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UNRESOLVED TAX DISPUTES: THE CASE OF SOUTH SUDAN'S DYSFUNCTIONAL
TAX APPEALS BOARD AND LESSONS FROM UGANDA AND SOUTH AFRICA

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Signed this ^I day., 20..... I

Joseph Majak Madut A

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ABSTRACT

This research will explore the tax disputes resolution mechanisms by the Tax Appeals Board and High Court under the Taxation Act, 2009 in the Republic of South Sudan. Additionally, it will examine legislative gaps affecting the independence and competence of Tax Appeals Board in its mandate of resolving tax disputes within the tax administration system. In addition, the study will explore the review process of Tax Appeals Board's decisions by the High Court of South Sudan. By contrast, however, this research will further examine the tax disputes resolution mechanisms in Uganda and South Africa with the focus on the legislative guarantees on the independence and competence of the statutory bodies tasked with tax disputes resolution.

This research is segmented into six chapters: Chapter One looks at the introductory background of the research while Chapter Two deals with functional framework of Directorate of Taxation, Tax Appeals Board, rights and duties of a taxpayer. Chapter Three which is the crux of this research deals with issues of independence and competence of the Tax Appeals Board as well as appeals to High Court. Chapters Four and Five look at tax dispute resolution mechanisms in Uganda and South Africa respectively. Finally, Chapter Six wraps up this research with findings and recommendations.

CHAPTER ONE: INTRODUCTION

1.0 BACKGROUND OF THE RESEARCH

In the *City of Johannesburg v Renzon and Sons (Pty) Ltd*,¹ it was stated that the distinguishing feature of a tax is that it is a compulsory contribution imposed by the sovereign authority on, and required from the general body of the subjects or citizens – as distinguished from isolated levies on individuals. As a result of it being a compulsory levy imposed by a sovereign authority, tax disputes with tax authorities are inevitable and prevalent in all jurisdictions.

There is no definition of tax dispute in the Taxation Act² of South Sudan. However, the definition of a ‘dispute’ in s 142 of Tax Administration Act³ offers guidance and states it as a disagreement on the interpretation of either the relevant facts involved or the law applicable thereto, or of both the facts and the law, which arises pursuant to the issue of an assessment or the making of a ‘decision’.

A tax dispute usually occurs between a tax authority mandated by law to collect taxes and a taxpayer liable to pay taxes. A tax disagreement with tax authority comes about when a taxpayer fails to observe essential duties such as filing returns, properly estimating returns or keeping proper records. The tax dispute may also arise from the audit’s findings when the taxpayer misrepresents its financial standings to tax authority. This disagreement requires quasi-judicial and judicial avenues to settle such tax disputes.

South Sudan is one such nation with quasi-judicial and judicial institutions established by law to adjudicate tax disputes. Being the latest country to gain her independence on 9 July 2011, it must be said at the outset, that South Sudan is at the initial stage of establishing and developing state institutions capable of running a modern nation-state. This means that its tax administration is at a nascent stage.

¹ 2010 (1) SA 206 (W).

² 2009(South Sudan).

³ S 142 of the Tax Administration Act 28 of 2011(South Africa).

The Directorate of Taxation of South Sudan has been established with the mandate to collect taxes for the government to fulfil its financial obligations to citizens⁴. Section 49 of the Taxation Act⁵ provides for the establishment of the Tax Appeal Board as follows:

- (1) The Minister shall convene an Appeals Board to review a tax assessment or a ruling made by the Directorate of Taxation.
- (2) The membership of the Appeals Board shall consist of:
 - (a) Undersecretary – Chairperson;
 - (b) The President of the South Sudan Society of Accountants as member;
 - (c) Director General of Taxation –Secretary (Ex-officio);
 - (d) An Ad hoc member appointed by the Minister.
- (3) A taxpayer who disputes a tax assessment or other decision of the Director General of Taxation or Directorate of Taxation may appeal to the Appeals Board for reconsideration. The appeal shall indicate the reasons and include the documents, if any, on which the taxpayer bases the request. The appeal shall be filed within 30 days after the action that gave rise to the appeal.
- (4) The person submitting the appeal shall have the burden of proving that the decision, assessment or determination against which he or she is appealing was incorrect.
- (5) The Appeals Board may issue summons, take statements and evidence and direct appellant to submit documents in the same manner as a court.
- (6) Subject to the provisions of this Act, the procedures and conduct of business of the Appeals Board shall be determined by it.

A close examination of s 49 of the Taxation Act⁶ in its entirety reveals legislative unfairness that prejudices a taxpayer in fair adjudication of a tax dispute with tax authority. This legislative unfairness will be discussed at length in this dissertation.

The ineffectiveness of the Tax Appeals Board in South Sudan in settling tax disputes before resort is had to the judiciary is the focus of this study. Pointing out the ineffectiveness of the Tax Appeals Board in handling tax disputes may persuade the policy makers to reform Taxation Act⁷, staff the Tax Appeals Board with skilled personnel and the publicity of the Tax Appeals Board's decisions. This research may further trigger law reform in tax administration in South Sudan. Publicity of the Tax Appeals Board's decisions on its website would enable the public to access legal information. This research may be equally important to

⁴ Section 6(1) and (2) of the Taxation Act, 2009 (South Sudan).

⁵ 2009(South Sudan).

⁶ 2009(South Sudan).

⁷ 2009(South Sudan).

academics, tax advisors and a wider readership in the sense that tax administration in South Sudan is made accessible and transparent.

In addition, this research will examine the process of tax appeals⁸ to the High Court and alternative dispute resolution mechanisms of tax disputes in South Sudan. Section 51 of the Taxation Act⁹ deals with appeals from Tax Appeals Board to High Court and stipulates that:

(1) Decisions of the Appeals Board may be appealed to the High Court; provided that, the appeal is initiated within 15 days of receiving notice of the decision of the Appeals Board.

(2) The High Court may only permit an appeal under subsection (1) when it is based on:

(a) a question of jurisdiction;

(b) a question of interpretation of law; or

(c) a question of evidence.

This research will finally juxtapose operations of similar tax tribunals and tax courts in other jurisdictions namely, Uganda and South Africa, with a view to adopting lessons of reform South Sudan's tax administration system. Uganda has been chosen because of her close trade ties with South Sudan while South Africa has a specialised tax court. This study will also highlight the gaps in the South Sudanese tax legislation which may be useful to policy makers in meeting their mandate of enacting parent and subsidiary legislations. This study concludes with the findings and recommendations to relevant stakeholders in the tax administration in South Sudan.

1.2 PROBLEM STATEMENT

In democratic nations, the rule of law is very instrumental in societal cohesion. This would entail in a tax context, equal treatment of the tax authority and taxpayer before the law and unfettered access to justice in the administration of the tax system.

Tax disputes in South Sudan undoubtedly lack proper resolution mechanisms. This stems from inherent weaknesses in tax legislation highlighted in sections 49 and 51 of the Taxation Act¹⁰ and discussed later in this dissertation. There are perhaps two salient weaknesses in s 49 of the Taxation

⁸ Section 51 of the Taxation Act, 2009(South Sudan).

⁹ 2009(South Sudan).

¹⁰ 2009(South Sudan).

Act¹¹ namely: the membership of Director General of Taxation in Tax Appeals Board compromises the latter's independence and secondly there is no requirement of law qualification for membership in Tax Appeals Board. Consequently, the layperson cannot be expected to aptly interpret and apply the tax legislation and the perhaps the proceedings before Tax Appeals Board are likely to be guess work. The impact of these legislative weaknesses renders the Tax Appeals Board dysfunctional in its mandate of tax dispute resolution. The problem is further compounded by the Tax Appeals Board's failure to issue rules of procedure despite having authority to do so for a decade of its existence.

The research methodology chosen is doctrinal research. This means that the reliance has been placed on the available literature in statutes, regulations, rules, case law, books and scholarly articles as opposed to quantitative research technique.

1.3 THE RESEARCH QUESTIONS

The research questions of this study are as follows:

- a) Does South Sudan's Taxation Act¹² properly provide tax dispute resolution mechanisms necessary for efficient tax administration?
- b) What is the importance of this research to policy makers, taxpayers and general readership?
- c) What are the necessary reforms needed to address the identified gaps in the Taxation Act?¹³

1.4 SUMMARY OF THE RESEARCH

This summary provides a guide for each chapter's content. Chapter one has examined the introduction, problem statement and research questions. Chapter Two covers legal framework of the tax administration in South Sudan and enactment process of the tax legislations in South Sudan. It also covers the powers and functions of a tax authority and the Tax Appeals Board. In addition to this, it discusses the rights, expectations and obligations of the taxpayers in South Sudan.

Chapter Three deals with the crux of this research. It covers justification of Tax Appeals Board, its composition, independence and capacity as well as 60 days' automatic decision rule in South

¹¹ 2009(South Sudan).

¹² 2009(South Sudan).

¹³ 2009(South Sudan).

Sudan. Finally, it discusses appeals from the decisions of Tax Appeals Board to High Court in South Sudan in addition to possibility of alternative dispute resolution mechanisms within the tax administration system.

Furthermore, Chapter Four and Five deal with tax dispute resolution in Uganda and South Africa as a comparative study to South Sudan. In Uganda, the independence and capacity of Tax Appeals Tribunal to deal with tax disputes is fully discussed. In South Africa, the institutions tasked with tax disputes resolution namely; Tax Ombud, Tax Board, Tax Court and appellate courts are discussed. The focus of the discussion is the legislative manner in which institutions tasked with tax disputes resolution are safeguarded from control and influence of the tax authorities. The purpose of the comparative study with Uganda and South Africa is to point out institutional independence and capacity of statutory bodies dealing tax disputes resolution compared to South Sudan.

Chapter Six summarises the findings of the research and proposed recommendations to policy makers in South Sudan to make reforms in tax administration system.

CHAPTER TWO: THE LEGAL FRAMEWORK OF TAX ADMINISTRATION IN SOUTH SUDAN

2.0 INTRODUCTION

This Chapter deals with the tax law making process in the National Legislature and the President's power to enact tax law pending the approval of the National Legislature. It also examines the powers of the Director General of Taxation provided under the Taxation Act¹⁴ as a primary role player in tax administration. This Chapter concludes with the taxpayer's expectations from tax authority and the Tax Appeals Board along with the rights and obligations of a taxpayer.

2.1 TAX LAW ENACTING POWER IN SOUTH SUDAN

Just like any other democratic state in the world, the principle that 'there can be no taxation without representation' applies to South Sudan. This principle is premised on the principle of legality.

It is imperative to discuss at the outset the tax law enacting power in South Sudan because the constitutional issues may arise in the proceedings before the Tax Appeals Board. The Tax Appeals Board, in addressing appeals filed before it, may encounter issues of constitutionality of a fiscal statute. In that case, the Tax Appeals Board lacks jurisdiction on matters of constitutional validity of tax legislation and therefore it can only refer such tax dispute to the court with appropriate jurisdiction. Instances where the taxpayer may challenge the constitutionality of tax legislation or the power exercised under it by a tax authority is when the taxpayer's fundamental human rights are violated. For example, the right to fair hearing, access to court or property. For example, in the South African case of *ITC 1806 68 SATC 117*, it was held that the Tax Court is a creature of statute and thus it lacks jurisdiction to adjudicate on the constitutionality of any fiscal statutes enacted by Parliament.¹⁵

In South Africa, courts have upheld the principle of 'no taxation without representation' in their judicial pronouncements. This principle is encapsulated in *Shuttleworth v SA Reserve Bank & another* where the Supreme Court of Appeal had this to say:

A founding principle of parliamentary democracy is that there should be no taxation without representation and that the executive branch should not itself be entitled to raise revenue but should

¹⁴ 2009(South Sudan).

¹⁵ 1806 68 SATC 117.

rather be dependent on the taxing power of parliament which is democratically accountable to the country's tax-paying citizenry.¹⁶

South Sudan is no exception, and the legislative competence of taxation matters vests with the National Legislature. The National Legislature is composed of the National Legislative Assembly as the upper house and the Council of States as the lower house.¹⁷

In revenue and tax matters in South Sudan, the National Legislature enjoys exclusive legislative power to some extent. Under art 55(3)(b) of Transitional Constitution,¹⁸ the National Legislature is competent to enact legislation assigned to it by the Constitution. Schedule (A) paragraph (40) of the Constitution specifically confers national tax-law-making power and revenue matters on the National Legislature. In terms of governance, South Sudan is a decentralised state and the legislative powers are divided between national and state levels of government.

However, in what will be a surprising legal norm compared to other democratic jurisdictions, the President of the Republic of South Sudan has intermittent tax-law-making power under the Constitution by Provisional Order. This power is exercised by the President when the National Legislature is in recess. This scenario finds support from writers as argued by Thuronyi:

Under the general distinction between the legislative and the executive functions of government, law-making, in the sense of establishing the general rules that control behaviour in society, is a privilege of the legislative branch, while the implementation and the administration of laws pertain to the executive branch. As an exception to this principle, some constitutions assign to the executive branch the power to make law by decree without the consent of parliament, usually strictly limiting this power in scope or in time or permitting it only when a state of emergency or specific authorisation by the legislature exists.¹⁹

Thus, art 86(1) of the Transitional Constitution²⁰ provides that in the case where the National Legislature is in recess, the President may, in respect of an urgent matter, issue a provisional order having the force of law.²¹ Notwithstanding art 86(1) above, art 86(5) of the Transitional Constitution²² says the President shall not make any provisional order on matters affecting the Bill of Rights, the decentralized system of government, general elections, annual allocation of

¹⁶ [2014] 4 ALL SA 693 at 704.

¹⁷ Article 54(1) of the Transitional Constitution of the Republic of South Sudan, 2011.

¹⁸ Article 55(3)(b) of the Transitional Constitution of the Republic of South Sudan, 2011.

¹⁹ Victor Thuronyi, *Tax Law Design and Drafting: in Legal Framework for Taxation: International Monetary Fund* 1996 ed volume 1 ch 2 p 42.

²⁰ 2011(South Sudan).

²¹ Article 86(1) of the Transitional Constitution of the Republic of South Sudan, 2011.

²² 2011(South Sudan).

resources and financial revenue, penal legislation or the alteration of administrative boundaries of the states.²³ Under article 90(1), the President has the power to issue a Presidential Order to levy tax where the National Legislature is on recess and it stipulates that notwithstanding the provisions of Article 86 (5) herein, the President may in the public interest, make a presidential order having the force of law, providing that the imposition of any tax, or fee or the amendment thereof shall come into force, pending submission of a bill requiring the same to the National Legislative Assembly.²⁴ Article 86(5) suggests that it is only in instances of public interest that the President may exercise his or her power of Provisional Orders to issue a Presidential Order having the force of law, until the National Legislature reconvenes, to levy tax or make amendments to the existing tax legislation. It is submitted that despite the National Legislature having the exclusive competence to enact tax laws, the President of South Sudan, as shown above, has a discretion to decree a tax law during the recess of the National Legislature. The President Order lapses when it is rejected by the National Legislature upon reconvention, and a President Order is introduced in the normal process of tabling bills for enactment.

The government of South Sudan raises its revenues to meet public expenditure from taxes and oil exports. Articles 177(2) and 179 of the Transitional Constitution²⁵ provide for several sources of revenues, including taxation, to National Government and States Governments respectively. The tax authority of South Sudan strives to achieve this objective of raising revenues by implementing the Taxation Act.²⁶

2.2 THE DIRECTORATE OF TAXATION AND THE POWERS OF THE DIRECTOR GENERAL OF TAXATION

The Directorate of Taxation is a statutory organ established by s 7 of the Taxation Act²⁷ with the mandate to make assessments, collect and enforce tax assessment, impose penalties, interest and fines and investigate the possible violation of tax legislation. It is headed by the Director General of Taxation in terms of s 6 of the Taxation Act²⁸ who ensures the enforcement of tax legislation.

²³ Article 86(5) of the Transitional Constitution of the Republic of South Sudan, 2011.

²⁴ Article 90(1) of the Transitional Constitution of the Republic of South Sudan, 2011.

²⁵ 2011(South Sudan).

²⁶ 2009(South Sudan).

²⁷ 2009(South Sudan).

²⁸ 2009(South Sudan).

To fulfil its mandate, the tax authority (Directorate of Taxation) is vested with statutory powers and tax collection methods which may be invoked to ensure compliance with tax legislation where there is no voluntary compliance in terms s 42 (2) of the Taxation Act.²⁹ These collection methods include offsetting the tax due to the taxpayer with the amount refundable to taxpayer but held by the tax authority, seizing and auctioning the taxpayer's property, seizing taxpayer funds from the deposits held by financial institutions and suspending customs clearance of the taxpayer.

This statutory power of the tax authority manifests itself in provisions legitimising audits, and the search and seizure of taxpayer's property in tax legislation. The tax authority's powers are considered below in detail:

To ensure compliance, s 7(d) of the Taxation Act³⁰ confers a mandate on the tax authority to make assessments of tax, impose penalties and other charges, and to provide the taxpayer with notice of such assessment. Where there is no voluntary compliance from a taxpayer, the tax authority may exercise the coercive power conferred on it under s 7(e) of the Taxation Act³¹ to pursue the collection and enforcement of tax payment and assessments.³²

Additionally, the tax authority has extensive investigative powers where it reasonably believes that a person required under the Act to register for tax but has not done so, verify a tax return or make assessment.³³ In a similar vein, the tax authority has the power to inspect any books of accounts and financial records of a taxpayer, audit, conduct searches in an establishment of the taxpayer to obtain evidence.³⁴

The most feared power of the tax authority is the power to obtain records or information from third parties. Section 14(3) of the Taxation Act,³⁵ states that the Director General of Taxation may provide written notice to any person, including a bank or financial institution, requiring that person to give access to all documents in that person's possession concerning a particular taxpayer.³⁶ These extensive investigative powers of the tax authority to search, inspect or request records in

²⁹ 2009(South Sudan).

³⁰ Taxation Act, 2009(South Sudan).

³¹ 2009(South Sudan).

³² Taxation Act 2009(South Sudan).

³³ s 14(1) of the Taxation Act 2009(South Sudan).

³⁴ S 14(2) of the Taxation Act 2009(South Sudan).

³⁵ 2009(South Sudan).

