

The Rights and Remedies of Taxpayers in the New South Africa

by Ian Dwyer

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**Department of Accounting and Management Science
University of Kwa-Zulu Natal, Durban**

Supervisor: Prof. L Sullivan

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DECLARATION

This research has not been previously accepted for any degree and is not being currently submitted for any other degree.

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ABSTRACT

South Africans emerged from the darkness and entered the into the light of freedom in 1994 when the first democratic elections where held in South Africa. This liberty was entrenched with the signing of the Constitution in December 1996 by President Nelson Mandela at Sharpeville. Taxpayers have also benefitted under the Constitution.

This dissertation examines the Constitution and how it applies to taxpayers and their rights. It examines the legislation which regulates the tax authorities and how they apply this legislation. It then examines the rights of taxpayers and how the Constitutional Court interprets the Constitution in respect of taxpayers rights.

The dissertation also examines the remedies that taxpayers have when they feel that their rights have been encroached upon. The correct order that should be followed by taxpayers in protecting their rights is discussed. Recent proposals announced by the tax authorities, in an attempt to assist taxpayers, are examined.

Finally, common law and practical problems that face taxpayers are discussed and thereafter a short conclusion is drawn as to the rights of taxpayers.

TABLE OF CONTENTS

CHAPTER ONE- Introduction	1
1.1 Purpose of this study	1
1.2 Background	1
1.3 Key Fiscal Policies	2
1.4 Inland Revenue	3
CHAPTER TWO- The South African Revenue Service.....	5
2.1 Introduction	5
2.2 The Transformation of the South African Revenue Service.....	5
2.3 Conclusion	10
CHAPTER THREE- The Power of SARS	11
3.1 Introduction	11
3.2 The Income Tax Act	12
3.3 The Value Added Tax Act.....	24
3.4 The Customs and Excise Act.....	26
CHAPTER FOUR- The Conduct Of SARS	29
4.1 Introduction	29
4.2 Practical examples	29
CHAPTER FIVE- The Constitution	35
5.1 Introduction	35
5.2 The Constitution of the Republic of South Africa, Act 108 of 1996	37
5.3 The Bill of Rights (sections 7 to 39).....	42
CHAPTER SIX- The Constitutional Court	61
6.1 Introduction	61
6.2 Establishment.....	61
6.3 The Constitutional Court as the Highest Court in South Africa	62
6.4 The 1996 Constitution.....	62
6.6 Cases before the Constitutional Court	63
6.7 Relationship with Parliament and Provincial Assemblies	64
6.8 Conclusion	65
CHAPTER SEVEN- A Review of Constitutional Court Cases	66
7.1 Introduction	66
7.2 Ferreira v Levin NO and Others CCT 5/95.....	66
7.3 Harold Bernstein and Others v L.Von Wielligh Bester NO and Others CCT 23/95	73

7.4	Rudolph and Another v CSARS CCT 13/96.....	76
7.5	Motsepe v CSARS CCT 35/96	79
7.6	Harksen v Lane NO and Others CCT 9/97	81
7.7	Mistry v Interim National Medical and Dental Council of South Africa CCT 13/97	83
7.8	Parbhoo and Others v Getz and Others CCT 16/97	84
7.9	The Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal CCT 10/98.....	85
7.10	Lesapo v North West Agricultural Bank and Another CCT 23/99	88
7.11	Pharmaceutical Manufacturers of SA and Another: In re Ex Parte President of the Republic of South Africa and Others CCT 31/99	91
7.12	Dawood and Another v Minister of Home Affairs CCT 35/99	93
7.13	Metcash Trading Limited v CSARS CCT 3/00	95
7.14	First National Bank t/a Wesbank v The CSARS CCT 19/01	98
	CHAPTER EIGHT - Relief and remedy for the taxpayer	101
8.1	Introduction	102
8.2	Non-Constitutional Avenue	103
8.3	Alternate Dispute Resolution	104
8.4	Appeal to the Tax Board.....	106
8.5	Appeal to the Tax Court	107
8.6	Administrative Avenue	107
8.7	Constitutional Avenue.....	108
	CHAPTER NINE- The Promotion of Administrative Justice Act, 3 of 2000.....	109
9.1	Introduction	109
9.2	Definition of Administrative Action.....	110
9.3	Definition of a Decision	110
9.4	Review of Conduct	111
9.5	Administrative Action Which Affects Any Person	113
9.6	Reasons for Administrative Action.....	114
9.7	Conclusion.....	117
	CHAPTER TEN- Tools for the Taxpayer	118
10.1	Introduction	118
10.2	The SARS Income Tax Practice Manual	118

10.3 Advance Rulings.....	119
10.4 SARS Service Monitoring Service	125
10.5 The SARS Client Service Charter	127
CHAPTER ELEVEN - Common law assistance for the Taxpayer	128
11.1 Introduction	128
11.2 Legitimate Expectations.....	128
11.3 The 'Contra Fiscum' Rule.....	132
11.4 The 'Audi Alteram Partem' Principle	133
CHAPTER TWELVE- Practical problems facing Taxpayers	134
12.1 Time	134
12.2 Lack of finance	134
12.3 Unskilled Tax Advisors	135
CHAPTER THIRTEEN- Conclusion.....	137
BIBLIOGRAPHY	138

CHAPTER ONE

Introduction

1.1 Purpose of this study

The purpose of this study is to review the changes that have taken place within the Revenue authorities. Specific sections of the Income Tax Act, the Value Added Tax Act and the Customs and Excise Act will be reviewed. It will examine how the Revenue authorities interpret and administer these sections in accordance with the stated objectives of SARS. Next, the role that the Constitution and Constitutional Court plays in the rights of the taxpayer will be examined. It will seek to understand the underlying spirit of the Constitution, and examine the sections of the Constitution that apply to the administration of the abovementioned three acts. The study will then briefly survey the mechanics of the Constitutional Court. Constitutional Court cases will be reviewed with particular insight into whom has brought constitutional challenges, their nature and the outcome. Then practical issues facing the taxpayer will be considered together with the rights, remedies and avenues of action that are available to the taxpayer.

1.2 Background

Although behind the scene discussions, negotiations and meetings had been taking place for some years, the re-entry of South Africa into the international community only began to become a possibility with the unbanning of the African National Congress and the unconditional release of Nelson Mandela from prison. This was announced by President FW De Klerk in 1990. As soon

as this had been accomplished, preparations for the New South Africa began in earnest, culminating with the first multi-party democratic elections in 1994.

In order to prevent the legislative discrimination and abuse of power that had characterized the previous regime, the Constitutional Court was established in 1994 as the highest court in the land. The Interim Constitution came into operation on 27 April 1994. A Bill of Rights was entrenched in the Constitution to ensure that the rights, as enshrined therein, of all the citizens of South Africa, be protected. Mahomed DP, in dealing with the vision of the Interim constitution stated in *Shabalala and Others v Attorney-General, Transvaal, and Another* CCT 23/94 on page 20 that:

" There is a stark and dramatic contrast between the past in which South Africans were trapped and the future on which the Constitution is premised. The past was pervaded by inequality, authoritarianism and repression. The aspiration of the future is based on what is 'justifiable in an open and democratic society based on freedom and equality'. It is premised on a legal culture of accountability and transparency. The relevant provisions of the Constitution must therefore be interpreted so as to give effect to the purposes sought to be advanced by their enactment."

According to the South African Yearbook 2002/3 the South African constitution is one of the most progressive in the world and enjoys high acclaim internationally. A bright new future had dawned for the people of South Africa. None so more than for taxpayer's rights under the 1996 Constitution.

1.3 Key Fiscal Policies

With the election of the African National Congress as the Government in 1994 significant changes were inevitable as it faced many challenges. In *Growth, Employment and Redistribution – A Macro-Economic Strategy* publication key fiscal goals of the ANC government that were identified were :

- the reduction of the overall budget deficit,
- the level of government spending, and
- the avoidance of permanent increases in the overall tax burden.

The tax system played an important role in government's fiscal stabilization programme. Efficient revenue collection and the closing of the tax gap were vital to the government's endeavour to achieve its policy goals.

1.4 Inland Revenue

In 1996 Inland Revenue changed its name to the South African Revenue Service and thereafter commenced a complete overhaul of itself (Taxgram Issue No 4 April 1996). The objective of this was to modernize technologies, motivate staff and become more efficient and user friendly with the end result of generating greater income by expanding the tax base and exploiting previously untapped sources.

The first significant legislation to be introduced was the change to residence-based tax, in 1999, which was necessitated by the re-introduction of South Africa into the international community. Capital Gains Tax was to follow in 2001 and to a lesser extent the subjection of directors of Companies and members of Close Corporations to PAYE in 2002 and amendments to the Transfer Duty Act in 2003. In 2004 the Alternate Dispute Resolution process was introduced.

Operationally, SARS upgraded its operating systems with the assistance of new-found friends overseas with most tasks becoming computerized. According to P Webb, in her article "Kissed by an angel" on page 31 of the

May 2003 issue of Accountancy SA, this upgrading resulted in SARS, possessing technology considerably more sophisticated than that used in Britain. With the introduction of e-filing (Taxgram March 2003), taxpayers had the opportunity of carrying out a number of transactions with SARS such as submission of VAT and PAYE returns (PWC Enhancing tax compliance Sept 2002) as well as submission of applications for and obtaining extensions and directives. A process of training and upgrading of personnel skills was, and continued to be, undertaken as was a process of integration of previously disadvantaged groups. Offices were completely overhauled and in some cases replaced. The Siyakha project was also instituted. The operational organization of SARS was reconfigured and divided into three separate operating divisions, namely call centres, processing and compliance.

In 2003 the Taxpayer Service Charter was adopted (Taxgram February 2003) and Customs and Excise was merged into SARS. These changes will be discussed in greater depth in Chapter 2.

So much for the liberalization of the Constitution and the transformation of SARS and tax legislation. How has this affected the taxpayer and his new perceived rights and how has the Constitutional Court interpreted these rights ?

CHAPTER TWO

The South African Revenue Service

2.1 Introduction

Since the change of government in 1994 significant changes have taken place within Inland Revenue. This has had important implications for the taxpayer.

2.2 The Transformation of the South African Revenue Service

In October 1995 (Taxgram Issue No 4 April 1996) the Cabinet approved the reform of Inland Revenue and Customs and Excise in the Department of Finance into an autonomous revenue service to be known as the South African Revenue Service (SARS) under a Board of Directors. The Cabinet had indicated that the required degree of autonomy and flexibility should be sought within the disciplines and control of the Public Service and SARS would be funded by a percentage of revenue collections. SARS came into operation on 1 April 1996. At the launch the then Minister of Finance, Chris Liebenberg is quoted on page 3 of the April 1996 issue of Taxgram as saying:

" The launch of the new service provides a unique opportunity for revenue collection in South to shake off its past and move towards a new era of

efficient and effective tax collection.”

Piet Liebenberg, former chief executive officer of the Council of Southern African Bankers, was appointed the chief executive from 1 June 1996.

2.2.1 Tax reform

Tax reform took place in two distinct phases:

2.2.1.1 Phase 1

Investigations undertaken and reports produced by the Katz Commission of Enquiry into Certain Aspects of the Tax Structure of South Africa were the first phase of reform.

According to page 87 of Kolitz & Arendse’s article “ A reflection : Tax reform in South Africa”, the Commission’s terms of reference were:

“ to inquire into the appropriateness and efficiency of the present tax system and make recommendations on its improvement, taking into account internationally accepted tax principles and practices.”

This was accomplished between 1994 and 1999 and resulted in many tax amendments. The second phase of reform dealt with amending the tax system to conform with the international community

2.2.1.1.a The Katz Commission

The Katz Commission made, among others, the following recommendations

- the elimination of discriminatory provisions that contravened the Constitution. As a result, gender discrimination was removed from the Income Tax Act in 1995.

- an investigation of incentives for small businesses, recognizing the importance of promoting this sector of the economy so as to achieve the objectives of growth and development. On 1 April 2000 a preferential tax rate was introduced for qualifying small business as was a special allowance, allowing a 100% write-off of manufacturing plant and machinery brought into use by the qualifying small business on or after 1 April 2001.
- retirement funds and savings. In its First Interim Report the Commission recommended that the tax-exempt status of pension funds should be reviewed. The Tax on Retirement Funds Act 38 of 1996 introduced tax on the gross interest and net rentals of retirement funds. The initial rate was 17% but was increased to 25% in 1998 and reduced to 18% in 2003.
- tax-exempt organizations. Almost the entire focus of the Ninth Report of the Commission was on tax-exempt organizations. A complete revamp of legislation covering religious, charitable, welfare and similar organizations was undertaken and implemented in 2000 with the introduction of public benefit organizations.

2.2.1.2 Phase 2

The second phase of reform dealt mainly with the broadening of the tax base and amending of the tax system to conform with international norms. A major part of the tax reform process was the restructuring of the Directorates of Inland Revenue and Customs and Excise into an autonomous collection agency known as the South African Revenue Service under the leadership of the Commissioner for the South African Revenue Service. This enabled the

SARS to implement the organizational changes and recruit the staff necessary to make substantial improvements in revenue collections. The Internal Corruption Investigation Unit was formed in May 1999 to deal with allegations of fraud and corruption perpetrated by SARS staff members (SA Revenue Service: Zero Fraud, Zero Corruption).

"SARS has invested in human resources and has attracted top-class professionals such as lawyers and chartered accountants."

So says the Commissioner's spokesman S Nkosi on page 11 of the February 2004 issue of 'You' magazine.

In his 2004 Budget Speech Finance Minister Trevor Manuel explained that between 1996 and 2000 SARS managed to collect more than R 20 billion in excess of its budgets. Furthermore, in the 2003 tax year alone the amount collected in excess of the budget was R 13 billion.

In June 1998 SARS launched the national transformation programme. From this emanated a comprehensive, detailed internal and external assessment and planning process and this eventually resulted in the Siyakha project.

2.2.2 The Siyakha project

Siyakha is a Zulu word meaning "we are building". According to an article prepared by SARS on pages 4-5 of the April 2004 magazine "The Accountant" this was in line with the stated intention of government to build an open democracy.

The Siyakha concept was presented to the Minister of Finance and the Cabinet during the latter half of 2000. At this time the first signs of the strong nominal revenue growth, averaging 13% a year, were becoming evident.

This was largely due to the administrative autonomy the founding SARS Act established and the fact that the organizational composition was beginning to

be reformed into a modern and efficient revenue and customs authority. However, SARS management remained convinced that there existed a burning need for change in the organization since SARS was still performing significantly below what was considered to be its full potential. The Siyakha initiative, which was the primary transformation tool to organization efficiency, has become the most radical and ambitious change strategy in the history of revenue collection in South Africa by introducing a new service culture, structural change in management and cutting-edge new technologies. In presenting Siyakha to Cabinet, SARS outlined as its key objectives, the commitment to establish targeted enforcement program based on risk-profiling, to integrate border management, to leverage developments in technology for electronic transactions, to improve inspections and enforcement, to enhance human resource and infrastructure capability and, as a front-line point of interaction with the public, to implement a customer-centric view that supports speedy resolution. The increased use of technology required of SARS to automate, streamline and standardize processes and to establish electronic data storage and file retrievals. The aim was to reduce turnaround times substantially, to eliminate the "silo effect" by treating taxpayers as holistic entities in respect of different tax types and to improve quality and accuracy of services and assessments to the public.

The conduct of SARS in recent years has, however, produced some responses which appear not to reflect the image that was aimed at. For example:

P Webb writes on page 31 of the May 2003 issue of Accountancy SA:

"... the South African Revenue Service appears to be enjoying more success in arresting those accused of tax fraud and other white collar crimes such as smuggling. Lets hope that, on conviction, the Courts impose salutary sentences and that the accused do not benefit from Solon's law. Solon, you remember, was a Greek philosopher who said that laws are like a spider's web. The weak are caught while the strong escape."

C Divaris, writing on page 144 of Tax Planning vol 17 No 6 about his own

experience as a tax consultant says:

"...in more recent years, and before a more sober yet still relatively impoverished audience, I endeavoured to keep people out of gaol... today I increasingly see myself as a human-rights activist, trying , albeit on a pathetically small scale, to protect the, again, relatively poor and weak from the mauling jaws of the terrible, destructive and ultimately futile machine that the current Commissioner has blindly and unwittingly created."

2.3 Conclusion

SARS has gone through a significant transformation process, which has been described above. With improved technology and trained specialist staff it is able to enter the realm of the privacy of people to a much greater degree. E Louw writes on pages 10 and 11 of the February 2004 issue of 'You' magazine:

"Thanks to computer technology, we're being watched like never before – and the dreaded Big Brother is the taxman ... It's enough to make you feel there's a tax agent skulking behind every corner, watching you through binoculars ... These people have the authority to stick their noses shamelessly in your business and go through your bank statements."

The authority that gives it the right to enter this realm is the subject of the next chapter.

CHAPTER THREE

The Power of SARS

3.1 Introduction

"The general public is largely unaware of the extraordinary powers available to the South African Revenue Service (SARS), and hopefully will never experience them first hand".

So writes E Lai-King, a director of Werkmans Tax on page 14 of Executive Business Brief Vol 9 No 4.

SARS obtains its authority and powers from the various Acts that it is entrusted with administering. These include, inter alia, The Income Tax Act, The Value Added Tax Act and The Customs and Excise Act. A plethora of similar sections within these Acts grants SARS its wide powers. The most relevant sections of the three Acts mentioned above will be reviewed before proceeding to examine in what manner these sections are administered.

3.2 The Income Tax Act

3.2.1 Section 3

"3. Exercise of powers and performance of duties.

(1) The powers conferred and the duties imposed upon the Commissioner by or under the provisions of this Act or any amendment thereof may be exercised or performed by the Commissioner personally, or by any officer engaged in carrying out the said provisions under the control, direction or supervision of the Commissioner.

(2) Any decision made by and any notice or communication issued or signed by any such officer concerned, shall for the purposes of the said provisions, until it has been so withdrawn, be deemed to have been made, issued or signed by the Commissioner : Provided that a decision made by any such officer in the exercise of any discretionary power under the provisions of this Act or any previous Income Tax Act shall not be withdrawn or amended after the expiration of three years from the date of the written notification of such decision or of the notice of assessment giving effect thereto, if all the material facts were known to the said officer when he made his decision.

(3) Any written decision made by the Commissioner personally in the exercise of any discretionary power under the provisions of this Act or of any previous Income Tax Act shall not be withdrawn or amended by the Commissioner if all the material facts were known to him when he made his decision.

(4) Any decision of the Commissioner under the definition of 'benefit fund', 'pension fund', 'provident fund', 'retirement annuity fund', and 'spouse' in section 1, section 6, section 8(4)(b), (c), (d) and (e), section 9D, section 9E, section 10(1)(cH), (cK), (e), (iA), (j) and (nB), section 11(e), (f), (g), (gA), (j), (l), (t), (u), and (w), section 12C, section 12E, section 12G, section 13,

section 14, section 15, section 22(1), (3), and (5), section 24(2), section 24A(6), section 24C, section 24D, section 24I, section 25D, section 27, section 30, section 31, section 35(2), section 38(4), section 41(4), section 57, paragraphs 6, 7, 9, 13, 13A, 14, 19 and 20, of the First Schedule, paragraph (b) of the definition of 'formula A' in paragraph 1 and paragraph 4 of the Second Schedule, paragraphs 18, 19(1), 20, 21, 22, 24 and 27 of the Fourth schedule, paragraph 2, 3, 6, 9 and 11 of the Seventh Schedule and paragraphs 29(2A), 29(7), 31(2), 65(1)(d) and 66(1)(c) of the Eighth Schedule, shall be subject to objection and appeal."

The Commissioner is empowered, by this section, to delegate his powers to his staff within SARS. This is a very important section of the Income Tax Act, particularly subsection 4 which notes which sections of the Income Tax Act are subject to the Commissioners discretion. Furthermore, delegation of powers constitutes 'conduct' as contemplated by section 2 of the Constitution and therefore these powers have to be exercised extremely carefully. This will be discussed more fully in 5.2.2. Furthermore, this section provides that, under certain circumstances, an exercise of discretion by the Commissioner may not be withdrawn or amended. It thus forces the taxpayer to have that exercise of discretion reviewed where he feels that the Commissioner has not, for example, applied his mind to all the facts or acted fairly. This will be discussed in 5.3.8 and also Chapter 9.

3.2.2 Section 74A

"74A. Furnishing of information, documents or things by any person.

The Commissioner or any officer may, for the purposes of the administration of this Act in relation to any taxpayer, require such taxpayer or any other person to furnish such information (whether orally or in writing) documents or things as the Commissioner or such officer may require."

3.2.3 Section 74B

"74B. Obtaining of information, documents or things at certain premises.

(1) The Commissioner, or an officer named in an authorisation letter, may, for the purposes of the administration of this Act in relation to any taxpayer, require such taxpayer or any other person, with reasonable prior notice, to furnish, produce or make available any such information, documents or things as the Commissioner or such officer may require to inspect, audit, examine or obtain.

(2) For the purposes of the inspection, audit, examination or obtaining of any such information, documents or things, the Commissioner or an officer contemplated in subsection (1), may call on any person :

(a) at any premises; and

(b) at any time during such person's normal business hours.

(3) For the purposes of subsection (2), the Commissioner or any officer contemplated in subsection (1), shall not enter any dwelling-house or domestic premises (except any part thereof as may be occupied or used for the purposes to trade) without the consent of the occupant.

(4) Any officer exercising any power under this section, shall on demand produce the authority letter issued to him."

3.2.4 Section 74C

"74C. Inquiry.

(1) The Commissioner or an officer contemplated in section 74(4) may authorise any person to conduct an inquiry for the purposes of the administration of this Act.

(2) Where the Commissioner, or any officer contemplated in section 74(4), authorises a person to conduct an inquiry, the Commissioner or such officer shall apply to a judge for an order designating a presiding officer before whom the inquiry is to be held.

(3) A judge may, on application by the Commissioner or any officer contemplated in section 74(4), grant an order in terms of which a person contemplated in subsection (7) is designated to act as presiding officer at the inquiry contemplated in this section.

