



TOPIC TITLE:

**THE EFFECT THAT SARS PROCEDURES CONTAINED IN THE TAX
ADMINISTRATIVE ACT HAS ON TAXPAYER'S CONSTITUTIONAL
RIGHTS**

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TABLE OF CONTENTS

CHAPTER 1: BACKGROUND TO THE RESEARCH

1.1 Introduction.....	6-10
1.2 Statement of Purpose.....	10-12
1.3 The Rationale for The Study.....	12-13
1.4 Research Questions.....	13
1.5 Literature Review.....	13-15
1.6 Conceptual/Theoretical Framework.....	15
1.7 Research Methodology.....	15
1.8 Anticipated Limitations.....	16
1.9 Ethical Issues.....	16

CHAPTER 2: INFORMATION GATHERING POWERS OF SARS

2.1 Introduction.....	17-18
2.2 Part A of Chapter 5 of the TAA.....	19-22
2.3 Part B of Chapter 5 of the TAA.....	22-23
2.4 Part C of Chapter 5 of the TAA.....	24-25
2.5 Part D of Chapter 5 of the TAA.....	26-28

CHAPTER 3: CONFIDENTIALITY OF INFORMATION

3.1 Introduction.....	29
3.2 The Provisions in the TAA that govern the Confidentiality of Information.....	29-30

**CHAPTER 4: AN INTERNATIONAL COMPARISON ON THE APPLICATION OF SA
AND USA CONSTITUTIONAL RIGHTS AND TAX LAWS**

4.1 Introduction.....	37
4.2 The Republic of South Africa (RSA).....	37-44
4.3 United States of America (USA).....	44-48

**CHAPTER 5: BREIF OVERVIEW OF SARS POWERS IN COMPARISON TO OTHER
GOVERNMENT ORGANISATION WITHIN SOUTH AFRICA,
PARTICULARLY THE CRIMINAL PROCEDURE ACT**

5.1 Introduction.....	49
5.2 Powers conferred on police officials in terms of The Criminal Procedure Act, specifically with regards to search and seizure.....	50-52
5.2.1 Search and seizure with a warrant.....	52-53
5.2.2 Search and seizure without a warrant.....	54-55
5.3 Powers conferred on SARS in terms of the Tax Administration Act, specifically with regards to search and seizure.....	55-56
5.3.1 Search and seizure with a warrant.....	56-57
5.3.2 Search and seizure without a warrant.....	57-60

CHAPTER 6: CONCLUSION

6. Conclusion.....	60
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BIBLIOGRAPHY	60-67
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CHAPTER 1

BACKGROUND TO THE RESEARCH

1.1 INTRODUCTION

The Republic of South Africa much like every other country, imposes taxes on residents worldwide and non-residents on their income from sources within South Africa, to collect revenue to facilitate a functioning state. There are various Acts that provide for the collection of tax from individuals such as the Income Tax Act 58 of 1962¹ and the Tax Administration Act 28 of 2011.²

In terms of these Acts a taxpayer is obliged to file a tax return with the South African Revenue Service.³ The provisions of those acts do not distinguish between legal and illegal income, creating the impression that it is the intention of the legislature that both should be subject to taxation. This was confirmed in *CIR v Delagoa Bay Cigarette Co Ltd*.⁴ Relying on the precedent of the English case *Partridge v Mallandaine*,⁵ the court indicated that there is indeed no distinction by stating that:

*“the legality or illegality of a business was irrelevant to
the issue of whether income is subject to taxation.”*

In ITC 1199,⁶ the court stated that:

“In the Income Tax Act, the tax-gatherer has cast his net wide enough to catch all income, so that once a receipt constitutes income, it is subject to the provisions of the Act, regardless of whether it is income derived from illegal activities or not.”

¹ Hereafter referred to as ‘The Income Tax Act’.

² Hereafter referred to as ‘TAA’.

³ Hereafter referred to as ‘SARS’.

⁴ *CIR v Delagoa Bay Cigarette Co Ltd* 1918 TPD 391 at 394.

⁵ *Partridge v Mallandaine* [1887] L.R. 18 Q.B.D. at 276

⁶ ITC 1199, 36 SATC 16 19

In light of the above, all revenue irrespective of whether it is “derived from an activity that is illegal, immoral or *ultra vires*”, has to be disclosed to SARS.⁷ This allows South Africa’s government to share in the returns, irrespective of the source thereof.

This in part creates a problem for a taxpayer who has either generated income from an illegal source, or who, by complying with the Tax Acts,⁸ will incriminate him/herself in a tax or other offence.

The disclosure of incriminating evidence by a taxpayer, in the course of complying with the obligations in terms of the Tax Acts is an aspect that is surrounded by much controversy. This is brought about because in terms of the TAA, as discussed in chapter 2 of this dissertation, in certain circumstances⁹ SARS can investigate the taxpayer’s tax affairs and inform the South African Police Services¹⁰ or the National Prosecuting Authority¹¹ to conduct a criminal investigation.¹²

As in the case with all other statutes, The TAA must adhere to the Constitution which is the supreme law of South Africa.¹³ The provisions that are contained in the TAA which are the procedures that are adhered to by SARS officials is questionable. The TAA provides for the confidentiality of taxpayers’ information, yet the same Act allows a senior SARS official to reveal information to organs of state in the course of the performance of their duties.¹⁴

Within the provisions of the Act, if at any time an auditor is suspicious that a possible serious tax offence had been committed by a taxpayer, the investigation must be referred to a Senior SARS official responsible for criminal investigations to decide whether a criminal investigation should be pursued.¹⁵

This provision allows SARS in certain circumstances, whether it be in the performance of their duties, or under the provisions of any other acts or, in terms of a high court order. To use the information provided to them by a taxpayer and the information collected during the SARS

⁷ *CIR v Delagoa Bay Cigarette Co Ltd* 1918 TPD 391 at 394.

Williams, RC. (1995). *Income Tax in South Africa: Cases and Materials* pg 181.

⁸ This is in reference to The Income Tax Act and the Tax Administration Act.

⁹ Section 43 of the Tax Administration Act 28 of 2011.

¹⁰ Hereafter referred to as ‘SAPS’.

¹¹ Hereafter referred to as ‘NPA’.

¹² Sections 72 and 69 of the Tax Administration Act 28 of 2011.

¹³ The Constitution of South Africa.

¹⁴ Sections 72 and 69 of the Tax Administration Act 28 of 2011.

¹⁵ Section 43(1) of the Tax Administration Act 28 of 2011.

criminal investigation. To inform the SAPS or the NPA on whether they should proceed to conduct a criminal investigation, or to institute prosecution proceedings against the taxpayer.

This process might be an infringement of the taxpayer's constitutional rights to privacy,¹⁶ to remain silent¹⁷ and the right against self-incrimination.¹⁸ The information provided by a taxpayer to the SARS official during its information gathering stages may be a breach of the taxpayer's right to privacy and the right to remain silent, whilst, being compelled to provide information that might be to his detriment, perhaps by contravening his right against self-incrimination.

This dissertation will focus on a taxpayer's constitutional rights with regard to "the right not to be compelled to give self-incriminating evidence" (the right against self-incrimination) and "the right to remain silent" in the Bill of Rights.¹⁹

As will be discussed in this dissertation,²⁰ the powers encompassed in the TAA that gives SARS officials its authority is equivalent to those given to the SAPS by the Criminal Procedure Act 51 of 1997.²¹

The few distinctive aspects between the two Acts is that the purposes of the Acts are vastly different, and the TAA does not have criminal consequences if a SARS official were to act contrary to the authority provided within the Act, as opposed to the CPA which has provisions to hold members of the SAPS accountable if they are in breach of the provisions of their Act.

South Africa could resolve any conflict that may appear between these statutes, by implementing techniques from other countries such as the United States which allows taxpayers to invoke their Fifth Amendment right when it comes to disclosing information on their tax returns from the outset, as such information maybe a violation of their constitutional rights.²²

¹⁶ Section 14 of the Constitution of the Republic of South Africa.

¹⁷ Section 35(1)(a) of the Constitution of the Republic of South Africa.

¹⁸ Section 35(3)(j) of the Constitution of the Republic of South Africa.

¹⁹ Sections 14, 35 (1)(a) and (b) and (3) (h) and (j) of Chapter 2 of the Constitution of the Republic South Africa Act No. 108 of 1996.

²⁰ Chapter 5 of this Dissertation.

²¹ Hereafter referred to as the 'CPA'.

²² Bittker BI. (1974). *Taxing Income from Unlawful Activities*. Case W. Res. L. Rev, 25, pgs 130-147.

The United States of Americas Fifth Amendment Constitutional right is the equivalent to South Africa's Constitutional right to remain silent and the right not to be compelled to give self-incriminating evidence.

The United States Internal Revenue Service²³ requires that disclosures made by the taxpayer must not violate the taxpayer's Fifth Amendment right.²⁴ The reason that the IRS is of this view is because the United States courts have held that "taxpayers may elect to invoke their Fifth Amendment right to specific entries on their tax return, if the disclosure would potentially expose him to the possibility of criminal prosecution."²⁵

Similarly, in *Marchetti v United States*²⁶ The Supreme Court of Appeal allowed a taxpayer with incriminating information to refuse to submit a return or account for "taxable income, in circumstances where the self-incriminating tax information needed to be handed from tax authorities, to prosecuting authorities for the purpose of instituting criminal prosecution proceedings against the taxpayer." The United States "requires the prosecution to prove that evidence introduced in a criminal trial was obtained completely independently of the compelled disclosure."²⁷

This approach could be useful in South Africa because it promotes the constitutional right against self-incrimination, by allowing taxpayers to make disclosures without perturbation of the legal consequences.

This dissertation will discuss SARS' powers as set out in Chapter 5 of the TAA and whether the relevant sections conform to the Constitution. It will also discuss the search and seizure powers that SARS officials have in comparison to those given to the SAPS and it will look at the manner in which other countries have dealt with this issue, and the solutions that have been implemented in those countries to prevent their tax laws from infringing on their citizens' rights.

The chapter outline of this dissertation will cover the background to the research²⁸ which introduces the topic, Information gathering powers of SARS²⁹ which discusses the provisions of the TAA that empower SARS officials, Confidentiality of information³⁰ that covers the provisions of confidentiality in the TAA, an international comparison on the application of SA

²³ Hereafter referred to as the 'IRS'.

²⁴ Amendment 5 to the Constitution of the United States of America.

²⁵ *United States v Josephberg* 459 F.3d 350 (2d Cir. 2009); *United States v Sullivan* 274 U.S. 259 (1927) at pg 264; *Garner v United States* 424 U.S. 648 (1976) at 666; *SA Berson Federal Tax Litigation* (2003) at pgs 13-42.

²⁶ 390 U.S. 39 (1968).

²⁷ Hanzel, JF. 'Self-incrimination and the Use of Income Tax Returns in Non-tax Criminal Prosecutions' (1973) 30 Wash. & Lee L. Rev. 182 at 191.

²⁸ Chapter 1.

²⁹ Chapter 2.

³⁰ Chapter 3.

and USA constitutional rights and tax laws³¹ which discusses the difference between taxpayers constitutional rights when it comes to filing their returns, brief overview of SARS powers in comparison to other government organisation within South Africa, particularly the CPA.³² This chapter illustrates the excessive powers given to SARS by the TAA in comparison to the powers given to our police force, and finally the conclusion.³³

1.2 STATEMENT OF PURPOSE

South Africa's tax laws have attempted to balance taxpayer's constitutional rights and their obligations to organs of state by first introducing section 4 "The Preservation of Secrecy" provisions into the Income Tax Act.³⁴ In terms of these provisions, taxpayers had an absolute right to secrecy, which guaranteed that their information would not be used to their detriment.³⁵ This absolute right has since then been diluted, due to the provisions contained under section 4 of the Income Tax Act having been repealed by Chapter 6 of the TAA.³⁶ In terms of Chapter 6 of the TAA, a distinction is now drawn between "SARS confidential information" and "taxpayer information". This distinction was not contained in the provisions of section 4 of the Income Tax Act.³⁷

The provisions contained under Chapter 6 of the TAA referred to as the "Confidentiality of Information"³⁸, prevents *inter alia* SARS employees from releasing information to any unauthorised or interested parties. However, if at any time an auditor discovers that a "serious tax offence had been committed" by a taxpayer, the investigation is referred to "a senior SARS official" who is authorised to decide whether a criminal investigation should be pursued.³⁹ All information obtained before the referral is admissible in criminal proceedings⁴⁰ and all information obtained after the referral must be kept completely separate from the criminal proceedings and is not admissible in court, unless a competent court directs otherwise.⁴¹

³¹ Chapter 4.

³² Chapter 5.

³³ Chapter 6.

³⁴ Section 4 of the Income Tax Act 58 of 1962.

³⁵ Bricout, RG. (2002). *The Preservation of Secrecy Provision: Still Worth It?*. *Acta Juridica*. pg 247-281.

³⁶ Section 26 of Schedule 1 of the Tax Administration Act 28 of 2011.

³⁷ Section 4 of the Income Tax Act 58 of 1962.

³⁸ Sections 67-74 of the Tax Administration Act 28 of 2011.

³⁹ Section 43(1) of the Tax Administration Act 28 of 2011.

⁴⁰ Section 44(2) of the Tax Administration Act 28 of 2011.

⁴¹ Sections 43(2) and 72(2) of the Tax Administration Act 28 of 2011.

According to the Constitution,⁴² the right against self-incrimination is included under arrested and detained persons which in turn means that this right will only be enforceable once a person becomes an accused. If this is so, and SARS uses this as an excuse to gather information during its Chapter 5 audit to verify the offence, then why does it consider the taxpayer's constitutional rights after the offence is verified, but before the taxpayer is formally charged?

By definition, self- incrimination is “the act of implicating oneself in a crime or exposing oneself to criminal prosecution”⁴³ and the right against providing self-incriminating evidence is entrenched in Chapter 2 Bill of Rights.⁴⁴

Section 72 of the TAA,⁴⁵ creates the misconception that it protects the taxpayer's right against self-incrimination.⁴⁶ This misconception stems from this section stipulating that once it is verified that “a serious tax offence has been committed the matter is referred for criminal investigation,” and SARS must conduct its criminal investigations with due regard to the taxpayer's constitutional rights.

This means that when a serious tax offence is identified, the section permits SARS to continue its investigation by collecting information from the taxpayer, as if it is conducting its normal Chapter 5 audit, without informing the taxpayer of its suspicions.

SARS then uses the information gathered from the taxpayer to verify its suspicions. Once it verifies that a serious tax offence has been committed, it then considers the taxpayer's rights by informing him of his rights and that a criminal investigation will now be conducted, and at the conclusion of the investigation his full rights will only be invoked if SARS has him formally charged.

It is submitted that if the legislature truly sought to protect a taxpayer's constitutional rights one would expect that the provisions would provide for the consideration of taxpayers' constitutional rights immediately after SARS' suspicions are raised, so that the taxpayer is aware that SARS is conducting an investigation and would be able to decide whether or not to provide it with further incriminating evidence.

⁴² Section 35(3)(j) of the Constitution of the Republic of South Africa.

⁴³ <https://www.dictionary.com/browse/self-incrimination> last visited on the 15th of November 2018.

⁴⁴ Section 35(3)(j) of the Constitution of South Africa.

⁴⁵ Section 72 of the Tax Administration Act 28 of 2011.

⁴⁶ Section 35(3)(j) of The Constitution.

