

UNIVERSITY OF CAPE TOWN



DEPARTMENT OF FINANCE AND TAXATION

2016

Information exchange across borders and the
confidentiality rights of taxpayers from a
South African perspective.

RESEARCH DISSERTATION PRESENTED FOR THE APPROVAL OF THE UNIVERSITY OF CAPE TOWN SENATE IN PARTIAL
FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF COMMERCE SPECIALISING IN TAXATION (IN THE FIELD
OF SOUTH AFRICAN TAXATION).

BY PHILLIPA BRITTON (BRTPHI007)

SUPERVISOR: PROFESSOR JENNIFER ROELEVELD

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

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

Abstract

In light of the provisions of the Tax Administration Act, No 28 of 2011 (TAA), as well as the introduction of Tax Information Exchange Agreements (TIEAs) between South Africa and other nations around the world, the issues around information exchange and the confidentiality thereof has become pertinent. Article 26 of the Organisation of Economic Co-operation and Development (OECD) Model Tax Convention on Income and on Capital provides a standard for information exchange and also highlights the use of automatic exchange of information as being considered a standard form of information exchange.

The recent case of *Commissioner of South Africa v Werner Van Kets* dealt with the definition of a taxpayer as well as information exchange. In addition, this case ruled on the hierarchy of domestic laws and international agreements. This case has led to the question of whether or not a third party is considered a taxpayer in terms of international tax agreements and raises question regarding the taxpayer's rights to confidentiality relating to information exchanged.

In light of new international best practice, domestic legislation and case law, various domestic laws of South Africa were reviewed to determine whether the domestic law allows for the international exchange of information and whether or not the confidentiality clauses therein are contradictory to one another.

When reviewing the manner in which South Africa allows for the exchange of information, in light of the standard Article 26, it was found that the TIEAs are aligned with both the TAA and Article 26 in terms of the exchange of information that is relevant to domestic laws.

It would however appear that South Africa has not yet adopted the use of automatic exchange of information - apart from the Foreign Account Tax Compliance Act (FATCA) Inter-Governmental Agreement (IGA) that was signed with the USA. South Africa has only entered into bilateral agreements which allow for the exchange of information on request and The TAA is silent on automatic exchange, despite the financial benefit of increased annual taxation revenue that South Africa could gain through having automatic exchange agreements in place.

Fishing expeditions¹ were reviewed in light of the provisions of the TAA and it was concluded that the South African Revenue Service (SARS) needs to be cautious when dealing with requests for information, making sure that requests received or requests made are in accordance with relevant international agreements and procedures so that they cannot be construed as being fishing expeditions.

The outcome of the OECD Global Forum Peer Review on South Africa reported a satisfactory report as far as exchange of information is concerned. South Africa does not have any legislation which requires SARS to notify the taxpayer that their information is going to be passed on to another country. This has raised some concerns with regard to a taxpayer's right to be notified if foreign countries are requesting information, or SARS is giving information, about their tax affairs.

¹ Broad, open ended requests.

The dissertation also reviews the confidentiality of information shared between a taxpayer and their tax practitioner. All tax practitioners have to belong to a professional body and most of these professional bodies have a confidentiality clause in their code of conduct that mentions circumstances in which information needs to be released and when one should not share information. Legal professional privilege for lawyers is based on common law and that privilege can only be claimed when legal advice in pursuant of litigation is sought. Other tax practitioners do not have this same privilege.

South Africa has made great strides to become compliant with the OECD recommendations on exchange of information. However, it would appear that taxpayers do not have many rights when it comes to the exchange of their information without their knowledge and limited confidentiality of information shared with their tax practitioners.

Plagiarism Declaration

Presented to the
Department of Finance & Taxation
University of Cape Town

by

STUDENT NAME(S): Phillipa Elizabeth Britton

STUDENT NUMBER: BRTPHI007

for

COURSE NAME: Minor Dissertation in Taxation

COURSE CODE: FTX5031W

Declaration

1. I know that plagiarism is wrong. Plagiarism is to use another's work and pretend that it is one's own.
2. I have used the Harvard convention for citation and referencing. Each contribution to, and quotation in, this *minor dissertation* entitled "*Information exchange with foreign entities and the confidentiality rights of the taxpayer around information exchange*" from the work(s) of other people has been attributed, and has been cited and referenced.
3. This paper is my own work.
4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work
5. I acknowledge that copying someone else's assignment, essay or paper, or part of it, is wrong, and declare that this is my own work.

Signed by candidate

Signature(s): Signature Removed

Date 29/01/2016

Full name(s) of student(s): Phillipa Elizabeth Britton

Contents

Abstract.....	1
Plagiarism Declaration	3
Acronyms and Abbreviations	6
Chapter 1: Introduction, Background, Purpose and Limitations of the Study.....	7
1.1 Introduction	7
1.2 Research Objectives.....	10
1.3 Scope of Dissertation	11
1.4 Limitations of Dissertation.....	11
1.4.1 International Law	11
1.4.2 Double Tax Treaties	11
1.4.3 Domestic Laws	12
1.4.4 Case Law.....	12
1.4.5 Types of exchange of information	12
1.4.6 Dates of review for inclusion in dissertation	12
1.5 Research Method.....	12
1.6 Structure	13
Chapter 2: Exchange of Information.....	15
2.1 Article 26 of the OECD Model Tax Convention on Income and on Capital.....	15
2.2 The Tax Administration Act No. 28 of 2011 (TAA)	15
2.3 South African Tax Information Exchange Agreements (TIEAs)	16
Chapter 3: Automatic Exchange of Information	18
3.1 Article 26 of the Model Tax Convention on Income and on Capital and forms of information exchange.	18
3.1.1 Exchange of information on request:	19
3.1.2 Automatic exchange of information:	19
3.1.3 Spontaneous exchange of information:.....	19
3.2 The Tax Administration Act No. 28 of 2011 (TAA)	21
3.3 South African Tax Information Exchange Agreements (TIEAs) and Automatic Information Exchange of Information.....	22
Chapter 4: Confidentiality of Information Exchanged	24
4.1 Manner in which information is exchanged	24
4.2 Article 26 of the Model Tax Convention on Income and on Capital and confidentiality of information exchange per the OECD report on “Keeping it safe”	26

4.3 The Commissioner for South African Revenue Services v Werner Van Kets (<i>case number 13446/2011</i>)	29
4.4 Confidentiality clauses per the TAA	31
4.5 Income Tax Act, 1962 Act No 58 and confidentiality of taxpayer’s information	33
4.6 Tax Information Exchange Agreements (TIEA) and confidentiality of information exchange....	34
4.7 Confidentiality and other South African Domestic Laws	34
4.7.1 The Constitution.....	34
4.7.2 Promotion of Access to Information Act 2000 Act 2 of 2000 (PAIA)	37
4.7.3 Indirect Taxes	38
4.7.4 Other applicable Financial Acts.....	40
4.8 Fishing Expeditions.....	43
Chapter 5: OECD Peer Review.....	46
Chapter 6: Taxpayers’ rights to confidentiality of information disclosed to tax practitioners.....	48
6.1 South African Institute of Chartered Accountants (SAICA).....	50
6.2 South African Institute of Professional Accountants (SAIPA)	51
6.3 Independent Regulatory Board of Auditors (IRBA).....	51
6.4 Law Society of South Africa.....	52
6.4.1 Legal Professional Privilege and Case Law	54
Chapter 7: Conclusion	58
Bibliography	63
Books.....	63
Articles and Publications.....	63
Case Law.....	65
South African Statutes	65
South African Revenue Service Agreements and Publications.....	66
Websites	67
Other	68

Acronyms and Abbreviations

ATO	Australian Tax Office
DTT	Double Tax Treaties
CIMA	Chartered Institute of Management Accountants
FATCA	Foreign Account Tax Compliance Act
FICA	Financial Intelligence Centre Act
FSBA	Financial Services Board Act
IGA	Inter-Governmental Agreement
IRBA	Independent Regulatory Board of Auditors
ITA	Income Tax Act
JSE	Johannesburg Stock Exchange
OECD	Organisation for Economic Co-operation and Development
PAIA	Promotion of Access to Information Act
RSA	Republic of South Africa
SAICA	South African Institute of Chartered Accountants
SAIPA	South African Institute of Professional Accountants
SALPA	South Africa Legal Practice Council
SARS	South African Revenue Services
TAA	Tax Administration Act
TIEA	Tax Information Exchange Agreement
VAT	Value Added Tax Act

Chapter 1: Introduction, Background, Purpose and Limitations of the Study

1.1 Introduction

The rapid evolution of technology and the ease of cross border trading have heightened the need for controls to be put in place to mitigate tax evasion or avoidance. The use of the so-called ‘tax havens’ by the wealthy to ‘hide’ their money, avoiding or even evading paying taxes in their own countries, is under the spotlight and is of concern to countries whose tax bases are being eroded. There is however a movement towards countries uniting to combat tax evasion, fraud and non-payment of tax owing. One way of achieving this is to ensure that domestic laws and agreements between countries address transparency and enable the exchange of information across borders.

The Organisation for Economic Co-operation and Development (OECD) has been at the forefront of ensuring strengthened international tax co-operation. The OECD was established in 1961, their mission being to promote policies that will improve the economic and social well-being of people around the world (OECD: About, n.d.).

“For years the OECD has advocated a policy of improved international tax co-operation between governments, including better information exchange and transparency to counter international tax avoidance and evasion”(OECD: Work on Aggressive Tax Planning, n.d.).

The OECD Model Tax Convention on Income and on Capital was introduced in 1963.

Article 26 of the Model Tax Convention on Income and on Capital (hereafter referred to as ‘Article 26’) was approved by the OECD council on 15 July 2005 (OECD: Launch of Peer Review Process, 2010) and the latest update was approved by the OECD council on 17 July 2012 (OECD: Update to Article 26, 2012). Article 26 *“provides the most widely accepted legal basis for bilateral exchange of information for tax purposes.”*(OECD: Article 26, 2012).

“Article 26 creates an obligation to exchange information that is foreseeably relevant to the correct application of a tax convention as well as for purposes of the administration and enforcement of domestic tax laws of the contracting states.” (OECD: Article 26, 2012).

Article 26 is the model article for the international exchange of tax information. Article 26 also states that information must remain confidential as well as whether or not the relevant parties to the agreement can decline to exchange information.

Due to countries acknowledging that their taxpayers can easily move their wealth across borders, as well as move their businesses or income offshore, countries adopting Article 26 will be able to maintain international relationships and assist one another in obtaining information on the tax affairs of taxpayers.

The concept of information exchange is not new and information has been flowing between South Africa and other countries upon request for some time. In South Africa, legislation exists governing the exchange of tax information with foreign countries as well as the confidentiality of the tax information exchanged. For example, Section 108 of the *Income Tax Act No.58 of 1962 (ITA)* governs the prevention or relief from double taxation and Section 4 governs secrecy of information.

As well as legislation that has been in existence for many years, new legislation has been promulgated in the *Tax Administration Act No. 28 of 2011 (TAA)*. The provisions of the TAA regarding exchange of information and confidentiality begs the question as to whether South Africa has made any advances in governing information exchange and confidentiality to support international agreements.

In addition to local legislation, South Africa has entered into 76 Double Tax Treaties (DTTs) and 13 Tax Information Exchange Agreements (TIEAs) with other countries around the world (SARS, 2015). A DTT is an agreement between two countries (contracting parties). “The purpose of the agreements between the two tax administrations of two countries is to enable the administrations to eliminate double taxation.” (SARS, 2013). In 2012 South Africa signed its first bilateral TIEA. The TIEA allows for the exchange of information between South Africa and the contracting country. The TIEAs are designed as a vehicle for mirroring Article 26 where no DTT is in place. It is to be noted that despite the fact that South Africa is not a member of the OECD, many of the South African DTTs follow the OECD Model and replicate Article 26 (exchange of information). Where Article 26 needed to be added or changed, protocols have been added to the respective DTT.

In October 2012 the OECD conducted a Peer Review, phase 1 and phase 2, on South Africa. The findings of the review have highlighted South Africa’s laws and agreements in light of the OECD norms (OECD: Global Forum, 2012).

Article 26 allows for three methods for information exchange namely: exchange of information upon request, exchange of information automatically and the exchange of information spontaneously (OECD: Update to Article 26, 2012). In 2012, the OECD released a report on *“Automatic Exchange of information: what it is, how it works and what remains to be done”*. This report was presented to the members of the G20 (of which South Africa is a member). In the report, a survey was conducted on 38 countries including South Africa. Of interest from the survey was that South Africa had not exchanged any information automatically by sending to other participating countries. The financial impact of international agreements can be of significant fiscal benefit to a country, as proven in the survey whereby five countries reported to have gained over €15 billion per year (OECD: Automatic Exchange of Information, 2012) (The report did not specify the Euro Denominated benefit of any specific country). In light of this report, the G20 mandated the OECD to compile a global standard on automatic exchange (OECD: The Fight Against Tax Fraud and Tax Evasion, 2013). OECD Head, Angel Gurría (when discussing automatic exchange with CNBC after presenting the report to the G8 in June 2013) said that there is to be a change to a higher single standard of automatic exchange, this standard will provide tax authorities with higher quality information, which will be more useful to them (OECD: Head Global, 2013).

Automatic exchange became more important in 2012 after the updated Article 26 and its commentary was approved. In light of the current Article 26, the question remains: How will South Africa exchange information and has South African legislation and tax agreements made advancements in relation to the OECDs recommendations?

Article 26 also discusses the confidentiality or secrecy of the information that has been exchanged. It specifies that the confidentiality of the information collected via an information exchange agreement must be treated in the same manner as prescribed by domestic laws in the said country (OECD: Update to Article 26, 2012, s2). South Africa has a significant number of domestic laws, many of which address confidentiality, with the Constitution being described on the Constitutional Court website as follows: “Our Constitution is the most important - or supreme - law of the land. No other law may conflict with it; nor may the government do anything that violates it.” (Constitutional Court of South Africa, n.d.). However, whether or not certain domestic laws have contradicting clauses on confidentiality of information and with whom information may be shared is of concern. A taxpayer needs to be assured that their tax information remains confidential and the exchange of such information does not infringe on their basic rights as prescribed in the Constitution.

In light of the above, one needs to consider whether South African domestic laws have any contradicting confidentiality clauses and if there are any provisions that may infringe on taxpayers rights. Furthermore, due to Article 26 specifically mentioning that confidentiality should not conflict with domestic laws, it becomes important to analyse the TIEAs, DTTs and domestic law for consistency in regard to confidentiality.

The case of *Commissioner for South African Revenue Services v Werner Van Kets*² has highlighted the hierarchy of domestic laws and international agreements. The question as to which law will override another as well as whether a DTT or TIEA is comparable or of a higher ranking than a domestic law is important when information is exchanged between South Africa and treaty partners.

In *Werner Van Kets*, whilst addressing information exchange with the DTT partner, there were conflicting definitions in the ITA and the DTTs which needed to be clarified. This led to the questioning of third party confidentiality with regards to information that a taxpayer has provided to them, or that to which they are privy. This is specifically relevant for tax practitioners who are considered third parties between the taxpayer and the South African Revenue Services (SARS).

