

UNIVERSITY OF CAPE TOWN

**THE SOUTH AFRICAN ADMINISTRATIVE POWERS OF THE
COMMISSIONER FOR INLAND REVENUE, TAXPAYER'S
PROCEDURAL REMEDIES AND THE IMPACT OF THE
CONSTITUTION (ACT 200 OF 1993) THEREON**

SIBONGISENI MZENZE

**Dissertation presented in partial fulfilment
of the requirements for the Degree of**

**MASTER OF LAWS
IN THE
FACULTY OF LAW**

SUPERVISOR : PROFESSOR TREVOR EMSLIE

BA LLB (Wits) BComm (Hons) (Taxation) MBA (Cape Town)

Advocate of the Supreme Court of South Africa

Associate Academic Member of the Cape Bar

CAPE TOWN, SOUTH AFRICA

September 1996



This University of Cape Town has been given
the right to use the name of the University in
or in part of any publication by the author.

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.

SUMMARY

Income Tax Act (Act No 58 of 1962) imposes a tax called normal tax upon taxpayers. The extent of the taxpayer's liability must be assessed, that is, determined authoritatively by the Commissioners for Inland Revenue. This dissertation utilises the administrative powers of the Commissioners; taxpayer's procedural remedies, preservation of secrecy and the impact of the Constitution thereon.

Now that we are a constitutional state, this paper seeks to examine whether our constitution accommodates the vast discretionary powers of the Commissioner' preservation of secrecy, appeals and reviews against Commissioner's decisions. Alternatively, do powers of the Commissioner in terms of the Income Tax Act measure up with the expectations and needs of the Constitution? What are constitutional restrictions, if any, are there on the exercise and implementation of the taxpayer's procedural remedies? Are the provisions of sections 4(1) and 80 of the Income Tax Act consistent with the Constitution?

The South African Transitional Constitution (Act 200 of 1993) embodies a Bill of Rights which will have an impact on tax law. This makes it imperative that a "rights culture" be engendered in all the people of South Africa.

ACKNOWLEDGEMENTS

First and foremost I wish to express my sincere thanks to my supervisor Professor Trevor Emslie of the University of Cape Town for his overall guidance.

Professor Monde Samela of the University of Transkei who helped in the preparation of this paper. He was never too busy or too tired to read this paper, make various comments and suggestions about presentation and legal writing.

Jodie Sissons who not only helped bring this paper into fruition, but was also house mother to me for the duration of my stay in Cape Town. She let her household at my disposal despite all inconveniences pertaining thereto.

I am grateful to my parents, in fact the whole family, for their continued support of my efforts.

Special thanks to my two sons, Lungani and Mandisi, who have endured being without a mother for the past year. This has been a most trying time in their young lives.

The financial assistance of The Centre for Science Development (HSRC, South Africa) towards this research is hereby acknowledged. Opinions expressed and conclusions arrived at are those of the author and are not necessarily to be attributed to The Centre for Science Development.

TABLE OF CONTENTS

Summary

Acknowledgments

Table of Contents

Bibliography

Table of Statutes

Table of Cases

Chapter 1 : General Introduction

Chapter 2 : Administrative Powers of the Commissioner for Inland Revenue and the Constitution (Act 200 of 1993)

2.1 Discretionary Powers of the Commissioner

2.2 Exercise and Non-Exercise of Powers

2.3 Preservation of Secrecy - Section 4(1) and 80 of Income Tax Act 58 of 1962

Chapter 3 : Taxpayer's Procedural Remedies and the Constitution

3.1 Objections to Assessment

3.2 Appeal

3.3 Review

3.3.1 General Principles of Administrative Law

3.3.2 Rules of Natural Justice

3.3.3 Legitimate Expectation

3.3.4 Judicial Review

Chapter 4 : Conclusion

4.1 Observations

4.2 Recommendations

BIBLIOGRAPHY

1. Administrative Law Reform: Bennet TW, Cockrell A, Jooste R, Keightley R, Murray CM and Corder HM as eds (1993) Juta.
2. Baxter L, Administrative Law (1985) Juta
3. Baxter L, Unpublished Diploma in Legal Studies Dissertation (1978)
4. Divaris, Silke and Stein: South African Income Tax (11th Memorial ed)
5. Emslie T, Davis DM, Hutton SJ: Income Tax Cases and Materials 2ed (1995) Taxpayer.
6. Hoffman LH, Zeffert DT: The South African Law of Evidence 3ed (1986) Butterworths.
7. Kourie MA, Oosthuizen J: Tax and Investment, Easiguide (1996) Butterworths.
8. Landman A, Unpublished LLM Thesis (UNISA)
9. Lehman G, Coleman C: Taxation in Australia (1989) Butterworths
10. McQuoid-Mason DJ: The Law of Privacy in South Africa (1978) Juta
11. Meyerowitz D: Meyerowitz on Income Tax (1995-1996 Ed) Juta
12. Morris E: Techniques in Litigation 3ed (1985)
13. Quest for Justice, E Kahn ed (1995) Juta
14. Rose-Innes: Judicial Review of Administrative Tribunals.

Journals

1995 De Rebus 169

LAWSA Vol. 1 par 436

LAWSA Vol 3. par 1433

LAWSA Vol. 5

Mail and Guardian (Newspaper) dd May 31 - Jun 6, 1996 p13

(1986) 2 SAJHR 164

1992 SALJ 696

1976 Taxpayer 161

1994 Taxpayer (January)

(1993) 7 Tax Planning

(1995) 9 Tax Planning

(1987) 8 LJ 571

Public Law, Summer 1996 Sweet and Maxwell 338

Stellenbosch Law Review vol. 2 (1994)

TABLE OF STATUES

1. Board of Trade and Tarrifs Act, 107 of 1986 (as amended)
2. Companies Act, 91 of 1973
3. Customs and Exise Act, 91 of 1964
4. Exchange and Audit Ad, 66 of 1975
5. Income Tax Act, 58 of 1962 (as Amended)
6. South African Constitution Act, 200 of 1993
7. Supreme Court Act, 59 of 1959
8. VAT Act, 89 of 1991

TABLE OF CASES

- Administrator, Transvaal v Trau 1989 (4) SA 731(A)
- Barnato Holdigns v SIR 1978 (2) SA 440 (A)
- CIR v City Deep Leve 1924 AD 298
- CIR v Da Costa 1985 (3) SA 768A, 47 SATC 87, 1985 Taxpayer 209
- CIR v Goodrick 1942 OPDI
- CIR v Middleman 1991(1) SA 200(c)
- Cuppan v Cape Display Chain Service 1995 (A) SA 175 D and CLD 180
- Estate Dempers v SIR 1977 (3) SA 410
- Hira and Another v Booyesen and Another 1992 (4) SA 69 (A)
- ITC 582 14 SATC 109
- ITC 721 17 SATC 485
- ITC 743 18 SATC 307 1962 Taxpayer 217
- ITC 1453 51 SATC 100, 1989 Taxpayer 235
- ITC 1470 52 SATC 88, 1995 Taxpayer 174
- ITC 1470 52 SATC 258, 1995 Taxpayer 59
- ITC 1470 52 SATC 476, 1994 Taxpayer 68
- Jeeva and Others v Receiver of Revenue, PE and Others 1995 (2) SA43, 57 SATC 187
- Jeewa v Dönges No and Others 1950 (3) SA 414 (A)
- Johannesburg City Council v Administrator, Transvaal 1969 (2) SA 72(T)76
- Johannesburg Consolidated Investment v Johannesburg Town Council 1903 TX 111 at 115
- Johannesburg Stock Exchange v Witwatersrand Nigel LTd 1988 (3) SA 132 (A)
- KBI v Trasvaal Suikerkorporasie Bpk 1958(2) SA 668 (T)
- Liversidge Anderson 1942 AC 206 (HL) at 221
- Marievale v NUM (1986) 7 ILJ 108 (W)
- Marieval v President of the Industrial Court 1983 (2) SA 485 (T)
- Matla Coal Ltd v CIR 1987 (I) SA 108 (A)
- Namex (Pty) Ltd v CIR 1992 (2) SA 761 (c)
- No. 8948 Transvaal Special court
- NUM v Marievale (1986) 7 ILJ 123

R v Ngwevela 1954(1) SA 123(A)

S v Bailey 11938 AD 204

S v Mankwanyane 1995 (3) SA 397 (cc)

S v Marwane 1982 (3) SA 717 (A)

S v Vermaas, S v Du Plessis 1995 (3) SA 292 (cc)

Silver v Silver 1937 NPD 129, 134

SIR v Geunstyn, Forsyth and Joubert 1971(3) SA 567 (A)

Tickly v Johannes No 1963 (2) SA 558

Union Government v Shiu 1955 (1) SA 298 (T)

Union Government v Union Steel Corporation SA Ltd 1928 AD 200

CHAPTER 1: GENERAL INTRODUCTION

Many developments and changes have surfaced since the 1994 elections. A new Constitution has just been adopted.¹ It brings promises and hopes to the people of South Africa. It is based on corrective justice. Corrective justice aims to rectify and ought to redress the wrongful gains and losses particular persons cause one another. The idea of constitutionalism brings about checks and balances therefore principles of reasonableness, impartiality and fairness are indeed vital to the development of the principle of public accountability, and must be tested in terms of the recognised values of society. This makes it imperative that a "rights culture" be engendered in all the people of South Africa.

This Constitution provides a bridge between the past of a deeply divided society characterised by strife, conflict, untold injustices and suffering, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans irrespective of colour, race, class, belief or sex.²

It is a transitional Constitution but one which itself establishes a new order in which human rights and democracy are entrenched. It envisages that each individual must have an opportunity to shape character of decision making process, despite the fact that there will be no guarantee of equal influence, but simply the opportunity of exercising influence.

The justice of the law is dependent on how it, along with other social arrangements, allocates all goods things in life. For one to understand justice one must reflect on what it is about people's judgment of justice and match the principles which would be chosen against his own considered judgment. Social inequalities are to be arranged so that they are both to the greatest benefit of least advantaged, consistent with the just saving principles and attached to the offices and positions open to all under conditions of fair equality of opportunity. Justice is "just conduct", "fairness"; the exercise of authority in the maintenance of right and to do justice is to treat fairly

¹ South African Constitution, 1996 dd 8/511966. But throughout the text when reference is made to the Constitution, it is a reference to Act 200 of 1993.

² Per Chaskalson P in *S v Mankwanyane* 1995(3) SA 397(cc).

or appropriately.³

To achieve this concept of justice, the Constitution contains provisions dealing with the way in which it is to be interpreted - Sections 35 and 232.⁴ It also has a limitation clause⁵ which states that the limitation must be justiciable in an open and democratic society based on freedom and equality, it must be both reasonable and necessary and it must not negate the essential content of the right.

In modern democratic societies and particularly in societies which are constitutionally committed to the goal of democracy the executive branch of the State has immense accession of power and has come to discharge functions varied in scope and nature. This inevitable increase in powers and functions of the executive has created vast, new and complex relationships between the executive and citizen. The modern administration has assumed enormous capacity to affect rights of the people. The question is, does the arming of administration with more powers keep in view the interests of the individual?

Are adequate precautions being taken to ensure that administration does not misuse or abuse its powers? Do administrative agencies follow such procedures as are fair, just, reasonable and consistent with rules of law, democratic values and natural justice, and if not, how can these agencies be made to follow these sound principles?

Although income tax law is classified under commercial law, the formal rules of income tax law include those rules providing for organisation, structure, functions, powers and duties, and control of income tax administration. This answers the definition of administrative law put forward by Wiechers, namely,

"Administrative law is the body of legal rules governing the administration,

³ The Concise Oxford Dictionary (New Edition).

⁴ South African Constitution, Act 200 of 1993.

