Furthermore, the officer and the person assisting him or her could “at any time break up any ground or flooring on any premises for the purpose of search and if any room, place, safe, chest, box or package is locked and the keys thereof are not produced on demand, the officer may open such room, place, safe, chest, box or package in any manner”.²³⁴

It is inexplicable why the enactment of the Constitution did not lead to any immediate challenge of or change to the warrantless searches and seizures as provided for by the CEA. Firstly, the searches and seizures were conducted without any judicial intervention which the Katz Commission identified as an important component for searches and seizures in a constitutional dispensation.²³⁵ Secondly, these provisions did not differentiate between a search being conducted at residential or commercial premises. Accordingly, a person’s inner sanctum which should be protected by his or her right to privacy was not specifically protected as such.²³⁶ Furthermore, these provisions provided for a warrantless search as the norm while South African case law has held it to be unconstitutional.²³⁷

One may speculate that the warrantless search provisions remained unchallenged because customs is a regulated field where the movement of goods is important. The movement of goods is an important feature as the goods may need to be examined to establish whether the provided information (for example regarding the

²³³ Section 4(6)(a) of the CEA.

²³⁴ Section 4(6)(b) of the CEA.

²³⁵ See Ch 3, par 3.2.2.1.

²³⁶ See Ch 2, par 2.8.3; Ch 3, par 3.2.2.1.

²³⁷ See Ch 3, par 3.2.2.1 where the relevant case law is discussed. According to the case law, in order for a warrantless search and seizure to muster constitutional scrutiny, it must only be used in exceptional circumstances and there should be additional legislative safeguards to ensure that a person’s rights are protected.

origin, value and tariff classification) used to establish the duty payable, is correct.²³⁸ It may be argued that requiring SARS to first obtain a warrant before conducting a search and seizure would allow taxpayers to move the goods, making it nearly impossible for SARS to verify information.

Despite the possible reason put forward for customs-related searches and seizures remaining the same after the enactment of the Constitution, the matter of *Gaertner (HC)*; *Gaertner (CC)* questioned the constitutionality of these warrantless searches and seizures.

In *Gaertner (HC)*, SARS conducted a search in terms of section 4(4) of the CEA at the premises of Orion Cold Storage (“OCS”). This search and seizure spanned over three days and included a search of Gaertner’s private home.²³⁹

Gaertner approached the Western Cape High Court to have section 4 of the CEA declared unconstitutional.²⁴⁰ SARS contended that the relevant sections were invalid insofar the searches were conducted at premises which were not designated.²⁴¹ Designated premises, according to SARS, referred to pre-entry facilities such as

²³⁸ *Gaertner (HC)* par 20. In terms of s 6(1) of the CEA, goods subject to customs duty are initially placed in a regulated environment such as a transit shed, a container terminal or depot, a state warehouse or a customs warehouse. When the prescribed forms and documentation are completed and the required duty is paid the Commissioner will issue a certificate or invoice. This will constitute due entry and the goods may then be removed from the regulated environment to the domestic domain.

²³⁹ *Gaertner (HC)* para 4–6. On the first day, the search continued for five hours during which documents were copied but SARS did not furnish an inventory of what was copied. On the second day, the search continued for another nine hours. The SARS officials agreed that they will seal off and retain the data pending extraction of the data in the presence of OCS and its legal representatives. On the last day, when Gaertner’s home was searched, the officials ransacked Gaertner’s cellar, garage and storerooms.

²⁴⁰ *Gaertner (HC)* par 1. Even though a settlement was reached in terms of which SARS returned all seized material and paid the applicants’ costs, the applicants proceeded with an application to have the relevant section declared unconstitutional (par 9). SARS and the Minister of Finance (par 10) indicated that even if s 4 infringed a taxpayer’s rights, it will be a justifiable limitation. Alternatively, they argued that if these sections were found to be invalid, this finding should not apply retrospectively but that an opportunity should rather be given to Parliament to rectify the situation. However, SARS in its heads of argument (par 14) conceded that s 4(4) (6) were invalid. See PwC “SARS’s powers of search and seizure in terms of the Customs and Excise Act” (Apr. 2013) *Synopsis* 2; De Bruin “SAID se mense het nog te veel mag” (2 May 2013) *Beeld* 3; Erasmus “Can SARS customs enter premises without a warrant?” (Apr. 2013) *Tax ENSight* available at <http://bit.ly/25aXhaV> (accessed 6 June 2016) for a discussion of the High Court decision.

²⁴¹ *Gaertner (HC)* par 16.

transit sheds, container terminals, container depots and licensed warehouses.²⁴² The court also included rebate stores under designated premises.²⁴³

Whilst SARS argued that the invalidity of the sections relates to the nature of the premises being searched, the applicants contended that the invalidity is based on the nature of the search, albeit routine or non-routine searches.²⁴⁴ The applicants asserted that warrantless, non-routine searches should be struck down due to their invalidity for being in conflict with the Constitution.²⁴⁵

The relevance of whether a search and seizure is routine or non-routine becomes apparent when the matter of *Magajane* is considered. In *Magajane*, the court held that a search dealing with suspected criminal contraventions or suspected offences (classified as non-routine) would be more intrusive than a search dealing with verifying compliance (classified as routine).²⁴⁶ The reason why a search conducted based on a suspicion of an offence or crime being committed would be more intrusive is that -

“the citizen has a very high expectation of privacy in respect of such investigations. The suspicion cast on persons ... can seriously, and perhaps permanently, lower their standing in the community. This alone would entitle the citizen to expect that his or her privacy would be invaded only when the State has shown that it has serious grounds to suspect guilt”.²⁴⁷

Conversely, the information subject to a routine search, which is aimed at verifying compliance, is mostly uncontroversial as it is information which the taxpayer should

²⁴² *Gaertner (HC)* par 77.

²⁴³ *Gaertner (HC)* par 100. According to SARS “Customs bonded warehouses and rebate stores” (update 6 Jan. 2016) available at <http://bit.ly/2IGOXPX> (accessed 9 Jan. 2016) rebates stores are stores where only “goods which have been entered under rebate of duty under the provisions of Schedules No 3,4 and 6” are kept. These stores are regularly inspected by the Customs authority.

²⁴⁴ *Gaertner (HC)* par 15.

²⁴⁵ *Gaertner (HC)* par 86.

²⁴⁶ *Magajane* 2006 (5) SA 250 CC par 69. In *Gaertner (HC)* par 81 it was held that a routine search, in relation to customs matters, refers to searches where officers conduct random searches to verify compliance with the CEA and it is not suspected that the CEA has been contravened.

²⁴⁷ *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* [1990] 1 SCR 425 508. In *Magajane* 1157 fn 85 the court approved of this *dictum*.

have made available to the revenue authority.²⁴⁸ As such, the interference with a person's privacy is not as invasive as that occasioned by a search conducted with a reasonable suspicion that an offence was committed.²⁴⁹

In *Gaertner (HC)*, considering the applicants' argument that a warrantless non-routine search is unconstitutional, the court found that the aim of the customs search was not concerned with criminal conduct. Furthermore, the court indicated that even though participants in a regulated field, such as customs, should tolerate routine searches to ensure compliance with the CEA it does not mean that these participants should tolerate non-routine searches that violate the participant's privacy based upon unfounded suspicions.²⁵⁰

Furthermore, the court found that section 4(4)(a) contained no limit regarding the premises that may be searched.²⁵¹ Even though the search could only be conducted "for purposes of the Act", it did not assist in restricting the extent of the limitation to a specific type of premises. This is because the scope of the CEA is extremely wide²⁵² and so lengthy that the schedules are not even printed as a standard publication.²⁵³ The absence of any limitations in relation to what premises may be searched is problematic as section 4(4)(a) of the CEA did not contain any measures to ensure additional protection of a person's private residence.²⁵⁴

The court held that:

- i) when a routine search is conducted at designated premises or at premises of a registered or licenced person without a warrant, it would be valid. The court remarked that there is no particular reason why a routine search should in any

²⁴⁸ McCracken "Going, going, gone... global: a Canadian perspective on international tax administration issues in the 'exchange-of-information-age'" (2002) *Canadian Tax Journal* 1897.

²⁴⁹ McCracken (2002) *Canadian Tax Journal* 1896; Brooks & Fudge "Search and seizure under the Income Tax Act-Criminal Law Series" (2007) *Summary of study paper* 12.

²⁵⁰ *Gaertner (HC)* par 83.

²⁵¹ *Gaertner (HC)* par 71.

²⁵² *Gaertner (HC)* par 72.

²⁵³ *Gaertner (HC)* par 18.

²⁵⁴ *Magajane* par 66–67, referred to in *Gaertner (HC)* par 56[e]. See Ch 2, par 2.8.3 where this aspect is discussed.

event be authorised by a warrant since there are no particular facts that must be provided to the judicial officer as this is a random inspection;²⁵⁵

- ii) warrantless non-routine searches at designated premises are justifiable;²⁵⁶
- iii) warrantless non-routine searches conducted on the premises of a registered person will be invalid except if those premises are also designated premises;²⁵⁷
- iv) a warrant must be obtained when it is a search conducted at the premises of an unregistered and unlicensed person.²⁵⁸ The court observed that this type of search will be a non-routine search and would therefore always require a warrant.²⁵⁹

The court also took cognisance of the fact that broader search powers would lead to a greater infringement of a person's rights²⁶⁰ and that in the absence of a warrant, legislation must provide adequate guidelines.²⁶¹ The court indicated that certain guidelines must be incorporated when a warrantless search, in terms of (i), (ii) and (iii)²⁶² above, is conducted. These guidelines are aimed at ensuring that a proper balance is reached between taxpayers' rights and SARS' interests.

The court provided the following guidelines:

- i) entry should occur during business hours except if the officer reasonably is of the opinion that entry at another time would be necessary for purposes of the Act;
- ii) it should be communicated to the person in charge at the premises whether it is a routine or non-routine search. If a warrant is not required, the person in charge should be furnished with a written statement indicating the purpose of the search. If it is a matter of urgency this should be communicated orally;
- iii) the person in charge is entitled to be present and witness the search;
- iv) a list of all copies made and things seized should be provided; and

²⁵⁵ *Gaertner (HC)* par 87.

²⁵⁶ *Gaertner (HC)* par 103.

²⁵⁷ *Gaertner (HC)* par 103.

²⁵⁸ *Gaertner (HC)* par 103.

²⁵⁹ *Gaertner (HC)* par 85.

²⁶⁰ See *Magajane* par 71.

²⁶¹ See Ch 3, par 3.2.2.1 for a discussion of the relevant case law.

²⁶² This relates to when the search is conducted at designated premises.

- v) the search proceedings should be conducted in an orderly and decent manner.²⁶³

The court held that the declaration of invalidity of non-routine searches on the premises of an unlicensed or unregistered person or searches on the non-designated premise of a registered or licensed person does not apply retrospectively. This resulted in the court suspending this declaration for 18 months to allow the legislature to bring the relevant provisions in line with the Constitution.²⁶⁴

As section 167(5) of the Constitution provides that the Constitutional Court has to confirm an order declaring legislation invalid, the matter of *Gaertner* was referred to the Constitutional Court. Although the applicants sought confirmation of the High Court order declaring certain sections invalid and approving of the interim reading-in of guidelines, they did not agree with the High Court in so far as it allowed warrantless non-routine searches of designated premises.²⁶⁵ Conversely, the Minister of Finance and the Commissioner contended that the differentiation made by the High Court between routine and non-routine searches was neither helpful nor practical.²⁶⁶ They furthermore argued that the guidelines provided were too detailed.²⁶⁷

In its judgment the Constitutional Court reiterated that warrantless searches and seizures must always be the exception as obtaining a warrant is not merely a rubber-stamp exercise.²⁶⁸ When an application for a warrant is made it allows the judicial officer to ensure that the required parameters are in place in order to limit the invasion of a person's privacy.²⁶⁹

The court, in accordance with the Minister of Finance and Commissioner' contention, held that the distinction between the two types of searches is not useful.

²⁶³ *Gaertner (HC)* par 105.

²⁶⁴ *Gaertner (HC)* par 119.

²⁶⁵ *Gaertner (CC)* para 20; 25.

²⁶⁶ *Gaertner (CC)* para 28, 33.

²⁶⁷ *Gaertner (CC)* par 28.

²⁶⁸ This was initially stated in *Magajane* par 74 and echoed in *Gaertner (HC)* par 56[g].

²⁶⁹ These parameters are set, as indicated in *Gaertner (CC)* par 69, as the warrant governs the time, place and ambit of the search.

Furthermore, the court indicated that the distinction between the different types of premises is also not useful.²⁷⁰ The court pointed out that the task of differentiating between the nature of searches and the nature of the premises must be left for the legislature.²⁷¹

Subsequently, the court supplied interim reading-in provisions, which are far removed from the specific guidelines provided in the High Court judgment. In terms of these reading-in provisions the only aspect that had to be read in is that generally when a search was conducted at a private residence, a warrant had to be obtained. The said warrant would only be issued by a judge or magistrate if he or she was satisfied that (i) reasonable grounds to suspect a contravention of the CEA existed; (ii) a search of the premises would supply information relating to the contravention; and (iii) the search was reasonably necessary for purposes of the CEA. A warrantless search of a private residence would have been allowed if the officer reasonably believed that (i) a warrant would have been issued if the officer applied for it; and (ii) a delay in order to obtain the warrant was likely to defeat the purpose of the search.²⁷²

However, the reading-in provisions did not contain details relating to what the content of the warrant should be and as such did not curb the extent to which a taxpayer's rights are infringed upon by indicating the time during which a search may be conducted and specifying the objects that were subject to the search.

3.3.1.2 *Amendment of section 4(4)–(6) of the CEA*

The legislature amended the relevant provisions by way of the Tax Administration Law Amendment Act²⁷³ which came into operation on 16 January 2014.²⁷⁴ This amendment provides that, as a point of departure, an officer may only enter premises on authority of a warrant.²⁷⁵

²⁷⁰ *Gaertner (CC)* par 75.

²⁷¹ *Gaertner (CC)* par 75.

²⁷² *Gaertner (CC)* par 88.

²⁷³ 14 of 2013.

²⁷⁴ GN 14 in *Government Gazette* 37236 (16 Jan. 2014).

²⁷⁵ Section 4(aA) of the CEA. See also National Treasury (2 July 2013) available at <http://bit.ly/15Ew2HQ> (accessed 2 Sept. 2013).

a) *Ex parte application and grounds for warrant*

Section 4(4)(e) of the CEA provides that:

“If the purpose of the entry is to conduct a search of the premises for goods, records or any other things in respect of which an offence in terms of this Act is suspected to have been committed or that may be used as evidence for the prosecution of such an offence, the magistrate or judge may issue such warrant if it appears from the information on oath that—

- (i) there are reasonable grounds for suspecting that an offence in terms of this Act has been committed;
- (ii) a search of the premises is likely to yield such goods, records or other things; and
- (iii) the search is reasonably necessary for the purposes of this Act.”

Even though section 4(4)(e) of the CEA does not expressly provide that the application for a warrant should be brought on an *ex parte* basis, unlike the TAA provision,²⁷⁶ it is submitted that a customs-related search warrant would by implication be sought by way of an *ex parte* application because serving notice on the taxpayer regarding the intended application would negate the relief sought.

b) *Warrantless search provisions*

Exceptions to the requirement of obtaining a warrant will be made when either the objective criterion is met or the SARS officer’s discretion is properly exercised.²⁷⁷

The objective criterion is met when a search is conducted at licensed premises, business premises of a registered person, premises operated by the State or with the consent of the person in charge of the premises. A warrantless search in terms of the SARS officer’s discretion may be conducted when “the officer on reasonable grounds believes – (i) that a warrant will be issued by a magistrate or judge if a warrant is applied for; and (ii) that the delay in obtaining the warrant is likely to defeat the purpose for which the officer seeks to enter the premises”.²⁷⁸

²⁷⁶ See Ch 3, par 3.2.2.3(b).

²⁷⁷ Deloitte “The wide entry, search and seizure powers of customs officials may finally be limited” available at <http://bit.ly/1heWPu1> (accessed 2 Sept. 2013 – no longer available) labelled the scenarios when the exceptions will be made as the “objective criteria” and “SARS officer discretion”.

²⁷⁸ Section 4(aB) of the CEA.

These amended provisions reiterate that conducting a search without a warrant should not be the norm. This means that the amended provisions do not allow for instant warrantless searches and seizures and as such these provisions are in line with other relevant South African case law.²⁷⁹

Also, the amended provisions partly acknowledge a person's increased expectation of privacy at residential premises. This is illustrated by the objective criterion which allows warrantless searches of commercial premises but not of residential premises. The only scenario provided for in the objective criterion which cannot be attributed to the respecting of a person's inner sanctum, is that a person in charge of premises may consent to a search without a warrant. As indicated earlier,²⁸⁰ based on the maxim *volenti non fit iniuria*, a person's rights will not be infringed when he or she has given consent. However, in terms of the SARS officer's discretion, it is still possible for a customs official to conduct a warrantless search as this discretion is not restricted to commercial premises as there is no provision, similar to the TAA, that residential premises may only be searched without a warrant if consent is obtained.²⁸¹

The CEA provisions also deviate from those of the TAA as the CEA does not require an imminent removal of relevant material that is likely to be found at the premises in order for a warrantless search and seizure to be conducted.²⁸² Accordingly, the CEA does not require time to be of the essence. When, apart from a possible removal, would a delay in obtaining a warrant defeat the purpose of the search? It is submitted that the purpose will not be defeated in time is not of the essence, as a warrant may be obtained by way of an *ex parte* application, meaning that the taxpayer would not receive notice of the warrant application. This is based on the fact that *ex parte* applications may be utilised when the nature of the relief, in this

²⁷⁹ See Ch 3, par 3.2.1.1 where these cases are discussed.

²⁸⁰ See Ch 3, par 3.2.2.4.

²⁸¹ See Ch 3, par 3.2.2.3(e) in this regard.

²⁸² See Ch 3, par 3.2.2.3(e) where it is indicated that this is a requirement for a warrantless search in terms of the TAA.

case to search specific premises, is such that notice would negate the relief sought.²⁸³

c) Warrantless search safeguards

The amended CEA search provisions, in reiterating the guidelines provided in *Gaertner (HC)*, provide that when dealing with the situation where a search is conducted without a warrant:

- i) officers should enter the premises during ordinary business hours, unless the officer is of the reasonable opinion that entry after business hours is necessary for purposes of the Act;
- ii) the officer must inform the person in charge of the premises of the purpose of the search when entering the premises;
- iii) if the search is conducted due to suspected offences being committed in terms of the CEA²⁸⁴ or after gaining entry to the premises the officer decides to search documents in respect of which an offence in terms of the CEA is suspected to have been committed, the officer must:
 - o furnish a written statement indicating that a search will be conducted, unless the officer is of the opinion that this might frustrate the search if the search is delayed in order to provide the said written statement;
 - o the officer's search parameters are restricted to what is reasonably necessary for the purpose of the search;
 - o the person in charge, or an appointed representative, has the right to be present and observe the search;
 - o an inventory must be made of all documents removed from the premises as well as a schedule of copies made during the course of the search. A copy of the inventory and schedule must be signed by the officer before leaving the premises and must be handed to the person in charge;

²⁸³ See Ch 3, par 3.2.2.2(a) for a discussion of the grounds on which an *ex parte* application may be brought.

²⁸⁴ This means in instances where the subjective criterion is present.

- iv) the officer should also conduct the search in an orderly and decent manner; and²⁸⁵
- v) an officer may use an assistant or member of the police force. The presence of an assistant or police officer is, however, restricted to instances when the SARS official may deem it necessary for purposes of the search.²⁸⁶

The last guideline deserves further attention. As the CEA does not provide an indication of when the assistance of a police officer's and that of another person would be required, it is submitted that the police officer's assistance would be required in instances that fall within the realm of police duties. Therefore, when, for example, there is a threat of violence, a police officer rather than another person should assist the SARS officer. In other instances, for example where the assistance of a locksmith is required, the SARS official will request the assistance of such a person and not that of the police.²⁸⁷

The guidelines provided by this amendment restrict the power of SARS when a warrantless search and seizure is conducted. Thus, SARS' powers when conducting a search are not as broad as before and, therefore, the infringement of a person's right to privacy will not be as invasive as before. The guidelines also recognise that a search aimed at enforcement or criminal sanction will be more invasive than a search aimed at verifying compliance as these guidelines demand even further requirements that must be met when a SARS official suspects that an offence has been committed.

²⁸⁵ Section 4(4)(AC)(c) of the CEA. See also National Treasury (2 July 2013) available at <http://bit.ly/15Ew2HQ> (accessed 2 Sept. 2013).

²⁸⁶ Section 4(4)(AC)(b) of the CEA.

²⁸⁷ Chapter 3, par 3.2.2.3(f) discussed the TAA provision relating to assistance when conducting a warrant. In terms of the TAA, a police officer may assist SARS with a search. There is no specific provision indicating that any other person, apart from a police officer, may assist SARS with the search. However, when considering the definition of a SARS official as provided for in s 1 of the TAA, it is clear that a person is classified as a SARS official when he or she is contracted or engaged by SARS in the administration of a tax Act and acts under the control, direction or supervision of the Commissioner. Consequently, another person would be able to assist SARS when conducting searches as he or she would be considered to be a SARS official.

3.3.2 Searches and seizures in terms of the CCA

Once the CCA comes into operation, section 4 of the CEA, which deals with searches and seizures, will be repealed in its totality.²⁸⁸ The new search and seizure provisions relating to customs will then be provided for by sections 709 and 714 of the CCA.

3.3.2.1 *Grounds for warrant*

Section 709(2) of the CCA provides that a warrant must be authorised before the officer may gain access to the premises and conduct a search.²⁸⁹ A judge or magistrate may issue the said warrant once the customs authority has applied for it. The above authorisation relates to “(a) the Commissioner; or (b) a custom officer; but only if and to the extent that a power or duty assigned to the customs authority in terms of this Act has been delegated to that officer in terms of section 19”.²⁹⁰ This means that only the Commissioner or duly delegated customs officer, and not an ordinary customs officer, may apply for a warrant. The Commissioner or the duly delegated customs officer must state under oath or affirmation the grounds upon which access is required.²⁹¹

Whilst the preservation of judicial intervention is commendable, this provision lacks the specific requirements contained in the CEA.²⁹² The CCA simply refers to grounds without clarifying what would constitute grounds upon which access is required. This has the effect that the authorisation of a warrant is completely within the discretion of the judicial officer. It would be difficult for a person affected by the search to establish that there are any reasons to apply for the setting-aside of the warrant. Equally, it would be difficult for the judge or magistrate hearing an application to have a warrant set aside, to determine whether the judicial officer in the warrant application exercised his or her discretion judicially. The vagueness (or absence) of the grounds

²⁸⁸ In terms of s 4 of the Customs and Excise Amendment Act 2014. Section 88 of this Act provides that it will only be applicable once the CCA comes into operation.

²⁸⁹ Section 709(2)(a) of the CCA.

²⁹⁰ Section 1 of the CCA. Section 19 provides, amongst other things, that the delegation must be done in writing and is subject to limitations as determined by the Commissioner.

²⁹¹ Section 715 of the CCA.

²⁹² See Ch 3, par 3.3.2.3. where the grounds are indicated as (i) the customs officer must on reasonable grounds believe that an offence has been committed; (ii) a search is likely to produce documents which can be used as evidence; and (iii) the search is reasonably necessary for the purposes of the Act.

on which a warrant will be authorised leads to broader powers on the part of SARS. Conversely, taxpayers' rights are more limited owing to this vagueness. This is also contrary to one of the founding principles of the Constitution, namely, the rule of law.²⁹³ A taxpayer could take the matter on review for infringing this value.

3.3.2.2 *Warrantless search and seizure provisions*

The CCA provides for instances in which a warrantless search and seizure of premises may be conducted, which can be divided into objective exceptions and subjective exceptions.²⁹⁴ The first objective exception relates to customs controlled areas. Customs control areas include container terminals,²⁹⁵ container depots,²⁹⁶ storage warehouses and excise warehouses.²⁹⁷ Whenever a search relates to such an area, the customs officer has unrestricted access thereto.²⁹⁸ A reason for allowing this exception is that participants in the regulated field of customs should tolerate routine searches to verify compliance.²⁹⁹

Section 709(3) of the CCA deals with other objective exceptions where a warrantless customs search may be conducted on premises other than those in a customs control area. Firstly, a warrantless search will be allowed if the owner of the premises or the person in physical control thereof consents thereto.³⁰⁰ If the owner or person in control of the premises consents, the search should be considered reasonable as the principle of *volenti non fit iniuria* would apply.³⁰¹ Secondly, a warrant is not required if the premises are occupied by a person who is registered in terms of the CCA and who uses the premises for the business for which he is registered.³⁰² These two exceptions resonate with the objective criterion of when warrantless

²⁹³ See Ch 2, par 2.7 where the rule of law is discussed.

²⁹⁴ Sections 709(1)(a) & 709(2)(a) read together with ss 709(3) & (4) of the CCA.

²⁹⁵ Section 1 read together with s 43(1)(iv) of the CCA.

²⁹⁶ Section 1 read together with s 43(1)(xiii) of the CCA.

²⁹⁷ Section 1 read together with s 43(1)(xv) of the CCA. See s 43(1) of the CCA for a complete list of areas that would be regarded as customs control areas. Section 43(2) of the CCA also provides a list of areas which the Commissioner may designate as customs controlled areas.

²⁹⁸ Section 709(1)(a) of the CCA.

²⁹⁹ *Gaertner (HC)* par 38. See also Ch 3, par 3.4.2.1 above.

³⁰⁰ Section 709(3)(a) of the CCA.

³⁰¹ See Ch 3, par 3.3.2.2(b) where this principle is briefly discussed.

³⁰² Section 709(3)(b) of the CCA. According to s 1 of the CCA a "registered" person refers to someone who is registered in terms of Ch 28 of the CCA. Chapter 28 deals, amongst other things, with the registration of importers and exporters of goods; persons obtaining ownership of goods whilst the goods are still under a customs procedure and persons who submit declarations to the customs authority electronically.

customs searches may be conducted in terms of the amended CEA provisions and as such simply reiterate exceptions already provided for in terms of current legislation.

A customs officer may also access premises without a warrant if the public has access to the premises but only at a time when the public has access thereto.³⁰³ This exception respects a person's private dwelling as it only relates to public premises.

In terms of the subjective exception, access may be obtained without a warrant if the customs officer has a suspicion relating to one of the grounds contained in section 709(3)(d)–(f) of the CCA. The first ground of suspicion is that goods subject to customs control were used or are used in activities which breached or will breach provisions of the CCA or another tax-levying Act.³⁰⁴ A search and seizure may then be conducted if the customs officer reasonably believes that either these goods,³⁰⁵ information relating to these goods³⁰⁶ or documents concerning these goods³⁰⁷ will be found at the premises. The second ground relates to a suspicion that there are prohibited, restricted or counterfeit goods on the premises.³⁰⁸

Irrespective of which one of the two grounds of suspicion is present, the customs officer must also, on reasonable grounds, believe that a warrant would have been authorised in terms of section 715 of the CCA but that a delay in obtaining such a warrant would defeat the object of the access.³⁰⁹

When considering the first ground of suspicion together with the fact that the officer must reasonably believe that taking time to obtain the warrant would defeat the purpose thereof, it seems similar to the requirements for conducting a warrantless

³⁰³ Section 709(3)(c) of the CCA.

³⁰⁴ Section 709(3)(d)(i)–(iii) of the CCA. In terms of s 1 a “tax levying Act” is “any legislation, other than this Act, imposing or imposing and regulating the administration of a specific tax on goods”. Furthermore a “tax levying Act” will include rules, regulations or other subordinate legislation of the Customs Duty Act, the VAT Act, the Excise Duty Act (not drafted yet), the Diamond Export Levy Act and the Diamond Export Levy (Administration) Act.

³⁰⁵ Section 709(3)(d) of the CCA.

³⁰⁶ Section 709(3)(f) of the CCA.

³⁰⁷ Section 709(3)(e) of the CCA.

³⁰⁸ Section 709(3)(d)(iv) of the CCA.

³⁰⁹ See s 709(4) of the CCA.

search in terms of section 4(aA)–(aB) read together with section 4(e) of the CEA.³¹⁰ A more in-depth analysis proves the contrary. To begin with: the CEA provisions only deals with a suspicion of an offence³¹¹ being committed and not a breach. As a “breach” of the CCA or a tax-levying Act refers to a list of acts or omissions “whether or not that act or omission is an offence”,³¹² it indicates that a breach relates to more than an offence. This leads to an extension of what the customs officer may reasonably suspect before conducting the search and seizure as it would be not as difficult to reasonably suspect a breach as it would be to reasonably suspect an offence. As a result, the instances when a customs official may conduct a warrantless search are expanded. In addition, it is unclear how a customs officer may come to a reasonable belief that a warrant would have been granted because the CCA does not provide the grounds on which a judge or magistrate would authorise a warrant. How would the customs officer have a reasonable belief that a warrant would have been authorised if the CCA does not indicate on which grounds a warrant would be authorised? It is clear that this ground of suspicion is not simply a replica of what is currently provided for by the CEA.

Section 709(1)(b) gives further powers to the customs officer once he or she has accessed premises. It provides that the customs officer may at any time, if it is for the purpose of enforcing the CCA or a tax-levying Act, perform an enforcement function. This function refers to “a power or duty assigned to the customs authority” in terms of the CCA or a tax-levying Act.³¹³

One such power is that the customs officer may search every part of that specific premises.³¹⁴ Also, the customs officer has the power to lock up, seal or secure any

³¹⁰ See par 3.3.2.2.

³¹¹ It is interesting to note that s 78(1) of the CEA provides that a contravention or failure to comply with any provision of the CEA will be regarded as an offence even though the Act does not classify that specific contravention or failure as an offence. “Offence” has a wide definition.

³¹² Section 1 of the CCA. The list of acts or omissions that will constitute a breach of the CCA or a tax-levying Act comprises of (i) contravening or not complying with a provision of the CCA or a tax levying Act; (ii) contravening, failing to comply or evading or attempting to evade “a term or condition of any registration, licence, accreditation, release, authorisation, permission, approval, exemption, instruction, direction or recognition issued or given in terms of” the CCA or a tax levying Act; and (iii) not complying with an instruction of the customs authority in terms of the CCA or a tax levying Act.

³¹³ Section 1 of the CCA.

³¹⁴ Section 714(b) of the CCA. In this specific instance it would be a customs controlled area.

goods or documents found.³¹⁵ Furthermore, section 762 of the CCA, read with section 753(2) of the CCA, provides the customs authority with the power to seize any goods and documentation what have become subject to customs control.³¹⁶

3.4 CONCLUSION

Conducting a search and seizure to verify whether a taxpayer has complied with fiscal legislation and has not committed an offence is important to ensure proper tax compliance. However, this important duty of verifying information must take place within the confines of the constitutional dispensation. This means that although a taxpayer's rights to privacy, just administrative action and access to courts may be infringed, as a result of the search and seizure process, the infringement must be reasonable and justifiable in terms of section 36 of the Constitution. Thus, a balance must be struck as to how SARS can efficiently and effectively verify compliance whilst ensuring that it is done in the least invasive manner.³¹⁷

As regards the effect of the Constitution on the initial section 74(3) of the ITA and section 57(1) of the VAT Act, it is clear that there was a move away from the absolute discretion of the Commissioner to conduct a warrantless search towards a situation where independent and objective authorisation must be obtained prior to a search.³¹⁸ SARS was no longer the judge and jury in deciding whether a warrant should be issued to enable SARS to search a taxpayer's premises.³¹⁹ The amended sections provided the parameters within which searches and seizures should be conducted. This change resulted in a lesser infringement of taxpayers' rights as SARS' power was no longer as broad as before. However, SARS' ability to conduct searches and seizures efficiently and effectively to verify compliance was significantly impeded as it had to approach the court in all instances when it wanted to conduct a search and seizure.

³¹⁵ Section 714(c) of the CCA.

³¹⁶ Customs control is widely defined in s 1 of the CCA as "control in terms of this Act".

³¹⁷ In terms of s 36 of the Constitution. See Ch 2, par 2.8.7 for further details in this regard.

³¹⁸ Gad & Bovijn (27 May 2011) *Tax ENSight* available at <http://bit.ly/1m81bHy> (accessed 10 Nov. 2016) 315.

³¹⁹ Croome "SARS search & seizure part II" (Oct. 2007) available at <http://bit.ly/18FpG7O> (accessed 18 Mar. 2010 – no longer available).

The TAA reintroduced the possibility of conducting a search and seizure without a warrant. These warrantless search provisions are not the same as the initial search and seizure provisions contained in the ITA and VAT Act as a warrantless search and seizure is only possible in exceptional circumstances. Additional safeguards to limit the power of SARS are provided by the introduction of specific guidelines that must be adhered to when a search is conducted. The addition of these safeguards relating to warrantless search and seizure is in accordance with jurisprudence relating to other areas of South African law where searches and seizures are conducted.

Similarly, the amended search and seizure provisions contained in the CEA and the CCA only allow warrantless search and seizure in limited instances. This means that a warrantless search is not the norm and will only be allowed in exceptional circumstances. Furthermore, the guidelines for conducting a search and seizure curb the extent of infringement on the taxpayer's rights.

When considering the conclusions reached thus far, it seems that the current search and seizure provisions have achieved the required balance. On the one hand, there is judicial oversight as a warrant is required as a point of departure, which ensures that taxpayers' rights are protected. On the other hand, warrantless searches in exceptional circumstances are provided for to ensure that SARS is able to exercise its powers efficiently and effectively.

However, the devil might be in the detail.³²⁰ Firstly, the protection afforded to taxpayers by requiring a warrant from the onset is diluted. Both the TAA and the CEA provide that there should be relevant material which is likely to be found at the specific premises. Neither Acts require that the warrant should indicate exactly what the relevant material is. Therefore, a taxpayer is left in uncertainty as to what the parameters of the search and seizure is. This creates a possible breeding area for abuse by SARS. The protection is even further diluted by the CCA as it does not require relevant material which is likely to be found. As the CCA leaves the granting

³²⁰ According to Author unknown *Oxford Dictionaries* available at <http://bit.ly/2fqrtU> (accessed 11 Nov. 2016) the phrase "the devil is in the detail" means that "the details of a matter are its most problematic aspect".

of a warrant completely within the discretion of the judicial officer as the relevant provisions do not indicate on which grounds a warrant may be issued, a taxpayer will not be sure of the reason for the search and seizure and whether the warrant may possibly be set aside. The vagueness of the grounds upon which a warrant will be authorised leads to broad powers on the side of SARS. Conversely, due to this vagueness, the limitation of taxpayers' rights are more apparent.

Secondly, when a customs-related search and seizure is conducted in terms of the CEA, a person's heightened expectation of privacy at a private dwelling is taken into consideration to a lesser degree than a search and seizure conducted in terms of the TAA. In terms of the TAA either a warrant or consent is required before a private dwelling may be searched, whilst with a customs-related search and seizure, a customs official may conduct a warrantless search and seizure at a private dwelling in terms of the subjective criterion. Likewise the CCA, which will govern customs-related searches and seizures once it comes into operation, allows warrantless searches and seizures at private dwellings if the customs authority has a reasonable suspicion that a breach has occurred.

The third concern that can be identified in relation to the South African fiscal search and seizure provisions is that the CCA extends the grounds upon which a customs officer may conduct a warrantless search to where there is a reasonable suspicion that a breach has occurred. This will lead to broader power on the side of SARS, which in turn results in additional limitation of a taxpayer's rights. Furthermore, no specific guidelines are provided regarding the situation where a warrantless search is conducted. Such guidelines could curb the extent of infringement of a taxpayer's rights to privacy, just administrative action and access to courts. The absence of guidelines when considering whether there are less restrictive means available to achieve government's purpose, as provided for in section 36(1)(e) of the Constitution, results in a situation where a taxpayer's rights are not reasonably and justifiably limited.³²¹

³²¹ See Ch 2, par 2.8.7 for a discussion relating to s 36 of the Constitution.

A last concern relating to searches and seizures is the instances when warrantless searches and seizures may be conducted. It is true that the absence of provisions providing for warrantless searches would impede SARS' powers significantly. Furthermore, the TAA and CEA are mindful of the fact that when warrantless searches and seizures are conducted there should be adequate guidelines in place to ensure that the warrantless provisions pass constitutional muster. The CEA also takes into consideration the purpose of the search as it provides additional guidelines when a search is conducted based on a suspicion.³²² However, it is questionable whether a warrantless search based on the subjective suspicions of a SARS official may be considered to be a reasonable and justifiable limitation on a taxpayer's rights to just administrative action and access to courts. The reason for questioning the constitutionality of such a search is that relying on the subjective suspicions of SARS could lead to an abuse of power and that it is contrary to the principle of *nemo iudex in propria causa*.

³²² See Ch 3, par 3.3.2.2 where it is indicated that the CCA does not provide any specific guidelines that must be adhered to when conducting a warrantless search.

CHAPTER 4 – SEARCHES AND SEIZURES –OTHER JURISDICTIONS

4.1 INTRODUCTION

Chapter 3 dealt with tax-related search and seizure provisions in South Africa. Problems identified in Chapter 3 are the following: (i) There is no requirement that the warrant should specify which items are subject to a search and seizure; (ii) in some instances there is no consideration for the fact that at a private dwelling a person's expectation of privacy is higher than at commercial premises; and (iii) the grounds upon which warrantless searches may be conducted are sometimes vague (or lacking) and subject to SARS' subjective suspicions.

In this chapter, the search and seizure provisions of Canada, Australia, New Zealand and Nigeria are discussed and compared to the South African provisions.¹ The aim of this chapter is to determine whether the manner in which these countries conduct fiscal searches and seizures may assist in resolving the problems regarding the South African search and seizure provisions. Section 36(1)(e) of the (South African) Constitution provides that when considering whether provisions are reasonably and justifiably limiting a person's rights (and as such whether they are constitutional), it must be considered whether there are less invasive ways in which to achieve the purpose of the limiting provisions.² Therefore, this chapter could possibly identify less invasive ways to conduct fiscal searches and seizures in South Africa whilst ensuring that compliance is verified and possible offences properly investigated.

This chapter deals with each country separately before reaching a conclusion. In the discussion of each country, the contextual setting relating to search and seizure of the specific country is discussed first. This pertains to the values, legislation and case law that have shaped the way in which search and seizure should be conducted in that country. Thereafter, the provisions which afford the revenue authority the power to conduct search and seizure come under scrutiny. Lastly, the

¹ See Ch 1, par 1.3, where the selection of the specific countries is motivated.

² See Ch 2, par 2.8.7 in this regard.

specific provisions of each country are compared to the search and seizure powers of SARS.

4.2 CANADA

4.2.1 Contextual setting

The Canadian Constitution Act, 1982 (“Canadian Constitution”) is the supreme law of Canada and no law may be in conflict with it.³ Part I of the Canadian Constitution contains the Charter, which provides in section 8 that “[e]veryone has the right to be secure against unreasonable search or seizure”.

A number of cases have dealt with the right contained in section 8 of the Charter. In *R v Collins* (“*Collins*”)⁴ it was held that a search is reasonable if it is conducted in terms of the law; the law itself is reasonable; and the search was conducted in a reasonable manner.⁵

In order to determine the reasonableness of the law itself and the manner in which a search is conducted, an individual’s interests should be weighed against those of the state.⁶ The individual’s interests pertain to being free from government’s intrusion which is dependent on a person’s expectation of privacy.⁷ This expectation is flexible.⁸ Reid and Young recognise that in case of business activities, the expectation of privacy may be relatively low.⁹ Conversely, a person may have a high expectation of privacy as regards his or her dwelling.¹⁰ Also, a person at a border post has a diminished expectation of privacy: such a person knows that he or she

³ Section 52(1) of the Canadian Constitution.

⁴ [1987] 1 S.C.R. 265.

⁵ *Collins* 278. See also *R v Stillman* [1997] 384 SCC par 25; *R v S.A.B* [2003] SCC 60 par 36 where this view is supported.

⁶ *Hunter v Southam* [1984] 2 S.C.R 145 159–160.

⁷ *R v McKinlay* [1990] 1 R.C.S 645.

⁸ *R v McKinlay* [1990] 645. See also Krishna “Beware of CRA’s formidable audit powers” (Jan. 2013) available at <http://bit.ly/1yyWcJu> (accessed 10 Nov. 2016).

⁹ Reid & Young “Administrative search and seizure under the Charter” (1984–1985) *Queen’s LJ* 399. They indicate that a person with a low expectation of privacy will still assume that the gathering of information will be limited to what is considered to be reasonable.

¹⁰ *R v McKinlay* 649.

needs to be searched before he or she may enter or exit a country.¹¹ The state's interests, on the other hand, relate to enforcing legislation.¹²

In *Hunter v Southam* (“*Hunter*”),¹³ the court remarked that achieving a balance between the individual's and state's interests cannot be left to someone's subjective decision.¹⁴ In *Hunter*, the court had to balance a person's expectation of privacy with the Restrictive Trade Practices Commission's interest in establishing whether an offence has been committed in terms of the Combines Investigation Act (“CIA”).¹⁵ The court considered whether the authorisation given in terms of sections 10(1) and 10(3) of the CIA infringed on the protection afforded by section 8 of the Charter. The relevant sections of the CIA allowed the Director of Investigation and Research of the Combines Investigation Branch or an authorised representative to enter and seize any documents which could produce evidence.¹⁶ Before this power could be exercised a certificate from a member of the Restrictive Trade Practices Commission was required.¹⁷

A number of principles relating to what would constitute an unreasonable search and seizure may be gleaned from *Hunter*. The first principle is that the section 8 guarantee may be upheld by requiring authorisation to conduct a search and seizure. The onus is on the state to prove that its interests outweigh that of the individual.¹⁸ The court held that this authorisation should be obtained before the search and seizure is conducted. The person authorising the search and seizure is given the opportunity to ascertain whether government's interests outweigh an individual's

¹¹ *R v Simmons* [1988] 2 S.C.R. 495 par 49. See also Garton *The Canadian Charter of Rights Decisions Digest, justice Canada – section 8 – search or seizure* (2004) available at <http://bit.ly/29yum8> (accessed 14 July 2015).

¹² *Hunter v Southam* 159–160. Ostberg “Charting new territory? Fifteen years of search and seizure decisions by the Supreme Court of Canada, 1982–1997” (2000) *American Review of Canadian Studies* 42 states that *Comité paritaire de l'industrie de la chemise v Potash* [1994] 2 S.C.R. 406; *British Columbia Securities Commission v Branch* [1995] 2 S.C.R. 3 are examples of instances where the court considered the state's interests to weigh more than that of the individual.

¹³ [1984] 2 SCR 145.

¹⁴ *Hunter* 166.

¹⁵ R.S.C. 1970.

¹⁶ As provided for in terms of s 10(1) CIA.

¹⁷ Section 10(3) of the CIA. Section 10(3) also provides that this certificate may be granted on an *ex parte* application.

¹⁸ *Hunter* 160.

expectation of privacy.¹⁹ Nevertheless, the court conceded that in some instances it may be impossible to obtain authorisation before conducting a search. In such an instance the state would need to rebut a presumption of unreasonableness.²⁰

A second principle laid down by the court is that prior authorisation must be given by a person who is able to act judicially. This means that this person should be able to act impartially.²¹ Dickson J held that a member of the Restrictive Trade Practices Commission cannot act in a judicial capacity when issuing the certificate as it “ill-accords with the neutrality and detachment necessary to assess whether the evidence reveals that the point has been reached where the interests of the individual must constitutionally give way to those of the State”.²² He furthermore held that such a person is disqualified by a rule of natural justice, to wit *nemo iudex in sua causa*.²³

Lastly, the court indicated that an objective criterion is required to determine whether a search and seizure may be authorised. This establishes a point of departure at which the state’s interests outweigh the individual’s privacy interests.²⁴ The court regarded a mere suspicion that there is a possibility of evidence likely to be found at specific premises as inadequate. The court indicated that the applicant should prove under oath that there are reasonable and probable grounds to suspect that an offence was committed. Furthermore, this affidavit should aver that evidence of such an offence will be located at the specific premises.²⁵

¹⁹ *Hunter* 161.

²⁰ *Hunter* 161. The court adopted the approach of *Katz v United States* 389 U.S. 347 (1967) 389 where the United States’ Supreme Court held that a warrantless search is *per se* unreasonable. See also Ostberg (2000) *American Review of Canadian Studies* 38; *R v Golden* [2001] 3 SCR 679 par 84.

²¹ *Hunter* 162. See also Reid & Young (1984–1985) *Queen’s LJ* 420–422 for a discussion of who should authorise the search and seizure.

²² *Hunter* 164.

²³ *Hunter* 164. *Nemo iudex in propria causa* means that “no one may be a judge in his or her own case”. See Ch 2, par 2.8.5 where this rule is discussed in the South African context.

²⁴ *Hunter* 167.

²⁵ *Hunter* 168. In *Hunter* the court held that s 10(1) and (3) of the CIA did not comply with the principles identified in this matter. Accordingly, s 10(1) and (3) of the CIA was held to be in conflict with s 8 of the Charter.

The matter of *R v McKinlay* (“*McKinlay*”),²⁶ which dealt with searches and seizures in the taxation realm, shows that the *Hunter* principles may in certain instances be “ill-suited”.²⁷ In this case it was held that the Minister of National Revenue needs broad powers in order to verify if a taxpayer has complied with legislation. This is because taxpayers are required to assess their own taxable income as opposed to submitting all their records so that the CRA can determine their taxable income.²⁸ The court remarked that when verifying compliance, the Minister should be able to conduct a search without even suspecting that an offence has been committed.²⁹ McCracken points out that the type of information that will be subject to the search when verifying compliance is mostly uncontroversial as the information that is gathered is information that the taxpayer should have made available to the CRA.³⁰ Therefore, the reason for and the extent of the interference with a person’s privacy is not the same when conducting regulatory searches to verify compliance than when conducting investigatory searches due to a reasonable belief that an offence was committed.³¹

Even though a regulatory search may not be subject to all the *Hunter* principles, the state’s interests in verifying compliance should still be balanced with the individual’s interests. The more invasive a search will be on a person’s privacy, the stricter the requirements should be. For instance, when a search is conducted at a private residence the requirements should be stricter than when it’s conducted at a business premises.³²

²⁶ [1990] 1 R.C.S 645.

²⁷ *McKinlay* 648. See also Ostberg (2000) *American Review of Canadian Studies* 42 who indicates that regulatory searches and seizures are not subject to the *Hunter* standard. See also Stratas “Crossing the Rubicon: The Supreme Court and regulatory investigations” (2002) *Criminal Reports* 75 fn 5 for a list of cases which indicated that less stringent requirements are necessary for regulatory searches.

²⁸ Grinhaus “An offer you can’t refuse: the genesis and evolution of compliance orders under section 231.7 of the Income Tax Act and procedural alternatives to the legislation” (Mar. 2012) 1 available at <http://bit.ly/1AqAcB4> (accessed 7 Jan. 2015). Grinhaus remarks that the CRA uses a system of self-assessment to ease its administrative (cost) burden and not because it trusts taxpayers.

²⁹ *McKinlay* 648.

³⁰ McCracken “Going, going, gone ... global: a Canadian perspective on international tax administration issues in the ‘exchange-of-information-age’” (2002) *Canadian Tax Journal* 1897.

³¹ McCracken (2002) *Canadian Tax Journal* 1896; Brooks & Fudge “Search and seizure under the Income Tax Act - Criminal Law Series” (2007) *Summary of study paper* 12.

³² *McKinlay* 649.

4.2.2 Search and seizure - fiscal provisions

4.2.2.1 Regulatory searches

The Canadian Income Tax Act (“CITA”)³³ recognises the distinction between regulatory searches and those aimed at investigations. The former is dealt with in terms of section 231.1 of the CITA. This section provides that an authorised person³⁴ may

“inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by the taxpayer under this Act.”³⁵

The section furthermore permits entry to any premises which relates to a business³⁶ or the keeping of records.³⁷

This power afforded in terms of section 231.1 of the CITA can only be exercised at reasonable times, which seem to refer to business hours.³⁸ Kroft mentions that generally the section 231.1 power is conducted on a pre-arranged date. However, there is nothing in the CITA that necessitates a pre-arranged meeting and as such a CRA auditor could arrive unannounced during business hours to conduct a regulatory search.³⁹

The use of section 231.1 is restricted to a purpose which relates to the administration or enforcement of the CITA. At first glance it does not seem to limit the power as this appears to be a rather broad purpose. Nonetheless, case law dealing with section

³³ R.S.C 1985, c 1 (5th Supp).

³⁴ Section 231 of the CITA defines authorised person as “a person authorized by the Minister for the purpose of sections 231.1 to 231.5”. However, s 220 of the CITA allows the Commissioner of the CRA to “exercise all the powers and perform the duties of the Minister under this Act”. This means that it is indeed the Commissioner who authorises a person to exercise the powers provided for by s 231.1.

³⁵ Section 231.1(1)(a) of the CITA.

³⁶ This consists of premises where a business is conducted or where anything is done in relation to the business.

³⁷ Section 231.1(1)(c) of the CITA. The keeping of records refers to either the place where records are kept or the place where records should be kept.

³⁸ Mallon “Powers v duties – a review of dealings with Revenue Canada” (Dec. 1998) available at <http://bit.ly/1tK0eNE> (accessed 10 Jan. 2015 – no longer available).

³⁹ Kroft *Dealing with tax officials: selected issues in administration, enforcement and appeals* (2010) 65.

231.1 has interpreted this purpose narrowly.⁴⁰ In *Canadian Bank of Commerce v Attorney General of Canada* (“*Canadian Bank*”),⁴¹ it was held that this purpose requires that the obtained information is relevant to the tax liability of a specific person.⁴² Furthermore, the court indicated that the person or persons whose information is/are required should be subject to an investigation.⁴³

Section 231.1 is further limited to premises that are not dwelling-houses.⁴⁴ In the event that the aforementioned premises are dwelling-houses, it may only be entered with the consent of the occupant or if it is authorised in terms of a warrant.⁴⁵ The reason for requiring either consent or a warrant in these instances relates to a person’s expectation of privacy being higher at residential premises. These requirements aim to ensure that the balance between a person’s privacy interests and the state’s interests in verifying and investigating compliance is achieved. If a person consents to a search being conducted at his or her private dwelling, it should only be considered valid consent if the person is aware that he or she has a right to refuse access.⁴⁶

When a warrant is required, that is when the CRA wants to enter a dwelling-house without consent, section 231.1(3) of the CITA stipulates that the Minister should, on an *ex parte* basis, apply for the warrant. A judge⁴⁷ may issue the warrant if he or she is satisfied that there are reasonable grounds to believe that the premises relates to a business or the keeping of records. The judge should also be satisfied that entry of

⁴⁰ Brooks & Fudge (2007) *Summary of study paper* 17.

⁴¹ [1962] S.C.R. 729. This matter dealt with the phrase “for purpose related to the administration or enforcement” in s 126(2) of the CITA.

⁴² This interpretation was also confirmed in *James Richardson & Sons Ltd v Minister of National Revenue* [1984] 1 S.C.R. 614 when the court stated that s 231.1 is not a fishing expedition. Garner *Black’s Law Dictionary* (2004) 668 defines fishing expedition as “[a]n attempt, through broad discovery requests or random questions, to elicit information from another party in the hope that something relevant might be found”.

⁴³ *Canadian Bank* 739.

⁴⁴ Section 231 of the CITA defines dwelling-house as “the whole or any part of a building or structure that is kept or occupied as a permanent or temporary residence and includes (a) a building within the curtilage of a dwelling-house that is connected to it by a doorway or by a covered and enclosed passageway, and (b) a unit that is designed to be mobile and to be used as a permanent or temporary residence and that is being used as such a residence”.

⁴⁵ Section 231.1(2) of the CITA.

⁴⁶ *R v Mellenthin* [1992] 3 S.C.R. 615 624. See also Ch 3, par 3.2.2.4 for a discussion of the requirement of valid consent in South Africa.

⁴⁷ Section 231 of the CITA defines “judge” as “a judge of a superior court having jurisdiction in the province where the matter arises or a judge of the Federal Court”.

this premises was denied or believe that reasonable grounds exist that entry will be refused. Lastly, entering this dwelling-house should be necessary for the administration or enforcement of the CITA.⁴⁸

The power of the CRA is limited to inspect, audit or examine and not seize documents.⁴⁹ In order to seize documents the CRA would need to comply with the requirements of section 231.3 of the CITA.⁵⁰ This limited scope of section 231.1 makes sense when considering that the aim of this section is to verify compliance.

4.2.2.2 *Investigatory searches and seizures*

Section 231.3 of the CITA is aimed at investigatory searches and seizures. This means that it is not a mere regulatory/routine search, but rather a search and seizure conducted due to a belief that a person has committed an offence.

With an investigatory search and seizure the Minister may bring an *ex parte* application.⁵¹ It is interesting to note that this section is not peremptory and gives the discretion to the Minister whether he or she brings an *ex parte* application.⁵² This section does not give any indication of what the Minister should consider when exercising his or her discretion to bring an *ex parte* application. It is submitted that the Minister could consider whether providing the respondent with a notice of the

⁴⁸ Section 231.1(3) of the CITA. Section 231.1(3) of CITA also provides for orders that the judge may make if he or she is not satisfied that entering a dwelling-house will be considered necessary for the administration or enforcement of the CITA. In terms of s 231.1(3)(d), the judge may order that the occupant of the dwelling-house furnish an authorised person with reasonable access to any document or property that is or should be in the dwelling-house. Further, s 231.1(3)(e) provides that the judge may make any other order which he or she deems appropriate.

⁴⁹ *R v HE* [2011] BCSC 369 dealt with the seizure of electronic information during a voluntary pilot project. The court held (par 38) that a seizure without a warrant would be invalid.

⁵⁰ Section 231.7 of the CITA bolsters s 231.1 of the CITA by providing that a judge may, on summary application by the Minister, order a person to grant access to premises as required under s 231.1. This compliance order does not pertain to information that is subject to the solicitor-client privilege. See Kreklewetz & Vipul "Right to assert privilege" (July 2007) *Canadian Tax Highlights* 8; *Minister of National Revenue v Cornfield* 2007 FC 436 for a further discussion of s 231.7 of the CITA.

⁵¹ Section 231.3(1) of the CITA.

⁵² This differs from the instance where a warrant has to be obtained to search a dwelling-house where it is expressly provided by s 231.1(3) of the CITA that the warrant application must be done by way of an *ex parte* application. See Ch 4, par 4.2.2.1 for a discussion of s 231.1(3) of the CITA.

impending application would be impracticable.⁵³ It is submitted that in the context of searches and seizures a departure from the general rule would be based on impracticability rather than not being necessary.

“A judge may issue the warrant referred to in subsection 231.3(1) where the judge is satisfied that there are reasonable grounds to believe that

- (a) an offence under this Act was committed;
- (b) a document or thing that may afford evidence of the commission of the offence is likely to be found; and
- (c) the building, receptacle or place specified in the application is likely to contain such a document or thing.”⁵⁴

If the judge is satisfied that the Minister has proven these requirements, he or she has a discretion to issue a written warrant.⁵⁵ The warrant should indicate the alleged offence, the person alleged to have committed the offence and the premises to be searched. The warrant must also provide clear parameters for the search and seizure to both the authorised person and the taxpayer as it should specify exactly what is to be searched and seized.⁵⁶

Section 231.3(5) seems to dilute these parameters as it allows a person who is executing the warrant to seize additional documents or things, which are not contained in the warrant, provided that the person believes that it serves as evidence of an offence being committed. In order not to overturn the requirement that the things subject to a search and seizure must be specified, section 231.3(6) provides a safeguard. The CRA must “as soon as practicable” take an object seized in terms of

⁵³ In terms of s 37.07(1) of the Rules of Civil Procedure, RRO 1990, Reg 194 a person may depart from the general rule of serving a notice of motion on a person who will be affected by a court order, when it would be impracticable or unnecessary.

⁵⁴ Section 231.3(3) of the CITA.

⁵⁵ Sections 231.3(1) and 231.3(3) of the CITA. Prior to the 15 June 1994 amendment, s 231.3(3) provided that once the requirements are met, the judge *shall* issue a warrant. In *Baron v Canada* [1993] 1 S.C.R 416 (439) the court referred to *Minister of National Revenue v Paroian* [1980] C.T.C 131 (138) where it was stated that the judge acts as an important safeguard and should not fulfil a mere rubber-stamp function. Consequently, in *Baron v Canada* (440) the court held that a court’s residual discretion is constitutionally required and that s 231.3(1) was not acceptable. See also Garton (2004) available at <http://bit.ly/29yumn8> (accessed 14 July 2016) for a discussion in this regard.

⁵⁶ Section 231.3(4) of the CITA.

the warrant or in terms of section 231.3(5) to the judge who issued the warrant or furnish a report regarding this to the judge.⁵⁷ The judge may order that the Minister may retain the objects and preserve them until an investigation is finalised or they are required in criminal proceedings. The judge may deviate from this order and demand that the seized objects be returned to the taxpayer if the Minister waives his or her retention thereof,⁵⁸ or if the judge is satisfied that the object will not be required for an investigation or criminal proceedings, or that it was not seized in terms of the warrant or section 231.3(5).⁵⁹

Brooks and Fudge observe that the CITA is silent as to what should happen during the execution of the warrant. They suggest that the warrant should be shown to the person whose property is to be searched.⁶⁰ This is correct. Although the existence of a warrant indicates that someone capable of acting judicially has determined that the state may infringe on a person's privacy, the warrant also specifies the parameters of the search. The warrant should, insofar as possible, be shown to the person whose premises are subject to the search so that he or she may familiarise him or herself with what can be searched and seized.

4.2.2.3 *Overlap between provisions*

a) *Overlap between regulatory searches and investigatory searches and seizures*

As the requirements for conducting a regulatory search and an investigatory search and seizure differ, this may lure a CRA official into conducting an investigatory search, which requires a warrant, under the guise of a regulatory search which generally does not require a warrant.⁶¹

In *R v Jarvis* ("Jarvis"),⁶² the court indicated that the CRA may not use its powers in terms of section 231.1 of the CITA

⁵⁷ Section 231.3(5) of the CITA. This section also indicates that if the judge who issued the warrant is unavailable, the seized material or report should be taken to a judge of the same court.

⁵⁸ Section 231.3(6) of the CITA.

⁵⁹ Section 231.3(7) of the CITA. This section indicates that the judge may *mero motu* order the return of seized documents or things or in terms of a summary application by a person with interest.

⁶⁰ Brooks & Fudge (2007) *Summary of study paper* 9.

⁶¹ Reid & Young (1984–1985) *Queen's LJ* 420.

⁶² [2002] 3 R.C.S 757. See Stratias (2002) *Criminal Reports* 77–78 for a discussion of *Jarvis*.

“where the predominant purpose of a particular inquiry is the determination of penal liability ... In essence, officials ‘cross the Rubicon’ when the inquiry in question engages the adversarial relationship between the taxpayer and the state”.⁶³

When the official crosses the Rubicon a taxpayer’s right against self-incrimination must be respected.⁶⁴ In order to determine exactly when this point is reached depends on the circumstances of each case and all relevant factors should be taken into account.⁶⁵ Amongst the factors to consider are whether it is apparent that a decision to conduct a criminal investigation could have been made and whether the taxpayer’s file has been handed over to a criminal investigator.⁶⁶

It is interesting to note that the information obtained from the regulatory search prior to the commencement of the investigatory search may be used in the investigation. The justification for this seems to be that there is a low expectation that information obtained when conducting a section 231.1 search will remain confidential.⁶⁷

b) Overlap between fiscal provisions and other legislation

Another instance where the CRA may circumvent the requirements of section 231.3 of the CITA is created by section 490(15) of the Criminal Code.⁶⁸ This section allows access to anything that is detained by a peace officer in order to examine it.⁶⁹ A

⁶³ *Jarvis* par 88. Tranquillus *The lives of the twelve Caesars* (2006) par XXXI available at <http://bit.ly/1DnOrY0> (accessed 9 Nov. 2016) indicated that in 49 BC Julius Caesar crossed the Rubicon river which divided Cisalpine Gaul and Italy. This was seen as an act of treason because a Roman general and his army could only enter Italy with the consent of the Roman Senate. The crossing of the Rubicon marked the beginning of a civil war. See *Commissioner of SARS v Founders Hill* [2011] ZASCA 66 (10 May 2011) par 1 where the South African Supreme Court of Appeal indicated that in a general sense crossing the Rubicon refers to a point of no return.

⁶⁴ Garton (2004) par 13 available at <http://bit.ly/29yumn8> (accessed 14 July 2016). Section 13 of the Charter provides that “[a] witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence”.

⁶⁵ *Jarvis* par 93; Garton (2004) par 13 available at <http://bit.ly/29yumn8> (accessed 14 July 2016).

⁶⁶ *Jarvis* par 92–94.

⁶⁷ *Jarvis* par 95. See also Ch 4, par 4.2.1 where it is indicated that information obtained from a regulatory search pertains to information that the taxpayer should have made available to the CRA.

⁶⁸ RCS 1985 c C-46.

⁶⁹ Section 490(15) read with s 490(1)–(3.1) of the Criminal Code.

judge⁷⁰ may allow access to the detained object if a summary application is made on behalf of someone who has an interest in the object after giving three days' notice to the Attorney General.⁷¹ In *Canada Revenue Agency v Canada Border Services Agency* (“*Canada Border*”),⁷² the respondents contended that the CRA should prove reasonable and probable grounds before an order in terms of section 490(15) may be granted for the CRA to have access to the detained objects.⁷³ The court held that when objects are detained a person's right to privacy has already been balanced with the state's interests in seizing objects.⁷⁴ Furthermore, persons will have a diminished expectation of privacy with regard to lawfully seized objects.⁷⁵ Consequently, the court held that it is not necessary for a separate agency of the state, for instance the CRA, also to prove reasonable and probable grounds before a section 490(15) order may be granted.⁷⁶ DelBigio and Plumridge comment that this makes it significantly easier to access objects seized by another agency of state than applying for a search warrant in terms of section 231.3(3) of the CITA.⁷⁷

4.2.3 Comparison with SARS' powers

4.2.3.1 Contextual setting

The framework that informs fiscal searches and seizures in Canada is similar to that of South Africa. The South African Bill of Rights contained in Chapter 2 of the Constitution follows the same structure as the Charter contained in Part I of the Canadian Constitution⁷⁸ and both declare that a person has a right against unreasonable search and seizure.⁷⁹

4.2.3.2 Search and seizure – fiscal provisions

A comparison of the fiscal search and seizure provisions of the two countries reveals similarities. In Canada, prior authorisation should be obtained before conducting a

⁷⁰ This includes a superior court criminal judge and a provincial court judge.

⁷¹ Section 490(15) of the Criminal Code.

⁷² 2013 BSCS 594.

⁷³ *Canada Border* par 18.

⁷⁴ *Canada Border* par 21.

⁷⁵ *Canada Border* par 24.

⁷⁶ *Canada Border* para 22, 32.

⁷⁷ DelBigio & Plumridge “Court grants powers to CRA to inspect previously seized documents” (Apr. 2013) available at bit.ly/1Dws2FO (accessed 10 Nov. 2016).

⁷⁸ Goldswain *The winds of change – an analysis and appraisal of selected constitutional issues affecting the rights of taxpayers* (unpublished PhD thesis, University of South Africa (2012)) 223.

⁷⁹ See s 14 read with s 36 of the Constitution; s 8 of the Charter.

search. Furthermore, this authorisation should be obtained from an independent person to ensure that the rule of natural justice, *nemo iudex in propria causa*, is adhered to. This approach is also evident in South Africa.⁸⁰

The CITA makes a clear distinction relating to the purpose of a search, namely, regulation or investigation. In South Africa the distinction is not as explicit. The distinction between regulatory (routine) searches and investigatory searches (searches based on a suspicion) can be detected in the CEA as it provides for additional safeguards when a warrantless search is conducted based on suspicion. However, the TAA does not seem to make a distinction at all and, accordingly, searches and seizures conducted in terms of the TAA are treated in the same manner irrespective of their purpose.

In most instances, both countries treat searches of private dwellings and searches at other premises differently. In Canada and South Africa a private dwelling may be searched if a person has consented thereto or if a warrant has been obtained. However, the CEA provides a loophole in terms of which SARS may conduct a search and seizure at a private dwelling based on SARS' subjective criterion. Therefore, the CEA fails to protect a person's inner sanctum.

There are a number of similarities in the two countries as far as investigatory searches are concerned. The starting point is that a warrant must be obtained to conduct this type of search. Second, the grounds for authorising a warrant boil down to a reasonable belief that there has been non-compliance or that an offence has been committed and that evidence thereof is likely to be found at the premises.

There are nevertheless some differences between the South African investigatory searches and that of Canada. The most striking difference is that the CITA does not provide for a situation where an investigatory search may be conducted without a warrant. In South Africa, investigatory warrantless searches are allowed when a delay in obtaining the warrant would defeat the purpose of the search. It is submitted that Canada may not require the power to conduct a warrantless search in such

⁸⁰ See Ch 3, par 3.2.1 where this is discussed.

instances as it may bring an application for a warrant on an *ex parte* basis. This makes the necessity of a warrantless search power in South Africa questionable. As indicated earlier, the TAA specifically provides that an application for a warrant must be made on an *ex parte* basis⁸¹ and it is difficult to envisage when SARS would not be able to establish grounds upon which an *ex parte* application may be brought when applying for a warrant in terms of the CEA.⁸² Could applying for a warrant on an *ex parte* basis not be sufficient to guarantee, on the one hand, that SARS may obtain information efficiently and effectively without allowing the taxpayer the opportunity to destroy the information as the taxpayer would be unaware of this application, whilst, on the other hand, ensuring judicial oversight? It is submitted that in some instances the mere fact that the application is made *ex parte* would enable SARS to obtain the relevant information before the taxpayer is able to destroy it. However, there may be instances where there is simply not enough time to obtain a warrant, even if it is on an *ex parte* basis.

Another difference lies in the contents of the warrant that is issued. In South Africa it is not necessary to provide particulars relating to what is to be searched.⁸³ In Canada the warrant should provide particulars relating to what items will be subject to the search and seizure.⁸⁴ This is an important aspect as in Canada the warrant provides the parameters of the search and seizure, which ensures certainty and transparency. If the warrant contains particulars relating to the specific items that are subject to scrutiny both the investigating officer and the taxpayer would be able to identify the ambit of the search and seizure.

Although the CITA allows the CRA to seize items that are not indicated in the warrant, the possibility of abuse is reduced by requiring a judge to determine whether the CRA may retain the seized items. This brings one to the next difference. In South Africa the warrant does not specifically indicate what can be seized. Furthermore, there is no independent party who determines whether it would be necessary to seize the items. Instead, a taxpayer would have to approach the High

⁸¹ See Ch 3, par 3.2.2.2.

⁸² See Ch 3, par 3.3.1.2(a).

⁸³ See Ch 3, para 3.2.2.3; 3.3.1.2(a); 3.4.

⁸⁴ See Ch 4, par 4.2.2.2.

Court if he or she questions whether an item could have been seized.⁸⁵ The CITA, on the other hand, acknowledges the possible impact of a seizure and automatically compels the CRA to bring the seized documents before a court if the item was not specified in the warrant. Consequently, the seizure of documents by the CRA is always subject to judicial authorisation, albeit before or after the seizure occurs.

4.3 AUSTRALIA

4.3.1 Contextual setting

Jones remarks that “[b]ecause Australia is a democracy the basic freedoms are respected”.⁸⁶ The respect for a person’s rights and privacy is embedded in the common law.⁸⁷ However, Jones acknowledges that these rights have limited legal or constitutional protection⁸⁸ as Australia does not have a bill of rights.⁸⁹

Apart from respecting a person’s privacy at common law, the International Covenant on Civil and Political Rights, 1976 (“ICCPR”), which Australia has ratified, also confirms that a person’s privacy should be respected.⁹⁰ Article 17 of the Covenant provides: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence ... Everyone has the right to the protection of the law against such interferences or attacks.”⁹¹

⁸⁵ See Ch 3, par 3.2.2.7 in this regard.

⁸⁶ Jones “The fundamental freedoms” in Pagone & Wallace (eds) *Rights and Freedoms in Australia* (1990) 3. The basic freedoms to which Jones refers are freedom and opinion of belief. McSweeney *Section 263 and 264 of the Income Tax Assessment Act 1936: a privacy perspective and review of overseas experience* (unpublished Masters of Business in Accounting and Finance dissertation, University of Victoria (1993)) 77 states that Jones’ comment also applies to the right to privacy.

