

The Taxpayer's Right to Finality – a critical analysis of legislation and practice in South Africa

Julia Choate (MRXJUL003)

Thesis Presented for the Degree of Doctor of Philosophy in the Department of Commercial Law Faculty of Law, University of Cape Town.

Date of submission: 12 February 2022

Supervisors: Dr. Tracy Gutuza, Associate Professor: Faculty of Law, University of Cape Town, and Judge Dennis Davis, Department of Commercial Law, University of Cape Town.

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

DECLARATION

I, Julia Choate, 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.

SIGNATURE _____

DATE _____

ACKNOWLEDGEMENTS

At the outset, I must thank my employers, KPMG and Bowman Gilfillan (particularly, Barry Garven) for providing me with the resources, support, and flexibility to pursue my studies while working full time.

To my supervisors, Dr. Tracy Gutuza and Judge Dennis Davis, my sincere thanks for your valuable input, guidance, and assistance in pursuing this project. Without Dr. Gutuza's encouragement to develop my ideas for an LLM dissertation into their full scope and potential, I would never have undertaken a project of this magnitude. I am indebted to her for this invaluable experience.

I thank my fellow legal, accounting and tax professionals, local and foreign legal academics, a number of SARS officials (past and present), and the members of the SAIT Tax Administration Technical Workgroup for many of the insights, themes, and research reflected in this thesis.

I wish to thank Annelize Bierman, for her assistance with proofing and formatting.

I am indebted to a number of friends and colleagues for their assistance and support in undertaking this project. I would particularly like to thank Dennis Fine SC, Kevin Iles, Patricia Williams, and Jessica Boast for the benefit of many valuable discussions, insights, and critiques of various ideas and concepts for this thesis.

Lastly, my most heartfelt thanks to my husband, Luke Choate. Without your patience, understanding, generosity and unwavering support, this thesis would not exist, and without the benefit of your incisive intellect and considerable legal knowledge, both this thesis and my own understanding of the law would be significantly poorer.

* * * * *

The research and writing of this thesis spanned a particularly turbulent period in South African tax administration. It is my sincere hope that this research contributes positively to the restoration of South African tax administration (and indeed, SARS itself) to its rightful place within our constitutional democracy.

CONTENTS

ABSTRACT	6
1 CHAPTER ONE: INTRODUCTION.....	8
1.1 Background and Context of the Research Question.....	8
1.2 Research Question and Hypothesis.....	14
1.3 Research Objectives and Methodology	18
1.3.1 Research Objectives.....	18
1.3.2 Research methodology	20
1.3.3 Contribution to the existing knowledge and literature on this aspect of South African tax administration.....	20
2 CHAPTER TWO – THE TAXPAYER’S RIGHT TO FINALITY	22
2.1 The Right to finality.....	22
2.2 The importance of the right to finality in tax administration	23
2.3 The relevance of the right to finality to tax morale and voluntary compliance	27
2.3.1 The Concept of Tax Morale.....	27
2.3.2 Finality and procedural fairness in tax administration	32
2.3.3 The interface between taxpayers and the revenue authority.....	35
2.3.4 Administrative compliance burden imposed on taxpayers	38
2.3.5 Legitimate government and a stable economy	38
2.4 Legislative Provisions codifying the right to finality	41
2.4.1 Interpretation of the right to finality by the South African courts	46
2.4.2 Principles emerging from judicial interpretation of section 79(1) of the Act.....	55
2.4.3 Applicability of case law on section 79(1) to the new sections in the TAA	57
2.5 Conclusion.....	62
3 CHAPTER THREE: THE AUDIT AND INFORMATION GATHERING PROVISIONS OF THE TAX ADMINISTRATION ACT.....	65
3.1 General overview of the legislation governing SARS’ investigative and information-gathering powers under the TAA.....	65
3.1.1 Auditing under the TAA	66
3.1.2 Information-gathering under the TAA.....	69
3.2 Requests for relevant material under section 46 of the TAA	71
3.2.1 “relevant material”	71
3.3 Impact of the misuse of SARS’ audit and information-gathering powers	79
3.3.1 Audit.....	79
3.3.2 Information-gathering	82
3.4 Remedies available to the taxpayer in respect of a breach of rights arising from the exercise of SARS’ audit and information gathering powers	84

3.4.1	Audit.....	84
	The remedies available to taxpayers where SARS mis-uses its audit powers are set out below, in relation to the harms which taxpayers typically encounter in the context of sections 40 – 42 of the TAA.	84
3.4.2	Requests for relevant material	93
3.5	Conclusion.....	97
4	CHAPTER FOUR: CONSTITUTIONAL AND ADMINISTRATIVE LAW PRINCIPLES GOVERNING THE EXERCISE OF THE COMMISSIONER’S AUDIT AND INFORMATION-GATHERING POWERS UNDER THE TAA	103
4.1	SARS’ audit and information-gathering powers as administrative action.....	104
4.1.1	The definition of administrative action in South African law	104
4.1.2	“A decision...”	108
4.1.3	“...by an organ of state (or a natural or juristic person) ...”	126
4.1.4	“...exercising a power in terms of the Constitution... or public power or performing a public function...”	127
4.1.5	“...in terms of any legislation...”	129
4.1.6	“...that materially and adversely affects the rights of any person...”	129
4.1.7	“...that has a direct external legal effect”	134
4.2	Interpretation of the definition of administrative action in the context of tax administration	148
4.3	SARS’ audit and information-gathering powers in the context of the principle of legality.	186
4.3.1	The definition of the principle of legality in South Africa	186
4.3.2	Application of the principle of legality to the exercise of SARS’ audit and information-gathering powers	193
4.4	Conclusion.....	199
5	CHAPTER 5: SOUTH AFRICAN TAX POLICY AND PRACTICE IN THE CONTEXT OF THE AUDIT AND INFORMATION-GATHERING PROCESS.....	205
5.1	Legislative framework governing SARS’ audit and information-gathering powers.....	207
5.2	Current South African administrative policy in respect of audit and information-gathering	207
5.2.1	The SARS Short Guide to the Tax Administration Act.....	208
5.2.2	SARS Service Charter.....	211
5.2.3	SARS Strategic Plans.....	211
5.2.4	Policy Oversight Mechanisms	215
5.3	Challenges in South African tax administration.....	216
5.3.1	Systemic issues within tax administration relating to the exercise of SARS’ audit and information-gathering powers.	216
5.3.2	Lack of appropriate oversight mechanisms.....	223

5.4	The relationship between taxpayers' rights and optimal tax administration in the context of audit and information-gathering	227
5.5	Conclusion.....	230
6	CHAPTER SIX: COMPARATIVE ANALYSIS OF AUDIT AND INFORMATION-GATHERING POWERS AND TAXPAYERS' RIGHTS IN FOREIGN JURISDICTIONS ...	236
6.1	Comparative Jurisdictions.....	236
6.1.1	Australia	237
6.1.2	Canada	253
6.2	Conclusion.....	264
7	CHAPTER SEVEN: APPLICATION TO THE SOUTH AFRICAN CONTEXT	268
7.1	Recommendation 1: The adoption of a more nuanced and streamlined approach to auditing and information-gathering	272
7.1.1	Moving away from randomized approaches to audit and risk detection	273
7.1.2	Implementing a nuanced, proportional, and service-oriented approach in audit and information-gathering	274
7.1.3	Improved focus on education for taxpayers and SARS officials	276
7.2	Recommendation 2: A comprehensive Taxpayers' Bill of Rights	279
7.3	Recommendation 3: Creating an Inspector-General for Taxation	286
7.4	Conclusion.....	290
	BIBLIOGRAPHY	292

ABSTRACT

In this thesis, I evaluate whether the exercise of the audit and information-gathering powers granted to the South African Revenue Service under sections 42 and 46 of the Tax Administration Act 28 of 2011 has the capacity to undermine taxpayers' rights to finality, and if so, what can be done to improve this aspect of South African tax administration.

To address the first part of this hypothesis, I analyse the content of the right to finality conferred on taxpayers by the "limitation period" prescribed in section 99 of the TAA, in respect of tax assessments. I evaluate the role which the right to finality plays in South African tax administration, with reference to domestic and foreign case law, and international research into selected aspects of tax administration and behavioural economics (concepts such as tax morale and voluntary tax compliance), concluding that finality is a crucial component of an optimally functioning modern tax administration.

I also analyse the content of the audit and information-gathering powers granted to SARS under the TAA, and SARS' current administrative policy and practice regarding the exercise of these powers, with reference to the legislation, various SARS manuals and publications, the findings of various commissions of inquiry, examples drawn from legal practice, relevant judgments, and the data compiled and published by the Office of the Tax Ombud.

I conclude that the exercise of SARS' audit and information-gathering powers has the capacity to negatively affect the right to finality, and often does so in practice. I also conclude that currently, no satisfactory remedies exist for taxpayers where their right to finality is compromised by the exercise of SARS' audit and information-gathering powers.

Having answered the first part of the hypothesis in the affirmative, I investigate potential policy-based solutions to achieve a sustainable and economically viable balance between

the exercise of SARS' audit and information-gathering powers, and taxpayers' right to finality. I analyse the policy and practice of various comparative international jurisdictions in order to formulate a series of recommendations to improve this area of South African tax administration, in line with current global standards of good practice.¹

My recommendations include the adoption of a more streamlined and nuanced approach to audit and information-gathering by SARS, the urgent adoption and implementation of a comprehensive taxpayers' bill of rights, an operational and cultural shift within SARS towards more collaborative and co-operative practices where possible, and the creation of an independent oversight body to monitor and evaluate the success of policy implementation within and by SARS.

¹ The standards which can be discerned from the benchmarks recommended by the OECD in its tax administration research, and the policy and practice adopted by Australia and Canada.

1 CHAPTER ONE: INTRODUCTION

1.1 Background and Context of the Research Question

The Tax Administration Act² (“TAA”) came into effect on 1 October 2012, redefining and significantly expanding both SARS’ powers and taxpayers’ rights in many areas of tax administration previously canvassed in the Income Tax Act³ (the “Act”) and in the Value-Added Tax Act⁴ (“VAT Act”).

These changes have had a significant impact on taxpayers’ rights, particularly the right to finality, which is a crucial facet of the rule of law, facilitating procedural fairness, commercial certainty, and legal certainty in the context of tax administration.⁵

The right to finality operates in the context of tax assessments,⁶ by limiting the period during which the South African Revenue Service (“SARS”) may alter or withdraw a tax assessment. Section 92 of the TAA generally compels SARS to amend tax assessments: it provides that if SARS is satisfied that a tax Act has been incorrectly applied, to the prejudice of SARS or the *fiscus*, SARS *must* issue an additional assessment to correct the prejudice.⁷

² No. 28 of 2011.

³ No. 58 of 1962

⁴ No. 89 of 1991.

⁵ *Commissioner for the South African Revenue Service v Brummeria Renaissance (Pty) Ltd and Others* 69 SATC 205 at page 217 to 218; *Carlson Investments Share Block (Pty) Limited v Commissioner for the South African Revenue Services* 63 SATC 295 at page 317 to 318 read with page 324.

⁶ The annual official determination of a taxpayer’s liability to pay an amount of tax, normally (but not in all cases) following the submission of a tax return to SARS; but excluding the determination of liability for customs or excise duties. The term “assessment” is defined in section 91 of the TAA read with the definition of “assessment” in section 1 thereof.

⁷ Section 92 of the TAA is limited by section 99, which lists the instances in which SARS may not issue an additional assessment. This will be discussed in more detail below.

The meaning of the word “*prejudice*” as it is used in section 92 of the TAA is not defined or explained in the legislation. However, the Explanatory Memorandum to the Tax Administration Bill⁸ provides that:

“A new simplified concept “prejudice to SARS or the fiscus” will be used as a basis for the issue of additional assessments, for example a previous understatement of income prejudices SARS or the fiscus in that the correct amount of tax was not assessed”.

Accordingly, “*prejudice*” can be understood, in the specific context of additional assessments, to refer to any amount which ought to have been, but was not, correctly assessed to tax. SARS officials are therefore legislatively mandated to review tax assessments and interrogate the tax position upon which these assessments are based, to ensure that it is correct.

SARS’ ability to discover and correct historical errors is premised on its ability to audit taxpayers, and to gather information in relation to historical tax submissions. SARS’ powers to audit and to request information from taxpayers are contained in sections 40 to 42, and section 46 of the TAA, respectively.⁹ These legislative powers are intended to provide SARS officials with the necessary tools to review and re-evaluate a taxpayer’s tax position with reference to the relevant supporting information, to ascertain whether there is an error in the original assessment that needs to be corrected (i.e. altered).

⁸ Available at <http://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2011-03%20-%20Memorandum%20Objects%20Tax%20Administration%20Bill%202011.pdf> (accessed on 17 July 2017) at page 191.

⁹ Further information-gathering and investigative powers are granted to SARS under sections 45 and sections 61 – 63 of the TAA. For purposes of this dissertation, only the audit and information-gathering powers under sections 40 – 42 and 46 are analyzed in detail, as the scope of this thesis is limited to the impact of audits and requests for relevant material on taxpayers’ rights to finality in the context of additional assessments.

These legislative powers (referred to hereafter as SARS' audit and information-gathering powers) serve an important function in tax administration. Both SARS and taxpayers may make *bona fide* errors in determining a taxpayer's annual tax liability. The interpretation of tax legislation is not a straightforward process, and genuine differences of opinion may arise between SARS and taxpayers in determining what is properly owed to SARS. Taxpayers may also deliberately understate their income (or overstate expenditures) to avoid paying their fair share of taxes. For these reasons, the TAA allows both SARS and taxpayers¹⁰ to alter and correct historical tax returns when an error is identified.

However, there must be a limit to the alteration of original assessments, to provide a reasonable measure of certainty and finality for taxpayers in their tax affairs. It is not in the public interest for disputes (including disputes about tax liability) to continue indefinitely,¹¹ partly because it becomes progressively more difficult for the parties to a dispute to produce complete and accurate evidence as time passes.

This is a particularly relevant consideration in the context of tax disputes, where taxpayers bear the burden of proof regarding the correctness (or incorrectness) of an assessment (in terms of section 102(1) of the TAA. It would be unfair for taxpayers to be compelled to defend a historical tax position in circumstances where there is insufficient evidence for either SARS or a court to come to a reasonable and defensible decision. It is similarly unfair for taxpayers (particularly, corporate taxpayers) to be expected to conduct their affairs in an environment where the degree and duration of legal and commercial uncertainty in the context of one's tax affairs makes it difficult to do business.

¹⁰ Taxpayers can request a reduced assessment in terms of section 93 of the TAA, and request SARS to withdraw an assessment in terms of section 98. Section 104 of the TAA empowers taxpayers to object to an assessment.

¹¹ *Supra* note 5.

In order to prevent these and other undesirable situations from arising, section 99 (read with section 100) of the TAA provides a reasonable and necessary limitation on SARS' ability to alter original assessments. This "right to finality" ensures that the legal and commercial uncertainty created by SARS' ability to alter original assessments is appropriately limited and balanced against considerations of fairness, and legal and commercial certainty.

Section 99(2) of the TAA provides that where SARS has issued an original assessment,¹² SARS may not issue an additional assessment (altering the tax position and tax liability set out in the original assessment) after a period of three years has expired, unless, *inter alia*, the correct amount of tax was not assessed due to fraud, misrepresentation, or a non-disclosure of material information by the taxpayer.¹³

In order to issue a valid additional assessment outside of this three-year limitation period, SARS must establish the factual existence of one of the abovementioned behaviours, as well as the causal nexus between the taxpayer's conduct and the fact that the correct amount of tax was not assessed, and must communicate this clearly to the taxpayer at the very latest, in the reasons given for the assessment.¹⁴

The limitation period contained in section 99 of the TAA does not apply to SARS' powers of audit and information-gathering. In terms of sections 40 – 42 and 46 of the TAA, SARS is empowered to review historical assessments and to request a wide scope and volume of information, over a (theoretically) unlimited time period. The unregulated and unfettered

¹² There are different criteria set out in section 99 of the TAA for instances of self-assessment or payment where no return is required to have been filed by the taxpayer. For purposes of this dissertation only the criteria applicable in instances where SARS issues an original assessment following the submission of a return by the taxpayer, as applicable to most corporate and individual taxpayers, is considered.

¹³ Section 99(2) also contains further instances in which SARS can issue an additional assessment outside of the limitation period, e.g. where SARS and the taxpayer agree in writing to the extension of the limitation period in respect of a particular year of assessment, or where it is necessary to give effect to a judgment.

¹⁴ *Supra* note 5.

use of these audit and information-gathering powers often creates precisely the sort of perpetual legal and commercial uncertainty that section 99 of the TAA seeks to prevent.

In the absence of clear policies requiring the appropriate and judicious application of SARS' audit and information-gathering powers outside of the limitation period, there is nothing to prevent SARS from investigating years of assessment for which witnesses, and evidence have become unavailable. In addition, there is no legislative or regulatory requirement for SARS to have identified a specific risk hypothesis¹⁵ or audit scope,¹⁶ and no formal limitation on the length of time in which investigations and audits must be completed.

In practice, audits can continue for several months, or even years, before completion. Since SARS is not required to engage with taxpayers regarding the specific scope and substance of the audit, taxpayers may experience the significant legal and commercial uncertainty of not knowing what the substance of the audit is, when the audit will be finalised, whether an additional assessment will be issued, or for what amount. During this period, taxpayers may be unable to prepare accurate financial reports. The resultant commercial and legal uncertainty may prevent taxpayers from pursuing valuable and

¹⁵ A risk hypothesis refers to the formulation and consideration of possible tax risks applicable to a specific taxpayer or group of taxpayers, based on the individual risk factors applicable to that taxpayer (or group), to limit the scope of audits and information-gathering exercises to relevant items. A risk hypothesis is typically determined using a risk differentiation framework. A risk differentiation framework (RDF) is a model used by revenue authorities to determine the intensity of the investigation and response required in a consistent and considered manner, with reference to pertinent risk factors. These factors may include the likelihood of taxpayers having adopted a contentious or aggressive tax position, identification of transactions which are likely to be premised on contentious or aggressive tax positions, the likelihood of taxpayers incorrectly (through error or omission) reporting their tax obligations, and analyzing industries and taxpayer groups which regularly apply complex and technical legislative provisions that have a higher chance of leading to errors. An RDF also considers the impact of potential non-compliance in targeting resources proportionately towards the areas of greatest harm. For an example of risk hypothesis determination and RDF, see <https://www.ato.gov.au/Business/Public-business-and-international/Transparency/How-we-assess-and-manage-risk/#Howweidentifyordetectrisks> (last accessed 17 July 2017).

¹⁶ The SARS Internal Audit Manual and the documents governing SARS risk identification procedures are not publicly available to taxpayers.

necessary commercial transactions, and from claiming significant refunds due to them,¹⁷ for an indefinite period. In summary, the inappropriate exercise of SARS' audit and information-gathering powers often leads to precisely the sort of indefinite legal and commercial uncertainty that the right to finality is intended to limit.

Auditing and information-gathering in the absence of a proper risk hypothesis may also lead to inefficiencies and unnecessary delays. For example, where a large volume of "typical" information is requested regardless of any correlation to a perceived risk, or where the impact of the perceived risk does not justify the approach taken by revenue officials from a time and cost perspective, both taxpayers and SARS may end up wasting a significant amount of time and financial resources on a frivolous enquiry.

Most importantly, the lack of any mandatory risk hypothesis or scoping requirement permits SARS officials to audit and request information in respect of historical periods on an entirely random (or "no-risk") basis, despite the fact that such "fishing expeditions" are neither permitted nor intended by the empowering legislation.¹⁸ In these circumstances, taxpayers may find themselves coerced into some form of payment or settlement with SARS as a result of their being unable to locate sufficient evidence required to prove that their tax position is correct. The impact of this kind of injustice on the procedural fairness of the tax system should not be underestimated.

In these circumstances, the exercise of SARS' audit and information-gathering powers compromises the protection intended to be given to honest and compliant taxpayers, in terms of section 99(2) of the TAA. This violation of the right to finality undermines the

¹⁷ Section 190(2) of the TAA authorizes SARS to withhold payment of a refund pending the completion of an audit, verification, inspection, or criminal investigation.

¹⁸ *Supra* note 8 at page 180; see also Mike Ziesmann "Gone Fishing: An Analysis of CRA Powers and Policies Relating to the Use of Fishing Expeditions in Information Gathering" University of Waterloo Master of Taxation dissertation submission available at https://uwaterloo.ca/master-of-taxation/sites/ca.master-of-taxation/files/uploads/files/gonefishing_ananalysisofcrapowersandpoliciesrelatingtotheuseoffishingexpedition sininform_000.pdf (last accessed 31 May 2017) at page 3.

relationship of trust between SARS and the tax base, and undermines the voluntary tax compliance which is necessary for SARS to carry out its mandate effectively and economically.

1.2 Research Question and Hypothesis

The problem statement which this dissertation seeks to answer is a question in two parts: firstly, whether the existing tax administration strikes an adequate balance between SARS' audit and information-gathering powers and taxpayers' right to finality; and secondly, what measures (if any) are necessary to achieve a more sustainable and economically viable balance between the execution of SARS' revenue-collection mandate and taxpayers' rights.

Chapter Two accordingly sets out a detailed analysis of the right to finality, reviewing the jurisprudence through which this principle has developed in South Africa, and how it fits into the broader framework of tax morale and voluntary compliance, in order to provide an understanding of the content of the right to finality and its importance in tax administration policy, as a tool for ensuring fairness in tax administration.

Chapter Three sets out a comprehensive analysis of SARS' audit and information-gathering powers, including consideration of the sanctions applicable to SARS in exercising these powers, and the remedies available to taxpayers in circumstances where the exercise of these powers breaches their rights (including the right to finality). Chapter Three concludes that outside of the possibility of invoking administrative justice principles against SARS, taxpayers lack adequate remedies to enforce their rights in circumstances where the exercise of SARS' audit and information-gathering powers violate those rights.

In Chapter Four, the administrative law principles governing SARS' audit and information-gathering powers are considered in detail. This includes an analysis of the applicable

constitutional and administrative law principles as codified in the Promotion of Administrative Justice Act¹⁹ (“PAJA”), and the common law doctrine of legality, to determine whether the decision to investigate or audit a taxpayer constitutes “administrative action” as defined in the PAJA, or is otherwise subject to the principles of administrative justice.

Chapter Four concludes that while the exercise of SARS’ audit and information-gathering powers may be subject to administrative justice principles and judicial review under certain specific circumstances, there is currently too much uncertainty for this to constitute an adequate remedy, particularly considering the nature and content of the prejudice typically experienced by taxpayers when the improper exercise of SARS’ audit and information-gathering powers breaches the right to finality.

Having answered the first part of the research question by concluding that the current administrative regime offers insufficient protection to taxpayers and the right to finality in the context of audit and information-gathering, this dissertation proceeds to evaluate SARS’ current approach to tax administration policy, in order to identify areas for improvement.

Chapter Five contains an analysis of SARS’ current policy and practice, including a review of the systemic issues recorded by various state bodies and commissions of enquiry in the context of audit and information-gathering. The conclusion is that SARS’ current policy and approach to auditing and gathering information from taxpayers results in various systemic issues within tax administration, and that an overhaul of SARS’ policies and practices is required in this area, including better and more independent oversight of how SARS implements policy and exercises its administrative powers, in practice.

¹⁹ No. 3 of 2000.

In order to formulate effective recommendations for this proposed policy and culture shift, Chapter Six examines comparative international administrative policy in the context of audit and information-gathering, from jurisdictions with high-functioning tax systems based on legislative structures that are similar to South Africa. The audit and information-gathering policy and practice of Australia and Canada were selected and reviewed in detail, together with certain international standards of tax administration benchmarked by the OECD. This evaluation of the successes and failures of the Australian and Canadian approach provides a basis from which to formulate guidelines for South Africa to consider, in pursuing its own administrative development.

In Chapter Seven, the standards of best practice which can be discerned from the international comparative analysis in Chapter Six are distilled into a series of concrete recommendations for improving South African administrative policy in the context of the right to finality, and how this is affected by the exercise of SARS' audit and information-gathering powers. This includes the protection of taxpayers' rights through the enactment of a taxpayers' charter or bill of rights; the formulation and implementation of prescriptive and transparent policies governing and promoting the lawful and ethical exercise of the revenue authority's audit and information-gathering powers; the incorporation of policies that promote taxpayer education; and the implementation of correlative employment-related objectives and incentives for revenue officials.

This also includes the introduction of additional oversight and accountability mechanisms for reviewing the implementation of tax administration policy in practice, like the creation of an inspector-general for taxation. Overall, the desired outcome is an institutional and cultural shift towards consultative and co-operative practices, emphasising open communication and transparency in taxpayer interactions. This is likely to increase

voluntary compliance, decrease enforcement costs and overall non-compliance, and facilitate a more synergistic relationship between SARS and taxpayers.

As Minister Pravin Gordhan (as he then was) stated in his commentary to the 2017 National Budget:

“South Africa’s democracy depends on the strength of its social compact. The payment of taxes is a legal obligation, but the effectiveness of the tax system relies to a large extent on the willingness of citizens to contribute. This cannot be taken for granted given rising public concerns about corruption, wastage of public funds and inefficiencies in service delivery. A marked decline in the culture of tax morality would have negative effects on the public finances and be exceptionally hard to reverse.”²⁰

SARS should prioritise real and perceived justice and fairness in all interactions with taxpayers, creating a culture of responsible tax paying, tax morality, and co-operation.²¹ This ultimately maximises revenue collections and decreases the need for formal (litigious) tax disputes, minimising needless expenditures of time and resources for both revenue authorities and taxpayers²².

²⁰ Chapter 4 of the 2017 National Budget Review available at <http://www.treasury.gov.za/documents/national%20budget/2017/review/Chapter%204.pdf> (last accessed 29 July) at page 38.

²¹ See *inter alia* Roula Hadjipaschalis “The effect of corruption on tax morality” available at <http://www.thesait.org.za/news/161234/The-effect-of-corruption-on-tax-morality.htm> (last accessed 29 July 2017); 2017 National Budget Speech available at <http://www.treasury.gov.za/documents/national%20budget/2017/speech/speech.pdf> (last accessed 29 July) at pages 11 and 13.

²² SARS audits and investigations are enquiries into the correctness of a tax position taken by the taxpayer. Audits and investigations thus inevitably require the taxpayer to provide documentation and information to SARS, in order to answer the questions posed and defend the taxpayer’s chosen tax position.

1.3 Research Objectives and Methodology

1.3.1 Research Objectives

The primary objectives of the research done in this dissertation are to:

- a. critically analyse the provisions of sections 40 – 42 and 46 of the TAA, and the manner in which SARS applies these sections in practice to interrogate and establish the capacity of SARS' audit and information-gathering powers to infringe on taxpayer's rights, specifically, the right to finality;
- b. understand the impact which the misuse or abuse of SARS' audit and information-gathering powers under sections 40 – 42 and 46 of the TAA have on the good management of the tax system and particularly, on voluntary tax compliance;
- c. evaluate and determined whether suitable checks and balances on SARS' audit and information-gathering powers currently exist (in the specific context of potential infringements of the right to finality); and
- d. with reference to international comparative legal and policy analysis and benchmarking, to provide recommendations sourced from global best practice on how to align the exercise of SARS' audit and information-gathering powers with taxpayers' rights to finality and the overall optimal management of this aspect of South African tax administration.

The analysis has been limited to SARS' powers to audit taxpayers and to request relevant material in terms of sections 40 – 42 and 46 of the TAA, and specifically excludes the further information-gathering and investigative powers granted to SARS in Chapter 5 of

the TAA (e.g. the power to inspect relevant material in person,²³ the power to conduct a field audit²⁴ and SARS' powers of search and seizure).²⁵

The rationale for this narrow focus is as follows: audit and information-gathering under sections 40 – 42 and 46 of the TAA are the most common methods employed by SARS to perform routine reviews of taxpayer disclosures, for the purpose of detecting errors which SARS is required to correct in terms of section 92 of the TAA (read with section 99). SARS' more invasive (and resource-intensive) Chapter 5 powers are generally reserved for instances where SARS has reason to suspect noncompliance or misconduct of a more serious nature.²⁶ To the extent that SARS' suspicions are well-founded in the exercise of search and seizure powers, the taxpayer(s) in question would typically be unable to avail themselves of the right to finality, which is only available to honest taxpayers.

Accordingly, audit and information-gathering under sections 40 – 42 and 46 likely constitutes the basis for the majority of the routine reviews conducted by SARS, and thus, the exercise of these powers likely accounts for a significant portion (if not the majority) of the overall number of additional assessments issued by SARS, which have the capacity to affect taxpayers' rights to finality.

^e Section 45 of the TAA.

²⁴ Section 48 of the TAA.

²⁵ Sections 61 – 63 of the TAA.

²⁶ See for example the Standing Committee on Finance ("SCOF") Briefing Note on Tax Administration Bill, 2011: Search without a warrant, where SCOF states, in the context of the promulgation of section 63 of the TAA, that "*stricter enforcement powers are required to target increasingly sophisticated and aggressive tax evaders and tax evasion schemes*" (<https://www.sars.gov.za/wp-content/uploads/Legal/RespDocs/LAPD-LPrep-Resp-2011-04-Response-Document-Briefing-to-SCoF-Search-without-warrant-Clause-63.pdf>) and the SARS media release dated 5 March 2018 where SARS states that "*...search and seizure operation by SARS is a criminal investigations tool and is not used to conduct lifestyle audits*" (available at <https://www.sars.gov.za/media-release/5-march-2018-sars-search-and-seizure-operations-are-strictly-governed/>)

1.3.2 Research methodology

The research upon which this dissertation is based is primarily a literature review i.e. an analysis and interpretation of the applicable provisions of the 1996 Constitution, the relevant domestic legislation and case law, relevant international jurisprudence, legislation, policy, and guidelines, as well as scholarly writing, publications, and research on relevant areas of tax administration, public law, and behavioural economics (in the context of voluntary tax compliance).

The aim of this dissertation is to critically analyse the existing position in South African legislation and practice to determine whether firstly, whether the existing tax administration strikes an adequate balance between SARS' audit and information-gathering powers and taxpayers' right to finality; and if not, what measures (if any) are necessary to achieve a more sustainable and economically viable balance between the execution of SARS' revenue-collection mandate and taxpayers' rights.

The research conducted for this dissertation therefore constitutes doctrinal, theoretical legal research.

The cut-off date for the research component of this dissertation was 30 September 2021.

1.3.3 Contribution to the existing knowledge and literature on this aspect of South African tax administration

This dissertation is, to my knowledge, the only literature on the subject of how the exercise of SARS' audit and information-gathering powers impacts on taxpayers' rights to finality and the practical effects of this impact on South African tax administration, including rates of voluntary tax compliance in South Africa.

This dissertation is also the first comprehensive analysis, to my knowledge, of foreign comparative guidelines with the aim of formulating recommendations for achieving a satisfactory balance between SARS' audit and information-gathering powers and the right to finality by examining the policies and approaches taken to this aspect of tax administration in comparative foreign jurisdictions.

2 CHAPTER TWO – THE TAXPAYER’S RIGHT TO FINALITY

2.1 The Right to finality

The right to finality is a legislated right (conferred by the provisions of the now repealed section 79 of the Act and section 99 read with section 100 of the TAA) which has developed in response to our courts’ recognition that commercial and legal uncertainty is undesirable and not in the public interest.²⁷

The principle of *res judicata* rests in part on the maxim “*interest reipublicae ut sit finis litium*”, that it is in the public interest for disputes to come to an end. This principle has been expressed in the context of tax disputes as a necessary balance between opposing components of the public interest.²⁸

It is certainly in the public interest that SARS collects the tax that is due to the *fiscus*, and SARS should, therefore, be empowered to review, and in appropriate instances, to amend assessments to ensure that taxpayers pay the correct amount of tax. However, it is also in the public interest that disputes do not continue indefinitely, and this is equally true for disputes regarding the correctness of an assessment issued by SARS.

It would not be equitable for SARS to be able to revise tax assessments indefinitely, particularly where such assessments are based on full, complete and honest disclosures. The Commissioner is, therefore, given a reasonable period of three years in which to review tax assessments, following which the assessments become final, unless it is apparent that the assessment was based on fraud, misrepresentation or the non-disclosure of material information by taxpayers.

²⁷ *Supra* note 5.

²⁸ *Ibid.*

In order to understand whether SARS' audit and information-gathering powers have the potential to infringe on the right to finality, it is necessary to understand, at the outset, what the right to finality encompasses, how this right has been defined and developed by the courts, and its function and importance in South African jurisprudence and tax administration.

2.2 The importance of the right to finality in tax administration

The Supreme Court of Appeal has found that a balance must be struck between the collection of revenue by the Commissioner, and the finalisation of disputes, both of which are in the public interest.²⁹

The importance of balancing the principle of finality with the more flexible requirements of fairness and justice is an issue that has been considered in some detail in most developed legal systems. The judiciary and similar adjudicative forums must inevitably address the tension that exists between the public interest requirement of finality, and the equally important requirement that decisions must be both fair and correct in law (in other words, the importance of a litigant being able to challenge judicial and administrative errors to avoid manifest injustice).

The concept of finality as an overarching legal principle has been considered and approved in a number of judicial decisions both in South Africa and in other jurisdictions,³⁰ particularly where statutory and common law rules and defences such as *res judicata* are concerned.³¹

Finality in adjudication and in administrative decision-making is considered a critical

²⁹ *Supra* note 5.

³⁰ See for example S Morris 'When is finality trumped? Kirk and the principle of finality' *Australian Public Law* 9 September 2016 (available at <https://auspublaw.org/2016/09/kirk-and-finality>; last accessed 24 April 2019) and the Australian judgments cited therein such as *Attwells v Jackson Lalic Lawyers (Pty) Ltd* (2016) 331 ALR 1 and *Kirk v Industrial Court of NSW* (2010) 239 CLR 531.

³¹ See for example the discussion of *res judicata* in *Daniel v President of the Republic of South Africa and Another* 2013 (11) BCLR 1241 (CC) and *Molaudzi v S* 2015 (2) SACR 341 (CC).

feature of the rule of law, as it allows for legal positions to be finally determined, and disputes to be absolutely resolved – one of the key features of any legal system.³²

Another issue informing the importance of the principle of finality is the inherent limitations of the civil justice system. The adversarial process of civil dispute resolution inevitably leaves room for judicial decisions to be influenced by outside factors, such as the availability of financial and legal resources, and the passage of time. These limitations become even more pronounced where one of the litigating parties is an organ of state.

In the context of tax disputes, institutions like SARS have access to significantly greater resources than the average taxpayer, and are not subject to the financial and commercial constraints that may influence a taxpayer's ability to challenge an unfavourable decision. In practice, it is not uncommon for taxpayers to accede to a tax assessment they do not agree with, simply because the financial or commercial cost of entering into a dispute with SARS outweighs the benefit of a successful result. If the right to finality was not enshrined in our tax legislation and in our civil jurisprudence, it is not inconceivable that the normal operation of the civil justice system would allow SARS to overrule taxpayers, even in situations where taxpayers' prospects of success are strong.

Finality in administrative decision-making (which includes the issuing of tax assessments) is governed by similar considerations. In *Khumalo v Member of the Executive Council for Education: KwaZulu Natal*³³ Skweyiya J held as follows (addressing the requirement for judicial review proceedings to be instituted timeously in the context of section 237 of the

³² Op cit note 30 at page 2.

³³ [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR (CC). See also *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC) at para 73.

Constitution,³⁴ which provides that all constitutional obligations must be performed diligently and without delay):

“Section 237 acknowledges the significance of timeous compliance with constitutional prescripts. It elevates expeditious and diligent compliance with constitutional duties to an obligation in itself. The principle is thus a requirement of legality. This requirement is based on sound judicial policy that includes an understanding of the strong public interest in both certainty and finality. People may base their actions on the assumption of the lawfulness of a particular decision and the undoing of the decision threatens a myriad of consequent actions. In addition, it is important to understand that the passage of a considerable length of time may weaken the ability of a court to assess an instance of unlawfulness on the facts. . . . Thus the very purpose of a court undertaking the review is potentially undermined where, at the cause of a lengthy delay, its ability to evaluate fully an allegation of illegality is impaired.”³⁵ (own emphasis)

Tax assessments have the power to affect a taxpayer’s financial situation significantly. This is particularly true for corporate taxpayers, where the integrity of tax items such as assessed losses, interest deductions, and deferred tax assets, and the amount of tax payable in a given period, all play a role in determining the company’s financial position. The exercise of SARS’ audit and information-gathering powers allows SARS to delay the payment of tax refunds which are due and owing to taxpayers until a “verification, inspection, audit, or criminal investigation” is complete,³⁶ potentially causing material financial hardship. In addition, third parties transacting with taxpayers may base material

³⁴ The Constitution of the Republic of South Africa, 1996.

³⁵ *Khumalo v Member of the Executive Council for Education: KwaZulu Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR (CC) at paras 46-8.

³⁶ Section 190(2) of the TAA, as amended by section 34 of the Tax Administration Laws Amendment Act No. 24 of 2020.

decisions on the taxpayer's statement of its financial position, and may be understandably unwilling to engage in circumstances of financial uncertainty, or to incur the additional costs of indemnification against future tax risks.

It is thus crucial that taxpayers are able to determine their tax and financial position with reasonable finality. If tax assessments did not become final after a certain period, taxpayers' financial positions would be impossible to determine with certainty, impeding all manner of commercial transactions, particularly in the context of due diligence exercises, and the taxpayer's ability to satisfy conditions precedent and avoid breaching finance covenants.

Another key principle underpinning finality is that it becomes progressively more difficult for litigants to produce proper evidence before a court (or other adjudicative body) as time passes. It therefore becomes progressively more difficult for the parties to a dispute to obtain a fair hearing, and for the adjudicator to reach a valid decision.

This is particularly important in the context of tax assessments, where the balance of power is skewed quite heavily in favour of SARS. Ordinarily, in any dispute, the onus of establishing a claim (i.e. the existence of a dispute) rests on the person instituting that claim. However, where SARS challenges the correctness of a tax assessment and calls into question the underlying tax position that the taxpayer relied upon to determine its tax liability, section 102(1) of the TAA places the burden on the taxpayer to demonstrate that its position is correct. While the lawfulness and constitutionality of the section 102(1) onus is not in dispute, the more onerous burden placed on taxpayers to defend the validity of their tax position considerably enhances the importance of fairness and due process in this context.

In the case of corporate taxpayers, the “institutional memory” of the organisation is entirely dependent on the integrity and accessibility of the company’s records, and the memories of the individual employees who have first-hand knowledge of the relevant facts and events. Corporate taxpayers are thus placed at a particular disadvantage when an assessment is questioned several years after it was issued. The cost and administrative burden of maintaining record archives may result in taxpayers legitimately choosing to destroy records after the mandatory statutory retention periods³⁷ have expired, and key witnesses may have left the taxpayer’s employ (and indeed, left the country) by the time SARS begins an audit. Accordingly, the prejudice inherent in the effluxion of time is enhanced for corporate taxpayers. As time passes from the date of an original assessment, the likelihood that corporate taxpayers will be unable to provide SARS with the facts and information necessary to successfully defend their position increases.

2.3 The relevance of the right to finality to tax morale and voluntary compliance

2.3.1 The Concept of Tax Morale

“Tax morality” and “tax morale” can be broadly defined as “*the attitude of a group or the whole population of taxpayers regarding the question of accomplishment or neglect of their tax duties... anchored in citizens’ tax mentality and in their consciousness to be citizens, which is the base of their inner acceptance of tax duties and acknowledgement of the sovereignty of the state*”.³⁸ Tax morale defines and determines how taxpayers perceive their relationship with the government (represented, in this case, by the revenue authority), the legitimacy of the tax system, and the fairness of the tax burden imposed upon them.

³⁷ As provided for in section 29, read with section 32 of the TAA.

³⁸Günter Schmolders *Das Irrationale in der öffentlichen Finanzwirtschaft* (1960) 97 – 98.

Various factors inform and determine this perception, or attitude. These include the perceived legitimacy of the government, the level of fairness experienced by taxpayers in their interactions with the revenue authority, and the manner in which public funds are spent. The level of tax morale (ranging from high to low, or alternatively, described as positive or negative) indicates how likely taxpayers are to voluntarily comply with their tax obligations, owing to a perceived moral obligation to contribute their “fair share” to society.³⁹

Tax morale is arguably a key determinant of tax compliance⁴⁰ and positive tax morale is one of the principal explanations for higher than expected rates of voluntary tax compliance.⁴¹ Similarly, negative tax morale is often identified as a contributing factor to unexpected shortfalls in revenue collections.⁴² In this regard, a significant amount of research has been conducted in the field of behavioural economics, in order to better understand the consistent failure of standard economic models to correctly predict the incidence of voluntary tax compliance.⁴³

From an economic risk perspective, tax compliance levels should correlate directly with the likelihood of detection and enforcement, and the harshness of the enforcement measures available to the revenue authority.⁴⁴ On the basis of the actual risk of non-compliance being detected (i.e. the rate at which taxpayers are audited), and the actual financial impact of tax penalties, tax compliance levels should be significantly lower than

³⁹ Ronald G. Cummings, Jorge Martinez-Vazquez, Michael McKee, Benno Torgler ‘Effects of Tax Morale on Tax Compliance: Experimental and Survey Evidence’ *Berkeley Program in Law and Economics Working Paper Series* at 2 (Available at <https://escholarship.org/uc/item/8sh2w9fp>; accessed 3 April 2018).

⁴⁰ Ken Devos ‘An Investigation Into Australian Personal Tax Evaders – Their Attitudes towards Compliance and the Penalties for Non-Compliance’ (2009) 19 *Revenue Law Journal* at 7.

⁴¹ Ramona-Anca Nichita and Larissa-Margareta Bătrâncea ‘The Implications Of Tax Morale On Tax Compliance Behavior’ (2012) 1(1) *University of Oradea Annals of Faculty of Economics* 739 at page 742.

⁴² Lars P. Feld and Bruno S. Frey ‘Trust breeds trust: How taxpayers are treated’ (2002) 3 *Economics of Governance* 87 at page 88.

⁴³ Op cit note 41 at page 742.

⁴⁴ James Alm and Beno Torgler ‘Do Ethics Matter? Tax Compliance and Morality’ (2011) 101(4) *Journal of Business Ethics* 635 at page 635.

actually measured.⁴⁵ Most economic models of taxpayer behaviour conclude that tax evasion should be considerably more prevalent than what is typically recorded and observed in practice.⁴⁶

The research undertaken to explain this anomaly consistently concludes that tax morale, or the degree of moral obligation which taxpayers feel towards paying their fair share of taxes, is one of the primary reasons for tax evasion being lower than predicted.⁴⁷

High levels of tax morale are, therefore, crucial for maintaining desirable levels of tax compliance.⁴⁸ In jurisdictions with positive tax morale, less emphasis needs to be placed on detecting and punishing non-compliance. The revenue authority is thus able to direct its resources toward that minority of taxpayers engaging in deliberately unlawful conduct (tax evasion), resulting in relatively low enforcement and collection costs for the majority of the tax base.

Negative tax morale reflects a socioeconomic environment where taxpayers consider the tax system to be unfair, and therefore, disregard the legitimacy of the revenue authority. In these jurisdictions, taxpayers are more likely to consider non-compliance with tax obligations to be morally justified, and may avoid or evade their tax obligations on a spectrum that encompasses both lawful and unlawful conduct. If negative tax morale becomes entrenched within the tax base, voluntary compliance decreases, and enforcement and collection costs for the revenue authority increase proportionately.

For most countries, tax revenue is the most significant source of funding for public expenditure. In South Africa, SARS' annual tax collection provides more than 90 percent

⁴⁵ *Ibid.*

⁴⁶ Op cit note 41 at page 742.

⁴⁷ Op cit note 41 at page 742.

⁴⁸ James Alm, Isabel Sanchez and Ana De Juan 'Economic and Non-Economic Factors in Tax Compliance' (1995) 48 *Kyklos* at page 3

of the revenue required by government to provide public services.⁴⁹ Understanding and finding ways to reduce tax non-compliance is thus of critical importance to the integrity of the national economy.⁵⁰

The cost of enforcing tax obligations and collecting unpaid taxes impacts on the total amount available for government spending, as well as the budget available to the revenue authority for its own projects and initiatives. When enforcement and collection costs are high, part of the revenue authority's allocated annual budget is inevitably diverted from other expenditures, such as the modernisation of systems and processes, or training and hiring specialist personnel. Accordingly, it is important for the revenue authority to collect tax in an efficient and cost-effective manner,⁵¹ minimising enforcement and collection costs wherever possible.⁵²

In addition, detecting and punishing taxpayer non-compliance (*inter alia*, through audit and information-gathering processes) can, in some instances, result in negative overall returns.⁵³ Current research demonstrates⁵⁴ that revenue collection and tax administration is most efficient in tax systems where the revenue authority can rely on positive voluntary compliance, compared to systems in which the revenue authority compels compliance

⁴⁹ SARS Strategic Plan for 2016/2017 – 2020/2021 available at <http://www.sars.gov.za/AllDocs/SARSEntDoclib/Ent/SARS-Strat-18%20-%20Strategic%20Plan%202016%202017%20to%202020%202021%20-%205%20September%202016.pdf> (last accessed 29 April 2018) at page 26.

⁵⁰ James Andreoni, Brian Erard and Jonathan Feinstein 'Tax Compliance' (1998) 36 *Journal of Economic Literature* 818.

⁵¹ Richard Bird and Eric Zolt 'Tax Policy in Emerging Countries' (2008) 26 *Environment and Planning C: Government and Policy* 73.

⁵² Lemessa Bayissa Gobena and Marius Van Dijke 'Fear and caring: Procedural justice, trust, and collective identification as antecedents of voluntary tax compliance' (2017) 62 *Journal of Economic Psychology* 1 at page 1; see also; and James Alm, Erich Kirchler and Stephan Muehlbacher 'Combining psychology and economics in the analysis of compliance: From enforcement to cooperation' (2012) 42(2) *Economic Analysis and Policy* 133.

⁵³ Op cit note 52.

⁵⁴ *Ibid.*

through extensive oversight, intervention, and sanctions.⁵⁵ Positive tax morale thus assists the revenue authority to conduct its functions as efficiently as possible. This is also in line with SARS' constitutional obligations to use state resources responsibly.⁵⁶

Positive tax morale also benefits society in more general terms, by ensuring that financial resources are available for the provision of high-quality public services. High levels of tax morale promote certainty in legislation and policy and provide a stable commercial environment (which is a prerequisite for sustainable economic growth).⁵⁷ Research demonstrates that an effective tax system plays an important role in national development, facilitating revenue generation, reducing economic inequality, and promoting good governance.⁵⁸ These are all highly desirable outcomes in South Africa, where levels of socioeconomic inequality are amongst the highest in the world (even prior to the devastating impact of the COVID-19 pandemic and National State of Disaster on the economy).

SARS' revenue collection mandate includes achieving compliance in the most efficient and cost-effective manner possible.⁵⁹ SARS is thus compelled to recognise the importance of providing services which aid taxpayer compliance, in a manner which minimises the administrative and compliance burden on the *fiscus* and taxpayers respectively.⁶⁰

However, SARS' existing policies and practices arguably fail to support the achievement of these outcomes in the context of audit and information-gathering, particularly in terms

⁵⁵ Lemessa Bayissa Gobena and Marius Van Dijke 'Fear and caring: Procedural justice, trust, and collective identification as antecedents of voluntary tax compliance' (2017) 62 *Journal of Economic Psychology* 1 at page 1 – 2.

⁵⁶ Section 195 of the Constitution provides that public bodies (including SARS) are obligated, *inter alia*, to use state resources economically.

⁵⁷ Op cit note 41 at page 742.

⁵⁸ Edward E. Marandu, Christian Mbekomize and Alexander N. Ifezue 'Determinants of Tax Compliance: A Review of Factors and Conceptualizations' (2015) 7 *International Journal of Economics and Finance* 207 at 208.

⁵⁹ Op cit note 49 at page 30.

⁶⁰ *Ibid.*

of how these powers potentially infringe upon the right to finality. To elaborate on this concern, the impact of the right to finality (and infringements of this right) on the factors which influence tax morale must be considered.

2.3.2 Finality and procedural fairness in tax administration

The first, and perhaps the most important, factor affecting tax morale is the fairness of the tax system. In the South African context, procedural fairness is defined in sections 3 and 4 of PAJA as having two critical components: affording affected persons an opportunity to make representations to the administrator prior to a final decision being reached, and ensuring that administrative decisions (and the decision-making process) are free from any impartiality, bias, or prejudice.

The majority of taxpayers rate fairness as one of the most important facets of the tax system,⁶¹ and this is unsurprising in the South African context, given that fairness is a fundamental constitutional value underpinning the Bill of Rights. Notwithstanding those aspects which taxpayers assess subjectively (such as the tax rate, the complexity of tax laws and relative ease of compliance with tax obligations, and the efficacy of government expenditures), a high perception of fairness amongst taxpayers typically predicts increased levels of voluntary tax compliance,⁶² and *vice versa*.⁶³

There are a number of factors influencing taxpayers' perceptions of procedural fairness. These include the consistent and proportionate application of revenue authority's powers,

⁶¹ Op cit note 58 at page 12; see also: the Davis Tax Committee Report on Macro Analysis of the Tax System and Inclusive Growth in South Africa (2016) at *inter alia* pages 9 and 6 (available at <https://www.taxcom.org.za/docs/20160421%20DTC%20Macro%20Analysis%20Final%20Report%20-%20Full%20Report.pdf>)

⁶² Larissa-Margareta Bătrâncea, Ramona-Anca Nichita and Ioan Bătrâncea 'Understanding the Determinants of Tax Compliance Behaviour as a prerequisite for increasing public levies' (2012) 12, Issue 1(15), *The USV Annals of Economics and Public Administration* 201

⁶³ Grant Richardson 'The Impact of Tax Fairness Dimensions on Tax Compliance Behaviour in an Asian Jurisdiction: the Case of Hong Kong' (2006) 32 *International Tax Journal* 29 at page 29.

the use of accurate and complete information for decision-making, transparency in the decision-making process, and ensuring that affected persons are afforded an opportunity to make representations regarding the revenue authority's decisions.⁶⁴

While a greater likelihood of having tax submissions audited has been found to increase individual taxpayer compliance, the threat of detection is only effective up to a certain point. Once this threshold is exceeded, an increased likelihood of detection (through audit and information-gathering processes) results in taxpayers disengaging from, and even beginning to resist the tax system.⁶⁵ An unnecessarily harsh approach to auditing and information-gathering may, therefore, backfire by creating an environment in which taxpayers feel justified in avoiding their tax obligations, resulting in lower tax morale and reduced voluntary compliance over time.⁶⁶ Effective policies to counteract tax evasion must thus address the perceived and actual fairness of taxpayer engagements and account for the impact these interactions have on the behavioural aspects of voluntary tax compliance.⁶⁷

The procedural fairness of the audit and information-gathering process is also negatively impacted by randomized approaches to risk assessment and mitigation. As will be set out in more detail in the following chapter, section 40 of the TAA currently authorises SARS to select taxpayers for audit on a completely random basis, and SARS officials are not required to disclose a specific risk hypothesis or audit scope as a basis for the decision to select a taxpayer for audit. In other jurisdictions, such as Australia, this approach has proved to be counter-intuitive.⁶⁸

⁶⁴ Op cit note 55 at page 2.

⁶⁵ Larissa-Margareta Bătrâncea, Ramona-Anca Nichita and Ioan Bătrâncea 'Understanding the Determinants of Tax Compliance Behaviour as a prerequisite for increasing public levies' (2012) 12, Issue 1(15), *The USV Annals of Economics and Public Administration* 201 at page 205 – 207.

⁶⁶ Op cit note 39.

⁶⁷ Op cit note 39.

⁶⁸ Op cit note 65 at page 205 – 206.

Finally, the right to finality is a crucial aspect of procedural fairness in tax administration, in the context of auditing and information-gathering. The right to finality provides a counter-balance to SARS' considerable powers by limiting the period in which SARS can alter original assessments, thereby limiting the period of legal and commercial uncertainty which honest taxpayers are exposed to. As will be discussed in more detail in the following chapters, the content of SARS' legislative audit and information-gathering powers and the manner in which SARS exercises these powers in practice have the potential to severely impact, and even to negate the right to finality, placing the taxpayer at a considerable disadvantage, particularly in respect of historical years of assessment outside of the limitation period.

Where taxpayers are unable to access the information required to defend a tax position due to the effluxion of time, they may be unable to exercise their right to respond to preliminary audit findings or to defend against an additional assessment in circumstances where they no longer have access to the relevant historical information. The perceived fairness of the audit and information-gathering process is also negatively influenced when SARS conducts audits and verification processes inefficiently, over an unreasonably long period of time, as a protracted audit creates the same type of legal and commercial uncertainty that the right to finality is intended to limit.

Procedural fairness typically leads to positive attitudes towards the tax authority and cooperative responses from the tax base, and has been shown to predict voluntary compliance with tax laws.⁶⁹ The adoption of policies which promote and enhance the fairness of the tax administration system is one of the most important tools that tax authorities have at their disposal to promote voluntary tax compliance.⁷⁰

⁶⁹ Op cit note 55 at page 2 – 3.

⁷⁰ *Ibid* at page 1.

In terms of fairness heuristic theory, individuals with low levels of trust in public authorities (i.e. citizens who particularly fear exploitation) will respond more strongly to procedural fairness than individuals who have high levels of trust in the revenue authority.⁷¹ In this way, a procedurally fair system is also an ideal resource to address historical corruption or mismanagement that has damaged the relationship between taxpayers and the revenue authority, by reassuring taxpayers, over time, that the authorities can be trusted not to abuse their powers.⁷² In the South African context, procedural fairness is thus particularly important.

2.3.3 The interface between taxpayers and the revenue authority

Another factor influencing tax morale is the nature of taxpayers' interactions with the revenue authority. In any given tax administration, tax morale exists on a continuum between an antagonistic climate and a synergistic climate. In an antagonistic climate, interactions between taxpayers and the tax authorities are mainly adversarial in nature,⁷³ whereas in a synergistic climate, interactions between the revenue authority and taxpayers are generally co-operative and collaborative.⁷⁴

The ethos of the revenue authority within an antagonistic climate can be characterised as a "cops and robbers" approach, or the institutional belief that taxpayers generally seek to evade their tax obligations wherever possible. In an antagonistic climate, the revenue authority tends to take a harsh approach toward administration. As a result, taxpayers tend to feel unjustly persecuted and justified in avoiding, or even evading, their tax obligations.⁷⁵ Voluntary compliance levels are likely to be low, and individuals are more likely to engage

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ Erich Kirchler, Erik Hoelzl and Ingrid Wahl 'Enforced versus voluntary tax compliance: The "slippery slope" framework' (2008) 29 *Journal of Economic Psychology* 210 at page 211.

⁷⁴ *Ibid.*

⁷⁵ Op cit note 73.

in and to rationalise tax evasion by weighing up the potential costs and benefits of evading tax.⁷⁶

Compliance is, therefore, mainly determined by the ability of the revenue authority to detect and enforce non-compliance.⁷⁷ This, in turn, requires the revenue authority to spend more time and resources on the detection and punishment of non-compliance, (which is likely to be pervasive), with less net revenue being collected and less resources being available to the revenue authority to combat tax avoidance and evasion in the long term.

A synergistic climate is characterised by a service-oriented relationship between revenue authorities and taxpayers, where taxpayers and the revenue authority work together to enhance society collectively.⁷⁸ In a synergistic climate, voluntary compliance tends to be high, and taxpayers are more likely to comply due to a sense of moral obligation, rather than weighing up the potential benefits of evading tax and complying only when the risk outweighs the potential reward of evasion.⁷⁹ Voluntary compliance is predominantly influenced by the level of trust which taxpayers have in the revenue authority,⁸⁰ resulting in lower enforcement costs and more resources being directed towards maximising the overall efficiency of the tax administration, enhancing net revenue collections.

The power of the revenue authority in both the antagonistic and synergistic climate influences, and is influenced by, levels of trust and voluntary tax compliance amongst taxpayers.⁸¹ If trust and perceived legitimacy are high, the revenue authority's power to elicit compliance increases, as taxpayers become more responsive. If trust and perceived

⁷⁶ *Ibid.*

⁷⁷ Op cit note 73 at page 210 – 211.

⁷⁸ Op cit note 73 at page 211.

⁷⁹ *Ibid.*

⁸⁰ *Ibid* at page 213.

⁸¹ Op cit note 73 at page 214.

legitimacy are low, taxpayers are increasingly likely to comply only in circumstances where they believe their non-compliance will be detected and punished.

In circumstances where taxpayers believe that they will be treated as dishonest no matter how much effort they put into complying with their obligations, they are less likely to voluntarily comply with their tax obligations.⁸² Taxpayers who are subjected to the same level of scrutiny and suspicion in audit and information-gathering processes and taxpayers who incur the same financial, administrative and legal costs in engaging with the revenue authority regardless of whether they are generally compliant or non-compliant, are less likely to trust the revenue authority or to perceive that the tax system is fair, and consequentially, are less likely to maintain high standards of voluntary compliance.⁸³

If revenue authorities adopt an authoritarian approach and there is an attrition of trust, taxpayers are likely to interpret the revenue authority's decisions and actions with growing levels of distrust and suspicion.⁸⁴ A routine audit is, therefore, experienced as an unjustifiably persecutorial action on the part of the revenue authority, which creates the perception amongst taxpayers that undermining and frustrating the audit and information-gathering process is a legitimate and justified response.⁸⁵ Tax authorities may try to address this type of conduct by increasing verification and information-gathering processes, and imposing heavier sanctions, but this only reinforces taxpayers' perceptions of the inherent unfairness of the system, which further reduces trust and co-operation.⁸⁶

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

2.3.4 Administrative compliance burden imposed on taxpayers

A further factor which has been demonstrated to affect tax morale is the complexity of the legislative framework and the tax administration system. If the law is complex and difficult to understand and apply with certainty, errors will increase, and taxpayers may be unwilling to spend the time and effort necessary to properly engage with and execute their obligations.⁸⁷ The same is true of tax administrations where taxpayers cannot easily engage with the revenue authority if they have questions about the correct process to follow, or are dissatisfied with a decision.⁸⁸ Studies demonstrate a positive correlation between individual levels of education, ability to comprehend and apply tax legislation, and increased tax compliance.⁸⁹

Many tax administrations (including, but not limited to, Australia, France, New Zealand, and the USA) have undertaken specific measures to simplify tax legislation and to make the system more accessible and comprehensible to individuals⁹⁰ by publishing comprehensive taxpayers' charters or bills of rights, and by making the revenue authority's internal policies and strategic approach to each stage in the information-gathering and investigation process available to the public. South Africa has not yet adopted this approach, as will be discussed in more detail in Chapter Five below.

