

Jeopardy assessments under the Tax Administration Act 28 of 2011

By

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ABSTRACT

The Tax Administration Act 28 of 2011 (hereinafter referred to as the “TAA”) has changed the law governing assessments. The introduction of jeopardy assessments in South African tax law is a new concept.

The term estimated assessment previously used in tax Acts, is replaced by the concept of an original, reduced, additional or jeopardy assessment based on an estimation.

If the audit process establishes that the original assessment was not correctly issued, SARS can issue an additional assessment. SARS has the right to issue an additional assessment despite the fact that the original assessment became final and conclusive.

The TAA provides for simplified grounds on which additional assessments may be issued to achieve alignment across taxes. A new simplified concept prejudice to SARS or the fiscus will be used as a basis for the issue of additional assessments.

Jeopardy assessments (as provided for in section 94 of the Tax Administration Act 28 of 2011), also known as a ‘protective assessment’, are introduced which may be issued in advance of the date on which the return is normally due in order to secure the early collection of tax that would otherwise be in jeopardy or where there is some danger of tax being lost by delay. SARS bears the onus and a taxpayer has the right to take the matter on review to the High Court.

The Supreme Court of Appeal has held that it is well established that, in review proceedings, only under certain exceptions will a court substitute its own decision for that of an official to whom the decision has been entrusted, the exceptions being where the proper decision is a foregone conclusion or where the decision-maker has disabled himself from making a proper decision.

The impression is thus gained that the purpose of a jeopardy assessment under South African law is to shorten the period within which tax is payable and not to do to away with the requirement to give notice of an assessment.

A termination assessment (IRC 6851) applies to the current tax year, or the immediately preceding tax year if the due date for the return has not passed. If jeopardy is determined, the taxpayer's tax year is terminated and treated as a complete tax year for assessment purposes. Termination assessments are made for income taxes only.

A jeopardy assessment applies to a closed tax year, where the due date for filing a return has expired. For income, estate, gift, and certain excise taxes, assessment is made pursuant to IRC 6861. For other kinds of taxes (employment and other excise taxes), assessment is made pursuant to IRC 6862.

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CHAPTER 1

1.1 BACKGROUND

Since the inception of the Constitution of the Republic of South Africa 1996 (hereinafter referred to as the “Constitution”) many laws have been passed but have had to face the scrutiny of the Constitution. The Constitution keeps the law makers in check and ensures the citizens of this country enjoy the protection and liberties afforded to them by the Constitution. According to section 195 of the Constitution of the Republic of South Africa, 1996 the South African Revenue Service has to act in accordance with the values and principles as mentioned in the section.¹ Section 195² deals with ‘Public Administration’ and requires among other things, a high standard of professional ethics, efficient use of resources, transparency, and fair and impartial treatment of the public.³

In light of the above, the South African Revenue Service (hereinafter referred to as “SARS”) is also bound by section 33⁴ of the Constitution and the Promotion of Administrative Justice Act 3 of 2000.⁵ The reason being that the South African Revenue Service is an organ of state falling under the definition of administrative action as defined in section 1 of the Promotion of Administrative Justice Act 3 of 2000.⁶

The South African Revenue Service being tasked with the collection of taxes from all individuals including juristic persons has to have certain powers to ensure compliance. SARS was established by legislation to collect revenue and to ensure compliance with tax laws.⁷

Assessments are one such power in order to collect tax. Assessments are now governed by the Tax Administration Act 28 of 2011. Issuing a tax assessment is the

¹ Phillip Haupt (2012) 2.

² Constitution of the Republic of South Africa, 1996.

³ Phillip Haupt (2012) 2.

⁴ Constitution of the Republic of South Africa, 1996.

⁵ Iain Currie & Johan De Waal (2005) 644.

⁶ *Ibid* 652 – 653.

⁷ South African Revenue Service Act 34 of 1997 S 3 – 4.

process of determining tax due by a taxpayer or a refund due to a taxpayer, and a distinction is made between self-assessment and administrative assessment.⁸

Assessments are now defined in section 1 of the Tax Administration Act 28 of 2011 as follows:

“The determination of the amount of a tax liability or refund, by way of self-assessment by the taxpayer or assessment by SARS.”

The Tax Administration Act 28 of 2011 provides for four types of assessments:

- Original assessment;
- Additional assessment;
- Reduced assessment; and
- Jeopardy assessment.⁹

In the case of *Partington v. Attorney General*, L.R. 4 H.L. 100, 122, where Lord Carrington said:

I am not at all sure that in a case of this kind -- a fiscal case -- form is not amply sufficient, because, as I understand the principle of all fiscal legislation, it is this: if the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

⁸ See SARS “Short guide to the Tax Administration Act” (2012) at 34.

⁹ *Ibid* at 35.

In this document a look at the sections of the Income Tax Act 58 of 1962 (hereinafter referred to as the “Income Tax Act”), Value-Added Tax Act 89 of 1991 (hereinafter referred to as the “VAT Act”) and the Tax Administration Act 28 of 2011 (hereinafter referred to as the “TAA”) dealing with assessments will be examined. It should be highlighted from the outset that certain provisions of the Income Tax Act and Value Added Tax Act have been repealed. Section 271 of the TAA lists the repealed provisions.

The sections that will be dealt with under the Income Tax Act 58 of 1962 will be as follows (these sections have now been repealed as per section 271 of the TAA):

- Section 78 (estimated assessments), section 79 (additional assessments) and section 88 (payment of tax pending objection and appeal).¹⁰ These sections will be looked at to understand the application of the law previously.

The sections that will be dealt with under the Value-Added Tax Act 89 of 1991 will be as follows (these sections have now been repealed as per section 271 of the TAA):

- Section 31 (assessments) and section 36 (payment of tax pending objection and appeal).¹¹ These sections will be looked at to understand the application of the law previously.

The sections that will be dealt with under the Tax Administration Act 28 of 2011 will be as follows:

- Section 91 – 100 – assessments.¹² Each section will be looked at in the context of jeopardy assessments. A jeopardy assessment is a new concept in South African tax law.
- As is mentioned in section 95 of the TAA (estimated assessments) – “SARS *may make an original, additional, reduced or jeopardy assessment*”. A jeopardy assessment will in all likelihood be based on estimate because as is

¹⁰ Income Tax Act 58 of 1962.

¹¹ Value-Added Tax Act 89 of 1991.

¹² Tax Administration Act 28 of 2011.

mentioned in section 94 “SARS may make a jeopardy assessment in advance of the date on which the return is normally due”.

- Sections 92 of the TAA (additional assessments) are important that in the event SARS raises a jeopardy assessment under section 94 of the TAA and there is prejudice can SARS now raise an additional assessment. In SARS short guide to the Tax Administration Act it is stated: “*This general concept is used essentially to cater for all circumstances in the tax Acts which may give rise to an additional assessment.*”¹³
- Section 164 of the TAA deals with the payment of tax pending objection or appeal. This section is very important because if SARS raises a jeopardy assessment under section 94 of the TAA payment of tax will be required. This section is very similar to section 88 of the Income Tax Act¹⁴ and the case law as decided under section 88 will be examined.

In the chapters to follow each section will be dealt with in detail and as such in order to avoid repetition, a brief outline of the sections of the relevant Acts above has been mentioned. Jeopardy assessments will be the focus of the topic and the repealed sections in both the Income Tax Act and Value Added Act will be looked at in order to understand the law.

In order to understand what the reasoning for the TAA was and how it came into law a brief explanation is necessary.

1.1.1) Highlighted points as mentioned in the *draft explanatory memorandum on the draft Tax Administration Bill (2009)*.¹⁵

- *The drafting of the Tax Administration Bill was announced in the 2005 Budget Review as a project to incorporate into one piece of legislation certain generic administrative provisions, which are currently duplicated in the different tax Acts. The drafting of the TAB focused on reviewing the current administrative provisions of the tax Act administered by SARS, excluding the Customs and*

¹³ See SARS “Short guide to the Tax Administration Act” (2012) at 35.

¹⁴ S 88 has been repealed by S 271 of the TAA.

¹⁵ See SARS *draft explanatory memorandum* (2009).

*Excise Act, 1964, and harmonising these provisions across taxes to the extent possible. The TAB takes account of the constitutional rights of taxpayers, but does not seek to re-codify them, because all legislation, including the TAB, must be read together with the provisions of the Constitution. Particularly the right to administrative justice as well as the application of the fairness requirements are very fact and context specific. Codifying them in respect of every administrative action by SARS will be an almost impossible task and may only serve to unnecessarily limit or expand these rights.*¹⁶

- The TAB also extends SARS' powers, for example its information gathering, assessment and collection powers.¹⁷ The purpose of the TAB in this regard is the extension of powers to more effectively target tax evaders who demonstrate certain behaviour, not ordinarily compliant taxpayers.¹⁸ Jeopardy assessments, the power to seize assets for 24 hours during which a court application for a preservation order must be made, and the like are clearly aimed at securing the collection of taxes where it would otherwise be in doubt due to a taxpayer's behaviour, such as the dissipation of assets or actions to frustrate the collection of debts.¹⁹

What must be kept in mind is that the draft explanatory memorandum on the draft Tax Administration Bill²⁰ was discussed in 2009. I will endeavour to try and take a step by step approach to what was behind the passing of the TAA.

1.1.2) A brief overview of certain points as mentioned in the *standing committee on finance: report-back hearings (21 September 2011)*.²¹

- Following a process involving the release of draft Bills, workshops with stakeholders and opportunities for written submissions, which stretched for

¹⁶ See SARS draft explanatory memorandum (2009) at 1.

¹⁷ *Ibid.*

¹⁸ See SARS draft explanatory memorandum (2009) at 2.

¹⁹ *Ibid.*

²⁰ See SARS draft explanatory memorandum (2009) at 3.

²¹ www.sars.gov.za/standingcommitteefinance/september/2011 at 1.

over two years, the Tax Administration Bill was introduced in the National Assembly on 23 June 2011.²²

- The comments of the Law Society of South Africa are regrettably based on an outdated draft of the Bill.²³ Accordingly, no response has been made to comments on aspects of the outdated draft that have changed in or have been dealt with by commentators commenting on the Bill as introduced.²⁴

1.1.3) A briefing of the *select Committee on Finance (30 November 2011)*:²⁵

- TAB seeks to achieve a balance between powers and duties of SARS and rights and obligations of taxpayers thereby enhancing equity and fairness of tax administration.²⁶
- “*TAB designed with due regard of constitutional rights of taxpayers and constitutional obligations of SARS. For example, to ensure consistent treatment and greater equity and fairness, certain discretionary powers is linked to objective criteria. Constitutionality of TAB reviewed by external constitutional experts.*”²⁷
- “*Drafting of TAB was informed by international best practice. A comparative evaluation of tax administration laws of other countries. Countries evaluated: Australia, Botswana, Canada, New Zealand, UK, and USA.*”²⁸

1.1.4) Commencement of the Tax Administration Act 28 of 2011:

According to Government Gazette number 35687, volume 567, dated 14 September 2012 the TAA²⁹ came into effect on 1 October 2012 except for sections 187(2), 3(a) to (e) and (4), 188(2) and (3) and 189(2) and (5) of the TAA. Furthermore any provision of Schedule 1 to the TAA that amends or repeals a provision of a tax Act relating to interest under that tax Act, to the extent of that amendment or repeal.

²² *Ibid* 1.

²³ *Ibid*.

²⁴ *Ibid*.

²⁵ ‘*Tax Administration Bill, 11B of 2011 (TAB), 30 November 2011, Briefing of the select committee on finance*’, South African Revenue Service.

²⁶ *Ibid* 7.

²⁷ *Ibid*.

²⁸ *Supra* fn23 at 14.

²⁹ Tax Administration Act 28 of 2011.

1.2 Problem Statement:

The TAA has changed the law governing assessments and in light of this: estimated assessments; additional assessments; jeopardy assessments and the new definitions introduced by the TAA will be examined. Jeopardy assessments will be the focus of the topic and estimated assessments and additional assessments will be looked at in the context of jeopardy assessments.

The objectives of the dissertation will be to identify the issues that may be raised with SARS regarding the administrative provisions that have been introduced by the TAA. The rationale and thinking behind the introduction of the TAA will be considered. As is mentioned in section 94 of the TAA review is one of the remedies available to a taxpayer upon receiving a jeopardy assessment.

The objectives are to establish:

1. What are the new provisions regarding assessments as introduced in the TAA? More specifically how do these provisions relate to jeopardy assessments
2. What changes have been brought about to estimated assessments in the context of jeopardy assessments?
3. When can SARS raise an additional assessment under the TAA? If SARS raises a jeopardy assessment can they also raise an additional assessment?
4. When may jeopardy assessments be issued and what are the rights and remedies available to a taxpayer?
5. Are the grounds for raising a jeopardy assessment justified or is there a need for it to be more specific, as is evident from the U.S.A tax system.
6. How and when does the IRS in the U.S.A use and apply a jeopardy assessment?
7. Are the actions of a senior SARS official, as defined under section 1 of the TAA, subject to judicial review under PAJA?

Jeopardy assessments are a new concept in South African law and as such there is not much case law on this subject. In an attempt to shed some light on this subject

the writer will look to the law in the U.S.A to gain an understanding on the concept of jeopardy assessments.

Furthermore the TAA has retained the provisions of estimated assessments and additional assessments but has given them a facelift. There is case law on this concept which is based on repealed provisions of the Income Tax Act 58 of 1962.

1.3 Proposed methodology:

This study is descriptive, analytical and comparative.

The descriptive approach is adopted because an overview of the manner in which additional assessments and estimated assessments are currently used. Prior to the TAA coming into operation, the Income Tax Act 58 of 1962 was employed in regard to assessments (the Value-Added Tax Act 89 of 1991 was used for those instances relating to VAT). In the descriptive approach the background and understanding of assessments will be obtained. The concept of assessments will not be examined in detail. Additional assessments and estimated assessments will be looked at in the context of jeopardy assessments.

The analytical approach will provide an in-depth understanding of jeopardy assessments and the changes that have been brought about by the TAA.

A comparative approach would be used to determine in what ways other countries have incorporated jeopardy assessments. In this instance the only jurisdiction that will be looked at is the U.S.A.

1.4 Scope of the study:

The writer will try to enable a logical and step by step approach as to what was behind the passing of the TAA and how these changes will affect tax legislation in South Africa. The discussion will look at the changes that have been brought about and how new concepts will have an effect on a taxpayers rights and obligations. A look at the U.S.A tax system will enable an understanding as to how jeopardy

assessments work, as this concept has been applied for several years in the U.S.A. The work will be divided into five chapters:

- First chapter: Introduction - In this part a background as to the reasoning for the TAA and also a brief history as to the passing of the TAA from birth to promulgation. An introduction to jeopardy assessments will be given in this chapter. Both estimated and additional assessments will be examined in the context of jeopardy assessments, under the TAA.
- Second chapter: Additional and estimated assessments in the context of jeopardy assessments will be looked at. The position prior to the TAA will be only looked in terms of case law. This chapter will be brief and only touch on estimated and additional assessments and how they relate to jeopardy assessment.
- Third chapter: Jeopardy assessments - The grounds for raising a jeopardy assessment, the instances when a jeopardy assessment will be employed and the rights and remedies available to a taxpayer.
- Fourth chapter: In light of the fact that jeopardy assessments are new, a look at the U.S.A may provide guidance due to the case law that is available under the U.S.A jurisdiction.
- Fifth chapter: Conclusion together with recommendations.

