

An evaluation of the recourse available to taxpayers where SARS does not adhere to the correct tax administrative procedures

By

Lauren Stacey Herbert

(Student number: HRBLAU001)

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Supervisor: Martie Foster, Corporate Tax Consultant and Lecturer in the Department of Finance and Tax at the University of Cape Town

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Lauren Herbert

1 November 2018

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ABSTRACT

There is a common perception among South African taxpayers and tax professionals that the South African Revenue Service ("**SARS**") is "draconian" in its administrative actions and interactions with taxpayers and tax professionals, which infringes on taxpayers' constitutional right to just administrative action.

This dissertation aims to make taxpayers and tax professionals more aware of their right to just administrative action which entitles taxpayers to administrative action and interactions with SARS that are lawful, reasonable and procedurally fair. Furthermore, this dissertation investigates how taxpayers and tax professionals may go about defending such administrative rights, should SARS infringe upon it without just cause.

A comparison is made between the recourse available to South African taxpayers and tax professionals who experience tax administrative disputes against SARS, against the recourse provided in a selection of foreign jurisdictions. This comparison is performed with a view to determine possible areas of improvement to the recourse provided in South Africa, as it pertains to administrative disputes against SARS. Recommendations to introduce a Taxpayers Bill of Rights or revise and improve on the current SARS Service Charter, is considered in Chapter 5 of this dissertation.

This dissertation shows that while the introduction of the Tax Ombud in South Africa certainly enriched taxpayers' constitutional right to just administrative action, the Tax Ombud's limited authority, mandate and the non-binding effect of its recommendations on SARS, limits the effectiveness of the role of the Tax Ombud in South Africa. Recommendations to further the Tax Ombud's authority and mandate are considered in Chapter 5 of this dissertation.

TABLE OF ABBREVIATIONS AND ACRONYMS

ADR	Alternative Dispute Resolution
ATO	Australian Taxation Office
Business days	Means business days as defined in the Tax Administration Act, 28 of 2011 (i.e. excluding Saturdays, Sundays, public holidays and days between 16 December and 15 January of the following year, both days inclusive).
CCRA	Canada Customs and Revenue Agency
CRA	Canadian Revenue Authority
CSARS	Commissioner for the South African Revenue Service
Customs Duty Act	Customs and Excise Act 91 of 1964
Federal Courts Act	Federal Courts Act (R.S.C., 1985, c. F-7) - Canada
HMRC	Her Majesty's Revenue and Customs - United Kingdom
IGT	Inspector-General of Taxation - Australia
IRC	Internal Revenue Code – United States of America
IRS	Internal Revenue Service of the United States of America
OECD	Organisation for Economic Co-Operation and Development
Parliament	the Parliament of the Republic of South Africa
PFMA	Public Finance Management Act 1 of 1999 – South Africa
SA	South Africa
SARS	South African Revenue Service

TAD	Taxpayer Advocate Directive – United States of America
TAO	Taxpayer Assistance Order – United States of America
TAS	Taxpayer Advocate Service – United States of America
Taxpayer	Such term refers to individuals (male or female) and corporates who are classified, by law, as being required to pay tax.
the ADJR Act	The Administrative Decisions (Judicial Review) Act 59 of 1977 – Australia
the CMO	the SARS Complaints Management Office
the Constitution	Constitution of the Republic of South Africa, 1996
the Interim Constitution	Interim Constitution of the Republic of South Africa Act 200 of 1993
the ITA	the Income Tax Act 58 of 1962 – South Africa
the NTA	the National Taxpayer Advocate – United States of America
the PAJA	the Promotion of Administrative Justice Act 3 of 2000 – South Africa
the SARS Act	South African Revenue Service Act 34 of 1997
the TAA	the Tax Administration Act 28 of 2011 – South Africa
UK	United Kingdom
USA	United States of America

TABLE OF CONTENTS

CHAPTER 1: INTRODUCTION	2
Introduction	2
Background	2
Research Problems/Questions	5
Research Problems	5
Research Questions	6
Research Objective	6
Limitations of Scope.....	7
Research Approach and Methods	8
Structure of the Dissertation	9
CHAPTER 2: HOW DOES THE TAA, THE PAJA AND THE CONSTITUTION INTERACT IN THE SOUTH AFRICAN TAX SYSTEM	11
Introduction.....	11
Overview of the Constitution	12
SARS' powers are subject to the Constitution.....	13
The Bill of Rights	14
Limitation of rights	15
Overview of the PAJA	16
SARS' powers are subject to the PAJA.....	17
Overview of the TAA	18
Interaction between the TAA, the PAJA and the Constitution	19
Conclusion.....	20
CHAPTER 3: AN OVERVIEW/EVALUATION OF SARS' FAILURE TO ADHERE TO CORRECT ADMINISTRATIVE PROCEDURES IN ITS INTERACTION WITH TAXPAYERS.....	22
Introduction.....	22
Manner in which SARS raises an additional assessment	23
Discussion of the facts in V Z Nondabula v CSARS & Another.....	23
Discussion of the findings in V Z Nondabula v CSARS & Another.....	24

Key points from V Z Nondabula v CSARS & Another.....	27
Manner in which SARS conducts an audit.....	28
Discussion of the facts in Mr. A v CSARS (IT13726)	28
Discussion of the findings in Mr. A v CSARS (IT13726).....	29
Key points from Mr A v CSARS (IT13726).....	31
Manner in which SARS enforces the 'pay now, argue later' principle	32
Discussion of the facts in A Way to Explore v CSARS	32
Discussion of the findings in A Way to Explore v CSARS	33
Key points from A Way to Explore v CSARS	34
Conclusion.....	34
CHAPTER 4: AN EVALUATION OF THE RECOURSE AVAILABLE TO A TAXPAYER WHERE SARS DOES NOT ADHERE TO CORRECT ADMINISTRATIVE PROCEDURES	35
Introduction.....	35
Internal remedies provided within SARS	37
Escalation within SARS – via the SARS Call Centre or local SARS Branch Office.....	37
SARS Complaints Management Office	38
External remedies provided outside of SARS	39
The Office of the Tax Ombud	39
Application for a default judgement	42
Recourse provided by the PAJA	42
Judicial Review of 'administrative action'	42
The Public Protector and the Human Rights Commission.....	46
SARS Service Charter.....	47
Recovering costs from an administrative dispute	47
Conclusion.....	48
CHAPTER 5: A GLOBAL OVERVIEW OF THE RECOURSE AVAILABLE TO TAXPAYERS EXPERIENCING AN ADMINISTRATIVE DISPUTE AGAINST THEIR VARIOUS REVENUE AUTHORITY	49
Introduction.....	49
The United Kingdom	50

Your Charter	50
Complaints process	51
The Adjudicator’s Office	52
Parliamentary and Health Service Ombudsman	52
Judicial Review	53
Canada	54
Taxpayer Bill of Rights	54
Complaints process	55
Taxpayers’ Ombudsman.....	56
Judicial Review	57
Australia.....	58
Taxpayers’ Charter	58
Complaints process	59
The Inspector-General of Taxation.....	60
Judicial Review	60
United States of America	62
The Taxpayer Bill of Rights	62
Complaints process	63
The National Taxpayers Advocate.....	64
Taxpayer Assistance Order	65
Taxpayer Advocate Directive	66
Low Income Taxpayer Clinic	66
Conclusion.....	66
CHAPTER 6: CONCLUSION	68
Enact a Taxpayer Bill of Rights	69
Introducing an additional right to the ‘SARS Service Charter’	70
Increase the power of the Tax Ombud.....	70
Recovering costs from an administrative dispute	71
Legal assistance	71

Conclusion72
BIBLIOGRAPHY73

CHAPTER 1: INTRODUCTION

Introduction

In the words of South Africa's Finance Minister at the time, Malusi Gigaba, at the 2018 Budget Speech on 21 February 2018, "*Tax morality is a crucial component of a healthy democracy*" (Menon, 2018). Each time the South African Revenue Service ("**SARS**") exercises disregard for its own empowering legislation, namely the Tax Administration Act of 2011¹ ("**the TAA**"), the level of tax morality decreases and leaves a bitter taste in the mouths of taxpayers. The conduct of SARS in its interactions with taxpayers, sets the tone for the level of tax compliance among taxpayers (Visser, 2017a).

According to Patricia Williams, a tax partner at a corporate and commercial law firm in South Africa, namely Bowman Gilfillan:

"The days of administrative bodies being able to do as they please are over, and South Africans are protected by the Constitution, the Promotion of Administrative Justice Act, and various other legal provisions" (Visser, 2018c).

This dissertation aims to evaluate the various channels of protection or recourse available to South African taxpayers who are facing, or may potentially face, a tax administrative dispute against SARS. Specifically, an evaluation of the recourse provided to taxpayers by the TAA, the Promotion of Administrative Justice Act of 2000² ("**the PAJA**") and the Constitution of the Republic of South Africa, 1996³ ("**the Constitution**").

Background

Prior to South Africa becoming a constitutional democracy in 1994, South Africa was a parliamentary state, which had the effect of Parliament being the supreme law. Parliament had the authority to

¹ The Tax Administration Act, 28 of 2011.

² The Promotion of Administrative Justice Act, 3 of 2000.

³ Constitution of the Republic of South Africa, 1996.

introduce and set aside any legislation. Thus the laws were unable to be challenged, on the grounds that such laws infringed upon taxpayers' constitutional rights enacted per the Constitution. Once South Africa became a constitutional state, via the enactment of the Constitution, the Constitution became the supreme law and no legislation in contravention thereof would be permitted to exist (Friedland, 2003).

South Africa, as a developing country, is dependent on the generation of adequate tax revenue in order to fund the economic and socio-economic objectives of the government. In terms of the South African Revenue Service Act of 1997⁴ ("**SARS Act**"), SARS' mandate is to collect revenue. It has become more evident through the actions and interactions with SARS, that SARS intends to meet this mandate through tightening the screws on tax compliance (Lamprecht, 2017b).

The previous Commissioner for the South African Revenue Service ("**CSARS**"), Tom Moyane, expressed that SARS is dedicated to reaching the increased revenue target for 2018, despite the poor performing economy (Menon, 2018). This declaration places increased pressure on SARS' officials to achieve such a goal, which may be unjustly encouraging SARS' officials to abuse their powers granted to them via the TAA (Brink, 2015; Khumalo, 2017). Until such a time as the government can decrease and limit its careless and squandered expenditure, the increased pressure on SARS to collect revenue will continue to squeeze taxpayers in an administratively unreasonable manner (Lamprecht, 2017b).

There is growing concern among taxpayers and tax professionals with regards to the increase in the unjust manner in which SARS interacts with taxpayers (Lamprecht, 2017a). Thus, it is essential for both taxpayers and tax professionals to become more aware of taxpayers' constitutional rights and the powers of SARS (Friendland, 2003). In practice, striking a balance between SARS' powers and upholding taxpayers' rights is proving to be 'easier said than done'.

The concern regarding the unjust manner in which SARS is interacting with taxpayers, is in light of section 33(1) of the Bill of Rights⁵ that states, "*Everyone has the right to administrative action that is lawful, reasonable and procedurally fair*". Through the study of several South African court decisions, in respect of tax administrative disputes with SARS, it is pleasing to see that it is possible for taxpayers' rights to be protected and defended when SARS is in contravention of such rights (Visser, 2018d). In the case of *V Z Nondabula v CSARS & Another*⁶, the court was called upon to adjudicate a

⁴ The South African Revenue Service Act, 34 of 1997.

⁵ The Bill of Rights forms part of Chapter 2 of the Constitution.

⁶ (4062/2016) [2017] ZAECMHC 21

dispute regarding the manner in which SARS had dealt with a taxpayer. This case will be discussed further in Chapter 3 of this dissertation, however, the court concluded that SARS is expected to, at the very least, comply with its own empowering legislation (Croome, 2017).

The Bill of Rights enforces citizens' constitutional rights, however, these constitutional rights are not always defensible as the Constitution provides limitations on the enforcement of such rights. Section 36 of the Constitution provides as follows:

"Limitation of rights

(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".

Thus, in the event that a taxpayer's right to just administrative action, per section 33 of the Constitution, is infringed upon by SARS, the taxpayer is required to determine whether such infringement is justifiable under section 36 of the Constitution before the conduct of SARS may be challenged on the basis of infringement against the taxpayer's constitutional right to just administrative action.

The TAA came into effect on 1 October 2012. The introduction of the TAA was motivated by the need to collate tax administration provisions of the majority of South Africa's tax Acts, into one piece of legislation (Gomes, 2017), while better promoting and upholding taxpayers' rights in their interactions with SARS (Croome, 2013). South Africa first promulgated its tax dispute resolutions rules under section 107A of the Income Tax Act 58 of 1962 ("**the ITA**"). As the years progressed there were numerous amendments to the content of the rules and such rules were moved from the ITA. On 11

July 2014, the tax disputes resolution rules moved to section 103 of the TAA in terms of the promulgation in Government Notice 550, published in Government Gazette No. 37819.

There is a realistic perception of imbalance between the powers that SARS is granted via the TAA versus the recourse that is made available to taxpayers via the TAA. In the event that a taxpayer fails to adhere to the provisions of the TAA, SARS is empowered by the TAA to enforce the laws of the country to ensure that the taxpayer is compliant. However, in the event that SARS fails to adhere to the provisions of the TAA, taxpayers have limited recourse available via the TAA, namely approaching the Office of the Tax Ombud (Croome, 2013).

In the latest Tax Ombud report for the 2016/17 period, 49.9% of the complaints were rejected due to either the complaint not falling within the mandate of the Tax Ombud or due to the taxpayer not having exhausted the SARS internal resolution procedures⁷ (Office of the Tax Ombud, 2017: 22,24). The large percentage of complaints rejected due to the above-mentioned reasons may be an indication that there is little knowledge among taxpayers of the correct internal dispute procedures that need to be exhausted before approaching the Tax Ombud as well as little knowledge around what types of cases the Tax Ombud has authority over (Williams, 2016).

Research Problems/Questions

Research Problems

There is a lack of awareness among taxpayers and tax professionals in respect of taxpayers' rights during their interactions with SARS. This lack of awareness stems from the unfamiliarity such taxpayers and tax professionals have of the forms of legislation which house these rights, namely, the TAA, the PAJA and the Constitution. The unfamiliarity of these legislations, together with the lack of awareness pertaining to taxpayers' rights when interacting with SARS, prohibits taxpayers and tax professionals from adequately defending these rights in the unfortunate event of the infringement of such rights by SARS.

⁷ SARS internal resolution procedures include the following:

- The aggrieved taxpayer is required to either call the SARS Call Centre or visit a SARS branch to resolve their complaint and simultaneously receive a case number allocated to such complaint;
- If the aggrieved taxpayer's complaint is not resolved via the SARS Call Centre and/or visiting a SARS branch, the taxpayer may submit their complaint to the SARS Complaint Management Office by phone, at a SARS branch or via SARS electronic filing system (namely e-Filing).

The recourse available to South African taxpayers, who are or may be, aggrieved by SARS' failure to adhere to the correct tax administration procedures is currently inadequate, costly and may take an extended amount of time to resolve. Furthermore, the recourse provided to taxpayers via the TAA may not be sufficient to ensure that taxpayers' constitutional right to just administrative action may be adequately defended in the event of the infringement by SARS of such right. Consequently, this dissertation aims to investigate whether there is alternative recourse available to aggrieved taxpayers through the PAJA and the Constitution.

Research Questions

This dissertation aims to answer the following questions:

- What rights do taxpayers have in their interaction with SARS?
- How does the TAA, the PAJA and the Constitution enforce and defend taxpayers' rights?
- What recourse is available to South African taxpayers who are undertaking, or wish to undertake, a tax administrative dispute against SARS?
- Is the recourse provided to taxpayers via the TAA, sufficient to uphold and defend the taxpayers' constitutional right to just administrative action?
- Do other jurisdictions, such as Canada, Australia, the United Kingdom ("**UK**") and the United States of America ("**USA**"), contain more advanced and efficient recourse for taxpayers confronted with a tax administrative dispute against their respective revenue authority?
- Can aspects of the recourse provided in the above-mentioned foreign jurisdictions be introduced to South Africa in order to improve on South Africa's available recourse?

Research Objective

This dissertation will be guided by the following research objectives:

- To create greater awareness among taxpayers and tax professionals of the TAA, the PAJA and the Constitution and how these legislations interact in the South African tax system.
- To create greater awareness among taxpayers and tax professionals of taxpayers' constitutional right to just administrative action and how this right is embodied in the South African tax system.