⁸⁷ *Citibank Ltd v Commissioner of Taxation* [1988] FCA 306 par 2.

⁸⁸ Jones (1990) 3.

⁸⁹ See McSweeney (1993) 77.

⁹⁰ Australia ratified the ICCPR on 13 Aug. 1980. See Department of Foreign Affairs and Trade available at <http://bit.ly/1CntHLp> (accessed 9 Nov. 2016).

⁹¹ Article 17(1) and (2) of the ICCPR. In terms of subart 2 of art 2 of the ICCPR each party to the ICCPR should take appropriate steps to ensure that the specific country gives effect to the Covenant. Australia has taken steps to give effect to art 17 by enacting the Privacy Act 1988. The preamble to the Privacy Act indicates that this Act was enacted to give effect to the ICCPR. See McSweeney (1993) 25–30 for a discussion of the Australian Law Reform Commission’s Privacy Report 1983 and the draft Privacy Bill. McSweeney observes that the Privacy Act is concerned with information privacy such as the automatic processing of personal data (30) and not privacy intrusions that would arise when a person or premises is searched (24). He indicates (32) that some of the information privacy principles contained in the Privacy Act would also be relevant when dealing with the intrusion on privacy. However, these principles were replaced on 12 Mar. 2014 with the Australian Privacy Principles (contained in Sch 1 of the Privacy Act). The

In *Citibank v Commissioner of Taxation*⁹² (*"Citibank (appeal)"*), the court held that there is "at least a nominal resistance to encroachment upon established rights and freedoms".⁹³ The court nevertheless cautioned that if the wording of a statute is clear it must be interpreted accordingly.⁹⁴

In *The coercive information-gathering powers of government agencies report* (*"Coercive information-gathering report"*),⁹⁵ the Administrative Review Council states that the minimum requirement for exercising information-gathering powers for monitoring (regulatory) purposes may differ from the requirements in case of specific investigations.⁹⁶ The Council continues that the minimum requirement for monitoring should be in line with the agency's statutory objectives.⁹⁷ On the other hand, if the information-gathering power relates to a specific investigation there should be a belief or suspicion on reasonable grounds.⁹⁸

4.3.2 Search and seizure – fiscal provisions

4.3.2.1 Regulatory and investigatory searches⁹⁹

Section 263 of the Australian Income Tax Assessment Act, 1936 (*"Assessment Act"*) allows for full and free access¹⁰⁰ to places, books and documents at all times. This

privacy principles are not relevant to searches that invade privacy as it relates to information privacy and as such are not discussed any further in this thesis.

⁹² [1989] FCA 126.

⁹³ *Citibank (appeal)* par 27.

⁹⁴ *Citibank (appeal)* par 27. See Ch 2, par 2.7 where it is shown that such a literal approach would not suffice in the South African constitutional dispensation.

⁹⁵ Administrative Review Council *The coercive information-gathering powers of government agencies report* no 48 (May 2008).

⁹⁶ *Coercive information-gathering report* 11.

⁹⁷ *Coercive information-gathering report* 11.

⁹⁸ *Coercive information-gathering report* 11.

⁹⁹ The Australian Income Tax Assessment Act does not distinguish between regulatory and investigatory searches and seizures. Accordingly, they are discussed under the same heading. Furthermore, as will transpire later in this discussion regarding Australia, the ATO is not empowered to seize material. Accordingly, this heading does not refer to the power of search and seizure.

¹⁰⁰ In *Federal Commissioner of Taxation v the ANZ Banking Group* 79 ATC 4039 4046 the court declared that "access" refers to "the right to enter the building and examine the documents". See *Citibank v Commissioner of Taxation* [1989] FCA 126 par 2 where the power of entry and access is referred to as "a search". Accordingly, the power of access afforded to the ATO in terms of section 263 of the Assessment Act is akin to a search power afforded to tax authorities in other countries.

power is afforded to the Commissioner of the ATO or an officer authorised by the Commissioner.¹⁰¹

Wheelwright views section 263 as one of the most powerful and controversial provisions of the Assessment Act.¹⁰² She appears to base her view on the wide interpretation given to this section by the court.¹⁰³ In *O'Reilly v Commissioners of State Bank of Victoria*¹⁰⁴ (“*O'Reilly*”), the court understood full access to mean that the Commissioner or the authorised officer may access “any part of the relevant place or building and to the whole of the relevant books, documents and other papers”.¹⁰⁵ Furthermore, free access refers to access without physical obstruction.¹⁰⁶ After *O'Reilly*, section 263(3) was inserted into the Assessment Act. It provides that the occupier whose place is entered in terms of section 263(1) must assist the Commissioner or officer to exercise his or her powers and provide reasonable facilities.¹⁰⁷ An example of reasonable assistance would be to provide computer passwords.¹⁰⁸ The officer is also entitled to the reasonable use of a photocopier and work space.¹⁰⁹ This section strengthens the ATO’s access power as a positive duty is placed on a person to assist.

In considering the extent of section 263 of the Assessment Act, the court in *South Western Indemnities Ltd v Bank of New South Wales and Federal Commissioner of*

¹⁰¹ Section 263(1) of the Assessment Act. In terms of s 8(1) of the Taxation Administration Act 1953 the Commissioner may delegate any of his or her powers, except this power to delegate, to the deputy Commissioner or any other person.

¹⁰² Wheelwright “Taxpayers’ rights in Australia” (1997) *Revenue Law Journal* 252.

¹⁰³ Wheelwright (1997) *Revenue Law Journal* 253. See, for instance, the discussion below of *O'Reilly v Commissioners of State Bank of Victoria* (1982) 83 ATC 4156; *South Western Indemnities Ltd v Bank of New South Wales & Federal Commissioner of Taxation* (1973) 4 ATR 130; *Sharp v Deputy Commissioner of Taxation* (NSW) (1988) 19 ATC 4259.

¹⁰⁴ (1982) 83 ATC 4156.

¹⁰⁵ *O'Reilly* 4162.

¹⁰⁶ *O'Reilly* 4162.

¹⁰⁷ Section 263(3) was inserted by the Taxation Laws Amendment Act (no 2) 1987. Prior to the insertion of s 263(3), the court in *O'Reilly* dealt with the question whether there was any obligation on anyone to take positive steps to provide free and full access in terms of s 263(1). The court found that there was no such obligation.

¹⁰⁸ Treasury *Taxation Laws Amendment Bill (No 2) Explanatory Memorandum* (1987) 106.

¹⁰⁹ Treasury (1987) 106.

*Taxation*¹¹⁰ (“*South Western Indemnities Ltd*”) held that the section 263 power extends to any person, and not only to the taxpayer.¹¹¹

Another reason why section 263 may be seen as providing extensive powers is that it does not require prior notice before the ATO may exercise its power to access. Nevertheless, the ATO has given the assurance that only in exceptional circumstances prior notice will not be given to the person who will be affected.¹¹² These exceptional circumstances include instances where the ATO discovers that information exists which the taxpayer claimed did not exist or where it has a reasonable belief that documents will be destroyed.¹¹³

The ATO requires these broad powers and discretions because the tax system is largely based on self-assessment. Also, these powers deter taxpayers from not complying with tax laws.¹¹⁴ However, these powers may not be as broad as one would initially believe. Section 263 appears to limit the full and free access in two ways.¹¹⁵ Firstly, access to the places, books and documents should be for a purpose of the Assessment Act.¹¹⁶ Secondly, the person using section 263 of the Assessment Act should, upon request, provide written proof signed by the Commissioner that he or she is authorised to exercise this power. Failure to provide such proof will result in the officer not being entitled to full and free access.¹¹⁷

When considering the first limitation, that it must be exercised for the purposes of the Assessment Act, Bentley observes that the Australian courts usually conclude that

¹¹⁰ (1973) 4 ATR 130. See Wheelwright (1997) *Revenue Law Journal* 253.

¹¹¹ *South Western Indemnities Ltd* 132.

¹¹² ATO *Our approach to information gathering – guide for taxpayers* (Nov. 2013) 27. According to the data provided by ATO in 2012–2013, it has used the power to access 21 times of which only two was without prior notice. The access power refers to access obtained in terms of s 353-15 of Sch 1 to the Taxation Administration Act 1953; s 263 of the Assessment Act; s 127 of the Fringe Benefits Tax Assessment Act 1986, s 76 of the Superannuation Guarantee (Administration) Act 1992 and s 107 of the Petroleum Resource Rent Tax Assessment Act 1987.

¹¹³ ATO (Nov. 2013) 29, 31.

¹¹⁴ *Coercive information-gathering report* 9.

¹¹⁵ McCabe “The investigatory powers of the Commissioner under the Income Tax Assessment Act and individual rights” (1993) *Revenue Law Journal* 2.

¹¹⁶ Section 263(1) of the Assessment Act.

¹¹⁷ Section 263(2) of the Assessment Act.

the power was exercised for a purpose of the Assessment Act without investigating what the purpose is.¹¹⁸ Keane remarks that:

“[S]ince the proper purpose for which the power may be used in the pursuit of information in relation to the assessable income of any person, it is difficult to envisage circumstances in which it could be demonstrated that the Commissioner sought to exercise the power for a purpose other than a relevant purpose.”¹¹⁹

Vincent and Morfuni add that any *bona fide* inquiry relating to the Assessment Act could be seen to be for a purpose of the Assessment Act.¹²⁰ Considering the views in relation to the court’s interpretation of when the power is exercised for the purpose of the Act, it appears that this limitation is interpreted widely.¹²¹ This leaves one to question whether the first limitation actually limits the ambit of section 263.

Dealing with the second limitation, namely, that the person exercising this power must be able to provide written proof of authorisation, it is essential that the person who is subject to the power of access should request to see this authorisation.¹²² In *Sharp v Deputy Commissioner of Taxation (NSW)*¹²³ (“*Sharp*”), the authorisation was signed by the Deputy Commissioner instead of the Commissioner¹²⁴ and the court held that when interpreting this provision it should be construed narrowly. This is because if a person fails to assist an authorised person it could lead to the person being liable to pay a penalty. It is crucial that a person subject to the access powers is able to ascertain immediately whether the required authorisation has been obtained. A narrow construction would mean that the ATO should comply

¹¹⁸ Bentley “The Commissioner’s powers: democracy fraying at the edges” (1994) *Revenue Law Journal* 91. He refers to *ANZ Banking Group* and *Industrial Equity Ltd v Deputy Federal Commissioner of Taxation* (1990) 90 ATC 5013.

¹¹⁹ Keane “Investigations and rights of access” (1983) *Taxation in Australia* 417.

¹²⁰ Vincent & Morfuni “Legal professional privilege and the government’s right to access information and documents” (June 2004) *Australian Tax Review* 89–99. See also *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Ltd.* (1979) 143 C.L.R. 499 544; *O’Reilly* 4162.

¹²¹ See also *Coercive information-gathering report* 8.

¹²² Martin “The ‘audit’ power of the Commissioner of Taxation: sections 263 and 264 of the Income Tax Assessment Act 1936” (1991) *Queensland University of Technology Law Journal* 69; Ashurst “What to do when the ATO calls – Tips for dealing with access and information notices issued by the Commissioner of Taxation” (Apr. 2012) available at <http://bit.ly/1vucHpz> (accessed 23 Oct. 2014 – no longer available).

¹²³ (1988) 19 ATC 4259.

¹²⁴ *Sharp* 4264.

meticulously with the access provisions, which means that the letter of authorisation should be signed by the Commissioner.¹²⁵ Nevertheless, this view was rejected in *Citibank v Commissioner of Taxation*¹²⁶ (“*Citibank (a quo)*”) as the court held that:

“Since the grant of and signature of a s. 263 authorisation are powers or functions of the Commissioner, they may be lawfully delegated by him ... and his delegate then exercises the power or function of signature in his own right”.¹²⁷

Thus, when considering the two limitations provided for in section 263 of the Assessment Act, it is clear that they are not successful in curbing the ATO's power in relation to searches. That may be why the court in *Citibank (a quo)* attempted to add another limitation in relation to section 263. This limitation entailed that the authorisation should contain specific particulars regarding the premises to which access is required and the documents that will be searched.¹²⁸ Lockhart J indicated that particularity would ensure that the officer and person subject to the search would understand the scope of the search. Also, providing such specific detail ensures that the person authorising the access applied his or her mind.¹²⁹ Lockhart J considered this requirement essential to ensure that a person's privacy interests are protected.¹³⁰ However, this limitation was discarded in *Citibank (appeal)* as this requirement is not contained in section 263 of the Assessment Act.¹³¹

A factor that contributes to the wide power of access is the fact that the Assessment Act does not contain special requirements or procedures relating to a private residence. Woellner points out that whilst it would be preferable that a person's private residence is only accessed with the consent of the affected person, in some instance the possibility of a person refusing consent and destroying evidence has to

¹²⁵ *Sharp* 4266.

¹²⁶ [1988] FCA 306.

¹²⁷ *Citibank (a quo)* par 55.

¹²⁸ *Citibank (a quo)* par 40.

¹²⁹ *Citibank (a quo)* par 41. See Ch 3, par 3.2.1 where the court in *Ferucci* indicated that particularities contained in a warrant ensure constitutional protection.

¹³⁰ *Citibank (a quo)* par 46. See also Clark “Search powers of the Taxation Commissioner” (1998) *Queensland University of Technology Law Journal* 100 for a discussion of this aspect.

¹³¹ *Citibank (appeal)* par 30. See also *Allen, Allen & Hemsley v Deputy Federal Commissioner of Taxation* [1989] 20 GCR 4294 4747.

be anticipated.¹³² Woellner suggests that in instances where it is expected that a person may not provide consent and destroy evidence, the federal police may be approached to obtain a warrant to access the premises. The ATO officer will then assist the police officer in executing the warrant.¹³³

In addition to not differentiating between commercial and private premises, the Assessment Act also does not differentiate between obtaining access for monitoring (regulating) and for purposes of investigation. However, the ATO states that it does not use its access powers to obtain evidence relating to an offence.¹³⁴ Nonetheless, the evidence that the ATO obtains with its access powers may be used in the subsequent prosecution of an offence in terms of the Taxation Administration Act, 1953 or Criminal Code, 1955.¹³⁵ Dirkis criticises this approach. He concedes that in reality whilst the ATO is exercising its access power, it may examine documentation which relates to other aspects. He indicates that the ATO should not use its access powers for purposes other than those envisaged in the Assessment Act. If it is used for other purposes, the ATO would be acting outside the scope of the powers provided for in section 263.¹³⁶ To allow these documents to be used for other purposes would, according to Dirkis, amount to “giving de facto legality to illegal access”.¹³⁷ In order to prevent potential abuse of this power, Lockhart J in *Citibank (a quo)* was correct to hold that the information or documentation obtained in terms of section 263 of the Assessment Act may only be used if it is relevant for the Assessment Act.¹³⁸

¹³² Woellner “Section 263 powers of access – why settle for second-best?” (2005) *Australian Tax Forum* 376.

¹³³ Woellner (2005) *Australian Tax Forum* 376–377. Woellner states that the ATO officer may assist the police officer by indicating what should be searched for and seized.

¹³⁴ ATO (Nov. 2013) 30.

¹³⁵ ATO (Nov. 2013) 27. This approach can also be detected in the matter of *Clyne v Deputy Commissioner of Taxation (NSW)* (1985) 16 ATC 938.

¹³⁶ Dirkis “1984 revisited? Review of the Commissioner of taxation’s access powers under section 263 of the Income Tax Assessment Act 1936?” (1989) *ADEL LR* 134.

¹³⁷ Dirkis (1989) *ADEL LR* 134.

¹³⁸ *Citibank (a quo)* par 46.

4.3.2.2 *Power to seize*

The Assessment Act does not provide the ATO with the power to seize any documents, records or books.¹³⁹ The ATO indicates that it relies on a person to consent to the removal of documentation in order to remove documents.¹⁴⁰

4.3.3 **Comparison with SARS' powers**

4.3.3.1 *Contextual setting*

In South Africa, SARS' power to search and seize is conducted within a constitutional dispensation. Thus, SARS must respect a taxpayer's constitutionally enshrined rights, which include the right to privacy, just administrative action and access to courts.¹⁴¹ Only in instances where the search and seizure can be seen as a reasonable and justifiable limitation of these rights will the search and seizure pass constitutional muster. An Australian taxpayer's right to privacy is embedded in the common law.

4.3.3.2 *Search and seizure – fiscal provisions*

In Australia a search is conducted without a warrant as the Assessment Act does not provide for any situation where a warrant has to be obtained before a search can be conducted. Accordingly, the ATO would be able to proceed with searches effectively and efficiently without needing a warrant. However, this situation is contrary to the situation in South Africa. In South Africa case law relating to searches and seizures in the realm of taxation and other areas of law provide that a warrant is required from the onset in order for the provisions to pass constitutional muster.

Another difference between the powers of the ATO and SARS relates to the power, or the lack of power, to seize. In South Africa, documents may be seized whereas the Assessment Act does not allow the ATO to seize any documents. The reason why the ATO are not permitted to seize documents could be to curb the extent to which the (warrantless) searches impact on a taxpayer's right to privacy. However, the inability to seize documents places a substantial restriction on a revenue

¹³⁹ McCabe (1993) *Revenue Law Journal* 2; Wheelwright (1997) *Revenue Law Journal* 255; Woellner (2005) *Australian Tax Forum* 381; ATO (Nov. 2013) 31.

¹⁴⁰ It is submitted that the ATO would be able to seize items based on consent as it accords with the principle of *volenti non fit iniuria*.

¹⁴¹ See Ch 2, para 2.83; 2.85; 2.8.6 where these rights are discussed in general.

authority's powers, which may impact on its ability to fulfil its duties effectively and efficiently.

4.4 NEW ZEALAND

4.4.1 Contextual setting

Section 21 of the BORA confirms the right “to be free from unreasonable search or seizure, whether of the person, property, or correspondence or otherwise”.

In *R v Jefferies*¹⁴² (“*Jefferies*”), the court indicated that a search would be an “examination of a person or property” whilst a seizure would be “taking of what is discovered”.¹⁴³ The court further considered the question as to what would constitute an unreasonable search. Richardson J pointed out that the values associated with the section 21 right must be balanced with the public interests involved in conducting searches and seizures.¹⁴⁴ Section 21 represents a combination of different values, namely, a person’s privacy, property, personal freedom and dignity.¹⁴⁵ The court also held that unreasonableness is not the same as unfairness,¹⁴⁶ unlawfulness/illegality¹⁴⁷ or the invasion of a person’s expectation of privacy.¹⁴⁸ Firstly, unreasonableness and unfairness in this context are not synonyms as unreasonableness requires a balancing of values and interests whilst unfairness focuses only on the citizen’s interests.¹⁴⁹ Secondly, unreasonableness should not be confused with unlawfulness/illegality. Richardson J held that

“[i]llegality is not a touchstone under s 21. The statutory concern is for the protection of the individual against the abuse of state power. Reasonableness is a different and wider test than lawfulness. It is an elastic word. There is an element of flexibility in its application not inherent in notions of legality or regularity. The lawfulness or unlawfulness of the

¹⁴² [1994] 1 NZLR 290 (CA).

¹⁴³ *Jefferies* 300.

¹⁴⁴ *Jefferies* 301.

¹⁴⁵ *Jefferies* 302. It is also indicated (302) that New Zealand does not have a specific statute dealing with the right to privacy and as such New Zealand does not guarantee a general right to privacy.

¹⁴⁶ *Jefferies* 302.

¹⁴⁷ *Jefferies* 304. If a search or seizure is conducted unlawfully the common law would apply with regard to the admissibility of evidence. Section 21 of the BORA is therefore only concerned with whether it is reasonable or not.

¹⁴⁸ *Jefferies* 302.

¹⁴⁹ *Jefferies* 302.

search will always be highly relevant but should not be determinative either way. A search may be legal but unreasonable. It may be illegal but reasonable”.¹⁵⁰

Lastly, determining whether a search is unreasonable is not the same as determining whether a person has an expectation of privacy. This is because it is necessary to limit a person’s expectation of privacy in order for society to function efficiently. Although it is recognised that a search will invade a person’s expectation of privacy, determining whether it would be reasonable or not requires that the particular circumstances and other values and interests be considered.¹⁵¹ The subject-matter, time, place and circumstances should be taken into account when considering whether the circumstances which gave rise to a search or seizure are unreasonable or whether the search itself was conducted unreasonably.¹⁵²

4.4.2 Search and seizure – fiscal provisions

*4.4.2.1 Regulatory and investigatory searches and seizures*¹⁵³

Section 16 of the New Zealand Tax Administration Act¹⁵⁴ (“NTAA”) provides that the Commissioner or an officer authorised by the Commissioner

“shall at all times have full and free access to all lands, buildings, and places, and to all documents, whether in the custody or under the control of a public officer or a body corporate or any other person whatever, for the purpose of inspecting any documents and any property, process, or matter”.¹⁵⁵

¹⁵⁰ *Jefferies* 304. See also *R v H* [1994] 2 NZLR 143 (CA) 148 where it is confirmed that whether searches and seizures are lawful would be a relevant consideration in establishing whether the searches and seizures are unreasonable.

¹⁵¹ *Jefferies* 302–303.

¹⁵² *Avowal Administrative Attorneys Ltd v District Court at North Shore* [2010] NZCA 183 par 21; *Jefferies* 301, 305; *R v Pratt* [1994] 3 NZLR 21 (CA) 24. *R v Pratt* illustrates how the place where a search is conducted may render it unreasonable. In this matter the police conducted a strip-search for drugs in a public street during the day despite there being three police stations within a 10 minute drive from the location. The court held that there was no risk of the suspect hiding or destroying any drugs he could have in his possession. Accordingly, the court held that this was an unreasonable search.

¹⁵³ The New Zealand Tax Administration Act 1994 does not distinguish between regulatory and investigatory searches and seizures. Accordingly, they are discussed under the same heading.

¹⁵⁴ 166 of 1994.

¹⁵⁵ In terms of IRD *Operational Statement O/S 13/01: the Commissioner of Inland Revenue Search power* (Sept. 2013) 8 premises may be accessed at a time that the Commissioner considers to

This power is restricted to instances which the Commissioner or officer believes are necessary or relevant to collect tax, execute any function conferred on the Commissioner or obtains information relating to these instances.¹⁵⁶

When the Inland Revenue Department (“IRD”) decides to access premises, the Operational Statement O/S 13/01: the Commissioner of Inland Revenue search power (“Operational Statement”)¹⁵⁷ indicates what is expected of the Commissioner or IRD officer. Firstly, the Commissioner or officer should indicate his or her intention to access the premises in terms of section 16 of the NTAA.¹⁵⁸ The Commissioner or officer should also produce proof of identity as well as a written notice.¹⁵⁹ This notice should indicate that the search is in terms of section 16 and the reason for the search.¹⁶⁰ Furthermore, to ensure that a person’s right in terms of section 21 of the BORA is protected,¹⁶¹ it should be communicated to such a person what the search process will entail and that he or she may consult with a lawyer.¹⁶²

Section 16(2)(a) of the NTAA ensures that the power afforded by section 16(1) can be exercised effectively by providing that reasonable facilities and assistance should be made available to the Commissioner or the officer. Although the IRD is not authorised to search a person in terms of section 16, based on the fact that a person

be the less disruptive for the occupier whilst also serving the operational needs of the investigation. Section 3 of the NTAA defines document as “(a) a thing that is used to hold, in or on the thing and in any form, items of information; (b) an item of information held in or on a thing referred to in paragraph (a); (c) a device associated with a thing referred to in paragraph (a) and required for the expression, in any form, of an item of information held in or on the thing”. In *Avowal Administrative Attorneys Ltd v District Court at North Shore* the court acknowledged that computer hard drives fall within the ambit of documents in terms of s 16 of the NTAA.

¹⁵⁶ Section 16(1) of the NTAA. See IRD *Operational Statement OS 13/01: the Commissioner of Inland Revenue’s search powers* 4 par 27 where it is indicated that “necessary” and “relevant” are not defined terms. Furthermore, this power entails that the Commissioner or officer may make copies of documents that fall within the scope of s 16(1).

¹⁵⁷ This Operational Statement came into operation on 1 Sept. 2013.

¹⁵⁸ *Operational Statement* para 49(a), 49(e).

¹⁵⁹ This is in instances where a warrant is not required. In terms of s 16(4) a warrant is required when the IRD wants to conduct a search at a private residence and the IRD has not obtained the consent of the occupier to do so.

¹⁶⁰ *Operational Statement* par 49(e). However, the *Operational Statement* indicates that the reason should be indicated in general terms.

¹⁶¹ *Operational Statement* par 58.

¹⁶² *Operational Statement* par 58 (a); (c).

subject to a search should provide reasonable assistance to the IRD, such a person on request should empty his or her pockets and hand over cellular phones.¹⁶³

A person at these premises must also answer proper questions relating to the effective exercise of section 16(1).¹⁶⁴ Proper questions would be questions regarding names, addresses and occupations and not questions aimed at obtaining evidence.¹⁶⁵ As soon as the questions relate to obtaining evidence, the questioning shifts to an inquiry which is provided for in section 18¹⁶⁶ and 19¹⁶⁷ of the NTAA or a voluntary interview.¹⁶⁸ The IRD indicates that if it asks questions that may possibly overlap with investigatory questions and those envisaged in section 16, it will ensure that the occupier is aware that he or she is answering on a voluntary basis and is not required to do so in terms of section 16.¹⁶⁹ Such an interview will normally be arranged once the search is completed.¹⁷⁰

A further provision that assists in ensuring that the section 16(1) power can be exercised effectively is section 16(2A). This section enables the Commissioner or officer, if necessary, to rely on the assistance of other persons such as digital

¹⁶³ *Operational Statement* par 63. The IRD also states (par 76) that it would consider the compliance cost to the occupier, his or her availability as well as the purpose of the search before requesting assistance from the occupier.

¹⁶⁴ Section 16(2)(b) of the NTAA.

¹⁶⁵ *Operational Statement* par 81.

¹⁶⁶ Section 18 of the NTAA deals with an inquiry before a district court judge. If “the Commissioner deems it necessary to hold an inquiry for the purpose of obtaining any information with respect to the liability of any person for any tax or duty under any of the Inland Revenue Acts or any other information required for the purposes of the administration or enforcement of any of those Acts or for the purpose of carrying out any other function lawfully conferred on the Commissioner, the Commissioner may apply in writing to a District Court Judge to hold an inquiry under this section”.

¹⁶⁷ Section 19 provides that: “The Commissioner may, for the purpose of obtaining any information with respect to the liability of any person for any tax or duty under any of the Inland Revenue Acts or any other information required for the purposes of the administration or enforcement of any of those Acts or for the purpose of carrying out any other function lawfully conferred on the Commissioner, by notice, require any person to attend and give evidence before the Commissioner or before any officer of the department authorised by the Commissioner in that behalf, and to produce all documents in the custody or under the control of that person which contain or which the Commissioner or the authorised officer considers likely to contain any such information.” In *Tauber v Commissioner of Inland Revenue* [2012] NZCA 411 the court held that s 16 may be used even if the IRD has not exercised its powers in terms of ss 18 and 19 of the NTAA.

¹⁶⁸ *Operational Statement* par 81. It is submitted that it is important that New Zealand taxpayers are educated in relation to what can be expected from them in terms of the different sections. An uneducated taxpayer may be more susceptible to abuse by the IRD.

¹⁶⁹ *Operational Statement* par 82.

¹⁷⁰ *Operational Statement* par 83.

forensic experts, locksmiths, interpreters and police officers.¹⁷¹ If the person who assists the Commissioner or officer is not a constable¹⁷² he or she may not enter the premises on the first occasion on his or her own and must be reasonably supervised.¹⁷³ If the assistant is a constable, he or she may conduct the search in accordance with his or her powers and is thus not subject to the control of the person who is authorised to conduct the search in terms of section 16(1) of the NTAA.¹⁷⁴

Section 16(4) of the NTAA states that when the Commissioner or officer wants to access a private dwelling¹⁷⁵ it may only be accessed if the occupier has consented¹⁷⁶ thereto or if access is allowed in terms of a warrant.¹⁷⁷

Certain provisions of the Search and Surveillance Act¹⁷⁸ (“SSA”) apply when a warrant has to be obtained to access a private dwelling.¹⁷⁹ Firstly, section 100(1)(a) of the SSA provides that the application for a warrant should be made in writing to an issuing officer.¹⁸⁰ Furthermore, the application must be reasonably specific as it

¹⁷¹ *Operational Statement* par 67.

¹⁷² Section 3 of the Search and Surveillance Act 24 of 2012 read with s 4 of the Policing Act 72 of 2008 defines constable as “a [p]olice employee who holds the office of constable” and “includes a constable who holds any level of position within the New Zealand Police”.

¹⁷³ Section 113(4) read with s 113(5) of the Search and Surveillance Act 24 of 2012. A person who assists the Commissioner or officer with a search and who is not part of the Revenue staff must also sign a declaration of secrecy in terms of s 87 of the NTAA. See *Operational Statement* par 71.

¹⁷⁴ Section 113(3) of the Search and Surveillance Act. In terms of s 16(6) of the NTAA certain provisions of the Search and Surveillance Act apply to s 16. One of these provisions is s 113, in terms of which an assistant would be subject to the control of the person who has overall authority in terms of s 16(1) of the NTAA.

¹⁷⁵ In terms of s 16(7) of the NTAA a private dwelling is defined as “any building or part of a building occupied as residential accommodation (including any garage, shed, and other building used in connection therewith); and includes any business premises that are or are within a private dwelling”.

¹⁷⁶ The NTAA does not specify the requirements for consent.

¹⁷⁷ Section 16(3) of the NTAA. The fact that s 16(3) expressly deals with the circumstances when a private dwelling may be entered is in line with the Public and Administrative Law Reform Report *Statutory powers of entry* (Apr. 1983) par 3.03 which provides that “the conferring of a power to enter private property is too great an infringement of private rights to be done by implication. Parliament should give specific consideration to the need for it, and its intention to authorise such an interference deserves to be expressed by clear words”. See also *Choudry v Attorney-General* [1999] 2 NZLR 585 (CA) 593 where this quote found approval.

¹⁷⁸ 24 of 2012.

¹⁷⁹ In terms of s 16(6A) of the NTAA, subpart 1,3,4,7,9 and 10 of Part 4 of the SSA apply to searches where a warrant is required in terms of the NTAA. Only the most pertinent sections of the SSA, relating to the IRD’s powers when conducting a search, are discussed in this thesis.

¹⁸⁰ Section 3 read with s 108(1) of the SSA indicate that an issuing officer would be a “Justice of the Peace, Community Magistrate, Registrar, Deputy Registrar, or other person” authorised by the Attorney-General.

should contain details such as the name of the applicant,¹⁸¹ in terms of which provisions the application is made,¹⁸² the grounds upon which the application is made,¹⁸³ a description of the place to be accessed¹⁸⁴ and a description of the item to be inspected.¹⁸⁵

An issuing officer may then issue a warrant if he or she is satisfied that the warrant is necessary for the Commissioner or officer to exercise his or her functions as envisaged in section 16(1) of the NTAA.¹⁸⁶ This warrant should contain the details of the issuing officer,¹⁸⁷ that a person authorised to do so may execute the warrant,¹⁸⁸ that reasonable force may be used in circumstances to obtain access to any area within the place,¹⁸⁹ and a description of the place or thing that may be entered and of the item that may be inspected.¹⁹⁰

4.4.2.2 *Power to remove versus power to seize*

Section 16C of the NTAA, which deals with the removal of documents to conduct a full and complete inspection, also requires either the consent of the occupier or a warrant.¹⁹¹ Section 16B of the NTAA, as opposed to section 16C of the NTAA, provides that the Commissioner or officer does not need to obtain consent or a warrant before removing documents from the accessed premises in order to make

¹⁸¹ Section 98(1)(a) of the SSA. Section 97 of the SSA defines the applicant for a warrant to be a constable or another person who is authorised in terms of the SSA to apply for a warrant.

¹⁸² Section 98(1)(b) of SSA. In this instance it will be in terms of s 16(4) of the NTAA.

¹⁸³ Section 98(1)(c) of SSA.

¹⁸⁴ Section 98(1)(d) of the SSA.

¹⁸⁵ Section 98(1)(e) of the SSA. In terms of s 99 of the SSA, the applicant should also annex a statement confirming that the content of the application is accurate.

¹⁸⁶ Section 16(4) of the NTAA; s 16C of the NTAA. If the warrant is obtained to access a private dwelling, s 16(6) of the NTAA provides that the warrant should be produced when first entering the private dwelling and upon any subsequent requests to do so.

¹⁸⁷ Section 103(4)(a) of the SSA.

¹⁸⁸ Section 103(4)(d) of the SSA. In terms of s 103(3)(b) of the SSA, a warrant may be executed by "any or all of the persons to whom it is directed" or a constable.

¹⁸⁹ Section 103(4)(e) of the SSA.

¹⁹⁰ Section 103(4)(f) of the SSA.

¹⁹¹ In terms of s 16C(8) of the NTAA, the provisions of the SSA relating to warrants also apply to instances where a warrant is obtained in terms of s 16C of the NTAA. Section 3 of the NTAA provides that full and complete inspection "includes use as evidence in court proceedings". It specifically excludes from its ambit removing objects to make copies in terms of s 16B of the NTAA. The *Operational Statement* states (par 112) that the IRD will provide the occupier, if he or she is the owner of the removed items, with an inventory and information relating to his or her rights.

copies.¹⁹² At first glance the difference between these two sections seems to lie in the purpose of the removal. The purpose in section 16B of the NTAA is to make copies whilst in section 16C the removal is for inspection. A possible reason why one section requires consent or a warrant for removal and the other does not, may be that taxpayer's rights may be infringed to a larger extent than when the removal is for inspection purposes and thus safeguards are built in. Whilst in theory it may make sense to require a warrant for the one instance of removal but not for the other, it creates a problem on practical grounds. How can it be regulated that documents removed under the guise of copying are not also inspected? This could mean that the requirements of section 16C of the NTAA may be circumvented by using section 16B.

However, there is another difference between these two sections. In terms of section 16B, once copies have been made the originals must be returned to the premises as soon as practicable.¹⁹³ Section 16C(6), on the other hand, allows for the documents removed for inspection purposes to be kept until the inspection is complete. In *Tauber v Commissioner of Inland Revenue*¹⁹⁴ ("*Tauber*") the court indicated that section 16C is more invasive than section 16B because the documents may be retained.¹⁹⁵ It is submitted that the reason for requiring a warrant or consent for a section 16C removal may not be its more invasive purpose, but rather because the documents will be removed until the inspection is complete. If the latter reason is preferred it would mean that section 16B cannot be used to circumvent section 16C as the IRD may not keep documents infinitely under section 16B.

Similar to section 16B of the NTAA, section 112 of the SSA also allows for the removal of items without consent or a warrant. In terms of this section, if a person conducts a search and it is uncertain whether any item may be seized, he or she may remove the item to examine whether it may be lawfully seized.¹⁹⁶ Lennard observes that if it is established that the item removed in terms of section 112 is not

¹⁹² Section 16B(1) of the NTAA.

¹⁹³ Section 16B(2) of the NTAA.

¹⁹⁴ [2012] NZCA 411.

¹⁹⁵ *Tauber* par 41.

¹⁹⁶ This is provided that it is not reasonably practicable to determine whether it may be seized whilst at the place where the search is conducted.

evidentiary material, it must be returned immediately.¹⁹⁷ Therefore, even though it may be inspected once it is removed it must be returned immediately. As a result, section 112 of the SSA may also not be used to circumvent the provisions of section 16C of the NTAA to return the material immediately.

Another section which may have an effect on section 16C of the NTAA, is section 123 of the SSA, which deals with the seizure of items in plain view and applies to instances where an enforcement officer¹⁹⁸ conducts a search.¹⁹⁹ In terms of section 123 of the SSA, the Commissioner or officer may seize an item if he or she has reasonable grounds to believe that this item could have been removed under a warrant if they had obtained a warrant.²⁰⁰ The effect of this section is that the officer does not require a warrant or consent to remove documents from the premises searched. A reasonable belief that he or she would have obtained a warrant to remove the said documents would be sufficient for removal in terms of section 123 of the SSA. The question arises as to how long the removed items may be kept. If they may be kept for the duration of the investigation, this section may be used to circumvent section 16C of the NTAA.

The SSA also addresses what would happen if a warrant is pending and there is a belief that evidentiary material will be destroyed.²⁰¹ Section 117(1) states that if a warrant is pending,²⁰² an enforcement officer may enter and secure²⁰³ the place or

¹⁹⁷ Lennard “Section 16: changes to search and seizure powers”, paper presented at *The New Zealand Institute of Chartered Accountants, Tax Conference*, Wellington (26–27 Oct. 2012) 19.

¹⁹⁸ In terms of s 3 of the SSA an enforcement officer would be a constable, a person authorised in terms of column 2 of the Schedule to the SSA, or a person who is expressly authorised to access, search or inspect in terms of part 4 of the SSA. Section 16 of the NTAA falls into the last two categories and accordingly a person who is authorised to access premises in terms of s 16 of the NTAA would be an enforcement officer.

¹⁹⁹ Section 123(1)(a) of the SSA. Section 3 of the SSA defines a “search power” as “(a) every search warrant issued under this Act or an enactment set out in column 2 of the Schedule to which that provision is applied; and (b) every power, conferred under this Act or an enactment set out in column 2 of the Schedule to which that provision is applied, to enter and search, or enter and inspect or examine (without warrant) any place, vehicle, or other thing, or to search a person”. Section 123 will also apply to instances where an enforcement officer is lawfully in a place or is conducting a lawful search of a person. A search conducted in terms of s 16 of the NTAA is set out in column 2 of the Schedule.

²⁰⁰ Section 123(2) of the SSA.

²⁰¹ See s 117 of the SSA.

²⁰² “Pending” in this instance refers to when an application for a warrant is about to be made or was made but has not yet been granted or refused.

thing that is the subject of the pending warrant.²⁰⁴ However, the enforcement officer must believe on reasonable grounds that evidence may be destroyed, removed or damaged before the application for a warrant is finalised.²⁰⁵ The scope of section 117 of the SSA is limited. It may only be exercised until the first of either a period of six hours from when it was first exercised, until the warrant is available or until the application for the warrant has been denied.²⁰⁶

4.4.3 Comparison with SARS' powers

4.4.3.1 Contextual setting

Neither the Constitution of South Africa nor the BORA allows unreasonable searches or seizures. This means that before a search or seizure may be conducted a person's rights must be weighed up against the revenue authority's interests in verifying information or obtaining evidence.

4.4.3.2 Search and seizure – fiscal provisions

Unlike SARS, the IRD conducts searches without a warrant from the onset. Although the power to conduct warrantless searches in all instances would assist SARS in verifying compliance and detecting the commission of offences in an efficient and effective manner, such an approach would not be a workable one in light of case law relating to warrantless searches in the South African constitutional dispensation.²⁰⁷

Although the IRD may enter and search premises without a warrant, removal or seizure is a separate component. Before documents may be removed the purpose of their removal has to be determined. If it is to make copies thereof or to determine whether they may be seized, the IRD may remove the documents without a warrant or consent. If it is for investigatory purposes, which would mean that the documents may be kept for the entire period of investigation, either consent or a warrant is

²⁰³ The SSA does not provide a definition of secure. *Collins Dictionary* defines secure relating to an object as “[f]ix or attach (something) firmly so that it cannot be moved or lost” available at <http://bit.ly/1GO71rm> (accessed 9 Nov. 2016). This could entail that the IRD places locks on certain cabinets to ensure that their contents may not be removed whilst a warrant is pending.

²⁰⁴ Section 117(1)(a) of the SSA. Section 117(1)(b) provides that the enforcement officer may also direct another person to access and secure the premises or thing.

²⁰⁵ Section 117(2) of the SSA.

²⁰⁶ Section 117(3) of the SSA.

²⁰⁷ See Ch 3, par 3.2.1.1 in this regard.

required.²⁰⁸ Obtaining consent or a warrant specifically to seize documents is unknown in the South African tax environment. In South Africa it would be sufficient to seize documents if the SARS officer believes that the documents would constitute evidence of non-compliance or the commission of an offence. SARS does not consider the level of invasion when documents are removed. Requiring a person's consent or a warrant before documents may be removed for the duration of an inspection would result in the seizure of documents not being subject to the tax officer's discretion as is the current situation.

A noteworthy aspect of New Zealand's approach to seizure is that the IRD may secure property subject to a warrant being issued in a relatively short period thereafter. This idea of a revenue authority acting without a court order subject to obtaining judicial approval shortly thereafter is not a foreign concept in South African tax administration. Section 163(2)(a) of the TAA provides for a situation where SARS may in anticipation of an application for a preservation order,²⁰⁹ seize assets pending the outcome of the application. The application for a preservation order must commence within 24 hours from the time of seizure. From a South African policy perspective, the New Zealand's approach, when there is not sufficient time to obtain a warrant to seize assets, would be a workable approach in South Africa. An approach in terms of which judicial authorisation is obtained after items are seized would ensure that SARS may act effectively and efficiently, while a taxpayer's rights relating to the property seized would be taken into consideration when the matter is considered by a court after the fact.

Both SARS and IRD respect a person's private dwelling, but in varying degrees. The IRD may only conduct searches at private dwellings if consent or a warrant is obtained. The grounds for obtaining such a warrant is fairly broad as the issuing officer is simply required to be satisfied that the warrant is required in order for the Commissioner or officer to exercise his or her functions as envisaged in section

²⁰⁸ See Ch 4, par 4.4.2.2.

²⁰⁹ Section 163(1) of the TAA provides that a preservation order may be obtained in order to prevent the disposal or removal of a realisable asset, which would frustrate the collection of tax that is due or payable. This order may be obtained by way of an *ex parte* application to preserve an asset or to prohibit a person from dealing with the asset in a manner that is contrary to the preservation order.

16(1) of the NTAA.²¹⁰ Although it may be seen as broad it still demonstrates that a person's private dwelling may not be accessed without some intervention by either the occupier in giving consent or by an issuing officer by way of a warrant. On the other hand, in South Africa, SARS may conduct a search at a private dwelling if it is authorised by a warrant, the occupier consented thereto and, with regard to customs-related search and seizure, the subjective criterion is complied with. Thus, it is possible for SARS in relation to customs duty to conduct a search of a private residence without the intervention of a third party.

4.5 NIGERIA

4.5.1 Contextual setting

The Constitution of the Federal Republic of Nigeria, 1999 ("Nigerian Constitution") is the supreme law of Nigeria.²¹¹ All conduct and laws must be in accordance with the Nigerian Constitution.²¹²

Chapter IV of the Nigerian Constitution provides for fundamental rights, which include the right to privacy in section 37.²¹³ Section 37 provides that "[t]he privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected". Nonetheless, section 45(1) of the Nigerian Constitution provides that the right to privacy may be infringed upon if there is a reasonable justification that is in the interest of defence, public safety, public order, public morality or public health, or for the purpose of protecting the rights and freedom of other persons.²¹⁴

²¹⁰ Section 16(4) of the NTAA; s 16C of the NTAA.

²¹¹ Section 1(1) of the Nigerian Constitution.

²¹² Sections 1(2) & 1(3) of the Nigerian Constitution.

²¹³ Section 37 of the Nigerian Constitution.

²¹⁴ In terms of s 45(1) of the Nigerian Constitution, the right to privacy (s 37), the right to freedom of thought, conscience and religion (s 38), the right to freedom of expression (s 39), the right to associate and form a political party (s 40) and the right to move freely throughout Nigeria (s 41) may be limited if the limitation is reasonable. See Ch 2, par 2.8.7 where it is indicated that in South Africa all rights contained in the South African Bill of Rights may be limited if the limitation is reasonable and justifiable.

4.5.2 Search and seizure – fiscal provisions

Section 29 of the Federal Inland Revenue Service (Establishment) Act, 2007 (“FIRSEA”) empowers the Federal Inland Revenue Service (“FIRS”) to conduct searches.²¹⁵ Before a search may be conducted a FIRS officer must apply to a judicial officer²¹⁶ who may authorise a warrant.²¹⁷ The prescribed form of the warrant²¹⁸ provides that the warrant is authorised in relation to a person who is suspected *inter alia* of fraud, evasion and wilful default with regard to tax debt.²¹⁹ Therefore, searches conducted in terms of section 29 of the FIRSEA are investigatory in nature as opposed to merely verifying compliance. Therefore, it is uncertain whether any regulatory searches may be conducted by the FIRS as there are no provisions regulating them.

Apart from requiring the warrant to be in a prescribed form, section 29(7) provides that the person who would be conducting the search should be named in the warrant²²⁰ and the warrant should indicate the period of validity, which can be a maximum period of three months.²²¹ Although the judicial officer has a discretion to authorise a warrant,²²² the FIRSEA does not indicate what aspects the judicial officer should consider when determining whether or not to authorise a warrant. Furthermore, the warrant does not have to specify exactly what objects are subject to the search.

Once a FIRS officer has received the warrant to proceed with the search, he or she may access all “lands, buildings, places, books and documents”²²³ that the FIRS officer considers to be necessary or relevant to collect tax or carry out any function

²¹⁵ See Oke *Taxpayers right protection in Nigeria* (unpublished Master’s dissertation, University of London (2012)) 31–33 for a general discussion of how the right to privacy and FIRS’ power to conduct a search should be balanced.

²¹⁶ In terms of s 318 of the Nigerian Constitution, “judicial officer” refers *inter alia* to the chief justice of Nigeria, a judge of the Supreme Court, the president or a justice of the Court of Appeal, the chief judge or a judge of the Federal High Court.

²¹⁷ Section 29(6) of FIRSEA.

²¹⁸ The prescribed form is contained in Sch 3 to the FIRSEA.

²¹⁹ Schedule 3 to the FIRSEA.

²²⁰ Section 29(7)(b) of the FIRSEA.

²²¹ Sections 29(7)(c) & (d).

²²² Section 29(6) of the FIRSEA provides that the officer *may* authorise a warrant.

²²³ Section 29(2) of the FIRSEA provides that if hard copies of the documentation mentioned in s 29(1) are not available, due to the documents being stored digitally, the FIRS may take possession of removable media.

conferred on the FIRS.²²⁴ A FIRS officer's power extends further than simply obtaining access as he or she may request an occupier of the property that is being entered to answer questions in order to exercise his or her powers effectively.²²⁵ Furthermore, the occupier must also provide reasonable assistance to the FIRS officer.²²⁶ There is no indication of what would constitute reasonable assistance in this context.

The removal of books and documents are dealt with in a separate section. Section 30(1) of the FIRSEA provides that the Executive Chairman may authorise the removal of books and documents accessed in terms of section 29. The Executive Chairman is the chief executive and accounting officer of the FIRS and oversees the day-to-day administration of the FIRS.²²⁷ As such, a judicial officer should authorise access to premises, whilst an employee of the FIRS may authorise the removal of books and documents. However, a seizure occurs after judicial authorisation for a search was obtained and as such a seizure is not done without some form of judicial scrutiny.

Another interesting aspect is contained in section 29(5) of the FIRSEA, which deals with searches conducted at private premises. In addition to obtaining a warrant to conduct a search at private premises,²²⁸ a FIRS officer may conduct a search of such premises with the consent of an occupier. It is interesting that in relation to private premises a search may be conducted if consent is obtained, whilst there is no indication that a search of commercial premises may be conducted when consent is obtained.

²²⁴ Section 29(1) of the FIRSEA.

²²⁵ Section 29(4)(b) of the FIRSEA.

²²⁶ Section 29(4)(a) of the FIRSEA.

²²⁷ Sections 11(b) & (c) of the FIRSEA.

²²⁸ As provided for in s 29(7) of the FIRSEA.

4.5.3 Comparison with SARS' powers

4.5.3.1 Contextual setting

The constitutions of both South Africa and Nigeria provide for the right to privacy which may be limited in justifiable instances. Therefore, SARS and the FIRS are only allowed to conduct searches and seizures if it constitutes a reasonable and justifiable limitation of the right to privacy.

4.5.3.2 Search and seizure – fiscal provisions

Similar to South Africa, in Nigeria the point of departure is that a warrant must be obtained in order to conduct a search. However, the Nigerian search provision does not indicate on what grounds a judicial officer may authorise the warrant. As indicated in the discussion of the South African provisions,²²⁹ the absence of grounds makes it difficult for a person affected by the search to establish whether there are any reasons to apply for the setting-aside of the warrant. It would also be difficult for the judge or magistrate hearing an application to have a warrant set aside to determine whether the judicial officer in the warrant application exercised his or her discretion judicially. Also, the prescribed form of the warrant in Nigeria does not require any particularity in relation to what objects may be searched in terms of the warrant. It is submitted that due to the vagueness with regard to the grounds on which a warrant may be authorised as well as what objects may be subject to the search, the authorisation of a warrant by the judicial officer is a mere rubber-stamping exercise. This leads to the question as to the purpose of judicial intervention in this instance. Requiring a judicial officer to authorise a warrant before a search may be conducted, delays FIRS in proceeding in an optimal and efficient manner. This also does not ensure protection of taxpayers' rights due to the vagueness referred to earlier. In South Africa the importance of requiring a warrant is that an impartial party should determine whether the violation of a person's privacy is reasonable in that specific instance and that the warrant provides the parameters of the search that is to be conducted.²³⁰

²²⁹ See Ch 3, par 3.3.2.1 in this regard.

²³⁰ See Ch 3, par 3.4.

Another questionable aspect of the Nigerian search provisions is that there is no provision for regulatory searches. If the FIRS is not authorised to conduct such searches at all, this has serious implications on FIRS' ability to fulfil its duties in an efficient and effective manner.

FIRS is not allowed to conduct a search based on a FIRS officer's suspicions. Although this means that the FIRS' effectiveness is stifled, this approach is preferred to the current South African approach where a SARS' officer may conduct a search based on his or her subjective suspicions.²³¹ It is preferred as a SARS officer, in assessing whether SARS' interests in conducting a search outweigh a taxpayer's right to privacy, would find it difficult to come to a neutral and detached conclusion in this regard.²³²

4.6 CONCLUSION

Although Canada, Australia, New Zealand and Nigeria all have provisions that empower the revenue authority to conduct searches, and in some instances seizures, the purview of what may be done differs substantially among the countries.

Some observations may be made regarding the protection afforded to taxpayers when fiscal searches and seizures are conducted. The approach followed in Australia and New Zealand of conducting searches without obtaining a warrant would ensure that the respective revenue authorities would be able to conduct searches and seizures in an efficient manner as they would not be required first to obtain judicial authorisation. However, an approach where a warrantless search is allowed from the onset would not be a workable one in South Africa. The reason is that constitutional case law in South Africa has recognised that in the South African constitutional dispensation a warrantless search and seizure cannot be the norm. An approach where all searches and seizures may automatically be conducted without a warrant would not pass constitutional muster in South Africa.

²³¹ See Ch 3, para 3.2.2.3(e); 3.3.2.2(b).

²³² See *Hunter* 164 where the court also concluded that an impartial person has to determine whether a search may be conducted in order to ensure that the necessary neutrality and detachment are present. See also Ch 4, par 4.2.1 in this regard.

The Canadian and Nigerian approach of obtaining a warrant as a point of departure is more in line with South African jurisprudence in this regard. The significance of obtaining a warrant is that judicial intervention is ensured and that the rights to just administrative action and access to courts are protected.²³³ The warrant itself provides the parameters for the search. Therefore, it is suggested that South Africa should, like Canada, require some particularity in a warrant regarding what documents will be subject to the search.²³⁴

In the discussion of the Canadian position, it was acknowledged that while in some instances obtaining a warrant by way of an *ex parte* application would be a solution to ensure judicial oversight and that the revenue authority's powers are being exercised efficiently, a warrantless search may be necessary in some instances.²³⁵ In instances where there is a legitimate threat of a person removing or destroying evidence and where there would not be enough time to obtain an *ex parte* warrant, South African legislation could deal with it in a way similar to New Zealand by securing documents while applying for a warrant authorising the seizure.

From the discussion of the Australian position, it is clear that the Assessment Act does not contain any specific requirements relating to private dwellings. This is not the situation in Canada, New Zealand, Nigeria and South Africa. Whilst Canada, New Zealand and Nigeria allow a search at a private dwelling when a warrant or consent has been obtained,²³⁶ SARS, in addition to these two instances, may conduct a customs-related search and seizure at a private dwelling if the subjective criterion is met. The question arises why it is necessary to allow a SARS official to enter a private dwelling based on an subjective opinion, whilst Canada, New Zealand and Nigeria only allow access to private dwellings after intervention by a third party, namely, either a judge or an occupier of the premises.

²³³ By ensuring judicial intervention, a person's rights to privacy, access to courts and just administrative action are protected.

²³⁴ See Ch 4, par 4.2.2.2.

²³⁵ See Ch 4, par 4.2.3.

²³⁶ See Ch 4, para 4.2.2.1; 4.4.2.1.

The selected countries also do not deal with the power to seize in the same manner. Australia does not allow the ATO to seize any documentation. It is submitted that this is a positive step towards protecting taxpayers' rights. Nonetheless, this could render the ATO's search power ineffective as it may not take any of the documents found during a search. In New Zealand the IRD seizure power is limited as generally documents may only be removed with consent or a warrant. In Canada a warrant should indicate specifically what documents will be seized. However, the CITA acknowledges that this degree of particularity may hamper the efficient collection of evidence and, therefore, the IRD may seize documents not indicated in the warrant if it is believed that they constitute evidence. In order to achieve a balance between respecting a person's right against unreasonable seizure and ensuring effective tax administration, the CITA provides a safeguard. A court has to determine whether the documents may be retained or should be returned to the owner.

South Africa stands in startling contrast to these countries as it does not treat seizure and search as separate components. Moreover, a seizure and search is carried out in the discretion of a SARS official. Consequently, a warrant allowing seizure or the consent of the owner to seize documents is not required. An argument that it would be nearly impossible for a SARS official to indicate, when applying for a warrant, what documents it wishes to seize is not convincing. A solution may be found in the Canadian position, where a judge, after the search has been conducted, determines whether the documents may have been seized. Although Nigeria recognises search and seizure as two separate components, the FIRSEA lays down less stringent requirements for a seizure than for a search,²³⁷ which is contrary to the manner in which Australia, Canada and New Zealand deal with seizure. Nigeria fails to consider the more invasive impact that a seizure may have on a taxpayer's rights.

²³⁷ The reason is that authorisation for a seizure is given by an employee of FIRS whilst a search must be authorised by a judge.

PART 3 TAX OBLIGATION PENDING DISPUTE RESOLUTION

CHAPTER 5 - OBLIGATION TO PAY TAX PENDING DISPUTE RESOLUTION IN SOUTH AFRICA

5.1 INTRODUCTION

When dealing with tax liability, three stages may be identified. First, there must be an activity or scenario that gives rise to the levying of a specific tax. For instance, income tax is levied when taxable income is received by or accrues to a taxpayer during a period of assessment,¹ whilst value-added tax is levied when a vendor² supplies goods or services in the course or furtherance of any enterprise,³ when a person imports goods into South Africa⁴ or when a person imports services.⁵ Customs duty is levied when goods are imported.⁶

The second stage is when the amount of tax payable is determined. In case of income tax and value-added tax, tax liability is generally determined by way of an assessment.⁷ Such an assessment should *inter alia* indicate the assessed amount,⁸ the tax period in respect of which the assessment is made⁹ and the date for paying the assessed amount.¹⁰ For customs duty purposes the amount of duty payable is determined when the goods enter South Africa for use or consumption.¹¹

¹ Section 5(1) of the ITA.

² Section 1 of the VAT Act defines “vendor” as “any person who is or is required to be registered under this Act”.

³ Section 7(1)(a) of the VAT Act.

⁴ Section 7(1)(b) of the VAT Act.

⁵ Section 7(1)(c) of the VAT Act. Section 1 of the VAT Act defines “imported services” as “a supply of services that is made by a supplier who is resident or carries on business outside the Republic to a recipient who is a resident of the Republic to the extent that such services are utilized or consumed in the Republic otherwise than for the purpose of making taxable supplies”.

⁶ Sections 38 & 44 of the CEA.

⁷ Section 1 of the TAA defines “assessment” as “the determination of the amount of a tax liability or refund, by way of self-assessment by the taxpayer or assessment by SARS”. See Croome & Olivier *Tax Administration* (2015) 236 who indicate that in some instances an income tax liability may arise without an assessment. They mention the employer’s liability to pay over employee’s tax as an example.

⁸ Section 96(1)(d) of the TAA.

⁹ Section 96(1)(e) of the TAA.

¹⁰ Section 96(1)(f) of the TAA.

¹¹ Section 45 of the CEA. See also SARS *Customs external guide overview of customs procedures* (28 Mar. 2013) for a general discussion of customs duty.

The third stage is when the taxpayer is obligated to pay the tax. In relation to income tax and value-added tax, the taxpayer is obliged to pay the assessed tax on the date stipulated in the assessment,¹² whilst customs duty is payable when the goods are entered for use in South Africa.¹³

In short: A taxable event, the determination of tax liability and the determination of the payment of the tax.

Dispute resolution procedures are available to a taxpayer who is dissatisfied with his or her tax liability, irrespective of the type of tax. If a taxpayer disputes an income tax or value-added tax liability, the taxpayer may object to the assessment.¹⁴ If SARS disallows the objection, the taxpayer may lodge an appeal with the Tax Board or Tax Court.¹⁵ A taxpayer who is still dissatisfied may appeal to the High Court or in some instances directly to the Supreme Court of Appeal.¹⁶ Apart from following the litigation route, a taxpayer may make use of alternative dispute resolution.¹⁷

Likewise, when a taxpayer disputes his or her customs duty obligation, a process exists to resolve the dispute. Firstly, a taxpayer may use the internal appeals procedure.¹⁸ Furthermore, an alternative dispute resolution procedure is available to the taxpayer.¹⁹ These options are in addition to a taxpayer approaching the courts.²⁰

¹² Section 69(1)(f) read with s 162(1) of the TAA. In addition, s 162(1) of the TAA provides that the Commissioner may by public notice indicate when the obligation to pay taxes arise, or that a tax Act may also provide when this obligation arises.

¹³ Section 47(1) of the CEA.

¹⁴ Section 104 of the TAA.

¹⁵ See Ch 2, par 2.8.6 for further details relating to the Tax Board and Tax Court.

¹⁶ Section 133(2)(a) of the TAA. In terms of s 133(2)(b) an appeal may be brought to the Supreme Court of Appeal if the Tax Court has granted leave to appeal to this court. See Ch 2, par 2.8.6 where it is indicated that the possibility of approaching of the courts ensures that there are impartial forums that may be approached and gives effect to the right of access to courts.

¹⁷ Section 103(2) of the TAA read with rule 13(1) of the Rules promulgated under s 103 of the Tax Administration Act 28 of 2011 as contained in GN 550 in *Government Gazette* 37819 (11 July 2014). See SARS *Dispute resolution guide: guide on the rules promulgated under section 103 of the Tax Administration Act, 2011* (28 Oct 2014) for further reading regarding dispute resolution of income tax and value-added tax disputes. Allowing for dispute resolution procedures gives effect to the right to just administrative action as the taxpayer has an opportunity to state his or her case. Furthermore, the litigation route ensures that a taxpayer's right to access to courts are protected. See Ch 2, para 2.8.5 & 2.8.6 for a discussion of these rights.

¹⁸ As provided for in s 77B of the CEA. SARS *External policy administrative appeals* (22 July 2008) 5 states that the aim of an initial internal appeal is to resolve disputes efficiently and in a cost efficient manner. However, a taxpayer may initiate legal proceedings instead of following this internal procedure. SARS (22 July 2008) 5–8 also indicates that internal administrative appeals

Although the applicable legislation allows for a procedure to dispute tax liability, the so-called “pay now, argue later” rule applies. The essence of this rule is that a taxpayer who disputes an amount payable to SARS is still obliged to pay this amount even though the taxpayer utilises a dispute resolution procedure. Thus, the “pay now, argue later” rule separates adjudication of the merits from payment of the tax debt.²¹

If the “pay now, argue later” rule did not exist, there would be an incentive for a taxpayer to dispute a tax obligation. This may lead to frivolous objections that may cause SARS and the South African government to experience dire financial constraints.²² In *Capstone 556 (Pty) Ltd v Commissioner for SARS*²³ (“*Capstone*”), the court summarised the reasoning behind the “pay now, argue later” rule as follows:

“The considerations underpinning the ‘pay now, argue later’ concept include the public interest in obtaining full and speedy settlement of tax debts and the need to limit the ability of recalcitrant taxpayers to use objection and appeal procedures strategically to defer payment of their taxes”.²⁴

are conducted by the Branch Office Appeal Committees, the Regional Operations Appeal Committees, the Large Business Centres Appeal Committees (head office), Enforcement and Risk Appeal Committee and the Customs National Appeal Committee. See SARS (22 July 2008) 5–8 for further reading relating to the scope of each of these committees.

¹⁹ In terms of s 77I of the CEA read with SARS “External policy dispute resolution” (4 June 2007). In terms of rule 77I.01–77I.23 of the Customs and Excise Rules contained in GN R 1874 in *Government Gazette* 16860 (8 Dec. 1995) the Commissioner must appoint a facilitator and inform the taxpayer of the identity of such a person. Usually the facilitator is an “appropriately qualified officer” of SARS and has to act in accordance with a code of conduct. The facilitator’s objective is to attempt to resolve the dispute in a fair, equitable and lawful manner. See Colesky *A comparative study on customs tariff classification* (unpublished LLD thesis, University of Pretoria (2014)) 140 fn 713 for further details in this regard.

²⁰ For further reading on customs dispute resolution see SARS (4 June 2007); Colesky & Franzsen “The adjudication of customs’ tariff classification disputes in South Africa: lessons from Australia and Canada” (Jan 2015) *CILSA* 259–264 for further reading on customs dispute resolution.

²¹ Standing Committee on Finance: Report Back Hearings *Draft Taxation Laws Amendment Bill, 2014 and Tax Administration Laws Amendment Bill, 2014 – Draft Response Document from National Treasury and SARS, as presented to SCOF* (15 Oct. 2014) 41.

²² *Metcash Trading Ltd v Commissioner for the South African Revenue Service* 2000 (2) SA 232 (W) 243.

²³ [2011] ZAWCHC 297.

²⁴ *Capstone* par 9.

The “pay now, argue later” rule itself does not have a substantial impact on a taxpayer because he or she may simply decide not to pay the disputed tax until the dispute is resolved. Rather, it is the effect of the rule that has a substantial impact. Firstly, interest will accrue on the outstanding tax from the date the tax was payable²⁵ until either the dispute is resolved in favour of the taxpayer or the taxpayer pays the assessed tax. The applicable interest rate from July 2016 is 10.50 per cent per annum.²⁶ Secondly, SARS may proceed with enforcement actions. If the taxpayer fails to pay the disputed tax pending dispute resolution, SARS may implement the so-called “statement procedure”.²⁷ This procedure entails that SARS²⁸ may file a statement, indicating the outstanding tax, as well as any interest and/or penalty payable, with the clerk or registrar of a competent court. The filing of the statement has the effect of a civil judgment. This enables SARS to obtain a writ to attach and sell property of the taxpayer.²⁹ A civil judgment also has an adverse effect on a person’s credit record.³⁰ Another enforcement action that SARS may invoke is to appoint a third party to act on behalf of the taxpayer. The third party would then be

²⁵ Croome & Olivier (2015) 371.

²⁶ SARS “Table 1 Interest rates in respect of the various Acts administered by SARS” (June 2016) available at <http://bit.ly/1RLuT58> (accessed 30 March 2017). This rate of 10.5 per cent is the same as the prime lending rate Standard Bank of South Africa has from 18 March 2016. See Standard Bank of South Africa “Interest rates” available at <http://bit.ly/2sTvZpi> (accessed 12 June 2017).

²⁷ The statement procedure was provided for in s 91(1)(a) of the ITA and s 40(2)(a) of the VAT Act. Currently s 114(1)(a)(ii) of the CEA and s 172 of the TAA provide for the statement procedure. Once the CCA comes into operation, s 895(3) will provide for the statement procedure. Section 172(2) of the TAA specifically provides that SARS may issue this statement even if an objection or an appeal has been lodged. See Silke “Taxpayers and the Constitution: a battle already lost” (2002) *Acta Juridica* 293 regarding the filing of a statement by SARS. In *Metcash Trading v Commissioner for the South African Revenue Service and the Minister of Finance (CC)* 1145 the court held the statement procedure to be constitutional as the execution of the civil judgment necessitates the intervention of court officials. Therefore, a taxpayer’s right to access to courts remains intact. See Keulder *Does the Constitution protect taxpayers’ against the mighty SARS?* (unpublished LLM dissertation, University of Pretoria (2011)) 48–54 where the constitutionality of the statement procedure in terms of the VAT Act and the ITA is discussed.

²⁸ The TAA provides that SARS has the power to file a statement while the other pieces of legislation refer to the Commissioner. However, see Ch 2, par 2.4 where it is indicated that the Commissioner’s powers may be delegated. Consequently, the power to file a statement is referred to as a power of SARS and not simply a power of the Commissioner.

²⁹ *Capstone* par 37.

³⁰ In terms of GN R144 in *Government Gazette* 37386 (26 Feb. 2016) a credit bureau must remove information relating to paid-up judgments from its records. Therefore, an unpaid judgment debt may be displayed on a taxpayer’s credit record.

required to make payment of taxes from money held by the third party on behalf of the taxpayer.³¹

Apart from SARS being able to continue with enforcement actions, Williams adds that “the notion that a person should be obliged to pay a debt that he disputes, and which has not been adjudicated by a court, is fundamentally offensive to ordinary conceptions of justice”.³² The impact of the “pay now, argue later” rule on the right to access to courts may be considered unjust as the taxpayer is obliged to pay tax before having the opportunity to approach an independent forum.

This chapter deals with the “pay now, argue later” rule provided for in South African fiscal legislation.³³ The development of this rule is discussed in two parts. The development of the “pay now, argue later” rule relating to income tax and value-added tax is explained first. This is followed by the development relating to customs duty.

5.2. DEVELOPMENT OF THE “PAY NOW, ARGUE LATER” RULE IN RESPECT OF INCOME TAX AND VALUE-ADDED TAX

The “pay now, argue later” rule relating to income tax and value-added tax has undergone some changes. This section deals with the initial provisions contained in section 88 of the ITA and section 36(1) of the VAT Act, the matter of *Metcash Trading Ltd v Commissioner for the South African Revenue Service and the Minister of Finance* (“*Metcash Trading (HC)*”),³⁴ *Metcash Trading Ltd v Commissioner for the South African Revenue Service and the Minister of Finance* (“*Metcash Trading (CC)*”) where the constitutionality of the “pay now, argue later” rule in terms of the VAT Act was questioned³⁵ and the ensuing amendments. Although these provisions were repealed with the enactment of the TAA, it is essential to consider these provisions and related case law as they provide context with regard to the current

³¹ This power is provided for in s 179 of the TAA and s 114A of the CEA. See Ch 7 which deals with the appointment of a third party on behalf of the taxpayer.

³² Williams “The pay-now-argue-later rule festers in our income tax system (Mobibane case)” (2 Dec. 2011) available at <http://bit.ly/1O5PQ8a> (accessed 21 Apr.2016).

³³ See Ch 1, par 1.4 where it is indicated that this thesis is limited to a discussion of SARS’ enforcement powers relating to income tax, value-added tax and customs duty.

³⁴ 2000 (2) SA 232 (W).

³⁵ 2001 (1) SA 1109 (CC).