CHAPTER 2

ESTIMATED AND ADDITIONAL ASSESSMENTS IN RELATION TO JEOPARDY ASSESSMENTS

2.1 Estimated assessments

2.1.1) Estimated assessments:

a.) Introduction:

SARS's practice is often to issue an assessment based on the information supplied by a taxpayer in his or her return, commonly known as 'a face value assessment'.³⁰ As was mentioned jeopardy assessments are a new concept to South African tax law. This chapter will enable the reader to understand the link between a jeopardy assessment and an additional and estimated assessment. Previous case law as decided under the repealed Income Tax Act and VAT Act will be looked at to understand relevant principles. Estimated assessments and additional assessments have been used in South African tax law; however with the TAA these concepts have been repealed. Before proceeding to discuss jeopardy assessments these concepts need to be examined and explained briefly. The provisions of the VAT Act and Income Tax Act dealing with estimated assessments and additional assessments have been repealed as per section 217 of the TAA.

2.1.1.1) Position under Tax Administration Act 28 of 2011:

a.) Background to drafting the TAA:

In the draft explanatory memorandum on the draft Tax Administration Bill (2009)³¹ it was stated that:

Under clause 85 estimated assessments are to counteract non-filing or late filing, SARS may issue an estimated assessment, without a return being filed, based on information readily available to it. The estimated

³⁰ Olivier "Additional assessments, interests and penalties under the Income Tax Act 58 of 1962: the boundaries defined" (2004) TSAR 2 at 273.

³¹ SARS "draft explanatory memorandum" (2009) at 11.

*provisions have been changed to also use it as a debt collection tool in respect of non-filers of returns. The issue of the assessment based on available information will create a tax debt collectable from a defaulting taxpayer, but a taxpayer is still required to submit a correct return within the prescribed time period. Where SARS is not satisfied with the information in the return, it may use information available or obtained by it in addition to return information and issue an assessment as described in clause 83.*³²

Provision is still made for an agreed assessment, if a taxpayer is unable to submit an accurate return.³³

The term estimated assessment previously used in tax Acts, is replaced by the concept of an original, reduced, additional or jeopardy assessment based on an estimation.³⁴

If a taxpayer does not comply with certain duties SARS is authorised to estimate the amount of an assessment which can be based on information readily available to SARS.³⁵

b.) What the TAA says:

Section 95 of the TAA says the following:

“(1) SARS may make an original, additional, reduced or jeopardy assessment based in whole or in part on an estimate if the taxpayer—

(a) fails to submit a return as required; or

(b) submits a return or information that is incorrect or inadequate.

(2) SARS must make the estimate based on information readily available to it.

(3) If the taxpayer is unable to submit an accurate return, a senior SARS official may agree in writing with the taxpayer as to the amount of tax

³² *Ibid* page 11.

³³ *Ibid.*

³⁴ See SARS “Short guide to the Tax Administration Act” (2012) at 34.

³⁵ *Ibid.*

chargeable and issue an assessment accordingly, which assessment is not subject to objection or appeal.”

c.) Explanation of section 95:

In the context of section 95 of the TAA the definitions of return and assessment are important. Section 1 of the TAA defines a return as follows, *“a form, declaration, document or other manner of submitting information to SARS that incorporates a self-assessment or is the basis on which an assessment is to be made by SARS.”* And an assessment is defined as a, *“determination of the amount of a tax liability or refund, by way of self-assessment by the taxpayer or assessment by SARS.”*

Estimated assessment is not defined in section 1 of the TAA. However the concept is elaborated upon in section 95 of the TAA. Section 95(1) of the TAA states that a jeopardy assessment may be based on an estimate in whole or in part if taxpayer fails to submit a return or submits a return or information that is incorrect or inadequate.

This phrase³⁶ presumably connotes that SARS is not required to expend time or resources in a search for material on which to base the assessment, though this is not easily reconcilable with the rule that the onus of proving the estimate to be ‘reasonable’ rests on SARS.³⁷

The taxpayer has the same rights of objection and appeal in relation to an estimated assessment as for a regular assessment and, before lodging an objection, would as a matter of strategy be well advised to request reasons for the assessment in terms of rule 3 of the rules under section 103(1) of the TAA in order to establish the basis on which the estimate was arrived at.³⁸

In practice, SARS treats a misrepresentation of stated facts as well as an omission of any amount or information in a return as a default in furnishing a required return,

³⁶ As mentioned in S 79(2) of the TAA.

³⁷ De Koker *“Silke on SA Income Tax”* (online) at par 18.124.

³⁸ *Ibid.*

even if it is not deliberate or intentional.³⁹ In practice, SARS may invoke its power to make an estimated assessment where the opulent lifestyle of a taxpayer seems irreconcilable with the modest income disclosed in his return.⁴⁰

The TAA is not explicit as to precisely what it is that SARS will estimate in order to make an estimated assessment.⁴¹ In particular, the TAA is silent as to whether the estimate will be of the taxpayer's gross income (thus ignoring potentially available allowances and deductions on the basis that the taxpayer had not made a claim in this regard) or whether the estimate will be of the amount of taxable income, taking account of the deductions and allowances that the taxpayer would probably have been entitled to.⁴² Since the TAA provides that SARS may make an *assessment* based in whole or in part on an assessment⁴³ and since an 'assessment' is defined as 'the determination of the amount of a tax liability'⁴⁴, it seems that the estimate should not be of the taxpayer's gross income, but of his 'tax liability', which of course requires account to be taken of deductions and allowances.⁴⁵

Section 95(1)(a) says 'fails to submit a return' can be interpreted as allowing a broader scope than that what was provided for in the repealed section 78(1) of the Income Tax 58 of 1962.

³⁹ Paragraph 4.1.1 of Interpretation Note 23 (published on 11 March 2004).

⁴⁰ De Koker "*Silke on SA Income Tax*" (online) at par 18.124.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ See Ss 95(1) of the TAA.

⁴⁴ See S 1 of the TAA.

⁴⁵ De Koker "*Silke on SA Income Tax*" (online) at par 18.124.

2.2 Additional assessments

2.2.1) Additional assessments:

a.) Introduction:

Section 79 of the Income Tax Act has now been repealed and replaced by section 92 of the TAA, which deals with additional assessments. Additional assessments are a topic on their own for discussion and as such each and every aspect will not be looked at, but only the relation to jeopardy assessments. Section 31 of the VAT Act governs the law for assessments (the section will not be quoted and unless otherwise indicated the principles are similar to those in the Income Tax Act). The TAA has also repealed the law governing assessments under the VAT Act.⁴⁶

2.2.1.1) Position under Tax Administration Act 28 of 2011:

a.) Background to TAA:

The TAA provides for simplified grounds on which additional assessments may be issued to achieve alignment across taxes.⁴⁷ A new simplified concept prejudice to SARS or the fiscus will be used as a basis for the issue of additional assessments.⁴⁸ For example an understatement of income prejudices SARS or the fiscus in that the correct amount of tax was not assessed.⁴⁹ This general concept is used essentially to cater for all circumstances in the tax Acts which may give rise to an additional assessment.⁵⁰

An additional assessment is a notification to a taxpayer to pay a tax liability which exceeds the tax liability in another assessment, or in the case of an income tax assessed loss reduces the assessed loss, and will always be issued subsequent to

⁴⁶ Schedule 1 of the TAA.

⁴⁷ See SARS "Short guide to the Tax Administration Act" (2012) at 35.

⁴⁸ *Ibid.*

⁴⁹ See SARS "Short guide to the Tax Administration Act" (2012) at 35.

⁵⁰ *Ibid.*

an original assessment.⁵¹ Does this mean that an additional assessment may only be issued after an original assessment and not after a jeopardy assessment.

b.) What the TAA says:

Section 92 of the TAA says the following:

“If at any time SARS is satisfied that an assessment does not reflect the correct application of a tax Act to the prejudice of SARS or the fiscus, SARS must make an additional assessment to correct the prejudice.”

c.) Explanation of section 92:

From the wording of section 92 of the TAA the grounds for an additional assessment are simplified. Under section 79 of the Income Tax Act there were only three instances when an additional assessment could be raised.

Time periods:

Furthermore the time periods and provisos are listed in section 99 of the TAA. From section 99 of the TAA the time period is still 3 years and the provisos have been retained. Sub-section 99(1)(a) states that, *“(1) SARS may not make an assessment in terms of this Chapter— three years after the date of assessment of an original assessment by SARS.”*

Sub-section 99(2) states that sub-section 99(1) does not apply in the case of fraud, misrepresentation, or non-disclosure of material facts.

It is clear that section 99 of the TAA is similar to the repealed provisions in the Income Tax Act. Case law as decided under the repealed Income Tax Act may provide some guidance as to the meaning and application of section 99 of the TAA. The case law is as follows:

⁵¹ *Ibid.*

- In *ITC 1776 (2002) 66 SATC 296* it was held that should the Commissioner issue an additional assessment more than three years after the date of the original assessment not because of fraud, misrepresentation or non-disclosure but due to a defective original assessment, the additional assessments will be set aside.⁵²
- In *ITC 1637 (1997) 60 SATC 413* it was held that section 79 of the Income Tax Act 58 of 1962 relates to matters which should have been subject to tax, in other words, which, at the time of assessment and having regard to the law then prevailing, should have been included either in the taxable income or, as the case may be, in the tax to be paid.⁵³
- In the case of *SIR v Trow 1981 (4) SA 821 (A), 43 SATC 189* it was said that, the Commissioner must satisfy himself that there has been a non-disclosure of material facts by the taxpayer, and that the amount in question was not assessed to tax prior to the expiry of the three-year period owing to that non-disclosure, that is, that the non-assessment was causally related to the non-disclosure.⁵⁴

These cases are still relevant because section 99 of the TAA is similar (if not identical) to the repealed provision in the Income Tax Act.

Practice generally prevailing:

An interesting point or definition as provided for in SARS guide on dispute resolution, November 2004, is the concept of practice generally prevailing. This definition is now defined in the TAA but not in the Income Tax Act. The ‘practice generally prevailing’ at the time, is the practice known to and applied by the Commissioner personally or, in view of his powers of delegation, through a duly delegated division at the SARS Head Office.⁵⁵ A ‘practice generally prevailing’ is therefore one that has been expressly authorized by the Commissioner (personally or through the delegated Head Office Division) and is being applied throughout the country - it cannot be said

⁵² *ITC 1776 (2002) 66 SATC 296.*

⁵³ *ITC 1637 (1997) 60 SATC 413.*

⁵⁴ *SIR v Trow 1981 (4) SA 821 (A), 43 SATC 189 at 194.*

⁵⁵ SARS “guide on tax dispute resolution” (2004) at 1.

that a practice that has its origin in a branch office of SARS falls within the concept of a 'practice generally prevailing'.⁵⁶

However the concept of practice generally prevailing as mentioned in sub-section 99(1)(d)(i)(aa) has been defined by the TAA in section 1. Practice generally prevailing has been defined in section 1 of the TAA and further elaborated upon in section 5(1) as "*a practice generally prevailing is a practice set out in an official publication regarding the application or interpretation of a tax Act.*"

If an amount was not subjected to tax because of a practice generally prevailing at that time, the assessment may not be reopened at any time in order to subject that amount to tax.⁵⁷ The practice generally prevailing is not a local practice which has evolved in the office of any Receiver but a practice known to and approved by the Commissioner for application throughout the country.⁵⁸

In *CIR v SA Mutual Unit Trust Management Co Ltd 1990 (4) SA 529 (A) (52 SATC 205)*⁵⁹ the taxpayer failed to discharge the onus resting upon it to demonstrate the existence of a practice generally prevailing governing the device of dividend-stripping. That onus, the Appellate Division held, is on the taxpayer to show, on a preponderance of probability, that an assessment was raised in accordance with a practice generally prevailing at the time of the assessment.⁶⁰

The Court then supplied an illustration how this onus might be discharged by a taxpayer: He would show that the Commissioner or an authorized official issued a directive covering the practice in dispute and he would show that the directive was being followed generally in the assessment of taxpayers.⁶¹

In *C:SARS v HulettAluminium(Pty) Ltd 2000 (4) SA 790 (SCA) (62 SATC 483)* it was held that a practice generally prevailing is one which is applied generally in the

⁵⁶ *Ibid.*

⁵⁷ De Koker "*Silke on SA Income Tax*" (online) at par A:A28.

⁵⁸ *Ibid.*

⁵⁹ This case was decided under the Income Tax Act.

⁶⁰ De Koker "*Silke on SA Income Tax*" (online) at par A:A28.

⁶¹ *CIR v SA Mutual Unit Trust Management Co Ltd 1990 (4) SA 529 (A) (52 SATC 205).*

different offices of the department and the onus of proving the existence of such a practice rests on the taxpayer.⁶²

Date of assessment:

Section 1 of the TAA defines a date of assessment as follows:

“(a) in the case of an assessment by SARS, the date of the issue of the notice of assessment; or

(b) in the case of self-assessment by the taxpayer—

(i) if a return is required, the date that the return is submitted; or

(ii) if no return is required, the date of the last payment of the tax for the tax period or, if no payment was made in respect of the tax for the tax period, the effective date.”

The date of assessment is now the date of issue of the notice of assessment.

⁶² This case was decided under the Income Tax Act.

2.4) Conclusion:

This chapter just touches on the concept of additional and estimated assessments under the TAA.

What was important in this chapter is the meaning of estimated assessments and additional assessments in the context of jeopardy assessments.

The term estimated assessment previously used in tax Acts, is replaced by the concept of an original, reduced, additional or jeopardy assessment based on an estimation.⁶³

Since the TAA provides that SARS may make an *assessment* based in whole or in part on an assessment⁶⁴ and since an ‘assessment’ is defined as ‘the determination of the amount of a tax liability’⁶⁵, it seems that the estimate should not be of the taxpayer’s gross income, but of his ‘tax liability’, which of course requires account to be taken of deductions and allowances.⁶⁶

It can be said that a jeopardy assessment will be based on an estimate.

The TAA provides for simplified grounds on which additional assessments may be issued to achieve alignment across taxes.⁶⁷ A new simplified concept prejudice to SARS or the fiscus will be used as a basis for the issue of additional assessments.⁶⁸

The date of assessment is now the date of issue of the notice of assessment.

⁶³ See SARS “Short guide to the Tax Administration Act” (2012) at 36.

⁶⁴ See S 95(1) of the TAA.

⁶⁵ See S 1 of the TAA.

⁶⁶ De Koker “*Silke on SA Income Tax*” (online) at par 18.124.

⁶⁷ See SARS “Short guide to the Tax Administration Act” (2012) at 35.

⁶⁸ *Ibid.*

CHAPTER THREE

JEOPARDY ASSESSMENTS UNDER THE TAA

3.1) Jeopardy assessments under the TAA:

In this chapter an examination of jeopardy assessment in light of the TAA as a whole will be looked at. Jeopardy assessment will be explained and the rationale and grounds for raising such an assessment will be examined.

Jeopardy assessment is new to South African tax law and as such the United States of America's (hereinafter referred to as the "USA") tax law will be looked at in order to gain an understanding of jeopardy assessments.

The USA tax system is complicated and difficult to understand and as such the writer will endeavour to try and explain the system as best as possible. An explanation of the tax system, the sections governing jeopardy assessment and case law will be looked at in the chapter to follow.

a.) Background to TAA:

In the draft explanatory memorandum on the draft Tax Administration Bill (2009) it was stated that under clause 88 that:

*jeopardy assessments, also known as a 'protective assessment', are introduced which may be issued in advance of the date on which the return is normally due in order to secure the early collection of tax that would otherwise be in jeopardy or where there is some danger of tax being lost by delay. A jeopardy assessment may be issued where the taxpayer, for example, tries to place assets beyond the reach of SARS' collection powers when an investigation into the taxpayer's affairs is initiated, or where procedural time limits for raising an assessment may otherwise expire.*⁶⁹

⁶⁹ SARS "draft explanatory memorandum" (2009) at 11 – 12.

