AN ANALYSIS OF CHALLENGING THE COMMISSIONER'S DISCRETIONARY POWERS INVOKED IN TERMS OF SECTIONS 74A AND 74B OF THE INCOME TAX ACT 58 OF 1962, IN LIGHT OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA 108 OF 1996

BY

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CERTIFICATE

I, the undersigned, hereby declare that the work contained in this thesis is, unless specifically indicated to the contrary in the text, my own original work which has not been submitted before in whole or in part at any other University for a degree.

SIGNED ON THIS THE 18th DAY OF NOVEMBER 2013 at JUPITER, FLORIDA, USA

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ABSTRACT

This thesis deals with the relevant law up to 30 September 2012.

This thesis analyses the inter-relationship in particular between ss 1(c), 33, 41(1), 195(1) and 237 of the Constitution of the Republic of South Africa ('the Constitution') (collectively referred to as 'constitutional obligations'); s 4(2) of the South African Revenue Service Act 34 of 1997 ('SARS Act'); the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'); and a decision by the Commissioner for the South African Revenue Service ('the Commissioner' or 'SARS', as the case may be) to exercise his powers under ss 74A and 74B of the Income Tax Act 58 of 1962 ('ss 74A and 74B of the Income Tax Act') by requiring taxpayers to produce or provide information, documents and things at the commencement of an inquiry or audit of taxpayers, and concludes that such a decision constitutes 'administrative action' as defined in s 1 of PAJA, or, alternatively is subject to the constitutional principle of legality. This conclusion is reached on the basis that such a decision, of an administration nature made, or leading to a further decision proposed to be made, or required to be made, to issue revised assessments will:

- have been taken by an organ of State exercising a public power in terms of legislation;
- involve the exercise of a discretionary power, where SARS determines whether and in what circumstances it will require a taxpayer to provide information, documents and things;
- adversely affect taxpayers' rights, and has a direct, external legal effect. The fact that the power in question is preliminary and investigative, and that its exercise does not in itself determine whether any tax, penalties and interest is payable, does not detract from the impending conclusion usually made by the same SARS officials that tax, penalties and interest will most likely become payable following from the preliminary investigation. The decision imposes on taxpayers an obligation to do something (to produce

> or provide information, documents and things) which, but for the exercise of that power, taxpayers would not in law be obliged to do, due to taxpayers' privacy rights in terms of s 14 of the Constitution, and entitling them to expect SARS to abide by its constitutional obligations. A failure by taxpayers to comply exposes them to criminal prosecution under s 75(1)(b) of the Income Tax Act. Furthermore, the power exercised by SARS is not subject to the normal objection and appeal processes in the Income Tax Act, limiting the opportunity for taxpayers to challenge such a decision in terms of the Income Tax Act.

Lastly, there is no relevant exclusion in the definition of 'administrative action' that removes this type of decision from that definition in PAJA.

TABLE OF CONTENTS

CHAPTER 1
HYPOTHESIS 9
1.1 THE THESIS CONTRIBUTION TO KNOWLEDGE IN TAXATION 10
1.2 THE CONTRIBUTION THAT THIS DISSERTATION WILL MAKE TO TAX LAW LITERATURE 11
1.3 RESEARCH QUESTIONS AND HYPOTHESIS 12
1.4 RESEARCH OBJECTIVES, METHODOLOGIES AND POTENTIAL FINDINGS 13
1.4.1 Research objectives 13
1.4.2 Methodologies 13
1.4.3 Potential findings 14
1.5 THEORETICAL FRAMEWORK AND HOW THE METHODOLOGIES EMPLOYED WILL ADDRESS THE RESEARCH QUESTION 15

CHAPTER 2
THE CONSTITUTION IN THE CONTEXT OF SS 74A AND 74B 17
2.1 ADVENT OF THE CONSTITUTION 18
2.2 THE RELEVANT CONSTITUTIONAL PROVISIONS 24
2.2.1 Foundational Values 24
2.2.2 Bill of Rights 26
2.2.3 Other Constitutional Provisions 27
2.2.4 Conduct, decisions and public power 28
2.2.5 Conduct, audits and inquiries 33
2.2.6 Conduct and legitimate expectations 34

2.3 A CONSTITUTIONAL BALANCE OF SARS'POWERS AND THE 'ADMINISTRATIVE ACTION' DEBATE 35
2.3.1 Introduction 35

2.3.2 Administrative action 36
2.3.3 Conclusion 44
2.4 THE RELEVANCE OF PAJA AND THE PRINCIPLE OF LEGALITY 44
2.4.1 Introduction 44
2.4.2 The principle of legality 47
2.4.3 Recent developments in the principle of legality 52
2.5 ADEQUATE REASONS 53
2.5.1 Introduction 53
2.5.2 The relevance of s 74 of the Income Tax Act 54
2.5.3 The meaning of 'adequate reasons' 58
2.5.4 Conclusion 60

CHAPTER 3
LIMITATIONS TO INVOKING SS 74A AND 74B OF THE INCOME TAX ACT 63
3.1 THE STATUTORY PROVISIONS: SS 74A, 74B, 74 AND 75 64
3.2 THE SARS INTERNAL AUDIT MANUAL 64
3.3 LAWFULNESS 70
3.3.1 Authority 74
3.3.2 Jurisdictional facts 76
3.3.3 Abuse of discretion 79
3.3.3.1 Improper or ulterior purpose or motive 82
3.3.3.2 *Mala fides* or bad faith 85
3.3.3.3 Failure to apply mind or relevant and irrelevant consideration 86
3.3.3.4 Unlawful fettering 87
3.3.3.5 Arbitrary and capricious decision-making 88
3.4 REASONABLENESS 89
3.4.1 Rationality 91
3.4.2 Proportionality 93
3.5 PROCEDURAL FAIRNESS 96
3.5.1 Bias 96
3.5.2 *Audi alteram partem* 97

3.6 LEGITIMATE EXPECTATIONS 101
3.6.1 The Legitimate Expectation Doctrine in the context of ss 74A and 74B 101
3.6.2 Limitation to the Legitimate Expectation Doctrine 109
3.7 MULT-STAGED DECISION-MAKING 113
3.8 'JUST CAUSE' DEFENCE 116

CHAPTER 4
SECTION 195(1) OF THE CONSTITUTION, 1996, AND PUBLIC ADMINISTRATION DUTIES WITH REFERENCE TO SECTIONS 74A AND 74B OF THE INCOME TAX ACT 123
4.1 INTRODUCTION TO SECTION 195(1), PAJA AND THE PRINCIPLE OF LEGALITY 124
4.2 THE DUTIES OF SARS EMANATING FROM SECTION 195(1) OF THE CONSTITUTION 126
4.2.1 Introduction 126
4.2.2 What are the democratic values referred to in s 195(1)? 128
4.2.3 High standard of professional ethics 132
4.2.4 Services must be provided impartially, fairly, equitably and without bias 141
4.2.5 Public administration must be accountable 143
4.2.6 Transparency must be fostered 147
4.2.7 Limitations to s 195(1) 149

CHAPTER 5 151
JUDICAL REVIEW WITH REFERENCE TO SS 74A AND 74B OF THE INCOME TAX ACT
5.1 INTRODUCTION 152
5.2 WHAT IS MEANT BY REVIEW 155
5.3 THE APPLICABILITY OF OBJECTION AND APPEAL 158
5.4 REVIEW APPLICATION DIRECTLY TO THE TAX COURT 160
5.5 REVIEWING UNCONSTITUTIONAL CONDUCT 164
5.5.1 Introduction 164
5.5.2 Sections 6, 7 and 8 of PAJA 165

5.5.3 Rule 53 of the Uniform Rules of Court 169
5.5.4 Save where any law otherwise provides 170
5.5.5 Show cause 171
5.5.6 The grounds of review 178
5.5.6.1 Introduction 178
5.5.6.2 Constitutionality of the inquiry and audit 181
5.5.6.3 Appropriate authority 183
5.5.6.4 Jurisdictional facts 184
5.5.6.5 Abuse of discretion 185
5.5.6.6 Reasonableness 187
5.5.6.7 Natural justice and Procedural fairness 188
5.5.6.8 Legitimate expectation 189
5.5.6.9 Constitutional obligations in terms of s 195(1) 190
5.6 SUPPORT FOR REVIEW OF ss 74A and 74B 191
5.7 PITFALLS IN BRINGING THE RULE 53 APPLICATION 194

CHAPTER 6
THE IMMEDIATE FUTURE 203
6.1 INTRODUCTION 204
6.2 THE NEW PROPOSED TAX ADMINISTRATION ACT 206
6.3 RELEVANT MATERIAL 209
6.4 REQUEST FOR RELEVANT MATERIAL, AUDIT SELECTION AND FIELD AUDIT 211
6.5 CONCLUSION 220

CHAPTER 7
CONCLUSION 223
7.1 GENERAL CONSTITUTIONAL PROVISIONS 224
7.2 SECTION 33 OF THE CONSTITUTION AND PAJA 224
7.3 SECTION 195(1) OF THE CONSTITUTION 226
7.4 ADMINISTRATIVE ACTION, THE RULE OF LAW AND THE PRINCIPLE OF LEGALITY 227
7.5 REVIEW IN TERMS OF SS 6, 7 AND 8 OF PAJA OR THE PRINCIPLE OF LEGALITY 234

7.6 ‘GOOD CAUSE’ SHOWN DEFENCE 237
7.7 THE PROPOSED TAX ADMINISTRATION ACT 238

BIBLIOGRAPHY 241
APPENDIX A 242
BOOKS
APPENDIX B 246
ARTICLES & MANUALS
APPENDIX C 251
LOCAL CASE LAW
APPENDIX D 268
FOREIGN CASE LAW
APPENDIX E 272
STATUTES

CHAPTER 1
HYPOTHESIS

1.1 THE THESIS CONTRIBUTION TO KNOWLEDGE IN TAXATION 10

1.2 THE CONTRIBUTION THAT THIS DISSERTATION WILL MAKE TO TAX LAW LITERATURE 11

1.3 RESEARCH QUESTIONS AND HYPOTHESIS 12

1.4 RESEARCH OBJECTIVES, METHODOLOGIES AND POTENTIAL FINDINGS 13

1.4.1 Research objectives 13

1.4.2 Methodologies 13

1.4.3 Potential findings 14

1.5 THEORETICAL FRAMEWORK AND HOW THE METHODOLOGIES EMPLOYED WILL ADDRESS THE RESEARCH QUESTION 15

1.1 THE THESIS CONTRIBUTION TO KNOWLEDGE IN TAXATION

The South African tax system has experienced significant changes within the purview of the advent of the Constitution, PAJA, and with the proposed promulgation of the Tax Administration Act.[1] The aim of the Tax Administration Act is to streamline the administrative provisions across the various tax Acts and consolidate these provisions into a single piece of legislation. It will bring to the fore the significance of a balance between the rights of taxpayers and the authority of SARS.

One such area is the power of SARS to audit and inquire into the tax-related affairs of taxpayers, and as such in terms of ss 74A and 74B of the Income Tax Act, require taxpayers to give information, documents or things, and to conduct an audit and inquiry on the taxpayer's premises.

These powers will be revisited in the new Tax Administration Act. The development in the Income Tax Act through the legislative changes, and supported more recently by various analogous supporting case law, has created an emerging body of jurisprudence that, although in its infancy, is developing into a formidable aspect of constitutional and administrative law, as applicable to these audit and inquiry provisions of SARS.

The Constitution protects the fundamental rights of taxpayers in South Africa. There are 27 fundamental rights outlined in ss 9 to 35 of the Constitution, collectively referred to as the Bill of Rights. Not all of the fundamental rights listed in the Bill of Rights are relevant to the SARS' audit and inquiry provisions. However, there are 9 fundamental rights that protect taxpayers. These are:

- Equality (s 9),
- Human dignity (s 10),
- Privacy (s 14),
- Freedom of trade, occupation and profession (s 22),
- Property (s 25),

[1]Tax Administration Act 28 of 2011.

- Access to information (s 32),
- Just administrative action (s 33),
- Access to courts (s 34) and
- Arrested, detained and accused persons (s 35).

The area of research for this dissertation focuses on the constitutional and administrative rights of taxpayers specifically in relation to the audit and inquiry powers of SARS (s 33 read with ss 1(c), 2, 41, 195 and 237). Emphasis in this study will specifically be directed to the taxpayers' right to just administrative action in the context of these audit and inquiry powers.

This dissertation aims to critically analyse the sections set out above as the foundation of taxpayers rights, and their entitlement to having SARS adhere to their constitutional obligations. This analysis will extend to the definition of 'administrative action' in PAJA, and the provisions of ss 3, 5 and 6 of PAJA. The constitutional obligations of SARS in s 4(2) of the SARS Act are also analysed.

This analysis will draw on leading constitutional and administrative case law in support of the hypothesis that taxpayers facing any SARS audit or inquiry, are being subjected to 'administrative action' as defined in PAJA, or in accordance with the constitutional principle of legality, and are entitled to question the public powers of SARS. Either way, if SARS acts outside the scope of their powers, as analysed, taxpayers have the right to take that conduct by SARS on review to the High Court.

1.2 THE CONTRIBUTION THAT THIS DISSERTATION WILL MAKE TO TAX LAW LITERATURE

Although the Constitution has been in existence for some 18 years, the rights of taxpayers has not been well developed within a constitutional context. Not many taxpayers challenge tax legislation or the conduct of SARS as being unconstitutional. There has thus been a lack of specific judicial decision in the context of tax legislation. There is also a shortage of scholarly text regarding the constitutional and administration rights of taxpayers. There is a particular dearth of literature in respect of the audit and inquiry powers of SARS. What is available is dealt with in a cursory manner without an in depth analysis, which this dissertation aims to achieve.

Thus far there has been almost no scholarly literature and no judiciary review regarding taxpayers' rights in relation to SARS powers to audit and inquire into taxpayers' affairs. Research into the influence on taxpayers' rights with regards to both procedural law and substantive law is important in determining the balance between SARS' powers and taxpayers' rights. Having an understanding of these two perspectives will enable taxpayers to protect themselves against unconstitutional legislation and conduct from SARS. Similarly, research in this area should be beneficial to SARS in that they too can recognise the limits of their powers and not violate taxpayers' rights.

1.3 RESEARCH QUESTIONS AND HYPOTHESIS

The aim of this dissertation is to critically evaluate SARS information gathering powers from the following two perspectives:

- The Income Tax Act restrictions placed on SARS without specific reference to the Constitution, the transgression of which will infringe on taxpayers' constitutional rights and the rule of law;
- The administration and constitutional restrictions placed on SARS, the transgression of which will infringe on taxpayers' constitutional rights and the rule of law.

1.4 RESEARCH OBJECTIVES, METHODOLOGIES AND POTENTIAL FINDINGS

1.4.1 Research Objectives

The primary objective of the research done in this dissertation is to critically analyse the provisions of ss 74A and 74B and the application by SARS of these powers to determine where the conduct of SARS infringes on the constitutional rights of taxpayers, and the constitutional obligations taxpayers can expect SARS to fulfil.

1.4.2 Methodologies

The research upon which this dissertation is based, analyses and interprets the Constitution, the relevant tax legislation, relevant case law and scholarly writings in this regard. The research thus falls within the domain of legal research.

The Council of Australian Law Deans,[1] in their *Statement on the Nature of Legal Research*, summarises the nature of legal research as follows:

> Legal research is multi-faceted. It is distinctive in some respects, and part of the mainstream of the humanities and social sciences in others. It would equally be mistaken to think of legal research as wholly different from or wholly same as other research in the humanities and social sciences.

The Statement refers to the *Pearce Report,*[2] which categorized legal research as either "doctrinal", "theoretical" or "reform-oriented" research. It also refers to the *Canadian Arthurs Report*,[3] which identified "fundamental" legal research as a fourth category.

The two reports described these four categories as follows:

- doctrinal – the systematic exposition, analysis and critical evaluation of legal rules and their inter-relationships;

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[1]Council of Australian Law Deans, *Statement on the Nature of Legal Research* http://www.cald.asn.au/docs/cald%20statement%20on%20the%20nature%20of%20legal%20research%20-%202005.pdf (last accessed 21 November 2013).

[2]Dennis Pearce, Enid Campbell, & Don Harding*, Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission,* AGPS, 1987, paras 9.10 - 9.15

[3]Harry Arthurs, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law* (1983).

- theoretical – the conceptual bases of legal rules and principles;
- reform-oriented – recommendations for change, based on critical examination; and
- Fundamental – law as a social phenomenon, exploring social, political, economic, philosophical and cultural implications and associations.

The Council of Australian Law Deans emphasize that the categories are overlapping, rather than mutually exclusive – convenient, rather than precise ways of thinking about legal research.

The review of literature for this dissertation consisted of an analysis of the Constitution, the relevant provisions of the Income Tax Act, the draft Tax Administration Act and other related fiscal legislation. The case law and common law principles together with the relevant reference textbooks and journal articles were also be researched.

Foreign reported decisions were referred to where appropriate. Section 38(1) of the Constitution requires the judiciary to consider international law and permits the judiciary to refer to foreign law when interpreting the Bill of Rights. This is a proviso that the judiciary "must promote the values that underlie an open and democratic society based on human dignity, equality and freedom".

As far as the local court decisions are concerned, a comprehensive search has been done on the *LexisNexis Electronic Library* and through various offshore online library databases. Appropriate cases relating to the this dissertation were selected. An internet search was also done for various published articles on the subject under consideration, both locally and internationally.

1.4.3 Potential Findings

The legislature introduced measures enabling SARS to obtain information, documents and things to assist in assessing and collecting taxes in terms of their powers under ss 74A and 74B. These measures may be regarded as being in line with the founding principles of the Constitution, but the manner in which SARS uses these powers may be constitutionally questionable, unless SARS pays careful attention to its constitutional obligations and taxpayers fundamental rights. The conduct of SARS in enforcing such

powers must measure up to the standards required by the founding principles of the Constitution. In the event that SARS conduct does not respect taxpayers constitutional rights or meet the constitutional standards, taxpayers are entitled to address the misconduct of SARS through a judicial review process, either in terms of PAJA, or in terms of the constitutional principle of legality.

1.5 THEORETICAL FRAMEWORK AND HOW THE METHODOLOGIES EMPLOYED WILL ADDRESS THE RESEARCH QUESTION

The present research analyses and interprets the Constitution, together with relevant case law, and scholarly writings to identify a framework of taxpayer rights, and uses this framework to analyze, interpret and critique the use by SARS of its ss 74A and 74B powers. This is done in order to determine whether, how and to what extent the use by SARS of these powers may infringe upon taxpayers' rights.

This dissertation has 7 chapters. Chapter 2 is an introduction to the fundamental constitutional rights of taxpayers in the context of ss 74A and 74B powers. Chapter 3 deals with the legislative limitations of ss 74A and 74B. Chapter 4 sets out the constitutional obligations of SARS when invoking ss 74A and 74B powers. Chapter 5 deals with the judicial remedies available to taxpayers aggrieved by SARS' misuse of its ss 74A and 74B powers. Chapter 6 covers the immediate future after this dissertation with the proposed advent of the Tax Administration Act. Chapter 7 is the conclusion.

Each issue raised in this dissertation is inter-connected with other emerging issues so as to meet the overall objective of this dissertation, namely to critically analyze the constitutional rights of taxpayers, and to determine when SARS' powers conferred on them by the ss 74A and 74B infringe upon those rights, and what remedy is available to those taxpayers.

CHAPTER 2

INTRODUCTION TO THE CONSTITUTION IN THE CONTEXT OF SS 74A AND 74B

2.1 ADVENT OF THE CONSTITUTION 18

2.2 THE RELEVANT CONSTITUTIONAL PROVISIONS 24

2.2.1 Foundational Values 24

2.2.2 Bill of Rights 26

2.2.3 Other Constitutional Provisions 27

2.2.4 Conduct, decisions and public power 28

2.2.5 Conduct, audits and inquiries 33

2.2.6 Conduct and legitimate expectations 34

2.3 A CONSTITUTIONAL BALANCE OF SARS'POWERS AND THE 'ADMINISTRATIVE ACTION' DEBATE 35

2.3.1 Introduction 35

2.3.2 Administrative action 36

2.3.3 Conclusion 44

2.4 THE RELEVANCE OF PAJA AND THE PRINCIPLE OF LEGALITY 44

2.4.1 Introduction 44

2.4.2 The principle of legality 47

2.4.3 Recent developments in the principle of legality 52

2.5 ADEQUATE REASONS 53

2.5.1 Introduction 53

2.5.2 The relevance of s 74 of the Income Tax Act 54

2.5.3 The meaning of 'adequate reasons' 58

2.5.4 Conclusion 60

CHAPTER TWO

INTRODUCTION

2.1 ADVENT OF THE CONSTITUTION

Prior to the advent of the Constitution[1] and the start of a new democracy in South Africa, judicial reviews, and the grounds for judicial review, in respect of discretionary decisions, and the exercise of power generally, were governed solely by the common law. The grounds for judicial review in terms of the common law could broadly be categorized as excess of power, use of powers for ulterior purpose[2], bad faith[3] or dishonesty, gross unreasonableness[4], and breach of the *audi alteram partem* rule.[5] To this can be added vagueness[6] and the fettering by rigidity[7] of discretion.

Since then the development of administrative law has advanced significantly with the promulgation of the Constitution, such as in the leading constitutional case of *Pharmaceutical Manufacturers Association of South Africa and another: In Re: Ex Parte President of the Republic of South Africa and Others*[8] and as commented on by some academic writers.[9] In the *Pharmaceutical Manufacturers* case[10] the Constitutional Court held that the common law was not a body of law separate and distinct from the Constitution. The court held that there was only one system of law shaped by the Constitution, which was the supreme law. All law, including the common law, derived its force from the Constitution and was subject to constitutional control. Therefore, courts no

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[1]Constitution of the Republic of South Africa 108 of 1996, hereinafter abbreviated as 'the Constitution' in this thesis.
[2] See section 3.3.3.1: *Improper or ulterior purpose or motive infra*.
[3] See section 3.3.3.2: *Mala Fides or Bad Faith infra*.
[4] See section 3.4: *Reasonableness infra*.
[5] See section 3.5.2: *Audi Alteram Partem infra*.
[6]*R v Jopp* 1949 (4) SA 11 (N); *R v Shapiro* 1935 NPD 155; *S v Meer* 1981 (1) SA 739 (N); and *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC).
[7]*Britten v Pope* 1916 AD 150; *Johannesburg Town Council v Norman Anstey & Co* 1928 AD 335; and *Moreletasentrum (Edms) Bpk v Die Drankraad* 1987 (3) SA 407 (T).
[8]*Pharmaceutical Manufacturers Association of South Africa and another: In Re: Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC), hereinafter referred to in this chapter as the *Pharmaceutical Manufacturers* case.
[9]See also Currie I & Klaaren J *The Promotion of Administrative Justice Act Benchbook* (2001) SiberInk; and *Constitutional Cases Commentary* De Rebus (September 2003) Lexis Nexis (last accessed 11 January 2013); See also the analysis in section 1.3: *A Constitutional Balance of SARS' Powers and the 'Administrative Action' Debate* of this thesis.
[10]*Supra* footnote 11 at para's [41], [45] and [50].

longer had to claim space and push boundaries to find means of controlling public power. What would have been *ultra vires* under the common law by reason of a functionary exceeding a statutory power was invalid under the Constitution according to the doctrine or principle of legality. In this respect, at least, constitutional law and common law were intertwined with there being no real difference between them. The same was held to be true of constitutional law and common law in respect of the validity of administrative decisions. The Constitutional Court held that what is 'lawful administrative action', and 'procedurally fair administrative action' justifiable in relation to the reasons given for it, 'cannot mean one thing under the Constitution, and another thing under the common law'.

Furthermore, just administrative action referred to in s 33 of the Constitution, requires all administrative action to be lawful, reasonable and procedurally fair,[11] and in cases where rights (and legitimate expectations)have been materially and adversely affected by administrative action, those taxpayers affected are entitled to be given written reasons.[12]

In LAWSA[13] the authors describe just administrative action in the following terms as emanating from the non-judicial branch of government, such as organs of state. It implies a system of public administration which upholds principles of fairness, reasonableness, equality, propriety and proportionality. These principles accountability and control, review and supervision, openness and consultation are promoted, with both procedural and substantive elements. Procedurally just administrative action requires compliance with the rules of procedural fairness. Substantively just administrative action requires compliance with the requirements of reasonableness, proportionality and rationality.

The explanation of just administrative action in LAWSA emanates from the provisions of ss 1(c) and 195(1) of the Constitution, read with s 33 in the Bill of Rights of the Constitution. Section 237 of the Constitution compels the an organ of state such as SARS and the Commissioner to diligently carry out all its obligations imposed upon it by the terms of the Constitution. Just 'administrative action' is analysed in this thesis in the context of ss 74A and 74B.

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[11]See section 3.3: *Lawfulness*, 3.4: *Reasonableness* and 3.5: *Procedural Fairness infra*.
[12]'Written reasons' referred to in s 33 of the Constitution are expanded in ss 3 and 5 of the Promotion of Administrative Justice Act 3 of 2000; See also section 2.5: *Adequate Reasons infra*.
[13] LAWSA Volume 1 *Administrative Law* 2nd ed Lexis Nexis at para 74 footnote 3 (last accessed 11 March 2013).

Sections 74A and 74B provide:

> 74A. Obtaining information, documents and things. - The Commissioner or any officer may, for the purposes of the administration of this Act in relation to any taxpayer, require such taxpayer or any other person to furnish such information (whether orally or in writing), documents or things as the Commissioner or such officer may require.
>
> 74B. Obtaining of information, documents or things at certain premises.—(1) The Commissioner, or an officer named in an authorisation letter, may, for the purposes of the administration of this Act in relation to any taxpayer, require such taxpayer or any other person, with reasonable prior notice, to furnish, produce or make available any such information, documents or things as the Commissioner or such officer may require to inspect, audit, examine or obtain.
>
> (2) For the purposes of the inspection, audit, examination or obtaining of any such information, documents or things, the Commissioner or an officer contemplated in subs (1), may call on any person—
>
> (a) at any premises; and
>
> (b) at any time during such person's normal business hours.
>
> (3) For the purposes of sub-section (2), the Commissioner or any officer contemplated in sub-section (1), shall not enter any dwelling-house or domestic premises (except any part thereof as may be occupied or used for the purposes of trade) without the consent of the occupant.
>
> (4) Any officer exercising any power under this section, shall on demand produce the authorisation letter issued to him.

The conduct by SARS in exercising its public power in deciding to apply the provisions of ss 74A and 74B to taxpayers, must comply with procedural just administrative action.

This requires procedural fairness, including the *audi alteram partem* principle[14] (the taxpayers right to be heard as part of procedural fairness), and impartial equitable conduct without bias. It also requires substantive just administrative action, namely, lawfulness (proper authority, compliance with jurisdictional facts and exercising discretion without abuse) and reasonableness (rationality and proportionality). These principles also form part of the constitutional principle of legality as discussed in section 2.4 below, and are analysed in Chapter 3.

Subsequent to the advent of the Constitution, the Promotion of Administrative Justice Act[15] with its codified twenty separate grounds for judicial review of administrative action[16] was promulgated. However, the concept of administrative action is open to interpretation, even though the term 'administrative action' is now defined in PAJA. A broader meaning was given to 'administrative action' in the Supreme Court of Appeal case of *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*[17] where the court, in referring to the 'cumbersome' definition, came to the conclusion that at the core of the definition was the idea of action (namely conduct, which includes exercising a discretion) often administered by public bodies undertaking their functions. In the Constitutional Court case of *Mazibuko and Others v City of Johannesburg and Others*[18] the court held that the clear purpose of PAJA was to give effect to s 33 of the Constitution, and that the meaning of administrative action be identified primarily with reference to PAJA's definition thereof. As will become more apparent during the discourse of this thesis, that the conduct of SARS in making a decision to exercise its powers in terms of ss 74A and 74B is administrative action.

An analysis of the term 'administrative action' is therefore relevant to the core conclusion reached in this thesis. This entails the right of taxpayers to challenge a decision based on the powers of SARS invoking the inquiry and audit provisions in terms of ss 74A and 74B of the Income Tax Act.[19] The Income Tax Act makes provision for original,

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[14] See section 3.5.2: *Audi Alteram Partem infra*.
[15] Promotion of Administrative Justice Act 3 of 2000, hereinafter abbreviated as 'PAJA' in this thesis.
[16] Section 6 (1) of PAJA.
[17] 2005 (6) SA 313 (SCA), hereinafter referred to in this chapter as the '*Grey's Marine* case'.
[18] *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC).

[19] Income Tax Act 58 of 1962, hereinafter referred to as 'the Income Tax Act' in this thesis, and ss74A and 74B of the Income Tax Act 58 of 1962, hereinafter referred to as 'ss 74A and 74B' in this thesis.

additional and estimated assessments and certain decisions[20] by the Commissioner or by any officer or person engaged in carrying out the said provisions under the control, direction or supervision of the Commissioner and SARS to be subject to objection and appeal.[21] A decision taken by SARS for the request of information, documents or things, to inquire into and audit the tax affairs of a taxpayer in terms of ss 74A and 74B is not subject to objection and appeal. However, there is the process of judicial review[22] for challenging those decisions of the SARS that are not subject to objection and appeal, where SARS' conduct is unlawful, unreasonable or procedurally unfair.

In the first tax-related case dealing with administrative law and the Constitution, *Metcash Trading Limited v C SARS and Another*[23] (but before the promulgation of PAJA), Kriegler J, in a landmark judgment (dealing with the 'pay-now-argue-later' principle) provided insight into the influence of the Constitution on administrative law, and the exercise by the Commissioner[24] of his discretion in tax legislation.[25]

In *Metcash*[26] Kriegler J made it clear that the High Court had the inherent power and jurisdiction to review decisions made by SARS. The question was: What is meant by a decision? In the judgment of *Metcash*, the 'decision' under consideration by the Constitutional Court related to a 'discretion' to be exercised by SARS. It is submitted that a similar discretion exists in ss 74A and 74B, in that the provisions of ss 74A and 74B are permissive in nature, as the word 'may' is used to allow SARS to exercise its powers.[27]It follows that a decision must be taken by SARS to enable it to invoke these discretionary powers.

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[20]*Ibid.* sections 3, 77, 78 and 79.
[21]*Ibid.* sections 81 and 83.
[22] Refer to the analysis in Chapter 5 on *Judicial Review with reference to ss 74A and 74B infra*.
[23] 2001(1) SA 1109 (CC).
[24] And his officials, hereinafter referred to as 'SARS' in this thesis, where appropriate.
[25]*Carlson Investments Share Block (Pty) Ltd v C:SARS* 2001 (3) SA 210 (W) where a s 79(1) of the Income Tax Act challenge that the provision was contrary to procedural fairness and finality of tax assessments, using the principle of *functus* officio, failed. Section 79 specifically terms overrides the *functus officio* principle; See also the discussion at section 4.2.7: *Limitations to s 195(1)*.
[26]*Metcash Trading Limited v C SARS and Another* 2001(1) SA 1109 (CC).
[27]*Commissioner of Taxes v Ferera* 1976 (2) SA 653 (R): '… the Commissioner is obliged to exercise his powers under the section if … he is of the "opinion" that the requisite [jurisdictional facts are] present ...'.

Consequently, if taxpayers can demonstrate that the decision of SARS is 'administrative action' as defined in PAJA,[28] a judicial review process is available to these taxpayers, despite ss 74A and 74B not being subject to objection and appeal. In addition, taxpayers may raise the appropriate 'just cause' defence in terms of s 75(1)(b) of the Income Tax Act for failing to comply with SARS' request for information, documents or things, or refusing to participate in a tax audit, invoked in terms of ss 74A and 74B, where taxpayers can show 'just cause' in not meeting SARS' demands. The 'just cause' defence is analysed in section 3.8 below.[29]

If a decision taken by SARS is 'administrative action' in terms of PAJA, taxpayers are entitled to access the provisions of PAJA where SARS must follow the procedurally fair process in terms of s 3(2) of PAJA. In terms of this section SARS must comply with five elements before 'administrative action' is taken against the taxpayer to ensure the process is procedurally fair:

(a) Adequate notice of the nature and purpose of the proposed administrative action must be given to the taxpayer;
(b) A reasonable opportunity to make representations must be given to the taxpayer;
(c) A clear statement of the administrative action must be made;
(d) Where applicable, adequate notice of any right of review or internal appeal must be given;
(e) Adequate notice of the taxpayer's right to request reasons in terms of s 5 of PAJA must be given.

SARS must then comply with the provisions of ss 5(1) and (2) of PAJA and provide adequate reasons with reference to the principles set out in the decision of the Supreme

[28]In that their rights or legitimate expectations are adversely affected, with a direct, external legal effect; or that the decision of SARS is the exercise of public power, so that taxpayers may invoke the constitutional principle of legality. What is the constitutional principle of legality? See section 2.4: *The Relevance of PAJA and the Principle of Legality infra*; See also Hoexter C *Administrative Law in South Africa 2ed* Juta (2012) at pages 121-5, hereinafter referred to in this thesis as 'Hoexter (2012).

[29]See section 3.8: *'Just Cause' Defence infra*; See also *Chetty v Law Society of Transvaal* 1985(2) SA 756 (AD); *Attorney-General, Tvl v Abdul Aziz Kader* 1991(4) SA 727 (A); *Shidiack v Union Government* (*Minister of the Interior*) 1912 AD 642; *Britten v Pope* 1916 AD 150.

Court of Appeal case of *CSARS v Sprigg Investments 117CC t/a Global Investment.*[30] What are 'adequate reasons'? This is analysed in section 2.5 below.

Any transgression of these fair administrative procedural provisions would entitle the taxpayer to launch the appropriate judicial review application to the High Court in terms of ss 6, 7 and 8 of PAJA, citing one or more of the codified grounds of review in s 6(2) of PAJA. If that were simply the case, it would have been the end of this thesis, and nothing further would need to be analysed. However, a potential *fundamental problem* exists as to whether or not 'administrative action' in PAJA includes a decision of SARS[31] to exercise the powers of ss 74A and 74B. Hence, the necessity for the analysis in this thesis in arguing that a decision of SARS in terms of ss 74A and 74B is 'administrative action' as defined in PAJA. If not, the constitutional principle of legality will apply to such a decision anyway. In both instances, entitling the taxpayer to review SARS' powers exercised in terms of ss 74A and 74B.

2.2 THE RELEVANT CONSTITUTIONAL PROVISIONS

2.2.1 Foundational values

Section 1 of the Constitution, dealing with the foundational values of the Constitution, reads:

> The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) *Human dignity*, the *achievement of equality* and the advancement of human rights and freedoms.
> (b) Non-racialism and non-sexism.
> (c) *Supremacy of the constitution and the rule of law*…

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[30] *CSARS v Sprigg Investments 117CC t/a Global Investment* 73 SATC 114 (SCA) at para's [12] and [13] and a quote from *Ansett Transport Industries (Operations) Pty Ltd and Another v Wraith and Others* (1983) 48 ALR 500 at para [12]; See also Van Dorsten J L *The Right to reasons for Decisions in Taxation Matters* The Taxpayer October (2005) at 186 -190 before *CSARS v Sprigg Investments 117CC t/a Global Investment* 73 SATC 114 (SCA).

[31] This submission emanates from the writer acting for and on behalf of various taxpayers in unreported cases such as that of *Drs Du Buisson, Bruinette and Kramer Inc. v C:SARS* Case No. 4594/02 in the High Court of the Transvaal Provincial Division..

(Emphasis supplied)

Section 2 of the Constitution of the Republic of South Africa, dealing with the supremacy of the Constitution, states that:

> This constitution is the supreme law of the Republic; law or *conduct inconsistent with it is invalid*, and the *obligations imposed* by it *must be fulfilled*.' (Emphasis supplied)

The discretion exercised by SARS in the form of a decision invoking its powers in terms of ss 74A and 74B is conduct: 'the act, manner, or process of carrying on or managing…mode or standard of personal behaviour.'[32] The constitutional obligations imposed on SARS 'must be fulfilled'.

In the work *Constitutional Law of South Africa*[33] it is suggested that the word 'law' means that all forms of law, from legislature to delegated legislation and from common law to customary law and indigenous law, fall within the ambit of the 'law' referred to in s 2 of the Constitution.

Any law that is in inconsistent with the Constitution[34] is subject to judicial review read with s 172(1)(a) of the Constitution.[35]

2.2.2 Bill of Rights

In addition, 7(2) of the Constitution states that:

> The State must respect, protect, promote and fulfill the rights in the Bill of Rights.

This positive obligation placed upon the State, with the obligation to fulfill its other

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[32]*Merriam-Webster's Dictionary of Law* 1st ed (1996) Springfield, MA: Merriam-Webster.
[33] Chaskalson et al *Constitutional Law of South Africa* (1996) Wits: Juta at pages 10-4.
[34] Section 2 of the Constitution.

[35]Chaskalson et al *Constitutional Law of South Africa* (1996) Wits: Juta at page 32.

constitutional obligations, places those same obligations on state officials, in the scope of their employment, to fulfill. In considering a well-entrenched principle in American Constitutional jurisprudence,[36] when a state official acts outside the ambit of the Constitution, that individual is stripped of her official character. This would arguably also be the case in South Africa.[37] In terms of s 172 of the Constitution the courts are given a wide discretion to order what is just and equitable under the circumstances where conduct is found to be 'invalid' under s 2 of the Constitution.

Section 8(1) of the Constitution binds all organs of state. SARS is an organ of state[38] and accordingly it is bound by the obligations and duties imposed upon it by the Constitution. This is also confirmed and repeated in s 4(2) of the South African Revenue Service Act,[39] where specific reference is made to SARS performing its functions in the most cost-efficient and effective manner in accordance with the values and principles mentioned in s 195(1)[40] (read with ss 1(c) and 41(1)) of the Constitution). This also places a constitutional obligation on SARS. In the same way, SARS officials carry out the functions of the Commissioner and are bound by those constitutional obligations.[41]

The authors of *Fundamental Rights in the Constitution: Commentary and Cases*[42] conclude that the Bill of Rights applies to all law in all its applications, including governmental action and acts of private individuals.

Section 33 of the Constitution deals with 'just administrative action' and states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. This section also entitles anyone whose rights have been adversely affected by administrative action to written reasons[43] for such administrative action.

National legislation that was to be enacted to give effect to these rights in s 33 of the

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[36]*Ex Parte Young* 209 US 123 (1908).
[37] The courts are encouraged to consider foreign law in terms of s 39(1)(c) of the Constitution; See also *Fose v Minister of Safety and Security* 1997(3) SA 786 (CC) at paras [60]-[61], [67] and [74].
[38]*Ibid.* sections 195 and 239 read with s 4(2) of the SARS Act.
[39] Act 34 of 1997, hereafter referred to as 'the SARS Act' throughout this thesis.
[40]See Chapter 4 *infra* for an analysis of the provisions of s 195(1).
[41]*Supra* footnote 32; There is nothing that prohibits officials acting outside the scope of their duties to be sued in their personal capacities in South Africa in terms of the Constitution; See also *Fose v Minister of Safety and Security* 1997(3) SA 786 (CC) at para's [60]-[61], [67] and [74].
[42] Davis et al *Fundamental Rights in the Constitution* (1997) Wits: Juta at page 44.
[43] See section 2.5: *Adequate reasons infra*; *CSARS v Sprigg Investments 117CC t/a Global Investment* 73 SATC 114 (SCA) at para's [12] and [13].

Constitution was effected in the form of PAJA, which came into force on 30 November 2000.

2.2.3 Other Constitutional provisions

In addition to this, ss 41(1) and 195(1) of the Constitution (apart from public administrators having to comply with the rule of law) public administrators can only assume power given to them in terms of the Constitution, and public administration must be governed by the democratic values and principles enshrined in the Constitution and, in particular, that services must, *inter alia*, be provided in accordance with high standards of professional ethics, impartially, fairly, equitably and without bias. It also states that public administration must be transparent and accountable.[44]

The duties set out in s 195(1) of the Constitution should also be read with the principles of s 1(c) stating the rule of law is supreme, and co-operative government and intergovernmental relations, as set out in s 41(1) of the Constitution: '…All…state organs…must…provide *effective, transparent, accountable* and coherent government for the Republic as a whole…*be loyal* to the Constitution … *not assume any power or function*, except those *conferred on them in terms of the Constitution* … (Emphasis supplied). Then there is the obligation placed on SARS (an organ of State) to perform its duties diligently and without delay.[45] Section 237 of the Constitution states that organs of state must diligently and without delay performs its constitutional obligations. In s 4(2) of the SARS Act it states:

> (2) SARS *must* perform its functions in the most cost-efficient way and *in accordance with the values and principles mentioned in s 195 of the Constitution*. (Emphasis supplied)

These constitutional obligations of SARS in the context of ss 74A and 74B, give rise to a right of judicial review to taxpayers where the decision is 'administrative action', and if not, judicial review in terms of a transgression of the principle of legality.

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[44]Sections 195 (1)(d)-(g) of the Constitution; See also Chapter 4 *infra* for an analysis of these provisions.
[45]Section 237 of the Constitution.

2.2.4 Conduct, decisions and public power

The effect of these provisions and commentary above, is that the provisions of ss 74A and 74B would be required to pass constitutional muster with particular reference to ss 1(c), 33, 41(1), 195(1) and 237 of the Constitution, read with s 4(2) of the SARS Act. In essence, the effect of reading these constitutional provisions together with the cases referred to above, is that any decision that adversely affects the rights of a taxpayer must be subject to a procedural and substantive due process. Croome holds the view that a decision by SARS in terms of ss 74A and 74B invariably affects the taxpayer's patrimony which constitutes a right envisaged in s 33(2) of the Constitution in that 'a decision … may affect the income tax payable by the taxpayer, the timing of payment, and whether the tax is subject to interest or additional tax (and penalties).'[46]

When SARS makes a decision in terms of ss 74A and 74B, it is submitted that taxpayers' rights are adversely affected, with an impending direct, external legal effect, in line with the determination theory.[47] The significance of this reasoning is that such a decision is 'administrative action' as defined in PAJA. Alternatively, the decision, being an exercise of power, would be subject to the principle of legality. If a court were to decide the decision was not administrative action – an additional remedy would be for the taxpayer to approach the court to declare the actual definition of 'administrative action' in PAJA as law inconsistent with the Constitution and therefore invalid. This would also be done through the application of s 172(1) of the Constitution.

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[46]Croome B *Taxpayers' Rights in South Africa* Juta 2010 at page 207 and at 224 where the author quotes from Wheelright K *Taxpayer' Rights in Australia* in Bentley D *Taxpayers' Rights: An International Perspective* Revenue Law Journal Bond University: Queensland 1998 at page 49 giving an international perspective.

[47]Woolman et al *Constitutional Law of South Africa* 2nd ed Juta 2002 at page 63-21 footnote 2, where the authors state: 'Applying the deprivation theory would, in our view, render the (P)AJA unconstitutional, as to hold that administrative justice only applies to decisions which deprive a person of his or her rights cannot be said to give effect to the constitutional right to just administrative action (footnote 4 - Hoexter C *The Future of Judicial Review in South African Administrative Law* (2000) 117 South African Law Journal page 484 at page 516 states that the deprivation theory 'clearly creates an unacceptably high threshold for admission to the category of "administrative action" '). In addition, had the Act intended to be more restrictive, it could have inserted the words 'existing rights' instead of 'rights' (footnote 5 - Some support for the determination theory may be found in the following dictum of Borochowitz J in *Association of Chartered Certified Accountants v Chairman, Public Accountants' and Auditors' Board* 2001 (2) SA 980 (W) at 997, in holding that the relevant decision amounted to administrative action: '[T]he Board's decision has plainly affected the rights and interests of the applicant. It has determined its rights')'; See also Croome B *Taxpayers' Rights in South Africa* Juta 2010 at page 208 where the author expresses the view that the wider meaning to the 'determination theory' should apply 'extending the reach of the Constitution.' citing Currie I & De Waal J *The Bill of Rights Handbook* 5ed Juta 2005 at para 6.3 at page 148 and at page 149: 'The purposive approach to interpretation therefore invariably requires a value judgment to be made about which purposes are important and protected by the Constitution and which are not.'

Following the reasoning of the authors in *Fundamental Rights in the Constitution: Commentary and Cases*,[48] it is clear from ss 2, 8(1) and 8(2) that the Constitution regulates conduct. The authors in *Fundamental Rights in the Constitution: Commentary and Cases*[49] argue that conduct is subject to the provisions of the Constitution because the State and its functionaries can only act if authorised by law. Unauthorised conduct is unlawful as confirmed in s 41(1)(f) and read with s 1(c) of the Constitution, in that functionaries can only assume such powers as conferred on them in terms of the Constitution - meaning powers that are lawful, reasonable, procedurally fair and with 'adequate reasons'. Either the law offends because it is unconstitutional, or the law is interpreted to render the conduct unlawful.

An example of the latter situation would be conduct by SARS outside the jurisdictional facts[50] of ss 74A and 74B. Any request or investigation by SARS must be for purposes of 'the administration of the Act',[51] as defined in s 74 of the Income Tax Act. If one or more of those defined jurisdictional facts are not present, then the conduct by the Commissioner or his official would be unauthorised and hence unlawful and unconstitutional. The empowering provisions are not necessarily unconstitutional, but the manner in which they are applied may be (ie. the conduct of SARS). If these sections were interpreted and enforced in a manner that is in conflict with ss 1(c), 33, 41(1) and 195(1) of the Constitution, the conduct of SARS would also be unlawful, unreasonable or procedurally unfair and as being contrary to just administrative action, or the principle of legality.

In one of the leading Constitutional Court cases on the principle of legality (also now known as the constitutional principle of legality), namely, the *Pharmaceutical Manufacturers* case,[52] Chaskalson P held:

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[48] Davis et al *Fundamental Rights in the Constitution* (1997) Wits: Juta at pages 32-5,37,45.
[49] *Ibid.* at page 33.
[50] See section 3.3.2: *Jurisdictional facts infra*.
[51] In *Industrial Equity Ltd v Deputy Commissioner of Taxation and Others* (1990) 170 CLR 649 at 659 the Australian High Court held that the powers of access and inquisition must be exercised for the purpose of the Act and that question is to be considered in the context of the provision levying income tax, as envisaged in that definition in s 74 of the Income Tax Act.
[52] *Supra* footnote 11 para's [20], [27], [41], [45] and [49] - [51].

> [20] The exercise of *all public power must comply with the Constitution* which is the supreme law and the doctrine of legality which is part of that law… (Emphasis supplied)

There can be no legitimate excuse for a SARS official not complying with the Constitution in exercising public power by invoking the provisions of ss 74A and 74B.

> [27] The principle applies … '*not only to review of ... legislative action but also to the review of administrative action.'*… (Emphasis supplied)

The administrative action contemplated would be that envisaged in the *Grey's Marine* case,[53] where the Supreme Court of Appeal observed that administrative action is:

> … the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.

The conduct of the bureaucracy known as SARS carries out the functions of administering the provisions of the Income Tax Act, *inter alia*, ss 74A and 74B. However, the conduct of the bureaucracy is subject to what the Constitutional Court held in the *Pharmaceutical Manufacturers* case:[54]

> [41] *Powers* that were previously regulated by the common law under prerogative and the principle developed by the courts to control the exercise of public power are *now regulated by the Constitution*. (Emphasis supplied)

The powers of ss 74A and 74B, in line with this authority, are regulated by the Constitution.

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[53] *Grey's Marine* case *op. cit.* footnote 21 at para [24].
[54] *Supra* footnote 11 at para's [41], [45] and [51] as quoted below.

> [45] *Courts no longer have to claim space and push boundaries to find means of controlling public power*. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government and the constraints subject to which public power has to be exercised. (Emphasis supplied)

As a result, the Constitution empowers the Courts to control the powers of SARS under ss 74A and 74B, and as aptly described in the final quote:

> [51] Although common law remains relevant to this process, *judicial review of the exercise of public power is a constitutional matter* that takes place under the Constitution and in accordance with its provisions. (Emphasis supplied)

This includes its constitutional obligations in ss 1(c),33, 41(1) and 195(1) of the Constitution, giving rise to a series of compulsory duties. Non-compliance with these duties or constitutional obligations would in turn give rise to a right to taxpayers to enforce these constitutional obligations as envisaged in the Constitutional Court judgments of *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*[55] and the more recent *Glenister v President of the Republic of South Africa and Others.*[56]

As to the invalidity of the law or conduct, the following analysis is appropriate.

Law for the purposes of this thesis (as already analysed above) means the actual wording of ss 74A and 74B, read with ss 74 and 75(1)(b) of the Income Tax Act. Conduct can only flow from authorising law or inherent power as per ss 1(c) and 41(1)(f) of the

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[55] 2001 (4) SA 938 (CC) at para [36].

[56] 2011 (3) SA 347 (CC); See also *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC) at para [44]; *The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Ano v Ngxuza and Others* 2001 (4) SA 1154 (SCA) at para [15] footnote 23; *Reuters Group Plc and Others v Viljoen NO and Others* 2001 (2) SACR 519 (C) at para [46]; *Carephone (Pty) Ltd v Marcus NO and Others* 1999 (3) SA 504 (LAC); See Chapter 4 *infra*.

Constitution. The Commissioner has no inherent power to exercise any conduct[57] not prescribed in an act of Parliament.[58] Sections 74A and 74B of the Income Tax Act would be the authorising law giving rise to the conduct, but subject to the constitutional duties imposed on SARS in terms of the Constitution. The constitutionality of the conduct is determined through interpreting ss 74A and 74B with reference to the lawfulness, reasonableness or procedural fairness requirements and the constitutional obligations placed on SARS in terms of the Constitution.[59]

This conduct must not be inconsistent with the following specific provisions, namely: ss 10 (dignity); 14 (privacy); 33 (just administrative action – procedural and substantive due process) ; and ss 41(1) and 195 (1) of the Constitution. Section 33 leads more specifically to ss 3, 5 and 6 of PAJA.

2.2.5 Conduct, audits and inquiries

Wheelright K in Taxpayer' *Rights in Australia in Bentley D Taxpayers' Rights: An International Perspective*,[60] gives a good summary and places into perspective what would be considered to be fair procedural due process when a tax authority like SARS initiates an inquiry and audit. He states that taxpayers should be given prior notification of the audit and the opportunity to request postponement of the audit if they have good reasons. As in any administrative decision, the tax authority should explain to taxpayers why they are chosen for an audit, what taxes and what years the audit will cover, what documents, books and other records will be required, how the audit will proceed, and give the taxpayer the opportunity to contact and use a legal or other representative in dealing

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[57] See also Murphy J *The Constitutional Review of Taxation* (1997) Revenue Laws at pages 89 and 105: 'In a literal sense taxation can be seen as a species of expropriation. For that reason many bills of rights explicitly delimit the scope of property rights by enacting a saving provision to admit taxation without incurring any obligation to pay just compensation… Since the rights affected by taxation are unquestionably 'rights in property'… we need to infer a saving of the taxing power from an interpretation of s 28 as a whole. In the first instance it may be argued that taxation is a 'deprivation' of rights in property under s 28(2) and, therefore, shall be permitted 'in accordance with a law'. The concept of a 'deprivation' is a wide one and may take many forms. Section 28(3) makes it plain that expropriation is but one species of a wider genus of deprivations. Taxation is feasibly another. Accordingly, Revenue will argue, the sole requirement for the taxing power in relation to property rights is for it to be 'in accordance with a law'…'. This analysis holds accord with a reading of s 25 of the Constitution, fundamental right against deprivation of property, where deprivation of property can only take place in accordance with a law of general application, bringing the power to tax within the Constitution's limitation of rights clause in s 36 – a specific law and provision of general application must give the power to do so.

[58] Based on the 'rule of law' as being supreme in s 1(c) of the Constitution, and s 41(1)(f) where SARS may 'not assume any power or function*, except those* conferred on them in terms of the Constitution.'(Emphasis supplied)

[59] Refer to Davis et al *Fundamental Rights in the Constitution* (1997) Juta at page 33.

[60]Wheelright K *Taxpayer' Rights in Australia* in Bentley D *Taxpayers' Rights: An International Perspective* Revenue Law Journal Bond University: Queensland 1998 at page 49.

with the tax authority. All these statements are in line with the provisions of s 33 of the Constitution and s 3 of PAJA.

The author goes on to express the view that at the commencement of the audit the taxpayer should receive clear guidelines from the revenue authority, setting out the audit procedures, the rights and duties of taxpayers during the audit as well as details of the tax authorities practices and rules governing the outcome of the audit.

Compliance with these requirements would satisfy some of the constitutional obligations placed on SARS, and holds accord with the SARS Service Charter and Standards (under review) referred to as the *Code of Conduct* in this thesis, and further analysed in sections3.3: *Lawfulness*, 3.6: *Legitimate Expectations*, 4.2.4: *Services must be provided impartially, fairly, equitably and without bias*, and 4.2.5: *Public administration must be accountable*, *infra*.

Furthermore, the application of ss 74A and 74B must not breach the rule of law and the principle of legality. SARS must be lawfully authorised to invoke the powers conferred upon it in accordance with the jurisdictional facts of these provisions,[61] when approaching taxpayers for inquiry and audit. A decision of SARS must be rationally related to the purpose for which that power was given them, ensuring that the conduct of SARS is not unlawful or unconstitutional.

2.2.6 Conduct and legitimate expectations

Taxpayers may also have an opportunity in limited circumstances to rely on the legitimate expectations doctrine[62] which exists when SARS invokes its powers under ss 74A and 74B. Such a legitimate expectation is transgressed when SARS fails to follow an established practice in conducting audits or inquiries, such as following the processes and

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[61] *Fedsure* 1998 (12) BCLR 1458 (CC); *President of the Republic of South Africa v South African Rugby Football Union* 1999 (2) SA 14 (CC) at para [42]; and also *President of the Republic of South Africa and another v South African Rugby Football Union and others* 2000(1) SA 1 (CC).

[62] See section 3.6: *Legitimate expectations infra*; Legitimate expectations are not defined in the s 1 definition of 'administrative action' of PAJA. However, the Constitutional Court in *Premier of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) BCLR151 (CC) at para [31] has indicated that a 'right' should probably be interpreted more broadly to include liability incurred by the state through the making of unilateral promises or undertakings, which includes in its ambit legitimate expectations. See Currie I & Klaaren J *Promotion of Administrative Justice Act Benchbook* (2001) SiberInk at 80. See also Williams R C et al *Silke on Tax Administration* (2009) Lexis Nexis at para 3.25 generally.

procedures in the *Code of Conduct*[63]and the *SARS Internal Audit Manual*.[64] SARS is obliged to conduct its actions in a fair, impartial, unbiased, accountable and transparent manner in accordance with s 195(1) of the Constitution. At any time that SARS engages with the taxpayer in terms of ss 74A and 74B, the taxpayer should point out that it is SARS' duty to promote a rational connection between the provisions it relies on and the specific purpose for invoking its powers. Otherwise it would be acting *ultra vires*.[65] SARS should abide by its internal audit guidelines in doing so. This will evidence the fact that it is fulfilling its constitutional obligations towards the taxpayer. SARS' constitutional obligations are enhanced by its own self-imposed, restrictive practice creating a legitimate expectation that it will comply with its own self-imposed guidelines in an impartial, fair and unbiased manner at the inquiry and audit phase.[66] SARS would be embarrassed by showing compliance with its internal guidelines towards one taxpayer, and then not towards the next one: displaying clear partial and biased treatment towards the latter taxpayer.

2.3 A CONSTITUTIONAL BALANCE OF SARS' POWERS AND THE 'ADMINISTRATIVE ACTION' DEBATE[67]

2.3.1 Introduction

As submitted in this thesis, the exercise of public power[68] by SARS to request information, documents or things, in terms of ss 74A and 74B, is a decision[69] that

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[63]Revised from time to time by SARS at http://www.sars.gov.za/home.asp?pid=54195 (last accessed 31 March 2013) and referred to as the *Code of Conduct* in this thesis.

[64] The *SARS Internal Audit Manual – Part 4: The Audit Process*; See 3.2: *The SARS Internal Audit Manual infra* for extensive extracts of its provisions; See Williams R C et al *Silke on Tax Administration* (April 2009) Lexis Nexis at para 8.17 generally.

[65] See section 3.3: *Lawfulness infra*; LAWSA Volume 1 *Administrative Law* 2nd ed Lexis Nexis at para 144; *FH Faulding & Co Ltd v The Commissioner of Taxation for the Commonwealth of Australia* 94 ATC 4867, where the tax authority was held to have *exceeded its information gathering powers* in making a request for information in circumstances involving offshore information where the section did not entitle them to do so. (Emphasis supplied)

[66] LAWSA: Volume 1: Administrative Law. 2nd ed: Lexis Nexis at para 113.

[67] Croome B & Olivier L *Tax Administration* 2010 (Juta) at pages 27-30.

[68] In *Glen Anil Development Corporation Ltd v SIR* 1975 (4) 715 (A) at 727A to 728A the court held that Revenue's powers should not unnecessarily be restricted by interpretation. But this is now subject to scrutiny under the Constitution.

[69]In *Bhugwan v JSE Ltd* 2010 (3) SA 335 (GSJ) Williams R C *The Concept of a "Decision" as the threshold requirement for Judicial Review in terms of the Promotion of AdministrativeAct* PER/PELJ2011(14)5 http://www.ajol.info/index.php/pelj/article/viewFile/70039/58153 (last accessed 30 March 2013), Williams states: '… It is arguable that the reason why the legislation includes a decision "proposed to be made" in the statutory definition of a "decision" was to prevent an administrative decision-maker from remaining outside the scope of PAJA by the stratagem of saying to the affected party something along the lines of – we have resolved to take view x of the matter unless and until you persuade us otherwise. If the definition of "decision" were not wide enough to encompass such a provisional

amounts to 'conduct' in terms of s 2 of the Constitution. If such conduct transgresses the constitutional obligations placed on SARS set out in this thesis, the conduct is inconsistent with the Constitution and is invalid. This gives the taxpayer the opportunity to approach the High Court through s 172(1) of the Constitution. Relying on the interpretation that the decision is 'administrative action' it will be subject to judicial review in terms ofss6(1), 6(2), 7 and 8 of PAJA;[70] failing that, it will be subject to review in terms of the principle of legality on the basis that the decision is unlawful, unreasonable or procedurally unfair.[71] It also gives taxpayers an opportunity to raise the 'just cause' defence in refusing to participate in an inquiry and audit instigated by SARS, as analysed in section 2.8 below.

