

An enquiry into the constitutionality of the ‘pay now, argue later’ principle and the appointment of a third party on behalf of the taxpayer for tax purposes under the Tax Administration Act.

By

Sikhulile Sithandiwe Zulu

217073021

Submitted in partial fulfilment of the requirements for the degree of

Master of Laws (Taxation)

At the

University of KwaZulu-Natal

College of Law and Management Studies

School of Law

Supervisor: Mr Christopher Schembri

Co-Supervisor: Professor Shannon Bosch

2020

DECLARATION REGARDING ORIGINALITY

I, Sikhulile Sithandiwe Zulu declare that:

- A. The research reported in this dissertation, except where otherwise indicated, is my original research.
- B. This dissertation has not been submitted for any degree or examination at any other university.
- C. This dissertation does not contain other persons' data, pictures, graphs or other information, unless specifically acknowledged as being sourced from other persons.
- D. This dissertation does not contain other persons' writing, unless specifically acknowledged as being sourced from other researchers. Where other written sources have been quoted, then:
 - a. their words have been re-written, but the general information attributed to them has been referenced;
 - b. where their exact words have been used, their writing has been placed inside quotation marks, and referenced.
- E. Where I have reproduced a publication of which I am an author, co-author or editor, I have indicated in detail which part of the publication was written by myself alone and have fully referenced such publications.
- F. This dissertation does not contain text, graphics or tables copied and pasted from the Internet, unless specifically acknowledged, and the sources being detailed in the dissertation/thesis and in the References sections.

Signed: 

Date:20/10/2021

ACKNOWLEDGEMENTS

I would like to express my gratitude to my Heavenly Father for granting me the opportunity, courage, strength, and determination to complete my dissertation. Dear God, I am grateful that this journey has never once felt lonely because I constantly felt thy presence and love even through my distress. You have been and you continue to be my safe harbour.

I wish to wholeheartedly express my gratitude to the following people who have contributed to and supported my academic career especially this research project:

- My supervisors Professor Shannon Bosch and Mr Christopher Schembri for taking your time to supervise the completion of this dissertation, responding to my questions always offering assistance even beyond the call of duty.
- My loving parents, Mr Selby Zulu and Mrs Bawinile Zulu for their unfailing love, encouragement, support both emotionally and financially. Thank you for having faith in me and in my dreams. Thanks for all the sacrifices you have made and continue to make to help me realise my dreams and reach my goals.
- My love and my dearest friend Tafadzwa Mangwiro for always being there for me, loving, supporting and encouraging me in all my endeavours. Thanks for being my very own personal cheerleader.
- To all the staff at the law library for their friendly assistance at the library.
- Dr Caroline Goodier for conducting writing workshops which I found very helpful throughout my writing process.
- To all the friends and colleagues who have been supporting and encouraging me on my journey.

TABLE OF CONTENTS	
DECLARATION OF ORIGINALITY	ii
ACKNOWLEDGEMENTS	iii
ABSTRACT	vi
CHAPTER 1:INTRODUCTION	
1.1 Introduction	1-2
1.2 Purpose statement	2
1.3 Rationale /justification	3-4
1.4 Research Problems	4
1.5 Research methodology	5
1.6 exposition	5-7
1.7 Motivation for the study	7-9
1.8 Limitation of scope	9-10
CHAPTER 2 :POWERS OF THE COMMISSIONER ; THE “PAY NOW, ARGUE LATER”	
2.1 Introduction	11-12
2.2 Section 36 of the VAT Act	12-13
2.2.1 Practical impact of section 36 of the VAT Act	13-14
2.3 The <i>Metcash</i> 's Judgment	14-15
2.3.1 Facts of the case	15
2.3.2 The court <i>a quo</i>	15-16
2.3.3 Arguments by the Commissioner	16
2.3.4 Arguments by <i>Metcash</i>	16-17
2.3.5 The Constitutional Court	17
2.3.6 Arguments for and against <i>Metcash</i>	17-21
2.4 The section 164 rule	21-22
2.4.1 Content	22-23
2.4.2 The contextual setting	23-24
2.4.3 Section 36 of the VAT Act versus Section 164 of the TAA	24
2.4.4 Does section 164 resolve concern raised under the VAT Act	24-25
2.4.5 The right to access to court	25
2.4.6 The general rule versus the ‘pay now ,argue later rule’	25-26

2.5 Conclusion	26-27
CHAPTER 3 :AGENT APPOINTMENT	
3.1 The legal framework- Appointment of a third party in terms of the ITA and TAA	28-29
3.2.1 Third Party Appointments under the VAT & ITA versus under the TAA	29-30
3.2.2 Garnishee orders versus section of the TAA	30-32
3.2.3 Constitutionality of the agent appointment	33-34
3.2.4 Judgment	34-35
3.3 Criticism of <i>Hindry</i>	35-37
3.4 Section 36 of the Constitution: The limitation Provision.	37-38
3.5 Does the TAA solve the difficulties experienced under the VAT Act and ITA	38-39
3.5 Conclusion	39-40
CHAPTER 4 : OTHER JURISDICTIONS , AUSTRALIA AND AMERICA	
4.1 Introduction	41
4.2 The use of foreign law in SA.	41
4.3 The ‘Pay now, argue later ‘ in Australia	41-42
4.3The ‘Pay now, argue later ‘ in Australia versus in South Africa	42-43
4.4 The ‘pay now, argue later ‘ rule in the USA	43-46
4.5 The agent appointment in SA versus USA and Australia	46
4.5.1 Agent appointment in Australia	47-48
4.5.2 Agent appointment in the USA	49
4.6 Conclusion	49-50
CHAPTER 5 : PROTECTION FOR THE TAXPAYER	
5.1 Introduction	51
5.2 Remedies for the taxpayer	51
5.2.1 Constitutional remedies	51-52
5.2.2 The Promotion of Administrative Justice Act(PAJA)	52
5.2.3 Delictual Damages	52-53
5.2.4 Dispute Resolution Procedures – Chapter 9 of the TAA	53
5.2.5 The Office of the Tax Ombud	53-54
5.2.6 SARS Service Charter	54
5.2.7 The Human Rights Commission and the Public Protector	54-56
5.3 Taxpayer protection in other countries	56-57

5.4 Conclusion	57-
6 OVERALL CONCLUSION	
6.1 Introduction	58
6.2 Main findings and issues	58
6.2.1 Section 164	58-60
6.3 Section 179	60-61
6.4 Other jurisdictions	61-62
6.5 Remedies	62
6.6 Recommendations	62
6.6.1 Final word	62-63
REFERENCES	
Books	64
Articles and dissertations	64-65
Internet and electronic sources	65-66
Case law	66
Legislation	67

ABSTRACT

Prior to 2012, the tax collection practices known as ‘pay now, argue later’ and ‘agent appointment’ respectively were contained in Value Added Tax and Income tax legislation and have been the cause of many disputes between the taxpayer and the revenue collector over the years. These collection practices have sparked much controversy among the legal scholars for the longest time. When the Tax Administration Act came into operation in 2012, it still made provision for a number of controversial summary collection procedures including the ones referred to above. This was probably due to the court decision in *Metcash Trading Limited v Commissioner for SARS 2001 (1) BCLR 1(CC)* which upheld ‘pay now, argue later rule’ and the decision in *Hindry v Nedcor Bank 1999 (2) All SA 38 (W)* in which the court found in favour of ‘agent appointment’ rule. These decisions were made in the context of VAT legislation, a system in which there is a much narrower scope for a genuine dispute of tax liability, as it is a self-assessment system as opposed to income tax where tax is paid on the basis of what is assessed by the Commissioner to be due to SARS.

As a result of these cases and the subsequent enactment of the Tax Administration Act, there has been an overwhelming level of confusion as to the constitutionality of these collection procedures in the context of income tax. Accordingly the desire to conduct this study was triggered by need to contribute to an attempt to achieve clarity as to whether these court decisions should be applied. In addition, the study contains a comparative analysis of the implementation of the same procedures in other selected jurisdictions.

It will be established that SARS’s conduct in exercising its statutory powers more often than not is in conflict with the taxpayers’ rights. Often the remedies are limited and place the taxpayer in an inconvenient situation as they are not directly related to tax. There is an urgent need for affordable and effective relief to which taxpayers can resort instead of litigation the cost of which is rather exorbitant.

CHAPTER 1 - INTRODUCTION

1.1 Introduction

There is neither something new nor unique about modern taxation. Governments around the world require the payment of taxes from their citizens to finance service delivery to the citizens and have done so for centuries.¹ According to Croome taxation can be defined as a ‘monetary based compulsory contribution payable by the public as whole or a substantial sector thereof to government.’² Tax legislation regulates tax payable by citizens of a country to their government to enable the government to achieve its economic objectives and give effect to the citizens’ socio-economic rights.³ As observed by Croome the relationship between the taxpayer and the collector of revenue is not one of equality and cannot be compared to the relationship between a client and a business where the client has a choice on what goods or services they may buy.⁴

The powers of tax collection and administration in South Africa are vested in the South African Revenue Service (hereafter SARS). Sections 3 and 4 of the South African Revenue Service Act 34 of 1997 (hereafter SARS Act) grants these powers to SARS. The legislature has vested SARS with far-reaching administrative and legal powers through legislation so as to enable it to collect taxes in an efficient and timeous manner, thereby effectively discharging its duty to collect taxes.⁵ Among the powers that SARS is afforded by the legislature is the power to apply the so-called ‘pay now, argue later’ rule, as contained in section 164 of the Tax Administration Act (hereafter the TAA),⁶ and the ability of SARS to appoint an agent to pay outstanding tax, on the taxpayer’s behalf for tax collection purposes as provided for by section 179 of the TAA.

¹ BJ Croome *Taxpayers’ Rights in South Africa* (2010) 1. See also G J King *The Constitutionality of the ‘pay now, argue later’ in terms of the Tax Administration Act* (unpublished LLM thesis, University of Pretoria, 2015) 4.

² BJ Croome... et al *Tax law an introduction* (2013) 5.

³ Croome (note 1 above) 3.

⁴ BJ Croome *Taxpayers’ Rights in South Africa An analysis and evaluation of the extent to which the powers of the South African Revenue Services comply with the rights to property, privacy, administrative justice, access to information and access to courts.* (unpublished Ph.D. thesis, University of Cape Town 2008) 1.

⁵ A Muller *A framework for wealth transfer taxation in South Africa* (2010) 63.

⁶ 28 of 2011.

The importance of effective and efficient tax collection cannot be over-emphasised. It is imperative that SARS be given powers to collect taxes efficiently and timeously. However, SARS's tax collection duty has to co-exist with taxpayer's rights. There are other considerations of equal importance which impact on tax collection. Those include;- the rights of the taxpayers as entrenched in the Bill of rights in the Constitution,⁷ which include *inter alia* the right to access to courts, the right to administrative justice and the right to property.

All rights in the Bill of Rights are not absolute and may in terms of section 36 of the Constitution be limited 'where the limitation is reasonable and justifiable in an open and democratic society.'⁸A balance has to be struck between effective and efficient tax collection and the Constitutional rights of taxpayers. Accordingly, the main purpose of this dissertation will be to examine whether the selected sections of the TAA are constitutionally aligned in light of the practices in other constitutional democracies like the USA and Australia.

1.2 Purpose statement

This study endeavours to analyse and evaluate selected sections of the TAA in order to ascertain whether these provisions uphold the rights of taxpayers which are entrenched in the Constitution. More specifically this study will examine taxpayers' rights to access to courts (section 34), the right to fair administrative action (section 33 of the) and the right to property (section 25) versus the powers afforded to SARS in terms of sections 164 and 179 of the TAA. The dissertation will consider whether or not a balance has been successfully struck between the taxpayers' rights and the need for efficient and effective tax collection by SARS. The research will involve a comparison of the implementation of the said powers in the Republic, the United States of America and Australia.

The reason why these countries were selected is that in deciding matters which form the subject of this research, these and other countries in the Organisation for Economic Co-operation and Development (OECD) seem to be the focus of our courts.

⁷ The Constitution of the Republic of South Africa, 1996.

⁸Section 36 (1) of the Constitution.

1.3 Rationale /Justification

After a number of reported cases,⁹ the implementation of the selected provisions of the TAA remains controversial and unresolved, the most controversial of the two is undoubtedly the ‘pay now, argue later’ rule. In so far as the ‘pay now, argue later’ rule is concerned there is an authoritative case in the setting of Value Added Tax (VAT), referred to as the *Metcash*¹⁰ judgment. The court, in this case, examined the ‘pay now, argue later’ rule and found it to be consistent with the Constitution of the Republic.¹¹ Although various courts have confirmed the position using the *Metcash* judgment,¹² there is doubt as to whether this judgment can rightly be used as binding authority in the context of the Income Tax Act (hereafter ITA). There is a need for certainty as to the Constitutional status of this principle and for the courts to provide some form of judicial guidance in the context of the ITA.

The third party appointment as an agent on behalf of a taxpayer, as provided for by section 179 of the TAA is another controversial feature of the TAA that needs to be examined thoroughly. The section provides as follows 179 of the TAA which provides as follows:

- (1) A senior SARS official¹³ may authorise the issue of a notice to a person who holds or owes or will hold or owe any money, including a pension, salary, wage or other remuneration, for or to a taxpayer, requiring the person to pay the money to SARS in satisfaction of the taxpayer's outstanding tax debt.
- (2) A person that is unable to comply with a requirement of the notice, must advise the senior SARS official of the reasons for the inability to comply within the period specified in the notice, and the official may withdraw or amend the notice as is appropriate under the circumstances.

⁹*Metcash Trading Limited v Commissioner for SAR; Mokoena Albert Sepataka v C: SARS 2011(2) SA 556(GSJ); Capstone Pty(Ltd) v C: SARS 2011 ZAWCHC 297 and Singh v C: SARS 2003(4) SA 520 (SCA).*

¹⁰*Metcash Trading Limited v the Commissioner for SARS 2001 (1) BCLR 1(CC).*

¹¹ See *Metcash at Trading Limited v the Commissioner for SARS 2001 (1) BCLR 1(CC).*

¹¹ See *Metcash 26.*

¹² *Mokoena Albert Sepataka v C: SARS 2011(2) SA 556(GSJ); Capstone Pty(Ltd) v C: SARS 2011 ZAWCHC 297 and Singh v C: SARS 2003(4) SA 520 (SCA).*

¹³ The term ‘senior SARS official’ is defined in section 1 of the TAA as a SARS official referred to in s6(3). Section 6(3) provides that the powers and duties required to be exercised by a senior SARS official ‘must be exercised’ by either the Commissioner, a SARS official who has specific written authority from the Commissioner or a SARS official occupying a post designated by the Commissioner for this purpose.

- (3) A person receiving the notice must pay the money in accordance with the notice and if the person parts with the money contrary to the notice, the person is personally liable for the money.

Even though this tax collection method was upheld to be constitutional in the case of *Hindry v Nedcor Bank*,¹⁴ there were and still are controversial features of the provisions relating to the appointment of a third party. This case was decided prior to the enactment of the TAA. It is important to determine whether the provision as provided for in the fairly recent TAA deals with the problematic issues identified in the previous legislation (the VAT Act and ITA) and whether this provision as it stands presently is more constitutionally aligned, and whether it bears similarities to corresponding provisions in other constitutional democracies.

1.4 Research questions/Problems

The first question to be answered is whether sections 164 and 179 of the TAA and the powers these sections grant to the Commissioner are consistent with the Constitution and the principles of natural justice. This is to evaluate whether taxpayers are adequately protected against the powers given to SARS when those powers result in the infringement of their constitutional rights. If it is found that these sections of the TAA are infringing on the taxpayers' rights, the second question will be whether there are less intrusive means of collecting taxes efficiently and effectively.

In researching this issue it became apparent that there are similar provisions dealing with 'pay now, argue later' and the appointment of third parties in the Australian Tax Administration Act¹⁵ and the USA Internal revenue Code.¹⁶ It is useful to explore how and by whom the relevant provisions are applied in these foreign jurisdictions. It is useful to compare the relevant sections with the corresponding sections in South African Tax Administration Act and see whether there are any striking similarities or differences.

The third and last question to be considered is what lessons can be drawn from Australian and American Tax legislation in order for South Africa take a step forward in an attempt to achieve some sort of an equilibrium between taxpayers' rights and SARS duty to collect taxes in a manner that is effective and efficient.