1.2 Research Objectives

Based on the outcome of the *Werner Van Kets* case as well as the introduction of TIEAs and specific provisions in the TAA in South Africa, this dissertation seeks to revisit information exchange provisions and confidentiality, comparing existing legislation with new developments and recommendations from the OECD.

Given the problems identified, this dissertation serves to answer the following questions around the exchange of information with foreign countries, as well as the confidentiality of such information, as well as addressing the confidentiality of information exchanged with third parties such as tax practitioners.

1. How does South Africa exchange information and does South African legislation and TIEAs or articles in DTTs reflect the OECD's version of exchange of information?
2. Does South African domestic law have any contradicting confidentiality clauses.

² *The Commissioner for South African Revenue Services (SARS) v Werner Van Kets* [2012] (3) SA 399 (WCC) (2011)

3. Does South African domestic law allow for the exchange of confidential information with other parties and would an international tax agreement confidentiality clause overrule domestic law?
4. What are the taxpayer's rights to confidentiality specifically when SARS requests taxpayers information from a tax practitioner?

1.3 Scope of Dissertation

This dissertation focuses specifically on South African domestic law and how it interacts with the OECD Model Articles, as a proxy for South Africa's treaties. The dissertation also seeks to clarify to what extent South Africa is in compliance with the OECD recommendations.

The dissertation focuses specifically on information exchange and does not consider the collection of taxes for foreign tax authorities nor does it consider double tax relief provided for foreign taxes paid.

The review of confidentiality for tax practitioners will review the confidentiality clauses of the various professional body codes which govern the majority of tax practitioners. This will be limited to the following professional bodies: South African Institute of Chartered Accountants (SAICA), South African Institute of Professional Accountants (SAIPA), Independent regulatory board of Auditors (IRBA) and Law Society of South Africa.

1.4 Limitations of Dissertation

1.4.1 International Law

This dissertation covers South African domestic law and does not review or compare South African law with the laws of any other countries or international norms.

1.4.2 Double Tax Treaties

Due to the fact that the purpose of most DTTs is for the relief of double taxation, DTTs will not be reviewed in detail. The dissertation will specifically focus on information exchange and therefore only article 26 of the OECD Model and TIEAs will be reviewed in detail. The DTT between South Africa and Australia will be reviewed when discussing the *Werner Van Kets* case due to the relevance of this DTT to the case. This is the only DTT to which this dissertation will specifically refer.

1.4.3 Domestic Laws

The domestic law under review is limited to The Constitution, the Tax Administration Act (TAA) , Income Tax Act (ITA), indirect tax acts (namely the *Value Added Tax Act (VAT)*, *Customs and Excise Act*, the *Promotion of Access to Information Act (PAIA)*, *Financial Intelligence Centre Act (FICA)* and the *Financial Service Board Act (FSBC)*). The decision to choose certain financial Acts was based on the fact that these could impact the taxpayer in terms of financial information that is collected under these applicable Acts.

1.4.4 Case Law

The dissertation will briefly review two cases with regard to legal professional privilege when discussing taxpayers' rights to confidentiality when information is exchanged with their tax practitioners.

1.4.5 Types of exchange of information

There are three types of information exchange per Article 26, only automatic exchange will be discussed in detail, as information exchanged upon request is the form of exchange per the TIEAs. The request for spontaneous exchange will also not be discussed in detail. Currently, automatic exchange of information is being considered in the international tax community, with the OECD advocating the benefits of this form of exchange.

1.4.6 Dates of review for inclusion in dissertation

The majority of the research for this dissertation was conducted between September 2012 and June 2015. All care has been taken to update the dissertation up to and inclusive of 30 June 2015. Any new developments post June 2015 have not been considered.

1.5 Research Method

An extended literary review was undertaken of the relevant sections, paragraphs and articles in the *Income Tax Act No. 58 of 1962*, *The Tax Administration Act No 28 of 2011*, the South African Tax Information Exchange Agreements, Agreement between the Republic of South Africa and the Government of Australia for the avoidance of Double Taxation and the prevention of fiscal evasion with respect to taxes on income, Constitution of the Republic of South Africa 1996, *Promotion of Access to Information Act, 2000 (Act 2 of 2000)*, *Value-Added Tax Act, 1991 (Act 89 of 1991)*,

Customs and Excise Act, 1964 (Act no 91 of 1964), Financial Intelligence Centre Act, 2001, Financial Services Board Act, 1990 (Act No 97 of 1990), SAICA Code of Professional Conduct for Chartered Accountants issued November 2010, South African Institute of Professional Accountants handbook 2006, as well as the Independent Regulatory Board for Auditors Rules regarding improper conduct and code of professional conduct for registered auditors issued June 2010 and effective 1 January 2011.

For interpretational guidance on the above, this dissertation presents a detailed study of South African Revenue Services (SARS) interpretation notes, accepted authority textbooks, relevant published articles and dissertations, manuals and tax journals, as well as the Organisation for Economic Co-operation and Development (OECD) model tax conventions and relevant commentaries.

1.6 Structure

Each chapter in this dissertation will answer the outlined research questions in the context of the central theme of information exchange and related confidentiality of information exchanged.

Chapter 2 serves to explain information exchange specifically in light of the OECD Article 26, as well as reviewing the information exchange clauses in the TAA and TIEAs.

Chapter 3 provides a review of automatic exchange of information per the commentary to Article 26 of the OECD Model 2014 and assesses whether or not the provisions in the TAA and articles of the DTTs address automatic exchange of information.

Chapter 4 addresses the element of confidentiality with regards the information being exchanged. This chapter will review the OECD Article 26 confidentiality clause as well as the manner in which information is exchanged. The *Commissioner for the South African Revenue Service v Werner Van Kets* case will be analysed in light of the changes to the definition of a taxpayer as well as in considerations regarding the ruling on the hierarchy of international agreements.

The confidentiality clauses in domestic law will be reviewed, namely in: The *Tax Administration Act* No 28 of 2011, the *South African Income Tax Act* No. 58 of 1962, Constitution of the Republic of South Africa 1996, *Promotion of Access to Information Act, 2000 (Act 2 of 2000), Value-Added Tax Act, 1991 (Act 89 of 1991), Customs and Excise Act, 1964 (Act no 91 of 1964), Financial Intelligence Centre Act, 2001 and the Financial Services Board Act, 1990 (Act No 97 of 1990).*

Fishing expeditions will be discussed in light of the *Tax Administration Act*.

Chapter 5 acknowledges the Peer Review conducted on South Africa by the OECD and the relevant findings of this dissertation.

Chapter 6 serves to address the issue of taxpayers' rights to confidentiality when seeking the assistance of tax practitioners. The relevant code of conduct of tax practitioners will be reviewed in light of the confidentiality clauses as well as reviewing legal professional privilege and relevant case law.

Chapter 7 provides the conclusions and recommendations derived from the dissertation.

Chapter 2: Exchange of Information

This chapter will review the exchange of information per Article 26 as well as the exchange of information provisions in the TAA and the TIEAs. The purpose of this chapter is to determine how South Africa exchanges information and if South African legislation and International Tax Agreements have made advancements in relation to the OECDs recommended Article 26.

2.1 Article 26 of the OECD Model Tax Convention on Income and on Capital

Article 26 is used in many comprehensive bilateral tax treaties and is a model Article on Information Exchange between two treaty countries.

Article 26 (1) of the Model Tax Convention on Income and on Capital updated and approved by the OECD council on 17 July 2012 is as follows:

“The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2.”(OECD: Update to Article 26, 2012, s 1).³

As evidenced above, the Article 26 clause on information exchange states that two countries under an international agreement must exchange information that they have collected under their own domestic laws. This is applicable for all taxes.

2.2 The Tax Administration Act No. 28 of 2011 (TAA)

The TAA was promulgated into law on 4 July 2012. Section 3(3) of the TAA states that the Commissioner is obliged to assist foreign countries with whom South Africa has an international agreement, albeit a DTT or a TIEA (TAA, 2011). Section 3(3) of the TAA provides:

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

³ Article 26(1) has remained unchanged in the 2014 OECD Model.

(a) information, SARS may obtain the information requested for transmission to the competent authority of the other country as if it were relevant material required for purposes of a tax Act and must treat the information obtained as if it were taxpayer information;

(b) the conservancy or the collection of an amount alleged to be due by a person under the tax laws of the requesting country, SARS may deal with the request under the provisions of section 185; or

(c) the service of a document which emanates from the requesting country, SARS may effect service of the document as if it were a notice, document or other communication required under a tax Act to be issued, given, sent or served by SARS.” (TAA, 2011: s.3 (3))

SARS may collect the information per the request submitted by a foreign country, if it is required to be collected per the domestic tax laws of South Africa. The TAA also prescribes that the treatment of the information must be performed in the same manner that the information would be treated if SARS obtained this information under South African tax laws. Section 185 of the TAA discusses the assistance granted to foreign governments and details the prescribed information required by South Africa to assist foreign countries in their information request (TAA, 2011: s 185 (2) (a-d))⁴. Section 185 applies to the tax recovery by or from foreign entities and not specifically to information exchange.

From the above, it is evidenced that Section 3(3) of the TAA supports Article 26 in terms of the information exchanged.

2.3 South African Tax Information Exchange Agreements (TIEAs)

South Africa has thirteen TIEAs in force to date, namely with the Bahamas, Gibraltar, Bermuda, Cayman Islands, Guernsey, Jersey, Argentina, Belize, Barbados, Cook Islands and San Marino (SARS, 2015).

⁴ Section 185(2) of The Tax Administration Act states the following: (2)

A request described in subsection (1) must be in the prescribed form and must include a formal certificate issued by the competent authority of the other country stating—

(a) the amount of the tax due;

(b) whether the liability for the amount is disputed in terms of the laws of the other country;

(c) if the liability for the amount is so disputed, whether such dispute has been entered into solely to delay or frustrate collection of the amount alleged to be due; and

(d) Whether there is a risk of dissipation or concealment of assets by the person.

Articles 1 of these TIEAs are all similar and not materially different. The TIEA with the government of Bermuda for example states the following:

“The Parties through their competent authorities shall provide assistance through exchange of information that is relevant to the administration and enforcement of the domestic laws of the Parties concerning the taxes covered by this Agreement, including information that is relevant to the determination, assessment, enforcement or collection of tax with respect to persons subject to such taxes, or to the investigation of tax matters or the prosecution of criminal tax matters in relation to such persons. A requested Party is not obliged to provide information which is neither held by its authorities nor in the possession of or obtainable by persons who are within its territorial jurisdiction. The rights and safeguards secured to persons by the laws or administrative practice of the requested Party remain applicable. The requested Party shall use its best endeavours to ensure that the effective exchange of information is not unduly prevented or delayed.” (Agreement RSA and Bermuda, 2012: art.1)

The TIEAs are therefore aligned with the TAA and Article 26 in terms of the exchange of information that is relevant to domestic law. The TIEAs, however, only deal with information exchange upon request.

Chapter 3: Automatic Exchange of Information

Despite the advancements in South Africa to align with Article 26, one concern is whether or not South Africa has considered adding automatic exchange to the TAA.

Automatic exchange of information has been topical of late amongst the tax community, specifically after the OECD released a report on *Automatic Exchange of information what it is, how it works and what remains to be done (2012)*, showing the financial impact that automatic exchange can have for a revenue authority (OECD: Automatic Exchange of Information, 2012: p. 17).

The OECD is currently promoting automatic exchange of information in order for countries to receive more revenue and to close the loopholes on tax evaders who wish to transfer profits into tax havens.

“Automatic Exchange seems to work both to detect tax evasion and as a deterrent” (OECD Insights, 2012).

The TAA has been reviewed to determine South Africa’s stance on automatic exchange and if the TAA allows for the automatic exchange of information between South Africa and foreign countries.

This chapter will assess automatic exchange and review the TAA, DTTs and TIEAs to determine if they provide for automatic exchange of information with treaty partners. The commentary on Article 26 (OECD: Update to Article 26, 2012: p. 9) discusses the different types of information exchange that can occur between countries. With Article 26 in mind, a review will be made as to whether or not South Africa is meeting the requirements of Article 26 with regards to automatic information exchange.

3.1 Article 26 of the Model Tax Convention on Income and on Capital and forms of information exchange.

The form of exchange as per Article 26 can be transacted in three ways, namely *on request*, *automatic* and *spontaneous* according to the commentary on the Article (OECD: Update to Article 26, 2012:p.8).

3.1.1 Exchange of information on request:

“Exchange of information on request describes a situation where one competent authority asks for particular information from another competent authority. Typically, the information requested relates to an examination, inquiry or investigation of a taxpayer’s tax liability for specified tax years.” (OECD: Manual - Module 1, 2006: p.2).

3.1.2 Automatic exchange of information:

“Automatic exchange of information (also called routine exchange by some countries) involves the systematic and periodic transmission of “bulk” taxpayer information by the source country to the residence country concerning various categories of income (e.g. dividends, interest, royalties, salaries, pensions, etc.). This information is obtained on a routine basis in the source country (generally through reporting of the payments by the payer (financial institution, employer etc.)”(OECD: Manual – Model 3, 2006: p.3).

3.1.3 Spontaneous exchange of information:

“Spontaneous exchange of information is the provision of information to another contracting party that is foreseeably relevant to that other party and that has not been previously requested. Because of its nature, spontaneous exchange of information relies on the active participation and co-operation of local tax officials (e.g. tax auditors, etc.). Information provided spontaneously is usually effective since it concerns particulars detected and selected by tax officials of the sending country during or after an audit or other type of tax investigation.” (OECD: Manual - Module 2, 2006: p.3).

In the 2014 Update to the OECD Model Tax convention, additional forms of information exchange were addressed in the commentary on Article 26, namely simultaneous requests, tax examinations abroad and industry-wide exchange of information. The Commentary also mentioned that a contracting party can combine the forms of information exchange i.e. combined spontaneous, automatic and on request if required (OECD: 2014 Update to the OECD Model Tax Convention, 2014: p47)

Information subject to automatic exchange is generally information that the source country would routinely collect (for example in South Africa the information collected through provisional and annual tax returns as well as through employee reconciliations). The information subject to automatic exchange is normally received from a third party (i.e. the employer in situations of

employees tax and the financial institution in terms of interest received) (OECD: Manual – Module 3, 2006: p.3). The information that SARS will routinely collect (for example: residential addresses, banking details and employee addresses) can also be considered information that can be exchanged, as it is collected through domestic tax laws and used by SARS. Automatic exchange can be helpful in eliminating tax evasion, as the information recorded by SARS can be useful to other countries especially when investigating directorships, shareholdings and a taxpayer's net worth (OECD: Automatic Exchange of Information, 2012: p. 7).

The legal basis for the automatic exchange of information is generally based on the exchange of information provision of a double taxation agreement which may be based on Article 26 of the OECD or the UN Model Convention (OECD: Automatic Exchange of Information, 2012:p.13). Most countries that participate in automatic exchange of information have a memorandum of understanding which documents what information is automatically exchanged and in what manner it will be exchanged (OECD: Automatic Exchange of Information, 2012: p.13).

South Africa (among other countries) recently participated in a survey conducted by the OECD committee on fiscal affairs covering the automatic exchange of information. The survey showed that automatic exchange was widely used, predominantly for interest, dividends, royalties, income from service and pensions. Of the 38 countries surveyed, 100% obtain information automatically from treaty partners, however only 85% sent the information automatically to treaty partners (OECD: Automatic Exchange of Information, 2012: p.15).