⁵ Section 33 (see no. 4 supra).

organisation, powers and functions of administrative authorities."⁶

Therefore recourse is necessary to rules of administrative law to compliment formal income tax law.

In terms of the Income Tax Act⁷, the Commissioner for Inland Revenue is the designated person to administer tax collection. He is, in fact, an administration officer. Black's Law Dictionary defines an administration officer as:

"an officer of the executive department of the government and ...legally, a ministerial or executive officer, as distinguished from a judicial officer."

Like any administrative officer, the Commissioner has discretionary powers accorded to him by the Income Tax Act. He is expected to act fairly and reasonably and comply with the requirements imposed upon him by common law and any relevant legislation. Persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent court or tribunal.

The Constitution has this right of redress provided for in Section 24. This provision constitutes a firm basis for the development of administrative law. It also serves as a catalyst for the development of democratic principles and behaviour in that through this section an individual's right to judicial review and extrajudicial adjudication of administrative action which in all Commonwealth countries is a common law right, an ordinary right has been transferred into a fundamental human right protected by the Constitution.

With the limited information at my disposal. I shall in this paper, endeavour to address and make some input on what can be done about discretionary powers of the Commissioner for Inland Revenue, preservation of secrecy in income tax law, taxpayers' procedural remedies and the impact of the Constitution. Reference to the Income Tax Act will be "the Act"; Commissioner for Inland Revenue as "Commissioner" and South African Interim Constitution as "the Constitution" throughout this text.

⁶ Wiechers in Law of South Africa, Vol. 1 (1970) Joubert (ed) Butterworths 57.

⁷ Income Tax Act (Act No. 58 of 1962).

CHAPTER 2: ADMINISTRATIVE POWERS OF THE COMMISSIONER FOR INLAND REVENUE AND THE CONSTITUTION

2.1 Discretionary Powers of the Commissioner

Discretionary power means a situation where a body has the power of choice in the circumstances to do "X" or not to do "X" or to do "X" and/or "Y" or to do either. In those circumstances there is a duty to act in a designated way as defined in the circumstances involving exercise or non-exercise of the duty on the part of the body. In administrative law it is said there is no power without authority. The source of that authority can be legislation, or common law, or practices. In tax law the Income Tax Act is the source from which the Commissioner derives his discretionary powers.

The Act charges the Commissioner with the responsibility of administering the Act. The Commissioner is assisted by subordinate officials employed by the State. The separation of administrative responsibility for the implementation of the Income Tax Act is an exception rather than rule. Legislation normally provides that the political office bearer, that is, the Minister, may delegate all or party of his authority to the public officials who serve him. In the case of fiscal laws in general and Income Tax Act in particular, the normal pattern has not been followed. The Commissioner is directly responsible to Parliament for his acts and actions of his subordinates. The separation of administration from political administrative bodies embodies an important constitutional convention. The decisions of the Commissioner must be done in a clinically objective and neutral manner and must not be subject to political or sectoral pressure.

The demands on government in a modern industrialized State have necessitated granting public bodies vast discretionary powers, thus enabling them to make decisions which fundamentally impact on the citizen. Powers exercised by the government in its dealings with the individual include powers to admit or accept and to refuse or reject claims; powers to exempt persons from statutory obligations, and powers to remit and make rebates.

The Act provides that the Commissioner shall be responsible for carrying out of its provisions.

The Commissioner is endowed with discretionary powers to exercise his administrative acts. He may exercise his administrative powers and duties either personally or through an office engaged in carrying them out under his control, direction or supervision. Section 3(2)⁸ provides that any decision made and any notice or communication issued or signed by any such office may be withdrawn or amended by the Commissioner or by such office concerned and shall, for the purposes of this provision, until it has been so withdrawn, be deemed to have been made, issued, signed by the Commissioner: provided that a decision made by such office in the exercise of any discretionary power shall not be withdrawn or amended after expiration of three years from the date of written notification. This prohibition for withdrawal refers only to written notification.

There is no requirement in the Act, it is noted, for the Commissioner to inform or furnish reasons to affected taxpayers for the withdrawal or amendment of the decision or notification. In the light of the Constitution which desires transparency it is suggested that the Commissioner informs or furnishes to the taxpayer reasons for withdrawal or amendment of the notification. The validity of re-opening of assessment after the expiry of the period of three years in terms of Section 3(2) was raised in CIR v Nemojim (Pty) Ltd⁹ but the court, unfortunately, did not decide it. The Court stated that:

"Taking the facts of the case and ignoring the obstacle created in regard to the 1977 tax year by S3(2), apportionment in the 1977 tax year would be applied to the cost of the shares actually involved in that year in divided stripping, i.e. purchases less closing stock."

In ITC 1480¹⁰ it was held that the time limit did not apply, although an assessment has been

⁸ S3(2) of Income Tax Act (Act 58 of 1962 as amended).

⁹ CIR v Nemojim (Pty) Ltd 1983 (4) SA 935(A).

¹⁰ ITC 1480 SATC.

issued, where the official had in fact not exercised his discretion. Commenting on CIR v Nemojim, Emslie et al state that:

"The argument presented by the taxpayer's Counsel to the Special Court and accepted by it was that the determination of an assessed loss in terms of S20(2) of the Act (which - prior to its amendment in 1993 - defined an assessed loss as meaning 'an amount, as established to the satisfaction of the Commissioner,' by which permissible deductions exceed income) involved the exercise by the Commissioner of a discretion, and that for this reason the proviso to S3(2) - prior to its amendment in 1992 limited the Commissioner's power to re-open to two years from the date of the assessment instead of the period of three years provided by S79 of the Act"¹¹

The Act has since been amended to the fact that a decision made by an office could not be withdrawn or amended after expiry of three years from the date of notice of assessment giving effect to it, as long as all material facts were known to the officer when he made his decision. The obvious, but still disappointing reason for this extension, argue De Kohler and Urgular¹² is to bring this period in line with the three year limitation controlling additional assessments under Section 79 of the Act.

There has since been an amendment of the Act decreasing discretionary powers of the Commissioner.¹³ Also the Constitution offers increased scope for ensuring that the powers of the tax administration are exercised in a fair and reasonable manner. In this regard the most important section in the Constitution is S24¹⁴ which guarantees the right to lawful, procedurally fair and justiciable administrative action as well as the right to be furnished with reasons for

¹¹ Emslie TS, Davis DM, Hutton SJ: Income Tax Cases and Materials: Taxpayer (1995) 339.

¹² De Kohler AP and Urquhart GA, Income Tax in South Africa.

¹³ Tax Yearbook 1993 - 94, Cross reference to Meyerowitz and Spiro on South African Income Tax.

¹⁴ South African Constitution Act 1993 (Act 200 of 1993).

administrative action.

The problem with discretionary powers conferred upon the Commissioner is that they are mostly subjectively phrased, for example, Section 11(e)¹⁵ "as the Commissioner may think just and reasonable;" Section 79¹⁶ "if at anytime the Commissioner is satisfied"; Section 78 "if the Commissioner is not satisfied" to name but a few. The test, therefore, to determine whether the Commissioner has properly applied his discretion is subjective. A tax legislation leaving the limitation of a fundamental right to the discretion of an official without laying down any principles or policy for guidance of the exercise of the discretion, is an excessive or disproportionate delegation and thereby an unreasonable limitation of fundamental rights

2.2 Exercise and Non-Exercise of Discretionary Powers

Assessment is defined in Section 1 of the Act¹⁸ as meaning the:

"determination by the Commissioner, by way of a notice of assessment served in a manner contemplated in Section 106(2)... and for the purposes of Part III of Chapter III includes any determination by the Commissioner in respect of any of the rebates referred to in Section 6 and any decision of the Commissioner which is in terms of this Act subject to objection and appeal."

When making an assessment it is, therefore, expected of the Commissioner to exercise his discretion as required by the law. He must apply his mind and not be biased, nothing more is required of him. Nowhere in the Act is it required of him to exercise "judicious" discretion. When it is complained that the Commissioner has not properly applied his mind it must be proved that all the facts were known to him or were at his disposal at the time he made his

¹⁵ Act 58 of 1962 (Income Tax Act) as amended.

¹⁶ See Note 8 (supra).

¹⁷ See Note 8 (supra).

¹⁸ Act 58 of 1962 (as amended), Income Tax Act 1962.

decision.

The Commissioner makes assessments in terms of Section 77, subject to the provisions of Section 3, upon submission of returns by the taxpayer as required in Sections 65, 66, 68, 69, 70, 71, 72, 73 and 74. The Act confers three types of discretion on the Commissioner, namely,

- (a) those which are excluded from objection and appeal;
- (b) those which are subject to objection and appeal;
- (c) those which are neither subject to nor excluded from objection and appeal.

When the Commissioner has made an assessment he remits notification to the taxpayer in writing in terms of Section 77 of the Act.

The question arises as to the Commissioner's power to issue a ruling or make a decision which effectively reduces tax liability of the beneficiary of it in circumstances which might fall outside his discretionary power provided in the Act. This question confronted the Court in Namex (Pty) Ltd.¹⁹ The facts of this case were as follows:

The company had been engaged in diamond mining. In 1984 it had been provisionally liquidated and in 1985 an offer in terms of Section 311 of the Companies Act²⁰ was made by a third party to the company. The scheme was sanctioned by the Supreme Court whereupon the provisional liquidations order was discharged. The Appellate Division was to decide whether a compromise under Section 311 of the Companies Act could bind the Commissioner.

The Court, per van der Heerden JA, held that the appellant rightly did not contest that a tax

¹⁹ Namex (Pty) Ltd v Commissioner for Inland Revenue 1992 (2) SA761(C).

²⁰ Companies Act of 1973 (Act 61 of 1973).

collector could not waive a tax claim. It was argued that in terms of Section 2 and 3 of the Act²¹, the Commissioner has broad management powers in regard to the administration and execution of the Act and therefore competent to agree to an agreement in terms of Section 311 of the Companies Act²². The court pointed out that it could not trace such an empowerment to waive a tax claim. Section 2(1): 77(1) and 91(1)(a)²³ of the Act lay down a duty on the Commissioner to assess income tax and recover it. Only Section 31(2) of the Treasury Act which contained a provision in terms of which waiver of an income tax may be made.

The Court further stated that income tax need not only be assessed once. There may be an unlimited number of assessments for any tax year. The Commissioner would thus be entitled to obtain judgment for additional tax even if he had already obtained judgment in respect of an original assessment of the relevant year - if this is necessary. The reason for this is that when the Commissioner acts against the taxpayer he need only base his claim on an assessment. Normally a liability can then not be contested in an ordinary court but in special income tax court in terms of the Act. In making an assessment the Commissioner depends on the information supplied by the taxpayer. On the question of the provisions of Section 311 of the Companies Act, only creditors of the taxpayer were bound not the Commissioner therefore not bound by the scheme.

Commenting on this case Professor Davis²⁴ stated that it is important to distinguish mandatory objection to levy tax in respect of which no ruling by the Revenue is binding, from concession granted by the State Attorney acting on behalf of the Commissioner in terms of discretionary powers as to interest and penalties. In terms of Section 76 (2)(a)²⁵ of the Act the Commissioner may remit any amount of additional tax imposed in the event of default or omission as he may think fit, provided that he is of the opinion that there were extenuating circumstances, he may not so remit if he is satisfied that any act or omission of the taxpayer was done with intent to evade

²¹ Income Tax Act, 1962 (Act 58 of 1962) as amended.

²² See Note 20 (supra).

²³ See Note 7 (supra).

²⁴ The Taxpayer Jan 1994 p6.

²⁵ See Note 7 (supra).

taxation.