2.3.2 Administrative action

A decision of SARS must fall within the definition of 'administrative action' as defined in PAJA in order for the taxpayer to invoke the review remedies in ss 6, 7 and 8 of PAJA. The limitations to such a decision falling under that definition can be summarised as follows.[72] The decision of SARS is arguably neither final nor ripe for adjudication by the courts. It is part of a multi-staged process that will ultimately result in a final decision (such as issuing a revised assessment) that in itself will be subject to all of the internal remedies of objection and appeal[73] in the Income Tax Act.

In mitigating a strict interpretation of 'administrative action' the Supreme Court of Appeal in case of *Grey's Marine* case[74] gave a wider meaning to the definition. A company established in Hout Bay by a group of women who had historically been

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or *prima facie* decision, a decision-maker could ensure that his response remained outside the scope of PAJA indefinitely, or at least for a protracted period, as each supply of further information by the affected person was deemed inadequate to persuade the decision-maker to alter his provisional view.'

[70] William R C et al *Silke on Tax Administration* Lexis Nexis (April 2009) at para 3.4 states: 'The Constitution now protects the institution of judicial review of administrative power from legislative interference and provides individuals with justiciable rights to claim relief from the effects of unlawful administrative action (Currie, I and de Waal, J, *The Bill of Rights Handbook*, 5th ed, 643). The supremacy of the Constitution is as applicable to tax legislation as to any other legislation. As the Constitutional Court has observed 'even fiscal statutory provisions, no matter how indispensable they may be for the economic well-being of the country – a legitimate governmental objective of undisputed high priority – are not immune to the discipline of the Constitution and must conform to its normative standards.' *First National Bank of SA Ltd t/a Wesbank v C: SARS* 2002 (4) SA 768 (CC) at 787B at para [31]'.

[71] For an analysis of the principle of legality see section 2.4 *infra*; Hoexter (2012) at pages 121-5.

[72] The authors of *Silke on Tax Administration* Lexis Nexis (April 2009) at para 8.9 hold a different view. They simply state, without performing the analysis done in this thesis, that s 74B is 'administrative action' and therefore subject to the provisions of PAJA. They cite Bentley D *Taxpayer Rights: An International Perspective* (1998) 49 and Daiber C *Protection of Taxpayer's Rights in Germany* as authority.

[73] See section 5.4: *Review Application directly to the Tax Court infra*.

[74] *Grey's Marine* case *supra* footnote 21 at para's [19] to [23].

excluded from the fishing industry applied to the Minister of Public Works to use property for the establishment of a fish-processing facility and associated restaurant. The Minister of Public Works agreed to let a property to them. The appellants, who were neighbouring occupiers, felt that the development of this area would cause traffic congestion, deprive tenants and visitors of parking and impede access to their premises and to the waterfront. They applied to court to review and set aside the Minister's decision.

The question at the outset was whether the Minister's decision constituted 'administrative action' falling within the provisions of PAJA. The court held that the Constitution is the repository of all state power, which power is distributed by the Constitution, both directly and indirectly, amongst the various institutions of the state where its exercise is subject to inherent constitutional constraint. The extent of the constraint varies according to the nature of the power that is being exercised. Where the power is significant, the constraint would be proportionately greater. Where it is less, the constraint would be less. In the case of ss 74A and 74B, because these powers of SARS are exercised early in a multi-staged process, the need to exercise constraints must be balanced against the necessity of SARS to have access to the required information, documents or things to conduct a proper inquiry and audit into the taxpayer's affairs. Because the exercise of this public power usually affects the taxpayer's patrimony and gives rise to culpability[75] by virtue of the impending issue of revised assessments by the same SARS officials, it is submitted that the power is significant, and any constraints should be proportionately greater, ensuring the full suite of constitutional protections envisaged in PAJA being made available to the affected taxpayer.

In referring to the restrictive definition of 'administrative action' in PAJA, the Supreme Court of Appeal came to the conclusion in *Grey's Marine* case[76] that at the core of the definition was the idea of action (a decision) often administered by public bodies undertaking their functions. Sections 74A and 74B require action on the part of SARS in requesting information, documents or things so as to commence a regulatory inquiry and

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[75] *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd & another* 2011 (1) SA 327 (CC) at para [37].
[76] *Grey's Marine* case *supra* footnote 21 at para [23].

audit, that may inevitably lead to revised assessments being issued by the same SARS officials.

In the *Grey's Marine* case[77] the Supreme Court of Appeal also pointed out that the definition had to be construed consistently and, wherever possible, with the meaning that is attributed to administrative action as that term is used in s 33 of the Constitution (from which PAJA originates), in order to avoid constitutional invalidity. In this regard, it is submitted that the fact that the power is investigative and that its exercise does not in itself determine whether any tax is payable does not detract from this conclusion. The decision imposes on taxpayers an obligation to do something (to produce information, documents and things) which, but for the exercise of the power, taxpayers would not in law be obliged to do. When SARS exercises these powers the information, documents of things must be produced to a SARS official. A failure by taxpayers to comply exposes them to criminal prosecution under s 75 of the Income Tax Act.

In the *Grey's Marine* case,[78] it was held that administrative action is the conduct of the bureaucracy in carrying out the daily functions of the state, and necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals. The relevant factors to be taken into account in determining what 'administrative action' is, are as follows:[79]

a. The source of the power;
b. The nature of the power;
c. The subject matter of the power;
d. Whether the power involves the exercise of a public duty;
e. How closely the power is related, on the one hand, to policy matters which are not administrative, and on the other hand to the implementation of legislation, which is.

By SARS exercising its powers under ss 74A and 74B:

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[77] *Ibid.* at para [22].
[78] *Ibid.*
[79] *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC).

a. The source of the power is specifically set out in the Income Tax Act;
b. The nature of the power is to regulate tax compliance;
c. The subject matter of the power is conduct in the form of exercising a discretion;
d. The power is exercised by SARS officials who are empowered to exercise specific public duties prescribed in the Income Tax Act;
e. The implementation of the policy of tax compliance through legislation is to audit taxpayers in pre-identified areas as envisaged in s 74 of the Income Tax Act, in the definition of 'the administration of this Act'. In this regard, SARS have also compiled an internal guideline[80] to guide and direct SARS officials in audit and inquiry cases where the powers of ss 74A and 74B (read with s 74) are invoked.

In addition, prior to the advent of the new Constitution, the Supreme Court of Appeal 'vigorously reappraised' the reasoning that preliminary decisions linked to investigations do not affect existing rights – where the Supreme Court of Appeal held that preliminary decisions can have devastating effects.[81] Hoexter states that: '…South African courts will have to work out South African meanings for terms such as 'direct, external legal effect' and that 'limited progress has been made in this regard.' And then: '…it would be a great pity if the term 'direct' were to be read as flatly contradicting this jurisprudence or as rendering preliminary decision-making entirely unreviewable.'[82] These difficulties are in fact being worked out in the development of the constitutional principle of legality. In the *Nextcom (Pty) Ltd v Funde NO and Others*[83] the court recognised that irregularities performed in leading to a decision where a right to procedurally fair administrative action had been infringed, the complainant was entitled to bring an immediate review application to review the conduct of the Minister:

> …[W]here a recommendation is a nullity because of *irregularities committed in the course of proceedings leading to the decision* to make that

[80] See section 3.2: *The SARS Internal Audit Manual infra*. The information contained therein sets out internal guidelines to be followed by SARS officials to ensure their methodology is lawful, reasonable (rational and proportional) and procedurally fair in auditing taxpayers.
[81] *Du Preez v Truth and Reconciliation Commission* 1997(3) SA 204 (A) and *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999(2) SA 709 (SCA).
[82] Hoexter (2012) at page 229 footnote 438 – *Du Preez v Truth and Reconciliation Commission* 1997(3) SA 204 (A) and *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999(2) SA 709 (SCA). Hoexter goes on at page 207 to state that: '…South African courts will have to work out South African meanings for terms such as 'direct, external legal effect'. Limited progress has been made in this regard.' And further at page 229: '…it would be a great pity if the term 'direct' were to be read as flatly contradicting this jurisprudence or as rendering preliminary decision-making entirely unreviewable.' (footnote excluded)
[83] 2000 (4) SA 419 (T).

> particular recommendation, *it means that a right to procedurally fair administrative action has been infringed*. That infringement *cannot be rectified by the Minister's decision; it remains an infringement of a constitutional right*. *…Once unlawfulness is manifest in a form which cannot be corrected no matter how the public authority continues to act, there is no point in insisting that the complainant should continue to go through the motions before bringing the matter to court*. (Baxter, Administrative Law, p 720.) In my view the review application and this application is not premature. (Emphasis supplied)

This set of circumstances is very similar to a taxpayer subjected to its rights to just administrative action being infringed whilst SARS embarks upon an inquiry and audit into the taxpayer's affairs.

Notwithstanding this, there is still a temptation for courts to narrowly view preliminary natured decisions as not having an immediate 'direct, external legal effect' in an attempt to disqualify a taxpayer from relying upon the grounds of review in s 6(2) of PAJA. The decisions and powers of SARS in terms of ss 74A and 74B fall into this category of preliminary decisions linked to investigations, which may devastatingly affect existing rights.[84] These powers are a form of 'seizure'[85] encroaching upon various taxpayer rights. The authors of *Constitutional Law of South Africa 2nd ed* also argue that the interpretative approach of the determination theory should be followed in arriving at a conclusion where the 'courts will, in practice, work in from the determination theory by accepting that all public power which determines rights will constitute administrative action…'.[86] Baxter supports this conclusion in his authoritative work *Administrative Law*[87] where he states that the criterion as to whether or not a sufficiently 'ripe' action constitutes a reviewable decision depends on 'whether prejudice has already resulted or is

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[84]See also Croome B *Taxpayers' Rights in South Africa* Juta 2010 at page 207; Compare *Law Society, Northern Provinces (Incorporated as The Law Society of The Transvaal) v Maseka and Another* 2005(6) SA 372 (BH) at 382B-E, *The Master v Deedat and others* 2000(3) SA 1076 (N) at 1083G, and *Van der Merwe and Others v Slabbert NO and Others* 1998(3) SA 613 (N) at 624D-E, where the courts held that if a functionary merely performs an investigative function that does not materially and adversely affect a person's rights, it is not an administrative decision. It is submitted in this thesis that a ss 74A and 74B investigative decision and function does materially and adversely affect a taxpayer's rights.
[85]*R v McKinlay Transport Ltd* S.C.R. 627.
[86]See the authorities at footnote 53 to 55 *supra*.
[87] Baxter L *Administrative law* (1984) Juta.

inevitable, irrespective of whether the action is complete or not'.[88] *Nextcom's* case[89] supports this line of reasoning and in effect follows the determination theory, that all public power which determines rights that will result in inevitable prejudice (whether the action is complete or not), will constitute administrative action and be reviewable.[90] The reviewable conduct includes all exercise of public power that defies constitutional obligations. This includes s 195(1) of the Constitution read with s 4(2) of the SARS Act. It also includes non-compliance with s 41(1) (c), (d) and (f) of the Constitution,[91] which applies to 'conduct' of public administration (including SARS),[92] and provides that SARS can only carry out the functions under the strict guidance of the basic norms and objective value system[93] derived from the Constitution. This means that SARS does not have inherent power other than that derived from specific statutory provisions.[94] Non-compliance with one or more of the eight jurisdictional facts in s 74 of the Income Tax Act and the definition of 'administration of this Act' would be non-compliance with the scope of SARS' powers. Encroaching upon the privacy (and dignity) of the taxpayer without proper justification[95] would also be unlawful conduct.

The underlying right of just administrative action as regulated through the definition of 'administrative action' in PAJA would be circumvented by the simple technique of

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[88] Quoted in Williams R C *The Concept of a "Decision" as the threshold requirement for Judicial Review in terms of the Promotion of Administrative Act* PER/PELJ 2011(14)5 http://www.ajol.info/index.php/pelj/article/viewFile/70039/58153 (last accessed 30 March 2013) at page 235.

[89] *Supra* footnote 82.

[90] Woolman et al *Constitutional Law of South Africa* 2nd ed Juta 2002 at page 63-21.

[91] '**41. Principles of co-operative government and intergovernmental relations. -** (1) All spheres of government and all organs of state within each sphere must-

…

(c) provide effective, transparent, accountable and coherent government for the Republic as a whole;

(d) be loyal to the Constitution of the Republic and its people;

…

(f) not assume any power or function except those conferred on them in terms of the Constitution…'; Section 41(1) of the Constitution.

[92] *Ibid.* s 239.

[93] Woolman et al *Constitutional Law of South Africa* 2nd ed Juta 2002 at pages 13-10 and 13-11.

[94] *High School Carnavon & another v MEC for Education and others* [1999] 4 All SA 590 (NC); *The Monastery Diamond Mining Corporation (Edms) Bpk v Schimper* 1983 (3) SA 538 (O); *Drakensberg Administration Board v Town Planning Appeals Board* 1983 (4) SA 42 (N) at 45A); Baxter *Administrative Law* at 408; Wiechers *Administratiefreg* 2 ed at 156; ; *Barrett NO v Macquet* 1947 (2) SA 1001 (A) at 1015–1016; See also Gzell I V *The Taxpayer's Duty of Disclosure* (Paper) October 2006 Hong Kong: where the presenter concluded that a 'taxpayer's duty of disclosure is a creature of statute. The content of the duty will depend upon the proper construction of the statutory provision.' http://www.lawlink.nsw.govau/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_gzell131006 (last accessed 31 March 2013); See also section 3.3: *Lawfulness infra*.

[95] The direct legal effect is that the fundamental right to privacy of the taxpayer is intruded upon, outside justifiable grounds. However, the case law on justification says that there is no 'privacy' when investigating business affairs (see *Bernstein and Others v Bester and Others NNO* 1996(2) SA 751 (CC). Here the deprivation versus the determination theory comes to play, where the latter is broader in meaning - one must merely show that determined rights that emerge going forward may be affected. Various academic writers favour this approach, such as Hoexter (2012) and Woolman et al *Constitutional Law of South Africa* 2nd ed Juta 2002 at page 63-21.

compelling taxpayers to comply without question at the commencement of the pre-assessment investigation in terms of ss 74A and 74B. Despite the fact that the inevitable revised assessment, penalties and interest charges may follow. This legalistic and literal interpretation is questionable, especially as the result of the inquiry and audit is the immediate enforcement of the 'pay now argue later' principle to any revised assessment raised against the taxpayer.

For this reason, it is submitted, taxpayers are entitled to challenge SARS before the actual issuing of the revised assessments, where the powers of SARS under ss 74A and 74B have been applied in an unlawful, unreasonable, procedurally unfair manner, or without adequate reasons. If not, the effect is simply to paralyse the rights of taxpayers in a process that takes them down an avenue of direct, external legal consequences, where the Constitution exists to otherwise protect them. SARS, as an organ of state, cannot escape that scrutiny of the Constitution by simply forcing the taxpayer to submit to these powers, without taxpayers having the right to challenge these powers in terms of PAJA, or the constitutional principle of legality.

As already stated, the reality is that the inquiry and audit is usually the trigger for the inevitable issue of revised assessments shortly after the commencement of that inquiry and audit. In *Park-Ross*[96] Tebbutt J stated that preliminary inquiries that may result in inevitable, significant consequences for the subject under investigation and for this reason the effect on fundamental rights of the person under investigation should not be ignored. It is also noteworthy that in *Nomala v Permanent Secretary, Department of Welfare and Another,*[97] the court held that a matter was ripe for adjudication in relation to the lawfulness[98] of administrative action where prejudice was inevitable even though the action had not yet occurred.

In *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd & another* 2011 (1) SA 327 (CC) the Constitutional Court held:

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[96] *Park-Ross and Another v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C) at pages [1641-165A].
[97] 2001 (8) BCLR 844 (E).
[98] See also section 3.3: *Lawfulness infra*.

> [37] PAJA defines administrative action as a decision or failure to take a decision that adversely affects the rights of any person, which has a direct, external legal effect.[99] This includes "action that has the capacity to affect legal rights".[100] Whether or not administrative action, which would make PAJA applicable, has been taken cannot be determined in the *abstract*. *Regard must always be had to the facts of each case*.[101] (Emphasis supplied)

Whether or not administrative action, which would make PAJA applicable, has been taken, '…cannot be determined in the abstract. Regard must always be had to the facts of each case.'[102] A decision to investigate, and the process of investigation, which excludes a determination of culpability, could not adversely affect the rights of the appellant's in a manner that has a direct and external legal effect.[103] So too a decision to institute proceedings in the High Court for an interdict does not affect the rights of the appellants, or have that capacity. It is the High Court which decides that the Act is being contravened and decides to grant the interdict.[104]

Having regard to the typical facts and circumstances that occur at the time of a SARS decision to inquire and audit, the inter-relationship between ss 1(c), 33, 41(1), 172(1), 195(1) and 237 of the Constitution, s 4(2) of the SARS Act, and PAJA, such a decision is considered to be 'administrative action' for the following reasons:

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[99] Section 1 provides that "administrative action"—
"means any decision taken, or any failure to take a decision, by—
(a) an organ of state, when—
(i) exercising a power in terms of the Constitution or a provincial constitution; or
(ii) exercising a public power or performing a public function in terms of any legislation; or
(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,
which adversely affects the rights of any person and which has a direct, external legal effect".

[100] *Grey's Marine* case *supra* footnote 21 at para [23].

[101] *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd & another* 2011 (1) SA 327 (CC) at para [37]; *Joseph & another v City of Johannesburg & others* 2010 (4) SA 55 (CC) at para [27]; *Grey's Marine* case *supra* footnote 21 at para [23]; *City of Cape Town v Hendricks & another* [2012] ZASCA 90; J R de Ville *Judicial Review of Administrative Action in South Africa*, (2003) para 2 1 6; Hoexter (2012) at pages 220-7; See also recent *Corpclo 2290 cc t/a U-Care v The Registrar of Banks* [2013] 1 All SA 127 (SCA) at para [26]: the Supreme Court of Appeal held that the Registrar's decisions to investigate the appellant's business and institute proceedings against the appellant's for an interdict in terms of s 81 of the Act were not administrative actions for the purposes of PAJA as they did not (as required by the definition of 'administrative action' in s 1 of PAJA) adversely affect the rights of the appellant's or have a direct, external legal effect or have that capacity.

[102] *Ibid*. at para [37].

[103] *Corpclo* case *op. cit*. at para [26].

[104] *Ibid*; *Competition Commission of SA v Telkom SA Ltd & another* [2010] 2 All SA 433 (SCA) at para [11].

(a) the decision has been taken by an organ of State exercising a public power or performing a public function in terms of legislation;

(b) the decision involves the exercise of a discretionary power, in that it is for SARS to determine whether and in what circumstances it will require any particular taxpayer to submit, produce or make available information, documents of things;

(c) the decision adversely affect taxpayers' rights, and has a direct, external legal effect. The fact that the power in question is preliminary and investigative, and that its exercise does not in itself determine whether any tax, penalties and interest is payable, does not detract from the conclusion that tax, penalties and interest may become payable as a result of the preliminary investigation. The decision imposes on taxpayers an obligation to do something (to submit, produce or make available relevant material (as defined)) which, but for the exercise of the power, taxpayers would not in law be obliged to do: normally taxpayers would have a right to keep private and confidential information, documents and things that must now be produced or provided to a SARS official. A failure by taxpayers to comply exposes them to criminal prosecution. Furthermore, these powers exercised by SARS are not made specifically subject to the normal objection and appeal processes in the Income Tax Act;

(d) there is no relevant exclusion in the definition of 'administrative action' that removes this type of decision from that definition in PAJA;

(e) a decision made by SARS in terms of ss 74A and 74B can and will most probably result in culpability in the form of revised assessments being issued by the same SARS assessors conducting the inquiry and audit, resulting in a decision by SARS that will 'materially and adversely affect(s) rights' and have a 'direct, external legal effect' on taxpayers.[105]

2.3.3 Conclusion

In conclusion, despite it being preliminary and investigative in nature, it is submitted that a decision of SARS in terms of ss 74A and 74B is 'administrative action' as contemplated in s 33 of the Constitution, and as defined in PAJA. The safeguards incorporated in PAJA should be applied to SARS. Taxpayers should be entitled to the full suite of rights in s

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[105] *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd & Another* 2011 (1) SA 327 (CC) at para [37].

3(2) of PAJA at the commencement of an inquiry and audit. Adequate reasons in terms of s 5(2) of PAJA will also be required by SARS. Any defective administrative action by SARS will be subject to the grounds of review in s 6(2) of PAJA, and subject to the provisions of ss 7 and 8 of PAJA. If not, SARS is still bound by the constitutional principle of legality, which entails exercising public power that must be carried out lawfully, reasonably, in a procedurally fair manner, and with adequate reasons, as discussed in the next section:*1.4 The Relevance of PAJA and the Principle of Legality*.

2.4 THE RELEVANCE OF PAJA AND THE PRINCIPLE OF LEGALITY

2.4.1 Introduction

With the development of constitutional law and the promulgation of PAJA giving effect to s 33(3) and the rights referred to in ss 33(1) and (2) of the Constitution, the provisions of PAJA must now, first and foremost, be considered in any review proceedings initiated against SARS for invalid conduct.[106] PAJA regulates 'administrative action' (in the absence of applying the constitutional principle of legality). Chaskalson CJ in *Minister of Health v New Clicks South Africa (Pty) Ltd*[107] rejected the Supreme Court of Appeal's approach to review the regulations for lawfulness by applying the provisions of s 33(1) of the Constitution and the common law directly, and not in terms of PAJA. Chaskalson pointed out that PAJA had been enacted pursuant to a constitutional command to give effect to the right to administrative justice. To allow applicants to go behind the provisions of PAJA to utilise s 33(1) of the Constitution to review administrative action would frustrate the purpose with which s 33(3) of the Constitution required the enactment of PAJA. In a concurring judgment, Nqcobo[108] held that to allow access for review to s 33(1) of the Constitution would allow for the development of two parallel systems of law with the same subject matter which would be untenable. He went on to state that litigants would only be entitled to rely directly upon s 33(1) of the Constitution where it was

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[106] Hoexter (2012) at pages 121-5 and 359; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999(1) SA 374 (CC) at para's [56] and [58] (principle of legality is an aspect of rule of law); *President of the Republic of South Africa v SARFU* 2000(1) SA 1 (CC) para [148] (act in good faith and do not miscontrue powers – see also section 3.3: *Lawfulness* and 3.3.3.2: *Mala Fides or Bad Faith infra*); *Pharmaceutical Manufacturers* case *supra* footnote 11 at para's [20], [44], [45], [49] - [51], and [79] – [90] (public power should not be arbitrary or irrational, and rationality is a minimum threshold for the exercise of public power – see also section 3.4: *Reasonableness* and 3.4.1: *Rationality infra*).
[107] 2006 (2) SA 311 (CC) at para [95].
[108] *Ibid.* para's [436] and [437].

alleged that the remedies afforded by PAJA were deficient – the action would be directed at the offending provision of PAJA, and not at the offending administrative action itself.

If the conclusion drawn in section 2.3.3 above is incorrect, and a court determines that the narrow definition of 'administrative action' in PAJA excludes a decision in terms of ss 74A and 74B, it is submitted that the definition of administrative action in PAJA would be questionable,[109] and the definition would be subject to constitutional review.

If PAJA does not apply, the other avenue of review open to the taxpayer would be the constitutional principle of legality, as an overriding general provision of constitutional law, creating justiciable rights for the taxpayer, empowering the taxpayer to apply to court to review conduct that is invalid under s 2 of the Constitution. The principle of legality is 'capable of filling the "accountability vacuum" (footnote omitted) when PAJA does not apply.'[110]

This submission is also based on the judgment of Chaskalson CJ in *Minister of Health v New Clicks South Africa (Pty) Ltd*:[111]

> [97]Professor Hoexter sums up the relationship between PAJA, the Constitution and the common law, as follows:
>
> > "The principle of legality clearly provides a much-needed safety net when the PAJA does not apply. However, the Act cannot simply be circumvented by resorting directly to the constitutional rights in s 33. This follows logically from the fact that the PAJA gives effect to the constitutional rights… Nor is it possible to sidestep the Act by resorting to the common law… The common law may be used to inform the meaning of the constitutional rights and of the Act, but it cannot be regarded as an alternative to the Act." (footnotes and emphasis omitted)

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[109] See also the analysis *supra* in 2.3: *A Constitutional Balance of SARS' Powers and the 'Administrative Action' Debate*; Croome B *Taxpayers' Rights in South Africa* Juta 2010 at page 208 where the author states: 'I submit that if the taxpayer can show that PAJA unreasonably restricts his constitutional rights in violation of s 36 of the Constitution, he may challenge the validity of PAJA.' He cites Currie I & Klaaren J *The Promotion of Administrative Justice Act Benchbook* SiberInk 2001 para 1.29 at page 29.

[110] Hoexter (2012) at page 248 and footnote 577: Michael Taggart 'The Province of Administrative Law Determined?' in Michael Taggart (ed) *The Province of Administrative Law* (1997) 1 at page 3.

[111] 2006(2) SA 311 (CC) at para's [93] to [96].

I agree.

Raz[112] defined the essence of the rule of law as relating to two features:

(a) that all people (including the government) should be ruled by the law and obey it; and

(b) that the law should be such that people should be able to be guided by it.[113]

The rule of law principle requires that all government action must comply with the law, including the Constitution. Government action includes the exercise of public power. As such, the exercise of all public power is subject to the Constitution. The Constitution contains constitutional obligations such as those in ss 41(1), 195(1) and 237 of the Constitution, irrespective of whether or not such exercise of power amounts to administrative action. The standards demanded by the Constitution for the exercise of public power by the Executive and other functionaries (such as SARS) are that it should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given: whether a decision is rationally related to the purpose for which the power was given calls for an objective inquiry.[114]

In relation to the exercise by SARS of 'public power' under ss 74A and 74B, the rule of law will require that the exercise of public power not be arbitrary, and that the decision taken to request information, documents or things be rationally related to the purpose for which the power was given; namely, for purposes of administration[115] of the Income Tax Act as defined in s 74. In applying these principles to ss 74A and 74B in making a decision to request information, documents or things, SARS must carry out its constitutional obligations in line with the rule of law.

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[112]Raz J *The Rule of Law and its Virtue* (1977) 93 Law Quarterly Review195, at page 198.

[113] Stewart C *The Rule Of Law And The Tinker bell Effect: Theoretical Considerations, Criticisms And Justifications For The Rule Of Law*. MacQuarie Law Journal at page 7.

[114]*Pharmaceutical Manufacturers* case *supra* footnote 11 at paras [20], [44], [45], [49] - [51], and [79] – [90]; See also *University of Cape Town v Ministers of Education & Culture* (*House of Assembly & House of Representatives*) 1988 3 SA 203 (C) ; LAWSA Volume 1 2nd ed *Administrative Law* Lexis Nexis at para 139 footnote 6.

[115]In *Industrial Equity Ltd v Deputy Commissioner of Taxation and Others* (1990) 170 CLR 649 at 659 the Australian High Court held that the powers of access and inquisition must be exercised for the purpose of the Act and that question is to be considered in the context of the provision levying income tax - as envisaged in the definition of 'administration of this Act' in s 74 of the Income Tax Act 58 of 1962.

SARS (as an organ of State) can exercise only those powers lawfully conferred upon them as set out in s 41(1) of the Constitution. This is part of the rule of law. This can also be extended to mean, from the authorities quoted *infra*, that compliance with the Constitution is the starting point of compliance with the rule of law. Non-compliance would mean that the organ of state has acted unlawfully and *ultra vires* the Constitution. As such, the Constitution extends the meaning of compliance by the organ of state (such as SARS) with the powers conferred upon them to include compliance with constitutional values, principles and obligations.

2.4.2 The principle of legality

The principle of legality was considered as an aspect of the rule of law in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*[116]where the Constitutional Court held that local government may only act within the powers lawfully conferred upon it: '(I)t is a fundamental principle of the rule of law,[117] recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law…'.[118]

In *President of the Republic of South Africa and another v South African Rugby Football Union and others*[119] the Constitutional Court held that public power must be exercised in good faith and in exercising those powers, should not be misconstrued. In this regard:

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[116] 1998 (12) BCLR 1458 (CC) to para's [56]-[57].

[117] Footnote to para [56] – see Dicey, *Introduction to the Study of the Law of the Constitution* 10ed. (Macmillan Press, London 1959) at 193, in which Dicey refers to this aspect of the rule of law in the following terms: 'We mean in the second place, when we speak of the 'rule of law' as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. … With us every official, from the Prime Minister down to a constable or a *collector of taxes*, is *under the same responsibility for every act done without legal justification as any other citizen.*' [footnotes omitted] (Emphasis supplied)

[118]See also, for example, *Reference Re Language Rights under the Manitoba Act*, 1870 [1985] 19 DLR [4th] 1 at 24, where the Supreme Court of Canada held that: 'The Constitution, as the supreme law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence. The founders of this nation must have intended, as one of the basic principles of nation building, that Canada can be a society of legal order and normative structure: one governed by rule of law. While this is not set out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution.'

[119] 2000(1) SA 1 (CC) at para [148]; See also section 3.3: *Lawfulness infra* and 3.3.3.2: *Mala Fides or Bad Faith infra*.

> [148]… the exercise of the powers must not infringe any provision of the Bill of Rights; the exercise of the powers is also clearly constrained by the *principle of legality*. (Emphasis supplied)

The Constitutional Court has made it clear that, in accordance with the constraints placed on public power by the rule of law and the principle of legality, the exercise of all public power is subject to the Constitution. This gives taxpayers the opportunity to review any conduct of SARS that is contrary to the rule of law (including the principle of legality), without having to 'claim space and push boundaries' to find means of controlling public powers.[120]

In the *Pharmaceutical Manufacturers* case,[121] the Constitutional Court established the following:

> [85]It is a requirement of the rule of law that the *exercise of public power by the Executive and other functionaries should not be arbitrary*. Decisions must be *rationally related to the purpose for which the power was given*, otherwise they are in effect arbitrary and inconsistent with this requirement…
>
> [86]*The question whether a decision is rationally related to the purpose for which the power was given calls for an objective inquiry*. Otherwise a decision that, viewed objectively, is in fact irrational, *might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational*. Such a conclusion would place *form above substance, and undermine an important constitutional principle*. (Emphasis supplied)

These principles are not unique to the Executive. The Constitutional Court made specific reference to 'other functionaries'. This would include SARS. Hence, in relation to the exercise by SARS of its powers under ss 74A and 74B, the rule of law including the principle of legality will at the very least require the following, that:

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[120]*Pharmaceutical Manufacturers* case *op. cit.* at para [45].
[121]*Ibid.* at para's [85]-[86].

(a) the exercise of SARS' power must fall within the powers lawfully conferred upon them in terms of the Constitution (ss 1(c) and 41(1)), and must not be arbitrary or irrational;[122]

(b) the decision taken to request information, documents or things must be rationally[123] related to the purpose for which the power was given,[124] namely, for 'the administration of the Act', as defined in s 74 of the Income Tax Act;

(c) this requirement must be satisfied so as not to fall short of the standards demanded by the Constitution, which would include compliance with the principle of legality generally, and various constitutional obligations such as s 195(1) of the Constitution; and

(d) merely accepting that the person making the decision has done so mistakenly and in good faith, believing it to be rational, would place form over substance, undermining the applicable constitutional principles.

The principle of legality and the duty imposed by s 7(2) of the Constitution that the State must respect, protect, promote and fulfil the rights in the Bill of Rights are also well illustrated in the unanimous decision of the Constitutional Court in *Mohamed and Another v President of the Republic of South Africa and Others.*[125] In this case, the Constitutional Court found that immigration officers, in handing over 'Mohamed' to the Federal Bureau of Investigation in the United States of America without getting at the very least a guarantee from the United States government that he would not be subject to a death sentence on conviction, was a gross transgression of the values inherent in the Constitution '… and contrary to the underlying values of our Constitution. It is

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[122] *Ibid.* at 261.
[123] *Pharmaceutical Manufacturers* case *supra* footnote 11 at para [45]; See also *University of Cape Town v Ministers of Education & Culture* (*House of Assembly & House of Representatives*) 1988 3 SA 203 (C); LAWSA Volume 1 2nd ed *Administrative Law* Lexis Nexis at para 139 footnote 6; 'In order to establish a *prima facie* case for enforceability of an Internal Revenue Service summons, plaintiffs must plead: (1) that the investigation has a legitimate purpose and that the inquiry may be relevant to that purpose, (2) that the information sought is not already within the Government's possession, and (3) that the Government has followed the procedural steps required by the Internal Revenue Code': *US v McCarthy* 514 F 2d 368.
[124] *Ibid.* at para [45].
[125] 2001(3) SA 893 (CC) at para's [37], [48], [52], [53], [58], and [68] and quoting Justice Brandeis in *Olmstead et al. v United States* 277 U.S. 438 (1928), a case about using unlawfully obtained evidence from wire tapping violations.

inconsistent with the government's … and it ignores the commitment implicit in the Constitution that South Africa will not be party to the imposition of cruel, inhuman or degrading punishment.' Having found that the conduct of the state in handing over Mohamed to the United States was unlawful, the Court went on to state that it was a serious finding as the State lead by example: 'If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself, it invites anarchy.'

In applying these principles to ss 74A and 74B when making a decision to request information, documents or things, SARS must protect taxpayers' constitutional rights, uphold their constitutional obligations, and not break the law. If not, its actions (by analogy) will be seen to breed contempt for the law. SARS must lead by example. The legitimacy of the constitutional order is undermined when SARS acts unlawfully, unreasonably or without procedural fairness and adequate reasons. This conclusion is supported by the clear obligation placed upon SARS to diligently and without delay perform its obligations in terms of the Constitution. The principle of legality can be viewed in a broad sense to mean that SARS must, in the first instance, uphold the principles and values of the Constitution in exercising any decision or executing any conduct. It must comply with the jurisdictional facts of ss 74A and 74B read with the definition of 'administration of this Act' in s 74, and comply with its constitutional obligations set out in ss 1(c), 33, 41(1), 195(1) and 237 of the Constitution. SARS must do so diligently and without delay.[126] This means, *inter alia*, that SARS cannot: exercise power not conferred upon it in terms of the Constitution; ignore its constitutional obligations such as those in terms of s 195(1) of the Constitution; and, exercise power arbitrarily and merely in good faith, in the belief that its decision is rationally[127] related to the purpose for which the power was given, albeit mistakenly. This would give credence to form over substance, undermining constitutional principles. To transgress these provisions in the Constitution would amount to conduct that is unlawful and *ultra vires*[128] the Constitution and 'invalid'.

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[126]Section 237 of the Constitution.
[127]*Pharmaceutical Manufacturers* case *op. cit.*; *University of Cape Town v Ministers of Education & Culture* (*House of Assembly & House of Representatives*) 1988 3 SA 203 (C); LAWSA Volume 1 2nd ed *Administrative Law* Lexis Nexis at para 139 footnote 6.
[128] See section 3.3: *Lawfulness infra*.

In practice, the first inquiry as to the reviewability of 'invalid' conduct by SARS would be to determine whether that conduct is 'administrative conduct' under PAJA, and then subject to the codified grounds of review in s 6(2) of PAJA. If this step is not satisfied, the 'accountability vacuum' referred to by Professor Hoexter above[129] is filled by the taxpayer relying upon the principle of legality in reviewing the 'invalid' conduct by SARS. The applicable review actions available to taxpayers both through PAJA, or the principle of legality, are discussed and analysed in this thesis.

The conclusion was reached in 1.3: *A Constitutional Balance of SARS' Powers and the 'Administrative Action' Debate* above that the definition of 'administrative action' includes a transgression by SARS of its constitutional obligations in ss 1(c), 33,41(1) and 195(1) of the Constitution when SARS make a decision in terms of ss 74A and 74B. SARS must: comply with the rule of law, only assume powers as provided for in the Constitution; apply just administrative action; display a high standard of professional ethics; provide efficient economic and effective use of resource; provide services that are provided impartially, fairly, equitably and without bias; respond to the people's needs; and, act in an accountable and transparent manner, by providing the public with timely accessible and accurate information.[130]

One of the emerging problems with s 195(1) of the Constitution is that, although it regulates Public Administration generally by imposing constitutional obligations SARS (an organ of State), the Constitutional Court has held that it does not give rise to justiciable rights - *Chirwa v Transnet Limited and Others*:[131]

> [76] Therefore although section 195 of the Constitution provides valuable interpretive assistance it does not found a right to bring an action.

The claimant attempted to raise s 195(1) as support for a justiciable right the party had. The Constitutional Court was not impressed with the argument, simply stating s 195(1) does not create a set of justiciable rights. They do however creating duties and obligations that must be fulfilled, otherwise conduct is inconsistent with the Constitution. In the

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[129] Hoexter (2012) at page 248.
[130] Sections 41(1)(f) and 195(1)(a), (b), (d), (e), (f) and (g); *Mpande Foodliner CC v C SARS* 63 SATC 46 at pages 51 and 64.
[131] 2008 (4) SA 367 (CC) at [74] – [76], [146] and [195].

recent Constitution Court decision in *Glenister v President of the Republic of South Africa and Others*[132] the court held that the High Court had jurisdiction to hear applications challenging the non-fulfilment of constitutional obligations such as 'to act reasonably and accountably; to cultivate good human resource management; to respect international treaty obligations; … and to respect values enshrined in the Bill of Rights.' It is submitted, similarly, the failure by SARS to adhere to its constitutional obligations such as ss 1(c), 33, 41(1) and 195(1) of the Constitution, read with s 4(2) of the SARS Act, is unlawful and would be the non-fulfillment of constitutional obligations as envisaged in the*Glenister* case,[133] bringing such failure by SARS to act consistently with the Constitution within the ambit of a judicial review on grounds of unlawfulness, with the resultant remedies available to the taxpayer through s 172(1) of the Constitution in terms of s 6(2) of PAJA, or the constitutional principle of legality.

2.4.3 Recent developments in the principle of legality

The courts are also beginning to accept in the recent development of the constitutional principle of legality, that failure to give reasons is a further transgression of that principle.[134]

The following recent decisions are significant in this regard: In *Albutt v Centre for the Study of Violence and Reconciliation*[135] the Constitutional Court made it clear that rationality may demand procedural fairness in appropriate cases. The High Court also recently supported the proposition that 'the principle of legality, which includes rationality and accountability, imposes a duty upon the functionary exercising a public power to provide reasons for its act or decision' in the full bench decision of Van Der Merwe J in *Wessels v Minister for Justice and Constitutional Development*.[136] In a recent decision of *Koyabe v Minister for Home Affairs*[137] the Constitutional Court also seems 'willing to source the obligation to give reasons elsewhere than in s 5 of PAJA'.[138]

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[132]2011 (3) SA 347 (CC) at para's [13] and [22].
[133]*Ibid*.
[134] Hoexter (2012) at pages 121-5 and 359.
[135] 2010 (3) SA 293 (CC) at para [49] *et seq*.
[136] 2010 (1) SA 128 (GNP) at para's 141I-J.
[137] 2010 (4) SA 327 (CC).
[138]*Ibid.* at page 359.

Consequently, it can be argued that the constitutional principle of legality has now come full circle, to encapsulate all the duties of SARS in terms of PAJA: the duty to act lawfully, reasonably, procedurally fairly, and to give reasons, where appropriate. If the provisions of ss 3 and 5 of PAJA, through the definition of administrative action, does not apply to SARS when invoking their powers in terms of ss 74A and 74B, then the constitutional principle, as described above, will apply, opening the taxpayer's door to taking any conduct by SARS that is inconsistent with these constitutional principles and obligations on review.

Chapters 2 and 3 below analyse the substantive limitations to SARS' powers in ss 74A and 74B, and the significance of SARS' constitutional obligations in s 195(1) of the Constitution.

2.5 ADEQUATE REASONS

2.5.1 Introduction

If a decision by SARS in terms of ss74A and 74B is 'administrative action' as defined in PAJA, and the decision and a taxpayers 'rights have been materially and adversely affected' as contemplated in s 5(1) of PAJA, SARS will have to give adequate reasons as contemplated in s 5(2), failing which it will be presumed that the administrative action of SARS was 'taken without good reason' (s 5(3) of PAJA), bringing the transgression within the ambit of a s 6(2)(c) and (i) of PAJA ground of review.

Hoexter states[139] that although PAJA gives effect to the constitutional right to reasons for administrative action as defined, and therefore only applies to those rights and legitimate expectations 'materially and adversely affected by administrative action',[140] reasons will increasingly be accepted as part of the content of fairness, even where rights are not involved, or as the subject matter of the discourse of public power in the broader sense, outside the narrowly defined scope of 'administrative action' in PAJA.

2.5.2 The relevance of s 74 of the Income Tax Act

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[139] Hoexter C & Lyster R *The New Constitutional & Administrative* (2002) Juta at page 203.
[140] As envisaged in s 5(1) of PAJA.

However, the necessity for adequate reasons goes beyond the requirements of PAJA. Sections 74A and 74B require an inquiry or audit to be 'for the purposes of the administration of this Act'. This phrase is defined in s 74 of the Income Tax Act. Section 74 of the Income Tax Act reads:

> 74. GENERAL PROVISIONS WITH REGARD TO INFORMATION DOCUMENTS OR THINGS…
>
> '*administration* of this Act' means–
>
> (a) obtaining of full information in relation to any –
>
> (i) *amount received by or accrued* to any person;
> (ii) *property disposed* of under a *donation* by any person; and
> (iii) *dividend declared* by any company;
>
> (b) ascertaining of the *correctness* of any return, financial statement, document, declaration of facts or valuation;
>
> (c) *determination of the liability* of any person for any tax, duty or levy and any interest or penalty[141] in relation thereto leviable under this Act;
>
> (d) *collecting* of any such liability;

[141]See the Canadian Supreme Court case of *R v Jarvis* 2002 (3) SCR 757 as support for this submission – discussed later in this thesis at page 88; In *Palmer v McMahon* 133 US 660 (1890) the court held that the imposition of the penalty did not deprive the taxpayer of liberty and property without due process of law, as the taxpayer had the opportunity to object before the assessment. In South Africa, objection only happens after the revised assessment and the imposition of punitive penalties, so if SARS were to use the inquiry and audit provisions in s 74 to investigate punitive penalties (as opposed to administrative penalties) and obtain evidence to pursue the punitive penalties and any criminal charges, the conduct of SARS would, it is submitted, be unconstitutional.

(e) *ascertaining whether an offence in terms of this Act has been committed*;

(f) ascertaining whether a person has, other than in relation to a matter contemplated in paragraphs (a),(b),(c),(d) and (e) of this definition, *complied with* the provisions of this Act;

(g) *enforcement* of any of the Commissioner's *remedies* under this Act to ensure that any obligation imposed upon any person by or under this Act, is complied with; and

(h) *performance of any other administrative function* which is necessary for the carrying out of the provisions of this Act. (Emphasis supplied).

It is not sufficient for SARS to simply restate the provisions in s 74 as the purpose for its inquiry and audit. A rational objective reason for invoking the provisions must exist.[142] A reasonable decision[143] must be supported by 'concrete evidence'[144] with reasons[145] given for taking the decision in the first place. The decision must be objectively capable of

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[142] *Ferucci and Others v Commissioner for South African Revenue Service and Another* 65 SATC 47 at page 52 and pages 54-5.

[143] See section 3.4: *Reasonableness infra*; LAWSA Volume 5(3) 2nd ed at para 165: 'There is no quantitative legal yardstick since the quality of reasonableness of the provision (or conduct) under challenge "must be judged according to whether it arbitrarily or excessively invades the enjoyment of a constitutionally guaranteed right"'; *Commissioner of Taxes v CW (Pvt) Ltd* 1989 (3) ZLR 361 (S) at 370F-372C; *Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Limited* 1928 AD 220 , 236-7; and *National Transport Commission v Chetty's Motor Transport* (Pty) Ltd 1972 (3) SA 726 (A); See also *Local 174 International Brotherhood of Teamsters v US*, 240 F.2d 387 (quoted from the headnote): where '(i)n proceedings by revenue agents to compel a union's production of records relating to transactions with the taxpayer-president, *agents had a burden to show that a demand was reasonable under all circumstances and to prove that books and records were relevant or material to the tax liability of the taxpayer* and that the union possessed the books or records containing items relating to the taxpayer's business'. (Emphasis supplied)

[144] Preiss, M, Silke J, & Zulman R H *The Income Tax Practice Manual* (November 2012), www.mylexisnexis.co.za. at para B 8 (7): 'The inference to be drawn from the decision in an unreported case in 1944, and from other decisions, is that the Court, while giving due weight to the onus placed upon the taxpayer under s 82, will not be satisfied with guesses by SARS which are not *supported by concrete evidence* and that if it has to decide on probabilities it will be guided by the relative strength of the evidence tendered by the appellant and by the Commissioner respectively.' (Emphasis supplied)

[145] See also *Park-Ross and Another v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C) at pages 1641-165A; *Sachs v Minister of Justice* 1934 AD 11.

furthering the purpose for which the power was given and for which the decision was taken.

In the case of *Nkondo & Gumede v Minister of Law and Order*,[146] the Appellate Division held that repeating the wording of the enabling legislation did not constitute reasons: 'I cannot accept the proposition that if the Minister acts on one of these grounds and informs the person concerned of that fact by repeating the relevant words in the relevant paragraph, that ground thereby assumes the character of "reasons"…'. In this case the court held that: the functionary must comply with the jurisdictional facts of the empowering provisions, otherwise the notice is invalid; all prescribed procedures must be complied with; a statement of statutory grounds is not reasons for a notice - as such, reasons must give the person concerned an opportunity to make proper representations; the Minister cannot act arbitrarily or capriciously; he must make a decision based on the information before him, otherwise he is acting arbitrarily. This is also supported by Hoexter,[147]who states that:'… reasons are not really reasons unless they are properly informative. They must explain why action was taken or not taken.'

The decision taken by SARS in taking a decision in terms of ss 74A and 74B must therefore be rationally[148] related to the purpose (one of those listed in s 74) for which the power was given.[149] In order to require information, documents or things, SARS must give an informative and adequate reason for the decision. For instance, the request for information, documents, or things could be formulated along the following lines, in order to comply with these provisions:

> The taxpayer is required to furnish, produce or make available information, documents or things for the purposes of the administration of the Income Tax Act, in accordance with the provisions of ss 74A and 74B, for the following reasons:

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[146] 1986 (2) SA 756 (A) at page 785; See also *Sachs v Minister of Justice* 1934 AD 11.
[147] Hoexter & Lyster R *The New Constitutional & Administrative Law* (2002) Juta at page 244.
[148] *Pharmaceutical Manufacturers* case *op. cit.* at para [85]; *University of Cape Town v Ministers of Education & Culture* (*House of Assembly & House of Representatives*) 1988 3 SA 203 (C); LAWSA Volume 1 2nd ed *Administrative Law* Lexis Nexis at para 139 footnote 6.
[149] Wheelright K *Taxpayer' Rights in Australia* in Bentley D *Taxpayers' Rights: An International Perspective* Revenue Law Journal Bond University: Queensland 1998 at page 49; *Pharmaceutical Manufacturers* case *op.cit*.

At this juncture, SARS would have to be selective in choosing one or more of the following, so as to demonstrate the rational exercise (as opposed to arbitrary exercise) of its power in line with a specific purpose. An example of such a lawful inquiry by SARS which is compliant with the jurisdictional facts of the sections mentioned follows:

1. to obtain full information in relation to the amount specified in item __ of the tax return, as supported by item __ of the attached financial statements;
2. to ascertain the correctness of the tax return at item __ as supported by item __ of the attached financial statements;
3. to determine the liability for income tax with respect to the following transactions [with specific reasons why the liability for tax is being questioned].[150]

Failure by SARS to formulate reasons along the suggested lines at the commencement of an inquiry and audit would mean that SARS have failed to comply with the jurisdictional facts of s 74 of the Income Tax Act and s 3(2) of PAJA (if the decision in terms of ss 74A and 74B is 'administrative action').

2.5.3 The meaning of 'adequate reasons'

Hoexter notes[151] that although PAJA gives effect to the constitutional right to reasons for administrative action as defined, and therefore only applies to those rights and legitimate expectations 'materially and adversely affected by administrative action'[152] as required in s 5(2) of PAJA, reasons will increasingly be accepted as part of the content of fairness, even where rights are not involved, or as the subject matter of the discourse of public power in the broader sense, outside the narrowly defined scope of 'administrative action' in PAJA. She states that this has been the trend in England and Australia. The point is also made that administrators should tend to err on the side of caution in giving reasons

[150] An example drafted by the writer based upon reviewing many such requests in the past two decades of tax practice.
[151] Hoexter C & Lyster R *The New Constitutional & Administrative* (2002) Juta at page 203.
[152] As envisaged in s 5(1) of PAJA.

for decisions.[153] Consequently, it is submitted that reasons in terms of the provisions of s 74 of the Income Tax Act would be required, even in a situation where it may be held by a court that a decision in terms of ss 74A and 74B is not administrative action defined in PAJA. This submission is supported by the commentary of Hoexter[154] and the decision in *Wessels v Minister of Justice and Constitutional Development*[155] where a full bench, *obiter*, supported the argument that 'the principle of legality, which includes rationality and accountability, imposes a duty upon the functionary exercising a public power to provide reasons for its act or decision'.

In *CSARS v Sprigg Investments 117CC t/a Global Investment*[156] the Supreme Court of Appeal quoted with approval from *Ansett Transport Industries (Operations) Pty Ltd and Another v Wraith and Others*[157] the requirements for 'adequate reasons' in respect of tax matters in South Africa is definitively spelt out by the Supreme Court of Appeal as follows:

> …[T]he decision-maker [must] explain his decision in a way which will enable a person aggrieved to say, in effect: 'Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging. This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation...

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[153] Wheelright K *Taxpayer' Rights in Australia* in Bentley D *Taxpayers' Rights: An International Perspective* Revenue Law Journal Bond University: Queensland 1998 at page 49; Hoexter C & Lyster R *The New Constitutional & Administrative* (2002) Juta at page 203.

[154]Hoexter (2012) at page 472 where the author refers to a discussion by Plasket C *Administrative Law* (2009) Annual Survey page 1 at page 21 in discussing the judgment of Mokgoro J in *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as amicus curiae)* 2009 (12) BCLR 1192 (CC) where the court recognised the right to reasons without requesting them, as a duty rested upon the administrators even though no express provision required them to do so: '…it is an incident of the founding value of the rule of law enshrined in section 1(c) of the Constitution. The rule of law was held to be the source of the development of a general duty to give reasons in Indian law, based on the same general idea as that expressed by Mokoro J in *Vedachala Moodliar v State of Madras* AIR 1952 Madras 276; *Gautam v Union of India* 1993 (1) SCC 78.'

[155]2010 (1) SA 128 (GNP) at para's 141I-J.

[156]73 SATC 114 (SCA) at para's [12] and [13].

[157](1983) 48 ALR 500.

In *Industrial Equity Ltd v Deputy Commissioner of Taxation and Others*[158] the Australian High Court held that the powers of access and inquisition must be exercised for the purpose[159] of the taxing act, and that question is to be considered in the context of the provision levying income tax.[160] Section 264 of the Australian Income Tax Assessment Act 1936 (Cth) is similar in its terms to ss 74A and 74B of our Act. The Australian Administrative Decisions (Judicial Review) Act 1977 is broadly similar to PAJA, and s 13 thereof (like s 5 of PAJA) requires public officials to give adequate reasons for administrative decisions. The Australian courts, including the highest court, have consistently held that decisions calling upon taxpayers to produce information and documents under s 264 are administrative decisions reviewable under the Judicial Review Act and for which reasons must be given.[161]

However, in *R v McKinlay Transport Ltd*[162] Lamer J and Wilson J held that a demand for information or documents is to enforce compliance with the Canadian Income Tax Act. While a demand for information[163] constitutes a 'seizure' it is not an unreasonable one. They went on to state that the integrity of the tax system can only be maintained by a system of random monitoring and the information gathering provisions[164] provides the least intrusive means by which effective monitoring of compliance with the Canadian Income Tax Act can be effected. A taxpayer's expectation of privacy with regard to the information and documents in question is relatively low, where seizures in the administrative or regulatory context may have a lesser standard.[165] However, it is submitted that this reasoning does

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[158] (1990) 170 CLR 649 at 659.

[159] See also section 3.3: *Lawfulness infra*.

[160]See also *Local 174 International Brotherhood of Teamsters v US* 240 F.2d 387 where 'revenue agents … had (the) burden to show that (the) demand was reasonable under all circumstances and to prove that *books and records were relevant or material* to (the) tax liability of taxpayer…'; *May v Davis* 7 F Supp 596.

[161] Refer to the overview furnished in Carbone *Statutory Judicial Review of the Administration of the Income Tax Assessment Act 1936* [1996] 6 *Revenue Law Journal* 104; and see also *Industrial Equity Ltd v Deputy Federal Commissioner of Taxation* [1990] HCA 46 at para [25]. In *O'Reilly v State Bank of Victoria Commissioners* [1983] HCA 47 Gibbs CJ said that s 264 conferred on the Commissioner a power whose exercise *'will be likely adversely to affect rights of individuals"* (para 7; see also the judgment of Mason J in the same case at para [18]; and see *Fieldhouse v Deputy Commissioner of Taxation* [1989] FCA 397 at para [22] *per* Hill J).

[162][1990] 1 S.C.R. 627.

[163]Canadian Income Tax Act (R.S.C., 1985, c.1(5th Supp.)) ss 231.1(1) and 231.2(1).

[164]*Ibid.* ss 231.1 and 231.2.

[165]For comparative American law see *US v McKay* 372 F.2d 174 where the court held that the '(p)ower of Commissioner of Internal Revenue to investigate records and affairs of taxpayers is greater than that of a party in civil litigation; such power may be characterized as an inquisitorial power, analogous to that of (a) grand jury and one which should be liberally construed, in context of which the criteria of relevancy and materiality have broader connotations than in context of trial evidence.'; See also *Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 170 CLR 649 at para's [14]-[24]: 'It is the function of the Commissioner to ascertain the taxpayer's taxable income. To ascertain this he may need to make wide-ranging inquiries, and to make them long before any issue of fact arises between him

not detract from the constitutional obligation of SARS in South Africa to furnish adequate reasons for doing so, in line with what is required to be 'adequate reasons' in *Sprigg Investment* above.[166]

2.5.4 Conclusion

These judgments, read in conjunction with the views expressed by Hoexter, emphasizes the importance of SARS giving 'adequate reasons' when a decision in terms of ss 74A and 74B is made. These submissions must also be read with the arguments set out in section 4.2.5: *Public Administration must be Accountable* in this thesis. An administrator may deviate from supplying adequate reasons where reasonable and justifiable in terms of s 5(3) of PAJA.[167] In *De Freitas v Permanent Secretary of Agriculture, Fisheries, Lands and Housing* 1998 3 LRC 62 the Privy Council, on the issue of what is 'reasonably justifiable in a democratic society' to limit a person's fundamental constitutional rights, stated[168]: '1.Whether the legislative objective is sufficiently important to justify limiting a fundamental right? 2.Whether the measures designed to meet the legislative objective are rationally connected to it? 3.Whether the means used to impair the right or freedom are no more than is necessary to accomplish the objective?'

These principles would apply in the limited instances where SARS can prove that it was not necessary to furnish adequate reasons. The only instance in practice where SARS would be justified in not furnishing such reasons would be a case where the information is required as a matter of urgency. In an urgent situation the adequate reasons would be given after the fact. Otherwise, failure to do so would transgress PAJA and the constitutional principle of legality,[169] where SARS would be required to account for its actions with reference to the facts and the law as to why the inquiry and audit was necessary; ensuring the audit is cost effective and efficient; that it is displaying a high

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and the taxpayer.'

[166]*Supra* footnote 168.

[167] Corder H and Van der Vijver (eds) *Realising Administrative Justice* SiberInk 2002 at page 11: 'No doubt the drafters of the PAJA will argue that such limitations on the availability of rights are justifiable and reasonable…for the 'promotion of efficiency'…The matter has yet to be brought court.'

[168]Cited with approval in *Law Society of Zimbabwe and Another v Minister of Finance* 61 SATC 458; See also *Ferucci and Others v Commissioner for South African Revenue Service and Another*65 SATC 47 at page 52 and pages 54-5.

[169]Hoexter (2012) at pages 121-5.

degree of professional ethics; it is exercising its powers impartially, fairly, equitable and without bias; and in a transparent manner.[170]

Failure by SARS to give adequate reasons as analysed supra would constitute a transgression envisaged in s 5(3) of PAJA:

'If an administrator fails to furnish adequate reasons for an administrative action, it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.'

[170]Complying with its constitutional obligation in ss 195(1) and 237 of the Constitution, so as not to be criticised for conduct that is inconsistent with s 2 of the Constitution.

CHAPTER 3

LIMITATIONS TO INVOKING SECTIONS 74A AND 74B OF THE INCOME TAX ACT

3.1 THE STATUTORY PROVISIONS: SS 74A, 74B, 74 AND 75 64

3.2 THE SARS INTERNAL AUDIT MANUAL 64

3.3 LAWFULNESS 70

3.3.1 Authority 74

3.3.2 Jurisdictional facts 76

3.3.3 Abuse of discretion 79

3.3.3.1 Improper or ulterior purpose or motive 82

3.3.3.2 *Mala fides* or bad faith 85

3.3.3.3 Failure to apply mind or relevant and irrelevant consideration 86

3.3.3.4 Unlawful fettering 87

3.3.3.5 Arbitrary and capricious decision-making 88

3.4 REASONABLENESS 89

3.4.1 Rationality 91

3.4.2 Proportionality 93

3.5 PROCEDURAL FAIRNESS 96

3.5.1 Bias 96

3.5.2 *Audi alteram partem* 97

3.6 LEGITIMATE EXPECTATIONS 101

3.6.1 The Legitimate Expectation Doctrine in the context of ss 74A and 74B 101

3.6.2 Limitation to the Legitimate Expectation Doctrine 109

3.7 MULT-STAGED DECISION-MAKING 113

3.8 'JUST CAUSE' DEFENCE 116

3.1 THE STATUTORY PROVISIONS: SS 74A, 74B, 74 and 75

This chapter analyses the limitations to SARS invoking its discretion in terms of ss 74A and 74B, in making a decision to inquire about and audit information, documents and things of taxpayers.

