



**UNIVERSITY OF <sup>TM</sup>  
KWAZULU-NATAL**

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**INYUVESI  
YAKWAZULU-NATALI**

**A CRITICAL DISCUSSION OF THE 'PAY NOW, ARGUE LATER' RULE IN  
SOUTH AFRICAN TAX LAW**

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DECLARATION

This dissertation has been undertaken at the University of KwaZulu-Natal, Pietermaritzburg, Faculty of Law, and has not been previously submitted and accepted for any other degree.

This research is my own work. I have referenced the sources from which I have obtained information and where I have utilised or relied on other peoples' ideas, I have acknowledged them.

SIGNED AT .....ON THIS ..... DAY  
OF NOVEMBER 2018.

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AMANDA ELIZABETH MUYONJO

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## ABSTRACT

The process of tax recovery is a significant and necessary one. However, it is also fraught with complexities and controversy. The State has enacted laws to facilitate the efficient collection of taxes.

When it comes to the various stringent tax laws in the South African tax system aimed at ensuring the efficient collection of taxes, the 'pay now, argue later' rule is certainly a contender. The practical impact of the rule is that neither the noting of an objection nor an appeal suspends a taxpayer's pre-existing obligation to pay tax. The provisions of the Tax Administration Act 28 of 2011 contain wide powers that are conferred upon the South African Revenue Service (SARS). These provisions in conjunction with the rule are the catalysts through which taxpayers' co-operation with SARS is achieved.

It is therefore not surprising that the State may enact and execute its laws in a manner so as to effectively achieve its tax collection mandate, whilst not having sufficient regard to the rights of taxpayers. The purpose of this mini dissertation is to engage in a critical discussion of the 'pay now, argue later' rule and to show the need to ameliorate the effect of the powers bestowed upon SARS in order to ensure better protection of taxpayers' rights. There is a need to create better awareness of taxpayers' rights and for tax legislation to be a lot more understandable and unambiguous in the interest of creating certainty for taxpayers, SARS and the courts.

## DEFINITIONS, MEANINGS AND ACRONYMS

‘assessment’<sup>1</sup> means the determination of the amount of tax liability or refund, by way of self-assessment by the taxpayer or assessment by SARS.

‘Commissioner’<sup>2</sup> means the Commissioner for the South African Revenue Service appointed in terms of section 6 of the SARS Act or the Acting Commissioner designated in terms of section 7 of that Act.

‘Constitution’ means the Constitution of the Republic of South Africa, 1996.

‘Income Tax Act’ means the Income Tax Act 58 of 1962.

‘PAJA’ means the Promotion of Administrative Justice Act 3 of 2000.

‘return’<sup>3</sup> means a form, declaration, document or other manner of submitting information to SARS that incorporates a self-assessment, is a basis on which an assessment is to be made by SARS or incorporates relevant material required under section 25, 26 or 27 or a provision under a tax Act requiring the submission of a return.

‘SARS Act’ means the South African Revenue Service Act 34 of 1997.

‘SARS’ means the South African Revenue Service, established under the South African Revenue Service Act 34 of 1997.

‘Tax Administration Act’ means Tax Administration Act 28 of 2011.

‘tax’,<sup>4</sup> for purposes of administration under this Act, includes a tax, duty, levy, royalty, fee, contribution, penalty, interest and any other moneys imposed under a tax Act.

‘VAT Act’ means the Value-Added Tax Act 89 of 1991.

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<sup>1</sup> Section 1 of the Tax Administration Act 28 of 2011.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

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## CHAPTER ONE INTRODUITION

### 1. INTRODUCTION AND BACKGROUND

‘We do not like to talk about burdens and duties these days and much prefer to talk about rights. Nevertheless it is still relatively novel to talk about taxpayers’ rights.’<sup>1</sup>

The purpose of law in society, fiscal laws inclusive, is to promote legal order and to eradicate anarchy and chaos.<sup>2</sup> As a result, various laws have been promulgated to enable governments to impose taxes on their citizens.<sup>3</sup> Taxation is no modern notion. It dates back several centuries to ancient civilisations.<sup>4</sup>

In the South African jurisdiction, the various taxes that are currently imposed on the citizenry include Income Tax, Value Added Tax (VAT), Customs Duties, Capital Gains Tax, Dividends Tax, Donations Tax, Estate Duty, Excise Duty, Transfer Duty.<sup>5</sup> Reference to taxes for purposes of this dissertation will be confined to income tax and VAT. Income tax is the normal tax levied on a person’s taxable income and profit whereas VAT is levied as a result of the consumption of goods and services in the country’s economy.<sup>6</sup> The charging statutes for income tax and VAT are the Income Tax Act 58 of 1962 (hereinafter, the ‘Income Tax Act’) and the Value-Added Tax Act 89 of 1991 (hereinafter, the ‘VAT Act’), respectively. Tax administration in respect of both taxes occurs in terms of the Tax Administration Act 28 of 2011 (hereinafter, the ‘Tax Administration Act’). The purpose behind the enactment of the Tax Administration Act was to consolidate into a single piece of legislation the administration provisions that were found in the various tax statutes.<sup>7</sup>

SARS is the revenue authority in South Africa, which was established under the South African Revenue Service Act 34 of 1997 (hereinafter, the ‘SARS Act’) as an organ of state within the public administration but outside the public service.<sup>8</sup> At the outset, it is important to note that

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<sup>1</sup> Duncan Bentley (ed) *Taxpayers’ Rights: An International Perspective* (1998) iii.

<sup>2</sup> L Olivier ‘Uncertainty Regarding the Philosophy Underlying South African Revenue Service Collection Procedures’ 2003 *TSAR* 382.

<sup>3</sup> B Croome & L Olivier *Tax Administration* (2010) 1.

<sup>4</sup> *Ibid.*

<sup>5</sup> SARS ‘What kinds of tax do we pay?’ available at [www.sars.gov.za](http://www.sars.gov.za), accessed on 02 August 2018.

<sup>6</sup> *Ibid.*

<sup>7</sup> Section 2 of the Tax Administration Act.

<sup>8</sup> *Ibid.*

taxes are not imposed by SARS, but by operation of law.<sup>9</sup> SARS is simply an organ of state mandated to collect taxes.<sup>10</sup>

The following have been identified as the major objectives of taxation, namely, to enable the government to pay for its expenditure, to enable same to redistribute and to reallocate its resources and to ensure the smooth economic running of the country.<sup>11</sup> In addition, one of the key justifications for the levying of taxes is that it is a necessary sacrifice in order to attain the kind of society that is desired by its members.<sup>12</sup> It is further submitted that those who enjoy the benefits of the state are liable to pay taxes to the state.<sup>13</sup> Thus, an obligation is placed on every person who becomes liable to pay any tax to register with SARS as a taxpayer.<sup>14</sup>

Notwithstanding the evidently legitimate purposes and justifications for taxation, it has been the subject of diverse views and opinions in various disciplines, ranging from economics to politics and ethics.<sup>15</sup> Albert Einstein candidly stated that ‘the hardest thing to understand in the world is the income tax’.<sup>16</sup> Equally candid was Benjamin Franklin<sup>17</sup> in his statement that ‘in this world nothing can be said to be certain, except death and taxes’. According to Williams,<sup>18</sup> ‘to levy a tax is to confiscate the taxpayer’s money’.

Given such views as these, it is little wonder that taxpayers and the revenue authority are frequently at loggerheads. It seems that the payment and collection of taxes is tantamount to a struggle in which SARS strives to collect a maximum amount of taxes on the one hand whilst taxpayers strive to pay a minimal amount on the other.<sup>19</sup> A further observation is that that we do not live in an ideal society where taxpayers diligently fulfil their tax obligations; hence the seemingly draconian powers conferred upon SARS to ensure the efficient collection of taxes.<sup>20</sup>

One such power is a highly daunting rule upon which the South African tax system is premised. It is colloquially termed the ‘pay now, argue later’ rule (hereinafter ‘the rule’). According to the rule, a taxpayer is obliged to first pay a tax amount demanded by SARS and only complain

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<sup>9</sup> Sections 3 and 4 of the SARS Act.

<sup>10</sup> Ibid.

<sup>11</sup> RC Williams *Income Tax in South Africa: Law & Practice* 4 ed (2006) 3.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> C Divaris & ML Stein *South African Income Tax Guide 2010/2011* (2011) 1.

<sup>15</sup> Williams op cit note 11 at 3.

<sup>16</sup> Ibid at 2.

<sup>17</sup> D Howell ‘Death and taxes’ 2017 *Tax Professional* 24.

<sup>18</sup> Williams op cit note 11 at 2.

<sup>19</sup> Croome & Olivier op cit note 3 at (v).

<sup>20</sup> Olivier op cit note 2 at 382.

thereafter. It does not matter that a taxpayer disagrees with a tax amount reflected in his or her assessment and whether he or she has every intention of contesting it. The obligation to pay such tax amount remains intact. The rule is a trite principle in South African tax law and it is currently enshrined in the Tax Administration Act.<sup>21</sup> The rule undoubtedly serves a pivotal role of ensuring the efficient collection of taxes to maintain a smooth economic running of the country.<sup>22</sup> Nonetheless, it is the object of much resistance in the tax sphere, with the core issue being whether it can harmoniously co-exist with taxpayers' rights.<sup>23</sup>

## 2. RESEARCH PROBLEM

First, unlike an ordinary tax debt, the payment of which is suspended until a debtor's liability has been established by a court of law, SARS is permitted to collect a tax amount from a taxpayer, despite the amount being contested by the latter.<sup>24</sup> This may potentially plunge a taxpayer into serious financial difficulty.

Furthermore, the remedies at the taxpayer's disposal do not seem to provide any significant protection because as briefly explained above, a taxpayer's obligation to pay a disputed tax amount remains intact. SARS is empowered to proceed with the collection of a disputed tax amount, to the extent of obtaining a certified statement which is regarded as a civil judgment, and to subsequently attach a taxpayer's property at a sale in execution.

Another major reason why the rule is frowned upon is because it appears to be inconsistent with taxpayers' rights as enshrined in the Constitution.<sup>25</sup> The constitutional rights that are of particular significance in the tax sphere are the right to property,<sup>26</sup> the right of access to the courts,<sup>27</sup> the right to privacy,<sup>28</sup> the right to equality,<sup>29</sup> the right of access to information<sup>30</sup> and the right to just administrative action.<sup>31</sup> All the said constitutional rights, save for the right of access to the courts, are beyond the scope of this dissertation. There appears to be an imbalance

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<sup>21</sup> Section 164(1) of the Tax Administration Act.

<sup>22</sup> C Keulder "Pay now, argue later" rule – before and after the Tax Administration Act' (2013) 16(4) *Potchefstroom Electronic Law Journal* 125.

<sup>23</sup> *Ibid.*

<sup>24</sup> *CIR v NCR Corporation of South Africa (Pty) Ltd* 50 SATC 9.

<sup>25</sup> C Keulder *Does the Constitution Protect Taxpayers Against the Mighty SARS? – An Inquiry into the Constitutionality of Selected Tax Practices and Procedures* (unpublished LLM thesis, University of Pretoria, 2011) II.

<sup>26</sup> Section 25 of the Constitution.

<sup>27</sup> Section 34 of the Constitution.

<sup>28</sup> Section 14 of the Constitution.

<sup>29</sup> Section 9 of the Constitution.

<sup>30</sup> Section 32 of the Constitution.

<sup>31</sup> Section 33 of the Constitution.

between the powers conferred upon SARS in the quest to collect taxes, and the need to protect taxpayers' rights from the might of the State. This view is consistent with that of the Davis Tax Committee where it stated thus:

It is common cause that, in balancing the powers and rights of tax authorities against those of taxpayers, there is a disproportionate bias of power and entitlement in favour of tax authorities. This is largely justified to ensure compliance, mainly by taxpayers who would rather not pay their fair share of taxes. This bias often overrides taxpayers' rights, which are in most instances unknown to the taxpayers.<sup>32</sup>

It appears that the law favours SARS at all costs in the quest to efficiently collect taxes, despite this being to the severe detriment of taxpayers.

### 3. STATEMENT OF PURPOSE

The purpose of this dissertation is to provide a critical discussion of selected criticisms surrounding the rule, and to establish the extent to which the rule, given its high importance, can co-exist with the equally important rights of taxpayers.

### 4. RATIONALE

There is increasing tension between SARS and taxpayers. This is especially so because history has shown that taxpayers are often the unsuccessful litigants in tax disputes.<sup>33</sup> A number of studies in this area focus on the constitutionality of the rule. Whilst a portion of this dissertation likewise includes a discussion on whether the rule can stand constitutional muster in respect of the right of access to the courts, this dissertation further entails a discussion of practical issues pertaining to tax administration in relation to the rule. It also entails a discussion of the controversial nature of selected specified powers conferred upon SARS in an effort to implement the rule.

### 5. RESEARCH QUESTIONS

- 5.1 What is the origin and the significance of the rule?
- 5.2 What problems are caused by the operation of the rule that it attracts much controversy?
- 5.3 How different is a tax debt from an ordinary civil debt?
- 5.4 Is a certified statement tantamount to a judgment against a taxpayer? In this regard, to what extent is the rule compatible with the constitutional right of access to the courts?

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<sup>32</sup> D Davis, D Tickle & T Legwaila *Report on Tax Administration* (2017) 63, available at [www.taxcom.org.za](http://www.taxcom.org.za), accessed on 13 June 2018.

<sup>33</sup> J Silke 'Taxpayers and the Constitution: A battle already lost' (2002) 17 *Acta Juridica* 282.

5.5 How adequate are the current remedies afforded to a taxpayer in view of the powers conferred upon SARS?

## 6. METHODOLOGY

The study requires a discussion of the relevant law as set out in the relevant tax statutes and court judgements. The analysis and critique of the law shall be facilitated by useful information from textbooks, literature reviews in journal articles and periodicals, and any other published material that is available in the public domain. Thus, the methodology utilised for this work is documentary and desktop research.

## 7. EXPOSITION

Chapter two will comprise a general discussion of the origin of the rule and its significance. It is investigated as to why the rule is so important and why the legislature is determined to enforce it at all costs. In addition, the chapter will engage in a discussion of specified statutory powers conferred upon SARS in conjunction with the rule, and the problems that this may cause for taxpayers.

Chapter three will contain a critical analysis of the compatibility of the rule with a taxpayer's right of access to the courts. The landmark constitutional court decision in *Metcash Trading Ltd v Commissioner for the South African Revenue Service*,<sup>34</sup> in which the court was tasked with deciding whether the rule could stand constitutional muster in the context of VAT, will be discussed. This chapter will also contain a discussion the nature of a tax debt as opposed to an ordinary civil debt. In addition, the chapter will contain an analysis of the implementation provisions of the rule, particularly section 174 of the Tax Administration Act. This section states that the certificate procedure which the Commissioner files with the clerk or registrar of a competent court, is regarded as a judgment lawfully obtained against a taxpayer. The chapter will engage in an analysis as to whether a certified statement is tantamount to a judgment.

Chapter four will entail a discussion of the remedies made available to a taxpayer under the Tax Administration Act. This chapter will discuss the effectiveness of these remedies. The chapter will also discuss whether there are any other remedies, beside those contained in the Tax Administration Act, at the disposal of an aggrieved taxpayer. In addition, the chapter will comprise a discussion of the instances where the operation of the rule may be suspended. The

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<sup>34</sup> 2001 1 BCLR 1 (CC).

Tax Administration Act does provide an aggrieved taxpayer with an opportunity to request for the suspension of the payment of disputed tax.

Chapter five is the concluding chapter. The chapter provides an overview of the findings of this work and also contains some recommendations.

## CHAPTER TWO

### THE STATUTORY POWERS OF THE COMMISSIONER AND THE IMPACT OF THE 'PAY NOW, ARGUE LATER' RULE

#### 1. INTRODUCTION

'The pay-now-argue-later rule is probably the most invasive of a taxpayer's rights'.<sup>1</sup>

The lives of all citizens are affected by the practice of taxation.<sup>2</sup> Income tax was introduced in the Union of South Africa in the year 1914 when General Smuts, who was the Minister of Finance then, tabled the Income Tax Act 28 of 1914 in Parliament.<sup>3</sup> The said statute was largely based on the previous taxation systems, being the old Cape Colony and the New South Wales Act 11 of 1912.<sup>4</sup> A prevailing notion in the historical development of taxation was that it was simply a way of government exercising its powers in order to maintain a stable society.<sup>5</sup>

#### 2. THE INCEPTION OF THE 'PAY NOW, ARGUE LATER' RULE IN SOUTH AFRICAN TAX LAW AND JUSTIFICATIONS FOR ITS OPERATION

It was through the Income Tax Act that the rule had its advent in South African tax law, and later in the VAT Act.<sup>6</sup> The rule in the Income Tax Act empowered SARS to proceed with the recovery of any tax from a taxpayer, notwithstanding the existence of an appeal by such taxpayer, unless the Commissioner directed to the contrary.<sup>7</sup> Similarly, the VAT Act provided that save where the Commissioner directed otherwise, a VAT vendor who had lodged an appeal was still obliged to pay the VAT amount that was demanded by SARS.<sup>8</sup> It is clear that the rule in both statutes, although dealing with different taxes, was substantially similar. Despite the lodging of an appeal by a taxpayer in any of the available forums, the rule required that a

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<sup>1</sup> RC Williams 'The pay-now-argue-later rule festers into our income tax system' *South African Institute of Tax Professionals* Technical 2 December 2011, available at <http://www.thesait.org.za>, accessed on 15 August 2018.

<sup>2</sup> J Hattingh, J Roeleveld & C West (eds) *Income tax in South Africa: the first 100 years 1914- 2014* (2016) xiv.

<sup>3</sup> P Surtees 'Importing and exporting income tax law: The international origins of the South African Income Tax Act' in Johann Hattingh, Jennifer Roeleveld & Craig West (eds) *Income tax in South Africa: the first 100 years 1914- 2014* (2016) 15.

<sup>4</sup> Ibid.

<sup>5</sup> B Croome (ed) *Tax Law: An Introduction* (2013) 2.

<sup>6</sup> SK Elliot *The "pay now, argue later" principle in South African Tax Law: its development, operation, comparison to South African civil debt enforcement and consistency with the constitutional right of access to courts* (unpublished LLM thesis, University of Cape Town, 2017) 19.

<sup>7</sup> Section 88(1) of the Income Tax Act.

<sup>8</sup> Section 36(1) of the VAT Act.

contested tax amount still had to be paid over to SARS, the only exception being where the Commissioner directed to the contrary.

