

ASPECTS OF THE ADMINISTRATIVE LAW RELATIONSHIP
BETWEEN THE TAXPAYER AND THE COMMISSIONER

FOR INLAND REVENUE

A THESIS

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CHAPTER ONE

Historical background	1
The growth of the Administrative State	2
The growth of the Administrative State in South Africa	3
The Welfare State	4
The growth of administrative tribunals	4
Income Tax and Administrative Law	5
Subject of this thesis	6
What is Administrative Law?	7
Administrative Law and Constitutional Law	9
Administrative Law and the Distinction between Private and Public Law?	9
General Administrative Relationships and individual relationships	11
The concept of the administrative state	11
Administrative corporatism	12
The permanence of large scale government	12
Constitutional doctrines which form a background to administrative law	13
The supremacy of parliament	13
Ministerial responsibility for administrative action	14
The doctrine of Separation of Powers	14
The Rule of Law	14
Theories of the Rule of Law	15
The legalistic theory of the Rule of Law	15
Procedural justice theories of the Rule of Law	15
The Diceyan Theories	16
The Rule of Law as substantive justice	17
Conclusion - Rule of Law	17
Discretionary Power	18

What is discretion?	18
Necessity for discretionary powers	18
The disadvantages of discretionary powers	18
Control of discretionary powers	19
Conclusion	22
Administrative Law in South Africa	22
Political Background of Administrative Law	22
Racial separation	23
Security	23
Tricameral Parliament, Provincial and Local Government	24
The Public Service	25
Monopoly Capitalism and the wide powers of the Executive	25
Specialisation	26
Diversification/Decentralisation	27
Application of the constitutional doctrines to the features of government in South Africa	27
The Rule of Law	27
The doctrine of Separation of Powers	27
The supremacy of Parliament	28
Conclusion	28
Aspects of the taxpayer morality in South Africa	28
Conclusion	30
Footnotes	31
CHAPTER TWO	
The Commissioner	36
The Administrative Law Relationship	36
The Commissioner	36
Relationships of Authority	36

The Administrative Law Relationship between the Minister of Finance and the Commissioner	37
The doctrine of Separation of Powers	38
The Commissioner	39
The Administrative Law Relationship between the Commissioner and his subordinate officials	39
Delegation and discretionary powers	40
Section 3 of the Act	41
Rulings - General	44
An application for a ruling	44
Rulings issued by the Commissioner personally	45
Rulings issued by subordinate officials	45
The recommendations of the Margo Commission	45
Practical limitations to the issue of rulings	46
Recommendations to overcome practical limitations	47
An administrative procedure	48
Conclusion	49
Direct and substantial interest	50
Publication of rulings	50
Publication and section 4 of the Act	51
Publication of rulings in other jurisdictions	54
Conclusion	56
Conclusion	57
Footnotes	58

CHAPTER THREE

The subject of the Administrative Law Relationship : the taxpayer	61
Introduction	61
General and individual administrative law relationships	61
English law and the doctrine of Legitimate Expectation	64
GCHG Case	66
English Law continued : Application and the doctrine to Revenue Law	69
Conclusion	73
Australia	73
European Courts	74
The doctrine of Legitimate Expectation in South Africa	74
Introduction	74
Case law	74
Laubscher v Native Commissioner	75
Everett v Minister of Interior	76
Boesak v Minister of Home Affairs	77
Castel NO v Mawu	77
Langeni v Minister of Health and Welfare	79
Mokoena v Administrator Tvl	80
Administrator Tvl v Traub	81
Administrator Cape v Ikapa Town Council	82
Kahn v Pietermaritzburg Local Road Transportation Board	83
Conclusion	83
The judiciary and the principle of equity in taxation	83
Introduction	83
Meanings of equity	84
Judicial decisions based on equity where the statute appears unclear	85
Conclusion	87

The classification of administrative powers	88
The rejection of the classification of administrative powers : case law	89
Conclusion	90
Conclusion in respect of the application of the doctrine in South African Law	91
Conclusion in respect of the application of the doctrine of Legitimate Expectation to rulings and other decisions by the Commissioner	92
Estoppel	93
The extension of the doctrine of estoppel to statutory illegality	95
Estoppel and internal irregularities	96
Estoppel and Legitimate Expectation	97
Footnotes	98
CHAPTER FOUR	
The assessment	102
Introduction	102
The initial stage of the administrative law relationship - section 65 and 66 of the Act	103
Section 65 returns to be in the form prescribed by the Commissioner	103
The clarity of the form	104
The first stage of the administrative law relationship	106
Meaning of returns	106
The duty of disclosure	109
The second stage of the administrative law relationship : assessments	110
General	111
Reduction	111
Errors	112
Estimated Assessments	112
Agreed assessments	113
Agreed additional tax	114
Additional assessments	114
Introduction	115

How much information must be furnished to the Commissioner in order to prevent him raising an additional assessment after a period of three years?	117
Communication by the Commissioner to the Taxpayer	118
The provisos	120
Fraud or misrepresentation or non-disclosure of material facts	120
General practice prevailing of the date of assessment	121
Order of Special Court	122
Production of documents and evidence on oath	122
Section 74	122
Penalty on default section 75	122
Conclusion	123
Footnotes	124
CHAPTER FIVE	
Appeal and review	126
Introduction	126
The meaning of appeal to the Special Court	128
Case law	129
The meaning of appeal to the Supreme Court	131
Conclusion	133
Review procedure	132
Introduction	132
The meaning of review general	133
The grounds of review in terms of the Supreme Court Act	133
The difference between appeal and review	134
Conclusion in respect of terminology	134
The Supreme Court and review procedures	135
The Special Court and review jurisdiction	136

Section 3 of the Act regulates the exercise of the power and performance of duties by the Commissioner. Sections 74 - 80 regulate the power of the Commissioner to issue assessments and to investigate matters related thereto. Sections 81 - 88 govern objections to and appeal against assessments. In chapter four the administrative law relationship between the taxpayer and the Commissioner will be examined with reference to the abovementioned sections of the Act in order to determine how the discretionary powers contained in these provisions are controlled by reference to the jurisdictional facts which are contained in these sections.

Generally, the taxpayer must enforce his remedy against the commissioner before a court of law. There is uncertainty as to the powers of the Special Court. This is examined in chapter five.

1.2 Introduction

In this chapter, the regulation of discretionary powers by 'rule based administrative action' and by 'adjudicative techniques of decision' is examined generally. The control of discretionary power by ministerial responsibility is also canvassed generally in this chapter.

More specifically the following is canvassed in this chapter :

- (a) What is Administrative Law, and why is it essential to examine the background of Administrative Law in a thesis which is concerned with the regulation of discretionary powers?
- (b) The meaning of discretionary power and the reason why discretionary power is essential in a society.
- (c) The regulation of the exercise of discretionary power with reference to the distinction between rule based administrative action and adjudicative techniques of decision.
- (d) The relationship between the collection of income tax (and a fortiori the exercise by officials of the Commissioner's office of their discretionary powers) and that which has been stated in (a), (b) and (c) above.

1.3 What is administrative law

Cane (3) states that :

Introduction	136
Case Law	136
KBI v Transvaalse Suikerkorporasie	139
Is the decision in KBI v Transvaalse Suikerkorporasie correct?	140
Strategy	144
Conclusion	144
Margo Commission	145
Footnotes	146
CHAPTER SIX	
Conclusion	148
Cases	150
Bibliography	153

CHAPTER ONE

1.1 Subject of this thesis

1.1.1 *The regulation of discretionary power*

There is an administrative law relationship between the taxpayer and the Commissioner for Inland Revenue, (hereinafter referred to as 'the Commissioner') The basis of this relationship is that the Commissioner is required to collect tax and the taxpayer is required to pay the tax. In exercising his powers under the Income Tax Act No. 58 of 1962 (hereinafter referred to as the Act), the Commissioner has been conferred with discretionary powers. In this thesis, this administrative law relationship is examined with specific reference to the means of regulating the exercise by the Commissioner of his discretionary powers.

There are a number of ways in which the discretionary powers of the Commissioner may be regulated. Generally discretion may be regulated by 'rule based administrative action' (1). This means that discretionary power is exercised subject to internal rules which state how discretionary power must be exercised. Another method of regulating the exercise of discretionary power is subsumed under the category of 'adjudicative techniques of decision' (2). The essence of the latter category is that the affected person participates in the decision which affects him.

The exercise of discretionary power may be regulated furthermore if the Minister who has responsibility for the Department is required to be responsible for and account publicly for the actions of his subordinate.

In this thesis, examples of rule based administrative action and adjudicative techniques of decision are examined. Thus in chapter two, the issuing of Rulings as a means of controlling the exercise of discretion is examined. It is submitted that the issuing of Rulings is an example of rule based administrative action because rulings should be issued in accordance with certain prescribed rules.

In chapter three, an example of adjudicative techniques, namely the doctrine of legitimate expectation is examined. It is submitted that an individual should have a legitimate expectation that he be afforded a hearing before a decision is made which affects him.

Section 3 of the Act regulates the exercise of the power and performance of duties by the Commissioner. Sections 74 - 80 regulate the power of the Commissioner to issue assessments and to investigate matters related thereto. Sections 81 - 88 govern objections to and appeal against assessments. In chapter four the administrative law relationship between the taxpayer and the Commissioner will be examined with reference to the abovementioned sections of the Act in order to determine how the discretionary powers contained in these provisions are controlled by reference to the jurisdictional facts which are contained in these sections.

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- (c) The regulation of the exercise of discretionary power with reference to the distinction between rule based administrative action and adjudicative techniques of decision.
- (d) The relationship between the collection of income tax (and a fortiori the exercise by officials of the Commissioner's office of their discretionary powers) and that which has been stated in (a), (b) and (c) above.

1.3 What is administrative law

Cane (3) states that :

'Administrative Law is concerned to a considerable extent with the relationships between different branches of Government. In the first place, it is concerned with the position of administrative authorities vis-a-vis the Parliament, since nearly all of the functions of administrative authorities are conferred and defined by statute, and Parliament exercises a certain amount of control over the exercise of these functions. At the same time, the importance of judicial review, as a mechanism for supervising the activities of administrative agencies, makes the question of the proper relationship between the legislative and the administrative branches of Government on the one hand and the judicial branch, on the other, central to administrative law.'

Baxter makes a distinction between general and particular administrative law. He states that (4) general administrative law :

'May be said to comprise the general principles of law which regulate the organisation of administrative institutions and the fairness and efficacy of the administrative process, govern the validity of and liability for administrative action and inaction, and govern the administrative, and judicial remedies relating to such action or inaction.'

He states that particular administrative law comprises the legislation governing, and legal principles and policies developed in respect of, specific areas of administration.

According to Wiechers (5) administrative law is 'that section of public law which governs the organisation, powers and actions of the state administration.'

1.4 Administrative Law and Constitutional Law

The description of Administrative Law proposed by Cane above does not distinguish Administrative Law from Constitutional Law adequately. It is submitted that the relationships between different branches of Government are a major component of Constitutional Law. Baxter states (6) that because Constitutional Law and Administrative Law share the same subject matter, that a distinction between the two is based on a difference of emphasis. He states that :

'Perhaps the best that can be said is that the two subjects involve a difference of emphasis while constitutional law is primarily concerned with the structure and distribution of governmental power, administrative law is primarily concerned with its mode of exercise.'

Wiechers (7) agrees that Administrative Law and Constitutional Law do not differ in character and content. He states that both these branches of the law form part of the public law of the State, and both involve the regulation of the division and the exercise of Governmental authority. He does however propose that Administrative Law to a certain extent 'constitutes a refined or more specialised part of constitutional law.' Thus Constitutional Law governs the power and procedures of Parliament, the Executive, the Judiciary and the relations between these organs while Administrative Law governs specific Executive acts such as the issuing of rulings by the Commissioner.

1.5 Administrative law and the distinction between Private and Public law

The question which must be answered is whether the distinction between Private and Public Law affects the content of Administrative Law. Generally it is difficult to distinguish between Public and Private Law although most writers agree that Administrative Law is part of what is often called Public law (8). Cane states that (9) :

‘Private law might be defined as law regulating the relations of private persons, whether individuals, corporations, or unincorporated associations, with one another. This definition suggests that public law concerns the activities of Governmental agencies; it regulates relations between Governmental agencies and private individuals on the one hand, and between different governmental agencies on the other.’

Wiechers (10) proposes that public law ‘governs general interests and private law individual or private interests.’ He however states that the above may be too vague and suggests that this vagueness is eliminated by stating that public law serves the public interest as its primary and main function, while the main function of private law is to serve private or individual interests.’

In view of the apparent vagueness of the distinction between Public and Private Law, the question which must be answered is whether it is necessary to distinguish Private Law from Public Law? Cane (11) suggests a number of reasons why this distinction is important. Firstly, because of the great power which the Government can wield over its citizens, the law has traditionally imposed on Governmental agencies special duties of procedural fairness which do not apply to dealings between private citizens. The application of the rules of natural justice by administrative tribunals, where such rules are not excluded, is an example of this. For example, in *Administrator Transvaal v Zenzile* (12), the appellant had dismissed hospital workers who had participated in a strike. Hoexter J A, distinguished between employers who are private individuals and employers who are representative of the State. He stated (*page 34 B-D*) that :

‘One is here concerned not with mere employment under a contract of service between two private individuals, but with a form of employment which invests the employee with a particular status which the law will protect. Here the employer and decision maker is a public authority whose decision to dismiss involved the exercise of a public power. The element of public service injected by statute necessarily entails, so I consider, that the respondents were entitled to the benefit of the application of the principles of natural justice before they could be summarily dismissed for misconduct.’

Furthermore the activities of Governmental agencies are often subject to forms of public accountability, notably to Parliament, to which the activities of private individuals are not. Furthermore, Cane believes (13) that judicial intervention differs depending on whether Public Law or Private Law is involved. He states that when dealing with the exercise of governmental power the Courts are more likely to take a more restrained view of their role. Whereas when the Courts adjudicate the affairs of private citizens they are the primary organs for interpreting, applying and enforcing the law. Accordingly their role is less restrained. A further reason suggested for the distinction between Private and Public Law arises out of the fact that, although

some of the functions of government are uniquely governmental, not all are. Cane suggests that in areas which are traditionally the domain of Private Law such as the law of Contract and Delict, the Courts tend to apply different rules depending on whether the parties to the contract or delict are both private individuals or whether one or both of the parties is a representative of the Government. It may be that, in such instances, that the private individual is prejudiced. For example, in South African Law, estoppel does not operate in favour of an individual where the act of the government official is *ultra vires* (14). This would not generally constitute a problem if the contracting parties were two private individuals. There are examples of this prejudice in Revenue Law. Thus in terms of section 82 of the Act, the onus of proof always rests on the taxpayer initially. A further example is the regulations governing the procedure in the Special Court in comparison to the rules of the Supreme Court. There is no discovery procedure in the Special Court. Furthermore, in terms of regulation B3 of the Act, the Commissioner must furnish the taxpayer with a copy of his dossier at the latest, 10 days before the hearing of the appeal. Thus, in theory the Commissioner could conceivably only furnish such information 10 days before the trial which would be unfair to the taxpayer who may be prejudiced in preparing for the appeal.

Thus the distinction between Public and Private Law remains 'as elusive as ever (15).' It is submitted that the distinction between Private and Public Law is a label (similar to the classification of administrative functions discussed in chapter four). This label should not be prescriptive of any consequences, but rather descriptive.

It is submitted that the definitions of Wiechers and Baxter both share the view that, in attempting to distinguish Administrative Law from Private Law and Constitutional Law, it is necessary to refer to a difference of emphasis, rather than a difference based on substantive law. In a House of Lords decision (16) it was stated by Lord Willberforce that :

'The expressions 'private law' and 'public law' have recently been imported into the law of England from countries which, unlike our own, have separate systems concerning public law and private law. No doubt they are convenient expressions for descriptive purposes. In this country they might be used with caution, for, typically, English law fastens not on principles but on remedies.

1.6 Conclusion

In this section, it has been shown that the regulation of discretionary powers forms part of a division of law known as Administrative Law. Administrative Law has been distinguished from Constitutional Law and is part of Public Law.

1.7 Discretionary Power

In his distinction between Administrative and Constitutional Law, Baxter (17) states that while

Constitutional Law is concerned with the structure and distribution of governmental power, Administrative Law is primarily concerned with its mode of exercise.

The 'mode of exercise' of governmental power, which is an essential component of Administrative Law, implies that representatives of government have to exercise certain governmental powers. The exercise of such power means that government official will take decisions, in pursuance of the policy which must be implemented, which affect individuals in a society. Such official may be granted discretionary power which he must exercise when he decides the extent to which the individual is affected by the policy.

1.8 Discretionary power and the Rule of Law

1.8.1 *What is discretion*

'A public officer has discretion whenever the effective limits on his power leaves him free to make a choice among possible causes of action or in-action' (18).

1.8.2 **The Rule of Law**

In essence the Rule of Law means that all government action should be predetermined with a maximum degree of certainty. The Rule of Law is important to Administrative Law because the control of discretionary powers is dependent on the extent to which Government action is determined by certainty. The origin of the theory of the rule of law has been attributed to Dicey (19). Dicey (20) proposed the following propositions

- (a) We mean in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of the law ...
- (b) We mean in the second place when we speak of the Rule of Law ... that with us no man is above the law
- (c) The general principles of constitution ... are the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts.'

The first proposition means that laws must be manifestations of general principles which must be laid down with certainty. The essence of the second proposition is that laws must provide certainty to the individual. Beinart (21) says that the second proposition 'relates primarily to the mechanics or structure of the legal system and not to the substance or content of the various laws.' Beinart states further that Dicey, although distinguishing between the mechanics and substance of the legal system emphasised the former and not the latter. The third proposition

means that the courts must adjudicate any dispute. The essence of Dicey's propositions is the rejection of discretionary powers which he equated with arbitrary power.

1.8.3 *Necessity for discretionary powers*

Baxter states that (22) there are a number of reasons why discretionary powers are necessary in a society. Firstly not all policies are capable of being crystallised into legislation (23). Secondly discretion is also necessary because Governments ... 'are likely to go on undertaking tasks the execution of which no one is able to prepare advance rules (24). Thirdly rules are inflexible, and every legal system retains some elements of equitable discretion in order to meet justice required in individual cases. Fourthly discretion must be used to determine when the law applies, because the matching process can never be exact : the person invoking the law often has the discretion to do so (25). It is submitted that discretionary powers are necessary in a modern society. The complexities of a modern sophisticated society mean that it is impossible that predetermined rules can be promulgated which solve all disputes. Therefore it is necessary to determine the means of regulating the exercise of discretionary power.

1.9 *Control of discretionary power*

In this section, the control of discretionary power is analysed with reference to controls imposed by rule based administrative action and then with reference to control imposed by adjudicative techniques of decision (26).

1.9.1 **Rule Based Administrative Action**

This means that administrative action should be regulated by predetermined rules. Furthermore, the individual in respect of whom the decision is taken should have knowledge of such rules. In South Africa, an example of such a set of rules are the regulations pertaining to exchange control which are only available to authorised dealers. These rules enable to authorised dealer to determine the relevant information which will result in the success of an exchange control application. Another example, in the area of Revenue Law (27), is the practice manual which has been compiled by the Commissioner for Inland Revenue. This contains guidelines which Revenue official apply in exercising discretionary power. This information is not available to the taxpayer.

1.9.1.1 *The advantages of Rule Based Administrative Action*

The most obvious advantage of rule based Administrative Action is that it provides certainty to the individual who is affected by the exercise of the discretionary power. The applicant knows what information must be furnished to the official in order to increase the likelihood of a decision in his favour. Furthermore, the official is bound to exercise his discretionary power in accordance

with certain criteria. This means that the exercise of his discretion is fettered. Thus the legality of official action can be measured and this permits 'individual redress against official action that does not accord with the standard (28).' Jowell (29) identifies a further advantage of rule based administrative action namely that the publication of rules 'generate public assessment of the fidelity of the official definition to legislative purpose,' ie. publication of rules enables the applicant to rely on the purpose of the legislation as a means of regulating the discretionary power.

1.9.1.2 *The disadvantages of Rule Based Administrative Action*

The main disadvantage of rule based administrative action is that discretionary powers may be fettered if the official is required to exercise discretionary power in accordance with predetermined rules. Rules may prevent 'flexibility individual treatment and responsiveness' (30) by the official who exercises the discretionary power. In other words the discretion of the official becomes fettered by the rules.

1.9.1.3 *Rule Based Administrative Action : Conclusion*

The above illustrates that there is a conflict in rule based administrative action. The conflict is between the certainty provided by the rules on the one hand and the fact that those rules may fetter the exercise of discretionary power on the other. Jowell proposes (31) that the solution would be a combination of rules and unfettered discretionary power. He says that the rules should provide that account should be taken of other material considerations.

The problem, it is submitted is that the conflict remains. Even if there are rules coupled with a provision which states that account must be taken of 'other considerations' there is still a degree of uncertainty because it is impossible to determine what constitutes 'other considerations.'

1.9.2 **Adjudicative Techniques of Decision**

The adjudicative techniques of decision provide another manner of controlling discretionary power. The adjudicative techniques of decision means that :

'the affected person [participates] in the decision about his welfare, his rights or interests. This requirement attempts to influence the discretion of the decision-maker (who should be unbiased and independent in the ideal form of the adjudication normally found in the court room) by exposing him to the claim of the person whose interests are at stake (32).'

Jowell (33) identifies the following disadvantage to such control of discretionary power namely that the decision may be taken with the appearance that the affected person has been afforded procedural justice, nevertheless the decision maker has already made his decision (34).

It is submitted that an example of this is to be found in the requirement of the Labour Relations

Act (35) which provides that prior to the dismissal of an employee, a disciplinary hearing must be held in order to enable the employee to state his case. It is submitted that in many such instances the employer has decided the outcome of the hearing prior to it and merely complies with the procedural requirements of the Labour Relations Act in order to avoid the charge that the dismissal was procedurally unfair.

It is however submitted that adjudicative techniques do provide an effective means of regulating discretionary power, especially where the reasons for the decision are publicised. Adjudicative techniques of decision 'encourage purposive decisions as justification must usually be made by reference to a general rule, standard or principal. Overt reference to arbitrary or particularistic factors (such as the defendant's race or political views) will be difficult (36).'

A combination of rule based administrative action and adjudicative techniques of decision

Baxter (37) proposes as a means of regulating the exercise of discretionary power proposes a combination of rule based administrative action and adjudicative techniques of decision. He proposes *inter alia* the following in order to control the exercise of discretionary powers:

1. structure discretionary decisions by means of rules, principles and standards which stipulates the reference that must be taken into account and procedures that must be followed; and
2. provide, by means of procedures, rules, standards and principles, the institutions and devices necessary for 'checking' or correcting the exercise of discretionary and non discretionary powers.

Dean (38) likewise believes that discretionary power must be exercised with reference to certain criteria which may be summarised as follows.

1. The discretionary power should be exercised by reference to as many jurisdictional facts as possible (39). (This incorporates rule based administrative action)
2. The official must give reasons for his decision (40). (This is a feature of adjudicative techniques of decision)
3. Discretions which involve legislative functions (eg. the power to make rules for an institution) should be treated as if they were acts of the legislature. Thus for example if the rules are vague, they should not be applied (41).

Cane (42) suggests that three basic concerns underlie the rules governing the control of discretion.

Some of the rules are concerned with the *substance* of the authorities decision : was it unreasonable; did it faithfully pursue the aims of the legislation conferring the power? Other rules are concerned with the *procedure* by which discretionary powers are exercised : the rules of natural justice, the rule against self-created rules of policy. Thirdly some rules are concerned with the *legitimacy* of the decision making process : does the decision have the stamp of legitimate authority. The rule against delegation is an example of this type of rule.

Wiechers (43) states that there is no such thing as a judicial, quasi judicial, legislative or administrative discretion. The discretion may be the manifestation of a judicial, legislative, quasi judicial or administrative act. According to Wiechers, the only distinction is between a free and a circumscribed discretion. A free discretion is one on which the law confers a wide freedom of choice without freeing the exercise of the discretion from adherence to the rules laid down by law.

Baxter (44) prefers the distinction of wide or narrow discretion 'for discretion is always limited to a greater or lesser degree.' He illustrates this statement by a reference to an example by Ronald Dworkin who states :

'What does it mean, in ordinary life, to say that someone 'has a discretion?' The first thing to notice is that the concept is out of place in all but very special contexts. For example, you would not say that I either do or do not have discretion to choose a house for my family. It is not true that I have 'no discretion' in making that choice, and yet it would be almost equally misleading to say that I do have discretion. The concept of discretion is at home in only one sort of context; when someone is in general charged with making decisions subject to standards set by a particular authority. It makes sense to speak of discretion of a sergeant who is subject to orders of superiors, or the discretion of a sports official or contest judge who is governed by a rule book or the terms of the contest. *Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction.* It is therefore a relative concept. It makes sense to ask, 'Discretion under which standards?' or 'Discretion as to which authority?'

It is submitted that a combination of rule based administrative action and of adjudicative techniques of decision is the most effective means of regulating the exercise of discretionary power. The application of this submission is the theme of this thesis. It should be remembered that the distinction between rule based administrative action and adjudicative techniques of decision is only one framework of the rule of law. A more traditional framework is to classify theories of the rule of law according to the degree in which they encompass substantive law.

1.9.3 Theories of the content of the Rule of Law

The Legalistic Theory of the Rule of Law

- I. In terms of this purely positivistic theory, the Rule of Law means only that a law is valid if it is enacted in terms of valid rules for the promulgation of rules in a society. The content of the rules pertaining to the valid enactment of the former rule are relative. Thus the requirement of legality

is satisfied if administrative action is legally authorised by clear rules, regardless of the content of such rules.

Procedural Justice Theories of the Rule of Law

II. The legalistic theory is referred to above is subsumed under this category. The procedural justice theories pertain to the legal machinery that is necessary to the application of the laws. Raz (45) states certain principles which are common to these theories. These include :

- (a) All Laws should be prospective open and clear :
- (b) Laws should be relatively stable :
- (c) The independence of the judiciary must be guaranteed :
- (d) The making of particular laws should be guided by open stable, clear and general rules :
- (e) The principles of natural justice must be observed :
- (f) The Courts should have review powers to ensure the implementation of the other principles :
- (g) The Courts should be easily accessible (page 199-201).

It can be seen that this theory is an example of adjudicative techniques of decision. Matthews describes this statement of the Rule of Law as meaning 'Government according to pre-announced clear rules faithfully administered by independent and accessible Courts according to fair trial procedures (46). Matthews (47) states that although this is a procedural theory nevertheless it does promote freedom because its central theme namely that laws should 'provide a clear guide to human conduct presupposes that men are rational autonomous creatures and therefore it enlarges their freedom to choose from as many options as possible.'

III. *Theories based on Dicey's theory*

Over the years Dicey's theory has been reformulated so as to encompass the idea of civil liberties. Matthews (48) reformulates Dicey's propositions as follows :

- (a) The Rule of Law requires the observance of legality in the form of clear and general pre-announced rules administered by independent Courts;
- (b) It also requires that the citizens should actually enjoy the basic civil liberties of person, conscience, speech, movement, meeting and association;
- (c) The substantive rights, described in paragraph (b) are best secured by procedural mechanisms described in paragraph (a) as the principle of legality.

This reformulation means that Dicey's theory now encompasses an aspect of substantive law namely that relating to civil liberties.

IV. *The Rule of Law as substantive justice*

The most expansive concept of the Rule of Law is a dynamic concept which should be employed to safeguard and advance the will of the people and the political right of the individual to establish social, economic, educational and cultural conditions under which the individual may achieve his dignity and realise his legitimate aspiration in all countries whether dependent or independent (49).

In essence this theory conflicts with the earlier theories because legality is subject to ideological consideration.

Administrative Law governs the legal relationship between the representatives of the State and the individual. The growth of the Administrative State has resulted in more and more decisions which affect individuals being taken by officials of the State who are vested with discretionary powers. It is necessary that such discretionary powers must be controlled. The theories of the rule of law, which were examined above, form a theoretical framework for the control of the discretionary powers. In order to further examine the control of the discretionary power of the Commissioner when he makes a decision which affects the taxpayer, it is necessary to examine the influence of constitutional doctrines on Administrative Law. The constitutional doctrine of the Separation of Powers is now examined briefly in order to determine its relationship to the regulation of discretionary powers.

1.10 **The doctrine of Separation of Powers**

1.10.1 **Introduction**

The doctrine of Separation of Powers means that there is a distribution of powers between the Executive, Legislature and Judiciary so that there is a separation and balance of such power. No society adheres to this doctrine rigidly and as a doctrine it is useful as a barometer in illustrating the degree to which a State adheres or does not adhere to this doctrine. In other words, the doctrine is an indication of what should be the ideal in a society. Baxter (50) states that :

'The idea rather than the practice [of the doctrine of Separation of Powers] has done much to mould the characteristics of administrative law throughout the Western world, though 'separation of powers' has meant many different things. Critics never tire of pointing out that Montesquieu was wrong in believing that this doctrine of Separation of Powers truly reflected the realities of the English constitution, and that the latter's most characteristic feature was not the separation of powers but their fusion. Nevertheless, what Montesquieu rightly perceived was the importance of a *distribution* of powers and it is this core meaning that is to be found in all the doctrine's practical applications. In the light of these formal similarities with English law, it is not surprising that the South African administrative law is similar in many respects to that of English law ...'

1.10.2 *The doctrine of Separation of Powers and the Sovereignty of Parliament*

A consequence of the doctrine of Separation of Powers is that Parliament is sovereign (51). 'The sovereignty of Parliament describes in formal terms the relationship which exists between the legislature and the courts (52).'

It is the function of the judiciary 'to administer the laws which Parliament has enacted ... When an enactment is passed, there is finality unless and until it is amended or appealed by Parliament. In the courts there may be argument as to the correct interpretation of the enactment : there must be none as to whether it should be on the statute book at all (53).'