The key provisions of ss 74A and 74B that limit of SARS' powers lies in the words and phrases '*may*', '*for the purposes of the administration of this Act*', '*taxpayer*' and '*shall on demand produce the authorisation letter issued to him*'. Each of these phrases are defined, or have express meanings attached to them in the Income Tax Act.

The provisions of ss 74A and 74B must also be read in conjunction with the relevant portions of ss 74 and 75(1)(b) of the Income Tax Act. Section 74 provides the meaning of 'for the purposes of the administration of this Act' and an 'authorisation letter'. Section 75(1)(b) provides the 'just cause'[1] defence to taxpayers where they refuse to adhere to the requests by SARS in terms of s 74A and 74B. Each of these provisions contain conditions that SARS must meet in order to advance towards lawful conduct when invoking their powers to investigate and audit. The fulfilment of those conditions demonstrate the presence of a lawful authority, the fulfilment of relevant jurisdictional facts, and conduct that is *intra vires* ss 74A and 74B, reasonable and procedurally fair.

3.2 THE SARS INTERNAL AUDIT MANUAL

As a part of the justifiable and accountable conduct of SARS that is lawful, reasonable and procedurally fair in making decisions in terms of ss 74A and 74B, it must follow its self-imposed practices impartially, including any published and internal guidelines, that ensures practical compliance with its constitutional obligations,[2] when its conduct 'materially and adversely affect'[3] the rights and legitimate expectations of taxpayers.

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[1]For an analysis of the term 'just cause' see section 3.8: *'Just cause' Defence infra*; See also *Chetty v Law Society of Transvaal* 1985(2) SA 756 (AD); *Attorney-General, Tvl v Abdul Aziz Kader* 1991(4) SA 727 (A); *Shidiack v Union Government* (*Minister of the Interior*) 1912 AD 642; *Britten v Pope* 1916 AD 150.

[2] Sections 1(c), 33, 41(1) and 195(1) (a) – (g) of the Constitution analysed in this thesis: rule of law, just administrative action, high standard of professional ethics, impartiality, fairness, unbiased, accountable and transparent conduct.

[3]Section 3 of PAJA; Key elements of PAJA are 'borrowed' from German law and Germanic administrative law will have a bearing on interpretations given to administrative law concepts such as *'materially and adversely affect'*; Mahendras P Singh *German Administrative Law in Common Law* Amazon Kindle Edition Location 2378 (last accessed 31 March 2013).

Internal guidelines are created by management of SARS to set out guidance that assessors should follow in order to control the efficiency and effectiveness of these SARS officials as mandated by s 4(2) of the SARS Act. It also ensures careful direction to a broad group of officials on the procedures they should be following in complying with the scope, purport and spirit of the Constitution, as stated in the Constitutional Court case of *Dawood and another v Minister of Home Affairs and others; Shalabi and another v Minister of Home Affairs and others; Thomas and another v Minister of Home Affairs and others*[4]: that in relation to broad, unguided discretionary powers (such as those prevalent in ss 74A and 74B) guidelines should be provided and must be adhered to, ensuring compliance with duties imposed by the Constitution.

The *SARS Internal Audit Manual*[5] sets the expected conduct of SARS in line with the constitutional obligations imposed on them. The creation of the expected conduct of SARS standards creates a self-imposed limitation that SARS should not deviate from, except with sufficient reason. If SARS applies these standards regularly in the exercise of its discretion in terms of ss 74A and 74B, then SARS will violate the principles of impartiality, equality, fairness and accountability if it does not apply them to *all* taxpayers undergoing audits or inquiries.

To carry this analysis further it is necessary to quote key extracts from the guidelines contained in the *SARS Internal Audit Manual*, as the manual is not available to the public, despite numerous attempts to have SARS make it available:[6]

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[4] 2000 (3) SA 936 (CC).

[5] An unofficial copy was obtained from SARS for the purposes of this thesis: *SARS Internal Audit Manual – Part 4: The Audit Process*; In *Scherer v Kelley* (1978) 584 F.2d 170 (quoted from the headnote): where the United States of America Freedom of Information Act §552(a)(2)(C) requires agencies to make public administrative staff manuals and instructions to staff that affect members of the public; See also Williams R C et al *Silke on Tax Administration* (April 2009) Lexis Nexis at para 8.17 generally; *Minister for Provincial and Local Government of the RSA v Unrecognised Traditional Leaders of the Limpopo Province, Sekhukhuneland* [2005] 1 All SA 559 (SCA).

[6] The writer corresponded with SARS requesting an official copy of the *SARS Internal Audit Manual*, but was advised it was not available due to the fact that it was still in draft form. This is contrary to information obtained from the SARS Germiston office that the manual was being used as a field audit manual for taxpayer inquiries and audits. The attitude of SARS is also contrary to the decision of *Minister for Provincial and Local Government of the RSA v Unrecognised Traditional Leaders of the Limpopo Province, Sekhukhuneland* [2005] 1 All SA 559 (SCA) where the appeal court found in favour of the public member seeking a report upholding the right of access to information held by the State, read with sections 36 (the limitation clause) and 39(2) (obliging every court to promote "the spirit, purport and objects of the Bill of Rights of the Constitution");*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (7) BCLR 687 (CC) followed; In *Earthlife Africa (Cape Town Branch) v Eskom Holdings Ltd* [2006] 2 All SA 632 (W) the court referred to the United States decision of *Vaughn v Rosen* (1974) 484 F.2d 820 where the *Vaughn* index originates, describing each exempt record with enough detail for the court to determine whether or not the record is subject to exemption from 'transparency' and disclosure, where a copy is handed to the opponent to enable them to

In order to carry out his tasks properly the auditor has to make professionally and technically sound decisions on the nature and scope of the audit. *This requires insight into the knowledge of the business process of the taxpayer as well as those of the industry or target group* of which it is part.[7]

…

The risk profiling team will manually *select cases to be audited by screening the tax returns in order to determine the level of risk per case, and to establish which cases warrant an audit* (desk or field); selection will be done under the guidance and ambit of the Manual Risk document.[8]

The Audit Assignment

The audit plan includes the schedule and set up of audits to be carried out within a certain time period. The audit plan translates itself into the audit assignment, which indicates *which taxpayers and which elements of the tax return(s) need to be audited*. This is important for each auditor, as it sets out the *nature and scope of the audit*.

The audit assignment is thus the link between the audit plan and the auditing process.[9]

2. Stage 1: AUDIT PLANNING

… The team leader will have to prioritise each case assigned. All decisions taken at this stage of the audit process and all

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challenge the exemption claims. This procedure is in line with ss 195(1) and 32 of the Constitution of the Republic of South Africa 108 of 1996, read with the Promotion of Access to Information Act 2 of 2000.

[7] *SARS Internal Audit Manual – Part 4: The Audit Process*, at page 2.

[8] *Ibid*. at page 4.

[9] *Ibid*. at page 5.

information and considerations on which *decisions are based, are recorded in the audit file*.[10]

Pre-planning

Not as critical in our environment, although the following two components of pre-planning should still be relevant:

- An engagement letter informing the taxpayer of the audit, i.e. notice of the intention to audit, when, purpose, approximate duration, information required and other general aspects.
- Allocation of staff in respect of the specific engagement.

Collecting Information

Prior to the audit, information will have to be collected on the taxpayer to be audited, as this will provide inside information into the entity.

- *Information on the taxpayer himself. Obtained from the existing tax files of the taxpayer. ...*
- *Information from other sources* (*third parties*) …
- Information on the business processes, administrative organisation and the internal control of the entity. …
- Information from minutes of meetings e.g. board of …
- Information from the file of the tax consultant and/or accountant/ external auditor of the taxpayer. …

The auditor should *restrict the initial information collected to the potential issues of the relevant case*, which will be of value to the audit of the risk areas identified.

…

[10] *Ibid*. at page 6.

Carrying out the preliminary analytical review

The purpose of this exercise is not to produce volumes of interesting, but ultimately useless information.

… The preliminary review may require that the auditor researches the tax laws and court cases that are relevant to particular issues to be examined in the audit of the entity. *Notes on the research are incorporated into the audit working papers*.

Risk analysis based on the tax return

In determining which activities will be carried out to achieve the audit objectives, *the team leader continually considers the relationship between the cost and the benefits of the audit* …

3. Stage 2: THE IMPLEMENTATION OF THE AUDIT PROGRAMME …

The general rule is as follows:

- *Where the auditor finds no or immaterial mistakes or errors, the audit in that particular area should be stopped.*
- *Where many material mistakes* or errors are detected, the audit should be expanded in that particular area.
- *If it appears that the taxpayer's returns are* ***substantially correct****, the audit should be terminated.*

The auditor must consider whether advice or support from a well-informed colleague is necessary...

All decisions at this stage of the auditing process, as well as the information and considerations on which they are based, are recorded in the audit file...

4. Stage 3: CONCLUSION

In this stage of the auditing process the auditor in charge reviews and *summarises* the findings of the audit and forms *a conclusion based on these findings.*

During the discussion with the taxpayer the auditor informs him of the conclusions reached on the tax return(s) and explains the decision. If the taxpayer does not agree with the judgement, the auditor listens to the reasons and considers whether these reasons may call for an adjustment of the conclusion. If it is decided that no adjustment is required, bearing in mind the outcome of previous consultation with colleagues, the auditor discusses the taxpayer's reason and arguments with the audit manager.

Where compromises are reached, they are recorded in the file and included in the report. SARS and the taxpayer should sign the compromises.

After the concluding discussions with the taxpayer and the audit manager, the position of SARS is determined. There are two possibilities:

- No further action is required; or
- The results of the audit necessitate further action, which usually *involves adjustment of the assessments* as well as the levying of interest, penalties and additional tax.

> *In some instances this is not sufficient and it is necessary to extend the audit to the criminal domain.* This calls for a change in the nature of the audit. *The timely recognition of such a change is an essential element of the auditing process*. Refer to part 7 of the audit manual.
>
> The audit report is completed and forwarded to the team leader who reviews, monitors and controls the completion and quality of the audits being performed.
>
> The team leader communicates the relevant findings to the research and analysis team and the risk evaluation committee. (Emphasis supplied)

The significance of the *SARS Internal Audit Manual* is that it sets out internal SARS guidelines that SARS must follow to conduct a lawful, reasonable and procedurally fair inquiry and audit into the tax affairs of a taxpayer, in terms of ss 1(c), 33, 41(1) and 195(1) read with s 4(2) of the SARS Act. These guidelines ensure SARS are acting within the boundaries of the rule of law, where they are: acting with a high degree of professional ethics, in an efficient, effective, impartial, fair, unbiased, transparent, accountable and coherent manner, and will not assume powers or functions except those conferred on them in terms of the Constitution. Any transgression from these guidelines would be an indicator that the SARS officials are violating these principles. Reference will be made in this thesis *infra* to relevant portions of the *SARS Internal Audit Manual*, read together with the publically published *Code of Conduct*.[11] Furthermore, its provisions are in line with the international benchmark rules of the International Ethics Standards Board for Accountants and its Code of Ethics for Professional Accountants.[12]

3.3 LAWFULNESS

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[11] referred to by SARS as the 'SARS Service Charter and Standards (under review)'; http://sars.gov.za/home.asp?pid=54086 (last accessed 31 March 2013).

[12] *Handbook of the Code of Ethics for Professional Accountants*, 2012 edition, International Federation of Accountants (IFAC), www.ethicsboard.org, at pages 17-24; See section 4.2.3: *High Standards of Professional Ethics infra* for a summary of the relevant rules.

Lawfulness is the first part of just administrative action contemplated in s 33(1) of the Constitution, and in PAJA, and the first principle of legality. Lawfulness, embraces authority, jurisdictional facts, and abuse of discretion, including improper or ulterior purposes or motives, *mala fides* or bad faith, the failure to apply mind, or failure take into account relevant, and taking into account irrelevant considerations, unlawful fettering of a discretion, and arbitrary and capricious decision-making by SARS, and in the context of this thesis, in exercising its powers under ss 74A and 74B.

In *Industrial Equity Ltd v Deputy Commissioner of Taxation and Others*[13] the Australian High Court held that the powers of access and inquisition must be exercised for the purpose of the taxing act, and that question is to be considered in the context of the provisions levying income tax.

American jurisprudence has also developed significantly in this area.[14] A summary of American jurisprudence, analogous to the principles analysed in this thesis, includes: in making inquiries and obtaining information from taxpayers, the investigation must have a legitimate purpose; the information must not already be in the State's possession; all procedural steps must have been followed; the demands must not be overbroad; taxpayers

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[13] (1990) 170 CLR 649 at 659; See also *FH Faulding & Co Ltd , The Commissioner of Taxation for the Commonwealth of Australia* 94 ATC 4867 where the tax authority was held to have exceeded its information gathering powers in making a request for information in circumstances involving offshore information where the section did not entitle them to do so.

[14] But an analysis thereof is beyond the scope of this thesis; For American comparative law that may influence court decisions in South Africa in terms of s 39(1)(c) of the Constitution (quoted from the headnotes): *US v McCarthy* 514 F 2d 368: '…(1) that the investigation has a *legitimate purpose* and that the inquiry may be *relevant to that purpose*, (2) that the information sought is *not already within the Government's possession*, and (3) that the Government has *followed the procedural steps* required by the Internal Revenue Code'; *Martin v Chandis* 128 F.2d 731: where the Ninth Circuit held: '(t)he rights of an internal revenue agent to require production of papers and records for examination are statutory, and in order to obtain the relief granted by statute, *he must bring himself within the terms thereof*'; In *US v Williams* 337 F Supp 1114: '…message slips held by taxpayer's telephone answering service … to check his returns … subpoena *was overbroad and out of proportion to ends sought*, and as such not entitled to enforcement'; *First National Bank of Mobile v US* 160 F.2d 532: where '(a) third party should not be called upon to produce records and give evidence … *unless such records and evidence are relevant to or bear upon the matter being investigated*'; *US v Coopers and Lybrand* 413 F Supp 942: where 'Internal Revenue Service summons requesting records, papers, and other data of a taxpayer will be enforced only if the *information sought is not already in the possession of the IRS is designed to protect taxpayers and third parties from the abuse of summons power*'; *Hubner v Tucker* 245 F.2d 35: where a '(s)pecial agent, internal revenue service, who sought to enforce subpoena against third person to compel production of records in investigation of others' tax liability, had no right to examine any paper *unless it was proved to have therein entry relating to tax liability of persons under investigation*, under statute relating to examination of books and witnesses'; *US v Brown* 536 F.2d 117: where the cout held '"Books, papers, records, or other data" to be produced under … the Internal Revenue Code relating to examination of books and witnesses … did not … authorize the IRS to *require the manufacture of documents* or other data for examination'; *Local 174 International Brotherhood of Teamsters v US* 240 F.2d 387: where '(i)n proceeding by revenue agents to compel union's production of records relating to transactions with taxpayer-president, *agents had burden to show that demand was reasonable under all circumstances and to prove that books and records were relevant or material to tax liability of taxpayer* and that union possessed books or records containing items relating to taxpayer's business'. (Emphasis supplied); See also *US v Newman* 441 F.2d 170.

do not have to manufacture documents not in their possession; and must relate to persons and information that will have a bearing on the tax being investigated in respect of the taxpayer under investigation.

A lawful decision of SARS must comply with the constitutional obligations of: impartially, fairness, equitable and unbiased conduct, in an accountable and transparent fashion with timely, accessible and accurate information in respect of s 195(1) as analysed in Chapter 4 *infra*.

To ensure the lawfulness of an inquiry and audit, consideration must also be given to any legitimate expectation created by SARS in its *Code of Conduct*, with its internal guidelines in the *SARS Internal Audit Manual*,[15] which in the case of exercising a discretion in terms of ss 74A and 74B includes:

(a) 'insight into…the business process of the taxpayer…';[16]
(b) '(after) screening the tax returns…(the taxpayer)…warrant(s) an audit…';[17]
(c) it has identified 'which elements of the tax return(s) need to be audited…';[18] and
(d) obtaining 'information from other sources…(on)…the potential issues of the relevant case…'.[19]

The inquiry and audit should be based on specific facts as effectively called for in the definition of 'for the purposes of the administration of this Act' in s 74 of the Income Tax Act:

(a) there must be an amount received by accrued to any person that must be in question;[20]
(b) there must be a property disposed of under a donation;[21]

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[15] *The SARS Internal Audit Manual*, see 3.2 *supra*.
[16] *Ibid.* at page2.
[17] *Ibid.* at page 4.
[18] *Ibid.* at page 5.
[19] *Ibid.* at page 6.
[20] Section 74(1)(a)(i) of the Income Tax Act.
[21] *Ibid.* s 74(1)(a)(ii).

(c) there must be a dividend declared[22] under investigation;

(d) the investigation must be in relation to an inquiry in a return, financial statement, document, declaration of facts or valuation, and the originating document must also exist to enable the further inquiry;[23]

(e) the investigation must relate to the determination of the liability for any tax, interest or penalty; here the existence of general evidence to suggest that the person is a taxpayer should at least exist;[24]

(f) the investigation must relate to collecting a liability, and the liability must exist;[25]

(g) ascertaining whether or not an offence has been committed by the taxpayer, whilst conducting the inquiry and audit. This is a very controversial issue as civil investigation provisions are being used to investigate criminal conduct by the taxpayer, where the taxpayer is being compelled[26] to give incriminating evidence, in contravention of the provisions of s 35(3) of the Bill of Rights. This is *prima facie* unconstitutional;[27]

(h) ascertaining general compliance, which is vague[28] and very general; this should also be prefaced by evidence that the person under investigation is the subject of an inquiry and audit owing to the existence of some evidence that warrants the exercise of the power to ensure that the decision of SARS is not arbitrary, capricious or has an ulterior or improper purpose. The random selection[29] of a taxpayer, without any form of preparatory justification by SARS for the inquiry and audit, may fall foul of the

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[22]*Ibid.* s 74(1)(a)(iii).
[23]*Ibid.* s 74(1)(b).
[24]*Ibid.* s 74(1)(c).
[25]*Ibid.* s 74(1)(d).
[26]Constitution ss 35(3)(h)-(j). See also *ITC 1818* 69 SATC 98 and *Seapoint Computer Bureau (Pty) Ltd v McLoughlin and de Wet NNO* 1997 (2) SA 636 (W).
[27]This analysis based on the Canadian Supreme Court case of *R v Jarvis* 2002 (3) SCR 757 discussed later in this thesis at page 88.
[28] See *Local 174 International Brotherhood of Teamsters v US*, 240 F.2d 387 for comparative American jurisprudence where the court held (quoted from the headnote): '*agents had [a] burden to show that [the] demand was reasonable under all circumstances and to prove that books and records were relevant or material to tax liability of taxpayer* …and the taxpayer… possessed books or records containing items relating to taxpayer's business.' (Emphasis supplied)
[29] In *US v Third Northwestern National Bank* 102 F Supp 879 the court held (quoted from the headnote): 'A 'fishing expedition' under statute permitting Internal Revenue agent to examine records bearing upon matters to be included in income tax *return cannot amount to an inquisition or arbitrary inquiry* on the part of an Internal Revenue agent, and *determination as to whether inquiry is reasonable, and therefore justifiable 'fishing', must be determined from all the facts in each case, including the end for which the information is sought*, and proof and prevention of tax frauds is not the only factor to be considered' (Emphasis supplied). This basic requirement limits a simple random taxpayer selection without SARS performing some preparatory work.

impartiality[30] provision in s 195(1) of the Constitution. It should also be clear that the audit or investigation is in respect of a named person who is or should be a 'taxpayer'[31] as defined in the Income Tax Act;

(i) the enforcement and performance of administrative function provisions, which again is a very vague and general provision, requiring some justification[32] from SARS that the inquiry and audit is necessary and within the scope and purport of its powers, as qualified by the requirement of effectiveness and efficiency set out in s 4(2) of the SARS Act.

All of these facts will have a source, giving rise to the initial information upon which SARS relies to enable it to commence the inquiry and audit in the first place. At this point it becomes important for SARS to follow its own internal guidelines, and to provide the necessary justification to proceed with the inquiry and audit, otherwise the conduct of SARS will *prima facie* be unlawful. Furthermore, taxpayers can also expect that in carrying out its audit and inquiry functions, SARS will not act in a vexatious or oppressive manner towards those taxpayers.[33]

3.3.1 Authority

The exercise of power must be authorised by law. In *Fedsure Life Assurance Limited v Greater Johannesburg Transitional Metropolitan Council*[34] the Constitutional Court stated that it is:

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[30] In *Reckitt and Coleman (NZ) Ltd v The Taxation Board of Review and The Commissioner of Inland Revenue* Turner J stated: 'It is of the highest public importance that in the administration of [tax] statues every taxpayer shall be treated exactly alike, no concession being made to one to which another is not equally entitled…Where there is no express provision for discretion, however, and none can be properly implied from the tenor of the statute, the Commissioner can have none; he must with *Olympian impartiality* hold the scales between the taxpayer and the crown giving to no one any latitude not given to others.' (Emphasis supplied)

[31] Section 74(1)(f) of the Income Tax Act.

[32] For the requirements of lawful justification, see *Premier of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) BCLR151 (CC) at para [42]: '…no question of justification …can arise as the decision taken…did not constitute 'a law of general application' as required by that provision…'; *cf.Registrar of Pension Funds and another v Angus NO and others* [2007] 2 All SA 608 (SCA) where the court held 'in terms of law [of general application]' would enable a decision. SARS decisions are enabled 'in terms of law [of general application]'.

[33] *Chairman of the Board on Tariffs and Trade and Others vs Brenko Inc and Others* 64 SATC 130 at para's [29] and [30], where it was held by the Supreme Court of Appeal that '…investigatory proceedings, which have been recognised to be absolutely essential to achieve important policy objectives, are nevertheless subject to the constraint that the powers of investigation are not exercised in a vexatious, oppressive or unfair manner (*cf. Bernstein and Others v Bester and Others NNO* 1996(2) SA 751 (CC) at 584F-I)...'; See also *Gardener v East London Transitional Local Council and Others* 1996(3) SA 99 (E) at para's 116E-G.

[34] 1999(1) SA 374 (CC) at para [58].

> …central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.

It follows by analogy from this dictum that SARS does not have inherent powers[35] to do as it likes, and that the exercise of public power by SARS must be derived from a lawful empowering source. Sections 74A and 74B, read with s 74 of the Income Tax Act, is such a source, but a source of authority that must be read through the prism of the Constitution and s 4(2) of the SARS Act. In terms of s 41(1)(d) of the Constitution: '…administrators…must…not assume power or function except those conferred on them in terms of the Constitution;'. Therefore any decision made by SARS that affects taxpayers, without lawful authority and compliance with the Constitution, is unlawful and *ultra vires*.[36]

Lawful authority in terms of s 74B requires that SARS must be able to provide an 'authorisation letter' as defined in s 74, if demanded by any taxpayer. Failure by SARS to comply with this requirement would mean that the SARS official concerned would not have the lawful authority to act. Production of the 'authorisation letter' does not apply to s 74A, but this does not mean that the SARS official must not be properly authorised to act on behalf of the Commissioner in terms of s 3 of the Income Tax Act.

If SARS makes a decision without the required authority, the decision would be defective and reviewable in terms of the principle of legality, and the codified grounds of review in terms of s 6(2) of PAJA. Section 6(2)(a)(i) of PAJA would apply in that SARS 'was not authorised to do so by the empowering provision'. The defective conduct would not be authorised by law and would also be unlawful and constitutionally invalid.[37] The

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[35] Hoexter (2012) at pages 255-6.

[36] *Ibid.*; In *FH Faulding & Co Ltd, The Commissioner of Taxation for the Commonwealth of Australia* 94 ATC 4867 the tax authority was held to have exceeded its information gathering powers in making a request for information in circumstances involving offshore information where the section did not entitle them to do so.

[37] Such an unlawful or invalid act must be set aside by the courts; See section 4.1 *infra* and the reference to *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) para's [26] – [31].

appropriate Rule 53[38] application would be launched by the taxpayer in the High Court, in terms of PAJA, or the principle of legality.

3.3.2 Jurisdictional facts

Before SARS is entitled to make a decision in terms of ss 74A and 74B, read with s 74, to investigate a taxpayer, it must satisfy the jurisdictional facts in those sections. SARS must first consider the empowering law and decide whether the facts of the matter warrant exercising the power: (1) that the investigation has a legitimate purpose and that the inquiry may be relevant to that purpose, (2) that the information sought is not already within SARS' possession, and (3) that SARS has followed the procedural steps required by the Income Tax Act and the Constitution.[39] Jurisdictional facts include conditions imposed by the empowering legislation that the SARS must satisfy. In *South African Defence and Aid Fund and Another v Minister of Justice*[40] Corbett J held: 'if the jurisdictional fact does not exist, then the power may not be exercised *and any purported exercise of the power would be invalid.*' (Emphasis supplied)

Proper compliance with the jurisdictional facts of ss 74A and 74B would include the following: proper delegation of the relevant powers by the Commissioner to the SARS officials in terms of s 74 and s 3 of the Income Tax Act; ensuring that the inquiry relates

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[38]Rule 53, Uniform Rules of Court, GNR 48 of 12 January 1965, made under s 43(2)(a) of the Supreme Court Act 59 of 1959, hereinafter referred to as 'Rule 53'.

[39] See American comparative law: *US v McCarthy* 514 F 2d 368 (quoted from the headnote): '…(1) that the investigation has a *legitimate purpose* and that the inquiry may be *relevant to that purpose*, (2) that the information sought is *not already within the Government's possession*, and (3) that the Government has *followed the procedural steps* required by the Internal Revenue Code'.

[40] 1967 (1) SA 31 (C): Corbett J at page 33 states: 'Before the State President is entitled to exercise this power to declare an organisation to be an unlawful organisation he must be satisfied that one or more of the conditions … exist. In order to satisfy himself in this way *he must have before him some information relating to such matters* as the aims and objects of the organisation in question, its membership, organisation and control, the nature and scope of its activities, *what its purpose is and what it professes to be*…The content of this kind of condition is often referred to as a 'jurisdictional fact' (see *Minister of the Interior v Bechler and Others*, 1948 (3) SA 409 (AD) at p. 442; Rose-Innes,Judicial Review of Administrative Tribunals in S.A., at pages 99 - 100) in the sense that *it is a fact the existence of which is contemplated by the Legislature as a necessary pre-requisite to the exercise of the statutory power*. The power itself is a discretionary one. Even though the jurisdictional fact exists, the authority in whom the power resides is not bound to exercise it. On the other hand, *if the jurisdictional fact does not exist, then the power may not be exercised* and any purported exercise of the power would be invalid.' (Emphasis supplied); *Farjas (Pty) Ltd another v Regional Land Claims Commissioners, KwaZulu-Natal* 1998(5) BCLR 579 (LCC) at para [22]; Baxter L *Administrative Law* (1984) Juta at page 456 ff: 'A public official must first consider the law which empowers her and decide whether on the facts of the particular matter, she has the power or jurisdiction to deal with it (at 452)'; See also *Martin v Chandis* 128 F.2d 731 (quoted from the headnote): where it was held that the 'production of papers and records for examination are statutory, and in order to obtain the relief granted by statute, …(the tax authority)… must bring himself within the terms thereof'; *US v McCarthy* 514 F 2d 368(quoted from the headnote): 'In order to establish a prima facie case for enforceability of an IRS summons, plaintiffs must plead: (1) that the investigation has a legitimate purpose and that the inquiry may be relevant to that purpose, (2) that the information sought is not already within the Government's possession, and (3) that the Government has followed the procedural steps required by the Internal Revenue Code'.

to a 'taxpayer' as defined in the Income Tax Act; and ensuring compliance (with supporting facts) with one or more of the eight sub-sections in s 74 under the definition 'the administration of this Act'.

In addition, compliance by SARS with the duties and responsibilities attached to exercising discretion in respect of ss 74A and 74B is required. This is especially so where SARS officials are given broad discretionary powers that are not subject to specific guidelines, such as was the case in *Dawood's* case.[41] See section 3.2 above. In that case the Constitutional Court held that unguided discretionary powers should be subject to provided guidelines, which must be adhered to.

In this regard the guidelines contained in the *SARS Internal Audit Manual*[42] should not, without lawful justification, be ignored by SARS in exercising its discretion in terms of ss 74A and 74B. These guidelines are important in assisting SARS officials to prepare and engage in exercising their powers of inquiry and audit, in that the following key factual areas are to be taken into account as prescribed in their guidelines: does SARS have proper 'insight into … the business process of the taxpayer …'?; 'has SARS screened the tax returns of the taxpayer and determined that they warrant an audit'?; has SARS identified 'which elements of the tax return(s) need to be audited'?; and has SARS obtained 'information from other sources … (on) … the potential issues of the relevant (audit) …'?[43]

Hoexter is of the view[44] that South African law has adopted a compromise between objective and subjective jurisdictional facts.[45] In terms of objective jurisdictional facts,[46] a fact or state of affairs must exist objectively before the power can be validly exercised. However, in the case of subjective jurisdictional facts, the court needs only to consider

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[41] *Dawood and another v Minister of Home Affairs and others; Shalabi and another v Minister of Home Affairs and others and Thomas and another v Minister of Home Affairs and others* 2000 (3) SA 936 (CC).
[42] See section 3.2: *The SARS Internal Audit Manual.*
[43] *Ibid.* at pages 2-6.
[44] Hoexter (2012) at pages 296-302.
[45] as identified by Corbett J in *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C) at pages 34H-35D; See also *Martin v Chandis* 128 F.2d 731 where it was held that the 'production of papers and records for examination are statutory, and in order to obtain the relief granted by statute, …(the tax authority)… must bring himself within the terms thereof'.
[46] *CSARS v Sprigg Investments 117CC t/a Global Investment* 73 SATC 114 (SCA) at para's [12] and [13] where the Supreme Court of Appeal favoured an objective approach to the furnishing of adequate reasons by SARS.

the opinion of the administrator to determine whether or not the facts or state of affairs exist.

Subjective clauses such as ss 74A and 74B which give wide discretionary powers[47] to SARS are curbed. The constitutional principle of legality implies that courts must be able to satisfy themselves as to the lawfulness of the administrative action, or exercise of public power,[48] including factual assumptions on which the action is based. This is taken further by the right to reasonable administrative action[49] and the requirement of rationality inherent in the principle of legality.[50]

There are also instances where SARS will be obliged to exercise a discretion in favour of a taxpayer, notwithstanding the fact that it has an unfettered discretion in terms of legislative provisions such as ss 74A and 74B.

The *locus classicus* in this regard is *Stroud Riley & Co Ltd v SIR*:[51]

> It seems to me that in dealing with a matter of this nature the respondent is required firstly to enquire into the facts. If after such enquiry he is satisfied … he is bound, as a matter of duty, to authorize the refund to the taxpayer…In the latter respect he has no discretion in the matter in spite of the use of the word 'may' in the section which authorizes him to make a refund. The general principle applicable was laid down in *Macdougall v Paterson* (1851) 11 CB 755 at 766 by Jervis CJ as follows:
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> 'The word "*may*" is merely *used to confer the authority: and the authority must be exercised, if the circumstances are such as to call for its exercise*.'
>
> In dealing with a similar provision in Australian legislation, it was

[47] In *Amoils v Johannesburg City Council* 1943 TPD 386 the court held 'an unreasonably wide by-law should not be held to be valid because of any presumption that a by-law will be reasonably administered by a local authority.'
[48] *Henbase 3392 (Pty) Ltd v Commissioner, South African Revenue Services* 2002 (2) 180 (T).
[49] See section 3.4: *Reasonableness infra*.
[50] Hoexter (2012) at pages 121-5.
[51] SATC 143 at page 151; Also refer to the dictum of Corbett J in footnote 47 *supra*.

held in *Finance Facilities (Pty) Ltd v Federal Commissioner of Taxation*[52]:

> If the Commissioner, having considered the matter, is satisfied of facts out of which the power to allow the rebate arises, he cannot nevertheless refuse to allow it.[53] (Emphasis supplied)

SARS is therefore obliged to exercise its discretion in favour of the taxpayer if certain conditions (jurisdictional facts) are not met. For instance, if SARS is to comply with the jurisdictional facts of ss74A and 74B it cannot commence a proposed investigation against a person that is not a 'taxpayer' as defined. An example is a group of persons whose identity as taxpayers is unknown. The discretion to commence the inquiry or investigation should not be made; or exercised in favour of the taxpayer.

Another example in determining whether or not to proceed is where SARS is obliged to review the relevant facts about the taxpayer at hand in line with its own internal guidelines as discussed above. Failure to comply with it's internal guidelines is an indication that SARS have not taken into account relevant factors (s 6(2)(e)(iii) of PAJA), or have failed to comply impartially with a mandatory procedure or condition imposed by internal policy. In terms of s 6(2)(b) of PAJA, the failure by SARS to comply with a 'mandatory' procedure or condition[54] will result in the official's conduct being unlawful, in that a precondition to a jurisdictional fact has not been met. As to a distinction between mandatory and directory provisions, the mere fact that a provision is directory does not mean that it can be ignored.[55]

3.3.3 Abuse of Discretion

As explained by Hoexter[56], discretionary powers are easily recognised by the permissive statutory language and the use of words like 'may'[57] in provisions such as ss 74A and

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[52] (1971) 2 ATR 573 at page 578.
[53] See also *Crown Mines, Ltd v Commissioner for Inland Revenue* 32 SATC 190at 100,102; *Noble & Barbour v SAR & H* 1922 AD 527 at page 540; *CIR v King* 1947(2) SA 196(AD) 4 at page 209.
[54] Croome B & Olivier L *Tax Administration* 2010 (Juta) at page 52.
[55] Klaaren J *Teaching Procedural Jurisdictional Facts* (1990) South African Journal on Human Rights 14: at page 63.
[56] Hoexter C & Lyster R *The New Constitutional & Administrative Law* (2002) Juta at pages 25-6.
[57] See also Wade H W R & Forsyth C F *Administrative Law* 7th ed (1994) Oxford at 391.

74B. The exercise of such discretions creates the temptation to abuse the discretion, which is why significant authority exists on abuse of discretion.[58] The traditional grounds of abuse of discretion are: *mala fides*, ulterior purpose or motive, and failure to apply mind. Abuse of discretion could also fall within the description in s 6(2)(f)(ii) of PAJA of not being rationally connected to: the purpose of the empowering provision; the information before the administrator; and, the reasons given for it (all of which would also form part of the principle of legality).

In *Dawood's* case,[59] O'Regan J of the Constitutional Court in a unanimous decision held the following in relation to discretionary powers:

> [53] Discretion plays a crucial role in any legal system[60]. … It is for the Legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore *not ordinarily sufficient for the Legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution*. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. …
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> [46] … conferring a broad discretion upon an official, who may be quite untrained in law and constitutional interpretation, and expecting that official, in the absence of direct guidance, to

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[58] Hoexter (2012) at pages 307-25.
[59] 2000 (3) SA 936 (CC) at para's [46] to [54].
[60] Footnote 73 in the case - Although there was a time when some thought that discretion was inappropriate in a legal system based on the rule of law (see for example, Dicey *Introduction to the Study of the Law of the Constitution* 10ed. (Macmillan, London 1959)), this is no longer the case. It is recognised that discretion cannot be separated from rules and that it has an important role to play in any legal system. See the ground-breaking work by K C Davis *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press, Baton Rouge, 1969). Administrative lawyers now generally acknowledge the importance of discretion to a functioning legal system. The challenge for administrative law is to ensure that discretion is properly regulated. See, generally, Galligan *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press, Oxford, 1986); Harlowand Rawlings *Law and Administration* 2ed. (Butterworths, London, 1997); Craig *Administrative Law* 3ed. (Sweet & Maxwell, London, 1994); and Baxter *Administrative Law* (Juta, Cape Town, 1984). See also *Baron v Canada* (1993) 99 DLR (4th) 350 at 363, 365-8; and the discussion in the dissenting judgment of *L'Heureux-Dubé J in Young v Young* (1993) 108 DLR (4th) 193 at 238 and where *Young v Young* (1993) 108 DLR (4th) 193 referred to.

> exercise the discretion in a manner consistent with the provisions of the Bill of Rights. …
>
> [47] It is an important principle of the rule of law that rules be stated in a clear and accessible manner.[61] It is because of this principle that s 36 requires that limitations of rights may be justifiable only if they are authorised by a law of general application. (Emphasis supplied)

The definition of 'administration of this Act' in s 74 of the Income Tax Act has defined the parameters within which SARS can make a decision 'for the purposes of administration of this Act' envisaged in ss 74A and 74B. But it contains no specific guidelines. Furthermore, the mere reiteration by SARS of the specific sub-sections in that definition would not be regarded as adequate reasons[62] to justify the necessity to proceed with an inquiry or audit, and could therefore amount to an abuse of its discretion,[63] in that the discretion exercised is arguably not rationally connected to the purpose of the empowering provision, or, the information before the administrator, or, the reasons given for it.

In addition to this, the principles set out in the *Stroud Riley*[64] above (which in some instances compel SARS to exercise its discretion in a particular manner such as not to proceed with the inquiry and audit) will apply. If SARS fails to comply with its own internal guidelines (*SARS Internal Audit Manual*),[65] as envisaged in *Dawood's* case above, in commencing an inquiry and audit, such conduct would be indicative of an abuse of discretion. For instance, in line with its internal guidelines, the initial gathering of the facts of a targeted taxpayer will assist in determining whether or not SARS should proceed with the inquiry and audit. The information before SARS will assist in justifying a rational connection between the decision and the purpose of the empowering provision. The internal guideline states that the SARS assessor, in the absence of evidence to the

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[61] Footnote 71 in the case – 'The rule of law is a foundational value of our Constitution (see s 1(c) of the Constitution of the Republic of South Africa 108 of 1996). See also *Pharmaceutical Manufacturers Association of SA and Others: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para [40].'
[62] See section 2.5: *Adequate Reasons supra*.
[63] Hoexter (2012) at pages 307-25.
[64] *Stroud Riley & Co Ltd vs SIR* 36 SATC 143 at 151.
[65] See section 3.2: *The SARS Internal Audit Manual* at pages 2-6.

contrary, should cease the inquiry and audit. The taxpayer will also know the 'substance of the case' being faced.[66] Otherwise, it may arguably be exercising its powers for some ulterior purpose or motive, in an arbitrary, capricious manner, or without having satisfied all the jurisdictional facts –unconstitutional conduct in terms of s 2 of the Constitution.

3.3.3.1 Improper or ulterior purpose or motive

Improper or ulterior purpose or motive[67] forms a sub-section to abuse of discretion. Section 6(2)(e)(ii) of PAJA deals with an improper or ulterior purpose or motive. Should SARS act with improper or ulterior purpose or motive in relation to the provisions of ss 74A and 74B, its conduct will be invalid. That would be sufficient to launch a judicial review application on the strength of a transgression of s 6(2)(e)(ii) of PAJA; or the principle of legality, where the administrator should exercise such powers only for the purposes they were conferred.

A typical example of an improper or ulterior purpose or motive occurs where SARS is in conducting a criminal investigation, under the guise of a civil regulatory investigation, in contravention of the principles in s 35(3)(j) of the Constitution, the guarantee against self-incrimination, under the auspices of a ss 74A and 74B inquiry or audit.

In *Probe Security CC v Security Offices' Board and Others*[68],the inspectors of a regulatory authority conducted an inspection into the affairs of the applicant at its premises, carried out a search of the premises and demanded inspection and copies of certain documents at these premises. The applicant claimed that the inspection was a violation of its common-law and constitutional rights, *inter alia*, those to privacy. It was clear that the regulatory authority permitted regulatory inspection. However, Satchwell, J was of the opinion that in instances where criminal offences have been committed in relation to those regulations, and criminal prosecutions are admissible, certain minimum

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[66]*Chairman of the Board on Tariffs and Trade and Others vs Brenko Inc and Others* 64 SATC 130 at para's [29] and [30].

[67]Croome B & Olivier L *Tax Administration* 2010 (Juta) at page 53; *Orangezicht Estates Ltd v Cape Town Town Council* (1906) 23 SC 297, 308; *Fernwood Estates Ltd v Cape Town Municipal Council* 1933 CPD 339, 403; *Sinovich v Hercules Municipal Council* 1946 AD 783, 792; *Van Eck NO & Van Rensburg NO v Etna Stores* 1947(2) SA 984 A; *Oos-Randse Administrasieraad v Rikhoto* 1983 (3) SA 595 (A); and *University of Cape Town v Ministers of Education and Culture (House of Assembly and House of Representatives)*1988 (3) SA 203 (C).

[68] 98 JER 0849 (W).

requirements as to reasonableness[69] and fairness have to be met before the inspection authority can be held to be acting *intra vires* and lawfully. While inspections could be of a routine regulatory nature, they could well incorporate an investigatory and disciplinary function that could result in the seizure of documents and which, in turn, could form the basis for the support of allegations of contraventions of the governing legislation. Furthermore, these inspections of a regulatory nature could lead to a violation of the security officers' rights to a fair trial. Unless safeguards were built into the regulations, they could result in a failure to meet the test of constitutionality. Satchwell, J was of the view that serious questions for consideration had been raised, which would be considered in a later review application. In this case, in conclusion, while the balance of convenience demanded protection for the applicant, the court refused to grant a temporary interdict holding that, while the inspection could take place, the fruits of such inspections could not be used in the procurement of or in the course of any criminal proceedings against the applicant.[70]

The effect of this judgment is resonated in the more detailed judgment of the Canadian Supreme Court in *R v Jarvis,*[71] where the court held that the nature and scope of a preliminary investigation by a tax authority impacts on the powers that the tax authority can use, and the later use of any evidence obtained from the taxpayer. If a criminal investigation is being conducted under the auspices of a routine verification audit, the conduct by SARS would be an abuse of power with an improper or ulterior purpose or motive. Furthermore, any direct or indirect evidence obtained from the taxpayer under

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[69] See section 3.4: *Reasonableness infra*; LAWSA Volume 5(3) 2nd ed at para 165; *Commissioner of Taxes v CW (Pvt) Ltd* 1989 (3) ZLR 361 (S) at 370F-372C; *Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Limited* 1928 AD 220, pages 236-7; and *National Transport Commission v Chetty's Motor Transport* (Pty) Ltd 1972 (3) SA 726 (A); *Local 174 International Brotherhood of Teamsters v US*, 240 F.2d 387.

[70] Jazbhay S A *Recent Constitutional Cases* (1999) De Rebus (373) February at page 44.

[71] 2002 (3) SCR 757; This is similar to the comparative jurisprudence in the United States of America: *Hale v Hinkle* 201 US; *Murdock v Pa* 319 US 105;*Couch v US* 409 US 322 where the US Supreme Court held (quoted from the headnote): '(c)ompulsion upon person asserting it is an important element of the privilege against self-incrimination and prohibition of compelling a man to be a witness against himself is a prohibition of use of physical or moral compulsion to extort communication; it is the extortion of information from accused himself that offends our sense of justice'; *Miranda v Arizona* 384 US 436 (1966) at page 460, where it was held that (quoted from the headnote): 'prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of a defendant unless it demonstrates use of procedural safeguards effective to secure privilege against self-incrimination.'; *US v LaSalle Bank* 437 US 298 where 'summons authority does not exist to aid criminal investigations solely' and '(p)rior to recommendation for prosecution to Department of Justice, Internal Revenue Service must use its summons authority in good faith'.

compulsion whilst conducting a verification audit would be inadmissible as evidence in any subsequent criminal investigation against the taxpayer.[72]

It is likely that a similar conclusion would be reached by the courts in relation to powers exercised in terms of ss 74A and 74B. The audit and inquiry would be allowed to continue, provided that the 'fruits of the inspections' were not used in the procurement of or in the course of any criminal proceedings against the taxpayer.

Furthermore, if the taxpayer suspects that the information, documents or things are required for the ulterior purpose or motive of gathering evidence in a move towards prosecuting the taxpayer for any criminal transgression in terms of any tax legislation or at common law, the taxpayer can show 'just cause' why it should not allow SARS to access any such information, documents or things as required under ss 74A and 74B, and raise a successful defence to SARS' attempt to compel the taxpayer to do so in terms of s 75(1)(b) of the Income Tax Act.

If SARS is in fact conducting a criminal investigation, SARS will not be able to avail itself of the broad inquiry and audit provisions[73] in terms of 74A and 74B, but will be required to pursue the matter against the taxpayer in terms of the provisions of ss 74C and 74D[74] of the Income Tax Act, or in terms of the Criminal Procedure Act.[75]

Because the definition of 'administration of this Act' in s 74(1) includes the power to investigate an offence committed by the taxpayer, that part of s 74(1) is arguably law contrary to the guarantee against the self-incrimination clause s35(3)(j) of the Constitution. A taxpayer would be entitled to request SARS whether or not the inquiry or audit involves such a criminal investigation or inquiry, particularly where the inquiry and audit pertains to taxes such as Value-Added Tax and 'Pay-As-You-Earn', where it is not uncommon for taxpayers to use the money collected on behalf of the *fiscus*, thereby

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[72]*Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) BCLR 1 (CC) at para's [165] – [166].
[73]*R v Jarvis* 2002 (3) SCR 757 also discussed in this thesis at page 88 below; *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) BCLR 1 (CC) at para's [165] – [166]; see also *US v LaSalle Bank* 437 US; *Hale v Hinkle* 201 US; *Murdock v Pa* 319 US 105.
[74]Williams R C et al*Silke on Tax Administration* (April 2009) Lexis Nexis at para 8.12 generally; *Pullen NO Bartman NO & Orr NO v Waja* 1929 TPD 838; *Haynes v Commissioner for Inland Revenue* 2000 (6) BCLR 596 (T); See also *Hunter et al v Southam Inc* (1984) 2 SCR 184, (1984) 11 DLR (4th) 641 (SCC).
[75] Act 51 of 1977.

prima facie committing fraud. If SARS refuses to answer, or answers 'yes', the inquiry or audit would be contrary s 35(3)(j) of the Constitution. The 'just cause' defence in s 75(1)(b) of the Income Tax Act will also be available to the taxpayer.

3.3.3.2 *Mala fides* or bad faith

A *mala fide*[76] decision by SARS is any discretion exercised by SARS in bad faith, entailing harassment, fraud or dishonesty, where it knowingly uses its power for reasons outside the ambit of the law. A discretion must be exercised for substantially valid reasons[77] with *bona fides*, and must also be exercised in respect of each individual case[78] without the presence of dishonesty on the part of the decision-maker – as apparent from the motives of the decision-maker.[79]

For instance, if SARS simply applied *ex parte* to the court for a warrant of search and seizure in terms of s 74D, without first exhausting and applying the less intrusive means of obtaining information, documents or things from a taxpayer through ss 74A and 74B, because it was irritated with the initial correspondence exchanged between the parties, where the taxpayer was questioning the entitlement of SARS to make inquiries in the first place, the decision would arguably be *mala fides*.[80] This would also be contrary to the principle of proportionality, a sub-section of reasonableness in section 3.4.2 below. SARS should use the least intrusive means to impose upon the fundamental rights of taxpayers to privacy in terms of s 14 of the Constitution.

Another obvious example of a *mala fide* decision would be SARS simply issuing revised assessments if the taxpayer failed to comply with the initial ss 74A and 74B requests, without properly considering the taxpayers reasons for not complying.

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[76]Hoexter (2012) at pages 310-12; *Hani v Rogers NO and Another* 20 SATC 296*; Adam's Stores (Pty) Ltd v Charlestown Town Board* 1951 (2) SA 508 (N); *Bloem v Minister of Law and Order* 1987(2) SA 436 (O); *Harvey v Umhlatuze Municipality* 2011 (1) SA 601 (KZP) atpara's [136]-[146].
[77]*Tayob v Ermelo Local Road Transportation Board & another* 1951 (4) SA 440 (A) at page 449; *Dungarshi Morajee & Co. v Zoutpansberg Rural Licensing Board* 1927 T.P.D. at page 993; *Ochberg v Cape Town Municipality* 1924 C.P.D. at pages 488-9; and for the objects intended by the Legislature: *Associated Provincial Picture Houses, Ltd., v Wednesday Corporation* [1947] 2 All E.R. 680 at page 682.
[78]*Britten & others v Pope*, 1916 A.D. at page 169.
[79] Hoexter (2012) at page 311; *Waks v Jacobs* 1990(1) SA 913 (T); *Hart v Van Niekerk NO* 1991(3) SA 689 (W).
[80]*Haynes v C:SARS* 64 SATC 321at page 355.

Mala fide conduct will be subject to review in terms of ss 6, 7 and 8 where the codified grounds of review in s 6(2)(e)(i) and/or(ii) and/or 6(2)(e)(v) of PAJA would apply; or in terms of the constitutional principle of legality.[81]

3.3.3.3 Failure to apply mind or relevant and irrelevant considerations

The failure by SARS to apply its mind in exercising a discretion in terms of ss 74A and 74B will result in its failure to exercise its public power properly.[82] Such transgressions by SARS are also covered by other administrative transgressions, such as the failure to comply with the 'jurisdictional facts' of ss 74A and 74B, or the general transgression of acting arbitrarily or capriciously, or *mala fide*.[83]

Hoexter[84] refers to relevant and irrelevant considerations, fettering, and arbitrary and capricious decision-making as sub-sections of failure to apply mind. Hoexter also refers to s 6 of PAJA as codifying the relevant remedies available to taxpayers aggrieved by SARS' failure to apply its mind.[85]

As for what are relevant and irrelevant considerations, Henning J best described these in *Bangtoo Bros v National Transport Commission*[86] as a case of a factor of obvious and paramount importance being relegated to a position of insignificance, while another factor is given weight far in excess of its actual value.

What are relevant considerations in the context of ss 74A and 74B? An example is where the taxpayer has been subjected to a full review by SARS of the same period under review, and no new evidence has been introduced by SARS to suggest additional tax exposure.

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[81] *Pharmaceutical Manufacturers Association of South Africa and another: In Re: Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para [50]: What would have been *ultra vires* under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them. The same is true of constitutional law and common law in respect of the validity of administrative decisions within the purview of section 24 of the interim Constitution. What is "lawful administrative action", "procedurally fair administrative action" justifiable in relation to the reasons given for it, "cannot mean one thing under the Constitution, and another thing under the common law"; Hoexter (2012) at page 254.
[82] Hoexter (2012) at page 313; *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A) at para's 152C-D.
[83] *Ibid*.
[84] Hoexter (2012) at pages 316, 318 and 325.
[85] *Ibid.* at page 316 and s 6(2)(e)(iii) of PAJA.
[86] 1973 (4) SA 667 (N) at para's 685A – D.

What are irrelevant considerations in the context of ss 74A and 74B? The audit and inquiry into the tax affairs of a taxpayer, that is a prominent participant in a particular industry, will send a strong message to similar taxpayers to be more compliant.[87]

A review by the courts of this function does carry the risk of turning judges into administrators and for this reason alone, reliance on this factor may cause further problems for the taxpayer.[88] If SARS fails to apply its mind or takes account of irrelevant considerations, and not relevant ones, the decision would be contrary to the rule of law and would be reviewable as public power being applied in an unlawful manner. Section 6(2)(e)(iii) and (vi) of PAJA would apply, as would the principle of legality.

3.3.3.4 Unlawful fettering

SARS officials should not exercise their discretionary powers under ss 74A and 74B acting under dictation by simply adhering blindly, without further thought, to policies or directives given.[89]An official purporting to exercise a discretion under the unauthorised or unwarranted dictates of another person or body, is unlawful and reviewable,[90] as is the referral by an authorised administrator of the taking of a decision to one who is unauthorised.[91]

In exercising their discretionary powers, SARS officials may not place limits on their own powers by adhering rigidly to policies.[92]

In *Kemp NO v Van Wyk*[93] the following principles were summed up:

> A public official who is vested with a discretion must exercise it with an open mind but not … a mind that is untrammelled by existing principles or policies…What is required is only that he or

[87]*Minister of Law and Order v Dempsey* 1988 (3) SA 19 (A) at pages 541-2.
[88] Hoexter (2012) at page 317.
[89]*Ibid.* at page 319.
[90] Section 6(2)(e)(iv) of PAJA; *Ulde v Minister of Home Affairs* 2009(4) SA 522 (SCA); *Mabi v Venterspost Town Council 1950* (2) SA 793 (W); *Hofmeyr v Minister of Justice* 1992 (3) 108 (C).
[91]*Vries v Du Plessis* NO 1967 (4) SA 469 (SWA).
[92] Hoexter (2012) at page 319.
[93] 2005 (6) SA 519 (SCA) at para [1].

> she does not elevate principles or policies into rules that are considered to be binding, with the result that no discretion is exercised at all.

An example in the case of the application of ss 74A and 74B would be a rote fashioned following by SARS assessors of a directive given by the Commissioner that they should audit all the top 1,000 taxpaying companies before a particular year of assessment prescribes, within the statutory three year period from the date of the original assessment, without taking into account the fact that some of these companies may have already undergone extensive tax risk management processes with the co-operation of various SARS offices, or extensive civil regulatory audits, to check that the very years of assessment in question had been dealt with correctly by those taxpayers, and thereby without first complying with the SARS *Code of Conduct*, and taking into account the facts required to be considered by SARS assessors before selecting taxpayers for audit, as required in terms of the *SARS Internal Audit Manual*.

'Fettering'[94] is not a ground specifically incorporated into s 6 of PAJA.[95] However, it is a well-established basis of review at common law,[96] and is covered by the 'catch-all grounds' in s 6(2)(i) of PAJA under the phrase conduct 'otherwise unconstitutional or unlawful'.

3.3.3.5 Arbitrary and capricious decision-making

Section 6(2)(e)(vi) provides for review 'if action is '(taken)' arbitrarily or capriciously'. [97] It is a long standing common law grounds for review,[98] entrenched in the Constitution through the provisions of ss 33 and 195(1) of the Constitution. Public power exercised

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[94]*Ibid*.
[95]As it does not specifically appear as a codified ground of review in PAJA.
[96] Wrong or non-performance giving rise to common-law review; *Hira v Booysen* 1992 (4) SA 69 (A); *Shidiack v Union Government* (*Minister of the Interior*) 1912 AD 642; *Britten v Pope* 1916 AD 150.
[97] Croome B & Olivier L *Tax Administration* 2010 (Juta) at page 52; The authors discuss the unlawfulness of IRS agents pursuing arbitrary set targets in tax audit results and quotas, as this was expected to affect the objectivity of the agents.
[98]*Beckingham v Boksburg Licensing Board* 1931 TPD 280 at 282; *JSE and Another v Witwatersrand Nigel Ltd and Another* 1988(3) SA 132(A) 152 A – *E; Hira v Booysen* 1992 (4) SA 69 (A); *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642*; Britten v Pope* 1916 AD 150.

must be rationally connected to the purpose for which it was given, and cannot be exercised in an irrational or arbitrary manner.[99]

In *Johannesburg Liquor Licensing Board v Kuhn*[100], Holmes JA described arbitrariness as: 'Arbitrariness connotes caprice, or *the exercise of the will instead of reason or principle, without a consideration of the merits*…' (Emphasis supplied).

Arbitrariness denotes 'absence of reason or at very least the absence of a justifiable reason'.[101] The failure by SARS to comply with the preliminary measures spelt out in the *SARS Internal Audit Manual*[102] would be an indication that the decision of SARS to conduct an inquiry or audit into the affairs of a taxpayer is arbitrary and capricious. The issue of randomness[103] for SARS is a challenge to justify, as randomness in the true sense is an arbitrary act. The challenge for SARS is to justify overcoming the constitutional obligation of rational, reasonable and results orientated inquiries and audits, so as to ensure that SARS is utilising its resources efficiently as it is obliged to do in terms of s 195(1)(b) of the Constitution read with s 4(2) of the SARS Act, so as to successfully justify that an inquiry and audit is not based upon an arbitrary or capricious decision.

3.4 REASONABLENESS

In *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism*,[104] O' Regan J set out a number of factors to be used in determining whether a decision is reasonable,[105] namely:

> (T)he nature of the decision, the identity and expertise of the decision maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interest

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[99] *Pharmaceutical Manufacturers Association of South Africa and another: In Re: Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para's [20], [44], [45], [49] - [51], and [79] – [90].
[100] 1963 (4) SA 666 (A) at 67.
[101] *Woolworths (Pty) Ltd v Whitehead* [2000] 6 BLLR 640 (LAC).
[102] See section 3.2: *The SARS Internal Audit Manual*.
[103] In *Du Preez v Truth & Reconciliation Commission* 1997 (3) SA 204 (A) the court held that the affected person should be made fully aware of the allegations against him or her. There is no definite rule on how much detail must be provided: this will depend on the circumstances of each case, and more particularly the seriousness of the case; this is authority for the submission that the ability for SARS to simply perform random inquiries and audits is limited without some preparatory work justifying its decision to do so; *US v Third Northwestern National Bank* 102 F Supp 879.
[104] 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).
[105] Croome B & Olivier L *Tax Administration* 2010 (Juta) at page 25.

> involved and the impact of the decision on the lives and well-being of those affected.[106]

In order to arrive at the points set out in the excerpt above, the rationality and proportionality of the decision must be determined.

The reasonableness standard was dealt with in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,[107] where Navsa AJ said in the context of s 6(2)(h) of PAJA, that a 'judge's task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution'.