From the survey, it is evident that South Africa did not automatically send information to any of its treaty partners; however South Africa received information from nine treaty partners (OECD: Automatic Exchange of Information, 2012: p. 16). The estimated transactional value from automatically reported information varied across countries from several million Euros to €200 billion in one year (OECD: Automatic Exchange of Information, 2012: p. 17). These numbers could have a significant impact on the South African economy in terms of revenue collection if South Africa entered into automatic exchange agreements with a greater number of treaty partners and amended DTTs and TIEAs where applicable.

One of the biggest concerns around the automatic exchange of information is the mitigating controls to ensure that confidentiality and privacy are maintained. A country needs to ensure that all information is kept confidential - confidentiality will be discussed under the next topic heading.

There are several benefits of automatic exchange:

- i. It can assist in the provision of information on non-compliance with tax laws;
- ii. Allows for information to be more readily available and to be obtained timeously;
- iii. To provide a deterrent for non-compliance and non-disclosure by taxpayers, as they know that certain transactions will result in their resident country obtaining the information through automatic exchange (OECD: Automatic Exchange of Information 2012: p.19).

3.2 The Tax Administration Act No. 28 of 2011 (TAA)

Chapter 5 of the TAA deals with information gathering and Section 46 in particular deals with the request for relevant information (TAA, 2011: Ch. 5).

Section 46 (1) of the TAA states the following:

“SARS may, for the purposes of the administration of a tax act in relation to a taxpayer, whether identified by name or otherwise objectively identifiable, require the taxpayer or another person to, within a reasonable period, submit relevant material (whether orally or in writing) that SARS requires.”(TAA, 2011: s 46(1)).

Section 46 (2) of the TAA states the following:

“A senior SARS official may require relevant material in terms of subsection (1) in respect of taxpayers in an objectively identifiable class of taxpayers.”(TAA, 2011: s 46(2)).

The above Sections of the TAA are broad in terms of the information that is being requested. There is a risk that random requests for information could be construed as a fishing expedition (broad, open-ended requests for information), especially with regards to Section 46 (2) whereby information can be requested in terms of a certain class of taxpayer. One needs to be specific as to the type of information that is being requested from the taxpayer. A fishing expedition is defined as:

“A search or investigation undertaken with the hope, though not the stated purpose, of discovering information” (Oxford English Dictionary, 2014).

Based on the review of the TAA, it would appear that the TAA is silent on the *automatic* exchange of information. The financial impact of the automatic exchange of information needs to be taken into

consideration As SARS is currently seeking more means to gather revenue, one system that should be reviewed and considered is implementing automatic exchange of information in order to ensure that lost revenue or revenue shifted offshore can be detected on an ongoing basis.

3.3 South African Tax Information Exchange Agreements (TIEAs) and Automatic Information Exchange of Information

From a review of all thirteen bilateral TIEAs that South Africa has in force, none of the TIEAs discuss automatic or simultaneous information exchange. In all thirteen agreements, article 4 of the TIEA provides for a request for information only.

“The competent authority of the requested Party shall provide upon request by the requesting Party information for the purposes referred to in Article 1.” (SARS, 2012: art.4)

It would be beneficial for South Africa to consider reviewing future TIEAs to add a clause on automatic information exchange. The mitigation of the risk of non-compliance could be narrowed and SARS could gain significant financial benefits, as was the outcome of the OECD survey whereby the countries exchanging information gained additional taxes that they would not have normally received.

However, understanding the financial benefits, in order to mitigate risk of misuse of financial and personal information exchanged, a strong control environment must be promoted and maintained.

As the G20 has mandated the OECD to prepare a model standard for automatic exchange, South Africa needs to be at the forefront of the changes and ensure that they amend current DTTs and for all TIEAs signed in future that automatic exchange is considered. From a review of the SARS website, they have documented a “multilateral TIEA” which will encompass all three forms of information exchange, however no multilateral TIEAs have been signed to date (SARS, n.d.) Of concern is that South Africa entered into a TIEA with the Government of Gibraltar on 21 July 2013, after the OECD reported on automatic exchange in 2012, in which South Africa did not consider automatic exchange.

On 9 June 2014, South Africa signed a Foreign Account Tax Compliance Act (FATCA) Inter-Governmental Agreement (IGA) with the United States of America (USA). This agreement became effective on the 1 July 2014 and has been ratified by Parliament. Per the SARS website, the IGA was signed for the following reasons:

“South Africa’s Financial Institutions have to collect and report on certain required information under FATCA and the OECD Common Reporting Standard on financial accounts with effect from 1 July 2014. The OECD’s Common Reporting Standard (CRS) is the standard for Automatic Exchange of Financial Account Information. In other words, the purpose of the CRS is to obtain financial account information from financial institutions and automatically exchange that information with other jurisdictions on an annual basis. SARS will then exchange the information with the US Treasury through a process of Automatic Exchange of Information (AEOI) under the legal framework provided by the double taxation agreement that exists between South Africa and the US.” (SARS, 2016)

Per the Agreement a financial institution is defined as follows:

“The term “Financial Institution” means a Custodial Institution, a Depository Institution, an Investment Entity, or a Specified Insurance Company.” (SARS, Agreement between the Government of The Republic of South Africa and the Government of the United States of America to improve International Tax Compliance and to implement FATCA, 2014)

The SARS website elaborates on financial institutions being banks and custodians, brokers, asset managers, private equity funds, certain investment vehicles, long-term insurers and other participants in the financial system (SARS, 2016).

Per the Agreement the contracting parties will declare account balances, interest, gross dividends, income generated from assets held in account and total proceeds from sale of property. These are for South African accounts held in the USA and vice versa. (SARS, Agreement between the Government of The Republic of South Africa and the Government of the United States of America to improve International Tax Compliance and to implement FATCA: Article 2(2), 2014).

Currently this is the only bilateral agreement for the automatic exchange of information that is in place in South Africa.

Chapter 4: Confidentiality of Information Exchanged

Taxpayers need to have assurance that personal information that is submitted to SARS will not be released to unauthorised individuals or institutions/entities.

Confidentiality is discussed in numerous tax laws, agreements and treaties. For the purposes of this dissertation the TAA, ITA, TIEAs, the Constitution of South Africa and Article 26 of the OECD model will be reviewed with respect to the confidentiality clauses and assessed as to whether there are contradicting confidentiality clauses in domestic law. A further analysis will be conducted on the confidentiality clauses of additional relevant domestic law. A review will be conducted of the recent *Werner Van Kets* case which discusses the hierarchy of domestic laws and international tax agreements followed by a discussion around the potential impact of this decision on confidentiality regarding third parties who provide tax information.

Croome (2010: p.168) discussed whether or not the disclosure of confidential information per DTTs violates Constitutional rights of South African taxpayers (Note the TIEAs were not yet in force at date of first publishing of *Taxpayers rights in South Africa (2010)*). The conclusion was that exchange of information can occur between two open and democratic societies as long as the information maintains its confidentiality.

“Ideally, the Commissioner should be required to inform taxpayers before a disclosure of information is made to a foreign authority to prevent incorrect information being passed to another country or, indeed, to the wrong country as has been encountered in practice.”
(Croome, 2010: p. 168).

A taxpayer should not be treated unfavourably or less favourably if information was exchanged with a treaty partner and confidentiality of the taxpayer’s information needs to be assured (Bentley, 1998: p. 46).

4.1 Manner in which information is exchanged

As an introduction to confidentiality of information, a brief review of the information exchanged transaction will be conducted, as the basic principles of the safeguarding of information is critical in ensuring that taxpayers information is kept confidential.

The OECD Report *“Keeping it safe: The OECD guide on the protection of confidentiality of Information Exchanged for tax purposes”*, that was published on the 23 July 2012 states the following:

“This report examines the legal framework to protect the tax confidentiality of information exchanged and the administrative policies and practices in place to protect confidentiality. The report sets out best practices related to confidentiality and provides practical guidance, including recommendations and a checklist, on how to meet an adequate level of protection while recognising that different tax administrations may have different approaches to ensuring that in practice they achieve the level required for the effective protection of confidentiality.”(OECD: Keeping it safe, 2012).

The above report is laid out as a guideline for confidentiality of information exchange, as the exchange of information is becoming a norm amongst countries to ensure compliance and to close the loop on non-compliant taxpayers. The taxpayer needs to be assured that any information that is exchanged remains protected and will not be leaked to any individuals who are not authorised to be exposed to the information.

The guideline for keeping information that is saved on a secure server includes: firewalls and specific user identification per employee, amongst other things. Records and access logs should be maintained. It is also vital that the records must show which employees have access to specific parts of the server, in order to avoid unauthorised access to the server (OECD: Keeping it safe, 2012: p. 17). Also included should be an electronic fingerprint identifying the person who is accessing certain information (OECD: Keeping it safe, 2012: p. 29).

The guide also states that background checks are to be conducted on employees, to ensure that those with the authority and access to servers do not have any criminal records or any previous convictions in terms of releasing confidential information (OECD: Keeping it safe, 2012: p. 17).

Policies should be developed for all laptops, smartphones and tablets whereby access to the secured server is either not granted or restricted.

When exchanging information with treaty partners the guide recommends that policies and procedures are in place in terms of how an employee must deal with such request. Of specific note is that the receiver of the request should verify the requestor’s information to ensure the requestor has the authority to request such information (OECD: Keeping it safe, 2012: p. 21).

“In order to ensure the tax confidentiality of information exchanged, the competent authorities of a number of countries include an embedded warning in the competent authority letter and all enclosures (background information, copies of contracts, etc.) such as a treaty stamp for paper mail or a watermark in case of electronic exchange.” (OECD: Keeping it safe, 2012: p. 21).

In the recent OECD Global Forum Peer Review Report for South Africa published in October 2012 (the Peer Review will be discussed in detail in Chapter 5), it was noted that South Africa uses an encrypted email system. SARS uses Winzip encryption and will email the password in another email to the receiver (OECD: Global Forum, 2012: p. 7). SARS has a secure server and if information is required to be provided at a local tax authority level then the confidentiality is emphasised (OECD: Global Forum, 2012: p.71). Per the Peer Review there have been no issues with regards to the confidentiality of the information.

4.2 Article 26 of the Model Tax Convention on Income and on Capital and confidentiality of information exchange per the OECD report on “Keeping it safe”

Per Article 26 (2) on information exchange:

“Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use.” (OECD: 2014 Update to the OECD Model Tax Convention, 2014: p7).

The OECD Report *“Keeping it safe: The OECD guide on the protection of confidentiality of Information Exchanged for tax purposes”* mentions that information may be reported to the taxpayer and their proxy, as well as the government or judicial council charged with deciding if the information can be disclosed to the taxpayer (OECD: Keeping it safe, 2012: p.8). Information cannot be disclosed to a

third party unless there is a bilateral treaty which allows the information to be exchanged (OECD: Keeping it safe, 2012: p.9).

The OECD's model TIEA states that information needs to be treated "*as secret in the same manner as information contained under domestic law*" (OECD: Keeping it safe, 2012: p.10), meaning that if South Africa receives information from other countries, they are required to treat this information received in the same manner as information obtained locally in terms of both the ITA secrecy provisions and the TAA.

Article 22 of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters takes it one step further to mention the confidential protection of personal data (OECD: Keeping it safe, 2012: p.10).

Section 22(1) Secrecy:

"Any information obtained by a Party under this Convention shall be treated as secret and protected in the same manner as information obtained under the domestic law of that Party and, to the extent needed to ensure the necessary level of protection of personal data, in accordance with the safeguards which may be specified by the supplying Party as required under its domestic law."(OECD: Multilateral Convention on Mutual Administrative Assistance, 2011).

Domestic laws are normally in line with the treaties in terms of confidentiality; however where there are inconsistencies between the domestic laws and the treaties, the treaty will override the domestic law (OECD: Keeping it safe, 2012: p.11).

The Vienna Convention on the Law of Treaties was enforced on 27 January 1980. The Vienna Convention sets out principles for international treaties.

Article 26 *Pacta sunt servanda* of the Vienna Convention states the following:

"Every treaty in force is binding upon the parties to it and must be performed by them in good faith."(United Nations: Vienna Convention, 1969).

Article 27 *Internal law and observance of treaties* states the following:

"A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." (United Nations: Vienna Convention, 1969).

Article 27 clearly states that one must adhere to international treaties and cannot invoke domestic laws for failure to meet any obligations or requirements under a treaty.

Section 231 (4) of the South Africa Constitution states:

“Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”(Constitution RSA, 1996).

Section 231(4) clearly states that all international agreements are law in South Africa and need to be adhered too as such. Judge Davis during his judgement in *Werner Van Kets* stated that a DTT and Section 231 of the constitution are equal in ranking (*Werner Van Kets* [2011] 13446: p. 13). *Werner Van Kets* will be discussed in detail in Chapter 4 subsection 3.

Of concern is that other domestic laws may allow for the release of information and therefore domestic laws need to be reviewed in terms of the confidentiality of information exchange to ensure that there are no contradicting rules which may allow for release of information to unauthorised persons or authorities (OECD: Keeping it safe, 2012: p.12). In South Africa the TAA and the ITA specifically mention confidentiality and secrecy of taxpayers’ information and both acts are in line when it comes to whom information may be disclosed. The confidentiality in domestic laws will be assessed further in this dissertation.

The OECD Report *“Keeping it safe: The OECD guide on the protection of confidentiality of Information Exchanged for tax purposes”* advises that domestic law must set out penalties for persons or authorities who disclose information without authorisation or what goes against domestic law (OECD: Keeping it safe, 2012: p.12). In France, the penalty is one year imprisonment and €15,000. In the United Kingdom, disclosure can lead to two years imprisonment and an unlimited fine. In New Zealand one can receive six months imprisonment or a fine of NZD 15,000 or both (OECD: Keeping it safe, 2012: p.13). The harsh penalties imposed by these countries are a deterrent for the leaking of confidential information.

In South Africa, Section 235 of the TAA states that it is a criminal offence to evade tax. The taxpayer could face being imprisoned for a minimum of five years or incur a fine or both (the fine would be based on Section 223 of the TAA whereby intentional tax evasion has a fine of up to 200% of the understated amount) (TAA, 2011: ch.15 s.223). What is of concern however is that the taxpayer

needs to prove that they are innocent (the onus is on the taxpayer)⁵. The fact that the taxpayer has to prove that they are innocent is the reverse to Section 35(3) (h) of the Constitution of South Africa whereby a person is “innocent until proven guilty”(Louw, 2013: p.61).

Section 236 of the TAA states that if the privacy provision is breached the person will also face criminal charges.

“A person who contravenes the provisions of section 67 (2) or (3), 68 (2), 69 (1) or (6) or 70 (5) is guilty of an offence and, upon conviction, is subject to a fine or to imprisonment for a period not exceeding two years.” (TAA, 2011: ch.15 s.236).

The TAA is silent on the fine amount that the SARS official will receive for breaching the privacy provisions. It would appear that the sentencing for a taxpayer who fraudulently submits returns or underestimates their tax liability is a harsh sentence compared to the sentence for a SARS official who releases confidential information. The SARS official holds a position whereby they are receiving highly confidential information which, if leaked, could impact significantly on taxpayers. There appears to be a need for tighter controls and tougher penalties and recourse against SARS officials.