As mentioned in chapter one, tax administration of the various taxes, save for Customs and Excise, now occurs under the Tax Administration Act.<sup>9</sup> The rule has been retained in the Tax Administration Act.<sup>10</sup> An apparent distinction in the rule under the Tax Administration Act is that the power to suspend payment of tax on request by a taxpayer now vests in a senior SARS official.<sup>11</sup> Furthermore, the rule is now not only applicable to appeals but also to objections.<sup>12</sup>

One of the canons of taxation according to Scottish economist, Adam Smith, is that of convenience.<sup>13</sup> This canon requires, amongst other things, that the imposition of tax ought to be done at a time and manner that is to the taxpayer's convenience.<sup>14</sup> However, the rule and the notion of convenience are two concepts that are utterly divergent. The rule seems to be much to the delight of SARS and to the chagrin of taxpayers. The main objective behind the operation of the rule is to ensure that taxes are collected quickly and effectively as explained in chapter one. This was confirmed by Binns-Ward J in *Capstone 556 (Pty) Ltd and Another v Commissioner, South African Revenue Service and Another*<sup>15</sup> where he stated that the operation of the rule is 'in the public interest in obtaining full and speedy settlement of tax debts' as well as to curb tax evasion. Thus, if the rule were not in operation, there would be a high prevalence of objections from taxpayers, frivolous and vexatious objections inclusive, which would stifle the economic progress of the State.<sup>16</sup> The Constitutional Court has upheld the constitutionality of the rule, albeit in the context of VAT.<sup>17</sup>

### 3. THE CONTROVERSIAL NATURE OF THE 'PAY NOW, ARGUE LATER' RULE

According to Croome, the advent of the Tax Administration Act improved the relationship between taxpayers and SARS.<sup>18</sup> On the other hand, however, it has been observed that the provisions of the Tax Administration Act have only served to widen the powers conferred upon

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<sup>9</sup> B Croome & L Olivier *Tax Administration* 2 ed (2015) 5.

<sup>10</sup> Section 164(1) of the Tax Administration Act.

<sup>11</sup> C Keulder "Pay now, argue later" rule – before and after the Tax Administration Act' (2013) 16 *PER/ PELJ* 148.

<sup>12</sup> Section 164(1) of the Tax Administration Act.

<sup>13</sup> Croome op cit note 5 at 10.

<sup>14</sup> *Ibid.*

<sup>15</sup> 2011 (6) SA 65 (WCC) para 9.

<sup>16</sup> Keulder op cit note 11 at 127.

<sup>17</sup> *Metcash Trading Ltd v Commissioner for the South African Revenue Service* 2001 1 BCLR 1 (CC).

<sup>18</sup> Hattingh, Roeleveld & West op cit note 2 at 278.



SARS, with the major aim being to combat tax evasion.<sup>19</sup> However, the extensive powers conferred upon SARS apply not only to tax evaders but also to taxpayers who faithfully discharge their tax obligations, with the result that the latter may suffer prejudice in the process.<sup>20</sup> Furthermore, the poor economic state of the country owing, inter alia, to the rising inflation and interest rates, soaring poverty levels and persistent unemployment does not place taxpayers in a financially viable situation, much less when they are compelled to pay tax amounts that they dispute.<sup>21</sup> Moreover, a taxpayer's failure to comply first and complain later may give rise to dire consequences under the Tax Administration Act, such as a certified statement being filed against such taxpayer, which statement is regarded as a civil judgement for purposes of tax recovery.<sup>22</sup> Thereafter, the Commissioner is able to acquire a writ of execution by which a taxpayer's property can be attached and sold.<sup>23</sup> Specified statutory powers conferred upon the Commissioner are discussed hereunder.

*(a) Jeopardy Assessments*

As explained in chapter one, once a person becomes liable for any tax, an obligation arises for such a person to register with SARS as a taxpayer.<sup>24</sup> Thereafter, the person is required to submit tax returns in terms of which liability for tax is determined and an assessment issued.<sup>25</sup> However, section 94 of the Tax Administration Act empowers SARS to issue an assessment to a taxpayer ahead of time before the taxpayer submits a tax return. This is to enable SARS to secure a tax debt that would otherwise be difficult to secure at a later stage. Although a taxpayer who finds themselves in such a situation is afforded the remedy of judicial review, it is accepted that this statutory power conferred upon SARS is manifestly drastic.<sup>26</sup>

*(b) The impact of a certified statement on a taxpayer's creditworthiness*

A prospective creditor usually determines whether or not to have confidence in a prospective debtor based on the latter's creditworthiness.<sup>27</sup> Creditworthiness refers to a trait that a debtor

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<sup>19</sup> M Seligson 'Previewing the new Tax Administration Act: more muscle for SARS – taxpayers beware!' (2012) 3 *Business Tax and Company Law Quarterly* 4.

<sup>20</sup> *Ibid.*

<sup>21</sup> The South African Institute of Tax Professionals 'Annexure C Proposals for 2018 Budget', available at [www.thesait.org.za](http://www.thesait.org.za), accessed on 28 July 2018.

<sup>22</sup> Sections 172 and 174 of the Tax Administration Act.

<sup>23</sup> Keulder *op cit* note 11 at 129.

<sup>24</sup> Lynette Olivier 'Law of Taxation' 2003 *Annual Survey of South African Law* 935.

<sup>25</sup> *Ibid.*

<sup>26</sup> Ben Johannes 'Pay now, argue later – principle: when must you pay SARS?' 2016 *TAXtalk* 28.

<sup>27</sup> HB Klopper 'The Nature of Creditworthiness' (1992) 55 *THRHR* 19.

possesses which influences the decision of a prospective creditor on whether or not to proceed to deal with such a debtor.<sup>28</sup> The trait is none other than the faithfulness of a debtor in honouring their financial obligations, specifically whether they have the same enthusiasm in settling their debts as they do in applying for credit.<sup>29</sup> This is done through the collection of data of the person's financial affairs.<sup>30</sup>

Entities such as credit bureaus, credit record agencies and companies constantly gather and sell data pertaining to the creditworthiness of individuals and businesses.<sup>31</sup> The collected data includes judgements that have been obtained against a person which involve for instance, garnishee orders, liquidations or sequestrations.<sup>32</sup> Thus, if the Commissioner obtains a certified statement against a taxpayer, this can have a detrimental impact on the taxpayer as his or her creditworthiness may be affected.<sup>33</sup> Generally, the first time that a taxpayer becomes aware of the existence of the statement is when he or she tries to apply for a loan, for instance.<sup>34</sup>

*(c) Liquidation, sequestration or winding-up of a taxpayer's estate*

Another far-reaching consequence of failure by an aggrieved taxpayer to comply first with the rule is the risk of having their estate liquidated, sequestrated or in extreme circumstances, wound-up.<sup>35</sup> Section 177(1) of the Tax Administration Act enables SARS to commence with liquidation, sequestration or winding-up proceedings against a defaulting taxpayer. This power which previously vested in the Commissioner under the Income Tax Act,<sup>36</sup> now vests in a senior SARS official under the Tax Administration Act. Once the liquidation or sequestration process is complete, SARS then proceeds to prove its claim in accordance with the provisions of the Insolvency Act 24 of 1936 (hereinafter the 'Insolvency Act').

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<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Understanding the Credit Record System, available at <https://www.finfindeasy.co.za>, accessed on 29 August 2018.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> L Olivier 'Constitutional Review of SARS's Power to Collect Outstanding Income Tax' (2010) 43 *De Jure* 161.

<sup>34</sup> Ibid.

<sup>35</sup> Croome & Olivier op cit note 9 at 394.

<sup>36</sup> Section 91(1)(c) of the Income Tax Act.

In *Commissioner for the South African Revenue Service v Hawker Air Services (Pty) Ltd*,<sup>37</sup> the respondent purported to raise the argument that the rule did not operate in the case of liquidation or sequestration proceedings against a taxpayer.<sup>38</sup>

The facts were that assessments had been issued against a company, Hawker Air Services and its former partners in respect of VAT debts that had been incurred under a previous partnership.<sup>39</sup> The partnership had conducted an air charter business and had made use of two aircrafts.<sup>40</sup> Both aircrafts had been bought and imported from a foreign company, Ben Navis, in the Virgin Islands.<sup>41</sup> Upon importation into South Africa, SARS agreed not to levy the relevant tax on condition that the aircrafts' usage be confined to commercial purposes in the running of the partnership business.<sup>42</sup> When a subsequent investigation by SARS revealed that the conditions had been breached and that the aircrafts were often used for private purposes by the director of Hawker Air Services, it issued VAT assessments against Hawker Air Services and its former partners and eventually instituted liquidation and sequestration proceedings against Hawker Air Services and the previous partnership, respectively.<sup>43</sup>

The court rejected the argument, reasoning that the invocation of liquidation or sequestration proceedings is simply one of the various powers conferred upon SARS to facilitate the effective enforcement and collection of taxes.<sup>44</sup> According to the court, Hawker Air Services had no 'reasonable and bona fide' grounds for opposing SARS's applications.<sup>45</sup> The court found that the evidence clearly confirmed SARS's findings that the aircrafts were predominantly used for private purposes in defiance of the conditions that had been initially imposed.<sup>46</sup> Thus, the court found that Hawker Air Services was liable for the debts of the partnership.<sup>47</sup> Since the initial partnership had no assets to satisfy the tax liability, the court held that a winding-up order was justified.<sup>48</sup>

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<sup>37</sup> [2006] SCA 55 (RSA).

<sup>38</sup> Supra note 37 para 17.

<sup>39</sup> Supra note 37 para 3.

<sup>40</sup> Supra note 37 para 3.

<sup>41</sup> Supra note 37 para 5.

<sup>42</sup> Supra note 37 para 3.

<sup>43</sup> Supra note 37 para 5.

<sup>44</sup> Supra note 37 para 17.

<sup>45</sup> Supra note 37 para 13.

<sup>46</sup> Supra note 37 para 18.

<sup>47</sup> Supra note 37 para 20.

<sup>48</sup> Supra note 37 para 20.

Upon the establishment of the validity of its claim, SARS takes preference over other creditors in terms of the Insolvency Act.<sup>49</sup> This was demonstrated in *Commissioner for South African Revenue Service v Stand Two Nine Nought Wynberg (Pty) Ltd and Others*.<sup>50</sup> A company, MMW, had taken over the assets of another company, Super Diamond, shortly after the latter had been liquidated.<sup>51</sup> MMW had not rendered payment to Super Diamond.<sup>52</sup> Prior to the liquidator's investigation as regards MMW's conduct, MMW entered into an agreement in which it bound itself to pay an amount of money to Super Diamond as well as to pay the liquidator an amount of money to settle the claims of Super Diamond's creditors.<sup>53</sup> However, MMW was unable to settle the claims of all Super Diamond's creditors and was itself subsequently wound up.<sup>54</sup> One of MMW's creditors was SARS and it was regarded as a preferential creditor by the liquidator in terms of the Insolvency Act, and consequently had to be paid first.<sup>55</sup> One of the concurrent creditors lodged an objection with the Master of the High Court on the basis that irrespective of the preferential claim, the amount of money was initially paid by MMW to be given to the concurrent creditor.<sup>56</sup> Thus, the creditor argued that it was entitled to a direct payment in respect thereof.<sup>57</sup> The objection was refused.<sup>58</sup>

The court held that it is not permissible for a debtor of an insolvent estate to enter into an agreement with the liquidator in terms of which an amount should be paid to a particular creditor.<sup>59</sup> Rather, the liquidator was obliged to adhere to the scheme of distribution enshrined in the Insolvency Act.<sup>60</sup> The concurrent creditor argued that by agreeing to the initial arrangement, the liquidator had in essence become the agent of the concurrent creditor.<sup>61</sup> In response, the court held that it is settled law that the same person can only be the agent of distinct principals where no conflict of duties arises.<sup>62</sup> Thus, the liquidator was bound to a

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<sup>49</sup> Section 99 (1)(cD) of the Insolvency Act.

<sup>50</sup> 2005 (5) SA 583 (SCA).

<sup>51</sup> Supra note 50 para 1.

<sup>52</sup> Supra note 50 para 1.

<sup>53</sup> Supra note 50 para 2.

<sup>54</sup> Supra note 50 para 3.

<sup>55</sup> Supra note 50 para 4.

<sup>56</sup> Supra note 50 para 5.

<sup>57</sup> Supra note 50 para 5.

<sup>58</sup> Supra note 50 para 5.

<sup>59</sup> Supra note 50 para 8.

<sup>60</sup> Supra note 50 para 8.

<sup>61</sup> Supra note 50 para 10.

<sup>62</sup> Supra note 50 para 14.

prior arrangement only to the extent that it was in harmony with his obligations under the Insolvency Act.<sup>63</sup> Accordingly, the court dismissed the appeal.<sup>64</sup>

In this case SARS was identified as a preferential creditor as is clear from the Insolvency Act. Consequently, any prior arrangements in an attempt to favour other creditors and which are in conflict with the Insolvency Act cannot stand. This is another example of the strong powers conferred upon SARS by the legislature. However, SARS' powers are not without restriction in this regard.

In *Union Government v Milne*,<sup>65</sup> estimated assessments were issued to the taxpayer in the tax year of 1947. The assessments were in respect of tax for the preceding five years prior to 1947 plus penalties.<sup>66</sup> The tax was incurred through the buying and selling of shares.<sup>67</sup> Whilst the taxpayer had objected to the assessments, he still attempted to make a payment arrangement with the Commissioner, pending the outcome of the objection.<sup>68</sup> The Commissioner, whilst not waiving the right to recovery of the tax, decided to entertain the possibility of such an arrangement on condition that the taxpayer submitted a certified statement confirming his financial standing for consideration.<sup>69</sup> In addition, the taxpayer had submitted a declaration in which he had consented to the Commissioner overseeing his banking transactions<sup>70</sup> and the momentary control of his assets.<sup>71</sup> One look at the taxpayer's statement is all it took for the Commissioner to not only decline the objection, but also to launch provisional sequestration proceedings against the taxpayer.<sup>72</sup> This was as a result of the Commissioner's discovery that the taxpayer's liabilities exceeded his assets.<sup>73</sup> In the Commissioner's view, the submitted financial statement was tantamount to an act of insolvency.<sup>74</sup>

The court was persuaded by the taxpayer's argument that no material facts had been advanced by the Commissioner and that a mere statement did not constitute an act of insolvency.<sup>75</sup> The court confirmed that the lodging of an appeal did not preclude the Commissioner from utilising

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<sup>63</sup> Supra note 50 para 14.

<sup>64</sup> Supra note 50 para 15.

<sup>65</sup> 15 SATC 131.

<sup>66</sup> Supra note 65 at 133.

<sup>67</sup> Supra note 65 at 133.

<sup>68</sup> Supra note 65 at 133.

<sup>69</sup> Supra note 65 at 133.

<sup>70</sup> Supra note 65 at 133.

<sup>71</sup> Supra note 65 at 133.

<sup>72</sup> Supra note 65 at 132.

<sup>73</sup> Supra note 65 at 132.

<sup>74</sup> Supra note 65 at 137.

<sup>75</sup> Supra note 65 at 138-139.

any of the collection mechanisms that were allowed to him under the relevant statute.<sup>76</sup> However, the court reasoned that the taxpayer's appeal, in which he argued that he had not committed an act of insolvency, could not be ignored.<sup>77</sup> This is because it was possible that the outcome of the appeal would have been favourable to the taxpayer.<sup>78</sup> If the court had given a final sequestration order, and the appeal turned out successful, the sequestration of the taxpayer's estate would still have proceeded.<sup>79</sup> The court held that the results of such an order would undoubtedly be dire.<sup>80</sup> Thus, the court held that unless 'clear proof' is given by the Commissioner of the taxpayer's insolvency, it could not grant a final sequestration order.<sup>81</sup>

The court further rejected the Commissioner's contention that the taxpayer's conduct was an indication of an inability to pay since the taxpayer had submitted an objection.<sup>82</sup> The court held that the objection meant that he disputed the assessed amounts, and not that he was unable to pay them.<sup>83</sup> The court applied the same reasoning to the taxpayer's undertakings on the basis that he sought to make arrangements pending the outcome of the objection, and not because he was unable to pay.<sup>84</sup> The court held that despite the statement and the undertakings, nowhere had the taxpayer admitted inability to pay.<sup>85</sup> Rather, the taxpayer had hoped that the objection and communication with the Commissioner would create favourable results.<sup>86</sup> Thus, the court declined to grant a final order and also set the provisional order aside.<sup>87</sup>

It can be inferred from the above case that the mere fact that SARS is empowered to institute sequestration proceedings and is ranked above other creditors does not guarantee its success if it does not furnish the court with evidence of actual insolvency of a taxpayer. It seems that each case would be decided on its own merits. This is evidenced by the court's reference to *Union Bank of SA v Fainman*<sup>88</sup> in which the inability to pay was established based on the contents of an unambiguous document. Despite the court's reference to

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<sup>76</sup> Supra note 65 at 139.

<sup>77</sup> Supra note 65 at 140.

<sup>78</sup> Supra note 65 at 140.

<sup>79</sup> Supra note 65 at 140.

<sup>80</sup> Supra note 65 at 140.

<sup>81</sup> Supra note 65 at 140.

<sup>82</sup> Supra note 65 at 140.

<sup>83</sup> Supra note 65 at 140.

<sup>84</sup> Supra note 65 at 141.

<sup>85</sup> Supra note 65 at 141.

<sup>86</sup> Supra note 65 at 141.

<sup>87</sup> Supra note 65 at 143.

<sup>88</sup> 1939 WLD 303.

*Union Bank of SA v Fainman*, the court held that the facts of that case were distinct from this case and held that in the case at hand, insolvency had not been proven.

Croome and Olivier<sup>89</sup> observe that attempts by taxpayers to impugn SARS's authority to sequester have often proved ineffectual. They suggest that a better alternative is for taxpayers in such a situation to consider entering into honest and meaningful communication and negotiations with SARS.<sup>90</sup> Moreover, in practice SARS generally commences with liquidation proceedings as a final option where there has been a lack of co-operation from a defaulting taxpayer.<sup>91</sup>

*(d) Appointment of a third party as a taxpayer's agent*

The wide powers conferred upon SARS in the Tax Administration Act in order to effectively implement the rule go as far as permitting the appointment of a third party as the agent of a defaulting taxpayer where such third party is holding funds on a taxpayer's behalf.<sup>92</sup> The appointed agent is then obliged to pay over the funds to SARS in an attempt to settle the taxpayer's tax liability.<sup>93</sup> The Income Tax Act and the VAT Act formerly contained similar provisions.<sup>94</sup> An example of a third party that may be appointed as a taxpayer's agent is a banking institution with which the former has an account.<sup>95</sup> As would be expected, this provision is no stranger to controversy. The ensuing discussion is aimed at analysing some of the key judgements in this regard.

In *Hindry v Nedcor Bank and Another*,<sup>96</sup> the taxpayer was the managing director of a company which was responsible for deducting employees' tax and paying it over to the revenue authority. The company had deducted tax from the taxpayer's salary, who was a provisional taxpayer,<sup>97</sup> both for the particular tax year as well as provisional tax for the subsequent 1987 and 1989 tax years.<sup>98</sup> It later transpired that the company had mistakenly paid as part of the

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<sup>89</sup>Croome & Olivier op cit note 9 at 395.

<sup>90</sup>Ibid.

<sup>91</sup>Ibid.

<sup>92</sup>Section 179(1) of the Tax Administration Act.

<sup>93</sup>Ibid.

<sup>94</sup>Sections 99 and 47 of the Income Tax Act and the VAT Act, respectively.