(4) An application under subsection (2) shall be supported by information supplied under oath or solemn declaration, establishing the facts on which the application is based.

(5) A judge may grant the order referred to in subsection (3) if he is satisfied that there are reasonable grounds to believe that :

(a) (i) there has been non-compliance by any person with his obligations in terms of the Act; or

(ii) an offence in terms of this Act has been committed by any person;

(b) information, documents or things are likely to be revealed which may afford proof of :

(i) such non-compliance; or

(ii) the committing of such an offence; and

(c) the inquiry referred to in the application is likely to reveal such information, documents or things.

(6) An order under subsection (3) shall, inter alia :

(a) name the presiding officer;

(b) refer to the alleged non-compliance or offence to be inquired into;

(c) identify the person alleged to have failed to comply with the provisions of the Act or to have committed the offence; and

- (d) be reasonably specific as to the ambit of the inquiry.
- (7) Any presiding officer shall be a person appointed by the Minister of Finance in terms of section 83A(4).
- (8) For the purposes of an inquiry contemplated in this section, a presiding officer designated under subsection (3) shall :
- (a) determine the proceedings as he may think fit;
 - (b) have the same powers :
 - (i) to enforce the attendance of witnesses and to compel them to give evidence or to produce evidential material; and
 - (ii) relating to contempt committed during the proceedings, as are vested in a president of the Special Court contemplated in section 83, and for those purposes section 84 and 85 shall apply *mutatis mutandis*; and
 - (c) record the proceedings and evidence at an evidence at an inquiry in such manner as he may think fit.
- (9) Any person may, by written notice issued by the presiding officer, be required to appear before him in order to be questioned under oath or solemn declaration for the purposes of an inquiry contemplated in this section.
- (10) The notice contemplated in subsection (9) shall specify the :
- (a) place where such inquiry will be conducted;
 - (b) date and time of such inquiry; and
 - (c) reasons for such inquiry.
- (11) Any person whose affairs are investigated in the course of an inquiry contemplated in this section, shall be entitled to be present at the inquiry during such time as his affairs are investigated, unless on application by the person contemplated in subsection (1), the presiding officer directs

otherwise on the ground that the presence of the person and his representative, or either of them, would be prejudicial to the effective conduct of the inquiry.

(12) Any person contemplated in subsection (9) has the right to have a legal representative present during the time that he appears before the presiding officer.

(13) An inquiry contemplated in this section shall be private and confidential and the presiding officer shall at any time on application by the person whose affairs are investigated or any other person giving evidence or the person contemplated in subsection (1), exclude from such inquiry or require to withdraw therefrom, all or any persons whose attendance is not necessary for the inquiry.

(14) Any person may, at the discretion of the presiding officer, be compensated for his reasonable expenditure related to the attendance of an inquiry, by way of witness fees in accordance with the tariffs prescribed in terms of section 51bis of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944).

(15) The provisions with regard to the preservation of secrecy contained in section 4 shall *mutatis mutandis* apply to any person present at the questioning of any person contemplated in subsection (9), including the person being questioned.

(16) Subject to subject (17), the evidence given under oath or solemn declaration at an inquiry may be used by the Commissioner in any subsequent proceedings to which the person whose affairs are investigated is a party or to which a person who had dealings with such person is a party.

(17)(a) No person may refuse to answer any question during an inquiry on the grounds that it may incriminate him.

(b) No incriminating evidence so obtained shall be admissible in any criminal proceedings against the person giving such evidence, other than in proceedings where that person stands trial on a charge relating to the administering or taking of an oath or the administering or making of an affirmation or the giving of false evidence or the making of a false statement in connection with such questions and answers, or a failure to answer questions lawfully put to him, fully and satisfactorily.

(18)As an inquiry in terms of this section shall proceed notwithstanding the fact that any civil or criminal proceedings are pending or contemplated against or involving any person contemplated in subsection (6)(c) or any witness or potential witness or any person whose affairs may be investigated in the course of such inquiry."

3.2.5 Section 74D

"74D. Search and Seizure.

(1) For the purposes of the administration of this Act, a judge may, on application by the Commissioner or any officer contemplated in section 74(4), issue a warrant, authorising the officer named therein to, without prior notice and at any time :

- (a) (i) enter and search any premises; and
- (ii) search any person present on the premises, provided that such search is conducted by an officer of the same gender as the person being searched, for any information, documents or things, that may afford evidence as to the non-compliance by any taxpayer with his obligations in terms of this Act;
- (b) seize any such information, documents or things; and
- (c) in carrying out any such search, open or cause to be opened or removed

and opened, anything in which such officer suspects any information, documents or things to be contained.

- (2) An application under subsection (1) shall be supported by information supplied under oath or solemn declaration, establishing the facts on which the application is based.
- (3) A judge may issue the warrant referred to in subsection (1) if he is satisfied that there are reasonable grounds to believe that :
 - (a) (i) there has been non-compliance by any person with his obligations in terms of this Act; or
 - (ii) an offence in terms of this Act has been committed by any person;
- (d) information, documents or things are likely to be found which may afford evidence of-
 - (i) such non-compliance; or
 - (ii) the committing of such an offence; and
- (c) the premises specified in the application are likely to contain such information, documents or things.
- (4) A warrant issued under subsection (1) shall :
 - (a) refer to the alleged non-compliance or offence in relation to which it is issued;
 - (b) identify the premises to be searched;
 - (c) identify the person alleged to have failed to comply with the provisions of the Act or to have committed the offence; and
 - (d) be reasonably specific as to any information, documents or things to be searched for and seized.
- (5) Where the officer named in the warrant has reasonable grounds to believe that :
 - (a) such information, documents or things are-
 - (i) at any premises not identified in such warrant; and

- (ii) about to be removed or destroyed; and
- (b) a warrant cannot be obtained timeously to prevent such removal or destruction, such officer may search such premises and further exercise all the powers granted by this section, as if such premises had been identified in a warrant.
- (6) Any officer who executes a warrant may seize, in addition to the information, documents or things referred to in the warrant, any other information, documents or things that such officer believes on reasonable grounds afford evidence of the non-compliance with the relevant obligations or the committing of an offence in terms of this Act.
- (7) The officer exercising any power under this section shall on demand produce the relevant warrant (if any).
- (8) The Commissioner, who shall take reasonable care to ensure that the information, documents or things are preserved, may retain them until the conclusion of any investigation into the non-compliance or offence in relation to which the information, documents or things were seized or until they are required to be used for the purposes of any legal proceedings under this Act, whichever event occurs last.
- (9)
 - (a) Any person may apply to the relevant division of the High Court for the return of any information, documents or things seized under this section.
 - (b) The Court hearing such application may, on good cause shown, make such an order as it deems fit.
- (10) The person to whose affairs any information, documents or things seized under this section relate, may examine and make extracts therefrom and obtain one copy thereof at the expense of the State during normal business hours under such supervision as the Commissioner may determine."

These sections empower the Commissioner to carry out search and seizure operations, in some cases without prior notice.

In *Shelton v CSARS 64 SATC 179*, the Commissioner applied, *ex parte*, for and was granted a warrant of search and seizure in relation to a businessman who was alleged to have failed to lodge tax returns for several years and to have made a false statement in relation to his personal assets and liabilities. The businessman's premises were searched thereafter by SARS officials, who seized certain documents. The businessman then applied to court for an order that the documents be returned to him on the grounds that the Commissioner ought to have given him notice that an application was to be made to a judge for the warrant of search and seizure, so that he could oppose the application. The Supreme Court of Appeal held that the warrant had been granted on the basis of allegations that the taxpayer had made false statements in his tax return in relation to his assets - in effect, that he had intentionally concealed the existence of assets from the tax authorities - and that in these circumstances it would have been self-defeating to have given the taxpayer advance notice of the application for a warrant of search and seizure. By implication, the court was saying that if it was true that the taxpayer had in the past deliberately concealed his assets from the tax authorities, then to give him prior warning of the search and seizure operation would have enabled him to take further steps to conceal assets or records of assets ahead of the raid on his premises.

In these circumstances, said the court, the legislation allowed the tax authorities to apply to a judge for a warrant of search and seizure without notice to the taxpayer.

The legislation also entitles them to conduct inquiries where the taxpayer may be subjected to interrogation under oath. The manner in which these are carried out has been the subject of more than a few approaches to the court for relief. The sections give the Commissioner widespread powers. However,

he has to be sure that, as much as the taxpayer must comply with tax regulations, he must comply with the provisions of the above sections read in conjunction with the provisions of the Constitution (PriceWaterhouseCoopers Nov/Dec 2002).

3.2.6 Section 88

"88. Payment of tax pending appeal.

(1) The obligation to pay and the right to receive and recover any tax chargeable under this Act shall not, unless the Commissioner so directs, be suspended by any appeal or pending the decision of a court of law under section 86A, but if any assessment is altered on appeal or in conformity with any such decision or a decision by the Commissioner to concede the appeal to the tax board or to the tax court or such court of law, a due adjustment shall be made, amounts paid in excess being refunded with interest at the prescribed rate, such interest being calculated from the date proved to the satisfaction of the Commissioner to be the date on which such excess was received and amounts short-paid being recoverable with interest calculated as provided in section 89.

(2) The payment by the commissioner of any interest under the provisions of this section shall be deemed to be a drawback from revenue charged to the National Revenue Fund."

J Silke, in an article on page 52 of Tax Planning Vol 15 No 3 entitled "Pay now, argue later – A valid principle" submits that if section 88 is directly challenged on a basis of its unconstitutionality, it is unlikely that the challenge would succeed for the reasons given in the Metcash Trading Limited v CSARS CCT 3/2000. It would be better to challenge the Commissioner's decision on fair and just administration.

3.2.7 Section 91(1)(b)

"91 Recovery of tax

(1)(b) If any person fails to pay any tax or any interest payable in terms of section 89(2) or 89quat when such tax or interest becomes due or is payable by him, the Commissioner may file with the clerk or registrar of any competent court a statement certified by him as correct and setting forth the amount of tax or interest so due or payable by that person, and such statement shall thereupon have all the effects of, and any proceedings may be taken thereon as if it were a civil judgement lawfully given in that court in favour of the Commissioner for a liquid debt of the amount specified in the statement."

Section 91(1)(b) relates to the recovery of outstanding tax, interest and penalties. It empowers SARS to file, without the taxpayer being present or informed, a statement with any court certifying that income tax, interest and penalties are owing by the taxpayer, and such statement shall have the effect of a civil judgement in favour of SARS for the debt so specified. This section has been interpreted by taxpayers to mean that they have no access to a court against a statement filed by SARS and therefore should be ruled unconstitutional. As will be seen in 7.5 this is not so.

3.2.8 Section 92

"92. Correctness of assessment cannot be questioned.

It shall not be competent for any person in any proceedings in connection with any statement filed in terms of paragraph (b) of subsection (1) of section 91 to question the correctness of any assessment on which such statement is based, notwithstanding that objection and appeal may have been lodged thereto."

This is an important section of the Income Tax Act because it is often misunderstood. It is often interpreted to state that the taxpayer has no recourse available once the statement is filed by the Commissioner with the Court. However in *Metcash Trading Limited v CSARS CCT 3/2000* which is examined in 7.13. the Court ruled differently.

3.2.9 Section 99

"99. Power to appoint an agent.

The Commissioner may, if he thinks necessary, declare any person to be the agent of any other person, and the person so declared an agent shall be the agent for the purposes of this Act and may be required to make payment of any tax, interest or penalty due from any moneys, including pensions, salary, wages or any other remuneration, which may be held by him or due by him to the person whose agent he has been declared to be."

It is Section 99 which empowers the Commissioner to appoint anybody, if he considers it necessary, to be an agent of SARS and to collect or withhold any amount that may be held by him or due by him to the person whose agent he has been declared to be. This could include the taxpayer's employer, bank manager or someone who has a contractual liability to the taxpayer. This section was the focus of the *Mpande Foodliner CC v CSARS 63 SATC 46* which is examined in 9.4.

3.3 The Value Added Tax Act

3.3.1 Section 5

The VAT equivalent of section 3 of the Income Tax Act.

3.3.2 Section 36

The VAT equivalent of Income Tax section 88 this section gives effect to the "Pay Now, Argue Later" principle.

3.3.3 Section 37

Section 37 lays the burden of proof on the taxpayer in any proceedings to prove the correctness of VAT claimed or income exempt from VAT.

3.3.4 Section 40(2)(a)

The Commissioner is entitled under this section to file a statement before a court as he may in terms of Section 91 of the Income Tax Act.

3.3.5 Section 40(5)

This section is the VAT equivalent of the income tax section 92 in that it prevents the taxpayer from disputing the correctness of an assessment filed by the Commissioner with a Court in terms of Section 36.

3.3.6 Section 47

Section 47 is the equivalent of the Income Tax section 99 which empowers the Commissioner to appoint any person as an agent of SARS.

3.4 The Customs and Excise Act

3.4.1 Section 3

The Customs and excise equivalent of the Income Tax and VAT delegation sections.

3.4.2 Section 4

Section 4 of the Customs and Excise Act grants the Commissioner his search and seizure powers. This section is different from those corresponding sections of the Income Tax Act and the VAT Act in that the officials involved in the search and seizure may do so at any time and without any prior notice. Furthermore, they may, unaccompanied, at least during the day, use force in order to break into any premises, boat or vehicle. In *Henbase 3392 (Pty) Ltd v CSARS 64 SATC 203* the taxpayer challenged the right by Customs and Excise officials to seize goods without a prior hearing and providing sufficient reasons. The taxpayer carried on a business as an importer, supplier and distributor to retailers of clothing, imported from Malawi. An agreement between South Africa and Malawi provided that there was no import duty on certain goods, including clothing manufactured in Malawi. This provision included a proviso that at least 25% of the cost of producing the imported goods would consist of material and labour performed in Malawi. At the border the customs officials required the taxpayer to make provisional payments in respect of the customs duty in respect of the clothing being imported. The taxpayer refused on the basis that the goods were exempt from customs duty in terms of the agreement between South Africa and Malawi. The customs officials thereafter detained the goods. The taxpayer was of the view that the customs officials had acted in an unfair, unjustifiable and unreasonable manner and approached the Court for an urgent order to release the goods.

The High Court agreed that the fact that the taxpayer had been given no hearing prior to the detention of the goods and no reasons had been advanced for such detention was unfair and infringed on his constitutional rights. However, it declined to grant the order as it was of the view that the goods had merely been detained and not seized or forfeited. Furthermore, it believed that it would be impracticable to demand a hearing before the goods were detained. This could make the particular section of the Act meaningless. The Court also found in its judgement that the Customs and Excise did not have unreasonable grounds for believing that the goods were not exempt from customs duty. On these bases, the infringement on the taxpayer's rights could be justified by the customs officials.

3.4.3 Section 77G

The "Pay Now, Argue Later" principle is given effect in this section.

3.4.4 Section 114A

Section 114A is the equivalent of the sections in the Income Tax Act and VAT Act empowering the Commissioner to appoint anybody as an agent.

Taxpayers do not merely have to contend with the statutory provisions that give SARS its power to wield. A thorn in any tax planner's side is the common law principles that the Courts apply from time to time. This was particularly relevant in *Erf 3183/1 Ladysmith (Pty) Ltd and Another v CIR 58 SATC 229* and *Relier (Pty) Ltd v CIR 60 SATC 1*. According to Silke J in his article "Tax avoidance schemes", in both of these cases elaborate agreements were entered into by the parties involved. Harms JA, in *Relier (Pty) Ltd v CIR 60 SATC 1* on page 6 summarised the conclusions of Hefer JA in the *Ladysmith* case:

" In the main this court concluded that although the law permits people to arrange their affairs so as to remain outside the provisions of a particular statute, including a taxing provision, the question in the end remains whether the arrangement was one of substance and not one of form. More to the point, it was held that parties cannot arrange their affairs through or with the aid of simulated transactions and effect will be given to unexpressed agreements and tacit understandings."

E Lai - King, a director of Werkmans Tax sums it up as follows on page 14 of Vol 9 No 4 Executive Business Brief:

" The end result is that the Sheriff of the Court may arrive unannounced at your business and start attaching assets. It sounds like a nightmare, but it's happening in practice."

CHAPTER FOUR

The Conduct Of SARS

4.1 Introduction

"The Receiver has always been someone to be reckoned with but since Pravin Gordhan became Commissioner of the South African Revenue Service he's started a transformation process to close the gap between what taxpayers actually pay and what they should be paying."

So writes E Louw on page 10 in her article entitled "You Can Run But You Can't Hide".

The South African Revenue Service influences all of our lives, whether directly or indirectly. The manner in which it carries out its duties and the reasons for which the Commissioner applies the discretions afforded him has a bearing on whether they are entitled to or not. This chapter provides examples of the manner in which the South African Revenue Service applies some of its energies and how it affects taxpayers.

4.2 Practical Examples

The following are examples from an article in You magazine written by E. Louw of how SARS has accessed private information:

- Five friends had collected enough money by saving on the household budget here and selling the odd koeksuster there and putting away every last cent into a bank account. Finally the big day arrived as they went to the bank to draw the money in order to pay for air tickets for an overseas holiday. It was then, to their shock, that they discovered that all the money had been withdrawn by SARS as the person who held the bank account was not registered for Income Tax. According to their tax consultant, months later they are still battling to recover their money.
- "The Receiver of Revenue has become much more aggressive over the past two years ... he (SARS) sues easily, takes you to court and takes possession of your money or goods". So says a Gauteng tax consultant.
- A well-known stripper believed she could get away with not declaring part of her income. To her shock she discovered a SARS employee had been keeping every single newspaper article and advertisement about her performances on file.
- If you own a swanky car you could easily attract the attention of an SARS employee who jots down your registration number and, at the tap of a computer keyboard, discovers who you are and takes renewed interest in your tax returns. With the click of a computer mouse he can see what property you own and how much you paid for it.
- Says a former auditor at SARS in the Eastern Cape:

"With our technology it's easier than ever for the taxman to play Big Brother. From his computer he can go to municipal car registrations or the deeds office where properties are registered or to your bank account. He can even transfer money from your bank account to the

Receiver's account if you owe him money."

- "Money made from shares can no longer be hidden from the Receiver by hiding shares in a trust fund. The Receiver requires the ID number of the person in charge of such accounts. All the loopholes have now been closed" says a Johannesburg tax consultant.
- The taxman studies magazines and newspapers and notes the names of achievers such as "Businessman or Woman of the Year" or an insurance company's top marketers. This was confirmed by SARS acting on media reports of the apparent wealth of a well known businessman. SARS launched an investigation into his affairs and as a result issued additional assessments amounting to R 2 billion. It then obtained an interdict to attach his assets and launched an application to have his estate provisionally sequestered.
- Should you get divorced and pay your ex-spouse a settlement of millions the Receiver will soon sit up and take note of whether there's any sign of those millions in your tax return.
- If he (SARS) discovers you own two homes but haven't declared any income from rent money he'll go through your monthly bank statements.
- In Gauteng, a rugby bugging scandal led to a probe being initiated by Revenue into the affairs of the Golden Lions Rugby Union.
- Every Monday morning, a Receiver of Revenue on the East Rand asked his staff to bring him the tax files of various taxpayers. He was a keen marathon runner and during long hours on the road, in training and in races, his fellow runners would unwittingly divulge damaging tax information.

- Commenting on the conduct of the Controller of Customs and/or his department in *Deacon v Controller of Customs and Excise* 61 SATC 275 Horn AJ had the following to say on page 290:

“ In my view the respondent, when one has regard to the information which was at his disposal, acted in a manner reminiscent of the old order prior to the coming into operation of the Constitution. The respondent acted on the misplaced conviction that the applicant had no rights insofar as it concerned the motor vehicle and that the provisions of the Act, drastic as they are, took precedence, come what may. The respondent was impervious to the applicant’s right to expect fair administrative procedure and his right to protection in terms of the Constitution. The manner in which the respondent dealt with this matter was particularly officious. The respondent acted without taking into account relevant factors and ignored the right of the applicant to be given full details of the respondent’s findings and the opportunity to be heard.”

From the preceding list it can be seen that the range of the ear and the eye of SARS is ever increasing and has become more sensitive, and in some cases totally insensitive to taxpayers right’s. SARS Commissioner Pravin Gordhan is quoted by the February issue of *You* magazine on page 10 as saying as follows:

“ Too many South Africans have Lamborghinis and Porches in the garage and own 10 properties yet claim their taxable income is less than R 100 000 a year.”

Is the South African Revenue Service allowed to act on assumptions such as the above without good reason ? Are there taxpayers’ rights that can be infringed and what defence do taxpayers have for their rights ?

In an article written in *Tax Planning* Vol 5 No 5 a few years ago, a senior lecturer at a local university had the following to say on page 141 about a

new income tax amendment :

" Bullies, we were taught as children, were to be stood up and to punched firmly on the nose. Many people may see the latest amendment as a bullying manoeuvre on the part of Inland Revenue. Yet perhaps by adopting the lessons learnt as children and standing up to the new provisions, the force of the amendment might prove to be illusory."

There have been a number of cases in the Constitutional Court which have laid challenge to the various sections of the three Acts referred to above. Metcash Trading Limited v CSARS CCT3/2000, in particular, drew considerable media attention as it was a challenge on the constitutionality of the "Pay Now, Argue Later" rule which, in terms of the Income Tax Act, the VAT Act and the Customs and Excise Act, requires taxpayers to pay any assessment issued by SARS before being able to challenge it before a court of law. The interest generated in the case was because of the enormous powers the "Pay Now, Argue Later" rule affords SARS. The case was referred to the Constitutional Court by the High Court to confirm its ruling that sections 36(1), 40(2)(a) and 40(5) of the VAT Act were unconstitutional.

This was subsequently declined by the Constitutional Court which stated that "the "Pay Now, Argue Later" action by SARS was not unconstitutional and that even if the taxpayer's right of access to a court of law was infringed, such infringement was justifiable and reasonable in an open and democratic society.

