

**DOES THE TAX ADMINISTRATION ACT
SUFFICIENTLY PROTECT THE TAXPAYERS'
RIGHT TO PRIVACY OR PROVIDE THE
TAXPAYER WITH A RIGHT TO BE INFORMED?**

By

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Dissertation presented in partial fulfilment of the requirements for the degree of Master of
Commerce specialising in Taxation in the field of South African Tax

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Date of submission: February 2014

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ABSTRACT

This dissertation endeavours to establish whether the Tax Administration Act sufficiently protects the taxpayers' constitutional rights to privacy and right to be informed.

Specifically it will be investigating these rights versus the powers provided to SARS under the different fiscal statutes to access information and to exchange information internationally.

The research focussed on the rights conferred on taxpayers in terms of the Constitution versus the powers awarded to SARS in terms of the Tax Administration Act and the Income Tax Act. The research included other relevant fiscal statutes, books, case law, websites, articles and comments of experts.

It has been said that the Commissioner of SARS has "draconian powers" that infringe on the rights of taxpayers. My research concludes that most of these rights are reasonable and justifiable limited in the interest of a democratic society in order to fund the administrative and financial burden on the state.

The current society with advanced information technology has resulted in information being easily accessible and transferred and accordingly our privacy is being more invaded than before.

This is also the case in dealings with the tax authorities but is considered a justifiable infringement in order to collect taxes to finance an open and democratic society.

Tax authorities around the world are entering into tax information exchange agreements that make the sharing of taxpayer information permissible by law.

The search and seizure powers without a warrant are substantially unconstitutional. It should be noted that these powers have been challenged in court and the Commissioner will not easily authorise such actions without being convinced that his actions are above the law. Taxpayers' will therefore not be subject to these powers on a regular basis.

Taxpayers' are not always informed of their right to administrative justice that ensures lawful, reasonable and procedurally fair administrative actions by the Commissioner.

The newly appointed tax ombudsman will be a more cost effective remedy for challenging the powers of SARS and it is likely that the future will bring about more precedents that will prevent the abuse of powers. The Tax Ombudsman will have a duty to educate taxpayers' about their rights and also to educate the SARS officials on reasonable and procedurally fair conduct.

DECLARATION

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

Signature: _____

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CHAPTER 1

1.1 Background

In any democratic society the taxpayers will have certain basic rights. It was found that taxpayers enjoyed the following basic rights in all OECD countries:¹

- The right to be informed, assisted and heard
- The right of appeal
- The right to pay no more than the correct amount of tax
- The right to certainty
- The right to privacy
- The right to confidentiality and secrecy

SARS officially released the *SARS Service Charter and Service Standards* to the public on 19 October 2005 after recommendation by the Katz Commission (Katz Commission, 1995). The original version has been withdrawn from the website, and has been replaced by a new version called *SARS Service Charter and Standards*. This charter did not grant the taxpayer any legal enforceable rights but does explain the taxpayers' rights in layman terms.

Most revenue authorities recognise taxpayers' rights in either a legislative or administrative form. Of these, 45 countries have codified them (partly or full) in tax law or other statutes, while 43 revenue authorities operate with a set of rights and obligations that are detailed in administrative documents, sometimes referred to as 'taxpayer' or 'service' charters. This indicates a significant increase from 2003 when the OECD found that only about 66% of revenue authorities had some form of formal statement of taxpayer's rights.²

South Africa promulgated the Tax Administration Act 28 of 2011 (TAA) that came into effect on 1 October 2012. *"The Act is intended to simplify and provide greater coherence in South African tax administration law. It eliminates duplication, removes redundant requirements and aligns disparate requirements that had previously existed in a number of different tax Acts."*

"The Act creates a single, modern framework for the common administrative provisions of the tax Acts. It also aligns the South African Revenue Service (SARS) with international best practice and modern tax administration practices. Crucially, the Act seeks to achieve a balance of rights and

¹ OECD, 1990. Taxpayers' Rights and Obligations: A survey of the Legal Situation in OECD Countries

² OECD, 2013. Tax Administration 2013: Comparative Information on OECD and Other Advanced and Emerging Economies

obligations between the South African taxpayer and SARS itself." (Press release issued by SARS on 1 October, 2012)

"This new legislation aspires to do more than merely collate and consolidate the administrative provisions of the various tax acts into a single statutory instrument, for it also attempts to make substantive changes to various administrative processes." (Klue, et al., 2012)

The Constitution of South Africa is the supreme law³ of the country and guarantees all citizens rights. The rights of taxpayers' ultimately flow from the Constitution. South Africa promulgated the Tax Administration Act, No 28 of 2011 with the intention to recognise and respect taxpayers' constitutional rights in matters regarding tax administration, but without attempting to give detailed expression to those rights.

1.2 What is the administration of a Tax Act?

"The 'administration' of a tax Act means to:

(a) obtain full information in relation to—

- (i) anything that may affect the liability of a person for tax in respect of a previous, current or future tax period;*
- (ii) a taxable event; or*
- (iii) the obligation of a person (whether personally or on behalf of another person) to comply with a tax Act;*

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

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

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

(e) collect tax and refund tax overpaid;

(f) investigate whether an offence has been committed in terms of a tax Act, and, if so—

- (i) to lay criminal charges; and*
- (ii) to provide the assistance that is reasonably required for the investigation and prosecution of tax offences or related common law offences;*

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

(h) perform any other administrative function necessary to carry out the

³ Section 2 of the 1996 Constitution: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

provisions of a tax Act; and

(i) give effect to the obligation of the Republic to provide assistance under an international tax agreement.”⁴

1.3 Research question

This dissertation endeavours to establish whether the Tax Administration Act sufficiently protects the taxpayers’ rights to privacy and right to be informed. Specifically it will be investigating these rights versus the powers of SARS to access information and to exchange information internationally.

1.4 Research method

The research method used is that of a doctrinal type of legal research. The different statutes, commentary and judicial decisions were identified, analysed, organised and amalgamated. The South African rules were analysed and compared with international rules, mainly those published by the OECD. The information was critically assessed to derive the conclusion.

1.5 Limitations to the scope of the study

The TAA consolidates the common administrative provisions of the Transfer Duty Act, 1949 (Act No. 40 of 1949), Estate Duty Act, 1955 (Act No. 45 of 1955), Income Tax Act, 1962 (Act No. 58 of 1962), Value-Added Tax Act, 1991 (Act No. 89 of 1991), Skills Development Levies Act, 1999 (Act No. 9 of 1999), the Unemployment Insurance Contributions Act, 2002 (Act No 4 of 2002), Diamond Export Levy (Administration) Act, 2007 (Act No. 14 of 2007), Securities Transfer Tax Administration Act, 2007 (Act No. 26 of 2007) and the Mineral and Petroleum Resources Royalty (Administration) Act, 2008 (Act No. 29 of 2008).

Comparisons with administrative provisions were limited to that of the Income Tax Act, 1962 due to the fact that the drafting of TAA was seen as a preliminary step of rewriting the Income Tax Act of which about 25% of its text consisted of administrative provisions.⁵

This dissertation does not take into account any development in law that occurred after 1 December 2013.

1.6 Structure of dissertation

Anecdotal evidence suggests that the TAA has awarded the SARS with more draconian powers to enforce tax legislation as opposed to the limited rights to protect the taxpayer. This dissertation seeks to investigate these powers of the tax authority and the remedies available to protect the taxpayers’ rights in terms of civil law, the Constitution and common law.

The remaining chapters of this dissertation comprise the following.

Chapter Two: The right to privacy, the Constitution and Tax Law

⁴ See s3 of the Tax Administration Act, No 28 of 2011

⁵ Memorandum on the Objects of the Tax Administration Bill, 2011 at 2.1

Chapter Two analyses the right to privacy in terms of the Constitution and when the limitation of this right is justifiable. This Chapter also investigates the powers awarded to SARS in terms of domestic legislation that could infringe upon this right.

Chapter Three: Is the right to privacy protected with the exchange of information?

This chapter investigates the confidentiality standards with regards to international models for the exchange of information.

Chapter Four: The taxpayer's right to be informed about and appeal against the exchange of information

This chapter seeks to establish if the taxpayer has a right to be informed when his personal tax information is being exchanged and whether there are any remedies available to prevent this exchange.

The last chapter, Chapter Five, concludes on the taxpayers' right to privacy and the right to be informed.

CHAPTER 2 THE RIGHT TO PRIVACY, THE CONSTITUTION AND TAX LAW

2.1 The Constitution

2.1.1 The Constitutional Right to Privacy

SARS has the obligation to ensure that all persons are compliant with tax legislation⁶ and this can only be verified by comparing the taxpayer's declaration with supporting documentation. Naturally taxpayers' are concerned about the infringement of their right to privacy when requested for personal and confidential information.

The Constitution provides in section 14 that:

"14. Privacy.—Everyone has the right to privacy, which includes the right not to have—

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

The Constitutional Court discussed the meaning of privacy in *Bernstein and Others v Bester N.O. and Others*.⁷

"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."

The courts adopted a two-part test⁸ to determine whether a persons' right to privacy has been infringed in particular circumstances. The first part is to establish whether a subjective expectation of the bearer of the right that something is a personal matter exists and the second part is whether this is considered a reasonable and justifiable expectation by society in general.

⁶ See s4(1) of the South African Revenue Service Act 34 of 1997

⁷ 1996 (4) BCLR 449 (CC) at 484 and 485.

⁸ *Bernstein and Others v Bester and Others* NO. 1996 (4) BCLR 449 (CC)

The right to privacy of an individual is more intense the closer it is to his intimate personal sphere and less intense the further it is from this personal sphere.⁹

Everyone has the right to privacy¹⁰ and it is not only enjoyed by natural persons but also by juristic persons, although to a lesser extent.

Langa DP, followed the judgment in Bernstein¹¹ when handing down judgment in the *Hyundai Motors Case*:

*“Juristic persons are not the bearers of human dignity. Their privacy rights, therefore, can never be as intense as those of human beings. However, this does not mean that juristic persons are not protected by the right to privacy. Exclusion of juristic persons would lead to the possibility of grave violations of privacy in our society, with serious implications for the conduct of affairs. The state might, for instance, have free licence to search and seize material from any non-profit organisation or corporate entity at will. This would obviously lead to grave disruptions and would undermine the very fabric of our democratic state. Juristic persons therefore do enjoy the right to privacy, although not to the same extent as natural persons. The level of justification for any particular limitation of the right will have to be judged in the light of the circumstances of each case. Relevant circumstances would include whether the subject of the limitation is a natural person or a juristic person as well as the nature and effect of the invasion of privacy.”*¹²

2.1.2 The Limitation of Constitutional Rights

Constitutional rights are not absolute and an infringement may be justifiable where it is in the interest of a democratic society.

Section 7(3) of the Constitution provides that the rights in the Bill of Rights are subject to the limitations contained or referred to in section 36 or elsewhere in the Bill.

The constitutional right of privacy is not absolute and an infringement of the right may be justifiable in terms of section 36 of the Constitution¹³ which is the general limitation provision. The onus of proving that a limitation on a constitutional right is justified under the general limitation clause rests upon the person invoking the limitation. This onus is not easily discharged and the person will have to explain

⁹ Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2000 (10) BCLR 1079 (CC) at para 18.

¹⁰ NM v Smith 2007 7 BCLR 751 (CC), 2007 5 SA 250 (CC) par [132]

¹¹ Bernstein and Others v Bester and Others NNO. 1996 (4) BCLR 449 (CC)

¹² Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO and Others [2000] ZACC 12; 2001 (1) SA 545 (CC)

¹³ Constitution of the Republic of South Africa, 1996.

the purpose of the limitation and how the limitation promotes the achievement of that purpose. The limitation must serve an important objective in the interest of a free and democratic society.¹⁴

Limitation of rights as contained in section 36 of the Constitution provides:

“(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;*
- (b) the importance of the purpose of the limitation;*
- (c) the nature and extent of the limitation;*
- (d) the relation between the limitation and its purpose; and*
- (e) less restrictive means to achieve the purpose.*

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

The Constitutional Court follows a two-stage approach to establish whether a limitation of a constitutional guaranteed right is reasonable and justifiable. The Constitutional Court has described the two-staged approach as follows:

*“The question of whether a right in the Bill of Rights has been violated generally involves a two-pronged enquiry. The first enquiry is whether the ... provision limits a right in the Bill of Rights. If the provision limits a right in the Bill of Rights, this right must be clearly identified. The second enquiry is whether the limitation is reasonable and justifiable under section 36(1) of the Constitution. Courts considering the constitutionality of a statutory provision should therefore adhere to this approach to constitutional adjudication”.*¹⁵

Section 36 does not define the purpose for which rights may be limited. The purposes for which rights are limited by tax legislation are normally in the public interest such as the collection of taxes in order to fund the administrative and financial burden on the state.¹⁶ This purpose is important enough to justify, within reason, the right to privacy in our open and democratic society.

¹⁴ Park-Ross and Another v The Director, Office for serious Economic Offences, 1995 (2) BCLR 198 (C) at 215A; R v Oakes (1986) 26 DLR (4th) 200 SCC; Qozeleni v Minister of Law and Order 1994 (3) SA 625 (E) at 640H-641C; Khala v Minister of Safety and Security 1994 (4) SA 218 (W) at 228D-I; S v Majavu 1994 (4) SA 268 (CK) at 315I-J; Phato v Attorney-General, Eastern Cape, 1995 (1) SA799 (E) at 833D; Jeeva v Receiver of Revenue, Port Elizabeth 1995 (2) SA433 (SE) at 453D.

¹⁵ *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009 (4) SA 222 (CC) par [41]

¹⁶ Rautenbach, IM. Bill of Rights Compendium, 1A49.(LexisNexis, South Africa, last updated October 2011).

There must be a balance between the importance of the purpose of the limitation and the nature and extent of the limitation. This was confirmed by the court in *Law Society of South Africa v Minister of Transport* where it was stated:

*“It is significant that one of the relevant factors listed in section 36 is the “relation between the limitation and its purpose”. This is so because the requirement of rationality is indeed a logical part of the proportionality test. It is self-evident that a measure which is irrational could hardly pass muster as reasonable and justifiable for the purposes of restricting a fundamental right”.*¹⁷

The Tax Administration Act will infringe upon some fundamental Constitutional rights of taxpayers and in terms of section 36, it should be established whether or not the infringement by these provisions could be considered reasonable and justifiable.

