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Taxpayers' Rights in South Africa: An analysis and evaluation of the extent to which the powers of the South African Revenue Service comply with the Constitutional rights to property, privacy, administrative justice, access to information and access to courts.

By

Beric John Croome [CRMBER 001]

B.Com (UCT), CTA (UCT), B.Proc (Unisa), LLB (Unisa), H.Dip Tax Law (cum laude) (Wits), FCMA, C.A. (SA), Advocate of the High Court of South Africa.

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Supervisors: Professor H Corder, Dean: Faculty of Law,  
University of Cape Town, and Professor R Jooste,  
Department of Commercial Law, University of  
Cape Town.

## ABSTRACT

Thesis Title:

Taxpayers' Rights in South Africa: An analysis and evaluation of the extent to which the powers of the South African Revenue Service comply with the Constitutional rights to property, privacy, administrative justice, access to information and access to courts.

**Submitted by:**

**Beric John Croome on 8 February 2008**

In my thesis, I evaluate certain powers conferred on the Commissioner: SARS under the fiscal statutes against five rights available to taxpayers. This analysis establishes whether a taxpayer is likely to succeed in challenging the constitutional validity of the powers available to the Commissioner. Further, I consider the remedies available to taxpayers in South Africa by reviewing current statutory provisions to establish whether the remedies are adequate.

In my research I reviewed South African texts, articles and cases in the context of constitutional law and tax law. I also drew on my experience of dealing with the Commissioner on behalf of clients who consulted with me on tax matters. The web sites of international revenue authorities yielded useful material, as did several other countries' texts, articles and cases on constitutional and tax law.

I conclude that taxpayers in South Africa do not have a cost-effective remedy in seeking redress from the Commissioner where his officials breach their rights. In addition, taxpayers' rights are meaningless unless there is an appropriate remedy for breaches of those rights. The relief available from the Service Monitoring Office is currently deficient because the office is not

independent of the Commissioner and does not have the legal authority to direct the Commissioner's officials to rectify matters. Thus, I suggest that the legislature create a specialised and independent ombudsman's office to deal with taxpayer's complaints, drawing on the principles followed in other democratic societies. Further, current legislation requires amendment to allow taxpayers to recover damages and wasted costs from the Commissioner in specific cases.

I also conclude that taxpayers and the Commissioner are not fully aware of the impact of the procedural rights contained in the Constitution, Act 108 of 1996. The Commissioner has a duty to educate taxpayers and his own officials about these rights and their effect on the application of fiscal laws. The Commissioner may achieve this by means of correspondence and other documents. The performance of the Commissioner's officials should be evaluated by, *inter alia*, referring to their knowledge of taxpayers' rights and to their compliance with the levels of service set out in the SARS Service Charter.

## DECLARATION

I, Beric John Croome, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university.

I authorise the university to reproduce for the purpose of research either the whole or any portion of the contents in any manner whatsoever.

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## **Dedication**

For Judy Croome

University of Cape Town

**In Memoriam**

In memory of Adrian Paul Nathan

University of Cape Town

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At the outset I must thank Professor R Jooste of the Commercial Law Department of the University of Cape Town for inviting me to submit a research proposal on taxpayers' rights for the PhD degree after I contributed an article on the subject to UCT's *Acta Juridica* 2002 at his request.

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Without the assistance of my erstwhile secretary, Avril Hyland, who typed the thesis, it would not have been completed in the required style and format. I also record my thanks to Karen Loxton for the role she played in finalising the thesis.

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My appreciation also to the many colleagues in my firm and fellow legal, accounting and tax professionals, officials at SARS and my clients for

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This thesis would not have been possible without the Constitution and the new democratic dispensation in South Africa. It is hoped that it makes a contribution to our young and growing constitutional democracy, especially in the area of taxpayers' rights.

Beric Croome

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## CHAPTER 1

### EXORDIUM

*‘A good shepherd should shear his flock not skin it.’<sup>1</sup>*

#### I INTRODUCTION

Governments around the world impose taxes on their citizens to fund the services they deliver. Tax, in some form or another, has been around for many centuries. In the time of the Pharaohs, the Egyptians paid tax calculated by measuring the rise and fall of the Nile.<sup>2</sup> In Roman times, the main burden of taxation did not fall on Roman citizens but on those living in the provinces controlled by the Roman Empire.<sup>3</sup> Wars instigated by the Romans allowed them to seize the wealth of the conquered people enabling them to impose taxes to finance the government in Rome.<sup>4</sup>

Today, legislation regulates the taxes payable by a country’s citizens to their government to enable it to meet its constitutional obligations.<sup>5</sup> The relationship between taxpayer and revenue authority is, therefore, unequal, and is different from that of a consumer and a business where the consumer may choose freely what goods and services to buy. The taxpayer regularly seeks to minimise the tax payable while, at the same time, the State seeks to extract the maximum amount possible from its citizens.<sup>6</sup> If taxpayers entered voluntarily into a relationship with the fisc

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<sup>1</sup> The Emperor Tiberius to certain governors who wanted to increase the taxes. Suetonius: Tiberius, ch xxxii as quoted in J Coffield *A Popular History of Taxation, From Ancient to Modern Times* (1970) 1.

<sup>2</sup> V Davies & R Friedman *Egypt Uncovered* (1998) 13. Reference is made to a stella used during the reign of Amenemhet III of the Middle Kingdom (1831 BCE) to mark the level of the Nile: ‘Taxes were levied according to the height of the inundation and the amount of land that would be watered and fertilised by it.’ See also I Brega *Ancient and Modern Egypt* (1998) 65 regarding the use of Nilometers for purposes of measuring ‘the level of the river for setting of the tax rates’.

<sup>3</sup> Coffield (note 1 above) 1.

<sup>4</sup> Ibid 4.

<sup>5</sup> *The Concise Oxford Dictionary of Current English* (1992) defines tax as: ‘A contribution to State revenue compulsorily levied on individuals, property or businesses’. The definition contained on p 896 in T Blackshield & G Williams *Australian Constitutional Law and Theory – Commentary and Materials* 3 ed (2002) is useful: ‘tax ... “is a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered”.’

<sup>6</sup> Many governments have introduced anti-avoidance legislation to combat the perceived abuse of the tax system by taxpayers. See *IRC v Duke of Westminster* [1936] AC 1, a leading case on the

there might be some justification in arguing that they must simply submit to the Commissioner's powers and accept that they have few rights.

## II OBJECTIVES AND APPROACH OF THESIS

The purpose of this thesis is to weigh up the powers conferred on the Commissioner: South African Revenue Service (the 'Commissioner') under various fiscal statutes and to determine whether the powers granted can withstand constitutional scrutiny.<sup>7</sup> In addition, it evaluates existing remedies available to taxpayers and makes recommendations about enhancing those remedies.

The fiscal statutes are subject to the constraints of the Constitution. Ackermann J stated this requirement as follows:

'... it is first necessary to emphasise that even fiscal statutory provisions, no matter how indispensable they may be for the economic well being of the country – a legitimate governmental objective of undisputed high priority – are not immune to the discipline of the Constitution and must conform to its normative standards.'<sup>8</sup>

I will consider the canons of taxation before reviewing the powers conferred on the Commissioner.<sup>9</sup> The State's power to impose and collect tax before the advent of the current constitutional democracy in South Africa will also be reviewed. I will specifically review the provisions of the Constitution of the Republic of South Africa, Act 200 of 1993 (the 'Interim Constitution') and the reports of the Katz Commission of Enquiry

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taxpayer's right to lawfully reduce his or her fiscal obligations and G S Cooper *Tax Avoidance and the Rule of Law* (1997).

<sup>7</sup> Under the South African Revenue Service Act 34 of 1997 the Minister of Finance must appoint a Commissioner as the chief executive officer of the South African Revenue Service responsible for the enforcement of the national legislation listed in Schedule 1 to the Act. In this thesis, the person holding the office of 'Commissioner' refers to the person so appointed who may be either male or female. This thesis refers to 'he' purely to save space, while recognising that the reference to one gender includes reference to the other gender.

<sup>8</sup> *First National Bank of S.A Limited t/a Wesbank v The Commissioner for the South African Revenue Service and Another* 2002 (7) BCLR 702 (CC); [2002] 64 SATC 471 para 31.

<sup>9</sup> See T S Emslie et al *Income Tax Cases and Materials* (1995) 1, where the following is stated: 'In this context, certain so-called canons of taxation (e.g. equity, certainty, convenience, efficiency and equality) have come to be accepted internationally as representing the characteristics of a good tax system.'

into the Tax System in South Africa.<sup>10</sup> It is appropriate to compare this background with the position in South Africa today since the introduction of the Constitution of the Republic of South Africa, Act 108 of 1996 (the 'Constitution'). Reference to direct and indirect taxation will place both the former and current constitutional dispensations in perspective.

The Bill of Rights contained in the Constitution has a direct bearing on the powers conferred on the South African Revenue Service (SARS) in enforcing the fiscal statutes administered by the Commissioner. The thesis will evaluate the manner of achieving the required balance between the powers conferred on the Commissioner and the rights taxpayers enjoy in South Africa and the obligations they face.

In identifying deficiencies in the fiscal statutes and how to address this problem I will refer to foreign experience. There will be an evaluation of remedies available to taxpayers in South Africa in enforcing their rights vis-à-vis the Commissioner, as well as of the benefit of introducing an ombudsman for the tax industry and the need to enact a taxpayers' charter. Several countries, including South Africa, have published such a taxpayers' charter.<sup>11</sup> Such documents typically set out the rights of taxpayers in relation to the respective revenue authority as well as the obligations of taxpayers in dealing with the fisc.<sup>12</sup> Invariably the charters are statements of intent and have no legal effect.<sup>13</sup>

I will consider the right of taxpayers to recover damages and professional fees incurred in their dealings with the Commissioner should a violation of their constitutional rights occur.

The specific focus of this thesis is to determine whether the powers of the Commissioner to act in a particular way violate the taxpayer's

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<sup>10</sup> The Commission of Enquiry Into Certain Aspects Of The Tax Structure of South Africa, later to become known as the Katz Commission, and the various reports issued by that Commission created under the Commissions Act 8 of 1947 and in accordance with *Government Gazette* 15924, *Regulation Gazette* 5378 of 1994.

<sup>11</sup> P Baker & A-M Groenhagen *The Protection of Taxpayers' Rights – An International Codification* (2001) 12.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid* 12 and 18.

specific rights to property, privacy, access to information, administrative justice and access to courts.

These rights are contained in ss 25, 14, 32, 33 and 34 respectively of the Constitution. Other rights contained in the Bill of Rights of the Constitution may also affect the fiscal statutes of the country (for example, the right to equality in s 9, the right to freedom of religion found in s 15 and so on). These rights are beyond the scope of this thesis. The use of domestic and foreign judicial pronouncements and related materials will assist in determining whether the powers conferred on the Commissioner violate the rights referred to. This thesis deals with the law as at 31 October 2007. The question, 'Is the Commissioner constitutionally empowered to act in a particular way?' therefore encapsulates the hypothesis posed in the thesis.

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## CHAPTER 2

### BACKGROUND

*‘... the power to tax involves the power to destroy ...’<sup>1</sup>*

#### I CANONS OF TAXATION

In managing a country’s economy the government will seek to improve economic growth by regulating and influencing, inter alia, the rate of inflation, levels of employment and budget deficit. This will determine the levels of taxation levied on the country’s citizens. Government makes decisions and choices about both fiscal and monetary policy. The National Budget, when introduced in the National Assembly, reveals these policies. The 1995 Budget Review on fiscal policy stated the following:

‘As a powerful political instrument and the central core in the government’s activities, the Budget impacts on the allocation of resources, the distribution of income and wealth, economic stabilisation and economic growth (including the level of employment).

Fiscal policy entails the conscious and deliberate use of the budget (expenditure, taxes and borrowing) to achieve one or more of these economic development goals. Not all of these objectives can be reached simultaneously and difficult choices must often be made ...’<sup>2</sup>

Fiscal policy is but one tool used by a government in its overall economic policy. It integrates with monetary policy, international economic relations, and other policies. The 1995 Budget Review states that:

‘Monetary policy attempts to achieve macro economic balance (especially stability) through control of the monetary system by means of influencing the supply of money, the level and structure of interest rates and other measures affecting the availability of credit. The central bank (The South African Reserve Bank) is responsible for monetary policy, and has as its mission the protection of the external and internal value of the Rand. The main instruments of monetary policy are interest rates charged by the

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<sup>1</sup> Chief Justice John Marshall *M’Culloch v The State of Maryland et al* 1819 4L ed 579 p 607, Wheat 4 316.

<sup>2</sup> Department of Finance Budget Review (15 March 1995) i.

central bank, reserve ratios and open market operations – the so-called indirect instruments – as well as credit ceilings, interest rate control and moral suasion – the so-called direct instrument.<sup>3</sup>

To ensure proper management of an economy a government should ensure an ideal mix of monetary and fiscal policy.<sup>4</sup> Taxation is an instrument used by government to achieve certain economic objectives.

On the subject of the tax structure in place in Roman times Coffield writes:

‘Cicero’s reference to letters of requisition may be a convenient point to say something of the system of requisitioning of men and materials which the Romans inherited from the East and which they were never able to abolish. This, although not strictly a tax, was worse than a tax. It had all the features that a good tax should *not* have. It was sudden, unpredictable, arbitrary and oppressive.’<sup>5</sup>

He states that requisitioning was a significant part of the Roman approach to tax, where payments made became the main revenue of the State.<sup>6</sup>

Adam Smith was the first recorded writer to refer to the fact that the canons of taxation, namely equity, certainty, convenience, efficiency and neutrality, internationally represent the characteristics of a good tax system.<sup>7</sup>

More recently, the report of the Commission of Enquiry into the Tax Structure of the Republic of South Africa contained the following statement:

‘For an adequate tax structure the basic characteristics (where the one does not conflict with the other or others) are equity, neutrality, simplicity, certainty, administrative efficiency, cost effectiveness, flexibility, stability, distribution or effectiveness, and a fair balance from the point of view of taxpayers between the respective burdens of direct and indirect tax. Tax reform measures must also be tested

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<sup>3</sup> Ibid ii.

<sup>4</sup> R L Heilbroner *The Making of Economic Society* 5 ed (1975). On p 161 the following is stated: ‘In economic circles, there is a continuing debate between “monetarist” and “fiscal” views; the first is emphasising the importance of monetary controls, the second giving priority to tax and budgetary policy. Nonetheless, a large measure of agreement exists as to the usefulness of the main control mechanism. The debate is largely about which mechanisms are the most effective.’

<sup>5</sup> J Coffield *A Popular History of Taxation, From Ancient to Modern Times* (1970) 5.

<sup>6</sup> Ibid 6.

<sup>7</sup> See T S Emslie et al *Income Tax Cases and Materials* (1995) 1, where reference is made to Adam Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) Book V Ch II.

against these criteria, and must be examined for transitional feasibility. The ideal, both for direct and indirect imposts, is a broad-based, widely distributed, low-rate, high-yield tax, conforming to these other requirements as far as possible.<sup>8</sup>

In designing a tax system, it is therefore necessary to apply the canons of taxation to ensure economic success and the optimisation of revenue collected by the State.

The State will seek to collect revenue by a mixture of direct and indirect taxes. Direct taxes are those taxes levied on income earned and paid to the fisc by each individual taxpayer.<sup>9</sup> Indirect taxes comprise taxes payable on goods and services bought by a taxpayer and paid to the fisc by the service provider.<sup>10</sup> Individuals pay direct taxation at progressive rates, while a flat rate fixes indirect taxes. In deciding the mix of direct and indirect taxation, the Government should adhere to the canons of taxation referred to above. Furthermore, Government should consider the level of taxation derived as a proportion of the gross domestic product. If the total tax 'take' exceeds the gross domestic product by an unacceptable percentage, this discourages economic activity.<sup>11</sup>

## II THE STATE'S POWER TO TAX PRIOR TO 1994

Before the first democratic elections in April 1994, South Africa was a 'parliamentary state', that is, Parliament reigned supreme.<sup>12</sup>

Section 81(1) of the Republic of South Africa Constitution Act 110 of 1983 provided as follows: 'There shall be a State Revenue Fund into

<sup>8</sup> The Commission later became known as the Margo Commission, RP34/1987 (1987) para 1.28 5.

<sup>9</sup> The distinction between direct and indirect taxes is dealt with in para 5.5 p 69 of the Margo Commission Report.

<sup>10</sup> Ibid.

<sup>11</sup> See Department of Finance Budget Review (15 March 1995) para 2.1.2 p 24, where the following was stated: 'Under present fiscal policy, thus, 25 per cent of GDP may be taken as the ceiling on tax revenue of the consolidated central and provincial government.' See also National Treasury, Budget Review (2003) 54, where the general government tax to GDP ratio is expected to stabilise at approximately 28 per cent.

<sup>12</sup> In accordance with s 34(3) of the Republic of South Africa Constitution Act 110 of 1983: 'No court of law shall be competent to enquire into or pronounce upon the validity of an Act of Parliament.' Act 110 of 1983 did not contain a Bill of Rights and it was therefore possible for Parliament to introduce whatever legislation it thought fit and legislation could only be set aside on the ground that it had not been introduced in accordance with the legal procedures required by Act 110 of 1983 or in accordance with the rules laid down by Parliament itself.

which shall be paid all revenues as defined in s 1 of the Exchequer and Audit Act, 1975.’

The Exchequer Act 66 of 1975, since repealed, defined ‘revenue’ as follows:

‘(a) The State Revenue Account means all monies received by way of taxes, imposts or duties and all casual and other receipts of the State, whatever the source, which may be appropriated by Parliament, and includes monies borrowed in terms of the provisions of this Act, but does not include the amount of any fine not exceeding R50 imposed upon any person by any court of law, insofar as such amount has not been paid, or revenue accruing to the accounts referred to in s 2(1)(b) or to 2(1)(c);’

The 1983 Constitution did not specifically provide the State with the power to tax its citizens but granted this power by implication, by compelling the State to provide certain services.<sup>13</sup> Before 1994 the Constitution of South Africa contained no Bill of Rights and taxpayers had limited rights against the fisc. A taxpayer could not challenge the revenue authorities’ powers in a court of law because such powers, contained in, inter alia, the Income Tax Act, Act 58 of 1962 (‘the Income Tax Act’) violated their rights.<sup>14</sup> The only basis for challenging revenue’s powers was found in certain narrow common law grounds of administrative justice (which did not result in any reported cases).

### III THE INTERIM CONSTITUTION

Significant political changes took place in South Africa in 1994 after the introduction of the Interim Constitution.<sup>15</sup> South Africa became a constitutional State, that is, a State where the constitution is supreme and any laws in breach thereof may not remain in force.<sup>16</sup> The Interim

<sup>13</sup> See, eg, chs 7,9,10,12,13 and 14 of the 1983 Constitution.

<sup>14</sup> R C Williams ‘Taxpayers’ Rights in South Africa’ in D Bentley *Taxpayers’ Rights: An International Perspective* (1998) refers to the supremacy of Parliament in South Africa prior to 1994 and confirms that the courts had no power to review and strike down legislation.

<sup>15</sup> South Africa became a true democratic state in which all persons of qualifying age could vote. See, eg, the Preamble and s 6 of the Interim Constitution.

<sup>16</sup> In accordance with s 4 of the Interim Constitution it was specifically provided that the Constitution shall be the supreme law of the country and any law or Act inconsistent therewith, unless otherwise

Constitution did not contain a specific provision conferring power on the State to impose tax.<sup>17</sup> I contend that it is not essential for a constitution to confer such a power on the State. As Hyatali CJ, drawing on *Cooley's Constitutional Law*, says:

‘Taxes are defined to be burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes. The power to tax rests upon necessity, and it is inherent in any sovereignty. The legislature of every free State will possess it under the general grant of legislative power, whether particularly specified in the Constitution among the powers to be exercised or not. No constitutional government can exist without it.’<sup>18</sup>

Section 185 of the Interim Constitution provided for the establishment of the National Revenue Fund into which all revenues raised or received by the national government had to be paid. Parliament could only appropriate funds therefrom under the Constitution or any applicable Act of Parliament.

The Interim Constitution regulated the three levels of government in South Africa: the national,<sup>19</sup> provincial<sup>20</sup> and local.<sup>21</sup> Section 155 entitled a province to an equitable share of revenue collected nationally. This enabled the province to provide services and to exercise its powers in conformity with the Interim Constitution.

Section 156 dealt specifically with taxes levied by provinces. Provinces could impose certain taxes, levies or surcharges other than income tax or Value Added Tax (‘VAT’).<sup>22</sup> Parliament could only enact legislation introducing a provincial tax after considering the Financial and Fiscal Commission’s recommendations on the draft text of the statute

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provided for expressly or by necessary implication in the Constitution, shall be of no force and effect. See, eg, M Chaskalson et al *Constitutional Law of South Africa* (1996) para 16 p 11.

<sup>17</sup> Other constitutions provide that people shall be liable to taxation. See, eg, Art 30 of the Constitution of Japan (Nihonkoku Kempo) 1947, which states: ‘The people shall be liable to taxation as provided by law’. L W Beer & J M Maki *From Imperial Myth to Democracy – Japan’s Two Constitutions, 1889-2002* (2002) 197.

<sup>18</sup> *Attorney-General of Trinidad and Tobago v Ramesh Dipraj Kumar Mootoo* (1976) 28 WIR 326.

<sup>19</sup> See, inter alia, ch 6 of the Interim Constitution.

<sup>20</sup> See ch 9 and Schedule 6 of the Interim Constitution.

<sup>21</sup> See ch 10 of the Interim Constitution.

<sup>22</sup> Interim Constitution s 155(2)(a) or (b) read together with 156(i).

imposing such tax.<sup>23</sup> Section 178 (2) of the Interim Constitution permitted local government to impose and recover such property rates, levies, fees, taxes and tariffs as were necessary to exercise its powers and perform its functions.

The Bill of Rights contained in the Interim Constitution prescribed how the State and its organs interacted with persons in the country.<sup>24</sup> Section 33 limited the fundamental rights contained in Chapter 3 of the Interim Constitution in terms of a law of general application. Any limitation of rights had to be reasonable, and justifiable in an open and democratic society based on freedom and equality.<sup>25</sup> Furthermore, s 33(1)(b) required that the limitation not detract from the essential content of that right and that such limitation be necessary.

The Interim Constitution, which was a temporary measure to allow time for the negotiation and formulation of the final Constitution, required the State to establish various bodies to remedy any breach of the fundamental human rights contained in the Interim Constitution. Among these bodies are the Commission for Gender Equality, the Constitutional Court, the Human Rights Commission, and the Public Protector's Office.<sup>26</sup>

Before the introduction of the Interim Constitution the Commissioner could act against taxpayers without fear of judicial intervention. The old s 74 of the Income Tax Act conferred on the Commissioner certain powers of gathering information from taxpayers. The section provided that the Commissioner could authorise any of his officers to search a taxpayer's premises or seize records without prior notice to the taxpayer and without independent review. The taxpayer had no means of preventing such search and seizure operations. This law was valid and incontestable because Parliament reigned supreme.<sup>27</sup>

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<sup>23</sup> Ibid s 156(1)(a).

<sup>24</sup> Ibid ch 3.

<sup>25</sup> Ibid s 33(1)(a).

<sup>26</sup> Section 98 of the Interim Constitution provided that a Constitutional Court must be established and ch 8 provided for the establishment of the Office of the Public Protector, the Commission for Gender Equality and the Human Rights Commission.

<sup>27</sup> Sections 30 and 34 of the Republic of South Africa Constitution Act 110 of 1983.

The introduction of the Interim Constitution made it necessary for the provisions of the Income Tax Act and, indeed, all fiscal statutes, to comply with the Interim Constitution.

#### IV KATZ COMMISSION

In his 1994 budget speech the Minister of Finance announced the appointment of a Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa (the Katz Commission).<sup>28</sup> The Interim Report of the Katz Commission dealt with the rule of law as follows:

‘The Commission notes that the tax system is subject to the Constitution and must conform to society’s commitment to the Rule of Law. This means not only that the system should be effective in the enforcement of all tax laws, equally and irrespective of status, but also that citizens’ right to be taxed strictly in accordance with the terms of those laws should be scrupulously protected both in the design of those laws and in their implementation.’<sup>29</sup>

The Katz Commission, in ch 6 of its Interim Report, dealt with some of the implications of the Interim Constitution for the country’s fiscal statutes.<sup>30</sup> Chapter 6 sought to weigh up various provisions of the fiscal statutes in South Africa vis-à-vis the Interim Constitution.

Section 8 of the Interim Constitution contained the fundamental right to equality. At that stage, the Income Tax Act contained several provisions that discriminated on the grounds of sex and marital status. Separate rates of tax were payable by married or unmarried persons, and those regarded as married women. A rebate was available to married persons. Further, s 10(1)(x) of the Income Tax Act, for example, referred to different ages, depending on the taxpayer’s sex.

Para 6.3.19 of the Katz Commission’s Interim Report concluded that discrimination based on sex or marital status was unconstitutional and

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<sup>28</sup> Budget Speech Minister of Finance D L Keys (22 June 1994) 3 and Department of Finance Budget Review (22 June 1994) para 2.3 at 2.5.

<sup>29</sup> Katz Commission Interim Report para (e) p 9.

<sup>30</sup> Ibid ch 6, entitled ‘Implications of the Constitution of the Republic of South Africa, Act 200 of 1993, for the Tax System’ 67-84.

was inappropriate in income tax legislation.<sup>31</sup> South Africa subsequently introduced a unitary rate of tax for all persons, regardless of sex or marital status.<sup>32</sup>

The Commission reviewed the provisions of the Income Tax Act dealing with the recovery of tax, in particular s 91(1)(b), whereby the Commissioner may file with any competent court a statement certified by the Commissioner as correct and specifying the tax or interest due from the taxpayer. Such statement constitutes a civil judgment lawfully given in favour of the Commissioner for a liquid debt of the amount specified.<sup>33</sup> Section 92 of the Income Tax Act precludes a taxpayer from challenging an assessment in the ordinary courts.<sup>34</sup> A taxpayer may only challenge an assessment by adhering to the objection and appeal procedures set down in s 81 and s 83 of the Act.<sup>35</sup> The Commission's view was that s 91 breached s 22 of the Interim Constitution, which conferred the right to have legal disputes settled by a court of law.<sup>36</sup> Although government suggested it would deal expeditiously with the various constitutional issues raised by the Katz Commission it did not amend s 91 of the Income Tax Act.<sup>37</sup> Section 40(2)(a) of the Value Added Tax Act 89 of 1991 ('the VAT Act'), was in many respects similar to s 91 of the Income Tax Act. The Constitutional Court in *Metcash Trading Ltd v C: SARS* [2001]<sup>38</sup> ruled that the provisions of s 40(2)(a) did not violate the taxpayer's constitutional rights and thus it is contended that s 91 is constitutionally valid.<sup>39</sup>

Section 14(1) of the Interim Constitution provided every person with the right to freedom of conscience, religion, thought, belief and opinion.

The Katz Commission expressed the view that the preferential treatment

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<sup>31</sup> Ibid 73.

<sup>32</sup> These amendments were introduced by way of Schedule 1 of the Income Tax Act 21 of 1995.

<sup>33</sup> See note 30 para 6.3.29 p 75.

<sup>34</sup> The section states: 'It shall not be competent in any proceedings in connection with any statement filed in terms of para (b) of sub-section (1) of section ninety-one to question the correctness of any assessment on which such statement is based, notwithstanding that objection and appeal may have been lodged thereto.'

<sup>35</sup> Income Tax Act s 92.

<sup>36</sup> Note 30 above para 6.3.29 p 75.

<sup>37</sup> Department of Finance Budget Review (5 March 1995) para 2.3.2.2 at 2.26.

<sup>38</sup> 2001(1)BCLR(1)CC 2001 63 SATC 13.

<sup>39</sup> This aspect is dealt with in ch 5.

contained in s 10(1)(f) of the Income Tax Act exempting religious organisations from income tax might fall foul of s 14 of the Interim Constitution.<sup>40</sup> The Commission also stated that the tax deduction granted for donations made to the Bible Society of South Africa under s 18A of the Income Tax Act would violate s 14 of the Interim Constitution. This concession was removed from 1 October 1996.<sup>41</sup>

As a consequence of the right contained in s 23 of the Interim Constitution to access to information held by the State taxpayers may call for the release of any relevant information held by the Commissioner relating to themselves.<sup>42</sup> If the Commissioner fails to release the information the taxpayer may approach a court for proper relief. I analyse the consequences of the Promotion of Access to Information Act 2 of 2000 on taxpayers' rights in chapter 5.

The Katz Commission's interim report dealt with the administrative practices adopted by the Commissioner. It also considered the impact of the taxpayer's right to just administrative action, addressed below, under s 24 of the Interim Constitution.<sup>43</sup>

Before 1994 it was the general practice of the Commissioner not to supply taxpayers with reasons for decisions made in the exercise of discretionary powers, or in issuing assessments. Section 24 of the Interim Constitution gave taxpayers the right to this information for the first time. The Katz Commission's Interim Report expressed the view that s 24(c) granted taxpayers the right to reasons, in writing, for administrative action affecting any of their rights.<sup>44</sup> The Commission specifically referred to the cryptic approach adopted by the Commissioner in dealing with objections and appeals, and stated that the prevailing practice would have to end.<sup>45</sup> Not long after the publication of the Katz Commission's report the

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<sup>40</sup> Note 30 above paras 6.3.30-6.3.32 at 76.

<sup>41</sup> In accordance with s 11 of the Income Tax Act 36 of 1996. An analysis of the right contained in s 14 of the Interim Constitution lies beyond the scope of this thesis and is not considered further.

<sup>42</sup> Note 30 above para 6.3.33-6.3.36 pp 76 and 77.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid para 6.3.34 p 76.

<sup>45</sup> Ibid.

Commissioner indicated that, in future, taxpayers would have access to the reasons for decisions.

For many years, the Commissioner's internal *Revenue Assessing Handbook* and internal circular minutes were unavailable to the public.<sup>46</sup> This caused difficulties for taxpayers who did not know why the Commissioner was taking a particular view on certain items of expenditure or income. The Katz Commission was of the opinion that such internal documentation should be available to taxpayers, ensuring that the Commissioner and his officers complied with their constitutional obligations.<sup>47</sup> Shortly after publication of the Commission's report the *Revenue Assessing Handbook* was published as the *SARS Income Tax Practice Manual*, which is now available to all taxpayers.<sup>48</sup> The Commissioner started releasing practice notes, interpretation notes, media releases and other documents to assist and educate taxpayers about the interpretation of their fiscal obligations.<sup>49</sup>

The Katz Commission also considered the constitutionality of s 82 of the Income Tax Act, whereby the onus of proof lies on the taxpayer.<sup>50</sup> The debate about whether s 82 as presently drafted is constitutionally valid is not over and lies beyond the scope of this thesis.

Referring to taxpayers' entitlement to due legal process under s 22 of the Interim Constitution, the Katz Commission expressed the view that certain fiscal statutes, which ousted the right to challenge certain actions of the Commissioner, might violate s 22.<sup>51</sup>

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<sup>46</sup> Ibid para 6.3.34 p 77.

<sup>47</sup> Ibid para 6.3.36 p 77.

<sup>48</sup> 1996.

<sup>49</sup> Available at <http://www.sars.gov.za>

<sup>50</sup> Note 30 above para 6.3.37 p 77.

<sup>51</sup> Note 30 above para 6.3.37 p 77, para 6.3.40 p 78, para 6.4.6 p 80 and para 6.5.13 p 84.

## V THE CONSTITUTION

In 1996 the Constitutional Court certified the Final Constitution, which replaced the Interim Constitution.<sup>52</sup> Chapter 2 of the Constitution contains a Bill of Rights similar to that contained in ch 3 of the Interim Constitution.

Section 213 of the Constitution provides for the creation of a National Revenue Fund for the collection of all money paid to the national government. The Constitution does not specifically confer on the State the power to impose tax but its provisions imply this. The legislature enacted the Public Finance Management Act 1 of 1999 to regulate those matters previously dealt with in the Exchequer Act. Section 1 of the Public Finance Management Act contains a definition of 'revenue fund'. This creates the National Revenue Fund as envisaged in s 213 of the Constitution and deals with the Provincial Revenue Fund as mentioned in s 226 of the Constitution.

As was the case in the Interim Constitution, a provincial legislature may impose the following taxes, as envisaged in s 228 of the Constitution:

- taxes, levies and duties other than income tax, value-added tax, general sales tax, rates on property or customs duties;
- flat-rate surcharges on the tax bases of any tax, levy or duty imposed by national legislation, other than the tax bases of corporate income tax, value-added tax, rates on property or customs duties.

For a province to exercise the power conferred on it under s 228 of the Constitution it must comply with the statute regulating that process.<sup>53</sup>

Thus far, no province in South Africa has exercised the right to impose a

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<sup>52</sup> The Constitution was adopted on 8 May 1996, amended on 11 October 1996 by the Constitutional Assembly, and promulgated on 18 December 1996. It took effect on 4 February 1997. See *Ex parte Chairperson of the Constitutional Assembly in re: Certification of the Constitution of the Republic of South Africa* (First Certification judgment) 1996 (4) SA 744 (CC) and *Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1996 (Second Certification judgment) 1997 (2) SA 97 (CC).

<sup>53</sup> Provincial Tax Regulation Process Act 53 of 2001.

provincial tax, though the Western Cape Province has mooted the possibility of a fuel levy.

Section 229 of the Constitution limits the powers of municipal authorities to impose rates on property and surcharges on fees for services provided by the municipality. A municipality may only impose other types of taxes if these are sanctioned by national legislation. Such taxing measure must not seek to impose any tax similar to that imposed by the national government.

The fundamental rights contained in ch 2 of the Constitution are not absolute and may be limited by s 36. Many taxpayers have the mistaken impression that because the Constitution enshrines rights they may not be restricted or violated. In deciding whether a breach of the Bill of Rights has occurred it is necessary to refer to the specific rights contained in ch 2 of the Constitution. Section 36, which determines the validity of any limitation of rights, provides as follows:

- '(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:
  - (a) the nature of the right;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;
  - (d) the relation between the limitation and its purpose; and
  - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

Thus, a taxpayer must weigh up the impact, if any, of the limitation of rights on the Commissioner's powers to collect tax.

A statute of general application may limit the rights contained in the Constitution.<sup>54</sup> Such rights are therefore not absolute and it is necessary to ascertain whether the infringement of the right by the organ of state in question is valid. If the legislature wishes to limit any right contained in the

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<sup>54</sup> A number of articles have been written on the limitation clause. See, for example, S Woolman 'Out of Order? Out of Balance? The Limitation Clause of the Final Constitution' (1997) 13 *SAJHR* 1 102 and Chaskalson et al (note 16 above) para 47 p 12.

Constitution the limitation must apply equally to all persons. It is not lawful, for example, to introduce taxing regulations that only apply to a section of the community. Any law limiting a person's rights must therefore apply generally and would have to be reasonable and justifiable, because of the ethos of the new South Africa. De Waal et al deal with the reasonableness and justifiability test in the following terms:

‘to satisfy the limitation test then, it must be shown that the law in question serves a constitutionally acceptable purpose and that there is sufficient proportionality between the harm done by the law (the infringement of fundamental rights) and the benefits it is designed to achieve (the purpose of the law).’<sup>55</sup>

As stated above, the government of the day needs funds to ensure that it can finance its administration and meet certain specified social objectives imposed on it by the Constitution. It is thus essential that proper administration of tax collection ensures that taxpayers comply with the law and meet their obligations. At the same time, the revenue authority should not exceed its powers.

Inland Revenue was previously a directorate within the Ministry of Finance and was an integral part of the civil service. Historically, it comprised two branches. The first fell under the Commissioner for Inland Revenue, who was responsible for overseeing all fiscal legislation other than the Customs and Excise Act 91 of 1964. The second branch, managed by the Controller of Customs and Excise, was responsible for collection of customs and excise duties and the supervision of the Customs and Excise Act 91 of 1964. The South African Revenue Service Act 34 of 1997 (SARS Act), section 2 of which established the South African Revenue Service as an organ of the state within the public administration but as an institution outside the public service, came into force on 1 October 1997. South Africa now has one office, the Commissioner: South African Revenue Service, responsible for the administration of all fiscal statutes in the country. Section 4 of the Act prescribes that it is the Commissioner's objective to ensure the efficient and effective collection of revenue and to enforce the fiscal statutes

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<sup>55</sup> J De Waal et al *The Bill of Rights Handbook* 2 ed (1999) 150.

administered by the Commissioner.<sup>56</sup> Under its regulatory statute the Commissioner must uphold the values and principles contained in s 195 of the Constitution.

The fiscal statutes of the country confer certain powers on the Commissioner, many of which are necessary to ensure the proper and efficient collection of taxes. Certain of the powers may be unconstitutional under ch 2 of the Constitution. I will weigh up the various powers conferred on the Commissioner in the fiscal statutes to ascertain if they can withstand constitutional scrutiny. I will also consider the extent of a taxpayer's right to:

- property
- privacy
- access to information
- administrative justice; and
- access to courts.

The provisions of the Constitution would be meaningless if taxpayers could not redress breaches of the Bill of Rights in some manner. Section 38 provides that should anyone violate a taxpayer's rights the taxpayer may approach a competent court for relief, including a declaration of rights. The section provides that the following persons may approach a court for relief:

- a) anyone acting in their own interest;
- b) anyone acting on behalf of another person who cannot act in their own name;
- c) anyone acting as a member of, or in the interest of, a group or class of persons;
- d) anyone acting in the public interest; and
- e) an association acting in the interest of its members.'

Schedule 6 of the Constitution confirms that the Constitutional Court, established by the Interim Constitution, becomes the Constitutional Court under the Constitution. Section 167(3) provides that the Constitutional

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<sup>56</sup> The various fiscal statutes administered by the Commissioner are listed in Schedule 1 of the SARS Act.

Court is the highest court in all constitutional matters. The court has the responsibility to decide whether or not an Act of Parliament is constitutional. The Supreme Court of Appeal or a High Court may rule that an Act of Parliament appears unconstitutional.<sup>57</sup> An order made by such court on the constitutionality of an Act may only obtain force once the Constitutional Court has confirmed that order.<sup>58</sup>

Paragraph 20 of Schedule 6 of the Constitution provides that various institutions created under the Interim Constitution continue to exist. Section 181 confirms the establishment of various State institutions to support democracy in South Africa. These bodies, which comprise, *inter alia*, the Public Protector and the Human Rights Commission, may also be available to taxpayers seeking redress against the Commissioner where they believe their rights, as enshrined in chapter 2 of the Constitution, have been violated.<sup>59</sup> Section 182 of the Constitution restates the functions of the office of Public Protector as, *inter alia*, investigating alleged or suspected improper conduct in State affairs or in public administration at any level of government. The duties and responsibilities of the Public Protector are more fully dealt with in the Public Protector Act 23 of 1994. A taxpayer may, in certain circumstances, be able to lodge a formal complaint with the Public Protector where the Commissioner has, in the taxpayer's view, violated the taxpayer's constitutional rights.<sup>60</sup>

The Constitution sets out the duties of the Human Rights Commission under s 184. These include observing, investigating and reporting on human rights, as well as taking the necessary steps to secure appropriate redress where human rights have been violated. Taxpayers may, in certain cases, be able to use the office of the Human Rights Commission to investigate alleged violations of human rights, including their rights as taxpayers *vis-à-vis* the Commissioner.

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<sup>57</sup> See Constitution ss 168 and 169.

<sup>58</sup> See Constitution s 167(3).

<sup>59</sup> Human Rights Commission Act 54 of 1994.

<sup>60</sup> See Constitution s 182, which sets out the functions of the Public Protector, and the Public Protector Act 23 of 1994.

## VI THE TAX PROCESS

### (1) *The Tax System*

Taxation in South Africa comprises two distinct parts, namely, direct taxation and an array of indirect taxes regulated by various statutes managed by the Commissioner.<sup>61</sup>

John Stuart Mill defines direct and indirect tax in the following terms:

‘A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another.’<sup>62</sup>

Direct taxation thus denotes taxation imposed on individuals, companies and other taxpayers. Indirect taxation is that form of taxation levied on transactions. It includes VAT payable on the purchase of goods or services, transfer duty payable on the purchase of property, stamp duties and similar levies payable on the purchase of shares.

### (2) *Direct Taxation*

The Commissioner requires all persons liable for taxation to register for tax purposes.<sup>63</sup> Section 66 of the Income Tax Act prescribes which specific persons must submit an annual tax return.<sup>64</sup> Section 1 of the Income Tax Act defines the term ‘person’ widely and includes companies, close corporations and natural persons, as well as the categories of persons specifically mentioned. The provisions of the Income Tax Act compel taxpayers to render an annual return to the Commissioner. The Commissioner may query items disclosed in that return. In addition, he

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<sup>61</sup> The Value Added Tax Act 89 of 1991; Customs and Excise Act 91 of 1964; Regional Services Councils Act 109 of 1985; KwaZulu-Natal Joint Services Act 84 of 1990; Unemployment Insurance Contributions Act 4 of 2002; Stamp Duties Act 77 of 1968; Uncertificated Securities Tax Act 31 of 1988; Skills Development Levies Act 9 of 1999; Transfer Duty Act 40 of 1949; Estate Duty Act 45 of 1955; Marketable Securities Tax Act 32 of 1948.

<sup>62</sup> P W Hogg *Constitutional Law of Canada* 4 ed (1997) para 30.2(a) page 744, quoting from J S Mill’s work *Principles of Political Economy* Book V (1848) ch 3.

<sup>63</sup> Section 1 of the Income Tax Act defines ‘person’ as ‘including an insolvent estate, the estate of a deceased person and any trust’.

<sup>64</sup> In the case of natural persons the taxpayer is obliged to render a return if the taxable income derived exceeds a specified amount or if the person concerned falls into the categories catered for in s 66 of the Income Tax Act.

may conduct an on-site audit or a detailed investigation into the taxpayer's affairs.

Once the Commissioner has processed the tax return he will issue an assessment reflecting the tax payable, or refundable, as the case may be. If the taxpayer disagrees with the Commissioner's assessment, he has a right to object. If the Commissioner disallows the objection the taxpayer may prosecute an appeal to either the Tax Board<sup>65</sup> or the Tax Court<sup>66</sup> under the rules promulgated in terms of s 107A of the Income Tax Act.<sup>67</sup>

When the taxpayer lodges his notice of appeal he may proceed to alternative dispute resolution ('ADR').<sup>68</sup> The Commissioner does not have to agree to the taxpayer's election of ADR. He is, however, obliged, within 20 days of receipt of the notice of appeal, to inform the taxpayer of the outcome of his or her request to refer to the matter to ADR.<sup>69</sup>

It is anticipated that ADR will promote the settlement of tax disputes without the need for the Commissioner and taxpayers to resort to the Tax Court and incur the related costs of litigation. From recent practical experience it appears to me that certain of the Commissioner's officials are frustrating the ADR route, advising that certain matters are inappropriate for ADR. The reason given is that the Commissioner is seeking judicial pronouncement on the issue.

In cases where the appeal proceeds to the Tax Board and the taxpayer or the Commissioner does not accept the board's decision either party may note an appeal to have the matter heard by the Tax Court. Where the parties are unhappy with a decision of the Tax Court they may advance either to the High Court or directly to the Supreme Court of Appeal.<sup>70</sup>

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<sup>65</sup> See Income Tax Act s 83A.

<sup>66</sup> Income Tax Act s 83.

<sup>67</sup> The regulations appeared in *Government Gazette* 24639 (1 April 2003) and took effect from 1 April 2003.

<sup>68</sup> Rule 6(3) promulgated in *Government Gazette* 24639 (1 April 2003).

<sup>69</sup> Rule 7(1)(a) promulgated in *Government Gazette* 24639 (1 April 2003).

<sup>70</sup> See Income Tax Act s 86A.

The Commissioner will seek to recover income tax under the provisions contained in the Income Tax Act and in terms of practices published in the *SARS Income Tax Practice Manual*.<sup>71</sup> The Commissioner will also publish media releases, interpretation notes, general notes and rulings to suggest how his officers should apply the law in certain circumstances.

The Commissioner may conduct audits of taxpayers to ensure the timeous and accurate payment of direct tax. He may also seek warrants to conduct search and seizure operations to ensure compliance with the applicable governing fiscal statute.

### (3) *Indirect Taxation*

The method of collecting indirect tax differs from that of gathering direct tax. A purchaser or person who is obliged to pay indirect tax does not always need to submit a tax return. However, in certain instances, the purchaser must pay the requisite tax over on declaration to the Commissioner. The VAT system calls for the submission of VAT returns under the VAT Act. Under other statutes the question of payment of indirect tax arises on the purchase of property or shares in the form of transfer duty, customs and excise duty and stamp duty.<sup>72</sup>

The administrative procedures and information-gathering powers found in the various statutes regulating indirect taxes are, in many respects, similar to those found in the Income Tax Act.

### (4) *The Commissioner's Powers*

The Commissioner, through his various officers, exercises powers contained in the fiscal statutes dealing with taxpayers. The right to establish whether the application of these powers is appropriate lies with the taxpayer. He further has the right to approach a court to determine

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<sup>71</sup> *SARS Income Tax Practice Manual* (1996).

<sup>72</sup> An analysis of the provisions of the Transfer Duty Act 40 of 1949, the Stamp Duty Act 77 of 1968 and Customs and Excise Act 91 of 1964 lies beyond the scope of this thesis.

whether those powers will withstand scrutiny vis-à-vis the Bill of Rights contained in ch 2 of the Constitution.

## VII THE RELEVANCE OF THE BILL OF RIGHTS TO THE TAX ARENA

At first blush there may appear to be little connection between the Bill of Rights and taxpayers' fiscal obligations. This is misleading.

*Taxpayers Rights and Obligations: A Survey of the Legal Situation in OECD [Organisation for Economic Co-operation and Development] Countries*<sup>73</sup> sets out the interaction of fundamental rights and tax obligations as follows:

'2.1 Tax administrations are given wide powers to determine the tax base, to verify information provided by taxpayers and third parties and to collect the tax due. There may be a potential conflict between the use of these powers to minimise tax evasion and avoidance and to ensure that all taxpayers are fairly treated, with the need to respect the rights of individual taxpayers. The rights to privacy, to confidentiality, of access to information, and to appeal against decisions of the administration, for example, are fundamental rights in democratic societies. A high degree of co-operation from taxpayers is required if complex tax systems are to operate efficiently. Co-operation is more likely to be forthcoming if taxpayers perceive the system as being fair and if their basic rights are clearly set out and respected. In practice, all OECD governments take great care to ensure that these rights are respected.'<sup>74</sup>

It is therefore fitting to consider whether the powers granted to the Commissioner in the various fiscal statutes conform with the requirements set out in the Constitution. Taxpayers are invariably in an unequal relationship with the fisc in that it compels them by statute to contribute to the State's coffers. They are therefore not willing participants in the tax system. Bentley submits that the perception by

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<sup>73</sup> 1990 OECD.

<sup>74</sup> Ibid 10. See further *Principles of Good Tax Administration – Practice Note* (1999) 3 and Bentley *Taxpayers' Rights: Theory, Origin and Implementation* (2007) 50.

taxpayers that they receive fair treatment and there is no violation of their rights enhances their degree of compliance with the tax system.<sup>75</sup>

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

## VIII INTERPRETATION OF THE BILL OF RIGHTS

Section 39 of the Constitution regulates the interpretation of the Bill of Rights. A court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. Further, it must consider international law and may consider foreign law. International law includes, for example, the United Nations Declaration on Human Rights and other international agreements dealing with human rights, whether South Africa has adopted such agreements or not.<sup>76</sup> Foreign law, on the other hand, comprises the statutes of other countries. In its decisions the Constitutional Court, empowered by s 39(1)(c) of the

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<sup>75</sup> Bentley (note 14 above) 43, where the following is stated: 'Research has shown that taxpayers respond positively to a good relationship with the tax authorities. Compliance improves where tax authorities provide good service and make it simpler for taxpayers to comply with tax laws that are often extremely complex.' See further Bentley *Taxpayers' Rights: Theory, Origin and Implementation* (2007) 50.

<sup>76</sup> See s 39(1)(b). For comment thereon see Chaskalson (note 16 above) paras 11.3(a), 11.12(c)(ii), 13.5(c).

Constitution, draws on foreign cases and foreign law for guidance on how to deal with such matters in South Africa.<sup>77</sup>

## IX INTRODUCTION OF A TAXPAYERS' CHARTER IN SOUTH AFRICA

Many countries have published a taxpayers' charter setting out the rights and obligations of taxpayers in their dealings with the revenue authority.<sup>78</sup> In 1995 the Katz Commission recommended the introduction in South Africa of a statement of taxpayers' rights.<sup>79</sup>

The Commission concluded that the fiscal statutes should not contain such a statement. Rather, taxpayers' rights should constitute a contract between the revenue authority and taxpayers which taxpayers may utilise as a means of evaluating service levels and administrative action encountered in their dealings with the Commissioner.<sup>80</sup>

The Minister of Finance published the SARS Client Charter in the 1997 Budget Review.<sup>81</sup> The Charter is merely a statement of intent by the Commissioner, it does not alter the law in any way and it confers no greater rights.<sup>82</sup> If a taxpayer believes his or her constitutional rights

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<sup>77</sup> See, for example, *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC); *Bernstein v Bester N.O.* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC); *Du Plessis v De Klerk* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC).

<sup>78</sup> P Baker & A-M Groenhagen *The Protection of Taxpayers' Rights – An International Codification* (2001) 12-18 deal comprehensively with this aspect.

<sup>79</sup> Third Interim Report of the Katz Commission ch 12 p 130.

<sup>80</sup> Ibid paras 12.23 and 12.25 p 132.

<sup>81</sup> 1997 National Treasury, Budget Review 7.2.

<sup>82</sup> Ibid. The Charter states the Commissioner's intention as being:

'To help you:  
 by being courteous at all times  
 to understand your rights and obligations  
 by continuously upgrading the quality of our service  
 by being accessible  
 To be fair:  
 by expecting you to pay only what is due under law  
 by treating everyone equally  
 by ensuring everyone pays their fair share  
 To protect your constitutional rights:  
 by keeping your affairs strictly confidential  
 by furnishing you with reasons for decisions taken  
 by applying the law consistently and impartially.'

have been breached he or she must approach a competent court for relief.<sup>83</sup>

The current Commissioner has indicated in discussions that he is investigating the possibility of introducing an ombudsman to assist taxpayers who face administrative difficulties in their dealings with the Commissioner.<sup>84</sup> Such an ombudsman would seek to address violations of taxpayers' rights. However, it would not seek to resolve objections and appeals, as the Tax Court, High Court and Supreme Court of Appeal must, by law, deal with such matters.<sup>85</sup>

Having briefly outlined the background to the tax system and the developments in our constitutional dispensation it is necessary to consider the taxpayer's right to property.<sup>86</sup> In the next chapter I will do so in the context of the fiscal statutes. This examination will determine whether those statutes can withstand constitutional scrutiny in light of the right to property.

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<sup>83</sup> The reference to the term 'taxpayer' refers to male and female persons who are required under the law to pay tax, as well as to entities recognised under the taxing statutes, such as companies, close corporations and trusts. The term 'taxpayer' thus includes both the male, female and neuter gender.

<sup>84</sup> 'Ombudsman' is a Swedish term for 'peoples' defender'. It generally means an office created to assist the general public in dealing with the State or an organ thereof. R T Bartlett 'The Ombudsman in Taxation: A Tripartite Perspective' (1988) *British Tax Review* 164.

<sup>85</sup> See Income Tax Act ss 83 and 86A. See also paper presented by B J Croome to SARS Workshop on Objections and Appeals held in Pretoria (23-24 August 2000).

<sup>86</sup> As enshrined in s 25 of the Constitution.

## CHAPTER 3

### THE RIGHT TO PROPERTY

*'As long as he does not rob the great majority of their property or their honour, they remain content.'*<sup>1</sup>

#### I INTRODUCTION

In this chapter I will evaluate certain fiscal provisions in the light of the right to property contained in the Constitution. I will determine whether these provisions conform to the taxpayer's right to property. Taxation constitutes a deprivation of property by the State. I analyse in what circumstances taxation may constitute an unlawful deprivation of property which contravenes s 25 of the Constitution and would not be saved by the limitation of rights contained in s 36 of the Constitution. Section 25 of the Constitution confers a right to property on taxpayers in the following terms: '(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'<sup>2</sup>

Section 25(4)(b) specifically provides, *inter alia*, that for s 25 the term 'property' is not limited to land. De Waal examines the term 'property' and expresses the view that it has at least three possible meanings:

'First the clause could refer to physical property itself ... second the term could refer to, a set of legal rules governing the relationship between individuals and physical property – what the common law terms property rights ... third the term could refer to any relationship or interest having an exchange value.'<sup>3</sup>

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<sup>1</sup> N Machiavelli *The Prince* (1995) 57.

<sup>2</sup> The right to property contains specific provisions dealing with the expropriation of property for public purposes. In such cases there is a prescribed method of determining and paying compensation. Section 25 also deals with land reform and the restitution of land taken as a result of racially discriminatory laws. The provisions regulating the expropriation of property, land reform and the restitution of land are beyond the scope of this thesis. Those provisions are contained in ss 25(2) to (9) of the Constitution.

<sup>3</sup> J de Waal et al *Bill of Rights Handbook* 4 ed (2001) 413.

Devenish comments on the concept of property as being not only a relationship between an owner and a 'thing', but 'rather as a spectrum of legally enforced claims upon resources'.<sup>4</sup>

In *First National Bank of S.A. Ltd t/a Wesbank v Commissioner for South African Revenue Services and Another* ('FNB') Ackermann J dealt with the meaning of 'property' as follows:

'At this stage of our constitutional jurisprudence it is, for the reasons given above, practically impossible to furnish – and judicially unwise to attempt – a comprehensive definition of property for purposes of s 25. Such difficulties do not, however, arise in the present case. Here it is sufficient to hold that ownership of a corporeal movable must – as must ownership of land – lie at the heart of our constitutional concept of property, both as regards the nature of the right involved as well as the object of the right and must therefore, in principle, enjoy the protection of s 25.'<sup>5</sup>

It appears from the above that the term 'property' has a wide meaning in terms of establishing the scope of the right to property contained in the Constitution. It is clear that the term 'property' refers not only to land but also to several different rights held by a taxpayer. Thus, if the authorities sought to introduce legislation to remove a taxpayer's entitlement to certain benefits or rights, those rights would constitute 'property' as envisaged in s 25 of the Constitution.

With regard to what comprises the deprivation of property envisaged in s 25(1) Ackermann J, in *FNB*, held:

'The term "deprived" or "deprivation" is, as Van Der Walt (1997) points out, somewhat misleading or confusing because it can create the wrong impression that it invariably refers to the taking away of property, whereas in fact

"the term 'deprivation' is distinguished very clearly from the narrow term 'expropriation' in constitutional jurisprudence worldwide."

In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned. If section 25 is applied to this wide *genus* of interference, "deprivation" would encompass all species thereof

<sup>4</sup> G E Devenish *A Commentary on the South African Bill of Rights* (1999) 352. See further A J van der Walt *Introduction to the Law of Property* 4 ed (2004) 9.

<sup>5</sup> 2002 (7) BCLR 702 (CC), [2002] 64 SATC 471 para 51.

and “expropriation” would apply only to a narrower species of interference. Chaskalson and Lewis, using a slightly different idiom in dealing with both the interim and 1996 Constitutions, put it equally correctly thus:

“Expropriations are treated as a subset of deprivation. There are certain requirements for the validity of all deprivations.”

...

If the deprivation infringes (limits) section 25(1) and cannot be justified under section 36 that is the end of the matter. The provision is unconstitutional.<sup>6</sup>

Based on *FNB* there must be a determination of whether there has been any infringement of the taxpayer’s right to property.<sup>7</sup> This includes the arbitrary deprivation of a taxpayer’s property, as well as a restriction on the taxpayer’s rights over the property concerned.

Does the right to property apply to both natural and juristic persons? The Constitutional Court considered this issue in *FNB*<sup>8</sup>, in which Ackermann J stated:

‘A preliminary question is whether FNB, as a juristic person, is entitled to the property rights protected by s 25 of the Constitution. In this regard, s 8(4) of the Constitution provides as follows:

“a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.”<sup>9</sup>

Ackermann J stated further:

‘Even more so than in relation to the right to privacy, denying companies entitlement to property rights would “... lead to grave disruptions and would undermine the very fabric of our democratic State.”<sup>77</sup> [<sup>77</sup> –*Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2000 (10) BCLR 1097 (CC); 2001(1) (SA) 545(CC)].” It would have a disastrous impact on the business world generally, and creditors of companies and, more specifically on shareholders in companies. The property rights of natural persons can only be fully and properly realised if such rights are afforded to companies as well as to natural persons. I therefore conclude that FNB is entitled to the property rights under s 25 of the Constitution, ...’<sup>10</sup>

Thus, the right to property applies to both natural and juristic persons.

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<sup>6</sup> Ibid paras 57 and 58.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid para 41.

<sup>10</sup> Ibid para 45.

I will now analyse the following issues in the light of the right to property found in s 25(1) and the limitation of rights contained in s 36 of the Constitution:

- When will the imposition of tax constitute an unlawful deprivation of property?
- Does the set-off of tax debts and refunds violate the right to property?
- Does a delay in receiving a tax refund constitute a deprivation of property?
- May the taxpayer recover from the Commissioner wasted costs incurred through unreasonable conduct by his officials?
- Where the Commissioner seeks to hold directors of companies personally liable for the tax debts of a company does this breach their right to property?
- Does the imposition by the Commissioner of additional tax and interest violate the right to property?
- Does the prohibition on payment of interest on delayed VAT refunds breach the right to property?
- Does the enactment of fiscal amendments with retrospective effect breach the right to property?<sup>11</sup>

## II WHEN WILL THE IMPOSITION OF TAX CONSTITUTE AN UNLAWFUL DEPRIVATION OF PROPERTY?

Is the power of the State to impose tax a violation of the right to property in that tax amounts to an unlawful deprivation of property?

Paying tax is involuntary in that the force of law requires taxpayers to pay amounts of money to the fisc under the various fiscal statutes in

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<sup>11</sup> The right to property affects various other provisions in the fiscal statutes, eg, the recovery and collection of tax, the imposition of capital gains tax and withholding tax on non-residents, and the Commissioner's decision to exact tax on the same amount twice, albeit from different taxpayers. These topics lie beyond the scope of this thesis.

force. The payment of tax, therefore, constitutes the deprivation of, for example, a part of the taxpayer's salary received for services rendered or a portion of the profit derived by an entrepreneur from the carrying on of business.

The various statutes under which taxes are payable constitute laws of general application applicable to all taxpayers in South Africa. These statutes do not discriminate unfairly on one or more of the grounds found in s 9 of the Constitution.<sup>12</sup>

I am not aware of any reported court case in South Africa in which a taxpayer has attempted to refuse to pay tax contending that taxation constitutes property deprivation in contravention of s 25 of the Constitution. *Metcash Trading Ltd v C: SARS and Another*<sup>13</sup> indirectly touched on this issue. In this case, the Commissioner procured an expert legal opinion from Professor Dr P Sellmer, who commented on German tax laws and the right to property as follows:

'Art. 14 GG thus, only by way of exception, grants protection against the duty to pay in cases which has a so-called strangling (punitive) effect. For the rest, the collection of taxes and revenues does not constitute an infringement of the right to property. If the imposition of a duty to pay does not constitute an infringement of Art. 14 GG, then the immediate execution of the duty to pay can *a fortiori* not do so.'<sup>14</sup>

Thus, the German Constitution does not regard tax imposition as an infringement of the taxpayer's right to property.

In *FNB*<sup>15</sup> Conradie J in the court a quo considered whether taxation constitutes property deprivation. He stated the following at page 449:

'Taxation does not amount to a deprivation of property. Nor is there anything which is expropriated. No one would think of claiming compensation for having been taxed. Freedom from taxation is not a fundamental right. Nothing protects the subject against taxation. Not even death. I consequently do not consider

<sup>12</sup> Section 9 of the Constitution contains a right to equality and prescribes certain actions which will be treated as unfair discrimination. The right to equality is not considered as it lies beyond the scope of this thesis.

<sup>13</sup> 2001 (1) BCLR (1) CC.

<sup>14</sup> Ibid Annexure C2 of court file 212.

<sup>15</sup> *First National Bank of S.A Ltd t/a Wesbank v Commissioner for South African Revenue Services and Another* 2001 (7) BCLR 715 (C), [2001] 63 SATC 432.

that the taking of the property of an affected owner (i.e. one who is not by definition an importer) is, in principle, a violation of s 28 of the Interim Constitution or s 34 of the Constitution. It may be different where the impugned tax is oppressive or partial and unequal in its operations; but customs duty is a form of taxation acknowledged worldwide. If its reach seems broader than it need be, that is no ground for a constitutional challenge.<sup>16</sup>

In the Constitutional Court Ackermann J, drawing on the court a quo's decision, stated that: 'Taxation could not amount to deprivation or expropriation'.<sup>17</sup>

In this case the Constitutional Court referred to the court a quo's decision and did not seek to contradict the views expressed by Conradie J, which were obiter.<sup>18</sup>

In interpreting the Bill of Rights our courts have an obligation to promote the values that underlie an open and democratic society. They must consider international law and may consider foreign law.<sup>19</sup> Imposing taxes and securing payment will, in principle, be acceptable in a democratic society, subject to the safeguards contained in the Bill of Rights.

A survey of the approach taken in other jurisdictions will assist in reaching a conclusion. Article 1 of Protocol No 1 of the European Convention on Human Rights supports this approach as follows:

'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provision shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'<sup>20</sup>

The Convention makes it clear that payment of taxes is not a breach of a person's right to the peaceful enjoyment of his or her possessions.

<sup>16</sup> Ibid [2001] 63 SATC 432 para I p 449.

<sup>17</sup> *FNB* (note 5 above) para 27.

<sup>18</sup> Ibid.

<sup>19</sup> Constitution s 39(1).

<sup>20</sup> P van Dijk & G J H van Hoof *Theory and Practice of the European Convention on Human Rights* 2 ed (1990) 454.

European democracies may impose taxing measures and may introduce measures to secure payment of taxes.

Van Dijk deals with the imposition of tax and securing the payment in Europe in the following terms:

‘Thus, the power of the national authorities to levy taxes, to impose penalties (with due observance of Article 7), to make social security contributions compulsory and to impose other levies is left intact as long as there exists a legal basis for them, no discrimination is involved, and the power is not used for a purpose other than that for which it has been conferred.’<sup>21</sup>

The European Commission of Human Rights has decided that it is entitled to assess a legislature’s objective in imposing a taxing measure and may determine whether it is reasonably necessary and proportionate.<sup>22</sup> In *Gudmundsson v Iceland*<sup>23</sup> the European Commission of Human Rights decided that even though the property tax was high it constituted a tax in the public interest and was legitimate.<sup>24</sup>

Although Australia considers taxation to be a deprivation of property it falls outside s 51<sup>25</sup> of that country’s provision governing and protecting rights to property.<sup>26</sup>

Commenting on the position in Switzerland Van der Walt writes:

‘The institutional property guarantee (*Institutsgarantie*) means that only those state interferences (including taxation) which leave the essence of private property as a fundamental institution of the Swiss legal system intact are acceptable in view of the constitutional property guarantee. The institutional guarantee implies that the state is prohibited from steadily depriving individual taxpayers of their wealth or parts of that wealth (for example, immovable property) through disproportionately high taxation. ... In this regard the court referred to similar German decisions, in which it was said that taxes which strangle (*erdrosselin*) the taxpayer would be confiscatory and thus unconstitutional.’<sup>27</sup>

<sup>21</sup> Ibid 465. This view is endorsed by A J van der Walt in *Constitutional Property Clauses* (1999) 104.

<sup>22</sup> *X v Austria* [1979] 13 DR 27 at 30; also see the comments by Van der Walt (note 21 above) 109.

<sup>23</sup> 1960 YB 3 394 422.

<sup>24</sup> Van der Walt (note 21 above) 109.

<sup>25</sup> Commonwealth of Australia Constitution Act 1900 (UK) s 51.

<sup>26</sup> Van der Walt (note 21 above) 43.

<sup>27</sup> Ibid 362.

Thus, the level of taxes imposed must be reasonable and must not disturb the essence of a taxpayer's right to property.<sup>28</sup>

In Trinidad and Tobago the courts have evaluated the validity of a tax and whether a particular levy unlawfully violates the taxpayer's right to property.<sup>29</sup> The courts have held that the State has an inherent power to collect taxes; however, to be valid, such taxation must serve the public purpose and apply equally to all citizens of the country.<sup>30</sup>

The Indian Supreme Court has considered whether imposing taxation constitutes the deprivation of property in contravention of the property clause contained in the Indian Constitution. Dealing with this issue Seervai writes:

'However, the Supreme Court held in *Ramjilal v I.T.O Mohindargarh* that the deprivation of property referred to in Art.31(1) did not include taxation in view of Art.265 which provides that "no tax shall be levied or collected save by authority of law" as otherwise Art.265 would be rendered redundant. However, Art.265 required that the law (i) should be within the legislative competence of the legislature, (ii) should not be prohibited by any particular provision of the Constitution e.g. Art.276(2), 286, etc and (iii) should not be invalid in whole or in part under Art.13. A tax law need not satisfy the test of Art.31(2), but it did not follow that every other Article of the chapter on Fundamental Rights was inapplicable.<sup>31</sup>

Commenting on the position under the American Constitution Henkin & Rosenthal write:

'In a literal sense, taxation is, of course, a confiscation of property; equally clearly no organised society can function without taxation. This has not prevented some extreme libertarians from arguing against taxation on the basis of natural rights: "taxation of earnings from labour is on a par with forced labour," argues Robert Nozick. ... In a notable paper, Epstein proceeds from a similar starting point (taxation is a taking) but notes the absurdity to which the constitutional argument would lead – the money raised must be returned to the individuals from whom it was collected as

<sup>28</sup> Ibid 361 and 363.

<sup>29</sup> *Attorney-General of Trinidad and Tobago v Ramesh Dipraj Kumar Mootoo* (1976) 28 WIR 304 p 316. See also Van der Walt (note 21 above) 386.

<sup>30</sup> *Attorney-General of Trinidad and Tobago* (note 29 above) 304 and 321 and see Van der Walt's comments in *Constitutional Property Clauses* (note 21 above) 386.

<sup>31</sup> H M Seervai *Constitutional Law of India A Critical Commentary* 2 ed Vol 1 (1975) 716.

“compensation”. His search is for an intermediate position that allows limited constitutional supervision of the powers to tax.

...

There may be other constitutional grounds for challenging taxation, but the taking of property without compensation is not one of them. Not surprisingly, other legal systems follow a similar course.<sup>32</sup>

The Irish High Court in *Daly v the Revenue Commissioners*<sup>33</sup> considered the obligation to pay tax and the taxpayer’s right to property. Costello J stated that where a taxpayer claims there is an infringement of his right to private property he or she must show that those rights have been subject to ‘an unjust attack’.<sup>34</sup> A taxpayer will succeed where the State fails to pass the proportionality test.<sup>35</sup>

*Daly* referred to a decision of the Canadian Supreme Court, namely, *Chaulk v R*,<sup>36</sup> which formulated the proportionality test as follows:

‘The objective of the impugned provision must be of sufficient importance to warrant over-riding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:-

- (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
- (b) impair the right as little as possible, and
- (c) be such that their effects on rights are proportional to the objective.<sup>37</sup>

In *Daly*<sup>38</sup> Costello J decided that the particular fiscal provision failed the proportionality test because it produced results that were unfair to taxpayers in that they caused them hardship.<sup>39</sup> Where a fiscal provision which is out of proportion to the objective it must achieve is challenged a court should strike the provision down for violating a taxpayer’s right to property.<sup>40</sup>

Kelly, writing on the Irish Constitution, expresses the following view:

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<sup>32</sup> L Henkin & A J Rosenthal *Constitutionalism and Rights – The Influence of the United States Constitution Abroad* (1999) ch 5 p 125.

<sup>33</sup> [1995] 3 IR 1.

<sup>34</sup> *Ibid* 8.

<sup>35</sup> *Ibid*.

<sup>36</sup> [1990] 3 SCR 1303 pp 1333-1336.

<sup>37</sup> *Daly* (note 33 above) 8.

<sup>38</sup> *Ibid*.

<sup>39</sup> *Ibid* 9.

<sup>40</sup> *Ibid*.

‘The courts are particularly reluctant to hold that tax laws amount to an unjust attack on property rights. Such laws enjoy the benefit of a very strong presumption of constitutionality and will only fall foul of the constitutional guarantee of property rights if they are discriminatory or arbitrary in their operation.’<sup>41</sup>

From the review of the right to property found in other countries it appears that the imposition of tax constitutes the taking of property. However, such deprivation of property is generally lawful and does not violate the particular country’s constitutional right to property.

It is contended based on *Daly*,<sup>42</sup> that if South Africa introduced a taxing measure that caused undue hardship to taxpayers it would not pass muster under s 25 of the Constitution. Taxation constitutes a deprivation of property but is generally lawful because the State requires funding from its citizens to meet its obligations. Where the tax ‘... affect[s] property rights in a manner out of proportion to the objective which the measure is designed to achieve’<sup>43</sup> the court should set it aside.

Where the legislature introduces a taxing measure that applies equally to all citizens of South Africa I contend that a taxpayer will fail to persuade a court to strike down the statute merely because it constitutes a violation of the right to property.<sup>44</sup> A taxpayer may succeed in having a taxing measure struck down on other grounds. For example, introducing unfairly discriminatory taxing measures is likely to violate the right to equality contained in s 9 of the Constitution.<sup>45</sup> This aspect lies beyond the scope of this thesis.

If the imposition of taxation constituted an unlawful deprivation of property in violation of s 25 of the Constitution the taxpayer would seek to recover compensation from the State. The State’s only means of

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<sup>41</sup> J M Kelly *The Irish Constitution* 4 ed (2003) 2010 para 7.7.82.

<sup>42</sup> Note 33 above.

<sup>43</sup> *Ibid.*

<sup>44</sup> *FNB* (note 5 above) para 27 where Ackermann J stated that ‘[t]axation could not amount to deprivation or expropriation’. This view is supported by Van Dijk & Van Hoof (note 20 above) 465; Seervai (note 31 above) 716; and Henkin & Rosenthal (note 32) ch 5 p 125.