However, all is not lost. An examination of this judgement, although delivered in favour of the Commissioner for SARS, points the taxpayer to the Constitution and ancillary legislation which can in certain circumstances aid the taxpayer. E Lai-King expresses it thus on page 16 of of Executive Business Brief :

"Although it often seems like a David and Goliath type of struggle when the attention and awesome powers of SARS are trained on a taxpayer, there are

remedies available to even the odds.”

The very power of SARS can be a stumbling block to it as the scrutiny of the carrying out of these vast powers can expose the conduct of Revenue officials to a challenge in terms of the Bill of Rights as contained in the Constitution. A review of the Constitution and, more specifically, the Bill of Rights will show what rights arise therefrom. Moreover, decisions may be reviewed in terms of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA) and this does not require an appearance in the Constitutional Court but can be dealt with by the High Court. The PAJA will be examined in detail in a later chapter.

CHAPTER FIVE

The Constitution

5.1 Introduction

In 1997 the Taxation Committee of the South African Institute of Chartered Accountants published a memorandum of proposed taxpayer rights that they had put together with the hope that it would serve as a basis for an amendment or amendments to the (then) current tax legislation in the form of a Bill of Rights for taxpayers. Among others, the following proposals were suggested in the memorandum:

- The right to be assisted and informed (in conformity with sections 23 and 24 of the Constitution);
- The right of appeal (section 24 of the Constitution);
- The right to pay no more than the correct amount of tax;
- The right to certainty;
- The right to privacy (section 13 of the Constitution);
- The right to confidentiality and secrecy (section 13 of the Constitution);
- The right to assistance for the illiterate;
- The right to communication;
- The right to equality of treatment;
- The institution of an independent office of an ombudsman;
- The acknowledgement of receipt of all communication;
- A system of advance rulings;

- The right to courtesy and consideration;
- The right to request information;
- The right to have counsel or an advisor present at all meetings;
- The right to have reasons for tax imposed or deductions disallowed;
- The right to fair objection and appeal procedures;
- The right to have prompt finalisation of their tax affairs;

Certain of these proposals have been legislated recently, such as the Alternative Dispute Resolution (ADR) procedure and the PAJA. The SARS Service Monitoring Office was a step in the right direction to an office of an independent ombudsman. However, the SARS Service Monitoring Office is not completely independent, being part of the SARS structure.

There has always been provision for others, such as the objection and appeal procedures. However, the idea of an actual Bill of Rights for taxpayers, unfortunately, seems to have fallen on deaf ears as nothing resembling the memorandum has seen the light of day, save for the Client Service Charter appearing on the back of certain income tax returns. The taxpayer is still forced to resort to reliance on legislation such as the Bill of Rights and other sections of the Constitution, as well as the PAJA for relief from the draconian powers granted by the tax legislation.

An example to consider would be that of the United States where the taxpayer's rights have been legislated in a separate Act. This Act, the Taxpayer Bill of Rights 2 (Public Law 104 – 168) Act was promulgated relatively recently, on 30 July 1996. It created the Office of the Taxpayer Advocate and provided for increased taxpayer protection by assisting taxpayers in resolving administrative problems with the Internal Revenue Service. In terms of this Act the Taxpayer Advocate is required to identify potential problems in tax legislation and recommend appropriate changes that would avoid disputes between the Internal Revenue Service. He is furthermore required to report to Congress on an annual basis as to the work

carried out by his office and the results of complaints lodged with it.

This chapter deals with the Constitution and gives a brief overview of the sections of the Constitution which have an impact on the rights of taxpayers and the duty of the Commissioner and SARS officials. These sections will be referred to in later chapters that discuss avenues that may be open to beleaguered taxpayers as well as chapter 7 that discusses relevant decided cases.

5.2 The Constitution of the Republic of South Africa, Act 108 of 1996

5.2.1 Introduction

The Constitution was approved by the Constitutional Court on 4 December 1996. It was signed by then President Nelson Mandela in Sharpeville, Gauteng on 10 December 1996 and became effective on 4 February 1997. It is divided into 34 chapters and subdivided into sections.

5.2.2 Supremacy of Constitution

Section 2 of the Constitution reads as follows:

"This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

This is the essence of the Constitution. No other law or government action may supersede the provisions of the Constitution. Each case must however be judged on its own facts.

Horn AJ in *Deacon v Controller of Customs and Excise* 61 SATC 275 said on page 281:

" At the outset, I need to emphasize that there will be situations where an act of Parliament or conduct in terms of such an act by the authority concerned, by reason of the very nature of the act, its requirements and objects, would not be subject to the natural rules of justice. The exigencies of government are such that an individual cannot rely on the protection of the Constitution in every case where his rights may be adversely affected by an administrative act."

In given circumstances public policy and public interest will hold sway over the rights of individuals in order to ensure effective governance. The use of the word "conduct" has important implications for the Commissioner and his staff because every action by a SARS official is subject to all the clauses contained in the Bill of Rights.

Furthermore, these rights may not be limited in terms of section 36 of the Constitution as conduct is not considered to be law of general application. This view was espoused by O'Regan J in *Premier Mpumalanga v Executive Committee of the Association of the Governing Bodies of State-Aided Schools, Eastern Transvaal* CCT 10/98 on page 33 when she said:

" In this case, in relation to the breach of section 24(b), no question of justification in terms of section 33 can arise as the decision taken by the second applicant did not constitute a law of general application as required by that provision."

In that case the member of the Executive Council responsible for education in the province of Mpumalanga (the MEC) decided to discontinue paying all bursaries to Model C schools in the province with effect from July 1995. The decision was approved by the Provincial Executive Committee. The Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal challenged this in the Constitutional Court on the grounds

that their right to procedurally fair administrative action had been infringed as they had not been given reasonable notice of the action. The Constitutional Court agreed and found that the bursaries were discontinued retrospectively, without reason and without affording the Association and its members an opportunity to be heard or to re-negotiate contractual obligations in the light of its diminished income. The MEC's decision was therefore constitutionally invalid.

If decisions or actions by government, which represent conduct as perceived above, are inconsistent with the Constitution they cannot be justified in terms of the limitation of rights clause (section 36).

In this respect Chaskalson P had the following to say in *Pharmaceutical Manufacturers of SA and Another : In re Ex Parte President of the Republic of South Africa and Others* CCT 31/99 on page 47:

" It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement ... If it does not, it falls short of the standards demanded by our Constitution for such action."

Thus, although SARS has been granted vast powers in order to carry out their functions, they need to carry them out in a manner which will not be inconsistent with the Bill of Rights and will not infringe on any of the taxpayer's rights contained therein.

In *Deacon v Controller of Customs and Excise* 61 SATC 275 the applicant had imported a vehicle from the United Kingdom and after taking delivery became aware of possible irregularities with regard to the importation. He brought this

to the attention of the appellant. Thereafter they agreed that the appellant would retain the vehicle pending a full investigation. The appellant heard no more from the respondent save for a letter advising him that the vehicle was liable for forfeiture in terms of section 87 of the Customs and Excise Act and was so seized and that he was required to deliver the vehicle to a state warehouse. The letter furthermore advised that he could apply for mitigation of the seizure in terms of section 93 of the Act. In order to avoid immediate attachment the applicant tendered to the respondent the amount that was due in respect of duties and penalties owing. Respondent, without giving reasons, refused the tender of the payment and the applicant thereafter obtained an interim order allowing him to retain possession of the vehicle until the matter was resolved by the court.

Blieden J in *Goodman Bros (Pty) Ltd v Transnet Ltd* 1998 (4) SA 989 (W) said on page 997B-D:

"...the Constitution has had a profound effect on the relationship which every organ of state, such as the respondent, has in its dealings with other persons or bodies and in the manner in which it conducts its business activities. Section 217 read together with sections 32(1) and 33 makes it plain that in addition to his common-law rights, any person dealing with a state organ, such as the respondent, is entitled to expect fairness, openness and equitable conduct from it in all its actions. The respondent is required to act in the spirit of the Constitution and the consequence of this is that in exercising his discretion ... the respondent is required to act 'fairly, responsibly, and honestly; it is not unfettered'."

5.2.3 Delegation of duties and powers

The Income Tax Act, the Value Added Tax Act and the Customs and Excise Act, as we have seen, all contain sections which deal with the delegation of

the Commissioner's duties and powers. The actions of these delegates would be included under the umbrella of the term "conduct". Any action undertaken by any person delegated by the Commissioner would be subject to review in terms of section 2 of the Constitution.

In *Dawood and Another v Minister of Home Affairs and Another* CCT 35/99 O'Regan J had the following to say on page 45:

" We must not lose sight of the fact that rights enshrined in the Bill of Rights must be protected and may not be unjustifiably infringed. It is for the Legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the Legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in light of the constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given. Guidance could be provided either in the legislation itself or, where appropriate, by a legislative requirement that delegated legislation be properly enacted by a competent authority."

Thus, although the Commissioner is empowered to delegate his powers, this has to be carried out with care and guidance to ensure that the delegates exercise the power and authority in compliance with the Constitution. Any non-compliance with set down procedures or any action which is decided upon arbitrarily or carried out arbitrarily will be subject to review in terms of the Constitution. As will be discussed hereafter in Chapter 8, the SARS Income Practice Manual may also be a useful tool in the hands of a person who is challenging the conduct of SARS. In this volume are contained the internal procedures and practices followed by SARS. Although the Practice Manual does not itself amount to law which can be relied on for relief, a

review of conduct can be instituted in terms of section 33 (see 5.3.7.) of the Constitution and the PAJA, which is dealt with more comprehensively in Chapter 9

5.3 The Bill of Rights (sections 7 to 39)

Fundamental rights are dealt with in Chapter Two of the Constitution which is known as the Bill of Rights. It seeks to protect the rights and freedoms of individuals.

The late Professor E Mureinik, expressing the importance of the Bill of Rights in the Constitution, wrote an article entitled *A Bridge to Where? - Introducing the Interim Bill of Rights*. On page 31 he wrote:

" What the bridge is from is a culture of authority ... If the new Constitution is a bridge away from a culture of authority, it is clear what it be a bridge to. It must lead to a culture of justification – a culture in which every exercise of power is expected to be justified; in which the leadership given by the government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion. If the Constitution is to be a bridge in this direction, it is plain that the Bill of Rights must be its chief strut. A Bill of Rights is a compendium of values empowering citizens affected by laws or decisions to demand justification. If it is ineffective in requiring governors to account to people governed by their decisions the remainder of the Constitution is unlikely to be very successful. The point of the Bill of Rights is consequently to spearhead the effort to bring about a culture of justification. That idea offers both a standard against which to evaluate Chapter 3 of the Interim Constitution and a resource with which to resolve the interpretive questions that it raises."

The Constitutional Court guards these rights and determines whether or not

actions by the State are in accordance with constitutional provisions. The rights contained in the Bill of Rights are only limited in terms of law of general application and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society. This is a particularly important point for taxpayers to bear in mind in their dealings with SARS as actions by SARS are not considered to be law of general application and SARS's actions cannot be vindicated in terms of section 36.

According to L Olivier, in her article "The new search and seizure provisions of the Income Tax Act", the Commissioner is acutely aware of the untenable position that this puts him in. This is evident from the fact of his approach to the Constitutional Court in 1996 on an *ex parte* basis to get clarification on which sections needed to be amended to comply with the Constitution. Furthermore he attempted to get the Constitutional Court to rule whether the proposed amendments were acceptable. Unfortunately for the Commissioner, the Constitutional Court did not oblige and on 10 May 1996 informed him, without providing any reasons, that it did not have jurisdiction to hear the case. The Commissioner has and was, therefore, forced to defend any attack on the provisions of the Act on the basis that the sections either did not infringe the human rights guaranteed in terms of the Constitution or it was limited in terms of the general limitation clause of the Constitution.

5.3.1 Rights

Section 7(2) of the constitution reads as follows:

" The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

This is an important section because it means that government organs and their employees have a positive duty to carry out their functions in relation to the Bill of Rights.

5.3.2 Application of the Constitution

Section 8 dictates how and to whom the Bill of Rights should be applied:

- " (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court
- a. in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that the legislation does not give effect to that right; and
 - b. may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).
- (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person."

This is the section which requires that SARS, as an administrative branch of government, conduct itself in a manner that is consistent with the provisions in the Bill of Rights. It is the link that brings the two together and for this reason is a critical provision in the Bill of Rights.

5.3.3 Equality

Section 9 provides as follows:

- (1) Everyone is equal before the law and has the right to equal protection

and benefit of the law.

- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

A good example of the practical application of this was the different tax rates that applied to men, married women and unmarried women as provided for by the Income Tax Act. In order for the Income Tax Act to conform with the provisions of this section of the Constitution, the Act was amended in 1995 to provide a single rate for the abovementioned individuals.

5.3.4 Privacy

Section 14 of the Constitution states :

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

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

Prior to *Rudolph v CIR* CCT 13/96, which is reviewed below at 7.4, the Commissioner had wide powers of search and seizure. This was the challenge mounted in that case, but since the seizure had taken place before the Interim Constitution came into effect, the application was dismissed. However the Commissioner must have taken note of the Constitutional Court's sentiments of the merits on the challenge because shortly thereafter the revenue acts were amended to be consistent with the Constitution.

The privacy rights provided for by the Constitution have been incorporated into the Income Tax Act in section 74D so that Revenue officials may not call on anybody without reasonable prior notice and must do so with a written request. Any Revenue official who has been delegated to carry out such a task must produce an authorization letter on request. The significance of this is that only officials authorized by the Commissioner may inspect books and records of taxpayers. Furthermore, the authorized officials may only conduct a search where a warrant has been issued by a Judge of the High Court.

Even after the amendments to the Income Tax, VAT and various other Acts, that were amended after *Rudolph v CIR* CCT 13/96, it is not impossible for a warrant to be challenged. In *Haynes v CSARS* 64 SATC 321, a case which came before the Transkei High Court, the circumstances upon which warrants for search and seizure were issued *ex parte* by a judge in Chambers in terms of the provisions of the Income Tax Act and the VAT Act, were challenged. The Commissioner had obtained the warrants and had seized documents at the taxpayer's premises. The taxpayer launched an urgent application to the Court submitting that, amongst other things, the warrant had not been correctly issued as the Commissioner had failed :

- 1) to show on reasonable grounds that the taxpayer had not complied with the Income Tax and VAT Acts;

2) to lay before the judge, who issued the warrants, facts and circumstances which justified granting a warrant without bringing it to the notice of the taxpayer.

The Court found that because of the above facts the warrant had been issued incorrectly and was therefore invalid. It ordered that all the documents seized be returned.

This is in agreement with the finding by Tebbutt J in *Park-Ross and Another v Director:Office for serious Economic Offences 1995 (2) SA 148 (C)* where Tebbutt J confirmed, that in order to issue such a warrant, the issuing judge must ensure that the person seeking the authority (to search and seize) must have reasonable grounds to believe that an offence has been committed.

Some years ago, people acting as agents for the Regional Services Councils approached businesses to inspect their books to verify that correct levies had been paid over. This took place again some time later. On enquiry it was confirmed by the Commissioner that only employees of SARS who are specifically delegated with written authorization may carry out such a task (B.Croome "Your right to privacy").

A similar set of circumstances arose when inspectors appointed by Sector Education Training Authorities visited businesses requesting access to books to establish that correct skills development levies had been paid over. Again it was confirmed that only SARS appointed officials could request access to books.

5.3.5 Property

Section 25(1) states:

"No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

In *First National Bank t/a Wesbank v CSARS* CCT 19/01 the Constitutional Court had to decide whether section 114 of the Customs and Excise Act was inconsistent with this section of the Constitution. In delivering his judgement, Ackermann J said the following on page 80:

" Under the circumstances the conclusion is unavoidable that the infringement by section 114 of section 25(1) is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The provision is accordingly constitutionally invalid."

A similar finding was made in *Lesapo v North West Agricultural Bank and Another* CCT 23/99 where the Court found that the individual's right to access to a Court to have a dispute resolved had been violated.

5.3.6 Access to information

Section 32 reads as follows:

- " (1) Everyone has the right of access to
- a. any information held by the state; and
 - b. any information that is held by another person and that is required for the exercise or protection of any rights.
- (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state."

This section deals with the access to information and grants the right of access to any information held by the state and any information held by another person for the protection of any rights.

In the converse situation, it should not be possible for representatives of the Commissioner to be allowed to make use of information to his advantage to which the taxpayer may not have access.

It is not unknown for the representatives of the Commissioner to make use of unreported decisions of the Special Court to which he has access and the taxpayer does not.

M Walpole on page 118 *The Taxpayer* Vol 6 No 5 writes:

" I have noticed a disturbing readiness on the part of some of the Commissioner's officials to brandish unreported judgements at taxpayers when these support the Commissioner's case. I believe that occasionally the unreported judgement is produced as late in proceedings as in the course of an appeal in the Special Court. Taxpayers are therefore somewhat at the mercy of the Commissioner. They would certainly feel in such circumstances that any trust in 'fair play' is misplaced; and I have yet to hear of cases in which the Commissioner's representative has provided a taxpayer with a case that turned out in favour of the taxpayer. The practice smacks of unfairness and, I would submit, ought to be discouraged."

Corbett JA (as he then was) in *Estate Dempers v SIR 39 SATC 95*, involving this very issue, expressed the Court's view on the matter on pages 106 and 107:

"... The use in court by the Secretary's representative of unreported judgements, where the consent of the taxpayer has not been obtained, amounts thus, in my view, to a breach of section 4 of the Act either by the representative himself or, when he is not a member of the Department, by

the departmental member who briefed him. To the extent that this has become a practice in the court's dealing with income tax appeals, this court should, in my opinion, state that the practice is not in accordance with the abovementioned secrecy provisions."

I Wilson, a partner at Price Waterhouse Meyernel writes on page 140 of Tax Planning Vol 7 No 6:

" It is submitted that, when the Commissioner intends to place reliance on an unreported case in assessing or attempting to assess taxpayers, he is morally bound to ensure that taxpayers have access to the entire judgement in the case. As a party in every case, he is entitled to a copy of the judgement. But the taxpayer should be the only other party entitled to receive a copy of the unreported judgement. By resorting to unreported judgements the Commissioner denies the taxpayer the opportunity to determine whether the case in question is distinguishable or whether the extract or principle relied upon forms part of the *ratio decidendi*. Accordingly, in the interests of the proper dispensation of justice, this practice should be discouraged."

In light of the above opinions, it would seem that the practice adopted by the Commissioner's representatives would be contradictory to the spirit of section 32 and section 33 of the Constitution. Moreover, should the Commissioner find himself in the position where he has in his possession documents or information which relate to the taxpayer's affairs and are required by the taxpayer for the protection of his rights under the Constitution, then the Commissioner is required to give the taxpayer access to all the relevant information in his possession.

In *Jeeva and Others v Receiver of Revenue, Port Elizabeth, and Others* 57 SATC 187 the appellants were directors, shareholders and employees of two company's which had been placed in liquidation at the request of SARS. SARS had authorized a raid on the companies offices and directors' homes early in 1990 and had seized documents dating as far back as 1985. In the

meantime, the liquidators of the companies had applied to the Master of the High Court to hold a commission of inquiry into their affairs in terms of sections 417 and 418 of the Companies Act. At the time SARS was still in possession of all the documents from the appellants. Subpoenas were served on the appellants to attend the inquiry and to submit to interrogation. The appellants requested SARS to allow them access to the seized documents he had in his possession relevant to the inquiry. This request was denied by SARS and an urgent application was brought before the South Eastern Cape Local Division of the Supreme Court (now the High Court). The respondent argued that the appellants were not assisted by the Constitution as the documents were not required for the protection of any of their rights and in any event SARS were prevented from making the documents available because of the secrecy provisions in the Income Tax Act.

Jones J, in finding for the appellants had the following to say on pages 196 and 197 regarding their right to access to the information for the protection of their rights:

" Much of the relevant information which will form the subject of the interrogation deals with company affairs going back over the years. Some of it is contained in documents seized by the Receiver of Revenue in 1990. The applicants have not had sight of these documents since then. They cannot be treated equally and fairly at this interrogation if they do not have sight of these and other relevant documents before the hearing."

With respect to the refusal by the respondent to make the documents accessible to the appellants because of the secrecy provisions in the Income Tax Act he found as follows on page 210:

" There is nothing secret about this information as far as the parties are concerned. It is accordingly entirely artificial to seek to invoke the secrecy principle of tax legislation at this time and in these circumstances. What is the purpose of preserving so-called secrecy by precluding the persons who gave the information in the first place from now having access to it ? The secrecy

principle has no application to these facts. None of the parties concerned is a stranger to the taxpayers. They are intimately associated and there is no conflict of interest between them and the taxpayer."

This is an important judgement for the rights of the taxpayer as it sends a clear message to SARS that they cannot employ the secrecy sections of the revenue acts merely for their own convenience, nor to stack the deck against the taxpayer. If they wish to prevent access to information held by them they have to prove that the infringement of the individual's right to access is justifiable and fair.

In *Ferela (Pty)Ltd and Others v CIR* a dispute had arisen between the Lourenco and Baeta families. The Lourenco family had brought an Anton Pillar type order to obtain books of a company which was owned by the Baeta family. This order was executed but was subsequently set aside and the Lourenco family ordered to return the books. The Lourenco family appealed against this, but this appeal failed and they were then ordered again to return the documents. Before they could return the documents, the Commissioner obtained a warrant for the documents on the basis of an affidavit from a chartered accountant who stated therein that he had investigated the affairs of the Baeta family group of companies, at the request of the Lourenco family, and discovered certain irregularities including a tax liability of R 70 million. The Baeta family thereafter attempted to obtain a copy of the warrant issued in terms of section 74D of the Income Tax Act. They were denied access to the court file on the instructions of the Commissioner.

They then appealed to the High Court submitting that their rights in terms of section 32 of the Constitution had been infringed in that the Commissioner had allowed himself to get involved in the dispute between the two families and that his intervention was interpreted to indicate that he had allowed himself to be used to frustrate the effect of a court order. The Commissioner was ordered to return all the documents and also to pay the Baeta family's

legal fees.