2.2 Information gathering

2.2.1 New Information gathering Powers and Procedure

SARS' information gathering powers are significantly enhanced by the TAA and similarly the taxpayers' rights are enhanced and made more explicit to counterbalance SARS' new information gathering powers. This was necessary to address the problem that SARS experienced when requesting information and then having protracted disputes as to whether they are entitled to this information. It is an established international principle that a revenue authority should not have to divert its focus from ensuring compliance with the tax acts with debates as to the entitlement of the revenue authority to the information.¹⁸

Sections 74A, B, C and D of the Income Tax Act were replaced by sections 40 to 66 of the TAA.

According to the SARS Short Guide to the Tax Administration Act (at p19) the TAA allows SARS six different methods to collect relevant information:

- Inspection of a business premises;
- Request for information;
- Production of relevant material in person during an interview at a SARS office;
- A filed audit or criminal investigation at the premises of a person;
- Formal enquiry before a presiding officer;
- Search and seizure.

The failure to furnish requested relevant information or answer questions is an offence and subject to civil proceedings¹⁹ and criminal proceedings²⁰ unless a taxpayer has just cause for such failure.

¹⁷ 2011 2 BCLR 150 (CC) par [37]

¹⁸ Memorandum on the Objects of the Tax Administration Bill, 2011 at 2.2.5

¹⁹ See s 210 of the TAA

2.3 What is just cause for failing to provide information?

A person with just cause may refuse to provide information or answer questions.²¹ This is a common law right of taxpayers' that protect them against the abuse of the information gathering powers by SARS. The certain circumstances with 'just cause' that warrant the taxpayer to refuse to provide information is discussed here below.

Just cause has been described as:

"On the face of it 'just excuse' is a wider concept in its ordinary meaning than, for instance, an expression like 'lawful excuse', which would have been more appropriate to connote an excuse sanctioned by existing rules of law."²²

2.3.1 "Just cause" and legal professional privilege

A taxpayer may refuse to comply with a request for information from SARS on the ground that the documentation is subject to legal professional privilege and the disclosure thereof could infringe on his rights.

Privilege is a word used by many professions. In South Africa the common law position is currently that other than marriage, the only relationship which gives rise to privilege information is the attorney client relationship. South African court judgments have held that privilege does not extend to other professional relationships²³ such as journalists,²⁴ insurers,²⁵ ministers of religion²⁶ or doctors.

Legal professional privilege is a common law principle for the benefit of individuals and companies seeking and obtaining legal advice and was developed by the judges in England going back to the 16th century. This privilege has been accepted by South African courts in a tax context. See for example *Heiman, Maasdorp and Barker v Secretary for Inland Revenue* (1968) (30 SATC 145) and *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 (2) SA 433 (SE).

This privilege has also been accepted as a fundamental right by the Constitutional Court in *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v. National Director of Public Prosecutions* [2008] ZACC 14; 2009 (1) SA 1 (CC) where it was held that:

"[184] The right to legal professional privilege is a general rule of our common law which states that communications between a legal advisor and his or her client are protected from disclosure, provided that certain requirements are met. The rationale of this right has changed over time. It is now generally accepted that these communications should be protected in order to facilitate the proper functioning of an adversarial system of justice, because it

²⁰ See s234(h), (i) and (j) of the TAA

²¹ See s49(2) of the TAA

²² Attorney-General, Transvaal v Kader [1991] 2 All SA 543 (A) at page 547

²³ Mandela v Minister of Prisons 1983(1) SA938(A)

²⁴ S v Pogrand 1961 (3) SA 868(T); S v Cornelissen 1994(2)SACR 41 (W)

²⁵ Howe v Mabuza 1961 (2) SA635(D)

²⁶ Smit v Van Niekerk NO en 'n Ander 1976(4) SA293(A)

encourages full and frank disclosure between advisors and clients. This, in turn, promotes fairness in litigation. In the context of criminal proceedings, moreover, the right to have privileged communications with a lawyer protected is necessary to uphold the right to a fair trial in terms of s. 35 of the Constitution, and for that reason it is to be taken very seriously indeed.

[185] Accordingly, privileged materials may not be admitted as evidence without consent. Nor may they be seized under a search warrant. They need not be disclosed during the discovery process. The person in whom the right vests may not be obliged to testify about the content of the privileged material. It should, however, be emphasised that the common-law right to legal professional privilege must be claimed by the right-holder or by the right-holder's legal representative. The right is not absolute; it may, depending upon the facts of a specific case, be outweighed by countervailing considerations."²⁷

The essential requirements for legal professional privilege to exist:

-The communications that are sought to be protected must have been made to a legal advisor acting in a professional capacity.

The simple fact that a person is an advocate or attorney does not give rise to the conclusion that information shared with him will be privileged. There are several indicators of a person acting in a professional capacity and not for example on a friendly basis. The payment of a fee is the most important but not necessary conclusive indicator.

-The information must have been supplied in confidence.

The communications between a legal professional and his client must originate in a confidence that it will not be disclosed. There can be no legal privilege where the nature of the communications indicates that the client is prepared to disclose the information to other parties.

-The information must have been supplied for the purpose of pending litigation or for the purpose of obtaining professional advice.

The mere fact that a person handed confidential documentation in a file to a legal professional does not make it subject to legal professional privilege when the lawyer was not consulted for legal advice.

-The advice must not facilitate the commission of a crime or fraud

Privilege will not apply if a client sought advice for purpose of committing a crime or fraud, even if the attorney was not aware of his clients' intentions.

-The client must claim the privilege.

The client has to claim the privilege or waive this privilege expressly or by implication. A court will not invoke the privilege of its own accord.

²⁷ At page 105.

Extension of legal professional privilege to accountants

The global opinion of accountants is that most tax consulting is done by accountants and that their communications with their clients on tax matters should be just as much protected from disclosure as if the communications were with a legal professional.²⁸

National Treasury received requests that the legal professional privilege should be extended to the tax practitioner profession as most tax advice is given by tax practitioners who are not admitted attorneys or advocates. This request was also submitted in order to “level the playing field” as the legal tax consultants have an unfair advantage.²⁹

Treasury commented that the legal professional privilege is a common law right that originated in the United Kingdom in the sixteenth century and in countries where this privilege is extended to other professionals it has to be done by statute. The decision was not to extend the privilege in the TAA to other professions because “SARS’s view is that just as is the case in Germany, the USA and (if a limited privilege is extended in that country) Australia, a prerequisite for considering the extension of privilege in tax matters to non-lawyers is that the tax practitioners are regulated, not by self-constituted professional bodies, but by law”.³⁰

The National Treasury referred to the UK case of *Prudential Plc & Anor, R (on the application of) v Special Commissioner of Income Tax & Ors* [2010] EWCA Civ 1094 where the legal professional privilege was denied by the court when communications take place between an accountant and client seeking and giving advice on tax law. At that time the ruling was still on appeal to the Supreme Court of Appeal. The judgment handed down, in a split decision, by this court on 23 January 2013 was that the appeal should not be allowed because it is a policy issue and best left to Parliament to decide.

It should be noted that the court were of the opinion that communications with an accountant should be just as much protected from disclosure as that with a legal professional, but that the court did not have the authority to rule and that it would have been inappropriate to do so.

It is submitted that it is improbable that our courts will depart from the established international common law principles. It is submitted that this privilege will not be enacted in the TAA until such time as tax practitioners are regulated by law.

2.3.2 “Just cause” and bank client confidentiality

A South African bank owes a duty of confidentiality to its clients that would generally prevent the disclosure of client information to third parties. This common law duty of confidentiality is overridden by SARS information gathering powers enacted by constitutionally valid legislation.

²⁸ Standing Committee on Finance. 2011. Report –Back Hearings on the Tax Administration Bill, 11 of 2010. Pretoria: National Treasury. At page 6.

²⁹ Ibid p 5.

³⁰ Ibid p 6.

This is in line with the common law principle that the duty of banker-client confidentiality can be overridden in situations where:

- the disclosure is compelled by law
- the client agrees to the disclosure of information
- the disclosure is for the bank's protection, or
- the circumstances gives rise to a public duty of disclosure

In a recent judgment by the Federal High Court of Australia,³¹ the court had to decide whether a request from the Australian Tax Office (ATO) for information on banking detail was in breach of certain non-statutory obligations of confidentiality between a bank and its clients. This information was requested in terms of section 264 of the Australian Income Tax Assessment Act (ITAA) which awards the Commissioner the same information gathering powers as section 46 of the South African Tax Administration Act.

It was held that section 264 was inserted in the ITAA to enable the Commissioner in performing his functions and responsibilities and that it confers upon the Commissioner very broad investigatory powers in order to perform those functions.

The bank contended that the information is subject to bank/client privilege. A banker has a contractual obligation which includes an implied term that the banker will not divulge any information to a third party. The court held that an obligation by law overrides any non-statutory contractual obligation of confidentiality.

The court quoted from *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Ltd*³² where it was held that:

"[...]the existence of the contractual duty provides no just cause or excuse for refusing or neglecting to produce the documents. It is likely that documents which relate to the income or assessment of a taxpayer will often be entrusted by him to another, for example, to a Bank, a solicitor or an accountant. The Parliament cannot have intended that a person whose taxation affairs were under consideration could protect his documents from disclosure simply by binding the person to whom they were entrusted to refrain from producing them."

Gibbs ACJ concluded at 522 that:

"The terms of a contract made between the taxpayer and the custodian of his documents would appear quite irrelevant for the purposes of s 264(1), and there is nothing in the provisions of the sub-section that would support the view that the existence of a contractual

³¹ *Australia and New Zealand Banking Group Ltd v Konza & Anor* [2012] FCA 196

³² *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Ltd* 76 ATC at 521

duty, or an arrangement short of a contract, to refrain from producing the documents should be regarded either as having the effect that the documents were not in the custody or under the control of the person who in fact had them in his custody or under his control, or as providing just cause or excuse for failing to produce them."

The court dismissed the applicant's application and held that the existence of the contractual duty provides no just cause or excuse for refusing to produce the information.

The same principles apply in South Africa where it has been held that the contractual duty to preserve secrecy can be overridden for considerations of public interest.³³ A bank will therefore not have "just cause" to refuse to adhere to a request for information by SARS.

2.3.3 "Just cause" and the constitutional right against self-incrimination

Section 50 of the TAA authorises SARS to conduct an enquiry into the tax affairs of a person. This enquiry extends the information gathering powers of SARS by questioning a taxpayer regarding his tax affairs while he is under oath.

The Constitution awards all persons a right to a fair trial which includes the privilege against self-incrimination by refusing to answer questions.

The privilege against self-incrimination is inconsistent with the information gathering powers awarded to the Commissioner in terms of section 50 of the TAA. If a taxpayer entitled to plead the privilege to excuse an answer when interviewed, then Commissioner's powers would be nullified.

The Constitutional Court held as follows in the matter of *Harold Bernstein and Others v L. Von Wielligh Bester NO and Others* considering an application where there was a possible violation of rights to privacy when declining to answer:

"The application of the Constitution to the issue of 'sufficient cause' in the present context would operate as follows. The first part of the enquiry is whether answering the particular question would infringe the applicant's right to privacy. If it would, this would constitute 'sufficient cause' for declining to answer the question unless the section 418(5)(b)(iii)(aa) compulsion to answer the question would, in all the circumstances, constitute a limitation on the right to privacy which is justified under section 33(1) of the Constitution."

It is submitted that a taxpayer will not be able to rely on the right to avoid self-incrimination by refusing to answer questions as section 50 of the TAA is a reasonable limitation of his rights, particularly in the

³³ *First Rand Bank v Chaucer Publications (Pty) Ltd*, 2008(2) SA 592 (CPD)

light that incriminating evidence obtained during an enquiry is not admissible in criminal proceedings, unless a competent court directs otherwise.³⁴

A taxpayer may also not refuse to file a tax return on the grounds that it might contain evidence of a tax offence that might incriminate him. Any admission made by a taxpayer in a return is inadmissible in criminal proceedings unless a competent court direct otherwise.³⁵

2.4 PAJA and Administrative Action

The taxpayer is protected from abuse by the Commissioner when exercising the powers awarded to him in terms of the TAA.

In terms of section 33 of the Constitution, administrative action will be reasonable, lawful and procedurally fair. It also provides that a person can request reasons for administrative action that could materially and negatively affect their rights. The Promotion of Administrative Justice Act 3 of 2000 (PAJA) was enacted to give effect to this right. The Constitutional Court has held that all statutes that authorise administrative action must be read together with PAJA.³⁶ PAJA is enacted in terms of the Constitution and has an overriding application.³⁷

Section 3(2)(b) of PAJA lists the five core elements of procedural fairness:

“In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)–

- (i) adequate notice of the nature and purpose of the proposed administrative action;*
- (ii) a reasonable opportunity to make representations;*
- (iii) a clear statement of the administrative action;*
- (iv) adequate notice of any right of review or internal appeal, where applicable; and*
- (v) adequate notice of the right to request reasons in terms of section 5.”*

PAJA defines an administrative action³⁸ as a decision or a failure to take a decision in terms of an empowering provision by an organ of the State which adversely affects his rights. The decisions must impose a burden or negative effect such as a decision to require someone to do something or a decision that may limit someone’s rights.

³⁴ See s72(2) of the TAA

³⁵ See s72(1) of the TAA

³⁶ *Zondi v MEC for Traditional & Local Govt Affairs* 2005 (3) SA 589 (CC) at par 101

³⁷ SARS. 2012. Short Guide to the Tax Administration Act, 2011 at page 9.

³⁸ The term ‘administrative action’ is defined in section 1 of the Promotion of Administrative Justice Act, No. 3 of 2000 as meaning

‘any decision taken, or any failure to take a decision, by

(a) an organ of state, when

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect . . .’

