



# **UNIVERSITY OF KWAZULU – NATAL**

## **“PAY NOW, ARGUE LATER RULE IN THE SOUTH AFRICAN TAX LAW – A CRITICAL ANALYSIS”**

**BY**

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**“Pay now, argue later rule in the South African Tax Law – a critical analysis.”**

As the candidate's supervisor, I agree to the submission of this dissertation for examination. To the best of my knowledge, the dissertation is primarily the student's work and the student has acknowledged all reference sources.

The above student has also satisfied the English language competency requirements.

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## DECLARATION

I, **Jappie Benjamin Thabo Chaka**, declare that:

- (i) The research reported in this dissertation, except where otherwise indicated, is my original research.
- (ii) This dissertation has not been submitted for any degree or examination at any other university.
- (iii) This dissertation does not contain any other person's data, pictures, graphs or other information, unless specifically acknowledged as being sourced from other persons.
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*Ke Koloti e tona se etella dinone pele... Robala ka kgotso Phoka, Lekakuba!!!*

*“The soul is a veiled light. Neglect it, it will dim and die. Fuel it with the sacred oil of love and it will burn with an immortal flame”.*

## ABSTRACT

The adoption of the Constitution by the Constitutional Assembly in 1996 heralded an era of hope for South Africa. An era devoid of repression and discord, where, the Constitution and not Parliament, reigns supreme. Concomitantly, South African nationals - taxpayers alike - were conferred with constitutional rights and the Constitutional Court (CC) became a vanguard of these rights.

The court in *Metcash Trading Ltd v CSARS (Metcash I)* was called upon to make a determination on the constitutionality of sections 36, 40(2)(a) and 40(5) of the VAT Act. Snyders J declared the aforementioned sections of the VAT Act unconstitutional and referred the matter to the CC for confirmation. The referral was, in the circumstances, necessary and in sync with the provisions of the Constitution. A glimmer of hope for taxpayers attributable to the decision of the court in *Metcash I*, was dashed by a unanimous decision of the CC in *Metcash* where the contentious sections of the VAT Act were declared constitutionally sound and the decision of the court a quo was quashed.

*Metcash* bears testimony to the fact that South Africa is indeed a constitutional state.

*Metcash* was decided within the context of the VAT Act and since income tax is different from VAT, there's widespread speculation concerning what the court's decision would be when called upon to make a determination on the constitutionality of the "pay now, argue later" rule within the income tax - context. While noble criticisms have been levelled against *Metcash* and by extension to the "pay now, argue later" rule, the reality is, unless *Metcash* is set aside or the legislature intervenes, the "pay now argue later" rule (the rule) is here to stay.

The thrust of the research was to establish whether the rule strikes a balance between two inextricably linked and competing interests, to wit, SARS's paramount duty to efficiently and speedily collect and administer tax on the one hand, and taxpayers' constitutional rights on the other.

Taxation constitutes the lifeblood of governments and South Africa is no exception. Since no constitutional state can exist without tax and equally no organized society can function without tax, it is important for governments to ensure that the tax levied on their respective nationals is commensurate with the income generated by a taxpayer during a given tax period.

Justification for the rule lies in the fact that:

- the rule obtains in open and democratic societies;
- the legislative enactment that forms the substratum of the rule has general application in South Africa.

Contrary to criticisms, there is overwhelming evidence to the effect that the rule does not vitiate taxpayers' constitutional rights and that many - a - disgruntled - taxpayer whose rights have been materially and adversely affected by the Commissioner's actions or omissions pursuant to SARS's aforementioned duty - have a myriad of remedies at their disposal; inter alia; Constitutional, PAJA and other remedies. The only disadvantage being that, since such remedies are primarily litigation - based, they are costly and time - consuming.

More cost-effective remedies for taxpayers such as the establishment of the Hugh Corder – type of administrative tribunals and the Australian 'merits system' are recommended. The heightening of public awareness concerning the fiscal complaints related - services that the Public Protector and the Human Rights Commission render to dissatisfied taxpayers is also recommended.

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# CHAPTER 1

## INTRODUCTION

### 1.1 INTRODUCTION

*“Render therefore to Caesar the things that are Caesar’s, and to God the things that are God’s.”<sup>1</sup>*

The above Biblical text bears testimony to the fact that the levying of taxes by governments on their nationals has been extant for time immemorial. In support of this fact, Croome states that:

*“[d]uring the reign of the Pharaohs, [n]ilometers were used for purposes of measuring the rise and fall level of the Nile River to determine the rate of tax payable. [A] Stela was used during the reign of Amenemhet III of the Middle Kingdom (1831 BCE) to mark the level of the Nile. [T]axes were levied according to the height of the inundation and the amount of land that would be watered and fertilised by it”<sup>2</sup>.*

Modern day governments, armed with relevant and applicable fiscal legislation, use tax returns and assessments by fiscal authorities to determine the quantum of tax payable. It is important for governments to ensure that the tax levied is commensurate with the income generated by a taxpayer during a given tax period.

Governments use tax as a tool, inter alia, to:

*“fund the services they deliver<sup>3</sup>, improve economic growth, regulate levels of employment and budget deficit<sup>4</sup> and to enable it to meet its constitutional obligations”<sup>5</sup>.*

### 1.2 DEFINITION OF TERMS

**“income”<sup>6</sup>** means the amount remaining of the gross income of any person for any year or period of assessment after deducting therefrom any amounts exempt from normal tax under Part I of Chapter II.

**“assessment”<sup>7</sup>** means the determination of the amount of tax liability or refund, by way of self-assessment by the taxpayer or assessment by SARS.

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<sup>1</sup>Holy Bible, New King James Version (NKJV): Matthew 22:21.

<sup>2</sup>Croome, B.J. Taxpayers’ Rights in South Africa. Claremont: Juta, (2006), 1. (Croome).

Croome, B.J. & Olivier, L. Tax Administration. Claremont: Juta, (2010), 1. (Croome & Olivier).

<sup>3</sup>Croome, 1.

<sup>4</sup>Ibid, 3.

<sup>5</sup>Croome & Olivier, 1.

<sup>6</sup>S1 of the Income Tax Act 58 of 1962 (ITA).

<sup>7</sup>Chapter 1 of the Tax Administration Act 28 of 2011 (TAA).

**“Commissioner”**<sup>8</sup> means the Commissioner for the South African Revenue Service appointed in terms of section 6 of the SARS Act or the Acting Commissioner designated in terms of section 7 of that Act.

**“Constitution”**<sup>9</sup> means The Constitution of the Republic of South Africa, 1996.

**“stare decisis”**<sup>10</sup> means that one stands by existing decisions and does not disturb settled legal questions.

**“judicial review”**<sup>11</sup> is the procedure whereby the court identifies and cures illegalities committed by the public official concerned. Its purpose is to ensure that the requirements of legality are met and that the aggrieved person is afforded a remedy for breach of legality.

**“return”**<sup>12</sup> means a form, declaration, document or other manner of submitting information to SARS that incorporates a self-assessment or is [the] a basis on which an assessment is to be made by SARS.

**“SARS”**<sup>13</sup> means the South African Revenue Service established under section 2 of the South African Revenue Service Act 34 of 1997.

**“SARS Act”**<sup>14</sup> means the South African Revenue Service Act 34 of 1997.

**“tax”**<sup>15</sup> for purposes of administration under this Act, includes a tax, duty, levy, royalty, fee, contribution, penalty, interest and any other moneys imposed under a tax Act.

**“tax debt”**<sup>16</sup> means an amount of tax due by a person in terms of a tax Act referred to in section 169(1).

**“taxpayer”**<sup>17</sup> means-

(a) a person chargeable to tax;

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<sup>8</sup>Ibid.

<sup>9</sup>S1 (ii) of the Promotion of Justice Act 3 of 2000 (PAJA). An Explanatory Memorandum to the Constitution.

<sup>10</sup>Ngcukaitobi, T. Precedent, Separation of Powers and the Constitutional Court. 2012 Acta Juridica, 148 (Ngcukaitobi). Ex parte Minister for Safety and Security & Others In re: S v Walters and Another 2002 (4) SA 613 (CC) para 57. Gcaba v Minister for Safety & Security & Others 2010 (1) SA 238 (CC).

<sup>11</sup>Dlamini, CRM. The Administrative Law of a Typical South African University. (LLD Thesis, UWC, 1994), 52-53 and 139.

<sup>12</sup>S30 (c) of the Tax Administration Laws Amendment Act 39 of 2013 (TALAA).

<sup>13</sup>S2 of the SARS Act.

<sup>14</sup>Ibid.

<sup>15</sup>Ibid. The Concise Oxford Dictionary of Current English. Oxford: Oxford University Press, (1992). Blackshield, T. & Williams, G. Australian Constitutional Law and Theory – Commentary and Materials, 3ed. The Federation Press, (2002). Nyambirai v National Social Security Authority & Another 1996 (1) SA 636 (ZSC), 643 C-D. Croome, 2.

<sup>16</sup>S30 (d) of the TALAA.

<sup>17</sup>S151 of the TAA.

- (b) a representative taxpayer;
- (c) a withholding agent;
- (d) a responsible third party; or
- (e) a person who is the subject of a request to provide assistance under an international tax agreement.

“**outstanding tax debt**”<sup>18</sup> means a tax debt not paid by the day referred to in section 162.

“**VAT Act**”<sup>19</sup> means the Value – Added Tax Act 89 of 1991 (VAT Act).

“**vendor**”<sup>20</sup> is a person who is, or is required to be, registered for VAT purposes.

### **1.3 EFFECTIVE DATE OF THE LAW THAT CONSTITUTES THE BASIS OF THE RESEARCH**

This study entails a restatement or an exposition of the law as at 16 July 2014 being the effective date of the Tax Administration Laws Amendment Act 39 of 2013 (TALAA) read with the Tax Administration Act 28 of 2011 (TAA).

### **1.4 THE ORIGIN OF THE “PAY NOW, ARGUE LATER” RULE**

The “pay now, argue later” rule (the rule) is no newcomer to the South African Tax Law arena. Its origin can be traced back to the Income Tax Act 58 of 1962 (ITA) and the Customs and Excise Act 91 of 1964 (CEA)<sup>21</sup>.

The taxpayer’s obligation to pay tax is not suspended by an objection or appeal or pending a decision by a court of law – hence the term “pay now, argue later”.

Kriegler J in *Metcash Trading Ltd v Commissioner for the South African Revenue Service (CSARS) & Another* (Metcash) succinctly paraphrased the rule, as follows:

*“In substance, section 36(1) of the Act says that upon assessment by the Commissioner, and notwithstanding the noting of an ‘appeal’, a taxpayer is obliged to pay the assessed tax, called value – added tax plus consequential imposts there and then,…”*<sup>22</sup>

The rationale behind the rule is that the South African government needs revenue to finance its expenditure.

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<sup>18</sup>S30 (a) of the TALAA.

<sup>19</sup>S1 of the VAT Act.

<sup>20</sup>Ibid.

<sup>21</sup>S9 (1) (b) of the ITA and s 114(1) (a) (ii) of the CEA. S36 of the VAT Act and s 164 of the TAA read with s 58 of the TALAA.

<sup>22</sup>2001 1 BCLR 1 (CC), para 1.

In similar vein, Croome and Olivier postulate the view that:

*“[n]o constitutional government can exist without tax”*<sup>23</sup>.

Prior to 1994, South Africa was a parliamentary state where parliament reigned supreme. Provision for this was contained in the Republic of South Africa Constitution Act 110 of 1983 wherein it is stated that:

*“No court of law shall be competent to enquire into or pronounce upon the validity of an Act of Parliament.”*<sup>24</sup>

A taxpayer could not therefore challenge the fiscal authority in a court of law on the basis that the former, in the exercise of its powers, violated his rights. The enactment of the Interim Constitution<sup>25</sup> and the subsequent adoption by the Constitutional Assembly of the Constitution<sup>26</sup>, led to the transformation of the Republic of South Africa from a ‘*parliamentary state*’ to a ‘*democratic state*’<sup>27</sup>.

The aforementioned unprecedented transformation of South Africa into a constitutional state, ushered an era for taxpayers to challenge any fiscal legislation which *prima facie* violated their procedural and substantive rights.

The Constitutional Court’s landmark decision in *Metcash* where the Constitutional Court (CC) was called upon to make a determination on the constitutionality of the rule books testimony to South Africa being a true constitutional state.

#### **1.4.1 BACKGROUND**

SARS’s paramount duty is to ‘*administer and collect tax in South Africa*’.<sup>28</sup> To enable SARS to discharge the above-mentioned duty, the legislature conferred SARS with powers to effect *“the efficient and speedy collection of taxes”*<sup>29</sup>.

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<sup>23</sup>Croome & Olivier, 3.

<sup>24</sup>S34 (3) of the Republic of South Africa Constitution Act 110 of 1983.

<sup>25</sup>Interim Constitution of the Republic of South Africa Act 200 of 1993.

<sup>26</sup>Constitution of the Republic of South Africa, 1996.

<sup>27</sup>Croome & Olivier, 2.

<sup>28</sup>Sections 3 & 4 of the SARS Act.

<sup>29</sup>Muller, EA. Framework for Wealth Transfer Taxation in South Africa. (LLD thesis, UP 2010), 63 (Muller).

Croome & Olivier crystallize this fact further in the following terms:

*“South Africa now has one office, the Commissioner, responsible for the administration of all fiscal statutes in the country.”<sup>30</sup>*

The Commissioner plays a pivotal role in the discharge of SARS’s aforementioned duty by, inter alia, issuing an assessment to a taxpayer for a period of assessment under consideration.

The court in *First National Bank of SA Ltd t/a Wesbank v CSARS (FNB)* held that SARS is subject to the Constitution in the following terms:

*“no matter how indispensable fiscal authority provisions were for the well-being of the country, they were not immune to the discipline of the Constitution and had to conform to normative standards.”<sup>31</sup>*

This decision reaffirms the fact that the Commissioner must, in the performance of his duties, uphold the values and principles contained in the Constitution. The following are some of the basic values and principles:

- promotion and maintenance of a high standard of professionalism;
- promotion of the efficient, economic and effective use of resources;
- prompt response to public needs;
- encouragement of public participation in policy - making;
- accountability and
- transparency...<sup>32</sup>

The Citation of Constitutional Laws Act, 2005(hereafter CCLA) states that:

*“no act number must be associated with the Constitution of the Republic of South Africa as this act was not passed by Parliament, but was adopted by the Constitutional Assembly.”<sup>33</sup>*

#### **1.4.2 AN OUTLINE OF THE RESEARCH PROBLEM**

The obligation to pay tax arises when an assessment has been issued. If dissatisfied with an assessment, a taxpayer may lodge an objection with the Commissioner and later an appeal if the objection is disallowed. The taxpayer’s obligation to pay tax and the corresponding

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<sup>30</sup>Croome & Olivier, 9.

<sup>31</sup>2002 (7) JTLR 250, 252.

<sup>32</sup>S195 (1) of the Constitution.

<sup>33</sup>S1 of the CCLA.



SARS's paramount duty to collect and administer tax is not suspended by an objection or appeal pending a decision by a court of law.

Relying on this provision dubbed the rule, the Commissioner is entitled to initiate proceedings for the recovery of a tax debt by filing a statement with the clerk or registrar of a competent court. Such a statement has the effect of a civil judgment for a liquid debt and is enforceable against a taxpayer.

