

A CRITICAL ANALYSIS OF THE PERSONAL LIABILITY OF REPRESENTATIVE TAXPAYER'S.

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“This project is an original piece of work which is made available for photocopying and for inter-library loan”.

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This piece of work is dedicated to my parents and husband. You have been the wind beneath my wings and you have provided me with nurturing, care, support and love. Thank you for listening even when I did not have the strength to complain anymore. I owe everything I am today to you.

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CHAPTER 1: INTRODUCTION.

At present the vast majority of individuals who can be described as ‘representative taxpayers’ in terms of section 153 of the Tax Administration Act 28 of 2011 (hereafter the TAA) are going about their day to day activities, blissfully unaware of the extent to which they are exposed to the risk of being held personally liable by the Commissioner of the South African Revenue Services (the Commissioner).

Lurking within the confines of the TAA is section 155 which confers the potential for personal liability and may have draconian¹ consequences for representative taxpayers who are unaware of the provisions impact. Historically the TAA came into operation on 1 October 2012 and consequently there is limited research on the topic. However this concept of personal liability of representative taxpayers has its origins in the section 1 of the Income Tax Act 58 of 1962 (hereafter the Income Tax Act), sections 48(6) and 48(9) of the Value-Added Tax Act 89 of 1991 (hereafter the VAT Act) and Paragraphs 16(2B) and 16(2C) of the Fourth Schedule to the Income Tax Act.

At the heart of personal liability in tax cases is section 155 of the TAA which essentially states that a representative taxpayer can be held liable in his or her personal capacity for outstanding taxes owed by the taxpayer. The section reads as follows:

‘Personal liability of representative taxpayer. — A representative taxpayer is personally liable for tax payable in the representative taxpayer’s representative capacity, if, while it remains unpaid—

- a) the representative taxpayer alienates, charges or disposes of amounts in respect of which the tax is chargeable; or*

- b) the representative taxpayer disposes of or parts with funds or moneys, which are in the representative taxpayer’s possession or come to the representative*

¹ A Van Staden ‘Draconian understatement penalties and potential personal liability for liquidation and business rescue practitioners’ available at <http://www.corprecover.co.za/wp/?p=58>, accessed on 15 April 2015.

taxpayer after the tax is payable, if the tax could legally have been paid from or out of the funds or moneys.'

At present section 155 of the TAA empowers the Commissioner in certain circumstances to hold a representative taxpayer personally liable for the taxpayer's outstanding tax debt. In terms of section 184 of the TAA the Commissioner must first request reasons from the representative taxpayer as to why they should not be held personally liable in terms of section 155 of the TAA. Thereafter there is no further requirement that the Commissioner is obliged to adhere to before invoking section 155 of the TAA and imposing personal liability.

In this discussion I will submit that section 184 of the TAA as it reads at present is not sufficiently robust from a procedural fairness point of view as a preliminary step to invoke section 155 of the TAA. In light of the fact that section 155 of the TAA does not require judicial oversight before imputing personal liability there should be more stringent checks and balances imposed on the Commissioner under section 184 before the Commissioner can invoke section 155. It is therefore suggested that section 155 of the TAA must include a generic process or enquiry that the Commissioner must adhere to before requesting reasons in terms of section 184 of the TAA. The enquiry that was conducted in *Peretz, Leon Yehuda v Commissioner for South African Revenue Services*² is a good example of a suitable enquiry or process to be included in section 155 of the TAA.

Furthermore the definition of a representative taxpayer in section 153 of the TAA read with section 1 of the Income Tax Act is wide enough to include '*public officers, trustees, directors, members and shareholders of CC's and companies.*'³ In the case of employees tax

² *Peretz v Commissioner for South African Revenue Services* (WLD) unreported case no 92/1236 of 23 June 2006 at para 16 (In the *Peretz* case the commissioner had conducted an analysis of the bank statement versus the VAT returns and managed to sustain the contention that the CC had funds available in its bank account and the applicant who had been in control of the bank account had failed to make payment of taxes which were due.).

³ E Bell 'Beware: You can be held liable for a company's tax debts' available at <http://www.thesait.org.za/news/170921/Beware-You-can-be-held-labile-for-a-companys-tax-debts.htm>, accessed on 15 April 2015.

the following categories of persons may also qualify as representative taxpayers: ‘*liquidators, judicial managers, any manager, secretary or other responsible person.*’⁴

Many business owners are of the mistaken belief that they are protected by the separate legal personality of the business and they are unaware that they are in terms of the TAA and the Income Tax Act effectively representative taxpayer’s.⁵ Therefore they may not be in a position to seek legal protection against the risk of personal liability arising from their status as ‘representative taxpayers’.⁶

Considering the wide range of persons that may be exposed to the risk of being held personally liable, and the turbulent economic environment that South African businesses operate within, it is quite conceivable that many representative taxpayers may eventually face the wrath of section 155 of the TAA.

Given the relative infancy of this piece of legislation,⁷ the lack of research on this topic, there is a real need for a study that explains when and under which circumstances a representative taxpayer may be held personally liable for the taxpayer’s tax debt and the extent to which the representative taxpayer may be held liable in terms of section 155 of the TAA. Thus the purpose of this study is to analyse the meaning and effect of these provisions and to suggest improvements to section 155 of the TAA.

- In chapter 2 I will analyse the meaning, purpose and practice at present of section 155 of the TAA. The chapter will conclude with a recommendation regarding whether 155 of the TAA should be developed further.

⁴ SARS ‘Interpretation note no. 27 - Personal liability of employers, representative employers, shareholders and directors for outstanding employees’ tax’ available at <http://www.sars.gov.za/AllDocs/LegalDoclib/Notes/LAPD-IntR-IN-2012-27%20-%20Personal%20Liability%20Employers%20Representative%20Employers%20Shareholders%20Directors.pdf>, accessed on 15 April 2015.

⁵ Ibid note 3.

⁶ Ibid note 3.

⁷ The TAA commenced into South African law on 1 October 2012.

- In chapter 3 I will analyse and define the meaning of the individual words and phrases in section 155 of the TAA in the context of relevant case laws.
- In chapter 4 I will discuss and comment on the issue of whether section 155 of the TAA can still be applied when a business rescue or liquidation is in progress. The purpose of this chapter is to illustrate the application of section 155 of the TAA in the case of a business rescue or liquidation.
- In chapter 5 I will critically analyse whether section 155 of the TAA is analogous with the corporate law practice of piercing the corporate veil. This is necessary because section 155 of the TAA appears to bear the hallmarks of piercing the corporate veil in the sense that the Commissioner is looking behind the corporate veil and analysing the actions of the persons in control of the company or business. In concluding the chapter I will propose that certain styles of interpretation used in piercing the corporate veil may also be used when invoking section 155 of the TAA.
- In chapter 6 I will highlight and discuss other issues that arise when section 155 of the TAA is applied. In considering these issues we can determine how section 155 of the TAA may be further developed.
- In Chapter 7 I will propose a practical solution to facilitate the fair and equitable application of section 155 of the TAA.
- In Chapter 8 I will conclude my study by recommending a solution to the problem that section 155 of the TAA in its present form presents.

Ultimately the study will conclude with a determination on whether a generic process or enquiry is required to add more clarity to section 155 of the TAA and the basic tenets of an appropriate enquiry or process will be proposed which can be adhered to before personal liability can be invoked by the Commissioner in terms of section 155 of the TAA.

CHAPTER 2: THE DEVELOPMENT OF PERSONAL LIABILITY IN TAX CASES.

In this chapter I will discuss the present application of section 155 of the TAA in practice. This will then set the stage for a brief discussion on whether section 155 of the TAA requires further development, and if so how can this be achieved. In order to make this determination I will briefly consider a few basic theories of taxation in order to explain the principles that underlie a sound fiscal system. This will then set the foundation for a discussion on whether section 155 of the TAA is inconsistent with a sound system of taxation. This will ultimately lead to a consideration of whether section 155 of the TAA should be developed further in order to enhance the South African fiscal system.

2.1 The Practice at Present.

At the outset it is important to remember that the liability for the tax debt is considered to rest with the taxpayer first.⁸ All the avenues to collect the outstanding tax debt from the taxpayer must be exhausted first. This point is highlighted by a recent article on the South African Institute of Chartered Accountants (hereafter SAICA) website.⁹ It is of paramount importance that *'SARS point of departure must be that liability for the tax debt of a company, CC or trust rests with the legal entity in the first place.'*¹⁰ Despite this directive, section 155 of the TAA makes it possible for the Commissioner to hold the representative taxpayer personally liable for the taxpayer's tax debt under essentially two instances.¹¹ The first being as a result of negligence, in the sense that funds were available and payment was not made.¹² The second is criminal in nature, such as fraudulent activities like the dissipation of assets to avoid payment of tax.¹³

⁸ 'Tax Administration 2080. Personal liability for tax debts' available at https://www.saica.co.za/integritax/2012/2080._Personal_liability_for_tax_debts.htm, accessed on 05 April 2015 (The article dealt with the experience of a representative taxpayer whom the Commissioner had sought to hold personally liable for the taxpayer's tax debt in terms of section 155 of the TAA. The process had begun with a notice from the Commissioner seeking to hold the representative taxpayer personally liable for the debt of the taxpayer. The article states that certain words and phrases that are used in the letter 'will probably scare many an addressee'. The fear and frenzy that this letter may cause is sufficient basis to set any representative taxpayer scrambling to know more about the risk that they are exposed to.).