¹⁴ 1999 (2) All SA 38 (W) hereafter *Hindry*.

¹⁵ Act 1 of 1953 as amended.

¹⁶ Internal Revenue Code ,title 26 Act Aug 16, 1954.

1.5 Research methodology

The methodology adopted is of a qualitative, interpretive and comparative nature with the interpretation of *inter alia* the Constitution, the Tax Administration Act, relevant case law, published journal articles, textbooks, selected foreign laws and secondary sources. This method is appropriate as it sets out the legal position relating to significant issues identified.

A literature review and analysis will be undertaken which will include the following sources:

- The Constitution of the Republic
- Statute
- Case law
- Journals
- Magazine articles
- Electronic databases
- Electronic sources
- Official/ Government Publications

1.6 Exposition

Chapter 1 –Introduction

This chapter will consist of an introduction of the law that forms the subject of the research, the origin of the ‘pay now, argue later’ rule and the third party appointment, the research objectives, research questions and the scope of the research.

Chapter 2 –The ‘pay now, argue later’ rule

In the second chapter the development of ‘pay now, argue later’ rule from section 36 of the VAT Act to the present section 164 of the TAA will be discussed and thereafter the powers conferred by sections 164 of the TAA will be scrutinised to establish whether this procedure is consistent with the Constitution. Chapter 2 will also explore the current views of other scholars on this practice in light of the *Metcash* judgment. Furthermore, a comparison will be conducted between the ‘pay now, argue later’ rule, and normal civil appeals. This contrast, it is submitted, will offer invaluable clarity as to the extent of SARS’ powers and will be useful in establishing whether or not this authority limits the taxpayer’s right to access to court and possibly other rights, in a manner that is said to be reasonable and justifiable, as required by

the Constitution. In the latter part of the chapter, the constitutional attack by scholars will be discussed and how this rule interacts with the taxpayer's rights guaranteed by the Constitution.

Chapter 3 –The appointment of a third party as an agent of the taxpayer.

The chapter will analyse the appointment of a third party as an agent of the taxpayer as provided for in terms of section 179 of the TAA. The development of this tax collection practice from the VAT Act, the ITA and finally the TAA will be analyzed highlighting some differences between the procedure in terms of the previous legislation and the current legislation. Further, the third party appointment will be compared to the civil garnishee procedure. This will provide an insight into the impact of this procedure. The constitutionality of the practice will be analysed with reference to the *Hindry* judgment in relation to the right to property and the right to administrative action which is fair.

Chapter 4- The Implementation of similar provisions in the selected foreign jurisdictions.

The objective of this chapter is to provide a brief discussion of how similar provisions in selected foreign jurisdictions are implemented and by whom. The chapter will also highlight the differences and similarities in the implementation of the said provisions in those jurisdictions and assess whether there are positive practices that SA can adopt and if so whether they can be as effective in the context of South Africa. South Africa is an emerging democracy, which can profit greatly by drawing on experiences of these foreign jurisdictions. The latter part of the chapter will briefly discuss what measures the selected jurisdictions take to ensure that the Revenue Services' tax collection duty and the taxpayer's rights are balanced. It is submitted that our tax administration can benefit greatly from the lessons learnt by the administration of the selected jurisdictions.

Chapter 5- Conclusion

The chapter will present the results of the study and make some suggestions concerning avenues that could be explored to make certain that the TAA strikes a balance between the rights of taxpayers and the duty upon SARS to collect taxes efficiently. Remedies that South

Africans have will be discussed. It will be established that the ‘pay now, argue later’ principle and the third party appointment have the potential to be less invasive with a few changes.

Chapter 6- Overall conclusion

The final section of this study will discuss the overall conclusions of this study and make some recommendations.

1.7 Motivation for the study.

Section 164 (1) of the TAA provides that ‘the obligation to pay tax and the right of SARS to receive and recover tax will not be suspended by an objection or appeal or pending the decision of the court pursuant to an appeal under section 133’ unless a SARS senior official’s direction is to the contrary in terms of the Act.

The Act¹⁷ provides that ‘a taxpayer may make a request to a senior SARS official to suspend the payment of tax or a portion thereof due under a tax assessment if the taxpayer intends to dispute or disputes the liability to pay that tax under chapter nine.’ The senior SARS official may then exercise their discretion as to whether or not the payment of the said tax will be suspended. Certain factors have to be considered such as; the taxpayer’s willingness to comply with SARS in the past and whether suspension will jeopardise the prospects of recovering the disputed tax.¹⁸ The SARS official also has to consider other important factors namely; whether the recovery of the tax despite an objection will cause ‘irreparable hardship’ to the taxpayer which outweighs SARS’s prejudice if the tax is not recovered. In terms of section 164(6) SARS is prohibited from employing measures to collect the said amount of tax within the period during which the request for suspension is being considered and for ten days subsequent to the notice of denial of the suspension being issued.

Among other summary procedures, the Commissioner can employ to collect taxes, is the power to authorise the issue of a notice to a person who ‘holds or owes or will hold or owe money’¹⁹ to the taxpayer, requiring the appointee to make payment to SARS to satisfy the

¹⁷ Section 164(2).

¹⁸ Section 164(3)(a) and (b).

¹⁹ Section 179(1) of the TAA.

outstanding tax debt of the taxpayer.²⁰ The funds being held or to be held may include money, a salary, wage and even a pension. The recipient of the notice is required to pay the money over to SARS according to the notice. If they do not pay the money over, and they part with the money notwithstanding the notice they become personally liable for the tax debt.²¹ SARS is only entitled to issue the notice referred to once a final demand for payment has been delivered to the tax debtor. However, SARS is not required issue the notice of final demand if a senior SARS official is, on reasonable grounds, of the opinion that to give such notice would place the tax debt collection in jeopardy.

The above sections of the TAA exist along with the Constitution which is ‘the supreme law of the Republic and any law or conduct inconsistent with it is invalid.’²² Rights entrenched in the Constitution include the right to property and the right to administrative justice. Embodied in the right to just administrative action are the rules of natural justice; *the audi alteram partem* rule and the *nemo eudex in sua causa* which require a decision maker to have no personal interest in any matter before them and, hear both sides of the story before adjudicating. Although entrenched in the Constitution, these rights are not unqualified and may be limited as provided for by the limitation clause contained in section 36 of the Constitution:

36. (1) The rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all the relevant factors, including –

- (a) the nature of the right ;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.²³

²⁰ Section 179.

²¹ Section 179(1) of the TAA.

²² Constitution of the Republic of South Africa 108 of 1996 (1996 Constitution) section 2.

²³ Constitution of the Republic of South Africa Act 108 of 1996 (1996 Constitution).

When a court is deciding on the constitutionality of any law or conduct it will first determine whether ‘a right in the Bill of Rights has been infringed by a law or conduct of the respondent.’²⁴The second enquiry to be considered is whether the infringement can be justified as an acceptable limitation of the right.²⁵The second enquiry will obviously depend on an affirmative answer to the first enquiry.

A review of the literature shows that studies focused predominantly on the comparison between the application of the of the ‘pay now, argue later’ rule and the third party appointment before the coming into operation of the TAA and whether enactment of the TAA has cured the issues that arose when these principles were applied to the VAT Act and the ITA.

Moreover, these studies focus on the constitutionality or otherwise of the selected provisions of the TAA in light of the *Metcash* judgment in so far as the ‘pay now, argue later’ principle is concerned and the *Hindry* case in so far as the third party appointment is concerned.

What is missing from these studies is an in-depth comparison of the implementation of these principles in South Africa and other jurisdictions which are constitutional democracies, in order to establish whether there are means of implementing these principles that South Africa can adopt from other countries to make our own tax collection less constitutionally invasive.

Further, as observed by Olivier²⁶,there is no clarity as to which foreign systems serve as an international basis for acceptance of the ‘pay now, argue later’ rule as neither the court *a quo* nor the Constitutional Court mentioned which foreign decisions and systems were relied upon in *Metcash*.

1.8 Limitations of scope

In this study, the selected provisions of the TAA will be analysed and evaluated against the Constitutional rights to fair administrative action, access to the courts and property. It is noted that there are other provisions of the TAA which may potentially be in conflict with the

²⁴ I Currie& J De Waal *The Bill of Rights Handbook* 6 ed (2013) 153.

²⁵ Ibid.

²⁶ L Olivier ‘Tax collection and the bill of rights’ 2001 *TSAR* 199.

Constitution but those fall out of the scope of this research. This study will not consider developments in the law that took effect after November 2018.

CHAPTER 2 – POWERS OF THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE : ‘PAY NOW, ARGUE LATER’

2.1. Introduction – The ‘pay now, argue later’ principle

Formidable powers are granted to the Commissioner for SARS to effectively and promptly collect taxes. Among these is the so-called ‘pay now, argue later’ rule. This principle refers to the authority which was in the past bestowed on SARS by sections 36 and 88 of the VAT Act and ITA respectively and which is now contained in section 164 of the TAA. In terms of section 164, the duty to pay additional tax penalties, tax and interest is ‘not suspended by an objection or appeal or pending the decision of a court of law pursuant to an appeal unless a senior SARS official directs otherwise on the request of the taxpayer.’²⁷ In accordance with this rule, a taxpayer who disputes an assessment will still be required to pay the taxes due despite having lodged an objection or noted an appeal. The implication of this principle is described by Olivier as follows: ‘The common law rule of practice in terms of which the execution of a judgment is automatically suspended upon the noting of an appeal, does not apply to a tax debt.’²⁸

The practical implication of this section can only be properly illustrated by the use of an example.²⁹ A taxpayer may receive a telephone call notifying him that he is indebted to SARS for a considerable amount that he or she is required to settle in a matter of days.³⁰ The taxpayer may not be satisfied with the amount they are said to owe to SARS, but disclosing this fact to the caller will not assist the taxpayer as the caller will point out that one needs to pay now and argue later.³¹

²⁷ Section 164 of the TAA.

²⁸ L Olivier ‘Tax collection and the bill of rights’ 2001 *TSAR* 194.

²⁹ C Keulder *Does the Constitution protect the taxpayers against the mighty SARS? –An inquiry into the constitutionality of selected tax practices and procedures* (unpublished LLM thesis, University of Pretoria, 2011) 54.

³⁰ *Ibid.*

³¹ *Ibid.*

The ‘pay now, argue later’ rule was dealt with in *Metcash Trading Ltd.*³²In this case, a taxpayer challenged the validity of the VAT legislation which creates this rule, arguing that it was in conflict with the Constitution, particularly section 34 which grants everyone the right to have access to courts. The court upheld of the ‘pay now, argue later’ rule. Since the *Metcash* judgment is the Constitutional Court’s decision, all the courts are bound by the judgment on the basis of ‘stare decisis’ unless it can be shown that the judgment was erroneous, or it can be distinguished.³³As observed by Chaka, the mere mention of the rule is infuriating to many taxpayers.³⁴

The ‘pay now, argue later’ rule appears to interfere with the taxpayer’s right to access to court before payment is made.³⁵It has been observed by Arnold that, if the rule is not applied, this may result in many taxpayers using the objection procedures as a dilatory tactic and therefore result in many frivolous objections being lodged.³⁶It therefore goes without saying that a balance must be struck between the taxpayer’s rights and SARS’s duty to collect taxes effectively. However, due to the complexity and significance of these two competing interests, achieving such balance has proved to be a difficult task. To ensure that section 164 of the TAA and its impact is clearly understood, it is necessary to discuss the impact of the rule under section 36 of the VAT Act which dealt with the ‘pay now, argue later’ rule prior to the enactment of the TAA.

2.2 Section 36 of the VAT Act.

In terms of section 36 of the VAT Act, any appeal or objection does not suspend the payment of tax unless the Commissioner directs otherwise.³⁷A vendor has an opportunity to ‘request the Commissioner to suspend the payment of tax or any portion thereof due under an

³²*Metcash Trading Limited v the Commissioner for SARS* 2001 (1) BCLR 1(CC) hereafter *Metcash Trading Ltd.*

³³ H R Hahlo & E Kahn *The South African Legal System and its Background* (1973)213. *Certification of the Amended Text of the Constitution of the Republic of South Africa 1996 -1997* 1 BCLR (CC) para 8.

³⁴ JBT Chaka ‘pay now, argue later’ rule in the *South African Tax Law – A critical analysis* (unpublished LLM thesis, University of KwaZulu Natal, 2015)30.

³⁵ C Keulder ‘Pay now, argue later rule’ before and after the Tax Administration Act (2013)16(4) *PER* 127.

³⁶ Anorl opinion prepared for the Commissioner for Inland Revenue (attached as annexure H to the affidavit of the Commissioner in an application to the Constitutional court CCT 22/96).

³⁷ Section 36 (1) of the VAT Act as amended.

assessment where liability for the tax is disputed or is intended to be disputed by the taxpayer.’³⁸

The Commissioner will then exercise his discretion as to whether or not the payment of tax will be suspended as per the taxpayer’s request. The Commissioner can deny the request, or rescind the suspension of payment if ‘he is satisfied that the objection or appeal is frivolous, or is being used for solely purposes of causing delay unduly or because material changes have occurred since the granting of the suspension.’³⁹

2.2.1 The practical impact of section 36

As observed by Keulder, in order to fully grasp the impact of section 36, one needs to acknowledge that the ‘pay now, argue later’ rule does not apply independently of other tax collection procedures.⁴⁰ In fact the rule would be of no particular significance if it were to stand on its own as the Commissioner would have to wait for the court to make a decision on the assessment in dispute before recovering the tax debt.⁴¹ Therefore SARS is granted additional powers to give effect to the ‘pay now, argue later’ rule.

Where the satisfaction of the tax debt is neglected by the taxpayer awaiting the conclusion of an objection or an appeal, section 40(2)(a) of the VAT Act allows SARS an option to implement the statement procedure.⁴²

The filing of a statement allows SARS to have a statement which is certified by the Commissioner as correctly reflecting the amount owed by the taxpayer, filed with the clerk or Registrar of the court fit to hear the matter. Thereafter the statement operates as a civil

³⁸ Section 36(2) of the VAT Act as amended.

³⁹ Section 36(4) of the VAT Act.

⁴⁰ C Keulder ‘‘Pay now, argue later’ rule before and after the Tax Administration Act’ (2013)16(4) *PER* 129.

⁴¹ G J King *The Constitutionality of the ‘pay now, argue later’ in terms of the Tax Administration Act* (unpublished LLM thesis, University of Pretoria, 2015).

⁴² Section 91(1)(b) of the ITA, section 172(1) and (2) of the TAA and section 114(1)(a)(ii) of the Customs Act 90 of 1964 contain similar provisions.

judgment,⁴³ on the strength of which the Commissioner can obtain a writ to attach and sell property belonging to the taxpayer.⁴⁴

Another contentious power that SARS could utilise to collect the unpaid tax was found in section 47 of the VAT Act. In terms of this section the Commissioner can, if he deems it expedient, cause a notice to be served on a third party holding funds on behalf of the taxpayer, requiring the third party to be the taxpayer's agent and to pay the outstanding tax, interest or additional tax as the case may be on behalf of the taxpayer.⁴⁵The agent must pay the money over to SARS and if they otherwise part with the money, they will be liable for the payment of the tax due. The extent of this power will be discussed in the next chapter.

In *Mokoena* Spilg J observed as follows in so far as the 'pay now, argue later' rule and its application to the VAT Act is concerned:

The provision is however draconian and should, therefore, be exercised with care by properly experienced and suitably qualified personnel since it may be otherwise reduced to an arbitrary guesstimate with grave consequences for the taxpayer. This is so because the Commissioner is entitled, even if there is an objection or an appeal, to seize and realize assets including money standing to the credit of the taxpayer's bank account notwithstanding that these actions may jeopardize the taxpayer's cash flow and business.⁴⁶

2.3 The *Metcash* judgment

It is essential to discuss the *Metcash* case to clearly understand the contextual setting in which section 36 of the VAT Act was held to be constitutionally sound.

It was the constitutional validity of section 36(1) the subsections, (2)(a) and (5) and section 40 of the VAT Act 89 of 1991 that the court in *Metcash* was concerned with. At issue was whether these sections limited the right to have access to courts, which is guaranteed by the

⁴³ Section 40(2)(a) of the VAT Act, Section 172 of the TAA. See also C Keulder' 'Pay now, argue later' rule before and after the Tax Administration Act' (2013)16(4) *PER* 130.

