

**An analysis of South African Revenue Service powers  
to request relevant material as it pertains to the so-  
called ‘lifestyle questionnaire’.**

by

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## Declaration

I, Mbuyiseli Mayezana, hereby declare that the work on which this dissertation is based is my original work (except where acknowledgements indicate otherwise). It has not been submitted before for any for another degree or examination at this or any other university.

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## **ABSTRACT**

This study focuses on the South African Revenue Service's (SARS) powers to request "relevant material" as it pertains to the so called 'lifestyle questionnaire'. It also deals with taxpayer's rights in terms of the Tax Administration Act No. 28 of 2011 (TAA) and the Constitution of the Republic of South Africa, 1996 (the Constitution). Furthermore, the definition of "relevant material" was discussed in order to establish whether or not a "lifestyle questionnaire" falls within the broad definition of "relevant material" as defined in the TAA and whether or not it infringes upon the taxpayer's fundamental rights contained in the Bill of Rights. The taxpayer's remedies were also examined.

The South African Revenue Act No. 34 of 1997 (SARS Act) provides that SARS must ensure efficiency and effectiveness of collection of all revenue. SARS must perform this function in the most cost efficient manner and in accordance with the values and principles mentioned in section 195 of the Constitution.

SARS administers various pieces of legislation including the (TAA). The TAA was promulgated on 4<sup>th</sup> July 2012, came into effect on 1 October 2012 and incorporated into once piece of legislation certain administrative sections generic to all tax Acts excluding the Customs and Excise Act.

Both SARS and taxpayers must adhere to the Constitution of the Republic which is the supreme law of the country. Any law or conduct inconsistent with the Constitution is invalid. The Constitution consists of the Bill of Rights, a cornerstone of the South African democracy. SARS is an organ of state and therefore must respect, protect and promote the rights contained in the Bill of Rights.

Since the introduction of the TAA, taxpayers feel that SARS' powers have been enhanced. Section 46 of the TAA empowers SARS to request relevant material in various ways for the purpose of administration of a Tax Act, one of which could be by way of issuing a "lifestyle questionnaire" to taxpayers.

A Lifestyle questionnaire requires details of the taxpayer's assets and liabilities, income and expenses for the current and future tax years. Taxpayers often feel that this document is not specific but wide, because they are obliged to reveal everything to the SARS officials.

This study reveals that the information requested through the "lifestyle questionnaire" is "in the opinion of SARS foreseeably relevant" for the administration of a tax Act. It therefore, falls within the definition of relevant material. Taxpayers may not without just cause refuse to complete and file the lifestyle questionnaire when requested to do so.

It was further established that the Constitutional rights in the Bill of Rights are not absolute. Taxpayers who wish to challenge SARS' decision to issue a lifestyle questionnaire need to be aware of their rights and the limitations thereof.

In addition, this dissertation has revealed that a decision taken by SARS to issue a lifestyle questionnaire is an initial stage, the responses to which could trigger an investigation or audit and that the taxpayer's Constitutional rights are not adversely affected by such a request. Therefore, taxpayers might encounter difficulty in successfully challenging SARS on judicial review by The High Court.

The most suitable, cost effective and expeditious remedy that may be explored by any aggrieved taxpayer is that of the office of the Tax Ombudsman. The mandate of the Tax Ombud is to review and address any complaint by a taxpayer regarding a service or a procedural or administrative matter arising from the application of a tax Act



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## Chapter I: Introduction to the Research Topic

### 1.1 Introduction

Since the promulgation, on 4<sup>th</sup> July 2012, and enactment of the Tax Administration Act 28 of 2011 (TAA),<sup>1</sup> on 1 October 2012, various articles have been written regarding the extended powers of the South African Revenue Service (SARS) to request relevant material. Some commentators are of the opinion that SARS infringes upon the taxpayer's constitutional rights when exercising these extended powers, specifically the request for information/relevant material by way of a "lifestyle questionnaire".

A "lifestyle questionnaire" is a document that SARS uses to obtain information about anything and everything that can affect the taxpayer's tax liability.<sup>2</sup> The lifestyle questionnaire requires the details of the taxpayer's assets and liabilities, income and expenses for previous, current and future tax years. Taxpayers often feel that a questionnaire is a "fishing expedition" as it requires the taxpayer to reveal everything to SARS.

The TAA is one of the pieces of legislation administered by SARS. It is aimed at incorporating into one piece of legislation certain administrative sections generic to all tax Acts,<sup>3</sup> as well as administrative sections previously duplicated under different tax Acts.<sup>4</sup>

Section 2 of the Constitution<sup>5</sup> states that:

*"This Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."*

Both the TAA<sup>6</sup> and the South African Revenue Act (SARS Act)<sup>7</sup> are subject to the Constitution as the supreme law of the Republic.

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<sup>1</sup> No. 28 of 2011

<sup>2</sup> Section 3(2)(a)(i) of the TAA

<sup>3</sup> Section 1 of the TAA defines "tax act" to mean this Act or an Act, referred to in section 4 of the SARS Act, excluding Customs and Excise legislation

<sup>4</sup> [www.sars.gov.za](http://www.sars.gov.za) see LAPD-Tadm-G01- Short Guide to the Tax Administration Act 2011- External Guide

<sup>5</sup> Section 2 of the Constitution

<sup>6</sup> No 28 of 2011

<sup>7</sup> No 34 of 1997

In terms of sections 3 and 4 of the SARS Act,<sup>8</sup> SARS' objective is to ensure efficiency and effectiveness of collection of revenue. SARS must perform its function in the most cost efficient manner and in accordance with the values and principles mentioned in section 195 of the Constitution.

Section 195 of the Constitutions states that:

“SARS must, inter alia, at all times:

- (a) *act with a high standard of professional ethics*
- (b) *use resources effectively, efficiently and economically,*
- (c) *act impartially, fairly, equitably and without bias;*
- (d) *be accountable; and*
- (e) *be transparent and provide taxpayers with timely and accurate information.*

The preamble to the TAA provides, *inter alia*, for the effective and efficient collection of tax, requests for information, the holding of inquiries and the carrying out of audits or investigations. The purpose of the TAA is set out in section 2<sup>9</sup>, which reiterates the effective and efficient collection of taxes and specifies the mechanisms by which this can be done.

Section 3 of the TAA requires SARS, as a body responsible for the administration of the Tax Act, to obtain full information to perform its functions. The powers and duties of SARS under the TAA may be exercised for the purpose of the Administration of a tax Act<sup>10</sup>.

Section 46 of the TAA empowers SARS to request relevant material in various ways for the purposes of administration of a Tax Act, one of which could be by way of issuing a “lifestyle questionnaire” to taxpayers.

This study will focus on the powers of SARS to request relevant material through issuing a “lifestyle questionnaire”, the taxpayer’s rights in terms of the TAA and the

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<sup>8</sup> South African Revenue Service Act No 34 of 1997

<sup>9</sup> Section 2 of the TAA- Purpose of the Act

<sup>10</sup> Section 6 of the TAA

Constitution, the definition of “relevant material”<sup>11</sup> and whether or not the issuing of a “lifestyle questionnaire” infringes upon the taxpayer’s fundamental rights and examine the taxpayer’s remedies.

SARS is conferred with the power to tax in terms of the Constitution but this right is limited by structural, procedural and substantive limitations. The Bill of Rights<sup>12</sup> also confer taxpayers with numerous rights which include the right to privacy, right to promotion of access to information Act (PAIA), right to just administrative action Act (PAJA) and Promotion of Protection to Information Act (POPI).

These rights could however, be limited in terms of the Constitution depending on whether or not certain requirements are applicable.

## **1.2 Research Question, hypothesis and objective of the study**

An assessment of the powers of SARS in terms of the TAA, definition of relevant material and the rights of the taxpayers in terms of the TAA and the Constitution will assist in answering the following research questions:

- Does SARS’ request for relevant material through issuing a “lifestyle questionnaire” amount to an infringement of the taxpayer’s rights in terms of the TAA and the Constitution of the Republic, the provisions of PAIA, PAJA and POPI?
- Can taxpayers refuse to provide the requested relevant material citing violation of their rights?
- What constitutes “relevant material” as defined in section 1 the TAA?
- What is the interaction between the TAA, PAJA, PAIA, POPI and the Constitution?

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<sup>11</sup> Section 1 of the TAA

<sup>12</sup> Chapter 2 of the Constitution of 1996

### **1.3 Research Methodology**

The research method used to conduct this study is that of qualitative research. The available literature review has been analysed and it includes the following:

- The South African Constitution
- Case Law
- Books
- Journals
- Legislation
- Published articles and
- Electronic resources- Internet

This qualitative research is chosen as it is best suited for the dissertation as the main aim is to determine and analyse the legal position pertaining to the stated issues.

### **1.4 Limitations**

SARS may request taxpayers to provide relevant material using different methods. This study will focus on the request for information through issuing a “lifestyle questionnaire”.

### **1.5 Overview of chapters / Structure of dissertation**

This dissertation is made up of six chapters:

This Chapter one consists of an introduction to the research topic, research question, hypothesis and objective of the study, research methodology and limitations of the dissertation.

Chapter two comprises in-depth discussion on the power of the South African Revenue Service to request relevant material in terms of the TAA.

Chapter three focuses on the definition of the term “relevant material” as defined in the TAA. Specifically, this research seeks to establish what constitutes relevant material.

Chapter four of this study deals with the Constitution of the Republic of South Africa.

Chapter five examines the provisions of the Promotion of Administrative Justice Act, the Promotion of Access to Information Act and the Promotion of Protection to Information Act.

Chapter six gives a summary and conclusion of all the chapters aforementioned and conclusion on the outcome of the research question and suggestion for further study.

## **Chapter II: The powers of South African Revenue Service to request relevant material in terms of TAA**

### **2.1 Introduction**

This chapter comprises in-depth discussion on the powers of SARS to request relevant material in terms of TAA.

The TAA was passed by the National Assembly in November 2011 and came into effect on 1 October 2012. It is designed to align, into a single piece of legislation, the administration of various tax Acts and promote their efficient and effective administration. It imposes obligations on a wide range of persons - taxpayers, non-taxpayers, representative taxpayers, registered tax practitioners, withholding agents, a responsible third party, shareholders, employers, vendors, and, generally, any person in possession or control of information or relevant material pertaining to a taxpayer's affairs.<sup>13</sup>

The Act seeks to promote a better balance between the powers and duties of SARS and the rights and obligations of taxpayers and to make this relationship more transparent. This balance will greatly contribute to the equity and fairness of tax administration. International experience has demonstrated that if taxpayers perceive and experience the tax system as fair and equitable, they will be more inclined to fully and voluntarily comply with it.<sup>14</sup>

SARS' information gathering powers are significantly enhanced by the TAA and similarly the taxpayers' rights are enhanced and made more explicit to counterbalance SARS' new information gathering powers. This was necessary to address the problem that SARS experienced when requesting information and then having protracted disputes as to whether it is entitled to this information. It is an established international principle that a revenue authority should not have to divert its focus from ensuring compliance with the tax acts with debates as to the entitlement of the revenue authority to the information.<sup>15</sup>

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<sup>13</sup> Fareed Moosa. SA Mercantile Law Journal = SA Tydskrif vir Handelsreg 24, pp 338 - 345 (2012)

<sup>14</sup> LAPD-TAdm-G01-Short Guide to Tax Administration Act 2011-External Guide (hereafter "the TAA external short guide") –see P4

<sup>15</sup> Memorandum on the Objects of the Tax Administration Bill, 2011 at 2.2.5

Section 44 of the Constitution confers the power to government to tax.

In the tax arena the executive authority is vested in SARS, which is an organ of state which is conferred with the executive power to administer, implement and enforce tax related matters.

## **2.2 Request for relevant material**

Information is the backbone for any Revenue office. Information is required to assess taxpayers and to ensure that taxpayers pay the correct amount of tax. As information is such a critical part of revenue collection, the Tax Administration Act (TAA) confers various powers on the Commissioner, which are very broad in scope, to enable such information gathering from the taxpayer and others. This information must also be requested with reasonable specificity. This means that SARS is not entitled to merely embark on a fishing expedition, or to send arbitrary requests.<sup>16</sup>

SARS derives its power to request relevant material from section 46 of the TAA, which states that:

- (1) SARS may, for the purposes of the administration of a tax Act in relation to a taxpayer, whether identified by name or otherwise objectively identifiable, require the taxpayer or another person to, within a reasonable period, submit relevant material (whether orally or in writing) that SARS requires.*
- (2) A senior SARS official may require relevant material in terms of subsection (1)—  
(a) in respect of taxpayers in an objectively identifiable class of taxpayers; or  
(b) held or kept by a connected person, as referred to in paragraph (d)(i) of the definition of 'connected person' in the Income Tax Act, in relation to the taxpayer, located outside the Republic.*
- (3) A request by SARS for relevant material from a person other than the taxpayer is limited to material maintained or kept or that should reasonably be maintained or kept by the person in respect of the taxpayer.*
- (4) A person or taxpayer receiving from SARS a request for relevant material under*

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<sup>16</sup> SAIPA- Tax Professional\_29 medium, Official Journal of the South African Institute of Professional Accountants 2017, By Ettiene Retief, Head of Tax Committee, SAIPA & Professor Pieter van der Zwan, Associate Professor, Taxation, North-West University

- this section must submit the relevant material to SARS at the place, in the format (which must be reasonably accessible to the person or taxpayer) and—*
- (a) within the time specified in the request; or*
  - (b) if the material is held by a connected person referred to in subsection (2)(b), within 90 days from the date of the request, which request must set out the consequences referred to in subsection (9) of failing to do so.*
- (5) If reasonable grounds for an extension are submitted by the person or taxpayer, SARS may extend the period within which the relevant material must be submitted.*
- (6) Relevant material required by SARS under this section must be referred to in the request with reasonable specificity.*
- (7) A senior SARS official may direct that relevant material—*
- (a) be provided under oath or solemn declaration; or*
  - (b) if required for purposes of a criminal investigation, be provided under oath or solemn declaration and, if necessary, in accordance with the requirements of section 212 or 236 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).*
- (8) A senior SARS official may request relevant material that a person has available for purposes of revenue estimation.*
- (9) If a taxpayer fails to provide material referred to in subsection (2)(b), the material may not be produced by the taxpayer in any subsequent proceedings, unless a competent court directs otherwise on the basis of circumstances outside the control of the taxpayer and any connected person referred to in paragraph (d)(i) of the definition of 'connected person' in the Income Tax Act, in relation to the taxpayer.*

The TAA external short guide was developed in order to assist taxpayers to understand their obligations and entitlements under the TAA which commenced on 1 October 2011. This guide must be used for guidance only.<sup>17</sup>

SARS may direct a request for information to a taxpayer or another person, typically a third party, which has information about the taxpayer, to provide information to SARS. The request is normally made by way of a written notice and the taxpayer or person will be asked to furnish the requested information or provide a written explanation. As stated in section 46, a request for relevant material is not limited to a formal audit or investigation, but may be utilised for any purpose related to the administration of a tax Act.<sup>18</sup> This includes a simple verification of registration and other details, compliance with any obligation imposed under a tax Act, such as reporting or reportable arrangements, or a so-called 'desk audit'.<sup>19</sup>

The TAA allows SARS officials to collect relevant information using six methods, namely:

- Request for information;<sup>20</sup>
- Production of relevant material in person during an interview at a SARS office;<sup>21</sup>
- A field audit or criminal investigation at the premises of a person;<sup>22</sup>
- Formal inquiry before a presiding officer;<sup>23</sup> and
- Search and seizure.<sup>24</sup>

The failure to provide information or answer questions is both administratively and criminally sanctionable, unless a taxpayer has just cause for such failure.<sup>25</sup>

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<sup>17</sup> The TAA short guide – see page 2

<sup>18</sup> Section 3 of TAA

<sup>19</sup> The TAA external short guide –see P26

<sup>20</sup> See Section 46 of the TAA

<sup>21</sup> See Section 47 of the TAA

<sup>22</sup> See Section 48 of the TAA

<sup>23</sup> See Section 50 of the TAA

<sup>24</sup> See Section 59 of the TAA

<sup>25</sup> See sections 210 and 234 of the TAA

### 2.2.1 What is “just cause”?

Just cause is a common law right of taxpayers which protect them against the abuse of power to gather relevant material by SARS.

