# VONNISSE

## WITHHOLDING A TAX REFUND: DID THE HIGH COURT APPLY SECTION 190 OF THE TAX ADMINISTRATION ACT 28 OF 2011 CORRECTLY?

***Rappa (Pty) Ltd v Commissioner for the South African Revenue Service* (20/18875)[2020] ZAGPPHC (5 Nov 2020)**


**OPSOMMING**

**Die terughou van 'n belastingterugbetaling: Het die Hoëhof artikel 190 van die Belastingadministrasiewet 28 van 2011 korrek toegepas?**

Artikel 190 van die Wet op Belastingadministrasie 28 van 2011 maak daarvoor voorsiening dat die Suid Afrikaanse Inkomstediens ("SAID") 'n belastingterugbetaling wat aan 'n belastingpligtige verskuldig is, in sekere omstandighede, kan terughou. Die SAID moet egter die belastingterugbetaling maak in omstandighede waar die belastingpligtige sekuriteit vir die waarde van die terugbetaling verskaf wat volgens 'n senior SAID amptenaar as voldoende sekuriteit beskou word. In *Rappa (Pty) Ltd v Commissioner for the South African Revenue Service* (20/18875)[2020] ZAGPPHC (5 November 2020), het die Hoëhof bevind dat dit nie nodig is vir die belastingpligtige om sekuriteit gelykstaande aan die waarde van die terugbetaling te gee nie. Trouens, waar die belastingpligtige slegs 'n gedeeltelike sekuriteit gee, kan die senior SAID amptenaar sy diskresie gebruik om die belastingterugbetaling gedeeltelik te maak. In hierdie bespreking ondersoek ons of die hof se uitleg en toepassing van artikel 190 korrek is. Verder oorweeg ons die grondwetlikheid van artikel 190(2).


### 1 Introduction

Chapter 13 of the Tax Administration Act 28 of 2011 ("TAA") regulates tax refunds. Where a tax refund is due to a taxpayer, the South African Revenue Service ("SARS") must pay the refund (s 190(1)). However, where there is an ongoing and yet uncompleted verification, inspection, or audit, SARS is not obliged to make the payment of the refund (s 190(2)). Yet, where, before the finalisation of the verification, inspection, or audit, the taxpayer has provided security for the tax refund in a form acceptable to the senior SARS official, SARS must authorise the payment (s 190(3)). In *Rappa (Pty) Ltd v Commissioner for the South African Revenue Service* (20/18875) [2020] ZAGPPHC (5 November 2020) ("*Rappa*"), the court ruled that it was not necessary for a taxpayer to provide security equal to the value of the refund. Actually, SARS may authorise a partial release of the refund equal to the value of the security provided. In this note, we examine the correctness of the court's application of section 190. We also consider whether section 190(2) is constitutionally sound.

### 2 What happened in *RAPPA?*

Rappa Resources (Pty) Ltd and Rappa Holdings (Pty) Ltd (hereafter "Rappa") hold a precious metal refining licence. In the main, Rappa trades in precious metals by purchasing and selling gold bars and by extracting gold from gold

by-products and selling it as gold bars. All the sales are exported. Typically, Rappa pays value added tax ("VAT") on its purchases. Yet, the export of the gold is zero-rated in terms of section 11(1)(*i*) and (*j*) of the Value Added Tax Act 89 of 1991 ("VAT Act"). This results in Rappa being entitled to a VAT refund at the end of a VAT assessment period. Rappa's business model depends on the VAT refund for its survival – Rappa buys the gold at the spot price less three per cent plus 15 per cent VAT, and sells the gold at the spot price less one per cent plus zero per cent VAT (para 6). As such, Rappa will operate at a deficit if the VAT refund is not paid.

SARS suspected that Rappa is used as a front to dispose of either illegally mined gold or smelted down Krugerrands, which are zero-rated (para 8). This prompted SARS to notify Rappa that it is being audited and that payment of VAT refunds will be stopped pending the finalisation and outcome of the audit. The total amount of refunds withheld is approximately R1.6 billion. Rappa applied to the court on an urgent basis to order SARS to pay the refunds, alternatively to pay 50 per cent of the refunds withheld (para 1). In addition, it sought SARS to complete the audit within 15 days of the court order, and for SARS to be directed not to withhold VAT refunds in respect of periods of assessment that do not form part of the original audit proceedings (para 2).

## 3 The judgment

The parties raised several arguments that required a ruling from the court. Each argument is discussed below separately.

### 3.1 *Withholding a tax refund is not a decision subject to review*

SARS argued that it had not made a decision to withhold a refund. As soon as the decision was made to conduct an audit, section 190(2) compels SARS to withhold a refund. There was no decision to be made. As SARS did not make any decision, and the withholding of the tax is an automatic result of the audit, there was no 'decision' that could be subject to review.

Yacoob J thought that this argument was patently inconsistent with the TAA and the prevailing practices of SARS (para 27). In *Cart Blanche Marketing CC v Commissioner for the South African Revenue Service* 2020 4 All SA 434 (GJ), the court ruled that the selection to audit a taxpayer was not reviewable, as the audit had no prejudicial effect on the taxpayer nor did it have any external legal effect. The decision to withhold a refund was different – it had a direct, external effect that affected the liquidity of the taxpayer (*Rappa* para 36). As such, a decision to withhold a refund could be reviewed (*ibid*).