⁴⁴ *Capstone 556(Pty) Ltd v CSARS* 2011 ZAWCHC 297 para 37 hereafter *Capstone* .

⁴⁵ Section 99 of ITA and section 179 of the TAA contain similar provisions.

⁴⁶ 2011(2) SA 556 (GSJ), para 10. hereafter *Mokoena*.

Constitution in section 34, and if they were found to be a limitation, whether the limitation was reasonable and justifiable.⁴⁷

2.3.1 Facts of the case

In this case, the Commissioner had assessed Metcash to tax in the amount of R 265 934 943, 04 (nearly R 266 million) which consisted of the original tax due, plus an additional tax of double the additional the amount, penalties and interest.⁴⁸This was because the Commissioner had been dissatisfied with Metcash's VAT returns for several years.⁴⁹Metcash had responded to this assessment by lodging an objection, which objection was disallowed by the Commissioner who thereafter granted Metcash a period of 48 days within which to comply with the assessment, otherwise the Commissioner would implement the summary procedures envisaged by section 40(2)(a) of VAT Act.⁵⁰

2.3.2 The Court *a quo*

Consequently, Metcash brought an urgent application to the High Court to counter the action which the Commissioner had threatened.⁵¹Snyders J found the pertinent sections of the VAT Act to be in contravention of section 34 of the Constitution. In coming to this conclusion, much reliance was placed on the court's decision of in *Chief Lesapo v Northwest Agricultural Bank and another* where it was held that the pertinent sections were invalid by reason of their infringement of section 34 of the Constitution.⁵²In *Metcash* the court quoted the following passage from *Lesapo*;

The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and the anarchy which it causes.⁵³

⁴⁷*Metcash* para 1.

⁴⁸ *Ibid* 4.

⁴⁹ *Ibid* 2.

⁵⁰ *Ibid* 5.

⁵¹ *Ibid* 6.

⁵² 1999 ZACC 16.

⁵³*Metcash* (note 45 above) 37.

It is against this background that the specific sections were the declared unconstitutional by the judge and the order was referred to the Constitutional court for confirmation of constitutional invalidity as per section 167(5) and 172(2) in terms of which ‘an order of constitutional invalidity made by a High Court is of no force or effect unless confirmed by the Constitutional Court.’⁵⁴

2.3.3 The arguments by the Commissioner

The Commissioner and the Minister obviously did not favour the confirmation of constitutional invalidity, contending that the court erred in finding the sections unconstitutional. They argued that the application of the ‘pay now, argue later’ rule afforded the taxpayer ample opportunities to be heard on the assessment.⁵⁵ This, they argued, could be done by way of an objection to the assessment by requesting the Commissioner to allow the payment to be done over an extended period and if the extension is refused, then the taxpayer may approach the court to set aside the Commissioner’s decision to refuse an extension on review; and, finally an appeal to the Special Court could be noted on the assessment and other charges.⁵⁶ They argued therefore that the sections did not violate the right to access to courts. Their alternative argument was that even if the section did violate the right to access to court, such infringement was reasonable and justifiable because quick, dependable and consistent VAT collection is of ‘vital national importance’ and the limitation was permissible under section 36.⁵⁷

2.3.4 Metcash’s arguments

The finding and reasoning of the High Court was favoured by Metcash contending that the opportunities afforded by SARS to voice disapproval are an ‘illusion’ and are inadequate as the taxpayer is in actual fact forced to pay and only be optimistic that they will receive their money back later.⁵⁸As to the justification under section 36 of the Constitution, Metcash

⁵⁴ Ibid 6.

⁵⁵ Ibid 8.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid 9.

argued that there were less invasive means of ensuring a prompt and dependable receipt of the VAT to protect national interests.⁵⁹

2.3.5. The Constitutional court

Kriegler J indicated in his judgment that ‘section 36(1) of the VAT Act is not concerned with access to a court of law and says nothing that can be construed as a prohibition against resort to such a court.’⁶⁰ Further, the court held that it is an accepted fact that the ‘Commissioner’s exercise of discretionary powers granted to him by statute, constitutes an administrative action and is therefore reviewable.’⁶¹ The judge shed some light on how the Special Court functions and pointed out that the Special Court operates like a normal court and ‘has extensive powers to interfere with, amend or set aside decisions of the Commissioner and a discontented taxpayer would have access to courts by appealing to the Special Court.’⁶² The court, therefore, held section 36 of the VAT Act to be constitutionally sound.

2.3.6 Arguments for and against the *Metcash* judgment.

Opinions of scholars vary on the question of whether the *Metcash* judgment from the Constitutional court was correct or not. Several of these opinions will be discussed below.

Croome concurs with the judgment of the court in *Metcash*. He is also of the opinion that since a discontented taxpayer can always have the court review the decision of the Commissioner to refuse a suspension which means they will have access to court as guaranteed by the Constitution.⁶³ He further contends that another court dealing with the same provision in the context of income tax would have probably reached the same conclusion.⁶⁴ The reason he puts forward in support of this proposition is that the ITA is a law of general application and applies to every taxpayer and is not unreasonable and unjustifiable in an open and democratic society.⁶⁵ He further argues that the requirement to pay tax due

⁵⁹ Ibid 10.

⁶⁰ Ibid 37.

⁶¹ Ibid 40.

⁶² Ibid 47. See also C Keulder ‘Pay now, argue later’ rule before and after the Tax Administration Act’ (2013)16(4) *PER* 137.

⁶³ B J Croome *Taxpayers’ Rights in South Africa* (2010) 40.

⁶⁴ *ibid*.

⁶⁵ *Ibid*.

pending the hearing is reasonable and justifiable in an open and democratic society because the Commissioner has a duty to collect taxes for the proper running of the country, and the taxpayer can always be refunded should he succeed on appeal.⁶⁶

Johannes is, however, of the opinion that while the possibility of a refund may sound like an even-handed solution, often payment under these circumstances may leave a taxpayer destitute as the taxpayer will probably have to finance the tax payment for a long period of time while it explores its various other avenues against SARS.⁶⁷

Kriegler J, in delivering the judgment stressed the fact the case was only concerned with the VAT Act and no other fiscal statute.⁶⁸The court drew a distinction between VAT, which is a self-assessment tax system and income tax, where the returns submitted are required to be assessed by the Commissioner.⁶⁹The court indicated in *Metcash* that liability for VAT arises on each and every transaction concluded by a VAT vendor whereas, in the case of income tax, the liability arises only once when the Commissioner has issued an assessment.⁷⁰

Williams and Keulder are of the view that the court's pronouncement of constitutional validity in *Metcash* does not necessarily indicate that 'it is a foregone conclusion that the court would have reached the same conclusion if income tax had been at issue',⁷¹ because there are a quite a number of noteworthy differences between the two taxes, the most important of which 'being that there is far more scope for genuine disputation of income tax liability than liability for VAT.'⁷²

⁶⁶ Ibid.

⁶⁷B Johannes 'pay now, argue later' rule: When must we pay SARS?(03 June 2016 available at <https://www.thesait.org.za/news/292287/Pay-Now-Argue-Later-Principle-When-Must-You-Pay-SARS.htm> accessed on 25 July 2018).

⁶⁸ C Keulder 'Pay now, argue later rule' before and after the Tax Administration Act (2013)16(4) *P.E.R* 139. See also B J Croome *Taxpayers' Rights in South Africa* (2010) 40.

⁶⁹*Metcash Trading Ltd* 14.

⁷⁰ Ibid 15. Keulder (note 66 above) 139.

⁷¹ Ibid.

⁷² R C Williams 'Unresolved aspects of the 'pay now, argue later' rule.'(07 February 2012) available at <https://www.thesait.org.za/news/83050/Unresolved-aspects-of-the-pay-now-argue-later-> accessed on 25 July 2018.

Keulder correctly submits that the *Metcash* judgment was only concerned with the ‘pay now, argue later’ rule in the context of VAT and therefore ‘the considerations that influenced the court in arriving at its decision in *Metcash* would not necessarily lead to the same conclusion in respect of income tax matters.’⁷³The *Metcash* decision should not be considered to be binding to other tax legislation.

To further emphasise the lack of clarity as to the applicability of the *Metcash* judgment in the context of income tax Williams observed as follows in so far as the ‘pay now, argue later’ principle is concerned ;

If anyone doubts the level of confusion and misunderstanding regarding the pay-now-argue-later rule in the context of income tax, he need only look to the two High Court decisions, a mere year apart, in *Mokoena v CSARS* 2011 (2) SA 556 (GSJ) and *Capstone 556 (Pty) Ltd v CSARS* [2011] ZAWCHC 297, which came to diametrically opposite conclusions on key aspects of the rule.⁷⁴

The court in *Mokoena* held that, if an objection has been lodged by the taxpayer against an assessment, there cannot thereafter be a judgment taken against that taxpayer by SARS in the form of filing a statement but SARS must wait for the hearing of the objection and any appeal by the court.⁷⁵ In contrast the court in *Capstone* found that the court’s decision in *Mokoena* relied upon a flawed interpretation of the ITA. Furthermore, it was held that a ‘judgment’ taken by SARS by way of filing a statement was not judgment in a true sense, in that it was not aimed at settling any quarrel between the revenue collector and the taxpayer. It does not establish the rights of both the parties like a ‘judicially delivered judgment’ but is a ‘mere recovery provision, no different from the other recovery provisions in the Act.’⁷⁶ Accordingly, ‘a taxpayer was not legally entitled to interdict SARS from taking judgment because, as a matter of law, the amount of tax, as recorded in the assessment, was in fact legally payable.’⁷⁷

⁷³ Keulder (note 66 above) 139.

⁷⁴ Williams (note 70 above).

⁷⁵*Mokoena* (note 44 above).

⁷⁶Capstone(note 42 above) .

⁷⁷Ibid. See also R C Williams ‘Unresolved aspects of the ‘pay now, argue later’ rule.’(07 February 2012) available at <https://www.thesait.org.za/news/83050/Unresolved-aspects-of-the-pay-now-argue-later-> accessed on 25 July 2018.

Olivier disagrees with the *Metcash* decision. She argues that it was never the argument of the taxpayer that the ‘pay now, argue later’ rule ‘ousted the jurisdiction of the court’ but rather that the rule excluded the jurisdiction at the time it is invoked.⁷⁸ She further argues that although the decision of the Commissioner can be overturned by the Special Court, the fact that at the time of payment the taxpayer has no access to the court remains the same.⁷⁹ Olivier points out that from the court’s decision, it appears that the court did not reflect on the fact that as a result of having made the payment first, the taxpayer might not be in a financial position to pursue the other avenues at their disposal.⁸⁰

Keulder agrees with Olivier in this regard and submits that the argument of the taxpayer was not concerned with access to the courts at a later time but, was concerned with the right prior to making the payment.⁸¹

It is submitted that, as observed by the above authors, the ‘reviewability of the Commissioner’s decision not to suspend payment is a far cry from access to court.’⁸² Further, ‘the review proceedings are extremely narrow in nature because the grounds for review of an administrative decision are limited.’⁸³ In *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd*⁸⁴ the grounds for review of an administrative decision were laid down as follows;

Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with “the behests of the statute and the tenets of natural justice”....Such failure may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or *mala fide* or as a result of an unwarranted adherence to a fixed principle or in order to further an ulterior motive or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones ; or that the decision of the president was

⁷⁸ L Olivier ‘Tax collection and the bill of rights’ 2001 *TSAR* 196.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ Keulder (note 66 above) 140

⁸² *Ibid.*

⁸³ L Olivier (note 76 above) 197.

⁸⁴ 1988 3 SA 132 (A) 152A-E.

so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated.⁸⁵

Olivier comments that the fact the decisions of the Commissioner are reviewable can in no way be construed to mean that the legislator does not have a duty to ensure that legislation complies with the Constitution.⁸⁶To this end, Olivier turns to *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs and Thomas v Minister of Home Affairs*⁸⁷ where the court held that;

[T]he fact the exercise of a discretionary power may subsequently be successfully challenged on administrative grounds, for example, that it was not reasonable, does not relieve the legislature of its constitutional obligation to promote, protect and fulfil the rights entrenched in the Bill of Rights.⁸⁸

Finally, Olivier argues that the court in *Metcash* did not attach much value to the taxpayer's argument that there were 'less invasive ways to give effect to prompt collection of taxes' where this fact deserved attention.⁸⁹

The court erred in finding that the limitation on the taxpayer's right to access to court was reasonable and justified in the circumstances because the taxpayer had advanced 'less invasive ways to ensure prompt payment of taxes', for example, the furnishing of security pending the hearing of an appeal or an objection.⁹⁰

2.4 The section 164 rule

This chapter now shifts its focus to the 'pay now, argue later' rule as it appears in the current legislation the TAA. The TAA came into effect on the 1st of October 2012. It purports to make

⁸⁵ Ibid.

⁸⁶ In terms of section 7(2) of the Constitution, the state is obliged to promote, protect and give effect to the rights in the Bill of Rights.

⁸⁷ *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs and Thomas v Minister of Home Affairs* 2000 8 BCLR 837 (CC) hereafter *Dawood*. L Olivier (note 76 above) 197.

⁸⁸ L Olivier (note 76 above) 197

⁸⁹ Ibid 199.

⁹⁰ *Metcash Trading Ltd* 10.

provision for the ‘effective and efficient collection of tax.’⁹¹This is achieved by *inter alia* ‘aligning the administration of tax Acts to the extent practically possible.’⁹²

The TAA applies to ‘any person who is liable to comply with a provision of a tax Act.’⁹³However, where the TAA does not provide for the administration of a particular tax Act, then the provisions of that tax Act will apply.⁹⁴

2.4.1 Content

As briefly mentioned above⁹⁵ section 164 of the TAA like its predecessor in the VAT Act, provides that an ‘obligation to pay tax and the right of SARS to receive and recover taxes will not be suspended by an objection or appeal or pending the decision of the court pursuant to an appeal’ unless a senior SARS official directs to the contrary.⁹⁶

The Act affords a taxpayer an opportunity to ‘request a senior SARS official to suspend the payment of tax or a portion thereof due under a tax assessment if the taxpayer disputes or intends to dispute liability.’⁹⁷ The senior SARS official thereafter has an opportunity to exercise his discretion whether or not the payment of the tax in dispute will be suspended.⁹⁸ Certain factors have to be taken into account including the ‘compliance history of the taxpayer with SARS,’⁹⁹ and whether the prospects of recovering the disputed tax will be jeopardised.¹⁰⁰The SARS official also has to consider other important factors namely; whether the recovery of the tax despite an objection will result in ‘irreparable hardship’ to the taxpayer which is not justified by SARS’s prejudice if the tax is not recovered.¹⁰¹Over and above these factors, a senior SARS official must circumspectly consider the principles of administrative law and all the relevant factors of the case in question before abruptly

⁹¹ Section 2 of the TAA.

⁹² Section 2(a) of the TAA.

⁹³ Section 4 (1).

⁹⁴ Section 4(2).

⁹⁵ See 1.5 above.

⁹⁶ Section 164(1).

⁹⁷ Section 164(2).

⁹⁸ Section 164(5).

⁹⁹ Section 164(3)(c).

¹⁰⁰ Section 164 (3).

¹⁰¹ Ibid.

dismissing the request.¹⁰² While this is true, it submitted that it is equally true that, as pointed out by O'Regan J in *Dawood*,¹⁰³:

There is, however, a difference between requiring a court or tribunal in exercising a discretion to interpret legislation in a manner that is consistent with the Constitution and 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 exercise the discretion in a manner consistent with the provisions of the Bill of Rights. Officials are often extremely busy and have to respond quickly and efficiently to many requests or applications. The nature of their work does not permit considered reflection on the scope of constitutional rights or on the circumstances in which a limitation of such rights is justifiable.¹⁰⁴

SARS, in terms of section 164(6) of the TAA is precluded from taking measures to collect tax within the period during which the request for suspension is being considered and thereafter and for ten days after the notice of denial of the suspension has been issued.¹⁰⁵

A senior SARS official can deny the request to suspend or revoke the suspension granted if he is satisfied that the taxpayer's objection is frivolous or was lodged as a dilatory tactic. The request to suspend can also be revoked 'if the senior SARS official is of the opinion that the suspension was granted in error or there has been a significant change in the factors on which the decision to suspend was based'.¹⁰⁶

2.4.2 The contextual setting.

Having looked at both sections, it is evident that section 164 of the TAA, like section 36 of the VAT Act makes provision for the 'pay now, argue later' rule. The section empowers SARS to enforce the payment of taxes notwithstanding the fact that an objection or an appeal, as the case may be, is pending. These powers include but are not limited to the appointment of a third party as an agent of the taxpayer and filing of a statement at court.¹⁰⁷ At this point it

¹⁰² J A Arendse, R C Williams & S Klue *Silke on Tax Administration* (2012) 182.

