

**AN ANALYSIS OF THE CHANGES INTRODUCED BY THE TAX ADMINISTRATION
ACT TO THE DISPUTE RESOLUTION PROCESS AND THE EFFECTS THEREOF ON
THE CONSTITUTIONAL RIGHTS OF TAXPAYERS**

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IN MEMORIAM

In memory of Mark “Champ” Davis

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ABSTRACT

This dissertation evaluates the changes introduced by the Tax Administration Act, 28 of 2011 ('the TAA') to the extent that such changes have an impact on the constitutional rights of taxpayers during the dispute resolution process.

Through comparison of the TAA provisions with the provisions that this Act replaces, this dissertation seeks to establish whether the legislature has achieved its objective of aligning the administrative provisions of the various tax Acts with the constitutional rights of taxpayers. A comparison with the Australian dispute resolution process was also undertaken with a view to identify any further areas of improvement insofar as the dispute resolution process is concerned.

The findings of this dissertation are that while the introduction of the TAA has generally enriched the rights of taxpayer's insofar as the dispute resolution process is concerned, some of the changes introduced result in the limitation of taxpayers' rights while other changes have not been completely effective and require further improvement. Recommendations to further improve the dispute resolution process are considered in Chapter 4 of this dissertation.

ABBREVIATIONS

| | |
|------------------|--|
| ADR | Alternative Dispute Resolution |
| ATO | Australian Tax Office |
| Business days | Means business days as defined in the TAA i.e. excluding Saturdays, Sundays, public holidays and days between 16 December and 15 January of the following year, both days inclusive. |
| CIR | Commissioner for Inland Revenue |
| Constitution | Constitution of the Republic of South Africa, 1996 |
| CSARS | Commissioner for the South African Revenue Service |
| Customs Duty Act | Customs and Excise Act, 91 of 1964 |
| DRP | Dispute resolution process as envisioned in chapter 9 of the TAA. |
| DRP legislation | Chapter 9 of the TAA (comprising section 101 to 150), the ‘rules’ envisioned in section 103 of the TAA as well as the legislation which Chapter 9 of the TAA has replaced. |
| DRP Rule/ rules | The rules for dispute resolution referred to in section 103 of the TAA. In terms of section 264(2) of the TAA the rules issued by the Minister of Finance under a tax Act that are in force immediately before the commencement date of the TAA continue in force as if they were issued under section 103 of the TAA. As a result, the rules promulgated in terms of Government Notice R. 467 in Gazette No. 24639 of 1 April 2003 continue to remain in force. |
| e-filing system | SARS’ web-based portal which facilitates tax return compliance. The use of the e-filing system is subject to the terms and conditions set out by SARS and which every user has to accept upon registration for e-filing. |
| ITA | Income Tax Act, 58 of 1962 |

| | |
|-----------------|---|
| PAIA | Promotion of Access to Information Act, 2 of 2000 |
| PAJA | Promotion of Administrative Justice Act, 3 of 2000 |
| DRP Rule/ rules | The rules for dispute resolution referred to in section 103 of the TAA. In terms of section 264(2) of the TAA the rules issued by the Minister of Finance under a tax Act that are in force immediately before the commencement date of the TAA continue in force as if they were issued under section 103 of the TAA. As a result, the rules promulgated in terms of Government Notice R. 467 in Gazette No. 24639 of 1 April 2003 continue to remain in force. |
| SABC | South African Broadcasting Corporation Limited |
| SARS | South African Revenue Service |
| SARS Act | South African Revenue Service Act, 34 of 1997 |
| TAA | Tax Administration Act, 28 of 2011 |
| tax Act | The TAA , or an Act, or any portion of an Act, referred to in section 4 of the SARS Act, excluding the Customs and Excise Act. |

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1. INTRODUCTION

1.1 Background

1.1.1 Introduction

A natural tension exists between taxpayers who seek to minimise the amount of tax that they suffer, and those charged with the collection of tax on behalf of the State, who seek to maximise the amount of tax collected. This natural tension, along with human and processing errors, is often at the root of disputes between taxpayers and revenue authorities.

A taxpayer's perception of whether or not it is being treated fairly ranks as one of the most important factors in determining their behaviour towards tax compliance in future (Jones & Maples, 2012: 528). When disputes arise a good tax system should therefore have mechanisms in place for resolving such disputes, while ensuring that a taxpayer's rights are protected and that the revenue authority's obligation to collect tax is not undermined.

In the South African context, the State's power to collect tax is not specifically provided for in the Constitution of the Republic of South Africa, 1996 ('Constitution'), although it is implicit in several of the other provisions of the Constitution (Klue, Arendse & Williams, 2012: 3-2). In terms of the South African Revenue Service Act, 34 of 1997 ('SARS Act'), the South African Revenue Service ('SARS') was established as an organ of state in order to advance the efficient and effective collection of revenue.

The Bill of Rights (sections 7 to 39 of the Constitution) forms the basis of taxpayers' rights in South Africa. Legislation giving effect to these rights include the Promotion of Administrative Justice Act, 3 of 2000 ('PAJA'), the Promotion of Access to Information Act, 2 of 2000 ('PAIA') and particularly in the case of taxpayers, the recently enacted Tax Administration Act, 28 of 2011 ('TAA'). With the introduction of the TAA, all provisions dealing with tax administration matters, including the process

for dealing with disputes between the taxpayer and SARS (other than disputes relating to customs duty) have been consolidated into one single Act. The Memorandum on the Objects of the Tax Administration Bill notes the following in respect of the objectives of the TAA insofar as the rights of taxpayers are concerned:

“Importantly, the TAB seeks to achieve a balance between the powers and duties of SARS, on the one hand, and the rights and obligations of taxpayers, on the other.

The TAB takes account of the constitutional rights of taxpayers, but does not seek to re-codify them, because all legislation, including the TAB, must be read together with the provisions of the Constitution. Particularly the right to administrative justice as well as the application of the fairness requirements are very fact and context specific. Codifying these rights in respect of every administrative action by SARS will be an almost impossible task and may only serve to unnecessarily limit or modify them. The TAB rather seeks to effect protection of administrative fairness rights through affording taxpayers more effective and overarching remedies, such as the creation of a Tax Ombud’s Office, and specific procedural rights in the clauses dealing with SARS’ powers, such as the right to an audit findings report after finalisation of an audit and providing reasons for assessments.” (Memorandum on the Objects of the Tax Administration Bill, 2011: 178)

1.1.2 The Bill of Rights

Section 2 of the Constitution provides that it is the supreme law in South Africa and that any law or conduct inconsistent with it is invalid. The TAA therefore has to comply with the Constitution which includes the Bill of Rights. The specific rights as set out in the Bill of Rights which have been considered as part of this analysis are the following:

“Privacy¹

Everyone has the right to privacy, which includes the right not to have -

¹ Section 14 of the Constitution.

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

“Access to information²

(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 legislation 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”.

“Just administrative action³

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

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

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

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

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

(c) promote an efficient administration”.

“Access to courts⁴

² Section 32 of the Constitution

³ Section 33 of the Constitution

⁴ Section 34 of the Constitution

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”.

The rights provided for in terms of the Bill of Rights are not absolute and section 36 of the Constitution recognises that these rights may be tempered in certain instances. Section 36 provides as follows:

“Limitation of rights⁵

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

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

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

Therefore, where infringements of the rights afforded to everyone in terms of the Bill of Rights are identified as a result of changes affecting the dispute resolution process as envisioned in chapter 9 of the TAA (‘DRP’), consideration must be given to whether such infringements are justifiable in terms of section 36 of the Constitution.

⁵ Section 36 of the Constitution

1.1.3 The DRP

The introduction of the TAA has resulted in the consolidation of all legislation relating to the administration of the various 'tax Acts' into one single Act. For the purposes of the TAA, a 'tax Act' is defined with reference to Schedule 1 of the SARS Act (attached as annexure B) but excluding the Customs and Excise Act, 91 of 1964 ('Customs Duty Act'). The introduction of the TAA also resulted in all provisions relating to the DRP being consolidated into one single chapter i.e. chapter 9, consisting of sections 101 to 150 of the TAA. Previously, these provisions were scattered around the various 'tax Acts'. Chapter 9 of the TAA should be read together with the DRP rules which the Commissioner for the South African Revenue Service ('CSARS') may prescribe in terms of section 103 of the TAA. In terms of the transitional provisions contained in section 264 of the TAA, the DRP rules issued by the CSARS which were in force immediately before the commencement of the TAA continue to remain in force as if they were issued under section 103 of the TAA. While new draft DRP rules have been published by SARS, these are not yet effective and the DRP rules issued in terms of section 107A of the Income Tax Act, 58 of 1962 ('ITA') continue to remain in force.

The DRP along with the relevant timeframes as set out in the DRP legislation can be summarised as follows:

- Prior to objecting to an 'assessment' a taxpayer may request reasons for the 'assessment' within 30 business days after the 'date of assessment', in terms of DRP rule 3. This time period may be extended to 60 business days where the CSARS is satisfied that reasonable grounds exist for the delay.
- SARS is then afforded 30 business days in which to advise the taxpayer that adequate reasons have already been provided. Alternatively, SARS has 60 business days within which to provide the taxpayer with such adequate reasons.
- In terms of section 104 of the TAA read together with DRP rules 4 and 26, a taxpayer may object to an 'assessment' or decision by SARS within 30 business days from the 'date of assessment' or decision by SARS. A request for reasons as set out above results in the automatic suspension of the time period within which a taxpayer has to object. Time is suspended until such time that adequate reasons are received or SARS informs the taxpayer that adequate reasons have already been provided. Furthermore, the time period within which a taxpayer has to object may be extended by a further 21 business days where reasonable

grounds for the delay exists or such further period if a senior SARS official is satisfied that exceptional circumstances for the delay exists.

- In terms of DRP rules 5 and 26, SARS has 60 business days within which to advise a taxpayer that its objection is invalid. The taxpayer would then be granted 10 business days within which to amend its objection.
- Should SARS require further information in order to decide on the taxpayer's objection it is granted 60 business days from the date that the objection has been received to request such further information. A taxpayer is then granted 60 business days within which to provide the information requested, although SARS may extend this period by a further 30 business days where reasonable grounds for the delay exists.
- SARS is granted 60 business days to reach its decision following receipt of further information requested. This period may be extended by an additional 60 business days where in the opinion of CSARS, exceptional circumstances exist, the case is complex, or because of the principle or amount involved. Where further information has not been requested by SARS, it is granted 90 business days from the date of receipt of the objection, or the amended objection, to alter the assessment or disallow the taxpayer's objection. Again, this period may be extended by a further 90 business days where in the opinion of CSARS, exceptional circumstances exist, the case is complex or because of the principle or amount involved.
- Should a taxpayer's objection not be upheld, it may note an appeal within 30 business days after the date of the notice of disallowance of its objection in terms of DRP rule 6 read together with section 107 of the TAA. A senior SARS official may extend the period within which an appeal must be lodged by 21 business days if satisfied that reasonable grounds for the delay exists or 45 business days under exceptional circumstances.
- When noting its appeal a taxpayer may indicate that it wishes to make use of the Alternative Dispute Resolution ('ADR') process instead of having its case heard by a tax board or tax court. The ADR process is less formal and therefore potentially less costly for the taxpayer. In terms of DRP rule 7, SARS has to notify the taxpayer within 20 business days of receipt of the notice of appeal whether the matter is appropriate for ADR. Where ADR has not been elected by the taxpayer and SARS is of the opinion that ADR would be appropriate, SARS has to inform the taxpayer accordingly within 10 business days after receiving the notice of appeal. The taxpayer is then granted 10 business days from the date of such notice from SARS to agree or disagree with SARS' view regarding the suitability of ADR.
- Where the ADR route has not been pursued an appeal may be heard by a tax board established in terms of section 108 of the TAA if the amount of tax in dispute does not

exceed the current threshold of R500 000, the taxpayer and CSARS agree that the matter should be heard by a tax board, and there is no objection against the jurisdiction of the tax board.

- Alternatively, an appeal against a decision by CSARS to disallow an objection may be heard by a tax court established in terms of section 116 of the TAA.
- Where a matter has been heard by a tax board, the taxpayer or SARS may appeal against the decision of the tax board to a tax court in terms of section 115 of the TAA. The appeal to a tax court must be noted within 21 business days after the date of notice of the tax board's decision, or within such further period as the chairperson of the tax board may allow.
- In terms of section 133 of the TAA an appeal against a decision of the tax court lies to the full bench of the Provincial Division of the High Court which has jurisdiction in the area where the tax court sitting was held. Alternatively, an appeal may be noted directly to the Supreme Court of Appeal if the president of the tax court has granted permission to do so in terms of section 135 of the TAA or if the appeal to the tax court was heard by a tax court consisting of three judges (or acting judges) of the High Court as provided for in terms of section 118(5) of the TAA. The appeal must be noted within 21 business days after the date of notice of the tax court's decision, or within such further period as the president of the tax court may allow.
- Where the dispute relates to a constitutional matter, an appeal against the decision of the Supreme Court of Appeal may be lodged with the Constitutional Court.

A diagrammatic outlay of the dispute resolution process is included as Annexure A to this dissertation.

1.2 Research objective

The objective of this dissertation is to analyse the effect of the changes introduced by the TAA to the DRP on the rights of taxpayers to privacy, access to information, just administrative action and access to the courts, to determine whether such changes have achieved the legislature's stated objective of greater alignment with the constitutional rights of taxpayers.

Where certain changes introduced by the TAA infringe on the constitutional rights of taxpayers, the further question which this dissertation seeks to answer is whether the limitation is justifiable in terms of section 36 of the Constitution.

Consideration was also given to whether the DRP legislation could be further improved to better cater for the constitutional rights of taxpayers.

1.3 Research approach

A comparative analysis was performed between the provisions in the TAA which have an impact on the DRP and the legislation which it replaces. The objective of the comparative analysis was to identify changes which may have an impact on certain constitutional rights of taxpayers i.e. the right to privacy, access to information, just administrative action and access to courts.

For differences identified in terms of the comparative analysis above, reasons for the changes were sought before an analytical analysis of relevant legislation, case law and other works was performed in order to establish whether the changes resulted in a positive or negative impact on the specific constitutional rights considered.

A study of the Australian dispute resolution process together with personal experiences as a tax advisor formed the basis on which recommendations for the improvement of the DRP was made.

1.4 Limitation of scope

This dissertation considers the impact which changes introduced by the TAA has on the DRP insofar as certain constitutional rights of the taxpayer is concerned. The specific constitutional rights considered were, privacy; access to information; just administrative action and access to courts. There are further overarching rights contained in the Bill of Rights which are impacted by the DRP, such as the right to equality and fairness. These rights have not been dealt with in this dissertation given the generality of such rights.

In considering further possible improvements to the DRP legislation, a comparison with Australia's dispute resolution process was performed. Australia was considered to be an acceptable country for comparison for the following reasons:

- Australia is part of the Commonwealth group of countries to which South Africa belongs.
- Australian tax administration legislation is well established (the current dispute resolution process was established in 1992 with amendments made to this legislation on an ongoing basis).
- Australia's tax administration legislation is internationally recognised as progressive and elements of the TAA has been influenced by, *inter alia*, Australian legislation (Memorandum on the Objects of the Tax Administration Bill, 2011:179).
- The Australian dispute resolution process is similar to South Africa's in that a taxpayer's right to request administrative or judicial intervention after an assessment has been issued by the relevant revenue authority is expressly provided for by legislation.

1.5 Chapter outline

Chapter 2 of this dissertation examines the changes introduced by the provisions of Chapter 9 of the TAA which have an impact on the constitutional rights of taxpayers. Both positive and negative effects have been identified and these are discussed in the order in which they appear in chapter 9 of the TAA.

Chapter 3 of this dissertation considers the various other changes introduced by the TAA which have an impact on the DRP and the constitutional rights of taxpayers. These include changes to definitions in section 1 of the TAA, the introduction of a Tax Ombud, pre-emptive measures aimed at resolving disputes without initiating the DRP, as well as the provisions relating to the payment of disputed tax and SARS' right to institute recovery proceedings.

Chapter 4 of the dissertation summarises the weaknesses of the DRP identified in the foregoing chapters and through comparison of the DRP with the Australian dispute resolution system. Recommendations are then provided for the weaknesses identified.

The dissertation ends with Chapter 5 of the TAA which provides a summary of the key findings and concludes by providing an answer to the research questions posed.

2. AMENDMENTS TO THE DRP LEGISLATION WHICH HAVE AN IMPACT ON THE CONSTITUTIONAL RIGHTS OF TAXPAYERS

2.1 Introduction

As highlighted in the previous chapter, the Constitution is the supreme law in South Africa and supersedes all other legislation. With regards to tax administration, and more particularly the DRP, it is in the interest of the legislature that legislation regulating the DRP complies with the Constitution so that the processes put in place for resolving disputes are not challenged on the basis of being unconstitutional, and therefore invalid, by any party involved in the dispute.