2.3.5 Legitimate government and a stable economy

A fourth factor affecting tax morale is the relationship between taxpayers, the government, and the stability of the economy. If taxpayers believe that they have some influence over the objectives on which tax funds are spent by the government (i.e. that there is some

⁸⁷ Op cit note 65 at page 203.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

democratic determination of the “public good”), they are more likely to comply with their tax obligations; and if taxpayers believe that their interests are properly represented by political institutions and they receive a desirable mix of public goods, their willingness to pay taxes increases.⁹¹

The perceived quality of political institutions may also affect taxpayers’ willingness to comply with their tax obligations.⁹² In particular, taxpayers have a vested interest in the legitimate use of tax revenue by the state, to provide public services. Tax compliance is enhanced when individuals view the paying of taxes as a fair fiscal exchange. The perception that decisions determining the services provided are transparent and fair is particularly likely to enhance voluntary compliance.⁹³

Research conducted in developed economies indicates that tax morale improves (and voluntary compliance increases) when public resources are spent more efficiently.⁹⁴ A similar study comparing tax morale in South Africa and Botswana recorded that the perception that the government is using tax revenues for socially desirable purposes has a positive effect on tax compliance.⁹⁵ Conversely, in countries with high levels of corruption, where citizens have little trust in state institutions, taxpayers are less likely to comply with their tax obligations.⁹⁶

In terms of the above findings, it is evident that South Africa finds itself in a precarious position regarding tax morale. Factors outside of SARS’ control, such as a weakening economy, political corruption and state capture, and the mismanagement of public

⁹¹ Op cit note 39 at page 11.

⁹² Op cit note 40 at page 9 – 10; see also Ronald D. Picur and Ahmed Riahi-Belkaoui ‘The impact of bureaucracy, corruption and tax compliance’ (2006) 5(2) *Review of Accounting and Finance* 174.

⁹³ Op cit note 39 at page 7.

⁹⁴ Guglielmo Barone and Sauro Mocetti ‘Tax morale and public spending inefficiency’ (2011) 18 *International Tax and Public Finance* 724.

⁹⁵ Op cit note 39 at page 7.

⁹⁶ *Ibid.*

finances are likely to negatively impact tax morale and voluntary compliance.⁹⁷ The 2018 National Treasury presentation to the Nugent Commission⁹⁸ highlights that the perceived fairness of the tax system (in terms of both policy and administration) is an important determinant of tax morale, and that the base assumption underlying tax policy should be that the overwhelming majority of South Africans are honest about their self-declared income and expenses.⁹⁹

Treasury notes in this presentation that the declining reputation of SARS and its perceived failure to act against tax transgressions in recent years has undermined tax morality, and that there have been increasing calls in the media for a “tax revolt”.¹⁰⁰ Treasury concludes that the recent trend of revenue shortfalls over the 2015 to 2018 period cannot be exclusively attributed to the economic cycle, confirming that the “tax gap” is likely the result of inefficiencies at SARS, and declining tax morale.¹⁰¹

Research on the connection between tax morale and voluntary tax compliance consistently reports a positive correlation. Countries with positive tax morale will generally experience a high degree of voluntary tax compliance, and a relatively small shadow economy (compared to the size of the legitimate economy),¹⁰² and *vice versa*.

As stated above, some of the factors informing tax morale in South Africa, such as the prevailing economic and political conditions, are outside of SARS’ control. It is therefore

⁹⁷ Op cit note 49 at page 35.

⁹⁸ ‘Tax policy impacts of tax administration: Input for Commission of Inquiry into Tax Administration and Governance by SARS’ presentation on behalf of the National Treasury by Dondo Mogajane, Ismail Momoniat, Yanga Mputa, and Chris Axelson (29 August 2018) available at http://www.inqcomm.co.za/Docs/affi/National%20Treasury%20Input%20for%20Commission%20of%20Inquiry%20into%20Tax%20Administration%20and%20Governance%20by%20SARS_%20Tax%20policy%20impacts%20of%20tax%20administration%2029%20Aug%202018.pdf (accessed 21 April 2020).

⁹⁹ *Ibid* at page 43.

¹⁰⁰ Op cit note 98 at page 45.

¹⁰¹ *Ibid* at page 58.

¹⁰² Op cit note 41 at page 742 – 743.

critically important for SARS to manage and improve on the aspects of tax morale which it can control as proactively as possible, to enhance voluntary compliance.

In the context of the audit and information-gathering process, SARS should be mindful of how its institutional culture, policies, and practices impact on taxpayers' rights, particularly the right to finality, and how this, in turn, impacts on taxpayers' perceptions of the quality of the service which they experience, the ease of interacting with SARS and complying with their tax obligations, and the procedural fairness of the tax system. As will be illustrated with reference to Chapter Three, the manner in which SARS currently exercises its audit and information-gathering powers has the potential to seriously undermine tax morale and voluntary compliance in South Africa.

2.4 Legislative Provisions codifying the right to finality

The right to finality is contained in the now repealed section 79 of the Act, and section 99 of the TAA.¹⁰³ Section 79 read as follows:

“if at any time the Commissioner is satisfied –

- (a) that any amount which was subject to tax and should have been assessed to tax under this Act has not been assessed to tax; or*
- (b) that any amount of tax which was chargeable and should have been assessed under this Act was not assessed; or*
- (c) that, as respects any tax which is chargeable and has become payable under this Act otherwise than under an assessment, such tax has not been paid in*

¹⁰³ The TAA came into operation in respect of assessments issued on or after 1 October 2012. Accordingly, section 79 of the Act will still apply in respect of original assessments issued prior to this date. See further B Croome and L Olivier *Tax Administration 2ed* (2010) Juta & Co Ltd First Floor Sunclare Building, 21 Dreyer Street, Claremont South Africa at page 247.

respect of any amount upon which such tax is chargeable or an amount is owing in respect of such tax,

he shall raise an assessment or assessments in respect of the said amounts, notwithstanding that an assessment or assessments may have been made...: Provided that the Commissioner shall not raise an assessment under this subsection –

- (i) after the expiration of three years from the date of assessment (if any)... unless –*
 - (aa) the Commissioner is satisfied that the fact that the amount which should have been assessed to tax was not so assessed or the fact that the full amount of tax chargeable was not assessed was due to fraud or misrepresentation or non-disclosure of material facts; or*
 - (bb) the Commissioner and the taxpayer otherwise agree prior to the expiry of that three year period.”*

Section 99 of the TAA states:

Period of limitations for issuance of assessments.—(1) *An assessment may not be made in terms of this Chapter—*

- (a) three years after the date of assessment of an original assessment by SARS;*
- (b) in the case of self-assessment for which a return is required, five years after the date of assessment of an original assessment—*
 - (i) by way of self-assessment by the taxpayer; or*
 - (ii) if no return is received, by SARS;*
- (c) in the case of a self-assessment for which no return is required, after the expiration of five years from the—*

(i) date of the last payment of the tax for the tax period; or

(ii) effective date, if no payment was made in respect of the tax for the tax period;

(d) in the case of—

(i) an additional assessment if the—

(aa) amount which should have been assessed to tax under the preceding assessment was, in accordance with the practice generally prevailing at the date of the preceding assessment, not assessed to tax; or

(bb) full amount of tax which should have been assessed under the preceding assessment was, in accordance with the practice, not assessed;

(ii) a reduced assessment, if the preceding assessment was made in accordance with the practice generally prevailing at the date of that assessment; or

(iii) a tax for which no return is required, if the payment was made in accordance with the practice generally prevailing at the date of that payment; or

(e) in respect of a dispute that has been resolved under Chapter 9.

(2) Subsection (1) does not apply to the extent that—

(a) in the case of assessment by SARS, the fact that the full amount of tax chargeable was not assessed, was due to—

(i) fraud;

(ii) misrepresentation; or

(iii) non-disclosure of material facts...

(c) SARS and the taxpayer so agree prior to the expiry of the limitations period;

(d) it is necessary to give effect to—

(i) the resolution of a dispute under Chapter 9;

(ii) a judgment pursuant to an appeal under Part E of Chapter 9 and there is no right of further appeal; or

(iii) an assessment referred to in section 93 (1) (d) if SARS becomes aware of the error referred to in that subsection before expiry of the period for the assessment under subsection (1) or...

(3) The Commissioner may, by prior notice of at least 30 days to the taxpayer, extend a period under subsection (1) or an extended period under this section, before the expiry thereof, by a period approximate to a delay arising from:

(a) failure by a taxpayer to provide all the relevant material requested within the period under section 46(1) or the extended period under section 46(5); or

(b) resolving an information entitlement dispute, including legal proceedings.

(4) The Commissioner may, by prior notice of at least 60 days to the taxpayer, extend a period under subsection (1), before the expiry thereof, by three years in the case of an assessment by SARS or two years in the case of self-assessment, where an audit or investigation under Chapter 5 relates to—

(i) the application of the doctrine of substance over form;

- (ii) *the application of Part IIA of Chapter III of the Income Tax Act, section 73 of the Value-Added Tax Act or any other general anti-avoidance provision under a tax Act;*
- (iii) *the taxation of hybrid entities or hybrid instruments; or*
- (iv) *section 31 of the Income Tax Act.*

Section 79(1) of the Act was originally introduced in response to the decision in *Miller v Commissioner for Inland Revenue (SWA)*¹⁰⁴ where the Appellate Division held that:

*“...it may perhaps, be pointed out that the 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.”*¹⁰⁵

In *Commissioner of Inland Revenue v Hilewitz*,¹⁰⁶ Wunsh J dealt with the rationale for the introduction of section 79(1) and referring to the *Miller*¹⁰⁷ judgment, stated that:

*“...not only would a taxpayer have escaped from assessment where the Commissioner made a mistake but he would have done so also where a Receiver of Revenue or more junior official allowed an objection and the Commissioner wanted to reverse his decision or where, for example, a decision of the appellate division or some other court, given after an objection had been allowed, were to have shown that it should not have been allowed.”*¹⁰⁸

¹⁰⁴ 1952 (1) SA 474 (A).

¹⁰⁵ *Supra* note 104 at 483B – C.

¹⁰⁶ 1998 SATC 86.

¹⁰⁷ *Supra* note 104.

¹⁰⁸ *Supra* note 106 at 101.

The right to finality so established by section 79 of the Act has been further interpreted, developed, and applied by the courts in several decisions over the years

2.4.1 Interpretation of the right to finality by the South African courts

In the case of *Natal Estates Limited v Secretary for Inland Revenue*¹⁰⁹ the Appellate Division (as it then was) considered the right to finality in terms of section 79 of the Act. The principal issue before the court was whether the proceeds from the sale of certain portions of land owned by the appellant were of a capital or revenue nature.¹¹⁰ The Secretary had initially assessed the proceeds as capital in an assessment issued in February 1967, but included the proceeds as income in an additional assessment issued in April 1972.¹¹¹

The appellant lodged an objection to the additional assessment in terms of section 81 of the Act (now repealed) against the merits of the assessment and also on the grounds that section 79(1) of the Act precluded the Secretary from issuing an additional assessment more than three years after the date of the original assessment.¹¹² The Secretary dismissed the objection¹¹³ and the appellant appealed this decision, which appeal was upheld by the Court *a quo*.¹¹⁴

On appeal, counsel for the Secretary argued that section 79 of the Act conferred an administrative discretion on the Secretary, to which there could be no right of appeal in the absence of contrary indications.¹¹⁵

On this point, Holmes JA said the following:

¹⁰⁹ 1975 4 All SA 375 (A).

¹¹⁰ *Ibid* at page 385.

¹¹¹ Note 109 *supra* at page 395.

¹¹² *Ibid*.

¹¹³ *Ibid*.

¹¹⁴ Note 109 *supra* at page 396.

¹¹⁵ *Ibid*.

“I shall assume, without deciding, in favour of the respondent, that, once he is satisfied that an amount was not previously assessed because of fraud or misrepresentation or non-disclosure of material facts, his decision is unappealable. However, there must be some evidence before the Special Court that he was so satisfied, otherwise there is no displacement of the immunity conferred on the taxpayer by the proviso to s 79(1) and the opening words of para (a) thereof. A convenient time and place for indicating the Secretarial satisfaction would be in the additional assessment itself, or in a covering letter; or in the notice which the respondent is required by s 81(4) to send to the taxpayer, if the latter's objection to the assessment is disallowed. And it should state the particular conduct of the taxpayer to which it relates, i.e. whether fraud or misrepresentation or non-disclosure of material facts.”¹¹⁶

Holmes JA went on to state that the onus of establishing that the Secretary was satisfied that there had been fraud, misrepresentation or non-disclosure of material facts (hereinafter referred to as “impugned conduct”) on the part of the taxpayer rests on the Secretary himself. In this regard, Holmes JA held that the Secretary’s satisfaction in respect of the impugned conduct *“is a substantive and far-reaching determination, which should be communicated to the taxpayer, if not before, then at the very latest at, the hearing in the Special Court.”*

The court held that the taxpayer should be informed of the determination that the Secretary is satisfied plainly, and with sufficient specificity to enable the taxpayer to clearly identify both the Secretary’s certain satisfaction, and the impugned conduct to which it relates.¹¹⁷

The court held that the taxpayer particularly “...should not be left to infer from the mere

¹¹⁶ *Supra* note 109 at page 396.

¹¹⁷ *Supra* note 109 at page 397.

receipt of an additional assessment, after the expiration of three years from the date of the original assessment, that the Secretary, after applying his mind to the matter, is satisfied that the taxpayer's fraud or misrepresentation or material non-disclosure caused a non-assessment. ...the taxpayer is entitled to know whether fraudulent conduct—a grave and ugly imputation—is being held against him.”¹¹⁸

The judgment in *Natal Estates*¹¹⁹ establishes the principle that in order to lawfully issue an assessment after the expiry of the limitation period under section 79 of the Act, the revenue authority must clearly demonstrate both its satisfaction that the relevant jurisdictional facts are present (i.e. that the taxpayer has committed fraud, misrepresentation or failed to disclose a material fact), and a clear causal link between the taxpayer's conduct and the failure or inability of the revenue authority to assess the correct amount of tax.

This judgment establishes the right to finality in our law, and also clarifies the distinction made between honest and dishonest taxpayers in the context of the right to finality, i.e. that honest taxpayers are entitled to certainty after the expiry of the limitation period, whereas dishonest taxpayers cannot use the limitation period to prevent SARS from discovering and rectifying the prejudice caused to the *fiscus* by their conduct. The constitutionality of section 79 of the Act was analysed in the case of *Carlson Investments Share Block (Pty) Limited v Commissioner for the South African Revenue Services*.¹²⁰ In this case, the taxpayer appealed against an additional assessment issued by the Commissioner during the three-year limitation period, on the basis that once an objection had been lodged by the taxpayer and allowed, such decision was final and could not be altered by a subsequent additional assessment. The taxpayer argued that section 79(1) of

¹¹⁸ *Supra* note 109.

¹¹⁹ *Ibid.*

¹²⁰ 2002 (5) BCLR 521 (W), hereafter “*Carlson Investments*”.

the Act was unconstitutional insofar as it deliberately set out to deprive the taxpayer of the right to finality, in contravention of the fundamental constitutional right to lawful and procedurally fair administrative action.¹²¹

In this instance, the court upheld and approved of the application of the doctrine of *functus officio* (the general principle that administrative decisions should be final and not subject to change) to administrative decisions taken by SARS. However, the court also correctly upheld the administrative law principle (expressed in various cases quoted in the judgment) that legislation may make provision for the amendment or reversal of an erroneous or improper administrative decision affecting the rights of a person, to enable both parties to rectify mistakes, particularly where it would be in the public interest to do so.¹²²

The court considered the comparable provisions contained in the income tax legislation of a number of foreign jurisdictions,¹²³ and concluded that it is not uncommon for income tax legislation to provide for the issuing of additional tax assessments where it can be shown that the original assessment was flawed or erroneously issued and requires correction.

The court emphasised that revenue collection powers ought to be exercised in the public interest.¹²⁴ It was submitted by the Commissioner's counsel that in the South African context, it is clear that the obligation and concomitant power conferred on the Commissioner to amend assessments where certain jurisdictional facts are found to be present is limited by the three year period (provided that the assessment being amended is not tainted by fraud or dishonesty).¹²⁵

¹²¹ *Supra* note 120.

¹²² *Ibid* at 530 to 536.

¹²³ *Ibid* at 536 to 539.

¹²⁴ *Ibid* at 539.

¹²⁵ *Supra* note 120 at page 540.

The court concluded that section 79(1) of the Act places sufficient limitation on the power of the Commissioner to amend assessments to prevent the arbitrary exercise of power to protect taxpayers' right to certainty, and that additional administrative law safeguards exist insofar as an unlawful or unfair exercise of the Commissioner's powers would be subject to review. In such an instance, the taxpayer would have recourse to the courts, as a statute cannot render the unlawful exercise of administrative power lawful, even if it purports to convey the necessary authority to do so.¹²⁶

The court held further that the three-year limitation period affords the Commissioner a reasonable and necessary period in which to revisit assessments if errors are discovered.¹²⁷ This period is necessary for the effective functioning of the tax system, particularly in light of the limitations cited by the Commissioner's counsel in argument (namely, limited resources, staff shortages, a lack of skills, the inevitability of errors on the part of officials auditing taxpayers, and the difficulty of collecting revenue from a relatively small tax base). The court held that insofar as the taxpayer is expressly aware of the three-year limitation period, he or she cannot claim to have any legitimate expectation of absolute finality within this period.¹²⁸

The court held that, taking all facts and circumstances into account, it was neither unfair nor unlawful for the Commissioner to re-assess the taxpayer within the three-year limitation period.¹²⁹ The statutory authority to re-assess within the limitation period is necessary to facilitate the rectification of mistakes of fact and law, and is in the national interest. The court held that section 79(1) of the Act does not sanction arbitrary behaviour on the part of the Commissioner, and comparable legislation is included in the statutes of many

¹²⁶ *Supra* note 120 at page 541.

¹²⁷ *Supra* note 120 at page 548.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

comparable legal systems.¹³⁰ Accordingly, it was held that section 79(1) was not unconstitutional.

This is a High Court decision, and therefore, potentially subject to being subsequently overruled by the Constitutional Court, which is the highest court in constitutional matters.¹³¹ However, in the absence of any contradictory judgments to date, this judgment confirms the constitutionality of the limitation period and effectively entrenches the right to finality in South African law.

In the Supreme Court of Appeal (“SCA”) decision in *Commissioner for the South African Revenue Service v Brummeria Renaissance (Pty) Ltd and Others*¹³² the court considered the purpose of section 79(1) of the Act (read with section 81(5) of the Act,¹³³ as it read at the time). In this case, the Commissioner had raised an additional assessment within the three-year limitation period, and then raised further additional assessments (subsequent to the allowance of an objection lodged by the taxpayer in response to the first additional assessment) which fell outside of the limitation period.

Counsel for the Commissioner contended, *inter alia*, that the Commissioner was entitled to revise the assessment subsequent to the receipt of a notice of objection in terms of section 81(4) of the Act, and that the three year period contemplated in section 79(1) ran from the date of the first additional assessment, and not from the date of the original assessment as averred by the taxpayer.

¹³⁰ *Supra* note 126.

¹³¹ Section 167(3) of the Constitution.

¹³² *Commissioner for the South African Revenue Service v Brummeria Renaissance (Pty) Ltd and Others* 69 SATC 205.

¹³³ Section 81(5) of the Act (now repealed) provided “*where no objections are made to any assessment, or where objections have been allowed in full or withdrawn, such assessment or altered assessment, as the case may be, shall be final and conclusive.*”

The court held that the purpose of section 79(1) of the Act is to achieve finality, and that to uphold either of the Commissioner's contentions "*would undermine that purpose*".¹³⁴ The court held that: "*it is obviously in the public interest that the Commissioner should collect tax that is payable by a taxpayer. But it is also in the public interest that disputes should come to an end... it would be unfair to an honest taxpayer if the Commissioner were to be allowed to continue to change the basis upon which the taxpayer were to be assessed until the Commissioner got it right.*"¹³⁵ (own emphasis)

The court indicated clearly that the three-year limitation period runs from the date of the original assessment, and that the three-year period is a reasonable one, achieving a balance between the rights of the Commissioner with regard to their mandate to collect revenue, and the constitutional rights of honest taxpayers.¹³⁶

This decision was relied upon in the SCA decision in *First South African Holdings (Pty) Ltd v Commissioner for South African Revenue Service*.¹³⁷ In this instance, the Commissioner had issued an additional assessment amending the original assessment within the limitation period, following which the taxpayer became aware of an error in its original return, and sought a reduced assessment in terms of section 79A of the Act (since repealed). Similar to SARS' argument in *Brummeria*,¹³⁸ the request for a reduced assessment was based on the averment that the limitation period began to run anew from the date of the additional assessment made by the Commissioner.

The court confirmed that, per *Brummeria*,¹³⁹ the date from which the limitation period begins to run is the date of the original assessment.¹⁴⁰ The court held that the interpretation

¹³⁴ *Supra* note 132.

¹³⁵ *Supra* note 132 at 218.

¹³⁶ *Ibid.*

¹³⁷ 73 SATC 221.

¹³⁸ Note 132 *supra*.

¹³⁹ Note 132 *supra*.

¹⁴⁰ Note 137 *supra* at page 226 – 227.

of section 79A of the Act advanced by the taxpayer would effectively give either the taxpayer or the Commissioner the right to alter the original assessment some six years after the original assessment, and that this was “*unthinkable*”¹⁴¹ in light of the existing legal principles.

These principles were again confirmed in the case of *ABC (Pty) Limited (in liquidation) v Commissioner for the South African Revenue Service*¹⁴² where the court emphasised that the effect of section 79(1) of the Act is to confer a “*statutory immunity*” on the taxpayer in respect of further assessments once the limitation period has expired. Referring to the judgment in *Natal Estates*,¹⁴³ the court emphasised that the onus lies on the Commissioner to show that he or she is satisfied that there was a non-assessment caused by impugned conduct on the part of the taxpayer, which actually caused the Commissioner to fail to correctly assess an amount to tax, if the Commissioner wishes to displace the taxpayer’s statutory immunity.¹⁴⁴

The court also held (having considered the judgment in the Special Tax Court in *ITC 1637*)¹⁴⁵ that the determination of the Commissioner’s satisfaction must be made before the additional assessment is raised.¹⁴⁶

In a more recent decision handed down in *Ackermans Limited v Commissioner for the South African Revenue Service*,¹⁴⁷ Mothle J held (on appeal from the Special Tax Court) that “...[t]he essence of s 79(1)... is that any Additional Assessments have to be effected within three years from the date of the original assessment. SARS is not entitled to raise

¹⁴¹ Note 137 *supra* at 227.

¹⁴² Case number IT12951 / VAT855 in the Tax Court of South Africa held at Durban.

¹⁴³ Note 109 *supra*.

¹⁴⁴ Note 142 at paragraph 36 – 37, see also *SIR v Trow* 1981 (4) SA 821 (A).

¹⁴⁵ 60 SATC 413.

¹⁴⁶ Note 145 *supra* at para 39.

¹⁴⁷ 77 SATC 191.

*additional assessments after the three years of the original assessment, unless the circumstances stated in subparas (aa) or (bb) of subs (1)(c)(i) to s 79, exists.*¹⁴⁸

The court held that this section, correctly interpreted, requires SARS to have been satisfied that, after the expiry of the three year period from the date of the “last assessment”¹⁴⁹, prior to the additional assessment having been raised, the taxpayer had committed fraud or misrepresentation, or failed to disclose a material fact which resulted in an amount (which is in fact chargeable to tax) not being assessed to tax in the original assessment.

The court held further that if the delay in raising an additional assessment (that is, the issuing of an additional assessment outside of the three year limitation period) falls within the proviso contained in section 79(1), such delay would not be unreasonable, as it is expressly provided for in the applicable legislation. However, a delay in issuing an assessment of more than three years where there was no impugned conduct on the part of the taxpayer would be unreasonable and in contravention of section 79(1)(c)(i) of the Act.¹⁵⁰

In this case, there was a clear dispute of fact as to whether or not the taxpayer had committed impugned conduct that would entitle SARS to issue an additional assessment outside of the limitation period, and the matter was referred back to the Special Tax Court for the leading of evidence.

¹⁴⁸ *Ibid* at paragraph 33.

¹⁴⁹ Mothle J’s reference to the “last” assessment is most likely intended to refer to the original assessment, and not a more recent additional assessment. It is clear from *inter alia* the SCA judgments in *Brummeria* and *First South African Holdings* that the limitation period begins to run from the date of the original assessment and that SARS cannot extend the limitation period indefinitely by making a series of additional assessments.

¹⁵⁰ *Supra* note 147 at para 35.

2.4.2 Principles emerging from judicial interpretation of section 79(1) of the Act

The interpretation of the applicable legislation in the judgments discussed in this chapter establishes a number of important principles in relation to the limitation period contained in section 79(1) of the Act.

Firstly, section 79(1) of the Act confers a “statutory immunity” upon the taxpayer against further assessments outside of the limitation period, provided that the taxpayer has not committed impugned conduct.¹⁵¹ Secondly, it is in the interest of public policy for the taxpayer to have some measure of finality regarding tax assessments. Third, the limitation period is important not only for establishing finality, but also for protecting the fundamental constitutional right of taxpayers to just administrative action.¹⁵²

Finally, it is clear that the onus lies on the Commissioner to show that the statutory immunity has been displaced (by evidencing the necessary jurisdictional facts) before an additional assessment may be issued outside of the limitation period. In order to satisfy this onus, the Commissioner must demonstrate to the taxpayer, by no later than at the date of the proposed additional assessment, that they are satisfied that the taxpayer is guilty of impugned conduct, in a manner which makes the nature of the conduct plainly ascertainable, and furthermore, that there is a direct causal link between the alleged impugned conduct and the non-assessment of an amount to tax.¹⁵³ The limitation period begins to run from the date of the original assessment, and is not interrupted by revised assessments.¹⁵⁴

¹⁵¹ *Supra* note 132; *supra* note 109; *supra* note 142.

¹⁵² *Supra* note 5.

¹⁵³ *Supra* note 109 at 397; *Supra* note 120 at 541.

¹⁵⁴ *Supra* note 137; *Supra* note 142; see also *CSARS v van Dijk* 64 SATC 7.

In addition, a number of principles relating to the purpose and effect of the section 79(1) statutory immunity (in other words, the right to finality) have been enunciated by the courts in the abovementioned case law. The courts have concluded that the purpose of section 79(1) is to achieve finality in tax disputes,¹⁵⁵ and that this is in the public interest.¹⁵⁶ The requirement for the Commissioner to establish certain jurisdictional facts before a decision is taken to issue an additional assessment outside of the limitation period is material for establishing the fairness and lawfulness of such purported additional assessments, which constitute administrative action.¹⁵⁷

The courts have found that the three-year limitation period affords the Commissioner a reasonable and necessary timeframe in which to revisit assessments if errors are discovered, taking into account the challenges the revenue authorities face when investigating and assessing taxpayers. The applicable legislation expressly informs the taxpayer of the existence of this period, and the taxpayer cannot, therefore, claim to have any legitimate expectation of finality before this period has expired.¹⁵⁸ Any capricious or arbitrary exercise of the Commissioner's administrative powers in issuing additional assessments outside of the limitation period would not be justifiable, even under an authorising statute, and would be subject to judicial review.¹⁵⁹

It follows from the above jurisprudence that in the ordinary course, once the limitation period expires, the original assessment is final and may not be altered, unless the Commissioner (being the party seeking to avoid the application of section 79(1) of the Act or section 92 of the TAA as the case may be, and therefore, bearing the onus of proof) can positively show that the taxpayer has committed impugned conduct, and demonstrate the

¹⁵⁵ *Supra* note 132.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Supra* note 120.

¹⁵⁸ *Supra* note 120 at 547 – 548.

¹⁵⁹ *Supra* note 126.

necessary direct causal link between the taxpayer's conduct and the non-assessment of an amount to tax.

2.4.3 Applicability of case law on section 79(1) to the new sections in the TAA

The courts have not yet had a substantial opportunity¹⁶⁰ to interpret the new sections relating to additional assessments and the limitations period (sections 92 and 99 of the TAA respectively) in comparison to the body of jurisprudence interpreting section 79(1) of the Act. The TAA came into effect as of 1 October 2012¹⁶¹ and applies to years of assessment commencing on or after that date.

The Explanatory Memorandum to the Tax Administration Bill (“the Explanatory Memorandum”)¹⁶² provides some background to the purpose and objects of the Tax Administration Bill (which was subsequently passed into law as the TAA). The Explanatory Memorandum states that the drafters of the Bill gave due regard to “*the following principles of international best practice in tax administration:*

- (a) *Equity and fairness to ensure that the tax system is fair and also perceived to be fair, which should in turn enhance compliance;*
- (b) *Certainty and simplicity so that tax administration is not seen as arbitrary but transparent, clear and as simple as the complexity of the system allows;*
- (c) *Efficiency, where compliance and administration costs are kept to a minimum and payment of tax is as easy as possible;*

¹⁶⁰ Some limited interpretation and consideration of sections 92 and 99 may be found at paragraphs 53 - 67 of the judgment in *Wingate-Pearse v C:SARS* 2019 (6) SA 196 (GJ) where the court commented on the establishment of the subjective satisfaction in section 92 of the TAA. Similarly, while paras 15 – 21 of the judgment in *Nondabula v Commissioner:SARS and Another* 2018 (3) SA 541 (ECM) contains some comments regarding the interpretation of section 92 of the TAA, the focus of the judgment is on the procedural notice requirements for the issuing of assessments contained in section 96 of the TAA. With respect, these judgments do not constitute substantial jurisprudence on the interpretation of the right to finality as contained in section 99 of the TAA.

¹⁶¹ Proclamation No. 51 in *Government Gazette* 35687 dated 14 September 2012 read in conjunction with the SARS Interpretation Note No. 68 (7 February 2013).

¹⁶² *Supra* note 8.

(d) *Effectiveness, so that the right amount of tax is collected, active or passive non-compliance is kept to a minimum, and the system remains flexible and dynamic to keep pace with technological and commercial development*.¹⁶³

The Explanatory Memorandum goes on to state that, *“to ensure consistent treatment of taxpayers in comparable circumstances, and consequently greater equity and fairness in tax administration, certain discretionary powers of SARS are now linked to objective criteria. Open-ended discretions on important matters have been fettered.”*¹⁶⁴

A material difference between section 79(1) of the Act and section 99 of the TAA (read with section 92) is the objective establishment of the existence of impugned conduct on the part of the taxpayer (as opposed to the previous entirely subjective satisfaction on the part of the Commissioner) which results in the non-assessment of the full amount chargeable to tax.

Section 92 of the TAA nonetheless provides that *“if at any time, SARS is satisfied that an assessment does not reflect the correct application of a tax Act to the prejudice of SARS or the fiscus, SARS must make an additional assessment to correct the prejudice.”* (own emphasis).

Section 99 thus fetters the extensive subjective discretion conferred on the Commissioner by section 92 in line with the requirements of the principle of finality. Section 99(2) provides that the limitation period does not apply to the extent that *“the fact that the full amount of tax chargeable was not assessed”* is due to impugned conduct on the part of the taxpayer.

Read together, sections 92 and 99 provide that where SARS is *satisfied* that the full amount of tax chargeable was not assessed (due to the incorrect application of a tax Act), SARS

¹⁶³ *Supra* note 8 at page 179.

¹⁶⁴ *Ibid.*

must make an additional assessment, but may only do so outside of the limitation period if “*the fact that the full amount of tax chargeable was not assessed*” was due to fraud, misrepresentation or non-disclosure of material facts by the taxpayer.

Section 102 of the TAA prescribes that generally, the onus of proof in tax matters lies with the taxpayer, *inter alia*, that a taxpayer bears the burden of proving that an amount, transaction, event or item is exempt or otherwise not taxable¹⁶⁵ (additional assessments under section 92 are issued for the purpose of increasing the taxpayer’s tax liability where SARS is satisfied that the original assessment prejudiced the *fiscus*¹⁶⁶).

However, before SARS can issue such an additional assessment, the onus placed on SARS (as set out in the decisions discussion in section 2.1 above) to establish the existence of impugned conduct and the causal link between such impugned conduct and the non-assessment of an amount which ought to have been assessed to tax, must be discharged.

Accordingly, in practice, it is accepted that where additional assessments are raised by SARS outside of the limitation period, SARS must establish as part of its audit findings, or at the very least as part of the grounds of assessment, the existence of impugned conduct resulting in an improper assessment of amounts which should have been taxed.

It submitted that this approach is correct, as it is in line with the interpretation of the legislation establishing the limitation period. The only material difference between section 99 of the TAA and the now repealed section 79 of the Act is that in the case of the former, SARS must show the existence of objective factual criteria, rather than the subjective

¹⁶⁵ Section 102(1)(a) of the TAA.

¹⁶⁶ Section 92 of the TAA.

satisfaction of the Commissioner that such criteria are present, in order to issue additional assessments after the expiry of the limitation period.

The above submission is supported by the SCA judgment in the case of *Commissioner for the South African Revenue Service v Pretoria East Motors (Pty) Ltd.*¹⁶⁷ In its judgment, the SCA held that a SARS official is not entitled to simply raise an additional assessment and “*leave it to the taxpayer to prove in due course*” that the assessment was incorrect.¹⁶⁸

The court held that “[i]n the case of income tax, (the assessment) *must be based on proper grounds for believing that there is undeclared income or a claim... that is unjustified. It is only in this manner that SARS can engage the taxpayer in an administratively fair manner, as it is obliged to do. It is also the only basis upon which it can, as it must, provide grounds for raising the assessment to which the taxpayer must then respond by demonstrating that the assessment is wrong*”.¹⁶⁹ (own emphasis).

The court went on to state that SARS is obliged to clearly indicate which underlying facts it wishes to place in dispute, so that the taxpayer is alerted to the need to call evidence on those matters, as well as the level of detail which will be required in the presentation of its case.¹⁷⁰

Section 268(5) of the TAA provides a right or entitlement enjoyed by, or obligation imposed on, a person under the repealed or amended provisions of a tax Act, that had not been exercised or complied with before the commencement date of the TAA, is a valid right or entitlement of, or obligation imposed on, that person in terms of any comparable provision,

¹⁶⁷ [2014] 3 All SA 266 (SCA).

¹⁶⁸ *Supra* note 167 at page 272.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Supra* note 109 at page 273.

from the date such right, entitlement or obligation first arose. This section is subject to the provisions of the TAA.

In addition, section 39(2) of the Constitution provides that all legislation (including the TAA) must be interpreted in accordance with the spirit, purport and objects of the Bill of Rights and the values contained therein, which include the right to equality and to administrative action that is lawful, reasonable, and procedurally fair.

The existing jurisprudence on the subject arguably confirms that the right to finality constitutes a right that existed under the now-repealed provisions of the Act, which taxpayers would be entitled to rely on in the current dispensation.¹⁷¹ The legal provisions which give effect to the right to finality have been incorporated into section 99(2) of the TAA, and so, there is arguably no contrary provision in terms of which the existence of the right to finality could be challenged.

The existing South African jurisprudence on this topic indicates that for an additional assessment to be valid and lawful, the assessment must indicate the reasons for the decision to issue such additional assessment with precision.¹⁷² An additional assessment issued outside of the limitation period requires impugned conduct on the part of the taxpayer (or one of the other criteria listed in section 99) to be valid in terms of the TAA. Therefore, notwithstanding section 102 of the TAA, in order to make a valid additional assessment after the expiry of the limitation period, SARS is required to allege the presence of impugned conduct and the causal link to the amount of tax which was not assessed as a result thereof.

¹⁷¹ Notes 109, 120 and 137 *supra*.

¹⁷² Note 168 *supra*.

2.5 Conclusion

In the context of tax administration, the right to finality has been established as an important principle designed to promote commercial and legal certainty and minimise the period in which tax disputes can occur, while also affording SARS the ability to retrospectively alter assessments where it is necessary in order to correct prejudice to SARS and the fiscus arising from an error on the part of SARS or the taxpayer. Where SARS can establish the requisite jurisdictional facts, a reasonable exception to the limitation period is provided by section 99(2) of the TAA, ensuring that dishonest taxpayers do not escape liability by invoking the statutory protection intended for honest taxpayers.

In *Brummeria*,¹⁷³ the Supreme Court of Appeal describes the balancing act which the court has to maintain in relation to the finality of tax assessments, with reference to a number of the aspects underpinning the constitutional principles of fairness and finality:

It is obviously in the public interest that the Commissioner should collect tax that is payable by a taxpayer. But it is also in the public interest that disputes should come to an end – interest reipublicae ut sit finis litium; and it would be unfair to an honest taxpayer if the Commissioner were to be allowed to continue to change the basis upon which the taxpayer were assessed until the Commissioner got it right – memories fade; witnesses become unavailable; documents are lost. That is why s 79(1) seeks to achieve a balance: it allows the Commissioner three years to collect the tax, which the legislature regarded as a fair period of time; but it does not protect a taxpayer guilty of fraud, misrepresentation or non-disclosure. If either of

¹⁷³ *Supra* note 132.

the Commissioner's arguments were to be upheld, this balance would be unfairly tilted against the honest taxpayer.¹⁷⁴ (own emphasis)

On the one hand, SARS must be able to address historical non-compliance and errors ensuring that incorrect administrative decisions are rectified within a reasonable period of time. Without this ability, SARS and the *fiscus* would suffer unnecessary financial prejudice, and there would be considerably less incentive for honest taxpayers to comply with their tax obligations.

On the other hand, finality is critically important for the integrity of the tax system. In judgments such as *Brummeria*,¹⁷⁵ significant emphasis is placed on the fact that an honest taxpayer should not be placed in the same position as a dishonest taxpayer, and that the limitation period exists to give the benefit of finality and certainty to those who abide by the law. This is one of the reasons underpinning the requirement that SARS must establish both the requisite jurisdictional facts and the causal nexus referred to in judgments like *Natal Estates*¹⁷⁶ and *Carlson Investments*¹⁷⁷ before issuing assessments outside of the limitation period.

It is against this background – that finality in disputes is in the public interest, and that honest taxpayers should not be subjected to prolonged commercial and legal uncertainty in respect of their tax affairs – that the potential problems arising from the impractical and overzealous exercise of SARS' audit and information-gathering powers become apparent.

Finality is a crucial element of procedural fairness in tax administration which should arguably inform all administrative processes, including auditing and information-gathering.

¹⁷⁴ *Ibid* at para 26.

¹⁷⁵ Note 132 *supra*.

¹⁷⁶ Note 109 *supra*.

¹⁷⁷ Note 120 *supra*.

If the role which finality plays in the fairness of the audit and information-gathering process is neglected, or worse, undermined by the manner in which SARS exercises its audit and information-gathering powers in practice, there is a real risk of tax morale and voluntary tax compliance being negatively impacted. The promotion of procedural fairness in all aspects of tax administration is particularly relevant for administrations in which the restoration of public trust and credibility is important.

Having concluded that the right to finality exists under the TAA as it did under section 79 of the Act, and having understood the importance of this right in ensuring that the revenue authority exercises its powers in a manner which serves the public interest and provides for a fair tax administration that promotes positive tax morale and voluntary compliance, the nature, scope, and content of SARS' audit and information-gathering powers under the TAA must be considered, in order to understand how these powers may potentially affect the taxpayer's right to finality.

Chapter Three of this dissertation accordingly examines and critically evaluates SARS' audit and information gathering powers, the limitations on these powers, and the remedies available to taxpayers who believe that SARS' audit and information gathering powers have been exercised in a manner that is unlawful or otherwise impermissible.

3 CHAPTER THREE: THE AUDIT AND INFORMATION GATHERING PROVISIONS OF THE TAX ADMINISTRATION ACT

In this Chapter, the investigative and information-gathering provisions of the TAA will be analysed to determine whether there is an infringement of the right to finality where SARS begins an investigation of a taxpayer's affairs outside of the limitations period without displacing the "statutory immunity" conferred on the taxpayer by the limitations period.

3.1 General overview of the legislation governing SARS' investigative and information-gathering powers under the TAA

Chapter 5 of the TAA sets out the audit and information-gathering powers conferred on SARS. Part A of Chapter 5 sets out the "General Rules for Inspection, Verification, Audit and Criminal Investigation" contained in sections 40 to 44 of the TAA. Part B of Chapter 5 contains the provisions relating to "Inspection, Request for Relevant Material, Audit and Criminal Investigation" set out in sections 45 to 49 of the TAA.¹⁷⁸

The Memorandum on the Objects of the Tax Administration Bill 2011, ("the 2011 Memorandum")¹⁷⁹ provides that SARS' information gathering powers are substantially supplemented or extended by the TAA, in order to, *inter alia*, "...address the problem that too many requests for information by SARS result in protracted debates as to SARS' entitlement to certain information."¹⁸⁰ The 2011 Memorandum further provides that "...taxpayer's rights are amplified and made more explicit to counterbalance SARS' new information gathering powers."¹⁸¹

¹⁷⁸ Part C and Part D are beyond the scope of this dissertation, and are accordingly not discussed here.

¹⁷⁹ Memorandum on the Objects of the Tax Administration Bill 2011, available at <http://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2011-03%20-%20Memorandum%20Objects%20Tax%20Administration%20Bill%202011.pdf> (last accessed on 27 January 2017).

¹⁸⁰ *Ibid* at page 185.

¹⁸¹ *Supra* note 179 at paragraph 2.25 on page 185.

While the extension of the scope of SARS' investigative and information gathering powers appears from the aforementioned provisions of the TAA itself (in comparison to the powers afforded to SARS under section 74A read with section 74(1) of the Act) the substance of the "amplified" rights afforded to taxpayers in the context of investigation and information gathering is more difficult to ascertain.

3.1.1 Auditing under the TAA

Section 40 of the TAA provides that SARS "*...may select a person for inspection, verification or audit on the basis of any consideration relevant for the proper administration of a tax Act, including on a random or a risk assessment basis*" (own emphasis).

This means that on the face of the empowering legislation, SARS officials do not need to provide reasons or obtain authorisation for the decision to investigate or audit a taxpayer, with the exception being criminal investigations, where SARS officials are obligated to procure authorisation from a Senior SARS Official before conducting an investigation.¹⁸²

Section 42 of the TAA is entitled "*keeping the taxpayer informed*" and regulates the conduct of audits by SARS officials. Section 42(1) provides that SARS officials involved in or responsible for an audit must provide taxpayers with a report indicating the stage of completion of an audit. This requirement is waived in instances where a senior SARS official has a reasonable belief that compliance with this section will impede or prejudice the purpose, progress, or outcome of an audit¹⁸³.

The 2011 Memorandum is silent on the application and interpretation of the provisions of section 42 of the TAA. However, Public Notice No. 788¹⁸⁴ ("the Public Notice") was issued

¹⁸² Section 41 of the TAA.

¹⁸³ Section 42(5) of the TAA.

¹⁸⁴ GN 788 GG 35733 of 1 October 2012.

by the Commissioner of SARS to provide guidance on the application of section 42 for SARS officials conducting audits.

Section 2 of the Public Notice provides that progress reports in respect of an audit must be issued to the taxpayer within 90 days of the start of the audit, and within 90 day intervals thereafter, until the conclusion of the audit.¹⁸⁵ It provides further that the report issued to the taxpayer must include a description of the current scope of the audit, the stage of completion of the audit, and any relevant material still outstanding from the taxpayer.¹⁸⁶

Sections 42(2) and 42(3) of the TAA provide that SARS must inform taxpayers of the outcome of the audit or investigation, even if the outcome is inconclusive. SARS must inform taxpayers of this outcome within 21 business days of the completion of the audit or other investigation, or such further period as may be required based on the complexity of the audit.

Section 42(2) provides that where the audit¹⁸⁷ results in the identification of potential adjustments of a material nature, SARS must provide taxpayers with a document containing the outcome of the audit, within 21 business days (or such further period as may be required based on the complexities of the audit). This document must include the grounds for the proposed assessment or decision, and taxpayers are provided with at least 21 business days from receipt of the outcome of the audit (a further period may be requested by the taxpayer and allowed by SARS) to respond to SARS' audit findings in writing. This essentially allows taxpayers to provide SARS with further facts and

¹⁸⁵ *Ibid* at page 18, at paragraph 2.

¹⁸⁶ *Op cit* note 184 at page 18, para 3.

¹⁸⁷ The words "audit or investigation" are not utilised in section 42(2)(b) of the TAA. It appears that the exclusion of the word "investigation" is deliberate based on the wording of the remainder of section 42 and the relevant principles of statutory interpretation, and that the intention is for the notification requirements to only apply to audits, and not to the information-gathering process that typically precedes an audit.

information which may influence the outcome of the audit (and SARS' decision to issue an additional assessment, or not).

By way of comparison, there was no obligation for SARS to provide a clear audit scope, or to keep taxpayers informed during an audit under section 74A and 74(1) of the Act, and taxpayers were often left waiting for lengthy periods before there was any indication of the progress of the audit or the expected timeline for completion.¹⁸⁸ Section 42 of the TAA thus constitutes a welcome expansion of taxpayers' rights in this regard.

However, in practice, SARS frequently fails to adequately define the scope of an audit, or to provide progress reports which comply with the requirements of the TAA. Unfortunately, there are no legislative mechanisms for the enforcement of these rights and obligations.

Section 42 is also silent in respect of the time period within which an audit should be finalised. This is hardly unexpected from a constitutional perspective, as the doctrine of separation of powers (an intrinsic part of our law¹⁸⁹) requires that the legislature and courts do not attempt to regulate the manner in which the executive, including organs of state, exercises its powers, outside of constitutionally mandated instances.¹⁹⁰ SARS would require a measure of flexibility on this aspect in practice, to deal with internal resource allocation and to be able to respond to the varying levels of complexity across different audits. However, the administrative law principles of fairness and reasonableness should nonetheless apply to the conduct of an audit or information-gathering process.

¹⁸⁸ B J Croome 'The Tax Administration Act and Taxpayers' Rights' available at <http://www.thesait.org.za/news/116113/The-Tax-Administration-Act-and-Taxpayers-Rights-.html> (accessed on 27 January 2017).

¹⁸⁹ See for example *Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC) at page 298 and *South African Association of Personal Injury Lawyers v Heath* 2001 (1) BCLR 77 (CC) at page 86, paragraph 22.

¹⁹⁰ D J Moseneke 'Oliver Schreiner memorial lecture: separation of powers, democratic ethos and judicial function' 2008 *SAJHR* 341 at page 350.

Despite the ways in which section 42 of the TAA seeks to protect taxpayers' rights in the context of audits, there is no clear mechanism for the taxpayer to enforce the fair and reasonable exercise of SARS' audit powers in the context of audit timeframes. This section thus has the potential to infringe on taxpayers' rights, as will be discussed in more detail below.

3.1.2 Information-gathering under the TAA

SARS' information-gathering powers were previously contained in section 74A (read with section 74(1) of the Act and section 57A of the VAT Act). These sections provided that 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”*.

These sections have been replaced by section 46 of the TAA. Section 46(1) provides that *“SARS may, for the purposes of the administration of a tax Act in relation to a taxpayer, whether identified by name or otherwise objectively identifiable, require the taxpayer or another person to, within a reasonable period, submit relevant material (whether orally or in writing) that SARS requires”* (own emphasis).

Section 46 increases the scope of SARS' information-gathering powers considerably, to include requests issued to an objectively identifiable class of taxpayers (primarily for purposes of obtaining information from third parties).¹⁹¹ It also greatly increases the scope of the information, documents and other items which SARS may request, by introducing a subjective definition of “relevant material” (discussed in more detail below), which

¹⁹¹ Op cit. note 179 at page 125.

effectively prevents taxpayers from being able to withhold information or dispute SARS' entitlement thereto on the basis of relevance.¹⁹²

Section 46(2) empowers a senior SARS official to request relevant material under subsection (1) in respect of "an objectively identifiable class of taxpayers", and to request relevant material which is held or kept by a connected person referred to in paragraph (d)(i) of the definition of "connected person" in the Act,¹⁹³ in relation to the taxpayer, located outside the Republic.

Section 46(3) provides that "*a request by SARS for relevant material from a person other than the taxpayer is limited to material maintained or kept or that should reasonably be maintained or kept by the person in respect of the taxpayer*". A wilful or negligent failure to comply with a request for relevant material is a criminal offence in terms of section 234(1) and (2) of the TAA, punishable by the imposition of a fine or imprisonment for a period not exceeding two years.

Section 46(4) requires that the recipient of the request for relevant material must submit such material to SARS at the place, in the format, and within the time specified in the request. If held by a connected person, relevant material must be submitted within 90 days from the date of the request.

In terms of section 46(5) SARS may extend the period for submission of relevant material requested from the taxpayer on reasonable grounds submitted by the person concerned. The relevant material required by SARS must be described in the request with "reasonable

¹⁹² *Ibid.*

¹⁹³ Paragraph (d)(i) of the definition of "connected person" contained in section 1 of the Act provides that the term means, in relation to a company, any other company that would be part of the same group of companies by virtue of a controlling group company directly holding more than 50% of the equity shares or voting rights in a controlled group company.

specificity”.¹⁹⁴ A request which is too broad and generic in relation to the information sought (i.e. a “fishing expedition”) would, therefore, arguably be unlawful.

3.2 Requests for relevant material under section 46 of the TAA

The power to request relevant material from taxpayers is one of the most far-reaching and comprehensive powers granted to SARS under the TAA. In order to properly understand the nature of the information-gathering powers conferred on SARS by section 46 of the TAA and the potential of these powers to affect taxpayers’ rights, the concept of “relevant material” and its component terms and definitions must be examined in more detail.

3.2.1 “relevant material”

The definition of “relevant material” is contained in section 1 of the TAA. “Relevant material” is defined as “...*any information, document or thing that in the opinion of SARS is foreseeably relevant for the administration of a tax Act as referred to in section 3*”. (own emphasis)

3.2.1.1 “any information, document or thing”

The phrase “*any information, document or thing*” is widely worded, and could conceivably refer to any electronic or written information in the possession of the taxpayer or a third party. This term is, however, limited by the further criteria contained in the definition.

3.2.1.2 “that in the opinion of SARS is foreseeably relevant”

This highly subjective criterion expands the scope of the already extensive information-gathering powers previously granted to SARS under the Act. The effect of this provision, as it reads subject to the amendments introduced by the Tax Administration Laws

¹⁹⁴ The remainder of the provisions of section 46 of the TAA are not discussed here, as they are not relevant to the scope of this dissertation.

Amendment Act 44 of 2014 (“2014 TALAA”), is to effectively render SARS the sole arbiter of whether information is relevant for the purposes of “administration of a tax Act”.

The 2011 Memorandum provides some guidance regarding the intended scope and purpose of the information-gathering powers conferred on SARS under section 46 of the TAA,¹⁹⁵ stating that the applicable standard of “foreseeable relevance” is that which is utilised by the OECD¹⁹⁶ in Article 26 of the OECD Model Tax Convention¹⁹⁷ for purposes of for specifying the type of information that should be exchanged between countries.¹⁹⁸

The rationale for this definition is:

“...to address the problem that too many requests for information by SARS result in protracted debates as to SARS’ entitlement to certain information. This is contrary to the internationally established principle that a revenue agency’s resources or energy should not be wasted on disputes over whether or not it is entitled to have access to a particular item of information, but should rather be focused on ensuring that all taxpayers pay the correct amount of tax on time based on timely available information. However, taxpayer’s rights are amplified and made more explicit to counterbalance SARS’ new information gathering powers.”¹⁹⁹

The definition of “relevant material” in the TAA was amended in 2014 to contain the wording “...in the opinion of SARS...” by clause 37(b) of the 2014 TALAA. The Memorandum on the Objects of the Tax Administration Laws Amendment Bill 2014²⁰⁰ (“the

¹⁹⁵ Op cit note 179.

¹⁹⁶ The Organisation for Economic Development and Cooperation.

¹⁹⁷ OECD Update to Article 26 of the OECD Model Tax Convention and its Commentary, which was approved by the OECD Council on 17 July 2012, available at [https://www.oecd.org/ctp/exchange-of-tax-information/120718_Article%2026-ENG_no%20cover%20\(2\).pdf](https://www.oecd.org/ctp/exchange-of-tax-information/120718_Article%2026-ENG_no%20cover%20(2).pdf) (accessed on 10 December 2016).

¹⁹⁸ *Ibid*, at para 2.2.1.8.

¹⁹⁹ Op cit note 179 at page 185, para 2.2.5.

²⁰⁰ Memorandum on the Objects of the Tax Administration Laws Amendment Bill 2014 available at <https://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2014-01%20-%20Memorandum%20on%20the%20Objects%20of%20the%20TALA%20Bill%2014%20of%202014.pdf> (last accessed 16 January 2020).

2014 Explanatory Memorandum”) reiterates that the purpose behind this amendment was to limit disputes about whether information requested by SARS is “foreseeably relevant” by ensuring that SARS is the sole arbiter of what constitutes “relevant material”.²⁰¹ The amendment contained in the 2014 TALAA is intended, according to the 2014 Explanatory Memorandum, to clarify that the authority to determine the relevance of any information, document or thing for the purposes of an audit or investigation rests exclusively with SARS.²⁰²

The 2014 Explanatory Memorandum states that SARS has had difficulty in obtaining information from taxpayers in the past, because taxpayers would dispute the relevance of the information and refuse to provide information and documentation on the basis that the taxpayer did not consider such information or material to be foreseeably relevant for the administration of a tax Act.²⁰³

The 2014 Explanatory Memorandum further indicates that the concept of foreseeable relevance was never intended to give taxpayers the ability to assess the relevance of material requested by SARS, or to allow taxpayers to refuse to provide documents and information on the basis of relevance. This legislative amendment was accordingly required to ensure that SARS is able to access information that is required as part of an audit or investigation.²⁰⁴

The 2014 Explanatory Memorandum further indicates that according to “the literature”,²⁰⁵ the test of what is foreseeably relevant for a domestic tax application would have a low

²⁰¹ Op cit note 200 at page 42 – 3, para 2.37.

²⁰² *Ibid.*

²⁰³ Op cit note 200.

²⁰⁴ *Ibid.*

²⁰⁵ This is not explicitly defined or referenced in the 2014 Explanatory Memorandum, which refers simply to “the literature”, but from the wording and content of the 2014 Explanatory Memorandum it would appear that the intended reference is to Article 26 of the OECD Model Tax Convention and the commentary thereto (see note 197 *supra*).

threshold, and would follow these broad principles: whether, at the time of the request, there is a reasonable possibility that the material is relevant to the purpose sought; whether the required material actually proves to be relevant once provided is immaterial in determining foreseeable relevance; information requests may not be declined in cases where a definite determination of the relevance of the material to an ongoing audit or investigation can only be made following receipt of the material; there need not be a clear and certain connection between the material and the purpose, but a rational possibility that the material will be relevant to the purpose; and the approach is to order production first and to allow a definite determination to occur later.

According to the 2014 Explanatory Memorandum, these broad powers to request information are not prejudicial to taxpayers, because all information received by SARS is treated as confidential under chapter 6 of the TAA and may only be disclosed to another party in the specific circumstances referred to in Chapter 6 of the TAA.²⁰⁶

The 2014 Explanatory Memorandum further refers to Australian case law²⁰⁷ in support of the fact that it is impractical for revenue authorities to justify the relevance of each information request addressed to taxpayers during an audit or investigation. This notwithstanding, certain authors²⁰⁸ have made the point that this explanation fails to account for the fact that Australia does not provide constitutionally enshrined fundamental rights (such as the right to administrative justice), to taxpayers.²⁰⁹

In a South African context, the rationale for the above approach ought to take into account the importance of taxpayers' fundamental rights. As will be discussed in more detail in

²⁰⁶ Op cit note 200.

²⁰⁷ *Australia and New Zealand Banking Group Limited v Konza*, [2012] FCA 196.

²⁰⁸ Dr. B J Croome 'Amendments to the definition of relevant material for purposes of the Tax Administration Act' *SAIT Tax Talk* 9 January 2015.

²⁰⁹ *Ibid.*

Chapter Four below, these fundamental rights may, in certain circumstances, override considerations of convenience and expediency for SARS, in the absence of a sound justification for the limitation of the right to, for example, administrative justice.²¹⁰ The true comparative value of Australian case law in this context is, therefore, questionable.

In addition, the statement in the 2014 Explanatory Memorandum that any prejudice inherent in SARS' broad and subjective information-gathering powers fails to take into account the impact of delays and uncertainty on taxpayers' rights to finality, or the real financial prejudice that a poorly managed and executed information-gathering process can have on a taxpayer's commercial affairs.

There are of course justifiable limitations of the taxpayers' rights in certain circumstances. These could include instances where SARS has reason to believe that taxpayers are engaging in a frivolous or vexatious delay of audit or information-gathering processes, where taxpayers have previously been dishonest or obstructive in their dealings with SARS, or where SARS has reason to believe that disclosing the reasons for requesting relevant material would defeat the purpose of the investigation (i.e. where the taxpayer would seek to destroy relevant material requested, or take other steps to prevent SARS from carrying out an audit and collecting additional tax that may be due).

The 2014 Explanatory Memorandum provides that:

“Inadequate investigation of tax evaders, or taxpayers who through aggressive tax planning only purport to comply with tax laws, is unfair to taxpayers who complied with the law. If such problems were allowed to persist, they would undermine public confidence in the tax system, and would reduce voluntary compliance by the

²¹⁰ *Ibid.*

majority of taxpayers, such compliance being an integral feature of an effective tax system.”

This is a relevant and understandable concern for SARS, given its mandate to collect revenue effectively and efficiently.²¹¹ However, adequate investigation of tax evaders and those who use aggressive tax planning to avoid paying tax can also be achieved in a more nuanced manner, without unfairly or unnecessarily limiting the fundamental rights of all taxpayers.

The concern raised in 2014 the Explanatory Memorandum regarding the promotion of public confidence in the tax system and fair treatment of honest taxpayers is valid, but as has been discussed in Chapter 2 above, there is a considerable body of evidence supporting the conclusion that subjecting honest taxpayers to unnecessarily harsh scrutiny is likely to lead to disengagement and lower rates of voluntary compliance.

Similarly, enacting far-reaching legislation like section 46 of the TAA without proper guidelines for implementation within a constitutional framework opens up the potential for abuse of the considerable powers granted to SARS in practice, which is likely to create the same (or greater) distrust and lack of confidence the system as inadequate investigation of dishonest taxpayers.

Recommendations for a more balanced approach to investigation and information gathering will be discussed in more detail in Chapter Seven below.

²¹¹ Section 3 of the South African Revenue Service Act No. 34 of 1997.

3.2.1.3 Administration of a tax Act

The phrase “administration of a tax Act” is also defined in section 1 of the TAA with reference to section 3(2) of the TAA. Section 3(2) provides that the administration of a tax Act means to:

“(a) obtain full information in relation to-

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

(ii) a taxable event; or

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

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

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

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

(e) collect tax debts and refund tax overpaid;

(f) investigate whether a tax offence has been committed, and, if so-

(i) to lay criminal charges; and

(ii) to provide the assistance that is reasonably required for the investigation and prosecution of the tax offence;

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

- (h) perform any other administrative function necessary to carry out the provisions of a tax Act; and*
- (i) give effect to the obligation of the Republic to provide assistance under an international tax agreement.”*

The definition of “administration of a tax Act” is couched in very broad language, and encompasses such a wide spectrum of SARS’ administrative functions that it would be practically impossible for a taxpayer to argue that relevant material requested by SARS was not requested for the purpose of administration of a tax Act.²¹²

In summary, it is evident that the provisions of section 46 of the TAA are intended to provide SARS with the power to request a wide range and volume of information from taxpayers, and that this power has deliberately been framed in a manner which leaves no room for taxpayers to delay or frustrate the information-gathering process by disputing the relevance or validity of an information request.

According to SARS, the public interest in the efficacy of the revenue collection system and in the fair and equal application of the rules to all taxpayers necessitates an efficient information-gathering system that cannot easily be frustrated through challenges brought by unscrupulous taxpayers. However, in arriving at this conclusion, SARS has arguably failed to consider other equally relevant considerations, such as the fact that unfair and unreasonable conduct towards taxpayers in the execution of audit and information gathering processes also has the potential to undermine public confidence in the tax system, and voluntary compliance along with it.