- To increase awareness among taxpayers and tax professionals of the recourse available to taxpayers, in the event that SARS does not adhere to correct administrative procedures stipulated in the TAA, and/or in the event that SARS displays disregard for taxpayers' constitutional right to just administrative action.
- To recognise case law that addresses SARS' failure to comply with tax administrative procedures as provided for in the TAA.
- To determine whether the current recourse available to South African taxpayers experiencing a tax administrative dispute against SARS, can be improved upon using guidance from recourse provided in foreign jurisdictions.

Limitations of Scope

The scope of the research is limited to the analysis of taxpayers' constitutional right to just administration action, per section 33(1) of the Constitution, read together with section 36 of the Constitution. There are further rights contained in Chapter 2 of the Constitution, namely the Bill of Rights, however this dissertation will focus on the right to just administrative action. Section 36 of the Constitution, in certain circumstances, has the effect of limiting the extent to which a right, contained in the Bill of Rights, may be enforced. This limitation will be considered in light of section 33(1), namely, a taxpayers' constitutional right to administrative action that is lawful, reasonable and procedurally fair.

This dissertation considers a taxpayer's constitutional right to just administrative action as it pertains to tax administrative disputes against SARS. Thus, the scope of this dissertation is limited to the recourse that is available to taxpayers who are facing, or will potentially face, tax administrative disputes against a particular revenue authority. This dissertation does not evaluate the recourse that is available to taxpayers who are facing, or will potentially face, tax disputes of a technical⁸ nature against a particular revenue authority.

This dissertation considers the tax administrative procedures contained in the TAA rather than the tax administrative procedures surrounding a specific tax type. The TAA does not govern the Customs and

⁸ A dispute in respect of the merits of a decision taken by a revenue authority.

Excise Act 91 of 1964, thus administrative or dispute resolution procedures pertaining to Customs and Excise Duties have not been explored in this dissertation.

The evaluation of case law is limited to the most prominent and relevant South African case law relevant to tax administration disputes between taxpayers and SARS.

This dissertation considers the tax administrative dispute resolution procedures in Canada, Australia, the UK and the USA in an attempt to draw a comparison with South Africa as well as to consider further possible improvements to South Africa's tax administrative dispute resolution procedures. Canada, Australia, the UK and the USA were considered to be acceptable countries for comparison for the following reasons:

- These countries, like South Africa, follow a common law legal system;
- These countries either have a long-standing Taxpayers' Charter or an enforceable Taxpayers' Bill of Rights (discussed in Chapter 5);
- These countries form part of the Organisation for Economic Co-operation and Development ("OECD"), thus such comparison and recommendations are to be made in order to align South Africa's tax administration with international best practice (Mahadevey, 2016:59);
- These countries have practical experience with tax administrative laws over an extensive period and such countries tax administration practices were observed (Memorandum on the Objects of the Tax Administration Bill, 2011:179); and
- South Africa, the UK, Canada and Australia form part of the Commonwealth of Nations.

Research Approach and Methods

This dissertation employed a qualitative research method that accumulated existing information, case law and the most recently enacted legislation in order to analyse and interpret the TAA, the PAJA and the Constitution.

A comparative approach was employed when considering how the TAA, the PAJA and the Constitution interact within the South African Tax System. The previously mentioned legislations were compared

and analysed in an attempt to create a better understanding of taxpayers' constitutional right to just administrative action and how such right is enforced within the South African tax system.

This dissertation involved an extensive review of South African case law and legislation in an attempt to determine the recourse available to a South African taxpayer facing, or who will potentially face, a tax administrative dispute against SARS.

A comparative and analytical analysis of relevant legislation, case law and other literature was performed in order to establish the recourse available to a taxpayer in South Africa versus the recourse available to a taxpayer in Canada, Australia, the UK and the USA, in respect of tax administrative disputes against the respective revenue authority. The objective of the comparative analysis was to determine recommendations and potential improvements to be introduced into South Africa's current tax legislation in order to better facilitate the protection and defensibility of taxpayers' constitutional right to just administrative action.

Structure of the Dissertation

This dissertation consists of six chapters, the content of these chapters will be briefly discussed below.

Chapter 1 provides an introduction and background to the research problem. The research objectives and research methods are stated as an approach to answering the sub-questions of the research problem.

Chapter 2 of this dissertation provides an overview of the TAA, the PAJA and the Constitution and evaluates how these legislations interact in the South African tax system. This chapter aims to demonstrate how SARS' powers are enacted via the Constitution and how a taxpayer's constitutional right to just administrative action is embodied in the TAA.

Chapter 3 provides a few examples, from the body of South African case law, of SARS' failure to adhere to correct administrative procedures in its interaction with taxpayers.

Chapter 4 evaluates the TAA, the PAJA and the Constitution to determine the extent of recourse available to taxpayers where SARS does not adhere to correct administrative procedures, exercises abuse of power or misconduct in its interactions with taxpayers.

Chapter 5 provides an overview of the recourse available to taxpayers in Canada, Australia, the UK and the USA when interacting with their various revenue authorities. This recourse is in respect of cases where the revenue authority has not followed the correct administrative procedures as required by the respective countries' legislation or where the revenue authority has shown disregard for a taxpayer's rights as embodied in either a Taxpayers' Charter or a Taxpayer Bill of Rights.

Chapter 6 concludes this dissertation, by providing recommendations and potential improvements obtained from the foreign jurisdiction comparison in Chapter 5, to be made to the recourse provided in South Africa as it pertains to administrative disputes against SARS.

CHAPTER 2: HOW DOES THE TAA, THE PAJA AND THE CONSTITUTION INTERACT IN THE SOUTH AFRICAN TAX SYSTEM

Introduction

On 8 February 2008, Dr Beric John Croome presented the following thesis topic for his Degree of Doctor of Philosophy at the University of Cape Town –

*"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".*
(the emphasis of this dissertation)

Upon conclusion of the above research topic, Croome concluded that "*taxpayers and the Commissioner are not fully aware of the impact of the procedural rights contained in the Constitution, Act 108 of 1996*" (Croome, 2008:iii). According to Patricia Williams, the Constitution of the Republic of South Africa, 1996⁹ ("**the Constitution**"), the Promotion of Administrative Justice Act of 2000¹⁰ ("**the PAJA**") and various other legal provisions will protect South Africans from the "*do as they please*" attitude of administrative bodies (Visser, 2018d).

The lack of knowledge pertaining to procedural rights in the context of the South Africa Tax System may be due to the unfamiliarity that taxpayers have of the Constitution, the PAJA and the Tax Administration Act of 2011¹¹ ("**the TAA**"). Accordingly, this chapter aims to investigate the administrative rights that taxpayers are granted via the Constitution, the PAJA and the TAA and how such legislation interacts in the relationship between taxpayers and the South African Revenue Service ("**SARS**").

⁹ The Constitution of the Republic of South Africa, 1996, was signed into law by President Nelson Mandela on 10 December 1996 and came into effect on 4 February 1997 (Currie & de Waal, 2005:7).

¹⁰ The Promotion of Administrative Justice Act 3 of 2000.

¹¹ The Tax Administration Act 28 of 2011.

Overview of the Constitution

In 1994, the first democratic elections were held in the Republic of South Africa. This resulted in South Africa's move from a doctrine of parliamentary sovereignty to a doctrine of constitutional supremacy (Currie & de Waal, 2005:2). South Africa became a constitutional democracy, via the enactment of the Constitution, and as a result the Constitution became the supreme law and no legislation in contravention thereof would be permitted to exist (Friedland, 2003).

In accordance with section 1(c) of the Constitution:

"The Republic of South Africa is one, sovereign, democratic state founded on the following values:

...

(f) Supremacy of the constitution and the rule of law".

Furthermore, section 2 of the Constitution provides that:

"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".

The abovementioned concept of the 'supremacy of the constitution' and the 'supreme law' is commonly referred to as the "principle of legality" (Myburgh, 2016).

The current Constitution of 1996 replaced the Interim Constitution of the Republic of South Africa of 1993¹² ("**the Interim Constitution**"). The Interim Constitution was enacted temporarily while the Current Constitution was being finalised (Croome, 2008:10).

¹² Any reference made to the Constitution will be to the Constitution of the Republic of South Africa, 1996. Any reference made to the Interim Constitution of the Republic of South Africa, Act 200 of 1993, will be noted as such.

SARS' powers are subject to the Constitution

Section 213(1) of the Constitution provides that there is a National Revenue Fund into which all money received by the national government must be paid, except money reasonably excluded by an Act of Parliament. Section 12(1) of the Public Finance Management Act of 1999 ("**the PFMA**"), requires SARS to deposit all the taxes, levies, duties, fees and other moneys collected by SARS into the Revenue Fund. The term 'Revenue Fund' is defined in section 1(a) of the PMFA as "*the National Revenue Fund mentioned in section 213 of the Constitution*". Thus, in determining whether the Constitution grants SARS the power to tax, Croome (2008:15) finds that the Constitution does not explicitly confer on SARS the power to levy tax, however the interaction of the above provisions imply this.

In terms of section 4(2) of the South African Revenue Service Act 34 of 1997 ("**SARS Act**"), SARS must exercise its power in accordance with the values and principles as stipulated in section 195 of the Constitution. Section 195 of the Constitution, embodied in Chapter 10 of the Constitution, lists the basic values and principles governing public administration. Per section 195(2), the principles listed in section 195(1) apply to:

- (a) *"administration in every sphere of government;*
- (b) *organs of state; and*
- (c) *public enterprises".*

In terms of section 2 of the SARS Act¹³, SARS is established as an organ of state. Furthermore, section 239 of the Constitution defines 'organ of state' as follows:

- (a) *"any department of state or administration in the national, provincial or local sphere of government; or*
- (b) *any other functionary or institution—*
 - (i) *exercising a power or performing a function 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, but does not include a court or a judicial officer;"*

¹³ Section 2 of SARS Act reads as follows – "*The South African Revenue Service is hereby established as an organ of state within the public administration, but as an institution outside the public service*".

In accordance with the interplay of the above legislation, SARS is an organ of state and is thus required to adhere and uphold the values and principles enshrined in section 195 of the Constitution.

The Bill of Rights

The Bill of Rights is contained in Chapter 2 of the Constitution, which was first introduced by the Interim Constitution¹⁴ and forms the cornerstone of democracy in South Africa. The introduction of the Bill of Rights was a major component of the Constitution's plan to make a positive transformation to South African society and the political and legal systems (Currie & de Waal, 2005:1).

Prior to the introduction of the Interim Constitution, there was no formal documented or enacted Bill of Rights and thus people had limited rights in their interaction with the *fisc* (Croome, 2008:8). Accordingly, taxpayers did not have the right to just administrative action and could thus not enforce such right, should the revenue authority display disregard for administrative procedures or display unjust conduct towards taxpayers. The only rights taxpayers had, before the introduction of the Bill of Rights, was to expect administrative bodies (such as a tax authority) to adhere to the general principles of administrative law. The general principles of administrative law contain the "*principle of audi alteram, that is, hear the other side, and the common law principles of judicial review of administrative acts*" (Croome & Olivier, 2015:571).

The Constitution awards the state with powers, while the Bill of Rights ensures that such powers are exercised by the state without infringing on a person's fundamental rights. In the event that the state fails to uphold a person's fundamental rights by exercising its powers, such action will be unconstitutional, unlawful and consequently, invalid (Currie & de Waal, 2005:23). Furthermore, the introduction of the Bill of Rights provides a set of rights by which, not only the state's actions, but SARS' actions can be evaluated against (Croome & Olivier, 2015:571).

Section 33(1) of the Constitution, the focus of this dissertation, forms part of the Bill of Rights and mandates that everyone has the right to just administrative action that is lawful, reasonable and

¹⁴ The Interim Constitution came into force on 27 April 1994 (Currie & de Waal, 2005:2).

procedurally fair. SARS, as an organ of state¹⁵, is subject to the Bill of Rights¹⁶ and must respect, promote and fulfil these fundamental rights¹⁷.

Limitation of rights

The Commissioner is afforded discretionary powers per its empowering legislation and must exercise such power reasonably. In the event where a taxpayer feels that SARS' powers are not in line with the Bill of Rights or SARS has infringed upon a fundamental right by limiting such right, a taxpayer is required to consider section 36 of the Constitution to determine whether such limitation is valid (Croome, 2010:14). Thus, the rights contained in the Bill of Rights are not absolute and such rights are subject to limitation in terms of section 36 of the Constitution.

"36 Limitation of rights

- (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".*

According to Currie & de Waal (2005:164), the word 'limitation' can be compared to a 'justifiable infringement', accordingly "A law that limits a right infringes the right". In the event that a right is infringed upon, such person performing the infringement, will be required to discharge the onus of such valid limitation in accordance with section 36(1) of the Constitution (Currie & de Waal,

¹⁵ SARS is an organ of state in accordance with section 2 of the SARS Act and section 239 of the Constitution.

¹⁶ Section 8(1) of the Constitution provides that "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state".

¹⁷ Section 7(2) of the Constitution provides that "The state must respect, protect, promote and fulfil the rights in the Bill of Rights".

2005:185). Should a right be limited without being classified as a valid limitation (i.e. the right will be unreasonable and unjustifiably infringed upon), an appropriate remedy will be sought by the aggrieved party (Currie & de Waal, 2005:27).

Overview of the PAJA

Section 33 of the Constitution, which forms part of the Bill of Rights, enshrines the right people have to just administrative action. Specifically, the right to administrative action that is lawful, reasonable and procedurally fair¹⁸. Any person whose right to just administrative action and who has been materially and adversely affected by administrative action, has the right to be given written reasons¹⁹. Before the enactment of the Interim Constitution, taxpayers had no legal ground to request SARS to provide reasons for a certain action or decision (Croome, 2010:203).

The Constitution provides, per section 33(3), that National legislation must be enacted to give effect to the right to just administrative action. Accordingly, the Parliament of the Republic of South Africa ("**Parliament**") promulgated the Promotion of Administrative Justice Act ("**the PAJA**") as such National legislation to give effect to such right (Mulder, 2014:1).

The PAJA provides legislation by which certain classes of administrative action may be reviewed and provides legislation that administrators are required to adhere to before certain actions are taken (Currie & de Waal, 2005:644). In accordance with the preamble of the PAJA, Parliament enacted the PAJA in order to –

" promote an efficient administration and good governance; and*

** create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action,"*

Before the enactment of the PAJA, any challenges against the validity of administrative action were instituted via the constitutional right to just administrative action, which was interpreted through

¹⁸ Section 33(1) of the Constitution.

¹⁹ Section 33(2) of the Constitution.

reference to common law (Currie & de Waal, 2005:647). The Parliament's enactment of the PAJA was a step in the right direction in terms of progressing administrative law in South Africa and giving effect to the constitutional right to just administrative action. There is no longer any reliance on common law when enforcing the constitutional right to just administrative action. This is confirmed in the case of *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others*²⁰ where it was held that the power of the courts to review administrative action no longer stems from common law but rather from the PAJA and the Constitution itself.

SARS' powers are subject to the PAJA

Section 1 of the PAJA defines 'administrative action' as follows:

"administrative action" means 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, but does not include ...".

Furthermore, Section 1 of the PAJA defines 'decision' as follows:

"decision" means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to – ...".

SARS is an organ of state²¹, thus, for SARS' decisions and/or actions to be subject to the provisions of the PAJA, such decisions and/or actions taken by SARS, or the lack of an action/decision taken by

²⁰ (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000)

²¹ SARS is an organ of state in accordance with Section 2 of the SARS Act and Section 239 of the Constitution.

SARS, is required to comply with all aspects of the above definition of 'administrative action'. Furthermore, for a taxpayer to rely on PAJA to challenge the conduct of SARS, such conduct must constitute 'administrative action' (Croome, 2010:204).

In applying the 'administrative action' definition, it is evident that in order for the conduct of an organ of state (i.e. SARS in this case) to meet such definition, such action, decision or conduct of SARS must comply with the following elements of the definition:

1. any decision taken (including a proposed decision); or
2. any failure to take a decision;
3. of an administrative nature;
4. made under an empowering provision;
5. by an organ of state;
6. where such decision or lack thereof has the effect of adversely affecting the rights of any person; and
7. where such decision or lack thereof has a direct, external legal effect (Mulder, 2014:7; Currie & de Waal, 2005:654).

Overview of the TAA

The Tax Administration Act 28 of 2011 ("**the TAA**") was promulgated in Government Gazette No. 35491 on 4 July 2012 and came into effect on 1 October 2012 (Haupt, 2017:984). The introduction of the TAA brought with it new tax administration concepts and terms while simultaneously aligning and consolidating into one piece of legislation tax administration provisions, that were either generic or duplicated, in the various other tax Acts (Klopper, 2015:13).