<sup>45</sup> See, eg, Devenish (note 4 above) 37, where the author deals with the nature of the right to equality and the consequences of unfair discrimination, and M H Cheadle, D M Davis & N R L Haysom *South African Constitutional Law: The Bill of Rights* (2002) 102, where the authors deal with unfair discrimination, the right to equality and the requirement that the differentiation must have caused prejudice.

financing such compensation would be from taxes themselves. Thus, a taxpayer will fail in challenging the constitutionality of taxing provisions on the grounds that they constitute an unreasonable and unjustifiable deprivation of property.

I therefore conclude that, in principle, the imposition of tax is a justifiable deprivation of a taxpayer's property. If, however, the State introduces an unreasonable taxing measure or a tax with an ulterior purpose or not for a public purpose, a court should strike such measure down as unreasonable in an open and democratic society.<sup>46</sup>

### III DOES THE SET-OFF OF TAX DEBTS AND REFUNDS VIOLATE THE RIGHT TO PROPERTY?

Generally in South African law set-off applies where person A owes a debt to person B, and B is in turn indebted to A.<sup>47</sup> Because of set-off such persons do not have to pay their debts to each other. Historically, the Commissioner might not appropriate a refund due to a taxpayer under one taxing statute to liquidate a debt due to the State under another statute.<sup>48</sup> The Commissioner, for example, paid refunds of VAT even though the taxpayer owed the Commissioner income tax.

Amendments to the various statutes administered by the Commissioner specifically allow him to appropriate a refund due under one statute against a debt due under another.<sup>49</sup> The question arises whether these provisions violate the taxpayer's right to property contained in s 25 of the Constitution.

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<sup>46</sup> *Daly* (note 33 above) 9.

<sup>47</sup> R H Christie in *The Law of Contract in South Africa* (1991) 565 deals with set-off or *compensatio* as follows:

‘Set-off or compensation or *compensatio* is a method by which contractual and other debts may be extinguished. It comes into effect when two parties are reciprocally indebted to each other: “If the debts are equal, both are discharged; if they are unequal, the smaller is discharged and the larger is reduced by the amount of the smaller. Set-off may be regarded as a form of payment, and even as the equivalent of payment in cash.”’

See also D J Joubert in *General Principles of the Law of Contract* (1987) para 21.3 p 286, where the principles relating to set-off are discussed.

<sup>48</sup> Income Tax Act s 102(3); VAT Act s 44(6); Stamp Duties Act 77 of 1981 s 32; Transfer Duty Act 40 of 1949 s 20. The Taxation Laws Amendment Act 30 of 1998 introduced the amendments.

<sup>49</sup> *Ibid.*

For example, s 102(3) of the Income Tax Act provides as follows:

‘Where any refund contemplated in sub-section (1) is due to any person who has failed to pay any amount of tax, additional tax, duty, levy, charge, interest or penalty levied or imposed under this Act or any other Act administered by the Commissioner, within the period prescribed for payment of the amount, the Commissioner may set off against the amount which the person has failed to pay, any amount which has become refundable to the person under this section.’

If a taxpayer, for example, owes the Commissioner value added tax (‘VAT’), transfer duty or stamp duty and has overpaid his income tax, entitling him to a refund, the Commissioner may appropriate that refund.<sup>50</sup>

When reference is made to the extensive meaning of the term ‘property’ a refund due to a taxpayer constitutes property under the Constitution.<sup>51</sup> The appropriation of a refund due to a taxpayer by the Commissioner in settlement of tax debts properly due under another fiscal statute means deprivation of property will take place under a law of general application. Various fiscal statutes apply equally to all South African taxpayers and are valid under s 36 of the Constitution. Thus, appropriating a refund due under one fiscal statute to settle taxes due under another does not constitute a violation of s 25 of the Constitution.

Unfair treatment of a taxpayer occurs when a refund is properly due under, say, the VAT Act and an incorrect tax assessment reflects an amount as owing to the Commissioner for income tax. Unfortunately, the Commissioner’s staff and systems are not infallible. Payments made by a taxpayer may be credited to the incorrect taxpayer. Alternatively, an income tax return may be incorrectly captured and reflect an incorrect amount of income tax payable. It is unfair for the Commissioner to appropriate a VAT refund and apply that against an amount of income tax reflected as owing by a taxpayer because of administrative errors made by the Commissioner. The application of the VAT refund to settle an income tax liability incorrectly reflected should not be upheld in an open and democratic society because such conduct is unreasonable and

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<sup>50</sup> Ibid.

<sup>51</sup> For the meaning of property as used in s 25 of the Constitution see Van der Walt (note 4 above) 9.

unjustifiable. The Commissioner should only be authorised to apply set-off after establishing that the income tax reflected as payable is, in fact, due.

Let us imagine that a business rendered services to the Commissioner and encountered difficulties in obtaining payment. At the same time the business owed the Commissioner income tax and VAT. The business could not effect payment of the taxes due because its cash flows were under pressure because of the non-payment of fees by the Commissioner. The question that arises is whether the business can seek to apply set-off of the VAT and other taxes due to the Commissioner against the debt due by the Commissioner for services rendered. Unfortunately, the fiscal statutes do not allow a taxpayer in such circumstances to apply set-off and *South African Railways v Kemp*<sup>52</sup> supports this.

In this case the court decided that the defendant could not reduce the amount due to the South African Railways by an amount due to him by the Department of Defence. The court ruled that the funds administered by the South African Railways were placed in the Railways and Harbour Fund and the amount due by the Department of Defence would come from the Consolidated Revenue Fund.<sup>53</sup> The court decided the defendant had to pay the amount claimed by the Railways and then claim the amount due from the Department of Defence.

The difficulty Kemp faced was that the amount due to him was payable by one State department and the amount payable by him was due to another.<sup>54</sup> Today a court hearing a similar matter would need to comply with s 39(2) of the Constitution under which the courts must promote the spirit and objects of the Bill of Rights.<sup>55</sup> A court faced with a taxpayer applying set-off of amounts due by the Commissioner for services rendered against tax due by the taxpayer may reach a different conclusion from that in *Kemp*<sup>56</sup> because the taxpayer is dealing with an

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<sup>52</sup> 1916 TPD 174.

<sup>53</sup> Ibid 179.

<sup>54</sup> Ibid.

<sup>55</sup> De Waal (note 3 above) 143.

<sup>56</sup> Note 52 above.

organ of state and the provisions of s 39(2) of the Constitution. A court may agree to set-off on the basis that it is fair to the taxpayer and promotes the Bill of Rights.

The Organisation for Economic Co-Operation and Development ('OECD'), which considered the question of whether a taxpayer may offset his tax liability against debts owed by the government, stated in its 1990 report: 'Offsetting a tax liability against a government debt is generally not permitted, though Greece and Turkey do so and a few countries allow it under certain conditions.'<sup>57</sup> In those countries that permit set-off it may only apply if the liability relates to taxes due and payable to the same level of government.<sup>58</sup>

A South African taxpayer would have to institute recovery proceedings against the Commissioner for the outstanding debt for services rendered. Unfortunately, the cost of proceeding to court is significant and the taxpayer could become insolvent before recovering the amount due. The fiscal statutes should provide for a taxpayer to apply set-off where he or she has not received timely payment from the Commissioner for services rendered and, as a result, cannot pay the taxes due. Alternatively, the Commissioner should defer payment for taxes due until he settles the amounts due to the taxpayer for services rendered.

#### IV DOES A DELAY IN RECEIVING A TAX REFUND CONSTITUTE A DEPRIVATION OF PROPERTY?

If a taxpayer overpays income tax he or she may seek a refund under s 102 of the Income Tax Act. In certain circumstances the taxpayer may receive interest on the overpaid tax under s 89*quat* of the Act.

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<sup>57</sup> *Taxpayers' Rights and Obligations: A Survey of the legal situation in OECD countries* (1990) 20 and table 23 p 84.

<sup>58</sup> *Ibid.*

Section 89*quat* (4) currently provides that interest shall be payable only to provisional taxpayers where the refund exceeds R10 000 or the taxpayer's taxable income exceeds certain specific amounts.

Section 89*quat* of the Income Tax Act provides that provisional taxpayers with a February year-end pay interest to the Commissioner and receive interest from the Commissioner after seven months from the end of the year of assessment. For provisional taxpayers with a year-end other than February interest is payable to and by SARS after six months from the end of the taxpayer's year of assessment. In these cases taxpayers receive interest on the refund payable to them. If a provisional taxpayer properly manages his or her tax affairs he or she should not become liable to pay tax to the Commissioner on assessment nor should he or she become entitled to a refund.

However, it may happen that a taxpayer overpays provisional tax because the taxable income reflected on the previous assessment is greater than the taxable income derived in the later year of assessment. Section 89*quat* of the Income Tax Act provides that interest is payable in cases where the provisional taxpayer overpays income tax.

Those persons who are not provisional taxpayers do not pay interest to the Commissioner until the due date of the assessment issued to them has passed. I submit that it is thus equitable for non-provisional taxpayers not to receive interest from the end of the tax year until the due date of the assessment.

My concern is the unreasonable delay of refunds to non-provisional taxpayers. If a taxpayer files his or her tax return on time he or she should receive the refund within a reasonable time. The failure to pay interest on a refund unreasonably delayed constitutes a violation of the taxpayer's right to property contained in s 25 of the Constitution. The Income Tax Act should provide for the payment of interest when the issue of the assessment is unjustifiably delayed. The statute should also require that the Commissioner issue assessments promptly to non-provisional taxpayers.

A taxpayer may challenge the interest receivable if the prescribed rate is lower than the rate of interest earned on an investment with a financial institution.<sup>59</sup> A question that arises is whether the rate of interest payable to a taxpayer is reasonable. If the taxpayer is an entrepreneur, his or her business would typically generate returns greater than the rate of interest payable by the Commissioner under the Income Tax Act. Is the shortfall between the rate of return the entrepreneur generates compared to the rate of interest payable by the Commissioner on the delayed refund an unlawful deprivation of the taxpayer's property? The rules regulating the payment of interest on refunds apply to taxpayers generally and do not distinguish between taxpayers other than between those who are provisional taxpayers and those who are not. The section thus constitutes a law of general application and I contend that such a provision is reasonable and justifiable in an open and democratic society. A revenue authority should pay a market-related rate of interest to a taxpayer who has overpaid tax, failing which the taxpayer may argue that the rate of interest is too low and thus constitutes an unjustifiable deprivation of property.

It would be more equitable if the rate of interest due to the Commissioner equated with that paid by the Commissioner for income tax purposes. In the case of VAT the rate of interest due to the Commissioner is the same as that paid by the Commissioner on a VAT refund. Further, where a taxpayer who succeeds in an income tax appeal has paid the tax in dispute the Commissioner refunds the tax plus interest at the same rate as is due to him.<sup>60</sup> The Income Tax Act should remove the disparity.

The interest received by a provisional taxpayer from the Commissioner is liable to income tax. However, the interest levied by the Commissioner is not deductible for tax purposes, which increases the

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<sup>59</sup> The 'prescribed rate' as defined in the Income Tax Act is, with effect from 1 November 2007, 13 per cent per annum, and the prime bank overdraft rate is 14 per cent per annum, with effect from 14 October 2007.

<sup>60</sup> Income Tax Act s 88 and VAT Act s 36.

cost of the interest paid to the Commissioner.<sup>61</sup> A taxpayer would find it difficult to show that, on constitutional grounds, the interest received from the Commissioner is not taxable. A taxpayer must declare all interest received for tax purposes. It would be equitable if interest paid to the Commissioner were deductible for tax purposes but it will be difficult to challenge this provision, which applies to all taxpayers. The only taxpayers who have a case for claiming interest are those who are not provisional taxpayers, where the Commissioner delays their refund unreasonably. Such taxpayers should place the Commissioner in *mora* and seek *mora* interest on the delayed refund. It would be preferable, however, if the legislature introduced amendments to cater for the payment of interest on refunds that the Commissioner has unreasonably delayed.

#### V MAY THE TAXPAYER RECOVER FROM THE COMMISSIONER WASTED COSTS INCURRED THROUGH UNREASONABLE CONDUCT BY TAX OFFICIALS?

The Commissioner may audit a taxpayer and issue a revised assessment. If the taxpayer has incurred professional fees because of consultations with attorneys or accountants to deal with the matter, the taxpayer cannot feel aggrieved if the revised assessment is valid. However, where the Commissioner issues additional assessments without proper foundation, is the taxpayer entitled to recover his costs from the Commissioner?

The Commissioner frequently institutes audits and investigations because of anonymous tip-offs received from estranged spouses or disgruntled employees. Where the complainant has made vexatious allegations against the taxpayer and the taxpayer has incurred accounting and other professional fees in answering the Commissioner's

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<sup>61</sup> This disparity in treatment has been raised in submissions made by SAICA to the Commissioner. The Commissioner views the interest levied on late payment of tax as a form of penalty, which, in principle, should not be deductible for tax purposes.

queries, the taxpayer suffers a decline in his or her patrimony. This constitutes a deprivation of the taxpayer's property.

The decision to engage professional advisors rests solely with a taxpayer. However, because of the complexities of South African fiscal legislation the taxpayer should not, in my submission, deal with the Commissioner without professional assistance. Is the taxpayer not entitled to recover his or her costs where the Commissioner acts unreasonably? There is currently no authoritative statement of the position in South Africa. A review of how other countries deal with this issue is instructive.

Bentley comments that:

'In a successful appeal, taxpayers should have the right to compensation for legal costs and expenses that they have incurred. They should also have the right to compensation for personal or economic loss resulting from any actions taken by the tax authorities without lawful authority or cause. This would include where an employee of the tax authority disregards the requirements of the tax law and regulations to the detriment of the taxpayer, for example, by releasing without authorisation, commercially sensitive information on a taxpayer's file, either generally, or to another taxpayer. Compensation should be available for inadvertent as well as intentional or reckless actions. The protection for the government would be that the taxpayer would have to show loss.

It might be reasonable for the government to place a cap on the compensation, to limit its exposure to massive claims. It is detrimental to the proper administration of the tax system if the tax authority is restrained in its proper pursuit of tax evasion and fraud for fear of facing large damages claims in the event that it cannot prove its case.'<sup>62</sup>

Sweden allows taxpayers to recover costs in limited cases. Hultqvist summarises the position in Sweden in the following terms:

'Finally, the taxpayer may recover costs if there are very special reasons for reimbursement. For example, they may be reimbursed if the tax authority has been negligent, or nearly so, when auditing a company and has forced the taxpayer to pay a lawyer or accountant to defend itself against unreasonable tax charges. This provision is rarely applied.

The taxpayer never has to pay the tax authorities their litigation costs. On the other hand, taxpayers are not reimbursed for their

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<sup>62</sup> D Bentley *Taxpayers Rights: An International Perspective* (1998) 56.

own work or other internal costs in an action. This applies equally to the cost of using in-house lawyers.<sup>63</sup>

In the United Kingdom Newth has stated the following:

‘It has to be said that, nowadays, satisfaction is often reached at this point and restitution may be made by an official apology, with or without compensation to reimburse the fees of the professional advisor and/or a consolatory payment to the client. I have taken this route myself and reached an entirely satisfactory settlement with a Revenue department.’<sup>64</sup>

The Australian authorities have released draft guidelines explaining how taxpayers may claim compensation from the Australian Tax Office where that office’s conduct has caused loss.<sup>65</sup>

Writing about the position in the USA Scott comments:

‘Congress has enacted some express rights to recover damages from the IRS. Because the action for improper disclosure of information is available for negligence and the damages are the greater of \$1 000 or the actual damages for each disclosure, people have a reasonable opportunity to recover compensation for their injuries.

Other rights are limited to the point that few people can recover. A proposal to include assessment in the malpractice statute was rejected, and the collection malpractice requirements are very difficult to satisfy. Because it is available only to the taxpayer, Congress intentionally excluded cases where collection is attempted from another person. Grounds are difficult to prove because there must be a reckless or intentional disregard of the Code or regulations, and damages are limited to the lesser of \$100 000 or the “actual, economic damages”. Because a proposal to authorise recovery of actual damages for negligent collection was rejected, Congress wanted to restrict recoveries. ...

Because they have a substantial track record of lawless conduct, remedies in addition to damages are needed to regulate the activities of the IRS and its employees. Possibilities include injunctions to prohibit future misconduct, class actions to make remedies available to groups of people, and publicity of all damages judgements against the IRS or its employees.’<sup>66</sup>

<sup>63</sup> A Hultqvist ‘Taxpayers’ Rights in Sweden’ in Bentley (note 62 above) 306.

<sup>64</sup> J T Newth ‘Complaints, redressing compensation’ (2004) *Simon’s Tax Briefing* 122 1 and 2.

<sup>65</sup> A Carey ‘ATO’s Compensation Guidelines’ (2003) *Australian Weekly Tax Bulletin* 38 item 1618 p 1444.

<sup>66</sup> R A Scott ‘Suing the IRS and its employees for damages: David and Goliath’ (1996) 20 *Southern Illinois University Law Journal* 507, the amount of damages was increased to \$1 000 000 under the Taxpayer Bill of Rights 2 PL 104-168. See further Technical and Miscellaneous Revenue Act of 1988 PL 100-647 Subtitle J, Section 6241(a) of Taxpayer Bill of Rights 1 and A Greenbaum ‘United States Taxpayer Bill of Rights 1, 2 and 3: A path to the future or Old Wine in new bottles?’ in Bentley (note 62 above) 347.

In the light of experience abroad, where a taxpayer has suffered financial prejudice because of unreasonable conduct by the Commissioner I would argue that he or she may recover damages from the Commissioner. A taxpayer may institute an action for damages on delictual grounds but it remains unclear how a court will decide on such an action in the tax arena. A taxpayer may, based on the decision of the court in *Carmichele v Minister of Safety and Security and Another*<sup>67</sup> succeed with a claim, based in delict against the Commissioner, where his officials have acted wrongfully.<sup>68</sup>

Where the taxpayer shows that he or she has suffered loss as a result of the negligent acts of the Commissioner's officials, a court should award damages.<sup>69</sup>

The legislature should introduce measures prescribing the circumstances in which a taxpayer can recover damages from the Commissioner. Such legislation would act as a counter balance to the Commissioner's draconian powers, which are unfortunately occasionally abused by the Commissioner's officials. However, the proposed legislation should not constrain the Commissioner in effectively exercising his mandate under the SARS Act. The proposed measures would enhance the fair and proper administration of the tax system in South Africa.

## VI WHERE THE COMMISSIONER SEEKS TO HOLD DIRECTORS OF COMPANIES PERSONALLY LIABLE FOR THE TAX DEBTS OF A COMPANY DOES THIS BREACH THEIR RIGHT TO PROPERTY?

In starting a business undertaking a choice must be made of which entity to use in conducting the business. If an entrepreneur conducts business as a sole proprietor or in partnership with other persons he or she exposes his or her personal assets to his or her creditors if the

<sup>67</sup> 2001 (10) BCLR 995(CC).

<sup>68</sup> Ibid 1012.

<sup>69</sup> C Hoexter *Administrative Law in South Africa* (2007) 467 and L Baxter *Administrative Law* (1984) 600-16. For law of delict generally, see J Neethling et al *Law of Delict 2* ed (1994). A comprehensive analysis of the Commissioner's liability under the law of delict lies beyond the scope of this thesis.

business fails. Alternatively, the choice is to conduct the business as a close corporation governed by the Close Corporations Act 69 of 1984, or as a company governed by the Companies Act 61 of 1973 or as a business trust regulated by the Trust Property Control Act 57 of 1988. A principle of company law limits the directors' and shareholders' liability for the debts of a company. Where, however, any officers of the company, including its directors, trade recklessly and defraud creditors they are personally liable for the debts of the company.<sup>70</sup> A court may also pierce the corporate veil in appropriate cases.<sup>71</sup> A close corporation limits the liability of members unless it trades in insolvent circumstances, cannot meet its debts when they fall due, or if the court rules that there is an abuse of the juristic personality.<sup>72</sup> In addition, s 63(a)-(h) of the Close Corporations Act prescribe various circumstances where the members are jointly and severally liable for certain debts of the corporation.

Various fiscal statutes contain provisions allowing the Commissioner to disregard the principle of limited liability conferred on shareholders and directors of companies and members of close corporations.

Paragraph 16(2C) of the Fourth Schedule of the Income Tax Act provides as follows:

'Where an employer is a company, every shareholder and director who controls or is regularly involved in the management of the company's overall financial affairs shall be personally liable for the employees' tax, additional tax, penalty or interest for which the company is liable.'<sup>73</sup>

If a company fails to withhold and/or pay over employees' tax, comprising Pay As You Earn ('PAYE') and Standard Income Tax on Employees ('SITE') from employees' remuneration, the Commissioner may recover the tax from either the directors or the shareholders of the company. The above provision does not take account of the negligence

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<sup>70</sup> See Companies Act 61 of 1973 s 424. *Business Day* reported that the company secretary and financial manager of Macmed Ltd (in liquidation) were personally liable for all the company's debts because they had traded recklessly. See 'Court hands Macmed Chiefs a R647m bill' (6 February 2004) and 'Alan Hiscock retreats to lick his wounds' *Business Report* (8 February 2004).

<sup>71</sup> H S Cilliers et al *Corporate Law* 2 ed (1992) para 1.23 p 11.

<sup>72</sup> Close Corporations Act 69 of 1984 ss 64 and 65.

<sup>73</sup> This paragraph was inserted in the Income Tax Act by s 86(b) of the Revenue Laws Amendment Act 45 of 2003. The VAT Act contains a similar provision in s 48(9).

or state of mind of the shareholder or director of the company. It only requires the director of the company to control or be regularly involved in managing the company's financial affairs. Paragraph 16(2C) of the Fourth Schedule of the Income Tax Act is thus harsh where there is no direct involvement by a director in the daily business of the company.

The rationale for this provision is that the amounts of employees' tax due by an employer to the Commissioner constitute 'trustee funds'.<sup>74</sup> An employer must withhold and deduct employees' tax under the Fourth Schedule of the Income Tax Act from remuneration paid to its employees and pay those amounts to the Commissioner on behalf of its employees.<sup>75</sup> Similarly, VAT collected by vendors from members of the public also constitutes 'trustee money' due to the Commissioner.<sup>76</sup>

Where a company fails to pay assessed income tax the Commissioner is unable to recover such tax from the directors or shareholders of the company under the Income Tax Act.<sup>77</sup> The Act does not override the general principle limiting the liability of a company's shareholders.

I question whether the provisions of para 16(2C) of the Fourth Schedule of the Income Tax Act and s 48(9) of the VAT Act comply with the principles contained in the Constitution. Where the shareholders or directors conduct a business negligently, or with the intention to defraud the Commissioner, such persons should lose the protection available to them under s 424 of the Companies Act. Where the directors administer the business according to sound financial principles and the business fails it is questionable why the Commissioner should be able to recover unpaid employees' tax, additional tax, penalties and interest from the directors personally. I suggest the affected persons could argue that para

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<sup>74</sup> Income Tax Act para 2 of the Fourth Schedule read with para 16(2C).

<sup>75</sup> Ibid para 2 of the Fourth Schedule.

<sup>76</sup> VAT Act s 48(9). According to 'Penalties And Offences' (2004) 24 *Weekly Tax Bulletin* (ATP) item 993 p 878 directors and offices of a corporation in Australia may, in certain cases, be held personally liable for '... unremitted PAYG and GST' (Australian GST is similar to our VAT).

<sup>77</sup> From a review of the provisions of the Income Tax Act it is apparent that the Commissioner cannot recover income tax from the directors and shareholders of a company utilising the provisions of that Act.

16(2C) of the Fourth Schedule of the Income Tax Act constitutes a violation of the taxpayers' right to property in s 25 of the Constitution.

A director of a company has a fiduciary duty to the company and must act with care and skill.<sup>78</sup> The failure by a director to pay over employees' tax and/or VAT could constitute a breach of the director's statutory duty to the company.

I accept that public interest demands that the Commissioner should rank preferentially *vis-à-vis* the taxpayer's other creditors. However, the legislature could have introduced less punitive measures to protect the Commissioner. Currently the Commissioner enjoys preference over other creditors in relation to the payment of debts due by liquidated or sequestrated taxpayers.<sup>79</sup> The recovery provisions under consideration should require negligence, recklessness, or an intention by the taxpayer not to pay SARS. The measures are thus too broad and require to be reviewed and narrowed down in the manner suggested.

Interest, additional tax and penalties levied by the Commissioner do not constitute funds held in trust by a taxpayer. The right to recover such amounts from a member of a close corporation or director or shareholder of a company may be invalid. Unfortunately, no cases have been decided that deal with this principle. The requirement to pay the interest, additional tax and penalties on employees' tax and VAT could constitute an arbitrary deprivation of the director's property where that director has acted reasonably.

## VII DOES THE IMPOSITION BY THE COMMISSIONER OF ADDITIONAL TAX AND INTEREST VIOLATE THE RIGHT TO PROPERTY?

The Income Tax and VAT Acts both contain provisions whereby additional tax, if imposed, may amount to up to twice the tax that would otherwise have been payable by a taxpayer.<sup>80</sup> The other fiscal statutes

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<sup>78</sup> Cilliers et al (note 71 above) para 10.09 p 135 and para 10.22 p 142.

<sup>79</sup> See Insolvency Act 24 of 1936 s 101.

<sup>80</sup> For example, s 76 of the Income Tax Act and s 39 of the VAT Act, which contains a similar provision.

administered by the Commissioner also contain provisions allowing for the imposition of additional tax.<sup>81</sup> In addition, a taxpayer faces the imposition of certain penalties and fines provided for in the various fiscal statutes.<sup>82</sup>

The Commissioner has the power to levy a penalty equal to 10 per cent of PAYE paid late.<sup>83</sup> The Commissioner may levy a late payment penalty under various fiscal statutes in those cases where the taxpayer fails to pay tax timeously.<sup>84</sup>

Section 75 of the Income Tax Act specifies those actions which will constitute an offence under the Income Tax Act. A taxpayer who violates s 75 faces criminal prosecution and, if convicted, exposure to a fine or imprisonment for any of the offences listed in s 75 of the Income Tax Act.<sup>85</sup>

Further, the Commissioner may levy interest at the prescribed rate in those cases where tax is overdue or where there is late payment of provisional tax.<sup>86</sup> In countries abroad, the opinion is that the imposition of interest by the Commissioner is a form of penalty imposed on the taxpayer.<sup>87</sup> The conclusion is that taxpayers should be subject to interest or penalties but not both, as this amounts to them facing a similar impost for the same offence.

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<sup>81</sup> See, eg, s 17A of the Transfer Duty Act 40 of 1949, inserted by way of s 7(1) of the Revenue Laws Amendment Act 45 of 2003. The Commissioner must exercise his discretion in determining the quantum of the additional tax imposed. I will consider this aspect further in ch 5, dealing with the taxpayer's right to administrative justice.

<sup>82</sup> See, eg, Income Tax Act para 6(1) of the Fourth Schedule and s 75; VAT Act ss 39(i), 58 and 59; Transfer Duty Act 40 of 1949 ss 4 and 17.

<sup>83</sup> Income Tax Act para 6(1) of the Fourth Schedule provides: 'If an employer fails to pay any amount of employee's tax for which he is liable within the period allowable for payment thereof in terms of para 2 he shall, in addition to any other penalty or charge for which he may be liable under this Act, pay a penalty equal to 10 per cent, of such amount.'

<sup>84</sup> See, eg, VAT Act s 39, which also imposes a penalty for the late payment of VAT.

<sup>85</sup> The fiscal statutes administered by the Commissioner contain a schedule of offences peculiar to the fiscal statute concerned. Where taxpayers commit the offence listed in the respective fiscal statute they stand exposed either to the imposition of a fine or to a term of imprisonment if they are convicted.

<sup>86</sup> See, eg, Income Tax Act s 89, which levies interest on overdue tax, and s 89 quat, which imposes interest on late or underpayment of provisional tax; also similar provisions in the VAT Act and other fiscal statutes. This is also the case with the skills development levy and unemployment insurance contributions.

<sup>87</sup> Note 57 above para 3.39 p 19.

The tax due, as well as any penalties and additional tax levied by the Commissioner, is subject to interest, thus increasing the interest finally payable.

Under s 89 of the Income Tax Act South African taxpayers may be subject to interest on the late payment of assessed tax and additional tax. The imposition of the penalties, additional tax and fines provided for in the various fiscal statutes may have dire financial consequences for taxpayers and directly affects their right to property.

Arnold deals with penalties imposed in South Africa as follows:

*'B.3.9.1 Comparison of the Canadian and South African provisions*

...

The basic approach of the Canadian Income Tax Act to penalties is considerably different from the approach in s 75 of the South African Income Tax Act. Under the provisions of the Canadian Income Tax Act, different penalties are provided for different offences. In this way, serious fines and imprisonment are restricted to serious offences such as tax evasion. Minor offences such as the late filing of a tax return are punishable by minor financial penalties.

...

*B.3.9.2 Reasonableness*

In my opinion, it is inappropriate, even if not unconstitutional, for major and minor offences to be subject to the same penalty and then to rely on the authorities not to impose penalties on what they perceive to be minor offences.

...

*B.3.9.5 Suggested reforms*

In light of the foregoing discussion, it seems appropriate for the penalty provisions of the South African Income Tax Act to be reviewed and restructured. There should be civil penalties that apply automatically where the taxpayer or another person fails to provide the necessary information or provides incorrect or false information. The amount of the penalty should be appropriate to the nature of the offence. ... In some situations it may be appropriate for the amount of the penalty to be based on the amount of the understatement of the taxpayer's tax liability. Criminal penalties should be restricted to serious offences such as tax evasion.<sup>88</sup>

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<sup>88</sup> B J Arnold Opinion prepared for the Commissioner of Inland Revenue for the Republic of South Africa, Annexure H to Affidavit filed by Mr T F Van Heerden, former Commissioner for Inland Revenue, to the Constitutional Court application CCT/22/96 pp 62-68. Bentley (note 62 above) 120 indicates that penalties in Canada vary according to the nature of the offence and whether it is a repeat offence.

The position in other countries will assist in determining whether the imposition of additional tax and other penalties violates the taxpayer's constitutional right to property.

Bentley writes of penalties imposed in other countries:

'Penalties are normally set out in statutes or regulations. It should be clear when they apply and in what circumstances. There should also be guidelines setting out how the tax authorities will exercise any discretion that they have in imposing penalties.'<sup>89</sup>

The penalties imposed by the Inland Revenue Department, New Zealand, take account of shortfalls identified in the taxpayer's income, and whether such identification takes place, for example, before or after notification of an audit.<sup>90</sup> In New Zealand, writes Alston,

'[t]he civil penalties include "shortfall penalties" for which standard rates are set but which may be either reduced, if the taxpayer makes a voluntary disclosure or if the shortfall is temporary in nature, or increased if the taxpayer obstructs the Commissioner in determining the correct tax position.'<sup>91</sup>

New Zealand allows for an increase in penalties if the taxpayer seeks to obstruct the New Zealand Revenue. The revenue authorities reduce the penalties where the taxpayer co-operates and assists, or advises the revenue department of the shortfall before an audit starts.<sup>92</sup>

Sommerhalder & Pechler summarise the position in the Netherlands as follows:

'In certain circumstances the tax inspector can increase the assessment. An administrative penalty of 100% is given if an additional assessment is necessary due to the intent or gross negligence of the taxpayer (AWR Art 18). The inspector, however, may remit all or any part of this penalty at her or his discretion (VAB para 18). Unless severe fraud is involved, the actual fine is usually reduced to 50% or lower.

The taxpayer may be punished by criminal sanctions for filing a return irregularly, too late or not at all, for furnishing the tax

<sup>89</sup> Bentley (note 62 above) 54.

<sup>90</sup> A Alston 'Taxpayers' Rights in New Zealand' in Bentley (note 33 above) 280. The standard rate of penalties may be reduced by 75 per cent if disclosure is made before notification of an audit. If it is made after notification of an audit, the reduction is 40 per cent. Where the disclosure is made at the time of filing the return the penalty is reduced by 75 per cent. However, if the taxpayer obstructs the authorities the penalty is increased by 25 per cent.

<sup>91</sup> Ibid 280.

<sup>92</sup> Ibid.

administration with incorrect or incomplete information, for providing the tax administration with incorrect or incomplete information, for providing the tax administration with false or falsified books and other records, for not keeping proper books and other records while obliged to do so, or for failing to preserve these books and records for a period of 10 years (ADW Art 68 (1)).<sup>93</sup>

At 100 per cent the penalties in the Netherlands are thus half the 200 per cent the Commissioner may levy in South Africa.<sup>94</sup> However, according to the OECD survey, penalties in countries abroad range from 40 per cent in Sweden and Japan to as much as 300 per cent in Turkey and 400 per cent in Switzerland.<sup>95</sup>

Unfortunately South African fiscal legislation, unlike that of other countries, does not contain a graduated system of penalties depending on the particular nature of the offence. Under the Income Tax Act the Commissioner may impose additional tax up to twice the normal tax otherwise payable, regardless of the offence committed. In practice, the question of additional tax may be subject to agreement and negotiation between the taxpayer and the Commissioner. In the 2006 Budget Speech the Minister of Finance said that, in future, guidelines would specify the circumstances under which the Commissioner may impose additional tax.<sup>96</sup> Unfortunately, these guidelines remain outstanding.

The penalties, additional tax and fines leviable under the various fiscal statutes constitute a deprivation of the taxpayer's property. Given that the provisions levying these amounts constitute laws that are not arbitrary and are generally applicable to all taxpayers they are lawful under s 25(1) of the Constitution. Fiscal statutes around the world contain provisions whereby the revenue authority of the country concerned may levy, inter alia, fines and penalties on defaulting taxpayers to improve taxpayer compliance. It is contended that the penalty and related

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<sup>93</sup> R A Sommerhalder & E B Pechler 'Protection of Taxpayers' Rights in the Netherlands' in Bentley (note 62 above) 327 and 328.

<sup>94</sup> This is particularly the case with income tax, in accordance with s 76 of the Income Tax Act, and VAT, where s 60 of that Act allows for the Commissioner to impose additional tax up to 200 per cent of the VAT not paid over.

<sup>95</sup> Note 57 above paras 3.39 and 3.40 p 19.

<sup>96</sup> 15 February 2006, National Treasury Budget Review 82.

provisions are reasonable, necessary and justifiable in an open and democratic society to ensure that the State timeously collects the taxes due to it. It is thus unlikely that a taxpayer would succeed in showing that the imposition of penalties, additional tax and fines constitutes an unlawful violation of his or her right to property.

#### VIII DOES THE PROHIBITION ON PAYMENT OF INTEREST ON DELAYED VAT REFUNDS BREACH THE RIGHT TO PROPERTY?

Normally a vendor may receive interest under the VAT Act if the VAT refund due remains unpaid within 21 business days after submitting a VAT return to the Commissioner.<sup>97</sup> Where a VAT return is defective interest is only payable from the date on which the information not previously supplied becomes available to the Commissioner.<sup>98</sup> Similarly, if the Commissioner conducts an audit of the taxpayer's affairs, interest is due only on completion of the audit.<sup>99</sup> If a VAT vendor reflects VAT refundable and has failed to supply VAT returns to the Commissioner, interest is not normally payable until that vendor submits the outstanding VAT returns.

Section 45(1)(iA) of the VAT Act prevents the Commissioner from paying interest on any VAT refund due if he identifies a vendor as not having submitted a return due under any other fiscal statute.

The section provides as follows:

'Where the vendor is in default in respect of any of his obligations under this Act *or any other Act administered by the Commissioner*, to furnish a return as required by such Act, the said period of 21 business days shall be reckoned from the date on which any such outstanding return or returns furnished by the vendor as required by such Act are received by an officer of the South African Revenue Service.' [my emphasis].<sup>100</sup>

Thus, if the vendor neglects to submit PAYE or Unemployment Insurance Fund contributions or other returns to the Commissioner

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<sup>97</sup> The VAT Act s 45(1).

<sup>98</sup> Ibid s 45(1)(i).

<sup>99</sup> Ibid s 45(1)(ii).

<sup>100</sup> See also VAT Act s 39(1)(a)(ii).

interest is not payable on the VAT refund due to the vendor. This is regardless of the amount due under the other statute or the nature of the return not submitted to the Commissioner.

The Income Tax Act 27 of 1997 inserted s 45(1)(iA) into the VAT Act 89 of 1991, further amending it by Acts 30 of 1998 and 60 of 2001. The Explanatory Memorandum on Act 60 of 2001 referred to the amendment to s 45(1)(iA) of the VAT Act 'as textual in nature'. However, in practice, the Commissioner sometimes delays paying significant amounts of VAT refunds due to vendors. He also refuses to pay interest either because the vendor owes a small amount under another fiscal statute or because the Commissioner has not received a return required under another fiscal statute. The difficulty a vendor faces is where the vendor has submitted to the Commissioner the returns required under another fiscal statute and the Commissioner is unable to locate those returns in his office. In practice the Commissioner has, in such cases, relied on s 45(1)(iA) as a reason for not paying interest on the delayed refund of VAT legally due to the taxpayer.

Section 45(1)(iA) of the VAT Act constitutes a law of general application as envisaged in s 25(1) of the Constitution. I submit that it violates the taxpayer's constitutional right to property contained in s 25 on the basis that the provision constitutes an unlawful deprivation of the taxpayer's property. To require that a taxpayer forfeit interest on an overpayment of VAT regardless of the taxpayer's circumstances or the nature of the offence allegedly committed is arbitrary. Interest should only be suspended under s 45(1)(iA) where the offence committed under another fiscal statute is serious. For example, the failure to submit a nil provisional tax return should not result in a suspension of interest as the Commissioner may achieve his objective by less draconian means. It is more reasonable if, in such cases, there is a suspension of interest due on the income tax until the taxpayer becomes entitled to interest on the VAT overpaid.

I contend that the provisions of s 36 of the Constitution do not assist the Commissioner, as the effect of s 45(1)(iA) is disproportionate to the

offence committed under another fiscal statute. The provisions contained in s 45(1)(iA) of the VAT Act are unreasonable and unjustifiable in an open and democratic society.

Amendments to s 45(1)(iA) should provide the Commissioner with the discretion to pay interest to vendors where the violation of the other fiscal statute is inconsequential. The legislature should introduce less restrictive means to achieve the Commissioner's purpose of ensuring compliance with other fiscal statutes.

#### IX DOES THE ENACTMENT OF FISCAL AMENDMENTS WITH RETROSPECTIVE EFFECT BREACH THE RIGHT TO PROPERTY?

May a taxpayer challenge the effective date of an amendment to the Income Tax Act on the basis that it breaches the right to property if it is introduced with retrospective effect?

Amendments to fiscal legislation normally take effect from a date after enactment. However, on occasion the National Treasury proposes tax legislation that takes effect retrospectively. I contend that the introduction of fiscal legislation with retrospective effect constitutes a deprivation of property as envisaged in s 25 of the Constitution.<sup>101</sup> Ideally, a change in taxing measures should relate to future events because if it relates to past events it constitutes confiscation of property held by the taxpayer before the measure's enactment.<sup>102</sup>

The Constitution contains no specific prohibition against the introduction of tax amendments with retrospective effect. I refer to commentators on the experience of other countries. Bentley writes:

‘A problem fundamental to taxation is retroactive legislation. One of the tenets of most legal systems is that legislation should not have retrospective effect. Citizens have a right to be required to

<sup>101</sup> See A Duncan ‘Hidden Assets’ *De Rebus* (July 2004) 30, where the view is expressed that if the legislature retrospectively rescinded the amnesty granted under the Exchange Control Amnesty and Amendment of Taxation Laws Act 12 of 2003 this would constitute a violation of s 25.

<sup>102</sup> For example, when the legislature decided to introduce CGT the legislation was drafted in order to ensure that CGT did not arise on capital gains attributed to the period prior to 1 October 2001, that is, the date on which CGT came into force. See, eg, paras 25, 29 and 30 of the Eighth Schedule to the Income Tax Act.

act only in accordance with laws enacted by the legislature and not simply in accordance with statements of legislative intention. Tax laws stretch this rule to its limit. However, even tax legislation is seldom passed so that the law applies from a date earlier than the date that the legislation was first announced. That would be to require taxpayers to obey a law which was yet to be foreshadowed. However, tax legislation is notorious for giving effect to vague forms of earlier announcements or indications that a law would be passed in that area.<sup>103</sup>

According to Bentley there are different forms of retrospective legislation.<sup>104</sup> The legislature often introduces amendments giving effect to earlier, administrative interpretations of the law. Retrospective legislation also includes announcing the enactment of amendments, ultimately broader in nature and effect than originally indicated, to achieve the desired result. However, the legislation as enacted takes effect from the date of the earlier announcement. Bentley states that in those countries adopting self-assessment with onerous penalties for non-compliance, the taxpayer should have a legitimate expectation of certainty in the tax laws – for instance, legislation should not be introduced via media release.<sup>105</sup> He concludes that such procedure is ‘offensive’ and ‘unfair’ in a democratic society.<sup>106</sup>

Bentley indicates that the introduction of retrospective legislation is justifiable in those cases to correct wrongs done to taxpayers, to confer benefits that do not prejudice taxpayers and to rectify errors in legislation.<sup>107</sup> He expresses the view that, in order to close identified loopholes, it is occasionally necessary for government to introduce measures that take effect from the date of the announcement.<sup>108</sup>

Li points out that in Canada tax legislation often takes effect on the date it is announced in the Budget Speech.<sup>109</sup> This is despite the fact that it might be a considerable time before the legislation is enacted. She points out that this creates uncertainty from the date of the announcement

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<sup>103</sup> Note 62 above 38.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> J Li ‘Taxpayer’s Rights in Canada’ in Bentley (note 62 above) 134.

until the proposed measure is enacted and that a lengthy waiting period may undermine the rule of law. Li states that the Canadian courts have refused to upset the budgetary process.

She indicates that under the Canadian Constitution Parliament and the provincial legislatures have an unfettered discretion in deciding the effective dates of new tax laws and points out that the Canadian Charter of Rights requires that the intended retrospective effect must be clear and unequivocal. Based on Li's commentary it appears that the Canadian courts have ruled that retrospective tax legislation does not undermine the rule of law or violate the provisions of the Charter.

Considering the position in Germany Daiber comments that taxpayers' rights include the right to certainty and the prohibition of laws which apply retrospectively.<sup>110</sup> She correctly expresses the view that retroactivity takes two forms: '[u]nder one form, future legal consequences are established but are based on past facts. Under the other form the legal consequences based on past facts are retroactive.'<sup>111</sup> . The second form is unconstitutional under German law.<sup>112</sup>

Dealing with the question of retrospective tax legislation generally Baker states:

'There is no clear consensus that retrospective tax legislation breaches the rights of taxpayers. This view is taken in certain countries (see, for example, Article 3 of the Italian Law 212 of 27<sup>th</sup> July 2000), and tax legislation in these countries may not be retrospective. In keeping with the principle of the rule of law and its corollary – certainty with respect to taxation – there is much to be said, however, for recognising this principle.'<sup>113</sup>

Several countries thus prohibit the introduction of fiscal amendments with retrospective effect.

At the time the Constitution was being drafted I proposed to the Constitutional Assembly that a specific provision be included prohibiting

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<sup>110</sup> C Daiber 'Protection of Taxpayers' Rights in Germany' in Bentley (note 62 above) 159.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

<sup>113</sup> P Baker & A-M Groenhagen *The Protection of Taxpayers' Rights – An International Codification* (2001) 41.

fiscal amendments from being introduced with retrospective effect.<sup>114</sup>

Unfortunately, the Constitutional Assembly decided not to include such a provision. The introduction of such retrospective amendments must therefore be weighed against the existing provisions of the Constitution.

The budget speech of South Africa's Minister of Finance, made in Parliament in February each year, includes the announcement of changes to tax rates. Shortly thereafter, the National Treasury releases for comment the legislation effecting those amendments. Parliament then passes the legislation, which the President enacts by proclamation in the *Government Gazette* in June or July. This approach is the most practical way to give legal effect to the tax announcements made in the Budget Speech. What causes concern is the enactment on one date of fiscal amendments which take effect on another date, sometimes even earlier than the date on which the Minister of Finance first announced them.

I agree that retrospective amendments should apply to those cases where the loss of revenue to the State would be significant.<sup>115</sup> It is also important that amendments enacted should not extend beyond the ambit of the State's prior announcements.<sup>116</sup>

Is it possible to challenge an amendment on the grounds that it is retrospective and should be set aside in that it violates the taxpayer's constitutional right to property? The statute enacting an amendment is a law of general application and it would be difficult to set the amendment aside because of the limitation provisions contained in s 36 of the Constitution. Fiscal amendments apply generally, and not to particular taxpayers because of their specific characteristics or other features and thus should be lawful.

The limitation of rights provision in s 36 of the Constitution specifically refers to 'less restrictive means to achieve the purpose'. Clearly, it is preferable and more equitable for an amendment to take

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<sup>114</sup> B J Croome correspondence addressed to the Constitutional Assembly dated 5 September 1995 and 3 October 1995.

<sup>115</sup> Bentley (note 62 above) 38.

<sup>116</sup> Ibid.

effect prospectively so that it applies to years of assessment commencing on or after a specified date.

It is appropriate to consider the effect, if any, of section 1 of the Constitution, which contains the foundational values of the Constitution. That section refers, *inter alia*, to the 'supremacy of the Constitution and the rule of law'. It is necessary to consider whether this provision may assist in arguing successfully that retrospective amendments to fiscal statutes are unlawful.

In *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders*<sup>117</sup> the Court stated:

'The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of section 1 itself, but also from the way the Constitution is structured and in particular the provisions of chapter 2 which contains the Bill of Rights.'<sup>118</sup>

The rule of law set out in s1 requires that the State act lawfully and that nobody is arbitrarily deprived of rights.<sup>119</sup>

Devenish comments on the rule of law and statutes introduced with retrospective effect as follows:

'The rule of law provides for a weak form of constitutionalism, since as Jowell explains, no English court would strike down legislation that introduced punishment without trial, or statute with retrospective effect. Nonetheless, he argues that respect for the rule of law might inhibit the legislature from passing such laws.'<sup>120</sup>

The courts in South Africa have not struck down legislation introduced with retrospective effect on the basis that it violates the rule of law. In *President of the Republic of South Africa v Hugo*<sup>121</sup> Mokgoro J stated that '[t]he need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to

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<sup>117</sup> 2005 (3) SA 280 (CC).

<sup>118</sup> *Ibid* para 21.

<sup>119</sup> Devenish (note 4 above) 14.

<sup>120</sup> *Ibid* 15.

<sup>121</sup> 1997 (4) SA 1 (CC).

know of the law, and be able to conform his or her conduct to the law.<sup>122</sup>

In *National Director of Public Prosecutions v Carolus and Others*<sup>123</sup> Farlam AJA decided that ch 6 of the Prevention of Organised Crime Act<sup>124</sup> was not intended to be retrospective because of the wording used to introduce the chapter. He also referred to the ‘cumulative effect of the unfairness, the legal culture leaning against retrospectivity where there is unfairness’.<sup>125</sup>

In introducing ch 6 of the Prevention of Organised Crime Act Parliament did not refer to offences committed ‘before or after the commencement of this Act’.<sup>126</sup> The effect of the rules of statutory interpretation is that amendments are introduced with prospective effect unless the legislature unequivocally provides that the legislation shall have retrospective effect.<sup>127</sup>

In *Anglo Platinum Management Services (Pty) Ltd and Others v Minister of Safety and Security and Others*<sup>128</sup> Van Oosten J was required to consider the validity of regulations introduced with retrospective effect under the Private Security Industry Regulation Act.<sup>129</sup> He commented as follows:

‘To revert to the question relating to retrospectivity. The rule against retrospectivity has become firmly entrenched in administrative law. It is founded upon the principle of legal certainty which in turn is derived from the rule of law. Where the exercise of powers affects rights and/or legitimate expectations retrospectivity clearly undermines the constitutional principle of the rule of law. This aspect received the attention of the Constitutional Court in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) paragraph [39] where the following extract

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<sup>122</sup> Ibid para 102.

<sup>123</sup> 2000 (1) SA 1127 (SCA) 1145.

<sup>124</sup> Act 121 of 1998.

<sup>125</sup> Note 123 above 1145.

<sup>126</sup> Ibid para 60 p 1145.

<sup>127</sup> I Currie & J Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001) para 2.39 p 84. See further *Minister of Safety and Security v Molutsi and Another* [1996] 4 All SA 535 (A).

<sup>128</sup> [2006] 4 All SA 30(T).

<sup>129</sup> Act 56 of 2001.

from De Smith, Woolf and Jowell *Judicial Review of Administrative Action* 5 ed at 14-14 was quoted with approval:

“...In addition, the rule of law embraces some internal qualities of all public law: that it should be certain, that is ascertainable in advance so as to be predictable and not retrospective in its operation; and that it be applied equally, without unjustifiable differentiation.”<sup>130</sup>

Regulation 10(3) of the regulations promulgated under the Private Security Regulation Act was declared null and void and of no force and effect because it purported to take effect retrospectively. This was because the public official who had made the decision was *functus officio* and could not alter his decision unless the empowering statute specifically authorised him to do so. Thus, the exemptions granted by the Minister of Safety and Security to Anglo Platinum Management Services (Pty) Ltd could not be amended by the introduction of regulations containing a time limit relating to the duration of those exemptions. The regulations were therefore held to be invalid because they did not conform to the provisions of the Act and also did not follow the process required under the Constitution and s 3 of the Promotion of Administrative Justice Act.<sup>131</sup>

In *Anglo Platinum*<sup>132</sup> the court was required to consider the validity of regulations introduced with retrospective effect. Unfortunately, no case could be identified in which a court considered an amendment to a statute introduced with retrospective effect and it remains to be seen what a court will decide if the Minister of Finance introduces amendments to the Income Tax Act with retrospective effect and a taxpayer challenges the introduction on the basis that it violates the rule of law contained in the foundational principles of the Constitution. The principle may soon be tested on the ground that amendments contained in the Pension Funds Secondment Act<sup>133</sup> are retrospective and thus invalid under the Constitution.<sup>134</sup>

<sup>130</sup> *Anglo Platinum* (note 128 above) 38 and 39.

<sup>131</sup> Act 3 of 2000.

<sup>132</sup> Note 128 above.

<sup>133</sup> Act 39 of 2001.

<sup>134</sup> M Hamlyn ‘Retrospective Bill for pension funds may be challenged’ *Business Report, The Star* (4 June 2007).

Thus it appears that the introduction of fiscal amendments with retrospective effect constitutes a deprivation of property, but it is difficult to show that such amendments are arbitrary and thus unlawful where they apply to taxpayers generally. It remains to be seen what impact the proposed Interpretation of Legislation Bill may have on the position.<sup>135</sup>

## X CONCLUSION

From the above analysis of a taxpayer's right to property weighed against certain provisions of the fiscal statutes it seems that taxpayers will find it difficult to satisfy a court that the Commissioner has violated their right to property. Many of the provisions of the South African fiscal legislation exist in the fiscal legislation of other open and democratic societies. This complicates matters for taxpayers in challenging the constitutional validity of the violation of the right to property contained in s 25 of the Constitution.

It is appropriate to summarise the above analysis by distinguishing those powers of the Commissioner which do not appear to constitute an unlawful deprivation of a taxpayer's property from those which would appear to do so.

The State needs funds to fulfil its constitutional mandate and thus it is unlikely that a taxpayer will satisfy a court that taxation is an unjustified deprivation of property violating the constitutional right to property enshrined in s 25. Furthermore, a taxpayer is unlikely to successfully challenge the Commissioner's power to impose additional tax, penalties and interest as constituting an unlawful deprivation of property. It is unfortunate that the fiscal statutes do not contain rules setting out what level of additional tax should be imposed for different types of offences. It would be far preferable if a system of graduated additional tax were introduced in South Africa, as is the case in a number of other open and democratic societies.

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<sup>135</sup> Interpretation of Legislation Bill, 2006 and South African Law Reform Commission Discussion Paper 112, Statutory Revision: Review of the Interpretation Act 33 of 1957 (Project 25), September 2006 p 257, available at <http://www.doj.gov.za/salrc/index.htm>, accessed 9 January 2008.

Some democracies outlaw fiscal amendments which have retrospective effect. It is most unfortunate that the South African Constitution does not contain such a prohibition. A case may be pursued on the basis that retrospective amendments are repugnant to the rule of law but it remains to be seen whether a court will strike down retrospective legislation on this ground. Fiscal amendments should only be introduced with retrospective effect where the integrity of the tax system is at stake.

Should the State introduce a taxing measure targeting only a selected section of the population or which is disproportionate to the State's objectives a court should strike such provision down as being unreasonable in an open and democratic society and as constituting a deprivation of property in breach of s 25 of the Constitution.

It is unfortunate that South African taxpayers cannot apply set-off for tax debts due to the Commissioner where the State, especially the Commissioner, is indebted to that taxpayer for services rendered. It is inequitable that a business that has rendered services to the State should be allowed to fail because it is unable to meet debts due to the Commissioner because the Commissioner has itself not paid a debt due to the business.

The tax laws should be amended to relax the strict rules applicable to withholding refunds from taxpayers where the Commissioner has issued an incorrect assessment or where the taxpayer prosecutes an appeal to the Tax Court or a higher court. Failure to effect timeously a refund to the taxpayer constitutes an undue violation of the taxpayer's right to property enshrined in s 25(1). In addition, where a refund due to a taxpayer is unduly delayed the Income Tax Act should compel the Commissioner to pay interest to a non-provisional taxpayer as the delay may amount to unlawful deprivation. Furthermore, the legislation should prescribe the period within which the refund should be paid.

I contend that in certain well-defined cases the exposure of the Commissioner to the risk of being liable to pay compensation to taxpayers

would improve the administration of the tax system in South Africa. It would also prevent the deprivation of property that arises where the taxpayer incurs costs in meeting unreasonable demands for information from the Commissioner. Examples of this conduct are where the Commissioner investigates the taxpayer to obtain proprietary information for purposes other than for administering the fiscal statutes or where his officials harass the taxpayer, causing the taxpayer to incur costs. Other countries permit the payment of compensation to taxpayers where they incur costs because of inappropriate conduct of the revenue authority's officials. A well-defined set of rules governing the payment of compensation should be introduced.

In addition, the statutory prohibition on the Commissioner paying interest on a VAT refund due to a taxpayer, where a taxpayer has failed to comply with his/her other fiscal obligations, is disproportionately harsh and constitutes an undue deprivation of the taxpayer's property, breaching s 25(1) of the Constitution. The VAT Act should be amended to allow the Commissioner to take the nature of the offence into account in deciding whether or not to pay interest on the delayed VAT refund.

The taxpayer's recourse in dealing with the Commissioner may, based on the above analysis, lie elsewhere. Taxpayers may be able to rely on other rights contained in the Constitution, particularly the right to just administrative action contained in s 33 and considered in chapter 5.

In the following chapter I analyse the taxpayer's right to privacy and its impact on certain powers conferred on the Commissioner under South Africa's various fiscal statutes.

## CHAPTER 4

### THE RIGHT TO PRIVACY

*‘Over himself, over his own body and mind, the individual is sovereign.’<sup>1</sup>*

#### I INTRODUCTION

This chapter examines certain powers conferred on the Commissioner in the light of the right to privacy contained in the Constitution. Under the fiscal statutes administered by the Commissioner his officials have certain powers, such as the power to call for information from taxpayers and to conduct audits on taxpayers’ affairs. If the Commissioner’s powers violate the taxpayer’s right to privacy it is necessary to ascertain whether that infringement is reasonable and justifiable in an open and democratic society.

Section 14 of the Constitution confers a right to privacy, as follows:

‘Everyone has a right to privacy, which includes a right not to have –

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

The use of the word ‘includes’ in s 14 indicates that the list is not exhaustive.<sup>2</sup>

Before the introduction of the Interim Constitution South African citizens had a common law right to privacy aimed at protecting their dignity and integrity, and s 14 expands on this right.<sup>3</sup>

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<sup>1</sup> J S Mill *On Liberty* (1985) 69.

<sup>2</sup> See *De Beers Holdings (Pty) Ltd v CIR* 1986 (1) SA 8 (A), [1985] 47 SATC 229.

<sup>3</sup> M Chaskalson et al *Constitutional Law of South Africa* (1994) para 18.2 p 18-2 states:

‘Section 14 creates a constitutional right to privacy. The supremacy of the Constitution does not, however, mean that all previous notions of privacy will be forgotten and fall into disuse. The courts will inevitably retain those existing common-law actions which are in harmony with the values of the Constitution.

South African courts have had little difficulty in recognising a common-law action for invasion of privacy under the broad principles of the *actio injuriarum*. One suggested definition for this delict is “an intentional and wrongful interference with another’s right to seclusion in his or [her] private life”.’

It is appropriate to consider first what the term 'privacy' means. The *Concise Oxford Dictionary* defines privacy as:

- 'n 1. (a) The state of being private and undisturbed.
- (b) A person's right to this.
- 2. Freedom from intrusion or public attention.
- 3. Avoidance of publicity.<sup>4</sup>

The *Bill of Rights Handbook* considers the common law right to privacy as follows:

'The common law recognises the right to privacy as an independent personality right which the courts considered to be part of the concept of a person's "dignitas". At common law, the breach of a person's privacy constitutes an iniuria. It occurs when there is an unlawful intrusion on someone's personal privacy or an unlawful disclosure of private facts about a person.'<sup>5</sup>

Under the common law it was necessary to assess whether the invasion of the citizen's privacy was unlawful or not.<sup>6</sup>

In *Constitutional Law of South Africa* the authors comment on the meaning of 'privacy' as follows:

'Privacy has been variously defined. It has been described as "an amorphous and elusive" concept. The scope of privacy has been said to be closely related to the concept of identity. At the very least, the right to privacy includes the right to be free from intrusion and interference by the State and others in one's personal life. This second connotation of privacy implies that individuals have control not only over who communicates with them but also who has access to the flow of information about them.' [footnotes omitted].<sup>7</sup>

In *Bernstein and Others v Bester N.O. and Others*<sup>8</sup> Ackermann J explained the meaning of the term 'privacy'.

"Privacy is an individual condition of life characterised by seclusion from the public and publicity. This implies an absence of acquaintance with the individual or his personal affairs in this state." ... The unlawfulness of a (factual) infringement of privacy is adjudged "in the light of contemporary *boni mores* and the general sense of justice of the community as perceived by the Court".

<sup>4</sup> *The Concise Oxford Dictionary of Current English* (1992) 949.

<sup>5</sup> J De Waal et al *The Bill of Rights Handbook* 4 ed (2001) 268.

<sup>6</sup> *Ibid* 269.

<sup>7</sup> See, eg, Chaskalson (note 3 above) 18-1.

<sup>8</sup> 1996 (4) BCLR 449 (CC).

Examples of wrongful intrusion and disclosure which have been acknowledged at common law are entry into a private residence, the reading of private documents, listening into private conversations, the shadowing of a person, the disclosure of private facts which have been acquired by a wrongful act of intrusion, and the disclosure of private facts contrary to the existence of a confidential relationship. These examples are all clearly related to either the private sphere, or relations of legal privilege and confidentiality. There is no indication that it may be extended to include the carrying on of business activities.' [footnotes omitted].<sup>9</sup>

Ackermann J commented further on the right to privacy by referring to a resolution of the Consultative Assembly of the Council of Europe, which stated:

"The right to privacy consists essentially in the right to live one's own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection from disclosure of information given or received by the individual confidentially."

And in the final conclusions of the Nordic Conference on the Right to Respect for Privacy of 1967 the following additional elements of the right to privacy are listed:

"The prohibition to use a person's name, identity or photograph without his/her consent, the prohibition to spy on a person, respect for correspondence and the *prohibition to disclose official information*".<sup>10</sup>

The right to privacy contained in the Constitution aims to protect the dignity of citizens and ensure that they may enjoy their space and their mode of living without undue invasion by the State or others.

However, it is necessary to establish whether the infringement of that right is justifiable under the limitation clause contained in s 36 of the Constitution.<sup>11</sup>

In *Bernstein*<sup>12</sup> Ackermann J held that the scope of the right to privacy must be considered in light of the rights of others and the interests of the community:

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<sup>9</sup> Ibid 484 and 485.

<sup>10</sup> Ibid 486.

<sup>11</sup> De Waal (note 5 above) 269. The limitation of rights is considered in ch 2 above.

<sup>12</sup> Note 8 above.

‘The truism that no right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.’<sup>13</sup>

In principle, what a person chooses to do in his or her home should be regarded and protected as being private. However, the right to privacy does not protect the conduct of a citizen if his or her enjoyment of life violates the laws of the country or disturbs fellow citizens.<sup>14</sup> Further, once the citizen chooses to enter the business arena or conduct a profession that is subject to regulation, such activities will limit the citizen’s right to privacy because the person has voluntarily chosen to descend into the public arena.<sup>15</sup> In such a case the person’s right to privacy is not as extensive as that of a person who does not interact with members of the public.

Section 8(2) of the Constitution entitles juristic persons to the rights contained in the Bill of Rights to the extent that the nature of the right permits.<sup>16</sup> White comments as follows: ‘While it is correct to say that juristic persons will be protected by s 13 it is likely that this protection will not be as vigorously protected as will the individual’s right to personal privacy.’<sup>17</sup>

Devenish expresses the following views on the matter:

‘It was previously thought, as far as our common law is concerned that privacy was a characteristic that could only inhere in human

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<sup>13</sup> Ibid para 67 p 484. See also M H Cheadle et al *South African Constitutional Law: The Bill of Rights*, (2002) where, on p 18 the following is stated: ‘In *Bernstein and Others v Bester and Others* 1996 (4) BCLR 449 (CC), Ackermann J characterised the right to privacy as lying along a continuum where the more a person interrelates with the world, the more the right to privacy becomes attenuated.’

<sup>14</sup> Ibid para 9.3 p 190.

<sup>15</sup> Ibid 270. See further *Bernstein* (note 8 above) 485.

<sup>16</sup> Section 8(2) provides that ‘A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.’

<sup>17</sup> J White ‘Constitutional Litigation And Interpretation, And Fundamental Rights’ *Annual Survey of South African Law* (1994) 58.

beings and that an action for the intrusion of privacy in relation to juristic persons would not be possible. However, in the recent controversial case of *Financial Mail (Pty) Ltd v Sage Holdings Limited*, it was held that a corporation had the right to sue for the invasion of privacy where a newspaper had obtained information from a private memorandum and unlawful tape recordings.<sup>18</sup>

Because of technological advances the transfer of information from third parties to the Commissioner is becoming easier. In the 2006 Budget Speech the Minister of Finance indicated the intention to amend fiscal legislation to promote improved data matching and enable the Commissioner to check information more effectively than was previously possible.<sup>19</sup> Commenting on the changes in technology and transfer of information Slemrod writes:

‘The transmission and processing of information is at the core of taxation, and one of the great ongoing technological revolutions has been in information technology. Looking forward, 10, 20 or 30 years, what are the implications of technological advancements for tax policy? How will, and should, a tax policy be different 20 years from now from how it is today?

I will argue that, although the new technology greatly facilitates the use of taxpayer information to create a personalised consumption tax system there are forces pushing the tax system in the opposite direction, towards a radically depersonalised tax system, partly out of concern about the infringement of privacy of the information.<sup>20</sup>

It is important to monitor technological advances in the transfer of information for tax purposes to ensure compliance with a taxpayer’s constitutional right to privacy.

In analysing the right to privacy the following questions are asked about the information-gathering powers conferred on the Commissioner:<sup>21</sup>

<sup>18</sup> G E Devenish *A Commentary on the South African Bill of Rights* (1999) 156 and 157. See further Chaskalson (note 3 above) para 18.4 p 8-18.

<sup>19</sup> Budget Review National Treasury (15 February 2006) 199.

<sup>20</sup> J Slemrod ‘Taxation and Big Brother: Information, Personalisation and Privacy in 21<sup>st</sup> Century Tax Policy’ 27 *Institute For Fiscal Studies* 1 p 2.

<sup>21</sup> Additional issues bearing on the taxpayer’s right to privacy are:

- the disclosure of information to persons other than the taxpayer under s 4 of the Income Tax Act;
- the exchange of information under double taxation agreements;
- the reporting of professional misconduct under the fiscal statutes;
- the publication of tax offender’s personal details in the *Government Gazette* and the press.

These issues are beyond the scope of this thesis.

- Do the powers of the Commissioner to call for information from taxpayers, banks and other parties violate the taxpayer's right to privacy?
- May the Commissioner justifiably conduct an audit of a taxpayer's affairs without breaching the taxpayer's right to privacy?
- Do search and seizure operations conducted by the Commissioner unlawfully breach the taxpayer's right to privacy?
- May the Commissioner conduct an inquiry into a taxpayer's affairs, without violating the taxpayer's right to privacy?
- May the Commissioner lawfully call for information about a taxpayer that is subject to legal professional privilege?

## II DO THE POWERS OF THE COMMISSIONER TO CALL FOR INFORMATION FROM TAXPAYERS, BANKS AND OTHER PARTIES VIOLATE THE TAXPAYER'S RIGHT TO PRIVACY?

Under the Income Tax Act a taxpayer must submit an annual tax return to the Commissioner.<sup>22</sup> The tax return calls for personal details about the taxpayer, his or her income, expenses and other items of information.

Does the Commissioner's power to call for a tax return unjustifiably violate the taxpayer's right to privacy?

The State has an obligation to supply the citizens of the country with certain services and may only finance its expenditure by levying income tax and other taxes on persons and goods.<sup>23</sup> Calling for personal information from taxpayers constitutes an infringement of the taxpayer's right to privacy, but such infringement seems reasonable and justifiable in an open and democratic society. There is no less intrusive means

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<sup>22</sup> See ch 2 above and definition of 'taxpayer' in s 1 of the Income Tax Act as well as ss 65 and 66 of the same Act.

<sup>23</sup> See ch 13 of the Constitution.

whereby the State may secure the payment of tax. Thus, a taxpayer will not succeed in showing that the obligation to submit an annual tax return unlawfully violates his or her right to privacy.

The Commissioner receives tax returns under the Income Tax Act and must issue an assessment of the taxpayer.<sup>24</sup> One way in which the Commissioner may verify information contained in a tax return is to call for further information or documentation from the taxpayer or from any other person about the taxpayer.<sup>25</sup> Another method used by the Commissioner to obtain information about a taxpayer is to require banks, employers and other persons to submit returns to the Commissioner reflecting income derived by the taxpayer.<sup>26</sup> Do these information-gathering powers conferred on the Commissioner violate the taxpayer's right to privacy?<sup>27</sup>

Section 74A of the Income Tax Act authorises the Commissioner's officers to call for information from a taxpayer and any other person for the purpose of administering the Income Tax Act.

'74A The Commissioner or any officer may, for the purposes of the administration of this Act in relation to any taxpayer, require such taxpayer or any other person to furnish such information (whether orally or in writing) documents or things as the Commissioner or such officer may require.'<sup>28</sup>

Thus, under s 74A the Commissioner may only call for information required for the administration of the Income Tax Act. In terms of section 74(1) the 'administration of this Act':

- 'means the –
- (a) obtaining of full information in relation to any –
    - (i) amount received by or accrued to any person;
    - (ii) property disposed of under a donation by any person;
    - and
    - (iii) dividend declared by any company;
  - (b) ascertaining of the correctness of any return, financial statement, document, declaration of facts or valuation;

<sup>24</sup> Income Tax Act ss 66 and 77.

<sup>25</sup> Ibid s 74A.

<sup>26</sup> Ibid ss 69 and 70.

<sup>27</sup> Ibid ss 74, 74A-74D .

<sup>28</sup> The VAT Act s 57A contains an identical provision. See also Stamp Duties Act 77 of 1968 s 31A; Transfer Duty Act 40 of 1949 s 11B and Uncertificated Securities Tax Act 31 of 1998 s 14.

- (c) determination of the liability of any person for any tax, duty or levy and any interest or penalty in relation thereto leviable under this Act;'

The Commissioner cannot use the provisions of s 74A for other purposes, for example, to obtain trade secrets or other commercial information from the taxpayer.

One of the methods used to corroborate the information contained in tax returns is to require persons to submit a special return, namely form IT3 under s 69 of the Act. These returns set out details of, for example, interest, rent, royalties and other payments made to a taxpayer and must be submitted to the Commissioner annually. The submission of the IT3 return enables the Commissioner to cross-check information with the tax returns submitted.

Section 70 of the Income Tax Act requires companies to complete and submit returns setting out details of interest paid to taxpayers on debentures and dividends paid on shares. Under s 70A of the Act the Commissioner requires collective investment schemes to submit returns setting out the income and other amounts awarded to taxpayers. These returns also facilitate the cross-checking of information supplied.

The Commissioner occasionally requests that taxpayers complete the so-called Lifestyle Questionnaire, which requires them to disclose full details of their assets, liabilities and annual expenditure on holidays, food, school fees, and so on. Many taxpayers have enquired whether such a request is constitutionally valid.<sup>29</sup> In practice the Commissioner calls on a taxpayer to complete the Lifestyle Questionnaire where the taxpayer's income does not appear to support his or her standard of living or where the increase in the taxpayer's net assets is disproportionately high in relation to his or her income disclosed for tax purposes.

The Commissioner only uses the Lifestyle Questionnaire in cases where a natural person is subject to an audit for sound reasons.

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<sup>29</sup> B J Croome quoted in K Thersby 'The Taxman's Up To New Tricks' (October 2001) *Moneyweb's Taxbreaks* 189 p 1.

Taxpayers believe the Lifestyle Questionnaire constitutes an undue violation of their right to privacy. However, the Commissioner uses the questionnaire circumspectly. Under s 74A the Commissioner has the power to call for information about the taxpayer's personal affairs. Acting under s 74B he may also conduct an audit at the taxpayer's premises to confirm that information,. Taxpayers overlook the fact that the rights contained in the Constitution may be limited and that the Commissioner calls for the information under a law of general application.

It is contended that it is reasonable and necessary in an open and democratic society for the Commissioner to insist on the completion of the Lifestyle Questionnaire and that this does not constitute an unlawful violation of the taxpayer's right to privacy.

In 2006 The South African Institute of Chartered Accountants ('SAICA') received reports from its members that the Commissioner's officials had arrived at business premises demanding that taxpayers complete a document entitled 'SARS Inspection Survey'.<sup>30</sup> The survey, which is still in use, requires taxpayers to answer numerous questions about their business. The purpose of the survey is to broaden the tax base of the country, which is notoriously low.<sup>31</sup> The Commissioner's officers arrive at the business premises without prior notice and usually demand that the taxpayer answer the questions immediately, sometimes in front of clients and customers. Further, certain officials deny the taxpayer's requests to consult with his or her tax accountants or attorneys before responding to the questionnaire.<sup>32</sup> Such conduct is unreasonable and does not conform to the standard required in an open and democratic society. The Commissioner could achieve the objectives of broadening the tax base by less intrusive means.