²¹² Milton Seligson ‘Information-gathering by SARS under the TAA: Trumping the taxpayer’s right to tax finality’ (2016) 7 *Business Tax & Company Law Quarterly* 1 at page 10.

Where broad powers are given to organs of state, a careful balance must be struck between the exercise of state power and the protection of the constitutional rights of affected persons. The judicial review of administrative action under PAJA, and the review of non-administrative exercises of public power in terms of the principle of legality, are examples of the checks and balances which exist in the South African context, to curb the abuse of state power as far as possible, and to provide affected persons with adequate remedies for abuses, where these do occur.

This does not necessarily mean that SARS' information-gathering powers should be limited in terms of legislation. However, it is important for adequate checks and balances to be placed on the exercise of SARS' information-gathering powers, as the expansion of taxpayer rights contemplated by the TAA has little practical value if there is no way for taxpayers to enforce their rights. Accordingly, adequate guidelines and external remedies must be provided to ensure that public trust in the tax system is not undermined by the implementation of some of the very processes put in place to protect its integrity.

3.3 Impact of the misuse of SARS' audit and information-gathering powers

3.3.1 Audit

Sections 40 to 42 of the TAA are widely framed, and the potential for these sections to infringe upon taxpayers' constitutional rights has been recognised in the incorporation of legislative provisions mirroring the procedural fairness guidelines contained in section 3(2) of the PAJA (e.g. the general requirement that SARS must provide taxpayers with preliminary audit findings, and 21 business days to respond to these findings, before finalising an audit, where material adjustments are

contemplated). The provision of various guidelines and publications outlining the fair and reasonable exercise of SARS' powers to audit taxpayers confirms this view.²¹³

Unfortunately, SARS officials do not always conform to these provisions and guidelines in practice.²¹⁴ Moreover, the TAA, the Public Notice,²¹⁵ and the various explanatory memoranda that outline the scope and content of SARS' audit and information-gathering powers are silent on the remedies available to taxpayers in instances where SARS officials fail to comply with their obligations.

Taxpayers who do not receive progress reports, or receive inadequate progress reports which do not clearly indicate the scope and stage of completion of the audit are prejudiced by the resulting legal and commercial uncertainty, and are left without a clear indication of the mechanisms available (if any) to address this breach of their rights.

There is also no clear remedy to address instances where SARS circumvents the section 42 process by issuing additional assessments without notifying taxpayers of the audit findings or providing them with an opportunity to respond.²¹⁶ Albeit that the ability to dispute the resulting assessment in terms of the Chapter 9 dispute resolution process provides some remedy for taxpayers, this does involve additional time and costs which cannot necessarily be recovered from SARS if the taxpayer is successful,

²¹³ SARS Short Guide to the Tax Administration Act, 2011, Version 3, 29 March 2018, available at <https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-TAdm-G01%20-%20Short%20Guide%20to%20the%20Tax%20Administration%20Act%202011.pdf> (accessed on 24 April 2020); and the requirements contained in the Public Notice.

²¹⁴ The author has come across numerous instances in practice where notification of audit letters are issued by SARS and the scope of the audit is described as "the Income Tax Act" or "incorrect invoice" (for VAT audits); and progress reports issued by SARS which simply state that the audit is "in progress". These issues are included in the list of systemic issues contained in the Annual Report delivered by the OTO for 2017/18 and 2018/19.

²¹⁵ Op cit note 184.

²¹⁶ The grounds for the disputes in *A Way to Explore v Commissioner for South African Revenue Service* (23896/17) [2017] ZAGPPHC 541 (23 August 2017) and *TCIT 13726 Port Elizabeth* (13 February 2018) are two examples of this issue occurring in practice.

and which may have been entirely avoidable (i.e. in cases where the assessment would not have been issued if SARS had engaged the taxpayer properly). This would also almost inevitably involve an extra step for the taxpayer in requesting the reasons for SARS' decision to issue an additional assessment,²¹⁷ where those reasons are not disclosed in the form of audit findings.

The inability to obtain proper information from SARS in relation to the scope and completion of an audit may be no more than an inconvenience to taxpayers in some instances, but it can become significantly problematic in others. A taxpayer's ability to conclude transactions, carry on its business, adhere to the relevant financial and corporate reporting requirements (particularly for corporate taxpayers forming part of a larger group), and adhere to finance covenants can be materially affected by an ongoing audit. Greater certainty with regard to the scope of the items being audited and the progress and likely completion date of the audit may considerably alleviate that impact.

Similarly, where SARS fails to complete an audit within a reasonable period, the abovementioned commercial concerns may come into play, as may the real financial prejudice of refunds (which are otherwise due and owing to the taxpayer) being withheld indefinitely.

Where SARS fails to properly notify the taxpayer of the commencement of an audit, or fails to properly outline the audit scope, the audit process is likely to be impeded by miscommunications and delays. Taxpayers' rights to respond and indeed, any hope of taxpayers' co-operative participation in an audit process is excluded when SARS

²¹⁷ As provided for in Rule 6 of the Rules promulgated under section 103 of the TAA.

officials engage in this type of irregular and unlawful conduct, and SARS' ability to elicit the required information may well be impaired.

3.3.2 Information-gathering

Requests for relevant material can be issued both as a precursor to an audit (to identify and understand tax risks and ascertain whether an audit is warranted) and during an audit, to obtain information relating to the items which are being investigated.

Ordinarily, there should be little to no prejudice associated with an information-gathering process. SARS should be requesting information in relation to taxpayers' financial and commercial affairs which is readily available, and forms part of the records which taxpayers are required to retain for the mandatory record retention periods.²¹⁸

However, in terms of section 46, requests for relevant material need not be restricted to any particular scope or time period, nor does section 46 provide for any of the administrative justice-oriented protections (such as the requirement for taxpayers to be notified of audit findings and provided with an opportunity to respond where a material adjustment is contemplated, or the right to request reasons) which apply to audits and assessments.²¹⁹

The rationale behind this approach is twofold: first, requests for relevant material arguably constitute a preliminary step in the information-gathering and assessment process²²⁰ that does not directly affect taxpayers' rights. Secondly, and perhaps more importantly from

²¹⁸ Op cit note 37.

²¹⁹ Taxpayers' rights in respect of the audit and information gathering process are set out in sections 40 – 42 and 46 of the TAA, read together with the Public Notice and the guidelines published by SARS on its website do not include the right to request or to receive reasons for the decision to audit or request relevant material.

²²⁰ Where SARS is contemplating issuing an additional assessment in terms of section 92.

SARS' perspective, revenue authorities should not have to direct already limited time and resources on information entitlement disputes.²²¹

However, while the Commentary to Article 26 of the OECD Model Tax Convention²²² indicates that the term “foreseeable relevance” is intended to facilitate the procurement of information in tax matters to the widest possible extent, this principle is not intended to empower revenue authorities to engage in “fishing expeditions”,²²³ or to request information that is unlikely to be relevant to the tax affairs of the taxpayer under investigation.

The Commentary provides that:

*“The standard of “foreseeable relevance” is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting States are not at liberty to engage in “fishing expeditions” or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer.”*²²⁴

As discussed in Chapter 2 above, the decision to gather information in circumstances where taxpayers are unlikely to be able to access the information and documents requested may cause significant prejudice to taxpayers. Where SARS requests information for historical periods in respect of which the limitation period has expired, taxpayers may have to conduct detailed searches of their archives, at significant time and

²²¹ Op cit note 200.

²²² Op cit note 197 at page 398.

²²³ *Ibid.* See also Brian A. Garner, ed., *Black's Law Dictionary*, 9 ed (1999) at 668, where a fishing expedition is defined as “[a]n attempt, through broad discovery requests or random questions, to elicit information from another party in the hope that something relevant might be found”.

²²⁴ Op cit note 198.

cost. The requested documents and information may no longer exist, or may prove extremely difficult to locate.

The burden of proof placed on taxpayers in terms of section 102(1) of the TAA (to demonstrate that a tax position or assessment is correct) can be very difficult to meet if the documents and information requested by SARS for purposes of auditing a particular tax position or year of assessment are no longer available. There is also a real risk that the information which SARS needs in order to make a valid assessment in terms of section 99(2) of the TAA (for years which have “prescribed”) will not be available.

In addition, SARS is not required to restrict requests for relevant material to a specific scope. As a result, requests for relevant material may require the taxpayer to produce information that is irrelevant to the enquiry, or is already in SARS’ possession from a previous audit or request for relevant material.

Such requests may also be too broadly framed, requiring enormous volumes of information, much of which will ultimately prove extraneous to the risk being considered and the enquiry which SARS intends to pursue. In circumstances such as these, the taxpayer still has to incur the financial and human resources costs of locating and providing SARS with the requested information, unless SARS agrees to narrow the scope of the enquiry on request, which is at the discretion of the relevant SARS official.

3.4 Remedies available to the taxpayer in respect of a breach of rights arising from the exercise of SARS’ audit and information gathering powers

3.4.1 Audit

The remedies available to taxpayers where SARS mis-uses its audit powers are set out below, in relation to the harms which taxpayers typically encounter in the context of sections 40 – 42 of the TAA.

3.4.1.1 Failure to provide audit progress reports

Where the taxpayer is prejudiced by SARS' failure to furnish audit progress reports, one option is for the taxpayer to approach the civil courts for a *mandamus* or mandatory interdict against the relevant SARS official, compelling SARS to provide an audit progress report which meets the requirements set out in the Public Notice.²²⁵ To obtain a mandatory interdict, the taxpayer would need to demonstrate that it has a right to the relief sought, that harm or imminent harm will result from SARS' conduct, that no other remedies are available, and that the balance of convenience (in others words, the prospective benefits to both parties if the relief is granted, weighed against the prospective prejudice if the relief is not granted) favours the taxpayer.

However, a mandatory interdict may prove challenging to obtain, as it may be difficult for the taxpayer to prove all of the requirements for an interdict at this stage in the process, particularly the requirement for the taxpayer to show that it has suffered, or has a reasonable apprehension of suffering irreparable harm.²²⁶ Since the initiation of an audit or investigation does not necessarily mean that SARS will issue an additional assessment, it will not be possible, in all cases, to prove the requirement of irreparable harm and obtain an interdict.²²⁷

Even in instances where the taxpayer can show that it is materially and significantly prejudiced by the non-disclosure of the information required to be contained in a progress report, it may not be possible to show irreparable harm.²²⁸ For example, where the taxpayer is required to quantify potential liabilities for financial reporting

²²⁵ B Croome and J Brink 'SARS Audits and Taxpayer's Rights' *Tax ENSight* 25 June 2013 available at <https://www.ensafrica.com/news/SARS-audits-and-taxpayers-rights?Id=1066&STitle=tax%20ENSight> accessed on 17 October 2016.

²²⁶ *Ibid.*

²²⁷ *Ibid.*

²²⁸ *Ibid.*

purposes, there may be remedial steps that the taxpayer can take to prevent sanctions being levied by the reporting authority. The cancellation of a profitable transaction in circumstances where, for example, information regarding the scope and time frame of an audit is material for purposes of completing non-negotiable due diligence procedures within transaction deadlines may not constitute irreparable harm, as the loss of a potential future financial gain may not meet the required threshold.

Even if the taxpayer can prove the requirements for a mandatory interdict, this is neither a time-effective nor cost-effective remedy relative to the purpose of the application, where the taxpayer may be under significant commercial and regulatory time pressure and may require an urgent response from SARS.²²⁹

Another possible remedy in the instance where SARS fails to issue a progress report (or issues a report which does not comply with the requirements in the Public Notice) would be an application to the High Court for review of the decision (which includes a failure to take a decision) under the PAJA.²³⁰ However, the time frame for obtaining this kind of relief (assuming the taxpayer is successful, which is by no means guaranteed) renders an application for judicial review ineffective as a remedy,²³¹ particularly since the taxpayer is required to request a copy of the record of the decision from SARS prior to the hearing of the matter in court, which SARS may refuse, forcing the taxpayer to bring interlocutory proceedings to compel SARS to provide a copy of the record,²³² further delaying the process.

²²⁹ Op cit note 225.

²³⁰ *Ibid.*

²³¹ *Ibid.*

²³² *Peolwane Properties (Pty) Ltd v Commissioner for the South African Revenue Service*, case no. 34483/2013, unreported.

A more time and cost-effective remedy may be to utilise the SARS internal complaints resolution process. The SARS Dispute Resolution Guide²³³ provides that where taxpayers disagree with the administration of law (as opposed to a disagreement regarding the interpretation of the law) the complaint should be addressed by utilising the SARS internal administrative complaints resolution process.²³⁴ This process commences with the submission of a complaint at the SARS contact centre or branch level.²³⁵

The matter will be assigned a service request number, and if the matter is not resolved within a reasonable time according to internally prescribed guidelines (currently 21 working days), the matter may be escalated by the taxpayer to the Complaints Management Office (“CMO”) (previously called the SARS Service Escalation Office or SSMO).²³⁶ The CMO will validate the service request number (to ensure that the complaint has been lodged correctly) and endeavour to resolve validated complaints within 15 working days.²³⁷ The CMO is also obliged to update the taxpayer as to the progress and expected resolution time frame of the complaint.²³⁸

If the CMO does not satisfactorily resolve the taxpayer’s complaint, the complaint may be escalated to the office of the Tax Ombud (“OTO”).²³⁹ The OTO may also be approached directly by taxpayers, where substantial and compelling circumstances justifying this approach exist.²⁴⁰ The recommendations of the OTO are not binding on

²³³ The SARS Guide on the Rules promulgated in terms of section 103 of the TAA, date of First Issue 28 October 2014, available at http://c.ymcdn.com/sites/sait.site-ym.com/resource/resmgr/2014_SARS_-_October_/LAPD-TAdm-G05_-_Dispute_Reso.pdf accessed on 26 March 2016.

²³⁴ *Ibid* at page 20.

²³⁵ *Ibid*.

²³⁶ *Ibid* at page 21.

²³⁷ *Ibid*.

²³⁸ *Ibid*.

²³⁹ *Op cit* note 233 at page 21.

²⁴⁰ Section 18(5) of the Act sets out the following factors which the OTO shall consider when determining if a circumstance may be “compelling”: If the request raises systemic issues, where exhausting the complaints resolution mechanisms will cause undue hardship to the requester, and where exhausting the

SARS, but disputes may be resolved through the mediation process facilitated by the Ombud, and if his recommendations are in the taxpayer's favour SARS may elect to abide by them.²⁴¹

It is submitted that the internal complaints process, while more cost effective and in some cases, more efficient, lacks efficacy, as SARS is not bound to abide by the decisions of the OTO.²⁴² In addition, taxpayers and tax practitioners would arguably be justified in the concern that SARS officials may not necessarily serve as independent and unbiased arbitrators of the conduct of their colleagues within the organisation.

3.4.1.2 *Unreasonable delay in finalising the audit*

As set out above, there is no legal or regulatory requirement for SARS to finalise an audit within a certain time period. Where SARS fails to conclude an audit within a reasonable period, taxpayers may be able to approach the High Court for an interdict or an order compelling SARS to finalise an audit .

While the court in the *Ackermans* case²⁴³ held, with reference to the audit process, that:

“It is indeed imperative that all Constitutional obligations executed by organs of State in the exercise of public power, must be performed diligently and without delay. An unreasonable delay will result in a procedurally unfair administrative action, which is a reviewable conduct in terms of Section 6 of PAJA. The decision

complaints resolution mechanisms is unlikely to produce a result within a period of time that the OTO considers reasonable.

²⁴¹ Op cit note 233 at page 21.

²⁴² *Ibid* at page 19 – 21.

²⁴³ *Supra* note 147 at para 27 – 30.

to raise Additional Assessments is an administrative action which is an exercise of public power and it falls within the ambit of Section 237 of the Constitution.”

And:

It is thus generally accepted in these court decisions that such inordinate and unreasonable delays in the exercise of public power or performance of public functions, prolong the element of uncertainty on the part of all concerned and results in the interest of justice not being served.”²⁴⁴

And:

“Section 273²⁴⁵ of the Constitution, correctly so, does not state what period would constitute unreasonable delay in any given situation. This is left to the courts to determine, having regard to the circumstances of each case... A determination of the reasonableness or otherwise of the delay requires a consideration of the provisions of section 79 of ITA (Income Tax Act)”²⁴⁶

Mothle J concluded that the determination of the reasonableness of SARS’ delay in issuing additional assessments, with reference to the facts of the case, was better suited for ventilation in the Special Tax Court on appeal by the taxpayer.

It is important to bear in mind that this judgment addresses the reasonableness of a delay in raising additional assessments, and does not address the reasonableness of a delay in finalising audit proceedings.

²⁴⁴ *Supra* note 147 at paras 27 and 29.

²⁴⁵ This erroneous reference to section 237 of the Constitution is clarified in footnote 1 to the judgment in the application for leave to appeal handed down by Mothle J in *Ackermans Limited v Commissioner for the South African Revenue Service* (16408/2013) [2015] ZAGPPHC 684.

²⁴⁶ *Supra* note 147 at para 31.

In *Shell's Annandale Farm (Pty) Ltd v Commissioner for the South African Revenue Service*²⁴⁷ Davis J held (in the context of whether a taxpayer could approach the court for a declaratory order prior to an assessment being issued) that:

*"...where the dispute involves no question of fact and is simply one of law the Commissioner and the Special [Tax] Court are not the only competent authorities to decide the issue – at any rate when a declaratory order such as that in the present case is sought."*²⁴⁸

This judgment supports the view that in the context of a purely legal dispute (potentially including the finalisation of an audit or information-gathering process), taxpayers could approach the High Court for declaratory relief, including an order compelling SARS to finalise an audit within a specified period of time.

More recently, the High Court has indicated its willingness to entertain and indeed, to grant an application under PAJA compelling SARS to finalise an audit within a reasonable period of time. In the unreported judgment handed down in *Rappa Resources (Pty) Ltd v The Commissioner for The South African Revenue Service*,²⁴⁹ the High Court confirmed that the principles of fairness and reasonableness (and the taxpayer's right to finality) are applicable in the context of audits.

In this case, the applicant sought an urgent order compelling SARS to complete a VAT audit, which SARS instituted in March 2020, within 15 days from the date of judgment.²⁵⁰ At the time the application was heard, a period of eight months had lapsed since SARS commenced with the audit. The basis for the urgent relief sought was SARS decision to

²⁴⁷ (2000) 62 SATC 97.

²⁴⁸ *Ibid* at page 103.

²⁴⁹ *Rappa Resources (Pty) Ltd v The Commissioner for The South African Revenue Service* (ZAGPPHC) unreported case no 20/18875 (5 November 2020).

²⁵⁰ *Supra* note 249 para 2.

withhold all VAT refunds which would otherwise be due and owing to the taxpayer, pending the outcome of the audit (as SARS is legally entitled to do in terms of section 190(2) of the TAA). The taxpayer contended that it would no longer be able to operate its business without payment of the refunds being withheld, as the business model adopted by the taxpayer depended on the timely payment of VAT refunds.

The taxpayer contended that all information requested by SARS to date had already been provided to SARS, and that at the time of the hearing, there was no other reason to delay finalisation of the audit. SARS contended that it required an additional 6 months to complete the audit.

The High Court weighed up the prejudice to the taxpayer (i.e. the closure of its business) against the potential prejudice to SARS if refunds were paid out in circumstances where a completed audit or investigation would reveal the taxpayer as fraudulent or otherwise not entitled to a refund (which, once paid, could be easily misappropriated by a dishonest taxpayer beyond any hope of recovery).²⁵¹ Although the High Court was understandably unwilling to undermine the provisions of section 190 of the TAA and order SARS to pay the disputed refunds to the taxpayer prior to the finalisation of the audit, the Court also found that:

“where SARS has withheld a refund, particularly where the refund is as integral to the business model of the taxpayer as in this matter, it cannot be allowed to take an indefinite time to complete an audit. This would mean that the TAA is inherently unfair towards the taxpayer. The audit has to be completed in a reasonable time, taking into account the circumstances.”²⁵² (own emphasis)

²⁵¹ *Supra* note 249 para 33 – 34.

²⁵² *Supra* note 249 para 51.

The Court noted that although SARS could not furnish any basis for the additional 6 months supposedly required to finalise the audit, SARS “...*must be afforded sufficient time to carry out the audit, and to ensure that Rappa’s information does not support a conclusion that Rappa is complicit in the unlawful scheme described.*”²⁵³

The Court held further that:

Fifteen days appears to me to be far too short. Taking into account that SARS has had the necessary information since at least 11 August, and that any further information requested may only supplement a process already well under way, I am satisfied that SARS should be allowed until 11 December at the latest to finalise its audit and make payment of the refunds unless the audit indicates that the payment is not due.”²⁵⁴

It must be noted that the High Court determined the issue of jurisdiction on the specific facts of this case, most notably, the “direct, external legal effect” of SARS’ decision to withhold the taxpayer’s VAT refunds across multiple tax periods,²⁵⁵ pending completion of the audit, considering the financial impact this would have on the taxpayer’s business. As will be discussed in more detail in Chapter 4 below, the High Court may be less willing to entertain an application to compel the finalisation of an audit where a similarly demonstrable prejudice is not evident.

However, in appropriate circumstances a court may well decide to evaluate the requirements of section 237 of the Constitution with reference to relevant facts and circumstances. This would be consistent with what the Constitutional Court held in

²⁵³ *Ibid* para 53.

²⁵⁴ *Ibid* para 53 – 54.

²⁵⁵ *Ibid* para 36.

*Metcash Trading Ltd v Commissioner, South African Revenue Service*²⁵⁶ regarding the jurisdiction of other courts to hear tax disputes:

*“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... It is therefore clear that any decision of the Commissioner... and not only a refusal by the Commissioner to grant relief under the power to do so vested in the office by section 36(1) of the Act (“unless the Commissioner so directs”), is subject to judicial intervention in certain circumstances.”*²⁵⁷

Whether the exercise of SARS’ audit and information-gathering powers constitutes an exercise of public power which is subject to judicial review is dealt with in more detail in Chapter Four below. However, when one considers the time and cost involved in bringing an urgent application before the High Court and the unique circumstances which taxpayers would have to prove, it is evident that approaching the High Court will not constitute a satisfactory remedy in most cases.

Taxpayer may utilise the SARS internal complaints system and have recourse to the OTO where the finalisation of an audit is unreasonably delayed. However, for the reasons stated above, the non-binding nature of the internal complaints resolution and OTO process may not provide a suitable outcome for aggrieved taxpayers.

3.4.2 Requests for relevant material

The 2014 Explanatory Memorandum indicates that where a taxpayer is dissatisfied with the way SARS requests information during an investigation (i.e. the information-gathering process as well as an audit), the following remedies are available to the taxpayer:

²⁵⁶ 2001 (1) SA 1109 (CC).

²⁵⁷ Note 256 *supra*, para 44 – 46.

- The taxpayer may request SARS to withdraw or amend the decision to request relevant material under section 9 of the TAA;
- The taxpayer may pursue the internal administrative complaints resolution process provided by SARS;
- The taxpayer may approach the OTO; and
- The taxpayer may approach the Public Protector.²⁵⁸

In addition to the remedies listed by SARS in the 2014 Explanatory Memorandum, a taxpayer aggrieved by a request for relevant material could potentially bring an application for judicial review, on the basis that the request for information constitutes unlawful administrative action as defined under the PAJA.²⁵⁹

However, despite requests for relevant material being defined as (or at least premised on) “decisions” in the 2014 Explanatory Memorandum, it is not at all clear that a request for relevant material will constitute a “decision” which, in turn, meets the definition of “administrative action” contained in the PAJA, in all cases. This issue is considered in more detail in Chapter Four below, but even if taxpayers are entitled to challenge the decision to issue a request for relevant material, or request an order compelling SARS to finalise a protracted information-gathering process, this would generally not constitute an appropriate remedy in the circumstances. Requests for relevant material generally, based on the time and costs involved in approaching the High Court for relief, and the more immediate nature of the prejudice experienced by the taxpayer.

²⁵⁸ Op cit note 200 at page 43.

²⁵⁹ Peter Dachs ‘Ability of SARS to request information from a taxpayer’ *Tax ENSight* 20 May 2015 <https://www.ensafrica.com/news/ability-of-SARS-to-request-information-from-a-taxpayer?Id=1822&STitle=tax%20ENSight> accessed on 27 January 2017.

The efficacy of the proposed remedies contained in the 2014 Explanatory Memorandum are considered and critically evaluated below.

3.4.2.1 Request to amend or withdraw a request for relevant material

A request to amend or withdraw a request for relevant material is unlikely to give sufficient protection to the taxpayer's right to just administrative action. First, while SARS may be willing to agree to refine a request where the taxpayer can demonstrate that it is in SARS' interests to do so, SARS is unlikely to do this on a regular basis. SARS places significant importance on information gathering, and has expressed strong views that taxpayers should not be able to refuse a request for relevant material based on criteria such as the taxpayer's assessment of relevance.²⁶⁰

Secondly, taxpayers are required to respond to requests for relevant material within the period specified in the notice. There are no provisions in the TAA that provide for the suspension of this obligation, including where a section 9 request for reconsideration or withdrawal is considered. Reputational risk, the desire to maintain a good relationship with SARS, and the sanctions set out in section 234 of the TAA may dissuade taxpayers from utilising section 9 of the TAA in the context of information-gathering.

There are no time periods provided for in the TAA for SARS to issue a decision in respect of a section 9 request, so this is arguably not an effective remedy in the circumstances. In addition, if SARS refuses a section 9 request, the taxpayer's only

²⁶⁰ Illustrated by the passages quoted from the 2014 Explanatory Memorandum, in Chapter Two above (op cit notes 193 – 202).

recourse would be a review application in the High Court,²⁶¹ which is similarly not a time or cost-effective remedy, for the reasons set out above.

3.4.2.2 SARS internal complaints resolution process

As set out above, the internal complaints process is lacking in both efficacy and independence.²⁶² While it may be a more cost-effective remedy, the time it ordinarily takes to escalate a complaint through the system renders such an approach undesirable, given that taxpayers are provided with a relatively short period (usually 21 days) within which to respond to requests for relevant material, and SARS is not compelled to grant an extension of this period.

3.4.2.3 Tax Ombud

Approaching the OTO is also an inappropriate mechanism for challenging a request for relevant material. The Ombud cannot compel SARS to amend or withdraw requests for relevant material and is only able to make non-binding recommendations in response to a taxpayer complaint, even where the Ombud's view is that a request for relevant material is too widely framed, or otherwise inappropriate.

Taxpayers are also unable to approach the Ombud directly, except where “substantial and compelling circumstances” justifying a direct approach exist.²⁶³ This position can be difficult to establish in practice. As set out above, given the deadlines imposed on taxpayers in the context of requests for relevant material, and the potential sanctions

²⁶¹ Although this view has not been tested in court, this is the view expressed by SARS in various publications, most recently in the Draft Interpretation Note on request for reduced assessments under section 93 of the TAA (16 August 2021) available at <https://www.sars.gov.za/wp-content/uploads/Legal/Drafts/LPrep-Draft-2021-71-Draft-IN-on-reduced-assessments-meaning-of-readily-apparent-undisputed-error-16-August-2021.pdf>

²⁶² Op cit note 233 at page 19 – 21.

²⁶³ Op cit note 240.

set out in section 234 of the TAA for failing to meet these deadlines, escalating a matter to the OTO is unlikely to be an effective remedy in practice.

3.4.2.4 Public Protector

While the Public Protector²⁶⁴ has the power to bind organs of state and administrators with their recommendations and decisions,²⁶⁵ it is unclear whether the Public Protector's office would entertain a complaint against SARS in relation to a request for relevant material, given that the OTO exists for precisely this reason. For the same reason, the Public Protector would also be unlikely to assist taxpayers as an institution of first recourse. While it would no doubt be possible to approach the Public Protector following an unsuccessful outcome from the OTO, the time this would take arguably renders the Public Protector's office an unsuitable option for taxpayers who are aggrieved by a request for relevant material.

3.5 Conclusion

While the TAA appears to have somewhat expanded taxpayers' rights, SARS' powers under the TAA outweigh taxpayers' rights considerably, in the context of information gathering and audit processes.

While it is critical to the efficient functioning of the tax system that SARS is able to collect sufficient information in order to identify and address potential risks and errors, due regard must also be given to the fundamental constitutional rights of taxpayers, particularly the right to finality, and the minimum thresholds for the exercise of public power in terms of the

²⁶⁴ The Public Protector's office is provided for by section 181 of the Constitution and given effect to through empowering legislation, the Public Protector Act 23 of 1994 ("the Public Protector Act").

²⁶⁵ Section 182(c) of the Constitution read with section 6 of the Public Protector Act empowers the Public Protector to take "*appropriate remedial action*", including mediation, conciliation, and "*any other means that may be expedient in the circumstances*". In *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) the SCA held that the Public Protector's findings are binding until set aside in terms of judicial review action.

principle of legality, and SARS' constitutional obligations to apply the law fairly, responsibly, and in a way that promotes the efficient and economic use of resources.

In the absence of a reasonable suspicion on the part of the relevant SARS officials that disclosing the scope of an audit or investigation to the taxpayer would prejudice the investigation, SARS officials should be able to formulate and disclose the scope and the underlying risk hypothesis motivating an audit or information-gathering exercise. Disclosing the concern or risk hypothesis motivating the audit or information-gathering exercise to taxpayers with sound compliance track records would promote a more co-operative approach by allowing the majority of taxpayers to provide useful input into the inquiry by identifying and providing relevant material, facilitating the fastest possible resolution of the audit or query.

The 2014 Explanatory Memorandum²⁶⁶ provides that due recognition ought to be given to the fact that “...*information is the lifeblood of a revenue authority's taxpayer audit activity, and the... whole burden of taxation would fall only on diligent and honest taxpayers if a revenue authority had no effective powers to obtain confidential information about taxpayers who may be negligent or dishonest.*”²⁶⁷

However, the efficacy of SARS' information-gathering powers must be balanced against taxpayers' rights to fair, reasonable, and lawful treatment. In particular, the right to finality and the important purpose which it serves should not be undermined by unlawful or unreasonable conduct on the part of SARS officials. Our courts have recognised that one of the reasons why it is not in the public interest for disputes to continue indefinitely is that it becomes increasingly difficult to procure information, documentary evidence, and

²⁶⁶ Op cit note 200 at page 43 – 44.

²⁶⁷ Op cit note 201.

witnesses over time, which makes adjudicating and resolving the dispute difficult if not impossible.

“Fishing expeditions” in respect of historical periods, where SARS has not yet established a risk hypothesis and essentially intends to comb through the taxpayer’s records in the hope of uncovering an error, certainly violate the right to finality. As discussed in the preceding chapter, while the ability to identify and correct mistakes in assessments is crucial for the integrity of the tax system, the procedural fairness of each component of tax administration is equally important for the maintenance of tax morale and voluntary compliance. The potential violation of the right to finality should be considered particularly carefully where SARS exercises its audit and information-gathering powers in relation to “prescribed” years. SARS should not investigate “prescribed” years without just cause, in other words, without at least a reasonable suspicion that the taxpayer is guilty of impugned conduct.

Unnecessarily lengthy audits, requests for excessive volumes or excessively broad scopes of information, and audits where SARS requests information in a piecemeal fashion, cause similar prejudice for taxpayers. The resultant legal uncertainty (where the taxpayer cannot produce the information, documents and witnesses to answer SARS’ queries due to the effluxion of time) and commercial uncertainty (where the taxpayer’s ability to do business is hindered by protracted audits where the potential additional tax liability is not clearly framed) creates an environment in which audits and investigations are often significantly prejudicial to taxpayers, hindering their ability to conduct business.

Aside from potential breaches of taxpayers’ rights (notably, the right to finality) the broad powers granted to SARS in the absence of guidelines and adequate remedies potentially sets a precedent for SARS officials to engage in unlawful and uneconomic conduct.

The time and cost involved in an audit can be significant for taxpayers, especially given the lack of any legislative or regulatory obligations on SARS to conduct audit and information-gathering processes economically, expediently, and with due regard for the principles of fairness and reasonableness. The likely outcome of an additional assessment requires taxpayers to plan for the further time taken, and additional legal and advisory costs, to dispute that assessment.

Accordingly, depending on how long it takes for an audit to be finalised and the information which the taxpayer has been able to locate to support its case, it often makes practical and commercial sense for taxpayers to agree to settle disputes before they reach the Tax Court, even where SARS' case is weak or where SARS has committed material procedural errors and the taxpayer thus has good prospects of success on appeal.

In most instances, SARS officials are not held accountable for unlawful conduct such as "fishing expeditions", and the willingness of most taxpayers to negotiate a settlement (and, therefore, of SARS receiving some revenue even where SARS has a poor case) is likely to increase depending on the availability of supporting information and documents (which is progressively less likely where historical tax periods are involved), and as the audit or information-gathering process progresses and more time and costs are incurred. There is accordingly an indirect incentive for SARS officials to engage in unlawful conduct which violates the right to finality, in the absence of enforceable obligations mandating compliance with the protections provided to taxpayers in the context of auditing (sections 40 to 42 of the TAA).

The sanctions imposed against taxpayers for failing to comply with the provisions of the TAA are often harsh, whereas the reciprocal obligations and sanctions for non-compliance imposed on SARS under the TAA are minimal, with the remedies afforded to taxpayers

being either insufficient or entirely absent. The remedies proposed in the 2014 Explanatory Memorandum are insufficient to safeguard against such potential abuses of SARS' powers, for the reasons set out above.

As set out in the preceding chapter, there are a number of principles which inform tax morale and, therefore, levels of voluntary compliance in any tax administration. In tax administrations where trust and credibility are lacking, and where many of the remaining criteria for positive tax morale are not met, procedural fairness is one of the most important factors underlying tax morale. If taxpayers believe that they will be subjected to the harshest possible scrutiny regardless of their compliance status and track record; compliance with audit and information-gathering obligations remains onerous and burdensome; and there is no reward for being a compliant taxpayer, there is very little incentive for taxpayers to engage in voluntary compliance.

The question of how and when the principles of fairness and reasonableness apply in the context of the audit and information gathering process, and which administrative justice framework is applicable (i.e. either the PAJA or the principle of legality), are considered in more detail in Chapter Four below. However, SARS should, at an absolute minimum, be required to adhere to the basic values and principles governing public administration contained in section 195 of the Constitution and the principle of legality (which are discussed in more detail in Chapter Four below).

Section 195 requires the efficient, economic and effective use of resources, and the provision of services impartially, fairly, equitably and without bias. These obligations arguably extend to the fair and reasonable application of SARS' audit and information-gathering powers. SARS thus has an obligation to finalise audits and information-gathering

processes expeditiously, and to use the legislative framework in a manner which facilitates meaningful engagement between taxpayers and SARS.

The precise relationship between the administrative justice principles enshrined in PAJA, the principle of legality, and SARS' obligations to ensure that audit and information-gathering processes are conducted in a procedurally fair manner, are less clear. In the South African context, the requirement of procedural fairness is typically reserved for administrative decisions, although, as stated above, all exercises of public power are at least subject to the minimum threshold of legality.

In practice, taxpayers aggrieved by the harsh or cumbersome exercise of SARS' audit and information-gathering powers are using administrative justice principles to approach the courts for relief, in steadily increasing numbers.²⁶⁸ It is thus necessary to interrogate and to understand this particular interface between taxpayers, the courts, and SARS, in order to establish what SARS' obligations are. This will set a baseline against which SARS' current practice, and international standards of good practice, can be compared and evaluated.

²⁶⁸ The relevant judgments are discussed in Chapter Four below.

4 CHAPTER FOUR: CONSTITUTIONAL AND ADMINISTRATIVE LAW PRINCIPLES GOVERNING THE EXERCISE OF THE COMMISSIONER'S AUDIT AND INFORMATION-GATHERING POWERS UNDER THE TAA

It is undesirable and potentially unlawful for a revenue authority to be able to effectively circumvent taxpayers' rights (and in particular, the right to finality) by using its audit and information-gathering powers in an unlawful or unreasonable manner. This conduct is likely to have a negative impact on tax morale and voluntary compliance and indeed, the overall cost-effectiveness and efficiency of the tax system.

As stated in the preceding chapter, the remedies which SARS and National Treasury have provided thus far to address the misuse of SARS' audit and information-gathering powers are largely ineffective, particularly having regard to their independence and enforceability. One possible exception is the judicial review of the exercise of SARS' powers, either under the PAJA, or under the principle of legality. While judicial review may not be a well-suited remedy from a time and cost perspective, it is the most practicable remedy available to a taxpayer who is aggrieved by SARS' conduct in exercising its audit and information-gathering powers.

This chapter will analyse the relevant legislation and judicial precedent to determine whether the exercise of SARS' investigative and information-gathering powers can constitute administrative action that is subject to review under the PAJA. Further consideration will be given to whether the principle of legality applies to the exercise of these powers and whether taxpayers may review the exercise of SARS' investigative and information-gathering powers on this basis, where SARS' conduct unfairly limits or infringes upon their rights, particularly, the right to finality.

4.1 **SARS' audit and information-gathering powers as administrative action**

4.1.1 The definition of administrative action in South African law

In terms of section 33 of the Constitution, administrative action must be reasonable, lawful and procedurally fair. The PAJA was enacted in order to give effect to this fundamental constitutional right. The Constitutional Court has also identified the principle of legality as a catch-all common law provision applicable to all exercises of public power, even those which fall outside of the definition of administrative action, as will be discussed in more detail below.²⁶⁹

The term “administrative action” is defined in section 1 of the PAJA as:

“any decision taken, or any failure to take a decision, by an organ of state, when exercising a power in terms of the Constitution or a provincial constitution; or exercising a public power or performing a public function in terms of any legislation...which adversely affects the rights of any person and which has a direct, external legal effect...”

PAJA also lists specific exclusions to this definition,²⁷⁰ but the administrative powers and functions of SARS do not form part of those exclusions.

Our courts have held that in determining whether or not a decision or act constitutes administrative action, the facts and circumstances of each case must be looked at individually. However, an important question informing this determination is whether the task itself is administrative or not.²⁷¹ In *President of the Republic of South Africa v South*

²⁶⁹ Cora Hoexter *Administrative Law in South Africa* 2 ed (2011) 172.

²⁷⁰ Section 1 of PAJA.

²⁷¹ *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) at para 148, hereafter “SARFU”.

African Rugby Football Union,²⁷² the Constitutional Court held that “[t]he focus of the enquiry as to whether conduct is ‘administrative action’ is... on the nature of the power he or she (the administrator) is exercising”.²⁷³

In *Metcash Trading Ltd v Commissioner, South African Revenue Service*,²⁷⁴ the Constitutional Court held that the implementation of legislation by the Commissioner was clearly administrative action, which is subject to judicial review:

*“It has long been accepted that when the Commissioner exercises discretionary powers conferred upon him (or her) by statute, the exercise of the discretion constitutes administrative action which is reviewable in terms of the principles of administrative law.”*²⁷⁵

And:

*“The Commissioner, in exercising the power under section 36 [of the VAT Act], is clearly implementing legislation and as such the exercise of the section 36 power constitutes administrative action and falls within the administrative justice clause of the Constitution. I cannot agree with Snyder’s J to the extent that she considered the exercise of the discretion conferred upon the Commissioner in section 36 of the Act not to be reviewable. The Act gives the Commissioner the discretion to suspend an obligation to pay.... The Commissioner must, however, be able to justify his decision as being rational. The action must also constitute “just administrative action” as required by section 33 of the Constitution and be in compliance with any legislation governing the review of administrative action.”*²⁷⁶

²⁷² *Supra* note 271.

²⁷³ *Ibid.*

²⁷⁴ Note 256 at para 42.

²⁷⁵ *Ibid* at para 40.

²⁷⁶ *Supra* note 275.

The Court noted further that the internal appeal procedure previously provided for in the VAT Act did not oust the review jurisdiction of appropriate courts:

“...the Act nowhere excludes judicial review in the ordinary course. The Act creates a tailor-made mechanism for redressing complaints about the Commissioner’s decisions, but it leaves intact all other avenues of relief.”²⁷⁷

And:

“...there is nothing in section 36 to suggest that the inherent jurisdiction of a high court to grant appropriate other or ancillary relief is excluded. The section does not say so expressly nor is such an ouster necessarily implicit in its terms, while it is trite that there is a strong presumption against such an implication.”²⁷⁸

The Constitutional Court thus appears to accept that internal remedies, such as those provided for in Chapter 9 of the TAA, do not automatically or inevitably oust the courts’ review jurisdiction.²⁷⁹ However, this does not mean that every exercise of SARS’ powers will fall within the legislative definition of “administrative action”, or that every exercise of SARS’ powers is reviewable under the PAJA. The facts and circumstances of each individual exercise of power must be evaluated with reference to the definition of “administrative action”.

An important factor influencing this analysis is whether the exercise of SARS’ powers in deciding to conduct an audit or information-gathering process is a final determination, or a preliminary decision taken as part of a multi-staged decision-making process.

²⁷⁷ *Supra* note 256 at para 33.

²⁷⁸ *Ibid* para 43.

²⁷⁹ *Ibid* para 33.

Administrative decisions are often taken in stages, constituting a single continuous process, rather than a series of discrete decisions or events.²⁸⁰ Audits and requests for relevant material are not typically initiated in isolation. Rather, these decisions can typically be described as components of the multi-stage decision-making process provided for in section 92 read with section 99(2) of the TAA, for the issuing of additional assessments. Section 92 of the TAA requires SARS to be *satisfied* that an assessment does not reflect the correct tax position, to the prejudice of SARS and the *fiscus*. This satisfaction can only be established by an examination of the taxpayer's position, and supporting documentation and information which will confirm or negate the correctness of the relevant tax position and assessment.

Put differently, the purpose of the audit and information gathering process is for SARS to identify and investigate risks, anomalies and potential errors in order to determine whether the law has been incorrectly applied to the prejudice of SARS or the *fiscus* (i.e. whether the original assessment is incorrect), in which case, an additional assessment must be issued.

This process should (in theory) begin with the detection of facts and circumstances that give rise to a reasonable suspicion of some error in the original assessment or in the taxpayer's supporting disclosures which causes prejudice to SARS or the *fiscus*. This prompts an audit or information-gathering process, and once SARS has considered the relevant information and reviewed the taxpayer's position, a recommendation is made regarding whether or not an additional assessment should be issued. The decision to commence an audit or to issue a request for relevant material is, therefore, arguably a preliminary decision falling within a multi-stage decision-making process.

²⁸⁰ Op cit note 269, at page 436 – 7.

Whether the exercise of SARS' audit and information-gathering powers falls within the definition of "administrative action" will depend on a number of factors. SARS has indicated that in the Commissioner's view, the decision to audit a taxpayer and the decision to gather information by issuing a notification of audit and requesting relevant material is an interim decision, and does not constitute administrative action as defined in the PAJA for this reason.²⁸¹

It is arguably correct to classify the decision to audit or to request relevant material from a taxpayer as an interim decision, being part of a multi-stage decision-making process. However, the interim nature of the exercise of SARS' audit and information-gathering powers does not necessarily exclude these acts from the scope of the "administrative action" definition in all circumstances, as will be discussed in more detail below.

To determine whether or not it is reviewable, the exercise of SARS' audit and information-gathering powers question must first be considered against each element of the PAJA definition of "administrative action".

4.1.2 "A decision..."

While it would seem that the initiation of an audit or request for relevant material evidently requires a "decision" on the part of a SARS official, our courts do not ascribe the term "decision" to each and every exercise of public power which requires an official to apply their mind and choose to do (or not to do) something. This is particularly relevant in the context of decisions of an interim nature.

Section 104 of the TAA refers to "decisions" made by a SARS official that are capable of objection, but does not provide any explicit guidance on which decisions would fall into this

²⁸¹ *Carte Blanche Marketing CC and Others v Commissioner for the South African Revenue Service* [2017] ZAGPPHC 253.

category. The SARS Dispute Resolution Guide provides some unofficial guidance in this regard, but does not include the “decision” to audit or to request relevant material as a decision for purposes of section 104 of the TAA.²⁸² This is not unexpected, as section 104 and the other provisions contained in Chapter 9 of the TAA are intended to regulate disputes of assessments issued by SARS. Section 104 probably only encompasses decisions relating to the dispute of an assessment (this would include, for example, a refusal to extend any of the time periods applicable to Chapter 9 of the TAA, the decision to levy interest on a disputed amount, or the decision to condone a late objection or appeal).

The term “decision” is defined in the PAJA as “...*any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to making, suspending, revoking or refusing to make an order, award or determination; giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission; issuing, suspending, revoking or refusing to issue a licence, authority or other instrument; imposing a condition or restriction; making a declaration, demand or requirement; retaining, or refusing to deliver up, an article; or doing or refusing to do any other act or thing of an administrative nature...*”²⁸³ (own emphasis).

This definition certainly has the potential to include a request for relevant material or the decision to audit a taxpayer. Audits and requests for relevant material do not happen automatically, and must be issued to the taxpayer by SARS. In almost all instances, the issuing of audit notifications and requests for relevant material requires deliberate action to be taken by a SARS official in terms of the relevant section of the TAA (or other tax Act),

²⁸² *Supra* note 269 at page 101.

²⁸³ *Op cit* note 270.

on the basis (or absence) of the specific facts and circumstances required by the authorising provision.

In the case of both audits and requests for relevant material, there is a demand or requirement imposed upon the taxpayer to respond in the manner and within the timeframe specified in the request. Both audit notices and requests for relevant material contain instructions to the taxpayer that determine the content of the taxpayer's obligations i.e. what must be made available or provided to SARS, and the periods in which the information must be provided.

The definition of "*empowering provision*" contained in the definition of "*decision*" in the PAJA refers to "...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". The TAA evidently meets the definition of an "empowering provision".

The decision to audit or request relevant material from a taxpayer therefore arguably meets the requirements to constitute a decision made under an empowering provision, which involves a demand or the imposition of requirements. The remaining requirement to consider is whether the decision is also "...of an administrative nature".

The phrase "...of an administrative nature" is not defined in PAJA. Certain authors have suggested that the purpose of this component of the definition is the exclusion of private action from the ambit of administrative action.²⁸⁴ It is evident from the existing jurisprudence that there is no concrete definition of what would be considered "administrative" in nature, and that the "administrative" nature of a decision must be

²⁸⁴ Op cit note 269 at page 203, citing J R De Ville *Judicial Review of Administrative Action in South Africa* rev ed (2005) 39 and I Currie *The Promotion of Administrative Justice Act: A Commentary* 2ed (2007) para 3.7.

inferred from the nature of the task being performed, and by the facts and circumstances of each case.²⁸⁵

Our courts have drawn a distinction between acts of an administrative nature and acts of an investigative or preliminary nature. A distinction has also been drawn between the investigative and deliberative functions of public bodies.²⁸⁶

In the case of *Competition Commission of SA v Telkom SA Ltd*²⁸⁷ (“*Telkom*”) the SCA held that the decision of the Competition Commission to refer a complaint to the Competition Tribunal was a decision of a preliminary and investigative nature, and therefore, not an administrative decision.²⁸⁸ In its judgment, the SCA placed significant reliance on the case of *Simelane and others NNO v Seven-Eleven Corporation SA (Pty) Ltd and another*,²⁸⁹ (“*Simelane*”) a case which also involved the question of whether a decision to investigate and refer a complaint to the Competition Tribunal was a decision of an administrative nature.

The appeal court in *Telkom*²⁹⁰ held, per the reasoning and conclusions expressed in *Simelane*,²⁹¹ that the ultimate decision to refer a matter to the Competition Tribunal and the referral itself are decisions of an investigative and not of an administrative nature, and that this remains “...a correct reflection of the position under PAJA...”.²⁹²

In *Simelane*, the main underlying legal dispute was whether the Competition Act No. 89 of 1998 (the “Competition Act”) provides for a dichotomous procedure for the resolution of a

²⁸⁵ *Ibid.*

²⁸⁶ *Supra* note 269 at page 204; see also C Hoexter “Administrative Action’ in the Courts’ 2006 *Acta Juridica* 303 at page 307.

²⁸⁷ [2010] 2 All SA 433 (SCA), hereinafter “*Telkom*”.

²⁸⁸ *Ibid* para 3 and para 9.

²⁸⁹ [2003] 1 All SA 82 (SCA), hereinafter “*Simelane*”.

²⁹⁰ *Supra* note 287.

²⁹¹ *Supra* note 289.

²⁹² *Supra* note 287 at para 11.

complaint.²⁹³ The appellants argued that there were two distinct stages, with the Competition Commission playing an investigative role, and the Competition Tribunal playing an adjudicative role. The respondent argued that the functions of the Commission are both investigative and adjudicative.²⁹⁴

The appellants argued that the dichotomous procedure is best illustrated by the execution of the process: the Commission receives a complaint, investigates it, and then determines whether it should be referred to the Tribunal, and the Tribunal effectively conducts a trial to determine whether the complaint is well-founded, and if so, what steps are to be taken.²⁹⁵

The court held, with reference to the empowering legislation, that both the Commission and the Tribunal are creatures of statute.²⁹⁶ Citing the judgment in the unreported case of *Novartis (sic) SA (Pty) Ltd and others v The Competition Commission and others*²⁹⁷ the court held that:

*“...it is clear that in a case such as the one we are concerned with the function of the Commission is investigative and not subject to review, save in cases of ill-faith, oppression, vexation or the like.”*²⁹⁸

In *Novartis*,²⁹⁹ the Competition Commission successfully argued that its decision to refer a complaint to the Tribunal is not final, nor does it create consequences for the applicants. It was held that the Competition Commission’s powers are thus of a preliminary and

²⁹³ *Supra* note 289 paras 10 – 11.

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*

²⁹⁶ *Supra* note 289 at para 12.

²⁹⁷ *Novartis SA (Pty) Ltd v Main Street 2* [2001-2002] CPLR 470 hereinafter “*Novartis*”.

²⁹⁸ *Supra* note 289 at para 17.

²⁹⁹ *Supra* note 297.

investigative nature, comparable to those of the police services or the Directorate of Serious Economic Offences.³⁰⁰

The court held that:

“To decide whether an administrative action has been taken fairly it is crucial that the decision-making process be viewed as a whole. The demands of fairness will depend on the context of the decision viewed within the procedural context in which it arises. An essential feature of the context is the empowering statute, which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.”³⁰¹ (own emphasis)

The court then refers, in paragraph 42 of the judgment, to the SCA judgment in *Brenco*,³⁰² stating that the approach in *Brenco* represents the “*practical and flexible approach our courts have taken on many occasions to administrative fairness challenges*”.³⁰³

The court held that “the standard applicable in the conduct of the investigative function is the general principle that an interested party must know the “gist” or the substance of the case that it has to meet” (own emphasis).³⁰⁴

The court referred to the judgment in *Huisman v Minister of Local Government, Housing and Works*,³⁰⁵ where significant emphasis was placed on the theme of administrative efficiency. It was held in this judgment that the proceedings of administrative bodies could be endlessly protracted if affected persons are given the right to respond at every stage of

³⁰⁰ *Ibid* para 40.

³⁰¹ *Supra* note 297 at para 41.

³⁰² *Chairman: Board on Tariffs and Trade and others v Brenco Incorporated and others* 2001 (4) SA 511 (SCA) hereinafter “*Brenco*”.

³⁰³ *Supra* note 297 at para 47.

³⁰⁴ *Supra* note 297 at para 44.

³⁰⁵ 1996 (1) SA 836 (SCA).

a decision-making process. Illustrating the consistent approach of our courts in striking a compromise between fairness and practical concerns of efficiency,³⁰⁶ the court in *Novartis* held that the principle of administrative efficiency is equally applicable to the Competition Commission:

*“...the administrative efficiency of the Commission in rendering its duties could be severely affected if, in exercising its discretion in terms of section 50(2), its every action would be subject to scrutiny under the principle of administrative review in the manner suggested by the applicants in this matter.”*³⁰⁷

The court further considered the judgment in *Van der Merwe and others v Slabbert NO and others*,³⁰⁸ where Booysen J, stated the principle that:

*“It is so that bodies required to investigate only need in general not observe the rules of natural justice and that bodies are required to investigate facts and make recommendations to some other body or person with the power to act need not necessarily apply the rules of natural justice, depending on the circumstances.”*³⁰⁹

Applying this conclusion to the circumstances of the case before it, the court in *Novartis* held that:

“...It is our view that the distinction drawn by the Court between an investigative and a determinative function performed by public bodies is crucial in ensuring that public bodies are not unduly restrained in their work where the exercise of their powers

³⁰⁶ *Supra* note 297 at para 48.

³⁰⁷ *Ibid* para 49.

³⁰⁸ 1998 (3) SA 613 (N).

³⁰⁹ Note 308 *supra* at page 624.

carries no serious or final consequences for affected parties.
In the context of this application... the violations of natural justice alleged by the applicants against the Commission can only be upheld if the complaint referral by the Commission constitutes a determinative action. Our view is that it does not.
Section 21... which deals with the functions of the Commission, states that the Commission has the power to investigate and evaluate alleged contraventions of Chapter 2. Chapter 2 deals with prohibited practices. The Commission therefore is empowered to investigate and evaluate alleged prohibited practices, and, in terms of section 50(2), refer to the Tribunal those complaints that in respect of which, it “determines”, a prohibited practice has been established. The Commission is an investigative body, which in referring the complaint to the Tribunal is only instituting the initial procedural step on the road to a hearing.

The Tribunal, on the other hand, is specifically empowered by section 27(a) of the Act to adjudicate on prohibited practices and to determine whether a prohibited practice has actually occurred... The Tribunal clearly exercises a determinative action... and therefore it is enjoined to conduct its proceedings in accordance with the tenets of natural justice. The Commission is not subject to the same requirement precisely because the legislature... sought, in this Act, to distinguish between investigative and adjudicative procedures.

Thus if one looks at the complaint procedure holistically... and not in piecemeal fashion, one comes to the conclusion that... the applicants’ argument that it is entitled to administrative justice at the complaint referral stage has no prospect of success before the High Court. Their application attempts to transform an investigative process into an adjudicative process... Furthermore, this application incorrectly assumes that if the applicants were in any way prejudiced by the

complaint referral, such prejudice cannot be remedied through the processes in the Tribunal. This is clearly not the case... The applicants have therefore ignored the fact that Tribunal Rules and procedures provide them with remedies if the referral is approached holistically...

If one examines the grounds of the applicants' complaint about why the Commission proceeded unfairly we will see that all three are accommodated in the Tribunal's procedures as set out in the Act and the Tribunal's Rules. Thus, in the proceedings before the Tribunal, the applicants would have to be given access to material evidence adverse to them, would be given a hearing to dispute adverse evidence and the Commission would have to be able to substantiate its allegations otherwise its case would fail...

If the applicants' contentions are correct... the Commission, would be asked to adjudicate over what it had thus far investigated despite the fact that it is not the final arbiter. A more pointless and inefficient process is hard to imagine. At the time that the Commission makes its referral the respondent firm (i.e. the applicants in this case) is not required to defend itself. That takes place when the hearing procedures evolve as part of the Tribunal process, that is, after the step of referral. Fairness is not compromised by denying natural justice prematurely; it is only compromised if it is ultimately denied...

Referring a complaint to the Tribunal is not determinative of the complaint. All it means is that the respondent will have to face a hearing before the Tribunal where it will be given an opportunity to respond to the allegations that it has engaged in a prohibited practice... the decision by the Commission to refer a complaint is merely one of the steps in the resolution of a complaint; it may be the most important one but it is not determinative of the complaint. The respondent gets an opportunity to

*state its case before the Tribunal. The decision of the Tribunal is determinative of the complaint as a whole and this is why the Act entitles a respondent in Tribunal proceedings to the principles of natural justice.*³¹⁰

The judgment in the *Novartis* case has been incorporated with approval into the SCA's judgment in *Simelane*, which, in turn, was confirmed in the *Telkom* case. *Telkom* has been confirmed in subsequent SCA judgments, and accords with previous judgments of the Constitutional Court under the Interim Constitution.³¹¹

Accordingly, our courts have established the view that at least in certain circumstances, preliminary or investigative decisions do not constitute administrative action. It is contended, however, that there may be distinguishing factors in relation to the decision of a SARS official to audit or request information from a taxpayer that motivate for a different approach to be taken.

In order to understand the difference between interim decisions in the context of the Competition Commission and Tribunal, and interim decisions made by SARS officials in the context of audit and information gathering, the various judgments on which the SCA based its decision in *Telkom*³¹² need to be considered more closely, and distinguished where appropriate.

The principles which can be drawn from the judgments in *Novartis*,³¹³ *Simelane*, and *Telkom*³¹⁴ are arguably determinative of the current South African position regarding

³¹⁰ *Supra* note 297 at paras 54 to 61.

³¹¹ *Competition Commission v Computicket (Pty) Ltd* [2015] 1 CPLR 15 (SCA); see also *Bernstein v Bester NO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) and *Nel v Le Roux NO* 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC).

³¹² *Supra* note 287.

³¹³ *Supra* note 297.

³¹⁴ *Supra* note 289.

whether (and when) investigative and preliminary processes constitute administrative action.³¹⁵

First, the courts have emphasised the importance of the distinction to be drawn between investigative and determinative functions performed by public bodies. This ensures that public bodies are not unduly restrained in their functioning.³¹⁶ The courts have accordingly been reluctant to impose strict requirements of fairness in instances where investigative actions and decisions are not determinative in nature, particularly where the exercise of investigative powers has serious or final consequences for affected parties. In both *Novartis* and *Simelane*, the fact that the investigation carried out by the Competition Commission lacked any determinative impact critically informed the decision that the investigative functions of the Competition Commission do not constitute administrative action.

On this basis, the courts have held that where legislation specifically imparts investigative but not determinative powers to a public body, that body's decisions will not constitute administrative decisions. In such instances, the investigation of the affected person is merely the "*...initial procedural step on the road to a hearing.*"³¹⁷ In reaching this decision, the SCA has placed significant weight on the principle that the legislature clearly intended to "*...distinguish between investigative and adjudicative procedures.*"³¹⁸ The SCA has firmly rejected arguments that "*attempt to transform an investigative process into an adjudicative process*".³¹⁹ It is submitted that this approach is correct, as duplicative processes constitute a waste of the administrative resources which are already thinly

³¹⁵ *Supra* note 287.

³¹⁶ *Supra* note 297 at para 49.

³¹⁷ *Supra* note 289 at para 55.

³¹⁸ *Ibid* para 56.

³¹⁹ *Supra* note 297.

stretched in many public bodies in South Africa, and would cause injustice in unnecessarily constraining administrative bodies in the carrying out of their functions.

Secondly, it is less likely that investigative and preliminary decisions have the capacity to prejudice the affected person (and thus, for the principle of fairness to dictate that such decisions should be subject to judicial review) where a determinative or adjudicative decision will be made at a later stage in the overall process. The courts have held that where there is no obvious prejudice to the rights of the affected person, or where any such prejudice would be capable of being remedied at a later (adjudicative) stage, the potential prejudice to the efficient functioning of public bodies outweighs the potential unfairness inherent in this approach.³²⁰

The additional layer of procedural fairness inherent in an adjudicative process undertaken by a separate public body, following the initial investigation, is ordinarily sufficient to address the potential for infringements of fundamental constitutional rights to occur at the investigative stage. Where there is a separate adjudicative process which is subject to the requirements of fairness, our courts have struck a balance in favour of administrative expediency and efficiency in decision-making, although it is clear that fairness will nonetheless depend on the facts and circumstances of each case.