This finding confirmed that the Commissioner is not permitted to simply join forces with a person when the taxpayer and that person have a dispute with each other. As far as the taxpayer is concerned, he cannot use the Constitution as a smokescreen to delay a trial in the Tax Court. This seemed to be the position in *Alliance Cash & Carry (Pty) Ltd v CSARS 64 SATC 111*. In this case the taxpayer was involved in a Special Court appeal against the Commissioner. It dealt with a dispute of whether certain goods had been sold to an export country and in such case would then be zero rated. The Commissioner required documentary evidence that the goods had in fact been exported. The taxpayer then applied to the High Court for an order requiring the Commissioner to make available certain documents that the taxpayer insisted were needed by him for the tax appeal. The High Court rejected the application stating that such matters were provided for in the rules of the Special Court and should have been argued there. The taxpayer then proceeded, with leave to appeal in the matter, to a Full Bench of the High Court where he argued that he had a constitutional right to have access to the documents and to be furnished with reasons for the disallowance of the VAT. The Full Bench of the High Court also rejected the application for the same reasons.

The importance of this case is that, where a right that is protected by the Constitution is adequately dealt with by other legislation or Court rules, the latter should be exhausted first and not the Constitution.

5.3.7 Just Administrative Action

Section 33 of the Constitution reads as follows:

“ (1) Everyone has the right to administrative action that is lawful, reasonable

and procedurally fair.

- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must
 - a. provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - b. impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - c. promote an efficient administration.

In *Carlson Investments Share Block (Pty) Ltd v CSARS* 63 SATC 295 the appellant had lodged an objection against an income tax assessment issued by the Commissioner. Thereafter the Commissioner allowed the objection, based on a judgement in a similar case which seemed to reverse long standing precedent, and revised the assessment. The appellant thought, mistakenly, that that was the end of the matter. However, after a considerable time – but less than three years - had passed since the revised assessment had been issued, SARS advised the appellant that the objection that had originally been allowed had now been rejected based on the fact that the judgement upon which SARS had originally based the allowance of the objection had recently been overturned by the Supreme Court of Appeal. The taxpayer brought an application before the Witwatersrand Local Division of the High Court seeking an order declaring section 79(1) of the Income Tax Act unconstitutional.

Section 79(1) provides for the issuing of additional assessments:

- “(1) If at any time the Commissioner is satisfied –
- (a) that any amount that was subject to tax and should have been assessed to tax under this Act has not been assessed to tax; or

- (b) that any amount of tax that was chargeable and should have been assessed under this Act has not been assessed; or
- (c) that, as respects any tax which is chargeable and has become payable under this Act otherwise than under an assessment, such tax has not been paid in respect of any amount upon which such tax is chargeable or an amount is owing in respect of such tax,

he shall raise an assessment or assessments in respect of the said amount or amounts, notwithstanding that an assessment or assessments may have been made upon the person concerned in respect of the year or years of assessment ... provided that the commissioner shall not raise an assessment under this subsection –

- (i) after a period of three years from the date of the assessment (if any) in terms of which any amount which should have been made upon the person concerned...”

On page 307 of his lengthy judgement, Navsa J had some important points to make regarding administrative action:

“ It is beyond debate that public authorities such as the Revenue Service are bound, in exercising their statutory powers and complying with their duties, to have due regard to constitutional standards of fair administrative procedures and lawful administrative action. It is equally clear that arbitrary and capricious behaviour will not be tolerated. Statutes that permit such conduct will invariably be found wanting when measured against the Constitution. And of course, in considering whether administrative procedures are fair and whether administrative action was lawful a court will not be limited to considering only the application of the twin maxims of *audi alteram partem* and *nemo iudex in sua causa*. As is evident from the authorities cited by the applicant a court will look to the principle and procedures applied in a

particular case and will determine whether in the totality of the circumstances the person affected was treated fairly and whether the outcome was just.”

Unfortunately for the appellant the Court rejected the submission that SARS had acted unfairly and that section 79(1) was unconstitutional.

However, on page 324 Navsa J found as follows:

“ To sum up: I conclude that the application is misconceived. The applicant’s reliance on the doctrine of legitimate expectation is without substance. There is an express power and obligation to revisit a tax assessment and this power is provided in the national interest. There is no justifiable charge of an abuse of power. There is no conduct or practice by the respondent or anything else which the applicant can rely on to support its claim of legitimate expectation. Insofar as the *functus officio* principle is concerned the statute in question informs one that finality attaches only at the end of a three year period. In the interim, taxpayers know that they are to arrange their affairs accordingly. The logical but untenable extension of all the applicant’s arguments is that in the circumstances where tax is in fact due and owing, it is exempted from such liability notwithstanding that other taxpayers similarly placed would be obliged to pay the tax in question or would in fact have paid it.”

In an earlier case, *Waters v Khayalami Metropolitan Council* 1997 (3) SA 476 (W), Navsa J said on page 494:

“It is, of course, fundamental to fair administration action that a person be afforded a full opportunity to hear the case against him and to state his case. Ideally, he should not, until the process has run its full course, be deprived of any of his rights.”

An early case which took advantage of the Interim Constitution was *Tseleng v Chairman, Unemployment Insurance Board, and Another* 1995 (3) SA 162 (T). In this case the applicant had applied for certain benefits under the

Unemployment Insurance Act. These were paid, but on re-application the application was denied. The applicant applied to have the Board's decision reviewed but this was also denied. Thereafter the applicant brought an application before the Transvaal Provincial Division of the High Court seeking a review of the Board's decision. The Court agreed with the applicant that the Board had breached his fundamental right, conferred on him by the Constitution, to have the right to procedurally fair administrative justice. The Court therefore set aside the Board's decision and referred it back to the Board for reconsideration.

This decision is important for it confirms that the review process as contemplated by section 33 of the Constitution is not a piece of theoretical legislation but is a useful tool in the hands of individuals against state bureaucracy and authoritarianism.

As a direct result of section 33(3) of the Constitution, the Promotion of Administrative Justice Act, No 3 of 2000 was promulgated. This will be discussed in detail in Chapter 9.

5.3.8 Access To Courts

Section 34 of the Constitution provides as follows:

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

No law may prevent an individual from having access to a court of law to have a dispute resolved or action reviewed. From the cases that have been reviewed in Chapter 7 it is clear that some litigants appeal to the courts where they feel that their access to a court of law has been denied. In the main this

has been found not to be so. With the introduction of the new Constitution, more specifically section 33, and the PAJA, individuals have greater access to the courts.

5.3.9 Self-Incriminating Evidence

Section 35 is a large section covering the rights of arrested, detained and accused persons. Subsection 3(j) provides as follows:

“ Every accused person has the right to a fair trial, which includes the right ... (j) not to be compelled to give self-incriminating evidence.”

The rights of accused persons are dealt with and specifically under (j), the right to not be compelled to give self-incriminating evidence. The Ferreira and Parbhoo cases, which are reviewed above, had important implications for legislation that was held to be inconsistent with this provision. In this regard Tebbutt J in *Park-Ross and Another v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C) confirmed on page 163 that South African law favours the approach of that of the American Courts which was espoused by Warren CJ on page 460 in *Miranda v Arizona* 384 US 436 (1966) when he said:

“ Our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labours rather than by the cruel, simple expedient of compelling it from his own mouth.”

It is of vital importance that a taxpayer knows what his rights are with respect to giving self-incriminating evidence which could be used against him at a later date. The implications are illustrated well in two separate cases. In the first, *S v Sebejan and Others* 1997 (8) BCLR 1086 (T), it was confirmed that a suspect is entitled to the same fair pre-trial procedures as an arrested person and that if a suspect is deprived of the rights afforded to an arrested person

then they would be denied a fair trial. However in the second, *S v Van der Merwe* 1997 (10) BCLR 1470 (O), it was ruled by the Court that when incriminating statements are made before arrest and before the accused is even a suspect, there is no reason why the evidence may not be used by the prosecution at the trial. The main reason why the court came to this conclusion was that the evidence had been obtained spontaneously and without any pressure. In this instance it was admissible. This has an implication for the taxpayer. Should he be threatened with prosecution in terms of the Revenue Acts he may rely on his Constitutional right not to give self-incriminating evidence that can be used against him. Should SARS merely be wishing to obtain information regarding his civil liability, and have undertaken not to prosecute him, the constitutional protection will not be available.

5.3.10 Limitation of Rights

Section 36 states:

- “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including
- a. the nature of the right;
 - b. the importance of the purpose of the limitation;
 - c. the nature and the extent of the limitation;
 - d. the relationship between the limitation and its purpose; and
 - e. less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

"Conduct" is not considered to be law of general application. This means that any "conduct" on the part of SARS cannot be justified by the limitations of rights clause above. Should their conduct, and that includes the exercising of a discretion, infringe on the rights of an individual as contemplated by the Constitution, it will be invalid.

It must be remembered, when dealing with rights and the limitation thereof, what Tebbutt J said in his judgement in *Park-Ross and Another v Director: Office for Serious economic Offences* 1995 (2) SA 148 (C). He stated on page 152 that:

"the party who seeks to establish the existence of the right bears the onus of proof insofar as the first leg of the inquiry is concerned, while the party who seeks the limitation of that right bears the onus of establishing the justification for that limitation in terms of s33(1) (of the Constitution)."

CHAPTER SIX

The Constitutional Court

6.1 Introduction

The Constitutional Court plays an important part in everybody's lives in South Africa. Some may not even be aware of the part it plays because they have not experienced it directly. As will be seen from the First National Bank case, which is reviewed in Chapter 7, we are now able to look back to a time when there was no protector of individual rights and freedoms. The Constitutional Court is the body which is charged with interpreting and upholding the Constitution and in that way affects us all, directly and indirectly. This chapter gives a brief overview of the structure and workings of the Constitutional Court and the influence that it has on the rights of taxpayers.

6.2 Establishment

The Constitutional Court was established in 1994 by the first democratic constitution in South Africa, the Interim Constitution of 1993. This constitution became effective on 27 April 1994. The Constitutional Court commenced operations in February 1995. The Court comprises eleven judges of which two are women. The judges serve for a term of twelve years and may not be appointed for a further term. They are required to retire at the age of 70.

6.3 The Constitutional Court as the Highest Court in South Africa

The Constitutional Court is the highest Court in the Republic of South Africa. Section 172(2)(a) of the Constitution provides as follows :

"The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

Thus it is clear that although a High Court or the Supreme Court of Appeal may rule on constitutional matters, if it rules that a piece of legislation is inconsistent with the Constitution, the ruling must be referred to the Constitutional Court for confirmation before the ruling will become effective. Nor is the Constitutional Court a law unto itself. It is obliged, and its primary role is, to uphold the Constitution. It cannot, it may not, make a ruling that is inconsistent with the Constitution that it is charged with upholding. In doing so it may consider the law developed in other democratic countries.

6.4 The 1996 Constitution

After the Interim Constitution had come into effect in April 1994, Parliament, sitting as the Constitutional Assembly, was required by it to produce a constitutional text that would form the new constitution. The Constitutional Court had an important part to play in the writing of the new constitution. It was required to certify that the text, submitted to it by the Constitutional Assembly, reflected the constitutional principles that had been agreed upon in advance by the negotiators of the Interim Constitution. In *Ex parte Chairperson of the Constitutional Assembly : in re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC)* the Constitutional Court ruled that it could not certify the text as there were parts

of it that did not reflect the agreements reached. The text was therefore referred back to Parliament. Parliament reconvened and made amendments to the text which was then adopted by Parliament in October 1996. In its subsequent judgement the Constitutional Court certified that the text complied with the agreements reached. This text then became the Constitution of the Republic of South Africa and came into effect in 1997. The Constitutional Court has therefore, aside from the cases that were already coming before it before the new constitution was adopted, had an effect on the rights and freedoms of individuals by certifying the constitutional text.

6.5 Constitutional Court Cases

The method in which cases may be placed before the Constitutional Court is twofold. All cases that end up in the Constitutional Court must first be placed before the High Court. The High Court will then rule on the case and if it is a constitutional issue which requires the invalidating of legislation, the High Court will refer the judgement on to the Constitutional Court for confirmation. That is the first way that a case can reach the Constitutional Court.

The second way is that if a matter is placed before the High Court and the High Court dismisses the application the appellants may apply directly to the Constitutional Court for leave to appeal. The judges of the Constitutional Court will consider the merits of the case and whether there is any reasonable chance that the application will succeed. Should they feel that there is such a reasonable chance, they will set it down for hearing.

6.6 Cases before the Constitutional Court

The Constitution requires that at least eight judges hear every case that is placed before them. Normally, however, eleven judges hear each case. This can be seen from the case reviews that follow in Chapter 7. Should a judge

not be available for attendance in the Court for a lengthy period, and a good example of this would be when Judge Goldstone was appointed to appear in the International Court in the Hague, the President of South Africa may appoint a judge on a temporary basis.

Decisions in the Court are reached by a majority vote of the judges hearing the case. The judges either agree with the judgement of the judge who delivers the judgement of the Court, or disagree. Each judge must state his reasons for disagreement in a written judgement. The first case that is reviewed in Chapter 7, *Ferreira v Levin NO and Others CCT 5/95*, is a good example of this. In this case all the judges agreed with Ackermann J in his finding but for different reasons. However, one of the judges disagreed completely with the finding.

The Constitutional Court does not carry out its task in exactly the same manner as the High Court or Supreme Court of Appeal in that it does not, in the main, hear evidence or argument or question witnesses. The parties to each matter, the appellants and the respondents, submit written arguments to the Court and the Court presents its finding thereon. It also does not deal with matters that do not have Constitutional bearing. All matters of this nature are dealt with by the courts previously mentioned.

6.7 Relationship with Parliament and Provincial Assemblies

The Constitutional Court has an important relationship with Parliament and the various provincial assemblies. Where there is a dispute in any of these bodies, regarding the constitutionality of legislation that has been passed and assented to, a third of the members may request the Constitutional Court to give a ruling thereon. In the same way, before assenting to new legislation,

the President of South Africa or any of the Provincial Premiers may request the Constitutional Court to review the constitutionality of that legislation.

6.8 Conclusion

The Constitutional Court has an important role to play in the rights and freedoms of individuals. This role is dynamic in that, in interpreting the Constitution it is in effect developing the law of our country and how it should be applied. Section 8(3)(a) and (b) of the Constitution specifically encourages the courts to develop common law and common law rules. A good example of this in Chapter 7 is the Rudolph case because as a result of this case a number of revenue acts were amended. J. Silke in his article entitled "Light at the end of the constitutional tunnel" writes

" Most taxpayers who have challenged the constitutionality of a whole variety of fiscal provisions in the Income Tax Act and the Customs and Excise Act, have failed. But the recent decision of the Constitutional Court in First National Bank of SA Ltd t/a Wesbank v C:SARS & Another indicates that there is light at the end of the constitutional tunnel.

CHAPTER SEVEN

A Review of Constitutional Court Cases

7.1 Introduction

There have been a number of cases referred to the Constitutional Court which affect taxpayers' rights either directly or indirectly. Each case will be examined to discover what important information can be gleaned with respect to taxpayers' rights and how the Court has interpreted these rights in respect of the Constitution and legislation prevailing at the time. In each case selected - this is not an exhaustive study of Constitutional Court cases - there will be a brief review of the facts of the case. Then the essence of the judgements will be given and thereafter the points which are important to taxpayers will be discussed and how these points may be applied to the three acts discussed in chapter 3.

7.2 Ferreira v Levin NO and Others CCT 5/95

The issue before the Constitutional court was the constitutionality of section 417(2)(b) of the Companies Act. This section provided for the examination of persons in the winding up of a company and read as follows:

" 417. Summoning and examination of persons as to the affairs of company

(1) In any winding-up of a company unable to pay its debts, the Master or the Court may, at any time after a winding-up order has been made, summon before him or it any director or officer of the company or person known or suspected to have in his possession any property of the company or believed to be indebted to the company, or any person whom the Master or the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company.

(1A) Any person summoned under subsection (1) may be represented at his attendance before the Master or the Court by an attorney with or without counsel.

(1) (a) The Master or the Court may examine any person summoned under section (1) on oath or affirmation concerning any matter referred to in that subsection, either orally or on written interrogatories, and may reduce his answers to writing and require him to sign them.

(b) Any such person may be required to answer any question put to him at the examination, notwithstanding that the answer might tend to incriminate him, and any answer given to any such question may thereafter be used in evidence against him."

This case was referred to the Constitutional Court by the Witwatersrand Local Division of the Supreme (now High) Court. It comprised two separate matters in which the appellants, Ferreira and Vryenhoek, had been summoned to appear at separate inquiries in terms of the above section. During the inquiries the appellants objected to being forced to give evidence which might be self-incriminating and which could be used against them in further proceedings.

They applied to the Supreme Court for interdicts prohibiting their further interrogation pending the determination of the constitutionality of section 417(2)(b). In that case, on 28 November 1994, Van Schalkwyk J dismissed both applications but granted leave to appeal to a full bench of the Supreme Court and referred the matter to the Constitutional Court.

The Constitutional Court had to decide whether the infringement of the individual's right not to give evidence which might later prejudice him was justified in terms of the need by the liquidators to obtain the evidence.

In a lengthy judgement, delivered by Ackermann J, the Court had the following to say on page 124:

" I conclude that section 417(2)(b) of the companies Act is inconsistent with the right to freedom protected in section 11(1) (of the Interim) Constitution to the extent indicated above. It must therefore pursuant to section 98(5) of the (Interim) Constitution, be declared invalid to the extent of such inconsistency. This is not a case where an order in terms of the proviso to section 98(5) ought to be made. The declaration of invalidity is very narrow. Its only effect will be to render inadmissible, in criminal proceedings against a person previously examined pursuant to the provisions of section 417(2)(b), incriminating evidence given by such person under compulsion of section 417(2)(b). Neither the interests of justice nor good governance require that these provisions should be kept in force any longer."

Chaskalson P agreed with the ultimate finding of Ackermann J that section 417(2)(b) was unconstitutional but he disagreed with the reasoning. He elaborated on pages 126 and 127 as follows:

" I am, however, unable to agree with his analysis of the issue of standing and with his interpretation of section 11(1) of the (Interim) Constitution on which he ultimately relies for his decision. In my view the matter is one in which the Applicants have standing and which can and should be dealt with under section 25(3) of the (Interim) Constitution ... A challenge to the

unconstitutionality of section 417(2)(b) should therefore, in my view, be characterised and dealt with as a challenge founded on the right to a fair criminal trial. It is precisely because section 417(2)(b) is inconsistent with that right, that its validity can be impugned."

His view was that the reasoning should be positive in promoting the right of an accused to a fair trial rather than the negative alternative of protecting the freedom under section 11(1) of the (Interim) Constitution against all governmental action that could not be justified in terms of the Constitution. Mahomed DP, Didcott J, Langa J, Madala J and Trengrove AJ concurred with his judgement.

Kriegler agreed with certain points in the above judgements but disagreed with all of the above judgements as a whole. In his view the previous judgements had effectively "jumped the gun" by providing immunity to the appellants against something that had not happened, nor had any certainty of happening. The appellants were concerned that evidence they might give might be used against them in some later proceedings. He stated the following on pages 148 and 151:

" The essential flaw in the applicants' case is one of timing or, as the Americans and, occasionally, the Canadians call it, 'ripeness'. That term has a particular connotation in the constitutional jurisprudence of those countries which need not be analysed now. Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallized, and not with prospective or hypothetical ones. Although, as Professor Sharpe points out and our Constitution acknowledges, the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air. And the present cases seem to me, as I have tried to show in the parody above, to be pre-eminent examples of speculative cases. The time of this Court is too valuable to be frittered away on hypothetical fears of

corporate skeletons being discovered ... I would therefore dismiss both applications."

Mokgoro J in turn agreed with Ackermann J, that the section was unconstitutional. However he agreed with Chaskalson P that the applicants did have the standing that Ackermann J had felt they did not have. Although he agreed with Chaskalson P, with regard to the meaning of "freedom" in section 11(1) of the (Interim) Constitution, he had a difference in respect of the interpretation by Chaskalson P of "freedom".

O'Regan J said the following in her judgement on pages 160 to 164 and 166 :

" In this case, however, although the challenge is against section 417(2)(b) in its entirety, the constitutional objection lies in the condition that evidence given under compulsion in an inquiry, whether incriminating or not, may be used in a subsequent prosecution. There is no allegation on the record of any actual or threatened prosecution in which such evidence is to be led. There can be little doubt that section 7(4) (of the Constitution) provides for a generous and expanded approach to standing in the constitutional context. The categories of persons who are granted standing to seek relief are far broader than our common law has ever permitted. In this respect, I agree with Chaskalson P. This expanded approach to standing is quite appropriate for constitutional litigation ... it is clear that in litigation of a public character, different considerations may be appropriate to determine who should have standing to launch litigation. In recognition of this, section 7(4) casts a wider net for standing than has traditionally been cast by the common law ... in the special circumstances of this case, it appears to me that the applicants may rely on section 7(4)(b)(v), as applicants acting in the public interest. The possibility that applicants may be granted standing on the grounds that they are acting in the public interest is a new departure in our law ... applicants under section 7(4)(b)(v) need to point to an infringement of or threat to the right of a particular person. They need to allege that, objectively speaking, the challenged rule or conduct is in breach of a right enshrined in chapter 3.

This flows from the notion of acting in the public interest ... in these special circumstances, it seems to me that the applicants have established standing to act in the public interest to challenge the constitutionality of section 417(2)(b). Accordingly, I agree with Ackermann J that the applicants should be granted direct access in respect of the first issue referred to this court by the Transvaal Provincial Division of the Supreme Court. Once the court has considered and granted direct access, it must then decide the issue upon which it has granted direct access. No further considerations of standing arise. To that extent, I respectfully disagree with Ackermann J who, after granting direct access to the applicants, finds that they have no standing to challenge section 417(2)(b) on the grounds that it is in breach of section 25. He does of course find that they have standing to challenge the section on the grounds that it is in breach of section 11(1). It is my view, after weighing these considerations, that section 417(2)(b) constitutes an unjustifiable breach of section 25 (of the Interim Constitution). For the above reasons, I concur in the order proposed by Ackermann J."