4.3 The Commissioner for South African Revenue Services v Werner Van Kets (case number 13446/2011)

The judgement for this case was delivered on 22 November 2011. The Commissioner sought to declare that Sections 74A and 74B of the *Income Tax Act* No. 58 of 1962 (prior to the promulgation of the TAA) could be invoked for the purpose of obtaining information from *Werner Van Kets* in order to comply with the double tax treaty’s (DTT) provision on information exchange (*v Werner Van Kets* [2011] 13446).

⁵ Section 102(1) of The Tax Administration Act states the following:

A taxpayer bears the burden of proving—

- a) that an amount, transaction, event or item is exempt or otherwise not taxable;
- (b) that an amount or item is deductible or may be set-off;
- (c) the rate of tax applicable to a transaction, event, item or class of taxpayer;
- (d) that an amount qualifies as a reduction of tax payable;
- (e) that a valuation is correct; or
- (f) whether a ‘decision’ that is subject to objection and appeal under a tax Act, is incorrect.

The Commissioner received a request from the Australian Tax Office (ATO) for information in terms of Article 25 of the DTT between Australia and South Africa. The crux of the case was to determine whether the word “taxpayer” as defined in Section 74A and 74B of the Act could be interpreted to include a person who is not a taxpayer as defined in Section 1, but has been determined in terms of the DTT as a person who can provide information per the request from the ATO (*v Werner Van Kets* [2011] 13446: p. 2)

Davis, J in his judgement of the case, states that the essential point of the case is whether the provisions of the DTT in general, and specifically Article 25 (equivalent to Article 26 of the OECD Model) of the DTT broadens the scope of Section 74A and 74B beyond the strict meaning of the Section 1 definition of a taxpayer (*Werner Van Kets* [2011] 13446: p. 12).

Davis, J goes on to determine whether the DTT and the Income tax act could be interpreted as one.

“It would thus appear as if the DTA provisions become part of domestic income tax laws. Given the manner in which the DTA stands to be treated in terms of S 231 of the Constitution, its provisions must rank at least, equally with domestic laws, including the Act. For this reason, the provisions of the DTA and the Act, should, if at all possible, be reconciled and read as one coherent whole.” (*Werner Van Kets* [2011] 13446: p. 13 and 14).

“Within this context, the question arises as to whether the exchange of information provision caters for a third party who may have information with regard to income profits or gains of a resident of Australia in circumstances where the income, profit or gain could be sourced anywhere in the world” (*Werner Van Kets* [2011] 13446: p. 15).

“In my view, once the DTA is read together with the Act, this reading would imply that the word ‘taxpayer’ should include those taxpayers who do not fall within the scope of the Act but fall within the scope of the DTA, which would thus include an Australian resident. Once the Australian resident, in this case Mr Saville, is considered to be a taxpayer, manifestly the respondent would fall within this section because he would be classified as ‘any other person’ who would be able to furnish information regarding a taxpayer, in this case Mr Seville” (*Werner Van Kets* [2011] 13446: p. 15).

The definition of a taxpayer per the Income Tax Act is as follows: *“means any person chargeable with any tax leviable under this Act;”* (Income Tax Act No. 58, 1962 s.1). In the DTT between Australia and South Africa, Article 1 (personal scope) states the following: *“This Agreement shall apply to persons who are residents of one or both of the Contracting States.”* (SARS: Agreement RSA & Australia,

2012: art.1). Article 3 of the DTT states that “*the term "person" includes an individual, a company and any other body of persons;*” (SARS: Agreement RSA & Australia, 2012: art.3 (1)(j)).

From Judge Davis’ judgement, he used the “any other persons” from Article 3 to explain why Mr Saville (Australian resident) is a taxpayer.

This case was under appeal but was withdrawn by the taxpayer the day before the hearing.

The impact of Judge Davis’ ruling is that, due to the wording in a DTT or TIEA, the Commissioner could seek information from third parties in South Africa with regards to offshore dealings (Brink Cohen Le Roux (n.d.)) and that the DTT holds the same legality as domestic law.

The question about whether taxpayers therefore have rights to confidentiality of their information and tax affairs (even amongst their advisors or business partners) appears to be one of concern, as the Commissioner can seek information from a broader spectrum of individuals, if the outcome of the *Werner Van Kets* case is followed, as a wider interpretation has been made for the ‘taxpayer’ as defined. However the *Werner Van Kets* case merely re-enforces what already exists in law and the case would probably not have succeeded in the Supreme Court of Appeal.

4.4 Confidentiality clauses per the TAA

Since the *Werner Van Kets* decision, the TAA was promulgated. A review of the TAA, to determine what taxpayers rights exist in respect to the confidentiality of their information being exchanged with foreign entities, reveals the following:

Section 3 of the TAA discusses the Administration of Tax Acts. Section 3(3) gives SARS permission to obtain information that has been requested by a foreign country per international agreements (TAA, 2011: S3(3)).

Chapter 6 of the TAA has the heading of *Confidentiality* and consists of the following Sections:

67. General prohibition of disclosure

68. SARS confidential information and disclosure

69. Secrecy of taxpayer information and general disclosure

70. Disclosure to other entities

71. Disclosure in criminal, public safety or environmental matters

72. Self-incrimination

73. Disclosure to taxpayer of own record

74. Publication of names of offenders

Section 67 of the TAA states that Chapter 6 (sections 67 to 74) applies to all confidential information received or processed by SARS. This includes information supplied by a third party, information subject to legal professional privilege, information from investigations, information supplied by another state and so forth (TAA, 2011: s 68 (a)-(j)). This also includes “taxpayer information, which means any information provided by a taxpayer or obtained by SARS in respect of the taxpayer, including biometric information.” (TAA, 2011: s 67(1)(b)).

Section 67 continues by stating that a SARS official and any other persons receiving information under Section 70 of the TAA is required to take an oath to comply with the requirements of Chapter 6 (TAA, 2011: 67(2)). Section 67(4) states that no disclosure is to be made unless the disclosure is required in terms of Sections 68, 69, 79 and 71 (TAA, 2011: 67 (4)).

Sections 69 to 71 of the TAA discusses general disclosure and disclosure to other entities (namely: the Director of National Treasury, Statistician-general, National Student Financial Aid Scheme, the taxpayers employer, Governor of the Reserve bank, Financial Services Board, Financial Intelligence Centre, National credit regulator, Auditor General and the President of South Africa (TAA, 2011: s 70(1)-(7)). The release of information must be to the extent necessary for the entities to perform a regulatory function, or exercising their powers under the governing legislation of the relevant entities.

There is no mention in these sections about the maintaining of confidentiality once the information has been provided to these other entities.

The question as to whether or not taxpayers have the right to be provided with notice when their information is being exchanged (as highlighted by Croome: 2010) is only mentioned in Section 67(5) where, in order to maintain the integrity and reputation of SARS, information will be disclosed after giving the taxpayer 24 hours’ notice. However there is no mention in the TAA of giving the taxpayer notice if a foreign entity requests information per foreign agreements (TAA, 2011: 67(5)).

Of note is the fact that South African taxpayers are not notified when information is being exchanged. In *Taxpayers Rights: An international perspective*, the following was stated:

“It is preferable that taxpayers are both informed and have the right to contest a request for information about them from a foreign jurisdiction, except where it can be shown that it would be to the detriment of the investigation.” (Bentley, 1998: p. 46).

Croome (2011: 166) comments on the fact that the Commissioner⁶ has encountered issues before whereby information of a taxpayer has been disclosed to the wrong country. The taxpayer was not notified that the Commissioner was releasing this information and the taxpayer had to explain to the country wrongfully receiving the information on their position. As the taxpayer was not aware that this information was being disclosed, the taxpayer did not have the opportunity to ensure that the information being released was correct and true (Croome, 2010: p.166).

Section 236 of the TAA states that any persons guilty of contravening Section 67-70 with regards to confidentiality of information will be guilty of an offence and can be fined or jailed for a term not exceeding two years (TAA, 2011:236).

4.5 Income Tax Act, 1962 Act No 58 and confidentiality of taxpayer’s information

Section 108 of the Income Tax Act, dealing with the prevention of or relief from double taxation, subsection 5 states the following:

“The duty imposed by any law to preserve secrecy with regard to such tax shall not prevent the disclosure to any authorized officer of the country contemplated in subsection (1), of the facts, knowledge of which is necessary to enable it to be determined whether immunity, exemption or relief ought to be given or which it is necessary to disclose in order to render or receive assistance in accordance with the arrangements notified in terms of subsection (2).”
(Income Tax Act No.58, 1962: s 108(5)).

In other words the preservation of secrecy does not prevent an authorised officer in another country (an official officer of the foreign countries revenue authority) to receive information in order to perform the duties per a DTT or TIEA.

⁶ Commissioner of the South African Revenue Services

4.6 Tax Information Exchange Agreements (TIEA) and confidentiality of information exchange

The TIEAs that have been signed to date by South Africa (with Bahamas, Gibraltar, Bermuda, Jersey, Cayman Islands, Guernsey, Argentina, Belize, Barbados, Cook Islands, Liberia, Liechtenstein and San Marino) all contain an identical Article (Article 7) discussing confidentiality.

Article 7 states that all information exchanged will remain confidential; the information must only be used for the purpose of the request and the information cannot be disclosed to other countries (SARS, 2012: Agreement RSA & Bermuda).

4.7 Confidentiality and other South African Domestic Laws

Domestic laws are normally in line with the treaties in terms of confidentiality; however where there are inconsistencies between the domestic laws and the treaties, the treaty will override the domestic law (OECD: Keeping it safe, 2012: p.11).

Of concern is that other domestic laws may allow for the release of information that would be kept confidential by SARS and that the taxpayers expect their information to be kept confidential from third parties. Domestic laws need to be reviewed in terms of the confidentiality of information exchange to ensure that there are no contradicting rules which may allow for release of information to unauthorised persons or authorities (OECD: Keeping it safe, 2012: p.12).

A review of other relevant domestic laws was performed to determine the confidentiality and privacy clauses of these laws and whether or not they were in line with the ITA and TAA. The following domestic laws were reviewed: The Constitution, The *Promotion of Access to Information Act*, *Value Added Tax Act (VAT)*, *Customs and Excise Act*, *Financial Intelligence Centre Act*, and the *Financial Services Board Act*. Note not all domestic laws were reviewed, as a detailed review on all Acts is beyond the scope of this dissertation.

4.7.1 The Constitution

“The Constitution is the supreme law of the country” (Constitution of the Republic of South Africa STET 1996: ch. 1 s.2). The Following Sections of the Constitution relate to the South African public’s right to privacy.

Chapter 2 of the Bill of Rights, Section 14 on Privacy:

- 1) *Everyone has the right to privacy, which includes the right not to have:*
 - a) *their person or home searched;*
 - b) *their property searched;*
 - c) *their possessions seized; or*
 - d) *the privacy of their communications infringed. (Constitution of SA No. 108 of 1996).*

In the SAICA published report on “*Preservation of Secrecy*” (SAICA, March 2009) it was mentioned that taxpayers need to be aware that the Commissioner will preserve the secrecy of the information disclosed to SARS, per Section 14 of the Constitution.

The SARS service charter was released on 19 October 2005; the charter contains the level of services that a taxpayer can expect from SARS (SAICA, December 2005: issue 76). The charter also makes it clear that SARS will protect the taxpayer’s constitutional rights to privacy (SAICA, March 2009).

Chapter 2 of the Bill of Rights, Section 32- Access to Information:

- “1) *Everyone has the right of access to:*
 - a) *any information held by the state; and*
 - b) *any information that is held by another person and that is required for the exercise or protection of any rights.*
- 2) *National legislation⁷ must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.” (Constitution of SA No.108 of 1996).*

National Legislation would therefore include the TAA and ITA as both have been enforced by Parliament.

Section 32 above is contradictory to the outcome of *Silver v Silver*. In *Silver v Silver* (Silver v Silver, 1937 NPD 129) clarification was made as to the protection of a taxpayer’s privacy. A subpoena was served on the Commissioner to release information pertaining to transactions between a husband and a wife. The court held that if the Commissioner released information and if the court made it a

⁷ National Legislation includes:

- a) *subordinate legislation made in terms of an Act of Parliament; and*
- b) *legislation that was in force when the Constitution took effect and that is administered by the national government;*

habit to rule that the Commissioner releases confidential information then the individual's rights to privacy, per the Constitution, would be contravened. The ruling of the court held that the right to privacy per the Constitution is protected, and that the Commissioner cannot release confidential taxpayer information, except for the exceptions per the ITA (for example to the National Prosecuting Authority-per Section 4) (Croome. 2010: p.158).

Chapter 14 of the General Provisions of the Constitution- International Law

Section 231- International Agreements

Section 231 (2) states the following:

“An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3)”⁸.

Section 231 (4) states:

“Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.” (Constitution of SA No.108 of 1996).

In Coome's (2010) *Taxpayers Rights in South Africa*, the issue around information exchange with foreign entities in terms of International agreements and treaties is discussed. Croome (2010) questions whether the exchange of information is a breach of the taxpayers' constitutional rights to privacy and should the taxpayer be informed that such information will be exchanged, before the exchange takes place. Croome (2010) concludes:

“in open and democratic societies to allow for the exchange of information from one revenue authority to another, so long as the recipient authority protects the information on the same basis and to the same degree as the transmitting authority. A taxpayer should not be prejudiced such that information that would be protected in their home country is made

⁸ S 231 (3) “An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the National Executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.”

known to another revenue authority which does not have similar privacy provisions as in this or her home state.”(Croome, 2010: p. 166-169).

4.7.2 Promotion of Access to Information Act 2000 Act 2 of 2000 (PAIA)

The PAIA gives effect to the Constitutional right of access to information held by the state. As discussed above, Section 32 of the constitution gives everyone the right to access to information held by the State. This Act was promulgated due to events occurring pre-1994 (PAIA, 2000 (Act 2 of 2000)). During the Apartheid era (pre-1994) the former government created a secretive culture which in turn provided for grounds of violation of basic human rights. The PAIA was developed to promote a transparent culture within South Africa.

In terms of Section 35 of PAIA there is mandatory protection of certain records held by SARS

“1) Subject to subsection (2), the information officer of the South African Revenue Service, referred to in section 2(3)⁹, must refuse a request for access to a record of that Service if it contains information which was obtained or is held by that Service for the purposes of enforcing legislation concerning the collection of revenue as defined in section 1 of the South African Revenue Service Act, 1997 (Act No. 34 of 1997).

2) A record may not be refused in terms of subsection (1) insofar as it consists of information about the requester or the person on whose behalf the request is made.” (PAIA Act 2000 (Act 2 of 2000) pt. 2 ch.4 s 35(1)-(2)).

Section 37 of the PAIA discusses the protection of confidential information supplied by a third party. An information officer of a public body must refuse a request to access information supplied by a third party if the revealing of the information would constitute a breach of confidence with the third party (PAIA Act 2000 (Act 2 of 2000) pt. 2 ch.4 s 37(1)).