Justification for the rule lies in the following:

Firstly, *taxation is the lifeblood of governments*. Conradie J in *FNB* held that:

“... [f]reedom from taxation is not a fundamental right. Not even death.”<sup>34</sup>

Support for this view is also made by Henkin, L in the following terms:

*“In a literal sense, taxation is, of course, a confiscation of property; equally clearly no organized society can function without it.”*<sup>35</sup>

Croome postulates the view that:

*“[w]hile taxpayers' rights may not be unnecessarily limited the government of the day needs funds to meet specified social objectives imposed on it by the Constitution.”*<sup>36</sup>

Secondly, *a due adjustment must be made and amounts paid in excess refunded with interest at the prescribed rate* if the taxpayer's appeal application is successful following the disallowance by the Commissioner of a taxpayer's objection to a disputed assessment.<sup>37</sup>

Thirdly, *as long as the enabling fiscal legislation satisfies the following prerequisites*, the implementation of the rule by fiscal authorities is appropriate:

- the applicable fiscal legislation must have general application in South Africa;
- the implementation of the applicable fiscal legislation must be in the public interest;
- the implementation of the applicable fiscal legislation must be reasonable and justifiable in an open and democratic society<sup>38</sup>.

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<sup>34</sup>FNB 2002 (4) SA 768 (CC) para 27.

<sup>35</sup>Henkin, L. & Rosenthal, AJ. *Constitutionalism and Rights – The Influence of the United States Constitution Abroad*: Ch5, 125. Columbia University Press, (1999).

<sup>36</sup>Croome, 10.

<sup>37</sup>S36 (1) of the VAT Act.

<sup>38</sup>S36 of the Constitution.

Taxpayers are held bent on paying the least amount of tax while fiscal authorities on the other hand are focused on levying the maximum tax against taxpayers in order to realize government's constitutional, economic and socio-economic objectives.

In confirmation of this fact, Croome states that:

*“taxpayers are invariably in an unequal relationship with the fisc in that it compels them to contribute to the state's coffers. They are not willing participants in the tax system.”*<sup>39</sup>

The inequality of the relationship between SARS and taxpayers is attributed to the rule. This relationship of inequality creates tension between taxpayers and fiscal authorities.

Croome makes the following suggestion in relation to harnessing such tension which *prima facie*, poses a potential threat to the South African economy:

*“It is thus essential that tax collection be properly administered to ensure that taxpayers comply with the law and meet their obligations. At the same time, the revenue authority should not exceed its powers.”*<sup>40</sup>

In the eyes of taxpayers, the rule constitutes an unjustifiable encroachment on “their procedural and substantive rights such as:

#### Procedural rights

- right of access to information;
- right to just administrative action and
- right of access to courts.<sup>41</sup>

#### Substantive rights

- right to property;
- right to equality and
- right to privacy.

These rights are entrenched in the Bill of Rights.”<sup>42</sup>

The right of access to information and substantive rights fall outside the scope of this research.

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<sup>39</sup>Croome, 14.

<sup>40</sup>Croome, 10.

<sup>41</sup>Sections 32, 33 & 34 of the Constitution.

<sup>42</sup>Chapter 2. The Constitution. Croome, 17 to 265. Croome & Olivier, 21.

The rule is at the core of the tension between taxpayers and revenue authorities. The rule has, since its inception, to date, been the subject of litigation and disputes in the South African Tax Law arena notwithstanding *Metcash*.

Since *Metcash* is a decision of the CC, it is, on the strength of the “*stare decisis*,”<sup>43</sup> binding on all courts unless it can be shown that the court has erred.<sup>44</sup>

The court found the rule to be in conformity with the provisions of the Constitution that were in contention.

## 1.5 MOTIVATION FOR THE STUDY

There is overwhelming authority in support of a long established principle in South African Tax Law that:

*“[n]o liability for tax arises if there has been no receipt or accrual by the taxpayer.”*<sup>45</sup>

This principle presupposes the generation of income by a taxpayer during the period of assessment under consideration. Generally, tax collection and administration is a convoluted and complex process that has indiscriminate global application.

Einstein made a similar observation in the following terms:

*“The hardest thing in the world to understand is the income tax.”*<sup>46</sup>

The Commissioner has been conferred with wide powers under different fiscal statutes pursuant to SARS’s paramount duty. One of these powers is the rule.

Severe criticisms have been levelled against the rule. The major criticism is that the rule violates the taxpayers’ above – mentioned constitutional rights. In order to achieve its constitutional and economic objectives and to maintain its competitiveness in the global economy and for its sustenance, it is imperative for the South African government to levy taxes on its nationals.

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<sup>43</sup>Hahlo, HR. and Kahn, E. *The South African Legal System and its Background*. Johannesburg: Juta, (1973), 213. Ngcukaitobi, 148. *Ex parte Minister for Safety and Security & Others In re: S v Walters and Another* 2002 (4) SA 613 (CC) para 57.

<sup>44</sup>Certification of the Amended Text of the Constitution of the Republic of South Africa 1997 (2) SA 97 (CC).

<sup>45</sup>Williams, RC. *Income Tax in South Africa: Law and Practice*, 4ed. Durban: Lexis Nexis Butterworths, (2006), 64 (Williams).

<sup>46</sup>*Ibid*, preface of Williams.

The focus of this study will be to determine whether the rule strikes a balance between the two inextricably interwoven and competing interests, to wit, SARS's paramount duty to administer and collect tax and the protection of taxpayers' procedural and substantive rights in the event of a disputed assessment.

## **1.6 RESEARCH OBJECTIVES AND QUESTIONS**

### **1.6.1 RESEARCH OBJECTIVES**

The objectives of the study are to:

- ascertain whether the Constitution provides a adequate protection to taxpayers' rights vis-à-vis the rule;
- ascertain the powers afforded to SARS to collect and administer taxes;
- ascertain whether the rule strikes a balance between SARS's paramount duty and taxpayers' constitutional rights.

### **1.6.2 RESEARCH QUESTIONS**

The study will attempt to answer the following questions:

- Does the Constitution provide protection to taxpayers' rights vis-à-vis the rule?
- What is the extent of the powers that have been conferred to the Commissioner pursuant to SARS's paramount duty?
- Does the imposition of tax by the state on taxpayers within the context of the rule constitute a violation of taxpayers' constitutional rights?
- What are the prospects of success for a taxpayer who challenges the constitutional validity of SARS's powers?
- Does the rule strike a balance between SARS's paramount duty and taxpayers' constitutional rights?

## **1.7 ETHICAL CONSIDERATIONS**

There are no ethical considerations. Having read the University's Research Ethics Policy I declare that to the best of my knowledge:

- the research does not fall into any category that requires special ethical obligations;
- the research does not create any conflict of interest either real or perceived.

## **1.8 RESOURCES**

The resources available are sufficient and no additional resources are required for purposes of the research.

## **1.9 LIMITATIONS OF THE RESEARCH**

No limitations to the research are envisaged.

## **1.10 RESEARCH METHODOLOGY**

The research is desk-top based. It will encompass a review and a critical analysis of journal articles, case law, published material and relevant statutes.

## CHAPTER 2

### POWERS OF THE COMMISSIONER

#### 2.1 POWERS OF THE COMMISSIONER

The court in *FNB*<sup>47</sup> held that SARS is subject to the Constitution. This therefore means that the Commissioner *must, in the performance of his duties, exercise his powers within the bounds of the law and the Constitution*<sup>48</sup>. Pursuant to SARS's paramount duty, the legislature has, *inter alia*, conferred the Commissioner with the below mentioned powers:

- the statement procedure,<sup>49</sup>
- the appointment of a third party as a taxpayer's agent,<sup>50</sup>
- the "pay now, argue later" rule,<sup>51</sup>
- the search and seizure procedure,<sup>52</sup>
- the sequestration, liquidation and winding up procedure.<sup>53</sup>

A discussion of the search and seizure procedure, the sequestration, liquidation, and winding up procedure lies beyond the scope of this research.

To appreciate the import of these intrinsically linked powers, it is necessary to allude to what the court stated in *CSARS v Hawker Air Services (Pty) Ltd; In re: CSARS v Hawker Aviation Services Partnership & Others (Hawker)* regarding the exercise of a public power by a public authority:

*"The Commissioner is indeed endowed with tremendous powers to collect taxes in the national interests, however, that power must be exercised within the bounds of the law and constitutional imperatives...[I]t is for the courts to maintain a modicum of fairness and justice in curbing the excesses of arbitrary use of public power."*<sup>54</sup>

The Commissioner's exercise of powers conferred on him by a fiscal statute constitutes *an administrative action*<sup>55</sup> which is *reviewable under the provisions of the PAJA*<sup>56</sup>. The term

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<sup>47</sup>2002 (7) JTLR 250,252.

<sup>48</sup>S3 (1) of the ITA.

<sup>49</sup>S91(1) (b) of the ITA & s 40(2)(a) of the VAT Act & s172 (1) of the TAA read with s 62(1) & (2) of the TALAA. *Metcash Trading Ltd v CSARS* 2000 (2) SA 232 (W), 242 (Metcash 1).

<sup>50</sup>S99 of the ITA; s47 of the VAT Act and s 179(1) of the TAA read with s66 (1) of the TALAA.

<sup>51</sup>S88 (1) (a) and (b) of the ITA; s36 (1) of the VAT Act and s164 (1) (a) & (b) of the TAA.

<sup>52</sup>S74D (1) (a) to (c) of the ITA and s 59(1) of the TAA.

<sup>53</sup>S65 (1) of the TALAA; s 40(2) (c) of the VAT Act and s 91(1) (c) of the ITA.

<sup>54</sup>[2005] 1 All SA 715 (T), para [75].

<sup>55</sup>S33 of the Constitution. *Capstone 556 (Pty) Ltd v CSARS & Another* 2011 ZAWCHC 297 (Capstone).

<sup>56</sup>S6 of PAJA.

‘administrative action’ is defined in PAJA.<sup>57</sup> In *Hawker*, the Commissioner had issued an assessment to the respondents against whom three writs of execution were later issued in favour of the Commissioner after the successful institution of an action against the respondents.

The Commissioner then filed urgent liquidation and sequestration applications against the respondents on the basis that they were unable to or should be deemed to be unable to satisfy a tax debt in terms of the Companies Act.<sup>58</sup>

The issues for determination by the court were, inter alia:

- whether the two applications were urgent;
- whether the applications were brought for an ulterior purpose and
- whether the judgment obtained in terms of section 40(2)(a) of the VAT Act was valid.

The court dismissed the two applications with costs on these terms:

*“I am not persuaded that the applicant has made out a convincing case for urgency...”*<sup>59</sup>

*Hawker*<sup>60</sup> is a classical illustration of an abuse by the Commissioner of the court process and of the fiscal powers conferred on him.

## **2.1.1 THE STATEMENT PROCEDURE**

### **2.1.1.1 NOTICE OF ASSESSMENT**

The TAA makes provision for four types of assessments, namely:

- original assessments<sup>61</sup>,
- additional assessments<sup>62</sup>,
- reduced assessments<sup>63</sup> and
- jeopardy assessments.<sup>64</sup>

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<sup>57</sup>S1 of PAJA. *Sasol Oil (Pty) Ltd v CSARS* [2012] ZAGPPHC312, para [30].

<sup>58</sup>S345 (1) (b) &(c) of the Companies Act 61 of 1973.

<sup>59</sup>*Hawker*, para [22].

<sup>60</sup>*Ibid*, para [25]. *High Stead Entertainment (Pty) Ltd t/a “The Club” v Minister of Law and Order* 1994 (1) SA 387 (C), 395A-B and *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 2000 (1) SA 1 (CC), para [133].

<sup>61</sup>S91 of the TAA.

<sup>62</sup>S92 of the TAA & s79 of the ITA.

<sup>63</sup>S93 (1) (a); (c) & (d) of the TAA read with s 45(b) of the TALAA. S79A of the ITA and s 31A of the VAT Act.

<sup>64</sup>S94 (1) of the TAA. *Croome & Olivier*, 90 -108.

The genesis of the statement procedure can be traced back to the issuance of a notice of assessment<sup>65</sup> by the Commissioner on the taxpayer<sup>66</sup>. And since a notice of assessment is a precondition for the statement procedure,<sup>67</sup> it is submitted that a discussion of a notice of assessment as a precursor to the statement procedure is appropriate and shall follow hereafter.

The court in *ITC 788*<sup>68</sup> drew a distinction between an assessment and a notice of assessment and held that the correct procedure is for the Commissioner to first do an assessment and thereafter to notify the taxpayer accordingly.

The notice of assessment must contain the following:

- the taxpayer's name;
- the taxpayer's reference number or any other form of identification;
- the date of assessment;
- the amount of the assessment;
- the tax period subject to the assessment;
- the date of payment of the amount assessed;
- a summary of the procedure for lodging an objection to the assessment<sup>69</sup>.

The purpose of issuing a notice of assessment is to determine the tax due by a taxpayer or a refund due to a taxpayer.<sup>70</sup> At the outset, the Commissioner issues an assessment to a taxpayer who may lodge an objection thereto if he is dissatisfied.<sup>71</sup>

The taxpayer's objection or appeal to the Commissioner's decision must be noted within the prescribed period.<sup>72</sup> Non-compliance with such timeframes often has dire consequences for a dissatisfied taxpayer.

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<sup>65</sup>S 96(1) and (2) of the TAA; s77 (3) of the ITA and s 31 of the VAT Act.

<sup>66</sup>S77 (3) of the ITA & s31 (1) (a) – (f) & (2) (a) and (b) of the VAT Act.

<sup>67</sup>*Singh v CSARS 2003 (4) SA 520 (SCA)*. S96 of the TAA read with s62(1) and (2) of the TALAA and s40 (2) (a) the VAT Act and s 91(1) (b) of the ITA.

<sup>68</sup>19 SATC 428. *Croome & Olivier, 91; Irvin & Johnson (SA) Ltd v CIR 1946 AD 483 and Stroud Riley & Co. v CIR 1974 (4) SA 534 (E)*.

<sup>69</sup>S96 (1) and (2) of the TAA.

<sup>70</sup>SARS Short Guide to the TAA, Chapter 8 at 42 para.8.1. Croome, B.J. "What can you do when SARS delays a Refund". (2007) Accountancy SA 31.

<sup>71</sup>S32 (b) of the VAT Act; s81 (1) of the ITA and s104 (1) of the TAA.

<sup>72</sup>S107A and Part IIIA of Chapter III of the ITA and the Rules promulgated thereunder. S104(5) (a) of the TAA and s 32(2) of the VAT Act.



In *Rossi & Others v CSARS* the court stated that:

*“the fiscus should be entitled to assume finality in the collection of tax monies, particularly where the Act sets out certain timeframes which cannot be lightly ignored or rendered ineffective.”*<sup>73</sup>

Support for this view was made by the court in *Van Wyk v Unitas Hospital & Another*.<sup>74</sup> The court in *Van Zyl v The Master & Another* held that:

*“[T]he only way in which these assessments can be questioned is in the manner provided for in the Act, namely, by objecting to the respondent in terms of s 81 of the Act and then appealing to the Special Court in terms of s 83 of the Act.”*<sup>75</sup>

### **2.1.1.2 ONUS OF PROOF**

The onus rests on the taxpayer to prove on a preponderance of probabilities<sup>76</sup> that he is exempt from or not liable to any tax chargeable<sup>77</sup>. A further onus rests on the taxpayer to prove that he did not receive an assessment.<sup>78</sup>

### **2.1.1.3 OBJECTION TO A DISPUTED ASSESSMENT**

The Commissioner may, on receipt of an objection to an assessment, alter the assessment in whole or in part or disallow the objection.<sup>79</sup> The taxpayer must be advised of the Commissioner's decision.<sup>80</sup> The Commissioner must state the basis of his decision.<sup>81</sup>

The Commissioner is obliged to furnish a taxpayer with adequate reasons in writing for the administrative action taken.<sup>82</sup> The Supreme Court of Appeal was called upon to make a determination on, inter alia, the adequacy of the reasons for a tax assessment in *CSARS v Sprigg Investment 117 CC t/a Global Investment*<sup>83</sup> (*Sprigg*).