The introduction of the TAA resulted in the DRP legislation being harmonised and consolidated into one single chapter i.e. chapter 9 of the TAA comprising sections 101 to 150. Apart from consolidating the DRP legislation into one single chapter, the introduction of the TAA was also used as an opportunity to improve on certain constitutional aspects of the legislation (Memorandum on the Objects of the Tax Administration Bill, 2011: 178). In certain instances these “improvements” may have led to an adverse effect on the constitutional rights of taxpayers.

The changes to the DRP introduced by chapter 9 of the TAA which have been identified as having an impact on the constitutional rights of taxpayers are the following:

- section 105 of the TAA which deals with the fora available to a taxpayer wishing to dispute an assessment or decision by SARS;
- section 106(5) of the TAA which requires SARS to provide the basis for its decision to disallow an objection;
- section 114(2) of the TAA which provides that a tax board must deliver its decision within a required timeframe, along with the remedy provided in section 115 of the TAA;
- section 124 of the TAA which deals with the sitting of the tax court; and
- section 132 of the TAA which deals with the publication of tax court judgments

2.2 Appropriate forum for DRP – section 105 of the TAA

2.2.1 Does the right to approach the High Court for review as introduced by the TAA affect a taxpayer's right to just administrative action and access to courts?

Prior to the introduction of the TAA, section 81(1) and section 83(1) of the ITA provided for the resolution of disputes relating to income tax between the taxpayer and SARS. Section 81(1) of the ITA provided that an objection to any assessment made under the ITA was to be made in the manner and under the terms prescribed by the ITA and the associated DRP rules. Section 83(1) of the ITA contained similar provisions in respect of an appeal to the tax court (this provision was subject to the application of section 83A of the ITA which provided for appeals to the tax board).

From a VAT perspective, the comparative provisions were contained in section 32 and section 33 of the VAT Act (section 33 of the VAT Act was similarly subject to the application of section 33A of the VAT Act which provided for appeals to the tax board). Section 32(1) of the VAT Act provided that any person dissatisfied with an assessment or decision of the CSARS “*may lodge an objection thereto with the CSARS*”. Section 33(1) of the VAT Act provided that “*an appeal against any decision [...] shall lie to the tax court constituted under the provisions of section 83 of the ITA*”.

Following the introduction of the TAA, the forum for dispute resolution is set out in section 105 of the TAA. Section 105 of the TAA therefore replaces the aforementioned provisions and provides that a taxpayer may not dispute an assessment or decision in any court or other proceedings except in proceedings under chapter 9 of the TAA, or by application to the High Court for review.

The Constitutional Court, in considering the constitutionality of the ‘pay now, argue later’ provision in section 36 of the VAT Act had the opportunity to comment on the effect section 33 and 33A of the VAT Act had on taxpayers’ rights to just administrative action (in terms of section 33 of the Constitution) and access to courts (in terms of section 34 of the Constitution) in the case of *Metcash Trading Limited v CSARS and the Minister of Finance, 2000 CC3/2000 (CC)*. In reaching its judgment the Constitutional Court noted that differences existed between the assessment process for

income tax (assessment issued by SARS) and VAT (self-assessment by vendor).⁶ The principles from this case may therefore possibly not apply *mutatis mutandis* to the comparative provisions in section 83(1) and section 83A of the ITA but would nonetheless be instructive for the basis on which the court reached its decision. In paragraph 32 and 33 of his judgment Kriegler J stated:

“[32] Section 36 should be seen in the context of Part V of the (VAT) Act, which comprises sections 32 to 37 and deals with objections and appeals. Section 32⁷, section 35⁸ and section 37⁹ are not relevant to the present discussion and can be put aside. Sections 33, 33A and 34 of the Act deal with the statutory right afforded to aggrieved vendors to challenge the rejection by the Commissioner of objections to assessments and associated decisions. Sections 33 and 33A provide that vendors may bring such challenges in either the Special Court or before a board; and section 34 allows a further resort to an ordinary court of law against decisions of the Special Court. The Act calls the proceedings before the Special Court/board (as well as the subsequent resort to a court of law) an appeal. The Commissioner is not a judicial officer and assessments and concomitant decisions by the Commissioner are administrative, not judicial, actions; from which it follows that challenges to such actions before the Special Court or board are not appeals in the forensic sense of the word. They are proceedings in terms of a statutory mechanism specially created for the reconsideration of this particular category of administrative decisions and appropriate corrective action by a specialist tribunal.

[33] It is important to have clarity about the effect of the mechanism created by sections 33 and 33A of the Act. Were it not for this special appeal procedure, the avenues for substantive redress available to vendors aggrieved by the rejection of their objections to assessments and decisions by the Commissioner would probably have been common law judicial review as now buttressed by the right to just administrative action under section 33 of the Constitution, and as fleshed out in the Promotion of Administrative Justice Act. Here, however, the Act provides its own special procedure for review of the Commissioner’s challenged decisions by specialist tribunals. But, and this is crucial to an understanding of this part of the case, the Act nowhere excludes judicial review in the ordinary course. The Act creates a tailor-made mechanism for redressing

⁶ Refer paragraph 16 of the judgment

⁷ Section 32 of the VAT Act deals with the objection process

⁸ Section 35 of the VAT Act allows members of the Special Court to participate in proceedings despite their possible liability to tax under the Act.

⁹ Section 37 of the VAT Act deals with the burden of proof in appeal proceedings.

complaints about the Commissioner's decisions, but it leaves intact all other avenues of relief”.

(Emphasis added)

The above pronouncements by the Constitutional Court therefore make it clear that although the previous provisions dealing with the forum for the DRP did not make any reference to a taxpayer's right to approach the court for judicial review, this right nevertheless existed and therefore the provisions did not necessarily infringe on the taxpayer's rights to just administrative action or access to the courts. In drafting section 105 of the TAA which replaces the previous provisions dealing with the forum for the DRP, the legislature saw it fit to make explicit the taxpayer's right to approach the High Court for judicial review. It is worth noting that section 32 of the VAT Act, as it currently stands still does not make reference to a taxpayer's right to approach the High Court for review. Notwithstanding this inconsistency, the Constitutional Court has already clarified that such a right exists. Furthermore, the provisions of section 105 of the TAA apply to all tax Acts including the VAT Act.

2.2.2 Is the High Court likely to intervene during disputes between a taxpayer and SARS?

Although section 105 of the TAA now recognises a taxpayer's right to approach the High Court for judicial review, section 7(2) of the PAJA places a burden on the taxpayer to first exhaust all internal remedies available to it before approaching the High Court. Section 7(2) of the PAJA reads as follows:

“(2)(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.”

The constitutionality of section 7(2) of the PAJA has itself been called into question in the past as it may be said that it infringes on a person’s right of access to the courts (Croome, 2008: 198). In the case of *Koyabe v Minister for Home Affairs and Others, 2010 SA 327/10 (CC)* it was noted by the Constitutional Court that the requirement to exhaust all internal remedies was not absolute and was not to be used by the administrator to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny. Furthermore, the court has the power to condone the non-exhaustion of internal remedies in exceptional circumstances and must consider the availability, effectiveness and adequacy of internal remedies.

In the context of the DRP, the opportunity afforded to a taxpayer to request reasons in terms of the DRP rules and object in terms of section 104 of the TAA would represent the internal remedies envisioned in section 7(2) of the PAJA, as found in *Metcash Trading Limited v CSARS and the Minister of Finance, 2000 CC3/2000 (CC)*. While the courts have the authority to condone the non-exhaustion of these internal remedies it would seem that the courts are reluctant to do so (refer *MTN International (Mauritius) Limited v CSARS, 2011 23203/2011 (HC)* as well as *Rossi v CSARS, 2010 34417/2010 (HC)*). It is submitted that the reluctance of the courts to condone the circumvention of the internal remedies included in the DRP (as set out in chapter 1 of this dissertation) arises because of the courts’ view of the general availability, effectiveness and adequacy of the DRP process. The DRP is well established and through initiatives such as e-filing (which now includes functionality enabling taxpayers to dispute an assessment) the availability of the internal remedy is improved. The DRP is comparable with similar processes of other democratic jurisdictions such as Australia, Canada and the UK (Memorandum on the Objects of the Tax Administration Bill, 2011: 179). As noted in the article by Visser:

“SARS has earned itself a reputation as one of the most advanced and sophisticated tax authorities in Africa and is respected globally with the commissioner representing the institution on various platforms.” (Visser, 2013: 1)

Current events such as the resignation of Oupa Magashula (former CSARS) following his involvement in a ‘jobs for pals’ scandal,¹⁰ as well as SARS’ public statements rebutting negative claims made against it by Julius Malema (a well-known political figure currently involved in a dispute with SARS),¹¹ serve to illustrate SARS’ intent to protect the reputation of the institution. Furthermore, the provision enabling SARS to disclose confidential taxpayer information in order to rebut false public claims made against it is contained in section 67(5) of the TAA and was introduced by the legislature for the exact purpose of enabling SARS to defend itself against any public attacks of its integrity. The foregoing therefore supports the view that the internal remedies afforded to a taxpayer are generally available, effective and adequate and that SARS is regarded as having the necessary levels of integrity to deal with disputes internally.

A further reason advanced for the courts’ general unwillingness to intervene where internal remedies have not been exhausted, unless exceptional circumstances exist, is provided in *Silke on Tax Administration*:

*“... and it has been held that where it is possible to decide a case without involving a constitutional issue, this is the course that should be followed”*¹² (Klue, Arendse & Williams, 2012: 3-89).

In practice however, the DRP is often frustrated by delays on the part of SARS, even where timelines for SARS’ response is provided for by the legislation.¹³ This fact has also been alluded to previously by Croome where he states:

“The Commissioner may frustrate a taxpayer’s attempt to finalise a dispute using the prescribed objection and appeal procedures by failing to comply with the time frames specified in the regulations promulgated under s 107A of the Income Tax Act. A tax counsel, during consultation,

¹⁰ Refer article (Cohen, 2013)

¹¹ Refer article (Gleason, 2013)

¹² Reference is made by Silke to *Motsepe v CIR 1997 (2) SA 898 (CC)* at para [21] in support of this statement.

¹³ Based on experiences in practice.

*has expressed the view that the taxpayer may succeed in approaching a court for review in these circumstances*¹⁴ (Croome, 2008: 197).

Other exceptional circumstances where the courts are likely to condone the non-exhaustion of internal remedies would include instances where the decision-maker has exhibited bias or where there is reasonable suspicion of bias on the part of the administrator and the person is therefore unlikely to be granted a fair hearing¹⁵ (Klue, Arendse & Williams, 2012: 3-90).

A recent case heard by the North Gauteng High Court, cited as *MTN International (Mauritius) Limited v CSARS, 2011 23203/2011 (HC)*, dealt with an application for the judicial review of procedural defects and actions by SARS in the determination of additional tax assessments raised by it.

While some of the facts of the case are unclear (such as the dates and number of additional assessments issued by SARS (Louw, 2013) counsel for SARS admitted that the ‘due date’ as well as the ‘second date’ on the IT40 additional assessment issued to the taxpayer were manipulated by a SARS official. This concession on the part of counsel for SARS together with the submission by the taxpayer that SARS had an ulterior motive for setting the ‘second date’ as 31 March 2011 i.e. to ensure that interest on the amounts per the additional assessment began to accrue to SARS from this date which could then be set-off against a substantial refund due to the taxpayer on the 30th March 2011, appears to provide *prima-facie* evidence of the existence of procedural defects in the issuance of the additional assessment as envisioned in section 6(2)(c) of the PAJA. Alternatively, SARS, through the actions of the SARS official, exhibited bias, or could reasonably be suspected of bias as envisioned in section 6(2)(a)(iii) of the PAJA, and the taxpayer would therefore appear to have been within its rights to turn to the High Court for judicial review. In the High Court, Tlhapi J however ruled that the claims by the taxpayer involved questions of fact which were to be decided by the Tax Court¹⁶ and not in the present High Court proceedings.

¹⁴ Based on Croome’s discussion with Advocate P A Solomon SC on 10 April 2006 about whether a taxpayer could proceed directly to the High Court seeking a review of an assessment issued by the Commissioner under the Income Tax Act as opposed to being obliged to follow the objection and appeal procedures contained in the Income Tax Act.

¹⁵ Reference is made in *Silke on Tax Administration to Gold Fields Ltd v Conellan NO [2005] 3 All SA 142 (W)* in support of this view.

¹⁶ Refer paragraph 32 of the judgement

The reluctance of the High Court to rule on matters which involve questions of fact and instead refer such matters to the Tax Court (which is only accessible to the taxpayer through initiation and exhaustion of the internal remedy i.e. objection) therefore appears to curtail the remedy of approaching the courts for judicial review as provided for in section 105 of the TAA and the PAJA. This unwillingness on the part of the court to intervene in tax matters involving questions of fact is also evident in the case of *Rossi v CSARS, 2010 34417/2010 (HC)* where the following is stated in paragraph 32 of the judgment:

“Firstly, it begs the question why the legislature conceived of a Special Tax Court if every tax dispute could be brought in either that court or the High Court at the taxpayer’s election. Secondly, it is inconceivable that the legislature intended to create competing and concurrent fora for resolution of tax disputes with resulting confusion as to selection of forum. Thirdly, it would not be possible to establish any useful body of precedent for the benefit of both taxpayer and SARS if different fora developed different law on the same issues. Fourthly, the role of the High Court has already been identified in the Act – it is to provide a judge as a member of the specialised Tax Court to hear appeals and not matters of first instance. Fifth, our courts should be alert to the dangers of forum shopping.”

It is therefore submitted that the inclusion of the option to approach the High Court for review in section 105 of the TAA will arguably not change the court’s approach when dealing with questions of fact and that an approach to the court for judicial review is only likely to be entertained where the grounds for review relate only to the constitutionality of an action or decision by SARS or the enquiry relates solely to another question of law. It is therefore debatable whether the constitutional rights of the taxpayer are improved as a result of the inclusion of this option.

2.2.3 Is there a role for the Magistrate's Court to play in ensuring that a taxpayer's right to just administrative action is protected during the DRP?

A request to the court for judicial review would have to be made in terms of section 6 of the PAJA. Section 6 of the PAJA provides as follows:

- “(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.*
- (2) A court or tribunal has the power to judicially review an administrative action if—*
- (a) the administrator who took it—*
- (i) was not authorised to do so by the empowering provision;*
 - (ii) acted under a delegation of power which was not authorised by the empowering provision; or*
 - (iii) was biased or reasonably suspected of bias;*
- (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;*
- (c) the action was procedurally unfair*
- (d) the action was materially influenced by an error of law;*
- (e) the action was taken—*
- (i) for a reason not authorised by the empowering provision;*
 - (ii) for an ulterior purpose or motive;*
 - (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;*
 - (iv) because of the unauthorised or unwarranted dictates of another person or body;*
 - (v) in bad faith; or*
 - (vi) arbitrarily or capriciously;*
- (f) the action itself—*
- (i) contravenes a law or is not authorised by the empowering provision; or*

(ii) is not rationally connected to -

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.

(3)[...].”

Section 6 of the PAJA refers to a ‘court’, which is defined in section 1 of the PAJA and includes the Constitutional Court, a High Court¹⁷ (or another court of similar status) and a Magistrate’s Court designated by the Minister responsible for the administration of justice by notice in the Gazette. Section 7(4) of the PAJA provides that an application for judicial review may only be brought before the High Court until such time that rules are introduced by the Rules Board for Courts of Law regulating the procedure for judicial review. New Draft Administrative Review Rules have recently been issued for public comment by the Rules Board for Courts of Law as the previous Administrative Review Rules were themselves subject to constitutional challenge and were set aside in part by the North Gauteng High Court. The new Draft Administrative Review Rules make provision for judicial review applications to be brought before a Magistrates Court (granted jurisdiction in terms of the PAJA).

¹⁷ The Superior Courts Act, 2013, introduces a number of new definitions. In terms of this Act a High Court may also be referred to as a ‘Division’ and the Constitutional Court, Supreme Court of Appeal, High Court and any court of similar status to the High Court may collectively be referred to as ‘Superior Courts’. The Tax Administration Act has however not been updated for these new definitions and therefore the older terms are still referred to in this dissertation.

Therefore, while in terms of section 170 of the Constitution a court of lower status than a High Court may not rule on the constitutionality of any legislation, in terms of the PAJA it is possible for a Magistrate's court to adjudicate in a judicial review of the administrative actions on the part of SARS, provided the matter is not a constitutional issue (Klue, Arendse & Williams, 2012: 3-88).

2.2.4 Conclusion

While the Constitutional Court has already found that the previous legislation governing the forum for the DRP did not prohibit a taxpayer from approaching the courts for the judicial review of actions and decisions taken by SARS, the legislature has nonetheless thought it necessary to make this right explicit with the introduction of section 105 of the TAA. Therefore, while the provision does not add to a taxpayer's rights to just administrative action and access to courts, the provision is welcomed as the rights are now clearly recognised within the DRP legislation.