“Just cause” was described in the case of *Attorney-General Transvaal v Kader* as: “on the face of it “just cause” is a wider concept in its ordinary meaning than, for instance, an expression like ‘lawful excuse’, which would have been more appropriate to connote an excuse sanctioned by existing rules of law.”<sup>26</sup>

It was further stated in the case of *De Lange v Smuts* that the concept of “just cause” *must be grounded upon and consonant with the values expressed in section 1 of the 1996 Constitution and gathered from the provisions of the Constitution as a whole.*<sup>27</sup>

Thus, a taxpayer may refuse to provide relevant material requested by SARS if there is ‘just cause’ for such refusal.

As alluded to in Chapter I of this study, SARS requests relevant material in various ways, one of which is by issuing a lifestyle questionnaire. This method of gathering relevant material was discussed at length in the matter between the *Commissioner for the South African Revenue Service and Julian Brown.*<sup>28</sup>

In that case, SARS delivered a lifestyle questionnaire to Mr. Julian Brown (“Brown”) and requested that it be completed and returned within 21 business days. Brown was also informed that the information is requested in terms of section 46 (1) of the TAA.<sup>29</sup>

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<sup>26</sup> *Attorney-General Transvaal v Kader* [1991] ZASCA 135; 1991 (4) SA 727 (AD); [1991] 2 All SA 543 (A) (27 September 1991)

<sup>27</sup> *De Lange v Smuts No and Others* 1998 (7) BCLR 779 (CC), see page 794

<sup>28</sup> *Commissioner for the South African Revenue Service v Julian Brown* 2016 78 SATC 2055

<sup>29</sup> *Ibid.*, page 10

Brown failed to submit the completed questionnaire within the 21 business days and SARS approached the Court for relief, arguing that the provisions of section 46 of the TAA are peremptory and where a taxpayer is required to submit “relevant material” to SARS under that section, he or she “*must submit relevant material to SARS at the place and within the time specified in the request*”.<sup>30</sup>

Brown argued, amongst others, that the request is an invasion of the taxpayer’s privacy in that he is not compelled to produce confidential information to a SARS official.<sup>31</sup> Furthermore, Brown contended that the information sought by SARS is personal information which is protected in terms of the Constitutional right to privacy.<sup>32</sup>

The Court stated in Paragraph 55, page 26 that:

*“All that SARS is required to show is that the information sought is relevant material necessary for the administration of a tax Act”.*<sup>33</sup>

In Chapter III of this study, I will discuss the definition of “relevant material” which will show whether or not the issuing of lifestyle questionnaire by SARS is a request for relevant material and that it is for the administration of a tax Act.

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<sup>30</sup> Ibid., para 28(a)

<sup>31</sup> Ibid., para 46

<sup>32</sup> Section 14 of the Constitution of 1996

<sup>33</sup> See paragraph 55

## **2.3 Powers and Duties of SARS**

The Commissioner, through his various officers, exercises powers contained in the fiscal statutes dealing with taxpayers.<sup>34</sup> The right to establish whether the application of these powers is appropriate lies with the taxpayer. He further has the right to approach a court to determine whether those powers will withstand scrutiny vis-à-vis the Bill of Rights contained in chapter 2 of the Constitution.<sup>35</sup>

The provisions of section 6 of the TAA reiterate that the powers and duties of SARS under the TAA may be exercised for the purpose of the administration of a tax Act as defined in section 3 of the TAA. The Commissioner is given a power to delegate duties to the SARS official<sup>36</sup>. Powers and duties not specifically required by the Act to be exercised by the Commissioner or a senior SARS official may be exercised by a SARS official. Relevant material may be required by SARS for various purposes within the administration of a tax act, therefore, one has to look at the empowering provision relating to specific purpose requests to establish or determine who is authorised to act under that provision.<sup>37</sup>

## **2.4. What is administration of a Tax Act?**

It is important to understand that SARS only has a power to request the "relevant material" for the purposes of the "administration of a tax Act" (defined in section 1, read with section 3(2), of the TAA). Therefore, not only would SARS have to meet the jurisdictional requirements of section 3(2) of the TAA, but must also marry the facts at hand to any one or more of the nine subsections stipulated in section 3(2) of the TAA.<sup>38</sup>

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<sup>34</sup> Section 6 of the TAA

<sup>35</sup> Croome, B.J. (2008). Taxpayers' rights in South Africa: An analysis and evaluation of the extent to which the powers of the South African Revenue Service comply with the Constitutional rights to property, privacy, administrative justice, access to information and access to courts Unpublished DPhil Thesis, University of Cape Town. see pages 23 and 24.

<sup>36</sup> See section 10 of TAA

<sup>37</sup> section 6 of the TAA

<sup>38</sup> Tax administration: SARS' constitutional obligations and taxpayers' rights, Author: Andries Myburgh (ENSAfrica), 23 February 2016

The TAA in section 3 defines the Administration of a tax Act as follows<sup>39</sup>

*“The ‘administration’ of a tax Act means to:*

*(a) obtain full information in relation to—*

*(i) anything that may affect the liability of a person for tax in respect of a previous, current or future tax period;*

*(ii) a taxable event; or*

*(iii) the obligation of a person (whether personally or on behalf of another person) to comply with a tax Act;*

*(b) ascertain whether a person has filed or submitted correct returns, information or documents in compliance with the provisions of a tax Act;*

*(c) establish the identity of a person for purposes of determining liability for tax;*

*(d) determine the liability of a person for tax;*

*(e) collect tax and refund tax overpaid;*

*(f) investigate whether an offence has been committed in terms of a tax Act, and, if so—*

*(i) to lay criminal charges; and*

*(ii) to provide the assistance that is reasonably required for the investigation and prosecution of tax offences or related common law offences;*

*(g) enforce SARS’ powers and duties under a tax Act to ensure that an obligation imposed by or under a tax Act is complied with; provisions of a tax Act; and*

*(i) give effect to the obligation of the Republic to provide assistance under an international tax agreement*

*(j) give effect to an international tax standard...”*

Should a taxpayer decide to challenge SARS’s decision to issue a lifestyle questionnaire to that specific taxpayer in the process of gathering information, SARS would be required to prove that the lifestyle questionnaire was issued for the administration of a tax Act as stipulated above. Therefore, SARS should be able to provide reasons as to why the relevant material requested by issuing of a lifestyle questionnaire is considered relevant and in relation to which SARS responsibility listed in section 3 of the TAA.<sup>40</sup>

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<sup>39</sup> See section 3

<sup>40</sup> LAPD-LPrep-Draft-2014-76-Draft response to SCof on TLAB and TALAB 2014 at page 37

## 2.5 Conclusion

Certain of the powers conferred on the Commissioner may not, in themselves, violate the fundamental rights of taxpayers. However, the execution of such powers may constitute a violation of the taxpayer's right to administrative justice and this requires to be investigated. The Commissioner must exercise his powers reasonably.<sup>41</sup> South African taxpayers have the right to question whether the powers granted to the State in collecting tax are valid when weighed up against the Bill of Rights. If the powers conferred on the Commissioner violate the taxpayer's fundamental rights as set out in the Constitution, the limitation of rights in section 36 will establish whether this infringement is sustainable. It is submitted that taxpayers' rights are a species of human rights that taxpayers should consider in their relationship with the fiscal authority.<sup>42</sup>

It remains to be seen whether an exercise of power or duty by the Commissioner to issue a lifestyle questionnaire to a taxpayer could amount to a violation of fundamental constitutional rights of a taxpayer.

The introduction of the TAA has significantly enhanced SARS' information gathering powers as discussed above. However, these wide powers are subject to the other laws including the Constitution, PAJA, PAIA and POPI and these will be discussed in chapters four and five of this study.

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<sup>41</sup> Section 195 of the Constitution of 1996, Basic values and principles governing public administration

<sup>42</sup> Croome, B.J. (2008), *supra* at page 24.

## **Chapter III: The definition of “relevant material” in terms of TAA.**

### **3.1 Introduction**

This chapter focuses on the definition of the term ‘relevant material’ as defined in the TAA. Specifically, this chapter seeks to establish what constitutes ‘relevant material’.

The Tax Administration Laws Amendment Bill (“TALAB”) in clause 37(b) proposed that the definition of "relevant material" in section 1 of the TAA will in future provide as follows:

*"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"*<sup>43</sup>

Previously, the definition of "relevant material" did not refer to “in the opinion of SARS”. The rationale for the above amendment as set out in the Explanatory Memorandum on the Objects of the TALAB<sup>44</sup> is to prevent protracted disputes about the information which SARS believes it is entitled to under the information gathering powers contained in the TAA.

The Explanatory Memorandum<sup>45</sup> points out that the proposed amendment seeks to clarify that the statutory duty to determine the relevance of any information, document or thing for the purposes of, for example, a verification or audit is that of SARS and the term "foreseeable relevance" does not imply that taxpayers may unilaterally decide relevance and refuse to provide access thereto. SARS indicates that in practice taxpayers are deciding what information should be submitted to SARS and what information should not be so provided.<sup>46</sup>

The Explanatory Memorandum indicates that SARS received comments that SARS should provide reasons for each request for information, explaining why the material requested is considered relevant.<sup>47</sup> SARS indicates that this is impractical when auditing taxpayers and referred to the case of Australia and New Zealand Banking Group

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<sup>43</sup> Tax Administration Laws Amendment Bill, 2014 at page 23

<sup>44</sup> Memorandum on the objects of the Taxation laws Amendment Bill, 2014 at paragraph 2.37.2, page 42

<sup>45</sup> Supra

<sup>46</sup> Ibid., page 42, para 2.37.2

<sup>47</sup> Ibid., at page 42

Limited v Konza, [2012] FCA 196<sup>48</sup>, which SARS relies on as a basis not to justify why material requested, is in fact relevant.<sup>49</sup>

The court decided in the said case that:

*“It is . . . for the recipient to decide for himself, difficult though the task may be, which of the documents answer the description. If his decision is wrong he exposes himself to prosecution and penalty. The existence of this hazard is not a sufficient basis for the conclusion that the section requires the Commissioner to give a notice in such terms as would enable the recipient on reading it and on examining the documents in his custody or control to determine whether they fall within the ambit of the Commissioner’s powers. To so hold would be to impose an impossible burden on the Commissioner. In many, if not most, cases he will be unaware of the contents of the documents of which he seeks production.”*

### **3.1.1 Definition of ‘relevant material’ in terms of the TAA**

Section 1 of the TAA defines “relevant material as follows:

*‘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’<sup>50</sup>*

The definition did not change from the proposed one in the TALAB. The next paragraph will focus on the words “foreseeably relevant”, as it forms part of the definition of relevant material. Many authors feel that the definition of ‘relevant material’ is wide. TALAB provides a further definition, that of ‘foreseeably relevant’.

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<sup>48</sup> Australia and New Zealand Banking Group Limited v Konza, [2012] FCA 196

<sup>49</sup> Amendments to the definition of relevant material for purposes of the Tax Administration Act, Author: Dr Beric Croome (Edward Nathan Sonnebergs Inc.), 09 January 2015

<sup>50</sup> See section 1 of the TAA

### 3.1.2 What is foreseeably relevant?

The Explanatory Memorandum<sup>51</sup> indicates that according to the literature, which is not cited in the Explanatory Memorandum, the test of what is foreseeably relevant for domestic tax application would have a low threshold and the application of what is "foreseeably relevant" follows the following broad principles:

- Whether at the time of the request there is a reasonable possibility that the material is relevant to the purpose sought;
- Whether the required material, once provided, actually proves to be relevant is immaterial;
- An information request may not be declined in cases where a definite determination of relevance of the material to an ongoing audit or investigation can only be made following receipt of the material;
- There need not be a clear and certain connection between the material and the purpose, but a rational possibility that the material will be relevant to the purpose; and
- The approach is to order production first and to allow a definite determination to occur later.<sup>52</sup>

The definition still remains wide even though from the above principles it can be surmised that the power to request information and the relevance thereof remains with SARS. Notwithstanding this there still has to be a causal nexus between the information being requested and the taxpayers' affairs.

From the above, it would seem that SARS has been afforded more powers than those afforded to the taxpayers. The discretion to determine whether information is relevant is intrusted to SARS. In addition, SARS may request any information that it considers foreseeably relevant as listed in section 3 of the TAA, under the definition of 'Administration of tax Act'.

