

**REVIEWING ADMINISTRATIVE ACTION BY SARS, THE COMMISSIONER
AND OTHER DELEGATED SARS OFFICIALS**

by

A van Niekerk

Student Number: 25098455

Submitted in fulfilment of the requirements for the degree of LLM

In the Faculty of Law,

University of Pretoria

6 February 2013

Prepared under the supervision of Adv C Louw

Declaration

I, Adéle van Niekerk, hereby declare that this dissertation is my own, unaided work. It is being submitted in partial fulfilment of the prerequisites for the degree of Master's in Tax Law at the University of Pretoria. It has not been submitted before for any degree or examination at any other University.

Adéle van Niekerk

Acknowledgements

I would like to thank the Lord for making this opportunity possible for me and providing me with the strength to complete this dissertation. Thank you Lord.

I would like to thank my supervisor, Advocate C Louw, for the supervision and support that he gave me throughout my research. Thank you for taking the time out of your practice to assist me in finalising this dissertation, I deeply appreciate it.

To the staff at the library who assisted me in my research when I needed material etc., thank you very much for your assistance, I appreciate it.

I would like to thank my loving parents, Mr JP van Niekerk and Mrs AM van Niekerk. Thank you very much for all your love, support, inspiration and encouragement over the years. Thank you for always believing in me and providing me with all the opportunities you have given me to make it possible for me to have accomplished what I have today.

I would like to thank Mr FW Craucamp for your love, support, inspiration and encouragement throughout my research. I appreciate your moral and emotional support immensely.

I would also like to give many thanks to Ms Melody Edwards, who edited and formatted this dissertation. Thank you for the work you did, it is greatly appreciated.

Abstract

The subject of this dissertation is:

“Reviewing administrative action by SARS, the Commissioner
and other delegated SARS officials”.

For an effective, fair, just and equitable tax system to be established, certain fundamental principles have to be enforced to ultimately achieve a balance between government interests and taxpayers' interests. The government is conferred with the power to tax which is derived from the Constitution. At first glance the government's power to tax seems wide, but upon an analysis of the Constitution, one can note that the government's power to tax is limited by certain structural, procedural and substantive limitations. By way of the Bill of Rights, the Constitution confers taxpayers with numerous rights which serve as the substantive limitations to the government's power to tax. One of these fundamental taxpayers' rights is the right of just administrative action, which is the sole focus of this dissertation. A right without a remedy to enforce same is of no consequence, and therefore the available remedy analysed is the remedy of judicial review which is regulated by the Constitution read together with PAJA and the Constitutional common law principles.

The executive authority to tax vests in SARS, being an organ of state, which is headed by CSARS. Empowering legislation confers SARS, CSARS and other delegated SARS officials with the power to take decisions/exercise discretions. There are three types of empowering provisions which are differentiated, based on whether the remedy of objection and appeal is available to the taxpayer. Despite the availability of the remedy of objection and appeal, most decisions taken/discretions exercised by SARS and its delegated officials may amount to administrative action. The question which arises is whether taxpayers are equipped with a right and remedy to protect their interests from unlawful, unreasonable, and procedurally unfair exercise of such administrative action.

S33 of the Constitution confers taxpayers with the fundamental right of just administrative action, and to enforce this right, taxpayers would have to implement the remedy of judicial review. The mere availability of a right and remedy does not provide taxpayers with protection; thus in order for the right and remedy to provide taxpayers with protection against

the administrative action taken by SARS and its delegated officials, taxpayers would have to prove that the right and remedy is applicable and enforceable in the circumstances.

The aim of this dissertation is to determine whether the right of just administrative action and the remedy of judicial review is applicable and enforceable in the tax arena. For the right and remedy to be applicable and enforceable, certain substantive and procedural requirements must be satisfied, and therefore those requirements are analysed in the tax arena in this dissertation.

The substantive requirements which need be complied with are: (a) the administrator must be subject to the provisions of PAJA; (b) the conduct of the administrator must constitute “administrative action” as defined in PAJA; (c) the “administrative action” must materially and adversely affect taxpayer’s rights or legitimate expectations and have a “direct, external legal effect”; and (d), the “administrative action” must be found not be “lawful, reasonable and procedurally fair”, and if so, a ground as contemplated in s6 of PAJA must be applicable.

The procedural requirements which needs be complied with are: (a) *locus standi* to institute judicial review proceedings; (b) time limitations in which judicial review proceedings must commence; (c) the exhaustion of all available internal remedies prior to the commencement of judicial review proceedings (unless there are exceptional circumstances); (d) that Rules regulating proceedings in terms of PAJA be established and determination of such Rules which will regulate judicial review proceedings until new Rules are promulgated.

If, in the circumstances, the taxpayer can prove that he or she complies with all substantive and procedural requirements, then the right of just administrative action and remedy of judicial review is applicable and enforceable. It then needs to be established which forum would have the necessary jurisdiction to adjudicate upon the remedy of judicial review in the tax arena. There are two relevant Courts, namely the Tax Court and the High Court. The Tax Court has been established to adjudicate upon tax-related matters, whereas the High Court has inherent jurisdiction. It has been determined that in terms of the Constitution read together with PAJA, only a High Court or court with similar status may adjudicate upon judicial review. The Tax Court is a creature of statute and it has been held that the Tax Court does not have a similar status as the High Court. Case law has, however, previously held that the Tax Court has jurisdiction to review administrative action by SARS and its delegated officials.

The leading case in this regard was, however, adjudicated upon in 1985, prior to the Constitution and PAJA having been promulgated. It therefore seems that the case law should be re-evaluated in light of the current Constitutional dispensation in which the Constitution is the supreme law.

Finally, this dissertation provides a concise analysis of the powers which the forum having jurisdiction to adjudicate upon judicial review has to make orders.

It is prudent to emphasise that this dissertation focuses on the position prior to 1 October 2012. On 1 October 2012 the Tax Administration Act 28 of 2011 (the TAA) came into force and effect. The TAA is relevant to some of the issues discussed in this dissertation. Where the TAA influences the issues, mention is made of the provisions of the TAA, but these are not discussed. Therefore a recommendation for further research is that this dissertation be re-evaluated in light of the provisions of the TAA. The most relevant provisions which the TAA caters for, which may influence the topic of this dissertation, is the establishment of the Tax Ombud and the conferring of a limited remedy of review upon SARS and its delegated officials, in addition to the remedy of objection and appeal.

Table of contents

DECLARATION	II
ACKNOWLEDGEMENTS.....	III
ABSTRACT	IV
CHAPTER 1: INTRODUCTION TO THE RESEARCH TOPIC.....	1
1.1 Chapter introduction.....	1
1.2 Summary of content of dissertation	2
1.3 Objectives of dissertation	5
1.4 Research methodology	6
1.5 Limitations	6
1.6 Structure of dissertation	7
CHAPTER 2: AN ANALYSIS OF THE SOURCE AND SCOPE OF AND LIMITATIONS TO GOVERNMENT’S POWER TO TAX.....	9
2.1 Introduction	9
2.2 Source of government’s power to tax	9
2.2.1 Introduction	9
2.2.2 Position prior to 1994.....	10
2.2.3 Position after 1994: The government’s power to tax under the Interim Constitution, Act 200 of 1993.....	10
2.2.4 Current position under the Constitution of the Republic of South Africa Act 108 of 1996	11
2.2.4.1 <i>National sphere of government</i>	12
2.2.4.2 <i>Provincial sphere of government</i>	13
2.2.4.3 <i>Local sphere of government</i>	14
2.3 Scope of government’s power to tax.....	14
2.4 Limitations to government’s power to tax.....	16
2.4.1 Background prior to 1996	16
2.4.2 Current limitation to government’s power to tax	18
2.4.2.1 <i>Structural limitations: Consequences of doctrine of separation of powers and scope of judicial authority</i>	18
2.4.2.2 <i>Procedural limitations to government’s power to tax</i>	22
2.4.2.2.1 Procedure to be followed when creating legislation	22
2.4.2.2.2 Procedures to be followed when amending the constitution	24
2.4.2.3 <i>Taxpayers’ rights and its enforcement as a substantive limitation to government’s power to tax</i>	24

2.5	CONCLUSION	28
-----	------------------	----

CHAPTER 3: THE ROLE OF AND SUBSTANTIVE REQUIREMENTS FOR THE APPLICABILITY AND ENFORCEABILITY OF JUST ADMINISTRATIVE ACTION IN GENERAL 30

3.1	Introduction	30
3.2	Background of administrative action in the tax arena	31
3.3	Current position under the Constitution in general	32
3.3.1	Introduction	32
3.3.2	Source of administrative law and administrative powers.....	33
3.3.3	S33 of the Constitution	34
3.3.4	The Promotion of Administrative Justice Act 3 of 2000.....	36
3.3.4.1	<i>General.....</i>	36
3.3.4.2	<i>Is the Administrator subject to the provisions of PAJA?</i>	38
3.3.4.3	<i>Conduct by the administrator being complained about must constitute “administrative action”.....</i>	39
3.3.4.4	<i>Administrative action adversely affects taxpayer’s rights</i>	45
3.3.4.5	<i>The requirement that administrative action must be lawful, reasonable and procedurally fair, and if not, one of the grounds for judicial review under s6 of PAJA must be applicable</i>	47
3.3.4.5.1	The constitutional standard of lawful, reasonable and procedurally fair administrative action 48	
3.3.4.5.2	List of grounds for judicial review as set out in s6 of PAJA.....	51
3.4	CONCLUSION	60

CHAPTER 4: THE ROLE OF AND SUBSTANTIAL REQUIREMENTS FOR THE APPLICABILITY AND ENFORCEABILITY OF JUST ADMINISTRATIVE ACTION IN THE TAX ARENA 62

4.1	Introduction	62
4.2	In whom the executive authority to tax is vested, nature of such powers and taxpayers’ remedies in general in respect of the executive authority’s power to tax	63
4.2.1	Executive authority to tax, in whom it is vested and nature of powers	63
4.2.2	Taxpayers’ remedies in respect of the executive authority to tax.....	65
4.2.2.1	<i>General principles in respect of interference with the executive authority to tax.....</i>	66
4.2.2.2	<i>Remedies available in respect of type 1 empowering provisions</i>	67
4.2.2.3	<i>Available remedies in respect of type 2 empowering provisions</i>	70
4.2.2.4	<i>Remedies available in respect of type 3 empowering provisions</i>	71
4.3	An implementation of the substantive requirements for the applicability and enforceability of just administrative action and the remedy of judicial review in general in the tax arena in general	72
4.3.1	Introduction	72
4.3.2	Do SARS and its delegated officials qualify as administrators as defined in PAJA? ...	73

4.3.3	Do decisions taken/discretions exercised by SARS and its delegated officials amount to “administrative action”?	73
4.3.4	The “administrative action” materially and adversely affects taxpayers’ rights or legitimate expectations	76
4.3.5	That the administrative action is not lawful, reasonable and procedurally fair and that a ground as contemplated in s6 of PAJA is applicable	78
4.3.5.1	S6(2)(a)	79
4.3.5.2	S6(2)(c)	80
4.3.5.3	S6(2)(d)	82
4.3.5.4	S6(2)(e)	82
4.3.5.5	S6(2)(f)	82
4.3.5.6	S6(2)(g)	82
4.3.5.7	S6(2)(h)	83
4.3.5.8	S6(2)(i)	83
4.4	Conclusion	84

CHAPTER 5: THE PROCEDURAL REQUIREMENTS FOR JUDICIAL REVIEW AND THE FORUM HAVING JURISDICTION TO ADJUDICATE UPON JUDICIAL REVIEW IN TAX MATTERS 86

5.1	Introduction	86
5.2	Access to courts	87
5.3	PROCEDURAL REQUIREMENTS IN RESPECT OF JUDICIAL REVIEW	88
5.3.1	Locus standi to institute judicial review	90
5.3.2	Time limitations	90
5.3.3	Exhaustion of available internal remedies	91
5.3.3.1	<i>Definition of internal remedy</i>	91
5.3.3.2	<i>Content of exceptional circumstances in the interest of justice as provided in s7(2)(c) of PAJA</i>	92
5.3.3.3	<i>Procedural requirement of exhaustion of internal remedies in tax arena</i>	94
5.3.3.4	<i>Controversial issue and contradictory opinions thereon</i>	96
5.4	Rules regulating procedures to be followed	97
5.5	Forum having jurisdiction to adjudicate upon judicial review	99
5.6	Forum having jurisdiction to adjudicate upon judicial review in the tax arena	102
5.6.1	Powers of the Tax Court	103
5.6.1.1	<i>General</i>	103
5.6.1.1.1	Prior to 1 October 2012	103
5.6.1.1.2	From 1 October 2012 forward	103
5.6.1.2	<i>Status of Tax Court</i>	104
5.6.1.3	<i>Judicial review in the Tax Court</i>	108
5.6.1.3.1	Authority for Tax Court having jurisdiction to adjudicate upon judicial review proceedings ...	108

5.6.1.3.2	Authority for Tax Court not having jurisdiction to adjudicate upon judicial review proceedings	111
5.6.1.3.3	Effect of TAA on Tax Court authority to adjudicate upon judicial review in tax matters ...	115
5.6.2	Powers of High Court in tax matters	115
5.6.2.1	<i>General inherent jurisdiction</i>	115
5.6.2.2	<i>Authority against High Court authority to adjudicate upon tax related matters and effect in respect of authority to adjudicate upon judicial review</i>	117
5.6.3	Tax Ombud	119
5.6.4	Conclusion in respect of a forum having jurisdiction to adjudicate upon the remedy of judicial review in tax-related matters	120
5.7	Powers of forum adjudicating upon judicial review	121
5.8	Conclusion	127
CHAPTER 6: CONCLUSION		129
6.1	Introduction	129
6.1.1	Source and scope of and limitations to government's power to tax, and introduction to taxpayers' procedural rights	129
6.1.2	Right of just administrative action	130
6.1.3	Rationale for PAJA	130
6.1.4	Substantive requirements for right and remedy	131
6.1.5	Administrative action as a substantive requirement	131
6.2	Empowering provisions	132
6.3	Substantive requirements for the applicability and enforceability of the right of just administrative action and remedy of judicial review in the tax arena	133
6.4	Procedural requirements for the applicability and enforceability of the right of just administrative action and remedy of judicial review in the tax arena	134
6.5	Which forum has jurisdiction?	135
6.5.1	Introduction	135
6.5.2	Tax Court	135
6.5.3	High Court	136
6.5.4	Tax Ombud	137
6.5.5	Conclusion	137
6.6	Powers of forum having jurisdiction to adjudicate upon judicial review	138
6.7	Recommendations for further research	138
REFERENCES		139

CHAPTER 1: INTRODUCTION TO THE RESEARCH TOPIC

1.1 Chapter introduction

An effective, fair, just and equitable tax system is essential to finance government expenditure. It is in government's interests that more tax be levied, and in taxpayers' interests that less tax be levied. A balance between government's and taxpayers' interests must be obtained.¹

In 1776 Adam Smith, in his work "The wealth of the nations",² set out four principles for an effective tax system; namely equity and fairness, simplicity, certainty and convenience, and cost effectiveness. More recently the report of the Commission of Enquiry into the Tax Structure of the Republic of South Africa stated the following in respect of an adequate tax structure:

"For an adequate tax structure the basic characteristics (where the one does not conflict with the other or others) are equity, neutrality, simplicity, certainty, administrative efficiency, cost effectiveness, flexibility, stability, distribution or effectiveness, and a fair balance from the point of view of taxpayers between the respective burdens of direct and indirect tax. Tax reform measures must also be tested against these criteria, and must be examined for transitional feasibility.

*The ideal, both for direct and indirect imposts, is a broad-based, widely distributed, low-rate, high-yield tax, conforming to these other requirements as far as possible."*³

¹ Van Niekerk, A. (2008). *Die heffing van inkomstebelasting uit 'n grondwetlike oogpunt*. Unpublished LLB thesis. Pretoria: University of Pretoria.

² Smith, A. (1937). *An Enquiry into the Nature and Causes of the Wealth of Nations*. New York: Random House. (Originally published in 1776).

³ The Commission later became known as the Margo Commission, RP34/1987 (1987) par 1.28.5. Croome, B.J. (2008). Taxpayers' rights in South Africa: An analysis and evaluation of the extent to which the powers of the South African Revenue Service comply with the Constitutional rights to property, privacy, administrative justice, access to information and

The aim of the principles of simplicity and certainty are to make the administration of tax more efficient, economical, and to avoid confusion which would, in turn, establish an environment in which taxpayers would more voluntarily and free willingly co-operate with government.⁴ Unfortunately taxpayers are generally not well informed in respect of the source and scope of and limitations to government's power to tax and taxpayers' rights. The result is that taxpayers are at a disadvantage when involved in tax disputes with the government. This dissertation will aim, *inter alia*, to equip taxpayers with a concise framework of the source and scope of and limitations to government's power to tax and taxpayers' rights.

1.2 Summary of content of dissertation

The source and scope of, and limitations to, government's power to tax will firstly be analysed. In this regard the source of government's powers is the sovereign authority of a country from which government derives its powers to tax. The sovereign authority⁵ firstly sets out the scope of, and limitations to, government's power to tax; secondly, it similarly confers taxpayers with certain taxpayers' rights which, in effect, serve as limitations to government's power to tax; and thirdly, it regulates the interaction between government's power to tax and taxpayers' rights in order to achieve the balance between their interests.⁶

South Africa is a Constitutional state and the *Constitution of the Republic of South Africa*⁷ ("the Constitution") is the supreme law.⁸ Both government and taxpayers must adhere to the

access to courts. Unpublished LLD thesis. Cape Town: UCT, pp. 6 and 7. Hereafter referred to as "Croome, B.J. (2008). Taxpayers' rights in South Africa supra"

⁴ Buehler (1940) as cited by Theron, L. (1994). *Regsteoretiese ondersoek na 'n landbougrondbelasting vir Suid Afrika*. Unpublished LLD thesis. Johannesburg: RAU (now University of Johannesburg).

⁵ Together with the other sources of law in South Africa which are not contrary to the Constitution.

⁶ See Chapter 2.

⁷ 108 of 1996.

⁸ The preamble read together with s1 and s2 of the Constitution.

Constitution⁹, which is the tool that aims to balance government and taxpayers' powers, rights and responsibilities.¹⁰

To determine the scope of, and limitations to, government's power to tax and taxpayers' rights, the Constitution must be critically analysed. The scope of government's powers to tax is wide, but there are various structural, procedural and substantive limitations to government's power to tax.¹¹ Substantive limitations to government's power to tax are the fundamental rights which are conferred upon taxpayers by the Bill of Rights.¹²

Taxpayers have numerous taxpayers' rights, which include fundamental rights of access of information,¹³ just administrative action,¹⁴ and access to courts,¹⁵ which form part of taxpayers' fundamental procedural rights.¹⁶ These fundamental procedural rights aim to enforce the values of equity and fairness in South African law. This dissertation will be limited to an analysis of the right of just administrative action in the tax arena.

Taxpayers' rights which are not applied and enforced do not protect a taxpayer. Thus, the applicability and enforceability of just administrative action in the tax arena must be determined, and if applicable and enforceable, the nature and extent of the protection they afford a taxpayer will be analysed.¹⁷ The focus of this dissertation will be on the right of just administrative action and the remedy of judicial review in the tax arena. All other taxpayers' rights and remedies fall outside the ambit of this dissertation.

The right of just administrative action is regulated by the Constitution, read with the *Promotion of Administrative Justice Act 3 of 2000* ("PAJA") and the common law. As all rights in the Bill of Rights, this right is not absolute and may be limited in terms of s36 of the Constitution.

⁹ Together with the other sources of law in South Africa which are not contrary to the Constitution.

¹⁰ The preamble read together with s1 and s2 of the Constitution.

¹¹ Chapter 2.

¹² Chapter 2 read together with s7 to s39 of the Constitution.

¹³ See s32 of the Constitution 108 of 1996.

¹⁴ See s33 of the Constitution 108 of 1996.

¹⁵ See s34 of the Constitution 108 of 1996.

¹⁶ Croome, B.J. (2010). *Taxpayer Rights in South Africa*. Cape Town: Juta, pp. 185.

¹⁷ Chapter 3 read together with Chapter 4.

For the right of just administrative action to be applicable and enforceable, the conduct must fall within the ambit of the definition of “administrative action” and certain substantive and procedural requirements need be complied with.¹⁸

The South African Revenue Service (“SARS”) is responsible for the administration, implementation, regulation and collection of taxes. The Commissioner is the head of SARS (“CSARS”). Fiscal legislation confers SARS, CSARS, as well as senior and other officials of SARS (“SARS and its delegated officials”), with powers to take decisions/exercise discretions (“empowering provisions”).¹⁹ To determine whether the right of just administrative action is applicable, it must be determined whether the decisions taken/discretions exercised by SARS and its delegated officials under the empowering provisions amount to administrative action and whether the substantive and procedural requirements have been complied with in the circumstances. Numerous powers conferred upon SARS and its delegated officials, in terms of empowering provisions to take decisions/exercise discretions, constitute administrative action.²⁰

If the right of just administrative action is applicable in the circumstances, it must be established what remedy is available to taxpayers to enforce the right of just administrative action. For this purpose, the types of empowering provisions must be analysed. Empowering provisions can be divided in three types; namely, those which provide for the remedy of objection and appeal procedures, those which neither expressly include nor exclude such remedy, and those which expressly exclude such remedy.²¹

The remedy to enforce the right of just administrative action is judicial review, which is regulated by the Constitution read together with PAJA and the common law. Generally on review, a court will only interfere with a decision if it is of the opinion that, at the time when taking the decision, the authority who took the decision did not duly consider the facts and/or

¹⁸ The substantive and procedural requirements are found in the provisions of the Constitution read together with PAJA and the common law. See Chapter 3 read together with Chapter 4.

¹⁹ For example, the Income Tax Act 58 of 1962, the Tax Administration Act 28 of 2011 and the Value Added Tax Act 89 of 1991. See Chapters 3 and 4.

²⁰ Croome, B.J. (2010). *Taxpayer Rights in South Africa*. Cape Town: Juta 2010, pp. 204-205.

²¹ Chapter 5.

did not exercise its discretion in a judicial manner (as prescribed by *inter alia* PAJA). The applicability and enforceability of judicial review in the tax arena must be established.²²

Once it is established that the remedy of judicial review is applicable and enforceable in the tax arena, it must be determined which forum has the necessary jurisdiction to adjudicate upon the remedy of judicial review in the tax arena. In this regard PAJA stipulates that a High Court has the authority to adjudicate upon judicial review in respect of the right of just administrative action.²³ The Tax Court has been established to adjudicate upon tax issues. A dispute pertaining to administrative action is not a tax issue, and it seems that the Tax Court would not have the jurisdiction to adjudicate such issues; however, there is authority to the effect that the Tax Court may preside as a court of review.²⁴ An analysis of the law regarding the jurisdiction of both the High Court and the Tax Court will be conducted.²⁵

Lastly, the powers of the forum adjudicating upon judicial review in the tax arena must be established.

1.3 Objectives of dissertation

The applicability and enforceability of the right of just administrative action and remedy of judicial review in the tax arena is not solely of an academic nature, it has great practical importance in the South African tax system. Especially the forum having the jurisdiction to adjudicate upon judicial review in the tax arena, is currently a controversial topic.

The aim and purpose of this dissertation is to:

- Provide a concise framework of the source and scope of and limitations to government's power to tax and taxpayers' rights and remedies;

²² Chapters 3, 4 and 5.

²³ Promotion of Administrative Justice Act, 3 of 2000.

²⁴ See De Koker, A *et al.* (2010). *Silke on the South African Income Tax Act*. Durban: Lexis Nexis, pg. 18 -17-1.

²⁵ Chapter 5.

- Focus on the applicability and enforceability of taxpayers' fundamental right of just administrative action;
- Discuss, analyse and determine the:
 - Applicability and enforceability of the right to just administrative action in general and in particular within the tax arena, with reference to the substantive and procedural requirements;
 - Applicability and enforceability of the remedy to enforce the right to just administrative action, namely judicial review, in general and in particular within the tax arena, with reference to the substantive and procedural requirements;
 - Forum having the necessary jurisdiction to adjudicate upon the remedy of judicial review in the tax arena, where the disputes relate to the right of just administrative action;
 - Powers of the forum referred to above to make orders in the tax arena.

1.4 Research methodology

The qualitative method will be implemented, relying on the Constitution, legislation, case law, books and published journal articles pertaining to the issues as set out above as the objectives of the research. The qualitative method is used because it is best suited for the dissertation as the main aim is to determine and analyse the legal position pertaining to certain issues.

1.5 Limitations

Due to limitations regarding the length of the dissertation, the following limitations are implemented in this dissertation: firstly only a concise summary of the source and scope of and limitations to government's power to tax is given; and secondly, although mention will be made of the full scope of taxpayers' rights, the focus will only be on taxpayers' fundamental right of just administrative action and its applicability and enforceability in the tax arena.

Thirdly, a concise summary of the types of empowering provisions and remedies they provide for will be set out but not discussed in detail, and fourthly, only the remedy of judicial

review in the tax arena will form the focus of this dissertation. Fifthly, the focus is on administrative action within the income tax arena to the exclusion of other forms of taxes.

It is important to note that this dissertation is based upon the position existing prior to 1 October 2012. On 1 October 2012 the provisions of the *Tax Administration Act 28 of 2011* ("TAA") came into full force and effect. The TAA influences some of the issues discussed in this dissertation.²⁶ The research for this dissertation was conducted on the position prior to 1 October 2012. Limited mention will, however, be made of the TAA to reflect that it may have an influence on the specific issue, but a full discussion of the position as from 1 October 2012 falls outside the ambit of this dissertation.

1.6 Structure of dissertation

This dissertation comprises six chapters. Chapter 1 consists of a discussion of the introduction, summary, objectives, research methodology and limitations of the dissertation.

Chapter 2 provides a concise discussion of the source and scope of, and limitations to, government's power to tax and the enforcement thereof. One of the limitations to government's power to tax is the taxpayers' rights as set out in the Constitution. The interaction between government's powers to tax and taxpayers' rights is also dealt with.

Chapter 3 firstly focuses on the history of the role, ambit, applicability and enforceability of the right of just administrative action, as well as the remedy of judicial review in South Africa in the tax arena. Secondly, it provides a concise analysis of the current role of, and substantive requirements for, the applicability and enforceability of the aforesaid right and remedy in general (not specific to the tax arena). The latter general exposition of the current position is necessary as the source and scope of the right of just administrative action and judicial review and the law which regulates and enforces same is rather complicated and requires a discussion to summarise same.

²⁶ For example, the remedy of objection and appeal incorporates a type of review for certain decisions taken/discretions exercised and introduces a Tax Ombud.

Chapter 4 discusses the types of empowering provisions which confer SARS and its delegated officials with the powers to take decisions/exercise discretions, as well as the remedies available under same. Thereafter the principles and substantive requirements (as set out in Chapter 3) for the applicability and enforceability of the right of just administrative action and remedy of judicial review are discussed in the tax arena in general.

Chapter 5 can be divided in three main parts. The first part deals with the procedural requirements for the applicability and enforceability of the right of just administrative action and remedy of judicial review in the tax arena; the second part discusses the forum which has the necessary jurisdiction to adjudicate upon judicial review proceedings; and the third part discusses the powers of the forum having jurisdiction to adjudicate upon judicial review proceedings.

Lastly, Chapter 6 provides a general summary of the discussions and conclusions in respect of all the aforesaid chapters as one unit, reflecting their interaction.

CHAPTER 2: AN ANALYSIS OF THE SOURCE AND SCOPE OF AND LIMITATIONS TO GOVERNMENT'S POWER TO TAX

2.1 Introduction

The government of the Republic of South Africa ("the government") imposes various taxes upon taxpayers. The government may legally only impose these taxes if it is conferred with the power to tax. This chapter aims to equip the reader with a concise analysis of the source and scope of and limitations to government's power to tax.

To determine the source, firstly the type of state and the supreme authority of South Africa must be established. Secondly it must be analysed whether the government is conferred with the power to tax under the supreme authority. Thereafter, the scope of, and limitations to, government's power to tax must be determined by an analysis of the supreme authority and the empowering legislation.

2.2 Source of government's power to tax

2.2.1 Introduction

The starting point is to establish the supreme authority of South Africa and to analyse same to determine whether the government is conferred with the power to tax. Two types of states exist; namely, a parliamentary and constitutional state. Government reigns supreme in a parliamentary state and the constitution is the supreme authority in a constitutional state. Important sources of South African law are summarised as, *inter alia*, the Constitution, legislation, common law, case law, international conventions and customs.

Since 1994 South Africa's supreme authority has changed dramatically. The position in respect of the period prior to 1994, after 1994 and currently, needs to be discussed.

2.2.2 *Position prior to 1994*²⁷

Until 1994, the *Republic of South Africa Constitution Act 110 of 1983* (“pre-1994 Constitution”) was in force. South Africa was a parliamentary state in which the government was the supreme authority.²⁸ The pre-1994 Constitution lacked an express provision conferring the government with the power to tax, but by implication (through forcing the government to comply with certain obligations) it conferred same.²⁹

2.2.3 *Position after 1994: The government’s power to tax under the Interim Constitution, Act 200 of 1993*³⁰

The *Interim Constitution Act 200 of 1993* (“the Interim Constitution”) was accepted on 27 April 1994 and changed the sovereign authority of South Africa dramatically from a parliamentary state to a constitutional state.³¹ The Interim Constitution functioned as a temporary measure to allow time for negotiations and the formulation of the Constitution.³²

The Interim Constitution lacked express provisions pertaining to the government’s power to tax, yet Croome comments that: “*it is not essential for a constitution to confer such a power*

²⁷ The full ambit of the pre-1994 position falls outside of the scope and ambit of this dissertation and therefore only a concise reference is provided.