According to the standing committee on finance report-back hearings (21 September 2011)⁷⁰, the comments and response by SARS should be noted. The following is worth mentioning:

	<u>Comment</u>	<u>Response</u>
1.	SARS should give the taxpayer prior notice that a “jeopardy assessment” is to be made.	It is recommended that this comment be partially accepted. Prior notice will defeat the object of a jeopardy assessment, which is intended to enable SARS to collect taxes, on an expedited basis, in circumstances where the collection of tax is in jeopardy. However, in order to ensure that this power is only approved at the highest level in SARS, it is recommended that the discretion to issue jeopardy assessment should be that of the Commissioner and not a senior SARS official.
2.	Taxpayers should be able to object to an assessment or a decision of SARS to invoke a jeopardy assessment.	It is suggested that this comment is misconceived. Clause 94(2) makes it clear that the right of review in the High Court is in addition to the right to object and appeal under Chapter 9.
3.	It is recommended that in the case of jeopardy assessments and third party liability the burden of proof should be upon SARS.	It is recommended that this comment should be accepted. The unusual aspect of a jeopardy assessment is its making. Thus it is recommended that SARS should bear the burden of proof in the High Court review procedure referred to in

⁷⁰ www.sars.gov.za/standingcommitteefinance/september/2011 at 41 - 42.

		clause 94(2) to show that the making of the jeopardy assessment was reasonable under the circumstances. As far as the amount of the jeopardy assessment is concerned, this is part of an assessment thus the normal remedies should apply. SARS will, in any event, bear the burden of proof under clause 102(2) to the extent that the assessment was based on an estimation.

b.) What the TAA says:

Section 94 of the TAA says the following:

“(1) SARS may make a jeopardy assessment in advance of the date on which the return is normally due, if the Commissioner is satisfied that it is required to secure the collection of tax that would otherwise be in jeopardy.

(2) In addition to any rights under Chapter 9, a review application against an assessment made under this section may be made to the High Court on the grounds that—

(a) its amount is excessive; or

(b) circumstances that justify a jeopardy assessment do not exist.

(3) In proceedings under subsection (2), SARS bears the burden of proving that the making of the jeopardy assessment is reasonable under the circumstances.”

c.) Explanation of section 94(1):

Sub-section 94(1) states the following:

“(1) SARS may make a jeopardy assessment in advance of the date on which the return is normally due, if the Commissioner is satisfied that it is required to secure the collection of tax that would otherwise be in jeopardy.”

It is in our view clear from the language of this provision that what SARS is required to prove in this context is not the reasonableness of the *quantum* of the jeopardy assessment, but that it was reasonable to make a jeopardy assessment at all.⁷¹ It is implicit that if it was not ‘reasonable’ to do so the jeopardy assessment must be set aside, in order that an ordinary assessment can be issued in due course.⁷² The concept of ‘jeopardy’ has been employed by SARS however the concept has not been defined or outlined. Section 1 of the TAA states that a jeopardy assessment “*is an assessment referred to in section 94.*” In the writers point of view this concept should have been defined as the scope of a jeopardy assessment is not entirely clear. The problem is that once a jeopardy assessment is issued does this mean that a taxpayer’s taxable year comes to an end. If a taxpayers tax year comes to an end will the taxpayer be assessed for the whole years tax or just the tax to the date the assessment has been issued.

In the Collins English dictionary ‘*jeopardy*’ is defined as:

- *“danger of injury, loss, death, etc.; risk; peril; hazard*
- *(law) danger of being convicted and punished for a criminal offence.”*⁷³

⁷¹ De Koker “*Silke on SA Income Tax*” (online) at par 18.132.

⁷² *Ibid.*

⁷³ www.collinsdictionary.com/dictionary/english/jeopardy.

d.) Explanation of section 94(2):

Sub-section 94(2) states the following:

“(2) In addition to any rights under Chapter 9, a review application against an assessment made under this section may be made to the High Court on the grounds that—

(a) its amount is excessive; or

(b) circumstances that justify a jeopardy assessment do not exist.”

This review process is distinct from an objection or appeal against the jeopardy assessment; in essence, it is a judicial review of the Commissioner's decision that the particular circumstances warranted the issuing of a jeopardy assessment.⁷⁴ But the way in which the issue in such a review is expressed in sub-section 94(2)(b) of the TAA, namely, whether ‘circumstances that justify a jeopardy assessment do not exist’ seems to require the court to take into account, not merely whether the decision to issue the jeopardy assessment was taken rationally and in good faith, but whether it was the correct decision on the merits.⁷⁵

In such a review, and at centre stage, will be the statement by SARS, and included in the jeopardy assessment, of ‘the grounds for believing that the tax would otherwise be in jeopardy’.⁷⁶

In *Metcash Trading Ltd v C: SARS and Another*,⁷⁷ it was stated that:

“[t]he Commissioner is not a judicial officer and assessments and concomitant decisions by the Commissioner are administrative, not judicial, actions; from which it follows that challenges to such actions before the Special Court [now called the Tax Court] or Board are not appeals in the forensic sense of the word. They are proceedings in terms of a statutory mechanism specially

⁷⁴ De Koker “*Silke on SA Income Tax*” (online) at par 18.132.

⁷⁵ *Ibid.*

⁷⁶ De Koker “*Silke on SA Income Tax*” (online) at par 18.132.

⁷⁷ 2001 (1) SA 1109 (CC).

created for the reconsideration of this particular category of administrative decisions – and appropriate corrective action – by a specialist tribunal.”⁷⁸

Section 3 of PAJA provides that:

“Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.”

The rights and legitimate expectations protected by this provision are thus applicable only in respect of ‘administrative action’.⁷⁹ Where an act does not constitute ‘administrative action’ it is not susceptible to review under PAJA.⁸⁰ The review as provided for in sub-section 94(2) of the TAA allows protection for a taxpayer. These rights are additional to those as provided for in Chapter nine of the TAA.

Chapter nine of the TAA deals with dispute resolution. The principles as mentioned in chapter nine of the TAA deals with objection and appeal. These principles will not be discussed here as it is beyond the scope of the topic.

Prior notice:

Thus, for example, it is arguable that, before SARS levies an additional assessment in respect of a particular taxpayer, it must give that person taxpayer adequate notice of such proposed action and a reasonable opportunity to make representations in this regard.⁸¹ Even though the concept mentioned is additional assessment, the rule may apply in the context of jeopardy assessment. However as mentioned in the Standing Committee on finance, *“prior notice will defeat the object of a jeopardy assessment, which is intended to enable SARS to collect taxes, on an expedited basis, in circumstances where the collection of tax is in jeopardy”⁸²*. A jeopardy assessment will be made at the highest level, by the Commissioner.

It is SARS’ practice to send the taxpayer a ‘letter of findings’ in regard to a proposed additional assessment and to give the taxpayer the opportunity to respond to those

⁷⁸ 2001 (1) SA 1109 (CC) at 1130.

⁷⁹ De Koker *“Silke on tax administration”* (online) at par 3.25.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² www.sars.gov.za/standingcommitteefinance/september/2011 at 41 - 42.

findings.⁸³ This practice accords with the requirements of PAJA.⁸⁴ If this practice is not adhered to in a particular case – or if the deadline imposed on the taxpayer to respond to the letter of findings is unreasonable – the affected taxpayer’s rights in terms of PAJA will have been infringed.⁸⁵

The decision in *Hindry v Nedcor Bank Ltd*⁸⁶ (decided under the repealed section 99 of the Income Tax Act) concerned a challenge to the constitutionality of section 99 of the Income Tax Act which empowered the Commissioner to appoint any person as the agent of a taxpayer and obliged that person to pay over to SARS any tax due by the taxpayer out of moneys held by that person on behalf of the taxpayer.⁸⁷ The court held that:

*“the section did not violate the Constitution for the following reasons: the taxpayer had ample opportunity for a later judicial determination of his legal rights; the section was an example of summary proceedings to secure prompt performance of pecuniary obligations to the government; the purpose of the section was to avoid assets of the taxpayer being placed beyond SARS’ reach; the section was no more than a form of garnishment and was a legitimate limitation of the taxpayer’s rights in terms of s 36 of the Constitution and was reasonable and necessary in an open and democratic society.”*⁸⁸

In *Contract Support Services v C: SARS*⁸⁹ the court held that not all administrative acts require the application of the *audi alteram partem*⁹⁰ rule, and that no notice or prior hearing is required where this would render the proposed act nugatory, as in the instant case, where notice or a hearing would have given the taxpayer the opportunity of spiriting away the funds to which SARS was laying claim.⁹¹

⁸³ De Koker “*Silke on tax administration*” (online) at par 3.26.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ 1999 (2) SA 957 (W), 61 SATC 163.

⁸⁷ De Koker “*Silke on tax administration*” (online) at par 3.26.

⁸⁸ 1999 (2) SA 957 (W), 61 SATC 163.

⁸⁹ 1999 (3) SA 1133 (W), 61 SATC 338.

⁹⁰ According to the rule a party to an administrative proceeding which may lead to action or a decision affecting his rights is entitled to present his case.

⁹¹ 1999 (2) SA 957 (W), 61 SATC 163.

In *Turner v Jockey Club of South Africa* 1974(3) SA 633(AD) at Page 646 D - H it was held that in the absence in the statute concerned of an express or clearly implied intention to the contrary, the presumption is that the rule⁹² applies.

Thus, in *Shelton v C: SARS*⁹³ the Supreme Court of Appeal held that giving prior notice to the affected person of an application to court for a warrant of search and seizure would defeat the object and purpose of the relevant section.⁹⁴

Reasonability:

The potential to take on review a decision or action by SARS as being 'unreasonable' is therefore an important weapon in the taxpayer's armoury.⁹⁵

The decision in *Deacon v Controller of Customs and Excise*⁹⁶ reveals an instance of a state official misdirecting himself and misconstruing the facts and the law.⁹⁷ It was held that he had failed to properly apply his mind to the matter and, with regard to the statutory provisions in issue, had failed to exercise his discretion at all.⁹⁸ It was held that where a government official has, in the exercise of a discretionary function, based his conclusions on incorrect information, or where his actions were wrong in that they were contrary to law or based on factual inaccuracies, his decisions are reviewable and can be set aside by the court.⁹⁹

It is submitted that, in terms of these principles, a taxpayer who is aggrieved, on the merits, in respect of the Commissioner's decision not to amend or set aside an assessment, must first exercise his right of objection and appeal before invoking his rights under PAJA to contest the fairness and rationality of the decision.¹⁰⁰

⁹² *Audi alteram partem* rule.

⁹³ *Shelton v C: SARS* 2002 (2) SA 9 (SCA).

⁹⁴ 2002 (2) SA 9 (SCA).

⁹⁵ De Koker "*Silke on tax administration*" (online) at par 3.26.

⁹⁶ 1999 (2) SA 905 (SE).

⁹⁷ De Koker "*Silke on tax administration*" (online) at par 3.26.

⁹⁸ 1999 (2) SA 905 (SE) at 919H/I.

⁹⁹ 1999 (2) SA 905 (SE) at 920A.

¹⁰⁰ De Koker "*Silke on tax administration*" (online) at par 3.28.

There is, as yet, no reported case in which a taxpayer has sought the review of an assessment in terms of PAJA on the grounds that it is so unreasonable that it ought to be set aside in terms of that Act.¹⁰¹

The Supreme Court of Appeal has held that it is well established that, in review proceedings, only under certain exceptions will a court substitute its own decision for that of an official to whom the decision has been entrusted,¹⁰² the exceptions being where the proper decision is a foregone conclusion or where the decision-maker has disabled himself from making a proper decision.¹⁰³

e.) Explanation of section 94(3):

Sub-section 94(3) states the following:

“In proceedings under subsection (2), SARS bears the burden of proving that the making of the jeopardy assessment is reasonable under the circumstances.”

It seems implicit that the onus of proof in this regard is borne by SARS.¹⁰⁴

The unusual aspect of a jeopardy assessment is its making. Thus it is recommended that SARS should bear the burden of proof in the High Court review procedure referred to in sub-clause 94(2) to show that the making of the jeopardy assessment was reasonable under the circumstances.¹⁰⁵

f.) Jeopardy assessment and estimated assessments:

Since the purpose of a jeopardy assessment is to raise a liability urgently, the assessment may be an estimation based on information readily available to SARS.¹⁰⁶

¹⁰¹ *Ibid.*

¹⁰² *Littlewoods v Minister of Home Affairs* 2006 (3) SA 474 (SCA) at 479G

¹⁰³ *Ibid.*

¹⁰⁴ De Koker “*Silke on SA Income Tax*” (online) at par 18.132.

¹⁰⁵ www.sars.gov.za/standingcommitteeonfinance/september/2011 at 41 - 42.

¹⁰⁶ See SARS “Short guide to the Tax Administration Act” (2012) at 36.

In sub-section 95(1) of the TAA the Act says that a jeopardy assessment may be based on an estimate. Furthermore sub-section 96(2)(a) of the TAA provides that if an assessment is based on estimate SARS must provide the taxpayer with the grounds for an assessment (in chapter two above the reasons for assessment was explained). Indeed, a jeopardy assessment is inherently an estimated assessment, given that, by definition, the taxpayer has not yet rendered the relevant return and tax is not yet due and payable.¹⁰⁷ The relationship between jeopardy assessment and estimated assessments was explained in Chapter two above.

g.) Jeopardy assessment and notice of assessment:

Although a jeopardy assessment can be issued without following the ordinary audit route, the basis on which it is believed that the collection of tax is in jeopardy will be stated on the notice of assessment.¹⁰⁸

Sub-section 96(1) and sub-section 96(2)(b) of the TAA states that the taxpayer must be given all the information as required by these two sub-sections.

Sub-section 96(2)(b) states that the taxpayer must be given the grounds for believing that the tax would otherwise be in jeopardy. This seems to be that no reasons for the assessment must be given, but just the grounds. So for instance if the Commissioner believes the taxpayer is disposing of assets this must be stated.

The impression is thus gained that the purpose of a jeopardy assessment under South African law is to shorten the period within which tax is payable and not to do to away with the requirement to give notice of an assessment.¹⁰⁹

¹⁰⁷ De Koker “*Silke on SA Income Tax*” (online) at par 18.132.

¹⁰⁸ See SARS “Short guide to the Tax Administration Act” (2012) at 36.

¹⁰⁹ Lynette Olivier “Assessments under the Tax Administration Bill” JEF 2011 4(2) 430.

*Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works*¹¹⁰ the court stated that adequate notice:

*“includes the duty to provide the affected person with the essential information which motivates the impending action, and must indicate what the main considerations for the contemplated action are in order to enable the affected person to prepare a response.”*¹¹¹

h.) Jeopardy assessment and additional assessments:

The question now is if SARS raises a jeopardy assessment and that assessment does not reflect the correct application of a tax Act to the prejudice of SARS or the fiscus can SARS now raise an additional assessment. A jeopardy assessment is issued by SARS based on an estimate, so the possibility of prejudice is high. The provisos as mentioned in sub-section 99(2)(a) relating to fraud, misrepresentation or non-disclosure of material facts may be applicable in the case of a jeopardy assessment. The problem now is that SARS can raise the additional assessment after the three or five year period and this leaves the taxpayer at constant unease. The relationship between jeopardy assessment and additional assessments was explained in Chapter two above.

i.) Jeopardy assessment and period of issuance of assessment:

Section 99 of the TAA does not state the period during which a jeopardy assessment may be raised. However sub-section 94(1) of the TAA states that, *“SARS may make a jeopardy assessment in advance of the date on which the return is normally due.”*

The writer is of the opinion that a jeopardy assessment can only be made during the current tax year and not for the previous or future years. As will be explained below the United States provides for a jeopardy assessment and a termination assessment, each having special rules and periods for issuance.

¹¹⁰ 2001 (1) SA 1109 (CC) at par 12

¹¹¹ De Koker *“Silke on tax administration”* (online) at par 3.26

j.) Jeopardy assessment and preservation order:

Preservation orders can be found in section 163 of the TAA. There was no such provision in the Income Tax Act. It was also stated that the power is available as conservancy measures for purposes of mutual assistance in the recovery of tax on behalf of foreign governments.¹¹² SARS provides no further guidance on preservation orders and as such case law will be looked at.

