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A regulatory framework for tax whistleblowing in South Africa

by

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List of acronyms and bbreviations

Amendment Act	Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 10 of 2019
ATO	Australian Tax Office
Companies Act	Companies Act 71 of 2008
Constitution	Constitution of the Republic of South Africa, 1996
CSRA	Civil Service Reform Act of 1978
Dodd-Frank	Dodd-Frank Wall Street Reform and Consumer Protection Act 2010
DOJ	United States Department of Justice
DPCI / Hawks	Directorate of Priority Crime Investigation
FCA	False Claims Act 1863
FIC	Financial Intelligence Centre
FICA	Financial Intelligence Centre Act 38 of 2001
IRC	Internal Revenue Code of 1986
IRM	Internal Revenue Manual
IRS	United States Internal Revenue Service
LRA	Labour Relations Act, 66 of 1995
NPA	South African National Prosecuting Authority
NSW	New South Wales, Australia
OSC	United States Office of Special Counsel
PAIA	Promotion of Access to Information Act 2 of 2000
PAJA	Promotion of Administrative Justice Act 3 of 2000
PDA	Protected Disclosure Act 26 of 2000
POPIA	Protection of Personal Information Act 4 of 2013

PRECCA	Prevention of Corrupt Activities and Crime Act 12 of 2004
PwC	PricewaterhouseCoopers
SAPS	South African Police Service
SARS	South African Revenue Service
SARS Act	South African Revenue Service Act 34 of 1997
SEC	United States Securities and Exchange Commission
SOX	Sarbanes-Oxley Act of 2002
Tax Administration Act	Tax Administration Act 28 of 2011
TIGTA	United States Treasury Inspector General for Tax Administration
US	United States of America
VAT	Value Added Tax
VAT Act	Value Added Tax Act 89 of 1991
VDP	Voluntary Disclosure Programme
VDR	Voluntary Disclosure Report
WPA	Witness Protection Act 112 of 1998
Zondo Commission	Judicial Commission of Inquiry into State Capture

Abstract

This study explores the viability and practicality of incorporating an incentivised tax whistleblowing programme in the Tax Administration Act, 28 of 2011. The primary objective of the study is to develop a legislative framework that can be used as a baseline for the development of the Tax Administration Act. To achieve this primary objective, the study considers the theories of compliance such as economic deterrence theory, fiscal exchange theory, social and comparative treatment and trust and political legitimacy of revenue authorities.

These theories provide a basis for concluding on the factors that influence taxpayers' behaviour. The potential effect of a whistleblowing programme on these theories is considered to determine the potential role of an incentivised whistleblowing programme. The study also considers protection laws, fines, reporting duties and rewards as different regulatory policies or strategies to compel tax compliance. Finally, by taking lessons from the policy designs of the US and Australia, the study concludes on the foundational requirements for an incentivised whistleblowing programme.

The study adopts a mixed-method approach. It involves reviewing the findings of existing studies on behavioural economics to understand taxpayer behaviour and a doctrinal analysis of the existing legislative framework in South Africa. In addition, the study also examines the regulatory designs of incentivised tax whistleblowing frameworks in the US and Australia, not for comparative purposes, but to gather key insights into the foundational requirements for an incentivised tax whistleblowing programme.

The key findings of the study can be summarised in three main points. Firstly, South Africa does not have an incentivised tax whistleblowing programme. In fact, there is no incentivised whistleblowing programme in South Africa. Secondly, the South African tax legislative framework requires amendment to accommodate such a programme. Tax whistleblowing is a fundamental and powerful tool for revenue authorities to collect information and combat tax non-compliance and evasion. Thirdly, the proposed incentivised legislative framework envisages the following seven foundational requirements:

i. A separate office within SARS that deals with whistleblower reports;

ii. The investigation powers currently available to SARS must be available for this separate office to investigate the whistleblower reports;

iii. A preliminary reward must be calculated;

iv. Appropriate dispute resolution mechanisms and processes;

v. A system for payment of rewards;

vi. Adequate protection for whistleblowers and taxpayers; and

vii. Appropriate anti-retaliation mechanisms.

Finally, the proposed whistleblowing programme passes preliminary constitutional scrutiny making it a viable option for consideration by SARS and the South African legislature.

The introduction of an incentivised tax whistleblowing programme has several benefits. It could potentially assist SARS in achieving its strategic objectives to promote voluntary compliance by encouraging individuals to report tax non-compliance and evasion. The proposed programme could increase revenue collection, since whistleblowers provide information that can be used to recover unpaid taxes. The proposed programme also plays a role in the deterrence of non-compliant and evasion behaviour, since individuals and companies may be more cautious and less aggressive in their tax planning.

In conclusion, the study highlights the potential benefits of such an incentivised tax whistleblowing programme and provides insight into the development of such a policy in South Africa. The study acknowledges the need for future research to develop the preliminary framework established in this thesis, so as to address the unique challenges within a South African context.

Keywords: Tax; Whistleblowing; Incentives; Rewards; South Africa; Constitution; Tax evasion, Tax administration, Incentivised tax whistleblowing programme, Revenue collection, Behavioural economics.

Chapter 1: Introduction

1.1. Background

The Judicial Commission of Inquiry into State Capture ("Zondo Commission"), chaired by former Constitutional Court Judge (now Chief Justice) RMM Zondo from 2018 to 2022, revealed large-scale allegations of state capture, corruption, tax evasion, fraud and tender irregularities by state-owned entities and private companies. The Zondo Commission's first hearing took place on 20 August 2018.[1] Many of the witnesses took part in and benefitted from corrupt or criminal activities and have been exposed to investigation by the South African Revenue Service ("SARS") and other state agencies.[2] Whistleblowers played a crucial role at the Zondo Commission. They enabled state agencies such as SARS and the Directorate for Priority Crime Investigations ("DPCI" also known as the "Hawks") to investigate the acts of corruption and other criminal offences to ensure that justice in respect of the criminal cases was served and that the revenue due to the fiscus was collected.

From an international tax perspective, various countries have included tax whistleblowing programmes within their legislative dispensation. In the United States of America ("US"), provision is made for financial incentives in tax-whistleblowing programmes under the Internal Revenue Code of 1986. For the financial year end of 2022, the Securities and Exchange Commission paid USD229 million in respect of 103 awards.[3] The enforcement actions brought based on the information provided by

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1 Judicial Commission of Inquiry into State Capture Report Part 1, V1 viii at https://www.gov.za/sites/default/files/gcis_document/202201/judicial-commission-inquiry-state-capture-reportpart-1.pdf (Accessed 31/03/2023).

2 Judicial Commission of Inquiry into State Capture Report Part 1, V1 viii at https://www.gov.za/sites/default/files/gcis_document/202201/judicial-commission-inquiry-state-capture-reportpart-1.pdf (Accessed 31/03/2023).

3 US Securities and Exchange Commission: Office of the Whistleblower "SEC Whistleblower Office Announces Results for FY 2022" at https://www.sec.gov/files/2022_ow_ar.pdf (Accessed 31/03/2023).

meritorious whistleblowers exceeded USD6,3 billion.[4] Similarly, in South Korea, the National Tax Service applies a reward programme for whistleblowers who report significant information; the National Tax Service has since 2012 awarded more than USD44 million.[5] The Australian Tax Office also recognises the importance of tax whistleblowers when it says, "*[w]e are committed to tackling phoenix, tax evasion or shadow economy activity. You can help us keep the system fair for everyone*".[6] In a similar vein, the Ghanaian Whistle-Blower Act was the first in Africa to introduce a reward programme for whistleblowers. However, the efficacy of the Act has been compromised by retaliation against whistleblowers.[7]

SARS has many information-gathering tools in its arsenal, including inspections at taxpayers' premises,[8] requests for relevant material,[9] production of relevant material

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4 Securities and Exchange Commission: Office of the Whistleblower "SEC Whistleblower Office Announces Results for FY 2022" at https://www.sec.gov/files/2022_ow_ar.pdf (Accessed 31/03/2023).

5 GCC FinTax "Tax Whistleblower Programs All Around The Globe 2022" at https://www.gccfintax.com/articles/tax-whistleblower-programs-all-around-the-globe-4089.asp (Accessed 31/03/2023).

6 Australian Tax Office (Updated June 2023) "Illegal Phoenix activity" at https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Illegal-phoenix-activity/ (Accessed on 31/03/2023). "Phoenix" refers to an scheme in which a company liquidates its assets and transfers them to a new company to avoid paying debts.

7 GCC FinTax (2022) "Tax Whistleblower Programs All Around The Globe 2022" at https://www.gccfintax.com/articles/tax-whistleblower-programs-all-around-the-globe-4089.asp (Accessed 31/03/2023).

8 S 45 Tax Administration Act 28 of 2011 provides "(1) A SARS official may, for the purposes of the administration of a tax Act and without prior notice, arrive at a premises where the SARS official has a reasonable belief that a trade or enterprise is being carried on and conduct an inspection to determine only- (a) the identity of the person occupying the premises; (b) whether the person occupying the premises is registered for tax; or (c) whether the person is complying with sections 29 and 30. (2) A SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for the purposes of trade, under this section without the consent of the occupant"

9 S 46 Tax Administration Act provides that "(1) SARS may, for the purposes of the administration of a tax Act in relation to a taxpayer, whether identified by name or otherwise objectively identifiable, require the taxpayer or another person to, within a reasonable period, submit relevant material (whether orally or in writing) that SARS requires."

in person through interviews,[10] tax inquiries,[11] and conducting search and seizure operations.[12] That said, SARS does not have specific powers or competencies to obtain information by incentivising and protecting whistleblowers. The contribution of this study is to consider including whistleblowers' rights and incentives in the Tax Administration Act, 28 of 2011 ("Tax Administration Act") as an information-gathering tool that SARS may utilise to investigate and audit taxpayers or expedite ongoing audits. The study will also focus on the requirements and jurisdictional elements necessary for SARS to use whistleblowing as an investigative tool.

Whistleblowing is an essential tool to collect information that may otherwise not be available or uncovered.[13] Whistleblowing is pivotal in preventing and detecting tax

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10 S 47 Tax Administration Act states that "(1) A senior SARS official may, by notice, require a person, whether or not chargeable to tax, an employee of the person or a person who holds an office in the person to attend in person at the time and place designated in the notice for the purpose of being interviewed by a SARS official concerning the tax affairs of the person…"

11 Ss 50 to 57 of the Tax Administration Act. Section 50 provides that SARS "…may on application made *ex parte* and authorised by a senior SARS official grant an order in terms of which a person described in section 51 (3) is designated to act as presiding officer at the inquiry referred to in this section…"

12 Ss 59 to 66 Tax Administration Act. S 59 provides that "(1) A senior SARS official may authorise an application for a warrant under which SARS may enter a premises where relevant material is kept to search the premises and any person present on the premises and seize relevant material…"

13 *Smyth v Anglorand Securities Ltd* (JS 751 / 18) (2022) ZALCJHB 72 para 1: "Standing as a silent observer in the face of misconduct by another creates a fertile breeding ground in which the misconduct can flourish. The situation is exacerbated by the fact that it would often be that only action taken by such an observer that would cause the misconduct to be brought to light, and then be hopefully dealt with, prevented and/or eliminated. In this regard, the following well known quote springs to mind: 'The only thing necessary for the triumph of evil is for good men to do nothing'. John Stuart Mill better described it as follows: 'Let not any one pacify his conscience by the delusion that he can do no harm if he takes no part, and forms no opinion. Bad men need nothing more to compass their ends, than that good men should look on and do nothing'. One can hardly do better, especially in the context of the employment relationship, than to refer to the following dicta in Tshishonga v Minister of Justice and Constitutional Development and Another: 'there is growing recognition that whistleblowers need protection. Whistleblowing is healthy for organisations. Managers no longer have a monopolistic control over information. They have to be alert to their actions being monitored and reported on to shareholders and the public. Everyone is alive to their loyalty to the organisation. As a safe alternative to silence, whistleblowing deters abuse. If employees did not turn a blind eye or were not afraid to rock the boat, and if employers did not turn a deaf ear or blame the messenger instead of heeding the message, many catastrophes could have been averted.'"

evasion, corruption, fraudulent activities and misconduct.[14] There are many definitions of whistleblowing. In essence, it is information provided by someone who believes that a transgression or wrongdoing has resulted in an offence, mismanagement, corruption, or disaster (such as state capture allegations investigated by the Zondo Commission).[15]

As part of the consideration of a whistleblowing programme, it must be established whether and how a tax whistleblower protection programme fits into the constitutional framework in South Africa. This enquiry demands an exposition of the existing legislative protection and the interplay with certain rights enshrined in the Constitution.

Of importance in this study is the consideration of those factors that influence and promote tax compliance and tax morale. After those factors are designed into draft legislation, it must comply with the existing constitutional framework within which it is intended to operate. This study will consider the relevant factors with the ultimate view of translating them into a proposed policy position. For this reason, the established principles of behavioural economics must be considered. To practically consider how whistleblowers are protected and the implementation of incentives, the study will incorporate the legal positions of two other jurisdictions.

In the face of state capture, the significance of the study is in the design of an information-gathering tool that SARS may use to detect, prevent and curb tax evasion and non-compliance. The intended use of an incentivised tax whistleblowing programme is to create a proactive programme that helps to prevent and limit tax offences. The benefits of an incentivised whistleblowing programme includes inter alia

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14 Botha and Van Heerden "The Protected Disclosures Act 26 of 2000, the Companies Act 71 of 2008 and the Competition Act 89 of 1998 with regard to whistle-blowing protection : is there a link?" *THRHR* 2014 2. Ff Antinyan, Corazzini, and Pavesi "What Matters for Whistleblowing on Tax Evaders?" *Survey and Experimental Evidence Working Paper Series* 2018 7.

15 See for example the definition by Transparency International, "Best Practice Guide for Whistleblowing Legislation" (2018) at https://images.transparencycdn.org/images/2018_GuideForWhistleblowingLegislation_EN.pdf (Accessed 31/03/2023) that provides the following definition "whistleblowing is the disclosure or reporting of wrongdoing, including but not limited to corruption; criminal offences; breaches of legal obligation; miscarriages of justice; specific dangers to public health, safety or the environment; abuse of authority; unauthorised use of public funds or property; gross waste or mismanagement; conflict of interest; and acts to cover up of any of these…"

an increase in the risk of detection, higher audit probability and cost of non-compliance and it is shown to be one of the most effective tools to increase voluntary taxpayer compliance.[16] An incentivised tax whistleblowing programme further aligns with SARS's strategic objectives to promote voluntary tax compliance.[17] In the end, a proposed policy framework is provided based on the findings of existing studies that determined the factors that influence whistleblowers.

Many have researched factors influencing a person's decision to blow the whistle. Very few studies seek to combine the factors with policy design. It also appears that there is limited research on whistleblower programmes in the context of tax evasion.[18] None of these attempted policy designs has been done in South Africa. The contribution of the current study is to provide an integrated model where tax whistleblowing receives legislative protection and reward.

There are no reported judgments and only limited academic literature in the South African context regarding the specific topic of study. The audience that will most likely benefit from the study includes tax and legal practitioners, the South African Revenue Service, the legislators and academics.

1.2. Research problem statement, research questions and proposed methodology

The crisp issue is that South Africa does not have a tax whistleblowing programme that incentivises and protects whistleblowers who report or intend to report tax non-compliance and tax evasion. Therefore, whistleblowing in the context of tax evasion and non-compliance is overlooked as a tool by the legislator and SARS. The need for such a programme is evident from the Zondo Commission's findings.

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16 Chapter 4 paras 4.3 and 4.4. Chapter 7 para 7.2.
17 Chapter 4 para 4.5. Chapter 7 para 7.3.
18 Slemrod "Tax Compliance and Enforcement: New Research and Its Policy Implications" *Ross School of Business* 2016 1-85.

The questions below will be used as a benchmark throughout the study. The questions are framed in the order of how the study intends to respond to the problem statement and are subject to amendment depending on the research findings.

i. Are tax whistleblowers recognised in the South African legislative or regulatory policy context?

ii. What competing rights of taxpayers and tax whistleblowers must be balanced to ensure protection for both persons without undermining the incentives to encourage tax whistleblowing?

iii. As for tax morale and compliance, what factors are relevant for an incentivised whistleblowing programme and what are the disadvantages of incentivised whistleblowing?

iv. What regulatory strategies must be considered for an incentivised tax whistleblowing programme and what have other jurisdictions done in the context of tax whistleblowers?

v. Considering the lessons from other jurisdictions and the strategies to incentivise whistleblowing, what form will the legal framework for tax-related whistleblowing take?

The envisaged methodology will be a combination of doctrinal and policy research methodologies. A doctrinal analysis will be used to analyse the existing legislative framework and the underlying competing human rights. This choice of methodology encompasses a purely legal analysis of what the law currently states regarding whistleblowers, and whether the evidence shows that the legal position is developing. The method is a source-based analysis considering case law, statutes and regulations.

A purely doctrinal analysis will not consider the effect of whistleblowing policies on tax compliance. It will fall short in the analysis of strategies to incentivise taxpayer compliance. For the purposes of the discussions on incentive strategies, the study will consider existing experiments and examples of policy designs in the US and Australia.

The study does not intend to compare the policy designs of the jurisdictions above with that of South Africa. Instead, the intention is to take lessons from those jurisdictions' policy design in considering the proposed regulatory design for South Africa. The jurisdictions were identified for their diverse policy designs and approach to tax whistleblowers in two key respects. Firstly, the nature of the incentive offered to tax whistleblowers differs between the jurisdictions. Secondly, the qualifying factors that determine whether a tax whistleblower should be protected.

The US introduced a monetary incentive programme for tax whistleblowers. Furthermore, the US' policy design is framed in broad terms and the protection and incentive are qualified by the nature and significance of the information to be provided by the whistleblower. In contrast, the Australian legislator relied on the anti-retaliation laws against tax whistleblowers to incentivise tax whistleblowers. In Australia, the factors determining whether a whistleblower should be protected are qualified by the way in which the disclosure was made and to whom the disclosure was made.

1.3. Limitations of study

This study does not intend to conduct field research on how a whistleblowing programme will be perceived and received by South African taxpaying citizens, nor is it necessary to determine the theories relating to tax compliance in South Africa. This study aims to identify the need to protect whistleblowers, and the factors that would influence a person to blow the whistle and determine how protection and reward for whistleblowers would manifest.

Furthermore, the proposed policy position will be tested at the surface level to ensure that it passes constitutional scrutiny. The intention is not to detail all foreseeable factual scenarios that may lead to different interpretations and results. This is another aspect that may deserve attention in future.

It is pointed out that the scope of the protection and reward proposed in the policy design may differ in relation to different types of tax. When discrepancies occur in the

manner of payment of taxes, rebates or penalties, the nature and context of the specific tax may compel a slight divergence of the proposed policy position.

Furthermore, this study does not account for any changes in the law after 30 April 2024.

1.4. Exposition

This study is conducted in three parts consisting of 10 chapters. The first part, comprising Chapters 1 to 3, provides the contextual setting of the study. Chapter 1 is a general introduction to the thesis and discusses the research problem statement, methodology and exposition of the intended study. Chapter 2 introduces the existing legislative framework for whistleblowers in South Africa, focusing on commercial, fiscal, and anti-corruption legislation. The aim is to determine whether the current legislation protects tax whistleblowers and, if so, the limitations of the applicable legislation. Chapter 3 discusses the underlying constitutional principles and rights that underscore whistleblowers. This investigation is relevant to determine whether the proposed policy position will pass constitutional scrutiny.

The second part of the study examines the strategies for incentivising whistleblowing and the factors influencing taxpayer compliance behaviour. This part comprises Chapters 4 to 6. In Chapter 4, the study endeavours to identify and discuss factors influencing taxpayer morale and compliance. The aim is to determine what factors must be considered when proposing a policy position on a whistleblower incentive programme. Chapter 5 discusses the various incentive proposals, such as rewards and anti-retaliation laws, as tools to encourage whistleblowing. The purpose is to provide a basis for the chosen incentive policy position. Finally, Chapter 6 examines different tax whistleblower incentives implemented in other jurisdictions. This discussion exposes how incentive programmes have been translated into legislation.

The third part comprises Chapters 7 to 10 and it deals with the proposed policy position and legislative framework. In Chapter 7, the proposed policy position is detailed and amalgamates Chapters 4 to 6 of the study to arrive at the different requirements for

the proposed legislative amendments. Chapter 8 identifies the foundational elements of an incentivised tax whistleblowing programme. It discusses the underlying policy considerations and the interplay between the existing policy and the proposed policy to help to explain why the proposed policy position is preferable.

The chapter also discusses the effect of the proposed legislative framework on existing legislation and the potential amendments to the existing legislation. In Chapter 9, the proposed legislative framework is tested against the constitutional principles discussed in Chapter 3. The purpose is to establish whether the proposed policy will pass constitutional muster.

Chapter 10 concludes the study by responding to the research questions mentioned above. The chapter also provides a list of practical recommendations for the implementation of the proposed incentivised whistleblowing framework. Moreover, the chapter concludes by recognising areas for future study.

Chapter 2: Current whistleblowing-related legislative framework in South Africa

2.1. Introduction

This chapter considers the South African legislative framework for tax whistleblowing to determine whether the position of tax whistleblowers is effectively regulated and if tax whistleblowing is incentivised. Various pieces of legislation deal with whistleblowers generally and within specific industries. The legislation within the labour and commercial sphere is relevant to the study. This chapter commences with a general background on tax whistleblowing in South Africa before the enactment of the Tax Administration Act. Following this, the applicable legislation to tax whistleblowers is discussed. This discussion scrutinises the legislation that could incentivise tax whistleblowing. In the current legislative framework of whistleblowing in general, a tax whistleblower has limited protection when blowing the whistle and zero incentive to do so. The protection is scattered throughout different legislation, each with unique requirements that may not always be relevant to a tax whistleblower, and which may cause them to be ultimately left unprotected.

As stated above, the South African legislator has enacted various legislation dealing with whistleblowing. The various Acts are listed in Table 2.1 below. Note that since the Constitution is discussed in Chapter 3, this Chapter does not delve into the Constitution.

Table 2.1 Legislation dealing with whistleblowers in South Africa

Legislation	**Relevant Section/s**
Constitution of the Republic of South Africa Act, 1996	Sections 9, 14, 16 and 23
Protected Disclosures Act, 26 of 2000, as amended by Act, 5 of 2017	All
Labour Relations Act, 66 of 1995	Sections 185, 186(2)(d),

	187(1)(h),188A(11) and 194
Companies Act, 71 of 2008	Section 159
Financial Intelligence Centre Act, 38 of 2001	Sections 28, 29, 37 and 38
Pension Funds Act, 24 of 1956	Sections 9B, 13B(10) and 37(1)
National Environmental Management Act, 107 of 1998	Section 31
Municipal Finance Management Act, 56 of 2003	Sections 32(6), 32(7) and 102(2)
Public Finance Management Act, 29 of 1999	Section 38(1)(g)
Prevention and Combating of Corrupt Activities Act, 12 of 2004	Sections 18 and 34
Protection from Harassment Act, 17 of 2011	Sections 1 and 2
Defence Act, 42 of 2002	Section 50
Witness Protection Act, 112 of 1998	Section 7 and in general

Source: Author's compilation.

None of the above statutes function directly within the tax legislative framework, nor do they incentivise whistleblowing through reward. Notably, no tax Act in South Africa provides for whistleblowing as an information-gathering tool for SARS and none includes incentivised whistleblowing.

The premise of this study is that legislative tax reform is needed to establish a regulatory framework within which tax whistleblowing must operate. Such a legal framework must regulate the protection of whistleblowers, encourage whistleblowing, and provide parameters from within which a reward system could operate.

Before the Tax Administration Act's enactment, SARS sometimes rewarded whistleblowers for providing information. But during the drafting of the Tax Administration Act, the issue of rogue activities when staff members may blow the whistle was raised.[1] During the public hearing on the proposed bill, it was argued that there was national legislation dealing with the protection of whistleblowers and that reporting of problems or corruption had to occur within those provisions.[2] This resulted in a whistleblowing programme not being included in the final version of the Act.

In this chapter, the national legislation that may deal with tax whistleblowers is considered to determine the need for policy reform. Although there is no statutory framework for tax whistleblowers, it is possible to report suspected tax or customs offences and non-compliance to SARS through its website.[3] What follows are observations concerning persons who file a report through SARS' website.

The website is not user-friendly because locating the correct landing page to make the anonymous report may be challenging. The reporting function does not appear on the website's home page and the potential informant must first navigate to the "Top Queries" panel or use the "Report Suspicious Activity" tab.[4]

There is also no guarantee that the information supplied will remain anonymous since there is no statutory obligation on SARS to keep the information confidential. The form to be filled in by the person requires an election of whether the whistleblower is willing to provide an affidavit.[5] As will be shown below, the entire whistleblowing regime at SARS is unregulated. Only when a matter is referred to the National Prosecuting

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1 Parliamentary Monitoring Group: Tax Administration Bill (B11-2011): SA Revenue Service response to public submissions at https://pmg.org.za/committee-meeting/13441/ (Accessed 30/03/2023).

2 Parliamentary Monitoring Group: Tax Administration Bill (B11-2011): SA Revenue Service response to public submissions at https://pmg.org.za/committee-meeting/13441/ (Accessed 30/03/2023).

3 SARS "How to report a tax crime" at https://www.sars.gov.za/targeting-tax-crime/report-a-tax-crime/ (Accessed 21/01/2023).

4 SARS "How to report a tax crime" at https://www.sars.gov.za/targeting-tax-crime/report-a-tax-crime/ (Accessed 21/01/2023). A presentation of how to navigate SARS' website and file a report is available at https://youtu.be/hybQwVwXpjI.

5 A presentation of how to navigate SARS' website and file a report is available at https://youtu.be/hybQwVwXpjI.

Authority ("NPA") will the whistleblower and SARS potentially be under any "legal" obligation to abide by a regulatory framework.

Below follows a discussion of the provisions of the Tax Administration Act that are relevant when considering tax whistleblowing. The purpose is to provide the required background of the provisions of the Tax Administration Act pertinent to the study.

2.2. Tax Administration Act

The Tax Administration Act provides a general prohibition on disclosing taxpayer and SARS confidential information.[6] "Taxpayer information" includes "any information provided by a taxpayer or obtained by SARS in respect of the taxpayer".[7] "SARS confidential information" includes *inter alia* information supplied in confidence to SARS, the disclosure of which could prejudice the future supply of similar information.[8] This is the only provision in the Tax Administration Act that might apply to a tax

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6 S 67(1) Tax Administration Act provides that "General prohibition of disclosure-(1) This Chapter applies to- (a) SARS confidential information as referred to in S68 (1); and (b) "taxpayer information", which means any information provided by a taxpayer or obtained by SARS in respect of the taxpayer, including biometric information…"; S68(2) "A person who is a current or former SARS official- (a) may not disclose SARS confidential information to a person who is not a SARS official; (b) may not disclose SARS confidential information to a SARS official who is not authorised to have access to the information; and (c) must take the precautions that may be required by the Commissioner to prevent a person referred to in paragraph (a) or (b) from obtaining access to the information"; S69(1) "Secrecy of taxpayer information and general disclosure (1) A person who is a current or former SARS official must preserve the secrecy of taxpayer information and may not disclose taxpayer information to a person who is not a SARS official..."

7 S 67(1)(b) of the Tax Administration Act states that "(b) "taxpayer information", which means any information provided by a taxpayer or obtained by SARS in respect of the taxpayer, including biometric information."

8 S 68(1)(c) Tax Administration Act provides that "(1) SARS confidential information means information relevant to the administration of a tax Act that is-…(c) information that was supplied in confidence by a third party to SARS the disclosure of which could reasonably be expected to prejudice the future supply of similar information, or information from the same source" Apart from the general prohibition of disclosure, taxpayer information is further protected in the context of confidential tax inquiries in terms of S53 to S65 of the Tax Administration Act. Note that the different types of confidential information under the Tax Administration Act will be referred to as "protected information."

whistleblower. Yet nothing in the aforesaid Act suggests that the section should be applied to tax whistleblowers, nor has it been tested in the South African courts.[9]

For this part of the study, the focus is on information supplied in confidence by a third party to SARS, of which the disclosure may result in a potential refusal by the same source to provide similar information in future.[10] The nature of whistleblowing information is that it is supplied in secret, and the whistleblowers bargain on the secrecy to ensure protection. Alternatively, the whistleblowers negotiate their indemnification from prosecution, for instance, under section 204 of the Criminal Procedure Act,[11] and the Zondo Commission.

Apart from the general prohibition of disclosure, sections 53 to 65 of the Tax Administration Act also prohibit the disclosure of information in the context of confidential tax inquiries. A commissioner of a confidential tax inquiry is authorised to order that a specific person may not be present during the inquiry if it may prejudice the inquiry.[12] This protection may relate to a whistleblower who wishes to be protected, although it is not expressly stated in the Act.

Depending on the circumstances, the information provided by tax whistleblowers may constitute both taxpayer information and SARS confidential information. The protected information classification is relevant only when considering the privacy rules applicable to it.[13] The general position is that disclosure of protected information is prohibited unless sanctioned by a High Court or some particular circumstance exists.[14] The general prohibition also ceases once civil or criminal proceedings commence.[15]

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9 The constitutionality of the secrecy provisions of the Tax Administration Act is discussed in chapter 3.

10 S 68(1)(c) Tax Administration Act provides that "(1) SARS confidential information means information relevant to the administration of a tax Act that is-…(c) information that was supplied in confidence by a third party to SARS the disclosure of which could reasonably be expected to prejudice the future supply of similar information, or information from the same source."

11 Criminal Procedure Act, 51 of 1977.

12 S 56(2) Tax Administration Act "(2) The presiding officer may, on request, exclude a person from the inquiry if the person's attendance is prejudicial to the inquiry."

13 SARS' Short Guide to the Tax Administration Act V3 (March 2018).

14 Ss 71(1) to (3) Tax Administration Act.

15 S 69(2)(a)(ii) Tax Administration Act.

The Tax Administration Act provides jurisdictional requirements for an application to the High Court to compel the disclosure of protected information.[16] The jurisdictional requirements for such an application are:

i. The information cannot be obtained in another manner;[17]

ii. The ordinary evidence-procuring procedures (such as discovery) will yield or have yielded disappointing results;[18]

iii. The information is central to the case;[19] and

iv. The information sought is not biometric information.[20]

As for disclosing information related to criminal offences, public safety or environmental matters, a senior SARS official must disclose such information to the SAPS and the NPA.[21] Furthermore, a senior SARS official may make an *ex parte* application for an order that such information may be disclosed, if it will be material to the prosecution of an offence or to avoid risks.[22] Notwithstanding the general prohibition against disclosure of protected information, once the person tendering the

16 S 69(5) Tax Administration Act. Ff De Lange "Secrecy of Taxpayer Information and the disclosure thereof by an order of court in terms of the Tax Administration Act 28 of 2011 and the Promotion of Access to Information Act 2 of 2000" *Journal for Juridical Science* 2023 205.

17 S 69(5)(a) Tax Administration Act. Ff De Lange "Secrecy of Taxpayer Information and the disclosure thereof by an order of court in terms of the Tax Administration Act 28 of 2011 and the Promotion of Access to Information Act 2 of 2000" *Journal for Juridical Science* 2023 206.

18 S 69(5)(b) Tax Administration Act. Ff De Lange "Secrecy of Taxpayer Information and the disclosure thereof by an order of court in terms of the Tax Administration Act 28 of 2011 and the Promotion of Access to Information Act 2 of 2000" *Journal for Juridical Science* 2023 207.

19 S 69(5)(c) Tax Administration Act. Ff De Lange "Secrecy of Taxpayer Information and the disclosure thereof by an order of court in terms of the Tax Administration Act 28 of 2011 and the Promotion of Access to Information Act 2 of 2000" *Journal for Juridical Science* 2023 209-210.

20 S 69(5)(d) Tax Administration Act. Ff De Lange "Secrecy of Taxpayer Information and the disclosure thereof by an order of court in terms of the Tax Administration Act 28 of 2011 and the Promotion of Access to Information Act 2 of 2000" *Journal for Juridical Science* 2023 211-212.

21 Ss 69(2)(a)(i) and 70 Tax Administration Act.

22 Ss 71(1) – (3) Tax Administration Act.

information is a witness in civil or criminal proceedings under a tax Act, the disclosure of protected information is allowed.[23]

The underlying principle for prohibiting disclosure is that taxpayers should be secure in knowing that their affairs and the information submitted to SARS will be protected, as they may divulge information they would not ordinarily reveal to business partners, competitors, or the state.[24] In the past, courts were cautious about overriding the confidentiality provisions in the Tax Administration Act, since the secrecy provisions aim to encourage full disclosure by taxpayers.[25] That said, the courts have recognised

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23 S 67(4) of the Tax Administration Act provides that "(4) A person who receives information under section 68, 69, 70 or 71, must preserve the secrecy of the information and may only disclose the information to another person if the disclosure is necessary to perform the functions specified in those sections" See also section 69(1) that provides "(1) A person who is a current or former SARS official must preserve the secrecy of taxpayer information and may not disclose taxpayer information to a person who is not a SARS official" S69(2) Tax Administration Act reads "(2) Subsection (1) does not prohibit the disclosure of taxpayer information by a person who is a current or former SARS official- (a) in the course of performance of duties under a tax Act or customs and excise legislation, such as-(i) to the South African Police Service or the National Prosecuting Authority, if the information relates to, and constitutes material information for the proving of, a tax offence; (ii) as a witness in civil or criminal proceedings under a tax Act; or (iii) the taxpayer information necessary to enable a person to provide such information as may be required by SARS from that person; (b) under any other Act which expressly provides for the disclosure of the information despite the provisions in this chapter;(c) by order of a High Court; or (d) if the information is public information."

24 Arendse *et al Silke on Tax Administration Tax* (2024) para 11.1.

25 *Welz and Another v Hall and Others* 59 SATC 49 54 the court held that public policy demands encouragement of full disclosure of taxpayers' affairs. See also *Jeeva and Others v* Receiver *of Revenue, Port Elizabeth and Others* 1995 (2) SA 433 para 200 – 201 wherein the court was requested to override the secrecy provisions related to taxpayer information for purposes of an inquiry in terms of section 417 and 418 of the Companies Act 61 of 1973. The court indicated that justification is easier achieved where the limitation of a constitutional right arises from a right which has its origins in another constitutional or fundamental right. The court further held that the secrecy provisions in the then Income Tax Act and Sales Tax Act is designed to promote "a free flow of information" The court held that "The courts will usually uphold this principle. They will be slow to order disclosure of information given to Inland Revenue where the taxpayer knows from the beginning that everything he communicates in confidence to Inland Revenue cannot ordinarily be divulged to anybody else and where he acts under a duty to make full disclosure even though this may be contrary to his interests if the disclosure were to become generally known" However, the court allowed the disclosure of the information premised on the right to just administrative action.

that the prohibition against disclosure cannot be absolute, and a court has the discretion to allow the disclosure of confidential information.[26]

In exercising this discretion, a court must consider the protection of the information and the disclosure to investigate corrupt practices to promote clean administration.[27] In *Ontvanger van Inkomste, Lebowa and Another v De Meyer No*,[28] the applicant in the court *a quo* chaired an inquiry into the Lebowa Income Fund and any irregular, improper and mismanagement in Lebowa. In the inquiry, the investigating team subpoenaed the Receiver of Revenue. The Receiver of Revenue relied on the then section 4 of the Income Tax Act which prohibited the disclosure of the information, as it constituted confidential taxpayer information and the disclosure would be against public policy.[29] The court *a quo* found that public policy demands the disclosure of information if it is in the interest of promoting a clean administration and the investigation of corrupt activities.[30] This principle was confirmed by the Appellate Division when it held that the public interest in a clean administration and the investigation of corrupt activities outweighed the prejudice suffered due to the disclosure. Accordingly, the judgment of the court *a quo* was confirmed on appeal.[31]

In addition to the above, the prohibition on disclosure is also diminished when a taxpayer enters the dispute resolution process under Chapter 9 of the Tax Administration Act. In terms of the dispute resolution process governed by the Tax Court Rules and section 74 of the Tax Administration Act, a taxpayer has a right to request a copy of the recorded particulars of an assessment or decision referred to in

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26 S 69(5) read with s71(3) Tax Administration Act. In *Silver v Silver* 9 SATC 6 the Court held that "It is well-established law that a court will not lightly direct an official of the Revenue to divulge information imparted to him by a taxpayer. One reason for this reluctance is found in public policy. The legislature has thought it desirable to encourage full disclosure of their affairs by taxpayers, even by those who carry on illegal trades or have illegally come by amounts qualifying as gross income. This object might easily be defeated . . . if orders were freely made for disclosure of those communications. A second and subsidiary reason . . . for a court's reluctance to make an order against the fiscus, is that it would cause great disruption in the revenue office if anyone who desired financial information concerning a party to litigation could subpoena an official to produce the necessary records."

27 *Ontvanger van Inkomste Lebowa and Another v De Meyer* 1993 2 All SA 462 (A).

28 *Ontvanger van Inkomste Lebowa and Another v De Meyer* 1993 2 All SA 462 (A) 466.

29 *Ontvanger van Inkomste Lebowa and Another v De Meyer* 1993 2 All SA 462 (A) 462-463.

30 *Ontvanger van Inkomste Lebowa and Another v De Meyer* 1993 2 All SA 462 (A) 466-467.

31 *Ontvanger van Inkomste Lebowa and Another v De Meyer* 1993 2 All SA 462 (A)467-468.

section 104(2) of the Tax Administration Act.[32] The Tax Court Rules also provide that taxpayers are entitled to reasons for their assessment, enabling them to understand the basis of the assessment.[33] Therefore, taxpayers must be informed of all the evidence on which SARS premised its assessment or decision. This position also aligns with the right to just administrative action and the promotion of access to information discussed in Chapter 3.

In conclusion, the protection currently afforded to whistleblowers in the Tax Administration Act is limited and the Act does not provide for incentivised whistleblowing. Not only will the secrecy provisions cease when civil or criminal proceedings commence, but the protection will also diminish once SARS commence with recovery and dispute resolution processes.[34] This ultimately undermines any protection afforded to the whistleblower.

2.3. Protected Disclosure Act, 26 of 2000 ("PDA")

The PDA governs protected disclosures by whistleblowers who are employees or workers and who may suffer occupational detriment due to the disclosure made.[35] The Act aims, therefore, to regulate disclosures within a labour context and not necessarily in a tax sphere. Before dealing with the requirements for disclosure under the PDA to

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32 S 73 Tax Administration Act provides that "(1) A taxpayer or the taxpayer's duly authorised representative is entitled to obtain-…(c) information, other than SARS confidential information, on which the taxpayer's assessment is based…" Tax Court Rule 36 provides for the discovery of documents related to any ground of assessment and opposing appeal in terms of the pleadings exchanged under Tax Court Rule 31 and Tax Court Rule 32.

33 Tax Court Rule 6 of the Tax Court Rules promulgated under s 103 of the Tax Administration Act, provides that "(1) A taxpayer who is aggrieved by an assessment may, prior to lodging an objection, request SARS to provide the reasons for the assessment required to enable the taxpayer to formulate an objection in the form and manner referred to in rule 7."

34 S 69(2)(ii) Tax Administration Act; Tax Court Rule 36 relating to discovery.

35 S 2 Protected Disclosures Act, 26 of 2000 ("PDA") provides that "(1) The objects of this Act are— (u) to protect an employee, whether in the private or the public sector, from being subjected to an occupational detriment on account of having made a protected disclosure; 25 (b) to provide for certain remedies in connection with any occupational detriment suffered on account of having made a protected disclosure; and (c) to provide for procedures in terms of which an employee can, in a responsible manner, disclose information regarding improprieties by his or her employer."

constitute a "protected disclosure", it is necessary to provide a short exposition of the operative terms of the Act.

The first two operative terms are "employee" and "worker" and must be considered together. Section 1 of the Act states that an 'employee' is a person who works for another and receives remuneration but excludes an independent contractor.[36] A "worker" is anyone who helps carry on or conduct a business.[37] The exclusion of an independent contractor limits the pool of potential tax whistleblowers who may be accountants or external service providers.

The third operative term is the meaning of "disclosure". Of relevance to this study is that "disclosure" means that the information provided by an employee or worker who has reason to believe in relation to the conduct of another employee or employer that a criminal offence is committed, or that the person complained about has failed to meet a legal obligation.[38] The fourth operative term is a "protected disclosure" and it is

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36 S 1 PDA "employee" means—(a) any person, excluding an independent contractor, who works or worked for another person or for the State, and who receives or received, or is entitled to receive, any remuneration; and (b)any other person who in any manner assists or assisted in carrying on or conducting or conducted the business of an employer."

37 S 1 PDA ""worker" means—(a) any person who works or worked for another person or for the State; or (b) any other person who in any manner assists or assisted in carrying on or conducting or conducted the business of an employer or client, as an independent contractor, consultant, agent; or (c) any person who renders services to a client while being employed by a temporary employment service."

38 S 1 PDA **"*disclosure*"** means any disclosure of information regarding any conduct of an *employer*, or of an *employee* or of a *worker* of that *employer*, made by any *employee* or *worker* who has reason to believe that the information concerned shows or tends to show one or more of the following: (*a*) That a criminal offence has been committed, is being committed or is likely to be committed; (*b*) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject; (*c*) that a miscarriage of justice has occurred, is occurring or is likely to occur; (*d*) that the health or safety of an individual has been, is being or is likely to be endangered; (*e*) that the environment has been, is being or is likely to be damaged; (*f*) unfair discrimination as contemplated in Chapter II of the Employment Equity Act, 1998 (Act No. 55 of 1998), or the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000); or (*g*) that any matter referred to in paragraphs (*a*) to (*f*) has been, is being or is likely to be deliberately concealed."

defined as a disclosure made to a legal adviser, an employer, a member of Cabinet or a person listed in sections 8 and 9 of the Act.[39]

The PDA provides various scenarios in which disclosure will constitute a protected disclosure.[40] The Act does not contain a specific scenario for tax whistleblowers since SARS is not a listed recipient in the definition of a "protected disclosure". This concerns potential tax whistleblowers because a report filed in terms of SARS' website, as mentioned above, will not qualify for protection under the definition of a "protected disclosure". The institutions authorised to investigate the disclosures derive their powers from their governing legislation.[41] Thus, their investigative powers related to the investigation of tax offences and non-compliance are severely limited.[42]

Section 9 sets out the requirements for a disclosure to be protected. It requires an informant to act in good faith, reasonably believe that the information disclosed is substantially true, was not made for personal gain and one of the special circumstances listed in the section applies, or it was reasonable to make the disclosure.[43] Although section 9 is couched in broad terms, it still functions within the employer-employee relationship and workplace disclosures. There may be some difficulty in applying sections 8 and 9 of the PDA to incentivised whistleblowing programme, especially concerning the "good faith" requirement. In the matter of

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39 S 1 PDA ""protected disclosure" means a disclosure made to—(a) a legal adviser in accordance with section 5;(b) an employer in accordance with section 6; (c) a member of Cabinet or of the Executive Council of a province in accordance with section 7; (d) a person or body in accordance with section 8; or (e) any other person or body in accordance with section 9, but does not, subject to section 9A, include a disclosure— (i) in respect of which the employee or worker concerned commits a criminal offence by making that disclosure; or (ii) made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5."

40 Ss 5 to 9 PDA.

41 Diale "Swimming against the tide-the plight of a whistleblower in South Africa" *South African Association of Public Administration and Management* 2005 275.

42 For instance, the Public Protector derives their functions and powers from the Constitution and the Auditor-General from the Constitution and the Auditor-General Act 12 of 1995.

43 S 9(1) PDA "General protected disclosure.—(1) Any disclosure made in good faith by an employee or worker— (a) who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and (b) who does not make the disclosure for purposes of personal gain, excluding any reward payable in terms of any law; is a protected disclosure if—(i) one or more of the conditions referred to in subsection (2) apply; and (ii) in all the circumstances of the case, it is reasonable to make the disclosure."

Radebe v Premier Free State,[44] the South African Labour Appeal Court held that actions borne from malice or an ulterior motive aimed at self-advancement are indications of a lack of good faith.[45] Thus, any disclosure by a whistleblower who envisages reward or tax relief due to the disclosure will be unprotected, as the reward is contrary to the requirements of "personal gain" and "good faith".[46] It may even be that a whistleblower steps forward due to conflict between themselves and the person complained about and wishes to disclose the information for revenge. This situation will not pass the test of good faith. Even so, it does not mean that the report or information supplied is less valuable for investigative purposes in the context of tax evasion and non-compliance.

Once it is established that a disclosure constitutes a "protected disclosure" and the informant suffered an occupational detriment, the PDA provides specific remedies for the damages.[47] The discloser may approach a court or tribunal to order the employer to pay compensation or to rectify the occupational detriment suffered, such as the reinstatement of the employer if they were dismissed.[48] In remedying the occupational detriment, the employer must transfer the employee to a different division or post, and the terms of their employment may not be less favourable than just before their transfer.[49] This requirement of occupational detriment or damages will automatically exclude a whistleblower that suffers no prejudice, limiting the pool of persons eligible to make a protected disclosure.

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44 *Radebe v Mashoff Premier of the Free State Province and others* 2009 JOL 23696 (LC).

45 *Radebe v Mashoff Premier of the Free State Province and others* 2009 JOL 23696 (LC) para 64.

46 Lubisi and Bezuidenhout "Blowing the whistle for personal gain in the republic of South Africa: an option for consideration in the fight against fraud?" *Southern African Institute of Government Auditors* 2016 56.

47 S 4 PDA.

48 S 4(1)(B) PDA "If the court or tribunal, including the Labour Court is satisfied that an *employee* or *worker* has been subjected to or will be subjected to an *occupational detriment* on account of a *protected disclosure*, it may make an appropriate order that is just and equitable in the circumstances, including—(*a*) payment of compensation by the *employer* or client, as the case may be, to that *employee* or *worker*; (*b*) payment by the *employer* or client, as the case may be, of actual damages suffered by the *employee* or *worker*; or (*c*) an order directing the *employer* or client, as the case may be, to take steps to remedy the *occupational detriment*."

49 Ss 4(3) and 4(4) PDA.

The PDA operates alongside the LRA and does not apply to whistleblowers who are not employees (section 8), incentivised whistleblowers (even if they are employees), or whistleblowers who did not suffer any damage. The general purpose of the PDA is to govern the employee-employer relationship when disclosures of potential impropriety are made.[50] Therefore, the Act's scope of application is limited and will not aid tax whistleblowers who are not the taxpayer's employees or workers, for example, co-conspirers, in a scheme for tax evasion.

The manner of disclosure, limited protection and the limitations to its scope do little to encourage whistleblowing.[51] For whistleblowers to blow the whistle they need to have confidence in the system and that their claims will be investigated and prosecuted.[52] In conclusion, the PDA provides limited assistance regarding encouragement, protection and regulation of incentivised tax whistleblowing.

2.4. The Labour Relations Act, 66 of 1995 ("LRA")

The LRA also protects whistleblowers in an employee -employer relationship. The LRA protects whistleblowers in three key aspects: unfair labour practices,[53] unfair

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50 Preamble to the PDA. Botha and Fritz "Whistle-blowing for reward- friend or foe? Exploring a possible tax whistle-blowing programme in South Africa" *Obiter* 2019 70.

51 Holtzhausen "Public or protected disclosure? The fallacy of whistleblower protection in South Africa" *South African Association of Public Administration and Management* 2005 7. Diale "Swimming against the tide-the plight of a whistleblower in South Africa" *South African Association of Public Administration and Management* 2005 275.

52 Holtzhausen "Public or protected disclosure? The fallacy of whistleblower protection in South Africa" *South African Association of Public Administration and Management* 2005 7. Lubisi and Bezuidenhout "Blowing the whistle for personal gain in the republic of South Africa: an option for consideration in the fight against fraud?" *Southern African Institute of Government Auditors* 2016 56.

53 S 186(2) Labour Relations Act, 66 of 1995 ("LRA") "Unfair labour practice" means any unfair act or omission that arises between an employer and an employee involving - (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee; (b) unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee; (c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and (d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act."

dismissals where a protected disclosure was made,[54] and disputes concerning unfair labour practices where the employee suffered occupational prejudice due to any action by the employer.[55]

The protection required by whistleblowers is not just from occupational detriment or employment-related issues. Often in the context of criminality (e.g., State Capture in South Africa), the problem is that whistleblowers face victimisation, public reprimand by the media and physical harm. Thus, the aim of protecting whistleblowers' information and the information supplied should be to avoid such hardships, together with any employment-related issues.

Before dealing with the provisions of the LRA, specific key definitions must be extrapolated, as they form the backdrop of the discussion of the LRA. The term "employee" means a person who works for another under a contract of employment.[56] The term has been extended by the South African courts to include a worker under a service contract that immediately started or only commences in future.[57] By extending the interpretation of the term "employee", the protection afforded by the LRA may apply to third parties such as an accountant of the taxpayer.[58]

The LRA applies whenever an "unfair" labour practice or dismissal comes into play.[59] "Unfair" has been interpreted to have both a procedural and substantive component.[60] The procedural component typically refers to how the employee was treated, for example, a breach of the *audi alteram partem* principle. The substantive component

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54 S 187(1)(h) LRA "a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an employee having made a protected disclosure defined in that Act."

55 S 191 LRA.

56 S 213 LRA "'…employee' means- (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer."

57 *Wyeth SA (Pty) Ltd v Manqele and Others* 2005 6 BLLR 523 (LAC) 535-537.

58 Botha and Fritz "Whistle-Blowing for Reward – Friend or Foe? Exploring a Possible Tax Whistle-Blowing Programme in South Africa" *Obiter* 2019 75.

59 Ss 186 and 187 LRA.

60 *Booysen v SAES* 2008 10 BLLR 926 (LC) 932. Note that the judgment of *Booysen v SAES* 2008 10 BLLR 926 (LC) was set aside on appeal in respect of the issue of the Labour Court's jurisdiction. See *Booysen v Minister of Safety and Security and Others* 2010 JOL 26450 (LAC).

relates to the reasons for the unfair practice, such as discrimination based on one of the other grounds listed in section 9(4) of the Constitution.[61]

2.4.1. Protection of whistleblowers against unfair labour practices

Section 186(2) of the LRA provides that an "unfair labour practice" means any unfair act or conduct in an employee-employer relationship that results in occupational detriment, other than dismissal, that conflicts with the provisions of the LRA.[62] This means that should an employee suffer social or economic prejudice due to the disclosure, such conduct can constitute an unfair labour practice. The Labour Court has held that "occupational detriment" must be broadly interpreted and includes subjecting an employee to disciplinary proceedings, even if the correct process were followed.[63]

If an employee suffers such prejudice due to a protected disclosure, the conduct by the employer may be found to be an unfair labour practice resulting in penalties and compensation to be paid to the employee.[64] Such protection is, however, reactionary to the damage already suffered by the employee. The LRA therefore does not regulate the protection of whistleblowers. Instead, it contains compensatory mechanisms to soothe the whistleblower once the prejudice or occupational detriment has occurred. This thesis argues that the compensation does not incentivise the whistleblower and will not likely encourage a potential tax whistleblower.

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61 Ss 9(4) read with 9(3) of the Constitution provides "(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination…"

62 S 186(2) LRA.

63 *Grieve v Denel (Pty) Ltd* 2003 4 BLLR 366 LC 377. Note that this judgment has been approved in *CWU and Another v Mobile Telephone Networks (Pty) Ltd* 2003 JOL 11147 (LC) 746 and *Radebe v Mashofff Premier of the Free State Province and others* 2009 JOL 23696 581.

64 Botha and Fritz "Whistle-Blowing for Reward – Friend or Foe? Exploring a Possible Tax Whistle-Blowing Programme in South Africa" *Obiter* 2019 80-81.

In the context of tax whistleblowers, the applicability of the LRA is limited. The LRA's scope under section 186(2) is limited to the employee-employer relationship. In other words, a whistleblower not defined as an employee or contractor will not be afforded the rights and freedoms of the LRA. The whistleblower must find protection and relief under a different Act.

Another issue with applying both the LRA and the PDA is the non-guarantee of anonymity throughout the dispute process. Thus, a whistleblower will risk being compelled to give testimony in a court or tribunal, being subjected to public scrutiny and harassment as alluded to above. Therefore, any protection afforded by the LRA and the PDA against prejudice (social, economic, or otherwise) will be rendered impractical once a person must testify.

In *Tshishonga v Minister of Justice and Constitutional Development*,[65] the court considered whether a disclosure to the media constitutes a protected disclosure under the PDA, and whether any subsequent disciplinary proceedings may be considered an unfair labour practice.[66] This media disclosure followed an earlier disclosure to the Public Protector and the Auditor-General of the alleged impropriety.[67] After the disclosure to the media, the employee underwent disciplinary proceedings for the disclosure.[68] The Labour Court held that the disclosure to the media related to matters of severe impropriety and that the media is an essential pillar in South African democracy.[69] Accordingly, the court held that such disclosure qualified as a protected disclosure under the PDA and the employee was entitled to the protection afforded by the LRA under section 186(2).[70] This judgment is critical from a policy perspective since disclosure made to the media may warrant protection in some cases,

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65 *Tshishonga v Minister of Justice and Constitutional Development* 2007 4 BLLR 327 (LC). Note that this judgment was set aside on appeal premised on the calculation of the damage payable to the whistleblower. See *Minister of Justice and Constitutional Development v Tshishonga* (2009) JOL 23712 (LAC).

66 *Tshishonga v Minister of Justice and Constitutional Development* JOL 2 3712 (LAC) 330.

67 *Tshishonga v Minister of Justice and Constitutional Development* JOL 23712 (LAC) 330 – 337.

68 *Tshishonga v Minister of Justice and Constitutional Development* JOL 23712 (LAC) *337*.

69 *Tshishonga v Minister of Justice and Constitutional Development* JOL 23712 (LAC) 370.

70 *Tshishonga v Minister of Justice and Constitutional Development* JOL 23712 (LAC)376-377.

considering the seriousness of the offence. It sometimes happens that whistleblowers report impropriety to the media when it seems as though no internal remedy provides appropriate relief.

In *Xakaza v Ekurhuleni Metropolitan Municipality*,[71] the Labour Court held that before an employee can rely on their disclosure to be a protected disclosure and subsequently section 186 and 187 of the LRA, the disclosure must first satisfy the requirements of the PDA.[72] The observations concerning the requirements of the PDA were discussed earlier and are not repeated. Incorporating the PDA in the application to whistleblowers, specifically tax whistleblowers, may be challenging.

If we were to apply the LRA on the basis suggested in *Xakaza*, tax whistleblowers would hardly ever be entitled to protection. Much less so, traitorous whistleblowers due to the challenges associated with the legal requirements of the PDA. Thus, the wording of the LRA excludes tax whistleblowers who are complicit (either in their capacity as an employee or a contractor) from the anti-retaliation protection.

2.4.2. Unfair dismissals as a result of having made a protected disclosure

The LRA provides that should an employee be dismissed due to having made a disclosure under the PDA, such dismissal may be considered automatically unfair and the employee is entitled to request the relevant compensatory awards.[73] The Labour Court have held that the employee must allege the required facts to sustain their unfair dismissal claim.[74]

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71 *Xakaza v Ekurhuleni Metropolitan Municipality* 2013 7 BLLR 731 (LC).

72 *Xakaza v Ekurhuleni Metropolitan Municipality* 738-739 2013 7 BLLR 731 (LC). Ff Botha and Fritz "Whistle-Blowing for Reward – Friend or Foe? Exploring a Possible Tax Whistle-Blowing Programme in South Africa" *Obiter* 2019 80.

73 S 187(1) LRA.

74 S 10(1) of the LRA. This principle was confirmed in the case of *NUM v Namakwa Sands-a division of Anglo Operations* 2008 7 BLLR 675 (LC) 693.

In *Sekgobela v State Information Technology Agency (Pty) Ltd*,[75] the employer dismissed the employee after they disclosed irregularities to the employer, the Public Protector and the SAPS.[76] The Labour Appeal Court held that the onus is on the employee to lead credible evidence of the wrongdoing before the dismissal is considered automatically unfair.[77] This interpretation by the Labour Appeal Court is problematic when considering the encouragement of whistleblowing. The whistleblower may consider the onus too big a task and lack the appetite for legal proceedings, they might lack the courage to speak out against the employer in a public forum, or they may not be financially able to afford legal representation to engage in a protracted legal battle.

The obstacles mentioned above serve as deterrents when applied to tax whistleblowers, since there is simply no benefit to the whistleblower in making the disclosure. More so if the general taxpayer compliance morale is low. Often, the tax whistleblower, who happens to be an employee, will work with the taxpayer's financial affairs. These persons may be accountants or auditors and whistleblowing may risk their professional careers. Thus, the potential compensation for the unfair dismissal will offer little to no incentive for these potential tax whistleblowers.

Since the provisions of the LRA overlap with the PDA, a tax whistleblower under an incentivised programme will not be entitled to the rights contained in the LRA and PDA when making a disclosure. Thus, the tax whistleblower will be vulnerable to occupational detriment and other prejudice associated with making the relevant disclosure. Accordingly, tax policy reform is needed to include anti-retaliation laws to protect tax whistleblowers.

As a concluding remark, the LRA's application is limited to an unfair labour practice and dismissal is only automatically unfair if the disclosure complied with the requirements of the PDA. Thus, the LRA does not apply to disclosures not made under the PDA, which dramatically reduces the rights of potential tax whistleblowers. It also

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75 *Sekgobela v State Information Technology Agency (Pty) Ltd* 2012 10 BLLR 10001 (LAC).
76 *Sekgobela v State Information Technology Agency (Pty) Ltd* 2012 10 BLLR 10001 (LAC)1003.
77 *Sekgobela v State Information Technology Agency (Pty) Ltd 2012* 10 BLLR 10001 (LAC) 1006.

discourages tax whistleblowers as they may be unsure whether their disclosure will comply with the terms of the PDA.

2.5. Financial Intelligence Centre Act, 38 of 2001 ("FICA")

The South African Law Commission introduced the FICA when it published its Money Laundering Control Bill.[78] The Commission established a task team in 1998 that was required to determine the appropriateness of the Financial Intelligence Control Bill.[79] One of the key features of FICA is the reporting duties for suspicious and unusual transactions that apply to all businesses, their employees, and every other person.[80]

Section 29 of the FICA provides a reporting duty for suspected or unusual activities. One of the grounds that triggers the reporting duty is when a person knows or ought to have reasonably known that a transaction (or series of transactions) is relevant to the investigation of tax evasion or attempted tax evasion.[81] To contextualise section 29, it is prudent to deal with the different elements of the reporting duty.

The first requirement is that a person must either have "knowledge" of the transaction or a "reasonable suspicion".[82] "Knowledge" is not defined in the Act and is ascribed its ordinary meaning as the actual understanding of the relevant facts or wilful blindness

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78 South African Law Commission Money Laundering and Related Matters Project 104 of 1996 at https://www.justice.gov.za/salrc/reports/r_prj104_1996aug.pdf (Accessed 23/01/2023).

79 South African Law Commission Money Laundering and Related Matters Project 104 of 1996 at https://www.justice.gov.za/salrc/reports/r_prj104_1996aug.pdf (Accessed 23/01/2023).

80 De Koker *et al. South African Money Laundering and Terror Financing Law* (2023) para 2.07.

81 S 29(1)(b)(iv) Financial Intelligence Centre Act, 38 of 2001 ("FICA") provides that "(1) A person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or ought reasonably to have known or suspected that….(b) a transaction or series of transactions to which the business is a party-…(iv) may be relevant to the investigation of an evasion or attempted evasion of a duty to pay any tax, duty or levy imposed by legislation administered by the Commissioner for the South African Revenue Service;… must, within the prescribed period after the knowledge was acquired or the suspicion arose, report to the Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions" Ff De Koker *et al. South African Money Laundering and Terror Financing Law* (2023) para 7.04, 7.10 -7.11. *National Director of Public Prosecutions v Seevnarayan* 2003 1 All SA 240 (C) 252-253. This reporting duty is similar to those found in sections 34 to 39 of the Tax Administration Act and sections 80A to 80K of the Income Tax Act, 58 of 1962.

82 S 29(1) FICA.

to the facts.[83] The courts define "suspicion" as a state of conjecture where proof is lacking.[84]

The reasonable person test considers the required skill and expertise required by the person in the informant's position and the skill and experience that the person has.[85] Thus, a person must file a report if they know (actual knowledge or wilful blindness) of a transaction or have grounds upon which another person with the informant's expertise and background would have formed a belief or suspicion that the transaction is reportable.[86] The introduction of reasonable belief or suspicion seemingly broadens the scope of the Act's application. Even so, some argue that it merely defines the extent to which the Act applies.[87]

The second requirement is the existence of the grounds in the Act that triggers the reporting duty.[88] In the current study, the ground related to tax evasion is relevant.[89] Section 29(1)(b)(iv) provides that transactions that are relevant to an investigation of tax evasion or attempted tax evasion trigger the reporting duty. There are several difficulties with this ground of the reporting duty.

Firstly, it presupposes that there must be an ongoing investigation, presumably by SARS or the SAPS, into tax evasion or attempted tax evasion. The section does not clarify how far along the investigation must be or who must conduct the investigation. Secondly, it assumes that the public, or at least the person obliged to make the report, will know whether SARS or the SAPS is investigating the person against whom the report will be made. Thirdly, the Act assumes that the person who must file the report has a workable understanding of what constitutes an offence of tax evasion.

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83 De Koker *et al. South African Money Laundering and Terror Financing Law* (2023) para 7.06.
84 *Powell v Van Der Merwe* 2005 (5) SA 62 (SCA) 162; *Isaacs v Minister van Wet en Orde* 1996 (1) All SA 343 (A); *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) 819.
85 De Koker *et al. South African Money Laundering and Terror Financing Law* (2023) para 7.06.
86 De Koker *et al. South African Money Laundering and Terror Financing Law* (2023) para 7.06.
87 De Koker *et al. South African Money Laundering and Terror Financing Law* (2023) para 7.06.
88 S 29(1)(b) FICA.
89 S 29(1)(b)(iv) FICA.

If one of the grounds listed in section 29(1)(b) is absent, no reporting duty exists. This means that any transactions or schemes aimed at tax non-compliance (which is not necessarily tax evasion) are not reportable and any suspicions without definable grounds or existing investigation are not reportable.

The Financial Intelligence Centre ("FIC") Guidance Note states that an unusual or suspicious transaction must be reported within fifteen days after a person learns about the impugned transaction.[90] The FIC may condone late filing in exceptional cases.[91] This means that potential tax evasion and non-compliance are not reported, or the FIC may ignore the reports due to an administrative and somewhat arbitrary imposed time burden. There appears to be no rational explanation for why the reporting of either a financial crime or suspicious transaction will be less meaningful for law enforcement after fifteen days.

The timing requirement for the report to be filed is troublesome in the context of whistleblowers. As an informant may believe that they may no longer report the offence once the period expires, it discourages whistleblowing It also encourages offenders to conceal their business dealings. If the informant files the report late and the FIC condones the late filing, the decision by the FIC may be considered reviewable by a court. On all accounts, the condonation aspect of the late filing is counterintuitive to the reporting duty.

After a person files a report under section 29 (within the appropriate time or after condonation has been given), the FICA provides certain protection mechanisms.[92]

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90 FIC Guidance Note 4B https://www.fic.gov.za/Documents/190117_FIC%20Guidance%20Note%2004B%20final%20draft%20(for%20consultation).pdf (Accessed 23/01/2023).

91 FIC Guidance Note 4B https://www.fic.gov.za/Documents/190117_FIC%20Guidance%20Note%2004B%20final%20draft%20(for%20consultation).pdf 31 (Accessed 23/01/2023).

92 S 38 FICA provides that "(1) No action, whether criminal or civil, lies against an accountable institution, reporting institution, supervisory body, the South African Revenue Service or any other person complying in good faith with a provision of this Part, Part 4 and Chapter 4, including any director, employee or other person acting on behalf of such accountable institution,

Firstly, FICA offers protection against civil and criminal liability to the reporting institution that received the report.[93] Secondly, the person who made the report is considered a competent but not compellable witness.[94] Thirdly, FICA protects the identity of the person who filed the report until that person testifies in court.[95] This protection is similar to that provided in the Tax Administration Act under section 69(2), which the High Court found to be unconstitutional in so far as the public interest may warrant the disclosure of the information.[96]

Section 41 provides that the FIC officials may only disclose the report within the scope of their statutory powers, FICA, legal proceedings or by a court order.[97] This is very similar to the provisions of the Tax Administration Act discussed above. The question is whether the provisions of FICA may also be declared unconstitutional in so far as it limits the right to access information. In *Minister of Finance v Oakbay Investments (Pty) Ltd and a related matter*,[98] a full bench in the Pretoria High Court found that section 41(1)(e) of FICA which provides that confidential information may be disclosed by order of a court is intended to enforce the constitutional right to access information.[99] The protection of the report and the identity of the whistleblower under

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reporting institution, supervisory body, the South African Revenue Service or such other person. (2) A person who has made, initiated or contributed to a report in terms of section 28, 29 or 31 or who has furnished additional information concerning such a report or the grounds for such a report in terms of a provision of this Part is competent, but not compellable, to give evidence in criminal proceedings arising from the report. (3) No evidence concerning the identity of a person who has made, initiated or contributed to a report in terms of section 28, 29 or 31 or who has furnished additional information concerning such a report or the grounds for such a report in terms of a provision of this Part, or the contents or nature of such additional information or grounds, is admissible as evidence in criminal proceedings unless that person testifies at those proceedings."

93 S 38(1) FICA.

94 S 38(2) FICA.

95 S 38(3) FICA.

96 *Arena Holdings (Pty) Ltd t/a Financial Mail and two others v SARS and two others* 2022 (2) SA 485 (GP).

97 S 41 FICA "No person may disclose confidential information held by or obtained from the Centre except- (a) within the scope of that person's powers and duties in terms of any legislation; (b) for the purpose of carrying out the provisions of this Act; (c) with the permission of the Centre; (d) for the purpose of legal proceedings, including any proceedings before a judge in chambers; or (e) in terms of an order of court"

98 *Minister of Finance v Oakbay Investments (Pty) Limited and a related matter* (2017) JOL 38442 (GP).

99 *Minister of Finance v Oakbay Investments (Pty) Limited and a related matter* (2017) JOL 38442 (GP) 22.

FICA could be declared unconstitutional on the basis of an unjustifiable infringement of the taxpayer's right to access information to protect rights and a fair trial, especially where a clear right is established.[100]

The protection afforded by the FICA is mainly against retaliation by the offender against the whistleblower. Section 38 of the FICA provides that civil proceedings may not be instituted against a person who filed a report if the disclosure was in good faith.[101] Furthermore, the person who made the complaint is a competent but not compellable witness.[102] Lastly, if the person who made the report refuses to testify, the informant's identity and the report's contents are inadmissible evidence. [103]

The "protection" against civil proceedings is activated only if the report was filed in good faith.[104] The Act is silent on what constitutes good faith in respect of the reporting duties. It can be argued that this requirement excludes any whistleblowing for personal gain. Therefore, the provisions of the FICA do not provide for an incentivised whistleblowing programme by offenders and persons who are complicit, and the protection afforded is scant. Offenders or complicit persons naturally have more intimate knowledge of the offences committed than an outsider. Having an informant come forward is a valuable resource for law enforcement and should be incentivised.

The FICA includes a Voluntary Disclosure Report ("VDR") programme under which persons can file reports when they are not obliged to do so. In its Guidance Note, the FIC indicated that it would maintain the confidentiality of any report under the VDR programme.[105] However, the issue with this programme is that there is no statutory guarantee that the information provided must be kept confidential. The traitorous whistleblower risks the information being used against them in civil and criminal

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100 Ss 14 and 32 of the Constitution. Ff *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (10) BCLR 1014 (CC).