<sup>95</sup>Johannes op cit note 26 at 28.

<sup>96</sup>[1999] 2 All SA 38 (W) at 41.

<sup>97</sup>Employers were mandated under Schedule 4 of the Income Tax Act to deduct tax from employees' salaries and pay it over to SARS. This can be done through the PAYE (pay-as-you-earn) principle. In terms of the PAYE principle, provisional taxpayers pay tax in advance based on estimated liability, without a tax assessment having been issued to them yet. See Croome op cit note 5 at 325.

<sup>98</sup>Supra note 96 at 41.

taxpayer's provisional tax payment, an excess amount of tax to the revenue authority.<sup>99</sup> Schedule 4 of the Income Tax Act provided that in such circumstances, the taxpayer was entitled to a refund which included interest.<sup>100</sup> It was subsequently discovered that the IRP5 certificates that had been received from the taxpayer's company were erroneous, with the result that an excessive refund was paid to the taxpayer.<sup>101</sup> When instructed by the revenue authority to repay the excess amounts, the taxpayer lodged an objection instead.<sup>102</sup> As a result of a lack of co-operation from the taxpayer, the Commissioner acting in terms of section 99 of the Income Tax Act, decided to appoint the taxpayer's bank as his agent.<sup>103</sup>

In the court a quo, the taxpayer successfully sought a temporary interdict to bar his bank from making any payments to the revenue authority.<sup>104</sup> He further argued that the provision did not afford him a hearing prior to the notice being sent to his bankers, and neither had he been made aware as regards the reasons for the issuing of the notice.<sup>105</sup> Thus, the taxpayer argued that his rights to access to the courts, just administrative action and privacy had been violated.<sup>106</sup>

The court a quo held that in terms of the Income Tax Act, a refund that was erroneously paid to a taxpayer was recoverable as if it were a tax.<sup>107</sup> The court found that there had been sufficient communication between the revenue authority and the taxpayer in which the former had given reasons for its actions.<sup>108</sup>

On appeal, the Constitutional Court per Ackermann J, confirmed that the lodging of an objection does not stay the pre-existing obligation to pay tax.<sup>109</sup> The court held that just as in the case with an ordinary civil debt, the appointment of an agent is likewise a form of garnishee order.<sup>110</sup> According to the court, the taxpayer's bank was in the position of a garnishee, despite the duty of confidentiality owed by the bank to the taxpayer regarding the latter's affairs.<sup>111</sup> The only difference between the recovery of an ordinary civil debt and the recovery of a tax through the appointment of an agent is that the latter process does not require a court

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<sup>99</sup> Supra note 96 at 41.

<sup>100</sup> Supra note 96 at 42.

<sup>101</sup> Supra note 96 at 43.

<sup>102</sup> Supra note 96 at 44.

<sup>103</sup> Supra note 96 at 45.

<sup>104</sup> Supra note 96 at 46.

<sup>105</sup> Supra note 96 at 46.

<sup>106</sup> Supra note 96 at 46.

<sup>107</sup> Supra note 96 at 48.

<sup>108</sup> Supra note 96 at 48.

<sup>109</sup> Supra note 96 at 50.

<sup>110</sup> Supra note 94 at 51.

<sup>111</sup> Supra note 96 at 54.



judgement.<sup>112</sup> The court held that the taxpayer had failed to show valid reasons upon which he would have objected to the garnishee order.<sup>113</sup> Ackermann J continued that it would defeat the purpose of the provision if the taxpayer were to be given prior notice regarding the appointment of an agent.<sup>114</sup> This is because in all likelihood, the taxpayer would try to prevent the prospective agent from transferring funds to the revenue authority.<sup>115</sup> The court upheld the constitutionality of the provision on the basis that the said rights were justifiably limited under the limitation clause.<sup>116</sup>

In *Contract Support Services (Pty) Ltd & others v Commissioner for the South African Revenue Services and others*,<sup>117</sup> the first applicant's business was that of an administrative agent for a number of contract workers. Subsequent to being appointed by the Commissioner to exercise certain powers in terms of the VAT Act and Income Tax Act, a chartered accountant of SARS had applied for a search warrant to facilitate the search for certain documents in order to ascertain whether the applicant's business operations were in line with the said statutes.<sup>118</sup> The accountant found that a considerable amount of financial data was unavailable at the applicant's premises.<sup>119</sup> A further search at the applicants' storage premises revealed the sought after financial data pertaining to the years of 1989 to 1998.<sup>120</sup> VAT assessments were subsequently issued and the first applicant's bank and certain of its clients and customers were appointed as the applicant's agents under section 47 of the VAT Act.<sup>121</sup> The appointment had occurred before the notice of assessments had taken place.<sup>122</sup> The applicants objected to the assessments<sup>123</sup> and sought, inter alia, a declaratory order setting aside the appointments.<sup>124</sup> They argued that they should have been afforded an antecedent hearing before the notice of appointment was given out in order to comply with the audi alteram partem principle.<sup>125</sup>

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<sup>112</sup> Supra note 96 at 55.

<sup>113</sup> Supra note 96 at 51.

<sup>114</sup> Supra note 96 at 55.

<sup>115</sup> Supra note 96 at 55.

<sup>116</sup> Supra note 96 at 59.

<sup>117</sup> [1999] 3 All SA689 (W).

<sup>118</sup> Supra note 117 at 697.

<sup>119</sup> Supra note 117 at 697.

<sup>120</sup> Supra note 117 at 698.

<sup>121</sup> Supra note 117 at 698.

<sup>122</sup> Supra note 117 at 698.

<sup>123</sup> Supra note 117 at 698.

<sup>124</sup> Supra note 117 at 700.

<sup>125</sup> Supra note 117 at 702. Audi alteram partem is Latin for 'hear the other side'. The principle requires that a person who is likely to be prejudiced by the outcome of proceedings instituted against them is entitled to an opportunity to be heard and make representations in defense of themselves. See *Arepee Industries Ltd v CIR* 55 SATC 139 at 144-5.

The court acknowledged the significance of the principle as a part of natural justice<sup>126</sup> but held that there are certain situations that do not require compliance with it.<sup>127</sup> According to the court, the appointment of an agent was one such situation.<sup>128</sup> The court reasoned that an antecedent hearing would nullify the objective of the provision as it would enable the taxpayer to dispossess the prospective agent of the funds.<sup>129</sup> According to the court, therefore, the principle was not violated.<sup>130</sup> Rather, the statutory provision excluded its applicability.<sup>131</sup> The court further held that liability to pay VAT is self-assessed and is not dependent upon the issuing of an assessment by SARS.<sup>132</sup> Consequently, the court found that in the context of VAT, the appointment of an agent before issuing a notice of assessment was lawful.<sup>133</sup> Thus, the court declined to set aside the appointments and confirmed that the objection did not stay the pre-existing obligation on the applicant to pay the VAT.<sup>134</sup>

Thus, the court in *Contract Support Services (Pty) Ltd & others v Commissioner for the South African Revenue Services and others*<sup>135</sup> shared the same reasoning as the Constitutional Court in *Hindry v Nedcor Bank and Another*.<sup>136</sup> Both held that it was not necessary to give a taxpayer a hearing before an agent was appointed on their behalf in order to achieve the purpose for which the power was conferred upon SARS.

However, in *Mpande Foodliner CC v Commissioner for South African Revenue Service*<sup>137</sup> the learned judge held a different view. In casu, Mabuza had started a business, which was a close corporation ('the corporation').<sup>138</sup> Being a general dealer, he together with other general dealers started a company, T, figuring that their commercial advantage would be boosted as a team in a company, as opposed to being individual general dealers.<sup>139</sup> A tender was subsequently awarded to T by the Mpumalanga Provincial Government to run a feeding scheme for certain schools in the area.<sup>140</sup> However, T began to encounter financial problems and there

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<sup>126</sup> Supra note 117 at 703.

<sup>127</sup> Supra note 117 at 703.

<sup>128</sup> Supra note 117 at 703.

<sup>129</sup> Supra note 117 at 703.

<sup>130</sup> Supra note 117 at 704.

<sup>131</sup> Supra note 117 at 704.

<sup>132</sup> Supra note 117 at 704.

<sup>133</sup> Supra note 117 at 704.

<sup>134</sup> Supra note 117 at 704.

<sup>135</sup> Supra note 117.

<sup>136</sup> Supra note 96.

<sup>137</sup> 63 SATC 46.

<sup>138</sup> Supra note 137 para 5.

<sup>139</sup> Supra note 137 para 5.

<sup>140</sup> Supra note 137 para 6.

was a sharp decline in its turnover.<sup>141</sup> Acting upon the advice given to it, T's directors resolved to cede the feeding scheme to the corporation as it had the infrastructure to continue with the scheme.<sup>142</sup> T was eventually liquidated.<sup>143</sup> The corporation continued with the scheme and was awaiting its payment when SARS, without notice, appointed the Provincial Government as agent for VAT that was due by T.<sup>144</sup> Upon being approached by Mabuza, SARS explained that the reason for its actions was that it appeared that T, in an attempt to avoid paying VAT, had transferred the funds to the corporation.<sup>145</sup> Mabuza in response explained to SARS what had transpired that had led to the decision of the cession, emphasising that the two were distinct entities.<sup>146</sup>

A number of issues required determination by the court, including whether a prior hearing was necessary before the appointment of an agent had occurred.<sup>147</sup> The court found that upon discovery that T and the corporation were indeed distinct entities, the relevant SARS officials had admitted their mistaken impression.<sup>148</sup> The court held that the relevant SARS officials had obtained clarity of the facts and yet refused to refund the corporation its money.<sup>149</sup> According to the court, SARS's conduct was not within the powers allowed to it under the VAT Act and found that its application of section 47 was unlawful in the circumstances.<sup>150</sup>

The court further held that the *audi alteram partem* principle is settled in our law.<sup>151</sup> The court declined to follow the precedent set by *Hindry v Nedcor Bank and Another*<sup>152</sup> on the basis that a different statutory provision was at issue in that case and that the facts of the two cases were distinct.<sup>153</sup> According to the court, a prior hearing was necessary in the circumstances.<sup>154</sup> Patel AJ likewise disagreed with the ruling in *Contract Support Services (Pty) Ltd & others v Commissioner for the South African Revenue Services and others*,<sup>155</sup> reasoning that the *audi alteram partem* principle was too important not to be applied regardless of the circumstances<sup>156</sup>

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<sup>141</sup> Supra note 137 para 7.

<sup>142</sup> Supra note 137 para 7.

<sup>143</sup> Supra note 137 para 7.

<sup>144</sup> Supra note 137 para 8.

<sup>145</sup> Supra note 137 para 11.

<sup>146</sup> Supra note 137 para 9.

<sup>147</sup> Supra note 137 para 19.

<sup>148</sup> Supra note 137 para 34.

<sup>149</sup> Supra note 137 para 34.

<sup>150</sup> Supra note 137 para 35.

<sup>151</sup> Supra note 137 para 37.

<sup>152</sup> Supra note 96.

<sup>153</sup> Supra note 137 para 40.

<sup>154</sup> Supra note 137 para 40.

<sup>155</sup> Supra note 117.

<sup>156</sup> Supra note 137 para 42.

and despite the implication created by an empowering provision.<sup>157</sup> He explained that a limitation is only permissible under the Constitutional limitation clause.<sup>158</sup> Thus, the court found for the corporation and rendered the appointment unlawful, thereby setting it aside.<sup>159</sup>

It is clear that the provision seems to attract a common grievance amongst taxpayers namely, the absence of a prior hearing before it is invoked. Patel AJ emphasised the importance of the audi alteram partem principle, thereby declining to follow the precedent set by the prior judgements discussed above.

Cameron J in *Industrial Manpower Projects (Pty) Ltd v Receiver of Revenue Vereeniging and Others*<sup>160</sup> was therefore faced with conflicting precedents in relation to the same issue of whether a prior hearing is necessary before an agent is appointed. In casu a VAT assessment had been issued to a close corporation, IMI CC, for an amount of over R7 million.<sup>161</sup> When IMI CC was in corporate form initially, it had had a predecessor, a private company.<sup>162</sup> SARS then proceeded to appoint IMI CC's creditors as its agents under section 47 of the VAT Act.<sup>163</sup> IMI CC applied to court to have the appointments set aside and also sought that section 47 be declared unconstitutional.<sup>164</sup> SARS contended that the company was involved in fraud as was evidenced by its failure to make certain declarations to SARS.<sup>165</sup> According to SARS, the company had operated its business under various entities, behind which it had hid as a ploy to avoid paying tax.<sup>166</sup>

The court found that there was irrefutable evidence to support the presence of fraud as the court was satisfied that the company had indeed not conducted its affairs in good faith.<sup>167</sup> Cameron J then referred to the prior judgments discussed above.<sup>168</sup> The court declined to deal with the question of whether the appointment provision excluded the right to a prior hearing in all circumstances.<sup>169</sup> It was content with the reasoning in *Contract Support Services (Pty) Ltd & others v Commissioner for the South African Revenue Services and others* and rejected that of

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<sup>157</sup> Supra note 137 para 45.

<sup>158</sup> Supra note 137 para 45.

<sup>159</sup> Supra note 137 para 48.

<sup>160</sup> 63 SATC 393.

<sup>161</sup> Supra note 160 at 396.

<sup>162</sup> Supra note 160 at 396.

<sup>163</sup> Supra note 160 at 396.

<sup>164</sup> Supra note 160 at 396.

<sup>165</sup> Supra note 160 at 398.

<sup>166</sup> Supra note 160 at 398.

<sup>167</sup> Supra note 160 at 400.

<sup>168</sup> Supra note 160 at 401.

<sup>169</sup> Supra note 160 at 402.

Patel AJ in *Mpande Foodliner CC v Commissioner for South African Revenue Service*<sup>170</sup> The court also distinguished the facts of *Mpande Foodliner CC v Commissioner for South African Revenue Service* from those of this case, deeming a prior hearing unnecessary in this case.<sup>171</sup> According to the court, it was important to omit the prior hearing in order to enable SARS to put an end to the ongoing fraudulent operations of the company.<sup>172</sup> The court highlighted the significance of the appointment provision in ensuring that SARS recovers taxes that are payable to it.<sup>173</sup> However, the court explained that the provision could only be invoked in respect of tax or other payments that were payable to SARS.<sup>174</sup> In this regard the court held that a taxpayer was still entitled to their usual remedies of objection and appeal.<sup>175</sup>

The majority of authority, therefore, supports the view that taxpayers are not entitled to a prior hearing before agents are appointed on their behalf for purposes of collecting taxes and related payments by SARS.

In *Smartphone SP (Pty Ltd) v ABSA Bank Ltd and Another*,<sup>176</sup> the court was faced with the issue of whether an assessment had to be issued before an agent could be appointed. A company, Smartphone, had sold its business to the taxpayer.<sup>177</sup> At the time that the taxpayer had taken over the business, four of Smartphone's directors remained as directors although new directors joined the business at a later stage.<sup>178</sup> It was subsequently discovered upon an investigation by SARS that Smartphone had operated a fraudulent scheme and had defrauded SARS and benefited in the amount of R19 million.<sup>179</sup> Acting in terms of s 40(2)(a) of the VAT act, SARS obtained a certified statement and a copy of the civil judgment was delivered at the taxpayer's principle place of business.<sup>180</sup> The Commissioner was convinced that the taxpayer had also benefited from the fraud.<sup>181</sup> SARS also relied on the fact that four of Smartphone's directors remained in the business and were also the directors of the taxpayer.<sup>182</sup> As a result, SARS appointed the taxpayer's bank as agent in order to recover the tax that was owed to it.<sup>183</sup>

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<sup>170</sup> Supra note 160 at 402.

<sup>171</sup> Supra note 160 at 402.

<sup>172</sup> Supra note 160 at 402.

<sup>173</sup> Supra note 160 at 402.

<sup>174</sup> Supra note 160 at 402.

<sup>175</sup> Supra note 160 at 402.

<sup>176</sup> 66 SATC 241.

<sup>177</sup> Supra note 176 para 12.

<sup>178</sup> Supra note 176 para 12.

<sup>179</sup> Supra note 176 para 12.

<sup>180</sup> Supra note 176 para 12.

<sup>181</sup> Supra note 176 para 13.

<sup>182</sup> Supra note 176 para 12.

<sup>183</sup> Supra note 176 para 12.

It was the taxpayer's contention that SARS had neither informed it of any tax due nor had it issued to it an assessment in respect thereof.<sup>184</sup>

In the court a quo, Cloete JA and Heher AJA found for the taxpayer on the grounds that section 40 required a certified statement to be obtained on the basis of an assessment that had been issued.<sup>185</sup> Since no assessment had been issued, it was the court's view that the statement procedure could not be validly invoked.<sup>186</sup> The court a quo based its decision on *Singh v Commissioner for the South African Revenue Service*<sup>187</sup> in which it was held that an assessment must precede the utilisation of the statement procedure.

The appeal court held that once the notice was issued to the taxpayer's bank, the latter was obliged by law to simply act in accordance with it on pain of specified penalties.<sup>188</sup> The bank was not empowered to challenge the lawfulness thereof.<sup>189</sup> Thus, the court dismissed the taxpayer's submission that the bank should have verified the notice's validity.<sup>190</sup>

The court stated that the facts in *Singh v Commissioner for the South African Revenue Service* were distinct from this case.<sup>191</sup> With reference to the preceding judgments of *Mpande Foodliner CC v Commissioner for South African Revenue Service*<sup>192</sup> and *Contract Support Services (Pty) Ltd & others v Commissioner for the South African Revenue Services and others*,<sup>193</sup> the court agreed with the latter's position in holding that an antecedent notice would nullify the objective of the provision.<sup>194</sup> As stated in the facts, the court found that a notice of assessment had in fact been issued to Smartphone.<sup>195</sup> As the court ruled out the possibility of possible prejudice, the court held that there was no need to issue an additional notice of assessment.<sup>196</sup> The court also held the view that VAT is a self-assessing system of tax in terms

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<sup>184</sup> Supra note 176 para 3.

<sup>185</sup> Supra note 176 para 14.

<sup>186</sup> Supra note 176 para 14.

<sup>187</sup> 2003 (4) SA 520 (SCA).

<sup>188</sup> Supra note 176 para 9.

<sup>189</sup> Supra note 176 para 9.

<sup>190</sup> Supra note 176 para 9.

<sup>191</sup> Supra note 176 para 15.

<sup>192</sup> Supra note 137.

<sup>193</sup> Supra note 117.

<sup>194</sup> Supra note 176 para 16.

<sup>195</sup> Supra note 176 para 17.

<sup>196</sup> Supra note 176 para 17.

of which a vendor bears the duty of ensuring that the correct amount of VAT is paid.<sup>197</sup> According to the court, liability for VAT arose before an assessment was issued by SARS.<sup>198</sup>

Despite the manifestly wide powers conferred upon SARS in this regard, section 179 of the Tax Administration Act makes it clear that the provisions can only be validly invoked if the prospective agent holds funds on the taxpayer's behalf or where a prospective agent owes such taxpayer money. Section 47 of the VAT Act contained a similar stipulation as seen in some of the above cases.