⁹ Ibid.

¹⁰ Ibid.

¹¹ P Dachs and C Rogers 'Tax liability and recovery' available at <https://www.ensafrica.com/news/Tax-liability-and-recovery?Id=872&STitle=tax%20ENSight>, accessed on 05 April 2015.

¹² Ibid.

¹³ Ibid.

Once the Commissioner decides to hold the representative taxpayer personally liable he may issue a Notice of Assessment to the representative taxpayer.¹⁴ The issuance of the assessment to the representative taxpayer will trigger the right to object or appeal against the assessment in terms of section 104 of the TAA.¹⁵ Should the Commissioner omit to issue a Notice of Assessment in terms of section 96 of the TAA then there can be no liability.¹⁶ This appears to be the escape hatch for a representative taxpayer that faces the wrath of section 155 of the TAA.¹⁷ However the Commissioner can in certain circumstances raise an assessment at any time.¹⁸ In practice the process of attributing personal liability in terms of section 155 of the TAA proceeds as follows:

1. The Commissioner will issue a notice to the representative taxpayer requesting reasons as to why representative taxpayer should not be held personally liable for the taxpayer's tax debt.¹⁹ The Commissioner is required to afford the representative taxpayer with an opportunity to make these representations in terms of section 184 of the TAA.²⁰
2. It is assumed that, depending on the nature of the representations made the Commissioner will then decide whether to proceed to hold the representative personally liable in terms of section 155 of the TAA.
3. The Commissioner then has the prerogative to issue an assessment²¹ against the representative taxpayer in his personal capacity.

¹⁴ S Klue... et al 'Representative Taxpayers' in *Silke on Tax Administration* available on [http://classic.mylexisnexis.co.za/nxt/gateway.dll/7b/52iib/gejib/4eujb?f=templates\\$fn=default.htm\\$vid=mylnb:10.1048/enu](http://classic.mylexisnexis.co.za/nxt/gateway.dll/7b/52iib/gejib/4eujb?f=templates$fn=default.htm$vid=mylnb:10.1048/enu), accessed on 06 April 2015 (This assessment would be issued in terms of section 96 of the TAA and obviously relate to the taxes owed by the taxpayer.).

¹⁵ Section 104 of the TAA provides that the taxpayer who is aggrieved by an assessment made in respect of the taxpayer may object to the assessment. Since an assessment has now been issued to the representative taxpayer in his personal capacity he can now object to the assessment if he so wishes.

¹⁶ L Olivier 'Constitutional review of SARS's power to collect outstanding income tax' 2010 *De Jure* available on [http://classic.mylexisnexis.co.za/nxt/gateway.dll/214da/2gbfb/o8qob/nehsb/sehsb.pdf?f=templates\\$fn=default.htm\\$vid=mylnb:10.1048/enu](http://classic.mylexisnexis.co.za/nxt/gateway.dll/214da/2gbfb/o8qob/nehsb/sehsb.pdf?f=templates$fn=default.htm$vid=mylnb:10.1048/enu), accessed on 06 April 2015.

¹⁷ Ibid note 11 (Dachs accentuates the point that in terms of section 96 of the TAA the Commissioner must issue a Notice of Assessment before imputing liability and should the Commissioner fail to do so then there can be no liability.).

¹⁸ In terms of section 99(2) of the TAA there is no moratorium against the Commissioner raising an assessment in cases where there is fraud, misrepresentation or non-disclosure of material facts.

¹⁹ Ibid note 11.

²⁰ Section 184 of the TAA.

²¹ The assessment will be issued in terms of section 96 of the TAA.

4. Once the representative has been held personally liable the Commissioner may then initiate steps to recover the tax debt from the representative taxpayer in terms of section 184 of the TAA.

It is clear from the above process that the TAA does not regulate a process that the Commissioner is obliged to administer before requesting the representative to make representations. Furthermore section 155 of the TAA does not mention that judicial sanction is a requirement to confer personal liability. These points raise the question of whether section 155 of the TAA needs further development.

2.2 The Need for Development.

When designing tax policy the legislative drafters are faced with a difficult and intricate process as tax law affects a plethora of individual needs and wants.²² Taxation has been a part of South African society since approximately 1600 and is regarded as ‘*compulsory payments*’ made to the government for general expenditure and benefit to society.²³ According to Silke,²⁴ tax laws are the ‘*financial measures employed by the government to influence or intervene in the economy*’. The principles underpinning the design of taxation policies are considered to have been influenced by Adam Smith²⁵ who was of the view that a good fiscal system should contain the following principles:²⁶

- *‘The Equity Principle: Tax should be imposed according to one’s ability or capacity.*
- *The Certainty Principle: The timing, amount and manner of tax payments should be certain.*
- *The Convenience Principle: Taxes should be imposed in a manner or at a time that is convenient for taxpayers.*
- *The Economic Efficiency Principle: Tax should be designed in a manner not unduly influencing economic decision-making.*

²² E Bronkhorst & M Stiglingh Silke: *South African Income Tax (2015)* at page 1177.

²³ Ibid at page 1178.

²⁴ Ibid.

²⁵ A Smith *The wealth of nations* (1947) Vol 2: 307.

²⁶ Ibid note 22 at page 1187.

- *The Administrative Efficiency Principle: The tax system should be designed in such a manner as to not impose an unreasonable administrative burden on the taxpayer and the Revenue Authorities.*
- *The Flexibility Principle: A good tax system should be designed in such a manner that it can easily adjust in response to changing economic circumstances.*²⁷

The aforementioned principles are commonly considered to be the hallmarks of a good fiscal system.²⁸ Professor Haupt²⁹ is of the view that these principles are still relevant today. As such I am of the view that any determination as to whether section 155 of the TAA is sound and defensible from a tax law perspective will have to consider whether section 155 of the TAA meets the aforementioned requirements. The most glaring principle in conflict with section 155 of the TAA appears to be the equity principle, which according to Silke³⁰ is rooted in the principle of fairness. The equity principle consists of vertical equity and horizontal equity.³¹ According to the principle of vertical equity a person with a greater ‘*economic capacity*’ should pay more taxes than a person with a lesser capacity. In sync with this principle is the horizontal principle which in effect provides that two persons of equal ‘*economic capacity*’ should pay the same amount of tax. When considering the effect of section 155 of the TAA it appears that the legislature may have ignored this principle in the sense that a representative taxpayer who is held personally liable for a taxpayer’s tax debt may be faced with paying more taxes than his economic capacity.

On the face of it there appears very little flexibility and equity enshrined in section 155 of the TAA and it is not consistent with Adam Smith’s principle. Clegg³² is of the view that where a person is liable in terms of the tax provisions then the necessary taxation must be imposed despite that fact that Adam Smith’s ideals might not being adhered to.³³ I do not agree with this line of thinking and believe that Adam Smith’s theory should prevail and that

²⁷ Ibid.

²⁸ Ibid.

²⁹ P Haupt *Notes on South African Income Tax* 34 ed (2015) 2.

³⁰ Ibid note 26.

³¹ P Black, E Calitz & T Steenkamp *Public Economics* (2011) 10.

³² D Clegg ‘Income Tax in South Africa’ available at <http://www.mylexisnexis.co.za/Index.aspx>, accessed on 01 December 2015.

³³ Ibid.

the legislature should have given consideration to the implication of these principles when drafting section 155 of the TAA. In order to determine whether there is indeed a violation of Adam Smith's equity principle it is necessary to examine more closely the legislature's intention when drafting this section 155 of the TAA.

The drafting of the TAA began in 2005 and the objective of Act was to provide simplicity and codify the various separate pieces of taxation legislation into one piece of legislation.³⁴ According to the Draft Explanatory Memorandum on the Draft Tax Administration Bill³⁵ it was envisaged that *'the potential personal liability of parties involved in the financial affairs of a company should serve as encouragement to comply with the tax laws by ensuring correct and timely payment of tax.'* This indicates the legislature's intention of fostering a climate of compliance, and may well be the reason why the definition of representative taxpayers was drafted so as to have broad application. The Response Document to the Standing Committee on Finance³⁶ requested that the TAA should include *'a process for a responsible third party to be informed of any impending liabilities to ensure that prior notice is provided.'* However there is no clear process defined in the TAA that regulates this issue before liability is invoked. I am of the view that should an assessment be issued against the representative taxpayer in his personal capacity for the taxpayer's tax liability, then the objection and appeal process³⁷ may be used settle such issues. In chapter 9 of the TAA we find section 104 which empowers a taxpayer to lodge an objection where he or she is aggrieved by an assessment. Furthermore section 107 of the TAA allows the taxpayer to appeal against a decision made by the Commissioner on an objection.

The objection and appeal process appears to regulate the process once an assessment is issued against the representative taxpayer, invoking these provisions would involve extensive time and effort from the representative taxpayer. The *'pay now and argue later'* principle³⁸ upon which the Commissioner administers its dispute resolution processes will no

³⁴ 'History of the Tax Administration Act, 2011' available at <http://www.sars.gov.za/Legal/TaxAdmin/Pages/History.aspx>, accessed on 29 June 2015.

³⁵ Draft Explanatory Memorandum on the Draft Tax Administration Bill, 2009.

³⁶ Response Document on the Tax Administration Bill 2011 to the Standing Committee on Finance.

³⁷ The objection and appeal process is contained in Chapter 9 of the TAA.