Under s 4 of the Income Tax Act the Commissioner's officials may not discuss the taxpayer's affairs with any person other than the taxpayer.

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<sup>30</sup> Electronic mail received from J Arendse, Project Director: Tax SAICA on 29 March 2006 questioning the constitutional validity of the inspection survey.

<sup>31</sup> B J Croome 'The Narrow Tax Base In South Africa' (July 2002) *Accountancy SA* 11.

<sup>32</sup> This refusal to allow taxpayers to consult with accountants or attorneys raises concerns about procedural fairness and the taxpayer's right to administrative justice, which are considered further in ch 5.

To demand answers to detailed questions about the taxpayer's business in front of third parties constitutes an infringement of the taxpayer's right to privacy. The Commissioner is charged with ensuring that taxpayers comply with the fiscal statutes he administers. However, it should not be necessary to violate a taxpayer's right to privacy in order to extend the tax base and the Commissioner's conduct is unlikely to be justifiable in terms of s 36 of the Constitution.

It would be more acceptable for the Commissioner to require the business to provide details of its tax reference numbers before compelling the taxpayer to complete the SARS Inspection Survey. The Commissioner should then review information to which he has access to establish whether the business is registered for tax purposes or is in default. In the case of a defaulting taxpayer the Commissioner may reasonably demand answers to the questions contained in the survey.

In addition, the survey requires a taxpayer to disclose details of his or her business plan. I question whether this constitutes information necessary to the administration of the Income Tax Act, as required under s 74(1). The demand that the taxpayer complete the questionnaire immediately appears unreasonable, as the officials do not first establish whether or not the taxpayer's affairs with the Commissioner are in order.

In deciding whether the Commissioner's information-gathering powers are constitutionally valid, I refer to the position in other democratic jurisdictions.

Section 20 of the 1970 Taxes Management Act of the United Kingdom confers certain information-gathering powers on an inspector of the United Kingdom Inland Revenue:

- '(a) An Inspector can, by notice in writing, require a person:
  - (i) to deliver to him such documents as are in the person's possession or power and (in the Inspector's reasonable opinion) contain, or may contain, information relevant to any tax liability to which that person may be subject or the amount of any such liability; and

- (ii) to furnish to him such particulars as the Inspector may reasonably require as being relevant to, or to the amount of, any such liability, ...<sup>33</sup>

As in South Africa under s 74A of the Income Tax Act, an Inland Revenue Inspector in the United Kingdom has the authority to call for information from third parties in the following terms:

- ‘(c) An Inspector can, by notice in writing, require a third party to deliver to him (or, if that person so elects, to make available for inspection by a named officer of the Board) such documents as are in his possession or power and as (in the Inspector’s reasonable opinion) contain or may contain, information relevant to a tax liability of that person into whose tax affairs the Inspector is enquiring (or the amount of such a liability) [TMA 1970 s20 (3)].<sup>34</sup>

According to Howarth & Maas the above provision authorises the revenue official to obtain documents held by a third party.<sup>35</sup> The official may not insist that a list of transactions with another party is provided unless such list is already in existence.<sup>36</sup>

A survey, entitled *Taxpayers’ Rights and Obligations – A survey of the legal situation in OECD countries* researched the question of banks supplying information to the fiscal authority and found as follows:

- ‘2.30 However, in the majority of countries the tax administration has a statutory power to override confidentiality and to obtain specific information from the bank for tax purposes. This power is used with reserve and tax administrations are obliged not to divulge any information so obtained to third parties, although they can pass the information to foreign tax authorities with whom they have bilateral or multilateral instruments which provide for exchange of information for tax purposes.
- 2.31 ... It follows that in many countries general investigations into banks to obtain information about their clients are not permitted and that examinations of the business accounts of banks may not be used for that purpose.<sup>37</sup>

<sup>33</sup> P Howarth & R Maas *Taxpayer Rights and Revenue Powers* (2004) para 5.26(a) p 62.

<sup>34</sup> *Ibid* 63.

<sup>35</sup> *Ibid*.

<sup>36</sup> *Ibid*.

<sup>37</sup> *Taxpayers’ Rights and Obligations: A Survey of the legal situation in OECD Countries* (1990) 13 and 14.

In the OECD countries, besides the obligation facing taxpayers to supply information to the tax authorities, third parties, especially employers and banks, must supply information to the tax administration:

- '3.8 In all countries employers have to supply the tax authorities with information on the amounts of salaries and wages paid to employees. ... A few countries operate special systems for the construction industry, under which a firm has to inform the tax authorities of payments to sub-contractors.
- 3.9 In most countries, banks and other financial institutions are required to respond to requests for information on interest payments to identify taxpayers.<sup>38</sup>

The Japanese tax authority may call for information from taxpayers and this is not seen as a violation of the citizen's right to privacy. Ishimura describes the position in Japan as follows:

- '(6) *Information gathering procedures accompanying audits*  
In Japan, there are virtually no provisions under current law to regulate the collection of materials by the tax authorities, such as the taking possession and photocopying of books, records and other documents.  
...  
From the point of view of this modern type of privacy right, a taxpayer should be notified of any request for co-operation and what information was provided. Then the taxpayer would be able to control his/her personal information.<sup>39</sup>

Commenting generally on the taxpayer's right to privacy Baker & Groenhagen write:

'A distinction can be made between confidentiality and privacy. Confidentiality relates to the handling of information which has been supplied to the revenue authority and which should not be passed on to any other person in breach of that confidence: privacy relates to the right of an individual not to suffer any intrusion into his private or business life, his home or business premises unless that intrusion is necessary and is expressly authorised by law.

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<sup>38</sup> Ibid 16.

<sup>39</sup> K Ishimura 'The state of taxpayers' rights in Japan' in D Bentley *Taxpayers' Rights: An International Perspective* (1998) 252.

It goes without saying that any interference with a taxpayer's right to privacy must be in accordance with law and should not be disproportionate to the context of the legislation.<sup>40</sup>

The above sources indicate that it is normal for a fiscal authority to request information from third parties about income paid to a taxpayer in the forms, for example, of wages, salaries and dividends.

The OECD survey shows that most tax administrations need not advise the taxpayer that they will call for information from a third party.<sup>41</sup>

The Commissioner's call for information may constitute an intrusion into the taxpayer's life and thus a breach of his or her right to privacy, however, the Commissioner has the responsibility of gathering taxes so that the government may finance its social and welfare programmes. An integral part of ensuring compliance with the fiscal laws of a country is the capacity of the Commissioner to call for information from taxpayers and other persons. In *Bernstein*<sup>42</sup> Ackermann J stated that the scope of the right to privacy narrows if a citizen conducts business and thereby enters the public arena.<sup>43</sup> A citizen who undertakes a business venture assumes certain obligations, one of which is to comply with the tax laws of the country.<sup>44</sup> To allow the revenue authority to call for information from banks and third parties is therefore reasonable and justifiable taking account of the mandate held by the Commissioner under the SARS Act. It is not possible for a taxpayer to prevent a bank, or other third party, from releasing personal information to the Commissioner on the basis that such conduct violates the taxpayer's right to privacy. The practice in other countries seems to support this view.

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<sup>40</sup> P Baker & A-M Groenhagen *The Protection of Taxpayers' Rights – An International Codification* (2001) 47 and 48.

<sup>41</sup> Note 37 above table 7 pp 44-46.

<sup>42</sup> Note 8 above.

<sup>43</sup> *Ibid* para 85 p 491.

<sup>44</sup> Bentley (note 39 above) 49.

### III MAY THE COMMISSIONER JUSTIFIABLY CONDUCT AN AUDIT OF A TAXPAYER'S AFFAIRS WITHOUT BREACHING THE TAXPAYER'S RIGHT TO PRIVACY?

Section 74B of the Income Tax Act sets out the power to call for information at the taxpayer's premises and to inspect or audit such information as follows:

- '74B (1) The Commissioner, or an officer named in an authorisation letter, may, for the purposes of the administration of this Act in relation to any taxpayer, require such taxpayer or any other person, with reasonable prior notice, to furnish, produce or make available any such information, documents or things as the Commissioner or such officer may require to inspect, audit, examine or obtain.
- (2) For the purposes of the inspection, audit, examination or obtaining of any such information, documents or things, the Commissioner or an officer contemplated in subsection 1, may call on any person –
- (a) at any premises; and
  - (b) at any time during such person's normal business hours.'

Section 74(1) defines the 'authorisation letter' referred to in s 74B(4) as:

'... a written authorisation granted by the Commissioner, or by any other person designated by the Commissioner for this purpose or occupying a post designated by the Commissioner for this purpose, to an officer to inspect, audit, examine or obtain, as contemplated in s 74B, any information, documents or things;'

A taxpayer may insist that a person claiming to be an official of the Commissioner present the authorisation letter issued by the Commissioner or any person designated by the Commissioner. The definition of 'authorisation letter' implies that it is a general letter of authorisation granting the official the powers set out in s 74B. It is not a requirement of the Act that the letter specify the particular taxpayer subject to audit. The power to conduct audits of taxpayers' affairs is therefore a general power exercised by the Commissioner's officers without the intervention of the judiciary. To obtain information from a taxpayer under s 74A requires the cooperation of the taxpayer. In terms of

s 74(B) the Commissioner may not arrive at a taxpayer's business to inspect and audit the taxpayer's records without prior arrangement.

Having set out the powers contained in s 74B I refer to the experience in other open and democratic societies.

Canada's taxing statute allows its revenue authority to conduct audits of taxpayers' affairs and to call for information from taxpayers.<sup>45</sup>

Li sets out the position:

'Sections 231 to 231.6 of the Act provide the Minister with the powers to:

- audit and inspect books and records kept by a taxpayer (s231.1);
- demand information from a taxpayer or third parties (s231.2);
- search premises for evidence and seize the evidence (s231.3);
- authorise an inquiry (s231.4); and
- demand foreign-based information (s231.6).

The right of taxpayers to privacy is guaranteed by s 8 of the Charter. It is protected by restricting the audit and investigative powers of Revenue, Canada. Sections 231 to 231.6 have undergone several major changes, each of which has resulted in more protection of the right to privacy. The most recent changes were in response to the enactment of the Charter.<sup>46</sup>

The power to conduct audits and to call for information from taxpayers does not constitute a violation of the right to privacy contained in the Canadian Charter of Rights and Freedoms.<sup>47</sup>

Germany is also a constitutional State which allows its revenue authority to conduct audits of taxpayers' affairs.<sup>48</sup> According to Daiber:

'Taxpayers that derive business income or income from forestry and agriculture are subject to field audits at regular intervals to ensure lawful and equal taxation. The tax inspector examines all the taxpayer's factual and legal circumstances whether favourable

<sup>45</sup> Income Tax Act (RSC 1985 [5<sup>th</sup> Supp]) ss 231-231.6.

<sup>46</sup> J Li 'Taxpayers' Rights in Canada' in Bentley (note 39 above) 109.

<sup>47</sup> Section 8 of the Charter, as quoted in Davis et al *Fundamental Rights in the Constitution: Commentary and Cases* (1997) 364.

<sup>48</sup> B P Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 2 ed (1997) 30 and 335.

or not. As in the general procedure, the taxpayer has a duty to cooperate.’ [section references omitted].<sup>49</sup>

Commenting on the right to privacy in Germany Kommers writes:

‘The Basic Law does not explicitly create a general right of privacy. Three of its provisions, however, do protect privacy interests. The second, at issue in the *Klass* case [...], is the provision of article 10 that guarantees “privacy of posts and telecommunications”; and the third is the guarantee of the home’s inviolability under article 13.

...

NOTE: PRIVACY OF HOME AND COMMUNICATION

Article 13(1) declares: “The home shall be inviolable.” Paragraph 2 authorises judges to order searches as prescribed by law, and paragraph 3 permits “encroachments” (Eingriffe) and “restrictions” (Beschränkungen) of the home’s inviolability only “to avert a common danger or a mortal danger to individuals or, pursuant to law, to prevent imminent danger to public safety and order.” ... The state could thus permissibly inspect records that would disclose the exact nature of a business for tax purposes.<sup>50</sup>

Greenbaum sets out the position in the United States of America (‘USA’):

‘One of the cornerstones of the investigative powers of the tax administration is the audit. ... Further, the taxpayer must be given, prior to the conduct of an audit or interview, an explanation of the process, and the statement of the rights which a taxpayer has in relation to the process.’<sup>51</sup>

Commenting generally on a revenue authority’s power to conduct audits and investigations, Bentley writes:

‘Fundamental to the successful operation of a self-assessment regime, and widely used in all tax systems, is the audit and investigation of taxpayers. ... However, it is important that taxpayers are protected by a clear definition of the limits of audits and investigation. ... However, the right to privacy should be used to provide protection for the taxpayer against unreasonable searches.’<sup>52</sup>

Regarding the taxpayer’s right to privacy Baker & Groenhagen write:

‘[P]rivacy relates to the right of an individual not to suffer any intrusion into his private or business life, his home or business

<sup>49</sup> C Daiber ‘Protection of Taxpayer’s Rights in Germany’ in Bentley (note 39 above) 184.

<sup>50</sup> B P Kommers (note 39 above) 327 and 335.

<sup>51</sup> A Greenbaum ‘United States Taxpayers’ Bill of Rights 1,2 and 3: A Path to the Future or Old Whine in New Bottles?’ in Bentley (note 39 above) 350.

<sup>52</sup> Bentley (note 39 above) 49.

premises unless that intrusion is necessary and is expressly authorised by law.

...

It goes without saying that any interference with the taxpayer's right to privacy must be in accordance with law and should not be disproportionate to the context of the investigation.<sup>53</sup>

Various constitutional democracies allow the revenue authority to conduct audits of taxpayers' affairs, treating such audits as reasonable and necessary violations of the taxpayer's right to privacy.

For the Commissioner's officials to obtain authorisation letters each time they call for information from a taxpayer unduly fetters them in exercising the mandate conferred on them to administer the tax laws. Section 74B(1) of the Income Tax Act should survive, if challenged on the grounds that it violates the taxpayer's constitutional right to privacy. A review of the position in, for example, Canada and the USA, supports this.<sup>54</sup>

It seems clear that the power conferred on the Commissioner by s 74B allowing him to audit and inspect taxpayers' records is an invasion of privacy. Is such invasion of privacy warranted?

Section 74B is part of a law that applies generally. To ensure and improve compliance with the tax system it is normal for the Commissioner to have the power to corroborate information received from taxpayers. Furthermore, the constitutional validity of the way in which the Commissioner conducts the audit and, in certain circumstances, requests specific information, must be considered.

The Commissioner's officials regularly visit luxury-car dealers on the pretext of auditing the VAT affairs of the business under s 57B of the VAT Act. This enables the Commissioner to establish the details of persons buying luxury vehicles from the registered vendor. The Commissioner then uses such information to corroborate whether the purchasers of the luxury cars have declared for tax purposes the income required to finance and maintain such expensive vehicles.

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<sup>53</sup> Baker & Groenhagen (note 40 above) 47.

<sup>54</sup> Li (note 46 above) 109 and Greenbaum (note 51 above) 350.

It is difficult for a luxury car dealer to resist the Commissioner's request for information about the purchasers of luxury cars. However, it is important that the Commissioner does not target only one luxury-car dealer but treats all car dealers in that category similarly. Failing this, the targeted business may justly raise the ground that the Commissioner's conduct is discriminatory.<sup>55</sup> However, the car dealer faces the difficulty of showing that the Commissioner's request for information as part of the VAT audit relating to purchasers of its goods, or indeed requesting such information, is constitutionally invalid.

Occasionally the Commissioner seeks remote access to the taxpayer's computer systems on a real-time basis, allowing him to secure information about the purchasers of goods or services supplied by the taxpayer. I contend that such a request is unreasonable in that it may hinder the business conducted by the taxpayer and that there are less restrictive means by which the Commissioner can obtain the required information. The Commissioner could, instead, seek specific information about transactions conducted with other taxpayers in a specified period. To allow the Commissioner ongoing access to live computer systems constitutes an undue violation of the taxpayer's right to privacy. The limitation of rights provision contained in s 36 of the Constitution would not legitimise the Commissioner's conduct.

In deciding whether the Commissioner's conduct in gathering information constitutes a violation of the taxpayer's right to privacy the taxpayer must consider his or her position dispassionately by interpreting the fiscal statutes and the Constitution.

The tax base in South Africa is narrow and the Commissioner has a duty to broaden that base, thereby spreading the tax burden among a greater number of people.<sup>56</sup> In such circumstances it is difficult to maintain that calling for information constitutes an unlawful violation of the taxpayer's right to privacy. The call for the information under a law of

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<sup>55</sup> This touches on the issue of equality contained in s 9 of the Constitution, which is beyond the scope of this thesis.

<sup>56</sup> 'Commissioners' Review' and 'The Tax Register' 2005 *South African Revenue Service Annual Report* 4 and 26 .

general application is both reasonable and necessary in an open and democratic society.

The Commissioner's decision to conduct an audit on a taxpayer or to request that the taxpayer supply information constitutes an 'administrative action' as envisaged in s1 of the Promotion of Administrative Justice Act 3 of 2000. Thus, the Commissioner must comply with the requirements of procedural fairness contained in that statute. This aspect is considered in chapter 5.

#### IV DO SEARCH AND SEIZURE OPERATIONS CONDUCTED BY THE COMMISSIONER UNLAWFULLY BREACH THE TAXPAYER'S RIGHT TO PRIVACY?

Under s 74D of the Income Tax Act the Commissioner may search the taxpayer's premises without prior notice if he obtains a search and seizure warrant. Before analysing the current provisions of s 74D I review the changes the search and seizure provisions have undergone since the introduction of the Constitution.

Section 74(3) of the Income Tax Act, before its amendment by s 14 of the Revenue Laws Amendment Act,<sup>57</sup> provided that the Commissioner could authorise his staff to conduct a search and seizure operation. It was unnecessary to obtain a warrant from a judge authorising such an operation.

The Katz Commission in its Interim Report expressed the following views on the validity of the old s 74:

'Furthermore in terms of Section 74(3) of the Act powers are conferred upon officers engaged in carrying out the provisions of the Act to search and seize a variety of items, subject to the authorisation of the Commissioner. This section *prima facie* violates Section 13 of the Constitution and would require to be justified in terms of the limitation clause. It should be noted that in terms of *Hunter et al v Southam* (1984) similar provisions were held to be unconstitutional by the Canadian Supreme Court.<sup>58</sup>

<sup>57</sup> Act 46 of 1996.

<sup>58</sup> *Interim Report to the Commissioner of Enquiry into certain aspects of the tax structure of South Africa, the Katz Commission* 75.

The Katz Commission recommended that warrants required under s 74 must be authorised in advance of execution by persons acting judicially. The Commission concluded that the authorisation of warrants by the Commissioner was invalid under the Constitution.<sup>59</sup> It pointed out that the person authorising the issue of the warrant must be satisfied, by information given under oath, that an offence has been committed under the fiscal statutes.<sup>60</sup> In addition, the Commission stated that the execution of the warrant should lead to evidence corroborating the assertion that an offence has been committed.<sup>61</sup>

The decision of the court in *Park-Ross and Another v The Director, Office for Serious Economic Offences*<sup>62</sup> supports the comments made by the Katz Commission. In *Park-Ross*<sup>63</sup> the Court had to decide whether s 6 of the Investigation of Serious Economic Offences Act 117 of 1991 empowering the Director of the Office for Serious Economic Offences (OSEO) to authorise entry, search and seizure, was constitutionally valid. Section 6 of the Investigation of Serious Economic Offences Act 117 of 1991 did not require the intervention of the judiciary in deciding whether to conduct a search and seizure operation. That provision was therefore similar to the provisions found in the old s 74(3) of the Income Tax Act.

Tebbutt J decided as follows:

‘It would, I feel, accord with the spirit and purport of the Constitution if it was provided that before any search or seizure pursuant to s 6 of the Act, prior authorisation be obtained from a magistrate or from a Judge of the Supreme Court in chambers for such search and seizure. Any application for such authorisation should set out, at the very least, under oath or affirmed declaration, information as to the nature of the enquiry in terms of s 5, the suspicion having given rise to that enquiry, and the need, in regard to that enquiry, for a search and seizure in terms of s 6.

...

I accordingly hold that s 6 as it presently reads is in conflict with the Constitution.<sup>64</sup>

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<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> 1995(2) BCLR 198 (C).

<sup>63</sup> Ibid.

<sup>64</sup> Ibid para (f) pp 220 and 221.

In *Mistry v Interim Medical and Dental Council of South Africa*<sup>65</sup> the Constitutional Court endorsed the decision of the court in *Park-Ross*.<sup>66</sup> In *Mistry*<sup>67</sup> the Constitutional Court struck down the search and seizure provisions of the Medicines and Related Substances Control Act 101 of 1965.

The recommendations of the Katz Commission, and probably the decision of the Court in *Park-Ross*, resulted in the repeal of s 74 of the Income Tax Act.<sup>68</sup> The current information-gathering powers contained in ss 74, 74A to 74D replaced the old section.

Section 74D provides, inter alia:

- '74D(1) For the purposes of the administration of this Act, a Judge may, on application by the Commissioner or any officer contemplated in s 74(4), issue a warrant, authorising the officer named therein to, without prior notice and at anytime –
- (a) (i) enter and search any premises; and
  - (ii) search any person present on the premises, provided that such search is conducted by an officer of the same gender of the person being searched, for any information, documents or things, that may afford evidence as to the non-compliance by any taxpayer with his obligations in terms of this Act;
  - (b) seize any such information, documents or things; and
  - (c) in carrying out any such search, open or caused to be opened or removed and opened, anything in which such officer suspects any information, documents or things to be contained.
- (2) ...
- (3) a Judge may issue the warrant referred to in subsection (1) if he is satisfied that there are reasonable grounds to believe that –
- (a) (i) there has been non-compliance by any person with his obligations in terms of this Act; or
  - (ii) an offence in terms of this Act has been committed by any person;

<sup>65</sup> 1998 (4) S.A 1127 (CC).

<sup>66</sup> Note 62 above.

<sup>67</sup> Note 65 above 1150.

<sup>68</sup> Katz Commission Report para 6.3.28 p 75. Similar amendments were made to the information-gathering powers found in other fiscal statutes.

- (b) information, documents or things are likely to be found which may afford evidence of -
  - (i) such non-compliance; or
  - (ii) the committing of such offence; and
- (c) the premises specified in the application are likely to contain such information, documents or things.'

The application for the warrant must, under s 74D (2), be supported by information supplied under oath containing facts substantiating the allegations of non-compliance with the fiscal statutes. Furthermore, under s 74D(4) the warrant must itself contain details of the alleged offences committed by the taxpayer and must specify the premises to be searched. In addition, the warrant must identify the taxpayer who has allegedly failed to comply with his or her fiscal obligations and must be reasonably specific about the information and documents to be seized.

In *Bernstein*<sup>69</sup> the court considered the right to privacy contained in s 13 of the Interim Constitution. Bernstein, a registered accountant and auditor in public practice, sought an order from the court that the audit working papers of the liquidated company were confidential and that he should not hand over the information to the liquidator of the company. Ackermann J, handing down judgment for the majority, stated:

'In South Africa, the right not to be subjected to seizure of private possessions forms part of every person's right to personal privacy. The right against seizure must therefore be interpreted in the light of the general right to personal privacy. So much is also clear from the qualification of the right, i.e. the right against seizure of *private* possessions. I have repeatedly emphasised that privacy concerns are only remotely implicated through the use of the enquiry. The public's interest in ascertaining the truth surrounding the collapse of the company, ... must be weighed against this, peripheral, infringement of the right not to be subject to seizure of private possessions. Seen in this light, I have no doubt that s 417(3) and 418(2) constitute a legitimate limitation of the right to personal privacy in terms of s 33 of the Constitution.'<sup>70</sup>

The court decided that the right to privacy extended only to private possessions and did not cover the documents and records affecting the business affairs of the liquidated company. This was because the public interest in establishing the reasons for the collapse of the liquidated

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<sup>69</sup> Note 8 above.

<sup>70</sup> Ibid 493.

company was greater than the individual's right to privacy. Thus, calling for the audit working papers of the liquidated company did not violate the right to privacy contained in the Interim Constitution.

I contend that *Bernstein*<sup>71</sup> makes it difficult for taxpayers to show that the search and seizure provisions contained in s 74D unlawfully violate their right to privacy. Thus, the failure by taxpayers to meet their obligations could result in the Commissioner requesting the issue of a search and seizure warrant under s 74D to secure records required for the administration of the Income Tax Act. The Commissioner cannot rely on s 74D to seize private possessions unrelated to the administration of the Act.

In *Oberholzer and Others v The Commissioner For The South African Revenue Service*<sup>72</sup> the taxpayer challenged the validity of the warrant issued under s 74D because the Commissioner failed to disclose material information to the judge. The taxpayer contended that the Commissioner failed to disclose particulars about a prior investigation, which the Commissioner settled. The taxpayer indicated that as payment of outstanding tax, interest and penalties was material, the Commissioner should have advised the judge who granted the warrant to the Commissioner under s 74D.<sup>73</sup>

The Commissioner responded to the taxpayer's assertion by pointing out that different entities were now under investigation. Further, the previous investigation also dealt with different tax issues. An alleged breach of the duty placed on the Commissioner in an *ex parte* application to make a full disclosure to the court was the basis for the taxpayer's cause of action.<sup>74</sup> The Commissioner's counsel argued that the application to a judge for a warrant under s 74D was an administrative authorisation issued by a court official and was not a court application. Blignault J decided there was no merit in this aspect of the

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<sup>71</sup> Ibid.

<sup>72</sup> Unreported decision of the High Court of South Africa, Cape of Good Hope Provincial Division, Case No 8714/98, Judgment delivered 20 May 1999.

<sup>73</sup> Ibid para 4.

<sup>74</sup> Ibid para 8.

Commissioner's defence.<sup>75</sup> He summarised the facts of the prior investigation conducted by the Commissioner on Oberholzer's affairs and decided as follows:

'In the circumstances I do not think that Van der Westerhuizen was under any particular duty to disclose the facts relating to these previous investigations at the time when he applied for the warrant. It seems to me, indeed, that a disclosure of a fact that first applicant's business activities had previously been the subject matter of two special investigations which resulted in the payment by him of tax penalties and interest might, if anything, have bolstered respondent's case in the application for the warrant.'<sup>76</sup>

As a result, the court dismissed the taxpayer's application for an order to set aside the warrant. The decision of Blignault J makes it clear that it is important that the Commissioner disclose material information to the court motivating the issue of a warrant under s 74D.

I contend that the power to search premises and seize documents is a necessary part of the Commissioner's armoury to ensure tax compliance. However, it is essential that a judge, as an independent party, oversees the powers granted and decides whether the Commissioner has just and reasonable cause to conduct such a search and seizure operation.

If a court grants the Commissioner a search and seizure warrant and the officer executing the warrant identifies further premises to search or documents to seize, he may do so under s 74D(5) and (6). The power conferred on the Commissioner's officer aims to prevent the destruction of records that may be necessary to enforce the provisions of the various fiscal statutes. The concern with these provisions is that the Commissioner's officers should not have the right to exercise this discretion. It would be preferable to obtain another warrant for such further premises and documents. This will prevent the Commissioner from abusing s 74D(5) and (6) by extending the ambit of the warrant on the pretext that the taxpayer will destroy documents. I submit that the failure

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<sup>75</sup> Ibid para 10.

<sup>76</sup> Ibid para 14.

to secure another warrant constitutes an undue violation of the taxpayer's right to privacy.

A difficulty arises where, under s 74D, the Commissioner presents incorrect facts to a judge. It is also a problem when the Commissioner relies on vexatious accusations made by a member of the public against a particular taxpayer. Once a judge authorises the issue of a warrant it is difficult for a taxpayer to prevent the Commissioner's officers from executing that warrant. However, s 74D(9) allows the taxpayer to challenge the issue of the warrant. The taxpayer may seek relief from the court after its execution, or seek an order suspending the warrant pending a hearing by the court.

Such relief was sought in *Ferela (Pty) Ltd and Others v Commissioner for Inland Revenue and Others*,<sup>77</sup> in which the Commissioner had secured warrants to search premises and seize records under s 74D of the Income Tax Act and s 57D of the VAT Act. The taxpayer approached the Commissioner for access to the court files containing the Commissioner's request for authorisation of the search and seizure warrants. The Commissioner refused this request because making the information available would violate the secrecy provisions contained in s 4 of the Income Tax Act.<sup>78</sup> The court decided that s 4 protects taxpayers against other parties obtaining information about the taxpayer's affairs and that taxpayers had a right of access to the file prepared in the case.<sup>79</sup> This allowed taxpayers to exercise their rights in relation to the warrant. It also enabled them to determine whether the warrant was valid and, further, what steps they could take in seeking relief against the Commissioner, if justified.<sup>80</sup> Botha J decided:

'That is in my view the purpose, *inter alia* of s 74D(9). It confers on the court, not judge, a wide discretion to order the return of any information, documents or things seized under a warrant. In effect it empowers the court to reverse the effect of a warrant *in toto*. It

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<sup>77</sup> 1998 (4) SA 275 (T), [1998] 60 SATC 513.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid* 522.

<sup>80</sup> *Ibid* 524 and 525.

also empowers the court on hearing such an application to make such an order as it deems fit. ...

It is not necessary for me to speculate on all the types of grounds on which s 74D(9) could be invoked. Grounds that spring to mind are: if a party concerned needs any documents that have been seized; if the documents seized do not have any bearing on the affairs of a taxpayer; if the documents seized are not covered by the warrant; and also if the warrant is deficient; or if it should not have been obtained.<sup>81</sup>

In *Ferela*<sup>82</sup> the Court held that the warrants issued to the Commissioner were invalid and ruled that the Commissioner should return to the taxpayer all documents seized in terms of the warrant.

Various other cases dealing with search and seizure provisions found not only in the fiscal statutes, but also in other statutes are instructive here.

In *Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*<sup>83</sup> the court had to decide whether the search and seizure warrants issued under the National Prosecuting Authority Act 32 of 1998 ('the NPA Act') unlawfully violated Hyundai's right to privacy.

In that case, certain of the applicants had been under investigation by the Commissioner and the Commissioner passed on information to the Investigating Director as envisaged in the NPA Act. Southwood J held that the Commissioner and his officials had contravened the secrecy provisions contained in s 4 of the Income Tax Act.<sup>84</sup> Southwood J granted an interdict against the Commissioner and his officials to prevent the continuing violation of the provisions of s 4.<sup>85</sup>

In considering the validity of the search and seizure warrants issued under the NPA Act the Court held that the judge called on to grant the warrant should only issue it if satisfied that there was reason to suspect the person had committed an offence specified in the NPA Act.<sup>86</sup> The Court referred to the requirements of the Income Tax Act and the VAT Act

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<sup>81</sup> Ibid 524.

<sup>82</sup> Ibid.

<sup>83</sup> 2000 (2) SA 934 T.

<sup>84</sup> Ibid 958.

<sup>85</sup> Ibid 972.

<sup>86</sup> Ibid 963.

that there must be some satisfaction that there had been non-compliance with a fiscal statute. Further, the warrant issued must specifically state the information, documents or things subject to search and seizure.<sup>87</sup>

In *Hyundai* it was necessary for Southwood J to determine whether certain provisions of the NPA Act were consistent with the Constitution. The comments made by the court are useful:

‘The question as to whether provisions in a statute are in conflict with the Constitution and therefore invalid is determined by an objective enquiry and the subjective positions in which parties to a dispute may find themselves have no bearing on the status of the provisions under attack ...’<sup>88</sup>

One of the Commissioner’s officials in *Hyundai*<sup>89</sup> assisted in the search and seizure operation conducted by the Special Investigations Division of the NPA for non-tax offences. The official was, according to the court, present because of his knowledge and understanding of the affairs of the persons subjected to the search and seizure operation. Southwood J held that such conduct violated s 4 of the Income Tax Act and s 6 of the VAT Act.<sup>90</sup>

In *Deutschmann NO and Others v Commissioner For the South African Revenue Service* and *Shelton v Commissioner For the South African Revenue Service*<sup>91</sup> the court was required to decide whether the search and seizure warrants issued under s 74D of the Income Tax Act were valid. Commenting on the taxpayer’s right to privacy and the provisions contained in s 74D of the Income Tax Act<sup>92</sup> Chetty J, Schoeman AJ and Brauns AJ said:

‘As alluded to hereinbefore it was submitted on behalf of Shelton that the application should be viewed against the background of the rights to privacy and property extended in ss 14 and 25(1) of the Constitution of the Republic of South Africa Act 108 of 1996 as well as the common law rights to privacy and property. In the context of s 14 of the Bill of Rights, privacy has been defined as “an individual condition of life categorised by seclusion

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<sup>87</sup> Ibid 964 and 965.

<sup>88</sup> Ibid 961.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid 971.

<sup>91</sup> [2000] 62 SATC 191, [2000] 1 All SA 198 (E).

<sup>92</sup> Ibid 205.

from the public and publicity. This implies an absence of acquaintance with the individual or his personal affairs in this State.” It is apparent from the judgement that the concept of privacy does not extend to include the carrying on of business activities.’ [footnotes omitted].<sup>93</sup>

The court also held that the issue of the warrant was proper in that it was ‘reasonably specific as to the information, documents or things to be searched for and seized’.<sup>94</sup> In *Deutschmann*<sup>95</sup> the applicants argued that the Commissioner should inform a taxpayer of the application for a search and seizure warrant under s 74D of the Income Tax Act and s 57D of the VAT Act. The court held as follows:

‘Given the wide ambit of search contemplated by the provisions of the sections, it is inconceivable that the legislature could have contemplated that prior notice of an application to conduct such search could be required in every instance. To require such would render nugatory the words ‘*without prior notice*’ in the respective sections. Furthermore, a requirement of prior notice of the application for a warrant would render redundant the provisions of s 74D(9) of the IT Act.’<sup>96</sup>

The Commissioner has no obligation to advise the taxpayer of an application for the issue of a warrant under s 74D before executing the warrant.<sup>97</sup>

Another case dealing with search and seizure warrants issued under s 74D came before Locke J in *Haynes v Commissioner For Inland Revenue*.<sup>98</sup> Haynes conducted business together with Deutschmann and Shelton.<sup>99</sup> Initially, Haynes was more successful in having the search and seizure warrant set aside in that Locke J ruled that the warrant was invalid.<sup>100</sup> The Court reviewed cases in other countries and concluded that the Commissioner should have informed the taxpayer of the

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<sup>93</sup> Ibid 205.

<sup>94</sup> Ibid 202.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid 203.

<sup>97</sup> Ibid.

<sup>98</sup> 2000 (6) BCLR 596 (Tk).

<sup>99</sup> *Deutschmann* (note 91 above).

<sup>100</sup> *Haynes* (note 98 above).

application for the search warrant before its approval and execution.<sup>101</sup>

Locke J decided as follows:

‘Again with respect I do not concur that the express terms of s 74D(1) provide that no prior notice need to be given of the application for a warrant. What the section provides is that the officer named in the warrant may without prior notice enter and search any premises, and search any person present on the premises. This “without prior notice” provision does not apply to the bringing of the application.’<sup>102</sup>

The court also ruled that when the Commissioner executes the search and seizure warrant he must supply the taxpayer with a copy of the court order and of his application for the warrant.<sup>103</sup> This is the correct view – how else may a taxpayer challenge the issue of a search and seizure warrant?

In *Haynes*<sup>104</sup> the court criticised the Commissioner for not having exhausted the provisions of ss 74A and 74B of the Income Tax Act. Locke J commented:

‘In my view, the Commissioner would have to show that the measures provided for in s 74A and 74B provided [sic proved] non-compliance by the taxpayer with his obligations in terms of the Act and that the information, documents or things could not be obtained by way of the provisions of s 74B thereby necessitating the application brought in terms of s 74D.

...

In the present matter, there were certainly no facts established by the Commissioner for the judge to be satisfied that there were reasonable grounds to believe that there had been non-compliance by the applicant with his obligations in terms of the Act and that information, documents or things were likely to be found which might afford evidence of such non-compliance in the absence of previous compliance with ss 74A and 74B of the Income Tax Act or 57A and 57B of the Value-Added Tax Act.’<sup>105</sup>

Should the Commissioner not use less invasive means of obtaining information by requiring a taxpayer to submit information under ss 74A and 74B before resorting to a search and seizure operation under s 74D? There is, with respect, merit in the view expressed by Locke J in

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<sup>101</sup> Ibid 349.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid 353.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid 355 and 356.

*Haynes*.<sup>106</sup> In the cases reviewed the Commissioner had no obligation to confirm when approaching a judge for a search and seizure warrant that he had exhausted ss 74A and 74B before resorting to s 74D.

Under s 46(1) of the Competition Act 89 of 1998 the Competition Commission is entitled to apply for the issue of a search and seizure warrant along the lines contained in s 74D of the Income Tax Act. In *Pretoria Portland Cement Co. Ltd and Another v Competition Commission and Others*<sup>107</sup> the Court had to determine whether there was proper authorisation of the search and seizure warrant. In addition, the Court had to establish whether the Competition Commission's officials executed the warrant properly and whether it unlawfully violated the appellant's right to privacy. In this case, the Competition Commission invited the South African Broadcasting Corporation and eTV to accompany them when they executed the warrant. Commenting on this aspect of the search and seizure operation Schutz JA said:

‘The camera crew had not been invited to enter PPC’s grounds, nor did any Court order permit them to do so. These facts, which are common cause, together with the further undisputed fact that there was no express identification of the camera crew when they entered the building, already constitute a grave invasion of PPC’s right to privacy.’<sup>108</sup>

The Court set aside the search and seizure warrant and ordered that the Commissioner return to the applicant all documents seized.<sup>109</sup>

The Competition Act provides that a warrant issued by a judge of the High Court is valid under s 46(3) of the Competition Act until:

- ‘(a) the warrant is executed;
- (b) the warrant is cancelled by the person who issued it or, in that person’s absence, by a person with similar authority;
- (c) the purpose for issuing it has lapsed; or
- (d) the expiry of one month after the date it was issued.’

Unfortunately, s 74D contains no similar provision and I recommend that the legislature amend the Income Tax Act and other fiscal statutes to incorporate such provisions. The Commissioner will often call for a

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<sup>106</sup> Ibid 356.

<sup>107</sup> 2003 (2) SA 381 (T) and 2003 (2) SA 385 (SCA).

<sup>108</sup> Ibid 409.

<sup>109</sup> Ibid 412.

warrant on one date and only execute it many months later. This is not ideal. It would be preferable if the warrant were valid for a restricted time only, as is the case under the Competition Act.<sup>110</sup>

Further, s 49(5) of the Competition Act deals with the matter of privileged information in the following terms: 'During a search, a person may refuse to permit the inspection or removal of an article or document on the grounds that it contains privileged information.'

I recommend that the fiscal statutes dealing with the specific issue of privileged information be amended along the following lines: when the Commissioner's officers execute a warrant issued under s 74D a taxpayer may, in terms of the court's decision in *Heiman, Maasdorp and Barker v Secretary for Inland Revenue*,<sup>111</sup> lawfully refuse to furnish privileged information to him.

The Constitutional Court reviewed the decision made by Southwood J in *Hyundai*<sup>112</sup>, where he ruled that certain provisions of the NPA Act were invalid.<sup>113</sup> Commenting on the need to balance a person's right to privacy and the needs of the State Langa DP commented:

'On the other hand, state officials are not entitled without good cause to invade the premises of persons for purposes of searching and seizing property; there would otherwise be little content left to the right to privacy. A balance must therefore be struck between the interests of the individual and that of the State, a task that lies at the heart of the enquiry into the limitation of rights. On the proper interpretation of the sections concerned, the Investigating Directorate is required to place before a judicial officer an adequate and objective basis to justify the infringement of the important right to privacy. ... These provisions thus strike a balance between the need for search and seizure powers and the right to privacy of individuals. ... It follows, in my view, that the limitation of the privacy right in these circumstances is reasonable and justifiable.'<sup>114</sup>

<sup>110</sup> Competition Act 89 of 1998 s 46(3).

<sup>111</sup> [1968] 30 SATC 145.

<sup>112</sup> *Hyundai* (note 83 above).

<sup>113</sup> *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2000(10) BCLR 1079 (CC).

<sup>114</sup> *Ibid* 1097 and 1098.

In *Ferrucci and Others v Commissioner, South African Revenue Service and Another*,<sup>115</sup> the Cape Provincial Division considered the validity of the search and seizure warrants granted in terms of s 74D of the Income Tax Act. The Court held that it is important that the warrant issued under s 74D indicate the nexus between the documents subject to seizure from the taxpayer, and the offence or non-compliance for which the Commissioner seeks a warrant.<sup>116</sup> In this case, the court held that the warrant did not specify clearly what documents were subject to seizure and this was not constitutionally justifiable.<sup>117</sup>

Oosthuizen A J commented as follows on the factors the Court should consider in deciding whether the issue of a warrant was valid under s 74D(9) of the Income Tax Act:

‘The court dealing with an application under s 74D(9) need do no more than satisfy itself, as does the Judge issuing the warrant, that there are reasonable grounds for believing that there has been a non-compliance by any person of his obligations or an offence committed under the Act, and that information, documents or things affording evidence of such non-compliance or offence are likely to be found at the premises specified in the warrant. If it is not so satisfied, that may constitute a ground for setting aside the warrant.’<sup>118</sup>

The court stated that it is insufficient for the warrant to specify only the sections of the Income Tax Act or the VAT Act the taxpayer has allegedly violated.<sup>119</sup> Oosthuizen A J stated that the warrant must specify in detail the alleged offence or non-compliance by the taxpayer, otherwise rendering s 74D(4)(a) meaningless.<sup>120</sup>

The Judge also considered whether the Commissioner must exhaust other means of gathering information before resorting to a search and seizure warrant under s 74D(9) of the Income Tax Act and stated:<sup>121</sup>

‘In my view, the contention that a search and seizure should not be permitted where the objective sought to be achieved thereby

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<sup>115</sup> 2002 (12) JTLR 404.

<sup>116</sup> Ibid 415.

<sup>117</sup> Ibid 416.

<sup>118</sup> Ibid 412.

<sup>119</sup> Ibid 414.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid.

could be attained by less drastic means is, generally speaking correct. The decision of the Supreme Court of Canada in *Araujo and Others v the Queen* 79 CRR (2d) 1 (SCC) is of some assistance on this issue. ... Delivering judgment LeBel J said the following:

“Thus, the authorising Judge stands as the guardian of the law and of the constitutional principles protecting privacy interests. The Judge should not view himself or herself as a mere rubber stamp, but should take a close look at the material submitted by the applicant. ... The Judge should remember that the citizens of his country must be protected against unwanted fishing expeditions by the State and its law enforcement agencies. There must be, practically speaking, no other reasonable alternative method of investigation, in the circumstances of the particular criminal enquiry.”

...

What is, in my view, clear is that the Judge issuing the warrant in terms of s 74D of the Income Tax Act or s 57D of the VAT Act should consider whether one of the less drastic mechanisms contained in those Acts could not be utilised in order to attain the objective sought. ... In the instant case, this was not done at the time that the respondents applied for the warrant. For this further reason the warrant should, in my view, not have been issued.<sup>122</sup>

In *Shelton v Commissioner for South African Revenue Service*,<sup>123</sup>

which proceeded on appeal to the Supreme Court of Appeal, Streicher JA, considering the Appellant’s contention that the Commissioner should give notice of the application for a search and seizure warrant, stated:

‘The appellant submitted that the respondent had to give notice to him of the application for a warrant unless a case could be made out that notice should be dispensed with; that the respondent failed to make out such a case; and that the respondent’s application for a warrant should, therefore, have been refused. ... In these circumstances the giving of prior notice of the application for a warrant would have defeated the object and purpose of this section which is, among other, to enable the respondent to enter premises to search for information intentionally concealed from him. In the circumstances the section, by necessary implication, did not require the giving of notice.’<sup>124</sup>

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<sup>122</sup> Ibid 419 and 420.

<sup>123</sup> 2001 JDR 0934 (SCA), 2002 (3) JTLR 94. It would appear that Deutschmann did not appeal against the decision of the High Court in *Deutschmann* (note 91 above).

<sup>124</sup> Ibid 17.

Thus, the appeals lodged against the decisions of Locke J in *Haynes v Commissioner For Inland Revenue*<sup>125</sup> and Chetty J, Schoemann A J and Brauns A J in *Deutschmann*<sup>126</sup> were dismissed by the Supreme Court of Appeal. Section 74D(9) does not require the Commissioner to advise the taxpayer that he has launched an application to secure a search and seizure warrant before the execution of the warrant.

More recently, the Supreme Court of Appeal struck down search and seizure warrants issued under the NPA Act because, inter alia, the warrants were too broad and thus unjustifiably violated the appellant's right to privacy.<sup>127</sup> Cameron J A, commented:

'The search warrants Van Der Merwe J signed were breath-taking in their scope. They authorised the investigating director or his delegates to examine "any object" and to seize "anything" at Powell's premises relevant or that could be relevant to "the preparatory investigation concerned". No offence is mentioned. ... It does not even refer to "alleged irregularities". Its recipient is not informed of the nature and ambit of the "the preparatory investigation concerned".

...

Instead, those carrying out the search were then given virtually untrammelled power to carry out what *Mr Slomowitz* in his argument justly called 'a general ransacking' of Powell's premises. That has not been the law in this country since at least 1891, and is not the law under our Constitution, which preserved and enhanced what was best in our legal traditions. ... The warrants must be set aside as unlawful.'<sup>128</sup>

In his decision Cameron J A reviewed various cases dealing with search and seizure operations and summarised the most important points as follows:

'These cases establish this:

- (a) Because of the great danger of misuse in the exercise of authority under search warrants, the courts examine their validity with a jealous regard for the liberty of the subject and his and/or her rights to privacy and property.
- (b) This applies to both the authority under which a warrant is issued, and the ambit of its terms.
- (c) The terms of a search warrant must be construed with reasonable strictness. Ordinarily there is no reason why it

<sup>125</sup> 2000 (6) BCLR 596 (Tk).

<sup>126</sup> Note 91 above.

<sup>127</sup> *Powell N.O. and Others v Van Der Merwe and Others* 2005 (7) BCLR 675 SCA 689.

<sup>128</sup> *Ibid* 689 and 696.

should be read otherwise than in the terms in which it is expressed.

- (d) A warrant must convey intelligently to both searcher and searched the ambit of the search it authorises.
- (e) If a warrant is too general, or if its terms go beyond those the authorising statute permits, the courts will refuse to recognise it as valid, and it will be set aside.
- (f) It is no cure for an over-broad warrant to say that the subject of the search knew or ought to have known what was being looked for: The warrant must itself specify the object, and must do so intelligibly and narrowly within the bounds of the empowering statute.<sup>129</sup>

Thus, a warrant sought by the Commissioner must clearly identify the person and premises subject thereto, as well as precise details of the offence allegedly committed under the fiscal statutes. It should set out in some detail the nature of the records and documents subject to seizure.

Having completed a review of cases in South Africa dealing with search and seizure warrants, I now consider how other open and democratic societies regard search and seizure operations.

Baker & Groenhagen write about search and seizure operations as follows:

‘The most extreme form of interference with the taxpayer’s right to privacy will occur in the course of a tax investigation where premises are searched and evidence is seized. Not surprisingly, in those circumstances heightened protections should apply. The European Court of Human Rights has held that a power of search by revenue authorities should be subject to judicial safeguards. ... Only a prior warrant from an independent judge can ensure that any search is in accordance with law and is not disproportionate.’ [footnotes omitted].<sup>130</sup>

The position of the OECD member states on search and seizure operations is the following:

‘Tax authorities also have extensive powers to enter business premises and personal dwellings, ... Many countries require a warrant to enter private dwellings though most do not for entering business premises (e.g. Canada, Norway, Portugal). A few countries have no requirement for a warrant at all (e.g. Ireland, New Zealand). Columns 8 and 9 of Table 9 (A) show that the power to seize documents usually requires some kind of warrant.

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<sup>129</sup> Ibid 695.

<sup>130</sup> Baker & Groenhagen (note 40 above) 48.

The seizure of documents, however, is limited to either serious fraud cases or to certain penal procedures.<sup>131</sup>

Bentley comments generally:

‘Search and seizure powers are usually used in the context of tax audits, should be subject to strict limits, and should be used as a last resort. Most recent interpretations of the scope of these powers, in jurisdictions where they are reviewed under bills of rights, require court or independent third party approval in the form of a warrant or similar document. ... It is part of the requirement for due process that search and seizure should be prevented before they take place, if they are unwarranted, rather than allowing them to proceed and giving the taxpayer a right of action once the harm has already occurred.

Unless the tax authority can show reasonable cause why it should hinder the purpose of the search, the taxpayer should be informed prior to the search taking place.

...

The taxpayer should also be able to insist that the tax authority copy the information, rather than taking an original, unless the original is crucial to the investigation. If it is, the taxpayer should be able to make a copy before the information was taken.<sup>132</sup>

Bentley’s suggestion that the tax authority should take copies of documents is a good one but unfortunately is not practical where the search and seizure operation involves thousands of documents, as is often the case.

The United Kingdom Inland Revenue may, under the provisions of its governing statute, conduct search and seizure operations. According to Howarth the position in the United Kingdom (‘UK’) is that:

‘In very serious cases the Revenue has the power to obtain and execute search warrants. The legislation permits the Revenue to apply for a warrant only if there are reasonable grounds of suspecting that serious fraud is involved. The officer applying for the warrant has to give evidence on oath that there are reasonable grounds and that evidence is likely to be found on the premises specified. He also has to swear on oath that he is acting with the approval of the Board of Inland Revenue in that particular case.’ [footnotes omitted].<sup>133</sup>

Thus, the United Kingdom judiciary also controls the issue of search and seizure warrants. In addition, the exercise of the warrant must take

<sup>131</sup> *Taxpayers’ Rights and Obligations* (note 37 above) 16 and 17.

<sup>132</sup> Bentley (note 39 above) 51.

<sup>133</sup> Howarth & Maas (note 33 above) para 5.97 p 78.

place within 14 days of its authorisation.<sup>134</sup> The person conducting the search and seizure operation must supply a copy of the warrant to the occupier of the premises before commencing the operation.<sup>135</sup> The Inland Revenue must supply a record of documents taken under the search warrant. If a photocopy of the document will suffice, Inland Revenue must not keep original documents for longer than necessary.<sup>136</sup> The powers conferred on the UK Inland Revenue to conduct search and seizure operations appear similar to those conferred on the Commissioner.

In *R v IRC, ex parte Rossminster Ltd and Others*<sup>137</sup> the UK's Court of Appeal considered whether the warrant issued and executed by the Inland Revenue Commissioners was valid. Commenting on the way the Inland Revenue executed the warrant, Lord Denning MR said:

'As far as my knowledge of history goes, there has been no search like it, and no seizure like it, in England since that Saturday, 30<sup>th</sup> April 1763, when the Secretary of State issued a general warrant by which he authorised the King's messengers to arrest John Wilkes and seize all his books and papers. ... Pratt C J struck down the general warrant. You will find it all set out in *R V Wilkes, Huckle v Money* and *Entick v Carrington*. Pratt C J said:

"To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish inquisition; a law under which no Englishman would wish to live an hour; it was the most daring public attack made upon the liberty of a subject."

Now we have to see in this case whether this warrant was valid or not. It all depends of course on the statute.<sup>138</sup>

Denning MR commented further on the Inland Revenue's conduct:

'When the officers of the Inland Revenue come armed with a warrant to search a man's home or his office, it seems to me that he is entitled to say, "Of what offence do you suspect me?" ... Unless he knows the particular offence charged, he cannot take steps to secure himself or his property. So it seems to me, as a matter of construction of the statute and therefore of the warrant, in pursuance of our traditional role to protect the liberty of the individual, it is our duty to say that the warrant must particularise the specific offence which is charged as being fraud on the tax.

<sup>134</sup> Ibid para 5.99 p 79.

<sup>135</sup> Ibid para 5.102 p 79.

<sup>136</sup> Ibid para 5.105 p 80.

<sup>137</sup> [1979] 3 All ER QBD and CA 385.

<sup>138</sup> *R v IRC, ex parte Rossminster Ltd and Others* [1979] 3 All ER CA 385 para c p 398.

... It should have specified the particular offence of which the man is suspected. On this ground I would hold that certiorari should go to *quash* the warrant.<sup>139</sup>

Thus, in the UK, a valid search and seizure warrant must specify the precise offence the taxpayer has allegedly committed. Further, a judicial officer must issue the warrant.

A leading case in Canada dealing with issuing a search and seizure warrant is *Hunter et al. v Southam Inc.*,<sup>140</sup> which weighed up the validity of a search and seizure warrant under the Canadian Charter of Rights and Freedoms. Dickson J dealt with the question of who should authorise the search and seizure warrant:

'The purpose of a requirement of prior authorisation is to provide an opportunity, before the event, for the conflicting interests of the state and the individual to be assessed, so that the individual's right to privacy will be breached only where the appropriate standard has been met, and the interests of the state are thus demonstrably superior. For such an authorisation procedure to be meaningful it is necessary for the person authorising the search to be able to assess the evidence as to whether that standard has been met, in an entirely neutral and impartial manner.'<sup>141</sup>

It is clear that other democracies allow their revenue authorities to conduct search and seizure operations, but often require a judge to authorise the issue of the warrant.

In South Africa a taxpayer would find it difficult to satisfy a court that it should strike down the Commissioner's powers in s 74D on the basis that they unduly violate the right to privacy. The position of other open and democratic societies on the conduct of search and seizure operations supports this conclusion.

Clearly the execution of a search and seizure warrant constitutes a grave violation of the taxpayer's right to privacy. It is therefore important that the Commissioner satisfies the judge approached for the search and seizure warrant that he has exhausted the other information-gathering powers contained in s 74A and 74B without success. The search and

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<sup>139</sup> Ibid 401.

<sup>140</sup> 84 DTC 6467.

<sup>141</sup> Ibid 6474.

seizure warrant granted by the Court should contain details of the alleged offence and must not merely refer to alleged non-compliance with certain specific sections of the fiscal statutes.

The search and seizure warrant must detail the information required and the premises subject to search. To expect the Commissioner to advise a taxpayer that he has applied to a judge for the issue of a search and seizure warrant undermines the provisions of s 74D and is unnecessary. Once the Commissioner secures the warrant the fiscal statutes should require the warrant to be executed within a specified period, as is the case with search and seizure warrants issued under the Competition Act. It would be desirable that amendments to s 74D deal with this aspect and preclude the seizure of privileged information.

If the Commissioner carries out a search and seizure operation the taxpayer retains the inherent right to approach a court for relief to quash the warrant and have it set aside. Unfortunately, this remedy is neither ideal nor effective, as the taxpayer has already suffered the violation of his privacy.

I contend that amendments made to the search and seizure provisions of the fiscal statutes now conform to the right to privacy contained in the Constitution because the Commissioner may no longer authorise his officials to conduct search and seizure operations.<sup>142</sup> Such operations require judicial intervention, which is also the case in many open and democratic societies.

#### V MAY THE COMMISSIONER CONDUCT AN INQUIRY INTO A TAXPAYER'S AFFAIRS WITHOUT VIOLATING THE TAXPAYER'S RIGHT TO PRIVACY?

If the Commissioner wishes to conduct an inquiry into a taxpayer's affairs he must invoke the powers contained in s 74C of the Income Tax Act. The Commissioner may utilise the section as another means of securing information from a defaulting taxpayer.

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<sup>142</sup> Revenue Laws Amendment Act 46 of 1996 s 14.

In *Ferrucci*<sup>143</sup> Oosthuizen A J summarised the provisions of s 74C:

‘Section 74C vests in the Commissioner even more comprehensive investigatory powers. Under that section the Commissioner or his authorised representative may apply to a Judge for an order designating a presiding officer before whom an inquiry is to be held. ... The Judge is entitled to grant the order if satisfied that there are reasonable grounds to believe:

- (a) that there has been non-compliance by any person with his obligation in terms of the Income Tax Act ...
- (b) that information, documents or things are likely to be revealed which may afford proof of such non-compliance or of the commission of such offence;
- (c) that the inquiry which is sought is likely to reveal such information, documents and things.

The order issued by the Judge must name the presiding officer, refer to the alleged non-compliance or offence, identify the perpetrator thereof and be reasonably specific as to the ambit of the inquiry. The presiding officer thus appointed thereafter conducts the inquiry, utilising such procedure as he sees fit.<sup>144</sup>

In order to conduct an inquiry into the taxpayer’s affairs under s 74C the Commissioner must secure the approval of a judge, a requirement that balances the violation of the taxpayer’s right to privacy and the need for the inquiry. The comments above about the judiciary’s involvement in the issue of search and seizure warrants under s 74D apply equally to an inquiry conducted under s 74C.

The press has reported regularly on the tax affairs of Dave King, a prominent businessman and his disputes with the Commissioner.<sup>145</sup> It is clear from *The Commissioner for the South African Revenue Service v D King and Others*<sup>146</sup> that the Commissioner has obtained useful information about King under s 74C of the Income Tax Act. *King* is the only reported case identified that refers to an inquiry conducted under s 74C. Thus it appears that the Commissioner seldom utilises s 74C and this raises the question whether the provision serves any purpose.

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<sup>143</sup> (Note 115 above).

<sup>144</sup> *Ibid* 409 and 410.

<sup>145</sup> S Temkin ‘Trustee in battles over Dave King’s tax bill’ *Business Day* (15 July 2002); R Cokayne ‘King wins the first tussle in tax fight’ *Business Report* (4 September 2002); M Klein ‘Taxman set to seize King millions’ *Sunday Times Business Times* (2 April 2006).

<sup>146</sup> TPD (Case No.4745/02, as yet unreported) where Hartzenberg J p 2 refers to an inquiry conducted under s 74C of the Income Tax Act.

Comparing the Canadian and South African provisions Arnold commented on the old s 74(2) of the Income Tax Act, which was similar to s 74C:

‘Under subsection 74(2) of the South African Income Tax Act, the Commissioner may demand any person in receipt of income or with information to be examined on oath. ... The Canadian provision does not authorise the examination of persons under oath. However, under s 231.4 of the Canadian Income Tax Act, the Minister may authorise an official to conduct an inquiry with respect to any matter relating to the administration or enforcement of the Income Tax Act. The official conducting the hearing has the power to call witnesses and examine them under oath. ... The inquiry procedure is seldom used by the Minister.’<sup>147</sup>

As to whether the conducting of an inquiry on oath is reasonable, Arnold writes:

‘I am uncertain about whether subsection 74(2) of the South African Income Tax Act is reasonable, and necessary, and justifiable in a democratic society. Given the wide array of powers conferred on the Commissioner to obtain information, I am uncertain whether the additional power under subsection 74(2) is necessary. Undoubtedly, persons who are required to provide information under the Income Tax Act are subject to penalties for providing incorrect or false information. If this is the case, it is unclear what additional benefits are to be gained by giving the Commissioner the authority to examine persons under oath.’<sup>148</sup>

Daiber comments on the position in Germany as follows:

‘The tax authorities have the discretion to ask a taxpayer to affirm any information provided or to ask a competent court to require a third party to provide any information under oath. A taxpayer affirming information provided must be advised of the meaning of the affirmation and that criminal charges may apply where there is a false affirmation. ... If a third party provides information under oath, the taxpayer must be informed of the date of the process and is entitled to ask questions during the examination.’ [Section references omitted].<sup>149</sup>

The Internal Revenue Service of the USA may issue an administrative summons directing that a taxpayer attend an inquiry.<sup>150</sup>

<sup>147</sup> B J Arnold Opinion prepared for the Commissioner for Inland Revenue in CCT/22/96 53 and 54 available from the Constitutional Court.

<sup>148</sup> Ibid 56.

<sup>149</sup> Daiber (note 49 above) 174.

<sup>150</sup> Greenbaum (note 51 above) 351, where reference is made to the fact that an administrative summons is a summons issued by the IRS in conjunction with an investigation.

A number of countries will conduct inquiries into a taxpayer's affairs and it is not always necessary that a judge approve such inquiry. It is right, taking account of the constitutional dispensation in South Africa, that a judge should authorise the Commissioner's request to conduct an inquiry as required by s 74C of the Act. Arnold questions why the Commissioner requires a power to conduct inquiries in light of the other information-gathering powers contained in the Income Tax Act.<sup>151</sup> When applying for a judge's approval to conduct an inquiry the Commissioner should show that he has exhausted all other less invasive means of obtaining information.

On the basis of decisions such as that in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*<sup>152</sup> and *Bernstein v Bester NO*<sup>153</sup> on inquiries conducted under s 417 of the Companies Act it seems the Commissioner may pose incriminating questions at the inquiry, which the taxpayer is compelled to answer.

Despite its infrequent use I contend that s 74C of the Income Tax Act is reasonable and justifiable in an open and democratic society, as the Commissioner cannot commence an inquiry without a judge's authorisation. It is unlikely that a taxpayer will succeed in having the provision struck down on the ground that it unduly violates his or her right to privacy.

## VI MAY THE COMMISSIONER LAWFULLY CALL FOR INFORMATION THAT IS SUBJECT TO LEGAL PROFESSIONAL PRIVILEGE?

The right to claim privilege is not a statutory right but flows from the common law.<sup>154</sup>

Hoffmann writes that privilege extends not only to the rules of evidence but is a 'fundamental common-law right (of which, no doubt, the

<sup>151</sup> Arnold (note 147 above) 56.

<sup>152</sup> 1996 (1) SA 984 (CC).

<sup>153</sup> 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC).

<sup>154</sup> See, eg, L H Hoffmann & D T Zeffertt *The South African Law of Evidence* 4 ed (1989) ch 11 p 236 et seq and P J Schwikkard et al *Principles of Evidence* 2 ed (2002) ch 10 p 115 et seq. See *Stradling v Morgan* (1560) 1 Plowd 199 (75 ER 305).

evidentiary aspect is a manifestation) that entitles a person to seek legal advice in confidence'.<sup>155</sup>

Hoffmann & Zeffert justify why legal professional privilege applies to communications between a legal advisor and a client as follows:

'The learned judge of appeal [Botha JA in *S v Safatsa and Others*]<sup>156</sup> went on to approve of what Dawson J had said about this 'fundamental principle' in *Baker v Campbell*:

"The law came to recognise that for its better functioning it was necessary that there should be freedom of communication between a lawyer and his client for the purpose of giving and receiving legal advice and for the purpose of litigation and that this entailed immunity from disclosure of such communications between them. ..."

Although the privilege had been originally confined to maintaining confidence "pursuant to a contractual duty" arising out of a professional relationship, ...

"The restriction of the privilege to the legal profession serves to emphasise that the relationship between a client and his legal advisor has a special significance because it is part of the law itself ..."

The public interest, it has been decided by the courts, is better served by confidentiality rather than disclosure, "because the operation of the adversary system", if this were not so, would be impaired'.<sup>157</sup>

Jones J in *Jeeva and Others v Receiver of Revenue, Port Elizabeth, and Others*,<sup>158</sup> in considering an application by taxpayers for the release of information held by the Commissioner, evaluated the scope of privilege and commented as follows:

'These cases lay down the principle that the right to keep professional communications between legal advisor and client confidential is a *fundamental* right. Gibbs C J comments that "(t)his is a new development, which goes beyond any decision in England or Australia" (*Baker v Campbell* (supra at 65 (CLR) ). It does not seem to me to matter whether this is really a *new development*, or whether the law has come to recognise that what it previously treated as a rule of evidence has always been something more and that the rule of evidence is only one way of giving expression to a more fundamental right. It is certainly a new way of looking at privilege'.<sup>159</sup>

<sup>155</sup> Hoffmann & Zeffert (note 154 above) 247.

<sup>156</sup> 1988 (1) SA 868 (A).

<sup>157</sup> Note 154 above 247 and 248.

<sup>158</sup> [1997] 57 SATC 187.

<sup>159</sup> Ibid 200.

He further referred to *Baker v Campbell*<sup>160</sup> where Dawson J stated:

‘This is why the privilege does not extend to communications arising out of other confidential relationships such as those of doctor and patient, priest and penitent or accountant and client. The restriction of the privilege to the legal profession serves to emphasise that the relationship between a client and his legal advisor has a special significance because it is part of the functioning of the law itself which may ultimately result in disadvantage to the client. ....’ [footnotes omitted].<sup>161</sup>

When the Commissioner requires information from taxpayers or their advisors, *Jeeva*<sup>162</sup> would entitle taxpayers to refuse to disclose information protected by privilege. The first ground is that the taxpayer’s right to privacy contained in the Constitution protects such information from disclosure. Secondly, the legal right to claim privilege on the requested information would make the refusal lawful.

Schwikkard succinctly sets out the requirements for the existence of privilege.

‘Before legal professional privilege can be claimed the communication in question must have been made to a legal advisor acting in a professional capacity, in confidence, for the purpose of pending litigation or for the purpose of obtaining professional advice. The client must claim the privilege. And the lawyer can claim the privilege on behalf of his client once the latter has made an informed decision.’<sup>163</sup>

For privilege to apply it is not necessary that the advice sought relates directly to actual or impending litigation. Schwikkard comments that:

‘Communications made between a legal advisor and her client, provided they are made for the purpose of obtaining legal advice, need not be connected to actual or pending litigation for privilege to attach to them. However, before statements taken from agents or independent third parties will be treated as privileged, they must have been made in connection with contemplated litigation. Legal professional privilege will not be upheld if legal advice is sought so as to further a criminal purpose.’<sup>164</sup>

<sup>160</sup> (1983) 153 CLR 52, (1983) 49 ALR 385 and 57 ALJR 749.

<sup>161</sup> Note 158 above.

<sup>162</sup> Ibid 168.

<sup>163</sup> Schwikkard (note 154 above) 135. See also Hoffmann & Zeffertt (note 154 above) 250.

<sup>164</sup> Schwikkard (note 154 above) 137.

In *Heiman Maasdorp and Barker v Secretary for Inland Revenue and Another*<sup>165</sup> the taxpayer contended that privilege precluded the disclosure of the information required by the Commissioner. Commenting on the Commissioner's powers to call for information under old s 74(1) of the Income Tax Act Snyman J said:

'The crisp issue raised before me by counsel for all three parties was whether or not the usual privilege which a person consulting an attorney had, namely that the latter could not without his consent be compelled to divulge any confidences communicated to him or documents handed to him in the course of an attorney-client relationship, persisted in spite of the provisions of s 74(1) of the Income Tax Act ...

...

The language of this section would be decisive unless it is subject to the rule *generalia specialibus non-derogant*. In order to resolve the issue my enquiry becomes: whether the provision in section 74(1) is of a general nature as against the special nature of the privilege.<sup>166</sup>

Snyman J decided that the old s 74(1) of the Income Tax Act did not override the taxpayer's right to claim privilege to legal advice procured from the taxpayer's legal advisor.<sup>167</sup> The judge correctly pointed out that attorney-client privilege exists only within well-defined legal limits.<sup>168</sup>

Taxpayers cannot secure privilege merely by handing over internally generated correspondence and documents to their legal advisor, which documents are required under the fiscal statutes by the Commissioner.<sup>169</sup> Privilege can only apply to communications where the legal advisor supplies legal advice to a client or for the purposes of pending litigation.<sup>170</sup> In addition, privilege does not apply where the legal advisor assists the taxpayer to complete schedules for a tax return or drafts other schedules for the taxpayer's personal use.

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<sup>165</sup> 1968 (4) SA 160, [1968] 30 SATC 145 Snyman J was required to consider whether the Commissioner was entitled to production of certain documents and records of the taxpayer. The taxpayer's attorneys contended that the information required by the Commissioner was protected by privilege.

<sup>166</sup> *Heiman* (note 165 above) 147 and 148

<sup>167</sup> *Ibid* 149 and 150.

<sup>168</sup> *Ibid*.

<sup>169</sup> *Ibid* 150.

<sup>170</sup> Schwikkard (note 154 above) 135.

Large accounting firms employ tax advisors who are not lawyers and the question arises whether a client's right to claim legal professional privilege applies only to qualified lawyers or also to accountants in public practice. May the Commissioner call for information from taxpayers or their advisors which legal privilege would otherwise protect?

Based on the authorities, an accountant is unable to claim privilege on communications that have passed between him or her and a client.<sup>171</sup> Thus, where a client seeks tax advice from any person other than a lawyer, privilege does not protect that advice.<sup>172</sup>

It is appropriate to refer to the views expressed by tax commentators on legal professional privilege.

Bentley points out that legal professional privilege constitutes a right protected by statute or common law in various jurisdictions.<sup>173</sup> According to Bentley, only lawyers may legally claim such privilege. However, the Australian Commissioner of Taxation has extended privilege to specified documents passing between registered accountants and their clients.<sup>174</sup> The privilege conferred on clients of accountants may be withdrawn by the Commissioner of Taxation at any time as such right to privilege arises out of a concession made by the Commissioner and is not based on law.<sup>175</sup>

Writing about other countries, Baker identifies a lack of consensus on the scope of a taxpayer's right to claim legal professional privilege, for advice supplied by lawyers and non-lawyers, thereby preventing the disclosure of information to a tax authority.<sup>176</sup> He points out that the debate is unresolved over whether privilege should apply only to lawyers

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<sup>171</sup> Ibid 141, where the authors refer to the case of *Chantrey Martin v Martin* 1953 2 All ER 691, which held that an accountant does not enjoy legal professional privilege. Hoffmann & Zeffertt (note 154 above) 266 refer to the fact that an accountant's client does not enjoy legal professional privilege. See also an article by R W F Scales 'Privileged Communications: A snare for the Unwary?' (1985) *SATJ* 1(1) 37 and J Dijkman 'Professional Privilege' *Accountancy SA* (Nov-Dec 2004) 23.

<sup>172</sup> Hoffmann & Zeffertt (note 154 above) 250.

<sup>173</sup> Bentley (note 39 above) 7.

<sup>174</sup> Ibid.

<sup>175</sup> Ibid 49 and 50.