In *Desai v Commissioner for Inland Revenue*,<sup>199</sup> Desai had loaned money and property to a family member, Ahmed, to enable the latter to start his own business. At a later stage, Desai had registered as a VAT vendor on behalf of Ahmed with the application in Desai's name.<sup>200</sup> The business ultimately failed and the estate was sequestrated, with both Desai and SARS lodging claims against the insolvent estate.<sup>201</sup> The Commissioner subsequently obtained a certified statement against Desai and also appointed his attorneys as his agents under section 47 of the VAT Act.<sup>202</sup> Desai argued that he was not the taxpayer in this instance.<sup>203</sup> He further argued that section 47 could not be validly invoked as he was not the owner of the money in his attorneys' possession.<sup>204</sup>

The court noted the substantial similarity of section 47 of the VAT Act to section 99 of the Income Tax Act and in the court's view, the purpose served by both provisions was the same.<sup>205</sup> As the case was being decided on the papers, and there was clearly a dispute as to whether Desai's attorneys held the funds on his behalf, the court decided not to proceed with the matter and instead referred it for oral evidence.<sup>206</sup> Notwithstanding the court's decision, it seemed to agree with the notion that if a third party held funds not belonging to a taxpayer, the third party could not be appointed as agent of that taxpayer.<sup>207</sup>

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<sup>197</sup> Supra note 176 para 17.

<sup>198</sup> Supra note 176 para 17.

<sup>199</sup> 61 SATC 222.

<sup>200</sup> Supra note 199 at 222.

<sup>201</sup> Supra note 199 at 223.

<sup>202</sup> Supra note 199 at 223.

<sup>203</sup> Supra note 199 at 223.

<sup>204</sup> Supra note 199 at 223.

<sup>205</sup> Supra note 199 at 228.

<sup>206</sup> Supra note 199 at 229.

<sup>207</sup> Supra note 199 at 229.

As if to aggravate the impact of this power, the Tax Administration Act further provides that failure by an agent to heed to SARS's instruction may result in the agent being held personally liable for the tax debt.<sup>208</sup> In the interests of ameliorating the impact of this drastic power on taxpayers, it is suggested that taxpayers should be informed by those appointed as agents, as this may open the door for further negotiations between SARS and affected taxpayers.<sup>209</sup> In addition, this may assist taxpayers to confirm whether the agents were in actual fact appointed by SARS.<sup>210</sup>

#### 4. DOES THE RULE CONSTITUTE A DEPRIVATION OR AN EXPROPRIATION OF TAXPAYERS' MONEYS?

According to the courts, the practice of taxation is neither a deprivation nor an expropriation of a taxpayer's property. The Constitutional Court explained that although it is 'practically impossible' to coin a definition of property, a taxpayer's money amounts to corporeal movable property and falls within the meaning of property as enshrined in section 25 of the Constitution.<sup>211</sup> Money has also been described by the courts as 'a species of property'.<sup>212</sup> Croome expresses the view that it is a deprivation but one that is sustainable under the limitation clause as it applies equally to the citizenry,<sup>213</sup> and it is necessary for the effective functioning of the State.<sup>214</sup> Therefore, it seems that the rule, being a mechanism by which effective taxation is achieved, does not constitute a deprivation or an expropriation of a taxpayer's money. Thus, it is unlikely that an aggrieved taxpayer would succeed with such a claim.

#### 5. CONCLUSION

It is clear that the reason why the rule works so well is because of the enforcement mechanisms behind it.<sup>215</sup> In view of the wide powers conferred upon SARS in the

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<sup>208</sup> Section 179(3) of the Tax Administration Act.

<sup>209</sup> C Keulder *Does the Constitution Protect Taxpayers Against the Mighty SARS? – An Inquiry into the Constitutionality of Selected Tax Practices and Procedures* (unpublished LLM thesis, University of Pretoria, 2011) 41.

<sup>210</sup> *Ibid.*

<sup>211</sup> *First National Bank of SA Ltd t/a Wesbank v CSARS* 2002 (4) SA 768 (CC) para 51.

<sup>212</sup> *Supra* note 199 at 228.

<sup>213</sup> Beric John Croome *Taxpayers' Rights in South Africa: An analysis and evaluation of the extent to which the powers of the South African Revenue Service comply with the constitutional rights to property, privacy, administrative justice, access to information and access to courts* (unpublished PhD thesis, University of Cape Town, 2008) 28.

<sup>214</sup> Hattingh, Roeleveld & West *op cit* note 2 at 289.

<sup>215</sup> Keulder *op cit* note 11 at 130.



enforcement provisions, it is not surprising that the dominant view amongst taxpayers and tax practitioners alike is that such powers are draconian in nature.<sup>216</sup> It is suggested that a fair balance needs to be achieved between SARS' mandate on the one hand, and the protection of taxpayers' rights on the other.<sup>217</sup>

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<sup>216</sup> Williams op cit note 1.

<sup>217</sup> Keulder op cit note 11 at 127.

## CHAPTER THREE

### THE NATURE OF A TAX DEBT, AND THE 'PAY NOW, ARGUE LATER' RULE VERSUS THE CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS

#### 1. INTRODUCTION

The recovery of a tax debt is unlike that of an ordinary civil debt.<sup>1</sup> SARS has been conferred with wide powers to facilitate the recovery of taxes.<sup>2</sup> One such power is the mechanism by which SARS is able to obtain a certified statement, which is regarded as a civil judgment obtained against a defaulting taxpayer.<sup>3</sup> The effect of these powers in light of taxpayers' rights is discussed in this chapter.

#### 2. THE UNIQUE NATURE OF A TAX DEBT AS COMPARED TO AN ORDINARY CIVIL DEBT

Where the liability of a debtor has been established by a court of law, the judgment creditor cannot, in terms of the settled common law principle, execute such a judgment if an appeal has been noted in respect thereof.<sup>4</sup> This is so, unless the court in which judgment was given grants permission to the judgment creditor to act otherwise.<sup>5</sup> The objective behind the principle is to protect a debtor from suffering irreversible damage before an appeal has been heard.<sup>6</sup> This is because a judgment enables a creditor to take further drastic steps against a debtor, such as obtaining a writ or warrant of execution in order to attach such a debtor's property.<sup>7</sup>

However, as briefly stated above, the same is not true for a tax debt. The Tax Administration Act clearly provides that neither the noting of an objection nor an appeal suspends the pre-existing obligation to pay tax.<sup>8</sup> Thus, the rule is in conflict with the aforesaid common law principle.

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<sup>1</sup> P Dachs 'Pay now, argue later: tax administration' 2014 *Tax Professional* 10.

<sup>2</sup> S Klue, J Arendse & B Williams 'SARS' power to recover tax' 2011 *TAXtalk* 24.

<sup>3</sup> Section 174 of the Tax Administration Act.

<sup>4</sup> *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) 544H-545A.

<sup>5</sup> *Supra* note 4 at 544H-545A.

<sup>6</sup> *Supra* note 4 at 545B-C.

<sup>7</sup> *Supra* note 4 at 545B-C.

<sup>8</sup> Section 164(1) of the Tax Administration Act.

This was confirmed in *CIR v NCR Corporation of South Africa (Pty) Ltd.*<sup>9</sup> The core question in this case pertained to when interest was payable on a refund by the revenue authority to a taxpayer and at what date it started to run,<sup>10</sup> a discussion beyond the scope of this dissertation. However, the court made an important observation about the nature of a tax debt. It was held that the common law rule which calls for the automatic suspension of the execution of a judgment where a debtor disputes liability, does not operate in the case of a dispute pertaining to a tax debt.<sup>11</sup> The court explained that as was stipulated in the Income Tax Act, the obligation to discharge a tax debt could only be suspended, not because of an objection by a taxpayer but rather where the Commissioner directed otherwise.<sup>12</sup> Thus, a tax debt is a debt *sui generis* as the recovery thereof is not dependent upon litigation.<sup>13</sup> Rather, it arises automatically by operation of law.<sup>14</sup>

### 3. PRESCRIPTION OF A TAX DEBT AS COMPARED TO AN ORDINARY CIVIL DEBT

An ordinary civil debt no longer stands after the lapse of its prescription period.<sup>15</sup> This means that once an ordinary debt prescribes, a creditor is barred from claiming it.<sup>16</sup> In terms of the Prescription Act 68 of 1969 (hereinafter the ‘Prescription Act’), the prescription period for any debt except those specifically referred to in the statute with different prescription periods, is three years.<sup>17</sup> However, a tax debt is clearly distinct from any other ordinary debt. The Prescription Act stipulates that a debt which involves the payment of tax only prescribes after thirty years.<sup>18</sup>

The question of the prescription of a tax debt was demonstrated in *Davis v Commissioner for South African Revenue Service*.<sup>19</sup> The taxpayer in casu, after having been compelled by his employer to change from a pension fund to a provident fund, later complained about what seemed to him to be excessive taxation of him in respect of both funds.<sup>20</sup> His employer had

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<sup>9</sup> 50 SATC 9.

<sup>10</sup> Supra note 9 para 10.

<sup>11</sup> Supra note 9 para 19.

<sup>12</sup> Supra note 9 para 20.

<sup>13</sup> SK Elliot *The ‘Pay Now, Argue Later’ Principle in South African Tax Law: Its Development, Operation, Comparison to South African Civil Debt Enforcement and Consistency with the Constitutional Right of Access to Courts* (unpublished LLM thesis, University of Cape Town, 2017) 48.

<sup>14</sup> Ibid.

<sup>15</sup> GB Bradfield *Christie’s Law of Contract in South Africa* 7 ed (2016) 560.

<sup>16</sup> Ibid.

<sup>17</sup> Section 11(d) of the Prescription Act.

<sup>18</sup> Section 11(a)(iii) of the Prescription Act.

<sup>19</sup> 2010 (5) SA 540 (KZD).

<sup>20</sup> Supra note 19 at 256.

undertaken to deal with the complaint.<sup>21</sup> An amount from SARS was subsequently credited to the taxpayer's account after he had retired.<sup>22</sup> He assumed that it was a refund, seeing that no explanation had followed the payment.<sup>23</sup> An explanation was to emerge later when SARS explained that the crediting of the taxpayer's account had in fact been an administrative mistake, the actual recipient of the amount being the taxpayer's employer.<sup>24</sup> When SARS demanded a refund, the taxpayer argued that the amount claimed was an ordinary civil debt which was time-barred as a result of prescription.<sup>25</sup>

The result of the proceedings was that the court found for the Commissioner. In arriving at its decision, the court explained that because of the mistake on the part of SARS, the taxpayer was paid a refund which was more than what he was actually entitled to.<sup>26</sup> The court referred to the Income Tax Act which provided that an excessive refund was recoverable as though it were a tax.<sup>27</sup> Thus, the court held that despite the administrative mistake, the amount was tax related and was to be recovered as a normal tax debt.<sup>28</sup> The court found that the debt was a tax debt with a prescription period of thirty years as stipulated in the Prescription Act.<sup>29</sup>

#### 4. THE SIGNIFICANCE OF THE TERMS *DUE* AND *PAYABLE* IN RESPECT OF A TAX DEBT

Under the Income Tax Act, any tax or interest that was due or payable was regarded as a debt that was owed to the State.<sup>30</sup> The VAT Act embodied a similar provision.<sup>31</sup> Neither of the said statutes defined the terms *due* and *payable*. Consequently, the effect of the terms had to be determined by the courts in light of a taxpayer's obligation to pay tax and SARS' mandate to recover such tax or any other amount owed to it.

In *Traco Marketing (Pty) Ltd and another v Minister of Finance and others*,<sup>32</sup> the Commissioner had filed a certified statement against the vendors in terms of section 40(2)(a) of the VAT Act which had the effect of a civil judgment. Thereafter, the Commissioner had

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<sup>21</sup> Supra note 19 at 256.

<sup>22</sup> Supra note 19 at 256.

<sup>23</sup> Supra note 19 at 256.

<sup>24</sup> Supra note 19 at 256.

<sup>25</sup> Supra note 19 at 256.

<sup>26</sup> Supra note 19 at 258.

<sup>27</sup> Supra note 19 at 258.

<sup>28</sup> Supra note 19 at 258.

<sup>29</sup> Supra note 19 at 257- 259.

<sup>30</sup> Section 91(1)(a) of the Income Tax Act.

<sup>31</sup> Section 40(2)(a) of the VAT Act.

<sup>32</sup> [1996] 2 All SA 467 (SE) at 469.

proceeded to obtain a writ of execution with which he attached the vendors' property.<sup>33</sup> The vendors sought an order to set aside the statement and the writ of execution.<sup>34</sup> Section 31(5) of the VAT Act required that a vendor be notified of an assessment and also to be informed of their entitlement to object thereto within 30 days.<sup>35</sup> The vendors argued that it could not have been the legislator's intention to permit the revenue authority to utilise the said mechanisms without ensuring that vendors were notified first.<sup>36</sup> It was further argued that the vendors' liability was yet to be finally determined, which could only occur once the Commissioner had dealt with the objections.<sup>37</sup>

The court disagreed with the vendors and held that their argument was based on an incorrect interpretation of the VAT Act.<sup>38</sup> The court explained that vendors were obliged to make VAT payments within the time frames enshrined in the VAT Act.<sup>39</sup> According to the court, VAT became due and payable before the Commissioner had issued an assessment.<sup>40</sup> An assessment was issued only where the Commissioner was not satisfied that a vendor had discharged their obligations under the VAT Act.<sup>41</sup> The court also emphasised that the obligation to pay is not suspended by an objection either for 30 days or for any period in that regard.<sup>42</sup>

Similarly in *Singh v Commissioner for the South African Revenue Service*,<sup>43</sup> the gravamen of the taxpayer's argument was that the Commissioner had failed to give him a notice of assessment before the certified statement was filed against him under section 40(2)(a) of the VAT Act. As a result, so the argument went, the statement procedure in the circumstances was invalid.<sup>44</sup> The Commissioner advanced the argument that giving notice of assessment was risky as a taxpayer may as a result conceal his property in order to frustrate any resultant judgment.<sup>45</sup> Although the VAT Act did not explicitly require that such notice be given to a

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<sup>33</sup> Supra note 32 at 469.

<sup>34</sup> Supra note 32 at 469.

<sup>35</sup> Supra note 32 at 470.

<sup>36</sup> Supra note 32 at 470.

<sup>37</sup> Supra note 32 at 470.

<sup>38</sup> Supra note 32 at 470.

<sup>39</sup> Supra note 32 at 471.

<sup>40</sup> Supra note 32 at 471.

<sup>41</sup> Supra note 32 at 471.

<sup>42</sup> Supra note 32 at 472.

<sup>43</sup> 2003 (4) SA 520 (SCA) para 3.

<sup>44</sup> Supra note 43 para 3.

<sup>45</sup> Supra note 43 para 21.

taxpayer before the filing of a statement, the court was tasked with establishing whether the granting of such notice was nonetheless implied by the statute.<sup>46</sup>

In finding for the Commissioner, the court a quo echoed the ruling in *Traco Marketing (Pty) Ltd and another v Minister of Finance and others*<sup>47</sup> and held that the VAT amount was already due and payable prior to the Commissioner issuing an assessment.<sup>48</sup> This was because VAT is a self-assessing system of tax which does not require the issuing of an assessment before an amount could be due and payable.<sup>49</sup> Thus, the court held that the vendor did not have to be notified.<sup>50</sup> If he disagreed with the assessment, the usual remedies of objection and appeal were available to him.<sup>51</sup>

The Supreme Court of Appeal, however, disagreed with the court a quo's interpretation of the provision. According to the court, section 40 was merely a collection mechanism.<sup>52</sup> It did not determine whether a VAT amount was due or payable.<sup>53</sup> According to the court, therefore, unless an amount was payable, the statement procedure could not be validly invoked.<sup>54</sup> Once an amount was payable, the Commissioner was empowered to recover it regardless of the lodging of an appeal or objection by the taxpayer.<sup>55</sup>

The court explained that an amount was due if it was the correct amount that was supposed to be paid, either as shown in a taxpayer's return or as established after the resolution of a dispute.<sup>56</sup> On the other hand, an amount was payable if it was assessed but was still pending final determination where it had been contested.<sup>57</sup> The court explained that in order for an amount to be payable, the existing obligation to pay had to be current and not contingent.<sup>58</sup> The court held that a notice of assessment was required in order for a taxpayer to know the amount that was payable.<sup>59</sup> Since no notice was given to the taxpayer, the statement procedure could not be resorted to by the Commissioner.<sup>60</sup> The court continued that although a vendor

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<sup>46</sup> Supra note 43 para 5.

<sup>47</sup> Supra note 32 at 471.

<sup>48</sup> Supra note 43 para 6.

<sup>49</sup> Supra note 43 para 6.

<sup>50</sup> Supra note 43 para 6.

<sup>51</sup> Supra note 43 para 6.

<sup>52</sup> Supra note 43 para 9.

<sup>53</sup> Supra note 43 para 9

<sup>54</sup> Supra note 43 para 9

<sup>55</sup> Supra note 43 para 9

<sup>56</sup> Supra note 43 para 10.

<sup>57</sup> Supra note 43 para 11.

<sup>58</sup> Supra note 43 para 11.

<sup>59</sup> Supra note 43 para 12.

<sup>60</sup> Supra note 43 para 12.

may have submitted a return reflecting an amount which he believed to be due, an assessment would still be necessary to alert him of the fact that he may have to re-assess his liability.<sup>61</sup> This is because according to the court, a taxpayer would be unaware if not notified through an assessment.<sup>62</sup> The court acknowledged the risk highlighted by the Commissioner but held that among other options, the Commissioner was still able to obtain judgment shortly after the issuing of an assessment.<sup>63</sup> Thus, the Supreme Court of Appeal found that the court a quo's ruling was incorrect.<sup>64</sup>

Although concurring, Olivier JA in a separate judgment stated that it could not be easily inferred from section 40 whether notice was supposed to be given to a vendor before the statement procedure could be resorted to.<sup>65</sup> He explained that if a debtor was required to immediately settle a debt, it was regarded as due.<sup>66</sup> On the other hand, he explained that a debt was payable if it was speaking either to current liability or to contingent liability.<sup>67</sup> In the context of section 40, the learned judge was of the view that the term *due* spoke of current liability whilst the term *payable* spoke of contingent liability.<sup>68</sup> He held that whilst the amount in a vendor's return is regarded as due, there might still be a contingent liability if the Commissioner issues an assessment reflecting the amount payable.<sup>69</sup> He held that in order for the amount to have become due and payable or final and conclusive, an assessment had to be issued first and any objections or appeals thereto, had to be dealt with first.<sup>70</sup>

The unequivocal ruling of the Supreme Court of Appeal is therefore clear that SARS cannot proceed with the recovery mechanisms prior to the issuing of an assessment to a taxpayer.<sup>71</sup> Although this case was decided in the context of VAT, the pertinent provisions of the VAT Act were substantially similar to those of the Income Tax Act, thereby making the judgment applicable to income tax as well.<sup>72</sup>

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<sup>61</sup> Supra note 43 para 17.