Sachs J in his judgement had the following to say on pages 166, 181 to 184 and 186:

" In essence, I accept Ackermann J's contention that the issue engaged is a freedom one and not a fair trial one, and Chaskalson P's argument that the concept of constitutionally protected freedom as advanced by Ackermann J is too broad ... In South Africa today, 'enormous fraud' is unfortunately a continuing occurrence. As I have said, it might well be reasonable and justifiable to continue with inquisitorial procedures against officials of failed companies. The public interest undoubtedly requires both that fraudulent dealings be exposed and set aside where possible, and that those responsible be punished. The corporate veil functions not only in the legal level to promote corporate identity and create the conditions for limited liability, but also at the evidential level to hide the doings of dishonest company officials. Front companies and nominee companies can obscure the true economic nature of transactions. Frauds can be intricate, take place over a long time,

and depend on the effect of activities which in their separate detail appear lawful, but in their cumulative conjunction are fraudulent. There is no 'smoking gun' to be detected by ordinary police methods. Yet, even allowing for the fact that special procedures of ancient provenance, designed to pierce the corporate veil and ensure that fraud is properly uncovered and punished, may pass the tests of reasonableness and justifiability, do they as well overcome the third hurdle provided by section 33(1) in relation to section 11, namely, that they are necessary? I have grave doubts as to whether the materials placed before us indicate that the test of necessity has been met ... in the words, once more, of Mr Justice Frankfurter: 'No doubt the constitutional privilege (against self-incrimination), may, on occasion save a guilty man from his just deserts. It was aimed at a more far-reaching evil – a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality. Prevention of the greater evil was deemed of more importance than occurrence of the lesser evil. Having had much experience with a tendency in human nature to abuse power, the Founders sought to close the doors against like future abuses by law enforcing-agencies.' The framers of our Constitution no doubt had more recent South African experience in mind when they drafted Chapter 3. To sum up: I agree with the implications of Ackermann J's judgement that section 417 should not be seen as a piece of criminal procedure legislation deliberately targetting company officials for specially harsh treatment, but rather as an integral part of an Act designed to consolidate law relating to companies ... I agree with the conclusions of Ackermann J and the order he proposes."

This case is of great importance to the taxpayer as it prohibits the forcing of an individual to give evidence that may incriminate him which can be used against him in further proceeding. This can be applied to the inquiry provisions of the Income Tax Act, the VAT Act, Customs and Excise Act and for that matter, any other Act that places him in the same position. This would include, for example, under the Income Tax Act the provisions of

section 74 and the use of the section by SARS in inquiries, audits and investigations.

Even if such evidence is handed over by the taxpayer it cannot be used against him. In *R v Esposito* (1985) 21 CCC (3d) 88 (1985) OR (2d) 356 (CA) it was stated that:

“ The rights of a suspect in respect of an accused to remain silent is deeply rooted in our legal tradition. The right operates at both the investigative stage of a criminal process and at the trial stage.”

In any event, from a practical point of view, it would be useless to confer protection to an accused from incriminating himself at trial if the protection did not also apply to pre-trial statements. This was pointed out in by McLachlin in *R v Herbert* (1990) 2 SCR 151 (57 CCC(3d)).

7.3 Harold Bernstein and Others v L. Von Wielligh Bester NO and Others CCT 23/95

As in the previous case, the essence of this case involved a challenge on the constitutionality of section 417 and in this case also section 418 of the Companies Act. The case centred around the collapse of the Tollgate group of companies, one of the largest corporate collapses in South Africa. At the time the Tollgate Group had debts of approximately R400 million. Bernstein was a partner in the firm of Kessel Feinstein, Chartered Accountants who were the auditors of the Tollgate Group.

In the investigation into the group's demise, certain irregularities were identified and certain directors and the chairman of the group were facing criminal charges relating to fraud and theft. Subsequent to the investigation into the affairs of the group, and following an application by the liquidators of the group, the Supreme Court (now the High Court) ordered that a

Commission of Enquiry be held into certain companies in the group. Bernstein in his capacity as partner of Kessel Feinstein was summonsed by the Commission to appear before it and produce certain documentation relating to the companies. Bernstein's attorneys then launched an application in the Supreme Court to have the order for the holding of the enquiry rescinded to the extent that it required partners and employees of Kessel Feinstein to be summonsed before the Commission, and to grant an interdict against the respondents and the Commissioner from using or disposing of or in any way disclosing to others any evidence given or documents obtained from the applicants.

Futhermore, they sought an order interdicting the respondents from proceeding with examination of Bernstein or any employees of Kessel Feinstein, an order declaring sections 417 and 418 to be unconstitutional.

This latter attack was advanced on the grounds that :

- "1. The whole mechanism created under sections 417 and 418 violates a whole cluster of inter-related and overlapping constitutional rights, namely,
 - (a) the right to freedom and security of the person;
 - (b) the general right to personal privacy;
 - (c) the particular aspect of the right to personal privacy not to be subject to seizure of private possessions or the violation of private communications.
2. The mechanism violates section 24 in that it permits an administrative interrogation in violation of the provisions of that section.
3. Insofar as section 417(2)(b) deprives witnesses of their privilege against self-incrimination and renders their self-incriminating evidence admissible against them in subsequent criminal proceedings, it violates both the general as well as particular rights to a fair trial in terms of section 25(3).

4. Insofar as the mechanism permits the liquidator and the creditors of the company in liquidation to gain a fair advantage over their adversaries in civil litigation, that they should not have enjoyed but for the liquidation of the company, it violates :
- (a) an implied constitutional right to fairness in civil litigation; and
 - (b) the guarantee of equality in terms of section 8."

The Court in the previous case had already found that section 417(2)(b) was in violation of the Constitution.

In this case Ackermann J, Kriegler J and O'Regan J concurred in ruling that, with the exception of section 417(2)(b), sections 417 and 418 did not violate the Constitution. In his judgement on page 21, Ackermann J quoted from *Cloverbay Ltd (joint administrators) v Bank of Credit and Commerce International S.A.* where the Court of Appeal stated the following:

" It is clear that in exercising the discretion the Court has to balance the requirements of the liquidator against any possible oppression to the person to be examined. Such balancing depends on the relationship between the importance to the liquidator of obtaining the information on the one hand and the degree of oppression to the person sought to be examined on the other. If the information required is fundamental to any assessment of whether or not there is a cause of action and the degree of oppression is small (for example in the case of ordering the premature discovery of documents) the balance will manifestly come down in favour of making the order. Conversely, if the liquidator is seeking merely to dot the i's and cross the t's of a fairly clear claim by examining the proposed defendant to discover his defence, the balance would come down against making the order. Of course, few cases will be so clear : it will be for the judge in each case to reach his own conclusion."

In the course of his judgement, on page 80, he said the following :

"The public's interest in ascertaining the truth surrounding the collapse of the company, the liquidator's interest in a speedy and effective liquidation of the

company and the creditors' and contributors' financial interests in the recovery assets must be weighed against this, peripheral, infringement of the right not to be subjected to seizure of private possessions. Seen in this light, I have no doubt that sections 417(3) and 418(2) constitute a legitimate limitation of the right to personal privacy in terms of section 33 of the Constitution."

On page 99 he continued:

"I am alive to the thrust of the applicants' argument that, as erstwhile auditors of the company, they co-operated fully and were at all times prepared to co-operate fully with the liquidators and their legal and other advisors to supply all relevant information required. If in the light hereof it was oppressive, or vexatious or unfair to summons or interrogate the applicants in the way they were summonsed or interrogated, their remedy was, as I have repeatedly stated, to approach the Supreme Court. Their alleged harassment and unfair treatment would not be in consequence of the substantive content of the provisions of sections 417 and 418 of the Act, but as a result of their improper application."

Although the case went against the appellant, this has important implications for the Commissioner for SARS as every time he claims to be exercising his powers of interrogation, inspection, audit and similar enquiries he has to ensure that his decision is not arbitrary and that all relevant considerations have been taken into account as this is what the courts will look to in their deliberations.

7.4 Rudolph and Another v CSARS CCT 13/96

This was one of the first cases to challenge the constitutionality of sections of the Income Tax Act. Rudolph was the sole director of Glyn Rudolph & Co (Pty) Ltd. On 22 April 1994 members of the respondent, acting under written authorisation, searched the appellant's office at the company's premises and

seized various documents. Rudolph subsequently brought an application before the Witwatersrand Local Division of the Supreme Court seeking an interim interdict restraining the Commissioner from exercising the powers of search and seizure as contemplated by section 74(3) of the Income Tax Act, pending a determination by the Constitutional Court of the constitutionality of that section.

The Court dismissed the application stating that the Interim Constitution specifically precluded the Supreme Court from making orders that suspended, in whole or in part, Acts of Parliament.

The appellants appealed to the Appellate Division (now the Supreme Court of Appeal) against this decision and directed their attack against the constitutionality of section 74(3) of the Income Tax Act. The matter was then referred to the Constitutional Court for a ruling on the common law grounds and failing this, the constitutionality of section 74(3). The Constitutional Court ruled that since the Interim Constitution did not operate retroactively, and the appellants were deprived of their possession, control and use of documents before the Interim Constitution came into force, it had no jurisdiction to rule on the matter and referred it back to the Appellate Division for it to rule on the common law grounds (Taxgram October 1994).

These were as follows :

- That an authorisation in terms of section 74(3), once issued and executed, may not be used in perpetuity and that the use in April 1994 of the authorizations originally issued and executed in October 1993 was invalid.
- That the power to issue such authorizations was vested in the Commissioner, that the delegation of this power to the Chief Director of Administration in the Department of Finance under section 3(1) of the Act was invalid and that the authorizations were therefore invalid.

- That the authorizations were invalid on the ground that they were vaguely and imprecisely worded.

Hefer JA, with Smalberger JA, Vivier JA, Nienaber JA and Plewman JA concurring, rejected the appellant's contentions and dismissed the application with costs.

It would appear at first glance that the taxpayer did not benefit at all from this judgement. In respect of Rudolph this may be true but for the taxpayer community at large there is an intriguing point to note and it is this - subsequent to this judgement the legislature was prompted to introduce new search and seizure procedures in the Income Tax Act, the Marketable Securities Act, the Transfer Duty Act, the Estate Duty Act, the Stamp Duties Act and the Value Added Tax Act. The essence of the changes made by the legislature was to require the Commissioner to have good reason for exercising his powers of search and seizure and to carry this out in a reasonable manner and at reasonable times. Furthermore, where the Commissioner found himself in the position that time was of the essence and that the search and seizure should be carried out immediately, without prior arrangement with the taxpayer and at odd hours, this could only be done by the issuing of a warrant by a Judge of the High Court after an *ex parte* application by the Commissioner.

The Commissioner was no longer permitted to authorize such a search and seizure. This is intriguing because in the Rudolph case the Court had found against the taxpayer.

The answer to this may lie in the case when it still lay before the Constitutional Court where the Commissioner's counsel made a concession in its written submission to the Court. J. Silke in his article in Vol 12 No 5 of The Taxpayer quotes on page 103 from the case:

" In the light of the foregoing it is submitted that common law grounds for

invalidity of administrative action fall within the jurisdiction of the Supreme Court, including the Appellate Division, and that the Constitutional Court has no jurisdiction in such matters. Should it be held that this Court has such jurisdiction, it is conceded that one or more of the common law challenges should succeed."

Again, although Rudolph lost his case on what may be considered to be a technicality of timing, the legislature took note of the Commissioner's concession and amended the aforementioned Acts before another attack arose against those provisions.

7.5 Motsepe v CSARS CCT 35/96

The appellant, ME Motsepe was the wife of SM Motsepe who was at the time a fugitive from justice. In December 1995 he had escaped from custody while being held on a charge of drug dealing (Moss-Morris Inc. Law News). The referral occurred in March 1996 in the course of an urgent application brought by the appellant as second respondent for the sequestration of the joint estate of ME and SM Motsepe, who were married in community of property.

The sequestration action was brought by the Commissioner on the basis of outstanding income tax that arose from income tax assessment issued against SM Motsepe for the tax years 1988 to 1995. On 16 February 1996 the Commissioner filed a statement in terms of section 91(1)(b) with the clerk of the Rankuwa Magistrates Court. The section provides that if anybody fails to pay any tax or interest when it becomes payable the Commissioner may file with the clerk of the court a statement certified by him as correct and setting forth the amount of tax or interest so due or payable by that person. The filing of the statement with the court would then have all the effects of a civil judgement lawfully given. Section 92 of the Act provides further that nobody may question the correctness of a statement filed in terms of section 91.

Roos J, in the court *ago*, referred only sections 92 and 94 to the Constitutional Court for consideration.

Ackermann J in dismissing the referral noted that the referral was defective in that the applicant had not exhausted her non-constitutional remedies, the rules of the Court had not been followed and Counsel for the appellant's main thrust of argument was against section 91(1)(b) of the Income Tax Act although this had not been included in the application for referral. Furthermore, should the referral have been effective and section 91(1)(b) declared unconstitutional, the Commissioner would still have had his claim based on his assessments and would still have been able to sequestrate the joint estate.

In awarding costs to the respondent, Ackermann J said the following on page 23 of his judgement:

"... when regard is had to the lack of candour in Mrs Motsepe's answering affidavit the conclusion can really not be avoided that her endeavour to engage this Court was little more than an attempt to gain time. It must not be thought that this conclusion in any way implies that the provisions of the Act might not be open to challenge; it relates solely to Mrs Motsepe's attempts to engage this Court in the light of the merits of the sequestration and the other remedies open to her which do not involve the constitutionality of any of the provisions of the Act. In my view her conduct was of such a nature that it warrants an award of costs against her."

The lesson to be learned from this case is that any challenge of legislation must come only after all non-constitutional remedies have been exhausted. Furthermore, the laid down court rules and procedures must be followed. In other words the Constitutional Court is not to be treated with disrespect or contempt.

7.6 Harksen v Lane NO and Others CCT 9/97

In some respects the circumstances of this case are similar to the case of Motsepe. Mrs Harksen was the wife of Jürgen Harksen upon whom a final sequestration order had been granted by the Cape of Good Hope Provincial Division of the Supreme Court on 16 October 1995.

Ultimately, Mrs Harksen was summonsed to appear before the first meeting of creditors and to produce all documentation relating to Jürgen Harksen in terms of sections 64 and 65 of the Insolvency Act. Unlike Motsepe's case, the Court was satisfied that Harken had exhausted all her non-constitutional remedies. Counsel for the appellant argued that sections 21, 64 and 65 were inconsistent with certain of the provisions of the bill of rights to the extent that they impacted on the property and affairs of the solvent spouse upon sequestration of the estate of the insolvent spouse.

In a lengthy judgement Goldstone J, with Chaskalson P, Langa DP, Ackermann J and Kriegler concurring, ruled that even if the provisions had discriminated against her as the spouse of the insolvent, they had not done so unfairly. On page 46 he said that:

"... the inconvenience and burden of having to resist such a claim does not lead to an impairment of fundamental dignity or constitute an impairment of a comparably serious nature."

However, in a minority dissenting judgement O'Regan J with Madala J, Mokgoro J and Sachs J concurring, said on page 74:

"In summary, in determining whether section 21 meets the test for justifiability set by section 33 (of the Constitution), I must weigh the infringement of section 8(2) against the purpose and effect of section 21. As to the first, I have concluded that there is unfair discrimination against spouses. Although the extent of the infringement is not extremely offensive or egregious, it nevertheless constitutes a significant limitation of that right. On

the other hand, although the purpose of section 21 is an important one, the relationship between purpose and effect is not closely drawn. In particular, the balance between the interests of the spouse of the insolvent and the interests of the creditors of the insolvent estate seems to favour the interests of creditors disproportionately. The absence of similar provisions in other legal systems seems to support the conclusion that that balance has not been achieved. In the circumstances, I conclude that section 21 does not meet the test of section 33 and is therefore inconsistent with the provisions of the interim Constitution."

Sachs J said on page 79:

"In my view, section 21 of the Insolvency Act 24 of 1936 (the 'Act') represents more than an inconvenience to or burden upon the solvent spouse. It affronts his or her personal dignity as an independent person within the spousal relationship and perpetuates a vision of marriage rendered archaic by the values of the interim Constitution, thereby being unfair in terms of section 8(2) of the Interim Constitution."

With regard to sections 64 and 65 the Court found unanimously that the sections were not inconsistent with the Constitution as they did not significantly limit the rights of Harksen.

The implication for the taxpayer from this case relates to the manner in which taxpayers may be identified for inquiry, inspection, investigation, audit or even search and seizure.

To be sure it is clear that the authority ordering any of the above needs to be absolutely certain that the taxpayer is not being unfairly discriminated against and that this is an avenue of defence for the taxpayer against arbitrary discrimination.

7.7 Mistry v Interim National Medical and Dental Council of South Africa CCT 13/97

This case is similar to the Rudolph case in that it involved a challenge of search and seizure provisions although not in respect of any of the Revenue Acts. It related to section 28(1) of the Medicines and Related Substances Control Act, No 101 of 1965. The applicant was a registered medical practitioner in private practice. On receipt of a letter of complaint, alleging that the applicant was committing fraud by claiming reimbursement from a medical aid for services he had not rendered, the Interim Medical and Dental Council ordered a search of the premises by a senior legal advisor on their staff. The search was carried out without the knowledge of the appellant who was present only towards the end of the search. During the search various items were seized and ultimately it was this that led to an urgent application to the Durban and Coast High Court for the return of the items seized and alternatively a referral to the Constitutional Court of the validity of section 28(1) which empowers an inspector appointed in terms of that Act to carry out the search. Sachs J in delivering a unanimous judgement in favour of the appellant and confirming the inconsistency of section 28(1) with the spirit of the Interim Constitution said on page 27:

" To sum up: irrespective of legitimate expectations of privacy which may be intruded upon in the process, and without any predetermined safeguards to minimise the extent of such intrusions where the nature of the investigations makes some invasion of privacy necessary, section 28(1) gives the inspectors carte blanche to enter any place, including private dwellings, where they reasonably suspect medicines to be, and then to inspect documents which may be of the intimate kind. The extent of the invasion of the important right to personal privacy authorised by section 28(1) is substantially disproportionate to its public purpose; the section is clearly overbroad in its reach and accordingly fails to pass the proportionality test laid down."

He continued on page 31:

"At the end of the day, the reasonableness and justifiability of the powers given to the inspectors will depend on the overall scheme of checks and balances put in place to regulate their authority. Such scheme would have to take account of the statutory and social context in which the inspectors would have to function and would include, where appropriate, independent authorisation. Thus, the failure to distinguish between the circumstances where such authorisation would be required and those where a warrantless regulatory inspection would be quite in order, is in my view, a sufficiently material defect to undermine the scheme of section 28(1)."

The importance of this case for the taxpayer is that it achieves what the Rudolph case failed to do – it substantially confirms that the search and seizure provisions of the various revenue acts would have been found wanting should they have been reviewed in light of the Interim Constitution. It lays down the principle that zealous government officials may not arbitrarily decide to infringe taxpayers' right to privacy.

7.8 Parbhoo and Others v Getz and Others CCT 16/97

The facts of this case are as follows: the applicants were the former directors of Plymouth International (Pty) Ltd which was wound up in October 1996. The first respondent was the liquidator of the company. In terms of section 417 and 418 of the Companies Act, a commission of enquiry was held into the company's affairs. It appeared from the record of the commission that the liquidator was attempting to establish that the directors had committed fraud and that the liquidator and the company against whom the alleged fraud had taken place would use the evidence thus obtained in a criminal prosecution. The applicants were advised in December 1996 that they would be required to appear before a meeting of creditors at which they would be subjected to an interrogation in terms of sections 414 and 415 of the Companies Act. The applicants confirmed their attendance subject to their rights under the

Constitution. However, before the creditors' meeting took place, the applicants launched an urgent application before Southwood J in the Witwatersrand Local High Court concerning the possible use of evidence to be obtained at the meeting which might be self-incriminating and to be used in a subsequent criminal prosecution in violation of the appellants' constitutional rights. Southwood J, agreeing with the applicants concerns, found that section 415(3) read with section 415(5) of the Companies Act was invalid to the extent that any self-incriminating evidence obtained at such enquiry may not be used in criminal proceedings against the person who gave the evidence. As the High Court was not competent to confirm its own order it directed the registrar of the High Court to refer the matter to the Constitutional Court for confirmation of its order. Ackermann J, with Chaskalson P, Langa DP, Kriegler J, Goldstone J, Madala J, Mokgoro J, O'Regan J and Sachs J concurring confirmed the order of the High Court.

This case was almost identical to that of *Ferreira v Levin* discussed above with that case examining section 417(2)(b) of the Companies Act. The importance of these two cases for the taxpayer is that he cannot be forced to advance evidence in any inquiry, audit, inspection or the like carried out by SARS which might be self-incriminating and which might be used against him in a criminal prosecution.

7.9 The Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal CCT 10/98

In August 1995, a member of the applicant's administration responsible for education in the province of Mpumalanga decided that bursaries paid to certain needy students in state-aided schools would be discontinued with effect from July 1995. This decision in principle was not disputed because the students who benefitted from the bursaries were mainly white and it was

accepted by all the parties that this was a form of discrimination. The only dispute was the manner in which the bursaries had been terminated. The respondent brought an application before the Transvaal High Court in October 1995 challenging the decision to terminate the bursaries on the grounds that it was procedurally unfair and therefore a breach of section 24 of the Interim Constitution. The order sought was to set aside the decision terminating the bursaries and to order the applicants to pay the bursaries until December 1995. De Klerk J agreed and granted the order on 1 December 1995. The applicants then appealed to the Supreme Court of Appeal (then still the Appellate Division of the Supreme Court). The Supreme Court of Appeal then postponed the case and granted the applicants leave to approach the Constitutional Court.