In South Africa, therefore, it is only once the taxpayer has been charged and is regarded as an accused, that his constitutional rights are fully enforceable. The position is different in the United States where the courts in *United States v. Doe*⁴⁷ held that it was not necessary for a taxpayer to comply with a *subpoena duces tecum*, because if the taxpayer were to produce the business records contemplated in the subpoena, he would be giving testimonial self-incriminating evidence to the tax authority, prior to being charged with a criminal offence.⁴⁸ This means that the United States courts recognise that producing documentation that contains self-incriminating evidence is self-incrimination, and cannot be sanctioned.

This type of recognition is not given to taxpayers in South Africa. Instead they are compelled to provide all information irrespective of whether it is incriminating or not to SARS officials when requested to do so.⁴⁹ This reiterates the fact that a taxpayer's constitutional rights are only enforceable once they are regarded as an accused and are of no force and effect at the SARS information gathering stage.

As indicated, in terms of the TAA, a taxpayer is compelled to provide incriminating information to SARS, which is then used as a starting point by SARS that could lead to a criminal investigation. Incorporating foreign solutions would be of assistance in better enforcing the taxpayer's constitutional rights in this context.

The purpose of this dissertation is to discuss whether the duty to disclose information, in the context of tax compliance, infringes on a taxpayer's constitutional right to privacy,⁵⁰ the right to remain silent⁵¹ and against self-incrimination.⁵²

1.3 THE RATIONALE FOR THE STUDY

The reason I have selected this research topic for my dissertation is because the issue of whether the duty to disclose infringes on one's constitutional right against self-incrimination is a grey area. When scrutinising the provisions of the confidentiality clause in the TAA, which *prima*

⁴⁷ *United States v. Doe* 465 U.S. 605 (1984).

⁴⁸ Touro L. (1997-1998). *Self-Incrimination*. Vol14. Issue 3. pgs 1235-1270.

⁴⁹ The Internal Revenue Code of 1998 available at

http://www.law.cornell.edu/uscode/html/uscode26/usc_sup_01_26.html last accessed 9 December 2017.

Chapter 4 Part A section 25 of the Tax Administration Act.

Section 5 of the Income Tax Act.

⁵⁰ Section 14 of The Constitution of the Republic of South Africa.

⁵¹ Section 35(1)(a) of The Constitution of the Republic of South Africa.

⁵² Section 35(3)(j) of The Constitution of the Republic of South Africa.

facie consider taxpayers' constitutional rights, it is clear that taxpayers' rights are only considered after the initial information is supplied to SARS. This topic is worth researching to discuss whether the relevant tax law sections infringe on our constitutional right against self-incrimination.

1.4 RESEARCH QUESTIONS

The main focal question that this dissertation seeks to answer is whether the provisions contained in the TAA, which are the procedures that are adhered to by SARS officials, infringe on taxpayer's constitutional rights. In order to achieve the desired goal, a few sub-questions need to be answered:

- 1) What are the information gathering powers of SARS?
- 2) Is the information provided by taxpayers in their tax return adequately protected by the confidentiality of information provisions contained in the TAA?
- 3) Will a comparison of the application of SA and USA constitutional rights and tax laws reveal solutions that can be adopted by South Africa to aid in improving the protection of taxpayers' constitutional rights in South Africa?
- 4) Can a comparison be made between SARS officials' authority and the authority of SAPS with regard to search and seizure, to illustrate the extent of the powers SARS is given by legislation?

1.5 LITERATURE REVIEW

The South African Constitution⁵³ is the supreme law of the Republic of South Africa. The Constitution is the legal foundation that all other legislation in the Republic has to adhere to. It stipulates the privileges and obligations of its citizens, and outlines the structure of the

⁵³ South Africa, The Constitution 1996, hereafter referred to as the 'Constitution'.

government. The Income Tax Act and the TAA are statutes and in order for the provisions within the statute to be valid it would need to comply with the Constitution.⁵⁴

The Income Tax Act and the TAA are pieces of legislation that provide for the effective and efficient collection of tax and contain provisions that grant SARS officials their authority. These Acts stipulate, *inter alia* that a taxpayer has an obligation to pay income tax,⁵⁵ the Acts further stipulates that if a taxpayer does not comply with the Acts “he shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a specified period.”⁵⁶ The duty to disclose information that could be incriminating, which can then in certain circumstances be handed over to the SAPS or the NPA, which may be an infringement of a taxpayer’s constitutional right to remain silent, privacy and against self-incrimination. It is therefore imperative that the Tax Acts be looked at in the context of our constitutional rights as if it were enforceable at the time of filing our returns.

The 2nd edition Tax Administration book⁵⁷ analyses the scope of SARS powers under the Tax Administration Act. This book assists us in understanding the functionality of SARS officials and how they go about exercising their authority.

The 6th edition Bill of Rights Handbook⁵⁸ is an overview of an individual’s constitutional rights within Chapter 2 of the Constitution. It sets out the rights and the context in which it may be enforced by individuals. This was used as a foundation in discussing these rights in relation to my dissertation topic.

The 11th edition Criminal Procedure Handbook⁵⁹ sets out the procedures that needs to be adhered to by our police officials when conducting a search and seizure either with or without a warrant. The information contained in this book gives an overview of the procedure that allowed a comparison between the authority given to SARS officials by the TAA and those given to Police officers by the Criminal Procedure Act.

⁵⁴ Section 39(2) of The Constitution of the Republic of South Africa.

⁵⁵ Section 2 of the Tax Administration Act 28 of 2011.

Section 5(1) of the Income Tax Act 58 of 1962.

⁵⁶ Sections 234-238 of the Tax Administration Act 28 of 2011.

Section 104(d) of the Income Tax Act 58 of 1962.

⁵⁷ Croome, B., & Olivier, L. (2015). *Tax Administration*. 2nd Ed. South Africa: Juta.

⁵⁸ Currie, I., & De Waal, J. (2013). *The Bill of Rights Handbook*. 6th. South Africa: Juta.

⁵⁹ Joubert, J. *Criminal Procedure Handbook*. 2013. 11th. South Africa. Juta.

Silke: South Africa Income Tax⁶⁰ deals with the Income Tax Act as well as the Tax Administration Act, which provided a more detailed insight into the provisions of the Acts that add to the overall view taken in this dissertation.

South Africans' rights as taxpayers were looked at by BJ Croome,⁶¹ in his book which discusses taxpayer's rights in South Africa and focuses specifically on whether Tax laws comply with the Bill of Rights. His core argument is that South Africa's Tax laws infringe on the taxpayer's Constitutional rights. He approaches the topic by discussing statutory provisions and judicial decisions and recognising that the issues discussed are not unique to South Africa and in an attempt to find a solution, he discusses how other countries have wrestled with these issues and the solutions implemented in order to have their tax laws comply with their citizens' rights entrenched in their bill of rights.

1.6 CONCEPTUAL/THEORETICAL FRAMEWORK

This dissertation will be based on a descriptive and comparative analysis of the relevant review of tax laws, literature, journal articles and several internet sources and principles applied by the courts which fall within the field of tax law and constitutional law.

1.7 RESEARCH METHODOLOGY

The research method used in this dissertation is qualitative analysis which is used in evaluating the issue of whether the duty to disclose infringes on the constitutional right against self-incrimination. The research will contain a review of tax laws, literature, journal articles and several internet sources and principles applied by the courts which fall within the field of tax law and constitutional law.

⁶⁰ Stiglingh, M. (Ed)., De Swardt, RD., Wilcocks, JS., Van Zyl, L., Koekemoer, AD. 2016. *Silke: South Africa Income Tax*. LexisNexis.

⁶¹ Croome, B J. *Taxpayers Rights in South Africa*. Cape Town: (2010). Juta & Co Ltd.

1.8 ANTICIPATED LIMITATIONS

Despite the relevance of the study there is not a lot of information available that discusses whether the duty to disclose infringes on one's rights to privacy and against self-incrimination. This dissertation will also present a limited comparative study of approaches taken by other countries and is limited to the discussion of whether there is a duty to disclose incriminating information and if so, does this infringe on a taxpayer's constitutional rights.

1.9 ETHICAL ISSUES

The research method that this dissertation seeks to implement is purely desktop research and it does not intend using any confidential material. In the circumstances, there should not be any ethical issues associated with this dissertation.

CHAPTER 2

INFORMATION GATHERING POWERS OF

THE SOUTH AFRICAN REVENUE SERVICE

2.1 INTRODUCTION

The South African Revenue Service (SARS) is the country's tax collecting authority. This organ of state was created in terms of the South African Revenue Service Act 34 of 1997 as an "autonomous agency".⁶² This agency is authorised to control the administration of the South African tax regime and customs service.⁶³

In order to determine whether the internal investigation procedures of SARS infringe on a taxpayer's right to "privacy", the right to "remain silent"⁶⁴ and the right "not to be compelled to give self-incriminating evidence",⁶⁵ we would first have to analyse the procedure followed and the powers that the TAA confers on the Commissioner for SARS⁶⁶ in gathering information from a taxpayer.

At a glance, the provisions contained in the TAA are phrased in a "discretionary" manner. This leaves it up to the relevant SARS officials to use their discretion in enforcing those provisions. Since the TAA is not prescriptive, taxpayers are left questioning whether or not their conduct was consistent with the Constitution.⁶⁷

The TAA confers various powers on the Commissioner, which includes the power to audit and raise queries with taxpayers on their tax returns, conduct a formal inquiry into the taxpayer's affairs or to search a taxpayer's premises and seize records.⁶⁸

⁶² Herewith referred to as the 'Act'.

⁶³ <http://www.sars.gov.za/About/Pages/default.aspx> last accessed 20 January 2018.

Sections 1-3 of the South African Revenue Services Act 34 of 1997.

⁶⁴ Section 35 (1)(a) and (b) of Chapter 2 of the Constitution of the Republic South Africa.

⁶⁵ Section 35 (3) (h) and (j) of Chapter 2 of the Constitution of the Republic South Africa.

⁶⁶ Hereafter referred to as "the Commissioner".

⁶⁷ Phrases such as "unless a Court orders otherwise", "he is of the belief that relevant material may be at premises other than the premises stipulated in the warrant", "if he believes that the delay in obtaining a warrant may defeat the purpose of the search and seizure and if the warrant cannot be obtained in time."

Zerbst, F. 2013. *Taxpayers' rights, the Tax Administration Act (TAA) and the Constitution* available at <https://www.fanews.co.za/article/talked-about-features/25/featured-story/1147/taxpayers-rights-the-tax-administration-act-taa-and-the-constitution/13561> last accessed 20 March 2018.

⁶⁸ Croome, B., & Olivier, L. 2015. *Tax Administration*. 2nd Ed. South Africa: Juta. Pg 108.

SARS is empowered by the TAA to collect relevant information in the following ways:⁶⁹

- by requesting the information from the taxpayer;⁷⁰ or
- by conducting an interview at a SARS office where the taxpayer will provide the relevant material in person;⁷¹ or
- by conducting “a field audit or a criminal investigation at the property of the taxpayer”;⁷² or
- by having a formal inquiry before a presiding officer;⁷³ or
- to search a taxpayer’s premises and seize records.⁷⁴

In terms of the TAA, SARS’ request for material must be for the purpose of the administration of a tax Act and in relation to the taxpayer. According to the TAA, relevant material is defined as “any information, document or thing that in SARS’ opinion is foreseeably relevant for the administration of a tax Act”.⁷⁵

A taxpayer is required to submit a tax return. Once it is submitted SARS then processes the information provided and issues an assessment. The tax return is regarded as a self-assessment, due to it being filled out by the taxpayer.⁷⁶

The various parts of the TAA contained in Chapter 5 that comprise the powers of SARS will be discussed below.

Parts A, B,C ,D of Chapter 5 and section 64 of the Tax Administration Act 28 of 2011.

⁶⁹ South African Revenue Services. 2013. *SARS Short Guide to the Tax Administration Act 28 of 2011* South Africa: Legal Division.pg 23.

Croome, B., & Olivier, L. 2015.*Tax Administration*. 2nd Ed. South Africa: Juta. Pg108

⁷⁰ Chapter 5 Part B section 46 of the Tax Administration Act 28 of 2011.

⁷¹ Chapter 5 Part B section 47 of the Tax Administration Act 28 of 2011.

⁷² Chapter 5 Part B sections 48 and 49 of the Tax Administration Act 28 of 2011.

⁷³ Chapter 5 Part C sections 50-54 of the Tax Administration Act 28 of 2011.

⁷⁴ Chapter 5 Part D sections 59-63 of the Tax Administration Act 28 of 2011.

South African Revenue Services. 2013. *SARS Short Guide to the Tax Administration Act 28 of 2011*. South Africa: Legal Division.pg 23

Croome, B., & Olivier, L. 2015.*Tax Administration*. 2nd Ed. South Africa: Juta. Pg108.

⁷⁵ Stiglingh, M. (Ed)., De Swardt, RD., Wilcocks, JS., Van Zyl, L., Koekemoer, AD. 2016. *Silke: South Africa Income Tax*. LexisNexis pg 1150.

Section 1 of The Tax Administration Act 28 of 2011.

⁷⁶ Stiglingh, M. (Ed)., De Swardt, RD., Wilcocks, JS., Van Zyl, L., Koekemoer, AD. 2016. *Silke: South Africa Income Tax*. LexisNexis pg 1148.

2.2 PART A

Part A of Chapter 5 of the TAA sets out the “general rules for inspection, verification, audit and criminal investigations” by SARS.⁷⁷ This chapter widens the scope of SARS’ powers to conduct audits and inspections into taxpayer’s affairs and is covered by sections 40, 41, 42 and 43 of the TAA.⁷⁸

SARS officials are given authority to select a taxpayer for “inspection, verification or audit on the basis of any consideration relevant for the proper administration of a tax Act, including on a random or a risk assessment basis.”⁷⁹

This power is further enhanced by section 68(1)(k) which stipulates that the disclosure of “information relating to the verification or audit selection procedure or method used by SARS which could reasonably be expected to jeopardise the effectiveness thereof”, would be regarded as SARS confidential information and taxpayers will not be legally entitled to the reason that they were selected for inspection, verification or audit.⁸⁰

However, SARS publishes a Strategic Plan on the SARS website that indicates the specific sector/area that it will be investigating. The information published can be of assistance to taxpayers as it illustrates the areas SARS will be focusing on for inspection, verification or audit of taxpayers.⁸¹

The method in which a SARS official can conduct an audit or criminal investigation is covered under section 41.⁸² This section allows a senior SARS official to give another SARS official “written authorisation to conduct a field audit or criminal investigation, as referred to in Part B of chapter 5 of the TAA”.⁸³

When exercising this power, a SARS official has to produce the authorisation to the taxpayer. If the authorisation is not produced, the taxpayer may presume that the individual is not regarded as an authorised SARS official in terms of the TAA. The taxpayer in turn does not

⁷⁷ The Tax Administration Act 28 of 2011.

⁷⁸ Croome, B., & Olivier, L. 2015. *Tax Administration*. 2nd Ed. South Africa: Juta. Pg 109
The Tax Administration Act 28 of 2011.

⁷⁹ Section 40 of the Tax Administration Act 28 of 2011.

⁸⁰ Croome, B., & Olivier, L. 2015. *Tax Administration*. 2nd Ed. South Africa: Juta. Pg 109.

⁸¹ Croome, B., & Olivier, L. 2015. *Tax Administration*. 2nd Ed. South Africa: Juta. Pg 110.

⁸² Section 41 of the Tax Administration Act 28 of 2011.