<sup>176</sup> Baker & Groenhagen (note 40 above) 49 and 50.

or should be extended to other advisors assisting a taxpayer with queries from revenue.<sup>177</sup>

Baker observes:

‘Two points might be made in this context. First, there is no reason why tax should be a special case: if there are good arguments for protecting professional privilege in ordinary civil cases, those arguments are equally good where tax is at issue. Secondly, tax is an area where professionals other than lawyers are commonly involved. If a client would enjoy privilege for communications with a lawyer, it seems logical that that privilege should apply equally to communications with another professional whom the taxpayer chooses to utilise in place of a lawyer.’<sup>178</sup>

The distinction between lawyers and accountants in the tax arena appears unjustifiably discriminatory. The taxpayer should be entitled to appoint an advisor who is treated equally by the law.

Reviewing the Australian Commissioner’s information-gathering powers and legal professional privilege Wheelwright states that the privilege applies where the purpose of ‘a communication is to obtain advice or to use it in litigation’.<sup>179</sup> She points out that the privilege does not extend to a solicitor’s trust account records nor does it apply to accountants dealing with their clients.<sup>180</sup> Officials inspecting taxpayers’ premises must afford taxpayers sufficient time to review their documents and claim legal professional privilege.<sup>181</sup>

According to Bloom the Australian courts have reviewed the issue of legal professional privilege in the tax arena.<sup>182</sup> He summarises the position as follows:

‘In *FCT v Citibank Limited* the Full Court of the Federal Court held that the common law principle of legal professional privilege restricts s 263 of *Income Tax Assessment Act 1936*. Bowen, CJ and Fisher J said:

“ ...

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<sup>177</sup> Ibid.

<sup>178</sup> Ibid at 49.

<sup>179</sup> K Wheelwright ‘Taxpayers’ Rights in Australia’ in Bentley (note 39 above) 81.

<sup>180</sup> Ibid.

<sup>181</sup> Ibid.

<sup>182</sup> D H Bloom QC ‘Legal Professional Privilege and Sections 263 and 264’ (1998) 27 *Australian Tax Review* 99. See also D M Maclean ‘O’Reilly’s Case and Legal Professional Privilege’ (1983) *Australian Tax Review* 163 and 164.

The adequate protection according to the law of privacy and the liberty of the individual is an essential mark of a free society and unless abrogated or abridged by statute the common law privilege attaching to the relationship of solicitor and client is an important element in that protection.”

It is not only a matter of protection for the client.

The freedom to consult one’s legal advisor in the knowledge that confidential communications will be safeguarded will often make its own contribution to the general level of respect for and observance of the law within the community.<sup>183</sup>

Bloom comments further that in Australia the Commissioner’s powers to search premises and make copies of documents are subject to the right of a taxpayer to claim legal professional privilege.<sup>184</sup>

Analysing a case dealing with the Australian Commissioner’s request for information from Deloitte, a firm of accountants, McLennan comments on Deloitte’s request for judicial review:<sup>185</sup>

‘Deloitte argued that there was a legitimate expectation created by the Commissioner’s “Access and Information Gathering Guidelines” (the Access Guidelines) that the Commissioner would not seize confidential material. Goldberg J noted the evident purpose of chapter 8.7 of the Access Guidelines is to provide: “by analogy with legal professional privilege a measure of protection except in exceptional circumstances to clients of professional accounting advisors in respect of disclosure of confidential taxation advice given to them by their professional accounting advisors.”<sup>186</sup>

McLennan points out that the information sought by the Commissioner was not privileged and was thus not protected by the guidelines.<sup>187</sup> It is unfortunate that South Africa does not have similar guidelines in place to confer privilege on communications between taxpayers and their non-lawyer advisors.

The Inland Revenue Department, New Zealand, has procedures in place to protect information supplied to taxpayers by accountants.<sup>188</sup>

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<sup>183</sup> Bloom (note 182 above) 99.

<sup>184</sup> Ibid 100.

<sup>185</sup> M McLennan ‘The Statutory Power of the Commissioner of Taxation and the Common Law Doctrine of Legal Professional Privilege’ (1999) 28 *Australian Tax Review* 139.

<sup>186</sup> Ibid 139.

<sup>187</sup> Ibid 143.

<sup>188</sup> ‘Tax and privilege: a proposed new structure’. Government discussion document published in May 2002 by the Policy Advice Division of the Inland Revenue Department, New Zealand, available at

In Canada, according to Li, a lawyer may claim solicitor-client privilege when Revenue Canada wishes to seize documents relating to a taxpayer.<sup>189</sup> The privilege does not extend to communications between an accountant and his or her client.<sup>190</sup> Analysing this position she writes:

‘The rationale for the absence of such a privilege seems to be that, unlike the solicitor-client privilege, the accountant-client privilege “is not founded upon a need to ensure an effective system of the administration of justice”, which is a basis for the solicitor-client privilege. However, it has been held that where an accountant is engaged by solicitors to obtain facts from a client, communications between the accountant and the client will be considered as communications between the solicitor and the client, and would be privileged.’<sup>191</sup>

Daiber points out that in Germany persons other than the taxpayer are not required to provide information to the tax authorities unless the taxpayer cannot provide the required information.<sup>192</sup> Attorneys, tax advisors, tax accountants, auditors and certified accountants may not provide information to the revenue authority unless the taxpayer withdraws the secrecy obligation facing these professionals.<sup>193</sup> The authorities need not inform the professionals of their right to remain silent.<sup>194</sup>

A leading case in the UK confirmed that a taxpayer need not supply documents covered by legal professional privilege to Inland Revenue.<sup>195</sup> Lord Hoffmann weighed the Inland Revenue’s power to call for documents against the right to claim that documents were subject to privilege as follows:

‘... the courts will ordinarily construe general words in a statute, although literally capable of having some startling or unreasonable consequence, such as overriding human rights, as not having

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<http://ird.govt.nz>, accessed 30 July 2004. See further ‘Non-disclosure rights for tax advice documents’, SPS05/07, July 2005, Inland Revenue, New Zealand, available at <http://www.ird.govt.nz>, accessed on 28 January 2008.

<sup>189</sup> Note 46 above 115.

<sup>190</sup> Ibid.

<sup>191</sup> Ibid 116.

<sup>192</sup> Daiber (note 49 above) 173.

<sup>193</sup> Ibid 173.

<sup>194</sup> Ibid 174.

<sup>195</sup> *R (on the Application of Morgan Grenfell and Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21. See further D Williams ‘United Kingdom Tax Collection: Rights of and Against Taxpayers’ in Bentley (note 39 above) 339.

been intended to do so. An intention to override such rights must be expressly stated or appear by necessary implication.<sup>196</sup>

He pointed out that a balance must be struck between the public interest of the Special Commissioner to assess the taxpayer correctly against the taxpayer's right to privacy and concluded that the right to claim legal professional privilege is absolute and not only forms part of the right to privacy but is based upon the taxpayer's right of access to justice.<sup>197</sup>

In *Grenfell*<sup>198</sup> the House of Lords decided that the documents requested by the United Kingdom Inland Revenue were subject to legal professional privilege and the taxpayer should not make them available.

Levy expressed the following view on the decision handed down in the *Grenfell* case: 'This [privilege] is well and good for lawyers but what about tax advisors? It is not only lawyers who provide skilled advice about the law, a fact which is recognised by parliament which has granted non-lawyers statutory rights to privilege under certain circumstances...'<sup>199</sup>

According to Howarth & Maas auditors who prepare documents as part of their function as auditor are not obliged to make those documents available to the UK Inland Revenue.<sup>200</sup> They point out that communications between a tax advisor and his or her client are protected where the purpose of the communications relate to the giving of tax advice.<sup>201</sup>

In the USA s 3411 of Taxpayer Bill of Rights 3<sup>202</sup> amended s 7525 of the Internal Revenue Code to extend legal professional privilege to 'a communication between a taxpayer and any federally authorised tax practitioner to the extent the communication would be considered a

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<sup>196</sup> *Grenfell* (note 195 above) 790.

<sup>197</sup> *Ibid* 791.

<sup>198</sup> *Ibid*.

<sup>199</sup> J Levy & A Watters 'Morgan Grenfell – Where Now?' *Simon's Tax Briefing Issue* (2002) 75-02.

<sup>200</sup> Note 33 para 5.57 p 70.

<sup>201</sup> *Ibid* 71.

<sup>202</sup> The formal title of the statute is Internal Revenue Restructuring and Reform Act of 1998, PL 105-26, more commonly referred to as Taxpayer Bill of Rights 3.

privileged communication if it were between a taxpayer and an attorney'.<sup>203</sup>

Thus, qualifying communications between taxpayers and registered tax practitioners are protected by privilege. It remains to be seen whether South Africa will follow this course when it enacts legislation to regulate the conduct of practitioners in the country.<sup>204</sup>

SAICA has proposed, via various submissions and in discussions with the Commissioner on legislation regulating tax practitioners, the removal of the distinction between tax advice given by a lawyer and that given by an accountant.<sup>205</sup> As is the case in many other jurisdictions in South Africa more accountants than lawyers give tax advice.<sup>206</sup>

The purpose of conferring legal professional privilege is to encourage full and frank disclosure to ensure the proper administration of justice. I contend that there is no justification for distinguishing between tax lawyers and tax accountants in an open and democratic constitutional society. The removal of the distinction would encourage full and proper disclosure by taxpayers to their advisors, whether those advisors are trained as accountants or as lawyers.

However, based on the decision of Hoffmann LJ in *Grenfell*<sup>207</sup> cited above a taxpayer may satisfy a court that advice obtained from an accountant should not be made available to the Commissioner. Furthermore, the decision of Botha JA in *S v Safatsa*<sup>208</sup> that the right to legal professional privilege 'is a fundamental principle upon which our

<sup>203</sup> See 'Congress Creates Client-CPA Confidentiality Privilege' (1999) *Tax and Business* 2 and A J Sawyer 'A comparison of New Zealand Taxpayers' Rights with Selected Civil Law and Common Law Countries – Have New Zealand Taxpayers Been Short-Changed?' (1999) 32 *Vanderbilt Journal of Transnational Law* 1368. See further Greenbaum (note 51 above) 373.

<sup>204</sup> The National Treasury has released the Regulation of Tax Practitioners Bill 2006 for public comment but the Bill has not been finalised and does not currently address the question of privilege in relation to tax.

<sup>205</sup> SAICA's submission, 'Proposal that legal professional privilege be extended to Chartered Accountants (South Africa)' 12 July 2002, addressed to the Commissioner. Comments by the Commissioner to SAICA entitled 'Proposed Regulation of Tax Practitioners in South Africa' 26 February 2003 9. Submission to the Commissioner by SAICA, 'Regulation of Tax Practitioners', 14 June 2005 9. All the above documents are available to Chartered Accountants (South Africa) at <http://www.saica.co.za>.

<sup>206</sup> D Bentley. *Taxpayers' Rights: Theory, Origin and Implementation* (2007) para 3.2.4 p 342.

<sup>207</sup> Note 195 above 786.

<sup>208</sup> 1988 (1) SA 868.

judicial system is based<sup>209</sup> may assist a taxpayer in resisting the Commissioner's request for access to tax advice supplied by an accountant.

Taxpayers cannot secure legal professional privilege for documentation not subject to privilege by handing that documentation over to their attorney or advocate.<sup>210</sup> To rely on privilege in refusing to supply information to the Commissioner a taxpayer must satisfy a court that documentation relates directly to obtaining legal advice or for purposes of litigation.<sup>211</sup>

## VII CONCLUSION

In terms of the provisions of s 74, 74A-D of the Income Tax Act the Commissioner may call for information from taxpayers in different ways. Those provisions lawfully and justifiably violate the taxpayer's right to privacy as enshrined in the Constitution. The need for the Commissioner to call for information is understandable and, based on international experience, constitutes a valid limitation of the taxpayer's right to privacy. What is important is the manner in which the Commissioner's officers conduct themselves in securing the information and that the information must be required for administration of the Act and not for ulterior purposes. Where a taxpayer believes the Commissioner is embarking on a fishing expedition it will be difficult to challenge the Commissioner's powers to call for the information on the ground that such a request violates the taxpayer's right to privacy. I contend that the taxpayer's remedy lies elsewhere and may arise out of the violation of the constitutional right to administrative justice (see later).

The search and seizure provisions contained in s 74D constitute a violation of the taxpayer's right to privacy. However, taking account of the experience in other open and democratic societies, the requirement that judicial authority must be sought for the issue of a search and seizure

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<sup>209</sup> Ibid 885.

<sup>210</sup> See *Heiman* (note 111 above).

<sup>211</sup> Ibid.

warrant under s 74D ensures that the warrant will be issued appropriately. I contend that the violation of the taxpayer's right to privacy entailed in such action constitutes a valid limitation of that right if the Commissioner can show that he has exhausted all other means of obtaining the required information.

The Commissioner does not conduct many inquiries into taxpayers' affairs under s 74C of the Income Tax Act and I question whether the power set out in this section is, in fact, necessary. The power is not common in other open and democratic societies.

Where the Commissioner requires a taxpayer or his or her advisor to supply information or documents the taxpayer should consider whether legal professional privilege protects any of that information. If it is protected the taxpayer would be within his or her rights to refuse to deliver the information to the Commissioner.<sup>212</sup> The right to refuse to disclose such information plays an important role in the administration of justice and is common in many other democratic societies, as, indeed, it is in South Africa.

Many countries confer legal professional privilege on tax advisors, be they accountants or lawyers. I contend that the South African legislature should review the position and should confer legal professional privilege on all tax advisors, thereby ensuring full and frank discussion of tax affairs between taxpayers and their advisors, which will enhance the level of tax compliance in the country. There is no justification for a distinction between tax accountants and tax lawyers in this country and other democratic countries which have extended legal professional privilege to all advisors, either statutorily or by agreement between the revenue authority and the governing accounting bodies. South African taxpayers are entitled to a right to privacy and taxpayers may seek to rely on that right in refusing to disclose information received from a tax accountant.

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<sup>212</sup> Ibid.

In the following chapter I consider the impact on the taxpayer's rights of access to information, to administrative justice and access to the courts on the powers conferred on the Commissioner in the fiscal statutes. I also analyse the way in which the Commissioner exercises those powers.

University of Cape Town

## CHAPTER 5

### PROCEDURAL RIGHTS

*'Justice should not only be done, but should manifestly and undoubtedly be seen to be done.'*<sup>1</sup>

#### I INTRODUCTION

In earlier chapters I evaluated the taxpayer's right to property and privacy. I concluded that a taxpayer might encounter difficulty in successfully challenging fiscal legislation or the conduct of the Commissioner on the basis of one of these rights and that the remedy might lie elsewhere. This chapter considers whether the procedural rights found in the Constitution offer an effective method of challenging the fiscal legislation or the conduct of the Commissioner and his officers. The three procedural rights contained in the Bill of Rights are inextricably linked and should not be evaluated independently.

The Constitution confers the following procedural rights on taxpayers:

- access to information;<sup>2</sup>
- just administrative action;<sup>3</sup> and
- access to the courts.<sup>4</sup>

#### II ACCESS TO INFORMATION

##### (1) *Background*

Section 32 of the Constitution provides that:

- '(1) Everyone has the right of access to -
- (a) any information held by the state; and
  - (b) any information that is held by another person and that is required for the exercise or protection of any rights.

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<sup>1</sup> Chief Justice Lord Hewart in *Rex v Sussex Justices* 1924 KB 131.

<sup>2</sup> Section 32.

<sup>3</sup> Section 33.

<sup>4</sup> Section 34.

- (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.<sup>5</sup>

The legislature enacted the Promotion of Access to Information Act 2 of 2000 ('PAIA') to comply with s 32(2). PAIA sets out the information a taxpayer may request from the Commissioner, as well as the procedures to follow in securing that information. The Act imposes no obligation on public bodies to make information available generally to the public apart from requiring all such bodies to produce a PAIA manual which is accessible by the public.<sup>6</sup>

It is unusual for a constitution to contain a separate right of access to information. Such right is normally part of a right to freedom of expression.<sup>7</sup> The rationale for a separate right of access to information is understandable in the light of South Africa's history, particularly during the apartheid era when many statutes contained provisions expressly prohibiting the publication of information held by the State.<sup>8</sup> The Interim Constitution created the right of access to information to encourage open, transparent and democratic government in South Africa.<sup>9</sup>

Roberts describes succinctly the rationale for a right of access to information.

'Die reg op toegang tot inligting is ook deurslaggewend in die voorkoming of vermindering van arbitrêre optrede en die bevordering van administratiewe geregtigheid. Dit behels onder meer dat 'n individu vooraf ingelig sal word oor beleid en prosedures en dat alle feite en oorwegings waardeur 'n party geraak mag word, beskikbaar gestel moet word sodat die persoon sy/haar kant van die saak kan stel ... Een van die vernaamste uitvloeisels van die geredelike verskaffing van inligting in sake waar die regte, vryhede en belange van die publiek ter sprake kom, is

<sup>5</sup> For a summary of the history relating to the right of access to information from the Interim Constitution to the Constitution see, eg, S Woolman & T Roux et al *Constitutional Law of South Africa* (2006) 62-1 and I Currie and J Klaaren *The Promotion of Access To Information Act Commentary* (2002) 3.

<sup>6</sup> Section 14 of PAIA requires public bodies to publish an information manual and s 51 places the same obligation on private bodies.

<sup>7</sup> M H Cheadle, D M Davis & N R L Haysom *South African Constitutional Law: The Bill of Rights* (2002) para 26.1 p 576.

<sup>8</sup> Currie & Klaaren (note 5 above) para 1.2 p 3.

<sup>9</sup> G E Devenish, *Commentary On The South African Bill of Rights* (1999) 439; Woolman & Roux (note 5 above) 62-3.

dat dit vertroue in die administratiewe proses in die hand werk en negatiewe persepies oor die openbare sektor verminder.<sup>10</sup>

A question that arises is whether a taxpayer may seek information only under PAIA or whether he or she may call for information directly under s 32 of the Constitution.<sup>11</sup> It has been argued that a taxpayer should seek primarily to rely on PAIA for required information but may, where appropriate, call for information by relying directly on s 32 of the Constitution on the basis that PAIA should not restrict a fundamental right contained in the Constitution.<sup>12</sup>

## (2) Meaning of 'required'

The right of access to information exists if the taxpayer requires that information to exercise or protect any rights protected under the Bill of Rights.

It is necessary to consider the significance of the term 'required' in the context of the right to access to information in s 32 of the Constitution. The decision of Myburgh J in *Khala v The Minister of Safety and Security*<sup>13</sup> is helpful.

'The context in which the word "required" is used in section 23 is that that section provides for a fundamental right in a Bill of Rights. The purpose of section 23 is to enable a person to gain access to information held by the State in order to create, and thereafter to maintain, an open and democratic society. One of the tests to be applied in deciding whether any fundamental right in Chapter 3 should be limited is that the limitation is justifiable in "an open and democratic society" in terms of section 33(1)(a)(ii) [my emphasis]. In that context, section 23, and in particular the word "required" therein should be given a generous and purposive interpretation. It should not be restrictively interpreted, as contended by the defendant. While it seems to me that "required" does not mean

<sup>10</sup> B V Roberts 'Betekenis en grondslae van die reg op toegang tot inligting' (2002) 65 *THRHR* 352. 'The right of access to information is crucial in preventing or reducing arbitrary conduct and in promoting administrative justice. It comprises, inter alia, that an individual will be informed in advance about policy and procedures and that all facts and issues affecting a party are made available so that the party may explain his or her point of view. ... One of the most important consequences of providing information on the public's rights, freedoms and interests, is that it increases confidence in the administrative process and reduces negative perceptions of the public sector.' [my translation].

<sup>11</sup> Currie & Klaaren (note 5 above) para 2.12 p 25.

<sup>12</sup> Ibid para 2.12 p 25 and Woolman & Roux (note 5 above) 62-4.

<sup>13</sup> 1994 (2) BCLR 89 (W).

“dire necessity” or “desired”, it is not possible to give the word a precise meaning. The enquiry in each case should be a factual one: Is the information required for the protection or exercise of a person’s rights?<sup>14</sup>

In *Khala*<sup>15</sup> the plaintiff sought access to the police docket to establish whether it contained any information that would assist in the plaintiff’s case for damages against the authorities for wrongful arrest. Myburgh J held that the plaintiff was entitled to the information requested to protect his rights.<sup>16</sup>

### (3) *Meaning of ‘Records’*

PAIA creates the means whereby taxpayers may request documents from the Commissioner for the protection of their rights, which would include the right to property, privacy and administrative justice. The document requested should assist taxpayers in understanding decisions that affect them.<sup>17</sup> The Act does not provide that taxpayers may call for information from the Commissioner. Instead, it prescribes that they may call for ‘records’ from the Commissioner in certain circumstances and sets out the procedures they must follow to secure that information.

Section 1 of PAIA defines a ‘record’ for the purposes of the Act as follows:

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

- (a) regardless of form or medium;
- (b) in the possession of or under the control of that public body or
- (c) whether or not it was created by that public or private body respectively;

The Act specifies who may request access to ‘records’ as defined and introduces the concept of ‘requester’

‘in relation to –

- (a) a public body [a requester] means –

<sup>14</sup> Ibid 95.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid 122. A similar decision was reached by Kroon J in *Qozoleni v Minister of Law and Order and Another* (1994) (1) BCLR 75 (E) 89.

<sup>17</sup> PAIA s 11.

- (i) any person other than a public body contemplated in paragraph (a) or (b)(i) of the definition of 'public body', or an official thereof) making a request for access to a record of that public body; or
- (ii) a person acting on behalf of the person referred to in subparagraph (i);'

PAIA imposes no obligation on the Commissioner to create records at the request of taxpayers but obliges the Commissioner to make available records requested by taxpayers, other than records containing information that the Commissioner may justifiably refuse under ch 4 of part 2 of the Act.

#### (4) *Public and private bodies*

The Act distinguishes between 'public bodies' and 'private bodies'.<sup>18</sup> The procedure governing requests for information by both types of bodies are much the same, as are the grounds for refusal of requests for information.

In terms of s 1 a 'public body':

'means -

- (a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
- (b) any other functionary or institution when –
  - (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
  - (ii) exercising a public power or performing a public function in terms of any legislation;'

In relation to paragraph (b) public bodies, and all private bodies, a requester may approach a court for relief if the body denies a request for information.<sup>19</sup>

Section 2(3) provides as follows: 'For the purposes of this Act, the South African Revenue Service, established by section 2 of the South African Revenue Service Act, 1997 (Act No. 34 of 1997), and referred to in section 35(1) is a public body.'

<sup>18</sup> See the definitions of these terms in s 1. A detailed examination of the rules governing private bodies lies beyond the scope of this thesis.

<sup>19</sup> PAIA s 78.

The provisions governing public bodies thus apply to the South African Revenue Service.

*(5) Requests for information from the Commissioner*

A taxpayer seeking information under PAIA must comply with s 11, which provides:

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

A taxpayer is thus entitled to request information held by the Commissioner about himself or herself. This includes information physically located in the taxpayer's file held by the Commissioner or held electronically on the Commissioner's sophisticated computer system. Where information requested falls into one of the grounds on which it may be refused under ch 4 of part 2 of the Promotion of Administrative Justice Act ('PAJA'),<sup>20</sup> the Commissioner is legally entitled to refuse access.

A taxpayer may call for information from the Commissioner before the commencement of criminal or civil proceedings. However, once proceedings have started a taxpayer cannot call for information relating thereto as such information is subject to the rules of discovery.<sup>21</sup> If a taxpayer obtains information in contravention of the section he or she may

<sup>20</sup> Act 3 of 2000.

<sup>21</sup> PAIA s 7; Currie & Klaaren (note 5 above) para 4.15 p 53.

not use it as evidence in the civil or criminal proceedings.<sup>22</sup> However, the court concerned may decide that to exclude the evidence would be detrimental to the interests of justice.

PAIA provides that an official wishing to decline a request for information must justify that decision rather than the requester being required to justify the request.<sup>23</sup> If the information may lawfully be made available to the taxpayer the Commissioner must accede to the request.

The Act lays down that each body must appoint an information officer who is responsible for ensuring that the body complies with the obligations imposed by PAIA. Section 17 of PAIA allows for the appointment of deputy information officers to assist the information officer. The information officer may delegate certain functions to the duly appointed deputy information officers.<sup>24</sup>

The Commissioner publishes many interpretation notes, practice notes and guides on customs, income tax, VAT and other taxes and levies. These documents are readily available, thus taxpayers do not need to follow the procedures contained in PAIA to secure copies.<sup>25</sup>

#### *(6) Commissioner's PAIA Manual*

Under s 14 of PAIA every public body must prepare a manual which sets out, as a minimum, the following information:

- a description of its structure and functions;
- contact details of the body and especially of the information officer of the body and every deputy information officer of the body;
- a description of the guide referred to in s 10 of the Act and how to obtain access thereto;

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<sup>22</sup> PAIA s 7.

<sup>23</sup> Ibid ss 9(b) and 25(3).

<sup>24</sup> Ibid s 17(3); Currie & Klaaren (note 5 above) para 6.1p 73.

<sup>25</sup> This thesis does not deal with the manner of obtaining records from private bodies as this lies beyond its scope.

- sufficient detail to facilitate a request for access to a record of the body, a description of the subjects on which the body holds records and the categories of records held on each subject;
- the latest notice under s 15(2) of the Act specifying what records are readily available from the body without the necessity of a request;
- a description of the services provided by the body to members of the public and how to access those services;
- a description of all remedies available in the event of the body acting or failing to act .

The Commissioner published the first edition of the manual required under s 14 in February 2003 and regularly issues updated manuals.<sup>26</sup> The Commissioner's manual is useful as it sets out which officials taxpayers should approach when requesting information. The Commissioner has decided that taxpayers must direct all requests to officials located at his office in Pretoria to ensure better control over requests and to expedite responses.<sup>27</sup>

The manual contains the information required under s 14 of PAIA and specifies that the Commissioner holds three main types of records, namely:

#### **8.1 Taxpayer information**

These records include tax returns, bills of entry, declarations, assessments, financial statements, financial or other information about taxpayers collected from various sources, and evaluative records.

#### **8.2 Personnel information**

These records include information on employment policy, contracts of employment of all personnel in SARS, evaluative records, and salary information.

#### **8.3 Business records**

These records include SARS' financial records on own account and revenue administered account, contracts, minutes of various

<sup>26</sup> *Manual on the Promotion of Access to Information Act 2000* published by the Commissioner in February 2003. This manual has been updated twice, most recently during April 2007. The latest version is available at <http://www.sars.gov.za>.

<sup>27</sup> Ibid 1 and 'Promotion of Access to Information Act and SARS' 6 *Taxgram* (September 2003) 6 and 7.

committee, operational records, operational instructions and manuals, tax statistics, tenders, and trade statistics.<sup>28</sup>

If a taxpayer requires a copy of his or her tax return, assessment, statement of account and related records, the Commissioner will make copies available on request. The taxpayer may have to pay for the cost of copies supplied, depending on the volume of copies called for.

The Commissioner's PAIA manual reminds taxpayers to establish whether his office holds the required records before requesting them.

A taxpayer who wishes to request information from the Commissioner under PAIA must complete a request form published by the Commissioner.<sup>29</sup> The form calls for the information required under PAIA and provides for payment of the prescribed fee where a person other than the taxpayer requests the information. If the taxpayer is requesting information about his or her own affairs no fee is payable.<sup>30</sup> If the request for information is successful the Commissioner is entitled to charge a fee for copies of documents. .

A taxpayer has a right to receive a decision about a request for information within 30 days.<sup>31</sup> PAIA deems the Commissioner to have denied a taxpayer's request if he fails to reach a decision within the stipulated period.<sup>32</sup> If the request is denied the taxpayer may utilise the internal appeal process set out in s 74 of PAIA. According to s 25 a decision denying a request for information must contain adequate reasons.<sup>33</sup>

Section 74 requires that a taxpayer lodge an appeal against a decision by a paragraph (a) public body to deny a request for information within 60 days of receipt of the decision. Because the Commissioner considers SARS a paragraph (a) public body as defined in s 1 of PAIA the appeal must be lodged by the completion of a form (form B) submitted to the Deputy Information Officer who originally dealt with the taxpayer's

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<sup>28</sup> *Manual* (note 26 above) 10.

<sup>29</sup> Form A contained in Annexure 1 to the *Manual* (note 26 above) 16.

<sup>30</sup> PAIA s 22(1).

<sup>31</sup> *Ibid* s 25(1).

<sup>32</sup> *Ibid* s 27.

<sup>33</sup> The term 'adequate reasons' is analysed in some detail below and is not dealt with further here.

request.<sup>34</sup> The Commissioner must decide on the appeal within 30 days and advise the taxpayer of the decision, with reasons.<sup>35</sup> Because paragraph (hh) of the definition of 'administrative action' in s 1 of PAJA specifically excludes decisions made under PAIA an aggrieved taxpayer may not rely on the procedures contained in PAJA to challenge the Commissioner's decision to deny access to a record.<sup>36</sup>

The taxpayer may also appeal to a court for relief in a case where the Commissioner has refused to grant a request for access.<sup>37</sup> The Court may make an order either confirming, amending or setting aside, the Commissioner's decision. In addition, the Court may grant an interdict, or specific relief, a declaratory order or compensation, or may award costs.<sup>38</sup>

#### (7) *Disclosure of records by the Commissioner*

What information may a taxpayer request from the Commissioner, and may members of the public request information about other taxpayers without restriction?

The Commissioner has a legal obligation to treat information supplied under the fiscal statutes as confidential under the secrecy provisions contained in the various fiscal statutes.<sup>39</sup> The taxpayer's right to privacy contained in s 14 of the Constitution must be balanced with the right of access to information in s 32 of the Constitution.

Section 35 of PAIA recognises the Commissioner's obligation not to disclose information about a taxpayer to any person other than the taxpayer. The section provides as follows:

'Mandatory protection of certain records of South African Revenue Service

(1) Subject to subsection (2), the information officer of the South African Revenue Service, referred to in section 2(3) must

<sup>34</sup> Form B is contained in Annexure 3 to the *Manual* (note 26 above) 22.

<sup>35</sup> PAIA s 77(3).

<sup>36</sup> Currie & Klaaren (note 5 above) para 3.8 pp 35 and 36.

<sup>37</sup> PAIA s 78.

<sup>38</sup> *Ibid* s 82.

<sup>39</sup> See, eg, s 4 of the Income Tax Act and s 6 of the VAT Act. Similar provisions are found in the other fiscal statutes administered by the Commissioner.

- refuse a request for access to a record of that Service if it contains information which was obtained or is held by that Service for the purpose of enforcing legislation concerning the collection of revenue as defined in section 1 of the South African Revenue Service Act, 1997 (Act No. 34 of 1997).
- (2) A record may not be refused in terms of subsection (1) insofar as it consists of information about the requester or the person on whose behalf it is made.'

(8) *Grounds for refusing access to records*

Insofar as it is relevant to this thesis, the Commissioner must, under PAIA, refuse access to the following classes of information:

- protection of privacy of a third party who is a natural person;
- protection of certain records of the Commissioner;
- protection of commercial information of a third party;
- protection of certain confidential information, and protection of certain other confidential information, of a third party;
- protection of police dockets in bail proceedings, and protection of law enforcement proceedings; and
- protection of records privileged in legal proceedings.<sup>40</sup>

The Commissioner may refuse access to information relating to the operation of SARS and requests that are manifestly frivolous or vexatious, or a substantial and unreasonable diversion of resources.<sup>41</sup>

All but one of the above categories are self-explanatory and are not analysed any further. The one ground that warrants further discussion is the protection of information under s 37 of PAIA, which covers information provided confidentially by a third party to the Commissioner. For example, a third party supplies an affidavit to the Commissioner alleging that a taxpayer did not export goods in conformity with s 11 of the VAT Act. When the Commissioner raises an additional VAT assessment and informs the exporter that he is relying on the affidavit to do so, may the exporter successfully call for a copy of the affidavit under PAIA?

<sup>40</sup> This summary is contained in the *Manual* (note 26 above) 13.

<sup>41</sup> *Ibid.*

The information officer of a public body must refuse access to information if disclosure constitutes a breach of a contractual confidentiality agreement, unless the information is publicly available or the affected third party consents to the disclosure of the information.<sup>42</sup>

The Commissioner frequently acts on information received voluntarily from one taxpayer about another. The informant may expect the Commissioner to treat such information as confidential. However, it may be possible for a person requesting information to show that it is not subject to a confidentiality agreement. If so, the Commissioner may disclose the information to the 'requester'. Where the information is subject to a confidentiality agreement the taxpayer seeking the information may only secure it from the source and not from the Commissioner.

The Commissioner may refuse to disclose information received from a third party if it falls under the provisions of s 37(1)(b) of PAIA. Currie & Klaaren analyse the section as follows:

'Section 37(1)(b) permits refusal of disclosure (1) if the record consists of information supplied in confidence by a third party and (2) if disclosure could reasonably be expected to prejudice the future supply of similar information or information from the same source and (3) if it is in the public interest that similar information should continue to be supplied.'<sup>43</sup>

If the deponent of the affidavit supplied the information in confidence, even if there was no contract to that effect, the Commissioner may refuse access to the affidavit. The Commissioner may rely on one of the other grounds in s 37(1)(b) to deny the request. Under s 37(2) the Commissioner may only release the information if the third party agrees under s 48 or in writing to the requester or if the information is publicly available.

It is contended that a taxpayer seeking the release of the affidavit will encounter difficulty doing so because of the provisions of s 37 of PAIA. However, the taxpayer may secure the desired information by relying on

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<sup>42</sup> PAIA s 37(1)(a) read together with s 37(2).

<sup>43</sup> Currie & Klaaren (note 5 above) para 8.62 p 155.

s 5 of PAJA as the taxpayer may come to understand the basis on which the assessment was made.

PAIA contains procedures for advising a third party that a 'requester' has called for information from a public body supplied with or in possession of information about the third party.<sup>44</sup>

If the public interest is greater than the ground for refusal to release the information a body other than SARS is, under s 46 of PAIA, entitled to release the information requested. Section 46 of PAIA provides:

'Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in sections 34(1), 36(1), 37(1)(a) or (b), 38(a) or (b), 39(1)(a) or (b), 40, 41(1)(a) or (b), 42(1) or (3), 43(1) or (2), 44(1) or (2) or 45 if –

- (a) the disclosure of the record would reveal evidence of –
  - (i) a substantial contravention of, or failure to comply with the law; or
  - (ii) an imminent and serious public safety or environmental risk; and
- (b) the public interest in the disclosure if the record clearly outweighs the harm contemplated in the provision in question.'

Section 46 of PAIA does not refer to s 35 of the Act. Thus, given that the Commissioner receives information from taxpayers under a statutory duty of secrecy and taxpayers expect that information to remain confidential, the records held by the Commissioner are not subject to the public-interest override, as is the case with records held by other public bodies.<sup>45</sup>

Where a member of the public seeks information about another taxpayer under PAIA the Commissioner must refuse the request for such information.<sup>46</sup> If the requester is the taxpayer or someone authorised to act on his or her behalf the Commissioner must release the information to the taxpayer or his or her representative where that information may be disclosed and will not violate ss 62 to 69 of PAIA.

<sup>44</sup> Part 2 ch 5. These procedures are not discussed further as they go beyond the scope of this thesis.

<sup>45</sup> Currie & Klaaren (note 5 above) para 8.26 p 133.

<sup>46</sup> PAIA s 35(2).

The purpose of the legislation is to facilitate the release of information to 'requesters'. Clearly, the Commissioner may deny requests for information in certain cases. However, PAIA allows for sections to be severed from records.

- '(1) If a request for access is made to a record of a public body containing information which may or must be refused in terms of any provision of Chapter 4 of this Part, every part of the record which-
  - (a) does not contain; and
  - (b) can reasonably be severed from any part that contains, any such information must, despite any other provision of this Act, be disclosed.
- (2) If a request for access to-
  - (a) a part of a record is granted; and
  - (b) the other part of the record is refused, as contemplated in subsection (1), the provisions of section 25(2), apply to paragraph (a) of this subsection and the provisions of section 25(3) apply to paragraph (b) of this subsection.'<sup>47</sup>

It is evident that the legislature intends the Commissioner to receive and consider requests for information. If possible, the Commissioner must make the information available to taxpayers in an unedited form. Where the information contains a mixture of information the Commissioner may release and information he may not release, he must delete the information that may not be released. He may do this on one of the grounds set out in ch 4 part 2 of PAIA. This will achieve the principle described by Currie & Klaaren:

'[T]hat limitations of the right of access to information should be reasonable and proportional to the aims pursued by the limitation, the Act requires holding bodies to sever (i.e., delete) from a record any information that is subject to refusal and to disclose the remainder of the information.'<sup>48</sup>

Where the Commissioner severs a record, he must release the information in such a manner that it contains no clues about the identity of the person protected.<sup>49</sup> Further, the way in which he edits the record must not render it misleading or meaningless.<sup>50</sup> Where a taxpayer requests

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<sup>47</sup> Ibid s 28.

<sup>48</sup> Note 5 above para 6.15 p 90.

<sup>49</sup> Ibid para 6.15 p 91.

<sup>50</sup> Ibid.

information about him or herself from the Commissioner, and such information contains details of another person, the Commissioner must release the record after removing the name of the other person.

What records may a taxpayer request from the Commissioner? The Katz Commission expressed the view that taxpayers will, under PAIA, have the right of access to all information held by the Commissioner relevant to an objection and appeal.<sup>51</sup> The Commission correctly pointed out that the Commissioner would fail to show that the limitation clause in s 36 of the Constitution would assist in a refusal to make the requested information available.<sup>52</sup>

Furthermore, according to Davis et al a taxpayer may seek information from the Commissioner comprising the Commissioner's official manual containing his tax policies, practices and procedures.<sup>53</sup>

In deciding what information a taxpayer may call for from the Commissioner I refer to the comments made by Kirk-Cohen J in *Rèan International Supply Company (Pty) Ltd and Others v Mpumalanga Gaming Board*:<sup>54</sup>

'The word "information" is far wider than the concept of "facts" known to an administrative body. In terms of s 33, an aggrieved applicant is entitled to decide for himself whether administrative action was justifiable in relation to the reasons given for the refusal of a licence. In order so to decide, an aggrieved party is entitled to "all information" which led to the refusal of a licence and that includes the deliberations of the administrative body. To exclude such deliberations would render the provisions of s 33(1)(d) somewhat nugatory because the deliberations may demonstrate the reasons upon which the board acted were unjustifiable or wrong. To exclude them from the ambit of ss 32 and 33 would impose an unjustifiable limitation upon the provisions of the Constitution. This follows from the provisions of s 33 that every person has a right to administrative action which is justifiable in relation to the reasons given. One can only decide whether

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<sup>51</sup> *Interim Report of the Commission of Enquiry into certain aspects of the Tax Structure of South Africa* para 6.3.33 p 76.

<sup>52</sup> *Ibid.*

<sup>53</sup> D M Davis et al *Fundamental Rights In The Constitution: Commentary And Cases* (1997) 151.

<sup>54</sup> 1999 (8) BCLR 918(T).

administrative action is justifiable if one has access to the reasoning of the administrative body.<sup>55</sup>

The Court held that the Gaming Board had to make available the transcripts of the meeting held to adjudicate the applicant's application for a licence.<sup>56</sup> Relying on this decision, taxpayers should succeed in obtaining information utilised by the Commissioner in reaching a decision on the taxpayer's assessment.

The Commissioner may levy interest, penalties and/or additional tax on a taxpayer. In deciding whether to impose tax and what amount of additional tax to impose, the Commissioner will call for reasons from the taxpayer justifying why he should not impose additional tax. The decision to impose additional tax and/or penalties is usually made by a Penalty and Interest Committee following the policy guidelines set by the Commissioner. Once that committee has met the Commissioner advises the taxpayer of his decision and issues an assessment.

The minutes of the committee may assist the taxpayer in understanding the Commissioner's decision to impose additional tax and/or interest. Based on the judgment in *Rèan*<sup>57</sup> the taxpayer should succeed in obtaining copies of minutes of the Penalty and Interest Committee meeting held to discuss whether the Commissioner will impose interest or additional tax on that taxpayer. If the Commissioner records those proceedings a taxpayer is entitled to call for a copy of the recording under the right of access to information.

The Commissioner's policy manual guides the decisions made by his officials in dealing with matters such as extensions for submission of tax returns, deferred payment of assessed taxes and finalisation of taxpayers' objections to and appeals against disputed assessments. A taxpayer's request for a copy of this manual should succeed.

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<sup>55</sup> Ibid 928.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

(9) *Operation of public bodies as a ground of refusal of access*

Section 44 of PAIA allows a public body to refuse a request for information if it relates to the operation of the public body. On this subject De Waal et al comment:

‘The purpose of this ground for refusal is to protect from disclosure the formulation of policy and the taking of decisions. In this sense, this ground for refusal draws on the state communications privilege.

...

Section 44 (1)(a) covers two categories of records: records containing an opinion, advice, report or recommendation (s 44(1)(a)(i)) and records containing an account of a consultation, discussion or deliberation that has occurred (s 44(1)(a)(ii)). An example of the second category would be a record containing minutes of a meeting. To qualify for this ground for refusal, however, the records in the first category must have been “obtained or prepared ... for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law”. Likewise, to qualify for this ground of refusal, the consultation, discussion or deliberation underlying the account in the second category must also have been “for the purpose of assisting to formulate a policy or take a decision in the exercise or performance of a duty conferred or imposed by law”.<sup>58</sup>

Thus, a taxpayer will not succeed in securing the release of information about planned changes in tax rates or other matters of fiscal policy. Where, however, the information relates directly to a taxpayer the Commissioner must release the information.

I submit that the taxpayer has the right to secure a copy of the minutes of the meeting of the Penalty and Interest Committee to the extent that they refer to the taxpayer. Clearly, the taxpayer cannot request information about other taxpayers discussed at the same meeting. The minutes of such meetings constitute a ‘record’ as envisaged in s 1 of PAIA.

Section 44 of PAIA should not prevent the taxpayer from securing the information requested in this case, as it relates to a decision already taken. Currie & Klaaren’s views on this aspect are instructive:

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<sup>58</sup> J De Waal et al *The Bill of Rights Handbook* 4 ed (2001) 551 and 552.

‘The disclosure of records after a decision has been taken cannot reasonably be expected to frustrate the deliberative process in a public body. Occurring after the deliberation, their disclosure would not inhibit candid communication of a pre-decision opinion, advice, report or recommendation. Likewise, the disclosure of a final and binding decision or policy and the information that it was based on cannot reasonably be expected to frustrate the deliberative process.’<sup>59</sup>

I contend that if the Commissioner has prepared guidelines or policy manuals for internal use by his assessors taxpayers have a right under PAIA to request the release of copies of such documents.<sup>60</sup>

The Commissioner regularly issues practice or interpretation notes on fiscal provisions, for public use via the website. Thus there is no need for a taxpayer to use the procedures contained in PAIA to secure a copy as these documents are released to the public once finalised by the Commissioner.

A difficulty may arise if, for example, taxpayer A suspects that the Commissioner may have issued a ruling to taxpayer B dealing with circumstances similar to those of taxpayer A. The Commissioner must apply the fiscal laws equally to all taxpayers so as not to violate the right to equality in s 9 of the Constitution. Taxpayer A, however, is unable to rely on PAIA to compel the Commissioner to release the ruling issued to taxpayer B.

Employers must deduct tax on remuneration paid to their employees, as defined in para 1 of the Fourth Schedule to the Income Tax Act. The law is clear but is difficult to apply to the facts that arise in practice. When sub-contractors supply labour only to a principal contractor in the construction industry it is unclear whether employees’ tax should be deducted and if so, at what rate.

The South African Institute of Chartered Accountants (‘SAICA’) became aware that the Commissioner had issued a ruling on the matter to the Building Industry Federation of South Africa (‘BIFSA’) and it wished to

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<sup>59</sup> Note 5 above para 8.102 p 186.

<sup>60</sup> Section 44 would not prevent such documents from being released to a taxpayer as they contain a record of policy decisions made by the Commissioner as opposed to deliberative documents.

obtain a copy of the ruling to circulate to its members. Legally, SAICA could not insist on procuring a copy of the ruling from the Commissioner under PAIA as the ruling related to another taxpayer or group of taxpayers.<sup>61</sup> As a result of the new provisions allowing taxpayers to request rulings from the Commissioner on certain aspects of the fiscal laws the Commissioner will, in future, publish general rulings of this type to assist taxpayers to comply with their fiscal obligations.<sup>62</sup> This will reduce fears that certain taxpayers may secure rulings from the Commissioner while others have no knowledge of such rulings.

#### (10) *Other Countries*

Few democratic countries have introduced a constitutional right of access to information.<sup>63</sup> However, other countries have introduced non-constitutional legislation allowing their citizens to obtain information under a dedicated piece of legislation, often referred to as 'freedom of information' legislation.<sup>64</sup>

Commenting on the international position, Baker & Groenhagen write:

'In some countries a taxpayer is given the right to have access to certain information held about him by the revenue authorities, and to correct any misinformation. This is the case, for example, in Australia under the Freedom of Information Act of 1982. There seems in principle no reason why such a right should not be more generally recognised. Practice may then develop as to what are appropriate details to which a taxpayer should be given access and what are matters (such as information from third parties) to which access might be denied.'<sup>65</sup>

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<sup>61</sup> SARS issued a directive to BIFSA – ruling effective from 1 March 2005 – available at <https://www.saica.co.za/Resources/ShowItemArticle.asp?Article ID=298&contentpagehtm>, accessed 29 January 2008.

<sup>62</sup> See Part IA of the Income Tax Act, which took effect on 1 October 2006 in terms of Proclamation No 43 in *Government Gazette* 29263 (29 Sept 2006).

<sup>63</sup> Cheadle, Davis & Haysom (note 7 above) para 26.1 p 576.

<sup>64</sup> De Waal et al (note 58 above) para 30.3 p 532 provide a comprehensive list of countries that have introduced such legislation.

<sup>65</sup> P Baker and A-M Groenhagen *The Protection of Taxpayers' Rights – An International Codification* (2001) 45.

(a) *Australia*

Australia introduced its Freedom of Information Act (Commonwealth) in 1982 and the Australian Tax Office ('ATO') has issued a manual for taxpayers in that country regarding access to information from the Australian Tax Commissioner.<sup>66</sup> Wheelwright expresses the view that the legislation 'facilitates the scrutiny of ATO policy and practice, thereby providing an important check on the ATO's activities'.<sup>67</sup>

Under Australian legislation taxpayers in that country have a right to the following:

'[I]nformation about you contained in documents held by us, as well as other information or documents such as public rulings and Tax Office procedures and guidelines that we use in making decisions. The Act also gives you the right to ask us to correct information held about you that's incomplete, incorrect, out of date or misleading.

...

However, there is information that the law exempts us from disclosure.'<sup>68</sup>

Unfortunately, South African legislation does not require the Commissioner to publish the guidelines used in making decisions, as is the case in Australia. The Commissioner does publish guidelines on certain topics for information purposes. However, those documents do not explain how the Commissioner's officers make decisions, or, for example, set out how his officials will conduct a tax audit and what he expects of the taxpayer during such an audit.

The grounds on which the Australian authorities may refuse requests for information are similar to those found in our legislation. Further, if the information will prejudice an investigation, the proper administration of the law, or the proper and efficient conduct of the Australian Tax Office's

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<sup>66</sup> *Taxpayers' Charter – Explanatory Booklet 06 Accessing information under the Freedom of Information Act* (November 2003) available at <http://www.ato.gov.au>.

<sup>67</sup> K Wheelwright 'Taxpayers' Rights in Australia' in D Bentley *Taxpayers' Rights: An International Perspective* (1998) 73.

<sup>68</sup> *Taxpayers' Charter 06* (note 66 above) 02. The comments of WDM Canon, author of the national report for Australia, in *Protection of Confidential Information in Tax Matters Cahiers de Troit Fiscal International Studies on International Fiscal Law LXXVIb* (1991) 170-3 are useful.

operations, the Australian authorities may deny a request for information.<sup>69</sup>

Australian law contains provisions allowing a taxpayer to take action against the Australian Tax Office by using the appeal procedures applicable to refusals to grant access to information.<sup>70</sup> A taxpayer who is dissatisfied with a decision about a request for information or about correcting a record may note an appeal that is heard internally. If the taxpayer remains unhappy with the decision after the internal appeal he or she may apply to the Administrative Appeals Tribunal to review the decision.<sup>71</sup> Alternatively, Australian taxpayers may lodge a complaint with the Taxation Ombudsman if they have complained to the manager of the tax officer dealing with their affairs and have not been satisfied with the outcome.<sup>72</sup>

Myers comments on the discovery of documents in disputes with the Australian Commissioner as follows:

‘It appears that the Commissioner being of the opinion that there had been an avoidance of taxation due to evasion assessed the taxpayer in *L’Estrange’s* case upon an assets betterment basis under ss. 167 and 170(2). The taxpayer, apparently having had his objections treated as an appeal and forwarded to the High Court, sought an order against the Commissioner. In a tantalizingly brief oral judgement Menzies J. made orders under Order 32, r. 18 of the High Court Rules:

- “(1) for the discovery of all reports in writing by officers of the respondent upon which the betterment statements, the foundation of the assessments in question, were based and of any documents upon which such reports were themselves based; and
- (2) for the discovery of all reports in writing by officers of the respondent upon which the respondent relied in forming the opinion that in relation to any year of income the appellant had avoided tax due to evasion and any document upon which such reports were themselves based.”<sup>73</sup>

<sup>69</sup> *Taxpayers’ Charter* (note 66 above) 03.

<sup>70</sup> *Ibid* 06.

<sup>71</sup> *Ibid* 07.

<sup>72</sup> *Ibid* 08.

<sup>73</sup> A J Myers ‘Discovery of Documents’ (Dec 1973) *Australian Tax Review* 236 and 237.

Myers wrote the article cited above before the enactment of the Australian Freedom of Information Act. However, the Australian High Court decided that the taxpayer could have access to detailed information.

Several reported Australian tax cases have dealt with the application of the Freedom of Information Act, and the Australian Administrative Appeals Tribunal has reviewed requests from taxpayers for the Australian Commissioner to supply documents.<sup>74</sup> The Tribunal weighed up whether the documents were exempt from disclosure on one of the grounds contained in the Australian legislation. It held that it was preferable, where possible, to disclose part of a document by removing the exempt portion rather than to refuse access to the entire document.<sup>75</sup>

A particularly complex issue relating to access to information arises when taxpayers seek to establish details about persons suspected of having suggested to the Commissioner that their affairs be audited.

When such an issue came before Beddoe, Senior Member of the Administrative Appeals Tribunal in *Re Sobczuk and Deputy Commissioner of Taxation*<sup>76</sup> he decided as follows:

‘A separate issue arises as to the source of information provided to the respondent. The public interest is in the applicant having access to the personal information about him, not the informant’s identity.

...

The informant’s name will need to be deleted in 2 places.’<sup>77</sup>  
[footnotes omitted].

On the basis of the above I contend that there is little or no support from the Australian system for South African taxpayers attempting to use PAIA to secure the release of an informant’s name from the Commissioner under PAIA.

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<sup>74</sup> See, eg, *Re Hart and Federal Commissioner of Taxation* 51 ATR 1086; *Re Hart and Deputy Commissioner of Taxation* 54 ATR 1057; *Re Wytkin and Anor and Deputy Commissioner of Taxation*, 52 ATR 1001; *Re Hart and Federal Commissioner of Taxation* 57 ATR 1174 and *Re Richardson and Federal Commissioner of Taxation and Martinek* 55 ATR 1091.

<sup>75</sup> *Re Richardson* (note 74 above) 1111.

<sup>76</sup> 50 ATR 1142.

<sup>77</sup> *Ibid* 1152.

The South African Police Service receives information from informants to assist in detecting crime.<sup>78</sup> The information supplied by informants is protected under the so-called informer's privilege and the public interest in fighting crime.<sup>79</sup> Similarly, the Commissioner may seek to rely on the public interest in detecting tax evasion as the basis on which to refuse disclosure of details of an informant.

(b) *India*

India enacted the Right to Information Act in 2005 'in order to promote transparency and accountability in the working of public authorities ...'.<sup>80</sup> The Act empowers citizens to gain access to information held by public authorities. A taxpayer must formally request information and the authorities must render assistance to persons who cannot reduce their request for information to writing. Indians wishing to request information do not have to supply any reasons.<sup>81</sup> The Indian authorities must supply the information within 30 days of receiving the request, failing which the official involved is liable to a penalty of up to Rs25 000 and may face disciplinary action.<sup>82</sup>

The threat of sanctions imposed on an official is an interesting innovation and should ensure that officials in India exercise caution when they make decisions about requests for information. Unfortunately, the South African Commissioner's officials are not subject to any similar sanction. Similar provisions in the South African legislation might enhance the quality and swiftness of decisions. India also prescribes appeal procedures if a State body denies an applicant's request for information.

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<sup>78</sup> P J Schwikkard et al *Principles of Evidence* 2 ed (2002) para 11.4 p 153.

<sup>79</sup> Ibid para 11.4.2 p 154.

<sup>80</sup> Implementation of the Right to Information Act 2005 1 available at <http://www.incometaxindia.gov.in>, accessed 28 January 2008.

<sup>81</sup> Ibid 2.

<sup>82</sup> Ibid.

(c) *United Kingdom*

The United Kingdom enacted the Freedom of Information Act in 2000, prescribing procedures for taxpayers wishing to request information from HM Revenue and Customs.<sup>83</sup> Individuals may request information on their personal affairs held by public authorities.<sup>84</sup> As expected, taxpayers may request information about their own affairs, but not about those of other taxpayers. The Act also requires public authorities to implement a publication scheme which specifies the information the authorities must publish, eliminating the need for members of the public to request such information.<sup>85</sup> This is similar to the requirement in South African law that public bodies publish a PAIA manual.

Taxpayers unhappy with the manner in which HM Revenue and Customs has dealt with their request for information may lodge a complaint with the Adjudicator's Office,<sup>86</sup> which has released guidelines on how taxpayers may request information and relevant publications.<sup>87</sup> The Adjudicator's Office publishes internal and external guidelines for the users of the Office's services. It is unfortunate that the Commissioner does not release similar guidelines for use by his staff and taxpayers, as is the case in the United Kingdom and other democracies.<sup>88</sup>

(d) *United States of America*

In the United States of America ('USA') taxpayers may request information, other than that protected from disclosure under the Freedom of Information Act from the Internal Revenue Service ('IRS').<sup>89</sup> According

<sup>83</sup> See Freedom of Information Act 2000 HM Revenue & Customs Publication Scheme, details of which are available at <http://www.hmrc.gov.uk/about/foi.htm>, accessed 28 January 2008.

<sup>84</sup> The Adjudicator's Office Freedom of Information Act (2000) Adjudicator's Office Publication Scheme 2 available at <http://adjudicatorsoffice.gov.uk>, accessed 28 January 2008.

<sup>85</sup> *Ibid* 2 and 3.

<sup>86</sup> Information about the purpose and functioning of the office may be found at <http://www.adjudicatorsoffice.gov.uk>.

<sup>87</sup> The Adjudicator's Office Freedom of Information Act 2000 available at <http://www.adjudicatorsoffice.gov.uk>, accessed 28 January 2008.

<sup>88</sup> 'If you're subject to enquiry or audit', *Taxpayers' Charter Explanatory Booklet* 10 (October 2003); 'Enquiries into tax' Code of Practice 1 (May 1995); 'What you should know about audits, RC4188 available at <http://www.cra-arc.gc.ca>, accessed 25 January 2008.

<sup>89</sup> Freedom of Information Act (FOIA) 5 U. S. C. 552.

to Kanakis & Osterberg, taxpayers may have access to the following information:

‘Specifically, each agency must make available for public inspection and copying final opinions and orders made in the adjudication of cases, statements of policy and interpretations which have been adopted by the agency and not otherwise published, and administrative staff manuals and instructions to staff that affect a member of the public, although to prevent a clearly unwarranted invasion of personal privacy the agency may delete identifying details. In addition, each agency is required to disclose to any person records upon request which reasonably describes such records and is made in accordance with the agency’s published rules for making such requests.’<sup>90</sup>

From the above it is clear that United States government agencies must publish more information than is the case with similar bodies in South Africa.

The IRS may authorise the release of tax return information to taxpayers, unless that disclosure will jeopardise federal tax administration.<sup>91</sup> The Internal Revenue Code (‘IRC’) defines the term ‘tax administration’ widely, and the authorities have a discretion to refuse requests for tax return information.<sup>92</sup>

US legislation contains administrative and judicial remedies for persons whose requests for information are denied.<sup>93</sup> In *Tax Analysts v Internal Revenue Service*<sup>94</sup> Urbina J denied the request for information from the Pacific Association of Tax Administrators (‘PATA’) about cross-border tax avoidance and tax evasion, as the information was non-disclosable.<sup>95</sup> The Court also refused a request for IRS records relating to meetings of the ‘Group of Four’ (the USA, UK, France and Germany).<sup>96</sup> Tax Analysts sought information about representatives at the meetings as well as about a foreign country’s tax law. The IRS contended that the

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<sup>90</sup> D E Kanakis & E C Osterberg ‘National Report for the United States’ in *Protection of Confidential Information in Tax Matters* (note 68 above) 288 and 289.

<sup>91</sup> *Ibid* 288.

<sup>92</sup> *Ibid*.

<sup>93</sup> See Freedom of Information Act notice published by the Treasury Inspector-General for Tax Administration available at <http://www.tigta.gov>, accessed 28 January 2008.

<sup>94</sup> United States District Court for the District of Columbia Civil Action No 99-0372 available at <http://www.dcd.uscourts.gov/99-372.pdf>, accessed 9 March 2006.

<sup>95</sup> *Tax Analysts v Internal Revenue Service* *Ibid* 10.

<sup>96</sup> *Ibid*.

non-disclosure provision in the United States Model Income Tax Convention prevents the disclosure of information about both the PATA and the Group of Four meetings.<sup>97</sup> The Court held that various tax treaties protected the information even though it did not relate to specific taxpayers.<sup>98</sup>

In *Department of Justice v Tax Analysts*<sup>99</sup> the US Supreme Court held that the district court decisions received by the Tax Division of the Department of Justice must be released to Tax Analysts.<sup>100</sup>

(e) *Canada*

Taxpayers in Canada have a right of access to information held by the revenue authority under the Privacy Act<sup>101</sup> and the Access to Information Act,<sup>102</sup> legislation similar to PAIA.<sup>103</sup> The right of access is subject to the right to confidentiality contained in the Canadian fiscal legislation and excludes information that is subject to attorney-client privilege.<sup>104</sup> Li indicates that when taxpayers request information they will typically receive a copy of their file collated by Revenue Canada with inter-office memoranda and reports. This is similar to the position in South Africa.<sup>105</sup> Where the authorities have deleted information they record this fact on the documents released to the taxpayer and the taxpayer may challenge the deletions by appealing to the Federal Court.<sup>106</sup>

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<sup>97</sup> Ibid 5.

<sup>98</sup> Ibid 7.

<sup>99</sup> 492 US 136 (1989).

<sup>100</sup> Ibid 155. See also *Tax Analysts v IRS* USDC Circuit Court of Appeal No 96 – 5152 decided 8 July 1997 available at <http://caselaw.lp.findlaw.com>, accessed 9 March 2006, where the court ruled that under the Freedom of Information Act the IRS should release the so-called 'Field Service Advice Memoranda' after redaction to Tax Analysts.

<sup>101</sup> Privacy Act R. S. C. 1985.

<sup>102</sup> Access to Information Act R. S. C. 1985.

<sup>103</sup> J Li 'Taxpayers' Rights in Canada' in Bentley (note 67 above) 101.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid and WJA Mitchell & J Potvin 'National Report for Canada' in *Protection of Confidential Information* (note 68 above) 250.

<sup>106</sup> Ibid 251.

(f) *New Zealand*

In 1982 New Zealand enacted the Official Information Act, which provides that taxpayers may request official information unless there are sound reasons to deny the request.<sup>107</sup> Reasons to deny a request for information include the reason that the information is protected by legal professional privilege, or that the information was supplied confidentially to the authorities.<sup>108</sup> Taxpayers in New Zealand are entitled to call for information relating to themselves from the Inland Revenue Department.

(11) *Conclusion*

It would appear that South Africa is unique in providing taxpayers with a constitutional right of access to information (s 32). However, many other countries have introduced specific 'freedom of information' legislation (similar to South Africa's PAIA), giving citizens the opportunity to secure the release of personal information held by the authorities.<sup>109</sup>

As in other open and democratic societies, for example, Canada, in South Africa the Commissioner must provide the taxpayer with a copy of his or her file when called on to do so.<sup>110</sup>

Should the Commissioner deny a taxpayer's request for information under PAIA, the taxpayer may follow the internal appeal procedure prescribed in s 74 of PAIA, or proceed to court under s 78 to secure the release of the required information.

An unresolved issue is whether the taxpayer may challenge the ground of refusal to access by relying directly on s 32 of the Constitution. I contend that a taxpayer could argue that the grounds of refusal in PAIA are too broad and undermine the fundamental right enshrined in s 32. Further, the taxpayer may attempt to satisfy a court that other open and democratic countries do not commonly deny access to records on the grounds contained in PAIA. The taxpayer could argue that the authorities

<sup>107</sup> G J Harley 'National report for New Zealand' in *Protection of Confidential* (note 68 above) 460.

<sup>108</sup> *Ibid.*

<sup>109</sup> Cheadle, Davis & Haysom, (note 7 above) para 26.1 p 576.

<sup>110</sup> Li (note 103 above) 101.

could achieve their objectives with less draconian methods than denying access to records. However, the taxpayer is unlikely to succeed with these arguments, particularly when referring to the grounds of refusal to access information in democratic countries such as those dealt with above and the limitation of rights contained in s 36 of the Constitution

I propose that the legislature should step in to amend PAIA to increase the amount of information such as, for example, internal policy manuals, that public bodies must publish.

The right to request information should not be viewed in isolation from the right to administrative justice contained in s 33 of the Constitution. Commenting on the interaction of the two rights, De Waal et al write:

‘The principal purpose of furnishing reasons is to justify the administrative action that has been taken. This is a different purpose to that of providing the *information* on which the administrative action is based.’<sup>111</sup>

The information a taxpayer successfully obtains from the Commissioner under PAIA may assist an understanding of the Commissioner’s reasons for decisions made. It is clear that taxpayers should consider the right of access to information in conjunction with the right to just administrative action.

### III ADMINISTRATIVE JUSTICE

#### (1) *Background*

Historically, taxpayers had no legal basis on which to insist that the Commissioner’s officials gave reasons for decisions reached.<sup>112</sup> There appear to be no reported tax cases decided before the Interim Constitution where a taxpayer sought to argue that he or she had the

<sup>111</sup> Note 58 above para 29.7 p 521. See also U Stander ‘Die Wenslikheid vir die Verskaffing van Redes vir Administratiewe Handelinge’ (1992) *Stell LR* 1 95 p 107: ‘*Inligting* dui op die feite en die getuienis waarop die owerheidsorgaan die uitoefening van sy diskresie grond, terwyl *redes* die motivering vir die motivering vir die uitoefening van die diskresie behels.’ ‘The desirability of providing reasons for administrative action’: ‘*Information* indicates the facts and evidence relied on by the organ of state in exercising a discretion, whilst reasons comprise the motivation for the exercise of its discretion.’ [my translation] and M Chaskalson et al *Constitutional Law of South Africa* (2006) para 25.7 p 25-19.

<sup>112</sup> The Interim Report of the Katz Commission para 6.3.36 p 77 recommended that the Commissioner train his staff to ensure that adequate reasons are supplied to taxpayers for decisions taken.

right to reasons for a decision or that the Commissioner had failed to comply with the principles of natural justice.

The introduction in the Interim Constitution of a right to administrative justice and its further inclusion in the Constitution has changed the manner in which the Commissioner administers the country's tax affairs.

(2) *The Constitutional right to just administrative action*

Section 33 of the Constitution confers a right to just administrative action on taxpayers in the following terms:

- '(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights and must -
  - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
  - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2);
  - (c) promote an efficient administration.<sup>113</sup>

Cachalia comments on the right to administrative justice as follows:

'Provisions in a bill of rights dealing with administrative justice are extremely rare. For example, in Canada and the United States administrative law has evolved largely without constitutional guarantees. Section 24 [of the Interim Constitution] does not purport to be a codification of South African administrative law but rather to provide for minimum basic entitlements to administrative justice.'<sup>114</sup>

Reviewing the effect on taxpayers of the Bill of Rights in the Interim Constitution the Katz Commission commented as follows:

<sup>113</sup> The history of the enactment of the Interim Constitution and the right to administrative justice in s 24 and the replacement thereof by s 33 of the Constitution lies beyond the scope of this thesis. A useful commentary is available in I Currie & J Klaaren *The Promotion Of Administrative Justice Act Benchbook* (2001) para 1.4 p 4 and De Waal (note 58 above) para 29.1 p 489. See Kruger AJ's comments on the Interim Constitution's effect on administrative law in *Noupoort Christian Care Centre v Minister of National Department of Social Development and Another* 2005 (10) BCLR 1034 (T) para 28 and C R M Dlamini 'The right to administrative justice in South Africa: creating an open and accountable democracy (parts 1&2)' *TSAR* 2000-4 697 and *TSAR* 2001-1 53 respectively.

<sup>114</sup> A Cachalia et al *Fundamental Rights in the New Constitution* (1994) 72.

‘Section 24 of The Constitution is even more significant. Although the entire section is so drafted as to make it difficult to provide a definite view as to its exact ambit Section 24(c) appears to provide the taxpayer with the right to be furnished with written reasons for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public. This means that a cryptic approach to objections and appeals as adopted by Inland Revenue in the past will have to cease. It is unlikely that the limitation clause will be of any assistance. Furthermore once reasons have been given the taxpayer could well argue that the initial decision taken was not justifiable in relation to the reasons given and that it should be set aside.’<sup>115</sup>

It is appropriate to consider the impact on taxpayers of the provisions contained in s 33 of the Constitution before turning to the legislation enacted under s 33(3), namely the Promotion of Administrative Justice Act.<sup>116</sup>

To rely on the right to administrative justice a taxpayer must show that the Commissioner’s conduct constitutes ‘administrative action’ as envisaged in s 33(1) of the Constitution. For example, the Constitutional Court had to determine whether a decision made by the President of the country to conduct an inquiry into the affairs of the South African Rugby Football Union constituted ‘administrative action’ and was thus reviewable by the Court.<sup>117</sup> The Court held:

‘[T]hat the test for determining whether conduct constitutes “administrative action” is not the question whether the action concerned is performed by a member of the executive arm of the government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not ... The focus of the enquiry as to whether conduct is “administrative action” is not on the arm of the government to which the relevant actor belongs, but on the nature of the power he or she is exercising.’<sup>118</sup>

The Court decided that the power to appoint a commission of inquiry was not ‘administrative action’ as envisaged and was thus not subject to

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<sup>115</sup> Interim report of the Katz Commission para 6.3.34 p 76.

<sup>116</sup> Note 20 above.

<sup>117</sup> *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC).

<sup>118</sup> *Ibid* para 141.

review by the Court but that it was nevertheless reviewable under the Constitution in terms of the principle of legality.<sup>119</sup>

I would argue that many of the decisions made by the Commissioner constitute 'administrative action' and are thus subject to the right to administrative justice. In fulfilling his mandate under the SARS Act<sup>120</sup> the Commissioner's officials will, for example:

- issue assessments to taxpayers,
- decide on requests made for postponement of tax pending an appeal, or
- decide whether to waive interest on the underpayment of provisional tax.<sup>121</sup>

Section 33 of the Constitution requires that 'administrative action' be 'lawful, reasonable and procedurally fair'. In analysing this requirement a question arises about the effect and status of the common law on 'administrative action'. In *Pharmaceutical Manufacturers Association of SA: Ex Parte President of the Republic of South Africa*<sup>122</sup> the Constitutional Court decided that the Constitution subsumes the common law principles of administrative law.<sup>123</sup> Thus, the common law continues to play an important role in administrative law. The Court explained the interaction between the Constitution and the common law as follows:

'The common law is not a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject matter each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the

<sup>119</sup> Ibid. In *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2004 (12) BCLR 1298 (C) Cleaver J held (1308) that the conclusion of a lease agreement by the state did not constitute 'administrative action'; Olivier JA held (385) in *Gamevest (Pty) Ltd v Regional Land Claims Commissioner, Northern Province and Mpumalanga, and Others* 2003 (1) SA 373 SCA that the receipt of a land claim did not constitute 'administrative action'.

<sup>120</sup> Act 34 of 1997. See also Chaskalson et al (note 111 above) para 25.2 p 25-4 and para 63.3 p 63-16.

<sup>121</sup> See, eg, A A Landman 'An Administrative Law Inquiry into the Legal Nature of the Assessment of Normal Tax' (1985), LLM thesis, University of South Africa; A G Schweitzer 'Aspects of the Administrative Law Relationship Between the Taxpayer and the Commissioner for Inland Revenue' (1991) LLM thesis, University of Cape Town, March 1991.

<sup>122</sup> 2000 (2) SA 674 (CC) para 46.

<sup>123</sup> Currie & Klaaren (note 113 above) para 1.24 p 25. See also De Waal et al (note 58 above) para 29.2 p 491; Devenish (note 9 above) 460 and 476 and Cheadle, Davis & Haysom, (note 7 above) 604.

supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control. What would have been ultra vires under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least constitutional law and common law are intertwined and there can be no difference between them.<sup>124</sup>

The common law principles of natural justice will therefore remain relevant in deciding whether the 'administrative action' is procedurally fair or not.

The fact that the legislature chose to use the phrase 'procedurally fair' in s 33(1) of the Constitution means that the test is broader than envisaged in the rules of natural justice.<sup>125</sup> Hoexter explains the significance of the use of the phrase 'procedurally fair' as follows:

'[I]t replaces the problematic idea of natural justice with a similarly wide and general term used in modern English law: "procedural fairness". Section 33(1) of the 1996 Constitution thus effectively rids us of the straightjacket of the classification of functions. For this reason, apart from any others the Constitution and the relevant provisions of the Promotion of Administrative Justice Act should not be treated as a mere codification of the existing common law.

...

However, the requirements and application of procedural fairness in particular situations may well be different from those of natural justice at common law. ... Here the judge pointed out that one could not regard s 24(b) of the Interim Constitution as codifying the existing common law. Instead, the right to procedural fairness entitles a person to "the principles and procedures ... which in [the] particular situation or set of circumstances are right and just and fair".<sup>126</sup>

Section 33(1) of the Constitution also requires the 'administrative action' to be 'reasonable'. Hoexter expresses the view that for 'administrative action' to be 'reasonable' it must be rational.<sup>127</sup> This

<sup>124</sup> *Pharmaceutical Manufacturers Association* (note 122 above) paras 46 and 50 p 9. See further Cheadle, Davis & Haysom (note 7 above) 604.