Despite its authority to review the decisions and actions of SARS, the courts appear hesitant to do so. Contributing reasons for this approach of the courts include; the requirement in terms of PAJA for taxpayers to first exhaust the internal remedies available to it (subject to limited exceptions), the high regard in which the DRP process and SARS' integrity is held, the courts preference to not decide cases on constitutional grounds where possible, and the High Court's reluctance to decide on tax matters involving questions of fact. As a result, the provisions introduced by section 105 of the TAA would appear to be of limited effect.

While only the High Court currently has authority to review the administrative actions of SARS it is envisioned that the Magistrate's Court will soon be granted authority to review non-constitutional matters. In the event that such an amendment is introduced by the legislature the provisions of section 105 of the TAA would require updating.

2.3 The requirement for SARS to provide the basis for its decision to disallow an objection – section 106(5) of the TAA

2.3.1 Does the requirement for SARS to provide its basis for disallowing an objection satisfy the requirements for just administrative action?

Section 106(5) of the TAA specifically provides that the notice by SARS informing a taxpayer of the disallowance or partial disallowance of an objection must state the basis for the decision (and must also set out a summary of the procedures for appealing against that decision). Section 81 of the ITA which previously dealt with objections against assessments did not include this requirement.

A decision by SARS to disallow an objection would represent ‘administrative action’ as defined in section 1 of the PAJA.¹⁸ This point is also confirmed in *Metcash Trading Limited v CSARS and the Minister of Finance, 2000 CC3/2000 (CC)* where it was noted that when the CSARS exercises discretionary powers conferred upon him by law, the exercise of such discretion constitutes ‘administrative action’.¹⁹

While the requirement for SARS to provide the basis for its decision in terms of the TAA is a welcomed improvement, it is submitted that the provision may still not satisfy the requirements of the PAJA, which gives effect to the right to just administrative action. Providing the ‘basis’ for a decision is not necessarily the same as providing ‘adequate reasons’ for the decision, which is what is required of an administrator in terms of section 5 of the PAJA. By way of example, SARS may disallow an objection relating to the deductibility of certain expenditure and merely inform the taxpayer that the basis for its decision is that in SARS’ view the expenditure in question is of a capital nature. But merely providing the basis for its decision does not provide the taxpayer with any insight into why SARS is of the opinion that the expenditure is of a capital nature.

¹⁸ ‘administrative action’ means: “any decision, or any failure to take a decision, by –

(a) An organ of state, when –

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

(j) Exercising a public power or performing a public function in terms of any legislation; or

(b) [...]

¹⁹ Refer paragraph 40 of the judgment.

In terms of section 5 of the PAJA, any person who has been subjected to ‘administrative action’ that has materially and adversely affected that person’s rights is, in the absence of exceptions provided for in section 5(4)(b) of the PAJA²⁰ (none of which it is submitted would ordinarily apply in a dispute with SARS), entitled to be provided with adequate reasons for the decision. The right to be provided with adequate reasons for ‘administrative action’ which materially and adversely affects the rights of a person is an important component of the principle of just administrative action.

“The focus of reason-giving under s 5 is on justification: on explaining to the affected individual, to a court, and ultimately to the public why a decision was taken. Reasons provide someone aggrieved by a decision with an explanation for and justification of the decision. They also assist such a person in deciding whether to exercise rights of appeal or review. A statement of reasons is of sufficient precision to give him or her a clear understanding of why the decision was made.”

On the supply side, requiring the administrator to give reasons for a decision is also a safeguard against unreasonable administrative action. Administrators are less likely to act arbitrarily or unreasonably if they know that reasons will have to be furnished justifying the action that has been taken. If one has to give reasons for decisions, one is likely to give more thought to those decisions, thereby making the decision-making process more structured and rational.” (Currie & de Waal, 2013: 685) (Emphasis added)

The DRP legislation does not provide the taxpayer with any remedies where SARS merely provides the basis for disallowing an objection and does not provide adequate reasons for its decision. DRP rule 3 only deals with reasons for an ‘assessment’, which has been redefined in terms of section 1 of the TAA and now no longer includes “*any decision of the Commissioner which is in terms of this Act subject to objection and appeal*”, such as for instance, a decision to disallow an objection. This effect may not have been intended by the legislature.

²⁰ Section 5(4)(b) of the PAJA provides: “*In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, Including –*

- (i) the objects of the empowering provisions;*
- (ii) the nature, purpose and likely effect of the administrative action concerned;*
- (iii) the nature and the extent of the departure;*
- (iv) the relation between the departure and its purpose;*
- (v) the importance of the purpose of the departure; and*
- (vi) the need to promote an efficient administration and good governance.*

The deficiencies of the DRP legislation insofar as a taxpayer's right to be provided with reasons for the disallowance of an objection is concerned, is compounded where taxpayers are unaware of their initial right to request reasons for an 'assessment' issued by SARS, even before they object to the 'assessment', as is often experienced in practice. This is because the right to request reasons for an 'assessment' is obscured by the fact that the right is not set out in the TAA itself (or previously in the ITA) but rather included under the DRP rules, or in separate legislation, namely the PAJA. The manner in which SARS' e-filing system has been set up for income tax purposes adds to the problem as 'assessments' (absent reasons) are issued almost immediately after a return has been submitted. Taxpayers are then allowed to click the 'dispute' button on e-filing for an 'assessment' with which they do not agree, which then triggers the commencement of the objection process without a request for reasons being filed first. Furthermore, the e-filing system itself does not facilitate the submission of requests for reasons in terms of DRP rule 3 and such a request therefore has to be filed outside of the e-filing system, via a letter to SARS.

2.3.2 Conclusion

The introduction of a requirement for SARS to provide a taxpayer with the basis for its decision to disallow an objection is welcomed as it may provide the taxpayer with some insight into the rationale behind SARS' decision. The DRP legislation however does not compel SARS to provide a taxpayer with adequate reasons for its decision to disallow an objection and may therefore still fall short of the requirements of the PAJA.

As a result of changes to the definition of 'assessment' in section 1 of the TAA, the DRP legislation no longer makes provision for a taxpayer to request reasons for SARS' decision to disallow an objection. The ability of a person to request adequate reasons for an 'administrative action' which adversely and materially affects that person's rights is an important component of just administrative action. Provision should therefore be made for this right within the DRP legislation itself.

The deficiencies insofar as a taxpayer's rights to be provided with reasons for the disallowance of an objection is concerned is compounded by the fact that the right to request reasons for an 'assessment' is obscured in the DRP legislation. Furthermore, SARS' e-filing system does not facilitate the

submission of such requests. It is therefore possible that a taxpayer may not have been provided with adequate reasons prior to SARS' notice that its objection has been disallowed.

Where a taxpayer is of the view that it has not previously been provided with adequate reasons and the basis provided by SARS for its decision also does not represent adequate reasons, it may request such reasons in terms of the PAJA. The DRP legislation itself, however, does not compel SARS to provide reasons for its decision to disallow an objection, nor does it provide the taxpayer with a mechanism for requesting such reasons. As such, the DRP legislation falls short of the constitutional requirements for just administrative action in this regard.

2.4 Timeframe within which a tax board has to communicate its decision – section 114(2) and section 115 of the TAA

2.4.1 Does the requirement for the tax board to make its decision within a prescribed timeframe improve the rights of taxpayers to just administrative action?

The tax board was established as a result of an increase in the number of appeals lodged which resulted in long waiting periods before a case could be heard, because of the limitation on the number of judges available who could act as presiding officers. A need for a more streamlined appeals process which enabled taxpayers to present their case sooner was therefore identified. The tax board was therefore established and is meant to be a more informal process in which appeals involving relatively small amounts²¹ could be dealt with speedily (Klue, Arendse & Williams, 2012: 5-32).

A timeframe of 60 business days after conclusion of the hearing is legislated for a tax board to prepare a written statement of its decision that includes the facts of the case as well as the reasons for its decision in terms of section 114(2) of the TAA. If the chairperson of a tax board fails to deliver the decision within the required timeframe the taxpayer or SARS may within 21 business days thereafter require that the appeal be referred to the tax court to be considered afresh in terms of section 115 of the TAA. Section 83A of the ITA which previously dealt with appeals to the tax board did not place

²¹ The current threshold is R500 000.

such an onus on the chairperson of the tax board, resulting in delays of up to 2 years before a decision was delivered (Memorandum on the Objects of the Tax Administration Bill, 2011: 194).

The introduction of section 114(2) of the TAA therefore represents an improvement to the DRP and the rights of taxpayers as it seeks to ensure that administrative action is efficiently carried out. The amendment also complements the initial purpose for which the tax board was created i.e. to ensure that cases of relatively small amounts are dealt with more speedily.

Depending on the decision of the tax board, either SARS or the taxpayer may wish to appeal against that decision. As was noted in *CIR v Allied Building Society, 1963 SA4/1963 (SA)* (in referring to delays before cases on appeal from the Special Tax Court were brought before the Supreme Court of Appeal) lengthy delays are not in the general interest. Facts may be forgotten or evidence may be misplaced which could have an impact on the outcome of such further appeals and therefore the rights of the parties involved in the DRP. It is therefore in the interest of all parties involved that the DRP be resolved as swiftly as possible and the introduction of section 114(2) of the TAA together with the remedy provided in section 115 of the TAA seeks to achieve this.

On the other hand, consideration should be given to whether the 60 business day timeframe imposed on the tax board by section 114(2) of the TAA is reasonable and provides the tax board with sufficient time within which to apply its mind to the facts and reach a correct decision. It should be kept in mind that for a particular case the tax board may consist of a chairperson (an advocate or attorney), an accountant and a representative of the commercial community.²² The members of a tax board will therefore in all likelihood have other professional commitments and obligations to fulfil in addition to their obligations as tax board members and this would impact on their time and availability to meet. While a tax board does not hear matters which involve significant amounts, a particular case may still involve complex issues which are outside of the field of expertise of the members of the tax board and which therefore requires further research. This point is particularly relevant given the fact that section 110 of the TAA does not make provision for the representative of the commercial community to be a specialist in certain instances, as is the case with the composition of a tax court.²³

²² As provided in section 110 of the TAA.

²³ As provided in section 118(2) of the TAA.

It is however submitted that the period of 60 business days should provide the members of a tax board with sufficient time within which to overcome the hurdles referred to above and that the imposition of a deadline will help in focusing the minds of the members of a tax board to reach a decision. Where a tax board is unable to reach a decision within 60 business days as a result of the complexity of a case, this may serve as a good indicator that the case is appropriate for adjudication by a tax court, despite the fact that the case may involve relatively smaller amounts.

Consideration should also be given to the effectiveness of the remedy provided by section 115 of the TAA for a taxpayer to approach the tax court to hear its case anew where the timeframe imposed on a tax board to communicate its decision has not been adhered to. Before a taxpayer can make use of this remedy it would have to consider the cost implications of having the matter heard by a tax court instead of a tax board.

As noted previously, the tax board was designed as a more informal means of dealing with disputes of relatively smaller amounts. Generally, taxpayers are required to represent themselves at hearings of the tax board, although a taxpayer may request to be represented by counsel or its tax advisors with such a request then being subject to the discretion of the tax board.

The tax court, however, is more formalised. The provisions of regulation B1(3) of the DRP rules provide:

“Save as is otherwise provided in the rules of this Part, the general practice and procedure of the Court shall be that of the High Court in so far as such practice and procedure are applicable.”

The idea of representing yourself before a tax court may therefore prove daunting for most taxpayers who would instead prefer to be represented by counsel, an attorney or agent. A taxpayer’s right to be represented at a tax court is specifically provided for in terms of section 125(2) of the TAA. The cost of such representation may however prove prohibitive and may therefore ultimately affect the effectiveness of the remedy provided by section 115 of the TAA.

Furthermore, a tax court does not entertain appeals in which the amount of tax in dispute is less than R100 000 (Department of Justice and Constitutional Development, 2013). This therefore renders the remedy provided in section 115 of the TAA ineffective for cases in which the amount of tax in dispute does not exceed R100 000.

2.4.2 Conclusion

Section 114(2) of the TAA imposes an obligation on a tax board to prepare a written statement of its decision within 60 business days after conclusion of the hearing. The provision is therefore aimed at ensuring that the DRP is efficiently carried out, although this objective needs to be tempered against the requirement to provide a tax board with sufficient time to apply its mind to the facts of a case and reach the correct decision. It is submitted that the 60 business day timeframe does provide a tax board with sufficient time to reach its decision. The change is therefore welcomed as it enriches a taxpayer's rights to just administrative action. The change ensures that the DRP is efficiently carried out and that any subsequent appeals against the decisions of a tax board may be heard while evidence and witnesses are still easily accessible.

Where the above timeframe is not complied with, section 115 of the TAA provides that a taxpayer may approach a tax court to hear the matter anew. This remedy may however not prove effective in all instances as a taxpayer would have to take into account the additional costs associated with having an appeal heard by a tax court as opposed to a tax board. Furthermore, the remedy is of no effect for cases where the taxes in dispute are less than R100 000 as this is the threshold for cases to be heard by a tax court.

Therefore, while the provisions of section 114(2) of the TAA are welcomed as improving the constitutional rights of taxpayers, where these provisions are not complied with, the remedy provided in section 115 of the TAA may not always prove effective in providing relief to a taxpayer.

2.5 Public sittings of a tax court – section 124 of the TAA

2.5.1 Would a taxpayer's rights to privacy and access to the courts be infringed as a result of public tax court sittings?

Section 83(11) of the ITA provided that the sittings of a tax court would not be public and that the court would at any time, on application by the taxpayer, exclude all or any persons whose attendance was not necessary for the hearing of the appeal. Section 33(4) of the VAT Act provided that the provisions of section 83(11) of the ITA would apply *mutatis mutandis* to any appeal to the tax court in terms of the VAT Act.

The sitting of the tax court is now dealt with in terms of section 124 of the TAA. The provisions of section 124(1) of the TAA are similar to the provisions it replaces as it also provides that the sittings shall not be public. Section 124(2) of the TAA however provides that the president of the tax court may in exceptional circumstances, on request of any person, allow that person or any other person to attend the sitting, but may only do so after taking into account any representations that the taxpayer and SARS wish to make. It appears that the 'person' being catered for by this provision is the media. It is explained in the Memorandum on the Objects of the Tax Administration Bill that this provision was inserted as a result of the concern that a constitutional difficulty may arise if only the taxpayer concerned may request that a sitting be held in public as this may conflict with the 'open justice principle' (Memorandum on the Objects of the Tax Administration Bill, 2011: 194). It is however noted that the provisions of section 83(11) of the ITA did not appear to give the taxpayer the right to request that a sitting be held in public but instead provided that a taxpayer could request that persons be removed from the sitting of the tax court.

The need for matters such as the sitting of the tax court to be addressed in the DRP legislation arises because the tax court is a special court which does not have the inherent power to protect and regulate its own processes as is the case with the Constitutional Court, the Supreme Court of Appeal and the High Courts, in terms of section 173 of the Constitution. When legislating the procedures of the tax court, consideration should however be given to the constitutionality of such provisions, failing which, the process could be invalidated.

The provisions of section 124(1) of the TAA, and also its predecessor, section 83(11) of the ITA, sought to protect the taxpayer's right to privacy. The right not to have the privacy of one's communications infringed is specifically provided for in terms of section 14(d) of the Constitution. On the other hand, section 124(2) of the TAA may result in an infringement of the right to privacy. Such an infringement may however be allowable in terms of section 36 of the Constitution which provides that the rights afforded to every person in the Bill of Rights may be tempered in terms of law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society, taking into account all relevant factors such as the nature of the right, the importance of the purpose of the limitation and the nature and extent of the limitation. The limitation on a taxpayer's right to privacy may be necessary to give effect to the right to freedom of expression as provided for in terms of section 16(1)(a) of the Constitution (which has previously been argued to include the right of the media to televise and broadcast court proceedings), as well as the right of the general public to receive information and ideas as provided for in terms of section 16(1)(b) of the Constitution.

In the case of *South African Broadcasting Corporation Limited v The National Director of Public Prosecutions and Others 2006 CCT58/06* the Constitutional Court had the opportunity to consider (i) the existence and role of the 'open justice' principle, (ii) the claim that the media's right to the freedom of expression included the right to televise and broadcast court proceedings, and (iii) the rights of the general public to receive information and ideas as balanced against the rights to a fair hearing and the right to privacy. The case before the Constitutional Court dealt with an application by the SABC to reverse a decision by the Supreme Court of Appeal not to grant the South African Broadcasting Corporation Limited ('SABC') full broadcasting rights (film and sound recordings) of the appeal by Mr Shabir Shaik and eleven companies he was involved with (Mr Shabir Shaik and the eleven companies were also the second to twelfth respondents in this case before the Constitutional Court) against a criminal conviction. While the principles were considered in the context of a criminal trial it is submitted that the findings would be instructive in the absence of a Constitutional Court ruling dealing with these principles in the context of the DRP.