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<sup>73</sup>[2011] ZAGPJHC 16 para [1]. S100 (1) (a) to (g) of the TAA; s 32(5) of the VAT Act and s 81(5) of the ITA.

<sup>74</sup>[2007] ZACC 24

<sup>75</sup>1991(1) SA 874 (ECD), 877G.

<sup>76</sup>CIR v Goodrick 12 SATC 279; Reliance Land & Investment BC (Pty) Ltd v CIR 14 SATC 47; CIR v SA Mutual Unit Trust Management Co. Ltd 1990 (4) SA 529 (A), 538D. Goldswain, G.K. The application and constitutionality of the so - called “reverse” onus of proof provisions and presumptions in the Income Tax Act: the revenue's unfair advantage. (2009) 2 Meditari Accountancy Research 61, 69 para 7.1.

<sup>77</sup>S37 of the VAT Act. S102 (1) (a) to (f) of the TAA and s 82(a) to (c) of the ITA.

<sup>78</sup>S106 (3) of the ITA. Singh v CSARS 2003(4) SA 520 (SCA).

<sup>79</sup>S32 (4) of the VAT Act; s 81(4) of the ITA and s106 (2) of the TAA.

<sup>80</sup>Ibid.

<sup>81</sup>S106 (5) of the TAA.

<sup>82</sup>S5 (2) of PAJA.

<sup>83</sup>[2010] ZASCA 172.

The decision of the court in *Minister of Environmental Affairs & Tourism v Phambili Fisheries (Pty) Ltd (Phambili)* wherein what constitutes ‘adequate reasons’ was endorsed - was approvingly cited in *Sprigg* as follows:

*“[T]he decision maker must explain his position in a way which will enable an aggrieved person to say, in effect: ‘even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.’”*<sup>84</sup>

In *CSARS v Pretoria East Motors (Pty) Ltd* the court stated that the raising of an additional assessment must be based on proper grounds.

The court held further that:

*“It is only in this way that SARS can engage the taxpayer in an administratively fair manner, as it is obliged to do. It is also the only basis upon which it can, as it must, provide grounds for raising the assessment to which the taxpayer must then respond by demonstrating that the assessment is wrong.”*<sup>85</sup>

The court set aside the taxpayer’s income tax assessments for the 2000 to 2002 tax years and the taxpayer’s additional VAT assessments for the 2000 to 2004 tax years because SARS could not provide proper grounds for raising such assessments.

The dispute concerning the aforementioned tax years was remitted to SARS for reassessment. This decision highlights the importance of furnishing the taxpayer with proper grounds or adequate reasons for raising assessments. The Commissioner’s decision - where no objection has been lodged or where any objection to a disputed assessment has been dismissed, withdrawn or altered as the case may be - is final and conclusive.<sup>86</sup> A dissatisfied taxpayer may lodge an appeal with the Tax Court against the Commissioner’s decision<sup>87</sup>.

#### **2.1.1.4 FILING OF A STATEMENT AT COURT**

Where the taxpayer fails to pay any tax or interest thereon when it is due or payable, the Commissioner may file a statement with the clerk or registrar of any competent court.<sup>88</sup>

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<sup>84</sup>2003 (6) SA 407 (SCA), para [40]. *Ansett Transport Industries (Operations) Pty Ltd & Another v Wraith & Others* (1983) 48 ALR 500 at 507. *Re Palmer and Minister for the Capital Territory* (1978) 23 ALR 196 at 206 -7. *Nkondo & Gumede v Minister of Law & Order* 1986 (2) SA 756(A) at 7721 – 7731.

<sup>85</sup>[2014] ZASCA 91, para [11].

<sup>86</sup>S32 (5) of the VAT Act. S81 (5) of the ITA and s 107 (4) of the TAA.

<sup>87</sup>S33 (1) of the VAT Act. S107 (1) of the TAA and s 83 (1) of the ITA.

<sup>88</sup>S40 (2) (a) of the VAT Act. S91(1) (b) of the ITA and s 172(1) and (2) of the TAA read with s 62(1) of the TALAA.

The purpose of filing a statement at court is to recover the tax due or interest thereon. The ITA, the TAA and the VAT Act do not provide for prior notice to the taxpayer ere the commencement of the statement procedure. On the contrary, the Tax Administration Laws Amendment Act 39 of 2013 ( TALAA) stipulates that the statement procedure may be initiated by SARS after at least 10 business days' notice to the taxpayer.<sup>89</sup> However, SARS may dispense with such notice if satisfied that the collection of tax would be prejudiced thereby.<sup>90</sup>

The following are attributes of a statement:

- it may be filed with the clerk or registrar of any competent court;
- the court must have jurisdiction over the taxpayer named in the statement;<sup>91</sup>
- it must set forth the tax debt or interest due or payable by a taxpayer;
- it must be certified by the Commissioner as correct;
- it shall thereupon have all the effects of <sup>92</sup>and must be treated as a civil judgment lawfully given in the relevant court in favour of SARS for a liquid debt of the amount specified therein.<sup>93</sup>

SARS is empowered to amend the statement filed with the clerk or registrar if the Commissioner is of the opinion that the amount of the tax debt amplified in the statement is incorrect.<sup>94</sup>

The TAA further stipulates that an amended statement is ineffective until it has been initialled by the clerk or registrar of the court concerned.<sup>95</sup>

SARS is further empowered to withdraw a statement on the basis of the incorrectness of the tax debt reflected therein by forwarding a notice to the relevant clerk or registrar of the court and to file a new statement in terms of s 172(1).<sup>96</sup>

Croome & Olivier <sup>97</sup>correctly postulate the view that the filing of a statement at court constitutes the deprivation of a taxpayer's property. Many dissatisfied taxpayers have, as will become apparent in the ensuing discussion, questioned the constitutional validity of the fiscal statutes that form the basis of the statement procedure.

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<sup>89</sup>S62 (1) of the TALAA.

<sup>90</sup>S172 (3) of the TAA.

<sup>91</sup>S173 of the TAA. S40 (3) of the VAT Act and s 91 (2) of the ITA. *Mokoena v CSARS* 2011 (2) SA 556(GSJ).

<sup>92</sup>S40 (2) (a) of the VAT Act and s 91(1) (b) of the ITA.

<sup>93</sup>S174 of the TAA.

<sup>94</sup>S175 (1) of the TAA read with s63 of the TALAA.

<sup>95</sup>S175 (2) of the TAA.

<sup>96</sup>S176 (1) & (2) of the TAA read with ss 62 (1) and (2) and 64 (a) of the TALAA.

<sup>97</sup>Croome & Olivier, 229.

It appears from the mere reading of the provisions of the enabling fiscal statutes that the following formalities must be met before the commencement of the statement procedure:

- the taxpayer must have been afforded time within which to pay the tax due;
- the period within which the tax due should be paid must have expired;
- the taxpayer must have failed or refused to pay the tax due;
- SARS must have demanded payment of the tax due from the taxpayer to no avail.<sup>98</sup>

In *Mokoena v CSARS*<sup>99</sup> (*Mokoena*) the taxpayer's application for the rescission of judgment granted in terms of s 91(1) (b) of the ITA was successful on the following grounds:

- the taxpayer had noted an objection to the assessment and such objection had not been finalized by the Commissioner when the latter filed a statement at court.
- the taxpayer was not aware of the judgment until when he approached Nedbank for a mortgage bond application and a credit check revealed this fact.

The court in *Mokoena* held that in the aforementioned circumstances, rescission is competent. In support of its decision, the court approvingly cited *Kruger v Commissioner for Inland Revenue*<sup>100</sup> and *Metcash*.<sup>101</sup>

In *Kruger v Sekretaris van Binnelandse Inkomste*<sup>102</sup> (*Kruger*) the taxpayer declined to pay the tax due to SARS and interest amplified on the assessments on the basis that the statement procedure in terms of s 91(1) (b) of the ITA was invalid and that the inclusion by SARS of additional interest was illegal. Jansen JA who delivered a unanimous decision of the court held that the inclusion of interest in the statement procedure was valid. The court accordingly dismissed the taxpayer's appeal.

The applicants in *Motsepe v CIR*<sup>103</sup> launched an unsuccessful challenge against the constitutional validity of sections 91(1) (b); 92 and 94 of the ITA.

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<sup>98</sup>Ibid. S40 (2) (a) of the VAT Act; s62 (1) of the TALAA and s91 (1) (b) of the ITA.

<sup>99</sup>2011 (2) SA 556 (GSJ). See also *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A). *De Wet & Others v Western Bank Ltd* 1979 (2) SA 1031(A). *PE Bosman Transport Committee & Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794(A). *Smith NO v Brummer NO & Another* 1954 (3) SA 352 (O).

<sup>100</sup>1966 (1) SA 457 (C), 462A.

<sup>101</sup>2001 1 BCLR 1 (CC), paras [65] and [66].

<sup>102</sup>1973 (1) SA 394 (A).

<sup>103</sup>1997 (2) SA 897 (CC).

In dismissing the application, the court held that:

*“it was unnecessary to decide on the constitutionality of the aforementioned sections because the taxpayers have failed to exhaust the objection and appeal procedures provided for in the Act.”*<sup>104</sup>

Furthermore, the court held that:

*“the constitutionality of s 91(1) (b) of the ITA was not raised in the court a quo nor did the court a quo refer the matter to the CC for determination.”*<sup>105</sup>

The court a quo referred only sections 92 and 94 of the ITA to the CC and there was no formal application for direct access as required by the Constitution<sup>106</sup> nor was such an application made from the bar.<sup>107</sup>

In response to the Commissioner’s prayer for costs including costs attendant upon the employment of three counsels, the court made the following remarks:

*“In my view one should be cautious in awarding costs against litigants who seek to enforce their constitutional right against the state, particularly where the constitutionality of a statutory provision is attacked, lest such orders have an unduly inhibiting or ‘chilling’ effect on other potential litigants in this category. This cautious approach cannot, however, be allowed to develop into an inflexible rule so that litigants are induced into believing that they are free to challenge the constitutionality of statutory provisions in this court, no matter how spurious the grounds for doing so may be or how remote the possibility that this court will grant them access...”*<sup>108</sup>

Since s 40(2) (a) of the VAT Act is couched in terms similar to s 91(1) (b) of the ITA, it is prudent to discuss the various decisions of the courts on s 40(2) (a) of the VAT Act.

The constitutional validity of s 40 of the VAT Act was raised in *Traco Marketing (Pty) Ltd and Another v The Minister of Finance and Others*<sup>109</sup>(Traco).

Counsel for the appellants submitted that the said section was unconstitutional and thus invalid for it was inconsistent with the Bill of Rights, inter alia, the right to administrative justice, human dignity, equality and access to courts.

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<sup>104</sup>Ibid, para [21].

<sup>105</sup>Ibid, para [24].

<sup>106</sup>S167 (6) (a) of the Constitution read with Rule 18 (1) to (5) of the Rules of the Constitutional Court. (Government Gazette No.25726).

<sup>107</sup>Motsepe, para [25].

<sup>108</sup>Ibid, para [30].

<sup>109</sup>1998 (4) SA 1002(SE).

The court held that an objection against an assessment does not postpone the payment of tax reflected as owing. Leave was granted to the Commissioner to refer the matter to the CC to make a determination on the constitutional validity of s40 of the VAT Act. The constitutional validity of s40 of the VAT Act remained unresolved as a result of the CC's denial of direct access<sup>110</sup> to the Commissioner.

Croome & Olivier made the following comments in support of the statement procedure:

*“It is unlikely that a court will find that the provisions contained in s 91(1) (b) of the Act and the VAT equivalents are invalid on constitutional grounds. The Commissioner is charged with administering the fiscal statutes of South Africa and it must be entitled to enforce the collection and recovery of assessed taxes due to it in order to ensure that the state recovers funds due to it to meet its constitutional obligations. It would appear that the filing of statements in court is found in other open and democratic societies and a taxpayer will be hard pressed to show that the provisions are unreasonable and unjustifiable in a democratic society. The provisions found in s 91(1) (b) of the Act and s 40 of the VAT Act are similar to those contained in the tax statutes of other democracies...”<sup>111</sup>*

The trial court in *Metcash Trading Ltd v CSARS*<sup>112</sup> (*MetcashI*) was called upon to make a determination on the constitutionality of sections 36, 40(2) a) and 40(5) of the VAT Act. Snyders J declared the aforementioned sections of the VAT Act invalid<sup>113</sup> and referred the matter to the CC for confirmation.<sup>114</sup>

The referral was, in the circumstances, necessary and in sync with the provisions of the Constitution.<sup>115</sup> A glimmer of hope for taxpayers attributable to the decision of the court in *MetcashI* was dashed by a unanimous decision of the CC in *Metcash* where the contentious sections of the VAT Act were declared constitutionally sound and the decision of the court a quo was set aside.<sup>116</sup>

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<sup>110</sup>S167 (6) (a) of the Constitution read with Rule 18 (1) to (5) of the Rules of the Constitutional Court (Government Gazette No. 25726).

<sup>111</sup>Croome & Olivier, 232.

<sup>112</sup>2000 (2) SA 232 (W).

<sup>113</sup>*Ibid*, 330.

<sup>114</sup>S167 (5) of the Constitution.

<sup>115</sup>S172 (2) (a) of the Constitution.

<sup>116</sup>*Metcash*, para [74].

The court in *Singh v CSAR*<sup>117</sup>(*Singh*) was called upon to make a determination on the validity of a statement procedure filed in terms of s 40 (2) (a) of the VAT Act where the taxpayer was not given a notice of assessment.

That the provisions of the VAT Act are mandatory insofar as the giving of written notice of assessment<sup>118</sup> to the taxpayer by the Commissioner is concerned, is crystal clear. It was common cause that the taxpayer was not served with a notice of assessment.

The court made the following remarks:

*“[I]n the absence of a notice of assessment an amount which is not due cannot be payable. No such notice had been given in this case. It follows that it was not open to the Commissioner to utilize the procedures of s 40.”*<sup>119</sup>

It was further correctly stated that:

*“the primary purpose of giving notice of the assessment is not objection and appeal but payment by the taxpayer.”*<sup>120</sup>

The court in *Lesapo v North West Agricultural Bank & Another*<sup>121</sup>(*Lesapo*) was called upon, pursuant to s 172 (2) (a) of the Constitution, to confirm an order invalidating section 38(2) of the North West Agricultural Bank Act 14 of 1981(the Act) which permits the North West Agricultural Bank to seize a defaulting debtor’s assets without recourse to court and to sell such property at an auction to defray the debt owed to it.

The court a quo held that s 38(2) of the Act was inconsistent with s 34 of the Constitution. Counsel for the respondents cited *Hindry v Nedcor Bank Ltd & Another*<sup>122</sup>(*Hindry*) as authority and justification for the respondents’ actions to resort to a measure of self-help.

The respondents’ counsel further submitted that the purpose of the impugned section was to provide a quick, effective and inexpensive procedure that enables the Bank to protect whatever real rights it has in the secured property.

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<sup>117</sup>2003 (4) SA 520 (SCA).

<sup>118</sup>S31 (4) of the VAT Act.

<sup>119</sup>*Singh*, para [12].

<sup>120</sup>*Ibid*, paras [17] & [22].

<sup>121</sup>[1999] ZACC16.

<sup>122</sup>1999 (2) SA 757 (W).