Implicit in this approach favouring expediency is the inference that if an investigative body is also the final arbiter of the matter it is investigating (i.e. where the investigative body also makes determinative decisions based on its investigations), a different approach may be necessary to give effect to the requirements of fairness. In particular, the effects of conduct which adversely impacts upon the rights of affected persons at the investigative stage of the process, and the capacity for such adverse impact to be remedied in the course of the

³²⁰ Note 287 and 289 *supra*.

decision-making process, should be considered. The statement made by the court in *Novartis* that “*Fairness is not compromised by denying natural justice prematurely; it is only compromised if it is ultimately denied...*”³²¹ has relevance in this regard.

In the context of the decision to audit and request relevant material from a taxpayer as part of the overarching decision-making process for the issuing of an additional assessment, it is important to consider the impact of adverse conduct at the preliminary decision-making stage. This may not be limited to the integrity of the ultimate determination, which can potentially be remedied at the time when the ultimate determination (i.e. the decision to issue an additional assessment) is made. Conduct having an adverse effect on the taxpayer’s rights during an audit or information-gathering process may cause irreversible prejudice to the affected taxpayer.

For example, the taxpayer may incur significant costs in responding to requests for relevant material which are not rationally connected to the items being investigated, which cannot be recovered. Commercial transactions and lending or finance arrangements may be irretrievably prejudiced by unreasonably delayed and uncertain audit processes. Taxpayers may have difficulty complying with various financial reporting obligations where a potential, uncertain liability exists for an extended period of time. Most importantly, the right to finality may be compromised, and the taxpayer may be left unable to locate the evidence it requires to defend its tax position, in circumstances where SARS engages in unnecessarily protracted audits or “fishing expeditions” in respect of historical years of assessment. Where taxpayers’ rights to finality are unfairly compromised, this may ultimately erode trust in the revenue authority and undermine voluntary compliance as discussed in the preceding chapters.

³²¹ *Supra* note 297.

The court has also considered the fact that in preliminary proceedings, the affected person is not usually required to defend themselves.³²² In *Novartis*, the court considered that in the context of a Competition Commission complaint, the affected person is given an opportunity to respond to the allegations emerging from the investigative phase, at the Tribunal. The decision to refer a complaint to the Competition Tribunal is thus “...*merely one of the steps in the resolution of a complaint...*”³²³

With reference to the abovementioned principles, the following important factual distinctions can be made between the referral of a complaint to the Competition Tribunal by the Competition Commission, and the investigation of taxpayers by SARS: first, while the decision to gather information and audit the taxpayer is not final in the sense that it creates a tax liability or inevitably results in an assessment, such decisions do have a direct effect upon the taxpayer’s rights. A request for relevant material or audit notification requires taxpayers to provide information and relevant material to SARS within a specified time frame, under threat of fines and criminal sanctions. The requirement to provide information and documentation to SARS also amounts to a limitation (albeit a justifiable one) of the taxpayer’s constitutional right to privacy.³²⁴

Most importantly, SARS’ audit and information-gathering powers have the potential to violate the right to finality. While a taxpayer is under audit, a potential adjustment to the taxpayer’s financial position is contemplated, creating financial and legal uncertainty for the duration of the audit and information-gathering process. Depending on the content of the notification of audit and any requests for relevant material issued, the taxpayer may or

³²² *Supra* note 297.

³²³ *Ibid.*

³²⁴ Beric John Croome *Taxpayers’ Rights in South Africa: An analysis and evaluation of the extent to which the powers of the South African Revenue Service comply with the Constitutional rights to property, privacy, administrative justice, access to information and access to courts* (Ph.D. thesis, University of Cape Town, 2008) 78.

may not have a clear indication of the nature and amount of the contemplated adjustments. SARS does not have to establish the jurisdictional facts required for a valid additional assessment in order to audit or gather information from a taxpayer, and honest taxpayers are thus potentially subjected to the same level of scrutiny, and uncertainty, as dishonest taxpayers.

Conduct infringing the taxpayer's rights at this stage also has the potential to inflict prejudice on the taxpayer which cannot be remedied at a later stage in the process. Examples of such prejudice include unnecessary expenditure and allocation of resources to respond to an unlawful audit or information-gathering process, the delay or cancellation of commercial transactions where an unreasonably delayed or vague audit or information-gathering process renders the taxpayer's financial position uncertain, and situations where the length of time and costs involved in SARS finalising an audit render the taxpayer unable to dispute the resulting additional assessment.

Secondly, the Competition Commission complaints process involves a two-stage process of investigation and adjudication, with two separate bodies carrying out these distinct functions. In the context of audit and information gathering processes, the same body (SARS) conducts both the preliminary investigation and the determination that follows. In fact, the audit findings provided to the taxpayer at the conclusion of the audit form the basis of the additional assessment to be issued, subject to the representations made by the taxpayer in response to the letter of audit findings.³²⁵ In most instances, the same SARS official conducting the investigation makes representations and recommendations in respect of the adjudicative decision (i.e. whether to issue an additional assessment or not). The additional layer of procedural fairness provided by the Competition Commission's two-

³²⁵ Section 42 of the TAA.

stage process is thus significantly diluted (if not altogether absent) in the context of the audit and information-gathering process.

Thirdly, in the case of audits and requests for relevant material, the answers a taxpayer provides will materially inform the findings made by the SARS auditor. The audit findings and the taxpayer's response thereto (in addition to the information and documentation disclosed by the taxpayer during the process of the audit or investigation) determine whether or not the taxpayer is issued with an additional assessment.

Requests for relevant material and notification of audit letters require the taxpayer *inter alia* to answer questions, provide documents and electronic data, and to explain and defend the tax position adopted in relation to various items in the tax return(s) underlying the assessment(s) which SARS is reviewing. Section 92 of the TAA provides that SARS must issue an additional assessment where an original assessment causes prejudice to SARS or the *fiscus*. SARS' decision to issue an additional assessment is therefore essentially a function or outcome of an audit or investigation, as opposed to an entirely separate determinative process. Accordingly, the decision to audit or gather information not only incorporates the features of both an investigative and an adjudicative process, but it also requires the taxpayer to defend itself and to make representations to the decision-maker at a preliminary stage in the proceedings.

This position differs materially from the Competition Commission's decision to investigate and refer a complaint to the Competition Tribunal. The decision to investigate does not result in any direct consequences for the affected person, as an entirely new public body (the Tribunal) will scrutinize the complaint and relevant information uncovered by the Commission, and provide the affected person with an opportunity to respond before any adverse decision is taken. In the context of audits and information-gathering, it may be

argued that the taxpayer will have an opportunity to remedy any unfairness or prejudice experienced at the audit and investigation stage at the final determinative stage of the process (i.e. once an assessment has been issued and the taxpayer objects thereto).

However, this will not always be the case. It is important to recognize that not all types of prejudice experienced by taxpayers when SARS misuses its audit and information-gathering powers can be remedied through a dispute. One example is where SARS fails to provide the taxpayer with its preliminary audit findings, and the taxpayer is deprived of the opportunity to respond to the audit findings, and an additional assessment is issued. Although the taxpayer can provide all relevant information in an objection (which may result in the withdrawal of the additional assessment) this will involve additional costs and a further delay of at least 60 days³²⁶ (although in practice SARS often takes significantly longer to respond to objections). These additional costs and delays imposed by virtue of SARS' deviation from the statutorily mandated process cannot be recovered from SARS.

In addition, tax audits and requests for relevant material may span several years, during which the taxpayer may incur significant financial and human resources costs, and is subjected to prolonged legal and commercial uncertainty. Where the audit and information-gathering process is unreasonably delayed (particularly regarding the audit of historical, "prescribed" years) the taxpayer's right to finality is significantly prejudiced, and the taxpayer may experience material financial prejudice (e.g. where commercial transactions are suspended or cancelled, or where refunds are withheld until finalisation of the audit) as a result. Taxpayers are not able to recover these costs and lost opportunities from SARS even if they are ultimately successful in a tax appeal, and in fact, may be compelled to settle a dispute (or to forgo disputing the additional assessment entirely) due to commercial

³²⁶ The period in which SARS is required to provide a decision on objection, in terms of Rule 7 of the Rules promulgated in terms of section 103 of the TAA.

and time-related pressures, particularly where withheld refunds are at stake. While tax disputes may be finalised at the objection or appeal stage, many disputes are only resolved once they are argued before the Tax Court. Bringing a tax dispute before the Tax Court typically takes a minimum of 18 months from the date on which an additional assessment is issued.³²⁷

Critically, when historical “prescribed” years are audited and the taxpayer no longer has the comprehensive corporate memory required to displace the section 102 burden of proof (i.e. where key witnesses have left the taxpayer’s employ, and documents and information have been destroyed or cannot be located) the taxpayer may be forced to accept an additional assessment even if the audited assessment and underlying tax position is in fact correct. Sections 40 and 42 of the TAA do not require SARS to disclose the basis for auditing a taxpayer, and it is, therefore, entirely possible for SARS to embark on a “fishing expedition”, auditing and requesting relevant material in respect of historical years of assessment for which the taxpayer legitimately cannot produce the evidence required to successfully defend its tax position. Where the taxpayer cannot successfully dispute additional assessments issued in respect of historical years of assessment, the violation of its right to finality (and the associated financial prejudice) cannot be addressed. This is the exact prejudice that the right to finality is designed to avoid, even honest taxpayers may be compelled to settle or forego any subsequent dispute due to the fact that the information the taxpayer would need to convince SARS and a court of its innocence no longer exists, or cannot be located.

³²⁷ This estimate takes into account the entire Chapter 9 dispute resolution process, including the 30 business days in which a taxpayer must lodge an objection, the 60 business days provided for SARS to respond to the objection, the further 30 business days in which the taxpayer must lodge an appeal, the time periods allocated for SARS to refer the matter to Alternative Dispute Resolution (30 days for SARS to notify the Taxpayer and 90 days to conclude the proceedings), the 20 business day notice period for termination of Alternative Dispute Resolution proceedings, and the average period of time for obtaining a trial date in the Tax Court at the time of submission of this dissertation, being approximately 6 - 8 months.

SARS has expressed the view that it may be necessary to conduct a general investigation into a taxpayer's historical affairs in order to discover the existence of impugned conduct. While this may be reasonable where SARS has reason to suspect that a taxpayer has been dishonest or otherwise failed to disclose material information, there is no requirement for SARS to establish a risk hypothesis before auditing a taxpayer. The result is that honest taxpayers are frequently exposed to the same level of scrutiny, and the same legal and commercial uncertainty, that should be reserved exclusively for dishonest taxpayers.

Finally, if an audit or information-gathering process is concluded without an additional assessment being issued, the taxpayer will have no remedy at all to address any infringements of its rights during the audit and information-gathering process (such as unnecessary or wasted costs, and lost commercial opportunities).

The decision to audit or obtain relevant material from a taxpayer can thus arguably be distinguished from the decision to investigate or refer a complaint to the Competition Tribunal. Audits and requests for relevant material are seldom a benign preliminary investigative process, and often have the potential to affect taxpayers' rights materially and adversely, in a number of ways. The decision to audit or request relevant material could, therefore, constitute a decision of an "administrative nature", having regard to the nature and purpose of these processes.

4.1.3 "...by an organ of state (or a natural or juristic person) ..."

Section 1 of the PAJA stipulates that "organ of state" bears the meaning given in section 239 of the Constitution, namely, *"any department of state or administration in the national, provincial or local sphere of government; or any other functionary or institution exercising a power or performing a function in terms of the Constitution or a provincial constitution or exercising a public power or performing a public function in terms of any legislation."*

Section 2 of the South African Revenue Service Act 34 of 1997 (the “SARS Act”) establishes SARS as an organ of state, but even in the absence of this legislative clarification, it is apparent that SARS exercises public functions in terms of legislation when applying the provisions of the TAA to taxpayers.

The judgment of the SCA in *Commissioner for the South African Revenue Service v Trend Finance (Pty) Ltd*³²⁸ further supports this conclusion, particularly insofar as the court concludes that the Commissioner for SARS is “...an organ of State as defined in section 239 of the Constitution”. On this basis, SARS, as an organization, the Commissioner (as the individual directly responsible for the performance of SARS’ functions and the exercise of its powers), and any SARS official exercising authority delegated by the Commissioner, may properly be considered an organ of state for purposes of section 239 of the Constitution and section 1 of PAJA, and taxpayers can arguably enforce their rights (in appropriate instances) against SARS as an institutional “organ of state”, and against the Commissioner or a SARS official under PAJA.

4.1.4 “...exercising a power in terms of the Constitution... or public power or performing a public function...”

While there is no fixed definition of “public” powers and functions in South African law, the Constitutional Court has held that the primary focus of the enquiry must be on the nature of the power being exercised or the function being performed.³²⁹ Other factors include the extent to which powers and functions are woven into a system of governmental control, or constitute tasks for which the public, in the shape of the state, has assumed

³²⁸ 2007 (6) SA 117 (SCA) at para 25.

³²⁹ Op cit note 269 at page 3; *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC) in which a private entity was held to exercise a public function and the factors influencing whether a function is of a public or private nature.

responsibility.³³⁰ In this regard, the SARS Act establishes SARS as an organ of state “*within the public administration, but as an institution outside the public service*”.

Our courts have taken a relatively conservative approach when considering whether and to what extent public interest is relevant for determining whether a power or function is public in nature.³³¹

The term “public in nature” has been held to mean:

“Powers or functions that are public in nature, in the ordinary meaning of the word, contemplate that it pertains to the people as whole or that they are exercised or performed by on behalf of the community as a whole. (or at least a group or class of the public as a whole) which is pre-eminently the terrain of government.”³³²

Our courts have held that public interest alone is not sufficient to establish conduct as public in nature.³³³ In *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry*³³⁴ the court held that an organisation with functions that were “*not woven into a system of government control*” and did not constitute “*a privatisation of the business of government itself*”³³⁵ was not exercising public power.

By their very design, the exercise of the legislative powers granted to SARS under the TAA affects the general public. It is submitted further that the nature of SARS as an organisation and the nature of its functions are woven into the fabric of the system of governmental control such that SARS exercises public power and performs public functions when carrying out its revenue collection mandate, including the exercise of legislative powers

³³⁰ Op cit note 269 at page 4, with reference to *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry* 2010 (5) SA 457 (SCA).

³³¹ Op cit note 269 at page 207 – 8.

³³² *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another* 2010 (5) SA 457 (SCA), at paragraph 39.

³³³ *Ibid* para 36.

³³⁴ *Ibid*.

³³⁵ *Supra* note 332 at paras 41 – 2.

which are necessary for the successful execution of that mandate. It is accordingly submitted that in administering tax legislation and managing the revenue collection process on behalf of the state, SARS is clearly exercising public power and performing a public function.

4.1.5 “...in terms of any legislation...”

SARS’ powers to audit and request relevant material are conferred by and exercised in terms of legislation (being the TAA). No further elaboration on this portion of the definition is required.

4.1.6 “...that materially and adversely affects the rights of any person...”

The verb “affects” can be interpreted to mean either the determination of rights (determination theory), or the diminishing or cancellation of existing rights (deprivation theory).³³⁶ It has been argued that the deprivation theory approach fails to give effect to section 33(1) as required by section 33(3) of the Constitution,³³⁷ insofar as it limits the right to lawful, reasonable and procedurally fair administrative action. Determination theory is arguably the correct approach, although it has not been followed consistently by our courts.³³⁸ In *LAWSA*,³³⁹ the authors argue that if all persons have the rights contained in section 33(1), it follows that the determination of rights must also constitute administrative action.³⁴⁰

The question of whether the word “materially” requires a significant adverse impact on the affected person’s rights was considered in detail in *Joseph v City of Johannesburg*.³⁴¹ It

³³⁶ Op cit note 269 at 220 – 1.

³³⁷ *Ibid* at 221 – 2.

³³⁸ *Ibid*. See also C Hoexter ‘The Future of Judicial Review in South African Administrative Law’ (2000) 117 *SALJ* 484 at 516 – 517.

³³⁹ J A vS d’Oliveira ‘Administrative Justice’ in J A Faris (ed) *The Law of South Africa* vol 2 3ed (2015) at 32.

³⁴⁰ Y Burns & M Beukes *Administrative Law under the 1996 Constitution* 3 ed (2006) 144–146.

³⁴¹ 2010 3 BCLR 212 (CC); 2010 4 SA 55 (CC).

is difficult to conceive of an example in which an adverse effect on rights would not be material, and certain commentators have made the point that this interpretation is, therefore, devoid of substance.³⁴² In *Joseph v City of Johannesburg*³⁴³ Skweyiya J held that “if any of the rights of the applicants were affected, such effect was material and adverse.”³⁴⁴ (own emphasis)

Skweyiya J held further that the right to administrative justice “*confirms the need for an interpretation of rights under section 3(1) of PAJA that makes clear that the notion of ‘rights’ includes not only vested, private law rights but also legal entitlements that have their basis in the constitutional and statutory obligations of government*”.³⁴⁵

In addition, South African jurisprudence appears to recognize and include decisions which have the capacity to adversely affect rights in the PAJA definition. In *Bullock NO v Provincial Government, North West Province*³⁴⁶ and In *Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works*,³⁴⁷ the courts have indicated that the concept of “rights” is broader than rights which are enforceable in a court of law.

In the context of PAJA, Nugent JA interpreted the meaning of the threshold definition of administrative action as follows in *Greys Marine*:

“While PAJA’s definition purports to restrict administrative action to decisions that, as a fact, ‘adversely affect the rights of any person’ I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on section 33 of

³⁴² Op cit note 269 at 398.

³⁴³ 2010 3 BCLR 212 (CC); 2010 4 SA 55 (CC).

³⁴⁴ *Supra* note 341 at para 31.

³⁴⁵ *Ibid* para 43.

³⁴⁶ 2004 (5) SA 262 (SCA) at para 20.

³⁴⁷ 2005 6 SA 313 (SCA).

*the Constitution. Moreover, that literal construction would be inconsistent with section 3(1), which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise **that administrative action impacts directly and immediately on individuals.**³⁴⁸ (own emphasis)*

Nugent JA goes on to say (referencing SARFU³⁴⁹) that the nature of the power being exercised is more relevant than the identity of the decision-maker, and that some of the discernible features of administrative action include “...*the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.*”³⁵⁰

In considering the definition of “rights” more closely, Nugent JA finds that:

“While ‘rights’ may have a wider connotation in this context, and may include prospective rights that have yet to accrue, it is difficult to see how the term could encompass interests that fall short of that. It has not been shown that any rights – or even prospective rights – of any of the appellants (or of any other person) have been adversely affected by the Minister’s decision...

Although in Bullock’s case... an interest falling short even of a prospective right was recognised, it might be that the court had in mind rather a legitimate expectation, grounded in past practice... But even if reliance may be placed on an interest falling

³⁴⁸ Note 347 *supra* at para 23.

³⁴⁹ Note 271 *supra*.

³⁵⁰ Note 347 *supra* at para 24.

short of a prospective right – of which I am doubtful – I do not think that the appellants have shown that they have a peculiar interest transcending those enjoyed by the public at large.

*Nor has it been shown that any of the appellants (or any other person) has a legitimate expectation...*³⁵¹

Notwithstanding these caveats, the judgment in *Greys Marine*³⁵² has been applied in a number of subsequent cases to justify the review of decisions which do involve prospective rights or interests, rather than established “rights”. For example, the decision not to appoint or promote an individual to a specific post or position has been considered reviewable, notwithstanding that the applicants had no enforceable right to be so appointed.³⁵³

In other cases, the courts have interpreted “legal interests or rights” more narrowly, to exclude certain decisions from the ambit of “administrative action”.³⁵⁴ In *Telkom*, the court dismissed the applicant’s contentions on the basis that “...*it cannot be said that its rights have been affected, or that the action complained of had that capacity*”³⁵⁵ (own emphasis). The reasoning behind this conclusion was that while the decision to refer the complaint to the Competition Tribunal may have affected Telkom in the sense that it may have been called to provide evidence under oath, attend a hearing before the Competition Tribunal, and be required to submit its business affairs and documentation

³⁵¹ Note 347 *supra* at para 30 – 32.

³⁵² *Ibid.*

³⁵³ See for example *Kiva v Minister of Correctional Services* (2007) 28 ILJ 597 (E) at para 28; *Minister of Defence v Dunn* 2007 (6) SA 52 (SCA) at para 4 – 5; and *Wessels v Minister for Justice and Constitutional Development* 2010 (1) SA 128 GNP.

³⁵⁴ *Steenkamp N O V Provincial Tender Board, Eastern Cape* 2007 (3) 121 (CC), noting the criticism of this judgment in *Hoexter* (op cit note 269) at page 226.

³⁵⁵ Note 287 *supra*, at para 10.

to public scrutiny, it could not be said that Telkom's rights had been or could be affected by these events.

The circumstances in *Telkom* may be distinguished from tax audits and information-gathering processes, on several bases. As set out above, the exercise of SARS' audit and information-gathering powers arguably constitutes a more invasive process than the preliminary investigations carried out in the context of Competition Commission investigations. Furthermore, in the context of audits and requests for relevant material, there is typically no real separation between the investigative process and the adjudicative, decision-making process.

Most importantly, the exercise of SARS' audit and information-gathering powers certainly has the capacity to affect taxpayers' rights and legitimate interests. The right to privacy encapsulated in section 14 of the Constitution is one right which is affected by (and arguably, justifiably limited by) the operation of sections 40 to 46 of the TAA.³⁵⁶ Although the courts have not yet had an opportunity to consider how the right to finality is specifically affected by the exercise of SARS' audit and information-gathering powers, the interpretation given to the word "rights" in *Joseph*³⁵⁷ arguably extends to the right to finality. Although this is not a "right" in the ordinary, constitutional sense, it is a legal entitlement conferred by legislation, which has been recognized and established by the courts in interpreting that legislation.

Accordingly, a broader understanding of the term "rights" may be adopted for purposes of interpreting this aspect of the definition of "administrative action". The decision to

³⁵⁶ Op cit note 324.

³⁵⁷ Op cit note 341.

implement SARS' investigative and information-gathering powers also has the capacity to affect the constitutional rights of taxpayers.

4.1.7 "...that has a direct external legal effect"

The words "legal" (having a legally binding effect) and "external" (affecting a person external to the decision-making authority) do little to clarify the definition of administrative action,³⁵⁸ although the term "external effect" has been explained to mean that the decision in question should not relate to the internal affairs of the administrative body which have no impact on the public.³⁵⁹ The word "direct", however, arguably reinforces the concept of finality in administrative law, in terms of which decisions should be final in order to be reviewable.³⁶⁰

The term "direct, external legal effect" has been interpreted variably by the South African courts.³⁶¹ The general requirement of finality, applied with a measure of flexibility in common law,³⁶² governs the issue of ripeness for administrative review. There have been cases where the decision to hold an inquiry into the affairs of a company and the decision to issue a subpoena in terms of section 414(2) of the Companies Act³⁶³ have been characterised as administrative action,³⁶⁴ but also, cases where the court has expressed doubt over whether an inquiry or similar investigative process can be classified as

³⁵⁸ Op cit note 269 at page 229.

³⁵⁹ *Ritchie v Government of the Northern Cape Province* 2004 (2) SA 584 (NC) at para 20; *Botha v Matjhabeng Municipality* [2010] ZAFSHC 18 at para 24.

³⁶⁰ Op cit note 269 at page 230 – 2.

³⁶¹ *Ibid.*

³⁶² C Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 SALJ 484 at 502 – 4.

³⁶³ 61 of 1973.

³⁶⁴ See *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 (2) SA 433 (SE) at 443 I – J and *Bestbier v Chief Magistrate, Stellenbosch* [2006] 2 All SA 598 (C) at para 12.

administrative action.³⁶⁵ While decisions amounting to preliminary or interlocutory steps often lack the finality to attract justiciable administrative justice rights,³⁶⁶ directness is not always understood and interpreted to refer exclusively to the last stage in multi-staged decision-making, particularly in the context of procedural fairness.³⁶⁷

In *Brenco*³⁶⁸ the court had the opportunity to consider the application of procedural fairness in the context of investigative action, particularly, whether the principles of fairness had been observed, at the appropriate stage(s) in the process.

This case involved an investigation into the prohibited dumping of goods in terms of certain legislative provisions.³⁶⁹ The court had to consider, *inter alia*, whether the Board on Tariffs and Trade (“BTT”) had violated the principles of natural justice by investigating the matter and making recommendations to the Minister of Trade and Industry without giving the respondents access to the information at its disposal, or an opportunity to respond. The respondents’ argument was that they were entitled to access the information on which the BTT had based its recommendations and to respond to those recommendations before the BTT made its report to the Minister of Trade and Industry.

The empowering legislation obligated the BTT to conduct a detailed investigation, which would include hearing all interested parties, before a report was made to the Minister of Trade and Industry.³⁷⁰ The Minister was, in turn, empowered to accept or reject the report and recommendations made by the BTT, and, if satisfied, to request the Minister of

³⁶⁵ See for example *Bernstein v Bester* NO 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 97; *Telkom* (Note 287 *supra*); *Simelane* (note 289 *supra*); and *Corpco 2290 CC t/a U-Care v Registrar of Banks* [2012] ZASCA 156.

³⁶⁶ *Eastern Metropolitan Sub-structure v Pieter Kleyn Investments (Pty) Ltd* 2001 1 All SA 187 (W); 2001 4 BCLR 344 (W); 2001 4 SA 661 (W) at para 14.

³⁶⁷ *Sokhela v MEC for Agriculture & Environmental Affairs (KZN)* 2009 JOL 23782 (KZP) at para 66.

³⁶⁸ *Supra* note 302.

³⁶⁹ *Ibid* 527 – 528

³⁷⁰ *Supra* note 302 at 519 – 520 and 527 – 528.

Finance to impose duties on the goods in question.³⁷¹ The Minister of Finance similarly had the discretionary power to act in accordance with that request and impose duties on the goods, or to reject the request.³⁷²

The court held that no single set of principles for giving effect to the rules of natural justice could be applied to investigations, official enquiries and exercises of power. The court further emphasised the need for flexibility in the contextual application of the principle of fairness.

In its judgment, the court quoted the dicta of Sachs L.J. in the case of *In re Pergamon Press Ltd.*³⁷³

“In the application of the concept of fair play, there must be real flexibility, so that very different situations may be met without producing procedures unsuitable to the object in hand... In each case careful regard must be had to the scope of the proceeding, the source of its jurisdiction (statutory in the present case), the way in which it normally falls to be conducted and its objective.”³⁷⁴ (own emphasis)

The court held further that:

“Upon a proper interpretation of the BTT Act and the wide powers conferred upon BTT, BTT has both an investigative function and a determinative function... Whilst BTT has a duty to act fairly, it does not follow that it must discharge that duty precisely in the same respect in regard to the different functions performed by it. When BTT exercises its deliberative function, interested parties have a right to know the substance of the case that they must meet. They are entitled to an opportunity

³⁷¹ *Ibid.*

³⁷² *Supra* note 302 at 519 – 520 and 527 – 528.

³⁷³ [1970] 3 ALL ER 535 (CA).

³⁷⁴ Note 302 *supra* at page 521.

*to make representations. In carrying out its investigative functions, BTT must not act vexatiously or oppressively towards those persons subject to investigation. ...investigatory proceedings, which have been recognised to be absolutely essential to achieve important policy objectives, are nevertheless subject to the constraint that the powers of investigation are not exercised in a vexatious, oppressive or unfair manner.*³⁷⁵ (own emphasis)

The court was of the view that when the BTT carried out its investigative functions, the requirements of fairness applicable to the investigative process did not mandate that “every shred of information provided to BTT should be made available to the respondents”.³⁷⁶ The court was also not of the view that the respondents should have the right, at the investigation stage, to make representations. Accordingly, it was held that the requirements of procedural fairness had been met in the circumstances.³⁷⁷

Commenting on *Brenco*, Hoexter alludes to the fact that the outcome was determined with reference to the facts underpinning the arguments made by the respondents – for example, that it was not a requirement of fairness (as argued by the respondents) for the BTT to disclose confidential commercial information.³⁷⁸ Hoexter notes that this judgment is “encouraging”, as there is no suggestion that the requirement of fairness would not apply to investigative processes, nor does the court indicate that the principles of fairness would only apply if rights were directly affected.³⁷⁹

In the context of multi-stage decision-making, early decisions of the Constitutional Court favoured the position that the PAJA will not apply to individual preliminary steps in the

³⁷⁵ Note 302 *supra* at 527.

³⁷⁶ *Supra* note 302 at 32.

³⁷⁷ *Ibid.*

³⁷⁸ Op cit note 269 page 440.

³⁷⁹ *Ibid.*

decision-making process, and that multi-staged decision-making processes should be viewed as a single process for purposes of ascertaining whether a decision constitutes administrative action.

However, in *Minister of Health and Another v New Clicks SA (Pty) Ltd and Others*,³⁸⁰ a different approach begins to emerge. The Constitutional Court had to consider whether the PAJA applied to the recommendations of the Pricing Committee and the subsequent making of Regulations by the Minister. The regulation-making process involved a two-stage process: a recommendation by the Pricing Committee, followed by a decision by the Minister on whether to accept the recommendation. In considering the question, the Constitutional Court regarded the regulation-making process holistically.

Chaskalson CJ held that³⁸¹:

“In the circumstances of the present case, to view the two stages of the process as unrelated, separate and independent decisions, each on its own having to be subject to PAJA, would be to put form above substance.”

Ngcobo, J (as he then was) held that:

“The process conducted by the Pricing Committee and the making of the regulations based on the recommendation of the Pricing Committee are interlinked. The one is incomplete without the other. Once the process is complete, in the sense that the regulations are made, they become inseparable. Thus the recommendation of the Pricing Committee represents part of the process of regulation-making. The process of making regulations on the specific matters set out in section 22G(2)(a)-(c) must therefore be seen as a single process involving the recommendation of the Pricing

³⁸⁰ 2006 (2) SA 311 (CC).

³⁸¹ Note 380 *supra* at para 137.

Committee and the making of regulations by the Minister based on that recommendation. If the process followed by the Pricing Committee is flawed, the ensuing recommendation is similarly flawed, so are the regulations based on such recommendation. It is this process that we are concerned with in these proceedings. And the question is whether PAJA applies to this process.”

Sachs, J held that:³⁸²

“As did the Chief Justice and Ngcobo J, I consider the making of regulations under section 22G(2)(b) one continuous process involving at different times the Pricing Committee and the Minister up to the point of promulgation.”

The Constitutional Court has, therefore, recognized the fact that a multi-staged decision-making process may, in appropriate circumstances, be properly regarded as a single, inseparable, process.

As alluded to above, in later decisions following the judgment in *Grey’s Marine*³⁸³ the courts have also acknowledged, in certain instances, that preliminary action in a multi-staged decision-making process has the capacity to affect rights in certain circumstances.

In *Oosthuizen’s Transport (Pty) Ltd and Others v MEC, Road Traffic Matters, Mpumalanga & Others*³⁸⁴ the MEC had suspended 233 of Oosthuizen’s operator cards (effectively suspending the company’s entire fleet of vehicles) upon the recommendation of the investigation team appointed in terms of the National Road Traffic Act.³⁸⁵ The applicants approached the court for an order reviewing and setting aside the report, on the basis that

³⁸² *Supra* note 380 at para 672.

³⁸³ Note 347 *supra*.

³⁸⁴ 2008 (2) SA 570 (T).

³⁸⁵ No. 93 of 1996.

they had been denied an opportunity to be heard and to make representations before the investigation team made its recommendation to the MEC.

The respondents (being *inter alia* the investigation team and the MEC) contended that the report and the recommendation contained therein was a preliminary step in a decision-making process and was not a “decision” which was final in the sense that it adversely affected the rights of any person and had a direct, external effect. On this basis, the respondents contended that the recommendation was not administrative action reviewable under the PAJA.

The applicants argued that the investigation team appointed by the MEC had both an investigative function and a deliberative function. According to the applicants, after investigating their activities, the investigation team had to deliver a factual finding, and then had to consider and decide whether the applicants failed to take reasonable measures to avoid axle overloading. Finally, the investigation team had to deliberate and determine what recommendation to make to the MEC. The applicants contended, on this basis, that the requirements of the PAJA applied to the recommendation and report, and that they ought to have been informed of the substance of the case they had to meet and provided with an opportunity to make representations.

While the court agreed with various sources that, in order to meet the definition of “administrative action” a decision would have to be sufficiently final in nature to be determinative of a person’s rights, it rejected the notion that a recommendation made as part of a multi-stage decision-making process would inevitably lack the requisite “direct, external legal effect”. Citing the judgment in *Van Wyk NO and Another v Van Der Merwe*,³⁸⁶ Fabricius AJ held that “*Even a preliminary decision can have serious consequences*

³⁸⁶ 1957 (1) SA 181 (A) at 188B 189A.

*especially where it lays 'the necessary foundation for a possible decision' which may have grave results.*³⁸⁷

The court held that the MEC's actions did amount to administrative action in that it had, at the least, the capacity to affect legal rights. Fabricius, AJ held that the recommendation of the investigation team had "*far reaching social, economic and political consequences*" and in coming to this conclusion, considered the view expressed in *Greys Marine*³⁸⁸ that administrative action includes action that has the capacity to affect legal rights.³⁸⁹

Fabricius, AJ held further that:

"It is clear therefrom that according to the German definition the administrative act need not to have direct legal external consequences. It is sufficient if such administrative act is 'aimed at' such consequences (gerichtet ist). When I say 'aimed at' I mean a decision that is addressed at or trained at a certain consequence and not one that will have those consequences. That is how I understand the German authorities, and that is why I presume the learned judge of appeal used the phrase 'capacity to affect legal rights'. This interpretation in my view would accord with s 33 of the Constitution and also the common law.

*I therefore hold that the decision of the investigating team to recommend suspension was 'administrative action' as defined in s 1 of PAJA.*³⁹⁰

In the case of *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hydro-Tech Systems (Pty) Ltd*³⁹¹ the Constitutional Court was required to consider what the obligations of an organ of State are in circumstances where a company which has been awarded a tender

³⁸⁷ *Supra* note 384 at para 25.

³⁸⁸ Note 347 *supra*.

³⁸⁹ Note 384 *supra* at paras 27 and 30.

³⁹⁰ *Ibid* paras 29 and 30.

³⁹¹ 2011 (2) BCLR 207 (CC).

(Viking Pony) was plausibly accused of having been successful only because of fraudulent representations it had made.³⁹² In this regard, regulation 15(1) of the Preferential Procurement Regulations³⁹³ provides that "*an organ of State must, upon detecting that a preference ... has been obtained on a fraudulent basis ... act against the person awarded the contract*".

The respondent in this case (Hidro-Tech) discovered an alleged fraudulent misrepresentation that gave Viking Pony an unfair competitive advantage in the tender application process. It brought the alleged fraud to the attention of the relevant municipality, and provided the municipality with substantial information supporting its allegation. Dissatisfied with the steps taken by the municipality, Hidro-Tech approached the High Court for relief.³⁹⁴

The High Court ordered the municipality to "act against" Viking Pony in accordance with the requirements of regulation 15(1), which order Viking Pony subsequently appealed to the SCA and then to the Constitutional Court. A key aspect of the dispute was the correct interpretation of the meaning of the terms "detect" and "act against".

As part of this enquiry, the court considered whether the PAJA was applicable to the discharge of the obligations imposed upon the municipality by regulation 15(1). At the outset, the court stated (citing the *SARFU*³⁹⁵ judgment) that "*Whether or not administrative action, which would make PAJA applicable, has been taken cannot be determined in the abstract. Regard must always be had to the facts of each case.*"

³⁹² *Ibid* para 22.

³⁹³ Proc R725 GG 22549 of 10 August 2001.

³⁹⁴ *Supra* note 391 at paras 11 – 14.

³⁹⁵ *Supra* note 271.

The court held that the process of detecting a reasonable possibility of a fraudulent misrepresentation of fact would not constitute administrative action,³⁹⁶ and that the administrative action, in this case, would be the action taken by the municipality on the basis of the information which has become available to it. Although the court accepted the *Grey's Marine*³⁹⁷ formulation of administrative action as a decision “*that has the capacity to affect legal rights*”, the court held that:

“It is unlikely that a decision to investigate and the process of investigation, which excludes a determination of culpability, could itself adversely affect the rights of any person in a manner that has a direct and external legal effect.

*If the City were about to pronounce on the culpability or otherwise of Viking, HidroTech and Viking would have to be afforded the opportunity, in terms of PAJA, to make whatever representations they may wish to make. Similarly, if Viking were found guilty, then the relevant provisions of PAJA would have to be invoked before an appropriate sanction is considered and imposed by the City.*³⁹⁸ (own emphasis added).

Accordingly, it is possible for an interim decision taken as part of a multi-staged decision-making process (or some other preliminary or investigative process) to constitute administrative action, provided that it has the capacity to directly and adversely affect the rights of the person(s) impacted by such a decision.

Whether or not a decision has the necessary direct effect on a person’s rights appears to be determined, in part, by the nature of the decision-making process and in part, with reference to the nature and impact of the decision. The outcome of this evaluation will

³⁹⁶ *Supra* note 391 at para 38.

³⁹⁷ *Supra* note 347.

³⁹⁸ *Supra* note 391 para 38 – 9.

inevitably depend on the individual facts and circumstances of each case. Our courts have distinguished between processes that are wholly preliminary and investigative in nature, as in the *Viking Pony*³⁹⁹ case, and investigative processes that include a determinative or prosecutorial element, which have the potential to impose significant consequences for the affected persons, as in *Oosthuizen's Transport*.⁴⁰⁰

The potential consequences that derive from a decision are in fact an independent consideration in evaluating whether a decision has the necessary “direct effect” to constitute administrative action. In various judgments following *Grey's Marine*,⁴⁰¹ the courts have accepted the lower threshold for the administrative action definition, namely that administrative action must have the *capacity* to affect legal rights. However, our courts have held, on several occasions, (for example, in *Viking Pony*,⁴⁰² *Telkom*,⁴⁰³ *Simelane*⁴⁰⁴ and *Novartis*⁴⁰⁵) that in order to meet this threshold, the potential consequences for the aggrieved person (i.e. the adversely affected right(s)) must be evidenced clearly.

Considering all of the elements of the PAJA definition of “administrative action”, the conclusion is that in appropriate circumstances, the decision to audit or gather information from taxpayers can constitute administrative action, which is subject to judicial review. In support of this conclusion, the following factors must be taken into account: first, there are discernible instances where the exercise of SARS’ audit and information-gathering powers has the capacity to affect legal rights or interests. As discussed in the preceding chapters, the improper exercise of the powers granted to SARS officials to audit and to gather information from taxpayers may violate, at a minimum, the right to finality, which is a right

³⁹⁹ *Supra* note 391.

⁴⁰⁰ Note 384 *supra*.

⁴⁰¹ *Supra* note 347.

⁴⁰² *Supra* note 391.

⁴⁰³ *Supra* note 287.

⁴⁰⁴ *Supra* note 289.

⁴⁰⁵ *Supra* note 297.

entrenched in our law by section 99(2) of the TAA. These processes may also limit (albeit justifiably) the constitutionally entrenched right to privacy.

Moreover, the misuse of SARS' audit and information-gathering powers has the capacity to create real and immediate financial prejudice to taxpayers (for example, where refunds are withheld, or where SARS audits historical "prescribed" periods for which the information necessary to confirm the correctness of the relevant assessment no longer exists), as well as the financial, human resources, and opportunity costs that arise where taxpayers are required to dedicate time and resources towards satisfying needlessly broad and voluminous requests for relevant material, or where protracted audit and information-gathering processes compromise the taxpayer's ability to do business. The "direct and immediate" effect contemplated in *Greys Marine*⁴⁰⁶ may accordingly exist, in certain circumstances.

As set out in the previous chapter, in many instances this prejudice will be final, in the sense that the prejudice arising from the misuse of SARS' powers is not always linked to an assessment, and cannot necessarily be remedied at a later stage using the Chapter 9 dispute resolution process. This is particularly relevant in circumstances where the right to finality is compromised by the exercise of SARS' audit and information-gathering powers, as in these instances, the fact that taxpayers cannot access the information and documentation necessary to displace the section 102 burden of proof may well prevent them from accessing the internal dispute resolution process at all.

Secondly, the audit and information-gathering process is not clearly separated from the determination of culpability (i.e. the decision to issue an additional assessment). The SARS officials carrying out the audit and information-gathering process are required to analyse

⁴⁰⁶ Note 347 *supra*.

the available information, issue *prima facie* findings to the taxpayer (to which the taxpayer is given an opportunity to respond), and then to communicate the final audit findings and make recommendations to an internal assessment committee, which directly and materially inform the decision to issue an additional assessment. The decision to audit or to request relevant material from a taxpayer may, therefore, be characterised as a process of investigation which *includes* a determination of culpability.

Further justification for this conclusion can be found in the manner in which audit notifications and requests for relevant material are typically framed. Even requests for relevant material issued outside of the audit process often contain questions which require the taxpayer to justify and defend its tax position, or to provide reasons as to why SARS should not take action which would adversely affect the taxpayer. The most common example of this is the generic statement (included in most requests for relevant material and audit notifications) that SARS intends to impose understatement penalties, providing the taxpayer with an opportunity to provide reasons as to why understatement penalties should not be imposed.⁴⁰⁷ This statement is typically made at the very outset of the information-gathering process, and accordingly does not provide any basis for the imposition of understatement penalties, essentially requiring the taxpayer to prove its innocence in the absence of any clear accusation of misconduct. As a result, taxpayers are compelled to defend an assessment or tax position (which may involve gathering

⁴⁰⁷ The generic statement included in audit notifications and requests for relevant material includes statements like “*In terms of the TAA relevant penalties and interest will be imposed. If you are not in agreement with any of the proposed adjustments, provide written reasons and/or supply any relevant material within 21 business days from the date of this letter. Also provide written reasons as to why any understatement penalty should not be imposed. Please provide copies of the relevant material and retain the originals for your records.*” (this quote is taken from a request for relevant material pre-dating an audit notification, addressed to one of the author’s clients during June 2020, at a stage in the information-gathering process where no adjustments had yet been proposed by SARS).

supporting information and incurring advisors' fees) before the SARS official issuing the letter has even received or considered any of the relevant material being requested.

In summary, since SARS conducts both the investigation and the determination of liability; with audits and information-gathering processes typically requiring taxpayers to prepare the necessary evidence and arguments to defend their tax positions right from the outset of their engagement with SARS; and the fact that in practice, audits and information-gathering processes typically result in an adverse determination (i.e. an additional assessment issued); it is reasonable to conclude that audits and other verification and information-gathering processes have the capacity to directly and immediately affect taxpayers' rights and interests. The audit and information-gathering process can be distinguished from a purely preliminary, investigative process on this basis.

This does not mean that the decision to investigate or audit a taxpayer and to request relevant material will always constitute administrative action. The principle of flexibility (or variability) ought to be applied, such to prevent the unjust fettering of SARS' powers in instances where it is evident that the taxpayer's rights and interests are not adversely impacted in a sufficiently final and irremediable manner. In addition, PAJA provides for instances in which it would be reasonable, fair and justifiable for an administrator to depart from the ordinary requirements of procedurally fair administrative decision-making.⁴⁰⁸ This would provide SARS with a measure of flexibility in instances where more drastic action is required (for example, where there is a real suspicion of fraud, tax evasion, or other criminal conduct).

It is submitted that the exercise of SARS' powers of investigation impacts on the tax-paying public at large, and meets this requirement of the definition. There are potentially serious

⁴⁰⁸ Section 3(4) and 3(5) of PAJA.

and irreversible consequences for taxpayers who are subject to unfair conduct during an audit or information-gathering process, particularly where the exercise of SARS' audit and information-gathering powers infringes on the right to finality. The potential impact procedurally unfair use of SARS' audit and information-gathering powers may have on tax morale and voluntary compliance also cannot be understated in the South African context.

In summary, the decision to initiate an audit or to request relevant material may meet the threshold of the definition of administrative action in circumstances where the application of SARS' audit and information-gathering powers adversely impacts upon taxpayers' rights and interests. In instances where the decision to investigate the taxpayer does not have the capacity to infringe on taxpayers' rights, this threshold should not be met.

4.2 Interpretation of the definition of administrative action in the context of tax administration

The Tax Court and High Court have been tasked with adjudicating various disputes relating to the exercise of SARS' audit and information-gathering powers over the years.

While it is beyond the scope of this analysis to enter into a detailed consideration of whether the Tax Court has the jurisdiction to amend or set aside the exercise of SARS' administrative powers, the decisions of the North Gauteng High Court in *Ackermans Ltd v Commissioner for the South African Revenue Service*⁴⁰⁹ and the Western Cape High Court in *South Atlantic Jazz Festival (Pty) Ltd v Commissioner for the South African Revenue Service*,⁴¹⁰ where a full bench (in both cases) held that an assessment may be objected to where the taxpayer's grievance relates to the exercise of SARS' powers, are accepted as correct in law. On the basis of these judgments, the Tax Court has jurisdiction to hear

⁴⁰⁹ *Ackermans Limited v Commissioner for the South African Revenue Service* (16408/2013) [2015] ZAGPPHC 684.

⁴¹⁰ [2015] ZAWCHC 8.

procedural disputes where appropriate, without ousting the inherent jurisdiction of the High Court to entertain judicial review applications in tax matters.

In the matter of *Commissioner for the South African Revenue Service v Brown*⁴¹¹ the taxpayer approached the High Court for the judicial review of a request for relevant material, on the basis that it constituted administrative action subject to the provisions of the PAJA.

In this instance, the applicant (SARS) had approached the High Court for an order directing the respondent (Brown) to comply with section 46(4) of the TAA by responding to the Lifestyle Questionnaire served on him on 19 October 2015.⁴¹² The respondent opposed the application on the grounds that he had shown just cause for refusing to respond to the Lifestyle Questionnaire.⁴¹³ It was common cause that the respondent was not a registered taxpayer, nor had he ever submitted any tax returns. The information sought from the taxpayer in the SARS Lifestyle Questionnaire related to his and his spouse's personal particulars and circumstances, personal and private investments and assets, properties owned, income received during the period under review, and expenses incurred during the relevant period.⁴¹⁴

In the correspondence addressed to Brown, SARS had specified the period under investigation (the respondent's 2011 to 2015 years of assessment), indicated that the information sought was being requested in terms of section 46(1) of the TAA and given Brown 21 business days in which to furnish the information requested.⁴¹⁵ Brown was also notified that SARS intended to commence an investigation into his tax affairs, based on

⁴¹¹ *Commissioner for the South African Revenue Services v Brown* [2016] ZACPEHC 17.

⁴¹² *Supra* note 411 at paras 2 – 3.

⁴¹³ *Ibid.*

⁴¹⁴ *Ibid* para 25.

⁴¹⁵ *Ibid* para 24.

confidential third party information in SARS' possession which indicated that he had not made a correct and complete disclosure of his tax affairs for the period under investigation.⁴¹⁶

Brown responded to SARS (through his attorneys) indicating that he required certain information before replying to the Lifestyle Questionnaire, which included the legislative provisions in terms of which he was obliged to submit the relevant material requested, evidence and written confirmation of the relevant aspects of the definition of "administration of a tax Act" to which the request related, and "adequate reasons" for the investigation of Brown's affairs, including the underlying risk analysis.⁴¹⁷ A formal request for the abovementioned information under the Promotion of Access to Information Act No. 2 of 2000 ("PAIA") was annexed to the letter.⁴¹⁸

In response, SARS advised that the refusal to answer the Lifestyle Questionnaire was unlawful.⁴¹⁹ Brown maintained that the request to complete the Lifestyle Questionnaire constituted administrative action, and that accordingly, in terms of PAJA, he was entitled to assume, in the absence of the information sought by him, that the exercise of SARS' powers in terms of section 46 of the TAA was unauthorised. Brown also alleged that SARS was obligated to provide him with reasons for the decision to issue the Lifestyle Questionnaire, in terms of PAJA.⁴²⁰

SARS refused to provide the requested information, on the basis that such a disclosure would jeopardise the audit procedure and frustrate SARS' internal deliberative processes by inhibiting candid communication of opinions, advice and reports.⁴²¹

⁴¹⁶ *Ibid* para 26.

⁴¹⁷ *Supra* note 411 para 27.

⁴¹⁸ *Ibid* para 28.

⁴¹⁹ *Ibid* para 30.

⁴²⁰ *Ibid* para 33.

⁴²¹ *Ibid* para 37.

In its application, SARS argued that the provisions of section 46 of the TAA are peremptory, and that the objective of the Lifestyle Questionnaire was clearly covered by the definition of the term “administration of a tax Act”.⁴²² SARS argued further that the reasons already provided to Brown for the request for relevant material (that information in SARS’ possession indicated incorrect or incomplete disclosures of his tax position) were sufficient for purposes of the TAA.⁴²³

Finally, SARS contended that even though the decision to issue a Lifestyle Questionnaire did not constitute administrative action, the information in SARS’ possession constituted an administratively rational and justifiable basis for a request to submit relevant material in terms of section 46 of the TAA.⁴²⁴

In response, Brown argued that the Lifestyle Questionnaire constituted an unlawful “fishing expedition” which infringed on his constitutional and statutory rights, and that in terms of the right to just administrative action, or alternatively, the principle of legality, he was entitled to expect fair, reasonable and lawful conduct on the part of SARS.⁴²⁵ Brown argued further that he was under no obligation to respond to the Lifestyle Questionnaire until such time as SARS provided him with adequate reasons for the decision to issue it.⁴²⁶ Brown argued that he was specifically entitled to details of the allegations made against him by the third parties from whom SARS had received information, in order to have a fair opportunity to address these allegations.⁴²⁷

The court upheld SARS’ argument that the provisions of section 46 of the TAA are peremptory, stating that “*The explicit and unambiguous wording of the section simply does*

⁴²² *Ibid* para 37 – 38.

⁴²³ *Supra* note 411 at para 37 – 38.

⁴²⁴ *Ibid*.

⁴²⁵ *Ibid* para 38.

⁴²⁶ *Ibid*.

⁴²⁷ *Ibid*.

*not allow for any other interpretation.*⁴²⁸ The court held further that the information sought in the Lifestyle Questionnaire constituted “relevant material” pertaining to the respondent’s assets, liabilities and expenses, and that this request was framed with the required level of specificity contemplated in the TAA. The court held that the Lifestyle Questionnaire was clearly required for purposes of “the administration of a tax Act”, as it was intended to enable SARS to determine “the liability of a person or persons for tax in respect of a previous, current or future tax year”.⁴²⁹

The court held that SARS had established all requisite jurisdictional facts per section 46 of the TAA. The undisputed facts regarding Brown’s failure to register as a taxpayer and submit tax returns, together with the third party information in SARS’ possession constituted a rational basis for issuing the Lifestyle Questionnaire, which, the court held, “...cannot by any stretch of the imagination be regarded as “a fishing expedition””.⁴³⁰ Brown’s contention that SARS had failed to observe the principle of legality was thus rejected.⁴³¹ The court held further that the issuing of the Lifestyle Questionnaire constituted a justifiable limitation of the right to privacy, as envisaged in section 36 of the Constitution.⁴³²

The court concluded that a request for relevant material is a preliminary investigation by SARS, which may result in a more formal audit or inquiry, once SARS has received the relevant material requested and is in a position to ascertain whether a further inquiry or an audit is warranted. The court stated that it is only at this more formal (audit) stage that the principles of administrative justice must be observed.⁴³³

⁴²⁸ *Ibid* para 39.

⁴²⁹ *Supra* note 411 at para 40 – 41.

⁴³⁰ *Ibid* para 42.

⁴³¹ *Ibid* para 52.

⁴³² *Ibid* para 54.

⁴³³ *Ibid* para 50.

In this regard, the court held that:

*“In the event, our courts have found that an investigation of this nature does not constitute administrative action. In Competition Commission v Yara (SA) (Pty) Ltd and Others 2013 (6) SA 404 (SCA) the Supreme Court of Appeal (per Brand JA) held that the initiation of a complaint by the Competition Commission or a private person in terms of the Competition Act, 89 of 1998 is a preliminary step that does not affect a person’s rights, and the Commission was thus not obliged to engage with a suspect on the question of whether its suspicions are justified. The learned judge held, at paragraph 24, that “[t]he principles of administrative justice are observed in the referral and the hearing before the tribunal. That is when the suspect firm becomes entitled to put its case”.*⁴³⁴

Whilst largely correct, there are a few aspects of the High Court’s judgment which arguably render this case distinguishable on its specific facts. First, the court was not required to enter into a thorough analysis of when SARS’ conduct would amount to a “fishing expedition”, or indeed to analyse the jurisdictional facts required for the exercise of SARS’ information-gathering powers, as the facts and circumstances of this case clearly warranted an investigation of Brown’s affairs, on the basis of what appeared to be the deliberate evasion of his tax obligations.

However, the establishment of the jurisdictional facts necessary to invoke section 46 of the TAA should not be the sole benchmark employed to decide whether an audit, investigation, or request for relevant material is reasonable and rational in all cases, particularly in instances where a more nuanced approach to the exercise of SARS’ audit and information-

⁴³⁴ *Supra* note 411 at para 51.

gathering powers is called for (e.g. where the taxpayer being investigated has an established history of compliant behaviour and co-operation with SARS).

Secondly, the confidentiality provisions of the TAA will not always justify a refusal to provide the reasons for the initiation of an audit or information-gathering process. The importance of the confidentiality provisions arguably does not override considerations of fairness and administrative justice⁴³⁵ except in appropriate instances, such as a case where SARS has a strong and justified suspicion that the taxpayer is engaging in dishonest conduct designed to frustrate the enforcement of its tax obligations.

While SARS cannot be expected to breach the requirements of confidentiality where this would jeopardise its ability to acquire information from third parties, as was held in the *Novartis* judgment⁴³⁶ (and confirmed more recently in *Commissioner of the South African Revenue Service v Public Protector and Others*⁴³⁷) even in preliminary investigative proceedings, affected persons are entitled to sufficient information to be aware of the case they will be required to meet. In an administrative environment where SARS can (and does) carry out unlawful “fishing expeditions” on occasion, SARS should not be able to rely on the confidentiality provisions of the TAA to conceal the fact that an audit was initiated, and information requested from a taxpayer, in the absence of any risk hypothesis or reasonable suspicion of an incorrect tax position.

In most instances (i.e. where engaging with habitually compliant taxpayers), SARS should be able to make these kinds of disclosures without the risk of compromising the audit and

⁴³⁵ See for example the recent High Court judgment in *Arena Holdings Pty Ltd t/a Financial Mail & Another v South African Revenue Service & Others* (88359/2019) where Davis J rejected the assertion that the confidentiality provisions of the TAA were necessary for taxpayers to disclose their affairs to SARS, and concluded that tax information should not be treated differently to any other sensitive information (e.g. the content asylum hearings and divorce proceedings, both of which involve the disclosure of sensitive personal information, and both of which the Constitutional Court has found to be subject to disclosure in appropriate instances).

⁴³⁶ *Supra* note 297.

⁴³⁷ (84074/19) [2020] ZAGPPHC 33.

information-gathering process and the requirements of the disclosure should reasonably exclude sensitive or confidential details, such as the source of third-party information upon which SARS relies. This judgment should be viewed in its proper context, and should not be understood to establish a minimum threshold for the rational and lawful exercise of SARS' audit and information-gathering powers in all instances.

Thirdly, the conclusion that the exercise of SARS' information-gathering powers cannot adversely affect taxpayers' rights is arguably only correct with reference to the specific facts of this case. In reaching this conclusion, the court examined the definition of administrative action in PAJA, as well as the judgment of Oliver JA in *Transnet Ltd v Goodman Brothers (Pty) Ltd*.⁴³⁸ As set out above, there is arguably a broader formulation of administrative action insofar as this includes decisions which have the capacity to affect rights and similar interests, in appropriate circumstances.

In *Brown*,⁴³⁹ the court based its conclusion that the Lifestyle Audit was not "administrative action" on the premise that a request for relevant material is a preliminary investigation, which may or may not lead to a more formal audit or inquiry under the TAA. In doing so, the court appears to have overlooked the fact that on the same day that SARS issued the Lifestyle Questionnaire to Brown, SARS also notified him of the commencement of an investigation into his affairs, based on information in SARS' possession which suggested a tax risk.⁴⁴⁰ A letter of this nature would ordinarily indicate that an audit or more serious investigation was in fact already underway, and that the information obtained in response to the Lifestyle Questionnaire would no doubt be used to inform the outcome of this investigation.

⁴³⁸ 2001 (1) SA 853 (SCA) at para 34.

⁴³⁹ Note 320 *supra*.

⁴⁴⁰ Note 411 *supra*, at para 26.

Again, the facts of this case merit a harsher approach, and indicate why the court was willing to entertain the argument that the decision to issue a Lifestyle Questionnaire should not be subject to review, but it is important to distinguish this case from other instances where the exercise of SARS' audit and information-gathering powers may adversely affect taxpayers' rights and interests. In this instance, the taxpayer's arguments in support of the purported violation of his constitutional rights were patently unfounded. However, in another case, a different decision may well be reached regarding the capacity of SARS' audit and information-gathering powers taxpayers to adversely affect taxpayers' rights.

Finally, the court relied on an SCA judgment which dealt with the exercise of administrative powers that are arguably distinguishable from the exercise of SARS' audit and information-gathering powers. Based on the judgment of the SCA in *Competition Commission v Yara (SA) (Pty) Ltd and Others*,⁴⁴¹ the court found that the issuing of a Lifestyle Questionnaire was a preliminary investigation, similar in nature to the initiation of a complaint by the Competition Commission or a private person in terms of the Competition Act,⁴⁴² which was found to be a preliminary step that does not affect the rights of the person being investigated (and, therefore, does not constitute administrative action).

In the *Yara* judgment, the SCA held that the Competition Commission was not obliged to justify the basis for initiating and referring a complaint to the person(s) being investigated. In reaching this conclusion, the SCA refers to the judgments handed down in *Simelane*⁴⁴³ and *Novartis*,⁴⁴⁴ and concludes that based on these judgments:

“...the purpose of the initiating complaint is to trigger an investigation which might eventually lead to a referral. It is merely the preliminary step of a process that does

⁴⁴¹ 2013 (6) SA 404 (SCA), hereafter “Yara”.

⁴⁴² Note 441 *supra* at para 24.

⁴⁴³ *Supra* note 289.

⁴⁴⁴ *Supra* note 297.

not affect the respondent's rights. Conversely stated, the purpose of an initiating complaint, and the investigation that follows upon it, is not to offer the suspect firm an opportunity to put its case. The Commission is not even required to give notice of the complaint and of its investigation to the suspect. Least of all is the Commission required to engage with the suspect on the question whether its suspicions are justified. The principles of administrative justice are observed in the referral and the hearing before the Tribunal. That is when the suspect firm becomes entitled to put its side of the case."⁴⁴⁵ (own emphasis)

Where a Lifestyle Questionnaire, or request for relevant material is issued as a purely preliminary step to determine (based on a risk hypothesis or information in SARS' possession that indicates a risk) whether an audit or further investigation is merited, the court's conclusion in *Brown*⁴⁴⁶ is correct. However, requests for relevant material are also issued as part of an audit (or similar review process), in which the taxpayer is required to state its "side of the case" and defend its tax position.

In such instances, the decision to request relevant material from the taxpayer can arguably be distinguished from the Competition Commission's investigative procedures. The rationale for this proposal is set out in detail above and need not be repeated here, save to reiterate that the exercise of SARS' audit and information-gathering powers is typically more analogous to a single multi-stage determinative process than the clearly separate investigation and adjudication processes undertaken by the Competition Commission and Competition Tribunal, respectively. Accordingly, the decision in *Brown*⁴⁴⁷ should be viewed in its proper context.

⁴⁴⁵ Note 441 *supra* at para 24.