Per section 4 of the TAA, the TAA applies to SARS and every person who is liable to comply with a provision of a tax Act. The TAA defines 'tax Act' to mean the TAA or an Act, or portion of an Act, referred to in section 4 of the SARS Act, excluding customs and excise legislation²². In the event that the TAA is silent, with regard to the administration of a specific tax Act (tax Acts listed in Schedule 117 of the SARS Act) and such tax Act contains administrative provisions, the provisions of such tax

²² Section 4 of the SARS Act refers to national legislation listed in Schedule 1. See Annexure A providing Schedule 1 of the SARS Act, which lists legislation or parts thereof that fall under the term "tax Act" in the TAA.

Act will apply. Furthermore, where there is an inconsistency between the administrative provisions in the tax Act in comparison to the TAA, the respective tax Act will prevail.

The purpose of the TAA is clearly provided for in section 2 of the TAA, which provides that:

"The purpose of this Act is to ensure the effective and efficient collection of tax by—

- (a) aligning the administration of the tax Acts to the extent practically possible;*
- (b) prescribing the rights and obligations of taxpayers and other persons to whom this Act applies;*
- (c) prescribing the powers and duties of persons engaged in the administration of a tax Act; and*
- (d) generally giving effect to the objects and purposes of tax administration".*

From the above stated objectives, it is evident that the TAA aspires to create a balance between the rights and obligations of taxpayers and the powers and duties of SARS. P Klopper (2015) performed an evaluation of the TAA with reference to its stated objectives. The conclusion of such study was that, in general, the TAA fails to meet its stated objectives. P Klopper specifically found that, concerning information gathering, there is an imbalance between the remedies available to taxpayers and the powers afforded to SARS via the TAA. Thus, in the event where SARS abuses its powers the taxpayer does not have sufficient remedies to protect its rights (Klopper, 2015:x).

Interaction between the TAA, the PAJA and the Constitution

SARS is required to comply with its own empowering legislation, in this case the Tax Administration Act 28 of 2011 ("**the TAA**"). Furthermore, SARS is expected to adhere to its empowering legislation while upholding and promoting taxpayers' constitutional rights²³ (Croome, 2017).

The 'principle of legality', established by the Constitutional court, stipulates that public bodies are expected to exercise their power in a lawful, reasonable and procedurally fair manner (Zerbst, 2013). The right to just administrative action is expected to directly influence the manner in which SARS makes a decision or interacts with a taxpayer. Thus, such decisions or actions by SARS should be

²³ *Vuyisile Zamindlela Nondabula v The Commissioner: SARS & Another (4062/2016) [2017] ZAECMHC 21 [79 SATC 333]*

performed in a lawful, reasonable and procedurally fair manner in order to comply with the Constitution and the PAJA (de Lange & van Wyk, 2017:1).

The introduction of the right to just administrative action as part of the Bill of Rights in the Constitution, has provided taxpayers with protection and recourse should such right be infringed upon via unconstitutional legislation and/or unconstitutional conduct by SARS (Mulder, 2014:31). The issue that arises, as evidenced by Croome's (2008) research discussed above, is that both SARS and the taxpayer are not familiar with their constitutional rights and obligations. Thus, should there be an infringement of such right or disregard for such obligation by SARS, an unaware and uninformed taxpayer will endure such infringement and not seek rectification which the taxpayer may be entitled.

Where a taxpayer is dissatisfied with the technical merits of an action or decision taken by SARS, such taxpayer has the right to request reasons for such decision, object to such decision or appeal such decision in accordance with Chapter 9 of the TAA and the Rules promulgated under section 103 of the TAA. However, where an action or decision is not subject to Chapter 9 of the TAA (i.e. such action or decision cannot be objected to or appealed against), and such action or decision constitutes 'administrative action', the taxpayer may be entitled to request reasons²⁴ of such decision or request a review of such decision in terms of the PAJA (Croome & Olivier, 2015:571).

Conclusion

The introduction of the Interim Constitution resulted in the debut of the right to administrative justice. This right was further included under Chapter 2, the Bill of Rights, in the Final Constitution²⁵. This right to just administrative action has reformed the way in which the Commissioner of SARS governs, or at least is expected to govern, the tax affairs of South Africa (Croome, 2008:148).

In the context of the South African Tax System, the interaction between the Constitution, the PAJA and the TAA is seen when the Commissioner of SARS does not follow due procedure when making a decision, omits to make a decision or exercises misconduct in its interaction with taxpayers. Where SARS' actions or decisions, or lack thereof of an action or decision, meet the definition of 'administrative action' per the PAJA, such action, decision or conduct by SARS may be challenged by taxpayers using the TAA, the PAJA and ultimately the Constitution.

²⁴ Section 5 of the PAJA

²⁵ Constitution of the Republic of South Africa, 1996.

The TAA grants extensive powers to SARS. However, taxpayers and tax professional must be cognizant to the fact that SARS has an obligation to exercise such powers in line with the TAA, while adhering to taxpayers' fundamental rights provided in the Constitution. When interacting with SARS, taxpayers and tax professionals are advised to be attentive of taxpayers' rights and SARS' duties and obligations. Such mindfulness during interactions with SARS, will assist taxpayers and tax professionals in identifying the appropriate remedy at the appropriate time, should SARS infringe upon a taxpayers' rights or disregard its duties and obligations per the TAA and the Constitution (Myburgh 2016).

CHAPTER 3: AN OVERVIEW/EVALUATION OF SARS' FAILURE TO ADHERE TO CORRECT ADMINISTRATIVE PROCEDURES IN ITS INTERACTION WITH TAXPAYERS

Introduction

The Tax Administration Act, 28 of 2011 ("**the TAA**") governs the procedural interaction between a taxpayer and the South African Revenue Service ("**SARS**") by providing for the rights and obligations of taxpayers and the powers and duties of SARS.

It is more likely than not for a taxpayer to pass up on their rights, awarded to them by the TAA, if such taxpayer has no knowledge of such rights and obligations. Similarly, if a taxpayer is not aware of the powers and duties afforded to SARS by the TAA, this may provide SARS with the opportunity to abuse its power and take advantage of an unaware taxpayer.

Taxpayers are experiencing tough economic times with unrelenting increases in costs that are not mirrored by an equal increase in revenues. Thus, it has become essential for taxpayers to become more aware of their constitutional rights in their interactions with SARS, as well as for taxpayers to gain knowledge of SARS' constitutional obligations when it enforces the tax legislation that empowers it (Govind, 2018).

There is a consensus among taxpayers and tax professionals, obtained from practical experience, that SARS more often than not exercises disregard for its own empowering legislation. For example, according to Duvenage (2018a), "*when SARS requires a taxpayer to submit documents, 21 days are 21 days. However, when SARS is required to consider a taxpayer request, 21 days mean one month (or more, depending on whether there is distortion by a heavy object; say a refund due to the taxpayer at the end of the SARS financial year*". Furthermore, there is a common perception among taxpayers and tax professionals that the TAA does not provide for an adequate balance of power between a taxpayer and SARS. For example, "*A taxpayer has 30 business days to submit an objection to an assessment, while SARS has 60 business days to make a decision on the objection*" (Duvenage, 2018a).

Both SARS and the taxpayer are obliged to adhere to due procedure as provided for in the TAA, if one party is seen not to be adhering to the required process a judge may rule against such party on the

grounds that such party did not follow due process (Office of the Tax Ombud, 2018). This chapter aims to provide a discussion of South African case law that demonstrates how SARS has exercised disregard for due process as required by the TAA and how the court ruled on such matters.

Manner in which SARS raises an additional assessment

In a recent judgment of *Vuyisile Zamindlela Nondabula v The Commissioner: SARS & Another* (4062/2016) [2017] ZAECMHC 21 [79 SATC 333], Acting Judge Jolwana dealt with the interaction and application of sections 92, 95 and 96 of the TAA and how these sections of the TAA interact when an additional assessment is raised by SARS.

Discussion of the facts in *V Z Nondabula v CSARS & Another*

The applicant, a sole proprietor of a fuel service station, prior to this judgement, had a cordial relationship with the first respondent (namely, SARS) evidenced by its history of tax compliance and timeous settlement of tax debt on assessment by SARS (79 SATC 333 at 2-3).

The issue that led to the matter being brought for adjudication in the Eastern Cape High Court, was a result of SARS raising an additional assessment without providing the applicant with sufficient notice of such additional assessment (commonly referred to as an ITA34), nor was the basis provided on which such additional assessment was raised (79 SATC 333 at 4).

The additional assessment was brought to the applicant's attention by means of a letter, dated 29 September 2016, whereby SARS expressed that the applicant had failed to pay an amount of income tax and that such payment was to be made within 10 days, failing which further action would be taken. A statement of account, that reflected a balance of income tax payable, and a letter of final demand, requesting payment of the outstanding tax debt to be paid within 10 days, preceded the abovementioned letter. However, all the above forms of notification and correspondence omitted to provide the basis on which the additional assessment was raised (79 SATC 333 at 4).

The statement of account was the only attempt that SARS made to notify the applicant of the basis on which the outstanding income tax arose. This notification was simply a single line item on the statement of account disclosing that an additional assessment had been raised for the 2014 year of

assessment. Thus, there was no attempt by SARS to provide an explanation of the basis on which the additional assessment was determined (79 SATC 333 at 5).

The applicant objected to the additional assessment, however SARS responded by objecting on the basis that such objection did not comply with the Rules promulgated under section 103 of the TAA. The applicant delivered an additional objection via the SARS electronic filing system (commonly referred to as e-Filing). The applicant's accountant subsequently wrote a letter to SARS whereby the applicant provided further documentation and requested SARS to re-examine the raising of the additional assessment and to simultaneously note the applicant's objection (79 SATC 333 at 9-10).

The applicant and SARS were in continuous communication, however at no point during these communications did SARS provide the applicant with an explanation or legal basis to support the basis on which the additional assessment was raised (79 SATC 333 at 10).

The applicant did not settle the allegedly outstanding debt while its objection was still being considered by SARS. In this time, SARS invoked the provision of section 179²⁶ of the TAA and issued a Third Party Notice requesting such third party (the second respondent of this case) to settle the applicant's outstanding tax debt.

Discussion of the findings in V Z Nondabula v CSARS & Another

Section 92 of the TAA provides the following –

"If at any time SARS is satisfied that an assessment does not reflect the correct application of a tax Act to the prejudice of SARS or the fiscus, SARS must make an additional assessment to correct the prejudice".

Acting Judge Jolwana, was of the opinion that according to the facts presented and taking into account SARS' answering affidavit²⁷, it appears that SARS raised such additional assessment in accordance

²⁶ "A senior SARS official may authorise the issue of a notice to a person who holds or owes or will hold or owe any money, including a pension, salary, wage or other remuneration, for or to a taxpayer, requiring the person to pay the money to SARS in satisfaction of the taxpayer's outstanding tax debt".

²⁷ "[F]rom this information, it was concluded that the applicant had failed to make proper and lawfully due declarations and this accordingly triggered a situation where SARS was not satisfied that the applicant's assessment reflected the correct application of the Tax Act and that same was to the prejudice of SARS or the

with section 92 of the TAA (79 SATC 333 at 14). However, section 92 of the TAA is required to be read in parallel with section 95 of the TAA, as SARS is unable to make an additional assessment before performing an estimation of such assessment (79 SATC 333 at 15). Section 95 of the TAA provides as follows –

(1) "SARS may make an original, additional, or reduced or jeopardy assessment based in whole or in part on an estimate if the taxpayer –

(a) fails to submit a return as required; or

(b) submits a return or information that is incorrect or inadequate.

(2) SARS must make the estimate based on information readily available to it".

Based on SARS' answering affidavit²⁸, SARS raised the additional assessment as the applicant's interest income, which was disclosed in his tax return, did not agree to the amount of interest income reflected on the bank account held by the applicant. Thus, in applying section 95 quoted above, SARS was in possession of information that revealed that the applicant had submitted a return or information that was incorrect or inadequate. Accordingly, SARS raised an additional assessment based on information that was readily available to it in terms of section 95(2) of the TAA (79 SATC 333 at 18).

When SARS became aware that such estimate could be made, in accordance with section 95, and as a result an additional assessment raised, in accordance with section 92, SARS was then required to have complied with section 96 of the TAA (79 SATC 333 at 19).

Section 96 of the TAA provides as follows -

(1) "SARS must issue to the taxpayer assessed a notice of the assessment made by SARS stating–

(a) the name of the taxpayer;

fiscus. On this basis SARS was under a legal obligation to make an additional assessment to correct the prejudice" [79 SATC 333 at 14].

²⁸ *"What prompted the additional assessment was the fact that the applicant, in the tax return that he submitted for the period, had declared interest income to the value of R0.00 (nil) and same did not match the interest income amount of R 32 734.00 (thirty two thousand seven hundred and thirty four rand) for account number 000 000 919 946 9411 held by the applicant at ABSA" (79 SATC 17).*

- (b) the taxpayer's taxpayer reference number, or if one has not been allocated, any other form of identification;*
- (c) the date of the assessment;*
- (d) the amount of the assessment;*
- (e) the tax period in relation to which the assessment is made;*
- (f) the date for paying the amount assessed; and*
- (g) a summary of the procedures for lodging an objection to the assessment.*

(2) In addition to the information provided in terms of subsection (1) SARS must give the person assessed

- (a) in the case of an assessment described in section 95 or an assessment that is not fully based on a return submitted by the taxpayer, a statement of the grounds for the assessment, and*
- (b) in the case of a jeopardy assessment, the grounds for believing that the tax would otherwise be in jeopardy”.*

In applying section 96 of the TAA to the correspondence and documentation issued by SARS to the applicant, it is evident that SARS did not adhere to all aspects of section 96. Specifically, the statement of account, in which the additional assessment is reflected, and the letters issued by SARS requesting payment of the outstanding amount, did not contain the required information stipulated in section 96 of the TAA. Most notably, SARS did not provide a statement of grounds for raising the additional assessment as required by section 96(2)(a) of the TAA (79 SATC 333 at 20). However, SARS omitted to explain the reason behind its non-compliance with section 96 and did not claim to have complied with such section (79 SATC 333 at 20).

As SARS “*is a creature of statute*”, it is fair to assume that SARS will “*operate within the four corners of the statutory provisions which empower it*” (79 SATC 333 at 11). The provisions of the TAA are the statutory provisions of focus in this case. SARS is governed by the TAA and should accordingly operate within its bounds. SARS “*therefore cannot do anything not specifically provided for in the Act²⁹ or some other legislation nor can it conduct itself contrary to the provisions of the Act*” (79 SATC 333 at 11).

The issuance of the Third Party Notice, in accordance with section 179(1) of the TAA, had the effect of closing down the applicant’s business. This resulted in the applicant having to retrench its employees,

²⁹ Specifically, the Tax Administration Act, 28 of 2011.

in a country where unemployment is widespread and distressing (79 SATC 333 at 22 and 25). SARS did not comply with section 96 of the TAA, nor did it consider the destructive impact of invoking section 179(1) of the TAA. These actions by SARS are *"not only unlawful, but a complete disregard of the doctrine of legality which is a requirement of the rule of law in a constitutional democracy"* (79 SATC 333 at 22).

The following direct quote, by the Acting Judge Jolwana, concludes this case in favour of the applicant:

"The least that is expected of the first respondent is to comply with its own legislation and most importantly promote the values of our Constitution in the exercise of its public power. This, the first respondent failed to do. In failing to provide the applicant with all the information prescribed in terms of section 96 which the first respondent was obliged to provide the applicant, it acted unlawfully and unconstitutionally" (79 SATC 333 at 26).

Key points from *V Z Nondabula v CSARS & Another*

The case of *V Z Nondabula v CSARS & Another*, is a prime example of how SARS does not adhere to proper administrative procedures, as stipulated in its own empowering legislation, in this instance the TAA. It is fair for taxpayers and tax professional to assume that SARS has upheld its duties under the respective legislation that empowers it, however this case has shown how it is in a taxpayer's best interest to be sceptical of SARS in order to adequately defend their rights.

In an earlier case of *CSARS v Pretoria East Motors (Pty) Ltd (291/12) [2014] ZASCA 91*, the Supreme Court of Appeal criticised the appellant (namely, SARS) for the method it adopted in raising additional Income Tax and Value-Added Tax assessments. Such method involved Ms Jacqueline Victor, the SARS official allocated to conduct the audit of the respondent, examining the respondents accounts and raising additional assessment in the event of a discrepancy that she did not understand (3 All SA 266 (SCA) at 9).