³⁸ South African Revenue Service *Dispute Resolution Guide: Guide on the Rules Promulgated in terms of section 103 of the Tax Administration Act, 2011* 28 October 2014.

doubt burden the representative taxpayer. There is some relief in the sense that the representative taxpayer will have the opportunity to apply for the suspension of payment in terms of section 164 of the TAA. It however seems quite daunting that the representative taxpayer will only enjoy the power of the objection and appeal process once an assessment has been raised and the issue of tax collection becomes relevant. Significantly where there is a serious risk that payment will not be made the Commissioner may impose a 24 hour period for payment as stated in the case of *Singh v CSARS*.³⁹ In such instances the burden on a representative taxpayer and their ability to challenge the assessment is especially onerous.

Therefore I am of the view that once an assessment has been raised against a representative taxpayer in his or her personal capacity for taxes owed by a taxpayer then, a request for reasons for the assessment should be made. In the recently decided SCA case of *CSARS v Pretoria East Motors (Pty) Ltd*⁴⁰ it was decided that the Commissioner must provide reasons for raising an assessment.⁴¹ In the SARS Dispute Resolution Guide⁴² it is stated that the duty to provide reasons is limited due to the administrative burden it places on the Commissioner and such reasons may only be requested with regard to an '*adverse decision or assessment both under rule 6 and section 5 of PAJA*'. The reference in this quote to rule 6 is in regard to the rules that were promulgated under section 103 of the TAA. The reference to section 5 of PAJA refers to the Promotion of Administrative Justice Act 3 of 2000. The guide also cautions that the taxpayer can request reasons via two avenues, but once adequate reasons have been provided the taxpayer cannot request reasons again.

It is thus apparent that in order to avoid undue hardship for a representative taxpayer there should be a process in place, with stringent checks and balances imposed by the TAA on the Commissioner, obliging the Commissioner to determine personal liability. The Commissioner should be compelled to adhere to this process before requesting reasons from the representative taxpayer in terms of section 184 of the TAA as to why they should not be held liable in terms of section 155 of the TAA.

³⁹ *Singh v Commissioner, South African Revenue Service* 2003 4 SA 520 (SCA) para 21.

⁴⁰ *CSARS v Pretoria East Motors (Pty) Ltd* 2014 (5) SA 231 (SCA).

⁴¹ *Ibid* at para 11.

⁴² *Ibid* note 38.

CHAPTER 3: DECONSTRUCTING AND DEFINING THE ESSENTIAL ELEMENTS.

In this chapter I will deconstruct, define and critically analyse the essential elements and specific words, terms and phrases of section 155 of the TAA. The following words, terms and phrases have accordingly been selected from section 155 of the TAA: *'representative taxpayer'*, *'tax payable'*, *'alienates'*, *'charges'*, *'disposes'* and *'funds or moneys'*. At this juncture it is imperative to refer to the case of *SIR v Kirsch*⁴³ and note the words of Coetzee J which aptly summarises the correct approach to interpreting the language used in statutes: *'There is no particular mystique about "tax law". Ordinary legal concepts and terms are involved and the ordinary principles of interpretation of statutes fall to be applied. One must look fairly at the language used to determine the intention of the Legislature.'*⁴⁴

3.1 Representative Taxpayers.

3.1.1 Definition as per the TAA.

Section 153 of the TAA defines the term *'representative taxpayer'* and reads as follows:

- (1) *In this Act, a representative taxpayer means a person who is responsible for paying the tax liability of another person as an agent, other than as a withholding agent, and includes a person who—*
 - (a) *is a representative taxpayer in terms of the Income Tax Act;*
 - (b) *is a representative employer in terms of the Fourth Schedule to the Income Tax Act; or*
 - (c) *is a representative vendor in terms of section 46 of the Value-Added Tax Act.*
- (2) *Every person who becomes or ceases to be a representative taxpayer (except a public officer of a company) under a tax Act, must notify SARS accordingly in such form as the Commissioner may prescribe, within 21 business days after becoming or ceasing to be a representative taxpayer, as the case may be.*

⁴³ *Secretary for Inland Revenue v Kirsch* 1978 (3) SA 93 (T).

⁴⁴ *Ibid* at para 94D.

(3) *A taxpayer is not relieved from any liability, responsibility or duty imposed under a tax Act by reason of the fact that the taxpayer's representative—*

(a) failed to perform such responsibilities or duties; or

(b) is liable for the tax payable by the taxpayer.

3.1.2 *According to the Commissioner.*

On the SARS website under the Frequently Asked Questions (hereafter FAQ) page⁴⁵ the following persons are identified as representative taxpayers: *'Treasurer, Guardian, Curator, Public officer, Accountant, Tax Consultant, Attorney, Advocate, Legal Advisor, Auditor, Bookkeeper, Conveyancer in a case of Transfer Duty, Director, Employer, Executor/administrator, Fund Administrator, Insurance Broker, Relative/Parent, Secretary, Trustee, Etc.'*

3.1.3 *In the context of employees' tax.*

SARS Interpretation Note 27 ('IN 27') which deals with the issue of personal liability of employers for employees' tax,⁴⁶ provides a guide to what is envisaged by the term *'representative taxpayer'* in respect of employees' tax and not in respect of the TAA. In IN 27 the term representative taxpayer is expanded to include liquidators, judicial managers, any manager, secretary or other responsible person.⁴⁷

IN 27 focuses primarily on the issue of *'representative taxpayers'* in paragraph 5 (1) of the Fourth Schedule of the Income Tax Act, which provides that where an employer fails to withhold or deduct the full employees' tax then the employer himself shall be held liable for this amount in his personal capacity. It is within these premises that I submit that the term representative taxpayer in the employees' tax arena is defined widely in order to place

⁴⁵ 'FAQ' available at <http://www.sars.gov.za/FAQs/Pages/1186.aspx>, accessed on 26 June 2015.

⁴⁶ 'Interpretation note no. 27 - Personal liability of employers, representative employers, shareholders and directors for outstanding employees' tax' available at <http://www.sars.gov.za/AllDocs/LegalDoclib/Notes/LAPD-IntR-IN-2012-27%20-%20Personal%20Liability%20Employers%20Representative%20Employers%20Shareholders%20Directors.pdf>, accessed on 04 April 2015.

⁴⁷ Ibid.

emphasis and foster compliance with paragraph 5 (1) of the Fourth Schedule of the Income Tax Act, and thereby to penalise a failure by the employer to deduct employees tax and ultimately aid with the tax collection process. In this respect this wider understanding of the term '*representative taxpayer*' is not necessarily indicative of the position in terms of the TAA.

3.1.4 *In the context of VAT.*

The VAT Act has made specific provision for the definition of '*representative taxpayers*' in section 48. In terms of section 48 (6) of the VAT Act a representative taxpayer can be held personally liable. At first glance it appears that this section mirrors section 155 of the TAA. However it is striking that section 48(6) of the VAT Act specifically includes the various forms of taxes in existence by using the words '*any tax, additional tax, penalty or interest payable*'. The careful drafting of the section ensures that there can be no confusion with such interpretation. I submit that section 155 of the TAA may benefit from harmonisation with section 48(6) of the VAT Act to this extent.

In terms of section 28 of the VAT Act every vendor is obliged to submit a return to the Commissioner which is a declaration made by the vendor himself for the calculation of tax. It is noted that VAT is a self-assessment tax therefore the Commissioner is not obliged to issue a notice of assessment, however where an additional assessment is raised by the Commissioner then a notice of assessment must be issued before imputing liability.⁴⁸ In *Singh's* case additional assessments were raised by the Commissioner however there was no notice of assessment that was issued to the vendor.⁴⁹ The court was of the view that since the Commissioner had raised an assessment a liability could not arise until such time as a notice of assessment had been issued.⁵⁰

3.2 *The Meaning of the Word 'alienates'.*

⁴⁸ R de Swart 'Tax Administration' in *Silke: South African Income Tax (2015)* 1135.

⁴⁹ *Ibid* note 39 at para 12.

⁵⁰ *Ibid* note 39 at para 22.

The term alienate is not defined in the TAA therefore the definition in its plain and ordinary meaning as per the Oxford Advanced Learners Dictionary⁵¹ will be referred to. The word is defined in the legal sense as meaning *'Transfer ownership of (property rights) to another person or group'*.

3.3 The Meaning of the Word 'charges'.

I am of the view that on a literal interpretation the word charges appears to refer to a sale transaction where an amount of money is charged as price for goods or a service being sold. The Oxford Advanced Learner's Dictionary⁵² defines the word charges in its verb form as a *'demand (an amount) as a price for a service rendered or goods supplied'*.

3.4 The Meaning of the Word 'disposes'.

The word *'disposes'* had very eloquently been coined by Schreiner, J.A in *CIR v Estate Kohler*⁵³ as *'covering all acts in the law which affect property'*. It is therefore imagined that section 155 implies a disposition in order to avoid or delay the payment of taxes.

3.5 The Meaning of the Term 'tax payable'.

At the outset it is important to note that under Chapter 1 of the TAA in the definitions section the word tax is defined as *'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'*. This definition is clear and leaves little room for doubt. However the word payable adds the element of interpretation in the sense that one may ask the question when does a tax become payable. The obvious answer to this question is, rightly the date indicated on the notice of assessment. It appears that the answer becomes a bit more complex when the taxpayer is in liquidation proceedings or business rescue. Furthermore one also has to consider whether a tax is still payable by the representative taxpayer when a tax debt is

⁵¹ Oxford Advanced Learners Dictionary available at <http://www.oxforddictionaries.com/definition/english/alienate>, accessed on 26 June 2015.