⁴⁴⁶ *Supra* note 411.

⁴⁴⁷ *Ibid.*

In the interlocutory application made to the Tax Court in *Carte Blanche Marketing CC and Others v Commissioner for the South African Revenue Service*,⁴⁴⁸ the taxpayers sought to compel discovery of certain further documents from SARS in relation to a review application being brought in the High Court, where the taxpayers sought to review and set aside SARS' decision to conduct an audit into their income tax affairs.⁴⁴⁹

The audit notice delivered to the taxpayers in terms of section 40 of the TAA included a request for a wide range of documents, spanning a five-year period. SARS indicated that the audit was being conducted on the basis of a "risk assessment", per section 40 of the TAA. The taxpayers refused to provide SARS with the information requested, and requested reasons for SARS' decision to conduct an audit. The taxpayers alleged that the decision to audit their financial affairs was *mala fides* and part of a campaign of deliberate harassment being conducted against them by SARS, due to animosity between SARS and the taxpayers stemming from a series of customs and excise disputes spanning several years.

According to SARS, the audit was initiated based on a risk that had been identified in the taxpayer's bank statements, which SARS had obtained in terms of section 46(3) of the TAA. The bank statements allegedly indicated large discrepancies between the gross income declared by the taxpayers to SARS in their tax returns, and the actual turnovers reflected in the bank statements. The taxpayers brought an interlocutory application to gain access to further documents, for purposes of supplementing the record⁴⁵⁰ in the review application.

⁴⁴⁸ Note 281 *supra*.

⁴⁴⁹ *Carte Blanche Marketing CC and Others v Commissioner for the South African Revenue Service* 2020 (6) SA 63 (GJ).

⁴⁵⁰ The "record of the proceedings" required by Rule 53(1) of the Uniform Rules of Court, to be provided by the respondent in a review application.

SARS opposed the application for the disclosure of further documentation, alleging that it had only filed the record for pragmatic reasons, in order to expedite the litigation, which it considered completely unfounded. SARS argued that it was under no duty to disclose any documentation at all, as the decision to commence with an audit did not constitute administrative action for purposes of the PAJA. SARS sought the dismissal of both the interlocutory application and the main review application, on the basis that the taxpayers' allegations of *mala fides* should either be rejected or found to be irrelevant.

The Tax Court held that this was not a matter in which it would be proper to dismiss the substantive application during interlocutory proceedings, particularly where the only question to be decided by the court is whether or not the applicant is entitled to additional documents. In reaching this decision, the court entered into a cursory examination of the merits, where Jansen AJ stated the following:

*Where one deals with the question whether an act is reviewable in principle, I would suggest that it is advisable to err on the side of caution. After all, it is now generally accepted that the exercise of all public power is reviewable on some or other basis. And the concept of legality includes the requirements of lawfulness, rationality and constitutional consistency... this case deals with something that is distinctly part of state administration, namely tax collection. So there is no need for any doctrinal anxiety. Tax disputes, if not otherwise settled, will end up in one or other court of law.*⁴⁵¹

The court noted that "...it is regular practice for the sections 40 and 46 notices to be combined in one notice",⁴⁵² and that the concept of a "risk assessment", while not defined

⁴⁵¹ *Supra* note 281 at para 15.

⁴⁵² *Ibid* para 4.

in the TAA, is understood to mean a suspicion of outstanding or understated payments resulting in an amount owing to SARS.

However, Jansen AJ acknowledged that a crucial aspect of SARS' argument was the assertion that the decision to audit the taxpayer had no direct external legal effect. In this regard, Jansen AJ stated that:

“It should be noted that the threshold for SARS to pass before it can utilise section 40 must be extremely low, and I accept that the instances where a court will interfere with such a decision will be extremely rare. On the other hand, the words ‘relevant for the proper administration of a tax act’ and ‘for the purposes of the administration of a tax act’ cannot be ignored. Utilising the provisions of the act for ulterior purposes will always be unlawful and will be a serious breach of the mutual trust that should exist between a tax payer and SARS... a finding that an act was not taken for purposes of the administration of a tax act, would vitiate such an act. Whatever one’s scepticism may be about the merits of this matter, that does not mean that as a matter of law the decision involved cannot be reviewed.”⁴⁵³

The court dismissed SARS' argument that permitting the review of decisions made in terms of section 40 of the TAA would “*bring the entire tax administration system to a halt*”, stating that such arguments “*...are often just a guise for inappropriate judicial conservatism or betray a streak of authoritarianism*”⁴⁵⁴ and that “*Enabling marginalised and voiceless people to bring their cases to court and to overcome cumbersome procedures is a far bigger problem.*”⁴⁵⁵

Jansen AJ went on to state that:

⁴⁵³ *Supra* note 281 at para 17.

⁴⁵⁴ *Ibid* para 18.

⁴⁵⁵ *Ibid* para 19.

“Whatever the correct description of the powers under sections 40 and 46 of the Tax Administration Act is, they remain exercises of public power, and must as such comply with the principles of legality.”⁴⁵⁶

And:

I accept for present purposes that there are strong arguments to be made in favour of the view that the decision to commence an audit does not constitute administrative action. As I understand the argument, this decision is merely provisional and is part of a process which eventually leads to a decision... to raise an additional assessment. Only once the additional assessment is raised, does the action constitute administrative action for purposes of PAJA. Unfortunately, the definition in PAJA has conflated issues which used to be dealt with as the requirement of prejudice, ripeness, premature applications... I must agree... that we need a more nuanced approach post 1994, and certainly a more generous one when fundamental rights are concerned. The requirements of adversely affecting rights and direct, external legal effect must not be used to shield acts of bias, mala fides, corruption and the like from judicial scrutiny at the earliest possible stage.⁴⁵⁷

(own emphasis)

The court held that the decisions and processes involved in tax administration are all related to a decision (i.e. the issuing of an additional assessment) that will ultimately constitute administrative action, and that the actions and decisions related to that ultimate decision must, therefore, form part of a process which is fair and free from any bias, ulterior purpose or corruption.⁴⁵⁸ Furthermore, the court recommended a cautious approach when

⁴⁵⁶ *Ibid* para 25.

⁴⁵⁷ *Supra* note 281 at para 27 – 28.

⁴⁵⁸ *Ibid* para 29.

evaluating whether action taken in terms of sections 40 or 46 of the TAA constituted administrative action or not, given that a notice of commencement of audit is a formal notice which heralds the beginning of a process in which statutory powers are used against the taxpayer.⁴⁵⁹ Critically, the court concluded that it was likely that decisions taken under sections 40 and 46 of the TAA would in some cases constitute administrative action.⁴⁶⁰

Jansen AJ held that if the audit and section 40 notice was just a preliminary step in the overall assessment process, it may be that the matter is not ripe for review, but that if it could be proven that a SARS official had acted with malice in issuing the notice, the court would be entitled to provide the taxpayer with some relief even at a preliminary stage of the proceedings.⁴⁶¹ In this regard, Jansen AJ noted that while High Court review proceedings could be abused by unscrupulous taxpayers to vexatiously delay and frustrate SARS in the execution of its duties, the TAA gives SARS and its officials such wide and invasive powers of inquiry and investigation that the exercise of such powers will almost certainly be subject to judicial review of some sort.⁴⁶²

In conclusion, Jansen AJ held that while review jurisdiction is not specifically granted to the Special Tax Court, section 105 of the TAA⁴⁶³ does not exclude judicial review in the High Court.⁴⁶⁴ SARS was thus ordered to provide the taxpayers with copies of the documents requested (insofar as those documents were in SARS' possession) within 20 days, for purposes of the main review application.

⁴⁵⁹ *Ibid* para 37.

⁴⁶⁰ *Ibid* para 35.

⁴⁶¹ *Ibid* para 38.

⁴⁶² *Supra* note 281 at para 39 – 43.

⁴⁶³ Section 105 of the TAA provides that: “A taxpayer may only dispute an assessment or ‘decision’ as described in section 104 in proceedings under this Chapter, unless a High Court otherwise directs.”

⁴⁶⁴ *Supra* note 281 paragraphs 43 – 49.

The review application in the High Court⁴⁶⁵ was ultimately unsuccessful. The applicants alleged that the decision to commence an audit into their income tax affairs was taken for an ulterior purpose; was authorised by the empowering legislation (i.e. the TAA); was irrational; and was taken in bad faith. SARS' response was founded on two bases: that a decision in terms of section 40 of the TAA does not constitute reviewable administrative action; and that even if selection for audit in terms of section 40 was reviewable, the decision to audit the applicants' income tax affairs was lawful and defensible.

The applicants alleged that, since SARS' decision to audit was based on a "risk assessment" (as indicated in the section 40 notice), SARS would need to be able to prove that it had established the existence of an income tax risk pertaining to the taxpayers.⁴⁶⁶ The evidence indicated that SARS' decision to initiate the income tax audit was based on an internal memorandum provided to the Tax and Customs Enforcement Unit ("TCEI Unit") by the customs division, which was tasked with the investigation of alleged noncompliance with the Customs and Excise Act, 91 of 1964 (the "Customs and Excise Act"). The internal memorandum stated that the information obtained in the ongoing customs litigation between SARS and the taxpayers indicated non-compliance with the provisions of other tax legislation, and urged the TCEI to investigate further.⁴⁶⁷

One of the SARS officials responsible for the decision to audit that taxpayers explained the rationale for SARS internally sharing and acting based on this type of internal information as follows:

"Experience has taught that if a company does not comply with one tax Act it almost without exception does also not comply with the other acts. In some instances, the

⁴⁶⁵ *Supra* note 442.

⁴⁶⁶ Note 449 *supra* at para 21.

⁴⁶⁷ Note 449 *supra* at para 7 – 10.

*reason is because its management or 'owners' conscientiously decide not to comply and in other because non-compliance with one act axiomatically makes compliance with the other two impossible. In a commercial setup non-compliance with the Customs Act inevitably results in non-compliance with both the Value Added Tax Act ("VAT Act") and the Income Tax Acts ("IT Act"). The principle can further be extrapolated to the management or 'owners' of the company: if the company is not tax compliant then they inevitably are also non-compliant."*⁴⁶⁸

From the outset, the applicants had communicated their concerns to SARS, that the decision to conduct an income tax audit was unlawful and constituted an abuse of power. Upon receiving the audit notification, the applicants requested the details of the risk assessment(s) which had led to SARS' decision to conduct an audit, to satisfy themselves that the decision to audit had a rational basis. The applicants advised SARS that if the risk assessments demonstrated a *bona fide* decision to conduct the audit, there would be no need for them to challenge the decision, and undertook to provide all information requested by SARS in the audit notification.

However, SARS refused to provide this information, stating only that the "*risk identified stemmed from the customs investigation into your clients' activities and the litigation in that regard over a period of just less than ten years.*" SARS alleged further that it had no legal obligation to explain the basis upon which a taxpayer was selected for audit.⁴⁶⁹ As a result, the applicants refused to provide the information sought by SARS, and the audits were conducted and concluded⁴⁷⁰ based on the information in SARS' possession.⁴⁷¹

⁴⁶⁸ *Ibid* at para 11.

⁴⁶⁹ *Ibid* para 24 – 27.

⁴⁷⁰ Section 95 of the TAA authorizes the Commissioner to make an estimated assessment, based on the information available to it, in circumstances where *inter alia* the taxpayer submits a return, or information, that is incorrect or inadequate.

⁴⁷¹ *Supra* note 449 at para 17.

SARS notified the applicants of the preliminary audit findings on 18 February 2015, including the intention to issue additional assessments.⁴⁷² In response, the applicants advised SARS that they would apply for review of the decision to conduct the audit. SARS nonetheless proceeded to issue additional assessments to each of the taxpayers on 13 April 2015, one day before the date on which the applicants undertook to launch the review application.

These additional assessments created an immediate indebtedness in excess of R300 million for the applicants, excluding interest and penalties. SARS refused to suspend the obligation to make payment on the disputed tax in terms of section 164 of the TAA (notwithstanding the positive compliance history of the taxpayers), and the applicants were forced to bring an urgent application to interdict SARS from collecting the disputed amounts pending finalisation of the review application, which SARS ultimately conceded to.⁴⁷³

In evaluating whether a decision in terms of section 40 of the TAA was reviewable in terms of the principle of legality, the court interpreted section 40 (applying the principles of statutory interpretation confirmed by the Constitutional Court in *Road Traffic Management Corporation v Waymark*⁴⁷⁴) and considered the purpose of that section, and the TAA as a whole.

In considering the purpose of the empowering statute, the court noted that the Commissioner has the power to select a taxpayer for an audit “... *on the basis of any consideration relevant for the proper administration of a tax Act, including on a random or a risk assessment basis*”, and that section 4 of the TAA specifically prescribes that the

⁴⁷² *Ibid* para 19.

⁴⁷³ *Supra* note 449 at para 29.

⁴⁷⁴ 2019 (5) SA 29 (CC) (2 April 2019) at paras 29 – 32.

Commissioner “*must ... secure the efficient and effective, and widest possible, enforcement*” of tax legislation.⁴⁷⁵

In considering the nature and purpose of the audit notifications sent to the applicants, the court found that the notifications and the documents requested were in line with the provisions of sections 40 and 46, and that the information requested was “*...of the kind that would prove the correctness of the VAT and income tax returns filed by a taxpayer. Put differently, they are typical of the documents which section 29 of the TAA enjoins a taxpayer to keep; are typical of the documentation with reference to which the applicants’ VAT and income tax returns would have been prepared.*”⁴⁷⁶

On this basis, the court concluded that:

*“Objectively adjudged it seems that no value could be served and no purpose (to SARS) could be achieved, save to prove or disprove the correctness of the applicants’ VAT and income tax returns but more importantly falling squarely within the definition of an ‘administration of a tax Act’ as defined in section 3(2) of the TAA.”*⁴⁷⁷

The court proceeded to consider whether the matter was in fact ripe for hearing. In this regard, SARS’ argument was twofold: if a taxpayer’s affairs are in order, no additional assessment (and, therefore, no prejudice) will result from an audit. If SARS incorrectly audits and issues an additional assessment, the dispute resolution mechanism contained in Chapter 9 of the TAA will result in the assessment being set aside, addressing the taxpayer’s prejudice satisfactorily. The applicants contended that the ability to dispute additional assessments cannot erode SARS’ obligations under the TAA to select taxpayers

⁴⁷⁵ Note 449 *supra* at para 39 – 42.

⁴⁷⁶ *Ibid* para 48 – 51.

⁴⁷⁷ *Ibid* para 52.

for audit on a rational and justifiable basis, or the applicants' concomitant "right" not to be arbitrarily subjected to audit proceedings.

The applicants' counsel conceded in argument that the decision to audit a taxpayer was not one which falls within the definition of administrative action as defined in PAJA, on the basis that, in this instance, the decision to select a taxpayer for an audit did not adversely affect the applicants' rights, or have direct external legal effect, and abandoned this submission in argument.⁴⁷⁸

The court agreed with this approach, citing the judgment handed down by the Constitutional Court in *Viking Pony Africa Pumps v Hydro-Tech Systems*⁴⁷⁹ and the judgment of the Supreme Court of Appeal in *Corpco 2290 CC t/a U-Care v Registrar of Banks*,⁴⁸⁰ where it was held that:

"[26] Even if the argument could be found to relate in some way to the interpretation of the sections, the appellants' reasoning is seriously flawed... the Registrar's decisions to investigate the appellants' business and institute proceedings against the appellants for an interdict in terms of s 81 of the Act were not administrative actions for the purposes of PAJA as they did not (as required by the definition of 'administrative action' in s 1 of PAJA) adversely affect the rights of the appellants or have a direct, external legal effect or have that capacity. Whether or not administrative action, which would make PAJA applicable, has been taken, cannot be determined in the abstract. Regard must always be had to the facts of the case. A decision to investigate and the process of investigation, which exclude a determination of culpability, could not adversely affect the rights of the

⁴⁷⁸ Note 449 *supra* at para 61.

⁴⁷⁹ Note 391 *supra*.

⁴⁸⁰ (755/11) [2012] ZASCA 156 at para 26.

appellants in a manner that has a direct and external legal effect.” (emphasis provided; footnotes excluded)

The court held that there can be no prejudice in a taxpayer being requested to produce documents which it is statutorily required to keep,⁴⁸¹ and furthermore, that the act of selecting a person for an audit does nothing more than set an investigative process in motion:

*“The initiation of an investigation does not constitute a decision which is capable of review: simply put, it is not yet ripe for review as it is incomplete.”*⁴⁸²

The court held further that the lawfulness of the decision to issue additional assessments ought to be decided in the Tax Court, following the outcome of the dispute resolution processes contained in the TAA. For purposes of this conclusion, the court accepted that the Tax Court had jurisdiction to pronounce on matters of legality.⁴⁸³

In addition, the court found that the applicants had been provided with an opportunity to participate in the “procedure” disclosed in section 42 of the TAA, but had elected not to do so. In this regard, the court held that:

*“Section 42 performs the function of section 3(2) of PAJA i.e. it affords a taxpayer, in the position of the applicants in receipt of the audit notifications, reasonable opportunities to make representations, and once that procedure is exhausted, the decision would potentially have reached the required degree of ripeness capable of forming the subject of a review.”*⁴⁸⁴ (own emphasis)

⁴⁸¹ Note 449 *supra* at para 66.

⁴⁸² *Ibid* para 66 – 67.

⁴⁸³ *Ibid* para 73 and 76.

⁴⁸⁴ *Ibid* para 74.

The court held further that the applicants' failure to participate in the audit process and to utilize section 42 of the TAA to protect their rights resulted in a breach of the subsidiarity principle, namely, that "*... a litigant may not rely directly on a constitutional provision to assert his or her rights if there is legislation that gives effect to that right, and that a litigant cannot seek a general declarator of constitutional principle divorced from the existing legislative or common-law framework.*"⁴⁸⁵

The court expressed the view that, since SARS had issued additional assessments, the applicants had the right to object and to follow the Chapter 9 dispute resolution process in order to dispute the lawfulness of SARS' decision to conduct an audit, and that the taxpayers should follow this process and ultimately, approach the Tax Court for the relief sought in the review application.

Opperman J nonetheless proceeded to consider the lawfulness of the decision, in event that the decision to audit the applicants was capable of review under the principle of legality. In doing so, she evaluated each of the three "risks" upon which the responsible SARS officials based their decision to conduct the audit. These "risk assessments" were only divulged to the applicants after the commencement of the review proceedings and the applicants' successful interlocutory application in the Tax Court to compel further and better discovery in relation to the record of the proceedings.⁴⁸⁶

SARS disclosed three separate areas of risk justifying the conclusion that the three applicants each posed an income tax risk that warranted their selection for income tax audits. These were: alleged customs non-compliance, an alleged discrepancy in turnover between the (first and second) applicants' VAT returns when compared to their income tax

⁴⁸⁵ Note 449 *supra* at para 78 – 81.

⁴⁸⁶ *Ibid* para 32 and 75.

returns, and an alleged discrepancy in income declared by the applicants in their income tax returns when compared to the content of their bank accounts.⁴⁸⁷

The allegations regarding the bank accounts were disregarded by the court at the outset, as the applicants demonstrated in their replying affidavit that SARS had not been in possession of the bank statements at the time that the decision was taken. SARS agreed to abandon this allegation, and the court declined to consider, for purposes of the review application, whether the apparent “*bona fide* oversight” that led to its inclusion in the reasons advanced by SARS for the decision to audit the applicants should have any bearing on the credibility of SARS’ further evidence.⁴⁸⁸

The applicants also provided evidence that the alleged turnover discrepancy was based on the application of a flawed and inconsistent methodology. This was compounded by the fact that SARS had (either negligently or deliberately) failed to consider material information in its possession which indicated that the taxpayers were compliant.⁴⁸⁹ Unfortunately, the applicants’ evidence in this regard was contained in an affidavit and two expert reports which were annexed to the applicants’ replying affidavit.⁴⁹⁰ The court was critical of the fact that SARS had not had an opportunity to respond to this new evidence, and accepted SARS’ argument that if a detailed 422 page report was necessary to demonstrate that the alleged turnover discrepancies were flawed, these apparent discrepancies clearly justified the decision to undertake an audit.⁴⁹¹

In respect of the customs non-compliance, SARS alleged that the customs risks identified would inevitably have resulted in non-compliance with the Income Tax Act. Counsel for the

⁴⁸⁷ Note 449 *supra* at para 30 – 32.

⁴⁸⁸ *Ibid* para 86.

⁴⁸⁹ *Ibid* para 87 – 97.

⁴⁹⁰ *Ibid* para 75 and 96.

⁴⁹¹ *Ibid* para 77.

applicants argued that even if this was true, the customs risks identified by SARS related to different entities, and could not be extrapolated to the applicants simply because they were part of the same group of companies. The court nonetheless accepted that this tenuous connection met the “low threshold” requirements of section 40 of the TAA, and justified selection for audit.⁴⁹² On this basis, the court found that even if the decision to audit the applicants was reviewable, it would be rational and, therefore, lawful. It is worth noting that the court did not deal with the applicable rationality threshold, or whether any element of fairness should have been considered in determining the rationality of the decision.

It is unclear whether the applicants intend appealing this judgment, but it is submitted that a very different finding could be made, if a different approach was adopted to the question of whether the decision to audit the applicants was reviewable.

The question of whether or not SARS’ decision to audit was taken for an ulterior purpose, was *ultra vires*, or otherwise biased and irrational ultimately turned on SARS’ reasons for initiating the audit. The court found the reasons advanced by SARS in the review application to be plausible, notwithstanding the various discrepancies in SARS’ evidence, the tenuousness of the links between existing evidence and the subject matter of the audit, and the “*bona fide* oversight” which led to an irrelevant consideration being advanced as a reason for the decision in SARS’ answering affidavit.

The judgment is focused primarily on the question of ripeness, concluding that the decision to conduct an audit is so preliminary in nature that it cannot form the subject of a review. Given the specific facts of this case, and the arguments advanced by the applicants’ counsel, the court did not have the opportunity to consider the potentially substantial

⁴⁹² Note 449 *supra* at paras 104 – 107.

differences between an income tax audit, and the purely preliminary investigative processes dealt with in *Viking Pony*⁴⁹³ and *Corpco*,⁴⁹⁴ which did not involve any determination of culpability.

As has been set out above, the decision to audit and to request relevant material from taxpayers typically forms part of a determinative or adjudicative process, and may, therefore, have a direct, external effect which materially and adversely affects taxpayers' rights. Section 102 of the TAA places the burden of proof on the taxpayer to demonstrate that its tax position is correct, and the preliminary information sought, and the responses provided by the taxpayer, accordingly, have a direct impact on the subsequent determination of liability. The fact that section 42 of the TAA provides the taxpayer with a statutory right to respond to SARS' *prima facie* audit findings before the conclusion of the audit (i.e. the "preliminary investigation") is further evidence of this. In addition, the commencement of an audit or information-gathering process may have immediate and long term adverse financial and commercial consequences for taxpayers.

Another key question regarding the ripeness of a decision is whether the affected person will have adequate remedies to address any prejudice at a later stage in the process, so that it is unnecessary to interrupt the process at the initial, preliminary stage.⁴⁹⁵ In this regard, the court concluded that both section 42 and Chapter 9 of the TAA provided the taxpayer with sufficient remedies to address any prejudice which might result from the exercise of SARS' audit and information-gathering powers.

The court held that section 42 was analogous to section 3(2) of the PAJA insofar as it affords taxpayers a reasonable opportunity to make representations, and that only after

⁴⁹³ Note 391 *supra*.

⁴⁹⁴ *Supra* note 480.

⁴⁹⁵ Note 269 *supra*, at pages 435 and 518 – 520; Cheryl Loots 'Standing, Ripeness and Mootness' in S Woolman, T Roux, J Klaaren, et al (eds) *Constitutional Law of South Africa* 2 ed (2005) Ch 7.

the “section 42 procedure” was exhausted would the decision potentially be ripe for review.⁴⁹⁶ This suggests that if the applicants had disclosed their concerns regarding SARS’ decision to conduct an audit in response to the facts and conclusions set out in SARS’ *prima facie* audit findings,⁴⁹⁷ the resultant finalisation of the audit (and issuing of additional assessments) would potentially be subject to review, on the basis that SARS had exercised its audit and information-gathering powers improperly in selecting the taxpayers for audit.

In this specific instance, SARS completed the audit, provided the taxpayers with its findings, and issued the additional assessments within a relatively short timeframe (approximately 8 months altogether). However, this is not always the case in practice. As was apparent from SARS’ own evidence in *Carte Blanche Marketing*, the “risks” which motivated SARS to conduct the income tax audit were first discovered in 2006, then highlighted again in 2010, and the audit was finally initiated in 2014. Due to similar resource constraints and internal inefficiencies, it is not unusual for audits to span lengthy periods, often becoming “dormant” for several years before being “revived” by SARS.

This places taxpayers in a very difficult position, as the more time that elapses between initial requests for information and the finalisation of the audit, the more difficult it is for the taxpayer and its advisors to re-familiarize themselves with the details of the dispute, locate documents, and procure witnesses (particularly where the employees responsible for the decisions which SARS is investigating, and those responsible for the initial interactions with SARS, have left the taxpayer’s employ before the audit is finalized). Taxpayers’ rights to finality may be irreparably compromised where SARS decides to audit historical “prescribed” years of assessment after the fact.

⁴⁹⁶ Note 449 *supra*, para 74.

⁴⁹⁷ In terms of section 42(3) of the TAA.

The issuing of an additional assessment is also by no means the only “material and adverse” effect resulting from the exercise of SARS’ audit and information-gathering powers. The improper or inefficient exercise of SARS’ audit and information-gathering powers may result in the financial, commercial and legal prejudice described in the preceding chapters, as well as infringing on the taxpayer’s right to finality. This prejudice may endure for months, or even years, before SARS issues its audit findings and the “section 42 process” commences. There is typically a further delay between the submission of the taxpayer’s response to these *prima facie* findings and the finalisation of the audit and issuing of additional assessments, which would conclude the “section 42 process” and render the matter ripe for review, based on the court’s reasoning.

A discussion of the interface between administrative law and delict, and the concept of administrative law quasi-damages is regrettably beyond the scope of this dissertation, but it is worth noting that unlawful administrative action does not automatically give rise to a claim for damages (delictual or otherwise), and that the requirements for claiming damages are usually very difficult to prove.⁴⁹⁸ It is thus unlikely that a taxpayer would be able to remedy the prejudice suffered as a result of the inefficient or improper exercise of SARS’ audit and information-gathering powers after the fact, by reviewing the decision to issue an additional assessment.

Unlike in the *Brown*⁴⁹⁹ case, SARS failed to provide the taxpayers with any substantive reasons for the refusal to disclose the basis of the “risk assessment” in *Carte Blanche Marketing*. The evasive approach taken by SARS, coupled with the relatively flimsy “risk assessment” grounds which SARS was ultimately forced to disclose, demonstrates an

⁴⁹⁸ See for example *Steenkamp N O V Provincial Tender Board, Eastern Cape* 2007 (3) 121 (CC); *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC); *Telematrix (Pty) Ltd v Advertising Standards Authority SA* (2006) 1 All SA 6 (SCA).

⁴⁹⁹ Note 411 *supra*.

approach to tax administration which is likely to have a damaging effect on the procedural fairness of the system as a whole, which, in turn, impacts on tax morale and voluntary compliance. In particular, it is difficult to understand how taxpayers would ever be able to demonstrate an allegation of bias or ulterior motive where they are unable to elicit the reasons (or lack thereof) for SARS' decision to conduct an audit or information-gathering process.

Moreover, section 195 of the Constitution imposes a duty on SARS to act fairly and equitably, and to promote the efficient, economic and effective use of resources.⁵⁰⁰

Although these issues were evidently not placed before the court in the review application, SARS' refusal to engage the taxpayers' request to disclose what was ultimately successfully defended as a rational basis for selecting the taxpayers for audit in the *Carte Blanche Marketing* case demonstrates a clear disregard for these constitutional obligations, in the context of the exercise of SARS' audit and information-gathering powers.

The court also found that the Chapter 9 dispute resolution process provided for in the TAA would enable the taxpayers to ventilate their concerns regarding the rationale behind their selection for audit, as the evidence necessary to support the conclusion that there was no rational basis for the decision to conduct an audit would be the same (or substantially so) as the evidence required to show that the additional assessments were incorrect. However, SARS only disclosed the basis on which the taxpayers were selected for audit after being compelled, in the context of the review proceedings, to provide a full and complete record of the decision. In response to the taxpayers' previous requests for SARS to disclose the basis of the "risk assessment" SARS indicated (correctly) that it had no legal obligation to make such a disclosure and, therefore, refused to do so.

⁵⁰⁰ This duty is legislatively entrenched in section 4(2) of the SARS Act, which provides that SARS "*must perform its functions... in accordance with the values and principles mentioned in section 195 of the Constitution*".

It is difficult to understand how the taxpayers would have been able to formulate valid grounds of objection to the additional assessments in relation to SARS' decision to conduct an audit in circumstances where they were not in possession of the details of SARS' decision, and had no means (outside of the requirements of Rule 53 of the Uniform Rules of Court) of compelling SARS to disclose this information. Had the taxpayers simply addressed this issue in an objection to the additional assessments, they would be confined to a very superficial argument setting out their suspicions in relation to SARS' motives in the objection, and in the subsequent appeal proceedings.

Rule 7(2) of the dispute resolution rules promulgated in terms of section 103 of the TAA provides that an objection must, *inter alia*, specify the grounds of objection in detail, including which part of the assessment or which specific amount is objected to, and which of the grounds of assessment are being impugned, in order to be valid. Rule 7(4) permits SARS to invalidate an objection which does not comply with the requirements of sub-rule 2. Rule 32(3) read with Rule 34 further provides that a taxpayer may not include any grounds of appeal which constitute new grounds of objection against the assessment, and which were not originally objected to.

The Commissioner may accept superficial arguments relating to the rationality of the decision to audit the taxpayer as valid grounds for objection, and the Tax Court may allow a taxpayer to flesh out the details of such superficial grounds of objection in the further appeal process, although these are substantial risks that negatively affect the taxpayer's prospects of success, and may, therefore, discourage many taxpayers from pursuing such a dispute. Even if these hurdles could be overcome, the taxpayer would almost certainly be unable to obtain the details of SARS' decision and the relevant "risk assessment" (or lack thereof) prior to the document discovery process provided for in Rule 36, which only occurs after the pleadings have been finalized.

Accordingly, the taxpayer would need to obtain condonation for the necessary amendments to its Rule 32 statement of grounds of appeal to include this additional information (which it may well have to compel in an interlocutory application, as was the case for the taxpayers in *Carte Blanche Marketing*), and SARS would need to be provided with an opportunity to amend (or file) a Rule 33 statement in reply, to deal with the new allegations. These risks, delays and additional costs further decrease the likelihood of a taxpayer successfully pursuing such a dispute (or indeed, pursuing the dispute at all).

It may be possible to circumvent this procedural difficulty by requesting the basis for the decision to conduct an audit in terms of Rule 6, which provides that a taxpayer may request reasons from SARS where further information is required for purposes of formulating a valid objection to an assessment. However, it must be emphasized that like section 104 of the TAA, the provisions of Rule 6 relate specifically to an assessment, and the reasons for the decision to issue an assessment, and not to the processes preceding that decision.

Section 104 of the TAA (which governs the initiation of a dispute under Chapter 9 by way of objection) provides that taxpayers may object against assessments issued to them, and to certain specific decisions set out in section 104(2). As discussed earlier in this chapter, the decision to audit or to request information from a taxpayer is unlikely to fall within the parameters of section 104(2), particularly because the Chapter 9 dispute resolution process is aimed at resolving disputes regarding assessments, and decisions which relate directly to those assessments (or the dispute process itself), rather than decisions forming part of the preceding audit and information-gathering process. The taxpayer would, therefore, be limited to impugning the assessment, on the basis that it resulted from a procedurally flawed audit, without being able to substantiate the allegation that the decision to conduct the audit was unlawful.

Accordingly, there is a sound basis for SARS to reject a request for the reasons informing the decision to audit in terms of Rule 6, and grounds of objection relating to the legitimacy of the decision to audit the taxpayer. Even if SARS is willing to provide reasons in terms of Rule 6, these are unlikely to be any more substantial than the “rationale” initially provided to the taxpayers in *Carte Blanche Marketing*.⁵⁰¹ Accordingly, a taxpayer wishing to dispute an assessment on the grounds that its selection for audit was unlawful is likely to face a laborious and expensive dispute process fraught with challenges, including the difficulty of securing the evidence necessary to substantiate the primary grounds of objection.

While it may have been an appropriate conclusion in the context of *Carte Blanche Marketing*, for the reasons set out above, responding to SARS’ *prima facie* audit findings in terms of section 42(3) of the TAA, or objecting to an additional assessment in terms of the Chapter 9 dispute resolution process is unlikely to be a suitable remedy for the taxpayer generally. With respect, the court’s approach to the question of ripeness, prejudice, and available remedies is overly formalistic.

Administrative law in a constitutional dispensation should be (and in South Africa, arguably is) moving away from unnecessary formalism. The development of the principle of legality, as will be discussed below, is a significant step in this regard. Hoexter⁵⁰² states that:

“Primarily, the principle of legality is a convenient way of requiring all exercises of public power – including non-administrative action – to conform to certain accepted minimum standards. It is thus also a way of overcoming the all-or-nothing results that are dictated by the use of threshold concepts. But in performing this important function the principle surely exposes the conceptual traps into which we have fallen,

⁵⁰¹ Note 449 *supra*.

⁵⁰² Cora Hoexter 'The principle of legality in South African administrative law' (2004) 3 *Macquarie Law Journal* 165.

and it shows us how to go on... to tell us that it is perverse to spend our time working out whether decisions pass the test of 'administrative action'"⁵⁰³ (footnotes omitted)

And:

"By telling us that all exercises of public power must comply with standards such as lawfulness, reasonableness and fairness, the principle of legality points away from all this conceptualism and parsimony and perversity... It tells us not to waste our time on conceptual reasoning, and not to be fearful of opening the floodgates, but rather to apply our minds to what administrative justice requires in every case. And it tells us that it is, in fact, possible to give appropriate content to lawfulness, reasonableness and fairness in individual cases."⁵⁰⁴ (footnotes omitted)

As will be discussed below, the flexibility inherent in the principle of legality should protect against abusive litigation designed to frustrate and delay SARS in the carrying out of its duties, while also ensuring that all exercises of public power, including the exercise of SARS' audit and information-gathering powers, are fair, lawful, reasonable, and economically sustainable.

Finally, although this issue was not before the court in *Carte Blanche Marketing*, even if the exercise of SARS' audit and information-gathering powers was a purely preliminary investigative process, our courts have held⁵⁰⁵ that administrators must not act *"...vexatiously or oppressively towards those persons subject to investigation"*⁵⁰⁶ and that *"...investigatory proceedings, which have been recognised to be absolutely essential to*

⁵⁰³ Op cit note 502 at page 184

⁵⁰⁴ *Ibid* at page 185.

⁵⁰⁵ Note 302 *supra*.

⁵⁰⁶ *Ibid* at 527.

*achieve important policy objectives, are nevertheless subject to the constraint that the powers of investigation are not exercised in a vexatious, oppressive or unfair manner”.*⁵⁰⁷

The body of judicial precedent in relation to tax and customs and excise disputes is evidence of the fact that SARS officials can interpret the law incorrectly, make mistakes, and act overzealously at times, to the detriment of taxpayers. At the very least, the principle of legality ought to shield taxpayers from erroneous and overly harsh treatment, even at the preliminary stages of an audit.

The approach suggested by Opperman J in *Carte Blanche Marketing*⁵⁰⁸ is in line with that adopted by the High Court in *A Way to Explore v Commissioner for South African Revenue Service*.⁵⁰⁹ In this instance, the taxpayer sought an order in terms of the PAJA for the setting aside of additional assessments issued by SARS, on the basis that SARS had not observed the procedural requirements of the TAA when conducting the audit that led to the additional assessments being issued. On the basis of these additional assessments, SARS also took steps to collect the disputed amount prior to the finalisation of the dispute.

The taxpayer had significant VAT refunds due and owing to it, because its income was mainly generated from the rendering of zero-rated services to non-resident customers, outside of South Africa. SARS requested certain information for purposes of verifying the taxpayer's VAT returns, and the taxpayer responded with the information which, in its view, constituted the information requested. As a result, the taxpayer only provided SARS with information in relation to its standard-rated supplies. SARS then requested further additional information in respect of the taxpayer's zero-rated supplies, but the taxpayer

⁵⁰⁷ *Ibid.*

⁵⁰⁸ Note 449 *supra*.

⁵⁰⁹ (23896/17) [2017] ZAGPPHC 541.

refused to provide this information on the basis that it had already made full disclosure of the information requested. SARS accordingly issued additional assessments taxing the zero-rated supplies at the standard rate, on the basis that the taxpayer had failed to discharge the burden of proof for zero-rating its services.

Following some administrative difficulties, the taxpayer filed an objection against the additional assessments, providing proof of the zero-rated supplies by attaching the relevant invoices to its notice of objection. Before SARS communicated any decision to the taxpayer in respect of the objection, the disputed funds were “collected” by setting off the additional VAT liability against the VAT refunds that were due and owing to the taxpayer.

The taxpayer’s argument was that the additional assessments were invalid, on the basis that SARS failed to follow the process set out in section 42 of the TAA, in terms of which SARS must notify taxpayers of the outcome of an audit and provide them with 21 days within which to respond to the audit findings. SARS argued that the additional assessments were validly issued because the taxpayer had refused to provide the additional information requested, despite being advised of the consequences of failing to respond to SARS’ requests.

Khumalo J found that the promulgation of section 42 and the Public Notice⁵¹⁰ was brought about by “...a need to improve on the taxpayer’s rights and curb the injustices that may result from an audit that may take place without the knowledge of the taxpayer or affording it an opportunity to make submissions with regard thereto”, and that the taxpayer’s rights should not be lightly disregarded.⁵¹¹

⁵¹⁰ *Supra* note 184.

⁵¹¹ *Supra* note 449 at para 29.

However, the court also found that in failing to include the procedural deficiency in its objection (which was still pending), the taxpayer had raised an issue on review which it had “seemingly excused” in pursuing the internal remedies provided for in Chapter 9 of the TAA.⁵¹² Khumalo J held that it is a requirement, in terms of section 7(2)(a) of the PAJA, that internal remedies must first be exhausted before an application for the judicial review of a decision is brought. Accordingly, the court held that it could not interfere in the internal dispute resolution process in circumstances where the taxpayer had not made out a compelling case for the necessity of a review of the decision pending the outcome of the Chapter 9 dispute resolution process.⁵¹³

Notwithstanding the above, the court suspended the set-off effected by SARS against the taxpayer’s refunds, pending finalisation of the dispute. In this regard, Khumalo J stated the following:

*“Notwithstanding my aforesaid sentiments, I find it iniquitous and excessive that whilst the process of objection is still pending, the Respondent proceeded to effect a set-off payment especially under circumstances where the Applicant was not alerted or afforded an opportunity to make submissions to Respondent's intention to implement a corrective payment after the assessment. It would therefore be just and curb any prejudice on the Applicant if the effect of the decision to set-off is suspended pending the outcome of the process of objection and for the Applicant to be afforded an opportunity to comment or make submissions on the set-off”.*⁵¹⁴

Albeit that the court declined to exercise any review powers in the context of the pending internal dispute (and particularly, the fact that the taxpayer had failed to include the

⁵¹² *Supra* note 509 para 36 – 37.

⁵¹³ *Ibid* para 38 – 39.

⁵¹⁴ *Ibid* para 40.

procedural issue in its objection), this judgment indicates that SARS is required to observe procedural fairness in the exercise of its audit and information-gathering powers in appropriate circumstances, emphasizing the importance of SARS adhering to the procedural requirements set out in section 42 of the TAA.

The abovementioned judgments arguably support the contention that the exercise of SARS' audit and information-gathering powers may constitute administrative action in appropriate circumstances, and that at a minimum, the exercise of SARS' audit and information-gathering powers should be subject to the principle of legality.

This is illustrated and evidenced by the unreported judgment handed down in *Rappa Resources (Pty) Ltd v The Commissioner for The South African Revenue Service*,⁵¹⁵ where the High Court confirmed that the principles of fairness and reasonableness (and the taxpayer's right to finality) are applicable in the context of audits, in circumstances where the necessary "direct, external legal effect" is present. In this case, the court found that SARS' decision to withhold the taxpayer's VAT refunds, pending completion of the audit, would have a material impact on the taxpayer's business which necessitated the invocation of the principles of fairness and reasonableness even at the preliminary audit stage.⁵¹⁶

Taking the abovementioned factors into account, the exercise of SARS' audit and information-gathering powers could constitute administrative action as defined in the PAJA, in appropriate circumstances. The nature, source, and subject matter of SARS' audit and information-gathering powers are undoubtedly public in nature, and form part of the performance of a public duty (revenue collection). The exercise of these powers also

⁵¹⁵ *Supra* note 249.

⁵¹⁶ *Ibid* para 36.

clearly involves the implementation of legislation, being the empowering provisions of the TAA.

Most importantly, the exercise of SARS' audit and information-gathering powers can (and in practice, frequently does) materially and adversely affect taxpayers' rights and interests, sometimes having the necessary direct, external legal effect to satisfy the administrative action definition from the very outset of the information-gathering process. The application of human and financial resources to deal with "fishing expeditions" and unnecessarily protracted audits is a cost that the taxpayer cannot recover, and the legislation was never intended to result in infringements on honest taxpayers' right to finality, with taxpayers being subjected to months, or even years of commercial and legal uncertainty (and sometimes, resultant financial loss) in circumstances where there is no rational basis for an investigation, or where the manner in which the audit process is carried out is unreasonably inefficient.

Unfortunately, it cannot be said in all cases that the prejudice to the taxpayer can be remedied once an assessment is issued, particularly when a significant aspect of that prejudice is, in many cases, the unnecessary expense and prolonged legal and commercial uncertainty created by unnecessarily vague or lengthy and drawn-out information-gathering and audit processes. This is particularly harmful to taxpayers in circumstances where the audit relates to historical "prescribed" years of assessment, and the right to finality is affected.

While preliminary investigative procedures do not usually constitute administrative action, the existing jurisprudence indicates that the limitation of the right to natural justice and procedural fairness in preliminary proceedings is appropriate *inter alia* where the affected person will be afforded a remedy at the determinative stage of the proceedings, and where

the unfair conduct being complained of at the preliminary stage cannot prevent the affected person from accessing the determinative stage of the process or delay access to the determinative process. Where SARS conducts “fishing expeditions” in respect of historical “prescribed” years, there is a very real risk of taxpayers being subjected to additional assessments in circumstances where the evidence they require to discharge the onus of defending their tax position cannot be located, or no longer exists. In such circumstances, the dispute resolution process contained in Chapter 9 will not avail the taxpayer, even after an additional assessment has been issued.

Moreover, as discussed with reference to the *Carte Blanche Marketing* High Court judgment,⁵¹⁷ even in circumstances where the prejudice experienced by the taxpayer can be remedied using the Chapter 9 dispute resolution process, in many circumstances, the financial costs and legal uncertainty imposed on taxpayers by the abuse of SARS’ information-gathering and audit powers impose challenges in pursuing a Chapter 9 dispute which will dissuade many, or even most taxpayers from pursuing such disputes. As a result, there will be little incentive for SARS officials to conduct proper risk analyses prior to commencing an audit or requesting information from taxpayers, and a concomitant risk of this inefficient and redundant tax administration policy becoming further entrenched within SARS.

There is arguably also an aspect of inherent injustice in the expectation that taxpayers should endure unfair treatment and the ongoing violation of their rights until such time as the dispute process provided for in the TAA is exhausted. The broader socioeconomic ramifications of such systemic procedural unfairness for the overall efficiency of the tax system should not be underestimated.

⁵¹⁷ Note 449 *supra*.

The argument that any prejudice experienced by taxpayers during the course of an audit or information-gathering process can be satisfactorily addressed using the Chapter 9 dispute resolution process is also premised on the notion that the preliminary, investigative stage and the determinative, adjudicative stage of the audit process are separate and distinct, and that the exercise of public power in making a preliminary decision or carrying out an investigation carries no serious or final consequences for the affected party.

The exercise of SARS' audit and information-gathering powers can be distinguished from other preliminary investigative processes (such as those implemented by the Competition Commission) in several respects, potentially rendering much of the existing jurisprudence on ripeness and the material adverse effect of a preliminary or investigative process distinguishable from the exercise of SARS' audit and information-gathering powers.

Having regard to the factors set out in this chapter, the decision to audit and to request relevant material should be considered to constitute administrative action, which is subject to judicial review, in appropriate circumstances. However, given the difficulty of pigeonholing a decision of a preliminary nature within the "palisade of qualifications" contained in the definition of administrative action, it is necessary to also consider the applicability of the principles of legality to the exercise of SARS' audit and information-gathering powers.

4.3 SARS' audit and information-gathering powers in the context of the principle of legality

4.3.1 The definition of the principle of legality in South Africa

The principle of legality, as a facet of the rule of law, is applicable to exercises of public power that do not constitute administrative action. The principle of legality thus provides a

conduit for the judicial review of non-administrative action.⁵¹⁸ The principle of legality broadly entails that no public power may be exercised and no function performed beyond what is conferred by law.⁵¹⁹ The principle of legality also incorporates the requirement that all exercises of public power must be rational.⁵²⁰

The Constitutional Court has stated that the principle of legality is premised on the idea that the legislature and executive may not exercise any power beyond that which is conferred by the law, which is a reflection of the *ultra vires* doctrine, a common-law ground of review in the pre-constitutional era.⁵²¹ Today, legality has a broader meaning, and refers to an overarching constitutional principle affecting all exercises of public power, which is informed by the values underlying the constitution as a whole.⁵²²

Legality is recognized as a key component of the rule of law, providing that unlawful conduct must always be undone, and that governments must always act for legitimate reasons in making decisions.⁵²³ The principle of legality, in this sense, was established in our jurisprudence through a series of Constitutional Court judgments dealing with non-administrative exercises of public power.⁵²⁴ The first of these judgments was delivered in the case of *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*.⁵²⁵ In its judgment, the Constitutional Court identified the principle of legality and held that the principle of legality was “*necessarily implicit in the Constitution*” insofar as it applied to exercises of public power which did not constitute administrative action.⁵²⁶ In its

⁵¹⁸ *Supra* note 269 at page 121.

⁵¹⁹ *Masetlha v President of the Republic of South Africa and another* 2008 (1) SA 566 (CC) at para 80; *supra* note 287 at page 441.

⁵²⁰ *Supra* note 269 at page 122.

⁵²¹ Radley Henrico ‘Re-visiting the rule of law and principle of legality: judicial nuisance or licence?’ 2014 *TSAR* 742 at 751.

⁵²² *Op cit* note 269 at page 122.

⁵²³ See for example Leo Boonzaier ‘Good Reviews, Bad Actors: The Constitutional Court’s Procedural Drama’ (2015) 7 *CCR* 1 at page 2 – 3 and the cases cited at footnote 3.

⁵²⁴ Note 502 *supra* at 181.

⁵²⁵ 1999 (1) SA 374 (CC), hereafter “*Fedsure*”.

⁵²⁶ *Supra* note 525 at para 59.

judgment, the Constitutional Court framed the principle of legality as part of the doctrine of the Rule of Law.⁵²⁷

In the *SARFU* judgment,⁵²⁸ the Constitutional Court developed the principle of legality significantly.⁵²⁹ The court held that the fact that the President's conduct did not amount to administrative action did not mean that there were no constraints upon it. The Constitutional Court found that both the implicit and explicit requirements contained within the Constitution were applicable to the President's conduct as an exercise of public power, including the requirement to act in good faith, and the requirement not to misconstrue his powers.⁵³⁰

In *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa*⁵³¹ the requirement of rationality was introduced to the principle of legality as a "minimum threshold requirement applicable to the exercise of all public power".⁵³² The Constitutional Court held, in a unanimous judgment, that:

*"It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement."*⁵³³

In *Albutt v Centre for the Study of Violence and Reconciliation*⁵³⁴ the Constitutional court elaborated on the principles expressed in *Pharmaceutical Manufacturers* and held that

⁵²⁷ *Ibid.*

⁵²⁸ Note 271 *supra*.

⁵²⁹ *Op cit* note 269 at page 123; *op cit* note 502 at page 181 – 182.

⁵³⁰ *Supra* note 271 at para 148.

⁵³¹ 2000 (2) SA 674 (CC), hereafter "*Pharmaceutical Manufacturers*".

⁵³² *Supra* note 531 at para 90.

⁵³³ *Ibid* para 85.

⁵³⁴ 2010 (3) SA 293 (CC).

procedural fairness is a requirement of rationality.⁵³⁵ However, as various authors have pointed out, the threshold for rationality may vary drastically from case to case.⁵³⁶ Rationality review contemplates a lower threshold than the standard of reasonableness review contained in section 62(h) of the PAJA, as it lacks the requirement of proportionality (i.e. the enquiry as to whether there are less restrictive means of achieving the same result).⁵³⁷ Rationality review merely requires that there is a rational connection between the decision reached by the decision-maker and the underlying relevant information and facts.⁵³⁸ Our courts have rejected the notion that proportionality is a requirement for rationality under the principle of legality.⁵³⁹ In *Glenister v President of the RSA and Others; Helen Suzman Foundation as Amicus Curiae*⁵⁴⁰ the court held that there must be a rational relationship between a scheme adopted by Parliament and the achievement of a legitimate governmental purpose, and Parliament may not act capriciously or arbitrarily.⁵⁴¹

However, the court held further that “*to survive rationality review, legislation need not be reasonable nor appropriate.*”⁵⁴² The different approaches taken by the Constitutional Court in *Albutt*,⁵⁴³ *Merafong*⁵⁴⁴ and *Glenister*⁵⁴⁵ appears to indicate that, despite requiring the application of a single constitutional standard, rationality review will vary in intensity from case to case. The *Albutt* judgment has, however, introduced a requirement into our law

⁵³⁵ *Op cit* note 269 at page 123.

⁵³⁶ *Op cit* note 269 at page 419 – 420; see also: Alistair Price 'Rationality review of legislation and executive decisions: *Poverty Alleviation Network and Albutt*' (2010) 127 SALJ 580.

⁵³⁷ Max Du Plessis & Stuart Scott 'The Variable Standard of Rationality Review: Suggestions for Improved Legality Jurisprudence' (2013) 130 SALJ 597 at 601.

⁵³⁸ *Ibid.*

⁵³⁹ *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC) paras 62 – 63.

⁵⁴⁰ 2011 (7) BCLR 651 (CC).

⁵⁴¹ *Supra* note 540 at para 55.

⁵⁴² *Ibid.*

⁵⁴³ *Supra* note 534.

⁵⁴⁴ *Supra* note 539.

⁵⁴⁵ *Supra* note 540.

that the principle of legality will, at least in certain instances, require procedural fairness to have been observed, where procedural fairness is necessary to achieve the legitimate purpose of the non-administrative decision taken.⁵⁴⁶

In *Poverty Alleviation Network v President of the Republic of South Africa*,⁵⁴⁷ the court held, quoting *Pharmaceutical Manufacturers*,⁵⁴⁸ that:

“...a court cannot interfere with legislation simply because it disagrees with its purpose or believes that it should be achieved in a different way. Unless it can be shown that the objective is arbitrary, capricious or manifests naked preferences, it is irrelevant... whether the scheme chosen by the legislature could be improved in one respect or another.” (own emphasis)

Simply stated, the minimum threshold for rationality is the demonstration of a rational connection between an act and the stated purpose of the government (or public body) in taking that action. Insofar as this connection can be evidenced, the action will be rational.⁵⁴⁹ However, the type and degree of rationality required will vary from case to case, depending on the specific facts and circumstances.⁵⁵⁰

There is some authority (albeit a High Court decision, which is not binding on superior courts) for the proposition that the principle of legality *“...which includes rationality and accountability, imposes a duty upon the functionary exercising a public power to provide reasons for its act or decision.”*⁵⁵¹ Arbitrary and capricious decision making is defined, at

⁵⁴⁶ *Ibid* at page 604 – 605; *Op cit* 269 at page 419 – 420; Alistair Price 'Rationality review of legislation and executive decisions: *Poverty Alleviation Network and Albutt*' (2010) 127 SALJ 580 at 586 – 587.

⁵⁴⁷ 2010 (6) BCLR 520 (CC).

⁵⁴⁸ *Supra* note 531.

⁵⁴⁹ *Supra* note 537 at page 605 – 606.

⁵⁵⁰ *Ibid*.

⁵⁵¹ *Wessels v Minister for Justice and Constitutional Development* 2010 (1) SA 128 GNP at 1411 – J; see also note 269 at page 359.

common law, as a decision which is “irrational or senseless, without foundation or apparent purpose”.⁵⁵² A decision will also be arbitrary or capricious where the decision-maker failed to apply their mind to the matter. However, while South African jurisprudence appears to be leaning towards the development of the principle of legality to include procedural fairness, our courts have not indicated with certainty that the principle of legality encompasses fairness in every instance.

In *Masethla v President of the Republic of South Africa*,⁵⁵³ the Constitutional Court held that the principle of legality applied to the decision to dismiss the head of the National Intelligence Agency.⁵⁵⁴ The court held further that “*it would not be appropriate to constrain executive power to the requirements of procedural fairness*”.⁵⁵⁵ However, Ngcobo J held, in a dissenting judgment, that those who exercise public power are under a duty to act fairly by virtue of the rule of law and the requirement of rationality.⁵⁵⁶

This approach was upheld in *Albut*⁵⁵⁷ where the court held that procedural fairness was required “*as a matter of rationality*.”⁵⁵⁸ While it cannot be said that this will be true of every application of the principle of legality to non-administrative exercises of public power, and while the judiciary should certainly be wary of overburdening public bodies with overly strict procedural fairness requirements that affect their ability to fulfil their functions efficiently and expediently, the inherent flexibility and variability of fairness⁵⁵⁹ arguably provides a sufficient safeguard against the undue fettering of administrative and non-administrative

⁵⁵² Op cit note 269 at page 325.

⁵⁵³ 2008 (1) SA 566.

⁵⁵⁴ Op cit note 269 at page 418.

⁵⁵⁵ *Supra* note 553 at para 77.

⁵⁵⁶ Op cit note 269 at page 418.

⁵⁵⁷ *Supra* note 534.

⁵⁵⁸ Op cit note 269 at page 420.

⁵⁵⁹ *Ibid* at page 364.

decisions alike, and ought to be incorporated in the principle of legality by virtue of its status as a requirement of natural justice and the rule of law.

The tension between the need for administrative bodies to be able to correct erroneous decisions (the inherent aspect of the rule of law fulfilled by the principle of legality, that unlawful conduct cannot stand) and the requirement for public bodies to comply expeditiously with their constitutional duties is well illustrated in *Khumalo and Another v MEC for Education, KwaZulu-Natal*.⁵⁶⁰ In its judgment, the Constitutional Court emphasises, from its first paragraph, the importance of the rule of law, and grapples with the differing implications of its application in the context of legality.⁵⁶¹ On one hand, the court held that the rule of law not only confers standing on the MEC to correct her own department's unlawful decisions, but imposes a duty to do so.⁵⁶² On the other, 'expeditious and diligent compliance with constitutional duties' is itself 'a requirement of legality'.⁵⁶³ As Boonzaier points out in analysing this judgment,⁵⁶⁴ "*Unlawful administrative conduct must be remedied – but remedied according to law*". In *Khumalo*, the Constitutional Court noted that the fundamental commitment to the rule of law requires that "...a court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power"⁵⁶⁵ although the court cautioned that this does not mean that all procedural requirements should be abandoned.

⁵⁶⁰ Note 33 *supra*.

⁵⁶¹ Note 33 *supra*, at para 1.

⁵⁶² *Ibid* para 35–36.

⁵⁶³ *Ibid* para 46.

⁵⁶⁴ Op cit note 523 at page 6.

⁵⁶⁵ Note 33 *supra* at para 45.

4.3.2 Application of the principle of legality to the exercise of SARS' audit and information-gathering powers

The concept of legality review has been mentioned in relation to the exercise of SARS' audit and information-gathering powers in recent Tax Court and High Court judgments. The exercise of SARS' information-gathering powers to request relevant material was dealt with in *Carte Blanche Marketing*,⁵⁶⁶ where Jansen J stated that:

*"Whatever the correct description of the powers under sections 40 and 46 of the Tax Administration Act is, they remain exercises of public power, and must as such comply with the principles of legality"*⁵⁶⁷

and:

*"I must agree ... that we need a more nuanced approach post 1994, and certainly a more generous one when fundamental rights are concerned. The requirements of adversely affecting rights and direct, external legal effect must not be used to shield acts of bias, mala fides, corruption and the like from judicial scrutiny at the earliest possible stage."*⁵⁶⁸

In considering the taxpayers' submission that a decision to request relevant material constituted reviewable administrative action, and with reference to the judgments handed down by the Constitutional Court in *Fedsure*,⁵⁶⁹ *Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng*,⁵⁷⁰ and *Pharmaceutical Manufacturers*,⁵⁷¹

Jansen J stated further that:

⁵⁶⁶ Note 281 *supra*.

⁵⁶⁷ *Ibid* para 25.

⁵⁶⁸ *Supra* note 281 at para 28.

⁵⁶⁹ *Supra* note 525 at para 40 – 60.

⁵⁷⁰ 2013 (5) SA 24 (SCA) at para 1.

⁵⁷¹ *Supra* note 531 at para 90.

“Where one deals with the question whether an act is reviewable in principle, I would suggest that it is advisable to err on the side of caution. After all, it is now generally accepted that the exercise of all public power is reviewable on some or other basis and the concept of legality includes the requirements of lawfulness, rationality and constitutional consistency. Whatever happened to creatures like the political questions doctrine and other rules that insulated the executive and the legislative branches from judicial review, I do not know. But this case deals with something that is distinctly part of state administration, namely tax collection. So there is no need for any doctrinal anxiety. Tax disputes, if not otherwise settled, will end up in one or other court of law.”⁵⁷²

and:

“The decisions and processes involved in tax administration are all related to a decision that will ultimately constitute administrative action. These related actions and decisions must be part of an overall fair process and must be free from any bias, ulterior purpose or corruption. In fact, only the highest professional standards will do.”⁵⁷³

In IT 13726,⁵⁷⁴ the taxpayer was engaged in a dispute with SARS in relation to additional assessments issued by SARS, which had the effect of recharacterizing an amount of income, and disallowing certain expenses claimed in his 2012 income tax return. SARS had disallowed the taxpayer’s objection and appeal against the additional assessments. As a point *in limine*, the taxpayer argued that the audit conducted prior to the issuing of

⁵⁷² Note 281 *supra* at para 15.

⁵⁷³ Note 202 *supra* at para 29.