The Supreme Court of Appeal strongly disagreed with SARS' method in raising additional assessments and expressed the following:

"Her approach was fallacious. The raising of an additional assessment must be based on proper grounds for believing that, in the case of VAT, there has been an under declaration

of supplies and hence of output tax, or an unjustified deduction of input tax. In the case of income tax it must be based on proper grounds for believing that there is undeclared income or a claim for a deduction or allowance that is unjustified. It is only in this way that SARS can engage the taxpayer in an administratively fair manner, as it is obliged to do. It is also the only basis upon which it can, as it must, provide grounds for raising the assessment to which the taxpayer must then respond by demonstrating that the assessment is wrong” (3 All SA 266 (SCA) at 11).

Both cases, namely *V Z Nondabula v CSARS & Another* and *CSARS v Pretoria East Motors (Pty) Ltd*, emphasise that SARS is prohibited from freely issuing additional assessments without properly engaging with the taxpayer. In the event that an additional assessment is required to be raised, SARS is required to engage with the taxpayer in an administratively fair manner in accordance with the provisions of the TAA. This will involve SARS providing adequate grounds for believing that an additional assessment should be raised, in order for the taxpayer to be able to respond to such grounds appropriately, either by accepting the grounds or objecting to such grounds should the taxpayer be in disagreement.

Manner in which SARS conducts an audit

In the case of *Mr. A v CSARS (IT13726) [2018]* (as yet unreported), a recent judgement by the Tax Court of Port Elizabeth, it is encouraging to see how SARS was reprimanded and penalised for not following correct procedure, when subjecting a taxpayer to an audit in terms of section 40 and 42 of the TAA (Mathatho & Wilson, 2018:6-7).

Discussion of the facts in *Mr. A v CSARS (IT13726)*

The appellant’s employment as the Chief Executive Officer of XYZ Pty Ltd came to an end in 2012. On resignation, the appellant received a lump sum payment from his employer. In addition to the appellant’s employment at XYZ Pty Ltd, the appellant traded as a cattle farmer in South Africa (IT13726 at 1).

In his income tax return for the 2012 year of assessment, the appellant treated this lump sum payment received as a severance benefit and accordingly did not subject such amount to tax. The

appellant also sought to claim his farming expenditure as a deduction in his 2012 income tax return (IT13726 at 2-3).

The respondent (namely, SARS), raised an additional assessment in respect of the appellant's 2012 year of assessment on the basis that such farming expenditure did not qualify for a deduction and that such lump sum payment received on resignation did not qualify as a severance benefit and was thus fully taxable (IT13726 at 4-5).

The appellant objected to this additional assessment and SARS subsequently rejected such objection, resulting in the present appeal by the appellant (IT13726 at 6-7). SARS purported, as a ground of assessment in opposition to the appeal, that during SARS' audit of the appellant it was revealed that the lump sum payment received by the appellant was incorrectly treated as a severance benefit by the appellant in its 2012 income tax return (IT13726 at 12).

The reference made to an audit by SARS in its grounds of assessment, was the first time that the appellant was made aware of such an audit having taken place. The appellant was thus not aware that such an audit had commenced or that SARS had drawn findings from such audit (IT13726 at 18).

Discussion of the findings in Mr. A v CSARS (IT13726)

The technical merits of the judgement will not be considered, rather, the procedural point *in limine*³⁰ will be discussed. Based on the above summarised facts, Judge Revelas was required to determine the following points *in limine*:

- whether the audit conducted by SARS, prior to SARS having issued the 2012 additional assessment, was valid; and
- whether the additional assessment raised, as a consequence of such audit findings, was valid.

³⁰ A technical matter requiring determination before the trial commences concerning the legitimacy of a particular issue.

Section 40 of the TAA stipulates when SARS may select a person for inspection, verification or audit, while section 42 of the TAA governs how SARS is required to keep a taxpayer informed during an audit. Section 40 and 42 of the TAA are provided below and will be applied to the above facts of the case.

“40. Selection for inspection, verification or audit.—

“SARS may select a person for inspection, verification or audit on the basis of any consideration relevant for the proper administration of a tax Act, including on a random or a risk assessment basis”.

“42. Keeping taxpayer informed.—

- (1) *A SARS official involved in or responsible for an audit under this Chapter must, in the form and in the manner as may be prescribed by the Commissioner by public notice, provide the taxpayer with a report indicating the stage of completion of the audit.*
- (2) *Upon conclusion of the audit or a criminal investigation, and where—*
 - (a) *the audit or investigation was inconclusive, SARS must inform the taxpayer accordingly within 21 business days; or*
 - (b) *the audit identified potential adjustments of a material nature, SARS must within 21 business days, or the further period that may be required based on the complexities of the audit, provide the taxpayer with a document containing the outcome of the audit, including the grounds for the proposed assessment or decision referred to in section 104 (2).*
- (3) *Upon receipt of the document described in subsection (2) (b), the taxpayer must within 21 business days of delivery of the document, or the further period requested by the taxpayer that may be allowed by SARS based on the complexities of the audit, respond in writing to the facts and conclusions set out in the document.*
- (4) *The taxpayer may waive the right to receive the document.*

- (5) *Subsections (1) and (2) (b) do not apply if a senior SARS official has a reasonable belief that compliance with those subsections would impede or prejudice the purpose, progress or outcome of the audit.*
- (6) *SARS may under the circumstances described in subsection (5), issue the assessment or make the decision referred to in section 104 (2) resulting from the audit and the grounds of the assessment or decision must be provided to the taxpayer within 21 business days of the assessment or the decision, or the further period that may be required based on the complexities of the audit or the decision”.*

SARS raised an additional assessment based on the findings obtained from its audit of the appellant. However, SARS failed to make the appellant aware of such audit in respect of the commencement and stage of completion thereof, as required by section 42(1) of the TAA (IT13726 at 22). Furthermore, SARS did not notify the appellant of the completion and outcome of such audit as required by section 42(2)(b) of the TAA. In the absence of such conclusion of the audit being relayed to the appellant, the appellant was unable to respond to such audit findings in accordance with section 42(3) of the TAA (IT13726 at 23).

The audit was thus conducted by SARS with disregard to its own empowering legislation, specifically section 42(1), 42(2)(b) and 42(3) of the TAA and is as a result thereof, a procedurally flawed audit (IT13726 at 19). Therefore, SARS based the 2012 additional assessment, on grounds that it obtained from a procedurally flawed audit. Accordingly, Judge Revelas found the additional assessment to be invalid (IT13726 at 30).

Key points from Mr A v CSARS (IT13726)

The case of *Mr A v CSARS (IT13726)*, dealt with section 40 and 42 of the TAA and how these sections impose duties on SARS in order to give effect to the right to just administrative action per section 33 of the Constitution. This case is testament to how vital it is for taxpayers and tax professionals to be aware of a taxpayer’s rights and obligations under the TAA as well as the bounds in which SARS is authorised to operate.

Manner in which SARS enforces the 'pay now, argue later' principle

The 'pay now, argue later' principle is housed in section 164(1) of the TAA and stipulates that a taxpayer's obligation to pay an outstanding tax debt will not be suspended by the objection or appeal process. The case of *A Way to Explore v CSARS (23896/17) [2017] ZAGPPHC 541 [80 SATC 211]*, is concerned with SARS exercising its power to recover the outstanding tax debt via its right to set-off amounts owed by the taxpayer against refunds due from SARS.

Discussion of the facts in *A Way to Explore v CSARS*

The applicant, a privately owned company, recruits English-speaking South Africans on behalf of North American employers. The applicant is thus providing a service to a non-resident, which is zero-rated in terms of section 11(2)(1) of the Value-Added Tax Act 89 of 1991 (80 SATC 211 at 5). On submission of the applicant's November 2015 Value-Added Tax Return (referred to as a "**VAT 201 return**"), the applicant was notified by the respondent (namely, SARS) that such return had been selected for verification in accordance with section 40³¹ of the TAA. SARS informed the applicant that such declaration had been identified for verification due to variances in the applicant's VAT 201 submission. The applicant was required to meet such request within 21 days from the date of the notification (80 SATC 211 at 6).

The applicant declared that the relevant documents were uploaded timeously on the SARS electronic filing system³². However, the applicant subsequently received an additional notice from SARS notifying the applicant that it had not yet responded to SARS verification request. This was followed by an additional verification request by SARS in respect of the same VAT period, which was followed by a reminder and a final request (80 SATC 211 at 8).

The applicant was of the view that it was not necessary to provide a response to the additional requests and reminders as the applicant had already delivered the relevant information via upload on e-Filing (80 SATC 211 at 8). A similar turn of events took place in respect of the applicant's January 2016 VAT 201 return submission (80 SATC 211 at 9).

³¹ Section 40 of the TAA allows for SARS to select a person arbitrarily for an inspection, verification or audit. This selection may be based on a risk assessment or any consideration that SARS believes is relevant for the proper administration of the TAA (80 SATC 211 at 32).

³² Commonly referred to as e-Filing.

After an extensive period, the applicant had still not received a response from SARS in respect of the delivered (uploaded via e-Filing) documentation for the November 2015 and January 2016 VAT periods. Accordingly, the applicant's accountant made enquiries with SARS, at which point the applicant was advised, for the first time, that the matter was currently under audit (80 SATC 211 at 10). Shortly after this enquiry, SARS raised additional VAT assessments in respect of both the November 2015 and January 2016 VAT periods on the basis that the applicant had not discharged the burden of proof in respect of its zero-rated services (80 SATC 211 at 11).

The applicant was not notified by SARS when such audit had identified potential adjustments to be raised via an additional assessment. Furthermore, SARS did not provide the applicant with the outcome of the audit, nor the opportunity for the applicant to respond to such audit findings (80 SATC 211 at 14). The applicant was not satisfied with the additional assessments raised and accordingly exercised its right to object to such assessments in accordance with section 104 of the TAA (80 SATC 211 at 23). Pending SARS' decision on this objection, SARS proceeded to set-off the applicant's refunds owed to SARS against the value of the additional assessments (80 SATC 211 at 24).

The applicant was of the view that it had been subjected to unreasonable administrative action, and accordingly sought relief under the Promotion of Administrative Justice Act 3 of 2000 ("**the PAJA**").

Discussion of the findings in *A Way to Explore v CSARS*

The court was requested to not consider the merits or technical basis on which the assessments were raised (80 SATC 211 at 3).

SARS failed to comply with section 42 (2)(b) of the TAA, which provides that SARS is required to notify a taxpayer when the audit has identified potential adjustments to be raised via an additional assessment. Furthermore, SARS failed to comply with section 42(3) by not providing the applicant with the outcome of the audit on which the applicant is entitled to provide a response to such findings (80 SATC 211 at 14). Accordingly, the applicant sought to have the additional assessments declared invalid and consequently set aside.

The court was unable to set aside the additional assessments as the applicant's objection was still pending and as a result thereof the internal remedies had not been exhausted. In accordance with section 7(2)(a) of the PAJA, only once all internal remedies have been exhausted may such administrative action come under review (80 SATC 211 at 38).

Judge Khumalo made the following comment in deciding to suspend the set-off by SARS pending finalisation of the objection:

"... I find it iniquitous and excessive that whilst the process of objection is still pending, the Respondent proceeded to effect a set-off payment, especially under circumstances where the Applicant was not alerted or afforded an opportunity to make submissions to Respondent's intension to implement a corrective payment after the assessment. It would therefore be just and curb any prejudice on the Applicant, if the effect of the decision to set-off is suspended pending the outcome of the process of objection and for the Applicant to be afforded an opportunity to comment or make submission on the set-off" (80 SATC 211 at 40).

The court accordingly concluded that the set-off payment initiated by SARS is suspended until such a time as the applicant has made its submissions regarding SARS decision to effect set-off (80 SATC 211 at 40.3.1).

Key points from A Way to Explore v CSARS

Although SARS has extensive powers to collect a taxpayer's outstanding tax debt, SARS is required to exercise such power while adhering to proper administrative procedures. In the event that SARS does not adhere to due procedure in the process of collecting such tax debt, SARS' actions may be seen to be unjust.

This case reveals that it is in the best interest of taxpayers to apply for a suspension of payment pending the objection and appeal process. A taxpayer may apply for a suspension of payment of outstanding tax debt in accordance with section 164(2) of the TAA.

Conclusion

The above discussed case law is evidence of SARS' far-reaching powers to raise additional assessments, to initiate audits and to collect outstanding tax debt from taxpayers and third parties. However, it is comforting to see that although SARS has these extensive powers, SARS is expected to conduct such powers in line with due procedure in accordance with the TAA.

CHAPTER 4: AN EVALUATION OF THE RECOURSE AVAILABLE TO A TAXPAYER WHERE SARS DOES NOT ADHERE TO CORRECT ADMINISTRATIVE PROCEDURES

Introduction

The latin legal maxim, *Ubi Jus Ibi Remedium*, exemplifies a principle of South African law, namely, “where there is a right there is a remedy”. In accordance with this principle, it is reasonable to expect that where there is a rule of law, there is similarly an appropriate authoritative body responsible for enforcing such law, and providing a remedy should such law be disregarded. According to Currie and de Waal (2005:23), “A legal rule will be deficient if there is no means of enforcing it and if no sanction attaches to a breach of that rule”.

The Tax Administration Act, 28 of 2011 (“**the TAA**”), came into effect on 1 October 2012, with the objective of increasing taxpayers’ rights in their interactions with the South African Revenue Service (“**SARS**”). Unfortunately, in applying the TAA since its enactment, it has transpired that where SARS does not adhere to its obligations stipulated in the TAA, taxpayers have insufficient or costly remedies to compel SARS to adhere to its own empowering legislation (Croome, 2013a).

The TAA awards SARS with extensive powers, however, SARS is required and reasonably expected to exercise its powers and fulfil its duties in line with the TAA provisions, while not infringing on taxpayers’ rights (Myburgh, 2016). “It is common cause that, in balancing the powers and rights of tax authorities against those of taxpayers, there is a disproportionate bias of power and entitlement in favour of tax authorities” (The Davis Tax Committee, 2017:63).

The fundamental constitutional rights of taxpayers are provided for in the Bill of Rights, which is contained in Chapter 2 of the Constitution of the Republic of South Africa, 1996³³ (“**the Constitution**”). It is in the best interest of both taxpayers and tax professionals to be aware of taxpayers’ rights as well as SARS’ obligations when executing its public powers. Furthermore, taxpayers and tax professionals need to be cognizant of the available remedies that may be utilised should SARS not adhere to its stipulated duties and obligations (Myburgh, 2016).

³³ Constitution of the Republic of South Africa, 1996.

This chapter is not concerned with the remedies available to taxpayers and tax professionals in respect of a technical dispute (a dispute based on the merits of a decision) against SARS. In the event where taxpayers disagree with a decision taken by SARS or an assessment issued by SARS which is based on a technical interpretation of the legislation, taxpayers or tax professionals are required to initiate the formal tax dispute resolution process. The remedies available to address an administrative dispute against SARS does not involve a dispute of the technical merits of an assessment (Croome, 2015). The tax dispute resolution process, in respect of a technical dispute, involves the following standard procedures or formalities³⁴:

1. A taxpayer is entitled to request reasons for a specific action or decision taken by SARS. This request will be initiated in terms of Rule 6 promulgated under section 103 of the TAA ("**the Rules**").
2. A taxpayer is entitled to object to a specific action or decision taken by SARS. This objection will be initiated in terms of section 104 of the TAA, read with Rule 7.
3. In the event that a taxpayer's objection is disallowed in whole or in part, a taxpayer is entitled to appeal against SARS' decision to disallow the objection. Such appeal is made to a tax board or tax court in terms of section 107 of the TAA, read with Rule 10.
4. In the event that a taxpayer's appeal is disallowed, a taxpayer is entitled to stipulate whether they wish to further pursue the dispute either via alternative dispute resolution or via litigation. Such election will be stipulated by the taxpayer in the appeal.

The above list of procedures provides a general overview of the lifecycle of the dispute resolution process in respect of a technical dispute against SARS, however the above list is by no means exhaustive, as such procedures are determined on a case-by-case basis, taking into account the facts of each case. In some cases, the above procedures may include SARS requesting additional information from a taxpayer, or SARS conducting an audit of the taxpayer.

When taxpayers and tax professional are mindful of taxpayers' rights and are aware of the various remedies available, should such rights be infringed upon, taxpayers and tax professionals are able to utilise the correct remedy and approach the correct forum in resolving such infringement (Mulder, 2014:3). This chapter aims to investigate SARS' internal remedies that are available to taxpayers and tax professionals, should taxpayers experience an administrative complaint or dispute against SARS.

³⁴ There may be additional procedures or formalities should SARS request additional information or initiate an audit of the taxpayer during the life cycle of the dispute.

Furthermore, this chapter will investigate whether there are any additional remedies available to taxpayers and tax professionals should taxpayers have exhausted SARS' internal remedies and such internal remedies did not resolve the administrative complaint or dispute.