⁵² Oxford Advanced Learner's Dictionary available at <http://www.oxforddictionaries.com/definition/english/charge>, accessed on 25 June 2015.

⁵³ *CIR v Estate Kohler* 18 SATC 354 at 373.

considered to irrecoverable at law in terms of section 198 of the TAA. These questions will be answered in chapter 4.

3.6 The Meaning of the Words 'funds or moneys'.

It is interesting to note that section 155 of the TAA does not refer to assets but merely to *'funds or moneys'*. On a literal interpretation this could mean that the section does not take into account assets which are received by the representative taxpayer and this could be a possible legal loophole for a representative taxpayer. The word 'funds' is defined in the Oxford Advanced Learner Dictionary⁵⁴ as a *'sum of money saved or made available for a particular purpose'* and 'moneys' is defined as a *'current medium of exchange in the form of coins and banknotes; coins and banknotes collectively'*.⁵⁵

3.7 The Meaning of the Word 'possession'.

The TAA does not define the word possession, however the Oxford Advanced Learner Dictionary⁵⁶ defines the word as meaning *'the state of having, owning, or controlling something'*.

3.8 Section 155(a) – 'the commission of an act'.

It appears that section 155(a) of the TAA is targeted at analysing the actions of the representative taxpayer and will be viewed with the emphasis being the commission of an act.

3.9 Section 155(b) – 'the omission of an act'.

Conversely it appears that section 155(b) is targeted at analysing the acts of the representative taxpayer after an omission to pay tax, thus an omission of an act. It appears that this section

⁵⁴ Oxford Advanced Learners Dictionary available at <http://www.oxforddictionaries.com/definition/english/fund>, accessed on 30 June 2015.

⁵⁵ Oxford Advanced Learners Dictionary available at <http://www.oxforddictionaries.com/definition/english/money>, accessed on 30 June 2015.

⁵⁶ Oxford Advanced Learners Dictionary available at <http://www.oxforddictionaries.com/definition/english/possession>, accessed on 29 June 2015.

actually requires that the representative taxpayer must have had the funds or moneys in his possession, or have had access to it, and omitted to pay the tax that was due and payable even though he was able to do so.

The words '*alienates*', '*charges*', '*disposes*' and '*possession*' are some of the essential terms that have not been defined in the TAA. It is therefore quite conceivable that in disputes that involve the application of section 155 of the TAA there could be conflicting interpretations of these terms. These differences in interpretation may lead to unnecessary litigation. It is therefore submitted that the legislature should seek to define these words so to avoid any uncertainty.

CHAPTER 4: PERSONAL LIABILITY OF REPRESENTATIVE TAXPAYERS IN BUSINESS RESCUES AND LIQUIDATIONS.

In this chapter I will draw on the findings from my research and critically analyse whether a representative taxpayer can be held liable for outstanding taxes whilst the company is in the liquidation or business rescue process. The purpose of this exercise is to illustrate the operation of section 155 of the TAA in a real world setting and in doing so, highlight the problems that could be encountered in its application.

In company law once a liquidation order has been granted by a court or '*a special resolution for the voluntary winding-up of a company has been registered*'⁵⁷ then in terms of section 359 of the Companies Act 61 of 1973 no legal proceedings may be instituted against the company. The approach is mirrored in the case of a business rescue which is regulated by section 133 of the Companies Act 71 of 2008 (hereafter Companies Act 2008) and essentially provides that no legal proceedings may be instituted against the company that has been placed in business rescue.⁵⁸ There are however a few exceptions to this legal bar on instituting legal proceedings, and one such exception pertains to the case of the representative taxpayer. Since the representative taxpayer is not in liquidation proceedings or in business rescue themselves, they are therefore exposed to the institution of potential legal proceedings.

⁵⁷ Section 359 of the Companies Act 61 of 1973.

⁵⁸ These exceptions are provided for in section 133 of the Companies Act 71 of 2008.

In terms of section 155 of the TAA it appears that there is no moratorium against personal liability being invoked against the representative taxpayer whilst the taxpayer is in the liquidation or business rescue process.⁵⁹ Therefore it appears that ‘SARS will get its pound of flesh’⁶⁰ and a representative taxpayer can be held liable for outstanding taxes whilst the taxpayer is in the liquidation or business rescue process.⁶¹

4.1 In Liquidations.

Professor Haupt⁶² is of the view that taxpayers are compelled to prove that an amount is not taxable in terms of section 102 of the TAA, however the Commissioner is only compelled to prove that an estimation penalty is correct and a section 95 estimated assessment is reasonable. One may well be deluded into thinking that the representative taxpayer will only bear the obligations of the taxpayer and none of the taxpayer’s rights. It is however a relief to note that in terms of section 181(4) of the TAA a person that would be liable for a company’s tax (in this case a representative taxpayer) is also able to exercise the rights that the company would have had available. It must however be noted with caution that this section only applies to companies that were voluntarily liquidated. With respect to companies that are involuntarily liquidated the law is not as clear, however the Public Officer who is considered to be the representative taxpayer of a company, will enjoy the same rights as the taxpayer in terms of section 248 of the TAA.

It thus appears that a representative taxpayer of an involuntarily liquidated company who is not the Public Officer of that company will only be subject to the taxpayer’s tax liabilities and not enjoy any rights of the taxpayer. This appears to be an inequity in the law and this point has not been discussed in any of the legislature’s explanatory memoranda. I therefore consider this issue to be an unintended consequence by operation of the law and could also be viewed as a lacuna in the law. As such any person affected by this anomaly will need to approach the courts for further relief.

⁵⁹ H Heymans ‘Are you the representative taxpayer at your business?’ available at <http://fspbusiness.co.za/articles/accounting/are-you-the-representative-taxpayer-at-your-business-heres-what-it-means-4905.html>, accessed on 15 April 2015.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² P Haupt *Notes on South African Income Tax* 34 ed (2015) 1012.

4.2 In Business Rescues.

The process of business rescue is contained in Chapter 6 of the Companies Act 2008 and the purpose of business rescue is to *'provide for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders.'*⁶³ In the case of *CSARS v Beginsel NO and Others*⁶⁴ the court had to decide on the ranking of the Commissioner as creditor in a business rescue. The court held that in liquidations the Commissioner would be ranked as a preferent creditor and a concurrent creditor in a business rescue.⁶⁵

It is thus apparent that despite the non-preferent nature of the Commissioner's claim in a business rescue, the Commissioner will pursue a tax debt where it finds that the tax payable is recoverable. According to section 133 of the Companies Act 2008 a company in business rescue is protected by a general moratorium with specific exceptions against any legal proceedings. The point of interest at this juncture is whether a representative taxpayer is also protected by such a moratorium. The simple answer to this question that there appears to be no relief for the representative taxpayer in the TAA until such time as the tax debt is considered to irrecoverable at law in terms of section 198 of the TAA, or is written off in terms of section 199 of the TAA.

Despite the fact that the taxpayer is in liquidation proceedings or business rescue the representative taxpayer may remain liable. This is due to the cautionary nature of section 198(2) of the TAA which provides that the tax debt will not be considered irrecoverable until such time as the Commissioner has pursued the assets of the person liable to tax which would include the representative taxpayer.

⁶³ Chapter 6 of the Companies Act 71 of 2008.

⁶⁴ *Commissioner for South African Revenue Service v Beginsel NO and Others* 75 SATC 87.

⁶⁵ *Ibid* at page 97.

It is interesting to note that it is possible that the business rescue practitioner and liquidator may well be argued to fall within the definition of a representative taxpayer. This is yet to be seen but it is certain that the Commissioner will get his pound of flesh.⁶⁶

CHAPTER 5: IS SECTION 155 OF THE TAA ANALOGOUS WITH PIERCING THE CORPORATE VEIL?

In this chapter I will compare the concept and theory of ‘piercing the corporate veil’ which is found in company law with the concept of attributing personal liability to a representative taxpayer. At the outset this will entail a brief outline of the principles of piercing the corporate veil which will then form the basis of raising important issues that can be applicable to section 155 of the TAA. This will be achieved by an analysis of the manner in which our courts view the concept of personal liability in tax cases. In order to do this I will critically analyse a series of cases such as: *Ochberg v Commissioner for Inland Revenue*,⁶⁷ *Dithaba Platinum(Pty) Ltd v Erconoraal Ltd & Another*⁶⁸ and *Cape Pacific Ltd v Lubner Controlling Investment(Pty) Ltd*.⁶⁹ The study will then determine whether the concept of piercing the corporate veil is analogous to the spirit, ambit and meaning of section 155 of the TAA. This is necessary because section 155 of the TAA appears to bear the hallmarks of piercing the corporate veil in the sense that we are looking behind the corporate veil and analysing the actions of the persons in control of the company or business. The result of this exercise will lead us to important considerations that could be applicable to section 155 of the TAA.

5.1 The Approach of South African Courts to the Concept of Separate Legal Personality.

The doctrine of piercing the corporate veil was confirmed⁷⁰ in the case of *Salomon v Salomon and Co Ltd*.⁷¹ It was noted in this case that a veil was placed over a company of which courts

⁶⁶ Ibid note 59.

⁶⁷ *Ochberg v Commissioner for Inland Revenue* 1931 AD 215.

⁶⁸ *Dithaba Platinum(Pty) Ltd v Erconoraal Ltd & Another* 1985(4) SA 615(T).