Croome (2010: p. 193) elaborates on Section 37 of the PAIA, mentioning that if a third party gives the Commissioner information on a taxpayer and the said information was made in confidence, the Commissioner cannot release the information to the taxpayer or any other requestor, unless the requestor can show the Commissioner that the information was not subject to a confidentiality agreement. The Commissioner can only release information if the third party gives the

⁹ Section 2 (3) : For the purposes of this Act, the South African Revenue Service, established by section 2 of the South African Revenue Service Act, 1997 (Act No. 34 of 1997), and referred to in section 35(1), is a [public body](#).

Commissioner written approval to release the information or if the information is already publically available (PAIA Act 2000 (Act 2 of 2000) pt. 2 ch.4 s 37(2)).

Therefore the PAIA allows for the release of certain information about the taxpayer if the request is made by the taxpayer himself, or if the taxpayer has given the Commissioner permission to release certain information. The Commissioner must refuse a request for information made by a third party. Therefore a third party cannot request information on a taxpayer and the Commissioner has no right to release such information.

Section 6 of the PAIA states:

“Nothing in this Act prevents the giving of access to-

- a) a record of a public body in terms of any legislation referred to in Part 1¹⁰ of the Schedule” (PAIA Act 2000 (Act 2 of 2000) pt.2 s.6).

From Section 6 and Section 35 above it would appear that the TAA would overrule the PAIA when it comes to the release of certain information. The PAIA allows for the refusal of information held by SARS should the information be held to enforce the TAA (Legislation) for the collection of taxes.

4.7.3 Indirect Taxes

4.7.3.1 Value Added Tax Act, 1991 (Act 89 of 1991)

The Value Added Tax Act (VAT Act) was promulgated in 1991 as an Act for the taxation of the supply of goods and services (VAT, 1991 (Act 89 of 1991): introduction).

Section 6 of the VAT Act on Secrecy states that the Chief Executive Officer¹¹ or any other person carrying out the provisions of the VAT Act may not disclose any information or permit access to information to any persons. However, there are exceptions with regard to disclosing information,

¹⁰ "public body" means--

- a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
- b) any other functionary or institution when--
 - (i) exercising a power or performing a duty 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;

¹¹ *Chief Executive officer means the Director- General: South African Revenue Services, www.acts.co.za/vat/chief_executive_officer.htm (retrieved 08.02.13)*

for example to the Auditor General to perform his duties or to the Director-General of the National Treasury. Section 6 (2)-(2D) stipulates when information may be released and to whom the information may be released (VAT 1991 (Act 89 of 1991) pt. 1 s.6). These are in line with Section 69-71 of the TAA (discussed in Chapter 4.4). Section 6(3A) states that if the consent has been received from the taxpayer then that information may be made known to any other persons VAT 1991 (Act 89 of 1991) pt. 1 s.6).

If Section 6 is contravened by any person the penalty is a fine of R5,000 or a period not exceeding 2 years imprisonment or both (VAT 1991 (Act 89 of 1991) pt. 1 s.6(6)).

The VAT Act documents the secrecy of all information gathered under the VAT Act. However the fine is not in line with that of the TAA and may also not have a significant financial impact on the person who releases the confidential information. The VAT Act does however follow the same requirements in terms of who can receive confidential VAT and taxpayer information.

4.7.3.2. Customs and Excise Act, 1964 (Act No 91 of 1964)

The Customs and Excise Act was implemented in order to provide for the levying of customs and excise duties, as well as the Fuel levy, Road Accident Fund levy and air passenger taxes (Customs and Excise Act, 1964 (Act no. 91 of 1964)).

Section 4(3) of the Customs and Excise Act states that the Commissioner or officer (Customs and Excise Act, 1964 (Act no. 91 of 1964)s.4(3)) shall not disclose any information relating to any person, firm or business, acquired in the performance of his duties (Customs and Excise Act, 1964 (Act no. 91 of 1964)s.4(3)). Section 4 (3) goes on to detail the exceptions to the non-disclosure, the exceptions are in line with both the VAT Act and the TAA (Customs and Excise Act, 1964 (Act no. 91 of 1964)s.4(3)).

Section 78 of the Customs and Excise Act discusses the fines and penalties that will be imposed if any section of the Act is contravened. The person will be liable for a fine not exceeding R8, 000 or imprisonment not exceeding 2 years (Customs and Excise Act, 1964 (Act no. 91 of 1964) s.78(1)-(3)).

The Customs and Excise Act therefore follows the same stance of confidentiality as the TAA and VAT Act. Once again it is noted that the fines and penalties may not be a deterrent for contravening the Act.

4.7.4 Other applicable Financial Acts

4.7.4.1 Financial Intelligence Centre Act, 2001

The Financial Intelligence Centre Act (FICA) was introduced to counter money laundering and other financial terrorist activities. FICA has imposed certain duties on institutions (for example banking institutions) that may be used for money laundering activities (FICA, 2001).

Section 36 (1) of FICA states the following: that if SARS knows or suspects that any unlawful activities are occurring with an accountable institution¹², SARS must advise the centre¹³ and furnish them with all information required¹⁴. Section 36 (2) states that if a centre believes that SARS is in possession or may have information on an accountable institution, that Centre may request SARS to release such information.¹⁵ Section 36 (3) states that the Commissioner may make reasonable procedural arrangements to ensure that confidentiality of the information is maintained (FICA 2001, ch.3 pt.3 s.36(3)).

Section 37(1) states that accountable institutions, for example SARS, must comply with FICA, in terms of a duty to report on money laundering. This is regardless of the secrecy or confidentiality clause imposed by common law or legislation (FICA 2001, ch.3 pt.3 s.(37)(1)).

¹² Means a person referred to in Schedule 1 of FICA, www.acts.co.za/fica/index.htm (retrieved 08.02.2013)

¹³ Means the Financial Intelligence Centre established by Section 2, www.acts.co.za/fica/centre.htm (retrieved 08.02.2013)

¹⁴ "If a [supervisory body](#) or the [South African Revenue Service](#) knows or suspects that an [accountable institution](#), wittingly or unwittingly has received or is about to receive the proceeds of unlawful activities or has been used or may be used in future for money laundering purposes or for the purpose of any transaction contemplated in [section 29\(1\)\(b\)](#), it must advise the [Centre](#) and any authority, service or body contemplated in section 3 or any other supervisory body that, in the opinion of the supervisory body or the South African Revenue Service, may have an interest therein, of that fact and furnish them with all information and any records regarding that knowledge or suspicion which they may reasonably require to identify the proceeds of unlawful activities or to combat money laundering activities or financing of terrorist and related activities." Financial Intelligence Centre Act, 2001, Chapter 3, Part 3, Section 36 www.acts.co.za/fica/index/htm (retrieved 04.01.2013).

¹⁵ "If the Centre believes that a supervisory body or the South African Revenue Service may have information indicating that an accountable institution, wittingly or unwittingly has received or is about to receive the proceeds of unlawful activities or has been used or may be used in future for money laundering purposes or for the purpose of any transaction contemplated in section 29(1)(b), the Centre may request that supervisory body or the South African Revenue Service to confirm or rebut that belief and the supervisory body or South African Revenue Service, as the case may be, must do so and, if that belief is confirmed, must furnish the Centre and any authority, service or body referred to in section 3 or any other supervisory body identified by the Centre that may have an interest in that matter with all information and any records regarding that knowledge or suspicion which the Centre may reasonably require for the achievement of its objectives." Financial Intelligence Centre Act, 2001, Chapter 3, Part 3, Section 36 (2) www.acts.co.za/fica/index/htm (retrieved 04.01.2013).

Section 37 (2) states that Section 37 (1) does not apply to a person's right to legal professional privilege¹⁶ in terms of communication regarding a litigation or legal advice obtained from their attorney (FICA 2001, ch.3 pt.3 s.37(2)).

Section 40 details who has access to information held by the centre. Section 40 (1) (a) states that an investigating authority inside the Republic, the SARS and the intelligence services may obtain information if there is written authority from the centre to release such information as required due to an unlawful activity (FICA 2001, ch.3 pt.3 s.40(1)(a)).

Section 40 (1) (b) states that entities outside of the Republic performing similar functions to that of the Centre in terms of investigating unlawful activities and combating money laundering activities, may on written request obtain information from the Centre, this is information believed to be relevant to the foreign entities (FICA 2001, ch.3 pt.3 s.40(1)(b)).

The FICA Act makes it clear in Section 40 that all requests must be in writing and that the Centre has the right to only release information they deem necessary for the investigation. The Act also stipulates that the information must only be used for the purpose as set out in the written request. Even though the FICA Act is broad in terms of who may request and receive information, the Centre will scrutinise and ensure all requests maintain relevance and a high degree of confidentiality. There is no mention in the Act as to fines and penalties imposed if confidential information is released to the wrong parties.

4.7.4.2 Financial Services Board Act, 1990 (Act No 97 of 1990)

The Financial Services Board Act (FSB Act) was established to supervise compliance with laws regulating financial institutions (FSBA, 1990 (Act No. 97 of 1990)).

Section 22 (1) (a) of the Act states that no member of the board¹⁷ may disclose information to any other persons, if the said information was obtained in performance of functions under the Act¹⁸. Section 22 (1) (b) states the exceptions to Section 22 (1) (a)¹⁹.

¹⁶ Legal professional privilege is the right to confidentiality between a person and their legal representative. Legal professional privilege is discussed in full in Chapter 6.

¹⁷ Board means the Financial Services Board established by Section 2, (retrieved 04.01.2013).

¹⁸ Section 22 of Financial Services Board Act, 1990 (Act No 97 of 1990) *"No member or alternate member of the [board](#), a member of a committee of the board, a member of the board of [appeal board](#) or a person referred to in [section 13](#) may, subject to paragraph (b) and subsection (2) disclose to any other person any information obtained in the performance of functions under this Act, the Acts referred to in the definition of 'financial*

Section 22 (2) states that the executive officer²⁰ may disclose information to foreign financial or investment services regulatory or supervisory authorities if the executive officer is of the opinion that such information will be of importance to the relevant authority²¹. The executive officer may also disclose information to foreign financial or investment services regulatory or supervisory authorities if the exchange of information is required in terms of an agreement or memorandum of understanding²².

The FSB Act clearly states that information must remain confidential and also allows for disclosure with foreign entities if the information is deemed relevant and important. The Executive officer needs to ensure that conditions are imposed relating to the confidentiality of the information.²³

institution', the Inspection of Financial Institutions Act, 1998 (Act No. 80 of 1998), the Financial Institutions (Protection of Funds) Act, 2001 (Act No. 28 of 2001) or the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001)." www.acts.co.za/financialservicesboard1990/index.htm (retrieved 04.01.2013).

¹⁹ Section 22 (1) (b) Financial Services Board Act, 1990 (Act No 97 of 1990)

"Despite the provisions of paragraph (a), disclosure of information may be made-

- i) in the course of performing functions under any law;*
- ii) for the purposes of legal proceedings;*
- iii) when required to do so by a court; or*
- iv) by the board, the executive officer or deputy executive officer if in their opinion, disclosure is in the public interest."*

²⁰ Executive officer means the person appointed as such in terms of Section 13, www.acts.co.za/financialservicesboard1990/executive_officer.htm (retrieved 04.01.2013)

²¹ Section 22 (2) (a) of the Financial Services Board Act, 1990 (Act No 97 of 1990)

"disclose to any foreign financial or investment services regulatory or supervisory authority, or any other regulatory or supervisory authority for financial or investment services in the Republic, including the Registrar of Medical Schemes and a self-regulatory body approved by the board, information relating to a particular financial or other institution or financial or other service or a particular individual who is or was involved in a particular [financial institution](#) or [financial service](#), if the executive officer is of the opinion that such information will be of importance to the relevant regulatory or supervisory authority, Registrar of Medical Schemes or self-regulatory body" www.acts.co.za/financialservicesboard1990/index.htm (retrieved 04.01.2013)

²² Section 22 (2) (b) of the Financial Services Board Act, 1990 (Act No 97 of 1990)

"disclose to any foreign financial or investment services regulatory or supervisory authority any information required in terms of any agreement, communiqué or memorandum of understanding concluded by the board or the executive officer with any such authority, and may render any assistance to such authority" www.acts.co.za/financialservicesboard1990/index.htm (retrieved 04.01.2013)

²³ Section 22 (2) of the Financial Services Board Act, 1990 (Act No 97 of 1990) *"Provided that the board or the executive officer may impose conditions relating to the use that may be made of any information or assistance and the preservation of confidentiality in respect thereof" www.acts.co.za/financialservicesboard1990/index.htm (retrieved 04.01.2013)*

4.8 Fishing Expeditions

A fishing expedition is defined as:

“a search or investigation undertaken with the hope, though not the stated purpose, of discovering information” (Oxford English Dictionary, 2014).

When a requesting country petitions for information they need to provide all relevant information including the persons tax number, identity number and other information that would assist SARS in identifying the taxpayer in question. The exchange of information must also be for a specific period and cannot be left open ended (OECD: fighting tax evasion, 2012: p.3). The use of prescribed information attempts to avoid ‘fishing expeditions’ whereby foreign countries send out blank requests or requests that do not specify what information is being required, in an attempt to obtain information about any taxpayer that will benefit the country requesting.

In the recent OECD peer review performed on South Africa the concept of a ‘fishing expedition’ was raised:

“Fishing expeditions are not authorised but all foreseeably relevant information must be provided, including bank information and information held by fiduciaries, regardless of the existence of a domestic tax interest or the application of a dual criminality standard.” (OECD: Global forum, 2012).

In other words, all information that is relevant for SARS to assist foreign entities in a request for information must be provided, this includes information held by banks.

The exchange of information between countries allows for transparent exchange to assist countries in identifying any tax misdemeanours for which there needs to be an investigation or inquiry. The exchange of information cannot however be used for general ‘fishing expeditions’ (OECD: Update to Article 26, 2012: commentary 4.4 p.3).

In a paper written by Ziesmann (n.d.) for the University of Waterloo, Ontario, Canada, the term of ‘fishing expeditions’ was elaborated upon:

“A Fishing expedition ... assumes there may be an “outcome” of some sort, and then seeks information to determine whether there should be an investigation into the outcome and the means by which it was achieved” (Ziesmann, n.d.).

Ziesmann (n.d.) scrutinised the Canadian Revenue Authorities and various Acts applicable to Canada in line with 'fishing expeditions' and taxpayers' rights to privacy.

Section 40 of the TAA states the following:

"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." (TAA, 2011: s.40).

Section 40 allows for SARS to audit any class or taxpayer based on a selection. There is no further clarity as to how the selection would be made; this process is at the discretion of SARS. The section states that random or risk assessments will determine who will be audited. Such random selection could be construed as 'fishing', as SARS could choose to contact a third party and ask broad questions (for example: SARS could contact a bank and ask for a list of taxpayers who spend over a certain amount, or a list of individuals who have purchased overseas air tickets).