<sup>125</sup> Devenish (note 9 above) 472. See also C Hoexter *The New Constitutional and Administrative Law Volume Two Administrative Law* (2002) para 5.1 p 190; J R de Ville *Judicial Review of Administrative Action in South Africa* (2003) para 5.1 p 217 and Y Burns *Administrative Law Under the 1996 Constitution* (1998) para 4.1 p 165.

<sup>126</sup> C Hoexter (note 125 above) para 5.1 p 190.

<sup>127</sup> C Hoexter *Administrative Law in South Africa* (2007) 307.

means that the decision must be justifiable in light of the information known to the administrator and the reasons supplied for that decision.<sup>128</sup>

In *Carephone (Pty) Ltd v Marcus NO*<sup>129</sup> the Court formulated the test for reasonableness as follows: '[I]s there a rational objective basis justifying the conclusion made by the administrative decision maker between the material properly available to him and the conclusion he or she eventually arrived at?'<sup>130</sup>

Furthermore, for an 'administrative action' to be reasonable it must also be proportional.<sup>131</sup> Hoexter comments on this element of reasonableness as follows:

'Proportionality may be defined as the notion that one ought not to use a sledgehammer to crack a nut. Its purpose is to "avoid an imbalance between the adverse and beneficial effects ... of an action and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end". Two of its essential elements, then are balance and necessity while a third is suitability – usually referred to the use of lawful and appropriate means to accomplish the administrator's objective.'<sup>132</sup>

Section 33(2) of the Constitution provides that the taxpayer may request written reasons where the 'administrative action' adversely affects his or her rights. It is necessary to evaluate the meaning of the terms 'rights' and 'adversely affected'.

De Waal et al express the view that the term 'rights' does not refer only to rights flowing from the Bill of Rights:

'The term "right" is usually understood to mean an enforceable claim maintainable against a duty-holder. Presumably, it is not restricted to Constitutional rights and rights granted by the AJA, but means in general statutory- and private-law rights such as contractual or delictual rights. Moreover, the Constitutional Court has indicated that a "right", for purposes of s 241C, should probably be interpreted more broadly than the definition of the term in private law to include liability incurred by the State through the making of

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<sup>128</sup> Ibid.

<sup>129</sup> 1999 (3) S.A 304 (LAC).

<sup>130</sup> Ibid para 37 and Hoexter (note 127 above) 307.

<sup>131</sup> Ibid 309.

<sup>132</sup> Ibid 309 and 310.

unilateral promises or undertakings. If this approach is followed, the term rights approaches “legitimate expectations” in its ambit.<sup>133</sup>

Hoexter adopts a wide interpretation of the meaning of ‘rights’ contained in s 33(2), concluding that :

“[T]he decision [in *Goodman Bros (Pty) Ltd v Transnet Ltd* 1998 (4) SA 989 (W)] has significant implications for s 33(2), and thus for s 5 of the PAJA, because it seems to mean that the right to reasons will automatically apply to anyone to whom s 33(1) applies. In other words, the right to lawful, reasonable and procedural fair administrative action inevitably entitles us to the right to reasons, since the s 33(1) right will always be adversely affected by the failure to give reasons.”<sup>134</sup>

In the tax context, a decision made by the Commissioner or by his officials invariably affects the taxpayer’s patrimony. I contend that a taxpayer’s patrimony constitutes a right as envisaged in s 33(2) of the Constitution on the ground that a decision made by the Commissioner may affect the income tax payable by the taxpayer, the timing of payment, and whether such tax is subject to interest or additional tax.<sup>135</sup>

Administrative action must result in the taxpayer incurring a cost in the form of tax or must otherwise prejudice him or her. Based on Hoexter, the right to lawful ‘administrative action’ as envisaged in s 33(1) of the Constitution results in taxpayers being entitled to written reasons to establish that a decision made by the Commissioner is procedurally fair.<sup>136</sup> Difficulty arises as to what the legislature intended by the term ‘adversely affects’. In this context the authorities refer to the ‘determination theory’ and the ‘deprivation theory’.<sup>137</sup> Currie & Klaaren comment as follows:

‘The verb “affect” is ambiguous. It may mean either “deprive” or “determine”. Where, for example, a person applies for a licence for the first time, the refusal of the application will not deprive the applicant of any established right. The decision would, however, determine what the applicant’s rights are. Taking “affect” to mean deprive (sometimes referred to in the literature as the “deprivation

<sup>133</sup> De Waal et al (note 58 above) para 29.3 p 507.

<sup>134</sup> Hoexter (note 127 above) 424.

<sup>135</sup> The interest would typically be levied under s 89 *quat* of the Income Tax Act and the additional tax would be imposed under s 76 thereof.

<sup>136</sup> Hoexter (note 127 above) 424.

<sup>137</sup> De Waal et al (note 58 above) para 29.3 p 506. See also Currie & Klaaren (note 113 above) para 2.31 p 76 and Hoexter (note 125 above) 104.

theory”) will cover a narrow class of administrative action. Taking “affect” to mean ‘determine’ (the “determination theory”) will cover a much broader class of administrative action.<sup>138</sup>

The provision under consideration exists in the Constitution itself and not in an ordinary statute. I contend that the wider meaning of ‘adversely affects’ should apply, thereby extending the reach of the Constitution.<sup>139</sup>

Section 33(3) of the Constitution requires the enactment of legislation giving effect to the rights contained in s 33 within a prescribed period. PAJA is the Act enacted for this purpose. The following question arises: what happens if PAJA unduly curtails the right to administrative justice in the Constitution? May a taxpayer challenge PAJA on the ground that it violates the taxpayer’s right to just administrative action? Alternatively, could a taxpayer challenge a decision made by the Commissioner on the ground that it violates the taxpayer’s rights in s 33 of the Constitution?

I submit that if the taxpayer can show that PAJA unreasonably restricts his or her constitutional rights in violation of s 36 of the Constitution he or she may challenge the validity of PAJA.<sup>140</sup> Section 74 of the Constitution regulates amendments to the Constitution itself. PAJA, however, is not an integral part of the Constitution. Amendments to PAJA fall under s 73 of the Constitution, which contains less onerous provisions than s 74. My concern is that extensive amendments to PAJA will make the rights contained in s 33 more difficult to enforce.

### (3) *The Promotion of Administrative Justice Act*

At the time PAJA was drafted and debated the press reported that the Commissioner expressed the view that PAJA would threaten his ‘effectiveness and efficiency’.<sup>141</sup> In a submission to the Parliamentary Justice Portfolio Committee the Commissioner’s legal representative indicated that the provisions of PAJA were inappropriate ‘to the work of

<sup>138</sup> Currie & Klaaren (note 113 above) para 2.31 p 77.

<sup>139</sup> This is in accordance with the principle of purposive interpretation, which seeks to give effect to the provisions of the Constitution as opposed merely to giving effect to the meaning of the words contained therein. In this regard, see, eg, De Waal et al (note 58 above) para 6.3 p 130.

<sup>140</sup> Currie & Klaaren (note 113 above) para 1.29 p 29.

<sup>141</sup> ‘Revenue Service says bill threatens its efficiency’ (1 December 1999) *Business Day*.

SARS'.<sup>142</sup> He explained that tax officials made many decisions relating to tax assessments, for instance, allowing claims for deductions and decisions on the import of goods into the country at customs posts.<sup>143</sup> The Commissioner's counsel argued that PAJA 'would make it impossible to do tax assessments in the normal way'.<sup>144</sup> The Commissioner believed SARS had well defined administrative and appeal procedures that 'offered fair treatment to taxpayers'.<sup>145</sup>

In an editorial on the matter *Business Day* pointed out the dilemma faced by Parliament:

'S A Revenue Service (SARS) legal counsel Nicholas Haysom is one of a number of people who have identified the central dilemma of the proposed Administrative Justice Bill. How does Parliament give effect to citizens' constitutional right to just and fair administrative action without making day-to-day government so onerous, and subject to challenge, that efficient administration (required by the same section of the constitution) is still possible?'<sup>146</sup>

The Justice Portfolio Committee, and subsequently Parliament, considered the comments on the draft Bill and decided not to exclude any public bodies, including the Commissioner, from PAJA's ambit.

Section 2 of PAJA provides that:

- 'The Minister may, by notice in the *Gazette* –
- (a) if it is reasonable and justifiable in the circumstances, exempt an administrative action or a group or class of administrative actions from the application of the provisions of section 3, 4 or 5; or
  - (b) ...
- (2) Any exemption or permission granted in terms of sub-section (1) must, before publication the *Gazette*, be approved by Parliament.'

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<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid.

<sup>146</sup> 'Serving The People' (2 December 1999) *Business Day*.

Thus far, the Minister has not published any notice as envisaged in s 2(i) of PAJA. Therefore PAJA applies to all administrators and no part of the public service is exempt from its provisions.<sup>147</sup>

(4) *'Administrative Action' and the Commissioner*

PAJA defines 'administrative action' for the purpose of the Act, and the definition, in turn, refers to the defined term 'decision'. To rely on the remedies provided in PAJA a taxpayer must show that the action or inaction in question falls within the definition in s 1:

'[A]ny decision taken, or any failure to take a decision, by -

- (a) an organ of state, when -
  - (i) exercising a power in terms of the Constitution or a provincial constitution; or
  - (ii) exercising a public power or performing a public function in terms of any legislation; or ...'

To rely on PAJA a taxpayer must show that SARS falls within the bodies referred to in s 1 of the Act. Section 2 of the South African Revenue Service Act<sup>148</sup> provides as follows: 'The South African Revenue Service is hereby established as an organ of state within the public administration but as an institution outside the public service.'

It is clear that SARS is an organ of state as envisaged in s 239 of the Constitution and thus PAJA applies to decisions of the Commissioner and his officials.

In interpreting the term 'administrative action' contained in s 1 of PAJA it is appropriate to refer to s 33 of the Constitution itself.<sup>149</sup> It should thus be possible to rely on the decisions of the Court on the meaning of the term 'administrative action' in s 33 of the Constitution.<sup>150</sup>

The definition of 'decision' in s 1 of PAJA determines whether the conduct constitutes 'administrative action'. The Act defines 'decision' as:

<sup>147</sup> Currie & Klaaren (note 113 above) para 2.37 pp 82 and 83.

<sup>148</sup> Act 34 of 1997.

<sup>149</sup> J R de Ville (note 125 above) 35.

<sup>150</sup> *President of the Republic of South Africa* (note 117 above); *Greys* (note 119 above); *Gamevest* (note 119 above). Currie & Klaaren (note 113 above) para 2.1 p 35 et seq.

‘[A]ny decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to -

- (a) making, suspending, revoking or refusing to make an order, award or determination;
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
- (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- (d) imposing a condition or restriction;
- (e) making a declaration, demand or requirement;
- (f) retaining, or refusing to deliver up, an article; or
- (g) doing or refusing to do any other act or thing of an administrative nature,

and a reference to a failure to take a decision must be construed accordingly.’

Section 1 of PAJA models its definition of ‘decision’ on s 3 of the Australian Administrative Decisions (Judicial Review) Act.<sup>151</sup> Currie & Klaaren comment as follows:

‘The leading case on the interpretation of the definition is the High Court decision in *Australian Broadcasting Tribunal v Bond*. The Court held that, subject to one exception, only the final conclusion of an administrative or decisional process qualifies as a “decision”: “a reviewable ‘decision’ ... will generally, but not always entail a decision which is final or operative and determinative, at least in a practical sense, of the issue of fact calling for consideration.”<sup>152</sup>

It seems that a taxpayer may only rely on PAJA once the Commissioner has actually taken a decision or failed to take a decision. Where the taxpayer anticipates that the Commissioner will make a decision it is not possible to invoke the provisions of PAJA before the decision is made.

Section 1 of PAJA defines ‘failure’ as follows: ‘in relation to the taking of a decision, includes a refusal to take the decision’. Thus, where the Commissioner must make a decision and refuses to do so, that conduct falls within the provisions of PAJA. Section 6 deals with the timeframe within which an official should reach a decision. If the law or other empowering provision prescribes a period within which the Commissioner should take a decision his non-compliance falls into the review process

<sup>151</sup> Currie & Klaaren (note 113 above) para 2.7 p 42.

<sup>152</sup> Ibid para 2.7 p 43.

available under PAJA. If the empowering provision does not prescribe a timeframe, a court reviewing the failure to make a decision will take account of what constitutes a reasonable period in the circumstances.

To fall within the scope of PAJA the taxpayer must show that the Commissioner made the 'decision' under 'an empowering provision', defined in s 1 as follows: '[A] law, a rule of common law, customary law or an agreement, instrument or other document in terms of which an administrative action was purportedly taken'. Taxpayers must submit a tax return to the Commissioner each year and the Commissioner must issue an assessment under s 77 of the Income Tax Act. That Act and other fiscal statutes clearly fall into PAJA's definition of 'an empowering provision'.

The formal act of issuing an assessment constitutes 'administrative action' as envisaged in PAJA. The Commissioner's decision on the following matters also constitutes 'administrative action':

- a request for an extension of time in which to render a tax return;<sup>153</sup>
- a request for the postponement of payment of tax subject to an objection or an appeal;<sup>154</sup>
- a plea for mitigation for the imposition of no, or a reduced level, of additional tax;<sup>155</sup>
- a request to waive interest on the underpayment of provisional tax;<sup>156</sup>
- a decision on whether to conduct an audit on the taxpayer's affairs;<sup>157</sup>
- a decision to file a statement at the court where the taxpayer owes assessed income tax;<sup>158</sup> and

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<sup>153</sup> Income Tax Act s 66(1)(a).

<sup>154</sup> Ibid s 88 read with s 89

<sup>155</sup> Ibid s 76.

<sup>156</sup> Ibid s 89 quat (4).

<sup>157</sup> Ibid s 74B.

- a failure to finalise a refund due to a taxpayer.<sup>159</sup>

For PAJA to apply a taxpayer must show that the 'decision' made by the Commissioner 'adversely affects' his or her rights. For a decision to have legal effect it must constitute a final determination of the taxpayer's rights.<sup>160</sup> PAJA requires the 'decision' to have 'direct' effect on the taxpayer and this means that the Commissioner has made a final decision.<sup>161</sup> It does not include the steps involved in reaching the decision.<sup>162</sup> Further, the 'decision' must have external effect and impact on the taxpayer; a decision that only affects the Commissioner's day-to-day operations would not typically fall into this requirement.<sup>163</sup>

The definition of 'decision' contains exclusions, the most important being that decisions made under PAIA fall outside PAJA.<sup>164</sup> This is because PAIA itself contains measures that a taxpayer may utilise if the Commissioner fails to release information requested. The definition of 'decision' in s 1 of PAJA excludes a taxpayer from using PAJA to establish the reasons for the Commissioner's decision to institute a prosecution against him or her and the exclusion of 'legislative functions of Parliament' contained in the definition of 'decision' in s 1 of PAJA means that a taxpayer unhappy with new tax measures may not use the provisions contained in PAJA to question the reasons for those measures.

Where the Income Tax Act permits the Minister or the Commissioner to promulgate regulations, may a taxpayer challenge those regulations because they constitute 'administrative action' as envisaged in s 1 of PAJA?

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<sup>158</sup> Ibid s 91(1)(b).

<sup>159</sup> Ibid s 102.

<sup>160</sup> Currie & Klaaren (note 113 above) para 2.34 p 82.

<sup>161</sup> Ibid para 2.35 p 82.

<sup>162</sup> Ibid.

<sup>163</sup> Ibid para 2.36 p 82.

<sup>164</sup> Ibid para 2.25 p 69.

In a minority judgment Chaskalson CJ, in *Minister of Health and McIntyre NO v New Clicks South Africa (Pty) Ltd and Others*,<sup>165</sup> stated as follows:

'When the interim constitution was adopted the making of delegated legislation was regarded as administrative action subject to judicial review. There is nothing to suggest that the interim Constitution, or the Constitution that took its place, intended to exclude delegated legislation from what had previously been understood as being administrative action. On the contrary, the Constitutions point in the opposite direction.'<sup>166</sup>

Chaskalson CJ concluded under PAJA that the Court could review the regulations issued by the Minister of Health under the Medicines and Related Substances Act, 1965.<sup>167</sup> He decided that the 'implementation of legislation, which includes the making of regulations in terms of an empowering provision, is therefore not excluded from the definition of administrative action'.<sup>168</sup> Chaskalson CJ's conclusion was supported by Ngcobo J and O'Regan J.<sup>169</sup> Moseneke J, however, decided it was unnecessary to consider whether PAJA applied to the case at hand.<sup>170</sup> The issue remains unsettled as the Court failed to reach consensus.<sup>171</sup> Thus, a taxpayer aggrieved by regulations promulgated by the Minister or the Commissioner under a fiscal statute may, based on Chaskalson CJ's views, challenge those regulations under the provisions contained in PAJA.<sup>172</sup>

##### (5) '*Procedurally Fair*' Administrative Action

Section 3 of PAJA describes 'procedurally fair' administrative action as follows:

'(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

<sup>165</sup> 2006 (2) SA 311 (CC).

<sup>166</sup> Ibid para 109.

<sup>167</sup> Act 101 of 1965.

<sup>168</sup> Ibid 126.

<sup>169</sup> Ibid 201 and 442.

<sup>170</sup> Ibid 201 and 351.

<sup>171</sup> Ibid and C Hoexter (note 125 above) 125.

<sup>172</sup> Ibid para 135.

- (2) (a) A fair administrative procedure depends on the circumstances of each case.
- (b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) -
  - (i) adequate notice of the nature and purpose of the proposed administrative action;
  - (ii) a reasonable opportunity to make representations;
  - (iii) a clear statement of the administrative action;
  - (iv) adequate notice of any right of review or internal appeal, where applicable; and
  - (v) adequate notice of the right to request reasons in terms of section 5.
- (3) ...
- (4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).
- (b) ...
- (5) Where an administrator is empowered by an empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure.'

Section 3 of PAJA requires that the 'administrative action' must 'materially and adversely affect the rights or legitimate expectations' of a taxpayer. The section thus applies to a particular person and not to taxpayers generally. The provision's effect is narrower than that flowing from s 33(2) of the Constitution in that the 'administrative action' must 'materially' affect the taxpayer. Klaaren & Penfold, writing in Woolman & Roux et al, explain the provision as follows:

'On the face of it, procedural fairness therefore appears in some respects, to be applicable to a narrower category of action than "administrative action" (the inclusion of the word "materially") and in other respects, to a wider category of action (that which affects legitimate expectations and not only rights). The latter conclusion would, however, be logically inconsistent, as action must first constitute "administrative action" under the AJA before one can consider whether it is subject to the requirement of procedural fairness. The ambit of s 3(1) cannot be wider than the ambit of "administrative action" in s 1.

One approach to solving this logical problem is to emphasize the word "materially". The inclusion of the word indicates that a certain class of administrative action will not require the application of procedural fairness, that is, those actions which affect rights but do not affect one's rights or legitimate expectations in a material

manner. In such a situation, the rules of procedural fairness will apply if the action materially affects the relevant person's legitimate expectations. According to this approach, legitimate expectations only matter when rights are adversely affected in a non-material manner.<sup>173</sup>

Unfortunately the legislature chose to insert the word 'materially' in s 3 of PAJA. The comments made in Woolman & Roux et al assist, but there is a danger that a court will interpret the wording restrictively and deny a taxpayer recourse under PAJA when reviewing a decision made by the Commissioner.<sup>174</sup> PAJA constitutes the legislation required under s 33(3) of the Constitution. However, those provisions of PAJA that constitute an unreasonable limitation of the taxpayer's right to administrative justice enshrined in s 33 of the Constitution should not survive.

Section 3(1) of PAJA appears broader than the definition of 'administrative action' in s 1 of PAJA in that it refers to 'legitimate expectations' and not only to rights. Woolman & Roux et al summarise the role of 'legitimate expectations' as follows:

'Indeed, reading from the Constitutional Court's decisions, it seems likely that the concept of legitimate expectations will continue to play an important role in assessing the scope of procedural fairness. In *Premier, Mpumalanga* O'Regan J restated Corbett CJ's decision in *Administrator, Transvaal & others v Traub & others* in the following terms:

"Corbett CJ also recognized that a legitimate expectation might arise in at least two circumstances: first, where a person enjoys an expectation of a privilege or a benefit of which it would not be fair to deprive him or her without a fair hearing; and, secondly, in circumstances where the previous conduct of an official has given rise to an expectation that a particular procedure will be followed before a decision is made."<sup>175</sup>

The existing procedures adopted where the Commissioner queries the taxpayer's affairs illustrate the above. Currently, the Commissioner will require that the taxpayer answer the queries raised. Once the Commissioner has evaluated the reply the taxpayer receives a letter of

<sup>173</sup> Woolman & Roux et al (note 5 above) para 63.5 p 63-27.

<sup>174</sup> Ibid para 63.5 p 63-27.

<sup>175</sup> Ibid para 63.5 p 63-28.

findings setting out which items the Commissioner intends subjecting to tax by issuing an additional assessment. At this stage there is no effect on the taxpayer's 'rights' as he or she has not received an assessment. The Commissioner affords the taxpayer a last opportunity to reply to his letter of findings before he issues an assessment. If the Commissioner decides to do away with the issue of the letter of findings I contend that this adversely affects the taxpayer's legitimate expectations.

The fact that the Commissioner issues a letter of findings before issuing an assessment complies with the requirement that 'administrative action' be procedurally fair. On the other hand, the Commissioner will often set an unrealistic deadline for the taxpayer's response. I submit that such an unreasonable deadline does not meet the requirement of procedural fairness.

The Commissioner must, subject to certain exceptions contained in s 3(4) of PAJA, comply with the requirements of procedural fairness prescribed in s 3(2)(b). It is clear from s 3(2)(a) that the appropriate administrative procedure depends on the circumstances of the case. The Commissioner may vary the procedure by taking account of the type of 'administrative action' involved.

To ensure compliance with the fiscal statutes the Commissioner calls for information from taxpayers and conducts audits of their affairs.<sup>176</sup> It is contended that the decision to call for information from a taxpayer constitutes 'administrative action' that is subject to PAJA. In some cases the Commissioner's branch office issues letters to taxpayers demanding that the information be made available within seven business days and that the taxpayer's failure to comply with the deadline imposed will result in VAT refunds being forfeited or other legal steps being taken against the taxpayer.<sup>177</sup>

The deadline set by the Commissioner must take account of the volume of information requested. Frequently the information demanded

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<sup>176</sup> See Income Tax Act ss 74A and B and Value Added Tax Act ss 57A and B.

<sup>177</sup> The writer has seen such letters issued to clients and fellow tax practitioners from various branch offices in the country.

covers many months, sometimes various tax years and may be stored offsite.

The sections of the Income Tax Act dealing with the Commissioner's information-gathering powers do not define what is meant by reasonable.<sup>178</sup> The Concise Oxford Dictionary defines 'reasonable' as: 'in accordance with reason; not absurd, within the limits of reason; not greatly less or more than might be expected'.<sup>179</sup>

In *Spassked (Pty) Ltd v FCT*<sup>180</sup> the Australian Court was required to decide if a subpoena issued by the Tax Commissioner requiring information within six days was reasonable. The Court held that, in the specific circumstances, the deadline of six days was 'oppressive' and set the subpoena aside.<sup>181</sup>

Under PAJA taxpayers are entitled to request an extension of time if the deadline set by the Commissioner is unreasonable.

The Commissioner must advise the taxpayer of the nature and purpose of the 'proposed administrative action', which accords with the audi alteram partem element of the rules of natural justice.<sup>182</sup> Thus, the Commissioner must inform the taxpayer of the planned action before he implements it, so the taxpayer may make representations to the Commissioner before he finalises the decision. The Commissioner must supply the taxpayer with sufficient information about the 'proposed administrative action', to enable him or her to understand the consequences thereof.<sup>183</sup>

Section 3(2)(b)(ii) of PAJA requires that the Commissioner afford the taxpayer the opportunity to make representations before he reaches a decision.<sup>184</sup> In practice, before issuing an additional assessment imposing additional tax on a taxpayer because of an audit the Commissioner will

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<sup>178</sup> Note 176 above.

<sup>179</sup> *The Concise Oxford Dictionary of Current English* (1992) 999.

<sup>180</sup> FCT (3) [2002] FCA 490.

<sup>181</sup> *Ibid* paras 18 and 26.

<sup>182</sup> PAJA s 3(2)(b)(i).

<sup>183</sup> Currie & Klaaren (note 113 above) para 3.9 p 97.

<sup>184</sup> *Ibid* para 3.10 p 98. See also *Degussa Africa (Pty) Ltd and Another v International Trade Administration Commission and Others* [2007] 69 SATC 146.

frequently call for such representation.<sup>185</sup> In other cases, the Commissioner has imposed the maximum of 200 per cent additional tax before calling for representations. I contend that such conduct is contrary to the provisions of s 3(2)(b)(ii) of PAJA. However, the right to make representations to the Commissioner does not, under s 3(2)(b)(ii), confer on the taxpayer the right to insist on attending a hearing by the Commissioner to debate the 'proposed administrative action'.<sup>186</sup>

Under s 3(2)(b)(iii) the Commissioner must inform the taxpayer of the 'administrative action' taken by him.<sup>187</sup>

Section 3(2)(b)(iv) requires the Commissioner to inform the taxpayer of any right to request a review or internal appeal against the decision. A taxpayer may approach a court to review a decision made by the Commissioner in accordance with the rights available under s 6 of PAJA. Where internal remedies are available it is necessary to exhaust them first, unless there is no merit in proceeding because the official concerned exhibits bias and the taxpayer is unlikely to receive a fair hearing.<sup>188</sup>

An important right conferred on taxpayers is the right to call for reasons, which flows from s 3(2)(a)(v) of PAJA. Section 5 sets out the procedure to follow if a taxpayer wishes to call for reasons. The Commissioner must give the taxpayer proper notice of the right to call for reasons and should supply adequate information.<sup>189</sup>

Section 3(3) of PAJA confers on the Commissioner the discretion to allow three further procedures in making a decision and he must decide if it is necessary to follow these procedures. Failure to permit such procedures does not mean that the 'administrative action' is automatically unfair.<sup>190</sup>

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<sup>185</sup> Income Tax Act s 76 and in accordance with the Commissioner's practice as published in *SARS Income Tax Practice Manual* (1996) A-214 (1).

<sup>186</sup> Currie & Klaaren (note 113 above) para 3.10 p 99.

<sup>187</sup> *Ibid* para 3.10 p 99.

<sup>188</sup> See s 7(2)(c) of PAJA and the decision of Snyders J in *Gold Fields Ltd v Connellan NO and Others* [2005] 3 All SA 142 (W) at 170.

<sup>189</sup> Currie & Klaaren (note 113 above) para 3.10 p 99.

<sup>190</sup> *Ibid* para 3.14 p 100.

The first procedure (3(3)(a)) is that the Commissioner consider allowing the taxpayer to obtain assistance and, in complex cases, legal representation.<sup>191</sup> If a taxpayer wishes to consult with his or her accountant or tax advisor and the Commissioner denies him or her the right to do so, it could indicate that the procedure followed is unfair. If the Commissioner raises complex issues of tax law and threatens to impose additional tax, the taxpayer should have the opportunity to employ legal advisors to assist in responding to the issues raised.

The second procedure (s 3(3)(b)) is that the taxpayer should have an opportunity to dispute the Commissioner's information and arguments. PAJA does not compel the Commissioner to grant the taxpayer an opportunity to contest the information on which he relies, but I submit that not to do so indicates that the procedure followed may be unfair.<sup>192</sup>

The third procedure (s 3(3)(c)) requires the Commissioner to consider allowing the taxpayer to appear in person. Currie & Klaaren comment as follows:

'The common-law courts have always inclined against requiring oral proceedings in cases where written representations would suffice.

This is a practical consideration: hearings on paper are cheaper and quicker. Oral proceedings run the risk of turning administrative tribunals into courts. At the same time, however, it may be unfair to require poorly educated or illiterate persons to articulate their position in writing. Indeed, in simple matters an oral hearing may in fact be more expeditious and efficient, from the point of view of both the administrator and the affected individual.'<sup>193</sup>

The Commissioner has created Interest and Penalty Committees to adjudicate whether he should impose, reduce or even waive interest, penalties or additional tax in certain cases. Taxpayers must present their submissions in writing as to why the Commissioner should not impose additional tax or should, in a particular case, reduce or waive interest or penalties.

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<sup>191</sup> Ibid para 3.15 p 100.

<sup>192</sup> Ibid para 3.15 p 101.

<sup>193</sup> Ibid para 3.17 p 101.

It is not customary to invite a taxpayer to attend the meeting of the Interest and Penalty Committee that deliberates his or her case.<sup>194</sup> I accept that PAJA does not grant a taxpayer a right to insist on attending the meeting. However, the decision to impose the maximum penalty under the Income Tax Act or VAT Act may have dire financial consequences and I contend that to exclude a taxpayer from attending the meeting held to discuss his or her affairs constitutes an unfair procedure.<sup>195</sup> The Commissioner has advised SAICA that it is his policy to allow taxpayers to attend meetings of the Interest and Penalty Committee.<sup>196</sup> Unfortunately, the Commissioner's branch offices do not usually invite taxpayers to attend the meetings.<sup>197</sup>

By attending the meeting the taxpayer will have a better understanding of why the Commissioner is seeking to impose additional tax or penalties. A letter to the taxpayer cannot convey the same degree of understanding. Likewise, the Commissioner will gain a better understanding of the taxpayer's demeanour and reasons for his or her conduct. To allow the taxpayer to attend the meeting would ensure that the procedure adopted in imposing interest or penalties is, and is perceived as, procedurally fair, as required by PAJA.

Section 3(1) of PAJA requires that the 'administrative action' be procedurally fair and s 3(2) contains five elements with which the Commissioner must comply for such action to be fair. Section 3(3) sets out a further three optional elements of fairness. In deciding whether the

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<sup>194</sup> L Olivier 'Additional assessments, interest and penalties under the Income Tax Act 58 of 1962: the boundaries defined' (2004) *Tydskrif Vir Die Suid Afrikaanse Reg ('TSAR')* 273 p 285 and B J Croome 'Imposition of penalties: taxpayers and the Commissioner: SARS' (2003) *The Taxpayer* 89.

<sup>195</sup> See s 76 of the Income Tax Act and ss 39 and 60 of the VAT Act, which provisions regulate the imposition of additional tax and/or penalties; see also C Hoexter (note 125 above) para 5.3 p 200.

<sup>196</sup> Notes of a meeting between representatives of SAICA, CFA and SARS Enforcement held on Wednesday 11 January 2006 p 1 available to Chartered Accountants (South Africa) at <http://www.saica.co.za>, accessed 28 January 2008. See also notes arising from the meeting held by SARS, SAIPA and SAICA on 20 June 2006 p 2 available to Chartered Accountants (South Africa) at <http://www.saica.co.za>, accessed 28 January 2008.

<sup>197</sup> Based on the writer's experience in practice, taxpayers and their advisers are very seldom asked to attend meetings of the Interest and Penalty Committee despite the agreement reached between the Commissioner and SAICA.

'administrative action' is procedurally fair the Commissioner may need to consider factors not specifically mentioned in s 3.<sup>198</sup>

Section 3(4) of PAJA recognises that in certain cases it may be inappropriate to comply with the peremptory provisions in s 3(2) analysed above.<sup>199</sup> An example is where public interest dictates the need to restrict the right of a taxpayer to 'administrative action' that is procedurally fair.<sup>200</sup> The Commissioner may file a statement at a court under s 91 of the Income Tax Act for unpaid assessed tax without informing the taxpayer that he is taking such action. If the Commissioner advises the taxpayer that he is utilising the section the taxpayer might dissipate his or her assets to the detriment of the fisc. The difficulty that may arise with s 91 of the Income Tax Act is the manner in which the Commissioner exercises the powers it confers on him and that an abuse of the provision may, in certain instances, occur.

Currie & Klaaren comment as follows:

'The Business Practice Act was silent about granting a hearing prior to the issuing of an s 8(5) notice. Counsel for the government (*sic* applicant) argued that the audi alteram partem requirement should be read into the Act. The Constitutional Court rejected this argument, holding that the clear implication of the Act was to exclude a prior hearing, since the giving of notice would defeat the purposes for which the power was granted.'<sup>201</sup>

In *Hindry v Nedcor Bank Ltd and Another*<sup>202</sup> Wunsh J considered the validity of the provisions of s 99 of the Income Tax Act, which allows the Commissioner to appoint another person as the agent of a taxpayer, and obliges the agent holding any funds belonging to the taxpayer to pay those funds to the Commissioner instead.

Hindry contended, *inter alia*, that s 99 of the Income Tax Act violated the Constitution because the section did not provide for the taxpayer to

<sup>198</sup> Currie & Klaaren (note 113 above) para 3.18 p 101.

<sup>199</sup> See the comments in D Davis, L Olivier et al *Juta's Income Tax* (1999)91-3 on the validity of s 91 of the Income Tax Act and the audi requirement.

<sup>200</sup> Currie & Klaaren (note 113 above) para 3.20 p 102.

<sup>201</sup> *Ibid* para 3.20 p 103 fn 46. See R C Williams 'Reflections on some decisions in the light of the coming into force of the Promotion of Administrative Justice Act' (2003) *Obiter* 24(1) 251 and 'The Commissioner's Powers of Tax Collection' (March 1999) *The Taxpayer* 54.

<sup>202</sup> [1999] 61 SATC 163, [1999] 2 All SA 38 (W).

receive prior notice before such notices became operative.<sup>203</sup> He argued that the section violated:

- his right to administrative justice contained in s 33.
- his right to privacy contained in s 14 of the Interim Constitution,<sup>204</sup> and
- his right of access to courts contained in s 34.

Wunsh J held that s 99 of the Income Tax Act was valid even though the Commissioner did not grant a hearing to the taxpayer before he invoked the section.<sup>205</sup> This was on the basis that the Commissioner corresponded extensively with the taxpayer, that the claim was properly made by the Commissioner and the taxpayer was afforded an opportunity to pay it.<sup>206</sup> Wunsh J decided that s 99 of the Income Tax Act limited the taxpayer's rights for sound reasons, namely to facilitate and enhance the Commissioner's ability to recover promptly taxes due by taxpayers. He pointed out that the taxpayer's loss of property might, if necessary, be remedied by administrative relief. It was also held that the garnishee procedure is recognised in other open and democratic societies and any limitation of s 99 is reasonable and necessary.<sup>207</sup>

In *Contract Support Services and Others v C:SARS*<sup>208</sup> the Court considered s 47 of the VAT Act, which, similarly to s 99 of the Income Tax Act, allows the Commissioner to appoint an agent to collect VAT due, Brett AJ stated as follows:

‘I agree with the submission made by Mr Du Toit that not all administrative acts require the application of the *audi alteram partem* rule before they are given effect to. Indeed, s 47 itself requires no such prior hearing. I also agree with Mr Du Toit that to require a prior hearing would defeat the very purpose of the notice. It would alert the defaulting vatpayer to the intention to require payment from the latter's debtor and to enable the taxpayer to spirit

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<sup>203</sup> Ibid.

<sup>204</sup> This case was not analysed in the chapter dealing with the right to privacy as it lies beyond the scope of this thesis.

<sup>205</sup> *Hindry* (note 202 above) 173.

<sup>206</sup> Ibid.

<sup>207</sup> Ibid 186.

<sup>208</sup> [1999] 61 SATC 338, 1999 (3) SA 1133 (W).

such funds away. Where prior notice and a hearing would render the proposed act nugatory, no such prior notice or hearing is required.<sup>209</sup>

Brett AJ refused to allow the challenge to the notices issued under s 47 of the VAT Act because the notices were not ultra vires the Constitution. Further, the taxpayer's challenge did not succeed even though the procedure adopted in issuing the notices did not comply with the audi alteram partem principle.<sup>210</sup> The reason given was that if the Commissioner gave prior notice and granted a hearing, such conduct would undermine the provisions under consideration.<sup>211</sup>

The approach by Brett AJ in *Contract*<sup>212</sup> is supported by the earlier decision of the Court in *Gardener v East London Transitional Local Council and Others*,<sup>213</sup> where Erasmus J decided that:

'Fairness is a relative concept. The meaning to be attached to "procedurally fair administrative action" must therefore be determined within the particular framework of the act in question viewed in the light of the relevant circumstances. ... I do not understand s 24(b) to mean that the *audi* – principle is absolutely applicable to every administrative act. Such an interpretation would make possible the misuse of the Constitution to hold up necessary social reform measures, or for that matter any executive or administrative act.'<sup>214</sup>

However, in *Mpande Foodliner CC v Commissioner for South African Revenue Service and Others*<sup>215</sup> Patel AJ set aside notices issued under s 47 of the VAT Act declaring that the denial of the audi principle before issuing the notices infringed s 33 of the Constitution. Subsequently, in *Smartphone SP (Pty) Ltd v Absa Bank Ltd and Another*<sup>216</sup> Ponnann J referred approvingly to Brett A J's comments in *Contract Support Services*.<sup>217</sup>

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<sup>209</sup> Ibid 350.

<sup>210</sup> Ibid 340.

<sup>211</sup> Ibid 350.

<sup>212</sup> Ibid.

<sup>213</sup> 1996 (3) SA 99 (E).

<sup>214</sup> Ibid 116.

<sup>215</sup> [2001] 63 SATC 46 p 65.

<sup>216</sup> 2004 (3) SA 65 (W) 72.

<sup>217</sup> Note 208 above 338.

Ponnan J was critical of the decision delivered by Patel AJ in *Mpande*, commenting that it was:

‘[A] conclusion, which in my view, lost sight of a fundamental principle, namely that the fairness of administrative procedure depends on the circumstances of each case. I thus regret that I am unable to lend my support to his lone voice.’<sup>218</sup>

In *Smartphone*<sup>219</sup> the Court held, inter alia, that the taxpayer had not exercised its rights of objection and appeal, nor availed itself of other legal remedies and thus the application to set aside the s 47 notices failed.<sup>220</sup> The Commissioner’s power to issue a notice under s 47 of the VAT Act does not unlawfully violate the taxpayer’s right to administrative justice as envisaged in PAJA.

Section 36 of the VAT Act confers a discretion on the Commissioner to postpone the payment of VAT pending an appeal. It is necessary to consider how the Commissioner must exercise that discretion taking account of the provisions contained in PAJA.

The Commissioner’s counsel in *Metcash*<sup>221</sup> stated in paragraph 5.61 of the Heads of Argument: ‘The Commissioner, on application would obviously be required to exercise a proper discretion and would be subject to the discipline of administrative law.’<sup>222</sup>

The Constitutional Court considered the discretion granted to the Commissioner to postpone payment of tax pending an appeal as enshrined in s 36 of the VAT Act.<sup>223</sup>

Kriegler J dealt with the exercise of the discretion contained in s 36 of the VAT Act, as follows:

‘The Commissioner, in exercising the power under s 36, is clearly implementing legislation and as such the exercise of the s 36 power constitutes administrative action and falls within the administrative justice clause of the constitution. ... It contemplates,

<sup>218</sup> *Smartphone* (note 216above) 72.

<sup>219</sup> *Ibid.*

<sup>220</sup> *Ibid.* 74.

<sup>221</sup> *Metcash Trading Ltd v Commissioner for South African Revenue Service and the Minister of Finance* 2001(1) BCLR(1) CC, [2001] 63 SATC 13.

<sup>222</sup> Available at <http://www.concourt.gov.za>.

<sup>223</sup> This provision is, for all practical purposes, identical to that contained in s 88 of the Income Tax Act.

therefore that notwithstanding the “Pay Now, Argue Later” rule, there will be circumstances in which it would be just for the Commissioner to suspend the obligation to make payment of the tax pending the determination of the appeal. What those circumstances are will depend on the facts of each particular case. The Commissioner must, however, be able to justify his decision as being rational.’<sup>224</sup>

The Commissioner may not summarily dismiss a taxpayer’s request for the postponement of payment of tax pending the hearing of an appeal. Under the principles of administrative law he must properly exercise the discretion granted by taking account of all relevant facts.

It is unfortunate that neither the Income Tax nor the VAT Act prescribes what criteria the Commissioner must consider in exercising the discretion granted to him. Media Release 27 of 2000, issued by the Commissioner shortly after the *Metcash* judgement, stated that the Commissioner might, depending on the particular facts of the case in question, consider the following:

‘Where payment of the whole of the amount at issue would cause grave and serious hardship which could not be reversed if the taxpayer were to succeed in his appeal, and the circumstances of the case give rise to reasonable doubt;  
Other relevant circumstances, for instance, certainty that the amount at issue will be paid were the appeal to fail.’<sup>225</sup>

I suggest that the fiscal statutes should contain clear guidelines stating what factors the Commissioner must consider in deciding whether to agree to a postponement of tax pending an appeal.<sup>226</sup>

In an opinion prepared for the South African Commissioner, Arnold compares the constitutionality of s 88 of the Income Tax Act with Canada’s statutory provisions.<sup>227</sup> Arnold recommends certain changes to s 88 of the Income Tax Act.

‘Under s 88 of the South African Income Tax Act, the Commissioner has the authority to suspend the payment of tax

<sup>224</sup> *Metcash* (note 221 above) 35.

<sup>225</sup> 27 November 2000.

<sup>226</sup> Support for this view is contained in L Olivier ‘Tax Collection and The Bill of Rights’ (2001) *TSAR* 1 p 200.

<sup>227</sup> B J Arnold Opinion prepared by for the Commissioner for Inland Revenue attached as Annexure H to the Affidavit filed by the Commissioner for Inland Revenue in CCT/22/96 available from the Constitutional Court.

pending an appeal. It might be appropriate to consider setting out in the legislation the factors that the Commissioner must consider or the conditions which must be met in order for the Commissioner to exercise his discretion. Also, it might be appropriate to provide taxpayers with a right of appeal if the Commissioner does not exercise his discretion. The Commissioner's discretion in this regard is important because there may be legitimate circumstances in which taxpayers cannot pay their taxes pending an appeal without significantly adverse consequences. Also, it might be appropriate in certain circumstances for taxpayers to be entitled to provide security for the taxes owing in lieu of payment.<sup>228</sup>

The Commissioner is concerned that taxpayers may lodge an objection that has no merit merely to postpone the payment of the tax.<sup>229</sup> A practical difficulty arises in deciding which objections have merit and which do not.<sup>230</sup> I contend that the Commissioner should possess the power to insist on the timeous payment of tax where a taxpayer lodges an objection lacking merit and where failure to pay would place the fisc in an invidious position.

VAT represents tax collected by a vendor and held in trust for, due to and belonging to the State. Income tax, however, comprises an amount payable only once SARS assesses the tax return submitted by the taxpayer. If the Commissioner wishes to enforce payment of income tax unreasonably, pending the hearing of a tax appeal, the aggrieved taxpayer should consider bringing an action in court based on the principles of administrative law. Thus, it is not necessary to show that s 88 of the Income Tax Act is unconstitutional. Even though the Constitutional Court has upheld the 'pay now argue later' rule contained in the VAT Act, a taxpayer may still challenge the Commissioner's decision to enforce payment.<sup>231</sup> A violation of the rules of administrative justice provides the ground for such challenge.<sup>232</sup> Depending on the facts, this may be the most suitable remedy available to the taxpayer.

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<sup>228</sup> Ibid para B.1.3.5 pp 23 and 24.

<sup>229</sup> The question of frivolous appeals is also a cause for concern in Australia; see W Gumley & K Wyatt 'Are the Commissioner's Debt Recovery Powers Excessive?' (December 1996) 25 *Australian Tax Review* 186 p 201.

<sup>230</sup> See, eg, *Motsepe v Commissioner for Inland Revenue* [1997] 59 SATC 245.

<sup>231</sup> This would be based on the principles of administrative law and particularly the right to administrative justice contained in s 33 of the Constitution read together with PAJA.

<sup>232</sup> *Metcash* (note 221 above) 45.

Arnold confirms that taxpayers in Canada generally do not have to pay taxes owing when the amount payable is in dispute.<sup>233</sup> He points out that, in the case of certain large corporations, the Canadian Revenue may take immediate collection action for half the tax assessed until the 90-day period for filing an objection has passed.<sup>234</sup> With these corporations, the Canadian Revenue may collect the balance of the tax after the 90-day period has passed, even though the corporation may appeal against the assessment.<sup>235</sup> Arnold concludes that s 88 of the Income Tax Act ‘is both reasonable and justifiable in a democratic society’.<sup>236</sup> Further, he states as follows:

‘If taxes payable under dispute do not have to be paid by taxpayers, there is a clear incentive for taxpayers to dispute tax assessments that they would not otherwise dispute. It is very difficult for the courts or the tax authorities to decide whether or not disputes are frivolous. If taxes are not paid when assessed, there is also the problem of the taxpayers not having the necessary funds to pay the taxes when the litigation is finally resolved and the taxes are found to be due and payable. Obviously, if the taxpayer is successful in disputing the amount of tax assessed, the amounts should be refunded with interest so that, as much as possible, the taxpayer is restored to the situation he would have been in if the tax had been correctly assessed in the first place.’<sup>237</sup>

Under s 74D of the Income Tax Act the Commissioner is authorised to search a taxpayer’s premises and seize records. In such cases the Commissioner applies to court for a warrant to conduct the search and seizure raid. He does not notify the taxpayer of the request before executing the warrant. Williams comments as follows:

‘It is certainly arguable that denying taxpayers the right of appeal on the merits against the issuing of a warrant of search and seizure is an infringement of the constitutional right to “administrative action that is lawful, reasonable and procedurally fair” (s 33(1) of the 1996 Constitution), and it is regrettable that the taxpayers in the instant case did not make this argument ...’<sup>238</sup>

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<sup>233</sup> Arnold (note 227 above) 20.

<sup>234</sup> Ibid para B.1.3.1 p 21.

<sup>235</sup> Ibid.

<sup>236</sup> Ibid para B.1.3.2 p 22.

<sup>237</sup> Ibid para B.1.3.2 pp 21 and 22.

<sup>238</sup> R C Williams ‘An Important Decision on Taxpayers’ Rights In Respect Of Search And Seizure Warrants Issued Under The Income Tax Act and The Value-Added Tax Act’ (2001) *SALJ* 118(418) 421.

To allow a taxpayer to receive prior notice of an application for a search and seizure warrant will undermine the power conferred on the Commissioner by the legislature. I contend that the power to call for a warrant without the knowledge of the taxpayer is a reasonable limitation of the taxpayer's right to administrative justice. Such power exists in other open and democratic societies such as the United Kingdom and Canada and thus s 36 would assist the Commissioner in the exercise of the power contained in s 74D of the Income Tax Act.<sup>239</sup>

The Commissioner has a discretion to reduce or waive any penalty incurred under the Customs and Excise Act.<sup>240</sup> The rules of administrative justice require that the Commissioner exercise that discretion properly. In *Deacon v Controller of Customs and Excise* Horn AJ stated as follows:

'In this matter it would not have been difficult for the respondent to afford the applicant the opportunity to be heard. This was clearly not the common situation where, for example, the applicant had knowingly been a party to the evasion of payment of customs duty. Here the applicant was an innocent party. His situation called for a proper investigation by the respondent and full ventilation by the parties of all the relevant facts before the respondent took the decision to seize the motor vehicle. I gain the distinct impression that the respondent took the view that once it had been confirmed that duty was payable in terms of the Act, he was entitled to invoke the provisions of ss 87 and 88 without the need to have regard to the provisions of s 33 of the Constitution. The respondent ignored the fact that s 33 had broadened the basis upon which a court will, on review, interfere with the decision of a function in matters of this nature.'<sup>241</sup>

The Court, therefore, held that the authorities must consider the Constitution and cannot apply the Customs and Excise Act in vacuo.<sup>242</sup> Horn A J directed the authorities to conduct a full and proper hearing of all relevant facts and consider the principles of fairness and the rules of natural justice and the taxpayer's right to a hearing.<sup>243</sup> Further, he directed the customs and excise officials to apply the provisions of s 93 of

<sup>239</sup> P Horwath & R Maas *Taxpayers' Rights and Revenue Powers* (2004) para 5.33 p 64; Li (note 103 above) 114. See also Baker & Groenhagen (note 65 above) 48 and 49.

<sup>240</sup> Act 91 of 1964 s 93.

<sup>241</sup> 2 All SA 405 (SE), [1999] 61 SATC 275 at 284.

<sup>242</sup> Ibid.

<sup>243</sup> Ibid 290.

the Customs and Excise Act and to act in accordance therewith.<sup>244</sup> The Court set aside the decision to treat the motor vehicle as forfeit as well as the levying of duties and penalties.<sup>245</sup>

The decision of the Court in *Deacon*<sup>246</sup> confirms the opinion that a taxpayer may succeed in setting the section aside because the Commissioner has failed to comply with the rules of administrative justice. Horn AJ stated the following:

‘There will be numerous cases where the respondent would not be required to give effect to the natural rules of justice. One can visualise a situation where the respondent had complied with the relevant provisions of the Act and the person concerned has no answer to the respondent’s entitlement to the duty imposed or alternatively, to the respondent’s concomitant right to seize the goods in terms of the Act. It would be unreasonable to expect the respondent to adhere strictly to the *audi*-principle in such sharply defined cases. It would be different, however, where the respondent has knowledge of a person’s innocence or is aware of the existence of other mitigating factors with regard to an imported article and there was clearly potential prejudice for such a person should the respondent act in terms of the legislation without having regard to the rules of natural justice.’<sup>247</sup>

In *Raymond Wong and Four Others v the Commissioner for the South African Revenue Service*,<sup>248</sup> the Court considered the taxpayer’s right to administrative justice. The Court also evaluated the manner in which the officials exercised the powers to seize goods from taxpayers under s 88 of the Customs and Excise Act.<sup>249</sup>

Bertelsmann J decided as follows:

‘As I have said, the application of the vast powers which the Act grants to the respondent’s officials must be exercised with discretion and elasticity. The greatest measure of transparency and observance of due administrative process must be allowed as far as possible. This includes *audi alteram partem*. Upon the facts of the present case, the applicants ought to have been given the opportunity to be heard and to produce the documentation upon

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<sup>244</sup> Ibid 291.

<sup>245</sup> Ibid.

<sup>246</sup> Ibid.

<sup>247</sup> Ibid 284.

<sup>248</sup> JDR0907(T) 2003.

<sup>249</sup> Ibid paras 49 and 50.

which they rely for their claims that the goods were lawfully imported and that the necessary duty was paid.

Under the circumstances, and in the light of the failure on the part of officialdom to do so the attachment and removal was unlawful. I therefore granted the order which the applicants prayed for.<sup>250</sup>

It is clear that a Court will, on the basis of a breach of a taxpayer's right to administrative justice, grant relief to one who believes customs officials have infringed his or her rights by not granting a fair hearing.<sup>251</sup> However, the Commissioner may, in certain cases, satisfy a Court that there is no need to inform the taxpayer before taking the 'administrative action' because his conduct complies with the exceptions in s 3(2)(b) read with s 3(4) of PAJA.

Section 3(5) of PAJA allows an official to adopt a procedure that differs from that contained in s 3(2) as long as that procedure is fair. PAJA permits exemptions from the provisions of the statute under s 2. Initially, as mentioned, the Commissioner wanted effectively to be exempt from PAJA, but to date no State bodies have been declared exempt.<sup>252</sup>

#### (6) *The right to call for reasons under PAJA*

Under s 5 of PAJA taxpayers may call for reasons, in writing, for decisions made by the Commissioner and his officers. The section provides:

- (1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action, request that the administrator concerned furnish written reasons for the action.
- (2) The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action.

<sup>250</sup> Ibid paras 56 and 57.

<sup>251</sup> The taxpayer would seek to rely upon the rules of natural justice, the *audi alteram* principle and the rights conferred in s 33 of the Constitution and the Promotion of Administrative Justice Act, Act 3 of 2000. See further *Degussa Africa (Pty) Ltd v International Trade Administration Commission and Others* [2007] 69 SATC 146.

<sup>252</sup> 'Revenue Service says bill threatens its efficiency' (1 December 1999) *Business Day*; Currie & Klaaren (note 113 above) para 3.22 p 105.

- (3) If an administrator fails to furnish adequate reasons for an administrative action, it must, subject to subsection (4) and in the absence to the contrary be presumed in any proceedings for judicial review that the administrative action was taken without good reason.’

Currie & Klaaren describe the rationale underlying the release of reasons justifying an ‘administrative action’ as follows:

‘The principal purpose of furnishing reasons is to justify the administrative action that has been taken, thereby furthering the goals of accountability, openness and transparency in the use of public power.

...

The effect of a reason-giving duty is therefore to make the decision-making process more structured and rational. This effect can also be institution-wide, leading to a more rational institutional decision-making process.’<sup>253</sup>

It is possible to call for reasons only where the ‘administrative action’ materially and adversely affects the taxpayer’s rights. If the Commissioner may show that a particular decision does not fall into s 5 of PAJA because its effect is insignificant it is not necessary to supply reasons for the decision.

The Commissioner is authorised by s 74B of the Income Tax Act to conduct an audit at the taxpayer’s premises. Is a taxpayer entitled to call for reasons why the Commissioner conducts such an audit?

Commenting on the international position, Bentley writes:

‘Taxpayers should be given prior notification of an audit and the opportunity to request postponement of the audit if they have good reasons. As in any administrative decision, the tax authority should explain to taxpayers why they are chosen for an audit, what taxes and what years the audit will cover, what documents, books and other records will be required, how the audit will proceed, and give the taxpayer the opportunity to contact and use a legal or other representative in dealing with the tax authority.’<sup>254</sup>

<sup>253</sup> Note 113 above para 5.2 p 135. See J R de Ville (note 125 above) 287; U Stander ‘Die Wenslikheid vir die Verskaffing van Redes vir Administratiewe Handelinge’ (1992) *Stell LR* 95 (1) 10; G A Flick ‘Administrative Adjudications And The Duty To Give Reasons – A Search for Criteria’ (1978) *Public Law* 16 p 17; R Vijayan ‘Administrative Decisions And Duty To Give Reasons – A Search For Justification’ (1984) *Journal of the Indian Law Institute* 26 p 70; *Ansett Transport Industries (Operations) (Pty) Ltd and Another v Wraith and Others* 48 ALR 507.

<sup>254</sup> Note 67 above 49.

He also expresses the view that taxpayers should, at the commencement of the audit, receive clear guidelines from the revenue authority, setting out the audit procedures, the rights and duties of taxpayers during the audit as well as details of the tax authorities' settlement practices and rules governing objection and appeals against assessments.<sup>255</sup>

According to Daiber the German revenue authority is authorised to conduct audits and inspect records of taxpayers, but it must comply with the administrative procedures contained in the German legislation.<sup>256</sup> It is unfortunate that the South African fiscal legislation does not contain similar guidelines on how the Commissioner's officials must conduct the audit. I recommend that the South African legislature revise the sections empowering the Commissioner to conduct audits to include provisions similar to those found in the German legislation.

Often the South African Commissioner subjects the taxpayer to an audit and issues an assessment imposing penalties without holding a meeting with the taxpayer. In those cases where the Commissioner does not issue an assessment the taxpayer is never formally advised that the Commissioner has finalised the audit. In other cases the Commissioner will conduct an audit and issue a letter of findings to the taxpayer, calling on the taxpayer to explain certain facts before finalising the audit. Thereafter, the taxpayer receives an assessment. However, when an audit commences the Commissioner does not inform the taxpayer about the procedures he will follow in conducting an audit, nor is the taxpayer advised of his or her rights during such an audit.

Several other countries set out the procedures the revenue authority should follow when conducting audits of taxpayers' affairs.<sup>257</sup> In such cases the revenue authority informs taxpayers about the process and advises them of their rights.

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<sup>255</sup> Ibid 49.

<sup>256</sup> C Daiber 'Protection of Taxpayers' Rights in Germany' in Bentley (note 67 above) 184.

<sup>257</sup> *If you're subject to enquiry or audit* Taxpayers' Charter Explanatory Booklet 10 (October 2003); *Enquiries into tax*, Code of Practice 2 (May 1995); *What you should know about audits*, RC 4188, available at <http://www.cra-arc.gc.ca>, accessed 25 January 2008.

Section 5 of PAJA requires the taxpayer to request reasons for the application of the section. The Commissioner has no obligation to supply reasons without having received a request from the taxpayer. In practice, however, the Commissioner's officers usually supply reasons for all assessments issued, without the taxpayer having to call for reasons.

The Income Tax Act contains detailed provisions dealing with the objection and appeal process in relation to disputes over assessments.<sup>258</sup> Taxpayers are entitled to call for reasons for an assessment issued by the Commissioner under either s 5 of PAJA or Rule 3(1)(a) of the rules governing objections and appeals.<sup>259</sup> Rule 3(1)(a) provides as follows:

'Any taxpayer who is aggrieved by any assessment may by written notice delivered to the Commissioner within 30 days after the date of the assessment, request the Commissioner to furnish reasons for the assessment.'

Rule 3(2), which clarifies the nature of the reasons the Commissioner must supply, expands on the above rule:

'Where in the opinion of the Commissioner adequate reasons have already been provided, the Commissioner must within 30 days after receipt of the notice contemplated in subrule (1), notify the taxpayer accordingly in writing which notice must refer to the documents wherein such reasons were provided.'

If a taxpayer calls for reasons it is clear that he or she needs only to lodge detailed grounds of objection once the Commissioner has supplied reasons for the assessment.<sup>260</sup> The Commissioner has expressed the view that where a taxpayer requests reasons under PAJA he or she must submit a letter of objection within 30 days of the date of the assessment.<sup>261</sup>

The Commissioner may, on fulfilment of certain specified criteria, grant an

<sup>258</sup> See s 81 of the Income Tax Act and the regulations promulgated under s 107A of that Act. In *South African Revenue Service and Another v Armsec Professional Services (Pty) Ltd* [2004] 66 SATC 277, Pillay J decided (280) that the taxpayer was not entitled to reasons why the Commissioner disallowed the taxpayer's objection to the VAT assessments. The court referred (281) to the fact that payment of tax is an obligation, that there are provisions in the legislation to deal with appeals, and that in the instant case there was no violation of the taxpayer's right to administrative justice. That case was decided before PAJA was enacted – had it been heard thereafter and argued on a different basis the result may, with respect, have been different.

<sup>259</sup> Promulgated under s 107A of the Income Tax Act, R 302, *Government Gazette* 24941 (28 February 2003).

<sup>260</sup> This is in terms of Rule 4 (e)(i) of the rules regulating the objection and appeal process. See also *Guide on Tax Dispute Resolution* (January 2005) available at <http://www.sars.gov.za> at para 5.4 at 6, accessed 28 January 2008.

<sup>261</sup> *Ibid* para 5.4 p 6.

extension of time within which to lodge the detailed grounds of objection.<sup>262</sup> If a taxpayer calls for reasons under s 5 of PAJA, his or her position should not differ from that if he or she had used Rule 3(1)(a) to do so. It is unreasonable to expect a taxpayer to submit detailed grounds of objection without knowing the Commissioner's reasons for the assessment. The Commissioner may grant an extension of time within which to lodge the objection. The fact that the taxpayer is awaiting reasons for the assessment under PAJA constitutes a reasonable ground for him or her to call for an extension.

In terms of s 5 of PAJA the taxpayer has 90 days from the date he or she becomes aware of the Commissioner's decision to call for reasons.<sup>263</sup> A taxpayer calling for reasons under Rule 3(1)(a) of the Income Tax Act must do so within 30 days of the date of the assessment.<sup>264</sup> The rules governing objections and appeals are time-linked to ensure speedier finalisation than was the case in the past.<sup>265</sup> Section 5(5) of PAJA allows an administrator, where authorised by an empowering provision, to follow a procedure that is fair but different from that contained in s 5(2) of PAJA, which requires reasons to be requested within 90 days. The only distinction between Rule 3(1)(a) and s 5(2) is the time within which reasons must be requested. There does not appear to be a rational explanation for or justification of the discrepancy. It is unclear if a court will uphold a taxpayer's challenge that Rule 3(1)(a) violates the right to just 'administrative action' on the basis that it violates s 5(2) of PAJA. The court may decide that the procedure is different but remains fair and is valid.

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<sup>262</sup> Section 81(2) of the Income Tax Act confers a discretion on the Commissioner to grant an extension of 30 days if reasonable grounds exist and may only grant a further extension in exceptional circumstances.

<sup>263</sup> See C Lange & J Wessels *The Right to Know – South Africa's Promotion of Administrative Justice and Access to Information Acts* (2004) 116. The Commissioner must advise the taxpayer of the administrative action taken and the rights available under PAJA in accordance with ch 3 of the schedule of regulations promulgated under s 10 of PAJA in Government Notice No R1022 (31 July 2002). The taxpayer is required to call for reasons in the manner prescribed in ch 4 of the same schedule.

<sup>264</sup> Rule 3(1)(a) of the rules prescribing the procedures to be observed in lodging objections and noting appeals against assessments, the procedures for Alternative Dispute Resolution and the conduct and hearing of appeals before a Tax Court promulgated under s 107A of the Income Tax Act.

<sup>265</sup> Guide on Tax Dispute Resolution (January 2005) para 6 p 61.

I submit that, since both s 5 and Rule 3(1)(a) require that the Commissioner supply 'adequate reasons' for decisions made on a taxpayer's affairs, the taxpayer should receive the same quality of reasons from the Commissioner..

The reasons for a decision will determine how the taxpayer responds, that is, whether he or she accepts the decision or challenges it. Thus, it is important to establish what constitutes 'adequate reasons' as neither s 5 nor Rule 3(1)(a) explains what the term means.<sup>266</sup>

Considering the right to reasons under s 24 of the Interim Constitution in *Moletsane v Premier of the Free State and Another*<sup>267</sup> Hancke J said:

'This, in my view, connotes a correlation between the action taken and the reasons furnished: the more drastic the action taken, the more detailed the reasons which are advanced should be. The degree of seriousness of the administrative act should therefore determine the particularity of the reasons furnished.'<sup>268</sup>

In my practice I have dealt with the matter of a company taxpayer who disposed of an asset before the introduction of tax on capital gains, which, it believed, constituted a receipt of a capital nature and was not liable to tax.<sup>269</sup> The Commissioner issued an assessment subjecting the gain to income tax. The Commissioner advised that the amount was taxable, as the taxpayer had failed to discharge the onus contained in s 82 of the Income Tax Act. Under s 5 of PAJA it is insufficient for the Commissioner to cite only a section of the Income Tax Act as the reason for subjecting an amount of income to tax without applying the taxpayer's specific circumstances to the law.

The comments made about affidavits by Joffe J in *Swissborough Diamond (Pty) Ltd and Others v Government of the Republic of South*

<sup>266</sup> Lange & Wessels (note 263 above) 125; De Ville (note 125 above) para 6.2.4 p 292.

<sup>267</sup> 1996 (2) SA 95 OPD.

<sup>268</sup> Ibid 98. See the decision of Du Plessis J in *Commissioner of the South African Police Service and Others v Maimela and Another* 2004 (1) BCLR 47 (T) 52, which dealt with the need to supply adequate reasons after the enactment of the Constitution but before the enactment of PAJA.

<sup>269</sup> Tax on capital gains was introduced under s 26A of the Income Tax Act read together with the Eighth Schedule to the Act in respect of assets sold on or after 1 October 2001.

*Africa and Others*<sup>270</sup> are a useful guide to the adequacy of the reasons the Commissioner must furnish:

‘The facts set out in the founding affidavit (and equally in the answering affidavit and replying affidavit) must be set out simply, clearly and in chronological sequence and without argumentative matter ...

Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annex to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the strength thereof.<sup>271</sup>

I submit that a taxpayer should not have to sift through a significant number of documents to glean the reasons for the Commissioner’s decision. In *The Minister of Environmental Affairs and Tourism and 18 Others v Phambili Fisheries (Pty) Ltd and Another*<sup>272</sup> the Court was called on to decide whether the Minister had supplied adequate reasons. In the unanimous decision of the Court Schutz JA stated:

‘What constitutes adequate reasons has been aptly described by Woodward J, sitting in the Federal Court of Australia, in the case of *Ansett Transport Industries (Operations) (Pty) Ltd and Another v Wraith and Others* (1983) 48 ALR 500 at 507 (23-41), as follows:

‘The passages from judgements which are conveniently brought together in *Re Palmer and Minister for the Capital Territory* (1978) 23 ALR 196 at 206 - 7; 1 ALD 183 at 193 - 4, serve to confirm my view that s 13(1) of the Judicial Review Act requires the decision-maker to explain his decision in a way which will enable a person aggrieved to say, in effect: ‘Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law which is worth challenging.’

This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the

<sup>270</sup> 1999 (2) SA 279 TPD.

<sup>271</sup> Ibid 324.

<sup>272</sup> 2003 JDR 0329 (SCA), [2003] 2 All SA 616 SCA.

decision, its complexity and the time available to formulate the statement. ...”

...

Detailed reasons were spelt out for not granting entry to any new applicants.<sup>273</sup>

The *Commissioner’s Guide on Tax Dispute Resolution* refers to the above comments of Schutz JA in an attempt to indicate the quality of reasons his assessors should supply to taxpayers.

Hoexter summarises the position as follows:

‘[I]t is apparent that reasons are not really reasons unless they are properly informative. They must explain why action was taken or not taken; otherwise they are better described as findings or other information.’<sup>274</sup>

A taxpayer has a right to be informed of the underlying thinking that resulted in the decision. The Commissioner must expand on the statutory provisions relied on and justify why he reached that particular conclusion.

In *Rèan*<sup>275</sup> Kirk-Cohen ADJP was required to decide whether the authorities had supplied adequate reasons to the applicant for a gaming licence. He commented as follows:

‘On the one hand it is not necessary for an administrative body to spoon feed an aggrieved party seeking reasons; on the other hand the administrative body cannot expect an aggrieved party to seek justification for the reasons from a myriad of documents where such reasons cannot reasonably be determined. In my view the applicants in the present case can easily ascertain any further information they need from the documentation and audio transcripts etc made available to them, the vast majority having been made available before the application was launched. Having regard to the facts of this case, the present attack upon the reasons given by the respondent indicates an attempt to alter the concept of reasons into an interrogation via question and answer and an unjustifiable request for further particulars.’<sup>276</sup>

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<sup>273</sup> Ibid 26. Bato Star Fishing Pty Ltd, a defendant in *Phambili Fisheries* (note 272 above), was granted leave to appeal and its appeal was dismissed by the Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687 (CC).

<sup>274</sup> Hoexter (note 125 above) para 6.2 p 244. See further D M Davis et al *Fundamental Rights in the Constitution: Commentary and Cases* (1997) 161.

<sup>275</sup> Note 54 above.

<sup>276</sup> Ibid 927.

In 2005 the Johannesburg Tax Court heard the first case relating to the term 'adequate reasons'.<sup>277</sup> In that case the taxpayer had called for reasons under Rule 3(1)(a) of the regulations governing objections. The Commissioner took the view that he had supplied 'adequate reasons' in various letters sent to the taxpayer. Jajbhay J described the test for adequacy of reasons as follows:

'De Ville suggests that the adequacy of reasons should be determined with reference to the rationale for the duty to provide reasons. These are firstly, that it encourages rational and structured decision making; secondly it encourages open administration; thirdly it satisfies the desire on the part of the individual to know why a decision was reached, and fourthly it makes it easier for that person to appeal against the decision. In this regard it also assists a Court in reviewing administrative action.'<sup>278</sup>

Jajbhay J decided that the Commissioner had not supplied adequate reasons and directed him to do so.<sup>279</sup> The Court expressed the view that 'the hand of the Commissioner can rest heavily on the taxpayer'.<sup>280</sup> Based on the decision in Tax Court Case No 4 of 2005 the Commissioner must furnish reasons that are understandable and explicit.<sup>281</sup> Jajbhay J stated that the taxpayer and the Court need not examine the letters received from the Commissioner to establish the reasons for the decision.<sup>282</sup> The taxpayer had raised specific questions about why the Commissioner made the decision to issue the assessments and why he had imposed additional tax at a particular rate. The Commissioner had never supplied answers to the taxpayer's questions and Jajbhay J ruled that the taxpayer must receive answers:<sup>283</sup>

'[T]he Applicant was, and still is, entitled to answers to its questions. They are essential to enable the Applicant to formulate its objection to the assessment. If the Court sanctions the Respondent's attitude, the Applicant will have to perform the

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<sup>277</sup> *ITC 1811* [2006] 68 SATC 193. JDR 1440 (JSpCrt) available at <http://www.sars.gov.za>. Counsel for the Commissioner in the matter, namely, P J J Marais SC, advised the writer that this was the first tax case dealing with a taxpayer's request for reasons.

<sup>278</sup> *Ibid* 14.

<sup>279</sup> *Ibid* 28.

<sup>280</sup> *Ibid* 14.

<sup>281</sup> *Ibid* 15.

<sup>282</sup> *Ibid*.

<sup>283</sup> *Ibid* 27.

impossible task of distilling the Respondent's (*sic*) reasons from twenty letters which do not speak for themselves and none of which contain clearly formulated reasons before formulating its objection.<sup>284</sup>

The Court ordered the Commissioner to supply the taxpayer with properly structured reasons for issuing the assessments. In doing so, the court directed the Commissioner to refer to the relevant statutory provisions and the findings of fact that supported the conclusions reached.<sup>285</sup> Jajbhay J directed the Commissioner to advise the taxpayer of the reasoning process followed in reaching his conclusions.<sup>286</sup>

The Australian Administrative Review Council has published a document that is of assistance in determining what constitutes adequate reasons.<sup>287</sup> The document, entitled *Commentary on the Practical Guidelines for Preparing Statements of Reasons*,<sup>288</sup> suggests that a decision-maker should address the following points in the statement of reasons made available to an affected person:

'The statement must:

- set out the decision; and
- contain the findings on material questions of fact; and
- refer to the evidence or other material on which those findings were based; and
- give the real reasons for the decision.<sup>289</sup>

If the Commissioner were to adopt these guidelines the standard of reasons supplied would comply with s 5 of PAJA and Rule 3(1)(a) of the regulations governing objections and appeals.<sup>290</sup>

<sup>284</sup> Ibid 27. See also Currie & Klaaren (note 113 above) para 5.13 p 146, where the opinion is expressed that if specific question asked are relevant to the reasons for the 'administrative action' answers should be supplied unless the answers will be apparent from the reasons supplied.