101 S 38(1) FICA.

102 S 38(2) FICA.

103 Ss 38(3) and 39 FICA.

104 S 38(1) FICA.

105 FIC Public Compliance Communication 2019 41 https://www.fic.gov.za/compliance/compliance-guidance/public-compliance-communication/ (Accessed 30/03/2024) para 8;12. De Koker *et al. South African Money Laundering and Terror Financing Law* (2023) para 7.48.

proceedings. Therefore, this programme does not encourage whistleblowers nor reward the reporting of unusual or suspicious transactions.

The provisions of the FICA do not adequately regulate the position of tax whistleblowers. The reporting duty is ineffective and unattractive to any person. Thus, legislative reform is needed to protect whistleblowers and encourage and incentivise whistleblowing for tax collection, audits or investigations.

2.6. Companies Act, 71 of 2008 ("Companies Act")

The Companies Act protects whistleblowers who are employees, as defined in the PDA, directors or shareholders of the company.[106] Section 159 of the Companies Act starts by stating that the protection afforded to whistleblowers is complementary to the protection afforded by the PDA.[107] The Act states that the protection applies despite the fact that the PDA would not ordinarily apply to a disclosure.[108] As such, a whistleblower does not have to choose the Act under which they intend to seek refuge.

In essence, section 159 stipulates five requirements that must be met for the whistleblower to enjoy the protection. Firstly, the potential informant must hold a specific capacity. Secondly, the disclosure must be in good faith. Thirdly, the disclosure must be to a specific person. Fourthly, when making the disclosure, the informant must have reasonably believed that the information complained about has exposed the company to risk. Fifthly, the report must concern one of the grounds in section 159.

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106 Ss 159(1) read with 159(4) of the Companies Act 71 of 2008 ("Companies Act"). S 159(1) provides that "(1) To the extent that this section creates any right of, or establishes any protection for, an employee, as defined in the Protected Disclosures Act, 2000 (Act No. 26 of 2000)—" and section 159(4) provides that "…(4) A shareholder, director, company secretary, prescribed officer or employee of a company, a registered trade union that represents employees of the company or another representative of the employees of that company, a supplier of goods or services to a company, or an employee of such a supplier…"

107 S 159(1)(a) Companies Act.

108 S 159(1)(b) Companies Act.

The first requirement is that the informant must hold a certain capacity.[109] The potential informant must be an employee (as defined in the PDA above), director or shareholder of the company. Earlier in this chapter, the definition of an employee was detailed, and repeating those paragraphs is unnecessary. The same arguments about the definition of an "employee" and the exclusions of independent contractors also find application in this context.

The second requirement is that the disclosure must be in good faith.[110] The difficulties in good faith under an incentivised whistleblowing programme were canvassed above. The position of the traitorous whistleblower in respect of the good faith requirement raises the same challenges as described above.

The third requirement is that the report must be made to a designated person. The Act lists several designations eligible to receive the complaint. Neither SARS, the SAPS nor the NPA are included. Section 159(3)(a) states that the disclosure may be made to a "regulatory authority". The term "regulatory authority" is defined as "an entity established in terms of national or provincial legislation responsible for regulating an industry, or sector of an industry".[111] The SARS was established to administer and collect taxes.[112] The regulation of any specific industry, in whole or part, is not included in the purpose, scope or objectives of the SARS Act. SARS is thus not a regulatory authority for purposes of the Companies Act.

The fourth requirement is that the informant must have reasonably believed that the information relates to one of the grounds listed in section 159.[113] This requirement incorporates an objective test of whether the notional reasonable person would have

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109 S 159(4) Companies Act.
110 S 159(3)(a) Companies Act.
111 S 1 Companies Act defines "regulatory authority" as "means an entity established in terms of national or provincial legislation responsible for regulating an industry, or sector of an industry."
112 Preamble South African Revenue Service Act 34 of 1997. S3 South African Revenue Service Act "SARS' objectives are the efficient and effective— (a) collection of revenue; and (b) control over the import, export, manufacture, movement, storage or use of certain goods.
113 S 159(3)(b) Companies Act.

held the same belief.[114] In tax whistleblowing, this is a particularly important consideration to avoid false claims.

The final requirement is that the disclosure must concern one of the trigger grounds listed in section 159(3)(b). The nature of the reports protected includes reports concerning any contravention of the Companies Act, behaviour that could endanger the health and safety of another person, unfair discrimination and any behaviour that contravenes a law that could expose the company to risk or liability.[115] The latter ground is relevant to the research problem in this study.[116] Tax non-compliance or evasion is behaviour that exposes a company to risk or liability. The Companies Act applies in the tax realm. Companies may face interest on late payment of tax or penalties under the Tax Administration Act.[117] Therefore, the disclosures made by employees, directors or shareholders will be protected and any prejudice suffered by the informants may be compensated.

If the disclosure meets the above requirements, the whistleblower may claim compensation if they suffer damage as a result of the disclosure.[118] The protection afforded by the Act is by imposing civil liability for any victimisation of the whistleblower.[119] The South African courts have yet to determine the calculation of the damages and how the concept of "detriment" should be distinguished from "harm", which is also used in the Act.[120]

Furthermore, a court will most likely determine the issue of compensation utilising testimony by the whistleblower. The same obstacles presented in the context of the

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114 Delport *et al*. *Henochsberg on the Companies Act 71 of 2008* (2022) 560(20).
115 S 159(3) Companies Act.
116 S 159(3)(b)(v) Companies Act.
117 Ss 187 to 189 Tax Administration Act; S208 to 224 Tax Administration Act.
118 S 159(5)(a) and (b) Companies Act that provides "(5) A person contemplated in subsection (4) is entitled to compensation from another person for any damages suffered if the first person is entitled to make, or has made, a disclosure contemplated in this section..."
119 S 159(5) Companies Act.
120 For an example of the use of the word "harm" see S 161 Companies Act. Delport *et al*. *Henochsberg on the Companies Act 71 of 2008* (2022) 560.

LRA and unfair dismissals will apply to these whistleblowers, as they will be required to testify in open court and proffer evidence.

The Companies Act does not guarantee confidentiality of the report made under this section. The Act merely states that the report enjoys qualified privilege. In other words, the whistleblower is not exempted from civil or criminal liability, as revealed by the disclosure.[121]

Again, the Companies Act, as it pertains to whistleblowers mainly relates to relationships within a labour environment. It is further reactionary since compensation is payable after the damage occurred and there are no mechanisms to proactively prevent damage and offer protection to whistleblowers.

If one accepts that the Companies Act's protection applies to tax whistleblowers, additional issues arise. For example, who must receive the disclosure by the potential informant, SARS, the SAPS, the shareholders or directors against whom the report is made? The whistleblower may not be comfortable disclosing impropriety to their employer if they believe their employer is compromised or complicit. The eligible recipients may not be equipped or have the required skilled employees to investigate possible tax evasion and non-compliance. There is no statutory requirement or procedural channel for communicating reports related to tax evasion and non-compliance by the eligible recipients to SARS, the SAPS or the NPA. There is also no statutory duty to keep the report confidential.

From an administrative viewpoint, it must be borne in mind that the Companies Act only applies to juristic persons, limiting the scope of the potential protection and compensation afforded. Thus, the whistleblower cannot report wrongdoing under this section regarding the behaviour of natural persons. This position is unregulated by the Companies Act. Tax offenders take many shapes and are not limited to juristic persons. As a result, the limited jurisdiction of the Companies Act strengthens the argument that the provisions are inadequate to deal with tax whistleblowers effectively.

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121 Delport *et al*. *Henochsberg on the Companies Act 71 of 2008* (2022) 560(21).

The above discussion illustrates the need for policy reform and supports the argument that the Tax Administration Act must include an incentivised tax whistleblowing programme. In conclusion, the protection afforded does little to incentivise whistleblowing. The Companies Act fails to govern tax whistleblowers' position adequately. It also does not provide for an incentivised whistleblower programme.

2.7. Witness Protection Act, 112 of 1998 ("WPA")

The general scope of the WPA is to protect witnesses from physical harm. The tax whistleblower may require protection from physical harm. In those circumstances, the witness protection programme will play an important role.

The WPA defines a "protected person" as a person under "protection".[122] "Protection" is any protection and includes the relocation of the protected person, change of their identity or related assistance.[123] If in civil proceedings, the protected person who is a party or a witness and his or her safety is endangered by the proceedings, the High Court may postpone the proceedings in a manner aimed at protecting the identity of the protected person or achieving the objects of the Act.[124]

To apply for witness protection, the witness must have reason to believe that any person or class of persons threatens his or her safety or the safety of a related person.[125] Such belief is reportable to the investigating officer, the person in charge of

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122 S 1(1)(xvii) Witness Protection Act "protected person" means any person who has been placed under protection…"

123 S 1(1)(xviii) Witness Protection Act "protection" means any protection in terms of this Act, excluding temporary protection as contemplated in section 8, and may include the relocation or change of identity of, or other related assistance or services provided to, a protected person, as prescribed."

124 S 15(2) Witness Protection Act reads "(2) If it appears to a judge of a High Court in an ex parte application, made to him or her in chambers by the Director, that the safety of any protected person might be endangered by the institution or prosecution of any civil proceedings in which a protected person is a party or a witness, whether in that High Court or in any lower court within its area of jurisdiction, the judge may make any order he or she deems appropriate with regard to the institution or prosecution or postponement of those proceedings in a manner aimed at (a) preventing the disclosure of the identity or whereabouts of the said person; or (b) achieving the objects of this Act."

125 S 7 Witness Protection Act.

a police station, the person in charge of the prison, the public prosecutor, or a member of the Office for Witness Protection.[126]

The first requirement is to report the belief to the investigating officer. There is no indication in the WPA or the Tax Administration Act that a SARS official will qualify as an "investigating officer". Thus, a report under the WPA to SARS will not meet the requirements for the application for witness protection. The relevant witness will be considered only for witness protection after SARS referred the matter for criminal investigation or prosecution by the NPA.

Section 10 of the WPA lists certain factors that the Director for Witness Protection must consider in an application for protection. These factors include the nature and extent of the risk to the witness's safety, the nature of the proceedings, the costs associated with the protection and the availability of other ways to protect the witness without invoking the provisions of this Act.[127] By including the catch-all clause that if any other means of protection is provided under any other law, the WPA does not

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126 S 7(1) Witness Protection Act: "Any witness who has reason to believe that his or her safety or the safety of any related person is or may be threatened by any person or group or class of persons, whether known to him or her or not, by reason of his or her being a witness, may-(a) report such belief- (i) to the investigating officer in the proceedings concerned; (ii) to any person in charge of a police station;(iii) if he or she is in prison, to the person in charge of the prison where he or she is being detained, or to any person registered as a social worker under the Social Work Act, 1978 (Act 110 of 1978), or deemed to be so registered and who is in the service of a Department of State; (iv) to the public prosecutor or the interested functionary concerned; or (v) to any member of the Office; and (b) apply in the prescribed manner that he or she or any related person be placed under protection."

127 S 10(1) Witness Protection Act "(1) The Director must in respect of an application for protection have due regard to the report and recommendations of the witness protection officer concerned, or if such an application has not been referred to a witness protection officer in terms of section 7 (4), any written recommendations by the interested functionary concerned as to whether the person concerned should be placed under protection or not and must also take into account- (a) the nature and extent of the risk to the safety of the witness or any related person;(b) any danger that the interests of the community might be affected if the witness or any related person is not placed under protection; (c) the nature of the proceedings in which the witness has given evidence or is or may be required to give evidence, as the case may be; (d) the importance, relevance and nature of the evidence given or to be given by the witness in the proceedings concerned; (e) the probability that the witness or any related person will be able to adjust to protection, having regard to the personal characteristics, circumstances and family or other relationships of the witness or related person; (f) the cost likely to be involved in the protection of the witness or any related person; (g) the availability of any other means of protecting the witness or any related person without invoking the provisions of this Act; and (h) any other factor that the Director deems relevant."

apply. In other words, the protections afforded will not be available in the context of labour disputes, since the LRA and PDA govern the position. If one accepts that the Companies Act regulates the position of tax whistleblowers, then the protection of the WPA is also excluded.

Accordingly, the WPA provides limited protection after SARS has referred the matter for criminal investigation. Furthermore, the WPA does not support the proposed tax policy reform to incentivise whistleblowing. The Act, therefore, falls short of adequately governing the position concerning incentivised tax whistleblowers and strengthens the argument that policy reform is indeed required.

2.8. Prevention of Corrupt Activities and Crime Act, 12 of 2004 ("PRECCA")

The PRECCA aims to provide the required investigative mechanisms in respect of crimes relating to corruption and corrupt activities.[128] Besides the investigative provisions, it also introduced a reporting duty for corrupt activities and created a general standard for the treatment of witnesses.[129]

The reporting duty contains four essential requirements to be triggered. These requirements are as follows: Firstly, the reporting person must hold a position of authority; secondly, they must know or reasonably ought to have known or suspected that an offence was committed; thirdly, the offender must be a person described in the Act; fourthly, the value of the offence must exceed ZAR100 000 and the reporting person must report such activity to the Directorate for Priority Crimes Investigation.[130] The criminal offences covered by the PRECCA include corruption, theft, fraud,

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128 Preamble Prevention of Corrupt Activities and Crime Act, 12 of 2004 ("PRECCA").

129 S 18 and 34 PRECCA.

130 S 34(1) PRECCA "Duty to report corrupt transactions.—(1) Any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed— (a) an offence under Part 1, 2, 3 or 4, or section 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2; or (b) the offence of theft, fraud, extortion, forgery or uttering a forged document, involving an amount of R100 000 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to the police official in the Directorate for Priority Crime Investigation referred to in section 17C of the South African Police Service Act, 1995, (Act No. 68 of 1995)."

extortion and forgery.[131] Failure to comply with the reporting duty is a criminal offence.[132]

Once the SAPS and NPA complete their investigation of the alleged crime, the informant may have to testify in a court or tribunal. As for the treatment of the informant, the PRECCA expressly states that it is a criminal offence to directly or indirectly, with or without force, influence a witness not to testify or to withhold evidence.[133] This sanction protects whistleblowers when testifying, which is unique to the PRECCA.

There are at least four difficulties with applying the reporting duty entrenched in the PRECCA to tax whistleblowers. Firstly, the scope of the reporting duty is limited to certain offences. Tax evasion is a crime separate from fraud, corruption or theft. Tax evasion may be committed with or without fraud, corruption or theft as alternative offences. As such, there is no obligation to report the offence of tax evasion on its own. Secondly, the reporting duty also excludes concerns of tax non-compliance. It may be that a whistleblower intends to report tax non-compliance that may result in only an administrative penalty. Thirdly, the reporting duty only rests on a person who holds a position of authority, meaning that ordinary employees have no such obligation in terms of section 34. This is a further limitation on the applicability of the Act. Fourthly,

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131 S 34(1) PRECCA.

132 S 34(2) PRECCA "Subject to the provisions of section 37 (2), any person who fails to comply with subsection (1), is guilty of an offence."

133 S 18 PRECCA "Offences of unacceptable conduct relating to witnesses.—Any person who, directly or indirectly, intimidates or uses physical force, or improperly persuades or coerces another person with the intent to— (a) influence, delay or prevent the testimony of that person or another person as a witness in a trial, hearing or other proceedings before any court, judicial officer, committee, commission or any officer authorised by law to hear evidence or take testimony; or (b) cause or induce any person to— (i) testify in a particular way or fashion or in an untruthful manner in a trial, hearing or other proceedings before any court, judicial officer, committee, commission or officer authorised by law to hear evidence or take testimony; (ii) withhold testimony or to withhold a record, document, police docket or other object at such trial, hearing or proceedings; (iii) give or withhold information relating to any aspect at any such trial, hearing or proceedings; (iv) alter, destroy, mutilate, or conceal a record, document, police docket or other object with the intent to impair the availability of such record, document, police docket or other object for use at such trial, hearing or proceedings; (v) give or withhold information relating to or contained in a police docket; (vi) evade legal process summoning that person to appear as a witness or to produce any record, document, police docket or other object at such trial, hearing or proceedings; or (vii) be absent from such trial, hearing or other proceedings, is guilty of the offence of unacceptable conduct relating to a witness"

the reporting duty is triggered only when the value of the transaction exceeds ZAR100 000. There will be no reporting duty if the transaction's threshold is lower than ZAR100 000, irrespective of its multitude.

Thus, the reporting duty in PRECCA does not govern the position of tax whistleblowers, absent crimes of fraud, corruption or theft. The Act further does not provide for incentivised whistleblowing, as contended in this study. Consequently, policy reform is needed to establish an incentivised tax whistleblowing framework that regulates, encourages and protects tax whistleblowers.

2.9. Conclusion

What is striking from the above discussion is that the legislation discussed above existed when the Tax Administration Bill was under discussion in 2010 and 2011. The view from Parliament at the time was that the existing national legislation would deal with the position of tax whistleblowers. Upon scrutiny of the existing legislation, it seems that it is ineffective and insufficient to regulate the position of tax whistleblowers. There is also no mention of incentivising whistleblowers through reward or otherwise.

Furthermore, when the Zondo Commission started, and individuals were forced to testify in a public forum, whistleblowers suddenly came forward and brokered certain indemnities. This supports the argument that the existing legislation had always fallen short in offering adequate protection for whistleblowers. In the case of the Zondo Commission, it was not a proverbial carrot that was placed before the whistleblowers, but the use of blunt sticks in the form of forced testimony that triggered the whistleblowers. Thus, the point remains that whistleblowing in South Africa requires legislative attention. This begs the question: would whistleblowers, specifically tax whistleblowers, have stepped forward earlier than the commencement of the Zondo Commission had there been a statutory tax whistleblowing programme?

As for whether the existing legal framework applies to tax whistleblowers, the findings are that some provisions may apply but with serious limitations. No Act expressly

provides for tax whistleblowers. The scattered statutory protection of whistleblowers seemingly deters whistleblowers and may leave whistleblowers completely vulnerable due to their limited application and scope. Therefore, the existing legal framework provides zero to limited relief and regulation to tax whistleblowers. Policy reform is needed to ensure that the position of tax whistleblowers is adequately addressed and regulated.

The efficacy of the protection mechanisms in the current dispensation is questionable as all of the Acts are reactionary to potential damage. Furthermore, the legislative framework fails to address incentivised tax whistleblowing.

Consequently, it is necessary to design a legal framework for regulating, protecting, and encouraging tax whistleblowers. This finding supports the premise of this study, as stated in Chapter 1. These findings will also be relevant in considering the factors influencing compliance and strategies for incentivising tax whistleblowing.

Chapter 3: Constitutional Principles

3.1. Introduction

This chapter focuses on the constitutional rights and values that may be engaged by including an incentivised tax whistleblowing programme. The aim is to provide the context in which the salient rights apply, as well as the scope and limitations of these rights. This chapter creates the assessment framework that will later be used to determine whether the proposed legislative framework of this thesis will pass constitutional scrutiny.

This chapter is structured to first list all of the constitutional human rights applicable to whistleblowing, and the requirements for limiting constitutionally entrenched rights. The discussion begins with the scope, application and limitations of privacy rights, access to information and administrative action.

When considering the protection of whistleblowers in the context of tax offences, fraud and corruption, various competing rights and rival contentions must be considered. In summary and before dealing with some of the applicable rights, the following constitutional rights apply when dealing with whistleblowing:

Table 3.1 Constitutional rights pertaining to whistleblowing

Section of the Constitution	**Description of the relevant constitutional right**
Section 9	The right to equality before the law and equal enjoyment of rights and freedoms
Section 10	The right to dignity
Section 11	The right to life
Section 12	The right to freedom and security of a person

Section 14	The right to privacy
Section 16	The right to freedom of expression, which includes the freedom to impart ideas and information
Section 23	The right to fair labour practices
Section 32	The right to access information
Section 33	The right to just administrative action
Section 34	The right of access to courts
Section 36	Limitations of rights

Source: Author's compilation.

In the context of policy considerations concerning tax whistleblowing, the fundamental rights are the right to freedom of expression,[1] privacy,[2] access to information,[3] just administrative action,[4] access to courts[5] and the requirements for the limitation of rights.[6] The rest of the constitutional provisions are on the periphery when dealing with tax whistleblowers. Although these other rights are important, they do not require special consideration in the context of the proposed policy reform.

The below discussion commences with the limitation of constitutional rights. This is done deliberately since the principles enunciated are relevant for the ensuing discussions of the identified constitutional rights.

1 S 16 Constitution.
2 S 14 Constitution.
3 S 32 Constitution.
4 S 33 Constitution.
5 S 34 Constitution. Note that this right is comprehensively dealt with in Chapter 9 para 9.5.
6 S 36 Constitution.

3.2. Limitation of constitutional rights

In terms of section 36 of the Constitution, any right contained in the Bill of Rights is limitable by a law of general application, if the limitation is reasonable and justifiable considering certain factors.[7] Thus, a right may not be limited for any reason, but it is a question of determining whether the limitation is reasonable and justifiable in an open democratic society. This may involve balancing the benefit of limitation to others or public interest and the benefit to the right-holder.[8] The limitation clause in the Constitution generally involves a two-pronged inquiry: Firstly, was a right contained in the Bill of Rights infringed? This involves the inquiry into whether the right is factually applicable.[9] Secondly, was the infringement justifiable, considering the factors in the limitation clause?[10] In what follows, the criteria for the application of the limitation clause will be briefly extrapolated.

The Constitutional Court held that the phrase "law of general application" must be broadly interpreted.[11] All enacted legislation, the common law and customary law are included in the scope of "law of general application".[12] The requirement does not mean that the law must apply to everyone, it may be limited to a group of persons or area.[13]

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7 S 36 of the Constitution states: "Limitation of rights - (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including- (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose" S 37(5)(c) of the Constitution provides for certain rights' scope that are non-derogable. The rights affected by an incentivised tax whistleblowing programme are not included in the relevant tabled list.

8 Currie and de Waal *The Bill of Rights Handbook* (2013) 151.

9 Currie and de Waal *The Bill of Rights Handbook* (2013) 152-154. Cheadle *et al*. *South African Constitutional Law: The Bill of Rights* (2023) para 30.2.

10 Currie and de Waal *The Bill of Rights Handbook* (2013) 152-154. Ff *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) 775, where the court declined to deal with the inquiry into the infringement of a right and immediately applied the limitation clause on the assumption that religious rights were infringed upon.

11 *Larbi-Odam v MEC for Education (North-West Province)* 1998 1 (SA) 745 (CC) 759 the court confirmed that delegated legislation in respect of educators was considered a law of general application. In *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) 877-878, the court held that common law is also considered a law of general application. Cheadle *et al*. *South African Constitutional Law: The Bill of Rights* (2023) para 30.2.

12 Currie and de Waal *The Bill of Rights Handbook* (2013) 156. Ff Botha *Statutory interpretation: an introduction for students* (2022) 34.

13 Cheadle *et al*. *South African Constitutional Law: The Bill of Rights* (2023) para 30.4.1.

The requirement is rather that the law must not be arbitrary or personal.[14] It follows that if a tax whistleblowing programme is included in the Tax Administration Act, it will be a law of general application satisfying the first criterion of the limitation clause.

The limitation of the right must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[15] In essence, this criterion requires that the limitation be proportional to the purpose of the limitation.[16] In other words, the restriction must not be excessive or beyond what would be acceptable in an open and democratic society. In *S v Makwanyane,*[17] the court adopted an approach that involved balancing the nature and effect of the infringement and the importance of the infringement.[18] This approach encompasses the factors identified in the limitation clause. The test for determining whether an infringement is reasonable and justifiable is by accounting for the nature of the right,[19] the importance of the purpose

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14 Cheadle *et al*. *South African Constitutional Law: The Bill of Rights* (2023) para 30.4.1

15 S 36(1) of the Constitution.

16 Currie and de Waal *The Bill of Rights Handbook* (2013) 162-163. Ff Cheadle *et al*. *South African Constitutional Law: The Bill of Rights* (2023) para 30.4.2.

17 *S v Makwanyane* 1995 3 SA 391 (CC).

18 In *S v Makwanyane* 1995 3 SA 391 (CC) 436, the court held that "The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s 33(1). The fact that different rights have different implications for democracy and, in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of s 33(1) and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, 'the role of the Court is not to second-guess the wisdom of policy choices made by legislators'" The court in *S v Bhulwana* 1996 (1) SA 388 (CC) 395 summarised the position in *S v Makwanyane* 1995 3 SA 391 (CC) as follows: "In sum, therefore, the Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be."

19 S 36(1)(a) Constitution.

of the limitation,[20] the nature and extent of the limitation,[21] the relation between the limitation and its purpose,[22] and whether less restrictive means to achieve the purpose exist.[23]

The ensuing paragraphs discusses the right to privacy, access to information and reasonable and fair administrative action and their limitation. The structure of the remainder of this chapter involves the discussion of the aforementioned rights, followed by a discussion of the limitation of each right. That is why the limitation rights preceded the discussion of the different rights. The limitation of the taxpayer and whistleblower's rights in the context of the proposed incentivised whistleblowing programme is detailed in Chapter 9.[24]

3.3. Right to privacy

"Privacy is not simply an absence of information about us in the minds of others; rather it is the control we have over information about ourselves."[25]

3.3.1. Right to privacy: Scope and nature

The South African Constitution provides that everyone has the right to privacy, including the right to privacy of communications.[26] There is much controversy

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20 S 36(1)(b) Constitution.
21 S 36(1)(c) Constitution.
22 S 36(1)(d) Constitution.
23 S 36(1)(e) Constitution.
24 Chapter 9 para 9.2 to 9.6.
25 Office of Science and Technology of the Executive Office of the President Privacy and Behavioural Research (1967) 8 (as quoted in US Department of Health, Education & Welfare Records Computers and the Rights of Citizens – Report of the Secretary's Advisory Committee on Automated Personal Data Systems (1973) 39.
26 S 14 of the Constitution provides that "Everyone has the right to privacy, which includes the right not to have—(a) their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed."

concerning the scope and definition of the right to privacy.[27] Steytler opines that the right to privacy comprises three spheres: A person's body, territorial or special aspect, and communications or information transfer.[28]

In the context of tax whistleblowers, the question is whether the right to privacy prevents whistleblowers from reporting the tax affairs of other persons. At the same time, can a whistleblower rely on the right to privacy to protect their identity and information supplied to SARS? The right to privacy may be considered a defence against a whistleblower on the basis that the use of the report is unlawful and inadmissible based upon a privacy infringement.

In *Bernstein v Bester*,[29] the applicant challenged the constitutional validity of sections 417 and 418 of the Companies Act 61 of 1973. These sections deal with the compulsion of a witness to attend an inquiry,[30] produce documents[31] and answer questions.[32] The applicant's attack on these sections was threefold: (i) the right to freedom and security of a person as envisaged in section 11(1) of the Constitution; (ii) the right to privacy in terms of section 13 of the Constitution; and (iii) the right not to be subjected to the seizure of private possessions or the violations of private communications as a competent right to the right to personal privacy.[33] For the present purposes, only the argument premised on the right to privacy is relevant. The court held that privacy is not acknowledged in every sphere and decreases as a person enters the business and social realms.[34] Furthermore, in determining whether there

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27 *NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA 250 (CC) para 32. Ff *National Coalition for Gay And Lesbian Equality and Another v Minister of Justice And Others* 1999 (1) SA 6 (CC) para 32 "Privacy recognised that we all have a right to a sphere of private intimacy and autonomy which allowed us to establish and nurture human relationships without interference from the outside community." Ff Cheadle *et al*. *South African Constitutional Law: The Bill of Rights* (2023) para 9.2. Chapter 9 para 9.3.

28 Steytler *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa 1996* (1998) 83.

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

30 S 417(1) of the Companies Act 61 of 1973.

31 S 417(1)(a) of the 1973 Companies Act.

32 S 417(2)(a) and (b) of the 1973 Companies Act.

33 *Bernstein & Others v Bester NO & Others* 1996 (2) SA 751 (CC) 779- 780.

34 *Bernstein & Others v Bester NO & Others* 1996 (2) SA 751 (CC) 789.

was an infringement of the right to privacy, one must apply the "reasonable expectation of privacy" test.[35]

The test for a reasonable expectation is both subjective and objective.[36] According to Currie and De Waal, the subjective component of the test is more than what would feel private but encompasses the permissibility of privacy waivers in the form of consent.[37]

As for the objective test of the reasonableness of a person's expectation of privacy, the court alluded to a spectrum of privacy interests when it stated that:

> *"*The truism that no right is to be considered absolute implies that from the outset of interpretation, each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly."[38]

Thus, only information in the genuinely personal realm of a person will be considered private and unlimitable by section 36 of the Constitution.[39] In *Mistry v Interim Medical and Dental Council of South Africa and others,*[40] the Constitutional Court considered the principles of reasonableness and justifiability of an infringement on the right to privacy. In this matter, the Interim Medical and Dental Council of South Africa ("the Council") instructed two inspectors to inspect the applicant's premises, where they seized several items. The applicant instituted action against the Council premised on

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35 *Bernstein & Others v Bester NO & Others* 1996 (2) SA 751 (CC) 789.
36 *Bernstein & Others v Bester NO & Others* 1996 (2) SA 751 (CC)792.
37 Currie and de Waal *The Bill of Rights Handbook* (2013) 298.
38 *Bernstein & Others v Bester NO & Others* 1996 (2) SA 751 (CC) 788.
39 Currie and de Waal *The Bill of Rights Handbook* (2013) 290 -299.
40 *Mistry v Interim Medical and Dental Council of South Africa and others* 1998 (4) SA 1127 (CC). Ff *Magajane v Chairperson, North West Gambling Board and others* 2006 (5) SA 250 (CC).

the unreasonable infringement of his right to privacy.[41] The Constitutional Court held that when considering an infringement of a constitutional right, the question is whether the limitation of that right falls within the parameters of section 36 of the Constitution.[42] The court confirmed the principle in *Bernstein v Bester* that the right to privacy extends to circumstances where there is a legitimate expectation of privacy.[43] The Constitutional Court held that when confronted with the infringement of privacy, certain factors are relevant: How the information was obtained and whether the method was intrusive; whether the information obtained was used for the purpose for which it was obtained; and to whom the information was disseminated.[44]

In *Magajane v Chairperson, North West Gambling Board and others,* the Constitutional Court was asked to determine whether an inspection by the North West Gambling Board established in terms of the North West Gambling Act, 2 of 2011 was unconstitutional, given that it warrants inspections that may infringe on the right to privacy.[45] The Constitutional Court confirmed the test in *Mistry* and added that the legislation's application scope is subject to scrutiny and that the applicant's expectation of privacy must be considered in a proportional review as required in section 36.[46] Accordingly, the court held that section 65 was unconstitutional and declared it invalid.[47] Ancillary to the discussion of a person's expectation of privacy, is the

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41 *Mistry v Interim Medical and Dental Council of South Africa and others* 1998 (4) SA 1127 (CC) para 14.

42 *Mistry v Interim Medical and Dental Council of South Africa and others* 1998 (4) SA 1127 (CC) para 24.

43 Mistry *v Interim Medical and Dental Council of South Africa and others* 1998 (4) SA 1127 (CC) para 27.

44 *Mistry v Interim Medical and Dental Council of South Africa and others* 1998 (4) SA 1127 (CC) para 51.

45 *Magajane v Chairperson, North West Gambling Board and others* 2006 (5) SA 250 254.

46 *Magajane v Chairperson, North West Gambling Board* 2006 (5) SA 250 265-266. Ff *Gaertner v Minister of Finance* 2014 (1) SA 442 (CC) para 86 "where the court held that Privacy is most often seen as a fundamental personality right deserving of protection as part of human dignity. This court in Mistry held that, to the extent that a statute authorises warrantless entry into private homes and the rifling through private possessions, the statute breaches the right to privacy. To this end, it is necessary that the right to privacy with regard to the homes of individuals and their private possessions is protected. In this context the expectation of privacy is higher and, at the very least, entry and searches conducted there have to be authorised by warrants. This is in line with Magajane. The reading-in of this requirement is warranted."

47 *Magajane v Chairperson, North West Gambling Board* 2006 (5) SA 250 265-268.

question of whether a whistleblower may be barred from disclosing information if they signed a non-disclosure agreement. This question is further considered in Chapter 9.[48]

In the context of protected information under the Tax Administration Act, Fritz suggests that there must be a balance between the disclosure of information and the right to privacy.[49] She argues that the question should not be whether the disclosure of the information is permitted, but rather whether the disclosure should be subject to certain exemptions or limitations.[50] In the context of tax whistleblowers, the question is whether a whistleblower reasonably expects privacy when providing information about another taxpayer. From the taxpayer's perspective, the question is whether the taxpayer's right to privacy should be waived in favour of the whistleblower's rights. If so, how will such limitation be justified in terms of section 36 of the Constitution?[51]

3.3.2. Right to privacy: Limitation

The Constitutional Court considered various limitations to the Bill of Rights and certain purposes for limitations have been decided as legitimate.[52] In what follows, the considerations relevant to tax whistleblowers are discussed. The aim is to illustrate that whistleblowing seeks to ensure the effective administration of justice and crime prevention, and it is a reasonable and justifiable purpose to limit the right to privacy.

In the case of *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and others In re Hyundai Motor Distributors (Pty)*

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48 Chapter 9 para 9.7.1.

49 Fritz "South African Taxpayers' Right to Privacy in Cross-Border Exchange of Tax Information" *Constitutional Court Review* 2021 424.

50 Fritz "South African Taxpayers' Right to Privacy in Cross-Border Exchange of Tax Information" *Constitutional Court Review* 2021 424.

51 Chapter 2 para 2.2 regarding the taxpayer's rights and the secrecy provisions.

52 *Larbi-Odam v MEC for Education (North-West Province)* 1997 (12) BCLR 1655 (reduction of unemployment among South African citizens); *Shabala v Attorney-General (Transvaal)* 1996 (1) 9 SA 725 (CC) 52 (prevention of disclosure of state secrets or the identity of informers); *S Ntuli* 1996 (1) SA 1207 (CC) 24 (screening of appeals); *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) 37 (prevention of illegal immigrants from entering the border).

Ltd and others v Smit No and others,[53] a search warrant in terms of section 29 of the National Prosecuting Authority Act, 32 of 1998 was issued in respect of the respondent's premises and documents. The applicants challenged the constitutional validity of section 29 because it infringed on the right to privacy.[54] In the Constitutional Court, the applicants argued that the provisions of the National Prosecuting Authority Act do not allow a reasonable suspicion to exist before a judicial officer authorising the search warrant.[55]

In the judgment penned by Langa J, the Constitutional Court held that when a person moves from their intimate space, they retain a conditional right to be left alone by the state. The intensity of the right to privacy may vary as they move to and from their personal sphere. The right to privacy's fluidity is an important characteristic that influences how the right to privacy is applied.[56] The Constitutional Court held that the right to privacy extends to juristic persons, although their privacy can never be equal to that of a natural person.[57]

In applying the proportionality test in interpreting the right to privacy, the Constitutional Court established that the state's ability and objective to combat crime is a legitimate interest that may limit the application of the right to privacy. Consequently, the right to privacy cannot be used as a shield against crime or to conceal evidence of wrongdoing.[58] This understanding and interpretation are significant in the context of

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53 *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit No And Others* 2001 (1) SA 545 (CC).

54 *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit No And Others* 2001 (1) SA 545 (CC) para 1 – 4.

55 *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit No And Others* 2001 (1) SA 545 (CC) para 11 – 14.

56 *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit No And Others* 2001 (1) SA 545 (CC) para 16 and 18.

57 *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit No And Others* 2001 (1) SA 545 (CC) para 17.

58 *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit No And Others* 2001 (1) SA 545 (CC) para 54.

whistleblowers, since the impugned taxpayer cannot rely on an absolute right to privacy against a whistleblower who reports a tax offence. Even so, the test of *Bernstein* and *Mistry* will remain applicable to ensure that the infringement on the right to privacy is proportionate and reasonable.

As stated in *Mistry v Interim Medical and Dental Council of South Africa* above, how the tax whistleblower obtained the information will be a relevant consideration when dealing with the infringement of the right to privacy.[59] Still, even if the information was obtained in violation of the constitutionally protected right, society's interest in exposing unlawful conduct could outweigh the violation. In this regard, the Court in *Protea Technology Ltd v Wainer,*[60] held that the court's discretion to admit unlawfully obtained evidence under the common law to expose unlawful conduct was a justifiable limitation on the right to privacy.[61]

Based on the above examples of the limitation of the right to privacy, it appears that although the taxpayer about whom a report is made has a right to privacy, such right may be limited where a whistleblower divulges information concerning a potential non-compliance or offence. For purposes of a proposed incentivised whistleblowing programme, the thesis proposes that whistleblowers should not be subject to personal liability claims on the basis of any report filed. This proposal is founded in the constitutional objective of combatting crime, smooth administration of justice and the prevention of tax evasion and non-compliance, all of which require unfettered whistleblowing.

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59 *Mistry v Interim Medical and Dental Council of South Africa and others* 1998 (4) SA 1127 (CC) para 51.

60 *Protea Technology Ltd v Wainer* 1997 (9) BCLR 1225 (W).

61 *Protea Technology Ltd v Wainer* 1997 (9) BCLR 1225 (W) 1241 – 1244. The admissibility of unconstitutionally obtained evidence is further discussed in Chapter 9 para 9.7.2.

3.3.3. Protection of Personal Information Act 4 of 2013 ("POPIA")

The South African legislature enacted the POPIA to give effect to the constitutionally entrenched right to privacy by providing a measure for safeguarding information and regulating information processing by public and private bodies.[62] To contextualise the operation of the Act, special mention of the definition of "personal information" and "processing" is required.

The definition of "personal information" is broad and the type of information included will constitute taxpayer confidential information. For example, "personal information" consists of a person's tax number and information on a person's financial or criminal history.[63] "Processing" includes any collection, recording, or dissemination through transmission in any format.[64] The above definitions apply to potential tax whistleblowers who gather information to file a report with SARS, SAPS and the NPA.

The POPIA excludes the processing of information by a public body for the prevention and detection of unlawful activities, combatting money laundering and investigating

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62 S 2 Protection of Personal Information Act 4 of 2013 ("POPIA") provides that "the purpose of this Act is to —(1) give effect to the constitutional right to privacy, by safeguarding personal information when processed by a responsible party, subject to justifiable limitations that are aimed at—balancing the right to privacy against other rights, particularly the right of access to information; and protecting important interests, including the free flow of information within the Republic and across international borders; (2) regulate the manner in which personal information may be processed, by establishing conditions, in harmony with international standards, that prescribe the minimum threshold requirements for the lawful processing of personal information; (3) provide persons with rights and remedies to protect their personal information from processing that is not in accordance with this Act; and (4) establish voluntary and compulsory measures, including the establishment of an Information Regulator, to ensure respect for and to promote, enforce and fulfil the rights protected by this Act."

63 S1 POPIA defines "personal information" as "information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person, including, but not limited to…(b) information relating to the education or the medical, financial, criminal or employment history of the person; (c) any identifying number, symbol, e-mail address, physical address, telephone number, location information, online identifier or other particular assignment to the person…"

64 S 1 POPIA provides that "processing" means any operation or activity or any set of operations, whether or not by automatic means, concerning personal information, including—(a) the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use; (b) dissemination by means of transmission, distribution or making available in any other form; or (c) merging, linking, as well as restriction, degradation, erasure or destruction of information…"

offences.[65] This exclusion only applies to public bodies (SARS, the SAPS or the NPA) processing the personal information supplied by the whistleblower after the report is made. There is no prohibition on the public bodies processing the information to prevent or investigate an offence. The question is whether the initial collection and report by the whistleblower is subject to the provisions of POPIA.

If the whistleblower must comply with the terms for the lawful processing of the personal information against whom the complaint is filed, they may face penalties, including imprisonment and administrative fines for their failure to do so.[66] In terms of section 38(1) of POPIA, the Regulator may grant an exception to a responsible party (whistleblower) for processing information (making the report) if the public interest in processing outweighs any interference with the taxpayer's privacy.[67] Section 38(2) provides that the public interest includes the "prevention, detection and prosecution of offences". To avoid sanction by the Regulator, a whistleblower must apply for exemption under the aforesaid provisions.

POPIA effectively prohibits the potential tax whistleblower from filing a report that may contain personal information about a third party. This conflicts with the legitimate purposes the Courts have approved to limit the right to privacy. It also conflicts with public bodies' right to process personal information as envisaged in section 6 of POPIA. In conclusion, the right to privacy may be justifiably limited to allow for an incentivised tax whistleblowing programme.

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65 S 6(1)(c)(ii) POPIA provides "Exclusions.—(1) This Act does not apply to the processing of personal information—…. (c) by or on behalf of a public body—… (ii) the purpose of which is the prevention, detection, including assistance in the identification of the proceeds of unlawful activities and the combating of money laundering activities, investigation or proof of offences, the prosecution of offenders or the execution of sentences or security measures, to the extent that adequate safeguards have been established in legislation for the protection of such personal information."

66 Ss 107 and 109 POPIA.

67 S 38(1) POPIA.

3.4. Right to access information

3.4.1. Right to access information: Scope and nature

Everyone is entitled to information held by the state or any other person to exercise or protect any right.[68] The Promotion of Access to Information Act, 2 of 2000 ("PAIA") was introduced in 2000 to give effect to the right to access information for the protection of rights.[69] It does so by elaborating on the protections and limitations of the constitutional right and provides a procedure through which a person may request access to information held by the state and private bodies.[70] The court in *ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd*[71] held that "any right" means the Bill of Rights, as well as any contractual or delictual right.[72] Thus, the right to access to information is not only limited to the protection of constitutional rights. It extends to information that may be required to protect contractual or delictual rights.

According to Currie and Klaaren,[73] three general principles underscore the scope of the PAIA and the interpretation thereof. Firstly, providing access to information by private or public bodies is the default position.[74] The central aim of the Act is disclosure and not secrecy; any interpretation of the Act must be aimed at this objective.[75] Secondly, departure from the default position is only justified in exceptional cases, for this reason specific refusal grounds are included in the Act.[76] Thirdly, the burden of proof in any dispute rests on the person refusing disclosure.[77]

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68 S 32 of the Constitution provides as follows "(1) Everyone has the right of access to—(a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights."

69 Preamble Promotion of Access to Information Act, 2 of 2000 ("PAIA"). Constitutional Principle IX (CP IX) in the *Certification of the Constitution of the Republic of South Africa* 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) para 82 -87.

70 *PFE International v International Development Corporation of South Africa Ltd* 2013 (1) SA 7 (CC). See also *Ferreira v Levin NO* 1996 (1) SA 984 (CC).

71 *ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd* 1998 (2) SA 109 (W).

72 *ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd* 1998 (2) SA 109 (W) 119.

73 Currie and Klaaren *The Promotion of Access to Information Act Commentary* (2002) 23.

74 Currie and Klaaren *The Promotion of Access to Information Act Commentary (2002)* 23

75 Currie and Klaaren *The Promotion of Access to Information Act Commentary* (2002) 23.

76 Currie and Klaaren *The Promotion of Access to Information Act Commentary* (2002) 23.

77 Currie and Klaaren *The Promotion of Access to Information Act Commentary* (2002) 23.

In terms of the dispute resolution process governed by the Tax Court Rules and section 74 of the Tax Administration Act, a taxpayer has a right to request a copy of the recorded particulars of an assessment or decision referred to in section 104(2) of the Tax Administration Act relating to the taxpayer.[78] The Rules of the Tax Court promulgated under section 103 of the Tax Administration Act also provide that a taxpayer is entitled to reasons for their assessment, enabling them to understand the basis of the assessment.[79] So a taxpayer is entitled to all of the evidence on which SARS premised its assessment or decision under the Tax Administration Act. The aforesaid is relevant when considering the provisions of the PAIA and the applicable refusal grounds contained therein.

3.4.2. Right to access information: Limitations and the Promotion of Access to Information Act

One of the goals of the PAIA is to limit the constitutional right to access information in a manner that is justifiable to protect privacy and commercial confidentiality and promote good governance.[80] Naturally, the right to access information is limited by applying the limitation clause discussed above. Notwithstanding the general limitation clause, section 32(2) of the Constitution provides another limitation in that the legislation to be enacted (PAIA) must "provide for reasonable measures to alleviate

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78 S 73 of the Tax Administration Act provides that "(1) A taxpayer or the taxpayer's duly authorised representative is entitled to obtain-…(c) information, other than SARS confidential information, on which the taxpayer's assessment is based…" Rule 36 of the Tax Court Rules provides for the discovery of documents related to any ground of assessment and opposing appeal in terms of the pleadings exchanged under rule 31 and 32.

79 Rule 6 of the Tax Court Rules promulgated under section 103 of the Tax Administration Act,2 28 of 2011 provides that "(1) A taxpayer who is aggrieved by an assessment may, prior to lodging an objection, request SARS to provide the reasons for the assessment required to enable the taxpayer to formulate an objection in the form and manner referred to in rule 7."

80 S 9 of PAIA states: "**Objects of Act** -The objects of this Act are- (a) to give effect to the constitutional right of access to- (i) any information held by the State; and (ii) any information that is held by another person and that is required for the exercise or protection of any rights; (b) to give effect to that right- (i) subject to justifiable limitations, including, but not limited to, limitations aimed at the reasonable protection of privacy, commercial confidentiality and effective, efficient and good governance; and (ii) in a manner which balances that right with any other rights, including the rights in the Bill of Rights in Chapter 2 of the Constitution."

the administrative and financial burden on the state".[81] Ordinarily, administrative and financial considerations are not compelling reasons to justify the limitation. This added limitation effectively eases the limitation of a constitutional right.

By introducing the refusal grounds in the PAIA, the legislature provided certain instances considered justifiable in which the right to access information may be limited.[82] These limitations must be narrowly interpreted and not unnecessarily limit the right to access information.[83]

The PAIA provides that access to a record must be given by a public body (SARS) to a requester when they comply with the procedural requirements of the Act.[84] An information officer may only refuse a request for a record when a refusal ground for such access exists.[85]

3.4.2.1. Applicable refusal grounds in PAIA

In its PAIA manual, SARS set out specific grounds upon which a request for access to a record will be refused.[86] For instance, the mandatory protection of privacy of a third party who is a natural person, protection of certain records held by SARS, and

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81 Currie and de Waal *The Bill of Rights Handbook* (2013) 698.

82 Robinson *Access to Information* (2016) 104 and 107. According to Robinson the grounds of refusal listed in the PAIA is not exhaustive. Ff *Centre for Social Accountability v Secretary of Parliament* 2011 (4) All SA 181 (ECG) para 62. Currie and Klaaren *The Promotion of Access to Information Act Commentary* (2002)126.

83 *Van Der Merwe v National Lotteries Board* 2014 JDR 0844 para 21. Ff Robinson *Access to Information* (2016) Chapter 5.

84 S 11(1) PAIA that provides "Right of access to records of public bodies (1) A requester must be given access to a record of a public body if- (a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and (b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part."

85 Chapter 4, Part 2 PAIA.

86 SARS Manual of the Promotion of Access to Information Act, 2000 and the Protection of Personal Information Act, 2014 (October 2021) at https://www.sars.gov.za/wp-content/uploads/SARS-PAIA-POPIA-Manual-SEVENTH-UPDATE-FINAL-05-October-2021-1.pdf para 9.4(b)(i) (Accessed 03/04/2023).

the protection of confidential information.[87] These grounds were extracted from the provisions of PAIA, which are discussed below.

In the context of tax whistleblowers, the following three grounds of refusal contained in PAIA will be relevant. Firstly, section 34(1) of the PAIA provides that access to a record may be refused if it contains confidential information of another party and the disclosure would be unreasonable. Secondly, section 35(1) provides that disclosure of a record held by SARS to enforce legislation concerning revenue collection must be refused if the information relates to a person other than the requester. Both grounds of refusal concern information not related to the requester. Third is the ground relating to the refusal to provide confidential information under section 37 of the PAIA.[88] In this regard, it must be noted that access to a record may be refused if there is an agreement of confidentiality, or if the information was supplied in confidence and disclosure may limit the future supply of similar information, and it is in the public interest that similar information (from the same source or otherwise) be supplied in future.[89] Section 37(2) of the PAIA provides that information subject to confidentiality may be provided if the third party concerned consents to such disclosure. Apart from the confidentiality agreement and the consent by a third party, the provisions of section 37 are similar to section 69(1)(c) of the Tax Administration Act.

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87 SARS Manual of the Promotion of Access to Information Act, 2000 and the Protection of Personal Information Act, 2014 (October 2021) at https://www.sars.gov.za/wp-content/uploads/SARS-PAIA-POPIA-Manual-SEVENTH-UPDATE-FINAL-05-October-2021-1.pdf para 9.4(b)(i) (Accessed 03/04/2023).

88 S 37 PAIA provides that "Mandatory protection of certain confidential information, and protection of certain other confidential information, of third party.—(1) Subject to subsection (2), the information officer of a public body—(a) must refuse a request for access to a record of the body if the disclosure of the record would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement; or (b) may refuse a request for access to a record of the body if the record consists of information that was supplied in confidence by a third party— (i) the disclosure of which could reasonably be expected to prejudice the future supply of similar information, or information from the same source; and (ii) if it is in the public interest that similar information, or information from the same source, should continue to be supplied. (2) A record may not be refused in terms of subsection (1) insofar as it consists of information—(a) already publicly available; or (b) about the third party concerned that has consented in terms of section 48 or otherwise in writing to its disclosure to the requester concerned."

89 S 37 PAIA.

When dealing with the refusal grounds under sections 34, 35 and 37 of the PAIA, the provisions of section 47 of the PAIA must be considered. Section 47(1) provides that if an information officer is confronted with a request for access to a record that might fall under sections 34, 35 and 37, they must notify the third party to whom the record relates and describe the content of the record requested.[90]

The provisions of section 47 are noteworthy in the context of tax whistleblowing, because if the requestor of the information, the impugned taxpayer, or the third party is connected to the taxpayer, consent would be easily obtainable and nullify the protection of the whistleblower. If the third party and the impugned taxpayer are complicit in a scheme, they could circumvent the confidentiality provisions by virtue of the notice requirements.

3.4.2.2. Public interest override: Section 46

Section 46(1)(a) and (b) of the PAIA provide that a request for access to a record held by a public body may not be refused if the disclosure would reveal evidence of a contravention of the law, non-compliance and the public interest in disclosing the record outweighs the harm contemplated in that provision.[91]

In *Arena Holdings (Pty) Ltd t/a Financial Mail v SARS*,[92] the High Court dealt with an application by Arena Holdings which requested information in terms of the PAIA from

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90 Ss 47(1) and 47(3)(a) PAIA provides that "Notice to third parties.—(1) The information officer of a public body considering a request for access to a record that might be a record contemplated in section 34 (1), 35 (1), 36 (1), 37 (1) or 43 (1) must take all reasonable steps to inform a third party to whom or which the record relates of the request" S47(3)(a) provides When informing a third party in terms of subsection (1), the information officer must—(a) state that he or she is considering a request for access to a record that might be a record contemplated in section 34 (1), 35 (1), 36 (1), 37 (1) or 43 (1), as the case may be, and describe the content of the record."

91 Ss 46(1)(a)(i) and (b) of the PAIA. Ff De Lange "Secrecy of Taxpayer Information and the disclosure thereof by an order of court in terms of the Tax Administration Act 28 of 2011 and the Promotion of Access to Information Act 2 of 2000" *Journal for Juridical Science* 2023 213-215.

92 *Arena Holdings (Pty) Ltd t/a Financial Mail and two others v SARS and two others* 2022 (2) SA 485 (GP). The order of unconstitutionality was confirmed in *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* 2023 (5) SA 319 (CC).

SARS concerning the tax affairs of the former President of the Republic, Mr Zuma.[93] SARS refused the application because it could not disclose confidential taxpayer information. Arena Holdings argued that their constitutional right to freedom of expression was infringed and unreasonably limited and that their request complied with section 46 of the PAIA.[94] The court held that sections 67 and 69 of the Tax Administration Act are unconstitutional and invalid, as much as it limits access to information to a requester where they complied with the requirements of section 46(1)(a) and (b) of the PAIA and that it precludes further dissemination of that information.[95]

In the confirmation proceeding, the Constitutional Court held that the tax Administration Act provides for disclosure of information in certain circumstances[96] and therefore there is no guarantee of absolute confidentiality.[97] There is no basis to conclude that absolute confidentiality is required for taxpayer compliance.[98] Therefore,

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93 *Arena Holdings (Pty) Ltd t/a Financial Mail and two others v SARS and two others* 2022 (2) SA 485 (GP) 489-490.

94 *Arena Holdings (Pty) Ltd t/a Financial Mail and two others v SARS and two others* 2022 (2) SA 485 (GP) 492-496. Ff Tredoux "Taxpayer Confidentiality versus Access to Information, Freedom of Expression, and the Public Interest in the Tax Affairs of a State President: Arena Holdings Pty Ltd T/A Financial Mail & Another V South African Revenue Service & Others – "A Giant Leap for Mankind" or the Opening of Another "Pandora's Box"?" *Journal for Juridical Science* 21.

95 *Arena Holdings (Pty) Ltd t/a Financial Mail and two others v SARS and two others* 2022 (2) SA 485 (GP) 501.Ff Tredoux "Taxpayer Confidentiality Versus Access to Information, Freedom of Expression, and the Public Interest in the Tax Affairs of a State President: Arena Holdings Pty Ltd T/A Financial Mail & Another V South African Revenue Service & Others – "A Giant Leap for Mankind" or the Opening of Another "Pandora's Box"?" *Journal for Juridical Science* 23-24. De Lange "Secrecy of Taxpayer Information and the disclosure thereof by an order of court in terms of the Tax Administration Act 28 of 2011 and the Promotion of Access to Information Act 2 of 2000" *Journal for Juridical Science* 2023 215 argues that it would be more favourable to obtain an order under section 46 since there is no prohibition on the further dissemination of the information obtained.

96 Ss 70, 71 and 73 Tax Administration Act.

97 *Arena Holdings (Pty) Limited t/a Financial Mail and Others v South African Revenue Service and Others* 2023 (5) SA 319 (CC) para 183. Ff Tredoux "Taxpayer Confidentiality Versus Access to Information, Freedom of Expression, and the Public Interest in the Tax Affairs of A State President: Arena Holdings Pty Ltd T/A Financial Mail & Another V South African Revenue Service & Others – "A Giant Leap for Mankind" or the Opening of Another "Pandora's Box"?" *Journal for Juridical Science* 30.

98 *Arena Holdings (Pty) Limited t/a Financial Mail and Others v South African Revenue Service and Others* 2023 (5) SA 319 (CC) para 183.

the limitation imposed by section 35 of the PAIA and sections 67(4) and 69(2) of the Tax Administration Act are unconstitutional.[99]

Under the provisions of the Tax Administration Act, the disclosure of information in pursuit of law enforcement is in the public interest.[100] Thus, the exception to the prohibition of disclosure exists.[101] By way of example, suppose the Commissioner of the Zondo Commission requested the information sought by Arena Holdings instead to fulfil its mandate. In such a case, disclosing Mr Zuma's confidential information could be justified on the same principle as the *Ontvanger van Inkomste, Lebowa v De Meyer*, being to promote a clean administration.

From the above discussion, it appears that public interest considerations may override the refusal grounds in the PAIA. However, the potential harm to the party whose information will be disclosed forms part of this consideration. According to Croome, confidential information is only protected if SARS can show that the information is subject to a confidentiality agreement.[102] Although the details surrounding a whistleblower's identity will be protected, the information proffered by the whistleblower related to the requester (or taxpayer) will not be kept confidential. This may especially be the case when the information pertains to an offence or contravention of a law and public interest demands disclosure, as contemplated in section 46 of the PAIA. It may also be possible for the requester, or the taxpayer concerned to unravel the whistleblower's identity when the information is supplied, especially if the person concerned was privy to it.

In *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: in re Masetlha v President of the Republic of South Africa*,[103] the applicant applied for the

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99 *Arena Holdings (Pty) Limited t/a Financial Mail and Others v South African Revenue Service and Others* 2022 (2) SA 485 (GP) 191-193.

100 S 71(1) Tax Administration Act.

101 Tredoux "Taxpayer Confidentiality Versus Access to Information, Freedom of Expression, and the Public Interest in the Tax Affairs of a State President: Arena Holdings Pty Ltd T/A Financial Mail & Another V South African Revenue Service & Others – "A Giant Leap for Mankind" or the Opening of Another "Pandora's Box"?" *Journal for Juridical Science* 2023 35.

102 Croome *Taxpayer's Rights in South Africa* (2010) 193.

103 *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: in re Masetlha v President of the Republic of South Africa* 2008 (5) SA 31 (CC).

disclosure of restricted materials in the record of court proceedings. The applicant's argument was premised on public interest and the media's right to gain access to observe and report on the administration of justice.[104] The Constitutional Court held that the mere classification of documents as confidential does not oust the jurisdiction of a court and that those documents are susceptible to scrutiny.[105] Accordingly, a court has the discretion to allow the media access to documents classified as secret or confidential.[106] A similar classification of protected information under the Tax Administration Act may also encounter similar limitations.

Following the reasoning in the *Arena Holdings (Pty) Ltd t/a Financial Mail v SARS, Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: in re Masetlha v President of the Republic of South Africa* and *Ontvanger van Inkomste, Lebowa v De Meyer* cases, it seems that public interest and public policy considerations coupled with the need to ensure and promote clean government administration erode the need to protect secret information. Bricout[107] argues that preserving secret information serves no purpose apart from protecting the revenue authorities' activities from undue disruptions.[108] He also argues that the use of modern technology also minimises the disruption of SARS' activities. Bricout further states that taxpayers should be informed, if not warned, that the information provided to revenue authorities is no longer protected.[109]

The information provided by a whistleblower may result in an audit or investigation by SARS regarding the alleged tax offence. This would mean that the information related to the tax offence, including the whistleblower's identity, may very well be provided to

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104 *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: in re Masetlha v President of the Republic of South Africa* 2008 (5) SA 31 (CC) 41-42; 47-50.

105 *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: in re Masetlha v President of the Republic of South Africa* 2008 (5) SA 31 (CC) 54.

106 *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: in re Masetlha v President of the Republic of South Africa* 2008 (5) SA 31 (CC) 54 - 55. In *Right2Know Campaign and Another v Minister of Police and Another* (2013/32512) (2014) ZAGPJHC 343; (2015) 1 All SA 367 (GJ), the Court also found that public interest may override the protection of information para 45.

107 Bricout "The preservation of secrecy provisions: Still worth it?" *Acta Juridica* 2002 247-281.

108 Bricout "The preservation of secrecy provisions: Still worth it?" *Acta Juridica* 2002 280.

109 Bricout "The preservation of secrecy provisions: Still worth it?" *Acta Juridica* 2002 281.

the taxpayer during the audit or recovery proceedings. This poses a conundrum since whistleblowers will probably need the protection, mainly during or after the commencement of civil or criminal proceedings. Thus, the protection afforded to whistleblowers is limited and may be of little use to whistleblowers in future proceedings. In the light of sections 67 and 68 being declared unconstitutional, whistleblowers and any potential whistleblowers' position is even more precarious. The table below summarises the potential challenges for whistleblowers' protection in respect of the right to access information:

Table 3.2 Potential challenges for whistleblower protection in respect of the right to access information

Taxpayer's right	**Appropriate section**	**Potential issue for whistleblower**
Right to access information on which an assessment or decision by SARS is based.	S73(1)(a), 73(1)(c) and 73(1)(d) of the Tax Administration Act.	SARS is obliged to disclose the information, which may include the whistleblower report and identity of the whistleblower, if it forms part of the record of an assessment or decision.
Right to request discovery of information during dispute proceedings.	Tax Court Rule 36.	A taxpayer may request the full particulars of SARS' audit file (excluding legally privileged documents) during a tax appeal in the Tax Court. Thus, the whistleblower's report and identity may be disclosed.
Right to access information if it is in the public interest.	S46 of the PAIA.	The public interest principle overrides any claim to confidentiality. Thus, when a whistleblower reports on public officials, the public interest principle may authorise disclosure of their identities and the report itself. This poses a security as well as a personal risk to whistleblowers.
Right to cross-examine and test evidence.	S35 of the Constitution.	An impugned taxpayer may want to cross-examine a whistleblower during court proceedings, resulting in whistleblowers having to face the taxpayer, who may be their employer. This also poses a risk to their security and potential workplace retaliation.

Source: Author's compilation.

In conclusion, the right to access information in terms of the PAIA may be limited or restricted at times. Nevertheless, the PAIA lacks the required provisions to limit the right to access information to safeguard a tax whistleblower effectively.

3.5. The right to procedurally fair, reasonable and lawful administrative action

Every person has the right to procedurally fair, lawful and reasonable administrative action.[110] The right to just administrative action is entrenched in the Promotion of Access to Justice Act, 3 of 2000 ("PAJA"). The departure point for an inquiry into the right to fair, reasonable and lawful administrative action is the determination of what constitutes administrative action.[111] Section 1 of the PAJA defines "administrative action" as any decision by an administrator, including an organ of state, in exercising a public power or performing a public function in terms of any legislation that adversely affects rights directly and externally.[112] The elements of the definition of administrative action must be considered in the context of any potential legislative regime in terms of which SARS would declare a person a whistleblower and afford that person certain rights. This determination is important since it relates to whether such a decision is reviewable under the principles of legality or the PAJA.

It is foreseeable that the PAJA will apply in the context of tax whistleblowers in two respects. Firstly, if a party seeks protection by SARS as a whistleblower, the process

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110 S 33(1) of the Constitution provides that "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

111 In the case of *President of the RSA and Others v SARFU and Others* 1999 (10) BCLR 1059 (CC) para 141 -143, the Constitutional Court held that the determination of administrative action relate to the function and not the functionary. Furthermore, the court held that the determination of administrative action must be done on a case-by-case basis.

112 S 1 PAJA ""decision" means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to- (a) making, suspending, revoking or refusing to make an order, award or determination; (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission; (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument; (d) imposing a condition or restriction;(e) making a declaration, demand or requirement; (f) retaining, or refusing to deliver up, an article; or (g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly…"

involving the decision by SARS to qualify them as a whistleblower will have to comply with the provisions of the PAJA. Secondly, a taxpayer against whom information was provided or any other person, for example, a newspaper, may, based on the provisions of the PAJA, challenge SARS' decision on the protection of the whistleblower.

The enquiry into the protection of whistleblowers and the right to just administrative action must include a detailed analysis of the elements of administrative action. In this regard, one must consider whether the administrative action will have a direct external legal effect and how such effect would manifest.[113] Furthermore, section 5 of the PAJA specifically provides a right to reasons for the administrative action.[114] The scope of the right to reasons aligns with the scope of the right to access information.

3.5.1. The right to procedurally fair, reasonable and lawful administrative action: Scope and nature

The definition of administrative action has six elements that must be considered. The first element of the definition of administrative action is that it requires a "decision" to be made by the relevant person. Section 1 of the PAJA provides that a "decision" includes a positive action and a negative omission by the decisionmaker.[115] A positive action would be an outward action by the decisionmaker when they take an active step to make a determination of a person's rights.[116] A negative omission includes the failure to exercise a discretion or to make any determination is also regarded as a decision for the purposes of the PAJA.[117] It is easy to see that a declaration or refusal

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113 Botha and Fritz "Whistle-Blowing for Reward – Friend or Foe? Exploring a Possible Tax Whistle-Blowing Programme in South Africa" *Obiter* 2019 93 to 98.

114 S 5 of Promotion of Access to Justice Act, No 3 of 2000 ("PAJA") provides as follows: "Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action."

115 S 1 PAJA.

116 S 1 PAJA.

117 S 1 PAJA para (g) of definition of "decision".

to declare a person as a whistleblower by SARS under an amended Tax Administration Act will constitute a decision under the PAJA.

The second element of administrative action is that it must be made by an administrator, defined as an organ of state, or a natural or juristic person.[118] The Constitution defines an "organ of state" as any department of state or any other functionary or institution that exercises or performs a public power or function under the Constitution or any legislation.[119] SARS is a regulatory body established as an organ of state under section 2 of the SARS Act.[120] It follows that SARS will be considered an administrator under the PAJA.

Under the third element, the administrator must exercise a public function or power. In the case of *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council & another,*[121] the Constitutional Court determined that the exercise of public power does not necessarily relate to governmental activities, but requires that the administrator perform a public function in terms of national legislation.[122] SARS' functions are set out in section 4 of the SARS Act and include the effective and efficient enforcement of various legislations and the collection of revenue.[123] In addition, the establishment of SARS under the aforesaid Act specifically states that it is part of public administration.

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118 S 1 PAJA defines ""administrator" means an organ of state or any natural or juristic person taking administrative action."

119 S 239 Constitution defines "organ of state" to mean "(a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution—(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer" In the case of *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council & another* 2006 JOL 18021 (CC) para 40-42, the Constitutional Court determined that the exercise of public power does not necessarily relate to governmental activities but requires that the administrator perform a public function in terms of national legislation.

120 S 2 of the SARS Act provides that "Establishment —The South African Revenue Service is hereby established as an organ of state within the public administration, but as an institution outside the public service.

121 *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council & another* 2006 JOL 18021 (CC).

122 *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council & another* 2006 JOL 18021 (CC) para 40-42.

123 S 4 of the SARS Act.

Therefore, as an administrator, SARS exercises a public function and power in pursuing its functions.

The fourth element merely records that the administrator must perform its functions under an empowering provision. In the context of this study, it is evident that SARS performs its duties under various tax legislations and premised on the references to the SARS Act as stated above; this requirement is easily satisfied.

The fifth element requires that the decision made by the administrator under an empowering provision must adversely affect another person's rights. To unpack this element, one must first consider the meaning of "affect". According to Hoexter and Penfold, the verb has two possible interpretations: Firstly, it can mean a determination of rights; secondly, as the abolishment of rights.[124] The South African courts have noted that if the decision has the "capacity to affect legal rights", it may satisfy this element of the definition of administrative action.[125] In *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works*,[126] the Supreme Court of Appeal held that the literal meaning of "adversely affect the rights of any person" cannot be ascribed to the phrase.[127] Instead, the meaning refers to the capacity of a decision to adversely affect rights directly and immediately.[128]

When considering legislative reform, the question is what rights from the impugned taxpayer or whistleblower will be adversely affected. On the one hand, from the perspective of the impugned taxpayer, their constitutional rights as set out in this chapter as well as those rights under the Tax Administration Act, will be affected. A further consideration that will form part of the discussion of the proposed legislative position is whether there are mitigating steps or considerations that may play a role in the justification of the limitation of the right to fair, reasonable and lawful administrative action, as contemplated in section 33 of the Constitution. On the other hand, from the

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124 Hoexter and Penfold *Administrative Law in South Africa* (2021) 309.
125 *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA).
126 *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) para 28. Ff Hoexter and Penfold *Administrative Law in South Africa* (2021) 312-314.
127 *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) para 23.
128 *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) para 23.

whistleblower's perspective, a failure by SARS to treat a person as a whistleblower under the proposed legislative position will influence their right to protection and potential tax relief under the proposed amendment.

The sixth element is that the decision must have a direct external legal effect. This requirement relates to the finality of the decision, and it must affect the public or relevant individual.[129] The inclusion of a "legal" effect seems to be a restatement of the requirement that the decision must affect a person's rights.[130]

3.5.2. The right to procedurally fair, reasonable and lawful administrative action: Limitations and specific exclusions under the PAJA

Certain acts of administrative action have been specifically excluded from review under the PAJA. These exclusions are i) executive powers or functions of the national, provincial, municipal executives and counsels,[131] ii) the legislative functions of Parliament, provincial legislature or municipal councils,[132] iii) judicial functions of judicial officers,[133] iv) decisions relating to prosecution,[134] and v) decisions concerning the appointment of judicial officers by the Judicial Service Commission.[135]

In the context of reviewable actions, one would also have to consider whether whistleblowers' protection should not be excluded from the provisions of the PAJA, since its inclusion and the rights associated with the act may render the protection afforded hollow. For instance, if an aggrieved party requests reasons why the whistleblower is protected, SARS may be bound to provide, as justification for the protection, the very same information it sought to protect and, by so doing, render the

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129 *Sasol Oil (Pty) Ltd v Metcalfe N.O* 2004 All SA 329 (W) para 13. In *Botha v Matjihabang Municipality* 2010 ZAFSCH 18 para 29.3, the court held that a decision taken in pursuit of internal affairs of a functionary does not meet the requirement of administrative action as it does not involve an interaction with the public.