This chapter will discuss the steps (in the order that they are required to be utilised), which a taxpayer is required to follow when addressing an administrative dispute³⁵ against SARS.

Internal remedies provided within SARS

Escalation within SARS – via the SARS Call Centre or local SARS Branch Office

In practice, when a taxpayer is faced with an administrative complaint or dispute against SARS a taxpayer's (or the taxpayer's tax representative) first port of call, in terms of the SARS internal remedies required to be exhausted, is to approach SARS via the SARS Call Centre or to visit a local SARS branch office. The SARS consultant, either via the SARS Call Centre or at the SARS branch office, will issue the taxpayer with a case number in order for SARS and the taxpayer to monitor the progress of such complaint or dispute.

In the event that the complaint or dispute is not resolved via the SARS Call Centre or SARS branch office, the taxpayer will require the case number that was obtained from either the SARS Call Centre or SARS branch office, in order to further escalate the dispute and for the taxpayer to be able to further access and exhaust the internal remedies as discussed below (Williams, 2016).

Once a taxpayer has lodged the complaint or dispute via either the SARS Call Centre or the SARS branch office, it is advised that the taxpayer allow SARS 21 business days³⁶ to process and resolve the issue before attempting to further escalate the dispute and exhaust the internal remedies as discussed below (Duvenage, 2017).

³⁵ An administrative dispute includes the manner in which a taxpayer's request for reasons, objection or appeal is being dealt with by SARS (SARS, 2014:21-22).

³⁶ Means business days as defined in the TAA i.e. excluding Saturdays, Sundays, public holidays and days between 16 December and 15 January of the following year, both days inclusive.

SARS Complaints Management Office

In October 2002, the SARS Service Monitoring Office (“**SSMO**”) was established to address administrative issues experienced by a taxpayer in their interactions with SARS. Such administrative issues include any complaints in respect of SARS’ administrative duties and SARS’ conduct towards a taxpayer (i.e. the service received by a taxpayer from a SARS consultant). An administrative dispute includes the manner in which a taxpayer’s request for reasons, objection or appeal, is being dealt with by SARS (SARS, 2014:21-22).

The SSMO is a tool intended to be used to enforce and protect taxpayers’ rights where SARS does not adhere to due administrative procedure or displays misconduct in its interactions with taxpayers. Specifically, *“The SSMO was intended as the first step in the creation of a mechanism to serve as a check on SARS’ administrative powers by addressing SARS’ failures to follow procedures or respect taxpayer’s rights (Memorandum on the Objects of the Tax Administration Bill, 2011:183).*

The SARS Complaints Management Office (“**the CMO**”) has replaced the SSMO (SARS, 2015). This change simply affected the name of the office while the office’s mandate remained unchanged.

When should the CMO be approached by the taxpayer?

In the event that taxpayers’ complaints are not resolved within 21 business days³⁷, via the SARS Call Centre and/or a visit to a local SARS branch office, the taxpayer is then entitled to approach the CMO. The taxpayer may approach the CMO via e-Filing, if the taxpayer is registered on e-Filing, or via the CMO’s Call Centre (Duvenage, 2017). It is essential that the taxpayer has a case number when escalating the administrative complaint to the CMO (Williams, 2016). As discussed above, such case number would have been obtained when the taxpayer (or taxpayer’s representative) called the SARS Call Centre or visited the SARS branch office.

³⁷ Means business days as defined in the TAA i.e. excluding Saturdays, Sundays, public holidays and days between 16 December and 15 January of the following year, both days inclusive.

What are the limitations on the CMO's authority?

The CMO is limited in terms of the complaints that it is permitted to accept and attempt to resolve. The CMO is unable to accept complaints or disputes of a legal nature, for example, matters that are currently under dispute (i.e. matters that are subject to objection or appeal). Furthermore, the CMO is unable to address disputes regarding any amount on an assessment or the merits of taxpayers' disputes with SARS (Edward Nathan (Pty) Limited, 2005).

External remedies provided outside of SARS

The Office of the Tax Ombud

The South African Minister of Finance ("**Minister**") is granted³⁸ the power to appoint the Tax Ombud in South Africa. The appointed Tax Ombud will be accountable to the Minister in terms of its actions and will be required to obtain approval from the Minister in respect of its budget (Croome, 2013b).

The mandate of the Tax Ombud is provided for in section 16 of the TAA, while the limitations of the Tax Ombud's authority is provided for in section 17 of the TAA. Both the Tax Ombud's mandate and its limitations will be discussed below.

When should the Tax Ombud be approached by the Taxpayer?

A taxpayer is entitled to approach the Tax Ombud once such taxpayer has made use of all (i.e. exhausted) the internal remedies provided by SARS (Croome, 2013a). For example, in the event where the SARS Call Centre, the SARS branch office and the CMO were all unable to resolve the taxpayers' complaint or dispute within 21 business days³⁹, a taxpayer is only then permitted to escalate the complaint or administrative dispute to the Tax Ombud. Such requirement to exhaust all SARS' internal remedies before approaching the Tax Ombud is provided in section 18(4) of the TAA (Duvenage, 2017).

³⁸Such power is granted via section 14 of the TAA.

³⁹ Means business days as defined in the TAA i.e. excluding Saturdays, Sundays, public holidays and days between 16 December and 15 January of the following year, both days inclusive.

Furthermore, section 18(4) of the TAA also provides that a taxpayer is permitted to approach the Tax Ombud, without exhausting SARS' internal remedies, in the event that compelling circumstances exist (Klopper, 2015:17). Such compelling circumstances are provided in section 18(5) of the TAA and include the following:

- the taxpayer's complaint is in respect of a systemic issue; or
- the process of the taxpayer exhausting SARS' internal remedies would cause undue hardship to the taxpayer; or
- the process by which the taxpayer exhausts SARS' internal remedies would not provide a result within a reasonable time, according to the Tax Ombud (Croome, 2013b).

Once a taxpayer approaches the Tax Ombud, the Tax Ombud will then consider the taxpayer's complaint against its mandate to determine whether such complaint falls within the Tax Ombud's mandate and notify the taxpayer accordingly (Croome, 2015). Such notification will either stipulate that the Tax Ombud will endeavour to resolve the complaint, or it will notify the taxpayer that the Tax Ombud is unable to resolve the complaint, as either the complaint does not fall within the Tax Ombud's mandate or the taxpayer has not exhausted all of SARS' internal remedies.

What is the mandate of the Tax Ombud?

The TAA provides for the Tax Ombud's mandate and how the Tax Ombud should go about discharging its mandate, specifically section 16 of the TAA.

When the Tax Ombud was first established, in October 2013, the office was solely mandated to consider complaints by taxpayers in respect of a service, procedural or administrative matter, which arose from the application of the provisions of a tax Act by SARS⁴⁰ (Manyathi-Jele, 2014). The Tax Ombud's mandate was extended, with effect from 19 January 2017, to review, at the request of the Minister or at the initiative of the Tax Ombud, with the approval of the Minister, any systemic and emerging issue related to a service matter or the application of the provisions of this Act or procedural or administrative provisions of a tax Act⁴¹ (Duvenage, 2017).

The Tax Ombud is permitted to accept and review complaints by taxpayers that are in respect of a service, procedural or administrative matter, which arose from the application of the provisions of a

⁴⁰ Section 16(1)(a) of the TAA

⁴¹ Section 16(1)(b) of the TAA

tax Act by SARS. Thus, it is imperative that taxpayers are able to distinguish between complaints that are in respect of an interpretation and/or application of the law versus complaints that are in respect of the administration of the law. It is complaints that are in respect of the administration of the law that are within the mandate of the Tax Ombud and may be accepted by the Tax Ombud for review (Klopper, 2015:17).

What are the limitations on the Tax Ombud's authority?

Section 17 of the TAA provides that the Tax Ombud may not review the following:

- (a) *"legislation or tax policy;*
- (b) *SARS policy or practice generally prevailing, other than to the extent that it relates to a service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS;*
- (c) *A matter subject to objection and appeal under a tax Act, except for an administrative matter relating to such objection and appeal⁴²; or*
- (d) *A decision or, proceeding in or matter before the tax court".*

The fact that the Tax Ombud has the above limitations, in addition to its recommendations not being binding on a taxpayer or SARS⁴³, raises the concern that the Tax Ombud does not have sufficient power when it comes to defending taxpayers against instances where SARS abuses its power (Klopper, 2015:19). However, what is possibly a taxpayer's saving grace, is where SARS does not accept a recommendation by the Tax Ombud, SARS is required to provide reasons for such decision within 30 days⁴⁴ of the notification of such recommendation. Thus, the Tax Ombud is not able to compel SARS to adhere to its recommendation, however should SARS disregard the Tax Ombud's recommendation, the Tax Ombud may report such disregard to Parliament (Croome, 2015).

⁴² For example, a delay in SARS responding to a taxpayer's objection or appeal.

⁴³ Section 20(2) of the TAA

⁴⁴ Calendar days

Application for a default judgement

Where SARS is not complying with the Rules promulgated under section 103 of the Tax Administration Act, 28 of 2011 (“**the Rules**”), a taxpayer is entitled to apply for a default judgement in terms of Rule 56. This application is submitted to the tax court and requests a final order to be made to compel SARS to comply with its obligations that are stipulated in its empowering legislation. This is a specific remedy and does not form part of the internal remedies provided by SARS that are required to be exhausted.

In a recent judgement delivered on 17 October 2017 of *S Company v The Commissioner for the South African Revenue Service (0122/2017) [2017] ZATC*, SARS had not provided its ground of assessment and opposing appeal⁴⁵ within the stipulated time period, accordingly, the taxpayer delivered its notice in terms of Rule 56(1), notifying SARS that it would apply to the tax court for a final order in terms of section 129(2) of the TAA. “*The court concluded that the taxpayer had complied with the procedural provisions of rule 56 whereas SARS failed to show good cause for condonation for its default*” (Treurnicht, 2017).

Recourse provided by the PAJA

Judicial Review of ‘administrative action’

In the unfortunate case where the above discussed remedies do not result in the taxpayer’s dispute or complaint being resolved, such taxpayer is entitled to subject SARS’ conduct or decision (or lack thereof) to Judicial Review. The Taxpayer will be entitled to approach the High Court on the basis that SARS failed to adhere to the provisions of the Promotion of Administrative Justice Act, 3 of 2000 (“**the PAJA**”), and SARS exercised disregard for the taxpayer’s constitutional right to just administrative action (Croome, 2013a).

⁴⁵ Commonly referred to as a Rule 31 statement.

Taxpayers have the right to just administrative action

There are instances of imbalance between the powers granted to SARS via the TAA in comparison to the rights awarded to taxpayers via the TAA, thus, it is advised that the TAA be read together with the PAJA. Unfortunately, a taxpayer who is not aware of the PAJA provisions or is unable to afford the guidance of a tax professional, may result in SARS taking advantage of such an uninformed taxpayer (Klopper, 2015:95).

The Bill of Rights, contained in Chapter 2 of the Constitution, provides for the fundamental rights of all people in South Africa. The focus of this dissertation is on a taxpayer's right to just administrative action, provided for in section 33(1) of the Constitution. In accordance with section 33(3) of the Constitution, the PAJA is the legislation enacted to promote and defend a person's right to just administrative action (Croome & Olivier, 2015:572).

As discussed in Chapter 2 of this dissertation, the rights contained in the Bill of Rights are subject to limitations in terms of section 36 of the Constitution. Thus, before a taxpayer may defend their specific right to just administrative action, the taxpayer is required to first determine whether their right has been validly limited. In the event that a person's right to just administrative action has been infringed upon, and there has been no valid limitation thereof, an appropriate remedy will need to be determined for such aggrieved person (Currie & de Waal, 2005:27). The determination of an appropriate remedy will be in accordance with section 38 of the Constitution which states that any person whose rights, as contained in the Bill of Rights, have been infringed upon or threatened, may approach a competent court for relief.

In accordance with section 33 of the Constitution, SARS' actions must be lawful, reasonable and procedurally fair. In the event that SARS does not act accordingly and such conduct or decision by SARS is not in line with the limitations in section 36 of the Constitution, an aggrieved taxpayer has the right to request reasons for SARS' action, in accordance with section 5 of the PAJA, and such aggrieved taxpayer is entitled to an appropriate remedy in accordance with section 8 of the PAJA (Mulder, 2014:30).

What is considered 'administrative action'?

In order for a taxpayer to bring the conduct of SARS or a decision (or lack thereof⁴⁶) by SARS under Judicial Review in terms of the PAJA, the taxpayer is required to demonstrate that such conduct, decision or lack of decision constitutes 'administrative action' per section 33(1) of the Constitution and as defined in section 1 of the PAJA (Croome & Olivier, 2015:573). Section 1 of the PAJA defines 'administrative action' as follows:

*“**administrative action**’ means 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 ...*

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include ...”

According to Croome and Olivier (2015:613), *“Many of the decisions taken by the Commissioner in administering the tax system constitute 'administrative action' as envisaged in PAJA, and are subject to judicial review by the courts under s 6 of that Act”*. Thus, when SARS is exercising administrative action, such administrative action is subject to the requirements of the PAJA. Accordingly, should SARS' actions not adhere to the requirements of the PAJA, such action may be subject to Judicial Review in terms of section 6 the PAJA (Croome & Olivier, 2015:590).

Taxpayers are required to exhaust all internal remedies before Judicial Review

In accordance with section 7(2)(a) of the PAJA, the taxpayer is required to demonstrate that all SARS' internal remedies have been exhausted (Croome & Olivier, 2015:591). Therefore, a taxpayer is obligated to exhaust⁴⁷ the internal remedies provided by SARS before such aggrieved taxpayer may approach the High Court for Judicial Review of the 'administrative action'. Judicial Review is considered a last resort in terms of remedies available to an aggrieved taxpayer. However, section 7(2)(c) of the

⁴⁶ The definition of 'decision' in the PAJA, includes the failure to make a decision.

⁴⁷ Make use of all forms of recourse provided for in South African tax law.

PAJA provides the court or tribunal with the discretion, in exceptional circumstances, to exempt a person from the obligation to exhaust internal remedies.

Therefore, once there is a qualifying 'administrative action' and all internal remedies have been exhausted and failed to remedy the administrative dispute, or exceptional circumstance exist to exempt the taxpayer from exhausting internal remedies, such aggrieved taxpayer is entitled to institute a Judicial Review in terms of PAJA. Section 7 of the PAJA provides for the procedures that should be followed by a person instituting Judicial Review in terms of the PAJA (Croome & Olivier, 2015:595).

Once the administrative action has been brought under Judicial Review, the court or tribunal may decide that the administrative action is unlawful, unreasonable or procedurally unfair. The court or tribunal may then make an order to remedy the administrative action (Mulder, 2014:2). Section 8 of the PAJA provides various just and equitable orders that the court or tribunal may grant to remedy the administrative action (Croome & Olivier, 2015:598).

What are the disadvantages of Judicial Review in terms of the PAJA

Once the taxpayer is entitled to initiate the review proceedings in terms of the PAJA, the taxpayer will be required to employ attorneys and counsel to formally submit an application to the High Court for such matter to be brought under review. Currently, the High Court only has jurisdiction to adjudicate an application for Judicial Review in terms of the PAJA. The legal costs required to bring administrative action under review in the High Court can be costly. In addition to Judicial Review being costly, it is also time consuming. Thus, both these drawbacks result in taxpayers deciding to abandon their administrative dispute against SARS as the dispute may not be substantial in monetary terms when compared to the legal costs the taxpayer would be required to incur in order to try and remedy the dispute in the High Court (Croome, 2013a).

It is disheartening that, more often than not, the large costs involved in instituting Judicial Review procedures under the PAJA, results in the taxpayers surrendering to SARS authority, or rather succumbing to SARS' abuse of power.

The Public Protector and the Human Rights Commission

Section 181 of the Constitution created the Public Protector, while section 184 of the Constitution created the Human Rights Commission. These bodies were created to enforce and support South Africa's constitutional democracy. Should a taxpayer believe that his or her constitutional rights have been infringed upon, such taxpayer may approach the Public Protector or Human Rights Commission as a potential remedy against SARS (Croome & Olivier, 2015:642).

The following functions of the Public Protector are stated in section 182 of the Constitution –

- (1) *"The Public Protector has the power, as regulated by national legislation –*
 - (a) To investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;*
 - (b) To report on that conduct; and*
 - (c) To take appropriate remedial action."*

The Public Protector and Human Rights Commission are associated with investigations into government corruption and breaches of human rights. Although taxpayers are entitled to lodge a complaint with such bodies, in the event of SARS infringing upon taxpayers' fundamental rights, these bodies are seldom utilised as a remedy in the tax arena (Croome & Olivier, 2015:642; Croome, 2010:311).