<sup>285</sup> *ITC 1811* (note 277 above) 28.

<sup>286</sup> Ibid.

<sup>287</sup> J L van Dorsten 'The Right To Reasons For Decisions In Tax Matters' (October 2005) *The Taxpayer* 189; Currie & Klaaren (note 113 above) para 5.12 p 144.

<sup>288</sup> Available at

[http://www.ag.gov.au/agd/WWW/archome.nsf/Page/Publications\\_Reports\\_Other\\_Documents](http://www.ag.gov.au/agd/WWW/archome.nsf/Page/Publications_Reports_Other_Documents), accessed 28 January 2008.

<sup>289</sup> Van Dorsten (note 287 above) 189; Currie & Klaaren (note 113 above) para 5.12 p 144.

<sup>290</sup> Both the 'Practical Guidelines for Preparing Statements of Reasons' and 'Commentary on the Practical Guidelines for Preparing Statements of Reasons' published by the Australian Administrative Review Council are of assistance in setting out what detail should be supplied by the Commissioner to a taxpayer requesting reasons for a decision. It is hoped the Commissioner will release similar documents for use by his staff and taxpayers.

Where the Commissioner has failed to supply proper reasons under Rule 3(1)(a) the taxpayer must approach the Tax Court for relief under Rule 26 of the objection and appeal regulations.<sup>291</sup> If the taxpayer requests reasons under s 5 of PAJA, he or she may commence proceedings for judicial review under s 6 of the Act.<sup>292</sup> This requires launching proceedings in the High Court and incurring the attendant legal costs. It is unfortunate that PAJA did not create a less costly and more informal tribunal to consider requests for reasons, although it does foresee the designation of Magistrate's Courts by the Minister for purposes of widening access to review.<sup>293</sup>

#### (7) *Judicial Review under PAJA*

A taxpayer dissatisfied with a decision made by the Commissioner, or with the reasons or lack of reasons supplied in support thereof, may seek judicial review under s 6 of PAJA which provides:

- '(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.
- (2) A court or tribunal has the power to judicially review an administrative action if -
  - (a) the administrator who took it -
    - (i) was not authorised to do so by the empowering provision;
    - (ii) acted under a delegation of power which was not authorised by the empowering provision; or
    - (iii) was biased or reasonably suspected of bias;
  - (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
  - (c) the action was procedurally unfair;
  - (d) the action was materially influenced by an error of law;
  - (e) the action was taken -
    - (i) for a reason not authorised by the empowering provision;
    - (ii) for an ulterior purpose or motive;
    - (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

<sup>291</sup> *Guide on Tax Dispute Resolution* (January 2005) para 5.1 p 6 and para 11 p 17.

<sup>292</sup> Currie & Klaaren (note 113) para 5.16 p 148.

<sup>293</sup> *Ibid* para 5.16 p 149.

- (iv) because of the unauthorised or unwarranted dictates of another person or body;
- (v) in bad faith; or
- (vi) arbitrarily or capriciously;
- (f) the action itself -
  - (i) contravenes a law or is not authorised by the empowering provision; or
  - (ii) is not rationally connected to -
    - (aa) the purpose for which it was taken;
    - (bb) the purpose of the empowering provision;
    - (cc) the information before the administrator; or
    - (dd) the reasons given by the administrator;
- (g) the action concerned consists of a failure to take a decision;
- (h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
- (i) the action is otherwise unconstitutional or unlawful.’

The grounds of judicial review are based on those found in the common law before the current constitutional dispensation.<sup>294</sup> Section 6 gives effect to the constitutional imperative of entrenching a taxpayer’s right to administrative justice. If a taxpayer can show that the administrative action in dispute has failed to meet one of the tests set out in s 6 a court or other tribunal may review that action. Section 8 of PAJA then allows the court to grant an order for an appropriate remedy.

Section 6(2)(a) caters for the position where the Commissioner has acted beyond the powers contained in a fiscal statute. In *Commissioner for South African Revenue Service v Hawker Air Services (Pty) Ltd and Hawker Aviation Services Partnership and Others*<sup>295</sup> Patel J decided that the imposition of 300 per cent additional tax was unlawful.<sup>296</sup> This was because s 60 of the VAT Act only empowered the Commissioner to levy additional tax of up to 200 per cent. *Hawker* is an example of the Commissioner acting beyond the powers conferred on him by the VAT Act.

<sup>294</sup> Ibid para 6.3 p 153.

<sup>295</sup> [2005] 67 SATC 107.

<sup>296</sup> Ibid 133. The Supreme Court of Appeal in *Commissioner for the South African Revenue Services (Pty) Ltd v Hawker Air Services (Pty) Ltd* [2006] SCA 55 (RSA) reversed the decision of the court a quo.

It is unfortunate that the Commissioner has not yet released guidelines relating to the imposition of additional tax in those cases where taxpayers default in disclosing their income, as is the case in New Zealand.<sup>297</sup> A South African assessor often imposes additional tax without calling for representations from the taxpayer as to why such additional tax should not be imposed. A review is necessary to streamline these provisions to take account of international experience. I suggest that, for the benefit of taxpayers, the statutory provisions should clarify the manner in which the Commissioner exercises the discretion granted to him to levy additional tax. The fiscal laws provide for the Commissioner to make certain decisions personally while in other cases he may authorise his officials to act on his behalf.<sup>298</sup> If the Commissioner's officials make a decision that is not authorised under, for example, the Income Tax Act, a taxpayer may have that decision reviewed under s 6(2)(a)(i) of PAJA.<sup>299</sup> If a fiscal provision authorises the minister to publish regulations and the Commissioner does so, the Court may review that decision under s 6(2)(a)(ii) of PAJA.

A further ground of review flowing from s 6(2)(a)(iii) is if an official is biased or reasonably suspected of bias. Currie & Klaaren summarise the test for bias as follows:

'The AJA uses the constitutional standard for the rule against bias: actual bias is not required, but a reasonable suspicion of bias is sufficient (footnote The Constitutional standard is based on the common-law standard. See *President of the Republic of South Africa v South African Football Rugby Union* 1999 (4) SA 147 (CC) para 36. The Constitutional Court adopted the following test for judicial bias from *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers' Union* 1992 (3) SA 673 at 690A-695C: "[I]n our law the existence of a reasonable suspicion of bias satisfies the test; and that an apprehension of a real likelihood that the decision maker will be biased is not a prerequisite for disqualifying bias."

<sup>297</sup> A Alston 'Taxpayers' Rights in New Zealand' in Bentley (note 67 above) 280. In the 2006 National Treasury Budget Review the Minister of the National Treasury indicated that this matter would receive attention during 2006.

<sup>298</sup> Currie & Klaaren (note 113 above) para 6.11 p 159.

<sup>299</sup> In *Scenematic Fourteen (Pty) Ltd v Minister of Environmental Affairs and Tourism and Another* 2004 (4) BCLR 430 (C) Brasser A J decided (443) that the Minister had sought to delegate certain powers incapable of delegation.

See also *S v Roberts* 1999 (4) SA 915 (SCA) paras 32 and 34, which set out the test for judicial bias as follows:

- (1) There must be a suspicion that the judicial officer might, not would, be biased.
- (2) The suspicion must be that of a reasonable person in the position of the accused or litigant.
- (3) The suspicion must be based on reasonable grounds.
- (4) The suspicion is one which the reasonable person referred to would, not might, have.<sup>300</sup>

In *Gold Fields Ltd v Connellan NO and Others*<sup>301</sup> Snyders J had to decide whether the Securities Regulation Panel ('SRP') acted prejudicially against Gold Fields. Snyders referred to the fact that Gold Fields was, *inter alia*, 'given an inordinately short time in which to respond' and 'did not get an opportunity to make submissions before the ruling was made'.<sup>302</sup> The Court decided that there was sufficient evidence before it to show that a reasonable person in Gold Fields's position would suspect or believe the SRP acted prejudicially against Goldfields<sup>303</sup> and that the SRP was biased against the company.<sup>304</sup>

There is a perception amongst many taxpayers that the Commissioner's officers make their decisions because they receive incentive bonuses based on the value of additional income assessed to income tax or VAT.<sup>305</sup> PAJA would treat officials with a pecuniary interest in the outcome of the decisions they make as biased because this impairs their objectivity. On review a court may set aside decisions made by biased officials.

In the United States the Taxpayer Bill of Rights 1 prohibited, for the first time, audit quotas.<sup>306</sup> Before enactment of that statute the United States tax administration 'set arbitrary targets of tax dollars to be collected regardless of the specific facts of the auditors' caseloads'.<sup>307</sup> There were

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<sup>300</sup> Ibid para 6.12 p 160.

<sup>301</sup> [2005] 3 All SA 142 (W).

<sup>302</sup> Ibid 158.

<sup>303</sup> Ibid 167 and 169.

<sup>304</sup> Ibid 169.

<sup>305</sup> 'Taxman's Huge Bonus Uproar' (20 July 2001) *The Citizen*. This aspect was discussed in March 2006 with senior officers at the Commissioner's office in Pretoria who confirmed that it is indeed the case. See further Hoexter (note 125 above) para 3.3 p 157.

<sup>306</sup> Bentley (note 67 above) 348; Technical and Miscellaneous Revenue Act of 1988, PL100-647, Subtitle J, more commonly referred to as Taxpayer Bill of Rights 1.

<sup>307</sup> Bentley (note 67 above) 348.

concerns that targets would negatively affect the objectivity of the tax auditors and thus the United States legislature outlawed the reliance on audit results and audit quotas as tools utilised in performance management.<sup>308</sup>

This approach to tax collection is commendable. The Commissioner should ensure that the manner in which he evaluates the performance of his auditors is not related to the quantum of tax they assess. It is important that taxpayers believe that the Commissioner's officials are conducting tax audits to ensure compliance with the fiscal statutes and not for the ulterior purpose of possibly enhancing their own remuneration.

Under s 6(2)(b) of PAJA a taxpayer may seek review of a decision if the Commissioner fails to adhere to a mandatory and material procedure contained in a fiscal statute or in the provisions of PAJA.<sup>309</sup> If the Commissioner has not followed a fair procedure the taxpayer is entitled to approach a court for review under s 6(2)(c). The yardstick used to determine whether the 'administrative action' was procedurally unfair is the same as that contained in s 33(1) of the Constitution.<sup>310</sup> In *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennies Group Ltd t/a Renfreight*<sup>311</sup> Hefer JA held that the Commissioner had acted unreasonably and unfairly and set his decision aside.<sup>312</sup> In another customs matter, Van Reenen J, in *Trend Finance (Pty) Ltd and Another v Commissioner for South African Revenue Service and Another*<sup>313</sup> held that because the Commissioner had failed to allow the taxpayer to make representations before he took the decision on forfeiture he had acted unfairly in contravention of s 8(1)(c) of PAJA.<sup>314</sup>

In terms of s 6(2)(d) of PAJA the taxpayer may seek a review where the Commissioner bases his decision on an error of law.<sup>315</sup> Section 6(2)(e)

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<sup>308</sup> Ibid.

<sup>309</sup> Currie & Klaaren (note 113 above) para 6.13 p 160.

<sup>310</sup> Ibid para 6.14 p 163.

<sup>311</sup> 1999 (3) SA 771 (SCA).

<sup>312</sup> Ibid 786.

<sup>313</sup> [2005] 67 SATC 334.

<sup>314</sup> Ibid 369.

<sup>315</sup> Currie & Klaaren (note 113 above) para 6.15 p 163. See further *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A) for the position in the common law before PAJA.

of PAJA caters for the manner in which the Commissioner exercises 'administrative action'. Willis J in *Sasol Oil (Pty) Ltd and Another v Metcalfe NO*<sup>316</sup> considered whether the official had the authority to decide on the construction of filling stations and whether that decision complied with s 6(2)(e)(i) of PAJA. The court ruled that the empowering statute did not authorise the decision taken by the official and set the decision aside.<sup>317</sup>

If the 'administrative action' taken has an ulterior purpose or motive the taxpayer may seek review under s 6(2)(e)(ii) of PAJA. Should the official rely on irrelevant factors in reaching the decision a court may review the decision under s 6(2)(e)(iii). In *Sasol*<sup>318</sup> Willis J held that the official had relied on 'irrelevant considerations' in reaching her decision and set the decision aside.<sup>319</sup> I submit that where an official makes an error because he or she has considered irrelevant facts or, alternatively, has not considered relevant facts, such conduct is reviewable by a court and may be set aside. In *Pepkor Retirement Fund and Another v Financial Services Board*<sup>320</sup> Cloete JA held that a court could review a decision made in ignorance of material facts.<sup>321</sup>

Under s 6(2)(e)(iv) a court may review a matter if the Commissioner makes a decision at the behest of anyone else, including, for example, a Cabinet Minister.<sup>322</sup> Section 6(2)(f) requires examination of the administrative action itself. If the action violates an empowering provision, or the decision is not rational when weighed against the reasons given for the decision, a Court may review that decision.<sup>323</sup>

The failure to make a decision constitutes 'administrative action' as defined in s 1 of PAJA. Thus, s 6(2)(g) allows a taxpayer to take the Commissioner on review if he fails to make a decision. If the empowering provision contains a time frame within which the Commissioner must reach

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<sup>316</sup> 2004 (5) SA 161 WLD.

<sup>317</sup> Ibid 172.

<sup>318</sup> Ibid.

<sup>319</sup> Ibid.

<sup>320</sup> 2003 (6) SA 38 (SCA).

<sup>321</sup> Ibid 59.

<sup>322</sup> Currie & Klaaren (note 113 above) para 6.21 p 166.

<sup>323</sup> Ibid para 6.23 p 167.

a decision a taxpayer may proceed on review if he declines to do so.<sup>324</sup> Where the empowering provision does not refer to a period within which the Commissioner must reach a decision the taxpayer may seek review where he does not do so within a reasonable period.<sup>325</sup> Some taxpayers experience frustration because the Commissioner withholds indefinitely issuing an assessment of a submitted tax return.<sup>326</sup>

Taxpayers also complain that the Commissioner does not expedite the payment of refunds.<sup>327</sup> In these cases, I contend that the Commissioner has failed to implement a decision as required under s 1 of PAJA and a taxpayer may rely on the relief available under that Act.<sup>328</sup>

Further, a taxpayer may challenge an unreasonable decision under s 6(2)(h) of PAJA. The test for reasonableness flows from the provisions of s 33(1) of the Constitution. Currie & Klaaren comment on s 6 of PAJA as follows:

‘The aim of the power is to discipline decision-makers, requiring them to make certain that the record adequately supports their decision, in that the decision is supported by persuasive reasons and it makes logical sense. Mureinik suggests that the effect of the subsection is to make an administrative decision unjustifiable unless:

1. the decision-maker has considered all the serious objections to the decision taken and has answers which plausibly meet them;
2. the decision-maker has considered all the serious alternatives to the decision taken, and has discarded them for plausible reasons;
3. there is a rational connection between the information (evidence and argument) before the decision-maker and the decision taken.<sup>329</sup>

O’Regan J in *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others*<sup>330</sup> commented on the test for reasonableness as follows:

<sup>324</sup> PAJA s 6(3)(b).

<sup>325</sup> Ibid s 6(3)(a).

<sup>326</sup> Based on the writer’s experience in dealing with clients in the tax arena.

<sup>327</sup> B J Croome ‘What can you do when SARS delays a refund?’ (September 2005) *Accountancy S.A* 31.

<sup>328</sup> Ibid.

<sup>329</sup> Currie & Klaaren (note 113 above) para 6.25 p 170. See also Van Zyl J in *Stanfield v Minister of Correctional Services and Others* 2003 (12) BCLR 1384 (C) 1418.

<sup>330</sup> 2004 (7) BCLR 687 (CC).

‘Section 6(2)(h) should then be understood to require a simple test, namely, that an administrative decision will be reviewable if, in Lord Cooke’s words, it is one that a reasonable decision-maker could not reach.

What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant in determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interest involved and the impact of the decision on the lives and well-being of those affected. ... Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.’<sup>331</sup>

In *Minister of Health and McIntyre NO v New Clicks South Africa (Pty) Ltd*<sup>332</sup> Chaskalson CJ pointed out that ‘reasonableness and procedural fairness are context specific’.<sup>333</sup> Evaluating the dispensing fee at issue Chaskalson CJ stated that if the fee was ‘appropriate’ it would not be unreasonable within the meaning of s 6(2)(h) of PAJA. If the fee was inappropriate it did not comply with the empowering statute and would be inconsistent with the provisions of PAJA.<sup>334</sup>

Where a taxpayer can show that the decision made by the Commissioner bears no relation to the facts under consideration a court should set such a decision aside. PAJA requires that the official seriously and properly consider the taxpayer’s representations and not call for facts that he intends to disregard.

If the ‘administrative action’ is unlawful or unconstitutional for any reason not covered by s 6 of PAJA a court may set it aside under s 6(2)(i) of that Act. However, s 6(2)(f)(i) of PAJA also refers to ‘administrative action’ that ‘contravenes a law’. Why did the legislature enact s 6(2)(i)? Currie & Klaaren offer the following explanation:

‘Our submission is that, on a purposive interpretation, s 6(2)(i) has to be interpreted as part of an Act with the purpose of giving effect to the rights in s 33 of the Constitution, and not to the Constitution in general. The s 33 rights permit review of administrative action on

<sup>331</sup> Ibid 7.11.

<sup>332</sup> 2006 (2) SA 311 (CC).

<sup>333</sup> Ibid para 145.

<sup>334</sup> Ibid para 188.

grounds of lawfulness, procedural fairness, and reasonableness. They do not exhaust the possibilities of a constitutional challenge to administrative action.<sup>335</sup>

The provision thus seeks to extend the reach of the taxpayer's right to review. I support this interpretation because it gives effect to the constitutional right to administrative justice contained in s 33.

(8) *Procedures to follow in initiating judicial review under PAJA*

A taxpayer must follow the procedures in s 7 of PAJA to proceed with the judicial review of 'administrative action' taken by the Commissioner.

Section 7(1) provides that:

'Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date –

- (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
- (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.'

If a taxpayer wishes to proceed on review he or she must first exhaust any available internal remedies.<sup>336</sup> Plasket comments on s 7(2) of PAJA as follows:

'It places a particularly onerous burden on those who wish to review the lawfulness, reasonableness or procedural fairness of administrative action first to exhaust internal remedies and curtail the power of the courts to review administrative action when internal remedies have not been exhausted. In this note it will be submitted that s 7(2) of the Act is an unconstitutional infringement of the right of access to court entrenched in s 34 of the 1996 Constitution. Even if it is not unconstitutional, it will be submitted, it is ill-conceived, unfair, impractical and ought to be reconsidered by the legislature.'<sup>337</sup>

<sup>335</sup> Currie & Klaaren (note 113 above) para 6.27 p 174.

<sup>336</sup> PAJA s 7(2).

<sup>337</sup> C Plasket 'The exhaustion of internal remedies and s 7(2) of the Promotion of Administrative Justice Act 3 of 2000' (2002) 119 *SALJ* 50.

O' Regan J stated in *Bato*<sup>338</sup> that a court, in deciding whether a litigant may request a review of a decision made before exhausting the internal remedies available, must 'ensure that the possibility of duplicate or contradictory relief is avoided'.<sup>339</sup> Thus a court may review a case before internal remedies are exhausted.<sup>340</sup>

In *Gold Fields*<sup>341</sup> Snyders J decided that the regulator showed bias against Gold Fields and that there would be no purpose in using the internal remedies available.<sup>342</sup>

A taxpayer dissatisfied with an assessment issued by the Commissioner must proceed with the objection and appeal procedures contained in s 81 of the Income Tax Act. A question not yet tested is whether a taxpayer may proceed to a court other than the Tax Court because the assessment is so unreasonable that a court should set it aside on review under PAJA. The initial stages of the approved objection procedure may constitute internal procedures as envisaged in s 7 of PAJA. However, once the Commissioner has disallowed a taxpayer's objection he or she must proceed on appeal to the Tax Court. That procedure, arguably, does not constitute an internal remedy as envisaged in s 7 of PAJA.

The Commissioner has not, as envisaged in PAJA, created an internal forum to consider a request for a review of a decision he has made.<sup>343</sup> The Income Tax Act sets out a well-defined process for resolving disputes pertaining to assessments, that is, the so-called objection and appeal procedures governed by s 81. Before a matter proceeds to the Tax Court the Commissioner's Tax Appeal Committee will review the matter. The committee will decide whether the Commissioner should settle the

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<sup>338</sup> Note 330 above.

<sup>339</sup> Ibid 701.

<sup>340</sup> Ibid para 17 p 701.

<sup>341</sup> Note 301 above.

<sup>342</sup> Ibid 169.

<sup>343</sup> This is apparent from correspondence between the writer and the Commissioner in relation to a variety of tax matters. Furthermore, the Commissioner consulted with GTZ, a German non-governmental organisation, and a leading law firm over how PAJA affects the Commissioner and what procedures have been introduced to comply with PAJA. It appears that the Commissioner is more concerned about the fairness of decisions relating to objections and appeals than that of his more general decisions.

matter, or refer it to the Tax Court, or whether the matter is appropriate for Alternative Dispute Resolution ('ADR'). The Commissioner may agree to ADR if he decides that the informal process is appropriate. Where taxpayers wish to challenge a decision of the Commissioner under PAJA they may utilise the procedures contained in that Act.

The Commissioner may frustrate a taxpayer's attempt to finalise a dispute using the prescribed objection and appeal procedures by failing to comply with the time frames specified in the regulations promulgated under s 107A of the Income Tax Act. A tax counsel, during consultation, has expressed the view that the taxpayer may succeed in approaching a court for review in these circumstances.<sup>344</sup>

Because the Commissioner has not introduced any internal remedies a taxpayer would need to commence review proceedings under PAJA within 180 days of becoming aware of the administrative action and the reasons for it.<sup>345</sup> By comparison with the period of 30 days in which to lodge an objection under s 81 of the Income Tax Act, the period of 180 days in s 7 is reasonable. If, however, a taxpayer cannot meet the deadline it may be possible to seek an extension under s 9 of PAJA.

A taxpayer wishing to rely on s 7 of PAJA would need to institute action in the High Court or the Constitutional Court. It would be preferable if there were another forum or tribunal that could review such matters on a less costly basis. It will be a most unusual case that would justify a taxpayer approaching the Constitutional Court directly under s 167(6)(a) of the Constitution. It is more than likely that the case would commence in

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<sup>344</sup> Discussion with Advocate P A Solomon SC on 10 April 2006 about whether a taxpayer could proceed directly to the High Court seeking a review of an assessment issued by the Commissioner under the Income Tax Act as opposed to being obliged to follow the objection and appeal procedures contained in the Income Tax Act.

<sup>345</sup> Currie & Klaaren (note 113 above) para 7.7 181. In *Pering Mine (Pty) Ltd v Director-General, Mineral and Energy Affairs and Others* [2005] 67 SATC 317 De Villiers J held (333) that the delay by the Commissioner in commencing review proceedings after nearly four years was unreasonable under PAJA. The Court rejected the Commissioner's assertion, in condonation of the failure to institute review proceedings, that it is in the public interest to collect tax (328). The Court ruled (333) that the Commissioner's interests were not greater than the taxpayer's right to administrative justice.

the High Court and from there may proceed to the Supreme Court of Appeal or to the Constitutional Court.<sup>346</sup>

I would argue that the requirement in s 7(2) of PAJA to exhaust internal remedies may violate the taxpayer's right to administrative justice under s 33 of the Constitution, read with the right of access to court contained in s 34.<sup>347</sup>

(9) *Remedies available under PAJA*

Section 8 of PAJA sets out the remedies available where 'administrative action' is reviewed by the court. The section provides that:

- (1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders -
  - (a) directing the administrator -
    - (i) to give reasons; or
    - (ii) to act in the manner the court or tribunal requires;
  - (b) prohibiting the administrator from acting in a particular manner;
  - (c) setting aside the administrative action and -
    - (i) remitting the matter for reconsideration by the administration, with or without directions; or
    - (ii) in exceptional cases -
      - (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
      - (bb) directing the administrator or any other party to the proceedings to pay compensation;
  - (d) declaring the rights of the parties in respect of any matter to which the administrative action relates;
  - (e) granting a temporary interdict or other temporary relief; or
  - (f) as to costs.
- (2) The court or tribunal, in proceedings for judicial review in terms of section 6(3), may grant any order that is just and equitable, including orders -
  - (a) directing the taking of a decision;
  - (b) declaring the rights of the parties in relation to the taking of the decision;
  - (c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from

<sup>346</sup> Currie & Klaaren (note 113 above) paras 7.11 and 7.12 pp 183 and 184.

<sup>347</sup> See Plasket (note 337 above) 62.

- the doing, of which the court or tribunal considers necessary to do justice between the parties; or  
 (d) as to costs.’

If the Commissioner fails to supply reasons, or supplies reasons that are inadequate, a taxpayer may seek relief directly under s 8(1)(a) of PAJA. The Court is authorised to direct that the Commissioner give reasons for his decision. Alternatively, the Court may direct the Commissioner to act in a particular way. This remedy equates to a mandamus, available under the common law.<sup>348</sup>

Section 8(1)(b) of PAJA allows the court to grant the applicant a prohibitory interdict, which prevents the Commissioner from acting in a particular manner. This measure differs from s 8(1)(a), which allows the Court to compel the official to act in a particular way.<sup>349</sup>

The court hearing the matter may set the Commissioner’s administrative action aside under s 8(1)(c) of PAJA. Under the common law, a court could hear the matter and direct that the official reconsider it.<sup>350</sup> Baxter indicates that courts are slow to substitute a decision made by an official, for the following reasons:

‘The function of judicial review is to scrutinise the legality of the administrative action, not to secure a decision by a judge in place of an administrator. As a general principle, the courts will not attempt to substitute their own decision for that of the public authority; if an administrative decision is found to be *ultra vires* the court will usually set it aside and refer the matter back to the authority for a fresh decision. To do otherwise ‘would constitute an unwarranted usurpation of the powers entrusted [to the public authority] by the Legislature’.<sup>351</sup>

Kruger AJ expressed a similar view in *Noupoort Christian Care Centre v Minister of National Department of Social Development and Another*<sup>352</sup> where he said:

‘As a general point of departure, the court will be slow to substitute its own decision for that of a functionary. Also as a general proposition, a court should not lose sight of the distinction between

<sup>348</sup> Currie & Klaaren (note 113 above) para 8.3 p 189 and see L Baxter *Administrative Law* (1984) 687.

<sup>349</sup> Baxter (note 348 above) 686.

<sup>350</sup> Ibid 680.

<sup>351</sup> Ibid 681.

<sup>352</sup> 2005 (10) BCLR 1034 (T).

its function as an appellate tribunal and as a tribunal reviewing decisions of an administrative functionary; judicial deference is called for.<sup>353</sup>

He raised the question of 'deference', that is, the approach whereby a court should not descend into the legislative arena and should recognise the distinct functions of the court and a State official.<sup>354</sup> It is important for a court not to attach too much weight to the concept of 'deference' because, in appropriate cases, aggrieved taxpayers may unfairly fail to secure a remedy against the Commissioner.

Importantly, a court may, under s 8(1)(c)(ii)(aa) of PAJA, substitute the decision made by the Commissioner in exceptional circumstances. The court may correct, under review, a defect arising from the 'administrative action'.

In exceptional cases a court may award compensation under 8(1)(c)(ii)(bb).<sup>355</sup> Where the Commissioner acts unfairly and unreasonably against a taxpayer the taxpayer should have the right to seek compensation from the Commissioner.

An example is the best way to illustrate circumstances in which it might be appropriate to award compensation. Assume the Commissioner decides to subject a taxpayer to an audit, issues amended assessments and then institutes legal action to recover the tax reflected as owing. Should the taxpayer not have the right to recover the legal and other costs incurred if the Commissioner eventually reverses the assessments incorrectly issued and with no legal foundation?<sup>356</sup>

Another example is where the Commissioner sent a letter to a company taxpayer informing it of an assessment to be issued and adding to the tax therein, the maximum of 200 per cent additional tax.<sup>357</sup> The

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<sup>353</sup> Ibid para 40 p 1049. See Froneman DJP, who took a similar view in *Carephone (Pty) Ltd v Marcus NO and Others* (1998) 19 ILJ 1425 (LAC) 1426 and 1435.

<sup>354</sup> See O'Regan J in *Bato* (note 330 above) para 46 p 712.

<sup>355</sup> De Ville (note 125 above) para 7.3.5 p 353; Hoexter (note 125 above) para 8.4 p 294. As to the position before PAJA, see Baxter (note 348 above) 599 and 636.

<sup>356</sup> Anecdotal evidence from a discussion held during April 2005 with a senior officer at the office of the Commissioner in Pretoria about a case encountered in the course of the officer's employment at the Commissioner's office.

<sup>357</sup> Based on the experience of a client of the writer.

Commissioner has not received a tax return, as it was not yet due, and the taxpayer does not know how the Commissioner arrived at the income subjected to tax. Further, the Commissioner did not comply with his own practice of enquiring from the taxpayer why he should not levy additional tax.<sup>358</sup> Challenged, the Commissioner eventually confirmed that he issued the letter incorrectly. The taxpayer incurred costs in dealing with the Commissioner. Why should the taxpayer, in these circumstances, not have a right under s 8(1)(c)(ii)(bb) of PAJA to recover the costs incurred?

The courts have not been forthcoming in granting orders for compensation where a State official has violated an applicant's right to administrative justice.<sup>359</sup> In *Olitzki Property Holdings v State Tender Board*<sup>360</sup> Cameron JA rejected the applicant's claim for damages and said that a more effective remedy than compensation was available, namely, the applicant could seek an interdict.<sup>361</sup>

The court may issue a declaration of the rights of the parties affected by the administrative action under s 8(1)(d) of PAJA. This provision recognises the common law right to seek a declaratory order from a court whereby the court determines the rights of a party to a dispute.<sup>362</sup>

A taxpayer may seek a temporary interdict against the Commissioner or other temporary relief under s 8(1)(e) of PAJA. Currie & Klaaren submit that 'temporary relief could include the striking down of subordinate legislation'.<sup>363</sup> The fact that relief available under this subsection is temporary means that another court must rule on the matter. A court may grant a temporary interdict where no other relief is available.<sup>364</sup>

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<sup>358</sup> *SARS Manual* (note 185 above) A-214 (1).

<sup>359</sup> *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA); *Fose v Minister of Safety and Security* 1997 (7) BCLR 851 (CC); *Premier, Western Cape v Fair Cape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA), which reversed the decision of Davis J in *Fair Cape Property Developers (Pty) Ltd v Premier, Western Cape* 2002 (6) SA 180 (CPD). See also Hoexter (note 125 above para 8.4 p 294).

<sup>360</sup> Note 359 above.

<sup>361</sup> *Ibid* para 42; Hoexter (note 125 above) 504.

<sup>362</sup> Hoexter (note 125 above) para 8.4 p 295; Baxter (note 348 above) 698.

<sup>363</sup> Currie & Klaaren (note 113 above) para 8.7 p 191; De Ville (note 125 above) para 7.3.6.2 p 365.

<sup>364</sup> Hoexter (note 125 above) para 8.4 p 296.

Section 8(1)(f) of PAJA allows a court reviewing administrative action to award costs.<sup>365</sup> Such an award will clearly include the legal costs incurred in proceeding on review. A question that remains unanswered is whether the award includes the costs incurred pursuant to the 'administrative action'.<sup>366</sup> Where a State official has acted *mala fide* the court may award costs *de bonis propriis*, that is, the official must pay such costs personally.<sup>367</sup> Further, a court may award costs on a punitive basis, that is, on attorney and client scale, and should do so if an official has abused his or her position.<sup>368</sup> Hoexter supports the view expressed by Plasket.

'As far as the Constitution is concerned, Plasket suggests that "appropriate relief" under s 38 could take the form of a punitive costs award against an administrator. He also suggests that -

"if any administrative conduct is motivated by bad faith of a sufficiently gross degree, it may be appropriate for a court to make an order that the administrative official concerned repay the state for the costs incurred by it in defending his or her actions, in addition to paying the costs of the applicant *de bonis propriis*."<sup>369</sup>

Thus, if the Commissioner has acted unreasonably against a taxpayer or has acted beyond the provisions in a fiscal statute, the taxpayer should succeed in obtaining a punitive costs order.

In *Motsepe v Commissioner for Inland Revenue*<sup>370</sup> Ackermann J stated that the court should not award costs against a litigant that seeks to enforce his or her rights against the State.<sup>371</sup> However, the Court will not hesitate to award costs against a vexatious litigant<sup>372</sup>.

If the Commissioner has failed to take a decision the court reviewing such failure may, under s 8(2)(a), direct the Commissioner to do so. Under

<sup>365</sup> De Ville (note 125 above) para 7.3.8 p 377.

<sup>366</sup> Currie & Klaaren (note 113 above) para 8.8 p 191.

<sup>367</sup> Hoexter (note 125 above) para 8.4 p 299; see also *Moeca v Addisionele Kommissaris, Bloemfontein* 1981 (2) SA 357 (O).

<sup>368</sup> See the decision of Patel J in *Hawker* (note 295 above) para 79 p 136. See also *ITC 1821* [2007] 69 SATC 194.

<sup>369</sup> Hoexter (note 125 above) para 8.4 p 299.

<sup>370</sup> 1997 (2) SA (2) 898 (CC), [1997] 59 SATC 245.

<sup>371</sup> *Ibid* para 30.

<sup>372</sup> Hoexter (note 125 above) para 8.4 p 300. As to 'vexatious litigants', see De Waal et al (note 58 above) para 31.3 p 561.

s 8(2)(b) the court may also declare the rights of the parties involved with that decision. Alternatively, it may, under s 8(2)(c), direct the parties to do something or refrain from doing something to achieve justice between themselves. Further, the court may once again grant an award of costs under s 8(2)(d). Thus, a court may assist the taxpayer to receive a decision from the Commissioner to which he or she has a right. The court has a wide discretion because it has an obligation to make an award treating both parties equitably.<sup>373</sup>

The Commissioner's officials have indicated that the Commissioner will prepare a manual setting out how PAJA affects taxpayers in their dealings with him.<sup>374</sup> The Commissioner has failed to release that manual. This neglect detrimentally affects taxpayers' awareness of their rights under PAJA.

#### (10) *Foreign Commentators on Administrative Justice*

The views of foreign commentators on the right of taxpayers in some other countries to call for reasons and the need for due process are instructive.

Baker & Groenhagen propose that tax legislation and tax administration should adhere to the rule of law.<sup>375</sup> He expresses the view that all 'acts of the tax administration should have a legal basis'.<sup>376</sup> Ideally, taxpayers have the right to certainty on tax matters.<sup>377</sup> They state:

'The right to be treated fairly is clearly an essential aspect of the administration of tax. There is an argument that it should apply both to administration and to the enactment of tax legislation. In Canada, rights to procedural fairness and to substantive fairness have been considered. In practice, however, the right to be treated

<sup>373</sup> Currie & Klaaren (note 113 above) para 8.9 p 192.

<sup>374</sup> The National Tax Committee of SAICA was informed of this manual during the writer's tenure as chairman of that committee from 1999 to 2002.

<sup>375</sup> Baker & Groenhagen (note 65 above) 38.

<sup>376</sup> Ibid.

<sup>377</sup> Ibid; *Taxpayer's Rights And Obligations A survey Of The Legal Situation in OECD Countries* (1990) para 2.21 p 12.

fairly is probably too vague to be utilised as a specific right of taxpayers.<sup>378</sup>

The right to administrative justice contained in s 33 of the Constitution achieves the objective of treating taxpayers fairly. I contend that taxpayers in this country may rely substantively on this clearly defined right to procedural fairness.

In Australia the courts have taken the view that the wording of that country's Constitution confers certain rights on taxpayers.<sup>379</sup> The Australian courts recognise a taxpayer's right to 'due process' or the rules of natural justice flowing from the separation of power doctrine.<sup>380</sup> Australia enacted the Administrative Decisions (Judicial Review) Act<sup>381</sup> which confers on taxpayers the right to call for reasons for certain decisions made by the Commissioner.<sup>382</sup> The State official must supply adequate reasons for the decision.<sup>383</sup> The Administrative Decisions (Judicial Review) Act also allows taxpayers to seek judicial review of decisions made by the Commissioner.<sup>384</sup> The Administrative Appeals Tribunal Act 1975 allows taxpayers the right to have administrative decisions reviewed and, if necessary, replaced.<sup>385</sup>

A summary of some Australian tax cases on the standard and availability of reasons is set out below.

In *Queensland Trading & Holding Co Ltd v Federal Commissioner of Taxation*<sup>386</sup> the Court held that the taxpayer must receive reasons for the

<sup>378</sup> Baker & Groenhagen (note 65 above) 39.

<sup>379</sup> P Hanks et al *Australian Constitutional Law Materials and Commentary* 7 ed (2004) para 11.3.23 p 1033.

<sup>380</sup> Ibid para 11.3.24 p 1034; P Keyzer *Constitutional Law – Butterworths Tutorial Series* 2 ed (2005) para 11.36 p 275. See further L Baxter *Administrative Law* (1984) 344 and Y Burns *Administrative Law Under the 1996 Constitution* (1998) para 2.3 p 34.

<sup>381</sup> 1977 (Commonwealth).

<sup>382</sup> For a commentary on how the Act affects tax decisions see Wheelwright (note 67 above) 65; see also Currie & Klaaren (note 113 above) para 5.12 p 144.

<sup>383</sup> The Australian Administrative Review Council has published a number of documents setting out what constitutes 'adequate reasons', see, eg, *Practical Guidelines For Preparing Statements Of Reasons* (November 2002) and *Commentary On The Practical Guidelines For Preparing Statements Of Reasons* (November 2002) available at [http://www.ag.gov.au/agd/WWW/archome.nsf/Page\\_Publications\\_Reports\\_Downloads](http://www.ag.gov.au/agd/WWW/archome.nsf/Page_Publications_Reports_Downloads), accessed 25 January 2008.

<sup>384</sup> I G Wallschutzky *Australian Income Tax Law* (1986) para 12.7 p 417.

<sup>385</sup> Ibid para 12.7 p 418.

<sup>386</sup> 59 ATR 118. K Wilson 'Taxpayer entitled to reasons for decision not to remit penalties' (2005) *Australian Weekly Tax Bulletin* 16 p 601.

decision not to remit the penalties imposed. Conti J commented on the position as follows:

‘Experience demonstrates incidentally that in the case of the Commissioner of Taxation, there is normally provided an adjustment sheet indicating the reasons for alterations made to the quantification of the assessable income of a taxpayer. The insertion of para (ga) into Sch 1 reflects implicitly the legislative intent that in circumstances outside those involving the exaction of a “tax charge or duty”, as normally understood, a taxpayer is entitled to the benefit of the legislative reforms of the ADJR Act, at least to the extent of providing reasons for decision-making.’<sup>387</sup>

In *MLC Investments Ltd v Federal Commissioner of Taxation*<sup>388</sup> the court had to decide whether the Australian Commissioner was correct in not granting the ruling requested by the taxpayer. The taxpayer applied to adopt a substituted accounting period, which the Australian Commissioner declined because he had previously issued a general ruling indicating that he would refuse such requests. The Court decided that the Commissioner had not evaluated the merits of the case but had merely followed previous rulings.<sup>389</sup> The Court held that the Commissioner considered irrelevant factors in reaching his decision.<sup>390</sup> Thus, the Court set the Commissioner’s decision aside and remitted it for further consideration.<sup>391</sup> I contend that a South African court reviewing similar facts would reach a similar decision under PAJA.

The Australian Commissioner must make a decision and the failure to do so will result in the Court directing him to do so. In *Commissioner of Taxes v Tourism Holdings Limited and Anor*<sup>392</sup> the Commissioner declined to exercise his discretion. The Court indicated that it is unacceptable for a State official to refuse to perform a duty imposed by Parliament.<sup>393</sup>

The Australian Commissioner must supply reasons for the assessments he issues. In *Bailey and Others v The Commissioner of*

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<sup>387</sup> *Queensland Trading* (note 386 above) 144.

<sup>388</sup> 54 ATR 671.

<sup>389</sup> *Ibid* 686.

<sup>390</sup> *Ibid* 691.

<sup>391</sup> *Ibid* 694.

<sup>392</sup> 51 ATR 256.

<sup>393</sup> *Ibid* 271.

*Taxation of the Commonwealth of Australia*<sup>394</sup> the High Court ruled that the taxpayer was 'entitled to know the basis on which the assessment has been made'.<sup>395</sup> Consequently, the taxpayer had the right to the particulars of the scheme that caused the Commissioner to invoke the anti-avoidance provisions in subjecting the taxpayer to tax.

Taxpayers in Australia have rights of review and appeal under the Taxation Administration Act 1953 (Commonwealth). The Court refused a request for reasons in *Meredith v Federal Commissioner of Taxation and Ors*<sup>396</sup> because the process of assessment fell outside the Administrative Decisions (Judicial Review) Act.<sup>397</sup>

Spry sets out a useful summary of principles the Australian Commissioner should follow in dealing with taxpayers.

1. A taxpayer ought not to be made subject to adverse administrative action because, although acting in accordance with his legal rights, he has taken steps lawfully to prevent unwanted liabilities to tax from arising.
2. A taxpayer ought not to be made subject to adverse administrative action because the Commissioner is of the view that he falls within a class of persons upon whom an advantage is conferred by particular legislative provisions.
3. Officers of the Commissioner ought not to assess adversely by reference to extraneous motives, such as a desire to intimidate or make an example of taxpayers who have conducted their affairs lawfully but as to prevent unwanted liabilities to tax from arising or who have criticized the Commissioner.
4. Especial care must be taken that the Commissioner and his officers do not conceive of their function as being of an adversary nature. Their function is, as has been noted, to administer their duties impartially for the purposes for which those duties were imposed.<sup>398</sup>

It seems that the factors Spry lists exist in some form or another in s 6 of PAJA, which sets out the grounds for review of 'administrative

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<sup>394</sup> 136 CLR 214.

<sup>395</sup> Ibid 217. E P Kennon 'Disclosure by the Commissioner' (August 1972) *Australian Tax Review* 174 refers to earlier cases in which it was decided that a taxpayer should, on request, be supplied with reasons for an assessment.

<sup>396</sup> 50 ATR 528.

<sup>397</sup> Ibid 541.

<sup>398</sup> I C F Spry 'Professional Ethics and the Commissioner' (December 1979) *Australian Tax Review* 185.

action'. Spry makes the submission that in performing his duties the Commissioner cannot consider that certain legislative provisions are unsatisfactory.<sup>399</sup> The official must administer the tax laws as passed by Parliament and not as the Commissioner would like them to be. If an official were to decide in such a manner in South Africa PAJA would assist the taxpayer in having the decision set aside.<sup>400</sup>

If the Australian Commissioner is negligent in his dealings with a taxpayer it appears that he could be liable for damages.<sup>401</sup> This situation is comparable to that envisaged in s 8(1)(c)(i) of PAJA.

Further, Australia has introduced the concept of 'merits review', defined as:

- '1.1 [T]he process by which a person or body:
- Other than the primary decision-maker;
  - Reconsiders the facts, law and policy aspects of the original decision; and
  - Determines what is the correct and preferable decision.
- 1.2 The process of review may be described as "stepping into the shoes" of the primary decision-maker. The result of merits review is the affirmation or variation of the original decision.'<sup>402</sup>

'Merits review' ensures that administrative decisions accord with the law and that the decisions are the best possible given the facts available to the State official at the time.<sup>403</sup> Further, 'merits review' will enhance the 'quality and consistency of the decisions of primary decision-makers'.<sup>404</sup>

Australia has published comprehensive documents on the quality of reasons State officials must provide. Furthermore, its courts have examined the standard of reasons relied on by the Australian Commissioner to justify decisions and these are instructive in determining the quality of reasons to be provided by the Commissioner.

<sup>399</sup> Ibid.

<sup>400</sup> PAJA s 6(2)(f)(i).

<sup>401</sup> See C Rider 'Estoppel of the Revenue: A Review of Recent Developments' (September 1994) 23 *Australian Tax Review* 149.

<sup>402</sup> 'Administrative Review Council, What decisions should be subject to merit review?' 2

Commonwealth of Australia, available at

[http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications\\_Reports\\_Downloads](http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Downloads), accessed 25 January 2008.

<sup>403</sup> Ibid 2 and 3.

<sup>404</sup> Ibid 3.

In Canada a decision-maker who has power over a person's life, liberty or security must comply with the principles of fundamental justice.<sup>405</sup> Section 2(e) of the Canadian Bill of Rights guarantees 'the right to a fair hearing with the principles of fundamental justice for the determination of his rights and obligations'.<sup>406</sup> The meaning of the term 'fundamental justice' is similar to that of 'natural justice' as used in this country.<sup>407</sup>

Commenting on the position in Canada Li writes:

'According to the Federal Court of Appeal in *Ludmer*, it is impossible to judge Revenue Canada's conduct by "varying and flexible criteria such as those dictated by the principles of natural justice". In other words, in determining whether or not the decisions made by Revenue Canada are valid, one does not ask whether it has exercised its powers correctly or in an abusive fashion, but whether or not it has acted in accordance with the statute by which it is governed. The duty to act fairly applies only where Revenue Canada has discretion, such as under the fairness legislation.'<sup>408</sup>

The right to fair administrative action in Canada appears to be narrower than that in other countries.

German taxpayers have a right to reasons for administrative orders issued by the German fiscal authority and to a hearing.<sup>409</sup> The German courts may review decisions under the Basic Law as an important part of the Rechtsstaat.<sup>410</sup>

Under the principles of administrative law, Indian taxpayers have the right to a fair hearing, and State officials must comply with the rules of natural justice.<sup>411</sup>

Unfortunately for Japanese taxpayers the Administrative Procedure Law applicable to actions of State officials generally does not apply to the tax administration.<sup>412</sup>

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<sup>405</sup> P W Hogg *Constitutional Law of Canada* 4 ed (1997) para 44.20 p 1117. This is according to s 7 of the Constitution Act 1982.

<sup>406</sup> *Ibid* 1076.

<sup>407</sup> *Ibid* para 44.10(a) p 1076.

<sup>408</sup> Li (note 103 above) 102.

<sup>409</sup> Daiber (note 256 above) 169 and 170.

<sup>410</sup> D P Kommers *The Constitutional Jurisprudence Of The Federal Republic Of Germany* (1997) 37.

<sup>411</sup> H M Seervai *Constitutional Law of India A Critical Commentary* 4 ed vol 2 (1996) para 16.153 p 1536, para 16.157 p 1537, para 16.514 p 1735. See also M P Jain *Indian Constitutional Law* 5 ed vol 1 (2003) 7, 503, 1030 and 1035 and vol 2 1704.

In the United Kingdom the courts have ruled that the Inland Revenue ('IR') is subject to judicial review.<sup>413</sup> Lord Scarman stated as follows:

'I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case it is a ground upon which a court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law.'<sup>414</sup>

Lord Templeton agreed that the IR owes a duty of fairness to taxpayers but noted that it must make decisions under the statute that confers the power to collect tax.<sup>415</sup> In *Reg v I.R.C*<sup>416</sup> the House of Lords indicated that a taxpayer has a claim to finality, but only if he or she has made full and proper disclosure of important facts.

Richardson suggests that State agencies should supply proper reasons for decisions made.<sup>417</sup> As to the nature of the reasons, he states:

'A statutory duty to give reasons can only be fulfilled by the provision of "adequate" reasons. Again *Re Poyser and Mill's Arbitration* provides the classic authority: "proper, adequate reasons must be given ... which not only will be intelligible, but also can reasonably be said to deal with the substantial points that have been raised". ... It is clear that that "the substantial points" encompass both fact and law and that the reasons must indicate "what it is to which the tribunal is addressing its mind". But they can be brief and need not state every point expressly. Such generalisations, however, are of little value in the abstract.'<sup>418</sup> [footnotes omitted].

Richardson refers to the 'due process' requirement in the United States and the need for proper reasons supporting decisions in that country.<sup>419</sup>

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<sup>412</sup> Law No 88 of 1993 and K Ishimura 'The State Of Taxpayers' Rights In Japan' in Bentley (note 67 above) 235.

<sup>413</sup> *Reg v I. R. C., Ex p. Preston* (H. L. (E.)) 1985 1 AC 851. For further comments on judicial review in the United Kingdom see G Richardson & H Genn *Administrative Law & Government Action The Courts and Alternative Mechanisms of Review* (1994) 45.

<sup>414</sup> *Reg v I. R. C* 851.

<sup>415</sup> *Ibid* 864.

<sup>416</sup> *Ibid* 852.

<sup>417</sup> G Richardson 'The Duty To Give Reasons' (Autumn 1986) *Public Law* 436-69.

<sup>418</sup> *Ibid* 457.

<sup>419</sup> *Ibid*.

In France and New Zealand taxpayers also have the right to a hearing before a State official makes a decision that adversely affects them.<sup>420</sup>

South African courts must consider foreign law under s 39 of the Constitution. The policies and practices in other countries may assist in developing South African law in the area of the taxpayer's right to administrative justice.

(11) *Finality of Assessments issued by the Commissioner*

The Commissioner may amend an assessment issued to a taxpayer within three years from the date of issue.<sup>421</sup> The three-year period does not apply if the taxpayer has failed to disclose material facts or if there was no tax levied on the income due to fraud or misrepresentation.<sup>422</sup> If the Commissioner and taxpayer agree before three years has elapsed that the Commissioner should revise the assessment, he may issue an additional assessment even after the three-year period has passed.<sup>423</sup>

Thus, if a taxpayer has made full and proper disclosure he or she has a right to the certainty that the Commissioner may not amend an assessment more than three years after issue.

Where a taxpayer receives an assessment and lodges an objection and the Commissioner upholds that objection, may the Commissioner revisit the assessment within three years from the date of the original assessment? This was the issue before the Tax Court in *Carlson Investments Share Block (Pty) Ltd v Commissioner for South African Revenue Services*.<sup>424</sup>

In *Carlson* the company incurred interest and claimed it as a deduction for tax purposes. Originally the Commissioner allowed the interest as a deduction for tax purposes. He later queried why he should

<sup>420</sup> For France see J Bell *French Constitutional Law* (1992) 33 and Alston (note 297 above) 273.

<sup>421</sup> Income Tax Act s 79.

<sup>422</sup> Ibid s 79(1)(c)(i)(aa).

<sup>423</sup> Ibid s 79(1)(c)(i)(bb).

<sup>424</sup> [2001] 63 SATC 295.

do so. When the taxpayer responded the Commissioner decided to disallow the deduction. The taxpayer lodged an objection to the revised assessments, which was upheld by the Commissioner, relying, *inter alia*, on the decision of the Tax Court in *ITC 1500*.<sup>425</sup> The Commissioner reinstated the original assessments. Subsequently, the Supreme Court of Appeal in its decision in *CIR v Brollo Properties (Pty) Ltd*<sup>426</sup> reversed the decision of the court a quo in *ITC 1500*.<sup>427</sup> As a result, the Commissioner revised the assessments issued to the taxpayer disallowing the interest once again despite the fact that he had previously allowed the taxpayer's objection. The Commissioner did so under s 79(1) of the Income Tax Act and the taxpayer challenged the constitutional validity of the action on the ground that the Commissioner's decision violated its right to administrative justice because it had a right to certainty about its tax affairs.

The taxpayer's counsel argued that the Commissioner was *functus officio* and the Court should set aside the second additional assessment. Counsel contended that s 79(1) of the Income Tax Act was invalid to the extent that it allowed the Commissioner to revisit an assessment amended pursuant to an objection.<sup>428</sup> Referring to *Miller v Commissioner for Inland Revenue (SWA)*,<sup>429</sup> counsel commented:

'The Ordinance contained provisions which were similar to the Income Tax Act, but did not have any words corresponding to the phrase "notwithstanding the provisions of section 81(5)" in section 79. In the *Miller* case Centlivres CJ stated (at 483B-C):  
 "[T]he policy of the legislature seems to be that the taxpayer should be entitled to some finality in the matter of assessments and that he should not be liable to be harassed from time to time as he would be if the Commissioner were given the power to rip up what he has deliberately done in the past."

It appears that the Income Tax Act, 1941 was amended in order to deliberately deprive the taxpayer of the right to "finality in the matter

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<sup>425</sup> [1991] 53 SATC 272.

<sup>426</sup> [1994] 56 SATC 47.

<sup>427</sup> [1991] 53 SATC 272.

<sup>428</sup> See Appellant's Heads of Argument – The Constitutional Challenge 36 for *Carlson* (note 424 above) 295.

<sup>429</sup> 1952 (1) SA 474 (A).

of assessments”, so that he should “not be liable to be harassed from time to time” by the Commissioner.<sup>430</sup>

The taxpayer submitted that it had a legitimate expectation that the Commissioner would not amend the reduced assessment further after allowing the objection.<sup>431</sup> It sought to show that the wording in s 79(1) violated the taxpayer’s right to administrative justice in s 24 of the Interim Constitution.

The Court did not agree with the taxpayer’s argument. It held that the Commissioner was not *functus officio* because the Income Tax Act conferred a power on the Commissioner to amend the assessment despite his having previously allowed an objection on the same principle.<sup>432</sup> Navsa J commented on the taxpayer’s challenge to the validity of s 79 as follows:

‘Since all the administrative principles debated in this judgement have as their end fair administrative procedures that will lead to lawful and just administrative decisions I am constrained to pose the question: Why against the totality of the circumstances of this case can the respondent be said to have acted improperly or unfairly? The applicant asserts that the unfairness lay in the fact that the respondent allowed an objection and then changed his mind. The response to this is that the statute in question permits him to do so within a three-year period and that this is known to taxpayers in advance.

The statute enables the respondent to rectify mistakes of fact and law. The respondent has a statutory obligation to act in the face of stipulated jurisdictional facts. Furthermore, this statutory power to revisit is in the national interest. Section 79(1) of the Act does not sanction arbitrary and capricious behaviour and is not unconstitutional. Statutes such as the one in question are found in comparable legal systems and the underlying rationale is accepted.’<sup>433</sup>

I submit that the Court’s decision is correct. However, in terms of s 81(1) of the Income Tax Act, a taxpayer has no right to seek an amendment to an assessment unless he or she lodges an objection within 30 days of date of issue. If a taxpayer makes an error in his or her tax return, the taxpayer will not succeed in having the assessment

<sup>430</sup> See Appellant’s Heads of Argument (note 428 above).

<sup>431</sup> *Ibid.*

<sup>432</sup> *Carlson* (note 424 above) 317.

<sup>433</sup> *Ibid* 324.

amended unless the Commissioner agrees. The Commissioner prescribes strict rules that taxpayers must adhere to before he will condone a late objection under s 81(2) of the Income Tax Act.<sup>434</sup> The Commissioner is in a strong position because he may amend an assessment within three years, whereas the taxpayer has no guarantee that the Commissioner will give effect to the amendment he or she requires. This is unfair. The Commissioner could ameliorate the problem if he agreed to grant taxpayers a more reasonable period during which to note an objection.

(12) *The relevance of the doctrine of legitimate expectations in the tax arena*<sup>435</sup>

The doctrine of legitimate expectations allows an extension of the applicability of the rules of natural justice. A taxpayer, subject to certain exceptions contained in s 3(4)(a) of the Act, has a right to a hearing before the Commissioner makes a decision under s 3(2)(b) of PAJA. I contend that the doctrine would, under PAJA, form part of the evaluation to determine whether the 'administrative action' is procedurally fair. In *Administrator, Transvaal, and Others v Traub and Others*<sup>436</sup> Corbett CJ held that, in ignoring the audi principle, the official erroneously decided not to appoint the doctors to the posts they had applied for.<sup>437</sup> As a result, the Court set the decision aside.

Writing on the doctrine of legitimate expectations, Schweitzer comments:

'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

<sup>434</sup> 'Objection: Exercise Of A Discretion – Late Objection' Interpretation Note 15 issued by the Commissioner (8 November 2004) available at <http://www.sars.gov.za>.

<sup>435</sup> A comprehensive analysis of this topic lies beyond the scope of this thesis.

<sup>436</sup> 1989 (4) SA 731.

<sup>437</sup> Ibid 764.

aggrieved person has a legitimate expectation that a decision will be favourable to him.<sup>438</sup>

If the Commissioner grants the taxpayer a ruling and the taxpayer later seeks another ruling on similar facts the taxpayer has a legitimate expectation that it will be comparable to the first ruling.<sup>439</sup> The doctrine not only results in securing a hearing on the matter but may have a substantive effect in that the taxpayer might obtain a right that the Commissioner will act in a particular way or reach a particular decision.

This doctrine is recognised in the *SARS Income Tax Practice Manual*,<sup>440</sup> which refers to *ITC 1674*,<sup>441</sup> where a taxpayer in Zimbabwe relied on a ruling given by the Commissioner that sales tax should not be levied on certain motor vehicles.<sup>442</sup> The court a quo held that the doctrine comprises the expectation of the taxpayer that there will be a hearing and that the State official will act fairly.<sup>443</sup> The Court reversed the decision on appeal in *COT v Astra Holdings (Private) Ltd trading as Puzey and Payne*.<sup>444</sup> It decided that the taxpayer could not rely on the ruling as the Commissioner had made an error of law and it would be unfair to the fisc to uphold the incorrect ruling.<sup>445</sup>

In *ITC 1682*<sup>446</sup> the taxpayer contended that it had implemented a so-called salary sacrifice arrangement based on a ruling issued by the Commissioner. Davis J stated:

‘It is clear that the ... Constitution has been interpreted by the Constitutional Court in support of a recognition that there are cases where the concept of a legitimate expectation conferring a right to substantive relief may be recognised. There is considerable merit

<sup>438</sup> A G Schweitzer ‘Aspects Of The Administrative Law Relationship Between The Taxpayer And The Commissioner For Inland Revenue’ (1991) LLM thesis University of Cape Town para 3.3 p 59; Corbett C J in *Traub* (note 436 above) 758; G Quinot ‘The developing doctrine of substantive protection of legitimate expectations in South African administrative law’ (2004) 19 *SAPR/PL* 543.

<sup>439</sup> Schweitzer (note 438 above) 84. See also D M Davis ‘Legitimate Expectations’ (January 2002) *The Taxpayer* 6.

<sup>440</sup> *SARS Manual* (note 185 above) B-25.

<sup>441</sup> [2000] 62 SATC 116. See R C Williams ‘The Doctrine Of Legitimate Expectations May Prevent The Revenue Authorities From Reneging On An Undertaking To a Taxpayer’ (2001) 118 *SALJ* 242.

<sup>442</sup> *SARS Manual* (note 185 above) B-25.

<sup>443</sup> *Ibid.*

<sup>444</sup> [2004] 66 SATC 79; J Silke ‘Legitimate Expectations Law Unfair to the taxpayer or fiscus’ (2004) 18 *Tax Planning* 40.

<sup>445</sup> *COT* (note 444 above) 92.

<sup>446</sup> [2000] 62 SATC 380.

in the recognition of such a doctrine in a case such as the present dispute, where Mr H of the Commissioner's office acknowledged that the principle [of a salary sacrifice] applied in the circumstances of a similar nature and where a clear unequivocal statement appears in respondent's own manual.<sup>447</sup>

A taxpayer may only rely on a ruling issued by the Commissioner if he or she makes a full and proper disclosure of facts when applying for the ruling. The Court considered this issue in *R v Board of Inland Revenue, ex parte MFK Underwriting Agencies Ltd & Ors & Related Applications*<sup>448</sup> and Judge J stated:

'In those cases where the taxpayer has approached the Revenue for guidance the court will be unlikely to grant judicial review unless it is satisfied that the taxpayer has treated the Revenue with complete frankness about his proposals. Applying private law tests to the situation calls for utmost good faith on the part of the taxpayer. He should make full disclosure of all the material facts known to him.'<sup>449</sup>

Louw expressed the opinion that the Commissioner should follow a ruling issued to a taxpayer if the taxpayer has disclosed the facts and implemented the transaction as advised to the Commissioner.<sup>450</sup> The Commissioner issues press releases, guides and interpretation notes for use by taxpayers. Taxpayers have the right to rely on those documents in completing their tax returns. The right to administrative justice together with the doctrine of legitimate expectations should assist taxpayers in ensuring that the Commissioner follows the interpretation notes issued by him.

Under ss 76B to S of the Income Tax Act the Commissioner may issue advance rulings to taxpayers. The rulings will comprise three types once the President has published the required notice in the *Government Gazette*:

- binding general ruling;
- binding private ruling;

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<sup>447</sup> Ibid 403.

<sup>448</sup> [1990] 1 All ER 91 (QBD).

<sup>449</sup> Ibid 115. The court reached similar decisions in *Preston v IRC* [1985] 2 All ER 327 and *Matrix-Securities Ltd v IRC* [1994] 1 All ER 769 [1994] 1 WLR 334.

<sup>450</sup> C Louw 'Kan die Suid-Afrikaanse Inkomstediens (SAID) Gebonde Gehou Word Aan Sy Aanwysings?' (2003) (66) *THRHR* 296.

- binding class ruling.

The Income Tax Act prescribes how taxpayers should apply for rulings and the conditions that apply in ensuring that a ruling binds the Commissioner. I submit that the taxpayer's right to just administrative action will assist taxpayers who seek rulings under ss 76B to S.<sup>451</sup>

The doctrine of legitimate expectations comprises the argument that estoppel binds the fiscal authority.<sup>452</sup> Rider makes the following interesting observations on this subject:

'The traditional view on estoppel derives from a time when the application of taxation statutes was a more straightforward matter, and the financial consequences for taxpayers less onerous, than is the case today. The question of the amount of tax which is lawfully due from a particular taxpayer in relation to particular transactions is not always a certain matter. ... In many cases, the only practical approach which a taxpayer can take in seeking a certain resolution of their tax liabilities is to form a view as to how the Commissioner might be expected to exercise his administrative powers in relation to the powers concerned.

If the Commissioner, on the basis of a proper understanding of the relevant facts, creates in the taxpayer a legitimate expectation that the Commissioner's powers will be exercised in a certain way, and is aware that this expectation has been created it is hard to see what prejudice to the public interest in due administration of the tax law will be done if a court restrains the Commissioner from subsequently acting in disregard of his previous conduct towards the taxpayer.'<sup>453</sup>

Commenting on the doctrine of legitimate expectations in the tax arena in *Brierley Investments Limited v CIR*<sup>454</sup> Casey J, in New Zealand, said:

'[I]n an appropriate case a decision by the Commissioner to act inconsistently with a taxpayer's legitimate expectation in the process leading up to an assessment could constitute unfairness amounting to an abuse of powers so as to justify intervention by way of judicial review'.<sup>455</sup>

<sup>451</sup> D Meyerowitz 'Revenue Rulings And Legitimate Expectations' (February 1990) *The Taxpayer* 24.

<sup>452</sup> C Rider 'Estoppel Of The Revenue: A Review of Recent Developments' (1994) 23 *Australian Tax Review* 35 p 151.

<sup>453</sup> Ibid 151 and 152.

<sup>454</sup> (1993) 15 NZTC 10212 (CA).

<sup>455</sup> Ibid 10225.

Thus, New Zealand taxpayers may be able to approach a court for relief where the Inland Revenue Department fails to treat taxpayers consistently.<sup>456</sup> It is argued that South African taxpayers may be able to rely on the doctrine of legitimate expectations to ensure not only procedural fairness in their dealings with the Commissioner but to achieve substantive relief against the Commissioner in appropriate cases.<sup>457</sup>

### (13) Conclusion

In summary, it is clear that taxpayers have obtained an enforceable right in their dealings with the Commissioner because of s 33 of the Constitution and the enactment of PAJA. They may now insist on proper reasons from the Commissioner for decisions made by his officers in performing their duties under the fiscal statutes.<sup>458</sup> Many of the decisions taken by the Commissioner in administering the tax system constitute 'administrative action' as envisaged in PAJA, and are subject to judicial review by the courts under s 6 of that Act.

Taxpayers should be able to secure an award of costs against the Commissioner when their action succeeds. In exceptional cases they should also have the right to recover damages from the Commissioner. The hurdle facing a taxpayer who wants to recover damages is relatively high because the taxpayer will incur significant costs in instituting action in the High Court and must show that the case is exceptional. It is unfortunate that there is not a more cost effective remedy for the taxpayer. Corder's comments are insightful:

'Perhaps a more urgent issue here, however, is the consideration and possible establishment of one or more administrative review tribunals, as forums which could apply the new system of review expeditiously, fairly and affordably, with restricted rights of appeal to the courts as a safety net. The Constitutional requirement of independence and impartiality dictates that such tribunals not be mere "in-house, further-up-the-hierarchy" appeals, although such

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<sup>456</sup> Alston (note 297 above) 276.

<sup>457</sup> Davis (note 439 above) 6 and 11.

<sup>458</sup> ITC 1811, [2006] 68 SATC 193, Tax Case 4/2005, 2005 JDR 1440 (JSpCr).

avenues would obviously be appropriate as a sifting device in many situations.<sup>459</sup>

Further, the introduction of 'merits review', as exists in Australia, would, I contend, enhance the quality of administrative decisions made in South Africa.<sup>460</sup>

It appears that many taxpayers and, indeed, the Commissioner's own officers, are not aware of the full impact of the provisions of PAJA on the fiscal statutes administered in South Africa. The Commissioner should meet his earlier undertaking to release a manual on how PAJA affects tax collection in the country. The Commissioner should undertake extensive training to improve the understanding of his staff of PAJA, its requirements of fair 'administrative action' and how the Act affects the powers exercised by the Commissioner under the fiscal statutes.<sup>461</sup> I submit that in the future courts, in adjudicating tax matters, will need to consider the interaction of the fiscal statutes with PAJA, as has been the experience in Australia in particular.

Commenting on the effect of the right to just administrative action in South Africa, Bentley writes: 'Provisions such as the South African constitutional entrenchment of the right to administrative justice could impact powerfully on tax administration.'<sup>462</sup>

I contend that neither the Commissioner nor the taxpayer has yet grasped the full extent of PAJA's effect on tax administration in this country.

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<sup>459</sup> H Corder 'Administrative Justice: A Cornerstone of South Africa's Democracy' (1998) 14 *SAJHR* 51.

<sup>460</sup> 'Administrative Review Council, What Decisions Should Be Subject To Merit Review?' Commonwealth of Australia available at [http://www.ag.gov.au/agd/WWW.archome.nsf/Page/Publications\\_Reports\\_Downloads](http://www.ag.gov.au/agd/WWW.archome.nsf/Page/Publications_Reports_Downloads), accessed 28 January 2008.

<sup>461</sup> Corder (note 459 above) 52.

<sup>462</sup> D Bentley 'Editorial: Taxpayers' Rights' (May 1997) 7 *Revenue Law Journal* vi.

## IV ACCESS TO COURTS

### (1) *The Right of Access to Courts*

Section 34 of the Constitution confers the right of access to courts: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

The right of access to court ensures that there is no recurrence of the legacy of the pre-democratic era, where statutes contained ouster clauses prohibiting courts from reviewing statutes or the conduct of State officials.<sup>463</sup>

Cachalia comments:

'In itself this is [an] unusual provision. The right of access to courts is generally guaranteed through a right safeguarding equal protection of the law or a provision which ensures that no person will be deprived of a right without due process of law or the more specific provision dealing with detained, arrested and accused persons.'<sup>464</sup>

In *Bernstein and Others v Bester NO and Others*<sup>465</sup> Ackermann J interpreted s 22 of the Interim Constitution, the predecessor to s 34 of the Constitution, as follows:

'When section 22 is read with section 96(2), which provides that "[t]he judiciary shall be independent, impartial and subject only to this Constitution and the law", the purpose of section 22 seems to be clear. It is to emphasise and protect generally, but also specifically for the protection of the individual, the separation of powers, particularly the separation of the judiciary from the other arms of the State. Section 22 achieves this by ensuring that the courts and other *fora* which settle justifiable disputes are independent and impartial. It is a provision fundamental to the upholding of the rule of law, the constitutional state, the "*regstaatide*", for it prevents legislatures, at whatever level from turning themselves by acts of legerdemain into "courts". One recent notorious example of this was the High Court of Parliament Act. By constitutionalising the requirements of independence and impartiality the section places the *nature* of the courts or other

<sup>463</sup> Hoexter (note 125 above) para 8.5 p 305.

<sup>464</sup> Cachalia (note 114 above) 68. See further Devenish (note 9 above) 485; Davis (note 53 above) 143; Cheadle, Davis & Haysom (note 7 above) 617.

<sup>465</sup> 1996 (4) BCLR 449 (CC).

adjudicating fora beyond debate and avoids the dangers alluded to by Van den Heever JA in the *Harris* case.<sup>466</sup>

Ackermann J held that s 22 of the Interim Constitution had not constitutionally entrenched a right of fairness between opposing parties in civil litigation.<sup>467</sup> However, the wording in s 34 of the Constitution differs in that it specifically requires that the hearing is open and fair.<sup>468</sup>

Chaskalson describes the right of access to courts as ‘another right of administrative justice’.<sup>469</sup> This view has merit, as a taxpayer may, under PAJA, seek judicial review of decisions made by the Commissioner.<sup>470</sup> Thus, when considering the taxpayer’s rights of access to information,<sup>471</sup> administrative justice<sup>472</sup> and access to courts<sup>473</sup> all interested parties should take account of how the three procedural rights interact.

Before PAJA’s enactment a court would not normally hear argument on a dispute unless the taxpayer had exhausted his or her internal remedies.<sup>474</sup> PAJA endorses this approach except in exceptional circumstances.<sup>475</sup> An example of ‘exceptional circumstances’ is where the Commissioner clearly exhibits bias against the taxpayer and the internal remedy will not assist the taxpayer.<sup>476</sup> Thus, if a taxpayer has noted an appeal against the disallowance of an objection to an assessment, another court will not hear the appeal until the Tax Court has pronounced thereon.

Section 34 of the Constitution refers to ‘any dispute’ and it is necessary to establish what this term means. Chaskalson P analysed it in *S v Pennington and Another*,<sup>477</sup> stating:

‘The words “any dispute” may be wide enough to include criminal proceedings, but it is not the way such proceedings are ordinarily

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<sup>466</sup> Ibid para 105 p 499.

<sup>467</sup> Ibid; Davis (note 53 above) 145.

<sup>468</sup> Cheadle, Davis & Haysom (note 7 above) 618.

<sup>469</sup> Chaskalson et al (note 111 above) para 25.10 p 25-23.

<sup>470</sup> PAJA s 6.

<sup>471</sup> Constitution s 32.

<sup>472</sup> Ibid s 33.