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<sup>51</sup> Memorandum, supra at page 42, para 2. 37. 21

<sup>52</sup> *Dr Beric Croome, Supra.*

### **3.2 Interpretation of words used by the legislature**

Legislation is generally interpreted based on the grammatical and ordinary meaning of the words of the law.<sup>53</sup>

This literal approach to interpretation was described in the judgment of *Commissioner for Inland Revenue v Simpson*:

*“In a taxing Act one has to look merely at what is clearly said. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing to be implied. One can only look fairly at the language used”.*<sup>54</sup>

It was further held in the case of *Venter v Rex* that:

*“...the court may depart from the ordinary effect if the words to the extent necessary to remove the absurdity and to give effect to the true intention of the legislature.”*<sup>55</sup>

It is well recognized that the interpretation of fiscal legislation (by Courts of law as well as by legal practitioners, the SARS) is an important subject that affects the lives of all citizens of the Republic of South Africa as well as the taxpayer base of the country<sup>56</sup>.

It follows that the term ‘relevant material’ must be interpreted to give the true meaning of the words of the legislature.

### **3.3 The meaning of the term ‘relevant material’ in its ordinary English meaning**

As highlighted above, the term ‘relevant material’ is defined in section 1 of the TAA. However, in addition to the definition in the TAA, the dictionary meaning will be used to further give more detailed explanation of the terms.

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<sup>53</sup> Analysis: Interpretation of tax law, 1 February 2015 by Pieter van der Zwan an Associate Professor and Programme Leader for Taxation at North-West University

<sup>54</sup> *Commissioner for Inland Revenue v Simpson* 1949(4) SA 678 at page 695

<sup>55</sup> <https://www.accountancysa.org.za/analysis-interpretation-of-tax-law>

<sup>56</sup> Swanepoel P.A (2012). An analysis of the purposive approach to the interpretation of South African fiscal legislation. Unpublished LLM Dissertation , University of Pretoria, at page 1.

‘**relevant**’ in the Oxford English dictionary is defined as follows:<sup>57</sup>

1. *Closely connected or appropriate to what is being done or considered.*

1.1 *Appropriate to the current time, period, or circumstances; of contemporary interest.*

‘**material**’ in the Merriam Webster dictionary is defined as follows:<sup>58</sup>

1. a (1): *“Relating to, derived from or consisting of matter”*

The major objective of this chapter is to *inter alia* show whether the information requested in the lifestyle questionnaire constitute ‘relevant material’ as defined in the TAA.

From the English dictionary of the two terms, it may be argued that the ‘lifestyle questionnaire’ is appropriate and contains ‘material’ as defined or information required by SARS for the purposes of determining the taxpayer’s tax liability and/or the fulfilment of one of the sub-sections of the definition of administration of a Tax in section 3 of the TAA.

In the case of Commissioner for South African Revenue Service v Julian Brown, the court emphasised that *the wording of section 46 of the TAA is explicit and unambiguous and simply does not allow for any other interpretation.*<sup>59</sup>

SARS may be in a position to determine the taxpayer’s tax liability when furnished with the relevant material. Thus, the information requested through the lifestyle questionnaire includes the income and expenses are arguably foreseeable relevant material as defined in section 1 of TAA.

The taxpayer, in terms of section 46, must submit relevant material to SARS at a place, in the format and within the time specified in the request.<sup>60</sup>

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<sup>57</sup> <https://en.oxforddictionaries.com/definition/relevant>, accessed 13 April 2018

<sup>58</sup> <https://www.merriam-webster.com/dictionary/material>, accessed 23-06-2018

<sup>59</sup> Brown. Supra at para 39

<sup>60</sup> Section 46(4) of the TAA

### 3.4 Conclusion

Previously, a person could refuse to provide SARS with material requested in terms of section 46 on the basis that he did not consider the material to be relevant. The (TALAA) has now, retrospectively to 1 October 2012, amended the definition of “relevant material” in the TAA to mean “any information, document or thing that in the opinion of SARS is foreseeably relevant for the administration of a tax Act...”<sup>61</sup>

It is therefore no longer within a taxpayer’s discretion to decide whether material is relevant. The Explanatory Memorandum related to the TALAA states that the reason for this amendment is to “prevent protracted disputes around entitlement of information and the consequent waste of resources... the term foreseeable relevance does not imply that taxpayers may unilaterally decide relevance and refuse to provide access thereto, which is what is happening in practice.”<sup>62</sup>

It would seem that the onus on SARS is simply to show that the information requested by it is foreseeably relevant and is being requested for the Administration of the tax Act as defined in the TAA.<sup>63</sup>

According to the Memorandum, the fact that SARS will henceforth determine what constitutes "relevant material", does not, however, leave the taxpayer without remedies, an aggrieved taxpayer may still approach the office of Tax Ombud, Office of the Public Protector etc.<sup>64</sup>

Clearly the intention is to introduce a purely subjective determination (by SARS) of what constitutes "relevant material". Whether this solves SARS’s problem is debatable.

Based on the above discussion, it can be seen that the information gathered by way of ‘lifestyle questionnaire’ falls within the definition of relevant material as defined in section 1 of the TAA.

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<sup>61</sup> Memorandum, supra at page 42

<sup>62</sup> [https://www.saica.co.za/integritax/2015/2419.\\_Relevant\\_material.htm](https://www.saica.co.za/integritax/2015/2419._Relevant_material.htm)

<sup>63</sup> Brown, supra, para 55

<sup>64</sup> Memorandum, supra at page 43 para 2.37.2.3

## **Chapter IV: The Constitution**

### **4.1 Introduction**

This chapter deals with the Constitution<sup>65</sup> and gives a brief overview of the sections of the Constitution which have an impact on the rights of taxpayers and the duty of the Commissioner and SARS officials.

The Constitution was approved by the Constitutional Court on 04 September 1996. It was signed by then President Nelson Rholihlahla Mandela in Sharpeville, Gauteng on 10 December 1996 and became effective on 4 February 1997.<sup>66</sup>

Chapter two of the Constitution deals with the Bill of Rights, a cornerstone of the South African democracy.

Section 7<sup>67</sup> of the Constitution states that:

- (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.*
- (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.*
- (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.*

Thus, all taxpayer's enjoy the protection of their fundamental rights which SARS as an organ of state must respect, protect, promote and fulfil.

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<sup>65</sup> Constitution of 1996

<sup>66</sup> <http://www.sahistory.org.za/dated-event/mandela-signs-sa-constitution-law>

<sup>67</sup> Section 7 of the Constitution of 1996

## 4.2 The Bill of Rights

The Bill of Rights applies to all law and is binding upon the legislature, the executive and the judiciary. A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.<sup>68</sup> The Bill of Rights applies to all organs of states including SARS. SARS is an organ of state, and therefore must respect the rights contained in the Bill of Rights.<sup>69</sup>

Some of the fundamental rights contained in the Bill of Rights include the right to equality,<sup>70</sup> the right to human dignity,<sup>71</sup> right to privacy,<sup>72</sup> right to property,<sup>73</sup> right to access to information,<sup>74</sup> right to just administrative action,<sup>75</sup> and right to access to courts.<sup>76</sup>

For the purpose of this study, the focus will be on the right to equality, right to human dignity, right to privacy, right to property and the right to access to courts. These will be compared to the information gathering powers of SARS in terms of the TAA in order to ascertain whether those powers may violate these fundamental constitutional rights. The Constitutional right to access to information and right to just administrative action will be dealt with in chapter five of this study.

These rights are not absolute and are subject to the limitation of rights provisions contained in section 36 of the Constitution. The limitation of rights provision stipulates that rights contained in the Bill of Rights may be limited only in terms of the law of general application that is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom.<sup>77</sup>

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<sup>68</sup> Section 8 (1) and (2) of the Constitution of 1996

<sup>69</sup> Section 2 of SARS Act.

<sup>70</sup> Section 9 of the Constitution of 1996

<sup>71</sup> Ibid Section 10

<sup>72</sup> Ibid Section 14

<sup>73</sup> Ibid Section 25

<sup>74</sup> Ibid Section 32

<sup>75</sup> Ibid Section 33

<sup>76</sup> Ibid Section 34

<sup>77</sup> Ibid Section 36

The rights listed above will be discussed together with circumstances in which these rights may be limited in terms of the Constitution. The discussion will seek to show the impact on the rights of taxpayers and the duty of the Commissioner and SARS officials.

In his book titled, *Taxpayer's Rights in South Africa*, B. Croome states that:

*“Tax administrations are given wide powers to determine the tax base, to verify information provided by taxpayers and third parties and to collect tax due. There 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 individual taxpayer...”*<sup>78</sup>

He went further to state that:

*“ it is therefore fitting to consider whether the powers granted to the Commissioner in the various fiscal statute conform with the requirements set out in the Constitution, Taxpayers are invariably in an unequal relationship with the fisc in that it compels them by statute to contribute to the state's coffers. They are therefore not willing participants in the tax system. Bentley submits that if taxpayers believe that they receive fair treatment and there is no violation of their rights, there is greater compliance with the tax system...”*<sup>79</sup>

Both paragraphs mentioned above confirm that SARS is constitutionally mandated to collect tax due and that information is crucial in achieving this constitutional mandate and/or determining the correct tax liability. However, in the process of gathering required information, some fundamental constitutional rights of taxpayer's may be infringed upon and a balance between those rights and the duties and powers of SARS need to be maintained.

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<sup>78</sup> Taxpayers' Rights in South Africa, B Croome at para 2.7, page 14

<sup>79</sup> Taxpayers Rights in Australia twenty years after the introduction of the Taxpayers' Charter

### 4.3 Supremacy of the Constitution

South Africa is a Constitutional state and the Constitution of the Republic of South Africa is the supreme law.<sup>80</sup> Law or conduct inconsistent with the Constitution is invalid and obligations imposed by the Constitution must be fulfilled. Both government and taxpayers must adhere to the Constitution, which is the tool that aims to balance government and taxpayers' powers, rights and responsibilities.<sup>81</sup>

The appeal court in the *Simelane judgment* reminded us that every citizen and every arm of government (which includes the legislature, executive and judiciary) ought rightly to be concerned about constitutionalism and its preservation. The rule of law, we are reminded, is a central and founding value and no-one is above the law.<sup>82</sup>

Thus, taxpayers and SARS need to be concerned about constitutionalism which means that South Africa is run according to the Constitution, a supreme law of the country.

All legislation including the TAA, may be challenged in terms of the Constitution, in a court, and maybe changed or scrapped if it is found to be inconsistent with the Constitution.

In order for SARS to function optimally, a balance between the rights of taxpayer's in terms of the Constitution and the powers of SARS needs to be struck. Failing which, SARS may not be able to achieve its Constitutional mandate.

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<sup>80</sup> The preamble read with section 1 and section 2 of the Constitution of 1996

<sup>81</sup> The preamble read with section 1 and Section 2

<sup>82</sup> <http://www.nortonrosefulbright.com/knowledge/publications/67938/supremacy-of-constitution> by Patrick Bracher, accessed 22 June 2018.

#### 4.4 The right to Equality

Section 9 of the Constitution states that:

- (1) Everyone is equal before the law and has the right to equal protection and benefits of the law.*
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.*
- (3) The state may not unfairly discriminate directly or indirectly against anyone on the one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.*

In exercising its statutory power, SARS needs to be mindful of equality before the law, the equal rights and freedom enjoyed by the taxpayers and may not unfairly discriminate against any taxpayer when deciding to issue a lifestyle questionnaire.

The constitutional entrenchment of the right to equality before the law is applicable to tax legislation no less than to other legislation. However, sight must not be lost of the fact that the general limitation clause contained in section 36 of the Constitution remains relevant in providing that the rights articulated in the Bill of Rights may be limited ‘in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’.<sup>83</sup>

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<sup>83</sup> <https://www.mylexisnexis.co.za/Index.aspx> Silke on Tax Administration 3.9 The Right to Equality before the law, accessed 22 June 2018

Thus, SARS as an organ of state is expected to respect and protect rights contained in the Bill of rights and may be called upon to prove that a lifestyle questionnaire was issued against a background good enough to limit the taxpayer's right to equality within the context of a constitutional democracy.

Thus, it must be established whether the taxpayer may argue that the SARS information gathering powers, through the issuing of 'lifestyle questionnaire' amounts to unfair discrimination against the taxpayer. Accordingly, SARS may not subject certain taxpayers to the completion of lifestyle questionnaires without a good enough reason, as that may be viewed as unfair discrimination against that taxpayer.

In the context of the right to equality in terms of section 8 of the interim Constitution as it impacted on s 21 of the Insolvency Act, Goldstone J said in *Harksen v Lane NO*<sup>84</sup>:

*'[I]t may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on s 8 of the interim Constitution. They are:*

- (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.*
- (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
  - (i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.**

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<sup>84</sup> *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC)

*(ii) If the differentiation amounts to ‘discrimination’, does it amount to ‘unfair discrimination’? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.*

If at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2).

*(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 33 of the interim Constitution).’*

Thus, based on the three cases above, a taxpayer will have to satisfy the Court that issuing a lifestyle questionnaire requesting the taxpayer to reveal information to SARS amounts to unfair discrimination to the taxpayer and that limitations in section 36 of the Constitution do not apply.

In the case of *Pharmaceutical Manufacturers Association of SA*<sup>85</sup>, the Constitutional Court held, per Chaskalson P, that:

*“It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action”.*

In the same case, Chaskalson went on to say in para 86 that:

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<sup>85</sup> *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) on 85 & 86.

*“The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle.”*

Thus, SARS as an executive arm of government, in exercising its power must be able to demonstrate that the decision to issue a lifestyle questionnaire is not arbitrary but rationally related to the purpose for which the power was given in terms of the TAA. Failing which, such decision may not pass the constitutional challenge.

In *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works*,<sup>86</sup> the appellant had applied for the setting aside of a ministerial decision to expropriate land belonging to it on the basis that the decision to do so was ‘irrational’. The Supreme Court of Appeal held that, *‘In order to succeed, [the appellant] must demonstrate that the decision served no legitimate governmental purpose’ and affirmed that, ‘Fair administrative procedure depends on the circumstances of each case’.*

In the circumstance, SARS would have to demonstrate that the decision to issue a lifestyle questionnaire served a legitimate governmental purpose as an executive arm of government.