²⁸ S34(3) of the pre-1994 Constitution. De Koker, A. *et al.* (2012). *Silke on the South African Income Tax Act*. Service 44. Durban: Lexis Nexis, pp. 22 – 3.

²⁹ S81(1) of the pre-1994 Constitution required that a State Income Fund had to be created in which all state income, as set out in s1 of the Exchequer and Audit Act 66 of 1975 (“Exchequer Act”), was to be paid into. The Exchequer Act defined income as: “(a) *The state Revenue Account means all monies received by way of taxes, imposts or duties and all casual and other receipts of the State, whatever the source, which may be appropriated by Parliament, and includes monies borrowed in terms of the provisions of this Act, but does not include the amount of any fine not exceeding R50 imposed upon any person by any court of law, insofar as such amount has not been paid, or revenue accruing to the accounts referred to in s 2(1)(c).*” as cited by Croome, B.J. (2008). *Taxpayers’ rights in South Africa*, *supra*, pp. 7 to 8.

³⁰ The full ambit of the Interim Constitution falls outside of the scope of this dissertation and only a concise reference is provided.

³¹ Ex Parte Speaker of the National Assembly: In re dispute concerning the Constitutionality of certain provisions of the National Education Policy Bill 83 of 1995 1996 (3) SA 289 (CC) and Ex Parte Chairperson of the Constitutional Assembly In Re: Certification of the Constitution of the Republic of South Africa 1996 (First Certification Judgment) 1996 (4) SA 744 (CC).

³² Croome, B.J. (2008). *Taxpayers’ rights in South Africa*, *supra*, pp. 10.

on the State.”³³ By implication, the Interim Constitution conferred the power to tax upon the government.³⁴

2.2.4 Current position under the Constitution of the Republic of South Africa Act 108 of 1996

On 8 May 1996 the *Constitution of the Republic of South Africa Act 108 of 1996* (“the Constitution”) was adopted, an amended Constitution was accepted on 11 October 1996, and on 18 December 1996, at Sharpeville, the then President Nelson Mandela signed the Constitution which came into force on 4 February 1997.³⁵

Under the Constitution, South Africa remained a democratic constitutional state in which the Constitution is sovereign and no one may exercise any power outside the Constitution.³⁶ Fundamental values are set out in s1 of the Constitution. The Constitution contains a Bill of Human Rights which is sovereign to all forms and sources of law and binds all legal persons, including the government and all organs of state.³⁷

³³ Croome, B.J. (2008). *Taxpayers’ rights in South Africa supra*, pp. 9 referring to *Attorney-General of Trinidad and Tobago v Ramesh Dipraj Kummar Mootoo* (1976) 28 WIR 326 where Hyatali, CJ drew attention to Cooley’s Constitutional Law, and Croome cites the following part thereof: “Taxes are defined to be burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes. The power to tax rests upon necessity, and it is inherent in any sovereignty. The legislature of every free State will possess it under the general grant of legislative power, whether particularly specified in the Constitution among the powers to be exercised or not. No constitutional government can exist without it.”

³⁴ S185 of the Interim Constitution required that a National Income Fund be established in which all taxes were to be paid in, which by implication conferred the government with the power to tax, as cited by Croome, B.J. (2010). *Taxpayer Rights in South Africa*. Cape Town: Juta, pp. 4 and 5.

³⁵ The Constitution, Ex Parte Chairperson of the Constitutional Assembly In Re: Certification of the Constitution of the Republic of South Africa 1996 (First Certification Judgment) 1996 (4) SA 744 (CC) and Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 (Second Certification Judgment) 1997 (2) SA 97 (CC).

³⁶ The preamble and s1 and s2 of the Constitution, Ex Parte Speaker of the National Assembly: In re dispute concerning the Constitutionality of certain provisions of the National Education Policy Bill 83 of 1995 1996 (3) SA 289 (CC) and Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996 (First Certification Judgment) 1996 (4) SA 744 (CC). De Koker, A et al. (2012). *Silke on the South African Income Tax Act*. Service 44. Durban: Lexis Nexis, pp. 22 – 4 and 22 – 6.

³⁷ Chapter 2 and s8 of the Constitution. *First National Bank of SA LTD t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA LTD t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 31 where Ackermann J held that “... it is first necessary to emphasise that even fiscal statutory provisions, no matter how

When determining the source of government's power to tax, the provisions of the Constitution are the starting point and must be analysed. The Constitution lacks an express provision conferring the government with the power to tax, but by implication the Constitution confers the government with the power to tax.³⁸

The Constitution divides central government in three spheres; namely the national, provincial and local spheres of government.³⁹ The Constitution further provides for a separation of powers in three categories; namely the legislative, executive and judicial authority of government.⁴⁰ To determine whether the government is conferred with the power to tax, the powers conferred on each individual sphere must be analysed.

2.2.4.1 National sphere of government

The Constitution lacks an express provision conferring national government with the power to tax, but by implication does so.⁴¹ An analysis of the following provisions of the Constitution supports the argument that the Constitution, by implication, confers the national government with the power to tax:⁴²

- Money received by the national government must be paid into the National Revenue Fund;⁴³
- In respect of provincial taxes, it is stipulated that, *inter alia*, flat-rate surcharges may be levied by provincial legislature "on any tax, levy or duty that is imposed by national legislation, other than on ..." (own emphasis);⁴⁴

indispensable they may be for the economic well-being of the country – a legitimate governmental objective of undisputed high priority – are not immune to the discipline of the Constitution and must conform to its normative standards."

³⁸ De Koker, A. *et al.* (2012). *Silke on the South African Income Tax Act*. Service 44. Durban: Lexis Nexis, pp. 22 – 2. Croome, B.J. (2010). *Taxpayer Rights in South Africa*. Cape Town: Juta, pp. 8.

³⁹ Chapters 4 to 7 of the Constitution.

⁴⁰ S43, s85 and s165 of the Constitution.

⁴¹ Croome, B.J. (2010). *Taxpayer Rights in South Africa*. Cape Town: Juta, pp. 8.

⁴² De Koker, A. *et al.* (2012). *Silke on the South African Income Tax Act*. Service 44. Durban: Lexis Nexis, pp. 22 – 2.

⁴³ S213 of the Constitution.

- In respect of equitable shares and allocations of revenue, it is stipulated that an Act of Parliament must provide for, *inter alia*, the equitable division of revenue raised nationally among the national, provincial and local spheres of government;⁴⁵
- Requirements in relation to national, provincial and municipal budgets are set out. In terms hereof budgets for the aforesaid spheres must be drawn and set out various aspect relating to government finances;⁴⁶
- It is required that a national treasury be established to deal with financial aspects of the government.⁴⁷

After the Constitution was enacted, most of the Exchequer Act was repealed and replaced by the *Public Finance Management Act 1 of 1999* (“PFM Act”), which contained the definition for “revenue fund”. The PFM Act created the National Revenue Fund.⁴⁸

2.2.4.2 Provincial sphere of government

S228⁴⁹ expressly confers the power upon the provincial legislature to levy certain limited taxes.⁵⁰ Some sections of the Constitution also confer the power to tax on provincial government by implication.⁵¹

Croome is of the opinion that when a province exercises the powers in respect of s228,⁵² it must utilise the process envisaged by the *Provincial Tax Regulation Process Act 53 of 2001*.⁵³

⁴⁴ S228 of the Constitution.

⁴⁵ S214 of the Constitution.

⁴⁶ S215 of the Constitution.

⁴⁷ S216 of the Constitution.

⁴⁸ As envisaged by s213 of the Constitution.

⁴⁹ Of the Constitution.

⁵⁰ The scope of and limitations to the provincial legislature’s powers are dealt with below.

⁵¹ S226 of the Constitution stipulates that money received by the provincial government must be paid into the Provincial Revenue Fund and the PFM Act created the Provincial Revenue Fund as envisaged in s226 of the Constitution. S215 of the Constitution deals with requirements in respect of national, provincial and municipal budgets. In terms hereof budgets for the aforesaid spheres must be drawn and set out various aspects relating to government finances.

2.2.4.3 Local sphere of government

Historically, municipalities derived their powers solely from statutes by way of delegation. Under the Constitution this position has changed in that municipalities now, in addition to powers derived from statutes by way of delegation, are conferred by the Constitution with the power to tax.⁵⁴

S229⁵⁵ deals with municipal fiscal powers and functions, and expressly confers the municipal legislature with powers to impose certain limited taxes.⁵⁶

2.3 Scope of government's power to tax⁵⁷

The scope of government's power to tax is determined by an analysis of the Constitution.⁵⁸ Currently each sphere of government is conferred with its individual power to tax and must be analysed individually to determine the scope of each sphere's power to tax. Furthermore each sphere's authorities are divided in three categories; namely the legislative, executive and judicial authority.⁵⁹

For current purposes it is relevant that the legislative authority of each sphere of government is responsible for the creation of legislation, and therefore the extent to which the legislative

⁵² Of the Constitution.

⁵³ Croome, B.J. (2008). *Taxpayers' rights in South Africa supra*, p 15 wherein Croome also comments that up to 2008 no province had exercised the rights to impose provincial tax, however the Western Cape had started to debate the possibility of a fuel levy.

⁵⁴ CDA Boerdery (Edms) Bpk v Nelson Mandela Metropolitan Municipality 2007 (4) SA 276 (SCA), 69 SATC 199 (which deals with a challenge to municipality's imposition of property rates).

⁵⁵ Of the Constitution.

⁵⁶ The scope of and limitations to the municipal legislature's powers are dealt with below.

⁵⁷ The full ambit of the scope of government's power to tax falls outside of the scope and ambit of this dissertation and only a summary of the most important provisions are provided for purposes of this dissertation.

⁵⁸ The full scope of government's power to tax falls outside the scope of this dissertation and only a concise framework is provided.

⁵⁹ By way of the separation of powers as referred to above. The nature of each authority will be discussed later in the Chapter under the discussion of separation of powers.

authority has the power to create legislation which imposes taxes, determines the scope of government's power to tax.

S43 of the Constitution sets out in whom the legislative authority of each sphere of government vests and refers to the section which sets out the powers which each legislative authority is conferred with. S44, s104 and s156 of the Constitution contains the powers conferred upon the national, provincial and local legislative authorities respectively.

The full scope of the powers conferred upon the legislative authority of each sphere of government falls outside the ambit of this dissertation. The following, in general, can however, be said in summary:

National legislative authority is vested in the National Assembly and the National Council of Provinces who are conferred with the legislative powers set out in s44 of the Constitution. S55 and s68 of the Constitution provide for further powers of the National Assembly and National Council of Provinces when exercising its legislative authority. The powers of the National Assembly and National Council of Provinces are very similar, but those of the National Assembly are wider. National legislative authority is conferred with a wide power to create tax legislation and therefore to date, national government has utilised its legislative authority and power to tax to enact various fiscal statutes.⁶⁰

Provincial legislative authority is vested in the provincial legislature who is conferred with powers set out in s104 of the Constitution. In addition, s228(1) of the Constitution stipulates that the Provincial legislature may impose: *"taxes, levies and duties other than income tax, value-added tax, general sales tax, rates on property or custom duties"*. Provincial legislature may further impose flat-rate surcharges on any tax, levy or duty which is imposed by national legislation, other than on corporate income tax, value-added tax, and rates on property or custom duties. S104(5) of the Constitution stipulates that if the provincial legislature is prohibited by law to create legislation in respect of a particular aspect, it may recommend such aspects of legislation to the National Assembly.

⁶⁰ For example the Income Tax Act 58 of 1962 and the Value-Added Tax Act 89 of 1991.

Lastly, s156(1) of the Constitution vests the local legislative authority in a municipality and confers on it the powers set out in s256(1) of the Constitution. In addition, s229 of the Constitution provides for certain limited express powers to tax, and stipulates that a municipality has the power to impose:

“(a) rates on property and surcharges on fees for services provided by or on behalf of the municipality; and (b) if authorised by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls, but no municipality may impose income tax, value-added tax, general sales tax or customs duty.”

2.4 Limitations to government’s power to tax

The limitations to government’s power to tax have developed over time. Hereunder, a concise framework of the limitations to government’s power to tax prior to 1996 will be set out, and thereafter the current limitations to government’s powers will be discussed.

2.4.1 Background prior to 1996

Prior to 1994 taxpayers had limited protection against government’s powers, as same were wide and the only material limitation thereto was the power conferred upon courts to adjudicate upon procedural validity (of procedures self created by Parliament)⁶¹, as opposed to substantive validity, of legislation.⁶²

The Interim Constitution expanded the limitations to government’s power in general, and in particular, the power to tax. The Interim Constitution materially limited government in the exercise of its powers by containing a Bill of Rights, including a limitation clause, constituting substantive limitations to government’s powers and provisions establishing a number of

⁶¹ Croome, B.J. (2008). Taxpayers’ rights in South Africa *supra*, pp. 8.

⁶² Croome, B.J. (2008). *Taxpayers’ rights in South Africa supra*, pp. 8. Taxpayers’ rights were restricted to extremely limited common law grounds of administrative action. Also see Hoexter, C (2012). *Administrative law in South Africa*. Second Edition. Juta & Co, pp. 13 to 15.

bodies to remedy any breach of the human rights contained in the Bill of Rights;⁶³ and various structural and procedural limitations to government's powers.

The Interim Constitution did not only enforce the limitations on future legislation but also provided retrospective limitations in respect of legislation already existing at the time when the Interim Constitution was enacted. Such legislation remained in force but the constitutionality thereof was subject to the provisions of the Interim Constitution and could be challenged in courts.⁶⁴

Further, in 1994, South Africa's then Minister of Finance requested that a commission be established to investigate certain aspects of the South Africa tax system.⁶⁵ The Katz Commission was established for that purpose, and after investigations compiled interim reports and thereafter a final report.⁶⁶ The interim reports and final report deal, *inter alia*, with aspects in respect of the scope of and limitation to the government's power to tax under the Interim Constitution.

The Katz Commission reported that the tax system, including the government's power to tax, is subject to the Interim Constitution and must conform with the Rule of Law.⁶⁷

⁶³ Chapters 8 of the Interim Constitution required the establishment of the Office of the Public Protector, the Commission for Gender Equality and the Human Rights Commission respectively.

⁶⁴ An example is the old Income Tax Act which conferred various powers on CSARS which in the pre-constitutional era were not contestable by the courts as the parliament was the supreme law. S98 of the Interim Constitution.

⁶⁵ Budget Speech Minister of Finance D.L. Keys (22 June 1994) 3 and Department of Finance Budget Review (22 June 1994) para 2.3 and 2.5 as cited by Croome, B.J. (2010). *Taxpayer Rights in South Africa*. Cape Town: Juta, pp. 5.

⁶⁶ The most prominent are the Katz Commission Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa RP 34/1987 Pretoria: The Government Printer, 1987) and Katz Commission Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa RP 1994 (Pretoria: The Government Printer, 1994). The full ambit of the Katz Commission reports fall outside of the scope and ambit of this dissertation and only a concise reference to the most important provisions thereof are discussed in short as background information.

⁶⁷ In Katz Commission Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa RP 1994 (Pretoria: The Government Printer, 1994), it was reported that: "*This means not only that the system should be effective in the enforcement of all tax laws, equally and irrespective of status, but also that citizens' right to be taxed strictly in accordance with the terms of those laws should be scrupulously protected both in the design of those laws and in their implementation.*" as cited by Croome. (2008). *Taxpayers' rights in South Africa supra*, pp. 11.

When dealing with the implications of the Interim Constitution on South Africa fiscal legislation, the Katz Commission reported that many of the provisions of tax legislation were unconstitutional in light of the Interim Constitution.⁶⁸

The Katz Commission also warned that provisions of fiscal statutes which oust the right to challenge actions of CSARS might violate s22 of the Interim Constitution.⁶⁹

2.4.2 Current limitation to government's power to tax

At first glance, the government's power to tax seems wide, yet the Constitution contains express and implied structural, procedural, and substantive limitations to the government's power to tax. These limitations will be dealt with hereunder.

As already discussed, the government is subject to the Constitution, including the limitations imposed thereby. Thus if the government exceeds its powers in terms of the Constitution or its conduct is contrary to any provision of the Constitution, such conduct may be declared unconstitutional by the Courts and be set aside.⁷⁰

2.4.2.1 Structural limitations: Consequences of doctrine of separation of powers and scope of judicial authority

Structural limitations pertain to the structure of the government which, by implication, limits the government's powers. By implication, the Constitution provides for a separation of powers of government.⁷¹ The authority of each sphere of the government is divided into legislative, executive and judicial authority, and each confers certain powers on the

⁶⁸ Katz Commission Interim Report. Chapter 6 Entitled "*Implications of the Constitution of the Republic of South Africa, Act 200 of 1993, for the Tax System*" pp. 67-84. The full scope and ambit of chapter 6 lies beyond the scope of this dissertation.

⁶⁹ Katz Commission Interim Report. Chapter 6 Entitled "Implications of the Constitution of the Republic of South Africa, Act 200 of 1993, for the Tax System", as cited by Croome, B.J. (2010). *Taxpayer Rights in South Africa*. Cape Town: Juta 2010, pp. 6.

⁷⁰ De Koker, A *et al.* (2012). *Silke on the South African Income Tax Act*. Service 44. Durban: Lexis Nexis, pp. 22 –6.

⁷¹ S8, s43, s85 and s165 of the Constitution.

government.⁷² Although these powers overlap at times, a balance between the powers and organs must be created.⁷³ The division is necessary to ensure that the government does not have absolute powers which could be misused, and the separation of powers is essential to ensure that a monopoly by the government is not created.⁷⁴

Each authority's primary powers are summarised as follows: The legislative authority's primary powers relate to the creation of legislation; the executive authority's primary powers pertain to the administration, implementation and enforcement of legislation created by the legislative authority; and the judicial authority's primary powers pertain to the assessment of the constitutionality of the legislation created by the legislative authority and the conduct of the executive authority.

A short framework of each authority, in particular in whom the authority vests and the scope of each authority's powers, is referred to below for convenience. Legislative authority has already been dealt with extensively above.⁷⁵

⁷² Currie, L & De Waal, J. (2005). The Bill of Rights Handbook. Fifth Edition. Cape Town: Juta. Wetton pp. 18 to 22 and South African Association of Personal Injury Lawyers v Heath 2001 (1) SA 883 (CC) at para 22. S8, s43, s85 and s165 of the Constitution.

⁷³ In *De Lange v Smuts NO* 1998 (3) SA 785 (CC) at pp. 810 para 60 Ackermann J held that: "*I have no doubt that over time our Courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.*"

⁷⁴ In *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) at para 25 and 26 the court emphasises that the judicial authority plays an important role in that it is essential that courts have a duty to ensure that public power do not exceed the limitations imposed thereon by the Constitution and in this regard Chaskalson P stated: "*A failure to uphold the separation required by the Constitution between the Legislature and Executive, on the one hand, and the Judiciary, on the other hand, would undermine the role of the courts as the independent arbiter of issues involving the division of powers between the various spheres of government and the legality of legislative and executive action measured against the Bill of Rights and other provisions of the Constitution. It is crucial to that role that the courts be, and be seen to be, independent.*" In *Ex Parte Speaker of the Western Cape Provincial Legislature: In Re Certification of the Constitution of the Western Cape* 1997, 1997 (4) SA 795 (CC) at pp. 825 - 826 and para 62 - 63 the Constitutional Court held that the separation of powers is broad enough to ensure interdependence between the executive and legislature as well as strict interdependence as in the democratic countries such as United States of America, France and Netherlands.

⁷⁵ See para 3 *supra*.

The general executive authority is vested in the President.⁷⁶ In the tax arena the executive authority is vested in SARS, which is an organ of state which is conferred with the executive power to administer, implement and enforce tax related matters.⁷⁷ The executive authority in tax matters will be discussed in greater detail in Chapter 4.

The judicial authority is vested in the courts who are conferred with the power to enforce the Constitution by declaring any conduct and/or law which is inconsistent with the Constitution, unconstitutional and invalid to the extent of the inconsistency.⁷⁸ The judicial authority therefore adjudicates upon the structural, procedural and substantive constitutionality of legislation and all other sources of law, including the government's executive powers. The Constitutional Court is the highest court in respect of all constitutional matters.⁷⁹ High Courts and the Supreme Court of Appeal may rule that a statute appears to be unconstitutional, but only the Constitutional Court may determine upon the constitutionality of the statute and declare same unconstitutional.⁸⁰ All orders and decisions given by the courts are binding on all persons, including government organs.⁸¹ The judiciary must remain objective and independent at all times, and in order to achieve same, a separation of powers is necessary.⁸²

The individual authorities are not absolute, but subject to the Constitution.⁸³ The interaction of each authority with the other is important to ensure that the government does not act as a monopoly. The judicial authority's powers aim to ensure that the legislative and executive

⁷⁶ S85 of the Constitution deals with the extent of the President's executive authority. The President may, however, delegate its authority to certain departments or administrations which are established.

⁷⁷ Croome, B.J. (2008). *Taxpayers' rights in South Africa supra*, pp. 17. *South African Revenue Services Act* 34 of 1997. The executive authority in the tax arena is dealt with in more detail in Chapter 4.

⁷⁸ S165 read together with s172 of the Constitution.

⁷⁹ S167(3) of the Constitution.

⁸⁰ S167, 168, 169 and 172(2) of the Constitution.

⁸¹ S165(5) of the Constitution. For purposes of the Constitution, the government is a legal person and therefore the government is also subject to all rights and obligations which are conferred upon a legal person. This is so because the government has characteristics of a legal person as is discussed in *Killian v Gauteng Provincial Legislature 1999 (2) BCLR 225 (T)* as well as Bekink, B. (2006). *Principles of South African Constitutional Law*. Revised Edition.

⁸² S165(2) of the Constitution. S165(4) of the Constitution also requires that organs of state should, through legislative and other measures assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of courts.

⁸³ S43, s85 and s165 of the Constitution.

authority's conduct do not exceed the Constitution and if they do so exceed it, then such conduct would be arbitrary, unconstitutional and invalid.⁸⁴ The judicial authority may not take over the legislative authority's powers to create law.⁸⁵ Similarly the executive authority may not take over the legislative authority's power to create law.⁸⁶

The doctrine of Rule of Law is consistent with the doctrine of legality, with the main purpose to protect basic human rights from the government's powers by limiting the government's powers through the Constitution.⁸⁷ In the preamble of the Constitution it is stated that the Constitution is "the will of the people" which emphasises the principle of democracy. The separation of powers thus provides for a structural limitation to government's power. Similarly, the separation of powers imposes an indirect limitation upon the government's power to tax. In this regard, the separation of powers is of great importance.

As discussed above, the government has the legislative authority to create tax legislation. The executive authority is vested in SARS which is responsible for the administration, implementation, regulation and collection of taxes. How the executive authority practically performs the above responsibilities, is dealt with in Chapter 4. SARS and its delegated officials' conduct when performing the aforesaid responsibilities are subject to the Constitution and the Rule of law.⁸⁸ Thus if SARS and its delegated officials' conduct are contrary to the provisions of the Constitution or infringe taxpayers' fundamental rights, then such conduct would be the subject of judicial scrutiny, which the courts, having the judicial

⁸⁴ In *Pharmaceutical Manufacturers Association of SA and Another: In re: ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC)* at pp. 85 Chaskalson P held: "It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action."

⁸⁵ In *S v Lawrence, Negal, Solberg 1997 (4) SA 1176 (CC)* at pp. 1205 para 80 the court held that courts may declare legislation unconstitutional and null and void but courts may not create legislation.

⁸⁶ Under s44(1)(a)(iii) of the Constitution the National Assembly may, in certain circumstances, delegate its national legislative authority to a legislative body in another government sphere. Croome expresses the opinion that national government may therefore authorise SARS to draft regulations. Croome, B.J. (2008). *Taxpayers' rights in South Africa supra*.

⁸⁷ See *Prinsloo v Van der Linde 1997 (3) SA 1012 (CC)* and *NNP v Government of the RSA 1999 (3) SA 191 (CC)*.

⁸⁸ The conduct of SARS and its delegated officials are subject to constitutional scrutiny.

authority, may interfere with SARS and its delegated officials' conduct and declare same unconstitutional and invalid.

2.4.2.2 Procedural limitations to government's power to tax⁸⁹

2.4.2.2.1 Procedure to be followed when creating legislation

When legislation is created, the Constitution prescribes certain procedural requirements which need to be complied with. Non-compliance with these procedural requirements would result therein that the specific legislation is declared unconstitutional.⁹⁰

The applicable procedural requirements depend on the type of bill in question as each type has its own specific procedural requirements. The Constitution differentiates between four types of bills in the Republic of South Africa; namely bills amending the Constitution,⁹¹ ordinary bills not affecting provinces,⁹² ordinary bills affecting provinces,⁹³ and money bills⁹⁴.

Tax-related bills are classified as money bills⁹⁵ and regulated by s77 and s75 of the Constitution which contain procedural requirements to be complied with when creating tax-related legislation.⁹⁶ The general procedural requirements of s73 of the Constitution relating to all bills, as well as the requirements of s79 and s82 of the final Constitution pertaining to

⁸⁹ The full ambit of the scope of the procedural requirements fall outside of the scope and ambit of this dissertation and only a concise framework of the applicability in respect of the tax legislation is dealt with.

⁹⁰ S73 to s82 read together with Chapter 4 of the Constitution. S44(4) of the Constitution stipulates that when exercising legislative authority the parliament is bound by the Constitution and must act in accordance and within the limitations of the Constitution. Similarly s104(3) of the Constitution provides that the provincial legislature is bound by the Constitution of its province, if any, and must act in accordance and within the limitations thereof.

⁹¹ S74 of the Constitution.

⁹² S75 of the Constitution.

⁹³ S76 of the Constitution.

⁹⁴ S77 of the Constitution.

⁹⁵ S77(1) of the final Constitution stipulates that a bill is a money bill if it: "(a) appropriates money; (b) imposes national taxes, levies, duties or surcharges; (c) abolishes or reduces, or grants exemption from, any national taxes, levies, duties or surcharges; or (d) authorises direct charges against the National Revenue Fund, except a Bill envisaged in s214 authorising direct charges."

⁹⁶ S77 of the Constitution regulates money bills and s77(3) of the Constitution determines that the provisions of s75 of the Constitution apply in addition to s77 of the Constitution's provisions.

the assenting of all bills, and the publication of Acts respectively, also apply to money bills, and those additional procedural requirements are to be complied with for tax-related legislation to be constitutional.

The procedural requirements constitute procedural limitations to the government's powers to tax.⁹⁷ Chapter 13 of the Constitution deals with finances.⁹⁸ Government's powers are limited by provisions regulating the circumstances in which funds may be withdrawn from the National Revenue Fund.⁹⁹

In addition to the above procedural limitations imposed on national government, the Constitution sets out certain requirements which the provincial legislature must comply with when utilising its powers to impose taxes, levies, duties and surcharges, namely that the power:

- “(a) may not be exercised in way that materially and unreasonably prejudices national economic policies, economic activities across provincial boundaries, or the national mobility of goods, services, capital or labour; and*
- (b) must be regulated in terms of an Act of Parliament, which may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.”¹⁰⁰*

Similarly, the Constitution sets out certain requirements which the local legislature must comply with when utilising its powers to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality, or other taxes, levies or duties, namely that the power:

- “(a) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour; and*

⁹⁷ The exact content of the procedural requirements fall outside the scope and ambit of this dissertation.

⁹⁸ S213 to 230A of the Constitution.

⁹⁹ S213(2) and s226(2) of the Constitution.

¹⁰⁰ S228(2) of the Constitution.

(b) *may be regulated by national legislation.*¹⁰¹

2.4.2.2.2 *Procedures to be followed when amending the constitution*

The question arises as to whether the government can merely amend the Constitution to fit the government's needs to create a dictatorship for itself under the Constitution, which would erase the limitations imposed upon it by the Constitution.

The Constitution provides for requirements which need to be complied with before the provisions of the Constitution could be amended.¹⁰² To amend any part of the Constitution is not an easy task. The Bill of Rights may only be amended if supporting votes of at least two third of the members of the National Assembly, as well as supporting votes of at least six of the provinces of the National Council of Provinces, in favour of the amendment are obtained.¹⁰³ Therefore the government's limited powers to amend the Constitution provide for a limitation on government's powers.

2.4.2.3 *Taxpayers' rights and its enforcement as a substantive limitation to government's power to tax*

The Constitution contains values, constituting substantive norms which result in indirect limitations to government's power to tax, as government must exercise its powers in a manner in which these values are not infringed.¹⁰⁴

The Constitution includes a Bill of Rights which is the cornerstone of the South African democracy and listing fundamental rights.¹⁰⁵ The Bill of Rights applies to all law and binds

¹⁰¹ S229(2) of the Constitution.

¹⁰² S74 of the Constitution which provides for different requirements for the amendment of s1, Chapter 2 and any other provision of the Constitution.