¹⁰³ *Dawood* (note 85 above).

¹⁰⁴ *Ibid* 46.

¹⁰⁵ See also Keulder (note 66 above) 146.

¹⁰⁶ *ibid*.

¹⁰⁷ See 2.2.1 above.

is essential to ask the question, whether there are any considerable disparities between the ‘pay now, argue later’ rule as it appeared under section 36 of the VAT Act and the current version as it appears in section 164 of the TAA. This comparison, I suggest, will assist in determining whether the concerns around some aspects of the ‘pay now, argue later’ rule that were contentious under section 36 of the VAT have been settled under section 164 of the TAA.

2.4.3 Section 36 of the VAT Act vs section 164 of the TAA

These sections are similarly worded. However, there are, albeit minor, differences between these sections that will now be considered.

Firstly, in terms of section 36, only the Commissioner was authorised to grant a suspension of the payment of tax while in terms of section 164 a ‘senior SARS official’ is granted the power to suspend payment.¹⁰⁸

Secondly, section 164¹⁰⁹ introduces a new subsection. In terms of this subsection, SARS is precluded from taking steps to collect the tax debt within the period during which the request for suspension is being considered, and for ten days after the notice of denial of the suspension has been issued.¹¹⁰

2.4.4 Does section 164 settle the concerns raised under section 36?

The fact that in terms of section 164 a ‘senior SARS official’ and not the ‘Commissioner’ is afforded the power to suspend payment of tax awaiting an objection or an appeal, does not tackle the difficulty faced by the taxpayer that payment can be enforced by SARS notwithstanding an objection or appeal.¹¹¹ It thus does not make the procedure any less invasive. This change does not alter the procedure as it stands but merely delegates the powers of the ‘Commissioner’ to a ‘senior SARS official.’¹¹²

¹⁰⁸ C Keulder (note 66 above) 148.

¹⁰⁹ Subsection (6).

¹¹⁰ C Keulder (note 66 above) 148.

¹¹¹ Ibid.

¹¹² Ibid. See also King (note 39 above) 37.

The introduction of subsection (6) does, however, bring about more certainty for taxpayers as they now know that SARS is forbidden from exploring collection measures within the period during which the request for suspension is being considered and thereafter and for ten days after the notice of denial of the suspension has been issued.¹¹³

It is, therefore, safe to conclude that the section 164 is as contentious as section 36 of the VAT Act.

2.4.5. The right of access to courts.

The Constitution of the Republic affords everyone an opportunity to ‘have any dispute that can be resolved by the application of law decided in a fair hearing before a court or an independent tribunal or forum.’¹¹⁴The historical significance of the right to access to court is that it outlaws the Apartheid law practice of ousting the jurisdiction of the courts to question the legal validity of any law or conduct.¹¹⁵‘By insisting on the resolution of legal disputes by fair, impartial and independent institutions, section 34 prohibits resort to self-help.’¹¹⁶Chakalson defines the right to access to courts as ‘another right of administrative justice.’¹¹⁷I submit that the interaction between these rights is to be found in the fact that they both guarantee the parties involved an opportunity to state their case before an impartial and independent institution before a decision is arrived at. The reader must, therefore, bear in mind how these rights interact.

2.4.6. The general rule v the ‘pay now, argue later’ rule.

It is trite that with the ‘pay now, argue later’ rule there is no access to the courts before payment is made. The focus of this chapter now moves to a comparison between the general rule in legal proceedings and the ‘pay now, argue later’ rule. This comparison is useful to gain an insight into the impact of this rule and the constitutionality of this rule.

¹¹³ Ibid.

¹¹⁴ Section 34.

¹¹⁵ *De Lange v Smuts NO* 1998 (3) SA 785 (CC) 44-45. See also I Currie & J De Waal *The Bill of Rights Handbook* 6 ed (2013) 711.

¹¹⁶ *Lesapo v Northwest Agricultural Bank* 2001(1) SA 409 (CC) para 11-12. See also Currie & De Waal (note 113 above) 711.

¹¹⁷ M Chakalson et al *Constitutional law of South Africa* (2006) 25-23.

Normally, the enforcement of a civil judgment is suspended subsequent to the noting of an appeal except when the appeal was not noted timeously¹¹⁸ or ‘the court in accordance with its discretion orders otherwise.’¹¹⁹

Only in exceptional cases will the request to suspend a civil judgment be refused whereas the ‘pay now, argue later’ rule deviates from this practice in that the payment will not be suspended as a point of departure.¹²⁰ Bearing in mind this peculiar fact it is submitted that Olivier’s argument, that the general rule that execution will be suspended pending an appeal is not applicable to a tax debt, has merit.¹²¹

In civil matters an appeal follows the final judgment.¹²² An appeal will therefore be noted subsequent to the pleading and trial phase. The ‘pay now, argue later’ rule comes into operation when an assessment has been issued by SARS. The taxpayer would be required to pay the amount as assessed prior to being given an opportunity to state his case.¹²³

It is quite plain that the general rule and what the legislature permits are different.

2.5 Conclusion

The significance of the right to access to courts in a constitutional state like South Africa cannot be overstated, given the history of this country. ‘For this entitlement to be meaningful, the alleged unlawful conduct must be justiciable by an entity that is separate and independent from the alleged perpetrator of the unlawful conduct.’¹²⁴ It is submitted that this contention in the context of the ‘pay now, argue later’ rule would mean that SARS, being an entity that allegedly committed an irregularity against the taxpayer by assessing them incorrectly, should not get to be judge in the matter by deciding whether or not to suspend payment of the taxes due in terms of the assessment. Conceivably the powers granted by section 164 would be less contentious if they were exercised by an independent entity like the office of the Tax Ombud.

¹¹⁸ *Schmidt v Theron* 1991 (3) SA 126 (K) 15.

¹¹⁹ Section 78 of the Magistrates' Courts Act 32 of 1944. See also Keulder (note 26 above) 54.

¹²⁰ Keulder (note 26 above) 56.

¹²¹ Olivier (note 76 above) 194. See also *CIR V NCR Corporation of SA Ltd* 1988 2 SA 765 (SA).

¹²² *Marsay v Dilley* 1992(3) SA 944(A). See also Keulder (note 26 above) 56.

¹²³ Keulder (note 26 above) 56.

¹²⁴ *Road Accident Fund v Mdeyide* 2011 (2) SA (CC) [1] and [64]. *Bernstein v Bester NO* 1996 (2) SA 751 (CC) 105.

Towards the end of this chapter, the general rule in civil litigation was contrasted with the ‘pay now, argue later’ rule. This comparison gave insight as to the extent of this rule. It was highlighted that the powers of SARS exceed the ordinary civil remedies available to an ordinary litigant.¹²⁵ It is freely acknowledged that SARS is allowed these powers to facilitate efficient and prompt tax collection. However, there needs to be a balance between rights entrenched in the Bill of Rights and these powers. As Dave King once said, ‘too many times, taxpayers pay taxes they genuinely do not believe they owe, simply because the consequences of standing up to the Receiver are too onerous.’¹²⁶

It is submitted that when drafting the TAA, the Legislature, having seen how contentious the ‘pay now, argue later’ rule was in the context of VAT Act could have and should have taken the opportunity to draft legislation aimed at attempting to achieve the balance between SARS’s duty and the taxpayers’ rights. It is noteworthy that nearly all the factors considered by SARS seem to scrutinise the ‘cleanliness of the taxpayer’s hands’.¹²⁷

¹²⁵ Keulder (note 26 above) 56.

¹²⁶ ‘King case is just a start as SARS hunts the mega-rich’ *Mail and Guardian online* 6 September 2013, available at <https://mg.co.za/article/2013-09-06-king-case-is-just-the-start-as-sars-hunts-the-mega-rich>, accessed 23 August 2018.

¹²⁷ G K Goldswain ‘The winds of change – An analysis and appraisal of selected constitutional issues affecting the rights of taxpayers’ (2012) 16(3) *Southern African Business Review* 16(3) 147.

CHAPTER 3 – AGENT APPOINTMENT

3.1 The legal framework - Appointment of a third party in terms of the ITA and TAA.

As was briefly mentioned in the previous chapter, SARS is vested with the authority to appoint any third party as an agent for purposes of collecting taxes which are unpaid from the taxpayer. Before the TAA was enacted, third party appointments were made under section 47 of the VAT Act and section 99 of the ITA which have both since been repealed. Section 99 provided that;-

The Commissioner may, if he thinks necessary, declare any person to be the agent of any other person, and the person so declared an agent shall be the agent for the purposes of this Act and may be required to make payment of any tax, interest or penalty due from any moneys, including pensions, salary, wages or any other remuneration, which may be held by him or due by him to the person whose agent he has been declared to be.¹²⁸

This authority is now granted by section 179 of the TAA which provides as follows :

- (4) A senior SARS official¹²⁹ may authorise the issue of a notice to a person who holds or owes or will hold or owe any money, including a pension, salary, wage or other remuneration, for or to a taxpayer, requiring the person to pay the money to SARS in satisfaction of the taxpayer's outstanding tax debt.
- (5) A person that is unable to comply with a requirement of the notice, must advise the senior SARS official of the reasons for the inability to comply within the period specified in the notice, and the official may withdraw or amend the notice as is appropriate under the circumstances.
- (6) A person receiving the notice must pay the money in accordance with the notice and if the person parts with the money contrary to the notice, the person is personally liable for the money.

¹²⁸ Of the ITA. Section 47 of the VAT Act is worded in a similarly.

¹²⁹ The term 'senior SARS official' is defined in section 1 of the TAA as a SARS official referred to in s6(3). Section 6(3) provides that the powers and duties required to be exercised by a senior SARS official 'must be exercised' by either the Commissioner, a SARS official who has specific written authority from the Commissioner or a SARS official occupying a post designated by the Commissioner for this purpose.

- (7) SARS may, on request by a person affected by the notice, amend the notice to extend the period over which the amount must be paid to SARS, to allow the taxpayer to pay the basic living expenses of the taxpayer and his or her dependants.¹³⁰

The senior SARS official can accordingly direct the taxpayer's bank to deliver any funds in that bank account to SARS in settlement of the taxpayer's tax debt to facilitate a prompt and effectual tax collection.¹³¹ Croome indicates that in practice, SARS only resorts to this extreme tax collection method where the taxpayer has neglected to respond to telephonic or written demands as opposed to its first collecting method.¹³²

3.2.1 Third party appointment in terms of the VAT Act and ITA versus in terms of the TAA.

There are a few noteworthy differences between the third party appointment in terms of the TAA and preceding provisions which dealt with the to the appointment of a third party.¹³³

Firstly, in terms of the TAA, a 'senior SARS official' is empowered to issue a notice appointing a third party whereas in the previous legislation only the 'Commissioner' was vested with such authority.¹³⁴ The scope of people allowed to issue the third party notice has been broadened and this will positively affect tax collection as more appointment notices will be issued.¹³⁵

Van der Walt and Le Roux¹³⁶ explain that the third party notice is normally electronic in nature and states that it was issued on the Commissioner's instruction and behalf. They, however, point out that there is nothing on the notice to propose that the notice has been well reflected on and issued by the Commissioner.¹³⁷ It is therefore difficult to determine the

¹³⁰ Section 179 of TAA.

¹³¹ BJ Croome *Taxpayers' Rights in South Africa* (2010) 42.

¹³² Ibid.

¹³³ C Keulder & T Legwaila 'The Constitutionality of third-party appointments –before and after the Tax Administration Act' (2014)77 *THRTH* 68.

¹³⁴ Ibid. See also 3.1 above.

¹³⁵ Ibid.

¹³⁶ J Van der Walt & D Le Roux 'Third party appointments by SARS under the TAA' Jan/Feb (2013) 15 *TaxTalk* 16.

¹³⁷ Ibid; Keulder and Legwaile (note 131 above)68.

person on whose instruction the third party notice was issued. One cannot be certain as to whether the appointment was in actuality done by a senior SARS official.¹³⁸ It is submitted that this fact on its own is a cause for concern because the person making the appointment may not be the person intended by the Act to exercise the authority and may be insufficiently trained to properly consider whether the circumstances in that particular case warrant the issuing of a third party notice.

Secondly, in terms of section 179, the appointee is obliged to make a payment to SARS of monies that it ‘holds or owes or will hold or owe ... for or to the taxpayer.’¹³⁹ The fact that the future tense is used seems to suggest that the section 179 could be applied in relation to money not yet received by the third party, but which is expected to be received only in future. The section can clearly apply prospectively.

Finally, the TAA introduces a further provision, subsection (4). This subsection allows an affected person on, the basis of affordability, to approach SARS and request for an extension of the period within which the outstanding tax will be paid. The extension is to enable the taxpayer to be able to afford the basic living expenses for himself and his dependants. The term ‘basic living expenses’ is not defined in the Act and will probably be defined on a case by case basis.¹⁴⁰

This provision bears some similarity to the civil procedure of garnishees and is sometimes referred to as ‘a garnishee order’ by SARS on its website.¹⁴¹ Section 179 will now be compared to normal civil procedure applicable to true garnishee orders to illustrate the extent of SARS’s powers.

3.2.2 Garnishee orders v Section 179.

Although the appointment of a third party is sometimes referred to as a garnishee order, a true garnishee order refers to ‘the attachment of any debt whether present or future owing or accruing to a judgment debtor by or from any other person of an amount sufficient to satisfy

¹³⁸ Ibid.

¹³⁹ Section 179(1) of the TAA.

¹⁴⁰ Keulder and Legwaila (note 131 above) 69.

¹⁴¹ C Keulder *Does the Constitution protect the taxpayers against the mighty SARS? –An inquiry into the constitutionality of selected tax practices and procedures* (unpublished LLM thesis, University of Pretoria, 2011)29; Van der Walt & D Le Roux (note 134 above)17.

the judgment and the cost of the proceedings for attachment.¹⁴²It is quite plain the garnishee order effectively pulls the garnishee into the matter between the creditor and the judgment debtor.¹⁴³This is a similarity between the civil garnishee procedure and the third party appointment in terms of section 179 of the TAA. However, there are crucial differences between the two procedures.

Firstly, a court order is a prerequisite in order to obtain a garnishee order whereas in the case of a third party appointment there is no required court order. It follows, therefore, that when a garnishee order is finally attained the judgment debtor has been afforded sufficient opportunity to contest the granting of the garnishee order before it is granted. The same cannot be said about the appointment of a taxpayer's agent where there is no court participation and the taxpayer is often unaware of SARS's intention to appoint a taxpayer's agent. This raises the question whether the *audi alteram partem* rule is adhered to.

Secondly, where the garnishee is discontented by the issuing of a garnishee order, he can approach the court by way of an application and have his reasons heard. For instance, he may argue that the debt is subject to a claim by some other person.¹⁴⁴The garnishee will only be required to pay where he does not appear in court or is unsuccessful in persuading the court that he should not pay the debt.¹⁴⁵On the other hand, the third party appointed in terms section 179 will be obliged to pay over the funds failing which, they will be personally liable.¹⁴⁶

Thirdly, on an application for a garnishee order, the court hearing the application has a chance to satisfy itself as to the financial affairs of the judgment debtor and may accordingly vary or rescind the garnishee order. In the case of a third party assessment, there is no examination of the taxpayer's financial position before the appointment is made. Such an examination is done *ex-post facto* in terms of section 179(4).¹⁴⁷

¹⁴² Pete S ...*et al* *Civil procedure- A Practical guide* 2ed (2015) 349.

¹⁴³ Ibid.

¹⁴⁴ Pete (note 133 above) 350.