<sup>62</sup> Supra note 43 para 17.

<sup>63</sup> Supra note 43 para 21.

<sup>64</sup> Supra note 43 para 22.

<sup>65</sup> Supra note 43 para 9.

<sup>66</sup> Supra note 43 para 25.

<sup>67</sup> Supra note 43 para 26.

<sup>68</sup> Supra note 43 para 27.

<sup>69</sup> Supra note 43 para 29.

<sup>70</sup> Supra note 43 para 32.

<sup>71</sup> Lynette Olivier 'Uncertainty Regarding the Philosophy Underlying South African Revenue Service Collection Procedures' 2003 *TSAR* 387.

<sup>72</sup> K Watkin 'Pay Now Argue Later- The Effect of New Legislation' *South African Institute of Tax Professionals* 10 September 2009, available at <https://www.thesait.org.za>, accessed on 12 August 2018.

Nevertheless, there were different reasons for reaching the same conclusion. In such an instance, the reasoning of the majority is the precedent to be followed whilst that of the minority serves as persuasive authority.<sup>73</sup> Therefore, in terms of the main judgment, SARS was at liberty to utilise the statement procedure despite a pending appeal or an objection.<sup>74</sup> What SARS was precluded from doing was to proceed with the statement procedure without having first issued a notice of assessment.<sup>75</sup>

At the time that *Singh v Commissioner for the South African Revenue Service*<sup>76</sup> was decided, the VAT Act and the Income Tax Act clearly stipulated that the noting of an appeal had no effect on the pre-existing obligation to pay tax.<sup>77</sup> However, no reference was made to an objection; hence the uncertainty.<sup>78</sup> A subsequent amendment to the Income Tax Act confirmed that both objections and appeals do not suspend the operation of the rule.<sup>79</sup> Thus, the uncertainty was dispensed with. The current position under the Tax Administration Act places beyond doubt the position that neither an objection nor an appeal suspends the obligation to pay tax.<sup>80</sup>

## 5. IS A CERTIFIED STATEMENT TANTAMOUNT TO A JUDGMENT?

In terms of the former provisions in the Income Tax Act<sup>81</sup> and the VAT Act,<sup>82</sup> a certified statement obtained by the Commissioner had all the effects of a civil judgment. In terms of the current position under the Tax Administration Act, it is stipulated that a certified statement ‘must be treated as a civil judgment lawfully given in the relevant court in favour of SARS for a liquid debt for the amount specified in the statement.’<sup>83</sup> The courts have had occasion to determine whether a certified statement amounts to a judgment.

In *Mokoena v Commissioner, South African Revenue Service*,<sup>84</sup> section 91(1)(b) of the Income Tax Act was challenged on the grounds that it empowered the Commissioner to obtain judgment without prior notice to the taxpayer and without the issuing of summons. As a result

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<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

<sup>76</sup> Supra note 43.

<sup>77</sup> Watkin op cit note 72.

<sup>78</sup> Ibid.

<sup>79</sup> L Kruger ‘Pay now, argue later – new rules for the suspension of payment’ (2014) 5 *Business Tax and Company Law Quarterly* 28.

<sup>80</sup> Section 164(1) of the Tax Administration Act.

<sup>81</sup> Section 91(1)(b) of the Income Tax Act.

<sup>82</sup> Section 40(2)(a) of the VAT Act.

<sup>83</sup> Section 174 of the Tax Administration Act.

<sup>84</sup> 2011 (2) SA 556 (GSJ) para 4.



of what was referred to as ‘unexplained income’, the Commissioner had issued additional assessments for the tax years 2001 and 2002 to the taxpayer.<sup>85</sup> The taxpayer had lodged an objection thereto.<sup>86</sup> In spite of the objection, the Commissioner proceeded to file a certified statement against the taxpayer.<sup>87</sup> When the Commissioner later discovered that his assessment was wrong, he allowed the taxpayer’s objection.<sup>88</sup>

According to the court, the Commissioner could not obtain judgment where a taxpayer had lodged an objection.<sup>89</sup> The court held that any objection or appeal had to be dealt with first before judgment could be obtained.<sup>90</sup> The court explained that SARS’ power to collect tax regardless of a pending objection or appeal would be rendered nugatory if it was permitted to obtain judgment in the interim.<sup>91</sup> As a result of the pending objection therefore, the court held that the judgment that was obtained was invalid.<sup>92</sup> The court held that SARS would do well first to ensure that no objection has been lodged before proceeding to obtain judgment against a taxpayer.<sup>93</sup> The court further explained that this would assist in protecting taxpayers’ rights before decisions with adverse consequences were taken against them.<sup>94</sup>

It is clear that Spilg J regarded the statement as a judgment against the taxpayer.

However, in *Capstone 556 (Pty) Ltd and Another v Commissioner, South African Revenue Service and Another*<sup>95</sup> Binns-Ward J took the opposite view. The facts briefly were that Capstone had been reassessed by SARS and an assessment issued to it as a result of the proceeds that had been obtained from its sale of certain shares.<sup>96</sup> Capstone simultaneously objected and lodged a suspension of payment request with SARS.<sup>97</sup> When the objection was declined,<sup>98</sup> capstone appealed to the Special Court.<sup>99</sup> However, no reply had been given as

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<sup>85</sup> Supra note 84 para 8.

<sup>86</sup> Supra note 84 para 11.

<sup>87</sup> Supra note 84 para 12.

<sup>88</sup> Supra note 84 para 13.

<sup>89</sup> Supra note 84 para 14.

<sup>90</sup> Supra note 84 para 16.

<sup>91</sup> Supra note 84 para 16.

<sup>92</sup> Supra note 84 para 17.

<sup>93</sup> Supra note 84 para 19.

<sup>94</sup> Supra note 84 para 20.

<sup>95</sup> 2011 (6) SA 65 (WCC).

<sup>96</sup> Supra note 95 para 13.

<sup>97</sup> Supra note 95 para 13.

<sup>98</sup> Supra note 95 para 13.

<sup>99</sup> Supra note 95 para 14. Under the Tax Administration Act, the tribunal is no longer referred to as the Special Court for hearing Income Tax Appeals and is now simply, the Tax Court. See section 116 of the Tax Administration Act.

regards the suspension request.<sup>100</sup> Pending the outcome of the appeal, Capstone was warned that if it did not make payment, SARS would not hesitate to not only obtain a certified statement but also a writ of execution against it.<sup>101</sup> Capstone argued with reference to *Mokoena v Commissioner, South African Revenue Service*<sup>102</sup> that SARS was not permitted to obtain judgment in the interim without first having dealt with the suspension request.<sup>103</sup>

Binns-Ward J expressed the view that although the certified statement had the effect of a civil judgement, it was not in itself to be regarded as a judgment.<sup>104</sup> He thus disagreed with Spilg J, and held that the latter's ruling was based on an incorrect interpretation of section 91(1)(b) and the relevant judicial precedent.<sup>105</sup> He explained that the certified statement was not in any way a sign of resolution of a dispute between a taxpayer and SARS.<sup>106</sup> Rather, it was simply an enforcement mechanism by which SARS was enabled to collect tax that was payable.<sup>107</sup> He continued that once tax became payable, a taxpayer was obliged to pay it although he or she disagreed with an assessment received.<sup>108</sup> He referred to the various mechanisms that were provided for by the Income Tax Act, such as the statement procedure, to ensure that this was done effectively.<sup>109</sup> The learned judge further explained that the reason why the statement had the effect of a civil judgment was so that the Commissioner could utilise it to obtain a writ of execution to attach a defaulting taxpayer's property.<sup>110</sup> He referred in this regard to *Singh v Commissioner for South African Revenue Service*<sup>111</sup> in which the Supreme Court of Appeal held that the statement procedure did not aid the Commissioner in any way in determining whether a tax amount was due or payable; it was merely a collection mechanism.<sup>112</sup> Thus, Binns-Ward J concluded that a certified statement is not tantamount to a judicially delivered judgment.<sup>113</sup> The application was dismissed.<sup>114</sup>

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<sup>100</sup> Supra note 95 para 14.

<sup>101</sup> Supra note 95 para 14.

<sup>102</sup> Supra note 84.

<sup>103</sup> Supra note 95 para 15.

<sup>104</sup> Supra note 95 para 34.

<sup>105</sup> Supra note 95 para 36.

<sup>106</sup> Supra note 95 para 37.

<sup>107</sup> Supra note 95 para 38.

<sup>108</sup> Supra note 95 para 37.

<sup>109</sup> Supra note 95 para 37.

<sup>110</sup> Supra note 95 para 37.

<sup>111</sup> Supra note 43 para 9.

<sup>112</sup> Supra note 95 para 38.

<sup>113</sup> Supra note 95 para 38.

<sup>114</sup> Supra note 95 para 60.

Whilst uncertainty lingered as a result of the two conflicting High Court decisions, the High Court was yet again tasked with a similar determination in *Modibane v South African Revenue Service*.<sup>115</sup> In casu, the taxpayer had lodged an objection and subsequently an appeal to assessments that had been issued to it by SARS.<sup>116</sup> Whilst the objection was refused by SARS, the appeal to the Tax Court was yet to be decided at the time of the court proceedings.<sup>117</sup> The taxpayer had not paid the tax amount to SARS throughout this period.<sup>118</sup> As a result, SARS utilised the statement procedure.<sup>119</sup> When SARS had declined to withdraw the judgment upon the taxpayer's request, the latter instituted court proceedings to have the judgment set aside.<sup>120</sup> The taxpayer likewise argued that SARS could not proceed to obtain judgment in the face of a pending appeal.<sup>121</sup>

Tsoka J expressed the same view as that of Binns-Ward J in *Capstone 556 (Pty) Ltd and Another v Commissioner, South African Revenue Service and Another* and held that the certified statement was not an actual judgment but simply had the effect of a judgment.<sup>122</sup> It was not tantamount to a pronouncement made by the Commissioner, but was merely a tool through which taxpayers were compelled to honour their tax obligations.<sup>123</sup> On that basis, therefore, the court concluded that it could not be rescinded in the same way that a judgment could.<sup>124</sup> The court then went on to say that supposing that the statement were to be taken as an actual judicial judgment; the taxpayer had to show sound reasons as to why it had to be set aside.<sup>125</sup>

Williams<sup>126</sup> submits that the ruling in *Capstone 556 (Pty) Ltd and Another v Commissioner, South African Revenue Service and Another*<sup>127</sup> was more persuasive than that in *Mokoena v Commissioner, South African Revenue Service*.<sup>128</sup> However, he argues that although the ruling in the earlier judgment was incorrect, the learned judge manifestly attempted to show the unjust nature of

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<sup>115</sup> 74 SATC 398.

<sup>116</sup> Supra note 115 para 2.

<sup>117</sup> Supra note 115 para 2.

<sup>118</sup> Supra note 115 para 2.

<sup>119</sup> Supra note 115 para 2.

<sup>120</sup> Supra note 115 para 2.

<sup>121</sup> Supra note 115 para 7.

<sup>122</sup> Supra note 115 para 14.

<sup>123</sup> Supra note 115 para 14.

<sup>124</sup> Supra note 115 para 18.

<sup>125</sup> Supra note 115 para 20.

<sup>126</sup> RC Williams 'Unresolved aspects of the "pay now, argue later" rule', available at <https://www.thesait.org.za>, accessed on 30 May 2018.

<sup>127</sup> Supra note 95.

<sup>128</sup> Supra note 84.

the rule towards taxpayers.<sup>129</sup> Nonetheless, both judgments were High Court decisions that were heard by single judges.<sup>130</sup> This means that they are on the same footing in terms of judicial precedent and the lower courts are bound by both of them.<sup>131</sup>

It is further submitted that although in practice a certified statement is entered into the judgment book, it does not constitute a judgment by default.<sup>132</sup> This is because neither are summons issued to taxpayers nor are the latter called upon to put up a defence against the issuing of a statement.<sup>133</sup> The statement is merely a means of recovery of a tax debt.<sup>134</sup>

In respect of the judgment in *Modibane v South African Revenue Service*,<sup>135</sup> it is observed that despite Tsoka J's reliance on *Capstone 556 (Pty) Ltd and Another v Commissioner, South African Revenue Service and Another*,<sup>136</sup> the two judgments dealt with different issues.<sup>137</sup> In the earlier judgment, the taxpayer sought to bar SARS from obtaining a certified statement whilst in the latter, the taxpayer sought a rescission of the certified statement that was obtained by SARS against the taxpayer.<sup>138</sup> Thus, it seems that according to Tsoka J's ruling, rescission of a certified statement is not one of the remedies at the disposal of taxpayers.<sup>139</sup> This potentially places taxpayers in a vulnerable situation where SARS declines to withdraw a statement.<sup>140</sup> It is further submitted that in view of the fact that a certified statement has the effect of a civil judgment, the rules that operate in respect of default judgments would also apply in respect of a certified statement.<sup>141</sup> Consequently, the taxpayer would be able to apply for rescission or variation.<sup>142</sup> In *Kruger v CIR*,<sup>143</sup> the court held that the fact that the statement in that case was obtained in the taxpayer's absence was a ground for rescission.

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<sup>129</sup> RC Williams 'The Pay-Now-Argue-Later Rule Festers into our Income Tax System' *South African Institute of Tax Professionals* Technical 2 December 2011 available at <https://www.thesait.org.za>, Accessed on 15 August 2018

<sup>130</sup> Williams op cit note 126.

<sup>131</sup> Ibid.

<sup>132</sup> Fareed Moosa 'Rescission of a tax "judgment"', available at [www.derebus.org.za](http://www.derebus.org.za), accessed on 10 October 2018.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

<sup>135</sup> Supra note 115.

<sup>136</sup> Supra note 95.

<sup>137</sup> Moosa op cit note 132.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid.

<sup>141</sup> Klue, Arendse & Williams op cit note 2 at 23.

<sup>142</sup> Ibid at 24.

<sup>143</sup> 1996 (1) SA 453 (C) at 426.

However, before a judgment can be set aside the person seeking such relief must show an ‘operative illegality’ which renders such a judgment invalid.<sup>144</sup> In other words, the applicant must clearly indicate the reasons why he or she objects to a judgment.<sup>145</sup> An example of such an illegality in this context would be where SARS obtains a certified statement without having adhered to the obligatory preliminary step of issuing a notice of assessment to the taxpayer concerned.

Although a certified statement is not a judgment according to the courts, the Tax Administration Act stipulates that it is to be regarded as a judgment. Thus, unlike other debtors whose property can only be attached by a judicial judgment handed down by a court of law, a mere statement suffices to enable SARS to obtain a writ or warrant of execution to attach a taxpayer’s property. For purposes of tax recovery, therefore, it seems to be of little significance that a certified statement is not a judgment, seeing that it is still able to accomplish what an actual judgment can.

## 6. THE ‘PAY NOW, ARGUE LATER’ RULE AND THE CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS

Prior to the advent of the constitutional era in South Africa, it is submitted that SARS was in essence ‘a law unto itself’ and was authorised to act against taxpayers without recourse to the courts.<sup>146</sup> However, in current democratic South Africa, in which the Constitution is the Grundnorm of the State, all law and conduct, including tax laws and the conduct of SARS officials is subject to the tenets of the Constitution.<sup>147</sup> Since the inception of the Constitution, taxpayers gained the right to call into question the validity of tax legislation and the conduct of SARS officials.<sup>148</sup> This approach has been confirmed by the Constitutional Court.<sup>149</sup>

The Katz Commission was a commission of enquiry that was appointed to investigate specified aspects of the tax structure in South Africa.<sup>150</sup> According to its report, the Katz Commission

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<sup>144</sup> *Taylor v Additional Magistrate, Vereeniging* 1984 (4) SA 1 (T) at GH-I.

<sup>145</sup> Jones and Buckle *The Civil Practice of the Magistrates Courts in South Africa* 8 ed (1988-1991) 365-366.

<sup>146</sup> B Croome ‘Constitutional Law and Taxpayers’ Rights in South Africa’ 2002 *Acta Juridica* 3.

<sup>147</sup> Section 2 of the Constitution.

<sup>148</sup> RC Williams ‘SARS & fair administrative action: quo vadis?’ 2013 *TAXtalk* 24.

<sup>149</sup> *First National Bank of SA Ltd t/a Wesbank v CSARS* 2002 (4) SA 768 (CC).

<sup>150</sup> L van Schalkwyk ‘Constitutionality and the Income Tax Act’ (2001) 9 *Meditari: Research Journal of the School of Accounting Sciences* 296.

found, amongst other findings, that the rule, coupled with the statement procedure was in conflict with the Constitutional right of access to the courts.<sup>151</sup>

About the year 1996, the controversial nature of certain tax provisions caused concern on the part of SARS because it figured that taxpayers would decide not to pay their taxes on the basis of the unconstitutionality of tax provisions.<sup>152</sup> Consequently, SARS applied directly to the Constitutional Court for a determination as to whether various provisions could stand constitutional muster, including the provisions containing the rule.<sup>153</sup> However, such determination was not to be, as the Constitutional Court declined to adjudicate on the application on the basis that it did not call for direct access.<sup>154</sup> That meant that SARS would have to deal with each individual attack as it came.<sup>155</sup>

A constitutional attack was launched upon the rule in *Metcash Trading Ltd v Commissioner for the South African Revenue Service*.<sup>156</sup> The case concerned a dispute in respect of VAT. The sections of the VAT Act that were under attack were section 36(1) (which comprised the rule), section 40(2)(a) (the statement procedure) and section 40(5) (in terms of which a taxpayer was barred from disputing the correctness of an assessment).<sup>157</sup> The core issue before the court was whether the impugned sections were at odds with a taxpayer's right of access to the courts.<sup>158</sup>

The taxpayer company, Metcash, was a liquor retailer as well as a wholesaler and distributor of goods.<sup>159</sup> The dispute arose as a result of the Commissioner's dissatisfaction with Metcash's VAT returns and allegations of Metcash's involvement in a number of counterfeit dealings, which had led SARS to issue assessments comprising additional tax, interest and penalties.<sup>160</sup> Metcash subsequently lodged an objection with SARS and also asked for extensions regarding the payment of the tax debt.<sup>161</sup> When the Commissioner had refused the objection and also made known his intention to utilise the statement procedure if Metcash remained in default,

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<sup>151</sup> Ibid.

<sup>152</sup> L Olivier 'Constitutional Review of SARS's Power to Collect Outstanding Income Tax' (2010) 43 *De Jure* 158.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

<sup>156</sup> 2001 1 BCLR 1 (CC).

<sup>157</sup> Supra note 156 para 1.

<sup>158</sup> Supra note 156 para 1.

<sup>159</sup> Supra note 156 para 2.

<sup>160</sup> Supra note 156 para 3.