A search was conducted by Mthimunye (2013:28) of the documents published on the Public Protector's website. Such search revealed that since the Public Protector's establishment in 1993, there have been no investigations performed into the actions of SARS. This is evidence of taxpayers not utilising the recourse of approaching the Public Protector when experiencing tax administrative disputes against SARS. In the experience of Croome (2010:311-312), the under-utilisation of both the Public Protector and the Human Rights Commission may be attributed to the limited tax expertise within both of these offices. Croome (2010:311) advises that *"The Commissioner should be obliged to encourage taxpayers to lodge complaints with the Public Protector if his internal complaints processes cannot resolve their grievance expeditiously"*.

SARS Service Charter

A charter of taxpayers rights, formally referred to as 'SARS Service Charter', was first introduced in South Africa by the then Minister of Finance in 1997 (Sawyer, 2000:12). This charter simply contains a general restatement of taxpayers' rights and does not constitute law (Klopper, 2015:60).

The SARS Service Charter was subsequently released on 1 July 2018, which is evidence of SARS taking a step in the right direction to highlight the rights of taxpayers as well as SARS' obligations to honour such rights (Visser, 2018b). "*Unfortunately the SARS Taxpayer Service Charter is not legislation and SARS cannot be held directly to its provisions as it is merely a statement of intent as to how it will conduct itself with respect to taxpayers' rights*" (Dwyer, 2004:127).

There has been no movement towards a legislated Taxpayers Bill of Rights, despite the proposal of such by the Davis tax committee in its final report on tax administration⁴⁸ (Visser, 2018b).

Recovering costs from an administrative dispute

A taxpayer involved in a legal dispute against SARS will more often than not require professional assistance, which comes at a great financial burden to the taxpayer. Where a taxpayer incurs unnecessary costs due to undue administrative procedures being followed by SARS, these wasted costs may be seen to constitute a deprivation of the taxpayer's property. Unfortunately, there is currently no mechanism whereby an aggrieved taxpayer may recover such wasted costs from SARS (Croome, 2010:49).

⁴⁸ The Davis Tax Committee. 2017. *Report on Tax Administration for the Minister of Finance*. Available: <http://www.taxcom.org.za/docs/20171113%20Tax%20Admin%20Report%20-%20on%20website.pdf> [2018, September 1].

Conclusion

In the event where SARS does not adhere to its stipulated duties, the TAA unfortunately does not provide a specific sanction against SARS for such disregard of its own empowering legislation (Croome, 2013a). Thus, the taxpayer needs to seek recourse via alternative channels.

Where an action or decision, or lack of action or decision, by SARS is not subject to the alternative dispute resolution procedures due to the merits of the decision not being under review, the taxpayer may be entitled to approach the High Court to have such action or decision, or lack thereof, brought under Judicial Review in terms of the PAJA. Such proceedings will be initiated on the basis that SARS has infringed upon the taxpayer's constitutional right to just administrative action and the provisions of PAJA (Croome & Olivier, 2015:571).

Before the aggrieved taxpayer is entitled to seek Judicial Review, of such action or decision by SARS, in terms of the PAJA, all internal remedies provided by SARS are required to be exhausted by the aggrieved taxpayer⁴⁹. Such internal remedies may only be bypassed by the aggrieved taxpayer in exceptional circumstances⁵⁰.

⁴⁹ Section 7(2)(a) of the PAJA.

⁵⁰ Section 7(2)(c) of the PAJA.

CHAPTER 5: A GLOBAL OVERVIEW OF THE RECOURSE AVAILABLE TO TAXPAYERS EXPERIENCING AN ADMINISTRATIVE DISPUTE AGAINST THEIR VARIOUS REVENUE AUTHORITY

Introduction

In order for a tax system to function efficiently, the cooperation by taxpayers is essential. As a means of encouraging taxpayer cooperation and creating a more positive connotation towards the role of tax administration in a tax system, many countries are working towards improving on the services provided to taxpayers by their revenue authority (Sawyer, 2000:2).

It is inherent that tax obligations carry a negative connotation, however taxpayers are inclined to perceive their tax obligations in a more favourable manner if they, the taxpayers, considered the government to be trustworthy and reliable instead of corrupt and unjust. Furthermore, tax morale may be increased among taxpayers who believe that their contribution towards tax revenue is being utilised by government efficiently (OECD, 2013:7). While it is important to encourage tax compliance among taxpayers, it is essential that taxpayers are aware that they have access to adequate recourse should their rights be infringed upon by the revenue authority (Klopper, 2015:57).

The 'SARS Service Charter' stipulates the rights and obligations taxpayers have in their interactions with the South African Revenue Service ("**SARS**"). However, such Charter is not legislated and therefore not legally enforceable on SARS by an aggrieved taxpayer. Where a South African taxpayer believes that their constitutional right to just administrative action⁵¹ has been infringed upon by SARS, the South African tax system has the following recourse available to taxpayers who wish to address their administrative dispute against SARS:

1. The SARS Call Centre or a local SARS Branch Office;
2. The SARS Complaints Management Office ("**the CMO**");
3. The Office of the Tax Ombud;
4. Judicial review in terms of the Promotion of Administrative Justice Act 3 of 2000 ("**the PAJA**");
5. Public Protector and/or the Human Rights Commission.

⁵¹ Section 33 of the Constitution of the Republic of South Africa, 1996.

The above recourse is explained further in Chapter 4 of this dissertation.

This chapter aims to investigate the recourse available to taxpayers who have administrative disputes against their revenue authorities in the United Kingdom ("UK"), Canada, Australia and the United States of America ("USA"). A comparison will be drawn between South Africa and these foreign jurisdictions in an attempt to ascertain whether the current recourse available in South Africa may be enhanced with aspects of the recourse available in the above foreign jurisdictions.

The United Kingdom

The Board of Inland Revenue⁵² and Her Majesty's Customs and Excise⁵³ merged into, what today is referred to as, Her Majesty's Revenue and Customs office ("HMRC"), the tax authority in the UK (Inspect-General of Taxation, 2016:22). The Commissioners and the Officers of Revenue and Customs may together be referred to as Her Majesty's Revenue and Customs⁵⁴.

Your Charter

The UK adopted the 'Your Charter' in 2009. The Charter provides a formal statement of what taxpayers can expect in their interactions with HMRC as well as what HMRC can expect from taxpayers in return (Inspect-General of Taxation, 2016:22). The HMRC revised the 'Your Charter' in January 2016, taking into consideration their customers' (the taxpayers of the UK) comments and suggestions for a more concise document stipulating the rights and obligations of taxpayers and HMRC in a manner that is intelligible to all taxpayers (HMRC, 2016).

The information stipulated in the Charter is not legislated into UK law, however its existence is supported by legislation through section 16A of the Commissioners for Revenue and Customs Act 2005 (Inspector-General of Taxation, 2016:23). In terms of such before mentioned section, HMRC is required to prepare a Charter, which must be regularly reviewed and revised when appropriate to do so. Furthermore, HMRC is required to issue an annual report which reveals to what extent HMRC has

⁵² Previously formed part of the British government, authorised to enforce the collection of direct taxation.

⁵³ Previously formed part of the British government, authorised to enforce the collection of customs duties, excise duties and other indirect taxes.

⁵⁴ Commissioners for Revenue and Customs Act 2005, section 4(1).

adhered to the rights and obligations stipulated in 'Your Charter'⁵⁵. Although the UK 'Your Charter' is not legally enforceable, taxpayers may have a legitimate expectation for HMRC to adhere and be accountable to the HMRC's own guidance.

Complaints process

The UK 'Your Charter' stipulates that taxpayers can expect their complaints to be dealt with quickly and fairly (HMRC, 2016). Consequently, taxpayers who have a complaint or feel that any right, stipulated in the 'Your Charter'⁵⁶, has been infringed upon through their interactions with HMRC, are entitled to utilise the two-tiered complaints process discussed below.

- Tier 1 - The taxpayer is required to submit the complaint directly to the HMRC either online, via phone or post. In the event that the taxpayer's complaint is not resolved at the Tier 1 complaints stage, the taxpayer may progress to the Tier 2 complaints stage (Bischoff, 2018; Oakes, 2013).

- Tier 2 - The taxpayer may request that the HMRC review the same complaint for a second time. The complaint will be reviewed by a different HMRC customer service advisor than that who was allocated to review the complaint at Tier 1 (Bischoff, 2018; Oakes, 2013).

Once the HMRC has provided the taxpayer with a final response, from its second review of the taxpayer's complaint, it is the responsibility of HMRC to make the taxpayer aware of its right to escalate such complaint to the Adjudicator's Office (Bischoff, 2018; Oakes, 2013).

The above explained two-tiered administrative dispute process, to be directed within the relevant HMRC Business Unit, is required to be exhausted before such administrative complaint is permitted to be escalated to the Adjudicator's Office (Adjudicator's Office, 2017:1).

⁵⁵ Section 16A(4) of the Commissioners for Revenue and Customs Act 2005.

⁵⁶ This is a Taxpayers Charter that stipulates taxpayers' rights and HMRC's obligations.

The Adjudicator's Office

The Adjudicator's Office is independent of the HMRC and has its main purpose to service taxpayers' complaints against HMRC and to act as an unbiased mediator between an aggrieved taxpayer and HMRC (The Davis Tax Committee, 2017:72).

Once the taxpayer has exhausted HMRC recourse provided via Tier 1 and Tier 2 of the administrative dispute resolution process, and the taxpayer remains unsatisfied, the aggrieved taxpayer may approach the Adjudicator's Office (Oakes, 2013). Unfortunately, it is seldom that taxpayers are aware that they have the right to escalate their unresolved complaint to the Adjudicator's Office, where their complaint will receive an impartial hearing. For the minority of taxpayers that are aware of their right to escalate their complaints to the Adjudicator's Office, these taxpayers do not feel they have sufficient expertise or the financial resources to further escalate their complaints (Bischoff, 2018).

The Adjudicator's Office will attempt to resolve the taxpayer's complaint either via mediation or recommendation. Mediation will involve the Adjudicator assisting the aggrieved taxpayer and HMRC to come to an agreement on how such complaint may be resolved. In the event where mediation is not appropriate, according to the specific facts of the complaint, the Adjudicator will review the complaint and issue a formal written recommendation to both the aggrieved taxpayer and HMRC, explaining the decision on the complaint and providing recommendation on how to best resolve the complaint (Adjudicator's Office, 2017:2). As this is a recommendation, it is not binding on the taxpayer or HMRC.

In the event that the taxpayer is of the opinion that the decision issued by the Adjudicator's Office is unsatisfactory or HMRC is not adopting the Adjudicator's recommendation, the taxpayer may refer their complaint to their Member of Parliament who will in turn direct such complaint to the Parliamentary and Health Service Ombudsman (Adjudicator's Office, 2017:2).

Parliamentary and Health Service Ombudsman

The Ombudsman was set up by Parliament to investigate and provide recourse to citizens that have been mistreated by government departments. This is the final step in the complaints process for an aggrieved citizen to have their complaint resolved (Parliamentary and Health Service Ombudsman, 2017:4-5). The Ombudsman only receives a small amount of complaints against HMRC as the majority

of the complaints are resolved at the Adjudicator's Office (Parliamentary and Health Service Ombudsman, 2017:35).

Judicial Review

Judicial Review is a form of litigation and is advised to be utilised once all other available remedies have been utilised and resulted in an unsatisfactory outcome. Accordingly, Judicial Review is a remedy of last resort (Judiciary for England and Wales, 2018:17).

The legal process of Judicial Review involves an aggrieved individual, company, or organisation challenging a public body based on its acts, or lack thereof, to ensure such public body adheres to its stated obligations (Judiciary for England and Wales, 2018:5). A 'public body' includes HMRC. Accordingly, an aggrieved taxpayer with a complaint regarding unreasonable behaviour or administrative impropriety of HMRC may bring such complaint under Judicial Review (Houlder, 2017). The court will then be tasked with evaluating the manner in which HMRC exercised its discretion or made a specific decision that resulted in such complaint. The court will not be concerned with the merits of the taxpayer's case.

The taxpayer will be required to apply for permission to bring the complaint under Judicial Review. Such application should be filed with the Administrative Court within three months of the event complained of (Judiciary for England and Wales, 2018:19). However, before an application may be submitted to the Administrative Court, the taxpayer is required to notify HMRC via letter of the intention to bring the complaint under Judicial Review. Such letter is referred to as the pre-action letter which explains the fault of HMRC, requests detailed reasons and/or additional information in respect of HMRC's decision and notifies HMRC of the intention to apply to the courts for Judicial Review if the HMRC's response is unsatisfactory. This pre-action letter provides HMRC with the opportunity to address the taxpayer's complaint and provide the taxpayer with the appropriate redress (Judiciary for England and Wales, 2018:18).

Adam Craggs is head of the tax dispute practice at a law firm called Reynolds Porter Chamberlain (commonly referred to RPC) in the UK. Adam Craggs has been witness to a number of cases whereby HMRC has withdrawn its decision once it became aware that the aggrieved taxpayer intended to bring their complaint against HMRC under Judicial Review (Williams, 2018). Thus, it is essential for the aggrieved taxpayer to follow the Judicial Review Pre-action Protocol as in some instances this may

result in the complaint being resolved by HMRC and litigation being avoided altogether (Judiciary for England and Wales, 2018:17).

The remedy of initiating Judicial Review involves a substantial outlay of an aggrieved taxpayer's financial resources (Williams, 2018). Thus, it would be advisable for the taxpayer to utilise all other available methods of recourse (discussed above) to attempt to resolve such complaint, before deciding to apply for Judicial Review (Judiciary for England and Wales, 2018:18).

In the event that the aggrieved taxpayer is successful in challenging HMRC under Judicial Review, on the basis that the HMRC acted unlawfully, the court will make the final decision of whether to award a remedy or not (Judiciary for England and Wales, 2018:47). A potential remedy that may be granted by the court is an injunction order. This remedy will request the HMRC to either act, or refrain from acting, in a particular way (Judiciary for England and Wales, 2018:50).

Canada

In Canada, taxes are paid to two levels of government, Federal and Provincial⁵⁷. The Canada Revenue Agency⁵⁸ ("**CRA**") is the federal government tax authority and is responsible for levying and administering all tax types and ensuring tax compliance on behalf of all the governments within Canada (Deloitte, 2017:9; Government of Canada, 2016b).

Taxpayer Bill of Rights

The Minister of National Revenue introduced the 'Declaration of Taxpayer Rights' in 1985. This declaration was not legislated and since then has been replaced by the Taxpayer Bill of Rights, which was adopted on 28 May 2007 (Inspector-General of Taxation, 2016:27). The Canadian Taxpayer Bill of Rights is comprised of sixteen rights, with eight⁵⁹ of these rights being geared toward the type of

⁵⁷ The Provincial authorities have the authority to levy direct taxes on persons and corporates within their jurisdiction (Deloitte, 2017:9).

⁵⁸ In 2003, the Canadian Government moved the customs function from the Canada Customs and Revenue Agency ("**CCRA**"), and transferred it to Canada Border Services Agency. Accordingly, the revenue function of the CCRA became the Canada Revenue Agency (Canada Revenue Agency, 2005:5).

⁵⁹ These eight service rights are as follows:

- *"the right to be treated professionally, courteously, and fairly;*

service taxpayers can expect in their interactions with the CRA (Government of Canada, 2016a). The Taxpayers' Ombudsman is solely responsible for enforcing and defending these eight service rights (Government of Canada, 2016a).

The Taxpayer Bill of Rights is intended to make taxpayers aware of the rights and obligations in their interactions with the CRA, and consequently to increase the CRA's accountability to such statement (Government of Canada, 2016a). Furthermore, the Taxpayer Bill of Rights contains guidance on the recourse available to taxpayers should they feel they have been mistreated or that their stated rights have been infringed upon by the CRA (The Davis Tax Committee, 2017:67). The Taxpayer Bill of Rights is not law and is thus not legally enforceable, nevertheless, it is a formal document that states the CRA's commitment to its taxpayers (Mackey, 2013).

In June 2013, the Taxpayers' Ombudsman, together with the Minister of National Revenue, announced a further addition to the list of rights contained in the Taxpayer Bill of Rights. This additional right stipulates that taxpayers have the right to lodge a service complaint or seek a formal review without fear of reprisal. This right will act to encourage taxpayers to raise complaints against the CRA if they are unsatisfied with their interactions with the CRA, thus protecting the taxpayer from any act of vengeance as a consequence of such complaint against the CRA (Mackey, 2013).