130 Hoexter and Penfold *Administrative Law in South Africa* (2021) 331.

131 S 1 PAJA "administrative action" para (aa) to (cc).

132 S 1 PAJA "administrative action" para (dd) PAJA.

133 S 1 PAJA "administrative action" para (ee) PAJA.

134 S 1 PAJA "administrative action" para (ff) PAJA.

135 S 1 PAJA "administrative action" para (gg) PAJA.

protection useless. In other words, without legislative protection of the whistleblower and the disclosed information, SARS may be forced to disclose the same information it sought to protect.

In the past, the South African courts have held that decisions to investigate which exclude a determination of culpability do not have a direct external legal effect.[136] In the tax realm, the court in *Carte Blanche Marketing CC and Others v CSARS*[137] held that a decision by SARS to audit a taxpayer under section 40 of the Tax Administration Act is not reviewable under the PAJA, since it has no direct legal and external effect.[138] It constitutes an investigative process that was set in motion.[139]

In the context of a tax whistleblowing programme, the decision to use the whistleblower report would be made either in support of a decision by SARS to audit a taxpayer, or during the investigation and information-gathering process. It is, therefore, foreseeable that the decision to use a whistleblower report will not be subject to review under the PAJA. Whether the decision will be reviewable on the grounds of legality will depend on whether the decision was lawful.[140]

The potential of review of the decision to use the whistleblower report is problematic insofar as SARS would be required to comply with the requirements of procedural fairness under section 3 of the PAJA, including the requirement of notice and the taxpayer's right to call for reasons for the decision. In opposing a review, SARS would be required to defend its position, which may result in the compulsory disclosure of the information it sought to protect. This is especially so since the court has the power to order a judicial peek under section 80 of the PAIA, which may ultimately defeat the

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136 *Viking Pony Africa Pumps v Hidro-Tech Systems* 2011 (1) SA 327 (CC) para 38.

137 *Carte Blanche Marketing CC and Others v Commissioner for the South African Revenue Service* 2020 (6) SA 463 (GJ) para 82-84. *Corpclo 2290 CC t/a U-Care v Registrar of Banks* (755/11) (2012) ZASCA 156. *Wingate-Pearce v SARS* 2019 (6) SA 196 (GSJ).

138 *Carte Blanche Marketing CC and Others v Commissioner for the South African Revenue Service* 2020 (6) SA 463 (GJ) para 61-64.

139 *Carte Blanche Marketing CC and Others v Commissioner for the South African Revenue Service* 2020 (6) SA 463 (GJ) para 82-84. Ff *Corpclo 2290 CC t/a U-Care v Registrar of Banks* (755/11) (2012) ZASCA 156. *Wingate-Pearce v SARS* 2019 (6) SA 196 (GSJ).

140 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 58-59.

purpose of the protection afforded to the taxpayer in the first place. A judicial peek refers to the scenario where the court, in determining whether information should be released or disclosed, examine such record.[141]

In conclusion, at this preliminary stage, the right under section 33 of the Constitution may be limited under the abovementioned circumstances. The application of section 36 of the Constitution will be applied to the proposed policy position at a later stage in this study.[142]

3.6. Right to freedom of expression

3.6.1. The right freedom of expression: Scope and nature

Section 16 of the Constitution provides that every person has the right to freedom of expression which includes, amongst others, the freedom to receive or to distribute information or ideas.[143] The right to freedom of expression has two facets.[144] The first facet relates to instrumental value of the right, for example the quality of choice of voters is improved with free political debate.[145] Thus, the instrumental dimension is outcome based.[146] The second facet relates to the inherent or intrinsic value of the right which relates to a person or society's morals. Essentially, it means that a morally responsible person would be entitled to make their own decisions.[147]

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141 S80(1) PAIA.

142 Chapter 9 para 9.2.1 and 9.2.5.

143 S16 Constitution provides "**16. Freedom of expression.—(**1) Everyone has the right to freedom of expression, which includes—(a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d)academic freedom and freedom of scientific research. (2) The right in subsection (1) does not extend to—(a) propaganda for war;(b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

144 Currie and de Waal *The Bill of Rights Handbook* (2013) 339. Cheadle *et al*. *South African Constitutional Law: The Bill of Rights* (2023) para 11.2.

145 Currie and de Waal *The Bill of Rights Handbook* (2013) 339. Cheadle *et al*. *South African Constitutional Law: The Bill of Rights* (2023) para 11.2.

146 Currie and de Waal *The Bill of Rights Handbook* (2013) 339. Cheadle *et al*. *South African Constitutional Law: The Bill of Rights* (2023) para 11.2.

147 Currie and de Waal *The Bill of Rights Handbook* (2013) 339. Cheadle *et al*. *South African Constitutional Law: The Bill of Rights* (2023) para 11.2.

In *South African National Defence Union v Minister of Defence and Another*,[148] the Constitutional court held that the right to freedom of expression is central to democracy, since it recognises a person's need to be able to hear and express views freely.[149] Similarly, in *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others,*[150] the Constitutional Court also held that:

> "The right to freedom of expression is integral to democracy, to human development and to human life itself. It must be all the more zealously guarded because the infringement of this right was used as an instrument in an effort to achieve the degree of thought control conducive to preserve apartheid and to impose a value system fashioned by a minority on all South Africans."[151]

Even so, this does not suggest that the right is absolute and not capable of limitation.[152] The below paragraphs discuss the limitation to the right to freedom of expression.

3.6.2. The right to freedom of expression: Limitations

The right to freedom of expression has certain internal limitations set out in section 16(2). These include limitations such as spreading of propaganda, or incitement of violence.[153] The Constitutional Court underscored the importance and value of the right in the matter of *Democratic Alliance v ANC and Another*,[154] when it held that the right aids in the search for the truth and enhances the likelihood of misgovernance

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148 *South African National Defence Union v Minister of Defence and Another* 1999 (6) BCLR 615 (CC).

149 *South African National Defence Union v Minister of Defence and Another* para 7.Ff *NM v Smith and Another* 2007 (7) BCLR 751 (CC).

150 *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 (3) SA 345 (CC*)* 356. Ff *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC); *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC).

151 *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 (3) SA 345 (CC*)* 356. Cheadle *et al*. *South African Constitutional Law: The Bill of Rights* (2023) para 11.3.

152 Cheadle *et al*. *South African Constitutional Law: The Bill of Rights* (2023) para 11.3.

153 S16(2) Constitution.

154 *Democratic Alliance v ANC and Another* 2015 (2) SA 232 (CC).

being exposed.[155] It appears that a whistleblower, if faced with potential court proceedings for divulging information, could rely on section 16(1)(b). But given the potential application of the principle of subsidiarity, the whistleblower will likely be able to rely on other legislation that places a reporting duty on them to disclose tax non-compliance or evasion.[156]

3.7. Conclusion

The constitutional rights set out in this chapter are limitable under section 36 of the Constitution. In respect of the right to privacy, various considerations, such as the promotion of a clean government and the fight against corruption may limit a person's right to privacy in the context of a tax whistleblowing programme. It appears that a tax whistleblowing programme and the protection of such whistleblowers will align with the current approach adopted by South African courts.

As for the right to access information, the right is limited by applying section 36 of the Constitution and the provisions of the PAIA. There are, however, various challenges concerning the refusal grounds for disclosing the information proffered by the tax whistleblower and their identity to a requestor. Public policy and interest considerations may override a determination that information is confidential, which poses a severe hurdle for a tax whistleblowing programme. This hurdle may be bridged by providing a specific exclusion of the provisions of the PAIA to the proposed tax whistleblowing programme. This may alleviate the pressure on SARS and potential tax whistleblowers.

As for the right to fair administrative action as detailed above in the context of a tax whistleblowing programme, it seems that at this stage, a decision under the proposed

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155 *Democratic Alliance v ANC and Another* 2015 (2) SA 232 (CC) 272. Ff *Mail and Guardian Ltd v The Judicial Service Commission and Others* 2002 (6) BCLR 615 (GSJ).

156 It is not necessary to delve into the limitations to the right to freedom of expression as the application thereof will be based on the facts of every case. Since this thesis merely suggest a framework for an incentivised whistleblowing policy it is not possible to speculate how the right to freedom of expression will be able to conform.

policy will be excluded from the definition of administrative action, as it will not have a direct or external legal effect. As such, judicial review based on the provisions of the PAJA is excluded. As for a review of a decision under the proposed legislative policy based on legality, it is foreseeable that such a review will fail on the grounds of lawfulness.

This chapter sets out to discuss the relevant constitutional principles that may apply to a potential whistleblower programme. The rights identified as most relevant were the right to privacy, access to information and procedurally fair, reasonable and just administrative action. The chapter also considered the general limitation of a rights clause contained in section 36 of the Constitution, instances where the aforementioned rights have been limited and the circumstances of such limitations.

Considering the above discussion, the above constitutional rights form integral considerations for the proposed whistleblower programme and do not bar or prohibit such a programme. Moreover, how the courts have interpreted these rights, the proposed whistleblower programme and policy reform might be encouraged and favoured, even being considered compelling and obligatory.

In the following chapters, and after the proposed framework has been set out, the principles mentioned above are tested to ensure that the proposed framework passes constitutional muster. It would be premature to conclude as such in this chapter since other considerations pertaining to tax morale and taxpayer compliance behaviour must also be considered in the proposed policy framework.

Chapter 4: Tax Compliance and tax morale

4.1. Introduction

Tax compliance cannot be attributed only to factors such as opportunity, tax rates or probability of detection. It is complex and depends on the willingness of each individual to comply, which is influenced by the level of tax morale.[1] This variable-dependent relationship has been explained by Torgler as follows "When tax morale is high, tax compliance will be relatively high too".[2]

Fjeldstad noted that to deal with tax policy reform issues, you must first understand the underlying factors for a taxpayer's decision to evade tax.[3] The factors determining taxpayer behaviour will likely help to explain the decision to engage in a whistleblowing programme. This will involve an enquiry into, for example, whether organisational trust (in SARS) is a prerequisite for whistleblowing and, if so, what that organisational trust would mean in the context of tax whistleblowers.[4]

This chapter aims to determine what factors motivate people to participate in a whistleblowing programme. For this reason, the factors influencing tax morale become relevant. Policy reform can be focussed and crafted by identifying the relevant factors to elicit the maximum compliance benefit from that taxpayer's behaviour.

To understand the importance and policy considerations of a tax whistleblowing programme, it is prudent to consider the concept of tax compliance and tax morale,

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1 Torgler *Tax compliance and tax morale* (2007) 65.
2 Torgler *Tax compliance and tax morale* (2007) 65.
3 Fjeldstad, Shulz-Herzenberg, Sjursen "Peoples' views of taxation in Africa: A review of research on determinants of tax compliance" *CHR Michelsen Institute Working paper* 2012 7. Ryšavá and Zídková. "What are the Factors of Tax Evasion? New Findings in the EVS Study" *Review of Economic Perspectives* 2021 385,396-397 and 409. Ryšavá examined whether demographic factors such as inter alia age, gender, education and religion influence tax morale. The study concludes that demographic factors and other socio-economic factors influenced the subjects' believe that tax evasion could be justified.
4 Holtzhausen "Organisational trust as a prerequisite for whistleblowing" *Journal of Public Administration* 2009 238-239.

determining the factors that influence them and what it means for policy instruments and their application. This chapter discusses and analyses the different schools of thought related to tax compliance and morale.

4.2. Tax compliance and tax morale defined

Devos describes tax compliance as compliance with statutorily imposed requirements for reporting and accurately filing tax reports on time. Tax non-compliance includes deliberate and accidental inaccurate reporting, but it does not include legal avoidance of tax.[5]

The gains or benefits for tax compliance may be categorised into cash-flow, managerial and tax deductibility benefits.[6] Regarding cash-flow gains, it is about the timing of the tax payment. Taxpayers extend or delay tax payments within the legal parameters to boost cash flow and earn more profit. As for managerial benefits, the taxpayers benefit from improved record keeping. From the perspective of tax deductibility, taxpayers deduct expenses from their earnings, reducing tax liabilities.[7]

There are four leading behavioural schools of thought or theories on tax compliance: i) Economic deterrence theory, ii) fiscal exchange, iii) social and comparative treatment and iv) political legitimacy and institutions. These schools of thought seek to inform authorities on why taxpayers obey or evade tax laws.[8]

As Torgler points out, tax compliance and tax morale are closely linked. Tax morale concerns itself with determining who pays taxes and who does not, and it encompasses an analysis of various factors, such as fairness, sentiment, social

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5 Devos *Factors Influencing Individual Taxpayer Compliance Behaviour* (2014) 5.

6 Rametse 2010 An international perspective on small business implementation costs of a new tax and managerial benefits derived. Proceedings of the 2010 Soweto International Conference on Entrepreneurship & Development, South Africa, 27-28 January 2010.

7 Rametse 2010 An international perspective on small business implementation costs of a new tax and managerial benefits derived. Proceedings of the 2010 Soweto International Conference on Entrepreneurship & Development, South Africa, 27-28 January 2010.

8 Mishi and Tshabalala "Public finance in South Africa: Tax compliance and behavioural responses to tax increases" *Africa's Public Service Delivery and Performance Review* 2023 2.

norms, and the relationship between taxpayers and the government.[9] Put differently, tax morale considers a person's willingness to pay taxes.[10] These factors are also linked to the theories on tax compliance, which demonstrate the synchronous relationship between tax compliance and morale.

Fairness in the context of tax morale relates to the application of the tax burden and is closely linked to theories of fiscal exchange (often perceived as quality of service or reciprocal duties between government and taxpayers) and the legitimacy of government institutions.[11] Thus, the perceived equity in the exchange relationship between the taxpayer and the government influences tax morale.[12] In other words, if the taxpayer believes in receiving good public service, their reaction will be positive and this improves the morale to pay tax. The contrary is also true.

Social norms underscore moral rules and sentiments, representing patterned behaviour sustained by peer-shared approval or disapproval.[13] In a 2007 study by Frey and Torgler, they found that a higher perceived rate of tax evasion, reduces tax morale.[14] Therefore, peer influence and socially accepted behaviour determine tax

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9 Torgler *Tax compliance and tax morale* (2007) 65. Farrar and Hausserman "An Exploratory Investigation of Extrinsic and Intrinsic Motivations in Tax Amnesty Decision-Making" *Journal of Tax Administration*, 2016 51.

10 Frey and Torgler "Tax morale and conditional cooperation" *Journal of Comparative Economics* 2007 140.

11 Torgler *Tax compliance and tax morale* (2007) 71. Snavely "Governmental policies to reduce tax evasion: Coerced behaviour versus services and values development" 1990 *Policy Sciences* 1990 57–72 61,70. Fjeldstad and Semboja "Why People Pay Taxes: The Case of the Development Levy in Tanzania" *World Development* 2001 2060.

12 Torgler *Tax compliance and tax morale* (2007) 72. Mishi and Tshabalala "Public finance in South Africa: Tax compliance and behavioural responses to tax increases" *Africa's Public Service Delivery and Performance Review* 2023 4 and 10. Dunn, Farrar and Hausserman, "The influence of guilt cognitions on taxpayers' voluntary disclosures" *Journal for Business Ethics* 2018 698.

13 Torgler *Tax compliance and tax morale* (2007) 65. Farrar and Hausserman "An Exploratory Investigation of Extrinsic and Intrinsic Motivations in Tax Amnesty Decision-Making" *Journal of Tax Administration* 2016 51. Sandmo "The Theory of Tax Evasion: A Retrospective View" *National Tax Journal* 2005 660. Vihanto "Tax evasion and the psychology of the social contract" *The Journal of Socio Economics* 2016 115 argues that people tend to follow the same rules as those in their peer group or with common interests. Fjeldstad and Semboja "Why People Pay Taxes: The Case of the Development Levy in Tanzania" *World Development* 2001 2060.

14 Frey and Torgler "Tax morale and conditional cooperation" *Journal of Comparative Economics* 2007 146.

morale.[15] Intrinsic motivation refers to the inherent predisposition of some taxpayers to always comply with the law, regardless of whether there may be any gain in non-compliance or harm done.[16] Ipsative theory suggests that taxpayers' behaviour is influenced by their unique characteristics and abilities, rather than external standards and norms.[17] This is closely linked to the social and comparative treatment schools of thought on tax compliance and will be expanded upon below.

Tax morale is also influenced by the taxpayer's relationship with the government.[18] Again, this is closely linked to fiscal exchange and political theories of tax compliance.

4.3. Schools of Thought on taxpayer compliance

4.3.1. Economic deterrence theory

This is the classical tax evasion theory developed by Becker in the 1960s that predicts that taxpayers are rational agents influenced by factors such as the tax rate, the probability of detection and penalties for fraud, and the cost of evasion.[19] According to this theory and explained by Torgler, tax compliance can be expressed as follows: *MB=MC=p*MP.*[20]

MB represents the marginal benefit that the taxpayer obtains from incorrectly reporting their taxes. The marginal benefit is equal to the tax rate (*t*). *MC* is the marginal cost of

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15 Torgler *Tax compliance and tax morale* (2007) 69-70. Sandmo "The Theory of Tax Evasion: A Retrospective View" *National Tax Journal* 2005 656.

16 Torgler *Tax compliance and tax morale* (2007) 71. Frey and Torgler "Tax morale and conditional cooperation" *Journal of Comparative Economics* 2007 153. Farrar and Hausserman "An Exploratory Investigation of Extrinsic and Intrinsic Motivations in Tax Amnesty Decision-Making" *Journal of Tax Administration* 2016 55.

17 Torgler *Tax compliance and tax morale* (2007) 71.

18 Torgler *Tax compliance and tax morale* (2007) 74. Mishi and Tshabalala "Public finance in South Africa: Tax compliance and behavioural responses to tax increases" *Africa's Public Service Delivery and Performance Review* 10 and 12.

19 Becker "Crime and Punishment: an economic approach" *Journal of political economy* 1968 254. Torgler "Tax Morale, Rule-Governed Behaviour and Trust" *Constitutional Political Economy* 2003 119.

20 Torgler "Tax Morale, Rule-Governed Behaviour and Trust" *Constitutional Political Economy* 2003 121-122.

tax evasion if the taxpayer is caught, and (*p)* represents the probability of detection.[21] In turn, *MP* means the marginal penalty for which the taxpayer will be liable if caught. In terms of this theory, the tax rate will be equal to the probability of detection multiplied by the marginal penalty (*t=p*MP*). Thus, if the tax rate increases, tax evasion increases and if the rate decreases, tax evasion reduces.[22]

Allingham and Sandmo expanded on this theory in 1970 when they included the assumption that the actual penalties and detection rates of audits influence taxpayers.[23] Their findings were that an increase in the penalty and detection rate would lead to greater accuracy in the declaration of income.[24] In 1974, Yitzhaki's research showed the first deviation from the model proposed by Allingham and Sandmo, when he examined taxpayers' compliance behaviour premised on their risk appetite. Yitzhaki found that if it is assumed that a taxpayer is absolute risk averse, an increase in risk will lead to improved compliance.[25] In 1990, Falkingher and Walther examined persuasive factors in the economic deterrence model rather than punitive ones. Their findings suggested that a tax system combining penalties and rewards will be more effective than one solely based on sanctions.[26] In a study by Fjeldstad, he critiqued this model, stating that it is primitive as it ignores the possibility that taxpayers may be risk averse. It also assumes that the taxpayer knows the probability of detection.[27]

Torgler notes that people do not always act rationally, and that rules-governed behavioural theory suggests that rules (such as penalties) encourage compliance

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21 Torgler "Tax Morale, Rule-Governed Behaviour and Trust" *Constitutional Political Economy* 2003 121.

22 Torgler "Tax Morale, Rule-Governed Behaviour and Trust" *Constitutional Political Economy* 2003 122.

23 Allingham and Sandmo "Income Tax evasion: A theoretical analysis" *Journal of Public Economics* 1972 331.

24 Allingham and Sandmo "Income Tax evasion: A theoretical analysis" *Journal of Public Economics* 1972 337-338.

25 Yitzhaki "Income Tax evasion: a theoretical analysis" *Journal of Public Economics* 1974 201-202.

26 Falkinger and Walther "Rewards v Penalties On a new policy on tax evasion" *Journal of Criminal Law and Criminology* 1991 67-79.

27 Fjeldstad, Shulz-Herzenberg, Sjursen "Peoples' views of taxation in Africa: A review of research on determinants of tax compliance" *CHR Michelsen Institute Working Paper* 2012 3.

since they create legal certainty, resulting in predictable behaviour.[28] He also argues that introducing a complex tax system to increase certainty may result in accidental non-compliance, which reduces the cost of morale in the evasion of taxes. This is so because taxpayers blame the system's complexity for their non-compliance.[29]

Under the economic deterrence or enforcement paradigm, taxpayers are sometimes viewed by tax authorities as criminals (irrespective of their compliance status) and deterrence mechanisms such as penalties, fines or jail sentences are used to modify their behaviour.[30] The fear of penalties appears to be one of the most prominent extrinsic motivations for taxpayers to modify their behaviour.[31]

In South Africa, Dare, using a laboratory experiment, studied the influence of audits and penalties on compliance behaviour.[32] The experiment was conducted in terms of salaried and non-salaried workers. The subjects needed to count the frequency of the number 1 in a grid in the shortest time.[33] Once completed, the subjects would receive their endowment and earned income and then they have to declare 30 percent of their income.[34] The subjects were informed that random audits would be conducted at the end of the game to determine the accuracy of their declarations. If the declarations

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28 Torgler "Tax Morale, Rule-Governed Behaviour and Trust" *Constitutional Political Economy* 2003 122. Ff Vihanto "Tax evasion and the psychology of the social contract" *The Journal of Socio Economics* 2003 116. Grasmick and Green "Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behaviour" *Journal of Criminal Law and Criminology* 1980 327.

29 Torgler "Tax Morale, Rule-Governed Behaviour and Trust" *Constitutional Political Economy* 2003 122. Ff Vihanto "Tax evasion and the psychology of the social contract" *The Journal of Socio Economics* 2003 116. Grasmick and Green "Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behaviour" *Journal of Criminal Law and Criminology* 1980 327.

30 Alm and Torgler "Do ethics matter? Tax compliance and morality" *Journal of Business Ethics* 2011 646. Grasmick and Scott "Tax evasion and social control" *Journal of Economic Psychology* 1982 215-216.

31 Farrar and Hausserman "An Exploratory Investigation of Extrinsic and Intrinsic Motivations in Tax Amnesty Decision-Making" *Journal of Tax Administration* 2016 60.

32 Dare "The impact of changes in audits and penalties on tax compliance behaviour: evidence from South Africa" *Southern African Business Review* 2020 6.

33 Dare "The impact of changes in audits and penalties on tax compliance behaviour: evidence from South Africa" *Southern African Business Review* 2020 6.

34 Dare "The impact of changes in audits and penalties on tax compliance behaviour: evidence from South Africa" *Southern African Business Review* 2020 6.

were inaccurate, certain penalties would be imposed.[35] Dare's findings were that there is a positive relationship between the audit rate, penalties and compliance.[36] The results also suggested that the probability of an audit was a more compelling reason for compliance, but the costs for a tax authority would be more.[37]

In its strategic plan for 2020/21-2024/25, SARS indicated that it operates on a scale of "soft" and "hard" compliance, which relates to the measures to be implemented depending on the seriousness of the non-compliance and evasion.[38] According to this strategic plan, the goal is for the cost of non-compliance to outweigh the benefit of non-compliance.[39]

4.3.2. Fiscal exchange theory

The fiscal exchange theory suggests that tax is a payment in terms of citizens' social contract with the government.[40] It is also called the service paradigm in encouraging tax compliance. It is a form of a *quid pro quo* for governmental services. According to this theory, tax compliance is relative to the availability of governmental goods and services.[41] According to Fjeldstad, taxpayer compliance under this theory is influenced by trust between taxpayers and the government. This is, however, also subject to what

35 Dare "The impact of changes in audits and penalties on tax compliance behaviour: evidence from South Africa" *Southern African Business Review* 2020 7.

36 Dare "The impact of changes in audits and penalties on tax compliance behaviour: evidence from South Africa" *Southern African Business Review* 2020 13.

37 Dare "The impact of changes in audits and penalties on tax compliance behaviour: evidence from South Africa" *Southern African Business Review* 2020 17.

38 SARS strategic plan, 2020/21-2024/25, RP 96/2020, ISBN 978-0-621-48252-2 9.

39 SARS strategic plan, 2020/21-2024/25, RP 96/2020, ISBN 978-0-621-48252-2 9.

40 Fjeldstad, Shulz-Herzenberg, Sjursen "Peoples' views of taxation in Africa: A review of research on determinants of tax compliance" *CHR Michelsen Institute Working Paper* 2012 3. Vihanto "Tax evasion and the psychology of the social contract" *The Journal of Socio Economics* 2003 116. Uslaner "Tax evasion, corruption, and the social contract in transition *International Studies Programme Working Paper* 2007 7.

41 Alm and Torgler "Do ethics matter? Tax compliance and morality" *Journal of Business Ethics* 2011 646. Vihanto "Tax evasion and the psychology of the social contract" *The Journal of Socio Economics* 2003 115. Fjeldstad and Semboja "Why People Pay Taxes: The Case of the Development Levy in Tanzania" *World Development* 2001 2060.

the taxpayer perceives as an essential service (education, health or transport, for example).[42]

Torgler has identified four categories of taxpayers: The social taxpayer, the intrinsic taxpayer, the honest taxpayer and the evader. The social taxpayer is influenced by social norms and is an emotional reactor.[43] The intrinsic taxpayer is motivated by their sense of duty and obligation.[44] These taxpayers are sensitive towards the action of the government and the tax authorities.[45] Taxes, audits or fines do not influence the honest taxpayer, since they have a pre-disposition to be frank and not to cheat.[46] The evader, however, compares the value of the evasion to the value expectation of honesty. In other words, they do a cost-benefit analysis associated with the economic deterrence theory.[47]

The perceived legitimacy and efficacy of tax authorities as government institutions are also important as they contribute to the taxpayer's trust in the government and the legal system.[48] Trust in the legal system and the rule of law is linked to the taxpayer's confidence in the tax authority. Thus, greater trust in the tax system will increase tax morale and compliance.[49] Furthermore, if taxes are seen as the price for good actions by the government and the taxpayer trusts the government, they are more willing to

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42 Fjeldstad, Shulz-Herzenberg, Sjursen "Peoples' views of taxation in Africa: A review of research on determinants of tax compliance" *CHR Michelsen Institute Working Paper* 2012 3.

43 Torgler "Tax Morale, Rule-Governed Behaviour and Trust" *Constitutional Political Economy* 2003 124. This category of taxpayers will be expanded on below in the social and comparative treatment theory.

44 Torgler "Tax Morale, Rule-Governed Behaviour and Trust" *Constitutional Political Economy* 2003 124.

45 Torgler "Tax Morale, Rule-Governed Behaviour and Trust" *Constitutional Political Economy* 2003 124.

46 Torgler "Tax Morale, Rule-Governed Behaviour and Trust" *Constitutional Political Economy* 2003 124.

47 Torgler "Tax Morale, Rule-Governed Behaviour and Trust" *Constitutional Political Economy* 2003 124.

48 Torgler "Tax Morale, Rule-Governed Behaviour and Trust" *Constitutional Political Economy* 2003 134. Fjeldstad and Semboja "Why People Pay Taxes: The Case of the Development Levy in Tanzania" *World Development* 2001 2061.

49 Torgler "Tax Morale, Rule-Governed Behaviour and Trust" *Constitutional Political Economy* 2003 134.

be honest in their declarations.[50] It is this idea of reciprocity that underscores the fiscal exchange theory.

As a critique of this theory, the increased trust between government and taxpayer might lead to reduced fines or audits conducted, which incentivises the evader. Thus, the use of fiscal exchange theory ought to be linked with other theories of tax compliance to achieve higher levels of compliance.[51]

4.3.3. Social and comparative treatment

Some perceive taxes as a social act and compliance is influenced by taxpayers' social norms and beliefs.[52] As alluded to above, the social taxpayer identified by Torgler fits into this theory of compliance. Taxpayers subject to social norms are emotional reactors to changes and any perceived inequality causes distress.[53] Feelings of pride, self-image and peer effects influence tax compliance. Under this theory, paying taxes depends on the views or behaviours of other individuals. This impacts their tax morale and compliance status.[54]

In 2014, Hallsworth, List, Metcalfe, and Vlaev conducted a study to determine the effect of an intervention on the timely payment of taxes in the UK. [55] They sent three messages to the taxpayers. The first message stated, "9 / 10 people pay their tax on time". The second message stated, "9/10 people in the UK pay their taxes on time".

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50 Torgler "Tax Morale, Rule-Governed Behaviour and Trust" *Constitutional Political Economy* 2003 134-137. Fjeldstad and Semboja "Why People Pay Taxes: The Case of the Development Levy in Tanzania" *World Development* 2001 2061.

51 Torgler "Tax Morale, Rule-Governed Behaviour and Trust" *Constitutional Political Economy* 2003 134-137.

52 Frey and Torgler "Tax morale and conditional cooperation" *Journal of Comparative Economics* 2007 156. Fjeldstad and Semboja "Why People Pay Taxes: The Case of the Development Levy in Tanzania" World Development 2001 2061 and 2070.

53 Torgler "Tax Morale, Rule-Governed Behaviour and Trust" *Constitutional Political Economy* 2003 124.

54 Torgler, Demir, Macintyre, and Schaffner "Causes and Consequences of Tax Morale: An Empirical Investigation" *Economic Analysis and Policy* 2008 155.

55 Hallsworth, List, Metcalfe, and Vlaev "The Behaviouralist as Tax Collector: Using Natural Field Experiments to Enhance Tax Compliance" *National Bureau of Economic Research, Inc, Cambridge Working Paper* 2014 4.

The third message said, "9/10 people in the UK pay their taxes on time and you are in the small minority of people who have not paid us yet".[56] The findings were that these messages boosted early payments, especially the third message.[57] Thus, social norms and perceived behaviour influence compliance. It may be that the efficacy of the third message lies in the perception that the taxpayer has already been identified as non-compliant, which motivates the taxpayer to regularise their affairs.

Torgler also postulated that cultural factors alongside social behaviours might also affect the willingness to pay tax.[58] Measuring the influence of cultural norms on tax compliance poses empirical difficulties, since it is difficult to distinguish other environmental factors from culture. There have been studies that attempted to measure the effect of culture. But the results are unreliable and cannot be used to support a theory that culture shapes tax morale.[59]

Under equity theory, taxpayer compliance is influenced by the perception that rules are applied impartially.[60] Fjeldstad notes that taxpayers would modify their compliance behaviour under this theory to match the tax system's perceived fairness.[61] This supports Torgler's view that inequity distresses the social taxpayer and unlocks an emotional response.[62] When measuring the perceived equity of a tax system, the perceptions of both marginalised and influential groups must be considered. In this

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56 Hallsworth, List, Metcalfe, and Vlaev "The Behaviouralist as Tax Collector: Using Natural Field Experiments to Enhance Tax Compliance" *National Bureau of Economic Research, Inc, Cambridge Working Paper* 2014 4.

57 Hallsworth, List, Metcalfe, and Vlaev "The Behaviouralist as Tax Collector: Using Natural Field Experiments to Enhance Tax Compliance", *National Bureau of Economic Research, Inc, Cambridge Working Paper* 2014 5. Torgler "Tax Morale, Rule-Governed Behaviour and Trust" *Constitutional Political Economy* 2003 155-160.

58 Torgler "Tax Morale, Rule-Governed Behaviour and Trust" *Constitutional Political Economy* 2003 161.

59 Torgler "Tax Morale, Rule-Governed Behaviour and Trust" *Constitutional Political Economy* 2003 161.

60 Fjeldstad, Shulz-Herzenberg, Sjursen "Peoples' views of taxation in Africa: A review of research on determinants of tax compliance" *CHR Michelsen Institute Working Paper* 2012 3.

61 Fjeldstad, Shulz-Herzenberg, Sjursen "Peoples' views of taxation in Africa: A review of research on determinants of tax compliance" *CHR Michelsen Institute Working Paper* 2012 3.

62 Torgler "Tax Morale, Rule-Governed Behaviour and Trust" *Constitutional Political Economy* 2003 124. This principle was also supported in the study by Grasmick and Scott "Tax evasion and social control" *Journal of Economic Psychology* 1982.

regard, a specific ethnic group or regional identity may also have different experiences regarding the government's service delivery.

4.3.4. Political Legitimacy and Institutions

This school of thought recognises that trust in government institutions and administrations (tax authorities) is an essential factor influencing tax morale and compliance.[63] It is also sometimes referred to as the trust paradigm.[64] Tax compliance is furthered with effective administrations (tax authority).[65] A tax authority may be efficient because its collection costs may be low, but it is ineffective in regulating tax compliance.[66]

Kirchler notes that trust is critical to good administration and civic engagement.[67] The engagement between tax authorities and taxpayers influences the compliance climate. Perceived legitimacy and trust in the tax authority increase voluntary compliance.[68] Without trust in the government, taxpayers disassociate from the state. Kirchler suggests that enforcement is not the only factor influencing tax compliance, but that the perceived strength of the tax authority also affects compliance.[69] Kirchler modelled this theory as the "slippery slope of compliance".[70] In essence, it predicts that if trust in the tax authority is high, compliance can be improved to equal that of a high-power-driven authority. At the same time, weak authorities and low trust increase the tax evasion probability.

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63 Alm and Torgler "Do ethics matter? Tax compliance and morality" *Journal of Business Ethics* 2011 646.
64 Alm and Torgler "Do ethics matter? Tax compliance and morality" *Journal of Business Ethics* 2011 646.
65 Silvani and Radano "Tax Administration Reform in Bolivia and Uruguay" *Improving Tax Administration in Developing Countries IMF 19-60* 1992 37.
66 Silvani and Radano "Tax Administration Reform in Bolivia and Uruguay" *Improving Tax Administration in Developing Countries IMF 19-60* 1992 37.
67 Kirchler *The economic psychology of tax behaviour* (2007) 202.
68 Kirchler *The economic psychology of tax behaviour* (2007) 202.
69 Kirchler *The economic psychology of tax behaviour* (2007) 204.
70 Kirchler *The economic psychology of tax behaviour* (2007) 202.

SARS, in its strategic plan, has recognised that public confidence in the effective and fair administration of taxes influences taxpayers' willingness to comply.[71] According to the strategic plan, public surveys reflect high trust in SARS.[72] The baseline from which public trust in SARS is measured is 67 percent.[73]

4.4. Effect of whistleblowing programmes on tax compliance

Tax whistleblowing as a measure to improve tax compliance and prevent tax evasion has received increasing attention over the last decade. The purpose of tax whistleblowing programmes is to provide whistleblowers with an opportunity to report leads to tax authorities, and for those authorities to use the tips for enforcement action.[74] Whistleblowing programmes also serve another purpose as a deterrent to aggressive tax evasion.[75]

In 2013, Breuer experimented with testing whether incentivising whistleblowing raises tax compliance.[76] He observed that monetary rewards for whistleblowing resulted in increased reporting of tax evasion.[77] At the same time, there were also findings that some taxpayers are intrinsically motivated to blow the whistle, irrespective of whether they would receive a monetary reward.[78] Breuer's research shows that whistleblowing is a powerful tool to increase compliance behaviour and reduce tax evasion.[79]

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71 SARS strategic plan, 2020/21-2024/25, RP 96/2020, ISBN 978-0-621-48252-2 14.
72 SARS strategic plan, 2020/21-2024/25, RP 96/2020, ISBN 978-0-621-48252-2 24.
73 SARS strategic plan, 2020/21-2024/25, RP 96/2020, ISBN 978-0-621-48252-2 24.
74 Berger, Preetika and Thorne "The Efficacy of Tax Whistleblowing Programs: A Mixed Methods Investigation" *National Tax Association* 2020 6.
75 Berger, Preetika and Thorne "The Efficacy of Tax Whistleblowing Programs: A Mixed Methods Investigation" *National Tax Association* 2020 66.
76 Breuer "Tax compliance and whistleblowing–The role of incentives" *Bonn. Journal of Economics* 2013 17.
77 Breuer "Tax compliance and whistleblowing–The role of incentives" *Bonn. Journal of Economics* 2013 35.
78 Breuer "Tax compliance and whistleblowing–The role of incentives" *Bonn. Journal of Economics* 2013 35.
79 Breuer "Tax compliance and whistleblowing–The role of incentives" *Bonn. Journal of Economics* 2013 8.

A study conducted in 2018 by Amir, Lazar and Levi in Israel focussed on the deterrent effect of whistleblowing on tax collections.[80] Their findings support the hypothesis that whistleblower programmes indirectly increase tax collections. Effective tax whistleblowing programmes increase the deterrence effect, which may result in increased tax collections.[81] But they caution that the credibility of the whistleblowing mechanism is the key to continued compliance behaviour. In other words, if the whistleblowing tool is not credible, taxpayers will revert to their previous evasion behaviour.[82]

Masclet, Montmarquette and Viennot-Briot experimentally investigated whether a whistleblower programme can reduce tax evasion.[83] The findings were that peer reporting improved tax compliance behaviour and rates.[84] The probability of detection is increased by introducing a whistleblowing programme resulting in increased tax compliance.[85]

Buckenmaier, Dimant and Mittone considered the effects of an institutional incentivised whistleblowing mechanism on collusive corruption and tax compliance.[86] Their findings show that whistleblower programmes reduce tax evasion and collusive corruption.[87]

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80 Amir, Lazar and Levi "The deterrent effect of whistleblowing on tax collections" *European Accounting Review* 2018 19.

81 Amir, Lazar and Levi "The deterrent effect of whistleblowing on tax collections" *European Accounting Review* 2018 19.

82 Amir, Lazar and Levi "The deterrent effect of whistleblowing on tax collections" *European Accounting Review* 2018 19.

83 Masclet, Montmarquette, and Viennot-Briot "Can whistleblower programmes reduce tax evasion? Experimental evidence" *Journal of Behavioral and Experimental Economics* 2019 5.

84 Masclet, Montmarquette, and Viennot-Briot "Can whistleblower programmes reduce tax evasion? Experimental evidence" *Journal of Behavioral and Experimental Economics* 2019 22.

85 Masclet, Montmarquette, and Viennot-Briot "Can whistleblower programmes reduce tax evasion? Experimental evidence" *Journal of Behavioral and Experimental Economics* 2019 22.

86 Buckenmaier, Dimant, and Mittone "Effects of institutional history and leniency on collusive corruption and tax evasion" *Journal of Economic Behaviour and Organization* 2020 3.

87 Buckenmaier, Dimant, and Mittone "Effects of institutional history and leniency on collusive corruption and tax evasion" *Journal of Economic Behaviour and Organization* 2020 30.

Bazart, Beaud and Dubois investigated the efficiency of a whistleblower-based audit scheme versus the standard random-based audit scheme.[88] They report four findings: Firstly, whistleblower-based audit schemes more effectively target tax evaders than random-based audit schemes.[89] Secondly, the whistleblower-based audit scheme increased the perceived probability of detection.[90] Thirdly, under a whistleblower-based audit scheme, the distribution of the total amount collected is more advantageous to tax administrations. Fourthly, taxpayers modify their behaviour after a random-based audit scheme to increase evasion, while their evasion behaviour decreases after a whistleblower-based audit scheme.[91]

The influence of a tax whistleblowing programme also affects taxpayers' tax planning. A 2020 study by Berger, Joshi and Thorne found that taxpayers are more likely to implement a conservative tax plan when there is an incentivised whistleblowing programme.[92] Thus, their experimental findings support including an incentivised tax whistleblowing programme, as it prevents aggressive tax evasion and filing.[93] Their results align with the economic deterrence theory stated above.

It also appears that whistleblowing programmes are not only relevant to individual tax evasion schemes, but they also affect anti-trust measures in the context of cartels.[94] The design of a whistleblowing scheme to fight cartels differs from tax compliance in individuals, since cartels involve collusion between various group members.[95] Therefore, the policy design aimed at cartels must include leniency towards

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88 Bazart, Beaud, and Dubois "Whistleblowing vs. random audit: an experimental test of relative efficiency" *Kyklos* 2020 49.

89 Bazart, Beaud, and Dubois "Whistleblowing vs. random audit: an experimental test of relative efficiency" *Kyklos* 2020 55.

90 Bazart, Beaud, and Dubois "Whistleblowing vs. random audit: an experimental test of relative efficiency" *Kyklos* 2020 60.

91 Bazart, Beaud, and Dubois "Whistleblowing vs. random audit: an experimental test of relative efficiency" *Kyklos* 2020 62.

92 Berger, Preetika and Thorne "The Efficacy of Tax Whistleblowing Programs: A Mixed Methods Investigation" *National Tax Association* 2020 6.

93 Berger, Preetika and Thorne "The Efficacy of Tax Whistleblowing Programs: A Mixed Methods Investigation" *National Tax Association* 2020 6.

94 Chapkovski, Corazzine, and Maggian "Does whistleblowing on Tax Evaders Reduce Ingroup Cooperation" *Frontiers in Psychology* 2021 3.

95 Chapkovski, Corazzine, and Maggian "Does whistleblowing on Tax Evaders Reduce Ingroup Cooperation" *Frontiers in Psychology* 2021 3.

whistleblowers, as this affects the efficacy of the whistleblower programme.[96] In designing an enforcement regime based on whistleblowers' reports, the whistleblower's motives must be carefully considered.[97]

It may be difficult to at face value differentiate between a disgruntled former employee or person and a *bona fide* whistleblower. However, there are certain factors or facts that could be used to draw the distinction. A *bona fide* whistleblower may provide more objective and specified evidence in support of their claim. Another factor that could be used is to consider the nature of the concerns raised and the circumstances giving rise the concerns. The principle remains that all reports should be treated as serious and investigated. An analogy is that of a prosecutor who must also decide whether to prosecute a person premised on the evidence at hand. Much the same, will the considerations of whether a whistleblower is bona fide, or a disgruntled employee depend on the evidence after investigation.

4.5. SARS' current strategic objectives on tax compliance

SARS has developed various strategic objectives to improve tax compliance.[98] These strategic objectives include improving the detection of non-compliant taxpayers and increasing the cost of non-compliance, designing and building public trust, and confidence in the tax administration system.[99] SARS has also indicated in its Service Charter that its compliance theory includes believing that most taxpayers are honest

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96 Chen and Rey "On the design of leniency programmes" *Journal of Law & Economics* 2013 30. The leniency principle and its effect on design form part of the discussion in Chapter 5 para 5.2.2.

97 Heyes and Kapur "An economic model of whistle-blower policy" *Journal of Law, Economics & Organization* 2009 30.

98 SARS strategic plan, 2020/21-2024/25, RP 96/2020, ISBN 978-0-621-48252-2 10-11. The strategic objectives include the following i) providing clarity and certainty to taxpayers on their obligations ii) ease compliance iii) detecting non-compliant taxpayers and making non-compliance hard and costly iv) developing a high-performing and diverse workforce v) increasing and expanding the use of data within a comprehensive knowledge management framework vi) modernising its systems and online systems vii) demonstrating effective use of resources viii) improving the tax ecosystem and ix) building trust and confidence in the institution.

99 SARS strategic plan, 2020/21-2024/25, RP 96/2020, ISBN 978-0-621-48252-2.

and want to comply with their tax obligations effortlessly and without unnecessary expense.[100] In what follows, SARS' strategic objectives are briefly discussed.

The strength and purpose of these strategic objectives are essential to promote a culture of compliance. A study by Mishi and Tshabalala in 2023 revealed that South African citizens' view shifted from a society that values tax compliance to one that justifies tax evasion.[101]

4.5.1. Strategic Objective 1: Provide clarity and certainty for taxpayers and traders of their obligations

The purpose of this objective is to ensure that taxpayers and traders receive appropriate guidance and customised support. This includes access to advance pricing agreements, advance and general binding rulings.[102] The proposed action steps toward achieving this strategic objective include regular research to gauge taxpayers' perception, influence tax policy to improve clarity and to provide information to taxpayers easily through digital platforms.[103]

This strategic objective aligns with Torgler's view on rule-governed behavioural theory that legal certainty improves compliance.[104] Under this theory and strategic objective, the increased information sharing and guidance support to taxpayers aim to improve legal certainty in the hopes of increasing tax compliance.

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100 SARS Service Charter at https://www.sars.gov.za/wp-content/uploads/Docs/ServiceCharter/Service-Charter-2022-Updated-23052022.pdf (Accessed 23/05/2023).

101 Mishi and Tshabalala "Public finance in South Africa: Tax compliance and behavioural responses to tax increases" *Africa's Public Service Delivery and Performance Review* 2023 12.

102 SARS strategic plan, 2020/21-2024/25, RP 96/2020, ISBN 978-0-621-48252-2 12.

103 SARS strategic plan, 2020/21-2024/25, RP 96/2020, ISBN 978-0-621-48252-2 12.

104 See discussion under Chapter 4 para 4.3.1.

4.5.2. Strategic Objective 2: Making it easy for taxpayers and traders to comply with their obligations

In terms of this strategic objective, SARS aims to ease the engagements between itself and taxpayers.[105] This means that registration as a taxpayer, filing of returns or declarations and payments must be easy and accessible from anywhere.[106] As part of this strategic objective, SARS aims to reduce the number of face-to-face visits required to resolve issues.[107]

SARS intends to achieve this strategic objective through the implementation of auto assessments and registrations, increasing the number of taxpayers using digital platforms to interact with SARS.[108]

4.5.3. Strategic Objective 3: Detect taxpayer and traders who do not comply, and make non-compliance hard and costly

Under this strategic objective, SARS intends to detect taxpayers who negligently, deliberately, aggressively or criminally avoid the tax systems. SARS intends to use enforcement mechanisms appropriate to the degree of non-compliance. Hard enforcement may include court action, asset seizure and criminal prosecution. This is the so-called "name and shame" approach aimed at increasing the cost of non-compliance. This strategic objective combines the economic deterrence, fiscal exchange and social theories of compliance.

As a sub-strategic objective, SARS intends to develop a method to detect and select non-compliance, which will be done by improving its capabilities to detect and profile cases.[109] According to the annual and quarterly targets set out in the strategic plan,

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105 SARS strategic plan, 2020/21-2024/25, RP 96/2020, ISBN 978-0-621-48252-2 18.
106 SARS strategic plan, 2020/21-2024/25, RP 96/2020, ISBN 978-0-621-48252-2 18.
107 SARS strategic plan, 2020/21-2024/25, RP 96/2020, ISBN 978-0-621-48252-2 18.
108 SARS strategic plan, 2020/21-2024/25, RP 96/2020, ISBN 978-0-621-48252-2 19.
109 SARS strategic plan, 2020/21-2024/25, RP 96/2020, ISBN 978-0-621-48252-2 19.

accurate risk detection is a key result indicator and the annual target for 2020 to 2025 is 95 percent.[110]

What is strikingly missing from this strategic objective is a proper methodology on how SARS intends to detect non-compliant taxpayers. It is for this strategic objective that a tax whistleblower programme is proposed. By including a tax whistleblower programme, SARS will enable itself to increase the detection of non-compliance and evasion. It provides a platform and incentive for taxpayers to report non-compliance and evasion helping SARS to achieve its objective.

The strategic plan shows that SARS intends to use its core systems and records held by the NPA to source and collect the data to implement its detection strategies.[111] The methodology proposed by SARS is problematic for two reasons. Firstly, taxpayers upload their declarations, returns and accounting records onto SARS' eFiling system. Thus, if there is deliberate non-compliance or evasion, it will be already in the documents that SARS intends to scrutinize to detect non-compliance and evasion. Without proper investigative auditing, the use of the information on SARS' systems will most likely not help. Secondly, the records held by the NPA are the records provided by SARS after investigation and referral in terms of section 43 of the Tax Administration Act.[112]

When considering the above policy objective, the need for an incentivised tax whistleblowing programme to increase the detection of non-compliance and evasion and build trust in the institution is vital.

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110 SARS strategic plan, 2020/21-2024/25, RP 96/2020, ISBN 978-0-621-48252-2 19.

111 SARS strategic plan, 2020/21-2024/25, RP 96/2020, ISBN 978-0-621-48252-2 33-34.

112 S 43 of the Tax Administration Act provides "43 **Referral for criminal investigation** (1) If at any time before or during the course of an audit it appears that a taxpayer may have committed a serious tax offence, the investigation of the offence must be referred to a senior SARS official responsible for criminal investigations for a decision as to whether a criminal investigation should be pursued. Relevant material obtained under this chapter from the taxpayer after the referral, must be kept separate from the criminal investigation. (3) If an investigation is referred under subsection (1) the relevant material and files relating to the case must be returned to the SARS official responsible for the audit if- (a) it is decided not to pursue a criminal investigation; (b) it is decided to terminate the investigation; or (c) after referral of the case for prosecution, a decision is made not to prosecute."

4.5.4. Strategic Objective 4: Develop a high-performing, diverse, agile, engaged and evolved workforce

In terms of this strategic objective, SARS intends to improve its service delivery by ensuring that its staff are competent and professional.[113] This objective is intended to align with the theories on fiscal exchange, political legitimacy and the quality of institutions. By applying this theory, if the quality-of-service increases, the compliance rate will also increase. However, the result indicator for this objective is the employee engagement index and the diversity and employment equity percentage.

From a strictly tax compliance perspective, the happiness of the staff members of SARS is at face value irrelevant. What one expected to be the key result indicators are factors of taxpayer's positive experience ratios, decreases in disputes that result in court applications and decreases in costs associated with compliance. Although the happiness of the SARS workforce is not relevant to taxpayer compliance at face value, it may have an impact on the quality of the service delivery. The reduced service delivery outcomes may have a ripple effect on taxpayers' perception of the efficacy of the tax administration, which could negatively impact their compliance.

4.5.5. Strategic Objective 5: Increase and expand the use of data within a comprehensive knowledge management framework to ensure integrity, derive insight and improve outcomes

This strategic objective involves the usage of data analytics and artificial intelligence to understand taxpayers' compliance behaviour.[114] The aim is to foster voluntary compliance and timely detection of risks, trends and instances of non-compliance. SARS intends to achieve this objective through improvement of data exchange with

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113 SARS strategic plan, 2020/21-2024/25, RP 96/2020, ISBN 978-0-621-48252-2 20.
114 SARS strategic plan, 2020/21-2024/25, RP 96/2020, ISBN 978-0-621-48252-2 21.

third parties, enhanced risk profiling and case selection modelling to facilitate proactive and reactive responses to risks.

The key result indicator is to automate risk detection, assessment and profiling together with accurate taxpayer registers.[115] Considering the practical perspective of the tax whistleblower programme, it could be facilitated through an online portal or cell phone application. It may also be possible to link the reports to whistleblower-based audits of taxpayers.

4.5.6. Strategic Objective 6: Modernise SARS' systems to provide digital and streamlined online services

In terms of this strategic objective, SARS aims to provide online services to ensure that taxpayers can easily and securely comply with their tax obligations.[116] Under this objective SARS intends to build technology platforms and systems that allow for enhanced data management and integration.[117] This is closely linked to Strategic Objective 5 discussed above.

This strategic objective aligns with the fiscal exchange theory in terms of which the increased service delivery and ease of tax compliance result in increased compliance.

4.5.7. Strategic Objective 7: Demonstrate effective resource stewardship to ensure efficiency and effectiveness in delivering quality outcomes and performance excellence

This strategic objective involves the effective use of resources to achieve compliance with the least amount of effort and cost.[118] As a sub-strategic objective, SARS aims to

115 SARS strategic plan, 2020/21-2024/25, RP 96/2020, ISBN 978-0-621-48252-2 21
116 SARS strategic plan, 2020/21-2024/25, RP 96/2020, ISBN 978-0-621-48252-2 22.
117 SARS strategic plan, 2020/21-2024/25, RP 96/2020, ISBN 978-0-621-48252-2 22.
118 SARS strategic plan, 2020/21-2024/25, RP 96/2020, ISBN 978-0-621-48252-2 22.

maintain its focus on cost management, responsible procurement and increased productivity. Furthermore, the objective is to allocate resources with a clear "cost-benefit" mindset.

To achieve this objective, SARS intends to, amongst other things, reconfigure its cost structure to align with international peers and build an investment portfolio management approach to ensure prioritised investment results to increase risk mitigation and positive yields. Simplified, SARS intends to decrease the cost of administration. It is unclear how this objective intends to affect compliance and evasion behaviour.

4.5.8. Strategic Objective 8: Work with and through stakeholders to improve the tax ecosystem

In terms of this strategic objective, SARS intends to improve voluntary tax compliance through increased partnerships with other tax and customs agencies and multilateral bodies.[119] The key result indicator is the number of intermediaries that are satisfied with SARS' cooperation and collaboration and the multilateral bodies' peer review assessments of SARS' engagements.[120] Based on the strategic plan, it is unclear how this objective aims to improve voluntary compliance. If it is linked to public trust in the administration as a means to improve compliance, one would have expected different key result indicators aimed at determining public trust percentage.

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119 SARS strategic plan, 2020/21-2024/25, RP 96/2020, ISBN 978-0-621-48252-2 23.
120 SARS strategic plan, 2020/21-2024/25, RP 96/2020, ISBN 978-0-621-48252-2 24.

4.5.9. Strategic Objective 9: Build public trust and confidence in the tax administration system

This strategic objective is aimed at public trust and confidence in the stewardship of the tax system.[121] To achieve this outcome SARS intends to review and enhance its surveys on public opinion.[122] What is missing from the strategic objective is SARS' intended methodology to achieve this objective. It is submitted that the public surveys will not provide a means to achieving public trust in the administration. Actions steps such as the implementation of a tax whistleblower programme to increase accurate detection of non-compliance and using resources to mitigate evasion are required.

In 2014, Ali, Fjeldstad and Sjursen conducted a study to determine the tax compliance attitude of citizens in Kenya, Tanzania, Uganda and South Africa.[123] Their survey revealed that approximately 50 percent of South Africans had a tax-compliant attitude.[124] The respondents were asked what the reasons were for tax evasion and the results showed that the top two reasons were that taxes are too high and unaffordable.[125] The authors then correlated the factors affecting tax compliance with the different theories of tax compliance.

The findings revealed that South Africans are more likely to be tax compliant if the perceived difficulty of evasion increases.[126] This supports the economic deterrence theory alluded to above. The authors also found support for the fiscal exchange theory in South Africa and the result shows that South Africans tend to be more compliant if government services such as obtaining an identity card are eased.[127] From a social and comparative treatment theory viewpoint, the findings were that an ethnic group's

121 SARS strategic plan, 2020/21-2024/25, RP 96/2020, ISBN 978-0-621-48252-2 24.
122 SARS strategic plan, 2020/21-2024/25, RP 96/2020, ISBN 978-0-621-48252-2 24.
123 Ali, Fjeldstad and Sjursen "To Pay or Not to Pay? Citizens' Attitudes Toward Taxation in Kenya, Tanzania, Uganda, and South Africa" *World Development* 2014.
124 Ali, Fjeldstad and Sjursen "To Pay or Not to Pay? Citizens' Attitudes Toward Taxation in Kenya, Tanzania, Uganda, and South Africa" *World Development* 2014 832.
125 Ali, Fjeldstad and Sjursen "To Pay or Not to Pay? Citizens' Attitudes Toward Taxation in Kenya, Tanzania, Uganda, and South Africa" *World Development* 2014 832.
126 Ali, Fjeldstad and Sjursen "To Pay or Not to Pay? Citizens' Attitudes Toward Taxation in Kenya, Tanzania, Uganda, and South Africa" *World Development* 2014 832 836.
127 Ali, Fjeldstad and Sjursen "To Pay or Not to Pay? Citizens' Attitudes Toward Taxation in Kenya, Tanzania, Uganda, and South Africa" *World Development* 2014 835.

perception of being treated unfairly strongly correlates to their compliance attitude.[128] Lastly, in respect of institutions' political legitimacy, they found no strong evidence that political legitimacy correlated to taxpayers' compliance attitude.[129]

4.6. Conclusion

Tax compliance and tax morale go hand-in hand. Tax compliance relates to the extent to which taxpayers comply with their duties, such as filing of tax returns. Tax morale, however, speaks to taxpayers' motivation to comply with the tax laws.

Tax morale is influenced by several factors, and over time different theories have been developed to understand the link with tax compliance. These theories are extensively discussed in the preceding paragraphs.[130] This chapter's purpose is to determine whether whistleblowing influences tax morale and by extent tax compliance.

From the literature discussed above, this chapter establishes that whistleblowing programmes positively influence taxpayer compliance and tax morale. This is so because it aligns with the different schools of thought on tax compliance. The ensuing paragraphs highlight the effect of whistleblowing programmes within the theories of compliance.

From an economic deterrence perspective, whistleblowing programmes assist in detecting and curbing tax evasion since it positively influences the probability of detection. This results in an increased perception of risk and reduces the potential benefit of non-compliance and evasion.

As for the fiscal exchange theory, it is also evident that whistleblowing programmes when used as an information-gathering tool result in an increased perception of

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128 Ali, Fjeldstad and Sjursen "To Pay or Not to Pay? Citizens' Attitudes Toward Taxation in Kenya, Tanzania, Uganda, and South Africa" *World Development* 2014 835.

129 Ali, Fjeldstad and Sjursen "To Pay or Not to Pay? Citizens' Attitudes Toward Taxation in Kenya, Tanzania, Uganda, and South Africa" *World Development* 2014 838.

130 Chapter 4 para 4.3.

governmental service. This could potentially translate into an increased trust in the administration of the revenue authority. It also raises taxpayers' belief that reports of wrongdoing are treated seriously resulting in improved detection and prevention of crime and corruption.

A whistleblowing programme further influences the social theory of tax compliance, since it affects the probability of detection. If non-compliant employers and business associates may be identified under a whistleblowing programme, it may result in businesses being more cautious and conservative in implementing their tax plans. Put differently, whistleblowing may influence the implementation of aggressive tax avoidance schemes. According to the social theory and the experiment by Hallsworth, List, Metcalfe, and Vlaev in 2014, reputational and financial gains associated with whistleblowing increase reporting.

Based on the literature in these two chapters, conclusions crystallise: firstly, improved trust in tax authorities' ability to detect, prevent and punish crime and non-compliance increases people's willingness to cooperate. Secondly, improved tax structure and tools will enable SARS to decrease audit costs and may help to combat corruption in SARS. Whistleblowing programmes are intended to fortify these conclusions.

The next question is then how the proposed whistleblowing programme aligns with SARS' strategic goals in South Africa. This consideration is relevant as it informs the need for it in South Africa. The benefit and the alignment of SARS' strategic goals with a whistleblowing programme are extensively dealt with in this chapter.[131] In the paragraphs below, the highlights of a whistleblowing programme's influence on SARS strategic goals are succinctly set out.

By introducing a tax whistleblowing programme, SARS may premise its audits on whistleblower audit schemes and not only on random or risk-based audits. The whistleblower-based audits offer the added benefit of increased target rates for evasion and overall better collection and distribution of taxes.

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131 Chapter 4 para 4.5.

Since tax evasion and non-compliance may be affected by policies and influences beyond standard tax enforcement actions, tax authorities should use a broader range of instruments to promote compliance and detect evasion. Thus, this chapter concludes that there are well-founded reasons for introducing a whistleblowing programme in the South African tax legislative framework, to prevent and detect non-compliance and tax evasion.

The aim of this chapter is to identify the factors that influence tax compliance. Taking the above discussion into consideration, seven factors may be extracted. These seven factors and their influence on a potential whistleblowing programme are reflected in the table numbered 4.1 below:

Table 4.1 Identified compliance factors

	Compliance factor identified	**Description of compliance factor**	**Influence on potential whistleblowing programme**	**Theory of compliance affected**
i)	Tax compliance is influenced by the cost of non-compliance.	This means that by increasing the cost of non-compliance through the imposition of penalties and the tax rate, the appeal for evasion and non-compliance reduces.	A potential whistleblower report leading to adverse findings could attract an increased penalty. The whistleblowing programme may also increase the probability of audit, thereby increasing the cost of compliance.	Economic deterrence theory.
ii)	Taxpayers are more compliant when they understand their obligations.	This factor relates to the simplicity of the tax system and the ease of compliance.	A potential whistleblowing programme must be readily accessible and easy. This means that the reporting process must be streamlined.	Economic deterrence theory. Social theory. Trust in administration.
iii)	Increased probability of an audit.	This relates to the perception that an audit is probable leading to increased compliance for fear of being caught.	In terms of a whistleblowing programme, a whistleblower-based audit scheme may be developed leading to higher accuracy and increased success.	Economic deterrence theory.

iv)	Enhanced government services increase compliance.	This factor relates to the taxpayer's *quid pro quo* perception of the purpose of tax. If the perception of quality and quantity of government services increase, tax compliance increases.	A tax whistleblowing programme could potentially affect this factor, if taxpayers perceive the reports to be adding value. In other words, by successfully investigating whistleblower reports on tax evasion and non-compliance, the government's ability to render service is increased.	Fiscal exchange theory. Trust in administrations.
v)	Social perception.	Taxpayers are influenced by the views and behaviour of their peers. Thus, if a non-compliant taxpayer sees that a fellow non-compliant taxpayer is penalised or prosecuted, it may influence their behaviour. This factor relates to the adage “justice must be seen to be done”.	A whistleblowing programme may result in an enhanced perception that non-compliance or evasion will be detected. However, for this factor to be effective, the statistics for whistleblower reports must be published and emphasised.	Social and comparative treatment.
vi)	Rules must be applied impartially and fairly.	This factor concerns the perception that political figures are “above the law”.	Under a whistleblowing programme, the reports must be open to any person. In other words, there should be no barrier to making a whistleblower report. Whether the report will result in a financial benefit to the whistleblower is a separate question.	Social and comparative treatment. Political legitimacy and trust in the administration.

vii)	Trust in the tax system.	This factor concerns the public trust in the administration of the tax system. In other words, the service delivery by the administration. It is not concerned with the spending of taxes collected by the executive branches of government.	For a whistleblowing programme, this means that any person must be able to make a report and SARS must attend to the report.	Political legitimacy and trust in the administration. Fiscal exchange theory.

Source: Author's compilation.

Chapter 5: Incentive strategies for tax compliance

5.1. Introduction

Tax non-compliance and evasion is a significant concern as it influences the expenditure associated with tax collection and the equitable distribution of the tax burden.[1] If tax evasion and non-compliance could be diminished or eliminated economically, it would mean increased resources to finance government projects or cuts in tax rates to benefit compliant citizens.[2]

This chapter focuses on various regulatory approaches developed based on the compliance theories discussed in Chapter 4. These approaches have been implemented in policy frameworks and elaborated upon in academic literature. The main objective of this analysis is to evaluate the effectiveness and appropriateness of these regulatory strategies in addressing tax evasion and compliance issues. Additionally, this chapter assesses the adoption and implementation of these strategies within the South African context.

The discussion on different regulatory schemes follows the adage noted by Feldman and Lobel as "Protect-Command-Fine-Pay".[3] The study by Feldman and Lobel is helpful for policy considerations, as it sets out findings on the costs and benefits of different regulatory systems. It also includes findings on legal incentives that may, inadvertently, be counterproductive. These terms reflect the legal structures accompanying social

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1 Slemrod "Tax Compliance and Enforcement" *NBER Working Paper Series* 2018 4. Ff Slemrod "Cheating Ourselves: The Economics of Tax Evasion" *The Journal of Economic Perspectives* 2007 26. Bird and Zolt "Redistribution via Taxation: The Limited Role of Personal Income Taxes in Developing Countries" *UCLA Law Review* 52 2005 1666.

2 Slemrod "Tax Compliance and Enforcement " *NBER Working Paper Series* 2018 5. Bird and Zolt "Redistribution via Taxation: The Limited Role of Personal Income Taxes in Developing Countries" *UCLA Law Review* 2005 1694.

3 Feldman and Lobel "The incentives matrix: The comparative effectiveness of Rewards, Liabilities, Duties and Protections for Reporting Illegality" *Texas Law Review* 2010.

reporting of non-compliance. The "protect" part refers to the anti-retaliation protections afforded to whistleblowers and could include various statutory obligations, such as secrecy of information or other safety regulations.[4] The "command" part relates to a reporting duty for non-compliance and tax evasion.[5] This reporting duty could fall on financial institutions, other authorities and taxpayers.[6] The "fine" is the penalty for failure to report non-compliance and evasion.[7] Lastly, the "pay" is the monetary reward offered to those who report non-compliance and evasion.[8]

Feldman and Lobel sought to measure the value which individuals attach to types of regulatory mechanisms.[9] Their findings indicate that monetary rewards become less critical if individuals consider specific conduct morally pervasive.[10] But if compliance morale is low, then rewards for compliance become significant.[11] According to the study, high monetary rewards incentivising reporting are relevant for misconduct that sparks less moral outrage (such as tax evasion).[12] Feldman and Lobel conclude that where an informant is expected to have a tremendous ethical stake in the misconduct, the legislation must appeal to that informant's sense of duty instead of a reward. These findings will be fleshed out in the discussions that follow.

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4 Feldman and Lobel "The incentives matrix: The comparative effectiveness of Rewards, Liabilities, Duties and Protections for Reporting Illegality" *Texas Law Review* 2010 1161-1162.

5 Feldman and Lobel "The incentives matrix: The comparative effectiveness of Rewards, Liabilities, Duties and Protections for Reporting Illegality" *Texas Law Review* 2010 1163-1164.

6 Feldman and Lobel "The incentives matrix: The comparative effectiveness of Rewards, Liabilities, Duties and Protections for Reporting Illegality" *Texas Law Review* 2010 1165.

7 Feldman and Lobel "The incentives matrix: The comparative effectiveness of Rewards, Liabilities, Duties and Protections for Reporting Illegality" *Texas Law Review* 2010 1154.

8 Feldman and Lobel "The incentives matrix: The comparative effectiveness of Rewards, Liabilities, Duties and Protections for Reporting Illegality" *Texas Law Review* 2010 1154, 1168-1170.

9 Feldman and Lobel "The incentives matrix: The comparative effectiveness of Rewards, Liabilities, Duties and Protections for Reporting Illegality" *Texas Law Review* 20101154.

10 Feldman and Lobel "The incentives matrix: The comparative effectiveness of Rewards, Liabilities, Duties and Protections for Reporting Illegality" *Texas Law Review* 2010 1202.

11 Feldman and Lobel "The incentives matrix: The comparative effectiveness of Rewards, Liabilities, Duties and Protections for Reporting Illegality" *Texas Law Review* 20101202. Ff Gneezy and Rustichini "A Fine is a Price" *The Journal of Legal Studies* 2000.

12 Feldman and Lobel "The incentives matrix: The comparative effectiveness of Rewards, Liabilities, Duties and Protections for Reporting Illegality" *Texas Law Review* 2010 1204.

5.2. Compliance strategies

5.2.1. Protect: Anti-retaliation laws as a means to incentivise compliance

5.2.1.1. Observations on anti-relation laws as incentives as detailed in academic literature

Auriacombe notes that there are generally three stages to whistleblowing.[13] The first stage is "causation", where the person perceives the illegal activity, unethical conduct, or immoral behaviour. The whistleblower then has five possible choices to make once the activity has been observed: they can disregard their observation, accept the conduct, participate, express disapproval, or walk away.[14] These choices are not mutually exclusive, and whistleblowers may, in time, change their behaviour. The second stage is the "disclosure" stage, in which the whistleblower approaches their employer, attorney or other officers tasked with dealing with reports to make the report.[15] The third stage is the "retaliation" stage; in this stage, the whistleblower may experience detriment due to their disclosure. At this point, the anti-retaliation laws become relevant, and questions on their efficacy arise.[16]

The principle of protecting whistleblowers against retaliation is naturally appealing, however, anti-retaliation laws are limited remedies and do not serve as a sufficient motivator for whistleblowers.[17] This is because the protections do not consider a detriment

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13 Auriacombe "Key Issues in the Whistle Blowing Process" *Journal of Public Administration* 2004.