⁶⁹ *Cape Pacific Ltd v Lubner Controlling Investment(Pty) Ltd* 1993(2) SA 784(C).

⁷⁰ *Income Tax Case No 1611 59 SATC* 126.

⁷¹ *Salomon v Salomon and Co Ltd* 1897 AC 22.

could not see through.⁷² The court was of the view that courts can ‘*pull off the mask*’ and look behind the veil to analyse what really is going on and that a company is a puppet of those that control it.⁷³

In the case of *Cape Pacific*⁷⁴ the court was tasked with the request of piercing the corporate veil. It was pointed out that in the general course of things a company has a ‘*separate legal identity*’ and that ‘*corporate obligations is the responsibility of the company and not that of shareholders, directors or officers who own and/or act for the entity*’. The court described the concept of piercing the corporate veil as a process whereby the court disregards the separation between the company and those who control it. The court referred to the case of *Dithaba Platinum*⁷⁵ and pointed out that South African courts very rarely pierce the corporate veil. In the case of *ITC 1611*⁷⁶ the court pointed out that there is ‘*no self-standing doctrine of piercing the veil*’ and that the corporate veil cannot be lifted by a court only because it finds that it is just to do so. *ITC 1611* further states that the veil can only be lifted in very specific circumstances and ‘*only if that is legitimate by the application of established doctrines, such as the plus valet rule or the in fraudem legis rule (or in other cases of fraud or dishonesty) or, possibly, the actio pauliana*’.⁷⁷

Section 155 of the TAA requires a careful consideration of the factors and events that took place behind the corporate veil. In *Ochberg*’s⁷⁸ case the court had to apply a similar process of looking behind the corporate veil and analysing the facts that occurred. The judgment has been referred to by the Appellate Division in cases such as *Delfos v CIR*⁷⁹ and *CIR v People's Stores*⁸⁰ with approval.⁸¹ This case is a classic example of the difficulties and complexities that come into play when analysing the facts and events behind the corporate veil. A single set of facts could be interpreted in multiple dimensions which may result in

⁷² Ibid at page 30.

⁷³ Ibid at page 31.

⁷⁴ Ibid note 69 at page 785.

⁷⁵ Ibid note 68.

⁷⁶ Ibid note 70 at page 141.

⁷⁷ According to *ITC 1611* the in fraudem legis rule essentially consists of situations where the parties to an agreement attempt to hide a transaction that is prohibited or subject to tax and make it appear to be legal.

⁷⁸ *Ochberg v Commissioner for Inland Revenue* 1931 AD 215.

⁷⁹ *Delfos v Commissioner for Inland Revenue* 1933 AD 242.

⁸⁰ *Commissioner For Inland Revenue v People's Stores (Walvis Bay) (Pty) Ltd* [1990] 4 All SA 594 (AD).

⁸¹ RC Williams *Income Tax in South Africa - Cases and Materials* 3 ed (2009) 104.

differing legal conclusions. In this case five judges of the Appellate Division had four differing views on the application of the law to the facts when looking behind the corporate veil. They also did not agree on the weight or importance that should be apportioned to certain factors. In order to truly grasp the complexities at play when analysing the facts behind the corporate veil it will be prudent to briefly analyse *Ochberg's* case. This will help us understand importance of regulating a process before section 155 of the TAA can be invoked. In what will follow I have highlighted the essential elements of the case and the views highlighted by the four of the five judges that had handed down judgment in this case. This is as Curlewis JA concurred with Roos JA's judgment and did not give separate reasons for so doing.

A brief description of the facts of the case is as follows: at the commencement of the year of assessment, the Airton Timber Company Limited had a nominal capital of £5,107. The Appellant (Mr. Isaac Ochberg) held £5,107 worth of £1 shares and six others held one £1 share each. The Appellant received from the Airton Timber Company Ltd during the year of assessment £4,893 worth of £1 shares for services rendered such as the financing of the Company by the Appellants, goodwill and the cession of a lease. The Appellant was of the view that since he had already been in full control of the company he did not receive value that he did not already have and therefore the value of the shares issued to him should not be subject to tax. The court was essentially faced with the task of looking behind the corporate veil and analysing the substance of the transaction. As the five judges of the court had four different views on the case each judgment has been highlighted to show the differences in interpretation.

In Roos JA's majority judgment which Curlewis JA concurred with, he looked behind the corporate veil to determine the true nature of the transaction. Roos JA considered the substance of the transaction and the taxpayer's intention at the time of entering into the transaction. I am of the view that Roos JA maintained a common sense and realistic approach to analysing the substance of the transaction. This is evident when Roos JA considered a scenario where another person had taken the taxpayers place in the transaction and received the shares. The Judge pointed out that if the shares had been issued to a person other than the taxpayer then that person would have been liable for tax on the value of those shares. He also

highlighted that if this thought process is correct then it does not make sense that the taxpayer should avoid liability for tax on the receipt of the shares. Furthermore the taxpayer's shareholding would have been reduced if the shares had been issued to another person. Therefore the value of the shares being issued to the taxpayer was that his shareholding did not decrease. This common sense approach of analysing the facts had led the court to making the correct decision as confirmed in the *Delfos*⁸² case with approval.⁸³

Although De Villiers CJ concurred with Roos JA he did so for the following reasons: De Villiers CJ could not understand how, what is income if received by 'A' for services rendered can be said to have changed its nature into capital when received by 'B' equally for services rendered. The fact that the Appellant incurred losses by the acquisition of the shares does not change or convert what is received by an outsider as income into capital when received by him. De Villiers CJ was of the view that the court must look at the substance of a transaction and not whether or not the taxpayer has benefited thereby.

In Statford, JA's dissenting judgment he agreed that the Appellant had not benefited by the issue of shares to him. This Judge was of the view that the substance of the whole transaction must be looked at and not the methods used to carry it out. He accepted the relative and not the abstract measure of value and thus the Appellant's receipt of the new shares did not alter his share in the assets. He looked at the simple analogy that '*What is taken in the right hand is simultaneously and automatically surrendered by the left*'. This led him to find that the accrual was of a capital nature since it was only obtained by a corresponding diminution of capital previously possessed. Statford JA's judgment was focused on looking at the transaction in its entirety and its actual effect on the taxpayer.

In Wessels J.A's dissenting Judgment he agreed with Statford JA's reasons and conclusion. However he found that juggling of shares of a private company is a favourite method of tax evasion. On these bases he emphatically stated that we must not merely look at the form of the transaction but at its real nature. We must therefore take all the facts into

⁸² *Delfos v Commissioner for Inland Revenue* 1933 AD 242.

⁸³ *Ibid.*

consideration and judge from all the facts whether the amount is gross income. If the Appellant's estate has not been increased then how could it be said to have received any amount or accrued anything to his estate. The legislature never intended that the State should take away a portion of a man's capital where he seems to have received an amount of money but when in fact he has received no money and no money's value. Although Wessels JA's judgment was a dissenting judgment I agree with his rationale on the basis that he was able to provide a judgment which was reflective of the real world. Wessels JA's judgment provides a good example of looking behind the corporate veil with a pragmatic approach.

This exercise of highlighting the four different judgments shows us that the process of analysing the facts behind the corporate veil is complex and can have multiple facets. In *Ochberg's* case four of the five judges handed down different reasons for their judgments. With the exception of Roos JA and Curlewis JA, who had agreed with each other on all aspects, the remaining three judges had differing views on how the transaction should be viewed. This is alarming in the sense that we are awakened to the subjective element of analysing facts behind the corporate veil. Considering the fact that section 155 of the TAA may be invoked without judicial oversight there should be more stringent checks and balances to be put into place before section 155 of the TAA may be invoked. This could entail a legislative intervention to ensure that only a court of law may confer personal liability in terms of section 155 of the TAA or that a generic process is proposed to ensure that all of the relevant facts are adequately and objectively viewed.

5.2 The Courts will look at the Substance of the Transaction.

In piercing the corporate veil the courts will look closely at the substance of the transaction that allowed for the disposition of the asset, in order to determine the overall intention of the parties. Similarly in section 155 of the TAA the transaction that renders the representative incapable of paying the tax due must be considered closely to determine liability. Therefore an example of how courts look at the substance of a transaction in piercing the corporate veil will add clarity to what type of consideration could be made before invoking section 155 of the TAA.

In the 2003 case of *CSARS v Ben Nevis Holdings Ltd and Others*⁸⁴ the Transvaal Provincial Division was tasked with piercing the corporate veil, and as such had to look at the substance of a transaction opposed to its form. In this case the respondents had attempted to disguise a disposition to resemble a sale in order to avoid the application of a preservation order. It was common cause that the Commissioner had sought to pierce the corporate veil against the respondents in order to collect outstanding taxes owed by the taxpayer who was the sixth respondent. The court found that the respondents had entered into a sale agreement which the court viewed as an elaborate scheme to avoid the imposition of a preservation order. The court looked at the substance of the transaction and found that the sale was not bona fide, but an artificial transaction and in fraudem legis. In effect respondents had entered into an elaborate scheme which caused an aircraft it owned worth approximately two hundred million rands, to be sold and moved to Switzerland thus taking the asset out of the reach of the Commissioner. The court found that the respondent's behaviour was tantamount to contempt as the preservation order had interdicted them from alienating any assets, and the false sale was accordingly reversed.