He further states that in the event that the Commissioner exercises his discretion to find that there were extenuating circumstances the finding in CIR v Namex (Pty) Ltd²⁶ case would not be applicable, for the Commissioner is entitled by the statute to so act. The Commissioner acting in terms of his discretion is empowered to so act in terms of a discretion accorded to him by the legislature and hence once more the mandatory implications of the Namex judgment would not be applicable. He expresses doubts about the correctness of the decision of the court. He poses a question whether the Commissioner has a so-called managerial discretion to reach agreement with creditors of a company in a Namex-type situation. He answers this thus: the Commissioner has managerial discretion in the cause of promoting equity, and that the ambit of such managerial discretion should extend to situations where the tax collected from a taxpayer, that is, to agree to a settlement which provides for the best possibility of a receipt of tax.

Landman²⁷ seems not to agree with this conclusion. He argued in his unpublished LLM thesis that the Commissioner is precluded from entering into private law contracts with the taxpayer concerning the latter's liability for normal tax; the Commissioner may not agree contractually to remit any tax legally chargeable; there can be no estoppel should the Commissioner fail to collect full amount of tax legally payable due to an error of judgment or incorrect decision; the Commissioner may not legally fetter the future exercise of any discretion entrusted upon him.

The present writer does not agree with Landman's²⁸ argument, with respect, that the Commissioner should not be estopped should he fail to collect tax (or over collect). That he must not and is not estopped to be bound by his decision is, in my view, prejudicial to the taxpayer in that this leads to uncertainty on the part of the taxpayer. Also the fact that the Commissioner has power to issue unlimited number of assessments for any year is, in itself, not acceptable. This, in my opinion (will) encourages mismanagement and neglect of duty on the part of the office of

²⁶ See Note 19 (supra).

²⁷ Unpublished LLM Thesis.

²⁸ Note 27 (supra).

the Commissioner. If they know that they can make further assessments even though all the information was at the disposal of the Commissioner²⁹ and the Commissioner has agreed to finality of the assessment already made, the taxpayer is at a disadvantaged position. He is at the mercy of the Commissioner.

The allowance given by the Act to the Commissioner to make further assessments for (over) or under-collection gives rise to uncertainty which is against the principle of legality. One cannot be certain that the assessment, though it was said to be final it is indeed final, because of the wide powers of the Commissioner especially in terms of Section 79(1) despite the provisions of Sections 81(5) and 83(18) of the same Act. The principle of legality demands that the rules governing discretion must be clear and precisely defined. This is a circumstance where a public body must be held responsible for his representation.

Although the writer is of the view of estoppel, each case must be treated according to its own circumstances. The writer is also mindful of the problems of estoppel in public law. The application of estoppel-type reasoning in public law is impeded by problems- no-fettering doctrine. It is sometimes suggested that if the officials are precluded from resiling from prior representations made by them on the ground that the fulfilment of those representations is no longer the public interest, the government's capacity to adjust its policies as and when the public interest demands will be fettered.

Andrew Breitenbach³⁰ has some suggestions to the issue. He suggests that were the courts:

"... in appropriate circumstances to permit public bodies to incur ultra obligations through an operation of estoppel estoppel will come to constitute a source of de facto administrative power. In view of the threat to the principle of legality

²⁹ KBI v Transvaal Suikerkorporasie Bpk 1985(2) SA668 (T).

³⁰ Andrew Breitenbach, "The Sources of Administrative Power" The impact of the 1993 Constitution on the Issues raised by Dilokong Chrome Mines (Edms) Bpk v Direkteur-General, Departement van Handel en Nywerheid 1992 (4) SA1(A)" In: Stellenbosch Law Review 1994 (2) p276 at 286

posed by ultra vires estoppel, ... however, in such cases courts should ensure that the interests of the general public are not subordinated to the interests of the “innocent” representees. Accordingly, all that can safely be said is that in a very limited range of circumstances the doctrine of estoppel might prove to be a passable substitute”

He goes on to state that in situations where interests of the representee outweigh considerations such as a legal certainty, the need to minimise disputes and litigation the public interest in keeping governmental bodies within their statutory powers, and the interest of third parties. Government bodies cannot rely on estoppel situations as authority for legal capacity which they would not otherwise enjoy. The assumption that undertakings should, in general, be honoured, may well be an important determinant of public interest. The use of estoppel is to “validate” governmental dispositions which do not encroach upon individual rights or interests may well be impliedly supported by Section 24(a) of the Constitution ³¹.

This sub-section requires that administrative action which “adversely affects or threatens” individuals’ existing rights or interests must derive from an acknowledged source of administrative power.

Ian Wilson³² expresses concern about the operation of the provisions of Section 103 of the Act. He argues that there is dearth of authority on the question whether the Commissioner has the right to go back beyond the three-year prescription period in relation to instances of tax avoidance. Accordingly there is very little judicial interpretation to be found that deals with the relationship between Section 79(1) and 103. He cites an unreported case³³ where the court held that Section 103 operated independently of Section 79. It seems that the courts have held that this wide interpretation gives the Commissioner power to impose tax even in circumstances in which assessments have become final, without regard to the limitations imposed by any other

³¹ South African Constitution Act, 1993 (Act 200 of 1993).

³² Ian Wilson, “Prescription - The Commissioner’s powers to reopen assessment” (1993) 7 Tax Planning at 139.

³³ No 8948 Transvaal Special Court.

provision of the Act.

There is a recently released Practice Note 20 in which the Commissioner has conceded that assessments raised under Section 103 should be subject to the constraints of Section 79(1) but this is no guarantee to the protection of the taxpayer. The Commissioner is free to invoke provisions of Section 103 or alternatively withdraw the said Practice Note - what I suggest is amendment of Section 103 to read with or be subject to the provisions of Section 79. It is quite appreciated that the intention of the legislature by enactment of this section it meant to curb tax avoidance and collect any outstanding tax due to the state but certainly and clarity are of importance. Another conclusion can be that the Commissioner would be allowed to compromise a claim for tax where he bona fide considers that this will best achieve the object of collecting tax.

The prescription itself under Section 79 is dependent on the fact that there was no misrepresentation or fraud on the part of the taxpayer - ITC 1470³⁴ where it was expressed that

“The immunity of the taxpayer from further assessments cannot be disturbed unless the Commissioner is satisfied that the amount was no assessed previously because of fraud or misrepresentation or non-disclosure of material facts and has expressed that satisfaction to the taxpayer.”

Unfortunately in terms of the Income Tax Act rules governing discretionary powers are not defined and clear. The writer feels that if the rules were to be defined and not be subjectively phrased it would be more effective. This suggestion meets the objections against leaving an unstructured and overboard discretion on the Commissioner. This may be done by combination of primary and secondary legislation, for example, an Act of Parliament may specify the content of the power and regulations lay down what form should it take to ensure that the powers are exercised properly without jeopardising policy and undue restriction on the Commissioner. Fortunately our Constitution allows rights to be limited by law of general application rather than

³⁴

ITC 1470,1995 Taxpayer, 174

a law of general application - Section 36(1)³⁵

Sometimes it so happens that taxpayers face not only open minds in the revenue offices but brick walls in the form of either obduracy, naivety, bureaucratic mindedness and at times also dishonesty such as is difficult to disentangle. There also arises problems when the Commissioner fails to exercise his discretion. Yet it is a fundamental law that officials performing administrative acts are required to apply their minds when doing so. This requirement

" is an essential condition for the valid exercise of all discretionary powers. This is why the real purpose of the rules of natural justice is to ensure that the organ has duly applied his mind to the matter. Seen in this light, it may be said that this is the sole and exclusive requirement for the performance of administrative acts."³⁶

Where the act of a statutory body is ultra vires, either because it exceeded the competence granted to it or because it did not comply with the statutory prescripts for the legal validity of that act: from the legal point of view it has not acted. What then happens when the Commissioner does not exercise the discretionary power? This question of non-exercise of discretionary power arose in ITC 1480³⁷ In this case the taxpayer had been issued an assessment which allowed his deductions of an allowance based on cash price of certain plant plus finance charges not exceeding the cash price. Over two years, later but within three years, the Commissioner issued a revised assessment based on the original advice to the taxpayer. The taxpayer objected on the ground that because of the proviso to Section 3(2) the Commissioner was out of time. The taxpayer lost his appeal on the ground that in issuing the original assessment the Commissioner had come to no decision and therefore the provision to Section 3(2) did not operate.

Commenting on this case in the 1994 Taxpayer³⁸ it was stated that it was surprising that the

³⁵ See Note 14 (supra).

³⁶ ITC 1480,52 SATC 276.

³⁷ ITC 1480, 52 SATC 276

³⁸ Editorial, 1994 Taxpayer.

Commissioner's office concerned with issue of assessments issue those without applying their minds to the correctness or the figures or to the validity of any deductions claimed by the taxpayer. It transpired from the facts that the Revenue on receiving returns from the taxpayers simply fed the information in to the computer which produced the assessments sent to the taxpayers. No-one exercises his mind in making the original assessment. This raises concern taking into account the provisions of Section 3(2) which stipulated that any decision made by a Revenue official in the exercise of a discretionary power granted under the Act could not be withdrawn or amended after the expiry of two years (as it then was) from date of the written notification of it or to the notice of assessment giving effect to it, if all material facts were known to the Revenue official when he made his or her decision.

Emslie and Eden³⁹ expressed dismay as to the conclusion reached by the court. They argued that this case was concerned with the applicability of the proviso to Section 3(2) rather than the validity of the original notice of assessment. Yet the court expressly held that the original assessment had been issued without any Revenue official having applied his mind to the question of the quantum of the allowance granted in terms of it. The question is, did the original notice of assessment constitute a valid administrative act? On the face of it, it did not. They argued that there is no authority in the Act for the Revenue to make assessments without applying its mind to their accuracy. The purpose of the Revenue's power to make additional assessments under Section 79(1) is to enable it to correct errors which may have been made in the previous assessments and to review, if necessary, the decisions taken when the original assessments were made. Issuing of pro forma notices of assessment amounts to a refusal to decide, indeed a refusal to assess, at the appropriate time.

They further state that the revenue could have been stopped because of the need by the taxpayer for certainty. The non-exercise of discretionary power by the Revenue amounted to unfairness and abuse of power. The "audit system" which is the general practice of the Commissioner has no place under the Act and ought not to be permitted to add to the already formidable task faced by the taxpayer seeking to prove the existence of a practice generally prevailing. Taxpayers are entitled to be protected from the ultra vires tyranny of the unexercised discretion, a practice

³⁹

1992 SALJ 696.

which flaunts the principle of legality and brings the administration of tax law into disrepute.

Fiscal statutes are not a special privilege category of legislation. They must be approached and dealt with in the same manner as other statutes. Nor is there any special virtue in revenue-raising measures. The legislature is presumed not to have intended unfair unjust or unreasonable treatment of the taxpayers. The statute must be interpreted so as to be unoppressive as much as possible.

2.3 Preservation of Secrecy

The Commissioner prepares and issues assessments in terms of Section 77⁴⁰ and all such records of assessments are kept in his office. They may be destroyed by the Commissioner after expiration of such period from the date of recording or filing as may be approved by the Controller and Auditor-General. These recordings are made by the Commissioner in his capacity as government official, therefore, assessments are classed as public documents. A public document is a document which has been drawn up by a public officer in the execution of a public duty which is intended for public use and to which the public has a right of access. In R v Daye⁴¹ a document was defined as

"any writing or printing capable of being made evidence".

A public document could, notwithstanding the hearsay rule, be admitted in court to prove the truth of their contents. It need not be identified or authenticated and secondary evidence of its contents is admissible. It may be handed into court from the proper custody of the official concerned without having to be authenticated. It is usually not the original document but an examined copy or extract which is tendered. There are numerous statutory provisions which extend the status of public documents, in this regard to documents which would not, as a rule, qualify as such at common law. However there is an exclusionary rule whereby evidence which

⁴⁰ Act 58 of 1962 (Income Tax Act).