⁵⁷⁴ *Mr A v Commissioner For The South African Revenue Service (IT13726)* [2018] ZATC 8.

one of the additional assessments was invalid (and that the additional assessment was thus also invalid), on the basis that SARS had failed to comply with the peremptory obligations set out in sections 40 and 42 of the TAA.⁵⁷⁵

The taxpayer contended that he had not been notified of the commencement or the outcome of the “personal audit” referred to in SARS’ Rule 31 Statement of Grounds of Assessment, and that the Rule 31 statement was the first indication the taxpayer received of the audit being conducted.⁵⁷⁶ The court held that SARS was not permitted to rely on a procedurally flawed audit conducted without the taxpayer’s knowledge as a new ground of assessment in its Rule 31 statement, as this would violate the principle of legality.⁵⁷⁷

The Tax Court confirmed in its judgment that an additional assessment constitutes administrative action as contemplated in section 33 of the Constitution, concluding that a failure to give reasons for the decision to issue an additional assessment would also be inconsistent with the principle of legality. The court held further that sections 40 and 42 of the TAA “...clearly give effect to and echo the administrative justice provisions set out in section 33 of the Constitution.”⁵⁷⁸

The court found that SARS’ failure to comply with various aspects of section 42 of the TAA compounded the breach of the principle of legality, including the failure to keep the taxpayer informed of the status of the audit, the failure to provide the taxpayer with written conclusions or findings at the end of the audit, and the failure to give the taxpayer an opportunity to respond to the audit findings. The court stated further that sections 40 and 42 of the TAA are intended to give effect to the constitutional right to lawful, reasonable

⁵⁷⁵ Op cit note 574 para 17.

⁵⁷⁶ *Ibid* para 18.

⁵⁷⁷ *Ibid* para 19.

⁵⁷⁸ *Ibid* para 20 – 21.

and fair administrative action.⁵⁷⁹ Based on these findings, decision to issue an additional assessment was set aside, and the additional assessments were invalidated.

Notwithstanding the High Court judgment in *Carte Blanche Marketing*,⁵⁸⁰ the exercise of the audit and information-gathering powers conferred upon SARS by sections 40 to 42 and 46 of the TAA arguably constitutes, at a minimum, an exercise of public power which is subject to the principle of legality. As alluded to in the *Carte Blanche Marketing*⁵⁸¹ interlocutory judgment, the exercise of SARS' audit and information-gathering powers forms part of a multi-staged process leading up to the decision to issue an additional assessment, and each part of this process should, at a minimum, conform to the standards required by the principle of legality.

Under the first requirement of lawfulness, SARS officials must not exceed the ambit of the empowering legislation when exercising their audit and information-gathering powers.⁵⁸² Section 42 provides for specific obligations to enforce procedural fairness, such as the requirement that the taxpayer must be provided with regular progress reports (the form and content of which is set out in the Public Notice⁵⁸³) and the requirement that the taxpayer must be notified of the outcome of an audit and provided with an opportunity to respond to SARS' findings before the decision to issue an additional assessment is taken. Conduct which deviates from these requirements would fall foul of the principle of legality, and would be reviewable on this basis. The requirements of section 46 are far less onerous, for the reasons set out in the Explanatory Memorandum.⁵⁸⁴

⁵⁷⁹ *Ibid* para 22 – 23.

⁵⁸⁰ Note 449 *supra*.

⁵⁸¹ *Supra* note 281.

⁵⁸² *Supra* note 553 at para 80.

⁵⁸³ *Supra* note 184.

⁵⁸⁴ *Op cit* note 200.

This position is arguably justifiable in instances where information-gathering is the preliminary step to an audit or other investigation or verification process. However, as set out in Chapter Three above, section 46 of the TAA was never intended to authorise “fishing expeditions” or other forms of unlawful conduct. Such conduct would, therefore, arguably be *ultra vires*, and the use of SARS’ information-gathering powers in any manner which violates taxpayers’ rights to finality would more likely than not be reviewable on that basis.

The second aspect of the principle of legality, being rationality, requires that there is a demonstrable and rational connection between the exercise of SARS’ audit and information-gathering powers, and the relevant information and facts before the decision maker. Accordingly, SARS would need to be in possession of some information indicating a risk that the original assessment(s) in question are incorrect for this requirement to be met. This could be a specific concern, such as an indication that there has been an error or deliberate non-disclosure on the taxpayer’s part (as in the *Brown*⁵⁸⁵ case), or a more general concern, such as the need for increased scrutiny of certain tax positions following changes to the tax legislation or accounting standards. At a minimum, the SARS officials deciding to audit or request relevant material from a taxpayer would need to have a properly framed audit scope based on a reasonable risk hypothesis (for example, an industry-specific concern identified by SARS across a number of audits).

Having due regard for the need for confidentiality in circumstances where SARS has reason to suspect that taxpayers will behave dishonestly, there is no reason why SARS should not be able to disclose the risk(s) that have been identified to the taxpayer and clearly and unambiguously define the audit scope when engaging with honest and compliant taxpayers. In circumstances where it is appropriate to do so, this specific

⁵⁸⁵ Note 411 *supra*.

approach to auditing and gathering information is likely to save both SARS and the taxpayer a significant amount of time and resources. This is particularly true in the instance of corporate taxpayers with complex operations, where large volumes of information may be required to complete an investigation.

The exercise of SARS' audit powers under section 42 of the TAA arguably constitutes an instance where the principle of legality would require the additional element of procedural fairness as part of the inherent rationality requirement. Indeed, the High Court in *Carte Blanche Marketing*⁵⁸⁶ considered section 42 of the TAA to be analogous to section 3(2) of the PAJA, in protecting the taxpayer's rights to procedural fairness.

As far as SARS' information-gathering powers conferred under section 46 of the TAA are concerned, the 2014 Explanatory Memorandum⁵⁸⁷ refers to Article 26(1) of the OECD Model Convention, which specifically provides that "...*Contracting States are not at liberty to engage in "fishing expeditions" or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer ...*"⁵⁸⁸ Accordingly, where SARS cannot demonstrate a rational connection between the relevant material requested and the scope and purpose of an audit or pre-audit risk hypothesis, such a request could be challenged.

The threshold incorporated in section 46 of the TAA for material to have been foreseeably relevant "for the purposes of administering a tax Act", coupled with the very broad and subjective definition of "administration of a tax Act" contained in section 3 of the TAA means that in most instances, a rational connection between the purpose of the empowering legislation, facts and circumstances, and the decision reached (to request relevant material from the taxpayer) would be easy to establish in respect of requests for

⁵⁸⁶ Note 449 *supra*.

⁵⁸⁷ *Op cit.* note 200.

⁵⁸⁸ *Supra* note 197.

relevant material. However, arbitrary and capricious decision making is not permitted, and SARS would, at a minimum, need to be able to link a request for relevant material to the facts and circumstances which informed the decision to issue it to the taxpayer in question.

If the principle of legality is continuously developed to include fairness (and more particularly, procedural fairness) in appropriate circumstances, SARS would be under an increasing obligation to show a rational connection between the decision to request relevant material from a taxpayer and the facts and circumstances which informed that decision, particularly in instances where the decision to request relevant material has an adverse effect on the taxpayer's rights.

4.4 Conclusion

The factors which differentiate the exercise of SARS' powers under sections 40 to 42 and section 46 of the TAA from other examples of preliminary investigations or preliminary steps in a multi-stage decision-making process, considered together with the material, adverse, and substantially final effects which the exercise of SARS' audit and information-gathering powers may have on taxpayers' rights supports the conclusion that the exercise of SARS' powers meets the definition of administrative action, as set out in section 1 of the PAJA, in appropriate factual circumstances.

The increasing number of judicial review applications (and procedural disputes in the Tax Court) relating to the exercise of SARS' audit and information-gathering powers indicates a growing frustration amongst South African taxpayers for SARS' often heavy-handed approach to taxpayer engagement, and the lack of adequate remedies in circumstances where SARS is perceived to be acting arbitrarily or unfairly.

However, the ability to review SARS' decisions to audit or gather information from taxpayers would not mean that each and every decision of SARS to audit or request

relevant material from a taxpayer is reviewable. Although SARS should, in principle, be able to provide the rationale for a decision to audit a taxpayer in most circumstances, it would be highly problematic from an administrative perspective if taxpayers were able to frustrate and delay the audit and information-gathering process by requesting detailed reasons for each audit and request for relevant material.

The time and cost involved in bringing a judicial review application before the courts is likely to discourage frivolous and vexatious litigation to some extent. The recent judgment in *Carte Blanche Marketing*,⁵⁸⁹ the continued uncertainty regarding the jurisdiction of the Tax Court to entertain procedural litigation, and the likelihood of the High Court referring procedural disputes and points *in limine* back to the Tax Court to be adjudicated together with the substantive dispute will no doubt serve as a further deterrent to disingenuous would-be litigants.

In addition, the inherent flexibility of the concept of fairness functions as a check on unnecessary interference with the administrative process. What is procedurally fair in relation to a decision to request relevant material prior to an audit (for purposes of ascertaining whether there is a risk which needs to be investigated) will differ substantially from what is fair in relation to the decision to request information in relation to an ongoing audit. A decision to investigate or audit years outside of the limitation period, which would be capable of adversely affecting the right to finality, may require yet another, stricter standard of fairness.

While some of the judgments referenced in this chapter demonstrate exactly how unscrupulous taxpayers and tax practitioners may attempt to abuse the review process to delay and frustrate SARS' attempts to uncover and rectify dishonest conduct and material

⁵⁸⁹ Note 449 *supra*.

non-disclosures, these judgments also demonstrate that our courts are quite capable of distinguishing between attempts to vexatiously delay and frustrate information-gathering and audit processes and genuine abuses of SARS' powers.

If the exercise of SARS' investigative and information-gathering powers can more properly be characterised as an exercise of public power by a public body which constitutes non-administrative action, then the principle of legality should nonetheless act as a "safety net",⁵⁹⁰ ensuring that all exercises of public power are lawful and rational. Lawfulness would require that SARS does not venture outside of the ambit of the empowering provisions (prohibiting conduct such as "fishing expeditions"), and rationality would, at a minimum, require there to be a reason for initiating an audit or issuing a request for relevant material that is apparent from the facts and circumstances available to the decision-maker at the time.

Notwithstanding these conclusions, the uncertainty over whether the exercise of SARS' audit and information-gathering powers falls within the ambit of judicial review under PAJA or legality review, and the necessity for a very specific factual matrix in which the taxpayer can clearly demonstrate sufficiently final, irremediable prejudice means that taxpayers cannot always approach the courts for relief in circumstances where SARS misuses its audit and information-gathering powers. Given the inherent difficulties in demonstrating that a preliminary decision within a multi-staged process meets the requirements for either legality review or review under PAJA, and the costs involved even where the taxpayer has reasonable prospects of success, access to judicial review is not a truly effective remedy for taxpayers aggrieved by the exercise of SARS' audit and information-gathering powers.

⁵⁹⁰ Note 380 *supra* at para 97.

Similarly, the remedies proposed by the High Court in *Carte Blanche Marketing*⁵⁹¹ and other judgments (i.e. using the “section 42 process” or the dispute resolution mechanism contained in Chapter 9 of the TAA) will often be unsuitable and even inaccessible to affected taxpayers, for the reasons discussed above.

The right to finality is particularly vulnerable in this context. The crux of the problem is that in being able to request information for “prescribed” historical periods, taxpayers are placed in an impossible position, where they are legislatively compelled to provide certain information to SARS both in terms of the requirements of sections 40 – 42 and 46 (and the applicable sanctions for noncompliance) and in terms of the burden of proof conferred by section 102 of the TAA. SARS is statutorily entitled to place “prescribed” assessments in jeopardy by auditing and requesting relevant material, and when taxpayers cannot locate the information required to defend their disclosures due to the passing of time, access to the appropriate dispute resolution fora becomes impossible.

Although section 99(2) of the TAA provides a measure of protection by limiting SARS’ ability to issue additional assessments for “prescribed” periods where a causal nexus between impugned conduct and an incorrect assessment cannot be shown, this does not prevent SARS from subjecting taxpayers to various kinds of financial, legal and commercial prejudice in terms of the exercise of audit and information-gathering powers, whether by virtue of *mala fides*, a negligent misconstruction of how these powers ought to be exercised, or simple ineptitude and lack of resources.

As set out in the preceding chapters, finality plays an important role in safeguarding the procedural fairness of the tax system in the context of engagements between taxpayers and the revenue authority, and is itself a facet of the rule of law.

⁵⁹¹ Note 449 *supra*.

The ability to review the decision to audit or the manner in which SARS implements audits and gathers information from taxpayers is, at best, a way to address the symptoms of a much larger, systemic issue within South African tax administration. The courts should not (and indeed, cannot) be tasked with remedying gaps in tax administration policy and policy implementation. Although the TAA was evidently not intended to be applied irrationally or in ways that undermine taxpayers' rights and legitimate interests, and although the misuse of SARS' audit and information-gathering powers is undoubtedly in most cases a function of human error or resource constraints rather than *mala fides*, the misuse of SARS' powers nonetheless has this effect, which is borne out in practice often enough to be considered a systemic issue.

As alluded to in the preceding chapters, this is not due to any shortcomings of the empowering legislation per se, but more likely, due to a lack of guidance, oversight and accountability in respect of how SARS' audit and information-gathering powers are exercised, particularly in the context of the right to finality. The result is that South African taxpayers are left without a competent remedy in most instances where their rights are so compromised.

Limiting the volume of procedural litigation in the context of the audit and information-gathering process is certainly in the public and national interest. Currently, the lack of effective controls, guidelines and accountability mechanisms results in taxpayers being forced to gamble on litigation to enforce even the minimum requirements of procedural fairness, when SARS exercises its audit and information-gathering powers improperly in ways that impact on the right to finality. Even those taxpayers with the means to access the courts may be prevented from finalising disputes due to commercial concerns and the legal uncertainty inherent in a pending review of SARS' decision to audit or request information, as well as the inevitable delays and costs of finalizing a tax dispute. The

current dispensation thus deprives an unknown number of taxpayers of access to justice, while simultaneously providing an environment in which the abuse of SARS' powers goes unchecked.

Bearing in mind the inherent limitations of litigation and the judicial review process to remedy the prejudice suffered by taxpayers where the right to finality (amongst other rights) is infringed by SARS' conduct, the current administrative approach poses a real risk of undermining the relationship of trust and compliance that ought to exist between SARS and the tax base in the context of audit and information-gathering, by encouraging a highly adversarial relationship between SARS and taxpayers, where procedural fairness is noticeably lacking in many instances.

In order to avoid this undesirable outcome and the consequential effects it will have on tax morale, voluntary compliance, and the integrity of the South African tax administration as a whole, the proposed approach examines how other jurisdictions have created and maintained synergistic tax administrations in which voluntary compliance and taxpayer trust are high, resources are optimally deployed, and detection and enforcement costs are kept to a minimum in the context of audit and information-gathering processes and the principle of finality.

5 CHAPTER 5: SOUTH AFRICAN TAX POLICY AND PRACTICE IN THE CONTEXT OF THE AUDIT AND INFORMATION-GATHERING PROCESS

The preceding chapters answer the first part of the research question and hypothesis underlying this dissertation in the affirmative. SARS' audit and information-gathering powers do have the capacity to affect the rights and interests of taxpayers, and the remedies available to aggrieved taxpayers when these powers are misused by SARS officials are inadequate to address this systemic problem.

Having established the importance of the right to finality for the efficient functioning of the tax system and the risks inherent in the abuse or misuse of SARS' audit and information-gathering powers, the second aspect of the research question now falls to be considered: how does SARS' current policy and practice inform the problem identified in the preceding chapters, and what can be done to remedy any identifiable shortcomings?

SARS' primary duty is to collect the tax and customs and excise revenue which government uses to fund (in part) the administration of the country and provision of public services,⁵⁹² including the annual budget allocated to SARS by the government. The tax revenue collected by SARS is by far the most significant contributor to the national budget in South Africa.⁵⁹³

⁵⁹² See for example the statements made by the Minister of Finance in the SARS Compliance Programme for 2012/13 – 2016/17 available at <https://www.sars.gov.za/AllDocs/SARSEntDoelib/Ent/SARS-Strat-07-G02%20-%20Compliance%20Programme%202012%202013%20to%202016%202017%20%E2%80%93%20External%20Guide.pdf> (accessed on 27 October 2020); and in the SARS Strategic Plan for 2020/21 – 2024/25 available at <https://www.sars.gov.za/AllDocs/SARSEntDoelib/Ent/SARS-Strat-24%20-%20SARS%20Strategic%20Plan%202020-2021-2024-2025%20-%202011%20May%202020.pdf> (accessed on 27 October 2020).

⁵⁹³ Op cit note 49. The 2019 Budget Speech indicates that non-tax revenue was expected to make up just R31.5 billion of the R1.45 trillion consolidated national budget, with over 90% of the total budget being comprised of tax revenues. (Available at <http://www.treasury.gov.za/documents/national%20budget/2019/review/FullBR.pdf> last accessed 27 October 2020).

Tax revenues are offset by the financial and human resources costs of enforcing tax compliance, and are thus directly impacted by the willingness of individual and corporate taxpayers to pay their fair share of tax.⁵⁹⁴ Enforcement costs may arise at various points in the tax collection process, including (but not limited to) the audit and information-gathering process, the dispute resolution process, and the debt collection process.

Higher enforcement costs tend to reduce both the total net tax revenue collected, and the overall budget given to the revenue authority to fund the performance of key functions. Tax administrations thus tend to rely heavily on the positive compliance attitudes of taxpayers in reporting and paying their taxes accurately, honestly, and on time.⁵⁹⁵

Increased voluntary compliance typically reduces enforcement costs, as fewer resources need to be allocated towards monitoring and enforcing taxpayers' compliance with basic tax obligations.⁵⁹⁶ This allows the revenue authority to direct its resources towards combating deliberately unlawful activities that undermine the *fiscus*, such as tax evasion and base erosion.

If voluntary compliance decreases, the revenue authority will be forced to spend more resources ensuring that ordinary taxpayers comply with their basic obligations.⁵⁹⁷ Paradoxically, these increased enforcement measures often lead to a downward spiral of decreasing voluntary compliance, as taxpayers lose trust in the revenue authority and begin to resist the tax system.⁵⁹⁸

⁵⁹⁴ Op cit note 41 at at page 742; op cit note 44.

⁵⁹⁵ OECD (2019) *Tax Administration 2019: Comparative Information on OECD and other Advanced and Emerging Economies* available at https://read.oecd-ilibrary.org/taxation/tax-administration-2019_74d162b6-en# (accessed 27 October 2020) at page 34; and OECD (2021) *Tax Administration 2021: Comparative Information on OECD and other Advanced and Emerging Economies* at page 27 – 28.

⁵⁹⁶ Such as correctly completing and submitting tax returns and paying any taxes due to the revenue authority on time.

⁵⁹⁷ Op cit note 52.

⁵⁹⁸ Op cit note 52 and note 55.

The concept of tax morale is thus a critical consideration for modern tax administrations.⁵⁹⁹ Maintaining high levels of tax morale and voluntary compliance requires the revenue authority to manage its relationship with taxpayers so that taxpayers feel that the system itself is fair, and that they are fairly treated within the system, without compromising on the detection and proportional punishment of non-compliance.

This chapter analyses SARS' existing tax administration policy in terms of the various policy documents published by SARS, the data collected and published by public bodies (such as the OTO), and the reports published by various presidential commissions of inquiry, to identify SARS' current approach in terms of tax administration policy, and the challenges experienced within the current administration.

5.1 Legislative framework governing SARS' audit and information-gathering powers

Sections 40 – 42 and 46 of the TAA have been comprehensively analysed in Chapter Three, and the contents of that chapter need not be repeated here, save to reiterate that the legislation provides SARS with very broad powers to audit and request relevant material from taxpayers, with very little formal (legislatively entrenched) limitations on the exercise of those powers in practice.

5.2 Current South African administrative policy in respect of audit and information-gathering

SARS' policy regarding the exercise of its audit and information-gathering powers is set out (to a certain extent) in policy documents and publications such as the Explanatory Memoranda issued in respect of the TAA and amendments thereto⁶⁰⁰ (which have been

⁵⁹⁹ Op cit note 50; op cit note 595

⁶⁰⁰ Op cit note 8, note 179 and note 200.

discussed in the preceding chapters, and need not be reiterated here), the SARS Service Charter,⁶⁰¹ SARS' Strategic Plans,⁶⁰² and the SARS Short Guide to the Tax Administration Act.⁶⁰³

At the outset, it must be noted that SARS' latest Strategic Plan⁶⁰⁴ evidences an intention to bring South African tax administration in line with international standards of best practice, in many respects. However, as will be demonstrated with reference to the publications and information discussed below, the implementation of these proposed changes will almost certainly require a significant shift in tax administration policy and in the context of this dissertation, the exercise of its audit and information-gathering powers.

5.2.1 The SARS Short Guide to the Tax Administration Act

The SARS Short Guide to the Tax Administration Act⁶⁰⁵ (the "Guide") is intended to enable taxpayers to understand their obligations and rights under the TAA.⁶⁰⁶ The section covering Chapter 5 of the TAA (which includes SARS' audit and information-gathering powers) provides that SARS' powers to audit and request information from taxpayers have been expanded by the TAA, and that taxpayers' rights in respect of information-gathering have similarly been amplified and made more explicit. However, the scope of these amplified rights, and how taxpayers can enforce them, is not elaborated on in the Guide.⁶⁰⁷

⁶⁰¹ SARS Service Charter, published by the South African Revenue Service on 1 July 2018, available at: <https://www.sars.gov.za/AllDocs/Documents/Service%20Charter/SARS%20Service%20Charter%201%20July%202018.pdf> (accessed 20 April 2020).

⁶⁰² The SARS Strategic Plan for 2016/17 – 2020/21 (op cit note 49) and the SARS Strategic Plan for 2020/21 – 2024/25 available at <https://www.sars.gov.za/AllDocs/SARSEntDoclib/Ent/SARS-Strat-24%20-%20SARS%20Strategic%20Plan%202020-2021-2024-2025%20-%2011%20May%202020.pdf> (accessed 27 October 2020) .

⁶⁰³ Op cit note 213.

⁶⁰⁴ Op cit note 623.

⁶⁰⁵ *Ibid.*

⁶⁰⁶ *Ibid* at page 2.

⁶⁰⁷ *Ibid* at page 24.

The Guide sets out the different ways in which SARS is entitled to obtain information from taxpayers, and the more common reasons for requesting information from taxpayers, which include audits and collecting evidence to determine whether a person has committed a tax offence.⁶⁰⁸ The Guide explicitly states that the failure to provide information to SARS is both administratively and criminally sanctionable, unless taxpayers have just cause for such failure.⁶⁰⁹

The Guide also sets out the basis on which taxpayers are selected for inspection, verification or audit in terms of section 40 of the TAA.⁶¹⁰ The Guide explains that audits are prescribed on either a random or a risk assessment basis, which is described as:

“...essentially a spot check, based on random factors, for example every 10th taxpayer on the register from a random starting point.”⁶¹¹

The Guide states further that:

“Random audit selection is premised on the reality that it is impossible to verify all returns, and that not all risks are known to SARS or are readily apparent from the face of a return. A spot check or a system of random monitoring is thus essential to the integrity of the tax system. Risk based audit selection is, however, more common in modern revenue authorities as it ensures that a revenue authority allocates its audit resources to taxpayers that demonstrate risks. It involves assessing the risk profile of taxpayers (“risk assessment”) and then allocating resources in accordance with the risk profiles (“resource to risk allocation”). There are clear benefits to risk based audit selection such as:

- More targeted audits and efficient use of SARS’s and taxpayers’ resources;

⁶⁰⁸ Op cit note 213.

⁶⁰⁹ *Ibid.*

⁶¹⁰ *Ibid* at page 25.

⁶¹¹ *Ibid.*

- *SARS will be able to address emerging tax risks in real time & provide tax certainty to taxpayers sooner;*
- *Reduced need for protracted audits (typically some years after targeted transactions occurred);*
- *Limiting of disputes; and*
- *The incidence of tax underpayments, administrative penalties and interest is reduced.*

Obtaining real-time information from taxpayers and about taxpayers from third parties is key to effective risk management.” (own emphasis)⁶¹²

The Guide also covers SARS’ obligations under section 42 of the TAA, to keep the taxpayer informed of the progress and outcome of the audit, and explains that requests for relevant material are not limited to a formal audit or investigation, but may be utilised for any purpose related to the administration of a tax Act, including a so-called ‘desk audit’.⁶¹³

The Guide describes the limitations on requests for relevant material as follows:

“A request for information must be related to and within the ambit of the administration of the tax Acts, for example in the case of a request for income tax information the request must be related to the ITA... The request for information may only be used to obtain relevant material as defined.”⁶¹⁴

The Guide does not provide any explanation of SARS’ policy or approach to the audit and information-gathering process, or what taxpayers should expect when interacting with SARS in terms of these provisions. If anything, the Guide seems to highlight some obvious

⁶¹² Op cit note 213 at page 25.

⁶¹³ *Ibid* at page 27 – 28.

⁶¹⁴ *Ibid* at page 28.

deficiencies in SARS' approach to audits and information-gathering when benchmarked against more modern approaches to risk management.

5.2.2 SARS Service Charter

South Africa does not currently have a taxpayers' charter or taxpayer bill of rights. The closest policy document resembling these items is the SARS Service Charter.⁶¹⁵ The Service Charter is intended to set out taxpayers' rights, obligations, and service timeframes. As has been discussed in previous chapters, the Charter sets out a very limited statement on taxpayers' rights and the values which SARS intends to uphold in providing a service that is fair, accurate, and based on mutual trust and respect.⁶¹⁶ The Service Charter is mainly dedicated to setting out the service timeframes and expectations which taxpayers should have in respect of various engagements with SARS.

The section on audit and information-gathering is limited to three bullet points setting out the expected service timeframes for notifying taxpayers that they have been selected for audit or verification, and concluding the audit or verification process. The Service Charter arguably lacks the detail required to empower taxpayers with an awareness of their specific rights and obligations, and the extent of the protection afforded to them in the context of SARS' audit and information-gathering powers.

5.2.3 SARS Strategic Plans

Another useful source of SARS' administrative policy is its strategic plans, which are published in five-year increments. The 2016/17 to 2020/21 Strategic Plan⁶¹⁷ addresses five key strategic outcomes: increased customs and excise compliance, increased tax compliance, increased ease and fairness of doing business with SARS, increased cost

⁶¹⁵ Op cit note 601.

⁶¹⁶ *Ibid* at page 1.

⁶¹⁷ *Ibid*.

effectiveness and internal efficiencies, and increased public trust and credibility.⁶¹⁸ The Strategic Plan proposes that increased voluntary compliance will be realised through better understanding of taxpayer circumstances, needs, attitudes, abilities and behaviours.⁶¹⁹

The 2016/17 to 2020/21 Strategic Plan also sets out SARS' research and conclusions regarding the factors underlying voluntary compliance in South Africa.⁶²⁰ As defined by SARS, voluntary compliance incorporates the entire revenue value chain: on-time registration, on-time filing, full and honest disclosure, and on-time payment.⁶²¹ In recognition of the abovementioned principles, the 2016/17 to 2020/21 Strategic Plan states that SARS must design, implement and manage a system that "*enhances perceptions of fairness, reduces administrative burden, and acts against infringements accurately and speedily.*"⁶²²

As discussed in more detail below, SARS spent most of the period outlined in the 2016/17 to 2020/21 Strategic Plan in the grip of corruption and mismanagement which seriously impaired its operational capabilities. It is, therefore, hardly surprising that neither SARS' conduct in practice nor the balance of the existing policy documentation reflects the values, goals, or outcomes set out in the 2016/17 to 2020/21 Strategic Plan.

However, the 2020/21 to 2024/25 Strategic Plan⁶²³ demonstrates an intention to embrace a more modern, nuanced and balanced approach to tax administration in South Africa. The focus has shifted from vague, high-level goals to specific strategic initiatives which can be implemented and then evaluated with reference to a defined set of criteria, such as

⁶¹⁸ *Ibid* at page 30.

⁶¹⁹ *Ibid* at page 31.

⁶²⁰ Op cit note 49.

⁶²¹ *Ibid.*

⁶²² *Ibid.*

⁶²³ SARS Strategic Plan for 2020/21 – 2024/25 available at <https://www.sars.gov.za/AllDocs/SARSEntDoctlib/Ent/SARS-Strat-24%20-%20SARS%20Strategic%20Plan%202020-2021-2024-2025%20-%2011%20May%202020.pdf> (accessed on 27 October 2020).

public survey scores, global rankings, and fixed percentage reductions in undesirable interactions and disputes. The Commissioner's stated intention for this period is to "*build a smart modern SARS, with unquestionable integrity, trusted and admired*" and "*to follow the internationally recognized approach of Voluntary Compliance*".⁶²⁴

SARS apparently intends to engage with taxpayers in a way that earns public confidence and trust, while encouraging a willingness to fulfil tax obligations,⁶²⁵ striving to promote a culture where compliance is viewed as a positive social contribution.⁶²⁶ SARS intends to fulfil this mandate by addressing certain key aspects of tax administration, including a compliance philosophy rooted in the understanding that tax compliance exists on a spectrum,⁶²⁷ and that voluntary compliance is best achieved when taxpayers are aware of their tax obligations, able to meet these obligations with minimal effort and expense, and a credible threat of detection and consequences exists for genuinely non-compliant taxpayers.⁶²⁸

SARS states that its new strategic intent is to develop this culture of voluntary compliance using technology and data analysis to enhance internal organisational capabilities, and by rebuilding SARS' staffing model to mirror the previous culture of service orientation, ethics and integrity.⁶²⁹ SARS also recognizes the need to benchmark its tax administration policies against comparable international systems.⁶³⁰

A valuable and welcome aspect of SARS' new strategy is the development of better communication channels and accessibility for taxpayers.⁶³¹ To this end, SARS intends to

⁶²⁴ Op cit note 623 at page 5 – 7.

⁶²⁵ *Ibid* at page 8.

⁶²⁶ *Ibid.*

⁶²⁷ *Ibid.*

⁶²⁸ *Ibid* at page 8.

⁶²⁹ *Ibid* at page 13.

⁶³⁰ *Ibid.*

⁶³¹ *Ibid* at page 18 – 19.

increase the number of taxpayers who are able to interact with SARS via digital platforms, and to provide taxpayers whose affairs are more complex with engagements customized to their specific needs.⁶³²

SARS further intends to significantly develop risk detection and profiling, building greater data management capabilities and capacity in order to deploy data analytics products to proactively profile and detect risks and trends in non-compliance.⁶³³ SARS' goal is to largely automate risk detection, assessment and profiling, which will inform the selection of taxpayers for audit and verification.⁶³⁴ This indicates an intention to develop a more modern, objective, and fair risk profiling system.

Another strategic objective for SARS is rebuilding public trust and confidence in the tax system.⁶³⁵ Part of the plan to achieve this objective includes the implementation of a revised compliance programme and emphasis in human resources and employment to ensure the right mix of knowledge, skills, and experience is available to competently select, profile, and audit complex and potential high-yield cases.⁶³⁶ This proposal is likely to be bolstered by SARS' undertaking to optimise cost management and responsible procurement and to allocate resources with a clear "cost-benefit" mindset in place.⁶³⁷

The 2020/21 to 2024/25 Strategic Plan evidences an intention to engage with taxpayers' rights and to rebuild trust between SARS and the tax base in all areas of tax administration, with reference to a structured and measurable set of targets and goals. Government has also made public statements to the effect that the SARS Act will be amended in order to

⁶³² Op cit note 623 at page 18.

⁶³³ *Ibid* at page 21.

⁶³⁴ *Ibid*.

⁶³⁵ *Ibid* at page 24.

⁶³⁶ *Ibid* at page 25.

⁶³⁷ *Ibid* at page 22.

implement the Nugent Commission's proposal for the establishment of an Inspector General for tax,⁶³⁸ to enhance accountability and governance within SARS.

5.2.4 Policy Oversight Mechanisms

Currently, there is no formal body charged with overseeing SARS' implementation of tax policy and legislation.

The OTO may identify, investigate, and attempt to resolve systemic issues within tax administration, insofar as these issues relate to complaints which the OTO receives from taxpayers. In collating and interpreting the data gathered by its office through the receipt of taxpayer complaints, the OTO is able to discern and report on patterns of conduct within SARS that result in unsatisfactory outcomes, and report to Parliament on these systemic issues.

However, the OTO does not have a mandate to independently investigate, assess, and evaluate SARS' implementation of tax administration policy, nor is the OTO empowered to make recommendations which are binding on SARS. The OTO is intended to function as an "independent redress channel"⁶³⁹ for taxpayers who are unable to resolve complaints using the internal SARS complaints mechanisms, and is not intended to service as an independent oversight body in respect of all forms of policy implementation.

South Africa has yet to implement a fully independent policy oversight body which would have the task of monitoring, reporting on, and making binding recommendations in respect of the implementation of policy, and other aspects of governance within SARS.

⁶³⁸ See for example the statement made to the media by the deputy-general for the National Treasury, available at <https://www.businesslive.co.za/bd/national/2019-09-03-sars-act-amendments-proposed-by-nugent-due-for-2020/> (accessed on 17 July 2019)

⁶³⁹ OTO Website <http://www.taxombud.gov.za/AboutUs/Pages/default.aspx> (accessed on 17 July 2019)

5.3 Challenges in South African tax administration

For purposes of this analysis, two challenges which are particularly relevant to the proper exercise of SARS' audit and information-gathering powers and the protection of the right to finality are considered in detail below.

First, South African tax administration is beset by systemic issues, some of which reflect a trend of the misuse of SARS' administrative powers in the context of audit and information-gathering. These issues are described in the Annual Reports published by the OTO.⁶⁴⁰ The steadily growing number of judgments in which the courts have set aside tax assessments based on the improper exercise of SARS' audit and information-gathering powers are further evidence of this systemic maladministration.⁶⁴¹

Secondly, various commissions of inquiry and formal investigations into South African tax administration have concluded that there is insufficient oversight, both internally and externally, to ensure that SARS carries out its functions effectively and with integrity, including the adequate protection of taxpayers' rights. The concerns raised by those tasked with investigating issues of governance and policy at SARS reveal that there are large gaps in South African tax administration policy, which must be urgently addressed if South Africa is to maintain a functioning tax system.

5.3.1 Systemic issues within tax administration relating to the exercise of SARS' audit and information-gathering powers.

As set out above, the OTO is authorised to investigate and report on systemic issues within tax administration in South Africa. The systemic issues reported on by the Ombud in recent

⁶⁴⁰ Office of the Tax Ombud Annual Report (2018/2019), available at <http://www.taxombud.gov.za/Documents/Tax%20Ombud%202018%2019%20Annual%20Report.pdf> (accessed on 27 October 2020) at page 33 – 34.

⁶⁴¹ See for example note 509, 574, and 249 *supra*.

years confirm that taxpayers' rights are persistently being violated when SARS carries out its mandate and exercises its legislative powers.

The OTO Annual Report for the 2016/17 financial year⁶⁴² (which was the first period during which the Ombud's powers were extended to identifying and reporting on systemic issues) raises concerns around factors causing declining tax morale in South Africa:

*“A growing number of taxpayers, and the general public to a large extent, are becoming increasingly vocal about the way revenue is being used, or even abused, by those entrusted with its management. We all know that taxpayers need to be motivated to pay tax. Whether they do so or not depends on several factors, including the trustworthiness of tax agencies and representatives of the tax administration system, government corruption, procedural justice or the lack thereof; also important is the perceived value gained through the use of public funds...”*⁶⁴³

Systemic issues identified by the OTO in relation to the exercise of SARS' audit and information-gathering powers include inconsistency in giving taxpayers timelines for finalisation of audits and verifications, the failure to take information requested during audit and verification procedures into account when making decisions to assess taxpayers, and inefficient escalation and complaint management procedures which prevent taxpayers from finalising or remedying complaints regarding the abuse of SARS' audit and information-gathering powers.

⁶⁴² Office of the Tax Ombud Annual Report (2016/2017), available at <http://www.taxombud.gov.za/Documents/OTO-AnnualReport-2017.pdf> (accessed on 25 April 2020).

⁶⁴³ *Ibid* at page 8.

In its 2017/2018 Annual Report,⁶⁴⁴ the OTO reported on the Draft Taxpayer Bill of Rights which it prepared and submitted to SARS and the Davis Tax Commission during 2015.⁶⁴⁵ The systemic issues reported in the context of SARS' audit and information-gathering powers for this period were identical to those reported in the 2016/2017 financial period. Through engagement with the OTO, SARS undertook to implement various measures to address these issues, including the improvement of its internal systems and a campaign of taxpayer education and engagement, to ensure that taxpayers can successfully navigate SARS' internal complaints process.⁶⁴⁶

The cause of these systemic issues is complex, and involves several interconnected factors. The first of these factors is the lack of oversight and a comprehensive policy framework governing the implementation of SARS' audit and information-gathering powers. The provisions of the TAA are drafted to give SARS broad powers to administer the tax system, which is necessary in order to prevent overly complex and cumbersome legislation that is difficult for both SARS officials and taxpayers to understand and to implement properly. The more nuanced economic and behavioural aspects of tax administration, such as the promotion of voluntary compliance and the stewardship of the relationship between the revenue authority and the tax base should, therefore, be dealt with at an institutional policy level.

Currently, SARS officials are not provided with the external or internal resources required to exercise their powers in a fair, lawful and reasonable manner, nor are they incentivised

⁶⁴⁴ Office of the Tax Ombud Annual Report (2017/2018), financial year available at http://www.taxombud.gov.za/Documents/Tax%20Ombud%20Annual%20Report%2017_18.pdf (accessed on 14 April 2020).

⁶⁴⁵ *Ibid* at page 18.

⁶⁴⁶ *Ibid* at page 39 – 43.

to do so. The only publicly available policy document in which SARS addresses taxpayers' rights is the SARS Service Charter.⁶⁴⁷

The Service Charter is insufficient for this purpose, only briefly addressing a narrow and superficial framework of taxpayer rights and obligations.⁶⁴⁸ The Charter focuses mainly on SARS' administrative structures and operational processes. SARS' constitutional obligations to apply the law fairly and without bias, and to promote the efficient and economic use of resources, are not referenced at all. The Service Charter bears little resemblance to the comprehensive taxpayers' charters and taxpayers' bills of rights which exist in other jurisdictions.

Internal guidelines and resources (such as proper training and employee performance assessments that consider the more nuanced aspects of tax administration) are particularly important considering the pressure SARS is placed under to collect its annual tax revenue target. Without a sound institutional and cultural framework prioritising the fair and lawful exercise of SARS' powers and positive stakeholder relationship management, coupled with an external framework to ensure that SARS' day-to-day operations are conducted in accordance with these principles, the likelihood of the improper exercise of SARS' audit and information-gathering powers is increased.

The second factor informing the existence of systemic issues in the context of audit and information-gathering is the organisational culture of SARS, which is largely antagonistic towards taxpayers.⁶⁴⁹ The "cops and robbers" culture which largely prevails within SARS, together with the inadequacy of the existing communications interface between SARS and

⁶⁴⁷ Op cit note 601.

⁶⁴⁸ *Ibid* at page 2.

⁶⁴⁹ Op cit note 640 at page 33 – 34.

taxpayers⁶⁵⁰ results in taxpayer engagements frequently being adversarial and prone to conflict from the outset.

The manner in which the audit and information-gathering process is conducted and the (often generic) language used in correspondence and notices issued to taxpayers creates the impression for taxpayers that errors or discrepancies in submissions and disclosures made to SARS are thought to be deliberate on the taxpayer's part. This practical experience contrasts sharply with the theory of compliance described in the latest SARS Strategic Plan,⁶⁵¹ which is that "*most taxpayers are honest and simply want to fulfil their obligations with the least amount of effort and cost*".⁶⁵²

There is also a noticeable lack of taxpayer engagement. The auditing and issuing of revised assessments to taxpayers without any notification or communication from SARS is so prevalent that it has been described as a systemic issue by the OTO in two successive Annual Reports.⁶⁵³ It has also become common practice for requests for relevant material and verification notices to include a statement confirming that SARS intends to impose understatement penalties on taxpayers, even though SARS has neither received nor evaluated any of the information necessary to determine whether the taxpayer has understated its tax liability at this stage in the process.

The third factor underlying the systemic abuse of SARS' audit and information-gathering powers is the inadequacy of the systems and procedures employed by SARS in verifying tax compliance. To maintain high levels of voluntary compliance and confidence in the tax system, the revenue authority's approach to enforcement must be "fit for purpose", aligning

⁶⁵⁰ *Ibid.*

⁶⁵¹ Op cit note 623.

⁶⁵² *Ibid* at page 8.

⁶⁵³ Op cit note 640 at page 33 – 34; Office of the Tax Ombud Annual Report (2019/2020), available at <http://www.taxombud.gov.za/Documents/Tax%20Ombud%202019%2020%20Annual%20Report.pdf> (accessed on 27 October 2020) at page 39.

with stakeholders' expectations of how the system will be administered.⁶⁵⁴ According to the most recent research undertaken by the OECD on tax administration,⁶⁵⁵ the type of compliance actions undertaken in order to determine whether taxpayers have properly disclosed their tax liability is changing, and revenue systems should adapt their approaches accordingly.⁶⁵⁶

In the past, revenue authorities generally relied on risk-based models to identify which cases in a segment or population should be subject to verification.⁶⁵⁷ The creation of more sophisticated data analytics tools has allowed revenue authorities to identify which returns, claims or transactions ought to be reviewed with greater accuracy and specificity.⁶⁵⁸ This allows revenue authorities to tailor their approach to compliance and, therefore, to verification, taking a firm stance against habitually non-compliant taxpayers, and a softer, more service-oriented approach where taxpayers are compliant or intend to comply, but are unsuccessful.⁶⁵⁹

In *Carte Blanche Marketing*,⁶⁶⁰ the court confirmed that SARS is still legislatively empowered to select taxpayers for audit "...on the basis of any consideration relevant for the proper administration of a tax Act, including on a random or a risk assessment basis."⁶⁶¹ SARS is not legally compelled to disclose the basis for selection for audit to taxpayers, and recent judgments⁶⁶² indicate that SARS typically refuses to disclose the basis for selecting a taxpayer for audit in practice, unless compelled by a court order. This random and obscure approach to auditing and information-gathering differs considerably

⁶⁵⁴ Op cit note 595 at page 98.

⁶⁵⁵ *Ibid.*

⁶⁵⁶ *Ibid* at page 88.

⁶⁵⁷ *Ibid.*

⁶⁵⁸ *Ibid.*

⁶⁵⁹ Op cit note 595 at page 88.

⁶⁶⁰ Note 449 *supra* at paras 42 and 107.

⁶⁶¹ Section 40 of the TAA.

⁶⁶² Note 411, note 281, and note 449 *supra*.

from the approach proposed by the OECD,⁶⁶³ and (as will be discussed in Chapter 6 below) from the approaches taken in comparative jurisdictions with similar tax administration legislation and highly functioning tax administrations.

The fourth (and perhaps most relevant) factor is the institutional damage occurred within SARS, as documented in the report issued by the formal commission of enquiry into tax administration and governance at SARS, appointed by President Cyril Ramaphosa, during May 2018 (the “Nugent Commission”).⁶⁶⁴ The Nugent Commission was appointed to investigate various allegations of maladministration and corruption within SARS. As a result of the conclusions and recommendations set out in the interim⁶⁶⁵ and final⁶⁶⁶ Nugent Commission Reports, erstwhile SARS Commissioner Tom Moyane was permanently removed from his post by President Ramaphosa, and a new Commissioner was installed.

The Commission found that there had been “*a massive failure of integrity and governance at SARS... that was brought about by at least reckless mismanagement on the part of Mr Moyane*”⁶⁶⁷ and that:

“In a tax collecting agency, oversight at every step in the tax collecting process is also vital, but... the organisational structure of SARS, that provided oversight, was pulled apart. Dissent was stamped out by instilling distrust and fear. Accountability

⁶⁶³ Op cit note 595.

⁶⁶⁴ Terms of inquiry set out in the GN 17 GG 41652 of 24 May 2018.

⁶⁶⁵ Interim report of the Commission of Inquiry into tax administration and governance by the South African Revenue Service, published on the Commission website and available at: <http://www.inqcomm.co.za/Docs/media/Complete%20Interim%20Report%20%2027%20September%202018%20including%20annexures.pdf> (last accessed 20 April 2020).

⁶⁶⁶ Final Report delivered by the Commission of Inquiry into tax administration and governance by the South African Revenue Service, published on the Commission website and available at: <http://www.inqcomm.co.za/Docs/media/SARS%20Commission%20Final%20Report.pdf> (last accessed 20 April 2020).

⁶⁶⁷ *Ibid* at page 3 – 4.

*to other state authorities was defied. Capacity for investigating corruption was disabled.”*⁶⁶⁸

As a result, many of SARS’ critical internal structures, operational capacities and systems were damaged and in some cases, completely dismantled.⁶⁶⁹ SARS also lost a large number of experienced and highly qualified SARS officials (many of whom were specialists in niche aspects of taxation and economics) during this turbulent period. During this period, an institutional environment of fear, uncertainty, and suspicion prevailed, significantly impacting upon the efficiency of SARS’ internal operations. Perhaps most importantly, public trust in SARS as an organisation was severely compromised.

The Nugent Commission also concluded that SARS’ audit and case selection processes were ineffective, and need to be reconsidered and improved.⁶⁷⁰ In this regard, the Commission found that the current key performance indicators (“KPIs”) for auditors promoted a large volume of audits, at the expense of quality and detailed scrutiny of complex tax affairs.⁶⁷¹ The SARS risk engine (which flags anomalies in tax submissions for further investigation) was also deemed to be inefficient.⁶⁷²

5.3.2 Lack of appropriate oversight mechanisms

In addition to the work of the Nugent Commission, various other investigations have been conducted into tax administration and the governance of SARS in recent years. The Davis Tax Committee Report on Tax Administration⁶⁷³ (hereinafter, the “DTC Report”) evaluated the governance structure of SARS as of September 2017, including a comparative study

⁶⁶⁸ Op cit note 666 at page 4.

⁶⁶⁹ *Ibid.*

⁶⁷⁰ *Ibid* pages 150 and 196.

⁶⁷¹ *Ibid* pages 150 and 196.

⁶⁷² *Ibid.*

⁶⁷³ Available at <http://www.taxcom.org.za/docs/20171113%20Tax%20Admin%20Report%20-%20on%20website.pdf> (last accessed on 20 March 2018).

of international tax administrations. The overarching issue emerging from the DTC Report is the need to re-examine all relevant legislation affecting the way SARS operates, as this is “*fundamental to the invariably delicate relationship between SARS and the taxpayer*”.⁶⁷⁴

The DTC Report summarises the key aspects of the Katz Commission first interim report, which recommended that statutory boards having oversight of the independent revenue authority should be established. These boards would be answerable to Parliament through the Ministry of Finance,⁶⁷⁵ and would have a broad range of responsibilities and powers, including the power and responsibility to ensure that all tax laws are enforced with the highest degree of integrity, making recommendations to the Minister of Finance on legislative and other changes to improve tax administration, and establishing a written code of conduct for revenue service employees.⁶⁷⁶

Sections 11 and 12 of the SARS Act initially provided for the establishment of a consultative body for the Minister and the Commissioner on matters concerning administration of the revenue collecting system.⁶⁷⁷ However, the 2002 amendments to the SARS Act narrowed and diluted this proposed oversight and regulatory board to the appointment of specialist committees for the purposes of advising the Minister of Finance and the Commissioner on matters concerning the management of SARS’ resources.⁶⁷⁸

The oversight function proposed by the Katz Commission was thus never properly introduced, and this may have played a role in the catastrophic governance failures and corruption which SARS was subjected to between 2014 and 2018. The DTC report concludes that greater oversight of SARS and the Commissioner is required,⁶⁷⁹ stating

⁶⁷⁴ Op cit note 673 at page 3.

⁶⁷⁵ *Ibid* at page 5.

⁶⁷⁶ *Ibid*.

⁶⁷⁷ *Ibid* at page 8.

⁶⁷⁸ *Ibid*.

⁶⁷⁹ Op cit note 673 at page 18.

that “A system where the Commissioner operates outside the strictures of the Minister and indeed Cabinet and is only answerable directly to the President is not conducive to a responsive and accountable SARS”.⁶⁸⁰

These findings are confirmed in the Nugent Commission final report,⁶⁸¹ which confirms that a massive failure of elementary principles of governance occurred at SARS during the tenure of the previous Commissioner.⁶⁸² In order to prevent a recurrence of these catastrophic events, governance at SARS must be comprehensively overhauled.⁶⁸³ The report also emphasises that taxpayer morale is materially affected by these considerations.⁶⁸⁴

One of the recommendations of the Nugent Commission is thus the establishment of an Inspector General for Tax. The Nugent Commission recommends that the office of the Inspector General is given wide powers to conduct enquiries internally and externally to SARS, to determine the general state of health of SARS. The Inspector General should also be given the power to escalate any concerns or issues first to the Commissioner, then to the Minister of Finance, and finally, to the President and to Parliament if necessary.⁶⁸⁵

However, until the office of the Inspector General is established, the Commissioner (and the officials who exercise their delegated powers) remain free to implement tax administration legislation without any significant oversight of the manner in which the exercise of such public powers are carried out, and without any independent evaluation of the integrity of SARS' internal governance structures or the efficacy of the policies through which tax administration is carried out.

⁶⁸⁰ *Ibid.*

⁶⁸¹ Op cit note 666.

⁶⁸² *Ibid* at page 168.

⁶⁸³ *Ibid.*

⁶⁸⁴ *Ibid.*

⁶⁸⁵ Op cit note 666 at page 147 – 148.

Currently, there are no oversight mechanisms in terms of which binding recommendations can be made, where evidence of systemic maladministration within SARS is detected. While the OTO reports to Parliament on the systemic issues it discovers in relation to taxpayer complaints, the Ombud lacks the capacity to report on governance and policy failures which occur outside of the scope of taxpayer interactions. The Ombud is also unable to oversee the evaluation and implementation of its recommendations (which, in any event, are not binding on SARS). The Nugent Commission has accordingly concluded that the OTO cannot and should not be involved in governance within SARS, and that its mandate should remain confined to addressing taxpayer rights.⁶⁸⁶

While SARS cannot control the political or economic environment in which it operates, the administration of the tax system (including the manner in which SARS exercises its audit and information-gathering powers) is very much within SARS' control. As has been discussed in the preceding chapters, the nature of taxpayers' interactions with the revenue authority, the perceived (and actual) fairness of these interactions, and in particular, the protections afforded to taxpayers' rights, can have a significant impact on voluntary tax compliance and tax morale.

In the face of ongoing political corruption and state capture⁶⁸⁷ and an economic recession which has only been exacerbated by the effects of the COVID-19 global pandemic,⁶⁸⁸ the fairness and accessibility of the tax administration system becomes an even more important factor in enhancing voluntary tax compliance. SARS must turn its attention

⁶⁸⁶ Op cit note 666 at 186.

⁶⁸⁷ At the time of submission of this dissertation, the Presidential inquiry into state capture being conducted by the Zondo Commission (appointed in terms of GN 396 GG 41772 of 13 July 2018) is ongoing, with the final report due on 28 February 2022.

⁶⁸⁸ The South African economy declined in two consecutive quarters during the 2018/2019 and 2019/2020 financial years, constituting an economic recession. See for example the Statistics South Africa report indicating that South Africa's Gross Domestic Product declined by 0.7% in the second quarter of 2018, available at http://www.statssa.gov.za/?page_id=1856&PPN=P0441&SCH=7182 (accessed on 29 October 2018 and 27 October 2020).

towards the manner in which it engages with taxpayers, including the manner in which SARS exercises its audit and information-gathering powers, to avoid practices which will continue to undermine trust and confidence in the South African tax system.

5.4 The relationship between taxpayers' rights and optimal tax administration in the context of audit and information-gathering

Tax law is a detailed and complex theoretical framework which necessarily affords revenue authorities extensive powers to regulate public affairs.⁶⁸⁹ As discussed in the preceding chapters, the broad and subjective powers granted to SARS to audit and gather information from taxpayers follow the legislative standards proposed by the OECD in Article 26 of the OECD Model Tax Convention for audit and information-gathering powers.⁶⁹⁰

The low legislative thresholds applicable to the exercise of SARS' audit and information-gathering powers reflect the established principle that revenue authorities' resources should not be wasted on information entitlement disputes, but should rather be focused on enforcing tax compliance, which necessarily involves reviewing and investigating the disclosures made to the revenue authority by taxpayers to check for errors.⁶⁹¹ Accordingly, amending the TAA to curb SARS' audit and information-gathering powers or to introduce stricter accountability measures is unlikely to provide a workable solution in the context of protecting taxpayers' rights.

In any event, the legislative entrenchment of taxpayers' rights may not achieve the desired results if there is insufficient cultural and political buy-in from the revenue authority. As

⁶⁸⁹ Duncan Bentley *A Model of Taxpayers' Rights as a Guide to Best Practice in Tax Administration* (PhD thesis, Bond University, 2006) available at https://pure.bond.edu.au/ws/portalfiles/portal/28897742/bentleyd1_Full.pdf (accessed on 31 May 2017).

⁶⁹⁰ Op cit note 179 and note 197.

⁶⁹¹ Op cit note 179 at page 185.

discussed in the preceding chapters, an administrative framework in which taxpayers are required to enforce their rights against the revenue authority through dispute resolution proceedings may limit access to justice for a number of taxpayers, who cannot always afford the time and costs inherent in litigating against a public body. In any event, an administrative framework in which litigious conflict between the revenue authority and taxpayers is common is also undesirable because it inevitably increases the financial and human resources costs for the revenue authority, and potentially harms the overall relationship of trust between the revenue authority and the tax base. Research from jurisdictions where taxpayers' rights are legislatively entrenched, such as the United States, confirms that institutional buy-in from the revenue authority is crucial for the effective protection of taxpayers' rights.⁶⁹²

The two most recent OECD reports on Tax Administration (2019 and 2021)⁶⁹³ set out some useful guidelines in this regard. These are drawn from comparative data collected from 59 different tax systems, for the purpose of, *inter alia*, establishing a benchmark for improvement in various areas of tax administration,⁶⁹⁴ and identifying key areas of change in global tax administration and how tax administrations are increasingly seeking more proactive approaches to influencing and managing tax compliance.⁶⁹⁵

To maintain high levels of voluntary compliance and confidence in the tax system, approaches to enforcement must be "fit for purpose" and in accordance with the community expectations of how the system will be administered.⁶⁹⁶ This requires that the revenue authority takes a firm stance against habitually non-compliant taxpayers, and a softer,

⁶⁹² Amanda Bartmann 'Making Taxpayer Rights Real: Overcoming Challenges to Integrate Taxpayer Rights into a Tax Agency's Operations' (2016) 69 *The Tax Lawyer*, 597 at 597 – 624.

⁶⁹³ Op cit note 595.

⁶⁹⁴ *Ibid* at page 21.

⁶⁹⁵ Op cit note 595 at page 22.

⁶⁹⁶ *Ibid* at page 98.

more service-oriented approach where taxpayers are compliant or intend to comply but are unsuccessful.⁶⁹⁷ To achieve this balance, tax administrations are investing more in researching the reasons for non-compliance and seeking to identify patterns or anomalies,⁶⁹⁸ as opposed to relying on random risk assessments.

Recent research strongly supports the hypothesis that a heavy-handed approach to auditing results in a decrease in voluntary compliance (and an increase in avoidance and evasion behaviours).⁶⁹⁹ Accordingly, while detection and deterrence remains an important component of any compliance strategy, tax administrations are increasingly taking note of research showing that the audit and information-gathering process and associated sanctions may negatively influence voluntary compliance when applied indiscriminately, or in ways that are otherwise perceived as unfair.⁷⁰⁰ This is illustrated by the experience of the Inland Revenue Board of Malaysia, where compliance strategies were rebalanced after excessive reliance on auditing as a means of compliance enforcement was found to be counterproductive.⁷⁰¹

The IBFD Yearbook on Taxpayers' Rights also prescribes a set of standards for best practice in audit and information-gathering.⁷⁰² Although these standards are generalized and do not necessarily reflect the impact of behavioural insights or the influence of domestic economic policy and experience on tax administration,⁷⁰³ IFBD best practice

⁶⁹⁷ *Ibid* at page 98.

⁶⁹⁸ *Ibid*.

⁶⁹⁹ Juan P. Mendoza, Jacco L. Wielhouwer, Erich Kirchler, 'The backfiring effect of auditing on tax compliance' (2017) 62 *Journal of Economic Psychology* 284; op cit note 54.

⁷⁰⁰ Op cit note 595 at page 188.

⁷⁰¹ *Ibid* at page 189.

⁷⁰² 2020 IBFD Yearbook on Taxpayers' Rights, available at <https://www.ibfd.org/sites/default/files/2021-09/2020%20IBFD%20Yearbook%20on%20Taxpayers%27%20Rights%20%281%29.pdf>

⁷⁰³ For example, the IFBD recommends a blanket collaborative approach to the audit process which includes the disclosure by the revenue authority of all information in its possession, to the taxpayer. This ignores the established practical effects of taxpayer behaviour i.e. that a collaborative approach is not appropriate, for example, in instances where avoidance or evasion behaviours are suspected, or where the taxpayer has a history of non-compliance.

includes the principle that tax audits should follow a pattern that is set out in published guidelines, that revenue authorities should follow an informative and collaborative process, that taxpayers should be properly notified of the commencement and conclusion of an audit and of the audit findings, and that reasonable limits should be fixed for the conduct and conclusion of audits, in respect of audit length and frequency.⁷⁰⁴

In the South African context, a comprehensive overhaul of SARS' policies regarding the exercise of its audit and information-gathering powers is arguably required, together with the implementation of more effective accountability and oversight mechanisms.

5.5 **Conclusion**

The perception of fairness, including how the revenue authority interacts with taxpayers, is a key factor in fostering voluntary compliance. It is presented as the interplay between trust and power, with the relationship of trust between taxpayers and the revenue authority being cited by some authors as the strongest predictor of voluntary tax compliance.⁷⁰⁵ Current research further supports the conclusion that procedural fairness and trust are closely linked, and that proportionate treatment of taxpayers in accordance with their individual compliance attitudes is more likely to promote a sense of fairness, trust, and in turn, voluntary compliance.⁷⁰⁶

Beyond the strong links to voluntary compliance, it has also been stated that taxpayer rights are fundamental human rights:

“... human rights principles have an application at the level of the implementation, collection, enforcement and dispute procedures embedded in a tax regime. As tax

⁷⁰⁴ Op cit note 702 at pages 68 – 74.

⁷⁰⁵ Stephan Muehlbacher, Erich Kirchler and Herbert Schwarzenberger, 'Voluntary versus enforced tax compliance: empirical evidence for the 'slippery slope' framework' (2011) 32 *European Journal of Law and Economics* 89 at 95; see also note 68 *supra* at page 213 – 214.

⁷⁰⁶ *Ibid.*

regimes have become more complex and pervasive, jurisdictions have enlarged the powers of tax collectors, so exacerbating the risk of infringing upon the fundamental rights of their citizens. Here the rights at issue are not founded so much in morality or distributive justice but rather as to a fair treatment by the bureaucracy.”⁷⁰⁷

One of the main strategic risks identified by SARS in the previous and current strategic plans is the “*unfavourable public perception of poor state delivery and corruption*”.⁷⁰⁸ The 2016/2017 Strategic Plan states that:

“Research and empirical evidence show that taxpayers’ attitudes towards compliance and their willingness to comply is influenced by how they perceive their taxes to be utilised. Concerns about corruption in the public sector, poor service delivery and the quality of service delivery remain an issue. This has the potential to affect SARS’ ability to achieve compliance due to loss of public confidence in government.”⁷⁰⁹

National Treasury also recognises the impact of tax morale on voluntary compliance, and the cascading effect that voluntary compliance has on revenue collections.⁷¹⁰ The systemic issues investigated and reported on by the OTO include issues relating to the exercise of SARS’ audit and information-gathering powers, and it is possible that many more such instances go unreported.

As has been demonstrated in the preceding chapters, the exercise of SARS’ audit and information-gathering powers has the capacity to severely prejudice taxpayers and to violate their rights, including the right to finality.