¹⁴⁵ Ibid.

¹⁴⁶ See section 179(3)

¹⁴⁷ Van der Walt & D Le Roux (note above 134 above) 17.

Lastly, section 37A(1) of the Pension Fund Act, 24 of 1956, provides that a Pension Fund benefit shall not be a subject of an attachment order including a garnishee order whereas SARS is empowered, in terms of section 179 to attach any salary, wages, pension or any other remuneration. While there is a restriction on the kind of money that can be subject to a garnishee order, there is none in the case of a third party appointment.¹⁴⁸

It is quite clear that garnishee orders vary significantly from third party appointments in that with garnishee orders there are certain inherent measures to ensure observance of the *audi alteram partem* principle and the right to just administrative action whereas in the case of third party appointment there are no such measures.¹⁴⁹ It appears therefore that SARS is afforded formidable powers to promptly collect taxes, apparently, to the ‘detriment of the *audi alteram partem* principle and the right to the just administrative action.’¹⁵⁰ This raises the question whether this almost draconian tax collection mechanism can be said to be consistent with the right to just administrative action as guaranteed by the Constitution.

It is trite that the actions performed by or on behalf of the Commissioner in his capacity as such constitute actions of an administrative nature. This is because these are ‘performed by an organ of the state,¹⁵¹ exercising a public power or public function in terms of any legislation’ as defined by section 1 of the Promotion of Administrative Justice Act.¹⁵² It follows therefore that the right to administrative justice is applicable to actions made by and on behalf of the Commissioner.

3.2.3 Constitutionality of the agent appointment

It is essential to discuss *Hindry v Nedcor Bank*¹⁵³ where the constitutionality of an agent appointment had to be considered by the court.

¹⁴⁸ Keulder and Legwaila (note 131 above)68.

¹⁴⁹ C Keulder *Does the Constitution protect the taxpayers against the mighty SARS? –An inquiry into the constitutionality of selected tax practices and procedures* (unpublished LLM thesis, University of Pretoria, 2011)32.

¹⁵⁰ Ibid.

¹⁵¹ Section 2 of the SARS Act provides that SARS is established as an organ of the state within the public administration but as an institution outside the public service.

¹⁵² Act 3 of 2000 hereafter PAJA.

¹⁵³ *Hindry* (note 11 above)164.

3.2.3.1 Facts of the case

In this case a taxpayer received a refund from SARS erroneously. The Commissioner reclaimed the refund incorrectly authorised by him by way of an additional assessment to which the taxpayer raised an objection. The objection having being disallowed by the Commissioner, a notice was sent to the applicant's bankers informing them that they had been appointed as the taxpayer's agent in terms of section 99 of the Income Tax Act and as such they were required to make a payment to the Commissioner of the amount he had assessed as due to SARS right away or the moment the money was obtainable from the applicant's bank account.¹⁵⁴

Consequently, the taxpayer sought an urgent interdict preventing its banker from paying the money over to the Commissioner as required by the notice issued in terms of section 99 and sought the notice to be set aside arguing that section 99 was aimed at recovering taxes which were due but had been excluded and not refunds erroneously made.¹⁵⁵ The taxpayer alternatively argued that section 99 conflicted with the Constitution and was therefore invalid.

The taxpayer asserted *inter alia* that section 99 infringed the Constitution as it did not provide for the taxpayer to be notified before a third party is appointed or for the taxpayer to make his representations prior to the notice becoming operative and it was 'totally outside the context of the court or any independent or impartial tribunal or forum.'¹⁵⁶ It therefore violated the taxpayer's right to privacy as guaranteed by s 14 of the Constitution, the right to just administrative action in section 33 and the right of access to courts in s 34 of the Constitution.¹⁵⁷

The taxpayer accordingly argued that the:

substantial inroads made by section 99 into a person's fundamental rights were neither reasonable nor justifiable as the infringement of rights provides for a unilateral

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

appropriation of another's property without any notice to that person or opportunity on his/her part to make any representation of whatever sort.¹⁵⁸

The Commissioner contended, *inter alia*, that it was in the interest of the country to collect taxes efficiently and need was pressing ;the provisions of the ITA are intended to circumvent delays so that collection of taxes is constant, predictable and sustainable. Further that;

recovering outstanding tax from a person owing monies to a particular taxpayer is simply a type of garnishee proceeding; that the provisions of section 99 are an essential part of the South African self-assessment tax system because they ensure compliance in the collection of taxes and leads to a timely recovery of due and payable tax.¹⁵⁹

3.2.4 Judgment

Wunsh J found that although attachment of a debt is considered a seizure of property, it is a kind that is generally used to put into effect a judgment the subject of which is money and the only feature that distinguishes section 99 is the fact it is capable of being enforced to recoup an amount assessed as outstanding under an assessment or owing as a result of a refund made in error or any other tax in absence of a judgment.¹⁶⁰

After the court had reviewed provisions similar to section 99 in other countries it was concluded that all their legislation do not require the tax debtor to be notified before their money is attached in order to afford them an opportunity to make representations to prevent the attachment.¹⁶¹ Once the notice is served it is implemented unless it is rescinded. It is in line with the nature of these proceedings that the garnishee is notified before the defaulting taxpayer because if the latter received prior warning, there is a risk of them frustrating the tax collection process.¹⁶²

The purpose for which section 99 limits the taxpayer's rights is to aid and heighten SARS's capacity to promptly recover due taxes and to prevent taxpayers from putting

¹⁵⁸ Ibid

¹⁵⁹ *Hindry* (note 11 above)165.

¹⁶⁰ Ibid

¹⁶¹ Ibid.

¹⁶² Ibid.

assets where SARS cannot reach them and, when one considers the need to accelerate tax collection and to avoid the obstruction of the efforts to achieve it, this collection method is very important to the country.¹⁶³The garnishee procedure is a recognised tax collection method in other open and democratic societies. When all these factors are weighed up, they justify any limitation of rights by section 99 and the section is therefore constitutional.¹⁶⁴

3.3 Criticism of *Hindry*.

Now that the *Hindry* judgment has been discussed, it is appropriate at this point to raise the question whether the appointment of a third party can be truly said to be in tune with the Constitution with regards to how the courts have dealt with this tax collection method. It has already been established above that the appointment of a third party constitutes administrative action. Procedurally fair administrative action must observe the *audi alteram partem* rule as far as possible.

In *Mpande Foodliner CC v C: SARS and Others*¹⁶⁵ a notice appointing a taxpayer's agent was set aside because SARS, in issuing the said notice, had failed to observe the *audi alteram partem* principle and therefore violated section 33 of the Constitution. This decision is constitutionally aligned as it upholds the *audi alteram partem* rule and therefore the right to administrative justice as per section 33 of the Constitution.

In *Contract Support Services(Pty) Ltd and Others v C: SARS and Others*¹⁶⁶ it was held that in some administrative decisions the observance of the *audi alteram partem* rule is not required before they can be regarded as lawful. The court further held that on the case before it;

a prior notice would defeat the very purpose of the notice. It would alert the defaulting VAT-payer to the intention to require payment from the latter's debtor and to enable the taxpayer to spirit such funds away. Where prior notice and a

¹⁶³Ibid.,

¹⁶⁴ *Hindry* (note 11 above) 166.

¹⁶⁵ 63 SATC 46 hereafter *Mpande Foodliner CC*.

¹⁶⁶ 61 SATC 338 hereafter *Contract Support (Pty)Ltd*.

hearing would render the proposed act nugatory, no such prior notice or hearing is required.¹⁶⁷

It is unfortunate that *Smartphone SP (Pty) Ltd v ABSA Bank Ltd and Another*¹⁶⁸ deviated from the *Mpande* decision. In *Smartphone*, the court refused to set aside a notice of appointment of a third party, holding that the taxpayer had not made use of the objection and appeal procedures available to him before attempting to have the notice set aside.

In the same light, the court in *Gardener v East London Transitional Local Council*¹⁶⁹ the *audi alteram partem* rule was held not to be absolute. The court went on to state that ‘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.’¹⁷⁰ It was further held that when deciding whether the *audi alteram principle* applies to an administrative act one must have regard to the objects of the Act in terms of which the administrative act is being done and whether the application of the *audi alteram principle* will not delay or even possibly frustrate the implementation of the objectives of the Act.¹⁷¹

It is considered a pity that the above decisions are all decisions of provincial courts and the Constitutional court is yet to decide as to whether the *Mpande* or the *Smartphone* decision accurately reflects the law.¹⁷² Nonetheless, the right to administrative justice prohibits an agent’s appointment arbitrarily.¹⁷³

A further concern raised by scholars is whether or not the taxpayer's right to property as guaranteed by section 25 is infringed by third-party appointment due to the fact that SARS is empowered to order someone else to pay over the taxpayer's money to SARS.¹⁷⁴ One may, however, raise the question whether money can be properly classified as property.

¹⁶⁷ Ibid 350.

¹⁶⁸ 66 SATC 241 hereafter *Smartphone SP (Pty) Ltd*.

¹⁶⁹ 1996 (3) SA 99 (E) 116.

¹⁷⁰ *Gardener v East London Transitional Local Council* 1996 (3) SA p116.

¹⁷¹ Ibid.

¹⁷² Goldswain(note 125 above)150.

¹⁷³ Ibid.

¹⁷⁴ Keulder (note 139 above 34).

Although property is not a defined term in the Constitution, the term has been described by Currie and De Waal as having ‘a wide variety of meanings that it is almost impossible to define accurately and exhaustively.’¹⁷⁵In *First National Bank of SA t/a Wesbank v C: SARS*¹⁷⁶ the court remarked that an attempt to define property would be ‘practically impossible’ and ‘judicially unwise.’¹⁷⁷It appears that the definition of property can be said to include money. However, it is submitted that the fact that the definition of property includes money does not necessarily mean that any conduct affecting money will violate section 25. Section 25 does permit deprivation of property rights, provided such deprivation is not arbitrary. It follows therefore that if the taxpayer’s agent is not appointed without a just cause, then the appropriation of the taxpayer’s will not constitute an arbitrary deprivation of property.

The third party appointment, theoretically, permits SARS, without proof of taxes owing, to appoint a taxpayer’s agent without any judicial oversight whatsoever and without any notice to the taxpayer. The fact that the tax may not be owing in the first place *prima facie* constitutes an infringement of the taxpayer's right to property, as it constitutes an arbitrary deprivation of property.¹⁷⁸

3.4 Section 36 of the Constitution: The limitation Provision.

It is clear from the previous chapters that section 179 and section 164 of the TAA have potential to infringe upon the taxpayer’s rights. The general limitation provision in the Constitution, namely section 36, states that the rights set out in the Bill of Rights may be limited but only,

in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.¹⁷⁹

¹⁷⁵ (note 21above)535.

¹⁷⁶ 2002 (4) SA 768 (CC) hereafter *First National Bank*.

¹⁷⁷ Ibid 51.

¹⁷⁸ Goldswain (note 125 above)148. See the discussion of the ‘pay now, argue later ‘ rule above.

¹⁷⁹ Section 36(1) of the Constitution.

Those relevant factors are stated to include the, the nature of the right, the nature and extent of the limitation, the relation between the limitation and its purpose, and less restrictive means to achieve the purpose.

Thus, the Constitution recognises that the rights expressed in the Bill of Rights are not absolute, and contemplates that limitations on such rights may, in certain circumstances, be constitutional. For an infringement of rights to be justifiable in terms of section 36, there must be a proportionality between the harm done by the infringement and the beneficial purpose that the law is meant to achieve.¹⁸⁰

The Tax Administration Act is obviously a law of general application. Further, the government needs funds to ensure that it can finance its administration and meet certain specified social objectives imposed on it by the Constitution. It is thus essential that proper administration of tax collection ensures that taxpayers comply with the law and meet their obligations.¹⁸¹The question remains as to whether there are less restrictive ways of achieving efficient tax collection.

3.5 Does the TAA address the problems experienced under the VAT Act or the ITA.

The operation of the agent appointment under the ITA and VAT Act has been discussed along with the difficulties faced by the taxpayers. Furthermore, the differences between the agent appointment under the preceding legislation and the TAA have been discussed but the question remains whether the agent appointment under the TAA is any different from its predecessor in terms of infringing the taxpayer's rights identified above. It is appropriate at this point to explore this question.

Like most provisions of the TAA, section 179 confers powers on a senior SARS official as opposed to the Commissioner. This change in the wording of the legislation is obviously inconsequential in so far as the identity of the official by whom the powers are exercised is concerned as the Commissioner has always been able to delegate his powers to certain

¹⁸⁰ Currie, I and de Waal, J, *The Bill of Rights Handbook*, 5th ed (2005) 185.

¹⁸¹ BJ Croome *Taxpayers' Rights in South Africa An analysis and evaluation of the extent to which the powers of the South African Revenue Services comply with the rights to property, privacy, administrative justice, access to information and access to courts.* (unpublished Ph.D. thesis, University of Cape Town 2008)17.

designated persons.¹⁸²Under the TAA this authority remains intact as a senior official is still designated by the Commissioner to exercise certain powers in terms of section 179. The appointee is obliged to pay over to SARS monies that 'it holds or owes or will hold or owe ... for or to the taxpayer'¹⁸³The fact that the future tense is used seems to suggest that the section could be applied with regard to money not yet received by the third party, but which is expected to be received only in future. This does nothing to change the fact that the taxpayer's rights are infringed nor does it reduce the extent of the infringement.¹⁸⁴On the contrary, it is argued that it has the potential to further infringe the taxpayer's rights as it broadens the scope of what can be attached.

Section 179 (4) permits the determination of the taxpayer's financial position, something the preceding legislation did not do. Although the examination of affordability is done *ex-post facto*, it does seem to lessen the extent of the infringement on the right of the taxpayer. It follows, therefore, that the powers of the Commissioner are no longer intact in this regard.¹⁸⁵

3.6 Conclusion

The TAA contains a number of provisions which empower the Commissioner to effect the collection of outstanding taxes from taxpayers who neglect to pay their tax debts timeously. The appointment of a third party known as a taxpayer's agent is one of these powers. These powers must, in an ideal world, be exercised with caution as they have the potential to infringe upon the rights of the taxpayers.

This chapter has discussed the development of the agent appointment from the VAT Act, the ITA and finally the TAA. It was established that although the third party appointment was held to be a reasonable and justifiable infringement of the taxpayers' rights there are still unresolved aspects of this tax collection method. It was further established by comparing the normal civil procedure garnishee orders and the third party appointment that it is rather glaring that the court erred in likening the appointment of an agent to a

¹⁸² Under the VAT Act the powers conferred on the Commissioner could be exercised by him personally or by any other person appointed by the Commissioner under the supervision of the Commissioner. See section 3(1) and section 5(1) of the VAT Act.

¹⁸³ Section 179(1) of TAA.

¹⁸⁴ Keulder and Legwaila (note 131 above) 69.

¹⁸⁵ Ibid 70.

garnishee order in terms of the civil procedure. This is because, compared to the normal garnishee order, the impact of the third party appointment on the rights of the taxpayers is far-reaching. The fact that monies are withheld and paid over to SARS prior to the taxpayer making representations gives SARS more power than is necessary to efficiently collect revenue. It has been argued by Keulder that a less invasive manner would be for the money to be withheld by the agent until such time as the taxpayer has made their case to SARS or the matter has been settled by a court of law.¹⁸⁶ It is however, submitted that the effect is the same. The fact is in both scenarios the taxpayer loses access to and the use of their funds before the matter is adjudicated whether the funds are withheld by the taxpayer's agent or by SARS.

This chapter further explored the enquiry as to whether the commencement of section 179 of the TAA was of any assistance in the resolution of the concerns that scholars had identified with the ITA and VAT Act.

It has been argued that since section 179 (4) permits the determination of the taxpayer's financial position, it does seem to lessen the extent of the infringement on the right of the taxpayer, which is one of the factors that have to be considered when deciding whether a law or conduct will survive constitutional scrutiny. It is, however, unfortunate that this is only to the extent that the revenue collector is more mindful of the pecuniary circumstances of the taxpayer. The rest of the section still maintains the attributes of the preceding legislation.

In conclusion, the third party appointment in terms of section 179 to some extent leans towards striking a balance between the taxpayer's rights and SARS's duty to collect taxes. Perhaps the human rights *mores* is slowly sifting into the South African tax administration but there is much to be improved.