Complaints process

The Taxpayer Bill of Rights stipulates that taxpayers have the right to lodge a service complaint against the CRA (Government of Canada, 2017). Consequently, taxpayers who have a complaint or feel that any right, stipulated in the Taxpayer Bill of Rights, has been infringed upon through their interactions with the CRA, are entitled to utilise the three step complaints process discussed below.

-
- *the right to complete, accurate, clear, and timely information from the CRA;*
 - *the right to lodge a service complaint and to be provided with an explanation of the CRA findings;*
 - *the right to have the costs of compliance taken into account when tax legislation is administered;*
 - *the right to expect the CRA to be accountable;*
 - *the right to expect the CRA to publish service standards and report annually;*
 - *the right to expect the CRA to warn you about questionable tax schemes in a timely manner; and*
 - *the right to be represented by a person of your choice" (Government of Canada, 2017).*

- Step 1 - The taxpayer is advised to correspond with the CRA employee he/she has been dealing with or make contact with the CRA via the contact details provided in any prior CRA correspondence received (Government of Canada, 2018).
- Step 2 - Where the taxpayer is not satisfied with the outcome of the before mentioned process, the taxpayer may request that the complaint be escalated to the CRA employee's supervisor (Government of Canada, 2018).
- Step 3 - Where the taxpayer remains unsatisfied after submitting the complaint to the respective CRA employee, and further escalating the complaint to such CRA employee's supervisor, the taxpayer is entitled to file a service complaint with the CRA and submit this online, via fax or post. Such complaint will be allocated to a complaints officer. The length of time it will take to resolve the complaint is largely dependent on the complexity of the complaint (Government of Canada, 2018).

It is only once the outcome of the service complaint has been determined by the service complaints officer and communicated to the taxpayer, that the unsatisfied taxpayer may escalate the complaint to the Office of the Taxpayers' Ombudsman (Government of Canada, 2018).

Taxpayers' Ombudsman

The Canadian Taxpayers' Ombudsman was created in 2007, together with the Taxpayers Bill of Rights. A 'Digest of Taxpayer Service Rights' was published by the Taxpayers' Ombudsman in an attempt to create an awareness and understanding of taxpayers' service rights, as provided for in the Taxpayer Bill of Rights (Office of the Taxpayers' Ombudsman, 2012:4).

In the event of one of a taxpayer's eight service related rights, stipulated within the Taxpayer Bill of Rights, being infringed upon by the CRA, such taxpayer may turn to the Taxpayers' Ombudsman (Government of Canada, 2016a). However, the taxpayer will be required to exhaust the internal remedies provided by the CRA, unless a taxpayer is suffering from financial hardship, the taxpayer may have direct access to the Taxpayers' Ombudsman without exhausting the CRA internal remedies (Alini, 2018).

The Taxpayers' Ombudsman is operationally independent from the CRA and reports directly to the Minister of National Revenue, who in turn is responsible to report the CRA's activities to Parliament (Government of Canada, 2016b). Unfortunately, the Taxpayers' Ombudsman is unable to overrule actions by the CRA, nor direct the CRA personnel to perform a certain action (Alini, 2018). However, the Taxpayers' Ombudsman may participate in negotiations between the aggrieved party and the CRA in an attempt to resolve the complaint. In the alternative, the Taxpayers' Ombudsman may issue a formal recommendation to the Minister of National Revenue (Government of Canada, 2016a).

Judicial Review

The Tax Court does not contain Judicial Review powers. Therefore, such court is unable to adjudicate on disputes that relate to the rule of natural justice being disregarded by the CRA or instances where the CRA exercises abuse of its discretionary power or improper conduct in its interaction with taxpayers. The Tax Court may only be approached to adjudicate on disputes that involve the merits of a decision by the CRA (McNary, 2009; Purse, 2015:5-6).

A taxpayer may initiate Judicial Review in terms of the Federal Courts Act (R.S.C., 1985, c.F-7). The Federal Court of Canada has jurisdiction "to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal⁶⁰". The Minister of the National Revenue, responsible for the CRA, is considered "other tribunal", and can therefore be brought under Judicial Review in terms of the Federal Courts Act (McNary, 2009).

In taxpayers' interactions with the CRA, taxpayers are entitled to be treated by the CRA's workforce with due care. This was demonstrated in the case of *Leroux v Canada Revenue Agency*⁶¹, where the British Columbia Supreme Court ruled that when the CRA workforce interact with taxpayers, they owe a "duty of care" to such taxpayers. This case gives taxpayers some comfort that there are instances where the CRA personnel, who are not acting with the appropriate level of care expected from public servants, are held accountable to such misconduct (Gray, 2014). This case was decided on in British Columbia, a province of Canada, and will accordingly form part of the private law of British Columbia. However, it is common practice for courts to look to rulings of other provinces when deciding on a new

⁶⁰ Section 18(1)(a) of the Federal Courts Act (R.S.C., 1985, c.F-7)

⁶¹ 2014 BSSC 720

case. It is hoped that this case will be referenced for its principle of “duty of care” that CRA personnel are expected to show taxpayers.

Australia

The Australian Tax Office (“**ATO**”) is the tax collecting authority and tax administrator in Australia. In 2015, the Australian Inspector-General of Taxation was established with the mandate of tax administration (The Davis Tax Committee, 2017:9). Prior to the introduction of the Inspector-General of Taxation, the Commonwealth Ombudsman was responsible for any complaints of a tax administrative nature, among other public interest responsibilities (Australian Taxation Office, 2016).

In a 2015 report on the status of taxpayer rights in Australia, the Inspector-General of Taxation at the time, namely Ali Noroozi, stated the following –

“The protection of taxpayer rights is fundamental to maintaining taxpayer trust and confidence, which is in turn essential for effective tax administration” (Inspector-General of Taxation, 2015:i).

Taxpayers’ Charter

The Taxpayers’ Charter was first published by the ATO in July 1997 (Inspector-General of Taxation, 2016:15). The Charter was formulated with the intention to educate both taxpayers and the ATO on their rights and obligations in their interactions with one another (Australian Taxation Office, 2017a). The Charter also provides for the process that taxpayers should follow when experiencing dissatisfaction with the behaviour of the ATO and its tax officers. The Taxpayers’ Charter has been revised and updated numerous times since its introduction in 1997 (Inspector-General of Taxation, 2016:15).

The Taxpayers’ Charter is not legislated and is purely formulated as an administrative statement. Accordingly, such rights are not legally enforceable and thus the effect is restrained. Although Australia has Constitutional rights, the application of these rights to tax issues are limited (Bentley, 2016:292&299).

According to Croome (2010:269), the manner in which ATO officials are expected to interact with taxpayers, as stipulated in the Charter, is not able to be legislated. *"This is because the treatment experienced depends on the attitude of the ATO's staff, which can only be enhanced through education and proper management and cannot be adjudicated by a court or similar tribunal"* (2010:269). Furthermore, in the event that the rights within the Charter were legislated, this would not guarantee the fair and courteous treatment of taxpayers by tax officials (Croome, 2010:270).

Complaints process

The Australian Taxpayers' Charter stipulates that taxpayers have the right to complain (ATO, 2018; ATO, 2017b). Consequently, taxpayers who have a complaint or feel that any right, stipulated in the Taxpayers' Charter, has been infringed upon through their interactions with the ATO, are entitled to utilise the complaints process discussed below.

- Step 1 - The taxpayer should attempt to resolve the complaint with the tax officer that was initially allocated to the taxpayer's case, or make use of the contact details provided in any correspondence from the ATO to date (ATO, 2018).
- Step 2 - Where the taxpayer is not satisfied with the outcome of the before mentioned process (i.e. step 1), the taxpayer may request to escalate the complaint to the ATO tax officer's manager (ATO, 2018).
- Step 3 - Where the taxpayer remains unsatisfied after submitting the complaint to the respective ATO tax officer and further escalating the complaint to such tax officer's manager, the taxpayer is entitled to access a complaints form and submit such complaint to the ATO via phone, fax, post or online (ATO, 2018).

In the event that the taxpayer is not satisfied with the outcome of the complaint, or the way the complaint was handled, the taxpayer may request that the complaint be escalated to a more senior staff member of the ATO (ATO, 2018).

- Step 3 - Where a taxpayer is not satisfied with the outcome of the complaint, issued by the ATO, the taxpayer may approach the Inspector-General of Taxation by visiting their website, or submitting the complaint via post or phone (ATO, 2018).

The Inspector-General of Taxation

The Commonwealth Ombudsman previously handled tax complaints against the ATO. However, from 1 May 2015, all complaints against the ATO were directed to the Inspector-General of Taxation (“**IGT**”) (ATO, 2016).

The Australian Inspector-General of Taxation Act, 28 of 2003, specifically section 3 thereof, provides the following responsibilities of the IGT:

- (a) “improve the administration of taxation laws for the benefit of all taxpayers, tax practitioners and other entities; and*
- (b) provide independent advice to the government on the administration of taxation laws; and*
- (c) investigate complaints by taxpayers, tax practitioners or other entities about the administration of taxation laws; and*
- (d) investigate administrative action taken under taxation laws, including systemic issues, that affect taxpayers, tax practitioners or other entities⁶².”*

The functions of the Australian Inspector-General of Taxation are documented in section 7 of the Australian Inspector-General Act, 28 of 2003, and are explicitly aimed towards resolving any administrative disputes that may arise against the ATO. The IGT is unable to instruct the ATO to adhere to its recommendations, nor is the IGT able to provide any legal remedies, however the IGT and taxpayers are entitled to have a reasonable expectation that the ATO will adhere to a standard of good practice as stipulated in the Taxpayers’ Charter (Inspector-General of Taxation, 2015:36; Bentley, 2016:304).

Judicial Review

“It is widely recognised that the right to judicial review is not absolute. Judicial review is available to test the legality of a decision, and not its merits—the courts are not authorised to ask whether a decision was a ‘good’ decision. It asks only whether the decision has been properly made, in accordance with the law” (Australian Law Reform Commission, 2015:415).

⁶² Section 3 of the Inspector-General of Taxation Act, 28 of 2003.

The Taxpayers' Charter stipulates that taxpayers have the right to be treated fairly and reasonably by the ATO (Australian Taxation Office, 2017b). Furthermore, there is a common law duty for administrative decisions to be made by administrators in a procedurally fair manner. Accordingly, Australian citizens have the right to procedural fairness and can seek Judicial Review⁶³ of an administrative decision on the basis that such aggrieved party was not afforded procedural fairness by the ATO (Australian Law Reform Commission, 2015:391-392).

The Administrative Decisions (Judicial Review) Act 1977⁶⁴ ("**the ADJR Act**") governs the Judicial Review of administrative decisions taken by administrators, where an aggrieved party is a result of such administrative decision. The ADJR Act "*seeks to simplify, codify, and in some cases, expand common law judicial review*" (Australian Law Reform Commission, 2015:414). Before Judicial Review is initiated, an aggrieved party is entitled to request reasons⁶⁵ for the administrative decision taken by the administrator⁶⁶.

The ADJR Act does not govern the Judicial Review of administrative decisions that are concerned with the merits of an administrative decision⁶⁷. However, decisions where the merits are being contested, or an exempt decision per schedule 1 of the ADJR Act, may be brought under Judicial Review in terms of section 39B of the Judiciary Act 1903 (Australian Law Reform Commission, 2015:414). Judicial Review of an administrative decision in terms of the ADJR Act will be brought before the Federal Court of Australia.

Judicial Review in terms of the ADJR Act can be initiated in the following instances:

- A Judicial Review of a decision that has already been made by the administrator⁶⁸;
- A Judicial Review of the conduct that the administrator engaged in, is engaging in, or proposes to engage in when making an administrative decision⁶⁹; and

⁶³ Section 75 of the Australian Constitution; section 39B of the Judiciary Act 1903 and section 5(1)(a) of the Administrative Decisions (Judicial Review) Act 1977.

⁶⁴ Administrative Decisions (Judicial Review) Act No. 59 of 1977

⁶⁵ This will be in the form of "*a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based*", in accordance with section 13(1) of the ADJR Act.

⁶⁶ Section 13 of the ADJR Act.

⁶⁷ Schedule 1 of the ADJR Act contains a list of decisions that are unable to be reviewed under the ADJR Act. Specifically, Schedule 1 paragraph (e), provides that a review of a tax decision based on the merits of the decision cannot be brought under Judicial Review in terms of the ADJR Act.

⁶⁸ Section 5 of the ADJR Act.

⁶⁹ Section 6 of the ADJR Act.

- A Judicial Review of an administrator's failure to make an administrative decision⁷⁰.

Judicial Review can thus be initiated in respect of "*decisions that have been made, decisions that are being made and decisions that are yet to be made*" (Nance, n.d.:2). The grounds of Judicial Review will differ depending on the nature of the review (the three types of Judicial Reviews are provided above). The grounds for each type of Judicial Review can be located in either section 5, 6 or 7 of the ADJR Act.

The Federal Court has the discretion to make specific orders as a means to remedy the administrative decision that was brought under review. The orders that the Federal Court may grant, depending on the nature of the review, are set out in section 16 of the ADJR Act. For example, where a decision has been made by an administrator, the Federal Court may order that the decision, or part thereof, be quashed or set aside⁷¹.

United States of America

The Internal Revenue Service ("**IRS**") is the Revenue Authority in the United States of America ("**USA**"). The Taxpayer Advocate Service ("**TAS**") is an autonomous office within the IRS that was established⁷² via the Taxpayer Bill of Rights 2⁷³ in 1996. Consequently, the Taxpayer Ombudsman was replaced⁷⁴ by the Taxpayer Advocate, who would be responsible for addressing taxpayers' complaints against the IRS, among other responsibilities.

The Taxpayer Bill of Rights

The IRS, on 10 June 2014, announced that the USA will be enacting a Taxpayer Bill of Rights (Croome, 2014). These Taxpayer Bill of Rights was enacted under §7803(a)(3) of the Internal

⁷⁰ Section 7 of the ADJR Act.

⁷¹ Section 16(1)(a) of the ADJR Act.

⁷² Sec 101 of the Taxpayer Bill of Rights 2 HR 2337.

⁷³ Taxpayer Bill of Rights 2 Public Law 104-168, approved 30 July 1996. An act to amend the Internal Revenue Code of 1986 to provide for increased taxpayer protections (Greenbaum, 1997:152).

⁷⁴ Sec 101(b)(1) of the Taxpayer Bill of Rights 2 HR 2337.

Revenue Code (“**IRC**”), which resulted in such rights being fundamental rights when interacting with the IRS (Roberson, 2018).

The Taxpayer Bill of Rights contains ten rights that taxpayers have when interacting with the IRS. Such rights have been through numerous amendments and are currently housed in the IRC⁷⁵ in a manner that is accessible and easy to understand by the average taxpayer and tax professional. The Taxpayer Bill of Rights does not introduce new rights, but rather seeks to highlight and create awareness of taxpayers’ rights to taxpayers, tax professionals and the tax authority officials (The Davis Tax Committee, 2017:67).

Complaints process

Taxpayers have the right to quality service⁷⁶ as well as the right to a fair and just tax system⁷⁷ (Roberson, 2015). Consequently, taxpayers who have a complaint against the IRS or feel that any right, as stipulated in the Taxpayer Bill of Rights, has been infringed upon through their interactions with the IRS, are entitled to utilise the complaints process discussed below.

1. Practitioner Priority Service

This is a support line tasked with dealing with account-related queries from tax practitioners. In the event that the employee at the Practitioner Priority Service is unable to address the tax practitioner’s queries, such employee will transfer/refer the call to a Revenue Officer or Revenue Agent (IRS, 2018b).

2. Toll-Free Telephone Service

The IRS has various toll-free numbers that are dedicated to different categories of taxpayers, for example, there is a specific toll-free number for individual taxpayers, which is different

⁷⁵ The U.S. Internal Revenue Code §7803(a)(3).

⁷⁶ “Taxpayers have the right to receive prompt, courteous, and professional assistance in their dealings with the IRS, to be spoken to in a way they can easily understand, to receive clear and easily understandable communications from the IRS, and to speak to a supervisor about inadequate service” (IRS, 2018e).

⁷⁷ “Taxpayers have the right to expect the tax system to consider facts and circumstances that might affect their underlying liabilities, ability to pay, or ability to provide information timely. Taxpayers have the right to receive assistance from the Taxpayer Advocate Service if they are experiencing financial difficulty or if the IRS has not resolved their tax issues properly and timely through its normal channels” (IRS, 2018f).

from the toll-free number for businesses (IRS, 2018c). Access to a toll-free number will assist those taxpayers who do not have access to online tools (IRS, 2018d).

3. Taxpayer Assistance Centers

A Taxpayer Assistance Center is a local IRS office that provides service by appointment. The taxpayer requiring assistance is required to call the specific Taxpayer Assistance Center and schedule an appointment to address a complaint or administrative dispute (IRS, 2018d).