The case of *Carmel Trading Co Ltd v Commissioner, South African Revenue Service and Others* 2008 (2) SA 433 (SCA) provides guidance on the meaning of 'dissipation of assets' in the context of tax debts.¹¹³ The court stated the following:

*"On 3 September 2002, Hartzenberg J issued a preservation and anti-dissipation order in relation to the Falcon. Such an order, which interdicts a respondent from disposing of or dissipating assets, is granted in respect of a respondent's property to which the applicant can lay no special claim. To obtain the order the applicant has to satisfy the court that the respondent is wasting or secreting assets with the intention of defeating the claims of creditors. Importantly, the order does not create a preference for the applicant to the property interdicted."*¹¹⁴

Based on the aforementioned, it would seem that the "dissipation of assets" involves the wasting, using up or secreting of assets with an intention of defeating the claims of SARS.¹¹⁵

If there is a reasonable suspicion that the collection of tax is frustrated because assets are, or will be, removed or dissipated then a senior SARS official can apply on an *ex parte* basis to the High Court for a preservation order.¹¹⁶ A court may order the seizure of movable property and place the custody of the assets of a taxpayer, or

¹¹² www.sars.gov.za/standingcommitteeonfinance/september/2011 at 58.

¹¹³ <http://www.mondaq.com/x/236266/tax+authorities/The+Potential+Implications+If+A+Taxpayer+Is+Seen+To+Have+Dissipated+Its+Assets>.

¹¹⁴ *Carmel Trading Co Ltd v Commissioner, South African Revenue Service and Others* 2008 (2) SA 433 (SCA) at par 3.

¹¹⁵ <http://www.mondaq.com/x/236266/tax+authorities/The+Potential+Implications+If+A+Taxpayer+Is+Seen+To+Have+Dissipated+Its+Assets>.

¹¹⁶ See SARS "Short guide to the Tax Administration Act" (2012) at 48.

another person liable for tax, in a *curator bonis* i.e. a caretaker of property.¹¹⁷ However, where there is urgency, SARS may seize and remove realisable assets up to 24 hours prior to an application for a preservation order.¹¹⁸

Assets seized under this section must be dealt with in accordance with the directions of the High Court which made the preservation order.¹¹⁹ This power is also available as a conservancy measure for purposes of mutual assistance in the recovery of tax on behalf of foreign governments.¹²⁰

An important consideration in this context is that both a preservation order and a jeopardy assessment are used to secure the collection of taxes. A jeopardy assessment is made, “*in advance of the date on which the return is normally due*”¹²¹. A preservation order can only be obtained by an *ex parte* application to the High Court. The differences are there but both rest on the same ground i.e. the collection of taxes.

k.) Jeopardy assessment and obligation to pay:

Also known as the “pay now argue later” rule, the obligation to pay tax, which arises upon the issue of an assessment, is not automatically suspended by an objection or appeal.¹²² The obligation can only be suspended by SARS upon request by the taxpayer.¹²³

The ameliorating effect of the Commissioner's power to suspend the operation of the 'pay now, argue later' provision in circumstances considered by him or her to be appropriate was regarded by the Constitutional Court as one of the factors that justified the provisions of s 40(5) of the VAT Act, even if they do constitute a limitation of the rights afforded in terms of s 34 of the Bill of Rights.¹²⁴

¹¹⁷ *Ibid.*

¹¹⁸ See SARS “Short guide to the Tax Administration Act” (2012) at 48.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ S 94 of TAA.

¹²² See SARS “Short guide to the Tax Administration Act” (2012) at 48.

¹²³ *Ibid.*

¹²⁴ *Metcash Trading Ltd. v C:SARS and Another 2001 (1) SA 1109 (CC) at para 62.* (decided under repealed VAT Act).

In the case of *Capstone 556 (PTY) Ltd and Another v Commissioner, South African Revenue Service and Another* 2011 (6) SA 65 (WCC) (decided under the repealed Income Tax Act) the court held as follows:

*“Having regard to the recognised public policy considerations underpinning the 'pay now, argue later' policy, the Commissioner would, for instance, obviously need to be able to revise a decision to direct that the obligation to pay be suspended if it became evident to him in the period before the appeal was heard that the taxpayer's financial situation was deteriorating, thereby jeopardising the prospect of making a recovery if the appeal were determined against the taxpayer. Similarly, the efficacious operation of the statute would be thwarted if the Commissioner were unable to revoke a decision to direct that a taxpayer's obligation to pay be suspended by the noting of an appeal if it became apparent that the taxpayer was failing conscientiously to prosecute the appeal.”*¹²⁵

The suspension of payment of disputed tax is not an automatic right and a taxpayer must apply for the suspension in the form and manner prescribed by SARS.¹²⁶

It is implicit that a jeopardy assessment may be enforced by SARS in the same manner as any other kind of assessment.¹²⁷ Indeed, there would be no point for SARS to issue such an assessment unless it intended to take immediate steps to enforce payment of the allegedly jeopardised (prospective) tax debt.¹²⁸ Sub-section 164(3) states the grounds which the senior SARS official must take into account when deciding whether to suspend the payment of tax, these grounds are:

- the compliance history of the taxpayer;
- the amount of tax involved;
- the risk of dissipation of assets by the taxpayer concerned during the period of suspension;
- whether the taxpayer is able to provide adequate security for the payment of the amount involved;

¹²⁵ *Ibid* at 83.

¹²⁶ See SARS “Short guide to the Tax Administration Act” (2012) at 48.

¹²⁷ *Ibid*.

¹²⁸ *Ibid*.

- whether payment of the amount involved would result in irreparable financial hardship to the taxpayer;
- whether sequestration or liquidation proceedings are imminent;
- whether fraud is involved in the origin of the dispute; or
- whether the taxpayer has failed to furnish information requested under this Act for purposes of a decision under this section.

However sub-section 164(4) of the TAA says that the suspension may be revoked if:

“(a) no objection is lodged;

(b) an objection is disallowed and no appeal is lodged; or

(c) an appeal to the tax board or court is unsuccessful and no further appeal is noted.”

An interesting point is that in sub-section 94(1) of the TAA it is the Commissioner who may raise a jeopardy assessment but the obligation to pay in section 163 of the TAA is determined by a senior SARS official¹²⁹.

There are two instances when SARS can bring forward a due date for payment:¹³⁰

- First, if the date for paying a tax has not yet arrived, but the collection of tax is in jeopardy as a result of the actions of the tax debtor, the Commissioner may authorise that a jeopardy assessment should be issued. A jeopardy assessment is then issued and the normal due date is brought forward;¹³¹
- The second instance is when a senior SARS official demands immediate payment despite an existing future due date. This will only happen if the future collection of the tax is at risk.¹³²

¹²⁹ The concept of a senior SARS official is explained in chapter 4 below.

¹³⁰ See SARS “Short guide to the Tax Administration Act” (2012) at 48.

¹³¹ *Ibid.*

¹³² *Ibid.*

I.) Jeopardy assessment and section 99 of the Income Tax Act:

Section 99 of the Income Tax Act allowed for the Commissioner to appoint an agent to collect taxes. The section will not be quoted but will be explained in terms of case law. It should be noted that section 99 of the Income Tax Act has been repealed¹³³. The relevant section in the TAA is section 156 and section 157.

In the case of *Hindry v Nedcor Bank Ltd. and another* 1999 (2) SA 757 (W) the court stated as follows:

- *“The applicant argued that section 99 of the Act empowered the Commissioner to appoint a person as agent and to require that agent to make payment of any tax due from moneys held by that person.”*¹³⁴
- *As to the manner in which the Commissioner (when I henceforth refer to the Commissioner I include, where the context so indicates, officials in the office of a Receiver of Revenue) acted, there can be no valid complaint of unfairness or the non-application of the audi alteram partem¹³⁵ principle. The claim was the subject of considerable correspondence and the Commissioner explained how his claim was arrived at and its basis and gave the applicant the opportunity to pay it. The audi alteram partem principle may in appropriate cases be satisfied by a party being heard after an adverse decision is taken.*¹³⁶
- *Objection to the validity of section 99 is that its enforcement does not require prior notice to the taxpayer or that he/she be given an opportunity to make representations to influence the Commissioner not to declare a party to be the taxpayer's agent or to direct that it make payment of the amounts due by him/her. In particular, it was argued that in the present case the Commissioner had not given advance notice or invited the applicant to make representations. The argument that it violates the contractual relationship between a taxpayer and his/her bank has to be stated to be rejected. As regards garnishee proceedings a bank should be in no different position from*

¹³³ See par 69 of Schedule 1 to the TAA.

¹³⁴ *Hindry v Nedcor Bank Ltd. and another* 1999 (2) SA 757 (W) at 759

¹³⁵ According to the rule a party to an administrative proceeding which may lead to action or a decision affecting his rights is entitled to present his case.

¹³⁶ *Hindry v Nedcor Bank Ltd. and another* 1999 (2) SA 757 (W) at 768 – 769.

*any other debtor of a taxpayer simply because it has a contractual duty to keep his/her affairs confidential.*¹³⁷

- *If the taxpayer were to receive prior warning, he or she could frustrate the tax collector's ability to recover the amounts due from his/her assets in the hands of a third party, for example by instructing the third party to pay the money to someone else or to the taxpayer him/herself or by ceding his/her claims to another.*¹³⁸
- *The purpose for which a person's rights are limited by section 99 is, according to the undisputed and inherently credible evidence of the Commissioner, to facilitate and enhance his ability to recover promptly taxes which are due and to avoid assets of taxpayers being put beyond his reach and, having regard to the need to speed up the collection of taxes and to prevent the frustration of the Commissioner's efforts and steps to that end, the weapon is of great importance to the State.*¹³⁹

Even though the above case was decided under the repealed provision of the Income Tax Act, the case can give a view as to how our courts might approach jeopardy assessments. Section 99 of the Income Tax Act is similar to section 94 of the TAA in certain instances. The difference is that in section 99 of the Income Tax Act (which has been repealed), the amount owed to SARS is certain and in that case it differs fundamentally from section 94 of the TAA. The rationale for this part was to indicate that SARS could collect a debt due to it without notice to a taxpayer and the court found this to be fair.

¹³⁷ *Hindry v Nedcor Bank Ltd. and another 1999 (2) SA 757 (W) at 774.*

¹³⁸ *Ibid* at 775.

¹³⁹ *Hindry v Nedcor Bank Ltd. and another 1999 (2) SA 757 (W) at 782 – 783.*

m.) Reasons for assessment:

Chapter Nine of the TAA deals with objection and appeal. Section 104 of the TAA deals with objections and section 107 of the TAA deals with appeal. Explaining these concepts will go beyond the scope of the topic of this dissertation and the only area which the writer will deal with is reason for an assessment.

In terms of section 103 of the Tax Administration Act 28 of 2011, the Minister may, after consultation with the Minister of Justice and Constitutional Development, by public notice make 'rules' governing the procedures to lodge an objection and appeal against an assessment or 'decision', and the conduct and hearing of an appeal before a tax board or tax court. The 'rules' may provide for alternative dispute resolution procedures under which SARS and the person aggrieved by an assessment or 'decision' may resolve a dispute.

Such rules have been published and are available on SARS website. The relevant rule is rule 6 (reasons for assessment). According to the writers understanding these rules are only a draft published for comment. To date the writer knows of no new or amended rules and as such will work with the available rules.

Rule 6 deals with the reason for an assessment. The rule under the Income Tax Act that deals with reasons for an assessment is rule 3. Rule 6 under the current rules provides as follows:

“(1) A taxpayer who is aggrieved by an assessment may, prior to lodging an objection under rule 7, request SARS to provide reasons for the assessment.

(2) The request must:

(a) be made in the prescribed form;

(b) specify an address at which the taxpayer will accept delivery of the reasons; and

(c) be delivered to SARS within 30 days from the date of assessment.

(3) The period within which reasons must be requested by the taxpayer may be extended by SARS for a period not exceeding 45 days if a SARS official is

satisfied that reasonable grounds exist for the delay in complying with that period.

(4) SARS must provide reasons for the assessment within 45 days after delivery of the request for reasons.

(5) The period for providing reasons may be extended by SARS if a SARS official is satisfied that more time is required by SARS to provide reasons due to exceptional circumstances, the complexity of the matter or the principle or the amount involved.

(6) An extension under subrule (5) may not be extended for a period exceeding 45 days and SARS must deliver a notice of the extension to the taxpayer before expiry of the 45 day period referred to in subrule (4).

(7) The provisions of reasons by SARS under this rule is final.”

The time periods have been changed. Under the previous rule 3 a taxpayer was allowed an extension of 60 days; however the period is now only 45 days. Furthermore SARS was under the previous rule 3 required to furnish reason within 30 days, now SARS has a period of 45 days within which to reply to a request for reasons.

However the periods as provided for are in the opinion of the writer speedier and may allow for prompt settlement of matters.

An interesting provision in rule 6 is sub rule 6(7) where it is stated that *“the provisions of reasons by SARS under this rule is final.”* Does this mean that the reason as provided for are final and a taxpayer must now accept those reasons as they stand.

The court in *CSARS v Sprigg Investment 117 CC (36/10) [2010] ZASCA 172* (decided under the repealed provision of the Income Tax Act) said the following regarding reasons for an assessment:

- *“The duty to give reasons, proceeded the argument, requires more than furnishing actual reasons; it entails a duty to rationalise the decision and obliges the decision-maker to ‘apply his mind to the decisional referents which*

*ought to have been taken into account' where, as here, the actual reasons given fell short of the Phambili test. It was clear from counsel's submissions that what was actually being challenged by the respondent were the very merits of the assessments and that it understood the order of tax court to entail, in its words, 'the Commissioner's reconsideration of the decisions embodied in his assessments'.*¹⁴⁰

- *"We are not here reviewing the commissioner's reasons for the assessments but merely adjudicating an application antecedent to that process. Thus, the cogency or rationality of the reasons is not yet in the balance."*¹⁴¹
- *"The test envisages that the decision in issue may involve 'an unwarranted finding of fact, or an error of law, which is worth challenging' and merely requires the decision-maker to explain why he decided the way he did to enable the requester of reasons to launch his challenge. It is only when the objection itself is adjudicated under judicial review that the PAJA test which the respondent wants imposed comes into play. The question now is simply whether the respondent has sufficiently been furnished with the commissioner's actual reasons for the assessments to enable it to formulate its objection thereto."*¹⁴²

It should be remembered that before a taxpayer proceeds to object to an assessment he/she requests reasons for the assessment. In the context of a jeopardy assessment this will be very important in that it will enable a taxpayer to ascertain what the reasons for the assessment were.

¹⁴⁰ 117 CC (36/10) [2010] ZASCA 172 at 13.

¹⁴¹ 117 CC (36/10) [2010] ZASCA 172 at 14.

¹⁴² *Ibid.*

n.) Constitutionality of the powers of SARS officials in carrying out jeopardy assessments:

From the above there are instances where a taxpayer may have to deal with a senior SARS official and it is important to examine this definition in the context of jeopardy assessments.

Section 1 of the TAA defines a SARS official as follows:

“SARS official” means—

(a) the Commissioner,

(b) an employee of SARS; or

(c) a person contracted by SARS for purposes of the administration of a tax Act and

who carries out the provisions of a tax Act under the control, direction or supervision

of the Commissioner.

Section 6(3) of the TAA indicates the following regarding a senior SARS official:

“(3) Powers and duties required by this Act to be exercised by a senior SARS official

must be exercised by—

(a) the Commissioner;

(b) a SARS official who has specific written authority from the Commissioner to do so; or

(c) a SARS official occupying a post designated by the Commissioner for this purpose.”