³⁶ 2009(South Sudan).

possession of a third party has a direct bearing on the right to privacy and confidentiality of a taxpayer's information as will be discussed below.

In the course of exercising investigative powers, tax authorities like other public bodies are prone to exceeding their powers. Therefore, the presence of tribunals, tax boards or courts to check instances of *ultra vires* ensures that taxpayers' rights are safeguarded on the one hand, and that the public bodies on the other hand, exercise their powers within the confines of the law.

To conclude, the tax authority's powers under tax legislation must be checked to avert arbitrariness and that is the mandate of the Tax Appeals Board. The role of the Tax Appeals Board in South Sudan in moderating the administrative power of a tax authority where it is *ultra vires*, is crucial and safeguards the taxpayer's rights. However, despite the tax authority's statutory powers of tax collection, building trust with the taxpayer so as to encourage voluntary compliance with tax legislation is also important. The tax authority should encourage self-assessment of the taxpayer and voluntary payment of taxes. The tax authority should only resort to statutory powers and enforcement mechanisms only for taxpayers who are unwilling to voluntarily pay their taxes. Voluntary payment of taxes is also linked to government provision and delivery of public goods as a purpose for which taxes are collected.

To illustrate the point of building trust between the taxpayer and the tax authority, s 30 of the Taxation Act³⁷ states that where an individual has declared an amount of income insufficient to support expenses incurred for personal consumption, including acquisition of property, the Director General of Taxation may determine the income for purposes of taxation on the basis of expenses incurred by the individual, taking into account income of previous periods or any other relevant information in accordance with the provisions set forth in the regulations. By allowing the taxpayer to voluntarily declare income for income tax purposes, under s 30 of the Taxation Act,³⁸ the tax legislation encourages self-assessment and, of course, with the tax authority reserving the right to ascertain the correctness of the assessment. It is submitted that voluntary compliance with tax legislation should be encouraged to ease the tax authority's duty.

³⁷ 2009(South Sudan).

³⁸ 2009(South Sudan).

Furthermore, beyond South Sudan's borders for example, Uganda has a self-assessment provision under s 95(1) of its Income Tax Act³⁹ which states that where a taxpayer has furnished a return of income for a year of income, the Commissioner is deemed to have made the assessment of the chargeable income of the taxpayer and the tax payable on that chargeable income for that year, being those respective amounts shown in the return. The Tax Appeals Board's mandate in South Sudan tax administration is essentially balancing the need of the tax authority to sufficiently collect taxes for public good and at the same time protecting the rights of the taxpayers. In the process of doing this, the Tax Appeals Board must be independent, competent and apply the law without favour. To achieve this, certainty is needed regarding the provisions of the Taxation Act⁴⁰ relating to the establishment of the Tax Appeals Board, its functions and the judicial review process.

How the Tax Appeals Board lives up to this expectation of fairly adjudicating the tax disputes in South Sudan is an issue which this research attempts to explore further.

2.3 THE STATUTORY DEFINITION OF A TAXPAYER

In examining rights of a taxpayer, it is vital to determine the definition of a taxpayer. Section 1 defines a taxpayer to mean any person who is required to make an application for a taxpayer identification number under this Act and may be defined in and for individual Chapters of this Act without prejudice to this definition.⁴¹ Simply put, a taxpayer is one who pays taxes. A taxpayer can either be a natural person or an artificial person like a company or trust.

2.4 THE TAXPAYER'S EXPECTATIONS OF THE TAX APPEALS BOARD

The taxpayer who has disagreed with the tax authority on an interpretation of a tax law provision, assessment, penalties or any other tax matter and files an appeal before the Tax Appeals Board has some expectations. The taxpayer expects the members of Tax Appeals Board to be independent, competent and be possessed with the necessary skills and knowledge to settle the tax dispute. It is also expected to speedily dispose of the tax disputes and uphold legitimate expectation where necessary.

First, the taxpayer expects the Tax Appeals Board to uphold the doctrine of legitimate expectation where the tax authority, in its written rulings, denies it to the taxpayer. For example, the taxpayer

³⁹ Cap.340(Uganda).

⁴⁰ 2009(South Sudan).

⁴¹ S 1of the Taxation Act 2009(South Sudan).

may rely on a written ruling in terms of s 27(1) of the Taxation Act⁴² which states that the Director General of Taxation may issue to a taxpayer a ruling setting out the application of tax legislation to a transaction by the taxpayer. Such a ruling is an “other decision” under section 49(3) of this Act, and the taxpayer to whom it is issued may appeal to the Tax Appeals Board convened under Chapter X of this Act for reconsideration of that ruling.

Legitimate expectation is a doctrine which protects citizens from some changes of mind, or changes of policy, by public bodies.⁴³ In *O'Reilly v Macknan* it was stated that the basis of the court's protection is said to be 'fairness', not any private law or other legal right.⁴⁴ It has often been said that the courts will intervene where the conduct of the authority is so unfair as to be an abuse of power.⁴⁵

This doctrine was also, in a tax context, expounded in the case of *R v Inland Revenue Commissioners, ex parte Unilever*⁴⁶ where it was held that ‘the categories of unfairness are not closed, and precedent should act as guide not as cage. Each case must be judged on its own facts, bearing in mind the Revenue’s unqualified acceptance of a duty to act fairly and in accordance with the highest public standards.’

It should be noted that legitimate expectation would be rejected if the taxpayer’s reliance on it is in bad faith. Thus, s 27(2) of the Taxation Act⁴⁷ states that if the taxpayer has made a full and true disclosure of the nature of all aspects of the transaction relevant to the ruling, and the transaction proceeds in all material respects as described in the taxpayer’s application for the ruling, a ruling under subsection (1) above shall be binding on the Directorate of Taxation and the taxpayer with respect to the application of the law as it stood at the time of the ruling. Croome and Olivier argued that a taxpayer may only rely on a ruling issued by the Commissioner if the taxpayer makes a full

⁴² 2009(South Sudan).

⁴³ Elizabeth Laing QC ‘Legitimate Expectation’ [2013] *Judicial Review (JR)*, DOI:10.5235/10854681.18.2.153 p. 158 para 22; Bluebook 21st ed. Elisabeth Laing, ‘Legitimate Expectation’, 18 *JUD. REV.* 153 (2013).

⁴⁴ [1983] 2 AC 237 at 275.

⁴⁵ *Re Preston* [1985] AC 835.

⁴⁶ [1996] STC 681 at 690.

⁴⁷ 2009(South Sudan).

disclosure of facts when applying for the ruling.⁴⁸ In *R v Board of Inland Revenue, ex parte MFK Underwriting Agencies Ltd & Ors and Related Applications*⁴⁹ the court stated:

In those cases, where the taxpayer has approached the Revenue for guidance the court will be unlikely to grant judicial review unless it is satisfied that the taxpayer has treated the Revenue with complete frankness about his proposals. Applying private law tests to the situation calls for utmost good faith on the part of the taxpayer. He should make full disclosure of all the material facts known to him.

It therefore submitted that where the tax authority fails to adhere to its tax rulings, published guidance or a long-standing practice to the prejudice of the taxpayer, the Tax Appeals Board is expected to uphold the principle of legitimate expectation.

Secondly, the taxpayer expects the Tax Appeals Board to be independent from the control or direction of the Director General of Taxation when the taxpayer's appeal is lodged with it. As will be seen in Chapter Three, the composition of the Tax Appeals Board in South Sudan, compromises its independence, particularly to the prejudice of the taxpayer. Section 49 of the Taxation Act⁵⁰ provides for membership of the Director General of Taxation as *ex-officio* on the Tax Appeals Board. This is not in accordance with the principles of natural justice and fair trial where the proposition holds that no one should be a judge in his or her own cause.

Thirdly, the taxpayer expects the Tax Appeals Board to be staffed with competent personnel. It should be noted that most taxpayers are advised by qualified tax advisors or legally represented by lawyers before the Tax Appeals Board. It is unfortunate to see that there are no qualified legal personnel on the Tax Appeal Board. Section 49(2) of the Taxation Act⁵¹ *supra* provides that the membership of the Tax Appeals Board shall consist of:

- (a) Undersecretary – Chairperson;
- (b) The President of the South Sudan Society of Accountants as member;
- (c) Director General of Taxation –Secretary (Ex-officio);
- (d) An ad hoc member appointed by the Minister.

⁴⁸ Beric Croome and Lynette Olivier, 'Tax Administration', (2010) p 64.

⁴⁹ [1990] 1 ALL ER 91 at 115; Beric Croome and Lynette Olivier, 'Tax Administration', (2010) p.64.

⁵⁰ 2009(South Sudan).

⁵¹ S 49 (2) of Taxation Act 2009(South Sudan).

In other jurisdictions, for instance in Uganda, it is a judge qualified to be in High Court that heads the tax tribunal. This is provided for under s 3(2) of the Tax Appeals Tribunal Act⁵² which states that a person is not qualified to be appointed chairperson of a tribunal unless he or she is qualified to be appointed a judge of the High Court. It is therefore submitted that when a taxpayer files an appeal, the expectation is that the Tax Appeals Board is competent to dispose of an appeal. However, it is unfortunate in South Sudan that there is no legal requirement for the Minister to appoint a person of a legal background to the Tax Appeals Board.

2.5 TAXPAYER'S RIGHTS IN SOUTH SUDAN

The Transitional Constitution of the Republic of South Sudan⁵³ and the Taxation Act⁵⁴ guarantee the taxpayer certain rights to safeguard against arbitrariness of the tax authority in the enforcement of tax laws. These rights include: the right to a fair trial, privacy, refund of overpaid tax, the right to object to an assessment, access to tribunals and courts, and the right to be taxed in accordance with the provisions of the law. These taxpayer's rights ought to be observed always by the tax authority and the Tax Appeals Board when dealing with taxpayers.

Bentley⁵⁵ argues that taxpayers' rights are classified into primary and secondary rights. Primary legal rights focus on law-making process and what makes a tax law a valid law⁵⁶ for example, how the rights to privacy, be taxed according to the law, and access to information are protected in the passing of a tax law. On the other hand, secondary legal rights focus on the specific operation of the law. They are concerned with the protection of rights at both a general and specific level,⁵⁷ for example, how the right to a fair administrative hearing is protected in the passing of a tax law.

In South Africa, the taxpayers' rights are guided by Charter of Taxpayers' rights alongside the constitution and tax laws. The Katz Commission first recommended the introduction in South Africa of a statement of taxpayers' rights.⁵⁸ The Minister of Finance published the South African

⁵² S 3(2) of Tax Appeals Tribunal Act Cap 345(Uganda).

⁵³ 2011(South Sudan).

⁵⁴ 2009(South Sudan).

⁵⁵ Duncan Bentley, *Taxpayers' Rights: An International Perspective* (1998) p 6. Published on the Gold Coast Australia by Revenue Law Journal, School of Law, Bond University, Queensland 4229.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Beric John Croome *Taxpayers' Rights in South Africa: An analysis and evaluation of the extent to which the powers of the South African Revenue Service comply with the Constitutional rights to property, privacy, administrative justice, access to information and access to courts'* (2008) p 25.

Revenue Service (SARS) Client Charter in the 1997 Budget Review.⁵⁹ The Charter is merely a statement of intent by the Commissioner, it does not alter the law in any way, and it confers no greater rights on the taxpayers.⁶⁰ The main effect of these charters is to prohibit arbitrary practices by the tax administration against taxpayers.⁶¹ South Sudan does not have a charter of taxpayer rights. However, s 8 of the Taxation Act⁶² provides for guiding principles which guide the tax authority and Tax Appeals Board when dealing with taxpayers. The author argues that the National Legislature could have intended s 8 of the Taxation Act⁶³ to be the current charter of taxpayer rights in South Sudan. This provision is quoted below in full:

The Directorate of Taxation shall observe the following guiding principles and values when exercising its functions and duties:

(a) ensure transparency in operations so that the level of government entitled to the revenue proceeds has complete information on revenue collections and can validate the calculations of its share;

(b) clearly enlighten the citizens on their rights and duties under this Act in a manner that is educating and permits the self-assessment of taxes;

(c) make easily understood forms and instructions freely available to the public;

(d) ensure that the law is applied uniformly to all taxpayers by publicizing explanations on how the Directorate of Taxation will apply the law where such application may affect a number of taxpayers;

(e) through the selection, training, and promotion of revenue officers, encourage them to be honest, courteous, and fair and to apply the law, regulations and rulings to each case on the basis of the objective facts;

(f) apply sanctions and penalties that are clearly understood and are swiftly applied in a uniform manner;

(g) make educational visits to taxpayers to ensure that they understand their rights and duties; and,

(h) to reduce Directorate of Taxation's reliance on sanctions that punish taxpayers for violations, develop programs and practices that encourage taxpayers to comply with the law.⁶⁴

Further to this argument, these taxpayers' rights are analyzed below bearing in mind their effect in the context of South Sudan:

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Victor Thuronyi, *Tax Law Design and Drafting*: in *Legal Framework for Taxation*: International Monetary Fund 1996 ed volume 1 ch 2 p 15.

⁶² 2009(South Sudan)

⁶³ 2009(South Sudan).

⁶⁴ Taxation Act 2009(South Sudan).

First, the taxpayer's right to be taxed in accordance with the law is considered. Article 19(5) of the Transitional Constitution⁶⁵ provides that no person shall be charged with any act or omission which did not constitute an offence at the time of its commission. This is a principle of legality and although it is couched in criminal law expressions, it can be interpreted to extend to civil and tax matters.

Stemming from the principle of legality is the retrospectivity of legislation which presupposes that the law should not affect past transactions that took place before its enactment. In the South African tax law context, the principle of retrospectivity does not apply as was expounded in *Pienaar Bros (Pty) Ltd v SARS*.⁶⁶ In a similar vein, Ongwamuhana, states that: 'Primary rights (statutory legal rights) include such things as the right not to be taxed except in accordance with the law. This right, written into many constitutions, translates itself into several sub-rights. The first is the taxpayer's right to pay no more than the law requires.'⁶⁷

In dealing with taxpayers, the tax authority and the Tax Appeals Board in South Sudan are obligated to ensure observance of, and enforcement of the taxpayer's right to be taxed in accordance with the unambiguous terms of tax laws. Since no court in South Sudan has pronounced itself on the applicability of the retrospectivity principle in tax legislation, it is submitted that the tax administrators in tax administration must abide by article 19(5) of the Transitional Constitution of the Republic of South Sudan.⁶⁸

Secondly, the taxpayer's right to privacy will now be considered. This right is most frequently violated during the tax collection process. Article 22 of the Transitional Constitution⁶⁹ provides that the privacy of all persons shall be inviolable; no person shall be subjected to interference with his or her private life, family, home or correspondence, save in accordance with the law. The limitation is regarded to be reasonable and demonstrably justified in free and democratic society.⁷⁰

The meaning of the right to privacy was considered in the South African case of *Bernstein and*

⁶⁵ Transitional Constitution of the Republic of South Sudan 2011.

⁶⁶ (2017) (6) SA 435 (GP).

⁶⁷ Kibuta Ongwamuhana 'Tax Compliance in Tanzania - an Analysis of Law and Policy Affecting Voluntary Taxpayer Compliance' UCT (2011) p 90.

⁶⁸ 2011(South Sudan).

⁶⁹ Transitional Constitution of South Sudan, 2011

⁷⁰ Article 190(a) of the Transitional Constitution of South Sudan, 2011.

*Others v Bester N.O. and Others*⁷¹ where Ackermann J explained the meaning of the term privacy as:

Privacy is an individual condition of life characterised by seclusion from the public and publicity. This implies an absence of acquaintance with the individual or his personal affairs in this state... The unlawfulness of a (factual) infringement of privacy is adjudged 'in the light of contemporary *boni mores* and the general sense of justice of the community as perceived by the Court'. Examples of wrongful intrusion and disclosure which have been acknowledged at common law are entry into a private residence, the reading of private documents, listening into private conversations, the shadowing of a person, the disclosure of private facts which have been acquired by a wrongful act of intrusion, and the disclosure of private facts contrary to the existence of a confidential relationship. These examples are all clearly related to either the private sphere, or relations of legal privilege and confidentiality. There is no indication that it may be extended to include the carrying on of business activities.

However, the fact that the right to privacy is derogable, does not in itself expose the taxpayer to arbitrary violation of this right.⁷² Section 44(6) of the Taxation Act⁷³ grants the Director General of Taxation a discretion to make an application, through the Ministry of Justice and Constitutional Affairs, to court for an order to seize the taxpayer's property. The tax authority must interfere with the right to privacy of a taxpayer only within the ambit of Taxation Act⁷⁴ and any conduct short of that will nonetheless be challenged as unconstitutional. The tax authority's powers of investigation as provided under s 14 of the Taxation Act⁷⁵ include the power to gather taxpayer's information from third parties like banks and financial institutions; the power of search and seizure of taxpayer property; and the power to conduct audits. All these powers have direct bearing on the taxpayer's right to privacy, and they should be exercised with caution so that the taxpayer's confidential information remains confidential.

Thirdly, the right to a fair trial will now be considered. It is a fundamental right not only in tax administration but also with respect to the rule of law in general. Article 19(3) of the Transitional Constitution⁷⁶ provides that in all civil and criminal proceedings, every person shall be entitled to

⁷¹ 1996 (4) BCLR 449 (CC); Beric John Croome Taxpayers 'Rights in South Africa: An analysis and evaluation of the extent to which the powers of the South African Revenue Service comply with the Constitutional rights to property, privacy, administrative justice, access to information and access to courts' (2008) p 67-68.

⁷² Article 190(a) of the Transitional Constitution of South Sudan, 2011.

⁷³ Taxation Act 2009(South Sudan).

⁷⁴ 2009(South Sudan).

⁷⁵ Taxation Act 2009(South Sudan).

⁷⁶ Transitional Constitution of the Republic of South Sudan, 2011.

a fair and public hearing by a competent court of law in accordance with procedures prescribed by law.

The idea of a fair trial is a broad concept. However, in the context of administrative bodies like the Tax Appeals Board, it narrows down to two basic principles: that one must not be condemned unheard as expressed by the *audi alteram partem* rule, and one cannot be a judge in one's own cause, expressed as *nemo iudex in causa sua*. In the often-quoted English case on judicial review or administrative action, *Ridge v Baldwin*,⁷⁷ it was held that a decision reached in violation of the principles of natural justice, especially the one relating to the right to be heard, is void and unlawful.