“pay now, argue later” rule as provided for in section 179 of the TAA. Lastly, this section examines the current “pay now, argue later” rule in terms of the TAA.³⁶

5.2.1 Initial provisions

Section 36 (1) of the VAT Act provided that:

“The obligation to pay and the right to receive and recover any tax chargeable under this Act shall not, unless the Commissioner so directs, be suspended by any appeal or pending the decision of a court of law, but if any assessment is altered on appeal or in conformity with any such decision or a decision by the Commissioner to concede the appeal to the special board or the special court or such court of law, a due adjustment shall be made, amounts paid in excess being refunded with interest at the prescribed rate (but subject to the provisions of section 45A) and calculated from the date proved to the satisfaction of the Commissioner to be the date on which such excess was received and amounts short-paid being recoverable with penalty and interest calculated as provided in section 39 (1).”³⁷

Section 36(1) of the VAT Act confirmed that the “pay now, argue later rule” applied with regard to a value-added tax obligation³⁸ but if an adjustment was made to the tax owed³⁹ subsequent to the payment of the tax, it would be refunded with interest at the prescribed rate. The prescribed rate that applied immediately before the “pay now, argue later” rule in terms of ITA and VAT Act was repealed, was 8.5 per cent per year.⁴⁰ This *prima facie* compared negatively to the prescribed interest rate relating to debt in instances not regulated in terms of other legislation at the same stage, which was 15.5 per cent per year.⁴¹ However, it must be mentioned that in

³⁶ Portions of this discussion relating to the development of the “pay now, argue later” rule in relation to income tax and value added tax are based on Keulder “Pay now, argue later” rule – before and after the TAA” (Dec. 2013) *PELJ* 125.

³⁷ The provisions of both these Acts relating to the “pay now, argue later” rule were largely identical. Consequently, any discussion relating to provisions of the one Act applies *mutatis mutandis* to the provisions of the other Act unless specifically indicated otherwise.

³⁸ Section 88 of the ITA confirmed the “pay now, argue later” rule in relation to an income tax obligation.

³⁹ This may be because the appeal was upheld or the Commissioner conceded the appeal.

⁴⁰ SARS (June 2015) available at <http://bit.ly/1RLuT58> (accessed 21 Apr. 2016).

⁴¹ Section 1 of the Prescribed Rate of Interest Act 55 of 1975.

terms of section 88(1) of the ITA and section 36(1) of the VAT Act, interest was calculated from the date on which SARS received the excess amount. This means that interest started to accrue from the date on which the taxpayer paid the disputed tax, whilst interest in relation to other debt was calculated only from the date on which a demand for payment was made or a summons issued, whichever occurred first.⁴² Consequently, interest in relation to a repayment by SARS could accrue before interest in relation to other debt could start to accrue.

Although the payment of interest was welcome, it must be emphasised that in some instances it may not have been enough to prevent the taxpayer from experiencing financial ruin by paying the assessed amount pending an objection or appeal.⁴³ The dispute resolution procedure could take a substantial amount of time, which could mean that the taxpayer would be out of pocket for that period of time.⁴⁴ This could severely prejudice a taxpayer and could even lead to the taxpayer's sequestration or liquidation.⁴⁵

Section 36(1) of the VAT Act and section 88(1) of the ITA provided the Commissioner with a discretion to suspend the payment of tax, which constituted administrative action.⁴⁶ Neither the VAT Act nor the ITA stipulated what factors the Commissioner had to consider when exercising this discretion. The absence of such factors was problematic in light of the right to just administrative action as provided for in section 33 of the Constitution and the grounds for review in terms of PAJA.⁴⁷ As there was no indication of what would be relevant factors, it was difficult for a

⁴² Section 2A(2)(a) of the Prescribed Rate of Interest Act. See Ch 5, par 5.3.4.5: the current prescribed interest rate is 10.5 per cent. See *Sage Life Ltd v Minister of Finance* (2001) 66 SATC 181 186 where the court indicated that *mora ex re* is not applicable as the Act itself does not provide a date of payment. The court held that a demand for payment by the taxpayer would constitute *mora ex persona* and that interest would run from then onwards.

⁴³ SAICA "Taxpayers may be at risk with new 'pay now, argue later' rule" (15 Feb. 2011) available at <http://bit.ly/1lk6BxF> (accessed 21 Apr. 2016).

⁴⁴ Du Plessis & Dachs "Pay now argue later" (23 July 2014) *Tax ENSight* available at <http://bit.ly/1FB3OZW> (accessed 21 Apr. 2016).

⁴⁵ Keulder (2013) 144.

⁴⁶ *Metcash Trading (CC)* 1133. See also Croome *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 courts* (unpublished PhD thesis, University of Cape Town (2008)) 158.

⁴⁷ See Ch 2, par 2.8.5 where the right to just administrative action and the interplay between the right to just administrative action and PAJA are discussed.

taxpayer to establish whether the ground for review, namely, whether an administrator has failed to take relevant considerations into account or has taken irrelevant considerations into account, could be relied upon.⁴⁸ Another possible ground for review is that the administrative action was taken arbitrarily.⁴⁹ Furthermore, this uncertainty on the part of the taxpayer was in conflict with the rule of law which is a founding value of the Constitution.⁵⁰

The absence of factors relating to when the Commissioner could exercise his or her discretion was not the only difficulty that the “pay now, argue later” provisions had in relation to taxpayers’ constitutional rights. The “pay now, argue later” rule also affected the right to access to courts as provided for in section 34 of the Constitution.⁵¹ The effect of the “pay now, argue later” rule on a person’s right to access to courts becomes evident when this rule is contrasted with the situation in ordinary civil proceedings where the enforcement of a civil judgment is generally suspended when an appeal is noted.⁵² This appeal may be noted after a final decision or judgment is made.⁵³ Thus, an appeal is noted after the pleading and trial phase has come to an end.⁵⁴ Accordingly, a party to the proceedings would have ample opportunity to state his or her argument, in an open court, prior to the final decision or judgment. The same cannot be said of the “pay now, argue later” rule as a taxpayer did not have an opportunity to state his or her argument as the obligation to pay the taxes remained irrespective of whether he or she opposed liability.⁵⁵

The matter of *Metcash Trading (HC)* challenged the constitutionality of the “pay now, argue later” rule contained in the VAT Act on the grounds that it violated the right to access to courts and the right to property.⁵⁶ Metcash did not pursue an argument regarding the possible infringement of a person’s right to property and, accordingly,

⁴⁸ Section 6(2)(e) of PAJA. See Ch 2, par 2.8.5.4 where the grounds of review in terms of PAJA are discussed.

⁴⁹ Section 6(2)(e)(vi) of PAJA.

⁵⁰ See Ch 2, par 2.7 where the rule of law is discussed.

⁵¹ See Ch 2, par 2.8.6 for a discussion of the right to access to courts.

⁵² Theophilopoulos *et al Fundamental principles of civil procedure* (2015) 391. The exceptions to this general rule are when the appeal was not noted timely, as was the case in *Schmidt v Theron* 1991 (3) SA 126 (C), or if a magistrate or judge orders otherwise.

⁵³ *Marsay v Dilley* 1992 (3) SA 944 (A).

⁵⁴ *Keulder* (2011) 56.

⁵⁵ *Keulder* (2011) 56.

⁵⁶ *Metcash Trading (HC)* 237.

the court only dealt with the effect that the relevant sections of the VAT Act had on a person's right of access to courts.⁵⁷

The reason Metcash did not pursue an argument relating to the right to property may be that it would be difficult to prove that the "pay now, argue later" provision, which is provided for in terms of law of general application, is arbitrary.⁵⁸ In *Metcash Trading (HC)*, the court held that this rule cannot be considered to be arbitrary.⁵⁹ Croome also shared this view. He furthermore stated that a taxpayer may face an uphill battle to convince a court otherwise as this rule exists in other democratic jurisdictions.⁶⁰ I share the court's and Croome's sentiment. Although a taxpayer's use and enjoyment of his or her money may have been infringed upon with the "pay now, argue later" rule,⁶¹ there was and still is a good reason for this rule. The "pay now, argue later" rule ensures the effective collection of taxes. Furthermore, there is a rational link between the reason for the rule and the deprivation caused by it. As a result, the "pay now, argue later" rule is not an arbitrary one. As such, an attack of the "pay now, argue later" rule based on the right to property, which requires an arbitrary deprivation, would have been unsuccessful.

In *Metcash Trading (HC)*, Snyders J held that the "pay now, argue later" rule infringed upon a taxpayer's right to access to courts as SARS acts as a substitute for the court by determining every aspect of the vendor's liability and the enforcement thereof.⁶² Further, she held that all interlocutory relief by the court was precluded by this section.⁶³ She elaborated by stating that: "The prospect that an eventual successful appeal might reverse the situation is no answer to the actual infringement which endures until then".⁶⁴

⁵⁷ *Metcash Trading (HC)* 238.

⁵⁸ See Ch 2, par 2.8.4: s 25(1) of the Constitution provides that no one may be arbitrarily deprived of property.

⁵⁹ *Metcash Trading (HC)* 238.

⁶⁰ Croome (2008) 39.

⁶¹ See Ch 2, par 2.8.4 where it is indicated that an invasion of the use and enjoyment of someone's property would constitute deprivation, which is one of the elements for the right to property to apply.

⁶² *Metcash Trading (HC)* 242.

⁶³ *Metcash Trading (HC)* 242.

⁶⁴ *Metcash Trading (HC)* 242.

The Commissioner argued that a reasonable and justifiable limitation was created for, *inter alia*, the following reasons:

- i) frivolous objections would be made to delay the payment of taxes;
- ii) fraudulent and dishonest tax returns would be encouraged; and
- iii) South Africa cannot afford that taxpayers do not pay taxes promptly.⁶⁵

The court held that a delay *in casu* would not have such a big impact considering the greater scheme of national tax.⁶⁶ It was further held that the limitation placed on a person's right to access to court by the "pay now, argue later" rule was extensive and even though it may only be temporary in nature, the effect could be ominous and permanent.⁶⁷ The limitation was, accordingly, held to be unreasonable and unjustifiable. Consequently, the court *a quo* declared the "pay now, argue later" rule invalid and the matter was referred to the Constitutional Court for confirmation.⁶⁸

In *Metcash Trading (CC)* the Minister of Finance ("Minister") and the Commissioner opposed the confirmation by the Constitutional Court of the order granted in the court *a quo*.⁶⁹ The Minister and the Commissioner argued that the limitation was reasonable and justifiable as there were adequate opportunities for a taxpayer to have a "hearing" on the assessment.⁷⁰ According to the Minister and the Commissioner these opportunities would entail objecting to the assessment, requesting an extension to pay from the Commissioner and if the Commissioner refuses said extension, taking the matter on review to a relevant court as well as appealing to the Tax Court.⁷¹

Metcash contended that the opportunities for a "hearing" on the assessment, as mentioned by the respondent, were insufficient as the taxpayer was in effect

⁶⁵ *Metcash Trading (HC)* 243.

⁶⁶ *Metcash Trading (HC)* 244.

⁶⁷ *Metcash Trading (HC)* 244.

⁶⁸ *Metcash Trading (HC)* 246. For a discussion of *Metcash Trading (HC)* see Vorster "Self-help and the Fiscus – *Metcash Trading Ltd v The Commissioner for SARS (CC)* 24-11-2000 (CCT3/00 Unreported)" (Jan. 2001) *De Rebus* 47; Editorial "Successful constitutional attack on Value-Added Tax Act in High Court" (Feb. 2000) *Taxgram* 1; Olivier "Tax collection and the Bill of Rights" (2001) *TSAR* 194; Silke (2002) *Acta Juridica* 310; Croome & Olivier (2015) 372.

⁶⁹ *Metcash Trading (CC)* 1118.

⁷⁰ *Metcash Trading (CC)* 1118.

⁷¹ *Metcash Trading (CC)* 1118.

compelled to pay and hope that he or she would get the money back at a later stage.⁷² Metcash submitted that there were less invasive means available to effect speedy collection of taxes,⁷³ which include higher interest rates, time-linked penalties and the furnishing of security.⁷⁴

The court, in considering the arguments of the parties, indicated that section 36(1) had two objectives, namely, that the obligation of an aggrieved taxpayer to pay tax was not delayed pursuant to other remedies and, secondly, that the necessary refunds would be made later.⁷⁵ Kriegler J held that the “pay now, argue later” rule was not concerned with access to courts and contained no provision ousting the court’s jurisdiction.⁷⁶

It was concluded that the court *a quo* in *Metcash Trading (HC)* erred in holding that the court’s jurisdiction is ousted and the Constitutional Court declared the “pay now, argue later” rule relating to value-added tax to be in line with the Constitution.⁷⁷

The Constitutional Court judgment has led to some comments and criticism. Some of the comments and criticism were directed to whether the judgment was correct whilst others were concerned with whether the “pay now, argue later” rule would be considered constitutional in relation to income tax as opposed to value-added tax.

Croome agreed with the judgment in *Metcash Trading (CC)* based on the fact that a taxpayer may approach a court to review the matter. In his view, this ensures that the taxpayer’s right to access to courts is respected.⁷⁸ On the other hand, Olivier did not agree with the Constitutional Court’s judgment. She indicated that the taxpayer never argued that the jurisdiction of the court was completely excluded but that this

⁷² *Metcash Trading (CC)* 1119.

⁷³ *Metcash Trading (CC)* 1119.

⁷⁴ *Metcash Trading (HC)* 244. See Ch 6, par 6.5 for the other means used in Canada and New Zealand in order to effect the speedy collection of taxes.

⁷⁵ *Metcash Trading (CC)* 1130.

⁷⁶ *Metcash Trading (CC)* 1132. The court further elaborated on the functioning of the Tax Court and the fact that it functions like an ordinary court. The taxpayer would therefore have access to courts by appealing to the Tax Court.

⁷⁷ *Metcash Trading (CC)* 1137, 1145. See also Editorial “Metcash Constitutional Court judgement” (Dec. 2000) *Taxgram* 1–2; Editorial “The Metcash judgment and the delicate balance between State and taxpayer” (Feb. 2001) *Taxgram* 1–4.

⁷⁸ Croome *Taxpayers’ rights* (2010) 40.

rule excluded the jurisdiction of the court when the rule was invoked.⁷⁹ Drawing on Olivier's criticism, it is submitted that the constitutional attack on the "pay now, argue later" rule was embedded in the fact that the right to access to courts strives to prevent self-help.⁸⁰ The court should have examined whether this rule, at the time it was invoked, unreasonably allowed SARS to help itself by becoming the judge in its own case. The question, therefore, should not be whether the taxpayer would have had access to courts at some stage, but rather whether the taxpayer would have an opportunity to access an impartial forum before being obliged to pay the assessed amount.⁸¹

The Constitutional Court's reliance on the review procedure also seems to be misplaced. Olivier⁸² referred to *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* ("Dawood")⁸³ where it was held that "the exercise of a discretionary power may subsequently be successfully challenged on administrative grounds, for example, that it was not reasonable, does not relieve the legislature of its constitutional obligation to promote, protect and fulfil the rights entrenched in the Bill of Rights".⁸⁴ Consequently, the legislature has a duty to ensure that provisions are constitutional even though an administrative decision may be taken on review.⁸⁵

Olivier also commented that the court did not deal with the argument raised by the applicant that there are less invasive ways to effect speedy collection of tax.⁸⁶ This consideration is important seeing that whether there are less invasive ways to achieve SARS' objective is one of the factors the court had to consider when

⁷⁹ Olivier (2001) *TSAR* 196.

⁸⁰ See Ch 2, par 2.8.6.

⁸¹ Keulder (Dec. 2013) *PELJ* 140.

⁸² Olivier (2001) *TSAR* 197.

⁸³ 2000 (8) *BCLR* 837 (CC).

⁸⁴ *Dawood* par 48.

⁸⁵ If there was no duty on the legislature to ensure the protection of a person's rights from the onset, the fact that a taxpayer could take the matter on review would not provide sufficient protection of a taxpayer's rights *ex post facto*. This is because the grounds for review are fairly narrow and the remedies available when a court reviews the Commissioner's discretion not to suspend payment are limited. As indicated in Ch 2, par 2.8.5.4, s 8 of PAJA provides that the court may grant an order directing the Commissioner to provide reasons or reconsider the decision. The court does not have the power to overturn the Commissioner's decision.

⁸⁶ Olivier (2001) *TSAR* 199.

determining whether a limitation is a reasonable and justifiable restriction on a person's constitutional rights.⁸⁷ Olivier also stated that that if legislation defined the grounds upon which the Commissioner should exercise its discretion to suspend payment pending an objection or an appeal, a person's right to access to courts would be better protected.⁸⁸ Olivier did not indicate exactly how defining the grounds upon which a suspension would be granted could assist in protecting a person's right to access to courts. It may be that she envisaged that providing grounds would bring about some certainty for taxpayers. This certainty may dispense the impression that the "pay now, argue later" is applied selectively without any clear criteria. SARS would also appear to act in a more transparent manner. Consequently, the notion that a taxpayer is at the mercy of SARS relating to whether the obligation to pay taxes was suspended or not may be disposed of if the grounds are known. Another important aspect that providing grounds relating to SARS' discretion would address, is that SARS' broad discretion would be curbed. Providing the grounds would thus ensure compliance with the rule of law.⁸⁹

As to the question whether the court would have come to the same conclusion if the matter related to income tax as opposed to value-added tax, it must be borne in mind that the "pay now, argue later" rule contained in the VAT Act was largely identical to that of the ITA.⁹⁰ Therefore, Croome stated that the "pay now, argue later" provisions in the ITA would also be found constitutional based on *Metcash Trading (CC)*.⁹¹ One of the reasons for Croome's view was that the ITA, like the VAT Act, is a law of general application that applies to everyone.⁹² Furthermore, the "pay now, argue later" rule in terms of the ITA would also constitute a reasonable and justifiable limitation of a taxpayer's rights as the collection of tax is essential to ensure that the government is able to fund its expenses.⁹³

⁸⁷ See Ch 2, par 2.8.7 where the limitation of constitutional rights in terms of s 36 of the Constitution is discussed.

⁸⁸ Olivier (2001) *TSAR* 199.

⁸⁹ *Dawood* 842. See also Ch 2, par 2.7 where the rule of law is discussed.

⁹⁰ See Ch 5, par 5.1.

⁹¹ Croome (2008) 173; Croome (2010) 40. See also Croome "Paying up or arguing first" (2001) *Business Day Professional* 6.

⁹² See Ch 2, par 2.8.7 where it is indicated that in order for a limitation of a right to be constitutional it must, amongst other things, be a limitation in terms of a law of general application.

⁹³ Croome (2010) 40.

On the other hand, Williams stated that it is not a foregone conclusion that the court would have come to the same conclusion in *Metcash Trading (CC)* if it was an income tax matter.⁹⁴ The court in *Metcash Trading (CC)* specifically drew a distinction between income tax and value-added tax.⁹⁵ First, the court indicated that value-added tax liability arises continuously, unlike income tax liability that arises once an assessment has been issued.⁹⁶ Secondly, vendors act as collection agents on behalf of SARS⁹⁷ as they may set off “tax incurred on enterprise inputs (input tax) from the tax collected on supplies made by the enterprise (output tax)”.⁹⁸ Finally, the calculation of value-added tax payments is therefore less complicated than that of income tax.⁹⁹ Accordingly, the court held that with income tax, the scope for conflict regarding interpretation of the statute or accounting practices is far greater than in case of value-added tax.

However, the grounds upon which the court distinguished income tax and value-added tax are susceptible to criticism. Firstly, it is submitted that income tax liability, similar to value-added tax liability, depends on an activity which triggers the levying of the specific tax. Thus, in both instances the liability arises continuously or sporadically depending on how often an activity that triggers a tax liability occurs.¹⁰⁰ Secondly, the fact that a vendor acts as a collection agent with regard to output tax is not significant. In *Director of Public Prosecutions, Western Cape v Parker (“Parker”)*,¹⁰¹ the court held that the relationship between SARS and a value-added tax vendor is one of debtor/creditor and not a relationship of trust.¹⁰² Thus, the fact that a vendor holds money on behalf of SARS as an agent does not change the nature of the relationship between the (vendor) taxpayer and SARS. Lastly, the court’s broad statement that the scope for conflict relating to income tax would be

⁹⁴ Williams “Unresolved aspects of the ‘pay now, argue later’ rule” (Jan. 2012) *Synopsis* 4.

⁹⁵ *Metcash Trading (CC)* 1121-1122, 10, 13. See also Croome & Olivier (2015) 372.

⁹⁶ *Metcash Trading (CC)* 1121.

⁹⁷ *Metcash Trading (CC)* 1122.

⁹⁸ SARS VAT 404 *Guide for vendors* (31 Mar. 2015) 2. See Silver & Beneke *Deloitte VAT Handbook* (2013) 14 for a discussion of input and output tax.

⁹⁹ *Metcash Trading (CC)* 1125.

¹⁰⁰ The second stage relating to tax liability, namely, when the tax amount payable is determined.

¹⁰¹ 2015 (4) SA 28 (SCA).

¹⁰² *Parker* par 9. The court indicated that it is a relationship of debtor-creditor because when a value-added tax vendor fails to pay over the tax that is due and payable, SARS may sue the vendor for payment. Also, this non-compliance would constitute a non-compliance offence as opposed to common-law theft of which a person would be guilty if the relationship was one of trust.

greater is wrong. Determining an income or value-added tax liability would depend on the complexity of a specific situation.

In *Capstone*, the court remarked:

“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.”¹⁰³

This remark in *Capstone*, in line with the *Metcash Trading (CC)* judgment, indicates that constitutional scrutiny of the “pay now, argue later” rule in relation to income tax might render a different result than when this rule is considered in terms of value-added tax as value-added tax is self-assessed and income tax not. The court did not elaborate on this aspect as it did have to be considered in the specific matter.¹⁰⁴ The court possibly was of the view that with value-added tax, the taxpayer would, to a certain extent, have had an opportunity to state his or her case as he or she is responsible for assessing his or her own value-added tax liability. On the other hand, with income tax the taxpayer does not have the same opportunity as he or she has to pay tax as assessed by SARS. However, such an argument would be flawed. Generally, the information provided by the taxpayer, be it the self-assessment of the value-added tax liability or a return¹⁰⁵ relating to income tax liability, would be used to

¹⁰³ *Capstone* par 9.

¹⁰⁴ *Capstone* par 9.

¹⁰⁵ According to s 1 of the TAA, a “return” refers to information submitted to SARS which forms the basis of an assessment.

determine the taxpayer's liability.¹⁰⁶ Consequently, the taxpayer has the same opportunity to provide information to SARS irrespective of whether it relates to income tax or value-added tax.

5.2.2 Amendment of section 88 of the ITA and section 36 of the VAT Act

Olivier's concern that the grounds of the Commissioner's discretion should be defined, was addressed in SARS' Media Release 27, which sets out the circumstances in which the Commissioner may exercise his or her discretion to suspend payment pending an appeal in favour of the taxpayer.¹⁰⁷ One such instance was when payment of the whole amount would cause irreversible damage if the taxpayer's appeal was successful, and the circumstances of the matter created reasonable doubt.¹⁰⁸ Furthermore, the Commissioner would take other relevant circumstances into consideration, such as whether the taxpayer would be able to pay the amount in dispute if the appeal was unsuccessful.¹⁰⁹

In 2009, the Taxation Laws Second Amendment Act ("TLSA")¹¹⁰ provided further clarity and certainty by amending section 88 of the ITA and section 36 of the VAT Act.¹¹¹ The sections were amended to contain the factors that the Commissioner could take into consideration when exercising its discretion to suspend a payment pending dispute resolution. These factors were:

- i) the amount involved;
- ii) the taxpayer's compliance history;
- iii) whether the taxpayer might alienate his assets during the postponement of payment;

¹⁰⁶ This does not apply to instances where SARS furnished an additional assessment based on information obtained, for example, by conducting an audit.

¹⁰⁷ SARS *Media Release 27* of 2000 (24 Nov. 2000) available at <http://bit.ly/1EZmzFC> (accessed 2 Mar. 2010 – no longer available). See Ch 5, par 5.2.1.

¹⁰⁸ SARS (24 Nov. 2000) available at <http://bit.ly/1EZmzFC> (accessed 2 Mar. 2010 – no longer available). It is not clear what this "reasonable doubt" refers to. Is it reasonable doubt as to whether the taxpayer's appeal would be successful or reasonable doubt as to whether the taxpayer would be able to pay the assessed amount?

¹⁰⁹ SARS (24 Nov. 2000) available at <http://bit.ly/1EZmzFC> (accessed 2 Mar. 2010 – no longer available).

¹¹⁰ 18 of 2009.

¹¹¹ Further clarity was provided by including additional factors. Certainty was provided because these factors were contained in legislation and not in a media release with no binding effect.

- iv) whether the taxpayer is able to provide adequate security for the payment of the assessed amount;
- v) whether payment of the amount would cause irreparable financial hardship to the taxpayer;
- vi) whether sequestration or liquidation proceedings are impending;
- vii) whether the taxpayer had failed to furnish requested information; and
- viii) whether fraud was involved in the origin of the dispute.¹¹²

Although the factors provided for in the TSLA could be seen to ensure some legal certainty relating to when payment could be suspended pending dispute resolution, and consequently addressed Olivier's comment that such factors were required, there were still "on-going confusion and misunderstandings".¹¹³

Williams remarked that there was no indication of the relative weight that should be afforded to each of the above factors.¹¹⁴ Moreover, the relevance of some of the factors was questionable. Williams questioned whether a large amount of tax in dispute was an indication of whether suspension of payment would be allowed or refused.¹¹⁵

The question whether payment of the amount would cause irreparable financial hardship to the taxpayer was also confusing. Williams stated that the payment of any

¹¹² Goldswain *The winds of change – an analysis and appraisal of selected constitutional issues affecting the rights of taxpayers* (unpublished PhD thesis, University of South Africa (2012)) 147 indicated that most of these factors were concerned with whether the taxpayer has "clean hands". For a discussion of the factors contained in the amended s 88 of the ITA and s 36 of the VAT Act, see SARS "Pay now, argue later' principle clarified" (14 Feb 2011) available at <http://bit.ly/1fMApHm> (accessed 21 Apr. 2016); Phato & Spira "Relief for taxpayers: 'Pay now, argue later' rule clarified" (22 Sept. 2011) available at <http://bit.ly/1HRQilU> (accessed 21 Apr. 2016); Croome "Payment of tax during an objection regulated" (22 Mar. 2011) available at <http://bit.ly/1OhaNxz> (accessed 21 Apr. 2016), ENS "Pay now, argue later" (2009) available at <http://bit.ly/1TFo9Xq> (accessed 21 Apr. 2016); Goldberg & de Villiers Inc "Pay now, argue later – SARS 1, taxpayers 0" (2 Feb. 2012) available at <http://bit.ly/1K9t7Yd> (accessed 21 Apr. 2016); McFadden "Pay now and argue later" (23 Mar. 2012) available at <http://bit.ly/1TFoMjU> (accessed 21 Apr. 2016); Daya & Gers "SARS clarifies the" (29 Apr. 2011) *Tax ENSight* available at <http://bit.ly/1Hxo7LU> (accessed 21 Apr. 2016); SAPA "Law clarifies 'pay now, argue later' rule: SARS" (14 Feb. 2011) available at <http://bit.ly/1CG8FOP> (accessed 21 Apr. 2016); Williams (Jan. 2012) *Synopsis* 6.

¹¹³ Williams (Jan. 2012) *Synopsis* 5.

¹¹⁴ Williams (Jan. 2012) *Synopsis* 6.

¹¹⁵ Williams (Jan. 2012) *Synopsis* 6.

amount would be reparable by a damages award.¹¹⁶ However, this may not be the case when the objection and appeal procedure took a substantial amount of time which severely prejudiced a taxpayer or even lead to the taxpayer's sequestration or liquidation. Also, Du Plessis and Dachs point towards a "catch-22"¹¹⁷ situation relating to whether irreparable financial hardship was present. If the taxpayer argued that the payment of tax would not result in irreparable financial hardship, SARS in all likelihood would then not suspend the payment of taxes. Conversely, if the taxpayer argued that the payment of the tax pending an objection or appeal would lead to irreparable financial hardship, SARS could be concerned that the taxpayer would not be able to pay the tax at a later stage and decide not to suspend the payment.¹¹⁸

In relation to the factor dealing with whether there was fraud involved in the origin of the dispute, Rood indicated that it was unclear whether the fraud only referred to an alleged or an actual fraud conviction. If an allegation of fraud was taken into consideration it would be unfair as the taxpayer would not have had the opportunity to defend him- or herself against the allegation.¹¹⁹ Moreover, an adverse finding by SARS based on whether the taxpayer was accused of an offence is in conflict with section 35(3)(h) of the Constitution which provides that an accused person has the right to be presumed innocent until proven guilty.¹²⁰

The confusion and misunderstandings were not limited to academic scholars and commentators. In *Mokoena v Commissioner for SARS* ("Mokoena")¹²¹ and *Capstone*, the courts came to entirely different conclusions on a pertinent aspect of

¹¹⁶ Williams (Jan. 2012) *Synopsis* 6.

¹¹⁷ Author unknown *Collins Dictionary* available at <http://bit.ly/1dpX2zH> (accessed 9 Nov. 2016) defines the phrase "catch-22" as "a situation in which any move that a person can make will lead to trouble". According to Author unknown *The phrase finder* available at <http://bit.ly/1GkUheg> (accessed 10 Nov. 2016) the phrase "catch-22" originated from the title of a novel by Joseph Heller. In this 1961 novel the "catch" was that if a pilot applied to be exempt from threatening bombing missions based on insanity, he would be considered sane as that is precisely what a sane person would do.

¹¹⁸ Du Plessis & Dachs (23 July 2014) *Tax ENSight* available at <http://bit.ly/1FB3OZW> (accessed 3 June 2015).

¹¹⁹ Rood "Pay now, argue later" (13 Aug. 2009) *Finweek* 44.

¹²⁰ It is submitted that other instances where an adverse finding is made based on an allegation of a crime being committed, the matter should be considered by an impartial party. For instance, when a judge or magistrate's considers a bail application, s 60(5) of the CPA allows the presiding officer to consider the crime that has allegedly been committed.

¹²¹ 2011 (2) SA 556 (GSJ).

the “pay now, argue later” rule.¹²² In the former, the court held that whilst SARS was competent to demand payment of tax pending an objection or appeal it could not obtain judgment in the interim. The “judgment” referred to here was the filing of a statement in terms of section 40(2)(a) of the VAT Act.¹²³ This decision was criticised in *Capstone* where the court found that the filing of a statement does not amount to a judgment.¹²⁴ Binns-Ward J conceded that even though it was not a judgment in the ordinary sense, it had the effect of a judgment as SARS was able to obtain a writ of execution.¹²⁵

5.2.3. The TAA

The TAA came into operation on 1 October 2012 and the “pay now, argue later” rule contained in the ITA and VAT Act was repealed.¹²⁶ The “pay now, argue later” rule in relation to income tax and value-added tax is now regulated by section 164 of the TAA.

5.2.4.1 *Obligation to pay not suspended*

Section 164(1) of the TAA provides as follows:

“Unless a senior SARS official otherwise directs in terms of subsection (3) –
(a) the obligation to pay tax; and
(b) the right of SARS to receive and recover tax;
will not be suspended by an objection or appeal or pending the decision of a court of law pursuant to an appeal under section 133.”¹²⁷

Section 164(1) of the TAA confirms the previous situation, namely, that a person needs to “pay now, argue later”. Therefore, the same concerns relating to the

¹²² Williams (Jan. 2012) *Synopsis* 5.

¹²³ *Mokoena* 559. See Ch 5, par 5.1 regarding the statement procedure.

¹²⁴ *Capstone* par 37.

¹²⁵ *Capstone* par 37.

¹²⁶ Section 271 read with Sch 1 to the TAA. See Milner “The Tax Administration Act – pay now & argue later” (Oct. 2012) *Tax Shock Horror Newsletter* available at <http://bit.ly/1UID8S6> (accessed 10 Nov. 2016); Buttrick “Whether wrong or right, pay now” (Feb. 2013) available at <http://bit.ly/1Gbqwb4> (accessed 10 Nov. 2016); Keulder (Dec. 2013) *PELJ* 125 for a discussion of the difference between the TAA on the one hand and the ITA and VAT Act’s “pay now, argue later” rule on the other.

¹²⁷ Section 133 of the TAA relates to an appeal against a decision of the Tax Court.

constitutionality of the “pay now, argue later” rule that were discussed in relation to the erstwhile provisions are relevant in respect of the TAA.

As in the previous situation, a taxpayer may request a suspension of a payment obligation if he or she intends to lodge an objection or an appeal against an assessment.¹²⁸ In terms of the TAA, a senior SARS official¹²⁹ has a discretion to consider whether a suspension may be granted. However, even if the obligation to pay the tax is suspended, interest will continue to accrue on the outstanding tax from the date stipulated in the assessment and not from the date on which the dispute is resolved.¹³⁰

5.2.4.2 *Factors to consider when exercising the discretion to suspend payment of disputed tax*

The initial section 164(3) of the TAA provided that a senior SARS official could consider factors that were identical to those inserted into the ITA and VAT Act by the TLISA.¹³¹ These factors were:

- (i) the amount involved;
- (ii) the taxpayer’s compliance history;
- (iii) whether the taxpayer might alienate his assets during the postponement of payment;
- (iv) the taxpayer’s ability to furnish security;
- (v) whether the payment pending an objection or an appeal would cause irreparable financial hardship;
- (vi) whether there were any imminent sequestration or liquidation proceedings;
- (vii) whether the taxpayer has failed to furnish required information; or

¹²⁸ Section 164(2) of the TAA. Milner (Oct. 2012) *Tax Shock Horror Newsletter* available at <http://bit.ly/1UID8S6> (accessed 10 Nov. 2016) states that prior to the TAA, SARS required proof that an objection was lodged before suspending the obligation. Section 164(2) of the TAA provides that a taxpayer may request such a suspension if he or she disputes or intends to dispute the tax liability. Consequently, the intention to dispute would be sufficient.

¹²⁹ In terms of s 1 of the TAA a “senior SARS official” is defined as “the Commissioner, a SARS official who has specific written authority from the Commissioner to do so or a SARS official occupying a post designated by the Commissioner for this purpose”. See Ch 3, par 3.2.2.1 for Moosa’s criticism regarding the concept “senior SARS official”.

¹³⁰ Croome & Olivier (2015) 433. See Ch 5, par 5.1: the current interest rate is 10.25 per cent per annum.

¹³¹ See Ch 4, par 5.2.2 in this regard.

(viii) whether any fraud was involved in the origin of the dispute.¹³²

The list of factors was amended on 20 January 2015 by the Tax Administration Laws Amendment Act (“TALAA, 2014”).¹³³ Solomon observes that the list of factors has been shortened. However, she correctly indicates that the introductory part of section 164(3) now provides that all relevant factors including those specifically mentioned should be taken into account.¹³⁴ This means that the list of factors is no longer exhaustive.¹³⁵ Thus, although the factors regarding the amount of tax involved,¹³⁶ imminent sequestration or liquidation proceedings and the failure to furnish information have been removed, they may still be taken into account if they are relevant due to the wording of the introductory part of section 164(3).

The factor relating to whether a taxpayer might alienate his or her assets when a suspension of payment is granted, was amended. This factor now also includes the question whether recovery of the disputed tax will be in jeopardy.¹³⁷ Although the TAA does not specifically indicate when recovery of tax will be in jeopardy, *The Short guide to Tax Administration Act, 2011* provides some indication of when the recovery of tax may be in jeopardy. Apparently, this will be the case when there is some risk that the tax may be lost if the collection is delayed.¹³⁸

¹³² Section 164(3) of the TAA.

¹³³ 44 of 2014. The specific amendment is contained in s 50 of the TALAA, 2014. National Treasury *Memorandum of the objects of the Tax Administration Laws Amendment Bill, 2014*” (2014) 46 states that the amendment of s 164 is aimed at simplifying the criteria that a senior SARS official has to consider.

¹³⁴ Solomon “‘Pay now argue later’ – recent amendments to section 164 of the Tax Administration Act no 28 of 2011” (22 Apr. 2015) *Tax ENSight* available at <http://bit.ly/1OdGCes> (accessed 9 Nov. 2016).

¹³⁵ Louw “Changes to the criteria considered by SARS when suspending payment of tax” (30 Jan. 2015) available at <http://bit.ly/1MsljQy> (accessed 5 June 2015 – no longer available).

¹³⁶ At the Standing Committee on Finance: Report Back Hearings (15 Oct. 2014) 41 a comment similar to Williams’ comment (see Ch 5, par 5.3.3) relating to the relevance of this factor was made. The relevance was questioned as a small amount of tax involved could result in not suspending payment whilst a significant amount may lead to the same result.

¹³⁷ Section 164(3)(a) of the TAA.

¹³⁸ SARS *Short guide to the Tax Administration Act, 2011 (28 of 2011)* (5 June 2013) 36. This guide deals with jeopardy in terms of jeopardy assessments as envisaged in s 94 of the TAA. In terms of this section SARS may make a jeopardy assessment before a return is due, if the Commissioner is satisfied that it is necessary to secure the collection of tax which would otherwise be in jeopardy. An example of when a jeopardy assessment would be appropriate is when a taxpayer is on the brink of leaving South Africa without paying his or her outstanding taxes. See also Solomon (22 Apr. 2015) *Tax ENSight* available at <http://bit.ly/1OdGCes> (accessed 9 Nov. 2016).

The factor which dealt with the taxpayer's ability to furnish security was also amended. The amended factor takes into account "whether the taxpayer has tendered adequate security for the payment of the disputed tax and accepting it is in the interest of SARS or the *fiscus*".¹³⁹ Since the taxpayer now has to tender security as opposed to previously proving the ability to provide the security, a heavier burden is placed on the taxpayer to comply with this factor.¹⁴⁰ In addition, the factor now requires a senior SARS official to determine whether accepting the security, instead of not suspending the payment obligation, would be beneficial to SARS or the *fiscus*. The question might arise as to when it would be more beneficial to accept security instead of performance (that is, the payment of the assessed tax). If SARS decides not to suspend the payment obligation, it does not automatically mean that it would receive the outstanding disputed tax as SARS might need to use its enforcement powers to obtain it.¹⁴¹ Consequently, SARS needs to weigh up the certainty of furnished security against the probability that it might need to enforce collection of the outstanding tax.

The factor relating to irreparable financial hardship has also been amended. Firstly, the word "financial" was omitted. Solomon considers this to mean that the legislature recognises that a taxpayer may suffer hardship, other than financial hardship, when he or she is compelled to pay tax that is in dispute.¹⁴² The question arises as to what would constitute irreparable "hardship" as this concept is subjective in nature. This factor now also includes the question whether the hardship that the taxpayer may suffer may be justified by the prejudice that SARS or the *fiscus* may suffer if the tax is not paid.¹⁴³ Consequently, this amendment has the effect that it is not simply

¹³⁹ Section 164(3)(e) of the TAA.

¹⁴⁰ Solomon (22 Apr. 2015) *Tax ENSight* available at <http://bit.ly/1OdGCes> (accessed 9 Nov. 2016). See also Louw (30 Jan. 2015) available at <http://bit.ly/1MsljQy> (accessed 5 June 2015 – no longer available).

¹⁴¹ See Ch 5, par 5.1 where the enforcement power relating to the statement procedure and third party appointments is discussed. See also Ch 7 which deals with third party appointments in South Africa.

¹⁴² Solomon (22 Apr. 2015) *Tax ENSight* available at <http://bit.ly/1OdGCes> (accessed 9 Nov. 2016). Solomon does not provide an example of other hardship that a taxpayer may suffer besides financial hardship. It is difficult to provide an example which does not indirectly relate to a financial aspect. It may be that the legislature meant that the hardship does not need to be directly related to a person's finances.

¹⁴³ Section 164(3)(d) of the TAA.

considering the taxpayer's hardship, but rather weighing it up against the interests of SARS and the *fiscus*.¹⁴⁴ It is impossible to understand how SARS can act in an objective manner when weighing the taxpayer's hardship against SARS' own interests. This is also in conflict with the maxim *nemo iudex in propria causa*.¹⁴⁵ Therefore, the fact that SARS has to exercise its discretion while taking its own interest into consideration, infringes upon the taxpayer's rights to just administrative action and access to courts.

The last amendment deals with whether fraud is involved in the origin of the dispute. As indicated above,¹⁴⁶ it was uncertain whether this factor was concerned with alleged fraud or an actual fraud conviction. This uncertainty has now been addressed as section 164(3)(c) of the TAA expressly provides that it is concerned with whether fraud was *prima facie* involved.¹⁴⁷ Despite the clarity that this section provides, the inclusion of the words "*prima facie*" confirms that Rood's concern that a taxpayer would not have the opportunity to defend him- or herself against the allegation of the fraud¹⁴⁸ and my concern relating a person's right to be presumed innocent until proven guilty¹⁴⁹ are justified.

It appears that after the amendment of the list of factors it would be more difficult for a taxpayer to have the obligation to pay taxes suspended than it was before the amendments were introduced.¹⁵⁰

5.2.4.3 *Grace period*

Section 164(6) adds a new facet to the "pay now, argue later" rule. In terms of this section,

"[d]uring the period commencing on the day that–

(a) SARS receives a request for suspension under subsection (2); or

¹⁴⁴ Louw (30 January 2015) available at <http://bit.ly/1MsljQy> (accessed 5 June 2015 – no longer available).

¹⁴⁵ This rule means that "no one may be a judge in his or her own case".

¹⁴⁶ See Ch 5, par 5.2.2.

¹⁴⁷ Section 164(3)(c) of the TAA.

¹⁴⁸ See Ch 5, par 5.2.2 where Rood's concern is discussed.

¹⁴⁹ The right to be presumed innocent is contained in s 35(3)(h) of the Constitution.

¹⁵⁰ Louw (30 Jan. 2015) available at <http://bit.ly/1MsljQy> (accessed 5 June 2015 – no longer available).

(b) a suspension is revoked under subsection (5), and ending 10 business days after notice of SARS' decision or revocation has been issued to the taxpayer, no recovery proceedings may be taken unless SARS has a reasonable belief that there is a risk of dissipation of assets by the person concerned".¹⁵¹

This means that once the taxpayer has requested a suspension in terms of section 164(2), no enforcement proceedings may be taken until ten days after SARS has delivered its decision to reject a suspension.¹⁵² Thus, a taxpayer would have an automatic suspension if SARS fails to deliver its decision as to whether the obligation is suspended or not. Nevertheless, SARS is allowed to continue with the collection procedures in the absence of delivering its decision if SARS has a reasonable belief that the taxpayer may alienate assets.

Section 164(6) of the TAA provides a taxpayer with a degree of certainty because the taxpayer is guaranteed that SARS will not continue with any collection steps during the time that the collection of tax is stayed, unless SARS believes that the taxpayer may alienate assets. As a result, SARS may do its utmost best to reach a decision regarding the request for suspending the obligation to pay taxes pending dispute resolution as soon as possible to ensure that it is able to continue collecting taxes swiftly. This provides an incentive for SARS to reach a quick decision or find reasons why it believes the taxpayer may alienate assets. This may result in senior SARS officials not taking into account all relevant considerations in determining whether payment pending an objection or an appeal may be suspended. If this is indeed the case, taxpayers would have to take the decision on review in order to have it re-evaluated.¹⁵³ This may have severe financial and time implications for the taxpayer.

¹⁵¹ Section 164(6) of the TAA. Section 1 of the TAA provides that a business day is "a day which is not a Saturday, Sunday or public holiday". The remainder of this definition deals with business days in the context of ch 9 of the TAA that deals with the dispute resolution process.

¹⁵² These enforcement proceedings may include the statement procedure and the appointment of a taxpayer's agent. See Ch 5, par 5.1 where these two proceedings are discussed.

¹⁵³ In terms of s 6(e)(iii) of PAJA this will constitute a ground for judicial review.

In a matter that was heard in 2015,¹⁵⁴ SARS demanded payment of the assessed tax before SARS' decision to reject a request for suspension of the taxpayer's obligation pending an appeal could be reviewed by a court. The taxpayer could not reach an agreement with SARS to suspend the obligation until the review was finalised and approached the court for an urgent interdict. The taxpayer obtained the interdict which prevented SARS from continuing with enforcement actions pending the review.¹⁵⁵ Although it is encouraging to see that a taxpayer possibly has recourse by way of an interdict to prevent enforcement actions pending a review, the cost implications associated with bringing such an application may deter some taxpayers from taking this route.

5.2.4.4 *Request for suspension denied or revoked*

A decision to suspend the payment of taxes pending an objection or appeal will be revoked instantly if no objection is lodged. The suspension will also be revoked if the objection is disallowed and the taxpayer does not lodge an appeal or if the appeal is unsuccessful and no further appeal is or can be lodged.¹⁵⁶

The TAA also provides instances when a request to suspend the payment obligation pending an objection or an appeal may be denied or a suspension already granted may be revoked.¹⁵⁷ These instances are:

- (i) if a material change has occurred since the official decided to suspend the payment;¹⁵⁸
- (ii) on further consideration of the factors, the suspension should not have been granted;¹⁵⁹
- (iii) when the objection or appeal was frivolous or;¹⁶⁰

¹⁵⁴ The merits of the taxpayer's liability had not yet been decided on and accordingly the judgment relating to the interdict was not made available. See ENS "Taxpayer victory as 'pay now, argue later' principle successfully challenged" (3 Sept. 2015) available at <http://bit.ly/1icqGLN> (accessed 10 Nov. 2016) where some details of this case are discussed by the taxpayer's attorneys of record, ENSafrica.

¹⁵⁵ This interdict was obtained on 31 Aug. 2015.

¹⁵⁶ Section 164(4) of the TAA.

¹⁵⁷ Section 164(5) of the TAA.

¹⁵⁸ Section 164(5)(d) of the TAA.

¹⁵⁹ Section 164(5)(a) of the TAA. It is submitted that the factors where material changes and further consideration are considered may only relate to the revoking of an already suspended payment obligation.

¹⁶⁰ Section 164(5)(a) of the TAA.

- (iv) when the objection or appeal was used by the taxpayer simply to delay the payment of tax.¹⁶¹

The question arises as to when can it be said that an objection or an appeal is made frivolously¹⁶² or simply to delay the payment of tax. It is submitted that in order for SARS to determine whether the objection or appeal was made frivolously or to delay the payment of taxes, SARS would need to deal, to a certain extent, with the merits of the matter. This distracts from the fact that the “pay now, argue later” should not be concerned with the adjudication of the merits relating to the dispute.¹⁶³

If a taxpayer is of the opinion that SARS has incorrectly identified the taxpayer's objection or appeal as frivolous or aimed at delaying payment of tax, he or she may take this administrative decision on review in terms of PAJA. A taxpayer may possibly rely on the ground that the senior SARS official has taken irrelevant considerations into account or relevant considerations were not taken into account.¹⁶⁴ In addition, a taxpayer who is dissatisfied with the non-suspension decision may approach the Office of the Tax Ombud¹⁶⁵ or the Office of the Public Protector,¹⁶⁶ request to withdraw or amend the decision not to suspend,¹⁶⁷ or follow

¹⁶¹ Section 164(5)(b) of the TAA.

¹⁶² See Croome “Dear SARS: objections and appeals” (1 May 2008) *Accountancy SA* available at <http://bit.ly/1M6ZwOP> (accessed 22 June 2015) where he also states that in practice it may be difficult to determine whether objections are frivolous or not.

¹⁶³ See Standing Committee on Finance: Report Back Hearings (15 Oct. 2014) 41. See also Ch 5, par 5.1 in this regard.

¹⁶⁴ This ground of review is provided for in s 6(2)(e)(iii) of PAJA.

¹⁶⁵ In terms of s 16 of the TAA, the Office of the Tax Ombud is mandated to review and address complaints that relate to service, procedural or administrative matters that arise from the application of a tax Act. Section 17 of the TAA provides that the office of the Tax Ombud does not review legislation, tax policy or a decision which is subject to objection or appeal. On 1 Oct. 2013 retired Judge President Bernard Ngoepe was appointed as the first Tax Ombud. See Treasury “Media statement Minister of Finance appoints Tax Ombud” (1 Oct. 2013) available at <http://bit.ly/1QEY91> (accessed 10 Nov. 2016). For further reading regarding the Tax Ombud, the Tax Ombud's website (<http://www.taxombud.gov.za/>) may be consulted.

¹⁶⁶ In terms of s 181(a) of the Constitution, the Office of the Public Protector is a state organisation that should strengthen the democracy of South Africa. Section 182 of the Constitution provides that this office investigates conduct by the state or public administration that is allegedly improper or would lead to prejudice. As indicated in Ch 2, par 2.4 SARS forms part of the public administration in terms of s 195(2)(b) of the Constitution. Accordingly, the Office of the Public Protector may investigate the conduct of SARS. For further reading regarding the Office of the Public Protector, the Office of the Public Protector's website (<http://www.pprotect.org/index.asp>) may be consulted.

¹⁶⁷ This can be done in terms of s 9(1)(b) of the TAA.

SARS' administrative complaints resolution procedure.¹⁶⁸ The decision of a senior SARS official to suspend the payment of taxes is not subject to objection and appeal.¹⁶⁹

5.2.4.5 Interest on refund

If a taxpayer paid an amount of tax and the assessment is later altered the amount in excess plus interest must be paid back to the taxpayer.¹⁷⁰ Interest is to be calculated from the date on which the excess payment was received until the refund is made.¹⁷¹ As the relevant provisions of the TAA relating to interest has not yet come into operation, the accrual of interest must be regulated in terms of the specific tax Act.¹⁷² This means that currently the situation relating to interest on refunds associated with income tax and value-added tax is the same as before the enactment of the TAA.¹⁷³ The only change to the situation after the enactment of the TAA is that the interest rate increased from 8.5 per cent to a rate of 9.75 per cent per year.¹⁷⁴ This compares negatively to the interest rate applicable to other debts which currently is 10,5 per cent per year.¹⁷⁵

¹⁶⁸ SARS (28 Oct. 2014) 18 indicates that this procedure commences by contacting the branch or call centre. If the complaint is not resolved it is escalated to the SARS Service Monitoring Office (SSMO). Only once these mechanisms are exhausted should a taxpayer approach the Tax Ombud (unless there are compelling circumstances to approach this office directly).

¹⁶⁹ See s 104(2) of the TAA for decisions that are subject to objection and appeal. Section 164 of the TAA is not included in this list.

¹⁷⁰ Section 164(7) of the TAA. The amount may be altered in accordance with an objection or an appeal, a decision of a court or a concession made by SARS.

¹⁷¹ Section 164(7) of the TAA. Section 164(7) provides that this interest is calculated in terms of s 187(1) of the TAA. Section 187(1), in turn, refers to ss 188 and 189 of the TAA to calculate the interest. However, the relevant subsections of section 188 and section 189 of the TAA have not yet come into operation and are awaiting proclamation by the President (GN 51 in *Government Gazette* 35687 (14 Sept 2012)). The sections that still have to come into operation are ss 187(2), 187(3)(a)–(e), 187(4), 188(2), 188(3), 189(2) and 189 (5) of the TAA. SARS *Interpretation Note 68 (issue 2)* (7 Feb. 2013) 2 states that only interest on an understatement penalty, as provided for in Ch 16, which is not paid by the effective date of the tax and interest on a tax debt due to a jeopardy assessment in terms of s 94, is currently dealt with in terms of the TAA. The reason why some of the provisions have not come into operation seems to be that the TAA introduced a new interest regime that requires considerable changes.

¹⁷² SARS (7 Feb. 2013) 3 available at <http://bit.ly/1fC4FEK> (accessed 13 July 2015).

¹⁷³ See Ch 5, par 5.1.1.

¹⁷⁴ SARS (June 2015) available at <http://bit.ly/1RLuT58> (accessed 21 Apr. 2016). For the period 1 May 2014 to 31 Oct. 2014 the interest rate was 9 per cent, for the period 1 Nov. 2014 to 31 Oct. 2015 9.25 per cent and for the period 1 Nov. 2015 to 29 Feb. 2016 it was 9.5 per cent. The current interest rate of 9.75 per cent applies from 1 Mar. 2016.

¹⁷⁵ Section 1 of the Prescribed Rate of Interest Act. GN 461 in *Government Gazette* 39743 (22 Apr. 2016) provides that the prescribed rate of interest from 1 May 2016 is 10.5 per cent *per annum*. GN 226 in *Government Gazette* 39785 (4 March 2016) provided that the prescribed rate of interest was 10.25 per cent *per annum* from 1 March 2016. Prior to that GN R554 in *Government*

This concludes the discussion relating to the “pay now, argue later” rule regarding income tax and value-added tax. The following section deals with this rule in relation to customs duty.

5.3 DEVELOPMENT OF THE “PAY NOW, ARGUE LATER” RULE IN RESPECT OF CUSTOMS DUTY

Firstly, this section deals with the customs provisions of the CEA regarding the “pay now, argue later” rule. Thereafter the relevant provisions of the CCA are analysed.¹⁷⁶ The reason for analysing the CCA provisions is that once they come into operation, they will replace the “pay now, argue later” provisions of the CEA.¹⁷⁷

5.3.1 The “pay now, argue later” rule in terms of the CEA

Section 77G of the CEA initially provided that

“the obligation to pay to the Commissioner and right of the Commissioner to receive and recover any amount demanded in terms of any provision of this Act, shall not, unless the Commissioner so directs, be suspended by an appeal in terms of this section or pending a decision by court”.

This provision was amended in December 2007 to extend the scope of this provision to the finalisation of any procedure in terms of an internal administrative appeal, an alternative dispute resolution or dispute settlement.¹⁷⁸ Consequently, SARS,¹⁷⁹ similar to a payment obligation relating to income tax and value-added tax, has a discretion to suspend the payment obligation pending dispute resolution. Nonetheless, the “pay now, argue later” rule differs in relation to customs duty obligations on the one hand and income tax and value-added tax payment obligations on the other. Firstly, as regards the Commissioner’s discretion to suspend an obligation to pay, there is no indication of what the Commissioner should take into consideration when determining whether this obligation may be suspended

Gazette 37831 (18 July 2014) provided that the prescribed rate of interest was 9, 0 per cent *per annum* from 1 Aug. 2014. In terms of s 187(2) of the TAA, once ss 188 and 189 of the TAA come into full operation, interest will be calculated on the daily balance owing and will be compounded monthly.

¹⁷⁶ Reference will also be made to the CDA in relation refunds and interest due to a taxpayer.

¹⁷⁷ See Ch 3, fn 228 regarding when the CCA will come into operation.

¹⁷⁸ In terms of the Revenue Laws Second Amendment Act 36 of 2007

¹⁷⁹ See Ch 2, par 2.4 regarding the Commissioner’s power to delegate his or her powers.

or not.¹⁸⁰ Moreover, there is no indication of instances when suspending the obligation to pay taxes must or may be denied or revoked. Furthermore, the CEA does not provide clarity as to whether SARS will continue with enforcement action¹⁸¹ until the Commissioner or a delegated person has exercised his or her discretion to suspend the obligation to pay. It is submitted that in the absence of such an explicit provision, SARS is empowered to proceed with enforcement even if it is still in the process of determining whether the obligation to pay taxes is suspended.

The differences between “pay now, argue later” provisions in the CEA and the TAA may possibly be ascribed to the specific context in which customs function. As explained earlier,¹⁸² the movement of goods is important in the customs field.¹⁸³ In terms of section 6(1) of the CEA goods subject to customs duty are kept in a regulated environment.¹⁸⁴ Only once the prescribed forms and documents are completed and the customs duty paid, may the goods be moved to the domestic domain. This results in a situation where SARS would either have received the customs duty or would be in possession of the goods.¹⁸⁵ Consequently, SARS has leverage against a taxpayer when dealing with customs duty, that is to say, it may secure the goods until the customs duty is paid.¹⁸⁶ The same leverage does not apply to income tax and value-added tax.

It is submitted that the fact that customs function within a specific context does not address some of the disparities between the “pay now, argue later” rule in customs matters and the rule relating to income tax and value-added tax. While the context of customs duty may demand a consideration of different factors regarding the

¹⁸⁰ See Ch 5, par 5.2.2; 5.2.4.2. The absence of factors is reminiscent of the problems associated with ITA and VAT Act provisions before the matter of *Metcash Trading (CC)* and the subsequent amendment; see Ch 5, par 5.2.1 in this regard.

¹⁸¹ For instance, the statement procedure or appointment of a third party.

¹⁸² See Ch 3, par 3.3.1.1.

¹⁸³ *Gaertner v Minister of Finance & Commissioner of SARS* 2013 (4) SA 87 (WCC) par 20.

¹⁸⁴ A regulated environment includes a transit shed, a container terminal or depot, a state warehouse or a customs warehouse.

¹⁸⁵ Electronic correspondence between Mr Raath, Senior Specialist in SARS: enforcement and author on 26 April 2016. Copy of electronic mail available on request.

¹⁸⁶ Electronic correspondence with Mr Raath, Senior Specialist in SARS: enforcement on 26 April 2016. Goods may be secured by detaining them in terms of s 88(1)(a) and 88(1)(c) of the CEA; seizing goods in terms of s 88(1)(d) of the CEA; or placing a lien on goods relating to duty which constitutes a debt to the State in terms of s 114(1)(a)(iv)(aa) of the CEA.

suspension of a payment obligation, the context does not explain the complete absence of any factors in the CEA. It is submitted that the absence of grounds upon which SARS should exercise its discretion to suspend the payment obligation gives it broad discretionary powers that are in conflict with the rule of law.¹⁸⁷

There are also other differences between the customs “pay now, argue later” rule and the “pay now, argue later” rule in relation to income tax and value-added tax that cannot be attributed to the context of customs duty. One such difference is that there are no provisions that stipulate when the suspension of a tax obligation must or may be denied or revoked. Also, the CEA does not indicate whether interest is payable in instances where a taxpayer has paid a disputed tax and the dispute is later resolved in the taxpayer’s favour.¹⁸⁸

In *Commissioner of Inland Revenue v First Industrial Bank* (“*First Industrial Bank*”),¹⁸⁹ the court concluded that “the *fiscus* is not immune to a claim for *mora* interest”.¹⁹⁰ This means that when a taxpayer demands payment of a refund or issues summons for a refund, whichever occurs first, interest will start to run at the prescribed rate of interest.¹⁹¹ Olivier states that in the event of a dispute, SARS will only be obliged to pay interest from the date on which the matter is settled.¹⁹² Therefore, a taxpayer would be able to claim a refund with *mora* interest accruing from the moment that the dispute relating to the tax has been finalised and not for the period before the dispute was resolved. This differs from the position in relation to income tax and value-added tax.

¹⁸⁷ *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 842. See also Ch 2, par 2.7 where the rule of law is discussed. See also Ch 5, par 5.2.1 where a similar argument is made in relation to the income tax and value-added “pay now, argue later” rule before the *Metcash Trading (CC)* matter.

¹⁸⁸ Section 76 of the CEA authorises a refund on an overpayment or incorrect payment of customs duty.

¹⁸⁹ 1990 (3) SA 641 (A).

¹⁹⁰ *First Industrial Bank* 655. This matter dealt with a taxpayer who paid stamp duties under protest. It was held that the Commissioner for Inland Revenue had to refund the taxpayer and the question arose whether the taxpayer was entitled to interest *a tempore morae*. See also Croome & Olivier (2015) 432 who state that at common law, the *fiscus* was not obliged to pay interest. However, the decision in *First Industrial Bank* made it clear that this common-law rule no longer applies.

¹⁹¹ Section 2A(2)(a) of the Prescribed Rate of Interest Act. See Ch 5, par 5.2.4.5 where it is indicated that the current prescribed interest rate is 10.5 per cent.

¹⁹² Olivier “Additional assessments, interest and penalties under the Income Tax Act 58 of 1962: the boundaries defined” (2004) 2 *TSAR* 283.

5.3.2 The “pay now, argue later” rule in terms of the CCA

Once the CCA comes into operation, the current “pay now, argue later” provisions of section 77G of the CEA will be repealed. Then section 830 read with section 916 of the CCA will regulate a taxpayer’s payment obligation pending dispute resolution.¹⁹³

5.3.2.1 *Obligation to pay not suspended*

The “pay now, argue later” rule is provided for in section 830 of the CCA, in terms of which a person’s obligation to pay taxes due in terms of the CCA or CDA is not suspended pending an internal reconsideration of a decision¹⁹⁴ or proceedings for dispute resolution.¹⁹⁵ However, section 830(2)(a) provides the customs authority¹⁹⁶ with a discretion to suspend the obligation to pay taxes.¹⁹⁷

5.3.2.2 *Factors to consider when exercising a discretion to suspend payment of disputed tax*

Unlike the CEA, the CCA provides factors which the customs authority should take into account when exercising its discretion to suspend the obligation to pay taxes.¹⁹⁸ As pointed out earlier,¹⁹⁹ an indication of what factors SARS should consider when exercising this discretion ensures legal certainty, transparency and adherence to the rule of law. Therefore, the CCA provisions are an improvement on the CEA provisions.

In terms of section 830(4) of the CCA, the customs authority must take the following factors into account when determining whether a payment obligation should be suspended pending dispute resolution. These factors are:

¹⁹³ In terms of s 68 read with s 88 of the Customs and Excise Amendment Act 32 of 2014.

¹⁹⁴ As provided for in s 826 of the CCA. In terms of this section, an internal reconsideration may be initiated by the Commissioner, the supervisor of the official who took the decision and on written request by the taxpayer. Furthermore, the lodging of an appeal or reaching a settlement may also result in the reconsideration of a decision.

¹⁹⁵ As provided for in s 827 of the CCA. These proceedings comprise of reconsideration of a decision, alternative dispute resolution, settlement and judicial proceedings.

¹⁹⁶ Section 1 of the CCA. Section 1 provides that the delegation by the Commissioner to a customs official needs to comply with s 19 of the CCA. Section 19 *inter alia* provides that the delegation must be in writing and may be assigned to a specific post or individual.

¹⁹⁷ Section 830(2)(b) of the CCA also provides that the obligation to pay taxes is suspended if a court suspends such an obligation.

¹⁹⁸ S 830(4) of the CCA read with s 916(1) of the CCA.

¹⁹⁹ See Ch 5, par 5.2.1.

- “(a) the amount of the disputed payment;
- (b) the risk of dissipation of assets by the applicant during the period of suspension or deferment;
- (c) whether the applicant is able to provide adequate security for the payment of the amount;
- (d) whether payment of the amount would result in irreparable financial hardship to the applicant;
- (e) whether sequestration or liquidation proceedings are imminent;
- (f) whether fraud is involved in the origin of the dispute; and
- (g) whether the taxpayer has failed to furnish information requested for purposes of a decision which is the subject of the proceedings.”

Section 830(4) provides that the factors provided for in section 916 of the CCA must also be taken into consideration. Section 916(1) provides that all relevant factors should be taken in to account including²⁰⁰ whether there is a risk associated with the payment or recovery of the tax²⁰¹ and whether the taxpayer has been convicted of an offence associated with fraud or dishonesty during the previous five years.²⁰²

Some of the factors contained in sections 830(4) and 916 of the CCA require further discussion. The factor dealing with the amount of tax is subject to the same criticism that Williams levelled against this factor in relation to the ITA and VAT Act, namely, whether a large amount provides an indication that the obligation should be suspended or that the request for suspension be rejected.²⁰³

The factor contained in section 830(4)(c) of the CCA, namely, whether the taxpayer is able to furnish security, echoes the factor contained in the TAA prior to the amendment thereof.²⁰⁴ Unlike the current TAA provision, the taxpayer’s ability to

²⁰⁰ Section 916(1) of the CCA pertains to factors that the customs authority have to consider in relation to exemptions, authorisations, permissions, approvals, recognitions and other special dispensations. Section 916(1) of the CCA provides that these factors should only be considered to the extent that they are relevant. Therefore, some of the factors contained in section 916(1) of the CCA are not relevant to the current discussion and are disregarded.

²⁰¹ Section 916(1)(d) of the CCA.

²⁰² Section 916(1)(g)(iii) of the CCA.

²⁰³ See Ch 5, par 5.2.2.

²⁰⁴ See Ch 5, par 5.2.4.2.

furnish security should be taken into consideration and not whether the taxpayer has tendered adequate security. Also, this CCA factor does not require the customs authority to establish whether accepting the security will be beneficial to the *fiscus*.²⁰⁵ Accordingly, this CCA factor places a lighter burden on the taxpayer than the analogous TAA factor for the obligation of taxes to be suspended.

Another factor contained in the CCA which deviates from a similar factor contained in the TAA is that relating to irreparable financial hardship.²⁰⁶ It deviates from the TAA's provision as it specifically refers to "financial" hardship. Also, it does not require weighing the hardship that a taxpayer might suffer when paying the disputed tax against the prejudice that SARS or the *fiscus* might suffer if the tax is not paid.²⁰⁷ The factor in terms of the CCA seems to be narrower than that of the TAA in the sense that it only relates to "financial" hardship.²⁰⁸ On the other hand, it seems as if the CCA factor would be easier to satisfy as it only considers the taxpayer's situation and not the position of SARS or the *fiscus* as well.

Lastly, sections 830(4)(f) and 916(g)(iii) of the CCA are concerned with fraud. In terms of the former section, the customs authority has to consider whether there was any fraud present relating to the disputed tax. Rood's concern with the amendment of the ITA and VAT Act,²⁰⁹ regarding whether it is alleged or actual fraud, is also relevant in this instance. If the factor in section 830(4)(f) refers to alleged fraud, it is questionable whether this factor would muster constitutional scrutiny. It is submitted that if this factor refers to alleged fraud, it infringes a taxpayer's right in terms of section 35(3)(h) of the Constitution to be considered innocent until proven guilty. Section 916(g)(iii) of the CCA is clearer on whether it deals with alleged or actual fraud as it specifically provides that it is concerned with whether the taxpayer "has been convicted of an offence involving fraud or dishonesty during the five preceding years".

²⁰⁵ See Ch 5, par 5.2.4.2.

²⁰⁶ As provided for in s 830(4)(d) of the CCA.

²⁰⁷ See Ch 5, par 5.2.4.2.

²⁰⁸ However, see Ch 5, par 5.2.4.2 fn 142 where it is indicated that it is difficult to envisage a scenario where the hardship that a taxpayer may suffer as a result of the payment obligation not being suspended, does not indirectly relate to financial hardship.

²⁰⁹ See Ch 5, par 5.2.2.

5.3.2.3 *Grace period*

The relevant CCA provisions do not state whether the customs authority may proceed with enforcement action in relation to disputed taxes before it has exercised its discretion regarding suspension of the payment obligation pending dispute resolution. Even though I appreciate that, due to the context within which customs function, enforcement action should not be stayed whilst the customs authority considers whether to suspend the payment obligation, an explicit provision in the CCA to such an effect would result in legal certainty which is paramount to the rule of law.²¹⁰

5.3.2.4 *Request for suspension revoked*

Section 830(5) of the CCA provides for instances where the customs authority may withdraw a suspension.²¹¹ These instances are:

- “(a) if eventual recovery of the disputed payment is compromised by the actions of that person;
- (b) if that person abuses the proceedings in terms of this Chapter, including by—
 - (i) unreasonably delaying conclusion of the proceedings;
 - (ii) consistently raising frivolous, vexatious or non-relevant issues in the proceedings; or
 - (iii) employing dilatory tactics in the proceedings;
- (c) if on further consideration of the factors referred to in subsection (4), the suspension or deferment should not have been granted;
- (d) if there is a material change in any of the grounds on which the suspension or deferment was granted; or
- (e) on any other good ground.”

Section 830(5)(b)–(c) of the CCA resembles the instances where a suspended payment obligation in terms of the TAA may be revoked. Consequently, the same argument relating to when an appeal may be considered to be made frivolously or to

²¹⁰ See Ch 2, par 2.7.

²¹¹ As indicated in Ch 5, par 5.3.1 the CEA does not provide for instances when a suspension may be withdrawn.

delay proceedings is applicable here.²¹² The two factors that are unique to the CCA, namely, if the actions of the taxpayer compromised the eventual recovery of the disputed tax and “any other good grounds” are rather broad and, therefore, constitute “catch all” provisions. The broadness of these two factors negates the aim of providing factors.

5.3.2.5 *Interest on refund*

The CCA does not provide for a refund in instances where a taxpayer has paid the disputed tax amount and thereafter it is determined through dispute resolution that the assessed amount was incorrect. However, the Customs Duty Act (“CDA”)²¹³ addresses this situation in section 64(2).²¹⁴ In terms of this section, an amount of tax, or portion thereof,²¹⁵ which relates to an incorrect assessment, should be refunded.²¹⁶ Section 76(1) of the CDA provides that when a person becomes entitled to a refund, no interest will be paid unless section 76(2) of the CDA applies. The latter section provides that the taxpayer will only be entitled to interest if the customs authority did not pay an approved refund²¹⁷ within 21 working days. The interest provided for in section 76(2) only deals with a delay by the customs authority in paying out the refund. It does not cater for a situation where a taxpayer paid an amount because of the “pay now, argue later” rule and it was later determined that the tax, or a portion thereof, was not due.