To this end, the respondents argued that the infringement of s 34 of the Constitution was justified. The court held that there are other less invasive remedies which are available to the Bank to realise its purpose. Such means do not prejudice debtors to the extent that the s 38(2) procedure does.

The court held further that:

*“[I]n appropriate circumstances an interdict against the alienation of the goods could be obtained on an urgent basis.”<sup>123</sup>*

The court held that *Hindry* was distinguishable from *Lesapo* in that the former dealt with provisions of a fiscal statute and furthermore, the court held that it had not been called upon to make a determination on the correctness or otherwise of *Hindry*.

The court’s decision was succinctly put by Olivier in the following terms:

*“The court struck down the provision as unconstitutional as it infringed upon the right of access to court and breached the rule of law by sanctioning self - help: the bank was permitted to be a judge in its own cause.”<sup>124</sup>*

### **2.1.2 THE APPOINTMENT OF A THIRD PARTY AS A TAXPAYER’S AGENT**

The ITA, TAA and the VAT Act confer the Commissioner with the above-mentioned power.<sup>125</sup>

Croome & Olivier<sup>126</sup> correctly state that the aforementioned power forms the substratum of the Commissioner’s directive to financial institutions to pay over any funds in the taxpayer’s bank account to liquidate the tax debts due by the taxpayer to SARS.

The primary purpose of the power is, according to Croome & Olivier, *to enforce and ensure that assessed tax is paid by taxpayers*<sup>127</sup>. The fact that the Commissioner, armed with this power, directs a pension fund, provident fund or retirement annuity fund to use all or part of a lump sum or annuity to a taxpayer in settlement of tax due to the Commissioner bears testimony to the scope and width of the Commissioner’s powers. It is submitted that such powers must be used sparingly.

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<sup>123</sup>Ibid, para [27].

<sup>124</sup>Olivier, L. Tax collection and the Bill of Rights. 2001 TSAR 193,198. First National Bank of SA Ltd v Land and Agricultural Bank of South Africa; Sheard v Land and Agricultural Bank of South Africa 2000 (3) SA 626 (CC).

<sup>125</sup>S99 of the ITA; s179 (1) the TAA read with s 66(1) of the TALAA and s47 of the VAT Act.

<sup>126</sup>Croome & Olivier, 232.

<sup>127</sup>Ibid, 233.



In *Hunting Industries Ltd v Barclays Bank of Zimbabwe & Others*<sup>128</sup> the court left open the question whether the Zimbabwean Revenue Authority may authorise a bank to increase a taxpayer's overdraft to the limit of such facility in order to effect payment of overdue tax to the fiscal authority.

Croome & Olivier correctly opined that:

*“it is unlikely that a South African court would authorise a bank to increase the taxpayer's overdraft to settle tax reflected as owing to SARS as the bank does not, in fact, have funds belonging to the taxpayer as required under s 99 of the ITA when the taxpayer's bank account is in overdraft.”*<sup>129</sup>

Croome & Olivier further and correctly postulate the view that:

*“in practice the Commissioner resorts to these extreme measures only where the taxpayer has failed to respond to written or telephonic demands for payment”*<sup>130</sup>.

In *Hindry*<sup>131</sup> the court was called upon to make a determination on the constitutionality of s 99 of the ITA. The Commissioner in this matter had, in terms of paragraph 28(1)(a) of the Fourth Schedule to the ITA, made an erroneous refund to the taxpayer during 1988 and 1990 respectively, in relation to the assessment of the 1987 and 1989 tax years. On discovery of this fact, correspondence ensued between Sauermann, a chartered accountant in the Commissioner's employ, and the taxpayer's accountants concerning the repayment of such erroneous refund. Sauermann further advised the taxpayer's accountants in a letter dated 13 February 1997 as follows:

*“As you appreciate I must continue with procedures to recover the amounts involved.”*<sup>132</sup>

The taxpayer's attorneys raised prescription against the Commissioner's claim and also that the taxpayer had lodged an objection to the assessment and that the Commissioner's decision was still pending.

To this end the Commissioner issued the s 99 of the ITA - notice to the taxpayer's bankers to *“immediately pay or as and when funds become available”*<sup>133</sup> the amount amplified in the notice.

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<sup>128</sup>68 SATC 91.

<sup>129</sup>Croome & Olivier, 233.

<sup>130</sup>Ibid, 232.

<sup>131</sup>[1999] 2 All SA 38 (W).

<sup>132</sup>Ibid, 44.

<sup>133</sup>Ibid, 45.

The taxpayer launched an urgent application to interdict the taxpayer's bankers from making payment to the Commissioner pursuant to the notice and as a final relief the taxpayer sought an order setting aside the s 99 of the ITA - notice on the basis of it being inconsistent with the Constitution.

The taxpayer's counsel made the following submissions:

- that the Commissioner is, in terms of the s 99 notice empowered to appoint a third party as an agent of the taxpayer and to require such agent to make payment of any tax due. The Commissioner in this case made the appointment to recover funds allegedly made in error.

Implicit in this submission is that the appointment was contrary to the empowering fiscal provision and thus invalid.

- the s 99 notice is inconsistent with the Constitution in that it:

*“makes no provision for notice to the taxpayer or representations by him before it becomes operative; is totally outside the context of the court or any independent or impartial tribunal or forum; infringes a taxpayer's right to privacy, the right to just administrative action and the right of access to courts.”<sup>134</sup>*

Counsel for the respondents argued that:

*“the Commissioner's claim is for a repayment under paragraph 28(7) of the Fourth Schedule to the ITA of a refund that was incorrectly authorised by him under paragraph 28(1) (a) of the Fourth Schedule...”<sup>135</sup>*

The court dispensed with the taxpayer's administrative injustice and prescription challenges by stating that paragraph 28(7) of the Fourth Schedule provides an answer to the argument that “any tax due” did not include any erroneous refund.

Furthermore, the court did not make any determination concerning the prescription of the claim because counsel for the taxpayer did not address this matter in the founding affidavit.

The court stated further that the relevant justification for the manner in which the Commissioner had acted in that –

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<sup>134</sup>Ibid, 46.

<sup>135</sup>Ibid, 47.

*“[T]he claim was the subject of considerable correspondence and the Commissioner explained how his claim was arrived at and its basis and gave the applicant the opportunity to pay it. The audi alteram partem principle may in appropriate cases be satisfied by a party being heard after an adverse decision is taken”.*<sup>136</sup>

The court found that the purpose for which a person’s rights are circumscribed by s 99 is:

*“to facilitate and enhance his ability to recover promptly taxes which are due and to avoid assets of taxpayers being put beyond his reach and, having regard to the need to speed up the collection of taxes and to prevent the frustration of the Commissioner’s efforts and steps to that end, the weapon is of great importance to the State. There is no suggestion of equally effective methods which could be used in the circumstances to achieve the desired needs”*<sup>137</sup>.

The court further held that any limitation of constitutional rights implicit in s 99 of the ITA is reasonable and necessary in an open and democratic society.

The court held that the s 99 notice is a justified measure for the collection of amounts due to the fiscus and is consistent with the Constitution.

The Commissioner is not obliged to give prior notice to the taxpayer of the s 99 notice. Croome & Olivier state that:

*“The reason for this is that the taxpayer could dissipate the assets in an attempt to frustrate the revenue authority’s attempt to enforce the collection of the tax debt.”*<sup>138</sup>

Brett A J echoed the same sentiments in *Contract Support Services (Pty) Ltd & Others v CSARS & Others (Support Services)* in the following terms:

*“I agree with Mr. du Toit that to require a prior hearing would defeat the very purpose of the notice. It would alert the defaulting VAT payer to the intention to require payment from the latter’s debtor and so enable the defaulting taxpayer to receive payment of the funds due and to enable the taxpayer to spirit such funds away. Where prior notice and a hearing would render the proposed act nugatory, no such prior notice or hearing is required.”*<sup>139</sup>

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<sup>136</sup>Ibid, 49. Administrator, Transvaal & Others v Traub & Others 1989 (4) SA 731(A), 748G-I & 750 B-F. Cabinet for the Territory of South West Africa v Chikane & Another 1989 (1) SA 349 (A),379 F-G and Administrator Transvaal & Others v Zenzile & Others 1991(1) SA 21 (A). Semenya & Others v CCMA & Others (2006) 27 ILJ 1627 (LAC). Sachs v Minister of Justice 1934 AD 9, 22. Momoniat v Minister of Law & Order & Others 1986 (2) SA 265 (W), 274D. Baxter, L. Administrative Law. Cape Town: Juta, (1984), 588.

<sup>137</sup>Hindry, 63.

<sup>138</sup>Croome & Olivier, 235.

<sup>139</sup>[1999] 3 All SA 689 (W), 703.

In the aforementioned judgment, the court was called upon to set aside an earlier appointment of the applicants' bank as an agent for the applicants in terms of s 47 of the VAT Act and to declare the provisions of s 47 of the VAT Act unconstitutional in terms of s 172(1) of the Constitution.

It was contended on behalf of the applicants that since the bank's appointment as an agent took place before assessments were issued, the issue of the s 47 notice was ultra vires.

To this end the court held that:

*"I do not consider that the decision to issue the notices in terms of s 47 was inextricably linked with the assessments made. As previously stated in this judgment the liability to pay VAT in terms of s 28(1) of the VAT Act is based upon a self-assessment. I agree with Mr. du Toit that the obligation to pay VAT exists independently of any assessment"*<sup>140</sup>.

The applicants made a further submission that the s 47 notices should be set aside because the amounts of VAT referred to as payable therein are in dispute. In quashing this submission the court held that:

*"section 36(1) of the VAT Act specifically provides that the obligation to pay and recover VAT under the VAT Act is not suspended by any appeal or pending the decision of a court of law."*<sup>141</sup>

The court approvingly cited *Traco*<sup>142</sup> in support of its decision. Accordingly, the court dismissed the applicants' application.

The court in *Shaikh v Standard Bank South Africa Ltd & Another*<sup>143</sup> made a determination to the effect that payment of funds to SARS by an agent of the taxpayer pursuant to a deficient notice was valid. In this matter, SARS, relying on s 114 A of the CEA, issued a notice to the bank for the payment of VAT due from a vendor. The bank complied with the notice.

The vendor challenged the notice and subsequent payment by the bank pursuant to such notice on the basis that the notice was deficient.

S114A of the CEA is couched in terms similar to s 99 of the ITA and s 47 of the VAT Act. The court dismissed the application on the basis that the CEA made provision for such notice as well.

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<sup>140</sup>Ibid, 704.

<sup>141</sup>Ibid.

<sup>142</sup>1998 (4) SA 74 (SE), 86G-J.

<sup>143</sup>2008 (2) SA 622(SCA).

Reference was made to *Howick District Landowners Association v Umngeni Municipality*<sup>144</sup> in support of the court's decision.

In *Goldblatt & Others v Liebenberg & Another*<sup>145</sup>, the court was called upon to make a determination on, inter alia, the manner in which the s 99 notice that was in contention in the matter, had been obtained.

In this case, the court dismissed the application on the basis that s 99 notice issued to Liebenberg's employer was deficient because there was no prior assessment issued to Liebenberg.

The court in *Pestana v Nedbank Ltd*<sup>146</sup> cautioned against the abuse of tax collection and enforcement mechanisms. In this case, the court made it crystal clear that the s 99 notice should be used solely for the collection of tax due by a taxpayer and for no other purpose.

In *Mpande Foodliner CC v CSARS & Others*<sup>147</sup> (*Mpande*) - the applicant made an application for the reversal of the Commissioner's conclusion to appoint the Mpumalanga Provincial Government as the applicant's agent in terms of s 47 of the VAT Act.

The issues to be decided upon were, inter alia,

- (a) whether the applicant was part of a tax avoidance scheme?
- (b) what is the ambit of s 47 of the VAT Act?
- (c) whether the Commissioner had applied his mind when issuing the s 47 notice?
- (d) whether the applicant was entitled to a hearing before the s 47 notice was issued?

After careful consideration of the substance and circumstances surrounding the cession of Tivotonkhe (Pty) Ltd's business to the applicant, the court came to a conclusion that:

*“the transaction between Tivotonkhe and the applicant was lawfully concluded at arm's length and that there was nothing untoward in transferring the feeding scheme by means of a cession”*.<sup>148</sup>

The court held that the Commissioner did not apply his mind objectively to the substance and circumstances surrounding the transaction and that there was no justification for the Commissioner's decision that there was indeed a tax avoidance scheme.

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<sup>144</sup>2007 (1) SA 206 (SCA).

<sup>145</sup>71 SATC 189. Croome & Olivier, 238.

<sup>146</sup>71 SATC 1.

<sup>147</sup>[2000] JOL 7545 (T).

<sup>148</sup>Ibid, para [24]. Hicklin v Secretary for Inland Revenue 24 SATC 705.

The other remaining issues will be dealt with simultaneously. The court retorted that the appointment of an agent must be reasonably necessary.

The court highlighted the following jurisdictional facts that are not only vital in invoking s 47 of the VAT Act but that each such fact must be present and objectively determined before the Commissioner is competent to issue the s 47 notice:

*“one, it must be reasonably necessary to declare a person an agent of the taxpaying vendor; two, who can only be declared an errant or recalcitrant taxpayer if an amount of tax, additional tax, penalty or interest is due and payable; three, only if the agent is required to make payments of such monies held by him or her for or due to the taxpaying vendor; and fourthly, only declare the person as an agent if he, she or it is the taxpaying vendor’s debtor.”<sup>149</sup>*

The court held that there was no VAT liability which was due and payable by the applicant to the Commissioner. The court held further that it was not reasonably necessary for the Commissioner to invoke s 47 thereby declaring the Mpumalanga Provincial Government as an agent of the applicant as the aforementioned requisite jurisdictional facts were not present.

The court found that the Commissioner usurped fiscal powers bestowed upon him when he issued the s 47 notice.

The court further stated that:

*“powers conferred on a public body for a particular purpose cannot be used for an ulterior purpose”.*<sup>150</sup>

In dealing with the question whether the applicant was entitled to a hearing before the s 47 notice was issued?-

The court held that the question raises two fundamental questions, namely:

- firstly, when should the audi alteram principle be applied?
- secondly, can the principle be whittled away in the light of the Constitution?

In dismissing counsel for the Commissioner’s submission which was predicated on *Hindry*, the court stated that *Hindry* was distinguishable from *Mpande* in that *Hindry* dealt with a different fiscal statute and that circumstances were different.

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<sup>149</sup>Ibid, para [33].

<sup>150</sup>Ibid, para [35]. Van Eck NO & Van Rensburg NO v Etna Stores 1947 (2) SA 984(A), 996-7.

The court held further that in the light of the Constitution which is supreme, *Hindry* is no authority for the appointment of a third party as an agent of a taxpayer. The court further held that the Commissioner's action was not only unlawful but that it was null and void in that the denial of the *audi alteram partem* principle to the taxpayer before the issuing of the s 47 notice by the Commissioner constitutes an infringement of s 33(1) of the Constitution.

Counsel for the respondent cited *Support Services* as authority for the submission that a prior hearing is not a prerequisite for the issuance of the s 47 notice and that a prior hearing would defeat the very purpose of the notice.