⁸³ Section 41(1) of the Tax Administration Act 28 of 2011.

have to grant SARS access to his/her premises or give them any information that they may have requested.⁸⁴

The TAA places an obligation on SARS officials to keep taxpayers informed as prescribed by “the Commissioner by public notice which should indicate the stage of completion of the audit within 90-days of the start of the audit”.⁸⁵

When the audit or criminal investigation is concluded, SARS is obliged to “inform the taxpayer within twenty one (21) business days (or a further period depending on the complexity of the audit)” on whether the conclusion was inconclusive or whether there are potential adjustments to the taxpayer’s return.⁸⁶ With regard to the adjustments, the taxpayer is provided with a document called a “letter of finding” stipulating the conclusion of the audit which includes the reasons for the proposed assessment or decisions referred to in section 104(2), which allows a taxpayer to object to certain decisions made in the assessment.⁸⁷

Once received the taxpayer has “twenty-one (21) business days (or a further period depending on the complexity of the audit) to respond in writing to the facts and conclusions set out in the document”.⁸⁸

If a senior SARS official reasonably believes that compliance would “impede or prejudice the purpose, progress or outcome of the audit” then subsection 42 (1) and 2 (b) are not applicable.⁸⁹

A distinction needs to be drawn between a civil investigation (ie an inspection, verification or audit) and a criminal investigation. The main distinction between the respective investigations lies in the onus of proof.

In a civil investigation, a taxpayer is obliged to provide all information requested by SARS for purposes of the investigation and the onus of proof is placed on the taxpayer to prove that the correct amount of tax was paid, whereas in a criminal investigation the onus would be placed on the State to prove that the person has committed an offence.⁹⁰ As a general rule, a taxpayer

⁸⁴ Section 41(1) and section 42 (2) of the Tax Administration Act 28 of 2011.

⁸⁵ Section 42 (1) of the Tax Administration Act 28 of 2011.

Government notice 788 in Government Gazette 35733 of 1 October 2012.

⁸⁶ Section 42 (2) (a) and (b) of the Tax Administration Act 28 of 2011.

⁸⁷ Section 42 (2) (b) and (3) of the Tax Administration Act 28 of 2011.

Section 42(5) states that a taxpayer may waive the right to receive the document.

⁸⁸ Section 42(3) of the Tax Administration Act 28 of 2011.

⁸⁹ Section 42(6) of the Tax Administration Act 28 of 2011.

⁹⁰ Chapter 9 Part A section 102 of the Tax Administration Act 28 of 2011.

South African Revenue Services. 2013. *SARS Short Guide to the Tax Administration Act 28 of 2011*.

is not obliged, under a criminal investigation, to provide SARS with information that may be self-incriminating.⁹¹ However it is important to point out that SARS relies on the information which a taxpayer is compelled to provide during civil investigations to reach a decision on whether or not to pursue a criminal investigation.

Section 43 deals with a situation in which a SARS official can have a taxpayer referred for criminal investigation.⁹² This means that if at any time before or during an audit, the auditor is suspects that “the taxpayer had committed a possible serious tax offence” the investigation is then referred to a senior SARS official⁹³ who has to determine whether a criminal investigation should be pursued.⁹⁴

An offence committed by a taxpayer “in terms of a tax Act, or any other offence involving fraud or a SARS official relating to the administration of a tax Act, or theft of monies due or paid to SARS for the benefit of the National Revenue Fund” is defined as a tax offence.⁹⁵

A serious tax offence on the other hand is defined as “a tax offence for which a person may be liable on conviction of imprisonment exceeding two years without the option of a fine, or to a fine exceeding the equivalent amount of a fine under the Adjustment of Fines Act 101 of 1991”.⁹⁶

All information obtained after the referral must be kept separate from criminal proceedings (unless a competent court directs otherwise) and if SARS is insistent on pursuing the criminal investigation then all relevant information obtained before the referral and during a criminal investigation may be used for the purposes of audit which is also admissible in subsequent civil and criminal proceedings.⁹⁷

South Africa: Legal Division.pg 42 and 84.

⁹¹ Stiglingh, M. (Ed)., De Swardt, RD., Wilcocks, JS., Van Zyl, L., Koekemoer, AD. 2016. *Silke: South Africa Income Tax*. LexisNexis pg 1148.

⁹² Section 43 of the Tax Administration Act 28 of 2011.

⁹³ This SARS official is responsible for heading the criminal investigations.

⁹⁴ Section 43(1) of the Tax Administration Act 28 of 2011.

⁹⁵ Section 1 of the of the Tax Administration Act 28 of 2011.

Stiglingh, M. (Ed)., De Swardt, RD., Wilcocks, JS., Van Zyl, L., Koekemoer, AD. 2016. *Silke: South Africa Income Tax*. LexisNexis pg 1149.

⁹⁶ Section 1 of the of the Tax Administration Act 28 of 2011.

Stiglingh, M. (Ed)., De Swardt, RD., Wilcocks, JS., Van Zyl, L., Koekemoer, AD. 2016. *Silke: South Africa Income Tax*. LexisNexis pg 1149.

⁹⁷ Sections 43(2), 44(2)-(3) and 72 (2) of the Tax Administration Act 28 of 2011.

If SARS decides not to persist with the criminal investigation, or decides to withdraw the investigation, or after referral for prosecution, decides not to prosecute then all relevant material and files should be given back to the SARS official in charge of the audit.⁹⁸

By virtue of this section it is evident that the SAPS rely on the information provided by SARS to pursue an investigation because had it not being for the internal investigations of the SARS officials, the SAPS officials would not have known of the offence. Even though this information is not admissible in court, it could be used to persuade a prosecutor to open a docket and the information could aid in building up the prosecution's case against the taxpayer.

2.3 PART B

Part B of Chapter 5 of the TAA⁹⁹ sets out the regulations for “inspection, request for relevant material, audit and criminal investigations” by SARS and are covered by sections 45,46,47,48 and 49 of the TAA.¹⁰⁰

Where a SARS official reasonably suspects that a “trade or enterprise” is being conducted at a premises, section 45 grants SARS access to a taxpayer's premises (“other than a dwelling-house or domestic premises, without the occupant's consent”) without prior notice to establish the identity of the occupant, and whether the occupant is registered and adhering to sections 29 and 30, which places an obligation on taxpayers to keep records and such records must be kept or retained in a prescribed form.¹⁰¹

SARS officials are also allowed to request any relevant material (orally or in writing) which must be submitted within a reasonable time frame from a taxpayer, another person (records he may possess in relation to the taxpayer) or an identifiable class of taxpayers (only if requested by a senior SARS official).¹⁰² If the information is requested from a third party, such request is usually accompanied by a condition that prohibits the third party from informing the taxpayer of the SARS request.¹⁰³

⁹⁸ Section 43(3) of the Tax Administration Act 28 of 2011.

⁹⁹ the Tax Administration Act 28 of 2011.

¹⁰⁰ the Tax Administration Act 28 of 2011.

¹⁰¹ Section 45 (1) (a) - (c) and (2) of the Tax Administration Act 28 of 2011.

Sections 20 and 30 of the Tax Administration Act 28 of 2011.

¹⁰² Section 46 of the Tax Administration Act 28 of 2011.

¹⁰³ Retief, E., & Zwan, P. 2017. *Official Journal of the South African Institute of Professional Accountants*. Issue 29. Pg 7.

SARS is empowered by section 47 to call upon a taxpayer via a notice “to attend an interview at a time and place stipulated in the notice” which may require a taxpayer to produce relevant material (stipulated on the notice) with regards to the taxpayer’s tax affairs (The taxpayer may refuse “to attend an interview where the distance exceeds the distance stipulated on the notice”).¹⁰⁴

This will only be allowable if SARS renders any further audits or verification unnecessary, and if the interviewer’s intention is to clarify problems that are of concern (which are not for the purposes of conducting a criminal investigation).¹⁰⁵

Section 48 deals with field audits or criminal investigations and stipulates that a SARS official authorised in terms of the notice mentioned in section 41 may conduct a field audit at the premises of the taxpayer or another person (anything he may possess in relation to the taxpayer) by giving ten (10) business days prior notice. The taxpayer or another person should make available all material as stipulated in the notice which the SARS official may need to conduct the field audit or criminal investigations.

Taxpayers need to keep in mind that the period for which information can be requested by SARS is not restricted, which means that information from any assessment year can be requested.¹⁰⁶ That’s why it is imperative that taxpayers always make full disclosure to avoid SARS reopening assessments on the basis that the taxpayer is guilty of “fraud, misrepresentation or non-disclosure of material facts”.¹⁰⁷

The taxpayer is obliged in terms of section 49 to give assistance during “field and other audits or criminal investigations”.¹⁰⁸ This section aids SARS officials by compelling a taxpayer or an individual on whose property an audit or criminal investigation is to be conducted, to assist the official.

This requires the individual to assist SARS in any reasonable manner that is deemed necessary for the official to conduct the “audit or criminal investigation” such as making available facilities, answering questions, and providing relevant material.¹⁰⁹

¹⁰⁴ Section 47 of the Tax Administration Act 28 of 2011.

¹⁰⁵ Croome, B., & Olivier, L. 2015. *Tax Administration*. 2nd Ed. South Africa: Juta. Pg 122

¹⁰⁶ Section 3 (2) (a) (j) of the Tax Administration Act 28 of 2011.

¹⁰⁷ The Tax Administration Act 28 of 2011.

¹⁰⁸ Section 49 of the Tax Administration Act 28 of 2011.

¹⁰⁹ Section 49 of the Tax Administration Act 28 of 2011.

2.4 PART C

Part C of Chapter 5 of the TAA sets out the inquiries procedure that SARS needs to adhere to in order to conduct an inquiry and are covered by sections 50 to 58 of the TAA which will be discussed below.

In order for SARS officials to conduct an inquiry under section 50, a senior SARS official or a person who has been authorised to act on the senior SARS official's behalf to bring the application into the inquiry, is obliged to make an *ex parte* application before a judge (the senior SARS official does not have to personally bring the application but he ought to have authorised the application to be made).¹¹⁰

In terms of this section the judge is entitled to grant an order whereby an individual described in terms of section 51(3) may act as the presiding officer at the inquiry which must be supported by information that establish the facts for the basis of the application (the supporting information is provided under oath or solemn declaration).¹¹¹

The inquiry order will only be granted if the judge is satisfied that there are reasonable grounds to believe that the taxpayer had committed a tax offence or has failed to fulfil the obligations imposed under the tax Act and an inquiry will assist in retrieving relevant material to prove the grounds stipulates above.¹¹²

The presiding officer can determine the manner in which the inquiry will take place but is obliged to ensure that the evidence and proceedings are documented in a manner acceptable to a court of law.¹¹³

The presiding officer is entitled to send a notice, compelling an individual to appear at the inquiry and holds the same powers as a presiding officer at a tax court, which means that he may hold a witness in contempt of court or sanction any person who fails to appear in terms of the inquiry notice.¹¹⁴ It is important to remember that if the person summoned is to appear as a witness then he is entitled to be represented at the inquiry.¹¹⁵

¹¹⁰ Sections 50 and 50 (3) of the Tax Administration Act 28 of 2011.

¹¹¹ Section 50 (1) and (2) of the Tax Administration Act 28 of 2011.

¹¹² Section 51 of the Tax Administration Act 28 of 2011.

¹¹³ Section 52 of the Tax Administration Act 28 of 2011.

¹¹⁴ Sections 53 and 54 of the Tax Administration Act 28 of 2011.

Croome, B., & Olivier, L. 2015. *Tax Administration*. 2nd Ed. South Africa: Juta. Pg 138.

¹¹⁵ Section 52 (3) of the Tax Administration Act 28 of 2011.

Unless otherwise directed by a court, all inquiries must proceed irrespective of whether there are “civil or criminal proceedings pending, contemplating or involving any person in the inquiry”.¹¹⁶

In terms of section 56,¹¹⁷ some inquiries can be regarded as private and confidential. However, even though the inquiry is given that status, SARS, subject to section 57(2),¹¹⁸ may use evidence obtained during an inquiry which has been given under oath or declaration by a person in subsequent proceedings involving that person or another.¹¹⁹

Section 57 governs incriminating evidence and stipulates that “no person may refuse to answer a question on the basis that the answer may incriminate oneself.”¹²⁰ This section further states that the evidence provided during the inquiry “will not be admissible in criminal proceedings unless the circumstances are related to the administering or taking/making of an oath or solemn declaration, the giving/making of false evidence or statements, and the failure of a person to answer a lawful question put to them fully and satisfactorily.”¹²¹

This section seems to open the doors for SARS to use evidence from the inquiry in criminal proceedings as individuals are generally reluctant to provide information that could be self-incriminating which could come across to the presiding officer as the individual failing to answer the legal question fully and to his satisfaction.

¹¹⁶ Section 58 of the Tax Administration Act 28 of 2011.

¹¹⁷ Chapter 5 Part C of The Tax Administration Act 28 of 2011.

¹¹⁸ Section 57 (2) of the Tax Administration Act 28 of 2011 “Incriminating evidence obtained under this section is not admissible in criminal proceedings against the person giving the evidence, unless the proceedings relate to— (a) the administering or taking of an oath or the administering or making of a solemn declaration; (b) the giving of false evidence or the making of a false statement; or (c) the failure to answer questions lawfully put to the person, fully and satisfactorily.”

¹¹⁹ Section 56 of the Tax Administration Act 28 of 2011.

Section 69 of the Tax Administration Act 28 of 2011 states that “A person who is a current or former SARS official must preserve the secrecy of taxpayer information and may not disclose taxpayer information to a person who is not a SARS official”.

Section 57 (2) of the Tax Administration Act 28 of 2011 states that “The person may not refuse to answer a question at the inquiry on the grounds that it may incriminate the person. Incriminating evidence is, however, not admissible in criminal proceedings against the person giving the evidence. it may however be admissible in criminal proceedings against the person giving the evidence: the administering or taking of an oath or the administering or making of a solemn declaration giving false evidence or making a false statement, or failing to answer questions fully and satisfactorily that were lawfully put to a person.” -

¹²⁰ Section 57 (1) of the Tax Administration Act 28 of 2011.

¹²¹ Section 57 (2) (a) – (c) of the Tax Administration Act 28 of 2011.

2.5 PART D

Part D of Chapter 5 of the TAA sets out the procedure and standards that SARS should adhere to with regards to conducting a search and seizure and is embodied in sections 59-66 of the TAA.

Prior to having a warrant issued, a senior SARS official must go through the application process set out in section 59 which regulates the manner, in which warrants are authorised.¹²² SARS is required to file an *ex parte* application which must be supported by information that establishes the facts for the basis of the application (this supporting information must be provided under oath or solemn declaration).¹²³

Once the application for a warrant has been heard, the judge or magistrate is authorised under section 60 to issue the warrant, on the basis that there are reasonable grounds to believe that the taxpayer has committed a tax offence or has failed to fulfil the obligations imposed under the tax Act, and that the relevant material defined under section 1 of the TAA¹²⁴ will probably be found at the property stipulated in the application to prove the grounds of the non-compliance or commission of an offence.¹²⁵ The warrant is only valid for a period of forty five (45) business days (or a period deemed appropriate by the judge), and will lapse if it is not executed within this time frame.¹²⁶

When exercising a power under the warrant, the SARS official conducting the search and seizure must show the warrant to the occupier of that property. Failure to produce the said warrant will entitle the occupier to refuse access to the premises (subject to section 63).¹²⁷

Once produced the warrant entitles SARS, in terms of section 61, to open/ cause to be opened/or remove anything that the official believes to contain relevant material. In addition, SARS can

¹²² Section 59 of the Tax Administration Act 28 of 2011.