1.10.3 *The doctrine of separation of powers and the independence of the Judiciary*

The consequence of the doctrine in respect of the Judiciary means that the Judiciary's task is to interpret the Act of Parliament.

Dicey stated (54) that :

'Powers however extraordinary, which are conferred or sanctioned by statute, are never really unlimited, for they are confined by the words of the Act itself, and, what is more by the interpretations put on the statute by the judges. Parliament is the supreme legislator, but from the moment Parliament has uttered its will as law giver, that will becomes subject to the interpretation put on it by the judges ...'

Cane (55) states :

'The doctrine of separation of powers encourages us to view the courts as independent and impartial third party adjudicators of disputes between citizen and citizen or between citizen and government. But the doctrine draws our attention to the fact that the courts are themselves a branch of government and that the judicial power is governmental power.'

1.10.4 *The doctrine of Separation of Powers and the Executive*

The doctrine of separation of powers means that the Executive is responsible for exercising the enactments of parliament. Furthermore the Executive is required to account to Parliament all its activities. This latter feature is referred to by many writers as the concept of the ministerial responsibility (56).

Turpin (57) states that Ministerial responsibility :

‘imports an obligation to submit to scrutiny - to provide opportunities Parliament to question, challenge, probe and criticise.’

Ministerial Responsibility is different from parliamentary control of the Executive. Whereas parliamentary control means the exercise of power *a priori* by Parliament to influence the decisions of government, Ministerial Responsibility means the ‘obligation of ministers to respond or answer or account for actions already performed (or left unperformed); responsibility is retrospective or a *posteriori* (58).’

Ministerial Responsibility furthermore connotes a duty of accountability by the Executive to the Judiciary for administrative acts. Thus where an administrative act is reviewed by the Judiciary, the Judiciary is, in reviewing such act indirectly holding the Executive accountable for a decision which has been taken.

In summary the most accepted meaning of Ministerial Responsibility is a responsibility to Parliament for the ‘merits and political wisdom’ (59) of administrative action. It can also mean the indirect accountability of the Executive to the Judiciary when the legality of administrative action is reviewed by the Judiciary.

1.10.5 *The doctrine of Separation of Powers and Discretionary Powers*

It is submitted that the above doctrine is related to discretionary power. The Sovereignty of Parliament means that the discretionary power must be exercised pursuant to an enactment promulgated by Parliament. The independence of the Judiciary, in terms of the doctrine of the Separation of Powers means that the Executive in exercising discretionary power is restrained by the Judiciary because the Judiciary controls discretionary power when it exercises its review functions.

1.10.6 *Conclusion*

The relationship of the Rule of Law to the regulation of discretionary power was examined generally. A distinction was made between rule based administrative action on the one hand and adjudicative techniques of controlling discretion on the other. It was shown that theories of the content of the rule of law contained both rules and adjudicative techniques in order to control discretionary powers. The importance of the doctrine of separation of powers and the relationship thereof to discretionary power was examined.

The relationship between the collection of income tax (and *a fortiori* the exercise by officials of

the commissioner's office of their discretionary power) is examined generally in the remainder of this chapter.

1.11 **The collection of taxation**

1.11.1 *Historical background*

A brief historical analysis of the need for and collection of tax illustrates the importance of the relationship between Administrative Law and Revenue Law. The imposition of a permanent direct tax on income is a recent phenomenon (60). In England, the main source of revenue which was required to fund State expenditure was originally customs and excise levies (61). In England, ad hoc direct taxation was required only when an emergency arose such as the need to fund a war (62). In the 11th century there was the Daengeld which was a property tax. Another feudal tax was the Scutage which was paid in lieu of military service (63). In the 17th century, the main source of revenue was the duty on malt, used in the making of ale (64). The major sources of revenue in the 18th century were the land tax, which gave a yield of £2 million, the customs duties which had their origins in mediaeval times and the excise duties, or inland revenue (65).⁷ A large portion of the money was needed to pay for the wars against Louis XIV. In the 16th century legislation was passed when the collection of taxes was frustrated by evasion (66). In 1784, a tax was payable on pleasure horses. In 1793, a tax was imposed on hair-powder in order to finance a war against France.

Some of the taxes were graduated such as the poll tax of 1380. In 1797 the Napoleonic wars resulted in the imposition of the Triple Assessment Act. This tax was imposed on persons who owned property. Furthermore, the amount of the tax payable was dependent on the means of the person. There was flexibility in this Act because exemptions and reductions were permitted for the first time. However, due to widespread evasion, the latter tax was abolished in 1798 and in 1799 a tax on income was introduced (67).

The effect on sectors of society of taxation was a factor which determined the imposition of taxation. In 1730, Britain's first Prime Minister, Sir Robert Walpole, reduced the salt tax, as a concession to the poor, and increased the land tax in order to make up the short fall. Two years later, he attempted to reintroduce the salt tax and was met with great opposition. The reintroduction salt tax was opposed because it was unfair to the poor because 'the poorer a man is, the more salt provisions he is obliged to consume.'

Another factor was the fact that the imposition of such taxes lead to a flight of business. In opposing Walpoles proposed reintroduction of the salt tax, an opposition speaker Lord Carteret (68) stated :

'By such methods we shall soon banish all the artifices and manufacturers out of the kingdom. We know how ready some of our neighbours are to receive them, and to give them all possible encouragement ... How can we expect to keep them in our country, if we go on thus every year loading them with taxes, while neighbours are declaring them free from all imports and duties, and doing all that is in their power to entice them away from us?'

The tax on income was regarded as unfair. In England, the late 18th and the 19th century were characterised by the repeal and re-introduction of taxes on income. At this stage, it was not considered a permanent tax.

There was also opposition in England to graduation of income tax and only in the 20th century was the permanence of graduated income tax accepted.

1.11.2 *The growth of Administrative Tribunals*

The need of the feudal State and ultimately the 20th century Administrative State to obtain finance from its subjects and the obligation on the subjects of the State to pay the required revenue meant that there would be different perceptions on the part of the State and its subjects as to how much revenue had to be collected.

In England, the Consolidating Act of 1803 which provided for taxes on windows inhabited houses, servants carriages, horses, mules and dogs contained an appeal provision in relation to appeals heard by the commissioners responsible for those taxes (69).

The logical concomitant of an Act which contains appeal provisions to commissioners is the existence of a forum and rules where such appeals could be heard.

Monroe states of the early administrative tribunals (70)

'Not only were the tribunals so established distinct from the ordinary courts but, as a matter of policy, the way in which claims were to be decided bore little resemblance to common law procedure. First, it was for the taxpayer to declare his income. Pitt contemplated that he would merely declare that the proposed figure was adequate, a proper discharge of his quota, but in course of time this was modified : the making of a return of income by the taxpayer was from the outset and is today the first step in the process of fixing his liability. If there were doubts, the surveyor was to raise them. Then the commissioners would decide.' ... But if the citizen claims a benefit of exemption or abatement or challenges in respect of assessment, he must still, as under Pitt's arrangements, disclose the details of his affairs. The onus is on him, not on the inspector to prove what tax is due. The underlying assumptions as to how tax will be imposed and how disputes will be resolved are as they were in 1799 and they have little to do with the common law.'

In opposing Walpoles reintroduction of the salt tax, Lord Carteret stated (71) :

‘... the subject is not to be tried in the usual way, by God and his country, but ... by Commissioners and officers who are appointed by the Crown and removable at the pleasure of the Crown; the Crown is to be plaintiff or prosecutor and a man depending on the Crown, perhaps for his daily bread is to be the judge ... when things have been turned out of the ordinary course of the law, when any extraordinary method of proceeding before Commissioners have been introduced, extraordinary iniquities have been committed; some are discovered, but most of them are sunk into oblivion by the might of power.’

1.11.3 *The 20th century*

Baxter identifies two events in the 20th century which were catalysts to the growth of Public Administrations. The first event was the First World War and the second event was the Great Depression (72). Baxter states that World War One marked the beginning of the final phase in this growth.

‘Government, engaged in a war effort of unprecedented scale, became a great buying and selling concern. Anguished social conscience afterwards demanded the same massive machinery now be used to set all right the maladies of society. Nations hastily continued the task, begun already before the war, of erecting their welfare states with all the complex machinery which this enterprise entailed.’

Baxter states (73) that as in Britain ‘the great war had consequences were both direct and indirect; and during its immediate aftermath there was a great burst of administrative expansion.’

Baxter states :

that the fact that South Africa had to rely on its own resources during the war had ‘the dual effect of stimulating local manufacture and creating a post-war belief that the South African economy should become self sufficient. Protectionist policies were adopted and industrial incentives were offered and public enterprises were created where there were thought to be strategically desirable. The effect was to increase substantially the level of state intervention in economic activity (74).’

Baxter (75) states that another development was the intervention of the State in industrial activities for example by way of the enactment of the Factories Act No. 28 of 1918. Other factors such as the acute housing shortage during and after the First World War and the need to develop a coherent transportation policy resulted in the growth of the Administrative State in South Africa.

1.11.4 *The Welfare State of the 20th century*

It is submitted that the 20th century welfare state is a good example of the growth in state administration.

De Kam identifies the following two features of the welfare state (76)

1. The production of goods (including services) and the distribution of income and wealth are primarily determined by the market process, that is, they are the outcome of the interplay of supply and demand.
2. The State corrects the resulting patterns of resource allocation and the distribution of income and wealth, so as to ensure that all citizens may enjoy a given minimal level of welfare.

De Kam (77) states that government intervention in a social welfare economy can be justified *inter alia* on one of the following grounds :

1. Markets fail to allocate resources efficiently.
2. Market outcomes lead to unacceptable distribution of income and wealth.

The above illustrates that in a Welfare State, the State Administration is greatly involved in all aspects of society. This extensive intervention of the State in society has, in books on Administrative Law, given rise to the notion of the Administrative State.

1.11.5 The notion of the Administrative State

Baxter states that the true value of the cliché 'administrative state' is that it emphasises the growing importance of the Executive and administrative branch of Government relative to the Legislative and Judicial branch' (78). It is submitted that the notion of Administrative State is generally synonymous with 20th century Government where the Executive, through the medium of administrative tribunals and officials, regulates and monopolises the exercise of authority in a society. Furthermore the notion of the 'Administrative State' 'emphasises that many legislative functions of Government are performed not by Parliament but by administrative officials and institutions while many judicial functions that would otherwise be performed by the Supreme Court or other courts of law are performed instead by administrative officials and tribunals (79).'

1.11.6 *The growth of the Administrative State*

The brief historical summary is relevant for the following reasons :

- a) Firstly it illustrates the development of the collection of revenue from an ad hoc system of tax based on assets to a graduated tax based on income. This development of Revenue Law is parallel to the evolution of the Feudal State into the 20th century Administrative State. The latter requires a permanent source of financing.

1.12.2 **Racial separation**

The effect of the policy of racial separation on Administrative Law in South Africa is a subject in respect of which volumes could be written 'Separate Administrative institutions have continually been created in order to administer the affairs of persons of colour' (84). Even where such institutions have not been created, racism has played a role. (85) Racism has also affected an area of law which is crucial to Administrative Law, namely the Interpretation of Statutes. (86) Ironically the presumption of Interpretation of Statutes namely that the consequences of an administrative act must not result in discrimination against persons on the grounds of colour so that 'substantially unequal treatment can be inferred' (87) forms part of common law.

As far as Revenue Law is concerned, the Margo Commission received evidence (88) that there is resentment about 'taxation without representation' and about items of State expenditure occasioned by the separation of the races.

A further effect of racial separation on revenue law is that 'tax assessment and enforcement in the national states which collect tax require revitalisation. The present ineffective administration prejudices the South Africa taxpayer.' (89) The response of the Government to the latter statement was that it would consult with the national states. (90) The Margo Commission stated (91) that postal problems in the townships meant that 'official correspondence, assessments and demands for payment often do not reach the addressee, and the rendering of returns, the issue of assessments and the receiving of payments suffer accordingly.' The Margo Commission stated further (92) that 'at present there is an undisputed need for Black participation in communicating with and educating Black taxpayers, and, with normal development, there will be a growing need for Black administrators in Inland Revenue.'

1.12.3 **Security**

Laws relating to security such as the Internal Security Act 74 of 1982 and laws which prevent the flow of information have an important effect on Administrative Law. An example is the limited powers of the Judiciary to review the actions of persons who are responsible for the implementation of the above legislation. In Revenue Law, the absence of a Freedom of Information Act (which exists in jurisdictions such as Australia and Canada) has meant that there is little publication of the Commissioners interpretation of the Act. (This is examined in detail in the next chapter)

1.12.4 **Tricameral parliament, provincial and local government**

This is a manifestation of racial separation. The tricameral parliamentary system is based on race. Local government is segregated on a racial basis. Municipalities are constituted for whites, management committees for coloureds and town councils for blacks. The resultant complex

structure of government begs the question of what is the difference between Administrative and Constitutional Law. Baxter and Wiechers agree that the distinction is not clear. 'Perhaps the best that can be said is that the two subjects involve a difference of emphasis : while constitutional law is *primarily* concerned with the structure and distribution of government power, administrative law is *primarily* concerned with its mode of exercise (93).'

The effect of the complex structure of government on Administrative Law is that at the stage of local government, the distinction between Constitutional and Administrative Law is even less clear than it is at the level of the central government. (94)

The tricameral parliamentary system, and the system of provincial and local government affects the relationship between the taxpayer and the revenue collecting authorities (who include the Commissioner).

The central and provincial governments obtain most of their finance from the State Revenue Fund which derives its money from taxpayers. Local government on the other hand derives its revenue from other sources such as property rates, and licenses and permits. This latter 'coercive power of taxation' (95) is the source of many cases pertaining to review of administrative action.

1.12.5 The Public Service

A tradition of public administration is that the person who is responsible for the day to day running of the department occupies the position of a 'professional administrator theoretically appointed for his administrative skills and not for his political allegiances.' (96) The Minister is responsible for the policy of the department. It is submitted that this distinction does not exist in practice. Firstly, in most departments, the policy permeates the implementation thereof to such an extent that one cannot say that the head of the department is an apolitical administrative automaton. (97) Secondly, as Baxter states (98) the administrators are involved in the planning of policy.

Landman (99) states that the separation of administrative and political responsibility in respect of the Act is entrenched because parliament has vested the implementation of the Act in the Commissioner (100) and not in the Minister. Landman (101) states that the reason for this is that the intention of parliament is that the administration of tax law must be seen to be free from political considerations and that this ensured by the secrecy provisions in section 4 of the Act.

Section 4 of the Act was amended in 1989 in order to ensure greater secrecy as a result of the publication of a directive from the Commissioner to the Receivers of Revenue requesting the latter to review the returns of certain members of parliament.

Another aspect of the public service in South Africa which merits attention is the political role played by life time bureaucrats in departments, the Ministers of which change more frequently. In other words, it is submitted that not only are senior bureaucrats concerned with political matters affecting their departments because they sit on policy advisory committees but because of the permanence and security of their tenure as opposed to that of the particular minister.

1.12.6 **Specialisation**

The advancements of the twentieth century have meant that the administration of the State has had to become more specialised 'The modern state, and in particular the administration as its executive arm, is not merely a guard or 'nightwatchman' combating enemies, but an active entrepreneur, welfare officer, teacher, builder, planner, guardian of morals and much more. All these tasks demand exceptional and specialised knowledge on the part of the administration.' (102) It is submitted that this qualitative expansion is to some extent, a manifestation of monopoly capitalism and the accompanying wide powers of the Executive and not only a manifestation of technology in the twentieth century.

This affects Revenue Law which likewise has become specialised. Tax avoidance schemes and the detection thereof have become more sophisticated. For example since 1988 there have been such additions to the Act as section 103(5) which deals with dividend/interest swops. Section 103(5) was introduced to combat this sophisticated form of tax avoidance. Another example is section 8E which deems dividends on certain shares to be interest. This section was also introduced to combat a sophisticated form of tax avoidance.

1.12.7 **Diversification\decentralisation**

It is necessary to apply the doctrines referred to above to South Africa.

Diversification\decentralisation is the quantitative expansion of the State. The tricameral system of government has caused this process to gain momentum. From an Administrative Law perspective, this feature means more decisions are made by the exercise of discretionary power. There is an increase of delegated authority. The doctrine of legitimate expectation which is discussed in detail in chapter three below becomes important as a protection against the omnipresence of the State.

1.12.8 **Application of the Constitutional Doctrines to the features of government in South Africa**

It is necessary to apply the doctrines referred to above to South Africa.

1.12.8.1 **The Rule of Law**

From the above it can be seen that South Africa adheres to the legalistic theory of the Rule of Law and to a limited extent, to the Procedural Justice theory of the Rule of Law. South Africa adheres to the legalistic theory of the Rule of Law because laws are valid only if they have been enacted in accordance with a valid procedure. If one adopts Raz's (103) description of a Procedural Justice theory of the Rule of Law, then it can be seen that South Africa adheres to a limited extent to the theory. For example, not all laws are prospective especially when it comes to Revenue Law, eg. section 8E of the Act was not introduced prospectively. Furthermore, although South Africa's laws are promulgated in accordance with open statute and clear rules, the courts are not easily accessible. Furthermore, the independence of the Judiciary in South Africa is open to question. (104)

1.12.8.2 **The doctrine of Separation of Powers**

Baxter (105) states that South Africa has been influenced by the idea rather than the practice of this doctrine. The idea is that there is a distribution of powers between the Executive, the Legislative and the Judiciary so that there is a separation and balance of powers. The doctrine has been distorted in South Africa because of the extensive powers of the Executive in South Africa and the decline of Parliamentary Supremacy.

1.12.8.3 **The Supremacy of Parliament**

The legislative supremacy of parliament is a consequence of the doctrine of Separation of Powers. In terms of this doctrine, the Judiciary, may not question the validity of legislation if the legislation has been enacted in accordance with constitutional laws which govern the promulgation of legislation. Furthermore, an administrative act, must not be contrary to an Act of parliament. In South Africa, the doctrine has been distorted entirely. Parliament cannot be said to be supreme because the Executive is dominant. Furthermore, Parliament is elected on a limited franchise. This negates the notions of parliamentary supremacy.

1.12.8.4 **Conclusion**

Thus the Constitutional doctrines which form the background of Administrative Law are not adhered to in South Africa. In the remainder of this chapter the importance of Administrative Law to the administrative law relationship between the Commissioner and the taxpayer is discussed.

1.13 **The administrative law relationship continued - aspects of taxpayer morality in South Africa**

Having examined the features of government in South Africa as part of the background in respect of the administrative law relationship between the taxpayer and the Commissioner, it is necessary to examine, in parenthesis, the background to the relationship further by referring to the morality of the taxpayers generally in South Africa. The technical nature of this relationship which is governed primarily by the Act, is not examined at this stage.

The relationship between the taxpayer and the Commissioner has become more adversarial. The reason is that tax planning has become more sophisticated and the Commissioner has become more zealous in his response to such tax planning. There have been calls (106) for the normalisation of what is perceived to be deteriorating situation. Huxham (107) believes that 'the time has surely come for the Revenue authorities to have the courage to initiate peace moves.' He does contradict himself when he states (108) 'that it is beyond the power of the Revenue authorities to persuade the public to change their current thinking on tax matters and it is therefore clear that the future lies in a substantial shift away from direct tax to indirect tax.'

He furthermore states (109) that 'the slow and almost imperceptible slide in moral standards is undoubtedly the biggest single factor influencing the present tax climate in the country [which] probably started at the time of the information scandal when the public were exposed to the phenomenon of misappropriation of funds and fraudulent behaviours and extensive press coverage thereof.'

It is submitted that Huxham's analysis is incorrect because it is predicated on the view that the perceived hostility between the taxpayer and the Commissioner is bad and that something should be done to restore the 'camaraderie' between the two parties. (110) If this is one's premise then one's view as to the cause of this hostility and the solutions thereto must *ipso facto* be vague because one is attempting to restore a degree of goodwill to a vague relationship between two parties in an adversarial relationship.

It is accepted that tax planning has become more sophisticated and that the Commissioner has become

more aggressive in investigating such planning. It cannot be said that an important contributory factor to this is a decline in moral standards. (111) The most common motive for tax evasion and tax avoidance is greed which has always existed. 'In short therefore, irrespective of whether it is moral or not to avoid tax, it is natural to do so if one is fortunate enough to be in the position of being able to do so lawfully.' By the same token, the Revenue is charged with the task of collecting sufficient taxes to finance a nation's expenditure and if tax avoidance practices are subverting this object, it is natural that steps must be taken to counter this position.' (112)

Furthermore, why should this relationship of goodwill be restored? It is better to accept the existence of a clear and adversarial relationship rather than one based on goodwill and the resultant vagueness. If one advocates the latter, then one's remedies for the normalisation of the latter relationship will be vague.

In summary it is submitted that it should be accepted that it is as natural for a taxpayer to avoid tax legally as it is for the Commissioner to investigate and curb such avoidance. The two parties are in a naturally adversarial relationship. This relationship must be clearly defined and the rules of this relationship, especially those of administrative law are more important than a vague concept of goodwill. It is submitted that the developments in Administrative Law, which are examined in this thesis, introduce an element of flexibility into the Administrative Law relationship between the taxpayer and the Commissioner. It is better that the source of this flexibility is defined ie. Administrative Law rather than a vague concept such as goodwill.

1.14 Conclusion

The background of Administrative Law in South Africa has been examined briefly in this chapter. The sociopolitical features of government in South Africa and the more positivistic administrative law related features are interrelated because the latter are a manifestation of the former. The degree of non adherence to the doctrine of separation of powers is a manifestation of racial segregation and the lack of universal franchise. Although there is legislative supremacy of parliament, this must be viewed against the background referred to above.

FOOTNOTES

1. See *Jowell and Oliver* The Changing Constitution page 8
2. *Jowell and Oliver* page 15
3. *Cane* Administration Law page 11
4. *Baxter* page 2
5. *Wiechers* Administrative Law ("Wiechers") page 2
6. *Baxter* page 51
7. *Wiechers* page 7
8. See *Cane* page 4, *Baxter* page 57, *Wiechers* page 2
9. *Cane* page 4
10. *Wiechers* page 2
11. *Cane* page 5
12. 1991 (1) SA 21 (A)
13. Ibid
14. See *Baxter* page 400 et seq
15. *Baxter* page 63
16. *Davy v Spelthorne Borough Council* [1983] 3 ALL ER 278 (HL) at page 285h
17. See above
18. *Davis* page 4
19. *Jowell and Oliver* page 3
20. See *Beinart* - The Rule of Law
21. Ibid page 103
22. *Baxter* 83 - 84
23. Ibid
24. *Davis* page 20
25. *Baxter* page 84
26. See *Jowell* page 8 et seq
27. Discussed in chapter two

28. *Jowell and Oliver* page 9
29. *Jowell* page 9
30. *Jowell* page 11
31. *Jowell* page 12
32. *Jowell* page 15
33. *Jowell* page 15
34. See also *Allars* 'Fairness Writ Large or Small'
35. Labour Relations Act section 43
36. *Jowell* page 15
37. *Ibid* page 93
38. *Dean* Our Administrative law page 14 et seq
39. *Dean* page *ibid* page 168
40. *Ibid* page 168
41. *Ibid* page 173
42. *Cane* page 70
43. Page 8
44. *Baxter* page 88
45. The Rule of Law and its Virtue (1977) 93 LQR 195
46. *Matthews* page 4
47. Page 202
48. Pages 301 and 302
49. See *Matthews* page 305
50. *Baxter* page 31
51. See above
52. *Jowell* page 26
53. Per Lord Morris in *Pickin v British Railway Board* (1974) AC 765 at 789
54. Law of the Constitution page 413
55. *Cane* page 18

56. *Jowell* page 53 et seq : *Baxter* page 30
57. *Jowell* The Changing Constitution page 57
58. *Turpin* page 56
59. *Baxter* page 30
60. See *Toby*; The Theory and Practice of Income Tax, page 2 et seq, see also *Monroe's* Reflections on the Law of Tax, page 4 et seq.
61. *Monroe* page 4, *Toby* page 2
62. This can be traced to the 11th century, *Toby* page 2
63. *Toby* ibid
64. *Ferrier* page 267
65. *Ferrier* page 267
66. *Toby* ibid and see the discussion of the 1689 Act for Making Good the Deficiency of Clipped Money in *Toby* ibid
67. *Toby* ibid
68. *Ferrier* page 271
69. *Monroe* page 10
70. Ibid page 10
71. *Ferrier* page 271
72. *Baxter* page 7
73. Ibid
74. Ibid
75. Ibid page 11
76. *De Kam* page 13
77. Ibid
78. *Baxter* page 4
79. Ibid page 4
80. *Jowell and Oliver*, The Executive Power Today page 197
81. Page 197
82. *Daintith* page 199
83. *Baxter* page 4

84. *Baxter* page 13, for example the Race Classification Board
85. See for example 'Administrative Law - our dismal science' - W H B Dean where he describes a series of cases in the Transvaal in the 1920's where the liquor licensing board's refusal to grant liquor bonuses to Blacks was reversed
86. See also *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530
87. *Wiechers* page 253. It is beyond the scope of this paper to enter into the debate about inequality which results from the separate but equal doctrine
88. Paragraph 1.32(b).
89. Paragraph 28.135(h) of the Margo Commission.
90. White Paper paragraph.
91. Paragraph 28.117.
92. Paragraph 28.119.
93. *Baxter* page 51.
94. *Wiechers* (page 8) is not certain whether the law relating to local authorities is constitutional or administrative.
95. *Baxter* page 152.
96. *Ibid* page 113.
97. Eg. the Department of Education and Training is responsible for Black Education.
98. *Ibid* page 3.
99. *Landman* 'An administrative law inquiry into the legal nature of the assessment of normal tax.' (hereinafter referred to as *Landman*) page 37.
100. Section 2(1).
101. *Ibid*.
102. *Wiechers* page 18.
103. See page above.
104. *E Cameron* 'Legal Chauvinism, Executive Mindedness and Justice. L C Steyn's Impact on South African Law (1982) 99 SALJ 38.
105. *Baxter* page 31.
106. See for example *Huxham* 'South African Tax Reform.'
107. *Ibid* page 71.
108. *Ibid* page 73.
109. *Ibid* page 70.

110. Ibid page 71.
111. The Margo Commission identified, as a cause of tax avoidance the fact that 'taxpayer morality declines with resentment over what is regarded as unfair or unduly burdensome taxation.' (paragraph 27.7)
112. *Stewart*, The Prohibition of Tax avoidance, page 171.

CHAPTER TWO

THE COMMISSIONER

2.1 Introduction

The issuing of rulings is a manifestation of rule based administrative action. For example, in many jurisdictions (discussed below) there are procedural rules which apply to the issuing of rulings. Furthermore, these rulings are either binding on the Revenue in a court or have strong persuasive value before a court, depending on the jurisdiction. In addition, these rulings are usually published. Therefore, if a taxpayer seeks a similar ruling, the publication of the previous ruling provides a published standard against which to measure the legality of official action and thus to allow individual redress against official action that does not accord with the standard (1).¹ In this Chapter the powers of the Commissioner are examined with reference to deconcentration and decentralisation of administrative powers. The delegation of Administrative functions is also analysed. Thereafter the regulation of the exercise of discretionary powers by means of ruled based administrative action is examined with specific reference to section 3 of the Act.

2.2 The Commissioner

The parties to the administrative law relationship are the Commissioner and the taxpayer.

Section 2 of the Act states that 'the Commissioner shall be responsible for carrying out the provisions of this Act.'² (2)

2.3 Relationships of authority

It is necessary to distinguish between two kinds of relationships of authority into which a government organs may enter into with each other. Wiechers distinguishes between the following two relationships. (3)

Firstly, there are those relationships which take place within the same sphere of authority ie. where one government department enters into a relationship with another. An example of this would be the administrative law relationship between the Director General of Finance and the Minister of Finance.

The essence of this administrative law relationship is the power of the superior organ to give instructions to the inferior organ. More specifically it means that the superior organ has the power to give instructions to subordinate organs within the same sphere of authority and the superior organ also has the power to amend rules made by the subordinate organ. The only condition of this power is that, if the action of the subordinate organ has resulted in the acquisition of certain rights by individuals, the superior organ may amend the decision of the subordinate organ if it has express statutory authority to do so or if the action is invalid in law. (4)

The second administrative law relationship between government organs occurs where the superior organ does not have the power to amend decisions taken by the inferior organ. In such a relationship, the superior organ only has power to approve or disapprove decisions of the lower organ but it may not amend those decisions. Wiechers states that this relationship is one of independent control.

As far as the distinction between the types of relationships between government departments is concerned (5), it is submitted that the administrative law relationship between the Commissioner and the Minister of Finance is one of independent control.

This is a relationship which exists between two administrative organs when one organ exercises a power of approval over the acts of the other. It is submitted that the Minister of Finance merely has the power to approve or disapprove of the actions of the Commissioner but not to replace such actions. The reason for this is that section 2(1) of the Act specifically provides that the Commissioner shall be responsible for carrying out the provisions of the Act. Furthermore, in terms of Section 2(2) a notice in the Government Gazette that any person who has been appointed to hold office as Commissioner for Inland Revenue is conclusive proof of such appointment. It is submitted that the effect of these two sections is that the Commissioner and not the Minister is responsible for the administration of the Act.

2.4 **The Administrative Law Relationship between the Minister of Finance and the Commissioner**

The Minister of Finance is the head of the Department of Finance. A public service official namely the Director General for Finance is responsible for the day to day running of the Department of Finance. The Department of Finance consists of numerous directorates, one of which is the directorate : Inland Revenue. The head of this directorate is the Commissioner for

Inland Revenue.

Landman (6) states that :

the separation of administrative responsibility for income tax administration from political responsibility embodies, it is submitted, an important constitutional convention. It is founded on the presumed intention of parliament that the administration of fiscal laws including the Income Tax Act must be independent, impartial and free from political influence.