The court respectfully expressed disagreement with Brett AJ's decision in *Support Services* in the following terms:

*“Section 33(1) constitutionalises the ancient rules of natural justice: audi alteram partem and nemo iudex in sua causa by adding a dynamic third dimension: the duty to act fairly ...<sup>151</sup> Secondly, given the paramountcy and potency of the Bill of Rights, section 47 of the VAT Act must indeed yield to section 33(1) of the Constitution.<sup>152</sup>*

*In my view, therefore the right to a hearing encapsulated in the audi principle cannot be whittled away by the common law presumption of interpretation under the rubric of ‘by necessary implication’.<sup>153</sup>*

In conclusion, the court held that on the facts of the case, the applicant should have been afforded a hearing prior to the issuing of the s 47 notice. The court set aside the Commissioner's appointment of the Mpumalanga Provincial Government as an agent of the applicant on the basis of being unlawful, null and void and deficient of the requirement to act reasonably and fairly. In *Smartphone SP (Pty) Ltd v ABSA Bank Ltd & Another*<sup>154</sup> an urgent application was brought by the applicant for an order declaring as unlawful the appointment in terms of s 47 of the VAT Act of ABSA Bank as an agent of the applicant and the reversal of payment made in favour of SARS by ABSA Bank pursuant to such appointment.

The gravamen of the applicant's case was twofold, namely:

- firstly, that it had not been issued with an assessment in terms of s 31(4) of the VAT Act and

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<sup>151</sup>Mpande, para [43].

<sup>152</sup>Ibid, para [46].

<sup>153</sup>Ibid, para [44].

<sup>154</sup>[2003] JOL 12349(W).

- secondly, the applicant averred that it was not afforded a prior hearing before the issuing of the s 47 notice.

Relying heavily on the judgment of the SCA in *Singh* and also on *Mpande*, the applicant's counsel argued that the necessary jurisdictional prerequisite for SARS's appointment of ABSA Bank as an agent of the applicant was lacking and that such a appointment and consequent payment to SARS effected pursuant to the s 47 notice was unlawful and fell to be set aside.

On a closer scrutiny of s47, the court stated that:

*“s 47 permits the Commissioner to appoint an agent for a taxpayer for purposes of paying tax and that s 47 is not an aid to determining liability, it merely provides SARS with a mechanism to obtain payment”<sup>155</sup>.*

Reference was made with approval to *Industrial Manpower Projects (Pty) Ltd v Receiver of Revenue, Vereeniging & Others*<sup>156</sup> where the same sentiments were echoed by the court. The court stated that *Singh's* case is distinguishable from *Smartphone* and cannot therefore be relied upon by the applicant with success.

Turning to whether the Commissioner was obliged to afford applicant a prior hearing ere the issuing of the s 47 notice, the court briefly referred to the controversy in the South Gauteng High Court created by the decisions of Patel AJ in *Mpande* and Brett AJ in *Support Services*. The court expressed support and preference for Brett AJ's decision.

The court cited *National Educare Forum v CSARS*<sup>157</sup> with approval and in support of the fact that the applicant would suffer no prejudice as a result of not having been afforded a prior hearing before the s 47 notice.

In the final analysis, the court found that SARS did in fact effect service of a notice of assessment on the applicant's predecessor and to that end; the court held that there had been compliance with s 31(4) of the VAT Act. The applicant's application was dismissed with costs.

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<sup>155</sup>Ibid, para [8].

<sup>156</sup>2001 (2) SA 1026 (W).

<sup>157</sup>2002 (3) SA 111(TkH).



### 2.1.3 THE “PAY NOW, ARGUE LATER” RULE

Section 36(1) of the VAT Act provides that the obligation to pay tax and the right to receive and recover tax shall not, unless the Commissioner so directs, be suspended pending an objection or appeal or a decision by a court of law.<sup>158</sup>

Similarly couched provisions can also be found in the ITA<sup>159</sup> and the TAA<sup>160</sup> read with the TALAA<sup>161</sup>. Olivier points out that the effect of section 36(1) which is often referred to as the rule is that:

*“[T]he common law rule of practice in terms of which the execution of a judgment is automatically suspended upon the noting of an appeal, does not apply to a tax debt.”<sup>162</sup>*

The mere mention of the rule sends chills down the spines of many a taxpayer. The rule is an epitome of the wide powers conferred to the Commissioner pursuant to SARS’s efficient and effective collection of tax revenue objective.

In *Mokoena*, Spilg J made the following comments concerning the Commissioner’s powers and the exercise thereof:

*“The provision however is draconian and should therefore be exercised with care by properly experienced and suitably qualified personnel since it may otherwise be reduced to an arbitrary guesstimate with grave consequences to the taxpayer. This is so because the Commissioner is entitled, even if there is an objection or an appeal, to seize and realise assets including money standing to the credit of the taxpayer’s bank account notwithstanding that these actions may jeopardise the taxpayer’s cash flow and business.”<sup>163</sup>*

The rule is not used in isolation but it is complimented by other powers at the disposal of the Commissioner to enforce the collection of taxes due.<sup>164</sup>

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<sup>158</sup>Act 89 of 1991.

<sup>159</sup>S88 (1).

<sup>160</sup>S164.

<sup>161</sup>S58.

<sup>162</sup>Olivier, 194. CIR v NCR Corporation of SA (Pty) Ltd 1988 (2) SA 765(A).

<sup>163</sup>2011 (2) SA 556 (GSJ), para [10].

<sup>164</sup>Keulder, C. “Pay now, argue later” rule – before and after the Tax Administration Act. 2013 PELJ (16) 4 at 129 (Keulder).

Wunsh J lends support for this submission in the following terms in *Hindry*:

*“The purpose for which a person’s rights are limited by s 99 is ...to facilitate and enhance his (the Commissioner’s) ability to recover promptly taxes which are due and to avoid assets being put beyond his reach and, having regard to the need to speed up the collection of taxes and to prevent the frustration of the Commissioner’s efforts and steps to that end, the weapon is of great importance to the State. There is no suggestion of equally effective methods which could be used in the circumstances to achieve the desired needs.”*<sup>165</sup>

In similar vein, Keulder postulates the view that:

*“[T]he ‘pay now, argue later’ rule, on its own, does not guarantee the effective collection of taxes but the enforcement procedures are such that SARS is assured of effectively collecting taxes.”*<sup>166</sup>

The rule is applicable to all forms of tax. Williams<sup>167</sup> gives a detailed account of, inter alia, the most important forms of tax in South Africa to which, it is contended that, the rule is applicable. The effect of the rule is unaffected by the form of tax. Williams submits that tax is primarily levied for the realization of certain objectives whose scope goes beyond this study.

The statement procedure<sup>168</sup> coupled with the appointment of a third party as a taxpayer’s agent compliment the rule and, when used collectively, are a formidable and effective tax enforcement and collection mechanism in the Commissioner’s hands. It is appropriate at this point in time to pose the question, are there any remedies available to a taxpayer against the aforementioned draconian powers of the Commissioner?

The transformation of South Africa from a parliamentary to a constitutional state has had a major impact on the South African legal system. Chief amongst which is the adoption of the Constitution wherein the Bill of Rights<sup>169</sup> are enshrined. Fiscal laws did not survive the onslaught. The new dispensation ushered a new era in which taxpayers were conferred with constitutional rights,<sup>170</sup> inter alia, – right to: property, privacy, administrative justice and access to courts.

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<sup>165</sup>[1999] 2 All SA 38 (W), 63.

<sup>166</sup>Keulder, 130.

<sup>167</sup>Williams, 2.

<sup>168</sup>Metcash, para [24] for a detailed discussion thereof.

<sup>169</sup>Chapter 2 of the Constitution.

<sup>170</sup>Croome & Olivier, 10.

Concomitantly, taxpayers can challenge the constitutional validity of fiscal statutes that *prima facie* encroach upon such rights. The *Rudolph*<sup>171</sup> saga bears testimony to this fact.

The rule made its grand debut in the CC in *Metcash* where the court was called upon to make a determination on the constitutional validity of sections 36(1), 40(2)(a) and 40(5) of the VAT Act.

The court declared the impugned sections of the VAT Act constitutionally sound. This finding of the CC was not well received by vendors and arguably by taxpayers alike.

The perception created in the minds of many despondent taxpayers following the *Metcash* decision was that SARS's paramount duty - when weighed against a taxpayer's constitutional rights - in particular, the right of access to courts - took precedence. This, despite the court's decision that s 36(1) strikes a balance between the two competing interests. The *Metcash* decision is viewed with a jaundiced eye by many taxpayers primarily because the decision is *prima facie*, in contradiction with what the CC stands for – *a vanguard of constitutional rights!*

*Lesapo* and *Metcash* are CC judgments which were decided one year apart.

The court in both cases was called upon to make a determination on the constitutional validity of the impugned sections<sup>172</sup> which, the applicants contended, were inconsistent with s 34 of the Constitution and thus ousted the jurisdiction of the courts.

In *Lesapo*, the impugned section 38(2) of the Act, was declared unconstitutional and constituted self-help in terms of which the Bank was judge in its own cause.

The court further held that less invasive remedies such as an interdict, were available to the Bank to protect its proprietary interests. To the taxpayers' dismay and contrary to precedential principles<sup>173</sup> and expectations, the court in *Metcash* declared the impugned sections of the VAT Act which the applicants contended were analogous to those dealt with in *Lesapo*, constitutionally sound.

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<sup>171</sup>Rudolph & Another v Commissioner for Inland Revenue & Others NNO 1994 (3) SA 771 (W);  
Rudolph & Another v Commissioner for Inland Revenue & Others 1996 (2) SA 886 (A);  
Rudolph & Another v Commissioner for Inland Revenue & Others 1996(4) SA 552 (CC) and  
Rudolph & Another v Commissioner for Inland Revenue & Others 1997 (4) SA 391(SCA).

<sup>172</sup>S38 (2) the North West Agricultural Bank Act 14 of 1981 and ss 36 (1); 40(2) (a) and (5) of the VAT Act.

<sup>173</sup>Ngcukaitobi, 148.

**JUSTIFICATION FOR THE METCASH** decision lies in the following:

- *Metcash* was concerned with the “pay now, argue later” rule in the context of the VAT Act and no other fiscal statute.<sup>174</sup>
- VAT, unlike income tax, is a multi - stage tax that arises continuously and does not give rise to liability once an assessment has been issued. Vendors are in a sense involuntary tax-collectors<sup>175</sup> or they act as collection agents on behalf of SARS.<sup>176</sup>
- vendors are entrusted with several important duties in relation to VAT. Prime amongst which is the duty to calculate and levy VAT on each supply of goods; to correctly calculate output and input tax on a transaction concerned and to keep proper records supported by prescribed vouchers...<sup>177</sup>
- the trial court in *Metcash1* placed heavy emphasis on *Lesapo* wherein the impugned section of the Act which was said to be analogous to the impugned sections in *Metcash* - expressly ousted the jurisdiction of the courts - permitted self-help, was inconsistent with s 34 of the Constitution and was therefore constitutionally invalid.
- *Lesapo* was concerned with a provision of the Bank Act and not a fiscal statute and that the trial court erred in placing such heavy and unwarranted emphasis on *Lesapo* which is clearly distinguishable from *Metcash*.
- section 36 (1) is not concerned with access to a court of law and says nothing that can be construed as a prohibition against a resort to such a court.<sup>178</sup>
- section 36 (1) is concerned with the non-suspension of the obligation to pay assessed VAT and also with the Commissioner’s discretionary powers to exercise of which constitutes an administrative action reviewable in terms of administrative law principles.<sup>179</sup>

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<sup>174</sup>Keulder, 139. *Metcash*, paras [9], [10] & [13]. Croome & Olivier, 224.

<sup>175</sup>*Metcash*, paras [17] and [70].

<sup>176</sup>Keulder, 139.

<sup>177</sup>*Metcash*, para [15].

<sup>178</sup>*Ibid*, para [37].

<sup>179</sup>*Contract Support Services (Pty) Ltd & Others v CSARS & Others* 1999 (3) SA1133 (W), 1144. *Johannesburg Stock Exchange & Another v Witwatersrand Nigel Ltd & Another* 1988 (3) SA132 (A), 152A-E.

- Section 36(1) does not expressly oust the jurisdiction of the courts nor is there any hidden or implicit ouster of the jurisdiction of the courts to be found in s 36...<sup>180</sup>

*“On a plain reading of s 40 (2) (a) of the VAT Act, the provision expressly contemplates the involvement of the courts... [T]he execution process created by s40 (2) (a) specifically goes via the ordinary judicial institutions. It requires the intervention of court officials and procedures. Filing the statement sets in train the ordinary execution processes of the particular court”<sup>181</sup>.*

- the statement procedure has the effect of a civil judgment,<sup>182</sup> the execution of which necessitates the intervention of court officials. Accordingly, a taxpayer’s right of access to the courts remains intact.<sup>183</sup>
- [A]though s 40(5) is couched in broad and general terms:

*“It pertinently limits possible grounds for challenge but does not prohibit litigation. Not only is that the tenor of the provision but it is as well to remember that we are engaged in the interpretation of a taxation statute, where verbal precision is essential. Nothing that is not stated is to be read in, especially not an element as important as an ouster.”<sup>184</sup>*

- the “pay now, argue later” rule given its prevalence in many jurisdictions, is accepted as reasonable in open and democratic societies based on freedom, dignity and equality as required by section 36.<sup>185</sup>
- the “pay now, argue later” rule successfully strikes a balance between SARS’s paramount duty of collecting taxes speedily and efficiently and the taxpayer’s right of access to the courts.<sup>186</sup>

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<sup>180</sup>Metcash, para [47].

<sup>181</sup>Metcash, para [51].

<sup>182</sup>S40 (2) (a) of the VAT Act. Capstone, para [37].

<sup>183</sup>Metcash, para [72].

<sup>184</sup>Ibid, para [53]. Jaga v Donges NO & Another ; Bhana v Donges NO & Another 1950 (4) SA 653 (A), 662G-663A. Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others 2004 (4) SA 490 (CC) para 90. South African Airways (Pty) Ltd v Aviation Union of South Africa & Others 2011 (3) SA 148 (SCA) paras 25- 30. Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593(SCA),para[18] - [26]. Bastian Financial Services (Pty) v General Hendrik Schoeman Primary School [2008] ZASCA 70, paras 16 -19. Barkhuizen v Napier [2007] ZACC 5, paras 135 -139. KPMG Chartered Accountants (SA) v Securefin Ltd & Another 2009 (4) SA 399(SCA), para 39. Singh v The Common Wealth [2004] HCA 43, para 19.

<sup>185</sup>Ibid, para [61].

<sup>186</sup>Keulder, 151.

The TAA, which came into force on 01 October 2012, brought relief to aggrieved taxpayers vis-à-vis the “pay now argue later” rule through the replication of factors to be considered by a senior SARS official when deciding on a taxpayer’s request to suspend payment of a disputed tax debt. The Taxation Laws Second Amendment Act 18 of 2009 (TLSA) first introduced these factors by amending section 88 of the ITA.

The relevant provision of the TAA states that:

“A senior SARS official may suspend payment of the disputed tax having regard to –

- (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 the 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.”<sup>187</sup>

The above – mentioned provision of the TAA is being cited for the following reasons-

- although the wording of section 36 of the VAT Act is to a greater extent analogous to section 88 of the ITA and section 164 of the TAA in that they both deal with the “pay now, argue later” rule - section 36 is silent on the factors to be considered by a Commissioner when deciding on a taxpayer’s request for the postponement of a disputed assessment.
- s164 of the TAA read with s 58 of the TALAA provides more clarity and has a wider scope of application in that it also incorporates an appeal as a precondition for the suspension of payment.

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<sup>187</sup>S164 (3) of the TAA.

Section 164(5) of the TAA sets out circumstances under which a senior SARS official may deny a request or revoke a decision to suspend payment with immediate effect, if satisfied that:

- (a) the objection or appeal is frivolous or vexatious;
- (b) the taxpayer is employing dilatory tactics;
- (c) the suspension of payment should not have been granted; or
- (d) there is a material change in the factors that precipitated the suspension of payment.