¹²³ Section 59 of the Tax Administration Act 28 of 2011.

Croome, B., & Olivier, L. 2015. *Tax Administration*. 2nd Ed. South Africa: Juta. Pg 153.

¹²⁴ Section 1 of the Tax Administration Act 28 of 2011: “relevant material” means any information, document or thing that is foreseeably relevant for tax risk assessment, assessing tax, collecting tax, showing noncompliance with an obligation under a tax Act or showing that a tax offence was committed.

¹²⁵ Section 60 of the Tax Administration Act 28 of 2011.

Croome, B., & Olivier, L. 2015. *Tax Administration*. 2nd Ed. South Africa: Juta. Pg 154.

¹²⁶ Section 60 (3) of the Tax Administration Act 28 of 2011.

¹²⁷ Section 61 (1) - (2) of the Tax Administration Act 28 of 2011.

seize “any relevant material as well as seize and hold a computer or storage device that relevant material is stored on” (for a period that is necessary to copy the material).¹²⁸

Furthermore, SARS may make extracts from or copies of and call for an explanation from a person with regards to relevant material. If the warrant lists a “vessel, aircraft or vehicle” then a SARS official is authorised to stop and board the aforementioned, as well as search and interrogate the said individual with respect to a matter dealt with in a tax Act.¹²⁹

In doing so, SARS is obliged to stipulate the form, manner and time in which the relevant material had been seized by creating an inventory and providing a copy to the person whose premises has been searched.¹³⁰ SARS is also granted the power to call upon the assistance of a police officer (if reasonably necessary) when executing a warrant, and any person obstructing or failing to assist as may be required in the executing of the warrant may face criminal charges.¹³¹

If for instance the SARS official is of the belief that relevant material may be at premises other than the premises stipulated in the warrant then the official may search and seize relevant material at the suspected premises as if it were the premises identified in the warrant, other than a “dwelling-house or domestic premises, without the occupant’s consent.”¹³²

This can only be done if the delay in attaining a warrant may defeat the purpose of the search and seizure and if it cannot be attained in time to avoid the destruction of records that may be necessary to ensure enforcement of the provisions stipulated in the relevant statutes.¹³³

In addition to the above, a SARS official may conduct a “search and seizure operation without a warrant” if the occupier consents, or if the official reasonably believes that there may be “an imminent removal or destruction of relevant material on the premises, and if the warrant was applied for it would have been issued, and the delay in applying for a warrant will defeat the purpose of the search and seizure.”¹³⁴

¹²⁸ Croome, B., & Olivier, L. 2015. *Tax Administration*. 2nd Ed. South Africa: Juta Pg 156.

¹²⁹ Section 61 (3) of the Tax Administration Act 28 of 2011.

¹³⁰ Section 61 (4) of the Tax Administration Act 28 of 2011.

¹³¹ Section 61 (6)-(7) of the Tax Administration Act 28 of 2011.

Croome, B., & Olivier, L. 2015. *Tax Administration*. 2nd Ed. South Africa: Juta. Pg 156.

¹³² Section 62 (1) and (2) of the Tax Administration Act 28 of 2011.

¹³³ Croome, B., & Olivier, L. 2015. *Tax Administration*. 2nd Ed. South Africa: Juta. Pg 164. Section 62 (1) (a)-(c) of the Tax Administration Act 28 of 2011.

¹³⁴ Section 63 of the Tax Administration Act 28 of 2011.

A person that has been subjected to a search is entitled to examine and make copies of the relevant documentation seized by SARS.¹³⁵ The TAA provides for persons to make copies of the relevant material at their own cost.¹³⁶

Once SARS is in possession of the documentation it deems relevant, the taxpayer is given the right to request that the documents be returned or hold SARS liable for any damages caused during the execution of the warrant.

If SARS refuses the request, the taxpayer can approach “the High Court for return of the documentation or compensation”.¹³⁷ If the warrant is set aside the court is empowered to either request that SARS return the material to the taxpayer or they can also allow SARS to “keep the original or retain a copy”.¹³⁸

In light of the above we see that SARS is empowered by the TAA with similar, and sometimes identical, powers given to SAPS in terms of the CPA. The only difference is that SAPS is subject to more extensive oversight because it is created by the Constitution,¹³⁹ which seems to provide a structure to ensure accountability, whilst SARS is an organ of state that is established in terms of Section 2 of The South African Revenue Service Act 34 of 1997 and has a less extensive oversight structure. This will be discussed in more detail below.¹⁴⁰

¹³⁵ Croome, B., & Olivier, L. 2015. *Tax Administration*. 2nd Ed. South Africa: Juta. Pg 165.

¹³⁶ Section 65 of the Tax Administration Act 28 of 2011.

¹³⁷ Section 66 of the Tax Administration Act 28 of 2011.

¹³⁸ Section 66 of the Tax Administration Act 28 of 2011.

¹³⁹ Chapter 11 sections 199 and 205 of the Constitution of the Republic of South Africa.

¹⁴⁰ Chapter 5 of this dissertation.

CHAPTER 3

CONFIDENTIALITY OF INFORMATION

3.1 INTRODUCTION

Confidentiality of information is a concept that is well known for being implemented by professionals in their various fields. This is to ensure that the individuals providing the information are certain that their information is secure, protected and kept private. It's a concept that is the key to a person entrusting a third party with valuable information.

This concept is imperative in discussing the impact of SARS' internal investigations on taxpayers' constitutional rights. When viewing the concept of confidentiality, in the context of the manner in which information is gathered by a SARS official as discussed in Chapter 2, one would think that these provisions would protect a taxpayer from having his information released to other organs of state which could implicate the taxpayer in an offence. As seen in Chapter 2, the information gathered can be handed to SAPS and the NDPP. This may be a violation of the taxpayer's constitutional rights.¹⁴¹ This chapter will discuss the provisions that govern the confidentiality of information within the TAA.

3.2 THE PROVISIONS IN THE TAA THAT GOVERN THE CONFIDENTIALITY OF INFORMATION

In terms of both the TAA¹⁴² and Income Tax Act¹⁴³ a taxpayer is obligated to provide full disclosure in their tax returns which includes disclosure of revenue obtained through illegal means.

In order for SARS to expect individuals to provide this incriminating information, it is only fitting to ensure that the information is kept secret and is not subject to reprisals from SARS or other authorities if the taxpayer's misdemeanours come to light.

¹⁴¹ Section 14 of the Constitution of the Republic of South Africa, 35(1)(a) of the Constitution of the Republic of South Africa, and 35(3)(j) of the Constitution of the Republic of South Africa.

¹⁴² The Tax Administration Act 28 of 2011.

¹⁴³ Act 58 of 1962.

If SARS is unable to guarantee that potentially incriminating information provided by taxpayers in their tax returns will be kept secret then the integrity of the tax system may be undermined.¹⁴⁴ It is in the best interest of the State for SARS to collect tax from citizens and if citizens are unwilling to co-operate by being honest in the filing of their tax returns, because they could be implicated in an offence for providing or omitting the information, this objective could be frustrated. Taxpayers might omit the information, including not declaring the associated income, in the hope of not being caught rather than providing the information up front. By guaranteeing that the potentially incriminating information would be kept confidential, it creates an environment of trust between the taxpayer and SARS, which would most likely lead to taxpayers being more transparent in the provision of information to SARS.

The confidentiality provisions that regulate the confidentiality of information provided by taxpayers, and the protection of SARS confidential information can be found in Chapter 6 of the TAA.¹⁴⁵

As will be seen in this chapter, the provisions set out to protect a taxpayer's confidential information contained in Chapter 6 of the TAA¹⁴⁶ are not absolute, which leaves taxpayers vulnerable to criminal prosecution.

The general prohibition of disclosure of information is contained in section 67, which stipulates that SARS confidential information which is "information relevant to the administration of a tax Act"¹⁴⁷ and taxpayer's information which is "any information provided by a taxpayer or obtained by SARS in respect of the taxpayer, including biometric information"¹⁴⁸ may not be disclosed under the TAA.¹⁴⁹ This provision is significant because it affords taxpayers the right to privacy¹⁵⁰ as envisioned by the Constitution by keeping their information confidential.

To safeguard this information the TAA requires "an oath or solemn declaration to be taken before a magistrate, justice of the peace or commissioner of oaths, by all SARS officials and the Tax Ombud" which requires them to undertake to comply with Chapter 6 of the TAA.¹⁵¹

¹⁴⁴ Hall v Welz and Others (4960/94) [1996] ZASCA 147.

¹⁴⁵ Chapter 6 of the Tax Administration Act 28 of 2011.

¹⁴⁶ Chapter 6 of the Tax Administration Act 28 of 2011.

¹⁴⁷ Section 68(1) of the Tax Administration Act 28 of 2011.

¹⁴⁸ Section 67 of the Tax Administration Act 28 of 2011.

¹⁴⁹ The Tax Administration Act 28 of 2011.

¹⁵⁰ Section 14 of the Constitution.

¹⁵¹ Section 67 (2) of the Tax Administration Act 28 of 2011.

This is not a blanket provision as senior SARS officials are allowed to make disclosure of the said information. An example of such a provision is section 70 which lists entities that a senior SARS official is allowed to make disclosures to and section 69 which allows disclosure to be made to the SAPS and the NDPP.¹⁵²

Provisions under section 67 try to maintain the confidentiality of the information in circumstances where disclosure was made in terms of or in contravention of Chapter 6 and states that a person in receipt of that information is to uphold the secrecy provisions or is prohibited from disclosing that information to any person other than a SARS official.¹⁵³

As if the provisions couldn't allow any more ways to make disclosure of taxpayer's confidential information, SARS is now granted a power that previously didn't exist which is the right to respond to press reports.¹⁵⁴

The disclosure of information by a taxpayer is found in various fiscal statutes.¹⁵⁵ This means that taxpayers are compelled to provide every detail of their lives to SARS to escape criminal prosecution. This is ironic as the disclosure of the same information could lead to criminal prosecution.

An example would be the TAA. This Act allows taxpayers who have “submitted inaccurate or incomplete information to SARS or failed to submit information or the adoption of a ‘tax position’, where such submission, non-submission, or adoption resulted in an understatement,”¹⁵⁶ to apply for a relief in terms of the “voluntary disclosure programme” which, if applied for successfully, will ensure that SARS will not pursue criminal prosecution.¹⁵⁷

¹⁵² Section 69 (2) (a)-(d) of the Tax Administration Act 28 of 2011

¹⁵³ Sections 67 (2) (a)-(b) and section 67 (3) and 67 (4) of the Tax Administration Act 28 of 2011.

¹⁵⁴ Section 67(5) of the Tax Administration Act 28 of 2011.

¹⁵⁵ The Tax Administration Act 28 of 2011, the Income Tax Act 58 of 1962, and the South African Revenue Service Act 34 of 1997.

¹⁵⁶ Chapter 16 section 222, 223, 225 of the Tax Administration Act 28 of 2011.

¹⁵⁷ Section 229 of the Income Tax Act 58 of 1962.

Sections 226-230 of the Tax Administration Act 28 of 2011.

<http://www.sars.gov.za/Legal/VDP/Pages/default.aspx> last accessed 14 March 2018

<http://www.sars.gov.za/Legal/VDP/Pages/Special-Voluntary-Disclosure.aspx> last accessed 14 March 2018.

Stiglingh, M. (Ed), De Swardt, RD., Wilcocks, JS., Van Zyl, L., Koekemoer, AD. 2016. *Silke: South Africa Income Tax*. LexisNexis pg 1171-1173.

However, if the taxpayer is unsuccessful in his application then the taxpayer will be guilty of a criminal offence and SARS can pursue a “criminal prosecution for a statutory offence under the Act or a related common law offence.”¹⁵⁸

It is imperative to note that the TAA refers to criminal sanctions when a taxpayer is in contravention of provisions in the various fiscal statutes. However, it fails to provide for criminal sanctions with regards to SARS officials if their actions were in contravention of provisions governing their authority.

The confidential information in SARS possession as stipulated in section 68(1)(a)-(k) is inter alia; “information supplied in confidence by a third party,¹⁵⁹ information relating to investigations and prosecutions,¹⁶⁰ information related to the operation of SARS.”¹⁶¹

The information listed under section 68 (1) (a)-(k) may not be disclosed “by a current or former SARS official to any individual that is not a SARS official or who is a SARS official but does not have authorisation to access the information.”¹⁶²

If the information is “public information,¹⁶³ or authorised by the Commissioner, or any other Act,¹⁶⁴ or access has been granted in terms of the Promotion of Access to Information Act¹⁶⁵ or if required by an order of a High Court then only can the information be disclosed by a SARS official or a former SARS official.”¹⁶⁶

It seems as if when interpreting the meaning of non-disclosure in terms of the TAA, one has to adopt a narrow interpretation rather than a broad one, due to the fact that disclosure can be made in certain circumstances.

With regards to taxpayers’ confidential information which is governed by section 69, which looks at the circumstances in which taxpayer’s information may be lawfully disclosed to a

¹⁵⁸ Section 231 (1) of the Income Tax Act 58 of 1962.

Stiglingh, M. (Ed.), De Swardt, RD., Wilcocks, JS., Van Zyl, L., Koekemoer, AD. 2016. *Silke: South Africa Income Tax*. LexisNexis

Oguttu AW ‘*Transfer Pricing and Tax Avoidance: Is the Arm’s-length Principle Still Relevant in the E-Commerce Era?*’ (2006) 18 SA Merc. LJ 138

https://journals.co.za/content/ju_samlj/18/2/EJC54194 last accessed 20 January 2018.

Sections 75, 76 and 104 of the Income Tax Act 58 of 1962

¹⁵⁹ section 68 (1) (c) of the Tax Administration Act 28 of 2011.

¹⁶⁰ section 68 (1) (d) of the Tax Administration Act 28 of 2011.

¹⁶¹ section 68 (1) (e) of the Tax Administration Act 28 of 2011.

¹⁶² Section 68 (2) (a) and (b) of the Tax Administration Act 28 of 2011.

¹⁶³ Section 68 (3) (a) of the Tax Administration Act 28 of 2011.

¹⁶⁴ Section 68 (3) (b) and (c) of the Tax Administration Act 28 of 2011.

¹⁶⁵ Section 68 (3) (d) of the Tax Administration Act 28 of 2011.

¹⁶⁶ Section 68 (3) (e) of the Tax Administration Act 28 of 2011.

person other than the taxpayer, the section stipulates that both current and former SARS officials must maintain the confidentiality of taxpayer's information and are prohibited from disclosing this information to individuals who are not SARS officials.¹⁶⁷

However, this section does not prevent a "current or former SARS official from disclosing taxpayer's information during the performance of their duties under a tax act."¹⁶⁸

This includes disclosing information to SAPS, or the NDPP under "any act that provides for disclosure of the information notwithstanding the provisions stipulated in Chapter 6, and if ordered by a High Court or if the information is public information."¹⁶⁹

The disclosure of this information is a breach of the taxpayer's constitutional right to privacy which is governed by section 14 of the Constitution which states that:

"Everyone has the right to privacy, which includes the right not to have—

(a) their person or home searched;

(b) their property searched;

(c) their possessions seized; or

*(d) the privacy of their communications infringed."*¹⁷⁰

This constitutional right is limited in terms of section 36¹⁷¹ and is not absolute. However this limitation means that the right may be infringed "if the infringement serves a purpose that is considered legitimate by all reasonable citizens in a constitutional democracy."¹⁷²

The release of confidential information by SARS to the SAPS or the NDPP that is used as a basis to investigate a taxpayer could be an infringement of the taxpayer's constitutional right to privacy which could lead to a further breach of the right against self-incrimination once a criminal prosecution is in progress.¹⁷³

SARS is governed by the duty to disclose information relating to criminal, public safety and environmental matters.¹⁷⁴ Under section 71 (1), a judge is empowered to issue an order that

¹⁶⁷ Section 69 (1) of the Tax Administration Act 28 of 2011.