South Africa has codified the common law principles of natural justice as a right to administrative action in the Constitution.⁷⁸ It provides for a taxpayer right to a fair administrative action under s 33⁷⁹ in the following terms:

Just administrative action. —

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must—

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration.

Similarly, the right to fair trial is a non-derogable right in Uganda in terms of art 44 of the Ugandan Constitution.⁸⁰

It is therefore submitted that the Tax Appeals Board and the tax authority of South Sudan are obliged to observe the sanctity of the taxpayer's right to a fair trial. This can be carried out in many forms, including *inter alia*; through providing notices to the taxpayer, providing the taxpayers with

⁷⁷ [1964] AC 40.

⁷⁸ 1996(Uganda).

⁷⁹ S 33 of the Constitution of the Republic of South Africa, 1996.

⁸⁰ Article 44 of the Constitution of the Republic of Uganda, 1995.

adequate time for preparation of their case, and by allowing for the taxpayer's right to be represented by an expert of the taxpayer's choice.

Fourthly, the taxpayer's right to property will now be considered. The meaning of 'property' was considered in *First National Bank of S.A. Ltd t/a West bank v Commissioner for South African Revenue Services and Another* ("FNB")⁸¹ where Ackermann J said:

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

In South Sudan, there is a constitutional guarantee against the alienation of individual property except in accordance with the law. For example, an expropriation is permissible only in the public interest or in the event of seizure in the exercise of the tax authority's power to recover taxes due to the government in terms of article 28(2) of the Transitional Constitution.⁸² Similarly, the Constitution of the Republic of South Africa protects the right to property. Section 25(1) of the Constitution of the Republic of South Africa⁸³ states no private property shall be confiscated save by an order of a court of law and that no one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of the property. Property may be expropriated only in terms of law of general application for a public purpose or in the public interest. It is submitted that payment of taxes is in the public interest for which a taxpayer's property may be alienated.

In South Sudan, s 43 of Taxation Act⁸⁴ illustrates how a taxpayer's property may be alienated by seizure. It states that pursuant to the provisions of s 42 of the Taxation Act,⁸⁵ a taxpayer's right of ownership and use of his or her property, whether movable or immovable, may be restricted by a lien and subject to seizure. Therefore, the Tax Appeals Board and courts while adjudicating tax

⁸¹ 2002 (7) BCLR 702 (CC); Beric John Croome Taxpayers 'Rights in South Africa: An analysis and evaluation of the extent to which the powers of the South African Revenue Service comply with the Constitutional rights to property, privacy, administrative justice, access to information and access to courts' (2008) p 28.

⁸² Transitional Constitution of the Republic of South Sudan, 2011.

⁸³ 1996(Uganda).

⁸⁴ 2009(South Sudan).

⁸⁵ 2009(South Sudan).

disputes before them must be alive to the fact that the taxpayers should not be deprived of their property except in cases where the law allows.

Fifthly, the taxpayer's right to object to and appeal a tax assessment will be considered. This will be discussed extensively in Chapter Three, but it is worthy to state here that this is an inherent right guaranteed by the South Sudan's Transitional Constitution.⁸⁶ Section 51 of the Taxation Act⁸⁷ restricts the judicial review process to only three grounds: questions of jurisdiction, law and evidence. As a result, many tax disputes based on other grounds remain unaddressed.

It is therefore submitted that by s 51 of the Taxation Act limiting the grounds for judicial review in the High Court, it is contravening art 20 of Transitional Constitution of South Sudan,⁸⁸ which states that the right to litigation shall be guaranteed for all persons; and no person shall be denied the right to resort to courts of law to redress grievances.⁸⁹ In contrast, in South Africa no limitations are placed on when tax disputes from the Tax Board may be referred to the Tax Court. In fact, the tax dispute is even heard *de novo* by the Tax Court after such referral.⁹⁰

Finally, the other taxpayers' rights expressly stated in the Taxation Act⁹¹ are self-explanatory and it suffices to state them in summary: the right to a refund of the money overpaid by the taxpayer under s 41 of the Taxation Act,⁹² the right to extension of time to file return under s 21 of the Taxation Act,⁹³ the right to written communications and rulings under s 26 of the Taxation Act⁹⁴ and s 27 of the Taxation Act⁹⁵ respectively.

2.6 OBLIGATIONS OF THE TAXPAYER

The converse of the rights of a taxpayer is the obligation to pay taxes to the tax authority. The taxpayer is expected to behave in a certain manner to avoid being in conflict with the tax authority. The tax authority and state would fail in their duties if there were no obligations on taxpayers imposed by tax statutes. These obligations are considered below in detail:

⁸⁶ 2011(South Sudan).

⁸⁷ 2009(South Sudan).

⁸⁸ 2011(South Sudan).

⁸⁹ Transitional Constitution of the Republic of South Sudan 2011.

⁹⁰ S 115(1) & (2) of the Tax Administration Act 28 of 2011(South Africa).

⁹¹ 2009(South Sudan).

⁹² Taxation Act, 2009(South Sudan).

⁹³ Taxation Act, 2009(South Sudan).

⁹⁴ Taxation Act, 2009(South Sudan).

⁹⁵ Taxation Act, 2009(South Sudan).

First, a taxpayer has an obligation to be honest while dealing with the tax authority. The tax authority will be respectful if the taxpayer reciprocally exhibits honesty in dealing with the tax authority. The maneuvers designed to outwit the tax authority or indulge in tax avoidance or evasion will only put the taxpayer at loggerheads with the tax authority.

Secondly, the taxpayer has the obligation to keep records of transactions so as to ease verification by the tax authority. Section 24(1) of the Taxation Act⁹⁶ provides that each taxpayer shall keep accounts of all transactions and these accounts shall be made available in South Sudan for inspection by a revenue officer. Moreover, each taxpayer shall preserve his or her accounts and documents substantiating such transactions for a period of six (6) years under s 24(3) of the Taxation Act.⁹⁷ Criminal sanctions or fines may ensue in the case of a taxpayer who does not keep records or intentionally destroys or fraudulently conceals records with the ultimate aim of denying revenues to the fiscus. Therefore, a taxpayer is duty bound to keep records and the Tax Appeals Board cannot come to the aid of such a person.

Thirdly, a taxpayer has an obligation to file returns and pay taxes as they fall due. Section 22(1) of the Taxation Act⁹⁸ stipulates that when a tax return or any other filing is required under the Act, the person required to make such return or filing shall pay at the time and place fixed for filing the return except as may be otherwise prescribed by regulations. A failure by a taxpayer to observe this obligation will not only make the tax authority invoke its power of seizure of property under the Act to ensure tax compliance, but also to auction the property and recover the taxes.⁹⁹ The tax authority may also impose fines, penalties and charge interest for the delay in paying taxes.¹⁰⁰

2.7 CONCLUSION

In conclusion, the tax authority and taxpayer are key litigants before the Tax Appeals Board and it is absolutely necessary to examine their respective roles and powers, duties and rights.

The tax laws are enacted by the National Legislature which the Tax Appeals Board and regular courts interpret in the adjudication process. The playing field is not level between the tax authority and the taxpayer because the former has swift powers of search, seizure of property and gathering

⁹⁶ 2009(South Sudan).

⁹⁷ 2009(South Sudan).

⁹⁸ 2009(South Sudan).

⁹⁹ S 43(3) of the Taxation Act, 2009(South Sudan).

¹⁰⁰ Sections 36 and 37 of the Taxation Act, 2009(South Sudan).

of information from third parties, irrespective of the economic hardship the exercise of these powers may have on the latter.

Be that as it may, the taxpayer has inviolable rights to a fair trial and to be taxed in accordance with the law as expressly enshrined in the Transitional Constitution.¹⁰¹ However, other rights of the taxpayer may be interfered with in accordance with tax legislation. For a taxpayer to avoid being in conflict with the tax authority, the taxpayer must be honest, cooperate with the tax authority, file returns and keep accurate records.

¹⁰¹ 2011(South Sudan).

CHAPTER THREE: TAX APPEALS BOARD IN SOUTH SUDAN

3.0. INTRODUCTION

This Chapter will discuss the establishment, composition, justification and jurisdiction of the Tax Appeals Board as a quasi-judicial body with a mandate to settle tax disputes arising between the tax authority and the taxpayer. The composition of the Tax Appeals Board will be examined thoroughly because its human resource capacity and independence in handling tax disputes is doubtful under the Taxation Act.¹⁰² It is argued in this dissertation that where there is no legislative safeguard to human resource capacity and independence of the Tax Appeals Board, tax disputes will remain unresolved in South Sudan's tax administration system. In addition to this, the appeal process of the Tax Appeals Board's decisions to the High Court in South Sudan will equally be examined as well as the constraints the appellant is likely to face.

3.1 THE JUSTIFICATION OF THE TAX APPEALS BOARD

Tribunals, in general, will normally be in the executive arm of government to settle disputes which require expertise. The tribunal arrangement should not be construed as infringing the doctrine of separation of powers. Under the doctrine of separation of powers, the legislature is to enact the laws, interpreted by judiciary and administered by executive. It sometimes happens that, for reasons of control, the state envisages creating a tribunal that will be part of the executive arm of government.¹⁰³ The consequence of this may be that decisions taken by the tribunal effectively remove the resolution of a dispute referred to that tribunal from the judiciary and place it instead in the hands of the executive.¹⁰⁴ For reasons of requisite specialisation inherent in certain disputes for example competition, tax, and industrial laws, it is a necessity to create a tribunal to deal with such disputes before formal courts are involved by way of judicial review or the appeal process. Currie and De Waal argue that it will be appropriate for other tribunals and forums to adjudicate on any legal dispute which is not a criminal matter.¹⁰⁵ In support of this, in *De Lange v Smuts, NO*¹⁰⁶ the Constitutional Court of South Africa had this dicta:

¹⁰² 2009(South Sudan).

¹⁰³ Kevin Hopkins 'Some Thoughts on the Constitutionality of "independent" Tribunals established by the State' University of Witwatersrand, (2006) *OBITER* 150.

¹⁰⁴ *Ibid.*

¹⁰⁵ Currie and De Waal 'The Bill of Rights Handbook' 5ed (2005) p 722-723.

¹⁰⁶ (1998) 3 SA 785 (CC)

The rationale for allowing tribunals and forums other than courts to perform judicial functions is obvious. Specialisation, expertise, the need to consider local circumstances and the need for the adoption of expeditious, informal and inexpensive procedures justifies the establishment of other independent bodies by legislation. The protection afforded by section 34 of the Constitution is that when a tribunal or forum decides a dispute, it must be impartial and independent and must decide the dispute in a fair and public hearing.¹⁰⁷

The Tax Appeals Board has been established to deal with tax disputes within tax administration system. It is submitted that the complexities and requisite specialisation required in tax law warrant the establishment of the Tax Appeals Board to sieve through tax disputes before recourse to the judiciary by way of judicial review or appeal. That in itself does not infringe the separation of the powers envisaged in the Transitional Constitution.¹⁰⁸

3.2 THE ESTABLISHMENT AND COMPOSITION OF THE TAX APPEALS BOARD IN SOUTH SUDAN

Section 49(1) of the Taxation Act¹⁰⁹ states the Minister shall convene an Appeals Board to review a tax assessment or a ruling made by the Directorate of Taxation. This means that the only authority to establish Tax Appeals Board in South Sudan is the Minister of Finance and Economic Planning. In terms of composition, the Tax Appeals Board is not free from the interference, control or direction of the Director General of Taxation. The reason is that the Director General of Taxation or his representative is legally a member of the Tax Appeals Board as its secretary in terms of s 49(2)(c) of the Taxation Act.¹¹⁰ The Tax Appeals Board's impartiality is not guaranteed because one of its members is the Director General of Taxation himself whose decisions on tax objections are appealable to the Tax Appeal Board. This is illustrated by section 49 (2) of the Taxation Act¹¹¹ which states that:

‘The membership of the Tax Appeals Board shall consist of:

- (a) Undersecretary – Chairperson;
- (b) The President of the South Sudan Society of Accountants as member;
- (c) Director General of Taxation –Secretary (Ex-officio);
- (d) An ad hoc member appointed by the Minister.’

¹⁰⁷ (1998) 3 SA 785 (CC).

¹⁰⁸ 2011(South Sudan).

¹⁰⁹ 2009(South Sudan).

¹¹⁰ 2009(South Sudan).

¹¹¹ 2009(South Sudan).

It is therefore argued that the Tax Appeals Board is likely to be biased because the Director General of Taxation is a participant of the Tax Appeal Board in two capacities. The first capacity is that he is a secretary of the Tax Appeals Board and in the second capacity, he is a litigant (respondent) with the taxpayer. This means that the taxpayer will not be comfortable with this arrangement and therefore it is likely to affect public confidence and credibility in the Tax Appeals Board.

Furthermore, s 49(3) of the Taxation Act¹¹² states that a taxpayer who disputes a tax assessment or other decision of the ‘Director General of Taxation or Directorate of Taxation may appeal to the Appeals Board for reconsideration.’ The appeal shall indicate the reasons and include the documents, if any, on which the taxpayer bases the request. The appeal shall be filed within 30 days after the action that gave rise to the appeal. The words in quote above under s 49(3) of the Taxation Act¹¹³ indicate the decision-maker of tax assessment and rulings is the Director General of Taxation. The same decision-maker sits on the Tax Appeals Boards as secretary to determine an appeal emanating from their own decision under s 49(2) of the Taxation Act.¹¹⁴ It is argued that the presence of the Director General of Taxation or their representative on the Tax Appeals Board infringes the common law rule against bias. Additionally, it infringes the right to fair and public hearing of any person guaranteed under art 19(3) of the Transitional Constitution.¹¹⁵ The fact that the adjudicator must be impartial while discharging a dispute resolution function is a foundation of the constitutional right to fair hearing.

In addition to this, the real likelihood of bias test may be applied to ascertain how the ordinary layperson would perceive the position of an adjudicator. In the South African case *Monnig v Council of Review*,¹¹⁶ Conradie J held that:

there is, however, in my view, no reason to jettison the real likelihood of bias test. I suggest that it retains its utility where a court is called upon to consider the impartiality of tribunals in the nature of administrative bodies which are known and expected by the reasonable layman to have an institutional or, as it is sometimes called, departmental bias. In these situations, the courts will not interfere with the exercise of administrative, and even quasi-judicial functions, unless it appears that there is, or is feared to be, a real likelihood, that is to say, a probability of (actual) bias on the part of the decision-maker or adjudicator.¹¹⁷

¹¹² 2009(South Sudan).

¹¹³ 2009(South Sudan).

¹¹⁴ 2009(South Sudan).

¹¹⁵ 2011(South Sudan).

¹¹⁶ 1989 4 SA 866 (C) 879G-H.

¹¹⁷ 1989 4 SA 866 (C) 879G-H.

In the author's view, if the test of impartiality of a tribunal as stated in this South African case is applied to the Tax Appeals Board, it will fail because the Director General of Taxation is a partisan member of Tax Appeals Board. It is argued that all the decisions rendered by Tax Appeals Board with the participation of Director General of Taxation are bias and would not pass the scrutiny of the appellate courts.

Moreover, art 19(3) of the Transitional Constitution¹¹⁸ provides that in all civil and criminal proceedings, every person shall be entitled to a fair and public hearing by a competent court of law in accordance with procedures prescribed by law. It is submitted that s 49(2)(c) of the Taxation Act, 2009 contravenes art 19(3) of the Transitional Constitution in so far as the right to fair and public hearing is concerned. The tribunal hearing cannot be fair if the person whom the complaint is against is at the same time also a decision-maker. Impartiality is a precondition for actual justice to be done between parties and is also foundational in establishing the legitimacy of the legal process in the eyes of the public.¹¹⁹ In *President of the Republic of South Africa v SARFU*,¹²⁰ it was stated that impartiality requires the presiding officer to consider the cases of the parties before him on their own merits, with an open mind and without being unduly influenced by irrelevant considerations.¹²¹

Moreover, in *Monnig v Council of Review*¹²² the court held that the importance of impartiality within the context of natural justice is evident from the view that:

'although the presence or suspicion of bias has in the past been treated as an irregularity which could be overlooked if there was proved to have been no prejudice to the aggrieved party ..., the tendency at present is to regard it as a vitiating failure of natural justice, the result of which is that what took place before the adjudicator is not so much a defective hearing as no hearing at all'.¹²³

It should be noted that the long-standing common law rule of natural justice of *nemo iudex in re sua causa* (literally meaning that no one should be a judge in their own cause) applies in the context of the Tax Appeals Board. It is submitted that the Director General of Taxation while sitting on

¹¹⁸ 2011(South Sudan).

¹¹⁹ N Whitear Nel and C Badul 'The Duty of Recusal' (2014) *SACJ* p 48.

¹²⁰ (1999) (4) SA 147 (CC) at para [104].

¹²¹ (1999) (4) SA 147 (CC) at para [104].

¹²² 1989 4 SA 866 (C) 879G-H.

¹²³ 1989 4 SA 866(C) 882G-H.

the bench of the Tax Appeals Board as secretary is a judge in their own cause. In the same vein, the issue of the possible partiality of a quasi-judicial body or an adjudicator in a matter is usually remedied by a recusal application. However, it is unclear whether the remedy of the recusal of a Tax Appeals Board's member is available. It remains a dilemma for a counsel representing the taxpayer whether to wait for a final decision of the Tax Appeals Board and appeal for judicial review or invoke the general inherent power of the court envisaged under s 328 of the Civil Procedure Act¹²⁴ for recusal proceedings in respect of the Director General of Taxation. The latter remedy is preferred in author's view. Such application must be based on merit. The test for a recusal application was stated in *Moolla v Director of Public Prosecutions and Others*¹²⁵ where Satchwell J stated that '[t]o succeed, the applicant would have to satisfy the court that her apprehension of bias was based on the correct facts, that she was acting as a reasonable person in apprehending bias, and that her apprehension of bias was based on reasonable grounds'.¹²⁶ Therefore, it is submitted that in an adversarial system as present in South Sudan, it is important that parties to any dispute should fight their cases on a level ground and that a matter should be decided solely on the credibility of evidence and law.