In taking the constitutional obligation of reasonableness further, in *ITC 1717*,[108] Davis J said:

> However, I will assume in favour of appellant that at the time of the dispute, appellant was *constitutionally entitled to a decision that was justifiable in terms of the reasons given*. The question then arises as to the meaning of "justifiable".
>
> …
>
> In my view, *justifiable must mean grounded in a rational justification*. (Emphasis supplied)

As stated in LAWSA[109] 'there is no quantitative legal yardstick since the quality of reasonableness[110] of the provision (*or conduct*) under challenge must be judged according to whether it arbitrarily or excessively invades the enjoyment of a constitutionally guaranteed right'. (Emphasis supplied)

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[106] *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism*2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para [45].
[107] 2008 (2) SA 24 (CC) at page 59 and para [109].
[108] 64 SATC 32 at page 40.
[109] LAWSA Volume 5(3) 2nd ed at para 165; See also *Commissioner of Taxes v CW (Pvt) Ltd* 1989 (3) ZLR 361 (S) at 370F-372C; *Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Limited* 1928 AD 220 pages 236-7; and *National Transport Commission v Chetty's Motor Transport* (Pty) Ltd 1972 (3) SA 726 (A).
[110] See also American jurisprudence in this regard: *Local 174 International Brotherhood of Teamsters v US*, 240 F.2d 387 where '(i)n proceeding by revenue agents to compel union's production of records relating to transactions with taxpayer-president, *agents had burden to show that demand was reasonable under all circumstances and to prove that books and records were relevant or material to tax liability of taxpayer* and that union possessed books or records containing items relating to taxpayer's business'. (Emphasis supplied)

3.4.1 Rationality

A decision of SARS under ss 74A and 74B is open to challenge on the grounds of irrationality[111] where the decision is 'so outrageous in its *defiance of logic* or *of accepted moral standards* that no sensible person who had applied his mind to the question to be decided could have arrived at it'.[112] This ground is also codified in s 6(2)(e)(h) of PAJA. This in practice is a difficult ground to prove.

The Commissioner in *Drs Du Buisson, Bruinette & Kramer Inc. v C:SARS*[113] attempted to justify the random basis on which they selected the taxpayer for audit, under circumstances where the same taxpayer had just undergone a major tax audit a few month earlier by another SARS branch. He stated that: (1) taxpayers report their tax affairs on a self-disclosure basis; (2) historically, tax morality has been very low in South Africa and many taxpayers have not reported their tax affairs honestly; (3) for this reason, it was important that SARS as a regulator inquired into and investigated the tax affairs of taxpayers; (4) because SARS did not have sufficient resources to do this in the case of all taxpayers, it had to do so randomly.[114] The question is: is this so outrageous as to defy logic or accepted moral standards? Probably not.

But then the objection by the taxpayer to this justification can be found in insisting that SARS complies with its constitutional obligations: s 4(2) of the SARS Act read with s 195(1)(b) of the Constitution. Does non-compliance by SARS with these constitutional obligations defy logic? The justification by SARS to randomly audit taxpayers, without complying with these obligations becomes more problematical for them. SARS will need to communicate more comprehensive reasons for their actions, other than a mere random

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[111] *University of Cape Town v Ministers of Education & Culture* (*House of Assembly & House of Representatives*) 1988 3 SA 203 (C); LAWSA Volume 1 2nd ed *Administrative Law* Lexis Nexis at para 139 footnote 6. See also s 6(2)(f) of PAJA.

[112] Routledge Cavendish *Constitutional Law* 5ed. (2006) at page 134; See also section 4.2.3 on moral standards in this thesis, analysing s 195(1)(a) of the Constitution and a high standard of professional ethics.

[113] Case No. 4595/02 in the High Court of the Transvaal Provincial Division.

[114] As per the affidavit of Commissioner Pravin Gordhan in the unreported matter of *Drs Du Buisson, Bruinette & Kramer Inc. v C:SARS* Case No. 4595/02 in the High Court of the Transvaal Provincial Division. This approach is limited when considering the decision in *US v Third Northwestern National Bank* 102 F Supp 879; However, in *US v McKay* 372 F.2d 174 where the court held the'(p)ower of Commissioner of Internal Revenue to investigate records and affairs of taxpayers is greater than that of a party in civil litigation; such power may be characterized as an inquisitorial power, analogous to that of grand jury and one which should be liberally construed, in context of which the criteria of relevancy and materiality have broader connotations than in context of trial evidence'.

selective – especially in a case such as *Drs Du Buisson, Bruinette & Kramer Inc.* Furthermore, the issue of proportionality (which follows this section) will also require SARS to exercise its powers in the least intrusive manner.[115] In this regard the *SARS Internal Audit Manual*[116] clearly demonstrates an internal methodology developed at SARS to administer tax legislation in an efficient and cost-effective manner, and in compliance with its duties under s 195(1) of the Constitution. There are a number of very good reasons in their internal guidelines why SARS should conduct a preliminary internal investigation into the affairs of a taxpayer they wish to audit, before taking the next steps in doing so. For instance, SARS should not unnecessarily on a random basis be auditing taxpayers who have already been audited in respect of specific tax returns, unless new material facts have come to light, justifying an additional inquiry or investigation. In this manner, SARS will not be criticised for the using its powers and resources in an unjustified and illogical manner, and contrary to its constitutional obligations. It will also limit any intrusion into the private affairs of a taxpayers.[117]

In considering the provisions of s 6(2)(f)(ii)(aa) to (dd) of PAJA the:

> 'action itself … (must be) … rationally connected to –
> (aa) the purpose with which it was taken;
> (bb) the purpose of the empowering provision;
> (cc) the information before the administrator; or
> (dd) the reasons given for it by the administrator'.

Hoexter[118] states that these provisions cover much of the same territory as pre-existing common-law grounds, such as ulterior purposes, failure to apply the mind and arbitrariness.[119] In light of the Constitution, a rational connection is merely required by SARS to overcome this ground of review, rather than the court having to substitute the

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[115] SARS are entitled to verify taxpayers affairs if compliant with the statutory provisions: *R v McKinlay Transport* [1990] 1 S.C.R. 627.
[116] See section 3.2: *The SARS Internal Audit Manual supra*.
[117] *US v Coopers and Lybrand* 413 F Supp 942 where 'Internal Revenue Service summons requesting records, papers, and other data of a taxpayer will be enforced only if the information sought is not already in the possession of the IRS is designed to protect taxpayers and third parties from the abuse of summons power'.
[118] Hoexter C *Unreasonableness in the Administrative Justice Act* in Claudin Lange & Jakkie Wessels (eds) *The right to know: South Africa's Promotion of Administrative Justice Act and access to Information Act* (2005) 148 at page 159.
[119] *Ibid.* at page 309.

decision because it is substantively incorrect.[120]Again, in practice this may be difficult for taxpayers to prove.

Taxpayers may question SARS as to the application of its internal guidelines in determining the suitability of the taxpayer for an inquiry and audit. SARS, through its obligation to share information and be transparent, would be obliged to share this information with inquiring taxpayers.[121]Failure by SARS to provide the information requested by the taxpayers, would entitle these taxpayers not to participate in the inquiry and audit (on the basis of 'just cause' shown), and to consider launching review proceedings on the basis that SARS' cannot show a rational connection between its decision to invoke ss 74A and 74B and an inquiry and audit of a named taxpayer, other than it being a random selection. The justification of the Commissioner in *Drs Du Buisson, Bruinette & Kramer Inc.* above, it is submitted, would not be sufficient where the taxpayer seeks compliance by SARS with its broader constitutional obligations. Where the taxpayer can demonstrate that there is no material reason for SARS to pursue another audit of the taxpayer, a logical and rational connection envisaged ins 6(2)(f)(ii)(aa) to (dd) of PAJA

3.4.2 Proportionality

Apart from the necessity for a rational connection to be present justifying SARS' decision to audit a taxpayer, the decision must also be proportional to the facts and circumstances of the case. Proportionality can best be described in the famous sentence of Lord Diplock in the English case of *R v Goldstein*:[122] 'You must not use a steam hammer to crack a nut, if a nutcracker would do.'

Sachs J in *Minister of Health v New Clicks South Africa (Pty) Ltd*[123] states: '[p]roportionality will always be a significant element of reasonableness'. However, Hoexter states that this ground of review remains controversial.[124] Section 6(2)(h) of PAJA, the ground dealing with unreasonable effects, does not specifically refer to

[120]*Niewoudt v Chairman, Amnesty Subcommittee, Truth and Reconciliation Commission* 2002(3) SA 143(c) at para's 155G-H, and para's 164G – H.
[121] Section 195(1)(g) of the Constitution.
[122][1983] 1 WLR 151.
[123]2006 (2) SA 311 (CC) at para [637]; *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC).
[124] Hoexter (2012) at pages 344-5.

proportionality. The section reads: 'the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which administrative action was purportedly taken, is so unreasonable that no person could have so exercised the power or performed the function.' However, the wording is similar to the well-known test in the English case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*,[125] also known as the *Wednesbury* rule. In applying the test for proportionality, based on the *Wednesbury* rule, English courts will ask the following questions:

(a) Whether the action pursued a legitimate aim;

(b) Whether the means adopted to achieve the aim were appropriate;

(c) Whether less restrictive means were adopted to achieve that aim;

(d) Whether the interference in the individual's rights is justified in the interest of a democratic society.[126]

In supporting the contention that proportionality is part of the reasonableness enquiry by the courts in South Africa, it is submitted that the *Wednesbury* rule will have persuasive value before South African courts, particularly in light of the provisions of s 39 of the Constitution, encouraging courts to review foreign applicable jurisprudence.[127]

In the context of ss 74A and 74B, it is difficult to establish a set of circumstances where these questions would not be answered in favour of SARS. There are, however, a few examples.

Where SARS asks for information not relevant to determining a tax liability of the taxpayer (for instance, a survey to obtain certain industry facts which in turn may be used in the audit of other taxpayers); where SARS as a matter of course audits all refunds where in a given case it is clear that the taxpayer merely mistakenly overpaid provisional tax which is due and payable to the taxpayer; where SARS has already conducted an audit into the affairs of the taxpayer and unjustifiably recommences an inquiry and audit into

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[125][1947] 2 All ER 680 (CA) at pages 683E and 685C.
[126] Routledge Cavendish *Constitutional Law* 5ed. (2006) at page 143; *R v Goldstein*[1983] 1 WLR 151.
[127]*First National Bank of SA Ltd t/a Wesbank v C: SARS* 2002 (4) SA 768 (CC) at para [94] *et seq*.

the same tax affairs of a taxpayer; where SARS had less restrictive means to gather information, documents of things – such as where the information is already in the possession of SARS, albeit in a different department within SARS.[128]

In many tax risk management processes conducted for multi-national corporations,[129] it has become clear that these corporations interact with many different SARS offices and that the same tax issues are investigated by different tax offices time and time again, without any co-operation between them. It often happens that a particular tax issue is resolved by one tax office, only for it to be raised again by another. Under such circumstances the taxpayer would aver that the decision by SARS to conduct an inquiry and investigation is not pursuant of a legitimate aim; the means adopted to achieve the aim are not appropriate; a less restrictive means could be adopted to achieve the aim; and, the interference with the taxpayer's rights is not justified. The simple fact is that one SARS office could have obtained all the relevant information from the other SARS offices that had already conducted an inquiry and investigation. SARS is, *vis-a-viz* taxpayers, one organisation.

In order to ensure that SARS are compliant with its constitutional duties and act proportionately in line with these duties, it is submitted that taxpayers are entitled to question SARS at the commencement of an inquiry and audit. These taxpayers would be entitled to adequate reasons at the commencement as discussed in section 2.5: *Adequate Reasons* above.

Should SARS fail to properly justify its intrusion into the affairs of a taxpayer by giving adequate reasons, the initial appropriate defence would be the 'just cause' defence discussed in section 3.8 below. The conduct by SARS would also be reviewable as 'otherwise unconstitutional or unlawful' in terms of the codified ground of review in s 6(2)(i) of PAJA; alternatively, as being contrary to the principle of legality, in that the basic requirement for rational and proportional conduct by SARS would be absent.

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[128] *Haynes v Commissioner for Inland Revenue* 2000 (6) BCLR 596 (T).

[129] Generally on tax risk management: Erasmus et al *Tax Risk Management: From Risk to Opportunity* IBFD (2012); Erasmus D N *Tax Intelligence: The 7 Habitual Tax Mistakes made by Companies* Xlibris (2010); and, by the writer over the past two decades, including corporations such as SAB Ltd, Tsogo Sun Ltd, Accenture (South Africa) Ltd, Edcon Group, Peermont Group Ltd, AECI Ltd, Mr Price Ltd, Altron Group, Zico Group, Nampak Products Ltd and MTN Group Ltd.

3.5 PROCEDURAL FAIRNESS

3.5.1 Bias

The test for bias (or *nemo iudex in sua causa*) emerges from the Appellate Division judgment of *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers' Union*,[130] where the Court confirmed the 'reasonable suspicion' test for bias. In order to have a SARS decision set aside for reasons of financial bias, the taxpayer has to prove the mere appearance of partiality, rather than its actual existence.[131] The courts accept that the 'smallest pecuniary interest' will be sufficient to raise the suspicion of bias.[132]

Section 195(1)(d) of the Constitution also places an obligation on SARS to provide services that are without bias. This includes financial bias. Should any SARS official be suspected of having the smallest pecuniary interest in the outcome of an investigation, that conduct would arguably be contrary to procedural fairness and s 195(1)(d).[133]

An example of such an instance would be an attempt by a SARS official to conduct an investigation into the affairs of a taxpayer prior to the end of the SARS financial year on 31 March in order to meet his or her annual revised assessment budget in order to meet certain key performance indicators within SARS.[134] Such an action is clearly not for the purposes of the 'administration of the Act' as envisaged in s 74 of the Income Tax Act. The conduct by SARS in exercising a discretion in terms of ss 74A and 74B under these circumstances would be procedurally unfair(as being subject to personal bias)[135] and invalid conduct.

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[130] 1992 (3) SA 673 (A).

[131] *South African Commercial Catering and Allied Workers Union v Irvin & Johnston Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC) at para's [11]-[17].

[132] *Rose v Johannesburg Local Road Transportation Board* 1949 (4) SA 272 (W).

[133] Croome B & Olivier L *Tax Administration* 2010 (Juta) at page 52; The authors discuss the unlawfulness of IRS agents pursuing arbitrary set targets in tax audit results and quotas, as this was expected to affect the objectivity of the agents, resulting in bias.

[134] Something which SARS will not make public, despite attempts by the writer and other colleagues to request the details under the Promotion of Access to Information Act 2 of 2000. The matter has not been tested in court yet. For access to the courts on this type of issue see *Alliance Cash and Carry (Pty) Ltd v Commissioner, South African Revenue Service* 2002 (1) SA 789 (T); *Scherer v Kelley* (1978) 584 F.2d 170; In *Minister for Provincial and Local Government of the RSA v Unrecognised Traditional Leaders of the Limpopo Province, Sekhukhuneland* [2005] 1 All SA 559 (SCA) the appeal court found in favour of the public member seeking a report upholding the right of access to information held by the State, read with sections 36 (the limitation clause) and 39(2) (obliging every court to promote "the spirit, purport and objects of the Bill of Rights" of the Constitution (*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (7) BCLR 687 (CC) followed)).

[135] *Rose v Johannesburg Local Road Transportation Board* 1947(4) SA 272 (W).

For this reason, the letter of findings process announced by the Commissioner in 2002,[136] and which has become standard practice with larger taxpayers, is an essential part of the inquiry and audit process, in that taxpayers are able to answer to the detailed findings of the assessors and address their concerns before SARS issues a revised assessment. The taxpayer has the opportunity to correct any incorrect findings of fact and law, with the opportunity to have a more senior SARS official review the letter of findings and the response, before revised assessments are issued. This process creates the impression of unbiased conduct by SARS in conducting fair administrative process. Procedural fairness is a principle of good administration that requires an impartial decision-maker.[137]

Failure to adhere to this procedure properly will result in the taxpayer being entitled to review the unfair conduct of SARS on the basis of bias and a failure by SARS to adhere to a legitimate expectation in the form of the letter of findings.[138]

3.5.2 *Audi alteram partem*[139]

Procedural fairness in the form of the *audi alteram partem* principle[140] gives taxpayers an opportunity to participate in any decisions that will adversely affect them, and gives them a chance to influence the outcome of those decisions.[141] This will improve the quality and the rationality of administrative decision-making, enhancing legitimacy.[142] An example is the letter of findings process referred to above where SARS must give adequate reasons

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[136] In the unreported application of *Drs Du Buisson, Bruinette & Kramer Inc. v C:SARS* Case No. 4595/02 in the High Court of the Transvaal Provincial Division brought by the taxpayer to prevent SARS proceeding with an audit in terms of ss 74A and 74B, under the advice and guidance of the writer.

[137] Hoexter (2012) at pages 362-4.

[138] In the unreported case of *Xstrata South Africa (Pty) Ltd v C:SARS* North Gauteng Provincial Division Case No 53772/2010 (21 September 2010) the applicant obtained a consent order against SARS to set aside a defective letter of findings issued by SARS, 2 days before the years of assessment for issuing revised assessments in terms of s 79 of the Income Tax Act prescribed. SARS were unable to remedy the defect within the 2 day period and the years of assessment prescribed – the writer was the tax attorney adviser to the applicant; On bias, see also *Griffin v Licensing Board, Durban* (1898) 19 NLR 37.

[139] *Attorney-General, Eastern Cape v Blom* 1988 (4) SA 645 (A), 660H; and *Podlas v Cohen NO and others NNO* 1994 (3) BCLR 137 (T) where it was held that the *audi alteram partem* principle applies when a statute empowers a public official to make a decision prejudicially affecting an individual in his liberty, property or existing rights, unless excluded by necessary implication; *Bailey v Commissioner for Inland Revenue* 1933 AD 204 at 220; *Cekeshe and Others v Premier, Eastern Cape, and Others* 1998 (4) SA 935 (Tk); *Morelettasentrum (Edms) Bpk v Die Drankraad* 1987 (3) SA 407 (T); For a qualified contrary view see *Contract Support Services (Pty) Ltd v C:SARS* 61 SATC 338 analysed in section 4.7: *Pitfalls in bringing the Rule 53 Applicationinfra*.

[140] *Podlas v Cohen NO and others NNO* 1994 (3) BCLR 137 (T) where it was held that the *audi alteram partem* principle applies when a statute empowers a public official to make a decision prejudicially affecting an individual in his liberty, property or existing rights.

[141] Hoexter (2012) at page 363.

[142] *Ibid.*

at the conclusion of an audit and inquiry, and an opportunity to the taxpayer to respond. Failure by SARS to adhere to this process properly will result in a review, either setting aside the revised assessment or the letter of findings.[143]

Goldstone J in *Janse van Rensburg v Minister of Trade and Industry NO*[144] explained the importance of fairness in relation to discretionary power:

> …it has become more and more common to grant far-reaching powers to administrative functionaries. The safeguards…all the more important…Observance of the rules of procedural fairness ensures that an administrative functionary has an open mind and a complete picture of the facts and circumstances within which the administrative action is to be taken. In that way the functionary is more likely to apply his or her mind to the matter in a fair and regular manner.

In the Supreme Court of Appeal Conradie JA stated that fairness must be decided on the circumstances of each case and whatever is done must display the attributes of fairness and transparency: *Metro Projects CC v Klerksdorp Local Municipality*.[145] These are also obligations imposed on SARS through s 195(1) of the Constitution.

Hoexter[146]acknowledges that there are many instances where the legislated procedure of fairness and the *audi alteram partem* principle are just not catered for in PAJA owing to the restrictive nature of the definition of 'administrative action'. Sections 74A and 74B are arguably such provisions if this type of decision by SARS is considered not to be administrative action. In order to overcome this problem, Hoexter[147] advocates that the courts make use of the constitutional principle of legality that governs the use of all public power rather than just the narrower realm of administrative action.[148] As stated

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[143] The letter of findings approach was announced as a practice by the Commissioner in the unreported application of *Drs Du Buisson, Bruinette & Kramer Inc. v C:SARS* Case No. 4595/02 in the High Court of the Transvaal Provincial Division brought by the taxpayer to prevent SARS proceeding with an audit in terms of ss 74A and 74B; Also see the *Xstrata* case in footnote 145 *supra*.
[144] 2001 (1) SA 29 (CC).
[145] 2004 (1) SA 16 (CC).
[146] Hoexter (2012) at page 397.
[147]*Ibid*.
[148] See section 2.4 *supra*; See also *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at para [59].

earlier in this thesis, the exercise of public power is only legitimate where lawful[149] and can only be lawful if the body exercising the public power acts within the powers lawfully conferred upon it.[150] More recently there have been developments to suggest that this includes the right to be heard.[151]

Procedural fairness includes giving taxpayers the opportunity to interact with SARS to ensure that considered and rational decisions are made, that relate to the purpose that SARS is given power to inquire and audit into the tax affairs of taxpayers: namely, to verify proper compliance. Not to meet personal revised assessment budgets, but to comply with the jurisdictional facts of ss 74A and 74B as read with the appropriate sub-sections of s 74. This is where the interactions, through the *audi alteram partem* rule, between taxpayers and SARS will give taxpayers the assurance that SARS is not transgressing its constitutional obligations in ss 1(c), 33, 41(1), 195(1) and 237 of the Constitution. A failure by SARS to justify the exercise of its public power in terms of ss 74A and 74B in compliance with the *audi alteram partem* principle, diligently and without delay, would cause its conduct to be invalid in terms of s 2 of the Constitution.

Taxpayers affected by this conduct will be entitled to launch a review application either in terms of PAJA - ss 7 and 8 read with s 6 of PAJA in that 'action was procedurally unfair' in terms of s 6(2)(c), or s 6(2)(i) in that the '…action is otherwise unconstitutional or unlawful', or that the conduct is a transgression of the principle of legality.

Finally, there are instances where the courts have held that the *audi* principle need not be adhered to where a prior hearing would defeat the process being embarked upon.[152] In *Gardener v East London Transitional Council and Others*[153] it was stated that fairness was a relative concept: 'The meaning to be attached to 'procedurally fair administrative action' must therefore be determined within the particular framework of the act in question viewed in the light of the relevant circumstances. The procedure must be fair not only to the holder of the right affected by the administrative act but also the executive or administration acting in the public interest.' The court went on to state that it does not

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[149] *Ibid.* at para [56].
[150] *Ibid.* at para's [56]-[59]; *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).
[151] Hoexter (2012) at pages 121-5; *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC).
[152] *Contract Support Services (Pty) Ltd and Others v CSARS* 61 SATC 338 at page 350; *Arepee Industries Ltd v CIR* 55 SATC 139 at pages 144-5.
[153] 1996 (3) SA 99 (ECD) at para's 116 D-G.

believe: 'that the *audi* principle is absolutely applicable to every administrative act. Such an interpretation would make possible the misuse of the Constitution to hold up necessary social reform measures or for that matter any executive or administrative act…'.

Following this line of reasoning, SARS may also rely on the Supreme Court of Appeal judgment in *Chairman of the Board on Tariffs and Trade and Others v Brenko Inc and Others*,[154] where the court held that there was no single set of principles for giving effect to the rules of natural justice which would apply to all investigations, inquiries and exercises of power, regardless of their nature; on the contrary, the courts have recognised and restated the need for flexibility in the application of the principles of fairness in a range of different contexts.

Following the reasoning in these judgments, SARS may argue that when considering the wide powers conferred upon it (which have both an investigative function as well as a determinative function in imposing additional tax on taxpayers), whilst it has a duty to act fairly, it does not follow that it must discharge that duty precisely in the same way in regard to the different functions performed by it. However, when SARS exercises its deliberative function, taxpayers have a right to know the substance of the case that they must meet. Moreover, taxpayers will be entitled to an opportunity to make representations. There is always the suspicion that the assessors are attempting to meet an internal SARS financial budget, where there is no rational connection between the purpose behind SARS being entitled to inquire into and audit a taxpayer's affairs to verify tax compliance, and the SARS official's personal goals. SARS officials are nevertheless bound by their constitutional obligations by adhering to the rule of law and displaying a high standard of professional ethics; unbiased, impartiality, and equitable conduct; and conduct that is accountable and transparent. These constitutional obligations in terms of ss 1(c), 41(1), and 195(1) of the Constitution supports taxpayers rights to natural justice and the *audi* principle.

The problem of whether or not the *audi* principle applies to ss 74A and 74B is also overcome in some instances where taxpayers have a legitimate expectation that SARS must uphold. This aspect is dealt with in the section 3.6 below, where there is now a legitimate expectation that SARS issues a letter of findings at the conclusion of an inquiry and audit.

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[154] 64 SATC 130.

It is submitted that this also applies to the *Code of Conduct* and the *SARS Internal Audit Manual*[155] where the legitimate expectations of the fair, impartial and unbiased standards of SARS in an inquiry and audit, has been created. The taxpayer can make inquiries about the scope, purpose and motivation behind the inquiry and audit, when SARS communicates with the taxpayer to commence the inquiry and audit. The taxpayer can enquire about SARS' duties to gain insight into the business process of the taxpayer, the industry of the taxpayer, and any industry or taxpayer specific risks identified, as envisaged in the *SARS Internal Audit Manual*.[156] In this way, the *audi* principle is fulfilled.

3.6 LEGITIMATE EXPECTATIONS

3.6.1 The Legitimate Expectations Doctrine in the context of ss 74A and 74B

A legitimate expectation may arise in the context of taxation[157] by means of a ruling or undertaking, the issuing of interpretation notes, media statements, practice notes and advance rulings or opinions; or a legitimate expectation based on a prevailing practice or a publically published document: such as the *Code of Conduct*, as supported by the unpublished *SARS Internal Audit Manual*. Taxpayers may expect SARS to apply these legitimate expectations fairly, impartially and without bias to all taxpayers.

The requirements that should be met in determining the legitimate expectations created by SARS, are as follows:[158]

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[155]See section 3.2: *The SARS Internal Audit Manual supra*.

[156]*Ibid*.:'In order to carry out his tasks properly the auditor has to make professionally and technically sound decisions on the nature and scope of the audit. This requires insight into the knowledge of the business process of the taxpayer as well as those of the industry or target group of which it is part'.

[157]Williams R C et al *Silke on Tax Administration* (April 2009) Lexi Nexis at para 3.25 generally.

[158] Summarised from a collective reading of the various cases that have contributed to the development of the legitimate expectations doctrine in South Africa: *Administrator, Transvaal and Others v Traub and Others* 1989 (4) SA 731 (A) at para's 756H-J; Lord Fraser in the English case *Council of Civil Service Unions and Others v Minister for the Civil Service* [1984] 3 ALL ER 935 (HL)*;* Lord Templeman in the English case *Re Preston* [1985] 2 ALL ER 327; *Pharmaceutical Manufacturers Association of South Africa and another: In Re: Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para [33]; *ITC 1674*62 SATC 116; *South African Veterinary Council And Another v Szymanski* 2003 (4) SA 42 (SCA) at page 49 and para [19] as quoted from *National Director of Public Prosecutions v Phillips and Others* 2002 (4) SA 60 (W) (2001 (2) SACR 542) at para [28]; *Premier Mpumalanga and another v Executive Committee, Association of State-Aided School* 1999 (2) SA 91 (CC) at para [38]; *Jenkins v Government of the RSA* 1996 1 All SA 659 (Tk); *Dilokong Chrome Mines v Direkteur-Generaal, Departement van Handel en Nywerheid* 1992 (4) SA 1 (A); *National Director of Public Prosecutions v Phillips and Others* 2002 (4) SA 60 (W) (2001 (2) SACR 542) at para [28] where the requirements for legitimacy of the expectation, include the following: **(i)***The representation underlying the expectation must be "clear, unambiguous and devoid of relevant qualification"*: De Smith, Woolf and Jowell (*op. cit.* [*Judicial Review of Administrative Action* 5th ed] at page 425 para

(a) induced by the decision-maker[159] – a ruling or undertaking, the issuing of interpretation notes, media statements, practice notes and advance rulings or opinions, and prevailing practice - are induced by SARS to taxpayers;

(b) an express or implied promise or undertaking[160] – a ruling or undertaking, the issuing of interpretation notes, media statements, practice notes and advance rulings or opinions, and prevailing practice, are express or implied promises or undertakings by SARS to taxpayers;

(c) a general or specific representations[161] – a ruling or undertaking, the issuing of interpretation notes, media statements, practice notes and advance rulings or opinions, and prevailing practice - are general or specific representations issued by SARS to taxpayers;

(d) clear, unambiguous and devoid of relevant qualification[162]– a ruling or undertaking, the issuing of interpretation notes, media statements, practice notes and advance rulings or opinions, and prevailing practice - is generally 'clear, unambiguous and devoid of relevant qualification' by SARS to taxpayers;

8-055). The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril. **(ii)***The expectation must be reasonable*: *Administrator, Transvaal v Traub* ((1989 (4) SA 731 (A)) at 756I - 757B); De Smith, Woolf and Jowell (*op. cit.* at page 417 para 8-037). **(iii)***The representation must have been induced by the decision-maker*: De Smith, Woolf and Jowell (*op cit* at 422 para 8 - 050); *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346 (PC) at 350h - j. **(iv)** The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate: *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (C) at 59E - G.' (Emphasis supplied); *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346 (PC) at page 350; *Walele v City Of Cape Town and Others* 2008 (6) SA 129 (CC) at pages 183-4; *Zuma and Others v National Director of Public Prosecutions*[2008] 1 All SA 234 (SCA); *ITC 1682*62 SATC 380 at page 403; De Ville J *Judicial Review of Administrative Action in South Africa* (2003) Juta at pages 219 and 220; Currie I & Klaaren J *Promotion of Administrative Justice Act Benchbook* (2001) SiberInk at page 80, Baxter L *Administrative Law* (1984) Juta; LAWSA Volume 1 *Administrative Law* 2nd ed Lexis Nexis at para 113 (last accessed 30 June 2008); Hoexter (2012) at pages 394-6; Croome B & Olivier L *Tax Administration* 2010 (Juta) at pages 63-70.

[159]*South African Veterinary Council And Another v Szymanski* 2003 (4) SA 42 (SCA) at para [49] and para [19] as quoted from *National Director of Public Prosecutions v Phillips and Others* 2002 (4) SA 60 (W) (2001 (2) SACR 542) at para [28]; The representation must have been induced by the decision-maker: De Smith, Woolf and Jowell (*op cit* at 422 para 8 - 050); *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346 (PC) at para's 350h - j.

[160]*Administrator Transvaal v Traub & Others* 1989 (4) SA 731 (A) at para's 756H-J.

[161]*Ibid*.

[162]*SA Veterinary Council v Szymanski* 2003 (4) SA 42 (SCA) at para [19].

(e) reasonable, competent and lawful, and induced by the decision-maker[163]– a ruling or undertaking, the issuing of interpretation notes, media statements, practice notes and advance rulings or opinions, and prevailing practice - is generally reasonable, competent and lawful, and induced by SARS to taxpayers;

In the context of ss 74A and 74B, failure by SARS to follow its legitimate expectations created, such as its published *Code of Conduct*, or any other substantive or procedural legitimate expectations created in respect of a particular taxpayer, will be conduct inconsistent with the Constitution and invalid. In terms of s 2 of the Constitution read with s 172 of the Constitution, such conduct would be subject to judicial review as explained in section 5.5.6 below.

In the exercise of a decision in terms of ss 74A and 74B written communication between a taxpayer and SARS is required. This written communication may lead to and create a legitimate expectation between the taxpayer and SARS that the process between them will follow a particular procedure - such as SARS issuing a letter of findings before any revised assessment is issued. Such a legitimate expectation created by SARS triggers the applicability of the adequate notice provisions of ss 3(1) and (2) of PAJA.[164]

Section 3(1) has a requirement that the legitimate expectation must be 'materially and adversely' affected.[165] De Ville[166] holds the view that 'this appears to be nothing more than an expression of the *de minimis non curat lex* principle' and that the phrase affecting legitimate expectations has been interpreted widely. De Ville goes on to state:[167] 'There is no natural limit to what can be understood as falling within the concept of 'rights' (or legitimate expectations) in section 3(1) of PAJA.' (Insertion supplied)

Thus, if SARS fails to comply with its legitimate expectations (read with the constitutional obligations of s 195(1) of the Constitution (*inter alia*, a high standard of ethics, impartial, fair and unbiased conduct) and s 4(2) of the SARS Act) SARS will *prima facie* 'materially and adversely' affect the legitimate expectations of taxpayers.

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[163] *Ibid.* at para [29].
[164] Williams R C et al *Silke on Tax Administration* (April 2009) Lexi Nexis at para 3.25 generally.
[165] However, Williams R C et al *ibid.* at para 3.25 place no significance on this requirement in respect of legitimate expectations.
[166] De Ville J *Judicial Review of Administrative Action in South Africa* (2003) Juta at page 224.
[167] *Ibid.* at page 227; *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001(1) SA 853 (SCA) at para [42].

Taxpayers are then entitled to rely upon the provisions of PAJA, and the fair procedural terms of s 3(1) of PAJA, and the provision of 'adequate reasons'[168] as contemplated in s 5(2) of PAJA.

As stated previously the salient provisions of the SARS' Service Charter and Standards (under review) or *Code of Conduct* creates a legitimate expectation in favour of taxpayers in summarising the constitutional duties applicable to SARS when exercising its powers under ss 74A and 74B. The *Code of Conduct* prior to its current 'under review' format provided as follows:

> …This code of conduct has been formulated to help SARS employees to *understand the standards of personal and professional behaviour required of them*…(Emphasis supplied)

In line with the high standard of professional ethics required of administrators in s 195(1)(a) of the Constitution (one of SARS' constitutional obligations), the SARS *Code of Conduct* records that a high standard of professional behaviour is required of SARS officials. What does this mean? It is at this juncture, it is submitted, that the *SARS Internal Audit Manual*[169] of SARS plays a guiding role. The *SARS Internal Audit Manual* require of the SARS assessor: '… insight into the knowledge of the business process of the taxpayer as well as those of the industry or target group of which it is part'.[170] Failure on the part of SARS to take this step is indicative that SARS' conduct is not of a high professional standard.

Another example is: 'The audit plan includes the schedule and set up of audits to be carried out within a certain time period. The audit plan translates itself into the audit assignment, which indicates which taxpayers and which elements of the tax return(s) need to be audited. This is important for each auditor, as it sets out the nature and scope of the audit. The audit assignment is thus the link between the audit plan and the auditing

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[168]See section 2.5: *Adequate Reasons supra*.
[169] See section 3.2: *The SARS Internal Audit Manual supra.*
[170]*Ibid.* at page 2.

process.'[171] The failure by SARS to conduct an audit scope plan is another example of conduct that falls short of the high standard of professional ethics standard.

For instance, SARS have made international presentations to the African Tax Administration Forum to share with other African Tax Administrations best practice in the approach towards determining whether or not a taxpayer should undergo a transfer pricing and tax audit. The steps demonstrated in the presentation[172] follow the audit process set out in the *SARS Internal Audit Manual*. The result is that by the time SARS decides to use its ss 74A and 74B powers in respect of a taxpayer, a collection of relevant information detailing the preliminary reasons for the inquiry and audit will exist. This information is available to the taxpayer as discussed below. Failure by SARS to plan the inquiry and audit, would also be indicative of a failure to adhere to the high professional ethics standard required as part of SARS' constitutional obligations, and in line with their own internal standards, and the legitimate expectations created in their *Code of Conduct*.

The *Code of Conduct* (prior to its current 'under review' format) stated:

> …SARS and its employees:
>
> 1.1 are *loyal to the Republic, honour the Constitution and abide by it in the execution of daily tasks*;
> 1.2 put the *public interest first in the execution of daily duties*.
> (Emphasis supplied)

SARS' *Code of Conduct* reiterates that SARS officials must abide by the provisions of the Constitution.

The *Code of Conduct* continues:

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[171] *Ibid.* at page 5; In an Africa Tax Administration Forum presentation in Kigali, Rwanda – September 2011, SARS made a presentation to various African Tax Administrations confirming this process in respect of Transfer Pricing tax inquiries and audits (http://www.ataftax.net/events/events-calendar_1/technical-event-on-transfer-pricing-implementation-and-case-studies.aspx. (last accessed 30 March 2013).

[172] In an Africa Tax Administration Forum presentation in Kigali, Rwanda – September 2011, SARS made a presentation to various African Tax Administrations confirming this process in respect of Transfer Pricing tax inquiries and audits (http://www.ataftax.net/events/events-calendar_1/technical-event-on-transfer-pricing-implementation-and-case-studies.aspx(last accessed 29 January 2013).

> …A SARS employee:
>
> 2.1 will *serve the public in an unbiased and impartial manner* in order to create confidence in the SOUTH AFRICAN REVENUE SERVICE;
> 2.2 is polite, helpful and readily accessible in his or her dealings with the public, at all times treating members of the public as valued clients who are *entitled to receive the highest standards of service*;… and
> 2.7 *recognises the public's right of access to information* excluding that information which is specifically protected by law. (Emphasis supplied)

Transparency, as required in the provisions of s 195(1)(g) of the Constitution, is emphasized in the *Code of Conduct* (and detailed in the *SARS Internal Audit Manual* in respect of inquiries and audits as set out in section 3.2 above). SARS must disclose to taxpayers any information they require to justify the conduct of SARS. In terms of SARS' practice, in following the steps demonstrated in the *SARS Internal Audit Manual*, by the time SARS decide to use its ss 74A and 74B powers in respect of a taxpayer, a collection of relevant information detailing the preliminary reasons for the inquiry and audit will exist. As this is the practice of SARS, all taxpayers have legitimate expectations, on the basis of fairness, impartiality and unbiased conduct, that similar information will exist at the commencement of their inquiry and audit, and be available to them in respect of their tax affairs. The only information that is excluded is that which is subject to legal professional privilege,[173] and information about other taxpayers' affairs, owing to the secrecy provisions in the Income Tax Act.

The *Code of Conduct* continues:

> …A SARS employee…

[173]See *Heiman Maasdorp & Barker v SIR* 1968 (4) SA 160 (W); *Krew v Commissioner of Taxation* (1971) 45 ALJR 249 where documents subject to legal professional privilege fall outside the parameters of information, documents or things that SARS are entitled to. See generally Williams R C et al *Silke on Tax Administration* (April 2009) Lexis Nexis at para's 3.15 and 3.16.

> 5.2
>
> strives to achieve the objectives of the South African Revenue Service *cost-effectively and cost efficiently without compromising the legitimate expectations of the public*;
>
> …
>
> 5.7
>
> will recuse himself or herself from any official action or decision-making process which may *result in improper personal gain, and declares this interest*;
>
> …
>
> 5.10
>
> *promotes sound, efficient, effective, transparent and accountable administration*;
>
> ….
>
> Compliance will ensure that the conduct of SARS personnel is *not just legally correct but is ethical,* enabling SARS to uphold its standards in a manner acceptable to Government and the public they serve.(Emphasis supplied)

The undertakings of cost effective and efficient service; not compromising legitimate expectations; recusing themselves from decisions that may result in improper personal gain (because they may be biased as their remuneration, bonus or promotion depends directly or indirectly on the outcome of the inquiry and audit); and, with transparent and accountable administration, demonstrates the duties of SARS in s 4(2) of the SARS Act and s 195(1) of the Constitution.

These principles set out in the *Code of Conduct* emphasizes the constitutional duties of SARS, and the rights and legitimate expectations of taxpayers, in a public document for the benefit of taxpayers. Furthermore, its provisions are in line with the international

benchmark rules of the International Ethics Standards Board for Accountants and its Code of Ethics for Professional Accountants.[174]

An abuse of power could also occur if the Commissioner were to discriminate between different taxpayers in like circumstances, and deny to some the benefits of a discretion or power exercised favourably to others. In the New Zealand case *Reckitt and Coleman (NZ) Ltd v The Taxation Board of Review and The Commissioner of Inland Revenue*[175] Turner J stated: 'It is of the highest public importance that in the administration of [tax] statues *every taxpayer shall be treated exactly alike*, no concession being made …; *he must with Olympian impartiality* hold the scales between the taxpayer and the crown giving to no one any latitude not given to others.' (Emphasis supplied)

The statement of Turner J supports the constitutional obligations of SARS to diligently and without delay conduct itself in an impartial, equitable and fair manner towards all taxpayers; as others before them.

The issuance of a letter of findings at the conclusion of all inquiries and audits is a clear example, despite the fact that this procedure is not a provision of tax legislation (but will change with the new s 42 in the Tax Administration Act 28 of 2011). Also if taxpayer's have enjoyed a practice up until the date of an adverse decision taken by SARS, they can expect that in terms of the rule of law and the principle of legality, the practice will not be changed retrospectively, in line with the application of the doctrine of legitimate expectations. SARS failure to adhere to the rule of law and these legitimate expectations, would amount to unfairness and an abuse of power. The *audi alteram partem* principle will have to be adhered to, and the promise or practice would have to be left intact, prior to the change of decision.

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[174] *Handbook of the Code of Ethics for Professional Accountants*, 2012 edition, International Federation of Accountants (IFAC), www.ethicsboard.org (last accessed 31 March 2013), at pages 17-24; See section 4.2.3: *High Standards of Professional Ethics infra* for a summary of the relevant rules.

[175] [1996] NZLR 1032: 'It is of the highest public importance that in the administration of [tax] statues *every taxpayer shall be treated exactly alike*, no concession being made to one to which another is not equally entitled. This is not to say that in cases where the statute has so expressly provided the Commissioner has no discretion to differentiate between cases – but this is in my opinion only to be done when provision for it is expressly, or it may be impliedly, made in the legislation. Where there is no express provision for discretion, however, and none can be properly implied from the tenor of the statute, the Commissioner can have none; *he must with Olympian impartiality* hold the scales between the taxpayer and the crown giving to no one any latitude not given to others.' (Emphasis supplied)

Finally, the onus is on the taxpayer to prove that the Commissioner has abused his powers.[176] This is not an easy task to overcome. However, the standard of proof is based on the taxpayer showing that SARS has abused its powers on a balance of probabilities in the review application brought by SARS.

3.6.2 Limitation to the Legitimate Expectation Doctrine

An immediate potential limitation which appears in the Income Tax Act viz-a-viz the application of the legitimate expectations doctrine is s 3(2) of the Income Tax Act:

> Any decision made and any notice or communication *issued or signed by any such officer* [engaged in carrying out the provisions of the Act under the control, direction or supervision of the Commissioner] *may be withdrawn or amended by the Commissioner...*

The application of the legitimate expectation doctrine is not ousted by this section in matters of tax. The doctrine applies notwithstanding the existence of various prescribed statutory powers such as in ss 74A and 74B, where these provisions must pass constitutional scrutiny in respect of the just administrative action provisions of s 33 of the Constitution, expanded by the provisions of PAJA, and the rule of law in s 1(c) of the Constitution and the constitutional principle of legality. SARS must display lawfulness, reasonableness and procedural fairness in its decision-making process to withdraw or amend a previous decision. Should SARS wish to withdraw a decision made as prescribed in s 3 of the Income Tax Act, an opportunity must be afforded to the taxpayer to state its case, in accordance with the *audi alteram partem* principle.

Support for this submission can be found in *Everett v Minister of the Interior*[177] case. The applicant had received no prior notification from the Minister that her temporary residence permit would be revoked and she applied to the Supreme Court for an order setting aside the notice purporting to withdraw her temporary residence permit on the

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[176] *Kimberley Girls' High School and another v Head of Department of Education, Northern Cape Province and others* [2005] 1 All SA 360 (NC).

[177] 1981 (2) SA 453 (C) at pages 458 – 459. The legitimate expectations doctrine first emerged in South Africa in *Everrett v Minister of the Interior* 1981 (2) SA 453 (C) which was the first South African case in administrative law that adopted the English doctrine of legitimate expectations. The court held that there had been a breach of natural justice, and that the Minister's notice should be set aside.

ground, *inter alia*, that it was contrary to natural justice that she had not been afforded an opportunity of making representations to the Minister. The court held that there had been a breach of natural justice, and that the Minister's notice should be set aside. This applies equally to SARS is deciding to change or amend its decision in terms of s 3(2) of the Income Tax Act.

Once the opportunity to be heard has been afforded to the taxpayer, may SARS simply change or amend its previous decision, retrospectively and retroactively? In other words, if a legitimate expectation has been created to provide a letter of findings at the conclusion of an audit, can SARS simply withdraw the requirement to produce a letter of findings at the conclusion of the audit?

The answer partially lies in the applicability of the substantive protection of the legitimate expectation, which as summarised by Hoexter,[178] has been cautiously approached by all South African courts, including the Constitutional Court. In essence, in the case of SARS back tracking on a legitimate expectation created in favour of a taxpayer, SARS would have to begin with procedural enforcement, where SARS will first hear the taxpayer affected, and then SARS would reach its decision taking into account all the relevant considerations, including the legitimate expectations, giving the latter sufficient weight. A decision that denies the legitimate expectations would be reviewable in terms of one of the grounds of review in s 6(2) of PAJA, and in particular on the basis of lack of rationality. If found to be irrational by the court, in exceptional circumstances (such as bias, incompetence or unjustifiable prejudice), the court may substitute its decision for that of the administrator.[179]

Bias and incompetence is difficult to establish in practice in a matter against SARS. Therefore, unjustifiable prejudice caused to the taxpayer would be one appropriate ground of review to pursue, on the basis that the administrative action of SARS is 'otherwise unconstitutional or unlawful'. This enquiry plays into the *functus officio* doctrine.[180]

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[178]Hoexter (2012) at pages 432-6, quoting extensively from Campbell J *Legitimate Expectations: The Potential and Limits of Substantive Protection in South Africa* (2003) 12 South African Law Journal at page 292.
[179]*Ibid.* at page 434, read with pages 552-7.
[180]*Ibid.* at pages 276-7 generally.

Any public power to revoke or amend a previous decision would at the minimum have to be exercised in accordance with PAJA if administrative action, and comply with the principle of legality and the rule of law.[181] In line with the preferred interpretation to a similar provision in s 10(1) of the Interpretation Act 33 of 1957, the power to revoke and amend existing 'rules, regulations or by-laws' enables administrators to exercise their powers anew in different situations, and not to revoke or amend existing decisions whenever they like.[182] Hoexter summarises the law aptly: 'The rule of law holds that individuals should be entitled to rely on … decisions, and to be able to plan their lives around such decisions, insulated at least to some degree from the injustice that would result from a sudden change of mind on the administrator's part. There is also the fundamental principle that administrators must have lawful authority for everything they do – or undo. These considerations of certainty, fairness and legality help to explain why official decision-makers are said at common law to be *functus officio* once a decision has been made.'[183]

The *functus officio* doctrine would arguably not apply to the Commissioner exercising his power to revoke or amend a legitimate expectation created by a SARS official in terms of s 3(2) of the Income Tax Act in line with the decision in *Carlson Investments Share Block (Pty) Ltd v CSARS*[184] because an express legislated provision entitles him to do so, but the considerations of certainty, fairness and legality would come into play, with his lawful authority to do so, limiting his power to do so retrospectively where a 'new determination does not affect completed transactions.'[185] This is in line with the rule of law, that certainty with regard to existing rights of taxpayers should not alter in the past, where loss of those rights retrospectively would unjustifiably prejudice the taxpayer. That would be contrary to the rule of law.

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[181] *Ibid.* at page 276.
[182] *Ibid.* at page 277.
[183] *Ibid.* with reference to Pretorius D M *The Functus Officio Doctrine in South African Administrative Law, with Reference to Analogous Principles in the Administrative Law of Other Commonwealth Jurisdictions* (unpublished PhD thesis, University of the Witwatersrand, 2004) especially at page 420ff.
[184] 63 SATC 295 at page 318.
[185] *3M South Africa (Pty) Ltd v CSARS* [2010] ZASCA 20 at para [36] where in relation to similar provisions in the Customs and Excise Act 91 of 1964 granting the Commissioner the power to withdraw and amend previous determinations, the Supreme Court of Appeal held: 'Having said that, however, it needs to be emphasised that the retrospective effect of the new determination does not affect completed transactions, but only applies in respect of uncompleted transactions…'.

It is submitted that a justifiable basis for the Commissioner to alter existing rights or expectations would be where, for instance, the legitimate expectation created in favour of the taxpayer was done so under false pretenses on the part of the taxpayer. Otherwise the legitimate expectation may give rise to both procedural and substantive expectations being protected, as quoted from Corbett CJ's judgment in *Administrator, Transvaal & Others v Traub & Others* 1989 (4) SA 731 (A) 758 in the *Carlson Investments Share Block* case.[186] The taxpayer in the *Carlson Investments Share Block* case argued that the Commissioner was *functus officio* after reassessing it to tax, and could not apply the express provisions of s 79 of the Income Tax Act to do so. The court held that in light of the express statutory provision, the Commissioner could reassess the taxpayer to tax again, provided it complied fully with the jurisdictional facts of that section, which in itself was a protection mechanism against arbitrary power. Furthermore, any harassment, malicious conduct or other unlawful conduct in applying that section would also be subject to review. None could be proven in that case. The taxpayer then attempted to rely on the legitimate expectations doctrine to uphold the previous reassessment by SARS, where the taxpayer would obtain substantive protection against SARS raising a revised assessment again within 3 years. The court found no evidence of a practice or communication that SARS would not revisit a previous decision to tax under these circumstances, so the doctrine was not applied in favour of the taxpayer.

A transgression by the Commissioner of the principles set out above and applicable to revoking or altering a decision previously taken by a SARS official (within 3 years of that decision being taken unless all material facts were not placed before the SARS official when making the original decision), would be subject to review if the Commissioner acted outside the scope of the jurisdictional facts of s 3(2) of the Income Tax Act, or acted unlawfully in doing so. The discussion in this section is around an audit and inquiry, where SARS has created a practice to issue a letter of findings, where a legitimate expectation exists in favour of the taxpayer. If the Commissioner invokes his power to change the decision in terms of section 3(2), attempting to argue that he is acting unlawfully because the doctrine of *functus officio* applies, will most probably be met with no success in court. But arguing that the Commissioner is acting unlawfully because he does not comply with the legitimate expectation clearly created, would most probably be

[186] At page 322 footnote 194 of the *Carlson Investment* case footnote 191 *supra*.

met with success. Unless he has transgressed some statutory duty in creating the legitimate expectation in the first place. Under these circumstances, that it is highly unlikely.

The grounds of review in s 6(2) of PAJA, or, the constitutional principle of legality – for failure to act lawfully, reasonably or in a procedurally fair manner – would be applicable.

3.7 MULTI-STAGED DECISION-MAKING[187]

Although administrative decisions are sometimes made in various stages, Hoexter makes the point that fairness should be applied at every stage of a multi-staged decision, and not only at the final stage where in the pre-Constitutional era, the rights of an individual had to be prejudicially affected,[188] giving rise to quasi-judicial decisions, before the laws of natural justice applied. The courts in the pre-Constitutional era were loath to bury administrators in a flurry of hearings that would hinder practical expediency in dealing with administrative matters. Although hearings may be the fairest way of reaching decisions, they are not the most practical or the least expensive or time consuming.

In the English case of *Re Pergamon Press Ltd*,[189] where the court was concerned with an inquiry in terms of the Companies Act, where inspectors were expected to investigate and report, Lord Denning offered a warning against underestimating the importance of the inspector's task:

> They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal proceedings or to

[187]Hoexter (2012) at page 441; Hoexter C & Lyster R *The New Constitutional & Administrative Law* (2002) Juta at pages 206-8 and pages 222-6.
[188]*R v Ngwevela* 1954 (1) SA 123 (A), followed by the decisions in *Cassem v Oos-Kaapse Komittee van die Groepsgebiederaad* 1959 (3) SA 651 (A) and *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 263 (A).
[189] [1970] 3 All ER 535 (CA).

> civil actions…Seeing that their work and their report may lead to such consequences, I am clearly of opinion that the inspectors must act fairly.[190]

However, notwithstanding the view of Lord Denning, Baxter[191] states that the right balance must be struck, 'continually modifying the actual requirements of natural justice in accordance with the importance of accurate and objective decision-making and in the light of administrative practicality.'

In counter-balancing the pre-Constitutional era when natural justice applied only to quasi-judicial proceedings where individual rights were affected, the Supreme Court of Appeal in *Director: Mineral Development, Gauteng Region v Save the Vaal Environment*[192] rejected the application of the *audi alteram* principle, since the *audi alteram* principle would be applied at a later stage in the process under scrutiny. There was no need to apply it in the first stage. However, the court did reject an argument that no rights were violated in the first stage. The court held:

> It is settled law that a mere preliminary decision can have serious consequences in particular cases, *inter alia*, where it *lays '...the necessary foundation for a possible decision…' which may have grave results*. In such cases the *audi* rule applies to the consideration of the preliminary decision…[193]. (Emphasis supplied)

Furthermore, in *Nomala v Permanent Secretary, Department of Welfare and Another*,[194] the court held that a matter was ripe for adjudication in relation to the lawfulness of administrative action where prejudice was inevitable even though the action had not yet occurred.

A decision by SARS in terms of ss 74A and 74B definitely '*lays…the necessary foundation for a possible decision…which may have grave results…*' (emphasis

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[190] *Re Pergamon Press Ltd* [1970] 3 All ER 535 (CA)at page 539d-f, cited with approval in *Du Preez v TRC* 1997 (3) SA 204 (A) at pages 232H-233B.
[191] Baxter L *Administrative law* (1984) Juta at page 583.
[192] 1999 (2) SA 709 (SCA).
[193] *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 (2) SA 709 (SCA)at para [17].
[194] 2001 (8) BCLR 844 (E).

supplied).The grave results referred to is the issuance by SARS of a revised assessment, with penalties and interest.

In the *Grey's Marine* case[195] the Supreme Court of Appeal, *obiter*, stated that a capacity to affect rights is all that s 1 of PAJA and the definition of administrative action requires in relation to the elements of 'adversely affected rights' and 'direct, external legal effect' which in tandem merely serve to emphasise that administrative action impacts directly and immediately on individuals.

Supporting the decision in the *Grey's Marine* case, Fabricius AJ in *Oosthuizen's Transport (Pty) Ltd v MEC, Road Traffic Matters, Mpumalanga*[196] held that a decision to investigate whether or not to suspend operator of a fleet of vehicles was administrative action; attracting procedural fairness in terms of s 3 of PAJA; and, that representations should have been allowed during the deliberative stage of the investigation. This is analogous to an investigation commenced by SARS under ss 74A and 74B.

In the Constitutional Court case of *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd & Another*[197] the court held that:

> [37] PAJA defines administrative action as a decision or failure to take a decision that adversely affects the rights of any person, which has a direct, external legal effect. This includes "action that has the capacity to affect legal rights". Whether or not administrative action, which would make PAJA applicable, has been taken cannot be determined in the abstract. Regard must always be had to the facts of each case.
>
> [38] Detecting a reasonable possibility of a fraudulent misrepresentation of facts, as in this case, could hardly be said to constitute an administrative action. It is what the organ of state decides to do and actually does with the information it has become aware of which could potentially trigger the

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[195] *Grey's Marine Hout Bay (Pty) Ltd and Othersv Minister of Public Works and Others*2005 (6) SA 313 (SCA) at para [23]; Hoexter (2012) at page 225.
[196] 2008 (2) SA 570 (T); Hoexter (2012) at page 232.
[197] 2011 (1) SA 327 (CC) at para's [37] and [38], footnotes excluded.

> applicability of PAJA. It is unlikely that a decision to investigate and the process of investigation, which excludes a determination of culpability could itself adversely affect the rights of any person, in a manner that has a direct and external legal effect.

Sections 74A and 74B results in a decision to investigate that includes a determination of culpability that could adversely affect the rights of the taxpayer, in a manner that has a direct and external legal effect, in that revised assessments may likely ensue, triggering the applicability of PAJA.

In conclusion, the analysis above shows that the exercise by SARS of its public powers in terms of ss 74A and 74B is part of a multi-staged investigative process, where a determination of culpability that could adversely affect the rights of the taxpayer, in a manner that has a direct and external legal effect, may be inevitable through the issuing of revised assessments at the end of the process. Therefore, SARS must ensure that every step in its decision-making process is not unlawful, unreasonable or procedurally unfair, and that it complies with all its constitutional obligations in terms of ss 41(1), 195(1) and 237 of the Constitution. The fact that it is multi-staged does not justify a deviation by SARS from these constitutional obligations.

Where SARS fails to comply with these constitutional obligations, the courts through s 172(1) of the Constitution will come to the aid of aggrieved taxpayers on the basis that non-compliance by SARS will result in an unconstitutional and 'invalid' decision – entitling taxpayers to invoke the grounds of review in s 6(2) of PAJA, or by virtue of the principle of legality.

3.8 'JUST CAUSE' DEFENCE

The provisions of s 75(1)(b) of the Income Tax Act provide:

> 75. **Penalty on default.**—(1) Any person who—
>
> (a) fails or neglects to furnish, file or submit any return or document as and when required by or under this Act; or

(aA) any person who fails to register as a taxpayer as contemplated in s 67;

(b) without *just cause shown* by him, *refuses* or neglects to—
(i) *furnish, produce or make available any information, documents or things*;
(ii) reply to or answer truly and fully, any questions put to him; or
(iii) attend and give evidence,
as and when required in terms of this Act;
…
(3) Any person who has been convicted under sub-section (1) of failing to furnish any return, information or reply, shall, if he fails within any period deemed by the Commissioner to be reasonable and of which notice has been given to him by the Commissioner, to furnish the return, information or reply in respect of which the offence was committed, be guilty of an offence and liable on conviction to a fine of R50 for each day during which such default continues or to imprisonment without the option of a fine for a period not exceeding 12 months. (Emphasis supplied)

Section 75(1)(b) provides the first line of defence that a taxpayer has against an attack by SARS when refusing to comply with a request for information, documents or things. If a taxpayer can show 'just cause' for its non-compliance with a SARS request, SARS will be unsuccessfully in obtaining a conviction in terms of s 75(3).

What is 'just cause'?

In *Chetty v Law Society of Transvaal*,[198] the court pointed out that 'sufficient cause' (or 'good cause') defies precise definition. This was also found to be the case in *Attorney-General, Tvl v Abdul Aziz Kader*:[199] 'Sufficient cause…comprises of two essential elements, namely that (a) the party seeking relief must present a reasonable and acceptable explanation for his default and (b) that on the merits such party has a bona fide defence which prima facie, carries some prospect of success…'.In *Attorney-General, Tvl*

[198] 1985(2) SA 756 (AD).
[199] 1991(4) SA 727 (A).

v Abdul Aziz Kader[200] it was held the 'just cause' is not confined to matters of privilege, compellability and admissibility – and has a wider connotation than an excuse sanctioned by rules of law – otherwise it would have been 'lawful cause'.