The right to equality is a valuable right to taxpayers as it should ensure that taxpayers in similar circumstances pay a similar amount of tax. However, the state is required to raise funds from taxpayers to meet its constitutional obligations and there may be occasions where policy choices made by government may result in taxpayers taking the view that they are being subjected to unwarranted discrimination.<sup>87</sup>

Accordingly, it follows that taxpayers issued with the lifestyle questionnaire may challenge that decision where there are reasonable grounds to believe that they are subjected to unwarranted discrimination by SARS.

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<sup>86</sup> In *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2011] ZASCA 246

<sup>87</sup> Beric Croome, *Taxpayers’ Rights in South Africa*, page 119

#### 4.5 The right to human dignity

Section 10 of the Constitution states that:

*“Everyone has inherent dignity and the right to have their dignity respected and protected”.*

In the case of *S v Makwanyane*<sup>88</sup> the Court stated on par 328 that:

*“The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in the Bill of Rights”*

SARS, as an organ of state, is bound to uphold the rights of taxpayers in terms of the Constitution. The right to human dignity like all the other rights must be respected<sup>89</sup> by SARS when dealing with taxpayers.

A taxpayer who believes that his or her right to dignity has been violated by SARS when requested to provide relevant material through completing a lifestyle questionnaire can challenge this decision in the Court of law. It is there that, SARS will be required to convince the court (by providing acceptable reasons for the issuing of a lifestyle questionnaire) that in exercising its statutory power to obtain relevant material, the taxpayer’s right to dignity was not violated or that the right is subject to the limitations of section 36 of the constitution, which deals with the limitation of rights contained in the Bill of Rights in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society. Since the TAA is one of the laws of general application as it applies to all taxpayers, SARS may succeed in justifying the reasons for issuing a lifestyle questionnaire.

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<sup>88</sup> *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995)

<sup>89</sup> Section 2 of the Constitution, 1996

## 4.6 The right to privacy

Section 14 of the Constitution states that:

*Everyone has the right to privacy, which includes the right not to have-*

- (a) Their person or home searched;*
- (b) Their property searched;*
- (c) Their possessions seized; or*
- (d) The privacy of their communications infringed.*

The right to privacy includes the right to be free from intrusion and interference by the State and others in one's private life and, from a tax perspective, comes strongly to the fore where revenue authorities demand that the taxpayer produce information or documents, or demand the right to search the taxpayer's premises. SARS officials have a statutory duty to preserve secrecy in regard to information that comes to their knowledge in the course of performing their duties.<sup>90</sup>

In the case of *Bernstein and Others v Bester NO and others*, the court stated that:<sup>91</sup>

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

It appears from the above that the constitutional right to privacy in terms of section 14 of the Constitution builds upon the common law right to privacy and that SARS, as an organ of state, has a duty to protect and respect the taxpayer right to dignity when gathering relevant material.

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<sup>90</sup> Silke on South African Income Tax by Alwyn De Koker and RC Williams, Memorail Edition, Volume IV, [August 1965] at page 22-12.

<sup>91</sup> *Bernstein and Others v Bester No and Others (CCT23/95)[1996]ZACC 2;1996(4) BCLR449;1996(2) SA 751 (27 March 1996)*. At paragraph 68

In the same case, the Court went on to say on paragraph 77:

*“A very high level of protection is given to the individuals 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 individuals activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation”<sup>92</sup>*

SARS, as a public authority, has at all times taken note of the fact that only when the person moves into a public sphere, his or her personal right to privacy may be subject to reasonable and justifiable limitations<sup>93</sup>. Otherwise, any law authorising the invasion of this ‘intimate core of privacy’ would be unconstitutional and SARS may not succeed in convincing the court that its decision to issue a lifestyle questionnaire is justifiable.

In *Mahajan v Chairperson, North West Gambling Board*<sup>94</sup>, it was held that:

*“the right to privacy extends beyond the inner sanctum of the home. This principle, it held further, was firmly established by in Bernstein v Bester which challenged, in part, searches and seizures of people involved in the winding-down of a company. In that case Ackermann J described what can be seen as a series of concentric circles ranging from the core most protected realms of privacy to the outer rings that would yield more readily to the rights of other citizens and the public interest”.*

Generally, it shall be expected that all taxpayers will be concerned with their privacy when they have to complete a ‘lifestyle questionnaire’ as requested by SARS. This is due to the fact a lifestyle questionnaire requires the taxpayer to reveal or disclose to a SARS official everything and anything about the taxpayer’s financial status and what the taxpayer spends his or her money on e.g. assets, liabilities, expenses and income.

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<sup>92</sup> Ibid., paragraph 77

<sup>93</sup> Section 36 of the Constitution of 1996

<sup>94</sup> In *Magajane v Chairperson, North West Gambling Board* 2006 10 BCLR 1133 (CC)

The taxpayer will have to evaluate whether or not the right to privacy may be justifiably limited in terms of the Constitution before challenging SARS decision to issue a lifestyle questionnaire. The right to privacy may be infringed upon by the completion of a lifestyle questionnaire, therefore, SARS would have to justify or show that there are good enough reasons to limit the right to privacy in terms of section 36 of the Constitution.

#### **4.7 The right to property**

In terms of section 25 of the Constitution, no one may be deprived of property except in terms of law of general application.<sup>95</sup>

Law of general application is the law that applies to everybody fairly and equally. TAA is one of the laws of general application as it applies to all taxpayers. The question that remains to be answered is whether a request for relevant material by SARS is a deprivation of taxpayer of his or her property. The definition of property is very wide and includes several rights of the taxpayer and provides that property is not only limited to land.<sup>96</sup>

Currie & De Waal examines the term 'property' and expresses the view that it has at least three possible meanings:

*'first the clause could refer to physical property itself...second the term could refer to , a set of legal rules governing the relationship between individuals and physical property- what the common law terms rights...third the term could refer to any relationship or interest having an exchange value.'*<sup>97</sup>

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<sup>95</sup> Section 25(1) of the Constitution of 1996

<sup>96</sup> Section 25 (4) (b) of the Constitution of 1996

<sup>97</sup> Bill of Rights hand book 5<sup>th</sup> Edition (Juta 2005) at page 537

In the *First National Bank*<sup>98</sup> case the Court defined “property” as follows:

*‘property includes corporeal property, rights related to property or an interest that’s has an exchange value...’*

SARS would have to establish whether the information contained in the lifestyle questionnaire falls within the definition of property.

In the case of *First National Bank t/a Wesbank v The Commissioner for SARS*<sup>99</sup>, the Constitutional Court had to decide whether section 114<sup>100</sup> of the Customs and Excise<sup>101</sup> Act was inconsistent with the Constitution. It was held that:

*“under the circumstances the conclusion is unavoidable that the infringement by section 114 of section 25(1) is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The provision is accordingly constitutionally invalid.”*<sup>102</sup>

‘[T]he meaning of s 25 has to be determined, in each specific case, within an interpretative framework that takes due cognisance of the inevitable tensions which characterise the operation of the property clause. This tension between individual rights and social responsibilities has to be the guiding principle in terms of which the section is analysed, interpreted and applied in every individual case.’<sup>103</sup>

Property may be expropriated only in terms of law of general application for a public purpose or in the public interest and subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.<sup>104</sup>

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<sup>98</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner for South African Revenue Service and another, First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 64 SATC 471, 28 August 2001.

<sup>99</sup> *Supra* at paragraph 55-56

<sup>100</sup> Allows the Commissioner to search and seize goods without a warrant issued by the court

<sup>101</sup> No. 91 of 1964

<sup>102</sup> *First National Bank*, page 80

<sup>103</sup> *First National Bank*, page 493, of 64 SATC 471

<sup>104</sup> *First National Bank* page 473 of 64 SATC 471

It was held in *Deutschmann NO and another; Shelton v Commissioner for the South African Revenue Service* that:

*‘With regard to the alleged deprivation of property, the Court emphasised that the constitutional right prevents the arbitrary deprivation of property. The fact that the granting of an application for a warrant requires a formal application supported by information supplied under oath and the exercise of a discretion by a judge negated the view that there was arbitrary deprivation of property involved.’*<sup>105</sup>

A “lifestyle questionnaire” issued by SARS to the taxpayer could lead to a contravention of right to property. The information supplied by the taxpayer in the lifestyle questionnaire includes assets, liabilities, income and expenses of the taxpayer and may be used by SARS to calculate the taxpayer’s tax liability which could result to a financial deprivation in the form of taxes payable to SARS with possible penalties and interests. Thus, it becomes crucial that SARS must be able to justify its reasons for gathering information by way of a lifestyle questionnaire should the taxpayer decide to challenge this decision in court.

The right to property like all the other rights contained in the Bill of Rights is not absolute, it is subject to limitations in terms of section 36 of the Constitution.

#### **4.8 Right to Access to courts**

Section 34 of the Constitution provides as follows:

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

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<sup>105</sup> *Deutschmann NO and another; Shelton v Commissioner for the South African Revenue Service* [2000] 1 All SA 198 (E), 9 December 1999

In the case of *Chief Direko Lesapo v North West Agricultural bank*, Mogoeng J, held that this section embodies a fundamental rule of natural justice, according to which everyone has the right to have a dispute settled by a court of law or an unbiased, independent and impartial tribunal, where appropriate; and nobody should be allowed to take the law into his or her own hands or to usurp the functions of a court of law.<sup>106</sup>

There are a number of various Courts in South Africa. Section 34 of the Constitution gives every citizen the right to access to all these Courts which includes Constitutional Court, Supreme Court of Appeals, High Courts, Magistrate Courts and Tax Courts for tax related matters.

No law may prevent a taxpayer who wishes to challenge SARS decision from having access to a court of law to have a dispute resolved or action reviewed.

This section serves as a remedy to a taxpayer who is aggrieved by SARS request to complete a lifestyle questionnaire to approach any of the above mentioned Courts for relief.

#### **4.9 Limitations**

Constitutional rights in terms of the Bill of Rights are not absolute. This means the application and scope of all these rights may in certain instances be limited.

Section 36 of the Constitution states that:

*(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—*

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<sup>106</sup> *Lesapo v North West Agricultural Bank and Another* (CCT23/99) [1999] ZACC 16; [2000] (1) SA 409; [1999] (12) BCLR 1420 (16 November 1999)

- (a) the nature of the right;*
- (b) the importance of the purpose of the limitation;*
- (c) the nature and extent of the limitation;*
- (d) the relation between the limitation and its purpose; and*
- (e) less restrictive means to achieve the purpose.*

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

The meaning of the law of general application and its implications in the tax arena will be discussed further below.

It was held in the case of *S v Makwanyane and Another* that:

*‘The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of section 33(1). The fact that different rights have different implications for democracy, and in the case of our Constitution, for "an open and democratic society based on freedom and equality", means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests.’<sup>107</sup>*

It follows that the constitutional the rights discussed above have different implications for democracy. Therefore, SARS must be in a position to discharge the onus that each of the above mentioned rights is not violated by the issuance of lifestyle questionnaire or if the right has been violated, the limitations in terms of section 36 of the Constitutions are applicable.

*In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom*

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<sup>107</sup> *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; [1995] (2) SACR 1 (6 June 1995) Paragraph 104, at page 69

*and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of section 33(1), and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, "the role of the Court is not to second-guess the wisdom of policy choices made by legislators."<sup>108</sup>*

Should SARS be challenged by an aggrieved taxpayer on the grounds that a request to issue a lifestyle questionnaire is in violation of fundamental rights contained in the Bill of Rights, SARS must be able to provide enough valid grounds for the limitation of the rights taking into account the nature of the right that is being limited, its importance, the importance of the right and the purpose of the limitation.<sup>109</sup>

Therefore, reasons for the issuance of lifestyle questionnaire to a taxpayer would have to be tested against the constitutional rights of the taxpayer to justify the limitation. It would be difficult to argue that legislation which requires a taxpayer to submit tax returns and other documents to SARS containing personal and business information, and follow-up requests from SARS for further information relevant to the taxpayer's tax affairs is not, in principle, justifiable in terms of this provision.<sup>110</sup>

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<sup>108</sup> Ibid.

<sup>109</sup> Section 36 of the Constitution of 1996

<sup>110</sup> <https://www-mylexisnexus-co-za.ezproxy.uct.ac.za/Index.aspx#-> Constitutional Right to privacy-general

#### 4.9.1 What does “law of general application” mean?

The requirement “of law of terms of general application” contained in section 36(1) of the Constitution includes legislation, common law and customary law.<sup>111</sup>

“This requirement means that any limitation must be authorised by a law that is formally valid in the sense that it is properly enacted and promulgated. If no formally valid law can be identified that authorises a particular limitation, the limitation is unjustifiable and there is no need to investigate whether the limitation is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.<sup>112</sup>

It was held in the case of *Premier of Mpumalanga v Executive Committee* that:

*“I conclude that in the circumstances of this case the decision by the second applicant to terminate the payment of bursaries to members of the respondent with actual retroactive effect and without affording those members an effective opportunity to be heard was a breach of their right to procedural fairness enshrined in section 24(b) of the interim Constitution. It is not necessary, therefore, to consider the merits of the respondent’s reliance on the provisions of section 24(d) of the interim Constitution. In this case, in relation to the breach of section 24(b), no question of justification in terms of section 33 can arise as the decision taken by the second applicant did not constitute “a law of general application” as required by that provision<sup>113</sup>”*

This suggests that the limitation in terms of section 36<sup>114</sup> applies to law of general application only. It is thus possible that a taxpayer can successfully challenge SARS administrative decision making process and conduct when applying fiscal legislation.

*Less clearly justifiable in terms of s 36 – and as yet untested in the courts – is SARS’ practice of requiring selected taxpayers to complete a so-called ‘lifestyle questionnaire’ which requires them to disclose, inter alia, details of their expenditure on such things as*

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<sup>111</sup> <https://www.mylexisnexis.co.za/Index.aspx#expired>- The requirement “only in terms of law of general application”

<sup>112</sup> <https://www.mylexisnexis.co.za/Index.aspx#expired>

<sup>113</sup> *Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal (CCT10/98) [1998] ZACC 20; 1999 (2) SA 91; 1999 (2) BCLR 151 (2 December 1998), para 42*

<sup>114</sup> Of the Constitution of 1996

*holidays, school fees and food. SARS has sought to justify these questionnaires as being reasonable and within its powers in terms of (the now-repealed) s 74A of the Income Tax Act where the particular taxpayer's standard of living is not consonant with his reported income or where an increase in the taxpayer's net assets is not matched by an increase in disclosed income.*<sup>115</sup>

Since the definition of relevant material has been widened under the TAA when compared to the now repealed section 74A of the income tax Act<sup>116</sup>, it is important to establish whether the limitation in terms of section 36 of the constitution may justify the issuing of lifestyle questionnaire under the TAA regime.