### 3.2 *Taxpayer entitled to a refund*

Rappa argued that it was a tax compliant taxpayer and that it had co-operated with SARS by providing all the necessary documents to complete the audit, and that the withholding of the refund prejudiced Rappa significantly (paras 30 and 33). Importantly, the wording of section 190(2) states that SARS 'need not authorise a refund' until the audit is complete. Consequently, the argument continued, SARS has to decide to withhold a refund – it is not required by law to withhold the refund (para 38). The audit accordingly did not change the fact that Rappa remained entitled to a refund.

Obviously, the paperwork of a taxpayer who is involved in some or other scheme will, on the face of it, appear in order (para 32). It is only during an audit that SARS will determine if a scheme was entered into, or the paperwork is false or misleading. While the withholding of the refunds prejudice Rappa, the prejudice of a fraudulent scheme is equally damaging to the *fiscus* (para 33). The TAA seeks to balance the rights of a taxpayer and the *fiscus* by allowing SARS to withhold a refund until completion of the audit. Being tax compliant does not necessarily entitle a taxpayer to a refund – section 190(2) clearly interferes with a taxpayer's entitlement to a refund as contemplated in section 190(1) (para 39). A taxpayer is entitled to a refund in terms of section 190(1) when it submits a self-assessment tax return that results in a refund (para 40). But then section 190(2) functions as a rebalancing mechanism in SARS's favour to protect money that was claimed as a refund, fraudulently or by mistake (para 41). The purpose of section 190(2) is to preserve funds until it is clear who is entitled to it (para 42).

3.3 *Sufficient security to obtain a refund*

Rappa was unable to provide security for the full amount of the refund and SARS refused to accept anything less (para 43). SARS contended that it could not make part payment of the refund – it followed an all-or-nothing approach.

Yacoob J ruled that to refuse a part payment of the refund was an unreasonable position to take it was inconsistent with the plain language and purpose of the TAA (para 44). Section 190(3) clearly entitles Rappa to a part of the refund equal to the value of the security provided to the satisfaction of the senior SARS official.

3.4 *Withholding a refund for periods of assessment not under audit*

Rappa complained that SARS withheld refunds for tax periods not under audit and continues to withhold refunds for tax periods as and when the assessments are filed.

Yacoob J gave a stern warning that such practices could not be condoned (para 47). However, SARS subsequently issued notices of audits for the other periods of assessment (para 48). While SARS could not withhold refunds for periods of assessment not under audit, the court could not order SARS to make payment of a refund where the period of assessment was also under audit (*ibid*).

3.5 *Mandamus to complete the audit*

Rappa contended that it had provided SARS with all the documentation requested by SARS to enable it to complete the audit. As such, Rappa sought an order to compel SARS to complete the audit within 15 days of the order.

Yacoob J confirmed that SARS could not be allowed to take an indefinite time to complete an audit (para 51). The audit had to be completed within a reasonable time (para 52). A reasonable time should take into account that SARS must be afforded a sufficient time to carry out an audit diligently (para 53). The request to complete the audit within 15 days was unreasonably short, and consequently Yacoob J granted SARS 35 days to complete the audit (paras 53–54).

## 4 Commentary: Some mixed emotions

4.1 *Deciding to withhold a tax refund*

Section 190(1) states that "SARS must pay a refund if a person is entitled to a refund, including interest thereon under section 183(3)(*a*), of … (*a*) an amount

properly refundable under a tax Act and if so reflected in an assessment; or (*b*) the amount erroneously paid in respect of an assessment in excess of the amount payable in terms of the assessment". Section 190(2), in turn, states that "SARS need not authorise a refund as referred to in subsection (1) until such time that a verification, inspection or audit of the refund in accordance with Chapter 5 has been finalised".

Yacoob J ruled that the action of withholding a refund was a decision by SARS that was subject to review, because it has an external legal effect on the taxpayer that affected the taxpayer's liquidity negatively.

This reasoning is not compelling nor satisfying. Yacoob J does not provide a well-reasoned explanation why she was of the opinion that not considering the action to withhold a refund as a decision subject to review was contrary to the objectives of the TAA. In this case, it is a fundamental issue to determine whether the withholding is a decision, and whether that decision is subject to review. As the entire argument rests on this fundamental question, in our view, Yacoob J's ruling lacks legal substance.

The wording of section 190(2) clarifies that SARS *need not authorise* the refund while an audit is ongoing. That means that once SARS has made a decision to verify, inspect, or audit the assessment (that results in a refund), it is not required to/obliged to/compelled to/ordered by law to authorise the payment of the refund (*Merriam-Webster.com Dictionary sv* "need" https://www.merriam-webster.com/dictionary/need (accessed on 18-02-2021)). It is not an automatic outcome of a verification, inspection, or audit that the payment of refunds is paused until completion of the verification, inspection, or audit. SARS makes an active decision to withhold payment. It may well be that the SARS internal revenue management system puts a hold on the payment of refunds automatically when a verification, inspection, or audit notification is loaded by a SARS official or flagged automatically as a result of built-in algorithms. But that is irrelevant. Such an automated system merely means that the SARS software systems are not aligned with the powers and the mandate granted to SARS by the TAA. It does not take away the fact that section 190(2) puts a discretion in the hands of SARS to decide whether or not to withhold a refund.