### **2.1.3.1 CRITICISMS - *METCASH***

The following criticisms have been levelled against *Metcash*:

#### **2.1.3.1.1 CRITICISMS BY KEULDER**

Keulder postulates the view that while an adjustment and payment of interest as a result of a successful appeal is a feat welcomed by many taxpayers<sup>188</sup>, the latter are not insulated from experiencing financial ruin for strict adherence to the rule.<sup>189</sup>

Taking her cue from Olivier,<sup>190</sup> Keulder submits that if the grounds upon which a taxpayer can dispute the filing of a statement were clear, the latter's right of access to the courts would be better protected<sup>191</sup>.

Keulder further states that from the mere reading of *Metcash I* and *Metcash* it is not clear which countries served as a basis for the court's decision that the rule is accepted as reasonable in open and democratic societies.<sup>192</sup> In dismissing the respondent's submission that this practice - "pay now, argue later" rule - was applicable in other countries Snyders J in *Metcash I* held that this did not persuade her that the South African provision is constitutional.<sup>193</sup>

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<sup>188</sup>S36 (5) of the VAT Act.

<sup>189</sup>Keulder, 128.

<sup>190</sup>Olivier, 199.

<sup>191</sup>Keulder, 141.

<sup>192</sup>Ibid.

<sup>193</sup>2002 (2) SA 232 (W), 329.

A further criticism made by Keulder is that the remedies available to a court when reviewing a commissioner's discretion not to suspend payment are circumscribed. Keulder submits that the court does not have the power to overturn the commissioner's decision.<sup>194</sup>

On the contrary, the court is empowered in judicial review proceedings to grant any order that is just and equitable including an order directing the commissioner to give reasons; act in the manner the court requires; setting aside the administrative action or reconsider the decision.<sup>195</sup>

It is submitted that it is unclear what the basis of this criticism is relative to section 8(1) (c) of PAJA. The phrase 'set aside' bears the following meaning – "...disregard or reject, annul"<sup>196</sup> while the phrase 'overturn' means - "turn over or fall down, upset, overthrow, subvert".<sup>197</sup>

It is submitted that *prima facie*, the two phrases bear the same meaning or have a similar import. There is merit in the criticism only insofar as the lack of clarity as to the extent to which the court may set aside the administrative action is concerned.

Keulder states that the value of the review procedure is further diminished when the statement procedure is invoked, as the taxpayer may then not challenge the correctness of the statement in legal proceedings.<sup>198</sup>

A further criticism is that:

*"[T]he constitutional attack on the s 36 rule therein lies that the right of access to the courts, as contained in section 34 of the Constitution, aims to prevent self- help. The court should thus have examined whether this rule, at the time it is invoked, unreasonably permits SARS 'help itself' and become the judge in its own case. The question, therefore, should not be whether the taxpayer will have access to the courts at some stage, but rather whether the taxpayer will have the opportunity to access the courts before being obliged to pay the assessment amount."*<sup>199</sup>

It is Keulder's further criticism that *Metcash* was concerned only with the "pay now, argue later" rule in relation to VAT and has no binding effect on other tax legislation.

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<sup>194</sup>Ibid.

<sup>195</sup>Ibid, 140. S8 (1) and (2) of the PAJA.

<sup>196</sup>Allen, R.E. The Pocket Oxford Dictionary, 7 ed. Oxford: Clarendon Press, (1984).

<sup>197</sup> Ibid.

<sup>198</sup>Keulder, 140 -1.

<sup>199</sup>Ibid.



Keulder submits further that the considerations which influenced the court in arriving at the decision in *Metcash* would not necessarily lead to the same conclusion in relation to income tax matters.<sup>200</sup>

#### **2.1.3.1.2 CRITICISMS BY WILLIAMS**

Williams, echoes the same sentiments in the following terms –

*“The fact is that, in Metcash, the Constitutional Court pronounced on the constitutionality of the pay-now-argue-later rule in the context of the Value - Added Tax Act, but said nothing at all about its constitutionality in the context of the Income Tax Act. It is by no means a foregone conclusion that the court would have reached the same conclusion if income tax had been an issue, for there are many significant differences between the two taxes, not the least being that there is far more scope for genuine disputation about income tax liability than for VAT.”*<sup>201</sup>

Williams further states that the ITA (and in similar vein the TAA) provides no guidance as to the relative weight of the factors to be considered by the Commissioner when confronted with an application to suspend payment pending an objection or a appeal against a disputed assessment.<sup>202</sup>

Williams highlights the ongoing confusion and misunderstanding regarding the

*“pay now, argue later” rule in the context of the income tax by making reference to Mokoena and Capstone - two High Court judgments decided a year apart and “which came to diametrically opposite conclusions on key aspects of the rule”.*<sup>203</sup>

Williams correctly states that the aforementioned decisions:

*“being High Court judgments of a single judge, have the same precedential authority over lower courts including the Tax Court - in their respective areas of jurisdiction”*<sup>204</sup>.

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<sup>200</sup>Ibid, 139.

<sup>201</sup>Williams, RC Unresolved aspects of the “pay now argue later” rule. January 2012, PWC Synopsis 4.

<sup>202</sup>Ibid, 5.

<sup>203</sup>Ibid, 4.

<sup>204</sup>Ibid, 5.

While Williams prefers *Capstone* on the basis of it being more persuasive than *Mokoena*, he bemoans the fact that neither judgment provides guidance in relation to the manner in which the s 88(3) factors of the ITA and s 164(3) factors of the TAA read with s 58 of the TALAA are to be interpreted.<sup>205</sup>

Williams further criticises the relevance of some of the factors such as the amount of tax involved. He poses the question whether the quantum of the tax debt is the yardstick for determining whether to grant or refuse suspension of payment?<sup>206</sup>

In the final analysis, Williams concludes by focusing our attention on an instance where the Commissioner makes an adverse decision to the taxpayer's request for suspension of an obligation to pay. The taxpayer is at liberty to review that decision in terms of PAJA<sup>207</sup>. The general rule on the basis of which a taxpayer's review application will be determined is that the taxpayer's obligation to pay shall not be suspended pending an objection or appeal unless there exists a substantial reason to depart from the general rule.

Williams cites the following as being the substantial reason often advanced by a taxpayer to persuade the court to deviate from the rule:

- where insistence on immediate payment of the tax debt would cause "irreparable financial hardship" to the taxpayer.

To this end Williams states that:

*"[t]he adjective 'irreparable' sets the bar very high, and it is probably an inappropriate word anyway, since any amount of financial loss is inherently repairable by an award of damages."*<sup>208</sup>

In a counter argument Keulder submits that:

*"[t]his might, however, not be the case where a taxpayer is rendered insolvent. The objection and appeal procedure may take a substantial amount of time which could severely prejudice a taxpayer and even lead to the taxpayer's sequestration or liquidation."*<sup>209</sup>

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<sup>205</sup>Ibid.

<sup>206</sup>Ibid.

<sup>207</sup>S6, Act 3 of 2000.

<sup>208</sup>Williams, RC Unresolved aspects of the "pay now argue later" rule January 2012, PWC Synopsis 6. Keulder, 144.

<sup>209</sup>Keulder, 144.

### 2.1.3.1.3 CRITICISMS BY ROOD

Rood, L. submits that the commissioner is, in the context of the rule, still a judge in a dispute to which he is a party.<sup>210</sup> He further states that it is not clear from a mere reading of s 164(3) whether the fraud referred to therein relates to alleged fraud or an actual conviction of fraud.

For, if it is an allegation of fraud that is to be taken into consideration, this would be unfair to a taxpayer as he would not have been afforded an opportunity to defend himself against such an allegation.<sup>211</sup>

### 2.1.3.1.4 CRITICISMS BY OLIVIER

At the outset, Olivier states that the summary procedures - it is submitted that by this she refers collectively to sections 36(1), 40(2) (a), 40(5) and 47 of the VAT Act and similarly couched provisions of the ITA and TAA read with the TALAA

– “are aimed at the swift collection of tax, not the settlement of the matter.”<sup>212</sup>

Olivier states that it is incomprehensible why the court in *Metcash* (vide para [44]) cited a list of cases wherein the jurisdiction of the high court to determine tax issues had been accepted since:

“it was never the taxpayer’s argument that under the scheme of the act the jurisdiction of the courts had been excluded. The argument was that the ‘pay now, argue later’ rule excludes the jurisdiction of the courts at the time it is invoked.”<sup>213</sup>

Olivier submits that the court erred by disregarding the fact that the “pay now, argue later rule” may culminate in a taxpayer suffering financial ruin to the extent of not being able to pursue other avenues at his disposal.<sup>214</sup>

Olivier points out that theoretically, the possible judicial review of the commissioner’s discretion not to suspend payment of tax pending an objection or appeal does allow a taxpayer access to the courts. Olivier further states that:

“review proceedings are, however, extremely limited in nature”<sup>215</sup>.

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<sup>210</sup>Rood, L. “Pay now, argue later” 13 August 2009 Finweek 44.

<sup>211</sup>Ibid.

<sup>212</sup>Olivier, 194

<sup>213</sup>Ibid, 196.

<sup>214</sup>Ibid, 197.

<sup>215</sup>Ibid.

This criticism has been assailed by Keulder as *being unclear and devoid of a basis*<sup>216</sup>.

Details of the grounds on which a decision may be reviewed are set out in *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd*<sup>217</sup> as being:

- failure to apply one's mind to the relevant issues;
- that the decision was arbitrary or capricious or mala fide;
- that the decision was as a result of an unwarranted adherence to a fixed principle;
- that the decision was arrived at in order to further an ulterior or improper purpose;
- that the decision was as a result of taking into account irrelevant considerations or ignoring relevant facts and
- that the decision was grossly unreasonable.

Olivier poses the question whether the review procedure is worth anything when a taxpayer is precluded from questioning the correctness of the assessment on which the statement based?

Olivier submits that:

*“the ground on the basis of which a decision is often taken on review is that it is so grossly unreasonable that the decision-maker failed to apply his mind to the matter”*<sup>218</sup>

Concomitantly, the correctness of such decision or in this case - the assessment - would have to be considered for the applicant's review application to succeed.

Olivier further submits that it is regrettable that the court in *Metcash* did not address the fact that although a commissioner must, in terms of s 31 notify a taxpayer of an assessment; nothing prohibits him from employing the summary collection procedures before a vendor is notified<sup>219</sup>. Such was the case in *Mokoena*<sup>220</sup> and *Support Services*.<sup>221</sup> It is Olivier's further submission that despite the fact that the exercise of discretionary powers is subject to review, the legislature still has an obligation to ensure that such provisions are constitutionally sound.<sup>222</sup>

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<sup>216</sup>Keulder, 140 (vide footnote 114).

<sup>217</sup>1988 (3) SA 132(A) 152 A- E.

<sup>218</sup> Olivier, 197.

<sup>219</sup>Ibid.

<sup>220</sup>2011 (2) SA 556 (GSJ).

<sup>221</sup>1999 (3) SA1133 (W).

<sup>222</sup>Olivier, 197-8. Keulder, 141.

Olivier raises a concern to the effect that it is disquieting that the court did not make any reference to *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* where it was held that:

*“[T]he mere fact that the exercise of a discretion is subject to judicial review does not relieve the legislature of its constitutional obligation to promote, protect and fulfil the rights entrenched in the Bill of Rights”*<sup>223</sup>.

Olivier postulates the view that as a result of the enactment of the Constitution the normative basis of administrative law in SA shifted.

This fact is canvassed in detail in *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa*<sup>224</sup>(*Pharmaceutical*)

According to Olivier references to judicial independence and the exercise of discretionary powers are equally applicable to a discretion exercised by the commissioner.

Instead, all that the court in *Metcash* held in this regard was that:

*“[T]he commissioner has to be able to justify his decision as being rational, and that the action must constitute ‘just administrative’ as required under s 33 of the Constitution and be in compliance with any legislation governing the review of administrative actions”*.<sup>225</sup>

The court in *Metcash* held that the certificate procedure in terms of the VAT Act does not constitute self-help as s 40(2) (a) contemplates the involvement of the courts. The court held further that the filing of a certificate sets in motion the ordinary processes of the particular court. Execution is primarily regulated by either the Uniform Rules of the High Court (Rules 45,45A and 46) or by the Magistrates’ Court Rules (Rule 36).<sup>226</sup>

Olivier points out that the setting in motion of the execution procedures of a specific court is a far cry from the right of access to court.

Nowhere in the VAT Act is provision made for the taxpayer to be informed in advance of the commissioner’s intention to file a certificate. It is thus not a matter of a default judgment being obtained against a taxpayer.<sup>227</sup>

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<sup>223</sup>2000 8 BCR 837(CC), para [48].

<sup>224</sup>2000 3 BCLR 241(CC), para [45].

<sup>225</sup>*Metcash*, para [42].

<sup>226</sup> *Ibid*, para [51].

<sup>227</sup>Olivier, 198.

Olivier's further criticism is that the grounds upon which a taxpayer can dispute the filing of the certificate are not clear.<sup>228</sup>

All that the court said in this respect was that:

*"it is notorious that the field of tax law can and often does raise a whole panoply of procedural or substantive issues derived from one or more of the individually complex and usually interlocking fields of law involved in tax disputes."*<sup>229</sup>

In support of Keulder's criticism relating to foreign systems and decisions that influenced the court's decision that the rule is accepted as reasonable in open and democratic societies, Olivier submits that:

*"the reader is thus left in the dark as to which foreign systems and decisions indeed serve or do not serve as an international basis of acceptance."*<sup>230</sup>

The court in *Kruger* found that the certificate procedure is not merely an administrative step aimed at facilitating the extra-judicial recovery of tax<sup>231</sup> but that it is a proper judicial decision reviewable at the instance of the taxpayer.

To this end, Olivier postulates the view that:

*"the mere fact that the judgment obtained may be rescinded is no guarantee that at the time the statement is filed, a taxpayer has access to the court with which it is filed. In practice an order to rescind the judgment is often made precisely because it was obtained without the taxpayer having knowledge that a statement has been filed."*<sup>232</sup>

The court in *Capstone*<sup>233</sup> held that a statement filed with the clerk or registrar of a competent court is not a judgment on the following grounds:

- it did not resolve any dispute between SARS and the taxpayer;
- it does not have the attributes of a judgment such as - "*the rights-determining character of a judicially delivered judgment*"<sup>234</sup>;
- it is a mere recovery provision no different from the other recovery provisions in the Act.

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<sup>228</sup>Ibid, 199.

<sup>229</sup>Metcash, para [56].

<sup>230</sup>Olivier, 199.

<sup>231</sup>1973 (1) SA 394 (A), para [64] - [65].

<sup>232</sup>Olivier, 199.

<sup>233</sup>Capstone, para [37]. Keulder, 144.

<sup>234</sup>Williams, 5.

Olivier correctly submits that:

*“the court in Metcash did not address the applicant’s argument that there were less invasive ways to effect the speedy and efficient collection of taxes”.*<sup>235</sup>

The applicant raised this view at the trial court and also in the constitutional court.

Snyders J in *Metcash I* lent support to the applicant’s argument by highlighting the following as less invasive ways that the Commissioner could have recourse to pursuant to his paramount duty, namely:

- higher penalties;
- the furnishing of security;
- higher interest rates or
- time-linked penalties.

In similar vein, Keulder makes the following submission:

*“The possibility that there are less invasive ways for SARS to achieve its objective is one of the factors the court would have had to consider in terms of s 36 of the Constitution.”*<sup>236</sup>

Olivier concludes her criticism of *Metcash* in the following terms:

*“The constitutional court found it unnecessary to deal specifically with the taxpayer’s arguments that as the summary procedures are also applicable in respect of the penalty provisions; the effect is that the commissioner may impose punishment for criminal conduct without recourse to the courts”*<sup>237</sup>.