In a unanimous judgement by the Court dismissing the appeal by the applicant, O'Regan J said on pages 28 to 31:

" ... Towards the end of the 1994 school year, notice was given to the governing bodies that payment of transport and boarding bursaries would continue until the end of 1995 or until the new provincial governments decided otherwise. ... In all these circumstances, it is clear that the governing bodies of schools had a legitimate expectation that government bursaries would continue to be paid during the 1995 school year subject to reasonable notice by the government of its intention to terminate such payment. Such legitimate expectation that the bursaries would continue to be paid subject to reasonable notice meant that if the applicant wished to terminate the bursaries he could not do so unless he gave reasonable notice prior to termination. Once, however, he had given reasonable notice there would have been no obligation to consult with the governing bodies or the schools concerned. This legitimate expectation, therefore, is one which has intertwined substantive and procedural aspects as discussed above. ... The question that arises is whether the second applicant acted procedurally fairly in the context of legitimate expectation that the respondent and its members entertained. It needs to be emphasized that section 24(b) (of the Interim

Constitution) requires that administrative action which affects or threatens legitimate expectations be procedurally fair. That does not mean that in all circumstances a hearing will be required. It is well-established in our legal system and in others that what will constitute fairness in a particular case will depend on the circumstances of the case. ... In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the executive to act efficiently and promptly. On the other hand, to permit the implementation of retroactive decisions without, for example, affording parties an effective opportunity to make representations would flout another important principle, that of procedural fairness. ... I conclude that in the circumstances of this case the decision by the applicant to terminate the payment of bursaries to members of the respondent with actual retroactive effect and without affording those members an effective opportunity to be heard was a breach of their right to procedural fairness enshrined in section 24(b) of the Interim Constitution."

This is an extremely important case for taxpayers because it confirms the right of an individual, in certain cases, to legitimate expectation and moreover a right to procedural fairness. In plain language this means that the Commissioner may not say one thing and do another and he may not make decisions which affect taxpayers' rights to procedural fairness without giving reasonable notice. What would constitute reasonable notice would be based on the facts of each separate case.

7.10 Lesapo v North West Agricultural Bank and Another CCT 23/99

The essence of this case was the right of an individual to have any dispute that can be resolved by the application of law decided before a court. The applicant, a farmer, had borrowed R 60 000 from the respondent to enable him to purchase certain farming implements. The loan was made in terms of a written agreement. When the appellant fell into arrears the respondent, in terms of section 38(2) of the North West Agricultural Bank Act 14 of 1981, gave notice to the appellant of his intention to seize and sell the movable property which the applicant had pledged as security for the loan. Section 38(2) of the Act provides as follows:

" The Board may, in the circumstances contemplated by subsection (1) where the loan or advance has already been paid over to the debtor, by written notice addressed to the debtor, recall the said loan or advance in whole, and require the debtor to pay such loan or advance together with interest thereon up to the date of such notice within the time specified therefor in such notice, and in the event of default of payment on such specified date, the Board may in writing and under official seal of the Bank, require the messenger of the court or any other person designated by the Board to seize-

- (a) in the case where such loan or advance has been secured by mortgage, the immovable property encumbered thereby; or
- (b) in the case where such a loan or advance has been secured by a deed of hypothecation of movable property, or where any other form of security has been given, the property encumbered by such deed or constituting such other form of security,

without recourse to a court of law, and irrespective of whether or not such messenger of the court or such other person is a licensed auctioneer, to sell

such property by public auction on such date, and at such time and place and on such conditions as the Board may determine, of which at least 14 days' notice has been given in the Provincial Gazette and in a newspaper circulating in the district where the said property is situated or, as the case may be, where the said property was kept or used before such seizure, or the Board may itself sell the property so seized by public tender on such conditions as it may determine: provided that the provisions of this section shall not be construed so as to derogate from the provisions of subsection (4)."

Upon his continued failure to pay, the Bank wrote a letter to the Messenger of the Court authorising him to seize and sell the property. In order to prevent the messenger from proceeding in terms of the notice, Lesapo brought an application before the Bophuthatswana High Court to declare section 38(2) invalid on account of its inconsistency with the Constitution. The respondent argued that there was no dispute between the parties with regard to the debt and hence the Court should find for the respondent. The Court disagreed and held that it was not necessary that a dispute be raised against the Bank's claim. The applicant had been summarily dispossessed of property and was aggrieved thereby and that was sufficient to entitle him to challenge the constitutionality of the legislation.

On 20 May 1999 Mogoeng J granted the invalidation order and Lesapo certain consequential relief. The matter was then referred to the Constitutional Court for confirmation of the invalidation order in respect of section 38(2).

In the Constitutional Court the respondent argued that section 38(2) had not infringed on the appellant's rights in terms of section 34 of the Constitution for two reasons:

- a) section 38(2) only becomes effective if there is no dispute between the parties with regard to the debt and as there was no dispute section 38(2)

- could be invoked without being unconstitutional; and
- b) the notice to the messenger of the court is preceded by a notice of demand to the debtor and should he have a dispute he has the opportunity then to challenge it.

The Court disagreed on both counts. Mokgoro J, who delivered the unanimous judgement on behalf of the Court stated, on page 6, the following with regard to point a):

" Section 38(2) does not appear to be reasonably capable of such a restrained interpretation. Thus, properly construed, the application of section 38(2) is not limited to circumstances where there is no dispute, nor is the requirement of the absence of a dispute anywhere implied. If the legislature had indeed intended such a prerequisite, there seems to be no reason why it should not have provided so expressly."

In respect of point b) he stated the following on page 7:

"That, however is no answer to the challenge to the constitutionality of the section. Section 38(2) allows the Bank to bypass the courts. Without any judgement or order from any court and without any of the statutory or other safeguards applicable to the attachment and sale in execution of a judgement debt, section 38(2) authorises the Bank itself to bypass the courts and these other safeguards and to seize and sell the debtor's property of which the debtor was in lawful and undisturbed possession. This is so even where, under section 38(2), the messenger of the court is required by the Bank to seize and sell the property because under the subsection the messenger can only be acting as the Bank's agent and not, as is normally the case, as an officer of the court. His instructions and authority emanate solely from the Bank and not from any court or court order."

This case is important because it confirms and protects the right of an individual to settle a dispute before a court. This means that nobody can take action against him or against his property without his having access to the

courts for review of that action. Even in the instance, for example, where the Commissioner invokes section 74 of the Income Tax Act and obtains a warrant for the purposes of search and seizure, a judge of the High Court must be approached to obtain such warrant and he must be satisfied that there are justifiable reasons for such action. He is, in effect, looking after the taxpayer's rights.

7.11 Pharmaceutical Manufacturers of SA and Another: In re Ex Parte President of the Republic of South Africa and Others CCT 31/99

This case raised the question of whether a court has the power to review and set aside the decision by the President of the country to bring an Act of Parliament into force. Simply, the President had assented to an Act of Parliament, the South African Medicines and Medical Devices Regulatory Authority Act, 132 of 1998 (the 1998 Act). This act all but replaced the Medicines and Related Substances Control Act, 101 of 1965 (the 1965 Act) and made material amendments to the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act, 36 of 1947. Certain schedules provided in the 1965 Act which were essential for the operation of the 1998 Act were repealed by the 1998 Act and not replaced. The applicants alleged that, because the necessary schedules had been repealed by the 1998 Act and not replaced, the control of medicines, detailed by such schedules, was therefore rendered unworkable.

They applied to the High Court for an order declaring the proclamation bringing the 1998 Act into force as invalid. The application was dismissed by Fabricius AJ who held that the President had acted within his powers and in good faith and that although the 1998 Act had been brought into force prematurely it was not sufficient cause to review the President's decision. On an application for leave to appeal against his decision this was dismissed. The

applicants then approached the Supreme Court of Appeal directly for leave to appeal to a Full Bench of the Transvaal High Court.

The Full Bench, in upholding the appeal, ruled that the fact that the President was bona fide in the action that he took seemed to be quite irrelevant. Insofar as he purported to exercise any discretion that was conferred upon him by the legislature, he did so prematurely and without yet having the authority to do so. His act was accordingly of no force or effect. It followed that the Act was never validly brought into effect and accordingly the earlier legislation has not yet been lawfully repealed.

The Judge President directed the Registrar of the Court to bring the Full Bench's decision to the attention of the Constitutional Court in case it needed to be confirmed by it. The Constitutional Court directed that it was necessary for the judgement to be so confirmed. In confirming the orders of the Full Bench, Chaskalson P commented on pages 50 and 51 that :

" ... Parliament was not in session at the time because of the pending general election, and considerable cost and inconvenience would have been occasioned by calling Parliament together on the eve of the election for the sole purpose of reversing the President's decision. The fact that another course might possibly have been open to the applicants does not mean that the President's decision is not justiciable. There might be cases in which a court would decline to intervene in matters that are properly matters to be dealt with by the legislature, but this is not such a case. ... The applicants acted promptly in coming to court and there is nothing to suggest that any legitimate interest of any member of the public has been prejudiced by the order made by the Full Bench. On the contrary, a failure to confirm the order would have serious consequences for the control of medicines and could invalidate actions taken to that end in terms of the Act since the order was made. There are good reasons for intervention in the present case and in my view the order made by the Full Bench concerning the validity of the Proclamation was correct and should be confirmed."

This case is significant in that it directly challenged the actions of the President of the country. It means that nobody is above the law of the Constitution as interpreted by the Constitutional Court and that if legislation is enacted that has some material defect or practical impossibility it could in certain circumstances be declared invalid and set aside. This includes legislation that would affect taxpayers.

It appears in the above case that the Court may have referred the legislation back to Parliament for correction if it had been in session. Thus, again, each case must be viewed on its own merits.

7.12 Dawood and Another v Minister of Home Affairs CCT 35/99

This case centres on the manner in which discretionary power, that legislation affords government officials, is carried out in the course of their duties. Three individuals, the applicants, being non-residents but residing in the Republic with their spouses, who were also residents, had applied for extensions to their existing temporary residence permits in order for them to remain in the Republic until such time as their immigration permits had been approved. The applications having been denied, the non-residents were ordered by officials of the Home Affairs Department to leave the Republic as they were non-residents without the requisite residence permits. The applicants then brought applications to the High Court seeking orders declaring section 25(9)(b) of the Aliens Control Act, 96 of 1991 to be inconsistent with the Constitution in that it authorises the grant of immigration permits to the spouses of South African residents when the applicant spouse is present in South Africa only if the applicant is in possession of a temporary residence permit. Van Heerden AJ upheld the applicants' arguments and referred the matter to the Constitutional Court for confirmation. O'Regan, in delivering a unanimous

judgement confirming the order of the High Court said the following on page 47:

"Whatever the language - Van Heerden AJ had in his High Court judgement observed that section 25(9) was not a model of legislative clarity - and purpose of section 25(9)(b), its effect is uncertain in any specific case because of discretionary powers contained in sections 26(3) and (6). The failure to identify the criteria relevant to the exercise of these powers in this case introduces an element of arbitrariness to their exercise that is inconsistent with the constitutional protection of the right to marry and establish a family. In my view, the effect of section 25(9)(b) read with sections 26(3) and (6) - section 26 deals with the granting of an extension of temporary residence permit - results in an unjustifiable infringement of the constitutional right of dignity of applicant spouses who are married to people lawfully and permanently resident in South Africa. There is no government purpose that I can discern that is achieved by the complete absence of guidance as to the countervailing factors relevant to the refusal of a temporary permit. In my view, therefore, section 25(9)(b) as read with sections 26(3) and (6) of the Act is unconstitutional "

It appears from the court record that counsel for and representatives of the Department of Home Affairs, the respondents, did not endear themselves to the Constitutional Court as shortly before close of business on the day before the hearing they lodged their formal notice with the court of their intention not to oppose the application and did not appear at the hearing.

O'Regan stated the following on pages 17 and 18:

"The Minister and Director-General are respectively the political and administrative heads of the national government department responsible for the implementation of the Act and the foremost source of knowledge about its terms, objectives and general application. Their last-minute abandonment of both their appeal and their opposition to the confirmation proceedings was inconvenient and discourteous ... the Court must still decide whether to confirm, vary or set aside the order. Moreover, the Court must determine what ancillary orders should be made, if any. The relevant government department is best placed to assist the Court to craft such ancillary orders by informing it of the potential disruption that an order of invalidity may cause. By withdrawing from these proceedings at such a late stage, the respondents deprived this Court of the benefit of being able to canvass the issues relating

to confirmation fully at the proceedings...”

It is clear from the case that government officials cannot apply discretion granted to them by statutory provision arbitrarily so that they infringe on the constitutional rights of individuals and this applies equally to the taxpayer. Nor will the Court tolerate or view kindly a last minute exit of government officials who carry with them substantial power to frustrate legitimate attempts by members of the public to fulfil their statutory requirements sometimes at great cost to themselves.

7.13 Metcash Trading Limited v CSARS CCT 3/2000

This case attracted great media attention and the judgement was one that was keenly awaited by many because of the belief that sections 36(1) and sections 40(2)(a) and 40(5) of the VAT Act prevented the taxpayer access to a court of law to challenge an assessment raised by the Commissioner. The facts of the case were that after a number of meetings and correspondence between the parties to the case, as well as further investigations by the Commissioner, a letter dated 31 May 1999 was received by the appellant advising of the Commissioner's dissatisfaction with the vat returns submitted to him for the period July 1996 to June 1997 and advising that he had made assessments, details of which were listed in an attached annexure. The assessments were arrived at by the disallowance of certain vat inputs claimed by the appellant with the result that the appellant was in debt to the respondent in the amount of R 265 934 943.04 including penalties and interest. The letter called for the payment of the debt by 30 June 1999, failing which, steps would be taken to recover the debt without further notice. The Chairman of the applicant led a delegation to meet with the respondent where it was pointed out that the respondent was sufficiently large to be in a position to pay whatever assessment it may be determined to be liable for and requesting the respondent not to require the appellant to pay the amount owing until such time, estimated to be no more than 60 days, as it could finalise its own investigation into the matter and whereafter SARS could

reassess its position. On 30 June 1999 an objection against the assessments was lodged as well as a formal request for an extension of time by 60 days referred to above. The respondent granted an additional 45 days commencing 30 June 1999 and when this time proved inadequate, a letter from the appellants' attorneys was received by the respondent repeating the formal noting of the objection. On 13 September 1999 the respondent sent a letter to the applicant disallowing its objection and demanding payment of the outstanding amount within 48 hours. An urgent application was brought before the High Court in Johannesburg and Snyders J ultimately ruled in a reserved judgement that the sections of the VAT Act referred to above infringed the fundamental right of access to the courts afforded to everyone by section 34 of the Constitution. She interdicted the respondent from enforcing payment and referred her ruling to the Constitutional Court for confirmation. In the Constitutional Court, where there was unanimous concurrence in the judgement delivered by Kriegler J, the Court found at paragraph 72 that:

"This analysis indicates that sections 36(1), 40(2)(a) and 40(5) do not oust the jurisdiction of the courts of law. To the extent that it can be argued that section 40(5) does indeed limit an aggrieved vendor's access to an ordinary court of law, such limitation is justified under section 36 of the Constitution."

The importance of this judgement for taxpayers, although found in favour of the Commissioner, cannot be over emphasised. Kriegler J had some extremely significant points to make regarding the access that the taxpayer still has notwithstanding the provisions of the abovementioned three sections of the Vat Act. He said the following in paragraphs 46 and 68 :

" Neither the injunction to pay first, regardless of a resort to the Special Court, nor the non-suspension provision is intended to or has the effect of prohibiting judicial intervention. Nor is there any hidden or implicit ouster of the jurisdiction of the courts to be found in section 36 as it stands. That section, therefore, cannot be said to bar the access to the courts protected by section 34 of the Constitution ... What cannot be left there, however, is the

belief that was common to the parties in both courts and that coloured the approach and conclusion of the learned judge in the High Court. The three provisions in question, section 36(1), section 40(2)(a) and section 40(5) of the Act, are found to pass constitutional muster because they do not bear the meaning ascribed to them in terms of common belief. Not one of these sections means, nor do any of them read together mean, that a vendor aggrieved by an assessment or other decision of the Commissioner is precluded from seeking appropriate judicial relief, notwithstanding that an appeal under the Act may be pending, whether to the Special Court or against its judgement. "

The appellants had believed (as had the High Court Judge), that in terms of section 36 of the VAT Act, which gives force to the Pay Now Argue Later rule, they would not be able to seek any relief, in respect of the demand to pay the amount owing to the respondent, from the courts. The Constitutional Court disagreed and expressed it thus at paragraph 42:

"I cannot agree with Snyders J to the extent that she considered the exercise of the discretion conferred upon the Commissioner in section 36 of the (VAT) Act not to be reviewable. The Act gives the Commissioner the discretion to suspend an obligation to pay. It contemplates, therefore that notwithstanding the Pay Now, Argue Later rule, there will be circumstances in which it would be just for the Commissioner to suspend the obligation to make payment of the tax pending the determination of the appeal. What those circumstances are will depend on the facts of each particular case. The Commissioner must, however, be able to justify his decision as being rational. The action must also constitute just administrative action as required by section 33 of the Constitution and be in accordance with any legislation governing the review of administrative action."

Here then is one of the most powerful defences or weapons that the taxpayer has in his dealings with SARS. Whenever a discretion is granted to SARS it must be exercised with care because it is subject to review.

This is the most important aspect of this case because the Constitutional Court has given its approval of this principle. Furthermore, the Commissioner released a media release on the same day (Taxgram December 2000/January 2001) as the judgement which stated:

"... SARS is committed to affording taxpayers every right allowed to them in terms of the Value-Added Tax Act or other revenue acts with similar provisions. Thus, where circumstances justify this and full and proper reasons are placed before the Commissioner, the Commissioner will in appropriate circumstances direct that the taxpayer's obligation to pay tax, additional tax, penalty or interest may be partially or wholly suspended by an appeal or pending the decision of a court of law."

The Commissioner has committed himself on public record to suspending the payment of tax, penalties and interest, pending the decision of a court of law, in appropriate cases. In terms of this therefore he would have to exercise this discretion carefully as it might be rejected by a court reviewing the exercise of discretion.

Examples of situations where the Commissioner might exercise his discretion to suspend payment could be the following:

- where the payment of the whole of the amount at issue would cause grave and serious hardship which could not be reversed if the taxpayer were to succeed in his appeal, and the circumstances of the case give rise to reasonable doubt;
- other relevant circumstances, for example the certainty of the amount at issue being paid if the appeal were to fail.

7.14 First National Bank t/a Wesbank v CSARS CCT 19/01

The facts of this case were that First National Bank (FNB) under the trading name of Wesbank had leased a motor vehicle to Lauray Manufacturers CC

(Lauray) in November 1994 and a motor vehicle to Airpark Cold Halaal Storage CC (Airpark) in November 1995. In January 1996, it had sold, by way of instalment sale agreement in which it retained its ownership until the final instalment had been paid, a vehicle to Airpark. Additionally, some time prior to August 1993 FNB had entered into a similar agreement – the details of this transaction are not clear from the court record but it is assumed for this purpose that it was similar, if not identical, to either of the Lauray or Airpark transactions - with Republic Shoes for three vehicles.

On 5 August 1993, 16 December 1996 and 7 April 1997 the Commissioner detained and thereby established a lien over the vehicles in the possession of Republic Shoes, Lauray and Airpark respectively in terms of section 114 of the Customs and Excise Act.

The three were indebted to the Commissioner in respect of customs duty and penalties. At the time of the detentions of the vehicles substantial outstanding amounts were owing to FNB in respect of the contracts of lease and instalment sale agreements. FNB launched an application in the Cape of Good Hope High Court challenging the constitutionality of section 114 of the Customs and Excise Act which authorised the Commissioner to carry out his detention of the vehicles. The three separate cases were consolidated into one in the High Court. This case was dismissed by Conradie J whereupon FNB was granted leave to appeal by and appealed directly to the Constitutional Court. In the appeal before the Constitutional Court the Republic Shoes matter was not dealt with as the Court found that it was not entitled to rule on it because the detention of the three vehicles, in that matter, had taken place on 5 August 1993 which date was prior to the coming into effect of the interim Constitution on 27 April 1994. The judgement of the Court was delivered by Ackermann J with the rest of the judges concurring unanimously. He stated the following on pages 23, 24, 25 and 77:

“ The keystone of the High Court’s analysis of section 114 is the conclusion that section 114 turns third parties (credit grantors and affected owners) into

co-principal debtors, who are liable, with the customs debtor, for the payment of the customs duty debt in question. I am unaware of any authority, and none has been cited to us, for the proposition that a person having a lien over the property of a third party thereby acquires an independent cause of action against the third party owner. In fact authority is to the contrary. In *Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd* the Supreme Court of Appeal confirmed that a lien did not exist in vacuo to secure or reinforce ('ter versekering of versterking') an underlying claim; accordingly neither a direct nor an indirect enrichment claim could be entertained if there had been no unjustified enrichment of the owner... It is against this background that the effect of the lien under section 114(1)(a)(ii) must be considered. In my view such lien, to the extent that it relates to the property of third parties who are not customs debtors, does no more than provide a further execution object for the recovery of the debt from the relevant customs debtor. There is nothing in the wording or purpose of this section providing for the statutory lien to suggest that a radical departure from the fundamental legal principles relating to liens, referred to above, is envisaged; least of all that a new and highly unusual form of co-principal customs duty liability is being created. As far as section 114 creates a lien over the property of third parties and enables the Commissioner to sell such property in execution of a customs debtor's obligation under the section, such liens over the property of third parties cannot, in my view, be equated with that of the common law lien or the landlord's hypothec, as found by the High Court ... Here the end sought to be achieved by the deprivation is to exact payment of a customs debt. This is a legitimate and important legislative purpose, essential for the financial well-being of the country and in the interest of all its inhabitants. Section 114, however, casts the net far too wide. The means it uses sanctions the total deprivation of a person's property under circumstances where (a) such person has no connection with the transaction giving rise to the customs debt; (b) such property also has no connection with the customs debt; and (c) such person has not transacted with or placed the customs debtor in possession of the property under the circumstances that

have induced the Commissioner to act to her detriment in relation to the incurring of the customs debt. In the absence of any such relevant nexus, no sufficient reason exists for section 114 to deprive persons other than the customs debtor of their goods. Such deprivation is accordingly arbitrary for purposes of section 25(1) and consequently a limitation (infringement) of such persons' rights."