⁴¹ 1908 2 KB 333, 340.

is both relevant and reliable, is excluded in order to protect the interest of the community or of a particular individual. Such evidence is said to be privileged.

Income tax documents, that is, records of assessment though they fall under public documents category, are privileged. There is no general access to them. The Act⁴² provides for preservation of secrecy. Section 4(1) states that:

"every person employed in carrying out the provisions of this Act shall preserve and aid in preserving secrecy with regard to all matters that may come to his knowledge in the performance of his duties in connection with those provisions, and shall not communicate any such matter to any person whatsoever other than the taxpayer concerned or his lawful representative nor suffer or permit any such person to have access to any records in the possession or custody of the Commissioner except in the performance of his duties under this Act or by order of a competent court."

Section 83(11) of the Act and 59(8) of the Ordinance each provides that the sittings of the court shall not be public and empowers the court on the application of [the taxpayer] to exclude from the sitting or to require to withdraw therefrom any person whose attendance is not necessary for the hearing of the appeal under consideration. An in practice the [Commissioner] or his representative, when seeking to use the information gleaned from the affairs of another taxpayer has been required not to disclose the source of his information or the fact that it is information given by a particular taxpayer..."

The purpose of this provision is to protect the private affairs of the taxpayers from casual disclosure by Inland Revenue officials. The leave of court must be obtained for the production of documents in the hands of the Inland Revenue even if the litigant is the State itself⁴³. This

⁴² Section 4 of Act 58 of 1962 (Income Tax Act).

⁴³ Union Government v Shiu 1955(1) SA 298 (T).

secrecy extends to proceedings before Special Court⁴⁴. If the State insists on a man disclosing his private affairs for a particular purpose it requires a very strong case to justify that disclosure being used for other purposes. The courts, however, are reluctant to order the Revenue to produce tax documents in an ordinary litigation. The court refusing disclosure of tax documents in Silver v Silver⁴⁵ stated that:

"It is obvious that if courts were to be in the habit of making orders requiring such information to be disclosed in suits between private individuals, there could be no guarantee at all as to secrecy and difficulties ofInland Revenue would be greatly increased."

Another purpose for preservation of secrecy in income tax matters is to preserve taxpayers right to privacy. However, the taxpayer may agree to dispense with the protection. Section 4(1) has no application to tax documents in the hands of the taxpayer himself. These are liable to be disclosed in the same way as any private but unprivileged documents. The taxpayer has no absolute right to secrecy and a court may order him to produce his returns of income unless those returns are privileged on some recognised grounds. Moreover the CIR can invoke drastic provisions of 74 of the Act to obtain documents in the hands of the taxpayer, or anyone else. This section has recently been declared unconstitutional in the Rudolf case.⁴⁶

The secrecy provisions are also designed to ensure and encourage voluntary compliance with

⁴⁴ Per Corbett JA in *Estate Dempers v SIR* 1977(3) SA 410: "This secrecy extends to proceedings before the Special Court. Section 83(11) of the Act and 59(8) of the Ordinance each provides that the sittings of the Court shall not be public and empowers the court on the application of [the taxpayer] to exclude from the sitting or to require to withdraw therefrom any person whose attendance is not necessary for the hearing. And in practice the [Commissioner] or his representative, when seeking to use information gleaned from the affairs of another taxpayer, has been required not to disclose the source of his information or the fact that it is information given by a particular taxpayer..."

⁴⁵ 1937 NPD 129, 134.

⁴⁶ Report taken from Mail and Guardian dd. May 31 to June 6, 1996 p13.

income tax laws. In the Steyn Report⁴⁷ it was stated that it is essential that taxpayers should have the assurance that no disclosure concerning their ordinary income earning activities will be made by the Commissioner. The disclosure would be against full and frank disclosure of information by taxpayers if their confidence in preservation by the Commissioner and his staff of the strictest secrecy in regard to such information were to be shaken by general relaxation of the statutory rules regarding secrecy. Without such secrecy the taxpayers will not disclose any receipts or accruals not being of a capital nature which are product of illegal activities.⁴⁸

Income Tax Act⁴⁹, is no exception to other fiscal laws⁵⁰, they all have secrecy provisions. It has been held that the secrecy has, as a general rule, to be preserved in prosecutions against the taxpayer for offences other than those arising out of the Act because it is more important in public interest that persons taking part in illicit transactions should be encouraged, by assurance of immunity against prosecution for illegality, to disclose their profits under those transactions than that they should be prosecuted for them, the immunity is exclude from the prosecution under the Act.

Given the increase of offences of corruption, money laundering, theft, fraud, in fact all forms of offences related to fiscal laws, is it not now the time that provisions of Section 4(1) be redefined or, possibly, amended. As it is now, it is clear from various authors that the Act does, in a way, encourage illicit transactions. There is no provision in the Act which compels the Commissioner to report such illicit transactions to any authority. It is submitted that there must be preservation of taxpayers right to privacy but at the same time within the confines of protection of confidentiality of information maximum transparency must be achieved. The question is how can this balance be achieved.

⁴⁷ Steyn Report 19.

⁴⁸ Divaris C Silke & Stein ML, Silke on South African Income Tax (11th memorial ed).

⁴⁹ Act 58 of 1962.

⁵⁰ For example, Customs and Excise Act 91 of 1964, Board of Trade and Tariffs Act 109 of 1986 as amended.

This is sensitive and problematic. How to balance secrecy and transparency is a high legalistic problem. The Constitution in Schedule four says that:

"paragraph VI: There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness,...

paragraph IX: Provision shall be made for freedom of information so that there can be an open and accountable administration at all levels of government."⁵¹

Hence the provisions of Section 23⁵² of the Constitution which deals with access to information, and Section 24⁵³ which provides right to administrative justice.

It is submitted that investigations, conclusions and decisions must be done in a clinically objective and neutral manner and must not be subject to political or sectoral pressure. The tax administration must be protected against interference by the government of the day and legitimate economic interest of the taxpayers be protected against scrutiny by their competitors. But there is this constitutional

requirement of transparency and openness. The secrecy provisions are further reinforced by the requirement that before acting, every person employed in carrying out the provisions of the Act is obliged to take and subscribe an oath of fidelity or secrecy. Breach thereof constitutes an offence. It is also an offence for any person to act in the execution of his office before he has taken the prescribed oath.

The Commissioner is a public body who stores information concerning declarations for tax

⁵¹ South African Constitution Act, 1993 (Act 200 of 1993).

⁵² See Note 51 (supra).

⁵³ See Note 51 (supra).

returns. As has been pointed out above tax documents are public documents which have statutory protection, therefore privileged. The public, including both the taxpayer and the State itself, has no general access to them. The taxpayer or the State can only have access by court order and the courts are reluctant to give such orders.⁵⁴ The general public has no access at all. From this there seems to be an inconsistency between this contention and the provisions of Section 23 of the Constitution which states that:

"Every person shall have the right of access to all information held by the state or any of its organs at any level of the government in so far as such information is required for the exercise or protection of any of his or her rights."⁵⁵

It must be noted that the dominant theme of the Constitution is to provide a bridge between the past and the future. While the past pervaded by inequality, authoritarianism and repression, the aspiration of the future is based on which is justiciable in an open and democratic society based on freedom and equality. The Constitution is also premised on a legal culture of accountability and transparency. Section 23⁵⁶ of the Constitution must be read with Section 25(3)⁵⁷ - the right to a fair trial, the limitation clause (Section 33)⁵⁸ and the interpretation clause (Section 35)⁵⁹ of the same Act. In order to serve the purpose of the Constitution each of the litigants, especially the taxpayer must have access to all the information in the hands of the Commissioner which will enable him to exercise his right to fair trial but subject to the provisions of Section 33⁶⁰ of the Constitution.

⁵⁴ Silver v Silver 1937 NPD 129, 134.

⁵⁵ See Note 51 (supra).

⁵⁶ See Note 51 (supra).

⁵⁷ See Note 51 (supra).

⁵⁸ See Note 51 (supra).

⁵⁹ See Note 51 (supra).

⁶⁰ See Note 51 (supra).

The question is whether the blanket secrecy on tax documents measure up with the application of Chapter 3 of the Constitution especially Section 23. The denial of access and reluctance of the courts to grant general access seem not to be in line with the Constitution. In the Income Tax Act⁶¹ it is not classified what is confidential and must be protected. Ordinarily the taxpayer should be entitled to have access to documents in the hands of the Commissioner which are prima facie likely to help his or her case. The right to fair trial includes access to information which the Commissioner relies on and will lead as evidence in court during trial. It is, in these circumstances, submitted that it would be better if it is listed what is confidential, give reasons for confidentiality and nature of the information. There must also be guard against possible abuse of this - the court has to test this for it

“is the content of each document that determines whether it is privileged.”⁶²

It has been stated that the secrecy provision is for the protection of the taxpayer's right to privacy. Privacy is a right of any person to be protected from intrusion upon himself, his home, his family, his relationships and communications with others, his property and his business affairs. Social scientists see the right to privacy as the right to control over one's information preserve and a status of personal dignity while invasion of privacy is an immoral affront to human dignity. Essentially privacy is a natural desire which is primarily designed to protect feelings and sensibilities of human beings and does not apply to artificial persons.⁶³

Invasion of privacy usually takes the form of intrusions, publications of private facts, false light and appropriation, and individual privacy is being further threatened by the increasing use of data banks in public and private sectors.

Section 4 of the Act seeks to protect the taxpayers' business affairs from being known by his

⁶¹ Income Tax Act 58 of 1962.

⁶² Van den Linde v Calitz 1967(2) SA 239(A).

⁶³ McQuoid-Mason DJ, The Law of Privacy in South Africa (Juta) 1978. This book was written before the enactment of the 1993 Constitution. The rights of the Constitution extend to artificial persons - Section 7(3).

competitors. It also protects the administration from requests for information by the general public. This right to privacy is entrenched in the Constitution. Section 13 of the Constitution states that:

“ Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.”⁶⁴

Human dignity is protected as much as possible. It is a fact that right to access to information in the hands of the State often infringes the rights and violates the human dignity of the individual. This creates difficulty in implementing provisions of Section 23 and 24 without infringing the rights of the offender.

In Section 33 of the Constitution it is stated that the rights entrenched in Chapter 3 may be limited by law of general application provided that such limitations is reasonable and justiciable in an open and democratic society based on freedom and equality. And such limitation shall not negate the essential content of the right in question.

There are exceptions to this secrecy provision for instance - double taxation agreements provide for exchange of information. In terms of Section 42(1) of the Exchange and Audit Act of 1975⁶⁵ the Auditor-General, in the performance of his duties, is entitled to be supplied by the Commissioner of information regards taxpayer's affairs, the supply of information to the Commissioner for Customs and Excise, if required, for purposes of preventing or combatting tax evasion. These bodies are not to use the information so supplied for any other purpose other than required by their respective duties. The Commissioner is empowered to report any unprofessional conduct where such relates to the affairs of the taxpayer to a control body.

This seems, therefore, that this right to privacy is not absolute. Whenever it is necessary and

⁶⁴ See Note 51 (supra).

⁶⁵ Act 66 of 1975.

justiciable this right can be infringed. As a fact, even the Constitution which guarantees fundamental rights does not necessarily guarantee that these will not be infringed by order of court when necessary or justiciable. Supply of information to prevent or combat tax evasion is a necessary infringement in terms of Section 33 of the Constitution. But publication of names of tax offenders on the other hand, it has been argued⁶⁶, is clearly a breach of Section 13 of the Constitution. The Katz Commission recommended that the secrecy provisions be repealed.