This does not mean that a taxpayer in whose favour the dispute has been resolved would not be entitled to interest on a subsequent refund. In *Sage Life Ltd v Minister of Finance* (“*Sage Life*”),²¹⁸ the court held that “the obligation to pay interest arises in terms of the common law principles of ‘mora’ and the fact that a provision fails to

²¹² See Ch 5, par 5.2.4.4 in this regard.

²¹³ 30 of 2014.

²¹⁴ Section 8 of the CCA provides that the CCA “must be interpreted and applied to facilitate the implementation” of amongst other legislation “the tax levying Acts”. In terms of s 1 of the CCA, tax levying Acts include the CDA. Therefore, the two Acts should be read together.

²¹⁵ Section 64(3) of the CDA provides that if only a part of the duty paid was subject to an error, the refund should be paid in proportion to the error.

²¹⁶ Section 1 of the CDA defines “refund” in this context as the “repayment of the duty, penalty or interest, or any part of the duty, penalty or interest”. Section 67 of the CDA provides that such a refund will only be made if a taxpayer or his or her representative applies for a refund.

²¹⁷ The refund must be approved in terms of s 70(4)(a) of the CDA.

²¹⁸ (2001) 66 SATC 181. In this matter, the taxpayer paid secondary tax on companies before a retrospective amendment came into operation. In terms of this amendment, a refund was due to the taxpayer.

provide for the payment of interest by the *fiscus* is ‘of no consequence’.²¹⁹ Applying this *dictum* to the present issue, it means that the CDA does not provide for the payment of interest in relation to a refund unless the refund was delayed, but does not exclude the accrual of *mora* interest. Consequently, the taxpayer would be entitled to *mora* interest in the event that he or she paid tax due to the “pay now, argue later” rule and it is found subsequently that this was indeed an overpayment.

5.4 CONCLUSION

The “pay now, argue later” rule enables SARS to collect taxes effectively despite a taxpayer disputing the amount of tax payable. However, this interest of SARS to collect taxes effectively may not unreasonably and unjustifiably limit a taxpayer’s rights. Despite *Metcash Trading (CC)* declaring the “pay now, argue later” rule as provided for in terms of the VAT Act to be constitutional, this judgment is probably not the final verdict regarding the “pay, now argue later” rule in the realm of taxation. There are valid criticisms against the judgment as the “pay now, argue later” rule excludes the jurisdiction of the court when the rule is invoked and there may be less invasive means for SARS to achieve the purpose envisaged with the “pay now, argue later” rule.²²⁰

A positive change that has occurred since *Metcash Trading (CC)* is the inclusion of factors that should be considered when SARS exercises its discretion whether to suspend the payment obligation in relation to income tax and value-added tax.²²¹ The relevant legislation has developed from initially not including factors,²²² to including factors,²²³ to attempting to simplify the factors.²²⁴ The inclusion of factors promotes legal certainty and curbs SARS’ discretionary powers to bring it in line with

²¹⁹ *Sage Life* 188. In this matter, the Minister relied on the principle *inclusio unius est exclusio alterius*, which according to Oxford Reference “Interpretation, rules and principles of statutory” available at <http://bit.ly/1K7HSL5> (accessed 9 Nov. 2016) means “the inclusion of the one is the exclusion of the other”, to avoid paying interest. The Minister argued that because the ITA did provide for certain instances where interest would be payable, interest would not be payable if it did not fall into one of those instances.

²²⁰ See Ch 5, par 5.2.1.

²²¹ See Ch 5, par 5.3.1 where it is indicated that the CEA does not contain any factors.

²²² See Ch 5, par 5.2.1.

²²³ See Ch 5, par 5.2.2.

²²⁴ See Ch 5, par 5.2.4.2.

the rule of law.²²⁵ Then again, the recent amendment of these factors, which was set to simplify these factors, makes it more difficult than before to have the obligation to pay taxes suspended.²²⁶ In addition, the relevance of some of these factors, the weight each factor should carry and the exact meaning of some of these factors may leave a taxpayer in uncertainty.

When comparing the development of factors regarding income tax and value-added tax to the development of factors in customs, the customs legislation appears to be a step (or two) behind. Currently, the CEA does not provide any factors which the customs authority should consider when exercising its discretion to suspend the obligation to pay taxes. This is in conflict with the rule of law. Although the passing of the CCA is imminent, and this Act will contain factors to be considered in this regard, these factors are reminiscent of the TAA provision prior to the recent amendment despite the CCA being assented roughly at the same time that the TAA amendments were introduced.²²⁷

The unanimity between the income tax and value-added tax provisions and customs provisions is also apparent in relation to whether there is a grace period during which enforcement actions are stayed. The TAA clearly allows for a grace period from the moment a suspension of the obligation was requested until ten business days have lapsed after the senior SARS official has exercised his or her discretion against the taxpayer. For customs duty the taxpayer is left in the dark as there is no provision that addresses this matter.

The third instance where the customs-related provisions differ from the income tax and value-added tax provisions deals with interest on refunds. Once again the TAA spells out that interest is payable at the prescribed rate from the date on which the excess amount is paid. A taxpayer who paid customs duty would not be privy to the

²²⁵ See Ch 5, par 5.2.1 regarding Olivier's comment in this regard.

²²⁶ Louw (30 Jan. 2015) available at <http://bit.ly/1MsljQy> (accessed 5 June 2015 – no longer available).

²²⁷ The CCA was assented to on 9 July 2014 whilst the TAA amendments were introduced on 17 July 2014. See National Treasury “Media statement: Taxation Laws Amendment Bill and Tax Administration Laws Amendment Bill” (17 July 2014) available at <http://bit.ly/1SrFXTo> (accessed 9 Nov. 2016) regarding the introduction of the TAA amendments.

same assurance in terms of the CEA or the CCA. At most he or she will be able to claim *mora* interest from the date on which the dispute was resolved.

The “pay now, argue later” rule may function differently or require different considerations in relation to customs due to the specific context within which customs function. However, there is no justification for not providing explicit provisions to clarify the uncertainty which currently prevails and, in the absence of amendments, will continue to prevail.

CHAPTER 6 – OBLIGATION TO PAY TAX PENDING DISPUTE RESOLUTION – OTHER JURISDICTIONS

6.1 INTRODUCTION

The previous chapter evaluated the South African approach to a tax payment obligation while a taxpayer is disputing the tax. That evaluation identified a number of aspects that may be in conflict with the constitutional context in which SARS should enforce collections. Firstly, the constitutionality of the “pay now, argue later” rule was questioned in relation to a taxpayer’s right to access to courts. Furthermore, Chapter 5 emphasised that clear factors are required when SARS considers whether to suspend a payment obligation. Clear factors ensure adherence to the rule of law and that the taxpayer knows whether he or she should take the matter on review. Another aspect where clarity is needed, is whether there is a grace period before SARS may proceed with enforcement pending a request for suspension in relation to customs matters.

This chapter deals with the Canadian, Australian, New Zealand and Nigerian approaches to tax payment obligations while dispute resolution procedures are pending. Furthermore, it compares these countries’ approaches to that of South Africa. The aim of this chapter is to determine whether the manner in which these countries deal with a tax payment obligation pending dispute resolution may assist in resolving the problems identified in the current South African approach. In addition, this chapter identifies less invasive ways to ensure that the payment of taxes is not unnecessarily delayed because of frivolous disputes.

This chapter deals with each country separately before reaching some conclusions. In the discussion of each country, the contextual setting relating to tax dispute resolution is outlined first. This discussion examines rights, values and legislation that inform tax dispute resolution procedures. With this context in mind, the provisions and approaches relating to a taxpayer’s obligation pending dispute resolution are analysed. Lastly, the specific provisions of each country are compared to SARS’ approach.

6.2 CANADA

6.2.1 Contextual setting

6.2.1.1 Taxpayer's rights

In addition to the Charter,¹ the Declaration of Taxpayer Rights, 1985 (“Declaration”) can be seen as another source of taxpayers’ rights.² The rights contained in the Declaration have been expanded and enhanced by the Taxpayer Bill of Rights.³

The Taxpayer Bill of Rights, which was published in 2007, is said to illustrate the CRA commitment to protect taxpayers’ rights.⁴ Three rights contained in the Taxpayer Bill of Rights lay the foundation for providing dispute resolution mechanisms in Canadian tax matters. One, a taxpayer has the right to pay no more and no less than what is required by law.⁵ Two, in the event of a taxpayer not agreeing with the tax obligation imposed on him or her, that taxpayer has the right to object to an assessment and lodge an appeal.⁶ Three, article 7 of the Taxpayer Bill of Rights provides that if a taxpayer disputes an assessed amount of income tax, he or she does not need to pay the said amount until the dispute has been heard by an impartial forum. However, the Taxpayer Bill of Rights states that the right to not pay tax until the dispute has been heard by an impartial forum is not absolute as this right applies unless the law provides otherwise.⁷ Although the Taxpayer Bill of Rights does not have any binding force,⁸ it creates awareness of what taxpayers rights are in terms of legislation.⁹

¹ See Ch 1, par 1.3.1; Ch 4, par 4.2.1 for discussions of the Charter.

² Li “Taxpayers’ rights in Canada” (1997) *Revenue Law Journal* 85. Li recognises that although the Declaration was not legally binding, it aimed to reform the attitude of the Canadian Revenue Agency towards taxpayers.

³ CRA *Taxpayer Bill of Rights guide: understanding your rights as a taxpayer* (update 5 Jan. 2015).

⁴ See The Canadian Press “Taxpayer Bill of Rights change protects Canadians from backlash” (26 June 2013) available at <http://bit.ly/1OvF7UB> (accessed 9 Nov.2016); Godfrey “Canada introduces Taxpayer ‘Bill of Rights’” (30 May 2007) available at <http://bit.ly/1KtiyC0> (accessed 9 Nov 2016). According to CRA *Taxpayer Bill of Rights – questions and answers* (update 26 June 2013) this Taxpayer Bill of Rights sets out to increase the transparency and accountability of the CRA while also clarifying the rights and redress available to taxpayers.

⁵ Article 1 of the Taxpayer Bill of Rights.

⁶ Article 4 of the Taxpayer Bill of Rights.

⁷ CRA (update 5 Jan. 2015) 7 (accessed 23 July 2015).

⁸ The Canadian Press (26 June 2013) available at <http://bit.ly/1OvF7UB> (accessed 9 Nov. 2016); Godfrey (30 May 2007) available at <http://bit.ly/1KtiyC0> (accessed 9 November 2016).

⁹ CRA (updated 26 June 2013).

6.2.1.2 *Dispute resolution framework*

As the CITA provides for a dispute resolution procedure, it gives statutory backing to the rights to pay no more and no less than what is required by law and to object to an assessment and lodge an appeal. Firstly, section 165(1) of the CITA provides that a taxpayer who is aggrieved by an income tax assessment may file an objection. This objection should usually be filed within 90 days after the day on which the notice of assessment was sent to the taxpayer.¹⁰ The objection is considered by the CRA's Appeal's Branch which functions independently and is said to be an impartial¹¹ internal division of the CRA.¹²

If the taxpayer is dissatisfied with the outcome of the objection, the matter may be taken on appeal. A taxpayer may file an appeal to the Tax Court once the Minister of National Revenue ("Minister")¹³ has made a decision relating to the objection or if 90 days have lapsed after the taxpayer had served a notice of objection and the Minister has failed to inform the taxpayer that the assessment was confirmed, reassessed or abandoned.¹⁴ A further appeal to the Federal Court of Appeal is available if the taxpayer is aggrieved by the decision of the Tax Court.¹⁵

¹⁰ If a taxpayer is an individual it would be the later of (i) one year after the taxpayer's filing due date for the year; and (ii) 90 days after the day the notice of assessment was sent to the taxpayer. See also CRA *Resolving your dispute: objection and appeal rights under the Income Tax Act* (June 2014) 7.

¹¹ The CRA *Tax appeals evaluation* (May 2012) states that this division is impartial as the officer who considers the objection has not been involved in the initial assessment of the taxpayer's liability. However, this person is still part of the tax authority.

¹² Bernier & Tonkovich "Canada" in Whitehead *The tax disputes and litigation review* (2013) 25.

¹³ The reference to Minister of National Revenue as Minister only applies in relation to Ch 6, par 6.2.

¹⁴ Section 169(1) of the CITA. See Bernier & Tonkovich (2013) 26 for a discussion of appeals to the Tax Court of Canada. The Tax Court follows two procedures. The informal procedure provided for in s 17 the Tax Court of Canada Act, RSC 1985, c T-2 is more flexible with regard to the rules of evidence in order to reach a prompt decision. CRA (June 2014) 14 states that this procedure may be used when the amount of federal tax in dispute plus interest does not exceed \$25 000, the disputed loss does not exceed \$50 000 or when interest relating to tax or penalties are in dispute. Section 18(1) and (2) of the Tax Court of Canada Act provides that if a dispute does not fall within one of these instances and a taxpayer has not consented to use the informal procedure, the ordinary appeal procedure is used. In terms of this ordinary procedure, the formal court rules must be adhered to. This involves complying with the rules of evidence and of discovery of documents. Section 17.7 of the Tax Court of Canada Act provides that an appeal in terms of the general procedure should be conducted in accordance with the provisions of the Federal Courts Act, RSC 1985, c F-7. See CRA (June 2014) 14–16 for a further discussion of the two procedures in the Tax Court of Canada.

¹⁵ In terms of s 27(1.1) and (1.2) of the Federal Courts Act, RSC 1985, c F-7 appeals from both the informal Tax Court procedure or the general Tax Court procedure will be heard by the Federal Court of Appeal. See also CRA (June 2014) 18.

6.2.2 Tax obligation pending dispute resolution

6.2.2.1 *Obligation to pay suspended*

Section 225.1(1) of the CITA restricts the collection of tax before a dispute is initiated. This section prevents the Minister¹⁶ from proceeding with collection actions before the collection-commencement day. This means that until 90 days have lapsed after the notice of assessment was sent,¹⁷ no court proceedings may be initiated and no tax debt¹⁸ may be certified and registered with the Federal Court.¹⁹ Moreover, the Minister may not require a person or institution to pay over to the CRA money it holds or will hold on behalf of a taxpayer.²⁰ The Minister may also not take any steps to seize and sell goods of the taxpayer in order to settle a tax debt. Section 225.1(1), therefore, creates a 90-day grace period before the CRA may start with collection proceedings.²¹ Wintermute states that during this period a taxpayer may decide whether he or she wants to dispute the assessed amount or not.²²

Section 225.1(2) of the CITA deals with collections after an objection is lodged by a taxpayer. This section provides that collection proceedings may not be taken until 90 days have lapsed since the Minister has sent a notice to the taxpayer to confirm or vary the assessment. In the same vein, section 225.1(3) provides that if a taxpayer

¹⁶ Section 220(1) of the CITA provides that the Commissioner of Revenue may exercise the powers and perform the duties afforded to the Minister in terms of the CITA. In addition, the Minister may allow officers to exercise the powers and duties that are assigned to the Minister in terms of this Act. Consequently, although the provisions discussed below refer to the Minister, the Commissioner of Revenue or another officer of the CRA may also be allowed to exercise and perform these rights and duties.

¹⁷ Collection-commencement day defined in s 225.1(1.1)(c) of the CITA. Section 225.1(1.1)(a) and (b) refers to the collection-commencement day in respect of charities.

¹⁸ In terms of s 222(1) of the CITA, tax debt relates to any amount that is payable by a taxpayer under the CITA.

¹⁹ Section 223(2) of the CITA provides that the Minister may certify a tax debt owed as payable by the debtor and in terms of s 223(3) once this is registered with the Federal Court it will be regarded as a judgment. Jackson *Settlement, compromise, and forgiveness in Canadian Income Tax Law* (unpublished LLM dissertation, Dalhousie University (2013)) 83 states that registering a certificate would provide enforcement tools to the CRA that are available in terms of the CITA without registering a certificate.

²⁰ In terms of ss 224(1), 224(1.1) & 224.3(1) of the CITA. See Ch 8, par 8.2 where the appointment of a third party on behalf of a taxpayer in Canada is discussed.

²¹ Section 225.1 of the CITA further provides that this 90-day grace period will not apply in instances where it was a reassessment with the taxpayer's consent in accordance with s 152(4.2), disposal of an appeal by reassessment or taxpayer's consent in terms of s 169(3) or where the taxpayer has waived penalties or interest as provided for in s 220(3.1).

²² Wintermute "Tax appeals: how to deal with an income tax, GST or payroll assessment" (Oct. 2003) 22 available at <http://bit.ly/1OQeKK2> (accessed 30 July 2015).

has taken a matter on appeal to the Tax Court of Canada, the collection of the disputed amount may not start before a copy of the decision of the court is mailed to the taxpayer, or on the day on which the taxpayer withdraws the appeal, whichever occurs first.

It is interesting to note that the CITA does not provide that the obligation to pay an assessed amount is suspended while the taxpayer takes the matter on a further appeal to the Supreme Court of Canada. In this regard the CRA provides that once the Tax Court of Canada's decision is mailed to the taxpayer, the taxpayer must immediately settle the full outstanding amount.²³ Accordingly, the CRA may then proceed with enforcement actions. The reason why the obligation to pay is not suspended when appealing to the Supreme Court of Canada may be that at that stage the dispute has already been heard by an impartial forum, namely, the Tax Court of Canada. This explanation seems to accord with article 7 of the Taxpayer Bill of Rights in that the obligation to pay taxes is suspended until an impartial forum has heard the matter in dispute.

6.2.2.2 *Exceptions*

In general, section 225.1 of the CITA "offers seamless protection from collection of claimed tax arrears up to the conclusion of a Tax Court appeal".²⁴ Nonetheless, there are exceptions to the "seamless protection" that a taxpayer enjoys until a tax dispute is heard by the Tax Court.

Firstly, section 225.1(6) of the CITA provides that when the amount in dispute was required to be deducted or withheld, for example a payroll deduction,²⁵ there is no

²³ CRA *Tax collection policies IC98-1R4* (May 2013). The CRA indicates that it would also be willing to accept adequate security instead of payment.

²⁴ *Alessandro v Canada* (2006) FC 895 par 5. From this matter it becomes apparent that a taxpayer may only rely on this stay in collection if he or she complies with the relevant timelines. In this case, the taxpayer lodged her appeal to the Tax Court of Canada outside the prescribed 90-day period. The question was raised (par 6) whether s 225.1(2) of the CITA only prevents new collection steps or also requires the CRA to reverse lawful collection actions due to a subsequent appeal. The court held (par 9) that if section 225.1(2) was meant to require a reversal of previous lawful collections, the section would have provided accordingly. Therefore, the CRA is not required to reverse lawful collection actions that were taken before an appeal was lodged

²⁵ See *Croombs v CRA* [2012] FC 1499 par 18 where the court confirmed that due to the wording of s 225.1(6) of the CITA, the CRA may continue with collections relating to payroll deductions.

restriction placed on the Minister with regard to collection actions.²⁶ This exception may be problematic if the aspect in dispute relates to whether the deduction was subject to withholding tax or not.

Secondly, section 225.1(7) provides that when the taxpayer is a large corporation, it does not enjoy “seamless protection”. A taxpayer will be classified as such when the corporation’s employed taxable capital²⁷ in Canada exceeds \$10 million.²⁸ In terms of this section, the Minister may collect half of the assessed amount even before 90 days have lapsed after the notice of assessment was sent irrespective of whether an objection has been raised.²⁹ Similarly, after the 90-days period, the Minister may proceed with collecting the remaining amount. However, if the large corporation disputes a portion of the assessed amount, only half of the amount in dispute may be collected in total.³⁰ The Canadian Chamber of Commerce criticises this exception³¹ because the payment of half of the disputed taxes by a large corporation is considered punitive, it unfairly impedes the corporation’s ability to conduct business³² as its cash flow is limited and is an administrative burden.³³

Lastly, section 225.2(2) of the CITA provides for a situation where a judge³⁴ may authorise the Minister to proceed with collection. A judge may authorise this if the Minister satisfies him or her on *ex parte*³⁵ application that there are reasonable

²⁶ Section 225.1(6)(b) of the CITA. The other exceptions dealt with in s 225.1(6) of the CITA relate to refundable tax, penalty or interest on corporations in respect of scientific research and experimental development tax credit (in terms of Part VIII of the CITA) and when a non-resident person disposes of taxable Canadian property (in terms of s 116 of the CITA).

²⁷ In terms of s 181.2(2) of the CITA this relates to the amount in which the corporation’s capital exceeds its investment allowance for that year.

²⁸ This section also provides that a corporation that is formed due to an amalgamation or merger of two or more enterprises is deemed to be the same corporation as, and a continuation of, each predecessor corporation.

²⁹ Section 225.1(7)(a) of the CITA.

³⁰ Section 225.1(7)(b) of the CITA.

³¹ Canadian Chamber of Commerce “Interest on overpaid taxes” (2013) available at <http://bit.ly/1JNbgJF> (accessed 24 Aug. 2015 – no longer available).

³² Canadian Chamber of Commerce (2013) available at <http://bit.ly/1JNbgJF> (accessed 24 Aug. 2015 – no longer available).

³³ Canadian Chamber of Commerce (2013) available at <http://bit.ly/1JNbgJF> (accessed 24 Aug. 2015 – no longer available).

³⁴ Section 225.2(1) defines a judge as “a judge or a local judge of a superior court of a province or a judge of the Federal court”.

³⁵ See Ch 3, par 3.2.1.2(a) where it is indicated that an *ex parte* application would mean that the person against whom relief is sought does not receive notice of the application and the relief is also sought in this person’s absence.

grounds³⁶ to believe that the collection of the assessed amount is in jeopardy due to the delay in the collection.³⁷ If an order is granted in terms of section 226.2(2), a taxpayer will not enjoy the benefit of collection proceedings being deferred.

These jeopardy orders deserve some further comment. In *Canada v Cormier-Imbeault* (“*Cormier-Imbeault*”),³⁸ the court identified some factors that may justify the authorisation envisaged by section 225.2 of the CITA. These factors include whether the taxpayer begins or continues to sell off or transfer his or her assets; if the taxpayer is evading his or her tax obligations; whether the taxpayer’s assets have the potential to depreciate in value; and if there are reasonable grounds to believe that the taxpayer has acted in a fraudulent manner.³⁹

To curb the possible impact of a jeopardy order, it must be served on the taxpayer within 72 hours after it has been granted, unless the judge orders otherwise.⁴⁰ The taxpayer is afforded further protection as he or she may apply to have the order reviewed.⁴¹ This allows the taxpayer to submit representations relating to the

³⁶ See *Danielson v Deputy Attorney General of Canada and Minister of National Revenue* 7 FTR (1986) 42 43; *Services ML Marengère Inc (Re)* (1999) 9004 (FC) par 63 where it was indicated that the CRA must show, on a balance of probability, that it is more probable that a delay would jeopardise the collection of the assessed amount than not. Nevertheless, in *The Minister of Citizenship and Immigration v Qu* [2002] 3 FC 3 (CA) par 24 it was indicated that the burden of proof is merely a “bona fide belief in a serious possibility based on credible evidence”.

³⁷ Section 225.2(2) of the CITA.

³⁸ (2009) 6 CTC 45.

³⁹ *Cormier-Imbeault* par 7. In *Canada v Arif* [2011] FC 1000 par 53 the court referred and confirmed the factors mentioned in *Cormier-Imbeault*. In *Services ML Marengère Inc. (Re)* (1999) 9004 (FC) par 63 the court held that this *ex parte* collection order constitutes an extraordinary remedy. Accordingly, the CRA must act in good faith and make full disclosure of all relevant information. In addition to obtaining an order to proceed with collection actions, the CRA may also in terms of s 225.2(3) of the CITA apply for an order to proceed with these actions even before the taxpayer has received a notice of assessment. The judge may grant this additional order if he or she is satisfied that a notice of assessment would probably further jeopardise collection of the tax.

⁴⁰ Section 225.2(5) of the CITA. In terms of s 225.2(6) the authorisation must be served on the taxpayer personally or in line with the judge’s directive. If a judge also authorises the collection proceedings in the absence of a notice of assessment being served on the taxpayer first, s 225.2(5) provides that the notice of assessment must be served with the jeopardy order.

⁴¹ Section 225.2(8) of the CITA. Section 225.2(9) provides that the review application must be made within 30 days after the authorisation was served on the taxpayer or within a time period allowed by a judge. The Deputy Attorney General of Canada must receive six clear days’ notice of the application for review (s 225.2(8) of the CITA).

assessed tax.⁴² A judge reviewing the authorisation may confirm, set aside or alter the authorisation to proceed with collection.⁴³

6.2.2.3 *Repayment*

Although the CITA provides that the obligation to pay taxes is suspended pending an objection, most taxpayers seem to pay the amount in dispute.⁴⁴ The reason for this is that although a taxpayer's obligation to pay taxes is suspended while disputing the amount, interest on the outstanding amount will continue to accrue.⁴⁵ From 2016 the interest rate is five per cent compounded daily.⁴⁶ Therefore, Wintermute advises taxpayers to pay the disputed amount in order to stop interest from accruing.⁴⁷ Simard states that an objection is usually assigned to an objection officer who must consider the objection within three to 12 months after the objection has been filed. In view of the approximate time lapse before the objection – which is lodged at the onset of resolving the dispute – is even considered, the interest that may accrue during the dispute resolution may be substantial.⁴⁸

When a taxpayer has paid a disputed amount of tax, section 164(1.1) provides that if the Minister has not provided the taxpayer with a decision relating to the objection within 120 days after the taxpayer has served the notice of objection⁴⁹ or if the taxpayer appeals to the Tax Court of Canada,⁵⁰ the taxpayer may apply in writing to

⁴² Alpert Law Firm “Defending jeopardy assessments” (June 2012) *Legal Business Report* 3 available at <http://bit.ly/1UudsFD> (accessed 9 Nov. 2016).

⁴³ Section 225.2(11) of the CITA. Section 225.2(13) provides that the judge's decision is not subject to appeal.

⁴⁴ Simard “How to object to assessment in Canada” (30 Aug. 2015) available at <http://bit.ly/1PMSI05> (accessed 9 Nov. 2016). Wintermute (Oct. 2003) 22 available at <http://bit.ly/1OQeKK2> (accessed 9 Nov. 2016) states that the payment of a disputed amount does not constitute an admission of liability.

⁴⁵ In terms of s 161 of the CITA, interest accrues on assessed tax debts. The prescribed interest rate may be amended every three months. See CRA “Prescribed interest rates” (update 16 June 2016) available at <http://bit.ly/2aQk7hx> (accessed 4 Aug. 2016) were these rates can be accessed. The interest will run from the date on which the taxes had to be paid until payment is made.

⁴⁶ CRA “Interest rates for the fourth calendar quarter” (20 Sept. 2016) available at <http://bit.ly/2fiBNoX> (accessed 27 Oct. 2016); CRA “Interest and penalties” (5 Jan. 2016) available at <http://bit.ly/1ncYrfc> (accessed 25 Apr. 2016). This rate of interest applies from 1 Apr. 2016 to 30 June 2016.

⁴⁷ Wintermute (Oct. 2003) 22 available at <http://bit.ly/1OQeKK2> (accessed 9 Nov. 2016).

⁴⁸ Simard (30 Aug. 2015) available at <http://bit.ly/1PMSI05> (accessed 9 Nov. 2016).

⁴⁹ Section 164(1.1)(a) of the CITA.

⁵⁰ Section 164(1.1)(b) of the CITA.

have the amount repaid.⁵¹ Section 164(3)(e) of the CITA provides that this amount must include interest.⁵²

These repayments will not be made in instances where a judge has authorised the collection of taxes in terms of section 225.2(2) of the CITA.⁵³ In addition, section 162(1.2) provides that a repayment will not be made to a taxpayer if a judge is reasonably satisfied that there are reasonable grounds that the repayment of an amount would jeopardise the collection of all or parts of the assessed amount. The judge is not concerned with the prospects of success in this instance.

6.2.2.4 *Deterrence measures*

The CITA contains some safeguards to ensure that a taxpayer does not simply delay his or her obligation by disputing a tax in order to have collection actions suspended.

As indicated above,⁵⁴ the Minister may approach the court if he or she is of the opinion that the delay caused by disputing the assessed amount would result in the collection thereof to be in jeopardy. In addition, the fact that interest continues to accrue if a taxpayer does not pay the assessed amount may act as a deterrent for taxpayers who consider disputing the assessed amount to avoid paying the tax.⁵⁵

Furthermore, section 179.1 of the CITA provides that if the Tax Court of Canada dismisses a taxpayer's appeal with regard to an amount payable or if the appeal has been withdrawn, it is within the court's discretion to order the taxpayer to pay the CRA a penalty which does not exceed 10 per cent of the amount in dispute.⁵⁶ The court may make such an order if it concludes that there were no reasonable grounds for the appeal or if the court finds that one of the main reasons for disputing the

⁵¹ In terms of s 164(1.1)(c) and (d) of the CITA, the amount which will be repaid is the amount the taxpayer paid that is subject to a dispute. If it is a large corporation who seeks repayment, only half of the amount in dispute which has been paid can be repaid.

⁵² Interest will start accruing from the day on which the amount in dispute was paid (as this would constitute an overpayment for purposes of s 164(3)(e)) until the CRA repays this amount.

⁵³ Section 164(1.1) of the CITA.

⁵⁴ See Ch 6, par 6.2.2.2.

⁵⁵ See Ch 6, par 6.2.2.3.

⁵⁶ The Minister must apply to court to levy this penalty. It seems that the court will not make such an order on its own accord.

assessed amount was to postpone the payment of any amount payable relating to income tax.

6.2.3 Comparison with SARS' powers

6.2.3.1 Contextual setting

South Africa and Canada have dispute resolution procedures that taxpayers may use when disputing an amount of tax. These procedures are fairly compatible as they allow for internal objections where after, if the dispute is still unresolved, the matter may be taken on appeal to a court.

6.2.3.2 Suspending the payment of tax pending dispute

When comparing how the two countries deal with the obligation to pay taxes pending a dispute, there is a clear disparity. As a starting point, taxpayers in South Africa would be obliged to fulfil this obligation while Canada allows collection actions to be stayed if the assessed amount is disputed.

This difference means that in South Africa a taxpayer needs to request a suspension and provide evidence as to how his or her specific case relates to the factors that have to be considered by SARS;⁵⁷ put differently, the provisions ensure that SARS is able to fulfil its duties effectively as the payment obligation is only suspended when the taxpayer can prove that it should be. In Canada the obligation is on the CRA to show that it falls within one of the exceptions in terms of which the payment obligation should not be suspended. Consequently, the CRA's ability to collect taxes efficiently and effectively is reduced. It is submitted that from a cost perspective it would be fairer to place the burden on the revenue authority as it would have more resources at its disposal to discharge the burden compared to a taxpayer.

Furthermore, most of the exceptions regarding instances when the obligation to pay taxes will not be suspended in Canada may be determined objectively, for instance,

⁵⁷ See Ch 5, para 5.2.2; 5.2.4.2; 5.3.2.2 where this discretion is discussed. See Ch 5, par 5.3.1 where it is indicated that the CEA does not contain any factors that should be considered when SARS considers whether the payment obligation should be suspended.

when it relates to a large corporation or the withholding of taxes.⁵⁸ The one subjective exception, namely, when there are reasonable grounds to believe that the delay in collecting the disputed amount could place the collection in jeopardy, requires a judge to be satisfied that the collection will reasonably be in jeopardy.⁵⁹ In South Africa, on the other hand, SARS exercises the discretion whether the obligation to pay may be suspended. This discretion is exercised on the basis of subjective factors.⁶⁰

In Chapter 5, the CEA and the CCA of South Africa were criticised for not containing a grace period similar to the TAA. The TAA provides that enforcement actions may only commence 10 business days after SARS has indicated that the obligation to pay taxes is not suspended.⁶¹ However, the manner in which Canada deals with grace periods may be transplanted successfully in South Africa. The effect of the Canadian grace period is that enforcement actions are stayed until the dispute is heard by an impartial forum, namely, the Supreme Court of Canada. Enacting a similar provision in South Africa would result in a taxpayer's right to access to courts being protected and ensure that SARS' obligation to collect taxes is not deferred indefinitely.

Although Canada, when compared to South Africa, seems quite accommodating to taxpayers when a dispute arises, the CRA does not necessarily have the short end of the stick as regards the grace period.⁶² Some taxpayers in Canada pay disputed taxes in order to prevent interest from accruing while the dispute is being resolved. It may be asked what the significance of legislation prohibiting collection actions pending dispute resolution is if taxpayers proceed to pay the disputed tax in any event. The significance is that the decision whether to pay disputed taxes is made by the taxpayer. It is for the taxpayer to decide whether he or she wants to restrict the

⁵⁸ However, it must be noted that although these exceptions appear to be objectively verified, it does not mean that there will not be a dispute relating to whether a specific taxpayer falls within one of these exceptions.

⁵⁹ See Ch 6, par 6.2.2.2 for a discussion of these exceptions.

⁶⁰ See Ch 5, para 5.2.2; 5.2.3.2 where problems relating to these subjective factors are identified.

⁶¹ Section 164(6) of the TAA. See Ch 5, para 5.2.3.3; 5.3.2.3 where the grace period, or lack thereof, is discussed.

⁶² McGraw-Hill *Dictionary of American idioms and phrasal verbs* (2002) available at <http://bit.ly/1Rde3f0> (accessed 9 Nov. 2016) indicates that "short end of the stick" refers to the smaller or less desirable part.

accrual of interest by paying the disputed tax or take the chance of interest accruing until the end of the dispute resolution procedure if the taxpayer is unsuccessful. This is fairer than legislation providing that, as a point of departure, the obligation to pay taxes is not suspended, as is the case in South Africa.

Apart from the accrual of interest pending dispute resolution urging taxpayers to pay the amount in dispute, as the Canadian Tax Court may penalise a taxpayer for bringing a vexatious appeal, it may urge taxpayers to re-evaluate whether he or she has a legitimate dispute. Currently, South African tax legislation does not have a similar provision as the payment obligation is generally not suspended pending a dispute. Consequently, the South African point of departure is relied on to deter a taxpayer from bringing vexatious objections and appeals.

In Canada, the right not to pay income tax while a dispute is pending is further curbed as collection actions are only stayed until an appeal is heard by the Tax Court of Canada. This allows for the taxpayer's dispute to be heard by an independent forum. The suspension of the payment obligation does not continue in perpetuity as the Minister may thereafter proceed with collection actions if the taxpayer is unsuccessful. As such, the taxpayer has a clear understanding of when the CRA may proceed with collection actions. This stands in contrast to South Africa where a taxpayer has to request to have the obligation to pay suspended, and the suspension may be revoked at any stage in the discretion of a senior SARS official. As indicated earlier,⁶³ the fact that a senior SARS official has to consider the merits of the matter in order to determine whether the objection or appeal is frivolous or just, is unsatisfactory as the SARS official cannot be deemed to make an impartial decision.

⁶³ See Ch 5, para 5.2.3.4; 5.3.2.4.

6.3 AUSTRALIA

6.3.1 Contextual setting

6.3.1.1 Taxpayers' rights

Although Australia does not have a Bill of Rights,⁶⁴ it does have a Taxpayers' Charter⁶⁵ which guarantees that the ATO respects a taxpayer's right to review a decision of that office.⁶⁶ Effect is given to this right by provisions of the Assessment Act, the Australian Tax Administration Act, 1953 ("Administration Act") and the Administrative Appeal Tribunal Act, 1975 ("Appeal Tribunal Act").

6.3.1.2 Dispute resolution framework

The first step when a taxpayer disputes an assessed amount would be to lodge an objection. Section 175A of the Assessment Act provides that a taxpayer who is dissatisfied with an assessment may object to the assessment in accordance with Part IVC of the Administration Act. Such objection will be considered by the Commissioner of the ATO ("Commissioner")⁶⁷ who may either allow⁶⁸ or disallow it.⁶⁹ The taxpayer must be furnished with a decision within 60 days, otherwise the objection is deemed to be disallowed.⁷⁰

If the objection is disallowed, or deemed to be disallowed, the taxpayer may request a review by the Administrative Appeals Tribunal⁷¹ or lodge an appeal with the Federal Court.⁷²

⁶⁴ McSweeney *Sections 263 and 264 of the Income Tax Assessment Act 1936: a privacy perspective and review of overseas experience* (unpublished Masters of Business in Accounting and Finance dissertation, Victoria University (1993)) 77.

⁶⁵ ATO *Taxpayers' Charter – what you need to know* (June 2010).

⁶⁶ According to James, Murphy & Reinhart "The Taxpayers' Charter: a case study in tax administration" (2004) 7(2) *Journal of Australian Taxation* 345, one of the criticisms against the Taxpayers' Charter is that it does not have legislative force. See also Bentley "A taxpayers' Charter: opportunity or token gesture" (1995) 12 *Australian Tax Forum* 1–23 where he considers the different levels of possible enforcement of the Charter.

⁶⁷ The reference to the Commissioner of ATO as "Commissioner" applies to Ch 6, par 6.3.

⁶⁸ The entire objection or a part thereof may be allowed.

⁶⁹ Section 14ZY of the Administration Act. Section 14ZY(2) provides that the decision to allow or disallow an objection would constitute an objection decision. Although s 14ZY specifically provides that the Commissioner should consider the objection, s 8(1) of the Administration Act provides that the Commissioner may delegate his or her powers to another person in writing.

⁷⁰ Section 14ZYA of the Administration Act.

⁷¹ Section 14ZZ(1)(a)(i) of the Administration Act. Section 14ZZA provides that the Administrative Appeals Tribunal Act 1975 applies to a review of a reviewable objection decision. A decision by the CRA to disallow an objection relating to an assessment is a reviewable objection decision as such a decision is defined in s 14ZQ of the Administration Act as "an objection decision that is not an ineligible income tax remission decision".

A request for a review by the Administrative Appeal Tribunal must be lodged within 60 days after the taxpayer was served with the notice indicating that the taxpayer's objection was disallowed or only partially allowed or when the objection is deemed to be disallowed.⁷³ The Administrative Appeal Tribunal must conduct proceedings as informally and swiftly as the matter permits⁷⁴ and the Administrative Appeal Tribunal has the power to affirm, alter or set aside the decision under review.⁷⁵ Section 44(1) of the Appeal Tribunal Act allows for an appeal of the Administrative Appeal Tribunal's review decision to the Federal Court.⁷⁶

Consequently, an appeal may be brought to the Federal Court if a taxpayer is dissatisfied with the decision of the Administrative Appeals Tribunal⁷⁷ or subsequent to a disallowed objection.⁷⁸ Irrespective of whether the appeal comes before the Federal Court by virtue of an appeal against a decision of the Administrative Appeal Tribunal or an appeal against the disallowance of an objection by the CRA, the

⁷² Section 14ZZ(1)(a)(ii) of the Administration Act.

⁷³ Section 14ZZC(1)(d) of the Administration Act. In terms of s 14ZZC(1)(a) and (c), the review application must be in writing and should indicate the reasons for the application.

⁷⁴ Section 33(1)(b) of the Appeal Tribunal Act. The permissible degree of informality and swiftness will also be determined by considering the technicality of and applicable legislation in that specific matter.

⁷⁵ Section 43(1)(a)–(c) of the Appeal Tribunal Act. If the tribunal sets the decision aside, it must make a decision to replace the original decision or remit the matter for reconsideration.

⁷⁶ Section 34A(1) of the Appeal Tribunal Act provides the Administrative Appeal Tribunal with the power to refer a matter before the tribunal to alternative dispute resolution. The alternative dispute resolution is conducted by a member or official of the tribunal (s 34A(2)) or a person who is suitably qualified and experienced to conduct these proceedings (s 34A(2) read with s 34H(1)). Section 34H(2) provides that the Registrar of the Administrative Appeal Tribunal has to ensure that a person is suitably qualified and experienced. No specific requirements are provided of what would be considered as adequate qualifications and experience. If the parties are able to reach an agreement during the alternative dispute resolution proceedings, the Administrative Appeals Tribunal may make a decision in accordance with the agreement. Section 34D(1)(b)–(d) requires the parties to reduce their agreement to writing, sign the agreement and lodge it with the Administrative Appeal Tribunal. Also, seven days must lapse after lodgement and none of the parties must have indicated that they want to withdraw from the agreement. Furthermore, the tribunal may only make an order which is within its powers. See s 34D(4) where it is indicated when the tribunal may vary or revoke its decision made in relation to an agreement reached by the parties.

⁷⁷ Section 44(2A)(a) of the Appeal Tribunal Act provides that the appeal must be lodged within 28 days after the decision of the Administrative Appeal Tribunal has been given to the applicant.

⁷⁸ Section 14ZZN of the Administration Act provides that the appeal must be lodged within 60 days after the taxpayer has received notice of the CRA's decision. According to ATO "Administrative Appeals Tribunal (AAT) proceedings" (1 Jun 2015) available at <http://bit.ly/2eWWfIC> (accessed 28 Oct. 2016) the Administrative Appeals Tribunal proceedings are more informal and less formal and less costly than court proceedings. That may prompt a taxpayer to approach the Tribunal instead of going directly to the Federal Court.

Federal Court may make an order which it deems appropriate.⁷⁹ This order must be implemented within 60 days after the decision becomes final.⁸⁰

6.3.2 Tax obligation pending dispute resolution

6.3.2.1 *Obligation to pay not suspended*

Section 14ZZM of the Administration Act provides that “[t]he fact that a review is pending in relation to a taxation decision does not in the meantime interfere with, or affect, the decision and any tax, additional tax or other amount may be recovered as if no review were pending”. Moreover, section 14ZZR of the Administration Act provides that “[t]he fact that an appeal is pending in relation to a taxation decision does not in the meantime interfere with, or affect, the decision and any tax, additional tax or other amount may be recovered as if no appeal were pending”.

Wyatt and Gumley emphasise that sections 14ZZM and 14ZZR of the Administration Act provide the Commissioner with a discretion to recover a tax debt pending a review or appeal as the sections indicate that the tax “may” be recovered instead of “must” be recovered.⁸¹ They submit that section 14ZZM and 14ZZR are to be used in cases where taxpayers have lodged a review or an appeal to delay paying taxes.⁸²

Wyatt and Gumley’s submission is in line with the court’s interpretation of the predecessor of sections 14ZZM and 14ZZR of the Administration Act, namely, section 201 of the Assessment Act.⁸³ In *Deputy Commissioner of Taxation v Roma Industries Pty Ltd* (“*Roma Industries*”),⁸⁴ Bowen CJ remarked that section 201 of the Assessment Act ensured the “protection against that class of taxpayer who might withhold payment and use the money as sinews of war to conduct appeals against

⁷⁹ See ss 44(4) and 14ZZP of the Administration Act respectively.

⁸⁰ Section 14ZZQ(1) of the Administration Act. Section 14ZZQ(2) provides that the decision of the Federal Court will be final if the decision was made by a single judge and no further appeal has been lodged within the period available to lodge such an appeal. The decision will also become final when the decision was not made by a single judge and the taxpayer has not applied for special leave to the High Court within 30 days after the order was made.

⁸¹ Wyatt & Gumley “Are the Commissioner’s debt recovery powers excessive?” (Dec. 1995) *Monash University Department of Banking and Finance working paper 95/4 32*.

⁸² Wyatt & Gumley (Dec. 1995) *Monash University Department of Banking and Finance working paper 95/4 34*.

⁸³ The difference between s 201 of the Assessment Act and ss 14ZZM and 14ZZR of the Administration Act is discussed shortly hereafter.

⁸⁴ (1976) 76 ATC 4113.

the Commissioner who being finally unsuccessful, was found to be unable to meet his tax liability having spent his money on the litigation”.⁸⁵

The fact that the Commissioner has a discretion to proceed with enforcement actions while the tax obligation is disputed, is important as it means that a taxpayer may take the Commissioner’s decision in this regard on review in terms of section 5(1) of the Administrative Decisions (Judicial Review) Act, 1997 (“ADJRA”).⁸⁶

6.3.2.2 Exceptions

Although the Administration Act does not explicitly provide for any exceptions or discretions in terms of which the payment of taxes pending a review or an appeal is suspended, it may be possible for a taxpayer to have his or her obligation suspended.

At first glance, paragraph 225-10(1) of Schedule 1 to the Administration Act appears to provide an exception where a taxpayer’s payment obligation may be suspended because it provides the Commissioner with a discretion to defer the time at which a

⁸⁵ *Roma Industries* 4116.

⁸⁶ In terms of s 3 of the ADJRA, a decision to which the ADJRA applies would be “a decision of administrative character made, proposed to be made, or required to be made (whether in the exercise of a discretion or not” either “under an enactment referred to in paragraph (a), (b), (c) or (d) of the definition of *enactment*; or by a Commonwealth authority or an officer of the Commonwealth under an enactment referred to in paragraph (ca) or (cb) of the definition of *enactment*”. S 3 of the ADJRA defines enactment as

- “(a) an Act, other than:
 - (i) the *Commonwealth Places (Application of Laws) Act 1970*; or
 - (ii) the *Northern Territory (Self-Government) Act 1978*; or
 - (iii) an Act or part of an Act that is not an enactment because of section 3A (certain legislation relating to the ACT); or
- (b) an Ordinance of a Territory other than the Australian Capital Territory or the Northern Territory; or
- (c) an instrument (including rules, regulations or by-laws) made under such an Act or under such an Ordinance, other than any such instrument that is not an enactment because of section 3A; or
- (ca) an Act of a State, the Australian Capital Territory or the Northern Territory, or a part of such an Act, described in Schedule 3; or
- (cb) an instrument (including rules, regulations or by-laws) made under an Act or part of an Act covered by paragraph (ca); or
- (d) any other law, or a part of a law, of the Northern Territory declared by the regulations, in accordance with section 19A, to be an enactment for the purposes of this Act”.

Therefore, it is submitted that the ATO’s decision would constitute a decision to which the ADJRA applies as it is of an administrative nature and made in terms of the Administration Act (which is not one of the Acts excluded in terms of par (a) of the definition of “enactments”).

tax liability arises. Deferring the obligation to a later stage results in a taxpayer's obligation being suspended and no interest on outstanding taxes will accrue as the tax will not be regarded as due and payable.⁸⁷ The Commissioner may, when exercising his or her discretion, consider whether the reason why payment cannot be made is beyond the taxpayer's control⁸⁸ or whether full payment can be made at a later stage.⁸⁹ The discretion provided for in paragraph 225-10(1) appears to deal more with a taxpayer not being able to pay the assessed amount as opposed to the taxpayer disputing the correctness of the assessed amount. It may not be an easy feat for a taxpayer to have his or her payment date deferred if the sole reason why he or she seeks the deferral is because the amount is disputed.

As it may be difficult for a taxpayer to have his or her payment date deferred it may be better to approach the ATO to reach a so-called "50-50 arrangement", in terms of which the taxpayer pays at least half of the amount in dispute⁹⁰ and the Commissioner defers the collection of the other half. Furthermore, the interest which would have accrued is partially remitted.⁹¹ Interest accrues on the entire amount in dispute from the due date until the taxpayer pays 50 per cent of the amount. As regards the remaining portion, a taxpayer will be responsible for 50 per cent of the interest from the date on which the 50 per cent payment was made until 14 days after the Commissioner has rejected the objection or a court or tribunal has handed down a decision against the taxpayer.⁹² This agreement may be reached at the objection stage and may be extended until a relevant tribunal or court has dealt with the review or appeal.⁹³

⁸⁷ Section 225-10(1) of Sch 1 to the Administration Act.

⁸⁸ See ATO *Practice statement law administration: general debt collection powers and principles* (3 July 2014) par 33 where it is indicated that the non-payment would be due to circumstances beyond a taxpayer's control when it relates to, for instance, natural disasters, other disasters that may have, or have had, a significant impact on a debtor or region, the serious illness of the debtor where there is no other person that can make (or could have made) the payment, a legal impediment and the embezzlement of the debtor's payment by a tax agent, solicitor or other third party.

⁸⁹ ATO (3 July 2014) par 32 available at <http://bit.ly/1E64Tt3> (accessed 4 Aug. 2015).

⁹⁰ The taxpayer has to pay all the taxes that are not in dispute.

⁹¹ ATO *Practice Statement Law Administration (PS LA 2011/4) – collection and recovery of disputed debts* (update 26 Feb. 2015) par 4.

⁹² ATO (update 26 Feb. 2015) par 36.

⁹³ ATO (update 26 Feb. 2015) par 33.

The ATO conducts a risk assessment to determine whether a 50-50 agreement may be reached.⁹⁴ In determining the risk associated, and consequently whether a 50-50 agreement may be appropriate, the ATO considers, amongst other factors, the nature of the debt, the taxpayer's attributes and relevant policy issues.⁹⁵ When dealing with the nature of the debt, the ATO considers whether the debt arose due to aggressive tax planning,⁹⁶ the age of the debt⁹⁷ and whether the debt was voluntarily disclosed or established by an audit.⁹⁸ The consideration of a taxpayer's attributes includes investigating his or her compliance history, financial position and the taxpayer's truthfulness.⁹⁹ From a policy perspective the ATO will also keep in mind that the legislation prioritises the recovery of revenue above the finalisation of a dispute.¹⁰⁰ A taxpayer may mitigate the risk associated with deferring a payment, and consequently making a 50-50 agreement more appropriate, by furnishing acceptable security.¹⁰¹

Apart from entering into a 50-50 agreement, the Commissioner may also defer the payment of disputed taxes if he or she is of the opinion that a genuine dispute exists in relation to the amount.¹⁰² There is no definition of or factors indicating what would be considered as a genuine dispute in this context.¹⁰³ However, the ATO indicates

⁹⁴ ATO (update 26 Feb. 2015) par 26.

⁹⁵ ATO "Practice statement law administration (PS LA 2011/6) – risk management in the enforcement of lodgement obligations and debt collection activities" (update 28 Nov. 2013) par 34 available at <http://bit.ly/1UpyY0h> (accessed 6 Aug. 2015).

⁹⁶ ATO (update 28 Nov. 2013) par 22 available at <http://bit.ly/1UpyY0h> (accessed 6 Aug. 2015).

⁹⁷ ATO (update 28 Nov. 2013) par 34 available at <http://bit.ly/1UpyY0h> (accessed 6 Aug. 2015). The older the debt, the higher the risk of not being able to collect it.

⁹⁸ ATO (update 28 Nov. 2013) par 34 available at <http://bit.ly/1UpyY0h> (accessed 6 Aug. 2015).

⁹⁹ ATO (update 28 Nov. 2013) par 34 available at <http://bit.ly/1UpyY0h> (accessed 6 Aug. 2015).

¹⁰⁰ ATO (update 26 Feb. 2015) par 8.

¹⁰¹ ATO (update 26 Feb. 2015) par 52. See ATO (3 July 2014) par 87 available at <http://bit.ly/1E64Tt3> (accessed 4 Aug. 2015) where (i) a registered first mortgage over free property; (ii) a registered second mortgage with adequate equity in the property to secure the tax debt; or (iii) an unconditional bank guarantee from an acceptable Australian bank are put forward as acceptable securities. According to ATO (update 26 Feb. 2015) par 60, at the ATO is not inclined to accept security for the entire amount of tax in dispute. This is because the ATO is tasked with the optimal collection of tax debt and not with deferring the payment in order to obtain interest. As such, security for the entire amount in dispute is limited to certain instances. An example of when security will be accepted *in lieu* of payment of the debt is when a taxpayer is unable to secure a loan from a financial institution to pay the tax debt because he or she does not have a sufficient income to repay the loan although he or she has an unencumbered asset in the form of real property.

¹⁰² ATO (update 26 Feb. 2015) par 43.

¹⁰³ In *DCT v Neutral Bay Pty Ltd; DCT v MA Howard Racing Pty Ltd; DCT v Broadbeach Pty Ltd* (2008) HCA 41 par 22 the Commissioner contended that a genuine dispute does not refer to an

that it expects a taxpayer who has filed a *bona fide* objection to co-operate by furnishing the necessary information in order to have the dispute resolved as soon as possible. If a taxpayer is considered to delay the dispute resolution process, the ATO may in all probability continue to recover the tax in dispute as it would then consider the taxpayer not to have a genuine dispute.¹⁰⁴ Thus, establishing whether there is a genuine dispute is left for the Commissioner to determine.¹⁰⁵

Deferring payment, either due to a 50-50 agreement or because it relates to a genuine dispute, is within the ATO's discretion. This situation is problematic. The Inspector-General of Taxation ("IGT") states that the ATO's approach to collecting disputed debts seems to be inconsistent in respect of large businesses and high-wealth individuals.¹⁰⁶ The IGT mentions that in some instances the ATO is willing to make payment arrangements while in other similar instances it proceeds with collection actions.¹⁰⁷

Another alternative to prevent the ATO from proceeding with enforcement actions pending dispute resolution would be to approach the courts. Firstly, in terms of section 15(1) of the ADJRA, the court may stay the ATO's decision to proceed with collections pending dispute resolution when a taxpayer has applied to have this decision reviewed, until the court has finalised the review of such a decision.¹⁰⁸ An application for the review in this instance does not automatically suspend the

objection, review or appeal being lodged. The court upheld this contention. This matter dealt with the meaning of "genuine dispute" in s 459 of the Corporations Act 2001 (Cth). This section provides that a statutory demand (in terms of s 459E) made by a creditor to a company may be set aside (in terms of s 459G(1)) if there is a genuine dispute between the company and the respondent regarding the existence of a debt to which the demand relates.

¹⁰⁴ ATO (update 26 Feb. 2015) para 12–13.

¹⁰⁵ ATO (update 26 Feb. 2015) par 43.

¹⁰⁶ IGT "The management of tax disputes – a report to the Assistant Treasurer" (Jan. 2015) par 5.4 available at <http://bit.ly/1HsLvGZ> (accessed 6 Aug. 2015). According to ATO "How we identify wealthy individuals and their businesses" (updated 27 May 2016) available at <http://bit.ly/2b5rMWR> (accessed 4 August 2016) a person would be classified as a high wealth individual when his or her net wealth is equal to or exceeds \$30 million.

¹⁰⁷ IGT (Jan. 2015) par 5.4 available at <http://bit.ly/1HsLvGZ> (accessed 6 Aug. 2015).

¹⁰⁸ Section 15(1) read with s 5(1) of the ADJRA. In terms of s 5(1) read with s 3(1) of the ADJRA, a decision would be subject to review when it relates to "a decision of an administrative character made, proposed to be made, or required to be made ... under an enactment". See Carbone "Statutory judicial review of the Administration of the Income Tax Assessment Act 1936" (Jan. 1996) *Revenue Law Journal* 110 for a discussion of when a decision would be subject to review. See *Ahern v Deputy Federal Commissioner of Taxation* (1983) ATC 4698 4704; 4709 where the court indicated that the ATO's decision not to suspend the payment obligation constitutes a decision to which the ADJRA applies.

taxpayer's payment obligation.¹⁰⁹ The ATO is only restricted from proceeding with enforcement actions pending a review when the Federal Court of Australia or judge of that court sitting in chambers¹¹⁰ deems it fit to stay the ATO's decision.¹¹¹

The matter of *Snow v Deputy Federal Commissioner of Taxation* ("Snow")¹¹² is an example of a taxpayer approaching a court in terms of section 15 of the ADJRA to have the ATO's decision to proceed with recovery actions stayed.¹¹³ This application was based on the fact that there was an error of law¹¹⁴ and that there was an improper exercise of power.¹¹⁵ The court did not deem it fit to suspend the recovery proceedings in this matter as the applicant did not provide adequate evidence that the ATO must be restrained from collecting the taxpayer's tax until all avenues of appeal have been exhausted.¹¹⁶

Secondly, a taxpayer may approach the courts for a stay in enforcement proceedings in terms of section 23 of the Federal Court of Australia Act, 1976 ("FCAA").¹¹⁷ In *Deputy Commissioner of Taxation v Australian Machinery and*

¹⁰⁹ Section 15(1) of the ADJRA.

¹¹⁰ Section 15(3) of the ADJRA read with s 4 of the Federal Court of Australia Act, 1976.

¹¹¹ Section 15(1) of the ADJRA.

¹¹² (1987) ATC 4078.

¹¹³ The applicant sought to suspend the ATO's decision to have a writ issued for the recovery of tax.

¹¹⁴ *Snow* 4085. In this case, the applicant asserted that the ATO made an error in law by failing to consider all the relevant circumstances and what the current situation demands; by taking irrelevant considerations into account and concluding that the applicant took part in "an artificial scheme of tax avoidance".

¹¹⁵ *Snow* 4084. Some of the relevant considerations that the applicant alleged were not taken into account (4084) were that there was a genuine dispute regarding whether the disputed income was derived by the applicant; the applicant was unable to pay the assessed tax and deferring the collection of tax would not substantially diminish the ATO's chances of recovering the said tax at a later stage.

¹¹⁶ *Snow* 4095.

¹¹⁷ Section 4 of the FCAA provides that a Federal Court is a court that is established in terms of the FCAA. In *Snow* (4096) the court held that it is not necessary to establish clear-cut parameters of the instances when s 15(1) of the ADJRA applies and when s 23 of the FCAA applies. However, the court mentioned that there might be instances where the requirements for a general interlocutory order in terms of s 23 of the FCAA may be met, yet would not comply with the requirements for the special operation of s 15 of the ADJRA. See *Australian Coarse Grain Pool* (1982) 46 ALR 398 where it was held that the requirements for an interlocutory order to be granted are (i) if there is a serious question to be heard and (ii) there is a balance of convenience in favour of the applicant. See Sigler "Interlocutory relief in proceedings under section 15 of the Administrative Decisions (Judicial Review) Act 1977 (CTH)" (1991) *University of Western Australia Law Review* 376–382 for a discussion of the requirements for interlocutory orders. See *Snow* 4085–4086 for a discussion of the overlap between s 15 of the ADJRA and s 23 of FCAA. In essence the court remarked that in an instance where both s 15 of the ADJRA and s 23 of

Investment Co Ltd (“*Australian Machinery*”),¹¹⁸ the court considered its discretion in terms of section 23 relating to sections 14 ZZM and 14 ZZR of the Administration Act’s predecessor, section 201 of the ITAA.¹¹⁹ The court stated that “[w]e are of the opinion that there is jurisdiction to grant a stay in such proceedings but that in considering any application for a stay the policy of the Act as stated in section 201 is a matter to which great weight should be attached”.¹²⁰

The court in *Deputy Federal Commissioner of Taxation v Mackey* (“*Mackey*”)¹²¹ indicated that when considering whether to suspend recovery proceedings of the ATO it has to take into account various factors. This consideration is not limited to whether an appeal is pending or whether there appears to be an arguable case. The Commissioner’s right to collect assessed taxes must also be considered. Moreover, the nature of the liability and the nature of the dispute should be taken into account.¹²²

In *Mackey*, the court remarked that the Commissioner has the right to collect taxes pending an objection or appeal. The court will only order otherwise if a special ground is present. The court held that there is no list of these special grounds and that it therefore has an open-ended discretion.¹²³ Glass J commented that on a scale of one to a 100, the needle is close to a hundred in favour of the Commissioner and it would require a substantial case by the taxpayer to reduce this needle below the halfway mark for the collection actions to be stayed.¹²⁴ The court indicated that if the Commissioner abuses its position¹²⁵ or if the payment of the disputed tax would

FCAA apply, it would consider an order for suspension in terms of s 15 of the ADJRA, as s 15 of the ADJRA provides a specific discretion while s 23 of the FCAA contains a general discretion.

¹¹⁸ (1945) 3 AITR 236.

¹¹⁹ See Ch 6, par 6.3.2.1: s 201 of the Assessment Act was the predecessor of s 14ZZM and 14ZZR of the Administration Act. The policy to which the quote refers is that the obligation to pay taxes pending dispute resolution is not deferred.

¹²⁰ *Australian Machinery* 241.

¹²¹ (1982) 82 ATC 4571. This matter also dealt with s 201 of the Assessment Act.

¹²² *Mackey* 4574. In *Mackey* (4572) the dispute related to what the court classified as a “contrived scheme to avoid tax”.

¹²³ *Mackey* 4575.

¹²⁴ *Mackey* 4575.

¹²⁵ An example of such abuse is when the Commissioner proceeds to collect tax in defiance of a court order: *Mackey* 4575.

cause the taxpayer extreme personal hardship, it would be a substantial ground to stay the collection actions.¹²⁶

6.3.2.3 Repayment

If a review or appeal regarding the disputed tax is later decided in favour of the taxpayer, he or she is entitled to interest. This entitlement emanates from section 9(1) of the Taxation (Interest on Overpayments and Early Payments) Act, 1983 (“T(IOEP)A”). In terms of this section, a person is entitled to interest when an amount of relevant tax was paid by the person to the ATO and “as a result of a decision to which this Act applies” the amount paid, or a portion thereof, constitutes an overpayment.

Two concepts in section 9(1) of the T(IOP)A, namely, “relevant tax” and “a decision to which this Act applies”, require closer consideration. Section 3C of the T(IOP)A provides a number of meanings for the concept “relevant tax”. The meaning relevant to this discussion is that “relevant tax” includes tax as defined in section 6(1) of the Assessment Act. This means that “relevant tax” includes the imposition of income tax by any Act.¹²⁷ The concept “a decision to which this Act applies” is defined in section 3(1) of the T(IOEP)A *inter alia* as the Commissioner’s or Administrative Appeals Tribunal’s decision relating to an objection¹²⁸ or a court’s decision relating to an objection.¹²⁹ Consequently, a taxpayer whose review or appeal is upheld will fall within the ambit of section 9(1) of the T(IOP)A and as such may claim interest on the overpayment.¹³⁰

¹²⁶ *Mackey* 4575.

¹²⁷ Section 6(1) of the Assessment Act. Section 6(1) explicitly excludes withholding taxes.

¹²⁸ In terms of ss 3(1)(a) & (b) of the T(IOP)A.

¹²⁹ In terms of s 3(1)(c)(i) of the T(IOP)A). The other instances that would fall under the definition “decision to which this Act applies”, not relevant to this discussion, are : (caa) a decision in terms of subdivision 263-A in Sch 1 to the Administration Act and furthermore where the expression “decision to which this Act applies” is used (cab) regarding tax referred to in item 91 of the table in section 3C; (ca) in relation to relevant tax in items 5 to 50 of the table in section 3C; (caaa) regarding tax referred to in item 60 of the table in section 3C; regarding fringe benefits tax imposed by the Fringe Benefits Tax Act 1986 and; (d) relating to relevant tax of a kind in terms of item 120 or 160 of the table in section 3C.

¹³⁰ The period during which and the amount of interest that accrues to the taxpayer are governed by s 10(1) of the T(IOEP)A. Interest will accrue either from when the taxpayer has received notice of the decision which resulted in an overpayment or when the relevant tax was paid to the ATO, whichever occurred last. The accrual of interest will end when the overpaid amount is refunded to the taxpayer. Section 10(1)(b) of the T(IOEP)A provides that interest is calculated at the base interest rate. In terms of s 10(1)(b) read together with s 995-1(1) of the Assessment Act, 1997

6.3.3 Comparison with SARS' powers

6.3.3.1 Contextual setting

South Africa and Australia provide taxpayers with dispute resolution procedures relating to tax disputes. Both countries provide for internal objections where after, if the dispute is still unresolved, the matter may be heard by an impartial forum, either a tribunal or court.

6.3.3.2 Suspending the payment of tax pending dispute

Australia, like South Africa, does not stay the obligation to pay taxes from the onset, pending an objection or an appeal.¹³¹ However, upon closer analysis it emerged that in some instances the ATO suspends the obligation to pay taxes, or half of the assessed taxes. Therefore, the ATO has a discretion to suspend the obligation to pay taxes even though the legislation does not explicitly specify when the discretion may be exercised in favour of the taxpayer. In South Africa it is much clearer what SARS would consider when exercising its discretion to suspend a tax obligation as this aspect has received substantial legislative attention. Although there are difficulties with some of the South African factors,¹³² they are provided for in legislation which provides certainty to taxpayers of what SARS will consider when exercising its discretion. The fact that legislation does not include the factors to consider when exercising its discretion to suspend the payment of taxes is not an approach that should be considered in South Africa. The absence of factors may result in an inconsistent application of the discretion and creates legal uncertainty in this regard.

In both South Africa and Australia a court may intervene regarding the question whether the obligation to pay taxes may be suspended. In South Africa, a taxpayer may take SARS' decision not to suspend the payment obligation pending an objection or an appeal on review in terms of PAJA. Australian taxpayers by the same

and s 8AAD of the Administration Act, this rate is linked to the monthly average yield of a 90-day bank accepted bill as provided by the Reserve Bank of Australia. See s 8AAD of the Administration Act for the applicable yield for each period.

¹³¹ Chapter 6, par 6.3.2.1; Ch 5, para 5.3.4.1; 5.4.1.

¹³² See Ch 5, para 5.2.3.2; 5.3.2.

token may apply to have the ATO's decision not to suspend the payment of taxes reviewed in terms of the ADJRA. Also, section 15 of the ADJRA provides the court with a discretion to suspend the obligation, in this instance to pay disputed taxes, pending the review application. A similar discretion is not provided for in PAJA and a taxpayer in South Africa would need to reach an agreement with SARS or apply for an interdict.¹³³

In both countries, a taxpayer who paid a disputed amount of tax and in whose favour the dispute is resolved, will be entitled to a refund and interest.

6.4 NEW ZEALAND

6.4.1 Contextual setting

6.4.1.1 Taxpayers' rights

Section 27(1) of the BORA provides that a tribunal or public authority¹³⁴ that has the power to make a decision regarding a person's rights, interests or obligations must adhere to the rules of natural justice. This means that both the *audi alteram partem* rule and the *nemo iudex in propria causa* rule must be complied with when the IRD

¹³³ See Ch 5, par 5.2.3.3.

¹³⁴ The BORA does not define public authorities. However, s 3 of BORA, which deals with the application of the BORA, provides that:

"This Bill of Rights applies only to acts done—

(a) by the legislative, executive, or judicial branches of the Government of New Zealand;
or

(b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law."

As such, the BORA does not place any obligation on a private individual in his or her personal capacity. See Stemplewitz "Horizontal rights and freedoms: the New Zealand Bill of Rights Act 1990 in private litigation" (2006) *New Zealand Journal of Public and International Law* 197–227 for further reading in this regard. Case law considering the meaning of "public function" in s 3(b) of the BORA has identified *inter alia* the following persons to conduct public functions for purposes of s 3(b): State-owned postal delivery enterprise (*Federated Farmers of New Zealand (Inc) v New Zealand Post Ltd* [1992] 3 NZBORR 339), the licensed private television broadcaster (*TV3 Network Ltd v Eveready New Zealand Ltd* [1993] 3 NZLR 435), the local government authority (*Zdrahal v Wellington City Council* [1995] 1 NZLR 700) and the director-general of health and the local health service (*Innes v Wong* [1996] 3 NZLR 238). See *Metro West v Sudi (Residential Tenancies)* [2009] VCAT 2025 (9 October 2009) para 67–78 for a discussion of these and other cases relating to what would constitute public functions in the New Zealand context. It is submitted that persons who are performing public functions, in addition to the legislative, executive and judicial branches of the New Zealand government, would have an obligation in terms of s 27 of the BORA to ensure that the principles of administrative justice are adhered to as the BORA applies to them. My submission accords with Stemplewitz (2006) *New Zealand Journal of Public and International Law* 203 who specifically identifies the IRD as a public authority.

makes decisions regarding a taxpayer's rights, interests and obligations.¹³⁵ Moreover, the right to justice provides that when a person's rights, interest or obligations are affected by a decision of a tribunal or public authority, the affected person has the right to apply for judicial review of the decision.¹³⁶ Section 27 of the BORA lays the foundation for dispute resolution procedures in New Zealand.

6.4.1.2 Dispute resolution framework

Before a dispute arises between a taxpayer and the IRD, the taxpayer usually furnishes a return of income and determines his or her income tax obligation.¹³⁷ If the IRD does not agree with this determination, the disputes procedures are initiated.¹³⁸

Firstly, section 89C of the NTAA provides that before the Commissioner of the IRD ("Commissioner")¹³⁹ may issue an assessment that differs from the taxpayer's determination, a notice of proposed adjustment ("NOPA") must be issued to the taxpayer.¹⁴⁰ The NOPA must indicate the proposed adjustment,¹⁴¹ adequate detail

¹³⁵ See Ch 2, par 2.8.5.1 where the *audi alteram partem* rule, which in essence entails that both parties should state their case, and the *nemo iudex in propria cause* rule, which provides that a person may not be a judge in a matter to which he or she is a party, are discussed in relation to how it is codified in the Constitution of the Republic of South Africa, 1996.