In respect of the 'open justice' principle, the Constitutional Court noted that the existence and role of this principal was a constitutional matter and that support for the 'open justice' principle was to be found in section 1 of the Constitution which provides that South Africa is founded on the values of a

democratic government which ensures accountability, responsiveness and openness.²⁴ Furthermore, both section 34 (dealing with right to access to the courts in the case of a dispute) as well as section 35 (dealing with the right of access to the courts in the case of arrested, detained and accused persons) of the Constitution provide for a public hearing or trial before a court, which further promotes openness.

As regards the rights and obligations of the media insofar as this related to the freedom of expression and the media's right to televise and broadcast court proceedings, Langa CJ in paragraph 24 of the judgment noted the following in favour of this view:

“[24] This Court has also highlighted the particular role in the protection of freedom of expression in our society that the print and electronic media play.²⁵ Thus everyone has the right to freedom of expression and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate. The media thus rely on freedom of expression and must foster it. In this sense they are both bearers of rights and bearers of constitutional obligations in relation to freedom of expression. As was said in Khumalo –

‘In a democratic society [...] the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of s 16’.”

²⁴ Refer paragraph 28 of the judgment.

²⁵ Reference was made to *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at paras 22-24.

In paragraph 25 of the judgment the Chief Justice however went on to note that in democratic jurisdictions such as The United States of America, Germany and England, the right to freedom of expression has been held not to include the right of the media to televise and broadcast court proceedings. The Chief Justice stated:

“The United States Supreme Court has held that state courts are free to experiment with television cameras in the courtroom if they wish, as long as the right of an accused to a fair trial is respected. However, they are not constitutionally required to do so; it is a matter of policy choice.²⁶ Similarly in the Lockerbie Bombers case, the High Court of Justiciary held that there was no right under article 10 of the European Convention on Human Rights, which guarantees freedom of expression, to televise legal proceedings”.

Whether the right to freedom of expression in terms of section 16 of the Constitution included the right of the media to televise and broadcast court proceedings was therefore not beyond doubt. However, given the urgent nature of the proceedings (the appeal to the Supreme Court of Appeal in respect of the criminal trial was suspended pending the ruling by the Constitutional Court on the media’s presence at the criminal trial) the Constitutional Court decided to avoid answering the question and instead assumed in favour of the applicant (the SABC) that such a right existed.

As for the right of the public to be informed and educated, the Constitutional Court ruled that this right was essential for ensuring meaningful involvement of ordinary citizens in public life. In this case it concerned the right of South Africans to know and understand the way and manner in which the judiciary functions.²⁷

While finding in favour of the applicant with regards to the existence and importance of the above rights and principles, the Constitutional Court majority went on to note that in certain circumstances one right has to take precedence over the other. The Supreme Court of Appeal’s decision to place

²⁶ See *Courtroom Television Network v State of New York* 5 NY 3d 222; 833 NE 2d 1197; *Westmoreland v Columbia Broadcasting System* 752 F 2d 16 (1984). See also the discussion in Eric Barendt *Freedom of Expression* 2nd ed (2005) at 349; see also the full discussion in M David Lepofsky “Cameras in the Court Room – not without my consent” (1996) 6 *National Journal of Constitutional Law* 161 at 168 and 223–224.

²⁷ Refer paragraph 29 of the judgment.

greater emphasis on the rights of the second to twelfth respondents to a fair trial when weighing up this right against the right to freedom of expression and the ‘open justice’ principle could therefore not be reversed on appeal.²⁸ In arriving at its decision not to grant the applicant full broadcasting rights (the Supreme Court of Appeal would, in terms of an agreement reached with the media in 1993, grant the applicant the right to film proceedings but only limited sound recording would be allowed²⁹) the Supreme Court of Appeal also took into consideration the impact full broadcasting could have on the possible future prosecution of other parties named in the state’s case against the second to twelfth respondents such as Mr Jacob Zuma.

The second to twelfth respondents’ right to privacy was also considered by the Constitutional Court but the court ruled that the undertaking by the applicant not to record Mr Shabir Shaik or any of his family members during cross-examination was a sufficient safeguard against the intrusion of his privacy.³⁰

Finally, in noting that there was not sufficient grounds for overturning the decision reached by the Supreme Court of Appeal not to grant the applicant full broadcasting rights, the Constitutional Court, in paragraph 67 of the judgment left open the possibility that it may have reached a different conclusion to that of the Supreme Court of Appeal had it been approached by the applicant for full broadcasting rights. The Constitutional Court then went on to point out some considerations which it thought needed to be taken into account in the future when the question of televising court proceedings arose. These factors included the fact that broadcasting (whether by television or radio) has the potential to distort the character of the proceedings given the potential for visual and audio editing, the possibility of complex issues being trivialised as a result of the replaying of sound bytes turning what should be public education into public entertainment, as well as how these risks could be guarded against including consideration of whether television and radio broadcasting was the best way to ensure that the public remained well informed.

²⁸ Refer paragraph 55 of the judgment

²⁹ In a footnote to paragraph 77 of the judgment the following is noted: “*Counsel referred to it as the Goldstone Concordat, because it was negotiated by Goldstone J on behalf of the judiciary with representatives of the media. Its principal provision was that sound and film recording could be made but sound would not be broadcast save for the delivery of judgment. It was also agreed that the recording should be done in a non-intrusive manner.*”

³⁰ Refer paragraph 9 of the judgment

Deputy Chief Justice Moseneke disagreed with the decision reached by the Constitutional Court majority noting that in his view, the Supreme Court of Appeal, in pitting the right to a fair hearing against the right to freedom of expression and the ‘open justice’ principle had misapplied the discretion granted to it by section 173 of the Constitution. In ruling that the right to freedom of expression had to make way for the right to a fair hearing it incorrectly implied that the Constitution catered for a hierarchy of rights. Furthermore, it ignored the fact that a public hearing was implicit in the right to a fair hearing. The Deputy Chief Justice therefore ruled that he would have upheld the applicant’s appeal and granted it full broadcasting rights. He also noted that internationally, support for allowing full broadcasting rights was provided by Canada as in that country the Supreme Court provides a live feed of all appeals to the Canadian press. While the Supreme Court holds copyright over all video recordings the court has an arrangement with the Canadian Public Affairs Channel which allows the channel to broadcast hearings at a later date. Upon written request, permission may be given to allow limited use of video recordings of cases for educational, non-commercial purposes.

In 2009, subsequent to the above case being heard, the Supreme Court of Appeal issued a practice notice (Practice Notice 2009/01) seeking to standardise the procedure for expanded media coverage requests. These guidelines have also been adopted by among others, the Gauteng Division (of the High Court) subject to the Judge President’s right to add or to alter any of the guidelines. This point is significant given the provisions of regulation B1(3) of the DRP rules which provides that apart from specific provisions in the rules, the general practice and procedure of the Court shall be that of the High Court in so far as such practice and procedures are applicable.

If an application for full broadcasting rights was made to the tax court by the media, the tax court would therefore have to turn to the guidelines applied by the High Courts as the DRP rules themselves do not provide such guidelines. Significant aspects of Practice Notice 2009/01 of the Supreme Court of Appeal are set out below:

“2. Any party who wishes to film or record proceedings must notify the registrar of its intention at least 24 hours beforehand. The registrar will then establish from the presiding judge whether there is any particular objection to the request.

3. Any party who wishes to object to any filming or recording must raise its objections in writing.

4. The court may on good cause in any particular case withdraw the leave or change the conditions.

5. *Equipment limitations:*

5.1 *Video: one camera only may be used at a time and the location of the camera is not to change while the court is in session.*

5.2 Audio: the media may install their own audio-recording system provided this is unobtrusive and does not interfere with the proceedings. Individual journalists may bring tape recorders into the courtroom for the purposes of recording the proceedings but changing of cassettes is not permitted while the court is in session.

5.3 [...]

6. *Pooling arrangements:*

6.1 *Only one media representative may conduct each of the audio, video and still photography activities.*

6.2 *This media representative is to be determined by the media themselves and is to operate an open and impartial distribution scheme, in terms of which the footage, sound or photographs would have to be distributed in a 'clean' form, that is, with no visible logos, etc., to any other media organisation requesting same and would also be archived in such a manner that it remains freely available to other media.*

6.3 *If no agreement can be reached on these arrangements, no expanded media coverage may take place.*

7. *Rules regarding behaviour of media representatives*

7.1 *Conduct must be consistent with the decorum and dignity of the court.*

7.2 *No identifying names, marks, logos or symbols should be used on any equipment or clothing worn by media representatives.*

7.3 *All representatives (including camera crew) must be appropriately dressed.*

7.4 *Equipment must be positioned and operated to minimise any distraction while the court is in session.*

7.5 *Equipment must not be placed in or removed from the court room while the court is in session.*

7.6 No film, video tape, cassette tape or lens may be changed while the court is in session.

8. There is an absolute bar on:

8.1 audio recordings or close-up photography of bench discussions.

8.2 audio recordings or close-up photography of communication between legal representatives or between clients and their legal representatives.

8.3 close-up photographs or filming of judges, lawyers or parties in court.

8.4 recordings (whether video or audio) being used for commercial or political advertising purposes thereafter.

8.5 use of sound bytes without the prior consent of the presiding judge. (This does not apply to extracts from judgments or orders).

9. Failure to comply with these instructions may lead to contempt of court proceedings.”

(Emphasis added)

While the above guidelines are less restrictive than the terms of the Goldstone Concordat,³¹ particularly with regards to sound recording, these remain guidelines and the presiding judge (or president of the tax court) is granted the discretion to apply the guidelines as he/she deems fit. These guidelines seek to promote open justice but at the same time protect the right to privacy.

SARS' stated purpose of introducing section 124(2) of the TAA i.e. to reduce conflict with the 'open justice' principle and also the introduction of section 67(5) of the TAA which gives SARS the power to protect itself against any public attacks against its integrity indicate that SARS may support the idea of tax court sittings taking place in the public domain for the purposes of educating the general public and also to increase transparency and protect the integrity of SARS. While the principles of 'open justice' and the right of the general public to be informed and educated may represent valid submissions in support of tax court sittings being broadcasted, strong arguments could be made against allowing the media such access, such as a taxpayer's right to privacy in respect of its financial affairs. Apart from listed companies and other public interest entities, the tax affairs of a particular taxpayer are likely to be personal and cannot necessarily be said to be in the interest of the general public although an argument could perhaps be made for the educational benefits which could be

³¹ Refer footnote 18.

derived from the general public being granted an audience in such instances. It is also questionable whether the general public would be interested in following the tax court sittings involving lesser known taxpayers and therefore whether there would in fact be a demand for the broadcasting of such proceedings. It is therefore possible that the media may only seek permission to broadcast tax court proceedings involving public figures or public interest entities.

2.5.2 Conclusion

Should a tax court be approached by the media for permission to broadcast a tax court sitting, the president of the tax court would be empowered by the provisions of section 124(2) of the TAA to grant such permission. In determining the extent of the broadcasting rights the president of the tax court may be guided by the guidelines laid down by the Supreme Court of Appeal and also the decision of the Constitutional Court in *South African Broadcasting Corporation Limited v The National Director of Public Prosecutions and Others, 2006 CCT58/06 (CC)*. Section 124(2) of the TAA, the guidelines issued by the Supreme Court of Appeal (Practice Notice 2009/01) and also the precedent set by the Constitutional Court would require the president of the tax court to take into account representations made by the taxpayer and SARS in support of or against such an application by the media, particularly insofar as these representations relate to the constitutional rights of these parties.

While the introduction of section 124 of the TAA may result in a taxpayer's right to privacy being tempered, section 36 of the Constitution does make provision for this. It may also be argued that the right to a fair hearing in terms of the Constitution is in fact aided by allowing the public access to such proceedings. It is submitted that where a taxpayer's right to privacy is infringed for the purposes of achieving open justice and the right to freedom of expression the infringement may, in certain instances, be necessary. We are therefore left to place our reliance in the court that it will give due consideration to the exceptional circumstances and representations made by the parties involved before deciding whether or not to allow any other persons access to the sittings of the tax court. Overall, it is submitted that the introduction of section 124 of the TAA improves the constitutionality of the DRP as it allows a tax court to take the constitutional rights of the taxpayer and other interested parties into account.

2.6 Publication of judgments of a tax court – section 132 of the TAA

2.6.1 Does the publication of tax court judgements promote the right of access to information while still protecting a taxpayer's right to privacy?

Section 132 of the TAA replaces the provisions of section 83(19) of the ITA which provided that the president of the tax court could indicate which judgments or decisions of the tax court were to be published for general information, provided that the judgments were published in such a way that it did not reveal the identity of the taxpayer. This provision therefore sought to protect a taxpayer's constitutional right to privacy.

Section 132 of the TAA also seeks to protect the taxpayer's right to privacy by providing that the taxpayer's identity may not be revealed unless the sitting of the tax court was public – refer comments on section 124 of the TAA above. Section 132 of the TAA however introduces a further requirement i.e. that all tax court judgments must be published for general information, whether marked reportable or not. The requirement for all tax court cases to be made available in the public domain seeks to address the disparity which previously existed where SARS had the benefit of access to all tax court judgments, including unreported and unpublished judgments, while the greater public only had access to the tax court judgments which were deemed publishable by the president of the tax court.

2.6.2 Conclusion

The introduction of section 132 of the TAA is welcomed as it enhances the general public's right to freedom of expression, more specifically the freedom to receive or impart information or ideas as provided for in terms of section 16(b) of the Constitution while still maintaining the taxpayer's right to privacy as envisioned in section 14 of the Constitution.

2.7 Conclusion

The TAA has not only resulted in the DRP legislation being consolidated and harmonised for all ‘tax Acts’, but has also resulted in significant improvement and clarification of taxpayers’ rights insofar as the DRP is concerned. The significant improvements under chapter 9 of the TAA include the following:

- A taxpayer’s right to approach the High Court for judicial review of ‘administrative action’ taken by SARS has been specifically included as a remedy available to taxpayers in terms of section 105 of the TAA.
- When informing a taxpayer of the disallowance, or partial disallowance, of an objection, SARS must state the basis for the decision and must also set out a summary of the procedures for appealing against that decision in terms of section 106(5) of the TAA. The change represents a partial improvement to the rights of taxpayers, however, the DRP legislation does not compel SARS to provide a taxpayer with adequate reasons for its decision to disallow an objection and may therefore still fall short of the requirements of the PAJA
- A timeframe of 60 business days after conclusion of the hearing is legislated for a tax board to deliver its decision in terms of section 114(2) of the TAA. Where the decision is not delivered within the required timeframe, the taxpayer or SARS may require that the appeal be considered afresh by a tax court in terms of section 115 of the TAA.
- Provision is made for the president of the tax court to allow any other person to attend the sittings of the tax court, after taking into account any representations by the taxpayer and SARS, in terms of section 124(2) of the TAA.
- Section 132 of the TAA introduces a requirement for all tax court judgments to be published for general information and no longer leaves this to the discretion of the president of the tax court. The provision therefore promotes a taxpayer’s right to access to information.

While the above additions to the DRP legislation are largely welcomed, in certain instances further improvement is still required. An example of this would be the remedy provided to taxpayers where the tax board fails to adhere to the timeframe imposed on it for delivering its decision. These weaknesses, as well as possible recommendations to fortify the constitutional rights of taxpayers are considered in further detail in chapter 4.

3. OTHER AMENDMENTS INTRODUCED BY THE TAA WHICH HAVE AN IMPACT ON THE CONSTITUTIONALITY OF THE DRP

3.1 Introduction

Apart from the introduction of chapter nine of the TAA which consolidates the DRP legislation into one single chapter, there have also been various other changes introduced by the TAA which have an impact on the DRP and the constitutional rights of taxpayers. Some of these changes have a direct impact on the DRP while other changes are more indirect and may possibly have been unintended by the legislature.

To the extent practicable, the affected provisions are discussed in chronological order in this chapter. In summary, the affected sections are:

- the definition of ‘date of assessment’ contained in section 1 of the TAA;
- the introduction of a Tax Ombud in terms of section 15 to section 21 of the TAA;
- the ability of SARS to request a person to correct an undisputed error in a return prior to issuing an assessment in terms of section 25(5) of the TAA as well as the introduction of additional circumstances under which SARS may withdraw an assessment without the DRP being initiated in terms of section 98 of the TAA;
- changes to the ‘pay now, argue later’ principle as introduced by section 164 of the TAA; and
- SARS’ right to institute recovery proceedings in terms of section 172 of the TAA.

3.2 The definition of ‘date of assessment’ and the time limits imposed in terms of the DRP legislation

3.2.1 Is the change to the definition of ‘date of assessment’ and the time limits imposed on taxpayers during the DRP constitutional?