<sup>473</sup> Ibid s 34.

<sup>474</sup> Baxter (note 348 above) 720.

<sup>475</sup> PAJA s 7(2)(c).

<sup>476</sup> *Gold Fields* (note 188 above).

<sup>477</sup> 1997 (10) BCLR 1413 (CC).

referred to. That section 34 has no application to criminal proceedings seems to me to follow not only from the language used but also from the fact that section 35 of the Constitution deals specifically with the manner in which criminal proceedings must be conducted.<sup>478</sup>

A taxpayer may not rely on s 34 of the Constitution if the Commissioner has instituted criminal proceedings against the taxpayer – it is s 35 that governs the conduct of criminal proceedings.

Section 34 applies if a taxpayer seeks to challenge the constitutional validity of a provision in a fiscal statute or commences review proceedings against the Commissioner because of decisions made by his officials.<sup>479</sup>

May a taxpayer use s 34 of the Constitution to challenge the Commissioner's decision to file a statement at court for taxes reflected as owing without the taxpayer having received prior notice thereof?<sup>480</sup> Once the Commissioner has filed such a statement it has the effect of a civil judgment against the taxpayer. The question is whether a taxpayer may approach a court for relief where the Commissioner has filed such a statement.

Before addressing the procedure in the tax context, it is appropriate to refer to *Lesapo v North West Agricultural Bank and Another*<sup>481</sup>. In this case the court decided that a provision of the North West Agricultural Bank Act<sup>482</sup> allowing the bank to dispose of a defaulting debtor's property without the court's intervention was invalid.<sup>483</sup> The court held that 'self-help' is invalid and a debtor facing such circumstances may exercise the right of access to court.<sup>484</sup> Cheadle, Davis and Haysom endorse the

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<sup>478</sup> Ibid para 46. See comments by F Venter *Constitutional Comparison Japan, Germany, Canada & South Africa As Constitutional States* (2000) para 3.4.2.4 p 160.

<sup>479</sup> De Waal et al (note 58 above) para 31.2 p 555; H Corder & L van der Vijver *Realising Administrative Justice* (2002) 98.

<sup>480</sup> Income Tax Act s 91(1)(b); VAT Act s 40(2)(a).

<sup>481</sup> 1999 (12) BCLR (CC) 1420.

<sup>482</sup> Act 14 of 1981, especially s 38(2).

<sup>483</sup> *Lesapo* (note 481 above) 1427; Cheadle, Davis & Haysom (note 7 above) 620.

<sup>484</sup> *Lesapo* (note 481 above) paras 11 and 19 p 1420. Cheadle, Davis & Haysom (note 7 above 620) endorses the view that 'self-help' expressly contravenes s 34 of the Constitution.

court's opinion that 'self-help expressly contravenes section 34'.<sup>485</sup>

Mokgoro J summarised the position as follows:

'Section 38(2), however, limits the debtor's rights in section 34 by vesting that authority in the Bank. The Bank itself decides whether it has an enforceable claim against the debtor; the Bank itself decides the outcome of the dispute and the subsequent relief; and the Bank itself enforces its own decision, thereby usurping the powers and functions of the courts. The fact that the debtor may have recourse to a court of law after the attachment takes place does not cure the limitation of the right; it merely restricts its duration. For the period of the limitation, the debtor has been deprived of possession of the assets in question without the intervention of a court of law and in a manner inconsistent with section 34.'<sup>486</sup>

In the light of the decision in *Lesapo*<sup>487</sup> an observer would expect a court to strike down the not-too-dissimilar provisions found in the fiscal statutes allowing the Commissioner to collect taxes. In adjudicating the Commissioner's powers in *Metcash*<sup>488</sup> Snyders J commented on the way ss 36 and 40 of the VAT Act and s 34 of the Constitution interact:

'There is no doubt that the relevant provisions are inconsistent with the provisions of s 34 of the Constitution in that:

- (a) It substitutes the first respondent for the court in determining every facet of the vendor's liability and the enforcement thereof;
- (b) It precludes any interlocutory relief by a court of law for the aggrieved.

The prospect that an eventual successful appeal might reverse the situation is no answer to the actual infringement which endures until then.'<sup>489</sup>

The Court then analysed the limitation of rights provision contained in s 36 of the Constitution to determine whether it justified the infringement of rights. Snyders J referred to the comments of the Constitutional Court in *Lesapo*,<sup>490</sup> which indicated that the right to access to the courts is important and only exceptional circumstances can limit that right.

Snyders J decided that the limitation of the right of access to court was

<sup>485</sup> Cheadle, Davis & Haysom (note 7 above) 620.

<sup>486</sup> *Lesapo* (note 481 above) para 20.

<sup>487</sup> *Ibid.*

<sup>488</sup> [2000] 62 SATC 84, 2000 (2) SA 232 (W).

<sup>489</sup> *Ibid.*

<sup>490</sup> Note 481 above para 22.

neither reasonable nor justifiable.<sup>491</sup> As a result, she held that parts of ss 36 and 40 of the VAT Act were unconstitutional and invalid because they denied the taxpayer the right to approach a court for relief.<sup>492</sup>

The Commissioner disagreed with the Court's decision because it resulted in the suspension of important provisions in the VAT Act used by him to enforce the collection and recovery of tax. The matter proceeded to the Constitutional Court where Kriegler J analysed the provisions of the VAT Act and pointed out that VAT is different from income tax in that it is, for practical purposes, a self-assessment system.<sup>493</sup> He pointed out that the noting of an appeal against an assessment did not automatically suspend payment of the amount reflected as payable to the Commissioner.<sup>494</sup> Kriegler J interpreted s 36(1) as dealing with the question of payment of VAT pending the outcome of a taxpayer's appeal and not as preventing a taxpayer from approaching a court for relief.<sup>495</sup> The Court indicated that s 36(1) contains a discretionary provision, because the Commissioner may agree to postpone the payment of tax in dispute.<sup>496</sup> According to Kriegler J, the Commissioner's counsel confirmed this interpretation.

'Counsel, conceding that s 36(1), read in context with the other two impugned provisions, effectively barred any judicial relief being extended to an aggrieved vendor, argued that the existence of the discretion coupled with the fact that the exercise of discretion would be reviewable on administrative law principles saved the section from unconstitutionality.'<sup>497</sup>

The Court referred to the fact that the Commissioner exercises various discretions under the fiscal statutes and any decisions he makes constitute 'administrative action' that may be reviewed in terms of the principles of administrative law.<sup>498</sup> Commenting on the Commissioner's discretion to postpone the payment of disputed VAT Kriegler J said:

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<sup>491</sup> Ibid.

<sup>492</sup> Ibid.

<sup>493</sup> Ibid para 17.

<sup>494</sup> Ibid para 36.

<sup>495</sup> Ibid para 37.

<sup>496</sup> Ibid para 38.

<sup>497</sup> Ibid.

<sup>498</sup> Ibid para 40.

'I cannot agree with Snyders J to the extent that she considered the exercise of the discretion conferred upon the Commissioner in s 36 of the Act not to be reviewable. The Act gives the Commissioner the discretion to suspend an obligation to pay.

...

The action must also constitute "just administrative action" as required by s 33 of the Constitution and be in compliance with any legislation governing the review of administrative action.<sup>499</sup>

Thus, the Court held that s 36(1) of the VAT Act did not oust its jurisdiction.<sup>500</sup> The Court summarised the legal process followed where a taxpayer disputes an assessment issued by the Commissioner.<sup>501</sup> A taxpayer may note an appeal against the disallowance of his or her objection to an assessment.<sup>502</sup> If the taxpayer succeeds in his or her appeal and the Commissioner accepts the court's decision the assessment falls away, thus finalising the matter. Where the taxpayer is unsuccessful in his or her appeal a further appeal lies to a higher court and that right is not excluded under the VAT Act.<sup>503</sup>

Kriegler J dealt with the High Court's inherent jurisdiction to hear tax matters as follows:

'Indeed, it has for many years been settled law that the Supreme Court has jurisdiction to hear and determine income tax cases turning on legal issues.

...

McCreath J concluded as follows as to his competence to determine the case:

"I am in agreement with the finding of the Court in that case that where the dispute involved no question of fact and is simply one of law the Commissioner and the Special Court are not the only competent authorities to decide the issues – at any rate when a declaratory order such as that in the present case is being sought."<sup>504</sup>

The Constitutional Court thus recognises the right of taxpayers to seek clarification from a court on fiscal legal questions. Thus, if a taxpayer takes a particular view of a fiscal provision and the

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<sup>499</sup> Ibid para 42.

<sup>500</sup> Ibid para 46.

<sup>501</sup> Ibid para 43.

<sup>502</sup> See, eg, s 32 of the VAT Act and s 81 of the Income Tax Act.

<sup>503</sup> *Metcash* (note 221 above) para 43.

<sup>504</sup> Ibid para 44.

Commissioner does not agree with it, the taxpayer may seek a declaratory order in the manner described by Kriegler J.<sup>505</sup>

In practice there is significant uncertainty as to whether a taxpayer must withhold employees' tax (PAYE) on fees paid to certain persons for services rendered.<sup>506</sup> The proposed advance rulings regime contained in ss 76B to S of the Income Tax Act provides that the Commissioner need not consider rulings on this difficult area of tax law. Is a taxpayer entitled to seek a declaratory order from a court on this question? Based on Kriegler J's comments it would appear possible for a taxpayer to do so. I contend that the reason taxpayers do not adopt this route is the prohibitive legal costs. It is easier for the taxpayer to deduct the PAYE and pay that over to the Commissioner.

When Kriegler J examined s 40(5) of the VAT Act and the 'pay now, argue later' rule he stated that the rule is 'one which is accepted as reasonable in open and democratic societies based on freedom, dignity and equality'.<sup>507</sup> Having considered the matter before him he decided that s 36(1) did not oust the taxpayer's right to court and thus set aside the order made by Snyders J in the court a quo.<sup>508</sup>

I submit that Kriegler's decision is correct in that taxpayers retain the right to approach a court for relief.<sup>509</sup> This is particularly the case where the fiscal statutes confer a discretion on the Commissioner and he either makes an unreasonable decision or makes no decision at all. The taxpayer has the right to administrative justice and may seek a review of the Commissioner's decision or his failure to make a decision.<sup>510</sup> Failing an internal remedy from the Commissioner the taxpayer may approach a court for relief.<sup>511</sup>

Section 88 of the Income Tax Act is similar to s 36 of the VAT Act. It is unlikely that the Constitutional Court would hold that s 88 is

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<sup>505</sup> Ibid.

<sup>506</sup> This is under the provisions contained in the Fourth Schedule to the Income Tax Act.

<sup>507</sup> Ibid para 61.

<sup>508</sup> Ibid para 74, which set aside the decision of Snyders J in *Metcash* (note 221 above).

<sup>509</sup> *Metcash* (note 221 above) para 72.

<sup>510</sup> Constitution s 33 read together with the provisions of PAJA s 6.

<sup>511</sup> PAJA ss 6 and 7.

unconstitutional in that it allows a taxpayer to approach a court for relief. A court must enquire whether the Commissioner has complied with his obligations under the right to administrative justice contained in s 33 of the Constitution. I would advise an aggrieved taxpayer to challenge, on administrative law grounds, the Commissioner's decision to refuse to defer the payment of tax pending the hearing of an appeal. This is preferable to seeking the striking down of the 'pay now argue later' provisions contained in the various fiscal statutes.

Unfortunately, the Income Tax Act does not currently deal with the payment of tax pending a decision on an objection lodged against an assessment.<sup>512</sup> Clearly, s 88 of the Income Tax Act allows for payment of tax to be postponed until the hearing of an appeal. The Income Tax Act is deficient, because it does not address the intervening period, that is, from the date of lodging an objection until the Commissioner decides whether to allow or disallow the objection. In practice the Commissioner will, depending on the circumstances, grant an extension of time to pay the tax pending a decision on the objection. I propose that the legislature amend the fiscal statutes to deal with the period between the date the objection is lodged and the Commissioner's decision whether to allow or disallow the objection.

The legislature created the Tax Court to hear appeals lodged by taxpayers against the disallowance of objections to assessments.<sup>513</sup> It is appropriate to discuss the nature of the Tax Court and whether it constitutes a High Court performing a specialised function.<sup>514</sup> In *Tax Case VAT 304* the appellants argued that because its status is similar to the High Court the Tax Court may determine whether a fiscal provision is constitutionally valid for the following reasons:

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<sup>512</sup> In 'Effect of Lodging an objection on payment of tax' (September 1964) *The Taxpayer* 168 the view is expressed that '... payment of tax cannot be enforced pending the Secretary's decision on an objection lodged timeously'.

<sup>513</sup> See s 83 of the Income Tax Act and the rules governing objections and appeals promulgated under s 107A of that Act.

<sup>514</sup> See Appellant's Heads of Argument *Carlson Investments* (note 428 above) and Southwood J in *Tax Case VAT 304* decided (7 November 2005) para 46 *ITC 1806* [2006] 68 SATC 117 available at <http://www.sars.gov.za>.

‘These *indicia* include the High Court Rules which apply in respect of the general practice and procedure of the court insofar as such rules are applicable; the power of the court to make costs orders which costs shall be determined in accordance with the fees prescribed by the rules of the High court; the tax court is a court of record; judgements or decisions of the tax court may be published; appeals from the tax court lie to the Full Court of the Provincial Division having jurisdiction and, with the consent of the President, directly to the Supreme Court of Appeal just as appeals from a single judge of the High Court do. On the other hand the respondent emphasises that the tax court is a creature of statute, that its powers are to be found within the four corners of the act and that the limited powers of the tax court are not comparable with those of the High Court.’<sup>515</sup>

Southwood J examined the characteristics of a High Court and pointed out that the rules of *stare decisis* do not apply to the Tax Court.<sup>516</sup> He decided that the Tax Court is not a court of similar status to the High Court and thus does not have jurisdiction to adjudicate on the constitutionality of a fiscal statute.<sup>517</sup> It would appear that the Tax Court took a similar view in *Carlson*<sup>518</sup> because the constitutional challenge came before Navsa J in the High Court and not in the Tax Court.

A taxpayer wishing to challenge the constitutionality of a fiscal provision must lay the ground for that challenge in the letter of objection lodged under s 81 of the Income Tax Act. A taxpayer may not raise a constitutional issue for the first time in the Tax Court or a higher court if his or her letter of objection did not contain that ground.<sup>519</sup> I contend that the Tax Court cannot consider the constitutional validity of a taxing statute and that the High Court must adjudicate the matter.<sup>520</sup> The Tax Court may only decide on appeals envisaged in s 81 of the Income Tax Act and cannot adjudicate on the Commissioner’s administrative acts under PAJA. Thus, a taxpayer must approach a High Court, and not the

<sup>515</sup> Southwood J in *VAT 304 2006* JDR 0112 (PSPCrT) para 46, [2006] *ITC 1806*, 68 SATC 117.

<sup>516</sup> *Ibid* para 57.

<sup>517</sup> *Ibid* para 58.

<sup>518</sup> Note 428 above 295.

<sup>519</sup> *Motsepe* (note 230 above) 256.

<sup>520</sup> *VAT 304* (note 515 above) 117 and Appellant’s Heads of Argument in *Carlson* (note 428 above) 295.

Tax Court, if seeking judicial review of 'administrative action' by the Commissioner.<sup>521</sup>

The high costs of litigation in this country may deter taxpayers from exercising their rights *vis-à-vis* the Commissioner. Under s 35 of the Constitution a person facing criminal charges has the right to a fair trial. This right places an obligation on the State to assist the person financially to secure legal representation if failure to do so would lead to an injustice.<sup>522</sup> How are taxpayers to benefit from the right of access to court enshrined in s 34 of the Constitution if they cannot afford to pursue a matter in a court? Should the State not be obliged to assist a taxpayer financially in approaching a court for relief in resolving a tax dispute?

De Waal et al comments on whether s 34 of the Constitution requires the State to provide financial assistance to citizens to resolve legal disputes as follows:

'It is unlikely that s 34 imposes a positive obligation on the state to provide people with access to appropriate forums for resolution of legal disputes. Such a positive interpretation of s 34 will mean that individuals will be entitled to financial assistance to have their disputes resolved by a court or another forum, and to legal representation in some cases. Budgetary constraints will obviously discourage such an interpretation of s 34. This is unfortunate, since the biggest single impediment to access to justice is of course the prohibitive cost of litigation. As we point out below, the courts have started to recognise the impact of legal costs on access to justice by refusing to make costs orders against losing applicants in what can be described as "public interest" litigation.'<sup>523</sup>

The above analysis implies that s 34 of the Constitution does not place an obligation on the State to assist taxpayers to pursue civil litigation. To expect the State to assist taxpayers financially would impose a significant financial burden on the State that it can only fund out of taxes collected from other taxpayers. Further, such a scheme would be fraught with difficulty in terms of ensuring fairness and, especially, in determining which cases warrant State financial support.

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<sup>521</sup> PAJA ss 6 and 8.

<sup>522</sup> Constitution s 35(3)(g).

<sup>523</sup> De Waal et al (note 58 above) 558.

The right of access to court also requires that a ‘fair public hearing’ decide the dispute.<sup>524</sup> Section 14 of the Constitution affords taxpayers a right to privacy. Thus, the Commissioner may not disclose details about a taxpayer without that taxpayer’s consent or unless the fiscal statute allows him to do so.<sup>525</sup> When a taxpayer prosecutes an appeal in the Tax Court the public may not attend the hearing, thereby protecting the taxpayer’s right to privacy.<sup>526</sup> I submit that this should not detract from the fairness of the taxpayer’s hearing at the Tax Court.

A taxpayer has the prerogative to waive his or her right to privacy and may decide to allow the media or members of the public to attend his or her tax case.<sup>527</sup> Importantly, the Commissioner effects the publication of the decisions of the Tax Court after removing the taxpayer’s name and other possible means of identification. This secures the taxpayer’s constitutional right to privacy but ensures transparency of the approach of the court to tax matters and the conduct and practices of the Commissioner.

In *Metcash*<sup>528</sup> Kriegler J expressed the view that the composition of the Tax Court, and the way it conducts proceedings, ensures that the taxpayer receives a fair hearing in that forum.<sup>529</sup> Cheadle, Davis & Haysom comment:

‘That section 34 deals with fairness rather than with the substance of a decision was confirmed in *Lane and Fey NNO v Dabelstein* as follows:

“The Constitution does not and could hardly ensure that litigants are protected against wrong decisions. On the assumption that s 34 of the Constitution does indeed embrace that right, it would be the fairness and not the correctness of the court proceedings to which litigants would be entitled.”

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<sup>524</sup> Constitution s 34.

<sup>525</sup> See, eg, s 4 of the Income Tax Act and s 6 of the Vat Act. The other fiscal statutes administered by the Commissioner contain similar secrecy provisions.

<sup>526</sup> Income Tax Act s 4 read together with s 83(11).

<sup>527</sup> *Ibid* s 4.

<sup>528</sup> Note 221 above.

<sup>529</sup> *Ibid* para 47.

In short, section 34 entrenches principles of natural justice, not only in respect of court procedures but also with regard to appropriate other tribunals.<sup>530</sup>

Harms JA commented on the meaning of 'fair' in *Pharmaceutical Society of SA v Minister of Health; New Clicks SA (Pty) Ltd v Tshabalala-Msimang*<sup>531</sup> where he stated:

'Although the Constitution does not guarantee a right of appeal in civil proceedings explicitly, a general right to a "fair" hearing is entrenched in section 34. Applied to the provisions of the Supreme Court Act, this means that the proceedings there described must, procedurally be "fair".

...  
The Supreme Court Act assumes that the judicial system will operate properly and that a ruling of either aye or nay will follow within a reasonable time.<sup>532</sup>

In *Pharmaceutical Society*<sup>533</sup> the court a quo had declined to decide whether it should grant the request for leave to appeal and Harms JA held that the delay was unreasonable, and thus unfair.<sup>534</sup>

Under the fiscal statutes a taxpayer may utilise other tribunals to resolve a tax appeal. One option is to request that the Tax Board, as envisaged in s 83A of the Income Tax Act, hears the appeal. The Tax Board may hear appeals if the taxpayer and the Commissioner agree and the tax in dispute does not exceed R500 000.<sup>535</sup> Hearings before the Tax Board are not as formal as those in the Tax Court and the procedure aims to provide a cost effective means of resolving tax appeals. If the taxpayer succeeds before the Tax Board the Commissioner may appeal to the Tax Court.<sup>536</sup> If the taxpayer's appeal is upheld in the Tax Court the Commissioner must pay the taxpayer's legal costs.<sup>537</sup> If the taxpayer loses his or her appeal in the Tax Board, a further appeal lies to the Tax

<sup>530</sup> Cheadle, Davis & Haysom (note 7 above) 622. See further De Waal et al (note 58 above) para 31.2 p 578.

<sup>531</sup> 2005 (6) BCLR 576 (SCA).

<sup>532</sup> Ibid para 30 p 588.

<sup>533</sup> Ibid.

<sup>534</sup> Ibid.

<sup>535</sup> Income Tax Act s 83A(1)(a). Similar provisions are found in the other fiscal statutes administered by the Commissioner.

<sup>536</sup> Income Tax Act s 83A(13).

<sup>537</sup> Section 83(17) of the Tax Court.

Court.<sup>538</sup> If the Tax Court confirms the Tax Board's decision the taxpayer will be liable for the Commissioner's costs.<sup>539</sup>

A taxpayer dissatisfied with a decision of the Tax Court may note an appeal. He or she may then proceed to a full bench of the provincial division that has jurisdiction or, with leave from the President of the Tax Court, directly to the Supreme Court of Appeal. Taxpayers should perceive the hearing granted by the Tax Court or another court as fair, as required by s 34 of the Constitution.

The Tax Court does not normally award costs against either the taxpayer or the Commissioner.<sup>540</sup> Where the Court finds that the '... actions of the respondent's [Commissioner's] officials fall short of the standard of professional conduct that the public is entitled to expect of them'<sup>541</sup> the costs will be awarded on the scale of attorney and client.

Another option available to the taxpayer is to request that the appeal proceeds to ADR instead of directly to the Tax Court.<sup>542</sup> The aim of ADR is to facilitate an efficient and cost-effective means of resolving tax disputes. The one disadvantage is that the Commissioner must decide that the appeal is appropriate for ADR, as a taxpayer has no legal right to insist that the ADR process finalises his or her appeal.<sup>543</sup> In practice, some officials do not appear to exercise properly the discretion granted to the Commissioner to decide whether the appeal should proceed to ADR. In other cases the Commissioner unduly delays decisions on taxpayer's requests to proceed to ADR, in contravention of the rules governing objections and appeals. In many cases where appeals have proceeded to ADR a mutually beneficial resolution alleviates the need to prosecute

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<sup>538</sup> Income Tax Act s 83A(13).

<sup>539</sup> Ibid s 83 (17).

<sup>540</sup> Ibid.

<sup>541</sup> *ITC 1821* [2007] 69 SATC 194 at 199. See further s 83(17) and '5 situations in which the tax court may make an order for costs' (April 2006) *Integritax* 80 Item 1394; 'Tax Court's power to make cost orders and decide on constitutional issues' (December 2006) *Integritax* 88 Item 1469; 'Costs awarded against SARS' (June 2007) *Integritax* 94 Item 1527.

<sup>542</sup> Section 83 read together with the Rules promulgated under s 107A(2) of the Income Tax Act.

<sup>543</sup> Rule 7 promulgated under s 107A(2) of the Income Tax Act.

an appeal in the Tax Court. The calibre of the facilitator appointed by the Commissioner largely determines the outcome of the ADR process.<sup>544</sup>

## (2) *Other Countries*

The right of access to courts in other countries and the procedures taxpayers should follow in resolving tax disputes are informative.

According to Venter, Japan, Germany and Canada confer a right of access to courts on taxpayers in some form or another.<sup>545</sup> Article 32 of the Japanese Constitution provides that '[n]o person shall be denied the right of access to the courts.'<sup>546</sup>

Courts in Japan may make findings of fact and must apply the law of that country.<sup>547</sup> A Japanese court may make 'its own decisions regarding the facts even in administrative review procedures'.<sup>548</sup> When the court faces a so-called 'political question' it adheres to a form of self-imposed restriction by not interfering with political decisions.<sup>549</sup>

Under the German Grundgesetz all persons may approach the court if the State has violated their rights.<sup>550</sup> Venter describes the position as follows:

'This last provision of the catalogue of basic rights is considered to protect a key right and to serve as a corner stone of the German *Rechtsstaat*. This provision affords the judiciary the final deciding competence in all matters involving subjective rights and gives it jurisdiction over practically all executive and administrative action.'<sup>551</sup>

German judges are independent and persons proceeding to court have the right to procedural information.<sup>552</sup>

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<sup>544</sup> The Commissioner has, in a number of cases, secured the services of Kirk-Cohen J (retired), which, has added more credibility to the proceedings than reliance entirely on the Commissioner's own staff to act as facilitators.

<sup>545</sup> Venter (note 478 above) para 3.4.2 p 156.

<sup>546</sup> Ibid para 3.4.2.1 p 156.

<sup>547</sup> Ibid.

<sup>548</sup> Ibid para 3.4.2 p 156.

<sup>549</sup> Ibid para 2.4.2.1 p 90; para 3.4.2.1 p 156.

<sup>550</sup> Ibid para 3.4.2.2 p 158.

<sup>551</sup> Ibid.

<sup>552</sup> Ibid 159.

It appears that Canada does not have a right entrenching access to the courts.<sup>553</sup> The limited right of access relates only to those rights entrenched in the Canadian Charter of Rights.<sup>554</sup> Further, a person cannot approach the court for access on behalf of another.<sup>555</sup> If a person's Charter rights have been threatened, they may approach a court for relief.<sup>556</sup>

In the OECD countries taxpayers may appeal against decisions made by the tax authorities.<sup>557</sup> The OECD summarises the position in the member countries as follows:

'In all countries taxpayers with a grievance have resort to a hierarchical range of appeals procedures which will enable them to contest the merits of a tax assessment. The description of country practices in Part IV shows that normally an appeal will first be lodged with an administrative tribunal, in some cases consisting of lawyers and experts; in others of specifically designated tax officials only.'<sup>558</sup>

Taxpayers in the OECD may challenge tax assessments and administrative rulings issued to the taxpayer.<sup>559</sup>

In Europe it appears that there are usually remedies available against assessments issued to a taxpayer.<sup>560</sup> However, objections and appeals may only be lodged against decisions specifically provided for in the law.<sup>561</sup> Albrege & Van Arendonk summarise the position if the tax authority imposes a penalty.

'[A]ccess to the courts is generally the starting point if the difference of opinion is not resolved. This holds true in particular when the protection of human rights is at stake. For example, if an administrative penalty has been imposed, it is settled case-law of the European Court of Human Rights that access to the courts must be guaranteed. In the *Golder* decision the Court held as follows:

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<sup>553</sup> Ibid para 3.4.2.3 p 159.

<sup>554</sup> Ibid.

<sup>555</sup> Ibid.

<sup>556</sup> Ibid.

<sup>557</sup> *Taxpayers' Rights And Obligations* (note 377 above) para 2.17 p 12.

<sup>558</sup> Ibid para 2.18 p 12.

<sup>559</sup> Ibid para 2.17 p 12.

<sup>560</sup> D Albrege & H van Arendonk *Taxpayer Protection in the European Union* (1998) para 2.3 p 37.

<sup>561</sup> Ibid para 2.2 p 36.

“It would be inconceivable, in the opinion of the Court, that art. 6 para 1 should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, and public and expeditious characteristics of judicial proceedings are of no value at all, if there are no judicial proceedings.”<sup>562</sup>

In many European countries, the public may not attend a court hearing a tax dispute, thereby protecting the taxpayer’s right to privacy.<sup>563</sup> This supports the approach that cases in the Tax Court in this country are not open to the public. Albrege & Van Arendonk say that if taxpayers fear a violation of their right to privacy they may refrain from prosecuting a tax appeal.<sup>564</sup>

A concern that arises in Europe is whether the hearing of the tax dispute will take place within a reasonable time.<sup>565</sup> Albrege & Van Arendonk suggest that fiscal legislation should contain time limits within which a court must hear and adjudicate a dispute.<sup>566</sup> The South African rules governing objections and appeals prescribe strict time frames, which should expedite the resolution of tax disputes.<sup>567</sup>

Some European countries reduce court registry fees because of a taxpayer’s inability to pay.<sup>568</sup> Legal aid is unavailable to taxpayers who wish to prosecute a tax appeal.<sup>569</sup> Their only recourse is to seek reimbursement of legal costs from a court if the appeal succeeds.<sup>570</sup> In some cases taxpayers may recover ‘a higher reimbursement via the difficult route of a civil tort action’.<sup>571</sup>

Commenting on the right to a fair trial in tax matters Partouche writes:

‘By nature, tax litigations, where taxpayers must fight against the tax authorities, look like “fights between David and Goliath”. Tax

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<sup>562</sup> Ibid.

<sup>563</sup> Ibid para 3.3 p 38.

<sup>564</sup> Ibid.

<sup>565</sup> Ibid para 3.6 p 39.

<sup>566</sup> Ibid.

<sup>567</sup> Promulgated under s 107A of the Income Tax Act.

<sup>568</sup> Ibid para 4.2 p 40.

<sup>569</sup> Ibid para 4.3 p 41.

<sup>570</sup> Ibid.

<sup>571</sup> Ibid.

matters are therefore one of the fields where the right to a fair trial set forth in Art 6-1, appears essential.<sup>572</sup>

The case law in France reduces the scope in that country of the application of Article 6-1 of the European Convention on the Protection of Human Rights and Fundamental Freedoms ('ECPHR').<sup>573</sup> Partouche is of the view that Article 6-1 may still apply where the fiscal authority prosecutes a taxpayer criminally.<sup>574</sup> It appears that if a penalty imposed by the tax authority is not proportional to the offence the European judges may reduce the penalty.<sup>575</sup>

### (3) Conclusion

Taxpayers around the world are generally entitled to have an appeal heard by an independent tribunal. The right of access to courts in South Africa is an important procedural right available to taxpayers, which they should utilise together with their right to information<sup>576</sup> and just administrative action.<sup>577</sup> Usually the Tax Court will hear tax disputes under the rules promulgated under s 107A of the Income Tax Act. The current rules governing objections and appeals should reduce the time taken to finalise a tax dispute. Where there is an unreasonable delay in having a tax appeal adjudicated the taxpayer may commence proceedings against the Commissioner in the Tax Court to expedite the matter. I contend that an unreasonable delay in finalising an appeal violates the taxpayer's right to access to the courts.<sup>578</sup>

Where the Commissioner fails to make a decision or refuses to exercise his discretion in favour of a taxpayer the taxpayer should challenge that conduct in the High Court using the framework provided

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<sup>572</sup> L Partouche 'The "Right to a Fair Trial": the French Civil Supreme Court Reduces its Scope of Application to Tax Matters' (2005) *Intertax* 33 (2) 80.

<sup>573</sup> *Ibid* 82.

<sup>574</sup> *Ibid*.

<sup>575</sup> *Ibid* 83.

<sup>576</sup> Constitution s 32.

<sup>577</sup> *Ibid* s 33.

<sup>578</sup> See the comments of Harms JA in *Pharmaceutical Society* (note 531 above) para 30 p 588.

for in PAJA. Further, a taxpayer should consider approaching a court for a declaratory order where a question of law warrants an answer.<sup>579</sup>

The right of access to courts is valuable and taxpayers should not underestimate its efficacy.

University of Cape Town

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<sup>579</sup> Krieger J in *Metcash* (note 221 above) para 44.

## CHAPTER 6

### CONCLUSION:

#### THE FUTURE OF TAXPAYERS' RIGHTS IN SOUTH AFRICA

'Ubi ius ibi remedium. *There can be no right without remedies.*'<sup>1</sup>

#### I INTRODUCTION

In this chapter the status of taxpayer's rights in South Africa is reviewed and suggestions are made about what changes will better protect those rights. The enactment of a Bill of Rights in the Constitution has improved the position of taxpayers who, before 1994 had limited rights in their dealings with the Commissioner. Bentley comments as follows:

'The beneficial effect of the Canadian Charter and the South African Constitution is that they provide clear legal parameters within which the revenue laws must operate. This is essential for the guidance of the executive arm of any government as it seeks to maintain its revenue base in an international environment where taxpayers and other governments are trying to erode it for their own advantage. In desperate times, governments take desperate measures. In revenue matters, a bill of rights would ensure the operation of the rule of law.'<sup>2</sup>

In his 1997 Budget the Minister of Finance released a draft SARS 'Client Charter', setting out taxpayers' rights and obligations.<sup>3</sup> The Charter did not create any new rights, nor did it indicate how taxpayers might enforce their rights. The release of the Charter was intended to increase taxpayers' awareness of their rights and obligations and to create and improve the service culture of the Commissioner's staff in their dealings with taxpayers. Caiden supports this approach, commenting that: 'It must

<sup>1</sup> G E Caiden *International Handbook of The Ombudsman: Evolution and Present Function* (1983) 5.

<sup>2</sup> D Bentley *Taxpayers Rights: An International Perspective* (1998) 385.

<sup>3</sup> Republic of South Africa Department of Finance *Budget Review* (12 March 1997) para 7.2.1 p 7.2. This gave effect to the recommendation of the Katz Commission's *Third Interim Report* para 12.4.1 p 139. The Joint Standing Committee On Finance in its *Report on the Third Interim Report of the Katz Commission of Inquiry into Taxation* 31 accepted the recommendation. The Taxation Committee of SAICA drafted a memorandum on taxpayers' rights to stimulate debate on the topic, 'Proposed rights – a step in the right direction' (1997) 11 *Tax Planning* 65.

always be remembered that rights can be enjoyed only by those who are aware of them and sufficiently well informed to ensure their possession.<sup>4</sup>

The Commissioner released an updated 'Service Charter' in 2005, setting out taxpayers' rights as well as the levels of service they may expect in their dealings with the Commissioner.<sup>5</sup> The 'Service Charter' acknowledged that the Commissioner required time to meet the deadlines prescribed in the new charter and intended meeting the self-imposed service levels in 2007.

In 2002 the Minister of Finance proposed creating a SARS 'Service Monitoring Office' ('SMO') to assist taxpayers whose complaints remain unresolved at the local Receiver of Revenue level.<sup>6</sup>

The Minister launched the SMO in October 2002.<sup>7</sup> The SMO may not consider the merits of a dispute between a taxpayer and the Commissioner but will assist where there is an abuse of taxpayers' rights or if a taxpayer receives poor service. The Minister of Finance stated during the launch of the SMO that the SMO might one day become a fully-fledged Ombudsman's office to deal with taxpayers' complaints.<sup>8</sup>

The rules governing objections and appeals have been amended to reduce the time taken to resolve disputes between taxpayers and the Commissioner.<sup>9</sup> These rules streamline the objection and appeal process and introduce the ADR procedure which should facilitate a quicker and more cost-effective method of resolving disputes.

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<sup>4</sup> Caiden (note 1 above) 6.

<sup>5</sup> The 'SARS Service Charter' is available at <http://www.sars.gov.za>, accessed 28 January 2008. The Commissioner released 'SARS Service draft SARS taxpayer service charter discussion paper' in November 2002. At the same time, the Commissioner released 'Best Practices In Respect Of Client Services', a paper prepared by SARS, November 2002, which summarises the levels of service and nature of taxpayer charters in a number of other countries. Members of the public were invited to comment on the documents and the draft Service Charter was amended and released on 19 October 2005 as the 'SARS Service Charter'.

<sup>6</sup> The Honourable T A Manuel MP, Minister of Finance, Budget Speech (20 February 2002) 33.

<sup>7</sup> See the booklets published by the Commissioner on the SMO entitled: 'SARS providing a better service', 'Putting things right' and 'SARS Service Monitoring Office leaflet' available at [http://www.sars.gov.za/smo/smo\\_main.htm](http://www.sars.gov.za/smo/smo_main.htm), accessed 28 January 2008.

<sup>8</sup> Manuel (3 October 2002) 4.

<sup>9</sup> 'Procedures to be Observed in Lodging Objections and Noting Appeals against Assessments', 'Procedures for Alternative Dispute Resolution and The Conduct and Hearing of Appeals before a Tax Court' (1 April 2003) R 467 *Gazette* 24639 promulgated under s 107A of the Income Tax Act.

The difficulty faced in practice is that the Commissioner does not comply with the time periods laid down in the rules governing objections and appeals. Further, many SARS officials advise that a dispute should not proceed to ADR because the case is, in the Commissioner's opinion, not appropriate for ADR. The Commissioner does not always supply reasons for these decisions, thereby violating the provisions of PAJA and s 33 of the Constitution. However, once the case reaches the Commissioner's head office in Pretoria it may be possible to settle the matter without proceeding to the Tax Court. The relatively new rules governing objections and appeals are an improvement on the old rules and should enable legal disputes to be resolved more quickly.

Section 88D of the Income Tax Act now allows the Commissioner to settle a dispute where it is in the State's interest to do so. These provisions facilitate settlements that were not possible in the past.

## II CURRENT REMEDIES AVAILABLE TO TAXPAYERS

Chaskalson comments on the need for remedies as follows:

'In the midst of the 1950s crisis over the removal of coloureds from the voting roll, Centlivres C J reminded South African lawyers of the importance of the question of remedies:

"There can to my mind be no doubt that the authors of the Constitution intended that those rights (that is, the rights entrenched in the Constitution) should be enforceable by the Courts of law. They could never have intended to confer a right without a remedy. The remedy is, indeed, part of the right. *Ubi jus, ibi remedium.*"

Remedies can take different forms: legislative, executive, judicial, even private or self-help remedies. Significantly, the interim and final Constitution created an impressive range of remedial agencies with Constitutional status such as the Human Rights Commission, the Public Protector, and others.<sup>10</sup>

The fiscal laws of the country and, indeed, the manner in which the Commissioner administers them are subject to the provisions of the Constitution.<sup>11</sup> Commenting on the impact of certain of the provisions of

<sup>10</sup> M Chaskalson et al *Constitutional Law of South Africa* (1996) para 9.1 p 9-1.

<sup>11</sup> SARS was created under the South African Revenue Service Act 34 of 1997, constitutes an organ of state and must comply with s 195 of the Constitution.

the Interim Constitution on the fiscal laws of the country the Katz Commission wrote in its Interim Report:

'In order to achieve compliance with the Constitution, it is recommended that the Branches of Customs & Excise and Inland Revenue conduct an immediate audit of the applicable legislation with a view to amending such legislation and with a view to ensuring that the administration of such legislation and the Departmental practices are in harmony with the Constitution.'<sup>12</sup>

The Joint Standing Committee on Finance commented on the above recommendation as follows:

'The Committee fully endorses the proposal of a thorough audit of legislation to ensure harmony with the Constitution. Clearly set out rules, procedures and guide-lines should be drawn up, with due regard being had to section 24(c) of the Constitution, and publicised as widely as possible.'<sup>13</sup>

Thereafter, the legislature introduced amendments to the Income Tax Act eliminating discriminatory provisions to ensure compliance with the rights to equality and freedom of religion in ss 9 and 15 of the Constitution, respectively.<sup>14</sup> The Commissioner also published for use by taxpayers the *Income Tax Assessing Handbook*, previously an internal guide used by his officers. The *Handbook* contains the Commissioner's practice on tax law.<sup>15</sup> To comply with the right to privacy in s 14 of the Constitution, ss 74, 74A to D of the Income Tax Act replaced the information-gathering powers contained in the old s 74.<sup>16</sup> Although the Katz Commission questioned the constitutional validity of the recovery provisions contained in the Income Tax Act, the legislature has not amended those provisions.<sup>17</sup>

Government accepted the Katz Commission's proposal that the Commissioner should conduct a constitutional audit of South Africa's fiscal

<sup>12</sup> *Interim Report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa* para 6.6.1 p 67.

<sup>13</sup> *Report of the Joint Standing Committee on Finance on the Interim Report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa* [C1-95] para 5 p 7.

<sup>14</sup> Schedule 1 of the Income Tax Act 21 of 1995 introduced a unitary tax rate to remove the historic gender discrimination in the Income Tax Act as this violated the right to equality in s 90 of the Constitution. Section 11 of the Income Tax Act 36 of 1996 removed the reference to The Bible Society of South Africa in s 18A as this violated the right to religious freedom in s 15 of the Constitution.

<sup>15</sup> See *Interim Report* (note 12 above) para 6.3.34 p 77; the *Handbook* was published as *SARS Income Tax Practice Manual* (1996).

<sup>16</sup> *Interim Report* (note 12 above) paras 6.3.22-28 p 73-75.

<sup>17</sup> *Ibid* para 6.3.29 p 75.

legislation.<sup>18</sup> It is unclear whether the Commissioner has undertaken such audit as I could not identify any references to it.

Under s 39 of the Constitution a taxpayer may approach a court for relief where he or she believes the Commissioner has infringed a right contained in ch 2 of the Constitution. Unfortunately, the cost of proceeding to court to enforce rights under the Constitution is high and such an approach may not yield the desired results.<sup>19</sup>

It seems that it is exceptionally difficult for a taxpayer to satisfy a court that it should strike down a fiscal provision because it violates his or her right to property or privacy as protected by ss 14 and 25 of the Constitution. Silke supports this conclusion:

‘Our courts have, up to now, taken the view, when confronted with a constitutional attack on a particular fiscal provision, that the relevant provisions of the ITA represent a legitimate limitation of a taxpayer’s Constitutional rights. The balance between the need of the Commissioner to recover taxes promptly and prevent a taxpayer’s assets being put beyond his reach and the taxpayer’s right to protection under the Constitution is a very fine one ...’<sup>20</sup>

Because Parliament must be satisfied before passing a fiscal law that it complies with the provisions of the Constitution a taxpayer is unlikely to succeed in satisfying a court that such a provision is constitutionally invalid.<sup>21</sup>

Under the information-gathering powers contained in the fiscal statutes the Commissioner may call for information from the taxpayer or from third parties, or seek a warrant from the Court authorising a search and seizure operation.<sup>22</sup> The Constitution requires that the Commissioner use the least intrusive means possible to obtain the required information. This approach complies with the requirement that in an open and

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<sup>18</sup> Joint Standing Committee Report (note 13 above) para 6 p 7.

<sup>19</sup> D Bentley *Taxpayer’s Rights: Theory, Origin and Implementation* (2007) para 2.1.5 p 165; para 3.3.3 p 183.

<sup>20</sup> J Silke ‘Taxpayers and the Constitution: A battle already lost’ (2002) *Acta Juridica ‘Revenue Law’* 334.

<sup>21</sup> See, eg, the Explanatory Memorandum on the 2007 Taxation Laws Second Amendment Bill where (17) it is stated that the Bill is not affected by the Constitution. See further Bentley (note 19 above) para 2.1.4 p 154. Our legislature should evaluate the impact of fiscal amendments on taxpayers’ rights. See Bentley *ibid* para 2.1.4.2 at 158.

<sup>22</sup> Income Tax Act ss 74, 74A-D.

democratic society any limitation of a taxpayer's rights must be reasonable and justifiable.<sup>23</sup> Thus, should the Commissioner require information from a taxpayer he should call for it from the taxpayer in the first instance.<sup>24</sup> If the taxpayer fails to supply the information the Commissioner should then conduct an audit of the taxpayer's affairs under s 74B of the Income Tax Act. Where the taxpayer does not co-operate it may be necessary to conduct a search and seizure operation under s 74D of the Act. I submit that it would be a breach of the taxpayer's right to privacy if, at the outset, the Commissioner sought a warrant under s 74D. The Commissioner must first exhaust other less intrusive remedies to secure the requisite information.<sup>25</sup>

It appears that a taxpayer's remedy for relief does not lie in seeking to strike down fiscal legislation.<sup>26</sup> However, it may lie in challenging the procedure adopted by the Commissioner in exercising the powers available to him and his officers under the fiscal statutes.

The procedural rights of a taxpayer, namely, the right of access to information,<sup>27</sup> administrative justice<sup>28</sup> and access to the courts,<sup>29</sup> offer a more effective means of challenging the conduct of the Commissioner. In addition, the enactment of the PAIA<sup>30</sup> and PAJA<sup>31</sup> creates a framework taxpayers may use effectively against the Commissioner to access information and administrative justice. The difficulty is that, in order to obtain an effective remedy against the Commissioner the taxpayer may need to approach a court for relief. Regrettably, the heavy costs of a court action mean that frequently the amounts in dispute or the nature of the dispute will not justify seeking such relief.<sup>32</sup>

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<sup>23</sup> Constitution s 36.

<sup>24</sup> Income Tax Act s 74A.

<sup>25</sup> This view is supported by the decision in *Haynes v CIR* 2000 (6) BCLR 596 (Tk) 365.

<sup>26</sup> Bentley (note 19 above) 140.

<sup>27</sup> Constitution s 32.

<sup>28</sup> *Ibid* s 33.

<sup>29</sup> *Ibid* s 34.

<sup>30</sup> Act 2 of 2000.

<sup>31</sup> Act 3 of 2000.

<sup>32</sup> Bentley (note 19 above) para 3.3.3 p 183.

Commenting on the situation in the United States Lederman advocates the need for a remedy for breaches of procedural rights as follows:

‘[P]rocedural “rights” do not necessarily protect taxpayers from mistakes or abuses by individual IRS [Internal Revenue Service] employees, and

...  
procedural rules are useless without remedies for their violation.’<sup>33</sup>

Thus, to properly protect taxpayers’ rights there must be an effective remedy. Lederman proposes that, in appropriate cases, taxpayers should have a right to recover costs and fees incurred in obtaining relief, as well as monetary damages from the IRS, where no other relief exists.<sup>34</sup> She suggests amendments to the United States Internal Revenue Code to allow for the payment of damages for material breaches of the standards set by the IRS.<sup>35</sup> Such amendment should cater for the harm done to taxpayers by the IRS, its agents and employees.<sup>36</sup> Lederman points out that the amendment would target the IRS as an organisation and not individual employees, improving the protection of taxpayers’ rights in the United States.<sup>37</sup> I would argue that the legislature should introduce an amendment similar to that proposed by Lederman to improve the protection of taxpayers’ rights in South Africa.<sup>38</sup>

Under PAIA taxpayers may call for information about their own tax affairs and this should assist them in exercising their rights against the Commissioner. The difficulty that arises is if the Commissioner refuses to accede to a request for access to information. The taxpayer must then exhaust the internal appeal process and, if that fails to yield the desired result, approach a court for relief.

Many of the decisions made by the Commissioner in administering the fiscal laws of the country constitute ‘administrative action’ as defined in

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<sup>33</sup> L Lederman ‘Of Taxpayers’ Rights, Wrongs, and a Proposed Remedy’ (22 May 2000) 87 *Tax Notes, Tax Analysts Special Report* 1138 available at <http://www.ssrn.com/abstract=233580>, accessed 25 January 2008.

<sup>34</sup> *Ibid* 1141.

<sup>35</sup> *Ibid*.

<sup>36</sup> *Ibid*.

<sup>37</sup> *Ibid* 1142.

<sup>38</sup> *Ibid* 1141.

s 1 of PAJA. Thus, the Commissioner must comply with the provisions of PAJA when making decisions affecting taxpayers.

Currently, taxpayers are concerned that the Commissioner's officers are receiving incentives based on taxes assessed. This remuneration policy undermines the taxpayer's right to administrative justice because the officers have a pecuniary interest in the decisions that they make about the taxpayer's affairs.<sup>39</sup> It appears that the Commissioner evaluates his staff only according to the amount of tax they assess and collect rather than on how rapidly officers attend to taxpayers' objections and appeals, or how they treat taxpayers or whether they respect taxpayers' rights.<sup>40</sup>

In the United States the IRS evaluates its officials by, inter alia, reference to the level of awareness they have of taxpayers' rights.<sup>41</sup> Further, the Taxpayer Bill of Rights,<sup>42</sup> in order to enhance the objectivity of tax officials, outlawed the use of audit quotas.<sup>43</sup> I submit that the Commissioner should reward his staff by taking account of stated criteria, including the manner in which they uphold taxpayers' rights. The reliance on monetary targets as a factor in evaluating the Commissioner's staff causes tax officials to concentrate more on achieving their targets than on ensuring that taxpayers receive the correct assessments.<sup>44</sup> The Commissioner should appraise his officials by comparing their levels of compliance with the service levels contained in the SARS Service Charter.

A taxpayer who is dissatisfied with the way the Commissioner has dealt with his or her affairs must initially lodge a complaint with the person

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<sup>39</sup> See 'Taxman's Huge Bonus Uproar' (20 July 2001) *The Citizen*.

<sup>40</sup> Taxpayers have suspected that this is the case and discussions held by the writer in March 2006 with a senior official at the Commissioner's office in Pretoria confirmed the suspicion.

<sup>41</sup> 'Performance Plan for Revenue Officer (OIC) GS-1169 including the Retention Standard for the Fair and Equitable Treatment of Taxpayers and Critical Job Elements' IRS, Department of the Treasury, Document 11492 (July 2001) at 3 and 5.

<sup>42</sup> Technical and Miscellaneous Act of 1988, PL 100-647 Subtitle J, referred to as Taxpayer Bill of Rights 1.

<sup>43</sup> A Greenbaum 'United States Taxpayer Bill of Rights 1, 2 and 3: A Path to the Future or Old Whine in New Bottles?' in Bentley (note 2 above) 348.

<sup>44</sup> Information based on discussions between the writer and senior officials of the Commissioner's office in Pretoria in March 2006.

who has been dealing with the affairs or that person's manager.<sup>45</sup> Where a taxpayer remains dissatisfied he or she must complain to the call centre, which will supply a reference number recording the complaint.<sup>46</sup> If the complaint remains unresolved the taxpayer may lodge a complaint with the SMO.<sup>47</sup>

Currently, the SMO is a complaints office that reports to the Commissioner and is not independent of the Commissioner.<sup>48</sup> The SMO should seek compliance with ISO 1002: 2004, the International Organisation for Standardization, 'Quality Management – Customer Satisfaction – Guidelines for complaints handling in organisations' as is the case in Australia.<sup>49</sup> Thus far the Commissioner has released no reports detailing the nature or volume of complaints made by taxpayers and how the SMO resolved those complaints.<sup>50</sup> The SMO seeks to assist in resolving taxpayers' complaints but does not issue binding directives to the Commissioner's officers on how to resolve a complaint. Further, the SMO has no legal authority to direct that the Commissioner recompense taxpayers for wasted costs or for damages suffered because of the Commissioner's conduct.

Taxpayers are loath to lodge complaints against the Commissioner for fear of victimisation.<sup>51</sup> The Commissioner needs to educate taxpayers and his own staff that taxpayers have a right to complain where they allege unfair treatment. The SMO does assist in resolving some procedural difficulties encountered by taxpayers.

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<sup>45</sup> 'SARS Service Charter' (note 5 above) 5. The complaints-handling process adopted by the Australian Tax Office is well defined and South Africa could learn from that country's model as set out in D Bentley (note 19 above) para 3.5 p 196 et seq.

<sup>46</sup> Ibid 5.

<sup>47</sup> Ibid.

<sup>48</sup> This is confirmed in 'SARS Service Charter' (note 5 above) 3, which states: 'If you remain dissatisfied, please send your procedural concern to our Service Monitoring Office at the SARS head office.'

<sup>49</sup> Bentley (note 19 above) para 3.4 p 194.

<sup>50</sup> The South African Revenue Service Annual Report 2005/6 81 indicates that the SMO received 5 824 complaints in the 2005/6 financial period and that 82% were resolved in terms of the service-level agreement. The annual report provides no details of the nature of the complaints.

<sup>51</sup> See Bentley (note 19 above) para 3.6.2 p 202, where the author comments on taxpayers' fears of retaliation.

The Commissioner has suggested that when his officials have not dealt appropriately with taxpayers his intention is to correct the matter:

‘When things go wrong we don’t want to cost you extra time and expense and will do our best to sort things out quickly and fairly. So when we have made a mistake we will:

- Apologise
- Explain what went wrong and why
- Correct the mistake so that, where possible, your affairs will be in the same position as if we hadn’t made the mistake, and
- Learn from our experience.’<sup>52</sup>

An apology from the Commissioner to an aggrieved taxpayer will often assuage that taxpayer. Unfortunately, the Commissioner does not often apologise, even though treatment of the taxpayer would suggest that an apology would be appropriate.<sup>53</sup> Furthermore, where the Commissioner issues provisional tax returns late or errors occur on the Commissioner’s system, an apology to taxpayers generally would enhance the relationship between the Commissioner and taxpayers.

The Commissioner has advised that the SMO will not investigate a taxpayer’s complaint where that matter is before a court or where the taxpayer has complained to the Public Protector.<sup>54</sup> Furthermore, the SMO cannot investigate complaints about Government policy or the Commissioner’s policy and will not investigate suggested changes to legislation.<sup>55</sup>

The National Treasury and the Commissioner advise the Minister on fiscal legislation. It is unfortunate that the SMO cannot suggest changes to that legislation even though such changes might improve the procedures, thereby enhancing the levels of service rendered to taxpayers. Moreover, the SMO cannot initiate an investigation into how the Commissioner deals with taxpayers nor is the office required to submit an independent report on its work to Parliament. The Commissioner’s Annual Report does not

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<sup>52</sup> ‘SARS Providing A Better Service’ available at <http://www.sars.gov.za> at 5, accessed 28 January 2008.

<sup>53</sup> In the writer’s 22-year experience in this area he has seen only one letter of apology from the Commissioner.

<sup>54</sup> ‘SARS Service Monitoring Office – putting things right’ available at <http://www.sars.gov.za> 4, accessed 28 January 2008.

<sup>55</sup> Ibid 4.

comment on the complaints received by the SMO nor on how that office deals with complaints.<sup>56</sup>

Currently there is no independent office which identifies systemic problems in tax administration. South Africa should create an Inspector-General of Taxation as is the case in Australia.<sup>57</sup>

Under s 182 of the Constitution taxpayers may complain to the Public Protector where they believe that the Commissioner's officers have acted improperly. The Public Protector Act<sup>58</sup> creates the office of Public Protector in conformity with s 182 of the Constitution. Under s 6(4) of the Act the Public Protector has, *inter alia*, the following powers:

- '(a) to investigate, on his or her own initiative or on receipt of a complaint, any alleged –
  - (i) maladministration in connection with the affairs of government at any level;
  - (ii) abuse or unjustifiable exercise of power or unfair, capricious, discourteous, or other improper conduct or undue delay by a person performing a public function;'<sup>59</sup>

The Public Protector has the jurisdiction to investigate allegations of abuse of power by the Commissioner or allegations that the Commissioner has unduly delayed dealing with a taxpayer's matter. The fact that the regulations prevent a taxpayer from proceeding to the SMO if he or she has lodged a complaint with the Public Protector indicates that the Commissioner recognises the right of taxpayers to lodge a complaint with the Public Protector.<sup>60</sup> However, in practice, taxpayers do not resort to the Public Protector for assistance, partly because they perceive that the Public Protector's office exists to investigate corruption in government and other national-government related problems, and not to investigate complaints against the Commissioner and partly because tax is a specialised area.<sup>61</sup>

<sup>56</sup> See SARS Annual Report for 2005 and 2006 and earlier years available at <http://www.sars.gov.za>, accessed 28 January 2008.

<sup>57</sup> Bentley (note 19 above) para 3.6.7 at 208.

<sup>58</sup> Act 23 of 1994.

<sup>59</sup> Public Protector Act s 6 (4).

<sup>60</sup> 'SARS Service Monitoring Office – putting things right' 4.

<sup>61</sup> In the writer's experience no client has complained to the Public Protector about a problem with the Commissioner.

The Commissioner should be obliged to encourage taxpayers to lodge complaints with the Public Protector if his internal complaints processes cannot resolve their grievance expeditiously. However, it is unfortunate that this office does not employ persons specialising in tax matters and able to attend effectively to complaints.

Another avenue of complaint is the Human Rights Commission.<sup>62</sup> However, I submit that the Human Rights Commission, like the Public Protector, does not have the specialised skills required to deal with taxpayers' complaints and cannot offer them an effective remedy for alleged breaches of their rights.<sup>63</sup>

I conclude that South African taxpayers do not currently have a cost-effective method of dealing with difficulties with the Commissioner.

It is appropriate to consider what changes are necessary to enhance the protection of taxpayers' rights in the country in order to improve the level of compliance with fiscal legislation.

### III WHAT REMEDIES SHOULD BE AVAILABLE TO TAXPAYERS IN SOUTH AFRICA?

The Katz Commission reviewed the Taxpayer Adjudicator and Parliamentary Ombudsman in the United Kingdom, concluded that a tax ombudsman was appropriate for South Africa and made the following recommendations in its *Third Interim Report*.<sup>64</sup>

- '12.3.7 ...
- (a) the Tax Ombudsman should be appointed from outside the revenue authorities, and should function independently;
  - (b) appropriate separate funding should be provided, although the staff complement may be drawn from the revenue;

<sup>62</sup> The Human Rights Commission was created under s 184 of the Constitution to, inter alia, 'promote respect for human rights and a culture of human rights, promote the protection, development and attainment of human rights and monitor and assess the observance of human rights'.

<sup>63</sup> In the writer's experience no client has sought relief from the Human Rights Commission for an alleged breach of his or her rights.

<sup>64</sup> With regard to the effectiveness of an ombudsman, see Bentley (note 19 above) para 3.1 p 169.

- (c) the Ombudsman should at all times be accessible to taxpayers, and have unfettered access to the revenue authorities;
- (d) the revenue authorities should in advance declare themselves to be bound by the Ombudsman's recommendations save in rare circumstances, the nature of which should be set down.

12.3.8 The Ombudsman's function would mainly be to deal with specific matters brought to its attention by the taxpaying public. It should also have the capacity to initiate suggestions to the revenue authorities regarding Codes of Practice, or to refer general problems in the administration of tax laws to the Public Protector or other authorities as appropriate.<sup>65</sup>

The Joint Standing Committee on Finance ('JSCOF') reviewed the recommendation and commented as follows:

'While accepting the principle contained therein, the recommendation to appoint a separate Tax Ombud is not supported at this stage. The JSCOF expressed a concern at the proliferation of such oversight bodies. Further consideration of alternatives is needed, including the possibility that the Public Protector's Office establish a specialised, skilled tax unit to achieve this purpose.'<sup>66</sup>

The SMO does not fulfil the role envisaged by JSCOF. Further, JSCOF recommended that Parliament should not enact the SARS Client Charter, but that a specialised tax unit in the Public Protector's office should monitor the Charter's effectiveness.<sup>67</sup> Currently, the Commissioner's Annual Report does not state how the organisation has fared in upholding the rights of taxpayers set out in the Charter. Once the SARS Service Charter comes into effect it should be easier to monitor the Commissioner's performance against the levels of service set out in the Charter.

The Katz Commission also recommended that taxpayers should have the right to recover costs from the Commissioner where he has made a mistake.<sup>68</sup> The Commission proposed that the Public Protector or Tax

<sup>65</sup> *Third Interim Report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa* para 12.3.7 p 138. The Taxation Committee of SAICA also called for the creation of an Ombudsman in an article entitled 'Proposed rights – a step in the right direction' (1997) 11 *Tax Planning* 66.

<sup>66</sup> Joint Standing Committee Report (note 12 above) 31.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Interim Report* (note 12 above) para 12.2.13(c) p 134.

Ombudsman should have a role in assessing what costs the Commissioner should refund.<sup>69</sup> Currently, taxpayers have no right under the fiscal laws to recover wasted costs or damages from the Commissioner. A taxpayer would have to seek costs under s 38 of the Constitution or under s 8(1)(c)(ii)(bb) of PAJA.<sup>70</sup>

In the United States and the United Kingdom taxpayers may recover wasted costs from the revenue authority.<sup>71</sup> In this respect South Africa is out of step with other open and democratic societies.<sup>72</sup> The legislature should amend the fiscal statutes to allow taxpayers to recover costs from the Commissioner where his officers have been negligent or have exceeded their powers.<sup>73</sup> Such a measure is necessary to restore the balance between the rights of the taxpayer and the powers of the Commissioner and will enhance the levels of service rendered by the Commissioner.

Investors have encountered numerous difficulties with service providers in the financial services arena. This, with the provisions of the Financial Services Ombud Schemes Act,<sup>74</sup> constitute the reasons for the creation of the following institutions, independent of the service providers, to deal with consumer complaints:

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<sup>69</sup> Ibid.

<sup>70</sup> C Hoexter et al *The New Constitutional & Administrative Law Volume Two Administrative Law* (2002) 294. The prospects of succeeding under s 38 of the Constitution may be remote.

<sup>71</sup> Section 7433 of the Internal Revenue Code. See s 801 of TBR 2, which increased the damages a taxpayer may claim from the IRS to \$1 000 000. For the United Kingdom see *Putting things right – How to complain* Code of Practice 1 p 5.

<sup>72</sup> Ibid. For the position generally see Bentley (note 2 above) 56. On the position in Sweden see A Hultqvist 'Taxpayers' Rights in Sweden' in Bentley (note 2 above) 306 and for Australia see A Carey 'ATO's Compensation Guidelines' (2003) *Australian Weekly Tax Bulletin* 38 item 1618 p 1444. For the United States see R.A. Scott (1996) 'Suing the IRS and its employees for damages: David and Goliath' 20 *Southern Illinois University Law Journal* 507 p 587. See also J T Newth 'Complaints, redressing compensation' (21 June 2004) *Simon's Tax Briefing* 122.

<sup>73</sup> It may be possible for a taxpayer to succeed in a claim against the Commissioner on delictual grounds but it will be difficult. See *Carmichele v Minister of Safety and Security and Another* 2001 (10) BCLR 995 (CC) and L Baxter *Administrative Law* (1984) 600-16. On delict generally see J Neethling et al *Law of Delict* 2 ed (1994) and C Hoexter *Administrative Law in South Africa* (2007) 467. See C Okpaluba 'The Law of Bureaucratic Negligence in South Africa: A Comparative Commonwealth Perspective' (2006) *Acta Juridica* 117 for comments on bureaucratic negligence and *Blois v The City of Halifax*, 56 DLR 239; *Hedley Byrne & Co. Ltd v Heller and Partners Ltd*, 1964 AC [HL] 465 and *M'Alister (or Donoghue) v Stevenson*, 1932 AC [HL] 562.

<sup>74</sup> Act 37 of 2004.

- Ombudsman for short-term insurance;<sup>75</sup>
- Ombudsman for long-term insurance;<sup>76</sup>
- Pension Funds Adjudicator;<sup>77</sup> and
- Ombudsman for banking services.<sup>78</sup>

The Pension Funds Act<sup>79</sup> created the Pension Funds Adjudicator and provides that determinations made by the Adjudicator are binding on the parties to the dispute.<sup>80</sup> The respective sectors created the other three bodies and decisions they make are generally binding on the parties to a dispute. The various institutions offer a cost effective way for aggrieved persons to complain about the service received from their financial service provider. I submit that if problems faced by consumers in the financial sector require an ombudsman, taxpayers also need the assistance of an ombudsman, as more people interact with the Commissioner than with financial service providers. Research shows that the fact that taxpayers may complain to a third party, independent of the Commissioner, may cause them to settle disputes more readily with the Commissioner.<sup>81</sup>

Taxpayers in the United Kingdom may lodge a complaint with the Adjudicator, an office independent of Her Majesty's Revenue and Customs and similar to an ombudsman in other countries.<sup>82</sup> The Adjudicator may consider complaints about mistakes, delays, poor or misleading advice, staff behaviour or the use of discretions by Revenue.<sup>83</sup> The services of the Adjudicator's office are free, thus taxpayers do not incur any costs in complaining to that office.<sup>84</sup> The Adjudicator's office will

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<sup>75</sup> 'Terms of Reference' available at [http://www.osti.co.za/terms\\_of\\_ref.pdf](http://www.osti.co.za/terms_of_ref.pdf), accessed 25 January 2008.

<sup>76</sup> 'How to Complain' available at <http://www.ombud.co.za/howtocomplain.asp>, accessed 25 January 2008.

<sup>77</sup> 'How to write your complaint' available at <http://www.fsb.co.za>, accessed 25 January 2008.

<sup>78</sup> 'Terms of reference of the Ombudsman for banking services' available at <http://www.obssa.co.za/>, accessed 25 January 2008.

<sup>79</sup> Act 24 of 1956 section 30A.

<sup>80</sup> 'What you need to know about lodging a complaint' para 8 available at <http://www.fsb.co.za>, accessed 25 January 2008.

<sup>81</sup> D Bentley (note 19 above) para 3.4.1 p191.

<sup>82</sup> D Oliver 'The Revenue Adjudicator: A new breed of Ombudsperson?' (1993) *Public Law* 407.

<sup>83</sup> 'The Adjudicator's Office for complaints about H M Revenue and Customs and Valuation Office Agency' 3, available at <http://www.adjudicatorsoffice.gov.uk>, accessed 28 January 2008.

<sup>84</sup> *Ibid.*

review Revenue's files and may meet with the taxpayer or Revenue.<sup>85</sup> If a taxpayer incurs costs because of meetings with the Adjudicator's office such costs may be reimbursed.<sup>86</sup>

The Adjudicator seeks to resolve complaints either through mediation or by issuing a letter of recommendation.<sup>87</sup> In mediation the Adjudicator seeks to resolve the complaint in a manner that is acceptable both to the taxpayer and to Revenue.<sup>88</sup> Where the Adjudicator issues a letter of recommendation it forwards a letter to Revenue proposing how the complaint should be resolved.<sup>89</sup>

Guidelines issued by the Adjudicator on the requirements that must be met to resolve a complaint state:

'However we resolve the complaint, it must be consistent with the organisation's own instructions and Codes of Practice. This could include asking the organisation to apologise and to meet any additional costs that you have incurred as a direct result of their mistakes or delays – things like postage, telephone calls or the cost of professional advice. Or we might ask the organisation to make a small payment to recognise any worry and distress that you have suffered.

We cannot ask the organisations to act outside their own instructions and we do not provide personal or general advice about tax, VAT and duty, or National Insurance matters.'<sup>90</sup>

According to an Inland Revenue publication a payment of £25 to £500 may be made to a taxpayer where the taxpayer has suffered distress because of the manner in which his or her tax affairs were managed.<sup>91</sup> South Africa should consider the introduction of an Adjudicator's office similar to that in the United Kingdom.

The SMO is not the ideal office to deal with taxpayers' complaints. Among other problems, the office is not independent of the Commissioner, it is an integral part of his office and cannot award costs. Further, the SMO

<sup>85</sup> 'Meetings with the Adjudicator's Office – Notes for people making complaints' AO 3 (October 2002) 2; Oliver (note 82 above) 408.

<sup>86</sup> Meetings with the Adjudicator's Office (note 85 above) 2.

<sup>87</sup> 'The Adjudicator's Office for complaints (note 83 above) 7.

<sup>88</sup> Ibid 7.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid 8 and Oliver (note 82 above) 408.

<sup>91</sup> 'Putting things right ...' (note 71 above) 5; 'Making a complaint to the Revenue' (September 2003) *Simon's Tax Briefing* 101 p 4. These amounts are not taxable according to p 7 of COP 1.

does not report on its caseload, nor on how it deals with complaints. The SMO cannot issue a Taxpayer Assistance Order similar to that issued by the Taxpayer Advocate in the USA.<sup>92</sup> It would be preferable if the SMO were independent of SARS and reported directly to Parliament. The SMO should be authorised to make decisions binding on the Commissioner and recommend improvements to the fiscal laws and the Commissioner's procedures.

The Taxpayer Advocate in the United States may issue binding 'Taxpayer Assistance Orders' if the taxpayer is suffering undue hardship because of the manner in which the IRS applies the law. Greenbaum describes the effect of the Orders as follows:

'The Orders are of broad application. They can require the Secretary of the Treasury to release seized property of the taxpayer, or compel the Secretary to cease any action or refrain from taking any action which he or she is empowered to take under the Code...

The Taxpayer Assistance Order can be of great assistance to a taxpayer whose position is being abused by the tax administration.'<sup>93</sup>

Further, the Taxpayer Advocate may issue 'Taxpayer Advocate Directives'.<sup>94</sup> These directives require the IRS to take action to ensure the protection of taxpayers' rights or, to prevent an undue burden on taxpayers, or to ensure equitable treatment.<sup>95</sup> The Taxpayer Advocate Directive may confer relief on a group of taxpayers or on all taxpayers.<sup>96</sup> This differs from a Taxpayer Assistance Order, which the Taxpayer Advocate may only issue to a specific taxpayer. South African taxpayers would obtain proper relief if there were an Ombudsman who could make orders similar to those available in the United States.

The only current means of obtaining relief for taxpayers who experience an abuse of power by the Commissioner is to approach a High Court, which is costly, time consuming and the application is difficult to

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<sup>92</sup> A Greenbaum (note 43 above) 352 and 361.

<sup>93</sup> Ibid 352.

<sup>94</sup> Taxpayer Advocate's Annual Report to Congress, Fiscal Year 1997 (1998) 6; 'Handbook 1.2.7.9 Problem Resolution Program Handbook Chapter 5 Taxpayer Advocacy' 4.

<sup>95</sup> Taxpayer Advocate's Annual Report (note 94 above) 6.

<sup>96</sup> Ibid.

frame.<sup>97</sup> It would be preferable if the taxpayer could complain to an ombudsman or advocate who could direct the Commissioner to suspend the enforcement action until the complaint is resolved. The taxpayer should only receive such relief where he or she has a proper complaint that is not vexatious, capricious or intended to prevent the Commissioner from performing his duties under the fiscal legislation.

Caiden defines ombudsman as:

‘[A]n independent, non-partisan officer appointed by one of the principal organs of state, [who] deals with specific complaints from the public and is in a position to research these cases and make public findings and recommendations.’<sup>98</sup>

Caiden contends that an ombudsman provides both procedural and substantive justice.<sup>99</sup> He asserts, correctly, that the existence of such an office discourages abuse of power by State officials and encourages people to question official conduct.<sup>100</sup> He writes:

‘In the case of the ombudsman, it is well to recall that its true role, in the words of one of its advocates, “is to supplement the existing institutions – courts, legislatures, executives, administrative courts, and administrative agencies, which institutions must be strengthened and made more responsive to the grievances of citizens.” Another warns that the ombudsman is a useful administrative critic but no pathfinder or panacea.’<sup>101</sup>

Because most ombudsman’s offices do not charge for their services the creation of such an office promotes the resolution of taxpayers’ complaints against the revenue authority without creating the need to proceed to court and without incurring costs.<sup>102</sup>

In Australia the intervention of the Ombudsman has resulted in:

- expedited action;

<sup>97</sup> See *Commissioner for South African Revenue Service and Another v Sterling Auto Distributors CC* [2006], 68 SATC 241 and *Commissioner for South African Revenue Service v Hawker Aviation Services Partnership and Others* [2005], 67 SATC 107 and [2006], 68 SATC 141.