Croome, B., & Olivier, L. 2015. *Tax Administration*. 2nd Ed. South Africa: Juta. Pg 205.

¹⁶⁸ Section 69 (2) (a) of the Tax Administration Act 28 of 2011.

¹⁶⁹ Section 69 (2) (a)-(d) of the Tax Administration Act 28 of 2011.

¹⁷⁰ Section 14 of Chapter 2 of the Constitution of the Republic of South Africa.

¹⁷¹ Constitution of the Republic of South Africa.

¹⁷² Meyerson D. (1997). *Rights limited: Freedom of Expression, Religion and the South African*. pg 36-43

¹⁷³ Section 14 and 35 of the Constitution of the Republic of South Africa.

¹⁷⁴ Section 71 of the Tax Administration Act 28 of 2011.

places a duty on SARS to disclose information to the National Commissioner of SAPS or the NDPP.¹⁷⁵

This disclosure could expose evidence that shows “an offence other than a tax offence had been committed and in respect of which a court may impose a sentence of imprisonment exceeding five (5) years.”¹⁷⁶

Further to the above, the TAA grants a senior SARS official the power to bring an “*ex parte* application before a judge in chambers for an order authorising a SARS official to disclose information”¹⁷⁷ that they are of the opinion is likely to be imperative for the prosecution of an offence or the avoidance of the risk to the environment or public safety or to the National Commissioner of the SAPS or the NDPP or the National Prosecuting Authority.¹⁷⁸

The National Commissioner of SAPS or the NDPP (or a person acting under their respective authority) may also make an *ex parte* application before a judge in chambers for an order compelling SARS to disclose information that they are of the opinion, that SARS has in its possession which will assist in its investigation relating to an offence or a public safety or environment risk.¹⁷⁹

Therefore, permitting SARS in certain circumstances, whether it be in the performance of their duties, or under the provisions of any other acts, or in terms of a high court order. To use the information provided to them by a taxpayer and the information collected during the SARS criminal investigation. To inform the SAPS or the NPA on whether they should proceed to conduct a criminal investigation, or to institute prosecution proceedings against the taxpayer.

The heart of the issue is that the confidentiality of information provisions do not protect taxpayers’ secrecy when the information in the custody of SARS is regarded as pertinent to an investigation or to the prosecution of a serious criminal offence, which inevitably creates an infringement of the taxpayer’s right to privacy and against self-incrimination since the information was supplied to SARS by himself.¹⁸⁰

¹⁷⁵ Section 71(2) of the Tax Administration Act 28 of 2011.

¹⁷⁶ Section 71(2)(a) - (c) of the Tax Administration Act 28 of 2011.

¹⁷⁷ Section 71(3) of the Tax Administration Act 28 of 2011.

¹⁷⁸ Section 71(3) of the Tax Administration Act 28 of 2011.

¹⁷⁹ Section 71(4) of the Tax Administration Act 28 of 2011.

¹⁸⁰ Section 35 of the Constitution of South Africa.

In such an event, SARS may disclose such information to the NDPP or the National Commissioner of SAPS and this disclosure could be regarded as being contrary to the provisions of the Bill of Rights.¹⁸¹

Section 72 of the TAA gives the illusion that it is considering a taxpayer's right against self-incrimination.¹⁸² This illusion is created by the fact that it stipulates that "once it is verified that a serious tax offence had been committed, the matter is referred for criminal investigation," and SARS must conduct its criminal investigations with due regard to the taxpayer's constitutional rights.¹⁸³

This means that when SARS suspects that there might be a serious tax offence committed, it continues investigating by collecting information from the taxpayer as if it is conducting its normal Chapter 5 audit. However, once the information has been gathered without informing the taxpayer, SARS then uses the information to verify its suspicions. Once it verifies that a serious tax offence has been committed, SARS then conducts the criminal investigation with regards to the taxpayer's constitutional rights. This is done by informing the taxpayer of his rights and that a criminal investigation will now be conducted. It is important to note that at this stage a taxpayer cannot invoke his constitutional rights because he is not yet regarded as an accused, detained or arrested person.¹⁸⁴ However, at the conclusion of the investigation his full rights can be invoked if SARS has him formally charged. As stated in chapter 2, it is only once the taxpayer has been charged and is regarded as an accused that, his full constitutional rights become fully enforceable. Had the taxpayer be able to invoke these rights from the outset, SARS would not have been able to compel the taxpayer to provide the incriminating information which is then handed to SAPS or the NDPP to assess whether its offices should investigate/prosecute the taxpayer.

The effectiveness of the confidentiality provision is controversial because one would expect a blanket confidentiality provision in light of the information that SARS anticipates to receive from a taxpayer. However, under certain circumstances a senior SARS official can make disclosures to departments that can use a taxpayer's information to his detriment. The system that seems to apply here is "provide now and dispute later".

¹⁸¹ Particularly section 14 of the Constitution of South Africa.

¹⁸² Section 35(3)(j) of The Constitution of the Republic of South Africa.

¹⁸³ Section 72 of the Tax Administration Act 28 of 2011.

¹⁸⁴ Section 35 of the Constitution of the Republic of South Africa.

The high expectation placed on a taxpayer by SARS to provide information willingly without protest and the assurance that their information will not be disclosed to their detriment is one that is not realistic. The expression that suits this best is that SARS cannot have their “bread buttered on both sides” by having an expectation of full disclosure without needing to guarantee full non-disclosure of confidential information.

The extent to which SARS is obliged to assist other departments is reflected on its website, where it states:

“SARS is empowered through its legislation to conduct criminal investigation into tax offences. Once the criminal investigation of the alleged tax offence is finalised, the matter is referred to the South African Police Service to give effect to entering the Criminal Justice System. The evidence collected is presented to the National Prosecuting Authority to make a determination on whether the entity should be charged with a crime and prosecuted.....SARS supports other government agencies in the investigation of money laundering and corruption activities. We are active participants in the Multi-Agency Working Group (MAWG) and the Anti-Corruption Task Team that are charged with combating corruption in government. Working through these forums has enabled SARS to confront complex international schemes that we could not have achieved on our own. There are also laws such as the Financial Intelligence Centre Act (FICA), the Prevention of Organised Crime Act (POCA) and Prevention, Combating of Corrupt Activities Act (PRECCA), Drugs and Drug Trafficking Act, which oblige us to support the Police and the Financial Intelligence Centre and other agencies in criminal investigations.”¹⁸⁵

The potential breach that these empowering provisions could cause on a taxpayer’s right to privacy¹⁸⁶ and self-incrimination¹⁸⁷ far outweighs the purpose for which the breach is caused. Surely the State’s need for maximum revenue collections from taxpayers would not be justified by creating an infringement of a taxpayer’s constitutional rights which an “organ of state” (SARS) has an obligation to adhere to in terms of section 195 of the Constitution?

¹⁸⁵ <http://www.sars.gov.za/TargTaxCrime/WhatTaxCrime/Pages/SARS-and-the-Criminal-Justice-System.aspx>
last accessed 20 March 2018.

¹⁸⁶ Section 14 of the Constitution of the Republic of South Africa.

¹⁸⁷ Section 35 of the Constitution of the Republic of South Africa.

CHAPTER 4

AN INTERNATIONAL COMPARISON ON THE APPLICATION OF

SA AND USA CONSTITUTIONAL RIGHTS

AND TAX LAWS

4.1 INTRODUCTION

The issue of conflict between tax laws and citizens' rights that South Africa faces is not rare. The various countries that have been examined as part of the research for this dissertation, being Canada, India, Australia, New Zealand, and the United Kingdom have all adopted an approach similar to that of South Africa, namely whereby a taxpayer is required to disclose now, and dispute later.

The only country that stood out on this aspect with a different approach was the United States of America (USA). The position followed by the USA to overcome the challenges faced when dealing with the balancing of tax laws and their citizens' rights should be taken into consideration.

This jurisdiction was chosen because it uniquely allows its taxpayers to invoke their Fifth Amendment privilege at the time of filing their tax return. The USA also has similar constitutional rights such as the Fifth Amendment privilege to those in South Africa which are awarded to its citizens and is the equivalent to the right to "remain silent" and the right "not to be compelled to give self-incriminating evidence."¹⁸⁸ The position in this jurisdiction would be beneficial to taxpayers if it were to be implemented in South Africa.

4.2 THE REPUBLIC OF SOUTH AFRICA (RSA)

South Africa had been dealing with the bitter struggles of colonialism, segregation and apartheid for over three hundred years, until the revolution of two post-apartheid Constitutions, the Interim Constitution which was enacted on the 27th of April 1994 and the Final Constitution

¹⁸⁸ Section 35 (1)(a) and (b) and (3) (h) and (j) of Chapter 2 of the Constitution of the Republic South Africa.

which came into effect on the 4th of February 1997.¹⁸⁹ These Constitutions have paved the way for South Africa's now established constitutional democracy.

The principles that are enshrined in the Constitution set out the framework for South Africa that protects the fundamental rights and freedoms of all citizens.¹⁹⁰

To ensure that the Constitution is adhered to, one of the foundational principles is the principle of “constitutional supremacy” which stipulates that the Constitution “is the supreme law of the Republic and that any law or conduct inconsistent with it, is invalid.”¹⁹¹

This principle was emphasised in *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* where the court stated that any law or conduct that is inconsistent with the Constitution, whether it be procedurally or substantively, will not have the full force of the law.¹⁹²

The cornerstone of South African human rights is enshrined in The Bill of Rights that protects the “civil, political and socio-economic rights” of people, and which affirms the democratic values of “equality, freedom and human dignity.”¹⁹³ The Constitution also stipulates that the interpretation of Acts and the State (including SARS) is required to “respect, protect, promote and fulfil” the rights in the Bill of Rights of the Constitution.¹⁹⁴

Similarly to the principle of constitutional supremacy, section 8 of the Bill of Rights provides for the supremacy of the Bill of Rights by stipulating that it applies to all law and binds all branches and organs of the state and private individuals (to the extent to which the provision is applicable).¹⁹⁵

When SARS as an organ of state uses its authority under the TAA there is a potential breach of a taxpayer's constitutional rights. The initial breach is the right to privacy in section 14,¹⁹⁶ which comes about when a taxpayer is obliged to disclose all information in their tax return.

¹⁸⁹ Currie, I., & De Waal, J. (2013). *The Bill of Rights Handbook*. 6th. South Africa: Juta. Pg 1,2,7.

The Constitution of the Republic of South Africa Act No. 108 of 1996.

¹⁹⁰ Sections 1(a) and 7 of The Constitution of the Republic of South Africa Act No. 108 of 1996.

¹⁹¹ Section 1(c) read with section 2 of The Constitution of the Republic of South Africa Act No. 108 of 1996.

¹⁹² 1995 (4) SA 877 (CC).

¹⁹³ Section 7 and Chapter 2 of the Constitution of the Republic South Africa Act No. 108 of 1996.

¹⁹⁴ Sections 7(2) and 39(2) of the Constitution of the Republic of South Africa Act No. 108 of 1996

Stiglingh, M. (Ed)., De Swardt, RD., Wilcocks, JS., Van Zyl, L., Koekemoer, AD. 2016. *Silke: South Africa Income Tax*. LexisNexis pg 9.

¹⁹⁵ Section 8 of chapter 2 of the Constitution of the Republic of South Africa Act No. 108 of 1996.

¹⁹⁶ The Constitution of the Republic of South Africa.

This initial breach then causes a ripple effect which leads to a further breach of the taxpayer's constitutional "right against self-incrimination" and the "right to remain silent" by compelling the individual to produce the information required by SARS irrespective of whether or not it is incriminating.

This can under certain circumstances be handed over to other departments who use the information to the taxpayer's detriment. We need to keep in mind that the incriminating information is obtained from the taxpayer because the taxpayer is unable to invoke his constitutional rights at this stage (this will be further discussed below).¹⁹⁷ The taxpayer is then faced with the imminent threat of criminal prosecution if full disclosure is not made.¹⁹⁸

This chapter will briefly discuss the three focal constitutional rights of this dissertation being "the right not to be compelled to give self-incriminating evidence" (the right against self-incrimination) and "the right to remain silent" and "the right to privacy" in the Bill of Rights.¹⁹⁹

The right against self-incrimination, developed from the Latin maxim "*nemo tenetur seipsum accusare*," which means "no man should be compelled to betray (or accuse) himself" is commonly known as the common law privilege against self-incrimination and is intertwined with the right to remain silent.²⁰⁰

These rights are based on the belief that in the event an individual is accused of some misconduct, then he should not be compelled to give evidence to assist in convicting himself of that misconduct. This is founded in judicial policy at common law, and is enshrined in the Constitution and the Criminal Procedure Act.²⁰¹

These rights are covered under the rights bestowed on three specific categories of persons; being "arrested, detained and accused persons."²⁰² The right to remain silent and the right

¹⁹⁷ From pages 4 onwards of this Chapter.

¹⁹⁸ Chapter 17 of the Tax Administration Act 28 of 2011.

¹⁹⁹ Sections 14, 35 (1)(a) and (b) and (3) (h) and (j) of Chapter 2 of the Constitution of the Republic South Africa Act No. 108 of 1996.

²⁰⁰ Tokarev, S., 2012. *Self-Incrimination (V): Historical Background* available at <http://usciviliberties.org/historical-overview/4467-self-incrimination-v-historical-background.html> last accessed 31 November 2017.

Currie, I., & De Waal, J. (2013). *The Bill of Rights Handbook*. 6th Ed. South Africa: Juta. Pg 759.

Theophilopoulos, C. 'The European Convention on Human Rights and the right to silence: The lesson for South Africa' (2003) 36 De Jure pg 372 373.

²⁰¹ Sections 14, 35 (1)(a) and (b) and (3) (h) and (j) of Chapter 2 of the Constitution of the Republic South Africa Act No. 108 of 1996.

Section 217 of the Criminal Procedure Act 51 of 1977.

S v Ngwenya (CC73/15) [2015] ZAGPPHC 654 (30 July 2015).

²⁰² Section 35 of Chapter 2 of the Constitution of the Republic South Africa Act No. 108 of 1996.

against self-incrimination are dealt with under the category of accused persons, specifically section 35 (1) (a) and section 35 (3) (h) and (j) which respectively stipulates that “everyone who is arrested for allegedly committing an offence has the right to remain silent” and that “every accused person has the right to a fair trial, which inter alia; includes the right to remain silent and not to be compelled to give self-incriminating evidence”.²⁰³

The definition of an accused is not found in statutes but can be defined as “A person or group of people who are charged with or on trial for a crime.”²⁰⁴

The right not to be compelled to give self-incriminating evidence and to remain silent is only applicable in the context of criminal investigations and the proceedings associated therewith. These rights permit a suspect to remain silent at the criminal investigation stage and decline to testify in proceedings against them.

These rights have been regarded as fundamental procedural rights by the Supreme Court of Appeal.²⁰⁵ This is illustrated in *S v Botha & Others*, where the accused had not been informed of his right to silence. The court held that the admissions made by the accused could not be used against him at the trial.²⁰⁶

Thus, it seems to be a logical deduction that the rights given in section 35(3) will accrue when the individual is either formally or informally notified of the State’s intent to prosecute the individual and that the proceedings are focused on determining the criminal culpability of the accused.²⁰⁷

This means that during the exercising of SARS’ powers in its process of gathering information, the right to remain silent and against incriminating oneself cannot be invoked at the time of

²⁰³ Section 35 of Chapter 2 of the Constitution of the Republic South Africa Act No. 108 of 1996.