¹⁸⁶ Ibid.

CHAPTER 4 - OTHER JURISDICTIONS; AUSTRALIA AND AMERICA

4.1 Introduction

It is clear from the discussion in the earlier sections of this dissertation that SARS is entrusted with a number of powers aimed at facilitating tax collection. Tax collection has many associated problems. The question arises as to what can be done to resolve these problems and whether these issues are unique to South Africa. In order to respond meaningfully to these questions, this section will briefly explore and contrast the implementation of the powers discussed in the chapters above in South Africa, Australia and the United States of America. South Africa is an emerging democracy while, Australia and the United States of America are more established democracies. Perhaps South Africa would gain valuable insight from the measures utilised in these countries aimed at striking a balance between efficient tax collection and the taxpayers' constitutional rights. Each jurisdiction will be discussed in turn.

4.2 The use of foreign law in SA.

South Africa is a sovereign state with its own laws to govern its own affairs. However, there is nothing preventing South Africa from borrowing from other jurisdictions where our own laws fall short or where it is necessary. Section 39(1)(c) permits courts to consider foreign law when interpreting the rights in the Bill of Rights.¹⁸⁷ I submit that it is necessary in and it is in the interest of the taxpayer that the courts consider foreign law in tax administration matters.

4.3 The 'pay now, argue later rule' in Australia.

Like the TAA, the Australian Tax Administration Act¹⁸⁸ allows a taxpayer who is dissatisfied by the Commissioner's tax assessment of him, to lodge an objection in writing against such an assessment on the ground that it is excessive or otherwise incorrect.¹⁸⁹ The Commissioner is empowered by sections 14ZZM and 14ZZR of the ATAA to pursue debt recovery action pending an appeal or a review. Section 144ZMM¹⁹⁰ provides that a pending review in relation to a tax decision, which includes an assessment, 'does not in

¹⁸⁷ Of the Constitution 108 of 1996.

¹⁸⁸ 1 of 1953 as amended hereafter the ATAA.

¹⁸⁹ Section 14ZZK (a)(1).

¹⁹⁰ See also K Wheelwright 'Taxpayers Rights in Australia' (1997) 7(1) *Revenue Law Journal* 231.

the meantime interfere with, or affect, the decision and any tax, additional tax or any other amount may recovered as if no review was pending.’¹⁹¹ Section 14ZZR is almost identically worded, save for the fact that it deals with the pursuit of debt recovery action awaiting an appeal. In other words Section 14ZZR allows the Commissioner to recover disputed taxes notwithstanding that an appeal is pending against his or her assessment. The Australian Tax Office’s (hereafter the ATO) practice, however, suggests that the ATO does not normally pursue debt recovery in respect of disputed tax debts except in cases where the ATO is of the view that ‘there is a risk that the revenue would suffer jeopardy if the recovery action is not commenced.’¹⁹²In such instances, the ATO may in the exercise of its discretion, postpone recovery if the taxpayer:

- Enters into an acceptable payment arrangement;
- Offers security for the debt;
- Enters into an arrangement whereby 50 per cent of the disputed debt is paid pending the outcome of the appeal; or
- Enters into an agreement which combines the above.¹⁹³

4.4 The ‘pay now, argue later’ principle in terms of the Australian law vs. the South African law.

It appears that the Australian Parliament also grants powers and discretions to the Commissioner of Taxation in terms of Australian tax legislation which may, to some extent, be equated to the ‘pay now, argue later’ rule in our legislation. There are, however, significant differences between these powers. These will now be considered.

Firstly, the TAA allows SARS to collect a disputed tax debt pending an objection, appeal or decision of the court pursuant to an appeal, whereas the ATAA only allows the collection of a disputed tax debt pending a review or appeal, and not an objection.¹⁹⁴It appears that the ATAA as a point of departure affords a taxpayer an opportunity to at least lodge an objection without worrying about having to “pay-up” first while the TAA requires the taxpayer to make

¹⁹¹ Section 144ZMM of the ATAA.

¹⁹² Australian Government: Inspector-General of Taxation *Report for the International Bureau of Fiscal Documentation* (2015) 20.

¹⁹³ Ibid. See also www.ato.gov.au, accessed on 20 august 2018.

¹⁹⁴ See chapter two above for a detailed discussion of how the ‘pay now, argue later’ rule operates.

an application for the payment of the tax debt to be suspended where the tax liability is disputed or is intended to be disputed. It is submitted that the Australian equivalent of the ‘pay now, argue later’ rule is to be preferred in that it grants the taxpayer more certainty, in that he will only be required to pay once the objection has been disallowed by the Commissioner. Moreover, a taxpayer who genuinely, with a sound factual basis, disputes the assessment is likely to be successful and will not have to go on a review or appeal.

Secondly, in so far as appeals and reviews are concerned, the ATO is entitled to pursue tax recovery in respect of the disputed tax pending a review or an appeal as has been pointed out above. The TAA grants the Commissioner the same powers in terms of section 164 and more often than not he is more than happy to exercise his powers no matter what the cost will be. This is one striking difference between SARS and the ATO. The ATAA despite the powers it affords the ATO, appears to be a little more sympathetic towards the taxpayer as it can defer payment of the tax debt if the taxpayer ‘furnishes security for the possible tax, enters into an arrangement whereby 50 per cent of the disputed debt is paid pending the liability, enters into an acceptable payment arrangement or ‘enters into an agreement which combines the above.’¹⁹⁵

In our law there are no such options, save for the furnishing of security. The factors that the Commissioner takes into account in deciding whether to suspend payment are, to a large extent, focussed on scrutinising the ‘cleanliness or otherwise of the taxpayers hands.’¹⁹⁶ The ATO appears to be more concerned with the taxpayers’ willingness to co-operate with the revenue collector to pay their fair share of taxes. It can be argued, however, that SARS is not to be blamed for considering the factors that point to the ‘cleanliness or otherwise of the taxpayer’s hands’ in the matter. If the job of collecting taxes is to be done in the most efficient manner, it might be necessary to be watchful to ensure compliance from taxpayers who are dishonest.

4.5 The ‘pay now, argue later’ principle in the USA

The Internal Revenue Code of 1986 (hereafter the IRC), among other pieces of legislation, governs tax collection in the USA. Generally, an assessment will be furnished to the

¹⁹⁵ Australian Government: Inspector-General of *Taxation Report for the International Bureau of Fiscal Documentation* (2015) 20.

¹⁹⁶ Goldswain (note 125 above) 147.

taxpayer, which must be paid within sixty days.¹⁹⁷If the tax is not paid the Internal Revenue Service(hereafter the IRS) will send a demand to the taxpayer demanding satisfaction of the assessed tax debt within 10 days.¹⁹⁸If the debt is still not paid despite demand then the IRS sends the taxpayer a lien attaching their property, and may levy the owing taxes on that property (except for certain property excluded by statute).¹⁹⁹Except as provided for in sections 6320 and 6330 of the IRC, which will be briefly discussed below, the only opportunity for the taxpayer to be relieved from tax liability after assessment is afforded after tax already been collected.²⁰⁰Once an assessment has been rendered the taxpayer must pay. If he disputes his liability for the assessed tax or at all, he is still required to make the payment and thereafter apply for a refund by way of an administrative claim with the IRS.²⁰¹If the IRS refuses the claim, the taxpayer may then approach either the district court or the court of federal claims.²⁰²The action will focus on the existence and the extent of the taxpayer's liability and not the IRS's collection method.²⁰³It is submitted that this position in American tax collection can to some extent be equated to the 'pay now, argue later' rule in our law in that the taxpayer is required to pay the tax as assessed first and dispute the liability later. It appears that our law is preferable in this regard as it affords the taxpayer an opportunity to lodge an objection to an assessment. It can be argued, however, that the opportunity to lodge an objection is ineffectual as the lodging of an objection does not suspend the obligation to pay taxes owing as per the assessment.

As is the case in South Africa, the courts in America tend to uphold the power of the government to collect taxes using summary procedures. This is indicated by a series of cases which for the purpose of this paper are too numerous to discuss. It is however, appropriate to make mention of the *Den ex dem. Murray v Hoboken Land & Improvement Co*²⁰⁴where the court stated as follows :

¹⁹⁷ DL Fahey 'The Tax Courts Jurisdiction over Due Process Collection Appeals: Is it Constitutional?' (2003) 55(2) *Baylor Law Review* 459.

¹⁹⁸ Ibid;460.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ Section 6511 of the IRC.

²⁰² Section 7422 and section 6532 of the IRS. See also Fahey (note 168 above;461).

²⁰³ Fahey (note 198 above)461.

²⁰⁴ 59 U.S 272(1855).See also Fahey 461.

It may be added, that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties, but always in some way observed and yielded to.²⁰⁵

Consequently, the court held in *Cheatam v United States*²⁰⁶ that if the courts had the powers of controlling or hampering the collection of taxes, or to alleviate hardship incidental to tax collection, then ‘the existence of the government will be placed in the hands of a hostile judiciary’.²⁰⁷

Before the collection due process provisions were introduced in the USA, the IRS could collect taxes without recourse to the courts or any form of judicial review.²⁰⁸ However, with the advent of sections 6320 and 6330 of the IRC (the collection due process provisions), a taxpayer who has been assessed is afforded an opportunity to make a request to have the anticipated tax collection measures judicially reviewed, pending the collection action, as the taxpayer can obtain an injunction²⁰⁹ against such an action.²¹⁰ A Collection Due Process (CDP) hearing will typically be as follows;

The IRS, by way of the appeals officer conducting the hearing, must verify that administrative procedure and applicable law have been followed with respect to the alleged unpaid tax. For example, the hearing officer must verify that the assessment was made and made lawfully; that there is unpaid assessment; that ,if the taxpayer disputes the underlying liability, the taxpayer did or did not have a

²⁰⁵ *Den ex dem. Murray v Hoboken Land & Improvement Co* 59 U.S 272(1855) 55.

²⁰⁶ 92 U.S 85 (1875).

²⁰⁷ *Ibid* 15.

²⁰⁸ L Book ‘The Collection Due Process Rights: A misstep or a step in the right direction’ (2004) 41(1) *Houston Law Review* 1152.

²⁰⁹ According to the Merriam Webster offline mobile dictionary, an injunction is ‘an order from a court of law that says something must be done or must not be done. ‘This definition in South African law, it is submitted , can be equated to that of an interdict.

²¹⁰ An Fahey (note 189 above)464. See also Book (note 200 above)1191.

prior opportunity to dispute the tax liability at issue ; and that all notices have been issued.²¹¹

To the extent that these CDP provisions give the taxpayer an opportunity to access judicial review before collection of the tax, they render the tax collection a little less hostile to the taxpayer, and which is far less intrusive than methods adopted in South Africa.

The CDP provisions, although vital in every tax collection system, are not without opposition. Book, although in agreement with these provisions, has expressed an opinion that they impose considerable costs on the taxing system compared to the value they add to defending the taxpayers' rights. ²¹²This perhaps could mean that CDP provisions are a luxury that South Africa cannot afford.

4.6 The agent appointment in SA versus USA, and Australia.

The first part of this section compared the 'pay now, argue later' rule in the selected jurisdictions. It is appropriate at this point to look at the appointment of third party agents and the constitutionality of their use in tax collection. This part will compare the agent appointment collection method as implemented in SA, USA and Australia and point out certain similarities and disparities in the practice of this collection method in these jurisdictions.

4.6.1 The agent appointment in Australia

Like section 179 of our TAA, Section 260-5 in Schedule One to the Australian Tax Administration Act, allows the Commissioner to collect tax debts from third parties who owe the taxpayer, whether or not the debt has become due and payable.²¹³What can be claimed from the third party 'is any amount of tax-related liability, a judgment debt of tax-related liability, costs of such a judgment debt and any other amount which the taxpayer has been ordered to pay by the court for an offence in tax law.'²¹⁴A written notice will be served to a third party who 'owes or will later owe money to the taxpayer,'²¹⁵ requiring the third party to pay immediately thereafter, or within a specified period after the money concerned becomes

²¹¹ P Browdey 'A reflection on Tax Collection: Opening a Can of Worms to Clean up a Collection Due Process Jurisdictional Mess' 2017 65(51) *Drake Law Review* 61.

²¹² Book (note 200 above)1188.

²¹³ Section 260-5 (1).

²¹⁴ Ibid.

²¹⁵ Section 260 -5 (3) .

due to the taxpayer,²¹⁶ the value of the tax debt or the funds available, whichever is lesser.²¹⁷In terms of section 260-20, failure to comply with the notice on the part of the third party is an offence and in addition to a penalty that a court can impose, the third party may be ordered to pay the Commissioner the value of the tax debt.

The ATAA, in section 260-5 (3) provides that a third party (the debtor) can be said to owe money to the taxpayer where the third party:

- (a) is an entity by whom the money is due or accruing to the debtor; or
- (b) holds money for or on account of the debtor; or
- (c) holds the money on account of some other entity for payment to the debtor; or
- (d) has authority from some other entity to pay money to the debtor

The third party is taken to owe money to the debtor even if:

- (e) the money is not due, or is not so held, or payable under the authority, unless a condition is fulfilled; and
- (f) the condition has been fulfilled.²¹⁸

All the parts of the ATAA relating to the appointment of a third party seem very similar to our section 179. However, there is one striking difference presented by section 260-5 (6), which is that the section requires the Commissioner to send a copy of the third party notice to the taxpayer. It has been argued that this fact is inconsequential as the notice would have already reached the third party when it is forwarded to the taxpayer and for that reason the taxpayer would not have received prior notice in the real sense of the word.²¹⁹It is submitted that although such an argument may be true, the sending of a notice still has the effect of lessening the infringement of the taxpayer's right as the taxpayer will at least not be completely oblivious as to the intentions of the Commissioner and this will save him the embarrassment of, for example, having cheques dishonoured by non-payment where he genuinely thought he had funds in his bank account to honour the cheques.

²¹⁶ Section 260-5 (5).

²¹⁷ Section 260-5 (4).

²¹⁸Section 260-5 (3).See also C Fritz 'Third Party Appointments by SARS:A look into the Future' (2018) 85(81) *THRHR* 89.

²¹⁹ Keulder and Legwaila (note 131 above) 62.

Further, the manner in which the third party appointment is implemented seems to be a little less hostile towards the taxpayer when the Practice State Law Administration 2011/18 which is a practice directive on the implementation of certain tax legislation (hereafter the PSLA) is taken into consideration. In terms of the PSLA the ATO acknowledges the fact that the issuing of a garnishee notice constitutes the use of coercive powers and therefore must be exercised with utmost possible care.²²⁰To this end the ATO, when contemplating the issuing of a garnishee notice, will carefully consider the financial position of the taxpayer, any other debts owed by to other debtors by the taxpayer, whether the tax collection is threatened by the taxpayer's conduct in preferring other creditors over the Commissioner and the likely implications of the garnishee notice on the taxpayer's ability to support his dependants and maintain the viability of his business.²²¹This ensures that companies are not driven into liquidation owing to tax debts.

In addition to the considerations above, the ATO further places limitations on the amount of money that can be the subject of a garnishee notice if the source is the taxpayer's wages or salary.²²² Normally the ATO will not require an amount in excess of thirty cents in a dollar unless the taxpayer has another source of income or where his financial position is such that it will be 'fair and equitable' to require more than that.²²³

The terms of the garnishee notice can be varied or withdrawn upon a reasonable request by the taxpayer, where alternative payment arrangements which the ATO considers to be suitable are made.²²⁴Where the taxpayer is appealing to a court or tribunal, the Commissioner must consider whether or not the garnishee notice will significantly prejudice the taxpayer's ability to pursue the appeals to ensure the right to have access to courts is realised.²²⁵The same cannot be said about SARS whose primary concern is to collect revenue no matter what the cost is. The ATO is clearly a more sympathetic revenue collector towards the taxpayer than SARS is.

²²⁰ PSLA available at www.ato.gov.au accessed on 2 October 2018. para 101.

²²¹ Ibid 102. See also C Hargreaves 'Got debtors? The ATO Wants Them.' available at <http://bit.ly/175U8p3> accessed on 5 October 2018.

²²² PSLA available at www.ato.gov.au accessed on 2 October 2018 para 108 .