¹⁰³ S74(2) of the Constitution.

¹⁰⁴ S1 of the Constitution containing the values of human dignity, equality, the advancement of human rights and freedoms, non-racialism, non-sexism, the supremacy of the constitution and the rule of law, universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness. De Koker, A. *et al.* (2012). *Silke on the South African Income Tax Act*. Service 44. Durban: Lexis Nexis, pp. 22 – 6.

¹⁰⁵ Chapter 2, s7 and s8 of the Constitution.

all spheres of government as well as the legislative, executive and judicial authority of each sphere, including all organs of state.¹⁰⁶ Taxpayers are conferred with these fundamental rights which, in turn, limit the government's power to tax, but the fundamental rights are not absolute as the Constitution provides for a limitation clause.¹⁰⁷

When interpreting the Bill of Rights the court/tribunal/forum must promote certain values, consider international law, and may consider foreign law, and when a court/tribunal/forum interprets legislation or develops common law and customary law, it must do so in a manner promoting the spirit, purport and objectives of the Bill of Rights.¹⁰⁸

Croome remarks that ostensibly there seems to be a slight connection between taxpayer's fundamental rights and their tax obligations, but that this is incorrect and supports a paragraph reflecting the connection from Taxpayers Rights and Obligations: A Survey of Legal Situation in OECD (Organisation for Economic Co-operation and Development) Countries, which summarises the interaction of taxpayers' fundamental rights and their tax obligations:

"2.1 Tax administrations are given wide powers to determine the tax base, to verify information provided by taxpayers and third parties and to collect the tax due. There may be a potential conflict between the use of these powers to minimise tax evasion and avoidance and to ensure that all taxpayers are fairly treated, with the need to respect the rights of individual taxpayers.

The rights to privacy, to confidentiality, of access to information, and to appeal against decisions of the administration, for example, are fundamental rights in democratic societies. A high degree of co-operation from taxpayers is required if complex tax systems are to operate efficiently. Co-operation is more likely to be forthcoming if taxpayers perceive the system as being fair and if their basic rights

¹⁰⁶ S7 and s8 of the Constitution.

¹⁰⁷ S7, s8 and s36 of the Constitution. In De Koker, A *et al.* (2012). *Silke on the South African Income Tax Act*. Service 44. Durban: Lexis Nexis, pp. 22 – 8. De Koker comments that it would not likely be held that the power to tax is unconstitutional, the nature of the right, the importance of purpose of limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve the purpose.

¹⁰⁸ S39 of the Constitution.

are clearly set out and respected. In practice, all OECD governments take great care to ensure that these rights are respected."¹⁰⁹

Initially an unequal relationship exists between government and taxpayers. The government is dominant in this unequal relationship. The enforcement of taxpayers' fundamental rights aims to balance this unequal relationship providing protection to taxpayers. The Constitution contains numerous fundamental rights, but the most prominent fundamental rights applicable in tax matters are the fundamental rights to equality,¹¹⁰ human dignity,¹¹¹ freedom and security of person,¹¹² property,¹¹³ privacy,¹¹⁴ freedom of movement,¹¹⁵ rights to fair labour practises,¹¹⁶ language of choice,¹¹⁷ access to information,¹¹⁸ just administrative action,¹¹⁹ access to courts,¹²⁰ and in respect of arrested persons.^{121, 122} Although a specific governmental power, in itself, does not infringe taxpayers' fundamental rights, the execution thereof may infringe taxpayers' rights.¹²³

To promote tax certainty, some countries have published a taxpayers' charter to protect taxpayers' rights by defining taxpayers' rights and obligations in their dealings with the

¹⁰⁹ Taxpayers Rights and Obligations: A Survey of Legal Situation in OECD [Organisation for Economic Co-operation and Development] Countries, as cited by Croome, B.J. (2008). *Taxpayers' rights in South Africa supra*, pp. 23.

¹¹⁰ S9 of the Constitution.

¹¹¹ S10 of the Constitution.

¹¹² S12 of the Constitution.

¹¹³ S25 of the Constitution.

¹¹⁴ S14 of the Constitution.

¹¹⁵ S21 of the Constitution.

¹¹⁶ S23 of the Constitution.

¹¹⁷ S30 of the Constitution.

¹¹⁸ S32 of the Constitution.

¹¹⁹ S33 of the Constitution.

¹²⁰ S34 of the Constitution.

¹²¹ S35 of the Constitution.

¹²² De Koker, A. *et al.* (2012). *Silke on the South African Income Tax Act*. Service 44. Durban: Lexis Nexis, pp. 22 – 7.

¹²³ De Koker, A. *et al.* (2012). *Silke on the South African Income Tax Act*. Service 44. Durban: Lexis Nexis, pp. 22 – 43.

specific revenue authority.¹²⁴ Having cognisance of such charters, the Katz Commission recommended that:

“That fiscal statutes should not contain such a statement but rather that taxpayers’ rights should constitute a contract between the revenue authority and taxpayers which taxpayers may utilise as a means of evaluating service levels and administrative action encountered in their dealings with the Commissioner.”¹²⁵

In the 1997 Budget Review, the Minister of Finance published the SARS Client Charter.¹²⁶ From the above it is clear that, in general, government’s power to tax must be exercised in a manner that does not violate taxpayers’ fundamental rights or the values of the Constitution. Government’s powers to tax may, in limited circumstances if it is reasonable and justifiable in terms of s36 of the Constitution, infringe taxpayers’ fundamental rights.¹²⁷

When considering whether s36 of the Constitution is to be implemented, it must be borne in mind that ultimately the government must be in a position to meet its obligations, which it can only do with the funds obtained from the taxpayers, but this must not be done at the unreasonable and unjustifiable expense of a taxpayer.¹²⁸ In respect of the test for reasonableness and justifiability, there should be sufficient proportionality between the harm

¹²⁴ Baker, P. & Groenhagen, M-A. (2001). *The Protection of Taxpayers’ Rights – An International Codification*. European Policy Forum. London, 12-18 deals comprehensively with this aspect, as cited by Croome, B.J. (2010). *Taxpayer Rights in South Africa*. Cape Town: Juta, at pp. 15.

¹²⁵ *Third Interim Report of the Katz Commission*, Chapter 12 page 132 paras 12.23 and 12.25 according to Croome, B.J. (2008). *Taxpayers’ rights in South Africa supra*, pp. 25.

¹²⁶ As cited by Croome, B.J. (2010). *Taxpayer Rights in South Africa*. Cape Town: Juta, at pp. 15. Croome expresses the opinion that the charter was merely a statement of intent by CSARS but did not alter the law and confers no greater rights.

¹²⁷ In this regard Croome comments that “The taxpayer must weigh up the impact, if any, of the limitation of rights on the Commissioner’s powers to collect tax.” Croome, B.J. (2008). *Taxpayers’ rights in South Africa, supra*, pp. 16.

¹²⁸ De Koker, A. *et al.* (2012). *Silke on the South African Income Tax Act*. Service 44. Durban: Lexis Nexis, pp. 22 – 8 commenting that there must be sufficient proportionality between the harm done by the law and the benefits it aims to achieve. Also see *Juta’s Income Tax Commentary* on the Income Tax Act 58 of 1962. Juta & Co Ltd on s3 of the ITA which comments that “In *First National Bank of SA Ltd t/a Wesbank v C:SARS 2002 (7) JTLR 250*, it was held that, no matter how indispensable fiscal statutory provisions were for the economic well-being of the country, they were not immune to the discipline of the Constitution and had to conform with its normative standards.”

which is done by law (i.e. the infringement of the human right) and the benefit obtained from the infringement (purpose of the law).¹²⁹

The argument that it is in the public interest to collect tax is also not unlimited. In *Pering Mine (Pty) Ltd v Director-General, Mineral and energy Affairs and Others* [2005] 67 SATC 317 at pages 328 and 333, the court held that SARS' interest were no greater than the taxpayer's right to administrative justice.¹³⁰

The organ of government tasked with the executive authority to administer, implement, regulate and collect taxes must be conferred with powers wide enough to perform its functions, but must not exceed its powers in a manner that unreasonably and unjustifiably infringes taxpayers' fundamental rights.

If any of the taxpayer's fundamental rights are infringed, the taxpayer may approach a competent court for relief, or may, in addition, seek redress from the Public Protector and/or Human Rights Commission.¹³¹ The right of just administrative action has been found to be a taxpayers' right.¹³² As set out above, the right of just administrative action is the focus of this dissertation to the exclusion of other taxpayers' rights.

2.5 CONCLUSION

South Africa is a constitutional state in which the Constitution is the supreme authority. The government is subject to, and obtains its powers from, the Constitution. The government's powers are not absolute and are limited by the provisions of the Constitution (providing for structural, procedural and substantial limitations).¹³³

¹²⁹ De Waal, J. *et al.* (1999). *The Bill of Rights Handbook*. Cape Town: Juta. Second Edition.

¹³⁰ *In casu* SARS attempted to bring review proceedings after four years had passed which the court refused and held too long a period had passed.

¹³¹ S38 of the Constitution.

¹³² Croome, B.J. (2008). Taxpayers' rights in South Africa, *supra*, pp. 24.

¹³³ *Constitution and Minister of Correctional Services v Tobani* 2003 (5) SA 126 E pp. 135 and 136.

The Constitution divides the central government in three spheres; namely the national, provincial, and local spheres. Each sphere's authority is in turn divided in three categories; namely legislative, executive, and judicial authority which aims to prevent a monopoly of government powers.

By implication, the Constitution confers the national government with the power to tax, and the scope of the national government's power to tax is very wide. The Constitution confers the power to tax expressly and by implication upon the provincial and local governments, but these powers are less wide than that of the national government. The national, provincial and local governments' power to tax, are however, limited by certain structural, procedural and substantive limitations, namely: -

- Structural limitation: The effect of separation of powers structuring the government enforces a sense of independence.
- Structural limitation: The limited powers of the government to delegate powers to other organs of state and/or sphere's of government.
- Procedural limitation: Procedural requirements to be complied with when creating legislation.
- Procedural limitation: Limited powers of government to amend the Constitution.
- Substantive limitation: Taxpayers are conferred with certain fundamental rights. The Government may not infringe the values of the Constitution or the fundamental taxpayers' rights as set out in the Bill of Rights, and the Constitution is to be interpreted to enforce the values and fundamental rights set out therein.

CHAPTER 3: THE ROLE OF AND SUBSTANTIVE REQUIREMENTS FOR THE APPLICABILITY AND ENFORCEABILITY OF JUST ADMINISTRATIVE ACTION IN GENERAL

3.1 Introduction

Taxpayers' fundamental rights limit the government's powers to tax.¹³⁴ This dissertation focuses solely on the right of just administrative action and the remedy of judicial review which enforces the aforesaid right.¹³⁵

This chapter aims to:

- Provide a concise background to the right of just administrative action in the tax arena;
- Determine and analyse the principles and substantive requirements for the applicability and enforceability of the right of just administrative action in general (with reference to general administrative law principles);¹³⁶ and
- Determine and analyse the principles and substantive requirements for the applicability and enforceability of judicial review in general (with reference to general administrative law principles).¹³⁷

Thereafter, in Chapter 4 the principles and substantive requirements set out at 2 and 3 above, in respect of the applicability and enforceability of the right of just administrative action and remedy of judicial review, will be discussed in the tax arena.

¹³⁴ See discussion in Chapter 2.

¹³⁵ The scope of all other taxpayers' rights fall outside the ambit of this dissertation.

¹³⁶ An analysis of the Constitution, PAJA and the applicable common law principles are necessary.

¹³⁷ Provided for by the provisions of PAJA.

3.2 Background of administrative action in the tax arena

Pre-1994 the common law rules pertaining to natural justice (“common law principles”) governed administrative action by public authorities. Taxpayers were not conferred with the right of just administrative action. A taxpayer’s only protection was limited to the insufficient powers conferred upon the courts to adjudicate upon the procedural validity of the government’s conduct.¹³⁸ In substance, this limitation provided little protection as the courts were bound by legislation in its decisions where such legislation was drafted and enacted by the government which prescribed its own procedures.¹³⁹ Taxpayers did not have the right to request reasons from the government for its decisions.¹⁴⁰

In 1994 the Interim Constitution was enacted, and conferred the right of just administrative action upon taxpayers. The Interim Constitution does not purport to be a codification of the South African administrative law, but rather provides minimum basic entitlements to administrative justice.¹⁴¹ Currie is of the opinion that the Interim Constitution sought the judiciary’s powers to review administrative action from the interference of the powers of the legislature when enacting legislation.¹⁴²

The Katz Commission reported that it was difficult to determine the exact ambit of s24 of the Interim Constitution, but reported that s24(c) of the Interim Constitution provided for a right to reasons for the decisions taken/discretions exercised by SARS and its delegated officials, and therefore recommended that SARS train staff to ensure that adequate reasons for decisions taken be provided to taxpayers.¹⁴³

¹³⁸ Chapter 2 above, and Currie, I. (2007). *The Promotion of Administrative Justice Act A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 10.

¹³⁹ Chapter 2 above, and Currie, I. (2007). *The Promotion of Administrative Justice Act A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 10.

¹⁴⁰ Croome, B.J. (2008). *Taxpayers’ rights in South Africa supra*, pp. 147 and Croome, B.J. (2010). *Taxpayer Rights in South Africa*. Cape Town: Juta, at pp. 203 comments that prior to the Interim Constitution he is not aware of any reported tax case in which taxpayers attempted to argue to obtain reasons from the government for its decisions and similarly no tax cases in which the rules pertaining to natural justice were applied.

¹⁴¹ Cachalia, A. et al. (1994). *Fundamental Rights in the New Constitution*, at pp. 72.

¹⁴² Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 11.

¹⁴³ Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa, RP 1994 (Pretoria: The Government Printer, 1994) at pp. 77, para 6.3.36.

It was also commented that “a cryptical approach to objections and appeals as adopted by Inland Revenue in the past will have to cease.”¹⁴⁴ The giving of adequate reasons to taxpayers for decisions taken/discretions exercised by SARS and its delegated officials would promote tax certainty and would place taxpayers in a better position to consider the constitutionality of their decisions.¹⁴⁵

3.3 Current position under the Constitution in general¹⁴⁶

3.3.1 Introduction

The Constitution is the supreme authority in South Africa and provides for the fundamental right of just administrative action.¹⁴⁷ S33(3) of the Constitution requires that legislation be enacted to implement and enforce the right of just administrative action. The Promotion of Administrative Justice Act 3 of 2000 (the “PAJA”) was enacted for this purpose. The right of just administrative action is protected by the remedy of judicial review, as provided for in PAJA.¹⁴⁸

The Constitution and PAJA are not mere codifications of the common law principles.¹⁴⁹ The common law principles remain relevant to judicial review in that it assists in the interpretation of the right of just administrative action and PAJA.¹⁵⁰

¹⁴⁴ *Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa*, RP 1994 (Pretoria: The Government Printer, 1994), at pp. 76 para 6.3.34, as cited by Croome, B.J. (2010). *Taxpayer Rights in South Africa*. Cape Town: Juta, at pp. 204.

¹⁴⁵ Katz Commission Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa, RP 1994 (Pretoria: The Government Printer, 1994), pp. 76 para 6.3.34.

¹⁴⁶ S33 of the Constitution, preamble of PAJA and De Ville, J.R. (2006 revised first edition reprint). *Judicial Review of Administrative Action in South Africa*. Durban: Lexis Nexis Butterworths, pp. 2 and 3.

¹⁴⁷ S33 of the Constitution.

¹⁴⁸ S6, 7 and 8 of PAJA.

¹⁴⁹ *Pharmaceutical Manufacturers Association of SA: Ex Parte President of the Republic of South Africa 2000 (2) SA 674 (CC)* as cited by Currie, I. (2007). *The Promotion of Administrative Justice Act A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 13 to 15, and Hoexter, C. (2002). *The New Constitutional and Administrative Law, Volume Two Administrative Law*. Cape Town: Juta at pp. 190, para 5.1, as cited by Croome, B.J. (2010). *Taxpayer Rights in South Africa*. Cape Town: Juta, pp. 151 and 206, and Croome, B.J. (2008). *Taxpayers' rights in South Africa supra*, pp. 147.

The current position in respect of the right of just administrative action and remedy of judicial review is discussed hereunder without specific reference to the tax arena. The reason is that the field of administrative law is a complex and difficult field which needs to be summarised before its principles and substantive requirements are implemented in the tax arena. In Chapter 4 the principles and substantive requirements set out hereunder will be implemented in the tax arena.

3.3.2 Source of administrative law and administrative powers

Administrative law governs, *inter alia*, the manner in which administrative powers are performed, and enforces the principles pertaining to just administrative action. Currently administrative law is governed by s33 of the Constitution, read together with the provisions of PAJA and the common law principles which are not contrary to the Constitution and PAJA (“Constitutional common law principles”).

Administrative law is a key tool in limiting government’s powers and the separation of powers assists in enforcing this limitation.¹⁵¹ In *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council 1999 (1) SA 374 (CC)*¹⁵² the court held that the legislative and executive authorities of each sphere are constrained by the principle that they may not exercise power, nor perform any function, beyond that conferred upon them by law.¹⁵³

¹⁵⁰ Currie, I. (2007). *The Promotion of Administrative Justice Act A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 37.

¹⁵¹ In *Pharmaceutical Manufacturers Association of SA: Ex Parte President of the Republic of South Africa 2000 (2) SA 674 (CC)* at para 45 as “an incident of the separation of powers under which the courts regulate and control the exercise of public power by the other branches of government”, as cited by Hoexter, C. (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 2 and 3.) Further in support hereof Baxter comments that general administrative law consists of, “the general principles of law which regulate the organisation of administrative institutions and the fairness and efficacy of the administrative process, govern the validity of and liability for administrative action and inaction, and govern the administrative and judicial remedies relating to such action or inaction.” Baxter, L. (1984 reprinted in 1991). *Administrative Law*. Cape Town; Juta & Co Ltd., as cited by Hoexter, C (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 8.)

¹⁵² Para 58 thereof.

¹⁵³ As cited by Hoexter, C. (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 29.

The advantage of administrative law is that it allows for a second decision-maker to exercise a “*calmer, more objective and reflective judgment*” in reconsidering the issue”.¹⁵⁴

Administrative powers are either powers conferred or duties imposed upon an official.¹⁵⁵ In the first instance a measure of discretion is applicable, whereas in the latter instance, the duty is an obligation and must be performed.¹⁵⁶ Administrative powers are conferred by law and are not self-generating.¹⁵⁷ When interpreting an administrative power, the rules pertaining to the interpretation of legislation are applicable.¹⁵⁸

The sources of administrative power are summarised as the Constitution, original and delegated legislation, prerogative powers, the common law, African customary law, and estoppels.¹⁵⁹ PAJA, as dealt with hereunder, also sets out the most pertinent sources in its definition of “empowering provision”.¹⁶⁰

3.3.3 S33 of the Constitution

S33 of the Constitution sets out the right of just administrative action and confers taxpayers with the right to just administrative action. It reads:

S33 Just administrative action

(1) *Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*

¹⁵⁴ Baxter, L. (1984 reprinted in 1991). *Administrative Law*. Cape Town: Juta & Co Ltd. As cited by Govender, K. (1993) *Administrative Appeals Tribunals*. in Bennett *et al.* (1993). *Administrative Law Reform*, as cited by Hoexter, C. (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 65.

¹⁵⁵ Hoexter, C. (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 43.

¹⁵⁶ Hoexter, C. (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 43.

¹⁵⁷ Hoexter, C. (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 30.

¹⁵⁸ Hoexter, C. (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 43.

¹⁵⁹ Hoexter, C. (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 30 to 43. The scope of each source falls outside the ambit of this dissertation.

¹⁶⁰ S1 of PAJA.

- (2) *Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.*
- (3) *National legislation must be enacted to give effect to these rights, and must-*
- (a) *provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;*
 - (b) *impose a duty on the state to give effect to the rights in subsections (1) and (2); and*
 - (c) *promote an efficient administration.”*

For the right to just administrative action to be applicable and enforceable in the circumstances, the following substantive requirements must be satisfied, namely:

- The decision taken/discretion exercised must amount to administrative action;
- The “administrative action” is not “lawful, reasonable and procedurally fair”. In this regard reasonableness must be assessed (rationality and proportionality play a role);
- A “right” must be “adversely affected”.¹⁶¹

According to s33(3) of the Constitution, national legislation had to be enacted to give effect to the right to just administrative action. PAJA was enacted for this purpose and embodies the aforesaid substantive requirements. Each substantive requirement will thus be discussed simultaneously with the discussion of the provisions of PAJA below.

¹⁶¹ Croome, B.J. (2010). *Taxpayer Rights in South Africa*. Cape Town: Juta.

3.3.4 The Promotion of Administrative Justice Act 3 of 2000

3.3.4.1 General

The purpose of s33(3) of the Constitution, requiring that national legislation be enacted to give effect to the rights contained in s33 of the Constitution, was to

“(a) cater for the review of administrative action by a court (or independent impartial tribunal where appropriate), (b) impose a duty on the state to give effect to the rights set out in s33 of the Constitution and (c) promote efficient administration.”¹⁶²

PAJA was drafted and enacted for the aforesaid purpose.¹⁶³ Croome comments that whilst PAJA was being drafted and debated, it became known that SARS was dissatisfied with its provisions,¹⁶⁴ yet despite SARS’ opposition PAJA was enacted.

The right of just administrative action exists separately from the provisions of PAJA.¹⁶⁵ PAJA is subject to the Constitution and if any of PAJA’s provisions are contrary to s33 of the Constitution, the provisions of the Constitution would constitute the basis for any Constitutional challenge to the provisions of PAJA, which may result in such provisions of PAJA being declared unconstitutional.¹⁶⁶

¹⁶² S33(3) of the Constitution.

¹⁶³ The drafting history, long title and preamble of PAJA refers to s33 of the Constitution and Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 18 to 21 and 27.

¹⁶⁴ The Business Day reported that it was SARS’ opinion that PAJA would threaten the “effectiveness and efficiency” of CSARS and to this extent CSARS had indicated to the Parliamentary Justice Portfolio Committee, *inter alia*, that: (a) the provisions of PAJA were inappropriate “to the work of SARS”, (b) by enforcing PAJA it would make government’s day-to-day tasks onerous and subject to challenge the effective administration which is in fact required by PAJA and (c) that SARS had administrative and appeal procedures in place which offered fair treatment to taxpayers. Fine, F. (1999). *Revenue Service says bill threatens its efficiency*. Business Day Newspaper, 1 December 1999, as cited by Croome, B.J. (2008). *Taxpayers’ rights in South Africa supra*, pp. 154.

¹⁶⁵ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 34 and 35.

¹⁶⁶ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 33 footnote 30. Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 34 and 35.

PAJA does not form an integral part of the Constitution and therefore when amending PAJA the provisions of s73 of the Constitution must be followed.¹⁶⁷

PAJA is not a codification of the common law grounds but rather a codification-reform.¹⁶⁸ The common law in respect of administrative action and judicial review does not form a separate body of law, but is subject to the Constitution and the common law principles, and insofar as they are not contrary to the Constitution, they are still applicable.¹⁶⁹ PAJA has not replaced the Constitution, but it is “*now the primary or default pathway to review.*”¹⁷⁰ Where PAJA is applicable, judicial review must be brought in terms thereof and its provisions may not be bypassed.¹⁷¹ PAJA aims, *inter alia*, to limit and ensure the proper exercise of public power.¹⁷² PAJA is general administrative law which regulates the manner in which administrators take a decision which they are empowered to take in terms of other legislation.¹⁷³

¹⁶⁷ S74 of the Constitution does not apply.

¹⁶⁸ Hoexter, C (2012). *Administrative law in South Africa*. Second Edition. Juta & Co pp. 117 and Hoexter, C. (2002). *The New Constitutional and Administrative Law*, Volume Two Administrative Law. Cape Town: Juta, at pp. 190 para 5.1 as cited by Croome, B.J. (2010). *Taxpayer Rights in South Africa*. Cape Town: Juta, pp. 151 and 206, and Croome, B.J. (2008). *Taxpayers' rights in South Africa supra*, pp. 147, and Currie, I. (2007). *The Promotion of Administrative Justice Act A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 6 to 8.

¹⁶⁹ De Koker, A. et al. (2012). *Silke on the South African Income Tax Act*. Service 44. Durban: Lexis Nexis, pp. 22 – 34 referring to Pharmaceutical Manufacturers Association of SA: Ex Parte President of the Republic of South Africa 2000 (2) SA 674 (CC).

¹⁷⁰ Hoexter, C. (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 118 and 132. Also see *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs & Tourism & Others* 2004 (4) SA 490 (CC) para 22 where the court held that “The Courts’ power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. The ground norm of administrative law is now to be found in the first place not in the doctrine of ultra vires, nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution. The common law informs the provisions of PAJA and the Constitution, and derives its force from the latter. The extent to which the common law remains relevant to administrative law review will have to be developed on a case-by-case basis as the Courts interpret and apply the provisions of PAJA and the Constitution.” as cited by Hoexter, C. (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 119.

¹⁷¹ *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment action campaign and Another as amici curiae)* 2006 (2) SA 311 (CC) as cited by Hoexter, C. (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 132 and 133.

¹⁷² *Pharmaceutical Manufacturers Association of SA: Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) as cited by Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 31.

¹⁷³ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 3 and 4.

When administrators exercise these administrative powers their conduct must comply with the requirements imposed by the legislation in terms of which they have conferred with the administrative power and with the requirements set out in PAJA.¹⁷⁴

The interpretation and application of PAJA constitute Constitutional issues, as PAJA involves the interpretation, protection and enforcement of s33 of the Constitution and therefore the Constitutional Court has jurisdiction to adjudicate upon same.¹⁷⁵ For PAJA to be applicable and enforceable, the substantive and procedural requirements must be satisfied. This chapter deals with the substantive requirements, whereas Chapter 5 deals with the procedural requirements.

The substantive requirements are summarised as: (a) the administrator must be subject to the provisions of PAJA; (b) the conduct of the administrator must constitute “administrative action” as defined in PAJA; (c) the “administrative action” must materially and adversely affect taxpayer’s rights or legitimate expectations and have a “direct, external legal effect”; and (d) the “administrative action” must not be “lawful, reasonable and procedurally fair” and a ground as contemplated in s6 of PAJA must be applicable. A summary of the applicable principles in respect of each substantive requirement will be dealt with hereunder.

3.3.4.2 *Is the Administrator subject to the provisions of PAJA?*

PAJA applies to the conduct of an Administrator, which is defined in s1 of PAJA as an organ of state or any natural or juristic person taking administrative action. S1 of PAJA defines an organ of state with reference to s239 of the Constitution, which states that an organ of state is:

“(a) any department of state or administration in the national, provincial or local sphere of government; or

¹⁷⁴ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 3 and 4.

¹⁷⁵ S167(3) of the Constitution. Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 34. The full scope and ambit of the court/forum having jurisdiction to adjudicate upon judicial review proceedings in terms of PAJA will be discussed in Chapter 5.

(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,*
- (iii) *but does not include a court or a judicial officer.”*

Although PAJA provides that the Minister may, in certain circumstances, exempt an administrative action or group or class of administrative actions,¹⁷⁶ to date no public bodies have been excluded from the ambit of PAJA.

3.3.4.3 *Conduct by the administrator being complained about must constitute “administrative action”*

For PAJA to be applicable in the circumstances, the conduct by the Administrator which is being complained about, must constitute “administrative action”. The definition of “administrative action” in terms of PAJA is a complicated one, which has been the subject of many decisions, which constitute various definitions which are to be read together.¹⁷⁷ The definitions of “administrative action”, “a decision”, “empowering provision” and “failure” are key elements in this regard.¹⁷⁸

“Administrative action” is defined as:

any decision taken, or any failure to take a decision by

¹⁷⁶ S2 of PAJA. According to s2(1) read together with s2(2) of PAJA, such an exemption must first be approved by Parliament and thereafter published in the Government Gazette. See Currie, I. & Klaaren, J. (2001). *The Promotion of Administrative Justice Act Benchbook*. Cape Town: Siber Ink CC, pp. 82 and 83, para 2.37; no such publication has been made and therefore PAJA applies to all administrators.

¹⁷⁷ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 49 to 50. This dissertation only aims to provide a concise analysis of the definition.

¹⁷⁸ S1 of PAJA.

- (a) **an organ of state**, when-
 - (i) *exercising a power 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; or*
- (b) **a natural or juristic person**, other than an organ of state, when *exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include...*
 - (aa) *the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79 (1) and (4), 84 (2) (a), (b), (c), (d), (f), (g), (h), (i) and (k), 85 (2) (b), (c), (d) and (e), 91 (2), (3), (4) and (5), 92 (3), 93, 97, 98, 99 and 100 of the Constitution;*
 - (bb) *the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121 (1) and (2), 125 (2) (d), (e) and (f), 126, 127 (2), 132 (2), 133 (3) (b), 137, 138, 139 and 145 (1) of the Constitution;*
 - (cc) *the executive powers or functions of a municipal council;*
 - (dd) *the legislative functions of Parliament, a provincial legislature or a municipal council;*
 - (ee) *the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;*
 - (ff) *a decision to institute or continue a prosecution;*

- (gg) *a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law; [Para. (gg) substituted by s. 26 of Act 55 of 2003.]*
- (hh) *any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or*
- (ii) *any decision taken, or failure to take a decision, in terms of section 4 (1);*¹⁷⁹ **(own emphasis)**

The definition of “administrative action” requires various conditions to be met for it to constitute “administrative action”, and thereafter sets out a list of specific exclusions from the definition. It has been held that the definition is cumbersome and limits the meaning more than it actually attributes to the meaning.¹⁸⁰

A decision is defined as:

“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;*

¹⁷⁹ S1 of PAJA.