A decision taken by SARS, to exercise its powers under the provisions of the TAA, which could adversely affect any Constitutional right of a taxpayer, will constitute an administrative action. It is not possible to compile a list of administrative actions as each case will have to be decided on its own merits. An example of an administrative action will be a request for information, documentation or things due to the fact that it could materially and adversely affect the rights of a taxpayer. Most information gathering decisions taken by SARS may amount to administrative action as the taxpayer is requested to do something (provide information) that could affect his rights (limitation on his right to privacy).

PAJA provides that taxpayers may request written reasons for administrative action taken by organs of the state.³⁹ A taxpayer may therefore request SARS to give adequate reasons in writing for any administrative decision taken. The Supreme Court of Appeal in *Minister of Environmental Affairs & Tourism v Phambili Fisheries (Pty) Ltd*⁴³ laid down the standard for what constitutes 'adequate reasons':

"[T]he decision-maker [must] explain his decision in a way which will enable a person aggrieved to say, in effect: 'Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.' This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions".

A decision to audit a taxpayer could also constitute an administrative action. This view is shared by others:

The view as submitted by *Bentley*:⁴⁴

"Taxpayers should be given prior notification of an audit and the opportunity to request postponement of the audit if they have good reasons. As in any administrative decision, the tax authority should explain to taxpayers why they are chosen for an audit, what taxes and what years the audit will cover, how the audit will proceed, and give the taxpayer the opportunity to contact and use legal or other representative in dealing with the tax authority."

The view submitted by *Croome*:⁴⁵

³⁹ Section 5(1) of the Promotion of Administrative Justice Act, No. 3 of 2000 reads as follows:

'Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.'

⁴³ 2003 (6) SA 407 (SCA) at para 40.

⁴⁴ Bentley, D (ed), *Taxpayers Rights: An International Perspective* (Bond University, Queensland: revenue Law Journal, 1998)

“To ensure compliance with the fiscal statutes the Commissioner calls for information from taxpayers and conducts audits of their affairs. It is contended that the decision to call for information from a taxpayer constitutes ‘administrative action’ that is subject to PAJA.”

The view as submitted by Erasmus:⁴⁶

”[I]t is appropriate for me to justify why I say a decision to audit a taxpayer is administrative action. My views are based on my draft PhD thesis which analyses the inter-relationship in particular between ss 2, 33, 41(1), 172(1), 195(1) and 237 of the Constitution 108 of 1996; s 4(2) of the South African Revenue Service Act 34 of 1997 (SARS Act); the Promotion of Administrative Justice Act 3 of 2000 (PAJA); and a decision by the Commissioner for the South African Revenue Service to exercise his powers under ss 40, 46, 47 and 48 of the Tax Administration Act 28 of 2011 by requiring taxpayers to submit, produce or make available relevant material. My thesis concludes that such a decision by the Commissioner (or SARS) constitutes administrative action as defined in s 1 of PAJA.”

The taxpayer is protected from administrative actions by SARS that are not lawful, reasonable and fair. The provisions of PAJA have a powerful impact on how the Commissioner exercises his duties under the fiscal statutes. An aggrieved taxpayer may challenge SARS and request reasons for decisions taken. He may institute proceedings in court for the review of decisions taken that are not reasonable, lawful and procedurally fair.

2.5 General rules for inspection, verification, audit and criminal investigation

2.5.1 Inspection at premises

2.5.1.1 The legislation previously and now

The repealed provisions of the Income Tax Act	The Tax Administration Act
74B. Obtaining of information, documents or things at certain premises	45. Inspection

2.5.1.2 Inspections

Section 45 of the TAA allows a SARS official to inspect a business premise without prior notice. This may only be done where SARS has reason to believe that a trade is being carried on at the premises.

⁴⁵Croome, B.J. 2008: *Taxpayers’ Rights in South Africa: An analysis and evaluation of the extent to which the powers of the South African Revenue Service comply with the Constitutional rights to property, privacy, administrative justice, access to information and access to courts*. Ph.D. Thesis. University of Cape Town.

⁴⁶Erasmus, D.N. 2013. The Tax Administration Act, Taxpayers’ rights and SARS Audits. Tax Talk. 31 January 2013

The purpose of the inspections is to identify the person carrying on the trade and to verify that he is registered for tax purposes and maintain proper records.

This would typically be done when SARS conducts Inspection Surveys. These surveys are face to face engagements with a taxpayer at the taxpayer's premises. The purpose is to complete a prescribed questionnaire to determine the identity of the person occupying the premises, whether the person is registered for tax and whether the person is keeping records in the required format.

The problem with these inspections is that the owner of a registered business might not always be available to supply SARS with the correct name of the company and reference numbers. Such inspections should be conducted only with the owner of the business and not with any of the employees'. The taxpayer should also have the opportunity to contact his tax representative or attorney to be present if he so wishes, although this would seem unnecessary due to the questions being straightforward and factual.

2.5.1.3 Conclusion

There are no additional powers or additional rights introduced by the new TAA. The purpose of random spontaneous inspections is intended to develop a compliant tax base which is important for the effective administration of a tax Act. The Legislature considers these inspections as 'regulatory', 'compliance', or 'administrative' which is a minimal, justifiable intrusion on the right to privacy of a taxpayer.⁴⁷

This is an administrative procedure that is not likely to constitute an unlawful violation of a taxpayer's right to privacy as it will pass the test of a justifiable intrusion on the right to privacy in order to enable the tax authority to perform its duties. SARS should however conduct inspections in a lawful, reasonable and fair manner.

2.5.2 Production of relevant material in person

Section 47 of the TAA allows SARS to request a taxpayer to be personally present for an interview.

This information gathering procedure is not an interrogation conducted during a formal inquiry but an informal interview for purposes of clarifying tax issues that might render further verification or audit unnecessary. It is therefore also less intrusive method of information gathering than a formal audit on the tax affairs of a taxpayer. A taxpayer is entitled to have a legal advisor present although this information gathering process is specifically prohibited for purposes of criminal investigations.

It is submitted that this information gathering process is less intrusive on the rights of a taxpayer than other powers contained in the TAA and is a justifiable infringement on taxpayers' rights.

2.5.3 Audit

⁴⁷ Standing Committee on Finance. 2011. Report –Back Hearings on the Tax Administration Bill, 11 of 2010. Pretoria: National Treasury.

<p>The repealed provisions of the Income Tax Act</p> <p>74A. Furnishing of information documents or things by any person</p>	<p>The Tax Administration Act</p> <p>40. Selection for inspection, verification or audit</p> <p>46. Request for relevant material</p> <p>48. Field audit or criminal investigation</p>
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2.5.3.1 Purpose

Section 40 of the TAA empowers SARS to select a taxpayer for an audit on the basis of any consideration relevant for the proper administration of a tax Act. This is considered a reasonable and necessary violation of a taxpayers' right to privacy in order to enable SARS to perform its duties.

The purpose of an audit is to ensure compliance with the various tax acts administered by SARS. The SARS (excluding the Customs division) conducts audits mainly on compliance with the Income Tax Act and the Value-Added Tax Act. Audits are also conducted on Employees Tax as provided in Schedule 4 to the Income Tax Act. Employees Tax audits will often result in an adjustment of Skills Development Levies and Unemployment Insurance Contributions. This is mainly due to the fact that PAYE audits will adjust remuneration and these taxes are directly linked to remuneration.

Section 40 of the TAA now prescribes the basis upon which a person may be selected for an inspection or audit being either a random selection or a risk assessment basis. It should be noted that paragraph (k) was inserted into section 68 of the TAA which prohibits the disclosure of information relating to audit selection procedures used by SARS, in case such disclosure could jeopardise the effectiveness thereof.

2.5.3.2 Selection basis for inspection, verification or audit

The TAA did not enhance the powers of SARS to conduct audits on taxpayers. There are specific provisions to ensure that these powers are exercised reasonable and fair. Section 40 of the TAA now prescribes the basis upon which a person may be selected for an inspection or audit being either a random selection or a risk assessment basis.

SARS conducts audits on various taxpayers in order to detect non-compliance. The full enforcement of the law against non-compliant taxpayers will, in theory, motivate the public to be voluntarily compliant with tax legislation. SARS has moved away from being a gatekeeper to focussing on risk based audits. This involves the move to identifying and auditing high risk taxpayers. The Client Risk Unit of SARS is responsible for identifying and selecting these taxpayers for referral to audit. Taxpayers with lesser risks are identified automatically by a computer programme. SARS hopes to

implement the risk based approach effectively by increasing access to third party data and by increasing third party validation of declarations. The pre-populating of data from third parties (e.g. IRP5 data from the employer is pre-populated on the income tax return of an individual) reduced the opportunity for false or inaccurate declarations.⁴⁸ (SARS Strategic Plan 2013/14 - 2017/18, 2013)

2.5.3.3 Random Selection of taxpayers for audit

It is necessary to also randomly select taxpayers for audits due to the fact that that is impossible for revenue authorities to audit all taxpayers. A simple random selection process implies that all taxpayers' have an equal probability of being selected for an audit regardless of the risk of non-compliance. Random auditing is a mechanism to measure compliance levels and to validate risk assessment models. It is also used to identify new tax evasion schemes and to act as a general deterrent against non-compliance.

In SARS, the random selection process is done by a risk engine which is programmed in the Service Manager software which is the SARS mirror version of the E-filing software used by taxpayers. This risk selection criterion is not known to the general public and is changed from time to time. This is not a scientific selection of a random sample of taxpayers but rather a targeted selection from taxpayers that meet defined criteria. The criteria can be that certain deductions are claimed, for example donations. A tax refund or decrease in a tax liability from current to previous tax year will also be a typical risk selection criteria programmed into the risk engine.

The recently introduced ITR14SD form, where taxpayers have to reconcile Income Tax, VAT and PAYE information, is also a source for selecting random audits.

SARS has the power to randomly select a taxpayer for an audit which is a justifiable limitation of his rights.

2.5.3.4 Risk assessment basis of selecting taxpayers for audit

The risk assessment basis cases are selected by the Client Risk Unit in SARS and referred to the Audit division who then allocate resources in accordance with the risk profile. These cases have a specific risk of non-compliance that needs to be investigated. A notification of the audit must be issued to the taxpayer and this notice must indicate the initial basis and scope of the audit.⁴⁹ This selection criterion can be anyone of the following:

- A specific industry.
- Information received from financial institutions e.g. banks information on interest income.
- Information received from third parties e.g. real estate agents information on rental income
- Information received from government departments e.g. tender payments.
- Spin-offs from other cases e.g. creditor of a taxpayer did declare income

⁴⁸ SARS Strategic Plan 2013-14 – 2017-18

⁴⁹ See s48 of the TAA

- A suspicious activity report filed on the SARS website e.g. disgruntled employee who is aware of tax evasion
- Information shared by other revenue authorities in terms of an international tax agreement.
- The information on SARS database will also be screened for risks e.g. Deeds Office records and ENatis Vehicle Licence records

SARS has the power to select a taxpayer for an audit on a risk assessment basis which is a justifiable limitation of his rights.

2.5.3.5 Taxpayer rights: Decision to select a taxpayer for an audit

Section 40 of the TAA empowers SARS to select a taxpayer for an audit on the basis of any consideration relevant for the proper administration of a tax Act. This is considered a reasonable and necessary violation of a taxpayers' right to privacy in order to enable SARS to perform its duties.

During a random selection of a company for an audit by the Australian Tax Office, a company challenged the authorities for being selected for an audit. The Australian Federal High Court held that the revenue authority does not have sufficient resources to audit all taxpayers and that, inevitably, there will be a random aspect to those who are selected for closer examination. On the issue whether there should be a suspicion of wrongdoing before a taxpayer is selected for audit, the Court held:

*"It is the function of the Commissioner to ascertain the taxpayer's taxable income. To ascertain this he may need to make wide-ranging enquiries, and to make them long before any issue of fact arises between him and a taxpayer."*⁵⁰

The Canadian Supreme Court of Appeal has also confirmed the legality of the principle and held:

*"A spot check or a system of random monitoring may be the only way in which the integrity of the tax system can be maintained."*⁵¹

During a recent case the Canadian courts⁵² held that the revenue authority acted improperly by using audit powers for selecting a taxpayer for an audit with an ulterior or secondary purpose.

"The Federal Court did find that a valid audit purpose existed, but it found it to be a secondary or subservient purpose to the primary purpose of chilling the respondent's business concerning the 10-8 plans. Based on evidence before it, the Federal Court

⁵⁰ Industrial Equity Ltd v Deputy Commissioner of Taxation (1990) 170 CLR 649 at paras 14-24.

⁵¹ R v McKinlay Transport Limited 47 CRR 151 (SCC) at 168

⁵² MNR v. RBC Life Insurance Co. et al. (2013 FCA 50) at 43

found that the Minister's "primary goal" was to chill this business – a purpose that was not "sufficiently tied to her valid audit purpose"

This decision shows that the decision to audit a taxpayer must be valid and not for alternative reasons.

These cases are indicative of SARS' power to conduct audits but also of the fact that the fiscal statutes and Constitution do not award unlimited powers to SARS.

2.5.3.6 Keeping a taxpayer informed of the audit

Section 42 of the TAA prescribes the procedure to keep a taxpayer informed during an audit. There were no similar rights afforded to the taxpayer in the old administrative provisions. This provision of the TAA enhances the rights of taxpayers' and is more in accord with the right to just administrative action as enshrined in the Constitution.

A taxpayer has the right to be informed on the progress of the audit at intervals of 90 days. This notice has to specify the period under review, the scope of the audit, the stage of completion and the relevant material still outstanding from the taxpayer.⁵³

The taxpayer also has the right to be informed of the outcome of an audit. SARS will issue this notice in the form of an 'Audit Findings Letter' which will list the potential adjustments and invite the taxpayers' comments. SARS is not allowed to issue any revised assessments without giving the taxpayer the opportunity to reply.

The right to be informed on the progress of the audit protects the taxpayer against audits protracted for long periods without receiving any feedback. Before the introduction of this Act it could happen that a taxpayer has not received any feedback for longer than a year and might assume that the audit has been finalised. The revised assessment will then be his first notice of adjustments to his taxable income that SARS might deem necessary. The only option would then be to follow the dispute procedures where the taxpayer now has the opportunity to correct the facts after receiving the letter of audit findings and before a revised assessment is issued.