Another indispensable rule of natural justice is procedural fairness which encapsulates the *audi alteram partem* rule (meaning that an adjudicator should hear both sides). It will not be discussed in detail here but highlighting it is important. In an earlier English case of *R v Sussex Justices, ex parte McCarthy*,¹²⁷ it was held that 'that justice should not only be done but should manifestly and undoubtedly be seen to be done'. It is imperative for the Tax Appeals Board to afford equal hearing opportunities to both the taxpayer and the tax authority on a given tax appeal. This not only involves giving adequate preparation for presentation of one's case, but also knowing fully the details of the case.

To sum up, it is submitted that tax disputes in South Sudan are not resolved on merit and the process is a masquerade. Based on the above analysis, it is argued that one can confidently conclude that the Tax Appeals Board is not independent and it is unable to always resolve tax disputes on merit.

¹²⁴ 2007(South Sudan).

¹²⁵ [2012] ZAGP JHC 94.

¹²⁶ [2012] ZAGP JHC 94.

¹²⁷ [1924] 1 KB 256 at 259.

3.3 CAPACITY OF THE TAX APPEALS BOARD

The second point to make with regard to the Tax Appeals Board is the absence of a legislative provision in the Taxation Act¹²⁸ requiring a lawyer to be part of its composition. It is pointless to purport settling a tax dispute without a lawyer on the Tax Appeals Board. Section 49(2) (d) of the Taxation Act¹²⁹ obliges the Minister to appoint an *ad hoc* member to the Tax Appeals Board. The Minister is therefore empowered *carte blanche* to appoint any member to the Tax Appeals Board – whether a lawyer or not. However, the provision falls short of specifying the skill of the ad hoc member. Without guidance, the Minister is at liberty to appoint even a relative without qualifications at all, in the worst-case scenario, to be a member of the Tax Appeals Board.

Further, in contrast with other jurisdictions, for example, in Nigeria, a chairperson of tax tribunal must not be less than fifteen years post-call experience.¹³⁰ Nigeria, Kenya and Uganda have been chosen because they give the best illustration of qualifications of persons who should be in the tax tribunal. In Uganda, a member of a tribunal shall be a person qualified in taxation, finance, accounting, or law.¹³¹ In Kenya, a person shall not be appointed a Chairperson or a member of the Tribunal under this section unless that person—

(a) in case of the Chairperson, is qualified to be appointed as a Judge of the High Court; and

(b) in case of a member—

(i) is of high moral character and integrity in accordance with Chapter six of the Constitution;

(ii) holds a degree in law, business, finance, public finance, economics, insurance or related discipline from a university recognised in Kenya or any other relevant qualification from an institution recognised in Kenya;

(iii) has at least ten years' experience in matters relating to the discipline referred to in paragraph (b).¹³²

The absence of skill balance, particularly in the discipline of law, is immensely affecting the capability of the Tax Appeals Board in resolving tax disputes. It is therefore argued that laypersons on the Tax Appeals Board can never have proper regard to the foundational principles of natural

¹²⁸ 2009(South Sudan).

¹²⁹ 2009(South Sudan).

¹³⁰ Iyabo Sa'du 'Overview of Tax Appeals Tribunal in Nigeria' (May/June 2010) *LASU Law Journal* 108 at p 110.

¹³¹ s 5(2) of the Tax Appeals Tribunals Act Cap 345(Uganda).

¹³² S 4(3) of the Tax Appeals Tribunal Act No.40 of 2013(Uganda).

justice and conduct a fair and public hearing enshrined in the Transitional Constitution of South Sudan,¹³³ and lack competence to interpret the provisions of fiscal legislations.

3.4 THE 60 DAYS' AUTOMATIC DECISION RULE

Section 50 of the Taxation Act¹³⁴ is a very interesting legislative provision. There was no legislative history readily available at the time of writing this dissertation to confirm the rationale and the intent of legislature in enacting this provision. It states that:

(1) The Tax Appeals Board shall make a written decision on any matter before it not later than 60 days after the receipt of the petition, or the day on which the taxpayer submits such documents as are required by the Tax Appeals Board.

(2) Where the Tax Appeals Board does not make a decision on the matter before it within the time specified (60 days), a decision shall be deemed to have been made in favour of the taxpayer.

Section 50(2) of the Taxation Act¹³⁵ has far-reaching legal and financial consequences. From a legal point of view, the tax dispute determined by the lapse of time is not resolved on merit and the credibility of evidence and law. It does not matter whether the tax authority has defended the taxpayer's appeal before the Tax Appeals Board – what matters is the 60 days. This is unfair to the tax authority which may diligently defend the disallowance of objection but because the decision is not rendered within 60 days by the Tax Appeals Board for reasons beyond the tax authority's control, the tax authority is bound to lose the tax dispute.

From a financial point of view, the financial implication of s 50(2) of the Taxation Act¹³⁶ is that the fiscus could lose taxes. This provision can fall foul on many fronts including bribery of the members of Tax Appeals Board by the taxpayer to remain mute until after the 60 days' lapse. In this case, the fiscus suffers the loss of taxes not because of fault attributable to tax authority but by an inherent weakness in the legislation. The National Legislature should reconsider s 50 of the Taxation Act.¹³⁷

¹³³ 2011(South Sudan).

¹³⁴ 2009(South Sudan).

¹³⁵ 2009(South Sudan).

¹³⁶ 2009(South Sudan).

¹³⁷ 2009(South Sudan).

3.5 APPEALS OF TAX APPEALS BOARD'S DECISIONS TO HIGH COURT

Section 51 of the Taxation Act¹³⁸ provides for judicial review or appeal of the Tax Appeals Board's decisions. It states that:

- (1) Decisions of the Appeals Board may be appealed to the High Court; provided that, the appeal is initiated within 15 days of receiving notice of the decision of the Appeals Board.
- (2) The High Court may only permit an appeal under subsection (1) when it is based on:
 - (a) a question of jurisdiction;
 - (b) a question of interpretation of law; or
 - (c) a question of evidence.¹³⁹

Section 51(2) of the Taxation Act¹⁴⁰ stipulates three grounds for the Tax Appeals Board's decision to be permissible in the High Court. The appeal must be based on a question of jurisdiction, a question of interpretation of law or evidence. The issues of fact are precluded in an appeal to the High Court.

The provision of s 51 of the Taxation Act¹⁴¹ is restrictive though not prohibitory and the tax disputes having merit on other grounds may not see light in the High Court. For instance, where a member of the Tax Appeals Board has been biased, the whole decision is tainted with illegality and should be null and void. It is submitted that Tax Appeals Board's decision affected by bias is not a question of jurisdiction, interpretation of law or question of evidence. It is an independent legal ground which merits the attention of the High Court. The tax dispute appealable on this ground is unlikely to pass the three-prong test required by s 51 of the Taxation Act for an appeal to be allowed in the High Court. This provision implies that a party aggrieved by the Tax Appeals Board's decision on the grounds of bias or other legitimate grounds has no remedy in the High Court.

¹³⁸ 2009(South Sudan).

¹³⁹ Taxation Act, 2009(South Sudan).

¹⁴⁰ 2009(South Sudan).

¹⁴¹ 2009(South Sudan).

3.6 ALTERNATIVE DISPUTE RESOLUTION (ADR) MECHANISM AS AN ALTERNATIVE REMEDY TO APPEAL TO THE TAX APPEALS BOARD.

The Taxation Act¹⁴² has no legislative approach for settlement of tax disputes outside the Tax Appeals Board or court environment. Simply put, there is doubt that the tax authority can settle amicably a tax dispute with the taxpayer in South Sudan. However, the taxpayer willing to settle a tax dispute amicably with the tax authority may rely on provisions of Transitional Constitution¹⁴³ and Civil Procedure Act¹⁴⁴ to persuade the Tax Appeals Board to refer a tax dispute for a negotiated settlement.

Article 122(5)(d) of the Transitional Constitution¹⁴⁵ states that ‘in adjudicating cases of both civil and criminal nature, the courts shall, subject to the law, apply, inter alia, the following principles: ... voluntary reconciliation agreements between parties shall be recognised and enforced.’

In a similar vein, s 137 of the Civil Procedure Act¹⁴⁶ stipulates that at any time before judgement is pronounced, the interested parties in a suit may agree that any matter in issue between them, shall be referred to arbitration, and apply in writing to the Court for an order of reference.

The provision of the Transitional Constitution¹⁴⁷ referred to above encourages the alternative dispute resolution. Additionally, the Civil Procedure Act equally permits parties to a suit to go for arbitration even after the institution of a civil suit. It is submitted that parties to a tax dispute are not precluded from exploring alternative dispute resolution mechanisms. The importance of alternative dispute resolution cannot be overstressed. The time, costs and animosity linked to legal battles are avoided in alternative dispute resolution. Beside time and money, other business reasons may point to alternative dispute resolution as not just being the ‘alternative’, but perhaps also the ‘appropriate’ form of dispute resolution, particularly where a valuable business relationship or confidential information is involved.¹⁴⁸

In South Africa, the South African Revenue Service has limited scope to accept settlement with taxpayers because of the basic principle in tax law that it is the duty of South African Revenue

¹⁴² 2009(South Sudan).

¹⁴³ 2011(South Sudan).

¹⁴⁴ 2007(South Sudan).

¹⁴⁵ 2011(South Sudan).

¹⁴⁶ 2007(South Sudan).

¹⁴⁷ 2011(South Sudan).

¹⁴⁸ Andrew Hutchison et al ‘Private Ordering and Dispute Resolution’ (2018) (2) *SALJ* p 324 at p 325.

Service to assess and collect tax according to the laws enacted by Parliament and not to forgo a tax which is properly chargeable and payable.¹⁴⁹ With this tax principle in mind, the Commissioner of South African Revenue Service will only accept settlement where the upsides outweigh the downsides in its favour.

The circumstances which are deemed inappropriate for South African Revenue Service to engage in settlement are stipulated under s 145 of Tax Administration Act¹⁵⁰ and include: public interest to have judicial clarification of the tax issue; where settlement would condone tax fraud or evasion; and where settlement will not promote compliance of the tax legislation by the taxpayer.

However, it is discretionary for South African Revenue Service to accept settlement when circumstances are in its favour. Factors such as saving the cost of litigation, interest of the overall good management of tax system and evidentiary difficulties during litigation¹⁵¹ can influence South African Revenue Service to consider alternative dispute resolution.

There are different methods of alternative dispute resolution that parties to a tax dispute could explore. The parties to a tax dispute can choose arbitration, mediation, negotiation and conciliation. The most common ones in commercial-related disputes are arbitration and mediation.

3.6.1 ARBITRATION

Most commercial contracts contain arbitration clauses. An arbitration clause may require parties to refer a dispute arising in the execution of a contract for arbitration. In the context of South Sudan, parties who have chosen arbitration may refer the matter to the Juba Centre for Arbitration or appoint their private arbitrators to settle the dispute. An arbitration process can be initiated prior to litigation or subsequent to the institution of court proceedings and the parties to a suit may request the court to allow for arbitration. The Civil Procedure Act¹⁵² permits parties to a civil suit to refer a dispute for arbitration.

Arbitration is more or less similar to litigation because a decision of the arbitrator is binding and enforceable inter-parties. The only difference is that each party has a right to appoint an arbitrator to the arbitration panel unlike court where the judges are appointed by state.

¹⁴⁹ Tax Administration Act 28 of 2011(South Africa).

¹⁵⁰ 28 of 2011(South Africa).

¹⁵¹ S 146 of the Tax Administration Act 28 of 2011(South Africa).

¹⁵² 2007(South Sudan).

The tax authority in South Sudan may likely prefer mediation to arbitration for settlement of tax disputes. This is because there is no existing contract between the taxpayer and tax authority to refer the tax dispute for arbitration. The relation between the taxpayer and tax authority is a creature of statute therefore, there can never be an arbitration clause requiring arbitration.

3.6.2 MEDIATION

Mediation is one of the methods of dispute resolution. Mediation may be described as the continuation of a negotiation process between the disputants, with a third person, namely the mediator, assisting the disputants in, first, identifying and understanding their underlying concerns and needs and, based on these, in negotiating a settlement that is acceptable to both parties.¹⁵³ Mediation has been defined as a flexible process conducted confidentially in which a neutral person assists the parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.¹⁵⁴ The importance of mediation has been pointed out:

Besides being person-centred, mediation also has a relational focus. This signifies that its methods and philosophy are concerned with the human side of dispute resolution, including the opportunity for the venting of emotions, acknowledgment of strongly-held feelings and attention to future relations between the parties. Mediation can preserve or improve relationships by taking into account the real interests of the parties, by providing an accessible and participatory procedure, by modelling constructive negotiation and problem-solving techniques and by humanising the management of conflict. This constitutes the “gentler art” of reconciliation, rather than the confrontationalist science of court battle.¹⁵⁵

Mediation is a less formal process of alternative dispute resolution mechanism compared to arbitration. The mediator’s role is limited to facilitating the parties to the dispute to reach a settlement. The mediator makes no decision on matters in discussion except where the mediator is called upon to express an opinion. It should be noted that a settlement agreement reached by mediation between the parties is non-binding.

3.7 CONCLUSION

In conclusion, the Tax Appeals Board in South Sudan is just a semblance of a quasi-judicial body, incapable of resolving tax disputes. Without qualification benchmarks for members of the Tax

¹⁵³ Stella Vettori, ‘Mandatory mediation: An obstacle to access to justice’ (2015) 15 *African Human Rights Law Journal* 355-377 at p.357.

¹⁵⁴ *Ibid.*

¹⁵⁵ Andrew Hutchison, Alan Rycroft and Michelle Porter-Wright, ‘PRIVATE ORDERING AND DISPUTE RESOLUTION’ (2018) (2) *SALJ* 324 at p.334.

Appeals Board and rules of procedure, the Tax Appeals Board is only masquerading in its mandate rather than effectively resolving tax disputes. The inherent legislative weakness in terms of its composition and staffing are frustrating its mandate. Additionally, a decade has passed without the rules of procedure proclaimed by the Minister concerned to ease the proceedings of the Tax Appeals Board. The weaknesses in the functioning of Tax Appeals Board are: the stagnation of service delivery; backlog of tax disputes; and injustice to either the taxpayer or the tax authority. This is reason why the tax disputes remain unaddressed in substance and on merit.

The matters are complicated further as appeals from the Tax Appeals Board's decisions to the High Court are required to adhere to specific requirements of questions of law, jurisdiction and evidence in order to be entertained. The appeals on other grounds can only be entertained by the High Court invoking its discretionary power.

However, the tax authority and the taxpayer may embrace the alternative dispute resolution mechanism of mediation to settle amicably their tax disputes thereby saving costs and time.

CHAPTER FOUR: THE TAX APPEALS TRIBUNAL IN UGANDA

4.0 INTRODUCTION

Revenue collection in Uganda for public expenditure is the mandate of Uganda Revenue Authority. The Tax Appeals Tribunal resolves the tax disputes arising from the tax collection and enforcement of tax legislations. The Tax Appeals Tribunal's decisions are appealable to the High Court of Uganda and beyond. The Uganda Revenue Authority and the Tax Appeals Tribunals are largely the main role players in the tax administration system in Uganda.

This Chapter will examine the mandate of the Uganda Revenue Authority, the establishment and composition of Tax Appeals Tribunal, review procedure and appeals from decisions of tribunals to the High Court of Uganda and the management affairs of the Tax Appeals Tribunal. This Chapter will conclude with comparative key differences between Uganda's Tax Appeals Tribunal and South Sudan's Tax Appeals Board.

4.1 UGANDA REVENUE AUTHORITY

The Uganda Revenue Authority is an established governmental authority with the mandate to assess, collect and account for all government revenues in Uganda in addition to advising the Minister on revenue implications, tax administration and aspects of policy changes relating to all taxes.¹⁵⁶

The Uganda Revenue Authority was set up on 5 September, 1991 by the Uganda Revenue Authority Statute.¹⁵⁷ The tax litigation is headed by the Assistant Commissioner for Arrears and Objections Management. From its inception in 1991 to date, Uganda Revenue Authority has achieved operational efficiency than ever before in the tax administration compare to South Sudan's tax authority.

4.2 TAX APPEALS TRIBUNAL OF UGANDA

The Tax Appeals Tribunal was established in 1997 but opened its doors to the public in 1999 with the mandate of reviewing tax disputes between the Uganda Revenue Authority and taxpayers.¹⁵⁸ The tribunal has expanded its operation to regional offices in Mbale, Gulu and Mbarara districts

¹⁵⁶ S 3(1) (b) of the Uganda Revenue Authority Act Cap.196.

¹⁵⁷ Statute No. 6 of 1991, Laws of Uganda.

¹⁵⁸ Tax Appeals Tribunals Act Cap.345 as amended by Act No.2 of 2018(Uganda).

respectively.¹⁵⁹ The tribunal currently handles the bulk of tax disputes with the few cases reaching the High Court of Uganda by way of appeal.

Section 2(1) and (2) of the Taxation Appeals Tribunals Act establishes Tax Appeals Tribunal and states that a tribunal shall consist of a chairperson and four other tribunal members appointed in accordance with this Act.¹⁶⁰ A person is not qualified to be appointed chairperson of a tribunal unless he or she is qualified to be appointed a judge of the High Court.¹⁶¹ A tribunal shall in the discharge of its functions be independent and shall not be subject to the direction or control of any person or authority.¹⁶²

The Tax Appeals Tribunal Act expressly provides the qualification benchmarks of the chairperson of the Tribunal. A person qualified to be a judge of High Court of Uganda is not only highly experienced in litigation but also of high moral and proven integrity. Additionally, the tribunal is independent in the discharge of its functions. It is argued that the general public may have confidence in the tribunal if it is independent and competent to discharge its functions.

Furthermore, where the member of Tax Appeals Tribunal has an interest in the tax matter before the tribunal, the member has the obligation to disclose such interest as detailed in s 10 of the Tax Appeals Tribunals Act.¹⁶³ Section 10 of Tax Appeals Tribunals Act¹⁶⁴ states that where a member is, or is to be, a member of the tribunal as constituted for the purposes of a proceeding and the member has any interest, pecuniary or otherwise, that could conflict with the proper performance of the member's functions, the member shall disclose the interest to the parties to the proceeding and, except with the consent of all the parties to the proceeding, the member shall not take part in the proceeding or exercise any powers in relation to the review by a tribunal of the taxation decision to which the proceeding relates.