⁷⁰⁷ Justin Dabner, ‘Resolving Australian tax controversies: does the tax jurisprudence under the European Convention on Human Rights suggest a better way?’ (2016) *Australian Tax Forum* 213, at 215.

⁷⁰⁸ Op cit note 49 at page 26.

⁷⁰⁹ *Ibid.*

⁷¹⁰ Op cit note 98623.

The right to finality serves an important purpose in the context of tax morale and voluntary compliance. Primarily, it ensures that honest taxpayers are rewarded for their efforts by being afforded a level of legal and commercial certainty that is not given to dishonest taxpayers. The right to finality also ensures that taxpayers are not placed in a position where, due to the passing of time, they can no longer locate the evidence necessary to defend their tax positions (in which case SARS may succeed in issuing additional assessments outside of the limitation period “by default”, even where taxpayers believe they have a strong case, or where SARS’ prospects of success are poor).

In the context of voluntary compliance, the right to finality also benefits SARS. The nature of the interactions between taxpayers and revenue authorities is important: a synergistic climate involves fewer costs and predicts higher compliance rates than an antagonistic climate.⁷¹¹ Trust and culture are important factors in establishing the relationship between revenue authority and tax base, and randomized and uniform approaches to auditing that disregard taxpayers’ individual circumstances, tax compliance histories, and rights (such as the right to finality) diminish trust and encourage an antagonistic climate.

Lastly, the right to finality acts as a safeguard against frivolous and inefficient audit processes for honest taxpayers, since in most cases⁷¹² SARS will have no more than three years from the date of the original assessment to initiate and conclude any investigations into the taxpayers’ disclosures – after that point, SARS will be unable to make any adjustments (i.e. to issue an additional assessment), assuming the taxpayer’s position is correct and honestly disclosed. If the right to finality is given proper consideration in the context of the audit and information-gathering process, SARS officials should avoid audits that are unlikely to yield results, and should also prioritize the completion of audits within

⁷¹¹ Op cit note 74 at page 210 – 211.

⁷¹² Subject to the provisions of section 99(4) of the TAA.

the relevant assessment timeframe. The uncertain application of the legal framework leads to larger administrative compliance burdens, which are undesirable.⁷¹³ Finality is one of the principles intended to enhance certainty in tax administration, and when finality is eroded or compromised by the manner in which SARS conducts audits and gathers information, uncertainty increases and compliance becomes more burdensome for taxpayers, disincentivising voluntary compliance.

As set out above, it is important that taxpayers feel that the administration is responsive, and that tax compliance is rewarded (particularly in circumstances where other factors influencing tax morale function poorly, such as where significant levels of political corruption and poor service delivery exists). It is also important that taxpayers perceive the system, and the way in which the revenue authority interacts with them, to be fair, which often includes elements of procedural fairness. The right to finality contributes towards these factors positively influencing tax morale and voluntary compliance, *inter alia* by ensuring that honest taxpayers are not robbed of the opportunity to make representations, or subjected to unacceptable periods of commercial and legal uncertainty.

Unfortunately, the exercise of SARS' audit and information-gathering powers often completely negates the right to finality in practice. In addition to the commercial and financial prejudice that may be inflicted upon taxpayers, the effect that the improper use of SARS' audit and information-gathering powers can have on aspects of tax morale (such as the perceived and actual fairness of the tax administration) and the nature of taxpayers' interactions with SARS, should not be underestimated.

In the long term, poor tax morale and declining voluntary compliance leads to an administrative climate in which taxpayers feel justified in avoiding and evading their

⁷¹³ Op cit note 623 at page 5 – 7.

obligations. A reactive response to declining tax morale, in which authorities begin to enforce increasingly stricter and harsher sanctions only worsens the situation, eventually resulting in resistance to the tax system, and even a tax revolt.⁷¹⁴

The long-term economic costs of low levels of voluntary compliance are also potentially significant. A revenue authority forced to devote large amounts of human and financial resources towards enforcement is unlikely to be able to free up the resources necessary to develop more sophisticated systems, procedures and policies. In an environment where tax revenues are decreased due to a lack of voluntary compliance, the funding for this kind of development is also less likely to be available to the revenue authority.

As the world moves through the fourth industrial revolution and the digitalisation of global and domestic trade accelerates, revenue authorities must navigate new and complex waters as taxation becomes increasingly globalised. In South Africa, the struggling economy, rising national debt, and the devastating effects of the global pandemic make for a poor fiscal outlook. Now more than ever, SARS cannot afford to be working against a recalcitrant and disengaged tax base.

As discussed above, the more nuanced aspects of tax morale and voluntary compliance cannot be legislated. It is up to SARS and the government to develop, implement, and continually evaluate policies that will support voluntary compliance, while retaining the revenue authority's capacity to detect and punish non-compliance.

Auditing and information-gathering are one of the main contact points between SARS and taxpayers, and if SARS' intends to recreate a climate of trust and voluntary compliance in

⁷¹⁴ Op cit note 74 at page 210 – 211.

South Africa, the gaps which currently exist in its policies, practices and organisational culture must be addressed.

6 CHAPTER SIX: COMPARATIVE ANALYSIS OF AUDIT AND INFORMATION-GATHERING POWERS AND TAXPAYERS' RIGHTS IN FOREIGN JURISDICTIONS

Without the necessary administrative policy framework to balance the exercise of SARS' audit and information-gathering powers against taxpayers' rights, the balance of power is skewed too far in SARS' favour. Inadequate protection for taxpayers' rights coupled with insufficient oversight internally and externally to SARS has created an environment in which tax morale and voluntary compliance are declining, to the extent that revenue collections are being affected.⁷¹⁵ This has potential long-term economic consequences for SARS and the national government, given the importance of voluntary compliance in an effective tax administration.

This chapter examines the policy and practices adopted in the context of audit and information-gathering by comparative foreign jurisdictions, in order to identify potential recommendations for South African administrative practice.

6.1 Comparative Jurisdictions

For purposes of comparative study, this dissertation will focus on Australia and Canada. These jurisdictions have similar legislative provisions to South Africa (indeed, a significant portion of our tax administration legislation is derived from the Australian Taxation Administration Act),⁷¹⁶ and both jurisdictions have a Taxpayer's Charter or Bill of Rights which codifies taxpayer's rights in respect of, *inter alia*, audits and information-gathering.

Both jurisdictions have well-developed administrative law provisions which interact with the tax administration legislation and practice. Given that both jurisdictions also have more established tax administration legislation (compared to the TAA, which was only enacted

⁷¹⁵ Op cit note 98.

⁷¹⁶ Australian Taxation Administration Act, 1953.

in 2012), both jurisdictions have a significant volume of scholarly literature considering tax administration and taxpayers' rights in the context of audit and information-gathering.

6.1.1 Australia

6.1.1.1 *The legislative framework governing audit and information-gathering*

The Australian Constitution gives the Commonwealth the power to impose taxation and to make laws in respect of taxation (which includes tax administration).⁷¹⁷ The audit and information-gathering powers of the ATO are primarily codified in sections 263, 264 and 264A of the Income Tax Assessment Act 1936 ("ITAA"), and section 353-10(1) and 353-15 of Schedule 1 to the Taxation Administration Act 1953 ("ATAA").⁷¹⁸

In terms of these provisions, the ATO may request taxpayers to produce documents (including electronic documents and records) informally or by issuing a notice, and to attend in person to give evidence under oath. The ATO also has the right to enter taxpayers' premises in order to access to documents, books and electronic information, to make copies of any document and information at the premises, and to ask questions of the taxpayer and staff representatives. The ATO may not remove original documents from the premises or exercise its investigative powers without notice to taxpayers, except in exceptional circumstances, such as instances where the ATO has reason to believe evidence will be concealed, altered or destroyed.⁷¹⁹

Under section 170 of the ITAA, the Commissioner is permitted to review a Notice of Assessment within a specific period from the date on which the original assessment was

⁷¹⁷ Section 51(ii) of the Constitution of the Commonwealth of Australia.

⁷¹⁸ There is additional Australian legislation which contains specific investigation and information gathering powers such as the Fringe Benefits Tax Assessment Act 1986 and the Petroleum Resource Rent Tax Assessment Act 1987, but for purposes of the scope of this dissertation, the only the legislation governing the revenue authority's general powers of audit and information-gathering is considered in detail.

⁷¹⁹ ATO Guide for taxpayers "*Our Approach to information Gathering*" available on the ATO website at <https://www.ato.gov.au/About-ATO/Access,-accountability-and-reporting/In-detail/Our-approach-to-information-gathering/> (accessed 31 May 2017) at page 27 – 35.

issued. The length of this “limitation period” is dictated by the complexity of the taxpayer’s affairs, with a two-year period being applicable to most individuals and small businesses, and a four-year period being applicable to taxpayers with more complex affairs, such as large corporate taxpayers.

Accordingly, an original assessment may not be altered after the expiry of the relevant limitation period, except in circumstances where specific anti-avoidance provisions are invoked.⁷²⁰ For example, the ITAA allows the Commissioner to extend the period of review indefinitely where the Commissioner makes a determination that there was “fraud and evasion” on the part of the taxpayer,⁷²¹ similar to the powers granted to the Commissioner for SARS in terms of section 99(2) of the TAA.

A review of taxpayers’ rights undertaken by the Australian Inspector-General of Taxation (“IGT”) in 2015 concluded that this right to finality is an enforceable right for Australian taxpayers.⁷²²

6.1.1.2 *The Taxpayer’s Charter*

The Taxpayer’s Charter⁷²³ was formally launched by the ATO in July 1997, following a report⁷²⁴ published by the Joint Committee of Public Accounts (“JCPA”) which recommended the establishment of a Taxpayer’s Charter by the Australian Government.⁷²⁵

⁷²⁰ Section 170(2) of the ITAA read with sections 155-40 to 155-60 and 155-65 of Schedule 1 to the ATAA.

⁷²¹ Section 170(1) of the ITAA; *Re Taxpayer and FCT* (2005) 59 ATR 1178 and *Weyers & Ors v FCT* (2006) 63 ATR 268.

⁷²² Inspector-General of Taxation Review into the Taxpayers’ Charter and Taxpayer Protections (2016) Ch 2, para 2.14, available at <https://www.igt.gov.au/news-and-publications/reports-reviews/review-taxpayers-charter-and-taxpayer-protections/executive-summary> (accessed 20 October 2020), hereafter “2016 IGT Review”

⁷²³ Available at <https://www.ato.gov.au/About-ATO/About-us/In-detail/Taxpayers-charter/> (accessed 31 May 2017).

⁷²⁴ *An Assessment of Tax: a Report on an inquiry into the Australian Tax Office* Joint Committee of Public Accounts Report No 326 (1993) 314 available at www.aphref.aph.gov.au_house_committee_reports_1993_1993_pp213a.pdf (accessed 31 May 2017) hereafter “JCPA Report”.

⁷²⁵ *Ibid.*

The JCPA Report concluded that, in light of the importance of encouraging voluntary compliance, a taxpayers' charter of rights and obligations should be introduced to redress "*the balance of authority between the ATO and the taxpayer*"⁷²⁶ given *inter alia* the ATO's extensive investigatory powers, and so that the relationship between taxpayers and the ATO is formally defined.⁷²⁷

The Taxpayer's Charter was accordingly developed as part of a consultative process with ATO staff, the public, various business stakeholders, tax agents, and other governmental agencies.⁷²⁸

The Taxpayer's Charter stipulates that the ATO has a role to play in building public confidence in the tax system by implementing administrative functions in a way that fosters a relationship of mutual trust and respect between taxpayers and the ATO.⁷²⁹ The Charter covers a number of areas of tax administration, but for purposes of this dissertation, only the aspects that relate to the exercise of the ATO's audit and information-gathering powers (and the way these powers potentially affect the right to finality) will be considered in detail.

The Charter sets out several general principles to be observed by the ATO in carrying out its administrative functions. These include (but are not limited to) the ATO treating taxpayers fairly and reasonably in all interactions, and engaging with taxpayers individually, taking their circumstances into account where the law provides for a discretion to do so. The Charter also provides that the ATO must presume that taxpayers are honest and compliant, and that any information furnished to the ATO is complete and accurate, unless there is reason to believe otherwise. The ATO is required to differentiate between

⁷²⁶ *Ibid* at 308.

⁷²⁷ *Ibid* at 343.

⁷²⁸ *Ibid*.

⁷²⁹ Op cit note 723.

honest mistakes and negligent or deliberate noncompliance, giving taxpayers an opportunity to remedy inadvertent errors.

The Charter provides that taxpayers have the right to understand and be informed of decisions which affect them, and that taxpayers have a right to compensation if the ATO's conduct has caused them to suffer a financial loss. Finally, the Charter provides for accountability and transparency in all administrative dealings with taxpayers. The ATO undertakes to treat the commitments made in the Taxpayer's Charter seriously, to explain decisions affecting taxpayers, and to advise taxpayers of their rights and obligations in relation thereto.

In line with these general taxpayers' rights, the Taxpayer's Charter also sets out a list of general taxpayer obligations.⁷³⁰ Taxpayers are expected to be honest in their dealings with the ATO, and to provide full, complete and correct information when completing tax returns and responding to a request for information. Taxpayers are also obliged to keep the required records for the statutory period (at least five years) after being assessed.

Taxpayers are required to take reasonable care in adhering to their obligations, ensuring that submissions are complete and accurate; that all returns, activity statements and other information are submitted by the due date; and that payments are made on time. Taxpayers are also obliged to be co-operative, to facilitate the ATO's goal of working with taxpayers in a collaborative manner. The Charter provides that if taxpayers do not adhere to this obligation and are uncooperative or obstructive, the ATO may be forced to utilise its formal access and information-gathering powers.

⁷³⁰ Op cit note 723.

The Review and Audit section⁷³¹ of the Charter sets out specific taxpayer rights in relation to the ATO's powers to review and audit assessments. This section of the Charter provides that taxpayers under audit are presumed to be honest unless their conduct indicates otherwise, and that taxpayers are entitled to make mistakes.⁷³² This section also explains the review and risk assessment process, and how this may culminate in an audit, where it appears that the review process may not be sufficient to properly investigate the risks identified under review.⁷³³

The Charter provides the ATO's focus should be to obtain information as part of an informal and co-operative process, as far as possible. Accordingly, the ATO is required to maintain a clear and ongoing engagement with the taxpayer by explaining its decisions, minimising costs for the taxpayer where possible, being impartial and fair, and generally treating taxpayers in accordance with the main principles of the Charter.⁷³⁴

This section of the Charter also outlines the practical process of auditing, and what taxpayers can expect if they are subject to an audit. Audits are conducted primarily in the form of interviews with the taxpayer at its premises, and taxpayers are entitled to representation.⁷³⁵ The ATO is usually required to notify taxpayers well in advance of audit proceedings (i.e. unless advance notice is likely to prejudice the audit), and to provide the taxpayer with an audit scope indicating what the ATO intends to investigate, which documents and records will be required for examination, and approximately how long it will take to finalise the audit.⁷³⁶

⁷³¹ Op cit note 723.

⁷³² *Ibid* at page 1.

⁷³³ *Ibid* at page 3.

⁷³⁴ Op cit note 723 at page 4.

⁷³⁵ *Ibid* at page 6 – 8.

⁷³⁶ *Ibid*.

The ATO is also required to provide regular progress reports and to provide the taxpayer with an opportunity to provide feedback on the scope, appropriateness and relevance of the audit, including any further information requests. Finally, the ATO is required to provide the taxpayer with the outcome of the audit and the reasons for any decisions taken.⁷³⁷

The Charter also contains a section on the fair use of the ATO's information-gathering ("access") powers.⁷³⁸ This section explains the ambit of the ATO's information-gathering powers, and reiterates the principle of collaboration and co-operation.⁷³⁹ The ATO will seek to work with taxpayers to obtain information on an informal basis, inform the taxpayer of its rights and obligations, give prior notice (where possible) of the information to be requested, and minimise the anticipated costs of compliance for the taxpayer, where possible.⁷⁴⁰

The ATO will only use its formal powers where a co-operative approach is no longer feasible, where the taxpayer has a history of non-compliance with informal information requests, or where a collaborative approach is inappropriate (for example, where the taxpayer is suspected of fraud or tax evasion).⁷⁴¹ This section of the Charter also clarifies that the use of the ATO's formal notice powers requires written notice to the taxpayer in all but exceptional circumstances.⁷⁴²

In exercising its formal or informal information-gathering powers, the ATO is required to adopt a fair, professional and open approach, to maintain a dialogue with the taxpayer

⁷³⁷ *Ibid* at page 13.

⁷³⁸ *Ibid*.

⁷³⁹ *Ibid* at page 3 – 5.

⁷⁴⁰ *Op cit* note 723 page 4 – 5.

⁷⁴¹ *Ibid* page 3 – 5.

⁷⁴² *Ibid* page 3.

after a request for information or documentation has been made, and respect the taxpayer's right to take advice and have representation.⁷⁴³

In addition to the exclusion of legally privileged documents from the ambit of an information request, both the Taxpayer's Charter and the Australian tax administration legislation recognise additional categories of sensitive information which are normally excluded from ATO scrutiny.⁷⁴⁴ Corporate board documents relating to tax risk, accounting advisor's documents, risk analyses, audit working papers, and transaction structuring memoranda prepared by the taxpayer's accounting advisors incorporating strategic tax advice may only be requested in specific instances. These documents are excluded from the information which the ATO is entitled to request as part of a routine review exercise.⁷⁴⁵

The Charter provides that taxpayers can review a decision to request information or documentation under the ADJRA where the ATO has used its powers unreasonably, in bad faith, or in an abusive manner.⁷⁴⁶ Taxpayers also have the right to a written statement from the ATO setting out the reasons for the ATO's decision to issue a notice under its formal notice powers requesting certain information or documentation, although this request does not delay or suspend the taxpayer's legal obligations to respond to the notice and furnish the information requested.⁷⁴⁷

The abovementioned safeguards offer significant protection to Australian taxpayers in the context of audit and information-gathering, including the right to finality. As previously mentioned, it is necessary for revenue authorities to have broad and extensive audit and information-gathering powers to ensure that errors in assessments can be rectified, so that

⁷⁴³ *Ibid* page 3 and page 5.

⁷⁴⁴ *Ibid* page 5.

⁷⁴⁵ *Op cit* note 723 at page 5.

⁷⁴⁶ *Ibid* page 7.

⁷⁴⁷ *Ibid*.

all taxpayers pay the correct and proper amount of tax to the government. However, where these extensive powers are not balanced by appropriate policies and accountability mechanisms, the risk of taxpayers' rights being ignored increases.

6.1.1.3 Administrative Policy: The ATO Guidelines on the exercise of Access and Notice Powers

In addition to the Taxpayer's Charter, the ATO has compiled an extensive written guide for taxpayers on its approach to information gathering ("the ATO Guide") and the use of its formal access powers in an audit or investigation.⁷⁴⁸

The ATO Guide discloses a coherent set of principles in relation to information gathering, which reflect the principles set out in the Taxpayer's Charter. Firstly, the ATO Guide informs taxpayers that in most instances, the information determining a taxpayer's liability is in the taxpayer's possession⁷⁴⁹ and that the ATO will, therefore, pursue an informal and co-operative approach when requesting information from taxpayers, unless and until it becomes necessary to make use of a formal process.⁷⁵⁰

The ATO will typically only use its formal information-gathering powers in circumstances where a certain degree of risk is perceived at the outset, where the taxpayer has a history of non-compliance, where the ATO is concerned that an informal approach may prejudice the investigation, or where it would be more time and cost-efficient to proceed formally.⁷⁵¹

The ATO is required to conduct a targeted information collection process based on a risk hypothesis.⁷⁵² The Guide states that the ATO's experience indicates that a collaborative approach usually yields the best results, incorporating fairness and minimising the

⁷⁴⁸ *Supra* note 719.

⁷⁴⁹ *Ibid* at page 6 – 7.

⁷⁵⁰ *Op cit* note 719.

⁷⁵¹ *Ibid*.

⁷⁵² *Ibid*.

compliance cost and business disruption to the taxpayer.⁷⁵³ The ATO will accordingly, as far as possible, disclose the suggested process and seek the taxpayer's agreement on the process and methodology to be followed for gathering information.⁷⁵⁴

Secondly, the ATO Guide provides that the ATO is required to explain its decisions to request information from taxpayers. Audits may only be conducted in respect of an identified risk,⁷⁵⁵ and the ATO is required to explain why specific information is being requested, and to give reasons for key decisions taken.⁷⁵⁶ The ATO is required to explain its risk hypothesis to the taxpayer, and how the risk hypothesis being used determines the information being sought from the taxpayer as part of the requirement to maintain an open and honest dialogue.⁷⁵⁷ The ATO Guide states that it is important for taxpayers to understand why they are being investigated.⁷⁵⁸ The decision to issue the taxpayer with a formal notice requesting information or documentation is reviewable under section 13 of the ADJRA, and the taxpayer has the right to written reasons for this decision.⁷⁵⁹ The ATO Guide provides that the reasons for a decision to request information or documentation from a taxpayer need to be clearly articulated, and the taxpayer should be provided with the opportunity to respond to what it believes are incorrect assumptions made by the ATO during the information gathering process.⁷⁶⁰

Thirdly, the ATO Guide indicates that taxpayers must be properly informed of their rights and obligations during the audit and information-gathering process.⁷⁶¹ The taxpayer must understand why and on what basis the information is being requested, when it has the right

⁷⁵³ *Ibid* at page 8.

⁷⁵⁴ *Ibid* at page 10.

⁷⁵⁵ *Ibid* at page 8.

⁷⁵⁶ *Ibid* at page 9.

⁷⁵⁷ *Op cit* note 719 at page 10.

⁷⁵⁸ *Ibid* page 12.

⁷⁵⁹ *Ibid*.

⁷⁶⁰ *Ibid* page 15.

⁷⁶¹ *Ibid* page 10.

to representation, what to expect during the information-gathering process, and how to respond appropriately.⁷⁶² The ATO must record all conversations and interviews (formal and informal) and the taxpayer is entitled to a copy of the written transcript of these recordings.⁷⁶³

The ATO must also advise the taxpayer of its right to claim privilege or an administrative concession in respect of requested documents, and give the taxpayer adequate reasons and an opportunity to make representations if the ATO intends lifting the administrative concession or challenging legal privilege (in most circumstances).⁷⁶⁴ The taxpayer must also be made aware of its remedies in the event that an ATO official fails to comply with the provisions of the empowering statute or the rights and principles set out in the Taxpayer's Charter.⁷⁶⁵ The ATO is required to ensure that the taxpayer is aware of the right to representation, and is given an adequate opportunity to consult its advisors where information is requested.⁷⁶⁶

Fourthly, the ATO Guide provides that the ATO officers conducting the investigation and gathering the information must comply with the rights set out in the Taxpayer's Charter. ATO officers are encouraged to make use of all necessary resources when dealing with information-gathering procedures and requests, to streamline the process by accurately determining the information required at any stage of the process and whether an informal or formal approach should be used.⁷⁶⁷

ATO officers are required to have an understanding and awareness of the diversity of the taxpayer's business operations and particular tax challenges, and may not take a one-

⁷⁶² *Ibid* page 12.

⁷⁶³ *Ibid* page 10.

⁷⁶⁴ Op cit note 719 at pages 36 – 38 and 42.

⁷⁶⁵ *Ibid* page 5.

⁷⁶⁶ *Ibid* page 4.

⁷⁶⁷ *Ibid* page 11.

size-fits-all approach when requesting information.⁷⁶⁸ ATO officers must use their information-gathering powers lawfully and appropriately, and should consult advisers, industry experts, or senior ATO officials if necessary to ensure that these obligations are complied with.⁷⁶⁹

Lastly, the ATO Guide provides that the ATO and its officials must constantly strive to promote fairness and the proper application of the law, and to minimise time and costs spent on disputes with taxpayers.⁷⁷⁰ Where the taxpayer does not properly comply with informal requests for information, the ATO must establish the reason for this non-compliance and confirm at least a reasonable suspicion of deliberate non-compliance before using its formal powers.⁷⁷¹ ATO officers should plan investigations and information-gathering to minimise cost and business disruption for taxpayers. In this regard, a risk hypothesis must be employed to determine the information requirements associated with the potential risk identified before the investigation commences.⁷⁷² This hypothesis must be communicated to the taxpayer, so that both parties understand the information requirements and the time frames which are applicable.⁷⁷³

Before issuing a formal notice, the ATO must consider the scope of information being requested, ensure that this information is not already available to the ATO. Where information needs to be obtained from third parties, the taxpayer should be consulted and advised beforehand if possible.⁷⁷⁴ Where the taxpayer refuses to provide information on

⁷⁶⁸ *Ibid.*

⁷⁶⁹ *Ibid* page 11.

⁷⁷⁰ *Ibid* page 8 – 9.

⁷⁷¹ Op cit note 719 at page 8 – 9.

⁷⁷² *Ibid* page 9 - 10

⁷⁷³ *Ibid* page 9 - 10

⁷⁷⁴ *Ibid* page 13.

grounds of privilege or the administrative concession, the ATO may not draw an adverse inference provided the taxpayer follows the Charter and ATO guidelines.⁷⁷⁵

Overall, this approach promotes fairness and aims to strike a balance between taxpayers' rights and the significant and potentially invasive powers granted to the ATO to audit and gather information. Most importantly, this approach encourages taxpayers to take ownership of their tax affairs and their relationship with the ATO, and to be as transparent and co-operative as possible when engaged in an audit or information-gathering process.

6.1.1.4 Commentary on and criticisms of the Taxpayer's Charter

Overall, the content and aim of the Taxpayer's Charter is highly commendable. It provides the necessary balance to ensure that the broad powers granted to the ATO by sections 263, 264 and 264A of the Income Tax Assessment Act 1936 ("ITAA"), and section 353-10(1) and 353-15 of Schedule 1 to the Taxation Administration Act 1953 ("ATAA") are exercised economically, efficiently, and in a way that promotes voluntary compliance.

Both the Charter and the ATO Guide emphasise that an informal and collaborative information-gathering process yields the best and most efficient results. ATO officials are, therefore, encouraged to adopt this approach wherever possible, and to maintain an ongoing and open dialogue with taxpayers around the risk(s) identified, the proposed process to be followed, and the information required to assess the risk.

The Charter thus encourages a transparent and collaborative approach to tax risk and compliance. By ensuring that taxpayers are protected from abusive and inefficient audit and information-gathering processes as far as possible, the Charter arguably encourages voluntary compliance, honesty, and responsibility amongst the tax base. This is in line with

⁷⁷⁵ *Ibid* page 19.

ATO's responsive compliance theory, encouraging taxpayers to take ownership of their tax affairs and to strive to be compliant, in order to benefit from a more amicable and transparent relationship with the ATO whenever a risk is identified and flagged for further investigation. The Charter and ATO Guide also provide useful tools and guidelines for ATO officials, empowering them to use their powers lawfully and fairly in the variety of complex circumstances which may arise.⁷⁷⁶

Some authors have criticised the Taxpayer's Charter from an implementation perspective. Bentley argues that the Charter is likely to lack legitimacy if it is not legislatively entrenched, on the basis that the ATO itself is responsible for interpreting and applying the Charter in circumstances where ATO officials are accused of breaching taxpayers' rights.⁷⁷⁷ The perception of fairness in tax administration would arguably be enhanced in instances where taxpayer's rights are protected by law, bearing in mind that adequate protection may also be achieved through the application of enforceable guidelines and general administrative principles to be observed by the revenue authority in its conduct towards taxpayers.⁷⁷⁸

The 2016 IGT Review of the Taxpayer's Charter⁷⁷⁹ confirms at least some of the criticisms voiced by Australian commentators. Stakeholder representations to the IGT included inadequate education of taxpayers, insufficient clarity regarding the provisions of the Charter, the nature of taxpayers' rights and their enforceability (particularly, uncertainty as to whether Charter protections are contingent on taxpayers discharging their obligations);

⁷⁷⁶ Simon James, Kristina Murphy and Monika Reinhart 'The Taxpayer's Charter: a case study in tax administration' *Journal of Australian Taxation* 2004 336.

⁷⁷⁷ Duncan Bentley 'A Taxpayer's Charter: Opportunity or Token Gesture?' (1995) 12 *Australian Tax Forum* 1 at page 88.

⁷⁷⁸ *Ibid* at pages 21 and 23.

⁷⁷⁹ *Op cit* note 722.

whether the potential time and costs in enforcing taxpayers' rights are taken into account, and how consistently ATO officials comply with certain aspects of the Charter.⁷⁸⁰

The IGT Review also raises concerns regarding the monitoring and evaluation of the ATO's compliance with the Charter principles, and whether this is being done effectively.⁷⁸¹ These concerns raise the question of whether legislative enactment or legislative enforcement of the Charter principles is required. In this regard, the IGT notes that no other comparable OECD jurisdictions have attempted a legislated taxpayer bill of rights, and concludes that this approach would be unlikely to address most stakeholder concerns, given the cost of accessing the courts. The IGT thus favours administrative obligations which would require the ATO to measure and publicly report on its compliance with the Taxpayer's Charter more effectively.⁷⁸²

In a more recent article,⁷⁸³ Bentley concludes that the Australian Taxpayer's Charter has successfully shown how a clearly articulated set of values embedded into the culture of the ATO has supported the transformation of the relationship between ATO and taxpayers, developing the compliance framework to ensure that the ATO administers the tax system through stable and co-operative engagement with taxpayers.⁷⁸⁴

What is evident from the available literature is that in the absence of legislative enactment or enforcement, continual evaluation and benchmarking of the revenue authority's performance against taxpayers' rights is necessary to ensure that the protection of taxpayers' rights becomes adequately entrenched within the ATO. Regular monitoring and reporting by the IGT has arguably encouraged the development and implementation of

⁷⁸⁰ *Ibid* at page 37.

⁷⁸¹ *Ibid*.

⁷⁸² Op cit note 722 at page (v).

⁷⁸³ Duncan Bentley 'Taxpayer rights in Australia twenty years after the introduction of the Taxpayers' Charter' (2016) 14 *eJournal of Tax Research* 291.

⁷⁸⁴ *Ibid* at page 317.

internal policies and guidelines within the ATO aimed at ensuring that revenue officials abide by the principles set out in the Taxpayer's Charter and that these principles become entrenched within the organisation.

6.1.1.5 Oversight Mechanisms: the Office of the Inspector-General for Taxation

The office of the IGT was established in 2001 by the Australian Prime Minister, and legislatively ratified in terms of the Inspector-General of Taxation Act, 2003 ("IGT Act").⁷⁸⁵

The Inspector-General was envisaged by Parliament to function as an independent statutory authority examining problems in the administrative framework of the tax system, to bring such problems to the attention of the government.⁷⁸⁶ It was also anticipated that the IGT would act as an advocate for all taxpayers, including Australian businesses, and provide an avenue for more effective conflict resolution than existed at the time.⁷⁸⁷

Section 3 of the IGT Act provides that the IGT's objects are to improve the administration of taxation laws for the benefit of all taxpayers, tax practitioners and other entities; to provide independent advice to the government on the administration of taxation laws; to investigate complaints by taxpayers, tax practitioners or other entities about the administration of taxation laws; and to investigate administrative action taken under taxation laws, including systemic issues, that affect taxpayers, tax practitioners or other entities.

Section 8 of the IGT Act authorises the IGT to conduct certain investigations on their own initiative, including systemic issues which have been highlighted by taxpayers, tax

⁷⁸⁵ History of the Inspector-General of Taxation, available at <https://www.igt.gov.au/about-us/history#:~:text=On%2015%20October%202001%2C%20the,Government%20and%20the%20Australian%20Parliament> (accessed on 31 October 2020).

⁷⁸⁶ Senate Economics Legislation Committee Report on the Performance of the Inspector-General of Taxation available at https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024347/toc_pdf/PerformanceoftheInspector-GeneralofTaxation.pdf;fileType=application%2Fpdf (accessed on 28 November 2020) at page 3.

⁷⁸⁷ *Ibid* at page 3.

practitioners, or the Auditor General. The IGT is also required to investigate tax administration systems if directed to do so by the relevant Minister.

In 2007, the Commissioner of Taxation and the Inspector-General signed a revised protocol formally defining the nature of the co-operative working relationship between their agencies.⁷⁸⁸ This Protocol establishes the IGT as an operationally independent agency operating under the Financial Management and Accountability Act, 1997 and defines a framework for effective working arrangements and the timely sharing of information between the Department of Treasury, the ATO and the IGT.⁷⁸⁹ The Protocol also sets out the IGT's role in reviewing the systems established by the Australian Taxation Office to administer the tax laws, and the systems established by tax legislation to deal with administrative matters, and to report on those reviews to the Treasury Ministers.⁷⁹⁰

Since 2015, the IGT has also taken on the function of national Taxation Ombudsman ("IGTO") to help members of the community (such as taxpayers and tax practitioners) to resolve complaints regarding the administrative actions of the ATO.⁷⁹¹ The scope of the IGTO's complaint-handling powers is broad, and includes extensive investigatory powers. The IGTO may also refer complaints to the Administrative Appeals Tribunal, or recommend that a principal officer in the ATO makes such a referral.⁷⁹² The IGT's complaint handling role is included in the report to the Assistant Treasurer, which is tabled in Parliament.⁷⁹³ However, the IGTO's recommendations are not binding on government or on the ATO.⁷⁹⁴

⁷⁸⁸ Protocol between the Inspector-General of Taxation and the Department of the Treasury available at https://www.igt.gov.au/sites/default/files/wp/IGT_Treasury_protocol.pdf (accessed 31 October 2020).

⁷⁸⁹ *Ibid* at page 1.

⁷⁹⁰ *Ibid*.

⁷⁹¹ Op cit note 785.

⁷⁹² Op cit note 783.

⁷⁹³ *Ibid*.

⁷⁹⁴ Op cit note 785.

A recent Parliamentary review conducted into the functioning of the IGT highlighted several recommendations for enhancing the efficiency of the Office of the IGT in carrying out its dual function as both IGT and IGTO.⁷⁹⁵ These included an assessment of whether the Office of the IGT is adequately resourced to carry out both functions, greater access to ATO systems, data and records, and the creation of a formal role for the IGTO in advising the relevant ministers on the administrative aspects of new and amended tax legislation.⁷⁹⁶

6.1.2 Canada

6.1.2.1 *Legislative Powers*

Section 231.1(1) of the Canadian Income Tax Act (“CITA”)⁷⁹⁷ authorises the Canadian Revenue Authority (“CRA”) to carry out a tax audit by inspecting and examining any records, accounts and documents belonging to a taxpayer. Section 230(1) of the CITA provides that every person carrying on business or who is required to pay or collect taxes or other amounts shall keep records and books of account, for the prescribed period and in the prescribed manner and place “...*in such form and containing such information as will enable the taxes payable under this Act or the taxes or other amounts that should have been deducted, withheld or collected to be determined.*”⁷⁹⁸

The CRA is also empowered under section 231.1(1) to examine a taxpayer’s premises or place of business and property, and to interview or require the assistance of anyone on the premises or in the place of business. The CRA is authorised to obtain records from third parties, and may require any person to provide any information or document for any purpose relating to the administration or enforcement of the CITA.⁷⁹⁹

⁷⁹⁵ Op cit note 786.

⁷⁹⁶ *Ibid.*

⁷⁹⁷ Income Tax Act R.S.C., 1985, c. 1 (5th Supp.).

⁷⁹⁸ *Ibid.*, section 230(1) read with section 230(4).

⁷⁹⁹ *Supra* note 797, section 231.2(1).

In terms of these provisions, the CRA has broad powers to audit and request information from taxpayers for the purposes of administering any tax Act, much like the powers afforded to SARS by sections 40 to 42 and 46 of the TAA. The only statutory limitation to the CRA's audit and information-gathering powers applies where information is sought in relation to an unnamed taxpayer.⁸⁰⁰

Section 152(4) of the CITA provides that the Minister may issue a reassessment or an additional assessment, within the normal reassessment period. The normal reassessment period is defined in section 152(3.1), which provides for a three-year period following the date of the original assessment for all taxpayers other than mutual fund trusts or a corporation other than Canadian-controlled private corporations, for whom the reassessment period is four years.⁸⁰¹ Section 152(4) provides further that in certain circumstances (including, but not limited to, misrepresentation or fraud committed by the taxpayer) the normal reassessment period will be waived.⁸⁰² Section 152(4) of the CITA accordingly provides for a right to finality, and empowers the CRA to issue assessments outside of the limitation period in a similar manner to sections 99(1) and 99(2) of the TAA.

The Canadian courts have interpreted the CRA's audit and information-gathering powers in several recent judgments. Section 231.2 of the CITA was enacted to address the Canadian Supreme Court's decision in *James Richardson & Sons, Limited v. MNR*.⁸⁰³ In this case, the court held that the requirement of a "genuine and serious enquiry" into the

⁸⁰⁰ Michael Ziesmann *Gone Fishing: An Analysis of CRA Powers and Policies Relating to the Use of Fishing Expeditions in Information Gathering* (Master of Taxation thesis, University of Waterloo, 2009) available at https://uwaterloo.ca/master-of-taxation/sites/ca.master-of-taxation/files/uploads/files/gonefishing_ananalysisofcrapowersandpoliciesrelatingtotheuseoffishingexpeditionisininform_000.pdf (last accessed 31 May 2017) at page 9.

⁸⁰¹ *Supra* note 797, section 152(3.1)(a) and (b).

⁸⁰² *Ibid*, section 152(4)(a)(i).

⁸⁰³ 84 DTC 6325 (SCC).

taxpayer's affairs had to be incorporated into the exercise of the CRA's audit and information-gathering powers under the now-repealed section 231.3.⁸⁰⁴

The new section 231.2 was first tested in *MNR v. Sand Exploration Limited*⁸⁰⁵ where the court held that although the CRA's powers were intrusive, section 231.2 was specifically drafted to provide wider information-gathering powers to the Minister.⁸⁰⁶ In *MNR v. Greater Montréal Real Estate Board*⁸⁰⁷ the court went even further, finding that the requirement of a "genuine and serious enquiry" into the taxpayer's affairs was no longer a prerequisite for the exercise of the CRA's information-gathering powers under section 231.2.⁸⁰⁸

The decisions in *eBay Canada Limited and eBay CS Vancouver Inc.*⁸⁰⁹ and *Redeemer Foundation v. MNR*,⁸¹⁰ which primarily concerned the power to request information in relation to unnamed persons in terms of section 231.2(2) of the CITA, further confirm the Canadian courts' stance of supporting the widest possible exercise of the CRA's audit and information-gathering powers in practice.⁸¹¹

6.1.2.2 *The Taxpayer Bill of Rights*⁸¹²

In 1985, the Minister of National Revenue introduced a publication titled the Declaration of Taxpayer Rights ("the Declaration"). This document did not have legislative force, although

⁸⁰⁴ *Ibid* at 6329 – 6330.

⁸⁰⁵ 95 DTC 5358 (FCTD).

⁸⁰⁶ *Ibid* at 5361.

⁸⁰⁷ 2007 FCA 346.

⁸⁰⁸ *Ibid* at para 20 – 21.

⁸⁰⁹ *eBay Canada Limited and eBay CS Vancouver Inc. v. MNR*, 2007 FC 930; *eBay Canada Limited and eBay CS Vancouver Inc. v. MNR*, 2008 FC 180; and *eBay Canada Limited and eBay CS Vancouver Inc. v. MNR*, 2008 FCA 348.

⁸¹⁰ 2008 SCC 48.

⁸¹¹ *Op cit* note 800 at page 12 – 18 for a more detailed discussions of these judgments and their impact on the interpretation of section 231.2 of the CITA.

⁸¹² Canada Revenue Authority, Taxpayer Bill of Rights (December 2013) available on the CRA website at <http://www.cra-arc.gc.ca/E/pub/tg/rc17/rc17-12-16e.pdf> (last accessed 31 May 2017)

its principles were sourced from the Canadian Charter of Rights and Freedoms and from statute and common law.⁸¹³

The Declaration was subsequently replaced by the Taxpayer Bill of Rights (“TBR”), which was adopted on 28 May 2007, with the aim of increasing the CRA’s accountability to taxpayers and enhancing taxpayers’ awareness of their rights and remedies when aggrieved by the conduct of CRA officials. The TBR sets out 16 taxpayer rights governing the administration of the CITA by the CRA, and interactions between taxpayers and the CRA. It contains both legislated and non-legislated service rights which accord with the content of the OECD Model Charter.⁸¹⁴

In the context of audit and information-gathering, Canadian taxpayers have the right to communicate with and receive services from the CRA in English or in French, at designated bilingual offices.

Taxpayers also have the right to privacy and confidentiality. The CRA is required to protect and manage the confidentiality of taxpayer information, in accordance with privacy laws. Taxpayers have the right to an internal review of administrative decisions, and the CRA is required to ensure that the revenue officer responsible for handling a taxpayer’s file was not involved with the original decision under dispute, to ensure an independent review. The taxpayer is permitted to make representations, and must be furnished with copies of the documents and information relied on by the CRA to support its position. If the taxpayer is not satisfied with the outcome of this process, he or she has the right to appeal or seek a judicial review of that decision from the appropriate court or tribunal.

⁸¹³ Jinyan Li, ‘Taxpayers’ Rights in Canada’ (1997) 7(1) *Revenue Law Journal* 83 at 85.

⁸¹⁴ *Supra* note 722 at 28.

Taxpayers have the right to courteous and considerate treatment during investigations, interviews and audits. Taxpayers have the right to be heard and to make representations, and the CRA is obliged to explain its decisions and inform taxpayers of their rights and obligations regarding those decisions. Taxpayers also have the right to complete, accurate, and timely information in plain language explaining the applicable laws and policies being applied by the CRA, during engagements.

Taxpayers have the right to accurate and consistent application of the law. Taxpayers are encouraged to approach the CRA where the law has not been applied consistently, and have the right to request a formal review of their tax file and to approach the courts for a review of the disputed decision, if necessary. Taxpayers also have the right to accountability, which includes publication of the CRA's service standards, and an annual report tabled in Parliament in which the CRA assesses its performance in relation to its service standards.

The CRA is required to consider the cost of compliance when administering tax legislation, and taxpayers thus have the right to a cost-efficient audit and information-gathering process. The CRA also acknowledges the importance of building relationships with taxpayers based on mutual trust and understanding, and taxpayers accordingly have the right to submit complaints without fear of reprisal or additional scrutiny. There is a specific reprisal complaints procedure available for taxpayers who believe that they have been subjected to biased or unethical conduct.

In addition to the protections offered by the TBR, Canadian law recognises the tort of "negligent investigation". The TBR does not provide specific remedies in this regard, and is designed to inform the taxpayer of the internal complaint procedures available to it. While Canadian courts have been reluctant to impose a duty of care on CRA officials in the

context of taxpayer interactions, the law in Canada appears to be developing towards the judicial recognition of circumstances in which revenue officials can be held liable for negligent actions, although no concrete guidelines have yet been framed.⁸¹⁵

6.1.2.3 CRA Tax Audit Policy

In addition to the TBR, the CRA has published a circular setting out its policy and approach to tax audits and information-gathering processes.⁸¹⁶ The circular sets out the CRA's legislative powers to audit and gather information from taxpayers in the context of the reassessment period (i.e. the limitation period after which the CRA can no longer alter an original assessment), and explains the role of auditing and information-gathering in a functioning tax system based largely on self-assessment and voluntary compliance.⁸¹⁷

The CRA sets out the institutional principles which govern the exercise of its audit and information-gathering powers, which includes the prioritisation of voluntary compliance as the most effective and least expensive form of tax compliance, that every type of taxpayer should receive at least a nominal amount of audit attention, and the selection of taxpayers for audit on a rational and impartial basis.⁸¹⁸ All taxpayers should be satisfied that the audit program is based on fair and non-discriminatory criteria.⁸¹⁹

The CRA states that the application of these principles is reviewed on a continuous basis, and the audit program itself is modified on an annual basis in keeping with the resources allocated to the department.⁸²⁰ As a result, careful consideration is given to identifying

⁸¹⁵ John Bevacqua 'Suing Canadian Tax Officials for Negligence: An Assessment of Recent Developments (2013) 61(4) *Canadian Tax Journal* 893.

⁸¹⁶ CRA Circular IC 71-14R3t "The Tax Audit" available at <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic71-14/tax-audit.html> (accessed on 31 May 2017).

⁸¹⁷ *Ibid* para 2 – 5.

⁸¹⁸ *Op cit* note 816 at para 9.

⁸¹⁹ *Ibid*.

⁸²⁰ *Ibid* para 10 – 11.

taxpayer groups and tax types in respect of which auditing is most likely to improve compliance, determined with reference to available taxpayer data for each period.⁸²¹

The CRA follows a screening process to identify groups of taxpayers which present a potential noncompliance risk.⁸²² In addition, taxpayers may be selected for audit on the basis of third party information, information disclosed to or discovered by the CRA in another audit (e.g. connected persons in relation to an audited transaction), or in terms of an audit project, where the CRA identifies incidences of non-compliance within a particular segment of taxpayers, and selects a sample of these taxpayers for audit.⁸²³

Finally, the CRA describes the type of audit activities it routinely conducts, in the Policy.⁸²⁴ Field audits constitute an examination of the taxpayer's books and records at the taxpayer's place of business, and are the most frequently used audit and information-gathering process.⁸²⁵ The CRA may also conduct industry-wide audits, although this is less common.⁸²⁶

6.1.2.4 Commentary on and criticisms of the Taxpayer's Bill of Rights

The TBR is arguably broader and less specific than the Australian Taxpayer's Charter in the way taxpayers' rights are framed. For example, the Australian Charter contains sections that deal specifically with each aspect of tax administration and taxpayer interaction with the ATO, such as the exercise of the ATO's audit and information-gathering powers.⁸²⁷

⁸²¹ *Ibid* para 11 – 12.

⁸²² *Ibid* para 14.

⁸²³ *Ibid* para 16.

⁸²⁴ *Ibid* para 20.

⁸²⁵ *Ibid* para 20 – 25.

⁸²⁶ *Ibid*.

⁸²⁷ Op cit note 723.

Although the CRA's audit policy indicates that objective risk assessment methodologies are applied in selecting taxpayers for audit, the requirement for officials conducting an audit to establish a risk hypothesis before commencing the audit and requesting information from the taxpayer is noticeably absent in the Canadian TBR (compared to the Australian Taxpayer's Charter). In the Australian context, this should be done in consultation with the taxpayer, as far as practically possible.⁸²⁸

The TBR generally provides that CRA officials must explain their decisions and give taxpayers the opportunity to make representations. However, there is room to debate whether the initiation of an audit or issuing of an information request constitutes a "decision" which is capable of being disputed within the ordinary complaints procedure or dispute resolution framework. The TBR does not specify whether a decision to audit or to gather information from taxpayers constitutes a "decision" which would be subject to the obligations imposed upon the CRA in the context of taxpayers' rights, or which is capable of being disputed by taxpayers.

According to research undertaken by the OECD,⁸²⁹ the CRA has some of the broadest information-gathering powers out of the OECD countries selected for study.⁸³⁰ While the TBR does provide some protection to taxpayers, particularly insofar as it incorporates notice requirements, the right to review certain decisions, and promotes a consultative and collaborative approach to tax administration, a more specific approach would arguably give taxpayers a clearer understanding of their rights and how to apply and enforce those rights in interactions with the CRA.

⁸²⁸ *Ibid* at pages 9 – 10 and 13.

⁸²⁹ OECD Report on *Tax Administration in OECD and Selected Non-OECD Countries: Comparative Information Series* (2008) available at <http://www.oecd.org/dataoecd/57/23/42012907.pdf> (accessed on 31 May 2017).

⁸³⁰ *Ibid*.

In terms of effective implementation, the CRA publishes annual results in which its performance is benchmarked against the service requirements set out in the TBR, in a report which is tabled in Parliament. This is a positive enforcement mechanism which promotes the entrenchment of the TBR in the CRA's operational practices, incentivising the CRA to educate, motivate and monitor the compliance and participation of its staff. This is a crucial component of enforcing compliance in jurisdictions where taxpayer's rights are not legislatively entrenched, as it is not feasible for taxpayers to approach the courts for relief in every instance where their rights are breached.

6.1.2.5 Oversight Mechanisms: the Taxpayer Ombud

In addition to the TBR, the Office of the Taxpayer's Ombudsman was established in 2007 to assist, advise and inform the Minister of National Revenue regarding matters relating to services provided to taxpayers by the CRA.⁸³¹ The Ombudsman reports to the Minister of National Revenue, and their duties include reviewing and addressing service complaints and breaches of the rights contained in the TBR.⁸³² The Ombudsman may make recommendations to government and the Minister specifically and may make recommendations aimed at improving CRA practice, but the Ombudsman's recommendations and directives are not binding on the CRA or the Minister.⁸³³

The Ombudsman may not review matters that are before the courts, or any complaints regarding the administration or enforcement of tax legislation or governmental policy which does not relate directly to services.⁸³⁴ The role of the Ombudsman is, therefore, restricted

⁸³¹ Supra note 722 at page 29; Order in Council P.C. 2020-703 (30 September 2020) available at <https://www.canada.ca/content/dam/cra-arc/2020-703-en.pdf> (accessed on 28 November 2020).

⁸³² *Ibid.*

⁸³³ *Ibid.*

⁸³⁴ Order in Council P.C. 2020-703 (30 September 2020) available at <https://www.canada.ca/content/dam/cra-arc/2020-703-en.pdf> (accessed on 28 November 2020).

to service complaints, such as undue delays in the CRA carrying out its functions, and communication or conduct by CRA officials which is not in line with the TBR principles.

The Canadian Ombud compiles an annual report⁸³⁵ which sets out the Ombudsman's recommendations for more efficient and fair tax administration policies within the CRA, and contains the details of investigations conducted into systemic issues in Canadian tax administration.

The Ombudsman recently published the outcome of a systemic examination into whether the CRA uses the Taxpayer Bill of Rights effectively in carrying out its daily activities, and the measures which the CRA has implemented to ensure that revenue officials are continually accountable in upholding taxpayer rights.⁸³⁶ The Ombudsman found that although the TBR is over a decade old, an unacceptable number of Canadian taxpayers have an insufficient understanding of their rights, and how to enforce those rights in interactions with the CRA.⁸³⁷ While the CRA does advertise the TBR and incorporate the values contained in the TBR into many of its products, the CRA has failed to entrench the importance of respecting and protecting taxpayers' rights in its operational guidelines.⁸³⁸

The report concludes that while CRA employees may have good intentions in carrying out their duties fairly and responsibly, the values guiding CRA officials' conduct need to be based in taxpayer rights, and it is not clear how the CRA is equipping its employees to uphold the TBR.⁸³⁹ The Ombud's recommendations to remedy this deficiency include the entrenchment of the importance of taxpayers' rights in all CRA workflows and activities at

⁸³⁵ See for example Transformation through Disruption: Taxpayer's Ombudsman Annual Report 2019-2020 available at https://www.canada.ca/content/dam/oto-boc/ar-2019-2020/5556_CRA_OTO_2019_Annual_EN_WEB.pdf# (accessed on 28 November 2020).

⁸³⁶ Back to Basics: Taxpayers Have Rights – Taxpayer's Ombudsman Special Report (19 November 2020) available at <https://www.canada.ca/en/taxpayers-ombudsperson/programs/reports-publications/special-reports/back-to-basics.html> (accessed on 28 November 2020).

⁸³⁷ *Ibid* at page 50.

⁸³⁸ *Ibid*.

⁸³⁹ *Ibid*.

agency level through enhanced policies; a mandatory training course for all employees on the TBR; an improved internal and external reporting system which includes a methodology for assessing how all frameworks, policies, workflows, and training impact on taxpayers' rights; and mandatory performance expectations for all employees in respect of upholding taxpayers' rights when carrying out their functions.⁸⁴⁰

This demonstrates the need for strong administrative protections in the absence of legislated taxpayers' rights. While the enactment of the Canadian TBR is a positive step towards ensuring a fair and just tax administration and promoting voluntary compliance, the outcomes, conclusions, and recommendations flowing from the Ombudsman's recent systemic investigation⁸⁴¹ demonstrate that merely having a comprehensive taxpayers' charter or bill of rights may not be sufficient to carry those principles over into practice.

As various authors have observed,⁸⁴² in the absence of legislated rights, taxpayers' rights must be administratively entrenched in the operational framework of the revenue authority, and there must be both internal and external evaluations of how effectively the revenue authority is integrating taxpayers' rights into its day-to-day operations, in order to maintain accountability. The Canadian Taxpayer's Ombudsman concludes that a successful administrative entrenchment of taxpayers' rights requires the revenue authority to provide its employees with suitable general and specific guidelines on taxpayers' rights, appropriate training, performance evaluation metrics; and to provide taxpayers with clear and easily accessible information about their rights and remedies.⁸⁴³

The Canadian example illustrates that it is not enough to simply adopt a taxpayer bill of rights, or even to integrate taxpayers' rights into the organisational culture of the revenue

⁸⁴⁰ *Ibid* at page 51 – 52.

⁸⁴¹ Op cit note 836.

⁸⁴² Op cit note 777 and note 692.

⁸⁴³ Op cit note 836 at page 51 – 52.

authority. Education and evaluation are key to ensuring that taxpayers' rights become part of the operational framework that informs day-to-day interactions between taxpayers and the tax administration itself.

6.2 Conclusion

In the context of auditing and information-gathering, South Africa can learn much from the policy and practice of comparative jurisdictions. SARS' existing policy framework does not provide for the collaborative, informal and service-oriented approach adopted by revenue authorities in comparative jurisdictions, which are focused on maintaining high levels of voluntary compliance. Currently, there is no differentiation in practice between SARS' approach towards compliant taxpayers (and those who intend, but fail, to comply), and those who are negligent regarding their tax obligations or intentionally noncompliant. If SARS intends to implement a compliance philosophy based on the "sliding-scale model" of enforcement, the approach to audit and information-gathering will need to be substantially updated at an institutional level.

Most concerningly, SARS' existing policy documents and the reports compiled by various commissions of inquiry acknowledge that the institutional approach to risk identification is outdated and that risk assessments are often conducted on a completely random basis. The SARS Strategic Plan⁸⁴⁴ indicates an intention to modernize this process and to make it more efficient. While the use of data analytics and technology is likely to improve the fairness, objectivity and efficiency of SARS' risk assessment processes in the context of audit and information-gathering, current research on behavioural insights and the factors influencing tax morale and voluntary compliance (discussed in the preceding chapters) suggests that in order to positively influence voluntary compliance and create an

⁸⁴⁴ Op cit note 623.

environment in which taxpayers strive to be compliant, SARS must centre taxpayers' rights and have due regard for the benefits of a more structured, nuanced, and collaborative approach to identifying and investigating tax risks.

Potentially the most significant takeaway from the Canadian and Australian experience is that it is not sufficient to draft and implement broad policies protecting taxpayers' rights, or even to make these rights legislatively enforceable. Reviews conducted by the IGT⁸⁴⁵ reveal that the legislative entrenchment of taxpayers' rights is relatively untested (and may even have undesirable consequences), and that administrative protections can be sufficient if properly implemented. Reviews conducted by the Canadian Taxpayer's Ombudsman⁸⁴⁶ reveal that in order to be effective, administrative protections must be properly and thoroughly embedded in the culture, the operational directives, and the internal policies of the revenue authority.

Voluntary compliance requires taxpayers to buy into the tax administration system, which they will only do if they perceive the system to be fair, and if they experience fair treatment by the revenue authority within the system. This, in turn, requires the revenue authority, and more importantly, the individuals who execute the national tax revenue collection mandate in carrying out their everyday employment duties, to buy into the concept of taxpayers' rights and procedural fairness in every aspect of the interface between taxpayers and the revenue authority.

Australia and Canada represent developed tax administrations, whose policy framework and execution aligns with the key areas of improvement and standards of best practice in tax administration recognised by the OECD (and several other countries).⁸⁴⁷ Australia

⁸⁴⁵ Op cit note 722.

⁸⁴⁶ Op cit note 836.

⁸⁴⁷ Op cit note 595 at page 21 – 23.

introduced its Taxpayer's Charter over 20 years ago, and the IGT has been operational for just over a decade, whereas the Canadian TBR and Taxpayer's Ombudsman were introduced in 2007. These countries, therefore, have considerable practical experience in developing and implementing a more modern approach to tax administration, which balances revenue authorities' extensive powers with considerations of fairness and equity, promoting and enhancing efficiency, tax morale, and voluntary compliance.

While not conclusive, SARS' and National Treasury's own research into the tax gap⁸⁴⁸ appears to provide further confirmation of this concerning trend. Several commentators and tax practitioners have debated whether South Africa is already in the grip of a "tax revolt" in recent years.⁸⁴⁹ Although purely anecdotal, these kinds of public discussions evidence a growing public dissatisfaction with institutional ineptitude, political corruption, and state capture (and in this context, the overwhelmingly negative impact of SARS' interactions with taxpayers).

It should be noted that Australia and Canada are largely self-assessment systems - in other words, most taxpayers calculate their own tax liability or rely on an automated process, as opposed to the revenue authority actively reviewing the information submitted by the taxpayer and determining their liability for tax. Both the ATO and the CRA emphasise the importance of maintaining high levels of voluntary compliance in a tax administration where the revenue authority has less physical oversight over taxpayers' disclosures.

⁸⁴⁸ Op cit note 98, note 49 and note 623.

⁸⁴⁹ See for example Roshelle Ramfol 'The fine line between tax compliance and tax resistance: the case of South Africa' (2019) Paper presented at the International Conference of Accounting & Business; Ruan Jooste 'Inside SA's great tax revolt' SAIT, available at <https://www.thesait.org.za/news/222949/Inside-SAs-great-tax-revolt.htm> (accessed on 27 October 2020); 'What you need to know about a tax revolt in South Africa' *Business Tech* 11 December 2019, available at <https://businesstech.co.za/news/finance/361442/what-you-need-to-know-about-a-tax-revolt-in-south-africa> (accessed on 27 October 2020).

If SARS intends to progress South African tax administration along similar lines in terms of the proposed modernisation project set out in the latest Strategic Plan,⁸⁵⁰ it is crucial that SARS duly recognizes the role that voluntary compliance plays in a modern tax administration, and prioritizes the enhancement of tax morale and voluntary compliance in all facets of tax administration and taxpayer interaction.

The following chapter concludes this dissertation by setting out the recommendations which can be distilled from the above analysis in support of the development of a more effective, efficient, nuanced and modern approach to the exercise of SARS' audit and information-gathering powers, in the context of promoting procedural fairness by protecting taxpayers' rights to finality.

⁸⁵⁰ Op cit note 623.

7 CHAPTER SEVEN: APPLICATION TO THE SOUTH AFRICAN CONTEXT

The right to finality is an important part of an optimally functioning tax administration. It is a principle of the rule of law, and an important component of procedural fairness in the context of tax assessments, which has been recognized by the courts and codified in section 99(2) of the TAA. Procedural fairness (which includes concepts such as proportionality and flexibility) plays a crucial role in optimizing voluntary compliance and tax morale.

Given that the issuing of additional assessments is usually preceded by some form of review and verification (i.e. an audit and/or information-gathering process), and the importance of the verification and correction of tax returns by both SARS and taxpayers for the effective functioning of South African tax administration as a whole, the impact of audit and information-gathering on taxpayers' rights to finality should not be understated.