The direct, external legal effect on rights that would entitle a taxpayer not to participate in a ss 74A and 74B inquiry and audit by using the 'just cause' defence, would be, *inter alia*, that the fundamental rights to privacy and dignity in terms of ss 10 and 14 of the Constitution are intruded upon, outside justifiable grounds[201] (the case law on justification says that there is no 'privacy' when investigating business affairs - but on the premise of the encroachment being one that is *intra vires* i.e. within the scope of the empowering provision of section 74 and 'administration of this Act'). Here the deprivation theory is trumped by the determination theory, where the latter is broader in meaning. The taxpayer must merely show that determined rights that emerge going forward may be affected (such as the right to privacy and dignity;[202] lawful, reasonable and fair procedural administrative action;[203] compliance by SARS with its constitutional obligations that must obey and fulfil). Various academic writers favour this approach.[204]

This would include non-compliance by SARS with the relevant jurisdictional facts. In *Farjas (Pty) Ltd another v Regional Land Claims Commissioners, KwaZulu-Natal*[205] Dodson J held the approach of the courts to judicial review on the 'ground of illegality' has been based on what is known as the 'jurisdictional facts doctrine': 'A public official must first consider the law which empowers her and decide whether on the facts of the particular matter, she has the power or jurisdiction to deal with it ... These prerequisite legal facts and circumstances are usually described as "jurisdictional facts". According to this doctrine, if the public official errs in her decision about the presence or absence of the necessary jurisdictional facts, then a court will not hesitate to intervene and set aside her decision to review because she will have acted outside her powers'.An example of a

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[200]*Ibid*.
[201]*Bernstein and Others v Bester and Others* NNO 1996(2) SA 751 (CC) at para's [67], [73] and [79].
[202]Section 10 and 14 of the Bill of Rights, the Constitution.
[203] See sections 3.3: *Lawfulness*, 3.4: *Reasonableness* and 3.5: *Procedural Fairness*, *supra*.
[204]Hoexter C *The Future of Judicial Review in South African Administrative Law* (2000) 117 South African Law Journal 484 at page 516 states that the deprivation theory 'clearly creates an unacceptably high threshold for admission to the category of "administrative action" '. In addition, had the Act intended to be more restrictive, it could have inserted the words 'existing rights' instead of 'rights'.'; Woolman et al *Constitutional Law of South Africa* 2nd ed Juta 2002 at page 63-21.
[205]1998(5) BCLR 579 (LCC) at [22], quoting *South African Defence and Aid Fund and another v Minister of Justice* 1967(1) SA 31(C) at pages 34H – 35F and Baxter L *Administrative law* (1984) Juta at page 456; See section 3.3.2: *Jurisdictional facts supra*.

'public official err(ing) in her decision about the presence or absence of the necessary jurisdictional facts'would be the failure by SARS to give 'adequate reasons' in terms of s 5(1) and (2) of PAJA, without justification in terms of s 5(3) of PAJA. The absence of adequate reasons would confirm that the conduct is devoid of reasons, unconstitutional and 'invalid'. Non-compliance with the jurisdictional facts would be a 'ground of illegality', and give a taxpayer 'just cause' not to respond to a ss 74A and 74B inquiry and audit.

'Just cause' used in the context of s 75(1)(b) contains the following key elements extracted from the case law set out above. The taxpayer:

- must have 'a reasonable and acceptable explanation for his default';
- must have some *prima facie* 'prospect of success' in respect of 'the merits such party' relies upon as 'a *bona fide*' defence;
- does not have to rely on an excuse sanctioned by rules of law, such as matters of privilege, compellability and admissibility.[206]

In applying these principles to a refusal by a taxpayer to submit to a decision by SARS in terms of ss 74A and 74B, the following examples are appropriate. The taxpayer:

- can explain that the conduct of SARS in making a decision in terms of ss 74A and 74B is unconstitutional and 'invalid' in terms of s 2 of the Constitution, in that SARS has exercised its powers, and has therefore exercised unconstitutional and 'invalid' conduct in one or more of the following ways:
    - SARS has transgressed 'the rule of law' in contravention of s 1(c) of the Constitution by failing generally to comply with its constitution obligations spelt out below – this includes the constitutional principle of legality;
    - SARS has failed to 'respect and protect' the dignity of the taxpayer, because the overhanded conduct by SARS in making demands without proper reasons impairs the self-esteem of the taxpayer, as the taxpayer

[206] *Attorney-General, Tvl v Abdul Aziz Kader*1991(4) SA 727 (A).

regards SARS' conduct offensive, in that SARS has failed to respect the taxpayer's right to privacy without proper justification;[207]

- SARS has acted *ultra vires* as demonstrated by not satisfying the jurisdictional facts of ss 74A and 74B, read with the constitutional obligations set out in ss 41(1), 195(1) and 237 of the Constitution, read with s 4(2) of the SARS Act;
- SARS has not complied with the taxpayer's right to 'just administrative action' in terms of s 33 of the Constitution, and as expanded in terms of PAJA, in that SARS has failed to comply with its obligations to give proper and adequate notice of its decision in terms of s 3(2) of PAJA, and 'adequate reasons' in terms of s 5(1) and (2) of PAJA (without proper justification in terms of s 5(3)) for its decision in terms of ss 74A and 74B, thereby transgressing one or more of the grounds of review in s 6(2) of PAJA;
- SARS has transgressed its constitutional obligation in terms of s 41(1) of the Constitution, and thereby the principle of legality by ignoring that provision – SARS is not entitled to 'assume any power or function except those conferred on them in terms of the Constitution', as set out in s 41(1). In terms of the principle of legality SARS cannot act *ultra vires* its empowering provision in ss 74A and 74B meaning compliance with the jurisdictional facts and all its constitutional obligations in ss 195(1) and 237 of the Constitution, read with s 4(2) of the SARS Act;
- SARS has transgressed its constitutional obligations in terms of s 195(1) of the Constitution, read with s 4(2) of the SARS Act, and thereby the principle of legality[208] by ignoring those provisions – SARS is not entitled to conduct themselves contrary to:

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[207] Sections 10 and 14 of the Bill of Rights; See *Pretoria Portland Cement & Another v Competition ommission & Others* 2003(2) SA 385 (SCA) where a warrant to enter premises did not approve of film crew entering premises, was a grave violation of the right to privacy and the right to dignity. This is analogous to a concern on the part of the taxpayer, if SARS gives inadequate explanation, reasons and details for an inquiry and audit in terms of ss 74A and 74B, that SARS may enter the taxpayers premises, or share information, documents and things, with persons not properly authorised by the Commissioner and subject to the secrecy provisions (s 4) of the Income Tax Act; *Bernstein & Others v Bester NO & Others* 1996(2) SA 751 (CC) at para's [67], [73] and [79] identifies 'privacy' with the 'inner sanctum of a person', but that all privacy rights are limited 'to the most personal aspects of a person's existence, and not to every aspect within his/her personal knowledge and experience.'; *Investigative Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001(1) SA 545 (CC) at para [18] where it was held that the right to privacy protects intimate space because such a space is a prerequisite for human dignity; *Probe Security CC v Security Offices' Board and Others* 98 JER 0849 (W).

[208] Hoexter (2012) at pages 121-5.

- Promoting and maintaining ‘a high standard of ethics’;
- Promoting ‘efficient, economic and effective use of resources’;
- Services that are delivered ‘impartially, fairly, equitably and without bias’;
- ‘accountable’ Public Administration; and
- ‘timely, accessible and accurate information’ fostering ‘transparency’,

as set out in s 195(1)(a), (b), (d), (f) and (g). In terms of the principle of legality SARS cannot act *ultra vires* its empowering provision in ss 74A and 74B meaning compliance with the jurisdictional facts and all its constitutional obligations in ss 41(1) and 237 of the Constitution;

- SARS has transgressed s 237 of the Constitution, and thereby the principle of legality by ignoring the provisions that state ‘all constitutional obligations must be performed diligently and without delay’;
- SARS has transgressed its legitimate expectations created in accordance with the analysis in section 3.6: *Legitimate Expectations* in this thesis.

In conclusion, if a taxpayer can aver what is set out above, as substantiated with the relevant facts, ‘a reasonable and acceptable explanation for his default’ to the demands of SARS will be met; the taxpayer will be able to demonstrate a *prima facie* ‘prospect of success’ in respect of ‘the merits’ the taxpayer relies upon as ‘a bona fide’ defence;and the ‘just cause’ shown. It is not required for the taxpayer to rely on an excuse sanctioned by rules of law, such as matters of privilege, compellability and admissibility. As a result the taxpayer will successfully be entitled to raise the ‘just cause’ defence in terms of s 75(1)(b) to an attempt by SARS to enforce its demands through criminal sanction, and s 75 of the Income Tax Act.

The averments set out above will apply equally in any review application brought by taxpayers against the unconstitutional and ‘invalid’ conduct of. What remains available to taxpayers is also the remedy of review by the courts, that is analysed in Chapter 5 below.

CHAPTER 4

SECTION 195(1) OF THE CONSTITUTION AND PUBLIC ADMINISTRATION DUTIES WITH REFERENCE TO SECTIONS 74A AND 74B

4.1	INTRODUCTION TO SECTION 195(1), PAJA AND THE PRINCIPLE OF LEGALITY	124
4.2	THE DUTIES OF SARS EMANATING FROM SECTION 195(1) OF THE CONSTITUTION	126
	4.2.1 Introduction	126
	4.2.2 What are the democratic values referred to in s 195(1)?	128
	4.2.3 High standard of professional ethics	132
	4.2.4 Services must be provided impartially, fairly, equitably and without bias	141
	4.2.5 Public administration must be accountable	143
	4.2.6 Transparency must be fostered	147
	4.2.7 Limitations to s 195(1)	149

4.1 INTRODUCTION TO SECTION 195(1), PAJA AND THE PRINCIPLE OF LEGALITY

Now that the Constitutional Court in the *Bato Star Fishing* case[1] has held that the cause of action for judicial review ordinarily arises from PAJA and not the common law,[2] the starting point to review any unconstitutional and invalid conduct by SARS in terms of ss 74A and 74B would be in terms of ss 6, 7 and 8, applying one or more of the codified grounds of review specified in s 6(2) of PAJA, as set out in section 5.5.6 below. Furthermore, to the extent that a review application is based on the principle of legality[3] (because the decision by SARS is held not to fall within the definition of 'administrative action' in PAJA) the codified grounds, it would be submitted in a review application to the High Court, should be applied to inform the grounds of review of the unconstitutional and invalid public power exercised by SARS in terms of s 2 of the Constitution. Hoexter, in her second edition of *Administrative Law in South Africa*[4] draws the conclusion that the constitutional principle of legality, in the past few years leading into 2012, has developed not only to incorporate reviewing the lawfulness and reasonableness of the exercise of public power, but that the basis of a principle of legality transgression review now also extends to lack of procedural fairness, and arguably failure to provide reasons in appropriate circumstances.

The grounds for review would be applied to uphold the constitutional duties and obligations placed upon SARS in terms of s 195(1) of the Constitution. Section 195(1) is also arguably not subject to any constitutional limitation in terms of s 36 of the Constitution, because the provisions in s 195(1) fall outside the Bill of Rights. Section 237 of the Constitution also takes care of the fact that they must carry out their constitutional duties and obligations. The conduct by SARS in the form of a decision can be reviewed in court. However, there are other limitations. In terms of *Chirwa v Transnet Limited and Others*[5] the Constitutional Court has held that the provisions of s 195(1) of the Constitution do not create justiciable rights such as those in the Bill of

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[1] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at para's [22] – [25].
[2] See also generally De Ville J *Judicial Review of Administrative Action in South Africa* (2003) Juta at 401; Currie I & Klaaren J *The Promotion of Administrative Justice Act Benchbook* (2001) SiberInk at para 7.2.
[3] Hoexter (2012) at pages 121-5.
[4] *Ibid.*
[5] *Chirwa v Transnet Limited and Others* 2008 (4) SA 367 (CC) (28 November 2007) at para's [74] – [76], [146] and [195].

Rights, but merely provide interpretational assistance as to the duties of administrators like SARS. This finding does not detract from the provisions that s 195(1) read with s 237 imposes constitutional obligations on SARS, which point was not argued before the Constitutional Court. The finding of the Constitutional Court merely states that these constitutional obligations of themselves do not create lone standing justiciable rights. The opportunity then remains for taxpayers to challenge the failure by SARS to meet these actual constitutional obligations, as being conduct that is inconsistent with the Constitution, and therefore invalid.[6] That then brings into play either the grounds of review in PAJA, or the constitutional principle of legality.

In further support of this line of reasoning, O'Regan J's judgment in *Bato Star Fishing*[7] echoes Kriegler's judgment in *Metcash*,[8] where he stated that nowhere is judicial review excluded in the ordinary course, and that 'it has long been accepted that when the Commissioner exercises discretionary powers conferred upon him (or her) by statute, the exercise of the discretion constitutes administrative action which is reviewable in terms of the principles of administrative law.' Kriegler J [9] cited as his authority the case of *Contract Support Services (Pty) Ltd and Others v C SARS and Others*[10] and *KBI v Transvaalse Suikerkorporasie Bpk.*[11]

The discretionary powers of ss 74A and 74B would be subject to Kriegler J's statements,[12] as left open for development in terms of the provisions of s 39 of the Constitution[13] and O'Regan J's *ratio* in the *Bato Star Fishing.*[14] Support for this submission is also to be found in the *Grey's Marine* case.[15] The discretionary powers of SARS in terms of ss 74A and 74B are subject to review where it can be shown that the conduct of SARS transgresses its constitutional obligations: ss 1(c), 33, 41(1), 195(1)

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[6] For insight into this reasoning see section 1.4 *infra* and the anaysis of *Glenister v President of the RSA and Others* 2011 (3) SA 347 (CC).
[7] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at paras [22] – [25].
[8] 2001(1) SA 1109 (CC) at page 1134 at paras [33] and [40].
[9] *Metcash Trading Limited v C SARS and Another* 2001(1) SA 1109 (CC) at page 1134.
[10] 1999 (3) SA 1133 (W) at pages 1144 –5.
[11] 1985 (2) SA 668 (T) at para's 67I I and 671 E-F.
[12] *Metcash Trading Limited v C SARS and Another* 2001(1) SA 1109 (CC) at page 1134.
[13] Section 39. Interpretation of Bill of Rights 'When interpreting the Bill of Rights, a court…must promote the values…(in the Constitution)…must consider international law; and…may consider foreign law.'.
[14] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at para's [22]-[26] and [45].
[15] *Grey's Marine Hout Bay (Pty) Ltd and Othersv Minister of Public Works and Others* 2005 (6) SA 313 (SCA) at para's [19]-[43].

and 237 of the Constitution. Depending upon the facts of each case, such transgressions by SARS would be conduct that is invalid.

Such a review application takes place in terms of ss 6, 7 and 8, relying on the grounds of review in terms of s 6 of PAJA, or relying on the constitutional principle of legality, currently by way of a Rule 53[16] application.[17]

4.2 THE DUTIES OF SARS EMANATING FROM SECTION 195(1) OF THE CONSTITUTION

4.2.1 Introduction

If SARS fails to exercise its discretion under ss 74A and 74B in accordance with the duties and responsibilities imposed upon it in the Constitution, it will fall foul of the following Constitutional Court dictum:[18]

> The exercise of all public power (which) must comply with the Constitution which is the supreme law and the doctrine of legality which is part of that law.

It is clear from the *Pharmaceutical* case[19] that all public power must comply with the Constitution, which includes the provisions of s 195(1).[20]

The duties and constitutional obligations[21] emanating from ss 41(1), 195(1) and 237 of the Constitution, quoted in their proper context, are as follows:

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[16] Rule 53, Uniform Rules of Court, GNR 48 of 12 January 1965, made under s 43(2)(a) of the Supreme Court Act 59 of 1959, hereinafter referred to as 'Rule 53'.
[17] As discussed and analysed in Chapter 5: *Judicial Review with reference to ss 74A and 74B*.
[18] *Pharmaceutical Society of SA and Others v Minister of Health and Another* [2005] 1 All SA 196 (C) at para [20].
[19] *Ibid*.
[20] This is and supported by what the Constitutional Court and Supreme Court of Appeal have held in the *Bato Star Fishing* 2004 (4) SA 490 (CC) and in *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*2005 (6) SA 313 (SCA).
[21] *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC) at para [44]; *The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Ano v Ngxuza and Others* 2001 (4) SA 1154 (SCA) at para [15] footnote 23; *Reuters Group Plc and Others v Viljoen NO and Others* 2001 (2) SACR 519 (C) at para [46]; *Carephone (Pty) Ltd v Marcus NO and Others* 1999 (3) SA 504 (LAC).

Principles of co-operative government and intergovernmental relations

41.(1) All spheres of government and all organs of state within each sphere must –

…

provide effective, transparent, accountable and coherent government for the Republic as a whole;

(d) *be loyal to the Constitution*, the Republic and its people;

…

(a) *not assume any power or function except those conferred on them in terms of the Constitution*;

…

Basic values and principles governing public administration

195 (1) *Public administration must* be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) A *high standard of professional ethics* must be promoted and maintained.

…

(d) Services must be provided *impartially, fairly, equitably and without bias*.

…

(f) Public administration must be *accountable*.

(g) *Transparency* must be fostered …

…

(2) The above principles apply to -

…

(b) *organs of State* …[22]

Diligent performance of obligations

237. All *constitutional obligations must be performed diligently and without delay*.

…

Definitions

239 …

'organ of state' means –

…

(b) *any other functionary* or institution –

…

(ii) *exercising a public power* or performing a public function in terms of any legislation…[23]. (Emphasis supplied)

These principles of collegiality and professionalism, impartiality, fairness, an absence of bias, and accountability and transparency underpin these duties (constitutional obligations) are repeated in s 4(2) of the SARS Act, emphasising their direct applicability to SARS.

What follows is an analysis of the administrative law principles that inform the relevant provisions and principles set out in s 195(1) of the Constitution.

4.2.2 What are the democratic values and principles referred to in s 195(1)?

This sub-heading reflects the opening clause of s 195(1) of the Constitution, which does not limit the duties of SARS to 'democratic values and principles enshrined in the Constitution' as set out in s 195(1), but emphasises these together with the other

[22] Such as SARS.
[23] Section 4(2) of the SARS Act.

democratic values and principles enshrined in the rest of the Constitution: ss 1(c), 33, 41(1) and 237.

Much has been written in this thesis, in the context of SARS as a functionary, about these constitutional values and principles as they apply to a functionary exercising public power. What remains to be done now is an analysis of the duties of SARS under s 195(1) of the Constitution, and a demonstration of how these duties accord with their constitutional obligations.

Section 195(1) sets out the requirements for good public administration. The SARS Act, as already noted above, also makes specific reference to s 195 of the Constitution in s 4 (2):

> 4. FUNCTIONS
>
> …
>
> (2) SARS *must* perform its functions in the most cost efficient way and *in accordance with the values and principles mentioned in s 195 of the Constitution.* (Emphasis supplied)

The use of the word 'must' is peremptory and confirms the duties and obligations of SARS to adhere to the principles enshrined in the Constitution, including the rule of law in s 1(c) (including the principle of legality), s 33, s 41, and those listed in s 195(1), which together with s 237 of the Constitution and s 4(2) of the SARS Act, SARS are obliged to diligently perform without delay.

In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*,[24] the Constitutional Court stated that public administration is subject to constitutional controls, which entails: 'establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public… Chapter 10 of the Constitution, entitled 'Public Administration', sets out the values and principles that must govern public administration

[24] 1999 (2) SA 14 (CC) at para's [133]-[134].

and states that these principles apply to administration in every sphere of government, organs of State and public enterprises.'

In *The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others*[25] it was held that the Constitution 'commands all organs of State to be loyal to the Constitution (as stated in s 41(1)(d)) and requires that public administration be conducted on the basis that 'people's needs must be responded to' (s 195(1)(e))'. It is the responsibility of the courts to safeguard any misuse of the law.

Taxpayers' needs must be responded to, including: a high standard of professional ethics being displayed; services being provided impartially, fairly, equitably and without bias; public administration being accountable; and transparency being fostered by providing the public with timely, accessible and accurate information. Furthermore, it is the responsibility of the courts to uphold these constitutional obligations.

In *Reuters Group Plc and Others v Viljoen NO and Others*,[26] the court stated the following:

> [46] In *the President of the Republic of South Africa & Others v The South African Football Union & Others* (2000 (1) SA 1 (CC)), the Constitutional Court observed at 62 paragraph 138:
>
> 'Public administration…is subject to a variety of constitutional control. The Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which represents fundamental rights and is accountable to the broader public. The importance of *ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated.'* ...(Emphasis supplied)

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[25] *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* 2001 10 BCLR 1039 (SCA) at para [15].
[26] 2001 (2) SACR 519 (C) at para [46].

The reference to public administration acting both ethically and accountably is once again a reference by the courts to the obligations imposed on organs of state such as SARS.

In *Carephone (Pty) Ltd v Marcus NO and Others*[27] the Court held that any public institution created by the Constitution or by legislation finds it ultimate authority and competence in the Constitution and is subject to its provisions. If it involves the exercise of public power: '(i)t is also subject to the basic values and principles governing public administration (s 195(2)(b) of the Constitution)…In terms of s 195(1)(d) of the Constitution the service provided to the parties by the Commissioner must also be impartial, fair, equitable and unbiased.'

SARS, like the Commission in *Carephone*,[28] finds its ultimate authority and competence in the Constitution, and is subject to its provisions including the provisions of s 195(1) of the Constitution where the service provided by SARS to the taxpayer must be impartial, fair, equitable and unbiased.

Finally, in *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others*[29] the Supreme Court of Appeal held:

> [58] …*Chapter 4 of the Constitution deals with co-operative government and dictates that all spheres of government must adhere to constitutional principles in this regard and must conduct their activities within constitutional parameters*.
> (Emphasis supplied)

The excerpt from the dictum in the *Democratic Alliance* case is significant in supporting the submission that all spheres of government (including organs of state such as SARS) must comply with the provisions of Chapter 4 of the Constitution, which includes being loyal to the Constitution and not assuming powers or functions except those conferred by them in terms of the Constitution (s 41(1)). Read with the basic values and principles that

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[27] 1999 (3) SA 504 (LAC) at para's [9] – [14]; See also the authorities quoted: *cf Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) (1995 (10) BCLR 1289) at para [62]; *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) (1996 (6) BCLR 708) at para's [11] and [28].
[28] *Ibid*.
[29] 2012 (3) SA 486 (SCA) at para [58].

Public Administration must comply with as set out in s 195(1), it is submitted that these constitutional principles apply to SARS and the exercise of its powers in terms of ss 74A and 74B. These constitutional obligations create duties SARS that SARS cannot ignore. These constitutional principles, and obligations, form part of the cornerstone of the rule of law in s 1(c) of the Constitution, and so form part of the constitutional principle of legality. Failure to comply diligently and without delay with these constitutional principles, and obligations, would be conduct that is reviewable in the High Courts – whether that conduct is regarded as 'administrative action' in terms of PAJA, or not.

4.2.3 High Standard of Professional Ethics

Section 195(1)(a) of the Constitution[30] reads:

> 195 (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following :
> (a) *A high standard of professional ethics must be promoted and maintained*. (Emphasis supplied)

What are professional ethics?[31] In the absence of direct authority in any defining provisions in the Constitution, a dearth of case law, and a lack of legal academic writings on the subject, it is necessary to establish what is meant by this term in similar or analogous circumstances.

The International Ethics Standards Board of Accountants (IESBA) has developed the *Code of Ethics for Professional Accountants* (the Code).[32] Section 110 dealing with integrity, requires professional accountants to be straightforward, honest, dealing fairly and with truthfulness. Section 120 dealing with objectivity imposes an obligation on all

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[30] To be read in conjunction with the constitutional obligations placed on organs of state such as SARS in terms of s 41(1) of the Constitution: '…all organs of state…must…provide effective, transparent, accountable and coherent government…be loyal to the Constitution…not assume any power or function except those conferred on them in terms of the Constitution…'.

[31] Generally see: *Handbook of the Code of Ethics for Professional Accountants*, 2012 edition, International Federation of Accountants (IFAC): 'This publication(s)..mission is to serve the public interest by: contributing to the development, adoption and implementation of high-quality international standards and guidance; contributing to the development of strong professional accountancy organizations and accounting firms, and to high-quality practices by professional accountants; promoting the value of professional accountants worldwide; speaking out on public interest issues where the accountancy profession's expertise is most relevant.'; www.ethicsboard.org (last accessed 31 March 2013).

[32] *Op. cit.* the *Handbook of the Code of Ethics for Professional Accountants*, 2012 edition, International Federation of Accountants (IFAC), www.ethicsboard.org (last accessed 31 March 2013), at pages 17-24.

professional accountants not to compromise their professional and business judgment because of bias, conflict of interest or the undue influence of others. Section 130 dealing with professional competence and due care, requires all professional accountants to act diligently in accordance with applicable technical and professional standards. Section 140 dealing with professional behaviour, states that professional accountants must comply with relevant laws and regulations weighing all the specific facts and circumstances available.

These international benchmark professional rules hold accord with the SARS *Code of Conduct* analysed in 3.6 above and sections 4.2.4 and 4.2.5 below (read with the *SARS Internal Audit Manual* discussed in section 3.2 above) and assists to inform the meaning of 'a high standard of professional ethics' that must be promoted and maintained by SARS.

The *Oxford English Dictionary*[33] defines ethics as:

> …
> b. *The moral principles by which a person is guided … c. The rules of conduct recognised in certain associations or departments of human life* … (Emphasis supplied)

Moral is defined in the *Oxford English Dictionary*[34] as:

> …of or pertaining to the distinction between right and wrong…4. Moral law: the body of requirements in conformity to which right or virtuous action consists…opposed to 'positive' or 'instituted' laws, the obligation of which depends solely on the fact that they have been imposed by a rightful authority…7. *Pertaining to, affecting, or operating on the character of conduct*, as distinguished from the intellectual or physical nature of human beings… (Emphasis supplied)

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[33]*The Compact Edition of the Oxford Dictionary* (1971) Oxford University Pressat page 312.
[34]*Ibid.* at page 288.

Hammer, the author of *Misconduct in Science: Do Scientists need a Professional code of Ethics?*,[35] makes the point that a professional code of conduct will show all that professionals are concerned with proper conduct, human affairs, beliefs and perspectives, just as others in society. Although administrators such as SARS have an even greater responsibility towards taxpayers in light of their constitutional obligations, the reference to a professional code of conduct as set out in the SARS *Code of Conduct* and the *SARS Internal Audit Manual* (analysed in section 3.2 and 3.6 above, and 4.2.4 and 4.2.5 below) become an important tools to benchmark the conduct displayed by SARS officials towards taxpayers in an inquiry and audit situation, especially when read in the light of the IESBA Code referred to above. Non compliance with all these guidelines would be indicative of behaviour that is not of a high professional standard.

In relation to other professions,[36] it has been written that professional ethics refer not only to a basic duty of honesty, of doing what is right, but also to collegiality towards each other. This latter quality requires respect for the opinion of others, respect for the rights of others, the refusal to spread unfounded accusations or rumours about each other, commitment to discussing differences openly and honestly, the adoption of a high standard of fairness, and the upholding of the dignity of others.

In *Kekana v Society of Advocates of South Africa*,[37] the Supreme Court of Appeal had the following to say about a high standard of professional ethics:

> The preservation of a high standard of professional ethics having thus been left almost entirely in the hands of individual practitioners, it stands to reason, firstly, *that absolute personal integrity and scrupulous honesty are demanded of each of them* and, secondly, that a practitioner who lacks these qualities cannot be expected to play his part. (Emphasis supplied)

SARS, as an organ of state, must promote and maintain a high standard of professional ethics as contemplated in s 195(1)(a) of the Constitution when exercising its discretion in

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[35]http://www.csu.edu.au/learning/eis/www_ethx.html,1 (last accessed June 2005).
[36]www.arg.org/Publications/other%20Pubs/EthicsStatement.htmlOctober 18 1988 (last accessed June 2005).
[37] 1998 (4) SA 649 (SCA).

terms of ss 74A and 74B. The courts have held[38] that organs of state such as SARS (when, exercising its discretion under ss 74A and 74B) are obligated to comply with the provision of promoting and maintaining a high standard of professional ethics. This according to the analysis above means: a basic duty of honesty, doing what is right, collegiality towards taxpayers; respect for the opinion of taxpayers; respect for the rights of taxpayers; the refusal to spread unfounded accusations or rumours about taxpayers (including conduct supportive of such a negative outcome); commitment to discussing differences openly and honestly; adopting a high standard of fairness; and upholding the dignity of taxpayers .

In the build-up to *Metcash*,[39] the Taxgram[40] published an advertisement that illustrated the taxpayer's frustrations, 'accusing Revenue of high-handed, bullying tactics during the investigation'. A section of the advertisement read:

> Metro abhors the high-handed and bullying tactics used by SARS … and feels that the commission arrangements existing between SARS and their investigators have given rise to the acts of SARS, and that SARS have *failed to demonstrate the high standard of professional ethics or impartial, fair and equitable service, expected of a public administration … .* (Emphasis supplied)

In response, SARS issued a Media Release,[41] part of which stated:

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[38]In the *President of the Republic of South Africa & Others v South African Football Rugby Union & Others*1999 (2) SA 14 (CC) at para [133], the Constitutional Court observed that: 'Public administration … is subject to a variety of constitutional controls … [and] … The importance of ensuring that the administration *observe fundamental rights and acts both ethically and accountably* should not be understated.' (Emphasis supplied); In *Barkhuizen NO v Independent Communications Authority of South Africa and Another*[2001] JOL 8458 (E) at para [19]the Court held: '… *[a] high standard of professional ethics must be promoted and maintained* (s 195(1)(a)) …'. (Emphasis supplied); In *Mpande Foodliner CC v Commissioner for South African Revenue Service and Others*, 2000(4) SA 1048 (T) at para [46] Patel A J stated: '… In the circumstances, the fiscus owes a legal duty to the general body of taxpayers to act fairly when deploying its discretionary powers which are subject to the requirements of good management, *namely by promoting and maintaining a high standard of professional ethics,* efficient, economic and effective use of resources, providing a service that is impartial, fair, equitable and without bias as well as responding to needs and fostering transparency by providing the public with timely, accessible and accurate information (ss 195(1)(a),(b),(d),(e) and (g) of the Constitution), *thereby ensuring that there are no favourites and no sacrificial victims.'*; see generally *Inland Revenue Commissioners v National Federation of Self-Employed and Small Business* Ltd [1981] 2 All ER 93 at 112-13; *Preston v Inland Revenue Commissioners* [1952] 2 All ER 327 at page 339; *F & I Services Ltd v Custom and Excise Commissioners* [2000] STC 364 (QB) at page 377; Income Tax Case 1674 2000 SATC 116 (ZA)).' (Emphasis supplied)

[39]*Metcash Trading Limited v C SARS and Another*2001(1) SA 1109 (CC).

[40]*Metro Cash, SARS and the laws* (1999) Taxgram Juta October, at page 1.

[41] SARS Media Release No 22 of 1999 September; and *Metro Cash, SARS and the law* (1999) Taxgram Juta October, at page 2.

> … SARS reiterates its open door policy for purposes of discussions with any taxpayer. It is the stated policy of *SARS to be accessible to taxpayers and it invites frank discussions between it and taxpayers at any time* …

In the same Taxgram article[42] Pierre du Toit, states:

> The overall job of revenue administration is *not to get in the money at all costs*; it is to *administer our tax laws with efficiency and dispassionate objectivity*. That involves both collection from, and protection for, the taxpayer. (Emphasis supplied)

This sentiment is echoed in the stance taken by Professor Reynolds in *A lawyer's conscience*[43] when commenting on ethics and the legal profession:

> The personal attributes and moral standards required of the attorney are high. C.H. van Zyl put them as follows in his *The Judicial Practice of South Africa* 14 ed. (1931) 33:
>
> 'He must manifest in all business matters an *inflexible regard for the truth; there must be a vigorous accuracy in minutiae, a high sense of honour and incorruptible integrity*.'
>
> It must be stated at the outset that most lawyers meet these standards, and are properly described as men of honour, dignity and integrity. As so often happens, however, it is the few 'rotten apples that spoil the barrel'. (Emphasis supplied)

One of the 'rotten apples' and, as Prof. Reynolds states, 'possibly the most common one relates to matters monetary'.[44] He states:

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[42] *Metro Cash, SARS and the law* (1999) Taxgram Juta October.
[43] Reynolds D A *A Lawyer's Conscience* South African Law Journal (1993) 10 at page 153.
[44] *Ibid.* at page 155.

> But this aspect should, of course, never be elevated to the extent that his integrity – in the full sense of the word – and the ideals of professional service give way to the avid acquisition of a 'heavy purse'.

The words of Reynolds[45] quoted above mirror the complaint in the press made by Metro Cash[46] in respect to the commission arrangements between SARS and its investigators, giving rise to actions where SARS failed to demonstrate a high standard of professional ethics. SARS, in compliance with its fundamental duties under the Constitution, will have to be mindful not to be seen to be doing this, especially in the more precise transgression of financial bias.[47]

In the *Third Interim Katz Commission Report*, released in December 1995,[48] the Commission recommended a charter of taxpayers' rights. SARS complied with this by publishing on 4 December 1997[49] the first 'Client Charter'[50] (now replaced by *Code of Conduct* published by SARS)[51]:

> … containing thirteen points setting out what taxpayers are 'entitled to expect' from the SARS, three points stating what taxpayers can do if they 'are not satisfied', and four points listing taxpayers' reciprocal obligations towards the SARS.

The accompanying media release[52] stated that:

> …the Charter 'is a commitment to the taxpaying public that SARS aims to *deliver a professional, effective and efficient client service'*. (Emphasis supplied)

This is a restatement of the duties of SARS under ss 41(1) and 195(1) of the Constitution.

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[45] *Ibid.*
[46] *Metro Cash, SARS and the law* (1999) Taxgram Juta October, at page 1.
[47] Hoexter C & Lyster R *The New Constitutional & Administrative Law* (2002) Juta, at page 193; *Rose v Johannesburg Local Road Transportation Board* 1947 (4) SA 272 (W).
[48] South Africa.1995.*Third Interim Report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa*. Pretoria: Government Printers. Chairperson: M. Katz.
[49] Williams R C *The South African Revenue Service 'Client Charter'* South African Law Journal (1998) 115(3) at 527.
[50] *Ibid*.
[51] See sections 3.6 *supra* and 4.2.4 and 4.2.5 *infra*.
[52] *Ibid* at page 528.

As Prof. Williams puts it[53] referring to the *Code of Conduct* (in its prior format to the one currently 'under review'):

> The Charter is headed 'Your rights and obligations' … [and] … 'You are entitled to expect the SARS …'. In other words, what the Charter professes to articulate are legitimate expectations and not enforceable rights.

The original *Code of Conduct* coincided with the release of the Batho Pele – *People First: White Paper on Transforming Public Service Delivery*,[54] with its opening statement:

> …a guiding principle of the public service in South Africa will be that of service to the people …

As explained by Beukes in *The Constitutional Foundation of the Implementation and Interpretation of the Promotion of Administrative Justice Act 3 of 2000*:[55]

> Batho Pele reflects the important message that the chief function of the public administration is to serve all the people of the country. In this sense it represents an affirmation of both s 195 and s 33.

What is more, included in the 'Revenue Handbooks, and internal memoranda' referred to by the Katz Commission[56] is, no doubt, the unpublished *SARS Internal Audit Manual*,[57] which provides clear guidelines to SARS officials on how to conduct itself in an inquiry

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[53] Williams R C *The South African Revenue Service 'Client Charter'* South African Law Journal (1998) 115(3) at page 530.

[54] South Africa.1997. *Batho Pele – People First: White Note on Transforming Public Service Delivery*. Pretoria: Government Printers.

[55] C Lange et al (eds) *The Right to Know* Siberlnk 2004 at page 7.

[56] South Africa.1994. *First Interim Report of the Katz Commission of Inquiry*. Pretoria: Government Printer.

[57] *SARS Internal Audit Manual – Part 4: The Audit Process*; Williams R C et al *Silke on Tax Administration* (April 2009) Lexis Nexis at para 8.17 generally. In *Minister for Provincial and Local Government of the RSA v Unrecognised Traditional Leaders of the Limpopo Province, Sekhukhuneland* [2005] 1 All SA 559 (SCA) the appeal court found in favour of the public member seeking a report upholding the right of access to information held by the State, read with sections 36 (the limitation clause) and 39(2) (obliging every court to promote "the spirit, purport and objects of the Bill of Rights" of the Constitution (*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (7) BCLR 687 (CC) followed)); In *Scherer v Kelley* (1978) 584 F.2d 170 where the United States of America Freedom of Information Act §552(a)(2)(C) requires agencies to make public administrative staff manuals and instructions to staff that affect members of the public. This is similar to provisions in the Promotion of Access to Information Act 2 of 2000.

and audit process. This is of particular relevance to invoking the discretionary powers of SARS. The *SARS Internal Audit Manual*[58] indicates clearly the 'high standard of professional ethics' that SARS must maintain and promote and which are also in line with the Batho Pele principles.

In determining the duties of SARS in conforming to the principle of maintaining and promoting a high standard of ethics, it is essential to determine the rules of conduct applicable to SARS in executing its discretionary powers under ss 74A and 74B. It follows that one of the key areas in determining the accepted standards of conduct comes from SARS' own internal memoranda, such as the *SARS Internal Audit Manual*. Owing to the fact that the high standard of professional ethics is based on doing right as opposed to wrong, s 195(1)(a) of the Constitution applies to virtually all SARS' duties.

Some of those duties contained in the *SARS Internal Audit Manual* are relevant to the duty of promoting and maintaining, *inter alia*, high standards of professional ethics. The opening section of these SARS guidelines refers to a high standard of professional ethics:[59]

> In order to carry out his tasks properly *the auditor has to make professionally and technically sound decisions* on the nature and scope of the audit…

From a careful perusal of the *SARS Internal Audit Manual*, it becomes apparent that taxpayers need not tolerate non-compliance by SARS with its constitutional duty to maintain and promote a high standard of ethics in executing its functions as tax administrator. Any such non-compliance will amount to unconstitutional and 'invalid' conduct.

This is reiterated in the *Code of Conduct*:

> 2.6 In dealing with you, we will endeavor to: *Respect, protect, promote and fulfill your constitutional rights; Act professionally and in accordance*

[58] *Ibid.*
[59] *Ibid.*

> *with a high standard of professional ethics*; Treat you impartially, fairly, equitably and without bias; …Be accountable; Provide you with timely, accessible and accurate information and feedback; Treat you with respect…; (Emphasis supplied)

Conduct of a high, professional, ethical standard would include:

(a) honest conduct as a basic requirement (SARS should be able to show clearly that it has no ulterior purpose or motive and that it is merely dispassionately establishing whether one of the criteria in the definition of 'for the purposes of the administration of this Act' in s 74 exists);
(b) collegiality (where SARS will inform the taxpayer of its conclusions, with an explanation of the decisions to be taken. If the taxpayer disagrees, SARS will listen to the reasons and consider whether these call for an unbiased adjustment of the conclusion);
(c) respect for taxpayers' opinions;
(d) respect for the rights and legitimate expectations of taxpayers;
(e) no unfounded accusations or rumours about taxpayers (including conduct supportive of such a negative outcome);
(f) commitment to discussing differences openly and honestly with taxpayers;
(g) a high standard of fairness towards taxpayers;
(h) upholding the dignity of taxpayers.

Most of these requirements in the *Code of Conduct* and the *SARS Internal Audit Manual* are reinterated in the international benchmark of professional accountants ethical standards published by the IESBA Code referred to above.

In conclusion, the display of a high standard of professional ethics by SARS in exercising any discretion under ss 74A and 74B means:

(a) displaying the highest degree of honesty and integrity towards taxpayers in executing its duties in exercising its decision under ss 74A and 74B;

(b) showing objectivity towards any taxpayer submissions, and giving those submissions the appropriate respect and consideration, as opposed to merely processing such submissions in a rote fashion with only a show of objectivity and respect;

(c) displaying the highest degree of collegiality towards taxpayers in conducting audits and reviews, being concerned with the facts of each particular case, rather than with the policies foisted upon it by SARS management;

(d) showing a degree of fairness greater than that expected from the general public towards each other;

(e) being bound by moral principles rather than strict adherence to the law.

The Supreme Court of Appeal has held that '…investigatory proceedings, which have been recognised to be absolutely essential to achieve important policy objectives, are nevertheless subject to the constraint that the powers of investigation are not exercised in a vexatious, oppressive or unfair manner.'[60] In the context of ss 74A and 74B, if the highest professional ethical standards are not displayed, as explained above, SARS will have breached one of its constitutional obligations, and their conduct is reviewable. Section 195(1)(a) is a lawful step that SARS is constitutionally obliged to take to ensure that a decision it takes falls within the scope of its legislated powers.

4.2.4 Services must be provided impartially, fairly, equitably and without bias

[60] *Chairman of the Board on Tariffs and Trade and Others vs Brenko Inc and Others* 64 SATC 130 at para's [29] and [30]; *cf Bernstein and Others v Bester and Others NNO* 1996(2) SA 751 (CC) at para's 584F-I; See also *Gardener v East London Transitional Local Council and Others* 1996(3) SA 99 (E) 116E-G.

Section 195(1)(d) states: 'services must be provided impartially, fairly, equitably and without bias'. All of these issues must be read in the context of the discussions on lawfulness and procedural fairness[61] in this thesis.

The concept of impartiality with reference to ss 74A and 74B means that SARS must apply the provisions without favour or prejudice, and in an unbiased manner.[62]

The reference to the word 'equitably' implies just and impartial conduct by SARS. Just conduct is covered by the analysis and discussions around lawfulness in administrative law, where SARS must adhere to the rule of law and comply with the jurisdictional facts[63] of the empowering provision of ss 74A and 74B.

Reference to the word 'fairly' brings procedural fairness into play, as analysed and discussed earlier[64] in this thesis.

Within the context of ss 74A and 74B, if any impartiality or bias is present when SARS exercises its discretion, or the discretion is exercised without complying with the jurisdictional facts or required procedural fairness, the discretion will be reviewable. Any justification[65] by SARS that non-compliance is excusable because the discretion is not 'administrative action' as defined in PAJA, or is part of a multi-staged decision-making process which is not 'ripe' for review, will be contrary to the constitutional obligation that SARS must comply with in terms of s 195(1)(d). Furthermore s 195(1)(d) is not subject to the limitations clause in s 36 of the Constitution.

The SARS *Code of Conduct* for the general taxpayer public to take note of, creates a legitimate expectation that SARS will do the following:

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[61] See section 3.3: *Lawfulness* and 3.5: *Procedural Fairness*, *supra*.

[62] Marcus G J et al *Bill of Rights Compendium* Lexis Nexis at 1A.2; This would include application of a practice by SARS such as the *letter of findings*; *Drs Du Buisson, Bruinette & Kramer Inc. v C:SARS* Case No. 4595/02 in the High Court of the Transvaal Provincial Division, where SARS provided reasons to the taxpayer for the inquiry and audit after the taxpayer brought the application to set the audit aside.

[63] See section 3.3: *Reasonableness* and 3.3.2: *Jurisdictional facts supra*.

[64] See section 3.5: *Procedural Fairness supra*.

[65] SARS would have to tread carefully here in the light of decisions such as *Nyambirai v Nssa & Another* 1995 (2) ZLR 1 (S) and *De Freitas v Permanent Secretary of Agriculture, Fisheries, Lands and Housing* 1998 3 LRC 62;*Ferucci and Others v Commissioner for South African Revenue Service and Another* 65 SATC 47 at pages 54-55; *Premier of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) BCLR151 (CC) at para [42]: '…no question of justification …can arise as the decision taken…did not constitute 'a law of general application' as required by that provision…'; Compare *Registrar of Pension Funds and another v Angus NO and others* [2007] 2 All SA 608 (SCA); *US v McCarthy* 514 F 2d 368.

> 2.1 Right to certainty and to be informed, assisted and heard…give you an opportunity to be *prepared for, and assisted by a representative* during a meeting regarding an audit or investigation by SARS; provide you with the *outcome of an audit or investigation*; provide you with the *opportunity to respond* to adverse audit or investigation findings
>
> …
>
> 2.6 In dealing with you, we will endeavor to: *Respect, protect, promote and fulfill your constitutional rights*; Act professionally and in accordance with a high standard of professional ethics; Treat you *impartially*, fairly, *equitably and without bias*; …Be accountable; Provide you with timely, accessible and accurate information and feedback; Treat you with respect…; (Emphasis supplied)

The duties placed on SARS in terms of s 195(1)(d) are clear and obvious and emphasized in its *Code of Conduct*. Any transgression of s 195(1)(d) and the legitimate expectation created in the *Code of Conduct* at sections 3.1 and 6.6 above would be inconsistent with the Constitution and 'invalid' conduct.

Meeting budgets imposed on them by management motivates SARS assessors. As a result, it is quite plausible in theory that an inquiry and audit may be motivated by meeting a budget target. That does not of itself mean that the inquiry and audit is unlawful, but unless SARS follows strict procedures in executing its powers to engage the taxpayer, sufficient suspicion may exist to justify an accusation by the taxpayer that the inquiry and audit is motivated by an ulterior or irrelevant factor, in a biased manner such as an improper personal gain, as referred to in the *Code of Conduct*. Such conduct by SARS would be reviewable.

4.2.5 Public administration must be accountable

Section 195(1)(f) states that public administration must be accountable.[66]Accountability can also be described as the 'concept of justifiability'.[67] In *Carephone (Pty) Ltd v Marcus*

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[66]*Transnet Ltd and another v SA Metal Machinery Co (Pty) Ltd* [2006] 1 All SA 352 (SCA) at para [55].

NO and Others,[68] the Labour Appeal Court considered the meaning of justifiability. It introduces a requirement of rationality in the merit or outcome of the administrative decision. When the Constitution requires administrative action to be justifiable it seeks to give expression to its fundamental values of accountability, responsiveness and openness. In determining justifiability, value judgements will have to be made which will, almost inevitably, involve the consideration of the 'merits' of the matter to determine whether the outcome is rationally justifiable.

As suggested in *Carephone (Pty) Ltd v Marcus NO and Others*,[69] the reviewer should ask the following question:

> Is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him [or her] and the conclusion … eventually arrived at?

Can SARS merely exercise the discretion in ss 74A and 74B in a vacuum, without at least some factual basis that is supported by one or more of the requirements set out in the definition of 'the administration of this Act' in s 74 of the Income Tax Act? This would be indicative of an unjustifiable and arbitrary decision. The jurisdictional facts of ss 74A and 74B, read with s 74, of the Income Tax Act require SARS to exercise its discretion with specific reference to one of more of the eight sub-sections set out in that definition. The practical manner in which SARS obtains the supporting facts to fulfil the jurisdictional facts, is set out in the *SARS Internal Audit Manual*.[70] The legislature had a purpose when creating these provisions, and they were not merely inserted as sub-sections that SARS could quote in support of its inquiry and audit, without at least some factual basis that placed SARS in the position to do so.[71] The constitutional requirement

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[67] Cheadle M H Davis D M & Haysom N R L *South African Constitutional Law: the Bill of Rights* (2002) Butterworths at page 612.
[68] 1998 (10) BCLR 1326 (LAC).
[69] *Ibid.* at para's 1337 F – G.
[70] The failure by SARS to follow its own internal guidelines without proper justification on its part would be indicative of unconstitutional and 'invalid' (lawful, reasonable and procedurally fair) conduct by SARS.
[71] In the case of *Nkondo & Gumede v Minister of Law and Order*1986 (2) SA 756 (A) the Appellate Division held that the reiteration of the wording of the enabling legislation did not constitute reasons; *Ferucci and Others v Commissioner for South African Revenue Service and Another*65 SATC 47 at pages 56-7; *Sachs v Minister of Justice* 1934 AD 11; This is also affirmed in *CSARS v Sprigg Investments 117CC t/a Global Investment* 73 SATC 114 (SCA) at para's [12] and [13] quoting with approval from *Ansett Transport Industries (Operations) Pty Ltd and Another v Wraith and Others* (1983) 48 ALR 500 that mere restating of the legislated provisions are not 'adequate reasons'.

and duty placed upon SARS to be accountable in terms of s 195(1)(f) of the Constitution emphasises this fact.

The *Code of Conduct* states:

> 2.6 *In dealing with you, we will endeavor to: Respect, protect, promote and fulfill your constitutional rights*; Act professionally and in accordance with a high standard of professional ethics; Treat you impartially, fairly, equitably and without bias; …*Be accountable*; Provide you with timely, accessible and accurate information and feedback; Treat you with respect…; (Emphasis supplied)

Some factual basis, matched to one of the requirements of the definition of 'the administration of this Act' in s 74, must exist to justify SARS' decision to use its powers. This will ensure that the exercise of the discretion is lawful and reasonable.

As stated by the late Professor Etienne Mureinik,[72] the Constitution promotes a 'culture of justification', 'a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.'

Reasons given by SARS for exercising its discretion in ss 74A and 74B are important, as the inquiry and audit may in fact lead to revised assessments being raised against the taxpayer that will have a prejudicial effect on the taxpayer. Adequate reasons (which go to the root of accountability) must be given as held in the Supreme Court of Appeal case of *Sprigg Investment*.[73] This requires that the decision maker (SARS) sets out its understanding of the relevant law, any findings of fact on which its conclusions depend (especially if those facts have been in dispute) and the reasoning process which led to

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[72] Mureinik E *A Bridge To Where? Introducing The Interim Bill of Rights* (1994) South African Journal on Human Rights 10 at pages 31 and 32.
[73] See the discussion in section 2.5: *Adequate Reasons supra*.

those conclusions. SARS should do so in clear, unambiguous language, not in vague[74] generalities or the formal language of legislation.

The letter of findings process introduced by SARS at the conclusion of the inquiry and audit is also aimed at addressing these requirements. However, in practice there are many instances where SARS does not apply the letter of findings process, especially towards smaller taxpayers. The opportunity for these taxpayers to question the findings of SARS before any prejudicial revised assessment is raised, is denied to them. Therefore it is necessary for taxpayers to question the proposed steps to be taken by SARS at the commencement of any inquiry and audit to ensure proper accountability on the part of SARS, and compliance with its *Code of Conduct*.

SARS cannot expect taxpayers to seek justification for its reasons from a myriad of documents and previous communications where such reasons cannot reasonably be determined from those communications.[75] Taxpayers cannot be expected to discover for themselves from the previous 'writing and elaborate discussions' what SARS' reasons might be. Moreover, even if the correspondence contains adequate reasons, SARS should identify these reasons in the correspondence.[76]

As already stated, the issue of accountability in s 195(1)(f) is fundamental to procedural fairness. Without the 'fair' participation of the taxpayer in the process leading to the exercise of its discretion to conduct an inquiry or audit, it would be difficult for SARS to justify the connection between the available information and the conclusion it arrives at to proceed with the inquiry or audit, unless prior research has been conducted by SARS into the tax affairs of the taxpayer. If this were the case, there would be few justifiable reasons for SARS not to share these facts with the taxpayer, and to receive the appropriate

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[74]*Ibid.*; *Powell NO and Others v Van Der Merwe and Others* 2005 (5) SA 62 (SCA) at page 73 where search and seizure warrants were struck down as too broad and unjustifiably violated the appellant's right to privacy; For comparative law from the United States of America:*US v Williams* 337 F Supp 1114 (quoted from the headnote): where the District Court in New York held the 'enforcement …to compel production of message slips held by taxpayer's telephone answering service would have provided government with names of persons who were not patients of taxpayer at all, or who were not patients during relevant years, and … was overbroad and out of proportion to ends sought, and as such not entitled to enforcement'; *Local 174 International Brotherhood of Teamsters v US*, 240 F.2d 387 where '*agents had burden to show that demand was reasonable under all circumstances and to prove that books and records were relevant or material to tax liability of taxpayer* …and the taxpayer… possessed books or records containing items relating to taxpayer's business.' (Emphasis supplied); *US v Newman* 441 F.2d 170; *US v Coopers and Lybrand* F Supp 942; *Hubner v Tucker* 245 F.2d 35; *First National Bank of Mobile v US* 160 F.2d 532.
[75]*Rean International Supply Co (Pty) Ltd v Mpumalanga Gaming Board* 1998 (8) BCLR 918.
[76]See section 2.5: *Adequate Reasons supra*.

response (as accountability and transparency demands). The fair participation of the taxpayer in the process started by ss 74A and 74Bis equally subject to the constitutional obligations imposed on SARS. As already stated, these constitutional obligations ins 195(1) (read with s 41(1) of the Constitution) are not subject to any justification as envisaged in s 36 of the Constitution.

In arriving at the decision to inquire about and audit in an accountable manner, SARS will have to show that it has adequate reasons which are informative, set out the decision, contain the findings on material questions of fact and law, refer to any relevant evidence and provide the real reasons for the decision to require the taxpayer to furnish SARS with information, documents or things – not simply restate the provisions of s 74 of the Income Tax Act. Where SARS does not comply with s 195(1)(f), aggrieved taxpayers will have the remedy of reviewing the unconstitutional and 'invalid' conduct in terms of s 6, 7 and 8 of PAJA, or, alternatively, the constitutional principle of legality.

4.2.6 Transparency must be fostered

Section 195(1)(g) of the Constitution states: 'Transparency must be fostered by providing the public with timely, accessible and accurate information…'.[77] This obligation, read with its incorporation into s 4(2) of the SARS Act, also places a constitutional obligation on SARS where the taxpayer has a right to compel performance by SARS.

In the interim Katz Commission Report,[78] the Commission recommended:

> … that the Revenue Handbooks, and internal memoranda used by assessors in their decision-making process be formulated into documents which are accessible to the taxpaying community and accordingly made public. Furthermore, attention must be given … that in general an awareness on the part of Inland Revenue is created which results in compliance with the Constitution.

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[77] *Transnet Ltd and another v SA Metal Machinery Co (Pty) Ltd* [2006] 1 All SA 352 (SCA) at para [55] where the court held that constitutional obligations were central including transparency and accountability in terms of ss 195(1)(f) and (g).

[78] Interim Report of the Commission of Inquiry into certain aspects of the Tax structure of South Africa, 18 November 1994; 77 at para 6.3.36.

The publication of one such Revenue Handbook is the *SARS Income Tax Practice Manual*.[79] SARS has conceded in the past that it is bound by its contents.[80] This has also been adjudicated upon by the Courts.[81] In *ITC 1682* Davis J stated:[82]

> It is clear that the Constitution … has been interpreted by the Constitutional Court in support of a recognition that *there are cases where the concept of a legitimate expectation conferring a right to substantive relief may be recognised. There is considerable merit in the recognition of such a doctrine in a case such as the present dispute*, where Mr H of the Commissioner's office acknowledged that the principle [of a salary sacrifice] applied in the circumstances of a similar nature and *where a clear unequivocal statement appears in respondent's own practice manual.*(Emphasis supplied)

In the preface to the *SARS Income Tax Practice Manual* it is stated:

> The creation of the South African Revenue Service facilitated the release of its practice in the interests of *greater transparency* and equity, in line with its new aims to be an improved, more efficient and user-friendly tax collecting authority. (Emphasis supplied)

These references to transparency emphasise the constitutional obligation of SARS to be transparent.

It is for this reason that the *SARS Internal Audit Manual* should also be made available to taxpayers. The *SARS Internal Audit Manual* makes reference to the keeping of assessor records.[83] The SARS constitutional obligation of transparency supports the fact that assessor records must be made available to the taxpayers on their request, and this will in turn throw light on some of the reasons why SARS is considering an investigation into

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[79] Preiss, M, Silke J, & Zulman R H *The Income Tax Practice Manual* (November 2012), www.mylexisnexis.co.za.
[80] *Ibid.* B–Procedure Legitimate Expectations at para B26.
[81] *Ibid.*
[82] *ITC 1682* 62 SATC 380 at page 403.
[83] See section 3.2: *The SARS Internal Audit Manual supra*.

the affairs of the taxpayers in question. In support of this submission, the *Code of Conduct*states:'2.6 In dealing with you, we will endeavor to: *Respect, protect, promote and fulfill your constitutional rights*; … Provide you with timely, accessible and accurate information and feedback…;' (Emphasis supplied)

Read together with the constitutional obligation of impartiality and unbiased conduct in s 195(1)(d), failure by SARS to apply its 'transparent' and publically published undertakings in the *SARS Income Tax Practice Manual* and the *Code of Conduct*(read with the *SARS Internal Audit Manual*)consistently, will be reviewable in the context of an unconstitutional and 'invalid' ss 74A and 74B inquiry and audit.

Should a review application be brought in terms of PAJA against SARS for such unconstitutional and 'invalid' conduct, SARS as an 'institution . . . exercising a public power or performing a public function in terms of any legislation'[84]that creates a record in the exercise of that power or performance of that function,[85] is obliged, subject to certain limitations, to make the record available to an applicant'.[86] At the commencement of Rule 53 review proceedings SARS will have to turn over its internal record to the taxpayer. This proves to be a good opportunity for a taxpayer to determine the level of compliance by SARS with its own internal inquiry and audit guideline, the *SARS Internal Audit Manual*, with an opportunity for the taxpayer to expose any unconstitutional conduct. This circumvents the complexities attempting to access such information by way of the Promotion of Access to Information Act[87]that falls outside the scope of this thesis.