We agree with the court that this discretion can be reviewed, as it constitutes "administrative action" as envisaged in section 1 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). Section 1(i) defines administrative action as "any decision taken, or any failure to take a decision, by … an organ of state, when … exercising a public power or performing a public function in terms of any legislation … which adversely affects the rights of any person and which has a direct, external legal effect." From this definition the following elements can be deduced: (a) a decision, or failure to make a decision; (b) by an organ of state; (c) a person's right(s) must be adversely affected; and (d) the decision should have a direct, external legal effect.

As the term "decision" refers to a decision of an administrative nature, the decision must relate to an unequal relationship in the public law realm (Burns & Beukes *Administrative law under the 1996 Constitution* (2006) 22). It is clear that when SARS considers whether or not to pay out a refund in terms of section 190(2), the taxpayer and SARS are not on an equal footing. For this reason the outcome of SARS' consideration constitutes a decision for purposes of administrative action. What is more, this decision by SARS, which is an organ of

state (s 2 of the South African Revenue Service Act 34 of 1997), has a possible impact on a taxpayer's property (money), which could have a lasting effect on the taxpayer. Consequently, this discretion afforded in terms of section 190(2) of the TAA, is subject to review in terms of the PAJA.

4.2 *Entitled to a refund*

Once SARS decides to withhold payment in accordance with section 190(2), the question arises as to what the effect of that decision is on the taxpayer's entitlement to the refund.

Two arguments can be made.

In the first instance, it can be argued that the decision to withhold payment merely puts on hold the authorisation of the payment of the refund until completion of the verification, inspection, or audit. The verification, inspection, or audit does not alter the fact that the taxpayer, *prima facie*, remains entitled to the refund. It is only the payment that is postponed. It is the outcome of the verification, inspection, or audit that ultimately dictates whether the temporary suspension of payment must be lifted and the refund authorised. This argument is supported by the words "need not" in section 190(2). The wording confirms that SARS may decide to still authorise payment pending the outcome of the verification, inspection, or audit. This is so, because the taxpayer is, based on the paperwork, entitled to a refund.

This argument is further supported by section 190(5) that states that "[i]f SARS pays to a person by way of a refund any amount which is not properly payable to the person under a tax Act, the amount, including interest thereon under section 187(1), is regarded as an outstanding tax debt from the date on which it is paid to the person". Section 190(5) confirms that SARS has to decide to authorise payment of a refund when the taxpayer's paperwork is in order. Thus, the taxpayer remains entitled to the refund unless the outcome of the audit dictates otherwise and SARS then decides to issue revised assessments. If SARS did make a payment, and it is later found that the taxpayer was never entitled to that refund, the refund plus interest are deemed an outstanding tax debt owed to SARS.

Secondly, it can be argued that the decision to withhold payment pauses the taxpayer's entitlement to the refund until completion of the verification, inspection, or audit. This argument is in line with the so-called rebalancing of rights principle as explained by Yacoob J in the judgment. The taxpayer can remove the pause on the entitlement of the refund by providing security for the refund in accordance with the provisions of section 190(3). This argument, in our view, is not as convincing as the first. This is purely because section 190(2) grants SARS a discretion to make payment. Even if SARS has decided not to make payment after it has issued a notification of verification, inspection, or audit, SARS can at any time while the process is ongoing make the decision to authorise payment. Also, this argument hints toward the notion that SARS is compelled by law to withhold payment once a decision has been made to verify, inspect, or audit the taxpayer's affairs. It confuses the decision to withhold payment and the decision to verify, inspect, or audit. This confusion stains the whole judgment.

4.3 *Security and part payment of a refund*

Section 190(3) states that "SARS must authorise the payment of a refund before the finalisation of the verification, inspection or audit if security in a form acceptable to a senior SARS official is provided by the taxpayer".

There are four requirements that must be met to trigger the obligation by SARS to pay a refund despite the pending outcome of a verification, inspection, or audit: (a) the taxpayer's self-assessment must reflect that a refund is due; (b) SARS issued a notification of verification, inspection, or audit; (c) SARS made a decision to withhold payment of the refund pending the outcome of the verification, inspection, or audit; and (d) the taxpayer has provided security for the refund in a form acceptable to a senior SARS official.

The fourth requirement places a discretion in the hands of the senior SARS official to accept or reject the security provided by the taxpayer. Put differently, the taxpayer must satisfy the demands of the senior SARS official in respect of the security required. It is only after the senior SARS official has accepted the security that payment of the refund must be authorised.

The Act does not provide any guidance as to what constitutes "security in a form acceptable to a senior SARS official". This puts enormous power in the hands of the senior SARS official. The only recourse the taxpayer has against a senior SARS official who refuses to accept the security provided unreasonably, is to take the senior SARS official's decision on review. This is unnecessarily costly. The legislation is patently lacking in this regard.