¹⁸⁰ Grey’s Marine Hout Bay (Pty) Ltd v Minister of Public Works 2005 (6) SA 313 (SCA) as cited by Hoexter, C. (2012). Administrative law in South Africa. Second Edition. Cape Town: Juta & Co, pp. 195.

- (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.*¹⁸¹

An empowering provision is defined to mean:

*“a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken.”*¹⁸²

The term failure is defined to include:

*“ in relation to the taking of a decision, ... a refusal to take the decision.”*¹⁸³

The exact time which constitutes a failure to take a decision is regulated by s6(2)(g) read together with s6(3) of PAJA, which stipulate that a court may judicially review an administrative action which consists of a failure to take a decision and set out the time frames applicable for when the affected person may proceed with such a review.

According to s6(3)(a) and (b) of PAJA, if the empowering provision does not contain a time frame in which the decision was to be taken, then the failure may be taken on review after the expiry of a reasonable period, and if the empowering provision does contain a time frame for the exercise of the decision, then the failure may be taken on review after the expiry of such period.

¹⁸¹ S1 of PAJA.

¹⁸² S1 of PAJA.

¹⁸³ S1 of PAJA.

According to Currie the elements of the definition of “administrative action” are summarised as follows, and all the elements must be considered together, and not individually, when determining whether it constitutes administrative action:

- “(1) a decision, or a proposed decision*
- (2) of an administrative nature;*
- (3) that is made in terms of an empowering provision;*
- (4) that is not specifically excepted, or is not the subject of an exemption;*
- (5) that is made by an organ of state or by a private person exercising public power or performing a public function;*
- (6) that adversely affects rights and*
- (7) that has a direct external legal effect.”¹⁸⁴*

According to Hoexter the elements of the definition of “administrative action” are:

- “(a) A decision*
- (b) by an organ of state (or a natural or juristic person)*
- (c) exercising a public power or performing a public function*
- (d) in terms of any legislation (or in terms of an empowering provision)*
- (e) that adversely affects rights*
- (f) that has a direct, external legal effect*

¹⁸⁴ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 50 and 51.

(g) *and that does not fall under any of the listed exclusions.*¹⁸⁵

Administrative action excludes acts, but rather includes decisions taken which are of an administrative nature, and does not include the preliminary determinations taken prior to the final decision being made.¹⁸⁶ Certain executive and legislative powers have been excluded from the definition of administrative actions and private actions do not constitute administrative action.¹⁸⁷

It must be emphasised that administrative action not meeting the criteria of PAJA does not mean such action is not subject to any legal control. Such action will still be subject to other Constitutional principles such as legality.¹⁸⁸

It is important to note that the Constitution does not provide a definition for “administrative action” and the common law does not contain an equivalent therefore. The meaning of “administrative action” has been the subject-matter of numerous cases. The leading case in this regard is *President of Republic of South Africa v SARFU 2000 (1) SA 1 (CC)* in which it was held that the decision made by the President of the country to conduct an inquiry into the affairs of the SARFU did not constitute “administrative action” and was not subject to review by the court, but was reviewable under the Constitution and in terms of the principle of legality.¹⁸⁹

The court held that:

“In s 33 the adjective 'administrative' not 'executive' is used to qualify 'action'. This suggests that the test for determining whether conduct constitutes 'administrative

¹⁸⁵ Hoexter, C. (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 197. De Koker, A. *et al.* (2012). *Silke on the South African Income Tax Act*. Service 44. Durban: Lexis Nexis, pp. 22 – 35 referring to *Chirwa v Transnet Ltd 2008 (4) SA 367 (CC)* and *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works 2005 (6) SA 313 (SCA)*.

¹⁸⁶ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 51 and 54.

¹⁸⁷ Hoexter, C. (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 203.

¹⁸⁸ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 44 fn 1 referring to *Pharmaceutical Manufacturers Association of SA: Ex Parte President of the Republic of South Africa 2000 (2) SA 674 (CC)*.

¹⁸⁹ Croome, B.J. (2010). *Taxpayer Rights in South Africa*. Cape Town: Juta, pp. 204.

action' is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in Fedsure, that some acts of a legislature may constitute 'administrative action'.

Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is 'administrative action' is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.”¹⁹⁰

3.3.4.4 Administrative action adversely affects taxpayer's rights

This element consists of three elements; namely “adversely”, “affects” and “rights”. The meaning of each of these words must be determined. Many writers support a wide interpretation of rights and are of the view that “rights” include not only fundamental rights as set out in the Bill of Rights, but also rights such as contractual or delictual rights, as well as liability incurred by the state when making unilateral promises or expectations.¹⁹¹

¹⁹⁰ President of Republic of South Africa v SARFU 2000 (1) SA 1 (CC) at page 67 para 141.

¹⁹¹ According to De Waal et al.: “The term “right” is usually understood to mean an enforceable claim maintainable against a duty-holder. Presumably, it is not restricted to Constitutional rights and rights granted by the AJA, but means in general statutory- and private- law rights such as contractual or delictual rights. Moreover, the Constitutional Court has indicated that a “right”, for purposes of s24IC, should probably be interpreted more broadly than the definition of the term in private law to include liability incurred by the State through the making of unilateral promises or undertakings. If this approach is followed, the term rights approaches “legitimate expectations” in its ambit.” De Waal, J. et al. (2001). The Bill of Rights Handbook. Fourth Edition. Juta and Co Ltd, at pp. 507 par 29.3. Hoexter, C. (2007). Administrative Law in South Africa. Cape Town: Juta, at pp. 424, relying on Goodman Bros (Pty) Ltd v Transnet Ltd 1998 (4) SA 989 (W). Currie, I. (2007). The Promotion of Administrative Justice Act: A Commentary. Second Edition. Cape Town: Siber Ink, pp. 79 to 83 and further refers to case law to indicate that rights also include legitimate expectations. De Ville, J.R. (2006 revised first edition reprint). Judicial Review of Administrative Action in South Africa. Durban: Lexis Nexis Butterworths, pp. 53 also points out that there is no natural limit to the concept of “rights” and any exercise of power by a decision that has a discernable effect on an individual would be subject to PAJA.

In analysing the meaning of “adversely affects”, the authorities rely on two theories; namely the “determination theory” and the “deprivation theory”.¹⁹² Currie and Klaaren explain the difference in the theories as:

*“The verb ‘affect’ is ambiguous. It may mean either ‘deprive’ or ‘determine’. Where, for example, a person applies for a licence for the first time, the refusal of the application will not deprive the applicant of any established right. The decision would, however, determine what the applicant’s rights are. Taking ‘affect’ to mean deprive (sometimes referred to in the literature as the ‘deprivation theory’) will cover a narrow class of administrative action. Taking ‘affect’ to mean determine (the ‘determination theory’) will cover a much broader class of administrative action.”*¹⁹³

Many writers support the determination theory which provides a wide reach in respect of PAJA and are of the opinion that the deprivation theory limits the meaning of administrative action in a manner to render PAJA unconstitutional.¹⁹⁴ Currie expresses the opinion that “adversely” means the administrative action must impose a burden or a cost upon the right.¹⁹⁵ In this regard Hoexter comments on *Goodman Bros (Pty) Ltd v Transnet Ltd 1998 (4) SA 989 (W)* as follows:

“Nevertheless, the decision has significant implications for s 33(2), and thus for s 5 of PAJA, because it seems to mean that the right to reasons will automatically apply to anyone to whom s 33(1) applies. In other words, the right to lawful, reasonable and procedural fair administrative action inevitably entitles one to the right to

¹⁹² Croome, B.J. (2008). *Taxpayers’ rights in South Africa supra*, pp. 147 and Croome, B.J. (2010). *Taxpayer Rights in South Africa*. Cape Town: Juta, at pp. 153 and De Waal, J. *et al.* (2001). *The Bill of Rights Handbook*. Fourth Edition. Cape Town: Juta and Co Ltd, at pp. 506 par 29.3 and Currie, I. & Klaaren, J. (2001). *The Promotion of Administrative Justice Act Benchbook*. Cape Town: Siber Ink CC at pp. 76 para 2.31. Hoexter, C. (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 221.

¹⁹³ Currie, I. & Klaaren, J. (2001). *The Promotion of Administrative Justice Act Benchbook*. Cape Town: Siber Ink CC, pp. 76 and 77 para 2.31.

¹⁹⁴ Hoexter, C. (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 221. Croome, B.J. (2008). *Taxpayers’ rights in South Africa supra*, pp. 154. Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 79 to 83.

¹⁹⁵ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 79 to 83.

*reasons, since the s 33(1) right will always be adversely affected by the failure to give reasons.*¹⁹⁶

In addition to administrative action adversely affecting rights, it must also have a “direct, external legal effect”.¹⁹⁷ In respect of this phrase, writers are of the opinion that a direct effect entails an effect on the scope of legal rights and implies finality, legal effect means that the “*decision must be a legally binding determination of someone’s rights in other words, a decision must establish what someone’s rights are, or change or withdraw them*”; and lastly, an external effect means that effect must be outside the arena of the administrator, and rights or status must be changed as a result of the administrative action.¹⁹⁸ Hoexter is of the view that the scope of “legal “ and “external” does not take the matter further but that the scope of “direct” reinforces the idea that the decision must be final.¹⁹⁹

3.3.4.5 The requirement that administrative action must be lawful, reasonable and procedurally fair, and if not, one of the grounds for judicial review under s6 of PAJA must be applicable

The Constitution requires that administrative action which adversely affects rights must be “lawful, reasonable and procedurally fair”, whereas PAJA requires it to be only “procedurally fair”.²⁰⁰ As explained above, the Constitution required legislation be enacted to provide for and regulate the remedy of judicial review, and for that purpose PAJA was enacted.²⁰¹ PAJA contains a list of administrative actions which would be subject to judicial review.²⁰²

¹⁹⁶ Hoexter, C. (2007). *Administrative Law in South Africa*. Cape Town: Juta, at pp. 424.

¹⁹⁷ Definition of “administrative action” in terms of s1 of PAJA.

¹⁹⁸ Currie, I. & Klaaren, J. (2001). *The Promotion of Administrative Justice Act Benchbook*. Cape Town: Siber Ink CC, at pp. 82 para 2.34, 2.35 and 2.36, and Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 86. De Ville, J.R. (2006 revised first edition reprint). *Judicial Review of Administrative Action in South Africa*. Durban: Lexis Nexis Butterworths, pp. 54 to 58.

¹⁹⁹ Hoexter, C (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 230 and 231.

²⁰⁰ S33 of the Constitution and s3 and s4 of PAJA.

²⁰¹ S6 of PAJA read together with s7 and s8 of PAJA.

²⁰² S6 of PAJA.

The Constitution and PAJA set positive standards for administrative action to comply with.²⁰³ If these standards are not met, the administrative action in question may be subject to judicial review if it falls within the ambit of the list provided in s6 of PAJA. Hereunder, the content of the Constitutional standard of “lawful, reasonable and procedurally fair”, and the standard of “procedurally fair” as envisaged in PAJA, will be discussed and the grounds for judicial review will be analysed.

3.3.4.5.1 The constitutional standard of lawful, reasonable and procedurally fair administrative action

Under the common law as well as s24 of the Interim Constitution, the test for this standard was whether the administrative action was “justifiable in relation to the reasons given”. The inclusion of the word “reasonable” in s33 of the Constitution amended the test.

The decisions in *Pharmaceutical Manufacturers Association of SA: Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) and *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others* (Treatment action campaign and Another as amici curiae) 2006 (2) SA 311 (CC)²⁰⁴ are authority therefore that the test laid down by s33 and PAJA is much wider and higher than that the test under s24 of the Interim Constitution and the common law. Writers support this interpretation.²⁰⁵

The common law, in particular the principles in respect of judicial review, does not form a separated body of law, but common law principles are now intertwined with Constitutional principles under the Constitution and therefore insofar as common law principles are not inconsistent with the Constitution, they may still be applicable.²⁰⁶

²⁰³ The requirement under the Constitution that administrative action must be “lawful, reasonable and procedurally fair” and the requirement under PAJA that administrative action must be “procedurally fair”.

²⁰⁴ At pp. 368 para 108.

²⁰⁵ Croome, B.J. (2008). *Taxpayers’ rights in South Africa supra*, pp. 147, Croome, B.J. (2010). *Taxpayer Rights in South Africa*. Cape Town: Juta, at pp. 151, and Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 15 to 16.

²⁰⁶ *Pharmaceutical Manufacturers Association of SA: Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) pp. 687- 688, 692 and 696 paras 20, 33 and 44. Also see Hoexter, C. (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 117.

When determining whether the administrative action was “lawful, reasonable and procedurally fair”, the common law principles in respect of *ultra vires* in respect of a functionary exceeding its statutory powers are intertwined with the Constitutional doctrine of legality, and similarly, the test for “lawful administrative action” under the common law (being whether the administrative action is justifiable in relation to the reasons given for it) is intertwined with the Constitutional test of “procedurally fair administrative action”.²⁰⁷ In respect of lawfulness, the administrative action must be taken in terms of an empowering provision, which by law, confers the power to take the administrative action.²⁰⁸

For a decision to be reasonable, it must be rational in that “the decision must be supported by the evidence and information before the administrator as well as the reasons given for it” and proportional.²⁰⁹

In respect of proportionality, Hoexter comments that:

*“Proportionality may be defined as the notion that one ought not to use a sledgehammer to crack a nut. Its purpose is ‘to avoid an imbalance between the adverse and beneficial effects ... of an action and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end’. Two of its essential elements, then are balance and necessity while a third is suitability – usually referred to the use of lawful and appropriate means to accomplish the administrator’s objective.”*²¹⁰

²⁰⁷ Pharmaceutical Manufacturers Association of SA: Ex Parte President of the Republic of South Africa 2000 (2) SA 674 (CC) at pp. 698 para 50.

²⁰⁸ De Ville, J.R. (2006 revised first edition reprint). *Judicial Review of Administrative Action in South Africa*. Durban: Lexis Nexis Butterworths., pp. 89. De Ville also at pp. 89 to 98 set out the sources of administrative authority. The full scope of the element of “lawfulness” falls outside the ambit of this dissertation, see De Ville, J.R. (2006 revised first edition reprint). *Judicial Review of Administrative Action in South Africa*. Durban: Lexis Nexis Butterworths., pp. 89 to 193, for a complete discussion in respect of the standard of “lawfulness”.

²⁰⁹ Hoexter, C. (2007). *Administrative Law in South Africa*. Cape Town: Juta, at pp. 307 and 309. Hoexter, C. (2002). *The New Constitutional and Administrative Law*, Volume Two Administrative Law. Cape Town: Juta, at pp. 307, as cited by Croome, B.J. (2010). *Taxpayer Rights in South Africa*. Cape Town: Juta, pp. 151, 152, 206 and 207; and Croome, B.J. (2008). *Taxpayers’ rights in South Africa supra*, pp. 147. For a full discussion on the element of reasonableness see De Ville, J.R. (2006 revised first edition reprint). *Judicial Review of Administrative Action in South Africa*. Durban: Lexis Nexis Butterworths, pp. 195 to 216.

²¹⁰ Hoexter, C. (2007). *Administrative Law in South Africa*. Cape Town: Juta, at pp. 309 and 310.

In *Carephone (Pty) Ltd v Marcus* NO 1999 (3) SA 304 (LAC) it was held that:

*“Many formulations have been suggested for this kind of substantive rationality required of administrative decision-makers, such as ‘reasonableness’, ‘rationality’, ‘proportionality’ and the like (cf, for example, Craig Administrative Law (op cit at 337 - 49); Schwarze European Administrative Law (1992) at 677). Without denying that the application of these formulations in particular cases may be instructive, I see no need to stray from the concept of justifiability itself. To rename it will not make matters any easier. It seems to me that one will never be able to formulate a more specific test other than, in one way or another, asking the question: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at?”*²¹¹

Lastly, the element of “procedural fairness” is introduced by s3 of PAJA.²¹² Procedural fairness serves an important purpose as it attempts to, *inter alia*, prevent arbitrary decisions.²¹³ Procedural fairness is however context specific.²¹⁴ S3 of PAJA provides that an administrator give notice of various procedural aspects in relation to the administrative action prior to the decision being taken.²¹⁵ If the formal notice required by s3 of PAJA is not complied with, then the decision taken in terms of the administrative action would be procedurally unfair. S5 of PAJA specifically requires that administrators must give reasons for their decisions. Similarly, if s5 of PAJA is not complied with, the decision taken by the administrative action will be procedurally unfair.

²¹¹ *Carephone (Pty) Ltd v Marcus* NO 1999 (3) SA 304 (LAC), pp. 316 at para 37.

²¹² De Koker, A. *et al.* (2012). *Silke on the South African Income Tax Act*. Service 44. Durban: Lexis Nexis, pp. 22 – 37. For a complete discussion in respect of the element of “procedural fairness” see De Ville, J.R. (2006 revised first edition reprint). *Judicial Review of Administrative Action in South Africa*. Durban: Lexis Nexis Butterworths, pp. 217 to 286.

²¹³ De Ville, J.R. (2006 revised first edition reprint). *Judicial Review of Administrative Action in South Africa*. Durban: Lexis Nexis Butterworths, pp. 217 referring to *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) para 131.

²¹⁴ De Koker, A. *et al.* (2012). *Silke on the South African Income Tax Act*. Service 44. Durban: Lexis Nexis, pp. 22 – 37 referring to *Minister of Health and McIntyre NO v New Clicks SA (Pty) Ltd* 2006 (2) SA 311 (CC) at 379E.

²¹⁵ Adequate notice of the following must be given: (a) nature and purpose of the administrative action; (b) a reasonably opportunity to make representations; (c) a clear statement of the administrative action; (d) right of review/internal appeal where applicable and (e) right to request reasons in terms of s5 of PAJA. A full discussion of each of the above topics which need be given notice of, falls outside the ambit of this dissertation.

3.3.4.5.2 *List of grounds for judicial review as set out in s6 of PAJA*

Currently, judicial review proceedings are regulated by PAJA, and administrative action which falls within one of the grounds listed in s6 of PAJA can be judicially reviewed. Previously the common law provided for the grounds for judicial review.²¹⁶ Currently, insofar as the common law principles are consistent with the Constitution, they are to be read together with the grounds listed in s6 of PAJA.²¹⁷

Some writers are of the opinion that s6 of PAJA constitutes a codification of the common law grounds of review rather than a reform thereof.²¹⁸ S6 of PAJA stipulates:

“1 Judicial review of administrative action

- (1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.*
- (2) A court or tribunal has the power to judicially review an administrative action if-*
 - (a) the administrator who took it-*
 - (i) was not authorised to do so by the empowering provision;*
 - (ii) acted under a delegation of power which was not authorised by the empowering provision; or*
 - (iii) was biased or reasonably suspected of bias;*

²¹⁶ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 154.

²¹⁷ Currie, I. & Klaaren, J. (2001). *The Promotion of Administrative Justice Act Benchbook*. Cape Town: Siber Ink CC, at pp., 153 para 6.3 and Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 154 by relying on the judgment of *Pharmaceutical Manufacturers Association of SA: Ex Parte President of the Republic of South Africa 2000 (2) SA 674 (CC)* are of the opinion that the common law grounds of review are still applicable in terms of s6 of PAJA.

²¹⁸ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 155.

- (b) *a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;*
- (c) *the action was procedurally unfair;*
- (d) *the action was materially influenced by an error of law;*
- (e) *the action was taken-*
 - (i) *for a reason not authorised by the empowering provision;*
 - (ii) *for an ulterior purpose or motive;*
 - (iii) *because irrelevant considerations were taken into account or relevant considerations were not considered;*
 - (iv) *because of the unauthorised or unwarranted dictates of another person or body;*
 - (v) *in bad faith; or*
 - (vi) *arbitrarily or capriciously;*
- (f) *the action itself-*
 - (i) *contravenes a law or is not authorised by the empowering provision; or*
 - (ii) *is not rationally connected to-*
 - (aa) *the purpose for which it was taken;*
 - (bb) *the purpose of the empowering provision;*
 - (cc) *the information before the administrator; or*

- (dd) *the reasons given for it by the administrator;*
 - (g) *the action concerned consists of a failure to take a decision;*
 - (h) *the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or*
 - (i) *the action is otherwise unconstitutional or unlawful.*
- (3) *If any person relies on the ground of review referred to in subsection (2) (g), he or she may in respect of a failure to take a decision, where-*
- (a)
 - (i) *an administrator has a duty to take a decision;*
 - (ii) *there is no law that prescribes a period within which the administrator is required to take that decision; and*
 - (iii) *the administrator has failed to take that decision,*
 - (iv) *institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision; or*
 - (b)
 - (i) *an administrator has a duty to take a decision;*
 - (ii) *a law prescribes a period within which the administrator is required to take that decision; and*
 - (iii) *the administrator has failed to take that decision before the expiration of that period;*
 - (v) *institute proceedings in a court or tribunal for judicial review of the failure to take the decision within that period on the ground that the*

administrator has a duty to take the decision notwithstanding the expiration of that period.”

A concise discussion of most of these grounds are dealt with hereunder.

3.3.4.5.2.1 S6(2)(a)

S6(2)(a) of PAJA focuses on the arbitrator.²¹⁹ It includes circumstances in which the administrator acted beyond its powers. Section 6(2)(a)(iii) of PAJA provides for judicial review in circumstances where the administrator who took the decision was biased or reasonably suspected of bias. The following principles have been laid in respect of such biasness:

- Currie is of the view that this ground was considered part of the common law doctrine of natural justice.²²⁰
- Case law as adjudicated upon the test for judicial bias and held that:
 - (1) *“There must be a suspicion that the judicial officer might, not would, be biased.*
 - (2) *The suspicion must be that of a reasonable person in the position of the accused or litigant.*
 - (3) *The suspicion must be based on reasonable grounds.*
 - (4) *The suspicion is one which the reasonable person referred to would, not might, have.”*²²¹

²¹⁹ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 157.

²²⁰ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 160, para 7.10 and footnote 35 referring to *President of the Republic of South Africa v South African Football Rugby Union* 1999 (4) SA 147 (CC) para 36, and *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers’ Union and Another* 1992 (3) SA 673 (A) at pp. 690A-695C.

- Factors such as the administrator providing extremely limited time and opportunity to respond, was sufficient evidence to rule that there was a reasonable suspicion that the administrator had acted prejudicially and was in fact bias.²²²
- Administrators having a pecuniary interest in the outcome of their decisions would be viewed in terms of PAJA as being biased on the basis that it would impair their objectivity.

3.3.4.5.2.2 S6(2)(b)

S6(2)(b) of PAJA originates from the common law doctrine of *ultra vires*. The previous strict legalistic approach to this doctrine was substituted with the substantive common sense approach assessing whether the steps taken by the administrator were “*effective, measured against the intention of the legislature as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular*”.²²³ Currie comments that this approach should remain to be enforced under s6(2)(b) of PAJA although PAJA refers to the word “mandatory”.²²⁴

3.3.4.5.2.3 S6(2)(c)

S6(2)(c) of PAJA provides for judicial review if the administrative action was procedurally unfair. In this regard, if the requirements of the standard of procedural fairness as envisaged under the common law, Interim Constitution, Constitution and PAJA are not met, s6(2)(c) of PAJA is applicable.²²⁵

²²¹ *S v Roberts* 1999 (4) SA 915 (SCA) pp. 924 and 925, para 32 and 34. Also referred to in Currie, I. & Klaaren, J. (2001). *The Promotion of Administrative Justice Act Benchbook*. Cape Town: Siber Ink CC, at pp. 160 para 6.12, as cited in Croome, B.J. (2008). *Taxpayers' rights in South Africa supra*, at pp. 190.

²²² *Goldfields Ltd v Connellan No & Others* [2005] 3 All SA 1442 (W) as cited by Croome, B.J. (2010). *Taxpayers' Rights in South Africa*. Cape Town: Juta, pp. 167 to 169.

²²³ *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 SCA at par 13 as cited by Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 161 and 162.

²²⁴ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 162.

²²⁵ Currie and Klaaren comment that the yardstick to determine whether the administrative action was procedurally unfair is similar to that under section 33(1) of the final Constitution. Currie, I. & Klaaren, J. (2001). *The Promotion of Administrative Justice Act Benchbook*. Cape Town: Siber

3.3.4.5.2.4 S6(2)(d)

In respect of s6(2)(d) of PAJA one may consider the content of some judgements handed down prior to the enactment of PAJA in respect of authorities pertaining to a deliberate and/or erroneous interpretation of statutes.²²⁶ The error must be material to the decision and only decisions not justifiable on the facts, apart from the error of law, will fall under s6(2)(d) of PAJA.

3.3.4.5.2.5 S6(e)

S6(2)(e)(i) to (vi) of PAJA deals with the manner in which a decision is made.²²⁷ Currie comments that the grounds mentioned in s6(2)(e)(i) and s6(2)(e)(ii) related to the principle that an administrator may only exercise its powers in relation to the purpose for which it was conferred.²²⁸ S6(2)(e)(i) of PAJA concerns itself with the purpose of the empowering provision whereas s6(2)(e)(ii) of PAJA concerns itself with the motivation for the administrative action.²²⁹

Circumstances may be of such that more than one of these provisions are applicable simultaneously.²³⁰ In *CSARS v Hawker Air Services (Pty) Ltd and Hawker Aviation Partnership 2006 (4) SA 292 (SCA)* the court of appeal reversed a finding by the court a quo that SARS and its delegated officials had acted improper and with ulterior motive. Such determination falls within s6(2)(e)(ii) of PAJA.

Ink CC, at pp. 163 para 6.14. Currie refers to the requirement of procedural fairness in s3 and s4 of PAJA. Non-compliance with s3 and s4 of PAJA would result in s6(2)(c) of PAJA being applicable, Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 163 and 164.

²²⁶ Commissioner for Inland Revenue v City Deep Limited 1924 AD 298 at pp. 306 and Hira and Another v Booyens and Another 1992 (4) SA 69 (A) and Johannesburg Stock Exchange v Witwatersrand Nigel Ltd 1988 (3) SA (A) at pp. 151-4; all as cited by Meyerowitz, D. (2002/2003). Meyerowitz on Income Tax. The Taxpayer. Cape Town at pp. 34-21.

²²⁷ Currie, I. (2007). *The Promotion of Administrative Justice Act A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 165.

²²⁸ Currie, I. (2007). *The Promotion of Administrative Justice Act A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 165.

²²⁹ Currie, I. (2007). *The Promotion of Administrative Justice Act A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 165.

²³⁰ In *Sasol Oil (Pty) Ltd and Another v Metcalfe NO 2004 (5) SA 161 W*, pp. 172 para 15 the court held that the decision was taken 'for a reason not authorised by the empowering provision' in terms of s6(2)(e)(i) of PAJA further that the decision relied on irrelevant considerations in terms of s6(2)(e)(iii) of PAJA and therefore was to be set it aside.

A decision made in ignorance of the material facts may be subject to judicial review under s6(e)(iii) of PAJA as a decision made upon a material mistake of fact.²³¹ S6(2)(e)(iv) of PAJA relates to circumstance where the authorised administrator exercises the administrative action based on unwarranted dictations of another unauthorised person or body.²³²

S6(2)(e)(v) of PAJA pertains to fraud or dishonesty in the taking of the decision or an abuse of powers from an honest mistake, being a ground for judicial review.²³³ S6(2)(e)(vi) of PAJA refers to decisions taken with the “ultimate form of unreasonableness”.²³⁴ The Constitutional requirement of reasonableness can be applied in this respect.

3.3.4.5.2.6 S6(2)(f)

S6(2)(f) of PAJA provide for circumstances under which the arbitrator either exceeded or abused the powers conferred upon it.²³⁵ S6(2)(f)(i) of PAJA caters for when the decision contravenes the law, besides the empowering provision.²³⁶ S6(2)(f)(ii) of PAJA provides for review in circumstances where the decision taken is irrational in respect of certain factors.²³⁷

²³¹ Pepkor Retirement Fund and Another v Financial Services Board 2003 (6) SA 38 (SCA) pp. 39 and 58 and Chairperson’s Association v Minister of Arts and Culture [2007] SCA 44 (RSA) as cited by Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 166.

²³² Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 166.

²³³ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 167.

²³⁴ Hoexter, C. (2007). *Administrative Law in South Africa*. Cape Town: Juta & Co, pp. 292 as cited by Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 167.

²³⁵ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 159.

²³⁶ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 167.

²³⁷ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 168.

3.3.4.5.2.7 S6(2)(g)

S6(2)(g) of PAJA deals with a ground for judicial review based upon a failure to take a decision. S6(3) of PAJA²³⁸ sets out the time frames in which it would be considered that a failure to take a decision has been effected.

3.3.4.5.2.8 S6(2)(h)

The standard of a reasonable decision-maker taking a justifiable decision forms the basis of this ground. In *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs & Tourism & Others 2004 (4) SA 490 (CC)*, the learned O'Regan J commented as follows:

“...Section 6(2)(h) should then be understood to require a simple test, namely that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach. What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case.

Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.

Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.”²³⁹

²³⁸ As discussed above.