#### **4.10 Conclusion**

As stated in section 39(2) of the Constitution, when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights<sup>117</sup>

The Commissioner must exercise his powers reasonably. South African taxpayers have the right to question whether the powers granted to the state in collecting tax are valid when weighing up against the Bill of Rights. If the powers conferred on the Commissioner violate the taxpayer's rights as set out in the Constitution, the limitation of rights in section 36 will establish whether this infringement is sustainable. The Taxpayer's rights are a species of human rights that taxpayers should consider in relationship with the fiscal authority.<sup>118</sup>

In order for the limitation to be reasonable and justifiable, it should not invade rights any further than it needs to in order to achieve its purpose. It must be shown that the law in question serves a constitutionally accepted purpose and that there is sufficient proportionality between the harm done by the law (the infringement of the right) and the benefit it attempts to achieve (the purpose of the law).<sup>119</sup>

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<sup>115</sup> Silke on Tax Administration- S3.12 The Right to privacy limitation

<sup>116</sup> No 58 of 1962

<sup>117</sup> Section 39(2) of the Constitution of 1996

<sup>118</sup> The Taxpayer's Rights is South Africa, B. Croome at page 14 para 2.7

<sup>119</sup> Currie & De Waal, 2005, p.176

A taxpayer who is requested to complete a lifestyle questionnaire and wishes to challenge SARS' decision to issue the lifestyle questionnaire needs to be aware of his or her rights in terms of the Constitution and equally keep in mind the limitation of those rights in terms of section 36 of the Constitution. Most fiscal legislation e.g TAA can pass the section 36 limitation of rights clause on the basis that it is reasonable and justifiable in an open and democratic society. SARS as an organ of state must respect, protect and promote the rights<sup>120</sup> of taxpayers as contained in the Bill of Rights and SARS needs to ensure the effective and efficient collection of taxes.<sup>121</sup>

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<sup>120</sup> Section 7 of the Constitution of 1996

<sup>121</sup> The preamble to the SARS Act

## **Chapter V: The provisions of the Promotion of Administrative Justice Act, the Promotion of Access to Information Act and the Promotion of Protection to Information Act.**

### **5.1 Introduction**

This chapter examines the provisions of the Promotion of Administration Justice Act (PAJA),<sup>122</sup> the Promotion of Access to Information Act<sup>123</sup> (PAIA) and the Protection of Personal Information Act<sup>124</sup> (POPI) as they may impact on the powers of SARS to request relevant material in terms of TAA.

The Constitution<sup>125</sup> confers the three procedural rights on taxpayers, the right to just administrative action,<sup>126</sup> the right of access to information<sup>127</sup> and right of access to Courts<sup>128</sup> which was discussed in chapter IV above.

#### **5.1.1 Promotion of Administrative Justice Act:**

The right to administrative justice under the Constitution is given effect to in the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) (PAJA). PAJA essentially mandates, in the context of tax administration, that tax administrative actions that materially and adversely affect taxpayer rights must, in the absence of exceptions provided for in PAJA, adhere to fairness requirements such as—

- Prior notice of the intended decision;
- A prior hearing before the decision is taken;
- Clear grounds for the decision; and
- Adequate notice of the right to request reasons for the decision<sup>129</sup>.

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<sup>122</sup> No. 3 of 2000

<sup>123</sup> No. 2 of 2000

<sup>124</sup> No. 4 of 2013

<sup>125</sup> Constitution, 1996

<sup>126</sup> Section 33 of the Constitution of 1996

<sup>127</sup> Ibid Section 32

<sup>128</sup> Ibid Section 34

<sup>129</sup> LAPD-TAadm-G1-Short Guide to the Tax Administration Act 2011, page 10.

PAJA was enacted pursuant to the provisions of section 33 which requires the enactment of national legislation to give effect to the right to administrative action. PAJA therefore governs the exercise of administrative action in general. All decision-makers who are entrusted with the authority to make administrative decisions by any statute are therefore required to do so in a manner that is consistent with PAJA. The effect of this is that statutes that authorise administrative action must now be read together with PAJA unless, upon a proper construction, the provisions of the statutes in question are inconsistent with PAJA.<sup>130</sup>

This study intends to show whether the decision taken by SARS to issue a ‘lifestyle Questionnaire’ in terms of section 46 of the TAA as a method of gathering relevant material amounts to an administrative action that materially and adversely affect the taxpayer’s constitutional rights or is inconsistent with PAJA.

### **5.1.2 Right to just administration Action**

Section 33<sup>131</sup> of the Constitution states that:

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

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<sup>130</sup> Zondi v MEC for Traditional and Local Government Affairs (CCT 73/03) [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) (15 October 2004) at para 101.

<sup>131</sup> Constitution, 1996

In the case of *Sasol Oil (Pty) Ltd v Metcalfe* No, <sup>132</sup> Willis J held that:

*'The purpose of PAJA is plainly to give effect to the rights, constitutionally enshrined in the Bill of Rights of the Constitution, to just administrative action. It is constitutional legislation. It is triumphal legislation...PAJA is not general legislation in the sense that it is some generally useful tool. It is, rather 'universal' legislation: it confers rights upon all who live in South Africa insofar as their dealings with the organ of state are concerned. To the extent that earlier legislation is inconsistent with PAJA, PAJA must prevail.'*

Accordingly, all taxpayers are entitled to an administrative action that is lawful, reasonable and procedurally fair and SARS as an organ of state has a duty to give effect to this procedural right when dealing with taxpayers. If the provisions of section 46 of the TAA, which SARS relies on when issuing a lifestyle questionnaire, are found to be inconsistent with the provisions of PAJA, PAJA must prevail.

### **5.1.3 What is administrative action?**

The term administrative action is defined in section 1 of PAJA as any decision taken, or any failure to take any decision in terms of an empowering provision by an organ of state which adversely affects the rights of any person and which has a direct, external legal effect.<sup>133</sup>

To ensure compliance with the fiscal statutes the Commissioner calls for information from taxpayers and conducts audits of their affairs. It is contended that the decision to call for information from a taxpayer constitutes "administrative action" that is subject to PAJA. In some cases the Commissioner's branch office issues letters to taxpayers demanding that the information be made available within seven business days and that the taxpayer's failure to comply with the deadline imposed will result in VAT refunds being forfeited or other legal steps being taken against the taxpayer.<sup>134</sup>

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<sup>132</sup> *Sasol Oil (Pty) Ltd v Metcalfe* No 2004(5) SA 161 (W)

<sup>133</sup> Section 1 of PAJA

<sup>134</sup> 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), page 178.

It was held in the case of *Chirwa v Transnet Ltd and others*<sup>135</sup> that the following seven requirements must be met in order for a decision to constitute “administrative action”:

- (i) There must be a decision,
- (ii) by an organ of state,
- (iii) exercising a public power or performing a public function,
- (iv) in terms of any legislation,
- (v) that adversely affects someone’s rights,
- (vi) which has a direct, external legal effect, and
- (vii) that does not fall under any of the exclusions listed in section 1 of PAJA

It was held in the case of *the President of the Republic of South Africa and Others v South African Rugby Football Union and Others*<sup>136</sup> that:

*“In section 33 the adjective “administrative” not “executive” is used to qualify “action”. This suggests that the test for determining whether conduct constitutes “administrative action” is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in Fedsure, that some acts of a legislature may constitute “administrative action”. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is “administrative action” is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising”*

Therefore, should SARS be challenged on the decision to issue a lifestyle questionnaire to the taxpayer, courts in determining whether or not the action taken by SARS to issue a lifestyle questionnaire is an “administrative action” will look at the nature of power exercised by SARS and not necessarily on SARS as an executive functionary of government or a state organ.

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<sup>135</sup> *Chirwa v Transnet Limited and Others* (CCT 78/06) [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) ; [2008] 2 BLLR 97 (CC) ; (2008) 29 ILJ 73 (CC) (28 November 2007), para 181

<sup>136</sup> *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999) at para 141

It was further held in the case of *Carte Blanche Marketing CC and Others v Commissioner for South African Revenue Service*<sup>137</sup>:

*“I accept for present purposes that there are strong arguments to be made in favour of the view that the decision to commence an audit does not constitute administrative action. As I understand the argument, this decision is merely provisional and is part of a process which eventually leads to a decision to either accept a self-assessment by the taxpayer or else to raise an additional assessment. Only once the additional assessment is raised, does the action constitute administrative action for purposes of PAJA. In other words, it is comparable to disciplinary proceedings that have many components to it”*

It should also be borne in mind, as was noted above, that PAJA defines ‘administrative action’ as including a failure to take a decision and a decision of an administrative nature, ‘proposed to be made’. However, a warning by SARS to a taxpayer that it intends to enforce the law is merely a preliminary step and is not ‘administrative action’.<sup>138</sup>

The term “failure” is defined in section 1 of PAJA as “*in relation to the taking of a decision, a refusal to take a decision.*”<sup>139</sup>

#### **5.1.4 What is a decision in terms of PAJA?**

It remains to be determined whether a decision to issue a “lifestyle questionnaire” to a taxpayer is a decision of an administrative nature which falls within the definition of ‘administrative action’ in terms of PAJA.

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<sup>137</sup> *Carte Blanche Marketing CC, C B M Hot Express CC and Michelle Jennifer Airey v Commissioner for South African Revenue Service*, 7 June 2017, para 26

<sup>138</sup> <https://www.mylexisnexis.co.za/Index.aspx#>, The impact and scope of the Promotion of Administrative Justice Act (‘PAJA’) in the sphere of tax is determined by several interlocking statutory definitions

<sup>139</sup> Section 1 of PAJA

Section 1 of PAJA states that a ‘decision’ means:

*“**decision**” means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating<sup>140</sup> 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;*

It was held in the case of *Competition Commission v Yara and Others*<sup>141</sup> that:

*“...the purpose of the initiating complaint is to trigger an investigation which might eventually lead to a referral. It is merely the preliminary step of a process that does not affect the respondent’s rights. Conversely stated, the purpose of an initiating complaint, and the investigation that follows upon it, is not to offer the suspect firm an opportunity to put its case. The Commission is not even required to give notice of the complaint and of its investigation to the suspect. Least of all is the Commission required to engage with the suspect on the question whether its suspicions are justified. The principles of administrative justice are observed in the referral and the hearing before the Tribunal. That is when the suspect firm becomes entitled to put its side of the case...”*

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<sup>140</sup> Section 1 of PAJA

<sup>141</sup> *Competition Commission v Yara (South Africa ) (Pty) Ltd and Others (784/12) [2013] ZASCA 107; [2013] 4 All SA 302 (SCA); 2013 (6) SA 404 (SCA) (13 September 2013), at paragraph 24*

Thus, it is important to determine whether the issuing of a “lifestyle questionnaire” is an initial stage which could trigger an investigation or audit by SARS and that the taxpayer’s constitutional rights are not adversely affected by such a request. In terms of section 46 of the TAA, SARS may merely request relevant material for the administration of a tax Act. That can be seen as an initial enquiry and no decision has been taken on which element of the definition of administration of a tax Act will be followed. Once SARS is in possession of the information supplied by completing a lifestyle questionnaire, a decision to conduct an audit or investigation may be taken. It is then that a taxpayer’s right may be adversely affected and that decision would fall under the definition of administrative action in terms of PAJA.

SARS was established as an organ of state within the public administration, but as an institution outside the public service<sup>142</sup> which functions within the general laws of the Republic thus, for example SARS is subject to the Constitution, the Public Service Act and the Labour Relations Act.<sup>143</sup>

“The underlying right of just administrative action as regulated through the definition of ‘administrative action’ in PAJA would be circumvented by the simple technique of compelling taxpayers to comply without question at the commencement of the pre-assessment investigation in terms of ss 74A and 74B.<sup>144</sup>

Despite the fact that the inevitable revised assessment, penalties and interest charges may follow, the legalistic and literal interpretation is questionable, especially as the result of the inquiry and audit is the immediate enforcement of the ‘pay now argue later’ principle to any revised assessment raised against the taxpayer. For this reason, it is submitted; taxpayers are entitled to challenge SARS before the actual issuing of the revised assessments, where the powers of SARS under ss 74A and 74B have been applied in an unlawful, unreasonable, procedurally unfair manner, or without adequate reasons. If not, the effect is simply to paralyse the rights of taxpayers in a process that takes them down an avenue of direct, external legal consequences, where the Constitution exists to otherwise protect them.

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<sup>142</sup> Section 2 of the South African Revenue Service Act 34 of 1997

<sup>143</sup> Silke on Tax Administration, introduction to the Tax Administration Act, Chapter 1 page 1.3

<sup>144</sup> Income Tax Act No.58 of 1962, as amended

SARS, as an organ of state, cannot escape that scrutiny of the Constitution by simply forcing the taxpayer to submit to these powers, without taxpayers having the right to challenge these powers in terms of PAJA, or the constitutional principle of legality”.<sup>145</sup>

The provisions of 74A and 74B of the Income Tax Act, have since been replaced by section 46 of the TAA. As alluded to in chapter one of this study, section 46 of the TAA empowers SARS to request relevant material from the taxpayers through various ways, for the purpose of administration of a Tax Act. When challenging the SARS powers to request relevant material, the taxpayer would have to prove that the decision to request relevant material is an “administrative action” as defined in PAJA. Secondly, only when the decision has proved to be unlawful, unreasonable, and procedurally unfair and adversely affected the taxpayer’s rights, the taxpayer would succeed in challenging SARS’ decision in terms of PAJA.

The fact that the information requested from the taxpayer by issuing a lifestyle questionnaire may lead to revised assessments and followed by a ‘pay now argue later’ principle is not a reason enough to invoke the provisions of PAJA. However, a taxpayer may have to prove that he has been adversely affected by SARS decision requesting the taxpayer to complete a lifestyle questionnaire.