²²³ Ibid. See also Keulder and Legwaila (note 131 above) 62.

²²⁴ PSLA available at www.ato.gov.au accessed on 2 October 2018, 103.

²²⁵ Ibid 112.

4.6.2 The agent appointment in the USA

In so far as this tax collection method is concerned in the USA, section 6331 provides that where a person who is liable to pay any taxes has neglected or refused to pay those taxes within ten days after notice and demand, the Secretary is authorised to collect the outstanding taxes by way of a levy,²²⁶ where the tax collected will include any further sum as may prove necessary to cover the costs of the levy.²²⁷ The subject of the levy may be all the tax debtor's property, including a salary or wages, property rights with an exception of the property expressly excluded by statute.²²⁸ The term levy is defined in the Act to include 'the power of distraint and seizure by whatever means necessary.'²²⁹ This in effect means the levy mentioned in the Act is not a separate tax but rather refers to the authority that the IRS has to compel a taxpayer to satisfy its tax obligations. Contrary to the position in South Africa, the IRS is required to communicate its intention to effect the levy by way of a notice in writing before the levy takes place.²³⁰ Once the tax debtor has been notified, it appears that the property, including money, is attached but the actual transfer will only occur once the thirty day period has elapsed.²³¹ This offers the tax debtor an opportunity to make representations while ensuring that the funds are not dissipated.

The notice is required to 'be given in person, left at the dwelling or place of business or sent by registered or certified mail to the last known address of the tax debtor not less than thirty days before the levy.'²³² The notice, however, will not be required before the levy where the Secretary has made a finding that the tax collection is in jeopardy.²³³

4.7 Conclusion

²²⁶ According to Merriam-Webster mobile offline dictionary the term levy means the 'use of legal authority to demand and collect a fine, tax etc.'

²²⁷ IRC section 6331 (a).

²²⁸ Ibid.

²²⁹ IRC section 6331 (b).

²³⁰ *ibid*; section 6331(d)(1).

²³¹ Keulder and Legwaila (note 131above) 63.

²³² *Ibid*; section 6331(d)2).

²³³ Section 6331(d)(3).

It appears from the analysis above that the USA and Australia have been able to achieve a balance between the taxpayer's rights to administrative justice and effective tax collection more successfully thus making their tax collection less invasive as compared to the South African experience. The USA grants the taxpayers an opportunity to be heard before their property is seized whereas South Africans do not have such an opportunity.²³⁴

Australia, as briefly discussed above, has placed some limitations on the percentage of money that can be subject to a garnishee and allows alternative payment arrangements taking into account the tax debtor's ability to keep his business viable.²³⁵

This suggests that perhaps it was not sufficient for the court in *Hindry* to simply say that other countries use this collection method and therefore it is reasonable and justifiable. Each provision had to be properly examined in its entirety to gain insight as to how the other countries with comparable revenue collection methods implement them. The court would have perhaps concluded differently as to the constitutionality of the third party appointment. The court would have recognised that unlike South Africa, other countries have created some protection measures within the legislation to lessen the extent of infringement on the taxpayer's rights.

²³⁴ Keulder and Legwaila (note 131 above)63.

²³⁵ Ibid.

CHAPTER 5 – PROTECTION FOR THE TAXPAYER AND CONCLUSION

5.1 Introduction

This dissertation inquired into the constitutionality of sections 164 and 179 of the TAA in light of the rights of the taxpayer to administrative justice, property and access to courts and not to provide a broad analysis of the TAA or the Constitution.

The main objective of this study was to determine whether these sections as they stand strike a balance as between the rights of the taxpayer and the SARS's duty to effectively collect taxes. Before the findings of the study are discussed, it is essential to take a brief look at the remedies that the South African legislation offers to a taxpayer who is unhappy with his assessment as issued by the Commissioner or any other tax dispute.

5.2 Remedies for the taxpayer - A basic overview

From research, it appears that there are quite a number of remedies that a taxpayer can pursue where the taxpayer is of the opinion that the revenue collector has acted beyond the bounds of its authority. These will now be explored below.

5.2.1 Constitutional remedies

Taxpayers in South Africa are burdened with onerous obligations under fiscal statutes but under chapter 2 of the Constitution taxpayers have obtained many rights which they did not have before. The Bill of rights, it is submitted, can in certain instances be relied upon where the Commissioner: SARS and his officers exceed the powers conferred on them under the SARS Act 34 of 1997 or the taxing statutes generally²³⁶

The Constitutional court can offer a number of remedies to an applicant whose rights are alleged to have been infringed. The court 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'²³⁷; an interdict and 'any other order which the court deems just and equitable' may also be made.²³⁸ It is suggested that the term 'any order' is an all encompassing term and will include declaratory orders and claims for damages.

²³⁶ B Croome 'Constitutional Law and Taxpayers Rights in South Africa – An overview' 2002 *Acta Juridica* 28.

²³⁷ Section 172 (a).

²³⁸ Section 172 of the constitution.

In tax matters it is easy to come to the conclusion that the Constitutional Court does not approach taxation matters with such firmness as it would in other areas of law. This can be seen from an array of cases where taxpayers attempted to challenge the constitutionality of certain tax legislation without success.²³⁹ The reason behind this is perhaps that the importance of tax collection will always take preference over some 'inconveniences' that taxpayers may suffer in the process, especially in South Africa, a developing country which needs tax revenue to provide for the most basic needs of the citizenry. This does not, however, exclude the Constitutional Court's jurisdiction in fiscal matters.

5.2.2 The Promotion of Administrative Justice Act (PAJA)

It has already been established above that the SARS is an organ of the state and as such actions by it, or on its behalf, will constitute administrative action.²⁴⁰ A taxpayer whose rights have been 'adversely and materially affected' as a result of administrative action can therefore rely on remedies provided for by PAJA.²⁴¹ Section 6 of PAJA allows a person who is aggrieved by the decision of an administrator by reason of either substantive or procedural unfairness, to have the decision of the administrator reviewed by a court or tribunal.

However, the reader must be mindful of the fact that section 7(2)(a) of PAJA requires recourse to first be made to the 'internal remedies' before an aggrieved party can rely on PAJA although section 7(2) of PAJA does specify circumstances where the recourse to internal remedies is not required.²⁴² In the context of taxation the internal remedies would probably mean the dispute resolution procedures in terms of Chapter 9 of the TAA and the Tax Ombud to which the taxpayer can turn first and once these are exhausted then they may move on to the PAJA.

5.2.3 Delictual Damages

Croome has commented on the possibility of a delictual claim against the Commissioner:

[A] taxpayer who suffers damages due to intentional or negligent actions by SARS will be entitled to successfully institute a delictual claim against SARS. In the light

²³⁹ See *Hindry, Metcash, Chief Lesapo* etc (see chapter 3 and 4).

²⁴⁰ See chapter 3 above.

²⁴¹ Croome (note 228 above) 15.

²⁴² Section 7 of PAJA.

of the constitutional guarantee that South Africa is based on the values of an accountable, responsible and open democratic government, SARS owes taxpayers a legal duty not to cause them damage.²⁴³

Such damage may not be caused intentionally or through negligence on the part of SARS.

5.2.4 Dispute Resolution Procedures- Chapter 9 of the TAA

Chapter 9 of the TAA makes provision for the dispute resolution procedures. Section 103 deals with the rules of dispute resolution and provides that:

- (1) The Minister may, after consultation with the Minister of Justice and Constitutional Development, by public notice make ‘rules’ governing the procedures to lodge an objection and appeal against an assessment or a ‘decision’, and the conduct and hearing before a tax board or a tax court.
- (2) The ‘rules’ may provide for alternative dispute resolution procedures under which SARS and the person aggrieved by an assessment or ‘decision’ may resolve a dispute.²⁴⁴

5.2.5 The Office of the Tax Ombud

The TAA in Chapter 20 establishes the Tax Ombud and mandates this office to:

- (a) review and address any complaint by a taxpayer regarding a service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS; and
- (b) review, at the request of the Minister or at the initiative of the Tax Ombud with the approval of the Minister, any systemic and immerging issue related to a service matter or the application of the provisions of this Act or procedural or administrative provisions of a tax Act.²⁴⁵

A Tax Ombud must be appointed by the Minister for a term of 5 years, which term is renewable.²⁴⁶

The Tax Ombud may not, however, review

²⁴³ BJ Croome *Taxpayers’ Rights in South Africa* (2010) 282.

²⁴⁴ Section 103 of the TAA.

²⁴⁵ Section 16 of the TAA.

²⁴⁶ Section 14 of the TAA.

- legislation or tax policy;
- SARS policy or practice generally prevailing other than to the extent that it relates to a service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS;
- A matter subject to objection or appeal under a tax Act, except for an administrative matter relating to such objection or appeal; or
- decision of, proceeding in or matter before the tax court.²⁴⁷

Interestingly, the Ombud cannot review tax policy or practice. It would be a very cost-effective way to challenge tax policies and practices that are unfavourable to the taxpayer. Conceivably, the reason behind the exclusion of tax policy and practice from review by the Ombud was the fear of being paralysed by a flood of cases.

5.2.6 SARS Service Charter.

A service charter was released by SARS in 2005. The charter did not give rise to new rights and did not introduce novel ways in which taxpayers can seek the enforcement of their rights.²⁴⁸ It has been commented that ‘the rationale behind the release of the Charter was to heighten taxpayers awareness of their rights and to improve the culture of service within SARS in interaction with taxpayers.’²⁴⁹ The question arises whether, since its implementation, the Service Charter has actually achieved its rationale as stated at the time of its release. There is doubt in this regard as taxpayers still look to litigation which is rather costly to seek the enforcement of their rights. This is probably due to the fact that the charter is not legislation, but is merely a mission statement by SARS. Perhaps if the service charter was made legislation, it would better achieve its rationale.

5.2.7 The Human Rights Commission and the Public Protector

Chapter 9 of the Constitution makes provision for the appointment of the Public Protector and the establishment of the Human Rights Commission. The Public Protector’s functions include the following;

²⁴⁷ Section 17 of the TAA.

²⁴⁸ BJ Croome *Taxpayers’ Rights in South Africa* (2010) 249.

²⁴⁹ Ibid 286.

- (a) to investigate any conduct in state affairs , or in the public administration in any sphere of government , that is alleged or suspected to be improper or to result in any impropriety or prejudice;
 - (b) to report on that conduct; and
 - (c) to take appropriate remedial action
- (2) The Public Protector has the additional powers and functions prescribed by national legislation.²⁵⁰

Like the Public Protector, the Human Rights Commission is an institution charged with ensuring observance of rights of people especially by the government bodies. The Commission must ‘promote respect for human rights and culture of human rights; promote the protection, development and attainment of human rights; and monitor; and assess the observance of human rights in the Republic.’²⁵¹

These institutions are here for the enforcement of the rights of people. However, doubt has been expressed as to whether these institutions can be of much assistance to taxpayers as tax is a very specialised area of law. Perhaps Croome’s argument has merit when he says;

The Human Rights Commission, like the Public Protector, does not have specialised skills required to deal with taxpayers’ complaints and cannot offer them an effective remedy for alleged breaches of their rights. The inevitable conclusion is that the South African taxpayers currently do not have a cost-effective method of dealing with difficulties with the Commissioner.²⁵²

These remedies discussed above are some of the remedies that could potentially offer the taxpayer some protection. As can be seen from the discussion, none of these remedies are directly related to tax except for the Office of the Tax Ombud which cannot question SARS practice and policy, and the SARS Service Charter which does not create any enforceable rights.²⁵³ It appears therefore that the taxpayers disgruntled by the ‘pay now, argue later’ rule and the third party appointment provisions have no choice but to explore litigation which

²⁵⁰ Section 182 of the Constitution.

²⁵¹ Section 184 of the Constitution .

²⁵² BJ Croome *Taxpayers’ Rights in South Africa* (2010) 312.

²⁵³ See discussion above .

exercise has proven futile in the past.²⁵⁴The question arises then whether these can be said to offer sufficient protection for the taxpayer. This question will be answered by making a brief reference to solutions that other countries have adopted.

5.3 Taxpayer protection in other countries

In the USA a Taxpayer Bill Of Rights was first introduced in 1988, signed into law in 1996 and there has been a number of subsequent amendments.²⁵⁵This Bill of Rights is aimed at providing ‘means by which abuses of power by the Internal Revenue Service could be prevented.’²⁵⁶Among other things the Bill of Rights prohibits the use of audit quotas or targets of taxes that should be collected by the auditors as a measure of performance.²⁵⁷The reason behind this was the concern that some auditors were overly enthusiastic about their work knowing that their performance was measured by the amount of money they collected.²⁵⁸The Taxpayer Bill of Rights has further been said to give taxpayers ‘better methods for resolving frustrating IRS administrative errors.’²⁵⁹

This distinct Taxpayer’s Bill of Rights is more than just a charter, it is legislation which creates enforceable right for taxpayers something which cannot be said about the SARS Service Charter. The Bill of Rights improves the accessibility of information to American taxpayers on how to go about resolving their quarrels with the revenue collector in an effective but affordable manner. The Taxpayers Bill of Rights is not without opposition. Greenbaum has commented that the Taxpayers Bill of rights is ‘more a means by which politicians improve their political stature with their electorate by attacking the IRS and less an attempt by legislators to advance the rights of taxpayers.’²⁶⁰

²⁵⁴ See chapter 2 and 3 above.

²⁵⁵ A Greenbaum ‘Taxpayer Bills of Rights 1 and 2 : A Charter to be Followed by the Rest of the World or just another Attack on the Tax Authority’ (1997)7(1) *Revenue Law Journal* 139.

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ Ibid 140.

²⁵⁹ J T Cross ‘Taxpayer Bill of Rights’ (1989)76(6) *ABA Journal* 79.

²⁶⁰ A Greenbaum ‘Taxpayer Bills of Rights 1 and 2 : A Charter to be Followed by the Rest of the World or just another Attack on the Tax Authority’ (1997)7(1) *Revenue Law Journal* 138.

It is considered unfortunate that South Africans do not have a bill of rights specific to tax. They can only form a picture of their rights by and piecing together separate pieces of legislation before they can finally have a glimpse of what rights they have and which one of the Acts will better suit their requirements at that time.

The Australians do not have separate charter of rights and they too can only identify their rights in the context of powers that the ATO has.²⁶¹

5.4 Conclusion

It has been established that there are a number of remedies that can potentially assist discontented taxpayer. However, it is considered unfortunate that many of these are not specifically related to tax with the exception of the Office of the Tax Ombud whose jurisdiction to question SARS' practice and policy is limited if not non-existent. The inevitable conclusion one comes to is that South Africa at the present moment does not have any accessible and cost effective manner of challenging SARS' practices and policy without resorting to litigation which is rather time consuming and expensive. It can be argued that it is a luxury many South Africans cannot afford. It is hoped that in the future legislation which offers real protection to the taxpayer will be enacted.

²⁶¹ K Wheelright 'Taxpayers Rights in Australia' (1997)7(1) *Revenue Law Journal* 227.

Chapter 6: OVERALL CONCLUSION**6.1 Introduction**

The main objective of this dissertation was to provide a brief discussion, analysis and appraisal of sections 164 and 179 of the TAA. In an attempt to provide an objective appraisal, equivalent legislation in other jurisdictions was considered and compared to the relevant sections of the TAA. In addition, the rights of taxpayers affected by the application of sections 164 and 179 were examined and the protection offered to the taxpayer in South Africa and in other jurisdictions was briefly discussed and analysed.

As may have appeared from the discussion and arguments above, the conclusion that this study reaches is that both the sections 164 and 179 of the TAA present quite a number of constitutional challenges. The main findings and issues discovered in this study will be discussed in the following section.

6.2 Main findings and issues**6.2.1 Section 164**

As for the constitutionality of section 164 (the ‘pay now, argue later’ rule). I favour the view that this principle can in no way be said to be constitutional in the context of income tax. There are numerous reasons for this stance and these will follow.