The playing field between the taxpayer and the Uganda Revenue Authority is levelled and the parties to a tax dispute are left to fight their respective cases solely on credibility of evidence and the law. The institutional issues such as interference, incompetence, institutional and legislative

¹⁵⁹ Available at its website www.tat.go.ug.

¹⁶⁰ Tax Appeals Tribunals Act Cap.345 as amended by Act No.2 of 2018(Uganda).

¹⁶¹ S 3(2) of the Tax Appeals Tribunals Act Cap.345 as amended by Act No.2 of 2018(Uganda).

¹⁶² S 14(3) of the Tax Appeals Tribunal Act Cap.345 as amended by Act No.2 of 2018(Uganda).

¹⁶³ Cap.345 as amended by Act No.2 of 2018(Uganda).

¹⁶⁴ Cap.345 as amended by Act No.2 of 2018(Uganda).

weaknesses are appropriately dealt with and there appears to be no party to a tax dispute that can suffer prejudice in the proceedings.

In contrast to South Sudan's tax authority, there are obvious legislative and institutional differences. First, there is no independence of the Tax Appeals Board from the tax authority in South Sudan. A representative of or the Director General of Taxation is a member of the Tax Appeals Board. Secondly, there is no qualification benchmark of law discipline required of a person serving on the Tax Appeals Board. It is difficult to imagine how a tax provision can be aptly interpreted by a layperson to resolve a legal dispute.

4.3 THE REVIEW PROCESS OF THE TAX DISPUTE

Any person who is aggrieved by a decision made under a tax Act by the Uganda Revenue Authority may apply to the tribunal for a review of the decision.¹⁶⁵ The tribunal has the power to review any taxation decision in respect of which an application is properly made.¹⁶⁶ The 'pay now and argue later' principle is also statutorily provided for under s 15(1) of the Tax Appeals Tribunals Act,¹⁶⁷ where a taxpayer is required to remit 30 per cent of the amount in dispute to Uganda Revenue Authority. The taxpayer must fulfil this condition before the Tax Appeals Tribunal would have jurisdiction to dispose of the tax dispute. It is submitted that while tax litigation may be complex and protracted, the fiscus would suffer and public service delivery would be constrained if the 30 per cent advance payment were not remitted to the Uganda Revenue Authority. It is justifiable to remit part of the disputed assessed tax to the fiscus for public expenditure.

However, the taxpayer does not lose anything because the taxpayer is entitled to a refund of the remitted 30 per cent with interest should the Uganda Revenue Authority lose the tax review application. For example, a taxpayer may apply to the Commissioner for a refund for any year of income, of any tax paid by withholding, instalments or otherwise in excess of the tax liability assessed to or due by the taxpayer for that year.¹⁶⁸ The Commissioner shall pay simple interest at a rate of 2 per cent per month from the date the person made the application for refund and ending on the last day of the month in which the refund is made.¹⁶⁹

¹⁶⁵ S 14(1) of the Tax Appeals Tribunals Act Cap.345 as amended by Act No.2 of 2018(Uganda).

¹⁶⁶ S 14(2) of the Tax Appeals Tribunals Act Cap.345 as amended by Act No.2 of 2018(Uganda).

¹⁶⁷ Cap.345 as amended by Act No.2 of 2018(Uganda).

¹⁶⁸ S 113(1) of the Income Tax Act Cap.340(Uganda).

¹⁶⁹ S 113(4) of the Income Tax Act Cap.340(Uganda).

The review process is initiated by the taxpayer by an application for review of the decision of the Uganda Revenue Authority in terms of s 13(1) of the Tax Appeals Tribunals Act.¹⁷⁰ The application for review must be in writing, stating the grounds of the application and it must be filed within 30 days from the date of Uganda Revenue Authority's decision.¹⁷¹ An application to a tribunal for review of a taxation decision is not taken to have been made unless the prescribed nonrefundable fee, if any, in respect of the application has been paid¹⁷² and accompanied with evidence of the remittal of 30 per cent of the amount in dispute to the Uganda Revenue Authority. An applicant to a tribunal shall serve a copy of the application on the Uganda Revenue Authority within five days after lodging the application with the tribunal.¹⁷³

Nonetheless, the proceedings being adversarial in nature requires the Uganda Revenue Authority to reply to the taxpayer's application for review. The Uganda Revenue Authority is required, not later than 30 days after being served with a copy of an application for review of a taxation decision, to lodge with the tribunal two copies of the notice of its decision; a statement giving the reasons for the decision; and every other document in the Uganda Revenue Authority's possession or under its control which is necessary for the tribunal's review of the decision.¹⁷⁴

Furthermore, the parties have an opportunity for mediation before proceeding to the hearing of a tax dispute in terms of s 17A of the Tax Appeals Tribunal Act.¹⁷⁵ The burden of proof lies on the taxpayer to prove on a balance of probabilities the reason why the Uganda Revenue Authority's taxation decision should not stand in terms of s 18 (1) of the Tax Appeals Tribunals Act.¹⁷⁶

The tribunal renders its decision on the application for review following the hearing. The tribunal's decision has three possible outcomes: It may affirm, vary or set aside the Uganda Revenue Authority's decision in terms of s 19(1) of the Tax Appeals Tribunals Act.¹⁷⁷ Upon delivery of its decision, the tribunal is required to publish its decision as provided under s 19(8) of the Tax

¹⁷⁰ Cap.345 as amended by Act No.2 of 2018(Uganda).

¹⁷¹ s 16(1) of the Tax Appeals Tribunals Act Cap.345 as amended by Act.2 of 2018(Uganda).

¹⁷² S 16(5) of the Tax Appeals Tribunal Act Cap.345 as amended by Act No.2 of 2018(Uganda).

¹⁷³ S 16(3) of the Tax Appeals Tribunals Act Cap.345 as amended by Act No.2 of 2018(Uganda).

¹⁷⁴ s 17(1) of the Tax Appeals Tribunal Act Cap 345 as amended by Act No.2 of 2018(Uganda).

¹⁷⁵ Cap.345 as amended by Act No.2 of 2018(Uganda).

¹⁷⁶ Cap.345 as amended by Act No.2 of 2018(Uganda).

¹⁷⁷ Cap 345 as amended by Act No.2 of 2018(Uganda).

Appeals Tribunal Act.¹⁷⁸ Section 19(8) of the Tax Appeals Tribunals Act¹⁷⁹ states that a tribunal shall provide for the publication of its decisions, including reasons, in such form and manner as may be adapted for public information and use, and such authorised publication is evidence of the decisions of the tribunal in all courts of Uganda without any further proof of authentication.

Therefore, because of the publication requirement of review decisions, the tribunal's decisions are accessible to the public either on its website or under the Uganda Legal Information Institute website. This makes it easier for tax practitioners, academics, learners and courts to access the tribunals' decisions for their own consumption.

4.4 APPEALS OF THE TRIBUNAL'S DECISIONS TO THE HIGH COURT OF UGANDA

Appeals from the tribunal's decision lie before the High Court of Uganda on grounds of law only as stated under s 27(1) of the Tax Appeals Tribunals Act¹⁸⁰ which states that a party to a proceeding before a tribunal may, within 30 days after being notified of the decision or within such further time as the High Court may allow, lodge a notice of appeal with the registrar of the High Court, and the party so appealing shall serve a copy of the notice of appeal on the other party to the proceeding before the tribunal. The High Court determines the appeal in a manner stipulated under s 27(3) of the Tax Appeals Tribunals Act,¹⁸¹ which states that the High Court shall hear and determine the appeal and shall make such order as it thinks appropriate by reason of its decision, including an order affirming or setting aside the decision of the tribunal or an order remitting the case to the tribunal for reconsideration. It should be noted that the appeals to the High Court of Uganda are based on issues of law only in terms of s 27(2) of the Tax Appeals Tribunals Act.¹⁸²

4.5 MANAGEMENT OF THE TRIBUNAL

One of the factors contributing to the success of the Tax Appeals Tribunal is the registrar and support staff. The ultimate administrative affairs of the tribunal are the responsibility of the chairperson of the tribunal, as stipulated under s 29(1) of the Tax Appeals Tribunal Act.¹⁸³ The registrar of the tribunal performs core functions such as maintaining the registry; ensuring effective

¹⁷⁸ Cap 345 as amended by Act No.2 of 2018(Uganda).

¹⁷⁹ Cap 345 as amended by Act No.2 of 2018(Uganda).

¹⁸⁰ Cap 345 as amended by Act No.2 of 2018(Uganda).

¹⁸¹ Cap 345 as amended by Act No.2 of 2018(Uganda).

¹⁸² Ibid.

¹⁸³ Ibid.

service of court process; sourcing venues for sitting and handling interlocutory applications; handling mediations; and taxing bill of costs in terms of s 30(5) of the Tax Appeals Tribunals Act.¹⁸⁴

In contrast to South Sudan's Tax Appeals Board, there is nothing elaborate about its administrative functions.

4.6 KEY LEGAL AND ADMINISTRATIVE DIFFERENCES BETWEEN UGANDA'S TAX APPEALS TRIBUNALS AND SOUTH SUDAN'S TAX APPEALS BOARD

Having analysed the legislative provisions and administrative functioning of both the Tax Appeals Board of South Sudan and the Tax Appeals Tribunal of Uganda, there are key differences and a few similarities identified and are considered below:

a) Legislative provisions

First, on the independence of the South Sudan's Tax Appeals Board, it has been shown in Chapter Three that the composition of Tax Appeal Board compromises its independence in discharging its functions. The members of the Tax Appeals Board are the Undersecretary of the Ministry of Finance and Economic Planning, the President of the South Sudan Society of Accountants as a member, the Director General of Taxation –Secretary (Ex-officio) and an ad hoc member appointed by the Minister in terms of s 49(2) of the Taxation Act.¹⁸⁵ The presence of the Director General of Taxation in the Tax Appeals Board as a legal requirement undermines its independence. The tax dispute is typically between the taxpayer and the Director General of Taxation. Consequently, common sense dictates that the Director General of Taxation or its representative should not be part of the Tax Appeals Board.

In contrast to the position in Uganda, s 14(3) of the Tax Appeals Tribunal Act¹⁸⁶ states a tribunal shall in the discharge of its functions be independent and shall not be subject to the direction or control of any person or authority. Additionally, s 5(3) of the Tax Appeals Tribunal Act¹⁸⁷ provides that no member of a tribunal may be an officer of the Uganda Revenue Authority or a civil servant.

¹⁸⁴ Ibid.

¹⁸⁵ 2009(South Sudan).

¹⁸⁶ Cap 345 as amended by Act No.2 of 2018(Uganda).

¹⁸⁷ Cap 345 as amended by Act No.2 of 2018(Uganda).

Therefore, by providing that no officer of the Uganda Revenue Authority should be a member of the Tax Appeals Tribunal as well as guaranteeing its independence from direction and control of any person or authority, the Parliament of Uganda has put in place an effective tax dispute resolution mechanism. It is submitted that South Sudan should follow a similar approach to that of Uganda so as to get rid of the current dysfunctional Tax Appeals Board composition.

Secondly, the skill balance of South Sudan's Tax Appeals Board is lacking compared to the Uganda's Tax Appeals Tribunal. As seen in Chapter Three, South Sudan has no qualification benchmarks of persons to be appointed to Tax Appeals Board. The membership of the Tax Appeals Board is simply acquired by an automatic appointment to the Office of the Undersecretary, election to the chair of Accountants Society or appointment as Director General of Taxation. Additionally, there is no term of service and perhaps the implication is that as one loses official office, the person also loses the membership in Tax Appeals Board.

In contrast to Uganda, it is expressly legislated that a chairperson of the Tax Appeals Tribunal must be a person qualified to be appointed as High Court judge of Uganda in terms of s 3(2) of the Tax Appeals Tribunal Act.¹⁸⁸ Not only does this benefit the Tax Appeals Tribunal in terms of experience, but also the requisite legal knowledge and training necessary for settling tax disputes.

Thirdly, South Sudan's Taxation Act¹⁸⁹ has awkward and absurd legal provisions which are not *pari materia* with legislation in Uganda and South Africa. Section 50(2) of the Taxation Act¹⁹⁰ states that where the Tax Appeals Board does not decide on the matter before it within the time (60 days) specified, a decision shall be deemed to have been made in favour of the taxpayer. The normal procedure in civil suits in courts or even tribunals is for the court or tribunal to proceed *ex parte* and deliver a default judgment where one party ignores court's or tribunal's summons. The party in *ex parte* proceedings is expected to prove his or her case before obtaining a default judgment.

On the other hand, Uganda's Tax Appeals Tribunal has laid down procedures regarding pleadings, hearings and ultimate review taxation decision. The Civil Procedure Rules¹⁹¹ apply *mutatis*

¹⁸⁸ Cap 345 as amended by Act No.2 of 2018(Uganda).

¹⁸⁹ 2009(South Sudan).

¹⁹⁰ 2009(South Sudan).

¹⁹¹ S.I. 71-1(Uganda).

mutandis to the Tax Appeals Tribunal in terms of s 22(3) of the Tax Appeals Tribunals Act¹⁹² which states that the proceedings of a tribunal shall be conducted in accordance with such rules of practice and procedure as the tribunal may specify, and the tribunal may direct the application of the rules of practice and procedure of any court subject to such modifications as the tribunal may direct. Therefore, the 60 days' decision rule of the Tax Appeals Board does not apply to Uganda's Tax Appeals Tribunal.

b) Administrative Functions

There is nothing explicit in the administrative operation of South Sudan's Tax Appeals Board in terms of Taxation Act¹⁹³ other than mentioning that the Director General of Taxation as member shall be the secretary. It is logically concluded that the Director of Taxation performs registry functions of the Tax Appeals Board.

In contrast to Uganda's Tax Appeals Tribunal, there is a registrar and support staff which perform its administrative functions in terms of s 30 of the Tax Appeals Tribunals Act.¹⁹⁴ This enabled it to achieve operational efficiency, in the author's view.

4.7 CONCLUSION

The current operational efficiency of Uganda's Tax Appeals Tribunal is rooted in legislative safeguards. The Tax Appeals Tribunal Act¹⁹⁵ secures the autonomy of the tribunal from direction and control by any person or authority and recruitment of competent members. This has sufficiently paid off not only in achieving operational efficiency but also in settling tax disputes without undue delay. Additionally, it benefits the taxpayer from protracted litigation through appeals to appellate courts which saves time and costs of litigation. In the same vein, the Uganda Revenue Authority benefits from operational efficiency of the tribunal because of speedy recovery of taxes.

On the other hand, South Sudan's Tax Appeals Board lacks adequate legislative safeguards in respect of functional independence and recruitment of its competent members. The obvious

¹⁹² Cap 345 as amended by Act No.2 of 2018(Uganda).

¹⁹³ s 49(2) of Taxation Act, 2009(South Sudan).

¹⁹⁴ Cap 345 as amended by Act No.2 of 2018(Uganda).

¹⁹⁵ Cap 345 as amended by Act No.2 of 2018(Uganda).

corollary of this legislative weaknesses in the Taxation Act¹⁹⁶ is that tax disputes remain unresolved. Therefore, not only does it affect the taxpayer but also the fiscus whose money is locked up in litigation.

¹⁹⁶ 2009(South Sudan).

CHAPTER FIVE: SOUTH AFRICA'S TAX DISPUTES RESOLUTION MECHANISMS

5.0 INTRODUCTION

The purpose of examining South Africa's tax dispute resolution mechanisms is multiple: First, to explore how tax disputes resolution institutions (namely, the Tax Court, Tax Board, High Court, Facilitator and Tax Ombud) are independent from South African Revenue Service. Secondly, the qualifications required of persons in the tax disputes resolution institutions. Thirdly, the legislative safeguards of a taxpayer's right of appeal to superior courts. Finally, to compare South Sudan's Tax Appeals Board with South Africa's tax disputes resolution mechanisms.

There are three avenues for tax dispute resolution in South Africa. First, the Tax Ombud's review and investigation of administrative complaints against South African Revenue Service regarding service or procedural matters South African Revenue Service's view, though not binding, is that disagreements on the administration of the law (as opposed to interpretation of the tax law) should be settled by the internal complaints resolution process and if it fails, then the complaints should go to the Office of Tax Ombud.¹⁹⁷ This mechanism is purely for administrative complaints and does not resolve any tax dispute with South African Revenue Service. It is submitted that its purpose is to check excesses by South African Revenue Service officials in procedural and administrative matters.

Secondly, the administrative or judicial review on the excesses of South African Revenue Service's administrative powers under s 105 of the Tax Administration Act¹⁹⁸ and the Promotion of Administrative Justice Act¹⁹⁹ by way of administrative action. This review mechanism may be triggered by South African Revenue Service' infringement of the fundamental rights of the taxpayer.

The third category of tax dispute resolution mechanisms is a recourse to formal litigation. This process begins with an objection against the decision of South African Revenue Service, then an appeal to Tax Board, Tax Court or further appellate courts or alternative dispute resolution by a facilitator.

¹⁹⁷ South African Revenue Service Dispute Resolution Guide Issue 2 dated 2nd March 2020 p.19(South Africa).

¹⁹⁸ Act 28 of 2011(South Africa).

¹⁹⁹ Act 3 of 2000(South Africa).

The rules regarding this route is set out in Chapter Nine of the Tax Administration Act.²⁰⁰ A list of the decisions that South African Revenue Service considers to be subject to objection and appeal is set out in Annexure C to the South African Revenue Service Guide,²⁰¹ such as the decision to impose an understatement penalty,²⁰² the decision not to extend period of objection,²⁰³ amongst others. The subject matter of an objection and appeal or alternative dispute resolution mechanism is either an assessment or ‘decision’ within the meaning of s 104 of the Tax Administrative Act.²⁰⁴ The fora concerned with tax disputes by way of objection and appeal are the Tax Court and the Tax Board.

This Chapter will examine South African Revenue Service’ mandate and its internal mechanism of dealing with objections to the tax assessment, the review of complaints by the Tax Ombud, appeals to the Tax Board, Tax Court and from the Tax Court to the High Court and finally, the alternative dispute resolution mechanisms. This Chapter will further look at administrative action as a remedy for the taxpayer aggrieved by South African Revenue Service’s *ultra vires* exercise of administrative power or procedural irregularity. This Chapter will conclude with a comparison of South Africa’s tax dispute resolution mechanisms and South Sudan’s Tax Appeals Board.