14 Auriacombe "Key Issues in the Whistle Blowing Process" *Journal of Public Administration* 2004 661.

15 Auriacombe "Key Issues in the Whistle Blowing Process" *Journal of Public Administration* 2004 661.

16 Auriacombe "Key Issues in the Whistle Blowing Process" *Journal of Public Administration* 2004 661. This view is supported by Holtzhausen "Organisational trust as a prerequisite for whistleblowing" *Journal of Public Administration* 2009 54.

17 Dworkin "Should Greed Be the Goad for Good?" *Journal of Financial Crime* 1997 337-338.

to the whistleblowers' potential career or personal-social risks, such as being labelled a "workplace pariah".[18]

This adverse and collateral effect of whistleblowing can be stifled only if there is a culture of whistleblowing and trust in the government or organisation, as the case may be. In a study conducted by Antinyan, Corazzini and Pavesi, they found that a belief-based system and trust in authorities yield higher reporting results.[19]

Auriacombe argues that the effectiveness of anti-retaliation laws depends on the existence of a whistleblowing culture.[20] She details five key steps to promote a whistleblowing culture from a procedural and policy perspective.[21] Firstly, there must be a clear understanding of the issues that may be reported. This means that the whistleblowing policy must be easy to understand, and it must be in simple terms.[22] Secondly, management in a corporation must "buy in" to the whistleblowing culture, and offer timely and appropriate support to whistleblowers.[23] Thirdly, there should be a clear communication channel which whistleblowers may use to file their reports.[24] Potential whistleblowers must know how to contact the relevant office or person(s) dealing with these reports.[25] She recommends a consultation process to ensure that whistleblowers

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18 Dworkin "Should Greed Be the Goad for Good*?" Journal of Financial Crime* 1997 338.

19 Antinyan, Corazzini and Pavesi "Does trust in the government matter for whistleblowing on tax evaders? Survey and experimental evidence" *Journal of Economic Behavior & Organization* 2020 171.

20 Auriacombe "Key Issues in the Whistle Blowing Process" *Journal of Public Administration* 2004 667.

21 Auriacombe "Key Issues in the Whistle Blowing Process" *Journal of Public Administration* 2004 668.

22 Auriacombe "Key Issues in the Whistle Blowing Process" *Journal of Public Administration* 2004 666.

23 Auriacombe "Key Issues in the Whistle Blowing Process" *Journal of Public Administration* 2004 666.

24 Auriacombe "Key Issues in the Whistle Blowing Process" *Journal of Public Administration* 2004 666.

25 Auriacombe "Key Issues in the Whistle Blowing Process" *Journal of Public Administration* 2004 666.

are comfortable and confident in the process.[26] Fourthly, although confidentiality and anonymity when filing a whistleblower report is essential to limit the risk to the informant, it complicates investigations and verifications.[27] Thus, confidentiality and anonymity must be limited. Fifthly, the response plan to the report should be included, to ensure that the whistleblower knows that their actions are considered and investigated.[28]

According to Holtzhausen, trust in the government, or the organisation for that matter, encourages persons to share information freely and without fear of retaliation. She identifies two factors critical for organisational trust.[29] The first factor is trust in a particular social environment with appropriate communication channels. This factor is underscored by Dworkin, when he states that other factors besides reprisal laws, such as proper internal reporting channels, encourage whistleblowing as it eases the process of making the report.[30]

The second factor involves evaluating the risks undertaken by the whistleblowers in making a report. In assessing the risk, the anti-retaliation laws become essential as the informant deliberates whether to report misconduct, fraud or other offences.[31] According to Holtzhausen, the anti-retaliation laws should not be considered as an incentivised scheme or a method to encourage whistleblowing.[32] Instead, its role is limited to the deliberation of the risk when a whistleblower considers whether to make a report. Thus,

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26 Auriacombe "Key Issues in the Whistle Blowing Process" *Journal of Public Administration* 2004 666.

27 Auriacombe "Key Issues in the Whistle Blowing Process" *Journal of Public Administration* 2004 667.

28 Auriacombe "Key Issues in the Whistle Blowing Process" *Journal of Public Administration* 2004 667.

29 Holtzhausen "Organisational trust as a prerequisite for whistleblowing" *Journal of Public Administration* 2009 239.

30 Dworkin "Should Greed Be the Goad for Good?" *Journal of Financial Crime* 1997 339.

31 Holtzhausen "Organisational trust as a prerequisite for whistleblowing" *Journal of Public Administration* 2009 238-239.

32 Holtzhausen "Organisational trust as a prerequisite for whistleblowing" *Journal of Public Administration* 2009 238-239. Holtzhausen "Whistleblowing for good governance: issues for consideration" *Journal of Public Administration* 2007.Ff Auriacombe "Key Issues in the Whistle Blowing Process" *Journal of Public Administration* 2004 666-668.

organisational trust is a prerequisite for a whistleblower to feel more accepted and encouraged to blow the whistle.

Holtzhausen argues that whistleblowers often face ethical concerns about loyalty to the organisation against which they are reporting.[33] In such cases, the public interest must persuade the whistleblower to abandon their belief of loyalty.[34] Therefore, individuals need to believe that the reported wrongdoing will be addressed, or they may think it is better to remain silent.[35] She also notes that when considering external whistleblowing, specific confidentiality issues may also arise, reinforcing ethical dilemmas and resulting in lower reporting rates.[36]

Dworkin comments that judicial authorities often misunderstand or misinterpret whistleblowing statutes, resulting in an inadvertent discouragement of whistleblowing.[37] It also appears that the only positive takeaway from anti-retaliation laws concerning whistleblowers is the obligation of companies and employers to implement a whistleblowing policy and to create a communication channel.[38]

Ramirez enjoins the view of Dworkin that the protections afforded to whistleblowers are often "legal patchwork" or a "porous net" that does not address the risk and cost carried

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33 Holtzhausen "Whistleblowing for good governance: issues for consideration" *Journal of Public Administration* 2007 50.

34 Holtzhausen "Whistleblowing for good governance: issues for consideration" *Journal of Public Administration* 2007 50.

35 Holtzhausen "Whistleblowing for good governance: issues for consideration" *Journal of Public Administration* 2007 50/

36 Holtzhausen "Whistleblowing for good governance: issues for consideration" *Journal of Public Administration* 2007 52.

37 Dworkin and Near "Whistleblowing Statutes: Are They Working?" *American Business Law Journal* 1987 264.

38 Dworkin and Near "Whistleblowing Statutes: Are They Working?" *American Business Law Journal* 1987 263.

by whistleblowers.[39] She bases this view on the influence of cultural mores concerning whistleblowing. In this regard, Ramirez notes that as early as kindergarten children are taught that "no one likes a tattletale" or that whistleblowers are "turncoats".[40] Thus, the culture of whistleblowing, or lack thereof, is why proper protection remains elusive despite yearly increases in anti-reprisal laws.[41]

In support of Ramirez' view, she raises three problems with anti-retaliation laws as an incentive for whistleblowing. The first problem identified is the limitations in the scope of the protection afforded, which is often limited to certain relationships and/or environments.[42] She notes that anti-retaliation laws are limited to employer-employee relationships, and that whistleblowers outside of this relationship do not enjoy the same protections.[43] The second problem identified is the cumbersome and costly forum for disputes to enforce anti-retaliation laws.[44] The third problem is the burden of proof relating to labour disputes, and enforcement of anti-retaliation laws that are stacked against whistleblowers, which frustrates the protection and potential incentive associated with these laws.[45] These problems with the anti-retaliation laws are similar to the limitations observed in the South African anti-retaliation laws, as set out in Chapter 2 of this study.

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39 Ramirez "Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power" *University of Cincinnati Law Review* 2008 189. This view is also supported by Lobel "Linking Prevention, Detection, and Whistleblowing: Principles for Designing Effective Reporting Systems Symposium: Citizen Employees: Whistleblowers and Other Employees Acting in the Public Interest" *South Texas Law Review* 2012 52.

40 Ramirez "Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power" *University of Cincinnati Law Review* 2008 190.

41 Ramirez "Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power" *University of Cincinnati Law Review* 2008 190.

42 Ramirez "Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power" *University of Cincinnati Law Review* 2008 207.

43 Ramirez, M.K. "Blowing the Whistle on Whistleblower Protection: A Tale of Reform versus Power" 204.

44 Ramirez "Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power" *University of Cincinnati Law Review* 2008 207.

45 Ramirez "Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power" *University of Cincinnati Law Review* 2008 207.

Yeoh considered empirical studies on whether employees weigh the financial benefits of making a report before making it.[46] The findings suggest that the protection afforded by anti-retaliation laws does not benefit whistleblowing or promote whistleblowing.[47] Yeoh concludes that the misinterpretations of anti-retaliation laws discourage whistleblowing.

The finding by Yeoh supports the argument by Auriacombe that anti-retaliation laws serve as a soothing balm against the collateral effects of whistleblowing, but it cannot be considered an incentive to blow the whistle. This is so since society values compensation or reward more than deterrence.

5.2.1.2. Concluding remarks on anti-retaliation laws as an incentive to promote compliance and whistleblowing

From the literature reviewed above, anti-retaliation laws are ineffective incentives for whistleblowing. This is so for these five reasons: firstly, anti-retaliation laws do not deal with collateral risk to the whistleblower, such as financial loss. Secondly, the persons falling within the scope of protection of anti-retaliation laws are limited, directly impacting their efficacy. Thirdly, confidentiality protection cannot be guaranteed, as disclosure may be required to verify and investigate reports, which may discourage whistleblowers. Fourthly, anti-retaliation laws and whistleblowing policies create a channel for communication but cannot be considered a "benefit" or "incentive". Fifthly, enforcing anti-retaliation laws is a cumbersome and costly process not necessarily available to all whistleblowers.

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46 Yeoh "Whistleblowing: Motivations, Corporate Self-Regulation, and the Law" *International Journal of Law and Management* 2014 470.

47 Yeoh "Whistleblowing: Motivations, Corporate Self-Regulation, and the Law" *International Journal of Law and Management* 2014 470.

Notwithstanding the above, anti-retaliation laws should not be cast aside in the quest to promote whistleblowing and compliance. Instead, they should be defined to facilitate whistleblowing, not as an incentive.

5.2.2. Command: Mandatory provisions

5.2.2.1. Observations in the academic literature on reporting duties

Taxpayer compliance with reporting duties is closely linked to the theory of intrinsic motivation, as explored by Torgler.[48] Graetz and Wilde state that one of the myths of tax compliance is that the economics of crime is the reason for compliance.[49] Instead, they find that in the 1980s, the sanction levels were low and leniency high. Thus, the high compliance rate had to be attributed to another reason.[50] They find that the compliance rate must hail from the taxpayer's respect for the law or lack of opportunity to evade.[51] This conclusion is supported by Frey, who argues that intrinsic motivation to comply is a crucial reason for compliance, rather than deterrence through punishment alone.[52] Frey suggests that rewards may be considered to promote compliance.[53]

Reporting duties go hand in hand with information reporting. Information reporting refers to the action in which entities or persons report information relevant to someone else's tax liability to the tax authority.[54] This type of reporting is generally not applied in the same context as tax whistleblowing. Information reporting is usually seen in employers reporting

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48 Torgler *Tax compliance and tax morale* (2007) 69-70. See discussion in Chapter 4 para 4.2, 4.3.2 and 4.4.

49 Graetz and Wilde "The Economics of Tax Compliance: Fact and Fantasy: I. Introduction" *National Tax Journal (pre-1986)* 1985 355.

50 Graetz and Wilde "The Economics of Tax Compliance: Fact and Fantasy: I. Introduction" *National Tax Journal (pre-1986)* 1985 355.

51 Graetz and Wilde "The Economics of Tax Compliance: Fact and Fantasy: I. Introduction" *National Tax Journal (pre-1986)* 1985 355.

52 Frey "Punishment-and Beyond" *Contemporary Economics* 2011 92-93.

53 Frey "Punishment-and Beyond" *Contemporary Economics* 2011 92-93.

54 Slemrod "Tax Compliance and Enforcement" *NBER Working Paper Series* 2018 42.

employee wages and salaries as withholding agents, for instance, the Pay-As-You-Earn tax system in South Africa.[55] Information reporting is also built into the VAT invoice credit system, in which credits from supplier purchases are allowed as input deductions only if accompanied by specific information by the seller.[56] The production of a tax invoice to deduct input claims enables the tax authority to cross-check transactions and, in that way, use information reporting to detect tax evasion and non-compliance.

Another example of information reporting in South Africa is the introduction of the domestic reverse charge regulation for VAT. In 2022, SARS introduced a domestic reverse charge regulation in the context of VAT on precious metals, in which the acquiring vendor (recipient) is required to account for the VAT on the purchase compared to the traditional position of the supplier. The recipient or acquiring vendor must retain a list of its suppliers and the tax invoices for domestic reverse charge regulation to be applied.[57]

Slemrod finds that increased information reporting appears to have the effect of more accurate reporting of income but an overall increase in reported expenses, thereby nullifying the apparent tax liability.[58] In other words, although information reporting effectively induces voluntary compliance when accounting for income, it has the opposite effect and results in non-compliance or evasion as far as taxpayers overstate their expenses. Therefore, information reporting may be ineffective in curbing evasion and non-compliance.

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55 Fourth Schedule to the Income Tax Act. Graetz and Wilde "The Economics of Tax Compliance: Fact and Fantasy: I. Introduction" *National Tax Journal* 1985. Lederman "Does Enforcement Reduce Voluntary Tax Compliance?" *Legal Studies Research Paper Series* 2018 352.

56 S20 of the VAT Act. Slemrod "Tax Compliance and Enforcement" *NBER Working Paper Series* 2018 42.

57 SARS explanatory memorandum LAPV – L prep – EN – 2022 2,4 and 8.

58 Slemrod "Tax Compliance and Enforcement" *NBER Working Paper Series* 2018 45.

5.2.2.2. Reporting duties in South Africa for tax non-compliance and tax evasion

Reporting duties within the tax legislative framework are limited to the reporting duties set out in FICA, PRECCA and the Tax Administration Act, which are dealt with below.

Section 29 of the FICA creates a reporting duty for suspected or unusual activities. This reporting duty may be triggered by various grounds, including if a person suspects that a transaction is linked to an investigation of tax evasion or attempted tax evasion.[59] The limitations of this reporting duty are detailed in Chapter 2 and summarised here. Firstly, there must be an ongoing investigation of or attempted tax evasion.[60] The report must be filed within a specific period, and failure to submit the report within the allocated time may result in rejection.[61] The limitations to the reporting duty in the FICA limit its effectiveness. The reporting duty is inadequate in the context of tax evasion and non-compliance.

Section 34 of the PRECCA provides a reporting duty for activities related to, amongst others, corruption, fraud, theft and extortion.[62] The challenges in applying the provisions

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59 S 29(1)(b)(iv) Financial Intelligence Centre Act, 38 of 2001 ("FICA") provides that "(1) A person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or ought reasonably to have known or suspected that….(b) a transaction or series of transactions to which the business is a party-…(iv) may be relevant to the investigation of an evasion or attempted evasion of a duty to pay any tax, duty or levy imposed by legislation administered by the Commissioner for the South African Revenue Service;… must, within the prescribed period after the knowledge was acquired or the suspicion arose, report to the Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions." *National Director of Public Prosecutions v Seevnarayan* 2003 1 All SA 240 (C) 252-253. This reporting duty is similar to those found in sections 34 to 39 of the Tax Administration Act and sections 80A to 80K of the Income Tax Act, 58 of 1962. Ff De Koker *et al. South African Money Laundering and Terror Financing Law* (2023) para 10 - 11.

60 Chapter 2 para 2.5.

61 Chapter 2 para 2.5.

62 S 34(1) PRECCA "Duty to report corrupt transactions.—(1) Any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed— (a) an offence under Part 1, 2, 3 or 4, or section 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2; or (b) the offence of theft, fraud, extortion, forgery or uttering a forged document, involving an amount of R100 000 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to the police official in the Directorate for Priority Crime Investigation referred to in section 17C of the South African Police Service Act, 1995, (Act No. 68 of 1995)."

of PRECCA to tax whistleblowers are detailed in Chapter 2.[63] In summation, the scope of offences subject to the reporting duty does not include tax evasion.[64] The reporting duty excludes acts of non-compliance, which is not a criminal offence.[65] The reporting duty is only imposed on a person who holds a position of authority.[66] Lastly, for certain offences, the Act only applies if the reported transaction exceeds ZAR100 000 in value.[67]

There is no reporting duty in the Tax Administration Act that compels a person, other than a SARS official, to report alleged non-compliance or evasion.[68] The Tax Administration Act only criminalises tax evasion or assisting a person to evade taxes.[69] The Act is silent on compelling social reporting on tax evasion or non-compliance. Although there is no duty in the Tax Administration Act to report non-compliance and evasion, there are consequences for persons who assists taxpayers in dissipating assets to the detriment of SARS, or whose conduct resulted in the failure to pay tax.[70] These third parties may be held personally liable for the tax debt.[71] Therefore, the Tax Administration Act envisages consequences for persons other than the taxpayer involved in non-compliance or evasion

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63 Chapter 2 para 2.8.
64 Chapter 2 para 2.8.
65 Chapter 2 para 2.8.
66 Chapter 2 para 2.8.
67 Chapter 2 para 2.8.
68 SARS officials are obliged to take action against non-compliance and evasion. In this regard, see s 92 of the Tax Administration Act related to when additional assessments must be issued.
69 S 235 Tax Administration Act provides that "235. **Evasion of tax and obtaining undue refunds by fraud or theft**.—(1) A person who with intent to evade or to assist another person to evade tax or to obtain an undue refund under a tax Act—a) The making of a false statement or entry in a return without reasonable grounds for believing the same to be true; b) By giving a false answer, whether orally or in writing, to a request for information made under this Act; c) To prepare, maintain or authorise the preparation or maintenance of false books of account or other records; d)To make use of or to authorise fraud or contrivance; e)To make any false statement for the purposes of obtaining any refund of or exemption from tax, is guilty of an offence and, upon conviction, is subject to a fine or to imprisonment for a period not exceeding five years…(3) Only a senior SARS official may lay a complaint with the South African Police Service or the National Prosecuting Authority regarding an offence under this section" For examples on prosecution in terms of section 235 see *S v Delport* 2020 (2) SACR 179 (FB) and *Grayston Technology Investment (Pty) Ltd and Another v S* 4 All SA 908 (GJ).
70 Ss 180 and 183 Tax Administration Act.
71 Ss 180 and 183 Tax Administration Act. Ff *Commissioner for SARS v Dr Christoffel Hendrik Wiese and Others* (2022) JOL 55368 (WCC).

schemes. However, in my view, in the absence of a clear reporting duty, the failure to report cannot be construed as an action in assisting the dissipation of assets to SARS' detriment or as conduct resulting in the failure to pay taxes.

The Tax Administration Act provides reporting duties in respect of certain reportable arrangements or transactions.[72] However, these are specific types of transactions identified by the legislature and is not akin to non-compliance or evasion. In any event, the obligation to report the transaction is on the participant and not on a person who merely has knowledge thereof.[73]

Furthermore, only a senior SARS official may file a criminal tax evasion complaint in terms of the Tax Administration Act with the South African Police Service.[74] This limits the scope of potential complainants and informants. If a member of public lays a criminal complaint of tax evasion at SAPS, the alleged crime may not be fully investigated or prosecuted. To qualify the aforesaid statement, the Tax Administration Act empowers SARS to investigate tax offence and to lay criminal charges.[75] This mandate includes the referral of tax offences to the NPA for prosecution.[76] The criminal justice system in South Africa involves a two-stage approach.[77] Firstly, an offence is investigated by SARS or the SAPS. In the case of tax offences, SARS conducts the investigations. Secondly, after finalisation of the investigation, the case is referred to the NPA and SARS' Specialised Tax Unit for prosecution.[78]

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72 S 35 Tax Administration Act.
73 S 37 Tax Administration Act.
74 S 235(3) Tax Administration Act.
75 S 3(2)(f) Tax Administration Act.
76 Ss 43 and 44 Tax Administration Act.
77 South African Government "How does the justice system work?" at https://www.gov.za/faq/justice-and-crimeprevention/how-does-criminal-justice-system-work (Accessed 01/03/2024). Ff Mpofu *The use of deferred prosecution agreements in tax disputes* (LLM dissertation 2022 UP) 19.
78 South African Government "How does the justice system work?" at https://www.gov.za/faq/justice-and-crimeprevention/how-does-criminal-justice-system-work (Accessed 01/03/2024). Ff Mpofu *The use of deferred prosecution agreements in tax disputes* (LLM dissertation 2022 UP) 19.

5.2.2.3. Concluding remarks on reporting duties as a means to incentivise whistleblowing and tax compliance

There is a lack of proper reporting duties in the South African tax law dispensation as far as it relates to tax offences and non-compliance. When viewed in the context of reporting duties in other legislation such as FICA and PRECCA, the absence of reporting duties in a tax context is peculiar and seemingly without reason.[79] This thesis does not argue that the failure to blow the whistle should be punished by penalty, especially not in the context of the innocent whistleblower. However, the point is simply that given the potential consequences for third parties' involvement in tax non-compliance and evasion, a reporting duty may assist in providing the appropriate channel for disclosure.

The observations from the literature show that compulsory information reporting may limit the opportunities for tax evasion. Reporting duties' effectiveness appears to be limited to intrinsically motivated taxpayers.

5.2.3. Fine: Imposition of penalties and fines to ensure tax compliance

5.2.3.1. Observations in the academic literature on penalties as a tool to promote compliance

Most countries use enforcement methods such as fines and penalties to compel tax compliance.[80]

A hallmark of an effective penalty regime is that it is applied consistently and similarly between taxpayers, failing which taxpayers lose respect and support for the penalty

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79 Chapter 2 para 2.5 and 2.8.

80 Lederman "Does Enforcement Reduce Voluntary Tax Compliance?" *Legal Studies Research Paper Series* 2018 352. Mphagahlele and Schutte "The Influence of Penalties on the Tax Compliance Behaviour of Small Business Owners" *Southern African Business Review* 2022 2.

regime. This directly influences the effectiveness of this strategy to promote voluntary compliance.[81] The penalty regime must also be proportionate in eliminating non-compliance without being considered unfair or disproportionate.[82]

In their field study, Gneezy and Aldo hypothesise that introducing a penalty to parents who collect their children late from a day-care centre will reduce late collection occurrences.[83] However, their findings show that the introduction of penalties has the opposite effect – that is an increased occurrence of late collection. After removing the fine, the status quo also did not return.[84] Their findings suggest that the parents tested whether the only consequence of not collecting their children on time was the imposition of a fine.[85]

The authors further find that from a social perspective, the parents' perception changed from "the teacher is just a nice and generous person. I should not take advantage of their patience" in rationalising the late collection of their children to "the teacher is taking care of the child in much the same way as she did earlier in the day. In fact, this activity is a price which I can buy as much as needed".[86] This change in perception appears to have justified the non-compliance with the collection rules of the day care centre. This informs the general perception of fines in the context of compliance with regulations and/or tax laws. Thus, taxpayers may perceive a fine as the cost of tax evasion, and if this fine is acceptable to them, it becomes a price to pay to benefit from the activities of tax evasion and non-compliance.[87]

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81 Coder "Achieving Meaningful Civil Tax Penalty Reform and Making It Stick" *Akron Tax Journal* 2012 156.
82 Coder "Achieving Meaningful Civil Tax Penalty Reform and Making It Stick" *Akron Tax Journal* 2012 157.
83 Gneezy and Aldo "A Fine Is a Price" *The Journal of Legal Studies* 2000 3.
84 Gneezy and Aldo "A Fine Is a Price" *The Journal of Legal Studies* 2000 3.
85 Gneezy and Aldo "A Fine Is a Price" *The Journal of Legal Studies* 2000 11.
86 Gneezy and Aldo "A Fine Is a Price" *The Journal of Legal Studies* 2000 14.
87 Gneezy and Aldo "A Fine Is a Price" *The Journal of Legal Studies* 2000 14.

In a separate study, Gneezy and Aldo study the effect of rewards on performance by participants in a "reward" and "zero reward" game. The authors divided their subjects into four groups, and each was paid a flat fee of NIS64 for participation. The subjects were then asked to solve 50 questions from an IQ test. The participants in the first group were promised another NIS0.10 for each question answered correctly; the second group received NIS1 for each question answered correctly; the third group received NIS3, and the fourth group did not receive any compensation. The result was that the group who received only NIS0.10 for each question performed the worst, despite the limited compensation received. This finding suggests that the absence of compensation is not the only factor determining participation motivation.[88]

The findings above show that the introduction of a fine and rewards, for that matter, are often decided and influenced by a larger context.[89] In other words, an announcement by government that tax evasion or non-compliance will be more severely prosecuted and fined may be interpreted in different ways and have a different effect than the desired increased compliance.[90] The bottom line is that although a penalty or a fine in the context of tax evasion may serve as an incentive to increase tax compliance, it is not always the case. Thus, additional factors might influence a taxpayer's risk appetite that could improve tax compliance. The Australian Law Reform Commission comments on tax penalties as follows:

> “Penalties seek to punish undesirable behaviour and thereby to promote desired behaviour. The form and level of penalty applied will depend on its purpose as well as on the area of activity, the type of wrongdoer and the nature of the wrongdoing. Several purposes, not all of which may be

88 Gneezy and Aldo "A Fine Is a Price" *The Journal of Legal Studies* 2000 15.
89 Gneezy and Aldo "A Fine Is a Price" *The Journal of Legal Studies* 2000 16.
90 Gneezy and Aldo "A Fine Is a Price" *The Journal of Legal Studies* 2000 17.

> consistent, can often be discerned in anyone penalty but the deterrence of wrongdoing is ultimately an aim of all penalty regimes."[91]

Smailes and McDermott also indicate the conventional argument that penalties serve as a punishment to promote compliance but is not the sole reason for imposing tax penalties.[92] This is so due to the ineffectiveness of penalties, as examined by other studies.[93] Thus, penalties also influence perceptions of fairness, preparation, retribution and social condemnation.[94]

Using mixed-method research, Devos studies the relationship between tax compliance and penalties on Australian individual tax evaders.[95] The study emphasises the link between tax evaders' awareness of penalties and the effect thereof on tax compliance decisions.[96] As for enforcement, the findings were that penalties affected the behaviour of tax evaders. The enforcement by the Australian Tax Office and the procedural justice considerations impacted tax evaders' perception of low tax law enforcement and their compliance behaviour.[97] In other words, the quality of the tax administration and the tax authority influenced the public's perception of the enforcement of penalties. As a result, the findings by the author confirm the link between factors influencing taxpayer compliance and the strategy imposed by the relevant tax authority.

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91 Australian Law Reform Commission Principled Regulation: Federal Civil and Administrative Penalties. In Australia, reports a number 95 (2002) 264 para 3.4 http://www6.austlii.edu.au/cgi-bin/viewdoc/au/other/lawreform/ALRC/2002/95.html#06.Tools_of_Regulationheading0 (Accessed 09/10/2023). Smailes and McDermott "The Uniformity of Taxation Penalties in Australia" *Monash University Law Review* 2012 216.

92 Smailes and McDermott "The Uniformity of Taxation Penalties in Australia" *Monash University Law Review* 2012 216.

93 Smailes and McDermott "The Uniformity of Taxation Penalties in Australia" *Monash University Law Review* 2012 217-218.

94 Smailes and McDermott "The Uniformity of Taxation Penalties in Australia" *Monash University Law Review* 2012 219.

95 Devos "Do Penalties and Enforcement Measures Make Taxpayers More Compliant? —the View of Australian Tax Evaders" *Journal of Business and Economics* 2014 268.

96 Devos "Do Penalties and Enforcement Measures Make Taxpayers More Compliant? —the View of Australian Tax Evaders" *Journal of Business and Economics* 2014 276.

97 Devos "Do Penalties and Enforcement Measures Make Taxpayers More Compliant? —the View of Australian Tax Evaders" *Journal of Business and Economics* 2014 276.

Although the findings point out that the penalties have some influence on compliance, such influence was found to be limited.[98] Devos found that penalties are only effective against fined taxpayers but ineffective in curbing future evasion actions. Accordingly, the results suggest that penalties alone are inadequate to promote compliance and must be combined with other compliance strategies.[99]

Ratto and Gemmel applied a basic cost-benefit model in which they predicted that increased penalties would result in increased compliance.[100] The study was not conducted on tax evasion specifically, but on the effect of penalties on late payment as a defined instance of non-compliant behaviour. They observe that, in general, taxpayers are unresponsive to penalties.[101] Therefore, the results show that the penalties were irrelevant to the taxpayers. Instead, payment arrangements or agreements influence their decisions in non-compliance.[102]

Osofsky examines whether failure to disclose penalties is effective in a responsive tax administration.[103] Osofsky differentiates between a penalty for failing to disclose an issue on a taxpayer's income tax return and a penalty for filing an incorrect return.[104] Osofsky

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98 Devos "Do Penalties and Enforcement Measures Make Taxpayers More Compliant? —the View of Australian Tax Evaders" *Journal of Business and Economics* 2014 276-277.

99 Devos "Do Penalties and Enforcement Measures Make Taxpayers More Compliant? —the View of Australian Tax Evaders" *Journal of Business and Economics* 2014 276. This finding is supported in Coetzee *Are Tax Penalties Effective in Combatting Tax Avoidance?* (MCom Taxation Mini dissertation 2019 UP) 39.

100 Ratto and Gemmell "The Effects of Penalty Information on Tax Compliance: Evidence from a New Zealand Field Experiment" *National Tax Journal* 2018 557. The model can be changed to replace the rate of penalties with the risk of detection or utility to arrive at an expected value of the penalty, however the outcome remains the same. Lawsky "Modelling Uncertainty in Tax Law" *Stanford Law Review* 2013 252, 256.

101 Ratto and Gemmell "The Effects of Penalty Information on Tax Compliance: Evidence from a New Zealand Field Experiment" *National Tax Journal* 2018 579.

102 Ratto and Gemmell "The Effects of Penalty Information on Tax Compliance: Evidence from a New Zealand Field Experiment" *National Tax Journal* 2018 559.

103 Osofsky "Some Realism About Responsive Tax Administration" *Tax Law Review* 2012 352. Ff Ramirez "Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power" *University of Cincinnati Law Review* 2008 304.

104 Osofsky "Some Realism About Responsive Tax Administration" *Tax Law Review* 2012 352. Ramirez "Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power" *University of Cincinnati Law Review* 2008 304.

suggests that even if taxpayers do not disclose, they can still determine the risk and cost of not reporting issues on their tax returns.[105] In other words, for "failing to disclose" the penalty is considered as a price. Osofsky suggests that penalties for different non-compliant behaviours should be used to offset the risk of non-compliance.[106] In conclusion, she argues that the penalty for "failure to disclose" is ineffective in preventing future evasion or non-compliance.[107]

Alm, Jackson and McKee find that increased tax rates result in lower compliance, but compliance marginally increases with an increase in fines issued.[108] Thus, when the probability of a fine or detection of non-compliance or evasion is low, high penalties and high-risk aversion in taxpayers are required for penalties to be effective.[109] In other words, high penalty rates are ineffective if there is a low probability of being imposed.[110] Lederman concludes that penalties or sanctions are not the only and may not be the leading cause for compliance. Instead, it is a combination of the detection risk and audit threat.[111]

Using meta-analysis, Dularif, Nurkholis and Saraswati present findings on the relationship between determinant factors such as audit rate, tax rate and penalties for tax evasion

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105 Osofsky "Some Realism About Responsive Tax Administration" *Tax Law Review* 2012 352. Ramirez "Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power" *University of Cincinnati Law Review* 2008 337.

106 Osofsky "Some Realism About Responsive Tax Administration" *Tax Law Review* 2012 352. Ramirez "Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power" *University of Cincinnati Law Review* 2008 352.

107 Osofsky "Some Realism About Responsive Tax Administration" *Tax Law Review* 2012 352. Ramirez "Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power" *University of Cincinnati Law Review* 2008 352.

108 Alm, Jackson and McKee "Estimating the Determinants of Taxpayer Compliance with Experimental Data: Abstract" *National Tax Journal* 1992 4.

109 Alm, Jackson and McKee "Estimating the Determinants of Taxpayer Compliance with Experimental Data: Abstract" *National Tax Journal* 1992 4. This finding is supported by Iyer, Reckers and Sanders "Increasing Tax Compliance in Washington State: A Field Experiment" *National Tax Journal* 2023.

110 Alm, Jackson and McKee "Estimating the Determinants of Taxpayer Compliance with Experimental Data: Abstract" *National Tax Journal* 1992 4.

111 Lederman "Does Enforcement Reduce Voluntary Tax Compliance?" *Legal Studies Research Paper Series* 2018 700.

using the deterrence approach.[112] They hypothesise that the “penalty” as a punishment for non-compliance and evasion, negatively affects tax evasion.[113] They predict that the penalty would result in increased voluntary compliance. The study find that penalties are only effective as a deterrent if the losses suffered by the sanctions are more significant than the potential gains obtained by non-compliance or evasion.[114] The study find that taxpayers, particularly those with sufficient resources and knowledge, hire tax consultants to avoid punishment and increase their chances of evading. This is contrary to the basic deterrence model. The result is that taxpayers engage in more sophisticated efforts to evade taxes and become non-compliant rather than becoming more obedient.[115] Dare’s findings discussed in Chapter 4 that other measures, such as audit rate, have a more significant influence on compliance than penalties aligned with the observations stated here.[116]

Mphagahlele and Schutte employed a qualitative method utilising semi-structured interviews to understand the contextual meaning of the small business owners in South Africa and their relationship with tax compliance.[117] They set out to answer whether penalties influence tax compliance behaviour by small business owners.[118] They identify four key results emerging from the response to the study.

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112 Dularif, Nurkholis and Saraswati "Is Deterrence Approach Effective in Combating Tax Evasion? A Meta-Analysis" *Problems and Perspectives in Management* 2019 97.

113 Dularif, Nurkholis and Saraswati "Is Deterrence Approach Effective in Combating Tax Evasion? A Meta-Analysis" *Problems and Perspectives in Management* 2019 97.

114 Dularif, Nurkholis and Saraswati "Is Deterrence Approach Effective in Combating Tax Evasion? A Meta-Analysis" *Problems and Perspectives in Management* 2019 108.

115 Dularif, Nurkholis and Saraswati "Is Deterrence Approach Effective in Combating Tax Evasion? A Meta-Analysis" *Problems and Perspectives in Management* 2019 109.

116 Dare "The impact of changes in audits and penalties on tax compliance behaviour: evidence from South Africa" *Southern African Business Review* 2020 6.

117 Mphagahlele and Schutte "The Influence of Penalties on the Tax Compliance Behaviour of Small Business Owners" *Southern African Business Review* 2022 5.

118 Mphagahlele and Schutte "The Influence of Penalties on the Tax Compliance Behaviour of Small Business Owners" *Southern African Business Review* 2022 3.

Firstly, sometimes penalties could discourage small businesses from registering for all taxes.[119] The penalty ranges from ten percent to 200 percent, which may be financially catastrophic if imposed on a small business owner.[120] The penalties may be considered harsh and disproportionate to the non-compliance.[121] To avoid the risk of the penalty for inadvertent or bona fide non-compliance small business owners would instead not register for all of the appropriate tax types.[122]

Secondly, the penalties are not an incentive or disincentive for compliance.[123] Instead, the main driver of compliance is the economic need for good standing with SARS to participate in economic trade.[124] This suggests that non-compliance collateral punishment or influence drives tax compliance, not penalties. This invites the question of the effectiveness of the penalty system in South Africa.[125]

Thirdly, the charging of penalties does not correlate to paying taxes on time.[126] The participants indicated that they often experience cash flow difficulties and must decide whether to pay SARS or their employees and suppliers.[127] To promote and facilitate continuous business activity, the business owners prefer making payments towards their

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119 Mphagahlele and Schutte "The Influence of Penalties on the Tax Compliance Behaviour of Small Business Owners" *Southern African Business Review* 2022 9.

120 Mphagahlele and Schutte "The Influence of Penalties on the Tax Compliance Behaviour of Small Business Owners" *Southern African Business Review* 2022 9.

121 Mphagahlele and Schutte "The Influence of Penalties on the Tax Compliance Behaviour of Small Business Owners" *Southern African Business Review* 2022 9.

122 Mphagahlele and Schutte "The Influence of Penalties on the Tax Compliance Behaviour of Small Business Owners" *Southern African Business Review* 2022 9.

123 Mphagahlele and Schutte "The Influence of Penalties on the Tax Compliance Behaviour of Small Business Owners" *Southern African Business Review* 2022 9.

124 Mphagahlele and Schutte "The Influence of Penalties on the Tax Compliance Behaviour of Small Business Owners" *Southern African Business Review* 2022 9

125 Mphagahlele and Schutte "The Influence of Penalties on the Tax Compliance Behaviour of Small Business Owners" *Southern African Business Review* 2022 9.

126 Mphagahlele and Schutte "The Influence of Penalties on the Tax Compliance Behaviour of Small Business Owners" *Southern African Business Review* 2022 10.

127 Mphagahlele and Schutte "The Influence of Penalties on the Tax Compliance Behaviour of Small Business Owners" *Southern African Business Review* 2022 10.

employees and suppliers.[128] Thus, the imposition of penalties does not correlate with paying taxes on time.[129]

Fourthly, the lack of knowledge and skills about tax declarations and taxes also emerged as a reason for small business owners sometimes unintentionally not complying.[130] This is especially true for emerging businesses that do not have the resources and capital to employ professional tax consultants.[131] The suggestion that flows from the study is that penalties must accompany skills training and basic tax education.[132]

The nature and severity of punishment for detected evasion and non-compliance is the neglected side of the coin when considering their deterrence model for tax compliance.[133] Governments hesitate to experimentally vary the extent of punishment to research their effects on that compliance. This is a generally understudied area.[134]

5.2.3.2. Penalties in South African tax law dispensation

Within the South African framework, the Tax Administration Act provides for the imposition of penalties.[135] The statutory non-compliance penalties are dealt with in Chapter 15, sections 208 to 220 of the Tax Administration Act.

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128 Mphagahlele and Schutte "The Influence of Penalties on the Tax Compliance Behaviour of Small Business Owners" *Southern African Business Review* 2022 10.
129 Mphagahlele and Schutte "The Influence of Penalties on the Tax Compliance Behaviour of Small Business Owners" *Southern African Business Review* 2022 10.
130 Mphagahlele and Schutte "The Influence of Penalties on the Tax Compliance Behaviour of Small Business Owners" *Southern African Business Review* 2022 12.
131 Mphagahlele and Schutte "The Influence of Penalties on the Tax Compliance Behaviour of Small Business Owners" *Southern African Business Review* 2022 12.
132 Mphagahlele and Schutte "The Influence of Penalties on the Tax Compliance Behaviour of Small Business Owners" *Southern African Business Review* 2022 12.
133 Slemrod "Tax Compliance and Enforcement" *NBER Working Paper Series* 2018 72.
134 Slemrod "Tax Compliance and Enforcement" *NBER Working Paper Series* 2018 72.
135 Chapter 15 Tax Administration Act.

The chapter in the Act commences with the definitions and the purpose of penalties, which is to ensure compliance with the provisions of a tax Act and the effective administration of the Act, as well as to impose administrative non-compliance penalties impartially, consistently and proportionally to the seriousness and duration of the non-compliance. [136]

"Administrative non-compliance penalty" is defined as a penalty imposed by SARS in Chapter 15 or a tax Act other than the Tax Administration Act, but it excludes an understatement penalty.[137] There are two types of administrative non-compliance penalties: Fixed amount penalties determined in sections 210 to 212 of the Tax Administration Act and percentage-based penalties detailed in section 213 of the Act mentioned above.

Fixed-amount penalties use a graduated system in which the penalty amount is increased by the assessed loss or taxable income for the preceding year.[138] The penalty increases automatically by the same amount for each month or part thereof that the taxpayer fails to remedy the non-compliance.[139]

In this regard, section 211 of the Tax Administration Act includes a table setting out the assessed loss versus the penalty to be imposed:

Table 5.1 Fixed amount administrative penalties for non-compliance

1 **Item**	**2** **Assessed loss or taxable income for preceding year**	**3** **Penalty**
(i)	Assessed loss	R250
(ii)	R0 – R250 000	R250
(iii)	R250 001 – R500 000	R500

136 S 209(a) and (b) Tax Administration Act.
137 S 208 Tax Administration Act.
138 S 211 Tax Administration Act.
139 S 211(2) Tax Administration Act.

(iv)	R500 001 – R 1000 000	R1 000
(v)	R1 000 001 -R5 000 000	R2 000
(vi)	R5 000 001 – R10 000 000	R4 000
(vii)	R10 000 001 – R50 000 000	R8 000
(viii)	Above R50 000 000	R16 000

Source: Section 211 Tax Administration Act.

Percentage based on penalties is imposed when SARS is satisfied that an amount of tax was not paid as and when required by the relevant tax Act. SARS must then set a percentage-based penalty equal to the unpaid tax.[140] Thus, a taxpayer may be exposed to two administrative non-compliance penalties and interest on the outstanding amount. Under the Tax Administration Act, a taxpayer can request a remittance of the penalty.[141]

Along with the administrative non-compliance penalty, the Tax Administration Act also provides for understatement penalties.[142] An "understatement" is defined as any prejudice to SARS or the fiscus, due to a failure to submit a return, filing of an incorrect or incomplete return and the failure to pay the amount of tax required.[143] The prejudice to SARS is not only in financial terms, but includes wasted hours or resources. In the matter of *Purlish Holdings (Pty) Ltd v CSARS*,[144] the Supreme Court of Appeal held that prejudice includes the additional resource allocation in the form of human capital and time.[145] Similarly, in the recent case of *Lance Dickson Construction CC v Commissioner for the South African Revenue Service*,[146] the High Court of South Africa held that the argument on prejudice

140 S 213 Tax Administration Act.
141 Ss 2015 to 220 Tax Administration Act.
142 Chapter 6, ss 221 to 233 Tax Administration Act.
143 S 221 Tax Administration Act.
144 *Purlish Holdings (Proprietary) Limited v The Commissioner for The South African Revenue Service* (76/2018) (2019) ZASCA 4 (26 February 2019).
145 *Purlish Holdings (Proprietary) Limited v The Commissioner for The South African Revenue Service* (76/2018) (2019) ZASCA 4 (26 February 2019) para 23.
146 *Lance Dickson Construction CC v Commissioner for the South African Revenue Service* (A211/2021) (2023) ZAWCHC 12 (31 January 2023) para 52.

in the form of wasted time and resources is also available to a taxpayer when arguing on the issue of costs.

The understatement penalties are also based on a percentage following an evaluation of the taxpayers' behaviour, resulting in the understatement.[147] The percentage ranges from 10 percent for a substantial understatement in the case of a standard case, to 200 percent for intentional tax evasion:

Table 5.2 Understatement penalty percentage

1	2	3	4	5	6
Item	**Behaviour**	**Standard case**	**If obstructive, or if it is a repeat case**	**Voluntary disclosure after notification of audit or criminal investigation**	**Voluntary disclosure before notification of audit or criminal investigation**
(i)	Substantial understatement	10%	20%	5%	0%
(ii)	Reasonable care not taken in completing return	25%	50%	15%	0%
(iii)	No reasonable grounds for 'tax position' taken	50%	75%	25%	0%
(iv)	Impermissible avoidance arrangement	75%	100%	35%	0%
(v)	Gross negligence	100%	125%	50%	5%
(vi)	Intentional tax evasion	150%	200%	75%	10%

Source: Section 223 Tax Administration Act.

147 S 223 Tax Administration Act.

The imposition of an understatement penalty by SARS is subject to ordinary dispute resolution mechanisms such as objection and appeal under Chapter 9 of the Tax Administration Act.[148]

5.2.3.3. Concluding remarks on penalties as means to incentivise whistleblowing and tax compliance

The observations from the literature discussed above on the effectiveness of penalties can be summarised in three key respects: Firstly, penalty or sanction is not the sole reason for compliance. Many factors play a role in compliance, such as the quality of the tax administration.[149] Secondly, penalties and sanctions do not necessarily outweigh the potential return of non-compliance.[150] In other words, the penalty is effective only if it is so high that the loss suffered by the imposition is greater than the potential gains of non-compliance.[151] This affects taxpayers' business decisions, as seen in the study by Mphagahlele and Schutte.[152] Thirdly, taxpayers appear to be generally unresponsive to penalties and fines

From a South African perspective, SARS determined that there are approximately 7 million registered personal income tax taxpayers in South Africa.[153] The 2023 survey by

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148 S 224 Tax Administration Act.

149 Gneezy and Aldo "A Fine Is a Price" *The Journal of Legal Studies* 2000. Ratto and Gemmell "The Effects of Penalty Information on Tax Compliance: Evidence from a New Zealand Field Experiment" *National Tax Journal* 2018 579.

150 Devos "Do Penalties and Enforcement Measures Make Taxpayers More Compliant? —the View of Australian Tax Evaders" *Journal of Business and Economics* 2014.

151 Alm, Jackson and McKee "Estimating the Determinants of Taxpayer Compliance with Experimental Data: Abstract" *National Tax Journal* 1992. This finding is supported by Iyer, Reckers and Sanders "Increasing Tax Compliance in Washington State: A Field Experiment" *National Tax Journal* 2010 7-32.

152 Mphagahlele and Schutte "The Influence of Penalties on the Tax Compliance Behaviour of Small Business Owners" *Southern African Business Review* 2022.

153 Tax Statistics 2023 at https://www.sars.gov.za/wp-content/uploads/2023-Tax-Statistics-Main-Publication-compressed.pdf (Accessed 01/03/2024) 8.

the Statistician General showed more than 60 million people in South Africa.[154] These statistics indicate that South Africa may have a large shadow economy of unregistered taxpayers, resulting in non-compliance and evasion, or the tax base is small due to low social and economic standards (people do not meet the financial requirements to register for tax). Regarding the former, South Africa's informal economy appears to represent approximately 28.8 percent of the total economy.[155] Considering the number of registered taxpayers and the size of the informal economy, it raises questions about the efficacy of penalties for non-compliance as it relates to the duties to register for tax.

5.2.4. Pay: Rewards as incentives for tax compliance and reporting of tax evasion and non-compliance

5.2.4.1. Observations in academic literature on rewards as a tool to promote whistleblowing and compliance

This section of the chapter examines the effectiveness of whistleblowing as a tool to promote compliance. The key features of this section are the role of positive incentives on taxpayer decision strategies, the potential benefits of using whistleblowing to encourage compliance, and the hallmarks of a proper legislative framework.

This section commences with the role of rewards or positive incentives on taxpayers' behaviour. After that, reference is made to various experimental studies on the effectiveness of incentivised tax whistleblowing programmes. This is followed by

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154 Stats SA at https://www.statssa.gov.za/?p=15601 (Accessed 01/03/2024).

155 World Economics, South Africa's Informal Economy Size at https://www.worldeconomics.com/National-Statistics/Informal-Economy/South%20Africa.aspx#:~:text=The%20size%20of%20South%20Africa's,easy%20comparison%20with%20other%20countries (Accessed 17/10/2023). Statista Number of people employed in the informal sector in South Africa from 2010 to 2020 at https://www.statista.com/statistics/1296024/number-of-informal-sector-employees-in-south-africa/ (Accessed 17/10/2023).

comments on the hallmarks of the legislative framework implementing these programmes.

5.2.4.1.1. Role and purpose of tax whistleblowing programmes

Bornman defines a tax compliance reward as "an incentive of a tangible or relational nature administered by a tax authority to encourage voluntary compliance by taxpayers".[156] As early as 1997, Dworkin stated that whistleblowing is one of the cheapest and most efficient sources of protecting the public good.[157] This may be partly because whistleblowing influences taxpayer behaviour. A study by Kastlunger, Muehlbacher, Kirchlerand and Mittone suggests that positive incentives directly influence taxpayers' decision strategies.[158] The study reveals that taxpayers balance the benefit of additional income from tax evasion against the reward for compliance.[159] In the context of a traitorous whistleblower, this means that the reward offered must be of such a nature that it outperforms the potential earnings of evasion and non-compliance.

A bounty reward can be a powerful motivator for a whistleblower to come forward and report non-compliance or evasion.[160] According to Rodrigues, anti-retaliation measures are essential as they work to eliminate any potential negative consequences that could discourage individuals from reporting. While reward and anti-retaliation serve similar goals, they address separate issues and should work together to create a safe and

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156 Bornman *Principles for Understanding, Encouraging and Rewarding Voluntary Tax Compliance* (DPhil, 2015 University of Johannesburg) 319.

157 Dworkin "Should Greed Be the Goad for Good?" *Journal of Financial Crime* 1997 339. Ff Ramirez "Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power" *University of Cincinnati Law Review* 2008 232-233.

158 Kastlunger, Muehlbacher, Kirchlerand and Mittone "What Goes around Comes Around? Experimental Evidence of the Effect of Rewards on Tax Compliance" *Public Finance Review* 2011 162.

159 Kastlunger, Muehlbacher, Kirchlerand and Mittone "What Goes around Comes Around? Experimental Evidence of the Effect of Rewards on Tax Compliance" *Public Finance Review* 2011 162.

160 Rodrigues "Optimizing Whistleblowing" *Temple Law Review* 2021 265.

supportive environment for whistleblowers.[161] Since anti-retaliation laws do not always account for the risks associated with whistleblowing, reward becomes increasingly essential to incentivise whistleblowing.[162] This aligns with Bornman's opinion that tax compliance reward aims to show appreciation and recognition to taxpayers for their voluntary compliance.[163]

According to Dworkin, the False Claims Act of 1963 of the United States, which introduced financial rewards for whistleblowers, was a game-changer in incentivising whistleblowing. The underlying social-psychological literature review suggested that rewards' size and structure could certainty bring about two types of whistleblowers: Firstly, it encourages lower-level or younger employees with shorter tenure to blow the whistle, since there may be a financial benefit.[164] The second type is the savvy employees who appreciate the risk and can make a risk-benefit analysis.[165]

In 2013, Breuer conducted a study to examine the effect of monetary incentives on the decision of taxpayers to report tax evasion and declare their taxable income. The study also aimed to determine the effect of financial incentives on whistleblowing and revenue collection.[166] His findings were that monetary incentivised whistleblowing increased reporting and directly contradicted earlier research that it may have a "crowing-out effect". In addition, according to Breuer, some whistleblowers will blow the whistle irrespective of whether they receive a reward.[167] Furthermore, the size of the reward also had a direct

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161 Rodrigues "Optimizing Whistleblowing" *Temple Law Review* 2021 265.
162 Dworkin "Should Greed Be the Goad for Good?" *Journal of Financial Crime* 1997 338.
163 Bornman *Principles for Understanding, Encouraging and Rewarding Voluntary Tax Compliance* (DPhil, 2015 University of Johannesburg) 316.
164 Dworkin "Should Greed Be the Goad for Good?" *Journal of Financial Crime* 1997 338. Ff Vihanto "Tax evasion and the psychology of the social contract" *The Journal of Socio Economics* 2003 113.
165 Dworkin "Should Greed Be the Goad for Good?" *Journal of Financial Crime* 1997 338.
166 Breuer "Tax compliance and whistleblowing–The role of incentives" *Bonn. Journal of Economics* 2013 8.
167 Breuer "Tax compliance and whistleblowing–The role of incentives" *Bonn. Journal of Economics* 2013 8.

influence on the number of reports filed. He concluded that incentivised whistleblowing is one of the most powerful measures against tax evasion.[168]

In 2015, Bornman and Stack examined whether the use of rewards promote compliant behaviour.[169] Their results confirm that rewards are more effective in encouraging compliance than penalties.[170]

In 2020, Berger, Preetika and Thorne experimentally studied the effect of incentivised whistleblowing programmes on taxpayer behaviour. They employed a mixed-method approach to provide empirical findings to show the effectiveness of whistleblowing programmes in deterring aggressive tax filing or tax evasion.[171] Their findings suggest that aggressive tax planning was reduced when financially incentivised whistleblowing was introduced.[172] This finding is linked to Becker's economic deterrence theory introduced in 1968, which implies that tax aggressiveness is relative to the increased detection risk resulting from an incentivised tax whistleblowing programme.[173] In other words, a reward-based incentivised tax whistleblowing programme results in less tax evasion and avoidance. According to Berger, Preetika and Thorne, a reward-based tax whistleblowing programme is an effective tool to curb and prevent tax evasion and avoidance.[174] The study suggests that tax whistleblower programmes serve two purposes: Detection of evasion or non-compliance to collect revenue for the state and deterrence of tax evasion. Finally, the study found that tax whistleblower programmes

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168 Breuer "Tax compliance and whistleblowing–The role of incentives" *Bonn. Journal of Economics* 2013 8.

169 Bornman and Stack "Rewarding Tax Compliance: Taxpayers' Attitudes and Beliefs" *Journal of Economic and Financial Sciences* 2015 804.

170 Bornman and Stack "Rewarding Tax Compliance: Taxpayers' Attitudes and Beliefs" *Journal of Economic and Financial Sciences* 2015 804.

171 Berger, Preetika and Thorne "The Efficacy of Tax Whistleblowing Programs: A Mixed Methods Investigation" *National Tax Association* 2020 1-2.

172 Berger, Preetika and Thorne "The Efficacy of Tax Whistleblowing Programs: A Mixed Methods Investigation" *National Tax Association* 2020 25.

173 Berger, Preetika and Thorne "The Efficacy of Tax Whistleblowing Programs: A Mixed Methods Investigation" *National Tax Association* 2020 26.

174 Berger, Preetika and Thorne "The Efficacy of Tax Whistleblowing Programs: A Mixed Methods Investigation" *National Tax Association* 2020 26.

serve two purposes: detecting evasion or non-compliance to collect revenue for the state and discouraging tax evasion.[175]

However, a tax whistleblowing programme's purpose is broader than its influence on taxpayer behaviour. Tax whistleblowing programmes are also central to information gathering, besides influencing tax evasion and non-compliance from an economic deterrence theory viewpoint by increasing detection risk.[176] Tax whistleblowing programmes help revenue authorities to breach the tax gap, especially when there is a severe resource and information deficiency to prosecute tax offences properly.[177] Tax whistleblowing programmes result in more promising prosecution and collection of tax debts.[178] In conclusion, tax whistleblowing programmes are essential to fighting crimes such as tax evasion, fraud and mismanagement, as they promote transparency.[179]

5.2.4.1.2. Experimental studies on tax whistleblowing programmes

In 2010, Bazart and Pickhardt provided experimental evidence of the effect of positive rewards on personal income tax evasion. They experimentally investigated the effect of reward, in the form of a lottery, on fully compliant taxpayers, rather than only sanctioning

175 Berger, Preetika and Thorne "The Efficacy of Tax Whistleblowing Programs: A Mixed Methods Investigation" *National Tax Association* 2020 29.

176 Dennis and Ventry "Not Just Whistling Dixie: The Case for Tax Whistleblowers in the States" *Villanova Law Review* 2014 474-475.

177 Dennis and Ventry "Not Just Whistling Dixie: The Case for Tax Whistleblowers in the States" *Villanova Law Review* 2014 469.

178 Dennis and Ventry "Not Just Whistling Dixie: The Case for Tax Whistleblowers in the States" *Villanova Law Review* 2014 469 and 502.

179 Transparency International "Whistleblowing: An Effective Tool in the Fight against Corruption" 1. (2010) at https://images.transparencycdn.org/images/2010_1_PP_Whistleblowing_EN.pdf (Accessed 25/04/2024) 3. Ff Dourado "Whistle-Blowers in Tax Matters: Not Public Enemies" *Intertax* 2018 426.

non-compliance.[180] Their findings revealed that the potential lottery winnings for fully compliant taxpayers significantly impacted tax compliance in general since it lured potential non-compliant taxpayers into the compliance domain.[181] Interestingly, the findings revealed that the male participants displayed a higher compliance rate with introducing lottery rewards.[182] They proposed that implementing rewards, such as lottery winnings, for complying with tax regulations can lead to higher revenue in countries with low tax compliance rates and a higher percentage of male taxpayers, typical features of developing nations.[183] Therefore, they conclude that the strategy will work well within developing countries that share the above attributes.[184]

After Bazart and Pickhardt's experiment, Schmolke and Utikal investigated how individual or situational determinants impact individuals' willingness to report misconduct to a sanctioning authority.[185] Their experiment determined that fines and rewards positively influence persons' willingness to report misconduct.[186]

In 2016, Brockmann, Genschel and Seelkopf considered the effects of a so-called "lucky" or lottery reward for tax compliance versus a donation framework where taxpayers may

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180 Bazart and Pickhardt "Fighting Income Tax Evasion with Positive Rewards" *Public Finance Review* 2010 125.

181 Bazart and Pickhardt "Fighting Income Tax Evasion with Positive Rewards" *Public Finance Review* 2010 145.

182 Bazart and Pickhardt "Fighting Income Tax Evasion with Positive Rewards" *Public Finance Review* 2010 145.

183 Bazart and Pickhardt "Fighting Income Tax Evasion with Positive Rewards" *Public Finance Review* 2010 145-146.

184 Bazart and Pickhardt "Fighting Income Tax Evasion with Positive Rewards" *Public Finance Review* 2010 146.

185 Schmolke and Utikal "Whistleblowing: Incentives and situational determinants" *FAU Discussion Papers in Economics* 2016 5-6.

186 Schmolke and Utikal "Whistleblowing: Incentives and situational determinants" *FAU Discussion Papers in Economics* 2016 25.

earmark their contribution to a specific purpose.[187] They hypothesised that both systems would increase tax compliance from a procedural utility perspective.[188]

Concerning the threat-based system, their findings revealed that this is the most expensive system for governments in the context of time, resources and persons spent attempting to increase tax compliance.[189] It also results in a high-stress society where taxpayers fear penalties due to inadvertent errors on their tax returns.[190] These factors result in limited usefulness in the strategy for improving tax compliance.[191] For norm-based strategies, their findings were that certain taxpayers are intrinsically motivated to comply with taxation laws and view compliance as part of their civic duty.[192] This finding is closely associated with the social and fiscal exchange theory discussed in Chapter 4.[193] As for a reward-based system, they found conclusive evidence of increased compliance, but that under this system, there is a possibility of "crowding-out" intrinsically motivated taxpayers.[194] Despite this negative finding, the authors conclude that rewards-based strategies are likely the most successful policy to increase reporting and compliance.[195]

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187 Brockmann, Genschel and Seelkopf "Happy taxation increasing tax compliance through positive rewards?" *Journal of Public Policy* 2016 382. The study by Brockman *et al.* aligns with the findings of Farrar, Hausserman and Rennie "The influence of revenge and financial rewards on tax fraud reporting intentions" *Journal of Economic Psychology* 102-116.

188 Brockmann, Genschel and Seelkopf "Happy taxation increasing tax compliance through positive rewards?" *Journal of Public Policy* 2016 382.

189 Brockmann, Genschel and Seelkopf "Happy taxation increasing tax compliance through positive rewards?" *Journal of Public Policy* 2016 383.

190 Brockmann, Genschel and Seelkopf "Happy taxation increasing tax compliance through positive rewards?" *Journal of Public Policy* 2016 383.

191 Brockmann, Genschel and Seelkopf "Happy taxation increasing tax compliance through positive rewards?" *Journal of Public Policy* 2016 383.

192 Brockmann, Genschel and Seelkopf "Happy taxation increasing tax compliance through positive rewards?" *Journal of Public Policy* 2016 384.

193 Chapter 4 para 4.3.2 and 4.3.3.

194 Brockmann, Genschel and Seelkopf "Happy taxation increasing tax compliance through positive rewards?" *Journal of Public Policy* 2016 399. Ff Breuer "Tax compliance and whistleblowing–The role of incentives" *Bonn. Journal of Economics* 2013 7-45.

195 Brockmann, Genschel and Seelkopf "Happy taxation increasing tax compliance through positive rewards?" *Journal of Public Policy* 2016 399. Ff Breuer "Tax compliance and whistleblowing–The role of incentives" *Bonn. Journal of Economics* 2013 7-45.

In 2017, Wilde studied the deterrent effect of employee whistleblowing on firms' financial misreporting and tax aggressiveness.[196] This study is significant as it makes two primary contributions. The first is that it provides empirical evidence that shows that whistleblowing is a means to deter financial misreporting and aggressive tax filing.[197] The second is that it highlights whistleblowing's ability to limit and prevent misreporting and tax aggressiveness.[198] The findings confirm that implementing whistleblowing policies curtails financial misreporting and reduces aggressive tax planning.[199]

The work done by Farrar, Hausserman and Rennie supports the findings of Brockmann, Genschel and Seelkopf. In 2019, Farrar, Hausserman and Rennie tested whether feelings of revenge and financial rewards influence tax fraud reporting.[200] They found that financial incentives have a low or diminished crowding-out effect on tax fraud reporting. They also found that, in some cases, both factors will increase reporting.[201] Thus, vengeful reporting may result in false claims being made. This highlights the need for the authority dealing with the whistleblower report to be able to verify and consider the report independently.

The effect of their findings on revenge as a motivator for tax fraud reports is essential, as it may result in false claims being reported.[202] Despite this possibility, the authors conclude that taxpayers are able to translate negative intrinsic motivation (revenge) into a positive motivation.[203] The findings by Farrar, Hausserman and Rennie could suggest

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196 Wilde "The Deterrent Effect of Employee Whistleblowing on Firms' Financial Misreporting and Tax Aggressiveness" *The Accounting Review* 2017 249.

197 Wilde "The Deterrent Effect of Employee Whistleblowing on Firms' Financial Misreporting and Tax Aggressiveness" *The Accounting Review* 2017 248.

198 Wilde "The Deterrent Effect of Employee Whistleblowing on Firms' Financial Misreporting and Tax Aggressiveness" *The Accounting Review* 2017 248.

199 Wilde "The Deterrent Effect of Employee Whistleblowing on Firms' Financial Misreporting and Tax Aggressiveness" *The Accounting Review* 2017 248.

200 Farrar, Hausserman and Rennie "The influence of revenge and financial rewards on tax fraud reporting intentions" *Journal of Economic Psychology* 2019 103.

201 Farrar, Hausserman and Rennie "The influence of revenge and financial rewards on tax fraud reporting intentions" *Journal of Economic Psychology* 2019 111.

202 Farrar, Hausserman and Rennie "The influence of revenge and financial rewards on tax fraud reporting intentions" *Journal of Economic Psychology* 2019 112.

203 Farrar, Hausserman and Rennie "The influence of revenge and financial rewards on tax fraud reporting intentions" *Journal of Economic Psychology* 2019 112.

that a psychological reward may serve as motivation for reporting. This suggestion aligns with the findings related to intrinsically motivated taxpayers detailed in Chapter 4.[204]

In 2019, Gholami and Salihu conducted a study to evaluate whistleblowing's role in combatting corruption in Nigeria.[205] They aimed to examine how the existing policy should be strengthened to effectively address Nigeria's corruption challenges.[206] Corruption, like money laundering or tax evasion, is a concealed activity that complicates and frustrates its investigation. As a result, the investigation depends on persons volunteering information.[207]

Nigeria's Federal Ministry of Finance introduced a whistleblowing policy on 21 December 2016 to support the fight against financial crimes.[208] The policy had three main goals: To increase public accountability and transparency in the administration of public funds, to recover funds to finance infrastructures, to attract foreign investors, and to promote a corruption-free society.[209] The policy provided that any person with genuine information on mismanagement or misappropriation of public resources, corruption or fraud is urged to report the practices, and should the information lead to the recovery of funds, the informant may receive up to five percent of the recovered amount.[210]

When the study was conducted, the Whistleblower Protection Bill and Safeguard Disclosure Bill had not been enacted. But despite the policy only being practical, Nigeria

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204 Chapter 4 para 4.4. Ff Breuer "Tax compliance and whistleblowing–The role of incentives" *Bonn. Journal of Economics* 2013 7-45.

205 Gholami and Salihu "Combating Corruption in Nigeria: The Emergence of Whistleblowing Policy" *Journal of Financial Crime* 2019 131.

206 Gholami and Salihu "Combating Corruption in Nigeria: The Emergence of Whistleblowing Policy" *Journal of Financial Crime* 2019 132.

207 Gholami and Salihu "Combating Corruption in Nigeria: The Emergence of Whistleblowing Policy" *Journal of Financial Crime* 2019 134.

208 Gholami and Salihu "Combating Corruption in Nigeria: The Emergence of Whistleblowing Policy" *Journal of Financial Crime* 2019 137.

209 Gholami and Salihu "Combating Corruption in Nigeria: The Emergence of Whistleblowing Policy" *Journal of Financial Crime* 2019 137.

210 Gholami and Salihu "Combating Corruption in Nigeria: The Emergence of Whistleblowing Policy" *Journal of Financial Crime* 2019 138.

experienced increased disclosure of financial crimes. As a result of this, the authors argued that whistleblowing is an effective tool for exposing corruption and fraud.[211]

In 2021, Niels and Stapler conducted empirical research on the deterrence effect of whistleblowing on offshore tax evasion. They determined that customer information leaks from banks in tax havens and deters criminal use of offshore banking services, as well as confirming the deterrence effect of whistleblowing.[212]

5.2.4.1.3. Remarks observed on the legislative framework of whistleblowing policies

Whistleblowers have a significant role to play beyond simply revealing and reporting violations. They help to prevent non-compliance. A well-executed whistleblowing programme adds a risk factor to non-compliance by raising the chances of being caught and receiving penalties, which results in higher revenue collections.[213]

One of the critiques against tax whistleblowing is that it may lead to a parallel tax administration process where citizens without expert knowledge of the tax laws act as quasi-revenue agents and have no training to identify potential false claims.[214] These fears lack support, as a well-crafted tax whistleblowing framework provides mechanisms under which the reports are scrutinised and verified before the revenue agency attempts to raise a tax debt and enforce the same or the prosecution of tax evasion crimes. [215]

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211 Gholami and Salihu "Combating Corruption in Nigeria: The Emergence of Whistleblowing Policy" *Journal of Financial Crime* 2019 139-140.

212 Niels and Stolper "The Deterrence Effect of Whistleblowing" *Journal of Law & Economics* 2021 822 and 837.

213 National Whistleblower Center "Why Whistleblowing Works" at https://www.whistleblowers.org/why-whistleblowing-works/ (Accessed 15/05/2023).

214 Dennis and Ventry "Not Just Whistling Dixie: The Case for Tax Whistleblowers in the States" *Villanova Law Review* 2014 454.

215 Dennis and Ventry "Not Just Whistling Dixie: The Case for Tax Whistleblowers in the States" *Villanova Law Review* 2014 454.

Some argue that whistleblowing programmes infringe on taxpayers' rights to due process (just administrative action), privacy and confidentiality.[216] They say that whistleblowing programmes result in taxpayers' otherwise confidential information being subject to public opinion and scrutiny due to the whistleblowing report.[217] Although this is possible, there are mechanisms to limit the potential infringement. In a South African context, one such mechanism is to empower the tax court to have jurisdiction over the prosecution of a whistleblowing report, as its proceedings are considered confidential. Moreover, the secrecy provisions in the Tax Administration Act ensure that any audit or investigation, irrespective of the trigger for such audit or investigation, remain confidential.[218]

In their report, Transparency International, amongst other things, states that many jurisdictions limit whistleblowing laws to labour environments, limiting the effectiveness and applicability of those provisions.[219] Furthermore, there appears to be an overreliance on criminal laws and witness protection programmes to protect whistleblowers, instead of providing a proper framework for protecting whistleblowers.[220] South Africa is an example hereof, as discussed in Chapter 2.