A request for relevant material is not limited to a formal audit or investigation, but may be utilised for any purpose related to the administration of a tax Act, including a simple verification of registration and other details, compliance with any obligation imposed under a tax Act, such as reporting or reportable arrangements, or a so-called ‘desk audit’.<sup>146</sup> Therefore, a request for relevant material through a lifestyle questionnaire could be related to any of the subsections (a to j) of the definition of administration of a Tax Act<sup>147</sup> as listed in section 3 of the TAA.

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<sup>145</sup>Daniel Nicolaas Erasmus (2013), An analysis of challenging the Commissioner’s discretionary powers invoked in terms of section 74A and 74 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 at page 45.

<sup>146</sup> SARS Short Guide to the Tax Administration Act, 2011

<sup>147</sup> See definition of Administration of a Tax Act in Chapter 2 of this study.

The question of whether a taxpayer can or may, in terms of PAJA, challenge SARS's decision to issue a "lifestyle questionnaire" as a way of requesting "relevant material" depends on whether or not a decision to issue a lifestyle questionnaire is as an administrative action as defined in PAJA. Based on the above, the gathering of information is not an administrative action as defined but an initial enquiry which could trigger an audit or investigation. Thus, a taxpayer may not succeed in challenging this initial enquiry as no rights have been adversely affected at that stage.

#### **5.1.5. Decisions that adversely affect someone or taxpayer's rights**

Since 'administrative action', as defined, must be a decision that 'adversely affects the rights' of a taxpayer in question and has 'a direct, external legal effect', only a final decision (including a proposed final decision) by SARS will fulfil these criteria, and no proceedings in terms of PAJA can be brought in anticipation of a final decision.

Thus, for example, where SARS raises queries with a taxpayer regarding his tax return, with a view to issuing an additional assessment, those queries do not trigger any right on the part of the taxpayer to invoke PAJA to forestall the issuing of the additional assessment.<sup>148</sup>

In the case of *Nedbank Ltd v The Master of the High Court and Others*<sup>149</sup> a case where an application was brought, in reliance on PAJA, to stay an inquiry into the affairs of a certain insolvent company in terms of s 417 and s 418 of the Companies Act the Court held that:

*"A reading of the language under sections 417 and 418 shows that these sections are purely investigative measures to facilitate the winding-up of a company. The decision to take evidence from a witness in a winding-up clearly has no potential to adversely affect the right of any person. Nothing is decided by the Commissioner under these sections. No rights or obligations are determined. Under section 418(3) a Commissioner must report to the Master and the court on any enquiry referred to him."*

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<sup>148</sup> <https://www-mylexisnexis-co-za.ezproxy.uct.ac.za/Index.aspx>

<sup>149</sup> *Nedbank Ltd v Master of the High Court (Witwatersrand Local Division) and Others* (5619/08) [2008] ZAGPHC 216 (18 July 2008)

On the same case, the court went on to state in paragraph 36.2 that:

*“It follows that the summoning of a witness to provide information concerning the affairs of a company is not “administrative action”. Accordingly the procedural fairness contended for by the applicant does not arise. Alternatively, if it can be said to arise, it does not arise at the stage when the enquiry is ordered. The secrecy provisions of sections 417(7) make it clear that prior notice should not and cannot be given to witnesses. Procedural fairness is however ensured by the right of the witness to have an attorney and/or advocate present.”*

The terms “adversely” mean that the administrative action must *impose a burden* of a cost or have a negative effect upon the right. This includes decisions that require someone to do something, to tolerate something or not to do something, limit or remove someone’s rights or decide someone does not have a right to something.<sup>150</sup>

There are two ways that a decision can affect a person’s rights:

- *the decision that could **deprive** a person of their existing right. For example, where an administrator decides to withdraw a licence that a person already has; or*
- *It could affect a person’s right by **determining** what those rights are. An example is where someone applies for a license and the administrator decides not to grant it. Here, the decision means the person will not get the rights that go along with the licence.*

The PAJA uses the term in both sentences. In other words, decisions that deprive someone of rights, and those that determine what that person’s rights will be, are both administrative action<sup>151</sup>

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<sup>150</sup> The Promotion of Administrative Justice Act: Administrators’ Guide by Lain Currie and Jonathan Klaaren, Research Unit for law and Administration, Associate Professors at the University of the Witwatersrand, bovijn\_warranted\_2011, [http://www.justice.gov.za/paja/docs/2002\\_adminguide.pdf](http://www.justice.gov.za/paja/docs/2002_adminguide.pdf) at page 17, accessed on 2017-12-18

<sup>151</sup> *Ibid.*, at page 18

This study has established that a request by SARS to the taxpayer to complete a “lifestyle questionnaire” could be described as “administrative action” that “adversely affects” the taxpayer’s rights in terms of the Bill of Rights.

If the decision to issue a lifestyle questionnaire to a taxpayer falls within the definition of administrative action as defined in PAJA, SARS may be called upon to defend its decision as lawful, reasonable and procedurally fair.

### **5.1.6 Lawfulness**

A fundamental rule of our constitutional democracy is that the government’s power is controlled and limited by law<sup>152</sup>. The government must be given the authority by a law for any action that it takes and it must obey the law. This is the idea behind the constitutional right to lawful administrative action.

To act lawfully means that administrators must have been given authority by a law for the decisions they make. If a person acts without authority they are acting unlawfully, and the ‘decision’ taken will have no legal effect. It also means that they must obey the requirements of the law and follow any instructions given by the law.<sup>153</sup>

As aforementioned, SARS is an organ of state and any action taken by SARS must be based on one of the pieces of legislation that are administered by SARS, which includes the TAA. The decision to issue a ‘lifestyle questionnaire’ would without a doubt be taken in terms of section 46 of the TAA and that makes it a lawful decision.

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<sup>152</sup> Section 36 of the Constitution of 1996

<sup>153</sup> Code of Good Administrative Conduct,

[http://www.justice.gov.za/paja/docs/unit/PAJA\\_Code\\_draft\\_v2\\_2006.pdf](http://www.justice.gov.za/paja/docs/unit/PAJA_Code_draft_v2_2006.pdf) at page 11

### 5.1.7 Unreasonableness

Courts may be called upon to decide on whether or not a decision taken by SARS to issue ‘lifestyle questionnaires’ as a way of gathering relevant material is reasonable.

The term *reasonable* is a generic and a relative one and applies to that which is appropriate for a particular situation. In the law of Negligence, the reasonable person standard is the standard of care that a reasonably prudent person would observe under a given set of circumstances. An individual who subscribes to such standards can avoid liability for negligence. Similarly a reasonable act is that which might fairly and properly be required of an individual.<sup>154</sup>

In the Australian case, *Minister for Immigration and Border Protection v Singh*<sup>155</sup> the court held that legal unreasonableness is invariably fact dependent and it can attach to the unreasonableness of the process or to the unreasonableness of the result.

In the Minister of Health and McIntyre No v New Clicks SA (Pty) Ltd Chaskalson CJ said that<sup>156</sup>:

*‘Reasonableness and procedural fairness are context specific. What is reasonable and procedurally fair in one context is not necessarily reasonable or procedurally fair in a different context’*

If a decision to issue a lifestyle questionnaire is an administrative action as defined in PAJA, a taxpayer who is aggrieved by SARS’s request to complete a ‘lifestyle questionnaire’ may be required to prove that the process pursued by SARS is unreasonable or amounts to an unreasonable act that might be declared unfair to the taxpayer. Equally, SARS may be required to prove that a lifestyle questionnaire was issued for the purpose of administration of a tax Act. Therefore, when SARS is called upon to explain reasons for the issuing of a lifestyle questionnaire, it must be in a position to provide valid reasons that resulted to a decision to issue a lifestyle questionnaire as a method of gathering relevant material.

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<sup>154</sup> <https://legal-dictionary.thefreedictionary.com/reasonable>

<sup>155</sup> *Minister for immigration and border protection v Vikram Jeet Singh and Migration review tribunal* [2014] FCAFC 1; 231 FCR 437; 308 ALR 280; 139 ALD 50

<sup>155</sup> *Minister of Health and McIntyre No v New Clicks SA(Pty) Ltd* 2006(2)SA311 (CC), page 379E

<sup>156</sup> 2006 (2) SA 311 (CC)

### 5.1.8 The Procedural Fairness

The Constitution requires that “administrative action” must be lawful, reasonable and procedurally fair and that reasons must be given for administrative action that adversely affects rights.<sup>157</sup>

Section 3 of PAJA states that:

*“Administrative action which materially and adversely affect the rights or legitimate expectations of any person must be procedurally fair...”*<sup>158</sup>

There are two parts to the idea of procedural fairness:

1. The first part is that it is usually thought to be unfair for an administrator to make a decision that adversely affects someone without consulting them first. As we know, a judge is not allowed to convict someone of a crime unless they have been given an opportunity to tell their side of the story. Similarly, an administrator should not make a decision affecting someone without first hearing what they have to say. This idea is covered by the Latin phrase ‘*audi alteram partem*’ – which means one should hear what the person who will be affected by the decision has to say before deciding.<sup>159</sup>
2. The second part is that the decision-making process must be free from any real or apparent partiality, bias or prejudice. When making a decision, administrators must be seen by everyone to be making the decision fairly and impartially and not because of their own private or personal interest in the matter. As is often said, “Justice must both be done and must be seen to be done”.<sup>160</sup>

In *Trend Finance (Pty) Ltd v CSARS*<sup>161</sup>, the judge said that he is inclined to the view that the requirements of procedural fairness laid down in PAJA had been violated, the failure to notify the taxpayer that the controller was considering exercising his

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<sup>157</sup> Section 33 of the Constitution of 1996

<sup>158</sup> Section 3 of PAJA

<sup>159</sup> Currie and Klaaren - Administrator’s Guide- Promotion of Administrative Justice Act at page 23

<sup>160</sup> Ibid.

<sup>161</sup> In *Trend Finance (Pty) Ltd v CSARS* 2005 (4) All SA 657 (c), 67 SATC 334

discretion against them, and without having given them an opportunity to make representation beforehand, offended the mandatory requirement of section 3(2) (a) and (b) of PAJA. In this case, SARS had not given the taxpayer an opportunity to make representation before the Commissioner exercised his discretion to demand payment in lieu of forfeiture.

The fact that the Act limits administrative fairness in respect of certain actions does not mean that SARS may not in respect of other administrative actions under the Act depart from administrative fairness requirements where such departure is reasonable and justifiable in the circumstances of a specific matter, as contemplated in PAJA.<sup>162</sup>

It is without a doubt that, should the decision to issue a ‘lifestyle questionnaire’ fall within the definition of administrative action in terms of PAJA, SARS may be called upon to prove that such a decision is procedurally fair and that no other interests will be served other than the administration of a tax Act.

## **5.2 Promotion of Access to Information Act:**

The purpose of the Promotion of Access to Information Act, 2000 (often referred to as (“PAIA”)) is to give effect to section 32 of the Constitution. Section 32 provides for “the right of access to information” and states that “everyone has the right of access to any information held by the State and to information held by another person that is required for the exercise or protection of any rights.” The motivation for giving effect to the right of access to information is to foster a culture of transparency and accountability both in Public and Private Bodies; and to promote a society in which the people of South Africa have effective access to information, to enable them to more fully exercise and protect all their rights.<sup>163</sup>

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<sup>162</sup> SARS Short Guide to the Tax Administration Act, 2011

<sup>163</sup> <http://www.justice.gov.za/paia/paia-faq.htm>

The Promotion of Access to Information Act ('PAIA') explicitly provides that, for the purposes of that Act, the South African Revenue Service is a 'public body', as defined<sup>164</sup>, as distinct from a 'private body'.

The terms of PAIA do not impose any obligation on a public body to make information available to the public on a generalised basis, save for the obligation to produce a PAIA manual, accessible to the public.

A taxpayer, seeking information from the South African Revenue Service, is entitled to invoke the provisions of PAIA. However, it has been held that PAIA cannot be invoked where a party, for the purposes of litigation and after the commencement of proceedings, seeks access to a record held by a public or private body, provided that access to the record in question can be obtained via the rules of court; but failure to obtain the required access under the rules or under another law does mean that the applicant is then entitled to invoke PAIA instead.<sup>165</sup>

### **5.2.1 Right of Access to Information Act**

Often taxpayers feel that a request for relevant material in the form of issuing a "lifestyle questionnaire" is a "fishing expedition" and based on certain information held by SARS. The said information is likely to have been received from a third party or informants, thus a taxpayer would request SARS to reveal such information or records before completing a lifestyle questionnaire.

Section 32<sup>166</sup> of the Constitution provides as follows:

(1) *Everyone has the right of access to—*

*(a) any information held by the state; and*

*(b) any information that is held by another person and that is required for the exercise or protection of any rights.*

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<sup>164</sup> Section 1 of Promotion of Access to Information Act 2 of 2000, definition on page 14, "public body" means-(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or (b) any other functionary or institution when- (i) exercising a power or performing a duty 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

<sup>165</sup> [www.mylexisnexis.co.za](http://www.mylexisnexis.co.za) - Silke on Tax Administration – S3.23 The Promotion of Access to Information Act,

<sup>166</sup> Section 32 of the Constitution of 1996

*(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.*

Section 2(3)<sup>167</sup> of PAIA provides that for its purpose, the South African Revenue Service is a public body as defined in section 1 of PAIA.

### **5.2.2 Request for Information from SARS**

A taxpayer who has been issued with a lifestyle questionnaire and wishes to challenge such a decision may request SARS to provide them with information for the protection of their rights. The document requested should assist taxpayers in understanding decisions that affect them.<sup>168</sup>

Section 11 of PAIA provides that:

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

Thus, a taxpayer may request information, held by SARS about the taxpayer, which influenced SARS' decision to issue a lifestyle questionnaire. The information may be held electronically or held in the taxpayers file.

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<sup>167</sup> Section 2(3) of Promotion of Access to Information Act 2 of 2000

<sup>168</sup> Supra, Beric Croome at page 187.