However there is no sanction against SARS or remedies available to the taxpayer in cases where SARS fails to report on the progress of the audit as obligated in terms of section 42. A taxpayer could approach the civil courts but the high costs involved in such legal proceedings will most probably outweigh the remedy ordered by the courts. A taxpayer could approach the recently appointed tax ombudsman for assistance in unfair administrative treatment by SARS.

⁵³ Form and manner of a report to a taxpayer on the stage of completion of an audit in terms of section 42(1) of the Tax Administration Act, 2011 (Act No.28 of 2011). *Government Gazette* 568(35733). 1 October 2012. Pretoria: Government Printer.

The letter of audit findings will also indicate any intention to impose Understatement Penalties and invite the taxpayer's comments on why penalties should not be imposed. The burden of proof that any of the behaviours are present to impose Understatement Penalties rests upon SARS.⁵⁴ In practice the audit findings and response from the taxpayer will be presented to an Understatement Penalty Committee to decide if any of the behaviours are present. The taxpayers are seldom invited to attend these meetings.⁵⁵ A taxpayer may exercise his rights in terms of PAJA to attend this meeting. It is a taxpayer's right to reply to the letter stating that it is the intention of SARS to impose penalties that he wishes to attend this meeting in person. He should advance reasons why his personal presence is mandated by the procedural fairness section 3(1) of PAJA.

The minutes of the meeting can be requested by the taxpayer if he meets the requirements of section 11 of Promotion of Access to Information Act (PAIA).⁵⁶ The information supplied by the Commissioner is normally confined to the reasons for the decision taken. The discussion and arguments by the Committee before arriving at the decision are not included in the minutes of the meeting and will not be made available.

The letter of audit findings cannot be disputed by the taxpayer but will invite his comments. This is the last opportunity to prove that the intention of the Commissioner to tax an amount is incorrect. He can state his facts in a reply before a revised assessment is issued. The Commissioner will review his arguments and supporting documentation before deciding to concede or proceed with revised assessments as per his original intention.

In cases of complex audit findings the taxpayer is normally invited to a meeting so that SARS can explain the content of the audit findings.

2.5.3.7 Conclusion

The introduction of section 42 did enhance the taxpayer's rights. There was no similar provision in the Income Tax Act. It has to be noted that this was the procedure adopted by SARS before the introduction of the TAA in response to the introduction of the PAJA and the Constitutional right to just administrative action. However there remain no remedies available to the Taxpayer in cases where SARS fails to report on the progress of the audit other than referring the matter to the Office of the Tax Ombudsman.

The most important notice to which a taxpayer is entitled under this section is the Letter of Audit Findings. This is the last opportunity to furnish additional explanations or information in order to convince the Commissioner that a revised assessment should not be issued.

It is also the only opportunity to furnish reasons why none of the behaviours are present in order to avoid the Commissioner's imposition of Understatement Penalties. The standard letter issued by

⁵⁴ See s 102(2) of the TAA

⁵⁵ BJ Croome, 'Imposition of penalties: taxpayers and the Commissioner: SARS', (2003) *The Taxpayer* 89.

⁵⁶ Promotion of Access to Information Act, No. 2 of 2000

SARS states that “Understatement Penalties shall be imposed” and in a later paragraph it invites comments as to why Understatement Penalties should not be imposed. This invitation to furnish comments enhanced the rights of taxpayers’.

2.5.4 Criminal Investigation

2.5.4.1 The legislation previously and now

<p>The repealed provisions of the Income Tax Act</p> <p>No specific provisions for Criminal investigation other than the general information gathering provisions in section 74A above.</p>	<p>The Tax Administration Act</p> <p>43. Referral for criminal investigation</p> <p>44. Conduct of criminal investigation</p>
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2.5.4.2 Purpose

A decision by SARS to commence with a criminal investigation confers the additional rights of being a suspect on the taxpayer. These rights are protected in terms of section 35 of the Constitution.

SARS might detect a serious tax offence during an audit. Section 1 of the TAA defines a serious tax offence as “a tax offence for which a person may be liable on conviction to imprisonment for a period exceeding two years without the option of a fine or to a fine exceeding the equivalent amount of a fine under the Adjustment of Fines Act, 1991 (Act no. 101 of 1991).”

When a taxpayer is being audited and it appears that a serious tax offence has been committed, the case must be referred to a Senior SARS Official for a decision to conduct a criminal investigation.⁵⁷

The information obtained by audit before referral for criminal proceedings may be used in an investigation but not any information after referral for investigation.⁵⁸ The information obtained during a criminal investigation may be used in both civil and criminal proceedings.⁵⁹

After a criminal offence relating to evasion of tax has been identified, a senior SARS official may lay a complaint with the South African Police Services or the National Prosecuting Authority.⁶⁰

2.5.4.3 Taxpayer rights

A criminal investigation must proceed with due adherence to the rights of the taxpayer as a suspect.⁶¹ To be regarded as a “suspect” requires a “reasonable” apprehension that the person concerned “may

⁵⁷ See s43 of the TAA

⁵⁸ See s44 of the TAA

⁵⁹ See s44(3) of the TAA

⁶⁰ See s 235(3) of the TAA

⁶¹ See s44(1) of the TAA

be implicated in the offence under investigation”, to the extent that there is “an element of objectivity to the enquiry as to whether the person was in fact a suspect at the relevant time”.⁶²

The Constitution⁶³ protects the following rights of a suspect:

- “-To remain silent;
- To be informed promptly of the right to remain silent and the consequences of not remaining silent; and
- Not to be compelled to make any confession or admission that could be used in evidence against him or her during a criminal trial.
- Aligned to this, the Constitution protects the rights of a suspect to choose and be represented by a legal practitioner at his own expense, at least until arrest, and to be informed of this right promptly.”

These Constitutional rights are further enhanced in the TAA:

- An admission of an offence by a taxpayer made in the course of information gathering by SARS is not admissible in criminal proceedings, unless a court orders that it is.⁶⁴
- An inspection and an interview cannot be used when conducting a criminal investigation.⁶⁵

According to the SARS Short Guide to the Tax Administration Act (at pp37 – 38) the purpose of s72(2) is to:

“protect the right against self-incrimination of taxpayers compelled to provide information to SARS under Chapter 5 under threat of criminal sanction. Interventions by SARS under its information gathering powers for purposes of, for example an audit or investigation, are specific to identified taxpayers – rather than the general body of taxpayers – and are closer to cases where the Constitutional Court had struck down legislation that provided for the use of evidence obtained under compulsion in criminal proceedings. Section 72(2) preserves some residual power for the Court to depart from the default position and direct that, in a specific case, admissions gathered using SARS's information gathering powers may be used. In the context of verification, inspection or audit under Chapter 5, a taxpayer is not a suspect. However, if it appears during such verification, inspection or audit that a serious tax offence has been committed and the matter is referred for criminal investigation under the Act, the taxpayer can then be regarded as a suspect and SARS is then obliged to conduct the investigation with due recognition of the taxpayer's constitutional rights as a suspect in a criminal investigation. Only once SARS has laid a criminal charge, will the taxpayer become an arrested, detained and accused person invoking the full protection afforded by the fair trial rights under the Constitution.”

⁶² S v Khan 2010 (2) SACR 476 (KZP) at para 26.

⁶³ See s35(1) and s35(3) of the Constitution

⁶⁴ See s72 of the TAA

⁶⁵ See s47 of the TAA

The taxpayer can furnish information requested by SARS under Chapter 5 without the fear that it will be used in criminal proceedings and once criminal investigation commences he can rely on his Constitutional rights as a suspect in a criminal investigation.

Section 43(1) of the TAA does stipulate that a senior SARS official has to decide whether to pursue a criminal investigation but is silent on whether the taxpayer should be informed of this decision. A taxpayer not aware of this decision may incriminate himself while the informed taxpayer could assert his Constitutional right to remain silent. PAJA provides that a taxpayer may request written reasons for administrative decisions that could materially and adversely affect a taxpayer rights. A taxpayer who is not informed will not be able to exercise this right and will not be able to approach the courts to review this decision.

It is submitted that a taxpayer should be informed when SARS decides whether his case should be referred for criminal investigation.

2.6 Search and Seizure

2.6.1 Background

SARS has the power to gather information by conducting search and seizure operations firstly with a warrant and secondly without a warrant. A decision by SARS to search the premises of a taxpayer and to remove documents or things is an infringement of his right to privacy and right to property.

The Constitutional Court held in the *Bernstein*⁶⁶ case that:

“In South Africa, the right not to be subjected to seizure of private possessions forms part of every person’s right of personal privacy. The right against seizure must therefore be interpreted in the light of the general right to personal privacy.”

The search and seizure powers awarded to the Commissioner in the TAA may not be used to collect evidence to be used in a possible criminal prosecution. Search and seizure warrants for criminal cases must be obtained under the provisions of the Criminal Procedure Act 51 of 1977 or the National Prosecuting Authority Act 32 of 1998. This was confirmed in the recent case of *Gaertner, PLM and Two Others v Minister of Finance & CSARS & 9 others*⁶⁷ where the judge remarked at 75:

“The impermissibility of using administrative search powers for the predominant purpose of collecting evidence for a criminal prosecution is well established in the Canadian cases (see Jarvis v R [2002] 3 SCR). In Jarvis, which concerned powers of inspection and entry under income tax legislation, the court seems to have based its conclusion, as do I, on proper interpretation of the stated purposes for which the powers could be exercised. In Jarvis the powers could be exercised for any purpose related to the administration or enforcement of

⁶⁶ *Bernstein and Others v Bester and Others* NNO. 1996 (4) BCLR 449 (CC) at 493.

⁶⁷ *Gaertner, PLM and Two Others* (incl. Orion Cold Storage). HC 12632/12 WC, 8 April 2013.

the Act'. This was held not to include the prosecution and investigation of the offences created by the Act (see paras 77-81)."

2.6.2 Search and seizure with a warrant

<p>The repealed provisions of the Income Tax Act</p> <p><i>74D. Search and seizure</i></p>	<p>The Tax Administration Act</p> <p>S 59. Application for warrant</p> <p>S 60. Issuance of warrant</p> <p>S61. Carrying out search</p>
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2.6.2.1 Purpose

SARS may apply for a warrant in order to gather information necessary for the effective enforcement of legislation. This procedure is normally only necessary in cases where taxpayers' refuse to cooperate or where there is proof of non-compliance. It would be unreasonable to investigate taxpayers who submit their returns on time and keep proper records while the taxpayers who are not submitting any returns or making any documentation available will escape the scrutiny of SARS. It is therefore not the average law abiding taxpayer who will be confronted with this intrusive method of information gathering.

The repealed search and seizure provisions were contained in section 74D of the Income Tax Act. This section did require a warrant, unlike its predecessor s74(3), where the Commissioner himself could authorise a search and seizure operation without prior notification and without independent review. Croome (2008:86) commented that section 74D replaced s74(3) in 1996 probably after the Katz Commission found that the authorisation of warrants by the Commissioner was invalid under the Constitution, together with the judgment in the *Park Ross* case.⁶⁸

The application for the warrant to enter a taxpayer's premises and search for material and seize any relevant documentation must be made by a senior SARS official.⁶⁹ SARS must apply *ex parte* to a judge of the High Court. In cases where the estimated tax involved is below R500,000 (the maximum for the Tax Board) the application for the warrant may be to a magistrate.⁷⁰

The law in South Africa acknowledges that authorities should not be permitted unrestricted access to search and seizure proceedings. It is important to note that SARS must have exhausted all other avenues available for obtaining the required information before applying for a warrant in order to invade the privacy of a taxpayer by entering his premises for purposes of search and seizure. There must be a balance struck between the interest of the taxpayer and that of SARS.⁷¹

⁶⁸ *Park-Ross and Another v The Director, Office for Serious Economic Offences*. 1995(2) BCLR 198 (C).

⁶⁹ See s59(1) of the TAA

⁷⁰ See s59(3) of the TAA

⁷¹ Klue, Arendse & Williams (2012)

This was noted in a decision by Langa DP:⁷²

“On the other hand, state officials are not entitled without good cause to invade the premises of persons for the purposes of searching and seizing property; there would be little content left to the right to privacy. A balance must therefore be struck between the interests of the individual and that of the State, a task that lies at the heart of the enquiry into the limitation of rights. On the proper interpretation of the sections concerned, the Investigating Directorate is required to place before a judicial officer an adequate and objective basis to justify the infringement of the important right to privacy [...]. These provisions thus strike a balance between the need for search and seizure powers and the right to privacy of individuals [...]. It follows, in my view, that the limitation of the privacy right in these circumstances is reasonable and justifiable.”

The warrant must be produced during the search and if not, a person can refuse the SARS official entry to the premises.⁷³

2.6.2.2 Taxpayer rights during search and seizure operations with a warrant

The TAA allows new additional protection to the taxpayers subjected to search and seizure actions:

“(a) A provision making explicit the duty on SARS to conduct a search with strict regard to decency and order.

(b) A requirement that SARS must make an inventory of seized material in the form, manner and time that is reasonable under the circumstances.

(c) If the removal of original documents or computers may prejudice the continuance of a taxpayer’s business, SARS has a discretion to make and remove copies if appropriate.

(d) A provision that a taxpayer may request SARS to pay or, if SARS declines, for a Court to order payment of the costs of physical damage caused during the conduct of a search and seizure.”⁷⁴

SARS may seize any relevant material. This could include cash, bullion, jewellery or even devices with storage capabilities e.g. cell phones, iPads, memory sticks, and portable hard drives. The storage devices will normally be taken to a forensic laboratory where officials will make mirror images and thereafter the device can be returned. This is not that easy in the case of cash seized. The TAA does not have any provisions that prescribe when goods should be returned. If SARS refuses a request in terms of section 66 of the TAA to return seized material the taxpayer could approach the High Court. Some countries, like India, have time limits on when assets should be released. There is also a punitive measure in the form of interest payable on excess money seized after deducting the

⁷² The Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd and Others, in re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others [2000] ZACC 12, 2000(10) BCLR 1079 (CC)

⁷³ See s61(1&2) of the TAA

⁷⁴ Memorandum on the Objects of the Tax Administration Bill, 2011 at 2.2.5.13

amount of any tax liability. No such provision exists in the TAA. The only claim for damages allowed in terms of section 66 is for damage caused during the search and seizure operations.