Appropriate whistleblower legislation is required to establish a culture of compliance and integrity in the taxation sphere.[221] Dourado holds that a proper whistleblowing programme significantly improves fairness and democracy.[222] She believes that whistleblowers'

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216 Dennis and Ventry "Not Just Whistling Dixie: The Case for Tax Whistleblowers in the States" *Villanova Law Review* 2014 455.

217 Dennis and Ventry "Not Just Whistling Dixie: The Case for Tax Whistleblowers in the States" *Villanova Law Review* 2014 455.

218 Ss 67 to 69 Tax Administration Act.

219 Transparency International. "Whistleblowing: An Effective Tool in the Fight against Corruption" (2010) at https://images.transparencycdn.org/images/2010_1_PP_Whistleblowing_EN.pdf (Accessed 25/04/2024) 3.

220 Transparency International. "Whistleblowing: An Effective Tool in the Fight against Corruption" (2010) at https://images.transparencycdn.org/images/2010_1_PP_Whistleblowing_EN.pdf (Accessed 25/04/2024) 3.

221 Transparency International. "Whistleblowing: An Effective Tool in the Fight against Corruption" (2010) at https://images.transparencycdn.org/images/2010_1_PP_Whistleblowing_EN.pdf (Accessed 25/04/2024) 3.

222 Dourado "Whistle-Blowers in Tax Matters: Not Public Enemies" *Intertax* 2018 424.

protection under a specialised framework is linked to their ability to prove their reasonable belief in tax evasion.[223]

In a study by Buccirossi, Immordino and Spagnolo[224] the authors attempt to develop a model to examine the interaction between financial reports for whistleblowers and the sanctions for reporting false or fabricated information to the revenue authority.[225] They find that if a system penalises whistleblowers severely for dishonest or inaccurate reporting, the rewards required for the programme to be effective for honest reports must also be increased.[226] This thesis submits that a penalty for inaccurate reporting may be counterproductive in encouraging whistleblowing.

Riggal notes that not every person is intrinsically motivated to become an informant, especially considering the personal and professional risks of blowing the whistle.[227] Moreover, even if there is a concern that false claims by disgruntled employees or spouses may lead to the misuse of resources, such reports would have existed regardless of the existence of a whistleblowing programme. This is because the motive behind such reports is often to settle personal scores and emotions, rather than to gain financial benefits.[228] Accordingly, the potential gain from monetised tax whistleblowing programmes outshines the limited non-pecuniary rewards.

Concerning the scope of potential financial rewards, Riggal advocates for an uncapped or open-ended reward to be payable to an informant to soothe the personal or

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223 Dourado "Whistle-Blowers in Tax Matters: Not Public Enemies" *Intertax* 2018 424.
224 Dourado "Whistle-Blowers in Tax Matters: Not Public Enemies" *Intertax* 2018 424.
225 Buccirossi, Immordino and Spagnolo "Whistleblower Rewards, False Reports, and Corporate Fraud" *European Journal of Law and Economics* 2021 413.
226 Buccirossi, Immordino and Spagnolo "Whistleblower Rewards, False Reports, and Corporate Fraud" *European Journal of Law and Economics* 2021 429.
227 Riggall "Should Tax Informants Be Paid - the Law and Economics of a Government Monopsony" *Virginia Tax Review* 2006 18.
228 Riggall "Should Tax Informants Be Paid - the Law and Economics of a Government Monopsony" *Virginia Tax Review* 2006 20.

professional risk associated with the disclosure.[229] She argues that if a limit is placed on the reward payable, informants will consider the cost of the report against the potential gain, which may result in decreased reporting if the risk is more than the reward. Such an approach may be pennywise but pound-foolish.

Nan, Tang and Zhang experimentally studied the informational value of whistleblowing reports subject to monetary rewards.[230] Their findings flagged that in some circumstances, the value of the report deteriorates, especially if a marginal taxpayer makes it.[231] Even so, the financial rewards still result in increased reports where there were previously none. They suggest that revenue authorities may consider different or adjusting awards for sectors more prone to fraud.[232] This is an interesting suggestion; that the reward for different sectors is adjusted to improve reporting.

5.2.4.2. Concluding remarks on whistleblowing

The observations from the literature studied, regarding rewards as an incentive for whistleblowing and tax compliance, can be summarised in seven key aspects: Firstly, reward-based whistleblowing directly influences taxpayer behaviour. It has an immediate social and economic impact on the decision-making process of taxpayers. Secondly, the studies show that the introduction of a reward-based whistleblowing programme results in increased reporting of non-compliance and evasion. This renders reward-based whistleblowing one of the most powerful tools available to promote voluntary compliance.

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229 Riggall "Should Tax Informants Be Paid - the Law and Economics of a Government Monopsony" *Virginia Tax Review* 2006 43.

230 Nan, Tang and Zhang "Whistleblowing Bounties and Informational Effects" *Journal of Accounting and Economics* 2024 13.

231 Nan, Tang and Zhang "Whistleblowing Bounties and Informational Effects" *Journal of Accounting and Economics* 2024 13.

232 Nan, Tang and Zhang "Whistleblowing Bounties and Informational Effects" *Journal of Accounting and Economics* 2024 13.

Thirdly, penalties and or sanctions are often ineffective, and taxpayers are unresponsive to their imposition. A reward-based whistleblowing programme can supplement the penalty strategy in that it bridges the gap by steering potential non-compliant taxpayers into the compliant domain.

Fourthly, a reward-based whistleblowing programme serves a broader role than that of penalties, reporting duties and anti-retaliation laws. It serves to collect information and evidence to investigate and prosecute silent crimes such as tax evasion and corruption.

Fifthly, one of the requirements for an effective whistleblowing programme is a culture of whistleblowing. This means that the perception of whistleblowing must be altered on both a social and economic level. This can be achieved by introducing a reward for whistleblowing, as it triggers taxpayers' natural reaction to weigh the financial benefit of any action.

Sixthly, whistleblowing for reward does not have a crowding-out effect, meaning that it has the potential to reach a larger audience to promote compliance. Seventhly, the informational value of the reports must be objectively evaluated.

Incentives or reward encourages whistleblowing, but to avoid abuse, such a programme should not be without proper regulation. Some jurisdictions regularise whistleblowing incentive programmes regarding certain thresholds or requirements that are applicable.[233] For instance, they weigh the value of the incentive against the significance of the evidence provided by the whistleblower.

The value of the information provided and its timing will be a crucial element that must be carefully considered. For example, when SARS investigates a tax offence and during the investigation the whistleblower learns of the investigation and comes forward to tender information. SARS will then need to consider whether the information tendered by the

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233 See the discussion on the regulations of US in Chapter 6 para 6.2 and Australia in Chapter 6 para 6.3.

whistleblower would have been revealed during the audit, and the value thereof at the stage of disclosure. In this consideration, one must differentiate between a whistleblower who comes forward without knowledge of SARS' investigation, or early in SARS' investigation, and a whistleblower who realised the net was closing and blowing the whistle would be his only reprieve.

Judge Zondo in this report of the Judicial Commission of Inquiry into State Capture, recommended that deferred prosecution agreements be introduced for purposes of tax offences and tax disputes.[234] A deferred prosecution agreement is when the prosecuting authority and an accused agrees not to pursue the prosecution in exchange for admittance of wrongdoing, restitution and any other obligations.[235] This could include obligations such as testifying in favour of the government or to produce information. Mpofu argues that deferred prosecution agreements should be considered in the context of tax disputes as it may assist SARS to fulfil its mandate and ensure efficient tax collection.[236] This thesis agrees with Mpofu's contention and submits that the deferred prosecution agreements could be extended to tax whistleblowers.

5.3. Conclusion

South Africa's tax compliance strategy is based mainly on the assumption that all taxpayers strive for voluntary compliance. [237] The strategic objectives discussed in Chapter 4 of this dissertation have outlined the various aspects in which SARS attempts to foster a voluntary compliance culture. Accordingly, the strategy to incentivise voluntary compliance must match this strategic objective. For the reasons summarised in this

234 Judicial Commission of Inquiry into State Capture Report: Part VI 2021 23-25.
235 Delaney "Congressional Legislation: The Next Step for Corporate Deferred Prosecution Agreements" *Marq.L.Rev* 2009 878.
236 Mpofu *The use of deferred prosecution agreements in tax disputes* (LLM dissertation 2022 UP) 49.
237 Bornman and Stack "Rewarding Tax Compliance: Taxpayers' Attitudes and Beliefs" *Journal of Economic and Financial Sciences* 2015 792.

chapter, it is submitted that the current strategies need supplementation to increase their effectiveness. The South African courts have already identified that taxpayer compliance and disclosure of information is not related to confidentiality provisions or anti-retaliation laws. Rather, the potential benefit of disclosure informs the decision to disclose information or comply with tax laws.[238]

From the discussion above, anti-retaliation laws, which include the provisions of confidentiality, do not serve as an incentive to promote tax whistleblowing or compliance. Therefore, one must be wary of defining such laws and provisions as an incentive for whistleblowing. Instead, the role and scope of these laws must be redefined to be a measure to mitigate the collateral damage associated with whistleblowing.

Reporting duties effectiveness is, by and large, limited to intrinsically motivated taxpayers. These duties do not entice taxpayers who are more concerned with fiscal exchange or benefit. Accordingly, reporting duties are ineffective as a means to incentivise whistleblowers to disclose non-compliance and evasion. It is also shown in this chapter and in Chapter 2 that the South African reporting duties are wholly inadequate to serve as an incentive in a tax whistleblowing context.

This chapter demonstrates that penalties are not the only measure to promote compliance. This is supported by the various studies referred to above, in that penalties are primarily ineffective, and most taxpayers are unresponsive towards their imposition. Within the South African context, penalties are disregarded by small business owners who must decide between paying employees and business continuity versus penalties for their intentional or negligent failure to comply. Other economic trading factors predominantly influence taxpayers' decisions to comply as opposed to penalties.

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238 *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Services and Others* 2022 (2) SA 485 (GP) para 8.

In the light of the above, the role of a reward-based tax whistleblowing programme as a means to promote voluntary compliance is a crucial introduction to the Tax Administration Act. This results in a mixed-method approach to achieve SARS' strategic objectives and the promotion of voluntary compliance.

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Chapter 6: Lessons from foreign jurisdictions

6.1. Introduction

Following the discussion in Chapter 5 on the different compliance strategies that governments and revenue authorities may implement to promote taxpayer compliance and whistleblowing and combat tax evasion, this chapter is dedicated to considering the practical implementation of these strategies within two jurisdictions, namely the United States and Australia.

These two jurisdictions have been selected for the following reasons. Both jurisdictions have a codified tax system, similar to South Africa. The US implemented a reward-based incentive for tax whistleblowing by paying monetary rewards to whistleblowers from the collected proceeds resulting from their reports. The Australian legislature does not reward whistleblowers with monetised rewards. Instead, they implement stronger anti-retaliation laws to incentivise tax whistleblowing through the protection of tax whistleblowers. At present, although the South African labour law dispensation, and to some extent the FICA, provide for a whistleblowing regime, there is no tax whistleblowing policy or regulations.[1]

The US' policy framework features a broadened scope, and the incentives are defined *inter alia* by the nature and significance of the information provided by the whistleblower. In contrast, the Australian policy framework relies more heavily on procedural requirements such as the person to whom the disclosure is made and the way in which the disclosure was made.

The objective of this chapter is not to delve into a comparative analysis of the South African legislative framework and that of the US and Australia. The objective is to gain a

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[1] Chapter 2 para 2.5.

practical perspective on how the US and Australia have addressed the subject of tax whistleblowers. The chapter explores how the legal frameworks of the US and Australia integrated the diverse elements and criteria essential for an effective tax whistleblowing programme.

6.2. US

6.2.1. History and Background of the Whistleblower Programme in the US

6.2.1.1. False Claims Act

On 2 March 1863, the US Congress enacted the False Claims Act ("FCA"), which provided for *qui tam* provisions to combat crime.[2] The FCA provides that the Department of Justice ("DOJ") could pay rewards to informants. The informant would submit a complaint to the DOJ, who may then decide whether to institute proceedings. If the DOJ refuses to institute proceedings, the informant may bring an action against the alleged wrongdoer. If the government instituted action from the complaint or report, the informant is paid fifteen to 25 percent of the amount collected.[3] But, if the government refuses to initiate proceedings and the informant is successful in its prosecution, the informant is entitled to 25 to 30 percent of the collections.[4]

The FCA has been largely successful, and in 2021, a total of 801 reports were made, resulting in the collection of USD5,650,026,663. Approximately USD238,003,381 was paid to whistleblowers.[5]

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2 Dworkin and Brown "The Money or the Media? Lessons from Contrasting Developments in the US and Australian Whistleblowing Laws" *Seattle J. Soc. Justice* 2013 653 and 665.
3 31 U.S.C. s 3730(d)(1) (2012).
4 31 U.S.C. s 3730(d)(2) (2012).
5 U.S. Department of Justice, Civil Division, Fraud Statistics Overview https://www.justice.gov/opa/press-release/file/1467811/download (Accessed 06/07/2023).

6.2.1.2. Civil Service Reform Act of 1978

The Civil Service Reform Act of 1978 ("CSRA")[6] provides for the protection of public sector whistleblowers in respect of prohibited personnel practices. The prohibited personnel practices included the violation of any legislative provisions, mismanagement, waste or abuse of funds or authority, or substantial danger to public health or safety.[7] In drafting the CSRA, the legislator presumed that if there was a proper channel to report the prohibited practices, employees would be more inclined to do so, and whistleblowing would be more likely. To this effect, the legislature introduced the Office of Special Counsel ("OSC"), tasked to receive whistleblower reports and investigate the claims to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred.[8] The protection afforded in the CSRA was aimed at preventing retaliation against employees who reported prohibited personnel practices and included the protection of the whistleblower's identity.[9]

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6 Civil Service Reform Act of 1978 (CSRA) Public Law 95-454; 92 Stat.1111.

7 S 2303(a) of CSRA.

8 S 1206(a)(1) of CSRA "(a)(1) The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken."

9 S 1206(a)(3)(B) "a disclosure by an employee or applicant for employment to the Special Counsel of the Merit Systems Protection Board, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures of information which the employee or applicant reasonably believes evidences-(i) a violation of any law, rule, or regulation; or (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; the identity of the employee or applicant may not be disclosed without the consent of the employee or applicant during any investigation under subsection (a) of this s or under paragraph (3) of this subsection, unless the Special Counsel determines that the disclosure of the identity of the employee or applicant is necessary in order to carry out the functions of the Special Counsel."

6.2.1.3. Sarbanes-Oxley Act of 2002

After the introduction of the CSRA, the legislature promulgated the Sarbanes-Oxley Act of 2002 ("SOX"), which also outlawed retaliation.[10] The SOX applies to publicly traded entities, mail, wire, bank and securities fraud and requires companies to implement a code of ethics and whistleblowing procedures.[11] The SOX established a system that required companies to have audit committees tasked with the development of whistleblowing procedures, whereby employees could anonymously submit issues of concern.[12] The SOX also aimed to protect employees from retaliation by their employers and provided criminal penalties for retaliation.

6.2.1.4. Dodd-Frank Wall Street Reform and Consumer Protection Act

The US legislators enacted further legislation known as the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") of 2010 after the 2008 financial crisis.[13] The Securities and Exchange Commission ("SEC") used the bounty structures of the Internal Revenue Service ("IRS") and the SOX as a guideline to encourage whistleblowing under the Dodd-Frank. The notorious Bernard Madoff Ponzi Scheme largely influenced Dodd-Frank's promulgation.[14] Dodd-Frank aimed to support the SOX to be more "whistleblower friendly" by including the right to a jury trial, precluding

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10 Public Law 107-204, 107 Congress Session 2, Sarbanes-Oxley Act of 2002" United States Statutes at Large 116, no. Main S (2002) (SOX).

11 Dworkin and Brown "The Money or the Media? Lessons from Contrasting Developments in the US and Australian Whistleblowing Laws" *Seattle J. Soc. Justice* 2013 659-660.

12 Dworkin and Brown "The Money or the Media? Lessons from Contrasting Developments in the US and Australian Whistleblowing Laws" *Seattle J. Soc. Justice* 2013 660.

13 Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C 2010 (Dodd-Frank).

14 Dworkin and Brown "The Money or the Media? Lessons from Contrasting Developments in the US and Australian Whistleblowing Laws" *Seattle J. Soc. Justice* 2013 672-678.

enforcement of pre-dispute arbitration agreements, lengthening the statute of limitations, and broadening the class of employers covered.[15]

Dodd-Frank's scope of application is broader than the SOX, insofar as it regulates the types of whistleblowing that are protected, who are protected, and the type of protection afforded. Like other legislation, Dodd-Frank also banned retaliation against whistleblowers. Notwithstanding the aforesaid, it still contains a reward system to encourage whistleblowers to report financial crimes of those involved in public markets.[16]

Under the Dodd-Frank Act, a whistleblower is only entitled to an award if the tipoff resulted in a penalty or sanction against the wrongdoer more than USD1 million.[17] The Act also provides informants with a right to appeal the denial of an award to the US Court of Appeals.[18]

During the first fiscal year after the enactment of the Dodd-Frank Act, the SEC received more than 3000 reports.[19] By the 2022 fiscal year-end, the SEC received 12,300 whistleblower reports.[20] In total, the enforcement actions from the whistleblower reports resulted in orders for more than USD6,3 billion in monetary sanctions.[21]

6.2.2. Tax Whistleblower Programme in terms of the Internal Revenue Code

Prior to 2006, the Internal Revenue Code of 1986 ("IRC") contained Code 7623 which provides for the discretionary payment of rewards to informants. A report by the Treasury

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15 15 U.S.C. s 922(c).
16 15 U.S.C. s 78u-6(h).
17 15 U.S.C. s 78u-6(a)(1) (2012).
18 15 U.S.C. s 78-6(o (2012).
19 SEC Annual Report on the Dodd-Frank Whistleblower Programme, Fiscal Year 2012 https://www.sec.gov/files/annual-report-2012.pdf (Accessed 06/07/2023) 4.
20 SEC Annual Report on the Dodd-Frank Whistleblower Programme, Fiscal Year 2012 *https*://www.sec.gov/files/2022_ow_ar.pdf (Accessed 06/07/2023) 1.
21 SEC "SEC Whistleblower Office Announces Results for FY 2022" at https://www.sec.gov/files/2022_ow_ar.pdf (Accessed 31/03/2023) 1.

Inspector General for Tax Administration ("TIGTA") revealed various administrative issues with the discretionary payments system.[22] These issues included, amongst others, lack of cooperation by the IRS and invocation of secrecy provisions to avoid providing informants with reasons for the refusal of their reward.[23]

In *Anonymous 1 and 2 v Commissioner*,[24] the IRS misled the court and the whistleblower to believe that its investigation stemmed from independent information. Accordingly, so it was argued, the IRS need not pay a reward to the whistleblowers. However, it later transpired that the IRS indeed based their investigation on the reports made by the whistleblowers and was accordingly ordered to reward the whistleblowers.[25] A further issue with the programme was that it lacked adequate oversight and standardised processing of claims, resulting in delays and inconsistent application.[26]

In addition to the administrative issues, a whistleblower could only review the award made to them if they could prove an agreement with the IRS. The courts interpreted section 7623 to be an offer by the IRS that the whistleblower accepts when making a report. The parties must then agree on the amount to be paid to the whistleblower.[27] In the Merrick-case, the Federal Court held that the government was not liable to make payment of a reward under section 7623 without an agreement to that effect. The contract for payment

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22 Treasury Inspector General For Tax Administration Report 2006-30-092, The Informants' Rewards Program Needs More Centralized Management Oversight https://www.finance.senate.gov/imo/media/doc/prg060906TIGTA.pdf (Accessed 06/07/2023).

23 West, Skarbnik and Brunetti "A Primer for Tax Whistleblowers" *Taxes- The Tax Magazine* 2012 30. Stock "Tax Whistleblower Statute: Obtaining Meaningful Appeals through the Appropriate Scope of Review" *Florida State University Law Review* 2015 828 – 832.

24 *Anonymous 1 and 2 v Commissioner* 12472-11W. Stock "Tax Whistleblower Statute: Obtaining Meaningful Appeals through the Appropriate Scope of Review" *Florida State University Law Review* 2015 828.

25 *Anonymous 1 and 2 v Commissioner* 12472-11W.

26 Treasury Inspector General for Tax Administration Report 2006-30-092, The Informants' Rewards Program Needs More Centralized Management Oversight https://www.finance.senate.gov/imo/media/doc/prg060906TIGTA.pdf (Accessed 06/07/2023). Faiman "No One Likes a Tattle Tale, or Do They: Why the Implementation of a Broad Definition of Collected Proceeds under the Tax Whistleblower Programme Is a Major Win for Whistleblowers and Taxpayers" *Charleston Law Review* 2018 186.

27 *Wilson v Commissioner* 07-191T. *Merrick* 846 F2d. *Kruger* 168 Fd.

only became enforceable after an agreement was reached between the IRS and the whistleblower.[28]

As a result of the issues with the existing whistleblower programme, the legislature enacted section 406 of the Tax Relief and Health Care Act of 2006 to introduce the Office of the Whistleblower, a judicial right to appeal a denial of a reward and section 7623(b) to the Internal Revenue Code. The existing code 7623 was renumbered to 7623(a).[29] It appears that the purpose of the amendment was to make the programme "informant-friendly".

The Internal Revenue Code provides that financial incentives may be paid for tax whistleblowers under codes 7623(a) and (b) by the Office of the Whistleblower.[30] For 2020, the Office of the Whistleblower collected approximately USD472,080,014 in taxes from whistleblowers' information.[31]

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28 *Merrick* 846 F 2d 726.

29 Faiman "No One Likes a Tattle Tale, or Do They: Why the Implementation of a Broad Definition of Collected Proceeds under the Tax Whistleblower Programme Is a Major Win for Whistleblowers and Taxpayers" *Charleston Law Review* 2018 186.

30 S 7623 Internal Revenue Code provides as follows "7623…(a) The Secretary, under regulations prescribed by the Secretary, is authorized to pay such sums as he deems necessary for—(1)detecting underpayments of tax, or (2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same, in cases where such expenses are not otherwise provided for by law. Any amount payable under the preceding sentence shall be paid from the proceeds of amounts collected by reason of the information provided, and any amount so collected shall be available for such payments. S 7263(b) **Awards to whistleblowers** (1) If the Secretary proceeds with any administrative or judicial action described in subsection (a) based on information brought to the Secretary's attention by an individual, such individual shall, subject to paragraph (2), receive as an award at least 15 per cent but not more than 30 per cent of the proceeds collected as a result of the action (including any related actions) or from any settlement in response to such action (determined without regard to whether such proceeds are available to the Secretary). The determination of the amount of such award by the Whistleblower Office shall depend upon the extent to which the individual substantially contributed to such action…"

31 IRS "Fiscal Year 2020 Annual Report Office of the Whistleblower 2020" at https://irs-whistleblowers.com/wp-content/uploads/2021/12/IRS-Whistleblower-Office-Annual-Report-2020.pdf (Accessed 20/04/2024) 15.

In implementing the whistleblower programme, the IRS faced tension between taxpayer confidentiality (which they call "return information")[32] and whistleblowers. This tension was alleviated by authorising the disclosure if the information is required for any service related to tax administration.[33]

6.2.2.1. Whistleblowing under section 7623(a): Discretionary payment

Section 7623(a) provides for a discretionary payment by the IRS to an individual who assisted in the detection of the underpayment of tax or bringing a person to trial and punishment for the violation of revenue laws.[34] In such cases, the IRS may make a

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32 S 6103(a) Internal Revenue Code provides the definition of 'return information' to mean "(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, (B)any part of any written determination or any background file document relating to such written determination (as such terms are defined in s 6110(b)) which is not open to public inspection under s 6110, (C)any advance pricing agreement entered into by a taxpayer and the Secretary and any background information related to such agreement or any application for an advance pricing agreement, and (D)any agreement under s 7121, and any similar agreement, and any background information related to such an agreement or request for such an agreement, but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws."

33 S 6103(n) Internal Revenue Code provides that: "Pursuant to regulations prescribed by the Secretary, returns and return information may be disclosed to any person, including any person described in s 7513(a), to the extent necessary in connection with the processing, storage, transmission, and reproduction of such returns and return information, the programming, maintenance, repair, testing, and procurement of equipment, and the providing of other services, for purposes of tax administration."

34 S 7623(a) Internal Revenue Code "**In general** - The Secretary, under regulations prescribed by the Secretary, is authorized to pay such sums as he deems necessary for— (1)detecting

payment to the whistleblower from the collected proceeds. Payment in terms of section 7623(a) is at the discretion of the Secretary of Treasury, who may pay any sum to a whistleblower, limited to USD10 million.[35] The computation of the reward is detailed in the paragraphs below.[36] Section 7623(a) is intended to cover all of those reports that do not comply with section 7623(b).[37] The section also applies to all claims filed before the enactment of section 7623(b).[38]

The collected "proceeds" refer to the tax recovered as well as penalties, interest, any additional taxes and criminal fines.[39] The award under this code is not subject to judicial review.[40]

6.2.2.2. Whistleblowing under section 7623(b): Mandatory payment

The language used by the legislature in section 7623(b) is mandatory and prescriptive.[41] The relevant portion of section 7623(b) provides that "if the Secretary proceeds with any administrative or judicial action ... based on information brought to the Secretary's attention by an individual, such individual ... *shall* receive as an award ... of the collected

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underpayments of tax, or (2)detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same, in cases where such expenses are not otherwise provided for by law. Any amount payable under the preceding sentence shall be paid from the proceeds of amounts collected by reason of the information provided, and any amount so collected shall be available for such payments.

35 IRS policy statement 4-27 and IRM para 25.2.2.1.1.2 (1) (28 May 2020). The IRS has on occasion deviated from this amount see West, Skarbnik and Brunetti "A Primer for Tax Whistleblowers" *Taxes- The Tax Magazine* (April 2012) 32.

36 Chapter 6 para 6.2.2.

37 IRM para 25.2.2.1.1.2 (2) (25 May 2020).

38 IRM para 25.2.2.1.1.2 (1) (25 May 2020).

39 S 7623(c) Internal Revenue Code provides "For purposes of this, the term "proceeds" includes—(1) penalties, interest, additions to tax, and additional amounts provided under the internal revenue laws, and…. criminal fines and civil forfeitures….and violations of reporting requirements" The inclusion of s 7623(c) was encouraged by the case of *Whistleblower 21276 -13W* in which the court found that the term required a broad interpretation and was sweeping in scope.

40 Morse E.A. "Whistleblowers and Tax Enforcement: Using Inside Information to Close the Tax Gap" *Akron Tax Journal* 2009 22.

41 West, Skarbnik and Brunetti "A Primer for Tax Whistleblowers" *Taxes- The Tax Magazine* 2012 31.

proceeds." This, by and large, eliminates the IRS' discretion to award a whistleblower an amount following the disclosure of information used by the IRS.

Section 7623(b) generally involves higher-value claims and rewards, since it only applies when there is a tax understatement of more than USD2 million.[42] The whistleblower is then entitled to a payment of 15 to 30 percent of the total tax collected.[43] The rationale for the introduction of the tax whistleblowing programme was to target higher values and to aid in closing the tax gap.[44] This was a mechanism to facilitate and encourage whistleblowing.

Section 7623(b) requires that the information provided by the whistleblower must have substantially contributed to the audit's ultimate tax adjustment.[45] The wording of section 7623(b), especially the terms "based upon" and "substantially contributed", resulted in some academic debate.[46] Some of the interpretation issues concerning the terms "based" and "substantially contributed" are whether the information is public and could originate from more than one source, whether it requires the audit or investigation to be primarily based on the information provided.[47]

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42 S 7623(b)(5) Internal Revenue Code provides (5) Application of this subsection This subsection shall apply with respect to any action— (A)against any taxpayer, but in the case of any individual, only if such individual's gross income exceeds $200,000 for any taxable year subject to such action, and (B)if the proceeds in dispute exceed $2,000,000."

43 S 7623(b)(1) Internal Revenue Code provides "(**1) In general** - If the Secretary proceeds with any administrative or judicial action described in subsection (a) based on information brought to the Secretary's attention by an individual, such individual shall, subject to paragraph (2), receive as an award at least 15 percent but not more than 30 percent of the proceeds collected as a result of the action (including any related actions) or from any settlement in response to such action (determined without regard to whether such proceeds are available to the Secretary). The determination of the amount of such award by the Whistleblower Office shall depend upon the extent to which the individual substantially contributed to such action."

44 West, Skarbnik and Brunetti "A Primer for Tax Whistleblowers" *Taxes- The Tax Magazine* 2012 30.

45 S 7623(b)(1) Internal Revenue Code.

46 Morse "Whistleblowers and Tax Enforcement: Using Inside Information to Close the Tax Gap" *Akron Tax Journal* 2009 20-21.

47 Morse "Whistleblowers and Tax Enforcement: Using Inside Information to Close the Tax Gap" *Akron Tax Journal* 2009 20-21.

The Internal Revenue Manual outlines nine factors that the IRS considers in determining whether the whistleblower's information "substantially contributed" to the final tax assessment and collection. These factors help the IRS to decide whether the whistleblower is eligible for an award and whether it includes the following: promptness of the whistleblower's action, the significance of the information provided, the timing of the report, whether the information was previously unknown to the IRS, the likelihood of the IRS discovering the information independently, accuracy and completeness of the information, whether the information identifies assets that could aid in recovery, and whether the information has an impact on taxpayer behaviour.[48] To avoid abuse, the legislature disqualified any person who benefitted from the non-compliance or evasion.[49]

The discretion afforded to the IRS, informed by the factors listed above, is, in essence, a balance between the value of the payment and the contribution by the whistleblower. Simply put, the more crucial and valuable the information, the higher the payment.

Not all action steps taken by the IRS result in administrative or judicial action as required by section 7623(b).[50] If, for example, the non-compliant person is already under investigation, the whistleblower will be ineligible for an award.[51] Judicial action includes selecting a taxpayer for an audit or any change in the way that the IRS routinely audits entities. In other words, if the IRS bases a decision on the whistleblower report, such action can be seen as judicial action potentially triggering the reward provisions.[52] Thus,

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48 IRM para 25.2.2.2.6.4.1 (1) (28 May 2020). See also Office of the United States Securities Exchange Commission – Office of the Whistleblower (Dec 2020) https://www.sec.gov/whistleblower/frequently-asked-questions. (Accessed 02/10/2022).

49 IRM 25.2.2.6.4 (5) https://www.irs.gov/irm/part25/irm_25-002-002#idm140666751783280 (Accessed 14/07/2023).

50 IRM 25.2.2.1.4. IRM 25.2.2.1.4.(5) and (6) defines "Judicial Action – the term judicial action means all or a portion of a proceeding against any person in any court that may result in proceeds" and "Administrative action - the term administrative action means all or a portion of a IRS civil or criminal proceeding against any person that may result in proceeds including, for example, an examination, a collection proceeding, a status determination proceeding, or a criminal investigation."

51 West, Skarbnik and Brunetti "A Primer for Tax Whistleblowers" *Taxes- The Tax Magazine* 2012 32.

52 West, Skarbnik and Brunetti "A Primer for Tax Whistleblowers" *Taxes- The Tax Magazine* 2012 32.

although payment is only made when the taxes are collected, the trigger for the reward provisions is the action by the IRS.

The US legislature foresaw that, in some instances, whistleblower reports may flow from other legal processes or reports. To cater for this scenario, it introduced section 7623(b)(2)(A) to provide for the limitation of the award to 10 percent if the information is based on, amongst others, a judicial or administrative hearing, government report or news media.[53] This limitation of the award does not apply if the whistleblower was the source of information.[54]

Under section 7623(b), it is no longer required for a whistleblower to reach a separate agreement with the IRS for payment.[55] In addition, the whistleblower may appeal to the Tax Court against the determination of the award by the IRS.[56]

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53 S 7623(b)(2)(A) and (B) Internal Revenue Code provides "(2) Award in case of less substantial contribution (**A)In general** -In the event the action described in paragraph (1) is one which the Whistleblower Office determines to be based principally on disclosures of specific allegations (other than information provided by the individual described in paragraph (1)) resulting from a judicial or administrative hearing, from a governmental report, hearing, audit, or investigation, or from the news media, the Whistleblower Office may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds collected as a result of the action (including any related actions) or from any settlement in response to such action (determined without regard to whether such proceeds are available to the Secretary), taking into account the significance of the individual's information and the role of such individual and any legal representative of such individual in contributing to such action. (**B) Nonapplication of paragraph where individual is original source of information** Subparagraph (A) shall not apply if the information resulting in the initiation of the action described in paragraph (1) was originally provided by the individual described in paragraph (1)."

54 S 7623(b)(2)(B) Internal Revenue Code.

55 S 7623(b)(6)(A) Internal Revenue Code.

56 S 7623(b)(4) Internal Revenue Code.

6.2.3. Computation of award under sections 7623(a) and (b) in terms of the Internal Revenue Manual (IRM)

The calculation of the award to be paid to the whistleblower is set out in the IRM part 25.2. The Office of the Whistleblower calculates the awards once the whistleblower claim has been concluded.[57] The Office of the Whistleblower prepares two calculations after the claim is received.[58] The first calculation is a preliminary calculation to determine whether there are sufficient potential proceeds that may be collected.[59] This provides the Office of the Whistleblowers with an understanding of the recoverability of the proceeds and whether there could potentially be a payment to the whistleblower.

The second calculation is done post-determination of the collected proceeds.[60] This calculation is done to determine whether there were any additional proceeds recovered after the finalisation of the matter.[61] The IRS then make the required other adjustments to the calculation of the whistleblower award.[62]

The IRM also provides for instances in which the IRS only managed to collect the proceeds partially. In this case, the adjustments to the whistleblower award are made proportionally to the partially collected proceeds.[63]

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57 IRM 25.2.2.6.2 (5) https://www.irs.gov/irm/part25/irm_25-002-002#idm140666751783280 (Accessed 14/07/2023).

58 IRM 25.2.2.6 https://www.irs.gov/irm/part25/irm_25-002-002#idm140666751783280 (Accessed 14/07/2023).

59 IRM 25.2.2.6. (6) https://www.irs.gov/irm/part25/irm_25-002-002#idm140666751783280 (Accessed 14/07/2023).

60 IRM 25.2.2.6.2 (6) https://www.irs.gov/irm/part25/irm_25-002-002#idm140666751783280 (Accessed 14/07/2023).

61 IRM 25.2.2.6.2 (6) https://www.irs.gov/irm/part25/irm_25-002-002#idm140666751783280 (Accessed 14/07/2023).

62 IRM 25.2.2.6.2 (6) https://www.irs.gov/irm/part25/irm_25-002-002#idm140666751783280 (Accessed 14/07/2023).

63 IRM 25.2.2.6.2 (7) https://www.irs.gov/irm/part25/irm_25-002-002#idm140666751783280 (Accessed 14/07/2023).

6.2.3.1. Computation of award under section 7623(a) for claims filed before 20 December 2006

In terms of the IRM, the calculation of the award will be based on the policy in effect at the time when the whistleblower claim was filed.[64] If the whistleblower substantially participated in the scheme, resulting in a loss to the IRS, the Office of the Whistleblower may deny an award.[65]

6.2.3.2. Computation of award under section 7623(a) and (b) after 20 December 2006

The IRM deals with the calculation of awards under section 7623(a) and (b) simultaneously in paragraph 25.2.2.6.4. Suppose the proceeds exceed USD2 million or, in the case of an individual taxpayer, their gross income exceeded USD200,000 for at least one taxable year. In such a case, the award paid to the whistleblower is between 15 and 30 percent of the collected proceeds, considering the relevant factors of the whistleblower's conduct referred to above.[66]

If the proceeds are less than USD2 million and the taxpayer's gross income did not exceed USD200,000 in at least one tax period, then the award is discretionary, taking into account the nine factors listed above.[67] If the whistleblower is convicted of the crime forming the subject matter of the claim, the IRS will deny an award.[68] Similar to the claims

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64 IRM 25.2.2.6.3 (1) https://www.irs.gov/irm/part25/irm_25-002-002#idm140666751783280 (Accessed 14/07/2023).

65 IRM 25.2.2.6.3 (1) https://www.irs.gov/irm/part25/irm_25-002-002#idm140666751783280 (Accessed 14/07/2023).

66 IRM 25.2.2.6.4 (1) https://www.irs.gov/irm/part25/irm_25-002-002#idm140666751783280 (Accessed 14/07/2023)

67 IRM 25.2.2.6.4 (2) https://www.irs.gov/irm/part25/irm_25-002-002#idm140666751783280 (Accessed 14/07/2023).

68 IRM 25.2.2.6.4 (5) https://www.irs.gov/irm/part25/irm_25-002-002#idm140666751783280 (Accessed 14/07/2023)

filed before 20 December 2006, if the whistleblower substantially participated in the scheme or played a crucial role in the defrauding of the IRS, the award may be reduced.[69]

6.2.4. Protections afforded to tax whistleblowers under section 7623(b)

Apart from the financial incentives offered to whistleblowers, a further incentive for whistleblowers is the protection provided under the whistleblowing programme. A discussion of the different protections offered to tax whistleblowers follows.

6.2.4.1. Anti-retaliation

Section 7623(d) provides that employers may not retaliate against employees, contractors or agents when they make a whistleblower report, assist or testify in any judicial action taken by the IRS under section 7623 relating to underpayment of tax or violation of tax laws or fraud.[70] Notably, outside the labour law framework, the whistleblower is not protected against retaliation from the taxpayer. Thus, a whistleblower may be the subject of a claim for damages by the impugned taxpayer.

The remedial actions available to whistleblowers in a labour environment who suffer any damage by virtue of making a report include reinstatement of their status if they have been dismissed and payment of compensatory damages.[71] The compensatory damages may consist of 200 percent of the back-pay receivable under the labour laws, 100 percent

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69 IRM 25.2.2.6.4 (1) https://www.irs.gov/irm/part25/irm_25-002-002#idm140666751783280 (Accessed 14/07/2023).
70 S 7623(c)(1) read with ss 7623(c)(A) and (B) Internal Revenue Code.
71 S 7623(d)(3)(B) Internal Revenue Code.

of all lost employment benefits with interest and special damages resulting from the reprisal, such as legal costs and witness fees.[72]

In addition to the compensation payable to whistleblowers, their labour rights and privileges are also retained throughout the whistleblowing process.[73] These rights are also not capable of being waived under any agreement, policy form, condition of employment or pre-dispute agreements.[74]

6.2.4.2. Confidentiality of the identity of whistleblowers

The IRM provides that the identity of whistleblowers is protected and considered confidential.[75] Any communication or contact between the whistleblower and the IRS is not regarded as third-party contact.[76] This means that the communication is not subject to the ordinary disclosure rules that form part of the tax collection process.[77]

When a whistleblower is asked to testify, it may be impossible to keep their identity confidential. If this is the case, the whistleblower and their legal counsel must be informed before their identity is disclosed.[78]

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72 S 7623(d)(3)(B) Internal Revenue Code.
73 S 7623(d)(4) Internal Revenue Code.
74 S 7623(d)(5)(A) Internal Revenue Code.
75 IRM 25.2.2.10(1) https://www.irs.gov/irm/part25/irm_25-002-002#idm140666751783280 (Accessed 14/07/2023).
76 IRM 25.2.2.10(2) https://www.irs.gov/irm/part25/irm_25-002-002#idm140666751783280 (Accessed 14/07/2023).
77 S 6103(k)(6) Internal Revenue Code read with IRM 25.27.1.1.1. https://www.irs.gov/irm/part25/irm_25-002-002#idm140666751783280 (Accessed 14/07/2023).
78 IRM 25.2.2.10(3) https://www.irs.gov/irm/part25/irm_25-002-002#idm140666751783280 (Accessed 14/07/2023).

6.2.5. Success of the tax whistleblowing programme

For the fiscal yearend of 2022, the IRS reported the following results under their tax whistleblowing programme: For claims under section 7623(b), they paid USD34,5 million to 26 tax whistleblowers, which resulted in the collection of USD152,7 million in taxes. In respect of claims under section 7623(a), they paid 106 awards totalling USD3,3 million to whistleblowers, which attributed to collected proceeds of USD20 million in taxes.

The IRS collected a total of USD172.7 million in taxes originating from 132 meritorious whistleblower reports.[79] The cost of the rewards represents a mere 21 percent of the taxes collected.[80] Following the above the inference is inescapable that the reward-based programme appears to be successful and cost-efficient.

6.3. Australia

6.3.1. History and Background of the whistleblower programme in Australia

Similar to the US, the initial assumption in Australia was that retaliation against whistleblowers was the main disincentive for disclosing wrongdoing.[81] In 1990, the state of Queensland promulgated the first interim legislation dealing with the protection of whistleblowers against retaliation.[82] The Whistleblowers (Interim Protection) and Miscellaneous Amendments Act 1990 aimed to outlaw retaliation (or victimisation as referred to in the Act) and provide for the imposition of criminal and civil remedies should

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79 Whistleblower Office Annual Reports 2022 https://www.irs.gov/pub/irs-pdf/p5241.pdf (Accessed 06/07/2023) 4.

80 Whistleblower Office Annual Reports 2022 https://www.irs.gov/pub/irs-pdf/p5241.pdf (Accessed 06/07/2023) 4.

81 Dworkin and Brown "The Money or the Media? Lessons from Contrasting Developments in the US and Australian Whistleblowing Laws" *Seattle J. Soc. Justice* 2013 683-684.

82 Whistleblowers (Interim Protection) and Miscellaneous Amendments Act 1990.

such retaliation occur. In doing so, it created a tort of victimisation whereby the whistleblower could recover damages if retaliation occurred.[83]

The state of New South Wales ("NSW") promulgated the Public Interest Disclosure Act, 29 of 1994, which states that recoverable civil damages may not exceed punitive or special damages or aggravated damages.[84] The legislation dealing with the compensation of damages has confounded the courts of Australia. In *Howard v Queensland*,[85] the court decided that there could be no action for civil damages unless a criminal offence of reprisal was proven. Accordingly, the focus is on criminal reprisals instead of compensation. Ironically, very few prosecutions have been undertaken with no known successes. Therefore, the protection of whistleblowers through banning reprisal seems more symbolic than substantive.[86]

An essential part of collecting taxes and the administration of tax law lies between balancing taxpayers' rights, such as privacy and confidentiality, with maximised tax collection.[87] In the 2017 review of tax and corporate whistleblower protections in Australia, the Law Council of Australia recommended that whistleblowing laws should have the following key design features:[88]

i. The law governing whistleblowing should be uniform and applied across all contexts and sectors;

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83 See for example the Whistleblower's Protection Act 1994 (SA s 9(2)(a) "An act of victimisation under this Act may be dealt with— (a) as a tort."

84 S 20(A)(3) of Whistleblower's Protection Act 1994.

85 *Howard v Queensland* 2000 (Qld) R 233 (Austrl).

86 Brown *Whistleblowing in the Australian Public Sector: Enhancing the theory and practice of internal witness management in public sector organisations* (2008) 271-277.

87 McLaren "Laws to protect tax whistleblowing in Australia: What does this mean for taxpayers and the taxation profession?" *Australasian Tax Teachers Association Journal* 2018 20.

88 Law Council of Australia "Whistleblower Protections in the corporate, public and not-for-profit sectors" *Review of Tax and Corporate Whistleblower Protections in Australia* Submission 52, 9 February 2017 1-33 6.

ii. The law should apply to any whistleblower irrespective of the relationship between the entity and the whistleblower;

iii. Internal whistleblowing should be encouraged with a specified resolution route but with an acknowledgement that the disclosure could occur at any time;

iv. Inclusion of the right of restitution and compensation for victimisation; and

v. Introduction of the merit and demerit points system for the purposes of whistleblowers.

On 1 July 2019, the Australian Government introduced new tax whistleblowing provisions in its Tax Administration Act 1953. The amendments were introduced by the Treasury Laws Amendment (Enhancing Whistleblower Protections) Act, 10 of 2019 ("Amendment Act"). Before this Amendment Act, no protection mechanisms were aimed explicitly at tax whistleblowers.

The Australian legislature recorded specific requirements that must be met for a discloser to qualify for protection as a tax whistleblower. In what follows, the various tests are outlined.

6.3.2. Test to qualify as a whistleblower

The qualifying test for the protection of whistleblowers is three-pronged.[89] Firstly, the whistleblower must qualify as a whistleblower.[90] Secondly, the disclosure must be made

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89 S 14ZZT Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 10 of 2019 ("Amendment Act").

90 S 14ZZT(1)(a) read with s 14ZZT(2)(a) Amendment Act. S 14ZZT provides as follows: "Disclosures qualifying for protection under this Part- (1) A disclosure of information by an individual (the

to the Commissioner of Taxation, an eligible recipient or a legal practitioner.[91] Thirdly, the discloser must consider the information helpful to the Commissioner of Taxation to perform its functions under a tax Act in relation to the entity or person to whom the information relates.[92]

The first test is that the discloser must qualify for protection as a whistleblower.[93] The following persons are eligible for protection: officers of the entity, an employee of the entity, an individual who supplies services or goods to the entity, irrespective of whether remuneration is received; an employee of a person who provides services or goods to the entity regardless of whether remuneration is received; an individual who is an associate of the entity; a spouse or child of any of the persons listed or an individual prescribed by the regulations.

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discloser) qualifies for protection under this Part if:(a) the discloser is an eligible whistleblower in relation to an entity (within the meaning of the Income Tax Assessment Act 1997); and(b) the disclosure is made to the Commissioner; and(c) the discloser considers that the information may assist the Commissioner to perform his or her functions or duties under a taxation law in relation to the entity or an associate (within the meaning of s 318 of the Income Tax Assessment Act 1936) of the entity.(2) A disclosure of information by an individual (the discloser) qualifies for protection under this Part if:(a) the discloser is an eligible whistleblower in relation to an entity (within the meaning of the Income Tax Assessment Act 1997); and (b) the disclosure is made to an eligible recipient in relation to the entity; and (c) the discloser has reasonable grounds to suspect that the information indicates misconduct, or an improper state of affairs or circumstances, in relation to the tax affairs of the entity or an associate (within the meaning of s 318 of the Income Tax Assessment Act 1936) of the entity; and (d) the discloser considers that the information may assist the eligible recipient to perform functions or duties in relation to the tax affairs of the entity or an associate (within the meaning of s 318 of the Income Tax Assessment Act 1936) of the entity."

91 SS 14ZZT(1)(b), 14ZZT(2)(b) and 14ZZT(3) Amendment Act. S 14ZZT(3) Amendment Act provides that: "A disclosure of information by an individual qualifies for protection under this Part if the disclosure is made to a legal practitioner for the purpose of obtaining legal advice or legal representation in relation to the operation of this Part."

92 S 14ZZT(1)(c) Amendment Act.

93 S 14ZZU "An individual is an eligible whistleblower in relation to an entity (within the meaning of the Income Tax Assessment Act 1997) if the individual is, or has been, any of the following: (a) an officer (within the meaning of the Corporations Act 2001) of the entity;(b) an employee of the entity;(c) an individual who supplies services or goods to the entity (whether paid or unpaid);(d) an employee of a person that supplies services or goods to the entity (whether paid or unpaid); (e) an individual who is an associate (within the meaning of s 318 of the Income Tax Assessment Act 1936) of the entity;(f) a spouse or child of an individual referred to in any of paragraphs (a) t€e);(g) a dependant of an individual referred to in any of paragraphs (a) to (e), or of such an individual's spouse;(h) an individual prescribed by the regulations…"

The Amendment Act caters for four types of eligible recipients or entities to which disclosures may be made. The eligible recipients who may receive whistleblower reports are The Commissioner of Taxation, an eligible recipient or entity, or a legal practitioner for legal advice or legal representation.[94]

In relation to disclosure to the Commissioner of Taxation, an eligible recipient is an auditor or member of an audit team conducting an audit, a registered tax agent or BAS[95] agent or services, a person designated to receive disclosures, or a person prescribed explicitly for the purposes of paragraph 14ZZV(1)(d).[96]

If the taxpayer is an entity, an eligible recipient is a director, secretary, senior manager or any other employee or officer whose functions relate to the tax affairs of a corporate body.[97] If the taxpayer is a trust, the eligible recipients are the trustee or person authorised by the trustee to receive disclosures that may qualify for protection under the Amendment Act.[98] Lastly, if the taxpayer is a partner, the eligible recipient is a partner or person authorised by the partner to receive disclosures that may qualify for protection under the Amendment Act.[99]

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94 S 14ZZT(1)(b); s 14ZZT(2)(b) and s 14ZZT(3) Amendment Act.

95 Business Activity Statements.

96 S 14ZZV(1) provides that "(1) Each of the following is an eligible recipient in relation to an entity (within the meaning of the Income Tax Assessment Act 1997): (a) an auditor, or a member of an audit team conducting an audit, of the entity; (b) a registered tax agent or BAS agent (within the meaning of the Tax Agent Services Act 2009) who provides tax agent services (within the meaning of that Act) or BAS services (within the meaning of that Act) to the entity; (c) a person authorised by the entity to receive disclosures that may qualify for protection under this Part;(d) a person or body prescribed for the purposes of this paragraph in relation to the entity."

97 S 14ZZV(2) provides as follows "(2) If the entity is a body corporate, each of the following is an eligible recipient in relation to the entity: (a) a director, secretary or senior manager (within the meaning of the Corporations Act 2001) of the body corporate; (b) any other employee or officer (within the meaning of the Corporations Act 2001) of the body corporate who has functions or duties that relate to the tax affairs (within the meaning of s 14ZZT) of the body corporate."

98 S 14ZZV(3) states "(3) If the entity is a trust, each of the following is an eligible recipient in relation to the entity: (a) a trustee of the trust;(b) a person authorised by a trustee of the trust to receive disclosures that may qualify for protection under this Part."

99 S 14ZZV(4) states "(4) If the entity is a partnership, each of the following is an eligible recipient in relation to the entity:(a) a partner in the partnership;(b) a person authorised by a partner in the partnership to receive disclosures that may qualify for protection under this Part."

Before a whistleblower can qualify for protection when a disclosure is made to an eligible recipient, the whistleblower must have reasonable grounds to believe that the information indicates misconduct or an improper state of affairs.[100] Notably, the question of motive is unimportant when determining whether the whistleblower should be protected. The Law Council of Australia indicated that the question of motive might be relevant to restitution, compensation or reward, but not to the right to make the disclosure or the protection to be afforded.[101]

6.3.3. Protections afforded in the Amendment Act

The protection afforded to whistleblowers that qualify relates to confidentiality, protection against civil, criminal or administrative penalties, a reprieve from contractual remedies, prohibition of victimisation, and compensation is payable for damage suffered due to a breach of the provisions of the Amendment Act.

6.3.3.1. Confidentiality

As part of its representation to the Treasury and Parliamentary Committee in respect of whistleblower protections, the Legal Council submitted that whistleblowers should disclose their identity since the absence of their identity would restrict the relevant authority's ability to assist the whistleblowers and determine whether there are reasonable grounds that support the claims. In contrast, the Foreign Corrupt Practices Committee supported the facilitation of anonymous disclosure. It argued that there may

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100 S 14ZZT(2)(c) Amendment Act.

101 Law Council of Australia "Whistleblower Protections in the corporate, public and not-for-profit sectors" *Review of Tax and Corporate Whistleblower Protections in Australia Submission 52,* 9 February 2017 12.

be a reason why a whistleblower would wish to remain anonymous, and that the usefulness of the information is not affected by the whistleblower's anonymity.[102]

Section 14ZZW provides for the confidentiality of the whistleblower's identity and information that might disclose the whistleblower's identity. A breach thereof is an offence punishable by six months imprisonment, thirty penalty units, or both.[103] However, the confidentiality of the whistleblower's identity is not absolute, and there are certain instances when the disclosure thereof is authorised.

The disclosure of the whistleblower's identity is authorised if the disclosure is to the Commissioner of Taxation, a member of the Australian Federal Police, a legal practitioner to obtain legal advice or representation, to a person prescribed in the regulations, or if the whistleblower consents to the disclosure.[104]

Significantly, the information proffered by the whistleblower is not protected if it is required for investigating misconduct, an improper state of affairs or circumstances to which the qualifying disclosure relates.[105] The only proviso is that the person who intends to use the information must take all reasonable steps to reduce the risk of disclosing the

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102 Law Council of Australia "Whistleblower Protections in the corporate, public and not-for-profit sectors" *Review of Tax and Corporate Whistleblower Protections in Australia Submission 52,* 9 February 2017 12.

103 S 14ZZW(1) Amendment Act "(1) A person (the first person) commits an offence if: (a) another person (the discloser) makes a disclosure of information (the qualifying disclosure) that qualifies for protection under this Part; and (b) the first person discloses any of the following (the confidential information): (i) the identity of the discloser; (ii) information that is likely to lead to the identification of the discloser; and (c) the confidential information is information that the first person obtained directly or indirectly because of the qualifying disclosure; and (d) the disclosure referred to in paragraph (b) is not authorised under subsection (2). Penalty: Imprisonment for 6 months or 30 penalty units, or both."

104 S 14ZZW(2) Amendment Act "(2) A disclosure referred to in paragraph (1)(b) is authorised under this subsection if it: (a) is made to the Commissioner; or (b) is made to a member of the Australian Federal Police (within the meaning of the Australian Federal Police Act 1979); or (c) is made to a legal practitioner for the purpose of obtaining legal advice or legal representation in relation to the operation of this Part; or (d) is made to a person or body prescribed by the regulations for the purposes of this paragraph; or (e) is made with the consent of the discloser."

105 S 14ZZW(3)(b) Amendment Act.

whistleblower's identity.[106] Concerning the disclosure of a whistleblower's identity during court proceedings, the Law Council submitted that such disclosure would be a matter of judicial discretion based on existing procedures that are satisfactory for dealing with confidential information. The Law Council also supported including procedural fairness requirements for those accused of wrongdoing.[107]

The Amendment Act provides that the information tendered by the whistleblower may be used in a court or tribunal provided that the whistleblower's identity or information that may result in the disclosure thereof may not be compromised.[108]

6.3.3.2. Other protection

Not only does the Amendment Act provide for the protection of the discloser's identity and provide a general confidentiality provision, but the Act also provides that the discloser will not be subject to any civil, criminal or administrative liability for making the disclosure and that contractual remedies, if applicable, are unenforceable.[109]

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106 S 14ZZW(3) Amendment Act "(3) Subsection (1) does not apply if: (a) the disclosure referred to in paragraph (1)(b):(i) is not of the identity of the discloser; and (ii) is reasonably necessary for the purposes of investigating misconduct, or an improper state of affairs or circumstances, to which the qualifying disclosure relates; and (b) the first person takes all reasonable steps to reduce the risk that the discloser will be identified as a result of the disclosure referred to in paragraph (1)(b)."

107 Law Council of Australia "Whistleblower Protections in the corporate, public and not-for-profit sectors" Review of Tax and Corporate Whistleblower Protections in Australia Submission 52, 9 February 2017 15.

108 S 14ZZB Amendment Act provides "If a person (the discloser) makes a disclosure of information that qualifies for protection under this Part, the discloser or any other person is not to be required: (a) to disclose to a court or tribunal: (i) the identity of the discloser; or (ii) information that is likely to lead to the identification of the discloser; or (b) to produce to a court or tribunal a document containing: (i) the identity of the discloser; or (ii) information that is likely to lead to the identification of the discloser; except where: (c) it is necessary to do so for the purposes of giving effect to this Part; or (d) the court or tribunal thinks it necessary in the interests of justice to do so.

109 S 14ZZ(2) Amendment Act "(b) a contract to which the person is a party may not be terminated on the basis that the disclosure constitutes a breach of the contract."

Furthermore, the Amendment Act provides that the information provided by the whistleblower is inadmissible in criminal proceedings, or proceedings that may impose a penalty.[110] The Amendment Act also prohibits the victimisation of disclosers, recognising the personal detriment that a whistleblower may suffer due to their disclosure. By criminalising any victimisation, the legislator afforded the discloser additional protection.[111] In this regard, the Amendment Act specifies that any conduct which causes or threatens to cause detriment to the whistleblower constitutes an offence, and such a body will be liable for 120 penalty points, two years imprisonment, or both.[112] The Act further provides that the threat of detriment may be expressed, implied, conditional or unconditional.[113] For purposes of prosecution of the offence, it is not necessary to prove that the discloser feared that the threat would be carried out.[114] Therefore, the mere existence of a threat of detriment is sufficient.[115]

The term "detriment" is defined in section 14ZZZAA of the Amendment Act and includes, in the context of labour relations, the dismissal, injury, alteration of the employee's position or discrimination against the employee. The detriment may also manifest in the form of harassment or intimidation of a person or injury, including damage to a person's property, reputation, business, financial position or any other damage.[116]

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110 S 14ZZX Amendment Act provides "(1) If a person makes a disclosure that qualifies for protection under this Part: (a) the person is not subject to any civil, criminal or administrative liability (including disciplinary action) for making the disclosure; and (b) no contractual or other remedy may be enforced, and no contractual or other right may be exercised, *against* the person on the basis of the disclosure; and (c) if the disclosure was a disclosure of information to the Commissioner—the information is not admissible in evidence against the person in criminal proceedings or in proceedings for the imposition of a penalty, other than proceedings in respect of the falsity of the information."

111 Sadiq "Tax and whistle-blower protection: Part of a commitment to tackling tax misconduct in Australia" *Intertax* 2018 429.

112 Ss 14ZZY(1) and 14ZZY(2) Amendment Act.

113 S 14ZZY(3) Amendment Act.

114 S 14ZZZ(2B) Amendment Act.

115 S 14ZZY Amendment Act.

116 S 14ZZAA Amendment Act.

In considering whether a specific reward system should be included in the tax administration, the Law Council supported the merit and demerit point system instead of a financial reward system.[117] According to the Law Council, a monetary reward system for whistleblowing has several disadvantages, such as a change in a whistleblower's motivation, increased government cost, potentially reduced quality of disclosures, the system will be open to abuse from "serial submitters" and litigation funders, altruistic whistleblowers may be discouraged, and it may undermine internal compliance or reporting systems as it gives employees an incentive to bypass them.[118]

In contrast to the Law Council view, the advantages of a financial reward system include potential high-quality tips, encouragement of people motivated by monetary gain, and compensation for intangible risks.[119]

6.3.3.3. Compensation payable in case of a breach of protection

The Amendment Act provides that compensation is payable to the discloser for damage resulting from a breach of the confidentiality or other protections described above. The compensation to be paid is similar to that of the delictual damage.[120] Significantly, the Act does not provide for the whistleblower's compensation merely for making a disclosure.

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117 Law Council of Australia "Whistleblower Protections in the corporate, public and not-for-profit sectors" *Review of Tax and Corporate Whistleblower Protections in Australia Submission* 52 9 February 2017 18-20.

118 Law Council of Australia "Whistleblower Protections in the corporate, public and not-for-profit sectors" Review of Tax and Corporate Whistleblower Protections in Australia Submission 52, 9 February 2017 18-20.

119 Law Council of Australia "Whistleblower Protections in the corporate, public and not-for-profit sectors" Review of Tax and Corporate Whistleblower Protections in Australia Submission 52, 9 February 2017 18-19.

120 S 14ZZA Amendment Act.

6.3.4. The success of the Whistleblower Programme in Australia

The Australian Tax Office ("ATO") has reported that for the 2021/22 fiscal year, it had received 43,000 tip-offs relating to the under-declaration of income, employers paying wages in cash, taxpayers whose income does not match their lifestyle and under-declaration of sales.[121]

The protections afforded by the whistleblowers laws in Australia were tested for the first time in the case of *Boyle v Commonwealth Director of Public Prosecutions*.[122] In this case, Mr Boyle, a former debt collection officer of the ATO, made a report asserting that the ATO had engaged in aggressive and unethical debt recovery tactics.[123] In preparing for his disclosure, he collected photographic evidence and recordings from his workplace.[124] The court held that the protection afforded is limited to the "making of the disclosure" and not the preparation for the disclosure.[125]

Following the outcome of the Boyle case, it appears that actions taken by a whistleblower to gather evidence in satisfaction of the requirements to be protected as a whistleblower are excluded from the scope of protection. This brings into question the efficacy of the protections provided.

6.4. Conclusion

This thesis establishes in Chapters 4 and 5 that a tax whistleblowing programme satisfies various compliance theories, including the economic deterrence theory and the fiscal

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121 Australian Tax Office (updated February 2024) "Making a tip-off" https://www.ato.gov.au/General/Gen/Making-a-tip-off/ (Accessed 14/07/2023).
122 *Boyle v Commonwealth Director of Public Prosecutions* (2023) SADC 27.
123 *Boyle v Commonwealth Director of Public Prosecutions* (2023) SADC 27 5.
124 *Boyle v Commonwealth Director of Public Prosecutions* (2023) SADC 27 1.
125 *Boyle v Commonwealth Director of Public Prosecutions* (2023) SADC 27 46.

exchange theory, as far as it concerns the perceptions of the probability of detection and cost of non-compliance. This chapter explored the practical application of a whistleblowing programme in the context of the US and Australia. As indicated in the discussions above, these countries employ entirely different strategies in the context of their tax whistleblowing programmes in order to achieve voluntary compliance.

The US implements a reward programme for its tax whistleblowers, which appears to be highly successful. The US approach incorporates both the so-called "pay" strategy, as well as the "protect" strategy discussed in Chapter 5. In contrast, Australia implemented a whistleblowing programme which does not offer rewards, but only offers protection against retaliation. Their strategy centres on the "command", "fine", and "protect" strategies to encourage whistleblowing.

As set out in the introduction to this chapter, the purpose is to extract policy lessons that must be borne in mind when crafting a tax whistleblowing programme for the South African tax law dispensation. From the discussions herein, seven policy lessons are identified which are elaborated on below.

Firstly, a tax whistleblowing programme requires a dedicated and designated office or unit within the revenue authority whose main objective is to receive, process and investigate reports from whistleblowers. This was seen in both the US and Australia's policy frameworks, taking the form of the Whistleblower Office and The Office of The Whistleblower. By including a designated office or unit that deals with these reports, whistleblowers can be confident that all reports are treated the same, ensuring consistency and impartiality by the revenue authority. It also provides that the claims are objectively, efficiently and independently investigated, as it does not form part of the already strenuous demands on the investigating teams within the revenue authority.

Secondly, the report must be addressed to the designated unit or office dealing with the tax whistleblowing programme, to ensure that the communication channel is clear. In other words, the requirements that must be made to a director, a legal professional, a tax

practitioner or a functionary within the National Treasury or finance departments are unnecessarily cumbersome on potential whistleblowers. Therefore, to promote a culture of whistleblowing, it should be as easy and convenient as possible to make a report.

Thirdly, the determination of the award payable to a whistleblower must be exercised within a defined scope of criteria. This is to ensure that the claims are authentic and meritorious. The US identified nine factors that they consider in determining whether a whistleblower is entitled to a reward. Thus, not all claims, even meritorious ones, are subject to reward.

Fourthly, the computation of the reward, once determined to be payable, should not be open-ended, and there must be clear thresholds within which the reward is calculated. This is evident in the requirement that the taxpayer forming the subject of the complaint or report must earn more than USD200,000 within a particular year of assessment; alternatively, the claim must involve more than USD2 million. The reason for these thresholds is to ensure that the ultimate recovery warrants the expense of resources. Ancillary to the computation thresholds is that the calculations should be subject to certain "checks and balances". These "checks and balances" include, for example, that the calculation be done at different stages within the whistleblowing process. In the US, a preliminary reward is calculated at the time when the complaint is made, and a final computation is done once the proceeds have been collected. This ensures that the reward ultimately payable is fair to both the whistleblower and the revenue authority in the circumstances.

Fifthly, the protection of whistleblowers must include actions taken in preparation for making a disclosure. As ruled in the recent case of *Boyle v the Commonwealth* in Australia, the effectiveness of the protection afforded should not be limited, as it would discourage disclosures. That said, it will take some trial and error to determine when a taxpayer has crossed the proverbial line or threshold relative to legal admissibility of evidence, in its preparations for making a disclosure.

Sixthly, the confidentiality of the information provided, as well as the identity of the whistleblower, should be guaranteed. If the circumstances permit or require a disclosure of the information or the identity of the whistleblower, advance notice to the whistleblower or their legal representative ought to be provided.

Seventhly, whistleblowers should be exempted from damages based on the disclosure by both the taxpayer and/or third parties. For example, a whistleblower should not be the subject of a defamation case if the revenue authority did not prosecute a specific disclosure. In the context of South Africa, this thesis suggests that the tax legislative framework be expanded and amended to include a specialised incentivised tax whistleblowing programme to encourage and protect tax whistleblowers.

Chapter 7: Proposed Policy Position

7.1. Introduction

SARS' compliance strategy is based on voluntary compliance following the Cash Economy Task Force model developed for the Australian Tax Office in 1998.[1] This model assumes that the default position is that taxpayers are voluntarily compliant.[2] Accordingly, SARS' strategy is grounded on the assumption that the preponderance of taxpayers fulfil their tax responsibilities voluntarily without requiring intervention from SARS.[3] SARS recognises a nuanced gradient of tax compliance, ranging from taxpayers who conscientiously fulfil their obligations to those who deliberately choose not to comply.[4] SARS' strategic objectives, delineated in its annual performance plan,[5] define specific goals to narrow the divide between voluntary compliance and deliberate evasion or non-compliance. This thesis contends that an incentivised whistleblowing programme can help to breach this divide.

This chapter aims to amalgamate the compliance factors identified in Chapter 4 with the findings presented in Chapter 5 regarding incentive strategies. By doing so, the chapter seeks to explain whether and how an incentivised whistleblower programme aligns with SARS' current strategic objectives. In its conclusion, this chapter indicates that an incentivised tax whistleblowing programme is a powerful instrument unused by SARS.

The chapter begins by condensing the compliance factors identified in Chapter 4 and exploring their interplay with the different incentive strategies. This shows how reward-based whistleblowing programmes can supplement and implement these compliance

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1 Bornman and Stack "Rewarding Tax Compliance: Taxpayers' Attitudes and Beliefs" *Journal of Economic and Financial Sciences* 2015 792. SARS Annual Performance Plan 2022/23 9.
2 Bornman and Stack "Rewarding Tax Compliance: Taxpayers' Attitudes and Beliefs" *Journal of Economic and Financial Sciences* 2015 792.
3 SARS Annual Performance Plan 2022/23 9.
4 SARS Annual Performance Plan 2022/23 9.
5 Chapter 4 para 4.5.

factors. The chapter then considers whether a reward-based whistleblowing programme fits SARS' nine strategic objectives, which were canvassed in the preceding chapters.

7.2. Amalgamation of the findings in Chapters 4 and 5

After considering the various compliance theories etched in the academic literature, Chapter 4 identifies seven factors influencing taxpayer compliance. These factors are:

i. Tax compliance is influenced by the cost of non-compliance;

ii. Taxpayers are more compliant when they understand their obligations;

iii. Tax compliance is influenced by the probability of an audit or detection;

iv. Enhanced government services increase compliance;

v. Taxpayers are influenced by social perceptions and their peers' behaviour;

vi. Rules must be applied impartially and fairly to all taxpayers; and

vii. Trust in the tax system promotes tax compliance.

Chapter 5 evaluates different strategies to incentivise whistleblowing and compliance. It considers four strategies: Anti-retaliation laws, reporting duties, penalties and rewards. The chapter concludes that anti-retaliation laws are not incentives for whistleblowing or compliance. Instead, its role must be defined to soothe collateral damage resulting from whistleblowing.[6] The effectiveness of reporting duties appears to be limited to intrinsically motivated taxpayers who always choose to comply.[7] Intrinsically motivated taxpayers fall on the voluntary compliance side of the spectrum

[6] Chapter 5, para 5.5.2.1. and 5.4.1.3.
[7] Chapter 5, para 5.2.2.

of tax compliance. Thus, it appears that reporting duties play no active role in incentivising whistleblowing.