²³⁹ *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs & Tourism & Others 2004 (4) SA 490 (CC)* at pp. 513 par 44 and 45.

Currie & Klaaren are of the view that:

“The aim of the power is to discipline decision-makers, requiring them to make certain that the record adequately supports their decision, in that the decision is supported by persuasive reasons and it makes logical sense. Mureinik suggests that the effect of the subsection is to make an administrative decision unjustifiable unless:

- 1. the decision-maker has considered all the serious objections to the decision taken and has answers which plausibly meet them;*
- 2. the decision-maker has considered all the serious alternatives to the decision taken, and has discarded them for plausible reasons;*
- 3. there is a rational connection between the information (evidence and argument) before the decision-maker and the decision taken.”²⁴⁰*

In *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others* (Treatment action campaign and Another as *amici curiae*) 2006 (2) SA 311 (CC) it was pointed out that:

“Reasonableness and procedural fairness are context specific. What is reasonable and procedurally fair in one context is not necessarily reasonable or procedurally fair in a different context.”²⁴¹

3.3.4.5.2.9 S6(2)(i)

S6(2)(i) of PAJA stipulates that administrative action would be reviewable if the action is otherwise unconstitutional or unlawful. The need for this subsection has been questioned as

²⁴⁰ See Currie, I. & Klaaren, J. (2001). *The Promotion of Administrative Justice Act Benchbook*. Cape Town: Siber Ink CC, pp. 170 para 6.25. According to Croome, B.J. (2008). *Taxpayers' rights in South Africa supra*, pp. 193; also see *Stanfield v Minister of Correctional Services and Others* 2003 (12) BCLR 1384 (C) 1418.

²⁴¹ *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others* (Treatment action campaign and Another as *amici curiae*) 2006 (2) SA 311 (CC) at pp. 379 para 145.

s6(2)(f)(i) of PAJA provides for judicial review when the administrative action contravenes a law. In this regard:

Currie acknowledges the confusion that this ground seems to be a form of s6(2)(f)(i) of PAJA, but is of the view that this ground has a two-fold purpose, firstly it intends to make provision for the common law grounds which were not expressly listed in PAJA (for example prohibition against vagueness, the prohibition on the fettering of administrative discretion and prohibition of retrospective administrative action) and secondly it provides opportunity for the courts to develop further grounds of review.²⁴²

Currie and Klaaren are of the opinion that:

*“Our submission is that, on a purposive interpretation, s6(2)(i) has to be interpreted as part of an Act with the purpose of giving effect to the rights in s 33 of the Constitution, and not to the Constitution in general. The s 33 rights permit review of administrative action on grounds of lawfulness, procedural fairness, and reasonableness. They do not exhaust the possibilities of a constitutional challenge to administrative action.”*²⁴³

3.4 CONCLUSION

Currently s33 of the Constitution, read together with PAJA, read together with the Constitutional common law principles, constitutes the administrative law of South Africa and regulates the manner in which administrative powers are exercised. Every person in South Africa has the Constitutional right of just administrative action, which is primarily regulated and enforced by virtue of the provisions of PAJA.

PAJA, read together with the Constitution and the Constitutional common law principles, provides for a certain standard to be maintained by any administrator when exercising

²⁴² Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 173.

²⁴³ Currie, I. & Klaaren, J. (2001). *The Promotion of Administrative Justice Act Benchbook*. Cape Town: Siber Ink CC, at pp. 174 para 6.27, and Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 174.

administrative powers. If the exercise of the administrative powers falls short of the standard, then PAJA provides for a remedy of judicial review. For judicial review proceedings to be applicable and enforceable, certain substantive requirements in terms of PAJA must first be met, these requirements are summarised as:

- The administrator is to be subject to the provisions of PAJA;
- The conduct of the administrator must constitute “administrative action” as defined in PAJA;
- The “administrative action” must materially and adversely affect taxpayer’s rights or legitimate expectations and have a “direct, external legal effect”;
- The “administrative action” is not “lawful, reasonable and procedurally fair” and a ground as contemplated in s6 of PAJA is applicable.

Once the above has been determined satisfactory, then judicial proceedings may proceed. There are, however, certain procedural requirements which would first have to be met, in addition to the aforesaid substantive requirements, before judicial review proceedings can be lodged.²⁴⁴

²⁴⁴ These procedural requirements and the specific court/forum which is to adjudicate upon judicial review proceedings are discussed in Chapter 5 below.

CHAPTER 4: THE ROLE OF AND SUBSTANTIAL REQUIREMENTS FOR THE APPLICABILITY AND ENFORCEABILITY OF JUST ADMINISTRATIVE ACTION IN THE TAX ARENA

4.1 Introduction

Chapter 3 dealt with the general principles and substantive requirements for the applicability and enforceability of the right of just administrative action, and the remedy of judicial review in general. This chapter aims to implement the aforesaid principles and substantive requirements of the right and remedy in the tax arena.

First, the organ of state that is vested with the executive authority to administer, implement, enforce and collect taxes (“executive authority to tax”) must be determined, and thereafter the scope of its powers needs to be analysed. It must further be established what remedies are available to protect taxpayers who are dissatisfied with the government’s conduct when exercising the power to tax. Thereafter, the principles and substantive requirements in respect of the applicability and enforceability of the right of just administrative action and remedy of judicial review are applied in the tax arena.

The following will be determined and analysed in this chapter:²⁴⁵

- In whom the executive authority to tax is vested.
- The nature of the executive authority to tax as well as the remedies available to taxpayer dissatisfied with the executive authority power to tax’s conduct.

²⁴⁵ This forms the subject-matter of this dissertation and all other taxpayers’ rights fall outside the ambit of this dissertation.

- By implementing the principles and substantive requirements set out in Chapter 3 above, the applicability and enforceability of the right of just administrative action and the remedy of judicial review in the tax arena will be determined.

At the outset of this Chapter, it is again emphasised that this dissertation is based on the position prior to 1 October 2012, i.e. prior to the provisions of the TAA coming into force and effect. Mention will, however, be made of the TAA where its provisions are applicable but will not be discussed.²⁴⁶

4.2 In whom the executive authority to tax is vested, nature of such powers and taxpayers' remedies in general in respect of the executive authority's power to tax

4.2.1 *Executive authority to tax, in whom it is vested and nature of powers*

SARS is conferred with the executive authority in respect of tax.²⁴⁷ CSARS is the head of SARS,²⁴⁸ and SARS is a creature of statute.²⁴⁹ Fiscal legislation confers SARS and its delegated officials with powers to perform the executive authority to tax practically ("empowering provisions").²⁵⁰ The powers conferred by empowering provisions can be categorised as two types of powers; namely, to take decisions and exercise discretions ("take decisions/exercise discretions" or "executive authority's powers"). When SARS and its delegated officials take decisions/exercise discretions by virtue of the empowering provisions in fiscal legislation, they act in their capacity as the executive authority to tax.

²⁴⁶ It is also important to note that currently both the ITA and the TAA deal with certain issues such as objection, appeal, certain empowering provisions and although there is a draft Amendment Act available, an Amendment Act rescinding one of the Statute's provisions has not yet been promulgated.

²⁴⁷ S2 of the *South African Revenue Service Act 34 of 1997* ("SARS Act") provides that SARS is an organ of government within the public administration, but an entity outside the public service arena. S4 of the SARS Act provides that SARS' objective is to ensure the efficient and effective collection of tax and to enforce the fiscal legislation.

²⁴⁸ S6 of the SARS Act and s2(1) of the ITA.

²⁴⁹ As discussed in Chapter 5.

²⁵⁰ Not all SARS officials are conferred with all powers.

Prior to the TAA empowering provisions conferred CSARS with powers to take decisions/exercise discretions on behalf of SARS and other SARS officials would only enforce powers if so authorised by CSARS.²⁵¹ The TAA stipulates that SARS is responsible for the administration of the TAA under the control and direction of CSARS. The TAA now directly confers senior SARS officials with the powers to take decisions/exercise discretions as well as ancillary powers.²⁵² The TAA also stipulates that if neither CSARS nor a senior SARS official are required to exercise a power in terms of the TAA, then any SARS official may do so.²⁵³

Thus, under the current fiscal legislation, SARS, CSARS, senior officials of SARS and other delegated officials of SARS ("SARS and its delegated officials") are all directly conferred with certain powers and duties, but CSARS still has the authority to confer powers and duties conferred upon it to other specific unauthorised SARS officials in certain circumstances.²⁵⁴ Case law has held that SARS and its delegated officials exercise discretionary powers conferred upon it by legislation; the exercise of which constitutes administrative action reviewable in terms of administrative law.²⁵⁵

In general SARS and its delegated officials do not have the legislative authority to create legislation,²⁵⁶ but government may delegate certain legislative authority to SARS and its

²⁵¹ S3(1) of the ITA.

²⁵² S6(3) of the TAA confers such power to senior officials and s6(3) read together with the definition of senior official in s1 of the TAA defines senior officials as CSARS, an official having specific written authority by CSARS or a SARS official occupying a post designated by CSARS to perform certain powers or duties. A SARS official is defined in s1 of the TAA as CSARS, and employee of SARS or a person contracted by SARS for administration of a tax Act who carries out administration of an Act under the control, direction and supervision of CSARS. S6(4) of the TAA provides for the authority in respect of ancillary powers. S6(2) of the TAA permits CSARS to delegate its powers and duties to other delegated officials.

²⁵³ S6(5) of the TAA.

²⁵⁴ S6(2) of the TAA.

²⁵⁵ *Metcash Trading Ltd v CSARS* 2001 (1) SA 1109 (CC) 1133C. *Deacon v Controller of Customs and Excise* 1999 (2) SA 905 (SE). De Koker, A. et al. (2012). *Silke on the South African Income Tax Act*. Service 44. Durban: Lexis Nexis, pp. 22 – 42.

²⁵⁶ Under s44(1)(a)(iii) of the Constitution the National Assembly may, in certain circumstances, delegate its national legislative authority to a legislative body in another government sphere. Croome expresses the opinion that national government may therefore authorise SARS to draft regulations. Croome, B.J. (2008). *Taxpayers' rights in South Africa supra*.

delegated officials, and thus SARS may, in certain circumstances, be authorised to draft regulations.²⁵⁷

Three types of empowering provisions exist,²⁵⁸ namely empowering provisions:

- Expressly providing for the remedy of objection and appeal against decisions taken/discretions exercised (“type 1 empowering provisions”).
- Not expressly including nor excluding the remedy of objection and appeal against decisions taken/discretions exercised (“type 2 empowering provisions”).
- Expressly excluding the remedy of objection and appeal against decisions taken/discretions exercised (“type 3 empowering provisions”).

4.2.2 Taxpayers’ remedies in respect of the executive authority to tax

The executive authority’s powers must be wide enough to ensure that it can perform its functions and duties. Taxpayers must, however, be protected from an excessive use of the executive authority’s powers which infringe taxpayers’ fundamental rights. A balance must thus be obtained. The executive authority is thus conferred with the wide power to tax as set out above. Taxpayers are then conferred with remedies to protect them from the excessive use of the executive authority’s powers which infringe their fundamental rights.

Taxpayers are not automatically conferred with remedies to protect them against the executive authority’s powers to take decisions/exercise discretions under empowering provisions. Taxpayers only have the remedies which are conferred on them by empowering provisions, and thus the distinction between the three types of empowering provisions is important for the determination of the appropriate remedy in the circumstances.

The most well-known taxpayers’ remedy is objection and appeal, which is not automatically available to taxpayers as is seen from the types of empowering provisions.²⁵⁹

²⁵⁷ Croome, B.J. (2008). Taxpayers’ rights in South Africa supra.

²⁵⁸ See *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk* 1985 (2) SA 668 (T), pp. 672.

A short discussion of the extent of the executive authority to tax under each empowering provision and the remedy available to taxpayers follows.

4.2.2.1 General principles in respect of interference with the executive authority to tax

The question is whether SARS and its delegated officials' decision taken/discretion exercised, when properly arrived at, are final and binding and not subject to review or appeal.²⁶⁰

It is right that SARS and its delegated officials must be permitted to implement its decisions taken/discretions exercised in terms of empowering provisions. Such decisions taken/discretions exercised, even if erroneous, should not lightly be interfered with if same were taken/exercised in a *bona fide* manner, properly applying its mind, and not act contrary to statutory provisions or other decisions of competent courts of law.²⁶¹

SARS and its delegated officials are not bound by previous decisions of the Tax Court.²⁶² SARS and its delegated officials' decisions taken/discretions exercised are final and binding until such time as they are interfered with by the forum having jurisdiction to do so. A forum will only interfere if a taxpayer has implemented a remedy which is applicable and enforceable in the circumstances.²⁶³

²⁵⁹ If the three types of empowering provisions are analysed it is clear that the remedy of objection and appeal is not automatically applicable and is only applicable in respect of type 1 empowering provisions.

²⁶⁰ Commissioner for Inland Revenue v City Deep Ltd 1924 AD 298 and Crown Mines Ltd v Commissioner for Inland Revenue 1922 AD 100.

²⁶¹ De Koker, A. et al. (2010). *Silke on the South African Income Tax Act*. Durban: Lexis Nexis, at pp. 18 – 70 – 1, referring to Shidiack v Union Government 1912 AD 642; CIR v City Deep Ltd 1924 AD 298 1; SATC 18 and Rand Ropes (Pty) Ltd v CIR 1944 AD 142, 13 SATC 1 at pp. 9. In Commissioner for Inland Revenue v City Deep Limited 1924 AD 298 the court specifically dealt with the issue whether a court would interfere with the discretion of CSARS and held that: “the Court will not interfere with his (CSARS’) decision even if it be wrong in law provided he has formed his opinion bona fide and there is no decision of a competent Court of law to the contrary”.

²⁶² De Koker, A. et al. (2010). *Silke on the South African Income Tax Act*. Durban: Lexis Nexis, at pp. 18 – 70 – 1.

²⁶³ De Koker, A. et al. (2012). *Silke on the South African Income Tax Act*. Service 44. Durban: Lexis Nexis, pp. 18 – 214 to 218.

The taxpayer's complaint against the decision taken/discretion exercised must be analysed, and it must be determined whether it pertains to a dispute in respect of merits (correctness) of, or the manner in which, the executive authority's powers were taken/exercised.²⁶⁴

The right which is conferred upon taxpayers to protect themselves in respect of the latter is just administrative action. The available remedy for that right is judicial review. The right of just administrative action and remedy of judicial review is not always applicable and enforceable in the circumstances, and therefore it must be determined whether, in certain circumstances, they are applicable. When reviewing decisions taken/discretions exercised by SARS and its delegated officials, the question is not whether the decision taken/discretion exercised was wrong, but whether SARS and its delegated officials had duly considered the circumstances of the matter.²⁶⁵

A short discussion of the remedies available to a taxpayer in respect of type 1, 2 and 3 empowering provisions is set out below.²⁶⁶ As will be discussed, the remedies available in respect of type 1 empowering provisions are, without question, clearer than that of type 2 and 3 empowering provisions.²⁶⁷

4.2.2.2 Remedies available in respect of type 1 empowering provisions

Type 1 empowering provisions expressly provide for objection and appeal to be implemented by taxpayers. Objection and appeal, are however, only applicable and enforceable in respect of merit disputes. Prior to the TAA, the ITA, in particular s107A of the ITA, Part A of Chapter III of the ITA, as well as the rules promulgated under s107A of the ITA, regulated the objection and appeal in respect of income tax.²⁶⁸

²⁶⁴ This dissertation is only concerned with the latter.

²⁶⁵ De Koker, A. *et al.* (2010). *Silke on the South African Income Tax Act*. Durban: Lexis Nexis, at pp. 18 – 70 – 1.

²⁶⁶ The remedies in respect of type 3 empowering provisions will be discussed shortly.

²⁶⁷ De Koker, A. *et al.* (2010). *Silke on the South African Income Tax Act*. Durban: Lexis Nexis, at pp. 18 – 71.

²⁶⁸ All other forms of taxes, VAT, custom and excise etc fall outside the ambit of this dissertation.

S104 to s107 of the TAA deals with objection and appeal. The TAA permits objection and appeal in respect of assessments or certain decisions.²⁶⁹ S103 of the TAA provides that the Minister may make rules to govern the procedures of objection and appeal. No rules have yet been made in this regard. S264 of the TAA provides that the rules promulgated in terms of the ITA will continue to be in force under the TAA.

S3(4) of the ITA lists type 1 empowering provisions.²⁷⁰ Similarly, s104(2) of the TAA lists type 1 empowering provisions. Other provision of the ITA and the TAA, although not listed in s3(4) of the ITA and s104(2) of the TAA, provide for objection and appeal, and therefore also constitute type 1 empowering provisions.²⁷¹

Prior to the TAA, the process followed in respect of objection and appeal can be summarised as follows:²⁷²

- SARS and its delegated officials take the decisions/exercise the discretion and inform the taxpayer of the outcome.
- If the outcome is against the taxpayer, the taxpayer may request SARS and its delegated officials to provide it with reasons for the outcome and they must provide same, unless they are of the opinion that adequate reasons have already been provided.²⁷³
- A taxpayer aggrieved by/dissatisfied with the decision taken and/or discretion exercised may lodge an objection against such decision taken/discretion exercised.²⁷⁴

²⁶⁹ S103 to 107 of the TAA.

²⁷⁰ De Koker, A. *et al.* (2010). *Silke on the South African Income Tax Act*. Durban: Lexis Nexis, at pp. 18 – 71 to 18 – 72 – 2. De Koker, A. *et al.* (2012). *Silke on the South African Income Tax Act*. Service 44. Durban: Lexis Nexis, pp. 18 – 218 to 18 – 222.

²⁷¹ A list of type 1 empowering provisions are provided by De Koker, A *et al.* (2010). *Silke on the South African Income Tax Act*. Durban: Lexis Nexis at pp. 18 – 71.

²⁷² This is the pre-TAA position and cognisance must be taken of s104 to 107 of the TAA which deals with objection and appeal procedures and regulations which are to be enacted for that purpose.

²⁷³ A taxpayer must request reasons within a specified time period in terms of the Rules.

²⁷⁴ This is governed by section 81(1) of the ITA and Rule 4 of the Rules promulgated under section 107A of the ITA.

- SARS and its delegated officials are compelled to rule on the objection and must either allow or disallow same.²⁷⁵
- If SARS and its delegated officials disallow the objection, the taxpayer may appeal against such disallowance by lodging a notice of appeal.²⁷⁶
- In the aforesaid notice of appeal the taxpayer may request that the alternative dispute resolution process be implemented.²⁷⁷
- If the ADR procedure is unsuccessful, or *alternatively* not implemented, then the appeal would proceed to either the Board or the Tax Court (previously known as the “Special Court”).²⁷⁸ SARS and its delegated officials would give its grounds of assessment in terms of Rule 10 and the taxpayer must give its grounds for appeal in terms of Rule 11.
- If the appeal was referred to and adjudicated upon by the Board and the taxpayer and/or SARS is dissatisfied with the decision of the Board, the taxpayer and/or SARS may require the appeal to be referred to the Tax Court.²⁷⁹
- If any party is dissatisfied with the judgment of the Tax Court, it may take the matter to the High Court or High Court of Appeal.²⁸⁰

Uncertainty exists as to whether a taxpayer may proceed with judicial review proceedings in respect of type 1 empowering provisions.²⁸¹ Writers have expressed the opinion that the remedy of judicial review is also available in type 1 empowering provisions, that the appropriate procedure to follow to implement same would be similar to the procedures for

²⁷⁵ This is governed by section 81(4) of the ITA and Rule 5 of the Rules promulgated under section 107A of the ITA.

²⁷⁶ This is governed by section 83 of the ITA and Rule 6 of the Rules promulgated under section 107A of the ITA.

²⁷⁷ This is governed by s83 and s83A of the ITA read together with the Rules promulgated under s107A of the ITA.

²⁷⁸ This is governed by section 83 of the ITA and Rule 6 of the Rules promulgated under section 107A of the ITA.

²⁷⁹ Section 83A(14) of the ITA.

²⁸⁰ See s86A of the ITA. See s104 to 107 of the TAA for the procedure in respect of the TAA.

²⁸¹ Judicial review in the tax arena will be full dealt with in Chapters 4 and 5.

objection and appeal to the Tax Court, and that the Tax Court would be permitted to rehear the whole matter and substitute its own decision for that of SARS and its delegated officials, even if they applied their minds in a *bona fide* manner.²⁸²

Writers are further of the opinion that the court hearing an appeal from the Tax Court would only be entitled to interfere with the ruling of the Tax Court if it is determined that the Tax Court failed to “*bring an unbiased judgment to bear on the question and did not act for substantial reasons or exercised its discretion capriciously or upon the wrong principle.*”²⁸³

4.2.2.3 Available remedies in respect of type 2 empowering provisions

Type 2 empowering provisions do not expressly include or exclude the remedy of objection and appeal. The question is whether a taxpayer has any remedy he/she may implement to protect themselves from decisions taken/discretions exercised by SARS and its delegated officials in terms of type 2 empowering provisions. There is an extent of controversy in this regard. It seems that the only available remedy would be judicial review, which could only be implemented if it is applicable and enforceable in the circumstances.

Writers comment that type 2 empowering provisions’ discretions are usually called “absolute” or “administrative” discretions.²⁸⁴ Generally, if decisions taken/discretions exercised by SARS and its delegated officials, in terms of a type 2 empowering provision, are

²⁸² ITC 1331 (1980) 43 SATC 76 at pp. 84, as cited by De Koker, A, *et al.* (2010). Silke on the South African Income Tax Act, Durban: Lexis Nexis at pp. 18 – 72 – 2. Meyerowitz, D. (2002/2003). *Meyerowitz on Income Tax*. Cape Town: The Taxpayer, at pp. 34-20. Meyerowitz refers to *Rand Ropes (Pty) Ltd v Commissioner for Inland Revenue 1944 AD 142 at 150*, 13 SATC 1; *CIR v Da Costa 1985 (3) SA 768 (A)*, 1985 Taxpayer 209, 47 SATC 87 as authority for this point. Meyerowitz, D. (2007/2008). *Meyerowitz on Income Tax*. Cape Town: The Taxpayer. at pp. 34-20. *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk 1985 (2) SA 668 (T)* as cited by Clegg, D. & Stretch, R. (March 2012). *Income Tax in South Africa*. Volume 1A. Durban: LexisNexis. Durban, at pp. 27 – 54(2).

²⁸³ *CIR v Da Costa 1985 (3) SA 768 (A)* at 775G, Taxpayer 209, 47 SATC 87 as cited by Meyerowitz, D. (2002/2003). *Meyerowitz on Income Tax*. Cape Town: The Taxpayer, at pp. 34-21. (Although Meyerowitz refers to the “Special Court” this is construed as being the current “Tax Court”).

²⁸⁴ ITC 1400 47 SATC 169. Meyerowitz, D. (2002/2003). *Meyerowitz on Income Tax*. The Taxpayer. Cape Town, at pp. 34-21. Clegg, D. & Stretch, R. (March 2012). *Income Tax in South Africa*. Volume 1A. Durban: LexisNexis, at pp. 27 – 54. Both authors refer to the matters of *Rand Ropes (Pty) Ltd v Commissioner for Inland Revenue 1944 AD 142 at 152* and *Irvin & Johnson (SA) Ltd v CIR 1946 AD 483 at pp. 492* as authority in this regard.

taken/exercised in an honest manner, and by duly considering and determining the matter, they are final and binding and cannot be interfered with, but if, however, SARS and its delegated officials acted in a “*mala fide*” manner, or failed to apply its mind to the matter, courts may interfere with the decision taken/discretion exercised.²⁸⁵

Thus it is clear that a taxpayer dissatisfied with decisions taken/discretions exercised by SARS and its delegated officials in terms of type 2 empowering provisions would, in appropriate circumstances, be able to enforce the remedy of judicial review.

Before taxpayers can proceed to implement judicial review, they must prove that the right of just administrative action and remedy of judicial review is applicable and enforceable in the circumstances. This is dealt with hereunder.

It could be argued that if SARS and its delegated officials take a decision/exercise a discretion under type 2 empowering provisions, such decisions/discretion may not be interfered with, unless it were shown that SARS and its delegated officials either did not apply its mind to the question or had acted *mala fide*.²⁸⁶

4.2.2.4 Remedies available in respect of type 3 empowering provisions

The material difference between type 2 and type 3 empowering provisions are that type 3 empowering provisions expressly exclude the remedy of objection and appeal, whereas type 2 empowering provisions are silent on whether the remedy of objection and appeal is available or not.

²⁸⁵ Meyerowitz, D. (2002/2003). *Meyerowitz on Income Tax*. Cape Town: The Taxpayer at pp. 34-21. The principle is that where legislature gave SARS and its delegated officials a free hand, it is not the role of the courts to limit the powers given to take decisions/exercise discretions. Clegg, D. & Stretch, R. (March 2012). *Income Tax in South Africa*. Volume 1A. Durban: LexisNexis, at pp. 27 – 54(1), referring to *Shidiack v Union Government* 1912 AD 642, *CIR v City Deep Ltd* 1924 AD 298, 1 SATC 18; *Rand Ropes (Pty) Ltd v CIR* 1944 AD 142, 13 SATC 1; *ITC 1378 (1990)* 52 SATC 258, *ITC 1527 (1991)* 54 SATC 227 and *ITC 1582 (1995)* 57 SATC 27.

²⁸⁶ See *Rand Ropes (Pty) Ltd v Commissioner for Inland Revenue* 1944 AD 142 at 150 and *Shidiack v Union Government* 1912 AD 652.

Therefore the only possible remedy which may be applicable and enforceable, depending on the circumstances, in respect of type 3 empowering provisions is the remedy of judicial review. Therefore, if the dispute lies against the merits of the decision taken/discretion exercised by SARS and its delegated officials, a taxpayer would have no remedy under type 3 empowering provisions. But if the dispute lies against the manner in which the decision was taken/discretion was exercised by SARS and its delegated officials, then the remedy of judicial review proceedings may be available to the taxpayer, depending on the circumstances and whether the substantive and procedural requirements of the right of just administrative action and remedy of judicial review have been complied with.

4.3 An implementation of the substantive requirements for the applicability and enforceability of just administrative action and the remedy of judicial review in general in the tax arena in general

4.3.1 Introduction

When SARS and its delegated officials exercise the executive authority's powers to tax in terms of empowering provisions, taxpayers may be dissatisfied with the manner in which such powers were exercised in that it infringes their fundamental rights. Depending on the type of empowering provision in terms of which the decision was taken/discretion was exercised, in certain circumstances the remedy of objection and appeal may be available to a taxpayer. The remedy of objection and appeal mainly considers the correctness of the decision taken/discretion exercised.

All citizens, including taxpayers, are conferred with the right of just administrative action. The appropriate remedy for the enforcement of the right is judicial review, brought in terms of PAJA. If the infringement pertains to the manner in which the decision was taken/discretion was exercised, the only right and remedy which affords protection to a taxpayer is the right of just administrative action in terms of s33 of the Constitution and remedy of judicial review in terms of PAJA. For a taxpayer to rely on the right and remedy, the taxpayer would have to satisfy the substantive and procedural requirements.

The purpose of this chapter is to implement the substantive requirements for the applicability and enforceability of the right of just administrative action and remedy of judicial review in terms of PAJA (as discussed in Chapter 3) in the tax arena. Chapter 5 will deal with the procedural requirements for the right and remedy in the tax arena.

4.3.2 Do SARS and its delegated officials qualify as administrators as defined in PAJA?²⁸⁷

The definition of “administrator” read together with “an organ of state” in terms of s1 of PAJA includes an organ of state as defined in s239 of the Constitution. S2 of the SARS Act defines SARS as an organ of state within the public administration but as an institution outside the public service. SARS falls within the definition of an organ of state as contemplated in s239 of the Constitution and therefore SARS falls within the ambit of the definition of an “organ of state” and “administrator” as defined in s1 of PAJA.

As CSARS, senior SARS officials, and other delegated SARS officials take decisions/exercise discretions under the executive authority conferred upon SARS, they too qualify as administrators.

4.3.3 Do decisions taken/discretions exercised by SARS and its delegated officials amount to “administrative action”?²⁸⁸

The principles relevant to the determination of whether certain conduct constitutes “administrative action” have already been dealt with in Chapter 3.²⁸⁹ It is necessary to apply those principles and substantive requirements in the tax arena in respect of the decisions taken/discretions exercised by SARS and its delegated officials.

As SARS and its delegated officials take decisions/exercise discretions in terms of the types of empowering provisions set out above, it must be established whether such empowering provisions constitute empowering provisions for purposes of PAJA. It has been determined that type 1 to 3 empowering provisions do constitute an “empowering provision” as defined

²⁸⁷ The principles set out in Chapter 3 are incorporated herein as if specifically set out.

²⁸⁸ The principles set out in Chapter 3 are incorporated herein as if specifically set out.

²⁸⁹ Including, *inter alia*, the role of the definitions of, *inter alia*, “administrative action”, “decision”, “empowering provision”, “failure to take a decision”.

in PAJA. SARS and its delegated officials are defined as organs of state as required by the definition of “administrative action”.

It is important to establish whether or not the decision taken/discretion exercised by SARS and its delegated officials falls within the ambit of one of the exclusions of the definition of “administrative action” as SARS and its delegated officials exercise powers in terms of the executive authority to tax.