Section 25 of the Constitution confers a right to property on all taxpayers'. The seizure of relevant material and not returning such material in a reasonable time could be an unlawful infringement on the right to property.

2.6.3 Search and seizure without a warrant

The repealed provisions of the Income Tax Act	The Tax Administration Act
None	S 63. Search without warrant

2.6.3.1 Purpose

This is a new provision extending the powers of SARS and has been one of the most controversial provisions in the TAA. No search and seizure without a warrant was allowed in terms of the repealed section 74D of the Income Tax Act. What makes this provision controversial is that a previous section 74(3), before its amendment by section 14 of the Revenue Laws Amendment Act in 1996, allowed search and seizure without a warrant. This section 74(3) was amended after it was found to be invalid under the Constitution by the Katz Commission.⁷⁵

2.6.3.2 Taxpayer rights during search and seizure operations without a warrant

The Constitutional Court has held in the two cases of *Mistry v Interim Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (CC) and *Magajane v Chairperson, North West Gambling Board and Others* 2006 (5) SA 250 (CC) that search and seizure powers without a warrant is unconstitutional.

SARS is of the opinion that these cases are authority that the warrantless search provision of the TAA is constitutional permissible because it does contain the necessary "safeguards". (SARS Briefing Note to Standing Committee of Finance, 2012)

The fundamental rights of the Constitution are not guaranteed as it may be limited in terms of the limitation clause contained in section 36 of the Constitution. It is necessary to analyse paragraphs (a) to (e) of section 36(1) in order to determine whether any limitation of the privacy right is reasonable and justifiable in a democratic society.

- (a) The first factor: The nature of the infringed right. The right to privacy is the right that will be infringed during search and seizure actions. This has been held in *Magajane*⁷⁶ and earlier cases to be an important right that belongs among the 'indispensable freedoms'. The strictness of the limitation of this right will be different depending on the identity of the person

⁷⁵ Interim Report to the Commissioner of Enquiry into certain aspects of the tax structure of South Africa, the Katz Commission.

⁷⁶ *Magajane v Chairperson, North West Gambling Board and Others* 2006 (5) SA 250 (CC)

bearing that right. The court has held that the privacy rights of a legal entity “can never be as intense as those of human beings”. The infringement of the privacy right will therefore be more reasonable in the case of a business premises than in case of a domestic dwelling.

- (b) The second factor: The importance of the purpose of the limitation. The purpose of the Revenue authorities when limiting a persons’ right to privacy must be a lawful purpose falling within their powers. The purpose of the limitation is to ensure that taxpayers are compliant with the Act and pay the correct amount of taxes due. This purpose is in public interest and essential for any government who has to fund public services to the general public by collecting taxes.
- (c) The third factor: The nature and extent of the limitation. This factor deals with how the limitation influences the protected conduct and interests (its substantive effect) and to what degree there has been non-compliance with the duties of persons bound by the right. The procedure that was followed during the search to limit the right to privacy is also a decisive.⁷⁷ In *Gaertner, PLM and Two Others v Minister of Finance & CSARS & 9 others*⁷⁸ the court held that at least three considerations are relevant: “(i) *A commercial property occupier has a lower expectation of privacy; and persons who conduct certain kinds of business know that their businesses are regulated and may be monitored. Searches of such business premise will involve a lesser intrusion on the right to privacy. (ii) Inspections aimed at uncovering evidence for use in criminal prosecutions will involve a greater intrusion; as will inspections aimed at enforcement (often with quasi-penal consequences) rather than compliance, though not all cases will be amenable to such a clear distinction. (iii) The broader and less circumscribed the inspection power, the greater the limitation. An overboard power fails to inform the inspected person of the limits of the inspection and leaves the inspector with insufficient guidelines as to how to conduct the search in a lawful manner and with due respect for the inspected person’s privacy.*”

The difference between searching a person’s residence and business premises have been pointed out by Langa J in the *Hyundai* case where he remarked that “[P]rivacy is a right which becomes more intense the closer it moves to the intimate personal sphere of the life of human beings, and less intense as it moves away from that core”.⁷⁹

- (d) The fourth factor: The relationship between the limitation of the privacy right and the purpose of the limitation. The purpose of the limitation is to ensure tax compliance in the interest of the public and this purpose must outweigh the limitation of the right to privacy.
- (e) The fifth factor: Is less restrictive means available to achieve the same purpose. The Revenue authorities should first explore other available avenues of obtaining the information

⁷⁷ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2000 10 BCLR 1079 (CC) at para [18].

⁷⁸ *Gaertner, PLM and Two Others (incl. Orion Cold Storage)*. HC 12632/12 WC, 8 April 2013.

⁷⁹ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2000 10 BCLR 1079 (CC) at para 18.

documentation or things before opting for the search and seizure powers that will infringe the right to privacy. SARS could call for the information or documentation under other provisions of the TAA. A starting point could be a simple telephone call or informal visit and a last resort could be a summons to appear in the court.

2.6.3.3 International comparison

The OECD published a survey comparing the information access and search powers of tax officials during 2013.⁸⁰ The survey compared 34 OECD countries and 18 Non-OECD countries. South Africa, a non-OECD country with observer status, participated in this survey. It was found that tax administrations generally have wide powers to enter a taxpayer's business premises and dwellings for purpose of obtaining information, documentation or things in order to verify tax compliance. These powers are limited in 23 countries where a search warrant is required to enter business premises. These powers are more restricted in case of entering the dwelling used for residential purposes with 39 countries requiring a search warrant necessary to enter a taxpayers' residential dwelling.

2.6.3.4 Conclusion

In the judgment in the most recent case⁸¹ of warrantless search and seizure operations it was held that warrantless routine searches are justifiable under the Customs Act in respect of licenced business premises but placed several restrictions on the search and seizure of a residential property. This case dealt with searches conducted in terms of the Customs Act which is a normal routine activity performed by Customs officials. In case of such routine searches there are not reasonable and probable grounds to believe that a particular offence has been committed. In this case it was also held that there is no justification for warrantless non-routine searches. It should be noted that the search and seizure operations in this case was done under the provisions of section 4 of the Customs and Excise Act, 1964 which allowed warrantless search and seizure operations. It should be noted further that, as a result of this judgment, this section was extensively amended by the Tax Administration Laws Amendment Bill of 2013 to regulate warrantless search and seizure operations, but that the section in the TAA has not been tested in the courts.

Routine searches are hardly ever necessary in case of enforcing Income Tax legislation. Most searches for purposes of enforcing Income Tax legislation will be of a non-routine nature after a specific risk has been identified. These searches are mainly done for collecting evidence for criminal proceedings and is therefore not done in terms of the Tax Administration Act but in terms of the Criminal Proceedings Act. The SARS will therefore only be able to use the search and seizure powers for enforcement purposes in non-routine cases where the taxpayer does not cooperate in supplying information and there are reasonable grounds to believe that it will deliver evidence of tax evasion.

These searches will be non-routine and normally taxpayers will not have a reasonable expectation to become the subject of such search and seizure operations. In such cases it will be difficult to convince

⁸⁰ OECD (2013), *Tax Administration 2013: Comparative Information on OECD and Other Advanced and Emerging Economies*, OECD Publishing.

⁸¹ Gaertner, PLM and Two Others (incl. Orion Cold Storage). HC 12632/12 WC, 8 April 2013.

a court that there are not less restrictive means available to achieve the same purpose. It has been held that there is no justification for non-routine warrantless searches of a registered taxpayer.⁸²

It is submitted that routine or non-routine searches without a warrant, for purposes of enforcing Income Tax or VAT legislation will not be justifiable under our Constitution. A non-routine search with a warrant could be justifiable if there are reasonable and probable grounds to believe that a person committed a tax offence and the search will deliver evidence of the offence.

It is therefore submitted that section 63 of the TAA may be unconstitutional for purposes of enforcing Income Tax and VAT legislation and that the limitation of the privacy right would not be reasonable and justifiable in an open and democratic society.

2.7 Request of information from third parties

2.7.1 The legislation previously and now

The repealed provisions of the Income Tax Act	The Tax Administration Act
Sections 69 & 70 & 74A	S26. Third party returns

2.7.2 The purpose

In the past financial institutions issued certificates (IT3(b)) to taxpayers reflecting the return on their investments in the form of interest and dividends. It was the responsibility of taxpayers to include this income on their tax returns. As part of the modernisation process of SARS, institutions are now required to submit this information in electronic form⁸³ directly to SARS. This information will either be pre-populated on the returns of income or used to verify the accuracy of declarations. This will contribute to the risk assessment function to identify possible non-compliant taxpayers for an audit intervention.

From the 2013 tax years the following institutions are required to submit returns on a bi-annual basis: (i) Banks; (ii) Co-operative banks; (iii) Postbank; (iv) Financial institutions; (v) Companies listed on the JSE and connected persons that issue bonds, debentures or similar financial instruments; (vi) State owned companies that issue bonds, debentures or similar financial instruments; (vii) Organs of the State that issue bonds or similar financial instruments; (viii) any person who purchases any livestock, produce, timber, ore, mineral or precious stones from a primary producer other than on a retail basis; (ix) Medical schemes; (x) Estate agents who pay to, or receive on behalf of, a third party, any amount in respect of an investment, interest or the rental of property and (xi) Attorneys who pay or receive on behalf of a third party any amount in respect of an investment, interest or the rental of property.⁸⁴

⁸² Gaertner, PLM and Two Others (incl. Orion Cold Storage). HC 12632/12 WC, 8 April 2013.

⁸³ Returns of less than 21 detailed records may be manually submitted to SARS.

⁸⁴ Tax Administration Act, No. 28 of 2011. Government Notice. 2013. *Government Gazette*. 574(36346). 5 April. Government Notice no. 260. Pretoria: Government Printer.

It should be noted that, compared to the previous year, SARS included more third parties in the request for information. The notice of 2013 included the last four institutions for the first time. It is expected that the list will grow in the coming years. There is already speculation about adding the Credit Bureau to the list of third parties required to submit a return.

SARS issued a notice⁸⁵ requesting banks for the first time to furnish SARS with information on the total debit and credit entries on bank accounts for the tax year ending on 28 February 2013. The reason for this request is not clear as it is not reliable information for verifying the declared income mainly because deposits from loans received; inter-bank account transfers etc. will not constitute income. Also the fact that income is reported on the accrual basis and not cash basis will make this information incomparable with the income reported. It is however important to realise that SARS has requested this information from banks and it is not possible for a taxpayer to prevent the bank from furnishing this information. It is also not necessary for the Commissioner to inform a taxpayer that the information is being requested and therefore the taxpayer will not have the opportunity to defend his right to privacy.

2.7.3 Is a request for information from third parties an infringement of the right to privacy?

The modernisation of SARS to become a more efficient revenue authority made it necessary for electronic information reporting by third parties. The matching of the information received from third parties is an extremely effective tool for the screening of tax returns in order to detect any under-declaration and to encourage the correct reporting of taxable income.

This is an international accepted method of information gathering. An overview of the information collection powers used by revenue authorities in OECD and selected non-OECD countries indicate that almost all revenue authorities (except Malaysia and Poland) have powers to obtain relevant information. Virtually all of these revenue authorities have the power to extend the request for information to third parties (except Malaysia, Poland and the Slovak Republic).⁸⁶

The request of information from third parties is an infringement of a taxpayer's Constitutional right to privacy, but again in terms of the general limitation clause, it is reasonable and acceptable in an open and democratic society. There is no other less intrusive procedure that the tax authority could use to obtain the required information. The limitation does not constitute an unlawful violation of taxpayers' rights. The international tendency agrees with this conclusion.

⁸⁵ Government Notice. 2012. *Government Gazette*. 35090. 29 February. Government Notice no. 173. Pretoria: Government Printer

⁸⁶ OECD (2013), *Tax Administration 2013: Comparative Information on OECD and Other Advanced and Emerging Economies*, OECD Publishing.

CHAPTER 3 IS THE RIGHT TO PRIVACY PROTECTED WITH THE EXCHANGE OF INFORMATION?

3.1 Introduction

Information gathering is crucial for tax authorities for verifying the correctness of declarations by taxpayers. This information is mainly gathered locally by revenue authorities to verify the correctness of income from local sources. In recent years we have seen an increase in cross border transactions making it necessary for tax authorities to gather information from other jurisdictions in order to verify the correctness of income generated from international trade. This resulted in agreements whereby tax authorities agree to share information of mutual interest. The purpose of information exchange goes further than tax compliance. It is also an effort to fight financial and other crimes, including the targeting of terrorist financing.

Section 3(3) of the TAA allows the exchange of information with other revenue authorities:

“(3) If SARS has, in accordance with an international tax agreement, received a request for—

- (a) information, SARS may obtain the information requested for transmission to the competent authority of the other country as if it were relevant material required for purposes of a tax Act and must treat the information obtained as if it were taxpayer information;*
- (b) the conservancy or the collection of an amount alleged to be due by a person under the tax laws of the requesting country, SARS may deal with the request under the provisions of section 185; or*
- (c) the service of a document which emanates from the requesting country, SARS may effect service of the document as if it were a notice, document or other communication required under a tax Act to be issued, given, sent or served by SARS.”*

Section 108(1) of the Income Tax Act also allows the authorities to enter into agreements that allow the exchange of information:

“The National Executive may enter into an agreement with the government of any other country, whereby arrangements are made with such government with a view to the prevention, mitigation or discontinuance of the levying, under the laws of the Republic and of such other country, of tax in respect of the same income, profits or gains, or tax imposed in respect of the same donation, or to the rendering of reciprocal assistance in the administration of and the collection of taxes under the said laws of the Republic and of such other country.”

Section 108(5) of The Income Tax Act allows the breach of the secrecy provisions, contained in section 4 of the Income Tax Act, when exchanging information about South African taxpayers in terms of an agreement:

“The duty imposed by any law to preserve secrecy with regard to such tax shall not prevent the disclosure to any authorized officer of the country contemplated in subsection (1), of the facts, knowledge of which is necessary to enable it to be determined whether immunity, exemption or relief ought to be given or which it is necessary to disclose in order to render or receive assistance in accordance with the arrangements notified in terms of subsection (2).”