Landman (7) further states that the constitutional principle involved, namely the separation of administrative and political responsibility, is ensured by the secrecy provisions of the Act.

The statement ignores the implementation of governmental policy by way of *dominium* (8). Daintith states (9) that 'the main resources available to government for persuading people to change their behaviour are two : first, the command of the law, backed in the last resort by force, carrying with it the threat of harm to those who do not comply; and second the promise of benefit for those who do (ie. *dominium*).'

In other words, fiscal laws of any society are an expression of political influences. For example a government which is committed to the welfare of its subjects will usually impose high taxation so that money is available for social welfare. Thus a State may also impose a capital transfer tax.

More specifically, *dominium* affects certain important sectors of South African society. For example, the standard values of livestock in the First Schedule of the Act is an example of the implementation of governmental policy in favour of farmers policy by way of *dominium*.

Therefore, it cannot be presumed that the political functions of the State have no connection with the perceived non-political implementation of the Income Tax Act.

2.5 The Commissioner

The relationship between the Minister of Finance and the Commissioner is one of independent control. Nevertheless, viewed from a political perspective, the parties to the relationship are inter-related.

2.6 The Administrative Law Relationship between the Commissioner and his subordinate officials

The Administrative Law relationship between the Commissioner and his subordinate officials is now examined. The administrative law relationship between the Commissioner and his subordinate officials is governed by section 3 of the Act. Section 3 of the Act states the following :

- (1) *The powers conferred and the duties imposed upon the Commissioner by or under the provisions of this Act or of any amendment thereof, may be exercised or performed by the Commissioner personally, or by any officer engaged in carrying out the said provisions under the control, direction, or supervision of the Commissioner.*
- (2) *Any decision made and any notice of communication issued or signed by any such officer may be withdrawn or amended by the Commissioner or by the officer concerned, and shall for the purposes of the said provisions, until it has been so withdrawn, be deemed to have been made or issued or signed by the Commissioner : Provided that a decision made by any such officer in the exercise of any discretionary power under the provisions of this Act or of any previous Income Tax Act shall not be withdrawn or amended after the expiration of two years from the date of written notification of such a decision or of the notice of assessment giving effect thereto, if all the material facts were known to the said officer when he made his decision.*
- (3) *Any written decision made by the Commissioner personally in the exercise of any discretionary power under the provisions of this Act or of any previous Income Tax Act shall not be withdrawn or amended by the Commissioner if all the material facts were known to him when he made his decision.*

The following areas of contention pertaining to Section 3 are examined below :

- a) Delegation and discretionary power with reference to
 - (i) the relationship of Section 3 to Section 79 of the Act ; and
 - (ii) the rulings issued by the Commissioner.

2.6.1 Delegation and Discretionary Powers

Wiechers distinguishes (10), inter alia, between three types of delegation of administrative powers.

The most rudimentary form of administrative delegation is a mandate or instruction. The superior organ takes a decision and requests or instructs the inferior organ to implement the decision.

The second type of administrative delegation which is identified by Wiechers is that of deconcentration. Wiechers (11) states that this type of delegation takes place within the same state department or local authority. Features of deconcentration include the following.

- (a) The *delegans* may withdraw the delegation at any time.
- (b) If the delegation has not been withdrawn by the *delegans*, then the delegate, in performing the act, replaces the *delegans*.
- (c) Once the *delegans* has performed the act, the delegate may not revoke the decision.
- (d) The delegate may always take over the powers delegated to the *delegans*.

The third type of administrative delegation which is identified by Wiechers occurs when there is decentralisation of activities. The difference between decentralisation and deconcentration is that in the former, the powers are transferred to an independent organ which carries out such powers in its own name. Wiechers states that there are a number of reasons why it is important to distinguish between deconcentration and decentralisation (12). 'In the case of decentralisation, the independent subordinate organ must be sued and not the superior controlling body; the lower organ may not transfer its powers to the superior organ and the superior organ may not, as a rule, perform the functions of the subordinate organ (except in the exceptional cases of dereliction of duty or impossibility of performance).'

It is submitted that the above framework forms a useful means of analysing components of the Administrative Law relationship between the Commissioner and the taxpayer.

2.6.2 Section 3 of the Act - General

In terms of Section 3(1) the Commissioner may delegate any powers or duties imposed upon him to '*any officer engaged in carrying out the said provisions under the control direction or supervision of the Commissioner.*'

It is submitted that the delegation contained in Section 3(1) does not involve decentralisation but deconcentration because the delegate (Commissioner) does not transfer all his powers and functions to an independent organ which carries out these powers in its own name. Furthermore, one of the important reasons for the distinction between deconcentration and decentralisation is that in the case of decentralisation, the independent (inferior) organ must be sued and not the superior organ. This is not applicable here.

In terms of Section 3(2) any decision made by a subordinate official may be withdrawn or amended by the Commissioner at any time. If however, the decision is made by the subordinate official in the exercise of any discretionary power under the provisions of the Act, then the notice shall not be withdrawn or amended after a period of two years 'if all the material facts were known to the said officer when he made his decision.'

The Commissioner has stated that he will exercise certain powers and perform certain duties personally. For example in practice note number 5 the Commissioner stated that only he will invoke section 105 A of the Act. (13)

2.6.3 The remedies which avail the taxpayer as a result of the exercise of a discretion by the Commissioner, include :

- (a) The taxpayer has a Legitimate Expectation that a ruling will not be withdrawn.

- (b) The expiration of the three year period in terms of section 79(1)(i) and (ii) of the Act.
- (c) The practice prevailing at the time was such that amount should not have been assessed to tax - section 79(1)(iii)(15)
- (d) Jurisdictional facts contained in section 3 have been ignored.

In the next chapter, the remedy of Legitimate Expectation is examined. The relationship of section 79 to section 3 is canvassed in this chapter. A brief discussion of the limitation of the jurisdictional facts contained in section 3(2) is examined in the Chapter. The provisions of section 79 are analysed in chapter four. Although Section 79 of the Act is examined below, it is necessary to consider those aspects of that section which affect the interpretation of Section 3(2) at this stage.

Section 79 - Additional Assessments

2.6.3.1 The courts have held that the time limits contained in the provisos to Section 79(1) of the Act override the provisions of Sections 3(2) and 3(3) and section 81(5) of the Act. (16) In *ITC 788* (17) it was held that the provision of Section 3(2) of the Act did not permit the recall of an assessment which had otherwise become final and conclusive pursuant to Section 77(16). The latter Section was the forerunner to the present Section 81(5). Ogilvie Thompson J stated (18) that :

The words 'that any decision made and any notice or communication issued or signed' occurring in Section 3(2) of the Act are certainly comprehensive in their scope. In that sense they may be said to be capable of including an assessment. At the same time, assessments - which are a vital feature of the machinery of the Act - receive no express mention in Section 3(2), whereas Section [81(5)] specifically provides that, subject to the conditions there stated, assessments are to be 'final and conclusive.' No language could be clearer. Purely as a matter of construction there would, I apprehend, be considerable difficulty in construing the provisions of Section 3(2) as overriding the clear language of Section [81(5)]. Moreover, on general grounds, such a conclusion would, I think, be most unfortunate; for all considerations appear to me to render it desirable that - subject to the conditions mentioned in Section [81(5)] of the Act - there should be finality in regard to assessments. The whole concept of the Act is based upon separate years of assessment ending ..., and it is manifestly desirable that, as a general principle, finality should at a certain stage be attained.'

In *ITC 1150* (19) an employee of a welfare council incurred travelling and incidental expenditure on a holiday tour in Europe. The Commissioner issued an additional assessment in terms of Section 79. One of the grounds of the taxpayers objection was that Section 81(5) rendered the assessment final and conclusive and therefore the Receiver could not invoke Section 79 or Section 3(2) against him. It was held that Section 79 overrides Section 81(5). Although nothing was said as to the relationship between Section 3(2) and Section 79 it can be inferred that Section 3(2) similarly overrides Section 81(5). In *CIR v Louw* (20) Corbett J A in a case dealing with the invocation of Section 103, stated that Section 3(2) does not preclude the issue of additional assessments.

2.6.3.2 *Jurisdictional facts*

One of the jurisdictional facts of Section 3(2) is that there must be a decision which has been made and which must be communicated to the taxpayer. A letter of confirmation by the Receiver has been held to be a decision. *ITC 1261* (21) dealt with the export marketing allowance provided for in Section 11 bis (4)(a) which refers to instances 'where it is proved to the satisfaction of the [Commissioner] that expenditure of the nature referred to has been incurred.' It was held that this wording implied a discretionary power subject to the limitations imposed by Section 3(2). It was also held that a letter from the Receiver of Revenue to the taxpayer confirming that certain commissions (the details of which had been fully explained to the Receiver in a letter from the taxpayer's auditors) would qualify for the export marketing allowance constituted a 'decision' in the context of Section 3(2).

If the decision which was made was based on a lack of material information furnished by the taxpayer then the taxpayer may not invoke Section 3(2) against the Commissioner. In *ITC 1357* (22) the taxpayer claimed that an amount received was subject to Section 7A(4) of the Income Tax Act. The Commissioner accepted this but in a subsequent tax year requested a copy of an agreement which revealed that the amount received could not be subject to Section 7A(4). The Commissioner issued an additional assessment. The taxpayer contended inter alia that the provisions of Section 3(2) of the Act precluded a reopening of the matter.

Melamet J stated that the agreement constituted material information which was not in the possession or known to the Commissioner at the time he exercised his discretion and that consequently he was not precluded by the provisions of Section 3(2) from raising an additional assessment.

2.6.4 **Rulings**

2.6.4.1 **General**

Section 3 is now examined in order to ascertain the relationship between the regulation of discretionary power and the issuing of rulings. The reason for undertaking such an examination is that rulings, being a manifestation of rule based administrative action, may be used to regulate the exercise of discretionary power. It is submitted that the recommendations of the Margo Commission in respect of rulings, should be adopted. Consequently, these recommendations are examined in detail.

A framework of rules

In his analysis of the implementation of policies by the Executive, Daintith (23) distinguishes

between *imperium and dominium*. Briefly, *imperium* means 'the governments use of the command of law in aid of its policy objectives' (24) while the term *dominium* is used to describe the employment of the wealth of government for this purpose.' For example, if a government wished to pursue a trade protectionist policy such as the local content programme applicable to the motor industry, it could either promulgate legislation prohibiting the import of motor vehicle parts (*imperium*) or it could offer incentives to manufacturers who used locally made parts (*dominium*).

It is submitted that in the modern 20th century administrative states, the government relies to a greater degree on *dominium* in order to implement policies than in the past.

'In earlier centuries, however, regulatory laws, with some rather haphazard enforcement mechanisms, were about the only resource for economic management available to government. Today government has available, in addition to a much greater enforcement capacity, enormous resources of public funds and public property accumulated through taxation, borrowing and purchase (25).'

One of the reasons why *dominium* has replaced *imperium* is because the use of *imperium* can sometimes be administratively impracticable (26). Furthermore, an advantage of *dominium* is that it facilitates implementation of government policy more readily than *imperium*. The reason for this is that implementation of government policy by way of *imperium* must take place through the medium of Parliament. Whereas the implementation of government policy by way of *dominium* does not require the passage of policy through Parliament.

It is submitted that the transition from *imperium* to *dominium* and the 'retreat from primary legislation in favour of government by informal rule's (27) mutually reinforce one another.

Baldwin states (28) that :

Each time a government confronts a difficult regulatory task, it seems to come up with a new device; a code of practice, guidance note, circular, approved code, outlined scheme, statement of advice, departmental circular - the list goes on. One view of such rules is that they offer a useful structuring of discretion ...'

Thus the regulation of policy by way of granting of and removal of financial incentives means that officials will be vested with discretionary power in order to decide who will qualify for such incentive.

A further factor is that the 20th century administrative state has meant that discretionary power has become a necessity (29).

The varieties of rules

Baldwin (30) distinguishes three types of rules from primary legislation.

‘First there is delegated legislation, in the case of which it is usual both for the parent statute to confirm power on a minister to make rules or regulations and for the statute to make clear that such rules shall have full legislative force. Second comes sub-delegated legislation where it may not be clear whether parliament has delegated a power to an individual, nor is it always plain whether the authorisation runs to making prescriptions of full legal force. Finally, there is the huge group comprising all those rules, guides or other statements of general applicability that are promulgated by administrators or others without express legislative mandate; these might be termed to ‘unsanctioned administrative rules.’

Baldwin adopts a framework, which is followed in this thesis, and which distinguishes between types of rules in the second and third category referred to above.

a) *Procedural rules*

These are rules which state the procedure which must be followed when applicant’s apply for rules. For example see Practice Note No. 7 which deals with the procedure to be followed in applications for exemption in terms of the Stamp and Transfer Duty moratorium.

b) *Interpretive guides*

This includes statements as to how legislation and court cases will be interpreted or applied.

c) *Instructions to officials*

The aim of these rules is not the offering of guidance to parties ‘outside a bureaucracy, but a controlling the exercises of powers within the bureaucracy. They aim not to inform citizens but to impose internal order - usually so as to facilitate planning or to encourage consistency.’ Strong arguments have been made for the publication of all such rules, but secrecy is sustained by the desire to avoid having to justify them in public (31).

The Income Tax Handbook which is distributed to officials of the Receiver’s office, but which is not available to the public, is an example of this.

d) *Prescriptive/evidential rules*

These rules prescribe the action which must be followed and refer to a sanction or allude to an indirect sanction, if the rule is not obeyed.

e) *Commendatory Rules*

In this type of rule a course of action is recommended. Failure to adhere to such a rule will not result in a direct or even indirect sanction.

f) *Voluntary codes*

Voluntary codes 'apply to stave off government regulation by upholding standards within a defined interest group, they may nevertheless carry considerable force; expulsion from the group for breach of a code may close down a business. The City Code on Takeovers and Merge is a prime example of a voluntary code.' [*Baldwin* page (32) 243-244]

g) *Rules of practice, management or operation*

These rules consist of arrangements made by administrative bodies which affect the operation of the law between one subject and another (33). An example of this is the extra concessions made by the Commissioner's for Inland Revenue in Britain. (see below page)

h) *Consultative devices and administrative pronouncements*

This is a safety net and it covers 'those pronouncements which fit into none of the other groups, but which has a significance that goes beyond the individual case. Principle amongst these are consultative documents. They often involve draft outlines of agency or departmental policy and invite comments (34).'

An example of this would be the invitations by Vatcom to taxpayers and their representatives to make representations before the draft VAT Bill has been finalised.

Advantages and Disadvantages of Rules

Baldwin [page 267-268] summarises the advantages of and reasons why, such rules may be cause for concern. (35)

- They have legal effects even though they have largely bypassed parliamentary scrutiny.
- Their legal conditionals are uncertain. But it may not be clear whether legal effects are authorised when tended at all.
- They may be couched in vague language.
- They allow judges too much leeway in choosing whether to give effect to them or leave them alone.

- They allow ministers illegitimately to instruct judges on interpretation of statutes.
- They are resorted to on issues of great political contention and so render the law most vague points when it should be most clear.
- They may be inconsistent with primary legislation.
- They are published haphazardly if at all and are inaccessible (this is especially true in South Africa).
- Little provision is made for consultation or public input into many rule making procedures.
- Special groups and interests may exert undue influence on the body which formulates the rules.
- The advantages for resorting to rules are the following :
 - they guide untrained officials and so facilitate planning and management.
 - they encourage consistency in bureaucratic decision making.
 - they inform the public of official attitudes.
 - they are flexible and may be issued quickly.
 - they deal with matters which are not amenable to strictly legal language.
 - they are relatively free from judicial review. (this is debatable)
 - they allow control of official action where legislation is either inappropriate or politically undecided by the government.

Baldwin (36) states that the legal force of the rules contained in the framework vary 'according both to the strength of authority or legitimacy that a set of rules has and to the nature of the particular rules.'

2.6.4.2 *Rulings in South Africa*

In South Africa, there is no formal system of published rulings which correspond to the categories of rules described above. Rulings are issued to taxpayers who request them and are not available to other taxpayers. In addition, the Commissioner has issued eleven Practice Notes since March 1985. Most of these notes fall within the category of Interpretive rules (see above). Practice Note No. 7, which lists the information and documentation which must be supplied in requesting an exemption from stamp or transfer duty in terms of the moratorium, is an example of a procedural rule. Practice Note No. 2 is an example of a residual category of rules. This

Practice Note states that the profits derived by the holders of certain financial instruments, are subject to tax. The Practice Note then quotes the penalties contained in section 75 and section 76, of the Act although this ruling does not contain a sanction, ie. it is not a Prescriptive ruling, it refers to a sanction imposed by the Act.

The Commissioner has made use of press releases for a variety of purposes. Some of the press releases fall outside the category of rulings. For example, some press releases are the precursors of future legislations. For example, on December 15, 1989, a press release announced the curtailment of section 12B of the Act and the introduction of section 12C. Some of the press releases fall within the last safety net category. One example is the press release dated December 14, 1990 in which it was announced that VAT would be introduced on October 1, 1991, despite rumours to the contrary.

Probably the most official comprehensive documentation in respect of the interpretation of the Act is the Income Tax Handbook which is issued only to officials of the Receiver of Revenue. This Handbook contains details pertaining to the interpretation of the Act.

The most obvious and serious indictment against the system which operates in South Africa is that it amounts to a haphazard publication of a few documents. No rulings are published. The Income Tax Handbook is not available to the taxpayer, yet it is the only official comprehensive document in South Africa which deals with the interpretation of the Act.

It will be shown, that in comparison with other jurisdictions, the South African approach to rulings is grossly deficient. However, the Margo Commission has made recommendations in respect of rulings. These recommendations are examined in detail with reference to the systems which operate in other jurisdictions.

An application for a ruling

There is no specific section in the Act in terms of which a taxpayer is entitled to apply for a ruling. Generally, rulings are issued pursuant to Section 3(2) and Section 3(3) of the Act.

2.6.4.3 *Rulings issued by the Commissioner personally*

Section 3(3), which governs the procedure for rulings issued by the Commissioner, provides that any written ruling made by the Commissioner personally in the exercise of a discretionary power may not be withdrawn if all the material facts were known to the Commissioner when the ruling was made. If the ruling is made as a result of the exercise of a non-discretionary power then presumably it may not be withdrawn. (37)

2.6.4.4 *Rulings issued by subordinate officials*

This is regulated by Section 3(1) and 3(2) of the Act. In terms of Section 3(1) the Commissioner may delegate any powers and duties to subordinate officials. In terms of paragraph 3(2) any decision made by an official under the control of the Commissioner in the exercise of a

discretionary power cannot be withdrawn or amended by the Commissioner or by the officer concerned after the expiration of two years from the date of such written notification or of the notice of assessment giving effect to such decision if all material facts were known to the said officer.

2.6.4.5 THE MARGO COMMISSION

The applicability of rulings :

The Margo Commission recommended that :

Rulings should not be used to give a particular taxpayer the advantage of certainty in a matter of general application which should, more appropriately, fall within a public regulation. (38)

Thus the Margo Commission recommends that the general administrative law relationship must take precedence over the individual administrative law relationship if the ruling sought is also applicable to a group of taxpayers. This recommendation is a recognition of the importance of interpretative rulings and of the fact that interpretative rulings, which are useful to taxpayers generally should be publicised. The Commission does not state what is meant by 'public regulation.' In view of the fact that the Commission does not recommend the publication of individual rulings it is submitted that publication by 'public regulation' is similar to the existing Practice Notes. If individual rulings are not published but 'rulings of general application are published, then a problem may arise because it may be difficult to determine when a ruling will 'give a particular taxpayer the advantage of certainty in a matter of general application which should fall within a public regulation. Furthermore, the reason why a taxpayer would apply for a ruling would be to obtain 'the advantage of certainty.' If one applied this fact to the recommendation, then most rulings sought would be publicised by way of a 'public regulation.' It is submitted that the solution is to publish all rulings as is the practice in jurisdictions such as Australia, Canada and the United States of America.

2.6.4.5.1 *The Binding Effect of Rulings*

The Margo Commission stated further that :

There are numerous provisions in the Income Tax Act giving the Commissioner a discretion upon the exercise of which imposition of taxation depends.

In order to gain certainty and thus facilitate economic decision-taking, and to promote equity, it seems appropriate that - solely in those cases where the imposition of taxation depends on the exercise of a discretion - the taxpayer be entitled to approach the Commissioner for a ruling which, subject to a full disclosure of facts, would be binding. (39)

The Margo Commission recognises that, in the circumstances described above, a ruling should be binding. The Margo Commission neglected to state whether the ruling should be binding on the Commissioner only or whether the taxpayer should be bound by the ruling as well. The Margo Commission neglected to state the grounds on which the Commissioner should be held to a ruling. In Australia, the Commissioner has issued a ruling (40) in terms of which it is bound by rulings which it has issued if certain conditions are fulfilled. In terms of this ruling, the Commissioner will not be bound by a ruling if there are 'good and substantial reasons' not to be bound. Such reasons include that :

- there have been legislative changes;
- an applicable Tribunal or court overturns or modifies an interpretation of the law on which a taxation ruling is predicated; or
- the approach adopted in a Taxation ruling is otherwise no longer considered appropriate.

A departure from a ruling on the basis that it was no longer considered 'appropriate' would generally only arise where;

- the commercial practice in respect of which the taxation Ruling was provided no longer operated in the manner described in the taxation ruling;
- an administrative practice outlined in a taxation ruling was being exploited by taxpayers as a means of tax avoidance; or
- on reconsideration, the taxation ruling was considered to be wrong in law.

The problem with this approach is that 'the system operates on the basis of good faith and consensus (41).' *Webb* (42) states that the effectiveness of the good faith and consensus is based on the presumption that the Commissioner would not breach the ruling because of fear of adverse publicity and on the presumption that the rulings will be admitted in a reasonable and consistent manner.'

In Australia, a sounder basis which would hold the Commissioner to be bound by a ruling is the Administrative Decisions (Judicial Review) Act of 1975. In terms of this Act an aggrieved taxpayer would have to establish

- a relevant 'decision,'
- that the decision is of an administrative character;
- that the decision has been made under an enactment;
- the decision is not excluded from the ambit of the Act;
- the taxpayer is aggrieved by the decision; and
- one or more of the grounds of review listed in section 5 is made out.

Webb (43) states that a taxpayer is faced with problem *inter alia*, of proving that he has been aggrieved by a ruling unless the ruling overrode a previous ruling which was favourable to the taxpayer. The development of the doctrine of legitimate expectation is a means of ensuring that the Commissioner is bound by a ruling and this is examined in the next Chapter.

In Sweden, a ruling is binding for the benefit of the applicant only. (45) Nevertheless the ruling does have persuasive value before the tax courts in Sweden. (46) The position is the same in Britain. In the United States of America, a ruling may be used by a taxpayer in a court of law. (47)

In South Africa, a ruling is not binding in either party. Thus in *ITC 429* (44) the court held that it was not bound by a ruling of the Commissioner.

2.6.4.5.2 *Practical Limitations to the issue of Rulings*

The Margo Commission (48) identified certain practical limitations to the issuing of ruling, namely :

- (i) It could add to the administrative burdens on the Revenue authorities;
- (ii) it has been abused to some extent in the past by taxpayers who, having approached the Commissioner for a ruling, have used the Commissioner's response to restructure a transaction in a manner which avoids tax: The Commissioner becomes, in effect, a tax consultant.

It is accepted that a practical limitation to the issuing of rulings is the fact this would add to the administrative burden on the Revenue authorities. In South Africa this is especially significant because of the general shortage of persons with skills in taxation. (49)

In Canada, where the legislation division of Revenue Canada is responsible for the issuing of rulings, difficulties have been experienced in recruiting skilled staff. The same problem occurs in the United States of America (50). In view of the fact that persons who are required to issue rulings must be highly skilled, South Africa does have a problem.

The further practical limitation identified by the Margo Commission, namely that the Commissioner becomes a tax consultant in respect of the avoidance of tax is a problem which has been experienced in other jurisdictions. In Canada, (51) the Revenue authorities are willing to grant rulings in respect of tax avoidance matters where previously they were reluctant to do so. In the United States of America, promoters of certain tax shelters are required to obtain and quote rulings (even if adverse) in respect of the scheme which they are promoting. In New Zealand, no rulings are given if the matter concerns tax avoidance. (52)

2.6.4.5.3 *Recommendation to Overcome Practical Limitations*

In order to obviate these problems the Margo Commission recommended the following (53) :

The taxpayer (personally or through his agent) should either have the right to apply for a ruling only on one occasion in respect of a particular matter. The Commissioner could, in his discretion, allow subsequent applications. Moreover the Commissioner could lay down any administrative procedures to facilitate administrative convenience and eliminate abuse. Rulings should be limited to matters in which the taxpayer already has a direct and substantial interest. The right to obtain a ruling should not extend to contingent or speculative matters. Finally, the Commissioner should be entitled to decline to give rulings in matters which, in his opinion, it would not be appropriate to do so.

The recommendations referred to above are analysed in detail below.

In the above recommendation, reference is made to the establishment of administrative procedures pertaining to the application of rulings. Such procedures would fall within the category of procedural rulings referred to by *Baldwin*. Practice Note 2, which states the procedure which must be followed in applications for exemption from stamp and transfer duty is an example of a procedural ruling.

2.6.4.5.4 *An Administrative Procedure*

New Zealand

In New Zealand (54) the administrative procedure in respect of rulings is the following:

- In the first instance, application is to the taxpayer's district office in the Inland Revenue Department. Most rulings are made at this level, though reference to Regional Offices or to the Departmental Head are not uncommon.
- The Department does not consider itself obliged to issue rulings, though it endeavours to do so.
- There is no appeal from an unfavourable ruling. The taxpayer may carry on regardless if he wishes and challenge the view of the department when a return has been furnished and an assessment issued.
- The department emphasises that its rulings are expressions of its opinion and are not binding on it. Of course, a ruling may be disregarded by the department if it is

Webb (43) states that a taxpayer is faced with problem inter alia, of proving that he has been aggrieved by a ruling unless the ruling overrode a previous ruling which was favourable to the taxpayer. The development of the doctrine of legitimate expectation is a means of ensuring that the Commissioner is bound by a ruling and this is examined in the next Chapter.

In Sweden, a ruling is binding for the benefit of the applicant only. (45) Nevertheless the ruling does have persuasive value before the tax courts in Sweden. (46) The position is the same in Britain. In the United States of America, a ruling may be used by a taxpayer in a court of law. (47)

In South Africa, a ruling is not binding in either party. Thus in *ITC 429* (44) the court held that it was not bound by a ruling of the Commissioner.

2.6.4.5.2 *Practical Limitations to the issue of Rulings*

The Margo Commission (48) identified certain practical limitations to the issuing of ruling, namely :

- (i) It could add to the administrative burdens on the Revenue authorities;
- (ii) it has been abused to some extent in the past by taxpayers who, having approached the Commissioner for a ruling, have used the Commissioner's response to restructure a transaction in a manner which avoids tax. The Commissioner becomes, in effect, a tax consultant.

It is accepted that a practical limitation to the issuing of rulings is the fact this would add to the administrative burden on the Revenue authorities. In South Africa this is especially significant because of the general shortage of persons with skills in taxation. (49)

In Canada, where the legislation division of Revenue Canada is responsible for the issuing of rulings, difficulties have been experienced in recruiting skilled staff. The same problem occurs in the United States of America (50). In view of the fact that persons who are required to issue rulings must be highly skilled, South Africa does have a problem.

The further practical limitation identified by the Margo Commission, namely that the Commissioner becomes a tax consultant in respect of the avoidance of tax is a problem which has been experienced in other jurisdictions. In Canada, (51) the Revenue authorities are willing to grant rulings in respect of tax avoidance matters where previously they were reluctant to do so. In the United States of America, promoters of certain tax shelters are required to obtain and quote rulings (even if adverse) in respect of the scheme which they are promoting. In New Zealand, no rulings are given if the matter concerns tax avoidance. (52)

2.6.4.5.3 *Recommendation to Overcome Practical Limitations*

In order to obviate these problems the Margo Commission recommended the following (53) :

The taxpayer (personally or through his agent) should either have the right to apply for a ruling only on one occasion in respect of a particular matter. The Commissioner could, in his discretion, allow subsequent applications. Moreover the Commissioner could lay down any administrative procedures to facilitate administrative convenience and eliminate abuse. Rulings should be limited to matters in which the taxpayer already has a direct and substantial interest. The right to obtain a ruling should not extend to contingent or speculative matters. Finally, the Commissioner should be entitled to decline to give rulings in matters which, in his opinion, it would not be appropriate to do so.

The recommendations referred to above are analysed in detail below.

In the above recommendation, reference is made to the establishment of administrative procedures pertaining to the application of rulings. Such procedures would fall within the category of procedural rulings referred to by *Baldwin*. Practice Note 2, which states the procedure which must be followed in applications for exemption from stamp and transfer duty is an example of a procedural ruling.

2.6.4.5.4 *An Administrative Procedure*

New Zealand

In New Zealand (54) the administrative procedure in respect of rulings is the following:

- In the first instance, application is to the taxpayer's district office in the Inland Revenue Department. Most rulings are made at this level, though reference to Regional Offices or to the Departmental Head are not uncommon.
- The Department does not consider itself obliged to issue rulings, though it endeavours to do so.
- There is no appeal from an unfavourable ruling. The taxpayer may carry on regardless if he wishes and challenge the view of the department when a return has been furnished and an assessment issued.
- The department emphasises that its rulings are expressions of its opinion and are not binding on it. Of course, a ruling may be disregarded by the department if it is

subsequently discovered that the facts are not as stated by the taxpayer in the application for the ruling. However, changes in the law or its interpretation will also cause the department to change its ruling. Furthermore, the department from time to time corrects rulings that it concludes were wrong when issued.