5.1 SOUTH AFRICAN REVENUE SERVICE’S MANDATE

South Africa Revenue Service’s mandate is provided for under s 3(2) of the Tax Administration Act,²⁰⁵ which can be succinctly stated to include: determining the identity of the taxpayer, ascertaining the correctness of returns, determining tax liability, the collection and refund of overpaid tax, investigating and prosecuting tax offences and enforcing obligations imposed by the tax legislations. This broad mandate extends to assisting foreign governments in the enforcement of international double taxation agreements to which the Republic is a party.²⁰⁶ The powers and duties of South African Revenue Service are exercised by the Commissioner personally or by a person with such express delegated authority.²⁰⁷

²⁰⁰ Act 28 of 2011(South Africa).

²⁰¹ Julia Moore, ‘Administrative Review in the Tax Court: A Way Forward’ (June 2018) *Business Tax and Company Law Quarterly* vol.9 Issue 2 p.21.

²⁰² s 222 of the Tax Administration Act 28 of 2011(South Africa).

²⁰³ S 104(2)(a) of the Taxation Act 28 of 2011(South Africa).

²⁰⁴ Act 28 of 2011(South Africa).

²⁰⁵ Act 28 of 2011(South Africa).

²⁰⁶ S 3(3) of Tax Administration Act 28 of 2011(South Africa).

²⁰⁷ S 6(2) and s 10(1) of the Tax Administration Act 28 of 2011(South Africa).

The Commissioner, through his various officers, exercises powers contained in fiscal statutes to ensure that taxpayers comply with their obligations.²⁰⁸ While exercising the duties and powers conferred upon her by fiscal statutes, the Commissioner must respect the taxpayer's confidential information in terms of s 4 of the Income Tax Act.²⁰⁹ Similarly, s 68 and s 69 of the Tax Administration Act²¹⁰ provide for protection of confidential information. This is why the Tax Court's hearings are not open to public in terms of s 124(1) of the Tax Administration Act.²¹¹

In the same vein, the case law also stresses the importance of preserving the taxpayer's confidential information. Thus, in the case of *Welz and another v Hall and Others*,²¹² Conradie J held that the underlying rationale of the secrecy provision in the Income Tax Act (ITA) is to encourage taxpayers to make full and proper disclosure of their income to the Commissioner. The thinking is that the taxpayers will be uncomfortable to make full and proper disclosure of their personal financial affairs to the Commissioner if they knew that such information could be readily made available to third parties without good reason.²¹³ It should be noted that the only exception where the taxpayer's confidential information could be divulged is under compulsion by law. For instance, in the case of *Rex v Kassim*²¹⁴ the court was required to consider whether the Income Tax Department of Southern Rhodesia was entitled to disclose information to the prosecution authority to prosecute an offence allegedly committed under the tax laws of that country. Greenberg JA decided that where a taxpayer has committed an offence under the fiscal statutes, the taxing authority must be allowed to disclose the information to the prosecuting authority thereby enabling it to prosecute the offence.

Additionally, South African Revenue Service must respect the taxpayer's constitutional rights discussed in Chapter Two when exercising his powers and duties under the tax legislations. The relevant taxpayer's constitutional rights are the right to property, privacy, access to information, administrative justice and access to courts.

²⁰⁸ Beric Croome and Lynette Olivier, 'Tax Administration' (2010) p.10.

²⁰⁹ Act No.58 of 1962(South Africa).

²¹⁰ 28 of 2011(South Africa).

²¹¹ 28 of 2011(South Africa).

²¹² 1996(4) SA 1073 (C).

²¹³ Beric Croome and Lynette Olivier, 'Tax Administration' (2010) p. 11.

²¹⁴ 1950 (4) SA 522 (A).

5.2 TAX OMBUD'S REVIEW OF COMPLAINTS

Historically, 'ombudsman' is a Swedish word meaning 'representative' and may be traced back to the 'Ombudsman for Justice' established in 1809.²¹⁵ Since 1809 many countries have adopted the concept of the ombudsman, such that by 2006 the ombudsman existed in 125 countries around the world and South Africa adopted it 2011.²¹⁶

The original mandate of the Tax Ombud was confined to reviewing and addressing taxpayer complaints regarding a service, procedural or administrative matters arising from the application of tax legislation, in terms of s 16(1) of Tax Administration Act.²¹⁷ This means that action on the part of the Tax Ombud was triggered by and only by, a complaint from the taxpayer.²¹⁸ Following the amendment of the Tax Administration Act in 2016, the Tax Ombud's mandate was expanded to include the investigation of, at the request of the Minister or at the initiative of the Tax Ombud with the approval of the Minister, any systemic and emerging issue related to a service matter or the application of the provisions of the Act or procedural or administrative provisions of a tax Act, in terms of s 51 of Taxation Amendment Laws Act.²¹⁹ Therefore, it is submitted that as the law stands, the taxpayer may initiate a complaint to the Tax Ombud for the review of service, procedural or administrative matters or the Tax Ombud may, on their own initiative and subject to the Minister of Finance's approval, conduct investigations against South African Revenue Service.

It should be noted that prior to the 2016 amendment of the Tax Administration Act, the Tax Ombud was facing serious questions regarding its independence from South African Revenue Service. This was because its staff were seconded by the Commissioner of South African Revenue Service,²²⁰ except the Chairperson who must have a tax law background and be appointed by the Minister of Finance in terms of s 14(1) and (5)(b) of the Tax Administration Act.²²¹ Commenting on this state of affairs, Croome and Olivier stated that:²²²

[s]ome commentators have expressed unhappiness that former SARS officials will be seconded to the office of the Tax Ombud and that this undermines the independence of the Tax Ombud. It is

²¹⁵ Thabo Legwaila, 'The Development of the South African Office of the Tax Ombud: From 2013 to 2020 and Beyond' (2020) 32 *SA MERC LJ* 113 at p.118.

²¹⁶ Thabo Legwaila, *op. cit.* at p.114

²¹⁷ 28 of 2011(South Africa).

²¹⁸ Thabo Legwaila, *op. cit.* at 114.

²¹⁹ 16 of 2016.

²²⁰ S 15(1) of the Tax Administration Act 28 of 2011(South Africa).

²²¹ 28 of 2011(South Africa).

²²² Croome & Olivier, *Tax Administration* (Juta 2015) p.77.

interesting to note that the Tax Ombud, Judge Ngoepe, when addressing a South African Institute of Tax Practitioner's function indicated that he would not merely accept any prospective employee offered by the Commissioner. Judge Ngoepe indicated that his office was also recruiting persons directly, and that not all of his office's employees were being seconded from SARS to reach the required staff levels to perform his functions under the TAA.

Fortunately, the Tax Administration Act as amended²²³ introduced an amendment in 2016 that secures the Tax Ombud's independence from the potentially perceived bias. The Office of the Tax Ombud currently recruits its own staff and pay them from its own budget pursuant to, and in terms of, s 50 of the Tax Law Amendment Act.²²⁴

The procedure for the review of complaints before the Tax Ombud is governed by s 18 (2) of the Tax Administration Act,²²⁵ and it is incumbent upon the Tax Ombud to determine its own rules and method of review. The Tax Ombud makes recommendations upon completion of the review process which are non-binding on the taxpayer or South African Revenue Service in terms of s 20(2) of the Tax Administration Act.²²⁶ Because of non-binding nature of the Tax Ombud's recommendations, it is doubtful whether many taxpayers will go for such redress. Having regard to the length of time it takes for the South African Revenue Service internal complaints-resolution process to reach a conclusion and the fact that South African Revenue Service is not compelled to adhere to the recommendations of the Tax Ombud, it is submitted that utilising the South African Revenue Service internal complaints process and approaching the Tax Ombud are unsuitable remedies in many cases, particularly if significant amounts of additional tax and/or commercial or legal deadlines are involved.²²⁷

It is however noted that the 2016 amendments reform Tax Ombud's functions in terms of independence and influence of South Africa Revenue Service. Thus, in terms of qualification of the chairperson of the Office of Ombud, the Minister of Finance is obliged to appoint someone with tax law qualification. Therefore, these legislative provisions strengthen the independence, competence, and efficiency of the Tax Ombud which is unfortunately not the case in South Sudan – as discussed in Chapter Three of this dissertation.

²²³ 16 of 2016.

²²⁴ 16 of 2016.

²²⁵ 28 of 2011(South Africa).

²²⁶ 28 of 2011(South Africa).

²²⁷ Julie Moore, 'Administrative Review in the Tax Court: A Way Forward', (June 2018) *Business Tax and Company Law Quarterly*, vol.9 Issue 2 p.22.

5.3 SOUTH AFRICAN REVENUE SERVICE INTERNAL OBJECTION PROCEDURE

Once the Commissioner has processed the taxpayer's tax return, she will issue an assessment reflecting the tax payable or refundable as the case may be and if the taxpayer disagrees with the Commissioner's assessment that taxpayer has a right to lodge an objection to that assessment.²²⁸ A taxpayer aggrieved by an assessment may object to an assessment²²⁹ by delivering a notice of objection to South African Revenue Service within 30 days after becoming aware of the notice of assessment.²³⁰ A decision by South African Revenue Service not to extend time for an objection or lodging an appeal in terms of s 104(2) of the Tax Administration Act²³¹ is an objectionable 'decision' capable of being appealed against to either the Tax Board or Tax Court.

South African Revenue Service is required to render its decision on the objection either by allowing or disallowing the objection within 60 days of filing an objection in terms of s 106(1) of the Tax Administration Act²³² and r 9(a) of the Rules²³³ respectively. Where the objection is allowed, the taxpayer's assessment will be adjusted and the matter will be finalised.²³⁴ However, where the objection is disallowed, the taxpayer may appeal to the Tax Board or the Tax Court in terms of s 107(1) of the Tax Administration Act.²³⁵

5.4. APPEALS TO THE TAX BOARD.

The Minister is empowered to establish the Tax Board as the Minister thinks fit in a given area in terms of s 108(1) of the Tax Administration Act²³⁶ to hear appeals arising from South African Revenue Service's disallowance of objections. It is submitted that the taxpayer is the only aggrieved party who can note an appeal before the Tax Board.

The Tax Board is constituted by chairperson who must be an advocate or attorney, and if considered necessary and agreed to by South African Revenue Service and the taxpayer, also the accountant and a representative of the commercial community in terms of s 110(1) of the Tax

²²⁸ Beric Croome and Lynette Olivier, op. cit. p.247.

²²⁹ S 104(1) of the Tax Administration Act 28 of 2011(South Africa).

²³⁰ R 7(1)(a) of the Dispute Resolution Rules No.550 Government Notice 37819 of 11th July 2014.

²³¹ 28 of 2011(South Africa).

²³² 28 of 2011(South Africa).

²³³ No.550 of 11th July 2014(South Africa).

²³⁴ Beric Croome and Lynette Olivier, op. cit. at p.247.

²³⁵ 28 of 2011(South Africa).

²³⁶ 28 of 2011(South Africa).

Administration Act.²³⁷ The Tax Board has a clerk that performs registry and administrative functions of the Tax Board.²³⁸ It is submitted that the skill balance in the Tax Board is legislatively taken care of in South Africa's tax administration system unlike in South Sudan, where there is no legal requirement for a lawyer to be on its Tax Appeals Board.

The Tax Board's pecuniary jurisdiction is to be determined by the Minister by public notice from time to time but currently it is R 1 000 000 or alternatively, South African Revenue Service and the taxpayer may mutually agree to refer their tax dispute to the Tax Board.²³⁹ An appeal arises to the Tax Board or the Tax Court as a result of a disallowance of an objection or decision by South African Revenue Service. The choice of jurisdiction by the taxpayer on whether to proceed to the Tax Board or the Tax Court is largely dictated by the provisions of Tax Administration Act²⁴⁰ or by mutual agreement between the parties.

The proceedings before the Tax Board are governed by Part D of the Dispute Resolution Rules.²⁴¹ The hearing before the Tax Board is not as formal as in the Tax Court and the procedure is intended to provide a cost-effective means of resolving tax appeals.²⁴² It is submitted that although the Tax Board's proceedings are informal, it is instrumental to consider the *audi alteram partem* principle.

At the conclusion of the hearing, the Tax Board must deliver its decision on the appeal and any party dissatisfied with the decision has the unfettered right of appeal in terms of s 114(1) and 115(1) of the Tax Administration Act.²⁴³ An appeal to the Tax Court must be heard *de novo*.²⁴⁴

5.5 APPEALS TO THE TAX COURT

It is the prerogative of the President of the Republic to establish a tax court in locations where the President deems fit in terms of s 116(1) of the Tax Administration Act.²⁴⁵ The Tax Court is by law a court of records and it is unclear whether its decisions are binding on the Tax Board. The High

²³⁷ 28 of 2011(South Africa).

²³⁸ S 112(1) of Tax Administration Act 28 of 2011(South Africa).

²³⁹ 28 of 2011(South Africa).

²⁴⁰ 28 of 2011(South Africa).

²⁴¹ Rules 26 to 30 of the Dispute Resolution Rules Government Notice No.550 of Government Gazette No.37819 published on 11th July 2017(South Africa).

²⁴² Beric Croome and Lynette Olivier, op. cit. p.249.

²⁴³ 28 of 2011(South Africa).

²⁴⁴ S 115(2) of the Tax Administration Act 28 of 2011(South Africa).

²⁴⁵ 28 of 2011(South Africa).

Court judge heads the Tax Court assisted by an accountant and a representative of the commercial community and the registrar tasked with registry and administrative functions.²⁴⁶ The Commissioner appoints the registrar of the Tax Court who is an employee of the South African Revenue Service. It is argued that the Commissioner's appointment of the registrar, albeit not a decision-maker in tax disputes, undermines the independence of Tax Court. The impression of potential bias is created because the registrar and the South African Revenue Service official in the Tax Court are both employees of the South African Revenue Service. Despite s 121(3) of the Tax Administration Act²⁴⁷ mandatorily imposing on the registrar the obligation to perform their duties independently, impartially and without fear or prejudice, the potential risk of bias is not eliminated. The Tax Court should recruit its own staff as does the Office of Tax Ombud pursuant to the Tax Laws Amendment Act.²⁴⁸

The Tax Court's jurisdiction is to hear tax appeals arising from disallowed objections or decisions in terms of s 107(1) of the Tax Administration Act.²⁴⁹ Additionally, the Tax Court entertains appeals from decisions of the Tax Board and exercises its appellate jurisdiction to dispose of them in terms of s 115(1) of the Tax Administration Act.²⁵⁰ Where the tax dispute exceeds R50 000 000 or South African Revenue Service and the taxpayer jointly apply to the Judge President as the case may be, the Judge President may direct the Tax Court to be constituted by three judges together with an accountant and a representative of the commercial community.²⁵¹

In connection to its jurisdiction, the Tax Court is not an appellate court in the ordinary sense when considering appeals from objections of assessment or decisions of the Commissioner of South African Revenue Service.²⁵² It must conduct the hearing between South African Revenue Service and the taxpayer and arrive at its own conclusion. In *Bailey v CIR*,²⁵³ it was held that a Special Court (as it then was) is a court of revision with the power to investigate the matter before it and to hear the evidence thereon; and if it arrives at the conclusion that the taxpayer is liable for the

²⁴⁶ S 117(1) and s 121(1) of the Tax Administration Act 28 of 2011(South Africa).

²⁴⁷ 28 of 2011(South Africa).

²⁴⁸ 16 of 2016(South Africa).

²⁴⁹ 28 of 2011(South Africa).

²⁵⁰ 28 of 2011(South Africa).

²⁵¹ S 118(5) of the Tax Administration Act 28 of 2011(South Africa).

²⁵² T S Emslie, D M Davies and S J Hutton, 'Income Tax Cases and Materials', 2nd ed March (1995) at p 1095.

²⁵³ 1933 AD 204 at 220; T S Emslie, D M Davies and S J Hutton, 'Income Tax Cases and Materials', 2nd ed March (1995) at p 1095-6.

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 that advanced by the Commissioner, provided that the maxim *audi alteram partem* is observed.

Furthermore, where the constitutional validity of a tax provision arises in a matter before the Tax Court, it has no jurisdiction to deal with it.²⁵⁴ The Tax Court is not regarded as a court similar to a High Court and thus, has no inherent jurisdiction to adjudicate on the constitutional validity of the provisions of a tax Act.²⁵⁵ Similarly, in *ITC 1806 68 SATC 117*,²⁵⁶ it was held that the Tax Court is a creature of statute and thus it lacks jurisdiction to adjudicate on the constitutionality of any statutes enacted by Parliament.

The proceedings before the Tax Court are governed by Part E of the Dispute Resolution Rules²⁵⁷ which consider, pleadings, amendment of pleadings, discovery, pre-trial conference, hearings and final decision. The Tax Court may confirm, alter or refer the assessment or decision back to South African Revenue Service for reconsideration²⁵⁸ and the decision of the Tax Court has to be published for the public to access it.²⁵⁹

In contrast, South Sudan does not have a special tax court. The tax disputes are solely resolved by the Tax Appeals Board and its decisions are appealable to the High Court.

5.6 APPEALS FROM THE TAX COURT TO THE HIGH COURT

The Tax Court's decision is appealable to a full bench of the High Court in which the Tax Court is situate or to the Supreme Court of Appeal where the President of the Tax Court grants leave to do so or the decision was made by a full bench of three High Court judges.²⁶⁰ The procedure that follows the lodging of an appeal is the ordinary procedure of appeals from inferior courts to the High Court.

It should be noted that the appeals from the Tax Court to the High Court or the Supreme Court of Appeal may be based on mixed questions of law and fact or of law only. In contrast to Uganda's

²⁵⁴ Beric Croome and Lynette Olivier, op. cit. p.249.

²⁵⁵ Beric Croome and Lynette Olivier, op. cit. p.249.

²⁵⁶ 1806 68 SATC 117; Beric Croome and Lynette Olivier, op. cit. p.249.

²⁵⁷ Government Notice No.550 of Government Gazette No.37819 published on 11th July 2017(South Africa).

²⁵⁸ S 129(2) of the Tax Administration Act 28 of 2011(South Africa).