4.2.7 Limitations to s 195(1)

Although s 195(1) of the Constitution regulates Public Administration generally by imposing constitutional obligations upon organs of state such as SARS, the Constitutional Court has held that it does not give rise to justiciable rights. In *Chirwa v Transnet Limited and Others*[88] the court held:

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[84] Section 1(b)(ii) – the definition of 'public body' of PAJA.
[85] Section 8 of PAJA.
[86]*Mittal Steel South Africa Ltd (formerly Iscor Ltd) v Hlatshwayo* 2007 (1) SA 66 (SCA).
[87] Act 2 of 2000. In *Alliance Cash and Carry (Pty) Ltd v Commissioner, South African Revenue Service* 2002 (1) SA 789 (T) the court held that taxpayers can access information in terms of the Promotion of Access to Information Act from SARS; Croome B & Olivier L *Tax Administration* 2010 (Juta) at pages 158-72.
[88]2008 (4) SA 367 (CC) at para's [74] – [76], [146] and [195].

> [76] Therefore although section 195 of the Constitution provides valuable interpretive assistance it does not found a right to bring an action.

The court did not conduct a thorough analysis by arriving at this decision, and merely passed judgment that as an alternate justiciable right to bring the action, the applicant could not rely on the provisions of s 195. The court did not say that public administrators did not have to adhere to these constitutional obligations. This brings non-compliance by SARS within the realm of the constitutional principle of legality.

In taking this line of reasoning further, if SARS fails to adhere to a constitutional obligation, it would be conduct inconsistent with the Constitution and invalid. The taxpayer would be entitled to approach the court for judicial review as contemplated in section 5.5.6 below in terms of s 172(1) if the Constitution to have the unconstitutional conduct declared invalid. With the proper factual motivation in line with the analysis provided in this thesis, the court would not be able to ignore this, and the unconstitutional and 'invalid' conduct would be reviewable, either in terms of ss 6(2), 7 and 8 of PAJA,[89] or in terms of the principle of legality,[90] through a rule 53 application.

In the recent Constitution Court decision *Glenister v President of the Republic of South Africa and Others*[91] the Constitutional Court held that the High Court had jurisdiction to hear applications challenging the non-fulfilment of constitutional obligations such as 'to act reasonably and accountably; to cultivate good human resource management; to respect international treaty obligations; … and to respect values enshrined in the Bill of Rights.' This opens the possibility for taxpayers to approach the courts if SARS fail to adhere to their constitutional obligations in s 195(1).

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[89] '…the action is otherwise unconstitutional or unlawful', s 6(2)(i) of PAJA.

[90] Which entails *inter alia* a basic level of rationality in SARS' decision-making, that SARS should apply its mind properly in deciding whether and in what manner to exercise its discretionary investigative powers, and that SARS should exercise such powers only for the purposes they were conferred in compliance with its constitutional obligations; *Pharmaceutical Manufacturers Association of SA & Another: In re Ex parte President of South Africa & Others* 2000 (2) SA 674 (CC) at para's [79]-[90].

[91] 2011 (3) SA 347 (CC) at para's [13] and [22].

CHAPTER 5

JUDICIAL REVIEW WITH REFERENCE TO SS 74A AND 74B

5.1	INTRODUCTION	152
5.2	WHAT IS MEANT BY REVIEW	155
5.3	THE APPLICABILITY OF OBJECTION AND APPEAL	158
5.4	REVIEW APPLICATION DIRECTLY TO THE TAX COURT	160
5.5	REVIEWING UNCONSTITUTIONAL CONDUCT	164
	5.5.1 Introduction	164
	5.5.2 Sections 6, 7 and 8 of PAJA	165
	5.5.3 Rule 53 of the Uniform Rules of Court	169
	5.5.4 Save where any law otherwise provides	170
	5.5.5 Show cause	171
	5.5.6 The grounds of review	178
	5.5.6.1 Introduction	178
	5.5.6.2 Constitutionality of the inquiry and audit	181
	5.5.6.3 Appropriate authority	183
	5.5.6.4 Jurisdictional facts	184
	5.5.6.5 Abuse of discretion	185
	5.5.6.6 Reasonableness	187
	5.5.6.7 Natural justice and Procedural fairness	188
	5.5.6.8 Legitimate expectation	189
	5.5.6.9 Constitutional obligations in terms of s 195(1)	190
5.6	SUPPORT FOR REVIEW OF ss 74A and 74B	191
5.7	PITFALLS IN BRINGING THE RULE 53 APPLICATION	194

5.1 INTRODUCTION

The access to courts under the auspices of the Constitution, through the process of review either in terms of ss 6, 7 and 8,[1] or the constitutional principle of legality, in terms of a Rule 53 application,[2] is the practical manifestation of a state of perfect freedom[3] where any public power is subject to constitutional scrutiny. It is through the enlightened approach, expounded in this thesis, that the Constitution is used for the protection of taxpayers' rights (when SARS uses its powers in terms of ss 74A and 74B), nurturing the development of constitutional law in the making of investigative decisions that will ultimately materially and adversely affect taxpayers, with a direct, external legal effect.

In the words of Stu Woolman:[4]

> [B]efore one can engage in indirect application and the development of new rules of law in terms of s 39(2) [of the Constitution],[5] one must first ascertain what the ambit is of the allegedly applicable constitutional provisions. Only when one has determined that ambit, and found that it does not speak to the issues raised by an ordinary rule of law, can one turn to the more open-ended invitation of s 39(2).

It has been reasoned in this thesis that to apply the fundamental principles of s 33 in the Bill of Rights to the power of SARS in ss 74A and 74B, leads the taxpayer through the constricted provisions of PAJA, where the definition of 'administrative action' could be too restrictive to include decisions of this nature. However, that is not where the enquiry ends. The taxpayer is entitled to expect that SARS adheres to its constitutional

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[1]The Rules of Procedure for Judicial Review of Administrative Action released in GG 32622 of 9 October 2009 have not yet come into effect, after the original rules were subjected to Constitutional review in the North Gauteng Court and held back from promulgation as explained by Plasket C *Administrative Law* Annual Survey 2009 (Juta) at pages 1- 5. To date there are no rules of procedure in effect for judicial review of administrative action under PAJA, and therefore Rule 53 of the Uniform Rules of Court, GNR 48 of 12 January 1965 apply.

[2] Rule 53, Uniform Rules of Court, GNR 48 of 12 January 1965, made under s 43(2)(a) of the Supreme Court Act 59 of 1959, hereinafter referred to as 'Rule 53'.

[3] As envisaged in Locke J *The second treatise of government* (1953) NewYork: Liberal Arts Press at sect. 4.

[4] Woolman S *The Amazing, Vanishing Bill of Rights* South African Law Journal (2008)page 124 at page 777.

[5] Section 39(2) of the Constitution of the Republic of South Africa 108 of 1996 provides: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.' Section 173 of the Constitution provides: 'The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

obligations in terms of ss 1(c), 33, 41(1), 195(1) and 237 of the Constitution. In theory, this line of reasoning concludes that the taxpayer has, at the very least, a review remedy through the constitutional principle of legality[6] – entitling taxpayers to lawfulness, reasonableness, procedural fairness and reasons, just as with the codified provisions of PAJA.

Also, the rule of law and the principle of legality form the basis for the judicial review of administrative powers. Since the advent of the Constitution the law pertaining to review of administrators decisions has changed considerably.[7] If there is no law supporting the conduct of SARS, SARS oversteps the rule of law. If there is a law which SARS oversteps, it is acting *ultra vires*[8] the law. That includes compliance with its constitutional obligations.

If SARS fails to cite ss 74A and 74B as the basis for its inquiry and audit, it is making a voluntary request not binding on the taxpayer, which can then be ignored by the taxpayer. Any enforcement of a voluntary request by SARS would be a transgression of the rule of law.

If SARS asks for information in respect of persons who are not taxpayers, or fails to hold a letter of authority, or fails to adhere to the jurisdictional facts of s 74 and the definition of 'the administration of the Act', or does not comply with a legitimate expectation[9] created (such as compliance with its *Code of Conduct*[10] read with the *SARS Internal Audit Manual*),[11] it is acting unlawfully, unreasonably or procedurally unfairly.

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[6] Which in terms of *Pharmaceutical Manufacturers Association of South Africa and another: In Re: Ex Parte President of the Republic of South African and Others* 2000 (2) SA 674 (CC) entails *inter alia*, a basic level of rationality in SARS' decision-making, that SARS should apply its mind properly in deciding whether and in what manner to exercise its discretionary investigative powers, and that SARS should exercise such powers only for the purposes they were conferred: satisfying the jurisdictional facts of the empowering provisions of ss 74A and 74B, read with the Constitution; and, ensure its conduct is not inconsistent with the Constitution, and in doing so, adhering to the norms, spirit and purpose of the Constitution, by fulfilling its constitutional obligations such as those in terms of s 195(1) of the Constitution.

[7] *Ibid.*

[8] See section 3.3: *Lawfulness supra*.

[9] Legitimate expectations are not defined in the s 1 definition of 'administrative action' in PAJA; However, the Constitutional Court in *Premier of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) BCLR151 (CC) at para [31] has indicated that a 'right' should probably be interpreted more broadly to include liability incurred by the state through the making of unilateral promises or undertakings, which includes in its ambit legitimate expectations; See Currie I & Klaaren J *Promotion of Administrative Justice Act Benchbook* (2001) SiberInk at page 80; See also Williams R C et al *Silke on Tax Administration* (April 2009) Lexis Nexis at para 3.25 generally; See also section 3.6: *Legitimate expectations supra*.

[10] http://www.sars.gov.za/home.asp?pid=54195 (last accessed 31 March 2013).

[11] See section 3.2: *The SARS Internal Audit Manual supra.*

What is the remedy, and what is the best forum to access this remedy? Furthermore, what is the next procedural step in the process of enabling the taxpayer to exercise its constitutional rights, and to ensure that SARS complies with its constitutional obligations?

The appropriate remedy is for the taxpayer to apply to a court to review SARS' decision or powers as exercised under ss 74A and 74B. Which court? The correct forum is the High Court, which has inherent jurisdiction to hear all reviews[12] through s 172(1) of the Constitution, in terms of ss 6, 7 and 8 of PAJA, or failing that, in terms of the principle of legality, and both in terms of a Rule 53 application. The Rules of Procedure for Judicial Review of Administrative Action released in GG 32622 of 9 October 2009 have not yet come into effect, and at the time of writing had been re-released during March 2013 in redrafted form for further public comment, after being held back from promulgation, as explained by Plasket.[13] To date there are no rules of procedure in effect for judicial review of administrative action under PAJA, and therefore Rule 53 would continue to apply, through s 172. Section 172 of the Constitution reads as follows:

> **Section 172 Powers of courts in constitutional matters**
> (1) When deciding a constitutional matter within its power, a court -
> (a) *must* declare that any law or *conduct that is inconsistent with the Constitution is invalid* to the extent of its inconsistency (with the Constitution); and
> (b) may *make any order that is just and equitable*, …(Emphasis supplied)

If SARS transgresses is duty of 'diligently and without delay' executing its constitutional obligations, taxpayers have a clear review remedy in the courts, despite any specific restrictions imposed by the definition of 'administrative action' in PAJA. Taxpayers can seek an order to review the invalid conduct of SARS. In *Oudekraal Estates (Pty) Ltd v*

[12] As its jurisdiction has not been specifically ousted under ss 74A and 74B or any other provision in the Income Tax Act 58 of 1962. See also Harms LTC *Civil Procedure in the Superior Courts*, www.lexisnexis.co.za (accessed 30 March 2013), at para B53.2; See also s 172(1) of the Constitution.
[13] Plasket C *Administrative Law* Annual Survey 2009 (Juta) at pages 1- 5.

City of Cape Town and Others Howie P and Nugent JA stated[14]: 'Until the Administrator's approval (and thus the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked.' The taxpayer has no choice but to approach the courts for a review of the unlawful and unconstitutional decision. The other avenue open to the taxpayer is to ignore the SARS request for information, documents or things where 'just cause' is shown.[15]

5.2 WHAT IS MEANT BY REVIEW?

The term 'review' is defined by Innes CJ in *Johannesburg Consolidated Investment Co v Johannesburg Town Council*[16] in three parts, two of which are relevant to this thesis:

> 1. … *first* and most usual signification denotes the process by which, apart from appeal, the proceedings of inferior courts of Justice … are bought before … [the High] Court …
>
> 2.… *second* species of review [is] analogous [to the first]. Whenever a *public body*[such as SARS] has a duty imposed upon it by statute, and *disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty*, this Court may be asked to review the proceedings … and *set aside or correct them*…
>
> 3.… Then as to the *third* … [t]he legislature has from time to time conferred upon this court or a judge a power to review …(with) … wider … power which it possesses under either of the … (first two) … review procedures …(Emphasis supplied) .

The first of the review proceedings has no application to this thesis.

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[14] 2004 (6) SA 222 (SCA) at para's [26] – [31]; As to the form and content of the application see *Safcor Forwarding (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A).

[15] See section 3.8: *'Just Cause' Defence supra*.

[16] 1903 TS 111 at pages 114-16; *Loxton v Kenhardt Liquor Licensing Board* 1942 AD 275 at 309; *Dawlaan Beleggings (Edms) BPk v Johannesburg Stock Exchange & Others* 1983 (3) SA 344 (W) at 363pr-B; *Blacker v University of Cape Town & another* 1993 (4) SA 402 (C) at para's 403F-I; *Magano & another v District Magistrate, Johannesburg, & others* (2) 1994 (4) SA 172 (W) at para's 175G-J; 1994 (2) SACR 307 at para's 310G-J.

The third review proceeding is covered by the object and appeal process in the Income Tax Act, giving the Tax Court the power to revisit *de novo* the matter brought before it.[17] This type of review is not available in respect of the discretionary powers of ss 74A and 74B, because these provisions are not specifically made subject to the objection and appeal process.

That leaves the second type of review proceeding[18] as the one applicable to ss 74A and 74B of the Income Tax Act, including the review of any public power in terms of the rule of law, and the principle of legality.[19]

As described in Civil Procedure in the Superior Courts,[20] statutory bodies such as SARS are not courts when it exercises its powers. It does not hand down judgments or grant judicial orders that are enforceable by execution. It usually exercises discretionary powers, with penalties[21] if taxpayers fail to adhere to these powers in the absence of a legitimate excuse.[22] Although the powers of SARS are not bound to comply with the strict procedures that are required of an inferior court, SARS must conduct its proceeding in a manner that will be just to all parties.[23] If SARS fails to do this, the High Court may intervene to ensure that natural justice is done, which is a right inherent in the High Court.[24]

The neglect or wrongful performance by SARS of a statutory duty where the taxpayers are injured or aggrieved, is a cause falling within the ordinary jurisdiction of the court.[25]

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[17]*Income Tax in South Africa*www.mylexisnexis.co.za (accessed 13 March 2013): '**27.29 Remedies of discretionary powers of the Commissioner**… all income tax assessments are subject to objection and appeal in terms of ss 81 and 83 of the Income Tax Act must mean that the discretionary decisions of the Commissioner giving rise to such an assessment must be subject to consideration by an Income Tax Special Court. Van der Walt J (in *Transvaalse Suikerkorporasie* 47 SATC 34) distinguished between cases where discretionary decisions are specifically made subject to objection and appeal and those where objection and appeal is neither granted nor excluded. He concluded that in the former cases the Income Tax Special Court can reach its own conclusions and substitute its own decision for that of the Commissioner, whereas in the latter cases the Special Court has the power to the exercise of the Commissioner's discretion on the usual grounds for review (for example: that he acted in bad faith, or from improper motives, or did not apply his mind properly).'

[18]LTC Harms *Civil Procedure in the Superior Courts*www.lexisnexis.co.za (accessed 13 March 2013) B53.4 (hereinafter referred to as 'Harms' in this thesis); See *Hira v Booysen* 1992 (4) SA 69 (A); *Shidiack v Union Government* (*Minister of the Interior*) 1912 AD 642; *Britten v Pope* 1916 AD 150.

[19]*Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) SA 486 (SCA).

[20]Harms B53.1 to B53.22.

[21]Section 75(1)(b) of the Income Tax Act.

[22]Such as a 'just cause'; *Ibid*.

[23]Harms B53.4.

[24]*Ibid.* B53.4 and Section 19(1)(a) of Act 59 of 1959.

[25]*Ibid* B53.4; Routledge Cavendish *Constitutional Law* (2006) at page 126 reviewing flawed decisions.

The court has the power to summarily correct or set aside proceedings which fall into the categories mentioned above.[26]

This inherent right to review proceedings of bodies such as SARS, on which statutory duties are imposed, without having to follow special machinery of review created by the legislature,[27] is traditionally termed review under the common law.[28]

However, with the advent of the Constitution, and more particularly the Constitutional Court case of *Pharmaceutical Manufacturers*,[29] Chaskalson P stated: 'the exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality which is part of that law…'. He was dealing specifically with the issue of judicial review. Furthermore, in dealing with the contention that there is a body of common law distinct and separate from the Constitution, Chaskalson P stated the following: '[44] I cannot accept this contention which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law, each with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control…[45]…Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution...'.

The High Court has inherent jurisdiction to hear reviews in respect of a decision taken by SARS in terms of ss 74A and 74B, in the absence of an express exclusion, or by necessary implication.[30]SARS must consider the provisions of ss 7 and 8 of the

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[26]*Ibid* B53.4; *Op. cit.* Routledge at page 126; *Gliksman v Transvaal Provincial Institute of the Institute of SA Architects & another* 1951 (4) SA 56 (W)*; Tayob v Ermelo Local Road Transportation Board & another* 1951 (4) SA 440 (A); *Northwest Townships (Pty) Ltd v The Administrator, Transvaal & another* 1975 (4) SA 1 (T).
[27]*Ibid.* B53.4.
[28]*Ibid.* B53.4. *Per* Feetham JA in *Loxton v Kenhardt Liquor Licensing Board* 1942 AD 275 at 310.
[29]*Pharmaceutical Manufacturers Association of South Africa and another: In Re: Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para's [40] and [41]; See also *Constitutional Cases Commentary* De Rebus (September 2003) Lexis Nexis (last accessed 11 January 2013); Currie I & Klaaren J *The Promotion of Administrative Justice Act Benchbook* (2001) SiberInk.
[30]Harms B53.4; *Golube v Oosthuizen* 1955 (3) SA 1 (T); *Main Line Transport v Durban Local Road Transportation Board* 1958 (1) SA 65 (D); *Charmfit of Hollywood Inc v Registrar of Companies & another* 1964 (2) SA 765 (T) at 768 *in fine* – 769H: *Local Road Transportation Board and another v Durban City Council* 1965 (1) SA 586 (A) at page 594.

Constitution, and so must the courts give effect to the scope, spirit and purpose of the Bill of Rights by virtue of s 39(2) read with s 173 of the Constitution.
The authors in The Civil Practice of the Supreme Court of South Africa[31] state:

> The courts have adopted the attitude that … the word *'review' must be understood in its widest and what may be called its popular sense, ... as conferring a wide exercise of supervision, and a great scope of authority*. (Emphasis supplied)

Sections 7, 8, and 173 of the Constitution[32] supports this view.

The unconstitutional conduct by SARS in making a decision in terms of ss 74A and 74B where taxpayers rights are adversely affected, with a direct, external legal effect (as demonstrated in chapters 2 and 3 in this thesis) is cause falling within the ordinary jurisdiction of the court.[33] The court has the power to summarily correct or set aside proceedings in respect of the codified grounds of review read with ss 6, 7 and 8 of PAJA, or if SARS have transgressed the principle of legality. Both types of applications will be brought in terms of a Rule 53 application to the High Court.

5.3 THE APPLICABILITY OF OBJECTION AND APPEAL

The fact that ss 74A and 74B are in the Income Tax Act, and that SARS may attempt to aver that the objection and appeal procedures in the Income Tax Act must be exhausted

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[31]Erasmus et al *The Civil Practice of the Supreme Court of South Africa* Juta at page 948.
[32] Sections 7, 8 and 173 of the Constitution reads as follows:
's7. **Rights**. (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights. (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.
s 8. **Application**. (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of sub-section (2), a court—(*a*) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (*b*) may develop rules of the common law to limit the right, provided that the is in accordance with section 36 (1). (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.
s173. **Inherent power**. The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'
[33]Erasmus et al. *The Civil Practice of the Supreme Court of South Africa* Juta at page 937. *Johannesburg Consolidated Investments Co v Johannesburg Town Council* 1903 75 at pages 111-5.

first as an 'internal remedy' in terms of s 7(2) of PAJA. The provisions of s 7(2) of PAJA state:

> … no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

It could be argued by SARS[34] that the internal remedy in the case of ss 74A and 74B should be the objection and appeal process prescribed in the Income Tax Act. However, it is clear from the provisions of ss 74A and 74B, read with s 3 of the Income Tax Act, that there is no specific objection and appeal process applicable to these sub-sections. There is therefore no internal remedy[35] that must first be exhausted in the Income Tax Act.

Furthermore, special remedies in the Income Tax Act do not limit the remedies available to taxpayers as all avenues of relief provided for in the Constitution and PAJA, including judicial review. In *Metcash Trading Ltd v Commissioner, South African Revenue Service, and Another*[36] Kriegler J stated the following:

> [33] …the Act nowhere excludes judicial review in the ordinary course. The Act creates a tailor-made mechanism for redressing complaints about the Commissioner's decisions, but it leaves intact all other avenues of relief.

Furthermore, refer to the discussion and analysis on internal remedies in 5.4: *Review Application directly to the Tax Court*, below. The conclusion is reached that the Tax Court (through the process of objection and appeal) is not an internal remedy that must first be satisfied before a taxpayer can approach the High Court to review a decision. The Tax Court is not part of the administrative hierarchy of

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[34] Opinions expressed by Advocates G J Marcus SC, J Stein and W Trengove SC acting for SARS on issues of administrative law stating the advice they would give SARS in defending a review application brought by a taxpayer in the light of an inquiry or audit in terms of ss 74A and 74B.

[35] Croome B & Olivier L *Tax Administration* 2010 (Juta) at page 33 and pages 55-7; A relevant defence to avoiding internal remedies, if applicable, is exhausting internal remedies first have no merit because the officials concerned exhibit bias and the taxpayer is unlikely to receive a fair hearing, such as through the objection process: *Gold Fields Ltd v Connellan NO and Others* [2005] 3 All SA 142 (W) at page 170.

[36] 2001 (1) SA 1109 (CC).

SARS. It is an independent specialist court that does not have, it is submitted, similar status to the High Court as contemplated in the definition of 'court' in PAJA, as Tax Court decisions are not subject to the *stare decisis* principle, and are not binding on the Commissioner in future matters.

5.4 REVIEW APPLICATION DIRECTLY TO THE TAX COURT

Can a review be brought directly to the Tax Court, as an alternative to an application to the High Court? The *Electronic Meyerowitz commentary on Income Tax Cases and Materials*[37] with reference to the *Transvaalse Suikerkorporasie*[38] case, states:

> The *Income Tax Act confers three types of discretion on the Commissioner: (a) those which are subject to objection and appeal, (b) those which are excluded from objection and appeal, and (c) those which are neither subject to nor excluded from objection and appeal.* In regard to (a), the proceedings before the Special Court amount to a rehearing of the matter and the Special Court is entitled to make its own finding; in regard to (b), no resort to the remedies of objection and appeal is possible; and in regard to (c), the taxpayer is entitled to object and to appeal to the Special Court by virtue of the provisions of s 81 and s 83 of the Act, applicable to all assessments issued by the Commissioner. In the latter case, however, the appeal amounts to *a review of the Commissioner's exercise of his discretion on the recognised grounds of review* (*KBI v Transvaalse Suikerkorporasie Bpk* …).

The effect of the *Transvaalse Suikerkorporasie*[39] case is that, despite the lack of reference to an objection and appeal procedure in ss 74A and 74B, SARS is exercising a discretion that is reviewable in the Tax Court. However, it is unlikely that the Tax Court is a 'tribunal' contemplated in s 6(1) of PAJA for the purposes of a decision in terms of ss 74A and 74B. Support for this contention can be found in the Supreme Court of Appeal

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[37] On DVD from Meyerowitz D, at para 24.1.
[38] 1985 (2) SA 668 (T).
[39] 1985 (2) SA 668 (T); See also Van Schalkwyk L *The discretionary powers of the Commissioner for the South African Revenue Service – Are they constitutional?* Meditari Accountancy Research Vol. 12 No. 2 2004: pages 165-83 at page 170.

judgment *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration*[40] where is was concluded that 'the codificatory purpose' of s 6 of PAJA has subsumed and extended limited grounds for review (in the context of the Labour Relations Act 66 of 1995 (LRA)) where Cameron JA reasoned that on the basis of s 39(2) of the Constitution 'the overriding factor in determining the impact of PAJA on the LRA is the constitutional setting in which PAJA was enacted' where he found that both s 33 of the Constitution and PAJA superseded the specialised provisions of the LRA in the field of administrative justice. This dictum will apply equally to a decision of SARS in terms of ss 74A and 74B in the absence of a clear objection and appeal process that clearly ousts PAJA, either by means of an initial tribunal inquiry in the Tax Court, or generally – due to lack of prejudice to the taxpayer, lack of 'ripeness' to adjudicate the matter, or 'mootness' where the court is loath to give opinions about abstract propositions of law.[41] This view is also supported by *Metcash*[42] where the Constitutional Court made it clear that review applications to the High Court are available to taxpayers. However, *Metcash* is also quoted to support the argument review to the High Court only pertains to a question of law, as opposed to the merits and the facts.[43]

The provisions of s 7(2)(a) of PAJA have been described as stringent provisions cast in peremptory language:

> 'The Court is obliged to turn the applicant away if it is not satisfied that internal remedies have been exhausted, and may grant exemption from the duty only in exceptional circumstances where it is in the interests of justice to do so.'[44]

Plasket J in *Reed and Others v Master of the High Court of South Africa and Others*[45] held that section 7(2) must be interpreted restrictively because it restricts the jurisdiction of a Court to determine an otherwise justiciable issue before it. He went on to say, the section applies to internal remedies, and not simply to any form of potential extra-curial

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[40] 2007 (1) SA 576 (SCA) at para [25].
[41] Hoexter (2012) at pages 583-8.
[42] *Metcash Trading Limited v C SARS and Another*2001(1) SA 1109 (CC) at para [33].
[43] *Ibid.* at para [44].
[44] Hoexter (2012) at page 540.
[45] [2005] 2 All SA 429 (E) at para [45].

redress. A remedy, in this context, is defined in the New Shorter Oxford English Dictionary as a 'means of counter-acting or removing something undesirable, redress, relief; legal redress'. Inherent in this concept, as it is used in its legal context is the idea that a remedy, must be an effective remedy. Section 7(2) of PAJA does not, in other words, place an obligation on a person aggrieved by a decision to exhaust all possible avenues of redress provided for in the political or administrative system - such as 'approaching a Parliamentary committee or a Member of Parliament, or writing to complain to the superiors of the decision-maker…(or) one or more of the Chapter 9 institutions - such as Public Protector or the Human Rights Commission - prior to resorting to judicial review'. The Tax Court is a body that provides an entirely effective remedy to a person aggrieved by the issue of an assessment. Of more assistance is the following portion of the judgment:

> [25] The dictionary definitions of the words "internal" and "remedy" that I have cited are in harmony with the way the composite term "internal remedy" is understood in the more specialised context with which this matter is concerned: when the term is used in administrative law, it is used to connote an administrative appeal - an appeal, usually on the merits, to an official or tribunal within the same administrative hierarchy as the initial decision-maker - or, less common, an internal review. Often the appellate body will be more senior than the initial decision-maker, either administratively or politically, or possess greater expertise. Inevitably, the appellate body is given the power to confirm, substitute or vary the decision of the initial decision-maker on the merits. In South Africa there is no system of administrative appeals. Instead internal appeal tribunals are created by statute on an *ad hoc* basis.

If this proposition is correct then an appeal to the Tax Court is not an internal remedy that must first be satisfied before a taxpayer can approach the High Court to review a decision. The Tax Court is not part of the administrative hierarchy of SARS. It is, instead, as Kriegler J pointed out in *Metcash Trading Limited v CSARS*,[46] a body that satisfies the requirements of section 34 of the Constitution as being an 'independent and impartial

[46] 2001(1) SA 1109 (CC).

tribunal' established for the purpose of resolving disputes that can be resolved by the application of law. It is presided over by a judge appointed by the Judge President of the division in which the Court is sitting and its decisions are appealable directly to the High Court and, with leave, directly to the Supreme Court of Appeal.

However, a review of a decision by SARS in terms of ss 74A and 74Bcan be brought directly to the Tax Court as part of the objection and appeal process (as opposed to a review application), through ss 81 and 107A of the Income Tax Act, and the Rules of the Tax Court promulgated in terms of s 107A, following the principles in the *Transvaalse Suikerkorporasie*[47] case above. The typical process in terms of these provisions is that the taxpayer will object within 30 days after receiving the revised assessment, setting out in its grounds of objection the conduct of SARS that is inconsistent with the Constitution, together with the grounds of objection that deal with the merits of the tax dispute. The Rules of the Tax Court promulgated in terms of s 107A allow for SARS to submit its Grounds of Assessment, and for the taxpayer to submit its Grounds of Appeal, after SARS has rejected the objection. The taxpayer would once again set out the complained about conduct of SARS in the Grounds of Appeal.

The problem with this approach is the timing. The conduct of SARS will only be considered by the Tax Court alongside the merits of the revised assessment, which by now would have been issued with an enforcement of the 'pay now argue later' principle. In practice the procedural transgressions that took place before the revised assessment pale into insignificance as the Tax Court tends to focus on the substantive merits of the tax dispute. The advantage of bringing a review application to the High Court is that the current conduct of SARS will be reviewed, prior to any revised assessment being raised. Any decision by SARS to raise a revised assessment would also be suspended, pending the decision of the High Court.

The taxpayer could also wait for the revised assessment to be issued, and then raise as one or more of his or her grounds for objection the administrative law grounds of review, in addition to those applicable to the merits of the revised assessment. Here the grounds of review will form part of the usual objection and appeal process in the Income Tax Act.

[47] 1985 (2) SA 668 (T).

Again, the difficulties raised in the previous paragraph are equally applicable to this scenario.

It is, consequently, more advantageous for the taxpayer to take the conduct of SARS on review to the High Court, provided there is no dispute of fact, otherwise the application stands to be dismissed, first tier, or if a dispute of fact becomes apparent to the court at the hearing of the matter, the *Plascon-Evans* rule will find application,[48] where the courts will apply certain second tier rules to determine whether or not a conflict of fact exists. In simplistic terms, the court will accept the version of the respondent (usually SARS in these applications), resulting in a usual insurmountable difficulty for the taxpayer to have the court accept its version of the facts, to require the court to make a finding in favour of the taxpayer.

5.5 REVIEWING UNCONSTITUTIONAL CONDUCT

5.5.1 Introduction

To recap, the major premise of this thesis: An inquiry and audit by SARS in terms of ss 74A and 74B must be constitutional: lawful, reasonable, procedurally fair and done with adequate reasons – where SARS must comply with the relevant provisions of the Constitution, PAJA, including the jurisdictional facts in ss 74A and 74B as analysed in this thesis. In the words of D Walton author of *Informal Logic: A Pragmatic Approach*[49]:

> In…(the)…dialogue called inquiry, premises can only be propositions that are known to be true, that have been established as reliable knowledge to the satisfaction of all parties to the inquiry.
>
> …
>
> The basic goal of the inquiry is increment of knowledge…This inquiry seeks out proof, or the establishment of as much certainty as can be obtained by the given evidence. Evidential priority is the key feature of the

[48] The rule emanates from *Plascon-Evans Paints Ltd v Van Riebeeck Paints* 1984 (3) SA 623 (A) at pages 634E – 635C.
[49] 2ed (2008) Cambridge pages 5 and 6.

> inquiry…This contrasts with persuasion dialogue…opinion based on reasoned (not conclusive) evidence.

This quotation holds accord with the provisions of ss 1(c), 33, 41(1), 195(1) and 237 of the Constitution. Failure by SARS to adhere to these standards, principles and norms, will entitle the taxpayer to bring a review application through s 172(1) of the Constitution. Reviewing the exercise of a decision by SARS in terms of ss 74A and 74B is divided into two alternate categories through a Rule 53 application to the High Court:

a. first and foremost, either in terms of ss 6, 7 and 8 of PAJA if the definition of 'administrative action' is satisfied: the grounds of review in s 6(2)(a) to (i) of PAJA as set out in 5.5.6 below; or, in the absence of s 6(2) of PAJA applying,

b. in terms of the principle of legality creating an opportunity to review the public power of SARS.

5.5.2 Sections 6, 7 and 8 of PAJA[50]

If SARS in making a decision in terms of ss 74A and 74B of the Income Tax Act, acts inconsistently with its constitutional obligations (ss 1(c), 33, 41(1), 195(1) and 237 of the Constitution) as analysed in this thesis, or fails to give adequate notice as required in terms of s 3(2) of PAJA, and adequate reasons after making a decision in terms of s 5(1) and (2) of PAJA, taxpayers will have the remedies available to them in terms of ss 6, 7 and 8 as read with the codified grounds of review in s 6(2) of PAJA.

It has been submitted in this thesis that a decision in terms of ss 74A and 74B 'adversely affects the rights of any person and which has a direct, external legal effect', as contemplated in the definition of 'administrative action' in PAJA. With the development of constitutional law and the promulgation of PAJA giving effect to s 33(3) and the rights referred to in ss 33(1) and (2) of the Constitution, the provisions of PAJA must now, first and foremost, be considered in any review proceedings initiated against SARS for

[50] Croome B & Olivier L *Tax Administration* 2010 (Juta) at pages 55-7

unconstitutional conduct. Chaskalson CJ in *Minister of Health v New Clicks South Africa (Pty) Ltd*[51] rejected the Supreme Court of Appeal's approach to review the regulations for lawfulness by applying the provisions of s 33(1) of the Constitution and the common law directly, and not in terms of PAJA. Chaskalson pointed out that PAJA had been enacted pursuant to a constitutional command to give effect to the right to administrative justice. To allow applicants to go behind the provisions of PAJA to utilise s 33(1) of the Constitution to review administrative action would frustrate the purpose with which s 33(3) of the Constitution required the enactment of PAJA. In a concurring judgment, Nqcobo[52] held that to allow access for review to s 33(1) of the Constitution would allow for the development of two parallel systems of law with the same subject matter which would be untenable. He went on to state that litigants would only be entitled to rely directly upon s 33(1) of the Constitution where it was alleged that the remedies afforded by PAJA were deficient – the action would be directed at the offending provision of PAJA, namely the restrictive definition of 'administrative action', and not at the offending administrative action itself. The provisions of ss 6(1), 7(1) and 8(1) of PAJA relevant to a review application state:

> 6. (1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action…
> 7. (1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date…
> 8. (1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable…

The starting point for any review application in terms of PAJA in relation to a ss 74A and 74B decision by SARS would be the failure by SARS to comply with the provisions of s 3 of PAJA before making a decision:

> 3. (1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.
> (2)(a)A fair administrative procedure depends on the circumstances of

[51] 2006 (2) SA 311 (CC) at para [95].
[52] Para's [436] and [437].

each case.

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

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

(b) a *reasonable opportunity to make representations*;

(c) a *clear statement of the administrative action*;

(d) adequate notice of any right of review or internal appeal, where applicable; and

(e) *adequate notice* of the *right to request reasons* in terms of section 5.

(3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in sub-section (1) an opportunity to -

(a) *obtain assistance* and, in serious or complex cases, legal representation;

(b) *present and dispute information and arguments*; and

(c) *appear in person*.

(Emphasis supplied)

If SARS, without proper justification, fails to adhere to these fair administrative procedures when making a decision in terms of ss 74A and 74B, its 'administrative action' will be subject to the ground of review in s 6(2)(c) that the decision or 'administrative action' was 'procedurally unfair'.

In terms of s 5(1), (2) and (3) of PAJA, SARS must adhere to the following provisions and give adequate reasons for its decision in terms of ss 74A and 74B:

5. (1) Any person whose *rights have been materially and adversely affected by administrative action* and who has *not been given reasons for the action may*, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, *request that the administrator concerned furnish written reasons for the action*.

> (2) The administrator to whom the request is made *must*, within 90 days after receiving the request, *give that person adequate reasons in writing for the administrative action*.
> (3) *If an administrator fails to furnish adequate reasons for an administrative action*, it must, subject to sub-section (4) and in the absence of proof to the contrary, *be presumed in any proceedings for judicial review that the administrative action was taken without good reason*. (Emphasis supplied)

Bearing in mind that if SARS 'fails to furnish adequate reasons…it must…be presumed in any proceedings for judicial review that the administrative action was taken without good reason', if SARS, without proper justification, fails to adhere to these fair administrative procedures when making a decision in terms of ss 74A and 74B, its 'administrative action' will also be subject to the ground of review in s 6(2)(c) that the decision or 'administrative action' was 'procedurally unfair', or in terms of s 6(2)(i) as 'otherwise unconstitutional or unlawful'.

Apart from these preliminary fair administrative procedures, the lawfulness and reasonableness of a decision by SARS in terms of ss 74A and 74B, the decision must not be conduct is inconsistent with s 2 of the Constitution, otherwise it will be contrary to the constitutional principle of legality, or the codified grounds of review of s 6(2) of PAJA[53] are applicable.[54]

If the court holds that the decision by SARS is not 'administrative action' as defined, then the taxpayer would have two further alternatives: (1) challenging the constitutionality of the restrictive definition of 'administrative action' in PAJA alleging that the remedies afforded by PAJA are deficient where the action is directed at the offending provision of PAJA; and (2) an application for review where the transgression of the constitutional

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[53] Sections 6(2)(a)-(i) and 6(3) of PAJA; *Gliksman v Transvaal Provincial Institute of the Institute of SA Architects & another* 1951 (4) SA 56 (W) where the court held that where a *discretion has been exercised with supporting evidence*, the courts in the past and before the advent of the Constitution did not interfere unless there was gross irregularity or a failure of natural justice (Emphasis supplied); In *University of Cape Town v Ministers of Education & Culture* (*House of Assembly & House of Representatives*) 1988 3 SA 203 (C); LAWSA Volume 1 2nd ed *Administrative Law* Lexis Nexis at para 139 footnote 6.
[54] *Ibid.*; See also *US v Williams* 337 F Supp 1114;*Local 174 International Brotherhood of Teamsters v US*, 240 F.2d 387; *US v Newman* 441 F.2d 170; *US v Coopers and Lybrand* F Supp 942; *Hubner v Tucker* 245 F.2d 35; *First National Bank of Mobile v US* 160 F.2d 532.

principle of legality would be the cause of action, on the basis that SARS' conduct is unlawful, unreasonable, procedurally unfair and exercised without giving adequate reasons. In essence similar grounds of review to those set out in s 6(2) of PAJA come into play.[55]

In both a review application brought in terms of PAJA, or it terms of the principle of legality, the preferred route, in the absence of express court rules applicable to PAJA, would be by way of Rule 53 application to the High Court.

5.5.3 Rule 53 of the Uniform Rules of Court

Section 172(1) of the Constitution opens the way for taxpayers to review any conduct by SARS that is inconsistent with s 2 of the Constitution, and invalid, either in respect of a transgression of PAJA, or the constitutional principle of legality. The appropriate review application would be brought in terms of Rule 53(1) of the Uniform Rules of Court that provides:

> (1) *Save where any law otherwise provides*, all proceedings to *bring under review the decision* or proceedings of any inferior court and of any tribunal, board or *officer* performing judicial, quasi-judicial or *administrative functions* shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected -
>
> (a) calling upon such persons to *show cause why such decision or proceedings should not be reviewed and corrected or set aside, and*
>
> (b) *calling upon* the magistrate, presiding officer, chairman or *officer*, as the case may be, to despatch, within fourteen days of the receipt of the notice of motion, to the registrar the *record of such proceedings sought to be corrected or set aside together with such reasons as he is by law*

[55]Hoexter (2012) at pages 121-5.

required or desires to give or make, and to notify the applicant that he has done so.

(2) The *notice of motion shall set out the decision or proceedings sought to be reviewed* and shall be supported by affidavit setting out the grounds and the facts and circumstances upon which applicant relies to have the decision or proceedings set aside or corrected.[56] (Emphasis supplied)

In the *Jockey Club of South Africa v Forbes*,[57] the Appellate Division held that the primary purpose of Rule 53 of the Uniform Rules of Court was to facilitate and regulate application for review, and on the face thereof was designed to 'aid and not shackle the applicant'. This is equally applicable to taxpayers who have the constitutional complaints against SARS where SARS have allegedly transgressed one or more of its constitutional obligations when invoking its powers in terms of ss 74A and 74B. Any founding affidavit prepared by the aggrieved taxpayer would commence with identifying the invalid conduct performed by SARS as envisaged in s 2 of the Constitution, and supported by the appropriate codified grounds of review in s 6(2) of PAJA, or the applicable aspects of the principle of legality that have been transgressed.

5.5.4 Save where any law otherwise provides

The 'save where any other law otherwise provides' is a limitation to applying Rule 53. This limitation would be applicable in the case where statutory provisions require a specific course of action to be taken, such as following the objection and appeal procedure prescribed in the Income Tax Act in specified and promulgated instances. This is not the case with ss 74A and 74B, as this decision is not subject to the objection and appeal procedures in the Income Tax Act. The analysis in section 5.4: *Review Application directly to the Tax Court* above is also applicable to this section.

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[56] *Kennasystems South Africa CC v Chairman, Board on Tariffs and Trade and Others*, 58 SATC 150 at page 151.
[57] 1993 (1) SA 649 (A).

Consequently, the review of ss 74A and 74B is available to the taxpayers seeking redress against any unconstitutional and 'invalid' conduct by SARS in the exercise of public power, in terms of Rule 53(1).

5.5.5 Show cause

In the notice of motion under Rule 53, a supporting affidavit must set out the grounds and the facts and circumstances upon which the taxpayer relies to have the SARS decision set aside or corrected, giving SARS the opportunity to show cause why the decision or proceedings should not be reviewed and corrected or set aside.

In such an affidavit, the major premise will set out the provisions of ss 74A and 74B that are being subjected to review, and the supporting constitutional legal principles:

(a) the constitutional premise on which any conduct by SARS must be based, and on which the application is based;
(b) 'may', and the manner in which the discretion of SARS is exercised;
(c) for the purposes of 'the administration of this (Income Tax) Act', and the satisfaction of one or more of the jurisdictional facts (words added);
(d) 'taxpayer', and whether or not the inquiry relates to a named taxpayer;
(e) 'information, documents and things', and whether or not the requested information, documents or things are available in a less intrusive manner[58] to SARS.

The minor premise will narrow down the legal provisions that are applicable to the facts of the matter under review. The taxpayer can explain that the conduct of SARS in making a decision in terms of ss 74A and 74B is unconstitutional and 'invalid' in terms of s 2 of

[58] See also *US v Coopers and Lybrand* 913 F Supp 942.

the Constitution, in that SARS has exercised its powers, and has therefore exercised unconstitutional and 'invalid' conduct in one or more of the following ways:

- SARS has transgressed 'the rule of law' in contravention of s 1(c) of the Constitution by failing generally to comply with its constitution obligations spelt out below – this includes the constitutional principle of legality;
- SARS has failed to 'respect and protect' the dignity of the taxpayer (where a natural person), because the overhanded conduct by SARS in making demands without proper reasons impairs the self-esteem of the taxpayer, as the taxpayer regards SARS' conduct offensive, and SARS has failed to respect the taxpayer's right to privacy without proper justification (applicable to all taxpayers);[59]
- SARS has acted *ultra vires* as demonstrated by not satisfying the jurisdictional facts of ss 74A and 74B, read with the constitutional obligations set out in ss 1(c), 41(1), 195(1) and 237 of the Constitution, and read with s 4(2) of the SARS Act;
- SARS has not complied with the taxpayer's right to 'just administrative action' in terms of s 33 of the Constitution, and as expanded in terms of PAJA, in that SARS has failed to comply with its obligations to give proper and adequate notice of its decision in terms of s 3(2) of PAJA, and 'adequate reasons' in terms of s 5(1) and (2) of PAJA (without proper justification in terms of s 5(3)) for its decision in terms of ss 74A and 74B, thereby transgressing one or more of the grounds of review in s 6(2) of PAJA;
- SARS has transgressed its constitutional obligation in terms of s 41(1) of the Constitution, and thereby the constitutional principle of legality[60] by ignoring that provision – SARS is not entitled to 'assume any power or function except those conferred on them in terms of s 41(1) of the Constitution'. In terms of the constitutional principle of legality SARS cannot act *ultra vires* its empowering provision in ss 74A and 74B, meaning compliance with all the jurisdictional facts

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[59] Sections 10 and 14 of the Bill of Rights; See *Pretoria Portland Cement & Another v Competition ommission & Others* 2003(2) SA 385 (SCA); *Bernstein & Others v Bester NO & Others* 1996(2) SA 751 (CC) at parra's [67], [73] and [79] identifies 'privacy' with the 'inner sanctum of a person', but that all privacy rights are limited 'to the most personal aspects of a person's existence, and not to every aspect within his/her personal knowledge and experience.'; See also *Investigative Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001(1) SA 545 (CC) at para [18] where it was held that the right to privacy protects intimate space because such a space is a prerequisite for human dignity; See also *Probe Security CC v Security Offices' Board and Others* 98 JER 0849 (W).

[60] See section 2.4: *The Relevance of PAJA and the Principle of Legality supra*.

read with its constitutional obligations in ss 1(c), 33, 195(1) and 237 of the Constitution, read with s 4(2) of the SARS Act;

- SARS has transgressed its constitutional obligations in terms of s 195(1) of the Constitution, as SARS is not entitled to conduct itself contrary to:
  - Promoting and maintaining 'a high standard of ethics';
  - Promoting 'efficient, economic and effective use of resources';
  - Services that are delivered 'impartially, fairly, equitably and without bias';
  - 'accountable' Public Administration; and
  - 'timely, accessible and accurate information' fostering 'transparency',

  as set out in s 195(1)(a), (b), (d), (f) and (g);
- SARS has transgressed s 237 of the Constitution, and thereby the principle of legality by ignoring the provisions that state 'all constitutional obligations must be performed diligently and without delay'; and/or
- SARS has transgressed its legitimate expectations created.[61]

To illustrate this effectively, the following set of hypothetical facts[62] is discussed:

> The taxpayer, a professional consultant, has acted on behalf of high profiled clients over a number of years.
>
> A major dispute develops between the taxpayer and one high profile client. The dispute is widely covered in a negative light in the media, setting out unproven and unsubstantiated allegations about the taxpayer's business dealings.
>
> The client in question is also closely connected to various politicians and government administrators.
>
> At the height of the media reports, the taxpayer receives notices in terms of ss 74A and 74B in respect of various entities where the taxpayer is a shareholder and/or director.

[61] in accordance with the analysis in section 3.6: *Legitimate Expectations supra.*
[62] Based on various actual case studies in the writer's legal practice.

The notices are not addressed to the public officers of these entities, which is the customary manner in which these investigations are usually conducted.

Despite the suspicion that SARS are on a blind fishing expedition[63] that is being motivated by the negative media publicity, and the possibility of a complaint lodged by the former high profile client, the taxpayer decides not to question the motives of SARS and enters into an agreed arrangement with SARS to provide information on a weekly basis over a period of time.

In line with the agreement, the exchange of information takes place weekly, until abruptly one week SARS fails to respond to numerous calls made by the taxpayer to furnish the next segment of information.

As a result of this, the taxpayer accepts that SARS have ceased and concluded the audit, without making any findings.

For three years there is no further communication between SARS and the taxpayer.

Until, as abruptly as the inquiry ended, the taxpayer receives a telephone call from SARS to request a meeting. The meeting is conducted and the taxpayer is handed seven notices in terms of ss 74A and 74B, requesting information, documents or things.

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[63]Croome B & Olivier L *Tax Administration* 2010 (Juta) at page 155 where the authors infer fishing expeditions are not lawful; For a comparative American viewpoint see *US v Third Northwestern National Bank* 102 F Supp 879 where the court held that an arbitrary (random) audit would be unlawful.

It appears *ex facie* the notices that three of them are in respect of the previous entities already inquired about, where the inquiry ended some three years ago without further explanation or communication. Two of the notices were in respect of shelf companies which the taxpayer sold to clients, in which he has no further interest.

The taxpayer is now especially suspicious that the latest inquiries are being driven by ulterior motives, and that SARS have not done the required homework before they embark upon such an audit. They make no reference to any of the provisions of s 74, or to why the previously concluded audits are being commenced again.

In following and applying the logical sequence of a syllogistic argument in the founding affidavit (based on these hypothetical facts), the minor premise that will underpin the legal principles being sought to being applied will be as follows:

(a) The taxpayer will as applicant aver that he is requesting the review of the conduct of SARS in accordance with the provisions of the Constitution[64] on the basis that:

a. The rule of law and the principle of legality is applicable to SARS;[65]
b. Conduct of SARS must be consistent with the Constitution;[66]

[64] All administrative law and the review thereof is no seen as part of the Constitution in line with the decision in *Pharmaceutical Manufacturers Association of South Africa and another: In Re: Ex Parte President of the Republic of South African and Others* 2000 (2) SA 674 (CC).
[65] Section 1(c) of the Constitution; Section 2.4: *The Relevance of PAJA and the Principle of Legality supra.*
[66] *Ibid.* s 2.

c. The conduct of SARS is governed by the constitutional obligations imposed on it by ss 1(c), 33, 41(1), 195(1) and 237 of the Constitution.

(b) The following material facts are present:

a. SARS made a decision to audit or investigate the taxpayer, which is conduct as contemplated in the Constitution and PAJA;
b. SARS' decision was originally made at the height of the negative media reports of the taxpayer;
c. SARS and the taxpayer agreed on what they were auditing and the basis for the exchange of information;
d. The taxpayer complied with the terms of that agreement;
e. SARS unilaterally terminated the agreement abruptly without explanation;
f. The taxpayer accepted SARS' decision to terminate the audit;
g. Three years later SARS suddenly re-commenced the audit expanding its parameters to include new entities by delivering seven notices on the taxpayer;
h. It is clear *ex facie* the notices that none of the notices:
    i. Are addressed to the public officer, where it is customary for SARS to request and obtain information from an entity's public officer, unless they are unable to do so;
    ii. State compliance with one or more of the jurisdictional facts in the definition of 'for the purposes of the administration' of the Income Tax Act;
    iii. State why the audit of the previous three entities is being reopened and the same information is being requested again;

iv. State why the notices are being addressed to the taxpayer in respect of two entities that he has no association with;

v. Indicate that SARS has at least complied with its Practice Manual that requires it to rely upon concrete evidence, or its *Code of Conduct* read with the *SARS Internal Audit Manual*, that requires it to follow certain preliminary procedures on conducting an audit.

i. The taxpayer has not agreed at this early re-commenced audit to participate in the audit absent SARS answering certain questions about the lawfulness of the audit – so as to ensure that SARS is not conducting a fishing expedition influenced by improper motives.

The conclusion to the founding affidavit will match the legal principles to the facts. The decision made by SARS to issue seven new notices in terms of ss 74A and 74B to the taxpayer, must be:

(a) grounded on the rule of law and the constitutional principle of legality and be made in compliance will all the jurisdictional facts of ss 74A and 74B - this has not happened here because SARS do not specify which provisions of s 74 (with supporting and explanatory facts) are applicable in the notices. Proof of its compliance would be an explanation of the preparatory work done by it in accordance with the provisions of its *Code of Conduct* read with the *SARS Internal Audit Manual.* Evidence of the existence of this (or not) will become apparent when SARS is expected to make its internal record available to the taxpayer as part of the Rule 53 review proceedings;

(b) consistent with the provisions of the Constitution in that the decision must be:

a. driven by a high standard of professional ethics - this has not been adhered to because SARS abruptly terminated the audit without reason, and as suddenly recommenced the audit on an expanded basis without reason or explanation;
b. impartial and not influenced by the dictates of outsiders – a reasonable inference can be drawn that the bad media publicity is the one motivator for the audit, as opposed to the audit risk indicators that SARS researches in accordance with the provisions of its *Code of Conduct* read with the *SARS Internal Audit Manual*;
c. unbiased conduct – not unduly influenced by financial reward of the SARS officials;
d. accountable - SARS must demonstrate why it is necessary to reopen the previous three audits that it deemed closed, and why the taxpayer must supply it with the same information again. SARS must comply with the jurisdictional facts of s 74 in giving these reasons;
e. transparent - to what extent has SARS conducted a preliminary internal investigation to justify approaching the taxpayer for the information, and is SARS able to furnish proof of this.

It is clear from the conclusions drawn above that sufficient opportunity exists for taxpayers to raise various grounds for reviewing the unlawful, unreasonable or procedurally unfair (and unconstitutional) conduct of SARS in the exercise of its powers in terms of ss 74A and 74B. Sufficient cause would exist to bring a review application in terms of PAJA, or, the principle of legality, in that the conduct of SARS is inconsistent with the terms of the Constitution, and is 'invalid' conduct.

5.5.6 The grounds of review

5.5.6.1 Introduction

The grounds of review upon which the taxpayer may rely to have the SARS decision set aside or corrected, go beyond the historical common law grounds of review,[67] which tend to be limited to a SARS official acting *mala fides*[68] or dishonestly, or for ulterior reasons, or with such gross unreasonableness as to be inexplicable.[69]

In the spirit and purpose of the Bill of Rights, and of the Constitution generally, s 39(2) of the Constitution (when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights) read with s 173 of the Constitution (the Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice), places both SARS officers and the courts in a position where they should interpret the powers of SARS in the light of these broader constitutional directions – 'must promote the spirit, purport and objects of the Bill of Rights'. SARS is a trustee of public interest and should use all means to ascertain all the relevant facts in order to arrive at the right decision in exercising any discretion.[70] To the extent that SARS' decision transgresses the lawfulness, reasonableness and procedural fairness requirement of administrative law, or breaks the rule of law and the principle of legality, SARS' unconstitutional conduct is subject to review. In this regard, every questionable exercise of power by SARS may be brought before the court to test its validity.[71]

In this regard, the grounds of review set out in s 6(2) of PAJA will apply if the review application is brought in compliance with ss 6(1) and 7(1) of PAJA, or provide guidance in developing the grounds of review applicable to a breach of the principle of legality, as suggested by Hoexter.[72] This is also in accordance with the judgment of Cameron JA in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration*[73] where is was concluded that 'the codificatory purpose' of s 6

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[67] Error of law, wrong or non-performance giving rise to common-law review; See *Hira v Booysen* 1992 (4) SA 69 (A); See *Shidiack v Union Government* (*Minister of the Interior*) 1912 AD 642; *Britten v Pope* 1916 AD 150.
[68] Dishonesty, fraud or harassment; See *US v Roundtree* 420 F.2d 845 where (quoted from the headnote) a '(t)axpayer against whom government was attempting to enforce summons and who claimed harassment was entitled to take deposition of internal revenue agent in charge of case in order to investigate Internal Revenue Service's purpose.'
[69] Erasmus et al *The Civil Practice of the Supreme Court of South Africa* Juta at page 939. *African Realty Trust Ltd v Johannesburg Municipality* 1906 TH 179 at 182.
[70] Singh M P *German Administrative Law in Common Law* Amazon Kindle Edition 1156 (accessed 7 March 2013).
[71] *Ibid*.
[72] Hoexter (2012) at pages 121-5.
[73] 2007 (1) SA 576 (SCA) at para [25].

of PAJA has subsumed and extended the limited grounds for review (in the context of the Labour Relations Act 66 of 1995 (LRA)) where it was reasoned that on the basis of s 39(2) of the Constitution 'the overriding factor in determining the impact of PAJA on the LRA is the constitutional setting in which PAJA was enacted' where both s 33 of the Constitution and PAJA supersedes the specialised provisions of the LRA in the field of administrative justice. This will apply equally to the powers of SARS in terms of ss 74A and 74B, namely: authority and conduct of the administrator; non-compliance with a mandatory and material procedure or condition; procedurally unfair action; action materially influenced by an error of law; manner of exercise of administrative action; rational connection grounds; failure to take a decision; unreasonableness; and otherwise unconstitutional or unlawful action.

These principal areas of review exclude two common-law grounds of review that would probably fall under s 6(2)(i) of PAJA (otherwise unconstitutional or unlawful action), namely: vagueness[74] and the 'fettering by rigidity of a discretion'.[75] In light of the *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration*[76] it is unlikely that the courts will ignore the codified grounds of review in a review of a decision taken by SARS in terms of ss 74A and 74B, where the review provisions of s 6 may not be directly applicable due to the decision of SARS being held by a court to fall outside the scope of PAJA. In developing constitutional law, and in particular the constitutional principle of legality, taking into account the interests of justice, the courts will most likely be informed by these codified grounds of review. It is also submitted that this reasoning is in line with the decision of *Carmichele v Minister of Safety and Security*[77](and other authorities)[78] where the Constitutional Court held that

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[74] See also *US v Williams* 337 F Supp 1114 where the District Court in New York held the 'enforcement …to compel production of message slips held by taxpayer's telephone answering service would have provided government with names of persons who were not patients of taxpayer at all, or who were not patients during relevant years, and … was overbroad and out of proportion to ends sought, and as such not entitled to enforcement'; See also *Local 174 International Brotherhood of Teamsters v US*, 240 F.2d 387 where '*agents had burden to show that demand was reasonable under all circumstances and to prove that books and records were relevant or material to tax liability of taxpayer* …and the taxpayer… possessed books or records containing items relating to taxpayer's business'. (Emphasis supplied); *US v Newman* 441 F.2d 170; *US v Coopers and Lybrand* F Supp 942; *Hubner v Tucker* 245 F.2d 35; *First National Bank of Mobile v US* 160 F.2d 532.

[75] Hoexter C *The Future of Judicial Review in South African Administrative Law* South African Law Journal (2000) Vol 17 at page 497.

[76] *Supra* footnote 74.

[77] 2001 (10) BCLR 995 (CC); 2001 (4) SA 938 (CC).