This definition is important in that it is the senior SARS official who may apply to the High Court *ex parte* for a preservation order¹⁴³, who may suspend the payment of tax

¹⁴³ S 163 of the TAA.

pending objection and appeal¹⁴⁴ and who deals with assessments. This definition needs to be examined in light of PAJA as well.

Section 33 of the Constitution of the Republic of South Africa, 1996 states that:

- 1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- 2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

The national legislation that has been enacted to safeguard the citizens of South Africa is the Promotion of Administrative Justice Act 3 of 2000 (*hereinafter referred to as "PAJA"*). The reason we will look at PAJA¹⁴⁵ is because of the new type of assessment introduced by the TAA¹⁴⁶ namely jeopardy assessment and the definition of senior SARS official. Section 6 of PAJA¹⁴⁷ governs judicial review. In the case of review we are not concerned with the merits of the decision but whether it was arrived at in an acceptable fashion. As the Supreme Court of Appeal, stated in *Rustenberg Platinum Mines Ltd. (Rustenberg Section) v Commission for Conciliation, Mediation and Arbitration*¹⁴⁸ "*the focus is on the process, and on the way in which the decision-maker came to the challenged conclusion.*"¹⁴⁹ With regard to this area of the law we will only look at briefly as this goes beyond the scope of the topic.

In the recent case of *Hella South Africa (Pty) Ltd v CSARS*, 65 SATC 401 the High Court made it clear that, where a decision is taken on review, the grounds on which the review is brought have to be indicated. The effect of the constitutional grounds of review is not that a decision can be taken on review merely because it is wrong in law.¹⁵⁰

¹⁴⁴ S 164 of the TAA.

¹⁴⁵ Act 3 of 2000.

¹⁴⁶ Act 28 of 2011.

¹⁴⁷ Act 3 of 2000.

¹⁴⁸ 2007 (1) SA 576 (SCA) at para 31.

¹⁴⁹ Hoexter C (2007) 104-105.

¹⁵⁰ *Hella South Africa (Pty) Ltd v CSARS*, 65 SATC 401

The common-law grounds on which an administrative decision may be reviewed were laid down in *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A) as follows:

*“Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the behests of the statute and the tenets of natural justice Such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated Some of these grounds tend to overlap.”*¹⁵¹

In the case of *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC) the court stated the following regarding administrative action:

- it must be a decision;
- by an organ of State;
- exercising a public power or performing a public function;
- in terms of any legislation;
- that adversely affects someone’s rights;
- which has a direct, external, legal effect; and
- that does not fall under any of the exclusions listed in s 1 of PAJA.¹⁵²

The South African Revenue Service is an organ of state, but not every act of SARS will constitute ‘administrative action’; for example, it seems that any purely investigatory action by SARS will not constitute ‘administrative action’, *inter alia* because it does not of itself, ‘adversely affect’ the rights of any person.¹⁵³

¹⁵¹ *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 3 SA 132 (A).

¹⁵² *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC) at 181. See also De Koker “*Silke on tax administration (online)*” at par 3.25.

¹⁵³ *Ibid.*

However, for purposes of PAJA, any ‘decision’ (which, as defined in PAJA, includes a proposed decision or a failure to take a decision) by SARS, that adversely affects someone’s rights and which has a direct, external effect, constitutes ‘administrative action’ in so far as that decision entails SARS’ exercising ‘a power in terms of the Constitution’ or a ‘public power’ or performing a public function in terms of any legislation.¹⁵⁴

In the case of *Chairman, State Tender Board v Digital Voice Processing 2012 (2) SA 16 (SCA)*, the court dealt with the issue of ripeness for administrative action. The court said the following:

“the appropriate criterion by which the ripeness of the action in question is to be measured is whether prejudice has already resulted or is inevitable, irrespective of whether the action is complete or not.”

It seems, therefore, that in the tax context the following ‘decisions’, *inter alia*, by SARS constitute ‘administrative action’ which is within the purview of PAJA, and which – to be in accordance with the Bill of Rights – must be procedurally fair, namely:

- issuing an assessment to tax;
- the imposition of additional tax;
- a decision whether or not to conduct an audit of the taxpayer’s affairs;
- a decision to file a statement with the clerk of the court which has the effect of a civil judgement.
- Decisions that adversely affect the rights of any person.¹⁵⁵

Significantly, therefore, the requirement of procedural fairness goes beyond that which affects the ‘rights of a person’, and extends into the realm of a person’s ‘legitimate expectations’.¹⁵⁶ For an expectation to be valid, the fact that it exists in

¹⁵⁴ *Ibid.*

¹⁵⁵ De Koker “*Silke on tax administration*” (online) at par 3.25.

¹⁵⁶ *Quinella Trading (Pty) Ltd v Minister of Rural Development* 2010 (4) SA 308 (LCC) at par 319B.

the mind of the person in question does not suffice; the expectation must be objectively legitimate in the legal sense.¹⁵⁷

Sub-section 3(2) of PAJA deals with administrative action and each case must be decided on its own merits. Because sub-section 94(2) of the TAA allows for a taxpayer to take matter on review, this may result in the section being constitutional. However this is up to the courts to decide.

The general principle that emerges from section 3 of PAJA is that (save where a different procedure is permissible in terms of sub-section 3(5)) in order for administrative action to be 'procedurally fair', as required by PAJA, an administrator must give adequate notice to the taxpayer of the nature and purpose of any proposed 'administrative action', and a clear statement of the administrative action, and must give the affected person a reasonable opportunity to make representations.¹⁵⁸

In *Joseph v City of Johannesburg*¹⁵⁹ the court stated that:

*"Procedural fairness . . . is concerned with giving people an opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants, but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy."*¹⁶⁰

¹⁵⁷ *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) at par 216.

¹⁵⁸ De Koker "*Silke on tax administration*" (online) at par 3.26.

¹⁵⁹ 2010 (4) SA 55 (CC) at 71C, at par 42.

¹⁶⁰ *Hoexter C* (2007) 326 – 327.

3.2.) Conclusion:

The issue of a jeopardy assessment is a narrow exception to the ordinary assessment procedure and is subject to the following limitations and rights of the affected taxpayer:¹⁶¹

- The SARS official intending to issue a jeopardy assessment must satisfy the Commissioner that a jeopardy assessment is necessary;¹⁶²
- An affected taxpayer may apply to the High Court for a review of the assessment on the basis that:¹⁶³
 - the amount is excessive,¹⁶⁴ or
 - the circumstances on which SARS relied to justify the making of the jeopardy assessment do not exist;¹⁶⁵

Prior notice will defeat the object of a jeopardy assessment, which is intended to enable SARS to collect taxes, on an expedited basis, in circumstances where the collection of tax is in jeopardy.¹⁶⁶ The impression is thus gained that the purpose of a jeopardy assessment under South African law is to shorten the period within which tax is payable and not to do away with the requirement to give notice of an assessment.¹⁶⁷

In *Contract Support Services v C: SARS*¹⁶⁸ the court held that not all administrative acts require the application of the *audi alteram partem*¹⁶⁹ rule, and that no notice or prior hearing is required where this would render the proposed act nugatory, as in the instant case, where notice or a hearing would have given the taxpayer the opportunity of spiriting away the funds to which SARS was laying claim.¹⁷⁰

¹⁶¹ See SARS "Short guide to the Tax Administration Act" (2012) at 36.

¹⁶² *Ibid.*

¹⁶³ See SARS "Short guide to the Tax Administration Act" (2012) at 36.

¹⁶⁴ *Ibid.*

¹⁶⁵ See SARS "Short guide to the Tax Administration Act" (2012) at 36.

¹⁶⁶ www.sars.gov.za/standingcommitteeonfinance/september/2011 at 41 - 42

¹⁶⁷ Lynette Olivier "Assessments under the Tax Administration Bill" JEF 2011 4(2).430.

¹⁶⁸ 1999 (3) SA 1133 (W), 61 SATC 338

¹⁶⁹ According to the rule a party to an administrative proceeding which may lead to action or a decision affecting his rights is entitled to present his case.

¹⁷⁰ 1999 (2) SA 957 (W), 61 SATC 163.

The question now is if SARS raises a jeopardy assessment and that assessment does not reflect the correct application of a tax Act to the prejudice of SARS or the fiscus can SARS now raise an additional assessment. A jeopardy assessment is issued by SARS based on an estimate, so the possibility of prejudice is high. The provisos as mentioned in sub-section 99(2)(a) relating to fraud, misrepresentation or non-disclosure of material facts may be applicable in the case of a jeopardy assessment. The problem now is that SARS can raise the additional assessment after the three or five year period and this leaves the taxpayer at constant unease.

It is implicit that a jeopardy assessment may be enforced by SARS in the same manner as any other kind of assessment.¹⁷¹ Indeed, there would be no point for SARS to issue such an assessment unless it intended to take immediate steps to enforce payment of the allegedly jeopardised (prospective) tax debt.¹⁷²

It seems, therefore, that in the tax context the following ‘decisions’, *inter alia*, by SARS constitute ‘administrative action’ which is within the purview of PAJA, and which – to be in accordance with the Bill of Rights – must be procedurally fair, namely:

- issuing an assessment to tax;
- the imposition of additional tax;
- a decision whether or not to conduct an audit of the taxpayer’s affairs;
- a decision to file a statement with the clerk of the court which has the effect of a civil judgement.
- Decisions that adversely affect the rights of any person.¹⁷³

¹⁷¹ See SARS “Short guide to the Tax Administration Act” (2012) at 48.

¹⁷² *Ibid.*

¹⁷³ De Koker “*Silke on tax administration*” (online) at par 3.25

CHAPTER FOUR

JEOPARDY ASSESSMENTS UNDER U.S.A. LAW

4.1) Position in foreign jurisdiction:

4.1.1) United States of America:

Jeopardy assessments have been used in the USA for several years and as such this will provide guidance on how the law works for jeopardy assessment. An explanation of the sections in Title 26 of the Internal Revenue Code of 1986 (hereinafter referred to as the “IRC”) will be quoted and explained.

Furthermore in the Internal Revenue Manual available on the Internal Revenue Service (hereinafter referred to as the “IRS”) website¹⁷⁴, the IRS provides guidance and an explanation on how jeopardy assessments operate. In part 4 the examining process is dealt with and in part 5 the collecting process is dealt with. In order to avoid repetition both parts will be examined below in one heading.

Before proceeding to examine how jeopardy assessments operate, a brief background of assessments in general is required. Section 6201(a) of the IRC states that, *“the Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties)”*.

Section 6203 of the IRC states that, *“the assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of the assessment.”* Section 6203 of the IRC governs the law regarding method of assessment.

There are two principal types of jeopardy procedures: Termination assessments and jeopardy assessments. In termination assessments, the Secretary or his delegate is

¹⁷⁴ www.irs.gov/irm.

authorized to terminate a taxpayer's taxable year immediately and to assess and collect the tax for that part of the year which has elapsed.¹⁷⁵

Under normal IRS assessment and collection procedures, a taxpayer has ample notice that the Commissioner proposes to assess and collect additional taxes from him.¹⁷⁶ If settlement negotiations reach an impasse, the district director will issue a statutory notice of deficiency, or "90-day letter," informing the taxpayer of the amount of the deficiency the director intends to formally assess and collect.¹⁷⁷

By petitioning the Tax Court, the taxpayer further forestalls IRS collection activities until the decision of the Tax Court becomes final.¹⁷⁸ Only after expiration of the 90-day period, and conclusion of Tax Court litigation and appeals therefrom, may the IRS make its assessment and formal demand for payment.¹⁷⁹ The taxpayer is then given a 10-day grace period before the IRS can levy on his property.¹⁸⁰

a.) Brief summary of the tax system in the USA:

Taxes in the United States are administered by literally hundreds of tax authorities.¹⁸¹ At the federal level there are three tax administrations.¹⁸² Most domestic federal taxes are administered by the Internal Revenue Service, which is part of the Department of the Treasury.¹⁸³

In the topic at hand we are only interested in the functions and duties of the Internal Revenue Service (hereinafter referred to as the "IRS").

¹⁷⁵ Margaret M. Armen "Assessing internal revenue service jeopardy procedures: recent legislative and judicial reforms" *Cleveland State Law Review* (1977) Review at 414.

¹⁷⁶ JE Gleason Jr. "IRS summary assessment powers: abuse and control" *Brigham Young University Law Review* (1976) at 233.

¹⁷⁷ JE Gleason Jr. "IRS summary assessment powers: abuse and control" *Brigham Young University Law Review* (1976) at 233.

¹⁷⁸ *Ibid.*

¹⁷⁹ JE Gleason Jr. "IRS summary assessment powers: abuse and control" *Brigham Young University Law Review* (1976) at 234.

¹⁸⁰ *Ibid.*

¹⁸¹ http://en.wikipedia.org/wiki/Taxation_in_the_United_States#Tax_administration.

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

The Federal tax law is administered primarily by the Internal Revenue Service, a bureau of the U.S. Treasury.¹⁸⁴ The U.S. tax code is known as the Internal Revenue Code of 1986 as amended (Title 26 of the U.S. Code).¹⁸⁵ Other federal tax laws are found in Title 26 of the Code of Federal Regulations; proposed regulations issued by the Internal Revenue Service (IRS); temporary regulations issued by the IRS; revenue rulings issued by the IRS; private letter rulings issued by the IRS; revenue procedures, policy statements, and technical information releases issued by the IRS.¹⁸⁶

There is a special trial court which hears disputes between the IRS and taxpayers regarding federal income, estate and gift tax underpayments - the U.S. Tax Court.¹⁸⁷ The Tax Courts' decisions may be appealed to the Federal District Court of Appeals and final review is retained by the highest court in the land, the U.S. Supreme Court.¹⁸⁸

Jeopardy assessments are made in situations where prior to the assessment of a deficiency or tax, it is determined that collection of such deficiency or tax, would be endangered if regular assessment and collection procedures are followed.¹⁸⁹

Jeopardy assessments are governed by the Internal Revenue Code - Subtitle F - Procedure and Administration – Chapter 70 – jeopardy, receiverships, etc. - subchapter A – jeopardy - part II – jeopardy assessments – section 6861 to section 6864.

¹⁸⁴ <http://www.hg.org/tax.html>.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ http://www.irs.gov/irm/part4/irm_04-004-017.html#d0e133.

b.) Extracts from the Internal Revenue Code:

There are several sections from the Internal Revenue Code of 1986 which are of importance. The Internal Revenue Code of 1986 provides for different types of jeopardy assessments and only these sections will be quoted here. The sections are as follows:

Section 6861: Jeopardy assessments of income, estate, gift, and certain excise taxes.¹⁹⁰

(a) Authority for making

If the Secretary believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary for the payment thereof.

(b) Deficiency letters

If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 6212(a), then the Secretary shall mail a notice under such subsection within 60 days after the making of the assessment.

(e) Expiration of right to assess

A jeopardy assessment may not be made after the decision of the Tax Court has become final or after the taxpayer has filed a petition for review of the decision of the Tax Court.

¹⁹⁰ Internal Revenue Code of 1986.

Section 6862: Jeopardy assessment of taxes other than income, estate, gift, and certain excise taxes.¹⁹¹

(a) Immediate assessment

If the Secretary believes that the collection of any tax (other than income tax, estate tax, gift tax, and the excise taxes imposed by chapters 41, 42, 43, and 44) under any provision of the internal revenue laws will be jeopardized by delay, he shall, whether or not the time otherwise prescribed by law for making return and paying such tax has expired, immediately assess such tax (together with all interest, additional amounts, and additions to the tax provided for by law). Such tax, additions to the tax, and interest shall thereupon become immediately due and payable, and immediate notice and demand shall be made by the Secretary for the payment thereof.

(b) Immediate levy

For provision permitting immediate levy in case of jeopardy, see section 6331(a).