The Commissioner's ability to alter an incorrect original assessment ensures that SARS and the *fiscus* recover the correct amount of tax where errors and omissions are discovered in an assessment. However, finality is also critically important for the honest taxpayer. In the South African context, taxpayers are placed at a potentially insurmountable disadvantage when they are required to justify a tax position several years after it was first disclosed, as it becomes progressively more difficult for the parties to a tax dispute to produce proper evidence (and, therefore, progressively more difficult for the taxpayer to obtain a fair hearing, and for the adjudicator to reach a substantively and procedurally valid decision) as time passes. This is particularly important in the context of tax assessments, where section 102(2) of the TAA places the burden on the taxpayer to demonstrate that its tax position is correct.

In addition to the above risk, taxpayers are subject to commercial and financial prejudice in circumstances where SARS exercises its audit and information-gathering powers inefficiently. The financial and human resources cost a taxpayer incurs in responding to a request for relevant material or audit increases proportionately where the taxpayers have to navigate poorly scoped and overly broad enquiries, even more so where the audit or information-gathering process is inefficient and unnecessarily protracted. Taxpayers may be unable accurately determine and report on their financial position, and they may also be denied refunds which are otherwise due and owing to them, for extended periods of time. In these cases, the commercial uncertainty and direct financial loss caused by deficient audit and information-gathering processes can jeopardize valuable commercial transactions and impede taxpayers' ability to do business in South Africa.

Finality plays an important role in maintaining a procedurally fair administration the context of audit and information-gathering, acting as a distinguishing factor between honest and dishonest taxpayers, as regards the level of legal and commercial certainty these taxpayers can expect, respectively. Finality is one of the ways in which honest and voluntarily compliant taxpayers benefit from their compliance efforts, in an optimal tax administration. Ideally, finality should influence the audit and information-gathering process such that honest taxpayers receive a more collaborative and service-oriented treatment in interacting with the revenue authority, and lower levels of overall scrutiny.

A tax administration which caters for proportionality and fairness also allows the revenue authority to direct resources more efficiently, spending less time and money investigating and reviewing the submissions of those taxpayers who can be trusted to be compliant (and most likely, relying increasingly on data analytics and co-operation between private and state organisations to detect and address chance anomalies and errors) and directing funds and human resources predominantly towards negligent, habitually noncompliant,

and fraudulent taxpayers. Simply put, taxpayers should be treated according to their behaviour, compliance history, and the circumstances of each individual case, as far as it is possible to do so.

Although primarily beyond the scope of this dissertation, another key factor influencing morale and voluntary compliance (which has been alluded to in the preceding chapters) is the relationship between taxpayers and the government generally. This includes factors such as whether taxpayers believe that they benefit from and have a say in how public funds are spent, how the tax base perceives and experiences levels of political and governmental corruption, and the relative stability of the economy. In South Africa, these factors are all overwhelmingly likely to contribute to the decline of tax morale and voluntary compliance. Although these aspects of tax morale are largely outside of SARS' control, where SARS can mitigate the negative effects of corruption, mistrust, ineffective service delivery and economic contraction by amplifying and enhancing other components of tax morale and voluntary compliance, SARS should arguably do so, especially where the likely outcome is decreased compliance costs and increased revenue collections (addressing the "tax gap" that National Treasury and SARS have already recognized and documented).⁸⁵¹

Moreover, current research data indicates that a successful modern tax administration depends primarily on trust, mutual co-operation and high levels of tax morale and voluntary compliance for its efficient and economic functioning. The increasing digitalisation and globalisation of trade and the continually evolving nature of commerce continually gives rise to new challenges in enforcement and tax compliance, and revenue authorities need

⁸⁵¹ Op cit note 98.

to be able to rely on the compliance of the majority of the tax base, in order to be able to direct their resources towards addressing these emerging challenges.

SARS recognizes the flaws in its current approach in its latest Strategic Plan, proposing to leverage enhanced technologies and data analytics to modernize its approach to risk management, and, therefore, the audit and information-gathering process. However, while this approach is likely to yield some positive returns in the form of increased efficiency and economy and the ability to target resources towards areas of genuine concern, the modernisation of SARS' administration is insufficient to address the burgeoning tax morality crisis in South Africa, without more being done.

SARS must also implement a cultural and organisational shift in order to bring the South African tax administration in line with the practices of the jurisdictions in which our administrative legislation is founded, with a focus on migrating from an adversarial to a collaborative and service-oriented system. In this regard, much can be learned from the ways in which comparative foreign jurisdictions such as Australia and Canada have addressed the balance between the extensive audit and information-gathering powers granted to the revenue authority and adequate protection of taxpayers' rights. Revenue authorities in these jurisdictions have had many years in which to develop and refine their fiscal policies and institutions, as well as reviewing, evaluating, and adjusting their strategies over time.

SARS and the National Treasury recognise that the growing tax collections deficit of the last few years cannot be attributed to economic contraction alone. In pursuing a more modern tax administration built on trust and voluntary compliance, SARS must simultaneously pursue the "soft changes" that promote voluntary compliance, including a

refined approach to auditing and gathering information that places sufficient emphasis on the protection of taxpayers' rights.

A set of specific recommendations for the implementation of these changes, in the context of protecting the right to finality, is set out below.

7.1 Recommendation 1: The adoption of a more nuanced and streamlined approach to auditing and information-gathering

SARS needs to become more responsive in recognizing the ways in which the exercise of its audit and information-gathering powers may prejudice taxpayers, particularly, by breaching the right to finality.

The systemic issues identified and reported on by the OTO in recent years⁸⁵² and several recent judgments⁸⁵³ indicate that abuses of SARS' audit and information-gathering powers happen all too frequently in practice. Moreover, this information indicates that disputes are rarely resolved without taxpayers having recourse to the courts, which, in turn, involves a significant cost to both taxpayers and SARS, and places an unnecessary burden on the already strained resources of the South African judicial system.

The right to finality is important for the establishment of procedural fairness in the context of the administrative system overall, ensuring that taxpayers pay their fair share of tax but at the same time, are not subjected to untenable levels of legal and commercial uncertainty in respect of their tax affairs. The preceding chapters set out in detail how finality is likely to inform and enhance tax morale and voluntary compliance.

SARS could engage in several processes in order to improve responsiveness, flexibility, and fairness in this area of tax administration. Some specific recommendations sourced

⁸⁵² Op cit note 640, 642, and 644.

⁸⁵³ *Supra* note 574, 509, and 249.

from the international standards of best practice collated in the preceding chapters are listed below.

7.1.1 Moving away from randomized approaches to audit and risk detection

SARS' current policy of applying a randomized approach to risk assessments and enforcing compliance in a unilaterally heavy-handed manner in the context of audit and information-gathering is likely to exacerbate taxpayers' perception of the tax system as arbitrary, indiscriminate, and unfair.

While SARS' historic position appears to be that an aggressive approach towards detecting and punishing non-compliance is necessary to discourage tax avoidance and evasion, more recent data and experience from comparative jurisdictions shows that an undifferentiated approach to tax administration (particularly in the context of audit and information-gathering)⁸⁵⁴ is overwhelmingly likely to produce steadily diminishing returns, as taxpayers perceive the system to be unfair regardless of their individual compliance efforts, and become less engaged and more resistant to the tax system.

In these circumstances, SARS is forced to spend an ever-increasing proportion of its human and financial resources on detection and enforcement, which is likely to generate steadily diminishing returns over time. Improving SARS' approach to risk assessment to provide for a less random and more deliberate process, and involving taxpayers in this process where appropriate, will reduce the likelihood of economically inefficient and procedurally unfair audit selection and information-gathering processes, like fishing expeditions. Although short-term financial windfalls may seem attractive at an operational level, the long-term consequences of circumventing the right to finality (and engaging in audit and information-gathering processes in other ways that are unfair and unreasonable)

⁸⁵⁴ Op cit note 47.

should not be underestimated, especially since the effects of a “tax gap” are already being noticed and quantified in the South African context.

The positive outcomes of the adoption of a more targeted and nuanced approach to risk detection can be seen from the practical experiences of comparative jurisdictions, and the use of technology to facilitate these processes also provides a useful starting point for SARS to begin implementing a similar system in more efficient and cost-effective manner which requires fewer specialised personnel to operate.

7.1.2 Implementing a nuanced, proportional, and service-oriented approach in audit and information-gathering

SARS should aim to mirror the service-oriented, collaborative approaches taken by the ATO and CRA in the context of audit and information-gathering powers. The ATO (supported by the evidence from IGT reviews) applies this approach on the basis that informal and co-operative information gathering processes produce the best and most cost-efficient results for both the revenue authority and the taxpayer.

Evidence from Australia and current research into tax morale indicates that a less formal and more collaborative approach to auditing is likely to positively influence compliance, whereas heavy-handed authoritarian approaches are likely to produce limited results in terms of compliance, and may even damage tax morale and encourage resistance.

Some specific recommendations that can be distilled from Australian and Canadian practice in this regard include: providing reasons for the decision to request information from taxpayers,⁸⁵⁵ conducting audits and gathering information only where there is a specific risk hypothesis in place,⁸⁵⁶ and informing taxpayers openly as to the reasons why

⁸⁵⁵ Op cit note 719 at page 8.

⁸⁵⁶ Op cit note 719 at page 8.

specific categories of information are being requested.⁸⁵⁷ SARS has indicated an intention to adopt a similar framework to the compliance model adopted by the ATO in the 2021 Strategic Report.⁸⁵⁸ This model recognizes specific compliance attitudes amongst taxpayers (ranging from habitually compliant to habitually non-compliant) and prescribes appropriate and proportional enforcement responses across all areas of tax administration.

It is submitted that a more co-operative and collaborative approach such as that adopted by the ATO would greatly assist SARS in the exercise of its functions and duties, as compliant taxpayers who are willing to informally submit information and work together with SARS to resolve risk concerns would alleviate much of the current administrative burden placed on SARS officials. Most taxpayers (particularly corporate taxpayers) are willing to go to extraordinary lengths and spare no cost to ensure that they and their businesses are tax compliant. The TAA and the Companies Act also place significant duties on corporate executives to be compliant with their obligations under tax legislation. A clear statement of understanding from SARS in this regard, as well as a statement of intention to work with taxpayers, would go a long way to restoring taxpayers' faith in the system.

Most importantly, a nuanced approach would address most, if not all circumstances in which the right to finality is negatively impacted in the context of audit and information-gathering. The implementation of a system in which both risk detection and the information-gathering process are informed by factors such as the taxpayer's conduct, principles of fairness and reasonableness, and an understanding of the overall impact of SARS' audit and information-gathering actions on the procedural fairness of the tax system would likely result in SARS only auditing historical "prescribed" years of assessment where it is absolutely necessary to do so.

⁸⁵⁷ *Ibid* at page 9.

⁸⁵⁸ Op cit note 623.

A proportional approach is also likely to reduce instances where SARS requests unnecessary volumes of information – since most taxpayers are compliant and seek to achieve compliance, the implementation of a more co-operative and collaborative information-gathering process would facilitate more proactive participation by taxpayers, alleviating much of the burden imposed on both taxpayers and SARS through the implementation of a unilaterally harsh and punitive system.

Finally, as suggested in the 2021 Strategic Plan,⁸⁵⁹ SARS should also make use of data analytics to further streamline the audit and information-gathering process by determining which types of requests and which classes of data yield the most effective results (both in terms of the quality of the data obtained by SARS, how well this data matches to and resolves the query, and how quickly taxpayers can provide this information).

This will assist in eliminating inefficient and unproductive exercises of SARS' audit and information-gathering powers, and will also assist in eliminating unlawful fishing expeditions. An analytical review of SARS' internal data on section 42 and 46 notifications and requests and the responses made by taxpayers could show patterns, particularly regarding which types of information and which formats produce the best and fastest results for SARS. In this way, SARS officials can issue more streamlined requests for relevant material and reduce their own administrative burden seeking less valuable and less relevant information only if primary information sources do not satisfactorily resolve the query or resolve the risk which has been identified.

7.1.3 Improved focus on education for taxpayers and SARS officials

The above initiatives will need to be implemented in a number of practical ways. This would include the revision of internal SARS policies to reflect SARS' new and enhanced policy

⁸⁵⁹ Op cit note 623.

directives, the provision of comprehensive training to SARS officials on their responsibilities and objectives, and including these new objectives in the KPIs of individual SARS officials, to ensure that SARS officials are incentivised to understand and apply their audit and information-gathering powers within the new policy framework.

Currently, there is very little information available to South African taxpayers or SARS officials regarding taxpayers' rights and how these rights should influence tax administration and interactions between taxpayers and SARS. This is particularly concerning in the context of audit and information-gathering.

There is often a material disconnect between the statements that are published by SARS at an executive level, and the experiences of taxpayers in practice, dealing with SARS officials at the operational level. This suggests that the broader policy goals being embraced by leadership are not filtering down to the persons tasked with implementing those policies.

In line with the Canadian Taxpayer's Ombudsman recommendations, SARS should ensure that taxpayers' rights are clearly established and communicated to all revenue officials at all levels of the organisation, and moreover, that these values are comprehensively and consistently embedded in its operational policies at all levels, and that a similar emphasis is placed on taxpayer education, so that all taxpayers are aware of their rights and how to enforce them in interactions with SARS.

SARS employees should be given general and specific training in taxpayers' rights and how these rights should influence the exercise of SARS' administrative powers. Individual employee performance, team performance, and overall organisational performance should be measured against, *inter alia*, adherence to these policies. The concept of a more

service-oriented and less adversarial approach (particularly to audit and information-gathering) should be integrated into SARS' organisational culture.

SARS should ensure that it regularly benchmarks its annual performance in terms of compliance with the requirements of the taxpayers' bill of rights against a set of measurable goals. Aside from the necessary accountability and transparency this provides, a regular assessment of SARS' progress in reforming its institutional approach towards tax administration will also help SARS to identify where it needs to improve, and where resources need to be focused. This information should be made available to the government, the OTO, and the general public.

By educating and empowering SARS officials with guidelines that facilitate the fair and lawful application of their powers in a manner that promotes precision at an early stage of the audit and information-gathering process, the review of taxpayer disclosures and assessments becomes a co-operative exercise in which honest taxpayers assist revenue officials in the exercise of their duties by volunteering the information required to address the identified risks or areas of concern.

Where such an approach is inappropriate, SARS can fall back on the full extent of its audit and information-gathering powers, compelling compliance where necessary. This additional level of procedural fairness is likely to encourage taxpayers to take responsibility for their tax affairs and to participate in review and information-gathering processes with SARS, instead of in opposition to SARS.

While SARS may be reluctant to open the floodgates for potential administrative justice-related complaints, it is important to bear in mind that the principles of flexibility and variability apply in the context of fairness. Taxpayers would not always be entitled to administrative justice-oriented protections, and taxpayers' rights could be explained with

the necessary precision and made available on SARS' website (as well as through various public media campaigns which are already available and utilized by SARS, e.g. radio and television advertisements, billboards, print and online media advertisements) to prevent misunderstandings, while giving taxpayers a clear indication of what their rights are, and how these rights can be enforced.

The provision of clear, enforceable, internal guidelines against which SARS officials can be measured for compliance (in line with other key performance indicators) would similarly assist in ensuring that SARS is not caught up in unnecessary disputes with taxpayers due to the misuse of SARS' audit and information-gathering powers. SARS officials are currently not properly equipped, at an operational level, to exercise their powers in a nuanced, fair and reasonable manner, and this gap in internal guidelines no doubt gives rise to a significant number of the instances where SARS misapplies its audit and information-gathering powers in practice.

It is crucial that SARS ensures that the individuals responsible for carrying out SARS' audit and information-gathering functions are properly supported through the provision of comprehensive guidance, supervision, and measurable goals and targets to incentivise adherence to these standards. The publication of these internal standards on SARS' website, in a format which is accessible to taxpayers and tax practitioners, may also prove useful in fostering a sense of public trust and accountability, as has been demonstrated in jurisdictions like Australia.

7.2 Recommendation 2: A comprehensive Taxpayers' Bill of Rights

In South Africa, the OTO has repeatedly called for the enactment of a taxpayers' bill of rights.⁸⁶⁰ SARS and government should publish a comprehensive taxpayer's bill of rights,

⁸⁶⁰ Op cit note 642 at page 18; note 640 at page 12.

aligned as closely as possible to the Australian model, which sets out taxpayers' rights and obligations in respect of each point of interaction with the revenue authority.

The purpose of this taxpayers' bill of rights is to codify the rights and responsibilities of SARS and taxpayers in respect of all administrative interactions (including, but not limited to, the audit and information-gathering process) in accordance with a set of principles that informs and governs the lawful conduct of both parties, so that the proper protection of taxpayers' rights and promotion of voluntary compliance and tax morale can be monitored and continuously improved upon, both internally (by SARS) and externally (by an independent oversight body similar to the Australian IGT).

Accordingly, the principles contained in this document must include standards of conduct against which SARS can be measured and evaluated in its interactions with individual taxpayers, as well as the standards against which taxpayers' conduct is measured, giving taxpayers a great deal of certainty as to what they can expect in their interactions SARS, as well as the consequences of their own actions (both positive and negative) and the impact of their behaviour and compliance history on the experience of interacting with SARS.

The bill of rights should, therefore, explicitly include a section on taxpayers' rights in the context of SARS' audit and information-gathering powers. While the SARS Service Charter⁸⁶¹ addresses some of these issues, a taxpayer bill of rights should go further than setting out aspirational service timelines and broad expectations (as contained in the Service Charter), by including step-by-step details of, *inter alia*, how the audit and information-gathering process is executed, the purpose of the process and its constituent

⁸⁶¹ Op cit note 601.

steps, what SARS looks for and expects from taxpayers in during and as a result of this process, and what taxpayers may expect from SARS in return.

This provides an opportunity for SARS to entrench the spectrum of compliance behaviours which it intends to adopt in relation to enforcement and compliance within its own organisational values and within the tax base, such that taxpayers clearly understand the benefits and rewards of making a sincere effort to comply with their obligations, and so that SARS officials clearly understand how to apply these values in their own decision-making processes so that these risks and rewards carry through consistently in taxpayer interactions.

Taxpayers should accordingly have the right to understand why they have been selected for an audit (or why they have been requested to provide information to SARS). Practically, this will require SARS officials to conduct a proper risk analysis and to present a risk hypothesis before initiating an audit, unless this would prejudice the collection of accurate information. In addition, in appropriate circumstances (i.e. where it would not prejudice the audit or information-gathering process) taxpayers should have the right to request and receive reasons for SARS' decision to initiate an audit.

Aside from enhancing procedural fairness for taxpayers, the right to be informed acts as an additional incentive (over and above the implementation of internal policies, training, and performance measurements) for SARS officials to conduct a proper risk assessment and establish a risk hypothesis prior to commencing an audit or information-gathering process. This maximises the efficiency of SARS' operations, preventing resources from being wasted on frivolous investigations, largely eliminating the need for taxpayers to approach the courts and to engage SARS in costly litigation,⁸⁶² and enhancing voluntary

⁸⁶² For example, the *Carte Blanche Marketing* litigation (*supra* note 281 and note 449), which spanned more than three years and involved two separate court hearings.

compliance by providing for a fair and transparent audit process in which taxpayers can understand why they have been selected for audit, even if they do not agree.

Although the adoption of a more streamlined and nuanced basis for auditing and information-gathering would primarily be developed and contained in SARS' internal policy documents and operational manuals (set out under Recommendation 1 above), the principles informing and governing the new approach should also be codified in the bill of rights as far as possible, in a way that clearly explains the basis for and guiding principles of the system, and how it will function in practice.

This codification will serve to empower and educate taxpayers, but more importantly, it will serve as a basis for the internal and external, independent, evaluation of how effectively SARS respects and promotes taxpayer rights in the context of the audit and information-gathering process. The OTO already gathers a substantial body of information from the processing of taxpayer complaints, which an independent policy oversight body could use to evaluate SARS' conduct and make binding recommendations to improve this aspect of tax administration from a service and voluntary compliance perspective.

Taxpayers should be able to understand what the factors informing audit and verification selection are, and how those factors determine the manner in which SARS engages with taxpayers (i.e. the level of scrutiny a taxpayer will experience, the expected administrative burden, and the degree of trust and collaboration with which SARS will approach the audit or information-gathering process).

A clear statement of the principles underlying this new, more nuanced approach to audit and information gathering will reinforce the concept of a procedurally fair and objective system underlying the exercise of SARS' audit and information-gathering powers, and will

also legitimize the more aggressive use of SARS' powers in appropriate circumstances, acting as an effective deterrent against noncompliance.

Another aspect that should be specifically addressed in the bill of rights is the proper interaction between SARS' audit and information-gathering powers with the right to finality. While greater transparency in respect of the audit and information-gathering process and the basis for selection for audit will assist in preventing "fishing expeditions", on the basis of the conclusions set out in previous chapters, SARS should also undertake to limit the audit of older historical periods to instances where there is a sound and reasonable basis for believing that section 92 read with section 99(2) of the TAA will permit (or require) an additional assessment. Although the treatment of historical periods is an aspect that needs to be addressed in SARS' internal policy and practice, the inclusion of the principles informing the exercise of SARS' audit and information-gathering powers in this context will enhance the internal and external monitoring of how these processes impact on the right to finality.

The bill of rights should also set out clearly what taxpayer's obligations are, in a way that guides record-retention and motivates proactive responses to SARS requests. Providing taxpayers with guidance on the frequency and intensity of audit and information-gathering processes (in line with the spectrum of behaviour model being implemented) and the types of information SARS will generally seek when engaging in the process of reviewing and verifying tax returns empowers taxpayers to be more proactive and selective in their record-keeping and in their responses to SARS' queries. If taxpayers understand the value and purpose of certain categories of information to SARS, they are more likely to be responsive to a request for relevant material. Similarly, although SARS officials would not face any absolute limitations on the volume and categories of information which may be

requested, a framework is provided for more nuanced, targeted and efficient information requests.

The provision of a comprehensive and clear statement of the public framework governing tax administration and the interface between taxpayers and SARS will enhance transparency and accountability (as it has in other jurisdictions).⁸⁶³ This also provides a sound basis for enhancing taxpayer education, as the bill of rights can be made available in multiple (electronic and print) formats, and distributed widely.

As international experience demonstrates,⁸⁶⁴ it is not enough to simply publish a taxpayer's charter or bill of rights. Proper implementation and adoption by the revenue authority at all levels of operation is key. Arguments have been made by international commentators that legislative entrenchment is necessary for a taxpayer bill of rights to provide meaningful protection.⁸⁶⁵ However, the IGT (and certain commentators) have concluded that a legislatively entrenched taxpayer bill of rights would be unlikely to address most stakeholder concerns regarding successful implementation. In the South African context, the cost and time involved in accessing the courts entrenches this concern.

A better approach, particularly in the South African context, would arguably be to monitor and encourage the adoption of the bill of rights by SARS through the introduction of specific policy obligations paired with independent oversight and accountability mechanisms, ensuring that the revenue authority's compliance with the taxpayer bill of rights or charter is not just encouraged, but measured and evaluated.⁸⁶⁶ A review of Australian research suggests that embedding the values contained in a non-legislated taxpayer bill of rights in the organizational values of the revenue authority supports a more stable collaborative

⁸⁶³ *Op cit* note 710.

⁸⁶⁴ *Op cit* note 692.

⁸⁶⁵ *Op cit* note 777 at pages 21 and 23, and note 722.

⁸⁶⁶ *Op cit* note 722 at page (v) and note 783.

relationship with the tax base.⁸⁶⁷ Reviews conducted by the Canadian Taxpayer's Ombudsman⁸⁶⁸ confirm this approach.

This will likely require a number of changes within SARS, on an internal policy level, including the education and training of SARS officials in compliance with the bill of rights principles and its impact on operations and day-to-day practices, the provision of comprehensive guidelines and reference materials to SARS officials to assist them in complying with bill of rights principles (which should be made available to the public to the extent possible), and the variation or introduction of new key performance indicators and individual employee performance metrics to ensure that SARS officials are duly incentivised to comply with and buy into the bill of rights, and sanctioned appropriately for non-compliance. In addition to internal monitoring and evaluation, external monitoring and evaluation is needed.

It is essential that SARS takes the necessary steps to educate taxpayers and SARS officials about the content of these rights, and how they should be applied in practice. SARS will also need to update internal policies and employee responsibilities to reflect the new approach to taxpayers' rights, and provide comprehensive training and guidelines to employees, so that SARS officials are empowered to exercise their powers within the new framework. As set out above, incentivisation for the adoption of the new approach into the organisational culture is crucial, and can be achieved by a combination of education and measurement of the implementation of these principles in practice against the KPIs of individual employees, teams, and divisions within SARS.⁸⁶⁹

⁸⁶⁷ Op cit note 783.

⁸⁶⁸ Op cit note 836.

⁸⁶⁹ Op cit note 710 at page 37.

In the specific context of the interaction between the right to finality and the exercise of SARS' audit and information-gathering powers, clear guidelines would need to be provided to SARS officials in terms of the need to first conduct a risk evaluation and formulate a risk hypothesis and how to communicate with taxpayers throughout this process, on the basis of the taxpayer's historical compliance behaviours and track record.

Most importantly, a clear internal policy regarding the auditing of historical years of assessment would need to be established, with SARS officials being made aware of the potential challenges and unfairness inherent in historical audits and being encouraged to avoid auditing or requesting information outside of the limitation period contemplated in the TAA unless there is a real possibility that SARS or the *fiscus* has been prejudiced as a result of an incorrect or inaccurate submission. This should involve (at a minimum) an internal policy discouraging historical audits unless a reasonable risk of historical noncompliance has been established (with reference to evidence and objective observations), as well as internal emphasis on the establishment of an audit scope, for historical audits, which demonstrates the objectivity and genuineness of the risk analysis. SARS should also promote an overall approach towards taxpayer interaction in the context of historical audits and information-gathering processes which demonstrates (to the taxpayer, and, objectively) an appropriate sensitivity to the potential negative impact of these kinds of audits and which promotes, as far as reasonably possible, a sensitive and collaborative approach to the entire process which emphasises procedural fairness at every stage.

7.3 **Recommendation 3: Creating an Inspector-General for Taxation**

The Nugent Commission has recommended the establishment of an Inspector-General for Tax, as an oversight body monitoring the implementation of internal and external policies

by SARS.⁸⁷⁰ This would also address the current lack of oversight and accountability within SARS that the DTC and the Nugent Commission have identified as being potentially problematic in the long term.⁸⁷¹

A fully independent organisation like the proposed office of the Inspector-General should be established in South Africa, to carry out independent reviews of SARS' success in adhering to the obligations imposed upon it by the proposed taxpayers' bill of rights, and other aspects of tax administration policy oversight and accountability. Monitoring and oversight by an Inspector-General (or similar independent body) is necessary in order to achieve the Commissioner's goals of restoring public trust and confidence in SARS, and promoting voluntary compliance, by ensuring that SARS implements policy correctly and effectively, in line with national policy structures and its own internal policy imperatives.

The governance failures experienced at SARS in recent years have seriously damaged public trust in the organisation, and the tax system as a whole. In line with the findings of various commissions formed both before and after these events, the establishment of an Inspector-General is likely to provide not only a valuable practical buffer against similar instances of corruption and mismanagement in the future (by enhancing transparency and accountability and holding SARS to account for the way in which various policies are implemented) but an important public perception of legitimacy and accountability, in circumstances where trust in SARS and in the overall administration needs to be restored.

The appointment of an Inspector-General is also arguably critical for the proper implementation of revised audit and information-gathering strategy, and the proposed taxpayers bill of rights. The Canadian administration is a good example of how important it is for a taxpayers' bill of rights to be fully implemented and adopted by the revenue

⁸⁷⁰ Op cit note 666 at page 189 – 190.

⁸⁷¹ Op cit note 666 and note 673.

authority in order for it to have the intended effect. Australia's IGT is similarly an informative example of how effective this kind of institution can be in creating a transparent, accountable, synergistic tax administration.⁸⁷²

It is very difficult for any institution, public or private, to successfully modernize and overhaul its functions and cultural environment without a clear set of goals, the metrics against which these goals are to be evaluated, and a timeline within which that evaluation should occur. While the latest SARS Strategic Plan⁸⁷³ contains all of these things, an external evaluation and ongoing monitoring by an institution like an Inspector-General would be most efficient in driving lasting positive change and promoting good governance within SARS.

Specific powers granted to the Inspector-General should include, but not be limited to the following:

- (a) the power to conduct an annual or bi-annual tax policy review for purposes of evaluating SARS' implementation of tax policy from an internal perspective (how effectively internal policies directed at improving tax administration are being implemented and adhered to by SARS officials, across all levels) and an external perspective (reviewing and evaluating how taxpayers experience the implementation of tax policy, as communicated in SARS' official publications, by SARS);
- (b) the power to meet with key OTO representatives on an annual basis to review the systemic issues identified by the OTO and the outcomes of OTO taxpayer surveys, and to review and consider the OTO's non-binding recommendations and proposals in this regard (for. *Inter alia*, the purpose of potentially upgrading the OTO's

⁸⁷² Op cit notes 724, 777 and 783.

⁸⁷³ Op cit note 623.

recommendations to binding recommendations issued by the Inspector-General to SARS);

- (c) the power to formulate policy-based recommendations which are binding on SARS and the Commissioner, based on the outcome of the abovementioned reviews, in respect of the unsatisfactory implementation of tax administration policy or unsatisfactory resolution of taxpayer complaints, and which must be implemented within a specific period of time with reference to specific, measurable outcomes;
- (d) (d) the power to call the Commissioner (or a suitable representative or group of representatives who are senior SARS executives) to quarterly, bi-annual, or annual progress meetings to discuss and evaluate the status and timeline of the implementation of the Inspector-General's binding recommendations or other policy implementation or revision objectives;
- (e) (e) the power to publish reports which will be made freely available to the public, in respect of the Inspector-General's recommendations and the status of implementation of those recommendations by SARS; and the use of these reports to identify and recommend potential legislative changes to National Treasury and/or to Parliament for purposes of improving tax administration and policy implementation.

In the context of audit and information-gathering and the effect of these powers on the right to finality, the Inspector-General would be able to make binding recommendations detailing how SARS should exercise its powers to avoid violating the right to finality, and also monitor (with reference to SARS' internal policies, guidelines and employee performance reviews, and external feedback consolidated from taxpayer experiences) how effectively those recommendations are being implemented.

7.4 Conclusion

As demonstrated by the lack of certain and enforceable remedies and the insufficiency of checks and balances on the exercise of SARS' audit and information-gathering powers, there is currently inadequate emphasis on the protection and implementation of taxpayers' rights in South African tax administration. The improper exercise of SARS' audit and information-gathering powers has a number of systemic aspects, and has the capacity to violate taxpayers' rights, including the right to finality.

As predicted by research and international experience, the result of this state of affairs is a serious and significant decline in national tax morality and voluntary compliance. It is submitted that instead of taking an increasingly authoritarian approach which alienates the tax base and, arguably, encourages defensive tax planning and strategy, SARS should co-opt taxpayers and develop a more co-operative and collaborative tax administration.

The enforcement of taxpayers' rights through the benchmarking of SARS' performance against its compliance with a taxpayers' charter or bill of rights would be an appropriate mechanism to begin with, particularly where this is implemented through requirements for the revenue authority to introduce compliance with the taxpayers' charter or bill of rights as a key performance indicator for internal staff evaluation (this model has been adopted by the IRS in the United States with some success).

While taxpayers may nonetheless perceive yet another internal mechanism in which SARS evaluates taxpayer complaints against its own performance with justifiable cynicism, it is submitted that public scrutiny in the form of internal and externally generated annual reports will be of assistance in obtaining public buy-in and restoring trust, as well as monitoring the implementation of these new policies within SARS. The creation of an Inspector-General for tax would further aid the accountability, transparency and legitimacy

of this project, in terms of the external and objective scrutiny which an IGT would be able to provide to both SARS, Parliament, and the public.

Ultimately, the experience of comparative (and more developed) tax administrations indicates that the success of such an approach will be largely determined by the degree of ownership and enthusiasm with which SARS and the government approach and address the abovementioned concerns, over time. The right to finality is an important aspect of the rule of law, and of the commercial and legal certainty necessary to facilitate trade and economic growth. The commercial uncertainty created by SARS' current administrative practices is having a demonstrably adverse effect on tax morale and voluntary compliance.

If South Africa can take note of, and implement the successes of its peers in addressing the attrition of voluntary compliance, there is no doubt that SARS can eventually be restored to its former position as a respected and trusted public institution which is globally admired for its efficiency and integrity.

BIBLIOGRAPHY

Primary Sources

Constitution

Constitution of the Republic of South Africa, 1996.

Statutes

South African:

Companies Act 71 of 2008.

Competition Act 89 of 1998.

Customs and Excise Act 91 of 1964.

Income Tax Act 58 of 1962.

National Road Traffic Act 93 of 1996

Promotion of Access to Information Act 2 of 2000

Promotion of Administrative Justice Act 3 of 2000.

Public Finance Management Act 1 of 1999.

Public Protector Act 23 of 1994.

South African Revenue Service Act 34 of 1997.

Tax Administration Act 28 of 2011.

Tax Administration Laws Amendment Act 24 of 2020.

Value Added Tax Act 14 of 2002.

Australian:

The Constitution of the Commonwealth of Australia

Financial Management and Accountability Act, 1997
Income Tax Assessment Act 1936

Inspector General of Taxation Act 2003

Taxation Administration Act 1953

Canadian:

Income Tax Act R.S.C., 1985, c. 1 (5th Supp.).

Regulations

GN 725 GG 22549 of 10 August 2001

GN 788 GG 35733 of 1 October 2012.

GN 17 GG 41652 of 24 May 2018.

GN 396 GG 41772 of 13 July 2018.

Order in Council P.C. 2020-703 (30 September 2020) available at
<https://www.canada.ca/content/dam/cra-arc/2020-703-en.pdf>.

Cases

South African:

AAA Investments (Pty) Ltd v Micro Finance Regulatory Council 2007 (1) SA 343 (CC).

ABC (Pty) Limited (in liquidation) v Commissioner for the South African Revenue Service

Case number IT12951 / VAT855 in the Tax Court of South Africa held at Durban.

Ackermans Limited v Commissioner for the South African Revenue Service 77 SATC 191.

Ackermans Limited v Commissioner for the South African Revenue Service (16408/2013) [2015] ZAGPPHC 684 (23 September 2015).

Albutt v Centre for the Study of Violence and Reconciliation 2010 (3) SA 293 (CC).

A Way to Explore v Commissioner for South African Revenue Service (23896/17) [2017] ZAGPPHC 541 (23 August 2017)

Bernstein v Bester NO 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC).

Bestbier v Chief Magistrate, Stellenbosch [2006] 2 All SA 598 (C).

Botha v Matjhabeng Municipality [2010] ZAFSHC 18.

Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry 2010 (5) SA 457 (SCA).

Carlson Investments Share Block (Pty) Limited v Commissioner for the South African Revenue Services 63 SATC 295.

Carte Blanche Marketing CC and Others v Commissioner for the South African Revenue Service (26244/2015) [2017] ZAGPPHC 253.

Carte Blanche Marketing CC and Others v Commissioner for the South African Revenue Service 2020 (6) SA 463 (GJ).

Chairman: Board on Tariffs and Trade and others v Brenco Incorporated and others 2001 (4) SA 511 (SCA)

Commissioner for the South African Revenue Services v Brown [2016] ZAECPEHC 17 (5 May 2016).

Commissioner for the South African Revenue Service v Brummeria Renaissance (Pty) Ltd and Others 69 SATC 205.

Commissioner for the South African Revenue Service v Pretoria East Motors (Pty) Ltd [2014] 3 All SA 266 (SCA).

Commissioner of the South African Revenue Service v Public Protector and Others (84074/19) [2020] ZAGPPHC 33 (23 March 2020)

Commissioner for the South African Revenue Service v Van Dijk 64 SATC 7.

Commissioner of Inland Revenue v Hilewitz 1998 SATC 86.

Competition Commission v Computicket (Pty) Ltd [2015] 1 CPLR 15 (SCA).

Competition Commission of SA v Telkom SA Ltd [2010] 2 All SA 433 (SCA).

Competition Commission v Yara (SA) (Pty) Ltd and Others 2013 (6) SA 404 (SCA).

Corpco 2290 CC t/a U-Care v Registrar of Banks [2012] ZASCA 156.

Daniel v President of the Republic of South Africa and Another 2013 (11) BCLR 1241 (CC).

Eastern Metropolitan Sub-structure v Pieter Kleyn Investments (Pty) Ltd 2001 1 All SA 187 (W); 2001 4 BCLR 344 (W); 2001 4 SA 661 (W).

Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC).

First South African Holdings (Pty) Ltd v Commissioner for South African Revenue Service 73 SATC 221.

Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng 2013 (5) SA 24 (SCA).

Glenister v President of the Republic of South Africa 2009 (1) SA 287 (CC).

Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works 2005 6 SA 313 (SCA)

Huisman v Minister of Local Government, Housing and Works 1996 (1) SA 836 (SCA)

ITC 1637 60 SATC 413.

IT13726 (as yet unreported). Also cited as *Mr. A v The Commissioner for the South African Revenue Service* (Case No. IT13726).

Jeeva v Receiver of Revenue, Port Elizabeth 1995 (2) SA 433 (SE).

Joseph v City of Johannesburg 2010 3 BCLR 212 (CC); 2010 4 SA 55 (CC).

Khumalo v Member of the Executive Council for Education: KwaZulu Natal [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR (CC).

Masetlha v President of the Republic of South Africa and another 2008 (1) SA 566 (CC).

Mashongwa v Passenger Rail Agency of South Africa 2016 (3) SA 528 (CC).

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

Merafong City Local Municipality v AngloGold Ashanti Limited [2016] ZACC 35; 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC).

Merafong Demarcation Forum v President of the Republic of South Africa 2008 (5) SA 171 (CC).

Miller v Commissioner for Inland Revenue (SWA) 1952 (1) SA 474 (A).

Minister of Health v New Clicks South Africa (Pty) Ltd 2006 (2) SA 311 (CC).

Minister of Home Affairs vs National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others 2005(3) SA 280(CC).

Molaudzi v S 2015 (2) SACR 341 (CC).

Mr A v Commissioner For The South African Revenue Service (IT13726) [2018] ZATC 8.

Natal Estates Limited v Secretary for Inland Revenue 1975 4 All SA 375 (A).

Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] 2 All SA 262 (SCA).

Nel v Le Roux NO 1996 (3) SA 562 (CC).

Nondabula v Commissioner: SARS and Another 2018 (3) SA 541 (ECM).

Norvatis (sic) SA (Pty) Ltd and others v The Competition Commission and others (unreported) Case number CT22/CR/B/Jun 01, subsequently cited as *Novartis SA (Pty) Ltd v Main Street 2* [2001-2002] CPLR 470.

Oosthuizen's Transport (Pty) Ltd and Others v MEC, Road Traffic Matters, Mpumalanga 2008 (2) SA 570 (T).

Peolwane Properties (Pty) Ltd v Commissioner for the South African Revenue Service case no. 34483/2013, unreported.

Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC).

Poverty Alleviation Network v President of the Republic of South Africa 2010 (6) BCLR 520 (CC).

President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1 (CC).

Rappa Resources (Pty) Ltd v Commissioner for the South African Revenue Service (20/18875) [2020] ZAGPPHC (5 November 2020) (unreported judgment).

- Ritchie v Government of the Northern Cape Province* 2004 (2) SA 584 (NC).
- Road Traffic Management Corporation v Waymark* 2019 (5) SA 29 (CC).
- Shell's Annandale Farm (Pty) Ltd v Commissioner for the South African Revenue Service* (2000) 62 SATC 97.
- Simelane and others NNO v Seven-Eleven Corporation SA (Pty) Ltd and another* [2003] 1 All SA 82 (SCA),
- SIR v Trow* 1981 (4) SA 821 (A).
- Sokhela v MEC for Agriculture & Environmental Affairs (KZN)* 2009 JOL 23782 (KZP).
- South African Association of Personal Injury Lawyers v Heath* 2001 (1) BCLR 77 (CC).
- South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA).
- South Atlantic Jazz Festival (Pty) Ltd v Commissioner for the South African Revenue Service* [2015] ZAWCHC 8.
- Steenkamp N O V Provincial Tender Board, Eastern Cape* 2007 (3) 121 (CC).
- Telematrix (Pty) Ltd v Advertising Standards Authority SA* (2006) 1 All SA 6 (SCA).
- Transnet Limited and Others vs Chirwa* 2007 (1) ALL SA 184 (SCA).
- Transnet Limited v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA).
- Commissioner for the South African Revenue Service v Trend Finance (Pty) Ltd* 2007 (6) SA 117 (SCA).
- Van der Merwe and others v Slabbert NO and others* 1998 (3) SA 613 (N).
- Van Wyk NO and Another v Van Der Merwe* 1957 (1) SA 181 (A).
- Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* 2011 (1) SA 327 (CC).
- Wessels v Minister for Justice and Constitutional Development* 2010 (1) SA 128 GNP.
- Wingate-Pearse v C:SARS* 2019 (6) SA 196 (GJ).

Foreign Case Law**Australia:**

Attwells v Jackson Lalic Lawyers (Pty) Ltd (2016) 331 ALR 1.

Australia and New Zealand Banking Group Limited v Konza [2012] FCA 196.

Kirk v Industrial Court of NSW (2010) 239 CLR 531.

Re Taxpayer and FCT (2005) 59 ATR 1178.

Weyers & Ors v FCT (2006) 63 ATR 268.

Canada:

Amtim Capital Inc v Appliance Recycling Centres of America 2014 ONCA 62.

eBay Canada Limited and eBay CS Vancouver Inc 2007 FC 930 and 2008 FC 180;
aff'd 2008 FCA

James Richardson & Sons, Limited v. MNR 84 DTC 6325 (SCC).

MNR v. Greater Montréal Real Estate Board 2007 FCA 346.

MNR v. Sand Exploration Limited 95 DTC 5358 (FCTD).

Redeemer Foundation v. MNR 2008 SCC 48.

United Kingdom

In Re: Pergamon Press Ltd [1970] 3 ALL ER 535 (CA)

Secondary Sources**Books:**

Y Burns & M Beukes *Administrative Law under the 1996 Constitution* 3 ed (2006)
LexisNexis Butterworths, Durban.

B Croome & L Olivier *Tax Administration* 2ed (2010) Juta & Co. Ltd, First Floor Sunclare Building, 21 Dreyer Street, Claremont South Africa.

Brian A. Garner, ed., *Black's Law Dictionary*, 9th ed. (St. Paul, MN: Thomson West, 1999)

Hoexter C *Administrative Law in South Africa* 2ed (2011) Juta & Co. Ltd, First Floor Sunclare Building, 21 Dreyer Street, Claremont South Africa.

Loots, Cheryl 'Standing, Ripeness and Mootness' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS, February 2005) Chapter 7.

Schmölders, Günter. *Das Irrationale in der öffentlichen Finanzwirtschaft*, Suhrkamp, 1960.

Reference Works:

d'Oliveira, J A 'Administrative Justice' in J A Faris (ed) *The Law of South Africa* vol 2 3ed (2015).

Journal Articles:

Alm, James, Erich Kirchler, & Stephan Muehlbacher 'Combining psychology and economics in the analysis of compliance: From enforcement to cooperation' (2012) 42(2) *Economic Analysis and Policy* 133.

Alm, James, Isabel Sanchez, & Ana De Juan 'Economic and Non-Economic Factors in Tax Compliance' (1995) 48 *Kyklos*.

Alm, James & Beno Torgler, 'Do Ethics Matter? Tax Compliance and Morality' (2011) 101(4) *Journal of Business Ethics* 635.

Andreoni, James, Brian Erard & Jonathan Feinstein, 'Tax Compliance' (1998) 36 *Journal of Economic Literature* 818.

Barone, Guglielmo & Sauro Mocetti 'Tax morale and public spending inefficiency' (2011) 18 *International Tax and Public Finance* 724.

Bartmann, Amanda 'Making Taxpayer Rights Real: Overcoming Challenges to Integrate Taxpayer Rights into a Tax Agency's Operations' (2016) 69 *The Tax Lawyer* 597.

Bătrâncea, Larissa-Margareta, Ramona-Anca Nichita & Ioan Bătrâncea, 'Understanding the Determinants of Tax Compliance Behaviour as a prerequisite for increasing public

levies' (2012) 12, Issue 1(15), *The USV Annals of Economics and Public Administration* 201.

Bentley, Duncan *A Taxpayer's Charter: Opportunity or Token Gesture?* 1995 12(1) *Australian Tax Forum* 1.

Bevacqua, John 'Suing Canadian Tax Officials for Negligence: An Assessment of Recent Developments (2013) 61(4) *Canadian Tax Journal* 893.

Bird, Richard & Eric Zolt, 'Tax Policy in Emerging Countries' (2008) 26 *Environment and Planning C: Government and Policy* 73.

Cummings, Ronald G., Jorge Martinez-Vazquez, Michael McKee, et al 'Effects of Tax Morale on Tax Compliance: Experimental and Survey Evidence' *Berkeley Program in Law and Economics Working Paper Series* at 2 (Available at <https://escholarship.org/uc/item/8sh2w9fp>).

Dabner, Justin 'Resolving Australian tax controversies: does the tax jurisprudence under the European Convention on Human Rights suggest a better way?' (2016) *Australian Tax Forum* 213.

Devos, Ken 'An Investigation Into Australian Personal Tax Evaders – Their Attitudes towards Compliance and the Penalties for Non-Compliance' (2009) 19 *Revenue Law Journal*.

Du Plessis, Max & Stuart Scott 'The Variable Standard of Rationality Review: Suggestions for Improved Legality Jurisprudence' (2013) 130 *SALJ* 597.

Feld, Lars P. & Bruno S. Frey, 'Trust breeds trust: How taxpayers are treated (2002) 3 *Economics of Governance* 87.

Henrico, Radley 'Re-visiting the rule of law and principle of legality: judicial nuisance or licence?' 2014 *TSAR* 742.

Hoexter, Cora "'Administrative Action" in the Courts' 2006 *Acta Juridica* 303 2006 at page 307.

Hoexter, Cora 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484.

Hoexter, Cora 'The principle of legality in South African administrative law' (2004) 3 *Macquarie Law Journal* 165 at 181.

James, Simon, Kristina Murphy & Monika Reinhart 'The Taxpayer's Charter: a case study in tax administration' *Journal of Australian Taxation* 2004 336.

Kirchler, Erich, Erik Hoelzl, & Ingrid Wahl 'Enforced versus voluntary tax compliance: The "slippery slope" framework' (2008) 29 *Journal of Economic Psychology* 210.

Li, Jinyan 'Taxpayers' Rights in Canada' (1997) 7(1) *Revenue Law Journal* 83.

Marandu, Edward E., Christian Mbekomize & Alexander N. Ifezue 'Determinants of Tax Compliance: A Review of Factors and Conceptualizations' (2015) 7 *International Journal of Economics and Finance* 207.

Mendoza, Juan P, Jaco L. Wielhouwer, & Erich Kirchler 'The backfiring effect of auditing on tax compliance' (2017) 62 *Journal of Economic Psychology* 284.

Morris. S 'When is finality trumped? Kirk and the principle of finality' *Australian Public Law* 9 September 2016 (available at <https://auspublaw.org/2016/09/kirk-and-finality>).

Moseneke, Dikgang J 'Oliver Schreiner memorial lecture: separation of powers , democratic ethos and judicial function' 2008 *SAJHR* 341.

Muehlbacher, Stephan, Erich Kirchler & Herbert Schwarzenberger, 'Voluntary versus enforced tax compliance: empirical evidence for the 'slippery slope' framework' (2011) 32 *European Journal of Law and Economics* 89.

Nichita, Ramona-Anca & Larissa-Margareta Bătrâncea 'The Implications Of Tax Morale On Tax Compliance Behavior," (2012) 1(1) *University of Oradea Annals of Faculty of Economics* 739.

Picur, Ronald D. & Ahmed Riahi-Belkaoui 'The impact of bureaucracy, corruption and tax compliance' (2006) 5(2) *Review of Accounting and Finance* 174.

Price, Alistair 'Rationality review of legislation and executive decisions: *Poverty Alleviation Network and Albutt*' (2010) 127 *SALJ* 580.

Richardson, Grant 'The Impact of Tax Fairness Dimensions on Tax Compliance Behaviour in an Asian Jurisdiction: the Case of Hong Kong' (2006) 32 *International Tax Journal* 29.

Seligson, Milton 'Information-gathering by SARS under the TAA: Trumping the taxpayer's right to tax finality' (2016) 7 *Business Tax & Company Law Quarterly* 1 at page 10.

Parliamentary Reports

Joint Committee of Public Accounts “An Assessment of Tax: a Report on an inquiry into the Australian Tax Office” (Report No 326, 1993) 314.

Standing Committee on Finance Briefing Note on Tax Administration Bill, 2011: Search without a warrant (available at <https://www.sars.gov.za/wp-content/uploads/Legal/RespDocs/LAPD-LPrep-Resp-2011-04-Response-Document-Briefing-to-SCoF-Search-without-warrant-Clause-63.pdf>)

Academic Research and Dissertations

Bentley, Duncan (2006) *A Model of Taxpayers' Rights as a Guide to Best Practice in Tax Administration*, PhD thesis, ePublications@bond, Faculty of Law available at https://pure.bond.edu.au/ws/portalfiles/portal/28897742/bentleyd1_Full.pdf.

Croome, B.J. 2008: *Taxpayers' Rights in South Africa: An analysis and evaluation of the extent to which the powers of the South African Revenue Service comply with the Constitutional rights to property, privacy, administrative justice, access to information and access to courts*. Ph.D. Thesis. University of Cape Town.

Ziesmann, Michael “*Gone Fishing: An Analysis of CRA Powers and Policies Relating to the Use of Fishing Expeditions in Information Gathering*” University of Waterloo Master of Taxation dissertation submission available at https://uwaterloo.ca/master-of-taxation/sites/ca.master-of-taxation/files/uploads/files/gonefishing_ananalysisofcrapowersandpoliciesrelatingtotheuseoffishingexpeditio sininform_000.pdf.

Conference Papers

Ramfol, Roshelle. (2019) ‘The fine line between tax compliance and tax resistance: the case of South Africa’ Paper presented at the International Conference of Accounting & Business (Johannesburg).

Internet Sources

Presidential Inquiry and Commission Reports

Davis Tax Committee Report on Macro Analysis of the Tax System and Inclusive Growth in South Africa (2016).

Davis Tax Committee Report on Tax Administration (2017).

Interim report of the Commission of Inquiry into tax administration and governance by the South African Revenue Service, published on the Commission website and available at: <http://www.inqcomm.co.za/Docs/media/Complete%20Interim%20Report%20%2027%20September%202018%20including%20annexures.pdf>.

National Treasury Publications

2017 Budget Speech, delivered by Minister Pravin Gordhan, and available at <http://www.treasury.gov.za/documents/national%20budget/2017/speech/speech.pdf>.

2017 National Budget Review, Chapter 4, available at <http://www.treasury.gov.za/documents/national%20budget/2017/review/Chapter%204.pdf>.

Presentation to the Nugent Commission of Inquiry on 29 August 2018, available at http://www.inqcomm.co.za/Docs/affi/National%20Treasury%20Input%20for%20Commission%20of%20Inquiry%20into%20Tax%20Administration%20and%20Governance%20by%20SARS_%20Tax%20policy%20impacts%20of%20tax%20administration%2029%20August%202018.pdf.

SARS Guidance and Reference Works

Explanatory Memorandum on the objects of the 2011 Tax Administration Bill available at <http://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2011-03%20-%20Memorandum%20Objects%20Tax%20Administration%20Bill%202011.pdf>

Memorandum on the Objects of the Tax Administration Laws Amendment Bill 2014 available at <https://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2014-01%20-%20Memorandum%20on%20the%20Objects%20of%20the%20TALA%20Bill%202014%20of%202014.pdf>

SARS Dispute Resolution Guide (Guide on the Rules promulgated in terms of section 103 of the TAA), date of First Issue 28 October 2014, available at http://c.ymcdn.com/sites/sait.site-ym.com/resource/resmgr/2014_SARS_-_October_/LAPD-TAdm-G05_-_Dispute_Reso.pdf

SARS Compliance Programme for 2012/13 – 2016/17 available at <https://www.sars.gov.za/AllDocs/SARSEntDoclib/Ent/SARS-Strat-07-G02%20-%20Compliance%20Programme%202012%202013%20to%202016%202017%20%E2%80%93%20External%20Guide.pdf>

SARS Strategic Plan for 2016/2017 – 2020/2021 available at <http://www.sars.gov.za/AllDocs/SARSEntDoclib/Ent/SARS-Strat-18%20-%20Strategic%20Plan%202016%202017%20to%202020%202021%20-%205%20September%202016.pdf> (last accessed 29 April 2018) at page 26.

SARS 2020/21 – 2024/25 Strategic Plan, available at <https://www.sars.gov.za/AllDocs/SARSEntDoclib/Ent/SARS-Strat-24%20-%20SARS%20Strategic%20Plan%202020-2021-2024-2025%20-%2011%20May%202020.pdf>

SARS Short Guide to the Tax Administration Act, 2011, Version 3, 29 March 2018, available at <https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-TAdm-G01%20-%20Short%20Guide%20to%20the%20Tax%20Administration%20Act%202011.pdf>.

The South African Revenue Service Charter, available at: <https://www.sars.gov.za/AllDocs/Documents/Service%20Charter/SARS%20Service%20Charter%201%20July%202018.pdf>

SARS media release (5 March 2018) “*SARS search and seizure operations are strictly governed*” available at <https://www.sars.gov.za/media-release/5-march-2018-sars-search-and-seizure-operations-are-strictly-governed/>)

Foreign Publications

Australian Taxpayers’ Charter Available at <https://www.ato.gov.au/About-ATO/About-us/In-detail/Taxpayers-charter/>.

ATO Guide for taxpayers “*Our Approach to information Gathering*” available on the ATO website at <https://www.ato.gov.au/About-ATO/Access,-accountability-and-reporting/In-detail/Our-approach-to-information-gathering/>.

Canada Revenue Authority, Taxpayer Bill of Rights (December 2013) available on the CRA website at <http://www.cra-arc.gc.ca/E/pub/tg/rc17/rc17-12-16e.pdf>.

CRA Circular IC 71-14R3t “The Tax Audit” available at <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic71-14/tax-audit.html>.

History of the Inspector-General of Taxation, available at <https://www.igt.gov.au/about-us/history#:~:text=On%2015%20October%202001%2C%20the,Government%20and%20the%20Australian%20Parliament.>

2020 IBFD Yearbook on Taxpayers' Rights, available at
<https://www.ibfd.org/sites/default/files/2021-09/2020%20IBFD%20Yearbook%20on%20Taxpayers%27%20Rights%20%281%29.pdf>

Inspector-General of Taxation Review into the Taxpayers' Charter and Taxpayer Protections, Chapter 2, at para 2.14, published on 13 December 2016 and available at
<https://www.igt.gov.au/news-and-publications/reports-reviews/review-taxpayers-charter-and-taxpayer-protections/executive-summary>.

Joint Committee of Public Accounts An Assessment of Tax: a Report on an inquiry into the Australian Tax Office (Report No 326, 1993) 314 available at
www.aphref.aph.gov.au_house_committee_reports_1993_1993_pp213a.pdf.

OECD Report on *Tax Administration in OECD and Selected Non-OECD Countries: Comparative Information Series* (2008) available at
<http://www.oecd.org/dataoecd/57/23/42012907.pdf>.

OECD (2019) *Tax Administration 2019: Comparative Information on OECD and other Advanced and Emerging Economies*, OECD Publishing, Paris,
<https://doi.org/10.1787/74d162b6-en>, available at https://read.oecd-ilibrary.org/taxation/tax-administration-2019_74d162b6-en#page4.

OECD (2021) *Tax Administration 2021: Comparative Information on OECD and other Advanced and Emerging Economies*, OECD Publishing, Paris,
<https://doi.org/10.1787/cef472b9-en>, available at <https://read.oecd.org/10.1787/cef472b9-en?format=read#page4>

Protocol between the Inspector-General of Taxation and the Department of the Treasury available at https://www.igt.gov.au/sites/default/files/wp/IGT_Treasury_protocol.pdf.

The Senate Economics Legislation Committee Report on the Performance of the Inspector-General of Taxation available at
https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024347/toc_pdf/PerformanceoftheInspector-GeneralofTaxation.pdf;fileType=application%2Fpdf.

Office of the Tax Ombud Publications

Office of the Tax Ombud Annual Report (2016/2017), available at
<http://www.taxombud.gov.za/Documents/OTO-AnnualReport-2017.pdf>.

Office of the Tax Ombud Annual Report (2017/2018), financial year available at http://www.taxombud.gov.za/Documents/Tax%20Ombud%20Annual%20Report%2017_18.pdf.

Office of the Tax Ombud Annual Report (2018/2019), available at <http://www.taxombud.gov.za/Documents/Tax%20Ombud%202018%2019%20Annual%20Report.pdf>.

Office of the Tax Ombud Annual Report (2019/2020), available at <http://www.taxombud.gov.za/Documents/Tax%20Ombud%202019%2020%20Annual%20Report.pdf>.

Online Articles

Croome, B J *The Tax Administration Act and Taxpayers' Rights* available at <http://www.thesait.org.za/news/116113/The-Tax-Administration-Act-and-Taxpayers-Rights-.html>.

Croome, B J 'Amendments to the definition of relevant material for purposes of the Tax Administration Act' *SAIT Tax Talk* 9 January 2015.

Croome, B J and J Brink 'SARS Audits and Taxpayer's Rights' *Tax ENSight* 25 June 2013 available at <https://www.ensafrica.com/news/SARS-audits-and-taxpayers-rights?Id=1066&STitle=tax%20ENSight>.

Dachs, Peter 'Ability of SARS to request information from a taxpayer' *Tax ENSight* 20 May 2015 available at <https://www.ensafrica.com/news/ability-of-SARS-to-request-information-from-a-taxpayer?Id=1822&STitle=tax%20ENSight>.

Hadjipaschalis, Roula 'The effect of corruption on tax morality' available at <http://www.thesait.org.za/news/161234/The-effect-of-corruption-on-tax-morality.htm>.

Jooste, Ruan 'Inside SA's great tax revolt' SAIT, available at <https://www.thesait.org.za/news/222949/Inside-SAs-great-tax-revolt.htm>.

Media Publications

Bhengu, Lwandile 'KZN municipal worker arrested for allegedly stealing millions meant for Eskom' *The Sunday Times*, 4 February 2020, available at <https://www.timeslive.co.za/news/south-africa/2020-02-04-kzn-municipal-worker-arrested-for-allegedly-stealing-millions-meant-for-eskom/>.

Ensor, Linda 'SARS Act amendments proposed by Nugent due for 2020' *Business Day* 3 September 2019, available at <https://www.businesslive.co.za/bd/national/2019-09-03-sars-act-amendments-proposed-by-nugent-due-for-2020>.

Matlala, Alex 'Alleged rampant theft at district municipality in Limpopo' *The Citizen*, 24 February 2020, available at <https://citizen.co.za/news/south-africa/investigation/2245529/alleged-rampant-theft-at-district-municipality-in-limpopo/>.

Staff Writer 'What you need to know about a tax revolt in South Africa' *Business Tech* 11 December 2019, available at <https://businesstech.co.za/news/finance/361442/what-you-need-to-know-about-a-tax-revolt-in-south-africa>.

Staff Writer 'Zuma has 45 days to pay up R7.8-million for Nkandla's non-security upgrades' *Mail & Guardian* 27 June 2016, available at <https://mg.co.za/article/2016-06-27-zuma-has-45-days-to-pay-up-r78-million-for-nkandlas-non-security-upgrades/>.