In Jeeva and Others vs Receiver of Revenue Port Elizabeth and Others⁶⁷ where the Receiver of Revenue was ordered to give applicants access to all information in his possession relating to the companies which were in liquidation. The applicants in this case were former directors of these companies. The court held that disclosure will, however, be ordered in appropriate circumstances. Courts must, in the exercise of their discretion, balance the policy considerations of the preservation of secrecy and its underlying motivation, on the one hand, with any other conflicting rights and interests on the other. On the facts of this case, the court held that there was nothing secret about this information as far as the parties were concerned and hence entirely artificial for joint liquidators to seek to invoke the secrecy principle of tax legislation. There was no danger of confidential financial information coming to the attention of the third parties who might be able to use it to the disadvantage of the taxpayer.

This case seems to suggest that courts must not adopt a strict approach when faced with a situation of applications for access to information in the hands of the Commissioner.

Section 13 (privacy) and Section 23 (right to access to information) of the Constitution, on the face of it, may seem to be in conflict with each other and the general practice. I submit they are not, they can be used to create the true justice instead of maintaining total confidentiality on tax matters. In interpreting a statute one must look at the intention of the legislature. In this instances

⁶⁶ It has been argued by Riel Franzen, 1995 De Rebus 169/171 that provisions of Section 62 of the VAT Act 89 of 1991 and Section 4(3) of Customs and Excise Act 91 of 1964 are clearly infringement of right to privacy.

⁶⁷ Jeeva and Others v Receiver of Revenue, Port Elizabeth and Others 1995 (2) SA 433, SATC 57 (1995) 187.

the intention of the drafters of the Constitution is to protect the rights of all. Fiscal laws still have provisions which provide for secrecy. The Constitutional court is a competent authority to declare unconstitutional these provisions if need be as envisaged in Section 229 of the Constitution. The secrecy provision, if it is felt that it is in conflict with the Constitution, must be rendered inoperative - S vs Marwane⁶⁸ . where the court held that:

"if [the Acts] were in conflict with the Constitution [they must be] repealed to the extent of such conflict by being rendered inapplicable."

The Constitution is the supreme law of the country

"against which all law or conduct is to be tested, it must be examined with a view to extracting from it those principle or values against which such law or conduct can be measured."⁶⁹

It is my submission that the secrecy provision be upheld in so far as protection of privacy of the taxpayer is concerned, but if public policy so demands (like in cases of crimes committed, tax evasion or any illicit transactions) disclosure must be made. As has been pointed out above there is need for redefinition of the secrecy clause but not repeal. What is confidential be listed and reasons thereof be supplied. It is further submitted that the taxpayer must have access to information which will enable him to exercise his right to administrative justice without to first have to approach the court. The taxpayer must supply the Commissioner with sufficient reasons for requisition of such information. The fact that the taxpayer must have such access to information with leave of court, to me it seems that, technically, he is denied such access because court process is time consuming and costly. In the US confidential information is released to lawyers only, which if it is the case even here that can be expensive. Recourse to court must be had only when the Commissioner refuses access. The court at the same time must not be too technical, they are to adopt a liberalistic approach. I do not agree with general public access to

⁶⁸ S v Marwane 1982 (3) SA 717 (A).

⁶⁹ Qozeleni v Minister of Law and Order 1994(3) SA 625(E).

information in the hands of the Commissioner. Trade secrets must be protected against unfair competition. Freedom of information can be maintained by issue, at regular intervals, of copies of such information, subject to any necessary editing, for inspection and purchase by members of the public.

The Constitution suggests that a right to access to information can be derived collaterally by way of private rights, the extent to which they applicant is affected or is representing associated interests or public interests. Access must be an autonomous right based on a citizen's democratic right to participate in the work of the courts.

CHAPTER 3: TAXPAYER'S PROCEDURAL REMEDIES AND THE CONSTITUTION

3.1 Objections to Assessment

The procedure for a taxpayer who is not satisfied with his assessment is to lodge with the Commissioner an objection in writing stating fully and in detail the grounds on which he relies. A formal notice of objection must be lodged with the Commissioner within the prescribed period of time informing him that the grounds of objection will follow as soon as possible. It is important that the taxpayer consider the contents of their objections very carefully, that is, the taxpayer must be meticulous when stating grounds of objection. The procedure for lodging an objection to an assessment is dealt with in the Act under Section 81. In this section it is stated that

"Objection to any assessment made under this Act may be made within 30 days after the date of assessment"

Some taxpayers feel that this is a stringent requirement in view of the fact that there is a 30 day time limit for lodging objections. This can be very short. Where the matter is very complex this leads to difficulties since on appeal the taxpayer is limited to the grounds of objection contained in his objection. However this restriction may be waived on good cause shown. In Matla Coal Ltd v CIR⁷⁰ the court held that in deciding whether a ground is covered by the taxpayer's objection the court should not be unduly technical or rigid in its approach. It should rather look at the substance of the objection and the issue as to whether it covers the point which the taxpayer wishes to advance or appeal must be adjudged or the particular facts of each case.

The taxpayer may object not only to the taxable amount or assessed loss determined but also to the amount of the tax levied, as well as to the rebates and any decision of the Commissioner which is subject to objection and appeal. On receipt of objection the Commissioner (more usually the subordinate) must consider the objection. The burden of proof is on the taxpayer⁷¹ to

⁷⁰ Matla Coal Ltd v CIR 1987 (I) SA 108 (A).

⁷¹ CIR v Middelman 1991 (I) SA 200 ©

prove that the decision of the Commissioner is incorrect. The taxpayer will discharge the burden of proof which rests upon him in terms of Section 82 by convincing the court on a balance of probabilities that the decision of the Commissioner is incorrect.

In this regard the court in ITC743⁷² remarked thus

"[When a particular accrual has been determined by the Commissioner in his assessment to be an accrual of income the court must treat it as such until the taxpayer establishes on a balance of probability that it is in fact an accrual of a capital nature and consequently not taxable as income."

A similar view was expressed in CIR v Goodrick⁷³ where the court stated that

"What is required from the taxpayer to discharge this onus is affirmative evidence which satisfies the court on a preponderance of probability that the amount received was not income."

In Barnato Holdings Ltd vs SIR⁷⁴ this burden of proof was described as a "formidable and difficult onus" resting on the taxpayer. In Middelman v CIR⁷⁵ the defence argued, relying on the description of onus given by the court in Barnato Holdings, that the onus cast on the taxpayer to prove that the profits realised by him during the three years in question were of capital nature, and more particularly that he did not acquire and sell the shares in those years in order to make a profit as an additional, secondary or subsidiary part of his business, was a "formidable and difficult" one to discharge. In response to this the court held that the court in Barnato Holdings was not seeking to lay down a different or higher standard of proof than on a balance of probabilities which the taxpayer has to meet if he is to succeed. The onus which the taxpayer had to discharge was no different to nor was it any heavier than that which is borne by the party in

⁷² ITC 743 (1962) Taxpayer 217, 18 SATC 307

⁷³ CIR v Goodrick 1942 OPD 1

⁷⁴ Barnato Holdings v SIR 1978 (2) SA 440 (A)

⁷⁵ See note 71 (Supra).

a civil litigation who bears the burden of proof, namely, to establish his case on a balance of preponderance of probability. When the court has no reason to disbelieve the taxpayer's evidence and it is not contradicted by the objective facts, the taxpayer will have discharged the burden of proof.

The Commissioner is empowered to condone a delay in the lodging of an objection. This depends on the discretion of the Commissioner whether to dispense with the formalities of time. An objection to an assessment by the taxpayer is means to persuade the Commissioner to depart from his point of view. After consideration of the objection the Commissioner may reduce or alter the assessment or may (allow or) disallow the objection, and he must send the taxpayer notice of such alteration, reduction or disallowance - Section 81(4).⁷⁶ It is noted that the Commissioner is not subject to any time limit within which to consider the objection. It is, therefore, expected that the Commissioner will be obliged to consider the objection within reasonable time. But what is reasonable time to the Commissioner cannot hold same in the eyes of the taxpayer. It is submitted that time be specified within which the Commissioner is to consider the objection. It is further noted that there is nothing in Section 81 which requires the Commissioner to give reasons of alteration, reduction or disallowance of the assessment. In the name of transparency it is submitted that he does so subject to the circumstances of each case.

If the objections against the assessment have been allowed or withdrawn, such assessment or altered or reduced assessment becomes final and conclusive subject, however, to the taxpayer's appeal is confirmed to the particular amounts which are the subject of the revised or additional assessment. The finality, notes Meyerowitz⁷⁷, applies between the Commissioner and taxpayer, not between the Commissioner and third party, such as the trustee of an insolvent estate or liquidator of an insolvent company. Section 81 (5) does not deal with the case where the objection has been disallowed. The right of the taxpayer to appeal is here unquestionable, but if he does not appeal timeously the assessment will in effect become final and conclusive vis a vis because he has no means of compelling the Commissioner to alter the assessment. As regards the

⁷⁶ Income Tax Act, 1962 (Act 58 of 1962)

⁷⁷ Meyerowitz D Income Tax 1995-1996 ed par 34.5

Commissioner, finality of the assessment is subject to his power under Section 79 to re-open the matter.

3.2 APPEALS

Chapter 3 of the Constitution offers increased scope for ensuring that the powers of tax administration are exercised in a fair and reasonable manner. Although the procedures for appeal and objection in the Act are generally fair, they are not without deficiencies nor immune from charge of unfairness. Many of the provisions can be justified on the grounds of administrative convenience and efficiency as will be shown in the discussion which follows. Be that as it may, it is submitted that consideration has to be given to more than prudential factors.

Subsequent to receipt of the Commissioner's decision concerning objection, the taxpayer may appeal to either the Appeal Board or the special Income Tax Court if his objection is not remedied. The Appeal Board is a 1991 innovation introduced to expedite the dispute process and with simplified procedures than the Special Court. An advocate or attorney elected from a panel acts as chairman. An accountant of ten years standing or a representative of the commercial community may be appointed as chairman if the parties so wish. Proceedings before the Board need not be recorded although the decision with a factual summary must be made by the Chairman. Rights to legal representation are at the Board's discretion (the person who prepared the return may represent the taxpayer). The decision of the Board is subject to objection and appeal.

The objective of this new procedure is to speed up the hearing of appeals and presumably, to allow the taxpayer the right to be represented could, so it is thought, prolong the hearing and therefore defeat the object of the appeal procedure which is intended to resolve the dispute in an informal manner. However, Meyerowitz states that the right to be represented is fundamentally essential to a fair hearing and a fair decision that its denial, except by the permission of the Board, is highly prejudicial and should not be countenanced. The fact that the taxpayer had the right to appeal against the decision of the Board to the Special Court where the matter is then to be heard de novo does not cure prejudice. It is submitted by the present writer that the right to representation must not be subject to the Board's discretion. The Constitution on this point of legal representation and fair hearing is clear and unambiguous despite the decision in S v

Vermaas; S v Du Plessis⁷⁸ where the court did not come up with guiding principles as to legal representation. It has left such to the discretion of the lower courts. Instead the court emphasised the importance of the right.

It is appreciated that the Board, as a tax tribunal, is to solve tax disputes as a forum of first instance and in a more informal way. This serves as a simple procedure designed to encourage access to justice⁷⁹ for taxpayers with small claims⁸⁰, who may be represented by tax advisors other than lawyers. (The problem of representation by non-lawyers will be dealt with later in the chapter). Appeals in this stream are to be dealt with as informally and expeditiously as circumstances and considerations of fairness permit. This must be taken as a complement rather than substitute the judiciary. In addition to applying legal principles, exercises of equity jurisdiction, that is, considerations of fairness, in so far as they are not in conflict with the law, can be taken into account in determination of any dispute. The Board is obliged to supply reasons for its decisions and an appeal against its decisions lies to the Special Court. It is commendable that an election to proceed informally does not limit further right to appeal to a lighter court as is the position in Australia⁸¹.