¹³⁶ Section 27(2) of the BORA.

¹³⁷ Section 92(1) of the NTAA. Section 92(5) provides that in instances where a tax credit in terms of ss MA–MF and MZ of the Income Tax Act 97 of 2007 applies, the taxpayer would not be required to furnish a return. Section 92(6) provides that a taxpayer does not have to file a return if the Commissioner made an assessment.

¹³⁸ The dispute procedures are provided for in Part 4A of the NTAA. In *Tannadyce Investments Limited v Commissioner of Inland Revenue* (2011) NZSC 158 (20 Dec. 2011) par 48 the court indicated that these procedures may be used when a return is filed by the taxpayer until an assessment is issued by the Commissioner. The challenge procedure provided for in Part 8A of the NTAA may be used after an assessment is issued and the taxpayer contests the assessment.

¹³⁹ The reference of Commissioner of IRD as "Commissioner applies" to Ch 6, par 6.4.

¹⁴⁰ Section 89C of the NTAA. This section provides that a NOPA is not required *inter alia* prior to issuing an assessment if the assessment is consistent with the taxpayer's return; if the tax return contains an obvious mistake or oversight which is merely corrected in the assessment; or if the assessment embodies an agreement reached between the Commissioner and the taxpayer. See also IRD *Standard Practice Statement SPS 16/05: disputes resolution process commenced by the Commissioner of Inland Revenue* (10 Oct 2016) para 24–35; 43–54. For a brief synopsis of the tax dispute resolution procedure prior to 1994, see Young "Tax disputes in New Zealand" (2009) *Journal of the Australasian Tax Teachers Association* 3–7; Glazebrook "Taxation disputes in New Zealand" (22 Jan. 2013) paper prepared for *Australasian Tax Teachers Association Conference* 6. Although section 89C of the NTAA specifically provides that the Commissioner must issue a NOPA, s 7 of the NTAA provides that the Commissioner may delegate his or her powers.

¹⁴¹ Section 89F(2)(a) of the NTAA.

relating to the factual and legal basis on which the Commissioner proposes this adjustment¹⁴² and how the law applies to this specific instance.¹⁴³

In the event of a taxpayer rejecting the IRD's proposed adjustment, section 89G(1) of the NTAA provides that the taxpayer must issue a notice of response (NOR).¹⁴⁴ The taxpayer's NOR should indicate which facts, legal arguments and grounds he or she considers to be incorrect as well as a quantitative adjustment.¹⁴⁵ If the IRD fully accepts the taxpayer's NOR, a notice of assessment in line with the NOR is issued. However, if the parties are unable to resolve the dispute, the conference phase follows.¹⁴⁶ Despite this phase not being provided for in legislation,¹⁴⁷ the IRD considers this procedure important as it creates an opportunity for the IRD and the taxpayer to attempt to resolve the different understandings of the relevant facts and legal arguments.¹⁴⁸ This phase is usually completed within three months.¹⁴⁹

¹⁴² Section 89F(2)(b) of the NTAA. In IRD (10 Oct 2016) par 56 it is indicated that the facts stated in the NOPA must focus on material factual issues and must be set out in a succinct way. Paragraph 58 specifies that the Commissioner should provide an outline of the legal principles applicable in the specific matter.

¹⁴³ Section 89F(2)(c) of the NTAA. The NTAA also provides for instances where the taxpayer may issue a NOPA, for example in terms of s 89D(1) of the NTAA, if the IRD has issued a notice of assessment to a taxpayer without issuing a NOPA beforehand. A taxpayer may also issue a NOPA in respect of a Commissioner's default assessment as envisaged in s 106(1) of the NTAA, a deemed assessment as envisaged in s 80H of the NTAA or in terms of s 89DA(1) where a taxpayer has filed an income tax return and the IRD has not issued a NOPA. Maples "Resolving small tax disputes in New Zealand – is there a better way?" (2011) *Journal of the Australasian Tax Teachers Association* 101 states that it is mostly the IRD that issues a NOPA. Accordingly, for purposes of this discussion, the dispute resolution procedure is discussed from the point of view that the IRD initiated the procedure by issuing a NOPA. See IRD *Standard Practice Statement SPS 11/06: disputes resolution process commenced by a taxpayer* (13 Oct. 2011) para 35–83 for further discussion relating to a NOPA issued by a taxpayer.

¹⁴⁴ Section 89G(1) read with s 89AB(2) of the NTAA. Section 89H(1) of the NTAA provides that if a taxpayer fails to reject the proposed adjustment within the prescribed response period, it will be deemed that he or she accepted the adjustment. In terms of s 89I of the NTAA the taxpayer may then not challenge the assessment of the IRD. In terms of IRD (10 Oct. 2016) par 92, if the IRD has not received a response to the NOPA from the taxpayer two weeks before the two-month respond period expires, the IRD will attempt to contact the taxpayer to determine whether he or she will furnish an NOR or not.

¹⁴⁵ Section 89G(2)(a), (b) & (e) of the NTAA.

¹⁴⁶ IRD (10 Oct. 2016) par 132.

¹⁴⁷ Maples (2011) *Journal of the Australasian Tax Teachers Association* 101; Glazebrook (22 Jan. 2013) paper prepared for *Australasian Tax Teachers Association Conference 7*.

¹⁴⁸ IRD (10 Oct. 2016) par 130. The parties must agree on when the conference phase is finalised (IRD (10 Oct. 2016) par 154).

¹⁴⁹ IRD (10 Oct. 2016) par 144.

Should the conference proceedings fail to resolve the dispute, the Commissioner must furnish the taxpayer with a disclosure notice¹⁵⁰ and a statement of position¹⁵¹ indicating the facts and evidence on which the Commissioner plans to rely, the issues that the Commissioner believes will transpire and the legal principles he or she intends to rely on.¹⁵² The taxpayer must in turn furnish the Commissioner with his or her statement of position,¹⁵³ which must reflect the taxpayer's position with regard to the facts and evidence on which the taxpayer intends to rely, the issues that may arise and the legal principles that the taxpayer intends to rely on.¹⁵⁴

Generally, the matter is then referred to the Disputes Review Unit for administrative adjudication.¹⁵⁵ This unit forms part of the IRD and is tasked with making an impartial

¹⁵⁰ Section 89M(1) of the NTAA.

¹⁵¹ Section 89M(3) of the NTAA.

¹⁵² Section 89M(4) of the NTAA. See also IRD (10 Oct. 2016) para 216–232 for a discussion of the statement of position.

¹⁵³ Section 89M(5) of the NTAA. In terms of s 89AB(5) of the NTAA, the taxpayer's statement of position should be issued within two months after receiving the Commissioner's disclosure notice and statement of position. Section 89M(11) of the NTAA provides that a taxpayer may approach the High Court if he or she requires more time to respond to the Commissioner's statement of position.

¹⁵⁴ Section 89M(6) of the NTAA.

¹⁵⁵ IRD "Disputing a notice of proposed adjustment – what to do if Inland Revenue disputes your assessment (IR 777)" (Jan. 2012) 12. Maples (2011) *Journal of the Australasian Tax Teachers Association* 101 indicates that the adjudication procedure is more administrative in nature as it is not regulated in terms of legislation. Glazebrook (22 Jan. 2013) paper prepared for the *Australasian Tax Teachers Association Conference* 8 refers to the Disputes Review Unit as the internal Adjudication Unit. Section 89N(c)(viii) of the NTAA provides that the taxpayer and the Commissioner may agree to opt out of completing the dispute procedures if they feel that the matter would be better resolved by a court or Taxation Review Authority. According to IRD (10 Oct. 2016) par 164 the IRD will only opt out if it is satisfied that the taxpayer has participated meaningfully during the conference phase. Moreover, in terms of IRD (10 Oct. 2016) para 172–198 the IRD will only agree to opt out if one of the following applies: (i) the total amount in dispute does not exceed \$75 00; (ii) the dispute deals with a question of fact; and (iii) the issues in the present matter are similar to issues currently before a court or the Disputes Review Unit. Keating and Lennard "Developments in tax disputes procedure – another step backwards" (11–12 Nov. 2011) paper presented at the *New Zealand Institute of Chartered Accountants Annual Tax Conference* 12 indicate that these criteria are not contained in legislation and the rationale for them is not adequately explained. Griffiths "Resolving New Zealand tax disputes: finding the balance between judicial determination and administrative process" (17 Jan. 2012) paper presented at the *Australasian Tax Teachers Association Conference* 18; Brown and Butler "Latest Tax Bill raises Bill of Rights questions" (28 Jan. 2011) *NZLawyer Online* 21 available at <http://bit.ly/1KGxZpj> (accessed 21 Sept. 2015) remark that requiring the IRD's approval to opt out constitutes "seeking the permission to litigate", which is not required in other cases. They argue that this is in conflict with s 27(3) of the BORA, which provides that matters where the Crown is a party must be dealt with in the same manner as when the civil proceedings are between individuals.

and independent decision relating to the dispute.¹⁵⁶ If the adjudicator finds in favour of the taxpayer there will not be an amended assessment as initially proposed by the IRD.¹⁵⁷ However, if the adjudicator finds in favour of the IRD, the IRD would issue an assessment in accordance with the amendment that it proposed in the NOPA.¹⁵⁸ A taxpayer may then contest this assessment by challenging¹⁵⁹ it before the Taxation Review Authority¹⁶⁰ or in the High Court.¹⁶¹

6.4.2 Tax obligation pending dispute resolution

6.4.2.1 *Obligation to pay suspended*

When a taxpayer proceeds with a challenge of the assessment to the Taxation Review Authority or the High Court, section 138I(2) of the NTAA provides that a taxpayer's liability to pay a deferrable tax relating to tax in dispute, a shortfall penalty associated with a tax in dispute or interest related to the deferrable tax or shortfall penalty is deferred until the due date of that deferrable tax.¹⁶²

¹⁵⁶ IRD (10 Oct. 2016) par 222. IRD (Jan. 2012) 9 available at <http://bit.ly/1W4wTHX> (accessed 17 Sept. 2015) states that the adjudicator is considered to be independent as he or she would not have dealt with the case before and would generally not contact the taxpayer or an IRD officer who has dealt with the matter. See also Griffiths (17 Jan. 2012) paper presented at the *Australasian Tax Teachers Association Conference 5* in this regard.

¹⁵⁷ In IRD (10 Oct. 2016) par 266 the IRD states that it is bound by the decision of the adjudicator and if a decision is made against the IRD it cannot challenge this decision. However, in *ANZ National Bank Ltd v C of IR (No 2)* (2006) 22 NZTC 18, 618 the IRD deviated from a practice statement dealing with the instances when adjudication must take place. The IRD does not consider itself bound to statements in the practice statements. The New Zealand Law Society and New Zealand Institute of Chartered Accountants *Disputes: a review, July 2010* (Sept. 2010)) 4, referring to *ANZ National Bank Ltd v C of IR (No 2)* state that although the IRD's practice statements are useful for taxpayers, they should remember that they are changed at the convenience of the Commissioner. Further support that the IRD is not bound by its practice statements can be found in IRD (13 Oct. 2015) par 4; IRD (10 Oct. 2010) Introduction where it is stated that these practice statements are a reference guide and that the IRD will follow the practices as outlined in the practice statements where possible. Accordingly, the IRD may decide to challenge an adjudicator's decision even if the practice statement provides otherwise.

¹⁵⁸ *Tannadyce Investments Limited v Commissioner of Inland Revenue* (2011) par 48. See *Ch'elle Properties (NZ) Ltd v Commissioner for Inland Revenue* (2004) 21 NZTC 18, 618 (HC) para 30, 32 where it is indicated that the Commissioner is not bound by the report of the Disputes Review Unit.

¹⁵⁹ Paragraph 8A of the NTAA deals with the challenge provisions.

¹⁶⁰ See Ministry of Justice "Taxation Revenue Authority" available at <http://bit.ly/1LjjBpt> (accessed 10 Nov. 2016) for more details relating to the Taxation Revenue Authority.

¹⁶¹ Section 138B(1)(a) of the NTAA. Section 138B provides that the matter may be referred to a hearing authority. Section 3 of the NTAA defines "hearing authority" as a Taxation Review Authority or the High Court. See also IRD (Jan. 2012) 9 available at <http://bit.ly/1W4wTHX> (accessed 17 Sept. 2015; IRD (10 Oct. 2016) par 268.

¹⁶² Section 128 of the NTAA emulates the provisions of s 138I of the NTAA. The deferral in s 128 of the NTAA's relates to assessments issued between 1 Apr. 1995 and 1 Oct. 1996 or an assessment issued by the Commissioner relating to a component objection made before 1 Oct.

Some concepts in section 138I(2) of the NTAA require further elucidation. Firstly, section 138I(2) defers the liability of a “deferrable tax”. Section 3 of the NTAA defines “deferrable tax as

- “(a) an amount of tax, assessed under a tax law as payable by the person, in relation to which the person makes a competent objection under Part 8 or that the person challenges under Part 8A;
- (b) goods and services tax, payable (as defined in section 20A(1) of the Goods and Services Tax Act 1985) by the person on a due date, in relation to which the person makes a competent objection under Part 8 or that the person challenges under Part 8A;
- (c) an amount of tax assessed under a tax law as payable by the person and described in section RP 17B(3)(bb) of the Income Tax Act 2007”.

The relevant definition for purposes of this thesis is contained in paragraph (a) above, in which the following elements may be identified: (i) tax, (ii) assessed under a tax law; and (iii) competent objection or challenge. The definition of “tax” is fairly broad as it refers *inter alia* to “a tax, levy, or duty of any type imposed by a tax law” irrespective of how it is described and any amount payable by the Commissioner in terms of a tax law.¹⁶³ The next element “assessed under a tax law”, consists of two parts. One, the tax should be assessed. Although the NTAA does not define “assessed” as such, it is submitted that a tax would be considered “assessed” once an assessment has been issued. As indicated above,¹⁶⁴ the IRD would have issued an assessment once the Disputes Review Unit for administrative adjudication had made a finding. Consequently, when a taxpayer challenges a disputed tax before the Taxation Review Authority or in the High Court it would be an assessed tax. Two, it must be assessed in terms of “a tax law”. “Tax law” is defined, amongst other things, as a provision of the Inland Revenue Acts, in addition to an order or regulation to the Inland Revenue Acts. In turn, section 3 of the NTAA provides that “Inland Revenue

1996. Because s 128 is only applicable to a specific 18-month period, the focus of this discussion is on s 138I of the NTAA that deals with the challenge procedure after 1 Oct. 1996. Glazebrook (22 Jan. 2013) paper prepared for the *Australasian Tax Teachers Association Conference 9* remarks that the challenge proceedings consider the dispute *de novo*.

¹⁶³ Paragraph (a) of the definition of “tax” in s 3 of the NTAA.

¹⁶⁴ See Ch 6, par 6.4.1.1.

Act” refers to the Acts contained in the schedule to the NTAA. These include the Income Tax Act 1994; the NTAA and the Taxation Review Authorities Act, 1994.

The last element regarding the definition of “deferrable tax” is that it should be a competent objection or a challenge. A competent objection is an objection lodged in terms of section 126 of the NTAA and does not constitute a non-competent objection.¹⁶⁵ Section 126 objections are dealt with in Part 8 of the NTAA, which only deals with assessments issued between 1 April 1995 and 1 October 1996.¹⁶⁶ Consequently, the only relevant aspect for purposes of this thesis relates to a taxpayer challenging an assessment in terms of Part 8A of the NTAA.¹⁶⁷

The second concept contained in section 138I(2) of the NTAA that requires further discussion is the shortfall penalty. This is a penalty levied in terms of sections 141AA–141K of the NTAA for taking an incorrect approach with regard to tax or acting contrary to these sections.¹⁶⁸ These sections of the NTAA deal, amongst other aspects, with a taxpayer not taking reasonable care in his or her approach relating to tax which results in a tax shortfall,¹⁶⁹ a taxpayer evading tax liability¹⁷⁰ and a taxpayer failing to withhold tax as stipulated in a tax law.¹⁷¹ Consequently, whenever a taxpayer disputes an amount of tax to which a shortfall penalty is linked, his or her liability to pay the penalty is deferred.

Thirdly, section 138I(2) of the NTAA refers to interest associated with the deferrable tax and the shortfall penalty.¹⁷² Generally, a taxpayer would be subject to interest on unpaid tax.¹⁷³ Due to the wording of section 138I(2) of the NTAA, a taxpayer’s

¹⁶⁵ Section 3 of the NTAA. In terms of this section, a non-competent objection would be an objection to an assessment that is based on deficient or insufficient information provided by the taxpayer.

¹⁶⁶ Section 124A of the NTAA. For purposes of this thesis lodging an objection is not be relevant as it only applies for a limited time period.

¹⁶⁷ See Ch 6, par 6.4.1 where it is indicated when a taxpayer may challenge an assessment.

¹⁶⁸ Section 3 of the NTAA.

¹⁶⁹ Section 141A of the NTAA.

¹⁷⁰ Section 141E of the NTAA.

¹⁷¹ Section 141F(1)(a) of the NTAA.

¹⁷² Section 128(2) of the NTAA: this interest refers to interest accruing under Part 7 of the Act.

¹⁷³ In terms of s 120D(1) of the NTAA. Section 120C(2)(b) of the NTAA provides that unpaid tax refers to the situation where a taxpayer’s tax liability exceeds the amount of tax paid or credited by the ATO. This excess would constitute unpaid tax. Deferrable tax and shortfall penalties would resort under unpaid tax. Section 120C(a)(i) provides that interest will start accruing to the taxpayer if he or she has not paid the day after the due date for payment of the tax. In terms of s

obligation to pay interest associated with a disputed amount will be deferred when a challenge of an assessment is lodged.

The last concept contained in section 138I(2) of the NTAA that requires further discussion is “due date” as the obligations will be deferred until the “due date” for payment. Section 142F of the NTAA provides that deferrable tax is due and payable on the 30th day after the period of deferral lapses. Consequently, the deferred tax will become due and payable 30 days after a taxpayer’s final liability is determined.¹⁷⁴ The final liability is determined either on the day on which the Commissioner receives notice that the taxpayer is discontinuing his or her challenge, when the challenge is determined by the Tax Review Authority or a court,¹⁷⁵ or when the Commissioner concedes a challenge.¹⁷⁶

Section 120T of the NTAA specifically provides that although the interest is deferred until the end of the deferred period, it continues to accrue. Keating states that the question whether or not interest accrues while a tax obligation is deferred plays an important role when a taxpayer decides whether he or she would challenge an assessment.¹⁷⁷ The Taxation Committee of the New Zealand Law Society and the National Tax Committee of the New Zealand Institute of Chartered Accountants state that due to the current situation where interest continues to accrue, the risk associated with challenging an assessment may be too high for some taxpayers.¹⁷⁸

120C(a) of the NTAA interest will continue to accrue until the date tax is paid or the ATO credits it as paid. The amount of interest payable on the unpaid tax per day would be calculated by multiplying the unpaid tax with the paying rate divided by 365 (ss 120E(1) & 120E(2) of the NTAA). The paying rate is established by an Order in Council in terms of s 120H. Section 120H(b) provides the Governor-General with authority to establish the rate at which taxpayers should pay interest. In terms of reg 2 of the Taxation (Use of Money Interest Rates Setting Process) Regulations 1997 the taxpayer’s paying rate (i.e. the rate at which taxpayers’ interest is calculated) is the 90-day bill bank rate plus 450 basis points.

¹⁷⁴ “Period of deferral” as defined in s 3 of the NTAA.

¹⁷⁵ “Day of determination of final liability” as defined in s 3 of the NTAA in relation to assessments that are subject to challenge.

¹⁷⁶ “Day of determination of final liability” as defined in s 3 of the NTAA.

¹⁷⁷ Keating *Tax disputes in New Zealand: a practical guide* (2012) 8. See also Glazebrook (22 Jan. 2013) paper prepared for the *Australasian Tax Teachers Association Conference* 14. See also Ch 6, par 6.2.2.3 where a similar conclusion was reached in relation to Canada.

¹⁷⁸ The Taxation Committee of the New Zealand Law Society and the National Tax Committee of the New Zealand Institute of Chartered Accountants *Joint submission: the dispute resolution procedures in Part IVA of the Tax Administration Act 1994 and the challenge procedures in Part VIIIA of the Tax Administration Act* (4 Aug. 2008) Appendix A. See also Glazebrook (22 Jan. 2013) paper prepared for the *Australasian Tax Teachers Association Conference* 14.

6.4.2.2 Exception – significant risk

Section 138I(2B) of the NTAA provides that if the Commissioner is of the opinion that there is a significant risk that the taxpayer would not pay the tax if the challenge is decided against him or her, the Commissioner has a discretion to require a taxpayer to pay the disputed tax even though a challenge is lodged.¹⁷⁹ Neither section 138I(2B) of the NTAA nor any other provision of the NTAA states when a significant risk would be present.

Lennard compares this exception of significant risk to instances where a court may order a plaintiff to furnish security for costs.¹⁸⁰ In terms of rule 5.45 of the High Court Rules¹⁸¹ a judge may order a plaintiff to provide security for costs if the judge has reason to believe that the plaintiff will not be able to pay the costs of the defendant if the plaintiff is unsuccessful in the proceeding.¹⁸² Both instances are concerned with whether a person (taxpayer or plaintiff) would be able to perform in accordance with a decision against him or her. Lennard refers to *AS McLachlan Ltd v MEL Network Ltd* (“*McLachlan*”)¹⁸³ where, as regards an order to furnish a substantial amount of security, the court remarked that such an order in effect prevents the plaintiff from pursuing the matter. “An order having the effect should be made only after careful

¹⁷⁹ Although s 138(2B) of the NTAA specifically provides the Commissioner with this discretion, s 7 of the NTAA must be kept in mind. In terms of s 7, the Commissioner may delegate his or her powers. Section 7(1) of the NTAA provides a list of the powers that the Commissioner may not delegate. These are powers delegated to the Commissioner by the Minister or by the State Services Commissioner. Before these powers may be delegated by the Commissioner, he or she must first obtain written approval from either the Minister or the State Services Commissioner respectively. Section 7(2) of the NTAA provides for powers which may not be delegated to a person who is not in the Public Service. In terms of s 27 of the State Sector Act 20 of 1988, the Public Service comprises of departments and departmental agencies. The powers that may not be delegated outside the Public Service are *inter alia* the Commissioner’s power to negotiate a tax recovery agreement with a territory outside of New Zealand.

¹⁸⁰ Lennard “Security for costs – another brick in the wall? (Aug 2010) *Taxation Today* 15. The Ministry of Justice “Costs and disbursements” (last update 26 May 2016) available at <http://bit.ly/2aCWHca> (accessed 4 Aug. 2016) explains that when a person furnishes security for costs, money is paid to ensure that if the person is unsuccessful, he or she will be able to pay an adverse cost order. This payment is kept in a trust account until the proceedings are finalised.

¹⁸¹ The High Court Rules are contained in Sch 2 to the Judicature Act 89 of 1908.

¹⁸² Rule 5.45 (1)(b). In terms of rule 5.45(1)(a), an order relating to security for costs may also be granted if the plaintiff is not resident in New Zealand, a corporation not incorporated in New Zealand or is a subsidiary of a corporation that is not incorporated in New Zealand.

¹⁸³ (2002) 16 PRNZ 747 (CA).

consideration and in cases in which the claim has little chance of success. Access to the courts for a genuine plaintiff is not lightly to be denied.”¹⁸⁴

It is submitted that although *prima facie* the significant risk exception relating to the deferral of taxes and an order to furnish security seems comparable, there is a substantial difference between the two. An independent party, a judge, determines whether the matter has a prospect of success and whether an order to furnish security for costs should be made. When dealing with section 138I(2B) of the NTAA, the determination lies with the Commissioner. It is submitted that determining whether there is significant risk of a taxpayer not paying if the challenge proceedings are unsuccessful cannot mean that the prospects of success should be determined. Such a meaning would result in the Commissioner adjudicating the merits of the tax dispute as opposed to whether there is a risk of the taxpayer being unable to pay. It is submitted that significant risk in this context could relate to whether there is a risk of assets being dissipated or whether there are imminent sequestration or liquidation proceedings.

6.4.2.3 *Repayment*

If a taxpayer paid an amount in dispute in terms of section 138I(2B) of the NTAA and he or she successfully challenges the assessment, the Commissioner must refund the taxpayer the amount of tax paid and interest that accrued on that amount.¹⁸⁵

A taxpayer who paid an assessed tax without being required to do so in terms of section 128(2B) of the NTAA, would also be entitled to a repayment of the assessed tax with interest if he or she were successful in the challenge thereof. Section 183G of the NTAA provides that when a liability to pay an amount is withdrawn after the taxpayer has already paid it, the Commissioner will refund the taxpayer.¹⁸⁶ The same applies to the situation where interest is payable to a taxpayer due to an overpayment¹⁸⁷ as in terms of section 138I(2A) of the NTAA, the taxpayer would be

¹⁸⁴ *McLachlan* para 15–16.

¹⁸⁵ Section 138I(3) of the NTAA.

¹⁸⁶ Section 183G(c) of the NTAA. Section 183G(d) provides an alternative in terms of which the Commissioner may apply the paid money towards another tax liability of the taxpayer.

¹⁸⁷ Section 120D(3) of the NTAA provides that the Commissioner is liable to pay interest on overpaid tax. According to s 120C(2)(a) of the NTAA, tax is overpaid when the tax paid by the taxpayer is

entitled to interest on the overpayment when he or she has paid a tax amount in dispute where after the dispute was resolved in favour of the taxpayer.¹⁸⁸

6.4.3 Comparison with SARS' powers

6.4.3.1 Contextual setting

Taxpayers in South Africa and New Zealand have the right to dispute an assessment. In New Zealand this right flows from the right to justice as contained in section 27 of the BORA while in South Africa this right is embedded in section 34 of the Constitution which provides for access to courts.

6.4.3.2 Tax obligation pending dispute resolution

New Zealand's approach to a taxpayer's obligation to pay taxes pending dispute resolution differs from the approach in South Africa. As a point of departure, a New Zealand taxpayer's obligations are deferred while in South Africa the obligation to pay tax is not deferred initially.

Legislation in both South Africa and New Zealand provides the revenue authorities with the discretion to deviate from the respective points of departure.¹⁸⁹ In New Zealand, the Commissioner has a discretion not to suspend the obligation to pay taxes pending dispute resolution if, in the opinion of the Commissioner, there is significant risk that the taxpayer would not pay the deferred amount if the dispute is

more than the tax payable. Consequently, when a taxpayer paid an amount of tax pending a dispute and the dispute is later decided in favour of the taxpayer, the amount of tax paid would constitute overpaid tax.

¹⁸⁸ Section 138(4) of the NTAA. In terms of s 120C(b)(A)'s definition of "date interest starts" read with s 120C(b) of the NTAA's definition of "interest period", the Commissioner is liable for interest from the day after the due date for payment or the day after which payment is made, whichever occurs last. In terms of s 120C(b)(i) and (ii) of the NTAA's definition of interest period, interest will continue to accrue until the Commissioner refunds the tax or applies it for another tax liability, whichever occurs first. The amount of interest payable by the Commissioner is calculated by multiplying the unpaid tax with the paying rate, which in terms of s 120C(1) of the NTAA's definition of Commissioner's paying rate read with s 120H of the NTAA, is the rate determined by the Governor-General divided by 365. This amount is then multiplied by the number of days in the interest period as provided for in s 120E(2) of the NTAA.

¹⁸⁹ In South Africa, a senior SARS official has this discretion while in New Zealand the Commissioner may exercise this discretion. See Ch 5, par 5.3.4.1 where it is indicated that in terms of s 6(3) of the TAA a senior SARS official is either the Commissioner of SARS or a SARS official who has written permission from the Commissioner to act accordingly or is occupying a post designated by the Commissioner for this purpose. See also Ch 6, par 6.4.3: although certain powers or rights are given to the Commissioner, they may be delegated in terms of s 7 of the NTAA.

decided in the IRD's favour.¹⁹⁰ Unlike the situation in South Africa there are no indicators of what the Commissioner should consider when determining whether to deviate from the initial position or not. This may result in an inconsistent application of the discretion as it is uncertain when there would be a significant risk.¹⁹¹ In South Africa, legislation provides which factors SARS may consider before deviating from the point of departure by suspending the obligation to pay taxes pending dispute resolution.¹⁹²

Both countries provide for a repayment, with interest, of the disputed amount if the dispute is resolved in favour of the taxpayer.

6.5 NIGERIA

6.5.1 Contextual setting

6.5.1.1 Taxpayers' rights

Section 36(1) of the Nigerian Constitution provides that every person has the right "to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality". The right to a fair hearing encapsulates two rules of natural justice, namely, *audi alteram partem*¹⁹³ and *nemo iudex in propria causa*.¹⁹⁴ Section 36(2) of the Nigerian Constitution qualifies the right to a fair hearing as it provides that a law will not be invalid simply because government is empowered to make administrative decisions that affect rights and obligations of a person. Such a law is valid if the person who would be affected by the decision has the opportunity to make representations before the decision is made¹⁹⁵ and the decision is not regarded as final and conclusive.¹⁹⁶

¹⁹⁰ See Ch 6, par 6.4.2.1.

¹⁹¹ See Ch 6, par 6.4.3.3(a).

¹⁹² However, see Ch 5, par 5.3.1: the CEA does not provide any factors that SARS has to consider when exercising its discretion to suspend the payment obligation pending dispute resolution.

¹⁹³ *Audi alteram partem* means to "hear the other side". See Ch 2, par 2.8.5.1 where this rule is discussed.

¹⁹⁴ *Olufeagba v Abdur-Raheem* [2010] ALL FWLR (Pt. 512) 1033, 1042; *Awazurike v Attorney-General of the Federation* [2009] ALL FWLR (Pt. 489) 549, 553. *Nemo iudex in propria causa* means "no one may be a judge in his or her own case". See Ch 2, par 2.8.5.1 where this rule is discussed.

¹⁹⁵ Section 36(2)(a) of the Nigerian Constitution.

¹⁹⁶ Section 36(2)(b) of the Nigerian Constitution.

6.5.1.2 Dispute resolution framework

When a taxpayer wishes to dispute an assessment he or she may raise an objection against the assessment.¹⁹⁷ If an objection is disallowed the taxpayer may take the matter on appeal to the Tax Appeal Tribunal (“TAT”)¹⁹⁸ or civil courts.¹⁹⁹

Hazeez indicates that once a dispute has been resolved the FIRS has to serve a notice of amended assessment in accordance with what was agreed or determined on appeal.²⁰⁰ The taxpayer must pay the amended assessment within a month from the date upon which the notice was served on him or her.²⁰¹

6.5.2 Payment obligation pending dispute resolution

There is no obligation on a taxpayer to pay the assessed amount when it is subject to an objection as the FIRS regards an amount in relation to a disputed assessment to only become payable a month after a formal objection has been determined.²⁰²

Similarly, when a taxpayer seeks redress by way of an appeal, the assessed tax is due only after the appeal has been finalised.²⁰³ Hence, a taxpayer’s payment obligation is suspended pending dispute resolution. However, it is possible that a taxpayer may be ordered to pay a portion of the disputed tax if the appeal is brought before the TAT. Paragraph 15(7) of the 5th schedule to the FIRSEA provides that if FIRS is able to prove to the TAT that

- (i) the taxpayer has failed to file the required tax returns for the year of assessment concerned;
- (ii) that the appeal is frivolous, vexatious or abusing the appeal process; or

¹⁹⁷ FIRS “Information circular: assessment procedure” (Feb. 2006) par 6.0.

¹⁹⁸ Paragraph 13(1) of the 5th Sch to the FIRSEA. See Anyie *Taxpayers’ rights in Nigeria* (unpublished MPhil dissertation, University of Pretoria (2015)) 55–56 for a brief discussion of the setup and structure of the TAT.

¹⁹⁹ FIRS (Feb. 2006) par 6.3. See Achor “Tax dispute resolution in Nigeria: a storm in a tea cup” (2014) *Journal of Law, Policy and Globalization* 2224–3240 for a discussion of the jurisdiction of the TAT and civil courts in relation to tax disputes.

²⁰⁰ Hazeez *Appraisal of Federal Inland Revenue Collection System* (unpublished MBA dissertation, University of Nigeria (2011)) ix.

²⁰¹ Section 77(4) of the Companies Income Tax Act Cap C21 LFN, 2004.

²⁰² Section 76 of the Companies Income Tax Act; s 66 of the Personal Income Tax Act 104 of 1993. See also FIRS “Information circular: collection procedure” (25 March 1993) par 1.4.

²⁰³ FIRS (25 March 1993) par 1.4.

- (iii) it is appropriate for the taxpayer to furnish security before hearing the appeal,

the TAT may order the taxpayer to satisfy a part of his or her payment obligation while the dispute is being resolved. A taxpayer would have to pay the lesser of an amount equal to the assessed amount of the previous year of assessment or half of the assessed amount that is currently subject to appeal plus 10 per cent of the amount.²⁰⁴ If the taxpayer fails to pay the amount determined by the TAT, the assessment would be confirmed and the taxpayer may not continue with an appeal with regard to that assessment.²⁰⁵

The fact that the TAT may order a taxpayer to pay a portion of the amount in question, requires further consideration. When the TAT orders a taxpayer to pay a portion of the disputed tax, it ensures that the FIRS is able to collect some of the taxes in an effective manner. However, it prevents a taxpayer with inadequate financial resources to exercise his right to appeal and a fair hearing. Furthermore, taxpayers may be discouraged from approaching the TAT and instead approach the civil courts where no a similar provision applies.

6.5.3 Comparison with SARS' powers

6.5.3.1 Contextual setting

In terms of the constitutions of both South Africa and Nigeria a taxpayer has the right to have a matter heard by an impartial forum.²⁰⁶ This right ensures adherence to the *audi alteram partem* and *nemo iudex in propria causa* rules. Accordingly, this right has to be taken into account when determining whether the way in which the revenue authority deals with a taxpayer's payment obligation pending dispute resolution is constitutional.

²⁰⁴ Paragraph 15(7) of the 5th Sch to the FIRSEA. Aniyie (2015) fn 180a states that the deposit is paid in the same manner as an assessed tax, namely, by paying it into the FIRS account. The taxpayer then has to present proof of payment to the TAT.

²⁰⁵ Paragraph 15(7) of the 5th Sch to the FIRSEA.

²⁰⁶ See Ch 6, par 6.5.1.1 regarding Nigeria and Ch 2, par 2.8.6 regarding South Africa.

6.5.3.2 *Tax obligation pending dispute resolution*

Nigeria's approach to a taxpayer's payment obligation when tax is disputed stands in contrast to the position of South Africa. In Nigeria the only instance where a taxpayer has to pay an assessed tax is when the TAT orders the payment of a portion of the disputed tax. In South Africa the payment obligation is not suspended from the onset.

The South African approach results in the effective and efficient collection of taxes, while the Nigerian approach would not be as effective from a revenue collection point of view. When considering the Nigerian provisions regarding a taxpayer's right to trial, it becomes apparent that when the TAT determines that a portion of the tax is payable before a taxpayer may proceed with further dispute resolution, this right is substantially infringed.

The Nigerian approach would not fit into the South African constitutional framework. A provision where a person's right to access to courts is ousted due to a person's inability to pay a portion of the disputed amount would not be considered a reasonable and justifiable limitation of his or her rights.²⁰⁷ The reason for this is that in South Africa the adjudication of the merits and the payment of the tax obligation should be kept separate.²⁰⁸ Accordingly, in the South African context the resolution of the dispute should not be brought to a standstill based on a taxpayer's inability to pay the disputed tax.

6.6 CONCLUSION

In this chapter it has been established that all four of the comparative jurisdictions, like South Africa, have dispute resolution procedures available when a taxpayer disputes liability to pay tax. Accordingly, the question of what happens to the taxpayer's obligation to pay the disputed tax while the dispute is pending is relevant in all these countries.

²⁰⁷ See Ch 2, par 2.8.6 where the right to access to courts is discussed.

²⁰⁸ Standing Committee on Finance: Report Back Hearings *Draft Taxation Laws Amendment Bill, 2014 and Tax Administration Laws Amendment Bill, 2014 – Draft Response Document from National Treasury and SARS, as presented to SCOF* (15 Oct. 2014) 41. See Ch 5, par 5.1 where this aspect is mentioned.

In light of the focus of this chapter, namely, whether a taxpayer's obligation to pay taxes is suspended pending dispute resolution, it was found that Australia has the same point of departure as South Africa. In both these countries the obligation to pay is usually not suspended. In Canada, New Zealand and Nigeria, on the other hand, a taxpayer generally does not have to pay disputed taxes until the dispute has been resolved.

Canada and New Zealand employ other measures to prevent taxpayers from making frivolous objections and appeals which are necessary as these countries suspend the payment obligation.²⁰⁹ In both countries, interest on the assessed tax continues to accrue even though the payment obligation is suspended pending dispute resolution. Also, in Canada a taxpayer who disputes an assessed amount simply to postpone payment of the tax may face a 10 per cent penalty. It is submitted that these measures constitute less invasive means than proceeding with enforcement actions while a dispute is pending to ensure effective collection of taxes. Consequently, Olivier's criticism that the court in *Metcash Trading Ltd v Commissioner for the South African Revenue Service and the Minister of Finance*²¹⁰ wrongly held that the "pay now, argue later" rule is constitutional as this rule is not a reasonable and justifiable limitation on a taxpayer's rights, is valid.²¹¹

Although the countries do not all have the same point of departure, each country is, to some extent, flexible. The ATO, similar to SARS, has a discretion to suspend the obligation to pay taxes pending dispute resolution. The instances when the ATO exercises this discretion in favour of the taxpayer are not provided for in legislation, and this may create uncertainty. Furthermore, the ATO has been criticised for not applying its discretion consistently. On the other hand, the relevant South African tax

²⁰⁹ Although Nigeria also does not suspend the payment obligation pending dispute resolution, it does not have any other deterrence measures in place. The reason may be that Nigeria relies more on oil revenue than taxes.

²¹⁰ 2001 (1) BCLR 1 (CC).

²¹¹ See Ch 5, par 5.2.1 where it is indicated that establishing whether there are less invasive ways for SARS to achieve an objective is a factor the court has to consider when determining whether a limitation is a reasonable and justifiable restriction on a person's constitutional rights. See also Ch 2, par 2.8.7 where the limitation of constitutional rights in terms of s 36 of the Constitution is discussed.

legislation²¹² does indicate which factors should be taken into account when SARS considers whether to deviate from the point of departure or not. Although these factors are subjective and not free from criticism, the factors have been clarified by legislation. It is submitted that, as is the case in South Africa, the factors should be provided in legislation to ensure legal certainty and adherence to the rule of law.

Although the discretion exercised by the ATO and SARS is fairly subjective, both countries allow a taxpayer to take the decision of the revenue authority on review to a court. Although the possibility of review is a positive opportunity as it provides a beacon of objectivity and impartiality, it must be borne in mind that taking the revenue authority's decision on review would have further cost implications for the taxpayer.

The instances when the CRA deviates from its initial approach are significant as they are not subject to the discretion of the revenue authority. Whether a tax is being withheld or the taxpayer is a large corporation are aspects that may be verified objectively.²¹³ The last exception, where the collection of the assessed amount is believed to be in jeopardy because of the delay of the collection, only applies when a judge issues a jeopardy order. This means that it is not the CRA that has to determine whether the collection is in jeopardy, but a judge. It is submitted that if objective criteria are used to determine whether a taxpayer is required to pay an assessed tax, the problems and criticisms relating to the factors that SARS has to consider would be eliminated.

There is another reason why the manner in which Canada deals with the obligation to pay taxes pending dispute resolution is important. In Canada the essence of a taxpayer's right to dispute resolution is captured by suspending the tax obligation until a decision has been made by an impartial forum. While it gives the taxpayer an opportunity to have his or her case heard, it does not allow for this in perpetuity. This

²¹² The TAA, the CEA & the CCA.

²¹³ Although I advocate an approach where exceptions should be made on objective grounds, I acknowledge that the exceptions of withholding tax and large corporations in Canada would lead to disputes.

achieves the required balance between a taxpayer's rights relating to dispute resolution and the revenue authority's duty to collect taxes effectively.

Canada, Australia and Nigeria share the notion of a taxpayer paying a portion of the disputed tax pending dispute resolution (in some instances). The advantage of such an approach is that the revenue authority will be able to collect at least a portion of the assessed tax, while, on the other hand, except for Nigeria, the taxpayer will not be financially hindered or discouraged from continuing with dispute resolution.

PART 4 THIRD PARTY APPOINTMENTS

CHAPTER 7 - THIRD PARTY APPOINTMENTS IN SOUTH AFRICA

7.1 INTRODUCTION

The payment and enforcement of taxes necessitate two parties: one, SARS, collecting taxes, and the other, the taxpayer, paying the taxes. The rights and obligations of both these parties are governed by legislation¹ *inter alia* the TAA and the CEA.

However, it is not only SARS and the taxpayer who incur obligations relating to the payment and enforcement of taxes. Certain provisions place duties on third parties to furnish SARS with information in relation to a taxpayer,² while other provisions stipulate that a third party may be liable for tax debts of a taxpayer, for example, when the third party is involved in the financial management of a taxpayer,³ a shareholder of a company⁴ or is appointed as an agent or who represents him- or herself as an agent of the person in charge of a ship⁵ or of a container operator.⁶

Both the TAA and the CEA allow for third party appointments in terms of which a third party becomes liable for the taxpayer's tax debt because he or she holds (or will hold) money on behalf of or due to the taxpayer. The third party only becomes liable for the taxpayer's tax debt once a third party appointment notice is issued.

¹ Nienaber *The expectation gap between taxpayers and tax practitioners in a South African context* (unpublished PhD thesis, University of Pretoria (2013)) 42.

² In terms of s 26 of the TAA a third party may be required to submit a return with the taxpayer's information. A third party in this instance could be a person who employs the taxpayer or receives money on behalf of the taxpayer. In GN 260 in *Government Gazette* 36346 (5 Apr. 2013) the Commissioner indicated that amongst other persons, banks, financial institutions, companies listed on the Johannesburg Securities Exchange, estate agents and attorneys are required to furnish third party returns. Section 46 of the TAA authorises the Commissioner to require a third party to furnish relevant material that pertains to a taxpayer. Relevant material, as defined in s 1 of the TAA, means "any information, document or thing that in the opinion of SARS is foreseeably relevant for the administration of a tax Act as referred to in section 3".

³ See s 180 of the TAA. The person may be held liable for the taxpayer's tax debt if he or she acted in a fraudulent or negligent manner which led to the taxpayer's failure to pay the tax.

⁴ In terms of s 181 of the TAA, shareholders, who were shareholders one year before the company was voluntarily liquidated, are jointly and severally liable for outstanding tax debt if the shareholders received assets within one year before the winding up of the company and the tax debt existed at that time.

⁵ See s 99 of the CEA read with s 1 of the CEA's definition of "master".

⁶ In terms of s 1 of the CEA a container operator provides international transport for goods in a container which is approved by the Commissioner.

In 2009, SARS acknowledged that the appointment of a third party is a useful mechanism to fulfil its duty of effective and efficient tax collection.⁷ Although the usefulness of the appointment of a third party from a collection perspective is apparent, it remains important to ensure that a taxpayer's rights as provided for in the Constitution are protected when this appointment is made.⁸ If the taxpayer's rights are not adequately protected, apart from the impact it may have on voluntary compliance, it would be unconstitutional.⁹ Therefore, it is paramount that a taxpayer's rights to access to the courts,¹⁰ to just administrative action¹¹ and to privacy¹² are not unreasonably and unjustifiably limited.¹³ It is submitted that a taxpayer would not be successful in arguing that his or her right to property, as contained in s 25(1) of the Constitution, is violated when a third party appointment has occurred. As indicated above,¹⁴ the right to property is infringed when there is a deprivation of property. However, a deprivation of property would be permissible if it is in terms of law of general application that is not arbitrary. It is submitted that the deprivation of a taxpayer's property (money) by way of a third party appointment is not arbitrary because there is a clear basis why the taxpayer's money is taken, namely, outstanding taxes. Accordingly, the right to property is not considered in the subsequent discussion.

⁷ With the introduction of a tougher administrative penalty regime at that stage, SARS specifically pointed out third party appointments as the manner in which outstanding penalties would be recovered. See SARS Communications "SARS announces tough penalties for non-compliant taxpayers and more time for provisional taxpayers to file returns" (14 Oct. 2009) available at <http://bit.ly/1WF4UjD> (accessed 3 May 2016) in this regard. See Ch 2, para 2.4; 2.5.5 where SARS' duty in terms of s 195(1)(b) of the Constitution to act in an efficient manner and the canon of taxation, efficiency, are discussed. See also SAICA "SARS' power to issue a garnishee-type order" (Feb. 2009) available at <http://bit.ly/16skvcz> (accessed 3 May 2016).

⁸ See Ch 2, par 2.8.1 where it is indicated that the Constitution imposes an obligation on SARS to respect the rights contained in the Bill of Rights.

⁹ See Ch 1, par 1.1 in this regard.

¹⁰ As provided for in s 34 of the Constitution. See Ch 2, par 2.8.6 where the right to access to courts is discussed.

¹¹ As provided for in s 33 of the Constitution. See Ch 2, par 2.8.5 where the right to just administrative action is discussed.

¹² As provided for in s 14 of the Constitution. See Ch 2, par 2.8.3 where the right to privacy is discussed

¹³ As provided for in s 36 of the Constitution. See Ch 2, par 2.8.7 where the limitation clause, s 36 of the Constitution, is discussed.

¹⁴ Chapter 2, par 2.8.4.

This chapter focuses on whether the third party appointment procedure achieves a balance between being an efficient and effective enforcement mechanism for SARS and protecting taxpayers' rights. Third party appointments relating to income tax and value-added tax are considered first and thereafter third party appointments relating to customs duty are examined.

7.2 DEVELOPMENT OF THIRD PARTY APPOINTMENTS RELATING TO INCOME TAX AND VALUE-ADDED TAX MATTERS¹⁵

Initially, third party appointments relating to income tax and value-added tax were regulated by section 99 of the ITA and section 47 of the VAT Act.¹⁶ These provisions have been repealed and the matter is now dealt with in terms of section 179 of the TAA.¹⁷ Although section 99 of the ITA and section 47 of the VAT Act have been repealed, it is essential to consider these provisions and related case law as they provide context with regard to the current third party appointment provisions contained in the TAA, insofar as the wording of the sections correspond.

7.2.1 Third party appointments in terms of the ITA and the VAT Act

7.2.1.1 Empowering provision

Section 99 of the ITA provided that

“[t]he Commissioner may, if he thinks necessary, declare any person to be the agent of any other person, and the person so declared an agent shall be the agent for the purposes of this Act and may be required to make payment of any tax, interest or penalty due from any moneys, including pensions, salary, wages or any other remuneration, which may be held by him or due by him to the person whose agent he has been declared to be”.

Section 47 of the VAT Act provided as follows:

“The Commissioner may, if he thinks it necessary, declare any person to be the agent of any other person, and the person so declared an agent shall

¹⁵ Portions of the discussion relating to the development of third party appointments in relation to income tax and value added tax are based on Keulder & Legwaila “The Constitutionality of third party appointments – before and after the Tax Administration Act” (2014) 77 *THRHR* 53–71.

¹⁶ 89 of 1991. Since the wording of s 99 of the ITA and s 47 of the VAT Act is similar, principles and discussions regarding the appointment of a third party in terms of one of these Acts apply *mutatis mutandis* to the other Act, unless specifically stated otherwise.

¹⁷ Schedule 1 to the TAA.

for the purposes of this Act be the agent of such other person in respect of the payment of any amount of tax, additional tax, penalty or interest payable by such other person under this Act and may be required to make payment of such amount from any moneys which may be held by him for or be due by him to the person whose agent he has been declared to be: Provided that a person so declared an agent who, is unable to comply with a requirement of the notice of appointment as agent, must advise the Commissioner in writing of the reasons for not complying with that notice within the period specified in the notice.”

When comparing these provisions, two differences become apparent. Firstly, section 99 of the ITA clarified that the money held by the third party could include pension, salary, wages or any other form of remuneration. The value-added tax provision, on the other hand, did not specify a list of what the money held by the third party could include. Therefore, it was unclear whether, for example, section 47 of the VAT Act would include money held as a pension.

Sections 37A and 37D of the Pension Funds Act¹⁸ provide clarity in this regard. Section 37A(1) provides that pension benefits, that is to say, amounts payable to a member or beneficiary in terms of the rules of the pension fund,¹⁹ are “not reducible, transferable or executable” except “to the extent permitted by this Act, the Income Tax Act, 1962 (Act. No 58 of 1962) and the Maintenance Act”. Section 37D of the Pension Funds Act provides when a deduction from a pension fund benefit is allowed by the Pension Funds Act. The only deduction allowed by this section that is relevant to this thesis, is that deductions may be made regarding an amount due in terms of the ITA.²⁰ When considering section 37A and 37D together, it is apparent that “any money” in relation to third party appointments in terms of the VAT Act could not have included a pension as it does not fall within the instances where a deduction of a pension benefit is authorised. It is uncertain why a pension fund benefit would have been subject to a third party appointment in terms of the ITA but not in terms of the VAT Act.

¹⁸ 24 of 1956.

¹⁹ “Benefit” as defined in s 1 of the Pension Funds Act.

²⁰ Section 37D(1)(a) of the Pension Funds Act.

A related aspect is whether the inclusion of “pension” in relation to money that could be attached by the third party appointment notice in terms of the ITA also referred to a pension interest, that is, the benefits to which the pension fund member would have been entitled if his or her membership of the fund was terminated before the member went on pension.²¹ It is submitted that section 99 of the ITA could not have been interpreted to include a pension interest. Section 37D(1)(d) of the Pension Funds Act provides that there may be a deduction of a member’s interest if it is assigned to a non-member spouse in terms of a divorce decree,²² an order relating to the division of assets in terms of Islamic law or an order in terms of the Maintenance Act.²³ Sonnekus points out that in terms of section 37D(1)(d) of the Pension Funds Act, pension interest may only be extracted from the pension fund when a court order is obtained specifically granting a creditor a claim against the pension fund.²⁴ Accordingly, Sonnekus states that SARS would not be able to claim a pension fund interest from a pension fund.²⁵ Also, It is submitted that based on the provision of section 37D(1)(d) of the Pension Funds Act, any deduction from a pension interest must be explicitly provided for in the Pension Funds Act. Therefore, it is submitted that the reference to “pension” in relation to third party appointments in terms of the ITA refers to pension benefit and not pension interest.

The second difference between the third party appointment provisions in the ITA and VAT Act was that the VAT Act provided that a third party who was unable to comply with the third party notice had to inform the Commissioner of such inability.²⁶ Section 99 of the ITA did not provide the third party with a similar opportunity to indicate his

²¹ “Pension interest” as defined in s 1 of the Divorce Act 70 of 1979.

²² In accordance with s 7(8)(a) of the Divorce Act.

²³ 99 of 1998.

²⁴ Sonnekus "Pensioendeling by egskeiding steeds onbevredigend en verwarrend gereël" (2008) *TSAR* 286.

²⁵ Sonnekus (2008) *TSAR* 286. Sonnekus does not specifically refer to third party appointments when he expresses this view which appears to be more general in nature. I agree with Sonnekus (289) that a pension fund interest ensures a nest egg for retirement and is not simply a piggy bank that may be cracked open at any time. Also, allowing deductions from a pension interest before it has matured into a pension benefit would be counterproductive. This is because the funds would then only comprise of the member's contribution with minimal interest and the employer's benefit, if applicable, would be forfeited.

²⁶ A possible reason why a third party may not be able to comply with the appointment notice is that he or she does not hold money on behalf of the taxpayer. SARS *E@syFile™ employer third party appointment – user guide* (date unknown) 12–13 indicates that an employer may also reject the appointment notice (AA88) if the taxpayer is deceased or insolvent.

inability. It is submitted that although the ITA did not explicitly provide a third party with the opportunity to indicate reasons why he or she was unable to comply, if the third party did not hold money on behalf of the taxpayer, the third party was exempt from complying with the appointment notice. This is because a valid appointment required a third party to hold money on behalf of the taxpayer.²⁷

Further support for my submission can be found in the wording of section 75(1)(j) of the ITA which dealt with the applicable penalty when a third party did not comply with the third party notice. The section provided that the penalty applied if the third party did not have a just cause for not complying with the notice. Accordingly, the penalty was not levied across the board in every instance where there had been non-compliance with section 99 of the ITA but only in instances where there was not an acceptable explanation for the non-compliance. Therefore, the ITA recognised that there could be instances where the third party was unable to comply. However, there was no statutory duty on a person appointed as a third party in relation to income tax to inform SARS of its inability to comply with the appointment notice.

7.2.1.2 Requirements for third party appointments

In *Mpanda Foodliner CC v the Commissioner* (“*Mpanda Foodliner*”),²⁸ the court considered the ambit of section 47 of the VAT Act in order to determine when SARS could authorise a valid third party appointment notice. The court identified the following requirements: (i) the third party appointment must be reasonably necessary; (ii) there must be tax, penalties or interest due and payable by the taxpayer; and (iii) the third party must be required to hold money for the taxpayer or pay the money to the taxpayer.²⁹

As regards the first requirement, to wit, that the Commissioner must have considered it necessary to appoint a third party, the court held that it meant that the appointment

²⁷ See *Mpanda Foodliner CC v the Commissioner* (2000) 63 SATC 46.

²⁸ (2000) 63 SATC 46.

²⁹ *Mpanda Foodliner* 61. *Mpanda Foodliner* 61 identified four requirements that have to be met in order for the Commissioner to appoint a third party. However, I fail to ascertain the difference between requirement three and four which are “only if the agent is required to make payments of such monies held by him or her for or due to the taxpaying vendor” and “declare the person as an agent if he, she or it is the taxpaying vendor’s debtor”. I consider both of these requirements to entail that the third party must hold money on behalf of or due to the taxpayer.

of the third party must have been reasonably necessary.³⁰ The court did not indicate what reasonably necessary in this context meant but rather indicated what it did not mean. “Reasonably necessary” did not mean that SARS had an unfettered discretion to appoint a third party on behalf of a taxpayer.³¹ Also, it did not mean that this discretion could only be exercised where a third party appointment was an absolute necessity.³²

The fact that the Commissioner had a discretion whether to appoint a third party, meant that his or her decision amounted to administrative action.³³ After the enactment of the Constitution, it meant that if a taxpayer was of the opinion that the third party appointment was not reasonably necessary, he or she could refer the matter to court to review this decision. Joffe remarked that such an application for review may have been hampered by financial constraints as the third party appointment may have depleted the last financial resources of a taxpayer, making it nearly impossible for a taxpayer to proceed with review proceedings without money.³⁴ In addition, the grounds upon which this matter could be taken on review were also limited because the erstwhile sections did not stipulate any factors that the Commissioner had to consider when exercising this discretion. Consequently, a taxpayer would have struggled to demonstrate two of the possible grounds for review, to wit, that irrelevant factors were taken into account³⁵ or relevant factors were not taken into account.³⁶

The second requirement identified in *Mpande Foodliner* - the taxpayer must have failed to pay tax, interest or penalties owed to SARS-³⁷ indicates that there must have been an existing liability towards SARS before a third party appointment could

³⁰ *Mpande Foodliner* 61.

³¹ *Mpande Foodliner* 61. In *Mpande Foodliner* 61 the court relied on *Arkel v Carter* 1971 (3) SA 243 (R) 245.

³² *Mpande Foodliner* 61. In *Mpande Foodliner* 61 the court relied on *R v Magana* 1961 (2) SA 654 (T) 658.

³³ *Contract Support Services (Pty) Ltd v SARS* [1998] 61 SATC 338 349. See Ch 2, par 2.8.5.2 where it is indicated what would constitute as administrative action and the grounds upon which this action can be taken on review are discussed.

³⁴ Joffe “*Hindry v Nedcor Bank Limited: another constitutional attack on an income tax provision fails*” (Dec. 1999) *Insurance and Tax Journal* 16.

³⁵ Section 6(2)(e)(iii) of PAJA.

³⁶ Section 6(2)(e)(iv) of PAJA.

³⁷ *Mpanda Foodliner* 61.

be made. This is why the third party appointment in *Mpande Foodliner* was invalid: SARS' view that the taxpayer had a value-added tax liability which was due and payable, was incorrect.³⁸

The last requirement that had to be met in terms of section 99 of the ITA and section 47 of the VAT Act was that the appointed third party must hold money on behalf of or due to the taxpayer.

7.2.1.3 Duties of an appointed third party

Once a valid notice of appointment had been issued, the third party had to act in accordance with the notice. Failure to comply with the notice had personal consequences for the third party because he or she would be considered to be a representative taxpayer.³⁹ The relevance of whether a person was considered to be a representative taxpayer lies in the fact that section 97 of the ITA provided that a representative taxpayer would be held personally liable for tax payable by him or her in this representative capacity insofar as he or she parted with income or funds of the taxpayer while the tax remained unpaid.⁴⁰ In addition, section 75(1)(j) of the ITA provided that an appointed third party, who in the absence of a just cause, did not comply with the third party appointment notice was guilty of an offence and was liable on conviction to a fine or to imprisonment for a period not exceeding 24 months.⁴¹

At first glance, the duties of a person appointed on behalf of the taxpayer seemed to be clear, namely, to pay over the money to SARS. However, several court cases have revealed the intricacies relating to the third party's duties. In *Smartphone SP (Pty) Ltd v ABSA Bank Ltd* ("*Smartphone*"),⁴² the taxpayer argued that an appointed

³⁸ *Mpande Foodliner* 51. In *Mpande Foodliner* (47–48) SARS attributed the value-added tax liability of a related company, Tiventonke (Pty) Ltd, to Mpande Foodliner CC as SARS contended that the transfer of a contract regarding a school feeding scheme from Tiventonke (Pty) Ltd to Mpande Foodliner CC constituted a tax avoidance scheme.

³⁹ Section 1, par (b) of the definition of representative taxpayer's specifically included a person appointed as a third party in terms of s 99 of the ITA. See s 48(1)(b) of the VAT Act where it was indicated that an appointed third party in terms of s 47 of the VAT Act was considered to be a representative taxpayer.

⁴⁰ Section 48(2) of the VAT Act contained a similar provision.

⁴¹ Section 58(o) of the VAT Act contained a similar provision.

⁴² (2004) 66 SATC 241. For a discussion of this case see Zulman, Stretch & Silke *Income tax practice manual* (last update Oct. 2015) Lexis Nexis internet version B:R4.

third party had to ensure that the appointment notice was valid before paying over the funds to SARS.⁴³ The court held that the appointment of a third party was a mechanism to ensure the payment of taxes and that it was not concerned with establishing tax liability.⁴⁴ Consequently, the third party was not allowed to question the appointment notice or the underlying tax *causa*.⁴⁵ It would have been up to the taxpayer to take the Commissioner's decision to appoint a third party on review or to object or appeal against the tax liability.

Nedbank Ltd v Pestana ("Pestana")⁴⁶ emphasised the extent to which a bank that is appointed as a third party has to comply with the appointment notice. In this matter, Nedbank's head office received a third party appointment notice relating to a taxpayer called Pestana. On the same day Pestana instructed the Nedbank's Carletonville branch to make a credit transfer⁴⁷ to another person.⁴⁸ The branch effected this transfer and was only informed after the transfer took place that Nedbank had been appointed as a third party in terms of section 99 of the ITA. The branch unilaterally reversed the credit transfer.⁴⁹ The question arose whether a bank was allowed to reverse a payment without the permission of the person whose

⁴³ *Smartphone* 245. It is submitted that "valid" in this context means that the appointment complies with the three requirements mentioned in Ch 7, par 7.2.1.2.

⁴⁴ *Smartphone* 245.

⁴⁵ *Smartphone* 246.

⁴⁶ (2008) 71 SATC 97. For a discussion of this case see Schulze "Electronic fund transfers and the bank's right to reverse a credit transfer: one small step for banking law, one huge leap for banks" (2007) *SA Merc LJ* 379; Schulze "Electronic fund transfers and the bank's right to reverse a credit transfer: one big step (backwards) for banking law, one huge leap (forward) for potential fraud: *Pestana v Nedbank* (act one, scene two)" (2008) *SA Merc LJ* 290; Sonnekus "Eensydige terugskryf van kliënt se krediet deur bank onregmatig" (2008) *TSAR* 349; Schulze "A final curtain call, but perhaps not the last word on the reversal of credit transfers: *Nedbank Ltd v Pestana*" (2009) 21 *SA Merc LJ* 396; Stretch "Power to appoint an agent" (Nov./Dec. 2009) *Taxgram* 14; Louw "When does a bank become a collecting agent of the South African Revenue Service?" (July/Aug. 2010) *TAXtalk* 12; Ryan "We are all tax collection agents now" (7 Apr. 2013) available at <http://bit.ly/164oJmo> (accessed 3 May 2016).

⁴⁷ Schulze (2007) *SA Merc LJ* 384 explains the difference between a credit and a debit transfer. With a credit transfer, the transfer is initiated on the payer's instructions while with a debit transfer the payee initiates the transfer by instructing his or her bank to order payment from the payer's bank.

⁴⁸ *Pestana* par 3. The other party's surname was also Pestana. The facts of the matter were common cause and were subsequently placed before court in terms of rule 33(1) and (2) of the Uniform rules of Court as a stated case. The stated case did not indicate what the relationship between the two Pestanas was (fn 3 of the judgment). However, see Louw (July/Aug. 2010) *TAXtalk* 13 where he states that the two Pestanas were cousins. Schulze (2008) *SA Merc LJ* 296 states that the two Pestanas were father and son.

⁴⁹ *Pestana* par 3.

account had been debited in order to give effect to the bank's appointment in terms of section 99 of the ITA.⁵⁰

The court held that credit transactions may be validly reversed if a cheque had been deposited and it was later established that the drawer's signature was forged, if a client deposited banknotes and afterwards it was discovered that they were forgeries⁵¹ and where a cheque had been deposited into a client's account and it was still subject to the standard holding period.⁵² Furthermore, a credit transaction may be reversed if the money was linked to fraud or theft⁵³ or where the incorrect account was mistakenly credited.⁵⁴ Thus, the court considered a reversal only to be valid if there is a legitimate reason for it.⁵⁵

As a result, the court had to determine whether an appointment in terms of section 99 of the ITA would constitute a legitimate reason for reversal of a credit transaction. The court approved of the court *a quo*'s⁵⁶ statement that "there were two things that the s 99 notice did not do. It did not freeze Pestana's account and it did not transfer or effect a cession of the funds in Pestana's account to SARS".⁵⁷ Sonnekus agreed with this *dictum* and indicated that an appointed third party was obliged to pay over money that he or she is holding on behalf of the taxpayer. He continued that it was not the appointed person's responsibility to do anything to obtain the taxpayer's money, such as reversing credit transactions, if the third party was not holding money on behalf of the taxpayer.⁵⁸

⁵⁰ *Pestana* par 4.

⁵¹ *Pestana* par 8 referring to *Standard Bank of South Africa v Oeanate Investments (in Liquidation)* [1998] 1 All SA 413 (A) 422.

⁵² *Pestana* par 9 referring to *Burg Trailers SA (Pty) Ltd v ABSA Bank Ltd* 2004 (1) SA 284 (SCA) par 9, where the court explained that there is a standard banking practice in terms of which cheques are subject to a holding period of 10 days. During this period the client cannot insist on payment and the payment may still be reversed as it is a conditional payment.

⁵³ *Pestana* par 9 referring to *Nissan South Africa (Pty) Ltd v Marnitz (Stand 186 Aeroport (Pty) Ltd Intervening)* 2005 (1) SA 441 (SCA) par 23.

⁵⁴ *Pestana* par 9 referring to *Nissan South Africa (Pty) Ltd v Marnitz (Stand 186 Aeroport (Pty) Ltd Intervening)* 2005 (1) SA 441 (SCA) par 25.

⁵⁵ *Pestana* par 9.

⁵⁶ *Pestana v Nedbank* 2008 (3) SA 466 (W).

⁵⁷ *Pestana v Nedbank* par 1, referred to in *Pestana* par 12.

⁵⁸ Sonnekus (2008) *TSAR* 351. See Ch 7, par 7.2.2.3 where the position of a third party appointment in relation to available credit as opposed to available funds is discussed.

The court indicated that the branch effected a valid credit transfer as it was not aware of the appointment notice at that stage and was entitled to proceed with the instruction from the client. Although the head office of Nedbank received the notice, it did not constitute constructive notice to the branch.⁵⁹ As there was no error or other legal prohibition at the time the credit transfer was effected, a complete juristic act occurred and the branch was not entitled to reverse it.⁶⁰

Schulze remarks that as *Pestana* was a stated case,⁶¹ where the court did not consider the “decidedly suspicious ring” of facts⁶² which was excluded from of the stated case, the decision does not establish a precedent that should be followed by future courts.⁶³

A third party’s duties in relation to the appointment could in some instances appear to be in conflict with the duties that the third party has towards the taxpayer due to a specific relationship between the third party and the taxpayer, for instance a bank-client relationship.

In terms of the bank-client relationship the bank has a duty of confidentiality which entails that the bank may not, without sufficient reason, disclose information relating to its client to another person.⁶⁴ This means that a person may have an expectation of privacy relating to his or her banking affairs. This expectation of privacy could

⁵⁹ *Pestana* par 15.

⁶⁰ *Pestana* par 15 referring to *Pestana v Nedbank* par 16.1.

⁶¹ See Ch 7, fn 48 in this regard.

⁶² Schulze (2008) 296 indicates that it cannot be a coincidence that a taxpayer “empties” his account on the same day that a third party appointment notice is issued to the bank. Schulze remarks that the taxpayer was perhaps alerted to the fact that an appointment notice was issued. Another suspicious aspect is that the funds were transferred to someone with the same surname.

⁶³ Schulze (2008) 296-297.

⁶⁴ *Abrahams v Burns* 1914 CPD 452 456. *George Consultants & Investments (Pty) Ltd v Datasys Ltd* 1988 (3) SA 726 (W) 736 and *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* 1991 (1) SA 100 (A) 109 indicate that the duty of confidentiality forms part of the *naturalia* of a contract between a bank and its client. This means that the law considers this duty to form part of the contract automatically. Schulze “Confidentiality and secrecy in bank-client relationship – banker’s duty or client’s privilege?” (2007) *Juta’s Business Review* 122; Van Jaarsveld “The end of bank secrecy? Some thoughts on the Financial Intelligence Centre Bill” (2001) *SA Merc LJ* 588 rely on the English matter of *Tournier v National Provincial & Union Bank of England* [1924] 1 KB 461 for exceptions to the duty of confidentiality. These exceptions are when the disclosure is mandated by law, when it is in public interest, where it is in the interest of the bank and where the client consents (either tacitly or expressly). In *George Consultants & Investments (Pty) Ltd v Datasys* 735 it was held that the English Law principles relating to bank confidentiality are applicable to South Africa.

possibly be thwarted or dispersed of even before SARS furnishes a third party appointment notice to a bank. It is possible that before an appointment notice is issued, SARS could inquire from the bank whether the taxpayer has an account with the bank and how much money the bank is holding on behalf of the taxpayer. However, the Code of Banking Practices stipulates that a bank's general duty to not disclose its client's information does not apply when the disclosure thereof is mandated by law.⁶⁵ Accordingly, when SARS requests a bank to furnish information relating to a taxpayer, it would constitute an exception to this duty of confidentiality.⁶⁶ As such the taxpayer would not be able to prove that he or she had an expectation that the bank would keep his or her affairs confidential when SARS requested information.

Furthermore, the bank-client relationship that is based on a contract of mandate,⁶⁷ is impeded when the bank withdraws money from its client's account, without being mandated to do so by the client, and pays it over to SARS in accordance with the appointment notice. Van Zyl and Schulze remark that a client of a bank subjects him- or herself to the laws of the country.⁶⁸ This means that the taxpayer, who has a bank account, would not be able to institute a claim against the bank for breach of its contractual duty as the bank was acting in terms of the law. The bank should also not notify the client of the withdrawal that is about to take place as it could frustrate SARS' ability to recover tax.⁶⁹

⁶⁵ BASA "Code of Banking Practices" (2012) 9). The exceptions to non-disclosure reflect those exceptions mentioned in *Tournier v National Provincial & Union Bank of England*. See Ch 7, fn 64 in this regard.