- Application for a ruling is by letter setting out the fact of the proposal together with drafts of relevant documents.
- The department will not give rulings in proposals which involve or could involve tax avoidance, hypothetical situations, a series or alternatives to the same transaction, or proposals where the names of the taxpayers are not disclosed.

United States of America

In the United States of America (55), a request for a ruling to the IRS must include :

Names, addresses and tax identifying numbers of all interested parties; The location of the IRS office that has or will have jurisdiction over the return or report of each party; A full and precise statement of the business reasons for the transaction; And a careful detailed description of the transactions.

In addition, the true copies of all contracts, wills, deeds, agreements, instruments and other documents involved in the transaction must be submitted with the request. However relevant facts reflected in documents submitted must be included in the taxpayers statement and not be incorporated by reference, and must be accompanied by an analysis of their bearing on the issue or issues, specifying the pertinent provisions. The request must contain a statement whether, to the best of the knowledge of the taxpayer or his representative, the identical issues are being considered by any field office of the IRS in connection with the act of examination or audit of a tax return already filed or is being considered by a branch office. Where the request pertains to only step of a larger integrated transaction, the facts, circumstances etc. must be submitted with respect to the entire transaction.

2.6.4.5.5 *Conclusion*

It is submitted that the Commissioner for Inland Revenue could emulate the procedures laid down by the New Zealand Inland Revenue as well as the information required by the IRS and compile an application procedure which would include the details which the taxpayer was required to submit. *Baldwin*, asks the question of whether procedural rulings are mandatory or directory (56). He states (57) that generally, 'the legal force varies according *both* to the strength of authority or legitimacy that a set of rules has and to the nature of the particular rule.' It is submitted that procedural rules, would be more likely regarded by the Judiciary, as being mandatory if their aim is to facilitate smooth administration. Rulings should be issued as expeditiously as possible. In this regard, the writer has been informed by a representative of the Receiver of Revenue in Cape Town that, for the purposes of completion of the new part 8 of the company tax return (form IT14) written rulings will be issued within two weeks of a request for a

ruling pertaining to information which is required to be furnished in this schedule.

2.6.4.5.6 *Direct and Substantial Interest*

In other jurisdictions, the taxpayer is required to have a direct interest in the ruling which is sought. In the United States of America a request for a specific ruling must include the names, addresses and taxpayer identifying numbers of all interested parties. In Canada (58) individual rulings will not be given where the taxpayer is not identified. The position is the same in Australia and New Zealand. (59)

In jurisdictions such as Sweden and Canada trade and industry associations successfully obtain rulings which have become precedents for that trade or industry. Although these rulings are not binding, nevertheless they have strong persuasive influence before the courts in those jurisdictions. In Canada a company can successfully obtain a binding ruling on behalf of its employees or shareholders even though the employees or shareholders are not parties to the application for the ruling. This would occur in cases such as a restructure. This recommendation must be read together with the recommendation in respect of the applicability of rulings, which is examined on page above.

2.6.4.6 *Publication of Rulings*

The Margo Commission (60) recommended that :

The Commissioner should establish a manual containing the regulations published by him from time to time. These regulations would set out the interpretation which the Commissioner accords to various sections of the Act. The Commissioner would be bound by these regulations, but the taxpayer would be at liberty to challenge any of them.

Publication of Rulings in other Jurisdictions

Australia

It is obvious that, in order that discretionary power is regulated effectively by rule based administrative action, it is crucial that the taxpayer is aware of the rules, ie. the rules must be published.

The *fons et origo* of the introduction of formal published rulings in jurisdictions such as Canada and Australia, is the existence of a Freedom of Information Act.

In Australia, section 9 of the Freedom of Information Act 1982 provides the Commissioner must

provide the public inter alia with :

'manuals, or other documents containing interpretations, rules, guideline practices or precedents including ... precedents in the nature of letters of advice providing information to bodies or bodies outside the Commonwealth administration.'

In most countries a distinction is made between a publication of individual rulings and the publication of general administrative procedure or general interpretation of legislation. Generally the publication of general information is not restricted. However there are restrictions on the publication of individual rulings.

In terms of Section 3 of the Freedom of Information Act :

'The right of access is to be granted by making available to the public information about rules and practices affecting them in their dealings with departments and public authorities and by creating a general right of access to information in documentary form in possession of ministers, departments and public authorities.'

In terms of part 2 of the Act copies of documents containing technical rulings, interpretations and guidelines as well as practices or precedents used to make decisions affecting the rights and obligations of taxpayers, must be made available for inspection and for purchase by the public (61).

The above Act came into effect in 1982. As from December 1, 1982 the taxation ruling system was introduced as a method of disseminating decisions on interpretation of the laws administered by the Commissioner of Taxation. This system is intended to enable the Commissioner to fulfil his obligations under the Freedom of Information Act. Taxation rulings are available for information and purchase at branch offices of the taxation officer. These rulings cannot bind the Commissioner and cannot circumvent the law. The rulings are however published but the anonymity of the taxpayer is maintained.

Canada

Canada also has a Freedom of Information Act 1984 which is similar to the legislation in Australia. Accordingly Revenue Canada is required to publish rulings. These rulings are edited and although anonymity is preserved, they are nevertheless available for public examination. In Canada rulings were not published for a number of years. This caused the establishment of informal clubs of tax practitioners from law and accounting firms who exchanged these unpublished rulings. (62) In Canada a distinction is drawn between specific rulings and general interpretation. These general opinions are published in information circulars. (63)

Sweden

Sweden also has a Freedom of Information Act. Consequently rulings are published but the anonymity of the taxpayer is preserved. General policy statements in Sweden are published as well.

United States of America

General policy decisions pertaining to the interpretation of the Internal Revenue Code are published by the IRS. These interpretations are published as treasury regulations.

The rulings issued pursuant to a specific request must also be publicised. The anonymity of the taxpayer must be maintained.

United Kingdom

The United Kingdom distinguishes between three types of statements of revenue practice. Firstly there are extra statutory concessions which are usually published. These are :

Departures from the strict letter of the law, but always in favour of the taxpayer. Their purpose is to allow relief which is in the spirit of a particular piece of legislation but which, for some reason or other is not actually given by it. There is a published list of these extra statutory concessions which is brought up to date annually. They are all reported to the Comptroller and Auditor General and are subject to scrutiny by the Public Accounts Committee. They are therefore subject to Parliamentary examination and oversight. (64)

Secondly there are statements of practice which is also published. These statements of practice are :

'A description of the way the revenue will in the general run of cases interpret and apply particular legal provisions. There is nothing legally binding. The statement is a public statement of the revenues understanding. It is open to any taxpayer who could consider that its application to his own tax liability produces a result which cannot be upheld in law, to appeal against the assessment in the usual way. Certain of these statements are published.'

The third category consists of advance rulings which are granted in individual cases provided the identity of the taxpayer is known and provided that the rulings apply to a specified transaction.

2.6.4.7 *Conclusion*

From the above it can be seen that most jurisdictions distinguish between general interpretation of sections of the Act which are published as well as individual rulings which are generally published although taxpayer anonymity is maintained. The existence of a Freedom of Information Act has meant that a ruling system has been developed as a means of fulfilling the requirements of the Act. In Australia, the taxation rulings system has now 'developed to such an extent that simply meeting the requirements of [The Freedom of Information Act] is arguably no longer the *raison d'être* for issuing rulings. The public rulings system has now become a self-perpetuating body for which documents are specifically created. Although the system maintains its primary function as a notification system for decisions, 'rulings' now often constitute the decisions themselves. Moreover they are written in a manner and form specifically for tax practitioners in mind, rather than simply as instructions to internal taxation officers (65).'

South Africa

In order to facilitate the completion of part 8 of the IT14 form, the Receiver of Revenue has undertaken to issue rulings, within 2 weeks of the request being made (in the case of simple matters) in respect of the information which is required in that part of the return (66). It is submitted that these rulings, if published, would assist a taxpayer in completion of Part 8 of the IT14. Furthermore, the rulings which have been published would contribute to greater efficiency in the office of the Receiver of Revenue because a taxpayer may be able to complete a return by referring to a published ruling, rather than applying for an individual ruling. 'The practice [of issuing Rulings] exists because the Revenue has concluded that it is of assistance to the administration of a complex tax system and ultimately to the benefit of the overall tax yield. [per Judge J in *R v Board of Inland Revenue, ep. M F K Underwriting Agencies* (67)].

The recent case of *CIR v SA Mutual Unit Trust Management Co* (68) illustrates the effect of the secrecy which surrounds the system of rulings in South Africa. In this case, the meaning of 'practice generally prevailing' in section 79(1)(iii) was examined. In this case, the taxpayer failed to discharge the onus that the original assessment was in accordance with a practice generally prevailing at the time.

Corbett C J stated that a crucial feature of such a practice is that the practice must be one which is applicable to generally in the offices of the Receiver of Revenue and that 'it would not be sufficient to show that the practice was applied merely in one or two offices.'

(This statement by Corbett C J is similar to the view of Bingham L J in *M F K Underwriters* who stated (69) that the similar responses of six Revenue officials over a period could not be 'aggregated into a Revenue policy.')

The dearth of publications means that it is very difficult for a taxpayer to discharge such an onus. He could only discharge the onus (i) if there was a practice note. (Only eleven have been issued since March 1985) or (ii) by the subpoena of all the Receivers of Revenue (70).

It is submitted that the recommendations of the Margo Commission are inadequate. It is submitted that South Africa should follow other jurisdictions in respect of the publication of individual rulings which have been obtained provided that the anonymity of the taxpayer has been maintained. It is submitted that this would allow the public to inspect rulings which had been obtained and this would offer them guidance in their own tax planning.

The recommendation by the Commission that general regulations should be published on the interpretation which the Commissioner accords to various sections of the Act should be welcomed. This is in accordance with practice prevailing in other jurisdictions. Once again this would assist the taxpayer in planning his affairs.

The Government's response in its White Paper to this recommendation was (71) :

This recommendation would be appropriate to a system of self assessment. 'Regulations' are not made by the Commissioner under the present system. This recommendation is at present not considered necessary as good text books and other publications dealing with taxation practice are available. The issuing of Practice Notes on a more regular basis is contemplated.

It is submitted that the response of the government White Paper to the recommendation is unacceptable. Furthermore one wonders whether the Government regards the press statements which are released as a component of the 'other publications.' Such statements have sometimes been retroactive. Furthermore they are not always clear and furthermore they are also introduced at short notice. This creates uncertainty and does little to enable a person to plan his affairs. Text books etc. contain views of third parties and do not interpret the Income Tax Act on behalf of the Commissioner. The response by the government that more Practice Notes should be issued is welcomed. Nevertheless it is submitted that the issuing of Practice Notes should be in addition to the publication of a manual containing general regulation which is in accordance with most foreign jurisdictions.

In view of the numerous discretions which the Commissioner has it is submitted that publication of rulings, Practice Notes and a manual of regulations would in the words of the Margo Commission 'gain certainty and thus facilitate economic decision making and ... promote equity.'

2.6.4.8 Conclusion

In this Chapter, the administrative law relationship between the Commissioner and the taxpayer was examined with reference to the Commissioner. Section 3 was examined because it is a manifestation of the discretionary power of the Commissioner. Rulings were examined and it was

proposed rulings should be binding upon the Commissioner in certain circumstances. Furthermore, it was proposed that Rulings should be published. Rulings are an important manifestation of rule based administrative action. The publication of Rulings means that there is a standard by which the exercise of discretionary power can be measured.

FOOTNOTES

1. *Jowell* page 9
2. In terms of Section 2(2) of the Act, conclusive proof of his appointment is a notice in the Government Gazette to that effect
3. Wiechers pages 48 to 50
4. See Wiechers page 49
5. See above
6. Landman : An administrative inquiry page 37
7. Ibid page 38
8. See page above
9. *Jowell and Oliver* 'The Changing Constitution' page 196
10. Page 52 et seq
11. Ibid
12. Ibid
13. Section 105A deals with the reporting of unprofessional conduct
14. (1963) 26 SATC 78(C) at 80
15. This is discussed in Chapter 4
16. In terms of the proviso to Section 79, the Commissioner shall not raise an additional assessment 'after the expiration of three years from the date of the assessment ... unless the Commissioner is satisfied due to fraud or misrepresentation or non disclosure of material facts'
17. (1954) 19 SATC 428
18. Page 433
19. 1970 33 SATC 131. Section 81(5) provides that where no objections are made to any assessment or where objections have been allowed or withdrawn, such assessment or altered or reduced assessment, as the case may be, shall, subject subject to the right of appeal hereinafter provided, be final and conclusive
20. 1983 (3) SA 551 (A), 45 SATC 113
21. (1976) 39 SATC 74
22. (1982) 44 SATC 143
23. The Executive Power Today in *Jowell and Oliver*, The Changing Constitution page 193 et seq
24. Page 197
25. *Daintith* page 199

26. *Daintith* ibid
27. *Baldwin* and Houghton Circular Arguments : The Status and Legitimacy of Administrative Rules, page 236
28. Ibid page 239
29. See page above
30. Page 240
31. *Baldwin* page 241
32. *Baldwin* page 243-244
33. *Baldwin* page 244
34. See below
35. Page 267-268
36. Page 249-250
37. See Meyerowitz and Spiro - paragraph 101. The editor of *Juta Foreign Tax Review* (Volume 2 Number 1 March 1989) criticises the statement in paragraph 99 of Meyerowitz and Spiro. The latter paragraph is a general paragraph, one of the sentences of which reads 'in view of the well known rule that a taxation statute must be construed according to the letter it could be argued that since the Act does not expressly give the Commissioner the power to withdraw or amend his own decisions, notices or communications, he does not have such power. It is considered that this is so.' The editor of the *Juta Foreign Tax Review* states that 'it is submitted that the opposite argument could have equal validity, namely, that Section 3 imposes constraints on the withdrawal of rulings and that, if these constraints had not been imposed, the Commissioner and his delegates would not be restricted in any way with regards to such withdrawals. Accordingly any area not specifically covered by the constraints of Section 3 (for example, a general non-discretionary ruling issued by the Commissioner himself) is not constrained in any way and may therefore be withdrawn or amended by the Commissioner at any time.' The criticism of Meyerowitz and Spiro by the editor of the *Juta Foreign Tax Review* is inaccurate. In paragraph 101, Meyerowitz and Spiro state that 'a written decision made by the Commissioner personally in the exercise of a discretionary power under the provisions of the Act or a previous Income Tax Act cannot be withdrawn or amended by the Commissioner if all the material facts were known to him when he made his decision.' Accordingly, the criticism in the *Juta Foreign Tax Review* is inaccurate
38. Paragraph 28.57 (d)
39. Paragraph 28.58 (a)
40. Taxation Ruling IT2500. See *Webb* The Taxation Rulings System - A Helpful Child or a Potential Bully
41. *Webb* page 230
42. Ibid

43. Page 234
48. Paragraph 28.58 (b)
49. See Margo Commission paragraph 28.35
50. Prebble page 220
51. Ibid page 228
52. Ibid page 218
53. Paragraph 28.58 (c)
54. Ibid page 218
55. Van Blerck Tax Rulings III page 50
56. Page 241
57. Page 249
58. Prebble page 229
59. Ibid
60. Paragraph 28.59 (a)
61. See above
62. Prebble page 236
63. See Canadian Master Tax Guide
64. Van Blerck, Tax Rulings III page 50
65. *Webb* page 220
66. A representative of the Receiver of Revenue in Cape Town informed the writer of this at a recent seminar
67. Per Judge J in *R v Board of Inland Revenue, ep. M F K Underwriting Agencies* [1990] 1 ALL ER QBI91 at 113 et
68. See above
69. At page 112 e-f
70. See *The Taxpayer* Vol 39 No. 12 page 221
- 71.

CHAPTER THREE

THE SUBJECT OF THE ADMINISTRATIVE LAW RELATIONSHIP

CONTINUED : THE TAXPAYER AND THE DOCTRINE OF LEGITIMATE EXPECTATION

3.1 Introduction

The parties to the administrative law relationship are the Commissioner and the individual taxpayer. Having examined certain aspects of the Commissioner's role in this Administrative Law relationship, it is necessary to examine the administrative law relationship from the perspective of the taxpayer. The question which is answered here is whether the taxpayer has the remedy of legitimate expectation which can be enforced against the Commissioner.

3.2 General and Individual Administrative Law Relationships

Wiechers (1) makes a distinction between general (objective) relationships as opposed to individual (or subjective) relationships. General administrative relationships are those relationships to which the same legal rules apply to all persons within those relationships and which are created or varied by legislative measures, whether by parliamentary or subordinate legislation. On the other hand, the content of individual relationships vary from case to case.

Wiechers (2) draws the following conclusions from this distinction.

- (a) General relationships may only be varied or terminated by general means, ie. by legislation including subordinate legislation.
- (b) An administrative organ may not govern general relationships by way of an individual resolution.
- (c) The effect of an Act which repeals a prior Act is drastically influenced according to whether there is a general or individual relationship is involved. If an Act which contains rules governing a general relationship is amended or repealed, the new legal rules apply to that relationship. Unless the amending Act directs otherwise, individual relationships are not affected by the new general provisions.

- (d) A further consequence of the difference between the general and specific relationships relates to the administration's power to enter into agreements with subjects. An administrative organ may not stipulate anything in an agreement if there is a general provision relating to that aspect.
- (e) When a court invalidates a legislative measure which creates a general relationship, the entire relationship is terminated.

Wiechers (3) states that private individuals also have rights which can be enforced against the State. This is based on the theory of public law rights. However, there is no *actio popularis* which gives the individual the right to challenge an administrative act on the ground of general interest.

According to Wiechers, rights which an individual has, include :

- a) All those rights which he can enforce against other private individuals in a private sphere. Unless authorised to do so, the administration may not deprive a subject of his private rights.
- b) A private individual has a variety of common law freedoms, powers and privileges which may be enforced against the administration. One example of such a common law privilege or freedom which enjoys full recognition in Administrative Law and which is not generally recognised in private law is the right of the subject to be economically active. In Administrative Law it is this very right of the subject to be economically active which entitles him to demand that the rules of natural justice be complied with when he applies for a trading licence. (4)
- c) The private individual has a wide variety of rights, powers and privileges which he acquires either by statute or by virtue of the democratic constitutional system. Thus, for example, a subject who objects to the issue of a new licence may rely on the right against over-trading; this right has been conferred on him by the statute which guards against over-trading in a particular commercial sphere. (5)

In chapter one, a distinction was made between rule based administrative action on the one hand and adjudicative techniques of decision on the other. Essentially adjudicative techniques of decision mean 'the participation of the affected person in the decision about his welfare' (6). The most obvious method by which a person participates in a decision which affects him is by utilising the rules of natural justice, eg. the *audi alterem partem* rule.

In this chapter, the regulation of discretionary power is examined with reference to doctrine of

legitimate expectation. The relationship between this doctrine and the rules of natural justice is examined in order to answer the question of whether the doctrine is applicable to Revenue Law in South Africa.

3.3 English law and the doctrine of legitimate expectation

In England (7), the doctrine of legitimate expectation has developed concurrently with the concept of the duty of fairness. Generally the duty of fairness means that an individual may avail himself of the remedy of judicial review 'on the grounds that a duty of fairness is owed by administrators to the public (8).'

One of the first cases in which the doctrine of legitimate Expectation was mentioned is in *Schmidt v Secretary of State for Home Affairs*. (9) where Lord Denning stated :

'An administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.'

Generally the doctrine of legitimate expectation contains a procedural as well as a substantive component. In terms of the procedural component of the doctrine, the aggrieved person has a legitimate expectation that he will be given a right to a hearing and that rules relating to procedural fairness are applied. The substantive law component of the doctrine means that the aggrieved person has a legitimate expectation that a decision will be favourable to him. In *Schmidt's* case, Lord Denning mentioned the doctrine in respect of substantive law only.

At the time of *Schmidt's* case and cases which were heard a few years thereafter, the duty of fairness meant adherence to the rules of natural justice (10).

A useful distinction was made by Sir Robert Megarry in a later case, namely *McInnes v Onslow Fane* (11). He stated :

'[W]here the court is entitled to intervene, I think it must be considered what type of decision is in question. I do not suggest that there is any clear or exhaustive classification; but I think that at least three categories may be discerned. First, there are what may be called the forfeiture cases. In these, there is a decision which takes away some existing right or position, as where a member of an organisation is expelled or a licence is revoked. Second, at the other extreme there are what may be called the application cases. These are cases where the decision merely refuses to grant the applicant the right or position that he seeks, such as membership of the organisation, or a licence to do certain acts. Third, there is an intermediate category, which may be called the Expectation cases, which differ from the application cases only in that the applicant has some legitimate expectation from what has already happened that his application will be granted. This head includes cases where an existing licence-holder applies for a renewal of his licence, or a person already elected or appointed to some position seeks confirmation from some confirming authority.'

The problem which arises with this classification is the position of the dividing line between the second category ie. the application cases, and the third category ie. the expectation cases. As far as the distinction between the forfeiture cases and the application cases is concerned, Megarry stated (12) that

‘It seems plain that there is a substantial distinction between the forfeiture cases and the application cases. In the forfeiture cases, there is a threat to take something away for some reason; and in such cases, the right to an unbiased tribunal, the right to notice of the charges and the right to be heard in answer to the charges...are plainly apt. In the application cases, on the other hand, nothing is being taken away, and in all normal circumstances there are no charges, and so no requirement of an opportunity of being heard in answer to the charges. Instead, there is the far wider and less defined question of the general suitability of the applicant for membership ... The distinction is well recognised, for in general it is clear that the courts will require natural justice to be observed for expulsion from a social club, but not on a application for admission to it.’

As far as the legitimate expectation cases are concerned, Megarry stated (13) that :

‘The intermediate category, that of the Expectation cases, may at least in some respects be regarded as being more akin to the forfeiture cases than the application cases; for although in form there is no forfeiture but merely an attempt at acquisition that fails, the legitimate expectation of a renewal of the licence or confirmation of the membership is one which raises the question of what it is that has happened to make the applicant unsuitable for membership or licence for which he was previously thought suitable.’

Thus, the common element between the application and the expectation cases is that something has been taken away. The difficulty is deciding what it is that has been taken away and consequently whether the rules of natural justice apply (forfeiture cases) or whether a diluted version of the rules apply (expectation cases).

Lord Diplock stated (14) in respect of the duty of fairness that :

‘Such legitimate expectation gave to each appellant a sufficient interest to challenge the legality of the adverse disciplinary award made against him by the Board of the grounds that in one way or another the Board, in reaching its decision, had acted outwith the powers conferred on it by the legislation under which it was acting; and such grounds would include the Board’s failure to observe the rules of natural justice : which meant no more than to act fairly towards him in carrying out their decision-making process ...’

Thus the duty of fairness is equated with the rules of natural justice.

3.3.1 The GCHQ case

A leading case in English Law is *Council of Civil Service Unions and Others v The Minister for the Civil Service* (15). Government Communications headquarters (GCHQ) is a branch of the Civil Service whose main functions were to ensure the security of the United Kingdom Military and Official Communications and to provide signals intelligence for the government. All the staff at GCHQ had a long standing right, originating when GCHQ was formed in 1937, to belong to national trade unions and most of them did so. As a consequence of certain industrial action

taken in 1981, the Minister for the Civil Service issued an oral instruction to the effect that the terms and conditions of Civil Servants at GCHQ would be revised so as to exclude membership of any trade union other than a departmental staff association approved by the director of GCHQ. That instruction, which was issued without prior consultation with the staff at GCHQ was issued pursuant to the Minister's power under Article 3 of the Civil Service Order Council 1982 to : 'give instructions ... for controlling the conduct of the service and providing for ... the conditions of service.'

The order itself was made under the Royal Prerogative. The appellant, applied for a judicial review of the Minister's instruction.

It was held, inter alia, that the appellant's legitimate expectation arising from the existence of a regular practice of consultation which the appellants could reasonably expect to continue, gave rise to an implied limitation on the Minister's exercise of the power contained in Article 3 of the 1982 Order, namely an obligation to act fairly by consulting the GCHQ staff before withdrawing the benefit of trade union membership. It was further held that the Minister's failure to consult was a ground for judicial review. However, the Minister's decision was upheld on the grounds of national security. The case is important because the judges discussed the doctrine of legitimate expectations at length.

Lord Fraser equated legitimate expectation with a reasonable Expectation. (16) He further stated that :

'Legitimate, or reasonable Expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the practice which the claimant can reasonably expect to continue.' (17)

Thus, the word 'legitimate' is equated with the notion of reasonableness. Furthermore, the representation in respect of which a legitimate expectation arises is either an express promise or the existence of a regular practice.

Lord Diplock in deciding whether a matter was subject for judicial review, stated generally that a decision must have consequences which affect some person or body of persons. As in South Africa, there is no English equivalent of the *actio popularis*. Lord Diplock stated that the decision must affect the person :

'either : (a) by altering rights or obligations of that person which are enforceable by or against him in private law or; (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or; (ii) he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.' (18)

The first category is similar to the forfeiture cases referred to by Megarry in *McInnes v Onslow-Fane* (19) The distinction is in turn the same as that referred to by Wiechers (20) where he states that private individuals who enter into administrative law relationships possess all those rights which can be enforced against other private individuals in the private law sphere.

As far as Lord Diplock's second category is concerned, the distinction is made between the procedural component and the substantive component of the doctrine of legitimate expectation.

Lord Diplock states that he prefers the phrase 'legitimate expectation' rather than 'reasonable expectation' because :

'In order thereby to indicate that it has consequences to which effect will be given in public law, whereas an expectation or hope that some benefit or advantage would continue to be enjoyed, although it might be well entertained by a reasonable man, would not necessarily have such consequences ... Reasonable furthermore bears different meanings according to whether the context in which it is used is that of private law or public law. To eliminate confusion it is best avoided in the latter.' (21)

Lord Roskill emphasised that procedural component of the doctrine (22) when he stated that :

'The principle is closely connected with a right to be heard. Such an expectation may take many forms. One may be an expectation of prior consultation. Another may be an expectation of being allowed to make representations, especially where the aggrieved party is seeking to persuade an authority to depart from a lawfully established policy adopted in connection with the exercise of a particular power because of some suggested exceptional reasons justifying such departure.'

Lord Fraser's statement as to when a legitimate expectation would arise (23) was applied in a later case, namely *Ruddock v Secretary of State for the Home Department*. (24) This case concerned the tapping of telephones of members of the Campaign for Nuclear Disarmament. The Secretary of State had issued criteria governing the interception of calls. Furthermore, the Secretary of State stated that he would only authorise interception of telephone calls of certain groups which did not include the Campaign for Nuclear Disarmament. Taylor J applied these two factors to the test stated by Lord Fraser. He stated :

'It would be hard to imagine a stronger case of an Expectation arising in Lord Fraser's words in the GCHQ case ... Either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.' (25)

This case is interesting in that it shows that it is not always easy to distinguish between the procedural component and the substantive component of the doctrine of legitimate expectation. Taylor J stated that 'I conclude that the doctrine of legitimate expectation in essence imposes a duty to act fairly (26).' This is the procedural component of the doctrine.

Taylor J then states that the applicants were entitled to a legitimate expectation that their telephones would not be intercepted based on statements by the Secretary of State. This is the

substantive component of the doctrine. (27)

3.3.2 English law continued : Application of the doctrine to Revenue Law

Decisions have been reported in England where the doctrine was canvassed in respect of Revenue Law. In *Preston's case* (28) the taxpayer and the Inland Revenue Commissioner agreed that if the taxpayer withdrew his claims for certain tax relief the Inland Revenue Commissioner would not make any further investigations into the sale of shares by the taxpayer. An inspector from Inland Revenue later re-opened the investigation. The taxpayer's appeal was dismissed because the correspondence between the taxpayer and the Inspector did not disclose any agreement or representation that the Commissioners would abandon their right to further assessments on the taxpayer.

It is implied in the judgment that the doctrine of legitimate expectation does not apply to general administrative law relationships (29) because it was held that the primary duty of the Commissioner was to collect, not to forgive, taxes and in the absence of special circumstances in which the unfairness complaint amounted to an abusive power, the court could not by way of judicial review, decide that an action against the taxpayer which the Commissioner's had determined to be fair, was unfair.

Lord Templeman stated (30) that :

In principle I see no reason why the taxpayer should not be entitled to judicial review of a decision taken by the commissioners if that decision is unfair to the taxpayer because the conduct of the commissioners is equivalent to a breach of contract or a breach of representation. Such a decision falls within the ambit of an abuse of power for which in the present case judicial review is the sole remedy and a appropriate remedy. There may be cases in which conduct which savours of breach of contract or breach of representation does not constitute an abuse of power; there may be circumstances in which the court in its discretion might not grant relief by judicial review notwithstanding conduct which savours of breach of contract or breach of representation. In the present case, however, I consider that the taxpayer is entitled to relief by way of judicial review for 'unfairness' amounting to abuse of power if the commissioners have been guilty of conduct equivalent to a breach of contract or breach of representations on their part.

Lord Templeman equates unfairness with an abuse of power and abuse of power arises, inter alia, where there is conduct on the part of the Commissioner which is equivalent to a breach of contract or a breach of a misrepresentation. This means that the duty of fairness no longer means that the rules of justice must be observed.