[78] Per Chaskalson P in *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at page 696D: 'The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say that the principles of common law have

it was the duty of courts to develop the common law, in line with the Constitution, and with the more recent decisions set out at the end of section 2.4: *The Relevance of PAJA and the Principle of Legality* above.[79]

Grounds for judicial review in terms of s 6(2)[80] would exist under PAJA in the following instances where SARS has made a decision envisaged in ss 74A and 74B that falls within the definition of 'administrative action':

(a) Where SARS has failed to act with the appropriate authority;
(b) Where SARS has failed to comply with the relevant 'jurisdictional facts' of ss 74A and 74B;
(c) Where SARS has abused its discretion;[81]
(d) Where SARS has failed to exercise reasonableness in exercising its discretion. This includes an improper or ulterior purpose or motive;[82]
(e) Where SARS has committed a breach of the rules of natural justice or procedural fairness;[83]
(f) Where SARS has breached a taxpayer's legitimate expectation of being treated in a certain way by SARS.[84]

5.5.6.2 Constitutionality of the inquiry and audit

The lawfulness of the inquiry and audit on constitutional grounds is applicable in this instance where SARS has failed to comply with its constitutional obligations in ss 1(c), 33, 41(1), 195(1) and 237 of the Constitution, read with s 4(2) of the SARS Act. SARS is governed by the values and principles enshrined in the Constitution that specifically obligate it to provide services within the scope of the powers provided in the Constitution, and which are impartial, fair, equitable and without bias, in an accountable fashion and through fostering transparency with timely, accessible and accurate information (as analysed and discussed in Chapter 4). Transgressing these constitutional

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ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development.'.
[79]At page 47 of this thesis.
[80] Section 6(2)(a)-(i) of PAJA.
[81]See section 3.3.3: *Abuse of discretion supra*.
[82]See section 3.3.3.1: *Improper or ulterior purpose or motive supra*.
[83]See section 3.5: *Procedural Fairness supra*.
[84]See section 3.6: *Legitimate Expectations supra*.

obligations brings the conduct of SARS within the realms of the constitutional principle of legality, and subject to review in terms of Rule 53.

SARS would also have to show compliance with its *Code of Conduct*[85] published on the SARS website, read with its unpublished *SARS Internal Audit Manual*[86] which provides specific guidelines to SARS officials on how to conduct an inquiry and audit in line with these constitutional obligations. The manual is a practical working tool for SARS officials, ensuring that they perform their statutory duties in accordance with the directions given under the hand of the Commissioner, who is given the power to administer the Income Tax Act. Consequently, for SARS to exercise its discretion lawfully in terms of ss 74A and 74B, it should (in line with the guidelines) demonstrate that: it has 'insight into…the business process of the taxpayer…';[87] after 'screening the tax returns…(the taxpayer)…warrant(s) an audit…';[88] it has identified 'which elements of the tax return(s) need to be audited…';[89] and it has obtained 'information from other sources…(on)…the potential issues of the relevant case…'.[90]

Furthermore, one or more of the jurisdictional facts set out in the definition of 'the administration of this Act' in s 74 of the Income Tax Act must exist. For instance: there must be an amount received by accrual to any person that must be in question;[91] there must be a property disposed of under a donation;[92] there must be a dividend declared;[93] in relation to an inquiry into a return, financial statement, document, declaration of facts or valuation, the originating document must also exist to enable the further inquiry;[94] the determination of a liability to any tax, interest or penalty with the existence of general evidence to suggest that the person is a taxpayer should at least exist;[95] on collecting a liability, where a liability must exist;[96] ascertaining an offence under civil investigation (which in itself is an unconstitutional provision because the inquiry and audit provisions

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[85]http://www.sars.gov.za/home.asp?pid=54195 (last accessed 31 March 2013).
[86] See section 3.2: *The SARS Internal Audit Manual supra.*
[87]*Ibid,* at page 2.
[88]*Ibid,* at page 4.
[89]*Ibid,* at page 5.
[90]*Ibid,* at page 6.
[91] Section 74(1)(a)(i) of the Income Tax Act.
[92]*Ibid* s 74(1)(a)(ii).
[93]*Ibid* s 74(1)(a)(iii).
[94]*Ibid* s 74(1)(b).
[95]*Ibid* s 74(1)(c).
[96]*Ibid* s 74(1)(d).

are being used for self-incrimination purposes);[97] ascertaining general compliance of tax affairs, prefaced by evidence that the person under investigation is subject to the provisions in question by virtue of some fact that exists pointing to the fact that the person is or should be a taxpayer;[98] and the enforcement and performance of administrative functions generally under the provision of the Income Tax Act.

If these jurisdictional facts are not met, the conduct of SARS will be unlawful, and inconsistent with the Constitution, and therefore invalid in terms of s 2 of the Constitution.

As a result, 'just cause' can be shown to exist under s 75(1)(b) of the Income Tax Act as to why a taxpayer may challenge SARS' entitlement to seek to enforce the provisions of ss 74A and 74B. The unconstitutional conduct of SARS is also reviewable by virtue of the provisions of s 172(1) of the Constitution: in terms of Rule 53 to the High Court on the basis of a transgression of s 6(2)(i) being 'action that is otherwise unconstitutional or unlawful', or in terms of the constitutional principle of legality.

5.5.6.3 Appropriate authority

The first principle of administrative law (and of the rule of law) is that the exercise of power must be authorised by law. SARS does not have inherent powers[99] to exercise public power: its power to act must be derived from a lawful empowering source[100]such as in the form of ss 74A and 74B. Any discretion performed by SARS without any lawful authority or empowering provision is illegal, contrary to the rule of law (including the principle of legality) and *ultra vires*.[101] This is also the case if SARS does not comply in full with the jurisdictional requirements of an empowering provision. An act performed by SARS, where it cannot produce an 'authorisation letter' as contemplated in s 74 of the Income Tax Act, or where the 'authorisation letter' does not specifically authorise the official to conduct an inquiry and audit under ss 74A and 74B in respect of a specific and named taxpayer, would be beyond its powers.

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[97]*R v Jarvis* 2002 (3) SCR 757.
[98]*Ibid* s74(1)(f).
[99] Section 41(1) of the Constitution; Hoexter (2012) at page 255;
[100] Beinart B *Administrative Law* (1948) 11 THRHR 204 at page 215; *Fedsure Life Assurance Limited v Greater Johannesburg Transitional Metropolitan Council* 1999(1) SA 374 (CC) at para [58].
[101] Hoexter (2012) at page 114 footnote 33; See section 3.3: *Lawfulness supra*.

Section 6(2)(a)(i) of PAJA allows the judicial review of administrative action by SARS when it 'was not authorised to do so by the empowering provision'. The mere exercising of a power which has not been conferred upon SARS in accordance with an 'authorisation letter' would be in contravention of the lawfulness requirement of administrative law, and the principle of legality, and, as such, reviewable. The taxpayer would call upon SARS to show why its decision should not be set aside for lacking the appropriate authority. The application would rely on s 6(2)(a)(i) of PAJA, and failing that, in the alternative as contrary to the principle of legality in that SARS' conduct is unlawful and thus unconstitutional.

5.5.6.4 Jurisdictional facts

Before SARS is entitled to exercise its power to audit and investigate a taxpayer, it must satisfy the jurisdictional facts[102] set forth in ss 74A and 74B, including those referred to in the definition of 'the administration of the Act'.

The inquiry and audit must be in respect of a specifically named taxpayer. The investigating SARS officials must also hold the appropriate authorisation letter permitting the specific inquiry and audit. In complying with the definition of 'for the purposes of administration of the Income Tax Act', SARS must satisfy one or more of the eight sub-sections of that definition with supporting facts from the subject matter of the inquiry and audit. SARS will in any event at a later stage have to produce concrete evidence to justify any revised assessment, in accordance with the legitimate expectation created in its *Code of Conduct* read with the *SARS Income Tax Practice Manual*.[103]

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[102] See section 3.3.2: *Jurisdictional facts supra*; *South African Defence and Aid Fund and Another v Minister of Justice* 1967 (1) SA 31 (C) where Corbett J at page 33 states the following in relation to jurisdictional facts: Before the State President is entitled to exercise this power to declare an organisation to be an unlawful organisation he must be satisfied that one or more of the conditions set forth in paras (a) to (e) of sec. 2 (2) exist. In order to satisfy himself in this way he must have before him some information relating to such matters as the aims and objects of the organisation in question, its membership, organisation and control, the nature and scope of its activities, what its purpose is and what it professes to be.…The content of this kind of condition is often referred to as a 'jurisdictional fact' (see *Minister of the Interior v Bechler and Others*, 1948 (3) SA 409 (AD) at p. 442; Rose-Innes, *Judicial Review of Administrative Tribunals in S.A.*, pp. 99 - 100) in the sense that it is a fact the existence of which is contemplated by the Legislature as a necessary pre-requisite to the exercise of the statutory power. The power itself is a discretionary one. Even though the jurisdictional fact exists, the authority in whom the power resides is not bound to exercise it. On the other hand, if the jurisdictional fact does not exist, then the power may not be exercised and any purported exercise of the power would be invalid.

[103] Preiss, M, Silke J, & Zulman R H *The Income Tax Practice Manual* (November 2012), www.mylexisnexis.co.za.

Another requirement is compliance by SARS with the duties and responsibilities attached to exercising a discretion as denoted by the use of the word 'may' in ss 74A and 74B.

In *Dawood's* case[104] it was made clear that it is relevant to an inquiry and audit that where broad, unguided discretionary powers are given to SARS, guidelines should be provided and must be adhered to.

In this regard, *Dawood's*[105] case applies to the *Code of Conduct* and the unpublished guidelines in the *SARS Internal Audit Manual.* These guidelines should not be ignored by SARS in exercising its discretion in terms of ss 74A and 74B, unless specific justification exists for such a transgression. Any non-compliance with these internal guidelines would *prima facie* be indicative of SARS' non-compliance with its constitutional obligations, the rule of law and the principle of legality. It is also a transgression of SARS' duty to comply with its own self-imposed practices, indiscriminately. Impartiality and unbiased conduct by SARS are part of their constitutional obligations in terms of s 195(1) of the Constitution. These guidelines internally regulate the powers given to various SARS officials, where SARS officials must be satisfied as to whether or not they have: 'insight into … the business process of the taxpayer …'; 'screened the tax returns of the taxpayer and determined that they warrant an audit'; 'identified which elements of the tax return(s) need to be audited'; and obtained 'information from other sources … (on) … the potential issues of the relevant (audit) …'.[106]

In terms of s 6(2)(b) of PAJA (dealing with mandatory procedures), the failure on the part of SARS to comply with a 'mandatory' procedure or condition, would result in its conduct being unconstitutional, and invalid, and reviewable. These procedures are mandatory insofar as these guidelines have created a legitimate expectation for taxpayers and non-compliance by SARS will illustrate and highlight conduct 'otherwise unconstitutional or unlawful' contemplated in s 6(2)(i) of PAJA. This in turn will point towards transgressions in the headings discussed below.

5.5.6.5 Abuse of discretion

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[104] *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC).
[105] *Ibid*.
[106] *SARS Internal Audit Manual – Part 4: The Audit Process,* at pages 2-6.

An abuse of discretion in the context of ss 74A and 74B would result by SARS' failure to comply generally with the principles analysed in 3.3:*Lawfulness* above. This would include, by way of example, failure to comply with the specific statutory requirements of 'the administration of this Act' in terms of s 74 of the Income Tax Act, and failure to comply with its *Code of Conduct* read with its internal guidelines in the unpublished *SARS Internal Audit Manual* indicative that SARS are transgressing legitimate expectations and their constitutional obligations summarised and illustrated in these guidelines.

Another form of abuse of discretion occurs when SARS exercises its discretion with an improper or ulterior purpose or motive, such as conducting a criminal inquiry and audit[107] simultaneously under the guise of an inquiry and audit merely for civil regulatory purposes, using the provisions of ss 74A and 74B, as opposed to the extensive legislated criminal procedure provisions and s 74D of the Income Tax Act.[108]

In order to ensure that it does not exercise a discretion in an abusive manner, SARS must be mindful of the guideline principles in *Dawood's*[109] case and the principles set out in the *Stroud Riley*[110] case. The former supports a conservative approach by SARS in following its *Code of Conduct* and the guidelines in the unpublished *SARS Internal Audit Manual*.[111] This ensures that an audit and inquiry by SARS into the tax affairs of a taxpayer will only be considered necessary after initial preparatory work has been done to justify the inquiry and audit. If SARS finds nothing in the preliminary audit that is materially wrong, these internal guidelines state that the audit must cease – unless the risk indicators for that industry suggest that a further investigation is necessary due to the external intelligence garnered from that industry as a whole. *Stroud Riley*[112]compels SARS to exercise a discretion in favour of the taxpayer where the facts warrant this. This means that if a preliminary review into the tax affairs of the taxpayer does not deliver anything materially wrong, and in the absence of another justification to proceed with the

[107]*Broadway Mansions (Pty) Ltd vs Pretoria City Council*1955(1) S A 517 (A) at 522: 'The question is simply, did respondent have power purported to be exercised. Where power is granted for a specific purpose it cannot be used for a purpose other than that for which it was intended. In rotation to such other purpose the power does not exist.'
[108]See the discussion in this thesis on the Canadian Supreme Court case of *R v Jarvis* 2002 (3) SCR 757, at page 88.
[109]*Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC).
[110]*Stroud Riley & Co Ltd v SIR* 36 SATC 143.
[111] See section 3.2: *SARS Internal Audit Manual supra* at pages 2-6.
[112]*Ibid*.

audit, the proposed audit must be ceased. Compliance with these lawfulness principles is peremptory for SARS.[113]

If the taxpayer can show that the issue being investigated by SARS has already been investigated by it in the past, SARS will most likely be obliged to exercise its discretion in favour of the taxpayer and terminate the inquiry and audit, unless new facts have come to light.

5.5.6.6 Reasonableness

In determining the reasonableness[114] of the decision, SARS must satisfy a number of factors in justifying the reasonableness of its decision:

a) the nature of the decision;
b) the range of factors relevant to the decision;
c) The reasons for the decision;
d) The nature of the competing interests involved and 'the impact of the decision on the lives and well-being of those affected.[115]

In this regard, SARS decisions must be rationally[116] related to the purpose for which the power was given to them. Otherwise, its conduct is arbitrary and inconsistent with this requirement.[117] If the purpose of the inquiry and audit is to obtain evidence for a criminal investigation that is running in tandem with the current inquiry and audit, the purpose is contrary the jurisdictional requirements of ss 74A and 74B, and s 35(3)(j) of the Constitution (dealing with the unlawfulness of being compelled[118] to give self-incriminating evidence by a taxpayer).

Any transgression of the reasonableness requirement is also subject to review.

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[113]See section 3.3: *Lawfulness supra*.
[114] See section 3.4: *Reasonableness supra*.
[115]*Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) at para [45].
[116] In *University of Cape Town v Ministers of Education & Culture* (*House of Assembly & House of Representatives*) 1988 3 SA 203 (C) ; LAWSA Volume 1 2nd ed *Administrative Law* Lexis Nexis at para 139 footnote 6. See also s 6(2)(f) of PAJA.
[117]*Pharmaceutical Manufacturers Association of South Africa and another: In Re: Ex Parte President of the Republic of South African and Others* 2000 (2) SA 674 (CC) at para [85].
[118] Sections 35(3)(h)-(j) of the Constitution; See also *ITC 1818* 69 SATC 98 and *Seapoint Computer Bureau (Pty) Ltd v McLoughlin and de Wet NNO* 1997 (2) SA 636 (W).

5.5.6.7 Natural justice and Procedural Fairness

Natural justice comprises three basic principles, namely, the principle of bias, the *audi alteram partem* principle and the general duty of SARS to act fairly. In determining the standards required of a decision maker, the courts tend to use the terms 'natural justice' and 'fairness' interchangeably.[119] These concepts are now entrenched in PAJA, which forms the starting point in determining what remedies are available to the taxpayer, where SARS transgresses any of its constitutional obligations in this regard. The *audi alteram partem* principle and the general duty of SARS to act fairly is dealt with in ss 3 and 5 of PAJA where SARS is required to give fair notice, the opportunity for the taxpayer to respond, and adequate reasons in making a decision that is 'administrative action' in terms of the definition of 'administrative action' in PAJA. Failure to do so without proper justification would immediately trigger one or more of the codified grounds of review in s 6(2)(a) to (i) of PAJA. As to bias, this is mentioned as a constitutional obligation in s 195(1)(c) of the Constitution. But a transgression of this principle would also be covered by the codified grounds of review in s 6(2)(a)(iii) of PAJA.

Bias may occur where the SARS assessors randomly choose a taxpayer to audit or inquire into because they are expected to raise revised assessments in order to meet their internal financial targets, and thus their contractual commitments to SARS. In this case, it is virtually impossible for the assessors to act in an impartial manner, because their motivation is driven by the fulfilment of a budget imposed upon them by management. Tell-tale indicators are audits or inquiries that take place before SARS is prepared to refund taxes to the taxpayer, or where the three-year prescription of the taxpayer is imminent. Often the SARS officials will not have done their mandatory preparatory work as required in terms of SARS' *Code of Conduct* read with its internal guidelines in the unpublished *SARS Internal Audit Manual* to determine whether or not an inquiry and audit is warranted. SARS, in practice, will simply commence the audit. This conduct on the part of SARS is questionable and suspiciously biased, and arguably a mere fishing expedition. For that reason, grounds for a review application in terms of s 6(2)(a) (lack of authority), (c) (procedurally unfair), (h) (unreasonableness) and (i) (otherwise

[119] Routledge Cavendish *Constitutional Law* 5ed. (2006) at page 145.

unconstitutional or unlawful) (amongst others) of PAJA would exist. Similar grounds would be applicable in terms of the principle of legality. The 'just cause' defence would also be applicable.

5.5.6.8 Legitimate expectations

Depending upon the circumstances of the case, a taxpayer may have legitimate expectations[120] that a hearing will be given, or that he or she will be consulted before a decision is taken, or that a decision will be taken in his or her favour when SARS seeks to invoke its powers in terms of ss 74A and 74B. Such legitimate expectations may arise because a taxpayer has relied on an arrangement (SARS has agreed to enter into an exchange of information with the taxpayer), a promise (SARS has agreed not to take further steps until certain undertakings for information have been concluded with the taxpayer – such as a letter of findings) or previous conduct by SARS where it has become practice or customary for SARS to exchange information with the taxpayer before making formal demands in terms of ss 74A and 74B – such as compliance with SARS' *Code of Conduct* read with its internal guidelines in the unpublished *SARS Internal Audit Manual*.

In many instances these open lines of communication will not exist between SARS and the taxpayer. So, in order for the taxpayer to determine the lawfulness, reasonableness and procedural fairness[121] of SARS' actions in commencing any inquiry and audit, it is necessary for the taxpayer to obtain certain key information that SARS to ensure that their conduct is constitutionally compliant with their constitutional obligations of a high degree of professional ethics being displayed, impartiality, fairness and unbiased conduct, with accountability and transparency, as envisaged in s 195(1) of the Constitution, read together with SARS' general duty to give adequate notice of its decision to inquire and audit in terms of s 3(1) and (2) of PAJA, and adequate reasons in terms of s 5(1) and (2) of PAJA as to why the inquiry and audit is required. All these constitutional obligations

[120]Section 3.6: *Legitimate Expectations supra*; See also Williams R C et al *Silke on Tax Administration* (April 2012) Lexis Nexis at para 3.25 generally.

[121]See sections 3.3: *Lawfulness*, 3.4: *Reasonableness* and 3.5: *Procedural Fairness*, *supra*; LAWSA Vol 5(3) 2nd ed at para 165; *Commissioner of Taxes v CW (Pvt) Ltd* 1989 (3) ZLR 361 (S) at 370F-372C; *Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Limited* 1928 AD 220, 236-7; and *National Transport Commission v Chetty's Motor Transport* (Pty) Ltd 1972 (3) SA 726 (A); See also *Local 174 International Brotherhood of Teamsters v US*, 240 F.2d 387; *US v Newman* 441 F.2d 170; *US v Coopers and Lybrand* F Supp 942; *Hubner v Tucker* 245 F.2d 35; *First National Bank of Mobile v US* 160 F.2d 532.

form part of SARS' *Code of Conduct*, creating the legitimate expectations (with the constitutional obligations imposed on them) that taxpayers are entitled to rely upon.

Should SARS fail to adhere to these legitimate expectations (with the supporting constitutional obligations), the taxpayer may refuse to submit to the requests of SARS in terms of ss 74A and 74B. The appropriate defence to SARS raising the criminal provisions of s 75(1)(b) of Income Tax Act would be that the taxpayer's conduct is justified, and that the taxpayer has 'just cause 'not to answer to SARS' request, until SARS complies with its legitimate expectations, and other constitutional obligations.

Should SARS seek to obtain the information by force, it would have to bring the appropriate application to court in terms of s 74D[122] of the Income Tax Act setting out in an *ex parte* application what its suspicions regarding the taxpayer are – so SARS would have to provide a form of 'adequate reasons' anyway. The process of providing information to the court is in essence no different to providing the taxpayer with the information justifying the decision by SARS in terms of ss 74A and 74B.The taxpayer would also be entitled to the information placed before the court to justify the application brought by SARS in terms of s 74D.

Once a legitimate expectation has been created, any attempt by SARS to avoid that legitimate expectation can be met by a review application, and ss 6, 7 and 8 of PAJA, or the principle of legality, would be appropriate. The transgression of a legitimate expectation will be reviewable directly in accordance with a transgression of the codified ground of review that SARS' conduct is unlawful or unconstitutional as envisaged in s 6(2)(i) of PAJA, or contrary to certainty and compliance with the rule of law in terms of the constitutional principle of legality.

5.5.6.9 Constitutional obligations in terms of s 195(1)

[122] In *Pullen NO Bartman NO & Orr NO v Waja* 1929 TPD 838; *Haynes v Commissioner for Inland Revenue* 2000 (6) BCLR 596 (T); See also *Hunter et al v Southam Inc* (1984) 2 SCR 184, (1984) 11 DLR (4th) 641 (SCC); Williams R C et al*Silke on Tax Administration* (April 2009) Lexis Nexis at para 8.12 generally.

What is also clear from case law[123], and the wording of ss 1(c), 33, 41(1), 195(1) and 237 of the Constitution, is that the constitutional obligations set out in s 195(1) of the Constitution must be followed, promoted and 'must be performed diligently and without delay.' This includes:

(a) a right to a high standard of ethics from SARS;
(b) fairness, absence of bias, and impartiality;
(c) accountability; and
(d) transparency.

As previously stated, these constitutional obligations placed upon SARS are also repeated in s 4(2) of the SARS Act to ensure proper compliance by SARS with these duties. Any transgression of these constitutional obligations will amount to SARS acting *ultra vires*[124] the Constitution, and that in itself would amount to conduct that is inconsistent with the Constitution and 'invalid'.

Section 172(1) of the Constitution is clear: 'When deciding a constitutional matter within its power, a court…must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and…may make an order that is just and equitable…'. If a taxpayer has a complaint about unconstitutional conduct of SARS, such as SARS not complying with its constitutional obligations in terms of ss 1(c), 33, 41(1), 195(1) and 237 of the Constitution, it must approach the appropriate court for relief. In terms of s 172(1)(b) and (2)(b) the court may make an order that is just and equitable, and grant a temporary interdict or other temporary relief to the taxpayer.

The appropriate relief would be sought in terms of the ground of review in s 6(2)(i) being conduct 'otherwise unconstitutional or unlawful', or in terms of a transgression of the principle of legality – the rule of law, supreme to the Constitution, has been transgressed.

5.6 SUPPORT FOR REVIEW OF SS 74A AND 74B

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[123] *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC) at para 44; *The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Ano v Ngxuza and Others* 2001 (4) SA 1154 (SCA) at para [15] footnote 23; *Reuters Group Plc and Others v Viljoen NO and Others* 2001 (2) SACR 519 (C) at para [46]; *Carephone (Pty) Ltd v Marcus NO and Others* 1999 (3) SA 504 (LAC) at para's [9]-[14].
[124] See section 3.3: *Lawfulness supra*.

Throughout this thesis, the difficulties surrounding the definition of 'administrative action' in PAJA, and the general submission that a discretion under ss 74A and 74B may not fall into that definition, have been discussed.

Section 6(2) of PAJA codified the grounds of review.[125] Although PAJA only applies to the review of 'administrative action' as defined this does not mean that 'administrative action that is excluded from the definition of 'administrative action' is not reviewable: 'like all other exercises of power by public officials and public bodies, such actions are reviewable for compliance with the founding value of the rule of law, including its principle of legality, entrenched in section 1(c) of the Constitution, at the very least.'

In *Nomala v Permanent Secretary, Department of Welfare and Another*,[126] the court held that a matter was ripe for adjudication in relation to the lawfulness of administrative action where prejudice was inevitable even though the action had not yet occurred.

These judgments[127] support the conclusion that the provisions of ss 74A and 74 are ripe for review in the appropriate circumstances, despite the general objections that maybe raised by SARS that its discretion does not fall into the definition of 'administrative action' in PAJA, or the fact that the provisions are investigative in nature, and preliminary as part of a multi-staged investigation. The exercise by SARS of its decision to conduct an inquiry and audit is the exercise of a power, and establishing the lawfulness, reasonableness and procedural fairness of the inquiry and audit require compliance by SARS with constitutional and other legislated jurisdictional facts.[128]

In light of a more recent development in the Supreme Court of Appeal that may have an

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[125] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC).

[126] 2001 (8) BCLR 844 (E): 'Even at common law, it was not only actual infringements of rights which were considered 'ripe' for adjudication. Courts have been prepared to adjudicate on the lawfulness of administrative action measured against the yardstick of whether prejudice was inevitable, irrespective of whether the action had occurred or not.' (*Transvaal Coal Owners Association and Others v Board of Control* 1921 TPD 447 at 452; *Gool v Minister of Justice* 1995 (2) SA 682 (C); *Afdelings-Raad van Swartland v Administrateur, Kaap* 1983 (3) SA 469 (C). A similar approach to this question was adopted by the Constitutional Court in the Levin matter where the provisions of the legislation sought to be declared inconsistent with the Constitution applied to an inquiry that had not yet commenced. (*Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) BCLR 1 (CC) at 981B–H (para's [165]–[166]).

[127] This is also in line with Kriegler J's judgment in *Metcash Trading Limited v Commissioner, South African Revenue Service* 2001(1) SA 1109 (CC).

[128] See also the discussion on lawfulness, reasonableness and procedural fairness in sections 3.3, 3.4 and 3.5 *supra*.

impact on the submissions made in this thesis, it is necessary to comment on the dictum in *Fuel Retailers of Southern Africa v Director General, Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and other*s,[129] where it was held 'that *'[t]he cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past*.'

In the *Bato Star* case, O'Regan J[130] contemplates 'causes of action for judicial review of administrative action that do not fall within the scope of PAJA', such as in terms of the principle of legality. She also stated that common law that remains relevant to administrative review will be developed on a case-by-case basis as the courts interpret and apply the Constitution and PAJA.[131] This would include the development of the constitutional principle of legality in addressing those review areas that fall outside the scope of the definition of 'administrative action in PAJA,[132] if one is to accept that the definition of 'administrative action' is not wide enough to include the powers exercised by SARS under ss 74A and 74B relevant to administrative review will have to be developed on a case-by-case basis in the courts interpreting the provisions of PAJA and the Constitution. But one area that is made clear by the Supreme Court of Appeal in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration*[133] is the fact that the grounds for review in s 6 of PAJA inform the development of the common law as to the extent of the grounds of review that may be applied in reviewing powers such as those of SARS under ss 74A and 74B (through the principle of legality, where the provisions of PAJA are held not to be applicable).

However, if one is to argue successfully that the exercise of powers by SARS fall within the definition of 'administrative action' as submitted in this thesis, then the grounds of review in terms of s 6(2) of PAJA are available directly to the taxpayer in reviewing the powers of SARS under ss 74A and 74B.[134]

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[129][2008] 1 All SA 627 (C) at page 632.
[130] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC).
[131]Ibid. at para [22].
[132] For instance, wrong or non-performance giving rise to common-law review; See *Hira v Booysen*[1992] 2 All SA 344; *Shidiack v Union Government* (*Minister of the Interior*) 1912 AD 642; *Britten v Pope* 1916 AD 150.
[133] 2007(1) SA 576 (SCA) at para [25].
[134] Similar tot he restrictions placed on the meaning of ‚administrative action' under PAJA, in American jurisprudence, only final administrative decisions are subject to judicial review. In order to be final, conduct or action must mark the

5.7 PITFALLS IN BRINGING THE RULE 53 APPLICATION

Exercising SARS' discretion in terms of ss 74A and 74B is final because the exercise of the discretion in ss 74A and 74B is of itself not of a tentative or intermediate nature. The decision stands on its own, although it is part of a more lengthy process, culminating in a possible later letter of findings and then finally a revised assessment. The decision determines rights or obligations on the part of taxpayers in that they must now furnish information, documents or things, which they may already have provided. Legal consequences flow from the action, in that jurisdictional facts must be complied with, both in terms of the provisions of ss 74A and 74B, and in terms of the Constitution.

When SARS makes demands under ss 74A and 74B, its decision to demand is final in nature. Has the complainant exhausted all administrative remedies? There is no objection and appeal process for ss 74A and 74B. There is no other internal remedy. The taxpayer may also have attempted to make contact with SARS to obtain answers as to the purpose of the inquiry and audit, and would probably have been met with rejection.

Is the matter ripe, in that it is sufficiently developed for judicial resolution? Here the fact pattern of the matter will determine whether or not a court will be convinced. However, the prejudice that will be suffered by the taxpayer immediately after the inquiry and audit, where SARS has acted unlawfully, unreasonably or unfairly, is severe enough to make the matter ripe for review prior to any revised assessment being raised. The 'pay now argue later' principle looms.

Apart from the issues of finality, exhausting all internal remedies, and ripeness of the matter, the case of *Contract Support Services (Pty) Ltd and Others v CSARS*[135] is a good starting point in determining the requirements for bringing a successful review application against SARS in terms of PAJA or a Rule 53 application.

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consummation of its decision-making process, and must not be of a tentative or intermediate nature. Furthermore the action must be one by which 'rights or obligations have been determined', or from which 'legal consequences flow' - *Following American jurisprudence* in Funk W F et al *Administrative Law 2nd ed* (2006) Aspen Publishers at page 234 – 239.

[135] 1999(3) SA 1133 (WLD), 61 SATC 338.

In this case, SARS had obtained a search and seizure warrant in terms of Section 57D of the Value Added Tax Act[136] and Section 74D of the Income Tax Act to search the premises where *Contract Support Services (Pty) Ltd*[137] conducted business.

Contract Support Services (Pty) Ltd conducted business as the agent for various contractors and collected moneys from clients on behalf of the contractors. After SARS had conducted the search and seizure operation and had seized documents, it caused notices in terms of Section 47 of the Value Added Tax Act to be served on the debtors of *Contract Support Services (Pty) Ltd* and others (the Applicants in the case).

This resulted in the Applicants making an application to the High Court for an interdict as a matter of urgency.[138] The Applicants asked the Court for various orders, *inter alia* to direct that SARS and others to make available to the Applicants all documents (other than those protected by legal professional privilege) and other information in terms of Section 32 of the Constitution. The Applicants also requested the Court to declare the search and seizure warrant issued by the Fifth Respondent (Judge Snyders) on 4 November 1998 to be set aside. In addition, the Applicants requested the Court to declare that the Value Added Tax Assessment issued should be corrected or set aside in terms of Rule 53(1)(a) of the Uniform Rules of Court.

The Applicants obtained an order before Malan J. This order was, however, rescinded on the same day by application from SARS after the leading of *viva voce* evidence. Thereafter the matter was postponed to the urgent roll.

At the hearing of the matter before court, Brett AJ first considered whether the Court was competent to consider the interim relief requested by the Applicants. In this regard the Court referred to the matter of *Safcor Forwarding (Pty) Ltd v VNTC*[139] where Corbett J A held that the *rule nisi* is available to applicants that can show *prima facie* that their rights have been infringed and that they will suffer real loss or disadvantage if compelled to rely on normal procedures to bring the dispute to the attention of the courts. He went on to

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[136] Act 89 of 1991.
[137] *Contract Support Services (Pty) Ltd and Others v Commissioner of Receiver of Revenue and Others* 1999 (3) SA 1133 (W).
[138] For the principles to be applied in interim interdicts, see *Cape Town Municipality v LF Boshoff Investments (Pty) Ltd* 1969 (2) SA 256 (C).
[139] 1982(3) SA 654AD at pages 674H-675D.

state that: 'The decisions of public bodies or officialdom sometimes bear hard on the individual. The impact thereof may be sudden and devastating. Therefore, as in the case of other types of litigation, applications for the review of such decisions may require urgent handling and in proper circumstances the grant of interim relief. In my opinion it would be unfortunate if our review procedures did not admit of this.'

Brett AJ held, after quoting extensively from the case of *Safcor Forwarding (Pty) Ltd v NTC*,[140] that the court was competent to grant interim relief to the Applicants if they succeeded in proving a *prima facie* case.

The next issue to decide was whether the notice issued by SARS in terms of Section 47 of the Value Added Tax Act should be set aside on review. More particularly, Brett AJ had to decide whether the Applicants were entitled to approach the court to review the decisions that SARS had taken to appoint agents in terms of Section 47 of the Value Added Tax Act, and secondly whether the Applicants had made a *prima facie* case on the merits of the matter.

Counsel for SARS contended that a notice under Section 47 of the Income Tax Act was not capable of review by the High Court. The basis for this argument was that the obligation on the taxpayer to pay (because of the self-assessment system of our Value Added Tax Act), exists notwithstanding any objection and appeal noted by the Applicants, by virtue of the operation of the various sections such as Section 28(1), 40, 48(6) and 49 of the Value Added Tax Act, and that the decision to use Section 47 of the Value Added Tax Act did not create any further obligation for a taxpayer and therefore did not constitute an administrative decision capable of review.

Brett AJ did not agree with this contention of the counsel for SARS. He referred to the unreported judgment of *Yusuf Vahed and Others v The Commissioner of Inland Revenue*,[141] where Swart J decided that the 'satisfaction' of SARS was an administrative decision, separate and distinguishable from the merits of the rest of the case, in that

[140] 1982 (3) SA 654 (AD).
[141] Case Number 28225/97.

instance the additional assessment. The relevant excerpt from the judgment of *Yusuf Vahed and Others v The Commissioner of Inland Revenue*[142] is as follows:

> I am accordingly of the view that the decision to issue notices in terms of Section 47 of the VAT Act constituted an administrative decision affecting the rights of the applicants to freely conduct their bank account held at the third Respondent and to receive payment from their debtors. For these reasons I consider *the decision to issue the notices* in terms of Section 47 *capable of being reviewed and set aside*.[143] (Emphasis supplied)

The only issue left to decide was whether the Applicants had in fact made a *prima facie* case on the merits for the interim relief sought. In this regard the Applicants relied on Item 23(2)(b) of the Constitution[144] prior to the promulgation of PAJA, where it is stated that every person has the right to:

(a) lawful administrative action where any of their rights or interests are affected or threatened;
(b) procedurally fair administrative action where any of their rights or legitimate expectations are affected or threatened;
(c) be furnished with reasons in writing for administrative action which affects any of their rights or interests; and
(d) administrative action which is justifiable in relation to the reasons given for it where any of their rights are affected or threatened.

The Applicants relied specifically on the *audi alteram partem* rule. Brett AJ agreed with SARS' submissions that the *audi alteram partem* rule did not apply[145] under these circumstances:

> I agree with the submission made … that not all administrative acts require the application of the *audi alteram partem* rule before they are

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[142] *Ibid*.
[143] This is in line with Kriegler J's judgment in *Metcash Trading Limited v Commissioner, South African Revenue Service* 2001(1) SA 1109 (CC).
[144] Schedule 6 of the Constitution.
[145] At page 350.

> given effect to. Indeed Section 47 itself requires no such prior hearing. I also agree … that to require a prior hearing would defeat the very purpose of the notice. It would alert the defaulting VAT payer to the intention to require payment from the latter's debtors and so enable the defaulting taxpayer to receive payment of the funds due and to enable the taxpayer to spirit such funds away. *Where prior notice and a hearing would render the proposed act nugatory, no such prior notice or hearing is required.* I refer in this regard to the case of *Gardener v East London Transitional Council and Others* 1996(3) SA 99 (ECD) at 116 D-G. (Emphasis supplied)

Brett AJ then quoted from the *Gardener v East London Transitional Council and Others*[146] where it is stated that fairness is a relative concept that must be viewed in the light of the relevant circumstances. The procedure must be fair not only to the holder of the right affected by the administrative act but also the executive or administration acting in the public interest. It was held that the *audi alteram partem* principle is not applicable to every administrative act. Such an interpretation would lead to the possible misuse of the Constitution.

Brett AJ then found specifically that the provision of Section 47 of the Income Tax Act excluded the *audi alteram partem* principle. He also found that the Applicants did not make out a *prima facie* case for interim relief and found in favour of SARS by not granting any interim relief to the taxpayers.

This case illustrates the technical difficulties facing a taxpayer who is seeking to bring a review application either in terms of PAJA (on the basis that the taxpayer's rights have been adversely affected, which create a direct, external legal effect as set out in the definition of 'administrative conduct' in PAJA), or in terms of Rule 53. These technical difficulties can be summarised as follows:

[146] 1996(3) SA 99 (ECD) at para's 116 D-G.

(a) where taxpayers seek interim relief the provisions of *Safcor Forwarding (Pty) Ltd v VNTC*[147] must be adhered to; the taxpayer must show *prima facie* that its rights have been infringed and that it will suffer real loss or disadvantage if compelled to rely solely on the normal procedures for bringing disputes to the tax court after revised assessments are issued. *Metcash Trading Limited v C SARS and Another*[148]and *Yusuf Vahed and Others v The Commissioner of Inland Revenue*[149] is authority that the decision taken by SARS to conduct an audit is a separate decision, that in itself is subject to the inherent review jurisdiction of the High Court;

(b) the question will be asked whether the subject matter of the review is in fact reviewable by the High Court; in this regard the issue that may be raised by SARS will be the fact that it is not 'administrative action' as defined in PAJA. SARS may also contend that the matter is not final or 'ripe' for review, as the decision relates to conduct which forms part of a multi-staged decision-making process. SARS may also contend that the final decision will be made when the revised assessment is issued by SARS in the future. It is at this stage that the taxpayer will be given the full opportunity to exercise its rights (through the objection and appeal process). In this regard the reference by Brett AJ to the fact that the word 'satisfaction' denotes an administrative decision which is separate and distinguishable from the merits of the rest of the case (in the matter of *Contract Support Services (Pty) Ltd*)[150] will assist the taxpayer in arguing that the use of the word 'may' denotes a discretion being exercised by SARS, which is separate from any merits of the rest of the case, capable of review. *Metcash Trading Limited v C SARS and Another*[151] and *Yusuf Vahed and Others v The Commissioner of Inland Revenue*[152] is authority that the decision taken by SARS to commence an audit of a taxpayer is a separate reviewable decision. That decision may result in significant transgressions of taxpayers constitutional rights in the near future in line with

[147] 1982(3) SA 654AD at pages 674H-675D.
[148] 2001(1) SA 1109 (CC).
[149] Case Number 28225/97, Witwatersrand Local Division.
[150]1999 (3) SA 1133 (W).
[151] 2001(1) SA 1109 (CC).
[152] Case Number 28225/97, Witwatersrand Local Division.

various authorities.[153] In the alternative, if it is held that the decision to audit is not an administrative decision or action, the constitutional principle of legality will apply where lawfulness, reasonableness, fair procedure and reasons apply to the conduct of SARS;[154]

(c) in most instances, taxpayers will rely on the *audi alteram partem* rule. Arguments will have to be proffered why this rule would apply in the instance of ss 74A and 74B, as discussed in the *Contract Support Services (Pty) Ltd*[155], and analysed in this thesis.[156] The primary reason given by the taxpayer would be that, in accordance with s 3(1) and (2), read with s 5(1) and (2) of PAJA, and s 195(1)(f), SARS is to be held accountable and must adhere to just administrative procedures in arriving at any decision it takes in terms of ss 74A and 74B. Such a decision would ultimately give rise to serious consequences for the taxpayer in the form of a revised assessment in the future, which could be prejudicial to the taxpayer and would adversely affect the rights of the taxpayer, with direct, external legal effect. Unlike the circumstances of the *Contract Support Services* case,[157] the application of the *audi* principle would not be a misuse of the Constitution resulting in the ss 74A and 74B process being nugatory.[158] The decision by SARS to access information, documents and things to base its findings on for a revised assessment, is final. Once the revised assessment is issued the 'pay now argue later' principle becomes immediately applicable, as any challenge against the findings of SARS does not suspend the payment of the revised assessment tax that is due. For the taxpayer to wait for the completion of the audit and the issuance of the revised assessment is too late if the taxpayer is to challenge

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[153]Hoexter (2012) at page 229 footnote 438; *Du Preez v Truth and Reconciliation Commission* 1997(3) SA 204 (A) and *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999(2) SA 709 (SCA); *Ferreira v Levin NO and Others; Vryenhoek and Others V Powell NO and Others*1996 (1) BCLR 1 (CC) at para's [165] – [166]; See also Croome B *Taxpayers' Rights in South Africa* Juta 2010 at page 207; Wheelright K *Taxpayer' Rights in Australia in Bentley D Taxpayers' Rights: An International Perspective* Revenue Law Journal Bond University: Queensland 1998 at page 49; *Park-Ross and Another v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C) paras [1641-165A]; *Nomala v Permanent Secretary, Department of Welfare and Another* 2001 (8) BCLR 844 (E); *Transvaal Coal Owners Association and Others v Board of Control* 1921 TPD 447 at 452; *Gool v Minister of Justice* 1995 (2) SA 682 (C); *Afdelings-Raad van Swartland v Administrateur, Kaap* 1983 (3) SA 469 (C).
[154] Hoexter (2012) at pages 121-5.
[155]*Contract Support Services (Pty) Ltd and Others v Commissioner for South African Revenue Service & Others* 1999 (3) SA 1133 (W).
[156] See sections 3.5: *Procedural Fairness* and 3.5.2: *Audi Alteram Partem supra.*
[157]*Op. cit.*
[158] As envisaged in s 75(1)(b) of the Income Tax Act.

any conduct of SARS that is constitutionally invalid, whilst SARS invokes its extensive powers. This is in accordance with the principles set out in various authorities, including *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*.[159] The Constitutional Court entertained an application from the applicant to determine a constitutional issue before the event actually took place. Had the event taken place first, the constitutional rights of the applicant would then have been transgressed – not to be compelled to give self-incriminating evidence.[160] The taxpayer facing a SARS audit is in a similar position to the applicant in the *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*[161]case, and the taxpayer is entitled to seek clarification from SARS as to the scope and purpose of the audit, and in the process to obtain certainty from SARS that it will comply with all of its constitutional obligations in favour of taxpayers.

Finally, in *Kimberley Girls' High School and another v Head of Department of Education, Northern Cape Province and others*[162] the court reiterated that '(t)he onus of establishing that there are grounds on which a court can review a functionary's decision, rests on an applicant'. The taxpayer has the onus of establishing that there are grounds on which a court can review SARS' conduct – as discussed throughout this thesis. This will be made by the taxpayer in the application for review in terms of Rule 53 of the SARS decision in terms of ss 74A and 74B.

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[159]1996 (1) BCLR 1 (CC) at para's [165] – [166].
[160] Sections 35(3)(h)-(j) of the Constitution; See also *ITC 1818* 69 SATC 98 and *Seapoint Computer Bureau (Pty) Ltd v McLoughlin and de Wet NNO* 1997 (2) SA 636 (W).
[161]*Supra* footnote 162.
[162] [2005] 1 All SA 360 (NC), in a case where s 195(1) of the Constitution was also considered as part of the grounds of review under consideration; See also *Chirwa v Transnet Limited and Others* 2008 (4) SA 367 (CC) (28 November 2007) at para's [74] – [76], [146] and [195]: '[76] Therefore although section 195 of the Constitution provides valuable interpretive assistance it does not found a right to bring an action.'

CHAPTER 6
THE IMMEDIATE FUTURE

6.1 INTRODUCTION 204

6.2 THE NEW PROPOSED TAX ADMINISTRATION ACT 206

6.3 RELEVANT MATERIAL 209

6.4 REQUEST FOR RELEVANT MATERIAL, AUDIT SELECTION AND FIELD AUDIT 211

6.5 CONCLUSION 220

6.1 INTRODUCTION

In 2005 the Minister of Finance announced in the Budget Review 2005 a project 'to incorporate into one piece of legislation certain generic administrative provisions, which are currently duplicated in the different (tax) Acts.'

This project culminated in the release for public comment the proposed Tax Administration Act 28 of 2011,[1] and with a request that comments be submitted by the public.

Many criticisms were submitted to the draft legislation questioning the constitutional validity of many of its severely encroaching provisions dealing with the entitlement of SARS to conduct random investigations, obtain any information in respect of any person and not just in relation to the affairs of a taxpayer, conduct warrantless search and seizure operations, enforce tax collection procedures against third parties in their personal capacities in an attempt to recover taxes due by a taxpayer, and seek to raise 'jeopardy assessments' against taxpayers even before the tax information is due by that taxpayer to SARS for assessment.[2] Other than the information gathering provisions in the proposed Tax Administration Act, the other provisions fall outside the scope of this thesis. In summary, some of the negative consequences of the proposed Tax Administration Act can be summarised as follows from an opening statement by the writer to various professional audiences at continuing tax training sessions conducted for the South African Institute of Tax Practitioners throughout South Africa commencing March 2010[3]:

The Tax Administration Act when it finally takes effect on 1 October 2012, will allow SARS to have some draconian powers. These include: on raising a revised assessment SARS will be entitled to immediately enforce the pay now argue later provisions of the Act(despite legitimate expectations granted in the past by the Commissioner that

[1]Hereinafter referred to as the 'Tax Administration Act'.

[2] Copies of some of the criticisms submitted by the Law Societies of South Africa ("LSSA"), the KwaZulu-Natal Law Society, the South African Institute of Tax Practitioners, the Advocates Bar Association of South Africa, professional firm Edward Nathan Sonnenberg and the South African Institute of Professional Accountants are available on the website www.TaxRiskManagement.com (last accessed 18 March 2013).

[3] Between 8 – 12 March 2010 in Cape Town, Port Elizabeth, Durban, Johannesburg, Bloemfontein, George and Pretoria, under a training series called *SAIT Tax Administration Bill* by the writer in his capacity as adjunct Professor of Law, Thomas Jefferson School of Law, San Diego, California – see the website the South African Institute of Tax Practitioners ("SAIT") www.thesait.org.za (last accessed 18 March 2013). This series of lectures was repeated nationwide in South Africa during October 2011 and to be repeated in October 2012.

application can be made for the suspension of payment under certain broad circumstances, and despite the past automatic suspension of the principle in terms of the Supreme Court of Appeal judgment in *Singh v C:SARS*[4] until the objection process is completed); SARS will be entitled to obtain an asset preservation order; enforce the assessment against third parties personally involved in the financial management of the taxpayer; apply to court to withdraw the taxpayer's authorisation to conduct business in South Africa; and require the taxpayer to cease trading. It can be anticipated that SARS will use these powers liberally.

The provisions that will replace ss 74A and 74B are contained in the definitions of 'administration of a tax Act' and 'relevant material' read together with ss 3, and 40 through 49 of the proposed Tax Administration Act, and in particular s 46 dealing with the request by SARS for 'relevant material' – 'foreseeably relevant' and with 'reasonable specificity', within a 'reasonable period'.

The provisions, are couched more widely to allow the inspection and investigation of persons who may not be taxpayers, the specific inclusion of random audits[5], and granting SARS specific powers to investigate in its scope of an audit whether or not an offence has been committed, in respect of tax offences where a senior SARS official may lay the appropriate criminal charges.

It is, however, submitted that taxpayers may have stronger 'just cause'[6] not to participate in a proposed audit by virtue of some of the stated extended SARS powers, and may in fact have greater constitutional justification in having the decisions taken by SARS to embark upon an audit reviewed by the courts – in that the current 'softer' environment to suspend the 'pay now argue later' principle will be eliminated, and the fact that SARS is given express and specific powers to investigate a taxpayer, obtain self-incriminating evidence from that taxpayer, and then use it to lay a criminal charge against the taxpayer. The taxpayer is expected to incriminate itself (contrary to the Bill of Rights s 35(3)(j) guarantee) by handing over any 'relevant material' that SARS may require as being

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[4]2003 (4) 520 (SCA).
[5] This is a specific attempt to circumvent principles in jurisprudence such as that set out in the American case of *US v Third Northwestern National Bank* 102 F Supp. 879.
[6]See section 3.8: *'Just Cause' Defence supra*.

useful to conduct the audit, for SARS to then simply use that information[7](or information derived from that information handed over in self-incriminatory circumstances) as evidence to prove beyond a reasonable doubt the guilt of the taxpayer in committing a statutory or common law tax-related offence. This is contrary to the principles laid out by the Constitutional Court in *Ferreira v Levin NO and Others; Vryenhoek and Others V Powell NO and Others*[8] in a similar instance where a person was compelled[9] to make available self-incriminating evidence. The Constitutional Court held that where public policy dictates that self-incriminating evidence should be made available by a person, that evidence cannot be used to incriminate that person both in its direct form, or any other evidence derived from it. This issue falls outside the scope of this thesis, but the constitutional issue that flows from it will no doubt give rise to much litigation, and opportunities for taxpayers to raise the 'just cause' defence to refuse to participate in any SARS audit by refusing to submit to SARS' demands for 'relevant material'.

Despite the above criticisms and comments, it is the writer's submission that the new proposed provisions in the Tax Administration Act do not affect the submissions and conclusions reached in this thesis.

6.2 THE NEW PROPOSED TAX ADMINISTRATION ACT

The definition in the new proposed Tax Administration Act for 'administration of a tax act' as defined in s 3(2) in so far as it is used in selecting taxpayers for inquiry and audit in ss 40 through 49 of the Tax Administration Act, states that SARS is responsible for the administration of a tax act, which in turns basically repeats the definition (with a few exceptions mentioned *infra*) of 'the administration of this act' contained in the current s 74 of the Income Tax Act and as one of the jurisdictional facts in ss 74A and 74B.

The definition is wider in that included in its ambit is the ability for SARS to: determine the future tax liability of a person (who may not even be a current taxpayer); establish the identity of a person to determine such a future tax liability; and an emphasis on the ability for SARS to investigate tax related offences and lay the appropriate statutory and

[7]Section 72 of the Tax Administration Act, unless a court directs otherwise.
[8]1996 (1) SA 984 (CC).
[9] Sections 35(3)(h)-(j) of the Constitution; See also *ITC 1818* 69 SATC 98 and *Seapoint Computer Bureau (Pty) Ltd v McLoughlin and de Wet NNO* 1997 (2) SA 636 (W).

common law criminal charges, and do all reasonably required for the investigation and prosecution of tax offences.

It is with reference to the later administrative action that the writer believes constitutional challenges will occur, either in challenging the law as being unconstitutional in its current form, in that it does not purport to give a clear line of separation between a necessary administrative audit for SARS to revisit the tax compliance of a taxpayer, and impose various administrative penalties[10] (Chapter 15 and 16 of the Tax Administration Act) and penalty interest (Chapter 12 of the Tax Administration Act), and criminal prosecution as envisaged in the Canadian Supreme Court case of *R v Jarvis.*[11] In that case a clear line between a civil or administrative audit, and a criminal investigation was drawn, as analysed earlier in this thesis.

To take matters further, the Constitutional Court in South Africa in *Ferreira v Levin NO and Others; Vryenhoek and Others V Powell NO and Others*[12] is authority for the submission that where any person has been compelled to give self-incriminating evidence in the interests of public policy, that direct, and any derivative, evidence cannot be used against the person in any subsequent criminal prosecution. This decision is in line with the constitutional guarantees given to persons in ss 35(3)(j) and (5) of the Bill of Rights[13].

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[10] The reverse onus usually applies in the case of penalties. On setting aside the 'reverse onus' by the Constitutional Court, see *William Mello and Constantina Botolo v S*1998 (3) SA 712 (CC). The Tax Administration Act places the onus of proof for understatement tax in Chapter 16 on SARS. On the difference between administrative and criminal penalties, attention should be paid to the facts. Administrative penalties are designed to assist SARS recover its costs in recovering undeclared taxes. Criminal penalties are imposed as a form of punishment. If administrative penalties are excessive under the circumstances, the issue of criminal or punitive penalties arises. Then the question of double jeopardy becomes relevant. The principles governing double jeopardy in South Africa are well summarised in *Tax Board Decision 198*, by Advocate B Spligg SC as Chairman, Lexis Nexis online at www.mylexisnexis.co.zahttp://www.mylexisnexis.co.za/nxt/gateway.dll/lc/u3b/w3b/yi1ea?f=templates$fn=default.htm $vid=mylnb:10.1048/enu (last accessed 31 March 2013), at para's [12]ff.

[11] 2002 (3) SCR 757; See also *US v LaSalle Bank* 437 US 298 *US* where it was held 'Congress intended Internal Revenue Service summons authority to be *used to aid determination and collection of taxes, which purposes do not include goal of filing criminal charges against citizens*; consequently, summons authority does not exist to aid criminal investigations solely' and '(p)rior to recommendation for prosecution to Department of Justice, Internal Revenue Service must use its summons authority in good faith; dispositive question in each case is whether Service is pursuing authorized purposes in good faith or whether it has abandoned, in institutional sense, pursuit of civil tax determination or collection'. Emphasis supplied; SARS in its *SARS Internal Audit Process Manual* at Chapter 5 Comparison with The United States of America, p 7 – 8 quote the *LaSalle case* in conjunction with *US v Powell* 379 US 48 where they state: '…the provisions…(are)…important for the South African situation in that the four requirements …on…the standards of good faith should substantially be complied with under South African circumstances.'*Hale v Hinkle* 201 US 43 where it was held that '(t)he privilege against self-incrimination given by the Fifth Amendment to the Constitution, U.S.C.A., is personal to the witness and cannot be invoked in favor of another person, or of a corporation of which the witness is an officer or employee'; *Murdock v Pa* 319 US 105.

[12]1996 (1) SA 984 (CC).

[13] Sections 35(3)(h)-(j) of the Constitution. See also *ITC 1818* 69 SATC 98 and *Seapoint Computer Bureau (Pty) Ltd v McLoughlin and de Wet NNO* 1997 (2) SA 636 (W).

The encroachment of the right not to give self-incriminating evidence was justified[14]as envisaged in s 36 of the Bill of Rights by guaranteeing the exclusion of the evidence so obtained, and any derivative evidence, from any future prosecution of the accused person.

These constitutional principles are now recognised in the Tax Administration Act. In s 57 of the Tax Administration Act it is stated that incriminating evidence obtained from a person at an inquiry is not admissible in any subsequent criminal proceedings against that person. A contrary provision appears in s 72 of the Tax Administration Act, but is subject to the court making a finding that the evidence be excluded for criminal prosecution purposes. However, no mention is made of the derivative evidence, or of evidence obtained by way of written interrogatories as envisaged in ss 40 through 49 of the Tax Administration Act. No further exclusion or mention is made of this in Chapter 17 of the Tax Administration Act dealing with criminal offences.

It is the writer's submission that these *lacunae* in the Tax Administration Act will entitle a suspicious taxpayer, before participating in any SARS audit, to raise the defence of 'just cause' in refusing to participate in an administrative audit commenced by SARS in terms of ss 40 through 49 of the Tax Administration Act, until one of three things happens:

1. SARS gives written assurances that the audit will remain an administrative one, and that no evidence or communication with the SARS criminal investigation unit will take place, and all evidence obtained from the taxpayer will be excluded (including any derivative evidence) from any future prosecution;

2. The appropriate court application is brought to the Constitutional Court to declare the law or conduct of SARS invalid, and/or to seek the appropriate

[14] Careful note would have to be taken by SARS of *Nyambirai v Nssa & Another* 1995 (2) ZLR 1 (S) and *De Freitas v Permanent Secretary of Agriculture, Fisheries, Lands and Housing* 1998 3 LRC 62 where this Privy Council decision was cited with approval on the issue of what is 'reasonably justifiable in a democratic society' to limit a person's fundamental constitutional rights in the Zimbabwean Supreme Court case of *Law Society of Zimbabwe and Another v Minister of Finance* 61 SATC 458: '1.Whether the legislative objective is sufficiently important to *justify limiting a fundamental right*? 2.Whether the measures designed to meet the *legislative objective are rationally connected* to it? 3.Whether the means used to impair the right or freedom are *no more than is necessary* to accomplish the objective?' (Emphasis supplied); See also *US v McCarthy* 514 F 2d 368; *Ferucci and Others v Commissioner for South African Revenue Service and Another* 65 SATC 47 at pages 54-55.

guarantees given to the applicant in *Ferreira v Levin NO and Others; Vryenhoek and Others V Powell NO and Others*[15]; and/or

3. Request detailed information from SARS in terms of s 73 of the Tax Administration Act in establishing the source of the audit, the scope of the audit, whether or not any criminal investigation is taking place or anticipated, and on what grounds. Seeking this type of information requires the taxpayer in terms of s 73 of the Tax Administration Act to do so through the mechanisms created in terms of the Promotion of Access to Information Act.[16] This requires the taxpayer to correspond with the information officer of SARS at its head office in Pretoria. A very slow, laborious and frustrating process, often resulting in the information officer refusing to make the requested information available, and expecting the taxpayer to seek redress through the internal appeal process set out in that Act,[17] which in turn causes delays running into numerous months. The purpose of the information request addressed to SARS will be to allow the taxpayer to insure SARS meets its constitutional obligations towards the taxpayer, as envisaged in 1. and 2. above.

The 'just cause' defence will prevent SARS seeking a positive conviction under s 234of the Tax Administration Act(read with ss 49(2) and 127 of the Tax Administration Act) for the taxpayer refusing to impart any 'relevant material' on the basis that SARS has made a decision that is inconsistent with the Constitution, and invalid.

6.3 RELEVANT MATERIAL

The definition of 'relevant material' in the Tax Administration Act provides for 'information, a document, or a thing (all in turn defined, but creating meanings the same as those in the current Income Tax Act, 1962) that may be useful in assessing a tax, collecting tax, or showing non-compliance with an obligation under a tax act or a tax

[15] 1996 (1) SA 984 (CC).
[16] Act 2 of 2000.
[17] The writer's experience in attempting to deal with the information officer of SARS since 2003 on numerous occasions after the promulgation of the Promotion of Access to Information Act.

offence was committed (which is specifically defined to include any other offence involving fraud on SARS)'.