⁶⁶ Erstwhile ss 74A of the ITA and 57A of the VAT Act provided SARS with the power to request information from another person pertaining to a taxpayer. After the repeal of these sections, this power is provided for by section 46 of the TAA.

⁶⁷ Schulze (2007) *Juta's Business Review* 125.

⁶⁸ Van Zyl & Schulze "The collection of value added tax on cross-border digital trade - part 2: VAT collection by banks" (2014) *CILSA* 345.

⁶⁹ *Hindry* 55. It remains speculative as to what SARS' remedies are where the agent, before he is officially appointed, leaks the information to the taxpayer.

7.2.1.4 Constitutional considerations relating to third party appointments in terms of the ITA and VAT Act

Third party appointment in terms of the ITA and VAT Act meant that an administrative action (appointing a third party)⁷⁰ was performed without notifying the taxpayer thereof or affording him or her the opportunity to make representations. Furthermore, such an appointment was issued without any court intervention in terms of which a taxpayer's property (money) was about to be seized. Consequently, a person's rights to just administrative action,⁷¹ access to courts⁷² and privacy,⁷³ more specifically the protection against the seizure of a person's possessions as provided for in section 14(c) of the Constitution, were infringed when a third party appointment notice was issued.⁷³ However, the enactment of the Constitution did not result in any amendments regarding third party appointments in terms of the ITA and the VAT Act.

In *Hindry v Nedcor Bank* ("Hindry")⁷⁴ the court had to consider whether a third party appointment in terms of the ITA was a reasonable and justifiable limitation of a taxpayer's constitutional rights. In *Hindry* the taxpayer applied for an urgent interdict to prevent Nedbank from paying over funds to SARS in accordance with a third party notice⁷⁵ as the taxpayer argued that some of his constitutional rights were unreasonably and unjustifiably limited.⁷⁶

Hindry averred that his right to just administrative action was unreasonably and unjustifiably limited as the third party appointment notice disregarded the *audi alteram partem* rule.⁷⁷ The basis for this was that Hindry did not receive notice of the

⁷⁰ See *Contract Support* 349 where it was confirmed that this decision constituted administrative action.

⁷¹ See Ch 2, par 2.8.5 where the right to just administrative action is discussed.

⁷² See Ch 2, par 2.8.6 where the right to access to courts is discussed.

⁷³ See Ch 2, par 2.8.3 where the right to privacy is discussed.

⁷⁴ [1999] 2 All SA 38 (W). In this matter SARS erroneously made a refund to the taxpayer, Hindry, and SARS issued a notice in terms of s 99 of the ITA to Nedbank. For a discussion of this case see Editorial "The Commissioner's power of tax collection" (March 1999) *The Taxpayer* 50; Joffe (Dec. 1999) *Insurance and Tax Journal* 16; Van Schalkwyk "Constitutionality and the Income Tax Act – revisited" (2004) *Meditari Accountancy Research* 195; Croome (May 2007) *Accountancy SA* 52; Zulman, Stretch & Silke (last updated Oct. 2015) LexisNexis internet version B:R4.

⁷⁵ A taxpayer will only be able to consider approaching the courts for an interdict to prevent a third party from complying with the third party appointment notice if the taxpayer is aware of the appointment.

⁷⁶ *Hindry* 46.

⁷⁷ *Hindry* 49. See Ch 2, par 2.8.5 where the link between the *audi alteram partem* rule and the right to just administrative action is discussed. See also Silke "Taxpayers and the Constitution: a battle already lost" (2002) *Acta Juridica* 306.

third party appointment and consequently could not state his case in relation to the administrative action.⁷⁸ Consequently, Hindry argued that the administrative action was not procedurally fair as it fell short of two elements that constitute procedural fairness, to wit, providing adequate notice relating to the nature and purpose of the proposed administrative action⁷⁹ and giving the person affected by the possible administrative action a reasonable opportunity to make representations.⁸⁰

Hindry also averred that his right to access to courts was unreasonably infringed as the third party appointment had been issued without any court intervention.⁸¹ Lastly, Hindry alleged that his right to privacy, more specifically the right to be protected against seizure of one's possessions, was infringed as his money, which was held by a third party, was about to be seized.⁸²

The Commissioner argued that the appointment of a third party created a reasonable and justifiable limitation on the taxpayer's rights to just administrative action, access to courts and privacy for the following reasons:

- i) effective tax collection is essential and the procedure in terms of section 99 of the ITA is simply a type of garnishee,⁸³
- ii) the procedure enhances voluntary compliance with tax collection which is essential in the self-assessment tax system of South Africa,⁸⁴
- iii) preventing delays in collecting taxes is of utmost importance in order to exercise state functions effectively,⁸⁵ and
- iv) it ensures that taxpayers are treated equally.⁸⁶

⁷⁸ *Hindry* 49.

⁷⁹ Section 9(2)(b)(i) of PAJA.

⁸⁰ Section 9(2)(b)(ii) of PAJA.

⁸¹ *Hindry* 49. See also *Silke* (2002) *Acta Juridica* 305.

⁸² *Hindry* 49.

⁸³ *Hindry* 58. See Ch 7, par 7.2.1.4 where it is indicated why it is incorrect to equate third party appointments to garnishee orders.

⁸⁴ *Hindry* 58. Klue, Arendse and Williams *Silke on tax administration* (last updated May 2015) Lexis Nexis internet version §4.4 indicate that with self-assessment, taxpayers are required to report the basis of assessment, such as taxable income, to calculate the due taxes and, generally, at the same time to pay over the amount due. SARS then has to verify the correctness of the assessment.

⁸⁵ *Hindry* 58.

⁸⁶ *Hindry* 58. SARS did not elaborate on how third party appointments would ensure that taxpayers are treated equally. It could be that due to the enforcement mechanism created by third party appointments all taxpayers would pay the taxes owed by them, some by voluntarily complying and others by way of third party appointments.

The court recognised the important purpose served by a third party appointment as it facilitated and enhanced SARS' ability to enforce tax collections and prevent the dissipation of assets by taxpayers.⁸⁷

In relation to the taxpayer's argument that his right to just administrative action was infringed as there was no notification of the intended administrative action and no opportunity to make representations in this regard, the court held that a third party appointment notice did not unreasonably and unjustifiably limit this right. The court relied on similar provisions operative in the United States,⁸⁸ Canada,⁸⁹ India⁹⁰ and Australia to support this decision.⁹¹ The court summarised the position in these other countries as follows:

"In none of these statutes is the taxing officer required to give the taxpayer advance notice of an attachment to enable him to make representations to avoid it. Once the notice is served the garnishee is at risk (even in the USA) unless the notice is withdrawn or set aside. It is of the essence of proceedings of this nature that a direction be served on the garnishee before notice is given to the defaulting taxpayer. If the taxpayer were to receive prior warning, he or she could frustrate the tax collector's ability to recover the amounts due from his/her assets in the hands of a third party, for example by instructing the third party to pay the money to someone else or to the taxpayer him/herself or by ceding his/her claims to another."⁹²

Furthermore, the court held that a third party appointment was similar to a garnishee, which is at the disposal of ordinary civil litigants.⁹³ Based on all the above considerations, the court held that third party appointments were constitutional.⁹⁴

⁸⁷ In terms of s 36(1)(b) the purpose of the limitation is a relevant consideration when establishing whether the limitation is reasonable and justifiable.

⁸⁸ Section 6631 of the 1986 US Internal Revenue Code.

⁸⁹ Section 224(1) of the CITA. See Ch 8, par 8.2 for a discussion of the appointment of a third party in Canada.

⁹⁰ Section 226(3) of the Indian Income Tax Act, 1961.

⁹¹ Section 218(1) of the Assessment Act. *Hindry* 52. See Ch 8, par 8.3 for a discussion of the appointment of a third party in Australia.

⁹² *Hindry* 55.

⁹³ *Hindry* 51. *Pestana* 103 approves of this view.

⁹⁴ *Hindry* 63.

Two aspects of *Hindry* require further consideration. First, the lack of notification and an opportunity to make representation does not constitute an unreasonable and unjustifiable limitation on a person's right to just administrative action. Second, can a garnishee order and a third party appointment be equated to one another?

When considering the impact of a departure from the *audi alteram partem* rule on a person's right to just administrative action, some guidance may be found in case law. In *Contract Support Services (Pty) Ltd v SARS* ("*Contract Support*")⁹⁵ the court indicated that not all administrative actions have to comply with the *audi alteram partem* rule, which is encapsulated in the right to just administrative action.⁹⁶ This suggests that there may be a departure from the *audi alteram partem* rule when it would be reasonable and justifiable. The court in *Contract Support* held that in terms of section 47 of the VAT Act, prior notice would provide a taxpayer with the opportunity to obtain the funds due to him before they could be paid over to SARS and as such a departure from the *audi alteram partem* rule would be reasonable and justifiable.⁹⁷

In contrast to *Hindry* and *Contract Support*, Patel J in *Mpande Foodliner* held that the taxpayer should receive notice before a third party is appointed in order to state his or her case.⁹⁸ Patel J justified his divergence from the *Hindry dictum* on the basis that *Mpande Foodliner* dealt with section 47 of the VAT Act while *Hindry* dealt with section 99 of the ITA. However, he failed to indicate why he also deviated from *Contract Support* that dealt with section 47 of the VAT Act.

In *Mpande Foodliner*, Patel J held that, in this specific instance, the applicant had the right to a hearing before the section 47 notice could be issued.⁹⁹ Unfortunately, the judge did not explain exactly why the appointment in terms of the VAT Act would

⁹⁵ [1998] 61 SATC 338. For a discussion of this case see SAICA "Taxing Acts and the Constitution" (Aug. 2000) available at <http://bit.ly/1X6iPQ7> (accessed 3 May 2016); Editorial "SARS appointing a person holding funds of a taxpayer to be the taxpayer's agent" (Oct. 2001) *The Taxpayer* 194; Olivier "Uncertainty regarding the philosophy underlying South African Revenue Service collection procedures" (2003) *TSAR* 383; Croome "Proper procedure: SARS and the taxpayer – part 12" (May 2007) *Accountancy SA* 53.

⁹⁶ *Contract Support* 350.

⁹⁷ *Contract Support* 350.

⁹⁸ *Mpande Foodliner* 65.

⁹⁹ *Mpande Foodliner* 64.

dictate an approach contrary to what would be the case if it was an income tax matter. He also did not indicate what specific grounds in this matter necessitated the right to be heard before the appointment notice was issued.¹⁰⁰

In *Industrial Manpower Projects (Pty) Ltd v Receiver of Revenue, Vereeniging* (“*Industrial Manpower*”),¹⁰¹ the court refrained from entering into a debate regarding the conflict between *Contract Support* and *Mpande Foodliner*.¹⁰² However, Cameron J criticised *Mpande Foodliner* for failing to appreciate that a statute may exclude the right to a hearing prior to administrative action being taken.¹⁰³ Expanding on this remark in *Mpande Foodliner*, it must be borne in mind that section 3(4)(a) of PAJA provides that there may be deviation from what is considered procedurally fair, as envisaged in section 3(2)(b) of PAJA, where it would be reasonable and justifiable to do so.¹⁰⁴ Section 3(4)(a) of PAJA indicates that the purpose of the limiting provision, the necessity to take the administrative action, and the necessity of providing efficient administration and good governance are aspects that have to be considered when establishing whether a deviation would be reasonable and justifiable.

Considering the importance of third party appointments for collecting outstanding taxes efficiently, it is apparent that, similar to the jurisdictions considered in *Hindry*, giving prior notice to the taxpayer could frustrate SARS’ collection ability as it would provide the taxpayer with an opportunity to retrieve the money from the third party. Consequently, it is submitted that in relation to third party appointments it would be reasonable and justifiable to deviate from the procedural fairness envisaged in section 3(2)(b) of PAJA.

¹⁰⁰ Both *Smartphone* and *National Educare Forum v the Commissioner* [2002] JOL 9423 (TK) 43 rejected *Mpande Foodliner’s* interpretation in relation to value-added tax third party appointment. Accordingly, *Smartphone* (248) and *National Educare Forum v the Commissioner* (43) concurred with *Contract Support* that the appointment of a third party in respect of value-added tax necessitates a departure from the *audi alteram partem* rule.

¹⁰¹ (2001) 63 SATC 393. For a discussion of this case, see Editorial (Oct. 2001) *The Taxpayer* 195; Olivier (2003) *TSAR* 383; Stretch & Silke “VAT collection: Powers of SARS to appoint an agent” (Aug. 2004) *Taxgram* 12; Croome (May 2007) *Accountancy SA* 53; Zulman, Stretch & Silke (last update Oct. 2015) Lexis Nexis internet version B:R4.

¹⁰² *Industrial Manpower* 401-402.

¹⁰³ *Industrial Manpower* 402.

¹⁰⁴ See also Ch 2, par 2.8.5.3 in this regard.

Turning to the second aspect of *Hindry* that requires further consideration, at first glance the third party appointment and garnishee order seem to be similar.¹⁰⁵ Analogous to a third party appointment, a garnishee order allows a judgment creditor to attach money due to the judgment debtor in the hands of a third party (the garnishee).¹⁰⁶ Nevertheless, this is where the similarities between these two enforcement methods end.¹⁰⁷ The first difference lies in the procedure, or lack of procedure, before the garnishee order or third party appointment is made. Before a garnishee order may be obtained the creditor must have obtained a court order regarding debt owed to the creditor.¹⁰⁸ The requirement of a judgment brings about built-in protection of the debtor. The debtor would have had an opportunity to defend the action in a court before judgment is granted,¹⁰⁹ which would ensure adherence to the *audi alteram partem* rule.¹¹⁰ Also, a taxpayer's right to access to courts in terms of section 34 of the Constitution is adhered to due to the judgment debtor having had a hearing by an impartial party.¹¹¹

On the other hand, the appointment of a third party on behalf of a taxpayer does not require a judgment relating to the tax debt.¹¹² Accordingly, the built-in protection afforded to ordinary civil debtors by requiring the existence of a judgment is absent. Thus, there is not necessarily an opportunity for the taxpayer to state his or her case

¹⁰⁵ The discussion relating to the difference between third party appointments and garnishee orders is based on the discussion thereof in Keulder (2011) 29–33; and Keulder & Legwaila (2014) *THRHR* 64–67.

¹⁰⁶ Cilliers, Loots & Nel *Herbstein and Van Winsen The civil practice of the Supreme Court of South Africa* (2009) 768. See also Paterson *Eckard's principles of civil procedure in the magistrates' courts* (2005) 271.

¹⁰⁷ Keulder & Legwaila (2014) *THRHR* 66.

¹⁰⁸ Rule 45(12)(a) of the Uniform rules of Court, which regulates the garnishee procedure in the High Court, and s 72 of the Magistrates' Court Act 32 of 1944, which regulates the garnishee procedure in the Magistrates' Courts, refer to a judgment debtor. Consequently a judgment must be obtained against the debtor before a garnishee order may be obtained.

¹⁰⁹ The action is defended by the defendant (debtor) filing a notice of intention to defend and a plea. See rules 17–22 of the Uniform rules of Court, dealing with the High Court procedure, and rules 13–17 of the Rules regulating the conduct of the proceedings of the Magistrates' Courts of South Africa, dealing with the Magistrate's Court procedure, regarding the procedure to defend an action.

¹¹⁰ Burns *Administrative law under the 1996 Constitution* (2003) 197.

¹¹¹ Currie & De Waal *The Bill of Rights handbook* (2013) 740.

¹¹² See Ch 5, par 5.1 where the statement procedure is mentioned. This procedure allows SARS to file a statement indicating the tax owed by the taxpayer with the registrar of a court. Such a statement will have the same effect as a civil judgment. This means that even if a third party appointment could only be issued after a judgment has been obtained it would not ensure that a taxpayer would have the opportunity to state his or her case relating to the outstanding debt. Furthermore, it would not be certain that the matter would have been heard by an impartial party as the statement procedure circumvents formal court proceedings.

relating to the tax allegedly owed.¹¹³ Also, the matter has not been heard by an impartial forum.

The second difference regarding garnishee orders and third party appointments relates to the manner in which the garnishee order and third party appointments are initiated. Obtaining a garnishee order in itself requires court intervention. Section 72(1) of the Magistrates' Courts Act,¹¹⁴ which deals with garnishee orders obtained in a Magistrate's Court,¹¹⁵ provides for a garnishee order to be obtained by way of an *ex parte* application.¹¹⁶ An *ex parte* application balances two conflicting interests. One, the judgment creditor is sure that the judgment debtor does not know about the imminent order relating to his or her money and would accordingly not have the opportunity to dispose of or dissipate it. Two, the judgment debtor's interests are protected against an arbitrary attachment by the judgment creditor as the granting of a garnishee order is subject to the judicial scrutiny.

A similar balance with regard to the two conflicting interests in respect of third party appointments is not obtained.¹¹⁷ The reason for the imbalance is that the third party appointment is issued without any court intervention.¹¹⁸ As a result, SARS is able to collect the taxes in question but the taxpayer's rights and interests are held in abeyance.

In addition to the court balancing the parties' interests when issuing a garnishee order, the court also has a discretion to vary or set aside the order.¹¹⁹ The court may exercise this discretion when it is shown that the judgment debtor may not be able to

¹¹³ If the taxpayer disputes the assessed tax, the "pay now, argue later" rule will apply. See Ch 5 for a discussion of the "pay now, argue later" rule in South Africa.

¹¹⁴ 32 of 1944.

¹¹⁵ Read with rule 47 of the rules regulating the conduct of the proceedings of the Magistrates' Courts of South Africa. The Magistrate's Court comprises of a district and regional division. GN 216 in *Government Gazette* 37477 (27 March 2014), read with s 29(1)(g) of the Magistrates' Courts Act, indicate that monetary jurisdiction of the regional division is between R200 000 and R400 000 and for the district division below R200 000. Consequently, a garnishee order may be obtained in the Magistrate's Court if the debt amount is below R400 000.

¹¹⁶ See Ch 3, par 3.1.2(a) where it is indicated that with an *ex parte* application the person against whom relief is sought is not informed of the application.

¹¹⁷ The conflicting interests in relation to third party appointments are SARS' duty to collect taxes and the protection of a taxpayer's rights.

¹¹⁸ *Hindry* 49.

¹¹⁹ Section 72(2) of the Magistrates' Courts Act.

maintain him- or herself and his or her dependants after satisfying the garnishee order.¹²⁰

The same cannot be said of the third party appointment. There was no opportunity for a court to establish whether the taxpayer will be able to survive after the third party has adhered to the appointment notice. The financial impact that the third party appointment may have on a taxpayer may be dire and the extent of this limitation on a taxpayer's right to access to courts and just administrative action may be excessive.¹²¹

The above differences between garnishee orders in general and third party appointments by SARS make it clear that the court in *Hindry* was not correct to equate garnishee orders and third party appointments in relation to their impact on a person's rights.

7.2.2 Third party appointments in terms of the TAA

7.2.2.1 Empowering provision

With the enactment of the TAA,¹²² section 99 of the ITA and section 47 of the VAT Act were replaced by section 179 of the TAA.¹²³

Section 179(1) of the TAA provides that

“[a] senior SARS official may authorise the issue of a notice to a person who holds or owes or will hold or owe any money, including a pension, salary, wage or other remuneration, for or to a taxpayer, requiring the person to pay the money to SARS in satisfaction of the taxpayer's outstanding tax debt”.¹²⁴

¹²⁰ Section 72(2) of the Magistrates' Courts Act.

¹²¹ Keulder & Legwaila (2014) *THRHR* 66.

¹²² The TAA was enacted on 1 Oct. 2012.

¹²³ In terms of s 270(2)(g) of the TAA third party appointment proceedings which were instituted prior to 1 Oct. 2012, but not finalised before the enactment of the TAA must be dealt with in terms of the TAA.

¹²⁴ The initial s 179(1) of the TAA provided that a senior SARS official may issue the third party appointment notice. Subsequently, this provision was amended by s 57(a) of the Tax Administration Amendment Act 23 of 2015, to provide the senior SARS official with the power to authorise the third party appointment. This amendment promotes efficient tax collection. The same group of SARS officials, to wit, senior SARS officials, still has to consider whether an appointment may be done, but the issuing of the appointment notice may be automated (National

Section 179(1) of the TAA deviates from the erstwhile section 99 of the ITA and section 47 of the VAT Act in three ways. First, the discretion whether to appoint a third party or not now lies with a senior SARS official, while previously it lay with the Commissioner. However, as discussed previously,¹²⁵ as the Commissioner's powers could have and may still be delegated, a third party appointment in terms of the ITA or VAT Act could have been issued by a SARS official with the necessary authority. Consequently, there is no significant difference with regard to who was and is now able to initiate a third party appointment notice.

The second difference is the fact that section 179(1) of the TAA does not indicate that an appointment notice has the effect of the third party becoming an agent of the taxpayer. In *Short guide to the Tax Administration Act, 2011*, SARS indicates that referring to the instance of appointing a third party to pay over money held on behalf of a taxpayer as an agent appointment was confusing.¹²⁶ It is submitted that the term "agent" leads to confusion when the general construction of agency is taken into consideration. Agency requires an agent to have authority from the principal on whose behalf he or she should act.¹²⁷ The third party appointments do not adhere to this construction as the authority, by way of appointment notice, is given by someone other than the principal, the taxpayer, on whose behalf the "agent" had to act.

The third difference is that section 179(1) of the TAA provides that a third party appointment may be made in respect of money that will be held or owed in future. This future component was not provided for by the ITA and the VAT Act.

The TAA's third party appointment provisions specifically provide that the money that may be subject to such an appointment may be in the form of a pension. As such, my arguments relating to what "pension" entails in terms of the ITA third party

Treasury Memorandum on the objects of Tax Administration Laws Amendment Bill, 2015 (2015) 53). Hence, the senior SARS officials can concern themselves with aspects more challenging than the issuing of third party appointment notices. Accordingly, this amendment results in SARS adhering to its constitutional duty to use its resources effectively.

¹²⁵ See Ch 2, par 2.4.

¹²⁶ SARS (5 June 2013) 63.

¹²⁷ Silke, Knight & De Villiers *The law of agency in South Africa* (1981) 2.

appointment provisions, would also apply in this instance.¹²⁸ Firstly, a taxpayer's pension benefit should be subject to a third party appointment notice as it may be argued that the benefit that may be transferable in terms of a provision of the ITA would also mean that a benefit may be transferable in terms of a provision of the TAA. The reason for this is that the specific third party appointment provision in section 99 of the ITA, which allowed the transfer of pension to SARS, was repealed and replaced with section 179 of the TAA. Accordingly, it is submitted that the Pension Fund Act had simply not yet been amended to include the TAA.¹²⁹ Secondly, "pension" would still not include pension interest as it is not specifically provided in the Pension Fund Act that third party appointments in terms of the TAA would be subject to deductions.

7.2.2.2 Requirements for third party appointments

The requirements for a third party appointment as identified in *Mpande Foodliner*,¹³⁰ have undergone some adjustments with the enactment of the TAA.

The first requirement, namely, that the third party appointment must be reasonably necessary, is not required as section 179(1) does not contain any wording to this effect. The second requirement, that of a tax being due and payable by the taxpayer, has remained the same. This is because the term "outstanding tax debt" refers to an amount of tax that is due and payable but has not been paid on or before the required day.¹³¹

The third requirement set in *Mpande Foodliner*, namely, that the third party must hold money on behalf of or due to the taxpayer, has changed with the enactment of the TAA. The power to appoint a third party has been extended to include money that is held or owed in the future. This raises the question whether a third party would be

¹²⁸ See Ch 7, par 7.2.1.1.

¹²⁹ If this interpretation is accepted, it would result in a pension benefit being subject to a value-added tax third party appointment, which was not the case prior to the TAA. Consequently, income tax and value-added tax third party appointments would be treated the same in relation to pension benefits.

¹³⁰ See Ch 7, par 7.2.1.2 where these requirements are that (i) the third party appointment must be reasonably necessary; (ii) there must be tax, penalties or interest due and payable by the taxpayer; and (iii) the third party must be required to hold money for the taxpayer or pay the money to the taxpayer.

¹³¹ The definition of "outstanding tax debt" and "tax debt" in s 1 of the TAA read with ss 162 and 169(1) of the TAA.

required to perform in terms of the third party appointment even though the money is not yet due to the taxpayer. Looking at the wording of the section it appears as if that may be the case. It is submitted that such a construction could lead to dire financial consequences for the third party. Expecting a third party to pay over money which is not yet payable to the taxpayer or held on behalf of the taxpayer would mean that the third party is parting with his or her own money. This burden is too onerous on a third party who has simply transacted with a person who has outstanding tax debt. It is submitted that the impact of the future third party appointment should be curbed by providing that the third party only has to pay over the money once it becomes payable to or held on behalf of the taxpayer.

The Tax Administration Laws Amendment Act¹³² (“TALAA, 2015”) introduced an additional requirement that must be met before a person may be appointed as a third party on behalf of a taxpayer. In terms of section 179(5) of the TAA, a third party notice may only be issued 10 business days after SARS has delivered¹³³ a final demand of payment to the taxpayer. The letter of demand must indicate the recovery actions that SARS may take if the taxpayer fails to perform in terms of the letter of demand.¹³⁴ Moreover, the letter of demand should inform the taxpayer of the debt relief options available in terms of the TAA.¹³⁵ The requirement of delivering a letter of demand before SARS may authorise a third party appointment notice may be

¹³² 23 of 2015.

¹³³ In terms of ss 251 and 252 of the TAA, a document would be delivered for purposes of the TAA *inter alia* when it is handed to the person/public officer, it is left with a person older than 16 years who resides or is employed at the taxpayer’s last known address/place of business, when it is sent via post to the taxpayer’s postal address or sent to the taxpayer’s last known electronic address.

¹³⁴ In terms of ch 11 of the TAA recovery actions include the instituting of sequestration, liquidation and winding-up proceedings (s 177 of the TAA) and appointing a third party to satisfy a tax debt (s 179 of the TAA).

¹³⁵ In general, the debt relief options available to a taxpayer in terms of the TAA include reaching an instalment payment agreement (s 167 of the TAA), SARS writing off tax debt either temporarily or permanently (ss 195–199 of the TAA) and compromise (ss 200–205 of the TAA). In addition, s 179(4) provides that, on request, SARS may extend the period over which the tax debt should be paid in order to allow the taxpayer to provide for the taxpayer and his or her dependants’ basic living expenses. Moreover, s 179(5)(a) and (b) of the TAA allow a taxpayer to, within five business days after receiving the letter of demand, request SARS to reduce the amount of the tax debt based on the taxpayer and dependant’s basic living expenses (in the instance of a natural person) or based on serious financial hardship (in instances of a person other than a natural person). See Ch 7, par 7.2.2.3 where the debt relief options specifically provided for in s 179 of the TAA are discussed further.

disregarded if a senior SARS official is satisfied that issuing a letter of demand to the taxpayer would prejudice the collection of the tax.¹³⁶

7.2.2.3 *Duties of an appointed third party*

Generally, the third party receives an electronic notice confirming the appointment as a third party on behalf of a taxpayer who has unpaid due taxes. The notice also provides a schedule of when the third party must make payments to SARS as well as the amount owed to SARS.¹³⁷ Section 179(2) caters for the situation where the third party is unable to act in accordance with the appointment as it provides that the third party must advise the senior SARS official of his or her inability to perform within the period specified in the notice. The senior SARS official may then withdraw or amend the notice as is deemed fit in the circumstances.¹³⁸

An appointed third party must pay over the money to SARS as stipulated in the appointment notice. If the third party fails to act in accordance with the notice, the third party will be held personally liable for the money due in terms of the third party appointment.¹³⁹ Furthermore, a third party who fails to comply with the appointment notice without just cause is guilty of an offence which could lead to a fine or imprisonment for a maximum period of 24 months.¹⁴⁰

It is submitted that, as was the situation prior to the enactment of the TAA, the appointed third party does not have to do anything to obtain the taxpayer's money. The appointed third party is only obliged to pay over money held on behalf of or due to the taxpayer.¹⁴¹ An interesting aspect to consider is whether a third party appointment notice could be issued to a bank in relation to credit, as opposed to funds, available to a taxpayer. It is submitted that a third party appointment notice cannot extend to this situation. Section 169(2)(b) of the TAA provides that tax debt is recoverable from assets of the taxpayer. Since available credit cannot constitute an

¹³⁶ Section 179(6) of the TAA.

¹³⁷ Le Roux & Van der Walt "Third party appointments by SARS under the Tax Administration Act" (Jan./Feb. 2013) *TaxTalk* 16.

¹³⁸ Section 179(2) of the TAA.

¹³⁹ Section 179(3) of the TAA.

¹⁴⁰ Section 234(n) of the TAA.

¹⁴¹ See Ch 7 par 7.2.1.3 where the court's *dictum* in *Pestana* and *Sonnekus' view* (2008) *TSAR* 351 in relation to this aspect are discussed.

asset of the taxpayer,¹⁴² it is not subject to a third party appointment. Where a third party extends credit to the taxpayer and pays this amount to SARS, it does so at own risk. Further, the third party has a claim against the taxpayer only for outstanding debt. It is doubtful if the claim would be successful where the bank pays an amount from credit facility to SARS without the taxpayer's consent.

7.2.2.4 *Constitutional considerations relating to third party appointments in terms of the TAA*

There has not yet been any reported constitutional challenge of section 179 of the TAA. This might be because *Hindry* is considered to be the final word on the constitutionality of third party appointments or perhaps and, more likely, because section 179 is a fairly new provision. In what follows it is considered whether section 179 of the TAA has addressed some of the concerns that were noted in the discussion of *Hindry*.¹⁴³

Section 179 of the TAA does not provide that a taxpayer has to receive notice before the third party appointment is made, which would provide the taxpayer with an opportunity to state his or her case before the third party has to act in accordance with the appointment notice. It is submitted that, similar to my argument regarding the position before the enactment of the TAA,¹⁴⁴ when considering the importance of third party appointments, namely, to collect outstanding taxes efficiently, it is apparent that giving prior notice to the taxpayer could frustrate SARS' collection ability as it would provide the taxpayer with an opportunity to retrieve the money from the third party. Thus, it is submitted that when exercising the administrative action of appointing a third party it is reasonable and justifiable to deviate from the requirements of giving prior notice and affording the opportunity to make representations.¹⁴⁵

Furthermore, section 179 of the TAA does not provide for any court intervention with regard to the third party appointment. As such a taxpayer's right to access to courts

¹⁴² Section 1 of the TAA defines "asset" as "(a) property of whatever nature, whether movable or immovable, corporeal or incorporeal; and (b) a right or interest of whatever nature to or in the property".

¹⁴³ See Ch 7, par 7.2.1.4 regarding these concerns.

¹⁴⁴ See Ch 7, par 7.2.1.4 in this regard.

¹⁴⁵ See s 3(4)(a) of PAJA in this regard.

is infringed. In order to curb the extent of this infringement there should be provisions in place to ensure that a taxpayer's interests are considered.

One such a provision can be found in section 179(4) of the TAA which provides that SARS may extend the period over which the tax must be paid. The taxpayer may request such an extension in order to cover the basic living expenses of the taxpayer and his or her dependants. SARS may then exercise its discretion whether to extend the period of payment. As the TAA does not stipulate what is meant by "basic living expenses", Zerbst states that the basic living expenses need to be determined on the facts of each case.¹⁴⁶

Section 179(4) resembles one of the elements of a garnishee order, which may be varied or set aside if the judgment debtor is unable to maintain him- or herself and his or her dependants.¹⁴⁷ However, while it is a judge or magistrate who evaluates whether a judgment debtor can afford the terms of the garnishee order, the discretion to vary a third party appointment notice is exercised by SARS. This constitutes a conflict of interest as SARS, the party tasked with enforcing the collection of taxes, determines whether a taxpayer can afford the terms set out in the third party appointment notice. This in effect places SARS in a position of being the judge in a matter to which it is a party.¹⁴⁸ In the event that SARS opts not to extend the payment period, the taxpayer would be able to take this decision on review. Nevertheless, taking the decision on review may not provide much relief for a taxpayer. If the taxpayer is unable to afford basic living expenses he or she would possibly not be able to afford taking the matter on review.¹⁴⁹

Section 179(5) of the TAA, which came into operation on 8 January 2016,¹⁵⁰ also considers a taxpayer's financial situation. In terms of this section, a taxpayer may

¹⁴⁶ Zerbst "Fund collecting tax for SARS – who bears liability?" (4 March 2013) available at <http://bit.ly/2aydDTJ> (accessed 3 May 2016).

¹⁴⁷ Section 179(4) does not appear to cater for a taxpayer who is not a natural person.

¹⁴⁸ A person who adjudicates in a matter in which he or she is a party is acting contrary to a rule of justice, namely, *nemo iudex in propria causa*. See Ch 2, para 2.4.3.2(c)(iv) and (v) where it is indicated that *nemo iudex in propria causa* is encapsulated in the right to just administrative action and the right to access to courts respectively.

¹⁴⁹ The review proceedings would involve the taxpayer approaching the court and may have cost implications.

¹⁵⁰ GN 607 in *Government Gazette* 39586 (8 Jan. 2016).

within 5 business days after receiving a letter of demand¹⁵¹ request SARS to reduce the amount of the outstanding tax debt. SARS would base a reduction of the outstanding tax debt on the taxpayer and his or her dependants' basic living expenses (in the event of the taxpayer being a natural person)¹⁵² or serious financial hardship (in the event of the taxpayer not being a natural person).¹⁵³

This concludes the discussion relating to income tax and value-added tax third party appointments. The following section deals with third party appointments in respect of customs duty.

7.3 DEVELOPMENT OF THIRD PARTY APPOINTMENTS RELATING TO CUSTOMS MATTERS

The current third party appointments relating to customs matters, governed by section 114A of the CEA, are discussed first. Thereafter, section 705 of the CCA is examined as this provision will replace section 114A of the CEA once the CCA comes into operation.¹⁵⁴

7.3.1 Third party appointments in terms of the CEA

7.3.1.1 Empowering provision

Section 114A of the CEA provides as follows

“The Commissioner may, if he thinks it necessary, declare any person to be the agent of any other person, and the person so declared an agent—

- (a) shall for the purposes of this Act be the agent of such other person in respect of the payment of any amount of duty, interest, penalty or forfeiture payable by such other person under this Act, and
- (b) may be required to make payment of such amount from any moneys which may be held by him or her for or be due by him or her to the person whose agent he or she has been declared to be.”

¹⁵¹ As indicated in Ch 7, par 7.2.2.2, SARS must first deliver a letter of demand to a taxpayer before it may furnish a third party appointment notice.

¹⁵² Section 179(5)(a) of the TAA.

¹⁵³ Section 179(5)(b) of the TAA. Neither s 179 nor the definition section of the TAA, to wit s 1, provides what would constitute “serious financial hardship”. However, s 218(f)(ii) of the TAA, which is concerned with the remittance of penalties in exceptional circumstances, provides that “serious financial hardship” in the case of a business would mean that there is an “immediate danger that the continuity of business operations and the continued employment of its employees are jeopardised”.

¹⁵⁴ See Ch 3, fn 228 as to when the CCA will come into operation.

Unlike the third party appointment provisions relating to income tax and value-added tax,¹⁵⁵ section 114A of the CEA does not stipulate what the money held by the third party on behalf of the taxpayer may comprise of. This means that the CEA does not specifically provide that the money may include pension benefits.¹⁵⁶ The question arises whether an appointment notice in terms of section 114A of the CEA may pertain to pension. This question should be answered in the negative. As discussed previously,¹⁵⁷ a pension fund benefit or right may only be transferred, ceded, or be subject to attachment “to the extent permitted by this Act, the Income Tax Act, 1962 (Act. No 58 of 1962) and the Maintenance Act”.¹⁵⁸ Neither the Pension Funds Act nor any other statute provides that pension benefits or rights may be subject to transfer, cession or attachment in respect of third party appointments for purposes of customs duty. Consequently, in the absence of a specific provision, a third party appointment in terms of the CEA cannot extend to pension fund benefits.

However, it is submitted that this interpretation leads to a nonsensical result. If a taxpayer has an outstanding income tax or value-added tax debt his or her pension fund benefit will be subject to a third party appointment while if it relates to customs duty his or her pension fund benefit will be protected against a third party appointment.¹⁵⁹

7.3.1.2 Requirements for third party appointments

Firstly, section 114A of the CEA requires the Commissioner to consider it necessary to make a third party appointment. It is submitted that, similar to the discretion previously afforded to the Commissioner in relation to third party appointments in terms of the ITA and VAT Act,¹⁶⁰ it should be reasonably necessary to do so. If a

¹⁵⁵ See Ch 7, par 7.2 where the income tax and value-added tax-related third party appointments are discussed.

¹⁵⁶ See Ch 7, par 7.2.2.1 where it is indicated that pension may be subject to third party appointments in relation to income tax and value-added tax.

¹⁵⁷ See Ch 7, par 7.2.2.1 in this regard.

¹⁵⁸ Section 37A(1) read with s 37D of the Pension Funds Act.

¹⁵⁹ However, when the CCA comes into operation this nonsensical result would be removed. See Ch 7, par 7.3.2

¹⁶⁰ See Ch 7, para 7.2.1.2; 7.2.2.2.

taxpayer is of the opinion that it was not reasonably necessary, the matter can be taken on review.¹⁶¹

Secondly, section 114A requires a taxpayer to have a present liability towards SARS relating to customs duty, interest and/or penalties which are payable in terms of the CEA. Lastly, the third party must hold money on behalf of or due to the taxpayer. This requirement reflects the position of income tax and value-added tax third party appointments before the enactment of the TAA.¹⁶² Contrary to section 179 of the TAA, the third party appointment does not include money which the third party may hold in the future on behalf of or owe to the taxpayer. This means that the extent of SARS' third party appointment power is narrower in the CEA than in the TAA.

7.3.1.3 *Duties of an appointed third party*

The proviso to section 114A provides that a third party who is unable to fulfil the requirements of the appointment notice must inform the Commissioner in writing of the reasons for the inability. This must be done within the period indicated in the notice.

Interestingly, the CEA does not contain provisions similar to the provisions of the ITA, the VAT Act and the TAA that impose personal liability on the third party if he or she failed to comply with the third party appointment notice without just cause. The CEA contains a provision to the effect that that a non-compliant third party¹⁶³ would be guilty of an offence.¹⁶⁴ In terms of section 80(1)(r) of the CEA, the penalty for this offence may be a fine up to a maximum amount of R20 000¹⁶⁵ or imprisonment for a maximum period of five years, or both a fine and imprisonment.

¹⁶¹ The reason why this decision could be taken on review is that the third party appointment in terms of the CEA would constitute administrative action. See Ch 7, par 7.2.1.2 where the limitations of a review application relating to third party appointments are discussed.

¹⁶² That is the position in terms of the ITA and VAT Act. See Ch 7, par 7.2.1 where this position is discussed.

¹⁶³ This would be in instances where the third party has not provided just cause to the Commissioner why he or she is unable to comply with the appointment notice.

¹⁶⁴ Section 80(1)(r) of the CEA.

¹⁶⁵ Section 80 of the CEA provides that the fine would be the greater of R20 000 or triple the value of the goods relating to the offence that has been committed. Since the failure of a third party to act in accordance with the appointment notice does not relate to any goods, the fine can only be for a maximum of R20 000.

As discussed above,¹⁶⁶ when a third party appointed in terms of the TAA fails to comply with the appointment notice, he or she is personally liable for the tax liability of the taxpayer. In addition, the third party may be imprisoned for up to two years or may have to pay a fine. However, non-compliance by a third party should result in the same consequences irrespective of whether the outstanding tax relates to income tax, value-added tax or customs duty. The reason for the current divergence regarding the consequences of non-compliance may be ascribed to the CEA being an old piece of legislation, which is being updated by the CCA, CDA and the Excise Duty Act.¹⁶⁷

7.3.1.4 *Constitutional considerations relating to third party appointments in terms of the CEA*

Third party appointment notices relating to customs duty have not been subjected to constitutional scrutiny. What follows is a discussion regarding to what extent, if any, the third party appointments in terms of the CEA address the concerns which transpired from the discussion of *Hindry*.¹⁶⁸

Similar to income tax and value-added tax third party appointments which were issued before the enactment of the TAA,¹⁶⁹ CEA third party appointments do not provide the taxpayer with the opportunity to request an extension in order to pay for basic living expenses. It is argued that an extension that allows a taxpayer to cover basic living expenses, which are provided for in the TAA,¹⁷⁰ makes the limitation of a taxpayer's rights less restrictive.¹⁷¹ The restriction that a TAA third party appointment places on a taxpayer's rights to just administrative action, privacy and access to courts may be considered a more reasonable and justifiable limitation while a CEA third party appointment may not be seen in the same light.

¹⁶⁶ See Ch 7, 7.2.2.2.

¹⁶⁷ National Treasury (2013) 33 states that the Excise Duty Act will *inter alia* deal with the levying, assessment and collection of excise duties and fuel levies.

¹⁶⁸ See Ch 7, par 7.2.1.4 for a discussion relating to *Hindry*. As third party appointment provisions in terms of the ITA, VAT Act, TAA and CEA are mostly identical, the effect of a CEA-related third party appointment on the *audi alteram partem* rule is the same as when it relates to income tax and value-added tax. Accordingly, no discussion relating to third party appointments in terms of the CEA and the *audi alteram partem* rule is warranted.

¹⁶⁹ Therefore, it was issued in terms of the ITA or VAT Act.

¹⁷⁰ See Ch 7, par 7.2.2.3 where the provision allowing for an extension is discussed.

¹⁷¹ Keulder & Legwaila (2014) *THRHR* 70. In terms of s 36(1)(e) of the Constitution whether there are less restrictive means available is a factor that should be considered when establishing whether a limitation is a reasonable and justifiable limitation of a person's rights.

7.3.2 Third party appointments in terms of the CCA

7.3.2.1 Empowering provision

The differences between the TAA and the CEA third party appointments will be removed once the CCA comes into operation. This is because section 705 of the CCA provides that Part D of Chapter 11 of the TAA applies to the collection of customs duty payable to the Commissioner with any changes which the context may require. Section 179 of the TAA, which deals with the third party appointments, is contained in Part D of Chapter 11. Accordingly, if a third party holds funds on behalf of the taxpayer and the latter has outstanding customs duty, the provisions of section 179 of the TAA will apply when issuing a third party notice.¹⁷²

The fact that section 179 of the TAA will apply in customs matters will lead to a number of changes with regard to customs duty third party appointments. Firstly, the third party appointment could also comprise of a pension fund benefit as section 179 explicitly includes pension. Another change would be that a third party could also be appointed as such in relation to money which he or she will hold on behalf of the taxpayer or owe to the taxpayer in future. The last change that will occur is that a taxpayer whose money is subject to a third party appointment in terms of the CCA will have the opportunity to request for an extension based on his or her inability to afford basic living expenses.

The first two changes will extend and broaden SARS' powers with regards to customs matters effectively,¹⁷³ while the third change will reduce the extent to which taxpayers' rights are limited as it will ensure that a taxpayer's most basic needs are considered.¹⁷⁴

7.3.2.2 Duties of an appointed third party

Section 705 of the CCA provides that sanctions contained in the TAA for the enforcement of Part D of Chapter 11 of the TAA would equally apply when the

¹⁷² Consequently, the requirements and duties associated with third party appointments in terms of the TAA will apply *mutatis mutandis* to third party appointments in terms of the CEA.

¹⁷³ See Keulder & Legwaila (2014) *THRHR* 69 where this conclusion is reached in relation to the inclusion of money that will be held or become due in the future.

¹⁷⁴ Keulder & Legwaila (2014) *THRHR* 69.

enforcement relates to customs duty. This means that the sanctions contained in sections 179(3) and 234(n) of the TAA, namely, personal liability, a fine or imprisonment of up to 24 months, would be the sanctions imposed on a third party whose appointment relates to customs duty.

Incorporating the TAA's sanctions relating to third party appointments into customs third party appointments addresses the disparity between the CEA's sanctions and that of the TAA.¹⁷⁵ Once the CCA comes into operation a third party who has failed to comply with an appointment notice may be held personally liable and face a fine or imprisonment for a period of up to 24 months.

7.4 CONCLUSION

This chapter has shown that a third party appointment is issued without any court intervention. Therefore, a taxpayer's right to access to courts is infringed, he or she is not notified of this administrative action and also does not have the opportunity to make representations. However, these infringements may be constitutional if they are found to be reasonable and justifiable when considering the factors contained in section 36(1) of the Constitution.¹⁷⁶ The one factor, where the importance of the limiting provision should be taken into account,¹⁷⁷ favours the current situation where these rights are infringed as this enforcement power of SARS to ensure the effective and speedy collection of tax is of utmost importance. However, according to section 36(1)(e) of the Constitution the third party appointment provisions must be as least invasive as possible on a taxpayer's rights.

The provisions discussed in this chapter do little to curb the impact that a third party appointment may have on the rights of a taxpayer. The scope of the third party appointment is broad as it relates to money that is held or owed in future and it includes pension which is generally not subject to attachments. Also, there is no restriction on how much of a taxpayer's salary, for example, may be subject to the third party appointment. However, the TAA's debt relief mechanisms in terms which SARS considers a taxpayer's financial situation may limit the impact that an

¹⁷⁵ See Ch 7, par 7.3.1.2 where the disparity is indicated.

¹⁷⁶ See Ch 2.8.7 for a discussion relating to section 36 of the Constitution.

¹⁷⁷ Section 36(1)(b) of the Constitution.

appointment could have on a taxpayer. Nevertheless, if a taxpayer disagrees with SARS' assessment of his or her financial situation, the taxpayer may not have the financial resources to take the matter on review.

The harmonisation of customs duty provisions, once the CCA comes into operation, with income tax and value-added tax provisions, is a positive step since it ensures legal certainty for taxpayers and persons appointed as third parties as all third party appointments will be made in terms of the same provisions.

CHAPTER 8 - THIRD PARTY APPOINTMENTS - OTHER JURISDICTIONS

8.1 INTRODUCTION

Chapter 7 evaluated third party appointments in South Africa. From that evaluation I ascertained that as taxpayer does not receive any prior notice of the imminent third party appointment, which means that there is no opportunity for the taxpayer to make representations, and no judicial intervention. Accordingly, a taxpayer's rights to access to courts and just administrative action is infringed upon. In order to ensure that the infringement is not too invasive, SARS third party appointment powers should be subject to certain restrictions. In this regard, I raised concerns as (i) a third party appointment may now also relate to money that will be held or owed to the taxpayer in future; and (ii) there is inadequate consideration of the financial situation of the taxpayer. As such I do not consider the current third party appointment provisions too invasive.

This chapter discusses the Canadian, Australian, New Zealand and Nigerian provisions pertaining to third party appointment by the respective revenue authorities.¹ Also, this chapter compares these countries' approaches with that of South Africa. The aim of this chapter is to uncover whether the manner in which third party appointments are made in these countries can assist in resolving the problems with the current third party appointment provisions in South Africa – as highlighted in Chapter 7.

This chapter discusses each country separately. In the discussion of each country, firstly, the empowering provisions and duties of the third party are discussed, where after aspects specific to each country's third party appointments are discussed. Lastly, to the extent possible, the specific country's approach to third party appointments is compared to SARS' approach.

¹ This chapter does not contain any separate contextual setting as there were no pertinent rights and values in the other jurisdictions that warranted a separate discussion. Where applicable the rights that may be considered in relation to third party appointments will be dealt with in the discussion or the third party appointment provisions.

8.2 CANADA

8.2.1 Empowering provisions and requirements for third party appointments

The CITA provides for three different types of third party appointments. Each of these appointments is discussed below under separate headings.

8.2.2.1 *General third party appointments*

Section 224(1) of the CITA stipulates that

"Where the Minister has knowledge or suspects that a person is, or will be within one year, liable to make a payment to another person who is liable to make a payment under this Act (in this subsection and subsections 224(1.1) and referred to as the "tax debtor"), the Minister may in writing require the person to pay forthwith, where the moneys are immediately payable, and in any other case as and when the moneys become payable, the moneys otherwise payable to the tax debtor in whole or in part to the Receiver General on account of the tax debtor's liability under this Act."²

This type of third party appointment in Canada is akin to the third party appointment of South Africa as this appointment is made in relation to a third party who is liable or will be liable to pay the taxpayer (tax debtor). A person is considered to be a tax debtor if he or she is liable to pay taxes in terms of the CITA.³ The CITA does not indicate that the tax debt must be a judgment debt. Also, no provision is made that an impartial person should authorise the issuing of the third party appointment notice. Consequently, there is no court intervention before a third party appointment is issued whatsoever. The general third party appointment in Canada limits the period within which the third party's liability to the taxpayer can arise to one year.

² Even though this third party appointment power is conferred on the Minister of National Revenue powers conferred on the Minister may be delegated, in terms of s 220(1) & 220(2.1) of the CITA) to the Commissioner of Revenue and CRA officers Consequently, the Minister, the Commissioner and the CRA officers have the power to appoint a third party.

³ The CITA governs the tax liability of income tax (part I), tobacco manufacturers' surtax (part II), additional tax on excessive elections (part III) and tax on taxable dividends received by private corporations (part IV).

Section 224(1) of the CITA provides that the third party must be liable to pay the tax debtor. Case law has considered when a person is considered "liable" in this regard. In *Canada v National Trust Co* ("National Trust Co"),⁴ the court held that this requirement is met when a person is responsible in terms of law to make a payment.⁵ This requirement of being responsible in terms of law to make a payment comprises of a couple of aspects. Firstly, it is not limited to only relationships of debtor-creditor and also applies to a third party who is a trustee.⁶ Secondly, a liability will be considered payable when the creditor (taxpayer) would be able to enforce the payment thereof.⁷ The judgment of *3087-8847 Quebec Inc v The Queen* ("Quebec Inc")⁸ provides some clarification relating to when payment can be considered enforceable. This matter was concerned with whether a third party could be considered liable to pay where a shareholder has not demanded payment in respect of a shareholder's loan.⁹ The court held that when a debt is payable on demand, the debt will be considered to be immediately due and the serving of a third party appointment notice will constitute a demand required for the debt to be liable to payment.¹⁰ In instances where the parties have agreed when a debt will be payable, the debt will be payable once that event or time occurs.

The matter of *Richmond Savings Credit Union v Miller* ("Richmond")¹¹ is also of significance. In this matter, a tax debtor participated in a retirement plan which did not provide for any withdrawals.¹² The retirement plan was set to mature when the tax debtor reached the age of 60 years.¹³ The court found that the administrator of the trust could not be considered liable to make a payment in respect of section 224(1) of the CITA. This is because neither when the third party notice was issued,

⁴ 1998, CanLII 8214.

⁵ *National Trust Co* par 46. The court relied on the English matter of *Littlewood v Wimpey and Co. Ltd* [1953] 2 All E.R. 915 921.

⁶ *National Trust Co* par 47; *Discovery Trust Company v Abbott* 1982, CanLII 794 (BCSC) par 2.

⁷ *National Trust CO* par 62. The court in *National Trust CO* relied on *Canada v Yanellis* 130 D.L.R. (4th) 632 (F.C.A.) 638.

⁸ [2007] TCC 302.

⁹ *Quebec Inc* par 38.

¹⁰ *Quebec Inc* par 42. The court relied on *Canada v Bidner* [1984] F.C.J. No. 1114 (QL) (FCA) to reach this conclusion. See also CRA "Questions and answers on requirement to pay" (date modified 8 Jan. 2016) par 8 (situation 4) available at <http://bit.ly/1TuYe5V> (accessed 15 Jan. 2016) where this approach is also reflected.

¹¹ 1999 CanLII 6921 (BC SC).

¹² *Richmond* par 26.

¹³ *Richmond* par 27.

nor within one year thereafter, would the administrator be responsible in law to make a payment. In the same way a locked-in guaranteed investment would need to mature before the amount will be considered to be liable for payment to the taxpayer and as such subject to a general third party appointment.¹⁴

Section 224(1) also explicitly provides that the third party must pay over the money as and when it becomes payable to the tax debtor. This means that there is no unnecessary burden placed on a third party to pay over money to the CRA before he or she would have been liable for payment to the taxpayer.¹⁵

8.2.1.2 *Third party appointments relating to loans and advances*

In addition to the general third party appointment power, section 224(1.1) of the CITA provides the CRA with the power to appoint a third party in relation to loans and advances. Section 224(1.1) stipulates that

"where the Minister has knowledge or suspects that within 90 days

- (a) a bank, credit union, trust company or other similar person (in this section referred to as the "institution") will lend or advance moneys to, or make a payment on behalf of, or make a payment in respect of a negotiable instrument issued by, a tax debtor who is indebted to the institution and who has granted security in respect of the indebtedness, or
- (b) a person, other than an institution, will lend or advance moneys to, or make a payment on behalf of, a tax debtor who the Minister knows or suspects

¹⁴ CRA (date modified 8 Jan. 2016) par 9 (situation 6) available at <http://bit.ly/1TuYe5V> (accessed 15 Jan. 2016).

¹⁵ In CRA (date modified 8 Jan. 2016) par 5 available at <http://bit.ly/1TuYe5V> (accessed 15 Jan. 2016) it is indicated that the "money" referred to includes currency, coins and negotiable instruments. However, bonds, shares, vehicles and buildings do not constitute money until they are converted into cash. Schulze "The legality of administrative garnishments under the Income Tax Act and other Federal Law" (2002) *Canadian Tax Journal* 1600 identifies this wide interpretation of money as problematic. This wide interpretation means that even social assistance payments may be subject to the third party appointment. See Woods Gordon Management Consultancy *Review of Revenue Canada Taxation: summary report* (1985) 242 in this regard.

(i) is employed by, or is engaged in providing services or property to, that person or was or will be, within 90 days, so employed or engaged, or

(ii) where that person is a corporation, is not dealing at arm's length with that person,

the Minister may in writing require the institution or person, as the case may be, to pay in whole or in part to the Receiver General on account of the tax debtor's liability under this Act the moneys that would otherwise be so lent, advanced or paid and any moneys so paid to the Receiver General shall be deemed to have been lent, advanced or paid, as the case may be, to the tax debtor."

Similar to the general third party appointment provision in section 224(1) of the CITA, there must be a tax debtor and no mention is made of any court intervention. In order for a section 224(1.1) third party appointment to be made one of three situations must be present. The first situation entails that the third party who will be lending, advancing or effecting payment to or on behalf of the taxpayer,¹⁶ must be an institution and the taxpayer must owe the institution money for which he or she has furnished security.¹⁷

The second situation relates to when the CRA knows or suspects that the taxpayer is employed or providing services or will do so within 90 days to the third party who is lending, advancing or making a payment on behalf of the taxpayer.¹⁸

The last situation will be met where the third party is a corporation that is not dealing at arm's length with the taxpayer.¹⁹ A transaction would be considered to not be conducted at arm's length when it is concluded between related persons²⁰ or a

¹⁶ This would include an instance where payment is made in respect of a negotiable instrument. See s 224(1.1) of the CITA in this regard.

¹⁷ Section 224(1.1)(a) of the CITA.

¹⁸ Section 224(1.1)(b)(i) of the CITA.

¹⁹ Section 224(1.1)(1)(b)(ii) of the CITA. Consult CRA "Income Tax Folio S1-F5-C1 - related persons and dealing at arm's length" (date modified 24 Nov. 2015) available at <http://bit.ly/1ShJjNe> (accessed 10 Nov. 2016) for a discussion of transactions at arm's length.

²⁰ Section 251(1)(a) of the CITA. In accordance with this section every transaction between related parties would be deemed to not be at arm's length. This approach deviates from general practice

taxpayer and a personal trust of which the taxpayer or a related person of the taxpayer benefits from the trust.²¹ Section 251(1)(c) of the CITA provides that in the event of unrelated persons, the facts will determine whether the transaction did occur at arm's length or not.²²

If one of the section 224(1.1) situations is present, the CRA may in writing require such a third party to pay over the money that would have been lent, advanced or paid to the taxpayer. The third party must pay over the money insofar as necessary to satisfy the taxpayer's tax liability.

Interestingly, this type of third party appointment's future application is limited to 90 days. Accordingly, if a third party intends to advance money to the taxpayer in four months' time, the money will not be subject to a section 224(1.1) appointment notice. The CRA would need to delay issuing such a notice until it is within 90 days of the intended advancement. I submit that the reason for restricting the future application of the third party appointment relating to loans and advances to 90 days, instead of a year as is the case with the general third party appointment, is that loans and advances are generally agreed on when the need for the money arises, not a year before.

in other countries and in international tax law where it would be considered whether the transaction would have been made under the same conditions and at the same price as with third (unrelated) parties before it would be considered to not be at arm's length. See OECD *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2010* (2010) 32 where the general approach is discussed. Subsection 251(2) of the CITA provides that "related person" means *inter alia* i) individuals connected by blood, marriage or adoption; ii) a corporation and one person who controls the corporation, or a member of a related group which controls the corporation; and (iii) two corporations that are controlled by the same person(s).

²¹

²²

Section 251(1)(b) of the CITA.

In the matter of *Peter Cundill & Associates Ltd. v The Queen* [1991] 2 CTC 221 a framework was developed to determine if unrelated parties are acting at arm's length. The following questions are considered important indicators in this regard: Firstly, was a common mind directing the bargaining for both parties? Secondly, did the parties act collectively without separate interests? Lastly, did one party exercise control over the other. In *Canada v Remai* 2009 FCA 340 (CanLII) par 32 it was held that it is not necessary for all the questions to be answered positively in order for a transaction to be not at arm's length. The court held that in some matters one of the questions may be more important than in other instances.

8.2.1.3 *Third party appointments with priority over a security interest*

The last type of third party appointment is provided for in section 224(1.2) of the CITA. This provision stipulates that

"if the Minister has knowledge or suspects that a particular person is, or will become within one year, liable to make a payment

(a) to another person (in this subsection referred to as the "tax debtor") who is liable to pay an amount assessed under subsection 227(10.1) or a similar provision, or

(b) to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor,

the Minister may in writing require the particular person to pay forthwith, where the moneys are immediately payable, and in any other case as and when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole or in part to the Receiver General on account of the tax debtor's liability under section 227(10.1) or the similar provision, and on receipt of that requirement by the particular person, the amount of those moneys that is so required to be paid to the Receiver General shall, notwithstanding any security interest in those moneys, become the property of Her Majesty to the extent of that liability as assessed by the Minister and shall be paid to the Receiver General in priority to any such security interest."²³

A third party appointment can be made in terms of section 224(1.2) in two instances. Firstly, where a third party is liable, or will become liable within a year, to pay money to a taxpayer who has a tax debt relating to taxes he or she had to withhold on behalf

²³ Section 224(1.2) further provides that this third party appointment power applies, irrespective of other provisions in the CITA, "the Bankruptcy and Insolvency Act, any other enactment of Canada, any enactment of a province or any law, but subject to subsections 69(1) and 69.1(1) of the Bankruptcy and Insolvency Act and section 11.09 of the Companies' Creditors Arrangement Act".

of the CRA²⁴ and secondly where a third party is liable, or will become liable within a year, to pay a secured creditor of the tax debtor. Moreover, the payment should have been payable to the tax debtor if it was not for the security interest²⁵ of the secured creditor.

I submit that the meaning attributed to “liable” in terms of section 224(1) of the CITA should also be attributed to “liable” relation to section 224(1.2) of the CITA. As a result, “liable” should be construed to mean the third party should be responsible in law to make a payment.

When one of the two instances provided for in section 224(1.2) is met and a third party appointment notice is issued, the money reflected in the notice becomes the property of the Crown and must be paid to the CRA preferential to any security interest.²⁶ Morris indicates that this “enhanced requirement to pay” bestows a proprietary right on the Crown in respect of the money the third party must pay over. This results in a right which enjoys priority over any security interest, charge or assignment. As such the CRA is able to intercept money that is owed to the tax debtor or his or her secured creditor.²⁷

²⁴ As stipulated in terms of s 227(10.1) of the CITA.

²⁵ Section 224(1.3) of the CITA defines security interest as “any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for”.

²⁶ Section 224(1.2) of the CITA. Before 1990, s 224(1.2) of the CITA did not provide that the third party notice issued in terms of s 224(1.2) enjoys priority over a security interest of another creditor. The part providing a preference for third party appointments was inserted to provide certainty in this regard. See *Transgas Ltd v Mid-Plains Contractors Ltd* 1993 CanLII 4413 (SK CA) 5; Ziegel “Commentaries: section 224(1.2) of the Income Tax Act in the Supreme Court of Canada” (1997) *Canadian Business Law Journal* 170-172 regarding the history of s 224(1.2) of the CITA. The rationale for allowing the CRA’s claim relating to withholding priority over other secured interest may be found in the matter of *Transgas Ltd v Mid-Plains Contractors Ltd*. The court (12) indicated that s 224(1.2)(a) enables the CRA to garnish money which would not have been available to other creditors if the taxpayer remitted the tax as required by law.

²⁷ *Morris Understanding Crown priorities in insolvency* (20 Feb. 2013) 6. In *Canada (Minister of National Revenue) v W. Mullner Trucking Ltd* 2010 BCCA 90 the competing claims were liens in terms of the Woodworker Lien Act R.S.B.C. 1996, c. 491 and the CRA’s claim in terms of section 224(1.2) of the CITA relating to unremitted deductions (para 3-7). The court held that on the plain reading of the relevant section of the CITA it is clear that the CRA’s claim enjoys priority (par 20).

As is the case with the other two types of third party appointments in Canada, the section 224(1.2) appointment does not require the courts or any impartial forum to be involved in this process.

8.2.2 Duties of an appointed third party

A person who is appointed as a third party must act in accordance with the third party appointment notice. If the money payable to the tax debtor consists of periodic payments, for example interest or rent, section 224(3) of the CITA provides that the appointment notice applies to all the payments until the tax debt has been satisfied.

Section 224(4) provides that if an appointed third party fails to comply with a third party appointment notice, he or she will be personally liable. With regard to an appointment notice in relation to a general third party notice (section 224(1)) or a third party notice which enjoys preference over security interest fails (section 224(1.2), a non-compliant third party is liable for the amount reflected in the third party notice. In the event of an institution or person failing to pay over the money which relates to lending or advancing to the taxpayer or effecting payment on behalf of the taxpayer (section 224(1.1), the institution or person is personally liable for an amount of either the total money lent, advanced, or paid,²⁸ or the amount reflected in the third party notice,²⁹ whichever is the lesser amount.

The third party appointment provisions do not require the CRA or the appointed third party to provide the taxpayer with a notice to inform him or her of the third party appointment.³⁰

8.2.3 Constitutional considerations in relation to third party appointments in terms of the CITA

A possible constitutional argument against third party appointments in Canada could be that a taxpayer right afforded in terms of section 8 of the Charter to be protected against unreasonable search and seizure is infringed upon when a third

²⁸ Section 224(4.1)(a) of the CITA.

²⁹ Section 224(4.1)(b) of the CITA.

³⁰ PLEA "Life & taxes: compliance and enforcement" (17 Feb. 2012) available at <http://bit.ly/1mSyaVq> (accessed 22 Feb. 2016).

party appointment notice is issued. In *Transgas Ltd v Mid-Plains Contractors Ltd* (“*Transgas*”),³¹ where the constitutionality of section 224(1.2) of the CITA was questioned, the respondents pursued precisely this argument by arguing that section 224(1.2) constitutes an unreasonable seizure of an economic interest.³² The court held that section 8 of the Charter is aimed at protecting the privacy of a person and not his or her property. Accordingly, section 8 of the Charter’s is not concerned with the seizure of “pure economic interests”.³³ The court continued that even if the ambit of section 8 of the Charter extended to economic interests, section 224(1.2) would be considered reasonable.³⁴ Accordingly, the constitutional attack on section 224(1.2) was unsuccessful.

8.2.4 Third party appointments and insolvency

Bank of Montreal v Canada (Attorney General) (“*Bank of Montreal*”)³⁵ dealt with whether bankruptcy of the tax debtor has an impact on the CRA’s right to receive money in terms of a third party appointment which was issued before bankruptcy.³⁶ The court held that generally a garnishee issued before bankruptcy but not yet executed does not enjoy preference over secured creditor’s rights.³⁷ However, if a provision stipulates that the receipt of a third party appointment notice has the effect that the money becomes the property of the Crown, as is the case with a section 224(1.2) appointment, the situation is different. The consequence of such a provision is that the tax debtor does not have any residual rights in respect of the funds subject to the appointment notice. Accordingly, the trustee of the bankrupt

³¹ 1993 CanLII 4413 (SK CA).

³² *Transgas* 14.

³³ *Transgas* 16.

³⁴ *Transgas* 18. See Ch 4, par 4.2.1 where I indicated that in order to consider whether a search and seizure in Canada is reasonable the search or seizure should be conducted in terms of law, the law itself should be reasonable and the search or seizure should be conducted in a reasonable manner.

³⁵ 2003 CanLII 52158.

³⁶ *Bank of Montreal* par 1. In *Bank of Montreal* the third party appointment notice was issued pursuant to s 317 of the Excise Tax Act, R.S.C. 1985, c. E-15. In essence the wording of s 317 of the Excise Tax Act is similar to the wording of s 224(1.2) of the CITA.

³⁷ *Bank of Montreal* par 1.

estate does not obtain any rights in relation to the specific funds and the funds never become the property of the trustee.³⁸

The following question then arises: What would the impact of a section 224(1.2) third party appointment notice be if it is issued after bankruptcy proceedings have commenced? The answer hereto can be found in the introductory part of section 224(1.2),³⁹ which provides that such a notice is subject to sections 69(1) and 69.1(1) of the Bankruptcy and Insolvency Act.⁴⁰ The salient part of sections 69(1) and 69.1(1) of the Bankruptcy and Insolvency Act provide that when bankruptcy proceedings have commenced, there is a stay in all actions to recover a provable claim.⁴¹ Accordingly, the CRA would be unsuccessful in collecting taxes by way of a third party appointment after bankruptcy proceedings have commenced.

8.2.5 Comparison with SARS' powers

When comparing the CRA's powers to appoint a third party with SARS' powers there are some similarities that can be detected. In both instances no judicial intervention is required⁴² and there is no requirement to give the taxpayer notice of the third party appointment.⁴³

Furthermore, the general third party appointment provisions at the disposal of the CRA are similar to the third party appointment provisions in South Africa. In both instances the third party is obliged in terms of law to pay money to the taxpayer. Moreover, in both instances the third party's liability towards the taxpayer may be a

³⁸ *Bank of Montreal* par 10.

³⁹ See Ch 8, fn 23 in this regard.

⁴⁰ RSC 1985, c B-3. Section 224(1.2) of the CITA is also subject to s 11.09 of the Companies' Creditors Arrangement Act RSC 1985, c C-36. In terms of this section a court may order that the CRA's power to use s 224(1.2) of the CITA is stayed for a specified period. See s 11.02(1) and 11.02(2) of the Companies' Creditors Arrangement Act where it is clear that this stay can only apply from when the application for an arrangement has been made or later. Consequently, s 11.09 of the Companies Creditors Arrangement Act cannot stay the CRA's power before application for a companies creditors arrangement has been made.

⁴¹ See ss 69(1)(a) & 69.1(1)(a) of the CITA specifically.

⁴² See Ch 7, par 7.2.1.4; Ch 8, para 8.2.1.1; 8.2.1.2; 8.2.1.3.

⁴³ See Ch 7, para 7.2.1.4; 7.2.2.4(a); Ch 8, para 8.2.1.1; 8.2.1.2; 8.2.1.3.

liability which will arise in the future.⁴⁴ However, this is where the South African third party provisions differ from the general third party appointment provisions in Canada. In South Africa there is no provision indicating for how long the third party appointment notice can “pend” whilst waiting for money to become due to or held on behalf of the taxpayer. May SARS issue a third party notice on a random basis in the hope of appointing someone who will someday owe money to the taxpayer? Canada, on the other hand, restricts the time a third party notice can “pend” whilst waiting for the debt to become payable. Third party appointments made in terms of section 224(1) or section 224(1.2) are restricted to instances where the third party’s liability to the taxpayer arise within a year. Third party appointments made in terms of section 224(1.1) are restricted to instances where the loan or advance is made within ninety days after the notice has been issued.

The Canadian third party appointment provisions provide clarity in relation to another aspect. Section 224(1.2) of the CITA expressly provides that when a third party appointment is made in terms of this section, the third party appointment enjoys preference over other security interests.⁴⁵ The South African legislation provides no indication whether a third party appointment would enjoy preference over a secured creditor.