The Appeal from the Board to the Special Court must be in writing and lodged within 30 days of receipt of the Commissioner's objection or receiving the Board's decision. The Special Court is presided over by Supreme Court judge or acting judge assisted by an accountant of ten years standing and a representative of the commercial community⁸². Members, with the exception of the judge, are appointed by the State President for a period of five years subject to termination if there is need for such before the expiration of that period⁸³. This court is more formal than the Board but it does not make orders to costs unless the appeal is considered to be based on

⁷⁸ S v Vermaas, S v DuPlessis 1995(3) SA 292 (CC)

⁷⁹ Section 22 of Act 200 of 1993 (The South African Constitution Act, 1993)

⁸⁰ Claims of up to R20 000,00.

⁸¹ Lehman G, Coleman C: Taxation Law in Australia (1989) Butterworths.

⁸² Section 83(2) Act 58 of 1962 (Income Tax Act, 1962)

⁸³ Section 85 (5) (a) Act 58 of 1962.

frivolous grounds or Board's decision is substantially confirmed.

The Special Court is the creature of statute which means that it can only decide such matters as it has been specifically entrusted with. It has, therefore, an inherent jurisdiction as is possessed by the Supreme Court and can claim no authority which is not laid down by the Act. The Act enables a person who is dissatisfied with an assessment of the Commissioner to appeal to the Special Court⁸⁴. At least ten days before hearing, a dossier containing a statement of the case, copies of the appellant's assessments, the notice of appeal and correspondence relating to it are served on both the court and the appellant⁸⁵. The Commissioner is able to rely, at the hearing, on the grounds other than those on which his decision was initially based, provided timeous notice is given to the applicant⁸⁶. The applicant can appear at the hearing in person or be represented by council, his attorney or agent¹⁶. Reasoned judgements are handed down by the court. The powers of the Special Court are set out in Section 83 (13) of the Act which states that the Special Court may

“(a) in the case of any assessment under appeal, order such assessment to be amended, reduced or confirmed, or may if it thinks fit refer the assessment back to the Commissioner for further investigation and assessment;

(b) in the case of any appeal against the amount of the additional charge imposed by the Commissioner under sub-section (1) of Section 76, reduce, confirm or increase the amount of the additional charge so imposed

© in the case of any other decision of the Commissioner which is subject to Appeal, confirm or amend such decision.”

⁸⁴ Section 83(1) Act 58 of 1962.

⁸⁵ Regulation B3 Made under Act 58 of 1962.

⁸⁶ ITC 721 SATC 12, 485. Matla Coal Ltd v CIR See note 70 (supra).

In Tikly v Johannes NO⁸⁷ the court distinguished three meanings of the word “appeal”. He said that

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

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

From the above it can be seen that there is a confusion of terminology. According to this an appeal includes review. The applicant or the Commissioner may appeal to a provincial division having jurisdiction or, with the consent of the presiding judge, direct to the Appellate Division.

Emslie et al⁸⁸ state that the Special Court is not a court of appeal in the ordinary sense. It is an inferior or lower court. Baxter⁸⁹ states that, it is not always easy to ascertain the status and reviewability of Special Courts. He further states that there is no clear dividing between courts and tribunals, one example being the Tax Court. The Special Court is presided over by a judge, but it is not “a court of law” in the sense that it does not deliver binding precedents : CIR v City Deep Level Ltd⁹⁰ where the court held that the Commissioner is not bound by the ruling of the

⁸⁷ Tikly v Johannes N O 1963 (2) SA 558 at 590 F-H.

⁸⁸ Emslie T, Davis DM, Hutton SJ: Income Tax Cases and Materials 2ed (1995) Taxpayer at 1095

⁸⁹ Baxter L Administrative Law (1985) Juta. 257

⁹⁰ CIR v City Deep Level Ltd 1924 AD 298 at 306.

Special Court though that court is a court competent to decide issues between the parties.” The Special Court is a court of revision with power to investigate the matter before it and hear evidence therein; and if it arrives at the conclusion that the taxpayer is liable for the tax which the Commissioner has levied, it is not precluded from upholding the same merely because its conclusion is based on a ground other than advanced by the Commissioner in support of his levy, provided that the maximum audi alteram partem is observed⁹¹ Meyerowitz describes the Special Court as an inferior or lower court while in LAWSA Vol. 5⁹² it is described as a superior court.

In cases involving the exercise of a discretion by the Commissioner the Special Court on appeal to sit is called upon to exercise its own, original discretion where the discretion is subject to objection and appeal.⁹³ Under Section 86A of the act the appellant has a full right of appeal against the decision of the court on fact or law or both. In SIR v Geunstyn, Forsyth and Joubert,⁹⁴ the court stated that :

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

These cases show that an appeal to the Special Court is a wide appeal.

Seemingly the Special Court has no clear status as Baxter⁹⁵ has pointed out, correctly. To me, as means to enable the taxpayer have a formal procedure and know the proper hierarchy of the courts, the Special Court ought to lose its dual or multi status: an inferior or superior court at the same time. It is not clear why tax disputes are treated differently. If submitted that tax disputes

⁹¹ S v Bailey 1938 AD 204, Emslie et al: Income Tax Cases and Materials 1103.

⁹² LAWSA Vol. 5 par 446

⁹³ CIR v Da Costa 1985(3) SA 768 A, 47 SATC 87, 1985 Taxpayer 209

⁹⁴ SIR v Geunstyn, Forsyth and Joubert 1971(3) SA 567 (A), Emslie et al at 906

⁹⁵ See Note 89 (supra)

may be treated like any dispute, the taxpayer and Commissioner like any other litigants. The Special Court ought to be a tribunal, but it is too formal thus the desirable goals of inexpensive and expensive proceedings are lost.

It is suggested that the Special Court be a lower court, that is a court of first instance. Appeals from it to lie to the Supreme Court or for that matter an Income Tax Appeal Court be created and the said appeal court be accorded concurrent jurisdiction with the Supreme Court. An appeal from the Income Tax Appeal Court be direct to the Appellate Division. If this can be followed there would be no need for forum-shopping. By forum-shopping it is meant that the taxpayer must not have the choice to appeal either to the board or Special Court. Only those with small claims may approach the board as a small claims court. The danger of forum-shopping was illustrated in the three *Marievale* cases⁹⁶. (Although these cases concern labour matters: they are relevant to this issue of forum-shopping.)

Briefly, what happened in these cases was that certain employees of *Marievale Consolidated Mines Ltd* went on legal strike. They received warning that unless they resumed work, they would be dismissed. They did not resume work. *Marievale* dismissed them. The Union on behalf of the employees approached the industrial court for reinstatement of the dismissed employees. On the other hand *Marievale* approached the Supreme Court to interdict the employees who refused to vacate hostel accommodation. The Supreme Court refused to postpone the hearing pending the decision of the industrial court on the basis that by so doing it would be:

“abdicating its jurisdiction to another tribunal... because of what another tribunal, which is not even a court of law, may decide.”⁹⁷

These two courts arrived at two conflicting decisions : the Supreme Court confirmed dismissal of the employees: The Industrial Court ordered re-instatement of the dismissed employees. The problem was which decision was to be followed. Commenting on the case *Zondo*⁹⁸ stated that

⁹⁶ *Marievale v NUM* (1986) 7 ILJ 108(W); *NUM v Marievale*(1986) 7 ILJ 123; *Marievale v President of Industrial Court* 1983 (2) SA 485 (T)

⁹⁷ *Marievale v Num* (1986) 7ILJ 108 (W) at 122 D-G

⁹⁸ *Zondo RMM; Forum - Shopping: Industrial court v Supreme court* (1987) 8 ILJ 571

this could have been avoided if it was clear in the employment agreements which disputes were to be referred to the Industrial Court and which ones to be referred to the Supreme Court.

Coming to the problem of representation the Act states that the Taxpayers may appear in person or be represented by his counsel, attorney or agent - Section 83 (12). Accountants and others not specifically trained in law are given a rare opportunity to appear on the behalf of the taxpayer. This person is to present the taxpayers case before the judge and other members of the Special Court and lead evidence. There has been arguments about appearance of non-lawyers on behalf of the taxpayer in the Special Court. Quite often, argues R. Jacobson⁹⁹, these non-lawyers do not appreciate the importance of evidence. He submits that it is true that litigation calls for a team effort - the client, his attorney, the witness and advocate, all have a role to play, however it is advisable that the person who appears on behalf of the taxpayer before the court should be a person with legal training. The rules of evidence and procedure and techniques of trial advocacy are complex matters but in the Special Court they are more complicated. He is of the opinion that reputation B4 t the act be adhered to. This reputation provides that:

"Save as in these reputations is otherwise provided, the general practice and procedure of the court shall be that of a magistrate's court in so far as such practice and procedure are applicable."

However, Meyerowitz¹⁰⁰ points out that this is not a helpful provision.

"[F]or, apart form the necessity to look for special reputations, it must be ascertained in each and every instance whether the general practice and procedure of the magistrate's courts' can be said to be applicable. Such an attempt cannot be made here, as it would require traversing the whole magistrate's court Act 32 of 1994, as amended, together with rules of court relative thereto..."

⁹⁹ Jacobson R, Argumentv Evidence (1995) 9 Tax Planning 109

¹⁰⁰ Meyerowitz on Income Tax 1995-1996 ed par 34.31

Even when applicable the rules may not be strictly adhered to as was held in ITC 582¹⁰¹ that:

"[I]t has always been the practice of the court not to adhere to the very strict rules of evidence so long as substantial justice has been done. So therefore the court will give wide interpretation to the reputation in order to carry out the spirit of the act..."

It was pointed out in 1976 Taxpayer¹⁰² that a fair hearing requires that each party should be aware of the other's case and so we have rules which oblige the parties to set out their version of the facts, to admit or deny facts set out, to disclose documents in their possession which they intend to use and allow copies and so on. These procedures are important attributes to a firm decision in the dispute and there is no reason, in principle, why tax disputes should be exception. This is a point, it is submitted, which needs that the taxpayer must be represented by a legally qualified person.

In Cuppan V Cape Display Supply Chain Services¹⁰³ the court pointed out that Section 25(3) of the constitution is clearly concerned with person who are accused of offences in a court of law and has no application to domestic disciplinary tribunals. It stated that:

"[i]t appears to be settled law that where a hearing takes place before a tribunal other than a court of law, there is no general right to legal representation..."

It is submitted, with due respect, that fair trial includes legal representation when the taxpayer requires one. Constitutional interpretation is a discipline at which actuates well tried guidelines of understanding and application; therefore it must not be interpreted to deny certain rights to the people which its drafters never intended to exclude. The courts are cast in the additional role of social engineers, social and legal philosophers in order to promote the values which underlie an open and democratic society based on freedom and equality. Section 25(3)(c) of the constitution must be given an extended meaning to include even representation in The Special Court. Legally

¹⁰¹ ITC: 582 14 SATC 109 at 110

¹⁰² Income Tax Appeals in Taxpayer 1976 at 161 - 4. Morris E Techniques in Litigation 3ed (1985) 232

¹⁰³ Cuppan v Cape Display Supply Chain Service 1995 (4) SA 175 DCLD 180

qualified people must appear on behalf of the tax payer before the speical court. Litigation is a complex issue one wonders how non-lawyers represent taxpayers without knowldge of other fields of law which become involved one way or another.

An interesting question, does the taxpayer have right to remain silent if he is denied legal representation. In Public Law, Summer 1996¹⁰⁴ it was stated that the European Court of Human Rights held that the right to remian silent and the priviledge agaist self-incrimination were generally recognized standards that lay at the heart of a fiar procedure, but these immunities were not absolute; that it might be proper for a court to be allowed to draw inferences from the silence; that, by having regard to the weight of evidence, the refusal to give an explanation at the trial could not be regarded as unfair or unreasonable in the circumstances.