Subsection (aa) to (cc) of the definition of “administrative action” pertain to exclusions in respect of the exercise of particular executive powers/functions; (aa) refers to that of the National Executive, (bb) pertains to Provincial Executive powers and functions, and (cc) pertains to Municipal Council powers/functions. Both (aa) and (bb) include specific powers in respect of specific empowering provisions.²⁹⁰ Most decisions taken/discretions exercised by SARS and its delegated officials in terms of empowering provisions will not, however, fall within the ambit of these exclusions.

The decision taken/discretion exercised must be of an administrative nature.²⁹¹ Whether the decision to be taken is of an administrative nature is not determined by the status of the administrator but rather the function of the decision itself. SARS and its delegated officials’ decisions taken/discretion exercised will not always be of an administrative nature; thus each power must individually be analysed.

Writers are of the opinion that various decisions taken/discretions exercised by SARS and its delegated officials constitute “administrative action” and are subject to taxpayers’ right of just administrative action.²⁹² Writers comment that the legislature may use various expressions in order to confer SARS and its delegated officials with the powers to take decisions/exercise discretions under empowering provisions, such as, for example, the phrase “in the opinion of

²⁹⁰ For a discussion of the exclusion in respect of “executive action” see De Ville, J.R. (2006 revised first edition reprint). *Judicial Review of Administrative Action in South Africa*. Durban: Lexis Nexis Butterworths, pp. 59 to 60.

²⁹¹ Definition of “administrative action”. De Ville, J.R. (2006 revised first edition reprint). *Judicial Review of Administrative Action in South Africa*. Durban: Lexis Nexis Butterworths, pp. 40.

²⁹² Croome, B.J. (2010). *Taxpayer Rights in South Africa*. Cape Town: Juta 2010, pp. 205 and Croome, B.J. (2008). *Taxpayers’ rights in South Africa supra*, pp. 150 and 158. De Koker, A *et al.* (2012). *Silke on the South African Income Tax Act*. Service 44. Durban: Lexis Nexis, pp. 18 – 215. *Juta’s Income Tax Commentary on the Income Tax Act 58 of 1962*. Juta & Co Ltd on s3(2) of the ITA.

the Commissioner” or “if the Commissioner is satisfied” or “unless the Commissioner otherwise directs”.²⁹³

In ITC 1470 (1989) 52 SATC 88 the court held that:

*“The very fact that he has to be “satisfied” implies the performance of an act from which legal consequences flow. The performance of that act involves the exercise of an administrative discretion.”*²⁹⁴

If an empowering provision confers SARS and its delegated officials with the power to take a decision/exercise a discretion and SARS and its delegated officials refuses to do so, then SARS and its delegated officials’ refusal may constitute administrative action, as defined in PAJA. In this regard Croome comments that:

*“It seems that a taxpayer may only rely on PAJA once the Commissioner has actually taken a decision or failed to take a decision. Where the taxpayer anticipates that the Commissioner will make a decision it is not possible to invoke the provisions of PAJA before the decision is made.”*²⁹⁵

The question whether SARS and its delegated officials’ decision taken/discretions exercised in terms of empowering provisions constitutes “administrative” action has been adjudicated in ample cases which were positively answered.²⁹⁶ In the premises most of the executive

²⁹³ Meyerowitz, D. (2007/2008). *Meyerowitz on Income Tax*. The Taxpayer. Cape Town, at pp. 34-20 referring to *Irvin & Johnson (SA) Ltd v CIR 1946 AD 483* at pp. 492. Clegg, D. & Stretch, R. (March 2012). *Income Tax in South Africa*. Volume 1A. Durban: LexisNexis, at pp. 27 – 54 and 27 – 54(1), also referring to the fact that gradually subsequent acts have commenced to remove some of CSARS’ discretionary powers. Also De Koker, A. *et al.* (2010). *Silke on the South African Income Tax Act*. Durban: Lexis Nexis at pp. 18 – 17. De Koker, A. *et al.* (2012). *Silke on the South African Income Tax Act*. Service 44. Durban: Lexis Nexis, pp. 18 – 214.

²⁹⁴ At page 92 of the judgment, as cited by De Koker, A. *et al.* (2010). *Silke on the South African Income Tax Act*. Durban: Lexis Nexis, at pp. 18 – 70 – 1.

²⁹⁵ Croome, B.J. (2008). Taxpayers’ rights in South Africa, *supra*, pp. 157.

²⁹⁶ Commissioner, South African Revenue Service v Trend Finance (Pty) Ltd 2007 (6) SA 117 (SCA) and Commissioner, South African Revenue Service v Saleem 2008 (3) SA 655 (SCA). The seizure of goods by SARS under s88 of the Customs and Excise Act 91 of 1994, pending investigation into a possible forfeiture was held to be “administrative action”; as cited by Hoexter, C. (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 196.

authority's power to tax, as exercised by SARS and its delegated officials, constitute "administrative action" but each individual case must be determined on its own merits.

4.3.4 The "administrative action" materially and adversely affects taxpayers' rights or legitimate expectations²⁹⁷

S33 of the Constitution and s3(1) of PAJA, read together with the definition of "administrative action" in terms of s1 of PAJA, stipulates that the right of just administrative action is only applicable if administrative action adversely affects rights. The principles set out in respect of the determination of whether rights have been adversely affected in the circumstances are set out in Chapter 3 and those principles are hereunder implemented in the tax arena in general.

It is clear that for PAJA to be applicable the administrative action in question must *materially and adversely affect taxpayers' rights or legitimate expectations* (own emphasis). Preliminary steps taken by SARS and its delegated officials when exercising administrative action, do not seem to meet this criteria. A final determination of taxpayers' rights seems to be a requirement in this respect.

In respect of the question as to whether the administrative action by SARS and its delegated officials adversely affects taxpayers' rights, writers have expressed the opinion that if the remedy of objection and appeal is still available, a final determination adversely affecting taxpayers' rights is not yet determined.²⁹⁸ This must, however, be viewed together with the fact that objection and appeal do not constitute a review, and are remedies in respect of the correctness of the decision taken/discretion exercised and not the manner in which same was taken/exercised.

In this regard Croome comments that,

"a decision made by the Commissioner or by his officials invariably affects the taxpayer's patrimony. I contend that a taxpayer's patrimony constitutes a right as

²⁹⁷ The principles set out in Chapter 3 are incorporated herein as if specifically set out.

²⁹⁸ *Juta's Income Tax Commentary*. (2012) commenting on s88 of ITA. Cape Town: Juta (Subscriber service)

*envisaged in s33(2) of the Constitution on the ground that a decision made by the Commissioner may affect the income tax payable by the taxpayer, the timing of payment, and whether such tax is subject to interest or additional tax.*²⁹⁹

It has also been held that where SARS and its delegated officials are given a power which is not made subject to objection and appeal, then such power cannot be interfered with unless it is shown that SARS and its delegated officials either did not apply its mind or acted *mala fide*.³⁰⁰ Furthermore, day to day decisions by SARS and its delegated officials are not included in the ambit of this requirement as it does not have an external effect. It is important that the administrative action has a direct external effect on taxpayers' rights outside the internal effect on SARS and its delegated officials.

In respect of the question of whether the taxpayer may challenge regulations enacted by SARS and its delegated officials under empowering provisions, Chaskalson CJ in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment action campaign and Another as amici curiae)* 2006 (2) SA 311 (CC) held that,

*"When the interim Constitution was adopted, the making of delegated legislation was regarded as administrative action subject to judicial review. There is nothing to suggest that the interim Constitution, or the Constitution which took its place, intended to exclude delegated legislation from what had previously been understood as being administrative action. On the contrary, the Constitutions point in the opposite direction."*³⁰¹

It therefore seems that a taxpayer would be entitled to challenge regulations enacted by SARS and its delegated officials in terms of empowering provisions on the basis that it constitutes administrative action. Thus a final determination of taxpayers' rights by a decision taken/discretion exercised by SARS and its delegated officials adversely affects taxpayers' rights and the availability of the remedy of objection and appeal does not lead to the non-compliance of this remedy.

²⁹⁹ Croome, B.J. (2008). *Taxpayers' rights in South Africa supra*, pp. 147 and Croome, B.J. (2010). *Taxpayer Rights in South Africa*. Cape Town: Juta, at pp. 153.

³⁰⁰ Shidiack v Union Government 1912 AD, pp. 652.

³⁰¹ At pp. 368, para 109.

As type 2 empowering provisions do not expressly include or exclude the remedy of objection and appeal procedures, this requirement will be complied with. In respect of type 3 empowering provisions, there cannot be any argument that objection and appeal procedures need first be complied with as they are expressly excluded and therefore type 3 empowering provisions would comply with this requirement.

4.3.5 *That the administrative action is not lawful, reasonable and procedurally fair and that a ground as contemplated in s6 of PAJA is applicable*³⁰²

The executive authority to tax is subject to taxpayers' right of just administrative action and therefore the performance of the powers of the executive authority to tax needs to be lawful, reasonable and procedurally fair. If administrative action taken by SARS and its delegated officials does not comply with the standard of lawful, reasonable and procedurally fair, such administrative action is reviewable. The grounds for judicial review set out in s6 of PAJA are applicable in the tax arena and therefore a taxpayer would have to institute judicial review based upon a ground set out in s6 of PAJA.

Under the common law and the Interim Constitution a taxpayer would have had to prove that the administrative action taken by SARS and its delegated officials was not "justifiable in relation to the reasons given". Under the Constitution a taxpayer dissatisfied with a decision taken/discretion exercised by SARS and its delegated officials would firstly have to prove that the administrative action fell short of lawful, reasonable and procedurally fair administrative action; and secondly, that a ground as envisaged in s6 of PAJA was applicable. Thus the Constitutional test broadened the ambit of judicial review proceedings.³⁰³

³⁰² The principles set out in Chapter 3 are incorporated herein as if specifically set out.

³⁰³ Pharmaceutical Manufacturers Association of SA: Ex Parte President of the Republic of South Africa 2000 (2) SA 674 (CC) and Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment action campaign and Another as amici curiae) 2006 (2) SA 311 (CC); as cited by Croome, B.J. (2008). Taxpayers' rights in South Africa supra, pp. 147. Croome, B.J. (2010). Taxpayer Rights in South Africa. Cape Town: Juta, at pp. 151, and Currie, I. (2007). The Promotion of Administrative Justice Act: A Commentary. 2nd Second Edition. Cape Town: Siber Ink, pp. 15 to 16.

Prior to SARS and its delegated officials taking a decision/exercising a discretion it must comply with s3 of PAJA. A failure to comply with s3 of PAJA may lead thereto that the administrative action would be procedurally unfair. Similarly SARS and its delegated officials must give adequate reasons for the decisions taken by them as envisaged in s5 of PAJA read together with the Rules promulgated under the ITA and TAA. It needs to be emphasised that the right to reasons is of extreme importance in the tax arena as SARS and its delegated officials must give reasons for decisions taken/discretions exercised upon request by the taxpayer, failure to provide such reasons when requested would result in procedurally unfair administrative action.³⁰⁴

This dissertation will aim to provide the reader with a general summary of tax related matters in which the circumstances have been held to be of such nature as to fall within one or more of the grounds set out in s6 of PAJA, and circumstances which may fall within one of the grounds contemplated in s6 of PAJA.

4.3.5.1 S6(2)(a)

S6(2)(a) of PAJA focuses on the arbitrator.³⁰⁵ In respect of s6(2)(a)(i) of PAJA, if SARS and its delegated officials take decisions/exercise discretions which go beyond the powers which are conferred upon them in terms of the empowering legislation, this ground would be applicable. An example of a tax related matter where this ground for review was applicable is *CSARS v Hawker Aviation Service Partnership & Others 2005 (5) SA 283 (T)*, in which CSARS acted beyond its powers by levying an additional tax of 300% where the statute limits same to 200% and was found to be a ground in terms of s6(2)(a) of PAJA.

If an official of SARS who was not delegated with the power to take decisions/exercise discretions, and the power was merely provided to CSARS which did not delegate the power to such official, s6(2)(a)(ii) would be applicable.

³⁰⁴ The full scope of argument in respect of the taxpayers' right to reasons from SARS and its delegated officials fall outside the ambit of this dissertation.

³⁰⁵ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 157.

There has been some controversy in respect of a perception of biasness amongst SARS and its delegated officials. Croome warns that:

“There is a perception amongst many taxpayers that the Commissioner’s officials take their decisions because they receive incentives bonuses based on the value of additional income assessed to income tax or VAT.”³⁰⁶

The correctness of this averment falls outside the ambit of this dissertation, but if this were correct, then it should constitute a form of bias under s6(2)(a)(iii) of PAJA, and therefore, in order to prevent this sort of perception of bias, SARS and its delegated officials should take precautionary measures to ensure that the manner in which it evaluates its officials’ performance is not dependant on the quantum of taxes assessed or collected.³⁰⁷ If a decision was taken by SARS and its delegated officials, and the person who took the decision/exercised the discretion is biased or reasonably suspected of bias, s6(2)(a)(iii) would be applicable.

Based on the case law, if SARS and its delegated officials provide the taxpayer with an extremely limited period of time to respond to any allegation by SARS and its delegated officials, such limited opportunity may be construed as a form of bias against the taxpayer,³⁰⁸ and similarly, if the person who took the decision has a pecuniary interest in the outcome of the matter, or any other interest which could impair his objectivity, such a decision would fall within the ground of s6(a)(iii) of PAJA.

4.3.5.2 S6(2)(c)

In *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd*; *Commissioner of Customs and Excise v Rennies Group Ltd t/a Renfreight* 1999 (3) SA 771 (SCA), the court

³⁰⁶ Croome, B.J. (2008). *Taxpayers’ rights in South Africa supra*, pp. 190 and Croome, B.J. (2010). *Taxpayer Rights in South Africa*. Cape Town: Juta, pp. 233. In support of the aforesaid Croome cites an article: Hagen, H. *The Taxman’s Huge Bonus Uproar*. The Citizen (20 July) 2001. Croome further relies on discussions he had with senior officials of SARS during March 2006.

³⁰⁷ Croome, B.J. (2010). *Taxpayer Rights in South Africa*. Cape Town: Juta, at pp. 233.

³⁰⁸ *Goldfields Ltd v Connellan No & Others* [2005] 3 All SA 1442 (W), as cited by Croome, B.J. (2010). *Taxpayer Rights in South Africa*. Cape Town: Juta, pp. 167 to 169.

found that SARS and its delegated officials acted in an unreasonable and unfair manner and therefore set its decision aside and held that:

"I cannot imagine that the intention was to do away with this type of review. No doubt administrative action which is not in accordance with the behests of the empowering legislation is unlawful and therefore unconstitutional, and action which does not meet the requirements of natural justice is procedurally unfair and therefore equally unconstitutional. But, although it is difficult to conceive of a case where the question of legality cannot ultimately be reduced to a question of constitutionality, it does not follow that the common-law grounds for review have ceased to exist.

What is lawful and procedurally fair within the purview of s 24 is for the Courts to decide and I have little doubt that, to the extent that there is no inconsistency with the Constitution, the common-law grounds for review were intended to remain intact. There is no indication in the interim Constitution of an intention to bring about a situation in which, once a Court finds that administrative action was not in accordance with the empowering legislation or the requirements of natural justice, interference is only permissible on constitutional grounds.

On the contrary, s 35(3) is a strong indication that it was the intention, not to abolish any branch of the common law, but to leave it to the Courts to bring it into conformity with the spirit, purport and objects of the Bill of Rights. Section 33(3), which proclaims that the entrenchment of rights shall not be construed as denying the existence of any other rights conferred by common law which are not inconsistent with the Bill of Rights, points the same way.³⁰⁹

In *Trend Finance (Pty) Ltd and Another v Commissioner for South African Revenue Service and Another* [2005] 67 SATC 334 SARS and its delegated officials failed to allow the taxpayer to make representations before taking its decision on forfeiture, and the court held that it had acted unfairly.

³⁰⁹ At pp. 786 para 20.

4.3.5.3 S6(2)(d)

S6(2)(d) of PAJA is applicable if SARS or its delegated officials take decisions/exercise discretions which amount to an error in law (deliberate or erroneous), which is not justifiable on the facts.

4.3.5.4 S6(2)(e)

In respect of s6(2)(e)(i) to (vi), these grounds are relevant to the motive or purpose which is used when taking the decisions, or whether irrelevant facts are considered and relevant factors are ignored, or where SARS and its delegated officials take a decision merely upon unwarranted dictations of another unauthorised person or body, or the decision is taken in bad faith or arbitrarily, or capriciously (fraud or dishonest decisions taken or abuse of powers from an honest mistake), or is unreasonable.

4.3.5.5 S6(2)(f)

If SARS and its delegated officials take decisions/exercise discretions which are not empowered by the empowering provision or are contrary to any other law besides that of the empowering provision, s6(2)(f)(i) of PAJA is applicable. If the decision taken/discretion exercised is not rationally connected to the purpose for which it was taken, the purpose or the empowering provisions, the information available to SARS and its delegated officials, then s6(2)(f)(ii) of PAJA is applicable. This ground of review ties up with the principle that SARS and its delegated officials are creatures of statute and are therefore restricted by legislation in their powers, and if they do not obtain a specific power from empowering provisions they have no authority to act.

4.3.5.6 S6(2)(g)

If SARS and its delegated officials are conferred with a power to take decisions/exercise discretions and if they fail to do so within either the period of time provided for by the empowering provision or within a reasonable time, s6(2)(g) of PAJA is applicable. In respect of s6(2)(g) of PAJA, Croome comments that if SARS and its delegated officials unreasonably

delay the payment of refunds, such inaction is an example of a review under s6(2)(g) of PAJA.³¹⁰

4.3.5.7 S6(2)(h)

If the decision taken/discretion exercised by SARS and its delegated officials is not one which the reasonable decision-maker taking a justifiable decision would take, then s6(2)(h) of PAJA is applicable. Croome states that “*PAJA requires that the official seriously and properly consider the taxpayer’s representations and not call for facts that he intends to disregard.*”³¹¹ In respect of s6(2)(h) of PAJA, Croome comments that,

*“Where a taxpayer can show that the decision made by the Commissioner bears no relation to the facts under consideration a court should set such a decision aside. PAJA requires that the official seriously and properly consider the taxpayer’s representations and not call for facts that he intends to disregard.”*³¹²

Regard can also be given to *Crown Mines Ltd v CIR* 1922 AD 91 at pp 101 in respect of unreasonableness as a ground for review.³¹³

4.3.5.8 S6(2)(i)

S6(2)(i) of PAJA stipulates that administrative action would be reviewable if the action is otherwise unconstitutional or unlawful. In respect of s6(2)(i) of PAJA, Croome concludes that,

*“the provision thus seeks to extend the reach of the taxpayer’s rights to review. I support this interpretation because it gives effect to the constitutional right to administrative justice contained in s33.”*³¹⁴

³¹⁰ Croome, B.J. (2010). *Taxpayer Rights in South Africa*. Cape Town: Juta, pp. 235.

³¹¹ Croome, B.J. (2008). *Taxpayers’ rights in South Africa* supra, pp. 194.

³¹² Croome, B.J. (2008). *Taxpayers’ rights in South Africa* supra, pp. 194.

³¹³ As cited by Meyerowitz, D. (2002/2003). *Meyerowitz on Income Tax*. The Taxpayer. Cape Town, at pp. 34-21.

In closing, if SARS and its delegated officials do not comply with the standard of lawful, reasonable and procedural fairness and a ground envisaged in s6 of PAJA is applicable, then PAJA, and in particular the remedy of judicial review, can be enforced.

4.4 Conclusion

The executive authority to tax is vested in SARS and its delegated officials which are thus conferred with the powers to take decisions/exercise discretions by virtue of empowering provisions. SARS and its delegated officials' powers are wide as it must provide for the administration, implementation, enforcement and collection of taxes. Taxpayers' rights and government's power to tax must however be balanced to obtain an equal relationship. Therefore the Constitution confers taxpayers with various taxpayer rights.

SARS and its delegated officials' powers are subject to the Constitution. Taxpayers are conferred with the right of just administrative action in terms of s33 of the Constitution. Taxpayers are further conferred with remedies which they may implement to protect their taxpayers' rights. As SARS and its delegated officials derive their powers from three types of empowering provisions, each empowering provision must be analysed to determine the taxpayers' remedies available there under.

Type 1 empowering provisions provide for the remedy of objection and appeal. This remedy however pertains to the correctness of a decision taken/discretion exercised by SARS and its delegated officials and do not assist taxpayers in respect of dissatisfaction with the manner in which the decisions/discretions were taken/exercised. Type 2 and 3 empowering provisions do not provide for the remedy of objection and appeal.

In respect of all three types of empower provisions, the remedy of judicial review is not mentioned. PAJA however provides for the remedy of judicial review in general and therefore, if the taxpayer can prove compliance with PAJA the remedy of judicial review is applicable and enforceable in respect of all types of empowering provisions. The substantive requirement which needs to be satisfied for the right of just administrative action and remedy of judicial review to be applicable and enforceable are:

³¹⁴ Croome, B.J. (2008). Taxpayers' rights in South Africa *supra*, pp. 195.

- SARS and its delegated officials must qualify as an administrator in terms of PAJA;
- SARS and its delegated officials' decisions taken/discretions taken, must constitute "administrative action" as defined in PAJA;
- The "administrative action" taken/exercised by SARS and its delegated officials must materially and adversely affect taxpayer's rights or legitimate expectations and have a "direct, external legal effect";
- The "administrative action" taken/exercised by SARS and its delegated officials must not be "lawful, reasonable and procedurally fair" and a ground as contemplated in s6 of PAJA must be applicable.

Once the above has been determined satisfactory, then the taxpayer would have to ensure that the procedural requirements for the applicability of the right of just administrative action and remedy of judicial review under PAJA is satisfied and will further have to determine the forum having jurisdiction to adjudicate upon judicial review in the tax arena.³¹⁵

³¹⁵ This is discussed in Chapter 5.

CHAPTER 5: THE PROCEDURAL REQUIREMENTS FOR JUDICIAL REVIEW AND THE FORUM HAVING JURISDICTION TO ADJUDICATE UPON JUDICIAL REVIEW IN TAX MATTERS

5.1 Introduction

SARS and its delegated officials are responsible to perform the executive authority in respect of tax and perform same by exercising the powers conferred on it to take decisions/exercise discretions in terms of empowering provisions.³¹⁶ These powers are limited by the taxpayers' right of just administrative action which is enforced by virtue of the remedy of judicial review.³¹⁷

To successfully rely on judicial review, taxpayers must prove compliance with the substantive and procedural requirements for judicial review.³¹⁸ The substantive requirements for the applicability and enforceability of the right of just administrative action and remedy of judicial review in the tax arena have previously been dealt with.³¹⁹ The procedural requirements for judicial review will be dealt with in this Chapter.³²⁰

After it is determined that the substantive and procedural requirements have been complied with the forum having the necessary jurisdiction to adjudicate upon judicial review, in particular in respect of tax related matters, must be determined. Currently this is a controversial topic.

This Chapter will aim to determine which forum has the necessary jurisdiction to adjudicate upon judicial review in the tax arena, in respect of type 2 empowering provisions. To achieve this, the applicable law will be analysed, including the right to access of court, provided in

³¹⁶ See Chapters 2, 3 and 4 above.

³¹⁷ See Chapters 2, 3 and 4 above.

³¹⁸ See Chapters 3 and 4 above.

³¹⁹ See Chapter 3 and 4 above.

³²⁰ S7 of PAJA.

s34 of the Constitution, and the provisions of PAJA, the ITA and the TAA. The reader is again reminded that this dissertation is based on the position existing as at 1 October 2012, prior to the provisions of the TAA coming into force and effect. Thus the applicable provisions of the TAA are only mentioned, but will not be discussed.

5.2 Access to courts

S34 of the Constitution confers the right of access to courts upon taxpayers and stipulates:

“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.”

In *Bernstein and Others v Bester and Others NNO 1996 (2) SA 751 (CC)*, the court interpreted s22 of the Interim Constitution (the equivalent of s34 of the Constitution) and held that:

“When s 22 is read with s 96(2), which provides that '(t)he Judiciary shall be independent, impartial and subject only to this Constitution and the law', the purpose of s 22 seems to be clear. It is to emphasise and protect generally, but also specifically for the protection of the individual, the separation of powers, particularly the separation of the Judiciary from the other arms of the State.

Section 22 achieves this by ensuring that the courts and other fora which settle justifiable disputes are independent and impartial. It is a provision fundamental to the upholding of the rule of law, the constitutional State, the 'regstaatidee', for it prevents legislatures, at whatever level, from turning themselves by acts of legerdemain into 'courts'.

One recent notorious example of this was the High Court of Parliament Act. By constitutionalising the requirements of independence and impartiality the section places the nature of the courts or other adjudicating fora beyond debate and avoids the dangers alluded to by Van den Heever JA in the Harris case.”³²¹

Chaskalson *et al.* describe the right of access to courts as “another right of administrative justice.”³²² Croome concurs with the above as it is so reflected by the fact that taxpayers may utilise the remedy of judicial review in terms of PAJA in respect of decisions taken/discretions exercised by SARS and its delegated officials.³²³ Croome argues that s34 of the Constitution is applicable when taxpayers challenge the Constitutional validity of fiscal legislation or enforce the remedy of judicial review against the decision taken/discretion exercised by SARS and its delegated officials.³²⁴

5.3 PROCEDURAL REQUIREMENTS IN RESPECT OF JUDICIAL REVIEW

Prior to commencing with judicial review certain procedural requirements, regulated by the Constitution and PAJA, are to be complied with. S7 of PAJA deals with the procedural requirement and reads:

“7 Procedure for judicial review

(1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-

³²¹ See pp. 804 para 105.

³²² Chaskalson, M. *et al.* (2006). *Constitutional Law of South Africa*, at pp. 23 -25 para 25.10.

³²³ Croome, B.J. (2008). Taxpayers' rights in South Africa, *supra* pp. 220.

³²⁴ Croome, B.J. (2008). *Taxpayers' rights in South Africa supra*, pp. 221 referring to De Waal, J. *et al.* (2001). *The Bill of Rights Handbook*. Fourth Edition. Cape Town: Juta and Co Ltd, at pp. 555 para 31.2, and Corder, H. & Van der Vijver, L. (2002). *Realising Administrative Justice*, at pp. 98.

- (a) *subject to subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or*
 - (b) *where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.*
 - (2)
 - (a) *Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.*
 - (b) *Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.*
 - (c) *A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.*
 - (3) *The Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act 107 of 1985), must, before 28 February 2009, subject to the approval of the Minister, make rules of procedure for judicial review.*
- [Sub-s. (3) substituted by s. 27 (a) of Act 55 of 2003 and by s. 29 of Act 66 of 2008.]*
- (4) *Until the rules of procedure referred to in subsection (3) come into operation, all proceedings for judicial review under this Act must be instituted in a High Court or another court having jurisdiction.*

[Sub-s. (4) substituted by s. 27 (b) of Act 55 of 2003.]

- (5) *Any rule made under subsection (3) must, before publication in the Gazette, be approved by Parliament.*”

The procedural requirements can be summarised as: (a) A time limitation in which judicial review proceedings must commence with;³²⁵ (b) the exhaustion of all available internal remedies prior to the commence of judicial review proceedings (unless there are exceptional circumstances);³²⁶ (c) that Rules regulating proceedings in terms of PAJA be established and determination of Rules which will regulate judicial review proceedings until new Rules are promulgated.³²⁷ Each procedural requirement will, in short, be dealt with hereunder.

5.3.1 *Locus standi to institute judicial review*

PAJA is silent on who has *locus standi*.³²⁸ S6(1) of PAJA provides that “any person may...”. Currie argues that as PAJA was enacted to give effect to the right of just administrative action, which is a Constitutional matter and therefore it is implied that the standing clause of the Bill of Rights, s38 of the Constitution, be read into PAJA.³²⁹ *Locus standi* under s38 of the Constitution is wider than under the common law.³³⁰ A taxpayer who satisfies the substantive requirement to have a right which was adversely affected, would undoubtedly have *locus standi* to commence with judicial review.

5.3.2 *Time limitations*

S7(1) of PAJA requires that a taxpayer must commence with judicial review proceedings within 180 days of becoming aware of the administrative action and the reasons therefore. This requirement is stricter than the common law requirement, which merely provided that

³²⁵ S7(1) of PAJA.

³²⁶ S7(2) of PAJA.

³²⁷ S7(3), 7(4) and 7(5) of PAJA.

³²⁸ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 179.

³²⁹ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 179.

³³⁰ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 180. Under the Common law a litigant must have an interest in the subject matter of litigation and an interest by another is not sufficient, whereas s38 of the Constitution includes direct and indirect interests and not only personal interests but also that of another.

judicial review proceedings be commenced with within a reasonable time. If 180 days have already lapsed, a taxpayer may still employ the provisions of s9 of PAJA which provides for the extension of the 180 day period in certain circumstances.³³¹ Currie is of the opinion that s7(1) of PAJA, in essence, limits s33 of the Constitution and is thus open to Constitutional challenges.³³²

5.3.3 Exhaustion of available internal remedies

Under common law, courts refrained from adjudicating upon judicial review unless all available internal remedies were first exhausted.³³³ S7(2) of PAJA now regulates the requirement of the exhaustion of available internal remedies prior to the commencement with judicial review. S7(2)(a) and (b) of PAJA contain a general requirement that prior to judicial review being commenced with, all available internal remedies need to be exhausted. The general rule does not exclude judicial review; it merely has the effect of deferring the time which judicial review may be brought to a later time.³³⁴ S7(2)(c) of PAJA caters for an exception to the general rule, and stipulates that all available internal remedies need not be exhausted if exceptional circumstances are present and it is in the interests of justice.