In *M F K Underwriting Agents Limited* (31) the doctrine of legitimate expectation was canvassed extensively. The five applicants were Lloyds Underwriting Agents and syndicates. In terms of Lloyds rules the applicants were required to hold premium income in trust funds for a period of

two years after close of an underwriting year. In order to invest the premium income in securities which were not only secure, inflation proof and readily accessible (in case the funds were required to meet claims by policy holders) but which also produced a yield which is taxable for capital gains rather than as income, thereby minimising the tax liability of their members, Lloyds syndicates preferred to invest premium income in index-linked gilts or similar securities where possible. In the case of UK Gilts the indexation uplift in the redemption value of the stock was treated as capital and any gain was taxed as a capital gain. In the case of premium income received in US or Canadian dollars the applicants were required to hold that income in US or Canadian dollar accounts or invest it in US or Canadian dollar securities but prior to 1986 there was no equivalent of index-linked US or Canadian dollar securities available for the investment of premium income received in US or Canadian dollars. A number of US banks therefore proposed to issue index-linked US or Canadian dollar securities intended for the Lloyds market. They made independent approaches to the Revenue seeking confirmation that the index-linked element payable on redemption of those securities would be regarded as capital and, if it was taxed at all, it would be taxed only as capital gains and not as income. In reply, Revenue officials indicated that they considered that the index-linked element payable on redemption would be taxed only as capital gains and not as income. Between April 1986 and October 1988 the applicants purchased index-linked bonds in US and Canadian dollars on the basis that they index-linked element payable on redemption would not be taxed as income. In October 1988 the Revenue decided to tax the index-linked element as income. The applicants applied for judicial review of that decision on the grounds that it was unfair, inconsistent and discriminatory and thus an abuse of power.

The applicants counsel argued that decisions of the Revenue, should be the subject of judicial review, inter alia, on the grounds of abuse of power, ie. on the grounds of unfairness (32). Counsel argued that the conduct of the Revenue was unfair because the conduct of the Revenue, (were the Revenue not a public body) had given rise to an estoppel or breach of contract.

Counsel for the applicants argued that if a public authority has a policy which it makes known or announces, it may not act inconsistently with that policy without sufficient notice and then not retrospectively.

In support of the above submissions the applicants relied, inter alia, on *Preston's* case and *Ruddocks's* case (33).

Counsel for the Revenue stated that judicial review could not be invoked to oblige the Revenue to act contrary to its statutory duties. Counsel stated that Parliament alone could decide what taxes should be paid and Inland Revenue had to collect the tax that Parliament had determined. Counsel for the Revenue argued further that the Revenue could not, without breach of statutory

duty, agree or indicate in advance that it would not collect tax which, on a proper construction of the relevant legislation, was lawfully due. It was further submitted on behalf of the Revenue that this case was distinguishable from cases discussed above because *in casu* the statements relied on fell far short of any statement of official policy.

In reply, the applicants counsel agreed that the Revenue could not bind itself to act contrary to a statutory duty. Counsel for the applicants argued however that the Revenue had been vested with a wide discretion as to the best means of collecting tax and its representations fell within this discretion. Therefore it did not act contrary to its statutory duty.

Bingham L J stated that the application would be unsuccessful if the Revenue could not lawfully make the statements or representation which were allegedly made. However he stated that if, in a case involving no breach of statutory duty, the Revenue makes an agreement or representation from which it cannot withdraw without substantial unfairness to the taxpayer who has relied on it, that may found a successful application for judicial review. The above statement is based on the views of Lord Templeman in *Preston's* case (34).

However, in cases where there has been no breach of statutory duty, Bingham L J stated that he was of the opinion that :

‘In assessing the meaning, weight and effect reasonably to be given to the statements of the Revenue the factual context, including the position of the Revenue itself, is all important. Every ordinarily sophisticated taxpayer knows that the Revenue is a tax-collecting agency, not a tax-imposing authority. The taxpayer’s only legitimate expectation is, *prima facie*, that he will be taxed according to statute, not according to a concession or a wrong view of the law (35).

Bingham L J stated that the applicants case should fail but that if the following requirements had been met, then he would have held that the Revenue was bound by its representation.

- (a) The taxpayer must give full details of the specific transaction on which he seeks the Revenue’s ruling, unless it is the same as an earlier transaction on which a ruling has already been given; and
- (b) the taxpayer must indicate the ruling sought which means that;
 - (i) the taxpayer must make plain that a fully considered ruling is sought; and
 - (ii) the taxpayer should indicate the use he intends to make of the ruling; and
- (c) it is necessary that the ruling or statement relied upon should be clear, unambiguous and devoid of relevant qualification (36).

The above requirements are tantamount to a procedural ruling of the type discussed in chapter two. Bingham L J stated that he was not undermining the concept of legitimate expectation. He stated that the doctrine of legitimate expectation was 'rooted in fairness' (37) by which is meant 'the notion of equitableness, of fair and open dealing to which the authority is entitled as much as the citizen.'

The doctrine of legitimate expectation was again canvassed in *Camacq Corporation*. (38) In this case the applicants applied for judicial review of a decision of the Commissioner revoking a direction given to one of the applicants to pay dividends to the US.

Counsel for the applicants argued that the Revenue, having conceded the existence of a practice, ie. of allowing gross dividends to be paid overseas, should have honoured it and if it wished to change its practice, it should have said that it was going to do so. Counsel for the applicants further argued that the applicants had a legitimate expectation that the Revenue would behave in that way because the doctrine of legitimate expectation was not limited to procedural irregularities.

Counsel for the Revenue brought evidence to show that the applicants were doubtful about the applicability of the ruling to that case.

Kennedy L J rejected the contentions of the applicants. He stated that :

'[The] applicants cannot invoke the doctrine of legitimate expectation because the practice in question never operated to their benefit. It benefited another class of taxpayer and it is only those who expect to benefit who can legitimately complain if, without notice, the practice which they expect to continue is prematurely brought to an end. It seems to me that the only practice on which the applicants could rely would be a practice of always issuing directives such as the directive issued on June 8 [to pay a gross dividend] and there is no evidence before me of the existence of any such practice.' (39)

3.3.3 Conclusion and Analysis of English Law

The following points may be concluded from all of the above cases :

- a) The doctrine of legitimate expectation is well entrenched in English Law. The doctrine has a procedural and a substantive law component which are inter-related.
- b) The doctrine of legitimate expectation and the doctrine of fairness have developed concurrently. In earlier cases such as *O'Reilly's case* (40), fairness was equated with the rules of natural justice. In later cases such as *Preston's case* (41) fairness meant an abuse of power by which was meant conduct on the part of the authority which is equivalent to a breach of contract or a breach of misrepresentation. In *M F K Underwriting* (42), it was held that the doctrine of legitimate expectation was rooted in fairness, and that fairness in addition to the meaning ascribed to it in *Preston's case*, also meant 'the notion of

equitableness of fair and open dealing to which the authority is entitled as much as the citizen (43).’

- c) In order for an applicant to succeed by invoking the doctrine of legitimate expectation, the applicant will have to comply with the procedural guidelines suggested by Bingham L J.
- d) The representation must benefit the applicant directly. If the representation was issued in respect of another class of taxpayer, then the applicant may not invoke the doctrine (44).
- e) Although the doctrine may not be invoked in order to bind the Revenue to an act which is in conflict with the statute (In *R v Imperial Chemical Industries PLC* (45) Lord Oliver stated that an *ultra vires* violation of the statute (for payment of Petroleum Revenue tax) could not create a legitimate expectation), nevertheless in view of the wide discretion which the Revenue has in order to collect taxation, the Revenue may not merely rely on the fact that it has no discretion to remit the taxation which has been imposed by Parliament in *M F K Underwriters* (46), where it was stated that the Revenue has ‘a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge, the highest net return that is practical having regard to the staff available to them and the cost of collection.’

3.4 Australia

The doctrine of legitimate expectation has been accepted in Australia. As in England, the concept of fairness in Australia was initially equated with the rules of natural justice (47). Furthermore, in Australia the doctrine of fairness meant that a hearing was implied where a representative of the state had made an undertaking ‘or followed a regular practise which the complainant could reasonably expect to be honoured’ (48).

The case of *Cunningham v Cole and Others* (49) involved an application for re-appointment to the public service. The application was refused on the grounds of alleged misconduct. Ellicot J allowed the applicant’s appeal.

The judge stated : (50)

‘Once it is accepted ... that the notion of ‘legitimate expectation’ can apply even where the person affected by the decision does not have a right to the exercise of a discretion in his favour, it becomes necessary ... to consider each case in relation to its circumstances. The proper question to ask is, in my view, whether, having regard to the circumstances in which the discretion is being exercised, the person complaining is entitled to expect, in accordance with ordinary rules of fairness, that rules of natural justice such as an opportunity to be heard will be applied. The answer to that question will depend, *inter*

alia, on a consideration of the nature of the discretion in its statutory context, the circumstances in which it is exercised and the consequences of its exercise unfavourably to that person.’

It is clear that Ellicot J is discussing the procedural component of the doctrine. He concluded that the applicant :

‘Had a legitimate expectation that the question of his future employment in the service under the application in question, would not be decided on grounds of prior conduct without his having had knowledge of the alleged misconduct and an opportunity to be heard in relation to it.’ (51)

In a later case, namely, *Kioa v Minister for Immigration and Ethnic Affairs* (52) the doctrine of fairness was given a different meaning. The applicant’s were citizens of Tonga, who had requested extensions of their temporary entry permits. An order had been issuing in terms of which the applicants were to be deported. Of significance in this case is the fact that there had been no prior representation by the Minister that the temporary entry permit would be extended upon its expiry, ie. there had been no act on the part of the Minister which was tant amount to a breach of contract or representation. It was held that the applicant’s had a legitimate expectation generally because a previous temporary entry permit had been granted. It was held that the rules of natural justice were applicable whenever ‘rights, interests, status or legitimate expectations’ at page 383 were affected. The tenor of the judgment is that the enquiry is not firstly to establish whether the applicant has a legitimate expectation, and if so to apply the rules of natural justice. Rather the judgment in this case suggests that the rules of natural justice should be invoked whenever an individual is affected in any way by the decision.

In a subsequent case, namely, *Kurtovic v Minister for Immigration, Local Government and Ethnic Affairs* (53) the Minister signed the deportation order which was subsequently revoked. After revocation, the applicant received a letter warning him that any further convection would lead to the question of his deportation being reconsidered. In 1988 the Minister signed a fresh deportation order even though the applicant had not been convicted of a further offence. It was held that the voluntary promise in 1985 founded a legitimate expectation in the applicant that without new material before the Minister, he would not deport the applicant.

3.4.1 Conclusion and analysis of the doctrine in Australia

In Australia, as in England, the concept of the legitimate expectation had to develop in tandem with that of fairness to permit this extension of natural justice to new fields of administrative decision making (54):

Allars states that :

‘Australian, judicial and academic perception of natural justice has been stifled by faithfulness to the test ... for the implication of natural justice. The three-fold test requires consideration of the nature of the property of the complainant affected by the decision, the circumstances in which the

administrator is entitled to intervene and the sanctions the latter is entitled to impose. Any one or more of the factors may point to the implication of the rules of natural justice (55).'

In *Kioa's* (56) case, this test was not adhered to and it was held that in order for procedural fairness to apply, the decision of the administrative authority may affect any interest of the individual. 'The expression 'legitimate expectation' is simply an epithet for all his interest and is not a sure criterion for determining whether natural justice is implied (57).'

However, in *Kurtovic's* (58) case Einfeld J (59) again adhered to the implication test referred to in above. Therefore it appears as if the test in *Kioa's* (60) case may not signify a new trend in Australia.

As in England, policy statements by the relevant governmental authority may create a legitimate expectation that the representation of the particular Minister will not be revoked.

3.5 European Courts

The European Courts have accepted the doctrine of legitimate expectation. Forsyth states that the development of the doctrine (61) before the European Courts was not based on English law but on the German doctrine of Vertrauensschutz Literally translated, it means 'protection of trust.' The concept arose in reaction to the principle of the free revocation of administrative acts. In Germany, the doctrine has been invoked even where the administrative act was unlawful. Thus in one case, the court had to weigh principles in order to determine whether public interest in the legality of the administration outweighed the need to protect the trust placed by a citizen in the validity of the administrative act.

3.6 The doctrine of legitimate expectation in South Africa

3.6.1 Introduction

The development of the doctrine in South Africa has been strongly influenced by the development of the doctrine in English law. Cases pertaining to this doctrine which culminated in the acceptance by the Appellate Division of the doctrine are examined. After this development has been examined the question will be answered as to whether the doctrine has application with respect of rulings of the Receiver of Revenue.

3.6.2 Case law

3.6.2.1 *Laubscher v Native Commissioner*

Subsequent cases pertaining to the doctrine in South Africa refer to *Laubscher's* case (62) as the starting point.

In this case it was held that the relevant Act did not make provision for an enquiry by a Native Commissioner before the latter could refuse the applicant permission to enter upon certain lands. The appellant was an attorney whose clients resided on the land in question. Reynolds A J A stated (63) that the appellant was not entitled to invoke the *audi alteram partem* rule. He stated that this rule was only applicable where the act complained of, took away some rights which the appellant possessed. In view of the fact that no existing rights were taken away, the doctrine had no application. This is an example of a forfeiture case mentioned by Megarry in *O'Reilly's* case. It is interesting to speculate as to what the outcome of this case would be, if it was decided recently and the appellant claimed that the doctrine of legitimate expectation applied. If he had been previously allowed on the land then it is submitted, based on the doctrine of legitimate expectation, the Commissioner would not be able to refuse permission for him to enter on the land again. Furthermore, on the basis of *Kioas'* case, it could be argued that the interest of the applicant was affected, ie. he had to consult with his clients. Therefore the rules of natural justice were applicable.

In *Laubscher's* case, Hall A J A stated that the classification of administrative powers as purely administrative on the one hand and quasi judicial on the other, was apt. From this he concluded that where the Commissioner exercised a purely administrative power, 'he is under no obligation whatsoever to acquaint an applicant for permission with any information upon which that decision may have been based.' (64)

It is submitted that this classification results in unfairness towards an applicant in Administrative Law. Administrative functions are not capable of easy classification according to whether they are administrative, legislative, judicial or quasi judicial. If an enquiry into the rights of an applicant is determined by the classification of the administrative function in question, the real nature of the interest which is affected, may be ignored. The role of the classification of administrative powers is examined below.

3.6.2.2 **Everett v Minister of the Interior**

The doctrine was discussed in *Everett v Minister of the Interior* (65) The applicant, a British citizen by birth, wished to become a permanent resident of South Africa. She had no intention of returning to England. She applied for an extension of her temporary residence permit for one year during which she intended making further representations to the immigration authorities to be granted permanent residence. This application was granted and her temporary permit was finally extended. Just before the expiration of the extension she was served with a letter from the Minister which ordered her temporary permit to be withdrawn with immediate effect. She was ordered to leave the country within a few days. The applicant who had received no prior notice of the Minister's intention applied to the Supreme Court for an order setting aside the notice withdrawing her temporary residence permit, on the ground, inter alia, that it was contrary to

natural justice as she had not been afforded an opportunity of making representation. The court held that there had been a breach of natural justice and the Minister's notice was set aside.

The approach of Fagan J was to classify the power of the Minister as quasi judicial and to conclude that therefore the rules of natural justice should apply. Furthermore, the applicant had a legitimate expectation flowing from the fact she had been permitted to stay for a certain period of time that she would be given a hearing. The approach of Fagan J is somewhat cumbersome. As Hlophe points out (66) if the applicant had a legitimate expectation of being allowed to stay for the permitted time, then there was no need to refer to the classification of the administrative function at all. Hlophe submits that if the quasi judicial classification had been ignored, Fagan J would have arrived at the same conclusion, if he invoked the legitimate expectation doctrine.

Nevertheless, the judgment is important because it accepted the doctrine of legitimate expectation in South African law. Fagan J adopted a classification which distinguished between application cases on the one hand and forfeiture cases on the other. (67) It is implied in his judgment that the doctrine has no place in application cases but that it does apply in re-application cases ie. those cases where an application is made in respect of a right or liberty which was granted previously.

It is interesting to compare this case to *Kioa's* case and to *Kurtovic's* case. It will be remembered that in the former case the temporary permit had expired and yet a legitimate Expectation was founded. In the latter case, the promise of the Minister not to deport the applicant founded a legitimate expectation.

3.6.2.3 **Boesak v Minister of Home Affairs**

In this case (68) the applicant's passport had been withdrawn in terms of the prerogative powers vested in the State President. Counsel for the applicant argued that the applicant had a legitimate expectation that he would be given a hearing before his passport was withdrawn because he would be committing a criminal offence if he left the country without his passport. This is the procedural component of the doctrine. Friedman J, held that that the applicant was not entitled to a hearing before the withdrawal of his passport because to do so would allow the applicant to leave the country prior to the hearing which would frustrate the reason why the passport was withdrawn. He held that the doctrine of (69) legitimate expectation does not constitute an additional ground for the application of the *audi alteram partem* principle.

3.6.2.4 **Castel N O v Mawu**

In *Castel NO v Mawu* (70), the respondent applied to the appellant (the acting Chief Magistrate),

for permission to hold the annual general meeting of its Natal branch at an open air venue in Durban. Permission was refused whereupon the respondent made an urgent application for an order setting aside the appellant's refusal and directing the appellant to authorise the meeting.

The order was granted on the grounds that :

- (a) the respondent had not been given a hearing (the court having found that, in applying for authority to hold the meeting, the respondent had not been applying for permission to do something it had not otherwise been entitled to do);
- (b) the appellant had erred in adopting an incorrect approach and by taking irrelevant matters into account; and
- (c) the appellant had acted *mala fide* and had acted *in fraudem legis*.

In appeal from the decision of the court *a quo*, the appellant argued, that since the gathering had been prohibited and could not validly be held without authority, the refusal of the authority to hold the meeting had not affected any right of, and had not involved any legal consequences to, the respondent. It had not therefore been necessary for the appellant to apply the *audi alteram partem* rule. The respondent, on the other hand, argued that freedom of assembly, like freedom to trade was a basic right which, as a result of statutory interference, could no longer be exercised, in the case of a right to trade, otherwise than by licence, and, in the case of the right of assembly, otherwise than upon permission of the Minister or Magistrate.

Furthermore it was argued that, as in the case of an application for a trading licence where it was generally accepted that the *audi alteram partem* rule had to be observed, so had the rule to be observed in applications for authority in terms of the Internal Security Act.

It was held that there was no need for the Minister or the Magistrate to whom the application for authority had been made to observe the *audi alteram partem* rule unless there were reasons calling for its observance. The courts view was based on the authority of *Laubscher's* case (71) ie. that there was no need for the respondent to observe the *audi alteram partem* rule because no rights which previously had existed, had been taken away.

The respondent argued that the principle in *Laubscher's* case was unjust and invited the court to grant relief in cases where an administrative decision, which did not affect a person's rights but nevertheless involved serious consequences to him, is taken without the observance of the *audi alteram partem* rule. It was suggested that the doctrine of legitimate expectation be invoked here. Hefer J A acknowledged that he was :

'Not unmindful of the serious and, in certain respects, justified criticism which had been levelled at some decisions and at the principle involved ... It may well be that there is

indeed a need for legal reform. It would be idle to explore the possibility of reform in the present case. Even if the legitimate expectation approach were to be adopted, there is no room for its application here. Applicant's counsel submitted that the applicant had a legitimate expectation that it would receive a fair hearing, and that its application would not be refused on grounds which it had not been afforded an opportunity to refute. There is, no factual basis for such a submission. Unlike the English and Australian cases on which the court relied, nothing had happened before the application for authority was submitted and nothing happened thereafter which could have caused the applicant to entertain such an expectation ...' (72)

Of significance is Hefer J A's implied statement that the doctrine would apply if something happened *after* the application which could have caused the applicant to entertain such an expectation.

3.6.2.5 **Langeni v Minister of Health and Welfare**

In *Langeni's* case, (73) an application was made by four provincial hospital employees for reinstatement on the grounds that their dismissal was unlawful. Goldstone J held that the classification of administrative functions was no longer adequate in determining whether the rules of natural justice were applicable. He stated that 'other tests have been adopted such as whether the administrative act in question is affecting rights or involving legal consequences to persons.' (74)

Goldstone J accepted that the doctrine of legitimate expectation was part of South Africa law. He relied on English law but stated that the employees :

'clearly had no right or legal interest to remain in the employment after the expiration of a notice period. I have no doubt that they also did not have a legitimate expectation that their employment would continue indefinitely unless there were good reasons for its termination. In effect they were employed at the pleasure of the administration and could leave employment at their pleasure. The fact that in some cases such as that of the first applicant, the employment has continued for many years, in no way confers any additional right, interest or legitimate expectation upon the employee.' (75)

It is submitted that the approach adopted by Goldstone J is narrow. Although the employment relationship was that between the private individual and the State, nevertheless this should not exclude the doctrine of legitimate expectation. The doctrine should extend to incorporate a *spes*. It is submitted that employees who have been employed by the same employer for a period of time (even though they may be subject to 24-hours notice) have a legitimate expectation (based on the period of time for which they have been employed) that they will be reinstated. The judgment raises a further problem namely that an individual cannot enforce private law rights against the State where these have been excluded.

3.6.2.6 **Mokoena v Administrator Transvaal**

A similar case is *Mokoena and Others v Administrator Transvaal*. (76) The applicants who were temporary workers at a provincial hospital and were subject to a 24-hour notice of termination of

their employment brought an application against their dismissal. Goldstone J again heard the case.

They had, however, all been employed for a considerable number of years and after the first two years, had become compulsory members of the pension scheme established under the Temporary Employee's Pension Fund Act and had made contributions thereto. They now disputed the right of the Administration to have summarily dismissed them without giving reason therefore. It was held that, although prior to their becoming members of the scheme the Administration had been entitled to summarily dismiss them on 24 hours notice, the effect of their becoming members of the pension scheme had placed them on an entirely different category. The administrative authority giving them 24 hours notice clearly affected their pension rights and involved legal consequences to them.

As far as the procedural irregularity is concerned, it was held that the maxim *audi alteram partem* rule applied and that they should have been heard before action was taken against them.

As far as the substantive law component of the application is concerned, Goldstone J relying on English Law applied the doctrine of legitimate expectation and stated that the applicant's had a legitimate expectation that they would not be deprived of their right to qualify for a pension without good or sufficient reasonable cause. He stated that 'that legitimate expectation [of not being deprived of the right to qualify for a pension without good cause] would have entitled them to a hearing before the decision to terminate their employment was made ...' (77)

Goldstone J did not invoke the procedural component of the legitimate expectation doctrine but rather applied the rules of natural justice *in vacuo*. This is similar to the approach adopted by Fagan J in *Everett's* case. The doctrine of legitimate expectation was applied to the substantive law aspect of the case. This raises the question of whether if one has a substantive legitimate expectation, there is not a procedural legitimate expectation or the rules of natural justice, superfluous. On the other hand, it may be argued that the procedural legitimate expectation is important and the substantive legitimate expectation is superfluous.

3.6.2.7 Administrator Transvaal v Traub

In *Administrator Transvaal and Others v Traub and Others* (78). The Appellate Division confirmed that the doctrine of legitimate expectation was part of South African law. The respondents were doctors at the Baragwanath Hospital. The applicant had refused to appoint or re-appoint certain of them to posts at provincial hospitals. The reason for this was that the respondents had published a letter criticising the attitude of the Provincial Administration to conditions in the hospital. It was held that the respondents should be promoted to their posts.

Counsel for the respondents argued that the respondents had a legitimate expectation that their

appointments would be confirmed (substantive component of the doctrine). Counsel for the respondents further argued that the respondents had a legitimate expectation to be heard before their appointments were not confirmed (procedural component of the doctrine). Therefore, instead of relying on the *audi alterem partem* rule as far as the procedural aspect of the unfairness was concerned, counsel for the respondents preferred to argue the procedural unfairness on the basis of the procedural component of the doctrine of legitimate expectation. This approach is in contrast to the decisions in *Langeni* and *Mokoena* (79). Corbett C J based his judgment on the English case law discussed above.

Corbett C J stated that legitimate expectations 'are capable of including expectations which go beyond enforceable legal rights, provided they have some legal basis.' He quoted the speeches of Lord Fraser and Lord Roskill in the *GCHQ* case where it was said :

'Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.' (80)

Corbett C J accepted that the doctrine 'is sometimes expressed in terms of a substantive benefit ... and at other times in terms of a legitimate expectation to be accorded a hearing ...' (81)

He further stated that :

'In practice the two forms of expectation may be inter-related and even tend to merge. Thus, the person concerned may have a legitimate expectation that the decision by the public authority will be favourable or at least before an adverse decision is taken, he will be given a fair hearing.' (82)

Corbett C J disagreed with the statement by Goldstone J in *Mokoena's* case that legitimate expectation refers to the rights sought to be taken away (substantive component) and not to the right to a hearing (procedural component). As far as the procedural component is concerned, Corbett C J confirmed that it is equivalent to a duty to act fairly which merely means that the courts are only concerned with the manner in which the decision was taken.

Corbett C J stated that the classification of administrative powers was no longer relevant. He stated that *Laubscher's* case (83) was no bar to the acceptance of the doctrine in South Africa. Corbett C J further stated that the doctrine should apply in South African law. He stated :

'There are many cases when one can visualise ... where an adherence to the formula of 'liberty, property and existing rights' would fail to provide a legal remedy, when the facts cry out for one; and would result in a decision which appeared to have been arrived at by procedure which is clearly unfair, being immune from review. The law should, in such cases, be made to reach out and come to the aid of persons prejudicially affected.

At the same time, whereas the concepts of liberty, property and existing rights are reasonably well defined, that of legitimate expectation is not. Like public policy, unless carefully handled it could become an unruly horse. And in working out, incrementally, on the facts of each case, where the doctrine of legitimate expectation applies and where

it does not, the courts will no doubt bear in mind the need from time to time, to apply the curb. A reasonable balance must be maintained between the need to protect the individual from decisions unfairly arrived at by public authority (and by certain domestic tribunals) and the contrary desirability of avoiding undue judicial interference in their administration.’ (84)

3.6.2.8 **Administrator Cape v Ikapa Town Council**

In the recent case of *Administrator, Cape and Another v Ikapa Town Council* (85) the respondent argued that it had a legitimate expectation that the Demarcation Board would grant it a hearing before a decision was taken. The Demarcation Board had made use of information in coming to a decision, which it had acquired, after a hearing but which had not been disclosed to the respondent. It was held that the information was not of a material nature and had not influenced the Board in making a decision. Joubert J A held that the doctrine of legitimate expectation was an integral part of the *audi alteram partem* rule. he held that ‘there is a clear duty on the public official or body in exercising its statutory functions to act fairly and accord the affected individual a fair hearing.’ Thus the judge applied the procedural component of the doctrine (86).

3.6.2.9 **Kahn v Pietermaritzburg Local Road Transportation Board**

In *Kahn t/a Kahn’s Motor Transport v Chairman, Pietermaritzburg Local Road Transportation Board* (87) the procedural component of the doctrine was applied. It was held that the decision of the Road Transportation Board was invalid because the applicant had not been informed of the date of the hearing (88).

3.6.2.10 **Administrator, Transvaal v Zenzile**

In *Administrator Transvaal v Zenzile* (89), the respondents had obtained an order in the court *a quo* setting aside a decision to dismiss them, without a hearing, after they had participated in a work stoppage at the Natalspruit Hospital. It was held that the respondents had been entitled to a hearing, prior to their dismissal and the order of court *a quo* was confirmed.

Hoexter J A, who delivered the judgment, reached his decision without reliance on the doctrine of Legitimate Expectation.

The appellant argued firstly that the employment relationship between itself and the respondents was governed by the common law of contract in terms of which the appellant was entitled to summarily dismiss the respondents, because the respondents had fundamentally breached the contract. Accordingly, the appellant argued that the decision to dismiss the respondents was not subject to administrative law, and therefore the rules of natural justice were inapplicable.

Hoexter J A, rejected the argument of the appellant. He stated that this matter did not fall beyond the purview of Administrative Law because the two contracting parties were not private individuals but one private individual and one representative of the state (90). He stated :

'one is here concerned not with mere employment under a contract between two private individuals but with a form of employment which invests the employee with a particular status which the law will protect. Here the employer and the decision-maker is a public authority whose decision to dismiss involved the exercise of Public Power. The element of Public Service injected by statute necessarily entails, so I consider that the respondents were entitled to the benefit of the application of principles of natural justice before they could be summarily dismissed for misconduct.'

He stated further (91) :

'where a statute empowers a public body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the individual has a right to be heard before a decision is taken unless the statute expressly or by indicates the contrary.'

As far as the nature of the enquiry is concerned he stated (92) :

'in my view it is logically unsound and wrong in principal to postulate that the *audi* principle has no application to 'purely contractual relations;' from that premise to embark upon an enquiry as to whether or not there is something in the legislation which imports the *audi* principles into the contractual relationship; and to require that the statutes concerned should incorporate the *audi* principle, either expressly or implicitly ... The existence of a contractual relationship cannot alter the essential relationship of the enquiry. With reference to any particular provision of a statute the questions to be answered are as always; (i) is a public official in power to give a decision effecting the existing rights of an individual? And, if so, (ii) is the right of the individual to be heard before the decision is taken excluded either expressly or impliedly?'

Hoexter J A concluded by referring briefly to the doctrine of Legitimate Expectation. In commenting on the affirmation in *Traub's* case that the doctrine of Legitimate Expectation relates to the right to a hearing rather than to the right sought to be taken away, he cautioned (93) that this view would imply that in cases where the employees tenure is precarious such employee may invoke the doctrine of Legitimate Expectation if his employer is a public body.

3.6.3 Conclusion and analysis of the doctrine of Legitimate Expectation in South African Law

- a) In early cases eg. *Laubsher*, the classification of administrative actions determined whether the rules of natural justice were applicable. Furthermore, the rules of natural justice were only applicable where the applicant was deprived of an existing legal right. In *Everett's* case, the classification of administrative powers was again used in order to determine whether the applicant was entitled to a hearing. However, it has been pointed out that the same result could be achieved if the enquiry as to

whether the rules of natural justice were applicable, was preceded by an enquiry as to whether the applicant had a Legitimate Expectation.