3.3 REVIEWS

3.3.1 Introduction

Judicial review in our law and practice is a remedy, distinct from appeal, afforded exclusively by the Supreme Court whenever the proceeding for inferior courts of law and of administrative officials, tribunals and authorities have been irregular or illegal, and whereby such proceedings may be corrected and set aside at the instance of any person whose interests have been prejudicially affected by these proceedings¹⁰⁵. The function of judicial review is to scrutinize the legality of administrative function, not to secure a decision by a judge in place of an administrator.¹⁰⁶ If an administrative action is found to be ultra vires the court will usually set it aside and refer the matter back to the authority for a fresh decision. To do otherwise would constitute an unwarranted usurpation of the powers entrusted to the ublic authority by the legislature.¹⁰⁷

¹⁰⁴ Public Law, Summer 1996 Sweet and Maxwell p338

¹⁰⁵ Rose-Innes, Judicial Review of Administrative Tribunals in SA (1963)1

¹⁰⁶ Baxter L, Administrative Law (1985) Juta 676

¹⁰⁷ Johannesburg City council v Administrator, Transvaal 1969(2) SA 72(J)76

Unlawful administrative decision may be set aside or be corrected by the Supreme Court

"[w]henver a public body was a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the legislature, it is a right inherent in the court, which has jurisdiction to entertain all civil cases and proceedings arising (within its territorial jurisdiction).. (and) in such a case as falls within the ordinary jurisdiction of the court."¹⁰⁸

The medium through which the taxpayer exercises his remedy against the Commissioner is judicial review. But there seems to be an uncertainty as to this remedy because it is not clear when the review lies with the Special Court and when to the Supreme Court and when to the Supreme Court since the KBI v Suikeroprasies¹⁰⁹ case. What will follow hereunder is a brief discussion of administrative law principles, the rules of natural justice, legitimate expectations and judicial review in tax matters making reference to impact of the constitution thereon.

3.3.2 GENERAL PRINCIPLES OF ADMINISTRATIVE LAW

South African administrative law has been called a dismal science¹¹⁰. The chief reason for this state of affairs was a legislative content to hand over virtually untrammelled power to the executive and a judiciary which at crucial moments displayed an executive mindedness which far exceeded that of the majority in Liversidge v Anderson¹¹¹ where the court held that:

"It is beyond dispute that he [secretary of state] can decline to disclose the

¹⁰⁸ Johannesburg Consolidated Investment Co v Johannesburg Town Council 1903 TS 111 at 115

¹⁰⁹ KBI v Suikerkorporasie Bpk 1985 (2) 668 (T)

¹¹⁰ 1986 (2) SAJ HR 164

¹¹¹ Liversidge v Anderson 1942 AC 206 (HL) at 221

information on which he has acted on the proud that to do so would be contrary to the public interest, and that the privilege of the crown cannot be disputed..."

There have been signs that this might be changing since the important decision in Administrator, Transvaal v Traub.¹¹² This case laid foundations for a development of juris prudence around the principle of audi alteram partem. In this case several medical doctors, who had served their internship at Baragwanath Hospital now wished to be appointed as senior house officers there. For decades the Director of Hospital Services had as a matter of course, appointed to these positions those interns recommended by heads of relevant departments. However, on this occasion some recommended doctors were not appointed. The only reason advanced to explain this was that they had written a letter to the SA Medical Journal which was critical of the hospitals grave shortcomings. Appointment to a senior house doctor was an important rung on the career ladder of able doctors; such appointments were essential if the doctors were to climb to the status of registrar and specialist. Thus the doctors turned to law to salvage their careers.

The court per Corbett CJ (as he then was) rejected the previously influential classification approach which held that the rules of natural justice applied to only judicial or quasi-judicial decisions and not to those that were purely administrative. It rejected the proposition that the rules of natural justice applied only where the liberty, property and existing rights of the applicant were affected. In future it would be sufficient if the applicant was affected in his liberty, property, existing rights or legitimate expectations. This case resolved the theoretical debate on whether the right to a hearing was a common law right (which had to be removed expressly or by necessary implication by a statute for it not to apply: R v Ngwevela)¹¹³ or whether it was a

¹¹² Administrator, Transvaal v Traub 1989 (4) SA 731 (A)

¹¹³ R v Ngwevela 1954 (1) SA 123 (A) - The court held that the principle of audi alteram partem should be enforced unless it is clear that Parliament has expressly or by necessary implication enacted that it should not apply (131H). Jeewa v Döonges NO and Others 1950(3) SA 414 A here the court said, in the absence of any indication in the statute to the contrary that the principle audi alteram partem was applicable, it would be presumptuous for the judiciary to impose its own methods on administrative or executive officers (422H - 433A)

right which only existed when it was granted, expressly or by implication in a statute.

There has since been a rapid growth of administrative law as the direct consequence of the society's felt necessity to keep constant vigil and check on the executive authorities. Administrative law is usually seen as a response to the problem of combining efficiency in administration with fairness to individuals, tax law not excepted. There is need for a transparent democracy participation and accountability on the part of those in authority to those affected by their decision. To achieve this there must be judicial intervention. But there must be guard against too much judicial intervention as this could prevent administrative agencies from implementing policies which have been democratically approved.¹¹⁴ The question is how shall the boundary be drawn between the courts and administrative agencies so as to enable judges to curb bureaucratic abuse and yet simultaneously enable administrators to perform the tasks delegated to them.

Before enactment of the 1993 Constitution there was controversy in South African law regarding unreasonableness as a ground for judicial intervention. In many decided cases the courts have held that unreasonableness *per se* is not a separate ground for review of administrative action. It is only a symptom or an indication that there were other reviewable irregularities in the exercise of discretionary powers by the official concerned. This is commonly referred to as the symptomatic unreasonableness rule in terms of which the surrounding circumstances surrounding a decision are used to infer the existence of a flaw in the decision itself. The leading case in this regard is Union Government v Union Steel Corporation SA Ltd¹¹⁵ where the court held that it knew of

“No authority ... for the proposition that a court of law will interfere with the exercise of discretion on the mere ground of its unreasonableness.”

The court added that the unreasonableness of a decision may be sufficiently gross to enable the

¹¹⁴ Davis DM, Administrative Justice in a Democratic South Africa: In: Administrative Law Reform (1993) Juta at 227

¹¹⁵ Union Government v Union Steel Corporation SA Ltd 1928 AD 200 at 236-7

court to infer that the decision was inexplicable except on the assumption of mala fides or ulterior motive, or that the decision amounted to proof that the person upon whom discretionary powers were conferred had not applied his mind to the matter.

3.3.3 Rules of natural justice

Natural justice probably constitutes the most fertile ground for review of administrative action today. Being a product of the common law, it serves as a constitutional barometer of the relationship of the judiciary to the executive in the continuously evolving constitution. When the principles of natural justice should be observed: when is it appropriate for an official or administrative body should be required to observe certain standards of procedure when carrying out his or its duties.

The principles of natural justice as applied by the courts derive from the common law, South African principles of judicial review of administrative actions have been developed by judges upon the basis of common law presumptions of statutory (and contracted) interpretation, whereas procedural due process derives its present force from the US Constitution (which binds only the National Government) provides that no person shall be deprived of life, liberty or property without the due process of law. In the administrative context this is essentially a requirement of notice and hearing. Since it appears to be settled that the Constitution¹¹⁶ authorises courts to review and strike down unconstitutional legislation, legislatures may not exclude due process from legislation. The doctrine of ultra vires and principle of legality form the basis of judicial review in South Africa¹¹⁷. There had been classification for determining when natural justice is applicable. This classification was rejected in Traub case¹¹⁸

¹¹⁶ South African Constitution Act, 1993 (Act 200 of 1993) Section 24

¹¹⁷ Baxter L; Unpublished Diploma in Legal Studies Dissertation (1978) 17 and cases cited there.

¹¹⁸ see note 112 (supra)

Baxter¹¹⁹ also states that the classification is both superfluous and misleading: the real question is whether the act involves some form of decision being taken after assessment of circumstances. In his opinion, natural justice is an important common law control, the importance of which cannot be underestimated. There are three broad functions performed by the principles of natural justice -

- (a) they increase the likelihood of accurate decisions by requiring the unbiased consideration of all the circumstances;
- (b) they express the ideal of fairness and fair treatment which individuals in a civilised society expect from the administration; and
- (c) as a result they act as a guide to the administration as to what is required of them by way of fairness. Even when the ultimate decision is subjective and cannot be tested against objective standards, the mere fact that natural justice will have been observed goes some way to assuring affected individuals that the decision has at least been fairly treated.

3.3.4. Legitimate Expectations

Legitimate expectation doctrine holds that where a decision-maker, through either an express promise or the adoption of a regular practice, leads those affected to gain the legitimate expectation that he will decide in a particular way, then that expectation will depend upon the circumstances giving rise to it. Sometimes what is expected will be that a particular procedure will be followed in making the decision; and at other times what is expected is some substantive benefit or decision in the individuals favour (as was the case in Traub). However, whether what is expected is a substantive boon or simply procedural justice, the view is that expectations of whatever kind are only protected by requiring a hearing before they are denied. The audi alteram partem principle is made applicable in order to protect the expectation. "This is one way in which the tension between the protection of expectations and the retention of discretion in the

¹¹⁹

see note 117 (supra) at 58-9

hands of decision-makers may be resolved ¹²⁰.

The taxpayer's only legitimate expectation is prima facie, that he will be taxed according to statute, not concession or a wrong view of the law. The doctrine of legitimate expectations is rooted in fairness. But fairness is not a one - way street. It imparts the notion of equitableness, of fair and open dealing, to which the authority is as much entitled as the citizen. The Revenue's discretion, while it exists, is limited. Fairness requires that its exercise should be on a basis of full disclosure. It would not be reasonable to rely on an unclear or equivocal representation. Nor would it be fair to hold the Revenue bound by anything less than clear, unambiguous and unqualified representation.

If it has been established that the Revenue has abused its powers the case for granting judicial review as a matter of discretion would have been clear. The person seeking judicial review must have placed before the Commissioner all the relevant facts to the decision which the Commissioner is being asked to make. He must be completely frank. If the taxpayer seeks an advance, the burden is on him in terms of Section 82 of the Act to explain in full all the consideration material to the Commissioner's decision.

The Traub ¹²¹ case fully introduced the legitimate expectations principle in South Africa. The Court held that

“ (It) has been found necessary, or at any rate desirable, to extend the scope of judicial review to include cases of legitimate expectation...Where an adherence to the formula of 'liberty, property, and existing rights' would fail to provide a legal remedy, when the facts cry out for one; and would result in a decision which appeared to have been arrived at by a procedure which was clearly unfair being immune from review. The law should in such cases be made to reach out and come to the aid of persons prejudicially affected. At the same time, whereas the

¹²⁰ Forsyth CF, 'Audi alteram partem Since Administrator, Transvaal v Traub': In: Quest for Justice: E.Kahn ed (1995) Juta 189

¹²¹ see note 112 above at 761 D-H

concepts of liberty, property and existing rights are reasonably well defined, that of legitimate expectation is not. Like public policy, unless carefully handled, it could become an unruly horse. And, in working out, incrementally, on facts of each case, where the doctrine of legitimate expectation applies and where it does not, the courts will, no doubt, bear in mind the need from time to time to apply the curb. A reasonable balance must be maintained between the need to protect the individual from decisions unfairly arrived at by public authority...and the contrary desirability of avoiding undue judicial interference in their administration...”

This case has transformed the South African law of procedural protection into a vital and expanding corpus of law replacing the moribund formalism that characterized natural justice in the past.