This section enables the Commissioner to collect taxes from the taxpayer to the detriment of the taxpayers’ right to access to courts and administrative justice as has been discussed in chapter 2. The right to access to courts is significant in state such as South Africa, given its history. For this right to be worth anything, especially in the context of tax collection, the revenue collector cannot be given power to collect taxes without any judicial oversight where the tax collected is in dispute. The Commissioner is the one who assesses the taxpayer. When the taxpayer expresses his dissatisfaction with the assessment by way of an objection or appeal and applies for a suspension of the payment, it becomes the very same Commissioner who will decide whether the suspension will be made. This renders the right to have access to courts meaningless at that moment as SARS will be the judge in its own cause in that it will still be able collect the disputed tax pending the objection or appeal.

The official considering the application for a suspension is required to consider the request carefully, in light of the factors listed in subsection(3), before dismissing the application. Over and above these factors, a senior SARS official must circumspectly consider the principles of administrative law. This could work well if the decision whether to suspend was made by a court or a tribunal. As was pointed out by O'Regan J in *Dawood*, there is a difference when a discretion is exercised by a court or tribunal and when it is exercised by an official because officials normally have too much on their plates.²⁶² They have many applications that they have to respond to within specified deadlines. This means that, in the nature of their work, there is not much room for a thorough reflection on and consideration of requests brought to them. This works against the taxpayers because requests to suspend payment that would have been approved had they been thoroughly considered and had the official applied his mind, will end up being denied. This is contrary to what the right to administrative justice stands for.

Of course the decision to refuse the suspension can be reviewed but the review procedures are extremely narrow in nature and the reviewability of the Commissioner's decision is a far cry from access to courts. Olivier correctly commented that the fact the decisions of the Commissioner are reviewable can in no way be construed to mean that the legislator does not have a duty to ensure that legislation complies with the Constitution.²⁶³

In addition, a comparison between the normal civil procedure and the operation of section 164 has revealed that section 164 grants SARS more powers than ordinary creditors would have which raises doubt as to whether the extent of the limitation of the taxpayers powers is justified by the its purpose.

As has been discussed above, the predecessor of section 164 of the TAA as it stood in the VAT Act was declared to be constitutional in *Metcash*. It has been established that the fact that the section was upheld in the context of VAT does not mean that it will be inevitably be upheld in the context of income tax. The reason put forward to favour this contention is that there are differences between VAT, which is a self –assessment system, and income tax

²⁶²*Dawood* (note 85 above).

²⁶³ L Olivier 'Tax collection and the bill of rights' 2001 TSAR 196.

which is assessed by the Commissioner. Therefore there is much greater scope for genuine dispute in income tax than in VAT.

6.3 Section 179

In so far as the constitutionality of section 179 is concerned, while I am of the view that the legislature has somewhat leaned towards achieving some sort of equilibrium between taxpayers rights and tax collection by decreasing the extent of the limitation of the rights of the taxpayer, there is much to be resolved with this tax collection method.

As may be seen from the discussion in chapter 3 above, the section allows SARS to appoint an agent on behalf of the taxpayer, effectively pulling a third party into the dispute between SARS and the taxpayer. This summary collection method was referred to by the court in *Hindry* as a form of a garnishee order. In 3.2.2 above the garnishee proceedings were compared to the operation of section 179 and it was found that although these two procedures are similar in that they include a third party into a dispute between the revenue collector and the taxpayer, section 179 is quite distinguishable from a normal garnishee order. One glaring difference between the two is the fact that before a garnishee order is granted, the defendant would have been given an opportunity to redeem himself by stating his version of events, while under section 179 there is no such opportunity. This is because the taxpayer will be oblivious as to the Commissioner's intention to utilise this collection method as no notice is given. While this is a very effective method for the Commissioner as the taxpayer will not have a chance to dissipate his assets, the *audi alteram* principle, which requires both sides to be heard will not be adhered to before a decision is made. The court's error is quite clear in referring to section 179 as 'a form of a garnishee.'

Another concern which section 179 raises is that it now allows moneys that will be held in the future by the agent and pension funds to be subject to such notice. The latter is now attachable in terms of section 179, contrary to section 37A(1) of the Pension Fund Act, 24 of 1956 in terms of which a pension fund is not to be subject to attachment orders. This broadens the scope of what can be attached compared to preceding legislation, as discussed above in chapter 3. Taxpayers who have pension funds are advised to tread carefully.

Le Roux and Van Der Waal explain that the notice is electronic and merely states that it was issued on behalf of the Commissioner; that there is nothing on the notice to propose that the

notice has been well reflected on and issued by the Commissioner. It is therefore difficult to determine the person on whose instruction the third party notice was issued. One cannot be certain as to whether the appointment was in actuality done by a senior SARS official. It is submitted that this fact on its own is a cause for concern because the person making the appointment may not be the person intended by the Act to exercise the authority and may be insufficiently trained to properly consider whether the circumstances in that particular case warrant the issuing of a third party notice.

It is however applauded that the section 179(4) has been introduced into the TAA which allows for the determination of the taxpayers affordability to pay the tax debt. Although the determination occurs *ex- post facto*, it is a step in the right direction by the legislature.

6.4 Other jurisdictions

The comparison done between certain aspects of tax administration in SA, Australia and the USA have shown that the constitutional issues associated with tax collection are not unique to South Africa. Other countries are faced with the some of the challenges as well. What distinguishes the other countries from us so far is their ability to overcome some of these difficulties.

The Australian Tax Administration allows the taxpayer to at least lodge an objection before the ‘pay now, argue later’ principle comes into play. It is only once the objection has been refused and the taxpayer has noted an appeal or review that he is required to pay pending the outcome. Therefore a taxpayer who is genuine in his lodging of an objection and has approached the Commissioner with good facts is given an opportunity to attain an affordable remedy to his dissatisfaction without resorting to litigation which is rather exorbitant.

In so far as the agent appointment is concerned, the taxpayer will receive notice of the appointment although this will be after the third party has already received the notice. Furthermore before a garnishee order is made, the financial position and the likely implications of the garnishee order on the taxpayer’s ability to support his family and maintain the viability of his business will be carefully considered. The ATO further places limitations on the amount of money that can be the subject of a garnishee notice; if the source of the funds is the taxpayer’s wages or salary, the amount cannot exceed 30% of the wages or salary, unless the taxpayer has another source of income, or it will be ‘just and equitable’ to exceed thirty percent. This is something we are yet to see in SA.

In the USA the introduction of the CDP provisions gave the taxpayer an opportunity to access judicial review before collection of the tax. The provisions thus render the tax collection process a little less hostile to the taxpayer, far less hostile than our methods.

In making use of garnishee proceedings, notice is given to the taxpayer no later 30 days before the levy occurs.

6.5 Remedies

In so far as remedies are concerned, it can be seen from chapter 5 that there are quite a number of remedies for South African taxpayers that may apply in the circumstances of the application of sections in question. However, these are not directly related to tax disputes and are associated with an overwhelming lack of accessibility, and if they are accessible they are not really effective.

However, in the US, the Bill of Rights and the Collection Due Process provisions, although not without flaws and criticisms, are a step in the right direction.

6.6 Recommendations

Having done this study I make the following recommendations

- The Office of the Tax Ombud should be authorised to review tax policy or practice. It would be a very cost- effective way to challenge tax practices that are unfavourable to the taxpayer.
- The SARS Service Charter should be more than just a mission statement. It should be made policy which is rendered binding on SARS officials, thereby giving taxpayers certainty as to what they can expect from the revenue collector.

6.6.1 Final word

Admittedly the Commissioner is charged with a difficult task of collecting taxes effectively while at the same required not to overstep the bounds of his authority by infringing on the fundamental rights of the taxpayers. Compliance by taxpayer suffers because taxpayers have a strong distrust and lack of respect for the government and SARS. Until the cause of this attitude is eliminated, compliance will continue to suffer. If taxpayers saw the government using their money efficiently, perhaps their attitudes towards taxation would change and there

would be more tax compliance, in which case SARS would not need these controversial tax collection procedures.

However, Bird has correctly observed as follows in respect of tax compliance and administration:

There is no single set of prescriptions - no secret recipe - that, once introduced will ensure improved tax administration in any country. Developing countries exhibit a wide variety of tax compliance levels, reflecting not only the effectiveness of their tax administrations but also taxpayer attitudes toward taxation and toward government in general as well as many other environmental factors.²⁶⁴

While this is freely acknowledged, it is hoped that in the future, the courts will bring more certainty as to the constitutionality of the ‘pay now, argue later’ rule and third party appointments in the context of income tax.

²⁶⁴ RM Bird & EM Zolt *Introduction to Tax Policy Design and Development* (Notes for a course on Practical Issues of Tax Policy in Developing Countries 2003) available at [www1.worldbank.org/...WBI%201\(Bird and Zolt\)](http://www1.worldbank.org/...WBI%201(Bird%20and%20Zolt)) accessed on 10 August 2018.

REFERENCES

Books

Arendse J A, Williams R C & Klue S *Silke on Tax Administration* (last updated February 2017), Lexis Nexis (2012) .

Baxter, L *Administrative law* Cape Town: Juta, (1984).

Chakalson, M ... *et al. Constitutional Law of South Africa* Cape Town : Juta & Co Ltd (1996).

Croome, B J ... *et al. Tax Law , an introduction* 1st ed Cape Town : Juta & Co Ltd (2013).

Croome, B J *Taxpayers' Rights in South Africa* Cape Town : Juta & Co Ltd (2010).

Currie, I & De Waal, J *The Bill of Rights Handbook* 6 ed Cape Town : Juta & Co Ltd (2013).

Hahlo, H R & Kahn, E *The South African Legal System and its Background* Johannesburg: Juta (1973).

Pete, S ... *et al Civil procedure- A Practical guide* 2ed Cape Town: Oxford University Press Southern African (2015).

Articles and dissertations

Book, L 'The Collection Due Process Rights: A misstep or a step in the right direction' (2004) 41(1) *Houston Law Review*.

Browdey, P 'A reflection on Tax Collection: Opening a Can of Worms to Clean up a Collection Due Process Jurisdictional Mess' 2017 65(51) *Drake Law Review*. Chaka, J B T 'pay now, argue later' rule in the South African Tax Law – A critical analysis (unpublished LLM thesis, University of KwaZulu Natal, 2015).

Croome B J *Taxpayers' Rights in South Africa: An analysis and evaluation of the extent to which the powers of the South African Revenue Services comply with the rights to property, privacy, administrative justice, access to information and access to courts.* (unpublished Ph.D. thesis, University of Cape Town 2008).

Croome, B J 'Constitutional Law and Taxpayers Rights in South Africa – An overview' 2002 *Acta Juridica*.

Cross, J T 'Taxpayer Bill of Rights '(1989) 76(6) *ABA Journal*.

Fahey, D L 'The Tax Courts Jurisdiction over Due Process Collection Appeals: Is it Constitutional?' (2003) 55(2) *Baylor Law Review*.

Fritz, C 'Third Party Appointments by SARS: A look into the Future '(2018) 85(81) *THRHR*.

Goldswain, G K 'The winds of change – An analysis and appraisal of selected constitutional issues affecting the rights of taxpayers' (2012) 16(3) *Southern African Business Review*.

Greenbaum, A 'Taxpayer Bills of Rights 1 and 2 : A Charter to be Followed by the Rest of the World or just another Attack on the Tax Authority' (1997)7(1) *Revenue Law Journal*.

Keulder, C "Pay now, argue later "rule before and after the Tax Administration Act'(2013)16(4) *P.E.R* .

Keulder C *Does the Constitution protect the taxpayers against the mighty SARS? –An inquiry into the constitutionality of selected tax practices and procedures* (unpublished LLM thesis, University of Pretoria, 2011).

Keulder, C & Legwaila T 'The Constitutionality of third-party appointments –before and after the Tax Administration Act' (2014) 77*THRTH*.

King JG *The Constitutionality of the 'pay now, argue later' in terms of the Tax Administration Act*(unpublished LLM thesis, University of Pretoria, 2015).

Muller, EA *A framework for wealth transfer taxation in South Africa* (unpublished LLD thesis, University of Pretoria, 2010)

Olivier, L 'Tax collection and the bill of rights' 2001 *TSAR* .

Van der Walt , J & Le Roux, D 'Third party appointments by SARS under the TAA' Jan/Feb (2013) 15 *TaxTalk*.

Wheelwright, K 'Taxpayers Rights in Australia' (1997)7(1) *Revenue Law Journal*.

Internet and electronic Sources

Anorld , BJ Opinion prepared for the Commissioner for Inland Revenue.(Attached as Annexure H to the affidavit of the Commissioner in an application to the Constitutional Court, CCT/22/96)

Bird RM & Zolt EM Introduction to Tax Policy Design and Development (Notes for a course Practical Issues of Tax Policy in Developing countries 2003) available at [www1.worldbank.org/...WBI%201\(Bird and Zolt\)](http://www1.worldbank.org/...WBI%201(Bird and Zolt)) accessed on 10 August 2018.

Hargreaves C 'Got debtors? The ATO , Wants Them ' available at <http://bit.ly/175U8p3> accessed on 5 October 2018.

Merriam Webster offline mobile application dictionary available at playstore.

Johannes B 'pay now, argue later 'rule: When must we pay SARS?' 03 June 2016 available at <https://www.thesait.org.za/news/292287/Pay-Now-Argue-Later-Principle-When-Must-You-Pay-SARS.htm> accessed on 25 July 2018.

Taxpayers Rights , The Tax Administration (TAA) and the Constitution .Available at [http://www.fanews.co.za/article/front-page-features/25/featured-story/1147/taxpayer ...](http://www.fanews.co.za/article/front-page-features/25/featured-story/1147/taxpayer...) accessed on 25 July 2018.

Williams RC 'Unresolved aspects of the 'pay now, argue later' rule.'07 February 2012 available at <https://www.thesait.org.za/news/83050/Unresolved-aspects-of-the-pay-now-argue-later-> accessed on 25 July 2018.

<https://www.ato.gov.au>

<https://www.saica.co.za/intergritax/2007/1501-Pay-now-argue-later-rule.htm> accessed on 16 September 2018.

Certification of the Amended Text of the Constitution of the Republic of South Africa 1996-1997 1 BCLR (CC).

Caselaw

Bernstein v Bester *NO* 1996 (2) SA 751 (CC).

Capstone Pty(Ltd) v C: SARS 2011 ZAWCHC 297.

Chief Lesapo v Northwest Agricultural Bank 2001(1) SA 409 (CC).

CIR V NCR Corporation of SA Ltd 1988 2 SA 765 (SA).

Contract Support Services(Pty) Ltd 61 SATC 338.

Cheatam v United States U.S 85 (1875).

Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs and Thomas v Minister of Home Affairs 2000 8 BCLR 837 (CC).

De Lange v Smuts *NO* 1998 (3) SA 785 (CC).

Den ex dem. Murray v Hoboken Land & Improvement Co 59 U.S 272(1855).

First National Bank of SA t/a Wesbank v C: SARS 2002 (4) SA 768 (CC).

Gardener v East London Transitional Local Council 1996(3) SA 99 (E).

Hindry v Nedcor Bank 1999 (2) All SA 38 (W).

Johhanesburg Stock Exchange v Witwatersrand 1988 3 SA 132 (A).

Marsay v Dilley 1992(3) SA 944(A).

Metcash Trading Limited v the Commissioner for SARS 2001 (1) BCLR 1(CC)

Mokoena Albert Sepataka v C: SARS 2011(2) SA 556(GSJ).

Mpande Foodliner CC v C: SARS and others 63 SATC 46.

Schmidt v Theron 1991 (3) SA 126(K).

Singh v C: SARS 2003(4) SA 520 (SCA) .

Sing v The Common wealth 2004 [HCA] 43 .

Smartphone SP (Pty) Ltd v ABSA Bank Ltd and Another 2004 (3) SA 65 (W) 72.

Road Accident Fund v Mdeyide 2011 (2) SA (CC) [1] and [64].

Legislation

South Africa.

Constitution of the Republic of South Africa , 1996.

Customs and Excise Act 91 of 1964.

Income Tax Act 58 Of 1962.

Magistrates' Courts Act 32 Of 1944.

Promotion of Administrative justice Act 3 of 2000.

Pension Fund Act 24 of 1956

South African Revenue Service Act 34 of 1997.

Tax Administration Act of 28 of 2011.

Value Added Tax Act 89of 1991.

United States of America

Internal Revenue Code of 1986(title 26).

Australia

Income Tax Act Assessment 27 of 1936.

Taxation Administration Act 1 of 1953 as amended.

Practice State Law Administration 2011/18.