5.3.3.1 Definition of internal remedy

PAJA lacks a definition of “internal remedy”. Currie argues that an internal remedy can be defined as a remedy provided by law, other than provided by PAJA or per contract, against administrative action other than judicial review.³³⁵

³³¹ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 182 and 183. Hoexter, C. (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 534 to 538.

³³² Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 41. Writer could not find any reported case in which these sections have been found unconstitutional.

³³³ See Baxter, L. (1984 reprinted in 1991). *Administrative Law*, at pp. 720, according to Croome, B.J. (2008). *Taxpayers' rights in South Africa supra*, pp. 220.

³³⁴ Hoexter, C (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 538.

³³⁵ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 184.

De Ville comments that an internal remedy is only a remedy referred to by statute, and if only an appeal lay to a Special Court, the High Court could be approached without having to first appeal to the Special Court.³³⁶

5.3.3.2 *Content of exceptional circumstances in the interest of justice as provided in s7(2)(c) of PAJA*

S7(2)(c) of PAJA stipulates that if it is proved that exceptional circumstances are present and it will be in the interests of justice, the general rule that all available internal remedies to be exhausted prior to the commencement of judicial review is not applicable in the circumstances.³³⁷ It must be established what constitutes exceptional circumstances. PAJA does not provide a definition for exceptional circumstances. The principles laid down by case law in this regard provide guidelines as to what would constitute exceptional circumstances.

The yardstick for exceptional circumstances has been said to be that the immediate intervention of the courts, rather than employing the internal remedies, must be necessary and in the interests of justice and that these exceptional circumstances have preferably existed prior to the commencement of review proceedings.³³⁸

Factors which may be considered when determining whether circumstances constitute exceptional circumstances are:

- The availability, effectiveness and adequacy of the existing internal remedies,³³⁹

³³⁶ De Ville, J.R. (2006 revised first edition reprint). *Judicial Review of Administrative Action in South Africa*. Durban: Lexis Nexis Butterworths, pp. 466, referring to *Metcash Trading Ltd v Commissioner, SARS 2001 (1) SAS 1109 CC* para 32 to 48.

³³⁷ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 185.

³³⁸ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 185.

³³⁹ *Koyobe v Minister for Home Affairs* 2010 (4) SA 327 (CC), as cited by Hoexter, C (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 542. Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 186 and fn 38 and 39.

- The likelihood that the internal remedy would be tainted by the irregularity which would be the subject of the review proceedings;³⁴⁰
- Whether the circumstances are of such nature that the immediate intervention by courts, rather than the resort to available internal remedies are justified.³⁴¹

It has been held that when determining whether exceptional circumstances are present, the court must “ensure that the possibility of duplicate or contradictory relief is avoided”.³⁴² Thus circumstances in which an internal remedy would be ineffective and/or the pursuit thereof would be futile, exceptional circumstances may exist for the courts to permit litigants to approach the court directly.³⁴³ In this regard it has been held that circumstances in which the administrator showed bias against the litigant, which would result therein that the exhaustion of all internal remedies first would serve no purpose, constitutes exceptional circumstances.³⁴⁴

It will be discussed below that there are writers who argue, regarding the general procedural requirement, that all available internal remedies must first be exhausted prior to judicial review being commenced with is unconstitutional as it limits the Constitutional right of access to courts. In light of this argument, Currie is of the view that the exemption provisions of s7(2)(c) of PAJA should “*be interpreted and applied generously*”.³⁴⁵

³⁴⁰ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 186 and fn 38 and 39.

³⁴¹ *Nichol v Registrar of Pension Funds* 2008 (1) SA 383 (SCA), para 16, as cited by Hoexter, C (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 541, also referring to *R v Secretary of State for the Home Department, ex parte Swati* [1986] 1 All ER 717 (CA), pp. 724 a-b.

³⁴² *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs & Tourism & Others* 2004 (4) SA 490 (CC), at par 17. Also see Croome, B.J. (2008). *Taxpayers’ rights in South Africa* supra, pp. 196.

³⁴³ *Koyobe v Minister for Home Affairs* 2010 (4) SA 327 (CC), as cited by Hoexter, C. (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 542.

³⁴⁴ *Goldfields Ltd v Connellan No & Others* [2005] 3 All SA 1442 (W).

³⁴⁵ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 184, relying on the judgment of *Earthlife Africa (Cape Town) v Director-General: Department of Environment Affairs and Tourism* 2005 (3) SA 156 (C) at para 44. De Ville, J.R. (2006 revised first edition reprint). *Judicial Review of Administrative Action in South Africa*. Durban: Lexis Nexis Butterworths, pp. 467.

De Ville analyses the arguments for and against the Constitutionality of s7(2) of PAJA and is of the view that the section would not likely be declared unconstitutional.³⁴⁶

5.3.3.3 Procedural requirement of exhaustion of internal remedies in tax arena

It is first necessary to determine what internal remedies are available in respect of tax matters. As dealt with in previous chapters there are three empowering provisions which confer SARS and its delegated officials with powers to take administrative action.

In respect of type 1 empowering provisions, the remedy of objection and appeal is available. In respect of type 2 empowering provisions, the remedies of objection and appeal are not expressly included or excluded. In respect of type 3 empowering provisions, the remedies of objection and appeal are expressly excluded.

The question is whether objection and appeal procedures constitute internal remedies in respect of judicial review procedures. The distinction between appeals and review proceedings are relevant in this respect. Appeals are concerned with a challenge to the merits/correctness of a particular decision, whereas a review “*tests the legality and not the merits of the decision*”³⁴⁷ and are thus concerned with the manner in which the decision was made and not the justice or correctness of the decision itself.

In respect of type 2 and 3 empowering provisions, no remedies of objection and appeal are available to enforce and therefore cannot constitute internal remedies. Croome is of the view that the initial stages of the remedy in respect of objections may constitute internal procedures as envisaged in s7 of PAJA, but once an objection is disallowed, a taxpayer must proceed by way of appeal procedure to the Tax Court, and according to Croome, that procedure does not constitute an internal remedy as envisaged in s7 of PAJA.³⁴⁸ This is only applicable in respect of type 1 empowering provisions.

³⁴⁶ De Ville, J.R. (2006 revised first edition reprint). *Judicial Review of Administrative Action in South Africa*. Durban: Lexis Nexis Butterworths, pp. 467 to 471.

³⁴⁷ Hoexter, C. (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 65.

³⁴⁸ Croome, B.J. (2010). *Taxpayer Rights in South Africa*. Cape Town: Juta, pp. 237.

Croome points out that it would have been preferable if there was another low cost forum to which the taxpayer could turn before having to proceed to the courts.³⁴⁹ In this respect Croome points out that during 2008 and 2010 SARS and its delegated officials had not yet created an internal forum to consider reviews of decisions taken, as envisaged in PAJA.³⁵⁰ Croome argues that from SARS and its delegated officials' point, prior to matters proceeding to the Tax Court, SARS' Tax Appeal Committee reviews the matter and decides whether SARS should settle, refer the matter to the Tax Court, or proceed with Alternative Dispute Resolution ("ADR") proceedings.³⁵¹ If taxpayers want to challenge the decisions taken by SARS and its delegated officials under PAJA, taxpayers may utilise the procedures contained in the Act.³⁵²

In general Croome is of the opinion that in tax-related matters a taxpayer would be able to proceed immediately to the High Court to adjudicate upon judicial review, without first enforcing objection and appeal procedures internally and to the Tax Court.³⁵³ In light of the case law pertaining to the factors to be considered to determine whether the provisions of s7(2)(c) of PAJA are applicable, it seems that taxpayers would be able to rely thereon that s7(2)(c) of PAJA is applicable in circumstances where bias by SARS and the Commissioner form the grounds of review.

Recently on 1 October 2012, after Croome's book was published, the provisions of the TAA have come into force and effect which provide that the Tax Ombud be established. S14 of the TAA confers the Minister with the power to appoint a person as the Tax Ombud. S14 of the TAA further deals with procedural aspects. S15 to s21 of the TAA set out the powers and duties of the Tax Ombud.

³⁴⁹ Croome, B.J. (2008). *Taxpayers' rights in South Africa*, supra, pp. 197.

³⁵⁰ Croome, B.J. (2008). *Taxpayers' rights in South Africa* supra, pp. 196 to 197. In footnote 343 Croome states that: "This is apparent from correspondence between the writer and the Commissioner in relation to a variety of tax matters. Furthermore, the Commissioner consulted with GTZ, a German non-governmental organisation, and a leading law firm over how PAJA affects the Commissioner and what procedures have been introduced to comply with PAJA. It appears that the Commissioner is more concerned about the fairness of decisions relating to objections and appeals than that of his more general decisions."

³⁵¹ Croome, B.J. (2008). *Taxpayers' rights in South Africa*, supra, pp. 196 to 197.

³⁵² Croome, B.J. (2008). *Taxpayers' rights in South Africa*, supra, pp. 196 to 197.

³⁵³ Croome, B.J. (2008). *Taxpayers' rights in South Africa*, supra, pp. 197, bases this opinion partially on advice obtained from a senior counsel.

The mandate of the Tax Ombud is to:

*“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.”*³⁵⁴

It thus seems that the TAA has attempted to establish a low cost forum which could adjudicate upon the review before the matter goes to the courts for the adjudication of judicial review. The question which arises is whether the Tax Ombud will constitute an available internal remedy in terms of s7(2) of PAJA, which taxpayers first need to comply with prior to commencing judicial review. Firstly, it must be said that although, academically speaking, the Tax Ombud seems to constitute an available internal remedy, practically it is not yet such as no one has yet been appointed to hold the office of the Tax Ombud.³⁵⁵ In future, once it has been practically equipped to perform its functions, powers and duties, this may become a very relevant aspect to consider in respect of the requirements of s7 of PAJA pertaining to the exhaustion of all available internal remedies.³⁵⁶

5.3.3.4 *Controversial issue and contradictory opinions thereon*

This procedural requirement is a controversial topic and has been the subject-matter of a great number of judgments and academic opinions. Some writers are of the opinion that the procedural requirement under PAJA is a considerable reform from the common law principles.³⁵⁷ Plasket is of the opinion that this procedural requirement is unconstitutional in light of s34 of the Constitution; alternatively, if not unconstitutional it is, “*ill-conceived, unfair, impractical and ought to be reconsidered by the legislature*”, and bases his opinion thereon that this procedural requirement places an onerous burden on the enforcement of the

³⁵⁴ S16(1) of the TAA.

³⁵⁵ S259 of the TAA provide that a Tax Ombud must be appointed by the Minister of Finance within one year of the commencement of the TAA.

³⁵⁶ De Koker, A. *et al.* (2012). *Silke on the South African Income Tax Act*. Service 44. Durban: Lexis Nexis, pp. 18 – 13.

³⁵⁷ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 183; and Plasket, C. (2002). The exhaustion of internal remedies and s7(2) of the Promotion of Administrative Justice Act 3 of 2000. 119 SALJ 50.

Constitutional right to just administrative action and curtails the power of the courts to review administrative action prior to all available internal remedies being exhausted.³⁵⁸

This opinion seems to give effect to the well-known principle that the courts must only interfere with administrative action if not exercised in a *bona fide* manner, not properly applying its mind, and or being contrary to statutory provisions or other decisions of competent courts of law.³⁵⁹ Currie supports the interpretation that the provisions of s7(2) of PAJA, in essence, limits s33 of the Constitution and is thus open to Constitutional challenges.³⁶⁰ Croome argues that the procedural requirement of s7(2) of PAJA may violate taxpayers' Constitutional rights to just administrative action and access to courts respectively.³⁶¹

Our courts have, however, held that s7(2) of PAJA is valuable and necessary because it prevents the undermining of the autonomy of the administrative process and provides that matters be finalised in a more cost effective manner.³⁶²

5.4 Rules regulating procedures to be followed

S7(3) and s7(5) of PAJA required that Rules for Procedure for Judicial Review were to be approved by the Parliament Rules Board for Courts of Law³⁶³, the Minister and Parliament, be published in the Government Gazette (after approval), and promulgated before 28 February 2009.

³⁵⁸ Plasket, C. (2002). The exhaustion of internal remedies and s7(2) of the Promotion of Administrative Justice Act 3 of 2000. 119 SALJ 50. De Koker, A. *et al.* (2012). *Silke on the South African Income Tax Act*. Service 44. Durban: Lexis Nexis, pp. 22 – 52.

³⁵⁹ Chapter 4 above citing De Koker, A. *et al.* (2010). *Silke on the South African Income Tax Act*. Durban: Lexis Nexis, at pp. 18 – 70 – 1 referring to *Shidiack v Union Government* 1912 AD 642; *CIR v City Deep Ltd* 1924 AD 298, 1 SATC 18 and *Rand Ropes (Pty) Ltd v CIR* 1944 AD 142, 13 SATC 1 at pp. 9.

³⁶⁰ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 41. The researcher could not find any reported case in which these sections have been found unconstitutional.

³⁶¹ Croome, B.J. (2008). *Taxpayers' rights in South Africa*, *supra*, pp. 198. Also see Plasket, C. (2002). The exhaustion of internal remedies and s7(2) of the Promotion of Administrative Justice Act 3 of 2000. 119 SALJ 62.

³⁶² *Koyobe v Minister for Home Affairs* 2010 (4) SA 327 (CC) at para 36-8, as cited by Hoexter, C (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 539.

³⁶³ Established by s2 of the Rules Board for Courts of Law Act 107 of 1985.

These rules were to supplement the procedural requirements of s7 of PAJA and would regulate the procedures followed when commencing and adjudicating judicial review proceedings.³⁶⁴

In the meantime, until such time as Rules had been promulgated in terms of s7(3) read together with s7(5) of PAJA, s7(4) of PAJA provided that judicial review had to be instituted in the High Court or another court having jurisdiction; which by implication meant that the Rules of the Supreme Court pertaining to review, in particular Rule 53, would regulate the procedures to be followed when commencing and adjudicating judicial review proceedings.

To date no Rules have been promulgated under s7(3) read together with s7(5) of PAJA, and therefore currently the Supreme Court Rules pertaining to reviews, in particular Rule 53, read together with s7 of PAJA, regulates the procedures to be followed when commencing and adjudicating judicial review proceedings.³⁶⁵

It also needs to be said that in tax matters, the procedure to be followed for judicial review of tax matters becomes more controversial. Some writers and case law provide authority for the position that the formal procedure to be followed by taxpayers to implement judicial review would be similar to the formal proceedings provided by the remedies of objection and appeal.³⁶⁶

³⁶⁴ S7(3) read together with s7(5) and s10 of PAJA, as cited by Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 177 and 178.

³⁶⁵ This dissertation does not aim to set out all the current procedural requirements but only aims to provide a concise summary of the procedural requirements which are the most controversial. It must, however, be pointed out that in GN R966 GG 32622 of 9 October 2009 Rules of Procedure for Judicial Review of Administrative Action were published but these Rules have to date not been promulgated. Hoexter, C. (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 525 to 531.

³⁶⁶ *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk 1985 (2) SA 668 (T)*, as cited by Clegg, D. & Stretch, R. (March 2012). *Income Tax in South Africa*. Volume 1A. Durban: LexisNexis, at pp. 27.36 and 27-54(2), and Meyerowitz, D. (2002/2003). *Meyerowitz on Income Tax*. The Taxpayer. Cape Town Even in the circumstances where type 2 empowering provisions do not expressly provide for the formal procedures of objection and appeal procedures to be proceeded with. In Meyerowitz, D. (2002/2003). *Meyerowitz on Income Tax*. The Taxpayer. Cape Town at pp. 34-22. Meyerowitz states that he is of the opinion that it seems that if the taxpayer chooses to proceed with a judicial review of the decision taken and/or discretion exercised by SARS and its delegated officials in terms of an empowering decision which is not subject to objection and appeal procedures, such a taxpayer would have to follow a similar procedure as envisaged in the objection and appeal procedures

As will be discussed hereinafter, the writers and case law supporting this view support the position that the Tax Court has jurisdiction to adjudicate upon judicial review in tax matters. In *ITC 1527 (1991) 54 SATC 227* Melamet J had recommended that a proper procedure be introduced and laid down for matters taken on review to the Tax Court.³⁶⁷

5.5 Forum having jurisdiction to adjudicate upon judicial review

Originally, under the common law, judicial review was reserved for adjudication by the courts; in particular the superior courts. Currently the Constitution, read together with PAJA, regulate the procedures and requirements for the remedy of judicial review. An analysis of the Constitution and PAJA's provisions in this respect is necessary.

PAJA provides that a court or tribunal may adjudicate upon judicial review proceedings.³⁶⁸

S1 of PAJA defines a "court" as

"(a) the Constitutional Court acting in terms of section 167 (6) (a) of the Constitution; or

(b) (i) a High Court or another court of similar status; or

(ii) a Magistrate's Court, either generally or in respect of a specified class of administrative actions, designated by the Minister by notice in the Gazette and presided over by a magistrate or an additional magistrate designated in terms of section 9A,

Within whose area of jurisdiction the administrative action occurred or the administrator has his or her or its principal place of administration or the party

in order to avoid an assessment from becoming final and binding in terms of section 81(5) of the ITA.

³⁶⁷ As cited in Clegg, D. & Stretch, R. (March 2012). *Income Tax in South Africa*. Volume 1A. Durban: Lexis Nexis, at pp. 27 – 54(1), and De Koker, A. *et al.* (2010). *Silke on the South African Income Tax Act*. Durban: Lexis Nexis, at pp. 18 – 71.

³⁶⁸ S6 and s8 of PAJA.

whose rights have been affected is domiciled or ordinarily resident or the adverse effect of the administrative action was, is or will be experienced.”

S1 of PAJA defines Tribunal as, “any independent and impartial tribunal established by national legislation for the purpose of judicially reviewing an administrative action in terms of this Act”.

Upon interpretation of the above, it is clear that the legislature envisaged that ultimately the adjudication of judicial review proceedings would not be reserved merely for adjudication by High Courts and courts with similar status, but also by certain designated Magistrate’s Courts and non-judicial tribunals (to be established).³⁶⁹ The purpose thereof would be to ensure that judicial review proceedings are more accessible and cost effective.³⁷⁰

Despite the provisions in the definition of “court”, providing that Magistrate Courts be designated to adjudicate upon judicial review proceedings, and despite the provisions requesting the national legislation to enact legislation creating a tribunal to adjudicate upon judicial review proceedings, to date no Magistrate’s Courts have been designated for this purpose and no legislation or regulations have been promulgated to establish a tribunal to adjudicate upon judicial review proceedings.³⁷¹

Furthermore, even if such Magistrate’s Courts or tribunals had been established, s7(3) read together with s7(5) of PAJA, stipulates that Rules have to be promulgated to regulate the procedures in respect of the remedy of judicial review in such Magistrate’s Courts and tribunals. As discussed above, these Rules have not yet been promulgated and the effect thereof is that even if such Magistrate’s Courts or another tribunals had been designated as envisaged above, they would not be able to give effect to such powers of judicial review as the Rules, in terms of which the process in such Magistrate’s Courts or tribunals had to be

³⁶⁹ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp., 154 referring to Hoexter, C. (2007). *Administrative Law in South Africa*. Cape Town: Juta & Co. De Ville, J.R. (2006 revised first edition reprint). *Judicial Review of Administrative Action in South Africa*. Durban: Lexis Nexis Butterworths, pp. 3 and 4.

³⁷⁰ Hoexter, C. (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 64.

³⁷¹ Hoexter, C. (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 64.

regulated, have not yet been promulgated.³⁷² S7(4) of PAJA, however, determines that until Rules are promulgated in terms of s7(3) and 7(5) of PAJA, all judicial review proceedings must be instituted in a High Court or another court having jurisdiction.

If the provisions of PAJA are interpreted in light of what has, to date, been done to enforce the provisions of PAJA, writers are of the opinion that currently the High Court (or court with a similar status) is the only forum having the necessary jurisdiction to adjudicate upon judicial review proceedings, and that the Uniform Rules of the High Court, in particular Rule 53, (read together with the procedural requirements of s7 of PAJA), is applicable and must be followed.³⁷³

Writers further argue that the above position will remain in force until such time as the Rules, as set out in PAJA, are promulgated and Magistrate's Courts are designated with the power to adjudicate upon judicial review proceedings, and/or tribunals are established to adjudicate upon judicial review proceedings.³⁷⁴ When the Rules required by PAJA are promulgated, they would regulate the procedural requirements of all judicial review proceedings in any forum having been conferred with the power to adjudicate judicial review proceedings, and such rules would replace the High Court Rules of review, i.e. Rule 53.³⁷⁵

Thus, currently only the Constitutional Court, High Court and courts with similar status to the High Courts have the necessary jurisdiction to adjudicate upon judicial review proceedings in terms of PAJA.³⁷⁶ Preferably, review proceedings should first be instituted in the High Court and thereafter, if necessary, the matter may proceed to the High Court of Appeal and the Constitutional Court thereafter.³⁷⁷

³⁷² Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 178.

³⁷³ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 178 and 179.

³⁷⁴ De Ville, J.R. (2006 revised first edition reprint). *Judicial Review of Administrative Action in South Africa*. Durban: Lexis Nexis Butterworths, pp. 297.

³⁷⁵ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 178.

³⁷⁶ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 191.

³⁷⁷ Currie I. & Klaaren, J. (2001). *The Promotion of Administrative Justice Act Benchbook*. Cape Town: Siber Ink CC, pp. 183 and 184, paras 7.11 and 7.12.

It must be emphasised that Special Courts may, in circumstances, have the necessary jurisdiction to adjudicate upon judicial review in terms of PAJA, but only if it can be proven that such Special Court has the status of a High Court. An example of a Special Court which has the necessary jurisdiction to adjudicate upon judicial review is the Labour Court as it is considered to have the status of a High Court.³⁷⁸

In passing, it must be pointed out that it may be argued that PAJA limits the Constitutional right of access to courts by providing that judicial review proceedings may only be commenced within the High Courts and that no other forum currently has jurisdiction to adjudicate upon judicial review proceedings.³⁷⁹

5.6 Forum having jurisdiction to adjudicate upon judicial review in the tax arena

The forum having jurisdiction to adjudicate upon judicial review in the tax arena must be determined, and forms the subject-matter of this chapter. In tax matters appeals lie with the Tax Court, being a special court having been established to deal with tax appeals. In tax matters, it is crucial for taxpayers to always ensure the court they approach has jurisdiction in the circumstances. Croome notes that the issue of “*whether a taxpayer may proceed to a court other than the Tax Court because the assessment is so unreasonable that a court should set it aside on review under PAJA*” has not yet been tested.³⁸⁰

This chapter aims to analyse the existing case law and legislation to determine which forum has the necessary jurisdiction to adjudicate upon judicial review in the tax arena. The jurisdiction of the Tax Court, as well as the High Court, will be analysed below. In this regard the jurisdiction of the Tax Court, High Court and Tax Ombud must be analysed.

³⁷⁸ Carephone (Pty) Ltd v Marcus NO 1999 (2) SA 304 (LAC).

³⁷⁹ A full discussion hereof falls outside the ambit of this dissertation.

³⁸⁰ Croome, B.J. (2008). Taxpayers' rights in South Africa, *supra*, pp. 196.

5.6.1 Powers of the Tax Court

The Tax Court was previously known as the “Special Court”. It is necessary to determine the extent of the powers of the Tax Court.

5.6.1.1 General

5.6.1.1.1 Prior to 1 October 2012

The Tax Court was established by s83 of the ITA and is a creature of statute.³⁸¹ It obtained its powers from the empowering provisions of fiscal legislation conferring powers upon it. S83, s83A and s107A of the ITA, read together with the Rules promulgated under s107A of the ITA, regulate the powers and procedures of the Tax Court. Where the rules promulgated under section 107A of the ITA do not expressly cater for certain procedures, the High Court Rules are implemented and will prevail.³⁸²

Section 83(13) of the ITA confers the power to adjudicate upon appeals in the Tax Court and regulates the proceedings. Section 83(13)(c) of the ITA provides that the Tax Court may, in respect of any other decision/discretion of SARS and its delegated officials which is subject to appeal, confirm or amend such decision.

The aforesaid sections do not provide the Tax Court with the express power to review a decision taken and/or discretion exercised by SARS and its delegated officials.

5.6.1.1.2 From 1 October 2012 forward

On 1 October 2012 the provisions of the TAA came into full force and effect. S116 to 132 of the TAA deals with the Tax Court, s116 of the TAA establishes the Tax Court, and s117 of the TAA sets out the jurisdiction of the Tax Court. S264 of the TAA provides that the Tax Court established under the ITA and the rules established under the ITA remain in force and

³⁸¹ *JTLR, Case No VAT 304*, unreported decision by the Pretoria Tax Court, delivered on 7 November 2005 by Southwood J. De Koker, A. et al. (2012). *Silke on the South African Income Tax Act*. Service 44. Durban: Lexis Nexis, pp. 22 – 5.

³⁸² Clegg, D. & Stretch, R. (March 2012). *Income Tax in South Africa*. Volume 1A. Durban: LexisNexis, at pp. 27 – 47.

effect. S103 of the TAA provides that the Minister may, in certain circumstances, make rules governing the procedures for objection and appeal and the conduct of the appeal before the Tax Board or Tax Court. As long as no other rules are however made, the rules under the ITA continue to be of force and effect.

The position from 1 October 2012 onwards falls outside the ambit of this dissertation, but mention will be made where some of its provisions are applicable. The effect of same will not be discussed in detail.

5.6.1.2 Status of Tax Court

S166, s169 and s172 of the Constitution set out the authority conferred upon the judicial system. S172(2)(a) of the Constitution determines that,

“The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.”

Thus the status of a court must be determined to determine the extent of the powers of a specific court. It is thus necessary to determine the status of the Tax Court to establish the extent of its powers. When determining the status of the Tax Court, courts have considered certain factors. Such factors are, *inter alia*:

- The general constitution of the Tax Court, namely a judge (or acting judge) of the High Court as the President of the court, an accountant of not less than ten years' standing and a representative of the commercial community. In business of mining-related matters the third member, if the President, SARS or taxpayer so request, must be a qualified mining engineer.³⁸³

³⁸³ S83(4) read together with s83(4B) of the ITA. Now governed by s118 of the TAA.

- Tax Courts may decide upon all questions of law and decisions as to whether the question constitutes a question of law or fact.³⁸⁴
- The status of a decision of the Tax Court is that it is final and binding, subject to the right of appeal.³⁸⁵
- S85 of the ITA provides Tax Courts with the power to make orders declaring persons in contempt of court and may impose imprisonment or a fine, similar as the power of the High Court.³⁸⁶
- Tax Courts possess the necessary power to make cost orders in accordance with the fees prescribed by the High Court Rules.³⁸⁷
- The High Court Rules are applicable to the Tax Court if the rules promulgated in terms of the regulations provided for in the ITA are not sufficient. In this respect it must be pointed out that prior to the regulations under s107A of the ITA being enacted, the previous legislation regulating the position specifically provided that the Rules of the Magistrate's Court be applicable to the Tax Court.³⁸⁸
- The Tax Court is a court of record.³⁸⁹
- Appeals from the Tax Court lie with the Full Court of the Provincial Division of the High Court or with consent of the President directly to the Supreme Court of Appeal similar as judgments/decision by a single judge of the High Court.³⁹⁰

³⁸⁴ *JTLR, Case No VAT 304*, unreported decision by the Pretoria Tax Court, delivered on 7 November 2005 by Southwood J.

³⁸⁵ Sections 86A and 83(18) of the ITA, as cited by Clegg, D. & Stretch, R. (March 2012). *Income Tax in South Africa*. Volume 1A. Durban: LexisNexis, at pp. 27 – 51.

³⁸⁶ Section 85(2) of the ITA as cited by Clegg, D. & Stretch, R. (March 2012). *Income Tax in South Africa*. Volume 1A. Durban: LexisNexis, at pp. 27 – 52. See s128 of the TAA.

³⁸⁷ *JTLR, Case No VAT 304*, unreported decision by the Pretoria Tax Court, delivered on 7 November 2005 by Southwood J. Clegg, D. & Stretch, R. (March 2012). *Income Tax in South Africa*. Volume 1A. Durban: Lexis Nexis, at pp. 27 – 52. See s130 of the TAA.

³⁸⁸ *JTLR, Case No VAT 304*, unreported decision by the Pretoria Tax Court, delivered on 7 November 2005 by Southwood J. See s264 of the TAA.

³⁸⁹ *JTLR, Case No VAT 304*, unreported decision by the Pretoria Tax Court, delivered on 7 November 2005 by Southwood J. See s116(b) of the TAA.

- The Tax Court is a creature of statute.³⁹¹
- The Tax Court's powers are found in four corners of the Act and the limited powers of the Tax Courts are not comparable with those of the High Court.³⁹²
- The Tax Court has no power to decide on the Constitutionality of an Act of Parliament which is inconsistent with the Constitution.³⁹³
- Recognised income tax textbooks conclude that the Tax Court is an inferior or lower court.³⁹⁴
- Judgments conclude that the Tax Court does not have similar status to the High Court.³⁹⁵
- The Tax Court is a court of first instance whereas the High Court is a court of first and/or second instance.³⁹⁶

³⁹⁰ *JTLR, Case No VAT 304*, unreported decision by the Pretoria Tax Court, delivered on 7 November 2005 by Southwood J. See s133 of the TAA.