The principles highlighted in the *Ben Nevis* case show us that the actual effect of a transaction should be looked at closely as opposed to the form of the transaction. The manner in which the court looked at the substance of the transaction and ultimately made a finding is a good example of the steps that should be taken before liability is imputed to a representative taxpayer. These principles are relevant to our discussion as section 155 of the TAA requires a consideration of the transaction that renders the representative incapable of paying the tax debt. It is imagined that a representative taxpayer with dubious intent may try to disguise a transaction to avoid the implementation of section 155 of the TAA. However if the approach of the court in *Ben Nevis* is applied then this loophole may easily be overcome. The substance of the transaction, as opposed to the form of the transaction, will be looked at and any transaction that actually falls within the confines of section 155 of the TAA will be identified.

5.3 Piercing the Corporate Veil in the Statutes – Section 20(9) of the Companies Act 2008.

⁸⁴ *Commissioner for South African Revenue Service v Ben Nevis Holdings Ltd And Others* 66 SATC 71 at page 73.

The Companies Act 2008 is of great significance to the process of determining the personal liability of representative taxpayers in the sense that section 20(9) provides a court with the statutory opportunity to pierce the corporate veil. Section 20(9) of the Companies Act 2008 provides that:

If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may –

- a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and*
- b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a).*

Section 20 (9) of the Companies Act 2008 essentially provides that liability would arise in the case where there is ‘*an unconscionable abuse of the juristic personality of the company as a separate entity*’. This would usually occur in instances of reckless trading or fraud.⁸⁵ In *Ebrahim v Airports Cold Storage*⁸⁶ the court described the nature of reckless trading as ‘*an entire failure to give consideration to the consequences of one’s actions, in other words, an attitude of reckless disregard of such consequences*’.

The first decided case⁸⁷ dealing with this section of the Companies Act 2008 was the case of *Ex parte Gore NO and Others NNO*⁸⁸ where the Western Cape High Court was faced

⁸⁵ R Cassim ‘Piercing the Corporate Veil ‘Unconscionable Abuse’ under the Companies Act 71 of 2008’ August 2012 *De Rebus*.

⁸⁶ *Ebrahim v Airports Cold Storage (Pty) Ltd* 2008(6) SA 585 (SCA) 11.

⁸⁷ R Cassim ‘Hiding behind the veil’ October 2013 *De Rebus*.

⁸⁸ *Ex parte Gore NO and Others NNO (in their capacities as the liquidators of 41 companies comprising King Financial Holdings Ltd (in liquidation) and its subsidiaries)* [2013] 2 All SA 437 (WCC) 440.

with the issue of piercing the corporate veil in terms of section 20(9) of the Companies Act 2008. The applicants had instituted the matter in terms of the common law rules, or otherwise in terms of section 20(9) of the Companies Act 2008. The applicants in this case were the liquidators of forty one companies which were held by King Financial Holdings ('KFH'). The King brothers were the directors and owned the majority of the shares in KFH and some of its subsidiaries. Their core business was in the financial services industry and they had been marketing investments of immovable properties.

The nature and magnitude of their business dealings had caught the attention of the Financial Services Board ('FSB') and ultimately resulted in the FSB conducting an investigation into their businesses. The FSB had found that the King brothers ran their businesses in such a manner that all the subsidiary companies were operated as one entity. They did not maintain any proper accounting records and the monies that were received from investors were transferred between the subsidiary companies with no legal or accounting purpose, merely at the whim of those controlling the business. They had scant regard to the separate legal personality and identity of each of the entities. The manner in which these subsidiary companies were managed and operated appeared as if they had been operated as one company.

The poor administration of the investments resulted in the liquidators having great difficulty in identifying where the investor's monies had actually been invested. In some cases the investors had received documents which evidenced an investment in property 'A' but in reality the money had actually been invested in 'B'. It appeared that the management of KFH had allocated the investor's moneys for their own benefit which was basically into a company within the group that was in need of funds or utilised for paying out investors who wished to withdraw their investments. Furthermore it was also reported that it was by luck that an investor's money had been invested into a stable company and that those investors that were close to the King brothers were allocated preferential investments. Some of the most appalling acts were that in certain circumstances share certificates had been issued to investors and no record of same had been kept by the company and that shares in KFH had been sold to the public although the company was registered as a private company. In view of

the glaring inconsistencies and scant regard for the separate legal personalities of the companies, the court found that the group was in fact a sham.

The court found that when piercing the corporate veil the goal to be achieved is ‘*a facts-based determination by the courts*’⁸⁹ to disregard the separate legal personality of the company in a manner that the law would not allow in the ordinary course.

The court was of the view that the words ‘*unconscionable abuse of the juristic personality of a company*’⁹⁰ was wide enough to cover a wider variety of acts. The section afforded relief to a third party in circumstances where the separate personality of a company was used to achieve an illegitimate result which should not be allowed. Accordingly the court found that the piercing of the corporate veil in terms of section 20(9) could be invoked in cases where circumstances justified the application of section 20(9).

Bearing in mind that the court found that the words ‘*unconscionable abuse of the juristic personality of a company*’ was wide enough to cover a wider variety of acts it may be prudent to add these words into section 155 (a) and (b) of the TAA. It will cater for situations where the words, ‘*alienates*’, ‘*charges*’, ‘*disposes*’ and ‘*possession*’ are inadequate to describe the omission or commission of an act. This addition will provide the escape hatch to the Commissioner in a case where a transaction is structured in a way to avoid falling within the confines of these words.

5.4 Is Section 20(9) of the Companies Act 2008 Analogous with Section 155 of the TAA?

I submit that section 155 of the TAA has striking resemblance to that of section 20(9) of the Companies Act 2008 in the sense that the basic requirement appears to be the abuse of a juristic personality. Section 20(9) of the Companies Act 2008 is limited to situations involving the abuse of a juristic personality however section 155 of the TAA does not require this. In a case where there is a juristic person involved in an application of section 155 of the

⁸⁹ Ibid at page 441.

⁹⁰ Ibid at page 453.

TAA an abuse as described in section 20(9) of the Companies Act 2008 is not required. In this sense section 155 of the TAA covers a broader range of acts than section 20(9) of the Companies Act 2008. As such section 155 of the TAA and section 20(9) of the Companies Act 2008 are not analogous.

Section 20(9) of the Companies Act 2008 requires the deliberation of a court of law however section 155 of the TAA does not require a court of law to sanction personal liability before it is imposed by the Commissioner. It appears that the provisions of section 155 of the TAA are more aligned to the policies of fiscal administration. This is evident through the objective of the TAA being simplicity of tax administration.⁹¹ Furthermore section 155 of the TAA is contained under Chapter 10 which contains the Commissioner's accelerated powers of collection. It not yet clear whether a court of law would agree with the application of section 155 of the TAA, however one thing remains certain, section 155 of the TAA will benefit fiscal administration in cases where tax evasion and fraud is evident. In this sense there is no common ground between section 20(9) of the Companies Act 2008 and section 155 of the TAA.

I submit that the two main differences between section 155 of the TAA and section 20(9) of the Companies Act 2008 are as follows: Section 20(9) of the Companies Act 2008 is limited to the abuse of a juristic personality whereas section 155 of the TAA covers a broader range of acts. Secondly section 155 of the TAA does not require judicial sanction whereas this is a requirement in section 20(9) of the Companies Act 2008. Bearing the aforementioned in mind I find that section 155 of the TAA is not analogous to section 20(9) of the Companies Act 2008 although they may seem similar at first glance.

CHAPTER 6: OTHER ISSUES THAT ARISE IN PRACTICE.

In this chapter I will highlight and discuss other issues that arise when section 155 of the TAA is applied in a real-world setting. Each issue that is highlighted will be discussed with the aim of identifying deficiencies that may exist in the law as it stands. It is submitted that in

⁹¹ Ibid note 38.

considering and dealing with these issues the foundations of the ways in which section 155 of the TAA can be improved will be laid.

6.1 The Legislature's Quick Fix to Section 184 of the TAA.

Section 184 of the TAA is the provision that enables the Commissioner to recover tax debts from a person that has been held personally liable in terms of section 155 of the TAA. In section 184 of the TAA, the Commissioner is empowered with the same right of recovery against a representative taxpayer as he has against the taxpayer. However this section was amended by section 51 of the Tax Administration Laws Amendment Act No. 44 of 2014 which was promulgated on 20 January 2015 and reads as follows: (it must be noted that the words in brackets were substituted by the underlined words)

'Substitution of section 184 of Act 28 of 2011

51. (1) The following section is hereby substituted for section 184 of the Tax

Administration Act, 2011:

'Recovery of tax debts from [responsible third parties] other persons

184. (1) SARS has the same powers of recovery against the assets of a person [referred to in] who is personally liable under section 155, 157 or this Part as SARS has against the assets of the taxpayer and the person has the same rights and remedies as the taxpayer has against such powers of recovery.

(2) SARS must provide a [responsible third party] person referred to in subsection (1) with an opportunity to make representations—

(a) before the [responsible third party] person is held liable for the tax debt of the taxpayer in terms of section 155, 157, 179, 180, 181, 182 or 183, if this will not place the collection of tax in jeopardy; or

(b) as soon as practical after the [responsible third party] person is held liable for the tax debt of the taxpayer in terms of section 155, 157, 179, 180, 181, 182 or 183.'.

(2) Subsection (1) comes into operation on the date of promulgation of this Act.'

It is interesting to note that section 51 of the Tax Administration Laws Amendment⁹² effectively changed the name of the section from '*Recovery of tax debts from responsible third parties*' to '*Recovery of tax debts from other persons*'. I am of the view that this indicates the legislature's intention to cast the net of personal liability to representative taxpayers even wider. This is further reiterated by the substitution of the words 'responsible third party' with the word 'person'.