Croome (2008) commented in his PhD thesis that SARS had in the past requested luxury car dealers to provide information on who purchased luxury vehicles; this information was used for VAT purposes for SARS to review the VAT input and output declared by the dealer, but whether the Commissioner could then use this information to audit a specific taxpayer who purchased a luxury vehicle is questionable. Croome (2008) writes that SARS must avoid targeting only one luxury dealer, as this could be grounds for an invalid request. Similarly, when SARS accesses information on a taxpayer's computer from a remote location, to determine the type of goods and services the taxpayer is supplying, Croome (2008) states:

"I contend that such a request is unreasonable in that it may hinder the business conducted by the taxpayer and that there are less restrictive means by which the Commissioner can obtain the required information. The Commissioner could instead seek specific information about transactions conducted with other taxpayers in a specified period. To allow the Commissioner on going access to live computer systems constitutes an undue violation of the taxpayer's right to privacy." (TAA, 2011: s.40).

The above highlights the need to have a specific request and not a broad open ended request for information.

Section 46 (1) and Section 46 (2) of the TAA as discussed in Chapter 2 allow SARS the freedom to request any information they deem fit. For example in the scenario mentioned above with the request for information from luxury car dealerships, SARS could decide, based on Section 40 and Section 46, that certain luxury car purchasers of the vehicles require a life-style audit. This broad request that is made to the luxury dealership can be considered as fishing and the review or audit on the purchasers can be a violation of their rights. There is a fine line between what SARS can or cannot request and the request being construed as 'fishing'.

When requesting information SARS needs to ensure that they are not seeking information for all categories of taxpayers for example requesting, from a top private bank, information on money markets opened each month or requesting from the Johannesburg Stock Exchange (JSE) a list of all share transactions. The concern is that SARS could be 'fishing' for any other form of taxpayer information through broad requests and not in fact focusing on their specific audit requirements.

When dealing with requests based on South African international tax agreements, SARS needs to ensure that the request is not a 'fishing expedition' and that the requesting country is specific in what they require and from whom they require it, SARS can then request the taxpayer if necessary for specific information pertaining to the international request.

Chapter 5: OECD Peer Review

In October 2012 the OECD released the results on the Peer Review that was performed on South Africa. The scope of the Peer Review was to monitor the implementation of the multilateral framework and standards for transparency and the exchanging of information for tax purposes (OECD: Global forum, 2012: p.5). The Peer Review consisted of three parts, Part A - Availability of Information, Part B - Access to Information and Part C - Exchanging of Information. The review covered the legal system, financial sector and the taxation and international co-operation of South Africa.

According to the Peer Review, the outcome was satisfactory, suggesting that South Africa has all the measures in place to assist with foreign partner's information requests. The Peer Review indicated that South Africa responded to 80% of the requests within 90 days and 90% of the requests within 180 days (OECD: Global forum, 2012: p.77).

Part B of the OECD Peer Review discusses Access to Information; of note is the comment that:

“There is no secrecy provision that may impede the effective access to information. Furthermore no rights and safeguards (e.g. notifications or appeal rights) exist in South Africa that will unduly prevent or delay effective exchange of information.” (OECD: Global forum, 2012: p.50).

This could infringe on a taxpayers rights to secrecy and confidentiality as described in the Constitution (refer to Chapter 1 and Chapter 4.7.1 for the discussion on the Constitution).

As the exchange of information with foreign countries is imposed via Law (refer to the Constitution of South Africa, Section 231 (Constitution of SA, No. 108 of 1996) and the TAA Section 3(3) (TAA, No. 28 of 2011: s.3 (3))), SARS has the right to assist and exchange information in terms of the DTTs and TIEAs with requesting countries.

The OECD concluded that in South African legislation, there is no law regarding the secrecy of accounting information:

“There are no provisions under South Africa's laws relating to the secrecy of ownership or accounting information. Common law accepts that a duty of confidentiality may arise through a contractual obligation, for example between a bank and its clients. However, the access powers contained in the ITA override the common law duty of confidentiality” (OECD: Global forum, 2012: p.57).

There is no requirement for the taxpayer to be notified if he/she is under investigation by SARS or foreign partners. If SARS requests information on behalf of a foreign partner in terms of a DTT or TIEA, SARS is not required to inform the taxpayer that the request is being made by a foreign partner (OECD: Global forum, 2012: p.59).

“There is no requirement in South Africa’s domestic legislation that the taxpayer under investigation or examination must be notified of a request. In addition, when requesting a person to produce information the South African authorities do not have to inform the person that the request is made for exchange of information purposes.” (OECD: Global forum, 2012: p.59).

Also of note was the following:

“Where possible, information will be obtained without requesting a taxpayer or a third person to produce such information. In cases where information is requested from a person in South Africa, the authorities will generally not inform that person of the purpose of the request. In fact, one of South Africa’s exchange of information partners indicated that in one specific case they were informed by South African authorities that the taxpayer could (indirectly) become aware of the request for information, and they were asked whether this would be appropriate. This shows that the South African authorities are aware of the risks of undermining the chance of success of the investigation conducted by the requesting jurisdiction, and that they will try to prevent this from happening” (OECD: Global forum, 2012: p.57).

This once again questions the taxpayer’s rights to secrecy and confidentiality should the taxpayer not be aware that information is being requested about their affairs.

The OECD was satisfied with the confidentiality provisions made, for information exchange between South Africa and other countries. There are relevant provisions in the exchange agreements to ensure confidentiality of the information (OECD: Global forum, 2012: p.69).

Of concern is that the OECD is satisfied with the fact that there is no obligation to notify taxpayers when information is requested about taxpayers per the treaties. This once again reiterates the fine line between the taxpayers’ constitutional rights to privacy, and those of the domestic laws in South Africa with regards to supplying confidential information to foreign countries. The taxpayer should have the right to be notified that their confidential tax information is being exchanged, unless it can be proven that the taxpayer could hinder the exchange of information.

Chapter 6: Taxpayers' rights to confidentiality of information disclosed to tax practitioners

The purpose for this section is to identify and assess the taxpayers' rights with regards to the confidentiality of information that they provide or discuss with taxation experts when seeking assistance in preparing tax returns; in other words with third parties.

Chapter 18 of the TAA discusses the registration of tax practitioners and the subsequent reporting of said tax practitioners for any unprofessional conduct (TAA, 2011: Chapter 18). Section 240 and Section 240A of the TAA states the requirements for registering as a tax practitioner and then details the recognised controlling bodies with which tax practitioners need to be affiliated. The purpose for the tax practitioner being registered with a controlling body is to ensure high ethics, integrity and professionalism of people providing tax advice. The purpose is also to close the gap on tax practitioners not abiding to a code of ethics. In years gone by, the ITA did not specify that tax practitioners needed to be registered with SARS, and this caused a great deal of concern surrounding the type of advice provided by their advisors. There was also no control around the integrity of the information that the tax practitioners were given by taxpayers.

Per Section 240A(1) of the TAA, the following professional bodies are recognised as controlling bodies for tax practitioners: Independent Regulatory Board of Auditors (IRBA), South Africa Legal Practice Council and the General Council of the Bar of South Africa (TAA, 2011: S240A (1))

Per Section 240A(2) of the TAA, the Commissioner may recognise other professional bodies provided they meet certain requirements²⁴ (TAA, 2011: S240A (2))

²⁴ S240A (2) of the Tax Administration Act states the following:

The Commissioner may recognise a "controlling body", for natural persons who provide advice with respect to the application of a tax Act or complete returns, as a "recognised controlling body" if the body—

- (a) *in respect of such persons, maintains relevant and effective—*
 - (i) *minimum qualification and experience requirements;*
 - (ii) *continuing professional education requirements;*
 - (iii) *codes of ethics and conduct; and*
 - (iv) *disciplinary codes and procedures;*
- (b) *is approved in terms of section 30B of the Income Tax Act for purposes of section 10 (1) (d) (iv) of the Act; and*
- (c) *has at least 1 000 members when applying for recognition or reasonable prospects of having 1 000 members within a year of applying.*

The SARS website acknowledges the following controlling bodies for tax practitioner purposes: South African Institute of Chartered Accountants (SAICA), , South African Institute of Professional Accountants (SAIPA), Chartered Institute of Management Accountants (CIMA), Chartered Secretaries of South Africa, Institute of Accounting and Commerce, South African Institute of Tax Practitioners (SAIT), the Association of Chartered Certified Accountants (ACCA) and Association of Accounting Technicians of Southern Africa (SARS, 2016).

Any person handling a taxpayer's confidential information should do so with integrity. The registration of tax practitioners ensures that there is an authority that is overseeing the process and holding the tax practitioners to be accountable, in an ethical and confidential environment.

Tax practitioners not registered with a controlling body may not hold the ethical and confidential standards as required of a professional person who is registered with a controlling body.

This begs the question: what rights do the taxpayers have to confidentiality, when requesting the service of a tax practitioner for assistance in tax matters.

Registration of a tax practitioner:

Section 240 Registration of tax practitioners.—

(1) every natural person who—

- (a) provides advice to another person with respect to the application of a tax Act; or*
- (b) completes or assists in completing a document to be submitted to SARS by another person in terms of a tax Act, must register with SARS as a tax practitioner, in such form as the Commissioner may determine, within 30 days after the date on which that person for the first time provides advice or completes or assists in completing any such document.*

(2) The provisions of this section do not apply in respect of a person who—

- (a) provides the advice or completes or assists in completing a document solely for no consideration to that person or his or her employer or a connected person in relation to that employer or that person;*
- (b) provides the advice solely in anticipation of or in the course of any litigation to which the Commissioner is a party or where the Commissioner is a complainant;*
- (c) provides the advice solely as an incidental or subordinate part of providing goods or other services to another person;*
- (d) provides the advice or completes or assists in completing a document solely—*
 - (i) to or in respect of the employer by whom that person is employed on a fulltime*

basis or to or in respect of that employer and connected persons in relation to that employer; or
(ii) under the direct supervision of a person who is registered as a tax practitioner in terms of subsection (1).

Tax practitioners who are registered with the various controlling bodies have a code of conduct with which each member must abide. The code of conduct is discussed below, looking specifically at the confidentiality clauses in each code. By contrast an attorney who is registered as a tax practitioner does not have a code of conduct *per se* and relies on legal professional privilege which is based on common law. Some of these codes will be discussed in the next sections.

6.1 South African Institute of Chartered Accountants (SAICA)

SAICA is the professional body which regulates Chartered Accountants in South Africa. SAICA performs the function of a professional body by ensuring high standards of all Chartered Accountants who wish to use the Chartered Accountant (South Africa) (CA) designation. They do this through enforcing that every member adheres to the code of conduct and if a member breaches the code there are severe consequences including the risk of losing the CA (SA) designation.

One of the fundamental Principles of the Code of professional conduct for Chartered Accountants is confidentiality. Part 100.5 (d) of the Code of Conduct:

“Confidentiality – to respect the confidentiality of information acquired as a result of professional and business relationships and, therefore, not disclose any such information to third parties without proper and specific authority, unless there is a legal or professional right or duty to disclose, nor use the information for the personal advantage of the chartered accountant or third parties.” (SAICA, 2010:s.100, p.13).

Section 140 of the Code of Conduct discusses the principles of confidentiality and how to maintain confidentiality. A Chartered Accountant must ensure they maintain confidentiality at all times with information acquired through professional and business relationships. A Chartered Accountant must also be aware of their surroundings when discussing confidential client information outside of their firm. The confidentiality will still apply even if the client relationship has ended (SAICA, 2010:s.140, p.20).

Section 140.7 describes circumstances whereby Chartered Accountants may be required to disclose confidential information, namely amongst others, if it is required by law or if there is a professional duty to disclose the information. For example in legal proceedings if the tax court specifically requests the Chartered Accountant to provide evidence on a tax case to the court of law or in terms of the TIEA whereby a foreign country requires the information to be disclosed for a legal proceeding (SAICA, 2010:s.140.7, p.21).

Section 140.8 gives guidance in deciding whether to disclose information. One of the factors in Section 140.8 (c) and (d) includes the type of communication and the parties the communication will be provided to (SAICA, 2010:s.140.8, p.21).

6.2 South African Institute of Professional Accountants (SAIPA)

SAIPA members are accountants who wish to belong to a professional body but have not qualified as Chartered Accountants. SAIPA members equally need to adhere to the SAIPA code of conduct.

Per the SAIPA Code of conduct, confidentiality is defined as:

“Confidentiality which means that members should respect the confidentiality of information acquired during the course of performing professional services and should not use or disclose any such information without proper and specific authority, unless there is a legal or professional right or duty to disclose such information.

It is noted that the duty of confidentiality continues beyond the end of the relationship between the full member and the client or employer.” (SAIPA: Code of Conduct, 2006:p.34).

This is the only mention of confidentiality in the SAIPA Handbook.

6.3 Independent Regulatory Board of Auditors (IRBA).

IRBA is the regulatory body for professional auditors. All IRBA members must abide by the code of professional conduct. Most IRBA members are also members of SAICA and therefore have to abide to both the SAICA code and the IRBA code.

Per Section 100.5 (d) of the IRBA Rules regarding improper conduct and code of professional conduct for registered auditors it states as follows:

“Confidentiality – to respect the confidentiality of information acquired as a result of professional and business relationships and, therefore, not disclose any such information to third parties without proper and specific authority, unless there is a legal or professional right or duty to disclose, nor use the information for the personal advantage of the registered auditor or third parties” (IRBA, 2011: s.100)

The definition for IRBA Confidentiality (as stated above) is in line with the SAICA definition for confidentiality.

Section 140 of the IRBA Rules regarding improper conduct and code of professional conduct for registered auditors, is in line with Section 140 of the SAICA Code of professional conduct for Chartered Accountants²⁵.

6.4 Law Society of South Africa

The Law Society of South Africa is the professional body for attorneys in South Africa.

In South Africa, attorney client privilege or legal professional privilege is protected through common law (Accountancy SA, 2013). The right to the privilege is not enforced in the Constitution (Marais, Molver-Adams and Adams, 2010).

For the privilege to be claimed, it needs to be made through seeking advice from a lawyer and made in confidence to the legal advisor (Marais, Molver-Adams and Adams, 2010).

Legal privilege is only applicable to the information required for the purpose of the legal advisor providing an opinion; therefore other information that is not directly linked to questions posed to the legal advisor for legal advice (for example: information obtained for tax return purposes such as a vehicle log book or an interest certificate from a bank) is not covered by legal professional privilege (Accountancy SA, 2013).

In the Accountancy SA published article on legal professional privilege (*Dear SARS - Legal Privilege in Tax Arena, 2013*) the following was documented:

²⁵ Section 140, IRBA Rules regarding improper conduct and code of professional conduct for registered auditors issued June 2010 and Effective 1 January 2011 Copyright © by the Independent Regulatory Board for Auditors. All rights reserved. Used with permission of the IRBA

“Clients often take the view that all communication that has passed between the client with an attorney or advocate is protected by legal professional privilege. This is not the case and Schwikkard, in Principles of Evidence (supra) states the following at page 135:

“Before legal professional privilege can be claimed the communication in question must have been made to a legal advisor acting in a professional capacity, in confidence, for the purpose of pending litigation or for the purpose of obtaining professional advice. The client must claim the privilege and the lawyer can claim the privilege on behalf of his client once the latter has made an informed decision.” (OECD: Global forum, 2012: p.69).

“For the privilege to apply it is not essential that the advice sought relates directly to actual or impending litigation. The privilege will also operate where the client is seeking legal advice.” (Accountancy SA, 2013).

It is however noted that an attorney or advocate does not need to register as a tax practitioner if they are purely providing advice to a taxpayer that will be used in litigation; this is due to the legal professional privilege of the advice provided.