- b) The doctrine of Legitimate Expectation was only applicable to cases where the applicant was deprived of an existing legal right. (*Everett, Langeni, Mokoena and Boesak*)
- c) In later cases (*Langeni*), the classification of administrative powers as a means of determining whether the terms of natural justice were applicable was held to be no longer adequate. In *Traub's* case, the Appellate Division held that the classification of administrative powers, inter alia, as a means of determining whether the rules of justice were applicable, was no longer relevant.
- d) Later cases, eg. *Traub's* case also held that it was not necessary that an existing legal right be taken away before the doctrine of Legitimate Expectation should be invoked. Thus in *Traub's* case the applicant did not have a legal right to be appointed to senior posts. In *Zenzile's* case the respondent's did not have a legal right to remain in employment.
- e) The exact meaning of the doctrine has been problematic. It has been stated that the doctrine has a procedural and a substantive component. This is similar to and the approach by the judiciary by the English Law. In *Everett's* case, the substantive aspect of the doctrine was applied. However, in *Boesak and Castel*, the procedural aspect of the doctrine was applied. In *Mokoena's* case Goldstone J stated that 'the Legitimate Expectation refers to the right not to be taken away, and not to the right to a hearing (ie. he refers to the substantive component of the doctrine). In *Zenzile's* case, Hoexter J A confirms that the Appellate Division has accepted that the Legitimate Expectation refers to the right to a hearing. In support of this he relies on the judgment of Corbett C J in *Traub's* case. However, Corbett C J did not unequivocally accept that the procedural aspect of the doctrine is the only meaning which may be ascribed to the doctrine. He stated (94) that :

'in practice the two forms of expectation may be inter-related and even tend to merge. Thus, the person concerned may have a Legitimate Expectation that a decision by the public authority will be favourable, or at least before an adverse decision is taken, he will be given a fair hearing.'

It is submitted that this is the correct view of the doctrine. An integral component of a substantive

Legitimate Expectation must be that there is a Legitimate Expectation that the correct procedure will be adopted in reaching a decision.

- f) *Zenzile's* case and *Kioa's* case have in common the fact that the doctrine of Legitimate Expectation was referred to in passing. In *Kioa's* case, the doctrine is 'simply an epithet for the interests which may be affected by a decision of the state and is not a sure criteria for determining whether natural justice is applied (95). In *Zenzile's* case one enquires whether a public official has the power to give a decision affecting the existing rights of an individual and if so, to determine whether the rules of natural justice are included either expressly or impliedly.

- g) In South Africa, England and Australia the rules of natural justice are applicable when a public official is empowered to give a decision which affects an individual. However, it appears that in Australia it would not be necessary to prove that a pre-existing legal right has been affected (if the trend set in *Kioa's* case will be followed) whereas in South Africa, the interest in respect of which the Legitimate Expectation arises may either have to be a legal right or at least a very substantial interest.

3.6.4 The classification of Administrative powers

3.6.4.1 Introduction

The acceptance of the doctrine of legitimate expectation again questions the usefulness of the classification of administrative powers. Would the decision in *Laubscher's* case have been different if there was no such thing as the classification of administrative action and if the doctrine of Legitimate Expectation had existed at that time? It is submitted that the doctrine of Legitimate Expectation is a flexible doctrine which suits the changing Administrative Law relationship between the Commissioner and the taxpayer. The rigidity which the classification of administrative powers seeks to impose on this Administrative Law relationship is detrimental to it.

The classification of Administrative powers is based on the doctrine of separation of powers whereby the Legislature, Executive and the Judiciary exist independently of one another. A distinction is made between legislative, judicial, quasi judicial, ministerial or purely administrative acts. Wiechers states that it is necessary to make such a distinction 'since the law attaches important consequences thereto.' (96)

The problem with the classification of administrative functions is that the Courts have attached labels to the Administrative function in question and the consequences of these functions have been examined by the Courts once the classification label has been attached thereto. The correct approach is to examine the consequences and if necessary, attach a descriptive label to the administrative function. The latter trend is now being adhered to in case law. (97) Baxter states that the scheme of classification 'reflects more accurately attitudes of judicial activism or restraint than the relevant characteristics of the act in question.' (98) He states that 'it has been forgotten that classification is simply a method by which complex data is organised for the purpose of analysis and comprehension, and that no more than limited assistance is to be derived from the classificatory label.'

Baxter proposes a broader category of distinctions. (99) He distinguishes between legislative and non-legislative acts. Generally legislative acts usually connote an action which is of general application in contrast to an action which is specific in application. This is similar to the general as opposed to the individual Administrative Law relationship proposed by Wiechers. (100) Baxter further distinguishes between (101) authoritative (unilateral) and consensual acts. The essence of this distinction is that in the former the state organ is not treated in a position similar to a private individual who enters into a

contract with another private individual.

3.6.4.2 The rejection of the classification of administrative powers : case law

A trend can be discerned in South African court decisions whereby the classificatory theory has been rejected.

In *Pretoria North Town Council v A-1 Ice-Cream factory* (102) Schreiner J A warned (103) against viewing these labels as pegs upon which to hang the substantive content of the administrative power in question and stated :

'The classification of discretions and functions under the headings of administrative, quasi judicial and judicial have been much canvassed in modern judgments and juristic literature; there appears to be some difference of opinion, or of linguistic usage, as to the proper basis of classification, and even some disagreement as to the usefulness of the classification when achieved. ...One must be careful not to elevate what may be no more than a convenient classification into a source of legal rules.'

In that case it was held that the appellant could not refuse certificates to hawkers who proposed to sell ice-cream manufactured outside its area to hawkers resident outside its area. Counsel for the appellant had argued that legislation gave the Counsel not a quasi judicial but an administrative or purely administrative discretion which it was entitled to exercise on any grounds of policy that might seem just. In other words the appellant argued that the classificatory scheme should be elevated to substantive Law.

The same caution which had been expressed by Schreiner J A was repeated by Rumpff C J in *Oberholzer v Padraad van Outjo*. (104) In *Oberholzer's* case the Court a quo held that the function of the road board was administrative and that therefore it was not necessary to grant the appellant a hearing. The Court set aside the decision of the court a quo. It is significant that in this case as in the *A-1 Ice-Cream* case the rejection of the elevation of the classificatory scheme to substantive law resulted in decisions against individuals being set aside.

In *South African Defence Aid Fund v Minister of Justice* (105) Williamson J A stated in a dissenting judgment allowing the appeal that he agreed with the remarks of Schreiner J A in *Pretoria North Town Council v A-1 Electric Ice-Cream Factory*. (106) He stated that he feared :

'The rigidity which such classification and labelling may induce. I appreciate the value, in its proper sphere of a scientific analysis and sub-division under proper nomenclature of the application in practice of a legal principle ... it is possible that, in the case of a basic principle of 'fair play' under consideration an undue limitation may be placed upon its scope by an attempt to find its applicability entirely by means of the type or class of test. The essential feature in each case is, I think the true meaning and effect, in surrounding circumstances, of the neighbouring statutory provisions.'

The South African Defence and Aid Fund had requested a hearing prior to it being declared unlawful.

In *Traub's* case (107) Corbett C J appears to have put a seal of approval on this trend when he stated that the classification of decisions 'no longer seems to have any relevance in this sphere.' (108) (109) In *Traub's* case the rejection of the classification theory went hand in hand with the acceptance of the doctrine of Legitimate Expectation. In *Langeni's* case the same occurred.

3.6.4.3 Conclusion

It is submitted that the classificatory scheme is not relevant to the Administrative Law relationship between the Commissioner and the taxpayer.

Adherence to the classificatory scheme as anything more than a mere labelling system would be prejudicial to the taxpayer. The latter comments acquire added significance against the background of the large number of discretions which are granted to the Commissioner. Even the distinction between the general and individual administrative law relationship, proposed by Wiechers, should merely serve as labels once the consequences of the administrative function in question have been examined. The above is consistent with the proposition in this thesis that the Administrative Law relationship between the Commissioner and the taxpayer should not be subject to unnecessary legalism.

3.7 Estoppel

3.7.1 Introduction

Having examined the doctrine of Legitimate Expectation as a remedy which the taxpayer has against the Commissioner, the remedy of estoppel is considered. Can estoppel operate to prevent the Commissioner or his subordinate officials from revoking a ruling? In terms of this doctrine (110) 'a person is precluded, is estopped, from denying the truth of a representation previously made by him to another person if the latter, believing in the truth of the representation, acted thereon to his prejudice.'

The requirements for estoppel are :

- (a) that there must be an intentional representation; and
- (b) that the person who pleads estoppel must have acted on the faith of the representation to his prejudice; and
- (c) there must be a causal connection between the representation and the prejudice which was suffered (111).

Whether a public official can be estopped from denying a representation which he has made is the subject of debate.

Baxter states :

'Allowing a public authority to waive legal requirements or prohibitions will also overlook an important principle of public policy that person's, be they public or private, cannot waive rights in which the public have an interest.' (112)

It is submitted that the question of whether Estoppel should operate in Revenue Law depends, to a certain extent on whether the Administrative Law relationship is general or specific. Wiechers distinguishes between general administrative law relationships and individual relationships. (113) General administrative relationships are those relationships in which the same legal rules apply to all persons within those relationships. In the case of individual administrative relationships the content varies from case to case. Wiechers states (114) that :

'the difference between general and individual legal relationships lies in the fact that, in a general relationship, the same legal rules obtain non-specifically and impersonally with regard to the legal subjects within that group, while in an individual legal relationship there are specific legal rules applicable to specific legal subjects who have been identified.'

It is submitted that generally the doctrine of estoppel may conceivably apply to Revenue Law if one is dealing with an individual legal relationship but not in the case of a general administrative relationship. Prima facie, the relationship between the Commissioner and the taxpayer is a general administrative relationship. The reason for this is that estoppel does not operate if the act is ultra vires. In the general administrative law relationship, wrong acts by the Commissioner are nearly always ultra vires, eg. if the Commissioner neglects to collect tax. (In *Commissioner for Inland Revenue v The Master* it was held that the Commissioner was not estopped from (116) raising taxes where he had neglected to do so).

Where, however, the relationship between the Commissioner and the taxpayer is an individual administrative relationship, ie. when the Commissioner issues a ruling to the particular taxpayer which is not ultra vires then it is submitted that estoppel should operate. In other words, because estoppel operates if the act of the Commissioner is not ultra vires, it is more likely that the doctrine will apply in the case of an individual Administrative Law relationship (because it is less likely that rulings are ultra vires) than in a general Administrative Law relationship.

The Margo Commission has recommended (115) that subject to a full disclosure of the facts a taxpayer should be permitted to obtain a *binding* ruling by the Commissioner. The Commission recommended that rulings should be limited to matters in which the taxpayer has a direct and substantial interest. If the operation of estoppel is refused in the case of ruling which has been obtained, then the recommendation of the Margo Commission would be inapplicable. It must be remembered that the Margo Commission recommended the issuing of rulings by the Commissioner in certain circumstances in order to achieve the objectives of the Commissioner's office more

effectively. To refuse to extend the doctrine of estoppel to rulings would not lead to the effective achievement of the objectives of Inland Revenue.

3.7.2 The extension of the doctrine to statutory illegality

In *Trust Bank van Afrika BPK v Eksteen* (117) Hoexter J A stated :

‘The doctrine of estoppel is an equitable one, developed in the public interest, and it seems to me that whenever a representator relies on a statutory illegality it is the duty of the court to determine whether it is in the public interest that the representee should be allowed to plead estoppel.’

Baxter asks the question as to whether compensation should be provided to someone who has suffered prejudice rather than allowing the operation of estoppel. (118)

However, he states, it may be difficult to prove negligence. Furthermore, if, as Baxter states, the interest of the general public is protected by a refusal to extend the doctrine of estoppel to ultra vires acts of public authorities, then it is submitted that the interest of the general public is also protected if compensation is not paid for negligent acts of public officials. In other words if the aggrieved person cannot rely on estoppel, then why should he be entitled to compensation instead?

3.7.3 Estoppel and internal irregularities

The courts have held more readily that estoppel operates where the legal defect is a mere internal irregularity. This usually occurs where the presumption of regularity ie. *omnia praesumuntur rite esse acta* is applied.

In *Natal Estates v SIR* (118) counsel for the Commissioner, in support of his argument that the Commissioner had satisfied himself as to the requirements of Section 79(1)(a), argued that the rule of *omnia praesumuntur rite esse acta* gave rise to the inference that the Commissioner had applied his mind to the requirement of Section 79 (1)(a). Holmes J A rejected this. He quoted from Wigmore on Evidence where that author stated that several requirements must be met before the presumption is applicable. The requirements are set out below.

- (a) The matter must more or less be in the past and be incapable of easily procured evidence; and
- (b) the matter must involve a mere formality or detail of required procedure; and
- (c) the matter must involve, to some extent, the security of apparently vested rights so that the presumption will serve to prevent an unwholesome uncertainty; and
- (d) the circumstances of a particular case must add some element of probability.

3.7.4 Estoppel and Legitimate Expectations

- (a) Generally estoppel and the doctrine of Legitimate Expectation can only be invoked if there has been no breach of statutory duty.
- (b) The requirements needed to establish estoppel differ from those pertaining to Legitimate Expectation. Although both doctrines require that there must be a representation, it is submitted that the taxpayer does not have to first act on that representation to his prejudice to invoke the doctrine of Legitimate Expectation whereas, in order to establish estoppel, he must have acted to his prejudice on the representation. In other words a taxpayer could invoke the doctrine of Legitimate Expectation if the Commissioner threatened to penalise the taxpayer in respect of future conduct, providing that a ruling had been obtained.
- (c) Estoppel is a substantive doctrine whereas Legitimate Expectation has substantive and a procedural component.

3.8 Conclusion in respect of the application of the doctrine of Legitimate Expectation to rulings and other decisions by the Commissioner for Inland Revenue

It is submitted that the following should be applicable to rulings by the Commissioner for Inland Revenue.

- (a) If the Commissioner or his subordinate officials have, in issuing a ruling or giving a decision, breached a statute, then the doctrine of Legitimate Expectation is not applicable. The standard would be that of the reasonable taxpayer, ie. whether the reasonable taxpayer should have known that the ruling/decision was clearly in conflict with the statute. If the taxpayer should have known of this then *cadit quaestio*.
- (b) If the Commissioner issues a written decision personally and all material facts are known to him then he may not withdraw that notice in terms of Section 3(3). The doctrine of Legitimate Expectation would have no relevance.
- (c) If the taxpayer had received a ruling pursuant to Section 3(3) and the taxpayer was refused a subsequent ruling based on similar facts then the doctrine of Legitimate Expectation should operate. The taxpayer should have a Legitimate Expectation that he be given a hearing as to why the ruling did not apply to the second set of similar facts (procedural component of the doctrine) the taxpayer would also have a Legitimate Expectation that the Commissioner would not refuse a ruling if one had been granted in the past on similar facts (substantive component of the doctrine).
- (d) If the Commissioner's agreement was oral then, even though it could be argued that the Commissioner may withdraw this because the Act is silent in this regard, nevertheless it is

submitted that the taxpayer has a Legitimate Expectation that he will be given a hearing (procedural component). Furthermore, it is submitted that the taxpayer has a Legitimate Expectation that the decision would not be withdrawn (component).

- (e) If a subordinate official issues a discretionary ruling in writing, this may be withdrawn prior to the expiration of two years from the date of written notification of such decision or the notice of assessment. After two years the notice may not be withdrawn if all the material facts were known. It is submitted that, if, prior to the expiration of the two year period, the decision is withdrawn then the taxpayer has a Legitimate Expectation to a hearing as to why the communication was withdrawn (procedural). It is submitted further that the taxpayer has a Legitimate Expectation that, provided all the material facts were known, the communication would not be withdrawn (substantive).
- (f) That which has been stated in c) above applies *mutatis mutandis* to communications by subordinate officials.
- (g) That which has been stated in d) above in respect of the Commissioner's oral rulings should apply *mutatis mutandis* to oral rulings issued by his subordinate officials.

FOOTNOTES

1. Page 57 et seq
2. Page 59
3. Page 71
4. See *Wiechers* page 71 et seq
5. See *Wiechers* page 73
6. See page above
7. *Allars Fairness : Writ Large or Small* [1987] Sydney Law Review (page 306)
8. *Webb The Taxation Rulings System* page 238
9. [1969] 1 ALL ER 904
10. See above page 22
11. *McInnes v Onslow-Fane* [1978] 3 ALL ER 211 (ch)
12. 218 d-f
13. Ibid
14. [1982] 3 ALL ER 1124 (HL)
15. [1984] 3 ALL ER 1124 (HL)
16. 943g
17. 944a
18. 949 f-g
19. 954 g.
20. *Wiechers* page 72
21. 949 h-j
22. 954g
23. *O'Reilly v Mackman*
24. *Ruddock v Secretary of State for the Home Department, ex parte Ruddock and others* [1987] 2 ALL ER 518 QBD
25. 531 j
26. Ibid

27. Ibid page
28. *Preston v Inland Revenue Commissioners* [1985] 2 ALL ER 327 (HL)
29. See *Wiechers* page 77
30. Page 341
31. *R v Board of Inland Revenue ex parte MFK Underwriting Agents Limited* [1990] 1 ALL ER QBD 91
32. See *Lord Templeman's* statement on page above
33. Page 110d
34. See above
35. See above
36. See above
37. page 111a
38. *R v Inland Revenue Commissioner's ex parte Camacq Corporation and Other* [1990] 1 ALL ER 193 (CA)
39. 182 g-i.
40. See above
41. See above
42. See above
43. See above
44. see the *Camacq* case above
45. In *R v Imperial Chemical Industries PLC* (1986 60 Tax Cases 1
46. Page 108 (f-j))
47. See *Allars* page 310
48. See *Allars* ibid page 311
49. (1983) 49 ALR 123
50. Ibid 344 at 10-25
51. Ibid 345 at 45
52. (1985) 62 ALR 321
53. (1989) 86 ALR 99

54. *Allars* page 311
55. *Allars* page 310
56. (1983) 49 ALR 123
57. *Allars* page 316
58. See above
59. See above
60. See above
61. *Forsyth : Provenance and the Protection of Legitimate Expectations*
62. *Laubscher v Native Commissioner, Piet Retief* 1958 (1) SA 546 (A)
63. Page 55
64. Page 554 H
65. 1981 (2) SA 453 (C)
66. Legitimate Expectation and Natural Justice
67. See *Megarry's* judgment above
68. 1987 (3) SA
69. Page 684 E
70. 1987 (4) SA 795 (A)
71. See above
72. Page 810 H-J and page 811 A
73. *Langeni and Others v Minister of Health and Welfare and Others* 1988 (4) SA 93 (WLD)
74. Page 96 B
75. At 101E
76. 1988 (4) SA 912 W
77. Page 918 B
78. 1989 (4) SA 731 (A)
79. See above
80. Per *Lord Fraser* at 943 (j)-944 (a)
81. Page 758 D-E
82. Page 758

83. See above
84. Page 761 D-G
85. 1990 2 SA 882 A
86. Page 882
87. 1990 (3) SA 234 (N)
88. See also *Staatsdiensliga van Suid Afrika en andere v Minister van Waterwese* 1990 (2) SA 440 NC
89. 1991 (1) SA 21(A)
90. Page 34 : B-D
91. Page 34 - 35 (j-a)
92. Page 35 - 36 (i-a)
93. Page 39 (i-j) (93)
94. Page 758 (D-E) (94)
95. See *Allars* page 318
96. LAWSA volume I par 64
97. See below
98. *Baxter* page 344
99. Page 344
100. See above
101. Page 351
102. 1953 (3) SA 1 (A). At page 11a-c
103. 1974 (4) SA 870 (A) at 875a
104. See the approach based on 'a practical, common sense approach' adopted in *Motaing v Mothiba* 1975 (1) SA 618 (0)
105. 1967 (1) SA 263 (A)
106. At 278 A-C
107. *Administrator Transvaal & Others v Traub*
108. Page 759 (B)
109. See also the remarks of Goldstone J in *Langeni v Minister of Health and Welfare*
110. 9 LAWSA para 367

111. Ibid
112. *Baxter* page 7 402
113. See above
114. *Wiechers* page 58
115. 1957 (3) SA 693 (C), 21 SATC 251
116. Paragraph 25,59 (b)
117. 1964 (3) SA 402 (A) at 415-6
118. *Baxter* page 403-4
119. 1975 (4) SA 177 (A), 37 SATC 193

CHAPTER FOUR

THE ASSESSMENT

4.1 Introduction

In the previous chapters, the regulation of discretionary power was examined with reference to rule based administrative action and with reference to adjudicative techniques of decision. The issuing of rulings is an example of the former and the doctrine of legitimate expectation is an example of the latter. The jurisdictional facts, which are contained in the Act also regulate discretionary power. In this chapter, the sections of the Act which constitute the administrative law relationship between the taxpayer and the Commissioner are examined in more specific terms. The core of the administrative law relationship is the issuing of assessments by the Commissioner and the obligation by the taxpayer to pay the amount contained therein.

The initial stage of the Administrative Law relationship is contained in Sections 65 and 66 of the Act. The latter provisions pertain to the filing of returns by the taxpayer pursuant to a notice issued by the Commissioner requiring returns to be filed. The second stage of the Administrative Law relationship is contained in those sections which pertain to the assessment. The latter stage is governed by sections 77 to 80 of the Act.

Section 74 (production of documents and evidence on oath), Section 75 (penalties on the default in respect of return) and Section 76 (additional tax in the event of default or omissions to make return) do not fit easily into the chronology of the administrative law relationship. The latter three sections may apply to the initial stage of the administrative law relationship ie. they may be invoked when a return has not been sent or if a return is faulty or they may be invoked in the second stage of the administrative law relationship ie. when, once an initial assessment has been issued, further investigations are undertaken by the Commissioner which result in an additional assessment.

Accordingly the following methodology is adopted in this chapter. An examination of the initial stage of the administrative law relationship (section 65 and 66 of the Act) is undertaken. This is followed by an analysis of Section 77 to 80 of the Act. Sections 74, 75 and 76 are discussed briefly.

4.2 The initial stage of the Administrative Law Relationship - section 65 and 66 of the Act

4.2.1 Section 65 Returns to be in the form prescribed by the Commissioner

In terms of Section 65 : 'all forms of returns and other forms required for the administrative of

this Act shall be in such form as may be prescribed by the Commissioner from time to time.'

The return must be distinguished from the form of the return (1). The meaning of return is discussed below. It is submitted that Section 65 imposes an obligation on the Commissioner to ensure that the form of the return is clear. If the form of the return is not clear, then the imposition of penalties pursuant to a failure by the taxpayer to render a return or an incorrect return, could be set aside on the grounds of unreasonableness. In other words, it is unreasonable to expect the taxpayer to understand or complete a form if the contents thereof are not clear.

In *CIR v Da Costa*, (2) the taxpayer was assessed for penalties in terms of Section 76 of the Act. The taxpayer stated in evidence that he entrusted the bookkeeping and the handling of his tax returns to a firm of accountants whom he regarded as possessing the necessary knowledge and skill in relation to such matters. Counsel for the Commissioner in the special court accepted the taxpayer's explanation and submitted that the taxpayer should nevertheless be penalised for the deceit of his agents.

4.2.2 The clarity of the form

The following questions must be answered :

Firstly, what standard should one apply in deciding whether a form issued by the Commissioner is clear, and secondly, if the form is unclear can any actions by the Commissioner pursuant to the issuing of such form, be declared invalid on the grounds of unreasonableness?

In *S V Ziegler* (3) the taxpayer argued that a form (an IT12) which had to be completed by a trustee and which had been issued by the Commissioner was void because it was vague. It was held, dismissing the appeal, that in view of the unfettered discretion given to the Commissioner by the statute as to the form the return should take, the courts would not lightly regard such a form as void.

It has been held that the test should be that the meaning :

'must not be so vague as to create substantial uncertainty in the minds of those who have to apply it or of those to whom it applies (4).

If the first test is adopted, then it is necessary to answer the question as to whom the form

applies. For example, if the form is addressed to a tax expert, the standard would not be that of the ordinary man in the street but that of the expert. (5)

The form which is encountered most frequently is the IT12 in terms of which a taxpayer is required to make a return in respect of income received for the previous tax year. It is submitted that if a taxpayer is unable to understand what information is required, based on the test of the reasonable taxpayer, then the Commissioner could not impose the penalties provided that the taxpayer was not assisted in the preparation of the form by a professional tax adviser.

This begs the question of what liability attaches to the person who prepares the tax form on behalf of the taxpayer. If the person who assisted with the completion of the form is, for example, a tax consultant, then does a different test apply, ie. whether the reasonable tax consultant should know what information was required. If, this is the case then is the taxpayer liable because he could have taken the advice of his adviser? Alternatively is the professional preparer of the form liable on the basis that the reasonable tax consultant should have known what information was requested?

Section 105A of the Act enables the Commissioner to lodge a complaint with the controlling body of a person who has assisted a taxpayer to contravene the Act in any way provided such assistance constitutes a contravention of any rule or code laid down by the controlling body of that person. In Practice Note 5 the Commissioner stated that the duties and obligations in respect of which an adviser could assist a taxpayer are those explicitly imposed by the Act such as the duty to make a full and true return of income and obligation to pay tax when due. The Commissioner further stated that he would invoke this section personally. He further stated :

'It is appreciated that questions of degree may be involved and it is not the intention that any complaint be lodged unless it appears that the professional adviser is guilty of a serious or persistent dereliction of duty involving dishonesty or subterfuge or the circumstances indicate that an intention to obstruct or mislead revenue officials in the performance of their duties under the Act.' (6)

It is submitted that the following conclusions may be drawn from the above :

- (a) If the form (IT12 or any other form or request) cannot be comprehended by the reasonable taxpayer, then *prima facie*, the action of the Commissioner is unreasonable on the grounds of vagueness and the taxpayer should not be penalised if he is unable to furnish the correct information.
- (b) If the taxpayer in (a) above is assisted by a professional adviser in the completion of the form or the request for information then, as far as the taxpayer is concerned, the test which should apply is that stated in (a) above.

- (c) If the test in (b) above is not satisfied, ie. the reasonable taxpayer could not be expected to comprehend the information requested from him, then the court should apply the test of the reasonable tax adviser. If, based on this test, it is held that reasonable tax adviser should have understood what information was being requested then :
 - i) The taxpayer should not be penalised if he entrusted his affairs to the tax adviser. The matters may be so complex as to necessitate the appointment of a tax adviser as an agent. It must also be noted that, for the purposes of the completion of the IT12, the tax adviser is not acting as an agent of the taxpayer. The former states that he is merely assisting the latter.
 - ii) The Commissioner should report the conduct of the tax adviser to his controlling body in terms of Section 105A.

4.2.3 THE FIRST STAGE OF THE ADMINISTRATIVE LAW RELATIONSHIP CONTD.
SECTION 66 - NOTICE BY COMMISSIONER REQUIRING RETURNS FOR
ASSESSMENT OF TAXES ... AND MANNER OF FURNISHING RETURNS ...

4.2.4 **Meaning of Returns**

A 'return' is not defined in the Act. It is submitted that return is a general term referring to all information which is required by the Commissioner for the purposes of the Act. Section 66 and the regulations contain a list of what information comprises a return. It is difficult to compile a *numerus clausus* of such information because, in addition to specific information requested, the Act provides that the return shall be a full and true return for the whole period of the relevant financial year. (see Section 66 (13) and 66 (13) quat)

The following information comprises a return :

- (a) Those particulars which may be prescribed by the Commissioner (Section 66(9)).
- (b) Further or more detailed returns affecting any matter of which a return is required (Section 66(10)).
- (c) Such information which constitutes a full and true return (Section 66(13) and 66(13) quat).
- (d) Further information which may be required by the Commissioner (Section 69(2)).
- (e) Balance Sheets, Trading Accounts, Profit and Loss Accounts and any other accounts of

whatsoever nature as are necessary to support the information comprising the return (Regulation A2).

- (f) Sufficient evidence to enable the Commissioner to satisfy himself as to the nature of the income (7).

Thus, it can be seen that it is very difficult to state what information comprises a return. In essence, the information must be sufficient so as to enable the Commissioner to issue an accurate assessment. This raises the question : 'What constitutes sufficient information?'

In terms of Section 66(1) the Commissioner must give public notice that all persons who are liable personally or in a representative capacity to pay tax must do so within a specified period. The Act contemplates two capacities in which a person becomes liable for income tax, ie. in his personal capacity or in his representative capacity. (8)

The notice states places where prescribed forms may be obtained and in terms of Section 66(2) all persons who are required to furnish such returns must apply for the prescribed forms. In practice the Commissioner does issue a notice which is displayed at various government offices. The taxpayer does not apply for the relevant form but the form is sent to the taxpayer (Section 66(3)). Any person who is not required to furnish a return may, for the purpose of having his liability for taxation determined, furnish a return in three years after the end of such year of assessment (Section 66(5)).

'The return must be signed by the taxpayer or by his agent duly authorised in that behalf, and any person signing such return shall be deemed for all purposes in connection with this Act to be cognizant of all statements made in that return.' (Section 66(6)).

It is submitted that the reference to agent in this Section does not refer to the person who signs the IT12 in the capacity of the person who prepared the return. It is submitted that a person may only sign as an agent for the taxpayer for the purposes of this Section if he signs in the place where the taxpayer should sign and states that he is signing in his capacity of agent for the taxpayer. In such a case the taxpayer is liable for statements made in that return.

In terms of Section 66(7) any return made or signed on behalf of any person shall be deemed to be duly made and signed by the latter person unless the latter person proves that the return was not signed by him or on his behalf.

In terms of Section 104(2) the Act creates a rebuttable presumption that it is proved that if a false statement is made in any return by or on behalf of any taxpayer, then that taxpayer shall be presumed, until the contrary is proved, to have made that false statement or entry or to have

allowed it to be made with the intent to evade assessment or taxation. Furthermore, in terms of the latter section, any person who made such false statement or entry shall be presumed, until the contrary is proved, to have made such false statement or entry with intent to assist the taxpayer to evade assessment or taxation.

In terms of Section 66(14) - if any person :

'When called upon to furnish a return under this Act is unable to furnish such return, the Commissioner may accept a return of estimated income for assessment, and such assessment shall be adjusted by the Commissioner if and when an actual return of income is furnished.'