Yacoob J reasons that section 190(3) can be interpreted to mean that the senior SARS official has a twin discretionary power. The one is to decide what is considered acceptable security in relation to the value of the refund. The other is to authorise a refund equal to the value of the security that has been found to be acceptable.

We cannot agree with this interpretation. The wording of section 190(3) limits the discretionary power of the senior SARS official to decide what s/he considers acceptable security. Once the security is accepted, the refund must be authorised in full. Nothing in the wording hints to a discretionary power to authorise part payment of the refund. It is all or nothing. Yacoob J is correct that section 190(3) does not dictate that the taxpayer must provide security equal to or in excess of the value of the refund. It merely states that the senior SARS official must be satisfied that the security is acceptable. Thus, the senior SARS official may accept security that is far less in value than the refund amount. Similarly, the senior SARS official may require security in excess of the refund amount to secure the payment of possible interest and penalties. Again, the absence of a proper benchmark in the Act literally puts the fate of the taxpayer in the hands of the senior SARS official.

The function of the court is to interpret the law and not to legislate (Cockram *Interpretation of statutes* (1983) 26; Devenish *Interpretation of statutes* (1992) 4–11). That means that the court does not have the mandate, nor is it the duty of the court to fill an apparent gap in a statute. Importantly, the court cannot ascribe a meaning to legislation of which it is not reasonably capable in order to give effect to what the court thinks the policy or objective of the legislation is (*Dadoo Ltd v Krugersdorp Municipal council* 1920 AD 543, 562; see also *R v Stevens* 1969 2 SA 572 (RA); *Amalgamated Packaging Industries Ltd v Hutt* 1975 4 SA 943 (A); *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA)). In *Car Rental Services (Pvt) Ltd v Director of Customs & Excise* 1988 1 ZLR 402 (S), Gubbay JA noted:

> "It is not for the courts to legislate or to attempt to improve on the situation achieved by parliament through the language it has chosen in its enactment. Effect must be given to what the Act says or permits and not to what it may be thought it

> ought to have said or prohibited. If there is a *casus omissus* in the Act, and if it could lead to undesirable consequences, the court has no power to fill it. It is a matter for the legislature."

Botha argues that the courts have limited law-making functions when the court exercises a legal discretion within the boundaries and parameters of the legislation and its purpose (Botha *Statutory interpretation* (2012) 159–165; see also Devenish (1992) 9–11; Van Heerden & Crosby *Interpretation of Statutes* (1996) 25–29). Of course, this function cannot rest on an arbitrary expression of personal conviction (Botha (2012) 159–165; see also Devenish (1992) 9–11; Van Heerden & Crosby (1996) 25–29). Yet, the courts have been, on occasion, prepared to fill a gap in a statute where not doing so would have resulted in an absurdity (see *S v Mpofu* 1979 2 SA 255 (R); *National Housing Commission v Cape of Good Hope Savings Bank Society* 1963 1 SA 230 (C); *Ex parte Slater Walker Securities SA Ltd* 1974 4 SA 657 (W); *S v Peppas* 1977 2 SA 643 (A); *S v Frederiksen* 2018 1 SACR 29 (FB); *Delta Beverages (Pvt) Ltd v Zimbabwe Revenue Authority* 2015 1 ZLR 117 (H); *Case No 10082/99* 2000 12 JTLR 381 TvlSpCrt). Ultimately, the court has to perform a balancing act of interpreting the wording of the Act as they appear (Devenish (1992) 9–11) and giving effect to the purpose of the legislation (*idem* 11–14, 93–98; *Natal Joint Municipal Pension Fund v Endumeni Municipality* (*supra*)). In finding the balance between the ordinary meaning of the text and the purpose or intention of the legislator, Wallis JA stated:

> "In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, [unbusinesslike] or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration" (*Natal Joint Municipal Pension Fund v Endumeni Municipality* (*supra*) para 26).

In this case, no absurdity exists. The interpretation that we proffer is neither impractical nor overly oppressive. Rather, it appears that the interpretation by Yacoob J is founded on the prevailing circumstances of the taxpayer and the perceived prejudice that the withholding of the refund would have on the taxpayer. Accordingly, Yacoob J's ruling attributes a meaning to section 190(3) that simply cannot be reconciled with the plain wording of the text.

If we are wrong and it is indeed the intention of the legislator to grant the senior SARS official the discretion to authorise part payment, the Act must provide for that discretion more clearly. To this end, an amendment of section 190(3) is required. In this regard, we suggest that some objective factors must inform the exercise of the discretion to accept or reject the security provided. These may include factors such as prejudice to the taxpayer, and prejudice to the *fiscus*. Moreover, if the legislator intends to afford the senior SARS official a discretion to authorise part payment, the Act must provide clearer guidelines so that the amount of the part payment is not decided upon arbitrarily.