In *ITC 1736*[18] Selikowitz P made the following pertinent comments:

> The term 'administration of this Act' is defined in s 74 and what is clear is that administration of the Act is a matter which falls within the domain of the Commissioner for Inland Revenue and should not be confused with this court's independent jurisdiction to decide upon matters which arise out of that administration. In other words, the rights of the Commissioner to seek to obtain information, documents and such things as he may require is not a right which is a substitute for any procedure which may be found to be applicable before this tribunal. Indeed, the purpose of discovery is far wider than the purposes required for the administration of the Act. Discovery is by its nature an extremely important aspect of our litigation procedure. It entitles a party to prepare properly by knowing what documents and other discoverable items are in existence. They may be, either items which the other party who has to discover them, is going to use in the course of presenting his or her case, or, indeed, they may be documents according to the provisions of the Magistrates' Court which tend to prove or disprove either party's case. Discovery is intended to permit the parties to litigation, to have full information as to what documentation and other discoverable items are in existence. That is a different concept to that expressed in s 74A of the Act where the Commissioner would be seeking documents which he in his own mind decides could be relevant. Clearly there may be documents in existence and in the possession of the other party which the Commissioner may not consider necessary because either he does not know that they exist or he does not know what they contain. It is therefore not an answer to suggest that s 74A of the Income Tax Act provides the Commissioner with a substitute for formal discovery.

[18] 64 SATC 464 at pages 467-8.

The principles set out in this judgment apply equally to the new 'relevant material' definition in the Tax Administration Act. However, one distinguishing factor may be the use of the words 'that may be useful in assessing tax, collecting tax, or showing non-compliance'. These words seek to broaden the scope of what SARS is entitled to now in terms of the current Income Tax Act, and may include much more than mere factual information about a taxpayer's tax affairs. This may include views or opinions (excluding those subject to attorney and client privilege)[19] that would otherwise not be only of a factual nature. In a sense, SARS is attempting to bring forward the discovery process referred to by Selikowitz P in *ITC 1736*[20] above.

Despite these general criticisms, the main issue with the definition of 'relevant material' relates back to the mixed civil audit and criminal investigation audit referred to above in this thesis: 'information, a document, or a thing … that may be useful in … showing non-compliance with an obligation under a tax act or a tax offence was committed'. The definition goes a long way to contribute to the potential transgression of taxpayers constitutional rights, in either not being able to be compelled[21] to give self-incriminating evidence, or where compelled to do so by public policy, receive a guarantee that any such direct or derivative evidence obtained under compulsion, will not be used against the taxpayer in any subsequent criminal prosecution.

6.4 REQUEST FOR RELEVANT MATERIAL, AUDIT SELECTION AND FIELD AUDIT

The differences between the provisions of ss 40 through 49 of the proposed Tax Administration Act, and ss 74A and 74B are summarised *infra*. SARS will be able to:

1. Request information 'that may be useful in assessing tax, collecting tax, or showing non-compliance',[22] broadening the scope of its audit investigation to include 'relevant material' that it subjectively believes 'may be useful' for its purpose;

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[19] *Heiman Maasdorp & Barker v SIR* 1968 (4) SA 160 (W).
[20] 64 SATC 464.
[21] Sections 35(3)(h)-(j) of the Constitution; See also *ITC 1818* 69 SATC 98; *Seapoint Computer Bureau (Pty) Ltd v McLoughlin and de Wet NNO* 1997 (2) SA 636 (W).
[22] Section 1 of the Tax Administration Act, definition of 'relevant material'.

2. Request information for the 'administration of a tax act' to 'investigate whether an offence has been committed in terms of a tax act' and then, if in its subjective belief this is so 'lay criminal charges…(and)…provide the assistance that is reasonably required for the investigation and prosecution of tax offences or related common law',[23] broadening the scope of the offence investigation provisions currently contained in s 74 of the Income Tax Act under the definition of 'the administration of this Act';

3. Request information in respect of classes of taxpayers, and not just in respect of a named taxpayer, 'whether identified by name or otherwise objectively identifiable' and 'objectively identifiable class of taxpayers'.[24] For example, members of an exclusive sports club, although SARS will still have to identify the class of taxpayers using an objective means. It may be in the example cited that some of the members of the club are foreigners, who are not taxpayers, and the club may have no objective means at its disposal to objectively identify who is a taxpayer, or should be a taxpayer, and who is not. The scope of the request for information has broadened to 'for the purposes of tax policy design or estimation'.[25] If the 'relevant material' is specifically requested for this purpose, based on the conclusions reached elsewhere in this thesis, if SARS were to make this information available to assessors to issue revised assessments or criminal investigators to investigate a prosecution or imposition of a penalty[26] (that is punitive in nature, such as additional tax), the legal concept of entrapment would be available to the taxpayer as a defence. This is an untested proposition, but one that is nevertheless available to taxpayers, simply because SARS would have obtained information from the taxpayers concerned under the false pretences of actually accumulating information to attend to statistical analysis, and not to collect evidence for revised assessment or criminal investigation purposes. Taxpayers are always, in terms of constitutional guarantees analysed in this thesis,

[23] *Ibid.* s 3(1)(f).
[24] *Ibid.* s46.
[25] *Ibid.* s 70(1)(b).
[26] See the discussion in this thesis on the Canadian Supreme Court case of *R v Jarvis*2002 (3) SCR 757, at page 88.

entitled to know what case they are facing if they are the subject of an adversarial investigation.[27] Facing an inquiry for statistical information that is subsequently used to pursue the taxpayer would be constitutionally questionable. However, in *S v Riaz Hassen and Another*[28] the Constitutional Court endorsed the finding of Le Roux J that 'entrapment' is not per se a violation of an accused's right to a 'fair trial' contained in s 35(3) of the Constitution. The Constitutional Court confirmed that the propriety of the admission of evidence consequent to the 'entrapment' of an accused must be examined on an *ad hoc* basis with the court carefully examining whether the prerequisites for the setting up of the trap were complied with prior to the setting up thereof.[29] The question of entrapment is potentially a difficult one. In *Dube v S*[30] the constitutional challenge of the appellant was whether the admission of the evidence of the entrapment rendered the trial of the appellant unfair. The court concluded that the admission of the evidence of the entrapment had not rendered the trial unfair and that, if anything, it was advantageous to the administration of justice. There was, in its opinion, nothing unfair about the setting up of the trap and it was held that the appellant was the victim of his own greed and dishonesty.[31] However, entrapment was specifically used in that case to entrap a suspected and allegedly dishonest accused. The approach by SARS would not normally be premised by such facts. What would more likely happen is that SARS may discover evidence, in the course of conducting the statistical analysis, of a transgression and only then submit the information to the assessor or the criminal investigator after the fact. In *Nortjé v S*[32] Foxcroft J at 459 states:

> In a work called "Entrapment in Canadian Criminal Law", Michael Stober summarizes the position in Canada as follows at 74: "Although entrapment situations have been before the Courts

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[27] *R v Jarvis* [2002] 3 SCR 757.
[28] 1997 (1) SACR 247 (T).
[29] Omar Z *The right to privacy and an accused's right to a 'fair trial' under the Constitution* De Rebus December 1998 Lexis Nexis (lasted accessed 21 March 2010).
[30] [2000] 1 All SA 41 (N).
[31] *Dube v S* [2000] 1 All SA 41 (N) at page 62b.
[32] [1996] 4 All SA 449 (C).

in Canada on several occasions, there is no clear authority, statutory or otherwise, nor a rational foundation for a defence of entrapment. In some cases, Judges have either denied the existence of the defence or skirted the issue entirely, disposing of the case before them upon other considerations. In others, there has been a common feeling among Judges that a person should not be subjected to such unconscionable practices, and consequently, courts have groped for some legal principle or device in order to exonerate the accused." The Canadian cases show a move towards recognising the defence but in *R v Mack* 44 CCC 3D at 513, the Canadian Supreme Court ruled that while entrapment is a "defence", it is based on the need to preserve the purity of the administration of justice and to prevent an abuse of its own processes. With reference to the Canadian Charter of Rights and the defence of entrapment, Stober points out (and I use the language of the Report at page 63), that "an aggrieved person must demonstrate to the court that police action infringed his rights and freedoms. The courts must, in reviewing police practices, decide first whether these practices violated the person's fundamental rights (for example right to life, liberty and security) and second whether such practices have been carried out in accordance with the principles of fundamental justice. In answering these questions the Charter prescribes that such limits be placed on these rights as can be demonstrably justified in a free and democratic society." Stober concludes at 189 that where, for example, government officials violate the personal integrity and privacy of a person through entrapment (by means of coercive tactics designed to induce an innocent person to commit an offence) it cannot be denied that his fundamental rights have been infringed. "Such conduct is far removed from any notion of fair play inherent in the principles of fundamental justice." See Commission Report, p 64. The Canadian Courts are therefore not prepared to allow the criminal justice system to be discredited by the admission of evidence

obtained in contravention of constitutional rights. Where the police act improperly, a balance should be struck between protection of the community and the protection of the individual. This balance is struck by the exclusion of evidence which brings the administration of justice into disrepute. In the words of Stober at 217: "It is offensive to common notions of decency and fair play to admit such evidence." [Commission Report, p 65].

The writer submits that the Constitutional Court should ultimately follow the line of reasoning set out in the Canadian Commission report above. However, further discussion or analysis of this point is outside the scope of this thesis.

Despite the difficulties with entrapment, the other defence available to the taxpayer would be a transgression by SARS of the constitutional guarantee of not using any evidence given to SARS under compulsion, as discussed in detail earlier in this chapter. This defence would assist in criminal prosecutions, but not in SARS raising a revised assessment. The final point on this proposed section, is that the taxpayer would have 'just cause' in not furnishing any information to SARS until it was advised what the precise scope and purpose of the request for 'relevant material' was, so as to enable it to enforce any rights the taxpayer may have to avoid constitutional breaches by SARS. This begs the question – if the taxpayer has been dishonest and this has been unearthed by the statistical analysis taking place, why should SARS not be entitled to hand over the information to the appropriate authorities? The answer to this question lies in the fact that organs of state such as SARS must also abide by a set of laws equally applicable to them that ensures the prevalence of the rule of law. Just because the taxpayer breaks the law, does not mean that SARS can also break the law so as to pursue the taxpayer. The wrong of SARS does not trump the wrong of the accused. The provisions of the Constitution apply specifically to SARS to ensure they comply with

respecting the fundamental rights of accused who have allegedly broken provisions of tax acts;

4. Request any 'relevant material' that 'is foreseeably relevant'.[33] This new proposed addition can be relied upon by taxpayers to ensure that SARS is specific in what they require as 'relevant material' from taxpayers. It would not suffice to request the taxpayer to make available general information such as all trial balances for specified years of assessment, but that SARS is required to be more specific – specify which information from the trial balances they require. Again 'just cause' would arise in favour of the taxpayer not to submit just any 'relevant material' until SARS can specify with 'reasonable certainty' what is specifically sought by SARS, and for what purpose;

5. Request that the person submitting the 'relevant material' must do so 'under oath or solemn declaration'[34] giving rise to the additional potential exposure to that person of a criminal charge of perjury, if the information turns out to be incorrect. Once again, 'just cause' will arise in favour of that person not to submit any information 'under oath or solemn declaration' until they are certain they will not be committing perjury at some point in the future;

6. Select a taxpayer for audit 'for the proper administration of a tax act, including on random or a risk assessment basis'.[35] Despite the specific proposed wording referring to 'random' audits, this is in line with current practice of SARS. Constitutional questions still arise, nevertheless, on

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[33] Definition of 'relevant material' in the Tax Administration Act. These provisions echo the findings of the American courts as follows: *US v Powell* 379 US 48 (quoted from the headnote): where '(p)rimary purpose of clause that no taxpayer shall be subjected to unnecessary examinations or investigations in sub-section of statute going on to provide that only one inspection of taxpayer's books shall be made for each taxable year unless taxpayer otherwise requests or Secretary or delegate, after investigation, notifies taxpayer in writing that additional inspections are necessary, *was no more than to emphasize responsibility of agents to exercise prudent judgment in wielding extensive powers granted to them* by Internal Revenue Code'. (Emphasis supplied); *US v Brown* 536 F.2d 117 (quoted from the headnote): where the cout held '"Books, papers, records, or other data" to be produced under … the Internal Revenue Code relating to examination of books and witnesses … did not … authorize the IRS to require the manufacture of documents or other data for examination'; see also *Local 174 International Brotherhood of Teamsters v US* 240 F.2d 387, where 'revenue agents … had burden to show that demand was reasonable under all circumstances and to prove that books and records were relevant or material to tax liability of taxpayer…'; *May v Davis* 7 F Supp 596.

[34] *Supra* footnote 1 at s 46(7).

[35] *Ibid.* s 40.

whether or not the conduct by SARS would be arbitrary in conducting random audits without the support of at least a risk analysis performed internally at SARS to suggest that a random audit of that taxpayer would be appropriate. Taxpayers would be entitled to access any information from SARS in terms of the Promotion of Access to Information Act[36] to access any relevant information from SARS on a risk review of a group of taxpayers that the taxpayer being sought to audit falls into, so that the taxpayer can better understand what the scope and purpose of the random audit is. If SARS can provide these answers, the random audit would not simply be arbitrary, and can be justified by SARS and in line with the Bill of Rights guarantee to taxpayers that they can expect just administrative action from SARS;[37]

7. Request entry to the business premises of the taxpayer to conduct the audit as set out in s 74B of the current Income Tax Act, but in terms of s 37(5) 'a SARS official must not enter a dwelling-house or domestic premises (except any part thereof used for the purposes of trade) … without the consent of the occupant'. The use of the word 'occupant' is not specific to a representative of a taxpayer, or the owner, or lessee of the premises, but may be any occupant, as long as the occupant gives consent. This provision is in accordance with developed Constitutional Court judgments on the privacy of persons, where the invasion of privacy becomes more justified where the premises in the place of business of the taxpayer.[38]

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[36] Act 2 of 2000.

[37] Sections 33 of the Constitution. Section 195(1)(b) and (f) requires SARS to use its resources efficiently and cost effectively, and requires SARS to be accountable for its decisions. Any arbitrary decision unsupported by underlying research analysis or a reason, would be conduct that is contrary to the provisions of the Constitution, and invalid conduct as stated in s 2 of the Constitution.

[38] In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079, Langa DP stated (with reference to *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 at para [68]) that the right to privacy lies along a continuum, where the more a person interrelates with the world, the more the right to privacy becomes attenuated (at para [15]). The right, however, does not relate solely to the individual within his intimate space, and when people are in their offices, in their cars or on mobile telephones, they still retain a right to be left alone by the state unless certain conditions are satisfied. See M. Dendy, Protection of Privacy, de Rebus, August 2009, Lexis Nexis. http://www.mylexisnexis.co.za (last accessed 31 March 2012). S 14 of the Constitution, 1996. Silke on Tax Administration, at para. 8.19, Lexis Nexis. http://www.mylexisnexis.co.za (last accessed 31 March 2013). Stricter enforcement of the privacy provisions on the Consttution, 1996 are enforced at the dwelling of the person concerned.

The proposed information gathering provisions in the proposed Tax Administration Act do not change the conclusions reached in this thesis. As demonstrated above, the opportunity for the taxpayer to raise the 'just cause' defence is increased in some instances where taxpayers have good reason not to participate in an audit. Section 3(3)(f) of the Tax Administration Act on what is meant by for the purposes of the administration of a tax act, was severely criticised by submissions made by the Law Societies of South Africa in respect of the Tax Administration Act,[39] as follows:

> In terms of paragraph 3 of the Tax Administration Act, SARS is authorised to liaise with the prosecuting authorities and charged with the duty to do all things required for the due prosecution of tax and other offences. In my view Parliament does not have the power to pass an Act containing such a provision. An amendment to the Constitution, 1996 would be required. This is so because section 179 of the Constitution establishes an independent prosecuting authority. It must exercise its functions without fear, favour or prejudice. Neither the Constitution nor the national legislation contemplated in section 179 contemplates that another organ of state, in the executive arm of Government, should be charged with the responsibility of ensuring the due prosecution of charges in relation to which it is the complainant! It is the function of the prosecuting authority to deal fairly with any charge made by a complainant, to have due regard to the rights of the accused person and to decide independently and without fear or favour whether to proceed with a prosecution. I am aware that SARS already has a Criminal Investigations Division that has a liaison of sorts with the DPP. It has with some justification been referred to as a "clandestine collusion" between SARS and the DPP. Details of the liaison have not, as far as I am aware, been made public but we are all aware of the arrangements in terms of which the work of the traditional "investigating officer" [very definitely not employed by the complainant] is now done by a SARS employee in the

[39] Drafted by Prof. H Vorster, and first submitted to SARS in June 2009, and again on 5 March 2010 by the LSSA Kris Devan, the PA: Manager Professional Affairs.

> SARS Criminal Investigations Division, assisted, or even directed, by the special prosecutor presented by the DPP by arrangement with SARS. The prosecution is presided over by a magistrate specially arranged to hear prosecutions of tax offences and presented by courtesy of the Department of Justice by prior arrangement with SARS. Early morning arrests and search and seizure raids are conducted by SARS officials and police officers with media reporters and television cameras in tow arranged, according to the evidence of a SARS official in a recent case, by courtesy of the SARS Media Department. There are those who hold the view that these arrangements and the involvement of SARS officials in the investigation and prosecution process will not withstand scrutiny. They might well be correct. Even if they were not, I am of the opinion that the involvement of SARS officials in the prosecution process cannot be legitimised in the manner now provided for in paragraph 3(2)(e)(ii) and (iii) of the Tax Administration Act.

The Cape Bar prepared a memorandum criticising the Tax Administration Act under the hand of Advocates Milton Seligson SC, Trevor Emslie SC and Joe van Dorsten, published in the February 2010 edition of The Taxpayer journal:[40]

> (On s 3(1), (2) and (3) of the Tax Administration Act) - In our view, it should be clarified that the role of SARS is limited…(and)…not itself prosecute taxpayers…The power to prosecute is vested by s 179 of the Constitution in the national prosecuting authority.
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> (On s 33(1) (and what is now s 40) of the Tax Administration Act) - The broad category of 'another person' may include persons who are in possession of 'relevant material' that includes material that is subject to legal professional privilege. Provision should be made

[40] *Comment on the Draft Tax Administration Bill*, The Taxpayer Journal, February 2010, at page 24.

for a procedure to challenge any requirement of SARS relating to privileged material, in order to safeguard documents or information that is subject to such privilege.

The scope of the LSSA, Cape Bar Council and other criticisms are beyond the subject matter of this thesis. However, the criticisms clearly illustrate the extent of other concerns expressed on the ability for SARS to investigate, lay and prosecute criminal charges as set out in the Tax Administration Act, and the potential ability for SARS to access through third parties information of a taxpayer subject to legal professional privilege.[41]

If these proposed provisions become law, taxpayers will have more reason than before to challenge SARS on the scope and purpose of a contemplated inquiry and audit.

Any participation in the prosecution of taxpayers by SARS in the Tax Administration Act is contrary to the provisions of s 179 of the Constitution and the doctrine of the separation of powers entrenched in the Constitution. This may cause a constitutional challenge as to the validity of this aspect of the proposed s 3 of the Tax Administration Act. This may lead to an opportunity for taxpayers affected by this offending proposed provision to raise the 'just cause' defence in not participating in an inquiry and audit initiated by SARS, until the constitutional validity of the proposed provision is deliberated upon by the courts.

The uncertainty surrounding the issue of legal privileged information will give taxpayers the opportunity with 'just cause' not to participate in the SARS inquiry and audit, until either SARS or a court acknowledges that the 'relevant material' excludes legal privileged information of taxpayers.

6.5 CONCLUSION

Until the taxpayer is satisfied that its constitutional rights are not being transgressed by SARS implementing the proposed provisions of ss 3, 33 36 and 37 of the Tax

[41] *Heiman Maasdorp & Barker v SIR* 1968 (4) SA 160 (W).

Administration Act, the taxpayer will have 'just cause' not to participate in the audit, inquiry or any request for 'relevant material' by SARS.

Should SARS attempt to force the taxpayer to comply with the proposed provisions of ss 3, and 40 through 49 of the Tax Administration Act, judicial review of the decision of SARS to compel the taxpayer to comply, would be available to the taxpayer. The process of judicial review is discussed in Chapter 5. Nothing in the proposed Tax Administration Act changes the ability for taxpayers to review decisions taken by SARS in an attempt to enforce the proposed provisions of the Tax Administration Act, where SARS have failed to diligently and without delay perform its obligations in terms of s 237 of the Constitution, in complying with its duties as set out in ss 1(c), 33, 41(1) and 195(1) of the Constitution, and as analysed in this thesis.[42]

In summary ss 1 (c), 33, 41(1) and 195(1) SARS (as reiterated in s 4(2) of the SARS Act) are the constitutional duties that SARS must adhere to in order to comply with the rule of law, where SARS may only assume power and functions provided in terms of the Constitution, act with a high degree of professional ethics, use resources efficiently, be impartial, equitable, fair, unbiased, accountable, and transparent in their conduct and administrative actions. Failure by SARS to adhere to its constitutional duties will be reviewable in terms of PAJA and the principle of legality.[43]

[42]See Chapter 3 *supra*.
[43] See Chapter 4 *supra*.

CHAPTER 7
CONCLUSION

7.1	GENERAL CONSTITUTIONAL PROVISIONS	224
7.2	SECTION 33 OF THE CONSTITUTION AND PAJA	224
7.3	SECTION 195(1) OF THE CONSTITUTION	226
7.4	ADMINISTRATIVE ACTION, THE RULE OF LAW AND THE PRINCIPLE OF LEGALITY	227
7.5	REVIEW IN TERMS OF SS 6, 7 AND 8 OF PAJA OR THE PRINCIPLE OF LEGALITY	234
7.6	'GOOD CAUSE' SHOWN DEFENCE	237
7.7	THE PROPOSED TAX ADMINISTRATION ACT	238

7.1 GENERAL CONSTITUTIONAL PROVISIONS

Despite the wide powers to conduct audits and inquiries into the tax affairs of taxpayers granted to SARS in terms of ss 74A and 74B, administrative law, as bolstered by the Constitution, contains important steps that SARS must adhere to in exercising its conduct.

The Constitution is the starting point as the supreme law of South Africa, governing all laws and conduct, including the Income Tax Act and discretions given to SARS, such as in the case of ss 74A and 74B, to make a decision to commence an inquiry and audit.

The Constitution requires adherence to the rule of law and the constitutional principle of legality, which prescribes that organs of state such as SARS must be governed by the law, and in particular the Constitution, the SARS Act and the relevant provisions of the Income Tax Act, in this instance, ss 74A and 74B, in exercising its discretion to audit or inquire into the tax affairs of the taxpayer. If it can be shown that the conduct of SARS is inconsistent with the Constitution, this conduct is invalid and application can be brought, on the basis of the s 172(1) of the Constitution, to have the conduct reviewed and set aside.

In terms of s 172(1)(b)(ii) the court may make 'any order that is just and equitable' that would include organs of state such as SARS to adhere to the scope, spirit and purpose of the Constitution in carrying out its constitutional duties and obligations.

7.2 SECTION 33 OF THE CONSTITUTION AND PAJA

In s 33 the Bill of Rights sets out three important steps that SARS must adhere to in emphasising its wide public powers, namely: lawfulness, reasonableness, procedural fairness and the giving of adequate reasons for any administrative action.[1]

This in turn has been developed in the promulgation of PAJA, which has codified

[1] See sections 2.5: *Adequate Reasons*, 3.3: *Lawfulness*, 3.4: *Reasonableness* and 3.5: *Procedural Fairness*, *supra*.

the grounds of review in s 6(2). However, applying a decision in terms of ss 74A and 74B to the definition of 'administrative action' presents a difficulty in that the definition of 'administrative action' is limited enough to allow SARS to make an argument that the exercise of its decision under ss 74A and 74B is not subject to the provisions of PAJA; if it was, SARS may argue that its ability to conduct audits and inquiries could be severely hindered.[2]

In interpreting these provisions, not only should the ordinary grammatical meaning be ascertained, but SARS should also give full recognition and effect to the fundamental rights and freedoms of taxpayers in line with the Constitution. In this regard, any interpretation should be a generous rather than a legalistic one, aimed at limiting the infringement of the rights of taxpayers, and with the view to fulfilling the purpose of the legislation. Because procedural fairness plays a pivotal role in SARS' exercise of any discretion under ss 74A and 74B, the particular situation and circumstances of the taxpayer must be carefully considered to ensure full compliance with the rule of law and the constitutional principle of legality[3] by SARS.

With regard to the definition of 'administrative action', the Supreme Court of Appeal held in the *Grey's Marine* case[4] that the definition of 'administrative action' must not be taken too literally, and here the purposive approach to interpreting the Constitution and PAJA must be applied. This dictum supports the view that the discretion of SARS in ss 74A and 74B is 'administrative action'. But even if it is held by a court in the future not to be 'administrative action' (denying taxpayers the right to review SARS' unlawful, unreasonable, or procedurally unfair and unconstitutional or 'invalid' conduct in terms of PAJA), ss 1(c), 33, 41(1), 195(1) and 237 of the Constitution, read with s 4(2) of the SARS Act, and the publication of the SARS *Code of Conduct*,[5] read with the *SARS Internal Audit Manual*,[6] creating a

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[2] As argued by SARS in the unreported application of *Drs Du Buisson, Bruinette & Kramer Inc. v C:SARS* Case No. 4595/02 in the High Court of the Transvaal Provincial Division brought by a taxpayer to prevent SARS proceeding with an audit in terms of ss 74A and 74B.
[3] See section 2.4: *The Relevance of PAJA and the Principle of Legality supra*.
[4] *Grey's Marine Hout Bay (Pty) Ltd and Othersv Minister of Public Works and Others*2005 (6) SA 313 (SCA).
[5] http://www.sars.gov.za/home.asp?pid=54195 (last accessed 31 March 2013).
[6] See section 3.2 *supra*.

legitimate expectation,[7] will support a review application through s 172(1) of the Constitution as a transgression of the constitutional principle of legality – which in any event requires SARS in exercising their public power to act lawfully, reasonably, procedurally fairly, and where appropriate with reasons. Taxpayers will be entitled to review any ss 74A and 74B discretion by SARS if it transgresses any of these provisions, guidelines or legitimate expectations in terms of a Rule 53 application to the High Court.[8]

Furthermore, the constitutional limitations, as stated in s 36 of the Constitution, do not apply to conduct (including the exercise of a discretion by SARS under ss 74A and 74B) because the exercise of a discretion is not 'law of general application' as required by s 36 of the Constitution (although the enabling law usually is).[9]Furthermore s 36 applies to justifying non compliance with s 33 of the Constitution, but does not specifically apply to the constitutional obligations in ss 1(c), 41, 195(1) and s 237. It will therefore be very difficult for SARS to justify[10] that its conduct in an inquiry and audit falls outside the constitutional scrutiny proposed in this thesis.

7.3 SECTION 195(1) OF THE CONSTITUTION

The specific constitutional provisions are those set out in s 195(1) of the Constitution as analysed in Chapter 4 *supra*, which in summary are: '(a)A *high standard of professional ethics* must be promoted and maintained…(d)Services must be provided *impartially, fairly, equitably and without bias*…(f)Public administration must be *accountable*.(g)*Transparency* must be fostered …'.(Emphasis supplied)

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[7] See Currie I & Klaaren J *Promotion of Administrative Justice Act Benchbook* (2001) SiberInk at 80. See also Williams R C et al *Silke on Tax Administration* (April 2009) Lexis Nexis at para 3.25 generally.

[8] See Chapter 5 *supra*.

[9]*Premier of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) BCLR151 (CC) at para [42]: '…no question of justification …can arise as the decision taken …did not constitute "a law of general application" as required by that provision.'; *cf.Registrar of Pension Funds and another v Angus NO and others* [2007] 2 All SA 608 (SCA) where the court held 'in terms of law [of general application]' would enable a decision. SARS decisions are enabled 'in terms of law [of general application].

[10] SARS will need to consider the decisions of *Nyambirai v Nssa & Another* 1995 (2) ZLR 1 (S) and *De Freitas v Permanent Secretary of Agriculture, Fisheries, Lands and Housing* 1998 3 LRC 62 as to the justification, rationality and limitation of a SARS decision; See also*Ferucci and Others v Commissioner for South African Revenue Service and Another* 65 SATC 47 at pages 54-55; *US v McCarthy* 514 F 2d 368.

These provisions are constitutional obligations, and the failure by SARS to adhere to any of them, read with the *Code of Conduct* and the *SARS Internal Audit Manual*, will result in conduct that is inconsistent with the Constitution, and invalid. The cause of action in an application to the High Court in terms of Rule 53 for review of SARS' conduct will either be one or more of the codified grounds of review in s 6(2) of PAJA, or, alternatively the principle of legality.

The codified grounds of review in s 6(2) of PAJA fall into nine principal groups, namely: authority and conduct of the administrator non-compliance with a mandatory and material procedure or condition; procedurally unfair action; action materially influenced by an error of law; manner of exercise of administrative action; grounds; failure to take a decision; unreasonableness; and otherwise unconstitutional or unlawful action. These nine principal areas of review exclude the two common-law grounds of review that would probably fall under s 6(2)(i) (otherwise unconstitutional or unlawful action),[11] namely vagueness and the 'fettering by rigidity of a discretion'.[12]

The constitutional principle of legality requires SARS to act lawfully, reasonably, procedurally fairly, and to give reasons where appropriate, in exercising public powers.

7.4 ADMINISTRATIVE ACTION, THE RULE OF LAW AND THE PRINCIPLE OF LEGALITY

The rule of law concept in the words of Neil MacCormick is as follows: '[t]he very idea of the "rule of law" or *Rechtsstaat* is that of a state in which determinate and pre-determined rules govern and restrict the exercise of power and regulate the affairs of citizens.'[13] Primarily, the rule of law principle requires that the legal system comply with minimum standards of certainty, generality and equality. The rule of law is a fundamental ideological principle of modern Western democracies,

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[11] Sections 6(2)(a), 6(2)(b), 6(2)(c), 6(2)(d), 6(2)(e), 6(2)(e), 6(2)(f), 6(2)(g), 6(2)(h), 6(2)(i) and 6(3) of PAJA.
[12] Hoexter C *The Future of Judicial Review in South African Administrative Law* South African Law Journal (2000) Vol 17 at page 497. See also: *US v Williams* 337 F Supp 1114; *Local 174 International Brotherhood of Teamsters v US*, 240 F.2d 387; *US v Newman* 441 F.2d 170; *US v Coopers and Lybrand* F Supp 942; *Hubner v Tucker* 245 F.2d 35; *First National Bank of Mobile v US* 160 F.2d 532.
[13] MacCormick N *Legal Reasoning and Legal Theory* (1995) at page xi.

and as such, we are often asked to believe in it with unquestioning acceptance, even though Western states often honour the principle in the breach.'[14]

To exercise its discretion under ss 74A or 74B, SARS is exercising public power that is conduct. If that conduct is contrary to the rule of law as set out in s 1(c) of the Constitution, and the constitutional principle of legality, because it does not comply with, *inter alia*, the basic jurisdictional facts of the provisions of ss 74A and 74B, read with s 74 of the Income Tax Act, or the constitutional obligations in ss 33, 41(1), 195(1) (read with s 4(2) of the SARS Act) and 237 of the Constitution (including lawfulness, reasonableness, procedural fairness, and reasons), the conduct will be invalid.

The jurisdictional facts require that the inquiry and audit is in respect of a specific taxpayer.[15] One or more of the jurisdictional facts in the definition of 'the administration of this Act' in s 74 must be present and substantiated with rational reasons that connect the provision in the definition in question in s 74 to a specific fact driving the necessity to conduct the inquiry and audit, or to an inference drawn from a specific fact.

Here the *Code of Conduct* and the *SARS Internal Audit Manual* serve an important purpose as a guide to what to expect as proper administrative governance where SARS exercises this discretion and makes a valid decision. In essence a legitimate expectation is created in favour of taxpayers as to what they can expect in ss 74A and 74B interactions with SARS from the *Code of Conduct* with the unpublished *SARS Internal Audit Manual* serving an important purpose by informing the taxpayer what can be expected of SARS in complying with its constitutional obligations when inquiring and auditing the tax affairs of a taxpayer – where the taxpayer can expect fairness, equal treatment, impartiality, accountability and transparency. It is for this reason that the unpublished *SARS Internal Audit Manual* should be made available to the public, as the approach by SARS to taxpayers' tax

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[14] Stewart C *The Rule Of Law And The Tinker bell Effect: Theoretical Considerations, Criticisms And Justifications For The Rule Of Law.* MacQuarie Law Journal at page 7.
[15] See section 3.3.2: *Jurisdictional facts supra*.

affairs are directly affected by its content.[16]

The discretion, as indicated by the use of the word 'may', must be exercised lawfully, reasonably and procedurally fairly.[17] The SARS official must not, *inter alia*, be driven in pursuing the inquiry and audit by the ulterior motive of fulfilling his or her internal management goals or budget at SARS, or be using this administrative process as a means to obtain evidence to penalise the taxpayer, contrary to the provisions of s 35(3)(j) of the Constitution, or to follow a discretion fettered by a SARS management directive, without considering its proper application to the facts of the taxpayer in question. The official cannot exercise power arbitrarily or merely in good faith in the belief that a decision is rationally[18] related to the purpose for which the power was given, albeit mistakenly. This would give credence to form over substance, undermining the applicable constitutional principles.

Lawfulness embraces the administrative law concepts of authority, jurisdictional facts and abuse of discretion (including improper or ulterior purpose or motive, *mala fides*,[19] failure to apply minds or relevant and irrelevant considerations, unlawful fettering, and arbitrary and capricious decision making) in limiting the ability of SARS to act in terms of its powers under ss 74A and 74B.

These concepts of administrative law relate to SARS' duty to attend to the following points regarding inquiries and investigations in relation to ss 74A and 74B:

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[16] Relying on the Promotion of Access to Information Act 2 of 2000 has been unsuccesful to compel SARS to produce the *SARS Internal Audit Manual* to show the guidelines created by SARS in its directions to officials making an inquiry or doing an audit. In *Scherer v Kelley* (1978) 584 F.2d 170 (quoted from the headnote): where the United States of America Freedom of Information Act §552(a)(2)(C) requires agencies to make public administrative staff manuals and instructions to staff that affect members of the public. See Williams R C et al *Silke on Tax Administration* (April 2009) Lexis Nexis at para 8.17 generally. In *Minister for Provincial and Local Government of the RSA v Unrecognised Traditional Leaders of the Limpopo Province, Sekhukhuneland* [2005] 1 All SA 559 (SCA) the appeal court found in favour of the public member seeking a report upholding the right of access to information held by the State, read with sections 36 (the limitation clause) and 39(2) (obliging every court to promote "the spirit, purport and objects of the Bill of Rights of the Constitution" (*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (7) BCLR 687 (CC) followed).

[17] See sections 3.3: *Lawfulness*, 3.4: *Reasonableness* and 3.5: *Procedural Fairness*, *supra*.

[18] *University of Cape Town v Ministers of Education & Culture* (*House of Assembly & House of Representatives*) 1988 3 SA 203 (C); See also LAWSA Volume 1 2nd ed *Administrative Law* Lexis Nexis at para 139 footnote 6; See also s 6(2)(f) of PAJA.

[19] See section 3.3.3: *Abuse of discretion supra*; See also *US v Roundtree* 420 F.2d 845 where a '(t)axpayer against whom government was attempting to enforce summons and who claimed harassment was entitled to take deposition of internal revenue agent in charge of case in order to investigate Internal Revenue Service's purpose.'

a) the inquiry and investigation must relate to a taxpayer as defined;

b) the SARS official must hold a valid letter of authorisation;

c) the discretion of SARS must be exercised lawfully subject to its guidelines;[20]

d) the inquiry or investigation must relate to the facts relevant to the definition of 'the administration of this act' contained in s 74.

In addition to the satisfaction of the above requirements, SARS must ensure that invoking ss 74A and 74B is reasonable (rational and proportional)[21] and procedurally fair(no bias, adherence to the *audi* principle and any legitimate expectation[22] created).[23]

Reasonableness[24] deals with the administrative law concepts of rationality and proportionality where SARS seeks to invoke its powers under ss 74A and 74B. SARS must show a rational connection between the decision to invoke ss 74A and 74B and the inquiry and audit of a named taxpayer, who has not already undergone an inquiry and audit in respect of the same tax issue, in the absence of new information not previously considered. This approach is in line with the methodology promoted by SARS to its assessors in terms of the *Code of Conduct* and the *SARS Internal Audit Manual*.

In terms of the concept of proportionality, when SARS conducts an inquiry and audit pursuing a legitimate aim, where the means adopted to achieve the aim are appropriate, the least restrictive means should be adopted to achieve that aim, and SARS must be able to demonstrate that the exercise of its powers in terms of ss 74A

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[20] *Code of Conduct* and the *SARS Internal Audit Manual*.

[21] See section 3.4: *Reasonableness supra*.

[22] See section 3.6: *Legitimate Expectations supra*. See also Currie I & Klaaren J *Promotion of Administrative Justice Act Benchbook* (2001) SiberInk at 80. See also Williams R C et al *Silke on Tax Administration* (April 2009) Lexis Nexis at para 3.25 generally.

[23] See section 3.5: *Procedural Fairness supra*.

[24] See section 3.4: *Reasonableness supra*; LAWSA Volume 5(3) 2nd ed at para 165; *Commissioner of Taxes v CW (Pvt) Ltd* 1989 (3) ZLR 361 (S) at 370F-372C; *Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Limited* 1928 AD 220 , 236-7; and *National Transport Commission v Chetty's Motor Transport* (Pty) Ltd 1972 (3) SA 726 (A); See also *Local 174 International Brotherhood of Teamsters v US*, 240 F.2d 38; *US v Newman* 441 F.2d 170; *US v Coopers and Lybrand* F Supp 942; *Hubner v Tucker* 245 F.2d 35; *First National Bank of Mobile v US* 160 F.2d 532.

and 74B is justified,[25] and is the least intrusive[26] means of achieving this legitimate aim. SARS must show that the information can only be obtained from the taxpayer and not by some other, less intrusive means, or that it does not already have the information from tax return filings made by the taxpayer, or from information previously submitted by the taxpayer or third parties.[27]

The concept of procedural fairness[28] in relation to ss 74A and 74B concerns the question of bias and the *audi alteram partem* principle. Where a SARS official has the smallest pecuniary interest in the outcome of a decision taken in terms of ss 74A and 74B, a reasonable suspicion of financial bias will exist. The taxpayer has to prove merely the appearance of partiality, rather than its actual existence. If these elements are present the procedural fairness of SARS' conduct will be in question.

The *audi* principle gives taxpayers an opportunity to participate in any decisions that affect them, and allows them to influence the outcome of those decisions. The difficulty in the *audi* principle is that the courts have held that there is no single set of principles for giving effect to the rules of natural justice which will apply to all investigations, inquiries and exercises of power, regardless of their nature. There are instances where SARS will argue that the *audi* principle would not be fair to it in its exercising of its duty to conduct inquiries and investigations, as the taxpayer will be given ample opportunity to object as part of the statutory dispute process under objections and appeals in the Income Tax Act. SARS will argue that the application of the *audi* principle to inquiries and investigations would be disruptive to this process and would create unnecessary hardship for SARS in exercising its duties. The counter argument to this is that a matter is right for adjudication under administrative law when, although the right that may be transgressed in future is not yet available to the taxpayer, it is clear that the preliminary steps taken by SARS

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[25]*Nyambirai v Nssa & Another* 1995 (2) ZLR 1 (S) and *De Freitas v Permanent Secretary of Agriculture, Fisheries, Lands and Housing* 1998 3 LRC 62; See also *Law Society of Zimbabwe and Another v Minister of Finance* 61 SATC 458; *Ferucci and Others v Commissioner for South African Revenue Service and Another* 65 SATC 47 at pages 54-55; *US v McCarthy* 514 F 2d 368.

[26]*R v McKinlay Transport* [1990] 1 S.C.R. 627; *cf.US v McKay* 372 F.2d 174 where the court held the '(p)ower of Commissioner of Internal Revenue to investigate records and affairs of taxpayers is greater than that of a party in civil litigation; such power may be characterized as an inquisitorial power...which should be liberally construed, in context of which the criteria of relevancy and materiality have broader connotations than in context of trial evidence.'

[27]*Supra* footnote 25.

[28] See section 3.5: *Procedural Fairness supra*.

will eventually prejudice that right in the future, giving the taxpayer the right to challenge and review any unlawful, unreasonable, or procedurally unfair (and unconstitutional and 'invalid') conduct by SARS in making the decision.[29]

Apart from the right to lawful, reasonable and procedurally fair administrative action, taxpayers may also have a legitimate expectation[30] that SARS will invoke its powers under ss 74A and 74B in a particular manner. Here taxpayers may expect SARS to have complied with its *Code of Conduct* and to have taken the appropriate steps as detailed in the guidelines provided to assessors in the *SARS Internal Audit Manual*.

SARS' *Code of Conduct* states that SARS : '…[will be] loyal to the Republic, honour the Constitution and abide by it in the execution of daily tasks; put the public's interest first …; … serve the public in an unbiased and impartial manner …; … treating members of the public as valued clients who are entitled to receive the highest standards of service; … recognises the public's right of access to information …; strives to achieve the objectives … cost-effectively and cost efficiently without compromising the legitimate expectations of the public; … recuses … (itself) … from any … action or decision-making process which may result in improper personal gain … (and) … promotes sound, efficient, effective, transparent and accountable administration …'.

These extracts from SARS' *Code of Conduct* also reiterate the constitutional obligations of SARS. Furthermore, the publication by SARS of this document on its website creates the legitimate expectations stated in the document that SARS will '… strive … to achieve the objective … cost effectively and cost efficiently without

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[29]Hoexter(2012) at page 229 footnote 438 – *Du Preez v Truth and Reconciliation Commission* 1997(3) SA 204 (A); *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999(2) SA 709 (SCA); *Ferreira v Levin NO and Others; Vryenhoek and Others V Powell NO and Others*1996 (1) BCLR 1 (CC) at para's [165] – [166]; See also Croome B *Taxpayers' Rights in South Africa* Juta 2010 page 207; Wheelright K *Taxpayer' Rights in Australia in Bentley D Taxpayers' Rights: An International Perspective* Revenue Law Journal Bond University: Queensland 1998 at page 49; *Park-Ross and Another v Director: Office for Serious Economic Offences*1995 (2) SA 148 (C) at paras [1641-165A; *Nomala v Permanent Secretary, Department of Welfare and Another* 2001 (8) BCLR 844 (E); *Transvaal Coal Owners Association and Others v Board of Control* 1921 TPD 447 at 452*; Gool v Minister of Justice* 1995 (2) SA 682 (C)*; Afdelings-Raad van Swartland v Administrateur, Kaap* 1983 (3) SA 469 (C).

[30] See section 3.6: *Legitimate Expectations supra*; See also Currie I & Klaaren J *Promotion of Administrative Justice Act Benchbook* (2001) SiberInk at 80. See also Williams R C et al *Silke on Tax Administration* (April 2009) Lexis Nexis at para 3.25 generally.

comprising the legitimate expectations of the public …' and in accordance with its constitutional obligations set out in ss 1(c), 33, 41(1), 195(1) and 237 of the Constitution.

In addition, by virtue of the provisions of ss 3(2), 5(1) and 5(3) of PAJA the taxpayer may require SARS to issue the taxpayer with adequate reasons[31]on making the decision to inquire and audit in terms of ss 74A and 74B, before embarking on any such inquiries or audit.

As part of the justification or defence raised by SARS against a challenge from a taxpayer that ss 74A and 74B is being unlawfully, unreasonably and procedurally unfairly (and unconstitutionally) invoked, and that SARS is not required to give adequate reasons at this stage of the process, SARS may argue that the inquiry and investigation process is part of a multi-staged decision-making process which will culminate in a final administrative act to which the taxpayer can object in accordance with the statutory procedures in the Income Tax Act. On this basis, SARS may argue that it is premature for the taxpayer to raise any objection at the inquiry and investigation stage. The counter argument by the taxpayer would be that an inquiry or investigation may lead to the serious consequence of an additional assessment being raised unlawfully if proper administrative procedures leading up to that revised assessment are not followed. In this regard, administrative law has developed in terms of the Constitution as analysed in this thesis to ensure that administrators such as SARS follow a prescribed set of rules in executing every part of its duties so as to ensure that the final decision reached is lawful, reasonable and arrived at in a procedurally fair manner.

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[31] See section 2.5: *Adequate Reasons supra*; In this regard, the taxpayer would be entitled to request 'adequate reasons' in terms of section 5(1) and (2) of PAJA for the decision taken by SARS to invoke the provisions of ss 74A and 74B; See also *CSARS v Sprigg Investments 117CC t/a Global Investment* 73 SATC 114 (SCA) at para's [12] and [13]; *Ansett Transport Industries (Operations) Pty Ltd and Another v Wraith and Others* (1983) 48 ALR 500; *Minister of Environmental Affairs & Tourism & others v Phambili Fisheries* (*Pty*) *Ltd & another* [2003] 2 All SA 616 SCA at para [40]; *Gumede v Minister of Law and Order* 1984 (4) SA 915 (N); Van Dorsten J L *The Right to reasons for Decisions in Taxation Matters* The Taxpayer October (2005) at 186-190 before *CSARS v Sprigg Investments 117CC t/a Global Investment* 73 SATC 114 (SCA). As to reason in tax matters generally in the United States Supreme Court in *US v Powell* 379 US 48 (quoted from the headnote): the court held that where the '(p)rimary purpose of clause that no taxpayer shall be subjected to unnecessary examinations or investigations in sub-section of statute going on to provide that only one inspection of taxpayer's books shall be made for each taxable year unless taxpayer otherwise requests or Secretary or delegate, after investigation, notifies *taxpayer in writing that additional inspections are necessary,was no more than to emphasize responsibility of agents to exercise prudent judgment in wielding extensive powers granted to them* by Internal Revenue Code'. (Emphasis supplied)

The constitutional obligations that the taxpayer can expect SARS to obey and fulfil as quickly as possible in terms of ss 1(c), 33, 41(1), 195(1) and 237 of the Constitution strengthens the taxpayer's position in demanding lawful, reasonable and procedurally fair conduct by SARS when invoking ss 74A and 74B. Public administration duties, as set out in ss 41(1) and 195(1) of the Constitution are constitutional obligations that SARS must adhere to.

In exercising a discretion under ss 74A and 74B, all constitutional obligations imposed on SARS must be performed diligently and without delay.[32]

The enforcement of these constitutional obligations should also now be easier after the Constitutional Court *Glenister v President of the Republic of South Africa and Others*[33] judgment. These constitutional obligations include the duties imposed on government and public administrators (including organs of state such as SARS), in terms of ss 41(1)(d) (which states '… all organs of state … must … be loyal to the Constitution …') and 195(1) of the Constitution. These constitutional obligations help to inform the fundamental rights set out in s 33 of the Constitution, read with PAJA. Failure to adhere diligently to these duties and without delay would result in conduct inconsistent with the Constitution and invalid, which would immediately be reviewable in terms of s 172(1) of the Constitution in terms of PAJA, or the principle of legality,[34] as set out in Chapter 5 above.

7.5 REVIEW IN TERMS OF SS 6, 7 and 8 OF PAJA OR THE PRINCIPLE OF LEGALITY

Where a review application is based on SARS' non-compliance with the provisions of s 195(1) of the Constitution and section 4(2) of the SARS Act, it is arguable that a right of the taxpayer has been adversely affected with direct, external legal effect,

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[32]Section 237 of the Constitution; See also *Minister of Health and Others v Treatment Action Campaign and Others* (1) 2002 (10) BCLR 1033 (CC) at para [112].

[33]2011 (3) SA 347 (CC) at para's [13] and [22] held that the High Court had jurisdiction to hear applications challenging the non fulfilment of constitutional obligations such as 'to act reasonably and accountably; to cultivate good human resource management; to respect international treaty obligations; … and to respect values enshrined in the Bill of Rights.'; See section 2.4 *supra*.

[34] Through a Rule 53 application to the High Court - Uniform Rules of Court, GNR 48 of 12 January 1965, made under s 43(2)(a) of the Supreme Court Act 59 of 1959, hereinafter referred to as 'Rule 53'.

and consequently the provisions of s 6(1), 7(1) and 8(1) of PAJA would be met, entitling the taxpayer to access the codified grounds of review in terms of s 6(2) of PAJA. Here the usual meaning of 'a right', is that of an enforceable claim against a duty-holder, is met.[35] A decision will have a direct, external legal effect if it has an actual impact on the taxpayer's rights or interests.[36] It may also affect propriety steps leading to a final determination.[37]

Where the conduct of SARS exercising powers in terms of ss 74A and 74B is unlawful, unreasonable and procedurally unfair (and unconstitutional or 'invalid'), taxpayers have a number of grounds of review, developed by the Constitution through specific legislated provisions, namely: sections 1(c), 33, 41(1), 172(1), 195(1) and 237 of the Constitution, read with s 4(2) of the SARS Act, and ss 6(2), 7(1) and 8(1) of PAJA. In addition, the jurisdictional facts[38] of ss 74A and 74B, read with 74 of the Income Tax Act, must be met. If any of these provisions are not complied with, the conduct of SARS will be inconsistent with the Constitution and may be reviewed by the High Court in terms of PAJA, and failing that, in terms of a transgression of the principle of legality, both by way of a Rule 53 application.

A review application in terms of PAJA, and in the alternative, a review application in terms of a transgression of the principle of legality, will entail a Rule 53 application process, with the grounds for review as set out in section 5.5.6 above being applicable. However, if PAJA is not available to the taxpayer, the principle of legality is.

Rule 53 is the preferred route to review the conduct of SARS in respect of a decision in terms of ss 74A and 74B. It was promulgated to come to the aid of, *inter alia*, taxpayers who need to review public power. The application process allows taxpayers to state their complaint and to request that SARS makes available its

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[35] Klaaren J & Penfold G *Just Administrative Action* Second ed (2002) at page 63-21.
[36] *Ibid.* at page 63-22.
[37] *Nextcom Cellular (Pty) Ltd v Funde NO and Others* 2000 (4) SA 491 (T), in which Coetzee AJ held that a recommendation of the South African Telecommunications Regulatory Authority to the Minister of Communications as to the award of the third cellular licence constituted a reviewable decision, even though preliminary in nature. Also see *Gertis Trading (Pty) Ltd v West Sun Hotel (Pty) Ltd and Others* 1984 (2) SA 431 (D).
[38] See the analysis in section 3.3.2: *Jurisdictional facts supra*.

record on exercising the discretion. This also creates compliance with the transparency requirements in the Constitution.

Once the taxpayer has access to the SARS record, he or she can establish whether or not SARS has complied with its *Code of Conduct*, and the internal *SARS Internal Audit Manual* for assessors. The taxpayer then has the option of amending the application to take into account any observations made from the SARS record. The grounds of review can then be carefully determined, in line with the submissions made in this thesis.

SARS may reply to the application by stating that the taxpayer's application is premature, because the process leading to the issue of the revised assessment is not complete. SARS may argue that its decision-making process is not final, and that the matter is not ripe for hearing. The revised assessment will give the taxpayer the opportunity to object and appeal in the normal course of the dispute procedure.

The taxpayer may respond that the nature of the decision by SARS to obtain information is a final one. Other new decisions may follow. But that decision is final.

The procedures of objection and appeal to review this decision in terms of the Income Tax Act are not available to the taxpayer. Sections 74A and 74B are not subject to objection and appeal. That leaves the taxpayer with the choice: access to the High Court, by virtue of ss 34 and 172 of the Constitution.

In essence, by challenging the conduct of SARS at the time that the inquiry and audit commences the taxpayer is immediately able to bring a suite of rights into play. SARS, on the other hand, when called upon to do so, must justify its actions. As a result, instead of SARS merely requesting information and then simply proceeding to the next point of issuing revised assessments, triggering the 'pay now argue later' principle, a proper inquiry is brought about between the adversaries where the taxpayer questions the motivation, purpose, and nature of the audit, in order to narrow down its scope. This ensures that the necessary infringement by SARS of the taxpayers' tax affairs in carrying out a regulatory process is kept to a

minimum, in line with the spirit of the Constitution. To repeat the words of John Locke in the *Second Treatise of Government* in 1690[39]:

> …we must consider, what state all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man.
>
> A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another; …

The process of allowing the taxpayer to question and review the conduct of SARS in the exercise of its broad public powers in ss 74A and 74B accomplishes the ideal set by John Locke in 1690, as it has found its way into the main thread underlying the Constitution of South Africa. The public power of SARS to regulate through access to taxpayers' information is balanced by the rights of taxpayers to question and review. The circle is complete.

7.6 'JUST CAUSE' SHOWN DEFENCE[40]

In order to avoid providing SARS with information, documents or things, 'good cause shown' in terms of s 75(1)(b) is also available as a defence to taxpayers, where SARS attempts to compel compliance by the taxpayer by invoking the criminal sanctions under s 75(1)(b) of the Income Tax Act, in an attempt to enforce its requests under ss 74A and 74B. The refusal to provide SARS with the information, pending the outcome of the review proceedings, will prevent the inquiry and audit going forward until the question of the lawfulness,[41] reasonableness[42] and procedural fairness[43] of SARS conduct has been addressed by the court.

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[39] John Locke *Second Treatise of Government* Amazon Kindle Edition chapter two: Of the State of Nature, Sect. 4.
[40]See section 3.8: *'Just Cause' Defence supra*.
[41]See section 3.3: *Lawfulness supra*.
[42] See section 3.4: *Reasonableness supra*; See also *Local 174 International Brotherhood of Teamsters v US* 240 F.2d 387.

7.7 THE PROPOSED TAX ADMINISTRATION ACT

The proposed Tax Administration Act 28 of 2011[44] does not negatively impact on the ability for taxpayers to use the 'just cause' defence analysed in this thesis, when taxpayers refuse to participate in SARS' audits due to SARS' inability to illustrate to taxpayers the scope and purpose of the audit and inquiry by invoking its powers in terms of ss 3, 40 through 49 of the Tax Administration Act.

Furthermore, some of the amendments to the existing tax administration legislation that is proposed in the Tax Administration Act will only enhance the ability for taxpayers to raise the 'just cause' defence.

Should SARS attempt to enforce its will to proceed with an audit and inquiry through the various search and seizure mechanisms available to it in the Tax Administration Act, that decision taken by SARS will clearly fall into the ambit of 'administrative action' as defined in the PAJA, and the provisions of ss 6(1), 7(1) and 8(1) of PAJA as analysed in this thesis will be available to taxpayers to take the decision by SARS to conduct the search and seizure process, under review. If correspondence is placed before the High Court setting out the information that taxpayers have sought to clarify the scope and purpose of the audit and inquiry, and show that SARS have ignored these requests, this will cast SARS in a bad light before the High Court – with much explaining to do. Unless the taxpayer concerned is suspected of committing fraud that SARS can *prima facie* demonstrate to the High Court,[45] in all probability the search and seizure process will be set aside, and all 'relevant information' seized will be either returned to the taxpayer, or placed in a neutral secure place for access by the taxpayer, but not SARS. SARS access will

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[43]See section 3.5: *Procedural Fairness supra*.

[44] Hereinafter referred to as the 'Tax Administration Act'.

[45]*Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Ply) Ltd and Others:In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC), (2000 (10) BCLR 1079) where the Constitutional Court held at para [37]: 'It is implicit in the section that the judicial officer will in *his or her mind to the question whether the suspicion which led to the preparatory investigation, and the need for the search and seizure to be sanctioned, are sufficient to justif the invasion of privacy that is to take place.* On the basis of that information, the judicial officer has to make an independent evaluation and determine whether or not there are reasonable grounds to suspect that an object that might have a bearing on a preparatory investigation is on the targeted premises.'

usually depend on terms and conditions being agreed upon between the parties as to the process the audit and inquiry will follow.[46]

The conclusion is that compelling SARS to diligently perform its obligations under the Constitution, in terms of ss 1(c), 33, 41(1), 195(1) and 237, will equip taxpayers with a 'just cause' defence not to participate in an audit or inquiry, unless SARS complies with the requests from the taxpayer as to the scope and purpose of the audit, and taxpayers will be entitled to review the conduct of SARS in terms of PAJA, or, by virtue of the constitutional principle of legality, through a Rule 53application to the High Court, should SARS seek to compel the taxpayer to participate in the inquiry and audit. Nothing in the proposed Tax Administration Act will change this conclusion.

[46] On the basis of unreasonable conduct by SARS exceeding the boundaries of what would be considered proportional to the result SARS is attempting to achieve – obtaining information for an inquiry and audit; See section 3.4.2: *Proportionality supra;* This is also based on the experience of the writer in bringing an appplication of a similar nature on behalf of a taxpayer against SARS in 2002 in the unreported matter of *Drs Du Buisson, Bruinette & Kramer Inc. v C:SARS* Case No. 4595/02 in the High Court of the Transvaal Provincial Division, and subsequent similar applications over the past 12 years. None of the applications were finally argued before the High Court. All applications were settled in negotiations with SARS where its legal department agreed to a process to be followed in accessing information required for specific aspects of the audit and inquiry in circumstances where the taxpayers understood the scope and purpose of the audit. In all instances the result of the audits resulted in no revised assessments being issued against the taxpayers concerned. In one instance, a consent court order was taken against SARS to rescind a defective letter of findings, denying SARS the opportunity to raise revised assessments, as the years of assessment prescribed a few days later - *Xstrata South Africa (Pty) Ltd v C:SARS* North Gauteng Provincial Division Case No 53772/2010 (unreported 21 September 2010).

BIBLIOGRAPHY

APPENDIX A 242

BOOKS

APPENDIX B 246

ARTICLES AND MANUALS

APPENDIX C 251

LOCAL CASE LAW

APPENDIX D 268

FOREIGN CASE LAW

APPENDIX E 272

STATUTES

APPENDIX A

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