However, if the attorney or advocate is giving advice that is not solely being used for litigation then the attorney or advocate is required to register as a tax practitioner (SARS: Brochure for Practitioners, 2013:p.4-5).

Therefore, if tax advice is sought for the purpose of completing a tax return, the information given to the attorney is not subject to legal professional privilege. Only once a taxpayer seeks advice on litigation with SARS and they request that legal professional privilege be applied, will the taxpayer be protected by such privilege.

In September 2014, President Jacob Zuma signed the Legal Practice Bill.

The Legal Practice Bill acts as a code of conduct for legal professionals (Chapter 4 Section 36) (RSA: Legal Practice Bill, 2012). The Legal Practice Bill provides legislation to which all attorneys are required to adhere with regard to their conduct and the courts will no longer have to rely on case law.

Section 64(1) of the TAA on Legal Professional Privilege states the following:

"If SARS foresees the need to search and seize relevant material that may be alleged to be subject to legal professional privilege, SARS must arrange for an attorney from the panel appointed under section 111 to be present during the execution of the warrant." (TAA No.28 of 2011: s64(1)).

Section 64 continues to set out that the attorney appointed by SARS must determine whether or not the legal professional privilege would exist for the particular material required by SARS.

6.4.1 Legal Professional Privilege and Case Law

6.4.1.1 Heiman Maasdorp and Barker v Secretary for Inland Revenue and another [1968], 30 SATC 145

In this case the taxpayer contended that privilege precluded the disclosure of information called for by the Commissioner (Croome and Olivier, 2010:p.137).

Snyman J concluded that the old Section 74(1) of the *Income Tax Act*, which stipulated the Commissioner's powers to call upon information did not override the taxpayers right to claim legal privilege from legal advice obtained from a legal advisor (Croome and Olivier, 2010: p.138), however in Snyman J's judgement, page 150:

"A taxpayer cannot by employing an attorney to do certain things for him which someone else could equally well have done for him, defeat the purpose of section 74 by claiming an attorney/client privilege in respect of it. For it lacks a peculiar confidence between attorney and client which is implicit in the privilege. Documents which in their initial stages may have been subject to the privilege ceased to be so once released by the taxpayer and made available to others." (Accountancy SA, 2007).

Based on *Heiman Maasdorp and Barker v SIR*, the taxpayer has the right to confidentiality if they seek the legal advice of an attorney or advocate provided that this is to seek legal advice for a litigation case. If an investigation has already commenced by the Commissioner, a taxpayer cannot seek legal professional privilege by merely handing over tax information and schedules and so forth to an attorney or advocate in order to claim legal professional privilege (Croome and Olivier, 2010:p.138).

6.4.1.2 Jeeva and Others v Receiver of Revenue, Port Elizabeth and others [1995] 2 SA433 (SE)57 SATC 187

In the Jeeva case, the applicant sought for information pertaining to a company with which they were previously involved (as former directors, auditors and employees) (Croome, 2010: p.159). The request to the Commissioner was for the released information of the company. In this case, Jones J ruled that the applicant had the right to gain access to the information as they were the ones who had initially supplied the Commissioner with the information (Croome and Olivier, 2010:p.14).

Jones J stated the following:

"These cases lay down the principle that the right to keep professional communications between legal advisor and client confidential is a fundamental right. Gibbs C J comments that 'this is a new development, which goes beyond any decision in England or Australia' [Baker v Campbell (supra at 65 (CLR))]. It does not seem to me to matter whether this is really a new development, or whether the law has come to recognise that what it previously treated as a rule of evidence has always been something more and that the rule of evidence is only one way of giving expression to a more fundamental right. It is certainly a new way of looking at privilege." (Accountancy SA, 2013).

Jones J went on to refer to *Baker v Campbell* where Dawson J stated:

"This is why the privilege does not extend to communications arising out of other confidential relationships such as those of doctor and patient, priest and penitent or accountant and client. The restriction of the privilege of the legal profession serves to emphasise that the relationship between a client and his legal advisor has a special significance because it is part of the functioning of the law itself which may ultimately result in disadvantage to the client." (Croome, 2008:p.109).

Jones J continued to state that the fact that the applicants were known to the company, and the information given to the Commissioner was through either the directors, auditors or servants of the companies, that there was nothing secret about the information supplied.

There was no independence between the applicants and the taxpayer. He further went on to state that the information was not prepared for the purpose of the litigation (Croome, 2010: p.159).

As can be seen in the Jeeva case in order to claim legal professional privilege one needs to be independent from the taxpayer and the privilege can only be claimed when the legal advice was sought in pursuant of litigation.

Taxpayers and their legal advisors can refuse to provide information requested by the Commissioner that has been protected by legal professional privilege on the grounds of the taxpayers' rights to privacy per Section 14 of the Constitution (Constitution of RSA: Right to Privacy, 1996: ch.2 s.14).

"The legal right to claim privilege on the requested information would make the refusal lawful" (Croome and Olivier, 2010: p.139).

Currently in South Africa, legal professional privilege does not extend to accountants (members of SAICA, IRBA or SAIPA). As documented above, accountants are required per the code of conduct to disclose information if required by law to disclose. As the TAA is enforced by law, the tax practitioner may be required to disclose the information requested by SARS.

To quote from the Accountancy SA article, entitled *Dear SARS - Legal privilege in Tax Arena (2013)*:

"Currently, in South Africa, clients of lawyers advising on tax matters, whether working for their own account or in an accounting firm should enjoy privilege. However, a client seeking advice from an accountant does not enjoy the legal right to claim privilege. It is submitted that the distinction between lawyers and accountants in the tax arena appears unjustifiably discriminatory in contravention of section 9 of the Constitution of the Republic of South Africa, Act 108 of 1996, as amended." (Accountancy SA, 2013).

In the recent United Kingdom case heard by the Appeal Court, Prudential PLC appealed to a decision that advice received from their accountants on the company's tax administration was bound to legal professional privilege (i.e. extending the legal privilege to accountants). The court held that legal privilege does not extend to any other professional member apart from lawyers when seeking tax advice.

One observation made by the courts was that due to the fact that lawyers normally give advice, if one gives a non-lawyer the right to legal privilege on advice, this could lead to a 'grey area' on the principles of legal privilege and could lead to uncertainty (Lewis, 2013).

Attorneys and Advocates on the other hand have legal professional privilege upon which they can fall back if necessary to protect the confidential information of taxpayers. However it would be

advisable to seek legal advice for litigation from an attorney or advocate who is not necessarily registered as a tax practitioner provided that advice is solely advice to be used in litigation.

Of interest in the recent OECD Peer Review performed on South Africa it was documented that South African Legislation does not have a provision for secrecy of accounting information. If there is a common law duty to confidentiality in terms of contractual agreements, the ITA will overrule the confidentiality per common law (OECD: Global Forum 2012: p.55).

Chapter 7: Conclusion

Based on the research performed for this dissertation the following can be concluded:

1. **How does South Africa exchange information and does South African legislation and TIEAs or articles in DTTs reflect the OECD's version of exchange of information?**

South Africa has made great improvements to step closer towards the OECD Model Article 26 when it comes to information exchange, specifically in terms of the TAA and the signing of thirteen (to date) bilateral TIEAs. The clauses on information exchange in all three of the relevant legislations are similar, specifically in terms of the fact that information is collected as it would be collected per the countries domestic laws. It is however noted that the DTT's, TIEAs and TAA mention exchange of information upon request only and no mention is made of automatic exchange of information.

More remains to be done on automatic exchange, which will help South Africa in tax collection and closing the loopholes in tax evasion and avoidance. As was evidenced in the OECD report *Automatic Exchange of information: what it is, how it works and what remains to be done (2012)*, South Africa can gain significant financial benefits from adopting automatic exchange with their treaty partners.

It is to be noted that on the SARS website they have made mention of multilateral TIEAs:

"Multilateral TIEAs are agreements between the tax administrations of two or more countries to enable them to exchange tax information on request, spontaneously or automatically, as well as to provide assistance in the collection of taxes." (SARS, 2014).

Given that, on the 21 July 2014, the OECD released the *Standard for Automatic Exchange of financial information in tax matters* (OECD, 2014), one hopes that SARS will take this into account when entering into new international tax agreements and that SARS will be in the forefront of automatic exchange in the future.

2. **Does South African domestic law have any contradicting confidentiality clauses?**

From reviewing different domestic laws, it is evident that each Act takes into account the importance of confidentiality and preserving secrecy of information. From the highest level of legislation, being the Constitution to the other relevant financial Acts that play a role in the bigger picture of tax collection.

However, more needs to be done in aligning all the Acts to have the same or similar confidentiality clauses. The FSB and the FICA Act for example are very broad regarding with whom information can be shared. Of importance is to always bear in mind the Constitution and the protection of taxpayer's right to privacy. Information leaking and or lack of strict controls around whom and what information is shared may be detrimental to SARS and the taxpayer as SARS needs to maintain their reputation of having strict controls and ethics.

In a democratic environment with sound governance, confidentiality needs to remain a priority in order for the citizens of the country to have trust and faith that their basic rights will not be violated.

The DTTs, TIEAs as well as the TAA and the ITA document the requirements for confidentiality of the taxpayer's information. However, the confidentiality clauses are relatively broad in terms of the manner in which information is exchanged.

In the OECD Peer Review of South Africa it was stated that 'fishing expeditions' are not allowed when it comes to requests for information between two treaty partners (OECD: Global forum, 2012). Croome (2008) states that SARS needs to be cautious about making broad requests, or requesting information for an indirect tax (VAT) and using said information for the purposes of a direct tax (Income Tax) (Croome, 2008:p.83). Overall, from the review of the TAA, it appears that South Africa needs to consider and review the TAA in light of 'fishing expeditions', such that 'fishing expeditions' need to be defined. Transparency is required in terms of the purpose of requests for information and what the information will be used for as well as how taxpayers are selected for audits and reviews.

Of concern is that the taxpayer is not informed that such information is being transferred by the South African tax authorities, or requested by tax authorities of foreign countries, nor are the penalties for an official who discloses confidential information harsh enough such that it will deter the unauthorised disclosure. The fines and penalties for unauthorised disclosure need to be reviewed in light of inflation and also consider the impact the financial loss will have on individuals or entities. SARS needs to be transparent in disclosing the amount of the fine that would be imposed on a tax official who breaches the privacy provision.

In order to maintain good corporate governance practices, there is a need for transparency in terms of SARS officials and their punishments for supplying confidential information to the incorrect parties.

The clause on confidentiality needs to be more specific regarding personal data as well as the method with which data is transferred (i.e. encryption of data, registered postal with tracking numbers etc.)

The form of security employed by SARS is questionable in today's society where websites, servers and other forms of technology are being hacked in order to gain access to confidential information. There are a number of websites, like Wikileaks, that disclose "top secret" information. It is questionable as to whether the security methods used by SARS are of the highest level to ensure protection of the confidential information.

Bentley (1998) commented in the book *"Taxpayers Rights: An international perspective"* the following:

"Advances in technology mean that tax authorities need to place particular emphasis on the protection of confidential information held on databases. The need to develop specific rights relevant to information collected from or held on computer. The protection should extend to provide strong sanctions to deter unauthorised third parties from accessing confidential taxpayer information. No system is completely safe from computer hackers and there must be protection for taxpayers against unauthorised dissemination of information possibly critical to the commercial survival of those taxpayers" (Bentley, 1998: p46).

Based on the results of the OECD Peer Review, it would appear that SARS has sufficient policies and procedures in place to ensure safeguarding of the exchange of confidential information with other parties. However, there may still be some gaps that SARS should consider based on how other countries ensure the safeguarding. SARS internal policies and procedures must be aligned with the OECD's guidelines to ensure that all information whether it is information gathering or information exchange, is stored in the highest level of secure systems. The review of the SARS internal policies falls out of the ambient of this dissertation.

A taxpayer does not have the right in South Africa to be made aware of information that will be released to a foreign country; the Commissioner needs to consider scenarios whereby SARS will release incorrect information to incorrect receivers and the controls that will be put in place to ensure this does not occur. Taxpayers should be given notification that information is being released, unless the taxpayer is in the position to hinder or alter the information before the release.

3. Does South African domestic law allow for the exchange of confidential information with other parties and would an international tax Agreement confidentiality clause overrule a domestic law

From the review of the relevant domestic laws, it appears all legislation reviewed allows for the exchange of information and the domestic laws also have a confidentiality or secrecy provision.

The outcome of the *Werner Van Kets* case was that the DTTs are read as one with the Constitution and other domestic laws (Werner Van Kets [2011] 13446: p. 13). Therefore, the DTTs and TIEAs could overrule a domestic law in certain circumstances if the DTTs or TIEAs provide more clarification or go into more detail in terms of confidentiality clauses. In Article 27 of the Vienna Convention on the Law of Treaties, it is stated that one cannot use internal laws for justification for not adhering to an international treaty (United Nations: Vienna Convention, 1969). In Section 231 (4) of the Constitution of South Africa it is stated that once an international agreement is enacted it becomes law in South Africa (Constitution of RSA, 1996).

Based on the research performed it is apparent that DTTs and TIEAs are enforceable in South Africa and are considered on the same level as domestic law and must be treated as such.

4. What are the taxpayer's rights to confidentiality specifically when SARS requests taxpayers information from a tax practitioner?

The outcome of the *Werner Van Kets* case whereby the definition of a taxpayer was expanded to include third parties or "and any other body of persons" (Agreement RSA & Australia: art.3(1)(j)) is a concern for all tax practitioners. The relevant codes of conduct for SAICA, SAIPA and IRBA members all cover member's confidentiality to information, however this has not yet been tested in court and tax practitioners need to exercise caution when obtaining tax information. They may not be able to refuse the providing of such information on the basis of their code of conducts. Taxpayers also need to be made aware of this when providing their tax practitioners with information, obviously without advocating tax evasion or avoidance.

Nazeer Wadee the ex-Chief Operating Officer of SAICA wrote the following in an article titled Straight Shooting- SAICA and SARS published in Accountancy SA in November 2008:

"Sketching the background to the submission, SAICA points to the prime difference between the role of practitioners and SARS thus: "The primary loyalty of practitioners is to their clients (within the ambit of the law) and not SARS. An important function of the regulation of tax

advisers is to help strike an appropriate balance between loyalty to the system and loyalty to the client" (Wadee, 2008).

The South African case law for legal professional privilege for attorneys, with regards to taxation matters, illustrates that a taxpayer does not have the right to claim privilege if he has already been investigated or if he is claiming privilege on schedules and documentation that would normally be sought after by the Commissioner for Income tax purposes.

"Taxpayers cannot secure legal professional privilege for documentation not subject to privilege by handing that documentation over to their attorney or advocate" (Croome and Olivier, 2010:p. 150).

Bibliography

Books

Bentley, D (1998) Taxpayers' Rights: An International Perspective, The Revenue Law Journal, Australia.

Croome, B. (2010) Taxpayers rights in South Africa. University of Cape Town, Juta Law.

Croome, B,J. and Olivier, L. (2010). Tax Administration. South Africa: Juta.