Sec. 6851 termination assessment of income taxes¹⁹²

(a) Authority for making

(1) In general

If the Secretary finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act (including in the case of a corporation distributing all or a part of its assets in liquidation or otherwise) tending to prejudice or to render wholly or partially ineffectual proceedings to collect the income tax for the current or the immediately preceding taxable year unless such proceeding be brought without delay, the Secretary shall immediately make a determination of tax for the current taxable year or for the preceding taxable year, or both, as the case may be, and notwithstanding any other provision of law, such tax shall become immediately due and payable. The Secretary shall immediately assess the amount of the tax so

¹⁹¹ Internal Revenue Code of 1986.

¹⁹² Internal Revenue Code of 1986.

determined (together with all interest, additional amounts, and additions to the tax provided by law) for the current taxable year or such preceding taxable year, or both, as the case may be, and shall cause notice of such determination and assessment to be given the taxpayer, together with a demand for immediate payment of such tax.

(2) Computation of tax

In the case of a current taxable year, the Secretary shall determine the tax for the period beginning on the first day of such current taxable year and ending on the date of the determination under paragraph (1) as though such period were a taxable year of the taxpayer, and shall take into account any prior determination made under this subsection with respect to such current taxable year.

(3) Treatment of amounts collected

Any amounts collected as a result of any assessments under this subsection shall, to the extent thereof, be treated as a payment of tax for such taxable year.

(4) This section inapplicable where section 6861 applies

This section shall not authorize any assessment of tax for the preceding taxable year which is made after the due date of the taxpayer's return for such taxable year (determined with regard to any extensions).

(b) Notice of deficiency

If an assessment of tax is made under the authority of subsection (a), the Secretary shall mail a notice under section 6212(a) for the taxpayer's full taxable year (determined without regard to any action taken under subsection (a)) with respect to which such assessment was made within 60 days after the later of

(i) the due date of the taxpayer's return for such taxable year (determined with regard to any extensions), or

(ii) the date such taxpayer files such return. Such deficiency may be in an amount greater or less than the amount assessed under subsection (a).

c.) Internal Revenue Manual:

If collection of an unassessed liability is in jeopardy, the IRS may make an immediate assessment and pursue collection without the need to follow normal assessment and collection procedures. As soon as a "jeopardy assessment" is made, the tax, penalties, and interest become due and payable.¹⁹³

IRC 6861 authorizes assessment where the due date for filing of a return has expired and applies to jeopardy assessments of income, estate, gift and certain excise taxes.¹⁹⁴

IRC 6862 applies to taxes other than income, estate, gift and certain excise taxes, that is, employment and other excise taxes whether or not the due date for filing and paying such tax has expired.¹⁹⁵

Termination assessments are very similar to jeopardy assessments except that, under the provisions of IRC 6851, they are made only for the current or immediately preceding taxable year and can be made at any time prior to the due date for filing those years' returns.¹⁹⁶

The term "jeopardy assessment," generally speaking, may refer to either a termination assessment under IRC 6851, or a jeopardy assessment under IRC 6861 and IRC 6862.¹⁹⁷

A termination assessment applies to the current tax year, or the immediately preceding tax year if the due date for the return has not passed. If jeopardy is determined, the taxpayer's tax year is terminated and treated as a complete tax year for assessment purposes. Termination assessments are made for income taxes only.¹⁹⁸

¹⁹³ www.irs.gov/irm/part5/irm_o5-017-015.html at par 5.17.15.1.

¹⁹⁴ *Ibid.*

¹⁹⁵ www.irs.gov/irm/part5/irm_o5-017-015.html at par 5.17.15.1.

¹⁹⁶ *Ibid* at par 5.1.4.2.

¹⁹⁷ www.irs.gov/irm/part5/irm_o5-017-015.html at par 5.17.15.2.

¹⁹⁸ *Ibid.*

A jeopardy assessment applies to a closed tax year, where the due date for filing a return has expired. For income, estate, gift, and certain excise taxes, assessment is made pursuant to IRC 6861. For other kinds of taxes (employment and other excise taxes), assessment is made pursuant to IRC 6862.¹⁹⁹

Treas. Reg. sub-section 301.6861-1(a), by reference to Treas. Reg. sub-section 1.6851-1(a), provides that jeopardy will exist if the IRS finds that the taxpayer:

- is (or appears to be) planning to leave the United States or to remove his or her property from the United States,
- is concealing himself or herself or his or her property within the United States, or
- is doing any other act threatening the collection of tax for the current or the preceding taxable year, such as transferring or dissipating assets, making himself or herself financially insolvent, or, in the case of a corporation, liquidating substantially all of its assets.²⁰⁰

In determining whether one of the three circumstances stated above is present, there are many factors which the court may consider.²⁰¹ The court²⁰² also may consider:

- whether the taxpayer possesses, or deals in, large amounts of cash;
- whether prior tax returns report little or no income despite taxpayer's possession of large amounts of cash;
- whether assets have been dissipated, such as through forfeiture, expenditures for attorney's fees, or appearance bonds;
- whether there is a lack of assets from which potential tax liability can be collected;
- whether the taxpayer has used aliases which makes it more difficult to locate either the taxpayer or his assets;
- whether the taxpayer has failed to supply appropriate financial information;

¹⁹⁹ www.irs.gov/irm/part5/irm_o5-017-015.html at par 5.17.15.2.

²⁰⁰ *Ibid* at par 5.17.15.2.1.

²⁰¹ *Ibid*.

²⁰² *Magluta v. United States*, 952 F.Supp. 798 (S.D. Fla. 1996).

- whether the taxpayer has used multiple addresses, making it hard to find the taxpayer;
- whether taxpayer has a history of illegal activity, convictions, or probable cause to believe that the taxpayer was engaged in illegal business activities;
- whether taxpayer has a history of concealing assets overseas;
- whether taxpayer recently sold or transferred property;
- whether taxpayer transferred property to relatives for inadequate consideration; and
- whether taxpayer transferred property in the wake of an investigation.²⁰³

Only the Area Director has the authority to determine that a jeopardy assessment should be made. Written approval by the Chief Counsel or his or her delegate is also required.²⁰⁴

Sufficient, objective facts must support the reasonableness of the determination that collection is in jeopardy. The amount assessed must be supportable, i.e. there must be a reasonable, factual basis for determining that the taxpayer received income.²⁰⁵

For income, estate, gift, and certain excise taxes, a statutory notice of deficiency for the jeopardy assessment must be issued within 60 days following assessment.²⁰⁶

After a jeopardy assessment is made, the IRS is required to send notice and demand to the taxpayer for the amount of the jeopardy assessment. Regardless of whether the taxpayer has filed a petition with the Tax Court, the amount of the assessment must be paid within 10 days unless a bond is filed as provided in IRC 6863.²⁰⁷

²⁰³ www.irs.gov/irm/part5/irm_o5-017-015.html at par 5.17.15.2.1.

²⁰⁴ *Ibid* at par 5.17.15.2.2.

²⁰⁵ *Ibid*.

²⁰⁶ www.irs.gov/irm/part5/irm_o5-017-015.html at par 5.17.15.2.2.

²⁰⁷ *Ibid* at par 5.17.15.2.3.

The bond must be equal to the amount of the jeopardy assessment the collection of which the taxpayer is seeking to stay, plus interest. Upon the filing of such a bond, collection of the amount covered by the bond is stayed.²⁰⁸

If any person is in possession of cash or a cash equivalent in excess of \$10,000.00, and does not claim it as his or as that of a readily identifiable person, IRC 6867 provides that the IRS may presume that it represents gross income of a single unidentified individual for that taxable year and that, for purposes of IRC 6861 (Jeopardy Assessments of Income, Estate, Gift, and Certain Excise Taxes), collection of the tax will be jeopardized by delay.²⁰⁹

IRC 7429(a)(1) requires that within five days after the jeopardy assessment or levy is made, the IRS must send the taxpayer a written statement of the information relied on in making the assessment or levy. The notice must state the specific facts and reasons (not mere conclusions) relied on by the IRS; if the notice states merely conclusions, the assessment or levy may be held invalid.²¹⁰

Within 30 days after the written statement is furnished (or 30 days after the five-day period expires), the taxpayer may ask for administrative review. This request requires the IRS to determine whether making the assessment or levy was reasonable and whether the amount assessed was appropriate under the circumstances. The request by the taxpayer for administrative review is a prerequisite to judicial review.²¹¹

The taxpayer may seek judicial review within 90 days after the earlier of the date the IRS notifies the taxpayer of the administrative determination or 90 days following the 16th day after the taxpayer requests administrative review. Normally the proper forum for review is the United States District Court, but the Tax Court has concurrent jurisdiction where a Tax Court petition was filed prior to assessment or levy and one

²⁰⁸ *Ibid.*

²⁰⁹ www.irs.gov/irm/part5/irm_o5-017-015.html at par 5.17.15.3.

²¹⁰ *Ibid* at par 5.17.15.5.

²¹¹ www.irs.gov/irm/part5/irm_o5-017-015.html at par 5.17.15.5.

or more of the taxable periods before the Tax Court is covered by the jeopardy assessment.²¹²

The court's review is limited to the reasonableness of the assessment or levy and the appropriateness of the amount. The court has 20 days to make its determination. However, the taxpayer, on reasonable grounds, may request an extension of up to 40 days.²¹³

d.) Explanation of jeopardy assessments in the Internal Revenue Code:

Jeopardy assessments:

Lord Wrenbury in the case of *Whitney v. Inland Revenue Commissioners* (1926) A.C. 37 (this case was decided before the Internal Revenue Code of 1986) had the following to say:

*"Once that it is fixed that there is liability, it is antecedently highly improbable that the statute should not go on to make that liability effective. A statute is designed to be workable, and the interpretation thereof by a court should be to secure that object, unless crucial omission or clear direction makes that end unattainable. Now there are three stages in the imposition of a tax; there is the declaration of liability that is the part of the statute which determines what persons in respect of what property are liable. Next there is the assessment. Liability does not depend on assessment. That, ex hypothesi, has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly come the methods of recovery, if the person taxed does not voluntarily pay."*²¹⁴

Prior to making a jeopardy assessment, at least one of the factors outlined in Policy Statement P-4-88²¹⁵ must be present. Those factors are: (a) the taxpayer is or appears to be designing quickly to depart from the United States or to conceal him/herself; (b) the taxpayer is or appears to be designing quickly to place his/her

²¹² www.irs.gov/irm/part5/irm_o5-017-015.html at par 5.17.15.6.

²¹³ *Ibid.*

²¹⁴ *Whitney v. Inland Revenue Commissioners* (1926) A.C. 37.

²¹⁵ http://www.irs.gov/irm/part1/irm_01-002-013.html.

property beyond the reach of the government either by removing it from the United States, by concealing it, by dissipating it, or by transferring it to another person; or (c) the taxpayer's financial solvency is or appears to be imperiled.²¹⁶

While jeopardy assessments may be appropriate in many types of cases, they most likely will be more prevalent in cases involving taxpayers engaged in organized crime, wagering cases, cases involving taxpayers who are believed to be receiving income from illegal sources, and cases involving taxpayers known or suspected of having plans to leave the United States without making provisions for tax payments.²¹⁷

Within five days of the issuance of a jeopardy assessment, the taxpayer must be provided a written statement of the information upon which the Service relied in making the assessment.²¹⁸ To the extent possible, every effort should be made to deliver the statement in person.²¹⁹ The taxpayer has 30 days from the date of receiving the written statement of the reasons for making the jeopardy assessment, or 35 days from the date of the assessment to file a written request for review of the assessment action which will be reviewed by the Appeals Office.²²⁰ If possible, an immediate conference will be held and a decision made within 15 days after the request is filed.²²¹ In addition, under the provisions of IRC 7429(b)(1), taxpayers can initiate judicial review of the assessment, if they have first requested an administrative review.²²²

If administrative or judicial review finds that the assessment was not proper or that it was excessive, abatement, in whole or in part, must be made.²²³

A jeopardy assessment is only appropriate after expiration of the taxpayer's tax period and the determination of a deficiency.²²⁴

²¹⁶ Ketchum and Hallihan "Jeopardy and termination assessments" EO-CPE (1997) at 1.

²¹⁷ Ketchum and Hallihan "Jeopardy and termination assessments" EO-CPE (1997) at 2.

²¹⁸ *Ibid.*

²¹⁹ Ketchum and Hallihan "Jeopardy and termination assessments" EO-CPE (1997) at 2.

²²⁰ *Ibid.*

²²¹ Ketchum and Hallihan "Jeopardy and termination assessments" EO-CPE (1997) at 2.

²²² *Ibid.*

²²³ Ketchum and Hallihan "Jeopardy and termination assessments" EO-CPE (1997) at 2.

By invoking the jeopardy assessment power, the IRS may make an immediate assessment and demand for payment, without prior notice to the taxpayer.²²⁵ Typically, the taxpayer is unable to immediately tender payment of the full jeopardy assessment.²²⁶

Furthermore, because the jeopardy assessment power is necessary in situations in which delay may endanger the collection of the revenue, the 10-day grace period prior to levy does not apply²²⁷, and assessment, demand for payment, and seizure of the taxpayer's property in satisfaction of the assessment can be virtually simultaneous. The ultimate effect on the taxpayer may be disastrous, rendering him impecunious and often permanently ruining his business.²²⁸

The statutory notice of deficiency, or 90-day letter, which ordinarily precedes and forestalls assessment and collection, is still required in the jeopardy assessment context, but need only be sent within 60 days after the jeopardy assessment has been made.²²⁹

As mentioned earlier, the jeopardy assessment power may only be exercised after the normal expiration of the taxable year.²³⁰

Termination assessments:

Occasionally, however, the IRS discovers that collection of the current year's tax will be jeopardized by waiting until the end of the year.²³¹ Hence, section 6851 of the IRC

²²⁴ *Laing v. United States*, 96 S. Ct. 473, 476, 480 (1976)

²²⁵ JE Gleason Jr. "IRS summary assessment powers: abuse and control" Brigham Young University Law Review (1976) at 236.

²²⁶ *Ibid* at 236.

²²⁷ Internal revenue code s6331(a) provides:

"If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section."

²²⁸ JE Gleason Jr. "IRS summary assessment powers: abuse and control" Brigham Young University Law Review (1976) at 237.

²²⁹ *Ibid*.

²³⁰ JE Gleason Jr. "IRS summary assessment powers: abuse and control" Brigham Young University Law Review (1976) at 238.

²³¹ *Ibid*.

provides that the IRS must immediately declare the taxpayer's taxable year terminated and determine his tax liability for the shorter period.²³²

The tax computed becomes immediately due and payable, just as if the taxable year had come to a normal close, and the Service must demand immediate payment.²³³

Until recently, a termination assessment was thought to be considerably more onerous than a jeopardy assessment because the IRS asserted that section 6861, which requires issuance of a 90-day letter within 60 days of a jeopardy assessment, did not apply to termination assessment.²³⁴ Hence, at the earliest, the IRS would send a 90-day letter to the taxpayer at the end of his taxable year, but could conceivably wait until the three-year statute of limitations had run following the close of his taxable year.²³⁵

The Commissioner's interpretation was recently invalidated by the Supreme Court in *Laing v. United States*,²³⁶ where it was held that termination of a tax year gives rise to a deficiency and that any subsequent summary assessment must be made pursuant to section 6861 jeopardy assessment procedure. Thus, it is now clear that the 90-day letter must be sent within 60 days after a jeopardy assessment following either termination or normal expiration of a taxable year.²³⁷

Collection of a deficiency:

Furthermore in section 6861 and section 6862 mention is made of “*collection of a deficiency*.” Section 6211 and section 6212 deal with the definition of deficiency and notice of deficiency, respectively.

²³² JE Gleason Jr. “IRS summary assessment powers: abuse and control” Brigham Young University Law Review (1976) at 238..