### 4.4 Withholding refunds for periods of assessment not under audit

Section 190(2) does not specifically mention that SARS need not authorise a payment in respect of an assessment or period of assessment until the finalisation

of a verification, inspection, or audit in respect of *that specific* assessment or period of assessment under investigation. Theron and Swart comment, without authority, that SARS is prevented from withholding a tax refund in respect of periods of assessment not under review (Theron & Swart "The SARS refund process" 2020 *Taxtalk* 152). The wording in section 190(2) does not specifically prevent SARS from withholding a tax refund in respect of periods of assessment not under review. However, to grant SARS the power to withhold any refund in respect of assessments or periods of assessment that are not under review would go beyond the spirit and purport of the TAA. Thus, Yacoob J notes correctly that such action cannot be condoned. What is alarming is that SARS, subsequently, issued notices of audits in respect of the remaining periods of assessment for which it has withheld a refund. *In casu*, SARS justified the action by claiming that it is likely that the suspected fraudulent activities are ongoing, and that all subsequent periods of assessment must be subjected to an audit. However, it appears to be a regular practice for SARS to withhold payment of refunds and then to issue a notice of audit after the fact (see Brink "Increasing disconnect between SARS' legislated powers and its internal policies" 2016 *Tax Breaks* 1–2; Rossato, Vermaak & Noormahomed "SARS: From verification to Tax Court in 8 steps" 2019 *Taxtalk* 14)). Such behaviour falls short of the provisions, spirit, and purport of the TAA. In *Vuyisile Zamindlela Nondabula v Commissioner: South African Revenue Service* (case no 4062/2016 (EC) 27 June 2017) (hereafter "*Vuyisile Zamindlela Nondabula*"), the court ruled that SARS must be accountable to the values of the Constitution of the Republic of South Africa, 1996 by, *inter alia,* fostering transparency by providing timely, accessible, and accurate information to taxpayers (paras 24–25). Thus, by withholding a tax refund and only later justifying the action by issuing a notice of audit after the fact, amounts to arbitrary action inconsistent with the values of the Constitution (see also Fritz *An appraisal of selected tax-enforcement powers of the South African Revenue Service in the South African constitutional context* (LLD thesis University of Pretoria 2017) 37).

4.5 *A reasonable time to conclude an audit*

With reference to the *Cart Blanche* judgment, Yacoob J confirms that an audit itself is not prejudicial to the taxpayer, but that the withholding of the refund has an external effect that can be prejudicial (para 35). We disagree. A protracted audit is costly and frustratingly time-consuming (Seligson "Information-gathering by SARS under the TAA: Trumping the taxpayer's right to tax finality" 2016 *Business Tax and Company Law Quarterly* 1–12). Also, a senior SARS official may, in terms of section 256(2) of the TAA, decline to issue a tax compliance certificate. This is so because the senior SARS official issuing the certificate must be satisfied that the taxpayer does not have any outstanding tax debt (section 256 (3)(*a*)). While the audit is ongoing, the senior SARS official's investigation may not satisfy him to conclude that no tax debt is outstanding. As such, the ongoing audit may prevent the senior SARS official from issuing a tax compliance certificate. Of course, the taxpayer can take this decision on review. But, as is well known, that is a costly exercise. In some instances, a taxpayer may be prevented from carrying on business without a tax compliance certificate. Thus, an ongoing audit is prejudicial to the taxpayer.

Yacoob J ruled correctly that SARS cannot be allowed to continue with an audit indefinitely (para 51). The audit must be completed within a reasonable time. The TAA does not provide any guidance in this regard either. Taxpayers

have an enforceable right to administrative justice, including lawful, reasonable, and procedurally fair treatment in tax matters (Davis Tax Committee *Final report on macro analysis of the tax system and inclusive growth in South Africa* (2014) 10). It amounts to an abuse of power when SARS fails to complete a verification, inspection, or audit within a reasonable time, and that infringes on a taxpayer's right to reasonable and procedurally fair treatment (see also *CSARS v Trend Finance (Pty) Ltd* 2007 6 SA 117 SCA; Croome "SARS vs taxpayers' rights 2013 *Taxtalk* 21; Theron & Swart "Verifications and audits: What of SARS does not comply? 2019 *Taxtalk* 20; Van Zyl "The review of administrative actions: an undue delay caused by SARS – *Ackermans Ltd v Commissioner for the South African Revenue Service* [Case 16408/2013] 2015 *SA Merc LJ* 583–588). Of course, what constitutes a reasonable time, will be dictated by the complexity of the taxpayer's tax affairs and the time required to conduct a thorough investigation that will lead to the finalisation of the audit.

In the Canadian matter of *Express Gold Refining Ltd v Canada (National Revenue)* (2020 FC 614 (CanLII)) ( "*Express Gold*"), the court concluded that the revenue authority, here the Canadian Revenue Authority ( "CRA"), should have a reasonable time to conduct an audit to verify the refund before paying it to the taxpayer (para 104). The provision under consideration, section 229(1) of the Excise Tax Act, RSC 1985, reads:

> "Where a net tax refund payable to a person is claimed in a return filed under this Division by the person, the Minister shall pay the refund to the person with *all due dispatch* after the return is filed" (emphasis added).

In *Express Gold*, the taxpayer argued that the CRA should follow a "pay first, audit later" approach (para 39). Inversely, the CRA, referring to *The Queen v Imperial Oil Ltd* (2003 FCA 289 para 9), argued that the phrase "all due dispatch" connotes "an elastic standard that gives the Minister sufficient discretion to determine that a particular return should not be assessed until after a detailed review" (*ibid*). Importantly, the court in *Express Gold* warned that the CRA should not act with an ulterior purpose nor extend the audit continuously in bad faith (*Express Gold* para 39).