The extent of the third party appointment in Canada is much broader than is the case in South Africa. In South Africa third party appointment provisions may be made when a third party is required to hold money on behalf of, or money due to, the taxpayer.⁴⁶ In Canada this is one of the types of third party appointments. Apart from the general third party appointments, the CITA caters, amongst other instances, for when a loan or advance will be made.⁴⁷ I submit that the broader provisions in Canada ensure that the CRA has more opportunities to effectively collect taxes. However, extending South Africa’s third party appointment powers in a similar way

⁴⁴ However, see Ch 7, par 7.3.1.2 where it is indicated that the CEA does not refer to any future money held on behalf of a taxpayer.

⁴⁵ See Ch 8, par 8.2.1.3.

⁴⁶ See Ch 7, para 7.2.1.2; 7.2.2.2; 7.3.1.2; 7.3.2.1.

⁴⁷ See Ch 8, par 8.2.1.2.

would not address the concerns I have identified in Chapter 7 in relation to the invasive nature of the current South African third party appointment powers.

8.3 AUSTRALIA

8.3.1 Empowering provisions and requirements for third party appointment

Initially section 218 of the Assessment Act provided the ATO with the power to appoint a third party.⁴⁸ However, A New Tax System (Tax Administration) Act, 1999 was enacted to consolidate the collection and recovery procedures in various taxations laws. This means that section 260-5 in Schedule 1 to Administration Act now governs third party appointments made by the ATO. In light of the fact that the aim of A New Tax System (Tax Administration) Act was to consolidate taxation laws, there were no substantial changes made to the provisions that existed prior to this consolidation.⁴⁹ Accordingly, even though the discussion relating to third party appointments is focused on section 260-5 of the Administration Act, case law relating to section 218 of the Assessment Act is also relevant.

Section 260-5 of the Assessment Act, entitled "Commissioner may collect amounts from third party", stipulates that

- “(1) This Subdivision applies if any of the following amounts (the debt) is payable to the Commonwealth by an entity (the debtor) (whether or not the debt has become due and payable):
- (a) an amount of a *tax-related liability;
 - (b) a judgment debt for a *tax-related liability;
 - (c) costs for such a judgment debt;
 - (d) an amount that a court has ordered the debtor to pay to the Commissioner following the debtor's conviction for an offence against a *taxation law.

⁴⁸ This was prior to 1 July 2000.

⁴⁹ Explanatory Memoranda to A New Tax System (Tax Administration) Bill 1999 47. For purposes of third party appointments the only relevant change is that whilst previously separate notices had to be issued for each particular liability, only one notice is required in terms of s 260-5(2). See Marriott "Tax debt management in New Zealand and Australia" (2014) *Journal of the Australasian Tax Teachers Association* 12-13 for a general discussion of the third party appointment provisions in Australia.

- (2) The Commissioner may give a written notice to an entity (the third party) under this section if the third party owes or may later owe money to the debtor."

In terms of section 260-5 of the Administration Act two requirements must be met before the Commissioner may issue a third party appointment. Firstly, there must be a debt payable (but not necessarily due and payable at that stage) to the Commonwealth by the taxpayer and secondly the third party must owe or later owe money to the taxpayer.

When analysing the first requirement, two of the four instances mentioned in section 260-5(1) that would constitute "the debt" specifies that it must be a "tax-related liability". A "tax-related liability" means that there "is a pecuniary liability to the Commonwealth" which came about in terms of a taxation law.⁵⁰ Since the tax debt payable refers to both debt and judgment debt it is clear that debt does not have to be confirmed by a court.⁵¹

Another interesting aspect of section 260-5(1) of the Administration Act is that the debt is payable to the Commonwealth irrespective of whether the debt has become due and payable. Consequently, the meaning of "payable" in this section requires further consideration.

The erstwhile section 218(1) of the Assessment Act provided that a third party appointment notice could be issued for an amount that "is sufficient to pay the amount *due* by the taxpayer in respect of any tax"⁵² in terms of the Assessment Act. In *Clyne v Deputy Federal Commissioner of Taxation* ("Clyne"),⁵³ the court considered, amongst other aspects, when a tax would be due for purposes of section

⁵⁰ Definition of "tax-related liability" as provided for in s 255-1(1) of the Administration Act. According to s 3AA(2) of the Administration Act read with s 995(1) of the Australian Income Tax Assessment Act 1997 "taxation law" refers to an Act where the Commissioner of the ATO administers the Act, legislative instruments made under such an Act, the Tax Agent Services Act 2009 or regulations made in terms of the Tax Agent Services Act.

⁵¹ See also The Law Society of New South Wales "ATO 'garnishee notices'" (13 Apr. 2010) par 1.2 available at <http://bit.ly/1QSCT4f> (accessed 31 Jan. 2016).

⁵² Own emphasis added.

⁵³ (1981) 150 CLR 1.

218(1) of the Assessment Act. The court pointed out that there are two possible meanings that could be attributed to the word “due”. It could mean due and payable, or it could mean owing.⁵⁴ Mason J indicated that “due” could be construed to mean due and payable if the context necessitates it. However, if there is nothing in the context requiring such a construction, usually “due” would refer to a legal liability to pay irrespective of whether the money is payable at that stage.⁵⁵ Mason J held that the context of section 218 of the Assessment Act did not necessitate “due” to be construed as due and payable and as such “due” refers to a tax debt that is owing but not necessarily payable.⁵⁶

Section 260-5 of the Administration Act does not refer to an “amount due by the taxpayer” but rather a debt that is payable irrespective of whether the debt has become due and payable. Therefore, this requirement entails something else than a due and payable debt. I submit that a meaning similar to what the court in *Clyne* attributed to “due” in terms of section 218 of the Assessment Act should be used in relation to “payable” in terms of section 260-5 of the Administration Act. Accordingly, I submit that the debt payable in terms of section 260-5 requires that there must be a legal liability.

The second requirement that must be met is that the person whom the ATO wishes to appoint as a third party, must owe or later owe money to the tax debtor.⁵⁷ This second requirement is based on two pillars. Firstly, the money must be owed or may later be owed. Secondly, it must be owed to the tax debtor (taxpayer).

Section 260-5(3) of the Administration Act provides that a third party is considered to owe money to a tax debtor if the third party

- “(a) is an entity by whom the money is due or accruing to the debtor; or
- (b) holds the money for or on account of the debtor; or
- (c) holds the money on account of some other entity for payment to the debtor; or

⁵⁴ *Clyne* 14.

⁵⁵ *Clyne* 15. Mason J relied on a quote from *Ex parte Kemp; In re Fastnedge* (1874) L.R.9 CH. 383 387.

⁵⁶ *Clyne* 16.

⁵⁷ Section 260-5(2) of the Administration Act.

(d) has authority from some other entity to pay the money to the debtor.

The third party is so taken to owe the money to the debtor even if:

(e) the money is not due, or is not so held, or payable under the authority, unless a condition is fulfilled; and

(f) the condition has not been fulfilled.”

When considering section 260-5(3)(a) and that “owed” could relate to debt that is accruing to the taxpayer, the question arises whether the third party would be obliged to pay over this “owed” debt to the ATO even before it becomes payable to the taxpayer. *Clyne*, which dealt with the previous third party appointment provisions, provides clarity in this regard. In *Clyne*, the ATO issued a third party notice relating to three interest-bearing deposits that had not yet matured. Subsequent to the issuing of the third party notice, but before the deposits matured, the taxpayer assigned the deposits to another person.⁵⁸ The third party argued that because the money was not yet payable to him when the third party appointment notice was issued and indeed never became payable to him due to the assignment, the third party appointment notice did not come into operation.⁵⁹ The court held that the obligation imposed by a third party appointment notice arises with the service of the notice.⁶⁰ If the money is not yet payable, the performance is delayed until the money becomes payable.⁶¹ Accordingly, subsequent actions by the taxpayer, such as assignment after a third party notice has been served, do not make a third party notice inoperative.⁶²

⁵⁸ *Clyne* 8.

⁵⁹ *Clyne* 12.

⁶⁰ *Clyne* 23.

⁶¹ *Clyne* 23.

⁶² *Clyne* 12,19. *Macquarie Health Corp Ltd v Commissioner of Taxation* [1999] FCA 1819 confirms that the third party notice becomes effective as soon as it is served on the third party and not only when the debt becomes payable by the third party. In this matter at the time the third party appointment notice was issued, a material part of the debt owed by the third party to the taxpayer was not yet payable. That part of the debt only became payable to the taxpayer after a winding-up order had been issued against the taxpayer (par 38). The court held that neither the taxpayer nor a liquidator could undermine the ATO’s rights with regards to a third party appointment when such a notice has been served. Consequently, once a third party appointment notice has been issued, a subsequent winding-up order cannot frustrate the operation of the third party appointment notice.

The matter of *Deputy Federal Commissioner of Taxation v Donnelly* (“*Donnelly*”)⁶³ dealt with the fact that the second requirement for a third party appointment may be met if the money is later owed. Van Doussa J indicated that a third party appointment notice will not be binding until an identifiable debt owing to the taxpayer arises. He continued that only once an identifiable debt arises, is the third party obliged to act in accordance with the third party appointment notice.⁶⁴

Donnelly also dealt with the second pillar, i.e. whether the debt is owed to the taxpayer. In this matter it was contended that money which becomes payable after the commencement of bankruptcy⁶⁵ would not be owing to the taxpayer but rather to the trustee. In accordance with this contention the money would then not fall within the ambit of the third party appointment notice.⁶⁶ Nevertheless, the court held that bankruptcy would not change the character of the money. If the money accrued to the taxpayer before the commencement of bankruptcy, the money is subject to the third party appointment notice.⁶⁷

It is apparent that the ambit of a third party appointment notice is rather broad as neither the tax debt nor the debt owed to the tax debtor has to be payable when the notice is issued. However, there are certain restrictions placed on the ATO’s power to appoint a third party.⁶⁸ For instance only 30 per cent of salary or wages may be

⁶³ (1989) ATC 5071.

⁶⁴ *Donnelly* 5080.

⁶⁵ Section 115 of the Bankruptcy Act 1996 deals with the commencement of bankruptcy. In terms of s 115(1) of the Bankruptcy Act, bankruptcy based on a creditor’s petition is considered to have commenced and to have “relation back” to the earliest act of bankruptcy within six months prior to the creditor’s petition being presented. Section 115(2) of the Bankruptcy Act provides a table of when bankruptcy is considered to have commenced and have relation back to when the bankruptcy is based on a debtor’s petition. The concept “relation back” was explained in *Re Pollitt; Ex parte minor* (1893) 1 OB 455 457-458. “Relation back” means that

“all subsequent dealings with the debtor’s property must be treated as if the bankruptcy has taken place at the moment when the act of bankruptcy was committed. The debtor must be considered as having become a bankrupt the moment the deed was executed. Then, he being a bankrupt, all the money which he then had, and all the money which was owing to him, passed to the trustee in the bankruptcy for the purpose of being distributed by him amongst the bankrupt’s creditors.”

⁶⁶ *Donnelly* 5092. See also s 116(1)(a) read with s 129 of the Bankruptcy Act.

⁶⁷ *Donnelly* 5093.

⁶⁸ See ATO *Practice statement law administration (PSLA 2011/18): enforcement measures used for the collection and recovery of tax-related liabilities and other amounts* (3 July 2014) para 108-123 where some of these limitations are discussed. These limitations include salary and wages, Medicare Australia payments, court as third party, trust fund money subject to a lien and an account held in terms of the First Home Saver Accounts Act 2008.

subject to a third party appointment. A higher percentage may be demanded if the taxpayer has another source of income.⁶⁹ Conversely, the percentage of salary or wages that are subject to the third party appointment may be lessened if the taxpayer's salary is already subject to another statutory garnishee.⁷⁰ The ATO will divert from the 30 per cent restriction when, in light of the taxpayer's financial position, it is fair and equitable to do so.⁷¹

The financial position of the taxpayer is not an aspect which the ATO only considers when determining the percentage of a salary or wage that may be subject to the third party appointment. The ATO also considers the financial position of the tax debtor before issuing a third party notice. This consideration would include having regard to debt owed to other creditors, whether the debtor has preferred paying other creditors over paying the ATO and the impact the third party appointment may have on the taxpayer's ability to provide for his or her family or maintain a business.⁷² Furthermore, the ATO may entertain a reasonable request from a taxpayer to vary or withdraw a third party appointment notice provided that the debtor is able to suggest viable alternatives to ensure the payment of the outstanding debt.⁷³ However, it must be noted that the ATO is not required in terms of law to consider the financial position of the taxpayer before issuing a third party appointment notice. Instead it is a Practice Statement⁷⁴ that provides that the ATO should consider the financial position.⁷⁵ Accordingly, the taxpayer may experience difficulty in compelling the ATO to take into consideration his or her financial situation.

Section 260-5(6) of the Administration Act stipulates that the Commissioner of the ATO must send a copy of the third party appointment notice to the taxpayer. In the matter of *Woodroffe v Deputy Federal Commissioner of Taxation* ("Woodroffe"),⁷⁶ the

⁶⁹ ATO (3 July 2014) par 108.

⁷⁰ ATO (3 July 2014) par 109.

⁷¹ ATO (3 July 2014) par 108.

⁷² ATO (3 July 2014) par 102.

⁷³ ATO (3 July 2014) par 103.

⁷⁴ ATO (3 July 2014) par 102.

⁷⁵ See ATO "Law administration practice statements" (Last modified 1 June 2015) available at <http://bit.ly/1Sde1aw> (accessed 9 Feb. 2016) it is specifically indicated that the Practice Statements are not law.

⁷⁶ (2000) ATC 4656.

court indicated that this does not mean that the taxpayer should receive advance notice of the third party appointment.⁷⁷

8.3.2 Duties of an appointed third party

A third party appointment notice compels the third party to pay over either the amount of tax debt owed or the amount of money available, whichever is the lesser. In the event that the ATO requires instalment payments as the money becomes available, the notice must indicate the amount or percentage that must be paid as the money becomes available.⁷⁸ Also, the third party appointment notice must indicate whether the payment must be done immediately or if the money will only become owing in future. In the latter instance, the notice should indicate within what time period after receiving the appointment notice should the ATO receive payment.⁷⁹

Section 260-20 of the Administration Act explicitly provides that the third party must act in accordance with the section 260-5 notice. Failure to comply with the said notice constitutes an offence.⁸⁰ The penalty associated with this offence is currently \$3 600.⁸¹ Moreover, section 260-20(2) of the Administration Act provides that the third party may also be ordered by court to pay the ATO an amount which does not exceed the amount stipulated in the third party appointment notice.

8.3.3 Third party appointments and insolvency

In Australia significant consideration is given regarding the impact of insolvency proceedings on a third party appointment and *vice versa*.

In the matter of *Donnelly*, the court stated that the third party appointment notice makes the ATO a secured creditor.⁸² This means that the outstanding tax liability will

⁷⁷ *Woodroffe* 4657.

⁷⁸ Section 260-5(4)(b) of the Administration Act.

⁷⁹ Section 260-5(5) of the Administration Act.

⁸⁰ Section 260-20(1) read with s 260-20(2) of the Administration Act.

⁸¹ Section 260-20(1) of the ATAA read with s 4AA(1) of the Crimes Act, 1914.

⁸² *Donnelly* 5091. Subsequently, the fact that a third party notice constitutes a secured claim has been confirmed in *Zuks v Jackson McDonald* (1996) 96 ATC 458; *Smith v Deputy Commissioner of Taxation (No 2)* (1995) 15 ACLC 687; *Commissioner of Taxation v GIO* (1993) 45 FCR 284.

first be paid out of the debt that is owed by the appointed third party to the insolvent taxpayer.⁸³ Only once the outstanding tax liability is satisfied may the remaining money owed by the third party be used to satisfy other debts of the taxpayer. Zanker indicates that trying to place the ATO's third party notice claim into the ordinary categories of creditors leads to uncertainty with regard to how the bankruptcy laws should be administered.⁸⁴ Furthermore, Duns and Glover observe that in the absence of a statutory preference relating to taxation claims, the collection of taxes by way of a third party appointment results in a *de facto* priority in insolvency proceedings.⁸⁵ The Law Society of New South Wales indicates that the ATO's ability to "leap-frog"⁸⁶ other creditors by way of a third party appointment notice is contrary to the policy considerations in terms whereof the ATO's statutory preference was abolished.⁸⁷

The matters of *Re Octaviar Ltd (No 8)* ("Octaviar")⁸⁸ and *Tricontinental Corporation Limited v Federal Commissioner of Taxation* ("Tricontinental")⁸⁹ also grappled with whether a third party appointment would provide a preference to the ATO in insolvency proceedings. In *Octaviar*, there was a fixed charged⁹⁰ in favour of a

See also Yu *Commissioner of Taxation and equal priorities in insolvency: a review* (June 2003) 7 in this regard. See Ch 8, par 8.3.2 where the other important components of *Donnelly* are discussed.

⁸³ Meskin *et al Insolvency Law* (last updated Oct. 2015) Lexis Nexis Internet Version par 12.4.1.1 relating to what the concept secured creditor entails.

⁸⁴ Zanker "Bankruptcy and notices under section 218 of the Income Tax Assessment Act – Crown priority in another guise? (1991) *Australian Tax Forum* 281.

⁸⁵ Duns & Glover "The taxation priority in insolvency: an Australian perspective" (2005) *International Insolvency Review* 179-180. See also Duns & Glover (2005) *International Insolvency Review* 176-179 for a discussion relating to the abolishment of statutory preferent tax claims.

⁸⁶ According to Author Unknown *Oxford Dictionaries* available at <http://bit.ly/1OHMjvd> (accessed 10 Nov. 2016) "leapfrog" means to "surpass or overtake another to move into a leading or dominant position".

⁸⁷ The Law Society of New South Wales (13 Apr. 2010) par 3.1 available at <http://bit.ly/1QSCT4f> (accessed 31 Jan. 2016).

⁸⁸ [2009] QSC 202. See Allens "Restructuring & insolvency – focus: garnishee notice served by the Commissioner of Taxation after liquidation is void" (2 Sept. 2009) available <http://bit.ly/2ItNR5S> (accessed 31 Jan. 2016) for a discussion of this case.

⁸⁹ (1987) Qd R 4456.

⁹⁰ In Australia the term "fixed charged" was used instead of the South African term "special notary bond". See Insol International "Glossary of terms – South Africa" (date unknown) available at <http://bit.ly/1QQ4ZNu> (accessed 8 Feb. 2016) where it is indicated that these terms mean that "specific movable assets would be subject to a security in favour of a creditor". It must be noted that since 30 Jan. 2012 the Personal Property Securities Act 2009 (Cth) came into operation. Kindynis & Berriman "Alert- taking security over Australian assets: everything changes in 2012" (27 Jan. 2012) available at <http://bit.ly/1SaX2FJ> (accessed 8 Feb. 2016) indicate that the

creditor. This charge existed before the ATO issued a third party appointment notice.⁹¹ The court held that the third party notice would in this instance not take preference over creditor's claim. This approach is also in line with the one adopted by the court in *Norgard v Deputy Federal Commissioner of Taxation* ("Norgard").⁹² In *Norgard*, Burt CJ opined that "the Commissioner receives the debt subject to all charges which are then, that is to say at the time of the service of the ... notice, attached to it."⁹³ Consequently, the money would be considered owing to the taxpayer for purposes of third party appointments insofar as it was not encumbered by securities registered over specific movable property when the third party notice was served on the third party.

A similar approach has been adopted by the Australian courts relating to floating charges.⁹⁴ In *Tricontinental*, it was held that once a floating charge has crystallised⁹⁵ over the money, the money cannot be owed to the taxpayer anymore but to that specific creditor.⁹⁶ Accordingly, the money would then not be susceptible to a third party notice which is issued after the security has crystallised. Conversely, when a

Personal Property Securities Act abolished terms such as "fixed charge" and the appropriate terms is now "specific security agreement".

⁹¹ *Octavia* par 43.

⁹² (1986) ATC 4947.

⁹³ *Norgard* 4952. In *Norgard* notices were issued in terms of s 38 of the Sales Tax Assessment Act 1930, which was practically identical to s 218 of the Assessment Act. In *Commissioner of Taxation v Park* [2012] FCAFC 122 it was held that the third party had to adhere to a third party notice even though the debt was already subject to a secured claim of a mortgage (par 115). However, in this instance the mortgagor released its claim over the property (par 114). See Anson, Varrasso & Walker "Mortgagees and ATO section 260-5 notices – be aware!" (19 Sept. 2012) available at <http://bit.ly/1RFfvJP> (accessed 31 Jan. 2016); Author unknown "When does the Commissioner of Taxation have priority over a secured lender?" (16 Oct. 2012) *Ashurst Australia* available at <http://bit.ly/1ofL2WR> (accessed 31 Jan. 2016); Van der Walt "Third party appointments – an Australian cat amongst the pigeons??" (21 Jan. 2013) *Tax Alert* 1-2.

⁹⁴ See Insol International (date unknown) available at <http://bit.ly/1QQ4ZNu> (accessed 8 Feb. 2016) where it is indicated that in South Africa the term "general notarial bond" is used instead of a "floating charge". In terms of the Personal Property Securities Act the preferred terminology would be "general security agreement". This type of charge is a security that "hovers over the debtor's assets" and would only become fixed once crystallisation occurs. A floating charge allows the debtor to deal with its assets in the ordinary course of business until this charge is crystallised (Australian Government Solicitor "Legal briefing - Personal Property Securities Act" (12 Jan. 2012) available at <http://bit.ly/2IQUTTr> (accessed 8 Feb. 2016)).

⁹⁵ Crystallisation would for instance occur once a liquidation order has been granted (Insol International (date unknown) available at <http://bit.ly/1QQ4ZNu> (accessed 8 Feb. 2016)).

⁹⁶ *Tricontinental* 4460.

floating charge is created but not crystallised before a third party notice is issued, the third party notice in favour of the ATO would enjoy preference.⁹⁷

An aspect similar to the impact a third party appointment may have on insolvency, is whether a third party appointment by the ATO after liquidation or bankruptcy is enforceable. In *Bruton Holdings Pty Ltd (in Liq) v Commissioner of Taxation* (“*Bruton Holdings*”),⁹⁸ a section 260-5 appointment notice was issued a few days after Bruton Holdings was voluntarily placed under liquidation by its creditors.⁹⁹ The court had to consider whether the third party appointment notice was void based on section 500 of the Corporations Act, 2001, which ensures that that the creditors are treated on an equal basis once winding-up proceedings have commenced.¹⁰⁰ The salient part of the provision stipulates that when an attachment is made against the property of the company after a resolution to liquidate the company has been made, the attachment would be void.¹⁰¹

The court held that a third party notice cannot be used to collect pre-liquidation tax debt after winding up has commenced.¹⁰² The court continued that there is already a process dealing with the recovery of tax liabilities contained in section 260-45 of the Administration Act.¹⁰³ In terms of this provision a liquidator must set aside and pay over an amount, which is calculated in accordance with a formula,¹⁰⁴ to the ATO in respect of outstanding tax-related liabilities.

⁹⁷ *Deputy Federal Commissioner of Taxation v Lai Corporation Pty Ltd* [1986] WAR 4088 4100. In this matter it was indicated that when a creditor has a floating charge he or she obtains an interest in the *res*, but this interest may be deprived of its value in the ordinary course of business.

⁹⁸ [2009] HCA 32. For a discussion of this case see Allens (2 Sept. 2009) available <http://bit.ly/2ltNR5S> (accessed 31 Jan. 2016); Ashurst “The sequel to *Bruton Holdings*” (30 Sept. 2015) *Insolvency & Tax Alert* available at <http://bit.ly/2monSB4> (accessed 31 Jan. 2016).

⁹⁹ *Bruton Holdings* par 2.

¹⁰⁰ Section 500(1) of the Corporations Act gives effect to s 501 of the Corporations Act which provides that “the property of a company must, on its winding up, be applied in satisfaction of its liabilities equally”.

¹⁰¹ Section 500(1) of the Corporations Act.

¹⁰² *Bruton Holdings* para 10; 19; 39.

¹⁰³ *Bruton Holding* par 16.

¹⁰⁴ Total value of assets available Notified amount
to pay ordinary debts X Notified amount + $\frac{\text{amount of remaining ordinary debts}}{\text{amount of remaining ordinary debts}}$
In this formula:

“ordinary debts” refer to debt that is not subject to security or enjoys statutory preference;

“notified amount” refers to an amount the Commissioner has indicted to the liquidator to be the outstanding tax-related liability of the company.

*Bell Group Limited (in liq) v Deputy Commissioner of Taxation (“Bell Group”)*¹⁰⁵ was concerned with whether the third party appointment notice could be used to collect post-liquidation tax debt.¹⁰⁶ Even though post-liquidation recovery tax-related liabilities are not dealt with in terms of section 260-45 of the Administration Act, but rather section 254 of the Assessment Act, the court concluded that there is no material distinction between section 260-45 of the Administration Act and section 254 of the Assessment Act. This means that there is a process in terms whereof the ATO can recover any tax-related liabilities which may arise after liquidation has commenced. As such the court held that third party appointment notices cannot be used to collect post-liquidation tax debt.¹⁰⁷

8.3.4 Comparison with SARS’ powers

From the onset it is apparent that third party appointments in both Australia and South Africa do not require any judicial intervention whatsoever. Firstly, it is not necessary for the required tax debt to be confirmed by a judgment. It is only required that there is a present liability in relation to tax. In addition, the third party appointment procedures do not require the courts to issue such an appointment.

Australian case law stipulates that a third party appointment notice may be issued even when the tax debt is not yet payable. In South Africa a third party appointment in terms of the TAA relates to a tax debt that was not paid by a required day.¹⁰⁸ Furthermore, the South African CEA provides that third party appointments relating to customs duty may be made if there is money payable in terms of the CEA.¹⁰⁹ Thus, in South Africa third party appointments are limited to instances where the tax debt is due and payable.

“amount of remaining ordinary debts” refers to the total ordinary debt of the company less any tax-related liabilities.

¹⁰⁵ [2015] FCA 1056. See Ashurst (30 Sept. 2015) *Insolvency & Tax Alert* available at <http://bit.ly/240yBim> (accessed 31 Jan. 2016) for a discussion of this case.

¹⁰⁶ *Bell Group* par 1.

¹⁰⁷ *Bell Group* par 79.

¹⁰⁸ See Ch 7, fn 131 in this regard.

¹⁰⁹ See Ch 7, par 7.3.1.1.

When considering the practicalities regarding third party appointments in South Africa in relation to a money that in future will be held or owed to the taxpayer, I indicated that requiring a third party to pay money over to SARS once a third party appointment notice has been issued out of his or her own pocket would be too erroneous on the third party.¹¹⁰ I submit that an approach similar to Australia, in terms whereof the obligation to pay over money to the revenue authority is established by serving the third party appointment notice but postponing the performance until the debt becomes payable or held on behalf of the taxpayer,¹¹¹ would curbed the impact of the third party appointment on the third party. Also, such an approach would not restrict SARS' powers in relation to third party appointments too much.

Furthermore, South African case law, unlike Australian case law, has not dealt with the possible overlap between a third party appointment and insolvency proceedings. Could a third party appointment result in SARS obtaining preference in insolvency proceedings provided that the third party appointment was first in time? PricewaterhouseCoopers comments that SARS already has statutory preference over some creditors.¹¹² The statutory preference is provided for in the Insolvency Act ("ISA")¹¹³ but the preference is limited because a tax claim will be paid out of the free residue.¹¹⁴ As a result, SARS statutory preferential claim will not be preferred over secured creditors.¹¹⁵ As such it is relevant whether a third party notice has the ability

¹¹⁰ See Ch 7, par 7.2.2.2.

¹¹¹ See Ch 8, par 8.3.1. The alternative meaning of "due" is that a third party appointment is only valid if at the time the notice is served the debt is both due and payable. I submit that such a construction would hamper SARS' enforcement powers by way of third party appointments significantly. I opine that if such a narrow understanding of the concept "due" was to apply, the provisions should have stated so explicitly.

¹¹² PwC "The Commissioner's preference for tax debts" (Nov. 2009) *Integritax* 1785 available at <http://bit.ly/1O4miWH> (accessed 31 Jan. 2016).

¹¹³ 24 of 1936. Section 99(1)(b) relates to income tax which the insolvent person was liable to withhold or deduct, s 99(1)(cA) relates to customs and excise duty and s 99(1)(cD) of the ISA relates to value-added tax. Section 101 of the ISA provides a preferential claim to SARS in relation to income tax owed by the insolvent.

¹¹⁴ Section 2 of the ISA indicates that "free residue" relates to the part of the estate "which is not subject to any right of preference by reason of any special mortgage, legal hypothec, pledge or right of retention". Meskin *et al* (last updated Oct. 2015) Lexis Nexis Internet Version par 12.4.1.2 (fn 1) indicate that free residue essentially refers to the money that remains after the creditors who had a secured claim (i.e. special mortgage, landlord's legal hypothec, pledge or right of retention) have been paid.

¹¹⁵ In term of s 2 of the ISA secured creditors refers to creditors who have special mortgage, landlord's legal hypothec, pledge or right of retention over the property of the insolvent.

to secure a claim for SARS which is preferential to the claims of secured creditors as it would improve SARS' statutory preferred position in insolvency proceedings.

Even though the ISA¹¹⁶ does not expressly deal with how third party appointments should be dealt with, I consider the principle of *concursum creditorium* to provide guidance in this regard. The principle of *concursum creditorium* dictates that once a company is liquidated or a natural person sequestrated, no creditor can alter his or her relative position to the detriment of the other creditors of the estate.¹¹⁷ Based on this, SARS should not be able to improve its position in insolvency proceedings by way of a third party appointment notice.

In Australia the extent of the ATO's power relating to third party appointments is curbed by only allowing 30 per cent of a person's salary or wages to be subject to such an appointment. SARS does not have a similar limitation despite other South African draft legislation, to wit, the Courts of Law Amendment Bill, 2016, limits the amount of a person's salary that may be subject to attachment.¹¹⁸

The current South African position where there is no objective limitation placed on the ambit of money that may be exposed to third party appointments is much more invasive than where an objective limitation applies. As indicated previously¹¹⁹ the impact of the revenue authorities' power relating to third party appointments is curbed by providing for a consideration of the taxpayer's financial situation. However, permitting a revenue authority to determine whether a taxpayer can afford the impact of the specific third party appointment creates a conflict of interests as the revenue authority is tasked with enforcing the collection of taxes.¹²⁰

¹¹⁶ 24 of 1936.

¹¹⁷ See *Walker v Syfret* 1911 AD 141 152 where this principle has to confirmed to form part of South African Insolvency Law. See also De Clerq *et al Insolvent estates* (2014) 16.

¹¹⁸ In terms of clause 8 of The Court of Law Amendment Bill only 25 per cent of a person's salary may be subject to emolument attachment orders. An emolument attachment order is a court order obtained by a judgment creditor in terms whereof an employer must pay a portion of a judgment debtor/employee's salary over to the judgment creditor.

¹¹⁹ Ch 7, par 7.2.3; Ch 8, par 8.3.1.

¹²⁰ See Ch 7, par 7.2.2.4(b).

8.4 NEW ZEALAND

8.4.1 Empowering provisions and requirements for third party appointments

Section 157 of the NTAA governs the IRD's third party appointments. Section 157(1) of the NTAA provides *inter alia* that

“Where a taxpayer has made default in the payment to the Commissioner of any income tax (or a part of any income tax) or any interest ... or any civil penalty (or a part of any civil penalty) ..., the Commissioner may from time to time by notice require any person to—

(a) deduct or extract, in 1 sum, from any amount that is, or becomes, an amount payable in relation to the taxpayer such sum as is equal to the lesser of—

(i) the amount that, according to the notice, is required to be deducted or extracted;

(ii) the amount that, at the time at which the deduction or extraction is required to be made in compliance with the notice, is the amount payable in relation to the taxpayer;

(b) subject to subsection (3), deduct or extract from time to time, by way of instalment, from any amount that is, or from time to time becomes, an amount payable in relation to the taxpayer such sum as is equal to the lesser of—

(i) the amount that, at the time at which the deduction or extraction is required to be made in compliance with the notice, is the amount required to be so deducted or extracted;

(ii) the amount that, at the time at which, according to the notice, the amount of the instalment is required to be deducted or extracted, is the amount payable,—

and require that person to pay to the Commissioner, within such time as is specified in the notice”.

In terms of section 157(1) of the NTAA the Commissioner of the IRD (“Commissioner”)¹²¹ has a discretion to issue a third party appointment in terms

¹²¹ The reference to Commissioner of the IRD as Commissioner only applies to Ch 8, par 8.4. Section 7(1) of the NTAA provides that the Commissioner may delegate his or her powers. In

whereof a person must deduct money which is or may become payable to a taxpayer in order to satisfy amongst other an income tax debt payable by that taxpayer.¹²² In terms of section 157(10) “income tax” refers *inter alia* to tax payable in terms of the Income Tax Act of 1976, the Income Tax Act of 1994, the Income Tax Act of 2004 and the Income Tax Act of 2007.¹²³

The second requirement for a third party appointment, is that there must be money that is or may become payable to the taxpayer. Section 157(10) provides clarification regarding this requirement as it stipulates that an amount is considered payable by a person whether it is payable on the person’s own account, or as an agent, or as a trustee.¹²⁴ Furthermore, in the event that the third party is a bank¹²⁵ any amount that is on deposit or deposited to the credit of the taxpayer on the day the notice is given to the bank¹²⁶ or any day thereafter, is considered an amount payable in terms of section 157.¹²⁷ The IRD indicates that it will not issue a notice which would place the taxpayer’s account into or further into overdraft. However, the IRD declares that it may issue an appointment notice relating to a deposit which has not yet matured.¹²⁸

Furthermore, section 157(10) of the NTAA specifically excludes a number of instances from the concept of “amount payable” and as such these instances are not susceptible to a third party notice in terms of section 157(1). These instances are a

terms of s 7(2)(c) of the NTAA the power conferred upon the Commissioner in terms of s 157 of the NTAA may not be delegated to a person who is not part of the public service.

¹²² See Marriott (2014) *Journal of the Australasian Tax Teachers Association* 7-8 for a general discussion of the third party appointment provisions in New Zealand.

¹²³ See s 157(10)(a) of the NTAA’s definition of “income tax”.

¹²⁴ Section 157(10)(a) of the NTAA’s definition of “amount payable”. Even before s 157(10) of the NTAA existed, the court in *King v Leary* (1998) 10 NZTC 5,067 held that the third party notice, at that stage in terms of s 400 of the Income Tax Act 1976, is not concerned only with a primary obligation to pay, i.e. a relationship of payer and payee. The court held (5,073) that this notice applies to “all persons who in any paying capacity had control of funds which were to go to the taxpayer.” See IRD “Tax Information Bulletin” (Feb. 1995) 7-8 for a discussion of s 400 of the Income Tax Act.

¹²⁵ Section 157(10) of the NTAA provides that “bank” refers to a building society registered in terms of the Building Societies Act 1965 and a bank as construed in the Banking Act 1982.

¹²⁶ Section 157(10)(c)(i) of the NTAA’s definition of “amount payable”.

¹²⁷ Section 157(10)(c)(ii) of the NTAA’s definition of “amount payable”. This notice will remain in effect until revocation thereof. See Ch 8, par 8.4.4 for a further discussion relating to the position of banks as third party appointments.

¹²⁸ IRD *Standard Practice Statement: returns and debt collection SPS11/04: compulsory deductions from bank accounts* (29 April 2011) para 6-7.

home lay-by account¹²⁹ as provided for in the Post Office Act, 1959, a home ownership account¹³⁰ as provided for in the Home Ownership Savings Act, 1974, a farm ownership account¹³¹ as provided for in the Farm Ownership Savings Act, 1959, and a fishing vessel ownership account¹³² as provided for in the Fishing Vessel Ownership Savings Act, 1977. The reason for excluding these types of accounts from the ambit of section 157 may be based on public policy as these exclusions facilitate the ownership of homes, farms and fishing vessels.¹³³ Nevertheless, these exclusions seem to have limited application as it appears that these types of accounts have not been offered for some time.¹³⁴

A section 157 third party appointment notice can also be issued in respect of money that will be payable to the taxpayer in future.¹³⁵ Manyam observes that the prospective debt should be dealt with in the same manner as it is dealt with in Australia.¹³⁶ Thus, the third party appointment notice will only bind the third party once an identifiable debt becomes owed to the taxpayer.

In addition to the statutory requirements of when a third party appointment notice may be issued, the IRD indicates that it considers all relevant information before issuing an appointment notice. The relevant information includes communications between the IRD and the taxpayer, the amount of unpaid tax and whether the taxpayer is likely to experience hardship.¹³⁷

Section 157(5) of the NTAA contains another requirement relating to third party appointments. In terms of this provision the Commissioner must provide a copy of

¹²⁹ Section 157(10)(d) of the NTAA's definition of "amount payable".

¹³⁰ Section 157(10)(e) of the NTAA's definition of "amount payable".

¹³¹ Section 157(10)(f) of the NTAA's definition of "amount payable".

¹³² Section 157(10)(g) of the NTAA's definition of "amount payable".

¹³³ Manyam "The extensive powers of the Commissioner of Inland Revenue in assessing and collecting tax debts" (2001) *Waikato Law Review* 102.

¹³⁴ Davidson "Commentary TAAC-157 (Deduction of tax from payments due to defaulters)" (date unknown) *Westlaw NZ database* par 11.0.

¹³⁵ Section 157(10)(b) of the NTAA's definition of "amount payable" as well as the wording of s 157(1) of the NTAA. Once the money becomes payable the third party has to pay it over. This notice remains valid until payment is made to the IRD or the notice is revoked.

¹³⁶ Manyam (2001) *Waikato Law Review* 119. See Ch 8; par 8.3.2.

¹³⁷ IRD (29 April 2011) par 14. However, the IRD does not indicate what the hardship entails or whether the IRD considers if the issuing of an appointment notice would cause the hardship.

the third party appointment notice when the notice is given to the third party. Manyam remarks that the taxpayer should be informed when the notice is served on the third party or shortly thereafter.¹³⁸ The importance of this requirement can be detected in the matter of *Anzamco Ltd (in liq) v Bank of New Zealand* (“*Anzamco*”).¹³⁹ In this matter, the liquidator¹⁴⁰ submitted that an appointment notice issued to a bank in relation to Anzamco’s tax debt was invalid, amongst other reasons, because Anzamco did not receive the statutory required notice.¹⁴¹ Barker J indicated that the requirement of serving a copy of the notice on the taxpayer is not without reason as it provides the taxpayer with the opportunity to oppose the notice. He continued that the taxpayer should have received notice of the appointment notice before the third party has to pay the money as directed.¹⁴²

Section 157(3) of the NTAA limits the amount that may be deducted if the amount payable relates to wages or salaries. In the case of the money comprising of wages or salaries, the third party may deduct the lesser of 10 per cent per week of the income tax that is due and payable by the taxpayer or 20 per cent of the wages or salary payable. The limitation on the amount deductible in terms of section 157(3) does, however, have a minimum threshold of \$10 per week.¹⁴³

The Commissioner may by way of a notice revoke the third party appointment notice. This subsequent notice may be furnished at the request of the taxpayer.¹⁴⁴ Once the Commissioner has received a request to revoke, he or she must furnish a notice to revoke to the third party appointment notice if the Commissioner is satisfied that the

¹³⁸ Manyam (2001) *Waikato Law Review* 102.

¹³⁹ (1982) 5 NZTC 61,249.

¹⁴⁰ The company (taxpayer) was in the process of voluntary liquidation and accordingly a liquidator was appointed.

¹⁴¹ *Anzamco* 61,255. The third party appointment notice was issued in terms of s 400 of the Income Tax Act 1976, the predecessor of s 157 of the NTAA. Similar to s 157(5) of the NTAA, s 400(6) of the Income Tax Act required the IRD to furnish the affected taxpayer with a copy of the third party appointment notice.

¹⁴² *Anzamco* 61,257.

¹⁴³ See IRD (Feb. 1995) 8 available at <http://bit.ly/1T8FcEk> (accessed 25 Feb. 2016) for an example of the wage calculation.

¹⁴⁴ Section 157(4) of the NTAA. However, section 157(4) of the NTAA indicates that a taxpayer other than an employer may make such a request. Davidson (date unknown) *Westlaw NZ database* par 5.0. understands this to mean that an employer who has failed to comply with his or her tax deduction obligations may not request that the third party appointment notice be revoked.

taxpayer has paid all the income tax which was due and payable to the IRD.¹⁴⁵ The Commissioner must also inform the taxpayer of the revocation.¹⁴⁶

8.4.2 Duties of an appointed third party

The third party appointment notice¹⁴⁷ may either pertain to a lump sum payment or instalments. A lump sum payment would entail that an amount equal to the lesser of the amount indicated in the notice and the amount which becomes payable to the taxpayer must be paid over to the IRD.¹⁴⁸ Instalment payments would entail that the third party would deduct or extract payments periodically when an amount relating to a taxpayer becomes payable.¹⁴⁹ The third party is required in such an instance to pay either an amount equal to the amount specified in the notice for that specific time¹⁵⁰ or the amount payable to the taxpayer at that specific time,¹⁵¹ whichever is the lesser.¹⁵²

Section 157A of the NTAA regulates the instances where a third party who has received an appointment notice fails to comply with the said notice.¹⁵³ In terms of section 157A such a person, who is not an employer,¹⁵⁴ may be guilty of committing an offence.¹⁵⁵ The relevant offence may be classified as a “knowledge offence” in terms of section 143A of the NTAA. The instances, relevant for purposes of this discussion,¹⁵⁶ that would constitute a knowledge offence is if the person knowingly

¹⁴⁵ Section 157(4) of the NTAA.

¹⁴⁶ Section 157(5) of the NTAA.

¹⁴⁷ Also referred to as the deduction notice.

¹⁴⁸ Section 157(1)(a) of the NTAA.

¹⁴⁹ A possible problem with instalment payments in terms of a third party appointment notice is that the taxpayer would be able to circumvent the operation of the appointment notice. For instance, he or she could arrange to have rental payments paid into a bank account which is not subject to a third party appointment notice.

¹⁵⁰ Section 157(1)(b)(i) of the NTAA.

¹⁵¹ Section 157(1)(b)(ii) of the NTAA.

¹⁵² Section 157(1)(b) of the NTAA. In terms of ss 157(1A) and 157(1B) of the NTAA the Commissioner has a discretion in both instances, lump sum payment or instalment payments, to include daily interest in the third party appointment notice which is incurred from the date specified in the appointment notice until the money is deducted in terms of the notice.

¹⁵³ Sections 157A(1)(a)-(b) of the NTAA.

¹⁵⁴ Section 157A(1) of the NTAA.

¹⁵⁵ In terms of s 157A of the NTAA the third party is not liable for a civil penalty or interest on the unpaid tax.

¹⁵⁶ Other instances that would constitute the commission of a knowledge offence would be when a person knowingly (i) does not keep documents required to be kept in terms of law; (ii) fails to register with a foreign government agency as required by Part 11B; (iii) does not provide

used the money that was subject to a deduction or withholding of tax for another purpose than paying it over to the IRD¹⁵⁷ or where a person fails to make a deduction as required by a tax law.¹⁵⁸ If it is the first time that the third party has committed such an offence, a maximum fine of \$25 000 may be levied. For every subsequent offence the fine may not exceed \$50 000.¹⁵⁹ Section 157A(1)(c) of the NTAA provides that a third party who has not complied with the appointment notice is not liable to pay interest on the unpaid tax. Moreover, section 157A(1)(d) provides that a defaulting third party would not be subject to a civil penalty.

In addition to paying over the amount as stipulated in the third party appointment notice, the third party must also send a notice to the taxpayer to inform him or her that a deduction has been made and the reason why it has been made.¹⁶⁰ The third party is deemed to act under the authority of the taxpayer when he or she adheres to the third party appointment notice. Consequently, the third party is indemnified in respect of the payment made to the IRD.¹⁶¹ Davidson remarks that the explicit indemnification of a third party who acts in terms of a third party appointment notice brings an end to the issue of whether for instance a solicitor could pay over his or her client's funds that were kept in a trust account in order to comply with a third party appointment notice.¹⁶²

information when required to do so in terms of tax legislation; (iv) provides altered, false, incomplete, or misleading information in relation to a tax law; (v) knowingly issues two tax invoices for the same taxable supply; or (vi) provides altered, false, or misleading information relating to their residence in New Zealand or their status as a registered person.

¹⁵⁷ Section 143A(d) of the NTAA.

¹⁵⁸ Section 143A(e) of the NTAA. If the third party can prove that the deduction has been done and the reason it was not done within the prescribed period was beyond the person's control, he or she will not be guilty of committing a knowledge offence.

¹⁵⁹ Section 143A(7) of the NTAA.

¹⁶⁰ Section 157(6) of the NTAA.

¹⁶¹ Section 157(7) of the NTAA.

¹⁶² Davidson (date unknown) *Westlaw NZ database* par 8.0. IRD "Public Information Bulletin 147 Income Tax Amendment Act 1986" (May 1986) 53 indicates that a solicitor's argument that s 89 of the Law Practitioners Act 1982, which provides that a solicitor holds all money received for or on behalf of a client solely for the client, prevents him or her from complying with a third party appointment notice would not be valid anymore.

8.4.3 Third party appointments and joint bank accounts

In *Commissioner of Inland Revenue v ANZ Banking Group (New Zealand) Ltd* (“ANZ Banking Group”),¹⁶³ the question arose whether a third party appointment notice can be issued in relation to a joint bank account.¹⁶⁴ The bank referred to the English Appeal Court matter of *Hirschhorn v Evans* (“*Hirschhorn*”)¹⁶⁵ where it was held that

“one has to look at the account as a whole, and, looking at the account as a whole, I think that it is in the nature of a joint account on which the bank are liable to both parties jointly, and consequently the garnishee order is misconceived in stating that the bank are indebted to the said judgment debtor in the sum there state, whereas, in reality, they are indebted to the judgement debtor and to his wife jointly.”¹⁶⁶

Thus, the court in *ANZ Banking Group* held that a joint account is not subject to a section 157 notice. However, with the enactment of section 157(11) of the NTAA the situation concerning joint bank accounts has changed.¹⁶⁷ In terms of section 157(11) if money is held in a joint account by the taxpayer and another or others and the taxpayer can withdraw the money without the signature or other authorisation of the other person(s) then the money may be subject to a third party appointment notice.¹⁶⁸ However, the money is not subject to a third party appointment notice if it is a joint account of a partnership that is required to file an income tax return.¹⁶⁹

Section 157(9) of the NTAA contains another provision that is directed to instances where a bank is the appointed third party. Once an appointment notice is issued to a bank, an amount that is or becomes payable to the taxpayer, insofar as it reflects the amount contained in the third party appointment notice, is deemed to be held in trust

¹⁶³ (1998) 18 NZTC 13, 643.

¹⁶⁴ See Manyam (2001) *Waikato Law Review* 120-122 for a discussion of cases relating to third party appointment by the IRD and joint accounts.

¹⁶⁵ [1938] 3 ALL ER 491.

¹⁶⁶ *Hirschhorn* 496.

¹⁶⁷ Section 157(11) of the NTAA was inserted on 21 Dec. 2010 in terms of s 161 of the Taxation (GST and Remedial Matters) Act 2010.

¹⁶⁸ In IRD (29 April 2011) par 22 it is indicated that including the term “other authorisation” recognises that accounts can be accessed electronically and as such transactions may occur without the signature of a joint account holder.

¹⁶⁹ Section 157(12) of the NTAA. In accordance with s 33(1) of the NTAA a person is required to file an income tax return unless s 33A applies or a multi-rate portfolio investment entity (PIE) is used.

for the Crown until the day upon which the bank pays the money over to the IRD.¹⁷⁰ In instances where the third party is not a bank, the money is only deemed to be held in trust for the Crown once the money has actually been paid over by the third party.¹⁷¹ Accordingly, the third party appointments relating to banks enjoy special treatment as the money is deemed in trust for the Crown much sooner in time.¹⁷² Due to the special treatment of third party appointments relating to banks, a taxpayer would only be successful in diverting the funds if the diversion occurs before it reaches the bank that is subject to the third party appointment.¹⁷³ In the event of a bank failing to comply with the appointment notice, the money is recovered from the bank in the same way income tax payable by the debtor would be recovered.¹⁷⁴

8.4.4 Comparison with SARS' powers

New Zealand, similar to South Africa, does not require a judgment relating to the tax debt before a third party appointment notice may be issued. Similarly, the third party appointment notice is furnished at the discretion of the revenue department and does not require any court intervention.¹⁷⁵

A further similarity between the third party appointments in South Africa and New Zealand is that both include money which will be held in future. Nevertheless, the scope of what money may be subject to third party appointments is curbed in New Zealand by limiting the amount which may be deducted from salaries and wages.

¹⁷⁰ Section 157(9)(a) of the NTAA provides that in relation to a lump sum payment, the period during which the money would be deemed in trust for the Crown starts on the day the third party appointment notice is given to the bank and ends on the day on which the money must be paid over to the IRD. Section 157(9)(b) of the NTAA stipulates the period when it relates to deductions that must be made in instalments. In terms of s 157(9)(b) of the NTAA the money pertaining to the first instalment is deemed to be kept in trust for the Crown from the day the bank receives the third party appointment notice until the day upon which the instalment must be paid to the IRD. In relation to each succeeding instalment, the money is deemed to be kept in trust for the Crown on the day following the day upon which the previous instalment was required to be made until the specific instalment has to be paid over to the IRD.

¹⁷¹ Section 157(8) of the NTAA.

¹⁷² Davidson (date unknown) *Westlaw NZ database* par 10.0.

¹⁷³ Manyam (2001) *Waikato Law Review* 123. Manyam remarks that if a taxpayer wants to circumvent the effect of a third party appointment notice the money has to be diverted to a completely different bank. He puts forward the matter of *Anzamco* to illustrate this point. In this matter the taxpayer diverted the funds to another branch of the same bank. However, this was not enough to prevent the effect of a third party appointment notice.

¹⁷⁴ Section 157(9) of the NTAA. Holding the third party personally liable in case of non-performance is an enforcement mechanism which is essential to ensure that the third party appointment is effective.

¹⁷⁵ See Ch 7, par 7.2.1.4; Ch 8, par 8.4.2.

Whilst it is appreciated that the South African third party appointment provides for an affordability assessment, the value thereof was questioned as the assessment is done by SARS.¹⁷⁶ A guideline limiting the scope, as is the case in New Zealand, is more favourable as it ensures certainty and it does not require one of the parties to exercise its discretion.

Another aspect of the New Zealand third party appointments that is commendable is the double notification requirement. First, the IRD must notify the taxpayer of the appointment of a third party once the appointment was done.¹⁷⁷ Secondly, the third party appointed person must inform the taxpayer of any deductions made in accordance with the third party appointment notice.¹⁷⁸ I submit that with this double notification, the taxpayer is informed of the state of affairs and can then act accordingly. Currently, neither the TAA nor the CEA contain any requirement to inform the taxpayer of the third party appointment.¹⁷⁹

8.5 NIGERIA

8.5.1 Empowering provisions and requirements for third party appointments

Section 31(1) and (2) of the FIRSEA provides as follow:

- “(1) The Service may by notice in writing appoint any person to be the agent a taxable person if the circumstances provide in sub-section (2) of this section makes it expedient to do so.
- (2) The agent appointed under sub-section (1) of this section may be required to pay any tax payable by the taxable person from any money which may be held by the agent of the taxable person.”

¹⁷⁶ See Ch 7, par 7.2.2.3(b).

¹⁷⁷ See Ch 8, par 8.4.2.

¹⁷⁸ See Ch 8, par 8.4.3.

¹⁷⁹ See Ch 7, para 7.2.1.4; 7.2.2.3(a). However, see Chapter 7, par 7.2.2.2 where it is indicated that before a third party appointment notice may be sent in terms of the TAA, SARS must send a letter of demand to the taxpayer. This letter should make a taxpayer aware that if he or she fails to pay the outstanding tax debt, a third party notice may be issued.

In terms of section 31(1) of the FIRSEA a discretion is provided to the FIRS to issue a third party appointment notice.¹⁸⁰ Section 31(2) provides that two requirements must be met before the FIRSEA can issue such a notice. One, there must be tax payable by a taxable person and two, the third party (agent) must hold money on behalf of the taxable person. The concept “taxable person” is defined in section 69 of the FIRSEA to include

“an individual or body of individuals, family, corporations sole, trustee or executor or a person who carries out an economic activity in a place, a person exploiting tangible or intangible property for the purpose of obtaining income by way of trade or business or person or agency of government acting in that capacity”.

Consequently, as soon as such a “taxable person” is liable to pay an amount of tax, the first requirement is met. In relation to the second requirement, neither the FIRSEA nor any case law clarifies when a person would be considered to be holding money on behalf of another. In the absence of jurisprudence in this regard, the ordinary dictionary meaning should be attributed to it. According to the Merriam Webster dictionary “hold” means “to have possession or ownership of or have at one's disposal”.¹⁸¹ I submit that in the context of section 31 of the FIRSEA, it should be construed as any money a third party has in his possession that belongs to or is due and payable to the taxpayer.

8.5.2 Duties of an appointed third party

A third party has to pay over the money as indicated in the appointment notice. If he or she fails to act in accordance with this notice, the tax will be recoverable from him or her.¹⁸² Accordingly, a third party may be held personally liable.

In terms of section 31(4) of the FIRSEA a third party may also be required to provide information regarding any money or assets of another person, the third party is holding on behalf of or due to the other person.

¹⁸⁰ Section 69 of the FIRSEA indicates that reference to Service in the Act means the FIRS. The power to appoint a third party is also referred to as the power of substitution in Nigeria.

¹⁸¹ Author unknown *Merriam Webster* available at <http://bit.ly/2eQx8q0> (accessed 8 Nov. 2016).

¹⁸² Section 31(3) of the FIRSEA.

8.5.3 Constitutional considerations in relation to third party appointments in terms of the FIRSEA

The Nigerian courts have not yet considered whether section 31 of the FIRSEA is constitutional. However, Anyie remarks that the third party appointment provision is contrary to the right to a fair hearing.¹⁸³ His remark is based on the fact that there is no requirement to notify the taxpayer of the third party appointment and as such the taxpayer cannot make representations why the third party should not comply with the appointment notice.¹⁸⁴ Also, FIRS becomes the adjudicator in a matter to which it is a party¹⁸⁵ and there is no court intervention required. As a result, the third party appointment is contrary to the rule of *nemo iudex in propria causa*.

8.5.4 Comparison with SARS' powers

Both Nigeria and South Africa allow for third party appointments without any court intervention or notice to the affected third party.¹⁸⁶ Although this means that the respective revenue authorities can proceed with the issuing of third party appointment notices in an effective manner, both countries do not have built-in protection to ensure that a taxpayer's right have his or her matter heard by an impartial forum.

The FIRS contains no measures to curb the extent of the impact a third party appointment may have on the taxpayer's right to a fair trial. Then again, the FIRS' third party appointment power is not as broad as SARS' as the FIRSEA provision does not stipulate that a third party may be appointed in relation to money that will be held in future. Consequently, Nigeria would not have to deal with the practicalities relating to future appointments, with which the other jurisdictions are confronted with.¹⁸⁷

¹⁸³ Anyie *Taxpayers' rights in Nigeria* (Unpublished MPhil dissertation, University of Pretoria (2015)) 54.

¹⁸⁴ Anyie (2015) 54.

¹⁸⁵ Anyie (2015) 55.

¹⁸⁶ See Ch 7, para 7.2.1.4; 7.2.3; 7.4.

¹⁸⁷ See Ch 8, para 8.2.1.1-8.2.1.1; 8.3.1 in this regard.

8.6 CONCLUSIONS

In Chapter 7, I identified that a taxpayer's rights to just administrative action and access to courts are infringed upon and I questioned whether there are not less restrictive measures to achieve effective enforcement by SARS than the current third party appointment provisions.¹⁸⁸ From the discussion of the third party appointment provisions in the selected jurisdictions it is apparent that these countries also do not require any court intervention or any notification before a third party appointment notice is issued.

Nevertheless, some of these countries contain provisions that limit the impact the third party appointment has on the taxpayer. In both Australia and New Zealand the amount of money which can be subject to a third party appointment is restricted to a certain percentage if the money relates to salary or wages. I submit that an objective restriction is preferred above a financial assessment where the revenue authority determines whether the taxpayer can afford the terms of the appointment notice.

I acknowledge that providing notice to the taxpayer before a third party appointment notice is issued may frustrate the purpose of the appointment as it provides the taxpayer with the opportunity to attain the money due to him or her before it could be paid over to the revenue authority. However, both Australia and New Zealand's third party appointment provisions stipulate that notice of the appointment should be sent to the taxpayer informing him or her that an appointment notice has been issued.¹⁸⁹ Furthermore, I submit that the second notice required in terms of the NTAA, which stipulates that the third party must inform the taxpayer of any deductions made in accordance with the notice, should be considered for South Africa. Such a notice would ensure that a taxpayer is kept abreast of his or her own affairs and would also ensure that SARS collect taxes in a transparent manner.

In Chapter 7, a new feature of third party appointments was discussed, namely that these appointments could relate to money which the third party will hold on behalf of

¹⁸⁸ See Ch 7, par 7.4.

¹⁸⁹ See Ch 8, para 8.4.2; Ch 8, par 8.3.2 in this regard.

or owe to the taxpayer in the future.¹⁹⁰ In the current chapter it became apparent that this “new” feature relating to third party appointments is a settled part of third party appointments in Canada, Australia and New Zealand.¹⁹¹ When considering the manner in which future appointments are dealt with in Canada, it is clear that the current South African provisions dealing with future appointments has to be reconsidered to take into account the practicalities of whether a third party should pay over money to SARS even though the money is not yet payable or held on behalf of a taxpayer and whether the appointment notice will remain valid until money is held on behalf of a taxpayer or due to a taxpayer. Canada’s approach of restricting the period to which a future appointment can apply and Australia’s approach of the third party only being required to perform in terms of the third party appointment notice once the money is actually payable to the third party should be considered. These two approaches would curb the extent of the third party appointment provisions in South Africa.¹⁹²

¹⁹⁰ See Ch 7, para 7.2.3; 7.3.1.1.

¹⁹¹ See Ch 8, para 8.2.1; 8.3.2; 8.4.2.

¹⁹² See Ch 8, para 8.2.1.1; 8.2.1.2; 8.2.1.3.

PART 5 CONCLUSIONS AND RECOMMENDATIONS

CHAPTER 9 – CONCLUSIONS AND RECOMMENDATIONS

9.1 INTRODUCTION

The aim of this thesis was to determine whether SARS' powers to (i) conduct searches and seizures; (ii) proceed with enforcement actions pending dispute resolution; and (iii) appoint a third party on behalf of a taxpayer conform to the Constitution and to propose plausible solutions for those situations where the current laws and practices may not pass constitutional muster.

This aim is important as the Constitution demands that all laws as well as the actions of organs of state (including SARS) must be in accordance with the Constitution.¹ Moreover, research suggests that achieving a balance between taxpayers' rights and the revenue authority's obligation to collect taxes may impact positively on voluntary compliance.²

In order to achieve the aim of this thesis the following three questions have to be answered:

- i) What are the constitutional parameters within which SARS must exercise its enforcement powers?
- ii) To what extent is the selected enforcement powers afforded to SARS within the parameters of the Constitution?
- iii) Can the South African law and procedures benefit from the laws and procedures of the revenue authorities of Australia, Canada, New Zealand and Nigeria regarding their corresponding enforcement powers?

Chapter 2 addressed the first question by providing a constitutional framework within which SARS' enforcement powers should be exercised. This constitutional framework focuses on taxpayers' rights. The reason for a rights' focus is three-fold. One, section 8(1) of the Constitution provides that organs of state are bound by the Bill of Rights. Accordingly, SARS, as an organ of state, is obliged to respect, amongst other rights, a taxpayer's rights to equality, privacy, property, just

¹ Section 2 of the Constitution.

² See Ch 1, par 1.1.

administrative action and access to courts. Two, when legislation is interpreted, section 39(2) of the Constitution provides that it must be interpreted within the spirit, purpose and objects of the Bill of Rights. Therefore, legislation that empowers SARS to collect taxes effectively and efficiently must be interpreted in accordance with the Bill of Rights. Three, the rights contained in the Bill of Rights give effect to the founding values of the Constitution. However, the Constitution does not provide absolute protection of taxpayers' rights. In terms of section 36 of the Constitution a taxpayer's rights may be limited if the limitation is reasonable and justifiable.

One of the factors that must be considered when determining whether a limitation is reasonable and justifiable is the importance of the purpose of the limiting provision.³ The over-arching purpose of SARS' enforcement powers, which were dealt with in this thesis, is to ensure the effective and efficient collection of taxes. This purpose is significant as taxes are essential to the idea of the modern state as they raise revenue and also redistribute resources. Furthermore, taxes influence behaviour. Another factor that must be considered when determining whether a provision limits a right on grounds that are reasonable and justifiable, is whether there are less invasive means available to achieve the purpose of the limiting provision.⁴

Thus, the South African constitutional framework intrinsically necessitates a weighing of taxpayers' rights against SARS' obligation to collect taxes efficiently and effectively. While taxpayers' rights may be limited in order to achieve SARS' obligation, the limitation may not be more limiting than necessary.

The powers selected for this thesis were discussed in Parts 2, 3 and 4 respectively. In the first chapter of each of these respective parts, I considered whether SARS' enforcement powers are in accordance with the present constitutional framework, thus addressing the second question posed in this thesis. The second chapter in each of these parts addressed the third question posed by comparing the South African enforcement powers with those of the jurisdictions selected for comparative purposes.

³ Section 36(1)(b) of the Constitution.

⁴ Section 36(1)(e) of the Constitution.

The aim of this chapter is to draw final, overarching conclusions and make recommendations for law and administrative reforms based on the answers obtained from the three posed questions. These conclusions and recommendations are made separately in relation to the enforcement powers discussed. This chapter concludes with final remarks.

9.2 PART 2 - SEARCHES AND SEIZURES

Part 2 comprised of Chapters 3 and 4. Chapter 3 dealt with SARS' power to conduct a search and seizure in order to verify compliance or investigate whether an offence has been committed, while Chapter 4 compared this power of SARS to the search and seizure provisions of the revenue authorities of Canada, Australia, New Zealand and Nigeria.

9.2.1 Conclusions

Apart from the tax environment, Chapter 3 also discussed the relevant principles regarding search and seizure as applied in other areas of South African law. The principles determining when searches and seizures may be considered to be reasonable and justifiable limitations of a person's rights to privacy, access to courts and just administrative action, were identified. When applied in the tax environment, these principles are as follows: The first is that search and seizure provisions must require a warrant as a point of departure. Secondly, in exceptional circumstances where a search and seizure may be conducted without a warrant, adequate guidelines must be in place to protect a taxpayer's rights. Another principle aimed at protecting a person's right to privacy is that a person's domestic dwelling should enjoy more protection than commercial premises when searches and seizures are conducted as a person's expectation of privacy at his or her residential premises is greater than at commercial property. Also, a search and seizure based on a suspicion that an offence has been committed would be more intrusive on the taxpayer than a search conducted for verification purposes. A search aimed at

investigation would constitute a greater intrusion as a person has a greater expectation of privacy concerning the risk of prosecution.⁵

Considering these principles and other *dicta* from case law, the following problems were identified relation to searches and seizures in respect of income tax and value-added tax on the one hand, and customs-related searches and seizures on the other:

- (i) there is no requirement that the warrant should specify which items are subject to a search and seizure. As such, a warrant does not provide parameters relating to what would be subject to the search and seizure;
- (ii) in some instances there are no provision ensuring that a person's heightened expectation of privacy at a domestic dwelling, which would require more protection than a search and seizure conducted at commercial premises, is protected; and
- (iii) a warrantless customs-related search and seizure may be conducted based on the subjective discretion of a SARS official which means that there is no impartial person who determines the parameters of the search and seizure.

Chapter 4 showed that these principles apply only to some extent in the selected jurisdictions. In Canada and Nigeria the revenue authorities must obtain a warrant before they may conduct searches based on a suspicion that an offence has been committed. The other two jurisdictions, Australia and New Zealand, do not generally require the revenue authorities to obtain a warrant and there are no real restrictions to curb these revenue authorities' powers when conducting a warrantless search. Apart from Australia, the selected jurisdictions restrict the instances when a private residence may be searched to when consent has been obtained or a warrant authorised such a search.⁶ Furthermore, Canada and Nigeria differentiate between regulatory and investigatory searches. Chapter 4 also emphasises that a seizure may be seen as a component separate to a search.⁷

⁵ *Magajane v Chairperson, North West Gambling Board* 2006 (5) SA 250 CC par 69; *Gaertner v Minister of Finance & Commissioner of SARS* 2013 (4) SA 87 (WCC) par 56[e]. See Ch 3, par 3.3.1 where these principles are discussed.

⁶ In Australia, a private residence may only be entered if a warrant has been obtained.

⁷ See Ch 4, para 4.2.2.1; 4.2.2.2; 4.3.2.2; 4.4.2.2 in this regard.

In Table 9.1 below and the discussion thereafter, the South African approach in relation to searches and seizures as provided for in the TAA and the CEA is discussed and compared to the approaches of Canada, Australia, New Zealand and Nigeria.

TABLE 9.1 – SEARCH AND SEIZURE PROVISIONS

	Warrant	Parameters of warrant	Warrantless
South Africa	<p><i>In relation to the TAA</i></p> <ul style="list-style-type: none"> As a general rule a warrant is required; No differentiation between investigatory and regulatory searches. <p><i>In relation to the CEA</i></p> <ul style="list-style-type: none"> Warrant required for investigatory searches; Differentiation between investigatory and regulatory searches. 	<ul style="list-style-type: none"> Particularity not required in relation to what may be searched and seized. 	<p><i>In relation to the TAA</i></p> <p>Warrantless search when:</p> <ul style="list-style-type: none"> Occupier of premises consents; or Subjective (SARS discretion): <ul style="list-style-type: none"> Threat of removal of material; Would comply with grounds for warrant; and A delay would defeat the purpose of the search
Canada	<ul style="list-style-type: none"> As a general rule a warrant is required for investigatory searches. No warrant is required for regulatory searches. 	<p>The following must be provided in the warrant for investigatory search:</p> <ul style="list-style-type: none"> The alleged offence that has been committed; The person who allegedly committed the offence; The premises to be searched; and The items subject to search and seizure. 	<p>No warrant is required when there is no suspicion of an offence being committed (regulatory in nature).</p>
Australia	<p>No warrant is required unless it is a private residence.</p>	<p>No parameters as no warrant is required.</p>	<p>Always warrantless as a warrant is not required, unless it is a private residence.</p>
New Zealand	<p>No warrant is required.</p>	<p>No parameters as no warrant is required.</p>	<p>Always warrantless as a warrant is never required.</p>
Nigeria	<ul style="list-style-type: none"> A warrant is required for investigatory searches. No provisions relating to regulatory searches. Accordingly it is uncertain whether FIRS may conduct regulatory searches. 	<ul style="list-style-type: none"> Uncertainty regarding on what grounds a warrant may be issued; Particularity not required in relation to what may be searched and seized. 	<p>No provision for warrantless searches.</p>

TABLE 9.1 – SEARCH AND SEIZURE PROVISIONS CONTINUE

	Warrantless continue	Parameters warrantless	Private residence
South Africa	<p><i>In relation to the CEA</i> Warrantless search when:</p> <ul style="list-style-type: none"> • Occupier of premises consents; or • Or regulatory search (licensed premises or business premises of a registered person; or • Subjective (SARS discretion): <ul style="list-style-type: none"> ○ Would comply with grounds for warrant; and ○ A delay would defeat the purpose of the search. 	<p><i>In relation to the TAA</i> No specific restrictions when a warrantless search is conducted <i>In relation to the CEA:</i> Generally search must be conducted during business hours.</p>	<p><i>In relation to the TAA</i></p> <ul style="list-style-type: none"> • May be searched with consent; or • In terms of a warrant <p><i>In relation to the CEA</i></p> <ul style="list-style-type: none"> • May be searched with consent; or • In terms of a warrant; or • When the subjective criterion is met.
Canada		<p>Warrantless search conducted</p> <ul style="list-style-type: none"> • Only at business premises; • No seizure allowed. 	<p>May be searched in terms of a warrant or with consent.</p>
Australia		<p>Search must be conducted for purposes of the Act and person must be authorised to conduct the search.</p>	<p>A warrant is required when a search is conducted at a private residence.</p>
New Zealand		<p>Search must be conducted to collect tax or exercise IRD functions.</p>	<p>May be searched in terms of a warrant or with consent.</p>
Nigeria		<p>No parameters as there is no provision for warrantless searches.</p>	<p>May be searched in terms of a warrant or with consent.</p>

TABLE 9.1 – SEARCH AND SEIZURE PROVISIONS CONTINUE

	Seizure
South Africa	Inventory of things seized
Canada	Seize items indicated in warrant (otherwise approach the court).
Australia	No seizure allowed.
New Zealand	Seized items indicated in warrant or with consent. Warrant pending, may secure items until warrant is obtained.
Nigeria	Seizure must be authorised by the Executive Chairman of FIRS.