<sup>161</sup> Supra note 156 para 4.

the latter applied to the court a quo for an urgent interdict to bar the former from proceeding with the statement mechanism.<sup>162</sup>

In finding for Metcash, the court a quo based its decision on *Lesapo v North West Agricultural Bank and Another*,<sup>163</sup> as the court considered the facts to be similar.<sup>164</sup> According to the court a quo, a court's intervention was excluded from the process.<sup>165</sup> The court held that a vendor was obliged to settle an amount reflected in an assessment, despite the lodging of an objection or an appeal.<sup>166</sup> The decision to direct otherwise lay not with a court of law but solely with the Commissioner.<sup>167</sup> Thus in the court a quo's view, it was clear that the impugned provisions infringed the right of access to the courts because a vendor was obliged to comply or face the dire consequences laid down in the Act, and the a court's intervention was impermissible irrespective of the demands of justice.<sup>168</sup>

The court a quo further explained that the importance of the right of access to the courts could not be overemphasised.<sup>169</sup> This is because maintaining a society that is free of chaos, self-help and anarchy requires the utmost protection of the right of access to the courts.<sup>170</sup> In determining whether the provisions were sustainable under the limitation clause, the court held that they were not as there were other means that SARS court have utilised in order to meet its tax collection mandate such as stricter penalties, higher interest rates and demanding security for a tax debt.<sup>171</sup> Thus, the court declared the provisions unconstitutional and referred its order to the Constitutional Court for confirmation.<sup>172</sup>

The Constitutional Court held that nowhere in section 36(1) was recourse to the courts implicitly or impliedly prohibited.<sup>173</sup> The court held that the section was not about access to the courts but rather referred to the fact that not even the appeal mechanism provided by the VAT Act could stay the operation of the rule, save where the Commissioner directed to the contrary.<sup>174</sup> The court further held that although in terms of the said statute, the tribunal of first

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<sup>162</sup> Supra note 156 para 5.

<sup>163</sup> 1999 (12) BCLR 1420 (CC).

<sup>164</sup> Supra note 156 para 25.

<sup>165</sup> Supra note 156 para 25.

<sup>166</sup> Supra note 156 para 25.

<sup>167</sup> Supra note 156 para 25.

<sup>168</sup> Supra note 156 para 26.

<sup>169</sup> Supra note 156 para 27.

<sup>170</sup> Supra note 156 para 27.

<sup>171</sup> Supra note 156 para 28.

<sup>172</sup> See section 172 of the Constitution.

<sup>173</sup> Supra note 156 para 37.

<sup>174</sup> Supra note 156 para 37.

instance as regards the merits of a dispute was the Special Court, section 36 did not in any way preclude an aggrieved vendor from approaching the ordinary courts for any other relief within the parameters of that court's jurisdiction.<sup>175</sup> Thus, the Constitutional Court disagreed with the court a quo's ruling.<sup>176</sup>

The Constitutional Court continued that although the Special Court was not an ordinary court of law, it still functioned like an ordinary court in all its processes.<sup>177</sup> It was given wide powers to adjudicate upon tax disputes and to ensure that the Commissioner's decisions and conduct were legally compliant.<sup>178</sup> According to the court, this in itself was a strong indication that the legislature intended tax disputes to be resolved fairly, independently and impartially as would be the case in the ordinary courts.<sup>179</sup>

The court rejected Snyders J's ruling in the court a quo that the statement procedure allowed the Commissioner to resort to self-help.<sup>180</sup> Kriegler J distinguished the facts of this case from those of *Lesapo v North West Agricultural Bank and Another*<sup>181</sup> and explained that in the earlier case, the impugned statute clearly empowered a bank to attach and sell its debtors' properties devoid of the courts' involvement.<sup>182</sup> The court held that in this case the statement procedure could only be utilised through the courts, by court officials and in compliance with court procedures.<sup>183</sup> An aggrieved vendor was only barred from disputing the correctness of the statement.<sup>184</sup> According to the court, the section did not forbid a vendor from challenging the statement on any other ground save the correctness thereof.<sup>185</sup> This is because disputes pertaining to the correctness of assessments and the merits were to be determined in the prescribed forum namely, the Special Court.<sup>186</sup>

The court further held that section 40(5) was simply a temporary mechanism that was aimed at compelling a vendor to settle the VAT amount despite contesting it.<sup>187</sup> Such a vendor was still

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<sup>175</sup> Supra note 156 para 43.

<sup>176</sup> Supra note 156 para 43.

<sup>177</sup> Supra note 156 para 47.

<sup>178</sup> Supra note 156 para 47.

<sup>179</sup> Supra note 156 para 47.

<sup>180</sup> Supra note 156 para 51.

<sup>181</sup> Supra note 163.

<sup>182</sup> Supra note 156 para 51.

<sup>183</sup> Supra note 156 para 51.

<sup>184</sup> Supra note 156 para 54.

<sup>185</sup> Supra note 156 para 54.

<sup>186</sup> Supra note 156 para 55.

<sup>187</sup> Supra note 156 para 58.



entitled to pursue the usual remedies, which included recourse to the ordinary courts.<sup>188</sup> Moreover, where the Commissioner was wrong, such a vendor would be entitled to a refund plus interest as was stipulated in the VAT Act.<sup>189</sup>

Interestingly, however, the court agreed with Metcash's contention that the effect of the rule was such that a taxpayer was precluded from approaching a court to obtain an interdict to stay the rule's operation.<sup>190</sup> To that extent, it was accepted by Kriegler J that the rule limited the right of access to the courts.<sup>191</sup> Nonetheless, he found the limitation to be sustainable in terms of section 36 of the Constitution.<sup>192</sup> In reaching this conclusion, he explained that the rule is only as effective as the implementation mechanisms behind it.<sup>193</sup> He held further that the provisions were justified because the public interest demands that taxes are collected speedily and effectively.<sup>194</sup> The learned judge continued that requiring the prompt payment of taxes is an important tool in curbing vexatious and frivolous objections that would otherwise arise.<sup>195</sup>

In addition, it was held that the rule is not unique to South Africa.<sup>196</sup> It is a mechanism that is recognised and implemented in several democracies around the world.<sup>197</sup> The court also referred to the fact that the rule was not set in stone as the said statute conferred a discretion upon the Commissioner to suspend its operation in certain circumstances.<sup>198</sup> The court left open the question as to whether the same reasoning would be applicable if a similar attack were to arise in the context of income tax.<sup>199</sup>

In one breath the court seemed to say that the rule did not infringe the right of access to the courts whilst in another, it seemed to acknowledge a limitation of the right albeit one that was justifiable under the limitation clause.<sup>200</sup> It is common cause that taxpayers' constitutional rights are not set in stone.<sup>201</sup> They are capable of limitation pursuant to the prescripts of the

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<sup>188</sup> Supra note 156 para 58.

<sup>189</sup> Supra note 156 para 58.

<sup>190</sup> Supra note 156 para 59.

<sup>191</sup> Supra note 156 para 59.

<sup>192</sup> Supra note 156 para 59.

<sup>193</sup> Supra note 156 para 60.

<sup>194</sup> Supra note 156 para 60.

<sup>195</sup> Supra note 156 para 60.

<sup>196</sup> Supra note 156 para 61.

<sup>197</sup> Supra note 156 para 61.

<sup>198</sup> Supra note 156 para 62.

<sup>199</sup> Supra note 156 para 67.

<sup>200</sup> Supra note 156 para 72.

<sup>201</sup> Croome op cit note 146 at 7.

limitation clause.<sup>202</sup> Notwithstanding this fact, the courts are generally not keen to interfere with the wide powers that have been conferred upon SARS.<sup>203</sup>

Binns-Ward J in *Capstone 556 (Pty) Ltd and Another v Commissioner, South African Revenue Service and Another* drew a distinction between liability for VAT being a system of self-regulation, as opposed to liability for income tax which is solely determined by SARS.<sup>204</sup> According to the learned judge, the Constitutional Court's reasoning which influenced its decision might not be applicable in a similar challenge in an income tax dispute.<sup>205</sup>

In response to the Constitutional Court's ruling, Olivier<sup>206</sup> argues that at no point did the taxpayer contend that the ordinary courts had no jurisdiction at all. Rather, at the time of the operation of the rule, a vendor was precluded from approaching the courts to oust its operation.<sup>207</sup> She further argues that the court omitted to consider the possibility that as a result of the operation of the rule, a vendor might not be in a financially viable position to pursue alternative remedies afterwards.<sup>208</sup> She also expresses the view that neither the court a quo nor the Constitutional Court shed some light as regards the actual comparable provisions of other jurisdictions made mention of, which justify the rule's adoption in South Africa.<sup>209</sup> Olivier also highlights the fact that the Constitutional Court did not consider the issue of less invasive means such as those that were suggested by Snyders J in the court a quo.<sup>210</sup> She further expresses the view that it would have been better if the Constitutional Court had clearly acknowledged a limitation of the right and then proceeded to show why such limitation was justifiable under the limitation clause.<sup>211</sup> The persuasive effect of Olivier's views in this regard cannot be ignored.

It is evident that launching constitutional attacks on tax provisions is not only lengthy and costly, but victory is also not guaranteed.<sup>212</sup> It is submitted that taxpayers stand a better chance at success if they raise administrative rather than constitutional attacks on tax legislation.<sup>213</sup>

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<sup>202</sup> Ibid.

<sup>203</sup> B Ger 'Taxpayers have rights too' 2003 *De Rebus* 55.

<sup>204</sup> Supra note 95 para 9.

<sup>205</sup> Ibid.

<sup>206</sup> L Olivier 'Tax collection and the bill of rights' 2001 *TSAR* 196.

<sup>207</sup> Ibid at 196.

<sup>208</sup> Ibid at 197.

<sup>209</sup> Ibid at 199.

<sup>210</sup> Ibid at 199.

<sup>211</sup> Ibid at 200.

<sup>212</sup> J Silke 'Taxpayers and the Constitution: A battle already lost' 2002 *Acta Juridica* 282.

<sup>213</sup> Ibid at 321.

## 7. CONCLUSION

As is apparent from the above discussion, a measure of uncertainty regarding whether a certified statement is an actual judgment, remains due to the conflicting case law. What is clear however, is that the statement mechanism is a powerful tool in the hands of SARS, as it has the effects of a civil judgment. A ray of hope for taxpayers is the assurance that they are entitled to a notice of assessment<sup>214</sup> as well as ten business days' notice before a statement can be filed against them.<sup>215</sup> The courts have acknowledged the extensive powers conferred upon SARS and have held that these powers must not be misused but must be exercised in compliance with the law and the Constitution.<sup>216</sup>

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<sup>214</sup> *Supra* note 43.

<sup>215</sup> Section 172(1) of the Tax Administration Act.

<sup>216</sup> Klue, Arendse & Williams *op cit* note 2 at 24.

## CHAPTER FOUR

### THE AVAILABLE TAXPAYER REMEDIES AND THE EXTENT TO WHICH THEY ARE ADEQUATE

#### 1. INTRODUCTION

‘As a citizen you have an obligation to the country’s tax system, but you also have an obligation to yourself to know your rights under the law.’<sup>1</sup>

Taxpayers must be aware of their rights if the protection of those rights is to be achieved.<sup>2</sup> As explained in chapter one, the purpose of this chapter is to explore the remedies available to taxpayers when dealing with SARS and to determine whether they provide effective protection to taxpayers.

#### 2. REMEDIES UNDER THE TAX ADMINISTRATION ACT

An obligation is placed upon SARS to refund any amounts plus interest that were erroneously recovered by it.<sup>3</sup> Despite this provision, this does not eliminate the possible financial hardship that a taxpayer might have to endure before such a refund occurs and whilst the taxpayer concerned attempts to obtain some recourse from the available remedies.<sup>4</sup>

##### *(a) Reasons, objections and appeals*

In the past, there was no obligation on the Commissioner to furnish reasons for an amount in an assessment.<sup>5</sup> Under the Tax Administration Act, taxpayers who disagree with an assessment are entitled to ask for reasons as to how the assessment was arrived at.<sup>6</sup> The reasons must be adequate and in writing.<sup>7</sup> If a taxpayer is still unhappy despite having received reasons, they have a right to object to the assessment.<sup>8</sup> Discretion is conferred upon the Commissioner to either allow or refuse an objection.<sup>9</sup> If an objection is allowed, SARS must amend the assessment.<sup>10</sup> The Commissioner may either fully or partly refuse an objection.<sup>11</sup> Where an

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<sup>1</sup> B Ger ‘Taxpayers have rights too’ 2003 *De Rebus* 55.

<sup>2</sup> GE Caiden *International Handbook of The Ombudsman: Evolution and Present Function* (1983) 6.

<sup>3</sup> Section 190(1) of the Tax Administration Act.

<sup>4</sup> P Dachs ‘Pay now, argue later: tax administration’ 2014 *Tax Professional* 10.

<sup>5</sup> *Arepee Industries Ltd v CIR* 55 SATC 139 at 147.

<sup>6</sup> Section 96(2)(a) of the Tax Administration Act.

<sup>7</sup> See section 5 of the Promotion of Administrative Justice Act 3 of 2000 (hereinafter, ‘PAJA’).

<sup>8</sup> Section 104 of the Tax Administration Act.

<sup>9</sup> Section 106(2) of the Tax Administration Act.

<sup>10</sup> Section 106(3) of the Tax Administration Act.

<sup>11</sup> Section 106(2) of the Tax Administration Act.

objection is refused, a taxpayer is further entitled to appeal the Commissioner's decision either to the Tax Board or to the Tax Court.<sup>12</sup>

The Tax Administration Act specifies timeframes within which objections and appeals must be lodged by taxpayers. Since the process for appeals<sup>13</sup> is similar to that of objections, this discussion is confined to objections. The time frame within which an aggrieved taxpayer must lodge an objection is 30 days, after which an assessment becomes decisive.<sup>14</sup> An extension may be permitted by a senior SARS official if the taxpayer concerned furnishes reasonable grounds.<sup>15</sup> However, the statute does not provide further guidance as to what constitutes reasonable grounds. Interpretation note 15 of SARS attempts to provide guidance in this regard by providing that when establishing whether reasonable grounds are present, a senior SARS official is obliged to take into account relevant factors which include 'the reasons for the delay, the length of the delay, the prospects of success on the merits, and any other relevant factor'.<sup>16</sup>

The period of extension is limited to 21 business days save where exceptional circumstances warrant an extension beyond that threshold.<sup>17</sup> However, no extension in excess of three years is permitted.<sup>18</sup> The Tax Administration Act likewise provides no guidance as to what constitutes exceptional circumstances. Since no definition is provided, it is submitted that the term must be understood in its ordinary grammatical sense.<sup>19</sup> In determining whether exceptional circumstances exist, each case would have to be decided on its own merits.<sup>20</sup> The term may be interpreted as 'something out of the ordinary and of an unusual nature'.<sup>21</sup>

As already discussed, although the remedies of objection and appeal are available to an aggrieved taxpayer, they do not oust the operation of the rule. A taxpayer is still required by law to pay the amounts demanded by SARS on pain of the consequences discussed in the prior chapters.

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<sup>12</sup> Section 107(1) of the Tax Administration Act.

<sup>13</sup> Section 107 of the Tax Administration Act.

<sup>14</sup> Section 100(1) of the Tax Administration Act.

<sup>15</sup> Section 104(4) of the Tax Administration Act.

<sup>16</sup> SARS 'Interpretation Note: NO.15 (Issue 4)' 20 November 2014 at 5, available at [www.sars.gov.za](http://www.sars.gov.za), accessed on 02 November 2018.

<sup>17</sup> Section 104(5) of the Tax Administration Act.

<sup>18</sup> *Ibid.*

<sup>19</sup> RC Williams 'Exceptional Circumstances' (2016) 30 *Tax Planning: Corporate and Personal* 5.

<sup>20</sup> *Ibid.*; see also *Norwich Union Life Insurance Society v Dobbs* 1912 AD 395 at 399.

<sup>21</sup> *Ibid.*; see also *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas* 2002 (6) SA 150 (C).

*(b) Request for suspension of payment*

This is the only remedy that creates a possibility for the suspension of the rule. A taxpayer who has either contested or who intends to contest an assessment or a decision by SARS has a right to apply for the suspension of payment of an amount of tax.<sup>22</sup> SARS is barred, within ten business days of receipt of a suspension request, from utilising the recovery mechanisms in the Tax Administration Act.<sup>23</sup> This is so, except where SARS harbours a reasonable belief of a possible dissipation of the taxpayer's property.<sup>24</sup> SARS is likewise barred from proceeding with collection procedures, ten business days after the suspension request has been refused or revoked.<sup>25</sup> It is in these instances that the mighty 'pay now, argue later' rule may be momentarily suspended.

However, the power conferred upon SARS in considering a suspension request is discretionary, as evidenced by the use of the word *may*.<sup>26</sup> Thus, the mere lodging of a suspension request is no reason for a taxpayer to become comfortable or passive.<sup>27</sup> Rather, a taxpayer must ensure continued communication and co-operation with SARS.<sup>28</sup> When dealing with a suspension request, a senior SARS official is required to take into account certain considerations under section 164(3). The Income Tax Act formerly contained a similar provision in section 88 which provided for the suspension of payment upon consideration of specified and other relevant factors.<sup>29</sup> The only difference is that the discretion that previously vested in the Commissioner is now delegated to a senior SARS official.<sup>30</sup>

In its initial form, section 164(3) comprised the following considerations which a senior SARS official was obliged to take into account in reaching a decision:

- (a) the compliance history of the taxpayer;
- (b) the amount of tax involved;
- (c) the risk of dissipation of assets by the taxpayer concerned during the period of suspension;

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<sup>22</sup> Section 164(2) of the Tax Administration Act.

<sup>23</sup> Section 164(6) of the Tax Administration Act.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> S De Lange & D Van Wyk 'The right to just administrative action in the context of suspending the payment of disputed tax' (2017) 20 *Potchefstroom Electronic Law Journal* 7.

<sup>27</sup> D Kotze 'Pay now argue later' 2013 *TAXtalk* 27.

<sup>28</sup> *Ibid.*

<sup>29</sup> SAICA 'Suspension of payment of tax' December 2013 – Issue 171, available at <https://www.saica.co.za>, accessed on 11 November 2018.

<sup>30</sup> C Keulder "'Pay now, argue later' rule – before and after the Tax Administration Act' (2013) 16 *Potchefstroom Electronic Law Journal* 149.

- (d) whether the taxpayer is able to provide adequate security for the payment of the amount involved;
- (e) whether payment of the amount involved would result in irreparable financial hardship to the taxpayer;
- (f) whether sequestration or liquidation proceedings are imminent;
- (g) whether fraud is involved in the origin of the dispute; or
- (h) whether the taxpayer has failed to furnish information requested under this Act for purposes of a decision under this section.<sup>31</sup>

Practitioners and academics alike have expressed doubt in relation to the factors. Williams<sup>32</sup> submits that no clarity is given as regards the weight that is to be accorded to each of the factors. He further expresses the view that the relevance of the factor pertaining to the amount of tax involved is doubtful in that it raises the question as to what bearing the amount involved has on the decision whether or not to agree to the suspension of payment.<sup>33</sup> Kruger suggests that the financial statements of the taxpayer would be helpful in assisting to establish whether a taxpayer would have sufficient funds to settle the payment if the suspension is granted.<sup>34</sup>

In respect of a taxpayer's compliance history, Van Zyl and Van Wyk observe that it is uncertain as to whether this is examined generally in relation to all taxes that the concerned taxpayer is obliged to pay or only to a tax in respect of a dispute.<sup>35</sup> They further observe that it is unclear as from what date the compliance history is to be determined.<sup>36</sup> Kotze suggests 'regular or serious transgressions in the past, applications for voluntary disclosure relief or amnesty in the past, or any unsuccessful disputes by the taxpayer in the past' as pertinent factors to the determination of a taxpayer's compliance history.<sup>37</sup> Kruger submits that SARS may consider, inter alia, how co-operative the taxpayer is in the payment of taxes, the rendering of returns and how co-operative the taxpayer is in allowing SARS to carry out its investigations on the former.<sup>38</sup>

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<sup>31</sup> Section 164(3) of the Tax Administration Act prior to its amendment.