Section 108(5) of The Income Tax Act allows the breach of the secrecy provisions, contained in section 4 of the Income Tax Act, when exchanging information about South African taxpayers in terms of an agreement.

De Koker and Brinckler (2010:36.14) commented that the history of section 108 should be considered when interpreting this section. This section was part of the original Income Tax Act when it was enacted in 1962. This was prior to the Interim Constitution of 1994 when it was necessary for Parliament to incorporate a treaty into law through an Act. After the Constitution all treaties became law under section 231(4) when published in the Government gazette. The Constitution is the supreme law and it is no longer necessary for the subordinate legislation contained in section 108 to bring treaties into South African law. It is submitted by the writers that after the Constitution section 108(5) *“seems to address the administrative capacity of the tax administration to enable the administration to give effect to obligations arising under a tax treaty”*. Without section 108(5) the SARS would not be authorised to exchange information about taxpayers as it would be precluded from doing so in terms of the secrecy provisions of section 4. The writers conclude that section 108 is a leftover from a previous era and will not infringe on the rights of taxpayers. The Constitution remains superior and protect the rights of taxpayers.⁹²

In terms of section 231(4) of the Constitution, a DTA and TIEA becomes part of South African tax law once it is approved by Parliament in terms of Sec. 231(2) of the Constitution, unless it is inconsistent with the Constitution or an Act of Parliament.

Tax information exchange (TIE) is deemed necessary for proper and effective application of domestic tax laws and double-taxation treaties. Tax information is private and confidential. Therefore, TIE involves the transfer of sensitive and personal information between jurisdictions. This implies that there should be established safeguards ensuring reasonable private interests.

⁹² De Koker, A.P. & Brinckler, E. 2010. *Silke on International Tax*. South Africa: Lexis Nexis in Chapter 36.14.

Section 72 of POPI stipulates that information will not be transferred to another country if, for example, proper safeguards for the protection of the information have not been adopted in that country or the data subject has not consented to the transfer.

South Africa's tax information exchange network consists of 76 Double Tax Agreements and 9 Tax Information Exchange Agreements.

The OECD has published detailed best practice recommendations regarding confidentiality of exchanged tax information.⁹³ The following paragraphs discuss these recommendations and the procedures adopted in South Africa.

3.2 Confidentiality standards

3.2.1 Background

The right to privacy is an international basic human right and also implies the right to confidentiality. In respect to ECHR article 8, the ECHR case of *Lundvall v. Sweden* (11.12.1985) provides a general illustration of this point, specifically regarding tax information. The court stated that publication of tax information was an interference with the right to private life if the disclosure could harm the private life of an individual.

Various human rights conventions protect the right to privacy:

- Universal Declaration of Human Rights, Article 3
- International Covenant on Civil and Political Rights (ICCPR) in article 17
- American Convention on Human Rights in article 11
- European Convention on Human rights (ECHR) in article 8
- United Nations Declaration of Human Rights in article 12

As mentioned earlier, the Constitution of South Africa protects the right to privacy in section 14. Chapter 6 of the TAA contains confidentiality provisions in sections 67 to 74.

3.2.2 The OECD model on TIE

The OECD Model Agreement on Exchange of Information on Tax Matters has the same confidentiality standards as contained in article 26 of the OECD Model Tax Convention on Income and on Capital.

Article 8 of the TIEA provides that:

“Any information received by a Contracting Party under this Agreement shall be treated as confidential and may be disclosed only to persons or authorities (including courts and

⁹³ OECD (2012) *Keeping it safe: The OECD Guide on the Protection of Confidentiality of information Exchanged for Tax Purposes*. Available: ([http://www.oecd.org/ctp/exchangeofinformation/Keeping%20it%safeEN%20FINAL%20w cover WEB.pdf](http://www.oecd.org/ctp/exchangeofinformation/Keeping%20it%safeEN%20FINAL%20w%20cover%20WEB.pdf))

administrative bodies) in the jurisdiction of the Contracting Party concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this Agreement. Such persons or authorities shall use such information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. The information may not be disclosed to any other person or entity or authority or any other jurisdiction without the express written consent of the competent authority of the requested Party.”

An important difference is the last sentence of article 8 which is not in the Model Tax Convention. This allows for broader sharing of information with persons other than tax authorities provided that written consent is obtained. With the written consent the information may be disclosed to any other person or entity or authority or any other jurisdiction.

Another difference is that the Model Convention contains an additional proviso that information should be treated “as secret in the same manner as information obtained under domestic law.” The absence of this proviso in article 8 does not have any bearing as domestic laws protecting confidentiality equally applies in the international context.

The absence of this proviso on secrecy could however prevent the transfer of information between countries if the agreements based on the Model Tax Convention are not compliant with section 72 of the POPI Act. This section provides that information will not be transferred to another country unless there is law governing the recipient “which provide[s] an adequate level of protection that—

- (i) effectively upholds principles for reasonable processing of the information that are substantially similar to the conditions for the lawful processing of personal information relating to a data subject who is a natural person and, where applicable, a juristic person; and
- (ii) includes provisions, that are substantially similar to this section, relating to the further transfer of personal information from the recipient to third parties who are in a foreign country in accordance with those applied in South Africa”. Currently this is unlikely to be a problem as all South African information exchange agreements contain secrecy provisions ensuring information received will be regarded as confidential.⁹⁴

3.2.3 Tax confidentiality provisions in the domestic legislation

A requirement is that contracting states must have confidentiality provisions in their domestic laws. In South Africa the domestic law that protects tax information is contained in Chapter 6 of the TAA. All SARS employees and contractors are required to sign an oath of secrecy⁹⁵ and may not divulge any information to a person who is not a SARS official.⁹⁶

⁹⁴ OECD (2012), Global Forum on Transparency and Exchange of Information for Tax Purposes peer reviews: South Africa 2012: combined: phase 1 + phase 2, OECD publishing, <http://dx.doi.org/10.1787/9789264182134-en> (South Africa peer review).

⁹⁵ See section 67(2) of the TAA

⁹⁶ See section 69 of the TAA

The secrecy provisions of the TAA may be breached in terms of section 108(5) of the Income Tax Act that allows the disclosure of confidential information, to a person who is not a SARS official, when information is exchanged with other tax authorities in terms of a double tax agreement.

South Africa meets the requirements of having domestic confidentiality provisions.⁹⁷

3.2.4 Penalties for breach of confidentiality

The OECD guide states that domestic legislation must set out penalties for improper disclosure of confidential information and that these should be strong enough to act as a deterrent for disobeying the law.⁹⁸ In terms of section 236 of the TAA any person who breaches the secrecy provision is guilty of an offence and, upon conviction, is subject to a fine or to imprisonment for a period not exceeding two years.

3.3 Are domestic laws ensuring confidentiality of tax information consistent with treaty standards?

A requirement of the OECD model TIEA is that the domestic law protecting the confidentiality of taxpayer information⁹⁹ should not be overridden by some other domestic law granting public access to information. In South Africa the Promotion of Access to Information Act 2 of 2000 (PAIA) gives effect to the constitutional right of access to information. A specific exemption from access to information exists in section 35 of this Act which gives mandatory protection of SARS's records.

Any person may request access to their records held by SARS in terms of PAIA and such requests must be in the prescribed format. All requests must be addressed to one of two Deputy Information Officers. The Information Officer is the Commissioner of SARS. There are three categories of information held by SARS of which taxpayer information is one category. This category includes tax returns, bills of entry, declarations, assessments, financial statements, financial or other information about taxpayers collected from various sources and evaluative records. SARS will provide a taxpayer (or the person authorised to represent him) with copies of his own records which includes the tax return, assessment, statement of account and similar records. SARS will deny a request for records in

⁹⁷ OECD (2012), Global Forum on Transparency and Exchange of Information for Tax Purposes peer reviews: South Africa 2012: combined: phase 1 + phase 2, OECD publishing, <http://dx.doi.org/10.1787/9789264182134-en> (South Africa peer review).

⁹⁸ OECD (2012) *Keeping it safe: The OECD Guide on the Protection of Confidentiality of information Exchanged for Tax Purposes*. Available: ([http://www.oecd.org/ctp/exchangeofinformation/Keeping%20it%safeEN%20FINAL%20w cover WEB.pdf](http://www.oecd.org/ctp/exchangeofinformation/Keeping%20it%safeEN%20FINAL%20w%20cover%20WEB.pdf))

⁹⁹ Defined in section 67(1)(b) of the TAA as “any information provided by a taxpayer or obtained by SARS in respect of the taxpayer, including biometric information”.

terms of PAIA if it contains information that SARS holds or has obtained for the purposes of enforcing revenue legislation.¹⁰⁰

The PAIA specifies the following categories of information to which access will be refused:

- mandatory protection of privacy of a third party who is a natural person;
- mandatory protection of certain records of SARS;
- mandatory protection of commercial information of a third party;
- mandatory protection of certain confidential information and protection of certain other confidential information of a third party;
- mandatory protection of safety of individuals and protection of property;
- mandatory protection of police dockets in bail proceedings and protection of law enforcement and legal proceedings;
- mandatory protection of records privileged from production in legal proceedings;
- defence, security and international relations of the Republic;
- economic interests and financial welfare of the Republic and commercial activities of public bodies;
- mandatory protection of research information of a third party and protection of research information of a public body;
- operations of public bodies; and
- manifestly frivolous or vexatious requests or substantial and unreasonable diversion of resources.

3.4 Imposition of sanctions on public servants

The TAA contains a comprehensive definition of confidential information¹⁰² and the disclosure of SARS confidential information is regulated.¹⁰³ A person found guilty of unauthorised disclosure is subject to a fine or imprisonment for a period not exceeding two years.¹⁰⁴ This provision is applicable to current and former employees and contractors who are responsible for the administration of the tax Act.

3.5 Is the information handled by competent and otherwise suitable persons?

All SARS employees' are required to sign an oath of secrecy which is annually renewed. SARS employees who deal with sensitive information have to undertake a security clearance. An official found guilty of breaching the confidentiality provisions can be fined or imprisoned.

¹⁰⁰ SARS Manual on the Promotion of Access to Information Act 2000. October 2010. Available at www.sars.gov.za

¹⁰² See section 68 of the TAA.

¹⁰³ See section 69 of the TAA.

¹⁰⁴ See section 236 of the TAA.

3.6 Storage of confidential information

All information gathered by SARS is stored on a secure server and there have been no reports of any unlawful access to any information.

3.7 Transmission of confidential information.

“When a request for information is received from another jurisdiction, all documents are scanned and stored on a secure server, and the paper files are destroyed. Only the personnel directly involved in exchange of information cases (part of the Division of Enforcement Risk Planning) has access to this server. Currently, five persons have such access. When a request is forwarded to a local revenue office, the confidentiality of the information is emphasised to ensure maximum awareness of this issue.

Currently, SARS does not use an encrypted e-mail system. Where e-mail exchanges occur with other jurisdictions, confidential information is not included in the text of the e-mail. SARS does however use WinZip encryption (if supported by a jurisdiction) should a document be e-mailed to a jurisdiction. The password is e-mailed in a separate e-mail to the jurisdiction. Otherwise, all information is posted”¹⁰⁵

There have been no reports of a breach in confidentiality by any other tax authority.¹⁰⁶

Section 72 of POPI stipulates that information will not be transferred to another country if, for example, proper safeguards for the protection of the information have not been adopted in that country or the data subject has not consented to the transfer. This will not prevent the exchange of confidential information in terms of current agreements as all South African information exchange agreements contains provisions ensuring information received will be regarded as confidential.¹⁰⁷ It is submitted that the current legislation and procedures are satisfactory to protect the right of taxpayers’.

3.8 US Foreign Account Tax Compliance Act (FATCA)

The Foreign Account Tax Compliance Act (FATCA) allows for private information of taxpayers to be exchanged with the IRS.

The introduction of FATCA in the United States during March 2010 is an important development in its efforts to improve tax compliance involving foreign financial assets and foreign accounts. The goal of

¹⁰⁵ International Fiscal Association. 2013. Exchange of information and cross-border cooperation between tax authorities. 2013. Copenhagen: International Fiscal Association; OECD, 2013. Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: South Africa 2013. At paragraph 232.

¹⁰⁶ OECD, 2013. Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: South Africa 2013. At paragraph 234.

¹⁰⁷ OECD (2012), Global Forum on Transparency and Exchange of Information for Tax Purposes peer reviews: South Africa 2012: combined: phase 1 + phase 2, OECD publishing, <http://dx.doi.org/10.1787/9789264182134-en> (South Africa peer review).

this Act is to identify potential US tax evaders who may be using offshore accounts to hide their assets. The United States has requested all governments to enter into an intergovernmental agreement that will require all financial institutions located in its jurisdiction to identify accounts held by US citizens. This agreement will impose a duty on the banks in South Africa to transfer the information on these accounts via SARS to the IRS. These agreements are additional information exchange agreements from the existing DTA's or TIEA.¹⁰⁸

The South African government, through SARS, National Treasury and Financial Intelligence centre has begun negotiations regarding inter-governmental agreement with the United States government on information exchange specifically relating to FATCA. South Africa seeks reciprocal multi-lateral agreements on tax matters.¹⁰⁹

This agreement allows for personal bank information to be exchanged via the tax authorities. It does not take domestic laws into account that protect a person's right to privacy. SARS has free access to information held by banks and can exchange this information in terms of an international agreement. The common law duty of banker client confidentiality will be overridden by this intergovernmental agreement which will become law in terms of section 231 of the Constitution. The SARS has to perform the duties imposed upon him in terms of the law. It is submitted that the automatic exchange of a taxpayers' confidential bank information is a justifiable limitation of the right to privacy in an open and democratic society.

3.9 Purchase of information

The SARS previously had a system where persons were rewarded for information supplied on parties guilty of tax evasion. No references could be found where Revenue authorities admit to the practise of paying informants for information obtained from within other jurisdictions.