Penalties' effectiveness is limited since it may be viewed as the "price of non-compliance", enabling taxpayers to adjust their non-compliance or evasion strategies according to their risk appetite.[8] Based on the literature reviewed in Chapter 5, whistleblowing is the most effective tool to promote and compel compliance.[9] Chapter 5, therefore, recommended a reward-based tax whistleblowing programme to encourage compliance and whistleblowing.[10]

Following these conclusions, the following section amalgamates the reward-based incentive strategy with the identified compliance factors.

7.2.1. The first compliance factor: Tax compliance is influenced by the cost of non-compliance

The compliance theory underscoring the first compliance factor is the economic deterrence theory, which assumes that taxpayers are rational agents influenced by audits, penalties and tax rates.[11] This compliance factor refers to the increase in the cost of compliance through the imposition of penalties and the tax rate.[12] It is also closely linked to the probability of detection or audit.[13] In essence, it represents taxpayers' risk appetite in making compliance decisions.[14]

A tax whistleblowing programme directly impacts taxpayer behaviour and decision-making.[15] The studies referred to in Chapter 5 provide evidence of the increased perception of the probability of detection and audit and the social impact of

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8 Chapter 5, para 5.2.3.1 and 5.3.
9 Chapter 5, para 5.2.4.
10 Chapter 5, para 5.3.
11 Chapter 4, para 4.3.1.
12 Chapter 4, para 4.3.1.
13 Chapter 4, para 4.3.1.
14 Chapter 4, para 4.3.1.
15 Chapter 4, para 4.4. and Chapter 5, para 5.2.4.

whistleblowing for reward programmes.[16] A tax whistleblowing programme increases detection of non-compliance and evasion, which may result in the imposition of penalties by the revenue authority. This increases the potential cost of non-compliance for non-compliant taxpayers and evaders.

Introducing a tax whistleblowing programme may also increase the audit probability, thereby acting as a disincentive for non-compliance and evasion. Thus, the proposed incentivised tax whistleblowing programme complements the first compliance factor identified by increasing the cost of non-compliance.

7.2.2. The second compliance factor: Taxpayers are more compliant when they understand their obligations

The second compliance factor is underscored by three compliance theories: economic deterrence, social and comparative treatment, and trust in the administration.[17] This compliance factor relates to the simplicity of the tax system and how easily taxpayers can comply.[18] Chapter 4 refers to Torgler's finding that a complicated tax system results in inadvertent errors or taxpayers opportunistically blame the system for their failure to comply.[19] This compliance factor encapsulates the problem identified by Torgler. Under the economic deterrence theory, a complicated tax system allows taxpayers to justify their non-compliance, reducing the cost of non-compliance and evasion.[20]

From a social and comparative treatment theory viewpoint, a complicated tax system may lead to the rules not being applied consistently and impartially.[21] This results in a weakened social perception of the tax system and administration, leading to an

16 Chapter 5, para 5.2.4 and 5.2.4.1.
17 Chapter 4, para 4.3.1, 4.3.2 and 4.3.4.
18 Chapter 4, para 4.3.1, 4.3.3 and 4.3.4 and Table 4.1.
19 Chapter 4, para 4.3.1.
20 Chapter 4 para 4.3.1.
21 Chapter 4, para 4.3.3.

increase in non-compliance.[22] This theory and its implications are closely linked to the trust in the tax revenue authority's ability to administer the system efficiently and fairly.[23] If taxpayers believe that the revenue authority cannot manage and administer the tax system effectively, it increases non-compliance and the opportunity to evade.[24]

A tax whistleblowing programme that is user-friendly and easily understood results in increased reporting and detection of non-compliance and evasion. By increasing the probability of detection, taxpayers' risk perception is influenced, which may reduce taxpayers "taking advantage of the tax system".[25] An effective tax whistleblowing programme can instil trust in the revenue authority.

As for the social comparative and political legitimacy theories, a reward-based whistleblowing programme has the potential to impact compliance significantly. The experimental studies referred to in Chapter 5 prove that reward-based whistleblowing pulls potential non-compliant taxpayers and evaders into the compliant domain.[26] The increased reporting resulting from rewards means that taxpayers are influenced by their peers and their self-image will be wary of adverse reports, thereby altering their behaviour.[27]

7.2.3. The third compliance factor is the increased probability of an audit

This factor relates to the perceived probability of audit and detection as part of the economic deterrence theory of compliance and represents the taxpayers' "fear of being caught".[28] Dare's findings in Chapter 4 prove that audit probability is one of the biggest motivators for compliance outperforming penalties.[29]

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22 Chapter 4, para 4.3.4.
23 Chapter 4, para 4.3.4.
24 Chapter 4, para 4.3.4. Chapter 5, para 5.2.2.1.
25 Chapter 4 para 4.3.1. Torgler "Tax Morale, Rule-Governed Behaviour and Trust" *Constitutional Political Economy* 2003 122.
26 Chapter 4, para 4.4. Chapter 5, para 5.2.4.
27 Chapter 4, para 4.4.
28 Chapter 4, para 4.3.1.
29 Chapter 4 para 4.3.1. and Chapter 5 para 5.2.3.1.

One of the main goals of a reward-based whistleblowing programme is the detection of tax evasion and non-compliance.[30] A reward-based whistleblower programme will result in increased reporting, which has a corresponding effect on the probability of detection.[31] As shown in Chapter 5, a tax whistleblowing programme is essential for increased information reporting to help to bridge the information gap and tax gap.[32]

7.2.4. The fourth compliance factor: Enhanced government services increase compliance

This factor is connected to how taxpayers perceive the social pact of taxation, where they expect their tax contributions to be related directly to providing government services.[33] When taxpayers believe that the quality and quantity of these government services are on the rise, it increases tax compliance.[34] This is the basis of the fiscal exchange theory. Not only does this factor trigger the fiscal exchange theory of non-compliance, but it also affects the trust in the government and revenue authority theories of compliance.[35]

From a fiscal exchange theory viewpoint, a reward-based whistleblowing policy can influence compliance in two ways: Firstly, taxpayers will be able to see that their taxes are being used in a manner that is responsible and intended to ensure compliance by all persons. In other words, taxpayers will be able to see that their money is used in furtherance of an efficient and fair tax administration. Secondly, the funding for the rewards payable to the whistleblowers is not sourced from the taxpayers' money that was paid voluntarily. Instead, it is sourced from the collected proceeds flowing from the whistleblowing report. Thus, the whistleblowing programme does not involve using

30 Chapter 5 para 5.2.4.1.
31 Chapter 4, para 4.4. Chapter 5, para 5.2.4.1.1 and 5.2.4.1.2.
32 Chapter 5, para 5.2.4.1.1. and 5.2.4.2.
33 Chapter 4, para 4.3.2.
34 Chapter 4, para 4.3.2.
35 Chapter 4, para 4.3.4.

traditional government resources to fund the rewards. In other words, the rewards are not additional expenditures from the current budget.

A reward-based whistleblowing programme may also affect taxpayers' perceived trust in the government, as it may be considered responsible stewardship of their tax money.[36] This, again, will relate to the revenue authorities' ability to properly administer and manage such a whistleblowing programme to increase the collection of tax debts.

7.2.5. The fifth compliance factor: Social perception

The social and comparative treatment theory strongly underscores this compliance factor. The theory assumes that taxpayers are susceptible to their peers' views, opinions and behaviour.[37] Ergo, if a potentially non-compliant taxpayer observes a fellow taxpayer being proverbially "caught" for evasion or non-compliance, their behaviour may be influenced. There are instances in which the Tax Administration Act allows SARS to publish the details of tax offenders.[38] Such publication is not deemed to be an invasion of the tax offender's privacy. The question is, however: how effective is anonymised publication to reduce criminal or non-compliant behaviour?

In a 2011 study, Florence, Shepherd and Simon explore the effectiveness of anonymised information sharing to prevent violence-related injury.[39] Although the study is intended to be used by health services, police and local government, the

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36 Chapter 4, para 4.5.7. and 4.5.9.

37 Chapter 4, para 4.3.3.

38 S 74 Tax Administration Act provides "**74. Publication of names of offenders**.—(1) The Commissioner may publish for general information the particulars specified in subsection (2), relating to a tax offence committed by a person, if—(a) the person was convicted of the offence; and (b) all appeal or review proceedings relating to the offence have been completed or were not instituted within the period allowed. (2) The publication referred to in subsection (1) may specify—(a) the name and area of residence of the offender; (b) any particulars of the offence that the Commissioner thinks fit; and (c) the particulars of the fine or sentence imposed."

39 Florence, Shepherd and Simon "Effectiveness of anonymised information sharing and use in health service, police, and local government partnership for preventing violence related injury: experimental study and time series analysis" *BMJ* 2011 https://doi.org/10.1136/bmj.d3313 (Accessed 02/03/2024).

findings may be applied to the current question.[40] In Cardiff the government introduced a violence protection programme, an anonymised information sharing programme to prevent violence-related injury.[41] They found that the introduction of the programme resulted in a substantial and sustained reduction of violence and hospital admissions as a result of violence.[42]

In her study, Terman[43] considers the relationship between shame and compliance and defiance behaviour. As a starting point she defines the social function of shame to be a motivator for prosocial behaviour and conformity.[44] Due to the motivational influence of shame, it is often used as a tool to exert social control over human behaviour.[45] The relationship between shaming and prosocial behaviour is often called the deterrence approach to shaming.[46] The argument for shaming as a factor of compliance is that by shaming an individual, it reinforces such certain accepted social norms and behaviour.[47] This pro-shaming argument is premised on shared social norms and community identity.[48] Put differently, shaming is only effective if the community as a whole regards the conduct forming the subject of the shame to be morally pervasive. If the premise of the pro-shaming argument falls away, shaming may have the

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40 Florence, Shepherd and Simon "Effectiveness of anonymised information sharing and use in health service, police, and local government partnership for preventing violence related injury: experimental study and time series analysis" *BMJ* 2011 at https://doi.org/10.1136/bmj.d3313 (Accessed 02/03/2024).

41 Florence, Shepherd and Simon "Effectiveness of anonymised information sharing and use in health service, police, and local government partnership for preventing violence related injury: experimental study and time series analysis" *BMJ* 2011 at https://doi.org/10.1136/bmj.d3313 (Accessed 02/03/2024).

42 Florence, Shepherd and Simon "Effectiveness of anonymised information sharing and use in health service, police, and local government partnership for preventing violence related injury: experimental study and time series analysis" *BMJ* 2011 at https://doi.org/10.1136/bmj.d3313 (Accessed 02/03/2024).

43 Terman *Backlash: Defiance, Human Rights and the Politics of Shame* (Doctoral dissertation 2016 University of California, Berkeley).

44 Terman *Backlash: Defiance, Human Rights and the Politics of Shame* (Doctoral dissertation 2016 University of California, Berkeley) 19.

45 Terman *Backlash: Defiance, Human Rights and the Politics of Shame* (Doctoral dissertation 2016 University of California, Berkeley) 20.

46 Terman *Backlash: Defiance, Human Rights and the Politics of Shame* (Doctoral dissertation 2016 University of California, Berkeley) 20.

47 Terman *Backlash: Defiance, Human Rights and the Politics of Shame* (Doctoral dissertation 2016 University of California, Berkeley) 21.

48 Terman *Backlash: Defiance, Human Rights and the Politics of Shame* (Doctoral dissertation 2016 University of California, Berkeley) 22.

opposite effect of reinforcing certain social norms.[49] It may result in defensive behaviour causing an individual to become more defiant.[50]

Accordingly, the publication of offenders' details as a "name and shame" technique must be carefully considered, especially given the goals of the publication and the expected audience. Thus, whether the publication will result in compliance or defiance depends on the community's intrinsic motivation and convictions on the relevant conduct. In the context of tax evasion and non-compliance, one must first establish whether the community views the conduct to be morally pervasive to the extent that shaming will be effective. As demonstrated in Chapter 4, the community's view is influenced by several theories and factors, for example, the quality of the government's service delivery.[51]

Therefore, it is difficult to predict whether the publication of information in an anonymised format in the context of tax whistleblowers would be equally effective as in the case of tax offenders under section 74 of the Tax Administration Act. However, given the study by Florence, Shepherd and Simon. there appears to be merit in an anonymised publication programme. Of greater importance is the publication of the success rate of an incentivised whistleblowing programme. This thesis argues that the revenue authority should rather focus on publishing the success rate of the incentivised whistleblowing programme.

A reward-based whistleblowing programme may enhance the perception that non-compliance or evasion will be readily detected,[52] thus providing an additional layer of deterrence. As found in Chapters 4 and 5,[53] a tax whistleblowing programme can enhance public trust in revenue authorities, resulting in increased compliance. When the public believes that misconduct and evasion are taken seriously and promptly

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49 Terman *Backlash: Defiance, Human Rights and the Politics of Shame* (Doctoral dissertation 2016 University of California, Berkeley) 22.
50 Terman *Backlash: Defiance, Human Rights and the Politics of Shame* (Doctoral dissertation 2016 University of California, Berkeley) 23, 26 and 27.
51 Chapter 4, para 4.3.
52 Chapter 4, para 4.3.3 and 4.3.4. Chapter 5, para 5.2.3.1 read with para 5.2.4.1.1 and 5.2.4.1.2.
53 Chapter 4 para 4.3.4 and Chapter 5 para 5.2.1.1.

addressed, they may have more faith in the revenue authority, which will boost tax morale.

7.2.6. The sixth compliance factor is that rules must be applied impartially and fairly

This compliance factor relates to social and comparative treatment theories, political legitimacy and trust in the government.[54] Under this factor, taxpayers are more inclined to be compliant if they perceive the rules to be applied impartially, without fear or favour and fairly. [55]

An effective tax whistleblowing programme envisages a clear channel for reporting tax non-compliance and evasion that is open to anyone, irrespective of their designations. This available reporting channel highlights the revenue authorities' commitment to combatting wrongdoing, regardless of the parties involved.

As explained in Chapter 6, one of the requirements for an effective tax whistleblowing programme is the introduction of an independent office dealing with the reports, which is not associated with those departments or business units within the revenue authority that ordinarily conduct audits and investigations. This amplifies and ensures the impartial and fair application of the tax laws and rules and reduces the opportunity for collusion.

Incentivised tax whistleblowing programmes play reactive and proactive roles in addressing non-compliance and evasion. They can assist revenue authorities with the early detection of non-compliance and evasion, which leads to mitigating potential damage to the fiscus. This may enhance the perception that the tax laws and rules are applied fairly toward all taxpayers and build trust in the revenue authority.

As this factor is also linked to the social compliance theory, it stands to reason that publishing the whistleblowing programme's success may positively influence taxpayer

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54 Chapter 4 para 4.3.3 and 4.3.4.
55 Chapter 4 para 4.3.3 and 4.3.4.

behaviour. This could boost tax morale as the public perceives the revenue authority's use, administration and application of the whistleblowing programme as lawful and efficient. The question on the publication of success and "naming and shaming" again becomes relevant for this compliance factor. In the US, the government publicly announces the success rate of the whistleblowing programme and the rewards paid. This could be a factor of responsible stewardship and accounting to the public on the collection of taxes and expenditure. At the same time, it signals the efficacy of the whistleblower system. Following the study by Florence, Shepherd and Simon referred to above, there is merit in an anonymised publication programme. This gives credence to the proposal to publish the success rate of the proposed programme.

7.2.7. The seventh compliance factor: Trust in the tax system

This identified factor is linked to the theories of trust in the government and political legitimacy. It relates to the general trust in the revenue authority and administration to render their services efficiently.[56] This factor is not concerned with the spending of taxes by the other executive branches of government, as seen in the context of fiscal exchange theory.[57] This factor embodies Kirchner's so-called "slippery slope of compliance", as depicted in the figure below:[58]

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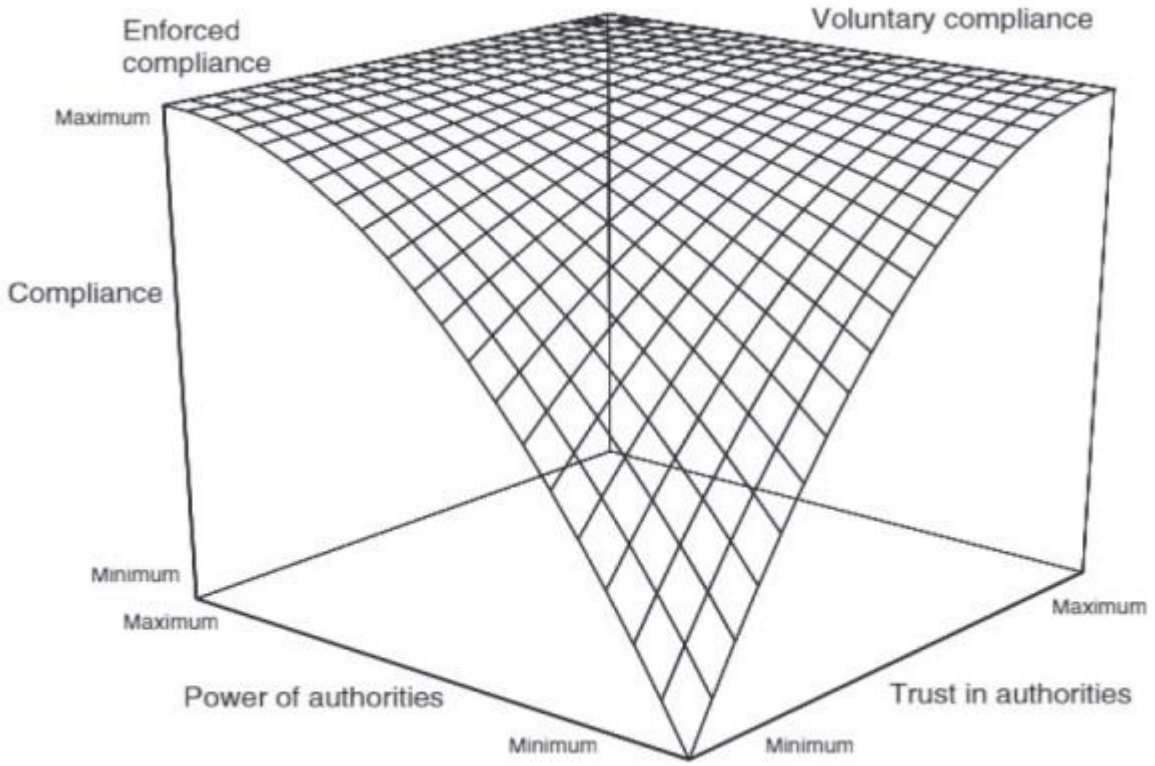
56 Chapter 4, para .4.3.4.
57 Chapter 4, para 4.3.4.
58 Kirchler *The economic psychology of tax behaviour* (2007) 205.

Figure 7.1 Determinants of compliance depending on the power of the state and trust in authorities: The slippery slope model



Source: Kirchler *The economic psychology of tax behaviour (2007)* 205.

According to the above figure, voluntary compliance reduces when the trust in the revenue authority is diminished. In turn, forced compliance increases with an increase in the powers of the revenue authority. As stated above, tax compliance is on a nuanced gradient between taxpayers who voluntarily comply and those who choose to evade. On the one hand, a whistleblowing programme may increase the trust in the government, pulling those taxpayers considering non-compliance into the compliance domain. On the other hand, a whistleblowing programme serves as a tool to gather information, detect non-compliance and increase the powers of the revenue authority, resulting in increased forced compliance.

PricewaterhouseCoopers ("PwC") conducted a survey in 2023 on the encounters of corporate taxpayers with SARS.[59] One of the questions posed to the participants was whether their trust in SARS had increased in the last 12 months. Only 42 percent of the participants indicated that their trust had increased.[60] This suggests that SARS should take serious measures to address the issue of trust in order to improve compliance and tax morality.[61]

Following the discussion above, a whistleblowing programme can positively affect the different compliance factors identified in Chapter 4. It has also been established that a reward-based whistleblowing programme fits into and enhances compliance theories discussed in Chapter 4.

7.3. SARS' strategic objectives and a reward-based whistleblower policy

Upon the acceptance that a whistleblowing programme positively influences the compliance theories and factors discussed above, and in Chapter 4, the question now turns to whether a reward-based whistleblowing programme is appropriate within the South African tax compliance sphere. To test the appropriateness of a reward-based whistleblowing programme, the potential influence of the programme is evaluated against SARS' strategic objectives discussed in Chapter 4.

Chapters 4 and 5 establishes that with the introduction of a reward-based whistleblowing programme, taxpayers are more readily willing to comply. A whistleblowing programme reduces aggressive tax planning, resulting in higher rates of passive compliance.[62] At the same time, a reward-based whistleblowing programme involves observers of non-compliance or evasion to take an active step in addressing

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59 PwC (2023) "Taxing Times Survey 2023" at https://www.pwc.co.za/en/assets/pdf/taxing-times-2023.pdf (Accessed 25/11/2023).

60 PwC (2023) "Taxing Times Survey 2023" at https://www.pwc.co.za/en/assets/pdf/taxing-times-2023.pdf (Accessed 25/11/2023) 19.

61 PwC (2023) "Taxing Times Survey 2023" at https://www.pwc.co.za/en/assets/pdf/taxing-times-2023.pdf (Accessed 25/11/2023) 19.

62 Chapter 5 para 5.2.4.1.1 and 5.2.4.1.2.

the non-compliance or evasion. Implementing a whistleblowing programme encourages passive and active compliance, ultimately increasing the detection of non-compliance and tax evasion, fulfilling SARS' objective of providing clarity and certainty to taxpayers.[63]

Under the current framework in South Africa, SARS may select a person for an audit or verification based on any consideration relevant to the administration of a tax Act, including a random and risk assessment basis.[64] A reward-based whistleblowing programme can serve as an additional audit and verification selection basis. This results in an increased use of whistleblower reports. It also means a more focused audit and collection strategy, potentially reducing audit and collection timelines. This results in better management of resources, satisfying SARS' strategic objective to use resources responsibly.[65] By utilising a focused strategy, overall collection can be increased, yielding higher returns for SARS, which may relieve some budgetary pressure.

The experimental studies discussed in Chapter 5[66] show that introducing a whistleblowing programme boosts the perceived risk of detection, audit and overall risk. This means that the cost of compliance from an economic theory perspective increase, results in higher voluntary compliance rates. This satisfies SARS' strategic objective to improve the detection of non-compliance and its cost.[67]

Based on the regulatory frameworks observed in the US, it appears essential for the revenue authority to have a separate business unit dealing with whistleblower reports.[68] The reason for this separate unit is to ensure that whistleblowing does not affect the efficiency of the audit investigators by forcing them to deal with these reports on top of their routine audits.[69] In addition, the separate business unit reduces the

63 SARS' strategic objectives 1 and 3 are discussed in Chapter 4 para 4.5.1 and 4.5.3.
64 S 40 TAA.
65 SARS' strategic objective 7 is discussed in Chapter 4 para 4.5.7.
66 Chapter 5 para 5.2.4.1 and 5.2.4.1.2.
67 SARS' strategic objective 3 is discussed in Chapter 4 para 4.5.3.
68 Chapter 6 para 6.2.2. and 6.4.
69 Chapter 6 para 6.4.

opportunity for potential collusion, resulting in diminished efficacy of the system, as seen in the Boyle case discussed in Chapter 6.[70] Therefore, it will be proposed that a new unit or office within SARS be created to deal with the whistleblower reports to relieve pressure and ensure efficient service delivery. This will likely satisfy SARS' strategic objectives to develop a high-performing and engaged workforce.[71] The effective investigation and use of whistleblower reports may help SARS to bridge the gap between taxpayers and tax evaders.

Premised on the discussions in Chapters 4 and 5 regarding social theory for tax compliance, it is established that a reward-based whistleblowing programme influences taxpayers' behaviour. This is based on the increased information sharing between observers or potential informers and the revenue authority.[72] This increased information sharing could assist SARS in expanding its use of data to improve outcomes.[73] It also potentially increases the detection rate of non-compliance and evasion.[74]

In Chapter 5, it is observed that a reward-based whistleblowing programme steers both compliant and potential non-compliant taxpayers into the compliance domain.[75] Similar to this observation, a reward-based whistleblowing programme pulls all persons into the potential informant and tax collection domain. It means that all persons become responsible for tax collection from non-compliant taxpayers and evaders. In other words, every person in an organisation or company is a potential incentivised quasi-revenue agent and can blow the whistle on non-compliance and evasion. By sharing the collection and detection responsibility, the tax morale may be positively influenced, resulting in increased voluntary compliance. This resonates

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70 Chapter 6 para 6.3.4. *Boyle v Commonwealth Director of Public Prosecutions* (2023) SADC 27.
71 SARS' strategic objective 4 discussed in Chapter 4 para 4.5.4.
72 Chapter 5 para 5.2.2 and 5.2.4.1.1 and 5.2.4.1.2.
73 SARS' strategic objective 5 discussed in Chapter 4 para 4.5.5.
74 SARS' strategic objective 3 discussed in Chapter 4 para 4.5.3.
75 Chapter 5 para 5.2.4.1.2.

strongly with SARS' strategic objectives to improve non-compliance detection, while making it easy to comply and building public trust and confidence.[76]

Apart from a collection perspective, a reward-based whistleblowing programme could assist SARS as a screening tool to detect potential tax evaders using automated lifestyle audit programmes based on open-source intelligence. For instance, if someone blows the whistle on potential non-compliance and tax evasion, it can trigger a computerised lifestyle audit based on the impugned taxpayer's social media accounts and compare it to their tax declarations. This potential use of an incentivised tax whistleblowing programme envisions a modernised and automated system to increase performance in both an efficient and cost-effective manner.[77]

A tax whistleblowing programme that establishes clear reporting channels for non-compliance and evasion makes it easy for potential informers to engage with the revenue authority on potential non-compliance and evasion.[78] This ease of communication can help to build trust and confidence in the tax administration system.[79]

Introducing a reward-based tax whistleblowing programme could enhance persons' general awareness, understanding and education of their tax obligations. Potential informants may be curious to determine whether their observed conduct qualifies as non-compliance or evasion, thereby educating themselves on the applicable laws. At the same time, it forces potential non-compliant taxpayers and evaders to concern themselves with their tax affairs, as there is an increased risk of detection. Thus, introducing a reward-based whistleblowing programme can help SARS to provide certainty of their obligations.[80]

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76 SARS' strategic objective 3 discussed in Chapter 4 para 4.5.3; SARS' strategic objective 2 discussed in Chapter 4 para 4.5.2; SARS' strategic objective 9 discussed in Chapter 4 para 4.5.9.

77 SARS' strategic objective 6 discussed in Chapter 4 para 4.5.6; SARS' strategic objective 7 discussed in Chapter 4 para 4.5.7.

78 Chapter 6 para 6.4.

79 SARS' strategic objective 9 discussed in Chapter 4 para 4.5.9.

80 SARS' strategic objective 1 discussed in Chapter 4 para 4.5.1.

A reward-based tax whistleblowing programme can also be administered using mobile applications for devices on which reports can be made and used to provide secure feedback to the whistleblowers. This results in increased online services and quicker turnaround times, cost-effectively satisfying SARS' strategic objectives.[81]

An incentivised tax whistleblowing programme may result in improved prosecution outcomes, as more and better evidence may be available. There is currently no formal channel or mechanism in terms of which SARS can engage other agencies like the NPA to offer whistleblowers witness protection or indemnity from prosecution. For example, suppose a traitorous whistleblower who forms part of a scheme, and who has committed tax offences, approaches SARS. In that case, SARS has no authority to offer any form of protection or to guarantee an audience with other agencies such as the NPA. The incentivised whistleblowing programme can enhance the working relationship and communication between SARS and other state agencies such as the NPA and the SAPS.[82]

7.4. Ethical considerations associated with the introduction of a reward-based tax whistleblowing policy

Implementing a reward-based policy for tax whistleblowers requires balancing the encouragement of reporting tax evasion or non-compliance with maintaining ethical and legal standards of privacy, fairness and transparency. The accounting and legal professionals are in an ideal position to aid authorities in identifying illicit acts. This is so because they can access knowledge and information concerning the particular

81 SARS' strategic objective 5 discussed in Chapter 4 para 4.5.5; SARS' strategic objective 7 discussed in Chapter 4 para 4.5.7.

82 SARS' strategic objective 7 is discussed in Chapter 4 para 4.5.7.

taxpayer or person.[83] Morse opines that governments should be aware of the ethical problems that incentives could create and should not violate these norms unduly.[84]

The question is whether any ethical issues arise from these professionals' position in the context of an incentivised tax whistleblowing programme. McCormally maintains that legal and tax practitioners form part of a highly regulated industry subject to rules of legal privilege that may render evidence inadmissible.[85] The inadmissibility of the evidence may result in the report not being successfully prosecuted and no recovery; as such, there is ultimately no risk to the taxpayers. Should these practitioners disclose information about their clients, they are subject to disciplinary action.[86]

Ayres conducted a study to determine how different institutional logics, *inter alia* family, religion, state, profession and community, influence accounting professionals' approach towards irregularities discovered in their daily professional activities.[87] They employed the Theory of Institutional Logic developed by Thornton in 2012, which recognises that different institutional logics influence individuals and societies in their study.[88] The results indicated that the family institutional logic outweighed all other considerations, as it directly relates to the morals of the family.[89] Thus, the reward

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83 McCormally "Ethics & Tax Procedure Corner Tax Whistleblowing: Both Knowledge and Nuance Needed" *Journal of Passthrough Entities* 2021 17.

84 Morse "Whistleblowers and Tax Enforcement: Using Inside Information to Close the Tax Gap" *Akron Tax Journal* 2009 31. Hazard and Hodes *The Law of Lawyering* (1998).

85 McCormally "Ethics & Tax Procedure Corner Tax Whistleblowing: Both Knowledge and Nuance Needed" *Journal of Passthrough Entities* 2021 17.

86 McCormally "Ethics & Tax Procedure Corner Tax Whistleblowing: Both Knowledge and Nuance Needed" *Journal of Passthrough Entities* 2021 17.

87 Ayres, Sauerbronn and Pimentel Duarte da Fonseca "Accounting Professionals and Whistleblowing: A Typology of the Influence of Institutional Logics" *Revista Contabilidade & Finanças* 2022 249.

88 Ayres, Sauerbronn and Pimentel Duarte da Fonseca "Accounting Professionals and Whistleblowing: A Typology of the Influence of Institutional Logics" *Revista Contabilidade & Finanças* 2022 249.

89 Ayres, Sauerbronn and Pimentel Duarte da Fonseca "Accounting Professionals and Whistleblowing: A Typology of the Influence of Institutional Logics" *Revista Contabilidade & Finanças* 2022 261.

offered for whistleblowing was not considered to be tempting to accounting professionals.[90]

Within the South African legal industry, the conduct of all legal practitioners is governed by the Legal Practice Act.[91] In terms of section 36 of the Legal Practice Act, all legal practitioners are bound by the code of conduct developed and regulated by the Legal Practice Council.[92] In terms of the accepted code of conduct, legal practitioners must keep their clients' affairs subject to legal privilege and confidential.[93]

Regarding the position of accountants in South Africa, the Board of the South African Institute of Chartered Accountants also governs the conduct of chartered accountants. It has adopted the International Code of Ethics for Professional Accountants.[94] This code of conduct also recognises the protection of all clients' affairs and business relationships.[95] This duty of confidentiality continues even after the relationship between the accountant and the client is terminated.[96] Accordingly, accountants will also be subject to disciplinary action for disclosing the confidential affairs of clients, even as a whistleblower.

Thus, legal practitioners and accountants will also be unable to blow the whistle on their clients' affairs without disciplinary action. A legal practitioner or accountant who is a mere bystander to the non-compliance or evasion will probably not risk their careers to receive a reward only potentially. However, a legal practitioner or accountant involved in non-compliance or evasion may consider the reward payment

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90 Ayres, Sauerbronn and Pimentel Duarte da Fonseca "Accounting Professionals and Whistleblowing: A Typology of the Influence of Institutional Logics" *Revista Contabilidade & Finanças* 2022 261.

91 Legal Practice Act 28 of 2014.

92 S 36 Legal Practice Act 28 of 2014.

93 Para 3.6 code of conduct published under Notice 198 of 2019 Government Gazette N42364 dated 29 March 2019.

94 SAICA website https://www.saica.org.za/about/general/ethics/saica-code-of-conduct (Accessed 25/11/2023).

95 Para 110.1A1(d), R114.1 Code of Professional Conduct of the South African Institute of Chartered Accountants, 2022 Edition at https://saicawebprstorage.blob.core.windows.net/uploads/SAICA-Code-of-Professional-Conduct-2022.pdf.

96 R114.2 Code of Professional Conduct of the South African Institute of Chartered Accountants, 2022 Edition.

for the disclosure, as they will likely not be allowed to practise in future. The question will be whether their whistleblower reports will be admissible in court. The general principle is that the person relying on legal privilege bears the onus of proving that the information or documents are inadmissible.[97] In *Zuma v National Director of Public Prosecutions*,[98] the Constitutional Court held that although privileged material is generally inadmissible, the right to assert legal professional privilege may be limited and outweighed by countervailing considerations.[99] These questions of admissibility will have to be weighed and evaluated on a case-by-case basis and no general conclusion can be drawn in this study.

7.5. Conclusion

The chapter aims to amalgamate the findings on the compliance theories and strategies to arrive at a proposed policy position and to consider certain ethical questions arising in the legal and accounting industries. This chapter establishes that a reward-based whistleblowing programme complements the tax compliance theories and factors identified and discussed in Chapter 4.

Introducing a reward-based whistleblowing programme has already been shown to positively impact taxpayer behaviour and compliance. Furthermore, a reward-based whistleblowing programme has the potential to help SARS to reach its strategic objectives to improve voluntary compliance. This chapter concludes that a reward-based whistleblowing programme is viable within SARS' current strategic objectives and is a powerful instrument that can be utilised to improve the current tax regulatory framework in South Africa from both an audit and collection perspective.

Considering the different strategies for incentivising voluntary compliance, this thesis does not suggest that the legislature remove the penalties, fines and reporting duties imposed by the Tax Administration Act. Instead, a reward-based whistleblowing

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97 *Randles v Chemical Specialities Ltd* 2011 8 BLLR 783 (LC) 790-791.
98 *Zuma v National Director of Public Prosecutions* 2009 (1) SA 141 (CC) para 183 – 185.
99 *Zuma v National Director of Public Prosecutions* 2009 (1) SA 141 (CC) para 183 – 185.

programme should be introduced to supplement the existing strategies in a combined strategy. Following the conclusions and observations of the US and Australian regulatory positions, the proposed policy position includes a reward-based whistleblowing programme rather than relying only on anti-retaliation laws to incentivise tax whistleblowing.[100] The findings of this chapter are summarised in the table below.

100 It must be noted that it is not the premise of this study to conclude whether the US or Australian regulatory frameworks must be adopted in the South African context. The aim is to consider how the foreign policies are drafted and what key aspects are relevant to lay the foundations of a tax whistleblowing programme for South Africa.

Table 7.1 Summary of compliance factors as they relate to different compliance strategies

	Compliance factor identified	**Description of compliance factor**	**Influence on potential whistleblowing programme**	**Theory of compliance affected**	**Whistleblower strategy affected**	**Whistleblowing policy framework**
i)	Tax compliance is influenced by the cost of non-compliance.	This means that by increasing the cost of non-compliance through the imposition of penalties and the tax rate, the appeal for evasion and non-compliance reduces.	A potential whistleblower report leading to adverse findings could attract an increased penalty. The whistleblowing programme may also increase the probability of audit thereby increasing the cost of compliance.	Economic deterrence theory.	Fine. Pay.	Penalties and criminal sanctions were found to be ineffective. Clear reporting channel required. Unambiguous terms and requirements for whistleblowing programme required.
ii)	Taxpayers are more compliant when they understand their obligations.	This factor relates to the simplicity of the tax system and the ease of compliance.	A potential whistleblowing programme must be readily accessible and easy. This means that the reporting process must be streamlined.	Economic deterrence theory. Social theory. Trust in administration.	Protect. Pay.	Calculation of payment/reward must be premised on objective criteria.

iii)	Increased probability of an audit.	This relates to the perception that an audit is probable leading to increased compliance for fear of being caught.	In terms of a whistleblowing programme, a whistleblower-based audit scheme may be developed leading to higher accuracy and increased success.	Economic deterrence theory.	Pay.	Easy access to the whistleblowing programme. The whistleblowing programme must be stated in simple terms. The process must be easy and quick. Whistleblower reports must be thoroughly vetted and investigated. Quick turnaround time for feedback to whistleblower and action steps. Separate whistleblowing unit within revenue authority. Confidentiality of reports must be guaranteed.
iv)	Enhanced government services increase compliance.	This factor relates to taxpayer's *quid pro quo* perception of the purpose of tax. If the perception on quality and quantity of government services increases, tax compliance increases.	A tax whistleblowing programme could potentially affect this factor if taxpayers perceive the reports to be adding value. In other words, by successfully investigating whistleblower reports on tax evasion and non-compliance, government's ability to render service is increased.	Fiscal exchange theory. Trust in administrations.	Protect. Pay.	
v)	Social perception.	Taxpayers are influenced by the views and behaviour of their peers. Thus, if a non-compliant taxpayer sees that a fellow non-compliant taxpayer is penalised or prosecuted, it	A whistleblowing programme may result in enhanced perception that non-compliance or evasion will be detected.	Social and comparative treatment.	Protect. Pay.	

		may influence their behaviour. This factor relates to the adage found in the dictum of Lord Chief Justice of England in *Rex v. Sussex Justices* [1924] 1 KB 256 "justice must be seen to be done".	However, for this factor to be effective, the statistics for whistleblower reports must be published and emphasised.			Whistleblowers must be protected from retaliation and exempted from damages claims. Separate whistleblowing unit within revenue authority to combat corruption and bribery. Clear requirements and thresholds for payments.
vi)	Rules must be applied impartially and fairly.	This factor concerns the perception that political figures are "above the law".	Under a whistleblowing programme, the reports must be open to any person. In other words, there should be no barrier to making a whistleblower report. Whether the report will result in a financial benefit to the whistleblower is a separate question.	Social and comparative treatment. Political legitimacy and trust in the administration.	Pay.	Protection in preparation of whistleblowing reports. Transparency in the process. Whistleblowers must be kept informed of the process and outcomes.
vii)	Trust in the tax system.	This factor concerns the public trust in the administration of the tax system. In other words, service delivery by the administration.	For a whistleblowing programme, this means that any person must be able to make a report and SARS must attend to the report.	Political legitimacy and trust in the administration.	Pay.	

		It is not concerned with the spending of taxes collected by the executive branches of government.		Fiscal exchange theory.		

Source: Author's compilation

Chapter 8: Proposed whistleblowing policy

8.1. Introduction

The introduction of an incentivised whistleblowing programme necessitates an examination of its constituent elements and the method of integration of such a programme into the current tax legislative framework. This chapter explores the foundational elements of a robust incentivised whistleblowing programme and its potential for incorporation within the existing legislative framework.

As a starting point, it is imperative to distinguish the proposed incentivised whistleblowing programme and the existing Voluntary Disclosure Programme ("VDP"). After drawing this distinction, the chapter delineates eight elements crucial for establishing an incentivised whistleblowing programme. This chapter concludes with a concise analysis of the consequential amendments required in the broader legislative framework concerning whistleblowers.

8.2. Voluntary Disclosure Programme

The Tax Administration Act provides for a VDP in sections 225 to 233. This programme enables a taxpayer to disclose their "default" to SARS. A "default" includes submitting inaccurate or incomplete information to SARS, failure to submit information, or

adopting a tax position, which resulted in an understatement.[1] A valid application for voluntary disclosure must:[2]

> "(a) be voluntary;
>
> (b) involve a 'default' which has not occurred within five years of the disclosure of a similar 'default' by the applicant or a person referred to in section 226 (3);
>
> (c) be full and complete in all material respects;
>
> (d) involve a behaviour referred to in column 2 of the understatement penalty percentage table in section 223;
>
> (e) not result in a refund due by SARS; and
>
> (f) be made in the prescribed form and manner."[3]

A person can apply in their personal, representative or withholding capacity for voluntary disclosure relief.[4] If SARS notified a person of an audit or investigation related to the default, the application for relief is not considered "voluntary" unless certain requirements are met.[5] These requirements include if the default would not have been detected during the audit or investigation and if the application is in the

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1 S 225 Tax Administration Act "**25. Definitions**.—In this Part, unless the context indicates otherwise, the following term, if in single quotation marks, has the following meaning—'default' means the submission of inaccurate or incomplete information to SARS, or the failure to submit information or the adoption of a 'tax position', where such submission, non-submission, or adoption resulted in an understatement"

2 S 227 Tax Administration Act "**227. Requirements for valid voluntary disclosure.**—The requirements for a valid voluntary disclosure are that the disclosure must—(*a*) be voluntary; (*b*) involve a 'default' which has not occurred within five years of the disclosure of a similar 'default' by the applicant or a person referred to in section 226 (3); (*c*) be full and complete in all material respects; (*d*) involve a behaviour referred to in column 2 of the understatement penalty percentage table in section 223; (*e*) not result in a refund due by SARS; and (*f*) be made in the prescribed form and manner"

3 S 227 Tax Administration Act.

4 S 226(1) Tax Administration Act "**226. Qualification of person subject to audit or investigation for voluntary disclosure**.—(1) A person may apply, whether in a personal, representative, withholding or other capacity, for voluntary disclosure relief. (2) If the person seeking relief has been given notice of the commencement of an audit or criminal investigation into the affairs of the person, which has not been concluded and is related to the disclosed 'default', the disclosure of the 'default' is regarded as not being voluntary for purposes of section 227, unless a senior SARS official is of the view, having regard to the circumstances and ambit of the audit or investigation, that— (a) . . . . . .(b) the 'default' in respect of which the person has sought relief would not otherwise have been detected during the audit or investigation; and (c) the application would be in the interest of good management of the tax system and the best use of SARS' resources."

5 S 226(2) Tax Administration Act.

interest of the good management of the tax system and the best use of SARS' resources.[6]

The relief available under the VDP includes relief concerning understatement penalties, 100 percent relief for administrative non-compliance penalties, and an undertaking that SARS will not pursue criminal prosecution of a tax offence.[7] If the application for relief under the VDP is accepted, it involves concluding an agreement between SARS and the person requesting relief.[8]

The VDP serves a separate but related purpose than an incentivised whistleblowing programme. The VDP aims to provide a mechanism for non-compliant taxpayers and tax evaders to regularise their tax affairs. It is an application launched by the taxpayer or their representative. An incentivised whistleblowing programme provides a mechanism for reporting non-compliance and evasion, enabling SARS to detect and curb the behaviour. The VDP and an incentivised whistleblowing programme can work in tandem and complement each other.

The VDP programme differs from the proposed incentivised whistleblowing programme in three ways. Firstly, the incentive under the VDP is for the remittance of penalties to make regularising their affairs cheaper for the taxpayer. The incentive under an incentivised whistleblowing programme is a monetary reward for assisting SARS in detecting and assessing non-compliance and evasion of another taxpayer. The reward allocation may reduce the whistleblower's capital tax liability.

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6 S 226(2)(b) and (c) Tax Administration Act.

7 S 229 Tax Administration Act "229**. Voluntary disclosure relief**.—Despite the provisions of a tax Act, SARS must, pursuant to the making of a valid voluntary disclosure by the applicant and the conclusion of the voluntary disclosure agreement under section 230— (a) not pursue criminal prosecution for a tax offence arising from the 'default'; (b) grant the relief in respect of any understatement penalty to the extent referred to in column 5 or 6 of the understatement penalty percentage table in section 223; and (c) grant 100 per cent relief in respect of an administrative non-compliance penalty that was or may be imposed under Chapter 15 or a penalty imposed under a tax Act, excluding a penalty imposed under that Chapter or in terms of a tax Act for the late submission of a return."

8 S 230 Tax Administration Act.

Secondly, the relief under the VDP may not result in the taxpayer being in a refund position.[9] The aim of the VDP is not for SARS to owe an amount to the taxpayer. Under the proposed incentivised whistleblowing programme, the whistleblower may be in a refund position and obtain a monetary reward for their whistleblowing report. The intention of the proposed whistleblowing programme is not to replace the VDP. The innocent whistleblower's position is straightforward in that they would receive a benefit in the context of a monetary reward, which may result in an eventual refund. The position of the traitorous whistleblower is more complex as it may overlap with the VDP. However, the traitorous whistleblower would blow the whistle on a third party with whom they may have business associations and they may be involved in an unlawful scheme. The traitorous whistleblower may receive a reward for their contributions; however, the reward will not regularise their affairs. Under section 92 of the Tax Administration Act, SARS must raise an additional assessment with the appropriate penalties if it appears that the correct amount of tax was not assessed previously. Thus, the traitorous whistleblower may receive a reward, but it does not result in a correction of their assessed taxes. What should follow, is SARS raising additional assessments with the appropriate penalties which may be set off against the credits in their tax account. Their incentive is thus in the possibility of having a reduced tax debt due to the reward. Nothing prevents the traitorous whistleblower from applying for VDP to regularise their own affairs, provided they will not be in a refund position, as that is not allowed under the VDP. Thus, the intention is not for the incentivised whistleblowing programme and the VDP to operate in silos.

Thirdly, the VDP is a taxpayer-driven process launched by the taxpayer or its representatives. It is not intended to serve as a reporting channel for third parties. The proposed incentivised whistleblowing programme is open for anyone to report non-compliance or evasion by another taxpayer. The rewards under the incentivised whistleblowing programme are not a transferable reward. For example, if person A is the only shareholder in a company called B. A then blows the whistle on the tax affairs of B and receives their reward. Is the reward now available to B to pay for penalties or

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9 S 227(1)(f) Tax Administration Act.

interest? Under the proposed incentivised whistleblowing programme, the rewards are not transferrable to related or connected parties. It may be that A eventually receives a refund, if they were compliant and the amount is deducted from any outstanding taxes. How A decides to spend the refund by paying B's debt ought not to be a concern for SARS. If A pays B's debt, the funds in any event flow back to the fiscus.

The VDP, penalties, reporting duties and the proposed incentivised whistleblowing programme all aim to provide different regulatory mechanisms to encourage tax compliance and reporting.[10] All of these different incentives and mechanisms are ultimately used to arrive at a pragmatic approach to increasing voluntary tax compliance.[11] The VDP therefore aims to provide a mechanism for regularisation of taxpayer's affairs through a voluntary process. The proposed incentivised tax whistleblowing programme provides a mechanism for SARS to obtain information in order to intervene and compel tax compliance. Thus, the VDP and the proposed incentivised tax whistleblowing programme can operate harmoniously within the tax legislative framework.

8.3. Elements of a Tax Whistleblowing System

8.3.1. Establishing an independent office to deal with whistleblower reports

One of the key functions of an effective whistleblowing programme identified in Chapter 6 is that it must be administered by an independent office separate from the ordinary investigating teams and/or auditors.[12]

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10 Lobel "Linking Prevention, Detection, and Whistleblowing: Principles for Designing Effective Reporting Systems Symposium: Citizen Employees: Whistleblowers and Other Employees Acting in the Public Interest" *South Texas Law Review* 2012 44.

11 Lobel "Linking Prevention, Detection, and Whistleblowing: Principles for Designing Effective Reporting Systems Symposium: Citizen Employees: Whistleblowers and Other Employees Acting in the Public Interest" *South Texas Law Review* 2012 42.

12 Chapter 6, para 6.2.2.

In the US, the Office of the Whistleblower administers the whistleblowing programme.[13] In Australia, the Commissioner for Taxation administers the whistleblowing programme.[14] Perhaps one of the reasons for the difference in the efficacy of the whistleblowing programmes in the US and Australia is the perceived independence of the functionaries or offices dealing with the whistleblowers. Lipman opines that a separate office dealing with whistleblower reports curbs fears of partiality in the investigation of a report.[15] This is so because it reinforces the perceived legitimacy of the organisation.[16] It enables whistleblowers to feel confident that their reports are reviewed fair and objectively.[17] There are various practical measures to achieve this trust in the organisation, such as ensuring adequate training of the personnel dealing with the whistleblower's report on behalf of the authorities, and establishing an effective whistleblowing management system.[18]

8.3.1.1. The Tax Ombud

Creating an office dealing with specific issues separate from the ordinary SARS units is not uncommon in the Tax Administration Act, since it already provides an

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13 Chapter 6 para 6.2.1.5.

14 Chapter 6 para 6.3.

15 Lipman *Whistleblowers: incentives, disincentives, and protection strategies* (2012) 111. Lobel "Linking Prevention, Detection, and Whistleblowing: Principles for Designing Effective Reporting Systems Symposium: Citizen Employees: Whistleblowers and Other Employees Acting in the Public Interest" *South Texas Law Review* 2012 51.

16 Lobel "Linking Prevention, Detection, and Whistleblowing: Principles for Designing Effective Reporting Systems Symposium: Citizen Employees: Whistleblowers and Other Employees Acting in the Public Interest" *South Texas Law Review* 2012 42.

17 Lipman *Whistleblowers: incentives, disincentives, and protection strategies* (2012) 110. Lobel "Linking Prevention, Detection, and Whistleblowing: Principles for Designing Effective Reporting Systems Symposium: Citizen Employees: Whistleblowers and Other Employees Acting in the Public Interest" *South Texas Law Review* 2012 42 -43.

18 Lipman *Whistleblowers: incentives, disincentives, and protection strategies* (2012) 114. Groenewald *Whistleblowing Management Handbook* (2020) 6.

independent Tax Ombud.[19] The Tax Ombud's mandate and duties are specified in the Tax Administration Act.[20]

The Tax Ombud is mandated to review taxpayer complaints regarding the service, procedural or administrative manner resulting from applying a tax Act.[21] The Tax Ombud is required to review the complaint and resolve it through mediation or conciliation.[22] The Tax Ombud must also act independently and follow informal, fair and cost-effective procedures in resolving the complaint.[23]

The Tax Ombud's duties are limited to taxpayers' complaints, and they cannot review legislation, SARS policy or practices generally prevailing, a matter subject to an objection and appeal or a decision pending before a Tax Court.[24] The review process

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19 S 15 Tax Administration Act "**15. Office of Tax Ombud**.—(1) The Tax Ombud must appoint the staff of the office of the Tax Ombud who must be employed in terms of the SARS Act. (2) When the Tax Ombud is absent or otherwise unable to perform the functions of office, the Tax Ombud may designate another person in the office of the Tax Ombud as acting Tax Ombud. (3) No person may be designated in terms of subsection (2) as acting Tax Ombud for a period longer than 90 days at a time. (4) The expenditure connected with the functions of the office of the Tax Ombud is paid in accordance with a budget approved by the Minister for the office."

20 Ss 16 and 18 Tax Administration Act. It must be noted that the perceived independence of the Tax Ombud and the progress made by this office to establish its independence fall outside the scope of the current study. It is recommended that the legislature consider the progress made by the Tax Ombud when the powers, mandate and composition of the whistleblower office is crafted

21 S 16(1) Tax Administration Act "**16. Mandate of Tax Ombud.**—(1) The mandate of the Tax Ombud is to—(*a*) review and address any complaint by a taxpayer regarding a service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS; and (*b*) review, at the request of the Minister or at the initiative of the Tax Ombud with the approval of the Minister, any systemic and emerging issue related to a service matter or the application of the provisions of this Act or procedural or administrative provisions of a tax Act."

22 S 16(2)(a) Tax Administration Act.

23 S 16(2) Tax Administration Act "(2) In discharging his or her mandate, the Tax Ombud must—review a complaint and, if necessary, resolve it through mediation or conciliation; (b) act independently in resolving a complaint; (c) follow informal, fair and cost-effective procedures in resolving a complaint; (d) provide information to a taxpayer about the mandate of the Tax Ombud and the procedures to pursue a complaint; (e) facilitate access by taxpayers to complaint resolution mechanisms within SARS to address complaints; and (f) identify and review systemic and emerging issues related to service matters or the application of the provisions of this Act or procedural or administrative provisions of a tax Act that impact negatively on taxpayers."

24 S 17 Tax Administration Act "**17. Limitations on authority.**—The Tax Ombud may not review— (*a*) legislation or tax policy;(*b*) SARS policy or practice generally prevailing, other than

considers various factors in the Tax Administration Act.[25] These include the age of the issue,[26] the time elapsed since the requester became aware of the issue,[27] the nature and seriousness of the issue,[28] whether the request or complaint is made in good faith,[29] and the findings of other redress mechanisms concerning the request.[30]

The Tax Ombud reports annually to the Minister and quarterly to the Commissioner for SARS.[31] This report contains a summary of the most serious issues encountered by taxpayers and an inventory of the issues described in such a summary.[32]

As for confidentiality, the Tax Ombud is subject to the provisions of Chapter 6 of the Tax Administration Act.[33] Furthermore, the Tax Administration Act explicitly states that the Tax Ombud may not disclose information obtained or prepared to SARS, except as required for performing its functions and duties.[34] The Tax Ombud keeps

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to the extent that it relates to a service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS; (*c*) a matter subject to objection and appeal under a tax Act, except for an administrative matter relating to such objection and appeal; or (*d*) a decision of, proceeding in or matter before the tax court."

25 S 18(3) Tax Administration Act "(3) In exercising the discretion set out in subsection (2), the Tax Ombud must consider such factors as—(a)the age of the request or issue;(b)the amount of time that has elapsed since the requester became aware of the issue;(c)the nature and seriousness of the issue;(d)the question of whether the request was made in good faith; and(e)the findings of other redress mechanisms with respect to the request."

26 S 18(3)(a) Tax Administration Act.

27 S 18(3)(b) Tax Administration Act.

28 S 18(3)(c) Tax Administration Act.

29 S 18(3)(d) Tax Administration Act.

30 S 18(3)(e) Tax Administration Act.

31 S 19(1)(a) and (c) Tax Administration Act.

32 S 19(2) Tax Administration Act "(2) The reports must—(a) contain a summary of at least ten of the most serious issues encountered by taxpayers and identified systematic and emerging issues referred to in section 16 (2) (f), including a description of the nature of the issues; (b) contain an inventory of the issues described in subparagraph (a) for which—(i) action has been taken and the result of such action;(ii) action remains to be completed and the period during which each item has remained on such inventory; or (iii) no action has been taken, the period during which each item has remained on such inventory and the reasons for the inaction; and (c) contain recommendations for such administrative action as may be appropriate to resolve problems encountered by taxpayers."

33 S 21 Tax Administration Act "**21. Confidentiality**.—(1) The provisions of Chapter 6 apply with the changes required by the context for the purpose of this Part. (2) SARS must allow the Tax Ombud access to information in the possession of SARS that relates to the Tax Ombud's powers and duties under this Act. (3) The Tax Ombud and any person acting on the Tax Ombud's behalf may not disclose information of any kind that is obtained by or on behalf of the Tax Ombud, or prepared from information obtained by or on behalf of the Tax Ombud, to SARS, except to the extent required for the purpose of the performance of functions and duties under this Part."

34 S 21(3) Tax Administration Act.

complaints and processes confidential from SARS to ensure objective and independent resolution and to make taxpayers feel comfortable lodging complaints.[35]

8.3.1.2. The proposed whistleblower office

Turning to the proposed incentivised tax whistleblowing policy, the inclusion of a dedicated and independent office, similar to the function of the Tax Ombud, is not novel. It is proposed that, like the Tax Ombud, the whistleblower office must have its mandate and powers to investigate and report on the whistleblower reports received. For the purposes of this chapter, the suggested office or functionary will be referred to as the "whistleblower office".

The whistleblower office's mandate should be to receive, review, process and investigate any report or disclosure by any person against a taxpayer concerning non-compliance with any tax Act, tax evasion or fraud, misconduct or failure to disclose material information, and deciding on a whistleblower's claim for award. Often in practise, the whistleblowers approach SARS' attorneys to engage on the possibility of whistleblowing. Under the proposed incentivised whistleblowing programme, when the whistleblowers approach attorneys for SARS or the audit team, these whistleblowers should be routed to the whistleblower office.[36]

The whistleblower's office should also have reporting duties similar to the Commissioner and Minister to ensure the whistleblower's office's effective administration and responsible use of resources. These reports may assist SARS in identifying the sectors, areas or persons prone to non-compliance and evasion to determine whether any amendments to the tax Act are required.

Information sharing between the whistleblower office and SARS is a precarious issue. On the one hand, it may be necessary for the investigative audit or criminal

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35 These provisions have not been tested in the South African courts.

36 It may also be considered a conflict of interest for SARS and its attorneys if the whistleblower and the audit team engage in the absence of the whistleblower office.

investigation teams to have access to the whistleblower reports, especially in cases involving illicit schemes. On the other hand, whistleblowers must be secure in knowing that their identities will be protected. To balance these competing interests, any request by SARS for access to a whistleblower report must be in writing and adequately motivated. The whistleblower office must then decide to disclose the report. This proposal is not uncommon as information-sharing or disclosure is included in the confidentiality provisions of the Tax Administration Act already.[37]

A further practical proposal would be to keep a database of the taxpayers against whom reports are filed but exclude the name of the whistleblower in the database. In this way, the audit or investigation teams will be able to know whether a report concerning a particular taxpayer has been filed historically. If they require a copy of the report, they can request the same from the whistleblower office. It must be borne in mind that this will foreseeably only relate to reports previously considered to be incomplete or non-meritorious at the time.

8.3.2. Investigation and powers of the whistleblower office

As part of establishing a whistleblower office, it is necessary to consider the extent of such an office's investigation powers. SARS has various investigation powers in Chapter 5 of the Tax Administration Act. These powers include requesting relevant information from third parties,[38] conducting interviews with taxpayers to clarify issues of concern,[39] conducting inspections and field audits at taxpayers' premises,[40] and gathering information through searches and seizures and tax inquiries.[41] Although these powers have their jurisdictional requirements that SARS must meet to exercise them, these powers should also be available to the whistleblower office dealing with

37 See ss 70, 71 and 73 Tax Administration Act.
38 S 46 Tax Administration Act.
39 S 47 Tax Administration Act.
40 Ss 45, 48 and 49 and Tax Administration Act.
41 Part C and D of Chapter 5 Tax Administration Act.

whistleblowing reports. After all, the whistleblower programme aims to enable persons to report information to SARS and for SARS to investigate these reports.

These powers may require some amendment to ensure sufficient protection for the whistleblower. For instance, section 46 of the Tax Administration Act, which states that SARS may request relevant material from any person, should include a provision that when the whistleblower's office requires the whistleblower to provide relevant information, such information may be provided confidentially. The purpose would be to protect the whistleblower's identity if the information provided by the whistleblower is used or leaked at any stage.

In an incentivised whistleblowing programme, it is envisaged that upon receipt of the whistleblower report, the whistleblower office reviews the whistleblower report using the existing information-gathering tools in its arsenal to investigate the allegations of non-compliance and evasion. After conducting the evaluation, the whistleblower's office submits a report to the head of the whistleblower's office or the commissioner for consideration. This report should include a preliminary evaluation of the impugned taxpayer's assets and liabilities and a preliminary calculation of a reward payable to the whistleblower. This calculation can then be used to determine the final amount payable to the whistleblower, if any. Based on the recommendation in the final report, the commissioner may then either refer the matter to audit[42] or criminal investigation,[43] or the matter may be found meritless, and no further action is required. Once this referral process is complete, the audit or investigation follows its ordinary course under the Tax Administration Act.

In the case of *Carte Blanche Marketing CC and Others v Commissioner for the South African Revenue Service*,[44] the court held that the decision to select a taxpayer for an

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42 S 40 of the Tax Administration Act "**40. Selection for inspection, verification or audit**.—SARS may select a person for inspection, verification or audit on the basis of any consideration relevant for the proper administration of a tax Act, including on a random or a risk assessment basis."

43 S 49 of Tax Administration Act.

44 *Carte Blanche Marketing CC and Others v Commissioner for the South African Revenue Service* 2020 4 All SA 434 (GJ); 2020 (6) SA 463 (GJ).

audit, verification or investigation is not a decision subject to a legality review.[45] The referral by the whistleblower office could be seen as forming part of the risk assessment done prior to the selection for audit or investigation. Thus, this recommendation or referral may also not be subject to a legality review. This is similar to a verification under section 40 of the Tax Administration Act which does not require notice to the taxpayer.

In line with the duty contained in the Tax Administration Act to keep taxpayers informed,[46] the whistleblower ought to be informed whether the matter will be further investigated. However, the whistleblower ought not to be advised of the details of the recommendation, as it will infringe on the confidentiality principles relating to the tax affairs of the impugned taxpayer in the Tax Administration Act. This proposed duty to inform the whistleblower is not uncommon since section 3B of the PDA provides a similar duty towards employees or workers in the context of a labour environment.[47] The PDA requires that the person or body who received the protected disclosure must acknowledge receipt of the disclosure and inform the employee or worker of the decision to investigate and the time frame for such investigation.[48] If the decision is not to investigate the matter, then the recipient of the disclosure must provide reasons for such a decision to the employee or worker.[49] The matter may also be referred directly to another body for investigation.[50]

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45 *Carte Blanche Marketing CC and Others v Commissioner for the South African Revenue Service* 2020 4 All SA 434 (GJ); 2020 (6) SA 463 (GJ) para 84.

46 S 42 Tax Administration Act.

47 S 3B PDA provides "3B. **Duty to inform employee or worker**.—(1) Any person or body to whom a protected disclosure has been made in terms of section 6, 7 or 8, respectively, must, subject to subsection (3), as soon as reasonably possible, but in any event within 21 days after the protected disclosure has been made—(a) decide whether to—(i) investigate the matter or not; or (ii) refer the disclosure to another person or body if that disclosure could be investigated or dealt with more appropriately by that other person or body; and (b) in writing acknowledge receipt of the disclosure by informing the employee or worker of the decision—(i) to investigate the matter, and where possible, the time-frame within which the investigation will be completed; (ii) not to investigate the matter and the reasons for such decision; or (iii) to refer the disclosure to another person or body."

48 S 3B(1)(b)(i) PDA.

49 S 3B(1)(b)(ii) PDA.

50 S 3B(1)(b)(iii) PDA.

The proposed duty to inform the whistleblower aligns with section 3B of the PDA except for the timeframe of the investigation. The timeframe for audits is unpredictable and depends on the scope of the investigation, years under assessment, the availability of information and the cooperation of the taxpayers. It can be argued that by informing the whistleblower whether their complaint is being investigated, it may result in the disclosure of confidential information. However, what must be borne in mind is that the whistleblower has a right to review the decision not to investigate their reports or the value of the reward. If the whistleblower is not informed of the decision, it may open the door for corruption within SARS and distrust in the system. In my view, the potential prejudice to the administration of SARS and the fiscus of not informing the whistleblower of the outcome of their report outweighs the potential infringement on the confidentiality of the taxpayer's information. The proposal for informing the whistleblower is not a full disclosure of all action steps and the investigation. It remains limited to whether the report is seen as preliminarily regarded as meritorious.

One of the key principles of an effective whistleblowing system is that whistleblowers should feel that their reports are taken seriously.[51] Therefore, the investigation by the whistleblower office should be done within a reasonable period. In section 42(1) of the Tax Administration Act, taxpayers must be informed of the status of completion of an audit.[52] Section 3B of the PDA provides a recipient with a protected disclosure within 21 business days to conduct the investigation. The same period could be applied in principle for the investigation to be done by the whistleblower office. However, there should be scope for the investigation to exceed 21 business days.

The final award payable to the whistleblower will be determined only after the matter is referred for investigation or audit and a final determination is made, and only if SARS has collected proceeds following the non-compliance and evasion. The audit or criminal investigations team or debt collection teams could then make

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51 Chapter 4 para 4.3.4 and Chapter 5 para 5.2.1.1.

52 S 42(1) Tax Administration Act provides "**42. Keeping taxpayer informed**.—(1) A SARS official involved in or responsible for an audit under this Chapter must, in the form and in the manner as may be prescribed by the Commissioner by public notice, provide the taxpayer with a notice of commencement of an audit and, thereafter, a report indicating the stage of completion of the audit."

recommendations or submissions to the whistleblower office regarding the weight and value of the whistleblower report during the investigation and, ultimately, in the final determination and calculation of the tax debts and collected proceeds.

8.3.3. Preliminary determination of possible reward

In the US, the reward calculation is based on a gradient considering various factors concerning the behaviour of the whistleblower.[53] These factors include the timing of the whistleblower's action, the importance of the information provided, whether the information was previously unknown to the IRS, the likelihood of the IRS discovering the information independently, accuracy and completeness of the information, whether the information identifies assets that could aid in recovery, and whether the information has an impact on taxpayer behaviour. [54]

One of the factors relevant to the determination of the reward is whether the information would have arisen or would have been established as part of the audit process or investigations. This is not a novel consideration in the context of the South African Tax Administration Act and the Canadian Securities Commission. The VDP in section 226(2)(b) provides for a similar consideration to determine whether a person qualifies for relief under the voluntary disclosure programme.[55] It is, therefore, proposed that the determination of the reward should also be based on an assessment of various factors to arrive at a fair amount. The authenticity of the information, and

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53 Chapter 6 para 6.2.2.

54 Chapter 6 para 6.2.2. IRM para 25.2.2.2.6.4.1 (1) (28 May 2020). See also office of the United States Securities Exchange Commission – office of the Whistleblower (Dec 2020) https://www.sec.gov/whistleblower/frequently-asked-questions. (Accessed 2/10/2022).

55 S 226 Tax Administration Act provides 226. **Qualification of person subject to audit or investigation for voluntary disclosure.**— (2) If the person seeking relief has been given notice of the commencement of an audit or criminal investigation into the affairs of the person, which has not been concluded and is related to the disclosed 'default', the disclosure of the 'default' is regarded as not being voluntary for purposes of section 227, unless a senior SARS official is of the view, having regard to the circumstances and ambit of the audit or investigation, that—…(b) the 'default' in respect of which the person has sought relief would not otherwise have been detected during the audit or investigation."

the originality requirements are also recognised by the Ontario Securities Commission in Canada as one of the criteria for a whistleblower to qualify for a reward.[56]

In Kenya, the Commissioner-General of the revenue authority may, upon recommendation of a commissioner, reward a whistleblower.[57] This reward is subject to the information leading to *inter alia* the discovery of unassessed taxes, recovery of unassessed taxes or enforcement of the tax laws.[58] Each of these criteria triggers a different reward. For instance, if the information leads to the discovery of unassessed tax, then the whistleblower is paid 1 percent of the taxes so identified, subject to a maximum of KES500 000.[59] Subsequent recovery of unassessed tax rewards a whistleblower with 5 percent of the taxes so recovered, subject to a maximum of KES5 million.[60]

The factors that ought to be considered for inclusion in the determination of reward are set out below.

Firstly, whether there was any delay in making the report which may influence the authenticity of the information available to investigate the report. Secondly, whether the whistleblower was involved in or contributed to the alleged non-compliance or evasion and the extent of their involvement. In this regard, it is not suggested that the traitorous whistleblowers should be automatically excluded from reward, as it is often those persons who may hold the most valuable information. In this regard, different options regarding the payment of rewards become relevant. A further possibility is to

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56 Ontario Securities Commission website at https://www.osc.ca/en/enforcement/osc-whistleblower-programme/award-eligibility-and-process (Accessed 04/12/2023).

57 S 5A Kenya Revenue Authority Act 2 of 1995.

58 S 5A Kenya Revenue Authority Act 2 of 1995 "5A. **Rewards** (1) The Commissioner-General may, upon the recommendation of a Commissioner reward any person for information leading to the identification or recovery of unassessed taxes or duties: Provided that this section shall not apply to any officer of the Authority. (2) The reward payable under subsection (1) shall be— (a) in the case of information leading to the identification of unassessed duties or taxes, one per centum of the duties or taxes so identified or five hundred thousand shillings, whichever is the less; and (b) in the case of information leading to the recovery of unassessed duties or taxes, five per centum of the taxes or duties so recovered or five million shillings, whichever is the less. (c) in the case of information not specified in paragraph (a) and (b) leading to the enforcement of the tax laws, five hundred thousand shillings."