## **2.2 TAXPAYER’S REMEDIES**

From the above discussion, the following feature predominantly as the taxpayer’s remedies against the draconian powers of the Commissioner:

- (a) lodging of an objection<sup>238</sup> or
- (b) noting an appeal against a disputed assessment;<sup>239</sup>

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<sup>235</sup>Olivier, 199. *Metcash I*, 146B.

<sup>236</sup>Keulder, 142.

<sup>237</sup>Olivier, 200. Rood, L. “Pay now, argue later” 13 August 2009 *Finweek* 44

<sup>238</sup>S32 (1) (b) of the VAT Act; S81(1) read with s 107A of the ITA and rules promulgated thereunder and s 104(1) of the TAA.

<sup>239</sup>S33 (1) & 33A of the VAT Act. SS 83(1) and 83A of the ITA and s 107(1) of the TAA.

- (c) making an application for the suspension of payment<sup>240</sup> pending an objection or appeal or decision of a court;
- (d) making an application for the review of the Commissioner's decision<sup>241</sup> and lastly
- (e) making an application to directly access the Constitutional Court<sup>242</sup>

In the case of direct access to the CC section 38 of the Constitution confers an aggrieved taxpayer with the requisite *locus standi*.

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<sup>240</sup>S88 (3) of the ITA and s 164(3) of the TAA.

<sup>241</sup>S6 (1) of PAJA.

<sup>242</sup>S 167(6) (a) of the Constitution read with Rule 18(1); (2); (3); (4) & (5) of the Constitution. Du Plessis, M. et al. Constitutional Litigation, 77-90.



## CHAPTER 3

### REVIEW OF THE RELEVANT STATUTORY PROVISIONS

#### 3.1 INTRODUCTION

A review of the relevant legislation will be confined to taxpayers' remedies under the Constitution and PAJA. It is contended that the relevance of the maxim *ubi ius ibi remedium* - "[T]here can be no right without remedies"<sup>243</sup> - is more appropriate in this chapter.

There has been an inevitable overemphasis in the preceding chapters on litigation as if it is the only recourse available to a disgruntled taxpayer. It is contended that there's an array of remedies at the disposal of taxpayers when SARS acts beyond the parameters of its authority. This chapter entails a brief discussion of such remedies and their relevance to the rule.

#### 3.1.1 A CASE FOR CONSTITUTIONAL & PAJA REMEDIES

The CC confirmed the constitutionality of the rule in *Metcash*.<sup>244</sup> Croome correctly contends that:

*"[N]otwithstanding the CC's decision in Metcash, an aggrieved taxpayer may institute an action in court against the Commissioner's resolve to unreasonably enforce payment of a disputed tax pending an appeal"*<sup>245</sup>.

Croome submits further that:

*"the action would be based on the principles of administrative law and particularly on the right to administrative justice contained in s 33 of the Constitution read with PAJA"*<sup>246</sup>.

The court per Kriegler J in *Metcash* echoed similar sentiments in the following terms:

*"A violation of the rules of administrative justice provides the ground for such challenge."*<sup>247</sup>

SARS is an organ of state envisaged in the Constitution.<sup>248</sup> The court in *FNB*<sup>249</sup> held that SARS is subject to the Constitution.

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<sup>243</sup>Caiden, GE International Handbook of the Ombudsman: Evolution and Present Function. Greenwood Press, (1983), 5. Croome, 305.

<sup>244</sup>2001 1 BCLR 1 (CC). Motsepe 1997(2) SA 897 (CC); Lesapo [1999] ZACC16 and Hindry 1999(2) SA 757 (W).

<sup>245</sup>Croome, 220.

<sup>246</sup>Ibid.

<sup>247</sup>Metcash, para [42].

<sup>248</sup>S239 of the Constitution. S2 of the SARS Act.

<sup>249</sup>2002 (7) JTLR 250,252.

With the enactment of the Constitution, South Africa was transformed into a democratic state that is founded,

*“inter alia, on the value of an accountable, responsible and open democratic government.”*<sup>250</sup>

Croome correctly submits that:

*“the Constitution puts it beyond doubt that all organs of state must be held accountable.”*<sup>251</sup>

The CC in *Carmichele v Minister of Safety & Security and Another*<sup>252</sup> held that members of the public are entitled to claim compensation from the government for damages suffered due to the actions or omissions of government officials.

Croome submits in similar vein that:

*“[A] taxpayer who suffers damages due to intentional or negligent actions by SARS will be entitled to successfully institute a delictual claim against SARS. In the light of the constitutional guarantee that South Africa is based on the values of an accountable, responsible and open democratic government, SARS owes taxpayers a legal duty not to cause them damage.”*<sup>253</sup>

The Constitution confers a right to administrative action on taxpayers.<sup>254</sup> The Constitution further provides for the enactment of national legislation that gives effect to the rights stated in s 33.<sup>255</sup> It is submitted that PAJA is such national legislation and that it should be read with as it compliments the Constitution.

Croome correctly contends that:

*“It should be noted that PAJA cannot be used to evaluate whether a constitutionally guaranteed right has been infringed. The constitutional challenge must be evaluated under s33 of the Constitution.”*

However, PAJA remains relevant in that the right to fair administrative action in the Constitution must be interpreted according to the provisions of PAJA<sup>256</sup> Croome correctly submits that: *“PAJA is applicable to the Commissioner and his officials.”*<sup>257</sup>

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<sup>250</sup>S1 of the Constitution. Croome, 282.

<sup>251</sup>Croome, 282. ss195 & 41(1) (c) of the Constitution.

<sup>252</sup>2001 (4) SA 938 (CC).

<sup>253</sup>Croome, 282.

<sup>254</sup>S33 of the Constitution.

<sup>255</sup>S33 (3) of the Constitution.

<sup>256</sup>Croome, 279. *Zondi v MEC for Traditional & Local Government Affairs 2005v(3) SA 589 (CC)* paras 99 – 102. *TML Consultancy v CSARS [2012] ZATC 1* and *Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13* for the interpretation of tax legislation.

<sup>257</sup>Croome, 209.

In similar vein, Currie & Klaaren postulate the view that:

*“PAJA applies to all administrators and no part of the public service is exempt from its provisions”*<sup>258</sup>.

Taking his cue from *Pharmaceutical* where it was held that:

*“the Constitutional Court is obliged to ensure that public power has been lawfully exercised”*<sup>259</sup>.

Croome submits that:

*“the aim of PAJA is not only to ensure fair administrative action, but it is aimed at the control of public power”*.<sup>260</sup>

Croome submits further that:

*“an analysis of relevant cases indicates that taxpayers are hardly ever successful in arguing that a fiscal statute or provision thereof is unconstitutional.”*<sup>261</sup>

It is for this reason that it is contended that not all is doom and gloom for the aggrieved taxpayer. According to Croome,

*“An action based on the violation of the rules of administrative justice may, depending on the facts, be the most suitable remedy available to the taxpayer”*.<sup>262</sup>

In the light of the above discussion, it is contended that a case has been established that the Constitution and PAJA and consequently the remedies provided therein, are applicable in the tax law arena and by extension to the rule.

Thus, a brief discussion of the Constitutional and PAJA remedies follows:

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<sup>258</sup> Currie, I & Klaaren, J. *The Promotion of Administrative Justice Act Benchbook*. Cape Town: Siber Ink, (2001), para 2.37, 82 & 83 (Currie & Klaaren).

<sup>259</sup> 2000 (2) SA 674 (CC) para 51.

<sup>260</sup> Croome, 280.

<sup>261</sup> *Ibid.* Metcash; Motsepe, Hindry, Lesapo, Support Services, Mpande & Smartphone in chapter 2 hereof. *Rudolph v CIR* NNO 1996 (7) BCLR 889 (CC). *Carlson Investments Share Block (Pty) Ltd v CSARS* 2001 (3) SA 210 (W). Silke, J. *Taxpayers and the Constitution: A battle already lost*. 2002 *Acta Juridica*, 334.

<sup>262</sup> Croome, 221. Metcash, para [42].

## 3.2 CONSTITUTIONAL REMEDIES

### 3.2.1 Purpose

Du Plessis et al (Du Plessis) submit that the primary purpose of constitutional remedies is:

*“to vindicate the Constitution and deter future infringements...”*<sup>263</sup>

In *FNB*, the court stated that:

*“The remedy must be effective because without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced.”*<sup>264</sup>

Another important feature of constitutional remedies is *“what is just and equitable in the circumstances of that case”*<sup>265</sup>.

### 3.2.2 Direct access to the Constitutional Court

The Constitution provides for circumstances under which direct access to the Constitutional Court (CC)<sup>266</sup> may be granted. The CC does not, as a general rule, sit as a court of first instance. Du Plessis submits that:

*“[o]ne of the primary reasons why direct access is ordinarily regarded as undesirable is because it deprives the court of the benefits and the assistance of the views of other courts on the matter before it.”*<sup>267</sup>

A taxpayer seeking direct access must, according to Du Plessis:

*“establish that there are compelling reasons justifying the exceptional leapfrogging of courts below”*<sup>268</sup>.

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<sup>263</sup>Du Plessis, M. Pinfolds, G. & Brickhill, J. Constitutional Litigation. Claremont: Juta, (2013), 108.

<sup>264</sup>1997 (3) SA 786 (CC), para 96.

<sup>265</sup>Ibid, para 19.

<sup>266</sup>S167 (6) (a) read with Rule 18(1) to (5) of the Constitution.

<sup>267</sup>Du Plessis, 83. *Zondi v MEC for Traditional and Local Government Affairs & Others* 2005 (3) SA 589 (CC), para 13; *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005(1) SA 530(CC), para 11 and *Minister of Home Affairs & Another v Fourie* 2006 (1) SA 524(CC), para 39.

<sup>268</sup>Du Plessis, 85.

Du Plessis<sup>269</sup> submits further that all of the formalities mentioned hereunder - a detailed discussion of which falls outside the scope of this research - must be satisfied for direct access to be granted:

- the interests of justice<sup>270</sup>;
- the exhaustion of all other remedies<sup>271</sup>;
- a non self - created urgent need for legal certainty<sup>272</sup>;
- substantial similarity between the relief sought by applicant and that sought by parties in a matter already before the CC<sup>273</sup> and
- reasonable prospects of success of a claim.<sup>274</sup>

In *exceptional circumstances*<sup>275</sup>, the CC does grant direct access.

### 3.2.3. LIST OF CONSTITUTIONAL REMEDIES

#### (a) Right of access to courts

Hoexter states that:

*“South African taxpayers currently have an inherent right under s 34 of the Constitution to approach a court for relief where SARS has abused the powers under the fiscal statutes or has failed to comply with the requirement of fair administrative procedure under s 33 of the Constitution and as expanded on in PAJA. The only problem that taxpayers have to contend with is that it is costly and time consuming to institute an action in the High Court.”*<sup>276</sup>

A taxpayer may in terms of s 39 of the Constitution approach the CC for relief where the former believes that the Commissioner has infringed his constitutional rights contained in chapter 2 of the Constitution. It is contended that since SARS is a state organ, it must comply with s 195 of the Constitution.

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<sup>269</sup>Ibid, 89.

<sup>270</sup>Ibid, 83. Bruce & Another v Fleecytex Johannesburg CC & Others 1998 (2) SA 1143 (CC), paras 7 & 8.

<sup>271</sup>Du Plessis, 85. Besserlik v Minister of Trade, Industry & Tourism 1996 (4) SA 331 (CC), para 6.

<sup>272</sup>Du Plessis, 87. Kruger v President of the RSA & Others 2009 (1) SA 417 (CC).

<sup>273</sup>Du Plessis, 88. Bhe & Others v Khayelitsha Magistrate & Others 2005 (1) SA 580 (CC).

<sup>274</sup>Du Plessis, 89. Christian Education South Africa v Minister of Education 1999 (2) SA 83 (CC), para 7.

<sup>275</sup>Justice Alliance of South Africa v President of the Republic of South Africa & Others 2011 (5) SA 388 (CC) para 18. S v Dlamini; S v Dladla & Others 1999 (4) SA 623 (CC) para 35.

<sup>276</sup>Hoexter, C. The New Constitutional & Administrative Law Volume 2, Administrative Law. Claremont: Juta, (2002), para 8.5, 305.

## **(b) Declaration of invalidity**

Croome submits that:

*“where an Act of Parliament is inconsistent with the Constitution, the CC has the power to strike it down”.*<sup>277</sup>

## **(c) Delictual claim for damages**

Croome submits that:

*“to succeed with a delictual claim for damages against SARS, a taxpayer must prove that the wrongful or culpable actions or inactions by SARS caused him to suffer damage”*<sup>278</sup>

Croome further submits that:

*“damages will be awarded where a mere declaration that the administrative action is invalid is not sufficient compensation to the person against whom the administrative action had been taken.”*<sup>279</sup>

This view was endorsed by the court in *FNB*.<sup>280</sup>

## **(d) Order for costs**

Three types of costs may be awarded, namely:

- party and party costs – also known as ‘attorney and attorney costs’;
- attorney and client costs and
- *de bonis propriis* costs<sup>281</sup>

Croome correctly submits that:

*“[t]he general rule is that a cost order follows the result of the litigation”.*<sup>282</sup>

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<sup>277</sup>Croome, 279. SS 167(5) & 172(1) (a) of the Constitution. Metcash; Motsepe, Hindry, Lesapo, Support Services, Mpande & Smartphone in chapter 2. Rudolph v CIR NNO 1996 (7) BCLR 889 (CC). Carlson Investments Share Block (Pty) Ltd v CSARS 2001 (3) SA 210 (W). Silke, J. Taxpayers and the Constitution: A battle already lost. 2002 Acta Juridica 334.

<sup>278</sup>Croome, 280. S1 of the State Liability Act 20 of 1957.

<sup>279</sup>Ibid, 279.

<sup>280</sup>1997 (3) SA 786 (CC). Transnet Ltd v Sechaba Photoscan (Pty) Ltd 2005 (1) SA 299 (SCA). Olitziki Property Holdings v The State Tender Board 2001 (3) SA 1247 (SCA).

<sup>281</sup>Croome, 284.

<sup>282</sup>Ibid. Modibane v SARS [2011] ZAGPJHC 152.

### (e) Declaratory orders

The Constitution confers powers to courts to grant declaratory orders.<sup>283</sup> The CC granted declaratory orders in *Minister of Health & Others v Treatment Action Campaign & Others*.<sup>284</sup>

The High Court Act confers High Courts with the power to grant declaratory relief.<sup>285</sup>

### (f) Interdicts

Interdicts may be divided into two main categories, namely prohibitory or mandatory interdicts<sup>286</sup>. The court may either grant an interim interdict or a final interdict. The court in *Setlogelo v Setlogelo*<sup>287</sup> stipulated requirements that must be satisfied by an applicant seeking an interdict.

### (g) The Public Protector & The Human Rights Commission

Croome<sup>288</sup> further contends that the following institutions provide remedies to aggrieved taxpayers:

- The SMO (Service Monitoring Office);
- The Public Protector<sup>289</sup>;
- The Human Rights Commission<sup>290</sup>

While a detailed discussion of the above institutions lies beyond the scope of this research, Croome postulates the view that the popularity of these remedial institutions is overshadowed by the fact that:

*“taxpayers are loath to lodge complaints against the Commissioner for fear of victimisation”<sup>291</sup>.*

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<sup>283</sup>S 38 of the Constitution.

<sup>284</sup>2002 (5) SA 721 (CC), paras 129 and 135.