²⁰⁴ <https://www.dictionary.com/browse/accused?s=t> last visited on the 15th of November 2018.

²⁰⁵ Theophilopoulos, C. *The So-Called Right to Silence and the Privilege against Self-Incrimination: A Constitutional Principle in Search of Cogent Reasons*, 18 S. Afr. J. on Hum. Rts. 505, 529 (2002)

S v Daniels 1983 (3) SA 275 (A).

S v Zuma 1995 (2) SA 642 (CC)

²⁰⁶ *S v Botha & Others* 1995 (2) SACR 605 (W).

also see *S v Cloete & Another* 1999 (2) SACR 137 (C).

also see *S v Sejaphale* 2000 (1) SACR 603 (T).

²⁰⁷ Currie, I., & De Waal, J. (2013). *The Bill of Rights Handbook*. 6th. South Africa: Juta. Pg 752.

The Constitution of the Republic of South Africa Act No. 108 of 1996.

disclosure.²⁰⁸ This is due to the fact that the taxpayer is not yet regarded as an “arrested, detained and accused” persons.²⁰⁹

Despite not being able to invoke this right, in terms of the TAA,²¹⁰ the information collected from the taxpayer can be handed over to the SAPS or the NDPP.²¹¹

This information then enables these organs of state to create a foundation for criminal prosecution against the taxpayer. Even though the documents cannot be admitted into evidence,²¹² the information so disclosed is still a fundamental instrument in building a criminal case against the taxpayer.

It is imperative to remember that under the various fiscal statutes, where a taxpayer does not make full disclosure in his tax return, the taxpayer may be guilty of an offence such as tax evasion which is defined as “an illegal non-disclosure of income, the rendering of false returns, and the claiming of unwarranted deductions.” This conduct may attract a fine/penalty or imprisonment.²¹³

This leaves taxpayers with no option but to comply with requests by SARS irrespective of whether or not the information handed over is incriminating because, if the taxpayer refuses to provide the information to SARS as per its request then the taxpayer is exposed to the imminent risk of being criminally prosecuted for a tax crime anyway.

Taxpayers are left with a choice between two evils, where on one hand the non-disclosure of the information will undoubtedly lead to criminal prosecution and on the other hand, full disclosure might potentially lead to criminal prosecution.

This leaves taxpayers feeling helpless despite the fact that South Africa is a constitutional democracy. It was once said in *Cape Brand Syndicate v IRC*²¹⁴ “sway in South African

²⁰⁸ Sections 40-66 of the Tax Administration Act 28 of 2011.

Section 35 of Chapter 2 of the Constitution of the Republic South Africa Act No. 108 of 1996.

²⁰⁹ Section 35 of Chapter 2 of the Constitution of the Republic South Africa Act No. 108 of 1996.

²¹⁰ The Tax Administration Act 28 of 2011.

²¹¹ Section 69 (2) (a)-(d) of the Tax Administration Act 28 of 2011.

²¹² Chapter 5 Part C sections 56.57(1) and 57(2) (a), (b), (c) of the Tax Administration Act 28 of 2011. Chapter 2 of this dissertation.

²¹³ Oguttu, AW. ‘*Transfer Pricing and Tax Avoidance: Is the Arm’s-length Principle Still Relevant in the E-Commerce Era?*’ (2006) 18 SA Merc. LJ 138

https://journals.co.za/content/ju_samlj/18/2/EJC54194 last accessed 1 December 2017.

sections 75, 76 and 104 of the Income Tax Act 58 of 1962

²¹⁴ *Cape Brand Syndicate v IRC* 1921 1 KB 64 at 71

courtrooms [is] to the exclusion, it would seem, of taxpayer's constitutional liberties."²¹⁵ This means that the courts seem to make decisions to the exclusion of the taxpayer's constitutional liberties, which reflects the extent to which taxpayer's rights are not fully taken into account when up against SARS and South Africa's need to collect revenue.

The rights in the Bill of Rights are limited in terms of section 36 and are therefore not absolute. However, this limitation means that the right may be infringed if it is for a compelling reason.²¹⁶ "A compelling reason is that the infringement serves a purpose that is considered legitimate by all reasonable citizens in a constitutional democracy."²¹⁷

If it is established that tax laws infringe on taxpayer's rights that are protected by the Bill of Rights, it may be argued that the infringement does not constitute a legitimate limitation of those rights because the fiscal administrative obligation to collect tax cannot be regarded as a justifiable limitation in terms of section 36 on a taxpayer's right to privacy, to remain silent and the right not to be compelled to give incriminating evidence.²¹⁸

SARS has far-reaching powers in terms of the TAA²¹⁹ to minimise tax evasion. These excessive powers may be in conflict with a taxpayer's Constitutional rights, as the need to collect revenue for the State cannot prevail over the rights bestowed upon citizens in the Constitution.

Based on this scenario, South African tax laws are in dire need of development by adopting less restrictive means for SARS to collect tax that would not result in it imposing on taxpayer's Constitutional rights.

Since World War II, human rights have been a major focus of international law and a citizen's right to a fair trial which is inclusive of right to remain silent and against self-incrimination has become an imperative basic human right since its incorporation into Universal Declaration of Human Rights.²²⁰

These human rights were subsequently included either directly or indirectly into many international human rights treaties such as the European Convention on Human Rights and

²¹⁵Ger, B. 'Taxpayers Have Rights Too' (2003) De Rebus available at http://journals.co.za/content/derebus/2003/427/AJA02500329_7840 last accessed 7 December 2017.

²¹⁶ Section 36 of the Constitution of the Republic of South Africa Act No. 108 of 1996.

²¹⁷ Meyerson, D. (1997). *Rights limited: Freedom of Expression, Religion and the South African*. pg 36-43.

²¹⁸ Sections 14 and 35 of the Constitution of the Republic of South Africa 1996.

Schalkwyk, L van. (2001). 'Constitutionality and the Income Tax Act'. pgs 285 at 297.

²¹⁹ The Tax Administration Act 28 of 2011.

²²⁰ Article 10 of the Universal Declaration of Human Rights available at http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf last accessed 7 December 2017.

Fundamental Freedoms,²²¹ the American Convention on Human Rights,²²² the International Covenant on Civil and Political Rights,²²³ and the African Charter on Human and Peoples' Rights to name a few.²²⁴ South Africa is a party to the latter two.

In addition, the Constitution provides for the Republic of South Africa to develop its domestic legal framework by using international and foreign law as an influence.²²⁵ Section 39 (1) states that:

“When interpreting the Bill of Rights, a court, tribunal or forum—

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

*(b) **must** consider international law; and*

(c) may consider foreign law.”

This Constitutional guideline was emphasised in *Government of the Republic of South Africa and Others v Grootboom*²²⁶ where the court stated that *“section 39 of the Constitution obliges a court to consider international law as a tool to interpretation of the Bill of Rights.”*

The Constitutional Court also considered international law In *S v Makwanyane and Another*²²⁷ where the court stated that *“The relevant international law can be a guide to interpretation... where the relevant principle of international law binds South Africa, it may be directly applicable.”*

In light of the above, it is imperative that South Africa considers an international perspective in order to develop the tax laws to be in accordance with the Constitution. This dissertation

²²¹ Article 6 of the European Convention on Human Rights and Fundamental Freedoms available at http://www.echr.coe.int/Documents/Convention_ENG.pdf last accessed 7 December 2017.

²²² Article 8 of the American Convention on Human Rights available at <http://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm> last accessed 7 December 2017.

²²³ Article 14 International Covenant on Civil and Political Right (CCPR) available at <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf> last accessed 7 December 2017.

²²⁴ Articles 7 & 26 of the African Charter on Human and Peoples' Rights <http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf> last accessed 7 December 2017.

²²⁵ Section 39 (1) of the Constitution of the Republic of South Africa Act No. 108 of 1996.

²²⁶ *Government of the Republic of South Africa and Others v Grootboom* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).

²²⁷ *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC).

seeks to ascertain this perspective from the United States of America, in which South Africa can use as a guideline in developing its tax laws.

4.3 UNITED STATES OF AMERICA (USA)

The USA is a constitutional democratic state. This means that similarly to South Africa, the Constitution of the United States of America is the supreme law of the land and all federal or state laws inconsistent with it are regarded as invalid.²²⁸

The USA Constitution draws its supremacy from Article VI.²²⁹ This was emphasised in the landmark case of *Marbury vs Madison*²³⁰ where the Supreme Court held that a court may declare an act of Congress void if it is inconsistent with the Constitution.

The USA tax laws are governed by the Internal Revenue Code, which provides for the complete disclosure of all information regarding a taxpayer's income irrespective of the source and manner in which the income had been derived.²³¹

The first ten amendments made to the USA Constitution have come to be known as "The Bill of Rights,"²³² one of which is the Fifth Amendment privilege that states that "No person shall be compelled in any criminal case to be a witness against himself."²³³ This confers the right for an accused not to be compelled to disclose any information that may incriminate or be used against him in criminal proceedings.

In *Murphy v Waterfront Commission of New York Harbour*, this privilege was held to be, "one of the great landmarks in man's struggle to make himself civilized."²³⁴ and was enforced in the case of *Miranda v Arizona*²³⁵ where the Supreme Court stated that "to ensure the protection of the right against self-incrimination, the individual, when in custody or before interrogation,

²²⁸ Article VI of The Constitution of the United States of America.

²²⁹ The Constitution of the United States of America.

²³⁰ *Marbury v. Madison*, 5 U.S. 137 (1803) available at http://www.ache.org/pubs/hap_companion/Wing/MarburyMadison.pdf last accessed 9 December 2017.

²³¹ The Internal Revenue Code of 1998 available at http://www.law.cornell.edu/uscode/html/uscode26/usc_sup_01_26.html last accessed 9 December 2017.

²³² Garrett, E. (2003). *The Bill of Rights*, 82 Or. L. Rev. 517, 528.

²³³ Fifth Amendment to the Constitution of the United States of America.

²³⁴ *Murphy v Waterfront Commission of New York Harbour* 378 U.S. 55 (1964) at 59.

²³⁵ *Miranda v Arizona* 384 U.S. 436.

must be given certain constitutional warnings.”²³⁶ These warnings are now commonly known as the “*Miranda warnings*”.²³⁷

In *U.S. v Wade* the Supreme Court stated that the "right to silence has become an ultimate article of faith in respect of which compromise is impossible because the right embodies principles which go to the nature of a free man and his relation to the state."²³⁸

The requirement of disclosing all information when filing tax returns may lead to a prosecution in which the individual may be criminally convicted. This is despite the constitutional Fifth Amendment privilege that guards against self-incrimination which is designed to protect the individual from being compelled by the State to divulge information that would assist in his own prosecution.²³⁹

To avoid conflict between the tax laws and the Constitution, the Internal Revenue Service (IRS) allows a taxpayer to claim the privilege against specific disclosures sought when filing a return.²⁴⁰

The reason that the IRS is of this view is because “the courts have held that taxpayers may elect to invoke their Fifth Amendment privilege to specific entries on their tax returns, if the disclosure would potentially expose them to the possibility of criminal prosecution.”²⁴¹

In *United States v Sullivan*²⁴² The Supreme Court held that a taxpayer may invoke his Fifth Amendment privilege by electing not to answer any questions put to him with regards to his return if the disclosures would be self-incriminating.

This was applied successfully in the case of *United States v LaMotte*²⁴³ where Timothy LaMotte had been summoned by the IRS to be questioned in relation to an investigation into LaMotte’s tax liability as the treasurer of a corporation and director of two insurance

²³⁶ Anita L. Henri, (1985). *Fifth Amendment*, 28 Howard L.J. 57, 100.

²³⁷ Anita L. Henri. (1985). *Fifth Amendment*, 28 Howard L.J. 57, 100.

²³⁸ *U.S. v Wade* 388 U.S. 261 (1967).

²³⁹ Wash. L. Lee. Rev. 182 (1973). *Self-Incrimination and the Use of Income Tax Returns in Non- Tax Criminal Prosecutions* available at <http://scholarlycommons.law.wlu.edu/wlulr/vol30/iss1/10>. Last accessed 10 December 2017.

²⁴⁰ Fifth Amendment to the Constitution of the United States of America.

<https://www.quora.com/Do-income-taxes-violate-the-Fifth-Amendment> last accessed on the 16th of November 2018.

²⁴¹ *United States v Josephberg* 459 F.3d 350 (2d Cir. 2009); *United States v Sullivan* 274 U.S. 259 (1927) at 264; *Garner v United States* 424 U.S. 648 (1976) at 666; *SA Berson Federal Tax Litigation* (2003) at 13-42.

²⁴² *United States v Sullivan* 274 U.S 259(1927).

²⁴³ *United States v LaMotte* 117 A.F.T.R.2d 2016-1725

subsidiaries. The court used a two-step approach before coming to its conclusion. The first step was an enquiry into the nature of the information sought by the IRS. The court noted that all the information sought was to illustrate the corporates participation in transactions, which were *prima facie* incriminating. The second step was to determine whether there was a possibility of criminal prosecution which may be triggered by the information being obtained by the IRS, which would trigger the need for constitutional protection. In light of the information before the court, it held that LaMotte was permitted to invoke his “Fifth Amendment privilege against self-incrimination in response to questions posed by an IRS agent.”²⁴⁴

In this case the court came to the rescue of the taxpayer, which was imperative in ensuring that he was able to invoke his Fifth Amendment privilege before providing incriminating evidence that could have led to criminal prosecution. Had it not done so, the taxpayer would have been obliged to hand over information to the IRS that would have been used to his detriment.

Similarly, in *Marchetti v United States*²⁴⁵ the Supreme Court of Appeal allowed a taxpayer to refuse to submit or account for taxable income under circumstances where the “self-incriminating tax information needed to be handed by the tax authorities to prosecuting authorities for the purpose of instituting criminal prosecution proceedings against the taxpayer.” The United States requires proof that the evidence introduced by the prosecution in a criminal trial was not obtained through the compelled disclosure.²⁴⁶

However, a taxpayer’s Fifth Amendment privilege is not a blanket right. This is illustrated in *Garner v United States*²⁴⁷ and emphasised in *United States v Barnes*²⁴⁸ where the taxpayer divulged incriminating information in his tax returns which was then admitted into evidence at his trial. The court held that “this was not a violation of his Fifth Amendment privilege as he willingly provided the information instead of invoking his Fifth Amendment privilege at the time of the filing of his return.”²⁴⁹

²⁴⁴ Martin J. Jr. McMahon; Bruce A. McGovern. (2017). *Recent Developments in Federal Income Taxation*. 2016, 20 Fla. Tax Rev. 131, 276.

²⁴⁵ *Marchetti v United States* 390 U.S. 39 (1968).

²⁴⁶ Hanzel. JF. ‘Self-incrimination and the Use of Income Tax Returns in non-tax Criminal Prosecutions’ (1973) 30 Wash. & Lee L. Rev. 182 at 191.

²⁴⁷ *Garner v United States* 424 U.S 648 (1976).

²⁴⁸ *United States v Barnes* 604 F.2d 121 (2d Cir. 1979).

²⁴⁹ *Garner v United States* 424 U.S 648 (1976)
United States v Barnes 604 F.2d 121 (2d Cir. 1979).