Prior to the introduction of the TAA the ‘date of assessment’ was defined in section 1 of the ITA as follows:

“In relation to any assessment, means the date specified in the notice of such assessment as the due date or, where a due date is not so specified, the date of such notice.” (Emphasis added)

Generally, the practice of SARS was to provide a ‘due date’ on the ‘notice of assessment’ which in certain instances would be more than 30 calendar days after the date of issue of the ‘notice of assessment’.³² The difference between the date of issue and the ‘due date’ of the ‘assessment’ therefore went some way in compensating for the time lag between when an assessment was issued by SARS and when the assessment was received, or could reasonably be expected to have been received by the taxpayer.

In terms of section 1 of the TAA the ‘date of assessment’ (in relation to assessments issued by SARS) is now defined as follows:

“(a) in the case of assessment by SARS, the date of the issue of the notice of assessment [...]”
(Emphasis added)

In terms of the DRP the ‘date of assessment’ is significant as it impacts on a taxpayer’s right to request reasons for an assessment in terms of the DRP rules and it also has an impact on the taxpayer’s right to object to an assessment.

³² Based on experiences in practice.

In terms of DRP rule 3(1)(a), a taxpayer must exercise its right to request reasons in terms of the rules within 30 business days after the ‘date of assessment’. In terms of DRP rule 3(1)(b), the CSARS is granted discretion to extend the 30 business day period to 60 business days where the CSARS is satisfied that reasonable grounds exist for the delay in not complying with the initial 30 business day period. The decision by the CSARS on whether or not to grant a taxpayer a further 30 business days for requesting reasons would in itself represent an administrative action subject to judicial review in terms of the PAJA.

In terms of section 5(1) of the PAJA a taxpayer is afforded 90 calendar days after the date on which the taxpayer became aware of the administrative action (or might reasonably have been expected to become aware of the administrative action) to exercise its right to request reasons. Prior to the change in the definition of ‘date of assessment’ brought about by the TAA there was therefore already a significant difference in the time period afforded to taxpayers to request reasons in terms of the DRP rules (30 business days) versus the PAJA (90 calendar days).

Apart from the differences highlighted above, the change in the definition of ‘date of assessment’ coupled with the wording of DRP rule 3 means that the comparatively shorter time period for requesting reasons in terms of the TAA begins when the ‘notice of assessment’ is issued, whereas in terms of the PAJA, the time period for requesting reasons only begins when a person becomes aware of, or could reasonably be expected to have become aware of the administrative action. The difference is to the disadvantage of the taxpayer. This mechanism is also different to the time bar rules which generally apply to SARS. For instance, in terms of DRP rule 5, SARS is afforded 60 business days from the date that it receives a taxpayer’s objection to inform the taxpayer that it requires further information in order to make a decision on the objection.

The foregoing provisions of the DRP legislation should be considered in conjunction with the provisions of sections 251 – 253 of the TAA. These provisions are comparable with section 106(2) – 106(4) of the ITA which it replaces. Sections 251 and 252 of the TAA deals with acceptable forms of delivery of notices and documents by SARS and includes notices and documents sent to the person’s/ public officer’s last known electronic address, which includes the last known email address or last known telefax number. In practice, electronic communication with SARS (including the receipt of ‘notices of assessment’) has become more prevalent. Where e-filing is used for the submission of

tax returns a 'notice of assessment' is generated within minutes of submission and an automated email or text message alerting the taxpayer to the fact that a 'notice of assessment' has been issued is usually sent at the same time. Section 253 of the TAA provides that a notice, document or any other communication issued in terms of section 251 or section 252 of the TAA is deemed to be received by the person to whom it was delivered unless SARS is satisfied or a court decides that the communication was not received or was received at some other time. If SARS is satisfied that a communication sent in terms of section 251 or section 252 of the TAA was not received or was received considerably later and as a consequence the person has been placed at a material disadvantage, SARS must withdraw the communication and issue it anew.

Another piece of legislation to consider in this regard is the new obligation imposed on taxpayers in terms of section 23 of the TAA which requires a registered taxpayer to inform SARS within 21 business days of any changes to its particulars, which includes changes to its electronic address used for communication with SARS.

All of this legislation taken together therefore empowers SARS to use electronic means of communication when interacting with taxpayers, including for the issuance of 'notices of assessment', using electronic addresses which should be kept up to date by taxpayers. Under the circumstances described above the time period between when a 'notice of assessment' is issued by SARS and when a taxpayer becomes aware of it, or could reasonably be expected to become aware of it, may be significantly reduced. However, this argument does not hold true in all cases (such as where the 'notice of assessment' is only delivered by post) and significant time lags between the two events may still arise, effectively reducing an already shorter time period (when compared with the PAJA) within which the taxpayer has to exhaust the remedies provided for in the TAA. While section 253 of the TAA does provide some relief, the mechanics of the DRP legislation still appears to be at odds with the PAJA as it does not require the taxpayer to become aware of the 'notice of assessment', or provide for a reasonable time period within which the taxpayer can become aware of the 'notice of assessment', before the limited time periods begin to run. The DRP legislation in its current form therefore places the taxpayer in a less favourable position when compared to the PAJA.

Where a taxpayer falls foul of the time period afforded to it for requesting reasons in terms of the DRP rules the taxpayer may consider requesting reasons in terms of the PAJA. However, where a

request for reasons is filed in terms of the PAJA, the minimum 30 business day period from the ‘date of assessment’ afforded to taxpayers to object to an assessment is not automatically suspended as is the case when a request for reasons is made in terms of the DRP rules (South African Revenue Service, Law Administration: Litigation Section, 2005). While the time period to object is not automatically suspended under PAJA, awaiting a response from SARS to a request for reasons filed in terms of the PAJA may qualify as “exceptional circumstances” for the delay in filing an objection as envisioned in section 104(5)(a) of the TAA. As such, a senior SARS official would be granted the discretion to extend the time period for lodging an objection. While the taxpayer would therefore be at the mercy of SARS, the discretion exercised by a senior SARS official in this regard would represent administrative action, and as such, would be subject to judicial review. The difference in time periods afforded by the TAA and the PAJA may therefore not be insignificant. As noted in Silke:

“The reason for the significant discrepancy in the respective time limits between the rules and PAJA has not been explained” (Klue, Arendse & Williams, 2012: 3-83).

The maximum 60 day period within which to request reasons in terms of the TAA is also inconsistent with the period within which an objection to an assessment must be lodged (a total period of 51 days is envisioned in terms of section 104 of the TAA read together with DRP rule 4 although this period may be extended even further if a senior SARS official is satisfied that exceptional circumstances exist for the delay in lodging an objection) as well as the period allowed for noting an appeal (a total period of 75 days may possibly apply in terms of section 107 of the TAA read together with DRP rule 6). The inconsistency in the time periods allowed for requesting reasons, objecting and appealing creates further uncertainty around how these time periods were determined and arguably creates an opening for arguing that the time periods are in fact unconstitutional.

While the imposition of limited time periods is necessary in the context of the DRP, as without it disputes could continue indefinitely, limited time periods impact on the taxpayer’s constitutional rights to just administrative action, access to information and access to the courts and on this basis could be subject to constitutional challenge. It is submitted that the change in the definition of ‘date of assessment’ places further pressure on the constitutionality of these time periods.

Whilst the constitutionality of the limited time periods imposed by the legislation governing the dispute resolution process has not been tested by our courts, in the case of *Brümmer v Minister for Social Development and Others, 2009 CC323/2009 (CC)* the Constitutional Court was called upon to confirm an order by the Western Cape High Court which deemed the limited time period imposed by section 78(2) of the PAIA unconstitutional. Section 78(2) of the PAIA allows a person that has been unsuccessful with its request for information 30 days to approach the courts to intervene and grant appropriate relief. The applicant argued that the 30 days afforded to it in terms of section 78(2) of the PAIA was insufficient and therefore constituted an unjustified infringement of its constitutional right to information (in terms of section 32 of the Constitution) and also its right of access to the courts (in terms of section 34 of the Constitution). The South African Human Rights Commission, which joined the case as a ‘friend of the court’, further argued that the time limit imposed by section 78(2) of the PAIA resulted in an unjustified infringement of the right to freedom of expression of the media and other press (in terms of section 16(a) of the Constitution) and also on the right of the general public to receive or impart information or ideas (in terms of section 16(b) of the Constitution).

In paragraph 50 of the judgement, Justice Ngcobo notes that the Constitutional Court has had four previous opportunities to consider the constitutionality of the so-called ‘time bar provisions’.³³ In paragraph 51 of the judgement Justice Ngcobo distils the principles from these cases as follows:

“The principles that emerge from these cases are these: Time bars limit the right to seek judicial redress. However, they serve an important purpose in that they prevent inordinate delays which may be detrimental to the interests of justice. But not all time limits are consistent with the Constitution. There is no hard and fast rule for determining the degree of limitation that is consistent with the Constitution. The “enquiry turns wholly on estimations of degree.” Whether a time bar provision is consistent with the right of access to court depends upon the availability of the opportunity to exercise the right to judicial redress. To pass constitutional muster, a time bar provision must afford a potential litigant an adequate and fair opportunity to seek judicial

³³ *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC); *Engelbrecht v Road Accident Fund and Another* [2007] ZACC 1; 2007 (6) SA 96 (CC); 2007 (5) BCLR 457 (CC); *Moise v Greater Germiston Transitional Local Council* [2001] ZACC 21; 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC); and *Mohlomi v Minister of Defence* [1996] ZACC 20; 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC).

redress for a wrong allegedly committed. It must allow sufficient or adequate time between the cause of action coming to the knowledge of the claimant and the time during which litigation may be launched. And finally, the existence of the power to condone non-compliance with the time bar is not necessarily decisive.” (Emphasis added)

In applying the above principles to the specific facts of the case at hand, Justice Ngcobo established that the question to be answered was whether the 30 day period afforded to the applicant in terms of section 78(2) of the PAIA provided sufficient time within which to seek judicial redress, taking into account the preliminary steps before it could approach the court. In the current case these preliminary steps included considering the reasons for the refusal for access to the information requested, obtaining legal advice on whether or not to pursue the matter and institute litigation, raising funds for litigation, and finally, preparing the necessary papers to institute legal proceedings. The Constitutional Court concluded that the 30 day period provided by section 78(2) of the PAIA did not afford an applicant an adequate and fair opportunity to seek judicial redress. Therefore, it limited the right of access to the court and also the right of access to information. The court then went on to conclude that the offending provision was not saved by section 36 of the Constitution, which allows for the limitation of rights afforded to everyone in terms of the Bill of Rights in certain instances. Importantly, the Constitutional Court pointed out that the onus rested on the respondent to prove that the infringements on the constitutional rights of the applicant were reasonable and justifiable in terms of section 36 of the Constitution, by providing factual material and policy considerations in support of this view. Furthermore, the fact that an extension of the time limits imposed could be requested did not necessarily save the offending provision from unconstitutionality.

It is submitted that many of the principles elucidated by the Constitutional Court in this case would apply equally to the time limits imposed by the legislation governing the dispute resolution process and that such time limits are therefore also susceptible to constitutional challenge. Support for this view is provided by Silke on Tax Administration at page 106 where the following is stated:

“It is clear that other time limits in the Income Tax Act, in particular the 30-day period within which to object to an assessment, may be challengeable on the same grounds, and that the latter time-bar is arguably inconsistent with the constitutional right of access to the courts for the same reasons that s 78(2) of the Promotion of Access to Information Act was held, in Brummer’s case to be unconstitutional and therefore invalid.”

While all of the preliminary steps necessary for instituting litigation in terms of section 78(2) of the PAIA would not necessarily apply when requesting reasons or objecting to an assessment, the ordinary taxpayer may very well require assistance from a tax practitioner or even senior counsel in understanding an assessment made by SARS, before requesting reasons or deciding to lodge an objection. The costs associated with the DRP would also have to be considered and in the case of a company, approval for incurring the associated costs may need to be obtained within the company or from other stakeholders. The initial 30 day period within which to request reasons and object to an assessment may therefore not be sufficient and in practice it is often necessary to request extensions of these time periods on behalf of taxpayers. As noted in the above case, the fact that an extension of the time limits may be requested does not necessarily save the offending provision from unconstitutionality and the fact that requests for extensions were often necessary in practice was seen as an indicator that the time limit imposed did not afford applicants sufficient time to seek judicial redress.

The change in the definition of ‘date of assessment’ places even further strain on the constitutionality of the time limits imposed by the DRP legislation because, as explained above, the Constitutional Court has established that in order for a time limit to pass constitutional muster one of the requirements are that such time limits must allow sufficient time between the date that the person becomes aware of the action or decision and the time by which redress must be sought. With the change in the definition of ‘date of assessment’ from the ‘due date’ to the ‘date of issue’ no consideration is given to whether the taxpayer has received the notice of assessment and become aware of the actions and decisions of SARS and the already limited time period for requesting reasons and objecting in terms of the DRP legislation begins to run immediately.

A key factor which led to the findings in *Brümmer v Minister for Social Development and Others, 2009 CC323/2009 (CC)* may be distinguished from that which would ordinarily apply to a tax dispute. In paragraph 64 of the judgment, Justice Ngcobo recognises the importance of time bar provisions in ensuring that the interests of justice are not hampered by delays which result in memories of witnesses fading, documents getting lost, etc. In paragraph 65 of the judgment, Justice Ngcobo however goes on to remark that these factors would not be a concern in the case under consideration as the case involved a dispute arising from a request for information held by a state

institution. The availability of witnesses would therefore not be a concern in such cases. The same cannot however always be said for tax disputes as such disputes often require accounts from witnesses as well as the scrutiny of records which are not necessarily secure. In this way the time bar provisions could be seen as promoting the constitutional right to just administrative action as it compels the taxpayer to act within a certain timeframe and initiate dispute resolution processes while information is readily obtainable.

Section 270 of the TAA deals with the transitional provisions applicable to the TAA. Section 270(1) of the TAA reads as follows:

“(1) Subject to this Chapter, this Act applies to an act, omission or proceeding taken, occurring or instituted before the commencement date of this Act, but without prejudice to the action taken or proceedings conducted before the commencement date of the comparable provisions of this Act.” (Emphasis added)

The effect of the foregoing is that in practice, SARS has sought to apply the definition of ‘date of assessment’ in terms of the TAA to ‘assessments’ issued prior to the introduction of the TAA, in order to exploit the difference in days between the ‘due date’ and the ‘date of issue’ and argue that the ‘assessment’ has prescribed (based on the earlier ‘date of issue’) and thereby disallow a request for a reduced assessment.³⁴ In light of this experience it seems plausible that SARS could apply a similar approach in ruling that the time period for requesting reasons or objecting in terms of the TAA has expired. The effect of the foregoing is that the legislation is in fact being applied retrospectively and prejudicially against the taxpayer which may present further constitutional difficulties.

The application of retrospective legislation is not specifically outlawed in terms of the Constitution, however, it would appear to be at odds with the ‘rule of law’ which is included as one of the founding provisions in chapter 1 of the Constitution. In essence, the ‘rule of law’ seeks to minimise legal uncertainty, promote access to and knowledge of the law and safeguard against arbitrary governance which is critical to the stability of government, the preservation of human rights and the economic and social development of society (LexisNexis, 2013). The importance of the ‘rule of law’

³⁴ Based on experience in practice when requesting a reduced assessment on behalf of a client.

concept was recognised by the Constitutional Court in *President of the Republic of South Africa v Hugo, 1997 CC4/1997* where the following was said:

“The need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to know of the law, and be able to conform his or her conduct to the law”.

In *Anglo Platinum Management Services (Pty) Ltd and Others v Minister of Safety and Security and Others, 2004 6104/2004 (HC)*, the High Court held that a decision by the Minister of Safety and Security to introduce regulations which sought to limit the time period for which certain exemptions applied (previously these exemptions were granted to the appellant indefinitely) amounted to retrospective application of an administrative act and the regulations were therefore declared as invalid on this basis. In the subsequent appeal to the Supreme Court of Appeal (cited as *Private Security Industry Regulatory Authority v Anglo Platinum Management Services Ltd and others, 2006 588/2005 (SCA)*) the Court upheld the decision of the lower court although it did not go so far as to affirm the lower court’s decision of invalidity due to retrospective application of an administrative act, instead the Supreme Court of Appeal found that the legislation did not give the Minister the power to pass the regulation and that it was therefore unnecessary to deal with any other considerations.

3.2.2 Conclusion

In conclusion, the existence of time bar provisions is clearly necessary in order to bring finality to decisions made by SARS. Stricter time limitations have been imposed by the TAA as a result of the change in definition of ‘date of assessment’. In terms of the TAA, these stricter time limitations may be applied retrospectively, and although the legislation provides that this may not be done to the prejudice of the taxpayer, in practice SARS has in fact attempted to apply the time bar provisions in this way. On balance, it would therefore seem that the amendments made to the time bar provisions in the TAA have increased the likelihood of these provisions being subjected to constitutional challenge.