²³³ JE Gleason Jr. “IRS summary assessment powers: abuse and control” Brigham Young University Law Review (1976) at 238.

²³⁴ *Ibid.*

²³⁵ JE Gleason Jr. “IRS summary assessment powers: abuse and control” Brigham Young University Law Review (1976) at 238.

²³⁶ 96 S. Ct. 473 (1976).

²³⁷ JE Gleason Jr. “IRS summary assessment powers: abuse and control” Brigham Young University Law Review (1976) at 239.

Section 6211(a) of the IRC states that:

“For purposes of this title in the case of income, estate, and gift taxes imposed by subtitles A and B and excise taxes imposed by chapters 41, 42, 43, and 44 the term "deficiency" means the amount by which the tax imposed by subtitle A or B, or chapter 41, 42, 43, or 44 exceeds the excess of –

(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over -

(2) the amount of rebates, as defined in subsection (b)(2), made.”

Section 6212(a) of the IRC states that:

“If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitles A or B or chapter 41, 42, 43, or 44 he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail. Such notice shall include a notice to the taxpayer of the taxpayer's right to contact a local office of the taxpayer advocate and the location and phone number of the appropriate office.”

Sub-section 6212(b)(1) of the IRC allows for the notice to be served at the taxpayers last known address and this will be sufficient enough.

Sub-section 6212(c)(1) allows the taxpayer to file a petition to the tax court within the prescribed time limits and this will preclude the Secretary from determining further deficiency. However the section further states that in the case of fraud, termination assessment²³⁸ and jeopardy assessment²³⁹.

²³⁸ S 6851 of IRC.

²³⁹ S 6861 of IRC.

Section 6213 of the IRC contains restrictions applicable to deficiencies. Section 6213(a) of the IRC states that:

“Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency.”

The section allows for a 90 day period within which a taxpayer can file a petition to the tax court for a redetermination of the deficiency. It should be noted that section 6861(b) of the IRC states that if no notice has been issued under section 6212(a) than the Secretary, *“shall mail a notice under such subsection within 60 days after the making of the assessment”²⁴⁰.*

Section 6213(a) of the IRC code goes on further to state that:

“no assessment of a deficiency in respect of any tax imposed by subtitle A, or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final.”

However what has been stated above does not apply in the case of section 6861, section 6851 and section 6852 of the IRC.²⁴¹

²⁴⁰ S 6861(b) of the IRC.

²⁴¹ S 6213(a) of the IRC.

e.) Case law:

The first case that will be looked at is the case of *Garwood v Indiana Department of State Revenue* 953 N.E.2d 682 (2011). This case was decided in the tax court of Indiana. The State of Indiana Tax Code sub-section 6-8.1-5--3²⁴² provides as follows for jeopardy assessments:

If at any time the department finds that a person owing taxes intends to

[1] quickly leave the state,

[2] remove his property from the state,

[3] conceal his property in the state, or

[4] do any other act that would jeopardize the collection of those taxes,

the department may declare the person's tax period at an end, may immediately make an assessment for the taxes owing, and may demand immediate payment of the amount due, without providing the notice required.

In the case of *Garwood v Indiana Department of State Revenue* 953 N.E.2d 682 (2011) the facts were briefly as follows:

- The Department assessed the Garwoods with income tax liabilities for the 2007 and 2008 tax years and sales tax liabilities for the tax periods ending on December 31, 2007, through April 30, 2009;²⁴³
- On June 29, 2009, Virginia and Kristin Garwood (the Garwoods) initiated an original tax appeal, challenging the Indiana Department of State Revenue's (Department) issuance of sixteen jeopardy tax assessments for portions of the 2007 through 2009 tax years.²⁴⁴

²⁴² Indiana Code, 2011(as amended) – Title 6 – taxation.

²⁴³ *Garwood v Indiana Department of State Revenue* 953 N.E.2d 682 (2011)

²⁴⁴ *Ibid.*

The court found as follows:

- Indeed, the use of a jeopardy assessment is an extraordinary measure because it allows the state to deprive a taxpayer of property without first providing constitutionally guaranteed notice or an opportunity to be heard;²⁴⁵
- As a result, our Legislature very narrowly tailored the Department's jeopardy assessment power to further the essential state interest of exercising its power to tax when collection is at risk;²⁴⁶
- The Department may issue a jeopardy assessment when it determines a person owing taxes intends to quickly leave the state thereby avoiding tax collection. The Department does not claim that the Garwoods were flight risks.²⁴⁷
- The Department does not claim that the Garwoods intended to remove property from the state.²⁴⁸
- Furthermore, taken as a whole, these actions suggest that the Garwoods were not properly reporting and paying taxes allegedly due, not that they intended not to pay, or preserve the wherewithal to pay, their taxes. The absence of facts demonstrating the Garwoods' intent to thwart collection is palpable.²⁴⁹
- While, the Garwoods' reliance on a tax specialist does not relieve them of personal responsibility to get their taxes right, it does not indicate their intent to thwart the tax system and circumvent the collection of taxes through regular proceedings. Thus, this is not a basis for the Department's use of jeopardy assessments in this case.²⁵⁰
- It cannot reasonably be inferred that the jeopardy assessment procedure was used in this case to protect the State's fiscal interests.²⁵¹
- The Court holds that the Department did not show the presence of the statutorily prescribed exigent circumstances that the Garwoods' intended to quickly leave the state, remove their property from the state, conceal their

²⁴⁵ 953 N.E.2d 682 (2011) at 11.

²⁴⁶ *Ibid.*

²⁴⁷ 953 N.E.2d 682 (2011) at 8.

²⁴⁸ *Ibid.*

²⁴⁹ 953 N.E.2d 682 (2011) at 12.

²⁵⁰ *Ibid.*

²⁵¹ 953 N.E.2d 682 (2011) at 15.

property in the state, or do any other act that would jeopardize the collection of taxes.²⁵²

The case of *Henderson v The United States of America* 949 F.Supp. 473 (1996) was decided under the IRC in the District Court. The facts of the case were as follows:

- On December 1, 1995, the Court conducted a hearing on Plaintiffs' Complaint to Set Aside Jeopardy Levy.²⁵³
- Between 1990 and 1994, Plaintiff Ricky Henderson was targeted by the Organized Crime Division of the Austin Police Department.²⁵⁴
- On July 19, 1994, the Austin Police Department searched the Hendersons' home pursuant to a warrant and seized \$446,829 in cash and numerous business records.²⁵⁵

The court²⁵⁶ found as follows:

- The critical inquiry is whether the Hendersons appeared to be designing quickly to place their assets beyond the reach of the government or that the collection was otherwise in jeopardy.²⁵⁷
- Absent demonstrating an unwillingness or inability on the part of the Hendersons to pay taxes that they owe, the tax deficiency is not in "jeopardy," and normal collection procedures should not be circumvented.²⁵⁸
- The assessment process deals with the decision to impose tax liability, while the jeopardy levy deals with the collection of taxes allegedly owed.²⁵⁹
- The government is not allowed to seize the assets of a taxpayer and then articulate reasons to justify the action which were unknown to or unconsidered by the agent at the time of the seizure.²⁶⁰

²⁵² *Ibid.*

²⁵³ 949 F.Supp. 473 (1996) at 15.

²⁵⁴ 949 F.Supp. 473 (1996) at 21.

²⁵⁵ *Ibid.*

²⁵⁶ 949 F.Supp. 473 (1996) at 11.

²⁵⁷ *Ibid.*

²⁵⁸ 949 F.Supp. 473 (1996) at 18.

²⁵⁹ *Ibid.*

²⁶⁰ 949 F.Supp. 473 (1996) at 14.

In the case of *Thompson v The United States of America Case No. 10 C 4455*, the facts of the case were briefly as follows:

- Plaintiff Marvel Thompson ("Plaintiff") filed a Complaint seeking review of a jeopardy assessment by the Internal Revenue Service.²⁶¹
- The IRS jeopardy assessment determined that Thompson had not filed income tax returns or paid taxes for tax years 2000 through 2004. The IRS considered the \$320,055.25 that was seized by the FBI as unreported income for tax year 2004. This resulted in \$107,565.00 in taxes owed, \$54,175.86 in penalties, and \$57,056.62 in interest (computed through February 10, 2010), for a total of \$218,797.48 owed for tax year 2004.²⁶²

The court²⁶³ held as follows:

- Reasonable under the circumstances' means something more than 'not arbitrary or capricious' and something less than 'supported by substantial evidence.'²⁶⁴
- "[T]he IRS does not have to show that the information it relied upon in making the assessments would be admissible at a trial on the merits and the government is not required to make its final case against the taxpayer, but only a preliminary showing of reasonableness."²⁶⁵
- The statute requires a court to find the assessment unreasonable or the amount assessed inappropriately *before* the court may order the government to abate the assessment.²⁶⁶
- The general test for reviewing the reasonableness of an assessment involves an inquiry into whether: (1) the taxpayer is or appears to be designing to leave the United States or to conceal him or herself, (2) the taxpayer is or appears to be designing to hide, transfer, conceal, or dissipate his or her assets, or (3)

²⁶¹ *Case No. 10 C 4455* at 4.

²⁶² *Case No. 10 C 4455* at 8.

²⁶³ *Ibid.*

²⁶⁴ *Case No. 10 C 4455* at 9.

²⁶⁵ *Ibid.*

²⁶⁶ *Case No. 10 C 4455* at 11.

the taxpayer's financial solvency appears to be imperiled. If any of the above conditions are met, the jeopardy assessment is reasonable.²⁶⁷

- In determining if the amount assessed is appropriate, the focus of the analysis is on the method used to determine tax liability.²⁶⁸
- This review just determines if the assessment was done properly, and has no bearing on ultimate tax liability.²⁶⁹

In the case of *Varjabedian v The United States of America* 339 F.Supp.2d 140 (2004), the court had to decide on the judicial review of a jeopardy assessment. The court held as follows:

- However, the jeopardy proceeding "is of a summary nature and does not amount to a final determination of plaintiff's correct tax liability."²⁷⁰
- The taxpayer is first entitled to an administrative review of the reasonableness of the jeopardy actions" after which "the taxpayer may challenge the reasonableness of the jeopardy assessment and levy in a district court."²⁷¹
- The court's review "is limited to determining (1) whether making the assessment and levy is reasonable under the circumstances, and (2) whether the amount assessed is appropriate under the circumstances."²⁷²
- Due to the summary nature of the judicial proceeding, the court "can hear evidence that may be inadmissible in a trial on the merits."²⁷³
- The district court's determination is final and may not be reviewed by any other court.²⁷⁴
- The government need not ultimately be correct in thinking that collection was imperiled, rather, "[t]he government only needs to prove that the circumstances *appear* to jeopardize collection."²⁷⁵
- In sum, "[t]he Court concludes that [Varjabedian] was designing to place his property beyond the reach of the Government by concealing it, transferring it

²⁶⁷ *Ibid.*

²⁶⁸ *Thompson v The United States of America* Case No. 10 C 4455

²⁶⁹ *Ibid.*

²⁷⁰ *Varjabedian v The United States of America* 339 F.Supp.2d 140 (2004)

²⁷¹ *Wellek v. United States*, 324 F.Supp.2d 905 at par 910.

²⁷² *Varjabedian v The United States of America* 339 F.Supp.2d 140 (2004)

²⁷³ *Ibid.*

²⁷⁴ *Wellek v. United States*, 324 F.Supp.2d 905 at par 910.

²⁷⁵ *Ibid.*

or by dissipating it; hence, the determination that collection would be in jeopardy was reasonable."²⁷⁶

- Once the reasonableness of imposing the jeopardy proceeding has been established, the court must then consider whether the amount assessed was appropriate under the circumstances.²⁷⁷
- Due to the circumscribed nature of the review, the court must focus on the method of computation itself, rather than the ultimate amount assessed.
- Thus, the plaintiff must "show that the method of calculating the assessment amount is fatally defective, irrational, arbitrary, or unsupported."²⁷⁸

In the case of *Cohen v. Commissioner*, 266 F.2d 5 (9th Cir. 1959) (decided before the 1986 IRC amendments) the court held as follows:

*"When the Commissioner's determination has been shown to be invalid, the Tax Court must redetermine the deficiency. The presumption as to the correctness of the Commissioner's determination is then out of the case. The Commissioner and not the taxpayer then has the burden of proving whether any deficiency exists and if so the amount. It is not incumbent upon the taxpayer under these circumstances to prove that he owed no tax or the amount of the tax which he did owe."*²⁷⁹

In the case of *Estate of Mitchell v. Commissioner*, 250 F.3d 696(9th Cir. 2001) the court held as follows:

*"The burden of proof shifted to the Commissioner because the taxpayer established that the Commissioner's determination of a tax deficiency was arbitrary and excessive."*²⁸⁰

²⁷⁶ *Varjabedian v The United States of America* 339 F.Supp.2d 140 (2004)

²⁷⁷ *Ibid.*

²⁷⁸ *Varjabedian v The United States of America* 339 F.Supp.2d 140 (2004)

²⁷⁹ *Cohen v. Commissioner*, 266 F.2d 5 (9th Cir. 1959)

²⁸⁰ *Estate of Mitchell v. Commissioner*, 250 F.3d 696(9th Cir. 2001)

In the case of *Larson v. U.S.*, 2011 WL 2682991 (N.D.Cal., Slip Opinion, July 11, 2011), the court stated as follows:

- Within twenty days after the filing of an action for summary judicial review, the district court must make the following determinations: (1) whether the making of the jeopardy assessment is reasonable under the circumstances; (2) whether the jeopardy levy is reasonable under the circumstances; and (3) whether the amount of the jeopardy assessment is appropriate under the circumstances.

In order to explain the above requirements the writer will use a table.

Within twenty days after the filing of an action for summary judicial review, the district court must make the following determinations: (1) whether the making of the jeopardy assessment is reasonable under the circumstances; (2) whether the jeopardy levy is reasonable under the circumstances; and (3) whether the amount of the jeopardy assessment is appropriate under the circumstances.

1.) <u>Reasonableness of assessment and levy</u>	2.) <u>Appropriateness of amount</u>
The government bears the burden of showing that a jeopardy assessment or a jeopardy levy is reasonable under the circumstances.	The taxpayer bears the burden of showing that the amount of a jeopardy assessment was not appropriate under the circumstances.
If the IRS finds that the collection of a tax is in jeopardy, then a levy may be made without notice.	The notice of deficiency provided to Mr. Larson set forth a detailed explanation of the amounts assessed against

	him, and he has not shown any of those amounts to be inaccurate or unsupported.
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4.2.) Conclusion:

IRC 6861 authorizes assessment where the due date for filing of a return has expired and applies to jeopardy assessments of income, estate, gift and certain excise taxes.²⁸¹

IRC 6862 applies to taxes other than income, estate, gift and certain excise taxes, that is, employment and other excise taxes whether or not the due date for filing and paying such tax has expired.²⁸²

IRC 6861 and IRC 6862 apply to a closed tax year where the due date for filing a return has expired.

Termination assessments are very similar to jeopardy assessments except that, under the provisions of IRC 6851, they are made only for the current or immediately preceding taxable year and can be made at any time prior to the due date for filing those years' returns.²⁸³ Termination assessments are very similar to jeopardy assessments under section 94 of the TAA.

If jeopardy is determined, the taxpayer's tax year is terminated and treated as a complete tax year for assessment purposes. Termination assessments are made for income taxes only.²⁸⁴

Treas. Reg. sub-section 301.6861-1(a), by reference to Treas. Reg. sub-section 1.6851-1(a), provides that jeopardy will exist if the IRS finds that the taxpayer:

- is (or appears to be) planning to leave the United States or to remove his or her property from the United States,
- is concealing himself or herself or his or her property within the United States, or
- is doing any other act threatening the collection of tax for the current or the preceding taxable year, such as transferring or dissipating assets,

²⁸¹ www.irs.gov/irm/part5/irm_o5-017-015.html at par 5.17.15.1.