This warning also rings true in South Africa. As SARS has a history of unduly delaying payment of verified refunds (Tax Ombud Report on the investigation in terms of section 16(1)(b) of the Tax Administration Act 28 of 2011 into alleged delayed payment of refunds as a systemic and emerging issue (2017)), it is understandable that there might be some scepticism when SARS is afforded a discretion not to pay refunds in certain instances. In the next part we consider whether section 190(2) of the TAA is constitutionally valid.

## 5 Section 190(2) of the taa: is it constitutional?

Section 25(1) of the Constitution states that "[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property". Does section 190(2) of the TAA respect a taxpayer's right not to be arbitrarily deprived of property? To address this question, one must determine whether the interest at issue is "property" as envisaged in section 25(1). Then one must ascertain whether there has been a "deprivation" of this property. Subsequently, it must be determined if the requirements for a valid deprivation of property have been met – it is "in terms of law of general application", which law may not permit "arbitrary deprivation of property" (*First National Bank of SA Ltd t/a Wesbank v Commissioner, South*

*African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 46 ("*First National Bank*").

In terms of this general methodology for adjudicating constitutional property disputes, one should consider whether a refund that is withheld by SARS in terms of section 190(2) of the TAA constitutes "property" for purposes of section 25(1) of the Constitution. The only constitutional aid in defining the concept "property" is contained in section 25(4)(*b*), which stipulates that property is not limited to land. The courts have been liberal with their interpretation of "property" for constitutional purposes and have held that the term includes tangible movable objects (*First National Bank* para 54 (vehicles); *South African Diamond Producers Organisation v Minister of Minerals and Energy NO* 2017 10 BCLR 1303 (CC) para 41 (diamonds)); limited real rights (*Jordaan v Tshwane Metropolitan Municipality* 2017 6 SA 287 (CC) paras 58, 61 (real security rights); *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) (mineral rights); intangible assets (*Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as amicus curiae)* 2005 8 BCLR 743 (CC) (intellectual property)); personal rights with a monetary value (*National Credit Regulator v Opperman* 2013 2 SA 1 (CC) paras 57–65; *Cool Ideas 1186 CC v Hubbard* 2014 4 SA 474 (CC) para 38 (unjustified enrichment claim); *South African Diamond Producers Organisation v Minister of Minerals and Energy* 2017 10 BCLR 1303 (CC) para 57 (diamond trading licence); *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 6 SA 125 (CC) paras 61, 68, 139, 143 (liquor trading licence)); and money in hand (*Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport* 2015 10 BCLR 1158 (CC) para 16).

In *Opperman v Boonzaaier* (2012 JOL 29470 (WCC) para 18), the court indicated that something would constitute "property" for constitutional purposes when it has patrimonial value, is transferable, and falls in a person's estate during sequestration or liquidation (see *National Credit Regulator v Opperman* paras 57–65 where this test was confirmed). Consequently, based on our argument above that the taxpayer remains entitled to a refund despite an ongoing audit, inspection, or verification, the money withheld by SARS in terms of section 190(2) of the TAA qualifies as "property" for purposes of section 25(1) of the Constitution (see Fritz & Brits "Does the 'pay now, argue later' approach in the Tax Administration Act 28 of 2011 infringe on a taxpayer's right not to be deprived of property arbitrarily?" 2020 *SAJHR* 206–207, who reach a similar conclusion in respect of section 164 of the TAA as regards to taxpayer money).

Moving on to the next aspect, "deprivation" does not necessarily mean that property is taken away (*First National Bank* para 57; *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* 2005 1 SA 530 (CC) para 32). Rather, "deprivation" points towards "any interference with the use, enjoyment or exploitation of private property" (*First National Bank* para 57), and whether the interference is "significant enough to have a legally relevant impact" on the affected interest (*National Credit Regulator v Opperman* para 46). As a result, the question in relation to section 190(2) of the TAA would be whether or not there is an interference with the taxpayer's use of the refund money that has a legally relevant impact. There is no doubt that withholding a refund to which the taxpayer is entitled, the entitlement being apparent from the fact that SARS has a

discretion to refund the taxpayer even when an audit is undertaken (as argued above), creates a deprivation of property.

The requirement that the deprivation of property should be in terms of law of general application is easily disposed of, because the TAA clearly is such a law (Fritz & Brits 2020 *SAJHR* 209). As regard the last aspect, arbitrariness, a deprivation will be arbitrary where the law in question does not provide sufficient reason for the deprivation or it is effected in a procedurally unfair manner (*First National Bank* para 100).