<sup>32</sup> RC Williams 'Unresolved aspects of the "pay now, argue later" rule', available at <https://www.thesait.org.za>, accessed on 30 May 2018.

<sup>33</sup> Ibid.

<sup>34</sup> L Kruger 'Pay now, argue later – new rules for the suspension of payment' (2014) 5 *Business Tax & Company Law Quarterly* 30.

<sup>35</sup> L Van Zyl & D Van Wyk 'Relevant factors for the suspension of the payment of disputed tax – a comparative analysis' (2016) 9 *Journal of Economic and Financial Sciences* 565.

<sup>36</sup> Ibid at 565.

<sup>37</sup> Ibid at 566.

<sup>38</sup> Kruger op cit note 34 at 29.

No definition is provided for the term ‘dissipation of assets’. Kruger suggests that the term be interpreted in the tax context to refer to the squandering or concealment of assets which is aimed at frustrating the purpose of SARS to recover the outstanding debt.<sup>39</sup> However, he makes it clear that this interpretation is not applicable to the sale of assets in good faith and at market related prices.<sup>40</sup> Kotze defines dissipation as a depletion of a taxpayer’s assets which has the effect of prejudicing SARS’s collection of tax at a future date.<sup>41</sup>

In respect of the tendering of adequate security to SARS, it is not clear when the security tendered will be considered adequate. Kruger suggests that such security may be a pledge on the taxpayer’s assets, or an amount of money that is equal to or which is more than the amount of tax demanded by SARS.<sup>42</sup> He submits that such security would ensure that SARS does not suffer prejudice whilst the dispute is being resolved.<sup>43</sup> It is arguable this school of thought is problematic on the basis that it is unjust to demand security for a debt that is contested by a taxpayer. When a tax debt is contested, the interests of both the taxpayer and SARS are at stake. Whilst SARS would still have the wide powers of recovery under the Tax Administration Act at its disposal, compelling a taxpayer to tender security for a tax debt that is contested may result in serious hardship of a financial or other nature for the taxpayer. Generally, debtors tender security for debts in terms of which they clearly acknowledge their indebtedness.

The term ‘irreparable financial hardship’ was likewise not defined. Williams expresses the view that the term is unsuitable on the basis that a taxpayer who incurs financial loss may be compensated through an award of damages.<sup>44</sup> It seems that each case would have to be decided on its own facts.<sup>45</sup> Kruger submits that the hardship will be irreparable if the taxpayer cannot be placed in the position that they were in before the hardship occurred.<sup>46</sup> It appears that if according to SARS, the taxpayer concerned will not suffer irreparable financial hardship, SARS may decline the suspension request and persist in its demand for payment.<sup>47</sup> However, if the taxpayer clearly shows that they will endure irreparable financial difficulty, SARS may

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<sup>39</sup> Kruger op cit note 34 at 31; see also *Carmel Trading Co Ltd v Commissioner, South African Revenue Service and Others* 70 SATC 1; *Knox D’Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A).

<sup>40</sup> Kruger op cit note 34 at 31.

<sup>41</sup> Van Zyl & Van Wyk op cit note 35 at 565.

<sup>42</sup> Kruger op cit note 34 at 31.

<sup>43</sup> Ibid.

<sup>44</sup> Williams op cit note 32.

<sup>45</sup> Kruger op cit note 34 at 32.

<sup>46</sup> Ibid at 33.

<sup>47</sup> P Dachs ‘Argue now, pay later’ (2014) 28 *Tax Planning: Corporate and Personal* 4.



nonetheless insist on payment on the grounds that the taxpayer might not have funds later if the obligation to pay is suspended.<sup>48</sup>

The difficulty in respect of the factor pertaining to fraud is that no explanation is given as to what is meant by ‘the origin of the dispute’.<sup>49</sup> In addition, Rood refers to the lack of clarity regarding whether this factor merely requires an allegation of fraud or a conviction.<sup>50</sup> He argues that if it is the former, it prejudices the taxpayer as he or she would not be given a chance to put up a defence.<sup>51</sup> Van Zyl and Van Wyk submit that since the Tax Administration Act does not clarify the weight that is to be attached to each factor, it is possible for SARS to attach greater weight to this factor.<sup>52</sup> This is especially so in light of the fact that fraud is not only a crime under the criminal law, but also a tax offence under the said statute.<sup>53</sup> The existence of fraud is a question of fact.<sup>54</sup>

The legislature subsequently enacted the Tax Administration Laws Amendment Act 44 of 2014 (hereinafter, ‘the Tax Administration Laws Amendment Act’). Section 50 of the Tax Administration Laws Amendment Act amended the initial section 164(3) of the Tax Administration Act. In terms of the current section 164(3), the relevant factors that a senior SARS official may take into account when considering a suspension request include the following:

- (a) whether the recovery of the disputed tax will be in jeopardy or there will be a risk of dissipation of assets;
- (b) the compliance history of the taxpayer with SARS;
- (c) whether fraud is *prima facie* involved in the origin of the dispute;
- (d) whether payment will result in irreparable hardship to the taxpayer not justified by the prejudice to SARS or the *fiscus* if the disputed tax is not paid or recovered; or
- (e) whether the taxpayer has tendered adequate security for the payment of the disputed tax and accepting it is in the interest of SARS or the *fiscus*;<sup>55</sup>

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<sup>48</sup> Ibid.

<sup>49</sup> Van Zyl & van Wyk op cit note 35 at 566.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Kruger op cit note 34 at 33.

<sup>55</sup> Section 164(3) of the Tax Administration Act as amended by section 50 of the Tax Administration Laws Amendment Act.

It is apparent from the amended section that the outline of the relevant factors is shorter.<sup>56</sup> A number of advantages and disadvantages for the taxpayer in relation to the amended section have been identified.<sup>57</sup> The word *including* suggests that the list is not a closed one.<sup>58</sup> Thus, the relevant factors that SARS may consider are not confined to those specified in the list.<sup>59</sup> This alteration seems to be advantageous to taxpayers, seeing that it is open to SARS to consider other relevant factors.<sup>60</sup> The amended section adds a further factor which speaks of the collection of tax being in jeopardy if a suspension request is granted.<sup>61</sup> As discussed in chapter two, section 94 of the Tax Administration Act similarly empowers SARS to recover tax before a return is due if recovery at later stage would be in jeopardy. However, the statute provides no guidance as to when recovery will be regarded as being in jeopardy.<sup>62</sup>

As opposed to the initial section which called for a consideration into whether a taxpayer was in a position to provide adequate security, the amended section requires such security to be provided prior to the consideration of a suspension request, thereby making the factor more burdensome for taxpayers.<sup>63</sup> As argued above, it is unjust to place a burden of this nature on a contested tax debt.

Whilst the initial section referred to the term ‘irreparable financial hardship’, the amended section speaks of ‘irreparable hardship’.<sup>64</sup> Although the latter term is likewise not defined, it widens the scope of hardship considered, which is no longer confined to financial hardship.<sup>65</sup> Thus, this alteration likewise appears to be advantageous to taxpayers.<sup>66</sup>

SARS is also empowered to refuse to grant a request for suspension if it is satisfied that such a request is ‘frivolous or vexatious’<sup>67</sup> or if the taxpayer is simply resorting to ‘dilatatory tactics’ in order to frustrate the recovery of tax by SARS.<sup>68</sup> If SARS declines to grant a suspension

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<sup>56</sup> T Solomon “‘Pay now, argue later’ – recent amendments to section 164 of the Tax Administration Act No. 28 of 2011’ 22 April 2015, available at <https://www.thesait.org.za>, accessed on 08 November 2018.

<sup>57</sup> *Ibid.*

<sup>58</sup> ‘Dealing with SARS’ “pay-now-argue-later” rule 2017 *Tax Breaks Newsletter* 7.

<sup>59</sup> *Ibid.*

<sup>60</sup> Solomon op cit note 56.

<sup>61</sup> Section 164(3)(a) of the Tax Administration Act.

<sup>62</sup> Solomon op cit note 56.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> Section 164(5)(a) of the Tax Administration Act.

<sup>68</sup> Section 164(5)(b) of the Tax Administration Act.

request, the objection and appeal remedies are not available to the taxpayer.<sup>69</sup> It follows that the taxpayer would once again be compelled to pay the amount demanded by SARS.<sup>70</sup> This remains the case even where such a taxpayer decides to resort to judicial review.<sup>71</sup>

Although this is the remedy through which the rule may be suspended, it is dependent upon the consideration of factors which are not clearly defined in the statute. It is likely that the courts will experience difficulty in attempting to interpret the factors, should a matter be referred for judicial review.<sup>72</sup>

The leading case currently on statutory interpretation is *Natal Joint Municipal Pension Fund v Endumeni Municipality*.<sup>73</sup> It was held that the interpretation process is an objective one.<sup>74</sup> The interpreter is required at the very beginning to have regard to the ordinary grammatical meaning of the words in a provision, the context<sup>75</sup> as well as the purpose,<sup>76</sup> all of which are equally important.<sup>77</sup> If a number of meanings can be inferred from a provision, due regard must be had to the same factors (ordinary grammatical meaning, context and purpose) in respect of each meaning.<sup>78</sup> The court rejected the conventional notion of ascertaining the legislature's intention and emphasised that in the process of interpretation, the focus is solely the language contained in the provision.<sup>79</sup> The court explained that this is because the interpreter interprets a provision in entirely different circumstances without knowing exactly what the thoughts of the legislature were at the time of drafting.<sup>80</sup> These principles would assist a court in attempting to interpret the factors in section 164(3).

Nonetheless, it must be emphasised that legislative provisions which are difficult to understand or which are ambiguous, do not create certainty.<sup>81</sup> Instead they open the door for numerous disputes between SARS and taxpayers.<sup>82</sup> It is important that meanings be accorded to the

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<sup>69</sup> SAICA 'Pay now, argue later' November 2014 – Issue 182, available at <https://www.saica.co.za>, accessed on 01 May 2018.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> RC Williams 'Tax Administration Laws Amendment Bill (B14 of 2014) will effect amendments to the Tax Administration Act 28 of 2011' available at <https://www.pwc.co.za>, accessed on 08 November 2018.

<sup>73</sup> [2012] 2 All SA 262 (SCA).

<sup>74</sup> Supra note 73 para 18.

<sup>75</sup> Supra note 73 para 19.

<sup>76</sup> Supra note 73 para 18.

<sup>77</sup> Supra note 73 para 19.

<sup>78</sup> Supra note 73 para 18.

<sup>79</sup> Supra note 73 para 20.

<sup>80</sup> Supra note 73 para 21.

<sup>81</sup> RC Williams *Income Tax in South Africa: Law & Practice* 2 ed (1995) 3.

<sup>82</sup> Ibid.

factors and terms in section 164 within the tax context as this would create certainty for taxpayers who intend to apply for the suspension of the payment of disputed amounts of tax. It is also worth noting that although taxpayers are afforded an opportunity to request for a suspension of payment, no time frame is provided within which SARS must render a reply to the request.<sup>83</sup>

### 3. ALTERNATIVE REMEDIES

#### *(a) Judicial review, constitutional and delictual remedies*

The courts have confirmed that the discretionary powers conferred upon SARS amount to administrative action, which is reviewable.<sup>84</sup> Such review would take place in terms of PAJA.<sup>85</sup> Thus, an aggrieved taxpayer is entitled to apply for the review of the decisions or conduct of SARS and its officials. However, success in a review application does not guarantee an award of damages as these are granted only in exceptional circumstances.<sup>86</sup>

A court may grant constitutional damages to an aggrieved taxpayer where it is appropriate to grant such relief.<sup>87</sup> If a court sets aside an administrative action and such an order does not properly recompense the applicant, this would prompt an award for constitutional damages.<sup>88</sup> However, as previously mentioned, Constitutional Court litigation is not affordable to many taxpayers and success is not certain.<sup>89</sup>

In some instances, the actions or inaction of SARS may cause a taxpayer to suffer economic loss.<sup>90</sup> Since the SARS Act does not exempt SARS from delictual liability, it is open to a taxpayer to claim delictual damages for pure economic loss from SARS.<sup>91</sup> However, a taxpayer would have to prove that SARS had a duty of care, which was breached, thereby resulting in the wrongfulness of SARS's conduct.<sup>92</sup> It is submitted that wrongfulness would not be an easy element to prove.<sup>93</sup> Croome argues that SARS, as an organ of state has a constitutional

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<sup>83</sup> A Lewis 'Pay now, argue later: are there any exceptions to this rule? : tax administration act' 2016 *TAXtalk* 55.

<sup>84</sup> *Contract Support Services (Pty) Ltd and Others v CSARS And Others* 1999 (3) SA 1133 (W) at 1144-5.

<sup>85</sup> See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) paras 22 and 25.

<sup>86</sup> See section 8 of PAJA.

<sup>87</sup> B Croome & L Olivier *Tax Administration* 2 ed (2015) 633.

<sup>88</sup> *Ibid* at 634.

<sup>89</sup> *Ibid* at 634.

<sup>90</sup> *Ibid* at 634.

<sup>91</sup> *Ibid* at 635.

<sup>92</sup> *Ibid*.

<sup>93</sup> *Ibid*.

obligation of accountability to its citizens.<sup>94</sup> He argues that it may be a ground for claiming delictual damages that SARS, through its conduct, caused undue damage to a taxpayer.<sup>95</sup>

#### 4. ONUS OF PROOF

The Income Tax Act formerly placed the onus of proof in tax disputes on SARS.<sup>96</sup> This provision was repealed because it was regarded as unduly cumbersome on SARS as the information that was required to discharge the onus was within the taxpayer's knowledge.<sup>97</sup> The current position under the Tax Administration Act places the onus of proof on a taxpayer that SARS's decision, which is objectionable or appealable, was erroneous.<sup>98</sup> The standard of proof is on a balance of probabilities.<sup>99</sup>

#### 5. JURISDICTION IN TAX DISPUTES

It is not only important for taxpayers to be aware of the remedies at their disposal. It is also crucial that taxpayers are aware of the appropriate forums to approach for their grievances against SARS. As already stated, for instance, a taxpayer who wishes to request for reasons for an assessment or who wishes to lodge an objection must do so at SARS. However, the Tax Administration Act provides for other forums at which tax grievances or disputes are to be resolved.

##### *(a) Alternative Dispute Resolution*

If an objection is refused, a taxpayer may either take the route of Alternative Dispute Resolution (ADR) or appeal to the Tax Board or to the Tax Court.<sup>100</sup> ADR is a more affordable and faster alternative for taxpayers.<sup>101</sup> It is not tantamount to litigation but is rather a distinct process through which the resolution of tax disputes may be achieved.<sup>102</sup> There is a code of conduct which the facilitator of the ADR process is obliged to obey to ensure a just outcome.<sup>103</sup> An

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<sup>94</sup> Ibid at 636.

<sup>95</sup> Ibid.

<sup>96</sup> Section 82 of the Income Tax Act.

<sup>97</sup> Croome & Olivier op cit note 87 at 262.

<sup>98</sup> Section 102(1) of the Tax Administration Act.

<sup>99</sup> Croome & Olivier op cit note 87 at 263.

<sup>100</sup> B Croome & J Croome *Street Smart taxpayers: a practical guide to your rights* (2017) 18.

<sup>101</sup> Ibid.

<sup>102</sup> SARS 'Alternative dispute resolution: Quick Guide' 31 October 2014 at 1, available at [www.sars.gov.za](http://www.sars.gov.za), accessed on 02 November 2018.

<sup>103</sup> Ibid.

agreement reached through ADR must be given effect to by SARS issuing a revised or amended assessment to the taxpayer.<sup>104</sup>

*(b) Tax Board*

The Tax Administration Act provides for the establishment of a Tax Board by the Minister of Finance.<sup>105</sup> The Tax Board is not a court of law but is rather an administrative tribunal.<sup>106</sup> Taxpayers that are in dispute with SARS regarding an assessment or a decision by SARS are required to first attempt to resolve the dispute through the Tax Board, provided that both parties consent to referring the matter thereto and provided that the amount in question is not more than that which is determined by the Minister of Finance by public notice.<sup>107</sup> The panel of the Tax Board is appointed by the Minister of Finance and comprises a chairperson, an accountant and a person who appears on behalf of the business community.<sup>108</sup>

*(c) Tax Court*

The Tax Court is not an appeal court in the generic sense of the word<sup>109</sup> but is simply a creature of the statute,<sup>110</sup> and its decisions do not create binding precedents.<sup>111</sup> It comprises a president of the Tax Court, an accountant and a person who appears on behalf of the business community.<sup>112</sup> The proceedings of the Tax Court are held in-camera.<sup>113</sup> This is intended for purposes of maintaining confidentiality of a taxpayer's affairs.<sup>114</sup> A taxpayer may elect to either represent himself or herself, or to have a representative.<sup>115</sup> The Tax Court lacks both the authority to determine the constitutionality of tax provisions as well as to make determinations involving PAJA.<sup>116</sup> Its jurisdiction is limited to appeals under the Tax Administration Act.<sup>117</sup> The Tax Court may either establish the correctness of an assessment or decision, order that an assessment or decision be changed or refer an assessment back to SARS for further

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<sup>104</sup> Croome & Olivier op cit note 87 at 289.

<sup>105</sup> Section 108 of the Tax Administration Act.

<sup>106</sup> SARS 'Dispute Resolution Process', available at [www.sars.gov.za](http://www.sars.gov.za), accessed on 03 November 2018.

<sup>107</sup> Section 109(1) of the Tax Administration Act.

<sup>108</sup> Section 110(1) of the Tax Administration Act.

<sup>109</sup> *Bailey v CIR* 6 SATC 69 at 76; *Ropes (Pty) Ltd v CIR* 13 SATC 1 at 10.

<sup>110</sup> *CIR v Taylor* 1934 AD 387 at 390.

<sup>111</sup> *CIR v City Deep Ltd* 7 SATC 1.

<sup>112</sup> Section 118(1) of the Tax Administration Act.

<sup>113</sup> Section 124(1) of the Tax Administration Act.

<sup>114</sup> Croome & Olivier op cit note 87 at 330.

<sup>115</sup> Section 125(2) of the Tax Administration Act.

<sup>116</sup> Croome & Croome op cit note 100 at 205.