As per the SARS guide to the TAA, a taxpayer may call for information from the Commissioner before the commencement of criminal or civil proceedings. However, once proceedings have started a taxpayer cannot call for information relating thereto as such information is subject to the rules of discovery.<sup>169</sup>

There are three rules which govern a taxpayer's right of access to information concerning that taxpayer:<sup>170</sup>

- *Assessment or other decisions*: A taxpayer is entitled to a certified copy of an assessment or other decision against which a taxpayer may object to;
- *Information provided by the taxpayer*: If the taxpayer provided SARS with the information, for example returns and supporting documents, then SARS must provide the taxpayer with copies of that information; and
- *Information obtained by SARS*

If a taxpayer requests information that SARS collected in respect of the taxpayer, then the taxpayer must request the information through the provisions of the PAIA.

The significance is that in terms of PAIA a request may be refused on a number of grounds including that disclosure is premature and prejudicial to the outcome of an investigation or may reveal the identity of an informant. Requests for information must be made to SARS's appointed PAIA information officer<sup>171</sup>, and SARS is authorized to levy a charge as prescribed by the PAIA.

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<sup>169</sup> Taxpayers Rights in South Africa by B. Croome at page 125

<sup>170</sup> LAPD-TAdm-G01-Short Guide to the Tax Administration Act 2011- External Guide at page 36

<sup>171</sup> Section 14 of PAIA

### 5.2.3 What is a ‘record’?

A record is defined in section 1 of PAIA as follows:

*“record” of, or in relation to, a public body or private body, means any recorded information-*

*(a) regardless of form or medium;*

*(b) in the possession of or under the control of that public body or*

*(c) whether or not it was created by that public or private body respectively;*

PAIA does not oblige SARS to create or compile “records” at the request of a person, but merely obliges SARS to make available existing records requested by a person, other than records containing information that the Commissioner is entitled to refuse in terms of Chapter 4 Part 2 of PAIA.<sup>172</sup>

### 5.2.4 Publication of PAIA Manual

In terms of section 14 of PAIA, the information officer of every public body must compile in at least three official languages a manual containing a description of its structure and functions, contact details of the information officer and deputy of the body, description of the guide and how to obtain access thereto etc.

The SARS has issued the first issue in April 2004 and fourth issue in August 2014, outlining the process to be followed by taxpayers requesting information from SARS in terms of the PAIA Act. The form to be completed by the taxpayer on submitting the request for information is attached to the PAIA manual.<sup>173</sup>

Thus, taxpayers who wish to challenge, in terms of PAIA, a decision to issue a lifestyle questionnaire may follow the process stipulated on the manual published on SARS website.<sup>174</sup>

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<sup>172</sup> Silke on Tax Administration First Ed by Stiaan Klue at page 28

<sup>173</sup> LAPD-Gen-G06- Manual on the Promotion of Access to Information Act 2000- External Guide, 12/08/2014

<sup>174</sup> [www.sars.gov.za](http://www.sars.gov.za)

### 5.2.5 Refusal of access to records

SARS may refuse to provide records.<sup>175</sup> If a request is refused, the onus is on SARS to justify the refusal, giving adequate reasons for the refusal, including the provisions of PAIA that are relied on for such refusal.<sup>176</sup>

Section 37(1)(b) permits refusal of disclosure (1) if the record consists of information supplied in confidence by a third party and (2) if disclosure could reasonably be expected to prejudice the future supply of similar information or information from the same source and (3) if it is in the public interest that similar information should continue to be supplied....The purpose of the provision is to protect the flow of confidential information to public bodies. Individuals and organisations who provide information to government on a confidential basis can do so with the assurance that the information goes no further than its recipient.<sup>177</sup>

In *Shabalala v Attorney-General, Transvaal, and another; Gumede and others v Attorney-General, Transvaal 1995*<sup>178</sup> Cloete J said:

*‘In addition, s 23 postulates that the information must be “required”. The word “required” is capable of a number of meanings ranging from “desired” through “necessary” to “indispensable” (see Khala v Minister of Safety and Security (supra [1994 (3) SA 218 (W) and 1994 (2) SACR 361 (W)] at 224G-225E (SA) and 367d-368a (SACR)) where Myburgh J discusses the meaning of the word “required” and the context in which it should be interpreted in the Constitution). To my mind, “required” in s 23 conveys an element of need: the information does not have to be essential, but it certainly has to be more than “useful” (the meaning given by Marnewick AJ in Sefadi’s case supra [S v Sefadi 1995 (2) SA SACR 667 (D)] at 671d) or “relevant” (the test postulated by Myburgh J in Khala’s case supra at 238D-F (SA) and 381h-382a (SACR)) or simply “desired”.’*

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<sup>175</sup> Section 37 of PAIA

<sup>176</sup> Silke on Tax Administration First Edition, Chapter 3, at page 29

<sup>177</sup> Currie and Klaaren para 8.62 at page 155

<sup>178</sup> *Shabalala v Attorney-General, Transvaal, and another; Gumede and others v Attorney-General, Transvaal 1995*178 (1) SA 608 (T) Cloete J said at 624C

In *Clutchco Pty Ltd v Andrew Christopher Davis*<sup>179</sup>, the court held that:

*“Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information in terms of s 32, an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right”*

It is clear that a taxpayer requesting information (possibly supplied by third party) from SARS following the issuance by SARS of a “lifestyle questionnaire” must justify that the information is required for the exercise or protection of any right.<sup>180</sup>

The taxpayer information received by SARS from a third party would ordinarily relate to the non-compliance of such a taxpayer. The information officer of the South African Revenue Service, referred to in section 2(3), must refuse a request for access to a record of that Service if it contains information which was obtained or is held by that Service for the purpose of enforcing legislation concerning the collection of revenue as defined in section 1 of the South African Revenue Service Act No. 34 of 1997.<sup>181</sup>

It was held in the case of *Commissioner for the South African Revenue Service v Julian Brown* that:

*“In so far as the respondent contends that he is entitled to the additional information sought in his second PAIA request, I am satisfied that the applicant’s objection to the disclosure of the information on the basis that it constitutes “SARS confidential information”, protected in terms of section 86 of the Act, is justified under the circumstances. Even though the respondent contends that he does not require the applicant to name names, Ms Williams has correctly argued that it would be relatively easy for him to infer the identities of the third parties if the additional particularity sought in his second PAIA request is disclosed.”*<sup>182</sup>

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<sup>179</sup> *ClutchCo Pty Ltd v Andrew Christopher Davis* SCA Case No 35/04 at page 9

<sup>180</sup> *Currie and Klaaren* at page 67

<sup>181</sup> *Currie and Klaaren* at page 132, para 8.26

<sup>182</sup> *Commissioner for the South African Revenue Service v Julian Brown* at page 26, para (53)

It is clear that a taxpayer may encounter difficulty in obtaining information supplied to SARS by a third party as SARS is clearly not willing to reveal the sources and divulge the source who supplied information to SARS in confidence.

### **5.3 The Protection of Personal Information Act**

The rationale for the Protection of Personal Information Act is “to promote the protection of personal information processed by public and private bodies; to introduce certain conditions so as to establish minimum requirements for the processing of personal information, to provide for the establishment of an Information Regulator to exercise certain powers and to perform certain duties and functions in terms of this Act and the Promotion of Access to Information Act, 2000; to provide for the issuing of codes of conduct; to provide for the rights of persons regarding unsolicited electronic communications and automated decision making; to regulate the flow of personal information across the borders of the Republic; and to provide for matters connected herewith”.<sup>183</sup>

Section 2<sup>184</sup> of POPI states the purpose of this Act as follows:

- (a) *give effect to the constitutional right to privacy, by safeguarding personal information when processed by a responsible party, subject to justifiable limitations that are aimed at—*
  - (i) *balancing the right to privacy against other rights, particularly the right of access to information; and*
  - (ii) *protecting important interests, including the free flow of information within the Republic and across international borders;*
- (b) *regulate the manner in which personal information may be processed, by establishing conditions, in harmony with international standards, that prescribe the minimum threshold requirements for the lawful processing of personal information;*
- (c) *provide persons with rights and remedies to protect their personal information from processing that is not in accordance with this Act; and*

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<sup>183</sup> The preamble to the Protection of Personal Information Act NO.4 of 2013.

<sup>184</sup> Section 2 of POPI Act

- (d) *establish voluntary and compulsory measures, including the establishment of an Information Regulator, to ensure respect for and to promote, enforce and fulfil the rights protected by this Act.*

The POPI recognises the provision of section 14 of the Constitution which provides that everyone has the right to privacy.<sup>185</sup> The preamble to the POPI Act states that the right to privacy includes a right to protection against the unlawful collection, retention, dissemination and use of personal information; the state must respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>186</sup>

SARS is an organ of state<sup>187</sup>, a public body<sup>188</sup> and must respect, protect and promote the taxpayer's right to privacy. Any information supplied by taxpayer's to SARS may not be disseminated and SARS may not collect taxpayer information unlawfully.

### **5.3.1 What is personal information in terms of POPI?**

*“personal information”<sup>189</sup>, means information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person, including, but not limited to –*

- (a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person;*
- (b) information relating to the education or the medical, financial, criminal or employment history of the person;*
- (c) any identifying number, symbol, email address, physical address, telephone number, location information, online identifier or other particular assignment to the person;*
- (d) the biometric information of the person’*

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185 Section 14 of the Constitution, 1996

186 The Preamble to the Protection of Personal Information Act No.4 of 2013

187 Section 2 of the SARS Act

188 “Public body” means (a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or (b) any other functionary or institution when- (i) exercising a power or performing a duty 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.

<sup>189</sup> Section 1 of POPI

- (e) *the personal opinions, views or preferences of the person;*
- (f) *correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;*
- (g) *the views or opinions of another individual about the person; and*
- (h) *the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person.*

A lifestyle questionnaire is by its very nature a wide document that requires the taxpayer to provide anything and everything that in the opinion of the Commissioner may affect the taxpayer's liability. Taxpayer's often feel that a request to complete a "lifestyle questionnaire" amounts to a violation of their constitutional right to privacy by SARS officials. This feeling emanates from the fact that the information sought through the questionnaire includes, physical addresses, home telephone numbers, email addresses, spouse and children's personal details, detailed financial information etc.

The POPI Act<sup>190</sup> specifies eight (8) conditions that must all be complied with for any processing, administration or dissemination to be legally compliant. These eight conditions are listed below –

- *Accountability , Processing Limitations, Purpose Specific (the data must be held for a purpose), Further Processing Limitation (data can only be used for its purpose and not beyond that), Information Quality (the data must be accurate), Openness (individual must be informed, processes must be transparent), Security Safeguards (reasonable steps to keep the information secure must be taken), Data Subject Participation*

### **5.3.2 Secrecy of taxpayer information and general disclosure:**

SARS officials are required to preserve the secrecy of taxpayer information and may not disclose taxpayer information to a person who is not a SARS official.<sup>191</sup> However, there

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<sup>190</sup> Section 4 of POPI

<sup>191</sup> Section 69(1) of the TAA

are exceptions where SARS officials, current or former, may in the course of performance of duties under TAA disclose taxpayer information.<sup>192</sup>

These include:

- (a) disclosure to South African Police Service and National Prosecuting Authorities, if the information relates to, and constitutes material information for the proving, a tax offence;
- (b) As a witness in civil or criminal proceedings under a tax act; or
- (c) The taxpayer information necessary to enable a person to provide such information as may be required by SARS from that person.

In addition to the POPI Act, taxpayers' personal information supplied to SARS through lifestyle questionnaires may not be disclosed unless some of the exceptions provided in the TAA as listed above applies.

#### **5.4 Taxpayer's remedies**

It is submitted that the introduction of the TAA has enhanced SARS' powers to gather relevant material but equally taxpayers have not been left without remedies. A taxpayer who is aggrieved by SARS request for relevant material may approach the *inter alia*, following institutions for relief:

- SARS Service Monitoring office (SMO);
- Judicial Review by Courts;
- Office of the Tax Ombudsman; and
- Office of the Public Protector

##### **5.4.1 SARS Service Monitoring Office**

The former minister of finance, Mr. Trevor Manuel made an announcement that SARS has opened a Service Monitoring Office (SARS SMO), to deal specifically with difficulties in respect of administrative processes and procedures and disagreements in respect of substantive matters.<sup>193</sup>

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<sup>192</sup> Section 69 (2) of the TAA

<sup>193</sup> <https://www.mylexisnexis.co.za/Index.aspx#expired>: Silke on Tax Administration 2.29 The SARS service Charter and Service Standard- the SARS Service Monitoring Office.

This office does not deal with any other dispute other than the above mentioned being administrative complaints and encourages taxpayers to report instances of administrative action they believe to be unfair or in violation of their rights.<sup>194</sup>

Therefore, taxpayers may consider lodging a complaint to the SARS SMO to challenge the issuance of a lifestyle questionnaire should they be aggrieved by that process.

#### **5.4.2 Judicial Review by Courts**

One of the remedies available to an aggrieved taxpayer is that of approaching courts for judicial review.<sup>195</sup>

Section 7(2) of PAJA provides that Courts or Tribunal cannot review such administrative action until any internal remedy provided for in any other law has first been exhausted.<sup>196</sup> However, this section does not apply where exceptional circumstances exist that the taxpayer may be exempted from following internal process if the court deems it to be in the interest of justice.<sup>197</sup>

The Constitutional Court has ruled that the requirement to exhaust internal remedies is not absolute and must not be used by an administrator to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny; the court has power to condone the non-exhaustion of internal remedies in exceptional circumstances and must consider the availability, effectiveness and adequacy of internal remedies.<sup>198</sup>

Therefore, a taxpayer issued with a lifestyle questionnaire may request a competent court to review SARS' decision to issue a lifestyle questionnaire should he be unhappy with such a decision without having to exhaust the internal processes.