This was found to be a practise of the German tax authorities. In a recent court case, the Swiss authorities found Mr Lutz Otte guilty of information theft after selling information to the German tax authorities. The right to privacy of the Swiss Constitution includes a right to 'private family life' such as financial income and assets and as a result all bank information is protected by Swiss laws. The disclosure of bank information is a criminal offence under the Swiss Criminal Code.¹¹⁰

Mr Lutz Otte is a German-born independent computer technician who was employed by the Julius Baer private bank in Switzerland. Mr Otte gathered the names, addresses and account numbers of German clients with assets in excess of 100,000 Euros, Swiss Francs, British Pounds or Dollars. He compiled a list and passed this on to a retired German tax inspector and from the evidence it was heard that it was agreed that in return he would receive compensation of 1.1 million Euros from the

¹⁰⁸ United States Internal Revenue Services. Available at <http://www.irs.gov/Businesses/Corporations/FATCA-Governments> [8 October 2013]

¹⁰⁹ SARS Strategic Plan 2013-14 – 2017-18, 2013 at p16

¹¹⁰ International Bar Association, 2013. Tax abuses, Poverty and Human Rights

German tax authorities. Mr Otte also allegedly sold information on Dutch account holders to the Dutch tax authorities.¹¹¹

There are several other reported incidents where the German tax authorities purchased stolen data in order to identify tax evaders. All 16 states in Germany have admitted to being party in buying stolen data. Mr Borjans, the finance minister in one of these states, has indicated that this practice will prevail “so long there is data containing valuable tips to be bought”.¹¹²

This is also the practise of the Internal Revenue Service (IRS) in the United States that offers a 15%-30% reward of the revenue recovered from information received from whistle blowers. During 2010 the IRS paid 97 awards to the total value of \$18,746,327 and collected \$464,695,459 as a result of this information. A condition of this reward program is that more than \$2 million must be collected by the IRS as result of the information received.¹¹³

An award claimed by Bradley Birkenfield, under this program, made the headlines in 2009. The IRS purchased information containing the names and account information of US citizens holding undeclared accounts at the UBS bank in Switzerland. The information was stolen from the bank by Bradley Birkenfield who was an employee at the bank. It is alleged that he received a \$104 million award from the IRS.

The payment of an award for information to identify tax evaders might be acceptable to society but there are questions about the legality of the purchase of stolen data. Furthermore this is a serious infringement of a taxpayer’s constitutional right to privacy. This is also a breach of the obligation of confidentiality between a bank and its clients. There is proof that these practises do exist in other jurisdictions, but there is no South African law whereby tax whistle-blowers are paid an award and no cases have been recorded where SARS has purchased stolen data to identify tax evaders.

3.10 The Global Forum on Transparency and Exchange of Information for Tax Purposes

This forum was established under the auspices of the OECD and G20 economies in order to develop an international standard of transparency and exchange of information among governments to fight tax evasion and increase tax collection. There are currently 120 members in the Global Forum.¹¹⁴ The forum provides recommendations and supports reform aimed at ending bank secrecy and expanding the network of information exchange agreements.

¹¹¹ The Wall Street Journal, 2013. Julius Baer Client Data Thief Sentenced. Available at <http://online.wsj.com/news/articles/SB10001424127887324165204579028513334141776> [15 November 2013]

¹¹² Reuters, 2013. How Germany’s taxman used stolen data to squeeze Switzerland. Available at <http://www.reuters.com/article/2013/11/21/us-germany-swiss-datatheft-specialreport-idUSBRE9AKOGT20131121> [2 December 2013]

¹¹³ Internal Revenue Service. 2010. *Fiscal Year 2010 Report to the Congress on the use of Section 7623*. Available: http://www.irs.gov/pub/whistleblower/annual_report_to_congress_fy2010.pdf [2013, October 29].

¹¹⁴ OECD. 2012. *Tax Transparency 2012 Report on Progress*. Available: <http://www.oecd.org/tax/transparency/> [2013, October 5]

According to the Global Forum there are ten essential elements against which jurisdictions' legal and regulatory framework and actual implementation of the standards are assessed:

“A AVAILABILITY OF INFORMATION

A.1. Jurisdictions should ensure that ownership and identity information for all relevant entities and arrangements are available to their competent authorities.

A.2. Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements.

A.3. Banking information should be available for all account-holders.

B ACCESS TO INFORMATION

B.1. Competent authorities should have the power to obtain and provide information that is the subject of a request under an EOI agreement from any person within their territorial jurisdiction who is in possession or control of such information.

B.2. The rights and safeguards that apply to persons in the requested jurisdiction should be compatible with effective exchange of information.

C EXCHANGING INFORMATION

C.1. EOI mechanisms should provide for effective exchange of information.

C.2. The jurisdictions' network of information exchange mechanisms should cover all relevant partners.

C.3. The jurisdictions' mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received.

C.4. The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties.

C.5. The jurisdiction should provide information under its network of agreements in a timely manner.”

A peer review report published by the Global Forum on 27 October 2012 found that South Africa has nine of the ten elements in place. The timely exchange of information element (C.5) was not fully assessed.¹¹⁵

3.11 Global Forum's Mutual Administrative Assistance Agreement (MAAA)

Another form of information exchange that could affect the rights of taxpayers' is the Mutual Administrative Assistance Agreement (MAAA). This agreement allows for information to be automatically exchanged and not just on request from other authorities.

This agreement should be ratified during 2013 or 2014. Once ratified, it will increase SARS's information exchange ability with authorities that currently do not have bilateral agreements with South Africa. This will also strengthen the enforcement capabilities of SARS together with debt

¹¹⁵ OECD. 2012. *Tax Transparency 2012 Report on Progress*. Available: <http://www.oecd.org/tax/transparency/> [2013, October 5]

collection efforts.¹¹⁸ It is also possible to use these agreements for collecting outstanding taxes in countries where it is not allowed by the current tax treaties. SARS are of the opinion that these agreements will enhance their risk detection and risk profiling capabilities which in the end will result in increased revenue.¹¹⁹

This agreement will be used to exchange private information of taxpayers which constitute a limitation of the right to privacy. The collection of taxes on behalf of other authorities could be a limitation of the right to property which has not been investigated for the purposes of this dissertation.

The MAAA will become law in terms of section 231 of the Constitution. The SARS has to perform the duties imposed upon him in terms of the law. It is submitted that the automatic exchange of a taxpayers' information is a justifiable limitation of the right to privacy in an open and democratic society.

3.12 Conclusion on the right to privacy and the exchange of information

The TAA in Section 3(3) allows the exchange of information in terms of international agreements. The Constitution in section 231 brings international agreements into South African law. Section 108 of the Income Tax Act then authorises the SARS to perform the obligations under a treaty.

Tax information exchange is necessary for proper and effective application of domestic tax laws. It is the duty of SARS to enforce the domestic tax laws and perform the duties imposed upon him in terms of international agreements.

There has to be safeguards for confidentiality before information is transferred. The information gathered by SARS may only be shared with tax authorities to be used for tax purposes.

I conclude that the exchange of information is a reasonable and necessary limitation of the right to privacy.

¹¹⁸ SARS Strategic Plan 2013/14 – 2017/18, 2013 at p16

¹¹⁹ Ibid at p46

CHAPTER 4 THE TAXPAYER'S RIGHT TO BE INFORMED ABOUT AND APPEAL AGAINST THE EXCHANGE OF INFORMATION

4.1 DOMESTIC LAW

4.1.1 THE TAX ADMINISTRATION ACT

The TAA does contain provisions that prescribe that SARS must keep a taxpayer informed, but this is limited to the instance of audit.¹²⁰ It is practice of SARS to issue a notification when a person is selected for an audit and a letter of audit findings after the finalisation of an audit. During the audit the taxpayer is also informed on the stage of completion and if adjustments are made the taxpayer will also receive a letter explaining what adjustments have been made. These procedures are standard for all taxpayers including non- resident individuals and companies that have been selected for an audit.

Section 3(3) of the TAA authorises SARS to collect information requested for transmission to another tax authority. There is no provision in our domestic legislation to ensure that a person is informed when an individual or company has been selected for an audit by another tax authority and that authority requests information from SARS. SARS can request information without informing the taxpayer that it is for reason of exchange purposes. There is also no provision available for a taxpayer to appeal against the exchange his of tax information.¹²¹

4.1.2 THE CONSTITUTION

As already mentioned, the Constitution is the supreme law in South Africa.

The various agreements that allow the exchange of information with other states are part of South African law in terms of section 108(2) of the Income Tax Act, read together with section 231(4) of the Constitution. The exchange of information must therefore not infringe any rights conferred to any person in the Bill of Rights, provided that it is justifiable in terms of the general limitation clause.

The right to be informed is not specifically listed in the Bill of rights. Before a right can be infringed it must first be established if a person was the bearer of that right. Section 14 of the Constitution provides that everyone has the right to privacy. This section reads that the right to privacy "includes" certain named rights. The use of the word "includes" implies that the list is not exhaustive.¹²² The right to privacy therefore includes a right to protection against the unlawful collection, use and distribution of personal information.

¹²⁰ See section 42 of the TAA

¹²¹ OECD, 2013. Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: South Africa 2013. At paragraph 148

¹²² De Beers Holdings (Pty) Ltd v CIR 1986 (1) SA 8 (A), [1985] 47 SATC 229.

The Constitution does not contain an exhaustive code of all rights and there are other rights beyond those expressly mentioned in the Constitution that are recognised or conferred by common law, customary law or legislation. These other rights are not denied by the Bill of Rights to the extent that they are consistent with the Bill.¹²³

4.1.3 PAJA

PAJA was enacted to give effect to the right to lawful, reasonable and fair administration as contained in section 33 of the Constitution. PAJA provides that a taxpayer may request written reasons for administrative decisions that could materially and adversely affect a taxpayer rights or legitimate expectations. Legitimate expectation is a broader concept than the rights conferred upon a person in terms of the Bill of Rights.

An legitimate expectation was described in *Administrator, Transvaal and Others v Traub and Others*¹²⁴ as:

“the legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interests of the person concerned is taken.”

The Commissioner’s decision to exchange of information with other tax authorities is an administrative action. Croome (2008:164)¹²⁵ contends that *“the Commissioner must inform the taxpayer of the planned action before he implements it, so the taxpayer may make representations to the Commissioner before he finalises the decision. The Commissioner must supply the taxpayer with sufficient information about the ‘proposed administrative action’, to enable him or her to understand the consequences thereof.”* This is in line with the requirement of section 3(2)(b)(ii) of PAJA.

This could result in an infringement of a right as a taxpayer who is not informed will not be able to exercise his right to fair administration and will not be able to approach the courts to review this decision.

4.1.4 THE PROTECTION OF PERSONAL INFORMATION ACT (POPI)

4.1.4.1 The purpose of POPI

This Act¹²⁶ was gazetted on 26 November 2013 and gives expression to the right of privacy as contained in section 14 of the Constitution. The POPI recognises that everyone has the right to

¹²³ Section 39 of the Constitution.

¹²⁴ 1989 (4) SA 731 (A) at 758D–F.

¹²⁵ Croome, B.J. 2008: *Taxpayers’ Rights in South Africa: An analysis and evaluation of the extent to which the powers of the South African Revenue Service comply with the Constitutional rights to property, privacy, administrative justice, access to information and access to courts.* Ph.D. Thesis. University of Cape Town.

¹²⁶ Protection of Personal Information Act, No. 4 of 2013. 2013. Cape Town: Government Printers.

privacy that “includes a right to protection against the unlawful collection, retention, dissemination and use of personal information”.¹²⁷

The Explanatory Memorandum of the Bill¹²⁸ states that “*The Bill aims to give effect to the right to privacy, by introducing measures to ensure that the personal information of an individual (data subject) is safeguarded when it is processed by responsible parties. The Bill also aims to balance the right to privacy against other rights, particularly the right of access to information, and to generally protect important interests, including the free flow of information within and across the borders of the Republic.*”

It is aimed at protecting citizens’ right to privacy including the flow of information within and across the borders of the Republic. It applies to the processing of private information by a responsible party. The definition of a responsible party includes a public body such as SARS. Section 72 stipulates that information will not be transferred to another country if, for example, proper safeguards for the protection of the information have not been adopted in that country or the data subject has not consented to the transfer.

4.1.4.2 Limitations on the application of POPI

The Act gives effect to an individual’s right to privacy but is subject to justifiable limitations.

Section 6 of the POPI contains certain exclusions as far as its application and for example will not apply in circumstances where the processing of personal information is carried out by a public body and “*the purpose of which is the prevention, detection, including assistance in the identification of the proceeds of unlawful activities and the combating of money laundering activities, investigation or proof of offences, the prosecution of offenders or the execution of sentences or security measures, to the extent that adequate safeguards have been established in legislation for the protection of such personal information*”

4.1.4.3 Conditions of POPI for the lawful processing of personal information

Chapter 3 of the POPI contains conditions for the lawful processing of personal information.

The eight core information protection principles are discussed below with specific reference to SARS as the responsible party:

- (i) **Accountability (Section 7)**
The responsible party (SARS is a public body which is included in the definition of a responsible party) must ensure that all principles of the Act are adhered too.
- (ii) **Processing limitation (Sections 8,9,10 & 11)**
The information must be processed lawfully and in a legal manner that does not infringe the privacy of a person.

¹²⁷ Preamble of the POPI Act

¹²⁸ Memorandum on the Objects of The Protection of Personal Information Bill, 2009. Government Gazette 32495. Notice 1107 OF 2009. Pretoria: Government Printers.

There are several laws authorising SARS to process information. This could be an infringement on the right to privacy, but as discussed earlier, such infringement is justifiable.

Personal information may only be processed if a person gives consent and if it is justifiable for certain specific reasons. SARS does not have a procedure to obtain the consent of a person before exchanging his personal information. This provision could have far reaching implications on international information exchange. Automatic exchange of bulk information will be almost impossible if the consent of thousands of individuals have to be obtained. Request for information on specific identified individuals, who poses a risk of tax evasion, will normally be opposed by the individuals involved for fear of being brought to justice.

I submit that either section 11(1)(c) or (e) of POPI may override the requirement for SARS to obtain prior approval for the collection of information to be exchanged. This is because processing could be necessary in order for SARS to fulfil the lawful duty imposed upon him in terms of the South African Revenue Services Act, 1997 (Act No. 34 of 1997) (SARS Act) and it could be necessary for the proper performance of a public duty by a public body.