Regarding whether there is a sufficient reason (substantive fairness), a means-ends analysis must be conducted (*ibid*). This analysis requires one to evaluate the relationship between the deprivation (the means employed) and the purpose of the law (the ends sought to be achieved). Accordingly, it is necessary to identify the exact purpose of section 190(2) of the TAA and to ask whether the purpose is sufficiently compelling when one considers the relevant aspects, such as the impact of this provision (Fritz & Brits 2020 *SAJHR* 215). From the *Rappa* judgment it appears that the discretion afforded to SARS not to refund a taxpayer when the refund is subject to audit, is to preserve the funds until it is established whether or not the taxpayer is entitled to them. As indicated above, we do not agree that section 190(2) is concerned with establishing entitlement but rather with placing a hold on the payment until completion of the verification, inspection, or audit, the crux of section 190(2) of the TAA remains that SARS retains possession of the money until it is verified that the money should be paid out. From an efficient tax administration perspective, withholding the refund in terms of section 190(2) makes sense. The reason is that if SARS refunds the taxpayer and it is uncovered with the finalisation of the audit that the money was actually not due to the taxpayer, SARS would need to employ resources to collect the outstanding tax.

In addition to this important purpose, the possible impact of withholding refunds plays a significant role in this means-ends analysis. In the current case under discussion, the taxpayer's business model depends on the VAT refund for its survival. Also, the decision to withhold the refund pending verification, inspection or audit can have a ripple-effect, where the employees of Rappa and their families are left without this income stream if Rappa were to close down because of the fact that the refund was withheld (in *Vuyisile Zamindlela Nondabula* para 25, the court highlighted that the ripple effect of tax provisions should be considered).

Thus, objectively the means-ends analysis points towards a rational link between withholding the refund and ensuring that SARS retains possession of the money until it is verified that the money should be paid out. However, in certain instances, the impact of SARS retaining the refund could have a devastating effect on the taxpayer and others. Thus we argue that section 190 of the TAA should be more nuanced than simply providing that a refund, which is subject to verification, inspection, audit, or criminal investigation, must be paid to the taxpayer before the relevant verification process is concluded, when acceptable security has been furnished (s 190(3) of the TAA).

Whilst the wording of section 190(2) of the TAA grants SARS a discretion whether or not to pay out the refund, such a broad discretion is unsatisfactory in a constitutional dispensation. The reason for this is that a discretionary power without restrictions diverges from the rule of law, as it is unclear when SARS would exercise this discretion for or against the taxpayer (Fritz (2017) 38).

To address the need for a more nuanced provision and to ensure that a taxpayer affected by the section 190(2) discretion can ascertain whether the decision should be taken on review, we recommend that section 190(2) should include factors that SARS would consider in exercising its discretion whether or not to pay the refund. In this respect, we suggest that SARS should have regard to all relevant factors, but a non-exhaustive list containing specific factors should be included in section 190(2) of the TAA. In our view, factors such as the compliance history of the taxpayer and whether or not paying the refund subject to verification, inspection, or audit, will result in irreparable hardship to the taxpayer, should be contained in this list.

Moreover, arbitrariness in relation to section 25(1) of the Constitution, requires one to determine if the deprivation of property is imposed in a procedurally fair manner. One should consider, amongst other aspects, whether there are sufficient safeguards imbedded in the process, if the timelines are fair, and whether there is a reasonable opportunity for the affected party to be heard (Fritz & Brits 2020 *SAJHR* 209).

Currently, the only possible safeguard that lessens the impact that section 190(2) of the TAA may have on a taxpayer is contained in section 190(3). As indicated above, this provision is somewhat wanting regarding what would be an acceptable form of security, and whether SARS actually has a discretionary power to authorise part payment of the refund. Inserting factors that SARS will consider when exercising its discretion in terms of section 190(2) will improve the safeguards in the refund pending verification, inspection, or audit process, as it would provide certainty to taxpayers regarding what SARS will be considering when exercising its discretion.

Section 190(2) – and for that matter the entire section 190 – does not contain any timelines. SARS can decide at any stage while the verification, inspection, or audit is underway to authorise payment of the refund. Nonetheless, the operation of section 190 is dependent on the verification, inspection, or audit processes. The TAA provides timelines relating to keeping the taxpayer informed of the progress that has been made with an audit (SARS should provide a report to a taxpayer within 90 days after an audit has commenced detailing the scope of the audit, the progress that has been made, and relevant material that the taxpayer must provide (s 42(1) of the TAA read with GN 788 in *Government Gazette* 35733 (1 October 2011)). A similar report must subsequently be given to the taxpayer in 90 day intervals. Furthermore, section 42(2)(*b*) provides that when an audit (or criminal investigation) is concluded, SARS must inform the taxpayer within 21 business days of the conclusion of the audit whether the audit was inconclusive or uncovered possible adjustments of a material nature. The purpose of these timelines is to keep taxpayers informed and not to limit the time SARS has to conclude an audit.

Even so, SARS' *Service Charter* ((2018) 5) provides timelines for verification, inspection, and audit. When a taxpayer's return for the current filing period is subject to verification, SARS aims to inform a taxpayer within 15 business days after submission of the return of the fact that it is subject to verification. Furthermore, SARS will attempt to finalise the verification within 21 business days after acquiring all supporting documents. In respect of audits, the *Service Charter* provides that audits should be concluded within 90 business days after SARS has received all the required supporting documents. While SARS' commitment to providing timelines within which these processes should be

concluded is commendable, the *Service Charter* sets out only what SARS endeavours to do and does not impose enforceable obligations on SARS (Disclaimer to the *Service Charter*; Rossato "Disputes and the SARS Service Charter" 2018 *TAXtalk* 22; Visser "SARS' Service Charter both delights and disappoints" 2018 *Tax Breaks* 1–3). Accordingly, as the court indicated in *Rappa*, an audit must be concluded within a reasonable time; the reasonableness of the time period depends on the complexity of the specific case. However, the legislative requirements to keep a taxpayer informed regarding an audit that is underway, act as a safety measure in terms of which SARS must account for the progress that has been made with the audit.