In essence section 184 of the TAA requires the Commissioner to give the representative taxpayer an opportunity to make representations before imputing personal liability to them. According to the Draft Tax Administration Laws Amendment Bill 2014, the object of amending section 184 of the TAA was to include the section 155 and 157 processes within the confines of section 184, as it was not included previously due an oversight. The rationale behind this view was that where a person was held liable in their personal capacity in terms of either section 155, 157 or 179 of the TAA it could not have been said that the person had a tax liability. Therefore if there was no tax liability there could have been no basis to issue an assessment against such person. It is within these premises that the TAA did not provide a process for collection of taxes from persons liable in terms of section 155, 157 and 179 of the TAA.⁹³

This effectively means that with the amendment of section 184 of the TAA, the Commissioner may now recover outstanding taxes from representative taxpayers who are held liable in their personal capacity.⁹⁴ It was further noted that prior to the amendment the Commissioner could only recover the outstanding taxes using a normal civil action and could not use its accelerated powers of collection as provided for in sections 169 to sections 186 of the TAA for persons appointed as third parties in section 179 of the TAA and held liable for tax in section 155, 157 or 179 of the TAA.⁹⁵

⁹² Tax Administration Laws Amendment Act No. 44 of 2014.

⁹³ Draft Tax Administration Laws Amendment Bill 2014.

⁹⁴ Ibid.

⁹⁵ Ibid .

Although it is evident that the lacuna has been addressed, I am of the view that there is still some uncertainty in this provision to the extent that section 184(2)(b) uses the words '*as soon as practical*'. These words render the time period discretionary in nature and may cause unnecessary litigation in cases where the taxpayer does not accept the Commissioner's interpretation of what is a practical time period. This uncertainty may also result in the Tax Ombuds office and the SARS Service Monitoring office being burdened with high volumes of complaints and enquiries by persons affected who would like to know when their matter would be resolved.

6.2 Preservation of Funds.

I am of the view that section 155 of the TAA places an indirect obligation on representative taxpayers to preserve funds. This is apparent in words '*amounts*', '*funds*' or '*moneys*' in section 155 (a) and (b) of the TAA. A failure to preserve these funds could lead to the representative taxpayer being held personally liable for the outstanding taxes. This interpretation is in accordance with section 22 of the Companies Act 2008. The provision states that '*a company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose.*'⁹⁶ It is therefore mandatory that a company does not carry on its business with gross negligence.

I am of the view that a failure to preserve funds to pay taxes owing can be argued to be gross negligence. However Grové⁹⁷ has found that directors are not expected to preserve funds such as a trustee would be expected to do, and has pointed to the findings of the court in *Daniels t/as Deloitte Haskins & Sells v AWA Ltd.*⁹⁸ The court in that case was of the view that a trustee should exercise conservatism when making investments, however a director would not be expected to exercise such restraint and may accept commercial risks to yield a profit.

⁹⁶ Section 22 of the Companies Act 2008.

⁹⁷ AP Grové *Company Directors: Fiduciary Duties and the Duty of Care and Skill* (unpublished LLM thesis, University of Pretoria 2012) 7.

⁹⁸ *Daniels t/as Deloitte Haskins & Sells v AWA Ltd* 191(1995) 37 NSWLR 438.

There is some relief to certain representative taxpayers who find that a director is acting negligently. In terms of section 162(5) of the Companies Act 2008 certain representative taxpayers may have the power to apply to court to have a director declared delinquent and accordingly mitigate the risk of taxes not being paid. The categories of persons who may do so are ‘*a company, a registered trade union that represents employees of a company or another employee representative, the Companies and Intellectual Property Commission (CIPC) and the Takeover Regulation Panel.*’⁹⁹ Thus it is apparent that there are steps that the representative taxpayer can take mitigate the possibility of personal liability.

6.3 The Nature of the Representative Taxpayer and Taxpayer Relationship is an Important Factor to be Considered in Determining Personal Liability.

It is submitted that the nature of the representative taxpayer and taxpayer relationship can be equated to that of an agent and principal relationship. This is apparent in the representative nature of the relationship. Classen¹⁰⁰ has pointed out that the nature of secret or undisclosed profits received by an agent without the principal’s knowledge had been highlighted in the case of *ITC 1792*.¹⁰¹ Classen¹⁰² has further pointed out that in the case of *ITC 1792*¹⁰³ the court was of the view that the funds remained taxable in the hands of the principal, as the agent’s actions were performed whilst executing his duties as the agent.

Classen¹⁰⁴ is of the view that the mere fact that the agent had changed his intention and taken the funds into his own use is a factor that must be considered for practical reasons when dealing with normal tax. Classen¹⁰⁵ is also of the view that a relationship similar to that of agency existed between the accused and the investors in *MP Finance Group CC (In Liquidation) v CSARS*.¹⁰⁶ The court was faced with the scenario wherein the taxpayer had received funds in an illegal manner. The taxpayer had lured unsuspecting investors into

⁹⁹ R Cassim ‘Delinquent directors under the Companies Act 71 of 2008’ February 2013 *De Rebus* 26.

¹⁰⁰ LG Classen ‘Legality and Income Tax – Is SARS “entitled to” Levy Income Tax on Illegal Amounts ‘received by’ a Taxpayer?’ (2007) 19 *SA Merc LJ* 537.

¹⁰¹ *Income Tax Case 1792* 68 SATC 236.

¹⁰² *Ibid* note 100 at 538.

¹⁰³ *Ibid* note 101 at para 241A.

¹⁰⁴ *Ibid* note 100 at page 548.

¹⁰⁵ *Ibid* note 100 at page 547.

¹⁰⁶ *MP Finance Group CC (In Liquidation) v Commissioner for South African Revenue Services* 69 SATC 141.

investing in a ponzi or pyramid scheme, of which the taxpayers knew, was unsustainable. It was found that although the funds were actually repayable immediately after receiving same and they still constituted receipts in the hands of the taxpayer of which was taxable. I am of the view and agree with Classen that this case can be viewed as an illegal agent scenario. The principles laid down in the *MP Finance*¹⁰⁷ case can also be applied to the issue at hand. I am of view that where a representative taxpayer has misappropriated funds of the taxpayer he can justifiably be held personally liable for the taxpayers' tax debt. This would not be an inequitable result as the misappropriated funds can also be argued to be taxable in the representative's hands.

Section 155(b) envisages a situation whereby funds or moneys are in the possession of, or come to the representative taxpayer which could have been legally used to pay the tax debt owed by the taxpayer. It appears that the section does not differentiate between a case whereby the representative taxpayer kept the funds or moneys in a separate trust account or kept it in his own account for his own use and enjoyment. It also does not differentiate between situations where the representative taxpayer dealt with the funds in a legal or illegal manner. Thus if the funds were used by the representative taxpayer in an illegal manner it would lend more weight to the Commissioner's case and satisfy the requirement set out in section 155(b) that funds or were available to pay tax.

6.4 Compromising Trade Secrets.

It is submitted that there is possibility that the enquiry envisaged in section 184 of the TAA, which requires a representative to make representations in order to absolve themselves of liability, could compromise a company's trade secrets and thereby compromise its competitive edge. This would obviously depend on whether such information falls into the wrong hands. Should there be an element of unlawfulness or illegality in the company's trading then the provision would not be detrimental. However where such does not exist then the Commissioner could possibly face a delictual claim for loss of income resulting from the trade secrets being revealed. It is comforting to note that the legislature has included

¹⁰⁷ Ibid.

safeguards against this in sections 67 - 74 of the TAA, which comprises Chapter 7, and is aptly named 'Confidentiality of Information'. Furthermore in the Commissioner's guide on access to information¹⁰⁸ it is clear that there are sufficient checks and balances that are in place to avoid taxpayer information falling into the wrong hands. To this extent the Commissioner has actually appointed information officers whose sole task is administer requests for information held by the Commissioner. However considering the secrecy provisions contained in the TAA, and the Commissioner's commitment to safeguarding taxpayer information, it seems unlikely that such a problem could eventuate.

6.5 Anonymous Tip-Offs and Whistleblowing.

I submit that the application of a whistle blowing program in South Africa may be great value to fiscal administration and could relieve representative taxpayers of some liability. WE Taggart¹⁰⁹ highlights the reward nature of whistle-blowing administered in the United States of America by the Whistle-blower Office and the IRS informant awards program which allows for an award of between 15 to 30 percent of the taxes collected. The article cautions that the whistle-blower could be denied an award in circumstances where the whistle-blower was actually involved in the planning and initiation of the activities that led to the underpayment of the taxes, or that led to the tax evasion. Furthermore should the whistle-blower be convicted of a criminal offence then the whistle-blower would not be entitled to any award whatsoever. Should the whistle-blower not be involved in the tax evasion then they would be entitled to award based on the relevance of the information provided and the degree to which the IRS used the information. The identity of the whistle-blower is protected while assisting with the investigation, and given an opportunity to provide a meaningful contribution. The information on the amount collected will be shared with whistle-blower which will ultimately determine the award to be received. Should the whistle-blower not agree with the amount of the award then the whistle-blower has a right of appeal to the Tax Court.

¹⁰⁸ 'Service Manual On The Promotion Of Access To Information Act, 2000' available at <http://www.sars.gov.za/AllDocs/OpsDocs/Manuals/LAPD-Gen-G06%20-%20Manual%20on%20the%20Promotion%20of%20Access%20to%20Information%20Act%202000%20-%20External%20Guide.pdf>, accessed on 26 June 2015.