Articles and Publications

Lewis, A. (2013). Legal Professional Privilege – Prudential Case Confirmed [Web Log post]. Available from: <http://www.taxtalkblog.com/?p=8437> [08 February 2013]

Love, P. (2012), OECD Insights: Taxpaying made easier. 16 August 2012. Available from: <http://oecdinsights.org/2012/08/16/taxpaying-made-easier/>. [11 February 2013]

Marais,J. and Molver-Adams, A. and Adams (2010). Precious Privilege. Available from: http://www.adamsadams.com/index.php/media_centre/news/article/Precious_privilegePrecious_privilege/. [16 January 2010]

OECD "fighting tax evasion: questions and answers, available at <http://www.oecd.org/tax/fightingtaxevasionquestionsandanswers.htm>

Organisation for Economic Co-operation and Development (2012). *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: South Africa 2012: Combined: Phase 1 + Phase 2*, OECD Publishing. Available from: <http://dx.doi.org/10.1787/9789264182134-en>

Organisation for Economic Co-operation and Development (2012). *Update to Article 26 of the OECD Model Tax Convention and its Commentary [Approved by the OECD on 17 July 2012.] Available from: [http://www.oecd.org/ctp/exchange-of-tax-information/120718_Article%2026-ENG_no%20cover%20\(2\).pdf](http://www.oecd.org/ctp/exchange-of-tax-information/120718_Article%2026-ENG_no%20cover%20(2).pdf) [18 September 2012]*

Organisation for Economic Co-operation and Development (2006). *OECD: Manual on the Implementation of Exchange of Information Provisions for Tax Purposes – (Unclassified) Module 1 on Exchange of Information on Request [Approved by the OECD Committee on Fiscal Affairs on 23 January 2006]. Available from: <http://www.oecd.org/ctp/exchange-of-tax-information/cfaapprovesnewmanualoninformationexchange.htm>. [19 September 2013]*

Organisation for Economic Co-operation and Development (2006). *OECD: Manual on the Implementation of Exchange of Information Provisions for Tax Purposes – (Unclassified) Module 2 on Exchange of Information on Request [Approved by the OECD Committee on Fiscal Affairs on 23 January 2006]. Available from: <http://www.oecd.org/ctp/exchange-of-tax-information/cfaapprovesnewmanualoninformationexchange.htm> [19 September 2013]*

- Organisation for Economic Co-operation and Development (2006). *OECD: Manual on the Implementation of Exchange of Information Provisions for Tax Purposes – (Unclassified) Module 3 on automatic or routine Exchange of information*, Updated January 2012, Approved by the OECD Committee on Fiscal Affairs on 23 January 2006 available from:
<http://www.oecd.org/ctp/exchange-of-tax-information/cfaapprovesnewmanualoninformationexchange.htm>
- Organisation for Economic Co-operation and Development (2012). *Automatic Exchange of Information: What it is, How it works, Benefits, What remains to be done*. Available from:
<http://www.oecd.org/ctp/exchangeofinformation/automaticexchangeofinformationreport.htm>, [05 September 2012]
- Organisation for Economic Co-operation and Development (2012). *Keeping it safe: The OECD guide on the protection of confidentiality of Information Exchanged for tax purposes*. Available from:
http://www.oecd.org/ctp/exchange-of-tax-information/Keeping%20it%20Safe_EN_FINAL_forweb.pdf [05 September 2012].
- Organisation for Economic Co-operation and Development 2011, Convention on Mutual Administrative Assistance in Tax Matters. Available from: <http://www.oecd.org/ctp/exchange-of-tax-information/ENG-Amended-Convention.pdf> [15 January 2014].
- Organisation for Economic Co-operation and Development (2010). *Terms of Reference: To Monitor and review Progress Towards Transparency and Exchange of Information for Tax Purposes*. Available from: <http://www.oecd.org/ctp/44824681.pdf> [18 January 2014].
- Organisation for Economic Co-operation and Development (2014). *2014 Update to the OECD*. Available from: <http://www.oecd.org/tax/treaties/2014-update-model-tax-convention.pdf>
- SAICA (2009 March), SAICA Integritax Issue 15: *Preservation of Secrecy*. Available from:
http://www.saica.co.za/integritax/2009/1716_Preservation_of_secrecy.htm. (08 January 2013.)
- SAICA (December 2005), SAICA Integritax Issue 76: SARS finally releases the SARS Service Charter. Available from:
http://www.saica.co.za/integritax/2005/1360_SARS_finally_releases_the_SARS_Service_Charter.htm [17 July 2013].
- Ziesmann, M. (n.d.) *Gone Fishing: An Analysis of CRA Powers and Policies relating to the use of Fishing Expeditions in information Gathering*. Available from:
http://saf.uwaterloo.ca/mtax/documents/GoneFishing_AnAnalysisofCRAPowersandPoliciesRelatingtotheUseofFishingExpeditionsinInformatio.pdf [13 February 2013].
- Accountancy SA (2007) Search and seizures. Available from:
<http://www.accountancysa.org.za/resources/ShowItemArticle.asp?ArticleId=1240&Issue=857>
- Accountancy SA (2013) *Dear SARS – Legal Privilege in Tax Arena*. Available from:
<http://www.accountancysa.org.za/resources/ShowItemArticle.asp?ArticleId=1286&Issue=896>
- Wadee, N. (2008) *Straight Shooting – SAICA and SARS*. Accountancy SA, November, 2008.

Case Law

Heiman Maasdorp and Barker v Secretary for Inland Revenue and Another [1968], 30 SATC 145

Jeeva and Others v Receiver of Revenue, Port Elizabeth and others [1995], 2 SA433 (SE)

Silver v Silver [1937] NPD 129

The Commissioner for South African Revenue Services (SARS) v Werner Van Kets [2012] (3) SA 399 (WCC) (2011)

South African Statutes

South Africa. *Tax Administration Act, No 28 of 2011*. [Online] Available from:
<http://www.acts.co.za/tax-administration-act-2011/> [15 January 2016]

South Africa. *Income Tax Act, No. 58, 1962*. [Online] Available from: <http://www.acts.co.za/income-tax-act-1962/index.html>. [17 January 2014]

South Africa. *Constitution of South Arica 1996, No. 108*. [Online] Available from:
<http://www.acts.co.za/constitution/index.htm>. [04 January 2014]

South Africa. *Promotion of Access to Information Act, 2000 (Act 2 of 2000)*. [Online] Available from:
<http://www.acts.co.za/promotion-of-access-to-information-act-2000/index.html>. [04 January 2014]

South Africa. *Value-Added Tax Act, 1991 (Act No. 89 of 1991) Introduction*. [Online] Available from:
www.acts.co.za/vat/ [04 January 2014].

South Africa. *Customs and Excise Act, 1964 (Act No. 91 of 1964) Introduction*. [Online] Available from:
<http://www.acts.co.za/customs-and-excise-act-1964/index.html> [05 March.2013]

South Africa. *Financial Intelligence Centre Act, 2001*. [Online] Available from:
www.acts.co.za/fica/index/htm. [08 February 2013]

South Africa. *Financial Services Board Act, 1990 (Act No 97 of 1990)*. [Online] Available from:
www.acts.co.za/financialservicesboard1990/index.htm. [04 January 2013]

Republic of South Africa Draft Tax Administration Amendment Bill, 2 July 2012. Available from:
<http://www.treasury.gov.za/public%20comments/TLAB/TAAB%202012%20PublicationDraft%205%20Jul%202012.pdf>

South African Revenue Service Agreements and Publications

SARS 2012, *Agreement between the Government of the Republic of South Africa and the Government of Bermuda for the exchange of information relating to tax matters* [signed 27 January 2012]. Available from: <http://www.sars.gov.za/home.asp?pid=53079>. [19 September 2012]

SARS 2012, *Agreement between the Government of the Republic of South Africa and the Government of the Republic of San Marino for the exchange of information relating to tax matters* [signed 28 January 2012]. Available from: <http://www.sars.gov.za/home.asp?pid=53079>. [19 September 2012]

SARS 2012, *Agreement between the Government of the Republic of South Africa and the Government of the Republic of Jersey for the exchange of information relating to tax matters* [signed 21 February 2012]. Available from: <http://www.sars.gov.za/home.asp?pid=53079> [19 September 2012].

SARS 2012, *Agreement between the Government of the Republic of South Africa and the Government of the states of Guernsey for the exchange of information relating to tax matters* [signed 17 February 2012]. Available from: <http://www.sars.gov.za/home.asp?pid=53079> [19 September 2012]

SARS 2012, *Agreement between the Government of the Republic of South Africa and the Government of the Cayman Islands for the exchange of information relating to tax matters* [signed 21 February 2012]. Available from: <http://www.sars.gov.za/home.asp?pid=53079>. [19 September 2012]

SARS 2012, *Agreement between the Government of the Republic of South Africa and the Government of the Government of the Commonwealth of The Bahamas for the exchange of information relating to tax matters* [signed 1 September 2011]. Available from: <http://www.sars.gov.za/Legal/International-Treaties-Agreements/Pages/Document-Results.aspx>. [14 January 2014]

SARS 2012, *Agreement between the Government of the Republic of South Africa and the Government of Gibraltar for the exchange of information relating to tax matters* [signed 2 February 2012]. Available from: <http://www.sars.gov.za/Legal/International-Treaties-Agreements/Pages/Document-Results.aspx>, [14 January 2014]

South African Revenue Service (SARS) (2013) *Brochure for Practitioners: Registration of Practitioners*. Available from: <http://www.sars.gov.za> [17 January 2013]

SARS (n.d.) Article 1 of the Agreement between the Republic of South Africa and the Government of Australia for the avoidance of Double Taxation and the prevention of fiscal evasion with respect to taxes on income. Available from: <http://www.sars.gov.za/AllDocs/LegalDoclib/Agreements/LAPD-IntA-DTA-2012-23%20-%20DTA%20Australia%20GG%2020761.pdf>. [17 January 2014]

SARS (2013). Summary of all Treaties for the Avoidance of Double Taxation. Available from: <http://www.sars.gov.za/AllDocs/LegalDoclib/Agreements/LAPD-IntA-DTA-2013-01%20-%20Status%20Overview%20of%20All%20DTAs%20and%20Protocols.pdf> [17 January 2014]

- SARS (2013). Exchange of Information Agreements (TIEAS). Available from:
<http://www.sars.gov.za/Legal/International-Treaties-Agreements/Pages/Exchange-of-Information-Agreements-%28Bilateral%29.aspx> [17 January 2014]
- SARS (2013). Double Taxation Agreements (DTAS) & Protocols. Available from:
<http://www.sars.gov.za/Legal/International-Treaties-Agreements/DTA-Protocols/Pages/default.aspx>. [17 January 2014]
- SARS (2014). Agreement between the Government of The Republic of South Africa and the Government of the United States of America to improve International Tax Compliance and to implement FATCA. Available from
<http://www.sars.gov.za/AllDocs/LegalDoclib/Agreements/LAPD-IntA-EIA-2014-04%20-%20FATCA%20IGA.pdf>. [19 January 2016]

Websites

- Brink Cohen Le Roux (n.d.) International co-operation to combat tax evasion. Available from:
http://www.bclr.com/combat_tax_evasion.htm. [07 January 2013]
- Constitutional Court of South Africa (n.d.) What is the constitution? Available from:
<http://www.constitutionalcourt.org.za/site/theconstitution/whatisaconstitution.htm>. [17 January 2014]
- Organisation for Economic Co-operation and Development (n.d.) OECD: About. Available from:
<http://www.oecd.org/about/> [19 September 2012]
- Organisation for Economic Co-operation and Development (n.d.) *OECD: Exchange of Information: OECD's work on Aggressive Tax Planning*. Available from: <http://www.oecd.org/tax/exchange-of-tax-information/atp.htm> [19 September 2012]
- Organisation for Economic Co-operation and Development (2013). *Exchange of information: The Fight Against Tax Fraud and Tax Evasion: Towards a New Global Standard on Automatic Exchange of Tax Information*. Available from: <http://www.oecd.org/ctp/exchange-of-tax-information/thefightagainsttaxfraudandtaxevasiontowardsanewglobalstandardonautomaticexchangeoftaxinformation.htm>. [18 January 2014]
- Organisation for Economic Co-operation and Development (n.d.) *OECD: Tax treaties: Article 26 of the OECD Model Tax Convention on Income and Capital*. Available from:
<http://www.oecd.org/ctp/treaties/article26oftheoecdmodeltaxconventiononincomeandcapital.htm>. [18 January 2014]
- South African Revenue Services (SARS)(2013). Available from:
<http://www.sars.gov.za/home.asp?pid=53079>
- South African Revenue Services (SARS) (2016) Available from:
<http://www.sars.gov.za/ClientSegments/Tax-Practitioners/Pages/Controlling-Bodies-for-Tax-Practitioners.aspx> [14 January 2016]

South African Revenue Services (SARS) (2016) Available from:

<http://www.sars.gov.za/ClientSegments/Businesses/Mod3rdParty/Pages/Automatic-Exchange-of-Information.aspx> [19 January 2016]

Other

Croome, B.J. (2008) *Taxpayers Rights in South Africa: An analysis and evaluation of the extent to which the powers of the South African Revenue Services comply with the Constitutional rights to property, privacy, administrative justice, access to information and access to courts* (Doctorate Dissertation). Cape Town: University of Cape Town.

Law Society of South Africa (2014) *Legal Practice Bill*. Available from:

<http://www.lssa.org.za/?q=con,112,Legal%20Practice%20Bill> [21 January 2013]

Law Society of South Africa (2014) *LSSA Publishes its draft submissions on the Legal Practice Bill*.

Available from:

http://www.lssa.org.za/upload/LSSA%20Advisory%2011_12%20LSSA%20publishes%20draft%20submissions%20on%20Legal%20Practcie%20Bill.pdf [21 January 2013]

Louw, H.(2013) SAICA Tax Administration Act Seminar. Presented at the Cliffe Dekker Hofmeyr seminar. [February 2013] p. 61

OECD Head: *Global Tax Laws Will Get Passed (2013) USA: CNBC [Online video file]*. Available from:

<http://video.cnn.com/gallery/?video=3000176661> [18 January 2014]

Oxford English Dictionary online (2014). Available from:

http://www.oxforddictionaries.com/definition/english/fishing?q=fishing+expedition#fishing_4 [13 February 2013].

Republic of South Africa, *Legal Practice Bill (As introduced in the National Assembly (proposed section 75), explanatory summary of Bill published in Government Gazette No. 35357 of 15 May 2012*.

SAICA (2010) *Professional Code of Conduct for Chartered Accountants [Issued November 2010]*.

Available from:

<https://www.saica.co.za/Portals/0/Technical/accounting/documents/Code%20of%20Professional%20Conduct.pdf>

South African Revenue Service (SARS) (2013) *Brochure for Practitioners: Registration of Practitioners*.

Available from: <http://www.sars.gov.za> [17 January 2013]

SAICA (2006) *Handbook (amended 2008): Code of Conduct*.

Independent Regulatory Board for Auditors (2010) *IRBA Rules regarding improper conduct and code of professional conduct for registered auditors* [issued June 2010 and Effective 1 January 2011].

United Nations 1969, *Vienna Convention on the Law of Treaties*. Available from:

<http://www.worldtradelaw.net/misc/viennaconvention.pdf>. [15 January 2014]