Thus, the disclosure of information by a taxpayer will not be regarded as “compelled” in terms of the definition of the Fifth Amendment privilege, if a taxpayer has not been forced to make the disclosure, and he does so without claiming his right to privilege.²⁵⁰

With regard to the above, we see that the United States has established a rule whereby it balances the State’s need to tax its taxpayers with the taxpayer’s Fifth Amendment privilege.

This rule was established in *Garner v United States*²⁵¹ which was then confirmed in *United States v Barnes*²⁵² where the court stipulated that “a taxpayer may not invoke his Fifth Amendment privilege to avoid filing a tax return, but however the taxpayer can invoke his Fifth Amendment privilege to refrain from providing specific information that may be self-incriminating when answering the questions stipulated in the tax return.”

This approach strikes a balance between the taxpayer’s obligation to disclose information, and his right to remain silent, to privacy and the right against self-incrimination. It allows taxpayers to comply with their obligations in disclosing information to the tax authority, because it gives taxpayers the option to be truthful while filing their tax returns because they can refuse to disclose incriminating information that could be used to their detriment.

The information gathering powers bestowed upon the Commissioner²⁵³ in South Africa is inconsistent with a taxpayer’s right against self-incrimination. This is because if the right was enforceable at SARS’ information gathering stage then a taxpayer would be entitled to plead the right to refrain from answering a question when interviewed, then in turn this would limit the Commissioner’s powers to demand information from taxpayers.

The Fifth Amendment privilege in USA is the equivalent to South Africa’s rights “to remain silent” and the right “not to be compelled to give self-incriminating evidence.”²⁵⁴ Both jurisdictions afford this right to accused persons. However, the USA has extended this privilege in order for its citizens to invoke it at the time of filing their return, unlike South Africa which

²⁵⁰ *Garner v United States* 424 U.S 648 (1976).

United States v Barnes 604 F.2d 121 (2d Cir. 1979).

²⁵¹ *Garner v United States* 424 U.S 648 (1976).

²⁵² *United States v Barnes* 604 F.2d 121 (2d Cir. 1979).

²⁵³ Section 50 of the Tax Administration Act 28 of 2011.

²⁵⁴ Fifth Amendment to the Constitution of the United States of America.

Section 35 (1)(a) and (b) and (3) (h) and (j) of Chapter 2 of the Constitution of the Republic South Africa Act No. 108 of 1996.

leaves its taxpayers exposed and unprotected by their Constitutional rights at the stage of filing their return which has no justification of a limitation of these rights in terms of section 36.²⁵⁵

South Africa should take into consideration the approach adopted by the USA, as it affords its taxpayers the ability to invoke their constitutional rights without limitations. This approach strikes a balance between the taxpayer's constitutional rights with that of the need of the fiscus to effectively collect tax. This is a balance that needs to be established in South Africa. By adopting this approach, it would seem that South Africa will be able to resolve the conflict that now exists between tax laws and taxpayers' constitutional rights.

²⁵⁵ the Constitution of the Republic South Africa Act No. 108 of 1996

CHAPTER 5
BREIF OVERVIEW OF SARS POWERS IN COMPARISON TO OTHER
GOVERNMENT ORGANISATION WITHIN SOUTH AFRICA,
PARTICULARLY THE CRIMINAL PROCEDURE ACT

5.1 **INTRODUCTION**

In light of the chapters discussed above, we have concluded that SARS officials in terms of the TAA have been given extensive powers in order to effectively collect tax and that those powers infringe on the constitutional rights of taxpayers by compelling them to provide incriminating evidence that could be used to their detriment by handing over the information gathered, to other government departments.²⁵⁶ We have also concluded that in terms of the Constitution the right to privacy, to remain silent and the right not to be compelled to give incriminating evidence is only enforceable as an accused, detained or arrested person.²⁵⁷ These rights can be limited.²⁵⁸ However in these circumstances a limitation on the taxpayer's constitutional rights cannot be justified. In order for South Africa to resolve this conflict that arises between its tax laws and taxpayer's Constitutional rights we should follow the model of the USA, which permits taxpayers to invoke their Fifth Amendment right at the stage of filing their return.

This chapter will consider the powers conferred on SARS in terms of the TAA with regards to its search and seizure provisions in comparison to other South African agencies, to evaluate how excessive its powers truly are.

²⁵⁶ Chapter 5 of the Tax Administration Act 28 of 2011.

²⁵⁷ Section 14 and 35 of the Constitution of South Africa 1996.

²⁵⁸ Section 36 of the Constitution of South Africa 1996.

5.2 POWERS CONFERRED ON POLICE OFFICIALS IN TERMS OF THE CRIMINAL PROCEDURE ACT, SPECIFICALLY WITH REGARDS TO SEARCH AND SEIZURE.

SAPS is the national police force of the Republic of South Africa. SAPS is governed by Chapter 11 (Security Services) of the Constitution²⁵⁹ and the South African Police Service Act²⁶⁰ which sets out the South African Police Service's responsibilities.²⁶¹

The procedures that needs to be followed when executing those responsibilities are embodied in the CPA which regulates the powers and duties of State officials, the State's duty to enforce criminal law and fair criminal procedure.

In this chapter we will be looking specifically at search and seizure in light of the provisions in the CPA, in order to create a comparison between the powers of SAPS and SARS which will illustrate the extent of SARS' authority to collect revenue for the State.²⁶² The legal concepts of the words search and seizure are known to be in relation to a person or property and are not clearly defined.

The question of what constitutes a search is left in the hands of the courts and is determined on a case by case basis.²⁶³ An element of physical intrusion is necessary to establish a search and when it is in relation to a person, it should be given its ordinary meaning within its context.²⁶⁴ The word search in relation to a person is defined as "to examine (a person) by handling, removal of garments and the like, to ascertain whether any article (usually something stolen or contraband) is concealed in his clothing."²⁶⁵

²⁵⁹ Constitution of the Republic of South Africa 1996.

²⁶⁰ Act 68 of 1995.

²⁶¹ <https://www.saps.gov.za/about/about.php> last accessed 20 January 2018.

²⁶² Act 51 of 1997.

²⁶³ Joubert, R., Sughrue, J., Alexander, D., *Search and seizure of learners in schools in a constitutional democracy: A comparative analysis between South Africa and the United States*.2013. De Jure. Pg 119-120. available at <http://www.saflii.org/za/journals/DEJURE/2013/8.pdf> last accessed 21 October 2018.

²⁶⁴ Joubert, R., Sughrue, J., Alexander, D., *Search and seizure of learners in schools in a constitutional democracy: A comparative analysis between South Africa and the United States*.2013. De Jure. Pg 119-120. available at <http://www.saflii.org/za/journals/DEJURE/2013/8.pdf> last accessed 21 October 2018.

²⁶⁵ <https://www.dictionary.com/browse/search?s=t> last visited on the 15th of November 2018.

The concept of the word seizure was discussed in *Ntoyakhe v Minister of Safety and Security*²⁶⁶ The court held that “the word seize encompasses not only the act of taking possession of an article, but also the subsequent detention thereof.” Otherwise the authority to seize would be rendered worthless. “The power to seize is limited to articles which are either involved in, used during, or may provide proof of the commission of an offence in the Republic or elsewhere, or provide proof of the fact that the commission of the offence was planned.”²⁶⁷

The general provisions of search and seizure are captured in Chapter 2 of the CPA.²⁶⁸ This chapter confers powers on officials where the object is to search a person or seize specific articles as stipulated in the Act. It has been widely criticised by writers to be excessive as it goes against our core Constitutional human rights.²⁶⁹

The articles referred to are those that the State can seize because “it is concerned in or reasonably believed to be used in the commission or suspected commission of a crime/offence or may be used as evidence of the commission or suspected commission of a crime/offence.”²⁷⁰

There are two ways in which the state can conduct a search and seizure, which are either with or without a warrant.²⁷¹ When looking at the Constitution, these methods are *prima facie* in direct conflict with section 14 of the Bill of Rights which states that:

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

(a) their person or home searched;

(b) their property searched;

(c) their possessions seized; or

(d) the privacy of their communications infringed.”²⁷²

²⁶⁶ *Ntoyakhe v Minister of Safety and Security* 2000 (1) SA 257.

²⁶⁷ Joubert, R., Sughrue, J., Alexander, D., (2013). *Search and seizure of learners in schools in a constitutional democracy: A comparative analysis between South Africa and the United States*. De Jure. Pg 119-120. available at <http://www.saflii.org/za/journals/DEJURE/2013/8.pdf> last accessed 22 March 2018.

²⁶⁸ Act 51 of 1997.

²⁶⁹ Basdeo, V. (2012). *The Constitutional Challenges of Warrantless Search and Seizure in South African Criminal Procedure: A Comparative Analysis*, 20 Afr. J. Int'l & Comp. L. 161. pg 161

²⁷⁰ Section 20 of the Criminal Procedure Act 51 of 1977.

²⁷¹ Sections 21 and 22 of the Criminal Procedure Act 51 of 1977.

²⁷² Section 14 of Chapter 2 of the Constitution of the Republic of South Africa.

In *Mistry v Interim Medical and Dental Council of South Africa and Others*²⁷³ Sachs J explained the historical background of the right to privacy and the discretionary powers of government officials and its impact on this safeguard:

*“The existence of safeguards to regulate the way in which state officials may enter the private domains of ordinary citizens is one of the features that distinguish a constitutional democracy from a police state. South African experience has been notoriously mixed in this regard. On the one hand there has been an admirable history of strong statutory controls over the powers of the police to search and seize. On the other, when it came to racially discriminatory laws and security legislation, vast and often unrestricted discretionary powers were conferred on officials and police. Generations of systematised and egregious violations of personal privacy established norms of disrespect for citizens that seeped generally into the public administration and promoted amongst a great many officials habits and practices inconsistent with the standards of conduct now required by the Bill of Rights. Section 13 accordingly requires us to repudiate the past practices that were repugnant to the new constitutional values, while at the same time re-affirming and building on those that were consistent with these values.”*²⁷⁴

Other rights that are also affected by a search and seizure are “the rights to dignity, bodily security, including the right against cruel, inhuman or degrading treatment.”²⁷⁵ However, these rights are not absolute and are qualified by the Constitution in terms of section 35 and 36²⁷⁶ which means that the search and seizure provisions are within the boundaries of the Constitution and the powers exercised in terms thereof accordingly do not infringe the Constitution. Each will be examined in turn.

5.2.1 SEARCH AND SEIZURE WITH A WARRANT

The procedure regulating search and seizure with a warrant is governed by section 21 subject to subsections 22, 24 and 25 of the CPA.²⁷⁷ According to this provision in order to seize an article, a search warrant is issued by a magistrate/justice if he is of the view after considering

²⁷³ *Mistry v Interim Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (CC) 76 para 25.

²⁷⁴ *Mistry v Interim Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (CC) 76 para 25. available at <http://www.saflii.org/za/cases/ZACC/1998/10.html> last accessed 22 March 2018.

²⁷⁵ Sections 10 and 12 of the Constitution of the Republic of South Africa 1996.

²⁷⁶ The Constitution of the Republic of South Africa.

²⁷⁷ The Criminal Procedure Act 51 of 1977.

information in the application supplied under oath or solemn declaration that there are reasonable grounds to believe that the article is either in that person's possession, under his control, or at a premises within his jurisdiction.²⁷⁸

The warrant can also be issued "by a judge or judicial officer presiding at criminal proceedings, if it is believed that the article is required in evidence at proceedings."²⁷⁹

When authorising a warrant, the judicial officer must use his discretion to determine whether there are reasonable grounds for the authorisation of the search.²⁸⁰ In *Ismael v Durban City Council*²⁸¹ the court held that a judicial officer's discretion would be exercised reasonably by taking into consideration all the relevant facts, in accordance with the law.

A search warrant can also be issued in terms of section 25 of the CPA, where a magistrate or justice is of the opinion after consideration of the information supplied under oath or solemn declaration that there are reasonable grounds to believe that "the internal security of the Republic or the maintenance of law and order is likely to be endangered by a meeting that is held or to be held or if the offense has been committed or is to be committed upon the premises within his area of jurisdiction."²⁸²

It is only if the requirements of the section are met that he can authorise the issuing of the warrant, which allows a police official to investigate and take steps that he deems necessary for the prevention of the "internal security of the Republic or maintenance of law and order or for the prevention of any offense, or search the premises and any person on the said premises, or seize any such article."²⁸³

It is important to note that a warrant must stipulate the purpose of the search and the article that must be seized. This provides directions for the police official exercising it and it is a legal procedure placed on the State that must be strictly interpreted to protect the individual from excessive State interference.²⁸⁴

²⁷⁸ Section 21 (1) (a) of the Criminal Procedure Act 51 of 1977.

²⁷⁹ Section 21 (1) (b) of the Criminal Procedure Act 51 of 1977.

²⁸⁰ Joubert, J. (2013). *Criminal Procedure Handbook*. 11th. South Africa. Juta. Pg 152

²⁸¹ *Ismael v Durban City Council* 1973 (2) SA 362 (N).

²⁸² Section 25(1) (a)-(b) of the Criminal Procedure Act 51 of 1997.

²⁸³ Section 25(1)(b)(i)-(iii) of the Criminal Procedure Act 51 of 1997.

²⁸⁴ Joubert, J. (2013). *Criminal Procedure Handbook*. 2013. 11th. South Africa. Juta pg 154

National Union of South African Students v Divisional Commissioner, South African Police 1971 (2) SA 553 (C) and *Pogrand* 1974 (1) SA 244 (T).

5.1.2 SEARCH AND SEIZURE WITHOUT A WARRANT

A search and seizure without a warrant is governed in terms of section 22 which stipulates that “a police officer may search any person, container or premises for the purpose of seizing any article,”²⁸⁵ if the person consents to the search and seizure²⁸⁶ or in terms of section 22(b)²⁸⁷ and section 25(3)²⁸⁸ a police officer is also authorised “to act without a warrant if he believes on reasonable grounds that a warrant would have been issued to him, if he had applied for it; and that the delay in obtaining such warrant would defeat the object thereof.”²⁸⁹

This type of search and seizure is more concerning in society because it has the same force and effect as a warrant but it is based on the discretion of a police officer and his belief that a judge or magistrate would have authorised the search and seizure.

This means that police officers are conferred with the same powers that they would have had, had they been issued a warrant in terms of section 21.²⁹⁰ However as stipulated in *Mayekiso*²⁹¹ the belief of the officer must be objectively justifiable on the facts. Further, if the police officer acts contrary to the warrant or acts contrary to the provisions authorising search and seizure without a warrant, then in terms of section 28,²⁹² he shall be guilty of an offence and liable on conviction to a fine or to imprisonment.

The provision²⁹³ that holds a police officer accountable when in breach of the CPA²⁹⁴ shows that there is an obligation placed on the police officer to ensure that he is acting within the letter of the law because if he fails to do so then he will be in contravention of the Act and criminally liable. This is a significant point to bear in mind when comparing the powers of the SAPS in terms of the CPA, to the powers of SARS, in terms of the TAA.²⁹⁵

²⁸⁵ Section 20 of the Criminal Procedure Act 51 of 1997.

²⁸⁶ Section 22(a) of the Criminal Procedure Act 51 of 1997.

²⁸⁷ The Criminal Procedure Act 51 of 1997.

²⁸⁸ The Criminal Procedure Act 51 of 1997.

²⁸⁹ Sections 20,22 and 25 of the Criminal Procedure Act 51 of 1977.

²⁹⁰ The Criminal Procedure Act 51 of 1997.