<sup>98</sup> Caiden (note 1 above) xvii. See further, H B Jacobini *An Introduction to Comparative Administrative Law* (1991) 197; L Baxter *Administrative Law* (1984) 279 and 283; Hoexter et al (note 70 above) 50.

<sup>99</sup> Caiden (note 1 above) 5.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid* 17. See also Bentley (note 19 above) para 3.6.2 p 203.

<sup>102</sup> See, eg, details about the Commonwealth Ombudsman in Australia available at <http://www.comb.gov.au>, accessed 28 January 2008 and <http://www.ato.gov.au>; for details of the Taxpayer Adjudicator in the UK see <http://www.adjudicatorsoffice.gov.uk> and at <http://www.hmrc.gov.uk>, both accessed 28 January 2008.

- admission of error or apology;
- a reversal or significant variation of the original act;
- payment of compensation or act of grace payment;
- other remedies.<sup>103</sup>

The purpose of the ombudsman is not to evaluate whether the official's decision was right or wrong, but rather to determine whether the complainant received fair treatment.<sup>104</sup>

The ombudsman usually reports directly to Parliament and the threat of publicity about a State agency's maladministration is often sufficient to ensure that the agency takes corrective action.<sup>105</sup> On this subject Jacobini writes:

'Although it is not always the case, ombudsmen usually cannot prosecute and are in fact normally empowered only to recommend, persuade, and conciliate, and via reporting bring the issues to public or higher authority. These are not mean weapons in the hands of a tactful and respected commissioner, and the evidence appears to be that they have on the whole, been successful.'<sup>106</sup>

Jacobini notes that some sectors of society are unaware of the existence of an ombudsman and thus do not seek relief from that office.<sup>107</sup> The Commissioner has a responsibility to educate taxpayers about their rights in their dealings with his officials.

The Public Protector's office currently lacks the specialised tax expertise which would enable it to investigate taxpayers' complaints and Hoexter et al indicate that there is a general perception that the Public Protector is not as effective as it might be.<sup>108</sup>

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<sup>103</sup> G E Caiden *International Handbook of the Ombudsman – Country Surveys* (1983) 3.

<sup>104</sup> *Ibid* 5.

<sup>105</sup> Jacobini (note 98 above) 198.

<sup>106</sup> *Ibid* 224. Bentley (note 2 above 394) supports the conclusion that 'Ombudsmen usually have sufficient power to be effective, often because of their capacity to publicise complaints against a tax authority'.

<sup>107</sup> Jacobini (note 98 above) 224.

<sup>108</sup> Hoexter et al (note 70 above) 54.

The creation of a specialised tax unit with access to taxpayers' files<sup>109</sup> might improve the situation.<sup>110</sup> This would require an amendment to the secrecy provisions contained in the fiscal legislation.<sup>111</sup> However, it would be preferable for an independent office of Tax Ombudsman to be created.

The Public Protector should have the power to order the Commissioner to recompense the taxpayer for his or her wasted costs and damages caused by the Commissioner's inaction or negligence.

Section 1 of the Constitution sets out the founding values of the new democracy in South Africa. The section enshrines the supremacy of the Constitution and confirms that South Africa is a democratic State upholding the rule of law. In accordance with s 1 the Commissioner and his officials must adhere to the rule of law in exercising their powers. It appears that the founding provisions contained in s 1 of the Constitution do not create justiciable rights but prescribes the manner in which the Constitution is to be interpreted.<sup>112</sup>

Section 195(1) of the Constitution prescribes the basic values and principles governing public administration.<sup>113</sup> The section applies to the Commissioner and means that SARS is governed by the democratic values and principles contained in the Constitution. The Commissioner is specifically required to maintain a high standard of professional ethics. Taxpayers are, under s 195(1)(d) of the Constitution, entitled to impartial, fair and equitable service from the Commissioner.<sup>114</sup> Thus, the Commissioner must render services to taxpayers in conformity with s 195 of the Constitution and in accordance with the founding values set out in s 1 of the Constitution. The failure by the Commissioner to comply with the

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<sup>109</sup> In the United Kingdom the Taxpayer Advocate and the Parliamentary Ombudsman have access to the taxpayer's file – see <http://www.adjudicatorsoffice.co.uk> and <http://www.hmrc.gov.uk> – as does the Taxpayer Advocate in the USA – see <http://www.irs.gov/advocate/>.

<sup>110</sup> As recommended by the 'Report of the Joint Standing Committee on Finance on the Third Interim Report of the Katz Commission of Inquiry into Taxation' 31.

<sup>111</sup> Income Tax Act s 4; VAT Act s 6.

<sup>112</sup> S Woolman et al *Constitutional Law of South Africa* 2 ed vol 1 (2006) 13-1 and 13-28.

<sup>113</sup> Plasket 'Protecting The Public Purse: Appropriate Relief and Costs Orders Against Officials' (2000) 117 *SALJ* 153.

<sup>114</sup> Where the Commissioner fails to act fairly the Tax Court may award costs on an attorney and client basis as in ITC 1816, [2007], 69 SATC 62 and ITC 1821, [2007], 69 SATC 194.

Constitution could result in taxpayers seeking redress from the Commissioner under PAJA or the Constitution itself.

Further, under s 172(1)(a) any court must declare that ‘any law or conduct that is inconsistent with the Constitution is invalid to the extent of its invalidity’.<sup>115</sup> However, a taxpayer must apply to court to achieve this result, which involves incurring legal costs.

Where a taxpayer satisfies a court that the Commissioner’s officials acted in bad faith the court may make an award of costs *de bonis propriis* against those officials.<sup>116</sup> Plasket comments as follows:

‘This type of costs order is, however, probably best suited to, and more easily justifiable for, the vindication of constitutional rights where the public interest in relief such as this is often obvious and apparent: such an order may amount to appropriate relief for the purposes of s 38 of the Constitution when unconstitutional administrative conduct is of such an order that it does not only harm the individual against whom it is primarily directed, but also “impedes the fuller realization of our constitutional promise”. In other words, if administrative conduct is motivated by bad faith of a sufficiently gross degree, it may be appropriate for a court to make an order that the administrative official repay the State for the costs incurred by it in defending his or her actions, in addition to paying the costs of the applicant *de bonis propriis*.’ [footnotes omitted].<sup>117</sup>

Plasket argues that the high cost of litigation should induce State officials to do their jobs properly and honestly, promoting an efficient public administration.<sup>118</sup> This would contribute to fulfilling the democratic values contained in s 195 of the Constitution.

I submit that the legislature should introduce a measure whereby in certain well-defined circumstances taxpayers may recover damages from the Commissioner for the harm caused by his officials. Under PAJA a taxpayer may recover the legal costs incurred and Plasket’s comments

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<sup>115</sup> Plasket (note 113 above) 154.

<sup>116</sup> Ibid 153.

<sup>117</sup> Ibid 158.

<sup>118</sup> Ibid.

are useful.<sup>119</sup> To obtain the required relief, a taxpayer must incur significant costs, which acts as an unnecessary obstacle.<sup>120</sup>

The Public Protector should be capable of independently reviewing the Commissioner's refusal of a taxpayer's request for access to information, as is the case in New Zealand.<sup>121</sup> Where the taxpayer has not received adequate reasons from the Commissioner or where there has been any other breach of the taxpayer's right to just administrative action the Public Protector should assist. Alternatively, Parliament should create a less costly tribunal than a court to deal exclusively with difficulties encountered by taxpayers in their interaction with the Commissioner.

Section 10(2)(a)(iii) of PAJA provides that the Minister may make regulations relating to:

'[T]he appropriateness of establishing independent and impartial tribunals, in addition to courts, to review administrative action and of specialist administrative tribunals, including a tribunal with general jurisdiction over all organs of state or a number of organs of state, to hear and determine appeals against administrative action.'

It is unfortunate that the above provision is not peremptory

Taxpayers in South Africa have the perception that the Commissioner and his officers feel that most, if not all taxpayers, are failing to comply with their fiscal obligations. This perception has a negative effect on the level of compliance and encourages tax officials to treat taxpayers unfairly, thereby breaching the rights available to them under the law.

Bentley comments on this global problem as follows:

'Where there are discrepancies, there will tend to be an automatic presumption of taxpayer dishonesty. ... It highlights the tension between the tax authorities and taxpayers. Unless there is appropriate protection for taxpayers against presumptions of dishonesty, there is a serious risk of victimisation. The risk is evident in the debt collection, search and seizure, and criminal prosecution areas. It is usually particularly evident where a

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<sup>119</sup> Ibid.

<sup>120</sup> Ibid; see further H Corder 'Administrative Justice: A Cornerstone Of South Africa's Democracy' (1998) 14 *SAJHR* 53 and Bentley (note 19 above) para 3.3.3 p 183.

<sup>121</sup> Media Release 4 August 1999, Inland Revenue Department, New Zealand, available at <http://www.ird.govt.nz/mediareleases/1999/040899.html>, accessed 31 March 2004.

taxpayer has already failed to comply with the requirements of the law or is viewed as likely to fail.<sup>122</sup>

Taxpayers who applied for amnesty under the Exchange Control Amnesty and Amendment of Taxation Laws Act<sup>123</sup> were impressed with the professionalism, courtesy and sensitivity of the staff of the Amnesty Unit, who were seconded by the Commissioner and the South African Reserve Bank. I contend that if other officials in the Commissioner's employ had the mindset of their colleagues seconded to the Amnesty Unit, the level of service rendered to taxpayers would improve. A professional culture of respect and fair treatment would encourage taxpayers to comply with the fiscal legislation.

One of the problems facing the Commissioner is that his employees lack full knowledge of the provisions of the Constitution, PAIA and PAJA and the way they affect the administration of the tax laws. The Commissioner only recently released the SARS Service Charter, but both his staff and the taxpayers need comprehensive education about its contents.<sup>124</sup> In all correspondence with taxpayers the Commissioner's officials should advise them of their rights because they can only seek fair treatment if they are aware of these rights.<sup>125</sup>

To improve compliance by his staff with PAJA the Commissioner should publish a manual on how PAJA affects tax administration.<sup>126</sup> Such a manual would assist taxpayers to enforce their rights against the Commissioner. Further, the Commissioner should draft and publish guidelines on making administrative decisions, similar to the Australian Administrative Review Council's 'A Guide To Standards Of Conduct For Tribunal Members'.<sup>127</sup> This would improve the quality of decisions made by the Commissioner's officials, thus complying with the obligations imposed on the Commissioner under s 195 of the Constitution.

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<sup>122</sup> Bentley (note 2 above) 390.

<sup>123</sup> Act 12 of 2003.

<sup>124</sup> 'SARS Service Charter' (note 5 above).

<sup>125</sup> Bentley (note 2 above) para 10 p 50.

<sup>126</sup> See Corder (note 120 above) 52.

<sup>127</sup> 2001, available at

[http://www.ag.gov.au/agd/WWW/archome.nsf/Page/Publications\\_Reports\\_Other\\_Documents](http://www.ag.gov.au/agd/WWW/archome.nsf/Page/Publications_Reports_Other_Documents), accessed 25 January 2008.

The Commissioner may levy additional tax up to twice the tax due under the Income Tax Act but there are currently no guidelines indicating when he will levy such additional tax.<sup>128</sup> This results in taxpayers in similar circumstances being treated differently. In one tax office a taxpayer who omits interest income from his or her tax return may face additional tax of 100 per cent, yet, in another, a taxpayer may face the full 200 per cent additional tax under s 76 of the Income Tax Act as well as a criminal prosecution under either s 75 or s 104.<sup>129</sup> This lack of uniformity in taxpayer treatment violates the taxpayer's right to equality contained in s 9 of the Constitution.<sup>130</sup>

The Minister of Finance stated in his 2006 Budget Speech that the Commissioner would release guidelines on penalty imposition during 2006 and it was hoped that these would result in more uniform treatment of taxpayers.<sup>131</sup> Unfortunately, the Commissioner has not yet finalised the guidelines. The publication of such guidelines would bring South Africa in line with other democratic societies and address the constitutional concerns in this area.<sup>132</sup>

Currently, taxpayers may lodge an appeal against the disallowance of an objection and proceed to the Tax Court or the Tax Board if the tax in dispute does not exceed R500 000.<sup>133</sup> The Tax Board is less formal and proceedings should be less costly than those in the Tax Court. However, the legal formalities at the Tax Board have increased as a result of its increased monetary jurisdiction. This means taxpayers require legal representation and the costs of pursuing an appeal may exceed the tax in dispute.

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<sup>128</sup> Under s 76 of the Income Tax Act and s 60 of the VAT Act the Commissioner may impose the so-called treble tax. In certain cases the taxpayer effectively pays the tax due plus 200 per cent thereof.

<sup>129</sup> This raises the concern of 'double jeopardy', that is, a taxpayer may be subjected to additional tax of up to 200 per cent under s 76 of the Income Tax Act and also be charged under s 75 of the Act or with tax fraud under s 104. Why should a taxpayer face two different sanctions for the same offence? This aspect is beyond the scope of this thesis.

<sup>130</sup> A detailed analysis of how s 9 of the Constitution affects taxpayers lies beyond the scope of this thesis.

<sup>131</sup> Budget Review 15 February 2006, National Treasury ch 4 p 82.

<sup>132</sup> See 'Taxpayer obligations, interest and penalties' IR 240, the guidelines published by the Inland Revenue Department of New Zealand, July 2006, available at <http://www.ird.govt.nz>, accessed 28 January 2008 and the comments made by A Alston 'Taxpayers' Rights in New Zealand' in Bentley (note 2 above) 280.

<sup>133</sup> Income Tax Act ss 81, 83 and 83A.

It would be preferable if the SMO or a special body were empowered to review the merit of decisions made by the Commissioner without taxpayers incurring significant legal costs. Australia has introduced the concept of 'merits review'.<sup>134</sup> South Africa should introduce 'merits review', thereby assisting taxpayers without forcing them to incur costs. Alternatively, the authorities should introduce a new forum to hear tax disputes, where the amount of tax in dispute is small, say, for example, less than R10 000. This new forum should be modelled on the lines of the Small Claims Court, where civil disputes can be settled relatively cheaply.<sup>135</sup> The decisions of the new forum should be binding on both the Commissioner and the taxpayer, neither of whom should be entitled to proceed to the Tax Court if there is dissatisfaction with the forum's decision.

A particular category requiring protection is taxpayers who cannot pay for professional assistance. Either the Commissioner should make officers available to review the affairs of such taxpayers, or legal aid should be made available to assist them. In criminal matters the State will assist indigent defendants and there is no reason why some form of assistance should not be available to taxpayers who are not financially educated and do not have the means to pay for professional tax advice.

#### IV CONCLUSION

The relationship between taxpayer and tax collector is invariably adversarial because the taxpayer does not enter into the relationship willingly but must do so under the force of law.<sup>136</sup> Failure to comply may result in penalties and other sanctions. It is important that the correct balance is struck between the powers of the tax gatherer and the rights of

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<sup>134</sup> 'Administrative Review Council, What Decisions Should Be Subject To Merit Review?', 1999, Commonwealth of Australia, available at [http://www.ag.gov.au/agd/WWW/archome.nsf/Page/Publications\\_Reports\\_Other\\_Documents](http://www.ag.gov.au/agd/WWW/archome.nsf/Page/Publications_Reports_Other_Documents) at 2 accessed 25 January 2008.

<sup>135</sup> Small Claims Court Act 61 of 1984.

<sup>136</sup> Bentley (note 19 above) para 2 p 16.

taxpayer, ensuring that taxpayers respect the fiscal laws and comply therewith.

It is unfortunate that the Commissioner has not finalised the review of fiscal legislation in the light of the Bill of Rights. This review should be undertaken and its findings made available to the public.

I assert that the enactment of the SARS Service Charter will not improve the lot of taxpayers in South Africa unless a cost-effective remedy is introduced.

Taxpayers have the right to an assessment that reflects the correct amount of tax due. In addition, the Commissioner should treat them fairly when finalising that assessment and collecting taxes.

Taxpayers require an appropriate, cost-effective and expeditious remedy whereby they may enforce their rights against the Commissioner. The greatest protection flows from the rights contained in ch 2 of the Constitution and enhanced by PAJA and PAIA.

The legislature should create a tax ombudsman, drawing on the best elements of similar institutions in Australia,<sup>137</sup> Canada,<sup>138</sup> Pakistan,<sup>139</sup> the United Kingdom,<sup>140</sup> New Zealand<sup>141</sup> and the USA.<sup>142</sup> Alternatively,

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<sup>137</sup> The post of Taxation Ombudsman was created in 1994. See D Bentley 'The Taxpayers' Charter: More than a Mission Statement' (June 1996) 4 *Taxation in Australia* Red Edition 5 p 264 and 'Taxation Ombudsman' a notice published by the ATO available at <http://www.ato.au>, accessed 31 March 2004.

<sup>138</sup> Canada announced during May 2007 that the office of the Taxpayers' Ombudsman will be created to attend to taxpayer's complaints and released a Taxpayers' Bill of Rights. See 'Taxpayers' Ombudsman: Overview', 2007, Canada Revenue Agency, available at <http://www.cra-arc.gc.ca/agency/ombudsman/menu-e.html>, accessed 27 January 2008. See further 'Taxpayer Bill of Rights', Canada Revenue Agency, 2007, available at <http://www.cra-arc.gc.ca/newsroom/factsheets2007/may/fs070528b-e.html> and 'Canada's new government announces Taxpayer Bill of Rights and Taxpayers' Ombudsman', Canada Revenue Agency, 2007, available at <http://www.cra-arc.gc.ca/newsroom/releases/2007/may/nr070528-e.html>, both accessed 27 January 2008.

<sup>139</sup> The Office of Federal Tax Ombudsman was created in 2000. See Establishment of the Office of Federal Tax Ombudsman Ordinance 2000 (Pakistan) Ordinance no XXXV of 2000.

<sup>140</sup> 'Putting things right ...' (note 71 above); A W Bradley 'The Role of the Ombudsman in Relation to the Protection of Citizens' Rights' (November 1980) 39 *Cambridge Law Journal* 304.

<sup>141</sup> 'Guide to The Inland Revenue Charter March 2001', IR 613; M Walpole 'Taxpayer Rights and Recourses – Australia, New Zealand and China' (2001) paper presented at a conference 37. See also A J Sawyer 'A comparison of New Zealand Taxpayers' Rights with Selected Civil Law and Common Law Countries – Have New Zealand Taxpayers been "short-changed"?' (1999) 32 *Vanderbilt Journal of Transnational Law* 1345; Alston (note 132 above) 276.

Parliament should create a specialised tax unit within the Public Protector's office. Either of these institutions should have the power and integrity to deal fairly with taxpayers' complaints and to recommend the award of costs or damages, as is the case in other open and democratic societies.

If the Commissioner does not treat taxpayers fairly and effective remedies are unavailable this will negatively affect taxpayer compliance in the future.<sup>143</sup> Therefore, the Commissioner must strike the correct balance between the rights of taxpayers and the degree of enforcement action necessary to ensure compliance with the fiscal laws of the country.

*Among those who came to be baptized were tax-gatherers,  
and they said to him, 'Master, what are we to do?'  
He told them, 'Exact no more than the assessment.'*<sup>144</sup>

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<sup>142</sup> The Taxpayer Ombudsman was created in 1979. Taxpayer Advocate's Annual Report to Congress Fiscal Year 1997 (1998) 5. The Taxpayer Advocate replaced the Taxpayer Ombudsman according to Greenbaum (note 43 above).

<sup>143</sup> See J Slemrod 'Taxation and big Brother: Information, Personalisation and Privacy in 21<sup>st</sup> Century Tax Policy' (March 2006) 27 Institute For Fiscal Studies 1(1) 13, where the author states that 'there is some evidence that having a negative attitude toward the tax system and perceiving other taxpayers as dishonest both significantly increase the likelihood that a person will evade taxes'.

See also Bentley (note 19 above) para 10 p 50.

<sup>144</sup> *The New English Bible* Luke 3 v 12-14 73.



## BIBLIOGRAPHY

### BOOKS

- Albregste, D & H van Arendonk, *Taxpayer Protection in the European Union* (Kluwer Law International, 1998).
- Alston, A, 'Taxpayers' Rights in New Zealand' in D Bentley (ed) *Taxpayers' Rights: An International Perspective* (Bond University, Queensland: Revenue Law Journal, 1998).
- Baker, P & A-M Groenhagen, *The Protection of Taxpayers' Rights – An International Codification* (European Policy Forum, 2001).
- Baxter, L, *Administrative Law* (Juta & Co Ltd, 1984).
- Beer, L W & J M Maki, *From Imperial Myth to Democracy – Japan's Two Constitutions, 1889-2002* (University Press of Colorado, 2002).
- Bell, J, *French Constitutional Law* (Oxford University Press, 1992).
- Bentley, D (ed), *Taxpayers' Rights: An International Perspective* (Bond University, Queensland: Revenue Law Journal, 1998).
- Bentley, D, *Taxpayers' Rights: Theory, Origin and Interpretation* (Kluwer Law International, 2007).
- Blackshield, T & G Williams, *Australian Constitutional Law and Theory – Commentary and Materials* 3 ed (The Federation Press, 2002).
- Brega, I, *Ancient and Modern Egypt* (The American University in Cairo Press, 1998).
- Burns, Y, *Administrative Law Under the 1996 Constitution* (Butterworths Publishers (Pty) Ltd, 1998).
- Cachalia, A et al, *Fundamental Rights in the New Constitution* (Juta & Co Ltd, 1994).
- Caiden, G E, *International Handbook Of The Ombudsman: Evolution and Present Function* (Greenwood Press, 1983).
- Caiden, G E, *International Handbook Of the Ombudsman – Country Surveys* (Greenwood Press, 1983).
- Canon, WDM, 'National report for Australia' in *Protection of Confidential Information in Tax Matters*, Cahiers de Troit Fiscal International Studies on International Fiscal Law, Vol LXXVIb (Kluwer Law, 1991).
- Chaskalson, M et al, *Constitutional Law of South Africa* (Loose leaf ed, Juta & Co Ltd, 1996).
- Cheadle, M H, D M Davis & N R L Haysom, *South African Constitutional Law: The Bill of Rights* (Butterworths Publishers (Pty) Ltd, 2002).
- Christie, R H, *The Law of Contract in South Africa* 4 ed (Butterworths Professional Publishers (Pty) Ltd, 1991).
- Cilliers, H S et al, *Corporate Law* 2 ed (Butterworths Publishers (Pty) Ltd, 1992).
- Coffield, J, *A Popular History of Taxation, From Ancient to Modern Times* (Longman Group Ltd, 1970).
- Cooper, G S, *Tax Avoidance and the Rule of Law* (IBFD Publications, 1997).

- Corder, H & L van der Vijver, *Realising Administrative Justice* (Siber Ink CC, 2002).
- Currie, I & J Klaaren, *The Promotion of Access To Information Act Commentary* (Siber Ink CC, 2002).
- Currie, I & J Klaaren, *The Promotion Of Administrative Justice Act Benchbook* (Siber Ink CC, 2001).
- Daiber, C, 'Protection of Taxpayers' Rights in Germany', in D Bentley (ed) *Taxpayers' Rights: An International Perspective* (Bond University, Queensland: Revenue Law Journal, 1998).
- Davies, V & R Friedman, *Egypt Uncovered* (British Museum Press, 1998).
- Davis, D, L Olivier et al, *Juta's Income Tax* (Juta & Co. Ltd, loose leaf edition, 1999).
- Davis, D M et al, *Fundamental Rights In The Constitution: Commentary And Cases* (Juta & Co. Ltd, 1997).
- De Ville, J R, *Judicial Review of Administrative Action in South Africa* (LexisNexis Butterworths, 2003).
- De Waal, J et al, *The Bill of Rights Handbook* 2 ed (Juta & Co Ltd, 1999).
- De Waal, J et al, *The Bill of Rights Handbook* 4 ed (Juta & Co Ltd, 2001).
- Devenish, G E, *A Commentary on the South African Bill of Rights* (Butterworths Publishers (Pty) Ltd, 1999).
- Emslie, T S et al, *Income Tax Cases and Materials* 2 ed (The Taxpayer, Cape Town, 1995).
- Greenbaum A. 'United States Taxpayer Bill of Rights 1, 2 and 3: A path to the future or Old Whine in new bottles?', in D Bentley (ed) *Taxpayers' Rights: An International Perspective* (Bond University, Queensland, Revenue Law Journal, 1998).
- Hanks, P et al, *Australian Constitutional Law Materials and Commentary* 7 ed (LexisNexis Butterworths, 2004).
- Harley, G J. 'National report for New Zealand, in *Protection of Confidential Information in Tax Matters*, Cahiers de Troit Fiscal International Studies on International Fiscal Law Vol LXXVIb (Kluwer Law, 1991).
- Heilbroner, R L, *The Making Of Economic Society* 5 ed (Prentice-Hall Inc, 1975).
- Henkin, L & A J Rosenthal, *Constitutionalism and Rights – The Influence of the United States Constitution Abroad* (Columbia University Press, 1999).
- Hoexter, C, *Administrative Law in South Africa* (Juta & Co Ltd, 2007).
- Hoexter, C et al, *The New Constitutional Law & Administrative Law Volume Two Administrative Law* (Juta & Co Ltd, 2002).
- Hoffmann, L H & D T Zeffertt, *The South African Law of Evidence* 4 ed (Butterworths Professional Publishers (Pty) Ltd, 1989).
- Hogg, P W, *Constitutional Law of Canada* 4 ed (Thomson Canada Limited, 1997).
- Howarth, P & R Maas, *Taxpayer Rights and Revenue Powers* (Reed Elsevier (UK) Ltd, Lexis Nexis, 2004).

- Hultqvist A. 1998. 'Taxpayers' Rights in Sweden', in D Bentley (ed), *Taxpayers' Rights: An International Perspective* (Bond University, Queensland, Revenue Law Journal).
- Ishimura, K. 'The state of taxpayers' rights in Japan', in D Bentley (ed), *Taxpayers' Rights: An International Perspective* (Bond University, Queensland, Revenue Law Journal, 1998).
- Jain, M P, *Indian Constitutional Law* 5 ed vols 1 & 2 (Wadhwa and Company Nagpur, 2003).
- Jacobini, H B, *An Introduction To Comparative Administrative Law* (Oceana Publications, Inc, 1991).
- Joubert, D J, *General Principles of the Law of Contract* (Juta & Co Ltd, 1987).
- Kanakis, D E & EC Osterberg, 'National Report for the United States', in *Protection of Confidential Information in Tax Matters*, Cahiers de Troit Fiscal International Studies on International Fiscal Law, Vol LXXVIb (Kluwer Law, 1991).
- Kelly, J M, *The Irish Constitution* 4 ed (Lexis Nexis Butterworths, 2003).
- Keyzer, P, *Constitutional Law – Butterworths Tutorial Series* 2 ed (Lexis Nexis Butterworths, 2005).
- Kommers, B P, *The Constitutional Jurisprudence of the Federal Republic of Germany* 2 ed (Duke University Press, 1997).
- Landman, A A, 'An Administrative Law Inquiry into the Legal Nature of the Assessment of Normal Tax', LLM thesis, University of South Africa, 1985.
- Lange, C & J Wessels, *The Right to Know – South Africa's Promotion of Administrative Justice and Access to Information Acts* (Siber Ink CC, 2004).
- Li, J. 'Taxpayers' Rights in Canada', in D Bentley (ed) *Taxpayers' Rights: An International Perspective* (Bond University, Queensland, Revenue Law Journal, 1998).
- Machiavelli, N, *The Prince* (Penguin Books 1995).
- Mill, J S, *On Liberty* (Penguin Books, 1985).
- Mitchell, WJA and J Potvin, 'National Report for Canada', in *Protection of Confidential Information in Tax Matters*, Cahiers de Troit Fiscal International Studies on International Fiscal Law Vol LXXVIb (Kluwer Law, 1991).
- Neethling, J et al, *Law of Delict* 2 ed (Butterworths Professional Publishers (Pty) Ltd, 1994).
- OECD. *Taxpayers' Rights and Obligations: A Survey of the legal situation in OECD countries* (1990).
- Richardson, G & H Genn, *Administrative Law and Government Action: The Courts and Alternative Mechanisms of Review* (Oxford University Press, 1994).

- Schwikkard, P J et al, *Principles of Evidence* 2 ed (Juta Law, 2002).
- Seervai, H M, *Constitutional Law of India: A Critical Commentary* 2 ed, vol 1 (NM Tripathi Private Ltd, 1975).
- Seervai, H M, *Constitutional Law of India A Critical Commentary* 4 ed, vol 2 (Universal Law Publishing Co Pvt Ltd, 1996).
- Schweitzer, A G, 'Aspects of the Administrative Law Relationship Between the Taxpayer and the Commissioner for Inland Revenue', LLM thesis University of Cape Town (1991).
- Sommerhalder, R A & E B Pechler, 'Protection of Taxpayers' Rights in the Netherlands', in D Bentley (ed), *Taxpayers' Rights: An International Perspective* (Bond University, Queensland, Revenue Law Journal, 1998).
- The Concise Oxford Dictionary of Current English* (Oxford University Press, Oxford, 1992).
- The New English Bible* (Oxford University Press and Cambridge University Press, 1970).
- Van der Walt, A J, *Constitutional Property Clauses* (Juta & Co Ltd and Kluwer Law International, 1999).
- Van der Walt, A J, *Introduction to the Law of Property* 4 ed (Juta & Co Ltd, 2004).
- Van Dijk, P & G J H van Hoof, *Theory and Practice of the European Convention on Human Rights* 2 ed (Kluwer Law and Taxation Publishers, 1990).
- Venter, F, *Constitutional Comparison Japan, Germany, Canada & South Africa As Constitutional States* (Juta & Co Ltd and Kluwer Law International, 2000).
- Wallschutzky, I G, *Australian Income Tax Law* (John Wiley & Sons, 1986).
- Wheelwright, K. 'Taxpayers' Rights in Australia', in D Bentley (ed) *Taxpayers' Rights – An International Perspective* (Bond University, Queensland, Revenue Law Journal, 1998).
- Wiechers, M, *Administrative Law* (Butterworths Professional Publishers (Pty) Ltd, 1985).
- Williams, D. 'United Kingdom Tax Collection: Rights of and Against Taxpayers', in D Bentley (ed) *Taxpayers' Rights: An International Perspective* (Revenue Law Journal (Bond University, Queensland, Revenue Law Journal, 1998).
- Williams, R C. 'Taxpayers' Rights in South Africa', in D Bentley (ed), *Taxpayers' Rights: An International Perspective* (Bond University, Queensland, Revenue Law Journal, 1998).
- Woolman, S, T Roux et al, *Constitutional Law of South Africa* 2 ed (Juta Law, 2006).
- Zulman, R, R Stretch & J Silke, *SARS Income Tax Practice Manual* (Lexis Nexis Butterworths, loose leaf, 1996).

## ARTICLES

- Bartlett, R T, 'The Ombudsman in Taxation: A Tripartite Perspective'. *British Tax Review* 164 (1988).
- Benjamin, C, 'Court hands Macmed Chiefs a R647m bill', *Business Day* (6 February 2004).
- Bentley, D. 'The Taxpayers' Charter: More than a Mission Statement' 4 *Taxation in Australia Red Edition* 5 (June 1996).
- Bentley, D, 'Editorial Taxpayers' Rights' 7 *Revenue Law Journal* (May 1997).
- Bloom, D H QC, 'Legal Professional Privilege and Sections 263 and 264' 27 *Australian Tax Review* 98 (June 1998).
- Bradley, A W, 'The Role of The Ombudsman in Relation to The Protection of Citizens' Rights' 39 *Cambridge Law Journal* 304 (November 1980).
- Carey, A, 'ATO's Compensation Guidelines' *Australian Weekly Tax Bulletin* 38 item 1618, 1444 (2003).
- Cokayne, R, 'King wins the first tussle in tax fight' *Business Report* (4 September 2002).
- Cokayne, R, 'Alan Hiscock retreats to lick his wounds' *Business Report* (8 February 2004).
- Corder, H, 'Administrative Justice: A Cornerstone of South Africa's Democracy' 14 *SAJHR* 38 (1998).
- Croome, B J, 'Imposition of penalties: taxpayers and the Commissioner: SARS' *The Taxpayer* 88 (2003).
- Croome, B J, 'The Narrow Tax Base In South Africa' *Accountancy SA* (July 2002).
- Croome, B J, 'The Taxman's Up To New Tricks', K Thersby, *Moneyweb's Taxbreaks* 189 (October 2001).
- Croome, B J, 'What can you do when SARS delays a refund?' *Accountancy SA* 31 (September 2005).
- Davis, D M, 'Legitimate Expectations' *The Taxpayer* 5 (January 2002).
- Dijkman, J H, 'Professional Privilege' *Accountancy SA* 23 (November/December 2004).
- Dlamini, C R M, 'The right to administrative justice in South Africa: creating an open and accountable democracy (part 1)' *TSAR* 4 697 (2000).
- Dlamini, C R M, 'The right to administrative justice in South Africa: creating an open and accountable democracy (part 2)' *TSAR* 1 53 (2001).
- Duncan, A, 'Hidden Assets' *De Rebus* 30 (July 2004).
- Fine, A, 'Revenue Service says bill threatens its efficiency' *Business Day* (1 December 1999).
- Flick, G A, 'Administrative Adjudications and the Duty to Give Reasons – A Search for Criteria' *Public Law* 16 (1978).
- Grant Thornton LLP, 'Congress Creates Client-CPA Confidentiality Privilege' *Tax and Business* (January/February 1999).
- 'Guide to The Inland Revenue Charter March 2001' IR 613, Inland Revenue Department, New Zealand.

- Gumley, W & K Wyatt, 'Are the Commissioner's Debt Recovery Powers Excessive?' 25 *Australian Tax Review* 186 (December 1996).
- Hagen, H, 'Taxman's Huge Bonus Uproar' *The Citizen* (20 July 2001).
- Hamlyn, H, 'Retrospective bill for pension funds may be challenged' *Business Report* (4 June 2007).
- 'How to Complain' available at <http://www.ombud.co.za/howtocomplain.asp>
- 'How to write your complaint' available at <http://www.fsb.co.za>
- Inland Revenue, United Kingdom, 'Putting things right – How to complain' *Code of Practice* 1 (June 2003).
- Integritax, '5 situations in which the tax court may make an order for costs', Issue 80 item 1394 (April 2006) available at <http://www.saica.co.za>
- Integritax, 'Tax Court's power to make cost orders and decide on Constitutional issues', Issue 88 item 1469 (December 2006) available at <http://www.saica.co.za>
- Integritax 'Costs awarded against SARS', Issue 94 item 1527 (June 2007) available at <http://www.saica.co.za>.
- Internal Revenue Service. 'Performance Plan For Revenue Officer (OIC) GS-1169 Including the Retention Standard for the Fair and Equitable Treatment of Taxpayers and Critical Job Elements', Department of the Treasury, Document 11492 (July 2001).
- Kennon, E P, 'Disclosure by the Commissioner' *Australian Tax Review* 170 (August 1972).
- Klein, M, 'Taxman set to seize King millions' *Sunday Times Business Times* (2 April 2006).
- Lederman, L, 'Of Taxpayer Rights, Wrongs, and a Proposed Remedy' 87 *Tax Notes, Tax Analysts Special Report* 1133 (22 May 2000) available at <http://www.ssrn.com/abstract=233580>
- Levy, J and A Watters, 'Morgan Grenfell – Where Now?' *Simon's Tax Briefing* Issue 75 (2 September 2002).
- Louw, C, 'Kan die Suid-Afrikaanse Inkomstediens (SAID) Gebonde Gehou Word Aan Sy Aanwysings?' (66) *THRHR* 292 (2003).
- MacLean, D M, 'O'Reilly's Case and Legal Professional Privilege' *Australian Tax Review* 163 (September 1983).
- 'Making a complaint to the Revenue' *Simon's Tax Briefing* Issue 101, 4 (1 September 2003).
- McLennan, M, 'The Statutory Power of the Commissioner of Taxation and the Common Law Doctrine of Legal Professional Privilege' 28 *Australian Tax Review* 139 (September 1999).
- Meyerowitz, D, 'Revenue Rulings And Legitimate Expectations' *The Taxpayer* (24 February 1990).
- Myers, A J 'Discovery of Documents' *Australian Tax Review* 235 (December 1973).

- Newth, J T 'Complaints, redressing compensation' *Simon's Tax Briefing* Issue 122 (21 June 2004).
- OECD, 'Principles of Good Tax Administration – Practice Note' (GAP001, OECD Centre for Tax Policy and Administration, 1999) (Amended 2 May 2001) available at <http://www.oecd.org>.
- Okapaluba, C, 'The Law of Bureaucratic Negligence in South Africa: A Comparative Commonwealth Perspective' *Acta Juridica* (Juta & Co. Ltd 2006).
- Oliver, D, 'The Revenue Adjudicator: A new breed of Ombudsperson?' *Public Law* 407 (1993).
- Olivier, L, 'Additional assessments, interest and penalties under the Income Tax Act 58 of 1962: the boundaries defined' *TSAR* 273 (2004).
- Olivier L, 'Tax Collection and The Bill of Rights' *Tydskrif Vir Die Suid Afrikaanse Reg* 1 193 (2001).
- Partouche, L 'The 'Right to a Fair Trial': the French Civil Supreme Court Reduces its Scope of Application to Tax Matters' *Intertax* 33 2 80 (2005).
- 'Penalties and Offences' 24 *Weekly Tax Bulletin* (ATP) item 993 (2004).
- Plasket, C, 'Protecting The Public Purse: Appropriate Relief and Costs Orders Against Officials' 117 *SALJ* 151 (2000).
- Plasket C, 'The exhaustion of internal remedies and s 7(2) of the Promotion of Administrative Justice Act 3 of 2000' 119 *SALJ* (2002).
- 'Promotion of Access to Information Act and SARS' 6 *Taxgram* (September 2003).
- Quinot, G, 'The developing doctrine of substantive protection of legitimate expectations in South African administrative law' 19 *SAPR/PL* 543 (2004).
- Richardson, G, 'The Duty To Give Reasons' *Public Law* (Autumn 1986).
- Rider, C, 'Estoppel of the Revenue: A Review of Recent Developments' 23 *Australian Tax Review* 135 (September 1994).
- Roberts, BV, 'Betekenis en grondslae van die reg op toegang tot inligting' (65) *THRHR* 339 (2002).
- Sawyer, A J, 'A comparison of New Zealand Taxpayers' Rights with Selected Civil Law and Common Law Countries – Have New Zealand Taxpayers Been Short Changed?' 32 *Vanderbilt Journal of Translational Law* 1345 (1999).
- Spiro, E, 'Effect of lodging an objection on payment of tax' *The Taxpayer* 167 (September 1964).
- Sceales, R W F, 'Privileged Communications': A snare for the Unwary? *SATJ* 1 (September 1985).
- Scott, RA, 'Suing the IRS and its employees for damages: David and Goliath' 20 *Southern Illinois University Law Journal* 507 (1996).
- 'Serving The People' *Business Day* (2 December 1999).
- Silke, J, 'Legitimate Expectations Law Unfair to the taxpayer or fiscus' 18 *Tax Planning* 40 (2004).

- Silke, J, 'Tax payers and the Constitution: A battle already lost' *Acta Juridica* 'Revenue Law' 282 (2002).
- Slemrod, J, 'Taxation and Big Brother: Information, Personalisation and Privacy in 21<sup>st</sup> Century Tax Policy' 27 *Institute For Fiscal Studies* 1 (March 2006).
- South African Institute of Chartered Accountants, 'Proposed rights – a step in the right direction' 11 *Tax Planning* 65 (1997).
- Spry, I C F, 'Professional Ethics and the Commissioner' *Australian Tax Review* 185 (December 1979).
- Stander, U, 'Die Wenslikheid vir die Verskaffing van Redes vir Administratiewe Handelinge' *Stell LR* (1) 95 (1992).
- 'Tax and privilege: a proposed new structure' A government discussion document (Policy Advice Division of the Inland Revenue Department, New Zealand, May 2002).
- Temkin, S, 'King in trouble with taxman over outstanding R2bn' *Business Day* (17 May 2002).
- Temkin, S, 'Trustee in battles over Dave King's tax bill' *Business Day* (15 July 2002).
- 'Terms of Reference' available at [http://www.osti.co.za/terms\\_of\\_ref.pdf](http://www.osti.co.za/terms_of_ref.pdf).
- 'Terms of reference of the Ombudsman for banking services' available at <http://www.obssa.co.za/>.
- Van Dorsten, J L, 'The Right To Reasons For Decisions In Tax Matters' *The Taxpayer* 185 (October 2005).
- Vijayan, R, 'Administrative Decisions And Duty To Give Reasons – A Search For Justification' *Journal Of The Indian Law Institute* 26, 70 (1984).
- Walpole, M, 'Taxpayer Rights and Recourses – Australia, New Zealand and China', Paper, Australian Taxation Studies Program (ATAX), Faculty of Law, University of New South Wales, Sydney, Australia (2001).
- 'What you need to know about lodging a complaint' available at <http://www.fsb.co.za>
- White, J, 'Constitutional Litigation And Interpretation, And Fundamental Rights' *Annual Survey of South African Law 1994, The School of Law University of the Witwatersrand, Johannesburg* (Juta & Co Ltd, 1994).
- Williams, R C, 'An Important Decision on Taxpayers' Rights in Respect Of Search and Seizure Warrants Issued Under The Income Tax Act and The Value-Added Tax Act' *SALJ* 118 418 (2001).
- Williams, RC. 2001. 'The Doctrine Of Legitimate Expectations May Prevent The Revenue Authorities From Reneging On An Undertaking To a Taxpayer' 118 *SALJ* 242.
- Wilson, K, 'Taxpayer entitled to reasons for decision not to remit penalties' *Australian Weekly Tax Bulletin* 16 item 602, p 601. (ATP 2005).
- Woolman, S, 'Out of Order? Out of Balance? The limitation clause of the Final Constitution' 13 *SAJHR* 1 102 (1997).

## GOVERNMENT PUBLICATIONS

Address by the Minister of Finance, the Honourable T A Manuel MP on the occasion of the launch of the SARS Service Monitoring Office (3 October 2002).

Budget Speech of the Minister of Finance, D L Keys (22 June 1994).  
*Best Practices In Respect Of Client Services*, a paper prepared by SARS (November 2002).

*Comprehensive Guide to Capital Gains Tax* available at <http://www.sars.gov.za>.

Customs Valuation Guide available at <http://www.sars.gov.za>.

Department of Finance, Budget Review (22 June 1994).  
Department of Finance, Budget Review (15 March 1995).

*Explanatory Memorandum 2007 Taxation Laws Second Amendment Bill* available at <http://www.sars.gov.za>.

*Guide on Tax Dispute Resolution* (SARS Commissioner, January 2005) available at <http://www.sars.gov.za>.

*Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa* RP 1994 (Pretoria: The Government Printer, 1994).

*Manual on the Promotion of Access to Information Act, 2000* (SARS Commissioner, February 2003).

*Manual on the Promotion of Access to Information Act, 2000* (SARS Commissioner, April 2004).

*Manual on the Promotion of Access to Information Act, 2000* (SARS Commissioner, April 2007).

Media Release 27 of 2000 issued by the Commissioner (24 November 2000).

National Treasury, Budget Review (12 March 1997).

National Treasury, Budget Review (26 February 2003).

National Treasury, Budget Review (15 February 2006).

'Objection: Exercise Of A Discretion – Late Objection' Interpretation Note 15 issued by the Commissioner (8 November 2004) available at <http://www.sars.gov.za>.

*Procedures To Be Observed In Lodging Objections And Noting Appeals Against Assessments, Procedures For Alternative Dispute Resolution and The Conduct And Hearing Of Appeals Before A Tax Court*, R 467 Gazette 24639 (1 April 2003).

'Putting things right' available at <http://www.sars.gov.za>.

*Report of the Commission of Inquiry into the Tax Structure of the Republic of South Africa* RP34/1987 (Pretoria: The Government Printer, 1987).

*Report Of The Joint Standing Committee On Finance On The Interim Report Of The Commission Of Inquiry Into Certain Aspects Of The Tax Structure Of South Africa* [C1-95], printed by order of Parliament.

*Report on the Third Interim Report of the Katz Commission of Inquiry into Taxation*, Joint Standing Committee On Finance.

SARS directive to BIFSA; ruling effective from 1 March 2005, available at <https://www.saica.co.za/Resources/ShowItemArticle.asp?ArticleID=298&contentpage.htm>.

'SARS Service Charter' available at <http://www.sars.gov.za>.

'SARS Service draft SARS taxpayer service charter discussion paper' (November 2002).

'SARS Service Monitoring Office leaflet' available at <http://www.sars.gov.za> (October 2002).

South African Revenue Service Annual Report, Commissioners' Review and The Tax Register (2005).

South African Revenue Service Annual Report 2005/6, available at <http://www.sars.gov.za>.

SARS Press Release on SARS Service Charter (19 October 2005), available at <http://www.sars.gov.za>.

'SARS providing a better service' available at <http://www.sars.gov.za>.

SARS Service Charter (19 October 2005), available at <http://www.sars.gov.za>.

South African Law Reform Commission, Discussion Paper 112, Statutory Revision: Review of the Interpretation Act, 33 of 1957 (Project 25), September 2006, available at <http://www.doj.gov.za/salrc/index.htm>.

*Tax Exemption Guide for Public Benefit Organisations*, available at <http://www.sars.gov.za>.

*Third Interim Report of the Commission of Enquiry into certain aspects of the tax structure of South Africa*, RP 1995, (Pretoria: Government Printer).

## OTHER

'Administrative Review Council, A Guide to Standards of Conduct For Tribunal Members', 2001, Commonwealth of Australia, available at [http://www.ag.gov.au/agd/WWW/archome.nsf/Page/Publications\\_Reports\\_Other\\_Documents](http://www.ag.gov.au/agd/WWW/archome.nsf/Page/Publications_Reports_Other_Documents).

'Administrative Review Council, What Decisions Should Be Subject To Merit Review?', Commonwealth of Australia available at [http://www.ag.gov.au/agd/WWW/archome.nsf/Page/Publications\\_Reports\\_Downloads](http://www.ag.gov.au/agd/WWW/archome.nsf/Page/Publications_Reports_Downloads).

Appellant's Heads of Argument – The Constitutional Challenge, for *Carlson Investments Share Block (Proprietary) Limited Ltd v Commissioner for South African Revenue Services* [2001] 63 SATC 295.

- Arendse, J, Project Director: Tax SAICA electronic mail to B J Croome on 29 March 2006 questioning the constitutional validity of the inspection survey.
- Arnold, B J, Annexure H to the affidavit submitted by Mr T F van Heerden erstwhile Commissioner for Inland Revenue to the Constitutional Court in case CCT/22/96.
- Browne, D, *Hägar The Horrible* (cartoon strip), *The Star* (20 March 2006).
- 'Canada's new government announces Taxpayer Bill of Rights and Taxpayers' Ombudsman' Canada Revenue Agency, 2007, available at <http://www.cra-arc.gc.ca/newsroom/releases/2007/may/nr070528-e.html>.
- Commentary on the Practical Guidelines for Preparing Statements of Reasons* available at [http://www.ag.gov.au/agd/www/archome.nsf/Page/Publications\\_Reports\\_Other\\_Documents](http://www.ag.gov.au/agd/www/archome.nsf/Page/Publications_Reports_Other_Documents).
- Commonwealth Ombudsman in Australia details available at <http://www.comb.gov.au>.
- Croome, BJ, discussion held with a senior official at the office of the Commissioner in Pretoria during April 2005.
- Croome, BJ, discussion held with senior officials of the Commissioner in Pretoria in March 2006.
- Croome, BJ, Paper presented to SARS Workshop on Objections and Appeals held on 23 and 24 August 2000.
- Croome, BJ, Private correspondence addressed to the Constitutional Assembly at the time of drafting of the Constitution dated 5 September 1995 and 3 October 1995.
- 'Enquiries into tax', Code of Practice 2 published by Inland Revenue, United Kingdom (May 1995).
- Freedom of Information Act 2000 HM Revenue & Customs Publication Scheme details of which are available at <http://www.hmrc.gov.uk/about/foi.htm>.
- Freedom of Information Act notice published by the Treasury Inspector General for Tax Administration available at <http://www.tigta.gov>.
- 'Handbook 1.2.7.9 Problem Resolution Program Handbook Chapter 5 Taxpayer Advocacy' available at <http://www.irs.gov>.
- 'If you're subject to enquiry or audit', Taxpayers' Charter Explanatory Booklet 10 published by Australian Government, Australian Tax Office (October 2003).
- Implementation of the Right to Information Act 2005 in Income Tax Department published by Income Tax Department, Department of Revenue, Ministry of Finance, Government of India at 1 available at <http://www.incometaxindia.gov.in>.

Media Release 4 August 1999, Inland Revenue Department, New Zealand available at <http://www.ird.govt.nz/mediareleases/1999/040899.html>.  
 'Meetings with the Adjudicator's Office – Notes for people making complaints' AO3 published by the Adjudicator's Office, October 2002.

'Non-disclosure right for tax advice documents', SPS 05/07, Inland Revenue, New Zealand, (July 2005) available at <http://www.ird.govt.nz>.

'Practical Guidelines for Preparing Statements of Reasons' available at [http://www.ag.gov.au/agd/WWW/archome.nsf/Page/Publications\\_Reports\\_Other\\_Documents](http://www.ag.gov.au/agd/WWW/archome.nsf/Page/Publications_Reports_Other_Documents).

Sellmer, P, Opinion prepared for the Commissioner in *Metcash Trading Ltd v the Commissioner: SARS and the Minister of Finance* 2001 (1) BCLR (1) CC, [2001] 63 SATC 13, Annexure C2 of court file.

Solomon, PA, SC consultation attended by B J Croome on 10 April 2006.

South African Institute of Chartered Accountants, Notes of a meeting between representations of SAICA, CFA and SARS Enforcement held on 11 January 2006, available to Chartered Accountants (South Africa) at <http://www.saica.co.za>.

South African Institute of Chartered Accountants, Notes arising from the meeting held by SARS, SAIPA and SAICA on 20 June 2006 available to Chartered Accountants (South Africa) at <http://www.saica.co.za>.

South African Institute of Chartered Accountants, submission to the Commissioner – 'Proposal that legal professional privilege be extended to Chartered Accountants (South Africa)' (12 July 2002).

South African Institute of Chartered Accountants, submission to the Commissioner – 'Proposed Regulation of Tax Practitioners in South Africa' (26 February 2003).

South African Institute of Chartered Accountants, submission to the Commissioner – 'Regulation of Tax Practitioners' (14 June 2005), available to Chartered Accountants (South Africa) at <http://www.saica.co.za>.

'Taxpayer obligations, interest and penalties', IR 240 published by the Inland Revenue Department of New Zealand (July 2006) available at <http://www.ird.govt.nz>.

'Taxation Ombudsman' a notice published by the ATO available at <http://www.ato.au>.

Taxpayer Adjudicator details available at <http://www.adjudicatorsoffice.gov.uk> and at <http://www.hmrc.gov.uk>.

Taxpayer advocate in the USA available at <http://www.irs.gov/advocate/>.

Taxpayer Advocate's Annual Report to Congress Fiscal Year 1997 (1998).

'Taxpayer Bill of Rights', 2007, Canada Revenue Agency, available at <http://www.cra-arc.gc.ca/newsroom/factsheets2007/may/fs070528be.html>.

Taxpayers' Charter – Explanatory Booklet 06 Accessing information under the Freedom of Information Act, Australian Government Australian Taxation Office (January 2007), available at <http://www.ato.gov.au>.

'Taxpayers' Ombudsman: Overview', 2007, Canada Revenue Agency, available at <http://www.cra-arc.gc.ca/agency/ombudsman/menu-e.html>.

'The Adjudicator's Office for complaints about H M Revenue & Customs and Valuation Office Agency' AO1, published by the Adjudicator's Office (2005) available at <http://www.adjudicatorsoffice.gov.uk>.

The Adjudicator's Office Freedom of Information Act 2000 Adjudicator's Office Publication Scheme at 2 available at <http://www.adjudicatorsoffice.gov.uk>.

'What you should know about audits, RC4188, published by Canada Customs and Revenue Agency available at <http://www.cra-arc.gc.ca>.

## **SOUTH AFRICAN CASES**

*Administrator, Transvaal, and Others v Traub and Others* 1989 (4) SA 731 (AD).

*Anglo Platinum Management Services (Proprietary) Limited Ltd and Others v Minister of Safety and Security and Others* [2006] 4 All SA 30 (T).

*Bato Star Fishing (Proprietary) Limited Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687 (CC).

*Bernstein v Bester* NO 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC).

*Carephone (Proprietary) Limited Ltd v Marcus NO and Others* (1998) 19 ILJ 1425 (LAC).

*Carlson Investments Share Block (Proprietary) Limited Ltd v Commissioner for South African Revenue Services* [2001] 63 SATC 295.

*Carmichele v Minister of Safety and Security and Another* 2001 (10) BCLR 995 (CC).

*Certification of the Amended text of the Constitution of the Republic of South Africa, 1996* (Second Certification Judgement) 1997 (2) SA 97 (CC).

*Chairperson of the Constitutional Assembly, Ex parte In re: Certification of the Constitution of the Republic of South Africa* 1996 (First Certification Judgement) 1996 (4) SA 744 (CC).

*CIR v Brollo Properties (Proprietary) Limited Ltd* [1994] 56 SATC 47.

*Commissioner of Customs and Excise v Container Logistics (Proprietary) Limited Ltd; Commissioner of Customs and Excise v Rennies Group Ltd t/a Renfreight* 1999 (3) SA 771 (SCA).

*Commissioner of the South African Police Service and Others v Maimela and Another* 2004 (1) BCLR 47 (T).

*Commissioner for South African Revenue Service v Hawker Air Services (Proprietary) Limited Ltd and Hawker Aviation Services Partnership and Others* [2005] 67 SATC 107.

*Commissioner for the South African Revenue Service v Hawker Air Services (Proprietary) Limited Ltd and Hawker Aviation Services Partnership and Others* [2006] SCA 55 (RSA), [2005] 68 SATC 141.

*Commissioner for South African Revenue Service and Another v Sterling Auto Distributors CC*, [2006] 68 SATC 241.

- The Commissioner for the South African Revenue Service v D King and Others* (Case No.4745/02, unreported TPD).
- Contract Support Services (Proprietary) Limited Ltd v Commissioner: South African Revenue Services and Others* [1999] 61 SATC 338, 1999 (3) SA 1133(W).
- COT v Astra Holdings (Proprietary) Limited trading as Puzey and Payne*, [2004] 66 SATC 79.
- Deacon v Controller of Customs and Excise* [1999] 2 All SA 405 (SE), [1999] 61 SATC 275.
- De Beers Holdings (Pty) Ltd v CIR* 1986 (1) SA 8 (A), [1985] 47 SATC 229.
- Deutschmann NO and Others v Commissioner For the South African Revenue Service; Shelton v Commissioner For the South African Revenue Service* [2000] 62 SATC 191, [2000] 1 ALL SA 198 (E).
- Directory Advertising Cost Cutters CC v Minister for Posts, Telecommunications and Broadcasting and Others* [1996] 2 All SA 83 (T).
- Du Plessis v De Klerk* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC).
- Fair Cape Property Developers (Pty) Ltd v Premier, Western Cape* 2002 (6) SA 180 (CPD).
- Ferela (Pty) Ltd and Others v Commissioner for Inland Revenue and Others* 1998 (4) SA 275 (T), [1998] 60 SATC 513.
- Ferrucci and Others v Commissioner, South African Revenue Service and Another* 2002 (12) JTLR 404.
- First National Bank of S.A Ltd t/a Wesbank v Commissioner for South African Revenue Services and Another*, 2001 (7) BCLR 715 (C), [2001] 63 SATC 432.
- First National Bank of S.A Ltd t/a Wesbank v the Commissioner for the South African Revenue Services; the Minister of Finance and First National Bank of S.A Ltd t/a Wesbank v the Minister of Finance* 2002 (7) BCLR 702 (CC), [2002] 64 SATC 471.
- Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC).
- Fose v Minister of Safety and Security* 1997 (7) BCLR 851 (CC).
- Gamevest (Pty) Ltd v Regional Land Claims Commissioner, Northern Province and Mpumalanga, and Others* 2003 (1) SA 373 (SCA).
- Gardener v East London Transitional Local Council and Others* 1996 (3) SA 99 (E).
- Gold Fields Ltd v Connellan NO and others* [2005] 3 All SA 142 (W).
- Goodman Bros (Pty) Ltd v Transnet Ltd* 1998 (4) SA 989 (W).
- Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2004 (12) BCLR 1298 (C).
- Haynes v Commissioner For Inland Revenue* 2000(6) BCLR 596 (Tk).
- Heiman, Maasdorp and Barker v Secretary for Inland Revenue* [1968] 30 SATC 145.
- Hindry v Nedcor Bank Ltd and Another* [1999] 61 SATC 163, [1999] 2 All SA 38 (W).

*Hira and Another v Booyesen and Another* 1992 (4) SA 69 (A).  
*Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2000 (2) SA 934 (D).

*ITC 1500* [1991] 53 SATC 272.  
*ITC 1674* [2000] 62 SATC 116.  
*ITC 1682* [2000] 62 SATC 380.  
*ITC 1811* [2006] 68 SATC 193, Tax Case 4/2005, JDR 1440 (JSpCrt).  
*ITC 1816* [2006] 69 SATC 62.  
*ITC 1821* [2007] 69 SATC 194.

*Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2000(10) BCLR 1079 (CC).

*Jeeva and Others v Receiver of Revenue, Port Elizabeth, and Others* [1995] 57 SATC 187.

*Khala v The Minister of Safety and Security* 1994 (2) BCLR 89 (W).

*Lesapo v North West Agricultural Bank and Another* 1999 (12) BCLR (CC) 1420.

*Metcash Trading Ltd v Commissioner for South African Revenue Service and Another* 2000(2) SA 232(W), [2000] 62 SATC 84.

*Metcash Trading Ltd v the Commissioner: SARS and the Minister of Finance*, 2001 (1) BCLR (1) CC, [2001] 63 SATC 13.

*Miller v Commissioner for Inland Revenue (SWA)* 1952 (1) SA 474 (A).

*The Minister of Environmental Affairs and Tourism and 18 Others v Phambili Fisheries (Pty) Ltd and Another*, 2003 JDR 0329 (SCA), [2003] 2 All SA 616 (SCA).

*Minister of Health and McIntyre NO v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC).

*Minister of Safety and Security v Molutsi and Another* [1996] 4 All SA 535(A).

*Mistry v Interim Medical and Dental Council of South Africa*, 1998 (4) SA 1127 (CC).

*Moeca v Addisionele Kommissaris, Bloemfontein* 1981 (2) SA 357 (O).

*Moletsane v Premier of the Free State and Another* 1996 (2) SA 95 (OPD).

*Motsepe v Commissioner For Inland Revenue* 1997(2) SA (2) 898 (CC), [1997] 59 SATC 245.

*Mpande Foodliner CC v Commissioner for South African Revenue Service and Others* [2000] 63 SATC 46.

*National Director of Public Prosecutions v Carolus and Others* 2000(1) SA 1127 (SCA).

*Noupoort Christian Care Centre v Minister of National Department of Social Development and Another* 2005 (10) BCLR 1034 (T).

*Oberholzer and Others v The Commissioner For The South African Revenue Service*, Unreported decision of the High Court of South Africa, Cape

- of Good Hope Provincial Division, Case No 8714/98, Judgement delivered 20 May 1999.
- Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA).
- Park-Ross and Another v The Director, Office for Serious Economic Offences* 1995(2) BCLR 198 Commissioner.
- Pepkor Retirement Fund and Another v Financial Services Board* 2003 (6) SA 38 (SCA).
- Pering Mine (Pty) Ltd v Director-General, Mineral and Energy Affairs and Others* [2005] 67 SATC 317.
- Pharmaceutical Manufacturers Association of SA: Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).
- Pharmaceutical Society of SA v Minister of Health; New Clicks SA (Pty) Ltd v Tshabalala-Msimang* 2005 (6) BCLR 576 (SCA).
- Powell NO and Others v Van Der Merwe and Others* 2005 (7) BCLR 675 SCA.
- Premier, Western Cape v Fair Cape Property Developers (Pty) Ltd* 2003 (6) SA 13 SCA.
- President of the Republic of South Africa and the Minister of Correctional Services v Hugo* 1997(4) SA (CC) 1.
- President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA (CC) 1.
- Pretoria Portland Cement Co. Ltd and Another v Competition Commission and Others* 2003 (2) SA 381 (TPD) and 2003 (2) SA 385 (SCA).
- Qozoleni v Minister of Law and Order and Another* (1994) (1) BCLR 75 (E).
- Raymond Wong and Four Others v the Commissioner for the South African Revenue Service* JDR 0907 (T) 2003.
- Rèan International Supply Company (Pty) Ltd and Others v Mpumalanga Gaming Board* 1999 (8) BCLR 918(T).
- S v Makwanyane & Another* 1995 (3) SA 391 (CC), [1995] (6) BCLR 665 (CC).
- S v Pennington and Another* 1997 (10) BCLR 1413 (CC).
- S v Safatsa and Others* 1988 (1) SA 868 (A).
- Sasol Oil (Pty) Ltd and Another v Metcalfe NO* 2004 (5) SA 161 (WLD).
- Scenematic Fourteen (Pty) Ltd v Minister of Environmental Affairs and Tourism and Another* 2004 (4) BCLR 430 Commissioner.
- Shelton v Commissioner For South African Revenue Service* 2001 JDR 0934 (SCA), 2002 (3) JTLR 94.
- Smartphone SP (Pty) Ltd v ABSA Bank Ltd and Another* 2004 (3) SA 65(W).
- South African Railways v Kemp* 1916 TPD 174.
- South African Revenue Service and Another v Armsec Professional Services (Pty) Ltd*, [2004] 66 SATC 277.
- Stanfield v Minister of Correctional Services and Others* 2003 (12) BCLR 1384 Commissioner.
- Swissborough Diamond (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 TPD.

*Trend Finance (Pty) Ltd and Another v Commissioner for South African Revenue Service and Another* [2005] 67 SATC 334.

*Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Limited* 1928AD 220.

*Van Niekerk v City Council of Pretoria* [1997] 1 All SA 305 (T).  
VAT 304 2006 JDR 0112 (PSPCrt), ITC 1806 [2006] 68 SATC 117.

## **FOREIGN CASES**

### **Australia**

*Ansett Transport Industries (Operations) (Pty) Ltd and Another v Wraith and Others* 48 ALR 500.

*Bailey and Others v The Commissioner of taxation of the Commonwealth of Australia* 136 CLR 214.

*Baker v Campbell* (1983) 153 CLR 52, (1983) 49 ALR 385 and 57 ALJR 749.

*Commissioner of Taxes v Tourism Holdings Limited and Anor* 51 ATR 256.

*Meredith v Federal Commissioner of Taxation and Ors* 50 ATR 528.

*MLC Investments Ltd v Federal Commissioner of Taxation* 54 ATR 671.

*O'Reilly v Commissioners of the State Bank of Victoria* (1982) 57 ALJR 130,  
(1982) 13 ATR 706 (1982) ATC 4671.

*Queensland Trading & Holding Co Ltd v Federal Commissioner of Taxation*  
59 ATR 118.

*Re Hart and Federal Commissioner of Taxation*, 51 ATR 1086.

*Re Hart and Deputy Commissioner of Taxation*, 54 ATR 1057.

*Re Hart and Federal Commissioner of Taxation*, 57 ATR 1174.

*Re Richardson and Federal Commissioner of Taxation and Martinek*, 55 ATR  
1091.

*Re Sobczuk and Deputy Commissioner of Taxation* 50 ATR 1142.

*Re Wytkin and Anor and Deputy Commissioner of Taxation*, 52 ATR 1001.

*Spassked (Pty) Ltd v FCT (3)* [2002] FCA 490.

### **Canada**

*Blois v The City of Halifax* [1921] 56 DLR 239.

*Chaulk v R* [1990] 3 SCR 1303.

*Hunter vs Southam Inc.* 84 DTC 6467.

### **European Court of Human Rights**

*Gudmundsson v Iceland* [1960] YB 3 394.

*X v Austria* [1979] 13 DR 27.

**Ireland**

*Daly v Revenue Commissioners* [1995] 3 IR 1.

**New Zealand**

*Brierley Investments Limited v CIR* (1993) 15 NZTC 10212 (CA).

**Trinidad and Tobago**

*Attorney-General of Trinidad and Tobago v Ramesh Dipraj Kumar Mootoo*  
(1976) 28 WIR 304.

**United Kingdom**

*Chantrey Martin v Martin* 1953 2 All ER 691.

*Hedley Byrne & Co. Ltd v Heller and Partners Ltd* [1964] AC [HL] 465.

*IRC v Duke of Westminster* [1936] AC 1.

*M'Allister (or Donoghue) v Stevenson* [1932] AC [HL] 562.

*Matrix-Securities Ltd v IRC* [1994] 1 All ER 769, [1994] 1 WLR 334.

*Preston v IRC* [1985] 2 All ER 327.

*R v Board of Inland Revenue, ex parte MFK Underwriting Agencies Ltd & Ors*  
& Related Applications [1990] 1 All ER 91 (QBD).

*R v IRC, ex parte Rossminster Ltd and Others* [1979] 3 All ER QBD and CA.

*R (on the Application of Morgan Grenfell and Co Ltd) v Special*  
*Commissioner of Income Tax* [2002] UKHL 21.

*Reg v I. R. C., Ex p. Preston* (H. L. (E.)) 1985 1 AC 846.

*Rex v Sussex Justices* 1924 KB 129.

*Stradling v Morgan* (1560) 1 Plowd 199, (75 ER 305).

**United States of America**

*Department of Justice v Tax Analysts* 492 US 136 (1989).

*Tax Analysts v IRS* USDC Circuit Court of Appeals No 96 – 5152 decided  
8 July 1997 available at <http://caselaw.1p.findlaw.com>.

*Tax Analysts v Internal Revenue Service* United States District Court for the  
District of Columbia, Civil Action No. 99-0372 available at  
<http://www.dcd.uscourts.gov/99-372.pdf>.

*M'Culloch v The State of Maryland et al* 1819 4 L. ed 579, Wheat 4 316.

**Zimbabwe**

*COT v Astra Holdings (Private) Ltd trading as Puzey and Payne* 66 SATC 79.

## **SOUTH AFRICAN STATUTES**

Close Corporations Act 69 of 1984.

Commissions Act 8 of 1947.

Companies Act 61 of 1973.

Competition Act 89 of 1998.

Constitution of the Republic of South Africa Act 108 of 1996.

Constitution of the Republic of South Africa Act 200 of 1993.

Customs and Excise Act 91 of 1964.

Estate Duty Act 45 of 1955.

Exchange Control Amnesty and Amendment of Taxation Laws Act 12 of 2003.

Exchequer Act 66 of 1975.

Human Rights Commission Act 54 of 1994.

Income Tax Act 58 of 1962.

Income Tax Act 21 of 1995.

Income Tax Act 36 of 1996.

Income Tax Act 27 of 1997.

Insolvency Act 24 of 1936.

Investigation of Serious Economic Offences Act 117 of 1991.

Kwa Zulu Natal Joint Services Act 84 of 1990.

Marketable Securities Tax Act 32 of 1948.

Medicines and Related Substances Control Act 101 of 1965.

National Prosecuting Authority Act 32 of 1998.

North West Agricultural Bank Act 14 of 1981.

Pension Funds Second Amendment Act 39 of 2001.

Pension Funds Act 24 of 1956.

Prevention of Organised Crime Act 121 of 1998.

Private Security Industry Regulation Act 56 of 2001.

Promotion of Access to Information Act 2 of 2000.

Promotion of Administrative Justice Act 3 of 2000.

Provincial Tax Regulation Process Act 53 of 2001.

Public Finance Management Act 1 of 1999.

Public Protector Act 23 of 1994.

Regional Services Councils Act 109 of 1985.

Republic of South Africa Constitution Act 110 of 1983.

Revenue Laws Amendment Act 46 of 1996.

Revenue Laws Amendment Act 45 of 2003.

Second Revenue Laws Amendment Act 60 of 2001.

Skills Development Levies Act 9 of 1999.

Small Claims Court Act 61 of 1984.

South African Revenue Service Act 34 of 1997.  
Stamp Duties Act 77 of 1968.

Taxation Laws Amendment Act 30 of 1998.  
Transfer Duty Act 40 of 1949.  
Trust Property Control Act 57 of 1988.

Uncertificated Securities Tax Act 31 of 1988.  
Unemployment Insurance Contributions Act 4 of 2002.  
Value Added Tax Act 89 of 1991.

## **SOUTH AFRICAN DRAFT BILLS**

Interpretation of Legislation Bill, 2006.

Regulation of Tax Practitioners Bill, 2006.

## **FOREIGN STATUTES**

### ***Australia***

Administrative Appeals Tribunal Act 1975.  
Administrative Decisions (Judicial Review) Act 1977 (Commonwealth).

Commonwealth of Australia Constitution Act. 1900 (UK).

Freedom of Information Act (Commonwealth) 1982.

### ***Canada***

Access to Information Act R. S. C. 1985.

Constitution Act 1982.

Privacy Act R. S. C. 1985.

### ***India***

Right to Information Act 2005.

### ***Japan***

Administrative Procedure Law, No 88 of 1993.

Constitution of Japan (Nihonkoku Kempo) 1947.

### ***New Zealand***

Official Information Act 1982.

### ***Pakistan***

Establishment of the Office of Federal Tax Ombudsman Ordinance, 2000  
(Pakistan) Ordinance no XXXV of 2000.

***United Kingdom***

Freedom of Information Act 2000.

***United States of America***

Freedom of Information Act (FOIA), 5 U. S. C. 552.

Internal Revenue Code

Internal Revenue Restructuring and Reform Act of 1998, PL 105-26  
(commonly referred to as Taxpayer Bill of Rights 3).

Technical and Miscellaneous Revenue Act of 1988. PL100 – 647 Subtitle J  
(commonly referred to as Taxpayer Bill of Rights 1.)

Taxpayer Bill of Rights 2 PL 104-168.

University of Cape Town