One of the aspects to consider when contemplating whether a provision is procedurally fair – whether there is a reasonable opportunity for the affected party to be heard – relates to the *audi alteram partem* principle. This principle, in turn, is given effect to by the constitutional right to just administrative action and the (PAJA) in so far as it relates to administrative action.

The discretion afforded in terms of section 190(2) of the TAA, constitutes administrative action and as such the provisions in the PAJA affording a person the right to be heard is important for two reasons. In the first instance, it is a consideration to determine procedural fairness *vis-à-vis* whether it is an arbitrary deprivation for purposes of section 25(1) of the Constitution. Secondly, section 33 of the Constitution dictates that administrative action should be lawful, reasonable, and procedurally fair. In this respect, section 3(2)(*b*) of the PAJA provides that procedurally fair administrative action entails giving a person –

> "(i) adequate notice of the nature and purpose of the proposed administrative action;
>
> (ii) a reasonable opportunity to make representations;
>
> (iii) a clear statement of the administrative action;
>
> (iv) adequate notice of any right of review or internal appeal, where applicable; and
>
> (v) adequate notice of the right to request reasons in terms of section 5."

Although section 3(2)(*b*)(ii) of the PAJA stipulates that a person affected by the administrative action should have a reasonable opportunity to be heard, in reasonable and justifiable circumstances, the administrator (here, SARS) may deviate from this requirement (s 4(*a*) of the PAJA). Contemplating whether or not such a deviation should occur, SARS would consider, *inter alia,* the purpose of the empowering provision, the "need to promote an efficient administration", and the effect that the administrative action is likely to have (s 4(*b*) of the PAJA). Section 190(2) of the TAA gives SARS the discretion to retain the money (refund) until it is verified that the refund should be paid out. When SARS decides not to pay out the refund pending verification, it is a step towards promoting an efficient tax administration, because SARS would not need to use resources to collect the outstanding tax if it is found that the money should not be refunded to the taxpayer. Despite the fact that withholding the refund could have a significant impact on a taxpayer, its family, and employees, this deprivation is not meant to be permanent. Once it has been established that the refund is actually due to the taxpayer, SARS endeavours to pay the taxpayer generally within 7 business days (SARS *Service Charter* (2018) 5).

Accordingly, it may be reasonable and justifiable not to allow a taxpayer to make representations before SARS exercises its discretion in terms of section 190(2) of the TAA. Yet, an unreasonable delay in finalising a verification, inspection, or audit process could have dire consequences even if the refund is eventually paid to the taxpayer. Consequently, it is of the utmost importance that SARS keeps the taxpayer informed regarding the stages of completion of a specific process so that the taxpayer can determine whether or not to approach a court for assistance. Unfortunately, the TAA provides no sanction if SARS fails to adhere to the timelines of keeping the taxpayer up to date on the progress that has been made with an audit (Croome & Olivier *Tax Administration* (2015) 211).

In our view, section 190(2) of the TAA muster constitutional scrutiny – it does not arbitrarily deprive a taxpayer of its property, as it is substantively and procedurally fair. However, as indicated above, it is advisable that section 190(2) stipulates what SARS must consider when it determines whether or not to pay a refund while the refund is subject to verification, inspection, or audit. Furthermore, we advise that the TAA must impose a sanction on SARS if it fails to keep a taxpayer informed in accordance with the legislative timelines. Adhering to these timelines are vital to ensure that SARS remains accountable and conduct the audit within a reasonable time, as it restricts the impact the deprivation of the refund may have on the taxpayer, its family, and employees.

## 6 Conclusion

As a result of SARS' contentious history of delaying refunds, the court had the perfect opportunity to provide clarity on the paying out of refunds pending verification, investigation, or audit. Sadly, *Rappa* has caused some mixed reactions. On the one hand, we consider the court's ruling that an audit should be completed within a reasonable time, depending on the facts of each case, to be correct. This view is also supported by the Canadian case of *Express Gold*. On the other hand, we cannot endorse the court's ruling as regards the effect of section 190 of the TAA on a taxpayer's entitlement. Another aspect that creates confusion, relates to the furnishing of security. If section 190(3) of the TAA empowers SARS to make a partial refund equal to the value of acceptable security, this should be explicitly clear from the wording of section 190(3). It is clear that section 190 of the TAA is in dire need of redrafting.

From the discussion of the constitutionality of section 190(2) of the TAA, it is clear that, because the provisions in the TAA are intertwined, they should not be interpreted in isolation. It is paramount that SARS keeps the taxpayer informed as to the progress of an audit, as this, in turn, makes it possible for the taxpayer to determine whether or not SARS is delaying an audit unreasonably and is withholding refunds unduly by virtue of section 190(2) of the TAA. Whilst the relevant provisions in the TAA accords with the Constitution, a taxpayer should be in a position to determine whether SARS' conduct is also in line with the Constitution.

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