²⁹¹ *Mayekiso* 1996 (2) SACR 298 (C).

²⁹² The Criminal Procedure Act 51 of 1997.

²⁹³ Section 28 of the Criminal Procedure Act 51 of 1997.

²⁹⁴ The Criminal Procedure Act 51 of 1997.

²⁹⁵ The Criminal Procedure Act 51 of 1997.

The Tax Administration Act 28 of 2011.

Even though there are concerns about the powers that are given to our police force, it is also important to remember that they are governed by the Constitution and have governmental oversight and the objective of those powers are to ensure a safer society.

5.3 POWERS CONFERRED ON SARS IN TERMS OF THE TAX ADMINISTRATION ACT, SPECIFICALLY WITH REGARDS TO SEARCH AND SEIZURE.

The purpose of the TAA is to “ensure the effective and efficient collection of tax by *inter alia* prescribing the powers and duties of persons engaged in the administration of a tax Act.”²⁹⁶

SARS has been established in terms of section 2 of the South African Revenue Service Act,²⁹⁷ and is regarded as “an organ of state within the public administration, but as an institution outside the public service.”²⁹⁸

SARS is the “nation’s tax collecting authority” which in terms of the TAA “is responsible for the administration of the Act under the control or direction of the Commissioner.”²⁹⁹

The constitutionality of SARS’ power to search for and seize items has not been decided by our courts but SARS is of the view that the provisions are constitutionally valid.³⁰⁰ Many critics believe that these provisions should be exposed to constitutional scrutiny.³⁰¹

In terms of the SARS Act³⁰² a SARS official, when “exercising public power or function, must do so subject to its constitutional obligations.”³⁰³

As discussed in chapter 2, The TAA confers powers upon the Commissioner and amongst those powers conferred, is the power to search a taxpayer’s premises and seize records.³⁰⁴

²⁹⁶ <https://www.saps.gov.za/about/about.php> last accessed 20 January 2018.

²⁹⁷ Act 34 of 1997, hereafter referred to as the SARS Act.

²⁹⁸ Section 2 of The South African Revenue Service Act 34 of 1997.

<https://www.saps.gov.za/about/about.php> last accessed 20 January 2018.

²⁹⁹ Section 3 of the Tax Administration Act 28 of 2011.

³⁰⁰ Silke Bovijn; Linda van Schalkwyk. (2012). *Concerns Regarding New Search and Seizure Powers Granted to the SARS in Terms of the Tax Administration Act*, 23 Stellenbosch L. Rev. 507. pg 516

³⁰¹ Silke Bovijn; Linda van Schalkwyk. (2012). *Concerns Regarding New Search and Seizure Powers Granted to the SARS in Terms of the Tax Administration Act*, 23 Stellenbosch L. Rev. 507. pg 516

³⁰² Section 4 (2) of the South African Revenue Service Act 34 of 1997

³⁰³ Section 195 of the Constitution of the Republic of South Africa

³⁰⁴ Croome, B., & Olivier, L. 2015. *Tax Administration*. 2nd Ed. South Africa: Juta. Pg 108. Parts A, B, C, D of Chapter 5 and section 64 of the Tax Administration Act 28 of 2011.

These powers are founded in sections 59-66 of the TAA, which stipulates the procedure and standards that SARS has to adhere to with regards to conducting a search and seizure.

5.3.1 SEARCH AND SEIZURE WITH A WARRANT

Similarly, to the provisions in the CPA, before a warrant is authorised under the TAA, a senior SARS official must make an application in terms of section 59 of that Act.

This application will be brought before a judge or magistrate to determine whether “he is satisfied that there are reasonable grounds that the person had committed a tax offence or has failed to comply with the obligations imposed under the tax Act, and that the relevant material defined under section 1 of the TAA³⁰⁵ is likely to be found at the premises stipulated in the application to prove the grounds of the non-compliance or commission of an offense.”³⁰⁶

If the senior SARS official is satisfied that the above have been met, then in terms of the TAA he is authorised to issue the warrant on the relevant facts in which the application is founded upon, after considering the information provided “under oath or solemn declaration.”³⁰⁷

Once the warrant is authorised, SARS officials are able to “open/cause to be opened/ or remove anything that the official believes to contain relevant material.”³⁰⁸ If the warrant lists a vessel, aircraft or vehicle, SARS can stop and board the aforementioned, as well as search and question the person in control (of the vessel, aircraft or vehicle) with respect to a matter dealt with in a tax Act.³⁰⁹

The similarity of the provisions between the CPA and the TAA means that SARS, a department created to collect revenue, is given the same authority as SAPS which is a department that has been created to enforce the law to ensure a safer society.

³⁰⁵Section 1 of the Tax Administration Act 28 of 2011: “relevant material” means any information, document or thing that is foreseeably relevant for tax risk assessment, assessing tax, collecting tax, showing noncompliance with an obligation under a tax Act or showing that a tax offence was committed.

³⁰⁶ Section 59 (1) and (2) of the Tax Administration Act 28 of 2011.

³⁰⁷ Section 60 of the Tax Administration Act 28 of 2011.

³⁰⁸ Section 1 and section 60 of the Tax Administration Act 28 of 2011.

³⁰⁹ Croome, B., & Olivier, L. 2015. *Tax Administration*. 2nd Ed. South Africa: Juta Pg 156.

5.3.2 SEARCH AND SEIZURE WITHOUT A WARRANT

Similar to the CPA, the TAA confers the right on a SARS official to act without a warrant if he is of the belief that relevant material may be at premises other than the premises stipulated in the warrant.³¹⁰

He will only be authorised to do so if the delay in obtaining a warrant may defeat the purpose of the search and seizure and if the warrant cannot be obtained in time to prevent the destruction of records that may be necessary to ensure enforcement of the provisions stipulated in the relevant statutes.³¹¹

This provision entitles the official to search and seize relevant material at the suspected premises as if it were the premises identified in the warrant, other than a dwelling-house or domestic premises, without the occupant's consent.³¹²

In light of the above, we see that a balance needs to be struck between the interests of individuals and those of the State. The TAA has given SARS similar powers which the Constitution and The South African Police Service Act has given SAPS, yet their purposes are vastly different.

This leaves South Africans thinking whether it is necessary to empower a government body that collects tax to the same extent that we empower our police officials to investigate murders, rape, culpable homicide etc.

These extensive powers have been given to perform an administrative function in the pursuit of a more efficient tax administration. There is an inherent danger in the exercising of these powers which creates the potential for abuse of power. Proper measures need to be taken to ensure that these powers will not infringe any rights in terms of the Constitution and the Bill of Rights which our forefathers have worked so hard to establish in our democratic country.

The South African Constitution provides for the division of power into three governmental spheres which is made up of the executive, the legislature, and the judiciary.³¹³ The executive³¹⁴ (president, deputy and ministers) is responsible for the development of policy and legislation,

³¹⁰ Section 62 (1) and (2) of the Tax Administration Act 28 of 2011.

³¹¹ Croome, B., & Olivier, L. 2015. *Tax Administration*. 2nd Ed. South Africa: Juta. Pg 164.

³¹² Section 62 of the Tax Administration Act 28 of 2011.

³¹³ Sections 40 and 41 of the Constitution of the Republic of South Africa 1996.

³¹⁴ Ibid

as well as the day-to-day administration of the country, the legislature³¹⁵ (parliament) is responsible for considering proposed bills before it is passed as law, and the judiciary is responsible for the administration of justice via our courts. The establishment of these spheres by the Constitution is to ensure accountability amongst government.

In regard to SAPS which is established in terms of the Constitution,³¹⁶ there are three main structural oversight bodies of South Africa's police services. The first is parliament's Portfolio Committee on Police which is established under the National Assembly which is responsible for overseeing the activities of the Minister of Police, the National Secretariat, the Independent Complaints Directorate, SAPS, and the legislation.³¹⁷ The second is the Civilian Secretariats for Police which is at national and provincial levels, the national secretariat has an advisory function which consists of civilian employees and independently and directly advises the Minister of Police on all relevant policy matters. This ensures its independence from the SAPS.³¹⁸ Lastly the Independent Police Investigative Directorate (IPID) formerly known as the Independent Complaints Directorate (ICD) is authorized to "investigate all police action/custody related deaths and also deals with other allegations of police misconduct or criminality."³¹⁹

In addition to the above the SAPS has various organisations, structures and institutions, that assist in overseeing the police which falls outside of governmental oversight.³²⁰

On the other hand, SARS is an organ of state that is established in terms of the SARS Act³²¹ which falls within the public administration, but which functions as an institution outside the public service. The Commissioner is appointed by the President and is the advisor to the Minister of Finance.³²² With regard to the other oversight spheres to ensure accountability and

³¹⁵ Ibid, Parliament consists of two houses namely the National Assembly and National Council of Provinces.

³¹⁶ Sections 198 and 205 of the Constitution of the Republic of South Africa 1996.

³¹⁷ Chapter 4 section 45 of the Constitution of the Republic of South Africa 1996.
<http://www.policesecretariat.gov.za/about/about.php> last accessed 20 March 2018.

³¹⁸ Established in terms of The Civilian Secretariat for Police Act 2 of 2011.
<http://www.policesecretariat.gov.za/about/about.php> last accessed 20 March 2018.

³¹⁹ Chapter 10 of the South African Police Services Act 68 of 1995.
<https://www.saferspaces.org.za/organisation/entry/civilian-secretariat-for-police> last accessed 21 October 2018.

³²⁰ Chapter 10 of the South African Police Services Act 68 of 1995.
 The Independent Police Investigative Directorate (IPID) Act No. 1 of 2011.

Gives effect to the provision of section 206(6) of the Constitution, ensuring independent oversight of the SAPS and MPS. The IPID resides under the Ministry of Police and functions independently of the SAPS.

³²⁰ These include non-governmental organisations (NGOs), Academic and research organisations (especially criminology departments); The media (state and privately controlled press, radio and television); Organised business (e.g. Business Against Crime); and Community based organisations (including community policing forums and related structures).

³²¹ Section 2 of the South African Revenue Services Act 34 of 1997.

³²² Section 6 and 4(1) (b) of the South African Revenue Services Act 34 of 1997.

transparency we see that in terms of section 9(1)(d)³²³ the Commissioner is the Chief Executive Officer and also the Accounting Authority for SARS. The Commissioner is also entrusted with the duty to establish the Executive Committee which is chaired by the Commissioner to assist in handling the business of SARS. The Executive Committee is managed by “two external statutory committees” namely Audit and Risk Committee³²⁴ and Human Resources Committee.³²⁵

In light of the above it is clear that the oversight which the SAPS is subjected to is vastly different when compared to that of SARS. The oversight that SAPS is subject to is necessary when looking at the context in which it is required to perform its functions. SARS has similar if not identical powers to that of the SAPS, yet it is not subject to similar oversight to ensure that it is adhering to the provisions and acting in accordance with the law.

If a senior SARS official does breach a provision that gives it its authority, the TAA does not have any provisions that hold them accountable. This in turn means that one has to rely upon the general principles of administrative law which renders the action *ultra vires* and of no force and effect. This could have a consequence of general damages, in that the taxpayer could sue for civil damages and the official can be interdicted from performing an act that is not administratively correct. Therefore, there is no criminal sanction that can be imposed. However, there are provisions in the SAPS Act that provide for criminal sanctions to be imposed on a police officer that acts beyond the boundaries of the provisions that empower him.³²⁶

If SARS is given the same authority as the SAPS then objectively speaking it should have the same sanctions/obligatory burden placed on it to act according to the provisions that so empower it. South Africa can resolve these issues by implementing provisions which would serve as a safeguard that encompass accountability and criminal sanctions that are suitable to the excessive powers given to SARS by the TAA.

³²³ The South African Revenue Services Act 34 of 1997.

³²⁴ Established under section 77 of the Public Finance Management Act, 1 of 1999 (PFMA).

³²⁵ Established by the Minister in terms of section 11(1) of the SARS Act.

³²⁶ Section 28 of the Criminal Procedure Act 51 of 1977.

CHAPTER 6

CONCLUSION

This dissertation undertook an overview of SARS' internal investigation procedures by reviewing certain of the powers that have been bestowed upon SARS officials by the TAA.³²⁷

It was argued that SARS has extensive powers in terms of the TAA, which permits it to gather information, and to conduct an audit or investigation.³²⁸ However, such powers and functions must be performed with due regard to the taxpayer's rights as enshrined in the Constitution.

The empowering provisions of the TAA potentially infringe on a taxpayer's right to privacy, right to remain silent and the right against self-incrimination.³²⁹ This is because taxpayers are compelled to disclose all the relevant information in their tax returns, irrespective of the incriminating nature of that information, which information can, in certain circumstances be disclosed to other government entities. A taxpayer is also unable to invoke his constitutional rights at the commencement of the SARS investigative process, due to him not being subject to criminal prosecution at that stage. This leaves a taxpayer no choice but to provide incriminating information to satisfy the demands for information stipulated by the SARS official, to avoid criminal prosecution for not complying with the said demands.

If it is found that the actions of SARS officials are contrary to the Constitution, then in terms of section 172(1)(b)(ii) the court may make any order that is "just and equitable". As an organ of state SARS must adhere to the "scope, spirit and purpose of the Constitution" in carrying out its constitutional duties and obligations.³³⁰

As was discussed in Chapters 2 and 5, SARS officials are given a "blank cheque" when it comes to the powers they are given because the Act phrases sections in a "discretionary" manner which leaves the application of the provisions in the hands of SARS officials, who are required to use their discretion in enforcing those provisions. This in turn leaves taxpayers uncertain as to what conduct is required to comply with the TAA. In addition, the broadly-couched powers may be inconsistent with the Constitution.

³²⁷ The Tax Administration Act 28 of 2011.

³²⁸ Chapter 5 of the Tax Administration Act 28 of 2011.

³²⁹ Sections 14 and 35 of the Constitution of the Republic of South Africa.

³³⁰ Section 172(1)(b)(ii) of the Constitution of the Republic of South Africa.

In the comparison between SARS and the SAPS, we saw that SARS officials have similar if not identical empowering provisions as the SAPS. But unlike the SAPS, which is subject to controls in terms of the CPA, the TAA imposes no such controls on SARS, to ensure that its actions are within the authorising provisions. Unlike the CPA, the TAA does not provide for criminal consequences when a SARS official acts beyond the bounds of the law, and an aggrieved taxpayer is left to rely on administrative law for any possible redress other than criminal sanctions.

There is an undeniable struggle that exists between the provisions of the TAA and taxpayer's rights enshrined in the Constitution. It is imperative to keep in mind that the future that distinguishes us from being a constitutional democracy and not a police state, is the enforcement of the rights enshrined in our Constitution.³³¹

South Africa can resolve any conflict by implementing the approach of other countries such as the United States of America, which allows taxpayers to invoke their rights when it comes to disclosing information that could be self-incriminating, at any stage of their engagement with the tax authority.³³²

South Africa should consider the manner in which its tax laws are drafted in so far as the possible infringements on citizens constitutional rights are concerned. If a taxpayer does not have to ponder about the potential criminal consequences of their disclosures, then they will be more forthcoming about the amounts disclosed in their tax returns because they will be able to omit where these monies came from. This will in turn assist SARS in maximising their collection of tax, which is the very nature of their existence.

³³¹ *Mistry v Interim Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (CC) 76 para 25. available at <http://www.saflii.org/za/cases/ZACC/1998/10.html> last accessed 22 March 2018.

³³² Bittker BI. (1974). *Taxing Income from Unlawful Activities*. Case W. Res. L. Rev, 25, 130-147.

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