3.3 Tax Ombud – section 15 to section 21 of the TAA

3.3.1 Does the introduction of the Tax Ombud improve the constitutional rights of taxpayers insofar as the DRP is concerned?

Part F (section 15 to 21) of the TAA has brought about the introduction of a Tax Ombud for the first time in South Africa. South Africa's first Tax Ombud, Retired Judge Bernard Ngoepe was appointed by the Minister of Finance on the 1st October 2013. The following was noted by the legislature in support of the introduction of the Tax Ombud.

“Public comments on the first draft TAB confirmed the public’s desire for the establishment of a separate and independent Tax Ombud’s Office. The Tax Ombud’s office should, it was proposed, provide accessible and affordable remedies for taxpayers affected by non-adherence to procedures or failure to respect taxpayers’ rights.

The introduction of a Tax Ombud is, therefore, proposed in view of the fact that:

- (a) The creation of an independent and effective recourse for taxpayers would be in line with the objective of the TAB to achieve a balance between SARS’ powers and duties and taxpayer obligations, remedies and rights.*
- (b) It would be in line with international best practice, particularly the framework of the Canadian ‘Taxpayer Ombudsman’ and the UK ‘Revenue Adjudicator’.*
- (c) It would also be consistent with what the Constitutional Court has had to say on the valuable role played by effective internal remedies, namely that although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.”*

“The mandate of the Tax Ombud will be to review and address any complaint by a taxpayer regarding a service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS, generally only after the taxpayer has exhausted the available complaints resolution mechanisms within SARS.

There are also specific limitations on the mandate of the Tax Ombud, such as that the Ombud may not review legislation, tax policy, SARS policy or practice generally prevailing. The Ombud may deal with a service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS. In the context of matters subject to objection and appeal, the Ombud may only deal with any administrative matter relating to such objection and appeal.” (Memorandum on the Objects of the Tax Administration Bill, 2011: 183)

The limitation on the Tax Ombud’s authority insofar as the DRP is concerned is imposed by section 17(c) of the TAA which provides that the Tax Ombud may not review:

“a matter subject to object and appeal under a tax Act, except for an administrative matter relating to such objection and appeal”.

A review of the CSARS’ decision to disallow an objection (the decision would represent an ‘administrative action’ as defined in terms of the PAJA) is therefore beyond the mandate of the Tax Ombud. The Tax Ombud may only review an administrative matter related to the ‘administrative action’ (such as for instance, a complaint by a taxpayer that the time limits imposed on SARS for communicating its decision was not adhered to). The improvement in the rights of taxpayers to just administrative action, insofar as the DRP is concerned, is therefore limited by the introduction of the Tax Ombud, as he has no authority to review the ‘administrative action’ itself, but can only review administrative matters related thereto.

Furthermore, in terms of section 18(4) of the TAA the Tax Ombud may only intervene once the taxpayer has exhausted all available complaints resolution mechanisms within SARS i.e. a taxpayer would have had to have gone through the call centre or team member, team leader, branch manager, SARS Service Monitoring Office and only thereafter may it approach the Tax Ombud to intervene, unless compelling circumstances exist for the taxpayer not doing so. Section 18(5) of the TAA lists some of the factors which the Tax Ombud must consider in deciding whether such compelling circumstances exist and these include, whether the request raises systematic issues, whether

exhausting the complaints resolution mechanism within SARS will cause undue hardship for the taxpayer or whether exhausting the complaints resolution mechanism within SARS is unlikely to produce a result within a period of time that the Tax Ombud considers reasonable.

The authority of the Tax Ombud is further tempered in terms of section 20(2) of the TAA which provides that the Tax Ombud may not make any determinative rulings but may only make recommendations which are not binding on the taxpayer or SARS. As the Tax Ombud was only recently appointed it is difficult to judge what the attitude of SARS will be towards the recommendations of the Tax Ombud. The Tax Ombud himself however believes that the reports he has to submit to the Minister of Finance will assist in having his recommendations enforced. The Tax Ombud's report may include recommendations that were not implemented by SARS, which the Minister of Finance would have to table before Parliament (SAIT Technical, 2013). Furthermore, the limitation on the Tax Ombud's authority as well as the reporting structure is comparable with the Commonwealth Ombudsman in Australia (Wheelwright, 1997: 240), the Revenue Adjudicator in the United Kingdom and the Taxpayer Ombudsman in Canada (Memorandum on the Objects of the Tax Administration Bill, 2011: 183), who all perform similar functions.

3.3.2 Conclusion

The introduction of a Tax Ombud in South Africa is welcomed as it provides taxpayers with a cost-effective means of resolving service matters, procedural matters or administrative matter arising from interactions with SARS. The role and reporting structure of the Tax Ombud is comparable with the roles of his contemporaries in other democratic jurisdictions such as Australia, Canada and the United Kingdom.

Insofar as the DRP is concerned, the role of the Tax Ombud is limited to assisting with administrative matters relating to a dispute but the Tax Ombud may not review the actual decisions ('administrative actions') made during the DRP. Furthermore, the Tax Ombud may only make recommendations which are not binding on either the taxpayer or SARS, although it is expected that the Tax Ombud's recommendations will be strongly considered by SARS.

It is unclear at this stage what impact the Tax Ombud will have in advancing service delivery and the constitutional rights of taxpayers to just administrative action. With regards to the DRP itself, it is submitted that the impact will be limited given the limitations imposed on the Tax Ombud in this regard.

3.4 Correction of undisputed error – section 25(5) of the TAA & withdrawal of assessments in terms of section 98 of the TAA

3.4.1 Does SARS' ability to request a return to be corrected or to withdraw an assessment without the DRP being initiated, improve a taxpayer's right to just administrative action?

Section 25(5) of the TAA provides that SARS may request a person to submit an amended return to correct an undisputed error prior to SARS issuing an original assessment. The Memorandum on the Objects of the Tax Administration Bill, (2011: 184) notes the following in support of the introduction of this provision:

“This will typically apply in the eFiling environment as a measure to avoid the issue of an incorrect assessment, pursuant to bona fide errors made in the return, which once an assessment has been issued can then only be rectified through more formal dispute resolution processes.”

It is submitted that section 25(5) of the TAA will be of limited application within the e-filing environment given that assessments are generally issued soon after an income tax return has been filed on e-filing, in terms of an automated process.

Section 98 of the TAA replaces section 79B of the ITA and section 31B of the VAT Act, which provided for the withdrawal of assessments despite the fact that no objection has been lodged or appeal noted. In addition to providing for the withdrawal of assessments issued to the incorrect taxpayer or for the incorrect year of assessment, section 98 of the TAA also provides for the withdrawal of an assessment where:

- “ *the assessment was issued as a result of an incorrect payment allocation;*
- *the assessment was based on an undisputed factual error by the taxpayer in a return;*
- *the assessment was based on a processing error by SARS;*
- *the assessment was based on a return fraudulently submitted by a person not authorised by the taxpayer;*
- *the assessment imposes an unintended tax debt in respect of an amount that the taxpayer should not have been taxed on;*
- *the recovery of the tax debt under the assessment would produce an anomalous or inequitable result;*
- *there is no other remedy available to the taxpayer; or*
- *it is in the interest of the good management of the tax system”*

Furthermore, e-filing has the functionalities which gives effect to the provisions of section 98 of the TAA and enables natural persons (individual taxpayers) to submit ‘requests for corrections’ where an assessment has been incorrectly issued. Unfortunately, e-filing does not currently have this functionality for other types of taxpayers.

3.4.2 Conclusion

Income tax assessments are generally issued as soon as an income tax return has been submitted on e-filing. As a result, the provisions of section 25(5) of the TAA, which allows SARS to request a taxpayer to correct a return before it issues an assessment, may be of limited application.

It is submitted that the provisions introduced by section 98 of the TAA have the potential to be more effective. Section 98 of the TAA introduces additional circumstances under which assessments may be withdrawn by SARS without the DRP being initiated and may therefore serve as an effective pre-emptive measure. The fact that e-filing facilitates the application of section 98 of the TAA in respect of natural persons is also welcomed although it is noted that this functionality does not extend for other types of taxpayers.

3.5 Payment of tax pending objection or appeal and right of SARS to institute recovery proceedings– section 164

3.5.1 Are the constitutional rights of a taxpayer to just administrative action enriched by the changes to the ‘pay now, argue later’ rule as introduced by section 164 of the TAA?

Consistent with the legislation it replaced, namely section 88 of the ITA and section 36 of the VAT Act, section 164(1) of the TAA provides that the obligation to pay tax and the right of SARS to receive and recover tax is not automatically suspended by initiation of the DRP (commonly referred to as the ‘pay now, argue later’ principle).

As stated in 2.2, the constitutionality of section 36 of the VAT Act was previously called into question in the case of *Metcash Trading Limited v CSARS and the Minister of Finance, 2000 CC3/2000 (CC)*. In the High Court it was found that section 36 of the VAT Act infringed the taxpayer’s right of access to the court as it allowed SARS to act as judge in its own case without providing recourse to a court of law. The High Court therefore ruled that the provision was unconstitutional, subject to confirmation by the Constitutional Court as required in terms of section 167(5) and section 172(2) of the Constitution.

The Constitutional Court however found that section 36 of the VAT Act (and therefore by implication section 88 of the ITA) was not unconstitutional as the section merely outlawed the automatic suspension of the payment of tax during the DRP (which is “a statutory form of revision of an administrative decision according to a special procedure”) but it did not prohibit access to a court of law to have payment suspended. Furthermore, the Constitutional Court held that section 36 of the VAT Act granted SARS discretion to accede to a request for the suspension of payment pending the outcome of the DRP and that exercising this discretion constituted ‘administrative action’ which would be subject to review in a court of law. The following extract from paragraph 42 of the judgment encapsulates the effect of the foregoing:

“It contemplates, therefore that notwithstanding the pay now, argue later rule, there will be circumstances in which it would be just for the Commissioner to suspend the obligation to make

payment of the tax pending the determination of the appeal. What those circumstances are will depend on the facts of each particular case. The Commissioner must, however, be able to justify his decision as being rational. The action must also constitute just administrative action as required by section 33 of the Constitution and be in compliance with any legislation governing the review of administrative action.”

With the introduction of section 164(2) of the TAA the legislature makes it clear that a taxpayer may approach SARS with a request to suspend the payment of tax or a portion thereof due under an assessment if the taxpayer intends to institute the DRP. The Memorandum on the Objects of the Tax Administration Bill explains that in view of the fact that the due date for the payment of tax under an assessment is normally before the due date for lodging an objection and to cater for pre-objection requests for adequate reasons, a suspension request may be made before an objection is lodged (Memorandum on the Objects of the Tax Administration Bill, 2011: 195).

Section 164(3) of the TAA introduces a list of certain factors which a senior SARS official should take into account when considering a request for the suspension of disputed tax. The factors listed are as follows:

- (a) “The compliance history of the taxpayer;*
- (b) The amount of tax involved;*
- (c) The risk of dissipation of assets by the taxpayer concerned during the period of suspension;*
- (d) Whether the taxpayer is able to provide adequate security for the payment of the amount involved;*
- (e) Whether payment of the amount involved would result in irreparable financial hardship to the taxpayer;*
- (f) Whether sequestration or liquidation proceedings are imminent;*
- (g) Whether fraud is involved in the origin of the dispute; or*
- (h) Whether the taxpayer has failed to furnish information requested under this Act for purposes of a decision under this section.”*

The above list of factors to be considered by a senior SARS official is not exhaustive. Support for this view is provided by Silke where the following is noted:

“It is submitted that this list may not be exhaustive and a decision not to postpone the payment of tax may result in unfair “administrative action” which may be challenged by the taxpayer.”

(Klue, Arendse & Williams, 2012: 5 - 31)

Furthermore, any one or a combination of the above factors may be sufficient for a senior SARS official to grant a request for the suspension of the disputed tax. This should be clear from the use of the conjunction “or” at the end of sub-paragraph (g). Theoretically, it should therefore be possible for a taxpayer’s request for the suspension of payment to be granted, where for instance, the taxpayer has a good compliance history, the amount of tax is significant, the risk of dissipation of assets by the taxpayer concerned during the period of suspension is low, the taxpayer is able to provide adequate security for the payment of the amount involved, there are no imminent sequestration or liquidation proceedings, the original dispute does not involve fraud and the taxpayer has furnished all information requested to substantiate these factors for the purposes of a decision to be made in respect of the request. Given this set of facts in practice however, a senior SARS official denied the request for the suspension of payment on the basis that the payment of the amount involved would not result in irreparable financial hardship to the taxpayer. While the senior SARS official’s view that irreparable financial hardship would not be suffered by the taxpayer in this matter was itself challenged, the foregoing serves to illustrate how the provisions of section 164(3) may be incorrectly interpreted by some senior SARS officials.

However, where the provisions of section 164(2) and section 164(3) of the TAA are correctly applied by SARS, a taxpayer’s right to just administrative action would be strengthened as it compels a senior SARS official to apply his/her mind to the specific facts of a request before exercising the discretion granted to it. This should therefore result in a decision which is lawful, reasonable and procedurally fair.

Section 164(6) provides further that no recovery proceedings may be instituted by SARS during the period it issues its decision not to suspend payment or a notice of revocation of such suspension, and 10 business days thereafter, unless SARS has a reasonable belief that there is a risk of dissipation of assets by the person concerned. It is explained in the Memorandum on the Objects of the Tax Administration Bill that the reason for this provision is to enable a taxpayer to consider its rights,

such as whether to file a judicial review application against the decision of SARS not to suspend payment or to revoke a suspension (Memorandum on the Objects of the Tax Administration Bill, 2011:195). The provision is also necessary in order to align section 164 of the TAA with the provisions of section 172 of the TAA which requires SARS to give a person 10 business days' notice before it can institute recovery procedures. Presumably, a notice of SARS' decision not to grant the request for the suspension of payment, or to revoke a previous request granted, may then simultaneously contain a notice of SARS' intention to institute recovery procedures within 10 business days.

3.5.2 Conclusion

The constitutionality of the 'pay now, argue later' provisions have previously been confirmed by the Constitutional Court and the principle has therefore been retained with the introduction of the TAA.

While the previous legislation recognised that SARS may, under certain circumstances, suspend the payment of a disputed amount, the introduction of a list of factors which a senior SARS official may take into account when considering a request for suspension may aid the taxpayer's cause. While the list of factors may be helpful in aiding SARS in reaching a decision which is just, it is submitted that this list of factors is not meant to be exhaustive. Furthermore, it is not necessary for all of the factors listed to be present in order for SARS to grant a request for the suspension of payment. Where the list of factors introduced by section 164(3) of the TAA is incorrectly applied by SARS, the right of a taxpayer to administrative justice would in fact be hampered.

Overall, the changes introduced by section 164 of the TAA are welcomed as they clarify that the obligation to pay tax in dispute is not automatically suspended pending the DRP but that the payment may be suspended by a senior SARS official. The inclusion of a list of factors which a SARS senior official must take into account when considering a request for suspension of payment helps improve the transparency of the process and is therefore also welcomed, provided the list of factors is correctly applied.

3.6 SARS' right to institute recovery proceedings – section 172 of the TAA

3.6.1 Do the changes to SARS' right to recover taxes improve the constitutional rights of taxpayers to just administrative action and access to the courts?

The constitutionality of section 40(2) of the VAT Act was considered in *Metcash Trading Limited v CSARS and the Minister of Finance, 2000 CC3/2000*. The section provided that where any person failed to pay any tax, additional tax, penalty or interest payable in terms of the VAT Act, the CSARS could file with the clerk or registrar of any competent court a statement, certified by the CSARS as correct, setting out the amount due or payable. Such statement would then have the effect of, and any proceedings may be taken thereon, as if it were a civil judgment lawfully given in that court in favour of the CSARS for a liquid debt of the amount specified in the statement. Section 91 of the ITA contained similar provisions in respect of income tax.

The Constitutional Court found that the provisions of section 40(2) of the VAT Act (and therefore by implication section 91 of the ITA) was not unconstitutional as it did not provide CSARS with “a form of self-help which by-passed the courts of the land” as was held in the High Court. Instead, it was decided that the requirement for the CSARS to file a statement set in motion the ordinary execution processes of the particular court. In substance, the ordinary civil process of execution was employed and the provision therefore did not authorise the CSARS to usurp any judicial functions.³⁵

Section 172 of the TAA replaces the provisions of section 91 of the ITA and section 40(2) of the VAT Act. In terms of this section, the authority of SARS to institute recovery procedures is largely retained as the constitutionality of these provisions insofar as the taxpayer's right of access to the courts is concerned was already confirmed, as explained above.