²⁵⁹ S 132 of the Tax Administration Act 28 of 2011(South Africa).

²⁶⁰ S 133(2) of Tax Administration Act 28 of 2011(South Africa).

position, appeals from the Tax Appeals Tribunal are appealable to the High Court on grounds of law only.²⁶¹ Similarly, South Sudan's Tax Appeals Board's decisions are appealable to the High Court only on questions of jurisdiction, law or evidence.²⁶²

5.7 ALTERNATIVE DISPUTE RESOLUTION UNDER CHAPTER NINE OF THE TAX ADMINISTRATION ACT

Chapter Nine of the Tax Administration Act²⁶³ deals with tax dispute resolution between the Commissioner and the taxpayer which may be resolved in one of two ways; namely first, by litigation which involves an objection and appeal to either the Tax Board or the Tax Court; and secondly, by amicable settlement. An amicable settlement of a tax dispute between the South African Revenue Service and a taxpayer is provided by s 144(1) of the Tax Administration Act.²⁶⁴ The South African Revenue Service appoints facilitators including its officials of good standing in tax, mediation, accounting or arbitration to settle disputes with willing taxpayers.²⁶⁵ It is argued that the fact that the facilitators are appointed by South African Revenue Service may tilt the outcome of mediation in its favour.

Having discussed in Chapter Three the circumstances under which South African Revenue Service may reject or accept settlement, it suffices to briefly consider the process of settlement and the effect of the settlement agreement. Either the South African Revenue Service or the taxpayer may voluntarily initiate the settlement of a tax dispute by communication to the other party.²⁶⁶ If the other party responds to the request accepting the amicable settlement, the parties approach the facilitator and the dispute is then settled within the framework of the Disputes Resolution Rules.²⁶⁷ A detailed discussion of the process of settlement is beyond the scope of this dissertation.

The effect of the dispute settlement process culminates into a settlement agreement which represents the final agreed position between the parties²⁶⁸ and is then entered into a register of

²⁶¹ S 27(2) of the Tax Appeals Tribunal Act Cap 345 as amended by Act No.2 of 2018(Uganda).

²⁶² S 51 of the Taxation Act, 2009(South Sudan).

²⁶³ 28 of 2011(South Africa).

²⁶⁴ 28 of 2011(South Africa).

²⁶⁵ Rule 16(1) of South African Revenue Service Dispute Resolution Rules 2014 GN.37819(South Africa).

²⁶⁶ S 144(1) of the Tax Administration Act 28 of 2011(South Africa).

²⁶⁷ Government Notice 37819 of 11th July 2014(South Africa)

²⁶⁸ S 148(1) of the Tax Administration Act 28 of 2011(South Africa).

settlement agreements maintained by South African Revenue Service.²⁶⁹ The settlement agreement is final unless otherwise vitiated by fraud or misrepresentation.²⁷⁰

5.8 ADMINISTRATIVE ACTION APPLICATIONS TO THE HIGH COURT

The High Court has competence in its original jurisdiction to entertain applications for judicial review, on interpretation of law only, arising from the administration of the tax legislation. Section 105 of the Tax Administration Act²⁷¹ is imperative and it states that a taxpayer may not dispute an assessment or ‘decision’ as described in s 104 in any court or other proceedings, except in proceedings under this Chapter or by application to the High Court for review. Similarly, the taxpayer may invoke s 6 of the Promotion of Administration of Justice Act²⁷² for judicial review of an administrative action against South African Revenue Service.

However, the choice of forum between the Tax Court and High Court in tax disputes is far from being settled. The courts have been trying to draw the line before and after the enactment of the Tax Administration Act.²⁷³ Thus in *Friedman and Others NNO v CIR*,²⁷⁴ decided before the Tax Administration Act,²⁷⁵ Satchwell J stated that the High Court has jurisdiction to hear and determine tax cases only if the dispute concerns questions of law. She held that:

... it is inconceivable that the Legislature intended to create competing and concurrent fora for resolution of tax disputes with resulting confusion as to selection of forum ... it would not be possible to establish any useful body of precedent for the benefit of both taxpayer and South African Revenue Service if different fora developed different law on the same issues ... our courts should be alert to the dangers of forum shopping.

The issue was not settled until the case of *Ackermans Limited v Commissioner for the South African Revenue Service*²⁷⁶ where Mothele J held that the High Court has the inherent jurisdiction to hear review applications regarding decisions made by South African Revenue Service, but that where a dispute of fact also exists, the Tax Court is better positioned to hear the matter as it is a specialised

²⁶⁹ S 149(1) of the Tax Administration Act 28 of 2011(South Africa).

²⁷⁰ S 148(2) of the Tax Administration Act 28 of 2011(South Africa).

²⁷¹ 28 of 2011(South Africa).

²⁷² 3 of 2000(South Africa).

²⁷³ 28 of 2011(South Africa).

²⁷⁴ 1991 (2) SA 340 (W); Julia Moore, ‘Administrative Review in the Tax Court: A Way Forward’, (June 2018) *Business Tax and Company Law Quarterly* vol.9 Issue p.23-4.

²⁷⁵ 28 of 2011(South Africa).

²⁷⁶ (2015) 77 SATC 191

body constituted for the purpose of hearing and determining tax disputes.²⁷⁷ It suffices to note that where the tax dispute is of mixed questions of fact and law arising within the administrative machinery of the tax administration, the High Court is unlikely to accept an application for review of the impugned objection or appeal. The Tax Court having the necessary tax specialisation would then be the appropriate forum. Most importantly to note is the procedural requirement to notify South African Revenue Service of the taxpayer's intention to apply for review at South African Revenue Service's specified address in terms of s 27 of the Tax Administration Laws Amendment Act²⁷⁸ which states that unless the court otherwise directs, no legal proceedings may be instituted in the High Court against the Commissioner, unless the applicant has given the Commissioner written notice of at least 10 business days of the applicant's intention to institute the legal proceedings. It is submitted that it is fatal to apply for the review in the High Court without prior notice to South African Revenue Service. The rationale for the notice is to enable South African Revenue Service to evaluate the prospects of defending the application for review or settle the matter amicably and save the public funds.

The issue of requisite notice to South African Revenue Service prior to filing an application for review arose in the case of *Ntanyiya v South African Revenue Services*.²⁷⁹ In that case, the South African Revenue Service made an investigation into the tax years of 2008 to 2013 where the taxpayer had filed a nil income return. Upon investigation, the South African Revenue Service discovered that some income deposits into the taxpayer's accounts were made in those years and were not disclosed in the returns. The South African Revenue Service brought the discrepancies to the notice of the taxpayer and subsequently issued a revised assessment to which the taxpayer objected and which was later disallowed. The taxpayer applied to the High Court for review without giving prior notice to South African Revenue Service. The South African Revenue Service contended that the application ought to be dismissed without delving into the merits for it having

²⁷⁷ Julia Moore, 'Administrative Review in the Tax Court: A Way Forward', (June 2018) *Business Tax and Company Law Quarterly* vol.9 Issue 2 p.24.

²⁷⁸ S 33 (c) of Act No.39 of 2013 substituted by S 27 of Act No.33 of 2019 and incorporated into s 11(4) of Tax Administration Act 28 of 2011(South Africa).

²⁷⁹ [2018] ZAECMHC 1 (23 January 2018).

been filed without prior notice in terms of the Tax Administration Laws Amendment Act.²⁸⁰ The court stated that as per Laing AJ

‘the requirement of prior notice is nothing unusual in relations to actions brought against organs of state and their functionaries. The reason for the statutory requirement is that with its extensive activities and large staff which tends to shift... [an organ of state] needs the opportunity to investigate claims laid against it, to consider them responsibly and to decide, before getting embroiled in litigation at public expense, whether it ought to accept, reject, or endeavour to settle them.’²⁸¹

The purpose of permitting the High Court to review applications arising from the tax administration is to protect the constitutionally guaranteed fundamental rights of access to courts and to just administrative action in terms of ss 33(1) and 34 of the Constitution of the Republic of South Africa.²⁸² These rights are considered in turn briefly: First, s 33(1) of the Constitution²⁸³ stipulates that everyone has a right to administrative action that is lawful, reasonable and procedurally fair. To enhance the protection of this right, the Promotion of Administrative Justice Act²⁸⁴ was enacted in 2000 to operationalise the right to just administrative action. Croome and Olivier²⁸⁵ argued that to rely on the right to administrative justice, a taxpayer must show that the Commissioner’s conduct constitutes administrative action as envisaged in s 33(1) of the Constitution.²⁸⁶ The question on what constitutes an administrative action has been a subject of judicial inquiry until the Constitutional Court’s landmark decision in the case of *President of the Republic of South Africa v South African Rugby Football Union*.²⁸⁷ The issue was whether the power of the President to appoint a commission of inquiry into the affairs of the South African Rugby Union was reviewable as an administrative action. The Constitutional Court held:

The test for determining whether the conduct constitutes “administrative action” is not the question whether the action concerned is performed by a member of the executive arm of the government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not... The focus of the enquiry as to whether conduct is ‘administrative action’ is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.

²⁸⁰ S 33(c) of Act No.39 of 2013 substituted by s 27 of Act No.33 of 2019.

²⁸¹ [2018] ZAECMHC 1 (23 January 2018)

²⁸² 1996(South Africa).

²⁸³ 1996(South Africa).

²⁸⁴ 3 of 2000(South Africa).

²⁸⁵ Beric Croome and Lynette Olivier, ‘Tax Administration’ (2010) p.23.

²⁸⁶ 1996(South Africa).

²⁸⁷ 2000(1) SA 1 (CC) at para.141.

The Constitutional Court decided that the power to appoint a commission of inquiry was not ‘administrative action’ as envisaged and was not subject to review by the court, but it was nevertheless reviewable under the Constitution in the terms of the principle of the legality.²⁸⁸

To clarify the matter further, Croome and Lynette argued that South African Revenue Service’s decisions constitute administrative actions on the following matters requested by the taxpayer:

- i) Request for extension of time in which to render a tax return.
- ii) A request for the postponement of payment of tax subject to an objection or appeal.
- iii) A plea for mitigation for the imposition of no, or a reduced level, of additional tax.
- iv) A request to waive interest on the underpayment of provisional tax.
- v) A decision on whether to conduct the audit on taxpayer’s affairs.
- vi) Failure to finalise a refund due to a taxpayer.²⁸⁹

Secondly, the right of access to court is enshrined in s 34 of the Constitution.²⁹⁰ Croome and Olivier state that s 34 of the Constitution applies if a taxpayer seeks to challenge the constitutional validity of a provision in a fiscal statute or commences review proceedings against the Commissioner because of decisions made by his officials.²⁹¹

However, where the High Court declines to entertain a tax dispute on the basis that the Tax Court is an appropriate forum, it should not be construed as a violation of the right of access to court. The taxpayer’s dispute would still be settled by the Tax Court. Fortunately, the taxpayer or the Commissioner has the right of appeal to the High Court from the Tax Court’s decisions as discussed earlier in this Chapter.

5.9 THE KEY DIFFERENCES BETWEEN SOUTH AFRICA’S AND SOUTH SUDAN’S DISPUTE RESOLUTION MECHANISMS

It must be stated at the outset that South Africa’s tax dispute resolution mechanisms are multifarious and advanced in comparison to South Sudan’s. South Sudan has two fora for tax dispute resolution under the Taxation Act,²⁹² that is the Tax Appeals Board and the High Court.

²⁸⁸ Beric Croome and Lynette Olivier, op. cit. p.23.

²⁸⁹ Beric Croome and Lynette Olivier, op. cit. p.29.

²⁹⁰ 1996(South Africa).

²⁹¹ Beric Croome and Lynette Olivier, op. cit. p.259.

²⁹² 2009(South Sudan).

On the other hand, South African has five forums namely: the Tax Board; Tax Court; High Court in its original and appellate jurisdiction; Alternative Dispute Resolution by the Facilitator; and finally, the Office of the Tax Ombud for service, procedural and administrative complaints.

Further differences are discussed below:

First, South Sudan's tax legislation does not provide for the Office of the Tax Ombud as in South Africa's Tax Administration Act.²⁹³ Therefore, the complaints arising in service, procedural and administrative matters do not have an avenue for resolving them in South Sudan.

Secondly, there is no alternative dispute resolution mechanism expressly provided for in South Sudan's Taxation Act²⁹⁴ and therefore, the tax authority and the taxpayer are left to craft their own way of amicably resolving a tax dispute. The instances of inefficiency, bias and unlimited time-frames in the alternative dispute resolution in South Sudan all work in concert to the detriment of either the taxpayer or the fiscus.

Thirdly, the South African tax legislation takes care of the skill balance in statutory bodies established to adjudicate tax disputes between South African Revenue Service and the taxpayer. For instance, the Tax Board is headed by an advocate or attorney, and the Tax Court is presided over by a judge of the High Court or the full bench of three judges, an accountant and a member of the commercial community. Unfortunately, for the case of South Sudan, there is no legal requirement to have a lawyer on its Tax Appeals Board.

Fourthly, unlike in South Sudan, South Africa's tax administration has a judicial review process with the High Court having original jurisdiction, in terms of s 105 of the Tax Administration Act²⁹⁵ or under the Promotion of Administrative Justice Act,²⁹⁶ for an infringement of the taxpayer's right to just administrative action. However, in South Sudan, the only way an aggrieved taxpayer could reach the High Court is by exhausting an appeal remedy to the Tax Appeals Board prior to an appeal to the High Court in terms of s 51 of the Taxation Act.²⁹⁷

²⁹³ 28 of 2011(South Africa).

²⁹⁴ 2009(South Sudan).

²⁹⁵ 28 of 2011(South Africa).

²⁹⁶ 3 of 2000(South Africa).

²⁹⁷ 2009(South Sudan).

Finally, the automatic decision in favour of the taxpayer in the event that the Tax Appeals Board fails to render a decision within sixty days of filing an appeal in terms of s 50 of South Sudan's Taxation Act²⁹⁸ is inapplicable in South Africa. The tax dispute between the taxpayer and South African Revenue Service must be inquired into and consequently a decision must be reached only having regard to the evidence and the law.

5.10 CONCLUSION

South Africa's tax dispute resolution mechanisms address all tax related disputes. The taxpayer and South African Revenue Service have two options of resolving a tax dispute; namely, either through litigation or by alternative dispute resolution. In respect of litigation, the Tax Board and the Tax Court mainly deal with tax disputes following the objection and appeal process. The taxpayer goes to the Tax Board if the amount of money involved in the assessment is less than R1 000 000 or where the parties agree to submit themselves to the jurisdiction of the Tax Board. Conversely, the taxpayer may note an appeal before the Tax Court if the amount in dispute exceeds R1 000 000. However, where the amount in dispute exceeds R50 000 000, the full bench of three judges, an accountant and a member of the commercial community must be called upon to constitute the Tax Court.²⁹⁹

On the other hand, if the parties opt for a settlement and the Commissioner has evaluated the appropriate circumstances for settlement, the parties can jointly apply to a facilitator.³⁰⁰ The facilitator plays no decisive role but facilitates the parties to reach settlement agreement. Once the mediation process is successful, a settlement agreement is signed and becomes binding on parties unless the contrary is shown on grounds of fraud or misrepresentation.³⁰¹

It should be noted that the Office of the Tax Ombud addresses complaints of service, procedural and administrative matters. The taxpayer must explore the internal complaints resolution mechanism within South African Revenue Service and if the complaint is not resolved, then the taxpayer has the right to take the complaint to the Office of Tax Ombud.³⁰²

²⁹⁸ 2009(South Sudan).

²⁹⁹ S 118(5) of the Tax Administration Act No.28 of 2011(South Africa).

³⁰⁰ Rule 13 of South African Revenue Service Dispute Resolution Rules of 11 July 2014, GN no.37819(South Africa).

³⁰¹ s 148(1) of the Tax Administration Act No.28 of 2011(South Africa).

³⁰² S.18(1) of the Tax Administration Act No.28 of 2011(South Africa).

Finally, the South African Revenue Service's decisions which affect the fundamental right to just administrative action are reviewable by the High Court in terms of s 105 of Tax Administration Act³⁰³ and s 3 of the Promotion of Administrative Justice Act.³⁰⁴

³⁰³ 28 of 2011(South Africa).

³⁰⁴ 3 of 2000(South Africa).

CHAPTER SIX: FINDINGS AND RECOMMENDATIONS

6.1 INTRODUCTION

This Chapter essentially answers the research questions posed in Chapter One of the dissertation. This Chapter will summarise how the Taxation Act³⁰⁵ treats the issues of independence and skills required of the Tax Appeals Board to competently discharge its functions in South Sudan. Secondly, this Chapter will briefly compare how the issues of the independence of tax dispute resolution institutions and their human resource skill balance is treated in Uganda and South Africa. Additionally, this Chapter will also consider how a dissatisfied party's right to review is safeguarded.

Lastly, this Chapter will propose recommendations for further tax legislation development in respect of the Tax Appeals Board in South Sudan's tax administration system.

6.2 THE TAX APPEALS BOARD IN SOUTH SUDAN

The Taxation Act³⁰⁶ established the Tax Appeals Board to resolve tax disputes arising from the enforcement of tax legislation. It is observed that the Tax Appeals Board is not carrying out its functions properly because of inherent legislative and institutional weaknesses.

The first legislative weakness in the Taxation Act, 2009 is the lack of independence from the Directorate of Taxation. It has been shown in Chapter Three that the Director General of Taxation is the Tax Appeals Board's secretary in terms of s 49(2)(c) of the Taxation Act.³⁰⁷ This undermines the independence of the Tax Appeals Board hence the inference of bias against the taxpayer. This is not only a violation of the constitutional right to fair public hearing in terms of article 19(3) of the Transitional Constitution of South Sudan³⁰⁸ but an infringement of the common law principle of *nemo iudex in re sua causa*. Consequently, the tax disputes are marred with bias to the detriment of the taxpayer. Therefore, it is argued that the inherent weakness in the tax legislation undermines the fair adjudication of tax disputes in South Sudan.

³⁰⁵ 2009(South Sudan).

³⁰⁶ 2009(South Sudan).

³⁰⁷ 2009(South Sudan).

³⁰⁸ 2011(South Sudan).