In South Africa, a warrant is required for all investigatory searches. This is in line with South African case law pertaining to search and seizure provisions in laws other than tax laws, which held that a warrant is required to ensure that a person’s rights are respected.⁸

The rights to access to courts, just administrative action and privacy are respected with the use of a warrant, as (i) an impartial person has to authorise the search⁹ and (ii) a person’s expectation of privacy is also taken into account as the warrant should provide parameters in terms of which the search and seizure should be conducted.

⁸ See Ch 3, par 3.2.1 where the cases of *Park-Ross v Director: Officer for Serious Economic Offences* 1995 (2) BCLR 198 (c); *Mistry v Interim National Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC) and *South African Association of Personal Injury Lawyers v Heath* 2000 (10) BCLR 1131 (T) are discussed.

⁹ See Ch 2, par 2.8.5.1 where it is indicated that the right to just administrative action indirectly prohibits a person from being a judge in a matter to which he or she is a party. See Ch 2, par 2.8.5.1 where it is indicated that one of the aims of the right to access to courts is to prevent self-help. See also Ch 3, par 3.2.1 where it is explained that requiring an impartial party to issue a warrant to conduct a search and seizure ensures that the rights to access to courts and administrative justice are protected.

Merely requiring a warrant is not sufficient to ensure that a taxpayer's rights are protected. The content of the warrant should provide the parameters of the search. This eliminates vagueness with regard to what may be searched and seized and the taxpayer would be able to ensure that SARS does not conduct a search and seizure outside of these parameters. Furthermore, providing clarity with regard to what may be searched and seized would ensure that the rule of law is adhered to.

As indicated earlier,¹⁰ it is acknowledged that restricting SARS' search and seizure powers to instances where a warrant has been obtained could frustrate SARS' collection efforts in practice. Thus, a warrantless search and seizure may be allowed in exceptional circumstances. When considering the current fiscal legislation, warrantless searches and seizures are allowed in the following instances: (i) when consent was obtained, (ii) when a regulatory customs search is conducted at licensed premises or business premises of a registered person; or (iii) the SARS officer has complied with the subjective criterion.

It is submitted that the first instance, when the consent of the occupier of the premises is obtained, would constitute a justifiable exceptional circumstance. A warrantless search and seizure when consent is obtained should be allowed due to the principle that "a willing person is not wronged".¹¹ Accordingly, if a person consents to a search and seizure his or her rights are reasonably and justifiably limited.

Another justifiable exceptional circumstance would be when a regulatory search is conducted in terms of the CEA. As indicated earlier,¹² in the customs field the customs authority must act in a swift manner as the origin, value and tariff classification of the goods have to be established before the goods may move from the regulated environment¹³ to the domestic domain.¹⁴ Another reason why the customs authority needs to act swiftly is to curb smuggling and the possible

¹⁰ See Ch 3, par 3.4.

¹¹ This principle is known as *volenti non fit iniuria*. See Ch 3, par 3.2.2.5 where this principle is discussed.

¹² Chapter 3, par 3.3.1.1.

¹³ The regulated environment comprises amongst others of a transit shed, container terminal, container depot and state warehouse

¹⁴ Section 38(4) of the CEA.

importation of hazardous items. However, these reasons cannot justify a power to conduct warrantless searches in all customs-related instances. Warrantless searches should be limited to regulatory (routine) searches because participants in the customs field have to comply with certain registration requirements. When a participant complies with these requirements, he or she in essence subjects him- or herself to verification by the customs authority and has to endure routine searches to verify compliance.

The third instance, dealing with a SARS officer's discretion, requires further consideration. It is submitted that in some instances the mere fact that the application for a warrant is made by way of an *ex parte* application would enable SARS to obtain the information before the taxpayer is able to destroy it. In instances where there is not enough time to obtain a warrant by way of an *ex parte* application, SARS would need to proceed without a warrant in order to ensure an effective and efficient search and seizure. However, it is problematic that a warrantless search and seizure may be conducted in terms of a subjective opinion of a SARS official, as it would be more invasive on a taxpayer's rights than the other exceptional circumstances as there are no parameters to curb the extent of the violation.¹⁵ A less invasive measure, as is the case in New Zealand, could be to secure the relevant material until a warrant is obtained, for instance, by placing locks on cabinets to ensure that the content is not removed pending the warrant.¹⁶

Based on the aforementioned, the search and seizure provisions in South Africa do not conform to the parameters of the Constitution in all respects.

Furthermore, when comparing and evaluating South Africa's search and seizure provisions against the corresponding provisions of Canada, Australia, New Zealand and Nigeria, it is clear that South Africa does not recognise seizure as a separate

¹⁵ When a warrantless search and seizure is conducted with consent, the parameters of the search and seizure is established from what the taxpayer has consented to. When a warrantless regulatory customs- related search and seizure is conducted, the search and seizure is restricted to the licensed premises or business premises of a registered person.

¹⁶ See Ch 3, par 3.4; Ch 4, para 4.4.2; 4.5.

component.¹⁷ In Australia the revenue authority is not entitled to seize any documentation or property. Such an approach unnecessarily impedes a revenue authority's ability to collect possible evidence. The Canadian and New Zealand approaches to seizure provide a better balance of allowing revenue authorities to function effectively and protecting taxpayers' rights. In Canada, when the CRA considers it necessary to seize documents or property not indicated in the warrant, these documents or property should be taken to court as soon as possible in order to have a judicial officer determine whether these things may be seized by the revenue authority. In New Zealand the IRD may remove documents for copying purposes and must return it to the taxpayer as soon as the documents have been copied. Furthermore, the IRD may seize documents for investigatory purposes when consent is obtained or it is authorised in terms of a warrant. When a warrant is pending the items may only be secured.

9.2.2 Recommendations

The appraisal of SARS' search and seizure power reveals that this power is in need of reform in order for it to conform to the constitutional framework.¹⁸

9.2.2.1 Searches and seizures in terms of the TAA

The following recommendations are made regarding searches and seizures conducted in terms of the TAA:

- (a) The current provision that a warrant should be obtained by way of an *ex parte* application, as opposed to an ordinary application where the opposing party, in this instance the taxpayer, is present, should be retained. Based on the nature of the application, to wit, obtaining a warrant to conduct a search, informing the taxpayer of the impending application to provide him or her with the opportunity to oppose the application would render the relief SARS seeks with the

¹⁷ In Ch 4, par 4.6 it is indicated that even though Nigeria recognises seizure as a separate power, Nigeria's approach is not to be followed as it has less stringent requirements for a seizure than for a search. This is contrary to the manner in which Canada, Australia and New Zealand deal with seizures.

¹⁸ See Annexure A for the amendments proposed to the current TAA and CEA provisions dealing with SARS' power to conduct searches and seizures in order to give effect to my recommendations in this regard.

application nugatory. The reason is that the taxpayer would have the opportunity to dispose of items that may become subject to the search.¹⁹

- (b) Where a specific instance is of such a nature that there is not enough time for SARS to obtain a warrant by way of *ex parte* application, and no consent was obtained, a combination of New Zealand and Canada's approaches to search and seizure should be used.²⁰ Taking from New Zealand's provision that items may be secured when an application for a warrant is about to be made and there is not enough time to obtain a warrant, SARS should be able to secure relevant material and only once a warrant authorising SARS to do so is obtained, may SARS seize the material. Securing relevant material should be construed to mean using the less invasive measure to ensure that the relevant material cannot be removed. Accordingly, if relevant material can be secured by, for example, placing a lock on a cabinet, SARS should not secure the relevant material by locking the entire premises.

This recommendation requires further consideration. As it would be difficult to determine whether SARS is about to apply for a warrant, as it boils down to the subjective intention of a SARS official, a time restriction is proposed. If SARS does not apply for a warrant within 24 hours after securing an asset, SARS must release the secured asset immediately after expiration of the 24 hours. Although in New Zealand a warrant should be obtained within six hours after the asset was secured, it is submitted that a similar time restriction would result in an ineffective provision in South Africa as the South African courts are already overburdened.²¹ Limiting the period in which SARS has to apply for a warrant to six hours could result in SARS removing the securing measures in place, not because SARS did not have the intention to approach the court, but simply because the courts were too overburdened to hear SARS application for a warrant in time. This could stifle SARS' efficient collection unnecessarily. On the

¹⁹ See Chapter 3, par 3.2.1.2(a) relating to grounds upon which an *ex parte* application is generally justified.

²⁰ See Ch 4, para 4.2.2; 4.4.2 for a detailed discussion of the search and seizure provisions of Canada and New Zealand respectively.

²¹ See Maclons *Mandatory court based mediation as an alternative dispute resolution process in the South African civil justice system* (unpublished LLM dissertation, University of Western Cape (2014) 1 in this regard.

other hand, the time period should not be too long as a taxpayer would be denied access to the relevant documentation. It is submitted that 24 hours would provide a balance between efficiency on the part of SARS and protecting a taxpayer's rights and interests. The reason is that the TAA already provides for an instance, to wit, anticipation of a preservation order, where a period of 24 hours is provided for SARS to approach the court.²² The extent of the invasion of a taxpayer's rights to privacy and property when relevant material is secured is not as intrusive as a seizure of assets in anticipation of a preservation order. Consequently, a taxpayer's rights would be reasonably limited. Furthermore, a 24-hour period would provide SARS with adequate time to bring the application to court as this period also applies to another instance where court has to make an *ex parte* court order.

In instances where the relevant material is of such a nature that it cannot be secured, Canada's approach relating to seizure of documents not specified in a warrant should be adopted. In terms of this approach, the revenue authority may seize the relevant material and take it to court immediately to have a judicial officer determine whether these things may be seized by the revenue authority.

This recommendation brings to mind a similar proposal that was made when the TAA was drafted.²³ The proposal was rejected at that stage as the TAA's warrantless search and seizure provisions were considered to contain more safeguards than other South African warrantless search and seizure provisions. In addition, the TAA warrantless search provisions were considered analogous to warrantless search and seizure provisions in countries that are members of the OECD.

As indicated earlier,²⁴ the warrantless search provisions are not more stringent than the Competition Act²⁵ and the CEA because a warrantless search in terms

²² In terms of s163(1) of the TAA, a preservation order may be obtained to prevent the disposal or removal of a realisable asset, which would frustrate the collection of tax that is due or payable. This order may be obtained by way of an *ex parte* application to preserve an asset or prohibit a person from dealing with the asset in a manner that is contrary to the preservation order.

²³ See Ch 3, par 3.2.2.6 where this proposal was discussed.

²⁴ See Ch 3, par 3.2.2.4 in this regard.

of the TAA can be conducted at any time. This is a substantial intrusion on a person's right to privacy. The other ground upon which the Standing Committee on Finance rejected the proposal, namely, that the TAA warrantless search provisions are similar to provisions in OECD countries, appears to be valid to a certain extent. As can be seen in Table 9.1 above, the instances when SARS may conduct a warrantless search and seizure are restricted to what are considered as exceptional circumstances. These instances are not as broad as in New Zealand and Australia. In this regard the warrantless requirements of South Africa appear to be more stringent than those in Australia and New Zealand. However, none of the OECD countries considered in this thesis allows for an automatic power to seize when a warrantless search is conducted. A warrantless seizure is either not allowed in any circumstance (Australia), consent is required (New Zealand) or some judicial intervention is required (Canada and New Zealand).²⁶ In this regard, SARS' warrantless seizure powers are more far-reaching than those of the selected OECD jurisdictions.

The fact that the TAA's requirements for warrantless searches are less stringent than other warrantless powers contained in South African legislation and do not necessarily compare favourably to the warrantless search and seizure provisions in OECD countries, casts doubt on whether judicial intervention after material has been seized should have been rejected outright. It shows that warrantless searches and seizures may be and are indeed conducted in ways that are less invasive.²⁷

- (c) The warrant should specify what is subject to the search and seizure. This ensures that the warrant is not invalid due to vagueness and establishes the parameters within which the search and seizure should be conducted. However, should a SARS official come across other relevant material that is not specified in the warrant, the material should be secured and SARS should approach a

²⁵ 89 of 1998.

²⁶ This judicial intervention is either in the form of a warrant or court validation after the seizure has occurred.

²⁷ Section 36(1)(e) of the Constitution provides that when a law of general application limits a person's rights, it must be considered whether there are less invasive means to achieve the purpose of the limiting provisions.

judge or magistrate on an *ex parte* basis to authorise the search and/or seizure of this material.

- (d) SARS' search and seizure power should not extend to premises that are not identified in a warrant as this may result in an abuse of power to enter any premises.²⁸ It creates breeding room for possible abuse as the safeguards envisaged by the issuing of a warrant are culled by this extension. If it appears that the relevant material identified in the warrant is not at the specified premises, SARS may secure the relevant material and only once a warrant has been obtained should SARS be able to seize it.

9.2.2.2 *Searches and seizures in terms of the CEA*

In this regard it is proposed that the recommendations made relating to search and seizure power in terms of the TAA should apply equally to the CEA-related search and seizure power. This would involve specifically providing that a warrant in terms of the CEA should be obtained by way of *ex parte* application. This would not lead to any extension of SARS' powers or a further infringement of taxpayers' rights as it would simply reflect the true state of affairs, namely, that a taxpayer is not informed of the application for a warrant in order to prevent him or her from disposing of relevant material. In addition to incorporating the TAA recommendations, the following recommendations specific to the CEA are made:

- (a) The reference to customs authority in the CEA should be replaced with senior SARS official. This would mean that the exact same group of SARS officers would be able to conduct searches and seizures, irrespective of whether it relates to income tax, value-added tax, or customs duty.
- (b) The CEA, in addition to consent, should retain the provision that allows for warrantless searches to be conducted at premises that are (i) managed or operated by the State or a public entity²⁹ on which an activity to which the CEA

²⁸ See Ch 3, par 3.2.1 where it is indicated that Croome holds a similar sentiment in relation to s 74D(5) of the ITA which also provided that SARS may conduct a search at a premises not indicated in the warrant.

²⁹ As defined in the Public Finance Management Act 1 of 1999.

applies is carried out or allowed; (ii) licensed or registered in terms of the CEA; and (iii) is occupied by a person licensed or registered in terms of the CEA and used for business purposes for which that person is licensed or registered. The reason for allowing additional instances when warrantless searches may be conducted in terms of the CEA, compared to the recommendations in respect of the TAA, is that customs is a regulated field where routine searches should be tolerated. These additional instances relate directly to premises used for purposes of the CEA.

- (c) The recommendation that a regulatory (routine) search and seizure may be conducted without a warrant, while an investigatory search and seizure would require a warrant, results in a differentiation between regulatory and investigatory search and seizure. It is recommended that different guidelines should apply to each type of search and seizure as investigatory searches and seizures are considered to be more invasive.³⁰ The reason is that it is similar to a criminal law search where a person has a high expectation of privacy because a criminal search has the potential to lower a person's standing in society.³¹ In order to curb the extent of an investigatory search and seizure, more restrictive guidelines are recommended for this type of search and seizure than for regulatory search and seizure. While it is suggested that the current guidelines contained in the CEA should be retained for purposes of regulatory searches, it is recommended that the amended version of section 61(3) of the TAA³² should apply *mutatis mutandis* to customs search and seizure where a warrant is required as it contains more specific restrictive guidelines than those currently provided for in the CEA.
- (d) It is recommended that warrantless searches of private dwellings may only be conducted with the required consent.³³ Accordingly, a SARS official should not

³⁰ *Magajane v Chairperson, North West Gambling Board* par 69; *Gaertner v Minister of Finance & Commissioner of SARS* par 56[e]. See also Ch 3, par 3.3.1.1.

³¹ *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* [1990] 1 SCR 425 508. For a discussion of the more invasive nature of investigatory searches, see Ch 3, par 3.3.1.1.

³² See Annexure A in this regard.

³³ In the event that a portion of the private dwelling could form part of premises that is regulated or registered in terms of the CEA, that portion would not be considered to be a private dwelling.

be able to conduct a warrantless search based on the subjective criterion. This ensures that a person's inner sanctum is respected in accordance with case law dealing with the right to privacy.

- (e) A warrant issued in terms of the CEA should only be valid for 45 business days in order to ensure legal certainty and to prevent abuse by SARS. Other legislation, such as the Competition Act, which also deals with the power to conduct searches, provides that a warrant is only valid for a certain period of time.³⁴ Furthermore, section 60(3) of the TAA provides that a warrant is only valid for 45 days. Consequently, this recommendation in relation to the CEA will bring the CEA validity period in line with the period imposed by the TAA.

9.3 PART 3 – PAYMENT OBLIGATION PENDING DISPUTE RESOLUTION

Part 3 of this thesis dealt with what happens to a taxpayer's obligation to pay taxes pending dispute resolution. Chapter 5 considered the South African position, while Chapter 6 dealt with the situation in the selected jurisdictions.

9.3.1 Conclusions

Chapter 5 questioned whether the "pay now, argue later" rule is constitutional when considering a taxpayer's right to access to courts. It was emphasised that when SARS considers whether to suspend the payment obligation, clear guiding factors are required in order for the taxpayer to know whether he or she should take the matter on review and to ensure adherence to the rule of law.

Chapter 6 showed that the selected jurisdictions follow different approaches regarding the suspension of the payment obligation pending dispute resolution. The different approaches of South Africa, Canada, Australia New Zealand and Nigeria in relation to the obligation to pay taxes pending dispute resolution are summarised in Table 9.2 below and discussed thereafter.

³⁴ In terms of s 46(3)(d) of the Competition Act, a warrant is valid for 30 days after it has been issued.

TABLE 9.2 – PAYMENT OBLIGATION PENDING DISPUTE RESOLUTION

	Payment obligation pending dispute resolution	Grace period before commencing enforcement	Deterrence measures to avoid frivolous objections and appeals
South Africa	<ul style="list-style-type: none"> • Generally obligation not suspended. • Within SARS’ discretion to suspend. <ul style="list-style-type: none"> ○ Factors SARS should consider contained in legislation. 	10 business days (TAA) after SARS has rejected request to suspend payment obligation.	Due to the “pay now, argue later” rule, other deterrence measures are not required.
Canada	<ul style="list-style-type: none"> • Obligation suspended as point of departure. • Not suspended when: <ul style="list-style-type: none"> ○ Withholding tax ○ Large corporations; or ○ Jeopardy order obtained. 	Until an impartial forum has decided on the merits of the matter.	<ul style="list-style-type: none"> • Interest continues to accrue. • Penalty if court decides that objections and appeals were frivolous.
Australia	<ul style="list-style-type: none"> ○ Obligation not suspended as point of departure; ○ Within ATO’s discretion to suspend (not in terms of legislation) <ul style="list-style-type: none"> • When a 50-50 agreement reached; • There is a genuine dispute. 	None.	Due to the “pay now, argue later” rule, other deterrence measures are not required.
New Zealand	<ul style="list-style-type: none"> • Obligation suspended as a point of departure; • Within IRD’s discretion not to suspend when it considers there to be significant risk that taxpayer would not be able to pay later. 	None.	Interest continues to accrue.
Nigeria	<ul style="list-style-type: none"> • Obligation suspended as point of departure. • May be ordered to pay a portion of disputed tax when appealed brought before the TAT. 	None.	None.

The “pay now, argue later” rule ensures that tax debts are settled swiftly.³⁵ Furthermore, this rule is meant to (also) prevent taxpayers from lodging frivolous objections or appeals to delay the payment of taxes.³⁶

It may be argued that in South Africa a taxpayer’s right to access to courts is respected as a taxpayer may request SARS to suspend his or her tax obligation while a dispute is pending. However, a taxpayer is burdened with proving his or her situation in relation to the factors that SARS has to consider. In addition to imposing this burden on a taxpayer before he or she can obtain the protection that the right to access to courts brings about, some of the factors that SARS has to consider are problematic as they require SARS to weigh its interests against those of the taxpayer. This conflict of interest is contrary to the *nemo iudex in propria causa* rule which is encapsulated in the right to access to courts.

Another aspect to consider when determining whether the “pay now, argue later” rule is a reasonable and justifiable limitation on a taxpayer’s rights, is whether there are less invasive measures to achieve the purpose of the limiting provision.³⁷ Consequently, it should be considered whether there are other ways to ensure that tax debts are paid swiftly and that frivolous objections and appeals are avoided. It is submitted that the comparative study in Chapter 6 has shown that there are other deterrent measures that may be used to achieve the purpose envisaged by the “pay now, argue later” rule. For instance, if the rate of interest, which is deferred but continues to accrue pending dispute resolution, is higher than the interest rate a taxpayer would be able to secure by investing the money, the taxpayer would probably be deterred from lodging frivolous objections and appeals. Another deterrent would be to empower a court to impose a penalty on a taxpayer if it finds that a dispute was frivolous.³⁸ These two measures, as opposed to the “pay now, argue later” rule, would be more appropriate for a South African taxpayer who disputes liability, as it would mean that a taxpayer would be able to pay an amount of

³⁵ *Capstone 556 (Pty) Ltd v Commissioner for SARS* [2011] ZACHC 297 par 9.

³⁶ *Metcash Trading Ltd v Commissioner for the South African Revenue Service* 2000 (2) SA 232 (W) 327.

³⁷ See s 36(1)(e) of the Constitution; Ch 2, par 2.8.7 in this regard.

³⁸ Considering the cost implications of the court’s decision to impose a penalty on the taxpayer for lodging a frivolous appeal, taxpayers would probably not consider taking the matter further on appeal.

tax which has been verified by an impartial forum. This would ensure that a taxpayer's right to access to the courts is respected.

In addition to the fact that the "pay now, argue later" rule infringes on a person's right to access to the courts, this rule may have dire financial consequences for the taxpayer. Even if the matter is decided in favour of the taxpayer, if he or she remained out of pocket until the dispute was resolved it could severely prejudice him or her.³⁹

However, a situation where a taxpayer would be able to continue disputing an amount of tax until all dispute resolution avenues have been exhausted would not suffice as it may be detrimental to both taxpayers and SARS. It could be detrimental to taxpayers, in the event of an unsuccessful objection and appeal, to have the payment obligation suspended as the inevitable, paying the tax, is only prolonged in addition to interest accruing. On the other hand, it could be detrimental to SARS as it may be more difficult to collect the larger amount (tax and interest) than the initial assessed amount. The negative effect of unnecessary interest accruing may be curbed by a provision similar to the one used in Canada. The obligation to pay taxes may be suspended until the dispute has been heard by an impartial forum. A taxpayer's right to access to courts will be respected by suspending the payment obligation until an impartial forum has considered the matter as opposed to when the dispute is resolved. As such, the period in which interest should accrue is limited.⁴⁰

Although an approach similar to that of Canada is advocated, the specific South African context must be borne in mind. As the South African courts are overburdened,⁴¹ waiting until an impartial forum is able to consider the merits of the dispute may take a substantial amount of time. This means that the *fiscus* would not be able to collect any of the disputed tax for that period of time.

³⁹ See Ch 5, par 5.2.1.

⁴⁰ Obviously if the taxpayer decides not to pay an outstanding tax that has been confirmed by the impartial forum, the interest period would not be limited to the period from when the liability arose until the matter was heard by an impartial forum.

⁴¹ See Maclons (2014) 1 in this regard.

9.3.2 Recommendations

The evaluation of what happens to the payment obligation pending dispute resolution has shown that the current South African provisions need to be amended. Recommendations for amendment of section 164 of the TAA and section 77G of the CEA are as follows:⁴²

- (a) A portion of a taxpayer's payment obligation and SARS' power to recover the tax should be suspended from the onset pending dispute resolution. There should be a deviation from the current approach, in terms of which the payment obligation is generally not suspended pending dispute resolution, as there are less invasive means to deter a taxpayer from making frivolous objections and appeals. The current approach cannot be considered a reasonable and justifiable limitation of a person's rights as section 36(1)(e) of the Constitution requires one to consider whether there are less invasive means to achieve the purpose of the limiting provision.

It is acknowledged that it may be detrimental to suspend the payment obligation until all dispute resolution avenues have been exhausted. If the matter is resolved in favour of SARS, the taxpayer would be liable for additional interest, which would not have accrued if the taxpayer had paid the assessed amount pending dispute resolution. It is, therefore, suggested that the suspension period should be restricted until the taxpayer fails to comply with a dispute resolution time period, which would mean that he or she is not proceeding with (further) dispute resolution proceedings, or when court has made a decision regarding the taxpayer's payment obligation, whichever occurs first. However, it is submitted that suspending the entire disputed amount would not constitute the required balance between SARS' enforcement duties and a taxpayer's rights. If the entire amount was to be suspended the *fiscus* may experience dire financial constraints. Consequently, it is proposed that 50 per cent of the payment obligation relating to the disputed tax should be suspended. This is in line with

⁴² See Annexure B for the amendments proposed to the current TAA and CEA provisions dealing with a taxpayer's payment obligation pending dispute resolution in order to give effect to my recommendations in this regard.

Australia's "50-50 arrangement"⁴³ and Canada's approach relating to large corporations.⁴⁴ A 50 per cent payment/suspension in relation to all payment obligations is recommended for two reasons. First, a more complex calculation, such as that used in Nigeria,⁴⁵ may result in unnecessary confusion and room for dispute. Second, the 50 per cent payment/suspension should apply in all instances and not only to specific taxpayers, as only applying it to certain taxpayers, for instance large corporations, could be seen as penalising a certain type of taxpayer on no apparent justifiable ground.⁴⁶

- (b) In instances where the delay in collecting the entire disputed tax may jeopardise the collection of all or any part of the assessed amount, a senior SARS official may approach the court on an *ex parte* basis. If a judge or magistrate is satisfied that there are reasonable grounds to believe that there is a delay in collecting the entire assessed tax pending dispute, he or she may order that SARS may proceed with collecting the disputed tax. This recommendation provides recourse to SARS where, according to an impartial forum, SARS' collection ability would be seriously impeded by suspending the payment obligation.

- (c) When an appeal is decided against a taxpayer, the court should have the power to order the taxpayer to pay a penalty to SARS if the court determines that there were no reasonable grounds for the appeal. The court should only make such an order if it is of the opinion that one of the main purposes for instituting or maintaining any part of the appeal was to defer the payment of any amount payable. The possibility of taxpayers being penalised for lodging frivolous appeals may deter them from doing so.

9.4 PART 4 - THIRD PARTY APPOINTMENTS

In Part 4, consisting of Chapters 7 and 8, the appointment of a third party who holds money on behalf of or due to a taxpayer who has tax debt was discussed in depth.

⁴³ See Ch 6, par 6.3.2.2.

⁴⁴ See Ch 6, par 6.2.2.2.

⁴⁵ See Ch 6, par 6.5.2 in this regard.

⁴⁶ See Ch 6, par 6.2.2.2 for criticism relating to applying the 50 per cent to a selected group of taxpayers.

9.4.1 Conclusions

Concerns in respect of SARS' power to appoint a third party, dealt with in Chapter 7, relate to the width of this power. There is substantial deviation from the *audi alteram partem* rule as a taxpayer is not informed of the anticipated appointment⁴⁷ and is unable to make representations in this regard. This results in an infringement of a taxpayer's right to just administrative action. Moreover, a third party appointment is not subject to any judicial intervention and a taxpayer's right to access to courts is also impeded. Even though the infringements on the taxpayer's rights ensures that SARS is able to collect outstanding taxes effectively and efficiently, it is essential to consider whether the width of this power may be restricted to ensure that it is exercised in the least invasive manner possible.

Chapter 7 questioned the practicalities of when the power to appoint a third party extends to money that will be held on behalf of or owed to the taxpayer in future. In addition, it questioned whether there is adequate consideration of the financial situation of the taxpayer. Such consideration would ensure that the extent of SARS' power to appoint a third party is not seen as too invasive, resulting in an unreasonable limitation of taxpayer's rights.

In Chapter 8 the requirements and scope of third party appointments in Canada, Australia, New Zealand and Nigeria were evaluated to ascertain whether the manner in which third parties are appointed in these countries may assist in resolving the concerns identified with the current third party appointment provisions in South Africa. Chapter 8 also revealed aspects that hitherto have not been considered in the South African context. For instance, Canada restricts the period of time in which a third party appointment dealing with future money is valid.⁴⁸ The discussion of Australia showed that third party appointment notices may play a significant role in insolvency proceedings.⁴⁹

⁴⁷ Although the letter of demand, as required by s 179(5) of the TAA, informs a taxpayer of the possibility that a third party notice may be issued if the tax debt remains outstanding, it does not specify that this administrative action will be taken. See Ch 7, par 7.2.2.4 in this regard.

⁴⁸ See Ch 8, par 8.2.1.

⁴⁹ See Ch 8, par 8.3.3.

The different approaches of South Africa, Canada, Australia, New Zealand and Nigeria in relation to the above mentioned principles are set out in Table 9.3 and discussed thereafter.

TABLE 9.3 – THIRD PARTY APPOINTMENTS

	Requirements for third party appointment	Scope of third party appointment	Notice to taxpayer
South Africa	<ul style="list-style-type: none"> • Due and payable tax debt; • 3rd due or hold money obo taxpayer. 	<p><i>In relation to TAA:</i></p> <ul style="list-style-type: none"> • Scope extended to: <ul style="list-style-type: none"> ○ Include pension benefit. ○ Future. • Scope restricted to: <ul style="list-style-type: none"> ○ Affordability assessment. <p><i>In relation to CEA:</i> None.</p>	<p><i>In relation to TAA:</i> Letter of demand before appointment.</p> <p><i>In relation to CEA:</i> None.</p>
Canada	<p>General appointment:</p> <ul style="list-style-type: none"> ○ Due and payable tax debt. ○ 3rd owe or hold obo taxpayer. <p>Other appointments:</p> <ul style="list-style-type: none"> ○ General appointment requirements plus loan/advances within 90 days; ○ General appointment requirements plus priority over security interest. 	<ul style="list-style-type: none"> • Scope extended to: <ul style="list-style-type: none"> ○ Future. ○ Other types apart from general appointment. • Scope restricted to: <ul style="list-style-type: none"> ○ Limited time in future. 	No notice required.
Australia	<ul style="list-style-type: none"> • Due tax debt. • 3rd owe money to taxpayer. 	<ul style="list-style-type: none"> • Scope extended to: <ul style="list-style-type: none"> ○ Future. • Scope restricted to: <ul style="list-style-type: none"> ○ Percentage of salary. 	Taxpayer should receive copy of notice after appointment is made.
New Zealand	<ul style="list-style-type: none"> • Due and payable tax debt. • 3rd debt due and payable to taxpayer. 	<ul style="list-style-type: none"> • Scope extended to: <ul style="list-style-type: none"> ○ Future. • Scope restricted to: <ul style="list-style-type: none"> ○ Percentage of salary. 	<p>Taxpayers must receive:</p> <ul style="list-style-type: none"> • Copy of notice; • Notice of deductions made by 3rd party.
Nigeria	<ul style="list-style-type: none"> • Holding money on behalf of the taxpayer. 	<ul style="list-style-type: none"> • Scope restricted to: <ul style="list-style-type: none"> ○ Money held on behalf of a taxpayer. 	No notice required.

Not one of the countries provide for court intervention in relation to a third party notice. It is submitted that this is because it would be impractical for a revenue authority to approach the courts every time it wants to issue a third party appointment notice as it would substantially impede its ability to collect tax effectively. The costs would also be exorbitant.

In the absence of court intervention, it is important that SARS' third party power is restricted to ensure that it is a reasonable and justifiable limitation of the taxpayer's rights. The current power should be curtailed.

Dealing with the third topic of this study, namely, to compare SARS' enforcement powers to and evaluate it against those of the other jurisdictions, it became apparent that there are some aspects pertaining to the appointment of third parties on behalf of taxpayers that should be considered for South Africa. Incorporating these aspects into third party appointments in South Africa would align this power with the Constitution.

Canada limits the impact of third party appointments by restricting the time periods within which a future debt must arise⁵⁰ while Australia and New Zealand use an objective approach to ensure that a taxpayer's financial situation is considered. This is done by restricting the percentage of a taxpayer's salary or wages that may be subject to an appointment.⁵¹ An objective approach, similar to Australia and New Zealand, is preferred to the subjective South African approach where SARS considers a taxpayer's financial situation in instances where the taxpayer requests it.

Australia's and New Zealand's provisions are of further significance. In these countries a taxpayer must receive notice of the third party appointment⁵² and not only a warning that the revenue authority has the power to appoint a third party on behalf of a taxpayer. Notifying a taxpayer of the third party appointment provides him or her with an opportunity to state his or her case as soon as he or she receives the

⁵⁰ See Ch 8, para 8.2.1.1; 8.2.1.2; 8.2.1.3.

⁵¹ See Ch 8, para 8.3.2; 8.4.2.

⁵² See Ch 8, para 8.3.2; 8.4.2.

notice as opposed to realising that this has occurred when the taxpayer wants to access the money held by the third party.

9.4.2 Recommendations

The recommendations to address the problems identified in relation to the South African third party appointments are dealt with below.⁵³ These recommendations aim to restrict the extent of third party appointments. Restrictions are necessary as third party appointments are made without court intervention or allowing the taxpayer the opportunity to make representations in relation to this administrative action. Most of the recommendations apply to both TAA- and the CEA-related third party appointments as the different contexts within which these Acts operate do not justify any disparity in this regard.

- (a) It is recommended that the impact of a third party appointment on a taxpayer's rights may be restricted by considering the affordability of the third party appointment. The TAA provisions already take into account the affordability of the appointment notice as a taxpayer, after receiving a letter of demand, may approach SARS for a reduction of the outstanding debt amount, and after a third party appointment notice has been issued to request the third party appointment period to be extended.

Nevertheless, the fact that SARS determines whether a taxpayer can afford the terms of the appointment notice is problematic as SARS has a duty to collect the maximum amount of tax that is due.⁵⁴ An objective standard should rather be used. However, a possible objective standard, where a court considers the affordability of the third party appointment notice, would hamper SARS' duty to collect taxes effectively more than is necessary.

A more appropriate standard may be to restrict the percentage of a taxpayer's salary or wages that may be subject to a third party appointment. This approach

⁵³ See Annexure C for the amendments proposed to the current TAA and CEA provisions dealing with the appointment of a third party on behalf of a taxpayer in order to give effect to my recommendations in this regard.

⁵⁴ See Ch 7, par 7.2.2.4(b).

is used in Australia and New Zealand. Furthermore, as indicated earlier,⁵⁵ draft legislation in relation to emolument attachment orders in South Africa also considers the notion of restricting a percentage of a person's salary or wages that may be subject to attachment.⁵⁶

However, It is submitted that basing the restrictions on a percentage may not provide a balance between ensuring that a taxpayer is able to meet his or her basic living expenses, on the one hand, and SARS' interest in collecting the maximum amount of tax, on the other hand. This can be illustrated as follows: If A has a net salary of R10 000 per month and only 30 per cent may be subject to a third party appointment, SARS would only be able to collect R3 000, leaving A with R7 000 at his or her disposal. On the other hand, if A's net income was R600, he or she would be left with R420 per month if SARS were to collect outstanding taxes by way of a third party appointment.⁵⁷

In the first example, the taxpayer may still be able to pay most of his or her expenses, essential and non-essential, while SARS gets the short end of the stick. In the second example the taxpayer's disposable income would be below the lower-bound poverty line of R544.⁵⁸ As such the taxpayer would not even be able to pay his or her basic living expenses in spite of the 30 per cent cap on third party appointments.

⁵⁵ See Ch 8, par 8.3.5.

⁵⁶ Clause 8 of the Court of Law Amendment Bill provides that only 25 per cent of a person's salary may be subject to emolument attachment orders.

⁵⁷ Although a person with a net monthly income of R600 would not be liable for income tax on this income (See SARS "Personal income tax" available at <http://bit.ly/2npzr8O> (accessed 20 February 2017) where it is indicated that a person younger than 65 years is liable for income tax if he or she earns more than R75 000.) the person could be subject to income tax in relation to a previous year where he or she earned more than the threshold amount or the tax liability could relate to another type of tax.

⁵⁸ Since 2012 South Africa uses three poverty lines, namely (i) the food poverty line (FPL), which shows that a level of consumption below this line means that an individual would not be able to purchase sufficient food required for an adequate diet; (ii) the lower-bound poverty line (LBPL), which indicates the income level where an individual would be able to buy essential non-food items but would need to sacrifice food in order to obtain these items; and (iii) the upper-bound poverty line (UBPL) which indicates the income level where a person would be able to purchase adequate food and non-food items. For further reading in this regard, see *STATS SA Poverty trends in South Africa – an examination of absolute poverty between 2006 and 2011* (2014). The lower-bound-poverty line referred to here was established in 2014. There are no more recent figures available in this regard.

Due to the inadequacy of restricting third party appointments to a certain percentage, it is recommended that a certain amount of a person's salary, wages or pension pay-out⁵⁹ should be protected from third party appointments. This amount should be linked to the lower-bound poverty line to ensure that these taxpayers are able to meet their most basic needs.⁶⁰ It is not necessary to provide for a similar protection in relation to other forms of income such as rental or interest. This is because these forms of income would seldom be the only form of income a person receives which would mean that a person should be able to pay his or her basic living expenses even if the entire rental or interest income is subject to a third party appointment notice.

Regardless of the protection recommended in relation to salary, wages and pension, where there is (still) not sufficient money available for a taxpayer to meet his or her basic needs⁶¹ or another type of income is his or her only income, the taxpayer should approach SARS. Like the current situation in terms of the TAA, SARS may then ascertain what would be affordable in the specific situation. Although approaching SARS when an individual case necessitates it does not resolve SARS' conflicting duty, I consider this recommendation to provide more protection for a taxpayer than the current TAA provisions. This is because an objective limitation is in place and approaching SARS can only help to facilitate a more affordable enforcement strategy.

- (b) With the enactment of the TAA, SARS' third party appointment power is extended to instances where the third party will in future hold money on behalf of or due to the taxpayer. This improves SARS ability to collect taxes effectively. Consequently, the CEA should be amended to provide for third party

⁵⁹ This pension pay-out does not refer to a lump sum that a person receives from the pension fund when he or she retires. As indicated in Ch 7, par 7.2.1.4, SARS should only be able to issue a third party appointment notice in relation to a pension benefit that a person receives because he or she is on pension. A taxpayer's pension interest, the money kept by the pension fund until the date of maturity, would generally not be subject to third party appointments.

⁶⁰ National Planning Commission *National Development Plan 2030: our future-make it work* (date unknown) 363 indicates that a goal of the South African National Development Plan is not to let anyone live below the lower-bound poverty line.

⁶¹ This would be for instance when the taxpayer has dependants.

appointments that relate to money that will be owed or held in future.⁶² However, it is submitted that without a time restriction placed on when in future the money should be held on behalf of or due to a taxpayer, this power of SARS is contrary to the rule of law due to vagueness. A time restriction would limit the impact of third party appointments on a taxpayer's rights and would also ensure that third parties are not inundated with appointments that may never materialise or only far in the future.

- (c) Furthermore, it is recommend that the third party appointment provisions should explicitly provide that the third party who has been appointed in relation to money that will be held or owed in future will only be required to perform in accordance with the appointment notice once the money becomes payable to the taxpayer. Nonetheless, once the third party appointment notice is served on the third party, the obligation to comply with the notice arises and a failure by the third party to act in accordance with the notice when the amount becomes payable or held on behalf of the taxpayer, would lead to sanctions being invoked against the third party.
- (d) Although in practice some third parties have the courtesy to inform the taxpayer of the appointment notice, it is imperative that the empowering legislation should provide that a taxpayer must be notified when a third party appointment has been made. Being notified of the third party appointment would allow a taxpayer the opportunity to approach SARS as regards the affordability thereof and also to re-arrange his or her financial matters in accordance with this appointment. In addition, the third party should also keep the taxpayer informed regarding the moneys paid over to SARS in terms of the third party appointment notice. This will ensure transparency in relation to SARS' collections.
- (e) The TAA, similar to the CEA, should provide that a third party who is unable to comply with the third party appointment notice, should inform SARS in writing of this inability. This should be done in writing for evidentiary purposes.

⁶² However, as soon as the CCA comes into operation, the TAA third party appointment provisions will also apply in relation to customs duty.

- (f) It is recommended that the term “agent” should be removed from the relevant CEA provisions. As indicated previously,⁶³ reference to the term “agent” is confusing as a third party appointment does not align with the general constructs of agency. Unlike ordinary agency, the “agent” in third party appointments receives authority to act on behalf of the taxpayer from a person other than the taxpayer.

9.5 CONCLUDING REMARKS

This thesis has shown that the current selected enforcement powers of SARS fail to consider alternative measures that may achieve a better balance between SARS’ collection obligation and taxpayers’ rights. The South African constitutional context demands that taxpayers’ rights should be respected and only infringed upon to the extent that is essential for SARS the exercise its enforcement powers effectively.

When reflecting on the recommendations made above, it is clear that in order to achieve a balance, some “give-and-take” is required from both taxpayers and SARS. As far as searches and seizures are concerned, a taxpayer should tolerate that in some instances SARS may secure relevant material or remove relevant material without a warrant. In turn, SARS should then obtain judicial oversight of these actions after securing or removing the relevant material. In relation to the payment obligation pending dispute resolution, the conflicting interests of SARS and the taxpayer may be balanced by requiring that only half of the disputed tax is paid until the matter has been adjudicated by an impartial forum. Finally, because a third party appointment is made without court intervention or an opportunity for the taxpayer to make representations, a taxpayer’s financial situation should be taken into consideration objectively.

⁶³ See Ch 7, par 7.2.1.1 in this regard.

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ANNEXURE A - SEARCHES AND SEIZURES

This annexure contains the amendments I propose to the current TAA and the current CEA provisions dealing with SARS' power to conduct searches and seizures in order to give effect to my recommendations in this regard. The amendments to existing provisions will be indicated in the following manner: (a) words in bold type in square brackets indicate omissions from existing provisions; (b) words underlined with a solid line indicate my recommended insertions in the existing provisions.

1. Sections 59-63 of the TAA

59. Application for warrant.

- (1) A senior SARS official may, if necessary **[or relevant]** to administer a tax Act, authorise an application for a warrant under which SARS may enter a premises where relevant material is kept to search the premises and any person present on the premises and seize relevant material.
- (2) SARS must apply *ex parte* to a judge for the warrant, which application must be supported by information supplied under oath or solemn declaration, establishing the facts on which the application is based
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- (3) Despite subsection (2), SARS may apply for the warrant referred to in subsection (1) and in the manner referred to in subsection (2), to a magistrate, if the matter relates to an audit or investigation where the estimated tax in dispute does not exceed the amount determined in the notice issued under section 109 (1) (a).
- (4) If an application for a search warrant is about to be made or has been made and has not yet been granted or refused by a judge or magistrate, the senior SARS official present at the premises that is or is to be the subject of the application may enter and secure the relevant material in respect of which the search warrant is being sought, at any time that is reasonable in the circumstances.
- (5) A warrant must be granted within 24 hours after the relevant material has been secured in terms of subsection (4), otherwise SARS must release the relevant material immediately after expiration of the 24 hour period.

(6) If a senior SARS official has reasonable grounds to believe that the relevant material specified in subsection 60(2)(d) and/ or subsection 60(2)(e) is not at the premises identified in terms of subsection 60(2)(c), the senior SARS official must secure the material and obtain a warrant within 24 hours after securing the material that specifically includes this material. Failure to obtain a warrant within 24 hours would result in the relevant material being released immediately after expiration of the 24 hour period.

60. Issuance of warrant.

- (1) A judge or magistrate may issue the warrant referred to in section 59 (1) if satisfied that there are reasonable grounds to believe that—
- (a) a person failed to comply with an obligation imposed under a tax Act, or committed a tax offence; and
 - (b) relevant material likely to be found on the premises specified in the application may provide evidence of the failure to comply or commission of the offence.
- (2) A warrant issued under subsection (1) must contain the following—
- (a) the alleged failure to comply or offence that is the basis for the application;
 - (b) the person alleged to have failed to comply or to have committed the offence;
 - (c) the premises to be searched; **[and]**
 - (d) the **[fact that]** relevant material as defined in section 1 that is likely to be found on the premises **[.]**; and
 - (e) the relevant material that may be seized.
- (3) The warrant must be exercised within 45 business days or such further period as a judge or magistrate deems appropriate on good cause shown.

61. Carrying out search.

- (1) A SARS official exercising a power under a warrant referred to in section 60 must produce the warrant, and if the owner or person in control of the premises is not present, the SARS official must affix a copy of the warrant to the premises in a prominent and visible place.
- (2) Subject to section 63, a SARS official's failure to produce a warrant entitles a person to refuse access to the official.

- (3) The SARS official may—
- (a) open or cause to be opened or removed in conducting a search, anything which the official suspects to contain the relevant material stipulated in the warrant;
 - (b) seize **[any]** the relevant material stipulated in the warrant;
 - (c) seize and retain a computer or storage device in which the relevant material stipulated in the warrant is stored for as long as it is necessary to copy the material required;
 - (d) make extracts from or copies of the relevant material stipulated in the warrant, and require from a person an explanation of the relevant material stipulated in the warrant;
 - (e) if the premises listed in the warrant is a vessel, aircraft or vehicle, stop and board the vessel, aircraft or vehicle, search the vessel, aircraft or vehicle or a person found in the vessel, aircraft or vehicle, and question the person with respect to a matter dealt with in a tax Act; and
 - (f) if the SARS official discovers other relevant material that is not stipulated in the warrant, the SARS official must secure the material and obtain a warrant within 24 hours after securing the material that specifically includes this material. Failure to obtain a warrant within 24 hours would result in the relevant material being discharged.
- (4) The SARS official must make an inventory of the relevant material seized in the form, manner and at the time that is reasonable under the circumstances and provide a copy thereof to the person.
- (5) The SARS official must conduct the search with strict regard for decency and order, and may search a person if the official is of the same gender as the person being searched.
- (6) The SARS official may, at any time, request such assistance from a police officer as the official may consider reasonably necessary and the police officer must render the assistance.
- (7) No person may obstruct a SARS official or a police officer from executing the warrant or without reasonable excuse refuse to give such assistance as may be reasonably required for the execution of the warrant.

- (8) If the SARS official seizes relevant material, the official must ensure that the relevant material seized is preserved and retained until it is no longer required for—
- (a) the investigation into the non-compliance or the offence described under section 60 (1) (a); or
 - (b) the conclusion of any legal proceedings under a tax Act or criminal proceedings in which it is required to be used.
- (9) A SARS official may only enter a dwelling-house or domestic premises, except any part thereof used for purposes of trade, with a warrant or the written consent of the occupier of such a premises.

[62. Search of premises not identified in warrant.

- (1) **If a senior SARS official has reasonable grounds to believe that—**
- (a) the relevant material referred to in section 60 (1) (b) and included in a warrant is at premises not identified in the warrant and may be removed or destroyed;**
 - (b) a warrant cannot be obtained in time to prevent the removal or destruction of the relevant material; and**
 - (c) the delay in obtaining a warrant would defeat the object of the search and seizure,**
- a SARS official may enter and search the premises and exercise the powers granted in terms of this Part, as if the premises had been identified in the warrant.**
- (2) **A SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for purposes of trade, under this section without the consent of the occupant.]**

[63. Search without warrant.

- (1) **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
 - (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.
- (3)(2) Section 61 (4) to (8) applies to a search conducted under this section.
- (4) A SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for purposes of trade, under this section without the consent of the occupant.
- (5) If the owner or person in control of the premises is not present, the SARS official must inform such person of the circumstances referred to in subsection (2) as soon as reasonably possible after the execution of the search and seizure.]

2. Section 4(4) of the CEA

4(4) Power to search and seize

- (a) An officer may, for the purposes of this Act enter any premises subject to the other provisions of this section.
- (aA)An officer may enter premises in terms of paragraph (a) only on authority of a warrant issued by a magistrate or judge, provided that in the case of the following categories of premises an officer may enter the premises without a warrant:
- (i) Premises managed or operated by the State or a public entity within the meaning of the Public Finance Management Act, 1999 (Act No 1 of 1999) as part of a port, airport, railway station or land border post and on which an activity to which this Act applies is carried out or allowed;
 - (ii) premises licensed or registered in terms of this Act;

- (iii) premises occupied by a person licensed or registered in terms of this Act and used for purposes of the business for which that person is licensed or registered; and
- (iv) premises entered by an officer with the written consent of the owner or person in physical control of the premises after that owner or person was informed that there is no obligation to admit the officer in the absence of a warrant.

(aB)**[An officer]** A senior SARS official must apply *ex parte* to a judge for the warrant in terms of subsection (d)., **[may without a warrant enter any premises for which a warrant is required in terms of paragraph (aA) if the [officer] on reasonable grounds believes]—**

[(i)]ii)that a warrant will be issued by a magistrate or judge if a warrant is applied for; and

(ii)that the delay in obtaining the warrant is likely to defeat the purpose for which the officer seeks to enter the premises.]

(aC)If an application for a search warrant is about to be made or has been made and has not yet been granted or refused by a judge or magistrate, the senior SARS official present at the premises that is or is to be the subject of the application may enter and secure the relevant material in respect of which the search warrant is being sought, at any time that is reasonable in the circumstances. A warrant must be granted within 24 hours after the relevant material has been secured, otherwise SARS must discharge the relevant material immediately after the 24 hours have lapsed.

(aD)If a senior SARS official has reasonable grounds to believe that the relevant material specified in subsection 4(4)(e)(iv) and/ or subsection 4(4)(e)(v) are not at the premises identified in terms of subsection 4(4)(e)(iii), the senior SARS official must secure the material and obtain a warrant within 24 hours after securing the material that specifically includes this material. Failure to obtain a warrant within 24 hours would result in the relevant material being released.

[(aC)] (aE) An officer who is entering premises in terms of section (aA) may for purposes of this Act—

- (i) after having gained entry to any premises in terms of this subsection, conduct an inspection, examination, enquiry or a search;

- (ii) while the officer is on the premises or at any other time require from any person the production then and there, or at a time and place fixed by the officer, of any book, document or thing which by this Act is required to be kept or exhibited or which relates to or which the officer has reasonable cause to suspect of relating to matters dealt with in this Act and which is or has been on the premises or in the possession or custody or under the control of any such person or his employee;
- (iii) at any time and at any place require from any person who has or is believed to have the possession or custody or control of any book, document or thing relating to any matter dealt with in this Act, the production thereof then and there, or at a time and place fixed by the officer; and
- (iv) examine and make extracts from and copies of any such book or document and may require from any person an explanation of any entry therein and may attach any such book, document or thing as in the opinion of the officer may afford evidence of any matter dealt with in this Act.

(aE) An officer who is entering premises in terms of section (d) may, for purposes of this Act—

- (i) open or cause to be opened or removed in conducting a search, anything which the official suspects to contain the relevant material stipulated in the warrant;
- (ii) seize the relevant material stipulated in the warrant;
- (iii) seize and retain a computer or storage device in which the relevant material stipulated in the warrant is stored for as long as it is necessary to copy the material required;
- (iv) make extracts from or copies of the relevant material stipulated in the warrant, and require from a person an explanation of the relevant material stipulated in the warrant; and
- (v) if the premises listed in the warrant is a vessel, aircraft or vehicle, stop and board the vessel, aircraft or vehicle, search the vessel, aircraft or vehicle or a person found in the vessel, aircraft or vehicle, and question the person with respect to a matter dealt with in a tax Act.
- (vi) if the SARS official comes across other relevant material that is not stipulated in the warrant, the SARS official must secure the material and obtain a warrant within 24 hours after securing the material that specifically

includes this material. Failure to obtain a warrant within 24 hours would result in the relevant material being discharged.

(vii) The SARS official must make an inventory of the relevant material seized in the form, manner and at the time that is reasonable under the circumstances and provide a copy thereof to the person.

(viii) The SARS official must conduct the search with strict regard for decency and order, and may search a person if the official is of the same gender as the person being searched.

(ix) No person may obstruct a SARS official or a police officer from executing the warrant or without reasonable excuse refuse to give such assistance as may be reasonably required for the execution of the warrant.

(x) If the SARS official seizes relevant material, the official must ensure that the relevant material seized is preserved and retained until it is no longer required for—

(aa) the investigation into the non-compliance or the offence described under section 4(4)(e)(i); or

(bb) the conclusion of any legal proceedings under a tax Act or criminal proceedings in which it is required to be used.

(b) An officer may take with him or her on to any premises an assistant or a member of the police force, provided that only those assistants and members of the police force whose presence, in the reasonable opinion of the officer, is necessary for purposes of conducting the inspection, examination, enquiry or search on the premises may enter the premises.

(c) When entering any premises in terms of paragraph **[(aB)] (aA)**, the officer shall comply with the following requirements:

(i) The officer may enter the premises only during ordinary business hours unless in the reasonable opinion of the officer entry at any other time is necessary for purposes of this Act;

(ii) the officer shall, upon seeking admission to the premises, inform the person in charge of the premises of the purpose of the entry;

(iii) if the purpose of the entry is, or if the officer after having gained entry decides, to search the premises for goods, records or any other things in respect of which an offence in terms of this Act is suspected to have been

committed or that may be used as evidence for the prosecution of such an offence—

- (aa) the officer shall hand to the person in charge a written statement signed by the officer stating that a search of the premises is to be conducted unless, in the officer's reasonable opinion, there are circumstances of urgency which may result in the search being frustrated if its commencement is delayed until such a statement can be prepared;
 - (bb) the officer's actions shall be confined to such searching, inspection, enquiries and examination as are reasonably necessary for the purpose of the search;
 - (cc) the officer may, either before or after complying with item (aa), take such steps as the officer considers necessary to prevent persons present on the premises from concealing, destroying or tampering with any documents, data or things located on the premises;
 - (dd) the person in charge shall have the right to be present, or to appoint a delegate to be present, during and to observe the search;
 - (ee) the officer shall compile an inventory of all items removed from the premises and shall, prior to leaving the premises, sign the inventory and hand a copy thereof to the person in charge: Provided that if it is not possible in the circumstances to compile, sign and hand such inventory to the person in charge before leaving the premises, the officer shall seal the items to be removed and as soon as possible after removal of the items from the premises, compile the inventory in the presence of the person in charge of the premises, if that person requested to be present, and sign and hand a copy of the inventory to that person;
 - (ff) the officer shall compile a schedule of all copies and extracts made in the course of the search and shall, prior to leaving the premises, sign and hand a copy thereof to the person in charge; and
 - (gg) the officer must conduct the search with strict regard for decency and order.
- (d) A judge or magistrate may issue a warrant referred to in paragraph (aA) **[only on written application by an officer setting out under oath or affirmation the grounds why it is necessary for an officer to gain access to the relevant premises.]** if satisfied that there are reasonable grounds to believe that—

- (i) a person failed to comply with an obligation imposed under a tax Act, or committed a tax offence; and
- (ii) relevant material likely to be found on the premises specified in the application may provide evidence of the failure to comply or commission of the offence.

[(e) If the purpose of the entry is to conduct a search of the premises for goods, records or any other things in respect of which an offence in terms of this Act is suspected to have been committed or that may be used as evidence for the prosecution of such an offence, the magistrate or judge may issue such warrant if it appears from the information on oath that—

- (i) there are reasonable grounds for suspecting that an offence in terms of this Act has been committed;**
- (ii) a search of the premises is likely to yield such goods, records or other things; and**
- (iii) the search is reasonably necessary for the purposes of this Act.]**

(e) A warrant issued under subsection (d) must contain the following—

- (i) the alleged failure to comply or offence that is the basis for the application;
 - (ii) the person alleged to have failed to comply or to have committed the offence;
 - (iii) the premises to be searched;
 - (iv) the relevant material that is likely to be found on the premises; and
 - (v) the relevant material that may be seized.
- (f) The warrant must be exercised within 45 business days or such further period as a judge or magistrate deems appropriate on good cause shown.

ANNEXURE B - PAYMENT OBLIGATION PENDING DISPUTE RESOLUTION

This annexure contains the amendments I propose to the current TAA and the current CEA provisions dealing with taxpayers' payment obligation pending dispute resolution. In order to give effect to my recommendations in relation to Part 3, the current section 164 and section 77G of the CEA should be replaced in totality with a new section. The reason for the replacement is that I recommend a rather substantial deviation from the current approach on what should happen with a taxpayer's payment obligation pending dispute resolution. The amendments to existing provisions will be indicated in the following manner: (a) words in bold type in square brackets indicate omissions from existing provisions; (b) words underlined with a solid line indicate my recommended insertions in the existing provisions.

1. Section 164 of the TAA

164. [Payment of tax pending objection or appeal.—

- (1) Unless a senior SARS official otherwise directs in terms of subsection (3)—**
 - (a) the obligation to pay tax; and**
 - (b) the right of SARS to receive and recover tax,**
will not be suspended by an objection or appeal or pending the decision of a court of law pursuant to an appeal under section 133.
- (2) A taxpayer may request a senior SARS official to suspend the payment of tax or a portion thereof due under an assessment if the taxpayer intends to dispute or disputes the liability to pay that tax under Chapter 9.**
- (3) A senior SARS official may suspend payment of the disputed tax or a portion thereof having regard to relevant factors, including—**
 - (a) whether the recovery of the disputed tax will be in jeopardy or there will be a risk of dissipation of assets;**
 - (b) the compliance history of the taxpayer with SARS;**
 - (c) whether fraud is prima facie involved in the origin of the dispute;**
 - (d) whether payment will result in irreparable hardship to the taxpayer not justified by the prejudice to SARS or the fiscus if the disputed tax is not paid or recovered; or**

- (e) whether the taxpayer has tendered adequate security for the payment of the disputed tax and accepting it is in the interest of SARS or the *fiscus*.
- (4) If payment of tax was suspended under subsection (3) and subsequently—
- (a) no objection is lodged;
 - (b) an objection is disallowed and no appeal is lodged; or
 - (c) an appeal to the tax board or court is unsuccessful and no further appeal is noted,
- the suspension is revoked with immediate effect from the date of the expiry of the relevant prescribed time period or any extension of the relevant time period under this Act.
- (5) A senior SARS official may deny a request in terms of subsection (2) or revoke a decision to suspend payment in terms of subsection (3) with immediate effect if satisfied that—
- (a) after the lodging of the objection or appeal, the objection or appeal is frivolous or vexatious;
 - (b) the taxpayer is employing dilatory tactics in conducting the objection or appeal;
 - (c) on further consideration of the factors referred to in subsection (3), the suspension should not have been given; or
 - (d) there is a material change in any of the factors referred to in subsection (3), upon which the decision to suspend payment of the amount involved was based.
- (6) During the period commencing on the day that—
- (a) SARS receives a request for suspension under subsection (2); or
 - (b) a suspension is revoked under subsection (5),
- and ending 10 business days after notice of SARS' decision or revocation has been issued to the taxpayer, no recovery proceedings may be taken unless SARS has a reasonable belief that there is a risk of dissipation of assets by the person concerned.
- (7) If an assessment or a decision referred to in section 104 (2) is altered in accordance with—
- (a) an objection or appeal;
 - (b) a decision of a court of law pursuant to an appeal under section 133; or

(c) a decision by SARS to concede the appeal to the tax board or the tax court or other court of law,

a due adjustment must be made, amounts paid in excess refunded with interest at the prescribed rate, the interest being calculated from the date that excess was received by SARS to the date the refunded tax is paid, and amounts short-paid are recoverable with interest calculated as provided in section 187 (1).

(8) The provisions of section 191 apply with the necessary changes in respect of an amount refundable and interest payable by SARS under this section.]

Suspension of tax obligation pending objection or appeal

(1) The 50 per cent of a taxpayer's obligation to pay tax and the right of SARS to receive and recover 50 per cent of the tax are suspended until either:

(a) the taxpayer fails to comply with a dispute resolution time period as provided for in the rules promulgated in terms of section 103 of the Tax Administration Act; or

(b) a court has confirmed the taxpayer's outstanding tax liability; whichever occurs the earliest provided that an order is not obtained in terms of subsection (2).

(2) Notwithstanding subsection (1), where, on *ex parte* application by a senior SARS official, a judge or magistrate is satisfied that there are reasonable grounds to believe that the collection of all or any part of an amount assessed in respect of a taxpayer would be jeopardised by a delay in the collection of that amount, the judge or magistrate shall, on such terms as the judge or magistrate considers reasonable in the circumstances, authorise SARS to proceed with the recovery of the tax with respect to the amount.

(3) Where a court disposes of an appeal by a taxpayer in respect of an amount payable or where such an appeal has been discontinued or dismissed without trial, the court may, on the application of SARS and whether or not it awards costs, order the taxpayer to pay to SARS an amount not exceeding 10 per cent of any part of the amount that was in dispute in respect of which the court determines that there were no reasonable grounds for the appeal, if in the opinion of the court one of the main purposes for instituting or maintaining any part of the appeal was to defer the payment of any amount payable.

2. Section 77G of the CEA

77G. [Obligation to pay amount demanded.—

Notwithstanding anything to the contrary contained in this Act, the obligation to pay to the Commissioner and right of the Commissioner to receive and recover any amount demanded in terms of any provision of this Act, shall not, unless the Commissioner so directs, be suspended pending finalisation of any procedure contemplated in this Chapter or pending a decision by court.]

Suspension of tax obligation pending objection or appeal

- (1) The obligation of the taxpayer to pay 50 per cent of the tax and the right of SARS to receive and recover 50 per cent of the tax are suspended until either
 - (a) the taxpayer fails to comply with a dispute resolution time period as provided for Chapter XA of the Act; or
 - (b) a court has confirmed the taxpayer's outstanding tax liability;whichever occurs the earliest provided that an order is not obtained in terms of subsection (2).
- (2) Notwithstanding subsection (1), where, on *ex parte* application by a senior SARS official, a judge or magistrate is satisfied that there are reasonable grounds to believe that the collection of all or any part of an amount assessed in respect of a taxpayer would be jeopardised by a delay in the collection of that amount, the judge or magistrate shall, on such terms as the judge or magistrate considers reasonable in the circumstances, authorise SARS to proceed with the recovery of the tax with respect to the amount.
- (3) Where a court disposes of an appeal by a taxpayer in respect of an amount payable or where such an appeal has been discontinued or dismissed without trial, the court may, on the application of SARS and whether or not it awards costs, order the taxpayer to pay to SARS an amount not exceeding 10 per cent of any part of the amount that was in dispute in respect of which the court determines that there were no reasonable grounds for the appeal, if in the opinion of the court one of the main purposes for instituting or maintaining any part of the appeal was to defer the payment of any amount payable.

ANNEXURE C - THIRD PARTY APPOINTMENTS

This annexure contains the amendments I propose to the current TAA and the current CEA provisions dealing with SARS' power to appoint a third party on behalf of an agent. The amendments to existing provisions will be indicated in the following manner: (a) words in bold type in square brackets indicate omissions from existing provisions; (b) words underlined with a solid line indicate my recommended insertions in the existing provisions.

1. Section 179 of the TAA

179. Liability of third party appointed to satisfy tax debts.—

- (1) A senior SARS official may authorise the issue of a notice to a person who holds or owes or will hold or owe any money within one year, including a pension, salary, wage or other remuneration, for or to a taxpayer, requiring the person to pay the money to SARS in satisfaction of the taxpayer's outstanding tax debt[.] provided that when the third party appointment relates to salary, wages or pension pay-outs, an amount equal to the latest determined lower-bound poverty line per month is not subject to the notice.
- (2) SARS should provide a copy of a notice given to a person in terms of subsection (1) to the affected taxpayer, and the copy must be provided at the time the notice is given.
- ~~[(2)]~~(3)A person [that] who is unable to comply with a requirement of the notice, must advise the senior SARS official in writing of the reasons for the inability to comply within the period specified in the notice and the official may withdraw or amend the notice as is appropriate under the circumstances.
- ~~[(3)]~~(4)A person receiving the notice must pay the money in accordance with the notice once the money becomes payable or held on behalf of the taxpayer and, if the person parts with the money contrary to the notice, the person is personally liable for the money.
- (5) A person should notify the taxpayer every time money is paid over to SARS in accordance with the notice referred to in subsection (1)

~~[(4)]~~~~(6)~~SARS may, on request by a person affected by the notice, amend the notice to extend the period over which the amount must be paid to SARS, to allow the taxpayer to pay the basic living expenses of the taxpayer and his or her dependants.

~~[(5)]~~~~(7)~~SARS may only issue the notice referred to in subsection (1) after delivery to the tax debtor of a final demand for payment which must be delivered at the latest 10 business days before the issue of the notice, which demand must set out the recovery steps that SARS may take if the tax debt is not paid and the available debt relief mechanisms under this Act, including, in respect of recovery steps that may be taken under this section—

- (a) if the tax debtor is a natural person, that the tax debtor may within five business days of receiving the demand apply to SARS for a reduction of the amount to be paid to SARS under subsection (1), based on the basic living expenses of the tax debtor and his or her dependants; and
- (b) if the tax debtor is not a natural person, that the tax debtor may within five business days of receiving the demand apply to SARS for a reduction of the amount to be paid to SARS under subsection (1), based on serious financial hardship.

~~[(6)]~~~~(8)~~SARS need not issue a final demand under subsection ~~[(5)]~~~~(7)~~ if a senior SARS official is satisfied that to do so would prejudice the collection of the tax debt.

2. Section 14A of the CEA

14A. Power to appoint agent.—

(1) **[The Commissioner may, if he thinks it necessary], A senior SARS official may authorise the issue of a notice to a person [declare any person to be the agent of any other person, and the person so declared an agent —**

- (a) shall for the purposes of this Act be the agent of such other person in respect of the payment of any amount of duty, interest, penalty or forfeiture payable by such other person under this Act, and**
- (b) may be required to make payment of such amount from any moneys which may be held by him or her for or be due by him or her to the person whose agent he or she has been declared to be:]**

who holds or owes or will hold or owe any money within one year, including, salary, wage or other remuneration, for or to a taxpayer, requiring the person to pay the money to SARS in satisfaction of the taxpayer's outstanding tax debt provided when the third party appointment relates to salary, wages or pension pay-outs, an amount equal to the latest determined lower-bound poverty line per month is not subject to the notice.

- (2) SARS should provide a copy of a notice given to a person in terms of subsection (1) to the affected taxpayer, and the copy must be provided at the time the notice is given.
- (3) [Provided that a] A person [so declared an agent] who is unable to comply with a requirement of the notice [of appointment as agent], must advise the [Commissioner] senior SARS official in writing of the reasons for not complying with that notice within the period specified in the notice and the official may withdraw or amend the notice as is appropriate under the circumstances.
- (4) A person receiving the notice must pay the money in accordance with the notice once the money becomes payable or held on behalf of the taxpayer and, if the person parts with the money contrary to the notice, the person is personally liable for the money.
- (5) A person should notify the taxpayer every time money is paid over to SARS in accordance with the notice referred to in subsection (1)
- (6) SARS may, on request by a person affected by the notice, amend the notice to extend the period over which the amount must be paid to SARS, to allow the taxpayer to pay the basic living expenses of the taxpayer and his or her dependants.
- (7) SARS may only issue the notice referred to in subsection (1) after delivery to the tax debtor of a final demand for payment which must be delivered at the latest 10 business days before the issue of the notice, which demand must set out the recovery steps that SARS may take if the tax debt is not paid and the available debt relief mechanisms under this Act, including, in respect of recovery steps that may be taken under this section—
 - (a) if the tax debtor is a natural person, that the tax debtor may within five business days of receiving the demand apply to SARS for a reduction of the amount to be paid to SARS under subsection (1), based on the basic living expenses of the tax debtor and his or her dependants; and

- (b) if the tax debtor is not a natural person, that the tax debtor may within five business days of receiving the demand apply to SARS for a reduction of the amount to be paid to SARS under subsection (1), based on serious financial hardship.
- (8) SARS need not issue a final demand under subsection (7) if a senior SARS official is satisfied that to do so would prejudice the collection of the tax debt.