Additionally, section 172(1) of the TAA introduces a requirement for SARS to grant the person at least 10 business days' notice before filing the statement with the clerk or registrar of a competent court. However, in terms of section 172(3) of the TAA such notice is not required if SARS is satisfied

³⁵ Refer paragraph 51 of the judgement.

that giving it would prejudice the collection of the tax. It is unclear whether a decision by SARS to file a statement with the clerk or registrar of a tax court would constitute 'administrative action' as such a notice would not of itself adversely affect the rights of the taxpayer (Klue, Arendse & Williams, 2012: 3-71 and 3-78). Should a taxpayer however be successful in arguing that such a decision by SARS qualifies as 'administrative action' section 3(2)(b)(i) of the PAJA would require SARS to give the taxpayer adequate notice of the proposed 'administrative action'. It is therefore presumed that the notice period has been introduced to cater for this possibility. The provision is therefore welcomed as it is geared towards ensuring that a person's rights to just administrative action is protected although it is debatable whether the 10 business days period provides a person with adequate notice and whether the discretion granted to SARS to not give notice in certain instances is justifiable.

In *Joseph v City of Johannesburg, 2010 SA 55/10 (CC)* the Constitutional Court held that the requirement for a taxpayer to be given notice of proposed 'administrative action' has to be balanced against efficiency and capacity considerations. On this basis, the limitations imposed on a taxpayer's rights by the offending provisions of section 172 of the TAA may be justified in terms of section 36 of the Constitution.

Furthermore, section 172(2) of the TAA provides that SARS may institute recovery procedures in respect of amounts subject to the DRP, although it may not do so where payment has been suspended in terms of section 164 of the TAA. Merely initiating the DRP therefore does not prevent SARS from instituting recovering procedures. A dispute lodged by the taxpayer will have to be supplemented by a request for the suspension of payment should a taxpayer wish to suspend payment and the implementation of recovery procedures by SARS. A decision by SARS not to grant a request for the suspension of payment may be taken on judicial review but in the intervening period SARS would not be prohibited from instituting recovery procedures. Under these circumstances a further application would have to be made to the courts requesting it to restrain SARS from instituting any recovery procedures.³⁶ As noted above, the Constitutional Court has already ruled that the authority of SARS to institute recovery procedures in the manner provided for in section 40(2) of the VAT Act (and by implication, section 172 of the TAA) is not unconstitutional as these recovery procedures contemplate

³⁶ An example of a taxpayer approaching the courts for such an order would be in the case of *The Oceanic Trust Co. Ltd N.O. v The Commissioner for the South African Revenue Service, 2011 22556/09 (HC)*

the involvement of the courts and therefore it cannot be said that SARS is allowed to act as the judge in its own case.

3.6.2 Conclusion

The constitutionality of the previous provisions (see section 40 of the VAT Act and section 91 of the ITA) which empowered SARS to implement recovery proceedings have previously been confirmed by the Constitutional Court. These provisions have therefore largely been retained with the introduction of section 172 of the TAA. Section 172 of the TAA however introduces a requirement for SARS to give a taxpayer at least 10 business days' notice before instituting recovery proceedings. This requirement allows the taxpayer time to consider its rights in relation to the decision by SARS. In this regard, the constitutional right of a taxpayer to just administrative action is therefore enhanced.

Section 172 of the TAA also clarifies that SARS' right to recovery is not affected where the DRP has been initiated, unless this has been supplemented by a request for the suspension of payment in terms of section 164 of the TAA. Because SARS' right to recover tax does not bypass the courts and because SARS' decision on whether or not to grant the suspension of payment is itself subject to judicial review, this provision passes constitutional muster.

On balance, the constitutional rights of taxpayers to just administrative action and access to courts are therefore enriched by the introduction of section 172 of the TAA.

3.7 Conclusion

Various provisions introduced by the TAA have a direct impact, both positively and negatively, on the constitutionality of the DRP despite the fact that these provisions are not included in chapter 9 of the TAA. The changes which have a positive impact on the DRP include the following:

- The introduction of a Tax Ombud in South Africa. Although given the limitations on the scope of the Tax Ombud insofar as the DRP is concerned, the impact is expected to be limited.

- The authority granted to SARS to request a person to submit an amended return to correct an undisputed error prior to SARS issuing an original assessment, as well as the introduction of additional circumstances under which SARS may withdraw an assessment without the DRP having to be initiated.
- The introduction of a list of factors which SARS must take into account when considering a request for the suspension of tax subject to dispute.
- The requirement for SARS to give a taxpayer at least 10 business days' notice before instituting recovery proceedings against the taxpayer.

Some of the changes introduced by the TAA may also have a negative impact on the constitutional rights of taxpayers insofar as the DRP is concerned. An example of this would be the change to the definition of 'date of assessment'. This change negatively impacts the rights of taxpayers to just administrative action as it has the effect of reducing the amount of time taxpayers have to exercise their constitutional rights. These weaknesses are considered in further detail in the following chapter.

4. SHORTCOMINGS OF THE DRP AND RECOMMENDED IMPROVEMENTS

4.1 Introduction

While the introduction of the TAA has generally enriched the rights of taxpayer's insofar as the DRP is concerned, some of the changes introduced still leave room for improvement. Through an analysis of the changes to the DRP legislation as well as a comparison with the Australian dispute resolution process, certain shortcomings were identified. Specific provisions of the DRP legislation which could be amended, as well as more wide-ranging areas of improvement are summarised below:

- The DRP legislation does not make provision for judicial review to a court of lesser stature than the High Court.
- The DRP legislation does not compel SARS to provide adequate reasons for its decision to disallow an objection, nor does the DRP legislation provide a mechanism under which such reasons may be requested by taxpayers. Furthermore, e-filing does not facilitate the submission of requests for adequate reasons.
- An effective remedy may not always exist where a tax board does not deliver its decision within the required timeframe.
- The time periods within which a taxpayer has to act during the DRP does not take into account potential time lags between when correspondence is issued by SARS and when it is received by the taxpayer.
- E-filing does not facilitate the submission of 'requests for corrections' (which gives effect to the provisions of section 98 of the TAA) in respect of taxpayers other than natural persons.
- The TAA does not clearly stipulate that the list of factors to be taken into account by SARS when considering a request for the suspension of payment is not meant to be exhaustive and that all the factors listed do not have to be met before the request can be granted.

- A comparison with the Australian dispute resolution process reveals that alternative dispute resolution processes should be made available throughout the DRP and that there is room for further pre-emptive measures to be introduced.

The key recommendations addressing the above deficiencies, which are discussed in detail below along with further justification, include:

- The DRP legislation should be amended so that it is aligned with the PAJA which makes provision for the possibility of a taxpayer approaching a Magistrate's Court for judicial review.
- DRP legislation should compel SARS to provide adequate reasons for its decision to disallow an assessment, alternatively, a taxpayer's right to request such reasons from SARS should be clearly provided for in the TAA.
- Tax board members should be held accountable where it does not deliver its decision within the required timeframe. Disciplinary measures such as the imposition of a fine or the removal from the panel of tax board members should be considered.
- The time periods within which a taxpayer has to act during the DRP should be aligned with the PAJA mechanism which requires the person to become aware of an 'administrative action', or allow for sufficient time for the person to become aware of the 'administrative action', before the time limits commence.
- E-filing functionality which facilitates the submission of 'requests for corrections' (which gives effect to the provisions of section 98 of the TAA) should be extended to taxpayers other than natural persons.
- The TAA should be amended to clarify that the list of factors which SARS may take into account when considering a request for the suspension of payment is not exhaustive and that all of the criteria listed in section 164 of the TAA does not have to be met before a request for suspension of payment is granted.

- Alternative dispute resolution mechanisms should be made available throughout the DRP and should be supplemented by further pre-emptive measures. Furthermore, SARS should be compelled to consider and promote the use of these alternative and pre-emptive measures where appropriate.

4.2 The DRP legislation should be aligned with the PAJA which makes provision for the possibility of a taxpayer approaching a Magistrate's Court for judicial review

Currently, section 105 of the TAA only makes provision for a taxpayer to approach the High Court for judicial review. The PAJA as well as the Draft Administrative Review Rules make provision for judicial review applications to also be brought before a Magistrates Court that has been granted jurisdiction by the Minister of Justice.

It is recommended that section 105 of the TAA be aligned with the PAJA to reflect the possibility of a taxpayer having recourse to a Magistrate's Court for judicial review. It is further recommend that the Minister of Justice exercises the power granted to him and designates certain Magistrate's Courts as having the authority to judicially review administrative action taken by SARS. In doing so, the taxpayer's right to access to the courts would be improved and not be hindered by the relatively higher costs associated with approaching the High Court for such a review.

4.3 A taxpayer's right to be provided with adequate reasons for 'administrative action' taken by SARS which materially and adversely affects its rights should be provided for in the DRP legislation and facilitated through e-filing

Section 106(5) of the TAA requires SARS to state the basis for its decision to disallow an objection but it does not require SARS to provide adequate reasons for the decision, despite the fact that such a decision represents 'administrative action', as defined in the PAJA.

While adequate reasons may be requested in term of the PAJA, it is recommended that section 106(5) of the TAA be amended so that it compels SARS to provide adequate reasons for its decision to disallow an objection. Alternatively, the DRP legislation should be amended to make reference to a taxpayer's right to request adequate reasons for the disallowance of an objection, in a similar manner that it provides for such requests in the case of assessments issued by SARS.

Furthermore, it is submitted that a taxpayer's right to request adequate reasons for any 'administrative action' by SARS would be better highlighted if this right was included in the TAA itself and not in the DRP Rules, as is currently the case with the right to request reasons for an assessment issued by SARS.

The manner in which e-filing has been programmed, allowing a taxpayer to object to an assessment without providing the option to request reasons first, should also be improved. Instead of automatically triggering a 'notice of objection form'³⁷ once a taxpayer clicks the 'dispute' button on e-filing, the taxpayer should be given the option to request reasons for SARS' decision first. Not only would such a mechanism give effect to a taxpayer's right to be provided with reasons, it could also potentially reduce the number of objections SARS would have to deal with, although more resources would potentially have to be dedicated towards providing taxpayers with reasons. E-filing should also make provision for a taxpayer to request reasons during the rest of the DRP i.e. following a decision by SARS to disallow an objection or a decision to not to grant a request for the suspension of payment.

4.4 The time periods afforded to taxpayers to act during the DRP should begin when the taxpayer becomes aware of, or could reasonably be expected to become aware of SARS' decision

Various provisions imposing time limits on the taxpayer to act during the DRP provide that the time limits begin from the date that SARS issues the notice of its decision to the taxpayer.³⁸ No regard is therefore given to the potential time lag between when the notice was issued and when the taxpayer

³⁷ Referred to as an NOO1 form

³⁸ Refer definition of 'date of assessment' per section 1 of the TAA read together with DRP rule 3(1)(a) and DRP rule 4(e), DRP rule 6(2) and DRP rule 7(b).

became aware of its existence. This is contrary to the principles established by the Constitutional Court which requires “sufficient or adequate time between the cause of action coming to the knowledge of the claimant and the time during which litigation may be launched”. While the DRP legislation does grant SARS the power to condone late submissions by the taxpayer, the Constitutional Court held that this does not save the provision from unconstitutionality.

It is therefore recommended that the relevant DRP rules be amended to provide that the time limits begin when a taxpayer becomes aware of the decision by SARS, or could reasonably be expected to become aware of the decision.

4.5 More effective remedies should be available to the taxpayer and SARS where a tax board does not deliver its decision within the required timeframe

Section 115 of the TAA provides that where a tax board has not delivered its decision within the 60 business day timeframe provided for in terms of section 114 of the TAA, the taxpayer or SARS may approach the tax court to hear the matter anew. While this may appear to represent an effective remedy at first blush, the associated cost implications need to be taken into account. The parties’ decision to have the matter heard by a tax board instead of a tax court may very well have been motivated by the differences in cost associated with these two options. After incurring costs at the hearing before the tax board, the parties may not be willing to incur further costs necessary to have their case heard anew before a tax court. Furthermore, the tax court is not mandated to hear cases in which the amount of tax in dispute does not exceed R100 000, rendering the remedy ineffective for cases below this threshold.

It is therefore recommended that alternative remedies be considered to encourage members of the tax board to adhere to the time limits imposed on them. One such mechanism would be to impose financial penalties on members of the tax board where decisions are not delivered within the required timeframe. The number of times a tax board member was involved in delayed decisions, as well as the extent of the delay, could be taken into account when considering the reappointment of that person to the panel of tax board members. The foregoing may serve as effective measures in ensuring that a tax board delivers its decision within a reasonable timeframe, without SARS or the taxpayer

having to incur further costs. Precautions should however be taken to ensure that the remedy does not result in the tax board rushing to a decision in order to avoid reprisal. This could be achieved by ensuring that the time period granted to the tax board for making its decision is reasonable, any financial penalty imposed are not too harsh, and by monitoring the number of decisions that get overturned on subsequent appeal as this could serve as a possible indicator that the tax board's decision was not well considered.

4.6 The TAA should be amended to clarify that the list of factors which SARS may consider when deciding a request for the suspension of payment is not exhaustive and that each of the criteria listed does not have to be met before a request for suspension of payment is granted

Section 164(3) of the TAA introduces a list of factors which a senior SARS official may consider when deciding a request for the suspension of payment. In practice, senior SARS officials have incorrectly interpreted the list of factors as being exhaustive or claimed that all of the criteria listed needed to be met before SARS could grant a request for the suspension of payment. The incorrect application of section 164(3) may result in a taxpayer's right to just administrative action being hampered.

It is therefore recommended that section 164(3) of the TAA be amended to clearly reflect that the factors listed are no exhaustive and that a senior SARS official should take all surrounding factors of a particular case into account when deciding a request for the suspension of payment. Furthermore, the provision should be amended to clearly reflect that all of the criteria listed does not have to be met before a request for suspension of payment is granted. These amendments may be supplemented with internal communication by SARS on the correct application of section 164(3) of the TAA.

4.7 Alternative dispute resolution mechanisms should be made available throughout the DRP and should be supplemented by further pre-emptive measures. SARS should be compelled to consider and promote the use of alternative and pre-emptive measures where appropriate

With the introduction of section 25(5) of the TAA, SARS has the power to request a taxpayer to submit an amended return to correct an undisputed error before it issues an original assessment. In terms of section 98 of the TAA, SARS may withdraw an incorrect assessment without the taxpayer first having to lodge an objection. These mechanisms are aimed at resolving potential disputes without initiating the DRP and are therefore welcomed. Similarly, the current ADR process has the potential to offer cost-effective alternatives to litigation while ensuring that a taxpayer's right to just administrative action is protected. A comparison with the Australian mediation process however suggests that there is room for further improvement in this regard.

The current ADR process, which was established in 2003, is arguably out of step with international efforts to find alternative forms of dispute resolution in resolving tax disputes. The use of mediation in resolving commercial disputes is also commonplace (Jones & Maples, 2012: 527). Currently, a taxpayer may only elect for ADR to apply at the appeal stage of the DRP and such an election is subject to SARS being agreeable thereto. SARS is not placed under any obligation to try and resolve disputes using ADR and the taxpayer is therefore at SARS' mercy in this regard.

While the alternative dispute resolution mechanisms in Australia are not without criticism, the Australian Tax Office ('ATO') has been accused of applying the alternative dispute resolution mechanisms inconsistently and of only pursuing alternative dispute resolution mechanisms once required to in terms of a court or tribunal process, it is submitted that South Africa stands to gain much from a study of the various alternatives provided. These are discussed in further detail below.

In Australia, dispute resolution mechanisms are provided for throughout the dispute resolution process. These include annual compliance agreements, settlement agreements as well as mediation and arbitration.

Annual compliance agreements may be entered into between the taxpayer and the ATO, and are aimed at identifying high-risk matters requiring resolution and providing sign-off on low risk

matters. An annual compliance agreement (similar to Advanced Transfer Pricing Agreements (APA's) which SARS has considered implementing (South African Revenue Service, 2012)) therefore serves as a pre-emptive measure and reduces the likelihood of disputes later on.

Settlement agreements are provided for in terms of the ATO's Code of Settlement Practice which provides that the ATO must determine if a matter is appropriate for settlement, and if so, enter into settlement processes involving a negotiation forum. The Australian settlement procedures are informal and in terms of the ATO's Code of Settlement Practice, the ATO is compelled to initiate settlement procedures where it believes that a matter is appropriate for settlement. The provisions of the TAA which deal with settlement (sections 142 – 150 of the TAA) provides for a more formalised process and importantly, it does not compel SARS or the taxpayer to settle a dispute where settlement may be appropriate. Instead, section 144 of the TAA provides that neither SARS nor the taxpayer has the right to require the other party to engage in settlement procedures.

Following the disallowance of a taxpayer's objection, the taxpayer may file an application for the review of the decision in the Administrative Appeals Tribunal (in the General Tax Division or Small Taxation Claims Tribunal) or appeal against the decision to the Federal Court. Importantly, both the Administrative Appeals Tribunal and the Federal Court provide for matters to be referred for alternative dispute resolution which may comprise conferencing, mediation, conciliation and arbitration. The Model Litigant Policy, which applies to the ATO, provides that it is only to start court proceedings if it has considered alternative dispute resolution methods.