59 S 5A(2)(a) Kenya Revenue Authority Act 2 of 1995.

60 S 5A(2)(b) Kenya Revenue Authority Act 2 of 1995.

include thresholds for the rewards payable to traitorous whistleblowers. This is elaborated on further in paragraph 8.3.5 below.

Thirdly, if the whistleblower benefitted in any manner whatsoever from the non-compliance or evasion and the extent of the benefit. Fourthly, whether the whistleblower (or its legal representative) obstructed or hindered SARS' investigation or audit in any manner, this could relate to the failure to respond to requests for further information or failure to testify or obstructed a SARS official to exercise their duties.[61] It also encompasses the provision of inaccurate or misleading information. Section 234 of the Tax Administration Act states that obstructing a SARS official from executing their duty or providing false information is a criminal offence.[62] Thus, this factor plays an important role in properly enforcing the tax Acts and administering the tax system. It would, in any event, be difficult to justify the reward in circumstances where the whistleblower commits these offences after making their report.

Fifthly, the significance of the information and the manner in which it contributed to the audit or investigation resulting in the collection of taxes, penalties or interest. This factual consideration may include considering whether the information resulted in the discovery of unassessed taxes or recovery of taxes. This factor can only properly be assessed after the conclusion of the audit or investigation, but a preliminary determination may be of assistance in determining the potential reward.

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61 S 234(1)(c), (d) and (g) of the Tax Administration Act criminalises this conduct.

62 S 234 Tax Administration Act 28 of 2011 provides **234. Criminal offences relating to non-compliance with tax Acts**.—(1) Any person who wilfully—(a) submits a false certificate or statement under Chapter 4; (b) issues an erroneous, incomplete or false document required to be issued under a tax Act to SARS or another person; (c) fails to—(i) reply to or answer truly and fully any questions put to the person by a SARS official, as and when required in terms of this Act; or (ii) take an oath or make a solemn declaration as and when required in terms of this Act; (d) obstructs or hinders a SARS official in the discharge of the official's duties; (e) refuses to give assistance required under section 49 (1); (f) holds himself or herself out as a SARS official engaged in carrying out the provisions of this Act; or (g) dissipates that person's assets or assists another person to dissipate that other person's assets in order to impede the collection of any taxes, penalties or interest, is guilty of an offence and is liable, upon conviction, to a fine or to imprisonment for a period not exceeding two years."

Sixthly, whether the information is original, and the likelihood of SARS discovering the information during the course of its audit or investigation. This factor is dealt with in the preceding paragraphs, and it is mentioned here for the sake of completeness.

8.3.4. Dispute resolution

It is foreseeable that the determination of the whistleblower's reward may result in disputes between SARS and the whistleblower. Accordingly, an appropriate dispute resolution mechanism should be considered as part of the incentivised whistleblowing programme.

Section 104(2) read with section 105 of the Tax Administration Act provides that an aggrieved taxpayer may dispute an assessment or decision by way of the objection and appeal procedure under Chapter 9 of the Tax Administration Act.[63] Considering that the whistleblower's reward is determined once tax is assessed and collected, which process is subject to objection and appeal proceedings, it follows that the whistleblower's reward could also be considered to be labelled as a "decision" subject to appeal to the Tax Court.

Section 105 provides that unless a High Court grant leave, an assessment or decision must be challenged by way of the objection and appeal process. In the recent case of *CSARS v Rappa Resources*,[64] the Supreme Court of Appeal held that taxpayers must

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63 S 104(2) Tax Administration Act provides "104. **Objection against assessment or decision…** (2) The following decisions may be objected to and appealed against in the same manner as an assessment—(a) a decision under subsection (4) not to extend the period for lodging an objection; (b) a decision under section 107 (2) not to extend the period for lodging an appeal; and (c) any other decision that may be objected to or appealed against under a tax Act" S 105 provides "**105. Forum for dispute of assessment or decision**.—A taxpayer may only dispute an assessment or 'decision' as described in section 104 in proceedings under this Chapter, unless a High Court otherwise directs."

64 *Commissioner for the South African Revenue Service v Rappa Resources (Pty) Ltd* (Case no 1205/2021) (2023) ZASCA 28 (24 March 2023). Ff *The Commissioner for the South African Revenue Service v Absa Bank Limited and Another* (596/2021) [2023] ZASCA 125 (29 September 2023), the court confirmed that High Court does not have jurisdiction to review

follow the objection and appeal process in terms of sections 104 to 107 of the Tax Administration Act.[65] Should a taxpayer wish to review SARS' decision to issue an assessment, they should first apply for leave to do so in the High Court.[66] It is not suggested that the decision of the reward be subject to the same principle as that of ordinary assessments and decisions, as in the case of Rappa Resources. The suggestion is that a review mechanism should be implemented within the Tax Court. This suggestion is elaborated on below.

Section 117 of the Tax Administration Act provides that the Tax Court has jurisdiction over tax appeals as envisaged in the Tax Administration Act.[67] Furthermore, the proceedings in the Tax Court are not open to the public and considered confidential.[68] Considering the position in an incentivised tax whistleblowing programme, the dispute resolution process could also be subject to the jurisdiction of the Tax Court. This provides a dispute resolution mechanism that simultaneously protects the whistleblower.

The procedure in the Tax Court for the adjudication of disputes involves the exchange of pleadings in terms of Tax Court Rules 31, 32 and 33. The sequence of events in the Tax Court is briefly set out hereunder.

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assessments which are not wholly a question of law. *Richards Bay Mining (Pty) Ltd v Commissioner for the South African Revenue Service* (2023-045310) [2024] ZAGPPHC 275 (26 March 2024) where the court held that s105 of the Tax Administration Act does oust the High Court's jurisdiction when it comes to declaratory relief. *Lueven Metals (Pty) Ltd v Commissioner for the South African Revenue Service* (Case no 728/2022) [2023] ZASCA 144 (8 November 2023) the Supreme Court of Appeal held that the High Court has a narrow basis for entertaining declaratory relief in tax matters. This judgment is currently pending before the Constitutional Court.

65 *Commissioner for the South African Revenue Service v Rappa Resources (Pty) Ltd* Case no 1205/2021) (2023) ZASCA 28 (24 March 2023) para 22-24.

66 *Commissioner for the South African Revenue Service v Rappa Resources (Pty) Ltd* Case no 1205/2021) (2023) ZASCA 28 (24 March 2023) para 22-24.

67 S 117 Tax Administration Act provides "**117. Jurisdiction of tax court**.—(1) The tax court for purposes of this Chapter has jurisdiction over tax appeals lodged under section 107…"

68 S 124 Tax Administration Act provides "124. **Sitting of tax court not public**.—(1) The tax court sittings for purposes of hearing an appeal under section 107 are not public. (2) The president of the tax court may in exceptional circumstances, on request of any person, allow that person or any other person to attend the sitting but may do so only after taking into account any representations that the 'appellant' and a senior SARS official, referred to in section 12 appearing in support of the assessment or 'decision', wishes to make on the request."

The dispute proceedings commence with the taxpayer filing of a notice of appeal in terms of Tax Court Rule 10. Thereafter, in terms of Tax Court Rule 31, SARS is required to set out the grounds for its assessment and opposition to the appeal. The taxpayer then has an opportunity in terms of Tax Court Rule 32 to respond to SARS' statement in terms of Tax Court Rule 31 and state its grounds of appeal. SARS then has a final opportunity to reply to the taxpayer's statement in terms of Tax Court Rule 33. The matter is thereafter enrolled for hearing and each party has an opportunity to present its case with evidence.

The Tax Court also provides for applications on notice.[69] These applications generally concern interlocutory or procedural disputes.[70] Tax Court Rule 51(1) provides that a procedural application in terms of section 117(3) must be dealt with in accordance with the process of the Tax Court Rules which includes the exchange of affidavits.[71]

The application process[72] or appeal processes[73] can be applied to whistleblower award disputes with the required wording changes in the Tax Court Rules. This thesis proposes that section 117 of the Tax Administration Act be amended to include review proceedings and that the application process be utilised. The benefit of the application process is truncated timelines for finalisation of the dispute rendering it more efficient.[74]

Once the Tax Court has made a determination of the reward, the determination may be subject to appeal to the Supreme Court of Appeal.[75] In these circumstances, it is suggested that, given the confidentiality of the whistleblowing regime and the aim to protect the whistleblower, such an appeal be dealt with *in camera* under the direction of the President of the Supreme Court of Appeal, as provided for in the Rules Regulating the Conduct of Proceedings of the Supreme Court of Appeal of South

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69 Tax Court Rules 50 to 64, Part F.
70 Tax Court Rule 52 and 56.
71 Tax Court Rule 51(1) read with Tax Court Rule 57, 60 and 61.
72 Tax Court Rule 51.
73 Tax Court Rules 31 to 33.
74 Under the application process the pleadings in the dispute is exchanged within 35 days whereas in the appeal process the pleadings are exchanged within a 100 day period.
75 S 135 Tax Administration Act.

Africa.[76] The same suggestion, relating to the protection of the whistleblower, is contended for in appeal proceedings to the Constitutional Court.[77]

8.3.5. Payment of rewards

8.3.5.1. Proposed method of payment

Payments to taxpayers are treated as refunds under the Tax Administration Act. Section 190(1) provides that SARS must pay a refund to a person of an amount that is refundable and reflected as such in an assessment, or if an amount was erroneously paid in excess of an amount in the assessment.[78] If an amount is refunded or paid to a taxpayer, such payment is set off against any existing tax debts.[79] If a taxpayer has no outstanding tax debts, SARS then pays the amount due to them.

SARS may allocate payments against penalties, interest or the oldest amount of an outstanding tax debt.[80] Accordingly, any payment or tax credit may first be applied to understatement or non-compliance penalties, and if any amount remains available, it will be allocated to the capital tax liability.

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76 Rule 11(1)(b) Rules Regulating the Conduct of Proceedings of the Supreme Court of Appeal of South Africa GN R1523 of 1998.

77 Rule 11(4) Rules of the Constitutional Court GN R1675 of 2003.

78 S 190 (1) Tax Administration Act provides "**190. Refunds of excess payments.**—(1) SARS must pay a refund if a person is entitled to a refund, including interest thereon under section 188 (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."

79 S 165 (3)(f) read with s 191(1) Tax Administration Act "165. **Taxpayer account**.—… (3) The taxpayer account must record details for all tax periods of—…(f) any credit for amounts paid that the taxpayer is entitled to have set-off against the taxpayer's tax liability" S 191 Tax Administration Act "**191. Refunds subject to set-off and deferral**.—(1) An amount refundable under section 190, including interest thereon under section 188 (3) (a), must be treated as a payment by the taxpayer that is recorded in the taxpayer's account under section 165, of an outstanding tax debt, if any, and any remaining amount must be set off against any outstanding debt under customs and excise legislation"

80 S 166 (1) Tax Administration Act "**166. Allocation of payments**.—(1) Despite anything to the contrary contained in a tax Act, SARS may allocate payment made in terms of a tax Act against an amount of penalty or interest or the oldest amount of an outstanding tax debt at the time of the payment…"

In an incentivised whistleblowing programme, the payment to whistleblowers could follow the same logic as the refund process described above. If the whistleblower office or the court determines that a whistleblower ought to be rewarded, and SARS has collected the tax, the payment could be done by applying the set-off principle described above. For the traitorous whistleblower, who benefitted from the tax evasion or non-compliance, the set-off would be against their tax liability. The traitorous whistleblower is, therefore, not immune from assessment, and SARS may tax their benefit from the tax evasion or non-compliance and impose penalties. SARS may allocate the credit of the reward of the traitorous whistleblower to the penalties imposed, leaving the capital debt in place. Thus, the traitorous whistleblower will very rarely be in an actual refund position where SARS must pay them the reward. The incentivised whistleblowing programme may in some instances be more lucrative than the VDP. However, this is an intentional advantage as it provides an additional incentive to report on third parties. When a person is confronted with the choice between regularising their own affairs through VDP or to blow the whistle on other taxpayers, SARS would want them to choose to blow the whistle, since it then receives information on non-compliance or evasion that it potentially would not have under the VDP.

Going back to the example above when person "A" is the only shareholder of a company "B", and A decides to blow the whistle in respect of B's tax affairs. This example raises the question of whether there should be limitations to the rewards in the case of connected persons. The challenge is that connected persons cannot be excluded from the incentivised whistleblowing programme, since they may be valuable in the context of fraud schemes. In the US, the payments under section 7623(b) are only compulsory if the potential non-compliance exceeds USD2 million. To overcome this potential issue of connected persons, a threshold for rewards to connected parties could be introduced.[81] For the whistleblower office in exercising their discretion to

81 The determination of the value of the threshold falls outside the scope of this thesis.

determine the reward, one of the factors forming part of the consideration is whether the whistleblower and the impugned taxpayer are connected.

The innocent whistleblower's case for payment under a refund scheme is slightly more complex. The innocent whistleblower could have an outstanding tax debt to which the refund and set-off process may apply. However, suppose the innocent whistleblower is tax compliant with no outstanding tax debt or they are not required to submit tax returns. In that case, the question is whether the credit due to them should be paid in cash or kept in their tax account for set-off against their tax liabilities in a subsequent assessment. For the whistleblower who is not required to submit a tax return, the proposal is that they file a return on which the credit may be allocated.[82]

This credit is then kept in the taxpayer's account for the assessment to limit the administrative burden associated with the payments. If the whistleblower is after set-off in a subsequent assessment in a refund position, the refund is paid as would have ordinarily occurred. This is not a novel concept in the context of the Tax Administration Act since section 191(3) provides that refunds of less than R100 must be carried forward in the taxpayer's account.[83] Thus, the whistleblower does not necessarily receive an immediate cash payout. The payment is carried forward in their tax account and applied to a subsequent assessment as a rebate of sorts. The innocent whistleblower will receive the payment, but in the form of a refund on existing or future liabilities.

This thesis proposes the payment benefit for the potential benefit and incentive it could have for the whistleblower. A refund could be payable by SARS for a myriad of reasons, for example, the application of rebates,[84] medical scheme fees,[85] or travel allowance benefits.[86] The award by SARS' whistleblower office will set off against tax

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82 There is no penalty when a person submits a return even though they are not required to file.

83 S 191(3) Tax Administration Act "**191. Refunds subject to set-off and deferral**…(3) An amount is not refundable is the amount is less than R100 or any other amount that the Commissioner may determine by public notice, but the amount must be carried forward in the taxpayer account."

84 S 6(2) Income Tax Act.

85 S 6A Income Tax Act.

86 S 8(1) Income Tax Act.

liabilities. Therefore, a tax-compliant whistleblower could potentially receive the benefit tax-free and unencumbered.

8.3.5.2. Practical considerations for the payment of refunds

As stated above, refunds are payable if reflected in an assessment.[87] The question is how would the whistleblower reward be reflected in an assessment? I propose that when the whistleblower office determines a reward payable to a whistleblower, the whistleblower be provided with a confirmation and a unique code that they may use to claim the tax credit.[88]

SARS' income tax return should include a line item to record the reward using the unique code. An example of the income tax return used by individuals (ITR12) is presented in Figure 8.1 below.[89]

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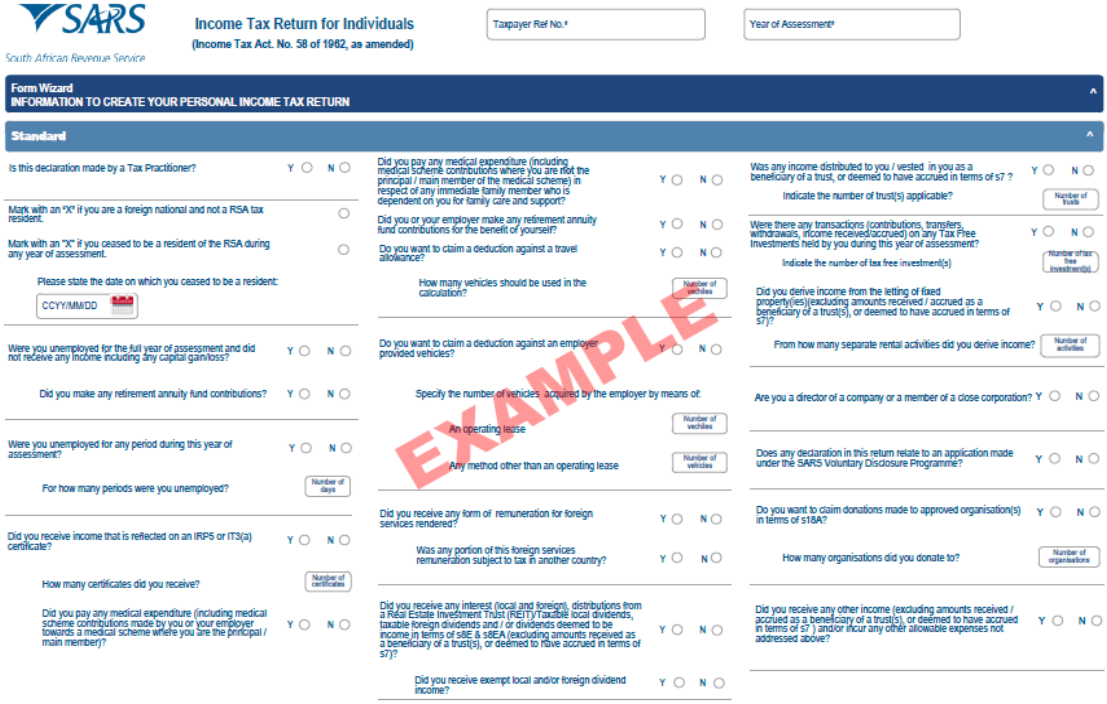
87 Chapter 8 para 8.3.5.1. and s 190(1) Tax Administration Act.

88 This is similar to the process used for deductions of donations to public benefit organisations under section 18A of the Income Tax Act.

89 SARS' website at https://www.sars.gov.za/wp-content/uploads/Ops/Forms/SARS_2021_LookFeel_ITR12_v2021.00.10-Example.pdf (Accessed 03/05/2024).

Figure 8.1 Example income tax return (ITR12)



Source: https://www.sars.gov.za.

The unique code triggers SARS' automated system to include the tax credit in the assessment. This tax credit is then ultimately reflected in the taxpayer's tax account.[90] This proposal prevents abuse of the whistleblower reward since SARS' system can be programmed so that the unique code cannot be used more than once. Furthermore, the tax credit is immediately available to the whistleblower. The payment of the whistleblower reward is then automated and need not require additional human capital to allocate or authorise payments.

This proposal entails that SARS revise the format of the income tax return to make provision for the whistleblower rewards. In addition to the amendment of the income

90 This is similar to the current Medical Schemes Fee Tax Credit rebate in terms of the Income Tax Act.

tax return, SARS will have to ascribe a new source code to capture the information on the amended income tax return in respect of whistleblower awards.[91]

The incorporation of the tax credit in the income tax return results in the award being linked to the calculation of the income tax liabilities of the whistleblower in their assessment. The result is that the award is reflected in an assessment for purposes of a refund being paid under section 190 of the Tax Administration Act.[92]

As part of the practical considerations for payment of rewards, the question of insolvency of the taxpayer becomes relevant. The proposed incentivised tax whistleblowing programme refers to payment to the whistleblower using the collected proceeds and not potential proceeds. Thus, if there are no collected proceeds then the whistleblower will not receive a reward. That said, it is up to SARS to use the mechanisms available in the Insolvency Act 24 of 1936 for the recovery assets or proceeds.[93] The possibility of potential insolvency may also encourage tax whistleblowers to blow the whistle sooner rather than later.

8.3.6. Confidentiality

Following the finding in Chapter 6 of this thesis[94] that the confidentiality of the report and anonymity of the whistleblower should be guaranteed, a robust whistleblowing programme should include provisions of confidentiality thereof.[95] This position is

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91 SARS uses source codes to capture the information submitted on income tax returns. For more information on SARS' source codes see SARS website at https://www.sars.gov.za/types-of-tax/personal-income-tax/filingseason/find-a-source-code/ (Accessed 20/04/2024).

92 The author considered the possibility of treating the award similar to the PAYE system. However, this will require the employee to disclose the whistleblower award to their employer to enable the employer to complete the requisite IRP 5 certificate reflecting the total tax paid and deductions claimed by the employee. This could potentially defeat the purpose of the strict confidentiality provisions proposed in the policy. Therefore, this route is not considered further.

93 The mechanisms referred to are contained in the Insolvency Act 42 of 1936 and the Companies Act 61 of 1973. A discussion of these Acts is outside the scope of the current study.

94 Chapter 6 para 6.4.

95 Chapter 6 para 6.4. Ff Transparency International "A Best Practice Guide for Whistleblowing Legislation" (2018) at https://images.transparencycdn.org/images/2018_GuideForWhistleblowingLegislation_EN.pdf (Accessed 31/03/2023) 18.

difficult in the South African context since the High Court in the matter of *Arena Holdings (Pty) Ltd t/a Financial Mail v SARS*,[96] declared the confidentiality provisions of the Tax Administration Act unconstitutional and subject to amendment, insofar as it limits access to information where the requestor complied with section 46 of the PAIA.[97]

This protection ought to extend to the civil or criminal court proceedings that may flow from the report. Any proposal to accommodate the protection of whistleblowers in court proceedings must be treated cautiously and account for the taxpayer's right to challenge and adduce evidence in an open public court.[98] That said, whistleblowers form part of a vulnerable group of persons since they are exposed to various personal, social and professional risks after making a report. In *Centre for Child Law and Others v Media 24 Limited and Others,*[99] the court stated that "the default position of ongoing protection is to ensure that the best interests of some of the most vulnerable members of our society are given the protection they are entitled to. The protection would be rendered hollow if the section fails to afford this."[100]

I argue that if the proposed incentivised tax whistleblowing programme does not include protection in the face of court proceedings, the protection afforded to the whistleblowers at the beginning of the investigation may be rendered futile and in vain. If the identity of whistleblowers must be disclosed during court procedures, it will defeat the purpose of protection and will compromise the whistleblowing programme in totality. In *Bosasa Operations (Pty) Ltd v Basson*,[101] the court held that it was not necessary for the media to disclose the identity of informants in defamation actions.[102]

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96 *Arena Holdings (Pty) Ltd t/a Financial Mail and two others v SARS and two others* 2022 (2) SA 485 (GP).

97 *Arena Holdings (Pty) Ltd t/a Financial Mail and two others v SARS and two others* 2022 (2) SA 485 (GP) 501. Chapter 3 para 3.4.2. Ff De Lange "Secrecy of Taxpayer Information and the disclosure thereof by an order of court in terms of the Tax Administration Act 28 of 2011 and the Promotion of Access to Information Act 2 of 2000" *Journal for Juridical Science* 2023 217.

98 S 34 Constitution.

99 *Centre for Child Law and Others v Media 24 Limited and Others* 2020 (4) SA 319 (CC).

100 *Centre for Child Law and Others v Media 24 Limited and Others* (4) SA 319 (CC) para 71.

101 *Bosasa Operations (Pty) Ltd v Basson* 2013 (2) SA 570 (GSJ).

102 *Bosasa Operations (Pty) Ltd v Basson* 2013 (2) SA 570 (GSJ) para 39.

The cases below indicate that the protection of whistleblowers in the private or public sphere is questionable. One of the most notorious whistleblower cases is that of Glen Chase in 2004.[103] He disclosed abuse of state financial resources and compiled a dossier for the then Special Investigative Unit (Scorpions). Following his disclosure, he was dismissed from the Northern Cape Provincial Government for releasing official information to the public.[104]

In 2021, Babita Deokaran, a senior manager, exposed more than R100 million in suspicious payments and another R850 million in suspicious transactions at the Gauteng Department of Health.[105] She was a key witness for the Special Investigative Unit's case involving influential politicians. She was assassinated on 23 August 2021.[106]

In considering options available to protect whistleblowers in court proceedings, one possibility is to allow anonymous *in camera* testimony.[107] This is not a novel concept in the context of the South African legislative framework since section 153(2) of the Criminal Procedure Act protects witnesses from harm and intimidation already, and authorises a presiding officer to order that they testify *in camera*, and that their identities protected.[108] In addition to the aforesaid section, section 170A of the

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103 News 24 'whistleblower going to the top" at https://www.news24.com/news24/whistleblower-going-to-the-top-20040907 (Accessed 18/02/2024).

104 News 24 (2004) "Whistleblower going to the top" at https://www.news24.com/news24/whistleblower-going-to-the-top-20040907 (Accessed 18/02/2024).

105 News 24 "Silenced Why Babita Deokaran was murdered" at https://specialprojects.news24.com/silenced/index.html (Accessed 18/02/2024). Global Initiative "Babita Deokaran" at https://assassination.globalinitiative.net/face/babita-deokaran/ (Accessed 18/02/2024).

106 News 24 "Silenced Why Babita Deokaran was murdered" at https://specialprojects.news24.com/silenced/index.html (Accessed 18/02/2024). Global Initiative "Babita Deokaran" at https://assassination.globalinitiative.net/face/babita-deokaran/ (Accessed 18/02/2024).

107 Morse "Whistleblowers and Tax Enforcement: Using Inside Information to Close the Tax Gap" *Akron Tax Journal* 2009 22. Morse suggests that to protect both whistleblowers and the taxpayer's right to have its return information kept confidentiality, the judicial review of the award and the enquiry into the requirements of the provisions must be held in an in camera court.

108 S 153(2) Criminal Procedure Act 51 of 1977 "**153. Circumstances in which criminal proceedings shall not take place in open court**.—(1) In addition to the provisions of section

Criminal Procedure Act provides that minor children may do so through an intermediary when they testify.[109]

Another proposal to include protection for a whistleblower is to make them competent but not compellable witnesses, and to include a specific exemption on the admissibility of hearsay evidence in court proceedings. Hearsay evidence is defined in section 3(4) of the Law of Evidence Act[110] to mean any "evidence, whether oral or in writing, the probative value of which depends upon the credibility of a person other than the person giving such evidence".[111] Section 3 of the Law of Evidence Amendment Act states that hearsay evidence is inadmissible in court proceedings.[112] This provision is subject to

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63 (5) of the Child Justice Act, 2008, if it appears to any court that it would, in any criminal proceedings pending before that court, be in the interests of the security of the State or of good order or of public morals or of the administration of justice that such proceedings be held behind closed doors, it may direct that the public or any class thereof shall not be present at such proceedings or any part thereof. (2) If it appears to any court at criminal proceedings that there is a likelihood that harm might result to any person, other than an accused, if he testifies at such proceedings, the court may direct— (a) that such person shall testify behind closed doors and that no person shall be present when such evidence is given unless his presence is necessary in connection with such proceedings or is authorized by the court; (b) that the identity of such person shall not be revealed or that it shall not be revealed for a period specified by the court…" For an example of the application of the section see *S v Lenting and Others* 2023 (2) SACR 409 (WCC) (24 July 2023).

109 S 170A Criminal Procedure Act.

110 Law of Evidence Act 45 of 1988.

111 S 3(4) Law of Evidence Act 45 of 1988.

112 S 3 Law of Evidence Amendment Act 44 of 1988 "**3 Hearsay evidence** (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless- *(a)* each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings; *(b)* the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or *(c)* the court, having regard to- (i) the nature of the proceedings; (ii) the nature of the evidence; (iii) the purpose for which the evidence is tendered; (iv) the probative value of the evidence; (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; (vi) any prejudice to a party which the admission of such evidence might entail; and (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice. (2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence. (3) Hearsay evidence may be provisionally admitted in terms of subsection (1) *(b)* if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph *(a)* of subsection (1) or is admitted by the court in terms of paragraph *(c)* of that subsection.(4) For the purposes of this section-**'hearsay**

three exceptions: Firstly, if each party against whom such evidence is adduced consents to the admission thereof.[113] Secondly, if the person on whose credibility the evidence depends later testifies in such proceedings.[114] Thirdly, if the court admits the evidence having regard to the nature of the proceedings,[115] the nature of the evidence,[116] the purpose for which it is tendered,[117] the probative value of the evidence,[118] the reason why the evidence is not given by the person on whose credibility it depends,[119] the prejudice to be suffered if the evidence is admitted,[120] and any other factor which in the court's discretion ought to be considered.[121]

After the whistleblower makes their report to SARS, it is possible for the SARS auditor or investigator to introduce and request the admission of the evidence tendered by the whistleblower to SARS on the basis of the third exception listed above, section 3(1)(c) of the Law of Evidence Amendment Act. The whistleblower will then not be required to testify in court and the taxpayer's right to challenge the evidence as presented by the SARS investigator remains intact. In order for this proposal to work, the requirements of section 3(1)(c) of the Law of Evidence Amendment Act referred to above must be met. This will result in factual findings by the court and depend on the merits of each case. It could also be argued that the fact that the information was provided by a whistleblower is a specific factor that could be incorporated into section 3(1)(c)(vii), which provides for "any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice".

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evidence' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence; **'party'** means the accused or party against whom hearsay evidence is to be adduced, including the prosecution."

113 S 3(1)(a) Law of Evidence Amendment Act 44 of 1988.
114 S 3(1)(b) Law of Evidence Amendment Act 44 of 1988.
115 S 3(1)(c)(i) Law of Evidence Amendment Act 44 of 1988.
116 S 3(1)(c)(ii) Law of Evidence Amendment Act 44 of 1988.
117 S 3(1)(c)(iii) Law of Evidence Amendment Act 44 of 1988.
118 S 3(1)(c)(vi) Law of Evidence Amendment Act 44 of 1988.
119 S 3(1)(c)(v) Law of Evidence Amendment Act 44 of 1988.
120 S 3(1)(c)(vi) Law of Evidence Amendment Act 44 of 1988.
121 S 3(1)(c)(vii) Law of Evidence Amendment Act 44 of 1988.

In this context, the case of *S v Brown*[122] is noteworthy. In this case, the accused was charged with attempted murder and pleaded not guilty to the charges and raised an alibi.[123] One of the witnesses of the crime saw an item drop from the accused's pocket during the incident. After the incident, the witness returned to the scene and picked up a cell phone device which she then handed to a third party.[124] It later transpired that the device was handed to SAPS by a member of the neighbourhood who did not want their identity disclosed.[125] The SAPS downloaded the device's content and confirmed that the device belonged to that of the accused.[126] The court had to consider whether the evidence concerning the device was admissible in the light of the fact that the person who handed the device to SAPS refused to be named.[127] The court determined that the probative value in the circumstances of the case depends on the purpose for which the evidence is used and how the evidence was dealt with in the so-called "chain of evidence".[128] The court did not find any issue with the evidence chain or that SAPS could have tampered with it.[129]

The principle deduced from *S v Brown* is simply this: If the whistleblower report is properly received and used by SARS, there is no reason why a SARS official cannot adduce the evidence on behalf of the whistleblower. This position should be seen in the context of the public interest in furthering the administration of justice. A similar provision for the admission of such hearsay evidence is found in the provisions of section 2(2) of The Prevention of Organised Crime Act 121 of 1998.

At or before the closing of the SARS case, the court has to make a finding on the admissibility of the hearsay evidence tendered by the SARS official when the evidence of the whistleblower is provided. Such a finding is interlocutory and can be revisited at the end of the case.

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122 *S v Brown* (CC 54/2014) (2015) ZAWCHC 128 (17 August 2015).
123 *S v Brown* (CC 54/2014) (2015) ZAWCHC 128 (17 August 2015) para 2.
124 *S v Brown* (CC 54/2014) (2015) ZAWCHC 128 (17 August 2015) para 2.
125 *S v Brown* (CC 54/2014) (2015) ZAWCHC 128 (17 August 2015) para 10.
126 *S v Brown* (CC 54/2014) (2015) ZAWCHC 128 (17 August 2015) para 5 – 9.
127 *S v Brown* (CC 54/2014) (2015) ZAWCHC 128 (17 August 2015) para 24.
128 S v Brown (CC 54/2014) (2015) ZAWCHC 128 (17 August 2015) para 25.
129 S v Brown (CC 54/2014) (2015) ZAWCHC 128 (17 August 2015) para 26.

It is significant to note that section 2(2) of The Prevention of Organised Crime Act 121 of 1998 only requires that the admission of the evidence should not render the trial unfair.

The principle of a fair hearing is further discussed in Chapter 9 as part of the constitutional evaluation of the proposals. The constitutional considerations concerning the other proposals set out herein are also discussed in Chapter 9.[130]

8.3.7. Anti-retaliation

Taking lessons from the tax whistleblowing programmes in the US and Australia, the inclusion of protection for whistleblowers against claims for damages and retaliation is essential for an effective whistleblowing programme.[131] This is underscored by the literature reviewed in Chapter 5.[132]

The proposed incentivised whistleblowing programme must include protection for unrelated or third-party whistleblowers who are not in an employee/employer relationship with the taxpayer to protect them against claims for damages. In this case, the lessons from the US and Australia provide that a whistleblower is not subject to a claim for damages or tort. Taking into account the matter of *Boyle v Commonwealth Director of Public Prosecutions,*[133] this protection should be extended to include the preparation by a whistleblower to make a report.

The constitutionality of the procurement of evidence by the whistleblower for purposes of their report is discussed in Chapter 9.

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130 Chapter 9 para 9.2.4.
131 Chapter 6 para 6.2.4 and 6.3.3.
132 Chapter 5 para 5.2.1 and 5.3.
133 *Boyle v Commonwealth Director of Public Prosecutions* (2023) SADC 27.

8.4. Consequential amendment of other existing legislation to accommodate an incentivised whistleblowing programme

This part of the chapter is a concise examination of the potential influence of the proposed incentivised whistleblowing programme. The purpose is to consider potential amendments to the existing legislation concerning whistleblowers to accommodate tax whistleblowing.

In considering the inclusion of the proposed incentivised whistleblowing programme within the legislative framework of South Africa, I considered whether its inclusion should be in the form of a separate and new parliamentary Act or whether it should be included in the current Tax Administration Act. I am of the view that the inclusion of the incentivised tax whistleblowing programme in the current Tax Administration Act is more beneficial for the following three reasons. Firstly, the whistleblower office will require the powers and duties currently attributed to SARS officials in terms of the Tax Administration Act since they will need to also investigate and verify the reports.[134] Secondly, a new Act would require the same consideration of the potential effect on the broader legislative framework in South Africa. Thirdly, the proposed incentivised tax whistleblowing programme aligns with the purpose and mission of the Tax Administration Act which is to collect taxes in the most efficient and effective manner and to consolidate all administrative provisions of the various tax Acts in South Africa.[135]

In Chapter 2 of this study, various legislative frameworks that may apply to whistleblowers are discussed and examined with the view to determining whether the legislation provides for an incentivised tax whistleblowing programme already. This

134 Chapter 8 para 8.3.2.
135 Preamble Tax Administration Act.

examination includes the Tax Administration Act,[136] the PDA,[137] the LRA,[138] the FICA,[139] the Companies Act,[140] the WPA[141] and the PRECCA.[142]

Based on the elements identified for a robust incentivised tax whistleblowing programme, the following Acts may require amendments to provide adequate protection for tax whistleblowers and to strengthen the existing reporting duties: the PDA, the LRA, the FICA and the WPA. In addition, the rules governing the procedures in the Tax Court and High Court of South Africa may also require amendment to cater for the proposed incentivised whistleblowing programme.[143]

8.4.1. LRA and PDA[144]

The definition of a "protected disclosure" must be considered as a starting point. As indicated in Chapter 2, a protected disclosure means a disclosure made to a legal advisor, an employer, a member of cabinet or a person listed in sections 8 or 9.[145] In order to include a disclosure by a tax whistleblower to SARS, the PDA must be amended to include the Commissioner for SARS as an eligible recipient of the disclosure.[146] If the Commissioner for SARS is included as an eligible recipient, the rights and protections afforded under the PDA could be extended to tax

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136 Chapter 2 para 2.2.
137 Chapter 2 para 2.3.
138 Chapter 2 para 2.4.
139 Chapter 2 para 2.5.
140 Chapter 2 para 2.6.
141 Chapter 2 para 2.7.
142 Chapter 2 para 2.8.
143 The required amendments are included in table 8.1 below.
144 LRA and PDA.
145 Chapter 2 para 2.3. S1 PDA ""protected disclosure" means a disclosure made to—(a) a legal adviser in accordance with section 5;(b) an employer in accordance with section 6; (c) a member of Cabinet or of the Executive Council of a province in accordance with section 7; (d) a person or body in accordance with section 8; or (e) any other person or body in accordance with section 9, but does not, subject to section 9A, include a disclosure— (i) in respect of which the employee or worker concerned commits a criminal offence by making that disclosure; or (ii) made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5."
146 Chapter 2 para 2.3.

whistleblowers, providing additional protection for tax whistleblowers in the context of employee-employer relationships.

One of the challenges identified in Chapter 2 pertaining to the application of the PDA to tax whistleblowers is the requirement of good faith in making the disclosure and that it may not be made for personal gain unless a reward is payable under a law.[147] Once the incentivised tax whistleblowing programme is included in the Tax Administration Act, the reward is provided for under the law, and the disclosure complies with section 9 of the PDA.

The PDA also requires amendment insofar as the test for a statement of fact in relation to possible tax offences and non-compliance is concerned.[148] In other words, the PDA currently provides that the whistleblower must reasonably believe that the facts reported are true, while the proposed incentivised whistleblowing programme has no such requirement. This thesis proposes that a whistleblowing report to SARS should be exempt from the requirement that the whistleblower must reasonably believe that the allegation is substantially true. Put differently, a tax whistleblowing report should not be governed by the same strict requirements applicable to other disclosures under the PDA.

The PDA does not require any amendment in respect of the requirements of the nature of the wrongdoing forming the subject of the complaint. The PDA already includes disclosures of criminal offences and non-compliance which both fall within the ambit of the Tax Administration Act.

The above proposals ensure that tax whistleblowers are also protected in a labour environment in the context of a protected disclosure. In doing so, the tax whistleblower,

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147 Chapter 2 para 2.3. S 9(1) PDA "General protected disclosure.—(1) Any disclosure made in good faith by an employee or worker— (a) who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and (b) who does not make the disclosure for purposes of personal gain, excluding any reward payable in terms of any law; is a protected disclosure if—(i) one or more of the conditions referred to in subsection (2) apply; and (ii) in all the circumstances of the case, it is reasonable to make the disclosure."

148 S 8(1)(c)(ii) PDA.

who is also an employee, enjoys the full rights and privileges associated with the PDA and the LRA.

The PDA operates within the employee-and-employer relationship and works in conjunction with the LRA. Should the PDA be amended as aforesaid, the rights and protections afforded in the PDA and the LRA will be limited to tax whistleblowers who are employees or workers of the taxpayer. The need for a separate programme in the Tax Administration Act for whistleblowers outside this labour relationship remains.

8.4.2. FICA[149]

The FICA incorporates a reporting duty for transactions relevant to the investigation of tax evasion or attempted tax evasion.[150] As indicated in Chapter 2,[151] various issues and challenges regarding the reporting duty created in section 29 of the FICA exist. In summary, these challenges include the following: Firstly, there must be an ongoing investigation for a reporting duty to be triggered, meaning that a suspected act of tax evasion is not included in the reporting duty. Secondly, the provision in the FICA assumes that the public is aware of ongoing tax evasion investigations. Thirdly, the Act assumes that the person on whom the reporting duty is imposed has a workable understanding of what constitutes tax evasion. Accordingly, these challenges prove the current reporting duty for tax whistleblowers impractical.

This thesis does not suggest excluding the existing reporting duty in the FICA. Rather, section 29 of the FICA should be amended by deleting the words "relevant to the

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149 Financial Intelligence Centre Act.

150 Chapter 2 para 2.5. S 29(1)(b)(iv) FICA provides that "(1) A person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or ought reasonably to have known or suspected that….(b) a transaction or series of transactions to which the business is a party-…(iv) may be relevant to the investigation of an evasion or attempted evasion of a duty to pay any tax, duty or levy imposed by legislation administered by the Commissioner for the South African Revenue Service; … must, within the prescribed period after the knowledge was acquired or the suspicion arose, report to the Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions."

151 Chapter 2 para 2.5.

investigation" from the section. The section should include persons "who suspect that a transaction is related to tax evasion or tax non-compliance". This amended scope of the reporting duty means that the duty is triggered not only when there is an investigation of tax evasion.

The remaining challenges regarding whether a person has knowledge of what constitutes tax evasion and non-compliance will remain. These challenges cannot be addressed in legislation and will have to be addressed on a different level through increased awareness of taxpayers' duties under the Tax Administration Act.

It was pointed out in Chapter 2 that the FICA provides for reports to be made within fifteen days.[152] This time limit is not conducive in the context of tax whistleblowers. Section 99(1) of the Tax Administration Act provides that SARS may not raise an assessment more than three years after the date of an original assessment and five years for self-assessments.[153] The aforesaid three- and five-year prescription periods do not apply if the assessment was not raised due to fraud, misrepresentation or non-disclosure of material facts.[154] Inherent in the nature of whistleblowing is disclosing

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152 Chapter 2 para 2.5.

153 S 99(1) Tax Administration Act provides that "**99. Period of limitations for issuance of assessments**.—(1) An assessment may not be made in terms of this Chapter—(a) three years after the date of assessment of an original assessment by SARS; (b) in the case of self-assessment for which a return is required, five years after the date of assessment of an original assessment—(i) by way of self-assessment by the taxpayer; or(ii)if no return is received, by SARS;(c)in the case of a self-assessment for which no return is required, after the expiration of five years from the—(i) date of the last payment of the tax for the tax period; or(ii) effective date, if no payment was made in respect of the tax for the tax period; (d) in the case of—(i) an additional assessment if the—(aa) amount which should have been assessed to tax under the preceding assessment was, in accordance with the practice generally prevailing at the date of the preceding assessment, not assessed to tax; or (bb) full amount of tax which should have been assessed under the preceding assessment was, in accordance with the practice, not assessed; (ii) a reduced assessment, if the preceding assessment was made in accordance with the practice generally prevailing at the date of that assessment; or (iii) a tax for which no return is required, if the payment was made in accordance with the practice generally prevailing at the date of that payment; or (e) in respect of a dispute that has been resolved under Chapter 9."

154 S 99(2)(a) and (b) Tax Administration Act "**99. Period of limitations for issuance of assessments…** (2) Subsection (1) does not apply to the extent that—(a) in the case of assessment by SARS, the fact that the full amount of tax chargeable was not assessed, was due to—(i) fraud; (ii) misrepresentation; or(iii)non-disclosure of material facts; (b) in the case of

facts that were previously concealed. It is unlikely that SARS will ever be prevented from raising an assessment consequent upon a whistleblower report. Therefore, the inclusion of a fifteen-day limit for a report for a tax whistleblower is not conducive to the proposed incentivised whistleblowing programme nor the interest of justice.[155] This thesis suggests that there be no limit to when a report may be made.

Currently, the reports related to tax evasion or attempted tax evasion under the FICA are investigated by the FIC. To improve efficiency and to promote uniformity, it is suggested that the reports filed in respect of tax evasion and tax non-compliance ought to be directed to the whistleblower office established in terms of the proposed incentivised whistleblowing programme. This can be a referral from the FIC to the whistleblower office.

8.4.3. WPA[156]

The protection afforded to witnesses under the WPA is within the exclusive mandate of the SAPS. SARS' mandate in terms of the SARS Act is to collect revenue and exercise control over the importation, movement, storage and exportation of certain goods.[157] SARS' function includes the administration of the tax Acts and legislation concerning the collection of revenue.[158]

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self-assessment, the fact that the full amount of tax chargeable was not assessed, was due to—(i) fraud; (ii) intentional or negligent misrepresentation; (iii) intentional or negligent non-disclosure of material facts; or (iv) the failure to submit a return or, if no return is required, the failure to make the required payment of tax;…"

155 S 171 Tax Administration Act "**171. Period of limitation on collection of tax.**—Proceedings for recovery of a tax debt may not be initiated after the expiration of 15 years from the date the assessment of tax, or a decision referred to in section 104 (2) giving rise to a tax liability, becomes final."

156 Witness Protection Act.

157 S 3 South African Revenue Service Act 34 of 1997 "**3. Objectives**—SARS' objectives are the efficient and effective— (a) collection of revenue; and (b) control over the import, export, manufacture, movement, storage or use of certain goods."

158 S 4 South African Revenue Service Act 34 of 1997 "**4. Functions**.—(1) To achieve its objectives SARS must— (a) secure the efficient and effective, and widest possible, enforcement of— (i)

SARS' mandate is not to offer personal or physical protection to any person. It would be difficult to bring the physical or personal protection of a witness or a whistleblower within the mandate of SARS, which is to collect taxes. Therefore, the duties under the WPA cannot be inferred to be the duties and responsibilities of SARS. That said, there may be a link between collecting taxes and protecting a whistleblower. It is foreseeable that there may be circumstances in which physical or personal protection of a tax whistleblower may be essential.

For those scenarios, it is suggested that the WPA be amended to extend the definition of a "witness" to include tax whistleblowers who make a report under the Tax Administration Act. In addition, the Commissioner for SARS must be included as a recipient of a report by a tax whistleblower, on which an application for witness protection is based without the requirement of an ongoing criminal investigation.

8.5. Conclusion

This chapter explores the foundational elements of an incentivised whistleblowing programme and its incorporation within the existing legislative framework. To achieve this goal, the chapter first differentiates between the VDP process included in the Tax Administration Act and the proposed incentivised whistleblowing programme. The VDP differs from the proposed incentivised whistleblowing programme in three key respects: The VDP aims to enable taxpayers to regularise their affairs within a programme that reduces the cost of bullying them into the compliance domain. An incentivised tax whistleblowing programme is not aimed at taxpayers regularising their affairs; rather the purpose is to enable persons who may or may not be connected to a particular taxpayer to report tax evasion or non-compliance.

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the national legislation listed in Schedule 1; and (ii) any other legislation concerning the collection of revenue or the control over the import, export, manufacture, movement, storage or use of certain goods that may be assigned to SARS in terms of either legislation or an agreement between SARS and the organ of state or institution concerned..."

The existing VDP does not provide for an incentive to be paid to a person who applies for volunteering disclosure relief. This aligns with the purpose of the programme which is for non-compliant taxpayers or evaders to regularise their affairs and not to incentivise the reporting of non-compliance or evasion. An incentivised whistleblowing programme aims to enhance the collection of taxes through monetary reward.

The VDP is a process driven by the taxpayer and not by third parties or related persons. An incentivised whistleblowing programme and the participation therein is intended for a person other than the taxpayer against whom a report is made.

In establishing the differences between the VDP and the proposed incentivised whistleblowing programme, the two programmes can work in tandem and be complementary to one another. At present, there exists no mechanism for individuals to safely report instances of non-compliance or evasion and receive incentives for doing so. This results in a considerable disparity between those who possess knowledge of non-compliance or evasion, but lack a secure reporting mechanism, and those who engage in such activities and desire to remedy their situation.

In establishing an incentivised whistleblowing programme, the chapter identifies seven key elements necessary for introducing such a programme. These seven elements are briefly:

i. The establishment of an independent whistleblower office to receive and investigate reports;

ii. The whistleblower office service so established must have certain investigative powers in order to investigate and examine reports submitted to the office;

iii. The whistleblower office ought to decide on the reward payable to the whistleblowers, taking into account a gradient of factors relating to the conduct of the law and the value of the information;

iv. There must be a dispute resolution mechanism in terms of which whistleblowers may dispute the determination by the whistleblower office of their reward;

v. The payment of the reward must be facilitated through the established channels for refunds and the taxpayer account;

vi. The confidentiality of the report and the whistleblower's identity must be guaranteed; and

vii. The inclusion of provisions prohibiting retaliation against whistleblowers and claims for damages.

When considering the elements of this proposed whistleblowing programme, a certain process becomes evident. This process is schematically represented in Figure 8.1 below.

From the analysis of the elements required for a robust whistleblowing programme, the Tax Administration Act is capable of including such a programme. However, the inclusion of an incentivised whistleblowing programme is not without consequences for another legislative framework.

In Chapter 2, various reporting duties and provisions related to whistleblowers, in general, are considered to determine whether they provide for an incentivised tax whistleblowing programme. In concluding the analysis in Chapter 2, the finding is that the existing legislative framework does not provide adequate protection or provision for an incentivised tax whistleblowing programme. Accordingly, consequential amendments of the legislative framework surrounding whistleblowers must be considered holistically when considering the inclusion of an incentivised whistleblowing programme.

In conclusion, the current legislative framework can include an incentivised whistleblowing programme, which could promote the SARS strategic objectives set out in Chapters 4 and 7 to improve overall tax compliance and reduce tax evasion. The envisaged amendments to the legislative framework are set out in Table 8.1 below.

Figure 8.2 Proposed incentivised whistleblowing programme process

Source: Author's own compilation.

Table 8.1 List of recommended legislative amendments

Legislation	**Identified section for amendment**	**Proposed amendment**
Tax Administration Act.	S1 – Definitions.	Include definitions for "whistleblower", "whistleblower office", "whistleblower reward", "whistleblower report".
	Part E - Powers and Duties of Minister.	Include power to appoint the proposed whistleblower office.
	Chapter 2	Include a new Part G for provisions related to the establishment of the whistleblower office, the mandate and limitations on authority, review and receipt of whistleblower reports, confidentiality of reports and identity of whistleblowers.
	S46 to 47 - Requests for relevant material.	Include that responses by whistleblowers are confidential.
	S67 - General prohibition on disclosure.	Include protection of whistleblowers' identity and report specifically.
	S68(1) - SARS confidential information.	Include that information supplied by a whistleblower under the incentivised whistleblowing programme is strictly confidential and not subject to disclosure, including grounds of PAJA or PAIA.

	S70 - Disclosure to other entities.	Include general prohibition on disclosure of whistleblower report and identity.
	S71 - Disclosure in criminal, public safety or environmental matters.	Include general prohibition on disclosure of whistleblower report and identity.
	S73 - Disclosure to taxpayer of own record.	Specifically exclude whistleblower reports or information concerning a whistleblower.
	S107.	Include a new section 107(4) to provide that the decision by the whistleblower office on the value of the reward is subject to review proceedings in the Tax Court.
	S117- Jurisdiction of the Tax Court.	Include section 117(4) to refer to review of the determination of the reward payable to the whistleblower.
	S190 - Refunds of excess payments.	Include a specific reference to refund payable if it results from a whistleblower tax credit.
	Chapter 16, Part C.	Include preliminary determination of rewards using identified factors, dispute resolution process, confidentiality and anti-retaliation provisions.

Tax Court Rules.	Rule 1 – Definitions.	Include definitions for "whistleblower", "whistleblower office", "whistleblower reward", "whistleblower report", "grounds of determination of whistleblower reward".
	Rule 6 - Reasons for assessment.	Include Rule 6A to provide for requests for reason for determination of whistleblower reward.
	Rule 51.	Remove the reference to "procedural application to the tax court provided for in section 117(3)". Instead refer to an application in terms of section 117(3) or 117(4) of the Tax Administration Act.
PDA	S8(1) - Protected disclosure to certain persons or bodies.	To include Commissioner of SARS as an eligible recipient of a protected disclosure.
	S8(1)(c)(ii) - Protected disclosure to certain persons or bodies.	Include an exception that the whistleblower is not required to reasonably believe the truthfulness of the report.

FICA.	S29(1)(b)(iv) - Suspicious and unusual transactions.	Remove the requirement of an investigation into tax evasion or attempted tax evasion as prerequisite for the reporting duty.
WPA.	S1 - Definition of "witness".	The definition of a witness must be extended to include tax whistleblowers who made a report under the proposed incentivised tax whistleblowing programme.
	S7(1)(a) - Application for protection.	The section should include that tax whistleblowers may direct their report under the Act to the Commissioner for SARS.

Source: Authors' own compilation.

Chapter 9: Constitutional analysis of certain elements of the proposed incentivised tax whistleblowing programme

9.1. Introduction

Chapter 8 explores the elements of the proposed incentivised whistleblowing programme. The proposed incentivised whistleblowing programme may in certain respects, infringe on the constitutional rights of both the taxpayer and the whistleblower. The proposed incentivised whistleblowing programme affects mainly four constitutional rights: The right to privacy,[1] the right to access to courts,[2] the right to just administrative action,[3] and the right to access information.[4]

The discussion in this chapter commences with an examination of the effect of the proposed incentivised whistleblowing programme on the right to privacy.[5] This concerns the position of both the whistleblower and the taxpayer, who is the subject of a whistleblower report.

Thereafter, the proposed incentivised whistleblowing programme is tested against the right to access information.[6] This discussion relates to the inclusion of confidentiality provisions to protect the whistleblower report and the identity of the whistleblower. The proposed incentivised whistleblowing programme may limit the taxpayer's right to information concerning the basis of any potential assessment raised or decision made by

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1 S 14 Constitution.
2 S 34 Constitution.
3 S 33 Constitution.
4 S 32 Constitution.
5 S 14 Constitution provides "**14. Privacy**.—Everyone has the right to privacy, which includes the right not to have—(a) their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed."
6 S 32 Constitution provides "**Right to access information.** (1) Everyone has the right of access to—(a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights."

SARS. Therefore, the right to information must be considered in the context of the required protection of whistleblowers for an effective incentivised whistleblowing programme.

The discussion then turns to the effect of the proposed incentivised whistleblowing programme on the right to access courts.[7] This consideration is specifically relevant to the protection of whistleblowers during court proceedings when the taxpayer challenges SARS' assessment or decision, which could, in part, be based on the whistleblower report. A whistleblower may be required to testify in court, which can lead to the disclosure of their identity and put them at risk of social, personal or professional harm. Accordingly, the proposal of special provisions relating to the whistleblower who is called as a witness may become relevant in the light of a taxpayer's right to access courts and a fair hearing.

The constitutional analysis of the proposed incentivised whistleblowing programme concludes with a discussion on whether the determination of the reward by the whistleblower's office constitutes administrative action.[8] If so, the question is whether the proposal to include dispute resolution proceedings to the Tax Court limits the whistleblower's right to procedurally fair, reasonable and lawful administrative action and access to courts.

With the exception of the right to access courts, the discussion of the potential infringements on constitutional rights is conducted in conjunction with the nature and scope of each right and its limitations, as explored in Chapter 3.

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7 S 34 Constitution "**34. Access to courts**.—Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

8 S 33 Constitution "**33. Just administrative action—** (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair" Right to access courts in terms of s34 which provides that "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

It is important to note that the discussion in this chapter does not aim to comprehensively test all possible factual scenarios under the proposed incentivised whistleblowing programme. The facts of each case for unconstitutionality will have to be determined on their own merits. This chapter aims to assess the constitutionality of the identified elements of the proposed whistleblowing programme that could impact the constitutional rights of taxpayers and whistleblowers.

Each analysis which follows first determines whether the potentially impugned right is subject to internal limitations and, if not, whether the relevant right can be subject to the general limitation of rights under section 36 of the Constitution.

This chapter concludes with miscellaneous considerations concerning the proposed incentivised whistleblowing programme, including the position of whistleblowers bound to non-disclosure agreements and potentially unconstitutionally obtained evidence.

9.2. Limitation of affected constitutional rights in terms of section 36 of the Constitution

This section considers the different elements of the proposed incentivised whistleblowing programme against the constitutional provisions to determine whether the proposed scheme will survive constitutional scrutiny. In doing so, it is necessary to determine whether the limitation of the potentially infringed constitutional rights is justifiable and accords with section 36 of the Constitution.

The interpretation of section 36 for the limitation of rights involves two-stage inquiry.[9] The first stage involves a court determining the scope of rights and whether there is an infringement on a right.[10] Determining the scope of a right requires a determination of the harm that the right is intended to remedy.[11] The second stage involves the limitation of rights relating to a proportionality analysis and balancing process.[12]

The *locus classicus* case of the application of section 36 is *S v Makwanyane*.[13] In this case, the court was faced with a constitutional challenge to section 277 of the Criminal Procedure Act sanctioning capital punishment.[14] The court applied section 33 of the Interim Constitution of 1994 (this section was later included as section 36 of the 1996

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9 *Ex parte Minister of Safety and Security: In re: S v Walters* 2002 7 BCLR 663 (CC) para 26 -27 the Constitutional Court described the two-stage inquiry as follows "…First, there is the threshold enquiry aimed at determining whether or not the enactment in question constitutes a limitation on one or other guaranteed right. This entails examining (a) the content and scope of the relevant protected right(s) and (b) the meaning and effect of the impugned enactment to see whether there is any limitation of (a) by (b). Subsections (1) and (2) of section 39 of the Constitution give guidance as to the interpretation of both the rights and the enactment, essentially requiring them to be interpreted so as to promote the value system of an open and democratic society based on human dignity, equality and freedom. If upon such analysis no limitation is found, that is the end of the matter. The constitutional challenge is dismissed there and then… (27)... the second stage ensues. This is ordinarily called the limitations exercise. In essence this requires a weighing up of the nature and importance of the right(s) that are limited together with the extent of the limitation as against the importance and purpose of the limiting enactment. Section 36(1) of the Constitution spells out the factors that have to be put into the scales in making a proportional evaluation of all the counterpoised rights and interests involved. It provides as follows: '(t)he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose'." Currie and de Waal *The Bill of Rights Handbook* (2013) 152. LAWSA *Constitutional law: Bill of Rights* para 24.

10 Currie and de Waal *The Bill of Rights Handbook* (2013) 152. LAWSA *Constitutional law: Bill of Rights* para 24.

11 Cheadle *et al*. *South African Constitutional Law: The Bill of Rights* (2023) para 30.3.2.

12 Currie and de Waal *The Bill of Rights Handbook* (2013) 153. LAWSA *Constitutional law: Bill of Rights* para 24. Cheadle *et al*. *South African Constitutional Law: The Bill of Rights* (2023) para 30.4.2.

13 *S v Makwanyane* 1995 3 SA 391 (CC) 408.

14 *S v Makwanyane* 1995 3 SA 391 (CC) 402.

Constitution) and established certain principles when it comes to the limitation of rights. Section 36 of the Constitution provides-

> "Limitation of rights - (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including - (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose."

The court held that inherent in the application of the limitation provision is the principle of proportionality and the balancing of differing interests or competing rights.[15] The goal of limitation is to maintain a particular right and not to extinguish the right.[16] This is the purpose behind the balancing process and achieving the harmony between the infringement and the persuasiveness of the justification grounds for the limitation.[17]

In consideration of the nature of the right, the court in *S v Makwanyane* held that the right to life and dignity are the "most important rights, and the course of all other personal rights" in the Bill of Rights.[18] Based on *S v Makwanyane*, there appears to be a hierarchy of rights; the more important a specific right is deemed, the more weight is attributed to the right in the balancing process.[19] Cheadle *et al.* differ from this interpretation and argue that some rights are not capable of limitation in an open and democratic society, for example, the right not to be subjected to slavery.[20] But, it does not mean that the rights not capable of limitation are superior to the others.[21] They argue that the rights contained

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15 *S v Makwanyane* 1995 3 SA 391 (CC) 436. Currie "Balancing and the Limitation of Rights in the South African Constitution" *Southern African Public Law* 2010 411.

16 Van Staden "Constitutional Rights and Their Limitations: A critical Appraisal of the Covid-19 Lockdown in South Africa" *African Human Rights Law Journal* 2020 491. *S v Bhulwana* 1996 (1) SA 388 (CC) para 18.

17 *S v Bhulwana*1996 (1) SA 388 (CC) para 18.

18 *S v Makwanyane* 1995 3 SA 391 (CC) 451. LAWSA *Constitutional law: Bill of Rights* para 29.

19 *S v Makwanyane* 1995 3 SA 391 (CC) 451. Currie and de Waal *The Bill of Rights Handbook* (2013) 166.

20 Cheadle *et al*. *South African Constitutional Law: The Bill of Rights* (2023) para 30.4.3.

21 Cheadle *et al*. *South African Constitutional Law: The Bill of Rights* (2023) para 30.4.3.

in the Bill of Rights are complex with different forms, and they may overlap at times. The context within which the rights are applied or limited informs their value.[22]

As for the importance and purpose of the limitation or infringement, the court in *S v Makwanyane* held that the purpose of the limitation must be worthwhile and important in a constitutional democracy.[23] In that case, the court specifically stated that retribution is in contrast to a society based on *ubuntu* and reconciliation, and therefore, the purpose of capital punishment and the infringement of the right to life and dignity does not serve a worthy purpose.[24] The purpose of the limitation is informed by the relevant legislative objective which must be constitutionally permissible.[25] Put differently, the limitation must be aimed at achieving a lawful and legitimate political, social or economic purpose.[26]

The nature and extent of the limitation factor of section 36(1)(c) requires an assessment of the manner in which the limitation affects the right in question.[27] It forms part of the proportionality analysis relating to the cost and benefit of the infringement.[28] In *S v Makwanyane*, the court held that the death penalty had an irrevocable and irreparable effect which cannot be justified.[29] The court aptly summarised the principle in *S v*

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22 Cheadle *et al*. *South African Constitutional Law: The Bill of Rights* (2023) para 30.4.3. LAWSA *Constitutional law: Bill of Rights* para 29 the authors argue that the importance of the right for the victim must also be considered. Ff *Edmonton Journal v Alberta Attorney-General* 1990 45 CRR 1 26-27. Ff *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2003 12 BCLR 1333 (CC) para 59.

23 *S v Makwanyane 1995 3 SA 391 (CC)* 467. Currie and de Waal *The Bill of Rights Handbook* (2013) 166 -167. Rautenbach "Proportionality and the Limitation Clauses of the South African Bill of Rights" *Potchefstroom Electronic Law Journal* 2014 2250.

24 *S v Makwanyane 1995 3 SA 391 (CC)* 467. Cheadle *et al*. *South African Constitutional Law: The Bill of Rights* (2023) para 30.4.4.

25 De Ville "Interpretation of the General Limitation Clause in the Chapter on Fundamental Rights" *SA Public Law* 1994 301. Currie and de Waal *The Bill of Rights Handbook* (2013) 166 -167. Rautenbach "Proportionality and the Limitation Clauses of the South African Bill of Rights" *Potchefstroom Electronic Law Journal* 2014 2255.

26 LAWSA *Constitutional law: Bill of Rights* para 30. Ff *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and others (Global Initiative to end all Corporal Punishment of Children) and Others* 2019 (11) BCLR 1321 (CC).

27 Currie and de Waal *The Bill of Rights Handbook* (2013) 168. LAWSA *Constitutional law: Bill of Rights* para 31.

28 Cheadle *et al*. *South African Constitutional Law: The Bill of Rights* (2023) para 30.4.5.

29 *S v Makwanyane 1995 3 SA 391 (CC)* 484.

Manamela and Another (Director-General of Justice Intervening) by stating that the limitation clause "does not permit a sledgehammer to be used to crack a nut."[30] Thus, the limitation must not be overly burdensome or cause more damage than what is required.[31]

To serve a legitimate purpose as required in section 36(1)(d), there must be a good reason for the limitation which accords with the values of an open and democratic society.[32] In *S v Makwanyane*, the court stated that although the death penalty is rationally connected to the prevention of the criminal committing the same crime, it is not necessarily connected to the purpose of deterring crime.[33] This factor requires a factual enquiry into the justification ground proffered for the limitation.[34] The limitation must, therefore, be rationally connected to the purpose which the relevant law is designed to serve.[35]

The last factor of section 36 is the consideration of whether less restrictive means are available to achieve the same purpose.[36] The court in *S v Makwanyane* held that the purpose of deterrence of crime could also be served with long-term imprisonment, and the availability of this less restrictive measure means that the death penalty is not a justifiable limitation of rights.[37] The principle derived from *S v Makwanyane* is that the

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30 *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC) 22.

31 Currie and de Waal *The Bill of Rights Handbook* (2013) 169. Cheadle *et al*. *South African Constitutional Law: The Bill of Rights* (2023) para 30.4.5. Ff *S v Meaker* 1998 2 All SA 8 (W) 22 where the court stated that the severity of the consequences of the limitation is not part of the test, but only the nature and extent of the limitation. Rautenbach "Proportionality and the Limitation Clauses of the South African Bill of Rights" *Potchefstroom Electronic Law Journal* 2014 2255-2256.

32 Currie and de Waal *The Bill of Rights Handbook* (2013) 168. Cheadle *et al*. *South African Constitutional Law: The Bill of Rights* (2023) para 30.4.4. LAWSA *Constitutional law: Bill of Rights* para 28.

33 *S v Makwanyane 1995 3 SA 391 (CC)* 466-467.

34 *S v Makwanyane* 1995 3 SA 391 (CC) 466-467.

35 Currie and de Waal *The Bill of Rights Handbook* (2013) 169. Cheadle *et al*. *South African Constitutional Law: The Bill of Rights* (2023) para 30.4.4 and 30.4.6. De Ville "Interpretation of the General Limitation Clause in the Chapter on Fundamental Rights" *SA Public Law* 1994 303. Ff *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC). Rautenbach "Proportionality and the Limitation Clauses of the South African Bill of Rights" *Potchefstroom Electronic Law Journal* 2014 2256-2257.

36 S 36(1)(e) Constitution.

37 *S v* Makwanyane 1995 3 SA 391 (CC) 444.

benefit of the limitation must be in proportion to the cost of the infringement.[38] If the purpose for which the limitation is included may be achieved by less invasive measures, the limitation is not justifiable nor reasonable.[39]

9.3. Right to privacy: The report by the whistleblower

Under the proposed incentivised tax whistleblowing programme, a person will be entitled to report on potential tax evasion and non-compliance and submit documentation in support of their report to SARS. This might include private information belonging to the reported taxpayer who currently enjoys a reasonable expectation of privacy. This could potentially infringe upon the taxpayer's right to privacy of their affairs entrenched in section 14 of the Constitution.[40]

In Chapter 3 I discuss the nature and scope of the right to privacy, as well as its limitations.[41] Based on the discussion on the limitation of the right to privacy, the following limitations to the right are justifiable: Firstly, the right to privacy may be limited to promote or ensure the state's ability to combat crime.[42] Thus, when a whistleblower reports on potential wrongdoing, the taxpayer cannot hide behind his right to privacy to stop or avoid

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38 Currie and de Waal *The Bill of Rights Handbook* (2013) 170. Cheadle *et al*. *South African Constitutional Law: The Bill of Rights* (2023) para 30.4.7. De Ville "Interpretation of the General Limitation Clause in the Chapter on Fundamental Rights" *SA Public Law* 1994 305. LAWSA *Constitutional law: Bill of Rights* para 31.

39 Currie and de Waal *The Bill of Rights Handbook* (2013) 170. Cheadle *et al*. *South African Constitutional Law: The Bill of Rights* (2023) para 30.4.7. Ff *Mail and Guardian Media Ltd and Others v Chipu NO and* Others 2013 (6) SA 367 (CC)*; J v National Director of Public Prosecutions and Another (Childline South Africa and Others as Amici Curiae)* 2014 (7) BCLR 764 (CC). Rautenbach "Proportionality and the Limitation Clauses of the South African Bill of Rights" *Potchefstroom Electronic Law Journal* 2014 2257.

40 S 14 Constitution provides "**14. Privacy**—Everyone has the right to privacy, which includes the right not to have—(a) their person or home searched; (b) their property searched;(c) their possessions seized; or (d) the privacy of their communications infringed."

41 Chapter 3 para 3.3.1 and 3.3.2.

42 Chapter 3 para 3.3.2. *Investigating Directorate: Serious Economic offences And Others v Hyundai Motor Distributors (Pty) Ltd and Others In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit No And Others* 2001 (1) SA 545 (CC) para 54.

the reporting. The state, and by extension SARS', ability to promote tax compliance and to curb tax evasion or fraud is a legitimate purpose for which the taxpayer's right to privacy may be limited.

Secondly, information obtained in violation of the right to privacy may be admitted as evidence.[43] Thus, the information collected by a tax whistleblower, which may infringe on the taxpayer's right to privacy, may still be admissible in court. Thus, the taxpayer's right to privacy may be limited in the context of the whistleblower making a report. In this regard, the court in *Bernstein v Bester* held that privacy is not protected in every sphere and the level of protection reduces as a person moves into social or business realms. [44] One of the limitations on the right to privacy is to promote the administration of justice and the combatting of crime and non-compliance.[45] Thus, if a taxpayer engages in non-compliant or criminal conduct or business activities, they cannot expect absolute privacy of their affairs. In the same vein, a taxpayer cannot contractually bar a person from whistleblowing on non-compliant or criminal conduct.[46] In the case of a vindictive reporter who blows the whistle on a tax compliant taxpayer, SARS may already be in possession of the information reported and no right would be violated. In addition, the disclosure of information would be to an institution which is statutorily obliged to keep the disclosed information confidential.