The application of the legitimate expectation doctrine is directly in point if one has regard to Section 24 (b) of the Constitution which states that

- “Every person shall have right to -
- (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened.”¹²²

It is a common place that procedural protection lies near the heart of liberty; and if procedural protection flourishes in the future, that will be an important part of the Traub case legacy.

3.3.5. Review Procedure

Hereafter the question addressed is the review procedure as a remedy which the taxpayer has against the Commissioner’s exercise of his discretion in cases where the section provides for

¹²²

objection and appeal; in cases where the section is silent as to objection and appeal; And where the section specifically prohibits objection and appeal.

The term review is capable of three distinct and separate meanings:¹²³

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

In terms of Section 24 of the Supreme Court Act¹²⁴ the grounds of review proceedings of inferior courts are as follows:

- a. Absence of jurisdiction on the part of the court;
- b. interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;

¹²³ Supreme Court Act, 1959 (Act 59 of 1959) Section 24

¹²⁴ LAWSA Vol. 1 par 436

- c. gross irregularity in the proceedings;
- d. the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

The Supreme Court has inherent jurisdiction under common law to review proceedings of quasi judicial and administrative bodies in appropriate circumstances.¹²⁵ Thus even if the Special Court is not an “inferior court” the proceedings of the Special Court may nevertheless be reviewed by the Supreme Court. An appeal differs from review in that an appeal is directed at the results of the trial whereas review is aimed at the methods by which the result is obtained. In an appeal the appellant is bound by the record of the court a quo; whereas in a review the applicant is not bound by the record of the court.

In South Africa there is no legislation dealing with judicial review. While there is no such statutory bodies in the performance of their duties. In Hira and Another v Booysen and Another¹²⁶ it was said that

“Generally speaking, the non-performance or wrong performance of a statutory duty or power will entitle persons injured or aggrieved thereby to approach the court by way of common law review”.

The recognised grounds of review were summarised as follows by Corbett JA (as he then was) in Johannesburg Stock Exchange v Witwatersrand Nipel Ltd.¹²⁷

“Section 17(3) clearly confers a discretion upon the president, provided that his decision to support shares be taken after due consultation with the head of the listings department, it cannot be challenged in a court of law except upon what are known as review grounds. Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues

¹²⁵ Hira and Another v Booysen and Another 1992 (4) SA 69 (A) at 93

¹²⁶ Johannesburg Stock Exchange v Witwatersrand Nipel Ltd 1988 (3) SA 132(A) 151-4

¹²⁷ ITC 1453, 51 SATC 100, 1989 Taxpayer 235

in accordance with the behests of the statute and the tenets of natural justice ... Such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the President mis-conceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner afore stated...some of these grounds overlap...In the circumstances there is much to be said for the view that Norton's decision may be reviewed and set aside on the ground that it was based upon irrelevant considerations. But it is not necessary to decide this, as there is, in my view, another valid ground for review. This brings me to my second point, which is that, as I have shown, the purpose of the suspension was not to protect the public interest, as I have broadly identified it, but rather to discipline or punish Nigel for disobeying what was thought to be a valid instruction given by Gair. It seems to me that this was an improper purpose - not one contemplated by S17(3) - and that this vitiates the decision taken by Norton to suspend the Wit Nigel shares and renders liable to be set aside on review."

In ITC 1453 ¹²⁸ the court held that where the terms of the taxpayer's objection were sufficiently full and detailed for the Commissioner to have been fully aware of the taxpayer's contentions so as to not be prejudiced by the fact that they were not referred to in specific terms, and where it was clear that the Commissioner's exercise of his discretion had been based upon an incomplete and incorrect set of facts, the relevant assessments should be set aside and the matter referred back to the Commissioner for him to reconsider the position in the light of the facts which emerged on appeal.

¹²⁸

ITC 1453, 52 SATC 258, 1995 Taxpayer 59

In ITC 1478¹²⁹ the court held that without attempting to lay down a procedure to be followed in such cases where a decision of the Commissioner was to be reviewed on certain specific grounds of appeal, it was not sufficient to apprise him of such conclusion in general terms without detailing the basis for such conclusion. Furthermore, the issue had to be tested on the facts and documents that were before the Commissioner at the time when he exercised his discretion. Emslie et al¹³⁰ commenting on this case stated that the court's finding in this case appears to be somewhat startling departure from its own decision in ITC 1453¹³¹, where the matter was referred back to the Commissioner because he had not had the full facts before him when he exercised his discretion. In other words, the Commissioner's exercise of his discretion in ITC 1453¹³² was not reviewed on the basis of the facts and documents that were before him at the time when he exercised his discretion. The act has since been amended to make the discretionary power in question subject to objection and appeal.

They further submit that if the exercise of discretion was based on incomplete or wrong facts - for whatever reason there is no reason why the matter should not be referred back to the official so that his discretion can be exercised afresh in the light of true appreciation of the facts. They consider that if for any reason it emerges that when the Commissioner exercised his discretion he could not have applied his mind properly because the full facts were not before him, the fact is that a valid (as opposed to a correct or incorrect) decision has not been made because it was made on incomplete facts, and the decision should be set aside.

In KBI vs Transvaal Suikerkorporasie Bpk¹³³ the Commissioner on appeal to the Supreme Court contended that the Special Court had no jurisdiction to decided that the additional assessment was out of time, in that the Commissioners satisfaction as to non-disclosure of material facts was an administrative discretion which was not subject to appeal but only to review and that such

¹²⁹ Emslie et al, Income Tax Cases and Materials 2ed (1995) Taxpayer p1114

¹³⁰ see note 129 (supra)

¹³¹ see note 129 (supra)

¹³² see note 128 (supra)

¹³³ 1985 Taxpayer 228 -237

review could only be brought before the Supreme Court. In other words the Commissioner challenged the power of the Special Court to review its administrative decisions. The question is does the Special Court have that power?

The court in this case decided that the objection and appeal procedure of the Act covered all assessments and enabled the Special Court to review the exercise of the Commissioner's discretion in those cases where his discretion was not specifically made subject to appeal. When it is made subject to objection and appeal the court can substantiate its own discretion. Where it is not subject to objection and appeal, one or other grounds of review must exist before the court can interfere.

The editorial comment on this case in 1985 Taxpayer¹³⁴ expressed the opinion that there is every reason for conferring the power of review on the Special Court instead of obliging the taxpayer to take review proceedings in the Supreme Court. Having regard for the reasons for establishing the Special Court as an institution to adjudicate between the taxpayer and Revenue and bearing in mind that the President of the Special Court is a judge of the Supreme Court, it would be highly artificial to deny Special Court the power to deal with assessment because it involves the Commissioner's discretion - an area which unfortunately is being widened. Take this very case. The taxpayer would have had to appeal to the Special Court both against the re-opening of the assessment and the assessment of the amount as taxable income. On being informed that the assessment was being re-opened after 3 years on the ground of non-disclosure of material facts, the taxpayer would then have been out of court in respect of his initial ground that the Commissioner was disbarred after re-opening. He could still pursue his second ground, the capital nature of the accrual, but if he lost on this ground, he would have had to take the Commissioner on review to the Supreme Court and if he succeeded there the whole appeal to the Special Court would have been a waste of time to all parties.

It is submitted, as has been pointed out above, that the lack of a clear status of the Special Court leads to problem of forum-shopping. The submissions made above on appeals apply to reviews.

¹³⁴

Section 33 r/w S7 of Act 200 of 1993 (SA Constitution Act, 1993)

The most important right regarding review of administrative acts and decisions is the right to administrative justice contained in Section 24 of the Constitution guaranteeing the right to lawful, procedurally fair and justifiable administrative action; as well as the right to be furnished with reasons for administrative actions. The most innovation brought about by the right is its empowerment of the courts to strike down administrative action under Section 24 of the Constitution on the sole ground of unreasonableness. Now all persons whose rights are affected or threatened by such actions are entitled to action which justifiable in relation to the reasons given for it. For the limitation clause to apply the administrative action must be reasonable, in some cases necessary, and justifiable.

Administrative decisions and acts performed by tax officials having an impact on taxpayer's rights are open to scrutiny to determine their suitability and feasibility in relation to their objectives. To assist the taxpayer take the decision on review Section 24 (c) of the Constitution grants all persons the right to be furnished with written reasons for administrative action unless they are made public. The taxpayer is entitled to take the Commissioner on review in order to show that the Commissioner had no proper ground for his satisfaction. This could be achieved only if the taxpayer has exercised his right to be furnished with reasons, that is, full disclosure from the Commissioner and his officials of what they have done and why they have arrived at the required satisfaction. When the Commissioner expresses that satisfaction, he exercises an administrative power vested in him to make a decision on the facts known to him following his investigations. The very fact that he has to be satisfied implied that he had performed some form of an act from which certain legal consequences flow. The performance of that act involves the exercise of an administrative decision. Section 156 of the Constitution has created some grounds of review which the taxpayer can rely on or invoke when challenging the Commissioner's decision.

CHAPTER 4: CONCLUSION

4.1 Observations

Discretionary Powers

It has been observed that the Commissioner has used discretionary powers which if they go unchecked can be subject to abuse. In some instances such discretionary powers are not exercised. Rules governing exercise of the discretion are not defined and clear. A legislation leaving the limitation of a fundamental right to the discretion of an official without laying down any principles or policy for prudence of the exercise of the discretion is an excessive or disproportionate delegation and thereby an unreasonable limitation of fundamental rights.

Secrecy

As it is Section 4 of the Act provides for blanket secrecy. This section needs redefining or amendment but not repeal. The taxpayer has no access to information unless by leave of court yet the Commissioner is accused full silence up until the trial. The taxpayer if he had not had the opportunity to ask for leave of court to have information in the hands of the Commissioner will be taken by surprise at he trial. There is no discovery of documents stage prior trial in tax litigations. If there was the taxpayer would not be so disadvantaged.

Objections

The time limit given to the taxpayer to submit his objection, it is felt, is too short taking into account that there may be complex and difficult cases. The taxpayer has to state fully the grounds upon which he bases his objection. The onus is on him to prove that the assessment is wrong or inaccurate or whatever he is not satisfied about. The only onus on the Commissioner is to prove that there is an amount and which is taxable; and by implication in the provisions of Section 103(1) (b) (I) if the Act to prove abnormality of a transaction in tax avoidance schemes.

Appeals and Reviews

It has been observed that the status of the Special Court is not clear - whether it is an inferior or superior court. It is not clear whether it has concurrent jurisdiction with the Supreme Court. The Appellate Division in KBI v Suikerkorporasie did not decide whether it has power to review an act of exercise of discretion by the Commissioner. It is submitted that where a decision in question involves an act of an exercise of discretion by the Commissioner that may be reviewable on the grounds of unreasonableness or ultra vires - Sections 24 and 156 of the Constitution respectively.

4.2. Recommendations

It is recommended that the discretionary powers vested in the Commissioner be defined but without limiting him in his duty to implement policy entrusted upon him by the legislature. Secrecy provision be redefined or amended (not repealed) to balance between right to privacy and transparency. That can be achieved by listing what is confidential and reasons thereof. It is suggested that the time for lodging objections be extended to at least 60 days after receipt of assessment or any correspondence from the Commissioner.

It is recommended that the Board entertain all small claims, as a small claims court, and appeals from it to lie with the Special Court. The Special Court be a court of first instance. It is further suggested that an Income Tax Appeal Court be created and it be accorded concurrent jurisdiction with the Supreme Court. This court is to hear appeals from the Special Court and review Commissioner's decisions. The appeals from this court be directed to the Appellate Division. It is submitted that only legally - qualified persons are to appear on behalf of the taxpayer before these all courts. In all this process, it is submitted, rules of natural justice - audi alteram partem doctrine, legitimate expectations - be observed. In that way right to administrative justice, legal representation fair trial and access to court will be achieved.