²⁸² *Ibid.*

²⁸³ www.irs.gov/irm/part5/irm_001-004.html at par 5.1.4.2.

²⁸⁴ *Ibid* at par 5.17.15.2.

making himself or herself financially insolvent, or, in the case of a corporation, liquidating substantially all of its assets.²⁸⁵

In the case of *Larson v. U.S.*, 2011 WL 2682991 (N.D.Cal., Slip Opinion, July 11, 2011), the court stated as follows:

- Within twenty days after the filing of an action for summary judicial review, the district court must make the following determinations: (1) whether the making of the jeopardy assessment is reasonable under the circumstances; (2) whether the jeopardy levy is reasonable under the circumstances; and (3) whether the amount of the jeopardy assessment is appropriate under the circumstances.

²⁸⁵ www.irs.gov/irm/part5/irm_o5-017-015.html at par 5.17.15.2.1.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

The TAA is a step forward in tax legislation, however the TAA has also given the taxman certain powers which may seem unreasonable to a taxpayer but enables the effective collection of taxes. The TAA came into effect on the 1 October 2012.

The TAA introduced into South African tax law the concept of jeopardy assessments under section 94 of the TAA.

Section 94 of the TAA says the following:

“(1) SARS may make a jeopardy assessment in advance of the date on which the return is normally due, if the Commissioner is satisfied that it is required to secure the collection of tax that would otherwise be in jeopardy.

(2) In addition to any rights under Chapter 9, a review application against an assessment made under this section may be made to the High Court on the grounds that—

(a) its amount is excessive; or

(b) circumstances that justify a jeopardy assessment do not exist.

(3) In proceedings under subsection (2), SARS bears the burden of proving that the making of the jeopardy assessment is reasonable under the circumstances.”

Additional and estimated assessment in relation to jeopardy assessment:

	TAA (section 95)
Estimated assessment	SARS may make an original, additional, reduced or jeopardy assessment based in whole or in part on an estimate.
	TAA (section 92)
Additional assessment	A new simplified concept prejudice to SARS or the fiscus will be used as a basis for the issue of additional assessments. ²⁸⁶

Since the TAA provides that SARS may make an *assessment* based in whole or in part on an assessment²⁸⁷ and since an ‘assessment’ is defined as ‘the determination of the amount of a tax liability’²⁸⁸, it seems that the estimate should not be of the taxpayer’s gross income, but of his ‘tax liability’, which of course requires account to be taken of deductions and allowances.²⁸⁹

This phrase²⁹⁰ presumably connotes that SARS is not required to expend time or resources in a search for material on which to base the assessment, though this is not easily reconcilable with the rule that the onus of proving the estimate to be ‘reasonable’ rests on SARS.²⁹¹ From the wording of section 95 of the TAA it is clear that a jeopardy assessment will in most likely event, be based on an estimate.

The time periods for raising an additional assessment have been retained in the TAA. However SARS may now raise an additional assessment if there is prejudice to

²⁸⁶ *Ibid.*

²⁸⁷ See Ss 95(1) of the TAA.

²⁸⁸ See S 1 of the TAA

²⁸⁹ De Koker ‘*Silke on SA Income Tax (online)*’ at par 18.124.

²⁹⁰ As mentioned in S 79(2) of the TAA.

²⁹¹ De Koker ‘*Silke on SA Income Tax (online)*’ at par 18.124.

SARS or the fiscus. This allows SARS to raise an additional assessment within the three year period if there is prejudice. The period of three years may be extended if there is fraud misrepresentation or non-disclosure. For example an understatement of income prejudices SARS or the fiscus in that the correct amount of tax was not assessed.²⁹² However it is SARS who will be raising the jeopardy assessment based on an estimate and if SARS is allowed to raise an additional assessment thereafter a taxpayer may be prejudiced.

In *ITC 1776 (2002) 66 SATC 296* (decided under the repealed Income Tax Act) it was held that should the Commissioner issue an additional assessment more than three years after the date of the original assessment not because of fraud, misrepresentation or non-disclosure but due to a defective original assessment, the additional assessments will be set aside.²⁹³

In *ITC 1637 (1997) 60 SATC 413* (decided under the repealed Income Tax Act) it was held that section 79 of the Income Tax Act 58 of 1962 relates to matters which should have been subject to tax, in other words, which, at the time of assessment and having regard to the law then prevailing, should have been included either in the taxable income or, as the case may be, in the tax to be paid.²⁹⁴

Date of assessment in relation to any assessment, means the date specified in the notice of the assessment as the due date or, where a due date is not so specified, the date of the notice of assessment.²⁹⁵

The date of assessment is now the date of issue of the notice of assessment according to the TAA.

²⁹² See SARS “Short guide to the Tax Administration Act” (2012) at 35.

²⁹³ *ITC 1776 (2002) 66 SATC 296*.

²⁹⁴ *ITC 1637 (1997) 60 SATC 413*.

²⁹⁵ SARS “guide on tax dispute resolution” (2004) at 1.

Jeopardy assessment:

The issue of a jeopardy assessment is a narrow exception to the ordinary assessment procedure and is subject to the following limitations and rights of the affected taxpayer:²⁹⁶

- The SARS official intending to issue a jeopardy assessment must satisfy the Commissioner that a jeopardy assessment is necessary;²⁹⁷
- An affected taxpayer may apply to the High Court for a review of the assessment on the basis that:²⁹⁸
 - the amount is excessive;²⁹⁹ or
 - the circumstances on which SARS relied to justify the making of the jeopardy assessment do not exist;³⁰⁰
- If the taxpayer challenges a jeopardy assessment in a High Court, then SARS has the burden of showing that the making of the jeopardy assessment was reasonable in the circumstances;³⁰¹
- The normal objection and appeal procedure is still available to the taxpayer.³⁰²

The table below compares the South African system of jeopardy assessment with that of the U.S.A.

	TAA (section 94)	IRC 6861	IRC 6862	IRC 6851
When may a jeopardy assessment be issued:	In advance of the date on which the return is	The due date for filing of a return has expired and applies to	Applies to, employment and other excise taxes	They are made only for the current or immediately

²⁹⁶ See SARS "Short guide to the Tax Administration Act" (2012) at 36.

²⁹⁷ *Ibid.*

²⁹⁸ See SARS "Short guide to the Tax Administration Act" (2012) at 36.

²⁹⁹ *Ibid.*

³⁰⁰ See SARS "Short guide to the Tax Administration Act" (2012) at 36.

³⁰¹ *Ibid.*

³⁰² See SARS "Short guide to the Tax Administration Act" (2012) at 36.

	normally due. It is assumed that jeopardy assessments apply to all taxes other than customs and excise.	jeopardy assessments of income, estate, gift and certain excise taxes. ³⁰³	whether or not the due date for filing and paying such tax has expired. ³⁰⁴	preceding taxable year and can be made at any time prior to the due date for filing those years' returns. ³⁰⁵
				If jeopardy is determined, the taxpayer's tax year is terminated and treated as a complete tax year for assessment purposes. Termination assessments are made for income taxes only. ³⁰⁶
Grounds:	The collection of tax would	Treas. Reg. sub-section 301.6861-1(a), by reference to Treas. Reg. sub-section 1.6851-1(a), provides that		

³⁰³ *Ibid.*

³⁰⁴ www.irs.gov/irm/part5/irm_o5-017-015.html at par 5.17.15.1.

³⁰⁵ *Ibid* at par 5.1.4.2.

³⁰⁶ *Ibid.*

	otherwise be in jeopardy.	jeopardy will exist if the IRS finds that the taxpayer: <ul style="list-style-type: none"> • is (or appears to be) planning to leave the United States or to remove his or her property from the United States, • is concealing himself or herself or his or her property within the United States, or • is doing any other act threatening the collection of tax for the current or the preceding taxable year, such as transferring or dissipating assets, making himself or herself financially insolvent, or, in the case of a corporation, liquidating substantially all of its assets.³⁰⁷
Remedies:	High court review or objection and appeal as set out in chapter nine of the TAA.	Within 30 days after the written statement is furnished (or 30 days after the five-day period expires), the taxpayer may ask for administrative review. This request requires the IRS to determine whether making the assessment or levy was reasonable and whether the amount assessed was appropriate under the circumstances. The request by the taxpayer for administrative review is a prerequisite to judicial review. ³⁰⁸

From the above table it is clear that a jeopardy assessment under section 94 of the TAA is similar to a termination assessment under section 6851 of the IRC.

³⁰⁷ www.irs.gov/irm/part5/irm_o5-017-015.html at par 5.17.15.2.1.

³⁰⁸ *Ibid.*

SARS is required to prove in this context is not the reasonableness of the *quantum* of the jeopardy assessment, but that it was reasonable to make a jeopardy assessment at all.³⁰⁹ It is implicit that if it was not 'reasonable' to do so the jeopardy assessment must be set aside, in order that an ordinary assessment can be issued in due course.³¹⁰ This is the case under the IRC as well.

This review process is distinct from an objection or appeal against the jeopardy assessment; in essence, it is a judicial review of the Commissioner's decision that the particular circumstances warranted the issuing of a jeopardy assessment.³¹¹ Under the IRC a taxpayer is allowed a judicial and administrative review.

In such a review, and at centre stage, will be the statement by SARS, and included in the jeopardy assessment, of 'the grounds for believing that the tax would otherwise be in jeopardy'.³¹²

In *Metcash Trading Ltd v C: SARS and Another*,³¹³ (decided under the repealed VAT Act) it was stated that:

*[t]he Commissioner is not a judicial officer and assessments and concomitant decisions by the Commissioner are administrative, not judicial, actions; from which it follows that challenges to such actions before the Special Court [now called the Tax Court] or Board are not appeals in the forensic sense of the word. They are proceedings in terms of a statutory mechanism specially created for the reconsideration of this particular category of administrative decisions – and appropriate corrective action – by a specialist tribunal.*³¹⁴

Thus, for example, it is arguable that, before SARS levies an additional assessment in respect of a particular taxpayer, it must give that person taxpayer adequate notice of such proposed action and a reasonable opportunity to make representations in

³⁰⁹ De Koker 'Silke on SA Income Tax (online)' at par 18.132.

³¹⁰ *Ibid.*

³¹¹ De Koker 'Silke on SA Income Tax (online)' at par 18.132

³¹² *Ibid.*

³¹³ 2001 (1) SA 1109 (CC).

³¹⁴ 2001 (1) SA 1109 (CC) at 1130.

this regard.³¹⁵ However notice of assessment will not be given as it may render the object of a jeopardy assessment futile.

In *Contract Support Services v C: SARS*³¹⁶ the court held that not all administrative acts require the application of the *audi alteram partem* rule³¹⁷, and that no notice or prior hearing is required where this would render the proposed act nugatory, as in the instant case, where notice or a hearing would have given the taxpayer the opportunity of spiriting away the funds to which SARS was laying claim.³¹⁸

It is submitted that, in terms of these principles, a taxpayer who is aggrieved, on the merits, in respect of the Commissioner's decision not to amend or set aside an assessment, must first exercise his right of objection and appeal before invoking his rights under PAJA to contest the fairness and rationality of the decision.³¹⁹

There is, as yet, no reported case in which a taxpayer has sought the review of an assessment in terms of PAJA on the grounds that it is so unreasonable that it ought to be set aside in terms of that Act.³²⁰

The onus is on SARS to establish the rationality and justification for a jeopardy assessment.

Indeed, a jeopardy assessment is inherently an estimated assessment, given that, by definition, the taxpayer has not yet rendered the relevant return and tax is not yet due and payable.³²¹

Although a jeopardy assessment can be issued without following the ordinary audit route, the basis on which it is believed that the collection of tax is in jeopardy will be stated on the notice of assessment.³²²

³¹⁵ *Ibid.*

³¹⁶ 1999 (3) SA 1133 (W), 61 SATC 338.

³¹⁷ According to the rule a party to an administrative proceeding which may lead to action or a decision affecting his rights is entitled to present his case.

³¹⁸ 1999 (2) SA 957 (W), 61 SATC 163.

³¹⁹ De Koker 'Silke on tax administration (online)' at par 3.28.

³²⁰ *Ibid.*

³²¹ De Koker 'Silke on SA Income Tax (online)' at par 18.132

³²² See SARS "Short guide to the Tax Administration Act" (2012) at 36.

The suspension of payment of disputed tax is not an automatic right and a taxpayer must apply for the suspension in the form and manner prescribed by SARS.³²³

There are two instances when SARS can bring forward a due date for payment:³²⁴

- First, if the date for paying a tax has not yet arrived, but the collection of tax is in jeopardy as a result of the actions of the tax debtor, the Commissioner may authorise that a jeopardy assessment should be issued. A jeopardy assessment is then issued and the normal due date is brought forward;³²⁵
- The second instance is when a senior SARS official demands immediate payment despite an existing future due date. This will only happen if the future collection of the tax is at risk.³²⁶

Lessons to be learnt from the U.S.A system:

Indeed, the use of a jeopardy assessment is an extraordinary measure because it allows the state to deprive a taxpayer of property without first providing constitutionally guaranteed notice or an opportunity to be heard.³²⁷

The assessment process deals with the decision to impose tax liability, while the jeopardy levy deals with the collection of taxes allegedly owed.³²⁸

The general test for reviewing the reasonableness of an assessment involves an inquiry into whether: (1) the taxpayer is or appears to be designing to leave the United States or to conceal him or herself, (2) the taxpayer is or appears to be designing to hide, transfer, conceal, or dissipate his or her assets, or (3) the taxpayer's financial solvency appears to be imperiled. If any of the above conditions are met, the jeopardy assessment is reasonable.³²⁹

³²³ See SARS "Short guide to the Tax Administration Act" (2012) at 48.

³²⁴ See SARS "Short guide to the Tax Administration Act" (2012) at 48.

³²⁵ *Ibid.*

³²⁶ *Ibid.*

³²⁷ *Garwood v Indiana Department of State Revenue* 953 N.E.2d 682 (2011).

³²⁸ *Henderson v The United States of America* 949 F.Supp. 473 (1996).

³²⁹ *Ibid.*

The court's review "is limited to determining (1) whether making the assessment and levy is reasonable under the circumstances, and (2) whether the amount assessed is appropriate under the circumstances."³³⁰

Due to the summary nature of the judicial proceeding, the court "can hear evidence that may be inadmissible in a trial on the merits."³³¹

The government need not ultimately be correct in thinking that collection was imperiled, rather, "[t]he government only needs to prove that the circumstances *appear* to jeopardize collection."³³²

Thus, the plaintiff must "show that the method of calculating the assessment amount is fatally defective, irrational, arbitrary, or unsupported."³³³

To date the writer knows of no case where the South African courts have decided on a jeopardy assessment. As a matter of caution, a taxpayer will be well advised to request for reasons under rule 6, of the rules issued under section 107 of the TAA. A taxpayer has the remedies under Chapter nine of the TAA or alternatively the right of review.

From the USA system most taxpayers have elected to use the review system. The grounds for review as was mentioned are:

Within twenty days after the filing of an action for summary judicial review, the district court must make the following determinations: (1) whether the making of the jeopardy assessment is reasonable under the circumstances; (2) whether the jeopardy levy is reasonable under the circumstances; and (3) whether the amount of the jeopardy assessment is appropriate under the circumstances.³³⁴

³³⁰ *Varjabedian v The United States of America* 339 F.Supp.2d 140 (2004).

³³¹ *Ibid.*

³³² *Ibid.*

³³³ *Varjabedian v The United States of America* 339 F.Supp.2d 140 (2004).

³³⁴ *Larson v. U.S.*, 2011 WL 2682991 (N.D.Cal., Slip Opinion, July 11, 2011).

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