- (iii) Purpose specification (Sections 12, 13, 14)
SARS does have a lawful purpose to collect information on individuals and SARS will meet the requirements of this principle.
- (iv) Further processing to be compatible with purpose of collection.(Section 16)
The further processing of information is specifically allowed if done to enforce legislation concerning the collection of revenue as defined in the SARS Act.
- (v) Information quality (Section 16)
SARS places a high premium on the accuracy of information and does take reasonable practicable steps to ensure the accuracy of information.
- (vi) Openness (Section 17)
Non-compliance with this principle is specifically allowed if necessary to enforce legislation concerning the collection of revenue as defined in the SARS Act.
- (vii) Security safeguards (Sections 18, 19, 20 and 21)
SARS is bound by secrecy provisions as contained in the TAA and does have the necessary policies and procedures in place to treat all information as confidential.

(viii) Data subject participation (Sections 22, 23 and 24)

A person has the right to request a public body the description of personal information held by the responsible party and information about the identity of third parties, who have or have had access to the information. The public body may refuse to supply the information on grounds of Chapter 4 of the PAIA. (Refer to chapter 3.3 for a description of these grounds.)

A person has the right to correct personal information after receiving a description of personal information being held by a responsible party. A person may request the responsible party to correct or delete personal information that is inaccurate, irrelevant, excessive, out of date, incomplete, misleading or obtained unlawfully.

The POPI Act will not prohibit SARS to process personal information as it is justifiable and necessary for complying with an obligation imposed by law.¹²⁹ The POPI Act explicitly creates the right to be informed on the collection and exchange of personal information. There is currently no procedure in place to notify a person that his personal information will be exchanged between revenue authorities.

This could be a violation of the “Processing limitation” that requires the consent of a data subject before his personal information is being processed. I submit that either section 11(1)(c) or (e) of POPI may override the requirement for SARS to obtain prior approval for the collection of information to be exchanged. This is because processing could be necessary in order for SARS to fulfil the lawful duty imposed upon him in terms of the South African Revenue Services Act, 1997 (Act No. 34 of 1997) (SARS Act) and it could be necessary for the proper performance of a public duty by a public body.

The remedy available where persons’ rights have been infringed is to lodge a complaint to the Information Protection regulator. This juristic person is subject only to the Constitution and to the law. The regulator will investigate complaints and issue a compliance notice if he finds that there has been a transgression of the Act. Failure to comply with the provisions of this Act could result in fines of up to R10 million or up to ten years imprisonment.

The actual commencement date of this Act has not been announced and it remains to be seen how this legislation will affect current tax information exchange procedures.

4.2 INTERNATIONAL LAW

Section 39 of the Constitution provides that international law must be considered and foreign law may be considered when interpreting the Bill of Rights.

¹²⁹ See s10 of the POPI Act

4.2.1 THE OECD MODELS

Effective exchange of information is an important tool that provides for a legal framework to enable countries to apply and enforce their domestic laws, and can take place, *inter alia*, in terms of an article in a Double Tax Agreement (DTA); or a Tax Information Exchange Agreement (TIEA).

4.2.1.1 MODEL TAX CONVENTION ON DOUBLE TAX AGREEMENTS

Article 26 of the OECD's Model Tax Convention on Income and on Capital contains the provisions relating to exchange of information in terms of a DTA and most of the DTA's signed by South Africa are based on this model.¹³⁰

The Contracting State is not bound to go beyond its own domestic laws and administrative practices to supply information requested by the other state.¹³¹

Paragraph 14.1 of the Commentary¹³² on Article 26 states that there are certain countries where the taxpayer has a right to be informed prior to the supply of his information:

“Some countries’ laws include procedures for notifying the person who provided the information and/or the taxpayer that is subject to the enquiry prior to the supply of information. Such notification procedures may be an important aspect of the rights provided under domestic law. They can help prevent mistakes (e.g. in cases of mistaken identity) and facilitate exchange (by allowing the taxpayers who are notified to co-operate voluntarily with the tax authorities in the requesting State).”

South Africa does not have specific tax administration procedures in place to notify a subject that his information is about to be exchanged with another tax jurisdiction. However, there are countries where this right does exist. As discussed paragraph 5.1.4.3 above, the South African taxpayers also enjoy this right to be informed, although not explicitly mentioned in the Constitution.

4.2.1.2 MODEL TAX CONVENTION ON DOUBLE TAX INFORMATION EXCHANGE AGREEMENTS (TIEA)

South Africa's TIEAs are based on the OECD Model Tax Information Exchange Agreement.¹³³

Article 1 of the TIEA Commentary provides that rights and safeguards granted to persons are not overridden, but it obliges the requested Party to ensure that such rights and safeguards are not applied in a manner that unduly prevents effective exchange of information.¹³⁴

¹³⁰ Olivier, L. & Honiball, M. 2011. *International Tax, A South African Perspective*, 2011. Tokai, Cape Town: Siber Ink at p.285.

¹³¹ OECD. 2010. Model Tax Convention on Income and on Capital: Condensed version 2010. Available: <http://www.oecd.org>

¹³² Ibid

¹³³ OECD. 2002. Agreement on Exchange of Information on Tax Matters, released April 2002. Available: <http://www.oecd.org/ctp/exchange-of-tax-information.htm>.

Article 5 provides that information shall be provided to the extent allowable under the requested States domestic laws.

Article 7 contains limitations to the obligation to collect and make available information in terms of the agreement. It limits the Contracting Party's obligations to information

- which the requesting party would be able to obtain under its own laws for the administration or enforcement of its own tax laws;
- would not disclose any trade secrets;
- would not reveal confidential communications between a client and attorney or solicitor;
- would not be contrary to public policy;
- does not discriminate against a national of the requested Party as compared with a national of the applicant Party in the same circumstances.

The OECD prescribes a model template for a request for information in terms of a Tax Information Agreement by tax authorities.¹³⁵ This document acknowledges that certain countries have domestic legislation in place that obligate the tax authorities to inform a subject that his information is being exchanged and that there might be exceptions to this notification requirement. This document allows a tax authority to request that the taxpayers involved should not be notified and if such a request is made the requesting state has to confirm that they will be able to refrain from notification in similar circumstances. The commentary to the agreement states that rights and safeguards such as prior notification should not be disregarded unless this procedure will cause a delay "*such that it calls into question the usefulness of the information exchange agreement*".¹³⁶

4.2.1.3 THE OECD SUMMARISED

The DTA and TIEA both specifically addresses information held by banks, financial institutions or persons acting in a fiduciary capacity. The DTA states that domestic legislation that protects bank secrecy, information held in a fiduciary capacity, or treat ownership of information as a trade secret may not be used as a basis for declining to provide information. The same result is achieved by the TIEA, although in a somewhat different manner; by maintaining that the Contracting Parties shall ensure that its competent authorities have the authority to provide such information.

The TIEA also contains a clear determination that information shall be provided to the extent allowable under the requested Party's domestic laws, and that rights and safeguards granted to

¹³⁴ Ibid at Para.6.

¹³⁵ OECD. Model Template Request for Information Tax Information Exchange Agreement. Available: <http://www.oecd.org/ctp/exchange-of-tax-information.htm>.

¹³⁶ OECD. Agreement on Exchange of Information on Tax Matters. Available: <http://www.oecd.org/ctp/exchange-of-tax-information.htm>.

persons are not disregarded. The DTA only go so far as to declare that a Contracting State is not bound to go beyond its own internal laws to make information available.

4.3 APPEAL AGAINST THE EXCHANGE OF INFORMATION

4.3.1 THE TAX OMBUDSMAN

The function of the Tax Ombud is to resolve administrative disputes where SARS refuses to review a decision and where all internal dispute resolution mechanisms have been exhausted. The Tax Ombud must resolve disputes laid by taxpayers using informal, fair and cost effective measures. It is a remedy for taxpayers where SARS fails to respect taxpayer rights and an alternative to costly court proceedings.

The exchange of information is an administrative decision and where taxpayers' rights have been infringed, a complaint can be referred to the Tax Ombud. The Tax Ombud was only recently appointed and it remains to be seen whether this will be an effective alternative to court actions for issues relating to tax information exchange.

4.3.2 THE CAYMAN ISLANDS CASE¹³⁷

This judgment dated 13 September 2013 is the first reported judgment to deal with tax information exchanged between tax authorities. The case dealt with a request from the Australian Tax Office (ATO) for information from the Cayman Islands Tax Information Authority (CITIA) in terms of a Tax Information Sharing Agreement.

In terms of section 17(1) of the Tax Information Agreement signed between the two governments, a person who is the subject of a request for information shall be served with a notice advising the person of the request and the general nature of the information sought. The subject will then have fifteen days to make a written submission to the authorities as to whether the request is lawful.

In this case the CITIA failed to serve such a notice on the Applicants. The court found that the Applicants were entitled to be informed and the failure to serve notices infringed the Applicants' rights under the Bill of Rights.

This international judgment could be relied upon in challenging the exchange of information by SARS when there could possibly be an infringement on the right to privacy, the right to be informed and the right to a fair trial. This judgment acknowledged that a tax authority has an obligation to comply with agreements to share information but that it must be done in such a way as not to infringe any rights of the taxpayer.

4.3.3 CONCLUSION

In today's global economy taxpayers can generally operate freely across international borders, but tax authorities must respect the sovereignty and laws of the countries in which its tax residents operate.

¹³⁷ M.H. Investments and J.A. Investments v The Cayman Islands Tax Information Authority (CITIA) Cause No. 391/2012

Information should not be exchanged before SARS confirmed that the requesting country does have the same rights and safeguards in place to protect the rights of a subject.

The Constitution and POPI grants a person the right to be informed. Currently South Africa does not have any safeguards and procedures in place to protect this right when exchanging information with other tax authorities. There may be specific circumstances where a limitation of this right could be justifiable but to disregard this right entirely could be an infringement of a taxpayer's rights.

SARS should follow other authorities' example and notify a subject prior to exchanging information. It is submitted that this right should be included in all international agreements.

CHAPTER 5 CONCLUSION

Professor R.C. Williams stated that: *“In short, there are many aspects of tax administration and taxpayers’ rights that are still unresolved and await authoritative determination by the courts.”*¹³⁸

The Tax Administration Act, effective from 1 October 2012, aimed to balance the powers and duties of SARS with the rights and obligations of taxpayers.¹³⁹ This Act has received wide criticism from tax professionals that it did not achieve what was intended and that there are sections that infringe upon the Constitutional rights of taxpayers’.¹⁴⁰

The TAA did not seek to recap all Constitutional rights word by word. This does not imply that a taxpayer is not entitled to certain rights as they can be claimed in terms of the Constitution and the Acts promulgated to give effect to these rights. In terms of PAJA a person can request reasons for administrative action that could materially affect your rights and such a decision may be reviewed by the courts. In terms of PAIA a person can request information from SARS about his tax affairs. In terms of POPI the personal information is protected.

The information gathering procedures are necessary in order for SARS to accomplish the duties imposed by the SARS Act and there is no other less intrusive method available in performing these duties. The inspection and audit powers are a justifiable infringement on a taxpayer’s right to privacy. The right to be informed on the progress of an audit, the letter of audit findings and the letter informing of any adjustments did enhance taxpayers’ rights.

The search and seizure provisions are a justifiable if conducted in a reasonable and fair manner but could be a serious infringement in the absence of a warrant unless there are extraordinary circumstances. It is submitted that the search and seizure of a residential property without a warrant will never be a justifiable limitation.

The request for information from third parties e.g. banks is an internationally accepted practice. This is not an additional power awarded to SARS and is a justifiable infringement on privacy.

The Constitution acknowledges international exchange of tax information agreements as law. It is justifiable infringement if conducted with the necessary safeguards.

A taxpayer’s has the right to be informed when his personal information is being exchanged in terms of an international exchange of information agreement. This right has been ignored by SARS and this

¹³⁸ Williams, R.C. 2013. SARS & fair administrative action : quo vadis. TAXtalk. (38):24-25.

¹³⁹ Memorandum on the Objects of the Tax Administration Bill, 2011.

¹⁴⁰ Erasmus, D.N. 2012. Tax Administration Act [Course notes] South African Institute of Tax Professionals.

is not a justifiable limitation. SARS should adopt the same procedures of keeping a taxpayer informed as when audits are being conducted by the South African authorities.

The government has the primary obligation to protect human rights and if human rights are infringed by tax laws then it is the responsibility of the government to review and change these laws. The Constitution is the supreme law and the powers awarded to SARS are subject to the Constitution. This was confirmed in the judgment handed down in *First National Bank of SA Ltd t/a Wesbank v C:SARS* where the court held that “no matter how indispensable fiscal statutory provisions were for the economic well-being of the country, they were not immune to the discipline of the Constitution and had to conform with its normative standards.”¹⁴¹

There will be undesirable abuses of powers from time to time but that does not make the TAA unconstitutional. The Constitutional Court remarked as follows on this point:

*“Any power vested in a functionary by the law (or indeed by the Constitution itself) is capable of being abused. That possibility has no bearing on the constitutionality of the law concerned. The exercise of the power is subject to constitutional control and should the power be abused the remedy lies there and not in invalidating the empowering statute.”*¹⁴²

The most cost effective remedy available to the taxpayer will be the Tax Ombudsman. It remains to be seen how effective this newly established body will be in preventing any abuse of power by SARS.

As stated by Judge Bernard Ngoepe who has been appointed as the first Tax Ombudsman: “*The Tax Administration Act’s structure is not perfect and satisfactory in many respects, but hopefully with the passage of time, as our wisdom graduates, we’ll be able to panel beat the ship into its proper cause and condition so that the office can better deliver that which it has been mandated to deliver.*”¹⁴³

¹⁴¹ First National Bank of SA Ltd t/a Wesbank v C:SARS at 252

¹⁴² Van Rooyen and Others v The State and Others (General Council of South Africa Intervening) 2002 (5) SA 246 (CC) at par 37.

¹⁴³ South African Institute of Tax Practitioners’ Breakfast with Tax Ombud. 7 November 2013

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