<sup>117</sup> Section 107(1) of the Tax Administration Act.

consideration.<sup>118</sup> A taxpayer who is dissatisfied with the ruling of the Tax Court is entitled to appeal further to a full bench of the High Court or to the SCA.<sup>119</sup>

## 6. JUDICIAL ATTITUDE REGARDING TAXPAYERS' REMEDIES AND JURISDICTION IN TAX DISPUTES

In light of the available tribunals that may be approached in an attempt to resolve tax disputes, taxpayers might be forgiven for thinking that they are at liberty to approach any one at will. However, as demonstrated by the discussion of the case law hereunder, this is not necessarily the case. The courts have held that the manner in which an assessment or a decision by the revenue authority is to be challenged is that which is laid down in the tax statutes namely, objection and appeal.<sup>120</sup>

In *Rossi and Others v Commissioner for South African Revenue Service*<sup>121</sup> SARS had demanded an amount of tax from the taxpayer by way of a letter. SARS subsequently recovered the amounts through the appointment of the taxpayer's bank as agent.<sup>122</sup> The taxpayer sought a refund on the basis that the letter and other accompanying documents that were issued did not amount to valid assessments under the Income Tax Act.<sup>123</sup> SARS conceded that although the letter did not constitute the actual assessment,<sup>124</sup> it was nonetheless compelling proof of the amounts that were owed to it by the taxpayer.<sup>125</sup> It was further argued by SARS that the timeframe within which the taxpayer could challenge the validity of the assessment had lapsed.<sup>126</sup>

The court declined to adjudicate on the merits of the dispute and confined its determination to the jurisdiction issue.<sup>127</sup> The court pointed out that the first step a taxpayer that is aggrieved by an assessment must take is to lodge an objection.<sup>128</sup> Where an objection is refused, such a taxpayer is further entitled to appeal the disallowance.<sup>129</sup> In casu the time frame within which

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<sup>118</sup> Section 129(1) of the Tax Administration Act.

<sup>119</sup> Section 133(2) of the Tax Administration Act.

<sup>120</sup> *Van Zyl NO v The Master and Another* 49 SATC 165 at 16970.

<sup>121</sup> 74 SATC 387 para 14.

<sup>122</sup> *Supra* note 121 para 5.

<sup>123</sup> *Supra* note 121 para 6.

<sup>124</sup> *Supra* note 121 para 6.

<sup>125</sup> *Supra* note 121 para 7.

<sup>126</sup> *Supra* note 121 para 8.

<sup>127</sup> *Supra* note 121 para 10.

<sup>128</sup> *Supra* note 121 para 12.

<sup>129</sup> *Supra* note 121 para 13.

the taxpayer could lodge an objection had lapsed<sup>130</sup> and he had not appealed the matter.<sup>131</sup> The court held that by approaching the High Court, the taxpayer was merely attempting to circumvent the consequences of not having timeously utilised the remedies of objection and appeal as was provided for in the Income Tax Act.<sup>132</sup> Thus, the court made it clear that taxpayers are not at liberty to elect whether to take their dispute to the Tax Court or to the High Court.<sup>133</sup> The court referred to such conduct as ‘forum shopping’ on the taxpayer’s part, which the court declared unacceptable.<sup>134</sup> According to the Court, this could never have been the legislature’s intention.<sup>135</sup> Rather, the Tax Court was put in place specifically to resolve tax disputes.<sup>136</sup> Thus, the court dismissed the matter on the basis that it did not have jurisdiction to hear it.<sup>137</sup>

In *MTN International (Mauritius) Ltd v Commissioner for South African Revenue Service*<sup>138</sup> the Commissioner had issued an additional assessment to the taxpayer. The taxpayer launched an application in terms of PAJA to review and set aside the additional assessment.<sup>139</sup> The grounds of the application were that SARS had back dated the assessment in an attempt to circumvent prescription as provided for in the Income Tax Act.<sup>140</sup> It was further argued that the Commissioner had taken into account irrelevant considerations and that SARS had not properly applied its mind but had acted under ulterior motives.<sup>141</sup>

The issues before the court were whether SARS had failed to adhere to the requisite procedures in raising the additional assessment and whether as a result, the assessment was void for infringing upon the taxpayer’s right to fair and just administrative action.<sup>142</sup> The court held that the allegations that were brought against SARS involved the merits of the matter and would have required the court to make a determination on the merits.<sup>143</sup> The court explained that in order to determine whether the Commissioner had acted with ulterior motives or in bad faith, it had to first establish whether the Commissioner had deemed that it was appropriate to issue

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<sup>130</sup> Supra note 121 para 12.

<sup>131</sup> Supra note 121 para 13.

<sup>132</sup> Supra note 121 para 18.

<sup>133</sup> Supra note 121 para 32.

<sup>134</sup> Supra note 121 para 32.

<sup>135</sup> Supra note 121 para 32.

<sup>136</sup> Supra note 121 para 32.

<sup>137</sup> Supra note 121 para 41.

<sup>138</sup> 75 SATC 171 para 1.

<sup>139</sup> Supra note 138 para 1.

<sup>140</sup> Supra note 138 para 8.

<sup>141</sup> Supra note 138 para 24.

<sup>142</sup> Supra note 138 para 19.

<sup>143</sup> Supra note 138 para 25.



the additional assessment in the circumstances.<sup>144</sup> The court held that such a determination lay solely with the Tax Court<sup>145</sup> and the application was dismissed with costs.<sup>146</sup>

In *Medox Ltd v Commissioner for South African Revenue Service*<sup>147</sup> the taxpayer company applied to the High Court to have all the income tax assessments that had been issued to it set aside. SARS contended that the dispute pertained to the merits of the case and as a result the High Court lacked jurisdiction to adjudicate thereon.<sup>148</sup> In addition, SARS argued that the taxpayer had omitted to utilise the remedies of objection and appeal and that its claim had prescribed.<sup>149</sup> The taxpayer conceded the tardiness of its claim but attempted to overcome this impediment by arguing that since its claim had prescribed, it had no other remedy save to approach the High Court for relief.<sup>150</sup>

The court held that in respect of tax disputes, the High Court is not a court of first instance.<sup>151</sup> The court also pointed out with reference to PAJA that there is a bar to resorting to the judicial review remedy until other internal remedies have been utilised.<sup>152</sup> The court found that the taxpayer had not timeously utilised the internal remedies of objection and appeal, and held that its conduct was nothing more than an attempt to bypass the clear provisions of the Income Tax Act.<sup>153</sup> The court similarly declined to adjudicate on the matter on the basis of lack of jurisdiction.<sup>154</sup> The court explained that the nature of the dispute was such that it required the court to delve into the merits, which only the Tax Court had jurisdiction to determine.<sup>155</sup>

The Constitutional Court in *Metcash Trading Ltd v Commissioner for the South African Revenue Service*<sup>156</sup> held that where taxpayers seek relief from the High Court, its jurisdiction as regards tax disputes is limited to legal issues. In addition, the High Court can only grant interlocutory and not final relief in this regard.<sup>157</sup>

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<sup>144</sup> Supra note 138 para 32.

<sup>145</sup> Supra note 138 para 32.

<sup>146</sup> Supra note 138 para 35.

<sup>147</sup> 76 SATC 369 para 1.

<sup>148</sup> Supra note 147 para 4.

<sup>149</sup> Supra note 147 para 7.

<sup>150</sup> Supra note 147 para 8.

<sup>151</sup> Supra note 147 para 26.

<sup>152</sup> Supra note 147 para 20.

<sup>153</sup> Supra note 147 para 27.

<sup>154</sup> Supra note 147 para 28.

<sup>155</sup> Supra note 147 para 28.

<sup>156</sup> 2001 1 BCLR 1 (CC) para 45; see also *Friedman and Others NNO v Commissioner for Inland Revenue* 1991 (2) SA 340 (W).

<sup>157</sup> Supra note 156 para 45.

It is clear from the above discussion the importance of taxpayers to be aware of the appropriate forums to approach. Taxpayers are required to make use of the remedies in the Tax Administration Act as a matter of first resort and to approach the Tax Board or the Tax Court, which will deal with the merits of a dispute. Although taxpayers also have the remedy of judicial review, they are required to first make use of internal remedies as provided for in the Tax Administration Act. Thus, a taxpayer who intends to challenge SARS either by way of an appeal or a review, must be mindful of the crucial distinction between the two.

Galgult J in *Income Tax Case Number 1697* explained the trite legal principles thus:

An appeal is a process whereby the court is entitled to consider the correctness of the conclusion reached and to interfere, if that conclusion is wrong, by substituting its own decision...if legislation accords it such right. On the other hand, a court's power of review, which really means nothing more than judicial scrutiny...arises from a court's general or inherent power to prevent illegalities... . The court's only function on review...is to enquire into whether there has been an illegality in the procedure. If there has been such an illegality, the court will set aside the decision, and will refer it back for reconsideration by the official concerned. Examples of such illegalities are where the decision is reached mala fide, or where the official has acted capriciously or arbitrarily in arriving at it, or where he has failed to follow the procedure laid down in the enabling legislation.<sup>158</sup>

## 7. ALTERNATIVES TO APPROACHING THE COURTS

There are other alternatives that taxpayers may opt for instead of approaching the courts. An example is the SARS Complaints Management Office (CMO) to which taxpayers may refer their complaints.<sup>159</sup> The said office only deals with disputes involving SARS's failure to adhere to administrative procedures.<sup>160</sup> It has no authority to deal with the merits of a dispute as well as matters that have already been referred to the courts or to the Public Protector, or matters involving SARS policy.<sup>161</sup>

Taxpayers may approach the office of the Tax Ombud (OTO) which was established by the Minister of Finance under the Tax Administration Act.<sup>162</sup> The OTO was not in place in the

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<sup>158</sup> 63 SATC 146 at 152-153.

<sup>159</sup> Croome & Croome op cit note 100 at 21-22.

<sup>160</sup> Croome & Olivier op cit note 87 at 640.

<sup>161</sup> Ibid at 640-641.

<sup>162</sup> Section 259 of the Tax Administration Act.

past in the South African Jurisdiction<sup>163</sup> and is thus a refreshing change. The OTO deals with complaints involving service and the procedures that SARS is obliged to follow in terms of any tax statute.<sup>164</sup> Fortunately, the independence of the OTO is established by virtue of the fact that it is answerable, not to SARS, but to the Minister of Finance.<sup>165</sup> Initially, officials of the OTO were appointed under the SARS Act, in terms of which the Commissioner had a say.<sup>166</sup> A similar provision was contained in the Tax Administration Act.<sup>167</sup> This caused dissatisfaction amongst tax commentators on the basis that such officials would most probably have practiced partiality towards SARS's cause over the plight of taxpayers.<sup>168</sup>

In view of this, the Tax Ombud, Judge Ngoepe, recommended amendments to the relevant provisions in order to achieve the independence of the OTO.<sup>169</sup> The relevant provision was subsequently amended to the effect that the portion which required consultation with the Commissioner in the appointment of officials of the OTO was eliminated.<sup>170</sup> However, the OTO similarly has neither the authority to determine the merits of a complaint nor to review tax policy, tax statutes and matters that have been to the Tax Court.<sup>171</sup> Moreover, the OTO merely serves the role of an independent conciliator or mediator.<sup>172</sup> Its recommendations have no binding effect but are simply aimed at attempting to resolve disputes.<sup>173</sup>

Alternatively, taxpayers are at liberty to approach the Public Protector, an institution that is empowered to make enquiries into alleged misuse of power by the state and its organs;<sup>174</sup> or the South African Human Rights Commission.<sup>175</sup> However, these institutions lack employees with the necessary tax skills to adequately handle tax related complaints.<sup>176</sup>

The benefits of the various forums through which taxpayers may attempt to resolve their disputes with SARS are acknowledged. For instance, this assists taxpayers to choose which

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<sup>163</sup> B J Croome *Taxpayers' Rights in South Africa: An analysis and evaluation of the extent to which the powers of the South African Revenue Service comply with the constitutional rights to property, privacy, administrative justice, access to information and access to courts* (unpublished PhD thesis, University of Cape Town, 2008) iii.

<sup>164</sup> Section 16 of the Tax Administration Act.

<sup>165</sup> Croome & Croome op cit note 100 at 24; see also section 14(5)(a) of the Tax Administration Act.

<sup>166</sup> D Davis, D Tickle & T Legwaila *Report on Tax Administration* (2017) 81, available at [www.taxcom.org.za](http://www.taxcom.org.za), accessed on 13 June 2018.

<sup>167</sup> Ibid at 82.

<sup>168</sup> Ibid at 81.

<sup>169</sup> Ibid at 82.

<sup>170</sup> Ibid at 83.

<sup>171</sup> Section 17 of the Tax Administration Act.

<sup>172</sup> Croome & Croome op cit note 100 at 25.

<sup>173</sup> Section 20 of the Tax Administration Act.

<sup>174</sup> Croome & Croome op cit note 100 at 252.

<sup>175</sup> Ibid at 253.

<sup>176</sup> Ibid at 252.

forums to approach in accordance with their means. Indeed, the informal nature and the cost-effectiveness of these forums make them an attractive alternative to litigation in the courts.<sup>177</sup> However, it is arguable that these forums simply provide taxpayers with various options. They do not in themselves have sufficient ameliorating effect on the wide powers conferred upon SARS.

## 8. CONCLUSION

The statutory remedies of objection, appeal and the request for suspension of payment, as well as the statutory forums in place to assist in the resolving of tax disputes are acknowledged. Nonetheless, the fact remains that the remedies in their current form do little to assist taxpayers who are still compelled to settle amounts demanded by SARS on pain of the consequences stipulated in the Tax Administration Act. SARS is in a highly privileged position as opposed to the taxpayer.

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<sup>177</sup> Davis, Tickle & Legwaila op cit note 166 a 78.

## CHAPTER FIVE

### CONCLUSION

#### 1. OVERVIEW AND FINDINGS

The purpose of this mini dissertation was to critically discuss the ‘pay now, argue later’ rule in South African tax law. The result of the operation of the rule is that once SARS issues a tax assessment to a taxpayer, the amount reflected therein must be paid by the taxpayer to SARS despite the taxpayer disputing such amount. As discussed in chapter two, the rule does not stand alone. Its strength lies in the mechanisms provided in the Tax Administration Act, in terms of which certain powers are bestowed upon SARS in order to bring about the successful recovery of tax from taxpayers. It is these statutory mechanisms that operate in conjunction with the rule that make it a success. The dissertation entailed a discussion of the powers bestowed upon SARS in the statutory mechanisms as compared to the rights of taxpayers.

The findings of this research work, in terms of the various arguments from the literature, indicate that as far as the rule is concerned, the mechanisms in the Tax Administration Act, as well as the decisions of the courts are primarily aimed at assisting SARS to successfully execute its tax collection mandate. This is not to say that the said statute takes no cognisance of the need to protect taxpayers’ rights. Its recognition of taxpayers’ rights is evidenced by the provision of taxpayers’ remedies to lodge objections and appeals against SARS’s decisions, to request for suspension of payment of disputed taxes as well as provision providing for a number of avenues at which taxpayers may refer complaints and disputes. Nonetheless, these avenues do not confer any new rights upon taxpayers. As is implicit in the rule itself, the draconian nature of the powers bestowed upon SARS remains. In other words, the said remedies do not offer adequate protection to taxpayers and the possibility of taxpayers experiencing hardship, financial or otherwise, is always present.

A further finding is that a measure of uncertainty persists in view of the conflicting High Court decisions, particularly on the issue whether a certified statement constitutes a judgment obtained by SARS in the absence of a taxpayer.<sup>1</sup> The issue remains to be authoritatively

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<sup>1</sup> *Mokoena v Commissioner, South African Revenue Service* 2011 (2) SA 556 (GSJ); *Capstone 556 (Pty) Ltd and Another v Commissioner, South African Revenue Service and Another* 2011 (6) SA 65 (WCC).

decided either by a full bench of the High Court, the Supreme Court of Appeal or the Constitutional Court.

In addition, although the Constitutional Court affirmed the constitutionality of the rule in a VAT dispute,<sup>2</sup> some academics hold the view that a different result would ensue in an income tax dispute whilst others are not persuaded that the Constitutional Court would decide differently in an income tax dispute, as discussed in chapter three. Taxpayers and SARS alike wait with bated breath for a possible ruling of the apex court to settle the debate.

## 2. RECOMMENDATIONS

Tax legislation, such as the Tax Administration Act is manifestly complex and is not easily understood by many taxpayers.<sup>3</sup> The need for certainty cannot be overemphasised as it will assist taxpayers in the quest to protect their rights. Therefore, it is recommended that proper meanings and definitions within the Tax Administration Act be accorded to the phrases and terms in section 164. This will assist in eliminating the problems of interpretation and enable SARS to properly exercise its discretion, as well as the taxpayer to know what to expect when invoking their rights under this section.

The Tax Administration Act provides time frames within which taxpayers must utilise their remedies. However, the legislature omitted to provide a period in section 164 within which SARS must consider a suspension request and respond to the taxpayer.<sup>4</sup> Therefore, it is further recommended that the Tax Administration Act contain a time frame within which SARS must respond to taxpayers in respect of suspension of payment requests.

Although the Constitutional Court has held that the legislature contemplated the protection of the right of access to the courts through the establishment of the Tax Court,<sup>5</sup> its decisions are not binding as seen from the discussion in chapter four. It is further recommended that the decisions of the Tax Court, as a court of first instance and in respect of the merits of a dispute, become binding in the interest of creating legal certainty for both SARS and taxpayers. Its decisions should form judicial precedent until such time that a decision is subsequently found to be incorrect and overruled.

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<sup>2</sup> *Metcash Trading Ltd v Commissioner for the South African Revenue Service* 2001 1 BCLR 1 (CC).

<sup>3</sup> RC Williams 'SARS & fair administrative action: quo vadis?' 2013 *TAXtalk* 24.

<sup>4</sup> A Lewis 'Pay now, argue later: are there any exceptions to this rule? : tax administration act' 2016 *TAXtalk* 55.

<sup>5</sup> *Supra* note 2.

In view of the need to raise greater awareness of taxpayers' rights, it is further recommended that a Tax Payer Bill of Rights be put in place.<sup>6</sup> This is because although the Tax Administration Act contains taxpayers' rights, the complex wording of the statute might not be easily understandable to all taxpayers.<sup>7</sup> This will also promote a spirit of transparency and assist to enhance the confidence of taxpayers in SARS.<sup>8</sup>

As explained in chapter four, the Public Protector lacks personnel with the requisite tax expertise in order to handle complaints of a tax nature.<sup>9</sup> In view of the crucial role of the Public Protector, it is further recommended that personnel with the requisite tax expertise be employed by the office of the Public Protector. This will enhance the said office's oversight role over SARS as an organ of state in the battle to fight against the misuse of power by the State.

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<sup>6</sup> D Davis, D Tickle & T Legwaila *Report on Tax Administration* (2017) 64, available at [www.taxcom.org.za](http://www.taxcom.org.za), accessed on 13 June 2018.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> B Croome & J Croome *Street Smart taxpayers: a practical guide to your rights* (2017) 252.

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