4. The National Taxpayer Advocate

In the event that a taxpayer remains aggrieved and unsatisfied by the above complaints process, the taxpayer may approach the National Taxpayer Advocate.

Andrew Roberson, a partner at McDermott Will & Emery LLP law firm, specialises in tax controversy and litigation and represents his clients in matters against the IRS. In an article, in May 2018, Roberson expressed that there are questions around how the recently enacted rights may be enforced as well as the remedies available should such rights be infringed upon by the IRS (Roberson, 2018). Thus, the exact path of recourse is unclear at this stage, however, it is possible that the Tax Court or Congress may be called upon to provide guidance on the Taxpayer Bill of Rights and how such rights can be enforced (Roberson, 2018).

The National Taxpayers Advocate

The National Taxpayers Advocate ("**the NTA**") does not function as a second IRS, rather, taxpayers are required to first try to resolve their complaint using the above IRS channels before approaching the NTA.

The NTA supervises and directs the Office of the Taxpayer Advocate⁷⁸, which is an independent organisation within the IRS that is responsible for appointing a Local Taxpayer Advocate for each state⁷⁹ in the USA (The Davis Tax Committee, 2017:98). There will be at least one Taxpayer Advocate in each state who will be an independent organisation within the IRS that reports to the NTA. The NTA

⁷⁸ The U.S. Internal Revenue Code §7803(c)(1).

⁷⁹ The U.S. Internal Revenue Code 7803(c)(2)(D).

is intended to act as the taxpayers' voice at the IRS, as well as to ensure that taxpayers are treated fairly and are aware of their fundamental rights when interacting with the IRS (IRS, 2018a). The NTA is mandated to address taxpayers' service complaints against the IRS (The Davis Tax Committee, 2017:73).

Taxpayer Assistance Order

A taxpayer may apply to the Office of the Taxpayer Advocate to request the NTA to consider issuing the IRS with a Taxpayer Assistance Order ("**TAO**"). The NTA will grant such request if the NTA is satisfied, per §7811(a)(1) of the Internal Revenue Code, that "*the taxpayer is suffering or about to suffer a significant hardship⁸⁰ as a result of the manner in which the internal revenue laws are being administered by the Secretary*" (IRS, 2017a). The process of a TAO acts to assist the Taxpayer Advocate Service on explicitly identified taxpayer cases (NTA, 2017:68).

The TAO may instruct the IRS to either terminate a specific action, refrain from taking a specific action or instruct the IRS to perform a certain action that is in accordance with the law⁸¹. A TAO may be modified or rescinded, however such actions are only permitted by the NTA (or her delegate), the Commissioner or Deputy Commissioner. In the event that a TAO is withdrawn by either the Commissioner or Deputy Commissioner, such party will be required to provide a written explanation to the NTA, providing justification as to why such modification to the TA) or rescission of the TAO was decided upon⁸² (NTA, 2017:68).

The NTA is required to identify any TAO's that were not accepted and adopted by the IRS. The TAO's identified as 'not honoured' will be documented in the NTA's Annual Report to Congress⁸³. The mechanism of issuing a TOA is a hands-on approach by the NTA in an attempt to address and resolve taxpayers' administrative disputes against the IRS (Croome, 2010:296)

⁸⁰ Hardship may be determined in accordance with the U.S. Internal Revenue Code §7811(2), read with Internal Revenue Service Treasury Regulation § 301.7811-1(a)(4)(ii).

⁸¹ Internal Revenue Code §7811(b)(2).

⁸² Internal Revenue Code §7811(c).

⁸³ Internal Revenue Code §7803(c)(2)(B)(ii)(VII).

Taxpayer Advocate Directive

A Taxpayer Assistance Order acts to address specific taxpayer cases, while a Taxpayer Advocate Directive (“**TAD**”) acts to address systemic issues that affect a group of taxpayers. In terms of Delegation Order No. 13-3⁸⁴, the NTA has the authority to issue a TAD “*to mandate administrative or procedural changes to improve the operation of a functional process or to grant relief to groups of taxpayers (or all taxpayers) when implementation will protect the rights of taxpayers, prevent undue burden, ensure equitable treatment or provide an essential service to taxpayers*” (IRS, 2017b; NTA, 2017:68).

Low Income Taxpayer Clinic

Linked to a taxpayer’s right to a fair and just tax system, is a taxpayer’s right to receive assistance from the Taxpayer Advocate Service (“**TAS**”) in the event of financial difficulty (IRS, 2018f). The taxpayer experiencing financial hardship will be able to receive assistance from a Low Income Taxpayer Clinic, if the taxpayer is considered eligible for such assistance, which is dependent on the level of the taxpayer’s income (IRS, 2018f). Therefore, a Low Income Taxpayer Clinic will represent low-income taxpayers who are unable to afford representation in their controversies against the IRS. Furthermore, such aggrieved taxpayer will not be charged more than a nominal fee for the services⁸⁵ provided by the Clinic (Croome, 2014).

Conclusion

The equivalent of the ‘SARS Service Charter’ in the UK, Canada and Australia is the ‘Your Charter’, the Taxpayer Bill of Rights and the Taxpayers’ Charter, respectively. The ‘SARS Service Charter’ in South Africa is not legislated and is thus not legally enforceable. This is in line with the equivalent statements in the UK, Canada and Australia. The USA has a legislated Taxpayer Bill of Rights that is legally enforceable by an aggrieved taxpayer against the IRS.

From the above investigation into the administrative complaint’s resolution processes of the UK, Canada, Australia and the USA, it is evident that all jurisdictions, including South Africa, have an

⁸⁴ Formally DO-250, Rev.1

⁸⁵ The U.S. Internal Revenue Code §7526(b)(1).

internal complaints process that is provided by the various revenue authorities. Furthermore, such internal complaints process is an aggrieved taxpayer's first port of call in attempting to resolve an administrative complaint against the relevant revenue authority. In addition, all the above jurisdictions, including South Africa, have independent bodies that can be approached should the internal complaints processes of the various tax authorities be ineffective. The independent body within each jurisdiction have differing mandates and thus not all independent bodies function the same or have the same effect in the various jurisdictions.

There are certainly aspects of the various foreign jurisdictions' administrative complaints resolution processes, that may further enhance South Africa's current complaints process, if such aspects are introduced. The recommendation of such aspects to be introduced into South Africa's current processes will be discussed in Chapter 6 of this dissertation.

CHAPTER 6: CONCLUSION

The South African Revenue Service (“**SARS**”) exercises its power via its empowering legislation, such as the Tax Administration Act 28 of 2011 (“**TAA**”) and the Income Tax Act 58 of 1962, to name a few. A taxpayer is entitled to challenge SARS’ power to determine whether SARS is exercising such power appropriately and in accordance with the respective legislation. Furthermore, a taxpayer may challenge SARS’ power to determine whether such power is exercised in accordance with the taxpayer’s constitutional rights⁸⁶. Should SARS infringe upon a taxpayer’s constitutional rights, the aggrieved taxpayer has the right to approach a court (Croome, 2010:14).

A person’s right to just administrative action is contained in the Bill of Rights, specifically section 33 of the Constitution. *“Certain of the powers conferred on the Commissioner may not, in themselves, violate the fundamental rights of taxpayers. However, the execution of those powers may constitute a violation of the taxpayer’s right to administrative justice, and this must be investigated”* (Croome, 2010:14). Thus, it is the manner by which SARS enforces its power or interacts with a taxpayer that may infringe upon a taxpayer’s right to administrative action that is lawful, reasonable and procedurally fair.

“Taxpayers are invariably in an unequal relationship with the fisc in that it compels them by statute to contribute to the state’s coffers. They are therefore not willing participants in the tax system” (Croome, 2010:14). Accordingly, there is a common perception, among taxpayers and tax professionals, surrounding the imbalance that exists between the powers of SARS in comparison to the rights of taxpayers. Such imbalance may be attributed towards taxpayers not having adequate recourse when their rights are infringed upon by SARS.

Chapter 5 of this dissertation investigated the administrative complaints processes available to taxpayers of the United Kingdom (“**UK**”), Canada, Australia and the United States of America (“**USA**”). It is evident from such investigation that certain aspects of the recourse available to taxpayers in those foreign jurisdictions, may improve the current complaints process in South Africa, should the recommended aspects be introduced. This chapter aims to provide recommendations on how certain aspects of the recourse in South Africa can be improved upon in order to further uphold taxpayers’ right to just administrative action and in order for South Africa to align itself to foreign jurisdictions that are providing better channels of recourse to their aggrieved taxpayers.

⁸⁶ The Bill of Rights, contained in Chapter 2 of the Constitution of the Republic of South Africa, 1996, specifies a person’s fundamental rights.

Enact a Taxpayer Bill of Rights

"Taxpayers' rights are a species of human rights that taxpayers should consider in their relationship with the fiscal authority" (Croome, 2010:14).

The Bill of Rights contained in Chapter 2 of the Constitution⁸⁷, provides for basic human rights. The Bill of Rights also acts to govern taxpayers' rights in their interactions with SARS (Croome, 2014). However, such constitutional rights do not explicitly address the specific rights a person has in respect of tax administration by SARS (Sawyer, 2000:3).

The 'SARS Service Charter' provides a formal document that sets out taxpayers' rights in their interactions with SARS, however, in the absence of statutory support, it proves difficult to enforce such rights (Sawyer, 2000:16). Thus, it is recommended that a separate Taxpayer Bill of Rights be enacted in South Africa so as to address the specific rights taxpayers have in their interactions with SARS and to ensure that such rights can be adequately enforced and defended. This recommendation is in line with the Davis Tax Committee's final report on tax administration which recommended a Taxpayer Bill of Rights that was able to be enforced with legal effect. The presence of enforceable taxpayer rights with legal effect will further encourage SARS' accountability to uphold such rights and be penalised accordingly should SARS exercise disregard for such rights (Visser, 2017b; Stigling & Smulders, 2008:608; The Davis Tax Committee, 2017:3).

The enactment of a Taxpayer Bill of Rights in South Africa will ensure that taxpayers' rights are upheld and are able to be adequately defended in their interactions with SARS. Furthermore, such a formal statement of taxpayers' rights will provide SARS with yet another set of standards to adhere to and be accountable to. Thus, the introduction of an enforceable Taxpayer Bill of Rights would serve to *"regulate the interactions and expectations of the relationship between SARS and taxpayers"* (Ensor, 2017b). Where taxpayers feel that their rights are being adequately represented and defended, this may result in taxpayers' having a more positive connotation towards tax compliance and this may in turn encourage cooperation and tax compliance by taxpayers (Stigling & Smulders, 2008:608).

In the alternative, should a Taxpayer Bill of Rights not be legislated with legal effect, it is recommended that SARS' accountability towards to 'SARS Service Charter' be increased. In the UK, the 'Your Charter' is not legislated, however there is legislation that supports the Charter, namely the

⁸⁷ Constitution of the Republic of South Africa, 1996.

Commissioners for Revenue and Customs Act 2005, which requires such Charter to be prepared and maintained by Her Majesty's Revenue and Customs office ("**HMRC**"). Furthermore, HMRC is required to issue an annual report stipulating to what extent the HMRC adhered to the rights and obligations stipulated in the 'Your Charter'⁸⁸. Thus, it is recommended that in order for the 'SARS Service Charter' to be more effective, the TAA should require such Charter to be prepared and maintained by SARS. In addition, it is recommended that SARS should be accountable to the contents of such Charter by issuing a report expressing SARS' level of adherence to the Charter.

Introducing an additional right to the 'SARS Service Charter'

A large number of South African taxpayers experience fear towards the almighty SARS, due to SARS' far-reaching powers. This fear is the result of numerous taxpayers being at the mercy of SARS' abuse of power. As a means to mitigate such fear, as seen in the Canadian Taxpayer Bill of Rights, it is recommended that 'the right for taxpayers to lodge a complaint without fear of reprisal' be introduced into the 'SARS Service Charter' as an additional right. Such recommendation stems from the discussion of the Canadian Taxpayer Bill of Rights in Chapter 5 of this dissertation.

Increase the power of the Tax Ombud

Since the establishment of the South African Tax Ombud in October 2013, there has been a positive movement towards enhancing the effectiveness of the Tax Ombud. As discussed in Chapter 3 to this dissertation, the recommendations issued by the Tax Ombud are not binding on the taxpayer or SARS⁸⁹. In the event that a Taxpayer Bill of Rights is legislated and brought into effect in South Africa, such rights will carry little value if they cannot be enforced. Thus, it is recommended that the Tax Ombud's powers be extended to enable the Tax Ombud to administer and enforce such rights (The Davis Tax Committee, 2017:73&108).

Such recommendation is provided in light of the role and authority of the National Taxpayer Advocate ("**NTA**") of the USA⁹⁰, discussed in Chapter 5 of this dissertation. The NTA has the authority to issue a Taxpayer Assistance Order ("**TAO**"). The TAO may instruct the IRS to either terminate a specific

⁸⁸ Section 16(4) of the Commissioners for Revenue and Customs Act 2006.

⁸⁹ Section 20(2) of the Tax Administration Act 28 of 2011.

⁹⁰ The Taxpayer Advocate of the USA may issue Taxpayer Advocate Directives or Taxpayer Assistance Orders to direct the Internal Revenue Service to act, or not to act, in certain way (Mthimunye, 2013:53).

action, refrain from taking a specific action or instruct the IRS to perform a certain action that is in accordance with the law⁹¹.

Thus, it is suggested that for the Tax Ombud to be more effective as a means of recourse for aggrieved South African taxpayers, the Tax Ombud should have the authority to direct SARS to either make a decision or withdraw/amend a decision (Mthimunye, 2013:53).

Recovering costs from an administrative dispute

A taxpayer involved in a legal dispute against SARS will more often than not require professional assistance, which comes at a great financial burden to the taxpayer. Where a taxpayer incurs unnecessary costs due to undue administrative procedures being followed by SARS, these wasted costs may be seen to constitute a deprivation of the taxpayer's property (Croome, 2010:49). The case in South Africa is that the TAA does not provide for a legal basis for taxpayers to institute recovery proceedings where SARS has exercised abuse of its powers (Croome, 2013a). The only way that taxpayers may attempt to recover costs, is if they escalate the matter to court, which will result in further legal costs for the taxpayer (Croome, 2010:294).

It is thus recommended that the legislature introduce provisions that describe the circumstances in which an aggrieved taxpayer may recover wasted costs or damages from SARS. Such introduction into the legislation would work to compensate aggrieved taxpayers for SARS' abuse of power and counterbalance SARS' powers with the increased rights and recourse of taxpayers. "*The proposed measures would enhance the fair and proper administration of the tax system in South Africa*" (Croome, 2010:51).

Legal assistance

In the USA, if taxpayers do not have sufficient financial resources to be formally represented in court proceedings, taxpayers are able to request assistance from a Low Income Taxpayer Clinic. Unfortunately this service is not offered in South Africa, which leads to taxpayers not being able to further escalate their complaints as the monetary outlay required is burdensome. It is recommended that consideration be given to establishing a non-governmental organisation that is willing to

⁹¹ Internal Revenue Code §7811(b)(2).

represent low income taxpayers who require assistance in their disputes against SARS (Croome, 2014). Such service will ensure that all taxpayers have the opportunity to defend their constitutional right to just administrative action.

Conclusion

The above recommendations are submitted in an attempt to improve upon the willingness of taxpayers to comply with their tax obligations through a more positive attitude towards SARS. Furthermore, this dissertation aimed to make taxpayers more aware of their administrative rights in their interactions with SARS. Such awareness and knowledge will enhance taxpayers' ability to challenge SARS where taxpayers are compliant, however, SARS exercises misconduct or disregard for due administrative procedures. A taxpayer who feels capable of adequately defending his/her rights, through the utilisation of an effective and affordable complaints process, may be more inclined to support SARS by complying with his/her tax obligations.

The Davis Tax Committee (2017:2) stated the following –

“Not only is the optimum level of efficiency and accountability in all SARS operations vital to the maximisation of tax collection but, failure to achieve optimum performance, affects the State’s ability to capacitate millions of poor people.”

Thus, it is in the best interest of SARS and the Republic of South Africa, for taxpayers to comply with their tax obligations. Such tax compliance may be improved upon and encourage taxpayers to comply when taxpayers believe that SARS is a public body that upholds taxpayers' rights and provides adequate remedies in the unfortunate event of an infringement. Where taxpayers feel that their rights are being adequately upheld by SARS and that any infringement thereof may be adequately defended, this may encourage tax compliance among taxpayers. Such tax compliance will assist SARS in meeting its revenue targets and in turn will assist the Republic of South Africa to meet its funding initiatives.

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