The following points pertaining to Administrative Law pursuant to this section are raised.

- (a) While Section 66 embodies a general administrative law relationship between the Commissioner and the taxpayer, Section 66(14) constitutes a departure from this type of relationship. The latter section embodies the individual administrative law relationship.
- (b) Secondly, does this section permit the Commissioner to depart from the statutory duty of collecting taxes due? It is submitted that this is not so for the following reasons; firstly, the section contains a wide discretion so that the Commissioner is not obliged to accept a return of estimated income (9); and secondly, a narrow meaning has been ascribed to the word 'estimate'. In *CIR v Di Ciccio*, (10) it was held by Nestadt J in relation to (11) Section 76 :

'The degree of accuracy in a return of estimated income will, inevitably, be less than in an accurate return. Nevertheless, these types of returns may not simply be a guess as to the taxpayer's income. They have to be more accurate than that.'

Thus the Commissioner may not accept any estimate of return. Nestadt J further stated that :

'The amount a person should estimate his income at would normally depend on what, in relation to his business activities, he knew or ought to have known at the time of making it.' (page 205)

A further factor is that the (12) reason for the failure to make the return would have to be an objective one such as loss of books of account by fire, theft, etc. and not a personal disability.

4.2.5 **The Duty of Disclosure**

A question which is not capable of an easy answer is exactly what information must the taxpayer disclose in his return. Apart from specified information contained in Regulation A2 the taxpayer

have been given or sent or served upon any person by the Commissioner is set out in Section 106(2).

Section 77(1) provides that all assessments : *'Shall, subject to the provisions of Section 3, be made by the Commissioner or under his direction.'*

In terms of Section 77(2) the particulars of every assessment and the amount of tax payable thereof may be destroyed by the Commissioner after the expiration of a certain number of years. Section 77(5) contains an error. It provides that the Commissioner shall inform the taxpayer in the assessment that any objection which he wishes to make must be made within twenty one days after the date of assessment. However, in terms of Section 81(1) the period for objection has been extended to thirty days.

Sections 77(6) and 77(7) provide for returns by spouses and partners respectively.

4.3.1 **General**

Unless a revenue official is specifically empowered to do by statute he may not enter into a contract with a taxpayer even if the taxpayer undertakes to pay the amount of tax which would be owing on an assessment. (16)

4.3.2 **Reduction**

Revenue officials cannot, by agreement, reduce any amount of tax legally due in terms of the Income Tax Act. In the case of *CIR v Delfos* (17) Wessels C J stated :

'The principle that an officer appointed to carry out the provisions of the Revenue Act cannot, by contract, remit taxation or monies due to the crown is clear.'

4.3.3 **Errors**

Revenue officials are not prevented from collecting tax merely because of an error of judgment. An incorrect decision by a revenue official cannot release a taxpayer from liability. (18)

4.3.4 **Estimated Assessments**

In terms of Section 66(14) : (19)

'If any person, when called upon to furnish a return under this Act in unable to furnish such return, the Commissioner may accept a return of such estimated income. Such assessment may be adjusted if and when an accurate return of income is furnished.'

It has been stated (20) that this section pertains to income estimated by the taxpayer. However, the fact that the section provides that the Commissioner *may* accept the return implies that the section also includes income estimated by the Commissioner. The reason for inability to furnish a return is considered (21) to be an objective reason such as the loss of books of account by theft, fire, etc.

Section 78(1) provides for estimates by the Commissioner. It is submitted that unlike section 66(14) which implies that the estimate is based on the co-operation of the Commissioner and the taxpayer, section 78(1) does not imply such co-operation, ie. the Commissioner may estimate the income without the co-operation of the taxpayer.

The Commissioner may estimate such income if there is a default in the furnishing of a return or information on the part of the taxpayer or if the Commissioner is not satisfied with the return or information. The grounds pursuant to which an estimation of taxable income is based is wider in section 78(2) than in section 66(14). It is considered that both sections are, to some extent, duplications of each other. For example, a taxpayer who is unable to furnish an accurate return for objective reasons (Section 66(14)) may provide an estimation of taxable income. The Commissioner may adjust that taxable income, either in terms of section 66(14) or in terms of section 78(1) on the grounds that he is not satisfied with the return information furnished by the taxpayer.

Furthermore, it is submitted that the first reason contained in Section 78(1) pursuant to which the Commissioner may make such an estimation, ie. that the person makes default in furnishing any return is subsumed under the second reason, ie. that the Commissioner is not satisfied with the return or information furnished by the person. It may be argued that the first reason assumes that no return or information has been made while the second reason assumes that, although such return or information has been furnished, it is inadequate.

In *ITC 1377*, (22) counsel for the taxpayer argued that where a taxpayer has kept books of account which were produced and where he has sworn to the accuracy of the books and has proved that they are in harmony with the returns made by him, he has *prima facie* discharged the onus of proving that an estimated additional assessment made by the Commissioner is wrong.

Counsel for the taxpayer argued that therefore the onus would pass to the Commissioner in such a case to prove that the accounts were inaccurate. The President of the Court Melamet J rejected this. He stated that this would place too high a reliance on the production of correctly drawn and certified accounts. He stated that such accounts may assist the taxpayer in discharging the onus of proof resting on him of establishing that the estimate of the Commissioner is wrong.

4.3.5 Agreed Assessments

Section 78(2) provides that :

'If it appears to the Commissioner that any person is unable, from any cause, to furnish an accurate return of his income, the Commissioner may agree with such person as to what amount of such income shall be taxable income and any amount so agreed upon shall not be subject to objection or appeal.'

This is an exception to the general principle that the Commissioner cannot agree with the taxpayer on the tax. Mere discussions on the particular items of income or expenditure do not constitute an agreement for the purposes of Section 78(2). (23)

This exception applies only if a person is unable to furnish an accurate return of information. If a taxpayer supplies information and the Commissioner is not satisfied with such information, the Commissioner may estimate either, in whole or in part, the taxable income in relation to such information (Section 78(1)).

The power of the Commissioner to agree with the taxpayer as to the amount of taxable income is restricted to those cases where the taxpayer in question is unable to furnish an accurate return of his income. The information in question must relate to income and this provision does not apply to information that a taxpayer is unable to obtain which relates to matters that do not have a bearing on income.

4.3.6 Agreed Additional Tax

Section 76(2) provides that :

'... the Commissioner may either, before or after an assessment is issued, agree with the taxpayer on the amount of the additional charge to be paid, and the amount so agreed shall not be subject to any objection or appeal.'

Additional taxes are in fact penalties. The Commissioner may therefore agree with the taxpayer regarding penalty as a separate matter. This type of agreement differs from the agreed assessment that may be reached in respect of the taxpayer's income.

4.3.7 Additional Assessments

Section 79 provides that:

'if at any time the Commissioner is satisfied -

- (a) *that any amount which was subject to tax or should have been assessed to tax under this Act has not been assessed to tax;*
- (b) *that any amount of tax which was chargeable and should have been assessed under this Act has not been so assessed;*

- (c) *that as respect any tax which is chargeable and which has become payable under this Act, otherwise then under an assessment, such tax has not been paid out in respect of any amount upon which such tax is chargeable or an amount is owing in respect of such tax*
- 'he shall raise an assessment ... notwithstanding that an assessment ... may have been made upon the person concerned in respect of the year or years of assessment in respect of which the amount or amounts in question is or are assessable and notwithstanding the provisions of sections 81(5) and 83(18).'*
- (i) *In terms of the proviso to the section the Commissioner shall not raise an additional assessment after the expiration of three years from the date of assessment, (if any) unless the Commissioner is satisfied that the fact that the amount which should have been assessed to tax is not so assessed for the fact that the full amount of tax chargeable was not so assessed, was due to fraud or misrepresentation or non-disclosure of material facts; or*
- (ii) *In respect of any tax referred to in paragraph c ... that the Commissioner is satisfied that the fact that such tax was not paid in full was due to fraud or misrepresentation or non-disclosure of materials facts or*
- (iii) *... the full amount of tax which should have been assessed under such assessment was in accordance with practice generally prevailing at the time of the assessment ... not assessed to tax; or*
- (iv) *In respect of any amount, if the previous assessment made on the person concerned has in respect of that amount been amended or reduced pursuant to any order made by a special court ... unless the Commissioner is satisfied that the order in question was obtained by fraud or misrepresentation or non-disclosure of material facts.'*

4.3.8

Introduction

In *Saacks v SIR* (24) Friedman J stated (25) that

the Act requires that 'liability for tax is determined with reference to income received by or accrued to a taxpayer during a particular year of assessment. The date on which the assessment for that year happens to be made by the Secretary is irrelevant. Section 79(1) accords fully with this principle : it enables the Secretary to raise assessments in respect of amounts which should have been assessed to tax but which have not been so assessed. Section 79(1) does not entitle the Secretary to raise an assessment in a particular tax year in respect of income received by or accrued to the taxpayer during a previous or subsequent tax year.'

Accordingly section 79 is founded upon the principle of annuality.

In terms of section 79 the Commissioner must be satisfied at two stages that certain jurisdictional facts exist.

At the first stage he must be satisfied that the jurisdictional facts in section 79(1)(a) or (b) or (c) exist. In *Bailey v CIR* (26) Curlewis J A stated (in respect of the predecessor to section 79) that

'All that that section requires is that the Commissioner shall be satisfied that any amounts which should have been subject to tax have not been assessed to tax. In the present case we do not know how, or in what manner, the Commissioner become satisfied ... ; it may be that he satisfied himself on that point merely by reviewing the work of his subordinate officers. But whatever the reason or the cause may have been which induced him to become satisfied on that point, we are not, under that section concerned with the *causa movens*; ...' (27)

The Commissioner is required to undertake an internal enquiry in order to ascertain whether an amount has been assessed to tax or whether an amount of tax should have been charged or whether an amount of tax has not been paid.

It would be difficult for a taxpayer to challenge a discretion of the Commissioner on the grounds that he did not satisfy himself as to the existence of one of these jurisdictional facts. In this regard the maxim *omnia praesumuntur rite esse acta* would apply. In *Natal Estates Ltd v SIR* (28) Holmes J A quoted volume 4 of Wigmore on evidence where it is stated that presumption applies if several conditions exist;

'First, that the matter is more or less in the past and incapable of easily procured evidence; secondly that it involves a mere formality or detail or required procedure, in the routine of a litigation or of a public officer's action; next that it involves to some extent the security of apparently vested rights, so that the presumption will serve to prevent an unwholesome uncertainty; and finally that the circumstances of the particular case add some element of probability.'

It is submitted that the first condition has been satisfied. Because the matter is more or less in the past and incapable of easily procured evidence. Furthermore, the second condition is fulfilled because the Commissioner's satisfaction is a mere formality. The third condition has been fulfilled because the presumption 'will serve to prevent an unwholesome certainty' furthermore the final condition has probably been fulfilled.

In *ITC 522 (29)* the President of the court stated [page 413 - 414] that

'Now, the court has discussed that meaning of the word 'satisfied' with ... the Commissioner's representation and it appears clear that what the learned judge meant in this paragraph was that 'satisfied' means 'satisfied in his own mind'. It does not mean satisfied by new evidence or new fact. This seems clear from the learned judge's words 'it may be that he satisfied himself on that point merely by reviewing the work of his subordinate officer'. 'Satisfied' does not mean that you must be satisfied - you may satisfy yourself, and there is no procedure or test laid down by which you have to satisfy yourself.'

The second set of jurisdictional facts in respect of which the Commissioner must be satisfied are contained in the provisos to the section. Generally the Commissioner must be satisfied that there exists fraud or misrepresentation or non-disclosure of material facts, whether directly ie. in a communication between the taxpayer or the Commissioner or indirectly ie. where the taxpayer obtained the order of the special court by means of fraud or misrepresentation or non-disclosure of material facts. These jurisdictional facts limit the Commissioner's discretion because they are matters of substantive law and not merely matters such as ascertaining whether tax has been paid.

Case law in respect of this section reveals that generally two questions form the basis of the decisions. The first question which is addressed is how much information must be given to the

Commissioner for him to be satisfied that there was no fraud or misrepresentation or non-disclosure of material facts and consequently he may not open re-open the assessment. The second group of cases involve the question of the communication of the Commissioner's satisfaction that there was fraud misrepresentation or non-disclosure of material facts to the taxpayer.

4.3.9 **How much information must be furnished to the Commissioner in order to prevent him raising an additional assessment after a period of 3 years?**

In *ITC 1254 (30)* the taxpayer disclosed an amount but the description was misleading. The Commissioner assessed the amount as capital initially but after 3 years he assessed it as revenue. Counsel for the taxpayer argued that the fault lay with the Commissioner because he should not have assumed that the amount was capital without a further enquiry. Counsel for the Commissioner argued that it was not the duty of the Commissioner to question the taxpayer in respect of the amount involved.

The President of the Court, Melamet J stated that :

'(31) Die betoog van die Appellant is dat die bedrae in sy opgaaf van bruto inkomste aangetoon is en dat die Ontvange van Inkomste hom oor hierdie bedrae moes uitgevrae het, voordat hy dit as inkomste van 'n kapitale aard beskou het. Die betoog van die Appellant wil die verpligting wat op die belastingbetaler op die Ontvanger van Inkomste oorplaas. Daar is 'n verpligting op die belastingbetaler om 'n juiste en volledige opgawe in te dien waarop hy aanslaan kan en sal woord.

In *ITC 1290 (32)* the taxpayer was informed by a Receiver of Revenue that because of the invocation Section 7(5), his trust would have a nil return. The taxpayer ignored this and did not include the trust's income in his own income when submitting his own tax return to another Receiver of Revenue. It was held that it was the duty of the taxpayer to include such an amount and failure to do so meant that there was a non-disclosure of material facts.

In *ITC 1425 (33)* the President of the Court Grosskopf J stated'

'n Wakkerder of bekwammer aanslaer sou moontlik besef het dat die ontbrekende inligting nodig is, of van tot 'n korrekte gevolgtrekking gekom het daarsonder, of sou nie van die spoor gebring gewees het deur die verkeerde inligting nie. Alle aanslaers is egter nie altyd ewer wakker en bekwaam nie ...'

In summary it can be said that a taxpayer is required to give sufficient information to the Commissioner and must assume that

- (a) a different person may deal with the matter;
- (b) the officials may not be diligent;
- (c) the communication to the Commissioner must not result in the Commissioner having to further question the taxpayer extensively in regard to material facts. (34)

This latter requirement must however be treated with circumspection. It is not the duty of the taxpayer to provide all information.

4.3.10 **Communication by the Commissioner to the taxpayer**

The following principles emerge from the cases. Firstly the Commissioner must be satisfied that there was fraud or misrepresentation or non-disclosure of material fact and secondly the fact that the juridical facts in section 79(1)(a), (b) or (c) were due to fraud misrepresentation or non-disclosure of material facts. Furthermore the Commissioner must communicate all this to the taxpayer.

As far as the communication of the satisfaction by the Commissioner to the taxpayer in *Natal Estates* was concerned, counsel for the Commissioner made the submission in the court *a quo* that the Commissioner was satisfied that there had been a material non-disclosure. In support of this counsel for the Commissioner relied on the maxim *omnia praesumuntur rite esse acta* which he claimed supported the inference that the Commissioner had indeed applied his mind to the requirements.

Holmes J A stated that the maxim cannot apply because this was not a merely formal decision. He said (35) :

‘However there must be some evidence before the Special Court that he was so satisfied, otherwise there is no displacement of the immunity conferred on the tax paid by the proviso to Section 79(1) and the opening words of paragraph (a) thereof. A convenient time and place for indicating the secretarial satisfaction would be in the additional assessment itself, or in a covering letter; or in the notice which the Respondent is required by Section 81(4) to send to the taxpayer, if the latter’s objection to the assessment is disallowed. It should state the particular conduct of the taxpayer to which it relates, ie. whether fraud or misrepresentation or non-disclosure of material facts ... The taxpayer should not have to grope inferentially for the secretarial satisfaction, or the particular form of dereliction of duty to which it relates ... For one thing [and it was common cause in this appeal that the material non-disclosure could be innocent] the taxpayer is entitled to know whether fraudulent conduct - a grave and ugly imputation, is being held against him.’

The tests laid down in the *Natal Estates* were added to in *Trow’s* case (36) Wessels J A stated and confirmed the decision of the Special Court that not only must the Commissioner satisfy himself as to the existence of fraud or misrepresentation or non-disclosure of material facts but the Commissioner must state in a letter to the taxpayer that he was satisfied that it was the non-disclosure which caused him not to assess the profit in question. In other words the Commissioner must be satisfied and must consequently communicate to the taxpayer the fact that the existence of the jurisdictional facts in 79(1) (a), (b) or (c) is causally linked to the existence of fraud misrepresentation or non-disclosure of material facts.

The tests laid down in *Natal Estates* and *Trow’s* case were followed in *ITC 1454*. (37) In *ITC 1454* (38) counsel for the Commissioner argued that it is often impossible to decide whether to rely on fraud, misrepresentation or non-disclosure of a material fact. Accordingly the Commissioner cannot inform

against an additional assessment. However, if the ruling is given to a particular taxpayer and the Commissioner issues a revised assessment on the basis that it was not general practice to issue such rulings at the time, the taxpayer should invoke the doctrine of legitimate expectation. The problem here is the difficulty which the taxpayer will encounter in proving the practice at the various offices of the Receivers of Revenue (see page above).

Order of Special Court

Proviso (iv)

This Proviso gives the Commissioner power to, in effect nullify an order of Special Court if he is of the view that the Order was obtained by fraud or misrepresentation or non-disclosure of material facts. This is an extremely wide power and gives to the Commissioner a power to overrule decisions of the Special Court.

4.3.12 **Production of Documents and Evidence on Oath** **Section 74**

This section enables the Commissioner to require any person to produce any deeds, plans, instruments which the Commissioner may deem necessary for the purpose of the Act. The Commissioner may require the taxpayer to produce a translation of the document if it is not in one of the official languages. In terms of Section 74(2)(a) the Commissioner may require any person to attend an examination, on oath, in respect of matters affecting them. The powers granted to the Commissioner are wide. In *Heiman Massdorp and Parker v SIR and another* (43) it was held that this section does not entitle the Commissioner to privileged communication between an attorney and his client. Nevertheless there are certain limits imposed by this section. Firstly, the production of the documents and evidence on oath must be for the purposes of the administration of the Act. In terms of Section 74(2) the official must produce written authorisation that he is entitled to enter the premises of the taxpayer.

4.3.13 **Penalty on default Section 75**

This section provides for penalties in respect of any person who fails to, or neglects to, furnish any communication to the Commissioner which is required to be furnished in terms of the Act or if he fails to disclose material facts in such communication.

Thus this section may be invoked by the Commissioner if there is a failure to furnish a return or if the return is incomplete. This section may also be invoked in respect of the issue an assessment. This section is invoked by the State. In *S v Benson* (43) it was held that while Section 66(3) of the Act imposes an obligation on every person who is liable to taxation to obtain a form and submit a return of income for assessment, an obligation to complete and return a form under the provisions of sub-sections (2) and (3) of Section 69 only arose when the form in question had

been received by the taxpayer; consequently, in the absence of any proof that the appellant had received the form sent to him, the magistrate had not been entitled to convict him under the charge as laid.

4.3.14 **Conclusion**

In this chapter the core of the Administrative Law relationship between the Commissioner and the taxpayer was examined. This core consists of the issuing assessments and the obligation to pay the tax. The relationship consists of two chronological stages namely that of the returns (section 65 and 66) and the second stage, ie. that relating to the issuing of assessments. In the first stage, the problem is that it is not clear exactly what must be contained in the return. Generally, there is a duty of disclosure in respect of material facts. It is submitted that in ascertaining the content of the information to be furnished in a return, one must remember that the Administrative law relationship between the Commissioner and the taxpayer is adversarial.

In other words, there will always be conflict as to what constitutes an adequate return although the view of the court is to favour the Commissioner.

Section 79 demonstrates that, because the Commissioner has wide powers, eg. he can ignore a decision of the Special Court, he is required to inform the taxpayer of the invocation of section 79 very clearly.

FOOTNOTES

1. See *Meyerowitz and Spiro*, paragraph 17.33
2. 47 SATC 87, 1985 (3) SA 768 (A)
3. 30 SATC 75 1968 (2) SA 231 (T)
4. 1983 (1) SA 986 (A)
5. See *Helgesen v South African Medical and Dental Council* 1962 (1) SA 800 (N)
6. See Practice Note No. 5
7. ITC 1254 29 SATC 24
8. See *Thome and Molenaar v Receiver of Revenue - Cape Town* 38 SATC 1 1976 (2) SA 50 (C)
9. See *Meyerowitz and Spiro* - para 1823
10. 47 SATC 199, 1985 (3) SA 989 (T)
11. Page 204
12. *Meyerowitz and Spiro* - para 1823
13. Page 106
14. Page 106
15. See ITC 1254 29 SATC 24
16. *Steenkamp v Union Government* 1947 (1) SA 449 (C) at 459; *CIR v Delfos* 1933 AD 242 at 248 and *Irwin and Johnson SA Limited v CIR* 1946 AD 483
17. 6 SATC 92, 1933 AD 242
18. See *Irwin and Johnson SA Limited v CIR* 1946 AD 486 and *SBI v Florisfontein Boerdery (Edms) Bpk* 1969 (1) SA 260 (AD) at 266
19. See *Meyerowitz and Spiro* paragraph 1737
20. *Meyerowitz and Spiro* para 1823
21. *Meyerowitz and Spiro* para 1823
22. 1981 45 SATC 221 T
23. See ITC 485 (1941) 11 SATC 353
24. 40 SATC 248, 1979 (1) SA 359(C)
25. Page 253
26. 6 SATC 69, 1933 AD 204

27. At page 84
28. 37 SATC 193, 1975 (4) SA 177 (A)
29. (1942) 12 SATC 411
30. 29 SATC 24
31. Page 26
32. 41 SATC 153
33. 49 SATC 157 at 163
34. See for example ITC 1351 (1982) 44 SATC 58
35. Page 225 - 226
36. *SIR v Trow* 43 SATC 189, 1981(4) SA 821(A)
37. 1988 SATC 107
38. Page 109
39. See ITC 1150 33 SATC 131 and ITC 1191 35 SATC 194]
40. Snyman : Criminal Law Butterworths 1983 page 456
41. 51 SATC 142, see also *CIR v SA Mutual Unit Trust Management Co* 52 SATC 205
42. 30 SATC 145, 1968 (4) SA 160 (W)
43. 35 SATC 273, 1974 (1) SA 317 (C)

CHAPTER FIVE

APPEAL AND REVIEW

5.1 Introduction

The administrative law relationship between the Commissioner and the taxpayer is now examined by analysing the methods by which the taxpayer may enforce his remedy against the exercise of discretionary power.

The medium through which the taxpayer exercises his remedy against the Commissioner is judicial review. The problem in respect of this aspect of the administrative law relationship is that there is uncertainty as to the precise remedy which the taxpayer has against the Commissioner as a result of the decision in *KBI v Transvaalse Suikerkorporasie* (1). In this case Van der Walt, J stated that the sections of the Act which deal with the decisions of the Commissioner can be divided into three groups. The first group consists of those sections where the decision of the Commissioner is expressly made subject to objection and appeal. The second group consists of those section which specifically exclude the right of objection and appeal (Section 76(2)(c) and Section 78(2)). The third group consists of those sections where there is no right of objection and appeal nor is there an express prohibition against objection and appeal.

Van der Walt, J stated that where the decision of the Commissioner is expressly made subject to objection and appeal, then the Special Court reconsiders the facts and makes a decision based on its reconsideration of the facts. He stated that where the right of objection and appeal is not expressly excluded or included, then the taxpayer may appeal against a decision in terms Section 83(1). He stated that in the latter case, the appeal is actually a review of the decision of the Commissioner on the usual grounds of review. He stated implicitly that where objection and appeal is excluded expressly then there is no right of appeal to the Special Court.

It is submitted that the remedy proposed by van der Walt, J in cases where the right of objection or appeal is neither excluded or included, is incorrect. In this chapter the reasons for the latter statement are supported.

In order to illustrate why the statement of van der Walt, J is incorrect the following is examined :

The meaning of appeal and review

The difference between appeal and review

The remedies of the taxpayer at the objection stage and secondly at the stage when an appeal is made to the Special Court and thirdly when an appeal is made to the Supreme Court.

In order to understand the problems which have arisen as a result of the decision in *KBI v Transvaalse Suikerkorporasie*, it is necessary to understand all the meanings of appeal. These are examined in chronological order, ie. at the objection stage and secondly when an appeal is made to the Supreme Court.

5.2 The Meaning of Appeal to the Special Court

The powers of the Special Court are set out in Section 83(13) of the Act which states that the Special Court may;

- a. *in the case of any assessment under appeal, order such assessment to be amended, reduced or confirmed, or may if it thinks fit refer the assessment back to the Commissioner for further investigation and assessment;*
- b. *in the case of an appeal against the amount of additional charges imposed by the Commissioner under sub-section (1) of Section seventy-six, reduce, confirm or increase the amount of the additional charges imposed;*
- c. *in the case of any other decision of the Commissioner which is subject to appeal, confirm or amend such decision.'*

In *Tikly v Johannes NO (2)*, Trolip, J distinguished three meanings of the word appeal. He said (3) that :

'the word appeal can have different connotations. Insofar as it is relevant in these proceedings it may mean :

- i) an appeal in the wide sense, that is, a complete re-hearing of and fresh determination on the merits of the matter with or without additional evidence or information ...
- ii) an appeal in the ordinary sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether the decision was right or wrong;
- iii) a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters exercised their powers and discretions honestly and properly.

Accordingly there is a wide appeal which is a complete re-hearing of the matter. Secondly there is an ordinary appeal which is a re-hearing on the merits and is similar to the powers of appeal exercised by the Supreme Court. Thirdly included in the meaning of an appeal, is a review. In the latter case the procedural aspects of the decision are examined.

From the above it can be seen that there is a confusion of terminology. According to the distinction of Trollop, J, which was also accepted in *COT v AB Company Limited* (4), an appeal includes a review.

The question which must be answered is what does the word appeal mean when used in the Special Court.

5.2.1 Case Law

It is necessary to answer this question by reference to case law. In *Bailey v CIR* (5), Curlewis, J A stated :

‘... a Special Court under the Income Tax Act is not a court of appeal in the ordinary sense; it is a court of revision with power to investigate the matter before it and to hear evidence thereof.’

One assumes that by the term ‘revision’ Curlewis J A refers to a wide appeal. Both Baxter and Meyerowitz and Spiro support this conclusion (6). However the word ‘revision’ is an example of vague terminology. To revise means to read or look over or re-examine or reconsider and correct, improve or amend (Concise Oxford Dictionary, 7th Edition). In other words it is possible that revision includes review in this case.

In *Rand Ropes (Pty) Limited v CIR*, (7) Centlivres, C J stated :

‘that the legislature apparently thought it was necessary to give a special right of appeal in cases where a matter is left open to the discretion of the Commissioner appears from a number of instances where the special right is confirmed. In all these cases it seems to me that the legislature intended that there should be a re-hearing of the whole matter by the Special Court and that that Court could substitute its own decision for that of the Commissioner. For, as Curlewis, J A pointed out in *Bailey v CIR*, the Special Court is not a court of appeal in the ordinary sense; it is a court of revision.’

It is submitted that although this is authority for the view that an appeal to the Special Court is a wide appeal, nevertheless Centlivres, J A does not add any clarity to the meaning of the word ‘revision’ as used in *Bailey’s* case.

In *ITC 1351* (8) Friedman, J expressed the view at page 63 that

‘where one is concerned with a permitted appeal against the exercise by the Commissioner of a discretionary power, then the approach of this court should become similar to that adopted by appeal courts in general when considering appeals against decisions involving the exercise by the court a quo of a discretion.’

In this case Friedman, J appears to equate the powers of the Special Court on appeal with that of review. The reason for this is that when the superior court considers the exercise by courts of a

quo of their discretions, this is usually on accepted grounds of review.

In *CIR v Da Costa* (9) it was held that in cases involving the exercise of a discretion by the Commissioner, the Special Court on appeal to it is called upon to exercise its own original discretion.

In *ITC 1430* (10) the Special Court followed the approach expressed in *Da Costa* and specifically held that the Court was entitled to take into account new evidence not originally before the Commissioner when he exercised his discretion, in exercising its own original discretion.

In *SIR v Geustyn, Forsyth and Joubert* (11), Ogilvie Thompson C J stated :

‘Although a major criterion prescribed by sub-section (1) is the opinion of the Secretary, his decision thereunder is by sub-section (4) expressly rendered subject to objection and appeal. Consequently the Special Court may, on appeal to it by the taxpayer, re-hear the whole case and if it decides substitute its own decision for that of the Secretary.’

The above cases illustrate that where the section provides for objection and appeal, then the appeal to the Special Court is a wide appeal. Therefore, the Special Court will have full power to re-hear the whole matter and substitute its own decision for that of the Commissioner.

Notwithstanding the above, there are a number of Special Court decisions which hold that the appeal to the Special Court is a narrow appeal. In *ITC 1078* (12), the Special Court held (13) that ‘this Court is in substantially the same position as an appeal court in an appeal concerning the quantum of damages.’

In *ITC 1295* (14), Friedman, J stated (15) :

‘The Secretary deals with a large number of cases of this kind. He has yardsticks by which to go and is in a far better position to decide upon appropriate remissions than this court. Where, of course, the Secretary exercises his discretion on an incorrect basis or by taking into account matters which he is not entitled to take into account, this court will disregard the Secretary’s decision and be at large to itself decide upon an appropriate remission. Where, however, the Secretary has properly exercised his discretion in a bona fide manner, then it seems to me that this Court will interfere only where there has been an unreasonable exercise by the Secretary of his discretion. In order, however, to decide what is or is not an unreasonable exercise of discretion, it is, as I have already indicated, necessary for this court itself to decide what it regards as an appropriate remission and if there is a significant difference between that which this court regards as appropriate and that which the Secretary has decided is appropriate, this court is entitled to infer that there has been an unreasonable exercise by the Secretary of his discretion and will interfere.’