#### **5.4.3 The office of Tax Ombuds**

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<sup>194</sup> Taxpayers' rights in South Africa- B. Croome at page 16

<sup>195</sup> Section 6 of PAJA

<sup>196</sup> Section 7(2) of PAJA

<sup>197</sup> Section 7(2)(c) of PAJA

<sup>198</sup> Koyabe v Minister for Home Affairs and Others 2010 (4) 327 (CC) at para 38

The Minister of Finance has established the office of the Tax Ombud.<sup>199</sup> The Tax Ombud's office exists as an independent, impartial and objective institution separate from SARS. Taxpayers may approach the Tax Ombud for assistance to resolve matters relating to service, procedure and administration by SARS. The purpose of the Tax Ombud is to improve the relationship between the public and SARS by offering an effective conflict resolution channel between the two parties.<sup>200</sup>

The Office of the Tax Ombud may not investigate complaints relating to review of legislation or tax policy. The office is mandated to only investigate *service matters or a procedural administrative matter arising from the application of the provisions of a tax Act.*<sup>201</sup>

Before lodging a complaint with the office of the Tax Ombud, a taxpayer must exhaust the available complaints resolution mechanisms within SARS unless there are compelling circumstances for not doing so. Accordingly, a taxpayer should first seek to resolve a complaint directly with SARS through its call centre or at the taxpayer's SARS branch. If a taxpayer is dissatisfied with the outcome of a complaint lodged through the call centre or at the branch office of SARS, the matter must be escalated to SARS' Operational Service Escalations and Support office for further attention. If a dispute with SARS remains unresolved, a taxpayer may then approach the Tax Ombud's office. There are no legislated time limits within which to resolve a complaint by the Tax Ombud.<sup>202</sup>

Thus, this Office is one of the remedies that are available to a taxpayer who is aggrieved by SARS' decision to issue a lifestyle questionnaire.

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<sup>199</sup> Section 14 of TAA

<sup>200</sup> Section 16 of TAA

<sup>201</sup> Section 17 of TAA

<sup>202</sup> LAPD-Gen-G06- Manual on the Promotion of Access to Information Act 2000- External Guide, 12/08/2014

#### **5.4.4 The Office of the Public Protector**

Section 182 of the Constitution provides that the taxpayers may lodge complaint to the Public Protector should they believe that SARS conduct is improper or to result in any impropriety or prejudice.<sup>203</sup>

In his book titled *the Taxpayers' rights in South Africa*, B. Croome stated that:

*“...in practice, taxpayers do not resort to the Public Protector for assistance, partly because they perceive the Public Protector’s office as existing to investigate corruption in government and other national-government related problems, and not to investigate complaints against the Commissioner, and partly because tax is a specialised area.”*<sup>204</sup>

Consequently, taxpayers who have been issued with the lifestyle questionnaire in terms of the TAA, may approach the office of the Public protector for relief should they believe that such a conduct is improper or will prejudice them.

#### **5.5 Conclusion**

The right to just administrative action requires there to be an administrative action and for it to be lawful, reasonable and procedurally fair. An administrator must follow the specific empowering provision that grants the authority to take an administrative action. The administrator must comply with all steps or procedures prescribed in the empowering provision. The administrator must also comply with the general rules and procedures that are set out in PAJA.<sup>205</sup>

Section 6(2) of the Promotion of Administrative Justice Act sets out the circumstances where administrative action or conduct of SARS may be judicially challenged by a taxpayer as being unconstitutional. The circumstances include, inter alia, when the decision, action or conduct is biased, unfair, based on an error of law, made in bad faith, arbitrary, capricious, unreasonable, unconstitutional or unlawful. Conduct that falls within the meaning of any of these words falls foul of the Promotion of Administrative

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<sup>203</sup> Section 182 of the Constitution of 1996

<sup>204</sup> See page 311

<sup>205</sup> [http://www.justice.gov.za/paja/docs/unit/PAJA\\_Code\\_draft\\_v2\\_2006.pdf](http://www.justice.gov.za/paja/docs/unit/PAJA_Code_draft_v2_2006.pdf) at para 3.5

Justice Act and thus also of the constitutional right to just administrative action (section 33 of the Constitution).<sup>206</sup>

A decision taken by SARS to issue a 'lifestyle questionnaire' is an initial stage<sup>207</sup> which could trigger an investigation or audit and that the taxpayer's Constitutional rights are not adversely affected by such a request. This means that an 'administrative decision' as defined in PAJA has not been taken yet; SARS is still in the process of gathering information for the purposes of administration of a tax Act.

Therefore, it would not be ideal for a taxpayer to consider taking SARS on judicial review to have a decision to issue a lifestyle questionnaire reviewed by High Court.

One of the possible remedies that maybe explored by an aggrieved taxpayer is that of the office of the Tax Ombudsman whose mandate is to review administrative queries and is more cost effective<sup>208</sup> than the court. To establish whether a proper procedure was followed, the office of the Tax Ombud may review SARS' decision to issue a lifestyle questionnaire as it relates to the application of the provisions of the TAA.<sup>209</sup>

In terms of section 35 of PAIA, SARS must refuse a request for access to a record if it contains information (supplied by third party or obtain from other sources, not the taxpayer and informed a decision to issue the lifestyle questionnaire) which was obtained or is held by SARS for the purposes of enforcing legislation concerning the collection of revenue.<sup>210</sup>

An unresolved issue is whether the taxpayer may challenge the ground of refusal to access by relying directly on s 32 of the Constitution. It is submitted that a taxpayer could argue that the grounds of refusal in PAIA are too broad and undermine the fundamental right enshrined in s 32. Further, the taxpayer may attempt to satisfy a court

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<sup>206</sup> The winds of change- an analysis and appraisal of selected Constitutional issues affecting the rights of taxpayer, thesis by George Kenneth Goldswain, University of South Africa, at page 139

<sup>207</sup> Supra. Competition commission

<sup>208</sup> Section 16(c) of TAA

<sup>209</sup> Section 16 (f) of the TAA

<sup>210</sup> Section 35 (1)(2) of Promotion of Access to Information Act 2 of 2000.

that other open and democratic countries do not commonly deny access to records on the grounds contained in PAIA.<sup>211</sup>

It would be to the benefit of the taxpayer to assess whether a request for the records kept by SARS will protect a constitutional right and that SARS is likely to avail such information to the taxpayer. In terms of section 78 of PAIA, where a public body, such as SARS, denies a request for information, the requester is entitled to apply to Court for appropriate relief after that requester has exhausted the internal appeal procedures against a decision by the information officer of the public body.<sup>212</sup>

SARS as an organ of state and a public body may not in terms of POPI disseminate taxpayer confidential information. Taxpayer's right to privacy is protected in terms of section 14 of the constitution.

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<sup>211</sup> Taxpayers Rights in South Africa, by B. Croome, at page 146

<sup>212</sup> Silke on Tax Administration, First Edition by Stiaan Klue, at page 28

## **Chapter VI: Conclusion**

### **6.1 Introduction**

This chapter provides a summary of the discussion points made in the above chapters one to five and provides answers to the research questions listed in chapter one.

SARS has far-reaching powers in terms of the TAA to obtain information (not just from taxpayers but other parties as well) for purposes of conducting an audit or investigation. However, such powers and functions must be performed in line with the empowering provisions of the TAA and must always be subject to the taxpayer's rights enshrined in the Constitution. A taxpayer must at all times be aware and mindful of these rights and SARS' obligations when SARS performs these public powers or functions. Furthermore, a taxpayer must be aware and mindful of its remedies to ensure that SARS complies with its constitutional obligations and must, in the interest of the relevant corporate taxpayer and its shareholders, use the appropriate remedy at the appropriate time.<sup>213</sup>

SARS may only request relevant material from a taxpayer for the administration of a tax act as stipulated in section 3(2) of the TAA. SARS has to meet the jurisdictional requirements of section 3(2) of the TAA, but must also marry the facts at hand to any one or more of the nine subsections stipulated in section 3(2) of the TAA. Put differently, if the requested information is for the purposes of the administration of any tax Act, SARS must quote the relevant subsection in section 3(2) of the TAA pertaining to the definition of relevant material that SARS relied on, and this must be supported by the underlying facts and circumstances that makes SARS' inquiry foreseeably relevant with "reasonable specificity."<sup>214</sup>

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<sup>213</sup> tax administration: SARS' constitutional obligations and taxpayers' rights by Andries Myburgh, ENS 17 February 2016

<sup>214</sup> Section 46 of the TAA

Taxpayers overlook the fact that the rights contained in the Constitution may be limited and that the Commissioner calls for the information under a law of general application. It is contended that it is reasonable and necessary in an open and democratic society for the Commissioner to insist on the completion of the Lifestyle Questionnaire and that this does not constitute an unlawful violation of the taxpayer's right to privacy.<sup>215</sup>

SARS is mandated by the constitution to collect taxes effectively and efficiently. Section 46 of the TAA empowers SARS to request relevant material in order to fulfil this constitutional mandate. When SARS exercises its constitutional power to gather relevant material, all it is required to show is that the information sought is relevant material necessary for the administration of a tax Act.<sup>216</sup>

“Relevant material” is defined in section 1 of the TAA 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 of the TAA.<sup>217</sup> The information sought in the lifestyle questionnaire relates to the taxpayer's assets, liabilities, income and expenses<sup>218</sup> therefore constitute ‘relevant material’ as defined in section 1 of the TAA, as such information may affect the taxpayer's tax liability in respect of the previous, current and future tax periods.<sup>219</sup>

The provisions of section 46 of the TAA are peremptory<sup>220</sup> a taxpayer issued with the questionnaire may not make the submission of a completed lifestyle questionnaire to SARS conditional or refuse to comply citing violation of their constitutional rights.

## **6.2 Violation of constitutional rights**

A request for relevant material by way of lifestyle questionnaire could lead to violation of taxpayer's constitutional rights contained in the Bill of Right.<sup>221</sup>

However, the Rights in the Bill of Rights are not absolute. These rights could be limited depending on whether or not the requirements of section 36 of the constitution are applicable.

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<sup>215</sup> Croome- 2003 at page 74

<sup>216</sup> Commissioner for the South African Revenue Service v Julian Brown 78 SATC 255, 2016 at para 55

<sup>217</sup> Section 1 of the TAA, definitions

<sup>218</sup> Brown. Supra at para 40

<sup>219</sup> Section 3 of the TAA

<sup>220</sup> Commissioner for South African Revenue Service v Brown 78 SATC 255, 2016 ,at paragraph 39

<sup>221</sup> Chapter 2 of the Constitution of 1996

In order for the limitation to be reasonable and justifiable, it should not invade rights any further than it needs to in order to achieve its purpose. It must be shown that the law in question serves a constitutionally accepted purpose and that there is sufficient proportionality between the harm done by the law (the infringement of the right) and the benefit it attempts to achieve (the purpose of the law).<sup>222</sup>

It would be difficult to argue that legislation which requires a taxpayer to submit tax returns and other documents to SARS containing personal and business information, and follow-up requests from SARS for further information relevant to the taxpayer's tax affairs is not, in principle, justifiable in terms of this provision.<sup>223</sup>

A taxpayer who is requested to complete a lifestyle questionnaire and wishes to challenge SARS decision to issue the lifestyle questionnaire needs to be aware of his or her rights in terms of the Constitution and equally keep in mind the limitation of those rights in terms of section 36 of the Constitution. Most fiscal legislation can pass the section 36 limitation of rights clause on the basis that it is reasonable and justifiable in an open and democratic society. SARS as an organ of state needs to respect the rights of taxpayers as contained in the Bill of Rights and SARS needs to ensure the effective and efficient collection of taxes.

A SARS decision to issue a lifestyle questionnaire to gather relevant material falls outside the definition of "administrative action" or "decision" as defined in terms of PAJA as it does not adversely affect the taxpayer's constitutional rights. Based on the definition of administrative action as discussed in chapter five of this study, a request for relevant material could not be seen as unlawful, unreasonable and procedurally unfair.

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<sup>222</sup> Currie & De Waal, 2005, p.176

<sup>223</sup> <https://www-mylexisnexus-co-za.ezproxy.uct.ac.za/Index.aspx#-> Constitutional Right to privacy-general

It can, however, be seen as a preliminary inquiry or initial stage which could trigger an investigation or audit by SARS<sup>224</sup> and the taxpayer's constitutional rights are not adversely affected by such a request.

However, an aggrieved taxpayer may still consider utilising the available remedies including services of the office of the tax Ombudsman, the office of the Public Protector, the SSMO and the Courts in order to satisfy himself or herself that his/her constitutional rights have not been adversely affected by SARS decision to issue a lifestyle questionnaire.

### **6.3 Conclusion**

As discussed in detail in this study, lifestyle questionnaire is a document that SARS may use to gather relevant material in terms of section 46 of the TAA. It is possible that some Constitutional rights may be violated in this process, however section 36 of the Constitution is applicable as SARS is an organ of state mandated to collect taxes on behalf of government.

SARS is mandated by the Constitution to ensure effective and efficient collection of taxes. In order to achieve this constitutional mandate, it will require information from Taxpayers as empowered in terms of section 46 of the TAA. The taxpayer's rights as discussed in chapter three above may be infringed upon during the process of gathering relevant material. However, these rights are not absolute, they may be limited in terms of section 36 of the Constitution.

In terms of PAIA, taxpayers have a right of access to the information that could have been obtained by SARS from third party or informants etc. This information could assist the taxpayer to understand SARS' decision to issue a lifestyle questionnaire. However, SARS may not grant access to this information if that will result to non-supply of information in future by third party or informants etc, and that information is required by SARS to execute its constitutional mandate.

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<sup>224</sup> Competition Commission v Yara (South Africa ) (Pty) Ltd and Others (784/12) [2013] ZASCA 107; [2013] 4 All SA 302 (SCA); 2013 (6) SA 404 (SCA) (13 September 2013), at paragraph 24

The decision to issue a lifestyle questionnaire is a preliminary step not reviewable in terms of PAJA as it falls outside the definition of administrative action. Therefore, taxpayer's may not refuse to complete a lifestyle questionnaire by relying on the provisions of PAJA.

SARS as an organ of state and a public body may not in terms of POPI collect taxpayer information unlawfully and may not disseminate taxpayer confidential information. Furthermore, SARS must respect, protect and promote the taxpayer's right to privacy.

Thus, in summary, provided proper procedure is followed SARS may issue lifestyle questionnaires to taxpayers without violating any laws.

#### **6.4 Recommendations for further research**

This study focused on the possible violation of the taxpayer's rights by SARS when such taxpayers have been requested to complete lifestyle questionnaires. The other focus was a definition of relevant material and whether or not the information requested through the lifestyle questionnaire falls within the definition of relevant material as defined in the TAA.

As a recommendation, perhaps an in-depth investigation into the powers and duties of the Tax Ombudsman as a newly established office may be conducted to establish whether this office provide remedies to the taxpayers who feel aggrieved by SARS' decision to exercise its powers to collect information through lifestyle questionnaires in terms of section 46 of the TAA.

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