In terms of the Civil Dispute Resolution Act 2011, applicants who institute certain civil proceedings in the Administrative Appeals Tribunal have to file a statement indicating they have taken "genuine steps", including considering ADR or settlement negotiations, to resolve the dispute. Mediation at the Administrative Appeals Tribunal is facilitated by a member or officer of the Administrative Appeals Tribunal that employs a facilitative role in assisting the parties to discuss the disputed issues and the possible options for resolution. The mediator has no advisory or determinative role in respect of the content of the dispute or its outcome. If the matter is not resolved at mediation, it will proceed to a hearing (Ernst & Young, 2010: 27).

Mediation in the Federal Court can be used as an alternative to a judge imposing a decision on the parties, although the Federal Court of Australia Act provides that any proceedings or part of proceedings can be referred by the Court to mediation without consent from the parties involved.

Mediations at the Federal Court level are generally conducted by a registrar of the court; however, the Court may appoint an independent external lawyer to conduct the mediation. If the dispute is not fully settled at mediation, the case may be prepared for trial (Jone & Maples, 2012: 539).

Information provided at mediation at the Administrative Appeals Tribunal level or the Federal Court level is confidential and may not be used in a later hearing unless both parties agree (Jone & Maples, 2012: 539).

It is submitted that the current ADR process could be supplemented by additional alternative dispute resolution processes. These may include the introduction of annual compliance agreements as well as the option of mediation and arbitration throughout the DRP. Furthermore, legislation should be enacted to compel SARS to strongly consider and promote alternative dispute resolution mechanisms before it refers a matter for litigation. The factors which SARS should take into account when considering whether or not a case is appropriate for alternative dispute resolution should be legislated (possibly included in the DRP rules), and should include factors such as, the likelihood of an agreement or partial agreement being reached; the cost of litigation to the taxpayer and SARS compared to the amount of tax in dispute; and, the number of taxpayers affected by the dispute and whether collective agreement is possible. It is further recommended that any mediation or arbitration meetings should be facilitated by neutral facilitators with sufficient technical knowledge of the matters in dispute. Where this requirement is likely to have significant cost implications, the use of a knowledgeable third party facilitator should be provided as optional to the taxpayer who would then have to bear the costs. Mediation or arbitration meetings should remain confidential and on a “without prejudice” basis, although the taxpayer and SARS should have the option of settling and disclosing parts of the disputes on which agreement may have been reached.

Alternative means of resolving disputes (such as the current ADR process) as well as pre-emptive measures to prevent disputes from arising in the first place (such as the introduction of section 25(5) and 98 of the TAA) are welcomed as these may result in a taxpayer’s right to just administrative action being protected at a potentially reduced cost to the taxpayer and SARS. It is however recommended that these initiatives be improved upon through the implementation of the aforementioned suggestions.

4.8 Conclusion

Certain aspects of the DRP require further improvement in order to give effect to the constitutional rights of taxpayers. The most significant shortcomings identified are the following:

- SARS is not compelled to provide adequate reasons for its decision to disallow an objection, nor does the DRP legislation provide a mechanism under which such reasons may be requested by taxpayers.
- An effective remedy may not always exist where a tax board does not deliver its decision within the required timeframe.
- The time periods within which a taxpayer has to act during the DRP is subject to constitutional challenge.
- Alternative dispute resolution processes are not made available throughout the DRP and there is room for further pre-emptive measures to be introduced.

The recommendations considered in this dissertation to correct the above weaknesses are the following:

- Legislation should be introduced compelling SARS to provide adequate reasons for its decision to disallow an assessment, alternatively, a taxpayer's right to request such reasons from SARS should be clearly provided for in the TAA.
- Disciplinary measures such as the imposition of a fine or the removal from the panel should be introduced for tax board members who do not deliver their decisions within the required timeframe.
- The time periods within which a taxpayer has to act during the DRP should be aligned with the PAJA.

- Alternative dispute resolution mechanisms should be made available throughout the DRP and should be supplemented by further pre-emptive measures. Furthermore, SARS should be compelled to consider and promote the use of these alternative and pre-emptive measures where appropriate.

5. CONCLUSION

The purpose of this dissertation was to examine the impact that the introduction of the TAA has on certain constitutional rights of taxpayers insofar as the DRP is concerned. The analysis undertaken was to compare the provisions of the TAA with the provisions of the tax Acts which it replaces.

In certain instances, the provisions of the TAA may result in the limitation of a taxpayer's rights. Such limitation may be necessary in order to give effect to a different right of the taxpayer or the rights of a third party and provision is made for this type of limitation in terms of section 36 of the Constitution. An example of this would be the introduction of section 124 of the TAA which gives the president of the tax court discretion to grant the public access to the sittings of the tax court. While a decision to grant the public such access may infringe a taxpayer's right to privacy it could promote the taxpayer's right to a fair hearing as well as the media and the public's right to freedom of expression.

In other instances certain provisions introduced by the TAA may have an adverse impact on the constitutional rights of taxpayers. The most significant example of this being the change to the definition of 'date of assessment' which results in a reduction of the amount of time available to a taxpayer to exercise its rights.

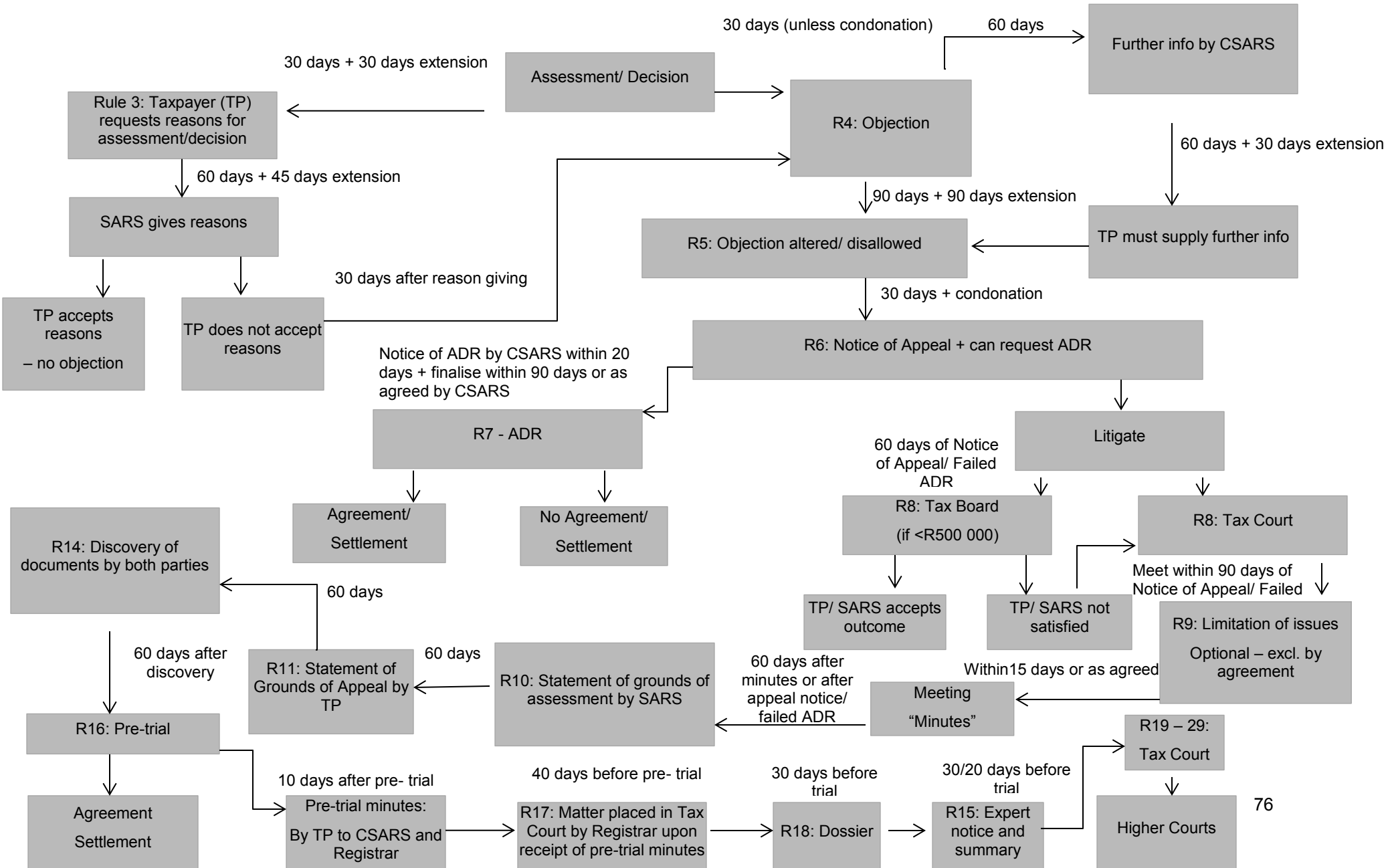
A further criticism of the changes introduced to the DRP by the TAA is that it does not do enough to reduce the cost that a taxpayer often has to incur in order to defend its rights. This is reflected in the provisions of section 115 of the TAA which provides that a taxpayer or SARS may approach the tax court to consider its case anew if the tax board does not deliver its decision within the required timeframe. This remedy arguably does not take into account the costs associated with such a decision. It is submitted that a more effective remedy, and one which would not necessarily result in any further costs being incurred by the taxpayer, would be to impose financial penalties or other sanctions on the offending members of the tax board.

The finding of this dissertation however is that on balance; the introduction of the TAA improves the constitutional rights of taxpayers to privacy, access to information, just administrative action and access to courts. Key improvements to the constitutional rights of taxpayers insofar as the DRP is concerned are:

- recognition of a taxpayer's right to approach the judiciary to review administrative action taken by SARS;
- a legislated timeframe within which a tax board has to deliver its decision;
- the requirement for all tax court judgements to be published;
- the introduction of additional circumstances under which SARS may withdraw an assessment without the DRP being initiated; and
- the introduction of a list of factors which a senior SARS official must take into account when considering a request for the suspension of payment.

ANNEXURE A

Diagrammatic outlay of the dispute resolution process



ANNEXURE B

Schedule 1 of the SARS Act

SCHEDULE

Schedule 1 to the South African Revenue Service Act, 1997
(Act No. 34 of 1997)

LEGISLATION ADMINISTERED BY COMMISSIONER

- 1) Union and Southern Rhodesia Death Duties Act, 1933 (Act No. 22 of 1933).
- 2) Transfer Duty Act, 1949 (Act No. 40 of 1949).
- 3) Estate Duty Act, 1955 (Act No. 45 of 1955).
- 4) Income Tax Act, 1962 (Act No. 58 of 1962).
- 5) Customs and Excise Act, 1964 (Act No. 91 of 1964).
- 6) Value-Added Tax Act, 1991 (Act No. 89 of 1991).
- 7) Section 39 of the Taxation Laws Amendment Act, 1994 (Act No. 20 of 1994).
- 8) Sections 56 and 57 of the Income Tax Act, 1995 (Act No. 21 of 1995).
- 9) Tax on Retirement Funds Act, 1996 (Act No. 38 of 1996).
- 10) Uncertificated Securities Tax Act, 1998 (Act No. 31 of 1998).
- 11) Demutualisation Levy Act, 1998 (Act No. 50 of 1998).
- 12) Skills Development Levies Act, 1998 (Act No. 9 of 1999).
- 13) Unemployment Insurance Contributions Act, 2002 (Act No. 4 of 2002).
- 14) Small Business Amnesty and Amendment of Taxation Laws Act, 2006 (Act No. 9 of 2006).
- 15) Second Small Business Amnesty and Amendment of Taxation Laws Act, 2006 (Act No. 10 of 2006).
- 16) Diamond Export Levy Act, 2007 (Act No. 15 of 2007).
- 17) Diamond Export Levy (Administration) Act, 2007 (Act No. 14 of 2007).
- 18) Securities Transfer Tax Act, 2007 (Act No. 25 of 2007).
- 19) Securities Transfer Tax Administration Act, 2007 (Act No. 26 of 2007).
- 20) Voluntary Disclosure Programmed and Taxation Laws Second Amendment Act, 2010 (Act No. 8 of 2010).
- 21) Tax Administration Act, 2011 (Act No. 28 of 2011).
- 22) Any regulation, proclamation, government notice or rule issued in terms of the abovementioned legislation or any agreement entered into in terms of this legislation or the Constitution.

BIBLIOGRAPHY

Articles - electronic

1. Cohen, T. 2013. *Tarnished integrity*. Available:
<http://www.fm.co.za/fm/Columns/2013/08/01/tarnished-integrity>; [2013, August 1].
2. Gleason, D. 2013. *Julius Malema might just have a point*. Available:
<http://www.bdlive.co.za/opinion/columnists/2013/08/14/julius-malema-might-just-have-a-point>;
[2013, August 16].
3. Louw, H. 2013. *MTN International (Mauritius) v CSARS – HC23203/11 judicial review and raising assessments*. Available: <http://www.sataxguide.co.za/mtn-international-mauritius-v-csars-hc2320311/> [2013, August 4].
4. Visser, A. 2013. *SARS fights to maintain its hard-won reputation*. Available:
<http://www.bdlive.co.za/economy/2013/07/15/sars-fights-to-maintain-its-hard-won-reputation>;
[2014, January 9].

Articles - published

5. Jone, M. & Maples, A.J. 2012. Mediation as an alternative option in Australia's tax disputes resolution procedure. *Australian tax forum*. 27(3):21 December 2013.
6. Wheelwright, K. 1997. Taxpayers' rights in Australia. *Revenue law journal*. 7(1).

Books

7. Currie, I. & de Waal, J. 2013. *The Bill of Rights Handbook*. 6th ed. Cape Town, South Africa: Juta & Co Ltd.
8. Klue, S., Arendse, J., & Williams, R. 2012. *Silke on Tax Administration*. Durban, South Africa: LexisNexis.

Cases

9. *Anglo Platinum Management Services (Pty) Ltd and Others v Minister of Safety and Security and Others*. 2004 6104/2004 (HC).
10. *Brümmer v Minister for Social Development and Others*. 2009 CC323/2009 (CC).
11. *CIR v Allied Building Society*. 1963 SA4/1963 (SA).
12. *Joseph v City of Johannesburg*. 2010 SA 55/10 (CC).
13. *Koyabe v Minister for Home Affairs and Others*. 2010 SA 327/10 (CC).
14. *Metcash Trading Limited v CSARS and the Minister of Finance*. 2000 CC3/2000 (CC).
15. *MTN International (Mauritius) Limited v CSARS*. 2011 23203/2011 (HC).
16. *President of the Republic of South Africa v Hugo*. 1997 CC4/1997 (CC).
17. *Private Security Industry Regulatory Authority v Anglo Platinum Management Services Ltd and others*. 2006 588/2005 (SCA).
18. *Rossi v CSARS*. 2010 34417/2010 (HC).
19. *South African Broadcasting Corporation Limited v The National Director of Public Prosecutions and Others*. 2006 CCT58/06 (CC).
20. *The Oceanic Trust Co. Ltd N.O. v The Commissioner for the South African Revenue Service*. 2011 22556/09 (HC).

Electronic resources

21. Department of Justice and Constitutional Development 2013. *The Courts of South Africa*. Available: <http://www.westerncape.gov.za/general-publication/courts-south-africa> [24 January 2014].
22. Ernst & Young. 2010. *Tax dispute resolution: A new chapter emerges*.

23. LexisNexis *Rule of Law*. Available: <http://www.lexisnexis.co.za/about-us/rule-of-law/> [2013 December 19].
24. *Memorandum on the Objects of the Tax Administration Bill*. 2011. Available: <http://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2011-03%20-%20Memorandum%20Objects%20Tax%20Administration%20Bill%202011.pdf> [17 July 2013].
25. SAIT Technical 2013. *Tax Ombud – The Missing Link towards Balancing SARS’ Powers and Duties with the Taxpayers’ Rights and Obligations?* Available: <http://www.thesait.org.za/news/146188/Tax-Ombud--Missing-Link-towards-Balancing-SARS-PowersDuties-with-Taxpayers-RightsObligations.htm> [19 December 2013].
26. South African Revenue Service. 2012. *Annual Performance plan 2012/2013*. Pretoria, South Africa: South African Revenue Service.
27. South African Revenue Service, Law Administration: Litigation Section. 2005. *Guide on tax dispute resolution*. Pretoria, South Africa: South African Revenue Service.

Thesis

27. Croome, B. 2008. *Taxpayers' rights in South Africa: an analysis and evaluation of the extent to which the powers of the South African Revenue Service comply with the constitutional rights to property, privacy, administrative justice, access to information and access to courts*. Doctor of Philosophy in the Department of Commercial Law, Faculty of Law. University of Cape Town.