<sup>285</sup>S 19(1) (a) (iii) of the High Court Act 59 of 1959. *Langa CJ & Others v Hlophe* 2009 (4) SA 382 (SCA), para 28. *Ex Parte Nell* 1963 (1) SA 754 (A), 759. *Reinecke v Incorporated General Insurance Limited* 1974 (2) SA 84 (A), 93.

Du Plessis, 120-1.

<sup>286</sup>Du Plessis, 121-3.

<sup>287</sup>1914 AD 221. *Webster v Mitchell* 1948 (1) SA 1186 (W). *Janse van Rensburg NO & Another v Min. of Trade & Industry & Another NNO* 2001 (1) SA 29 (CC), para 32. *National Treasury & Others v Opposition to Urban Tolling Alliance & Others* 2012 (6) SA 223 (CC), paras 41 & 45.

<sup>288</sup>Croome, 309 -17.

<sup>289</sup>S182 (1) (a), (b) & (c) and (2);( 4) & (5) of the Constitution and s 6 (1) to (9) of the Public Protector Act 23 of 1994.

<sup>290</sup>S184 (1) to (4) of the Constitution.

<sup>291</sup>Croome, 310.

It is submitted that taxpayers' awareness of the services that the Public Protector and the Human Rights Commission offer should be heightened by SARS through training, print and electronic media and pamphleteering. Croome correctly submits that:

*"[T]he Human Rights Commission, like the Public Protector, does not have the specialized skills required to deal with taxpayers' complaints and cannot offer them an effective remedy for alleged breaches of their rights... The inevitable conclusion is that the South African taxpayers do not currently have a cost – effective method of dealing with difficulties with the Commissioner."*<sup>292</sup>

### 3.3 PAJA REMEDIES

#### 3.3.1 Just administrative action

The right to just administrative action is one of the three inextricably linked procedural rights that the Constitution confers on taxpayers. To be just, administrative action must be *lawful, reasonable and procedurally fair*<sup>293</sup>. This requirement begs the question – what is the effect and status of the common law on administrative action? The court in *Pharmaceutical* held that the Constitution subsumes the common law principles of administrative law.<sup>294</sup> For administrative action to be reasonable, Hoexter submits that *it must be rational and proportional*.<sup>295</sup> Croome contends that:

*"many decisions taken by the Commissioner constitute administrative action and are thus subject to the right to administrative justice"*<sup>296</sup>.

It is Croome's further contention that for a taxpayer to succeed with a just administrative action - claim, he must show that:

*"the Commissioner's action constitutes 'administrative action' and is thus reviewable by the court"*<sup>297</sup>.

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<sup>292</sup>Ibid, 312.

<sup>293</sup>S33 (1) & (2) of the Constitution. S 3(1) & (2) of PAJA, purpose and preamble thereto as well.

<sup>294</sup>2000 (2) SA 674 (CC), para 46. Currie, I. & Klaaren, J. para 1, 24 & 25.

<sup>295</sup>Hoexter, C. Administrative Law in South Africa. 2 ed. Claremont : Juta, (2007), 307 & 309-10

<sup>296</sup>Croome, B. Taxpayers' Rights in South Africa. Claremont: Juta, (2010) 206 (Croome).

<sup>297</sup>Ibid, 204-5. President of the Republic of SA v SARFU 2000 (1) SA 1 (CC), para 141. Greys Marine Hout Bay (Pty) Ltd & Others v Minister of Public Works & Others 2004 (12) BCLR 1298 (C), 1308. Gamevest (Pty) Ltd v Regional Land Claims Commissioner, Northern Province and Mpumalanga & Others 2003 (1) SA 373 (SCA), 385.



PAJA's definition of 'administrative action' encompasses a refusal by the Commissioner to take a decision<sup>298</sup>.

### 3.3.2 Judicial review of administrative action

The main remedy under PAJA is the judicial review of administrative action<sup>299</sup>. The court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others (Bato)* stated that:

*"[W]hen administrative action is taken on review; it has to be reviewed on the grounds provided for in PAJA and not on the narrower grounds provided for under the common-law."*<sup>300</sup>

### 3.3.3 Exhaustion of internal remedies

Notwithstanding the peremptory provisions of PAJA regarding the exhaustion of internal remedies before the commencement of judicial review proceedings,<sup>301</sup> the court in *Goldfields Ltd v Connellan NO & Others* held that:

*"[T]here would be no purpose in using internal remedies available since the regulator showed bias against Gold Fields."*<sup>302</sup>

Stringent criticisms have been levelled at s 7(2) of PAJA. Prime amongst such critics is Plasket who retorted as follows:

*"It places a particularly onerous burden on those who wish to review the lawfulness, reasonableness or procedural fairness of administrative action first to exhaust internal remedies and curtail the power of the courts to review administrative action when internal remedies have not been exhausted. In this note it will be submitted that s7 (2) of the Act is an unconstitutional infringement of the right to access to court entrenched in s 34 of the Constitution. Even if it is unconstitutional, it will be submitted that it is ill-conceived, unfair, and impractical and ought to be reconsidered by the legislature."*<sup>303</sup>

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<sup>298</sup>S1 of PAJA.

<sup>299</sup>Croome & Olivier, 278. SS 6 & 8 of PAJA.

<sup>300</sup>2004 (4) SA 490 (CC), paras 22 & 25. Williams, R.C. SARS & fair administrative action: Quo Vadis? (31 January 2013), Tax Talk 24 -25. Investigations Directorate : Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO & Another [2000] ZACC 12. Corpcllo 2290 CC t/a U-Care v Registrar of Banks (755/2011) [2012] ZASCA 156. Western Cape High Court v City of Cape Town 2011 (6) SA 88 (WCC). City of Cape Town v Bouley Properties (Pty) Ltd [2010] ZAWCHC 650.

<sup>301</sup>S7 (2) of PAJA.

<sup>302</sup>[2005] 3 All SA 142 (W), 169.

<sup>303</sup>Plasket, C. 'The Exhaustion of Internal Remedies and S 7(2) of PAJA 3 of 2000' (2002) 119 SALJ 50.

Relying on *Bato*,<sup>304</sup> Croome concludes that:

*“[A] court may review a case before internal remedies are exhausted.”*<sup>305</sup>

It is submitted that while the aforementioned criticisms are valid and persuasive - s 7(2) provisions of PAJA remain in force and effect. O’Regan J in *Bato* cautioned against the possibility of duplication or contradictory relief<sup>306</sup> in the event where a litigant requests a court to review a decision before the exhaustion of available internal remedies.

It is further contended that section 7(2) (c) of PAJA provides for circumstances under which the exhaustion of available internal remedies - requirement may be circumvented.

### **3.3.4 Grounds of review**

The grounds for the review of administrative action are explicitly stated in PAJA<sup>307</sup>

### **3.3.5 Formalities**

For a taxpayer to rely on PAJA remedies he must show that:

- SARS falls within the institutions referred to in s 1;
- the Commissioner has actually made a decision or failed to do so;
- the Commissioner made a decision under an ‘empowering provision’ defined in s 1;
- the Commissioner’s decision constitutes ‘administrative action’ as envisaged in s 33 of the Constitution;
- the Commissioner’s action or inaction falls within the ambit of s 1;
- the Commissioner’s decision adversely affects his rights<sup>308</sup>

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<sup>304</sup>2004 (4) SA 490 (CC), para 17.

<sup>305</sup>Croome, 237.

<sup>306</sup>*Bato*, para 17.

<sup>307</sup>S6 (2) (a) – (i) and S6 (3) (a) & (b) of PAJA. Croome, 232-6. Currie & Klaaren, 153 -174.

*CSARS v Hawker Aviation Services Partnership & Others* 2005 (5) SA 238 (T). *S v Roberts* 1999 (4) SA 915 (SCA) paras 32 & 34. *BRT Industries South Africa (Pty) Ltd v Metal & Allied Workers’ Union* 1992 (3) SA 673 (A). *Scenematic Fourteen (Pty) Ltd v Min. of Environmental Affairs & Tourism and Another* 2004 (4) BCLR 430 (C), 443. *Minister of Health & Another NO v New Clicks SA (Pty) Ltd & Others* 2006 (2) SA 311 (CC).

<sup>308</sup>Croome, 209-11. Croome & Olivier, 27 -9.

### 3.3.6 Reasons for administrative action

A taxpayer whose rights have been adversely and materially affected by administrative action is, upon request, entitled to being furnished with written reasons for such decision.<sup>309</sup>

The court in *Swissborough Diamond (Pty) Ltd & Others v Govt. of RSA & Others*<sup>310</sup> made comments that constitute a useful guide to the adequacy of reasons to be provided.

## 4. OTHER REMEDIES

### (a) Doctrine of legitimate expectation

In the final analysis, Croome contends that the doctrine of legitimate expectation espoused by the court in *Administrator, Transvaal & Others v Traub & Others*<sup>311</sup> is applicable in the tax arena in the following terms:

*“it allows an extension and applicability of the rules of natural justice and would under PAJA form part of an evaluation whether the ‘administrative action’ is procedurally fair.”*<sup>312</sup>

### (b) SARS Service Charter (The Charter)

On 19 December 2005 SARS released the Service Charter. According to Croome, the Charter did not create new rights nor did it indicate how taxpayers might enforce their rights<sup>313</sup>.

Croome contends further that:

*“the rationale behind the release of the Charter was to heighten taxpayers’ awareness of their rights and to improve the culture of service within SARS in its interaction with taxpayers”*<sup>314</sup>.

The Charter does not create any rights enforceable by a taxpayer in a court of law. However, it appears that allegations of breaches of service standards laid down in the Charter are, subject to a complaint by an aggrieved taxpayer having been registered with SARS, investigated by the Service Monitoring Office.

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<sup>309</sup>S5 of PAJA. Rule 3(1) (a) promulgated under s 107A of the ITA.

<sup>310</sup>1999 (2) SA 279 (T), 324. *Min. of Environmental Affairs & Tourism & Others v Phambili Fisheries (Pty) Ltd & Another* 2003 (6) SA 407 (SCA), paras 40-41.

<sup>311</sup>1989 (4) SA 731 (A).

<sup>312</sup>Croome, 249. Schweitzer, AG. ‘Aspects of the Administrative Law Relationship between the Taxpayer and the Commissioner for Inland Revenue.’ (1991) LLM thesis, UCT. para 3.3, 52.

<sup>313</sup>Croome, 286.

<sup>314</sup>*Ibid.* In an interview with a senior SARS official at the PMB SARS Office on 4 February 2015, advice was given to the effect that the 2005 SARS Service Charter has not been updated since its release.

## CHAPTER 4

### CONCLUSION

#### 4.1 CONCLUSION

It is instructive in this chapter to reflect on the problem questions raised at the outset of this study to determine whether or not they have been comprehensively addressed. The main objective of the study was to determine whether the rule strikes a balance between SARS's paramount duty and the taxpayers' constitutional rights.

The study reveals that the Constitution confers rights and remedies to taxpayers vis-à-vis the rule. The study further reveals that the Constitution confers wide powers to the Commissioner pursuant to the latter's tax collection and administration mandate on which the sustenance of the South African government, being a constitutional state, depends.

There is overwhelming evidence as the study reveals, that the "pay now, argue later" rule does not vitiate taxpayers' rights. That the "pay now, argue later" rule obtains in open and democratic societies and that the fiscal statutes from which it is derived have general application, is justification for the rule.

However, stringent but valid criticisms notably by Keulder, Williams, Rood and Olivier have been levelled against Metcash and by extension, to the "pay now, argue later" rule.

The study also reveals that the prospects of success for a taxpayer that challenges the constitutionality of a fiscal statute primarily within the context of the rule are akin to searching for a needle in a haystack.

Taxpayers whose rights have been materially and adversely affected by the actions or omissions of the Commissioner are at liberty to institute an action against SARS based on breach of the rules of administrative justice. It is submitted that their prospects of success in respect of such action are, depending on the facts, relatively good.

Entrenched in the Constitution and P AJA are provisions that curtail the Commissioner's powers to administer and collect taxes. However, where it is in the interest of the public and in addition thereto, SARS's tax administration and collection mandate would be compromised if the rules of natural justice are observed, the court sanctions SARS' actions notwithstanding the prejudice suffered by a taxpayer.

The primary purpose of PAJA is not only to ensure fair administrative action but also to control the exercise of public power by organs of state.

In the final analysis, the study further reveals that the rule does not - albeit that a concerted effort was made through legislative intervention - strike a balance between SARS's paramount duty and the taxpayers' constitutional rights.

The one and only effective remedy at the disposal of taxpayers is the costly and time-consuming litigation route – which many destitute taxpayers cannot afford.

Given the fact that Metcash was decided within the VAT Act context and not within the context of the ITA, it is submitted that there is room for further research and speculation on what the CC's' decision would be when called upon to make a determination on the rule within the income tax context.

Sadly, until such decision is made, taxpayers have to come to terms with reality - that being, the “pay now, argue later rule” is here to stay and seemingly for a long period!

#### **4.2 RECOMMENDATIONS**

It is recommended that a more cost-effective remedy for taxpayers such as the establishment of the Hugh Corder - type of administrative tribunals with restricted rights of appeal to the courts or the introduction and adoption of the Australian ‘merits review’ system which according to Croome would enhance the quality of administrative decisions made in South Africa – should be considered.

It is recommended that SARS Service Charter should be regularly reviewed and where necessary updated to take account of developments in the tax arena.

The applicable Charter was introduced by SARS in 2005. It is submitted that it is dated and should be reviewed as a matter of urgency to bring it in line with the developments in the tax arena.

The Public Protector and the Human Rights Commission and not SARS, should play a pivotal role of heightening taxpayers' awareness to the fiscal related services that such institutions render to the public through pamphleteering, print and electronic media and also by providing training to staff in order to equip them with the skills and expertise necessary to address tax complaints.

Fear of retribution by SARS is the underlying reason behind taxpayers' reluctance to complain about SARS. It is recommended that mechanisms should be devised on the basis of which taxpayers can lodge complaints against SARS on a confidential basis. A criteria that such complaints must satisfy should be set and be published to circumvent the flooding of the system with frivolous and vexatious complaints. Consequently, the only complaints to be entertained should be those that meet the criteria.

The creation and enhancement of pressure groups such as taxpayers' association (where they do not exist) which play a significant role in improving the protection of taxpayers' rights, is recommended.

It is further recommended that the SMO should be detached from SARS in order to enhance its effectiveness in relation to addressing taxpayers' substandard performance-related complaints levelled against SARS.

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## **G**

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## LIST OF ACRONYMS AND ABBREVIATIONS

A / (AD)	: Appellate Division
ALR	: Australian Law Reports
CCMA	: Commission for Conciliation Mediation and Arbitration
CIR	: Commissioner for Inland Revenue
CSARS	: Commissioner for the South African Revenue Service
CC	: Constitutional Court
CEA	: Customs and Excise Act
ITA	: Income Tax Act
ITC	: Income Tax Case
LAC	: Labour Appeal Court
PAIA	: Promotion of Access to Information Act
PAJA	: Promotion of Administrative Justice Act
PELJ	: Potchefstroom Electronic Law Journal
SALJ	: South African Law Journal
SARS	: South African Revenue Service
SARS Act	: South African Revenue Service Act
SATC	: South Africa: Tax Court
SCA	: Supreme Court of Appeal
SIR	: Secretary for the Inland Revenue
TAA	: Tax Administration Act
TALAA	: Tax Administration Laws Amendment Act
THRHR	: Tydskrif vir die Hedendaagse Romeins – Hollandse Reg
TSAR	: Tydskrif vir die Suid Afrikaanse Reg
VAT	: Value Added Tax
VAT Act	: Value Added Tax Act