¹⁰⁹ WE Taggart and J Taggart 'Whistleblower Office - What a Taxpayer Representative Must Know' *Journal of Tax Practice and Procedure* available at http://www.heinonline.org.ezproxy.ukzn.ac.za:2048/HOL/Page?handle=hein.journals/jtaxpp13&div=72&collection=journals&set_as_cursor=8&men_tab=srchresults&terms=representative|taxpayer|liability&type=matchall#307, accessed on 07 May 2015.

I submit that the application of a similar program within the South African context could affect many representative taxpayers that could be held liable in terms of section 155 of the TAA. They could come forward with company secrets that they were involved with. Considering the wide meaning of the term representative taxpayer there are many individuals that could find solace within such a program. Perhaps with the roll out of such a program in a situation where there is gross negligence or fraud resulting in tax evasion such as that in the *Gore's*¹¹⁰ case could be avoided. In such a situation the representative taxpayer could avoid being held liable by striking a deal with the revenue authority in exchange

6.6 Cowboy Behaviour will not be Accepted.

In the recent case of *Pretoria East Motors*¹¹¹ the court was faced with a situation where an official acting on behalf of the Commissioner, one Ms Victor had conducted an audit on the taxpayer.¹¹² She had not properly acquainted herself with the taxpayers accounting system that was made available to her.¹¹³ Whenever she did not understand a discrepancy she raised an assessment against the taxpayer.¹¹⁴ I am of the view that this type of behaviour exhibited by the Commissioner's official was that of a cowboy. The court noted that when the taxpayer had requested reasons for the assessments same could not be readily advanced as the official had relied on the taxpayer to disprove the assessments she raised.¹¹⁵ The court noted that the Commissioner is required to properly review and understand the documentation submitted by the taxpayer.¹¹⁶ The standard of proof that the taxpayer is required to discharge will be considered as a whole taking into account the ipse dixit of the taxpayer, documentary evidence as well as witness testimony.¹¹⁷

¹¹⁰ Ibid note 88.

¹¹¹ Ibid note 40.

¹¹² Ibid note 40 at para 7.

¹¹³ Ibid note 40 at para 10.

¹¹⁴ Ibid note 40 at para 11.

¹¹⁵ Ibid note 40 at para 13.

¹¹⁶ Ibid note 40 at para 11.

¹¹⁷ Ibid note 40 at para 14.

It is thus evident that the courts will not accept such cowboy type of behaviour from Commissioner's representatives, and that when an assessment is raised there must be proper grounds for such. It is therefore comforting to those facing the wrath of section 155 of the TAA that the courts will ensure that there is no cowboy behaviour by any of the parties, especially the Commissioner's representatives. This point raises the importance of laying the proper foundations and correctly assessing the facts of a case. In this context we are alerted to the importance of introducing a generic process that may be followed before section 155 of the TAA can be invoked. If this generic process is introduced then sloppy work from the Commissioner's representative can be detected before section 155 of the TAA is invoked and as such we can avoid undue time, effort and money from being spent.

The issues that have been highlighted in the aforementioned text provide the foundations of the way forward and will be tied together in my concluding chapter.

CHAPTER 7: A PRACTICAL APPROACH.

In this chapter I will make a determination on whether a generic process or enquiry is required to add more clarity to section 155 of the TAA and the basic tenets of any such appropriate enquiry or process will be proposed before personal liability can be invoked by the Commissioner in terms of section 155 of the TAA.

The case on point in this regard is the unreported case of *Peretz v CSARS*¹¹⁸ where the court found that it is of grave importance that before the Commissioner can invoke the personal liability of a representative taxpayer a full and proper enquiry must be conducted on the facts and it must be satisfied on a balance of probability that the requirements of personal liability have been met and can be supported by concrete evidence.

In the case of *Peretz* the applicant had sought to rescind a default judgment taken against him in his personal capacity for the outstanding taxes owed by Restomont Trading

¹¹⁸ Ibid note 2.

CC ('Restomont') of which he had been the sole member.¹¹⁹ The Commissioner held the applicant personally liable for Restomont's outstanding taxes in terms of the erstwhile section 48 (6) of the VAT Act¹²⁰ which can be equated to section 155 of the TAA, in that it attributed personal liability to the representative vendor in specific circumstances. The court was faced with the issue of whether those specific circumstances had existed in the case to enable the Commissioner to hold the applicant personally liable.¹²¹ The Commissioner had analysed the bank statements of the CC and referred to specific periods in time where taxes were due and not paid.¹²² The bank statements showed that there had been sufficient funds available in Restomont's bank account at those points, yet no payment was made for the taxes due.¹²³ The applicant contended that one Mr Hyde had been responsible for the administration of the CC and he had since passed away at the end of February 2004.¹²⁴ Consequently the applicant argued that they could not be held liable for any alienation or disposition before that time.¹²⁵ The court did not agree with this argument and held that Mr Hyde was at no point the representative taxpayer of the CC, and that the applicant was always the representative taxpayer of the CC and at all material times controlled the CC.¹²⁶ The court referred to the then section 48(6) of the VAT Act and found that the applicant became personally liable when the applicant had '*disposed of the funds under his control instead of paying tax*'.¹²⁷

Since the applicant had based his case on the contention that judgment was erroneously taken against him, instead of Restomont¹²⁸ the court did not expand on the concept of personal liability. Since the court did not elaborate on the personal liability issue one may view this judgment as lacking in its statutory obligation to add clarity to the law. There were two important considerations which the judgment did raise. At the outset we note that the court did not entertain the defence that Mr Hyde was responsible for the failure to pay the outstanding taxes. The court was clear on its stance that the applicant was at all relevant times in control of the CC and could not pass liability for failing to pay taxes to

¹¹⁹ Ibid note 2 at para 1.

¹²⁰ Ibid note 2 at para 12.

¹²¹ Ibid note 2 at para 16.

¹²² Ibid.

¹²³ Ibid note 2 at para 19.

¹²⁴ Ibid note 2 at para 17.

¹²⁵ Ibid note 2 at para 17.

¹²⁶ Ibid note 2 at para 18.

¹²⁷ Ibid note 2 at para 32.

¹²⁸ Ibid note 2 at para 31.

another.¹²⁹ Secondly the Commissioner had conducted an analysis of the bank statement, versus the VAT returns, and managed to sustain the contention that the CC had funds available in its bank account at the time the VAT debt was due.¹³⁰ However the applicant who had been in control of the bank account had failed to make payment of outstanding VAT.¹³¹ The court seemed to favour the systematic and objective approach of matching the bank statements with the specific points in time when the taxes were due and not paid. However it is concerning that the court did not address the issue of whether the funds were disposed of for essential services such as employees' salaries and electricity. It therefore seems from the judgment that during such an enquiry to determine personal liability of a representative vendor all that needs to be proven is that funds were available and payment was not made.

This approach appears to be due to the court's finding that VAT is a self-assessment tax and therefore the responsibility to make payment does not arise from demand or assessment. Thus the very nature of the VAT system, in the words of the court, made vendors '*involuntary tax collectors*'.¹³² On that basis is it then possible to argue that in the case of other taxes such as normal tax where the responsibility to pay arises from an assessment or demand that a consideration can be made for other payments which are necessary to be made.

CHAPTER 8: CONCLUSION.

In this dissertation I have laid out the practice at present in respect of the application of section 155 of the TAA. The central issue that has been raised is the fact that there is no process that the Commissioner is obliged to adhere to before requesting reasons in terms of section 184 of the TAA from the representative taxpayer. This is the only process that the Commissioner must adhere to before he holds the representative taxpayer liable in terms of section 155 of the TAA. This is alarming because it raises the suspicion that this provision could be misused in an environment where there is a large volume of work to be done. An example of this is the behavior exhibited by the Commissioners representative in the *Pretoria*

¹²⁹ Ibid note 2 at para 18.

¹³⁰ Ibid note 2 at para 16.

¹³¹ Ibid note 2 at para 19.

¹³² Ibid note 2 at para 28.2.

*East Motors*¹³³ case. This could thereby lead to undue hardship to unsuspecting representative taxpayers. The problem is compounded by the fact that section 155 of the TAA does not require judicial supervision to be invoked. This is in contrast to section 20(9) of the Companies Act 2008. This raises the suspicion that the provision does not have sufficient checks and balances to mitigate potential harm to representative taxpayers.

It is submitted that the most practical solution to the problem is to develop section 155 of the TAA further. This should be done in a manner that compels the Commissioner to adhere to a generic process of analysing the facts, in an objective manner, such as the process highlighted in the *Peretz* case.¹³⁴

A further practical solution to this issue is for the legislature to consider harmonising section 155 of the TAA with section 20(9) of the Companies Act 2008. At present these two provisions can be invoked to hold a representative taxpayer personally liable for the taxpayer's tax debt. However section 20(9) of the Companies Act 2008 requires a court of law to review the process of looking behind the corporate veil and holding the representative taxpayer personally liable. On the other hand section 155 of the TAA does not require this. It is therefore submitted that these two provisions should be harmonised in the sense that section 155 of the TAA must also be subject to review by a court of law.

These two findings could well assist in bringing an equitable resolution to the potential troubles that section 155 of the TAA could create for an unsuspecting representative taxpayer.

¹³³ Ibid note 40 at para 10.

¹³⁴ Ibid note 2 at para 16.

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