This case has importance to the taxpayer for two reasons. The first is that legislation cannot deprive an individual of his property arbitrarily. This applies even if there are good reasons for the deprivation thereof. In this case the Commissioner attempted to deprive FNB of its vehicles to settle a debt that was not owed by it. The second of these is mainly reflective in nature in that this case dealt with matters of a similar nature that occurred before and after the coming into effect of the Interim Constitution on 27 April 1994. In the Republic Shoes matter the detention of vehicles belonging to FNB occurred on 5 August 1993. It was for this reason that the Constitutional Court had no jurisdiction. To many it might seem unfair that there should be no relief in the Republic Shoes matter when it concerned a matter similar to that of the other two merely because it took place at an earlier date. However, as Conradie J reminded the appellants in the earlier High Court case on page 449:

"If this seems inequitable, the answer is that there is no equity about a tax."

Taxpayers can look back to a time when they had no constitutional rights such as are represented in that case, or had no protection for their constitutional rights. They can also, however, look to the future with confidence that their constitutional rights are now protected.

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CHAPTER EIGHT

Relief And Remedy for the Taxpayer

8.1 Introduction

Relief and remedy for the taxpayer, from the actions of the South African Revenue Service, exists in three separate avenues and these must, normally, follow in order. These could be termed non-constitutional, administrative and constitutional avenues. The first avenue of relief, which is his non-constitutional avenue of relief, is that which is provided by the revenue legislation itself. So, for instance, the Income Tax Act provides in sections 81 to 86 for objections and appeals against income tax assessments. The VAT Act and the Customs and Excise Act, as well as other revenue acts, contain identical or similar provisions. It is to these provisions that the taxpayer would normally turn in order to question or challenge assessments and the like. This normally occurs where the Commissioner determines a taxpayer's liability for tax. Should the taxpayer feel aggrieved by the assessment he may object against it and again later, if not successful appeal to higher authorities. This is the normal route. Thereafter, if income tax, for example, is owing and is not settled by the taxpayer the Commissioner may institute actions or proceedings to recover that tax. It is at this point that an aggrieved taxpayer might, if he feels that his rights under the PAJA have been infringed, turn to the second avenue provided by the PAJA for relief. This would be the administrative avenue of relief. It would involve the review by the High Court

of an exercise of discretion by an administrator. His third avenue would be the constitutional avenue where the High Court, would again, first be approached to adjudicate on a legislative provision which the taxpayer believes infringes on his constitutional rights. The High Court would rule on this issue and, if the ruling includes the striking down of a piece of legislation, would in turn refer the ruling to the Constitutional Court for confirmation of the ruling. However, the taxpayer must be sure that before he enters the constitutional avenue, he has exhausted his non-constitutional and administrative options. The Constitutional Court will not normally entertain a constitutional challenge where these have not been exhausted. These three routes normally follow in this order but, as was seen in Chapter 7, this is not always the case. It may happen that a person is precluded, by legislation or an administrator, from any access to any forum to question or challenge conduct or legislation. In that case he must mount a challenge directly to the High Court or in exceptional circumstances the Constitutional Court.

8.2 Non-Constitutional Avenue

The normal route of challenging assessments would be in terms of, for example, section 81 of the Income Tax Act. In terms of this section the taxpayer would submit either:

- written request for the reasons for the assessment – this was recently introduced into the objection process in order to comply with section 33 of the Constitution and the Promotion of Administrative Justice Act; or, if the reasons are known
- a written objection in the prescribed form.

This would normally have to be submitted within 30 days of receiving the assessment. The Commissioner would then reply to the objection, either allowing it or rejecting it. Should the objection be rejected and the taxpayer still feel aggrieved, he may note an appeal in the prescribed form within 30

days of receiving the notice of rejection of the objection. J. Silke, in his article "Settling disputes" writes as follows :

"Before the introduction of the new rules, attempts at settling matters were rather haphazard, as described by AJ Swersky SC. : 'I usually settle matters with Revenue before the case even reaches the objection stage. After an appeal has been noted and the matter is ripe for consideration by the Commissioner's law-interpretation section, I make a practice of seeking an interview with the revenue officials concerned and endeavouring to persuade them that they are wrong or that there is room for a settlement. On one occasion I was told that no settlement was possible; yet a few days later, just before the proceedings commenced, the revenue officials changed their minds and decided that in fact a settlement could be reached. On other occasions, during the course of the trial, mention of the possibility of settlement is broached and after some bargaining a settlement may be reached'".

In terms of new legislation, effective on 1 April 2003, a process known as Alternative Dispute Resolution (ADR) was introduced that provides the taxpayer with an additional avenue of resolving or negotiating disputes. The next section will summarise the reasons for the implementation of the ADR process and its structure.

8.3 Alternative Dispute Resolution

The South African Revenue Service's reason for introducing the ADR process was that it had received numerous complaints from taxpayers regarding the lengthy period taken to resolve objections to assessments. Of particular worry to them was the length of time taken between the lodging of an objection by the taxpayer and the response to the objection. It has not been unknown for SARS to take a year or more to decide on an objection. The ADR process allows disputes to be resolved outside of the litigation arena and is applicable to the following legislation:

- Income Tax Act, 1962 (Act No. 58 of 1962)
- Marketable Securities Tax Act, 1948 (Act No. 32 of 1948)
- Transfer Duty Act, 1949 (Act No. 40 of 1949)
- Estate Duty Act, 1955 (Act No. 45 of 1955)
- Stamp Duties Act, 1968 (Act No.77 of 1968)
- Value-Added Tax Act, 1991 (Act No.89 of 1991)
- Tax on Retirement Funds Act, 1996 (Act No.38 of 1996)
- Uncertificated Securities Tax Act, 1998 (Act No. 31 of 1998)
- Skills Development Levies Act, 1999 (Act No. 9 of 1999)
- Unemployment Insurance Contributions Act, 2002 (Act No. 4 of 2002)

The Customs and Excise Act has a dispute resolution process of its own.

Essentially the process commences at the appeal stage. Should the taxpayer feel it necessary to lodge an appeal against the rejection of an objection, he may, in the form lodged with the Tax Board to note the appeal, request ADR procedures. The taxpayer must accept the terms of the ADR set out on the reverse side of the prescribed appeal form for the process to operate. SARS must within 20 days of receiving the notice of appeal from the taxpayer, inform him whether it is of the opinion that the matter is capable of being resolved by the ADR proceedings. The ADR process should begin no later than 20 days after the receipt by SARS of the notice of appeal from the taxpayer. SARS will appoint a facilitator who would normally be a suitably qualified officer of SARS. He would be bound by a code of conduct and would seek a fair, equitable and legal resolution of the dispute. At the end of the process he would record any agreement reached and if not, record that no agreement was reached. It is important to be aware of the fact that the ADR process is conducted "without prejudice". No representation made or document tendered during the process may be used as evidence by the other party in any subsequent proceedings. Should the taxpayer feel, at the end of the process, that he wishes to continue the appeal, the appeal process would

continue as if from the lodging of the appeal. Prof. E Hamel writes in her article "How you can save time and money" :

"... SARS is attempting to improve service to taxpayers by providing additional processes that can resolve any dispute between the parties. These new rules can help the taxpayer to save time and, in certain cases, money. Taxpayers and consultants should be aware of these new rules and procedures when the need arises to lodge an objection and noting an appeal. The new rules and procedures are an attempt by SARS to reinforce the statements in their client charter namely that the taxpayer can expect SARS to help them, to be fair to them, to protect their constitutional rights."

8.4 Appeal to the Tax Board

The Tax Board is established in terms of the Income Tax Act and normally consists of an advocate or attorney as chairman. The advocate or attorney is appointed by the Minister of Finance, in consultation with the Judge-President of the respective Provincial Division of the High Court, to a panel of advocates or attorneys. Should either the Chairman, the Commissioner or the taxpayer consider it necessary, an accountant or a representative of the commercial community may co-chair the Tax Board. The Tax Board is administered by the clerk of the Board, normally an officer of SARS. The Tax Board usually hears cases involving amounts not exceeding R 100 000. The appeal must be placed before the Board within 40 days of receipt of the notice of appeal or of the ADR process being terminated. The clerk of the Board will advise the taxpayer of the time and place of the hearing at least 30 days before the date of the hearing. The taxpayer will be present and may, with the permission of the Chairman, be represented by a legal representative. SARS will normally be represented by an officer from the branch office. Generally, the Board does not adhere to strict rules of evidence (SARS – Guide for dispute resolution p13). Either of the parties may submit documents as evidence. The Chairman will thereafter give his ruling within 30 days, which the clerk will furnish to both parties within 10 days of receipt by him. Where the taxpayer is not

satisfied with the Tax Board's decision he must notify the clerk of the Tax Board with 30 days of receiving the Tax Board's decision. Where the Commissioner is dissatisfied he must refer the appeal to the Tax Court and notify the taxpayer within 30 days.

8.5 Appeal to the Tax Court

The Tax Court hears all cases in which the tax involved exceeds an amount R 100 000. In these cases, should the ADR process not prove successful or not be pursued the taxpayer will pursue the appeal in the Tax Court. The Tax Court is a formal court process where the taxpayer may represent himself or be represented by a legal representative. The Tax Court is presided over by the President, who is a judge or acting judge of the High Court, together with two assessors to assist the judge (a member of the accounting fraternity and a person of the business community. In certain cases, an expert such as a mining engineer or a valuer may assist the Judge. Where the amount, which is the subject of the dispute, exceeds R 50 million or where the Commissioner and the taxpayer jointly agree and apply to the Judge President, he may direct that the Tax Court hearing shall consist of three Judges or Acting Judges of the High Court. This is where the matter has finally reached formal courts. The rules which apply to the High Court would apply here and any further appeal would be in terms of these rules.

8.6 Administrative Avenue

In circumstances where a decision has been taken by an administrator or a discretion has been exercised and the taxpayer is dissatisfied with it he may bring an application before the High Court to have that decision or exercise of discretion reviewed. This would be in terms of the PAJA. In some cases this might take place before the non-constitutional avenue because, for example, that process has not been followed correctly or it is an issue which falls

outside of that process. A good example here would be the case of *Stroud v Riley* 36 SATC 143. In that case the taxpayer approached the High Court on administrative review application because the Commissioner had not exercised his discretion in the taxpayer's favour and had not applied his mind correctly. The PAJA will be discussed in Chapter 9 in detail.

8.7 Constitutional Avenue

In this avenue of seeking relief the taxpayer must approach the High Court for a ruling on the constitutionality of a provision of legislation. The High Court, if striking down that provision, would refer the ruling to the Constitutional Court for confirmation. In exceptional circumstances the Constitutional Court may be approached directly but all non-constitutional and administrative avenues should have been exhausted first.

CHAPTER NINE

The Promotion of Administrative Justice Act, 3 of 2000

9.1 Introduction

The Promotion of Administrative Justice Act (PAJA) was promulgated in terms of section 33 of the Constitution to give effect to the right to administrative action. This Act has important implications for the taxpayer in that decisions that are made by the Commissioner, in terms of a discretion, may be judicially reviewed. This is one of the most powerful defences that the taxpayer has in its dealings with the Commissioner. In the Metcash case the Commissioner had the discretion to suspend payment of the amounts owing by the taxpayer. The judge in that case found that the particular provisions of the VAT Act in question were not unconstitutional for the reason that the exercise of discretion was reviewable and the taxpayer therefore was not denied access to the Courts. He stated in paragraph 42 that:

"(the exercise of discretion) must constitute 'just administrative action' as contemplated by section 33 of the Constitution."

9.2 Definition of Administrative Action

Section 1 of the PAJA defines "administrative action" as:

"any decision taken, or any failure to take a decision, by-

(a) an organ of state, when-

- (i) exercising a power in terms of the Constitution or a provincial constitution; or
- (ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when

exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect,..."

It must be remembered when applying this section that issuing of summons does not constitute administrative action and therefore cannot be challenged in terms of this Act. In *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661 (W) the High Court held that the issuing of summons did not constitute administrative action but rather procedural action and in the circumstances precluded the respondent from relying on section 33 of the Constitution and indirectly the PAJA. In any event, the matter would still be reviewable if the respondent challenged the appellant's action in terms of the summons directly.

9.3 Definition of a Decision

A "decision" is defined as:

"any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision,

including a decision relating to-

- (a) making, suspending, revoking or refusing to make an order, award or determination;
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
- (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- (d) imposing a condition or restriction;
- (e) making a declaration, demand or requirement;
- (f) retaining, or refusing to deliver up, an article; or
- (g) doing or refusing to do any act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly."

From the above definitions it is clear that the discretionary decisions that the Commissioner is empowered with are reviewable in terms of the PAJA.

9.4 Review of Conduct

Section 6(2)(a)(ii) reads as follows:

- " (2) A court or tribunal has the power to judicially review an administrative action if-
- (a) the administrator who took it-
 - (i) was not authorised to do so by the empowering provision;
 - (ii) acted under a delegation of power which was not authorised by the empowering provision."

This section is particularly pertinent as it allows a court or tribunal to judicially review an administrative action if the administrator who took it acted under a

delegation of power which was not authorized by the empowering provision. Section 3 of the Income Tax Act, section 5 of the Value Added Tax Act and section 3 of the Customs and Excise Act contain the powers of delegation provided to the Commissioner by each Act. It is these delegation powers that are referred to by section 6(2)(a)(ii) of the PAJA. The three sections referred to above must be strictly adhered to by SARS because any deviation or non-compliance therewith would be subject to review as contemplated by Section 6(2)(a)(ii).

Furthermore, all jurisdictional facts of the relevant provision must be present. In *Mpande Foodliner CC v CSARS* this was found not to be the case. The Commissioner had invoked section 47 of the Value Added Tax Act by appointing an agent to collect vat which he believed due to him. In giving judgement for the taxpayer Patel JA said on page 61 (with respect to the invoking of section 47):

- " (1) It must be reasonably necessary to declare a person an agent of the taxpaying vendor;
- (2) who can only be declared an errant or a recalcitrant taxpayer if an amount of tax, additional tax, penalty or interest is due and payable;
- (3) 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
- (4) only declare the person an agent if he, she or it is the taxpaying vendor's debtor. Each of the jurisdictional facts must be present and objectively determined before the first respondent is competent in issuing a section 47 notice."

In *Stroud Riley & CO Ltd v Secretary for Inland Revenue* 36 SATC 143 the company had overpaid non-residents' shareholders' tax but was not aware that it had made an overpayment at the time that it made the payment. At the time the respondent did not issue an assessment, which was the prevailing departmental practice in similar circumstances. Subsequently, the auditors of the company discovered the overpayment and the company

applied for a refund of the overpaid tax. The respondent satisfied himself that the tax was in fact overpaid but declined to approve the refund on the grounds that the application had been made more than three years after the tax had been paid. The applicant argued that since no assessment had been issued, the time period of three years had not commenced. The Court agreed with this. In its judgement it considered the word "may" which seemed to grant the respondent a discretion as to whether he should authorize the refund or not. The Court quoted the following principle which was set down by Jervis CJ in *MacDougal v Paterson* (1851) 11 CB 755 on page 766 as authority:

"The word 'may' is merely used to confer the authority and the authority must be exercised, if circumstances are such as to call for its exercise."

This is an important principle and means that the Commissioner must exercise his discretion in favour of the taxpayer where all the necessary requirements have been fulfilled by the taxpayer.

9.5 Administrative Action Which Affects Any Person

Section 3 reads as follows:

" (1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2)(a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;

- (iv) adequate notice of any right of review or internal appeal, where applicable; and
- (v) adequate notice of the right to request reasons in terms of section 5."

In *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal CCT 10/98* the essence of the case was that the appellant had not allowed the respondent reasonable time in which to prepare itself for the changes that were due to take place. The decision to suspend certain bursaries constituted administrative action as contemplated by section 33 of the Constitution and was accordingly set aside in order to enable the respondent to have sufficient and reasonable time to prepare for the discontinuation of the bursaries. The details of this case were discussed more fully in 7.9.

9.6 Reasons for Administrative Action

Section 5(1) of PAJA provides that where a person's rights have been materially and adversely affected by an administrative action, and reasons have not been furnished, that person may request the administrator concerned to furnish him with written reasons. Should the reasons not be furnished it may be presumed, in any (court) proceedings or judicial review, that the administrative action was taken without good reason.

This is an important section as it enables people to obtain reasons for the exercise of a discretion against them. Government officials can no longer make decisions without exercising thought and care and where they have not provided reasons where requested to do so the onus is on them, in court proceedings or a judicial review, to prove that their decision was not taken without good reason.

Section 32 and 33 of the Constitution work together in this regard. Section 33 provides for fair administrative justice, which specifically includes written reasons for a decision, and section 32 provides for access to information held by the government. Fair administrative justice cannot exist, except in exceptional circumstances, without there being proper reasons. Reasons may not be understood if all the information that was required to make such decision is not available. A useful example to note in this regard is *Rean International Supply Company (Pty) Ltd v Mpumalanga Gaming Board* 1999 (8) BC LR 918 (T). In this case the appellant company had applied to the respondent for a maintenance and supplier of gaming equipment licence. This had been refused. The appellant thereafter requested written reasons for the decision which the respondent duly provided. A request for further amplification of the reasons in the form of audio-recordings of the respondent's deliberations was agreed to but in an edited form. The appellant rejected this and immediately brought an application seeking the full audio-recordings.

Kirk, ADJP in his judgement for the appellant stated the following on pages 926, 927 and 928 :

"It is impossible to lay down a general rule of what could constitute adequate or proper reasons, for each case must depend upon its own facts ... it is clear that the reasons given must be intelligible and must adequately meet the substance of arguments advanced. On one hand it is not necessary for an administrative body to spoonfeed an aggrieved party seeking reasons; on the other hand the administrative body cannot expect an aggrieved party to seek justification for the reasons from a myriad of documents where such reasons cannot reasonably be determined. Section 32 of the Constitution grants to an applicant the right of access to all information held by the relevant authority. The word "information" is far wider than the concept of "facts" known to an administrative body. In terms of section 33 an aggrieved applicant is entitled to decide for himself whether administrative action was justifiable in relation to the reasons given for the refusal of a licence. In order to so decide, an

aggrieved party is entitled to "all information" which led up to the refusal of a licence and that includes the deliberations of the administrative body. To exclude such deliberations would render the provisions of section 33(1)(d) (of the Constitution) somewhat nugatory because the deliberations may demonstrate that the reasons upon which the board acted were unjustifiable or wrong. To exclude them from the ambit of sections 32 or 33 (of the Constitution) would impose an unjustifiable limitation upon the provisions of the Constitution."

Thus, in terms of the above judgement, it may not be sufficient for an administrator merely to provide reasons. He may be required to provide further information in order for the aggrieved party to comprehend and appreciate those reasons. I Currie and J Klaaren, in their book "The AJA Benchbook", quote an Australian judge's explanation on page 223:

" It requires the decision-maker to explain a decision in a way which will enable a person aggrieved 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'."

In *Sidarov v Minister of Home Affairs* 2001 (4) SA 202 (T) the appellant had been denied further temporary residence and business permits and had been offered insufficient reasons for the decision. In the meantime the Department of Home Affairs had indicated to the appellant that he was no longer considered a desirable inhabitant. The appellant thereafter brought an application before the High Court extending the temporary permits until finalisation of the review application. The Court in its judgement found that the applicant had presented a case which strongly suggested that the respondent's and the department's actions were irrational and were motivated by unreasonable considerations. It accordingly granted the appellant's application.

9.7 Conclusion

This Act is a very important piece of legislation as it provides for formal protection of individual rights by way of making administrative decisions reviewable. However, every situation has to be decided on its own merits and individuals must be sure that they present the correct facts before the court. From a taxpayer's point of view, this Act gives him legislative access to the courts where previously he had to rely on common law principles to assist him where possible.

CHAPTER TEN

TOOLS FOR THE TAXPAYER

10.1 Introduction

In recent years, mainly since 1998, SARS has dramatically increased the amount of material with respect to its interpretation and application of Revenue legislation. These include inter alia, the SARS Income Tax Practice Manual, the Client Charter, media releases and press statements, interpretation notes and practice notes. Although these are not binding on SARS, the Commissioner will not act contrary to the treatment outlined therein without good reason. It must also be noted that interpretation and practice notes can be and have been withdrawn. A careful examination of the material available may assist a taxpayer in his dealings with SARS.

10.2 The SARS Income Tax Practice Manual

One of the ways in which SARS has become more transparent is by the publishing of the SARS Income Tax Practice Manual. Previously SARS had an income tax assessing handbook which was only available to SARS officials. The publication of the SARS Income Tax Practice Manual was undertaken in order for SARS to comply with section 32(1)(a) of the Constitution. This section provides that everyone has the right of access to information held by the state.

In this volume is contained the view that SARS would take with regard to a particular tax issue. Although the manual is not considered to be law and SARS cannot be held to it, taxpayers could rely on it in general terms to the extent that SARS would not deviate from it without good reason. However, in certain cases, local branch offices have disagreed with the interpretation taken therein. Moreover, the Commissioner does not warrant the correctness or currency of the practices therein. The bottom line is that it is merely a guide (Taxgram February 1997) and can only be taken at face value level. Furthermore, each case would be judged on its own merits.

10.3 Advance Rulings

10.3.1 Introduction

Certainty is a general principle of taxation. Generally, internationally accepted advance ruling systems attempt to attain the following goals:

- To give certainty to the tax treatment of transactions.
- To promote self-assessment.
- To promote good relations between tax authorities and taxpayers.
- To ensure greater consistency in the application of the law.
- To minimise controversy and litigation.
- To achieve a more co-ordinated system.

10.3.2 Advantages

There are advantages for tax authorities and taxpayers of an advance tax ruling system. For the taxpayer it provides certainty as to the treatment of transactions with tax implications and the consequences thereof. For tax authorities it fosters more assurance in the tax system and fosters a better relationship with taxpayers. Furthermore it enables the tax authorities to

perceive what types of operation taxpayers are contemplating entering into and to prevent irregularities arising from deficient legislation which leads to unintended results. It also fosters efficiency by enabling the tax authorities to be able to react more promptly should future disputes arise.