Secondly, there is no legal requirement in s 49 of South Sudan's Taxation Act³⁰⁹ regarding the qualification of the chairperson or a member of the Tax Appeals Board. The Tax Appeals Board is simply composed of the undersecretary of the Ministry of Finance and Economic Planning, the Chairperson of the accountancy society, the Director General of Taxation as an *ex officio* and a member to be appointed by the Minister of Finance. There is no requirement on the Minister of Finance to appoint an advocate or an attorney to the Tax Appeals Board. It is unlikely that a layperson could aptly interpret a tax legislation and apply it to resolve a tax dispute. On the other hand, the membership of the Chairperson of the accountancy society on the Tax Appeals Board is appropriate because dealing with the accounting issues of a tax dispute would require such expertise. It is argued once again that the Tax Appeals Board is unable to discharge its functions properly because it lacks the necessary human resource skill to properly address all the relevant issues that may arise in a tax dispute.

Thirdly, the 60 days' automatic decision rule is also affecting the functioning of South Sudan's Tax Appeals Board in terms of s 50(2) of the Taxation Act,³¹⁰ which provides that if the Tax Appeals Board does not render its decision on the appeal filed before it within 60 days, the decision will be deemed to have been decided in favour of the taxpayer. It is argued that this provision is unfair to the fiscus because the tax dispute is resolved in favour of taxpayer by the lapse of 60 days rather than by judicial findings on issues of evidence and law.

Fourthly, the members of the Tax Appeals Board are already burdened in their respective offices and they have little time for tax disputes. For example, the Undersecretary of the Ministry of Finance and Economic Planning as a chairperson of the Tax Appeals Board may not have time to address tax disputes. Similarly, the Director General of Taxation and chairperson of the accountancy society of South Sudan may not have the time to address tax disputes. The corollary is that tax disputes remain unaddressed in the tax administration system. Tax dispute resolution is a huge task which calls for full time service on the Tax Appeals Board. In contrast, in Uganda for instance, the position of the Chairperson of Tax Appeals Tribunal is a fulltime job.³¹¹

³⁰⁹ 2009(South Sudan).

³¹⁰ 2009(South Sudan).

³¹¹ S 4(2) of Tax Appeals Tribunals Act Cap 345 as amended by Act No.2 of 2018(Uganda).

Fifthly, the Tax Appeals Board's decisions are appealable to the High Court only on questions of jurisdiction, law and evidence in terms of s 51 of South Sudan's Taxation Act.³¹² It is argued that since there is no advocate or an attorney on the Tax Appeals Board who could substantively deal with issues of facts and law, it is appropriate for the High Court to hear the dispute *de novo*. Additionally, it is not clear under s 51 of the Taxation Act³¹³ whether the High Court has original jurisdiction to review decisions of the Director General of Taxation which affect the taxpayer's fundamental human and constitutional rights.

Sixthly, there is no alternative dispute resolution mechanism provided under South Sudan's Taxation Act³¹⁴ and therefore the parties to a tax dispute have no legislative guidance in the event that they wish to explore amicable settlement.

Furthermore, at the institutional and administrative level of the Tax Appeals Board in South Sudan, there are a number of constraints affecting its mandate of tax dispute resolution. These constraints are not from the tax legislation but purely administrative in nature. These are:

First, there are no rules of procedure for the Tax Appeals Board, thus making it difficult to be consistent in its proceedings. The Tax Appeals Board is empowered to make its own rules of procedure, but it has not issued any rules since its establishment in 2009. It is provided in terms of s 49 (6) of the Taxation Act³¹⁵ that subject to the provisions of this Act, the procedures and conduct of business of the Tax Appeals Board shall be determined by it. Similarly, s 119(1) of the Taxation Act³¹⁶ empowers the Minister to promulgate regulations or rules for proper implementation of the Taxation Act,³¹⁷ but nothing has been done in this respect. It is therefore argued that there is no consistency in the proceedings of the Tax Appeals Board because there are no rules governing its procedure. This substantially affects the effectiveness of tax dispute resolution in South Sudan.

Secondly, there is no registrar that organises and runs the affairs of the Tax Appeals Board save the Director General of the Taxation which is its secretary. This affects the operations of the Tax Appeals Board in terms of setting up venues, filing of appeals and publicizing its decisions.

³¹² 2009(South Sudan).

³¹³ 2009(South Sudan).

³¹⁴ 2009(South Sudan).

³¹⁵ 2009(South Sudan).

³¹⁶ 2009(South Sudan).

³¹⁷ 2009(South Sudan).

6.3 TAX DISPUTE RESOLUTION IN OTHER JURISDICTIONS

6.3.1 UGANDA

The legal framework of tax dispute resolution in Uganda is similar to that of South Sudan. It involves the Uganda Revenue Authority, Tax Appeals Tribunal and the High Court which are similar institutions in South Sudan.

However, the difference between Uganda and South Sudan in terms of tax dispute resolution is that the Tax Appeals Tribunal Act³¹⁸ of Uganda legislatively safeguards the independence of the Tax Appeals Tribunal from the control and direction of any person or authority.³¹⁹ Additionally, the chairperson of the Tax Appeals Tribunal is a person qualified to be appointed as High Court judge.³²⁰ Moreover, the Tax Appeals Tribunals Act³²¹ provides the alternative dispute resolution a full time chairperson, registrar and other support staff which assist it in the operational management of its affairs.³²²

6.3.2 SOUTH AFRICA

South Africa has three main institutions that deal with the tax disputes; namely, the Tax Board, Tax Court and High Court. The tax dispute is appealable to the Supreme Court of Appeal and where there is a constitutional issue, it may reach the Constitutional Court. It should be noted that the Tax Board and Tax Court deal with objections and appeals which involve issues of fact and law of a tax dispute.³²³ The parties to a tax dispute may also refer the matter to the facilitator for alternative dispute resolution which if successful, would result in a binding settlement agreement.³²⁴

Additionally, the Office of the Tax Ombud deals with the service, procedural and administrative complaints brought by the taxpayer against the South African Revenue Service officials.³²⁵

³¹⁸ Cap 345 as amended by Act No.2 of 2018(Uganda).

³¹⁹ S 14(3) of the Tax Appeals Tribunals Act Cap 345 as amended by Act No.2 of 2018(Uganda).

³²⁰ S 3(3) of the Tax Appeals Tribunals Act Cap 345 as amended by Act No.2 of 2018(Uganda).

³²¹ S 17A of the Act as amended by Act No.2 of 2018(Uganda).

³²² S 30(1) of the Tax Appeals Tribunals Act Cap 345 as amended by Act No.2 of 2018(Uganda).

³²³ S 109(1) and s 117(1) of the Tax Administration Act 28 of 2011(South Africa).

³²⁴ S 144(1) of the Tax Administration Act 28 of 2011(South Africa).

³²⁵ S 16(2) of the Tax Administration Act 28 of 2011 and s 51 of Act No.16 of 2016(South Africa).

In terms of safeguarding institutional independence, the Tax Administration Act³²⁶ has legislatively secured the independence of tax disputes resolution institutions from interference or direction of the South African Revenue Service or any other authority. For example, there is no South African Revenue Service member or staff in the Office of Tax Ombud, Tax Court or Tax Board. Similarly, South African Revenue Service does not play any role in the staffing of those institutions except for the clerk and registrar for the Tax Board and Tax Court respectively. However, this recruitment of the registrar and the clerk cannot compromise the tax decision because they are not the decision makers of a tax dispute.

It is observed that the alternative dispute resolution mechanism is where South African Revenue Service appoints the facilitators to facilitate the mediation.³²⁷ It is submitted that the mediation may be likely undermined by lack of independence since the facilitators are South African Revenue Service's appointees. However, the alternative dispute resolution process is absolutely voluntary, and the taxpayer may reject the participation in the mediation.³²⁸ It is therefore argued that the South African Revenue Service appointment of facilitators does not significantly affect the outcome of the mediation.

In terms of skill balance of the tax disputes resolution institutions, South Africa has done well. For example, the Tax Ombud must be a person with a tax law background,³²⁹ the Tax Board must be headed by an advocate or an attorney,³³⁰ and the Tax Court must be headed by a judge of the High Court together with an accountant in certain instances.³³¹ Therefore, the specialisations required for dealing with tax disputes are well catered for by legislation.

6.4 RECOMMENDATIONS

South Sudan's tax administration system greatly needs further legislative development if efficient and effective tax dispute resolution is to be achieved. The following reforms are necessary:

³²⁶ 28 of 2011(South Africa).

³²⁷ R 16(1) of the Dispute Resolution Rules Government Notice 317819 of 11th July 2014(South Africa)

³²⁸ S 144(2) of the Tax Administration Act 28 of 2011(South Africa).

³²⁹ S 14(5) (b) of the Tax Administration Act 28 of 2011(South Africa).

³³⁰ S110(1)(a) of the Tax Administration Act 28 of 2011(South Africa).

³³¹ S118(1)(a) of the Tax Administration Act 28 of 2011(South Africa).

1. The Tax Appeals Board needs to be separated from the apparent control of the Directorate of Taxation or Director General of Taxation by amending s 49 of the Taxation Act.³³² There is need for the complete independence of the Tax Appeals Board in terms of its finances, staffing and operational management. This will ensure independence when dealing with tax disputes.
2. The Taxation Act³³³ should be amended so as to ensure the lawyer is on the panel of a Tax Appeals Board. For example, there should be a requirement of an experienced advocate or judge and an accountant to constitute every panel of the Tax Appeals Board. The rationale is that tax disputes require the specialisation of both law and accountancy for effective tax dispute resolution.
3. Members of the Tax Appeals Board need to be fulltime officials just like Uganda where the chairperson of the Tax Appeals Tribunal is a fulltime employee. This will avail more time for dealing with tax disputes.
4. It is also recommended that South Sudan should introduce an alternative dispute resolution mechanism. The alternative dispute resolution would be cost-effective as it would not involve time-consuming litigation.
5. The 60 days' decision rule in favour of the taxpayer must be reconsidered. It is inappropriate for a decision to be decided by the lapse of time rather than on evidence and law. It also deprives the fiscus of funds needed to finance public expenditure.
6. The rules of procedure to govern the proceedings of Tax Appeals Board must be proclaimed. This will ensure consistency and ease the work of the lawyers representing taxpayers and the Director General for Taxation.

6.5 CONCLUSION

Much as South Sudan is a nascent nation grappling with the establishment of and strengthening institutions, ensuring efficient and effective tax administration will enable it to collect sufficient funds to meet the demands of public expenditure. The best way to achieve this is to ensure that the Tax Appeals Board is competent, independent and efficient. This will significantly reduce the frequency of appeals to the High Court. This would enable the Tax Appeals Board to dispose of tax disputes which would otherwise end up in the High Court along with the attendant litigation delays and

³³² 2009(South Sudan).

³³³ 2009(South Sudan).

costs. It is also costly for the fiscus because the taxes will be locked up in litigation in superior courts. It should be noted that the tax law rule that ‘pay now, argue later’ does not apply in South Sudan as can be seen in s 52 of the Taxation Act,³³⁴ which states an appeal for review by the Tax Appeals Board or an appeal to the High Court shall suspend collection of the tax being the subject of the appeal, but only with respect to the amounts in dispute.

It is also important to the taxpayers, academic, policymakers and general readership who would find this research valuable to use it as a pressure tool for further legislative development not only of the Tax Appeals Board but also the general tax administration system.

It is also important that the South Sudanese government learn from countries like Uganda and South Africa which have well established tax disputes resolution institutions, and borrow lessons of reforms from these jurisdictions.

³³⁴ 2009(South Sudan).

BIBLIOGRAPHY

PRIMARY SOURCES

LEGISLATION

SOUTH AFRICA

Constitution of the Republic of South Africa, 1996.

Income Tax Act 58 of 1962

Promotion of Administrative Justice Act 3 of 2000.

Tax Administration Act 28 of 2011.

Tax Administration Laws Amendment Act No.33 of 2019.

FOREIGN SOURCES

UGANDA

Constitution of the Republic of Uganda 1995.

Income Tax Act Cap as 340 as amended.

Tax Appeals Tribunals Act Cap 345 as amended by Act No.2 of 2018.

Uganda Revenue Authority Statute Cap.196

Civil Procedure Rules S.I 71-1.

SOUTH SUDAN

Transitional Constitution of the Republic of South Sudan 2011.

Civil Procedure Act, 2007.

Taxation Act, 2009.

SUBSIDIARY LEGISLATION

SOUTH AFRICA

Disputes Resolution Rules Government Notice No.37819 of 11th July 2014.

South African Revenue Service Dispute Resolution Guide Issue 2 dated 2nd March 2020 p.19.

CASES

SOUTH AFRICA

Ackermans Limited v Commissioner for the South African Revenue Service (2015) 77 SATC 191.

Bailey v CIR 1933 AD 204 at 220

Bernstein and Others v Bester N.O. and Others 1996 (4) BCLR 449 (CC)

City of Johannesburg v Renzon and Sons (Pty) Ltd 2010 (1) SA 206 (W).

De Lange v Smuts, NO (1998) 3 SA 785 (CC).

First National Bank of S.A. Ltd t/a West bank v Commissioner for South African Revenue Services and Another („FNB“) 2002 (7) BCLR 702 (CC).

Friedman and Others NNO v CIR 1991 (2) SA 340 (W).

ITC 1806 68 SATC 117.

Moolla v Director of Public Prosecutions and Others [2012] ZAGP JHC 94.

Monnig v Council of Review 1989 4 SA 866(C) 882G-H.

Ntayiya v South African Revenue Services [2018] ZAECMHC 1 (23 January 2018).

Pienaar Bros (Pty) Ltd v SARS (2017) (6) SA 435 (GP).

President of the Republic of South Africa v South African Rugby Football Union 2000(1) SA 1 (CC) at para.141.

Rex v Kassim 1950 (4) SA 522 (A).

R v Inland Revenue Commissioners, ex parte Unilever [1996] STC 681 at 690.

R v Sussex Justices, ex parte McCarthy [1924] 1 KB 256 at 259.

Shuttleworth v SA Reserve Bank & another [2014] 4 ALL SA 693 at 704.

Welz and another v Hall and Others 1996(4) SA 1073 (C).

FOREIGN JURISDICTIONS

Council of Civil Service Unions V Minster of Civil Service (1983) 3 ALLER 935 (English).

O'Reilly v Macknan [1983] 2 AC 237 at 275(English).

Ridge v Baldwin [1964] AC 40(English).

In R v Board of Inland Revenue, ex parte MFK Underwriting Agencies Ltd & Ors and Related Applications [1990] 1 ALL ER 91 at 115(English).

SECONDARY SOURCES

BOOKS

Beric Croome and Lynette Olivier, 'Tax Administration' (2010) p.23, First published in 2010, Juta & Co.Ltd First Floor, Sunclare Building, 21 Dreyer Street, Claremont 7708.

Currie and De Waal 'The Bill of Rights Handbook' 5ed (2005) p 722-723. Published by Juta & Co.Ltd 2005.

Duncan Bentley, Taxpayers' Rights: An International Perspective (1998) p 6. Published on the Gold Coast Australia by Revenue Law Journal, School of Law, Bond University, Queensland 4229

TS Emslie, DM Davies & SJ Hutton, Income Tax Cases and Materials 2ed (March 1995), published by The Taxpayer P.O Box 3191, Cape Town 8000.

Victor Thuronyi, *Tax Law Design and Drafting: in Legal Framework for Taxation: International Monetary Fund* 1996 ed volume 1 ch 2 p 15.

ARTICLES

Andrew Hutchison, Alan Rycroft and Michelle Porter-Wright, 'PRIVATE ORDERING AND DISPUTE RESOLUTION' (2018) (2) *SALJ* 324 at p.334 University of Cape Town, Department of Commercial Law.

Beric John Croome Taxpayers '*Rights in South Africa: An analysis and evaluation of the extent to which the powers of the South African Revenue Service comply with the Constitutional rights to property, privacy, administrative justice, access to information and access to courts*' (2008) p28.

Elizabeth Laing QC 'Legitimate Expectation' [2013] *Judicial Review (JR)*, DOI:10.5235/10854681.18.2.153 p. 158 para 22; Bluebook 21st ed. Elisabeth Laing, 'Legitimate Expectation', 18 *JUD. REV.* 153 (2013).

Hafsat Iyabo Sa'adu 'An Overview of Tax Appeal Tribunal in Nigeria' (May/June 2010) 7 No.1 *LASU Law Journal* p.110 Faculty of Law, Lagos State University, Free Enterprise Publishers Ibadan.

Jalia Kangave, 'Improving Tax Administration: A Case Study of Uganda Revenue Authority' (2005) *African Law Journal*, 49, 2 p.150. 145–176 # School of Oriental and African Studies. doi:10.1017/S0021855305000124 Printed in the United Kingdom. Also available at <https://www.cambridge.org/core/terms>. <https://doi.org/10.1017/S0021855305000124> accessed on 4th July 2021.

Julia Moore, 'Administrative Review in the Tax Court: A Way Forward', (June 2018) *Business Tax and Company Law Quarterly* vol.9 Issue 2 p.24, SIBER INK. ASSOCIATE IN BOWMAN GILFILLAN.

Kevin Hopkins 'Some Thoughts on the Constitutionality of "independent" Tribunals established by the State' University of Witwatersrand, (2006) *OBITER* 150, University of the Witwatersrand, Member of the Johannesburg Bar.

N Whitear Nel and C Badul 'The Duty of Recusal' (2014)1 *SACJ* p 48. University of KwaZulu-Natal, Pietermaritzburg.

Stella Vettori, 'Mandatory mediation: An obstacle to access to justice' (2015) 15 *African Human Rights Law Journal* 355-377 at p.357. Professor of Labour Law and Dispute Resolution, Graduate School of Business Leadership, University of South Africa.

Thabo Legwaila, 'The Development of the South African Office of the Tax Ombud: From 2013 to 2020 and Beyond' (2020) 32 *SA MERC LJ* 113 at p.118, Professor of Mercantile Law, University of Johannesburg, Juta & Co.Ltd.

OTHERS

Kibuta Ongwamuhana '*Tax Compliance in Tanzania - an Analysis of Law and Policy Affecting Voluntary Taxpayer Compliance*' UCT (2011) p 90.

Tax Appeals Tribunals in Uganda on its website www.tat.go.ug.