Thirdly, the right to privacy is limited by the existing reporting duties in FICA which provides that suspicious transactions and transactions related to the investigation of tax evasion must be reported.[47] The imposition of this reporting duty already paves the way

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43 Chapter 3 para 3.2.2. *Mistry v Interim Medical and Dental Council of South Africa and others* 1998 (4) SA 1127 (CC). *Magajane v Chairperson, North West Gambling Board and others* 2006 (5) SA 250 (CC). *Protea Technology Ltd v Wainer* 1997 (9) BCLR 1225 (W). Ff *Van Deventer and Another* 2012 (2) SACR 263 (WCC) 280 where the court held that unconstitutionally obtained evidence may still be admissible in a court.

44 *Bernstein & Others v Bester NO & Others* 1996 (2) SA 751 (CC) 788.

45 *Protea Technology Ltd v Wainer* 1997 (9) BCLR 1225 (W). Chapter 3 para 3.3.2.

46 For a discussion on this see Chapter 9 para 9.3.1.

47 Chapter 2 para 2.5.

for the limitation of the right to privacy in the context of information reporting as envisaged under the proposed incentivised tax whistleblowing programme.

The proposed incentivised tax whistleblowing programme infringes upon the taxpayer's right to privacy; however, the right is subject to limitation as justified in terms of existing case law[48] and legislation such as POPIA and FICA.[49]

9.4. The Right to Access Information: Taxpayer's right to the whistleblower's report and information submitted by the whistleblower

Section 73 of the Tax Administration Act provides that a taxpayer is entitled to obtain the details of any decision or assessment related to the taxpayer and all information upon which their assessment is based.[50] This right to information is also included in the Tax Court Rules as part of the dispute resolution proceedings; a taxpayer is entitled to request discovery of all documents in SARS' possession related to the tax appeal.[51] These provisions support the taxpayer's constitutional right to access information to exercise or

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48 Chapter 3 para 3.3.2. See discussion on *Investigating Directorate: Serious Economic offences And Others v Hyundai Motor Distributors (Pty) Ltd and Others In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit No And Others* 2001 (1) SA 545 (CC); *Protea Technology Ltd v Wainer* 1997 (9) BCLR 1225 (W).

49 Chapter 3 para 3.3.3.

50 S 73 Tax Administration Act "**73. Disclosure to taxpayer of own record**.—(1) A taxpayer or the taxpayer's duly authorised representative is entitled to obtain—(a) a copy, certified by SARS, of the recorded particulars of an assessment or decision referred to in section 104 (2) relating to the taxpayer; (b) access to information submitted to SARS by the taxpayer or by a person on the taxpayer's behalf; (c) information, other than SARS confidential information, on which the taxpayer's assessment is based; and (d) other information relating to the tax affairs of the taxpayer. (2) A request for information under *subsection* (1) (d) must be made under the Promotion of Access to Information Act…" Chapter 3 para 3.4.2.

51 Tax Court Rule 36.

protect their rights.[52] These rights include the right to dispute a decision or assessment by SARS through the objection and appeal procedures.[53]

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52 S 32 Constitution.

53 S 104 to 107 Tax Administration Act. S 104 Tax Administration Act provides "**104. Objection against assessment or decision**.—(1) A taxpayer who is aggrieved by an assessment made in respect of the taxpayer may object to the assessment. (2) The following decisions may be objected to and appealed against in the same manner as an assessment—(a) a decision under subsection (4) not to extend the period for lodging an objection; (b) a decision under section 107 (2) not to extend the period for lodging an appeal; and (c) any other decision that may be objected to or appealed against under a tax Act. (3) A taxpayer entitled to object to an assessment or 'decision' must lodge an objection in the manner, under the terms, and within the period prescribed in the 'rules'. (4) A senior SARS official may extend the period prescribed in the 'rules' within which objections must be made if satisfied that reasonable grounds exist for the delay in lodging the objection. (5) The period for objection must not be so extended— (a) for a period exceeding 30 business days, unless a senior SARS official is satisfied that exceptional circumstances exist which gave rise to the delay in lodging the objection; (b) if more than three years have lapsed from the date of assessment or the 'decision'; or (c) if the grounds for objection are based wholly or mainly on a change in a practice generally prevailing which applied on the date of assessment or the 'decision'."S 105 Tax Administration Act "**105. Forum for dispute of assessment or decision**.—A taxpayer may only dispute an assessment or 'decision' as described in section 104 in proceedings under this Chapter, unless a High Court otherwise directs." S 106 Tax Administration Act "**106. Decision on objection**.—(1) SARS must consider a valid objection in the manner and within the period prescribed under this Act and the 'rules'. (2) SARS may disallow the objection or allow it either in whole or in part.(3) If the objection is allowed either in whole or in part, the assessment or 'decision' must be altered accordingly. (4) SARS must, by notice, inform the taxpayer objecting or the taxpayer's representative of the decision referred to in subsection (2), unless the objection is stayed under subsection (6) in which case notice of this must be given in accordance with the 'rules'. (5) The notice must state the basis for the decision and a summary of the procedures for appeal. (6) If a senior SARS official considers that the determination of the objection or an appeal referred to in section 107, whether on a question of law only or on both a question of fact and a question of law, is likely to be determinative of all or a substantial number of the issues involved in one or more other objections or appeals, the official may— (a) designate that objection or appeal as a test case; and (b) stay the other objections or appeals by reason of the taking of a test case on a similar objection or appeal before the tax court, in the manner, under the terms, and within the periods prescribed in the 'rules'." S 107 Tax Administration Act "**107. Appeal against assessment or decision**.—(1) After delivery of the notice of the decision referred to in section 106 (4), a taxpayer objecting to an assessment or 'decision' may appeal against the assessment or 'decision' to the tax board or tax court in the manner, under the terms and within the period prescribed in this Act and the 'rules'. (2) A senior SARS official may extend the period within which an appeal must be lodged for— (a) 21 business days, if satisfied that reasonable grounds exist for the delay; or (b) up to 45 business days, if exceptional circumstances exist that justify an extension beyond 21 business days. (3) A notice of appeal that does not satisfy the requirements of subsection (1) is not valid. (4) If an assessment or 'decision' has been altered under section 106 (3), the assessment or 'decision' as altered is the assessment or 'decision' against which the appeal

In terms of the proposed incentivised tax whistleblowing programme, the whistleblower's identity and report are specifically guaranteed to be kept confidential and not subject to disclosure. This inclusion of guaranteed confidentiality infringes upon the taxpayer's constitutional right to access information. The question is whether this right to access information is subject to limitation.

As stated in Chapter 3, the PAIA was enacted to act as the grounds for the limitation of the right to access information.[54] The PAIA provides that SARS may refuse to provide access to a record in circumstances when the disclosure would be unreasonable,[55] if the information was supplied in confidence and disclosure may limit the future supply of similar information,[56] or if the information relates to a person other than the requester.[57] The PAIA further provides that public interest considerations relating to the disclosure of information may outweigh the potential prejudice to disclosing the records.[58] Croome argues that despite the refusal grounds contained in the PAIA, a taxpayer will be able to obtain access to confidential information if the information is necessary to understand the basis of an assessment.[59]

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is noted. (5) By mutual agreement, SARS and the taxpayer making the appeal may attempt to resolve the dispute through alternative dispute resolution under procedures specified in the 'rules'. (6) Proceedings on the appeal are suspended while the alternative dispute resolution procedure is ongoing. (7) SARS may concede an appeal in whole or in part before— (a) the matter is heard by the tax board or the tax court; or (b) an appeal against a judgment of the tax court or higher court is heard."

54 Chapter 3 para 3.4.2.

55 S 34(1) PAIA.

56 S 37 PAIA.

57 S 35 PAIA.

58 S 46 PAIA.

59 Croome *Taxpayer's Rights in South Africa* (2010) 194 -195. In *Rèan International Supply Company (Pty) Ltd and Others v Mpumalanga Gaming Board* 1999 (8) BCLR 918 (T); 1999 JOL 4871 (T) 22 the court held "The word "information" is far wider than the concept of "facts" known to an administrative body. In terms of section 33 an aggrieved applicant is entitled to decide for himself whether administrative action was justifiable in relation to the reasons given for the refusal of a licence. In order so to decide, an aggrieved party is entitled to "all information" which led up to the refusal of a licence and that includes the deliberations of the administrative body. To exclude such

Should a taxpayer wish to challenge the constitutionality of the refusal grounds in the PAIA for the disclosure of the whistleblower report and the identity of the whistleblower, the doctrine of subsidiarity would apply. This simply means that the taxpayer would have to challenge the provisions of the PAIA and the proposed whistleblowing programme and cannot rely directly on section 32 of the Constitution. The Constitutional Court in *Mazibuko v City of Johannesburg*,[60] puts it more eloquently when it states that "where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution."[61]

The confidentiality provisions of the Tax Administration Act are discussed in Chapters 2 and 3.[62] The matter of *Arena Holdings (Pty) Ltd t/a Financial Mail v SARS*,[63] is discussed in Chapter 3. By way of summary, the court held that the confidentiality provisions of the Tax Administration Act are unconstitutional insofar as public policy requires disclosure of the information held by SARS.[64] In the light of *Arena Holdings (Pty) Ltd t/a Financial Mail v SARS* case, the question is then whether the whistleblower's identity and report under the new proposed incentivised tax whistleblowing programme would also be subject to the same scrutiny as the existing confidentiality provisions, and whether the taxpayer's right to that information may be limited.

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deliberations would render the provisions of section 33(1)(d) somewhat nugatory because the deliberations may demonstrate that the reasons upon which the board acted were unjustifiable or wrong. To exclude them from the ambit of sections 32 and 33 would impose an unjustifiable limitation upon the provisions of the Constitution" Ff *Commissioner for the SAPS and others v Maimela and another* (2003) 3 All SA 298 (T) 303.

60 *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

61 *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 73.Ff *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687 (CC) para 22.

62 Chapter 2 para 2.2 and Chapter 3 para 3.4.2.

63 *Arena Holdings (Pty) Ltd t/a Financial Mail and two others v SARS and two others* 2022 (2) SA 485 (GP). *Arena Holdings (Pty) Limited t/a Financial Mail and Others v South African Revenue Service and Others* 2023 (5) SA 319 (CC).

64 *Arena Holdings (Pty) Ltd t/a Financial Mail and two others v SARS and two others* 2022 (2) SA 485 (GP).

In order to determine whether the taxpayer's right may be limited, the limitation provision of section 36 of the Constitution must be applied. The test in terms of section 36 was dealt with in Chapter 3.[65] The departure point for an enquiry into the limitation of a right in terms of section 36 is whether the limitation is done by a law of general application.[66] This requirement is met since the proposed incentivised tax whistleblowing programme is to be included in the Tax Administration Act, and the Tax Administration Act is a law of general application.

This turns the enquiry to whether the limitation is reasonable and justifiable in an open and democratic society.[67] In order for a limitation to be reasonable and justifiable in an open and democratic society, there must be a legitimate governmental purpose for the limitation.[68] This includes a test of proportionality to ensure that there is a sufficient link between infringement and the purpose of the law.[69] The Constitutional Court has held that protecting the administration of justice,[70] the prevention of intimidation of witnesses and protecting the identity of informers are legitimate constitutional purposes that may limit a person's rights entrenched in the Bill of Rights.[71]

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65 Chapter 3 para 3.2.

66 Chapter 3 para 3.2. S36(1) Constitution "**36. Limitation of rights.—**(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—(a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation;(d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

67 Currie and de Waal *The Bill of Rights Handbook* (2013) 163. Cheadle *et al*. *South African* Constitutional *Law: The Bill of Rights* (2023) para 30.4.2

68 Currie and de Waal *The Bill of Rights Handbook* (2013) 163. Cheadle *et al*. *South African Constitutional Law: The Bill of Rights* (2023) para 30.4.2.

69 Currie and de Waal *The Bill of Rights Handbook* (2013) 163. Cheadle *et al*. *South African Constitutional Law: The Bill of Rights* (2023) para 30.4.2.

70 *S v Singo* 2002 (4) SA 858 (CC) para 33.

71 *Shabalala v Attorney- General (Transvaal)* 1996 (1) SA 725 (CC) para 52. Ff *S v Staggie and Another* 2003 (1) BCLR 43 (C).

In the context of the proposed incentivised tax whistleblowing programme, the purpose of the confidentiality of the whistleblower's identity and reports is to protect them from intimidation or harm that may be caused by the impugned taxpayer or retaliation in the workplace.[72] Chapter 6 highlights that the confidentiality of whistleblowers' identities and reports is one of the key elements required for an effective whistleblowing programme.[73] Therefore, the requirement of a legitimate constitutional purpose is met.

The enquiry into the limitation of the right to access information does not stop at the above proportionality test. The factors listed in section 36 of the Constitution must be applied to the intended provision to determine whether the right may be limited. As stated above, the limitation of rights requires a balancing of competing interests, and the context of each constitutional challenge, informs the outcome of thereof. Accordingly, a case-by-case approach is proposed.

Section 36(1)(a) provides that the nature of the right to be limited must be considered. Some rights, such as the right to life, weigh more heavily than others.[74] The right to access information is an important right, as it underscores other rights such as the right to just administrative action. However, the right is not absolute since Parliament, through the enactment of the PAIA and the pronunciations of the courts, as indicated above, provides for the limitation of the right. Therefore, the right to access to information in the context of the proposed incentivised tax whistleblowing programme may also be subject to limitation.

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72 See for example the case of *S v Brown* (CC 54/2014) [2015] ZAWCHC 128 (17 August 2015) discussed in Chapter 8 para 8.3.6.

73 Chapter 6 para 6.4.

74 *S v Makwanyane* 1995 3 SA 391 (CC) 436.

The importance of the infringement must also be considered.[75] This means that the limitation must be proportional and justifiable in a constitutional democracy.[76] It is established already that the proposed infringement serves a legitimate governmental purpose. As part of the proportionality test, the nature and extent of the limitation becomes relevant.[77]

The enquiry into the nature and extent of the limitation necessitates a court to question how the limitation affects the right concerned. In the proposed incentivised tax whistleblowing programme, the whistleblower report may result in the taxpayer being selected for audit, assessments may be based in part on the whistleblower report, and penalties may be imposed as a result thereof. In the context of the selection for an audit, the High Court held that this decision by SARS is not subject to review and amendment.[78] In the proposed incentivised tax whistleblowing programme neither the report nor the identity of the whistleblower is disclosed to the taxpayer. Since SARS' decision to select a person for an audit is not reviewable,[79] it could be argued that the refusal to disclose the report or the identity of the whistleblower to the taxpayer is not a substantial infringement on their right to information. Furthermore, it is unlikely that any tax dispute will hinge on the identity of the whistleblower, since it is SARS' assessment that forms the subject of the dispute. In other words, it is SARS' interpretation of the applicable legislation to the relevant facts that form the subject of the dispute. Although a taxpayer may request a copy of the whistleblower report in terms of the Tax Court Rules,[80] the source of the information only becomes relevant when a taxpayer wishes to challenge the *viva voce* evidence of a whistleblower. However, such challenge may still be done if the

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75 S36(1)(b) Constitution.

76 Currie and de Waal *The Bill of Rights Handbook* (2013) 166. Ff *Richter v Minister of Home Affairs* 2009 (3) SA 615 (CC) para 36. *Centre for Child Law and Others v Media 24 Limited and Others* 2020 (4) SA 319 (CC) para 52.

77 S 36(1)(c) Constitution.

78 Chapter 8 para 8.3.2. *Carte Blanche Marketing CC and Others v Commissioner for the South African Revenue Service* 2020 (6) SA 463 (GJ) para 84.

79 *Carte Blanche Marketing CC and Others v Commissioner for the South African Revenue Service* 2020 (6) SA 463 (GJ) para 84. See discussion in Chapter 8 para 8.3.2.

80 Tax Court Rules 6 and 36.

whistleblower testifies *in camera*. Consequently, it is not necessary for a taxpayer to know the identity of the whistleblower to challenge any evidence flowing from a whistleblower report.

Insofar as an assessment or decision may be based in part on a whistleblower report, SARS will investigate the report and the allegations independently, once it has been decided that further investigation is warranted. SARS must conduct and finalise its investigation before assessing or deciding the matter. If the investigation results in an audit, SARS is obliged to inform the taxpayer of the process.[81] The details of SARS' independent investigation and interpretation of the law are subject to disclosure to the taxpayer. Given that the information reported by the whistleblower will likely originate from the taxpayer themselves, they already possess the information. Thus, the proposed infringement is not a substantial infringement of the rights of a taxpayer. Accordingly, the requirement of section 36(1)(c) has been met.

Section 36(1)(d) of the Constitution requires a court to consider the link between the limitation and its purpose.[82] As stated above, the purpose of the confidentiality provisions is to prevent intimidation and harm to whistleblowers or informants.[83] It is also to encourage reporting so as to improve tax compliance and the prevention of tax evasion.[84]

The justification grounds for the limitation are constitutionally permissible.[85] This interpretation and submission are fortified by the provisions of section 18(4) of the POPIA which provide that it is not necessary to inform a party of the collection or processing of their information for purposes of enforcement or compliance with a tax obligation or if

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81 S 42 Tax Administration Act. Note that verifications do not require any notice to a taxpayer. In this regard, see Theron *et al. Practical Guide to Handling Tax Disputes* (2024) 10.
82 Chapter 9 para 9.2. Chapter 8 para 8.3.6.
83 Chapter 8 para 8.3.6.
84 Chapter 8 para 8.3.6.
85 Chapter 3 para 3.3.2 and 3.4.2.

compliance would prejudice a lawful purpose.[86] Therefore, in my view, the requirement in section 36(1)(d) is complied with.

The final consideration in terms of section 36(1) is whether a less restrictive means is available to achieve the same purpose.[87] In the context of the proposed incentivised tax whistleblowing programme, it is submitted that less restrictive means are not available. Even if the whistleblower report is provided to a taxpayer in a redacted format, there may be cases when there is only one person capable of reporting certain facts and that by providing the report, that person's identity is revealed (for instance a bookkeeper will be privy to certain information that others are not). In the Zondo Commission, the famed "Mr X's" (although not a whistleblower) identity was revealed by one of the other witnesses when commenting on his testimony.[88] The point is simply that by disclosing the whistleblower report, the whistleblower's identity may be inadvertently revealed, defeating the purpose of the confidentiality provisions and protection afforded to a whistleblower.

Unlike in the case of Arena Holdings in which the court found that confidentiality is not required for taxpayer compliance,[89] confidentiality is required for whistleblowers. As far as the test of section 36 is concerned, the facts of Arena Holdings may be differentiated from that of the current proposed incentivised whistleblowing programme. Consequently,

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86 S 18(4)(c)(i) and (d) POPIA "Section 18 Notification to data subject when collecting personal information….(c) non-compliance is necessary—…(ii) to comply with an obligation imposed by law or to enforce legislation concerning the collection of revenue as defined in section 1 of the South African Revenue Service Act, 1997 (Act No. 34 of 1997)…(d) compliance would prejudice a lawful purpose of the collection…"

87 S 36(1)(e) Constitution.

88 IOL (2020) "Dudu Myeni reveals identity of secret state capture witness Mr X, stunning Justice Zondo" 5 November 2020 at: https://www.iol.co.za/news/politics/dudu-myeni-reveals-identity-of-secret-state-capture-witness-mr-x-stunning-justice-zondo-93f48d13-c8a8-4c64-ab64-7b9d388b9b77 (Accessed 04/02/2024). See also News 24 "Dudu Myeni pleads guilty, fined for naming Mr X at Zondo Commission" 27 July 2022 at https://www.news24.com/fin24/companies/dudu-myeni-pleads-guilty-to-obstruction-of-justice-for-naming-protected-witness-20220727 (Accessed 04/02/2024).

89 *Arena Holdings (Pty) Limited t/a Financial Mail and Others v South African Revenue Service and Others* 2023 (5) SA 319 (CC) 74. *Shabalala v Attorney- General (Transvaal) 1996 (1) SA 725 (CC)* para 52. Ff *S v Staggie and Another 2003 (1) BCLR 43 (C)*.

the taxpayer's right to access to the whistleblower's identity and report may be limited in terms of section 36 of the Constitution.

9.5. The Right to Access the Courts: Protection of whistleblowers' identity in court proceedings and the right to fair public hearing

Section 34 of the Constitution provides that every person has the right to have any dispute capable of resolution by application of the law decided in a fair public hearing before a court or, where appropriate, another independent and impartial forum.[90] The right to access courts comprises three rights: Firstly, it entitles a person to access a court, tribunal or other forum to adjudicate disputes. Secondly, tribunals and forums, other than courts, must also be independent and impartial. Thirdly, it guarantees due process by requiring disputes to be adjudicated in a fair and public hearing.[91]

The right to a fair hearing translates into a person's right to have an opportunity to state their case, also known as the *audi alteram partem* principle.[92] The right extends to the cross-examination of witnesses during civil and criminal proceedings. This applies equally to a taxpayer who challenges an assessment or decision.[93]

Chapter 8 proposes two possible ways to deal with the testimony of whistleblowers.[94] Whistleblowers could be allowed to testify *in camera*, behind closed doors and without revealing their identity.[95] Alternatively, a SARS official may testify about the evidence

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90 S 34 Constitution "**34. Access to courts**—Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

91 Currie and de Waal *The Bill of Rights Handbook* (2013) 711. Cheadle *et al*. *South African Constitutional Law: The Bill of Rights* (2023) Chapter 28 para 28.1.

92 *De Beer NO v North-Central Local Council and South-Central Local Council* 2002 (1) SA 419 (CC) para 11.

93 Tax Court Rule 43 and 44.

94 Chapter 8 para 8.3.6.

95 Chapter 8 para 8.3.6.

given by the whistleblower as an exception to the hearsay rule. Both of these proposals, to different degrees, infringe upon a taxpayer's right to a fair hearing, including the right to test the whistleblower's evidence through cross-examination. The question is whether this right may be limited considering existing limitations and section 36 of the Constitution.

There are existing limitations to the right to cross-examine in civil and criminal proceedings. In criminal proceedings, section 153(2) of the Criminal Procedure Act already provides for the protection of witnesses from harm and intimidation and authorises a presiding officer to order that they testify *in camera* and that their identities are protected.[96] In addition to the aforesaid section, section 170A of the Criminal Procedure Act provides that when minor children testify, they may do so through an intermediary.[97] Thus, the right to cross-examine and a fair hearing has been limited in the past in the context of criminal proceedings. Chapter 8 discusses the exception where hearsay evidence will be admissible following an enquiry in terms of section 3(1)(c) (vii).[98] Similar limitations exist in the context of the South African labour laws. It is a trite principle in labour disputes that witnesses may testify *in camera* should they fear for their safety.[99]

The infringement of the right to a fair trial in the current study will be in civil proceedings instituted by SARS. In these civil proceedings, the onus of proof is on the taxpayer[100] and

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96 S 153(2) Criminal Procedure Act 51 of 1977 "**153. Circumstances in which criminal proceedings shall not take place in open court**.—(1) In addition to the provisions of section 63 (5) of the Child Justice Act, 2008, if it appears to any court that it would, in any criminal proceedings pending before that court, be in the interests of the security of the State or of good order or of public morals or of the administration of justice that such proceedings be held behind closed doors, it may direct that the public or any class thereof shall not be present at such proceedings or any part thereof. (2) If it appears to any court at criminal proceedings that there is a likelihood that harm might result to any person, other than an accused, if he testifies at such proceedings, the court may direct— (a) that such person shall testify behind closed doors and that no person shall be present when such evidence is given unless his presence is necessary in connection with such proceedings or is authorized by the court; (b) that the identity of such person shall not be revealed or that it shall not be revealed for a period specified by the court…" For an example of the application of the section see *S v Lenting and Others* 2023 (2) SACR 409 (WCC) (24 July 2023).

97 S 170A Criminal Procedure Act.

98 Chapter 8 para 8.3.6.

99 *NUM & Others v Deelkraal Gold Mining Co Ltd* (1994) 7 BLLR 97 (IC) 102- 103.

100 S 102 of the Tax Administration Act.

it is based on the balance of probabilities.[101] The balance of probabilities is not as high an onus as opposed to criminal matters, in which the onus is beyond a reasonable doubt.

The right to access to courts to dispute an assessment or decision by SARS has been limited in the past in *Metcash Trading Ltd v Commissioner for the South African Revenue Service and Another*.[102] In this case, the question was whether the provisions of section 40 of the VAT Act, which provides that a taxpayer must pay the assessed amount despite a dispute concerning the correctness of the amount of the assessment.[103] Metcash contended that section 40 of the VAT Act unjustifiably infringed upon its right to access the Courts and to have its dispute adjudicated.[104] There were two constitutional challenges in the Metcash case: the first concerned the relegation of disputes to a specialised court or tribunal and whether this ousted the taxpayer's right to access courts. The second concerned the "pay now, argue later" principle that allows SARS to collect an assessed amount despite a dispute about the correctness thereof.[105]

In respect of the first issue, the court held that the fact that a dispute is routed to a specialised court or tribunal does not infringe upon a taxpayer's right to access the courts.[106] In the case of *Commissioner, South African Revenue Service v Rappa Resources (Pty) Ltd,*[107] the Supreme Court of Appeal held that there is no reason for a

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101 *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) 157.
102 *Metcash Trading Ltd v Commissioner for the South African Revenue Service and Another* 2001 (1) BCLR 1 (CC).
103 *Metcash Trading Ltd v Commissioner for the South African Revenue Service and Another* 2001 (1) BCLR 1 (CC) 4.
104 *Metcash Trading Ltd v Commissioner for the South African Revenue Service and Another* 2001 (1) BCLR 1 (CC) 4.
105 *Metcash Trading Ltd v Commissioner for the South African Revenue Service and Another* 2001 (1) BCLR 1 (CC) 25.
106 *Metcash Trading Ltd v Commissioner for the South African Revenue Service and Another* 2001 (1) BCLR 1 (CC) 25.
107 *Commissioner for the South African Revenue Service v Rappa Resources (Pty) Ltd* (Case no 1205/2021) [2023] ZASCA *28* 7.

taxpayer to circumvent the Tax Court (a specialised court) when challenging an assessment.[108]

As for the second issue, being the "pay now argue later" principle, the court held that the limitation of the taxpayer's right to access the courts is justified, taking into account that the purpose of the limitation is to ensure speedy settlement of tax debts. It accords with the values of an open and democratic society making it reasonable, and the effect on the taxpayer is limited since the obligation to pay may be suspended by SARS.[109]

Taking into account the precedent of Metcash referred to above, it is clear that the proposed dispute resolution process in the proposed incentivised whistleblowing programme, as it relates to the procedures in the Tax Court, does not infringe on the taxpayer's right to access the courts. What remains to be considered is the considerations of confidentiality of the whistleblower's report and identity.

The protection of whistleblowers and their identities stems from the state's duty to protect witnesses and informers to promote the administration of justice.[110] The limitation of the right to access courts and by extension a fair trial is considered in this context.

The arguments with respect to the requirements of a law of general application and that the limitation must be reasonable and justifiable in an open and democratic society have already been canvassed above.[111] It is accordingly not necessary to repeat those arguments and conclusions again.

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108 *Commissioner for the South African Revenue Service v Rappa Resources (Pty) Ltd* (Case no 1205/2021) [2023] ZASCA 28 7-8 and 12. *United Manganese of Kalahari (Pty) Ltd v Commissioner for the South African Revenue Service* (1231/2021) (2023) ZASCA 29; 85 SATC 529 (24 March 2023) para 10 -12. *Commissioner for the South African Revenue Service v Absa Bank Limited and Another* (596/2021) (2023) ZASCA 125; 2024 (1) SA 361 (SCA) (29 September 2023) para 25-27.

109 *Metcash Trading Ltd v Commissioner for the South African Revenue Service and Another* 2001 (1) BCLR 1 (CC) 29-30.

110 Chapter 9 para 9.2.3.2.

111 Chapter 9 para 9.2.3.1.

The right to access courts is important in that it ensures that no person is excluded from the right to challenge the validity of certain laws or conduct. This right was historically not available under the apartheid era.[112] As stated above, some rights may weigh more heavily than others and are not subject to limitation. The right to access the courts and a fair public hearing is not one of those rights that are unlimitable. Parliament has limited the aforesaid right in so far as it relates to the right to challenge evidence and to cross-examine a person under the Criminal Procedure Act.[113] Therefore, as a starting point to the enquiry into the limitation of the right, it is significant to note that the right is already subject to various limitations. This limitation concerning criminal trials is significant considering the stricter onus of proof encountered in criminal proceedings. Thus, when considering the nature of the right to cross-examine a witness as an extension of the right to a fair hearing, the proposals to either provide for *in camera* testimony or as an exception to the hearsay rule are approved by existing legislation.[114]

The importance of the infringement[115] is derived from the constitutional objective to promote the administration of justice by preventing witnesses from intimidation and keeping the identity of informants secret.[116] Whistleblowers may face threats to their personal safety or retaliation in the form of civil suits or labour dismissals. In *Centre for Child Law and Others v Media 24 Limited and Others,*[117] the Constitutional Court held that continued protection of vulnerable persons in subsequent proceedings is an essential requirement in our society.[118] The protection of whistleblowers is vital as they are exposed to many social, personal and professional risks.[119] This could potentially warrant treating tax whistleblowers as vulnerable persons justifying their protection. These objectives are

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112 Currie and de Waal *The Bill of Rights Handbook* (2013) 710. Ff *De Lange v Smuts No* 1998 (3) SA 785 (CC) para 46 -47.
113 S 153(2) Criminal Procedure Act 51 of 1977 read with S 3(4) Law of Evidence Act 45 of 1988.
114 S 153(2) Criminal Procedure Act 51 of 1977 read with S3(4) Law of Evidence Act 45 of 1988.
115 S 36(1)(b) Constitution.
116 Chapter 9 para 9.2.3.2.
117 *Centre for Child Law and Others v Media 24 Limited and Others* 2020 (4) SA 319 (CC) para 71.
118 *Centre for Child Law and Others v Media 24 Limited and Others* 2020 (4) SA 319 (CC) para 71.
119 Chapter 5 para 5.2.1 and 5.2.4.

legitimate governmental purposes warranting protection to whistleblowers. Accordingly, the infringement is required to provide protection to whistleblowers and to encourage the reporting of tax compliance and prevention of tax evasion.

The proposed limitation materially affects a taxpayer's right to a fair hearing. However, section 36 is not a checklist of requirements, but entails the balancing of competing rights to conclude whether there is a legitimate purpose to the limitation a particular right.[120] In order to determine whether the limitation is justifiable, the extent of the limitation must be properly considered.[121]

In attempting to discern the extent of the proposed limitation, this discussion first deals with the position under the proposal to testify anonymously and *in camera*. Thereafter, the focus turns to the proposal to include whistleblowers as an exception to the hearsay rule.

The identity of the whistleblower, considering the capacity in which they testify (as the taxpayer's bookkeeper, for example), may have an influence on their credibility as a witness. By allowing the whistleblower to testify anonymously, the court is deprived of an opportunity to consider their credibility based on their role and demeanour. It also deprives the taxpayer of challenging the credibility of the evidence on this score.

Testimony *in camera* does not remove the taxpayer's right to challenge the evidence. It merely deprives them of the opportunity to read a witness' demeanour which could influence their credibility. Credibility means the process of determining the truthfulness of a witness' statement.[122] There are various factors that courts take into consideration when

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120 *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* 2023 (5) SA 319 (CC) para 133-134. Van Zyl and Fritz "Different cities, different property-tax-rate regimes: Is it fair in an open and democratic society?" *Law Democracy & Development* 2022 330. Currie "Balancing and the limitation of rights in the South African Constitution" *Public law* 2010 411.

121 S 36(1)(c) Constitution.

122 Olaborede and Meintjies-van der Walt "Demeanour, credibility and remorse in the criminal trial" *South African Journal of Criminal Justice* 2021 56.

determining the credibility of a witness such as appearance, age or temperament.[123] Non-verbal communication may, sometimes, play a pivotal role in discerning the true meaning of a witness's testimony.[124] That said, the significance of a witness' demeanour should not be inflated since it is a subjective observation.[125] In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*,[126] the Constitutional Court held that credibility is not only determined by demeanour but on the probability of the facts to which the witness testified.[127] Thus, demeanour is only relevant to support an objective conclusion on the probabilities, or to tip the scales if the probabilities are evenly balanced.[128] On a clinical interpretation, the infringement is not against the taxpayer's right to challenge the evidence, but rather impacts the potential evaluation of the evidentiary weight a court should give to the whistleblower's evidence.

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123 Schmidt and Rademeyer *Law of Evidence* (2023) para 10.4. Olaborede and Meintjies-van der Walt "Demeanour, credibility and remorse in the criminal trial" *South African Journal of Criminal Justice* 2021 56.

124 Denault, Dunbar and Plusquellec "The detection of deception during trials: Ignoring the nonverbal communication of witnesses is not the solution-A response to Vrij and Turgeon (2018)" *The International Journal of Evidence & Proof* 2020 5,7. Denault, Jupe, Dodier and Rochat "To Veil or Not to Veil: Detecting Lies in The Courtroom: A comment on Leach *et al*. (2016) *Psychiatry, Psychology and Law* 2017 109.

125 Schmidt and Rademeyer *Law of Evidence* (2023) para 3.2.3.1. Ff *S v Kelly* 1980 (3) SA 301 (A) 308.

126 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC).

127 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) para 79 para 79 the court stated that ""The advantages which the trial court enjoys should not, therefore, be overemphasised "lest the appellant's right of appeal becomes illusory" The truthfulness or untruthfulness of a witness can rarely be determined by demeanour alone without regard to other factors including, especially, the probabilities. As indicated above, a finding based on demeanour involves interpreting the behaviour or conduct of the witness while testifying. The passage from S v Kelly above correctly highlights the dangers attendant on such interpretation. A further and closely related danger is the implicit assumption, in deferring to the trier of facts findings on demeanour, that all triers of fact have the ability to interpret correctly the behaviour of a witness, notwithstanding that the witness may be of a different culture, class, race or gender and someone whose life experience differs fundamentally from that of the trier of fact" Ff *S v Kelly* 1980 (3) SA 301 (A) 308.

128 *Estate Kaluza v Braeuer* 1926 AD 243 266 -267. Ff *R v Abels* 1948 (1) SA 706 (O); *Body Corporate of Dumbarton Oaks v Faiga* 1999 (1) SA 975 (SCA) 979.

Naude notes that even through *in camera* testimony the witness' identity may be revealed.[129] One alternative is to allow witnesses to testify anonymously.[130] However, according to Naude, there are serious concerns with allowing a witness to testify anonymously. These concerns including not being able to test the probability of a version put forward by the witness or testing the character of the witness.[131] This thesis does not suggest anonymous testimony by tax whistleblowers, since such infringement is not justifiable when less restrictive means as proposed in this chapter are available.

In the context of the proposal to have a SARS official testify about the whistleblower's evidence as an exception to the hearsay rule, the taxpayer is deprived of the right to confront the whistleblower. This right to confrontation is more associated with criminal proceedings than civil proceedings. This is so due to the reduced onus in civil proceedings. In allowing the hearsay evidence, the courts will still apply the cautionary rules in evaluating the evidentiary weight of the evidence. Thus, the infringement to the taxpayer's rights is reduced.

Considering both proposals holistically, it appears that although the taxpayer's right is affected, the extent of the proposed infringement is limited. Both proposals allow the taxpayer to challenge the evidence of the whistleblower report, but they deprive the taxpayer of knowing the whistleblower's identity. It is unlikely that an assessment by SARS will be solely based on the whistleblower report. This reduces the importance of the report for purposes of determination of the tax liability. However, the report may become more relevant once the taxpayer's behaviour is scrutinised for determining the imposition of an understatement penalty.[132] It is in this regard that the challenge to the evidence of a whistleblower albeit in a criminal trial or civil tax appeal becomes relevant.[133]

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129 Naude "The absolute anonymity of a state witness" *Obiter* 2011 162.
130 Naude "The absolute anonymity of a state witness" *Obiter* 2011 162.
131 Naude "The absolute anonymity of a state witness" *Obiter* 2011 163-164.
132 For discussion on understatement penalties see Chapter 5 para 5.2.3.2.
133 It is important to remember that a civil tax appeal also involves *viva voce* evidence much in the same way than that of a criminal trial.

In my view, the whistleblower's identity does not play a role in the weighting and relevance of the evidence. By allowing hearsay evidence or testifying *in camera*, taxpayers can still challenge the evidence presented against them. This protects the whistleblower's right to privacy while ensuring that the evidence is thoroughly scrutinised. With this approach, both parties could find a fair and just resolution.

Section 36(1)(d) of the Constitution requires a link between the limitation and its intended purpose. The infringement on the taxpayer's right to challenge the whistleblower's evidence is linked to the constitutionally sound governmental purpose of protecting whistleblowers. The benefits of the limitation are the furtherance of the administration of justice, the promotion of voluntary compliance, and the curbing of tax evasion through the proposed incentivised whistleblowing programme.

There are no other or less restrictive means by which the same purpose of the limitation referred to above could be achieved.[134] Both proposals for the protection of whistleblowers during court proceedings meet the requirements for the limitation of the taxpayer's right in terms of section 36.

However, the proposal to treat the evidence under the exceptions to the hearsay rule is more practical than the provisions for *in camera* and anonymous testimony. There is merit in the reasoning that there should not be a blanket rule allowing for whistleblowers to always testify *in camera* and anonymously, as not all whistleblowers will necessarily be exposed to the same risks. Under the proposal for testimony *in camera* and anonymously, SARS will be required to apply to a court to authorise the testimony to be given *in camera* and anonymously, which may result in the inadvertent disclosure of the whistleblower's identity, thereby defeating the purpose of the protection.

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134 S 36(1)(e) Constitution.

9.6. The Right to Administrative Justice: Is the determination of a reward by the whistleblower office administrative action and subject to review?

One of the questions identified in Chapter 3[135] is whether the determination of the reward constitutes administrative action that is subject to review. The definition and interpretation of what constitutes administrative action were set out in Chapter 3.[136] Chapter 3 further already established that SARS is an organ of the state that performs a public function under the SARS Act and the Tax Administration Act. There can be no dispute that the decision by the whistleblower office has a direct external legal effect. The question now is whether the decision of the reward payable, if any, is a "decision" which adversely affects the rights of the whistleblower to be compensated.

As stated in Chapter 3, a "decision" can be any positive action or negative omission.[137] Thus, the determination by the whistleblower office to reward the whistleblower is a positive outward action. In turn, a failure by the whistleblower office to take any action to determine whether a reward is payable is a negative omission. Both actions constitute a decision which would be grounds for administrative action.

The decision by the whistleblower office could affect the rights of the whistleblower in two ways. Either the whistleblower office's determination of the reward was too low, and a larger amount is payable to the whistleblower, or they determined that no reward is due, and the whistleblower could contend that their decision is wrong. Thus, the determination of the reward constitutes administrative action.

In concluding that the determination of the reward constitutes administrative action, the question is whether the right to procedurally fair, reasonable and lawful administrative

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135 Chapter 3 para 3.5.
136 Chapter 3 para 3.5.1.
137 Chapter 3 para 3.5.1.

action is limited by the dispute resolution procedure under the proposed incentivised whistleblowing programme.

In the proposed incentivised whistleblowing programme, the decision by the whistleblower office to make an award to the whistleblower is subject to the dispute resolution process in terms of the Tax Court. The right to procedurally fair, reasonable and lawful administrative action includes the right to challenge decisions and to request reasons for decisions. The remedy to challenge the decision or request reasons for the decision is not ousted by the proposed incentivised whistleblowing programme, since the provisions in the Tax Court also provide for requests for reasons for a "decision" to be submitted, and for requests for additional information and documentation.[138]

The only potential limitation on the right to procedurally fair, reasonable and lawful administrative action could be that the review proceedings must be brought in the Tax Court. It is not uncommon for different specialised High Courts in South Africa to have exclusive jurisdiction over certain matters.[139]

The mere fact that the dispute by a tax whistleblower of an award is under the jurisdiction of the Tax Court does not equate to a limitation of the right to procedurally fair, reasonable and lawful administrative action or access to courts for that matter. In this regard, the finding of the Constitutional Court in Metcash and the precedent of Rappa Resources discussed above are equally relevant.[140] Following these judgments, the Tax Court is the specialised court equipped for dealing with disputes arising from and related to tax assessments.[141] By incorporating the dispute resolution process under the Tax Court's

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138 Tax Court Rules 6, 8 and 36.

139 For example, Land Claims Courts, Labour Courts, Military Courts and the Commercial Courts.

140 Chapter 9 para 9.2.3. *Metcash Trading Ltd v Commissioner for the South African Revenue Service and Another 2001 (1) BCLR 1 (CC)*. *Commissioner for the South African Revenue Service v Rappa Resources (Pty) Ltd (Case no 1205/2021) [2023] ZASCA 28*. *United Manganese of Kalahari (Pty) Ltd v Commissioner for the South African Revenue Service (1231/2021) [2023] ZASCA 29*.

141 In *Poulter v C:SARS* 2 All SA 876 (WCC) para 52 the High Court stated that the Tax Court could be described as an administrative forum or tribunal.

jurisdiction is to the benefit of the whistleblower, as the proceedings are not public, thereby adding additional protection for the whistleblower. Consequently, the whistleblower's right to fair administrative action is not infringed upon and they may still review the decisions concerning the reward payable or due to them. The prescribed process of the Tax Court does not infringe upon the right to fair administrative action.

Considering the above, I argue that there ought not to be a constitutional challenge on the manner in which disputes regarding the determination of the reward are treated.

9.7. Miscellaneous considerations

9.7.1. Contractual agreements between taxpayer and whistleblower

One of the considerations raised in Chapter 3 is the position when a person signs a non-disclosure and confidentiality agreement with the taxpayer and thereafter wishes to blow the whistle. Following the Constitutional Court's judgment in *Arena Holdings*, taxpayers have no absolute guarantee of confidentiality.[142] This fit into the test of *Bernstein* that as a person moves into the commercial and business spheres of society, their right to privacy diminishes.[143] The need for confidentiality or anonymity and by extent the right to privacy diminishes as the taxpayer moves into the communal and business realms of society. The right to privacy within this communal and business realm must be balanced with public interest.[144]

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142 *Arena Holdings (Pty) Limited t/a Financial Mail and Others v South African Revenue Service and Others* 2023 (5) SA 319 (CC) para 172-183.
143 *Bernstein & Others v Bester NO & Others* 1996 (2) SA 751 (CC) 788.
144 *Arena Holdings (Pty) Limited t/a Financial Mail and Others v South African Revenue Service and Others* 2023 (5) SA 319 (CC) para 141-143.

The general principle is that contractual agreements must have a lawful purpose which is not contrary to the public interest.[145] Contracts that require a person to act contrary to an Act of Parliament will be considered against public interest and unenforceable.[146] It may be that at the time of contracting, the potential non-compliance or tax evasion was never envisaged by either party, but later the party guilty of non-compliance or evasion wants to prohibit the other from reporting their wrongdoing. In this regard, the non-disclosure and confidentiality agreement was not *per se* illegal at the time of contracting, but its enforcement is contrary to public policy. In those circumstances, public interest would demand a court not to enforce the agreement.[147]

9.7.2. The use and admissibility of unconstitutionally obtained evidence by the whistleblower

Section 35(5) of the Constitution provides that in criminal proceedings, evidence that is obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission thereof may result in an unfair trial, or if it is detrimental to the administration of justice.[148] Section 35(5) operates within the scope of the constitutional rights of accused, detained or arrested persons.[149] When whistleblowers gather information from taxpayers to support their reports, a question may arise about the admissibility of this

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145 *Colonial Banking and Trust Co v Hill's Trustee* 1927 AD 488 495. Stone and Devenney *The Modern Law of Contract* (2013) para 12.11.

146 *Eastwood v Shepstone* 1902 TS 294 302; *Kennedy v Steenkamp* 1936 CPD 113 116*; Essop v Abdullah* 1986 2 All SA 234 (C); 1986 4 SA 11 (C) 14.

147 LAWSA *Contract* para 334-335. Stone and Devenney *The Modern Law of Contract* (2013) para 12.11Ff *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 8; *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 2 All SA 583 (A).

148 S 35(5) Constitution "**35. Arrested, detained and accused persons**… (5) Evidence obtained in a manner *that* violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."

149 Currie and de Waal *The Bill of Rights Handbook* (2013) 809. Cheadle et al. *South African Constitutional Law: The Bill of Rights* (2023) para 29.2.

evidence. This is because the information may have been obtained in violation of the Bill of Rights.

This exclusionary rule contained in section 35(5) is not without its limitations and permutations, as etched out by the South African Courts. The rule does not mean that all unconstitutionally obtained evidence is automatically excluded in court proceedings.[150]

In *Key v Attorney General Provincial Division*,[151] Judge Kriegler stated that "[w]hat the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in *Ferreira v Levin,*[152] "Fairness is an issue which has to be decided upon the facts of each case, and a trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted. If the evidence to which the accused objects is tendered in criminal proceedings against him, he will be entitled at that stage to raise an objection to its admissibility. It will then be for the Trial Judge to decide whether the circumstances are such that fairness requires the evidence to be excluded."[153]

Similarly, in the matter of *S v Pillay and Others*,[154] the Supreme Court of Appeal held that even in matters of serious infringement of constitutionally guaranteed rights, if the interest of the public is not served by the exclusion of the evidence as a result of such infringement, then such evidence ought to be admitted by a court.[155] Concerning the

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150 Currie and de Waal *The Bill of Rights Handbook* (2013) 809. Cheadle et al. *South African Constitutional Law: The Bill of Rights* (2023) para 29.2.
151 *Key v Attorney General Cape Provincial Division* 1996 (2) SACR 113 (CC).
152 *Ferreira v Levin* 1996 (1) SA 984 (CC).
153 *Key v Attorney General Cape Provincial Division* 1996 (2) SACR 113 (CC) 121.
154 *S v Pillay and Others* 2007 1 All SA 11 (SCA).
155 *S v Pillay and Others* 2007 1 All SA 11 (SCA) 41.

interest of the public, the Constitutional Court in *S v Jaipal*,[156] held that fairness to the public must instil confidence in the criminal justice system.[157]

In conclusion, although the evidence obtained by a whistleblower could infringe on the taxpayer's constitutional rights, such evidence's admissibility is not automatically excluded. A trial court will have to determine the admissibility of the evidence, considering all of the facts of each case. The admissibility of all of the evidence would in any event be considered by a court when a taxpayer disputes an assessment or decision.

9.8. Conclusion

This chapter identifies four instances in which the proposed incentivised whistleblowing programme could potentially infringe on the rights of taxpayers and whistleblowers.

The first instance relates to the making of a whistleblower report and the implications thereof for whistleblowers' and taxpayers' rights to privacy, the above examination concludes that the right to privacy is subject to various limitations already included within the South African jurisprudence. The taxpayers' right to privacy may be limited and cannot be used as a shield against the reporting of non-compliance and tax evasion.

The second instance concerns the inclusion of confidentiality provisions related to the whistleblower report and the identity of the whistleblower. The taxpayer's right to information and the details of any assessment or decision was examined. The examination of the limitation of this right necessitates the application of section 36 of the Constitution. In applying the limitation test to the taxpayer's right to information, the result

156 *S v Jaipal* 2005 (4) SA 581 (CC).
157 *S v Jaipal* 2005 (4) SA 581 (CC) para 29.

indicates that the limitation imposed by the proposed incentivised whistleblowing programme is reasonable and justifiable according to the prescripts of section 36.

The third instance is the protection of whistleblowers during court proceedings when the assessment or decision is challenged by the taxpayer. This analysis also requires the application of the limitation test of section 36 of the Constitution. The application of the limitation test reveals that the limitations on the taxpayer's right to access courts and a fair hearing pass constitutional scrutiny, taking into account the legitimate constitutional purpose of protecting whistleblowers, the furtherance of the administration of justice, the overall promotion of voluntary tax compliance and prevention of tax evasion.

The fourth instance is whether the determination of the reward by the whistleblower office constitutes administrative action. The results of the examination of the aforesaid question show that the determination by the whistleblower office is administrative action subject to the right to procedurally fair, reasonable and lawful administrative and access to courts. The conclusion in respect of this element is that under the proposed incentivised whistleblowing programme there is no infringement on the right to procedurally fair, reasonable and lawful administrative and access to courts.

Finally, the chapter concludes with a discussion of miscellaneous issues such as the contractual obligations of whistleblowers and the admissibility of unconstitutionally obtained evidence. In respect of the contractual obligations of whistleblowers bound to a non-disclosure agreement or confidentiality agreements, it appears that the provisions of those agreements cannot be enforced in order to prevent non-compliance or offences from being reported.

As for potentially unconstitutionally obtained evidence, the position remains that a court must determine the admissibility of the evidence. Section 35(5) of the Constitution does not point to the automatic exclusion of evidence so obtained, and each case will have to be determined on its own merits. In fact, the provisions of section 35(5) allow the exclusion

of unconstitutionally obtained evidence only if the admission thereof would render the trial unfair.

Taking into account the above findings, this chapter concludes that the proposed incentivised whistleblowing programme will likely pass constitutional scrutiny. The incentivised whistleblowing programme's purpose is to promote voluntary compliance and prevent tax evasion, which is a noble and constitutionally legitimate purpose.

Chapter 10: Conclusion

10.1. Introduction

In 2022 and 2023 there has been a zealous pursuit of legislative reform concerning whistleblowers in South Africa. In June 2023, the Department of Justice and Constitutional Development published a discussion document on the proposed reforms for whistleblower protection in South Africa.[1] This discussion paper considers the current protection afforded to whistleblowers in general and the shortcomings concerning whistleblower legislation in South Africa.[2] A simple Boolean Google Search for news articles for 2023 with the keywords "whistleblowers" and "South Africa" delivers more than fifteen pages of search results.

This thesis considers the position of tax whistleblowers in South Africa and potential legislative reform to allow for an incentivised tax whistleblowing programme. The research suggests that incentivised tax whistleblowing may positively impact voluntary tax compliance. To achieve the aim and purpose of the thesis, five questions must be answered:

i. Are tax whistleblowers recognised in the South African legislative or regulatory policy context?

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1 Department of Justice And Constitutional Development "Invitation For Public Comments Discussion Document On Proposed Reforms For The Whistleblower Protection Regime In South Africa" at https://www.justice.gov.za/legislation/invitations/20230629-Whistleblower-Protection-Regime.pdf (Accessed 21/12/2023).

2 Department of Justice And Constitutional Development "Invitation For Public Comments Discussion Document On Proposed Reforms For The Whistleblower Protection Regime In South Africa" at https://www.justice.gov.za/legislation/invitations/20230629-Whistleblower-Protection-Regime.pdf 7-19, 29-34.

ii. What competing rights of taxpayers and tax whistleblowers must be balanced to ensure protection for both persons without undermining the incentives to encourage tax whistleblowing?

iii. Which compliance factors are relevant for an incentivised whistleblowing programme, and what are the disadvantages of such a programme?

iv. What regulatory strategies must be considered for an incentivised tax whistleblowing programme, and what have other jurisdictions done in the context of tax whistleblowers?

v. Considering the regulatory strategies adopted by other jurisdictions to incentivise whistleblowing, what legislative reform is required to enable a framework for tax-related incentivised whistleblowing?

The conclusions on the above questions are used to extrapolate and inform the recommendations and the identification of further research fields related to the study. The questions are dealt with below.

10.2. Are tax whistleblowers recognised in the South African legislative or regulatory policy context?

In considering this research question, the study in Chapter 2 showcases the South African legislative framework as it relates to whistleblowers in the context of the Tax Administration Act, the LRA, the PDA, the Companies Act, the FICA and the PRECCA. The findings suggest that the South African tax legislative framework requires reform to formally recognise and protect tax whistleblowers. Tax whistleblowers are in a precarious position since they do not necessarily enjoy the protection afforded to whistleblowers in, for example, the context of labour relations.

The statutory protections that a tax whistleblower might rely on are scattered, each with its own limitations and applications. Therefore, there is a need for a unified programme catering to tax whistleblowers. Tax whistleblowers divulge information in some circumstances without any or limited protection and benefit, leaving them vulnerable to personal, professional and social risks.

Chapter 2 concludes that, in South Africa, there is no incentivised tax whistleblowing programme. The current tax legislation also does not encourage proactive whistleblowing, but it focuses on a reactional response. By achieving the outcome of this research question, the study highlights the need for legislative reform to assist SARS in pursuing voluntary tax compliance and preventing tax evasion.

10.3. What competing rights of taxpayers and tax whistleblowers must be balanced to ensure protection for both persons without undermining the incentives to encourage tax whistleblowing?

Chapter 3 deals with this research question. The chapter focuses on the potentially affected constitutional rights of taxpayers and tax whistleblowers under an incentivised tax whistleblowing programme. The identified constitutional rights affected by an incentivised tax whistleblowing programme are the right to privacy, the right to access information, and the right to procedurally fair, reasonable and just administrative action. These rights compete with one another since taxpayers may wish to rely on the right to privacy not to have their affairs divulged to SARS.

Furthermore, on the one hand, the incentivised tax whistleblowing programme provides for the identity of the whistleblower and the report to remain confidential and undisclosed to the taxpayer. On the other hand, taxpayers have a right to access information concerning their affairs. The reward payable to a whistleblower under the incentivised programme results in administrative action, which is subject to review. Thus, the proposed programme affects a whistleblower's right to fair, reasonable and just administrative

action. Chapter 3 investigates these rights to determine their scope of application and potential limitations with the view to establish whether an incentivised tax whistleblowing programme is a reasonable and justifiable limitation of these constitutional rights.

The findings confirm that these rights are subject to limitation and do not exclude the implementation of an incentivised tax whistleblowing programme. Moreover, considering the interpretation and application of the identified constitutional rights by the South African courts, an incentivised whistleblowing programme could be encouraged and favoured, since it promotes the administration of justice and aids in the quest for voluntary tax compliance.

10.4. In respect of tax morale and compliance, what factors are relevant for an incentivised whistleblowing programme and what are the disadvantages of incentivised whistleblowing?

Chapter 4 examines the different theories of tax compliance and its influence on tax morale. The theories include economic deterrence, fiscal exchange, social and comparative treatment, trust in the government and political legitimacy. The review aims to determine whether the elements of these theories influence an incentivised tax whistleblowing programme and whether it will support SARS' strategic tax compliance goals. The results indicate that incentivised whistleblowing complements these theories and can be instrumental to achieving voluntary tax compliance. In the South African tax dispensation, whistleblowing is a powerful but unutilised tool that could promote voluntary compliance and prevent tax evasion.

After examining these theories of compliance and SARS' strategic objectives, Chapter 4 identifies seven essential compliance factors related to voluntary tax compliance. These factors are:

i. Tax compliance is influenced by the cost of non-compliance;

ii. Taxpayers are more compliant when they understand their obligations;

iii. Increased probability of an audit;

iv. Enhanced government services increase compliance;

v. Social perception;

vi. The rules must be applied impartially and fairly; and

vii. Trust in the tax system.

Chapter 4 also highlights the potential disadvantages of an incentivised tax whistleblowing programme. The main disadvantage is the potential administrative burden, including the investigation of false or meritless reports. Even so, the enquiry under this research objective concludes that the potential administrative burden pales into insignificance when the benefit of an incentivised tax whistleblowing programme is considered.

10.5. What regulatory strategies must be considered for an incentivised tax whistleblowing programme and what have other jurisdictions done in the context of tax whistleblowers?

Chapter 5 identifies four regulatory strategies for compliance. These strategies include the protection of whistleblowers through anti-retaliation laws, the introduction of reporting duties, penalties/fines and rewards. Chapter 5 analyses each of these regulatory strategies to determine whether they effectively promote voluntary compliance, whistleblowing, and the prevention of tax evasion.

According to the literature, anti-retaliation laws, penalties and reporting duties are ineffective and do not enhance voluntary compliance or prevent tax evasion. That said, anti-retaliation laws serve a different purpose than to incentivise whistleblowing and

compliance. Their purpose is to provide a soothing balm for the risks taken by the whistleblowers. This purpose is essential to an effective whistleblowing programme.

The chapter concludes that to reward persons for blowing the whistle is the best method in combating tax evasion and promoting voluntary compliance. This is so because incentivised whistleblowing encourages persons to step forward to report tax non-compliance and evasion, thereby increasing the probability of detection increasing cost of evasion and non-compliance. An incentivised tax whistleblowing programme also comprises elements of the fiscal exchange theory, as it assists the revenue authority to administer the tax system better, resulting in improved collection rates. This, in turn, helps the government to fund quality public service delivery.

From a social and comparative treatment perspective, an incentivised tax whistleblowing programme influences the public's perception of tax non-compliance and evasion and increases information reporting. Finally, an incentivised tax whistleblowing programme also improves the public's trust in the government in that citizens will be able to see that justice is done following their reports of non-compliance or evasion. The public can observe the increased collection of taxes resulting from their reports.

Premised on the achievement of this objective, the study concludes that an incentivised tax whistleblowing programme is the most effective tool to promote voluntary compliance and prevent tax evasion.

10.6. Considering the regulatory strategies adopted by other jurisdictions to incentivise whistleblowing, what legislative reform is required to enable a framework for tax-related incentivised whistleblowing?

Chapters 6, 7 and 8 deal with this research question. Chapter 6 considers the regulatory frameworks of the US and Australia. The purpose of the examination of these countries' legislation is to consider the practical implementation of two different regulatory

strategies. The reason for the chosen jurisdictions is their different approaches to rewarding tax whistleblowers. The US implements an incentivised tax whistleblowing programme under which whistleblowers receive monetary rewards based on their contributions in collecting unassessed taxes. Australia does not provide monetary rewards, but it focuses solely on the protection of whistleblowers. Chapter 6 concludes that although the monetary reward framework of the US appears to be more effective, Australia's protection strategy cannot be discarded. The conclusions reveal that both frameworks are necessary to establish an effective incentivised tax whistleblowing programme. Accordingly, elements of the systems from both jurisdictions require incorporation to establish an effective incentivised tax whistleblowing programme.

After examining the approach of the US and Australia, Chapter 6 concludes with seven policy lessons essential for an incentivised tax whistleblowing programme in South Africa. These lessons are:

i. An effective incentivised tax whistleblowing programme requires a dedicated office within SARS that deals with the whistleblower reports;

ii. There must be a communication channel within which the whistleblower reports could be delivered to SARS;

iii. The determination of an award payable to whistleblowers must be exercised within defined criteria;

iv. The computation of the reward should not be open-ended, and there must be clear thresholds for calculating rewards;

v. The protection of whistleblowers must include protection of their identities, the report and the steps taken in making a disclosure;

vi. Whistleblowers should be protected from retaliation in the form of both labour-related practices and damages; and

vii. There should be an appropriate mechanism for dispute resolution concerning the reward payable to the whistleblower.

Chapter 7 provides a comprehensive analysis delineating the integration of the proposed incentivised whistleblowing policy with the identified compliance factors set out in Chapter 4 that are necessary to promote a culture of voluntary compliance. The results underscore the inherent benefit and usefulness of an incentivised tax whistleblowing programme. The findings also affirm that an incentivised tax whistleblowing programme serves as a catalyst, advancing and aligning SARS' strategic objectives. Implementing such a programme is posited as a strategic imperative and means to achieve and maintain SARS' mandate and strategic goals. Premised on the advantages of an incentivised tax whistleblowing programme, Chapter 8 identifies the elements of such a programme.

In considering the introduction of such a programme, Chapter 8 first distinguishes between the existing VDP in the Tax Administration Act and the proposed incentivised tax whistleblowing programme. This distinction is essential as it shows that there is scope for the inclusion of the proposed incentivised tax whistleblowing programme as a supplementary information-gathering tool available to SARS.

To establish an incentivised tax whistleblowing programme in South Africa, an independent whistleblower office is required to receive and investigate reports submitted by whistleblowers. After investigating the report, the whistleblower office recommends to the Commissioner for SARS on whether the report warrants further audit or investigation. The Commissioner for SARS may then select the relevant taxpayer for audit or investigation under the Tax Administration Act. Once this selection is complete, the ordinary provisions regarding the audit or investigation procedure follow.

After SARS has issued its assessment for the unassessed taxes and collected the proceeds, based (in part) on the whistleblower's report, the whistleblower office decides upon the reward payable. The proposed framework includes a dispute resolution mechanism in terms of which the whistleblower could dispute the whistleblower office's

decision on the reward payable. For the reasons canvassed in Chapter 8, this dispute ought to fall within the exclusive jurisdiction of the Tax Court. Once the reward due to the whistleblower is final, it is proposed that payment of the reward must be facilitated through the taxpayer's account and refund process under the Tax Administration Act.

Not only is it necessary to consider the rewards to whistleblowers, but an effective incentivised tax whistleblowing programme must also include adequate protection for whistleblowers. To safeguard whistleblowers, the proposed incentivised tax whistleblowing programme should provide for the confidentiality of the whistleblowers' identities and reports from the time they make the report to the potential court proceedings. These protections should include the prohibition of retaliation in the context of the labour provisions and general damages claims. In respect of the court proceedings, it is proposed that the testimony of a SARS official on the whistleblower report should be treated as an exception to the hearsay rule; alternatively, the whistleblower could testify *in camera*. These provisions strengthen the incentivised tax whistleblowing programme, aligning it with the established legal framework while protecting whistleblowers.

The final enquiry under this research question relates to the constitutionality of the proposed incentivised tax whistleblowing programme. To establish whether the proposed incentivised tax whistleblowing programme is feasible, it is necessary to consider the identified constitutional rights under the first research question and its potential limitation. In this regard, Chapter 9 identifies four potential constitutional challenges to the proposed incentivised tax whistleblowing programme. These constitutional challenges include:

i. The limitation of the taxpayer's right to privacy;

ii. The limitation of the taxpayer's right to information, which includes to know the identity of the whistleblower and access to the report submitted;

iii. The taxpayer's right to a fair public hearing, including the right to confront the whistleblower and challenge their evidence; and

iv. The whistleblower's right to fair administrative action in respect of the determination of the reward payable and to review the decisions by the whistleblower office.

As to the right to privacy, the enquiry in Chapter 9 concludes that a taxpayer does not have an absolute right to confidentiality and privacy of their affairs. Premised on the dicta referred to in case law, a taxpayer's privacy diminishes as they move into the commercial and business spheres of society. Moreover, taxpayers cannot hide their non-compliance and tax evasion behind a shield of privacy.

As for the taxpayer's right to access information, Chapter 9 distinguishes between the right to access information and the application of the principles of public interest to the position of whistleblowers. The taxpayer cannot rely on arguments pertaining to public interest to gain access to the identity of the whistleblower and the report. The findings of the examination of the right to access information signify that the taxpayer need not know the details of the report or the identity of whistleblowers to answer to SARS' additional assessments. It is unlikely that the information provided by the whistleblower will be different to the information already in the taxpayer's possession. Accordingly, the need for the protection of whistleblowers to encourage information sharing outweighs the potential prejudice to taxpayer's right to access information.

The third challenge relates to the taxpayer's right to access courts and fair public hearing. This includes the right to confront the evidence adduced by SARS in respect of its assessments. The investigation into this challenge revealed that although the proposed incentivised whistleblowing programme infringes on this right, it is still subject to limitation in terms of section 36 of the Constitution. Chapter 9 identifies two potential avenues available to limit the infringement: Firstly, to allow a whistleblower to testify in *camera*. Secondly, the SARS official can testify about the details of the report as an exception to the hearsay rule. The result of the enquiry into this challenge is that the proposed incentivised whistleblowing programme may pass constitutional scrutiny.

The fourth challenge relates to the whistleblower's right to fair administrative action by the whistleblower office in determining the reward payable to them. In this way, the proposed incentivised whistleblowing programme suggests that the decision by the whistleblower office be subject to judicial review in the Tax Court. Premised on precedents of the Supreme Court of Appeal, the proposed dispute resolution mechanism does not infringe on the whistleblower's right to challenge the administrative decision by the whistleblower office. In conclusion, the proposed incentivised whistleblowing programme may survive this constitutional challenge.

10.7. Recommendations and concluding remarks

10.7.1. Recommendations for the development and implementation of the proposed incentivised tax whistleblowing programme

I propose the recommendations below for the development and implementation of the proposed incentivised tax whistleblowing programme:

i. Legislative amendment to the Tax Administration Act and other consequential amendments to the whistleblower-related legislative framework in South Africa as proposed in Table 8.1 in Chapter 8. This should be the first step in the implementation of the proposed incentivised tax whistleblowing programme.

ii. The Minister of Finance will be required to attend to the allocation of an appropriate budget to allow for the implementation of the proposed incentivised tax whistleblowing programme. This should include the relevant budget allocation for the establishment of the whistleblower office dealing with the reports, as well as its staff complement. A further consideration in terms of budgetary allowances should include training of the officials employed in the whistleblower office, so as to enable them to be equipped to deal with whistleblowers and to understand the needs of whistleblowers and the application of the Tax Administration Act.

iii. In respect of SARS' IT infrastructure, it is envisaged that additional infrastructure will be required to facilitate the proposed incentivised tax whistleblowing programme. This includes the creation of additional source codes to verify whistleblowers and their allocated rewards. Moreover, the infrastructure should cater for a database to be kept for whistleblower reports (if this is not already in existence). This database should be linked to SARS' system to show SARS officials already involved in audit or investigation that there is a whistleblower report related to the particular taxpayer. The SARS official may then approach the whistleblower office through the appropriate channels to obtain a copy of the report, which could be in a redacted format.

iv. Furthermore, SARS' income tax return for individuals (ITR12) would have to be amended to include a line item in which whistleblowers can indicate that they have been awarded a reward with their unique source code or number that verifies their statement. This source code also triggers the coded amount of the reward as a tax credit in their tax account.

v. In addition to the amendment of the ITR12, the current RS01 form, which is used by whistleblowers when reporting a tax crime, should be amended to include a line item in which the taxpayer could elect whether they want to be eligible for a reward. From the research it appears that some whistleblowers are intrinsically motivated to report non-compliance and evasion and may wish not to be considered for a reward.

vi. Finally, after implementing the proposed incentivised tax whistleblowing programme, the programme should be well advertised and easily available to the public. This recommendation includes placing the relevant link on SARS' website where it is easily accessible.

10.7.2. Recommendations for future research

In relation to this thesis, these areas warrant further research:

i. Quantitative research is required to determine the ideal thresholds for the monetary reward payable to whistleblowers, taking into consideration the economic and fiscal challenges unique to South Africa.

ii. After the design and drafting of the proposed amendments, a further constitutional review will be required to ensure that the programme is constitutionally sound.

When reflecting on the position of tax whistleblowers in South Africa set out in this thesis, the words of CF Alford in his book *Whistleblower: Broken Lives and Organizational Power* come to mind: "To be a whistleblower is to step outside the Great Chain of Being, to join not just another religion, but another world. Sometimes this other world is called the margins of society, but to the whistleblower, it feels like outer space."[3] The recommendations and conclusion in this thesis aim to improve the position of tax whistleblowers by catering for their specific needs and to encourage whistleblowing using incentives to promote voluntary compliance. The recommendations in this thesis are intended to protect whistleblowers as a vulnerable group of persons to avoid their marginalisation and to shield them from personal, professional and social risks.

This study contributes to the pursuit of legislative reform for whistleblowers, particularly the tax administration in South Africa. It provides plausible and practical recommendations to incentivise and protect tax whistleblowers while contributing to the public interest in creating a morally sound and ethical tax-compliant society.

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3 Alford *Whistleblower: Broken lives and Organizational Power* (2001) 170.

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