10.3.3 Disadvantages

The risks for taxpayers relate essentially to the vulnerability of their business operations and trade secrets. This is of considerable concern to a taxpayer who is, on application, declined a decision. Even more perturbing for a taxpayer is that SARS' focus may be concentrated on him after a proposed operation has been rejected. Tax authorities are faced, by introducing the system, with acquiring dedicated and competent staff to attend to matters that arise. This would minimise the risk of incorrect rulings should incompetent staff be appointed, which in turn could ultimately lead to a loss of confidence in the tax authorities.

10.3.4 International Models

The International Guide to Advance Rulings published by the International Bureau of Fiscal Documentation provides in its introduction some useful insight into international use of advance ruling systems:

" Despite the fact that a rulings procedure serves similar purposes in all countries, there are significant differences in the procedures adopted in various countries summarised in this service. Some countries have highly developed systems sanctioned by statute. Others have very informal, almost ad hoc procedures, stemming from largely unpublished administrative practice. While there has been some confluence of substantive tax law amongst countries, there has not necessarily been any similar developing uniformity in the administration of tax law. Different countries may have very different " tax cultures" resulting in different administrative procedures, and

the nature of an advance rulings procedure adopted by a particular country is undoubtedly influenced accordingly. It is thus difficult to make any broad comparisons or generalizations about the private rulings procedures used around the world. In most countries, tax authorities have generally been willing to answer inquiries made by taxpayers. Even without a formalized rulings procedure, it has become common for a binding administrative rulings procedure to develop in some countries, whereby the tax authorities will issue a ruling which they will honour even in the absence of a legislative requirement to do so. However, this practice is not universal.”

Among the countries systems that were examined, the following were subjected to closer examination :

Australia, Canada, India, Mexico, Netherlands, New Zealand, Sweden and the United States of America.

On examination of the systems in these countries it is evident that there are two basic models in use:

- A non-statutory approach – an administrative (non-statutory) system provided by a tax authority whereby taxpayers request the tax authorities to provide rulings in respect of a proposed transaction which ruling the tax authority accepts as binding. Canada is a useful example.
- A statutory approach – a statutory, binding ruling system on how the tax laws apply to a particular arrangement or transaction. These binding rulings give taxpayers confidence about how the tax authority will apply the tax laws and assist taxpayers to meet their obligations. New Zealand is a good example.

A different statutory type is that utilised by Sweden and India. In those countries an independent authority constituted by legislation provides rulings. In Sweden both sides may approach the independent authority for rulings.

These rulings are then binding on the tax authority. At least as far back as 1998 there have been calls for SARS to join the inland revenue authorities in much of the rest of the developed world and provide taxpayers with advance rulings in respect of transactions they are contemplating entering.

10.3.5 The Proposed South African Model

The discussion paper issued by SARS which discusses the model that SARS has proposed includes the following elements:

- It would have a statutory basis.
- A centralised unit within SARS would issue rulings. In exceptional circumstances the Commissioner would be empowered to appoint skilled persons from outside SARS to give advice on specific matters.
- All taxes would be covered, except for Customs and Excise, which already has a system in place. An investigation would be undertaken to determine whether that system should be encompassed within the proposed system.
- There would be classes of rulings; binding general ruling, binding private ruling, binding class ruling, binding product ruling and non-binding private opinion.
- All rulings would be binding on SARS but not the taxpayer except the non-binding private opinion which would not be binding on SARS nor the taxpayer.
- All rulings would be issued by the internal Tax Ruling Unit except for the non-binding private opinion which would be issued by the officers at the branch offices of SARS.
- Fees would not be charged for the binding general ruling and the non-binding private opinion but for all the others there would be fees charged.

The advance ruling system's purpose would be the following:

- To promote clarity regarding the interpretation and application of tax law.
- To promote certainty and consistency in the application of tax law.
- To assist taxpayers to comply with tax laws.
- To promote good relations with taxpayers.
- To minimise controversy and tax litigation.

10.3.6 Tax Without Advance Tax Rulings

D. Clegg writes in his article "As a rule" :

"Unlike inland revenue authorities in much of the rest of the developed world, the South African Revenue Service (SARS) does not have a well developed system of providing taxpayers with – in advance – in respect of transactions into which they are contemplating entering."

Admittedly, as referred to in the previous section, SARS has published the Income Tax Practice Manual, which is a useful volume in any tax practitioner's library. However, the Income Tax Practice Manual has no binding authority on the Commissioner in terms of tax legislation and as such cannot be relied on in the same manner that advance rulings are contemplated. This uncertainty has, in some instances in the past, forced taxpayers to approach the High Court for declaratory rulings in order to clarify a particular point. Should the advance tax ruling system not come about, taxpayers may have to continue along the same path as beforehand.

In *Chancellor, Masters and Scholars of the University of Oxford v CIR* 58 SATC 45, the Commissioner, in 1991, notified the Oxford University Press South Africa (OUPSA) of his revoking of their 1961 exemption from income tax. This led to the OUPSA seeking a declaratory order reinstating their tax exemption. This was ultimately successful.

The Court will not always assist the taxpayer. In *Family Benefit Friendly Society v CIR* 58 SATC 243, the Friendly Society had not commenced operations and was reluctant to do so until the disagreement between it and the Commissioner with regard to its status in terms of the Income Tax Act had been adjudicated upon by the High Court.

Van Dijkhorst J said on page 251 of his ruling:

"What the applicant seeks is an opinion by the Supreme Court to be added to its bundle of opinions from learned counsel, which may become useful should it decide to go into business and should it be able to enlist employers and members... the courts should not be utilised for this purpose."

SARS has taken the first steps towards a system of advance rulings. In his 2003 Budget Review the Minister of Finance announced that SARS was actively reviewing the possibility of introducing an advance ruling process and planned to release a discussion document in that regard (J.Silke "Advance Tax Rulings). Subsequent to this, the discussion paper on a proposed system for advance tax rulings was published.

The discussion paper alluded to the fact that in South Africa at present there is no formal advance tax ruling system while taxpayers often approached SARS for guidance on a variety of tax issues. The paper referred to practice/interpretation notes, guides and brochures as an example of what is presently available for taxpayers to consult on a general basis. It was noted that occasionally, for a specific set of circumstances usually arising from a dispute between a taxpayer and a branch office, views or rulings are given. However, it was pointed out that there is no statutory basis for this and SARS is not bound by it.

10.3.7 Conclusion

It would seem from the abovementioned information that there are positive and negative aspects with respect to advance ruling systems. However, we live in an imperfect world and it would seem that the positives of the implementation of such a system far outweigh the negatives.

10.4 SARS Service Monitoring Office

In an attempt to be more accountable, to try and deal more effectively with the service problems that SARS was experiencing and to get away from the image that nobody at SARS is really concerned about the taxpayer the Minister of Finance announced in his February 2002 Budget Speech that SARS would be launching a complaints office that would operate independently of branch offices. According to the SARS publication "Putting things right" in March 2002 he said :

" Mechanisms are required to assist taxpayers who are having difficulty in resolving problems of a procedural nature with SARS. In line with the announcement made in the Budget Speech, SARS will establish an office which will function independently of branch offices, report directly to the Commissioner, and maintain an objective perspective on the complaints it receives. The creation of this office is tangible evidence of SARS's commitment to the improvement of service delivery.

The office will fast-track and follow up on complaints on procedural matters that cannot be resolved at the branch office level. Where the complaint relates to a dispute as to the merits of a decision or assessment, the office will advise the taxpayer of the steps that he or she needs to take to make use of the dispute resolution mechanisms. The office will not be involved in deciding the merits of the assessment."

On 2 October 2002 the SARS Service Monitoring Office (SMO) was launched and became operational the following day (PriceWaterhouseCoopers-A way out for irate taxpayers). In order to give the Service an air of independence and impartiality Professor L Olivier, a well known and respected tax academic was appointed to be its head (B. Croome – SARS wants to hear your complaints). She has penned a number of tax articles and publications as well as serving as Acting Dean of the Faculty of Law at the Rand Afrikaans University. The SMO reports directly to the office of the Minister of Finance and is required to provide it with regular reports.

According to the SARS publication " Providing a better service" the SMO would only be approached once the normal avenues of contact had been exhausted. So, for example, if a taxpayer had been attempting to resolve an issue relating to the issuing of an assessment subsequent to the submitting of an income tax return and no assessment had been issued after a considerable period of time he would approach the local revenue office. If no satisfactory action was forthcoming he would then approach the office's branch manager after which, having had no success there, he would approach the SMO.

S. Taylor, in his article entitled "Please Mr Commissioner", writes :

"So, while the Commissioner may hold all the cards, there are limits to how long he can hold up the game by refusing to play them."

As stated above concerning the Minister's Budget Speech, the SMO will not deal with issues relating to the levying of tax, or VAT and any other taxes. It will only deal with operational issues where the normal system has stopped moving.

The SMO is an office which has been set up by SARS to assist taxpayers with difficulties of an operational nature that they are experiencing and they should consider an approach to it before implementing an application to the courts. Thereafter if the SMO cannot assist their next step may well be to

approach the courts.

10.5 The SARS Taxpayer Service Charter

The SARS Taxpayer Service Charter was introduced in 2003 (Taxgram February 2003). According to B.Croome in his article entitled "Taxpayers' Rights" the Charter provides the following in respect of taxpayers rights :

" to protect your constitutional rights

by keeping your private affairs strictly confidential,
by furnishing you with reasons for decisions taken,
by applying the law consistently and impartially."

Unfortunately the SARS Taxpayer Service Charter is not legislation and SARS cannot be held directly to its provisions as it is merely a statement of intent as to how it will conduct itself with respect to taxpayers' rights. The question arises as to whether there is any way to hold SARS to these provisions. The Constitution guarantees the rights in the SARS Taxpayer Service Charter and, moreover, in terms of the PAJA, any decision taken by an administrator must be supported by reasons for the decision. So, although it may seem that the SARS Taxpayer Service Charter is merely a statement of good intentions on the part of the SARS to deal fairly with taxpayers, it is indirectly accountable for its actions in terms of the Taxpayer Charter. It also becomes evident from the cases which have been brought before the courts that the courts will look at all the circumstances of a particular matter and if necessary will look to these types of statement of good faith in their consideration of the matters that lie before them.

CHAPTER ELEVEN

Common Law Assistance For The Taxpayer

11.1 Introduction

Over the years the courts, in their judgements, have developed common law. This chapter will briefly summarise common law which can work to the advantage of the taxpayer.

11.2 Legitimate Expectations

11.2.1 Introduction

The principle of legitimate expectations originates from the United Kingdom. D. Clegg in his article "The Doctrine of Legitimate Expectations" reminds us on page 141 of Lord Denning MR's remark in *R v Liverpool Corporation* (1972) 2QB 249:

" that it was a well-established principle of law that a public body entrusted by the legislature with certain powers and duties cannot divest itself of them, nor act in a manner incompatible with them."

In *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149 (CA), where the principle of legitimate expectation was first applied to administrative law,

he had the following to say:

"... an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say."

Bingham LJ, in a concurring judgement in *R v Liverpool Corporation* (1972) 2QB 249, stated:

"If the taxpayer approaches the Revenue with clear and precise proposals about the future conduct of his fiscal affairs and receives an unequivocal statement about how they will be treated for tax purposes if implemented, the Revenue should in my judgement be subject to ... review on grounds of unfair abuse of power if it peremptorily decides that it will not be bound by such statements when the taxpayer has relied on them. The same principle should apply to Revenue statements of policy."

Lord Roskill said the following in *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374:

" Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."

11.2.2 South African Cases

Corbett CJ, in *Administrator, Transvaal and Others v Traub and Others* 1989 (4) SA 731 (A) noted that a legitimate expectation must have a reasonable basis. It had, he said, been utilised by courts in Australia and New Zealand in the context of judicial review of administrative action. His conclusion on page 748 was:

"In my opinion, there is a similar need in this country. There are many cases where one can visualise in this sphere ... where an adherence to the formula of 'liberty, property and existing rights' would fail to provide a legal remedy, where the facts cry out for one; and would result in a decision which appeared to have been arrived at by a procedure which was clearly unfair being immune from review. The law should in such cases be made to reach out and come to the aid of persons prejudicially affected. At the same time, whereas the concepts of liberty, property and existing rights are reasonably well defined, that of legitimate expectation is not. Like public policy, unless carefully handled it could become an unruly horse. And, in working out, incrementally, on the facts of each case, where the doctrine of legitimate expectation applies and where it does not, the Courts will, no doubt, bear in mind the need to protect the individual from decisions unfairly arrived at by public authority (and in certain domestic tribunals) and the contrary desirability of avoiding undue judicial interference in their administration."

Corbett CJ also recognised that a legitimate expectation might arise in two ways:

- where a person enjoys an expectation of a privilege or a benefit of which it would not be fair to deprive him without a fair hearing;
- where the previous conduct of an official has given rise to an expectation that a particular procedure will be followed before a decision is made.

In *Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* CCT 10/98 O'Regan J said in her judgement that once a person establishes a legitimate expectation in terms of the Constitution, he will be entitled to procedural fairness in relation to administrative action that may affect or threaten that expectation.

D Clegg, in his article on legitimate expectation, discusses the effect that it has on Practice Notes, the SARS Practice Manual and individual rulings. His

conclusion is that no reliance can be placed on Practice Notes. With regard to the SARS Practice Manual, if it has no disclaimer and it is proved that it is a correct representation of the Commissioner's actual practice it can be relied on from a legitimate expectation point of view. He argues that individual rulings should be able to be relied on depending on the facts of each case.

Although the doctrine of "legitimate expectation" has been mentioned many times in passing, in cases such as the ones quoted above, the only case that appears to have come before the courts in Southern Africa which directly considered the doctrine is *COT v Astra Holdings (Private) Ltd t/a Puzey & Payne* 66 SATC 116, a Zimbabwean case. In that case, which started out as ITC 1674, the respondent was an owner of a business selling motor vehicles to the members of the public. He had been charging sales tax, as was required by law. At some point he came into possession of a letter addressed to one of his colleagues in the same industry from the appellant's office confirming that no sales tax was chargeable on the vehicles as they were paid for with foreign currency. From then on and for almost the next two years he did not charge sales tax as per the letter. During two inspections of his books by revenue officials no mention had been made by the respective inspectors of the sales tax. During a subsequent inspection of his books and after a comparison with his monthly returns the appellant issued the respondent with assessments for sales tax on the sale of the vehicles. The respondent brought an action in the Zimbabwe Fiscal Appeal Court. The Court ruled for the respondent (in that case the appellant) on the basis that he had a legitimate expectation originating from the letter. The appellant then took the case on appeal to the Zimbabwe Supreme Court. In their ruling the Court found that the letter was based on an error in law and it said that the respondent could never rely on legitimate expectation when it was derived from an error in law. Thus the Fiscal Appeal Court's ruling was set aside and the taxpayer was ordered to pay the sales tax.

11.2.3 Conclusion

Legitimate expectation is an area of tax law that has not been fully tested in South Africa. Taxpayers should be extremely careful before venturing into its untested waters. They should also be extremely sure of all the facts of their case and how the law applies to it.

J. Silke in his article "Legitimate expectations" makes the following points :

- A taxpayer should obtain his own ruling from the Commissioner, and not rely on rulings given to other taxpayers even if the subject matter is identical.
- South African tax legislation provides for a 'practice generally prevailing' being initiated by the Commissioner with specific consequences, but then this practice must fulfil certain requirements.
- SARS has issued a Discussion Paper on a proposed system for advance tax rulings which, once introduced into the Income Tax Act, will go a far way in giving certainty to the tax treatment of transactions between the Commissioner and the taxpayer concerned, thereby lessening the need to resort to the more obscure branch of administrative law on which the doctrine of legitimate expectation is based.

Should the system of advance rulings see the light of day, this might go some way to preventing taxpayers from having to rely on the doctrine of legitimate expectation to justify their actions.

11.3 The "Contra Fiscum" Rule

Simply put, the "*contra fiscum*" rule means that if a case of ambiguity arises in a provision that imposes a revenue charge, the provision must be read in favour of the taxpayer. This was stated in the case of *CIR v Insolvent Estate*

Botha 52 SATC 47. Although this is unusual, it can be of benefit to the taxpayer. It must also be remembered that the "*contra fiscum*" rule does not apply to the interpretation of anti-avoidance provisions of the Income Tax Act (M.Kolitz Tax Avoidance).

11.4 The "Audi Alteram Partem" Principle

This principle means that a person whose rights will be affected prejudicially should be given the opportunity to be heard or to defend himself. In *Deacon v Controller of Customs and Excise* 61 SATC 275 the Court said on page 283 of the *audi alteram partem* principle:

" The greater or more serious the intrusion and far-reaching the prejudice, the more readily will the courts uphold the audi-principle."

In this case the judge found that it would be impracticable to order the respondent to give every taxpayer a hearing before he is required to pay the duty. A similar finding was that in the case *Henbase 3392 (Pty) Ltd v CSARS* 64 SATC 203. This case also involved Customs and Excise. It would seem that the Customs and Excise officials are given more slack, perhaps because of the nature of their work. The *audi alteram partem* principle has essentially been legislated for in the PAJA. This provides for fair administrative justice which can include a hearing for the review of a decision.

CHAPTER TWELVE

Practical Problems Facing Taxpayers

12.1 Time

The Revenue Acts do not compel the Commissioner in any of its provisions to carry out any of his duties in a specific time. The one exception to this is the recently introduced alternative dispute resolution procedures and the amended objection and appeal procedures. Thus, the Commissioner may take as long as he wishes to, for example, issue an assessment, reply to a query from a taxpayer or issue a refund, which may fall within his discretion.

These actions, the decision and the exercise of discretion, are reviewable in terms of the Promotion of Administrative Justice Act. The Service Monitoring Office which was introduced recently is the correct forum to deal with this problem.

12.2 Lack of Finance

Lack of finance is a real problem for taxpayers who find themselves at the mercy of the resources of SARS. Admittedly, the initial objection and appeal processes are reasonably cost effective and the taxpayer can represent himself, particularly where the ADR process is followed. However, when the formal court process is required, the expense is beyond the resources of the

majority of people of South Africa. The cost of hiring an attorney and an advocate and bringing an application before the High Court could cost as much as R 50 000 or even more. It is also true that, in certain circumstances, legal aid may be available. If an appeal is to proceed to the Supreme Court of Appeal or even the Constitutional Court this would result in significantly higher costs for the applicant. If the applicant's constitutional rights had been infringed and he was not able to approach that court because of a lack of finance it would surely mean that he had no recourse. On the side of the Commissioner, he has at his disposal advocates and staff as well as finances to fight any challenge. It would appear that this is an unfair advantage and perhaps is a stumbling block to the protection of constitutional rights of individuals.

12.3 Unskilled Tax Advisors

It would seem that taxpayers may be treading in a minefield when they appoint a person to attend to their tax affairs. At present there is no standard against which to measure the competency of a tax advisor. There is no requirement for a minimum qualification nor experience. Accountants who belong to any of the recognized accounting bodies are normally required to have a minimum qualification and a level of experience. But that relates essentially to accountancy and in the case of audit companies, auditing. Any person can act as a tax advisor to any other person without having any knowledge of tax law or tax cases or to have any formal training in tax at all. In an article written by G. Goldswain on the subject of what he terms "advisor's necessary equipment" he states the following on page 33: "Unless an entry-level advisor has what I call, for the want of a better word, a 'feeling' for taxation, he will not, in my opinion, make a good tax advisor. In fact, I could go so far as to say that he would never be able to progress to a tax 'specialist' without his 'feeling' for taxation. One way to achieve this 'feeling' is to be aware of the concept of tax cases and the part they play in

the interpretation of tax legislation. A thorough knowledge and understanding of the principles discussed in the cases, together with the legislation, is a prerequisite for effective tax planning." On page 34 he states :

" In my opinion, I find it quite unacceptable that a tax advisor can be let loose on the unsuspecting public without knowing these, what I would term, entry-level principles, yet be expected to know a specific case on a subject which I would term specialised."

SARS has taken the first steps towards providing a possible solution to this problem by proposing an association of tax practitioners where tax advisors will be required to have a level of qualification and or experience before they can practise as such.

C. Divaris, in his article "Dogs bark", expresses a critical view of such an association on page 143:

" On the point (and on no other) that tax advisors are generally either crooks or incompetents, I agree with the Commissioner, although I think that his campaign to register tax practitioners is both unworkable and silly. As a famous educator once taught me, you cannot legislate for morals. (For confirmation, ask our professional societies, if you can catch them in a waking moment)."

On the other side, since tax advisors will be required, in the future, to have a certain standard of experience and qualification, it would only be fair to require that the employees of SARS directly involved with issuing assessments should also have a certain level of competency, whether academic or experience-based or both ?

CHAPTER THIRTEEN

Conclusion

In this study we have considered the question of whether the taxpayer in South Africa is protected by the Constitution or any other law. We have found that the ability of SARS to become more intrusive into the lives of every person has increased significantly. More importantly, we have noted instances where the power and authority has been used arbitrarily and without consideration for the rights of people. It has been pointed out by the Courts on occasion that there are times when the infringement of the rights of people can be justified. However, the new Constitution and the Constitutional Court which interpret it, protects the rights of all people and will not allow abuse of power and arbitrary decisions that negatively impact on people's rights to go unchecked. Certain legislation has been promulgated to beef up the watchdog ability of the Court. SARS has to exercise much greater care and diligence in their dealings with taxpayers because the very power that they wield could also be their greatest threat. Some tax experts may express dismay at the large majority of Constitutional Court decisions that have gone against the declaring of certain revenue provisions unconstitutional. However, as J Silke crisply puts it in the title of his article on the subject: "When will they ever learn ? " The Constitution is there to provide protection for the rights of people who obey the law and, where a law is unjustifiable, to strike it down. It is not there to be abused by delaying tactics. Apart from the Constitution there is ample legislation that will protect the rights of people. There is always room for an organ of state to improve and SARS is no exception. While much has been done, much still remains to be done to rid it of the legacy of inefficiency that has always dogged it.

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