In this regard it seems to me that the position is not entirely different from that of, for example, a court of appeal hearing an appeal in a criminal case against the sentence imposed by a lower court.’

In *ITC 1351* (16), Friedman, J stated that :

‘It seems to me ... where one is concerned with a permitted appeal against the exercise by the

Commissioner of a discretionary power, then the approach of this court should be similar to that adopted by appeal courts in general when considering appeals against decisions involving the decision by the court *a quo* of a discretion.'

In *Da Costa's* case the court disagreed with views of Friedman, J in the above Special Court cases and confirmed that the appeal against a decision of the Commissioner, where the section allows for objection and appeal, is a wide appeal.

5.2.2 The Meaning of Appeal to the Supreme Court

Appeals against decisions of the Special Court to a provincial division of the Supreme Court or to the Appellate Division are governed by Section 86(A) of the Act. In terms of Section 86(A)(2)(b) the President of the Special Court must grant leave to appeal to the Appellate Division directly.

In *Hicklin v CIR* (17) it was held that the appeal in Section 86(A) was similar to an appeal in terms of Section 22 of the Supreme Court Act.

Section 22 of the Supreme Court Act provides :

'The Appellate Division or a Provincial Division, or a Local Division having appeal jurisdiction, shall have power :

- a) *on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by such division, or to remit the case to the court of first instance, or the court whose judgment is the subject of appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as to the division concerned seems necessary;*

and

- b) *to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require.'*

In *Colman v Dunbar* (18) it was held that the following principles apply in determining whether to receive further evidence or remit the matter to the court *a quo* for the reception of such evidence.

- a) It is essential that there should be finality to a trial and a litigant should therefore not be allowed to produce further evidence, except in exceptional circumstances.
- b) The party who makes the application must show that his failure to produce the evidence was not due to any omission on his part; he must satisfy the court that he could not have obtained the evidence if he had used reasonable diligence.
- c) The evidence tendered must be weighty and material and presumably must be believed, and must be such that if it is used it would be practically conclusive, for if not it would still leave the issue in doubt and the matter would lack finality.
- d) If the conditions have so changed that fresh evidence will prejudice the opposite party, for example, if the witnesses of the opposite party have been scattered and

cannot be brought back to refute the fresh evidence, or to explain their own evidence in the light of the fresh evidence, the court will not grant the application.

5.2.3 **Conclusion**

Therefore the appeal from the Special Court to either the Provincial Division of the Supreme Court or the Appellate Division is a narrow appeal. In contrast the appeal from a decision of the Commissioner to the Special Court is a wide appeal.

5.3 **Review procedure**

5.3.1 **Introduction**

The question which is answered here is what is review and how does it differ from appeal. Thereafter the review procedure is examined in relation to the remedy which a taxpayer has against the Commissioner's exercise of his discretion in cases where the section provides for objection and appeal, in cases where the section is silent as to objection and appeal and where the section specifically prohibits objection and appeal.

5.3.2 **The meaning of Review - General**

The term review is capable of three distinct and separate meanings. (19)

- a) The first and most usual use of the term is to denote the process whereby the proceedings of lower courts are brought before the Supreme Court in respect of grave irregularities or illegalities occurring during the course of proceedings. Examples of such 'inferior courts' means any court (other than a court of a division of the Supreme Court) which is required to keep a record of its proceedings.
- b) The second type of review is where a public body has a duty imposed upon it by statute and disregards important provisions. Here the Supreme Court may be asked to review the proceedings complained of and set aside or correct them. Such administrative authorities includes statutory boards such as road transportation boards, rent boards and valuation boards.
- c) The term review refers to that power conferred upon the Supreme Court which is intended to be far wider than the power which it possesses under either a) or b) above, namely the power conferred by statute to review the proceedings of certain statutory bodies.

5.3.3 Grounds of Review in terms of the Supreme Court Act

In terms of Section 24 of the Supreme Court Act 59 of 1959 the grounds of review of proceedings of inferior courts are the following :

- a) *absence of jurisdiction on the part of the court;*
- b) *interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;*
- c) *gross irregularity in the proceedings;*
- d) *the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.*

In terms of the Supreme Court Act 'inferior court means any court (other than a court of a division) which is required to keep a record of its proceedings, ...' Examples of such court include the Children's Court under the Children's Act and the Maintenance Court under the Maintenance Act.

5.3.4 The difference between Appeal and Review

The following differences exist between appeal and review. (20)

- a) The first distinction is that an appeal is directed at the result of a trial whereas a review is aimed at the method by which the result is obtained.
- b) In an appeal the appellant is bound by the record of the court a quo. In a review the applicant is not bound by the record of the court.
- c) There are procedural differences between appeals and reviews.

5.3.5 Confusion of Terminology

It can be seen that certain cases may involve both appeal and review procedures. Furthermore, the judiciary has used vague terminology in distinguishing between appeal and review. In *Tikly's* case (see above) Trollip, J said that one of the meanings of appeal is 'a review, that is a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not but whether the arbiters exercise their powers and discretion honestly and properly.'

Baxter states that (22) :

'The dividing line is often extremely difficult to draw, especially when discretionary powers are in question. This is because the legal limits placed upon discretionary power are, in the final analysis, questions which can only be determined by the courts. The extent to which the decisional referents that structure the discretion are considered to be justifiable will depend upon what is thought appropriate by the court. In the end all but the narrowest zone of choice could be deemed to be a matter affecting the legality of the decision and not its merits.'

The distinction between appeal and review is even less clear in the Special Court when that court reviews the action of the Commissioner than when the Supreme Court reviews the action of the Special Court. A further problem which must be addressed is whether the Special Court has power to review the actions of the Commissioner where the section in question is silent as to objection and appeal or specifically excludes objection and appeal. In order to answer this question the review by the Supreme Court is first analysed. Thereafter the review jurisdiction of the Special Court is analysed.

5.4 **The Supreme Court and Review Procedures**

In terms of Section 23 of the Supreme Court Act the proceedings of inferior courts may be brought under review on the grounds stated in 5.3.3 above.

An inferior court means any court other than a court of a division of the Supreme Court which is required to keep a record of its proceedings.

The Special Court is required to keep a record of its proceedings. Therefore in terms of Section 24 of the Supreme Court Act, the Supreme Court may review proceedings of any inferior court.

Furthermore the Supreme Court has inherent jurisdiction under the common law to review the proceedings of quasi judicial and administrative bodies in the appropriate circumstances (23). Thus, even if the Special Court is not an inferior court, the proceedings of the Special Court may nevertheless be reviewed by the Supreme Court because the Special Court is a quasi-judicial body. 'It must be appreciated that by inherent is meant logically inherent rather than inherited.'

(24)

5.5 **The Special Court and Review Jurisdiction**

5.5.1 **Introduction**

In *KBI v Transvaalse Suikerkorporasie, van der Walt, J* stated that the sections of the Act which deal with the decisions of the Commissioner can be divided into three groups. The first groups

consists of those sections where the decision of the Commissioner is expressly made subject to objection and appeal. In this case the Special Court reconsiders the fact and makes a decision based upon its reconsideration of those facts. The second group consists of those sections which specifically exclude the right of objection and appeal (Section 76(2)(c) and Section 78(2)). He stated implicitly that in such cases there is no right of appeal to the Special Court. The third group consists of those sections where there is no express right of objection and appeal, nor is there an express prohibition against objection and appeal. In this case an appeal to the Special Court is actually a review of the decision of the Commissioner on the usual grounds of review.

The question which must be answered is whether this is correct. In order to answer this question it is necessary to examine whether the meaning of review in the Special Court differs from the meaning of review in the Supreme Court.

5.5.2 Case Law

In a number of cases where the Act was silent as to whether a right of objection and appeal existed, it was held by Special Court that it could review a decision of the Commissioner on the usual grounds of review.

In *ITC 93*, (25) the Court held that the Special Court could not substitute its decision for that of the Commissioner. The President of the Court stated :

‘The Commissioner had a discretion and that discretion had been delegated, as was authorised under the Act, to this official. The court had to be satisfied by unequivocal evidence that that official had not applied his mind to the matter in terms of the Act.’

In *ITC 168*, (26) the court held that :

‘We have to enquire into whether the Commissioner had directed his mind to the question whether the debts were bad or doubtful.’

However, in *Irvin & Johnson SA Ltd v CIR* (27) the court held that where the section of the Act is silent as to appeal and review, then there is no appeal against the exercise of the discretion to the Special Court. In other words the Special Court may not review the act of the Commissioner. Schreiner, J A stated (28) that :

‘Despite therefore the right of appeal given by Section 79(1) (29) to a taxpayer who is dissatisfied with any decision of the Commissioner ... if it appears that the decision has been given under a section which requires the Commissioner to exercise an administrative discretion no appeal lies to the Special Court ... had the legislature intended that an appeal to the Special Court should lie in cases falling within the proviso it would, in all probability, have made express provision therefore ...’

In *ITC 892* (30) the Commissioner's representative objected *in limine* to the hearing of the appeal on the ground that no appeal lay to the Special Court against the exercise by the Commissioner of the administrative discretion to allow the amount of any debts due to the taxpayer to the extent to which they are proved to the satisfaction of the Commissioner to be bad.

O' Hagan, J stated, approving the decision in *Irvin and Johnson*, that where the Act does not in express terms confer a right of appeal from the exercise of a discretion then the objection by the Commissioner is well founded.

O' Hagan, J stated (31) :

'The argument of the appellant's attorney seeks to invest the Special Court with a special power of review similar to that possessed by the Supreme Court in reviewing decisions of public bodies which have not duly performed discretionary duties required of them.

The Special Court, I consider has no such power. The jurisdiction of the Supreme Court in matters of this character is an inherent one as pointed out by Innes, C J in *Johannesburg Consolidated Investment Company v Johannesburg Town Council* ... The Special Court created by Section 79 (now 83) of the Income Tax Act possesses no such inherent jurisdiction. Its powers are derived solely from statute ... The only jurisdiction given to this Court by Section 79(1) (now 83) is to entertain appeals from any decision of the Commissioner as notified in terms of Section 77(6). If in a particular matter an appeal does not lie to this Court, this Court has no jurisdiction to deal with the matter. It may well be that in cases where it can be proved that the Commissioner has not applied his mind to a matter entrusted to his judgment alone ... the Supreme Court can interfere on review ... The Special Court has, however no jurisdiction to do so.'

In *ITC 921* (32), Van Winsen, J approved views in the *Irvin and Johnson* case. In this case the taxpayer objected to a valuation which a Commissioner deemed to be reasonable in respect of wool. The taxpayer objected against the Commissioner's additional assessments on the grounds that the value fixed was too low. The court held that since the power vested in the Commissioner to fix the value in question was a discretionary power and the Act contained no provision granting a right of appeal against the exercise by him of such power and none of the recognised grounds of review had been established, that the Special Court was unable to interfere with the decision.

The judgment does imply that if a recognised ground of review had been established then the Special Court may have heard the matter.

In *ITC 936* (33) the Commissioner raised the same argument which he had raised in limine in *ITC 892*, namely that the Special Court was not entitled to hear evidence that the Commissioner had not applied his mind to the matter since the Special Court possessed no inherent review jurisdiction. Van Winsen, J rejected this argument and held that while the Special Court had no

right to substitute its discretion for that of the Commissioner, it was competent for the Special Court to intervene if the Commissioner exercised his discretion in an improper manner and consequently it was competent for the court to hear the appeal which had been brought. The court however held that the Commissioner had applied his mind to the matter.

In *ITC 1400* (34) the taxpayer appealed against the exercise by the Commissioner of his discretion in terms of Section 14(1)(b) to determine whether or not the particular aircraft was used in the business of transporting by air and for reward, persons, livestock, goods or materials. This section of the Act makes no provision for an appeal against the exercise of the Commissioner's discretion. The President of the court, Melamet, J stated that : (35)

'Any decision taken bona fide in the exercise of a discretion is not subject to appeal unless the Act specifically provides for such an appeal ... the remedy is to take the exercise of such discretion on review to the Supreme Court if that discretion was exercised mala fide or the Commissioner had not applied his mind to the matter. The procedure in such a case is by way of review. Whether this court is the competent court to which an application for review can be made is not clear. I shall assume for purposes of this appeal that it is competent to launch review proceedings before this court. As stated above, the grounds of review against the exercise of a discretion are that the presiding officer, in this case it would be the Commissioner, acted *mala fide* or failed to apply his mind to the matter.'

The court held that because there was no suggestion of any objection or notice of appeal that the Commissioner acted mala fide or did not apply his mind to the matter but therefore the court could not entertain the motion.

The above cases were decided before *KBI v Transvaalse Suikerkorporasie* and some of the cases were the basis of the decision in *KBI v Transvaalse Suikerkorporasie*. It is submitted that the above cases cannot be regarded as authority for the view that the Special Court may review acts of the Commissioner on the accepted grounds of review. There are obiter dicta to the effect that the Special Court will review the Commissioner's exercise of a discretion on accepted grounds of review. The only Appellate Division decision on this matter, ie. *Irvin & Johnson* did not canvass the particular point. In 1983, when *ITC 1400* was heard Melamet, J stated that he was not sure whether it was competent for the Special Court to entertain an application on the grounds of review but that he assumed that the Special Court was competent to hear such a motion.

5.6 **KBI v Transvaalse Suikerkorporasie**

In this case the court approved the view in *ITC 936* that the Special Court can only intervene in the exercise of a discretion by the Commissioner on one of the recognised grounds of review. Van der Walt, J referred to the cases discussed above. He said nothing about the *ITC 93*, *ITC 168*, *ITC 297* or *ITC 696* where the Special Court stated that it had the power to review acts

where the Act was silent, as to whether an objection and appeal lay against the decision. He approved the view in *ITC 936* that where nothing is said about appeal and review that the Special Court had the power to intervene on the accepted grounds of review.

5.6.1 Is the decision in *KBI v Transvaalse Suikerkorporasie* correct?

May the Special Court review the decision of the Commissioner on the accepted grounds of review where the section allows for objection and appeal?

It has been shown that the appeal to the Special Court against the exercise of a discretion by the Commissioner is a wide appeal. Therefore on appeal, the Special Court may substitute its own decision for that of the Commissioner. In view of the fact that such an appeal is not a narrow appeal, it is submitted that the Special Court may review such a discretion on the accepted grounds of review. In a wide appeal there is no reason why the Special Court should be precluded from substituting its decision for that of the Commissioner on one of the accepted grounds of review where the Commissioner exercised his discretion improperly.

Another remedy for the taxpayer in such a case would be to request the Supreme Court to review the proceedings. The Supreme Court has inherent jurisdiction to review proceedings of administrative tribunals. (36)

Does the Special Court have the power to review the exercise by the Commissioner of his discretion where the section in the Act is silent as to whether a right of objection and appeal exists?

It is submitted that the Special Court has no such power for the following reasons :

- (a) The Special Court is a creature of statute. It derives its powers from Section 83 of the Act. In terms of Section 83(1) '*Any person entitled to make an objection* may appeal to a Special Court.' (italics added). Therefore before the Special Court may consider an appeal the taxpayer must be entitled to make an objection. It can be argued that where the section of the

Act is silent as to the right of objection and appeal, the taxpayer is not 'entitled to make an objection.' Therefore the Special Court may not exercise any powers in terms of Section 83.

- (b) In terms of Section 83(13)(a) of the Act the Court may '*in the case of any assessment under appeal* order such reassessment to be amended, reduced or confirmed ...' (italics added). Therefore before the Court may exercise any power, the assessment must be the subject of an appeal. It may be argued that in the case where the Act is silent as to

whether a right of objection and appeal exists, it cannot be said that the assessment is 'under appeal.' The same reasoning applies to Section 83(13)(b) and (c). The latter sub-sections both refer to assessments and decisions which are subject to appeal.

In summary then, it is implicit in that determining the powers of the Special Court in terms of Section 83 of the Act, the objection must be capable of being the subject of an appeal. Where the Act is silent as to the right of objection and appeal it may be argued that such an appeal does not fulfil the jurisdictional facts set out in Section 83(13). *ITC 1474 (37)* is authority for the view that the Special Court's power in terms of Section 83(13)(a) of the Act is limited. In this case it was held that there was nothing in that section which empowered the Court to order the Commissioner to reassess the Appellant in respect of a tax year which had not formed the subject of the appeal. This case supports the view that an appeal in Section 83(13), although being a wide appeal, is somewhat restricted and that the power of the Special Court is limited to that which is subject to appeal.

- (c) It is submitted that the reasoning in *KBI v Transvaalse Suikerkorporasie* may not be correct. It is necessary to trace the reasoning adopted in order to support this conclusion.
- (i) In *Irvin & Johnson (38)* Schreiner J A stated (39) that :

'Despite, therefore, the right of appeal given by Section 79(1) to a taxpayer who is dissatisfied with any decision of the Commissioner ... if it appears that the decision has been given under a section which required the Commissioner to exercise an administrative discretion, no appeal lies to the Special Court.'

In *ITC 936 (40)* Van Winsen, J stated, in interpreting the above quote from *Irvin & Johnson* that :

'Met hierdie passaat het die geleerde Regter na my mening slegs bedoel wat hy gese het, naamlik, dat the Spesiale Hof nie regsbevoegdheid het om die besluit van die Kommissaris in herooring te neem in gevalle waar 'n diskrestionêre mag aan die Kommissaris verleen word. Ek lei nie uit die aangehaalde woorde af dat die geleerde Regter bedoel het dat the belasting betaler hom nie na die Spesiale Hof kan wend waar sy klagte is dat die Kommissaris sy diskrestionêre mag *mala fide* uitgeoefen het of sodanige wyse behandel het dat sy besluit op een van die bekende hersieningsgronde aangeval kan word nie.'

It is submitted that this interpretation by Van Winsen, J may not be correct. Schreiner J A did not say this. Van Winsen J, is merely interpreting that which was said by Schreiner J A. In *KBI v Transvaalse Suikerkorporasie*, van der Walt, J relied on the above interpretation by Van Winsen, J without comment and other factors in *ITC 936* in order to arrive at a conclusion that the Special Court does have power to review the acts of the Commissioner on the accepted grounds of review.

- (ii) Van Winsen, J approved the view in *Bailey's* case (41) that the Special Court is a court of revision. He used this statement to emphasise the unique nature of the Special Court and this became a factor in influencing his decision.

The description of the Special Court as a Court of revision is vague (42). Furthermore if the Special Court is a court of revision (whatever that term may mean) then why can the Special Court not review the discretion of a Commissioner where the Act expressly prohibits the right of objection and appeal. In other words the description of the Special Court as a unique court of revision would imply that it would have this latter power ...

- (iii) Van Winsen, J relied on a series of cases (43) which were heard before *ITC 892* and decided that these cases supported the view that the Special Court could hear the aggrieved taxpayer on the grounds of review where the Act was silent as to the right of objection and appeal. In *ITC 892* the authorities on which Van Winsen, J had relied, had been dismissed. Since *ITC 892* there have been very few cases which have specifically stated that the Special Court may review acts of the Commissioner where the section does not expressly provide for objection and appeal. Accordingly the reason of Van Winsen, J in this regard is open to question.

In *Transvaalse Suikerkorporasie* the factors (subparagraphs (i) - (iii) above) in the judgment by Van Winsen, J were relied on by Van der Walt, J. It is submitted for the reasons stated above, that the cases relied on in the judgment of *ITC 936* are not conclusive for illustrating that where the section is silent as to the right of objection and appeal, that the Special Court may review the acts of the Commissioner. Accordingly, these cases should not have been afforded the authority which they were in *Transvaalse Suikerkorporasie*.

- (d) An inconsistent result flows from the application of the judgment in *Transvaalse Suikerkorporasie*. Van der Walt, J stated that where the discretionary power of the Commissioner is not specifically made subject to an objection and appeal or specifically not excluded from objection and appeal, then the taxpayer can lodge an objection against the decision in terms of the general provisions of Section 81 and thereafter can appeal to the Special Court in terms of Section 83(1) against the Commissioner's decision. He stated that in this case the appeal is in fact a review of the Commissioner's decision on the accepted grounds of review. Thus, an aggrieved taxpayer can approach the Special Court on the grounds of review where objection and appeal is not specifically excluded. The taxpayer may also approach the Supreme Court on the grounds of review and the Supreme Court would grant a hearing because it has inherent powers of review. However where the section does not provide for objection and appeal then according to

Van der Walt, J the taxpayer may not approach the Special Court on the grounds of review, even though the Special Court is a court of revision.

If the taxpayer and the Commissioner agreed on an assessment (these are the provisions which exclude objection and appeal), and if, at a later stage the taxpayer realised that there was for example a misrepresentation by the Commissioner which induced him to agree, the taxpayer would have to bring his case before the Supreme Court. The inconsistency is the following : Why should the Special Court, if it is a court of revision not be entitled to hear matters on review (as that term is generally understood) where the section does not provide for objection and appeal, but only where the section does provide for objection and appeal or the section is silent as to objection and appeal. This is not consistent with the view that the Special Court has wide powers of revision. It is submitted that this supports the view that, although the Special Court is a unique Court, it only has wide powers, ie. wider than the Supreme Court as far an appeal is concerned. It does not have powers of review as that term is generally understood.

- (e) If the Special Court did have powers of review then it is inconsistent with this power that the Commissioner is given a power in terms of Section 79(1)(iv) to nullify a decision of the Special Court where the Commissioner is of the opinion that the Court Order was obtained by fraud, misrepresentation or non-disclosure of material facts. The situation could arise whereby the Special Court decides that the Commissioner acted male fide in imposing additional assessments. The Commissioner may decide that the Court Order was obtained by fraud, non-disclosure of material facts or misrepresentation. The decision of the Special Court, ie. that the Commissioner did act male fide would then have no effect. This catch-22 situation is not consistent with the view that the Special Court possesses powers of review.

5.7 Strategy

Despite that which has been said above, the aggrieved taxpayer who wishes to bring a matter on review may approach the Special Court if the section provides for objection and appeal or does not specifically exclude objection and appeals (*Transvaalse Suikerkorporasie*). The latter taxpayer may approach the Supreme Court on the grounds of review as well (because the Supreme Court has inherent powers of review). Where the section specifically excludes objection and appeal, the aggrieved taxpayer may proceed by way of review in the Supreme Court only (*Transvaalse Suikerkorporasie*). In order to obtain a hearing before the Special Court on the grounds of review, the objection would have to specify the grounds clearly. (44)

5.8 **Conclusion**

Judicial intervention in the administrative law relationship is confusing. The uncertainty in respect of the meaning of appeal leads to anomalous results. In summary, it is submitted that because the Special Court is a creature of statute, it does not have review powers where the section of the Act is silent as to the right of objection and appeal. The latter are possessed by the Supreme Court. It cannot have been the intention of the legislature, that aggrieved taxpayer could bring a decision on review either in the Special Court or in the Supreme Court.

5.9 **Margo Commission**

The Margo Commission recommended (45) that in view of the number of discretionary powers which are vested in the Commissioner, the protection which a taxpayer has against error by the Commissioner in the exercise of his discretion, be strengthened by reducing the number of discretionary powers that are not subject to objection and appeal and making those powers that related to tax liability subject to objection and appeal.

FOOTNOTES

1. 1985 (2) SA 666 (T), 47 SATC 34
2. 1963 (2) SA 558 (T)
3. Page at page 590 F-H
4. 31 SATC 66, 1969 (2) SA 689 (R)
5. 6 SATC 69, 1933 AD 204
6. See *Baxter* page 305 et seq; *Meyerowitz and Spiro* paragraph 1877
7. 13 SATC 1, 1944 AD 142
8. (1981) 44 SATC 58
9. 47 SATC 87, 1985(3) SA 768 (A)
10. (1988) 50 SATC 51
11. 33 SATC 113, 1971 (3) SA 567 (A)
12. (1965) 28 SATC 42
13. At page 43
14. (1979) 42 SATC 19
15. At page 30 - 31
16. (1981) 44 SATC 58
17. 41 SATC 1 179, 1980 (1) SA 481 (A)
18. 1933 AD 141 at 161 to 162
19. See *Lawsa* Volume 3, paragraph 1433
20. See *Lawsa* ibid
21. See above
22. Page 22
23. *Lawsa* volume 11, para 436
24. *Baxter* page 24 and see *Dawnlaan Belegging v Johannesburg Stock Exchange* 1983 (3) SA 344 (W)
25. 3 SATC 239

26. 5 SATC 160
27. 14 SATC 24, 1947 AD 483
28. Page 34
29. Now section 83(1)
30. 23 SATC 358
31. Page 361
32. (1961) 24 SATC 322
33. (1961) 24 SATC 361
34. (1987) 47 SATC 169
35. At page 171
36. See above
37. (1989) 52 SATC 132
38. 1946 AD 483, 14 SATC 24
39. At page 34
40. See above
41. See above
42. See above
43. ITC 93, ITC 168, ITC 297, ITC 564, ITC 696
44. See ITC 1454
45. See paragraph 28.55

CHAPTER SIX

CONCLUSION

- 6.1 Aspects of the Administrative Law relationship between the taxpayer and the Commissioner were examined in this thesis. This relationship was examined with reference to the remedies which a taxpayer has against the exercise by the Commissioner of discretionary powers. The legal effect of rulings was examined and it was submitted that South Africa should emulate other jurisdictions. Thus rulings should be binding on the Commissioner. Furthermore, the Commissioner should publish more practice notes and regulations. Rulings should be published provided that taxpayer anonymity is preserved. The doctrine of legitimate expectation was examined. This doctrine should form part of Revenue Law in South Africa. Equity in determining the rights of taxpayers where the Act is ambiguous is an indication that the Judiciary would invoke this doctrine. The acceptance of the doctrine of legitimate expectation means that the traditional classification of administrative powers serves no real purpose.
- 6.2 An examination of socio political influence on Administrative Law was undertaken. These included such features as, racial segregation and the tricameral parliamentary system. The positivistic influence on Administrative Law such as the doctrine of Separation of Powers and Administrative Corporativism was examined. Administrative Law is greatly influenced by these factors and therefore they were discussed.
- 6.3 The core of the Administrative Law relationship namely the issuing of assessments and the obligation to pay tax was examined. It was shown that naturally adversarial nature of the Administrative Law relationship between the Commissioner and the taxpayer meant that it was not easy to determine what information should be incorporated in a return. The exercise of the Commissioner's discretion is limited by jurisdictional facts. This was illustrated in this chapter.

- 6.4 The role of the Judiciary in the Administrative Law relationship was examined. The uncertainty as to the difference between appeal and review in Revenue Law has had the result that the Special Court has arrogated the power of review where the Act is silent as to the right of objection and appeal. It was submitted that this power is possessed by the Supreme Court only and that the resultant uncertainty weakens the Judiciary and strengthens the Executive.
- 6.5 The Classification of Administrative functions is unnecessary to this relationship and it should be relegated to a function of labelling only. This labelling should take place once the relevant administrative function has been examined and not before.
- 6.6 The Commissioner is vested with extensive discretionary power. This is a consequence of growth of the omnipresent Administrative State where there is a need for such power. On the other hand, the taxpayer must be afforded some protection against the abuse of such power. This can be achieved by a combination of the following :
- (a) Acceptance of the binding nature of rulings.
 - (b) Greater publicity in respect of rulings, practice notes and regulations.
 - (c) Acceptance of the doctrine of Legitimate Expectation in Revenue Law.
 - (d) Clarity as to the rights of the taxpayer in the Special Court and in the Supreme Court.

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2. Administrator, Cape and Another v Ikapa Town Council 1990 (2) SA 882 (A)
3. Boesak v Minister of Home Affairs 1987 (3) SA 665 (C)
4. Bailey v CIR 1933 AD 204, 6 SATC 69
5. Castel v Mawu 1978 (4) SA 795 (A)
6. CIR v Bowman NO (1990) 52 SATC 69
7. CIR v da Costa 1985 (3) SA 768 (A), 47 SATC 87
8. CIR v Delfos 1933 AD 242, 6 SATC 92
9. CIR v Di Ciccio 1985 (3) SA 989 (T), 47 SATC 199
10. CIR v Louw 1983 (3) SA 551 (A), 45 SATC 113
11. CIR v Nemojim (Pty) Ltd 1983 (4) SA 935 (A), 45 SATC 241
12. CIR v SA Mutual Unit Trust Management Co Ltd 1990 (4) SA 529 (A) 52 SATC 205
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14. COT v AB Company Ltd 1969 (2) SA 689 (R) 31 SATC 66
15. Council of Civil Service Unions and Others v The Minister for the Civil Service [1984] 3 ALL ER 935 (HL)
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23. ITC 93 (1927) 3 SATC 239
24. ITC 132 (1928) 4 SATC 196
25. ITC 168 (1930) 5 SATC 160

26. ITC 297 (1934) 8 SATC 53
27. ITC 429 (1939) 10 SATC 355
28. ITC 485 (1941) 11 SATC 353
29. ITC 696 (1950) 17 SATC 86
30. ITC 788 (1954) 19 SATC 428
31. ITC 840 (1957) 21 SATC 424
32. ITC 879, (1958) 23 SATC 232
33. ITC 921 (1960) 24 SATC 242
34. ITC 936 (1960) 24 SATC 361
35. ITC 1150 (1970) 33 SATC 131
36. ITC 1254 (1976) 39 SATC 24
37. ITC 1261 (1976) 39 SATC 74
38. ITC 1357 (1982) 44 SATC 143
39. ITC 1377 (1981) 45 SATC 221
40. ITC 1400 (1983) 47 SATC 169
41. ITC 1454 (1988) 51 SATC 107
42. ITC 1459 (1989) 51 SATC 142
43. ITC 1459 (1989) 51 SATC 142
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