³⁹¹ *JTLR, Case No VAT 304*, unreported decision by the Pretoria Tax Court, delivered on 7 November 2005 by Southwood J. See s116 and 117 of the TAA.

³⁹² *JTLR, Case No VAT 304*, unreported decision by the Pretoria Tax Court, delivered on 7 November 2005 by Southwood J.

³⁹³ ITC 1687 62 SATC 474 at 477B-D in which it was held: "It is trite that this court is a "creature of statute" - Commissioner for Inland Revenue v GT Taylor 1934 AD 387 at 390. It is not a court of appeal in the ordinary sense, but a court of revision with powers to investigate the matter before it and to hear evidence thereon - see Bailey v Commissioner for Inland Revenue 1933 AD 204 at 220, Rand Ropes (Pty) Ltd v Commissioner for Inland Revenue 1944 AD 142 at 150 and ITC 743: 18 SATC 294. Notwithstanding the Special Court consisting of a judge of the High Court, an accountant and a representative of the commercial community, it has no inherent jurisdiction such as is possessed by the High Court and can claim no authority which is not laid down in the Income Tax Act under which it is constituted. It is what may referred to as an "inferior or lower court" - see Meyerowitz on Income Tax (1997-1998) para 34.17" and *JTLR, Case No VAT 304*, unreported decision by the Pretoria Tax Court, delivered on 7 November 2005 by Southwood J.

³⁹⁴ *Meyerowitz on Income Tax*, 2004-2005 para 34.20: *Silke on South African Income Tax*, vol. 3 para 18-62-6. *JTLR, Case No VAT 304*, unreported decision by the Pretoria Tax Court, delivered on 7 November 2005 by Southwood J.

³⁹⁵ Commissioner for Inland Revenue v City Deep Limited 1924 AD 298, Bailey v Commissioner for Inland Revenue 1933 AD 204, Rand Ropes (Pty) Ltd v Commissioner for Inland Revenue 1944 AD 142, ITC 1351 44 SATC 58. *JTLR, Case No VAT 304*, unreported decision by the Pretoria Tax Court, delivered on 7 November 2005 by Southwood J.

³⁹⁶ *JTLR, Case No VAT 304*, unreported decision by the Pretoria Tax Court, delivered on 7 November 2005 by Southwood J para 56.

- The powers of the Tax Court in respect of the decisions it may take in terms of s83(13) of the ITA are to be contrasted with the criminal and civil powers of the High Court, including the jurisdictional area and subject-matters.³⁹⁷
- The principle of *stare decisis* applies to judgments of the High Court but not the Tax Court, as the Tax Court's judgments are not binding on itself or other Tax Courts.³⁹⁸

The factors set out under bullets 1 to 8 support the argument that the Tax Court has the status of a High Court, but the factors set out under bullets 9 to 16 above support the argument that the Tax Court does not have the status of a High Court. LAWSA classifies the Tax Court (previously the Special Court) as a High Court.³⁹⁹ Courts have adjudicated upon the question as to whether the Tax Court was established as a court having similar status to the High Court in terms of s166(e) of the Constitution, and have held that the Tax Court was not established with such similar status.⁴⁰⁰

In some cases it has been held that the Tax Court does not have similar status to the High Court as it is not a court of law, but rather a Magistrate's Court.⁴⁰¹ The Tax Court is not conferred with the inherent jurisdiction which the High Court is conferred with.

³⁹⁷ *JTLR, Case No VAT 304*, unreported decision by the Pretoria Tax Court, delivered on 7 November 2005 by Southwood J para 56.

³⁹⁸ *JTLR, Case No VAT 304*, unreported decision by the Pretoria Tax Court, delivered on 7 November 2005 by Southwood J para 57 citing LAWSA 2 ed. Vol. 5 para 163-172. *Commissioner for Inland Revenue v City Deep Limited 1924 AD 298* at pp. 306 in which it was held that the Tax Court: "is not bound by the reasoning of the Special Court, which, though a competent court to decide the issues between the parties is not a court of law."

³⁹⁹ *Law of South Africa*. Second Edition. Volume 5, at para 122.

⁴⁰⁰ *JTLR, Case No VAT 304*, unreported decision by the Pretoria Tax Court, delivered on 7 November 2005 by Southwood J referring to the unreported judgment of *Khomisenore Petrus Tsoaeli and Others v The Minister of Defence and others (TPD Case number 27513/2000 delivered June 2005)*, *Fredericks and others v MEC for Education and Training, Eastern Cape 2003 (2) SA 693 (CC)*. Although in some cases it was held that although legislation does not expressly provide that a specific court has similar status to a High Court, such status can be inferred, the learned judge Southwood in *JTLR, Case No VAT 304*, unreported decision by the Pretoria Tax Court, delivered on 7 November 2005 by Southwood J held that the Tax Court has not expressly nor impliedly nor tacitly been conferred with such similar status.

⁴⁰¹ *JTLR, Case No VAT 304*, unreported decision by the Pretoria Tax Court, delivered on 7 November 2005 by Southwood J, para 60. De Koker, A. *et al.* (2012). *Silke on the South African Income Tax Act*. Service 44. Durban: Lexis Nexis, pp. 22 – 5 referring to *CIR v City Deep Ltd 1924 AD 298* and *Estate HM Brownson (deceased) v President and Members of the Income Tax Special Court and CIR 1933 WLD 116*.

A Magistrate's Court may not rule on the constitutionality of any legislation or conduct of the President, and may only do so if an Act of Parliament confers the Magistrates Court with constitutional jurisdiction.⁴⁰²

5.6.1.3 *Judicial review in the Tax Court*

Whether the Tax Court may adjudicate upon judicial review proceedings in terms of PAJA is currently a controversial issue. There are case law and authors who express the view that the Tax Court has judicial review powers, and there are case law and authors who express the view that the Tax Court does not have judicial review powers. A discussion of both views is provided.

A dissatisfied taxpayer is entitled to appeal against the decision taken/discretion exercised by SARS and its delegated officials.⁴⁰³ If the decision is taken/discretion is exercised in terms of a type 1 empowering provision, a taxpayer would first implement objection procedures, and if the outcome is not satisfactory, would proceed to lodge an appeal with the Tax Court. The question which arises is, however, in respect of judicial review proceedings whether a taxpayer may bypass objection and appeal procedures and approach a court for judicial review proceedings immediately.⁴⁰⁴

In respect of decisions taken/discretions exercised in terms of type 2 and 3 empowering provisions, no objection and appeal procedures are available and the applicable forum to adjudicate upon the judicial review proceedings would have to be approached immediately.

5.6.1.3.1 *Authority for Tax Court having jurisdiction to adjudicate upon judicial review proceedings*

Prior to 1985 there was contradictory case law in respect of the question as to whether the Tax Court had the power to adjudicate upon judicial review.

⁴⁰² Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 191.

⁴⁰³ Section 83A(11) of the ITA read together with section 82.

⁴⁰⁴ This falls outside the ambit of this dissertation.

Some cases were for the Tax Court having judicial review powers,⁴⁰⁵ while others were opposed to the Tax Court having review powers.

In *Rand Ropes (Pty) Ltd v Commissioner for Inland Revenue* 1944 AD 142, it was argued that the Special Court did not have the power to overrule the Commissioner's decision. The court held that it disagreed with the argument as the court was of the opinion that the legislature did not intend that taxpayers should not have a right to question decisions taken by the Commissioner, and concluded that the Tax Court, hearing an appeal, has similar wide discretion which was vested upon the Commissioner originally.⁴⁰⁶

In 1985 in the matter of *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk* 1985 (2) SA 668 (T), the Transvaal Provincial Division held that in respect of matters falling within type 1 empowering provisions, the Tax Court can reach its own conclusions and substitute its own decision for that of SARS and its delegated officials, and in respect of matters falling within type 2 empowering provisions, the Tax Court has the power to judicially review the exercise of SARS and its delegated officials' decisions taken/discretions exercised on the normal grounds of review (exercised discretion in bad faith or with improper motives or by failing to apply its mind properly).⁴⁰⁷

In this matter the taxpayer had implemented the remedy of objection and appeal in respect of a type 2 empowering provision and the court did not suggest that the taxpayer misconstrued its remedy but held that: "*in so 'n geval is die appél egter inderwaarheid 'n*

⁴⁰⁵ Some cases did not ever expressly decide on whether the Tax Court had judicial review powers, the court merely proceeded to exercise powers similar to judicial review powers. See *ITC 93 (1927) 3 SATC 239; ITC 132 (1928) 4 SATC 196; ITC 168 (1930) 5 SATC 160; ITC 297 (1934) 8 SATC 53; ITC 696 (1950) 17 SATC 86; ITC 840 (1957) 21 SATC 424* as cited by Clegg, D. & Stretch, R. (March 2012). *Income Tax in South Africa. Volume 1A*. Durban: Lexis Nexis, pp. 27 – 54(1) which are cases in which SARS did not object to the Tax Court's authority. Clegg also referring to *ITC 921 (1960) 24 SATC 242* in which the Court was not prepared to interfere with CSARS' discretion only because it was of the opinion that none of the recognised grounds for review were applicable in the circumstances. *ITC 936 Taxpayer 188, 24 SATC 361 and 1985 Taxpayer 228, 47 SATC 34. ITC 1331 (1980) 43 SATC 76* at pp. 84. De Koker, A. *et al.* (2010). *Silke on the South African Income Tax Act*. Durban: Lexis Nexis, at pp. 18 – 70 – 2. *ITC 921 24 SATC 242* pp. 244 as referred to in *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk* 1985 (2) SA 668 (T) pp. 672.

⁴⁰⁶ At page 153 of the judgment. This case is therefore authority for the view that the Tax Court has judicial review powers.

⁴⁰⁷ *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk* 1985 (2) SA 668 (T) at pp. 676. Clegg, D. & Stretch, R. (March 2012). *Income Tax in South Africa. Volume 1A*. Durban: LexisNexis, at pp. 27 – 54(2).

*hersiening van die Kommissaris se beslissing op die gebruiklike hersieningsgronde.*⁴⁰⁸ The court, however, did not hold that the Tax Court had judicial review powers in respect of type 3 empowering provisions.

The matter was taken on appeal in *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Beperk* 1987 (2) SA 123 (SCA). The Appeal Court, however, did not have any regard to the aforesaid issues in the Transvaal Provincial Divisions' judgment and thus did not overrule the aforesaid, and in fact confirmed the Transvaal decision.

It is significant to note that the above judgment was handed down in 1985 whilst South Africa was a parliamentary state. Subsequently, during 1994 the supreme authority of South Africa materially changed to a constitutional state with the enactment of the Constitution, and in terms of the provisions of s33(3) of the Constitution, PAJA was enacted in 2000.

Therefore it is necessary to determine whether the authority of the judgment in *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk* 1985 (2) SA 668 (T) is still applicable and enforceable. To date many authors and judges still express the opinion that the Tax Court has jurisdiction to adjudicate upon judicial review proceedings and most of them refer to the authority of *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk* 1985 (2) SA 668 (T) as the leading authority upon which their opinions and views are based.⁴⁰⁹

⁴⁰⁸ *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk* 1985 (2) SA 668 (T) at pp. 676 as cited by Clegg, D. & Stretch, R. (March 2012). *Income Tax in South Africa*. Volume 1A. Durban: LexisNexis, at pp. 27 – 54(1).

⁴⁰⁹ *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk* 1985 (2) SA 668 (T) read together with *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Beperk* 1987 (2) SA 123 (SCA) is referred to as a legal precedent giving added weight to the decisions held prior to it being of the view of the Tax Court has judicial review powers without analysing the law in respect of the ambit of the Tax Court's jurisdiction and whether such power fell within same. The principle set out above in the Transvaal divisions is interpreted as forming part of the *ratio decidendi*, and as the Appeal Court did not overrule same, stands as the legal precedent. Meyerowitz, D. (2002/2003). *Meyerowitz on Income Tax*. The Taxpayer. Cape Town: Juta, at pp. 34-22 and refers to ITC 936 1961 Taxpayer 188, 24 SATC 361. Clegg, D. & Stretch, R. (March 2012). *Income Tax in South Africa*. Volume 1A. Durban: LexisNexis, at pp. 27 – 44, 27 – 54(1) and 27 – 55. De Koker, A. et al. (2010). *Silke on the South African Income Tax Act*. Durban: Lexis Nexis at pp. 18 – 72 – 2 and 18-72-4, referring to case law cited at footnote 188 in which De Koker is of the opinion that if SARS had taken the decision improperly or on an incorrect basis, the Tax Court has the power to review such decision of SARS and its delegated officials.

However, it seems that none of the above authors or courts have properly taken cognisance of the effect which the Constitutional right to just administrative action and provisions of PAJA have on the judgment of *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk 1985 (2) SA 668 (T)*. Some courts have also accepted for purposes of the specific matter, without dealing with the merits, that the Tax Court is a competent court to hear judicial review proceedings.⁴¹⁰

In *ITC 1400 47 SATC 169* the court held that it is not clear what the competent court would be, but for purposes of the appeal accepted the Tax Court to be competent to judicially review proceedings.⁴¹¹ De Koker comments that there is nothing in s172 of the Constitution that bars the Tax Court from adjudicating upon the constitutionality of “conduct” as opposed to an “act”.⁴¹²

5.6.1.3.2 Authority for Tax Court not having jurisdiction to adjudicate upon judicial review proceedings

As discussed above, prior to 1985 there were contradictory case law and opinions in respect of the question as to whether the Tax Court had the necessary jurisdiction to adjudicate judicial review proceedings. Subsequently, in 1985 the judgment of *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk 1985 (2) SA 668 (T)* ruled that the Tax Court had judicial review powers, and as the Appeal Court did not overrule the

⁴¹⁰ In *ITC 1400 47 SATC 169* the subject matter was a type 2 empowering provision. The court held that unless the legislation does not provide that a provisions is expressly subject to objection and appeal, a decision taken/discretion exercised in terms of such empowering provisions is final and binding if it was taken/exercised in a *bona fide* manner. If it was taken/exercised in a *mala fide* manner or the Commissioner failed to apply its mind to the matter, then such decision taken/discretion exercised may be the subject of judicial review proceedings. The court held that it is not clear what the competent court would be but for purposes of the appeal accepted the Tax Court to be competent to judicially review proceedings. Ultimately it could not be proved that the Commissioner had acted *mala fide* or failed to apply its mind and therefore the court held that the taxpayer had misconceived his remedy and approached the court in effect based on a right of appeal it did not have in the circumstances. Case also cited by Clegg, D. & Stretch, R. (March 2012). *Income Tax in South Africa*. Volume 1A. Durban: LexisNexis, at pp. 27 – 55.

⁴¹¹ Ultimately it could not be proved that the Commissioner had acted *mala fide* or failed to apply his mind and therefore the court held that the taxpayer had misconceived his remedy and approached the court in effect based on a right of appeal it did not have in the circumstances. Case also cited by Clegg, D. & Stretch, R. (March 2012). *Income Tax in South Africa*. Volume 1A. Durban: LexisNexis, at pp. 27 – 55.

⁴¹² De Koker, A. *et al.* (2012). *Silke on the South African Income Tax Act*. Service 44. Durban: Lexis Nexis, pp. 22 – 5.

principle laid down by the Transvaal Division, academics are of the opinion that the principle of the Transvaal Division became the legal principle to be followed.

In 1994 South Africa's supreme authority materially changed from a parliamentary pre-1994 state to a constitutional post-1994 state. Further, in terms of s33(3) of the Constitution, during 2000 PAJA was enacted to regulate judicial review procedures. As discussed, an analysis of PAJA, read together with the Constitution, makes it clear that currently only the High Court and courts having similar status to the High Courts have the necessary jurisdiction to adjudicate upon judicial review proceedings.

After the enactment of the Constitution and PAJA, there has not been an Appeal Court decision which has reconsidered the judgment of *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk 1985 (2) SA 668 (T)*. The result is that after the enactment of the Constitution and PAJA, contradictory opinions have again been formed in respect of the question as to whether the Tax Court has judicial review powers or not. The case law and opinions supporting the position that the Tax Court has jurisdiction has been dealt with above, and hereunder the case law and decisions supporting the position that the Tax Court does not have the jurisdiction will be dealt with.

There are cases in which it was held that the Tax Court does not have the jurisdiction to adjudicate upon judicial review proceedings.⁴¹³ In *ITC 1806 68 SATC 117* it was held that the Tax Court is not conferred with the power to adjudicate upon disputes relating to the question whether a particular statutory provision is unconstitutional in light of the provisions of the Constitution.⁴¹⁴

⁴¹³ ITC 892 (1959) 23 SATC 358, ITC 1806 68 SATC 117.

⁴¹⁴ Clegg, D. & Stretch, R. (March 2012). *Income Tax in South Africa*. Volume 1A. Durban: LexisNexis, at pp. 27 - 52(3). Yet in *JTLR, Case No 11641*, unreported judgment by the Johannesburg Tax Court, delivered on 4 December 2006, by Boruchowitz J the question the court had to decide upon was whether the so-called "double jeopardy" clause in section 35(3)(m) of the final Constitution was infringed if SARS laid a criminal charges against the taxpayer and in addition imposition of additional tax under s76 of the ITA, as a civil remedy, based on the same cause of action. The court held that s35(3)(m) of the final Constitution was not infringed in the circumstances as a civil and criminal remedy cannot constitute "double jeopardy". It is clear that the learned Boruchowitz J, in this case decided upon a constitutional issue in the tax court. In the Editorial Comment of *Juta Tax Court Cases 2007* the following comments are made of this case: "*It is doubtful how much this decision can be relied upon as it was made clear in ITC 1806 68 SATC 117 that the Tax Court as a creature of statute does not have jurisdiction to adjudicate on constitutional issues.*" In *JTLR, Case No VAT 304*, unreported

In *JTLR, Case No VAT 304*, unreported decision by the Pretoria Tax Court, delivered on 7 November 2005 by Southwood J, the court analysed the Tax Court's jurisdiction and powers, in particular whether the Tax Court has jurisdiction to decide upon the constitutionality of statutory provisions.⁴¹⁵ The court held that jurisdiction meant "*the power vested in the court by law to adjudicate, determine and dispose of a matter*".⁴¹⁶ As discussed above, the court held that the Tax Court does not have a status similar to the High Court, but rather a lower court.

In *Irvin & Johnson (SA) Ltd v Commissioner for Inland Revenue 1946 AD 483*, CSARS took a decision which amounted to an administrative action and the court held that such an administrative action was to the exclusion of the Special Court, and held that,

*"Despite, therefore, the right of appeal given by s 79 (1) to a taxpayer who is dissatisfied with 'any' decision of the Commissioner as notified under s 77 (6) of Act 31 of 1941, if it appears that the decision has been given under a section which requires the Commissioner to exercise an administrative discretion, no appeal lies to the Special Court."*⁴¹⁷

Schreiner JA further held that the absence of the express right to objection and appeal seems indicative thereof that the legislature did not intend to have the specific discretion subject to objection and appeal procedure to a Special Court.⁴¹⁸

In *Bailey v Commissioner for Inland Revenue 1933 AD 204*, at 220, the court found that a particular entity was a "sham" and it was argued that the Special Court did not have the jurisdiction to declare the entity a "sham".

decision by the Pretoria Tax Court, delivered on 7 November 2005 by Southwood J it was also held that as the Tax Court is a creature of statute it cannot rule upon the constitutionality of any statute of parliament and no legislation confers it to adjudicate upon same.

⁴¹⁵ See paras 43 to 59 thereof.

⁴¹⁶ Southwood J referred to the following cases in this regard: *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board 1950 (2) SA 420 (A)* at 424; *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd 1987 (4) SA 883 (A)* at 806D-F; *Spendiff NO v Kolektor (Pty) Ltd 1992 (2) SA 537 (A)* at 551C and *Ewing McDonald & Co Limited v M & M Products Co 1991 (1) SA 252 (A)* at 256G-H.

⁴¹⁷ *Irvin & Johnson (SA) Ltd v Commissioner for Inland Revenue 1946 AD 483*, pp. 492.

⁴¹⁸ See page 493 of the judgment.

In this regard Curlewis JA held that,

*“a Special Court under the Income Tax Acts is not a court of appeal in the ordinary sense; it is a court of revision with power to investigate the matter before it and to hear evidence thereon”.*⁴¹⁹

In the latest unreported Tax Court case which dealt with the question as to whether the Tax Court has jurisdiction to adjudicate upon judicial review in the tax arena, namely *Case No VAT 789*, unreported decision by the Pretoria Tax Court, delivered 10 September 2012 by Bertelsmann J, the court held that it did not have such authority in the light of the new Constitutional dispensation and provisions of PAJA, and further supported the case of *ITC 1806 68 SATC 117* where it was held that the Tax Court only has jurisdiction to adjudicate upon matters allocated to it by the legislature. *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk 1985 (2) SA 668 (T)* should be reconsidered in light of the above.⁴²⁰

De Koker is of the opinion that the Tax Court does not have the jurisdiction to adjudicate upon the constitutionality of conduct of SARS and its delegated officials as it does not have the inherent jurisdiction of the High Court and is merely limited to “jurisdiction over tax appeals”.⁴²¹ De Koker further stipulates that where the challenge lies against the constitutionality of the provisions of the ITA or the TAA, or the conduct of SARS and its delegated officials, such a challenge is to be adjudicated by the High Court from the outset.⁴²²

Thus PAJA is clear that currently only a High Court or court with a similar status has jurisdiction to adjudicate upon judicial review proceedings. Therefore in terms of the Constitution read together with PAJA, if a Tax Court does not have the status similar to that

⁴¹⁹ The court in *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk 1985 (2) SA 668 (T)* pp. 675 supports this argument to contend that the word “appeal” in the tax legislation must not be interpreted technically but widely.

⁴²⁰ *Case No VAT 789*, unreported decision by the Pretoria Tax Court, delivered 10 September 2012 by Bertelsmann J.

⁴²¹ De Koker, A. *et al.* (2012). *Silke on the South African Income Tax Act*. Service 44. Durban: Lexis Nexis, pp. 22 – 5 and 22 – 58.

⁴²² De Koker, A. *et al.* (2012). *Silke on the South African Income Tax Act*. Service 44. Durban: Lexis Nexis, pp. 22 – 5.

of a High Court it cannot be interpreted that the Tax Court has jurisdiction in terms of PAJA to adjudicate upon judicial review.

5.6.1.3.3 Effect of TAA on Tax Court authority to adjudicate upon judicial review in tax matters

S104(2) of the TAA makes provision that certain “decisions” taken by SARS and its delegated officials are subject to the remedies of objection and appeal. S105 of the TAA provides that a taxpayer may not dispute a “decision” as set out in s104 of the TAA in any other forum than the Tax Court in any other proceedings except proceedings under Chapter 9 or a review to the High Court. S107 sets out the Tax Court’s jurisdiction.

It seems that the TAA has attempted to create jurisdiction for the Tax Court to hear a type of review in respect of certain “decisions” taken by SARS and its delegated officials. Decisions taken/discretions exercised by SARS and its delegated officials, which are not included in s104 of the TAA seem not to have been affected by the provisions of the TAA, and thus the discussion as set out above is still applicable to the Tax Court’s jurisdiction to adjudicate upon judicial review.

5.6.2 Powers of High Court in tax matters

5.6.2.1 General inherent jurisdiction

It is trite law that High Courts have inherent jurisdiction, which include the jurisdiction to review administrative action by either setting it aside or correcting it.⁴²³ As discussed above, PAJA gives effect to the right of just administrative action, controls public power, and confirms that the High Court is conferred with the jurisdiction to adjudicate upon judicial review proceedings under PAJA.⁴²⁴ Some writers acknowledge that the High Court has the jurisdiction to adjudicate upon judicial review proceedings in respect of matters in the tax

⁴²³ Hoexter, C. (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 515.

⁴²⁴ Definition of “court” in s1 of PAJA and Hoexter, C. (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 517.

arena, and in particular where SARS and its delegated officials take decisions/exercise discretions in terms of type 2 empowering provisions.⁴²⁵

According to Meyerowitz, neither the availability of the remedies of objection and appeal in respect of appeals to the Tax Court, nor the finality of assessments or failure to appeal to the Tax Court influence the inherent jurisdiction of the High Court.⁴²⁶ The High Court further has jurisdiction to adjudicate upon appeals of fact and law against judgments handed down by the Tax Courts.⁴²⁷

In this regard, it was held in *CIR v Da Costa 1985 (3) SA 768 (A)* that the High Court, hearing an appeal from a decision taken by the Tax Court:

*“will interfere with the determination of the extent of a penalty (or the exercise of any discretion) by a Special Court (as it then was) only on the limited grounds on which a value judgment of a court of first instance may be set aside or varied on appeal.”*⁴²⁸

The court further held that if the decision is based on the exercise of a discretion, the appeal court:

*“will interfere only if the Special Court did not bring an unbiased judgment to bear on the question, or did not act for substantial reasons, or exercised its discretion capriciously or upon a wrong principle: Ex Parte Neethling & others 1951 (4) SA 331 (A) at 335.”*⁴²⁹

⁴²⁵ De Koker, A. et al. (2010). *Silke on the South African Income Tax Act*. Durban: Lexis Nexis at pp. 18 – 70 – 1. Meyerowitz, D. (2002/2003). *Meyerowitz on Income Tax*. The Taxpayer. Cape Town, at pp. 34-22.

⁴²⁶ Meyerowitz, D. (2002/2003). *Meyerowitz on Income Tax*. The Taxpayer. Cape Town, at pp. 34-22.

⁴²⁷ S86A of the ITA. The process is also regulated by s86A of the ITA.

⁴²⁸ As cited by De Koker, A. et al. (2010). *Silke on the South African Income Tax Act*. Durban: Lexis Nexis, at pp. 18 – 72 – 3.

⁴²⁹ As cited by De Koker, A. et al. (2010). *Silke on the South African Income Tax Act*. Durban: Lexis Nexis, at pp. 18 – 72 – 4.

And in the event of SARS and its delegated officials having exercised its discretion improperly or on an incorrect basis, the court hearing an appeal from the Tax Court would, according to De Koker, “*while paying due deference to the factual and credibility findings of the [T]ax Court’ under s86A... substitute its own decision for that of the Tax Court.*”⁴³⁰

In *Friedman and Others NNO v Commissioner of Inland Revenue: In Re Phillip Frame Will Trust v Commissioner of Inland Revenue* 1991 (2) SA 340 (W) at pp 341, referring to *Emary NO and Another v Commissioner for Inland Revenue* 1959 (2) PH T16 (D), it was held that where the dispute involved only a question of law and no question of fact, SARS and its delegated officials and the Special Court are not the only competent authorities to decide the issue. Therefore similarly, the High Court has jurisdiction to make a declaratory order.

In *ITC 936 24 SATC 361*, Van Winsen J held that in respect of type 2 empowering provisions the only remedy the taxpayer has is judicial review, and held that such proceedings are to be commenced in the High Court in terms of the procedure of High Court Rule 53. The court further interprets the decision in *Irvin & Johnson (SA) Ltd v Commissioner for Inland Revenue* 1946 AD 483 merely to mean that the Tax Court cannot reconsider the decision taken/discretion exercised by SARS and its delegated officials if it is not expressly conferred with the powers to do so, but this does not exclude the Tax Court’s jurisdiction to reconsider decisions taken/discretions exercised by SARS and its delegated officials in terms of the general grounds for review in circumstances where such decision/discretion was taken/exercised *mala fide*.⁴³¹

5.6.2.2 Authority against High Court authority to adjudicate upon tax related matters and effect in respect of authority to adjudicate upon judicial review

There is, however, some who are of the opinion that the High Court does not have jurisdiction in all tax related matters.⁴³²

⁴³⁰ De Koker, A. *et al.* (2010). *Silke on the South African Income Tax Act*. Durban: Lexis Nexis at pp. 18 – 72 – 4.

⁴³¹ *ITC 936 24 SATC 361* pp. 364.

⁴³² *Rossi, Pera and P and R Construction Civil Engineering v CSARS, JTLR Case No 2010/34417*, (unreported decision by the South Gauteng High Court, Johannesburg, 22 February 2011) at para 32.

In this regard, in *Metcash Trading Ltd v Commissioner, SARS 2001 (1) SAS 1109 CC*, the court held that in respect to the benefits for the taxpayer of the special Tax Court that the Tax Court is a specialist tribunal and interprets the ITA to have designated an independent and impartial tribunal “**specifically tooled to deal with disputed tax cases...** (own emphasis).” The Court further held that the High Court was not “*specifically tooled to deal with disputed tax cases*”, and that the High Court only has jurisdiction to adjudicate upon tax matters in circumstances where the relief sought is of an interlocutory nature.

The court in *Rossi, Pera and P and R Construction Civil Engineering v CSARS, JTLR Case No 2010/34417*, unreported decision by the South Gauteng High Court, Johannesburg, 22 February 2011, followed a similar approach as in *Metcash Trading Ltd v Commissioner, SARS 2001 (1) SAS 1109 CC*.⁴³³ The court was requested to determine whether the High Court had jurisdiction to grant and order to compel SARS to authorise the payment of a refund to the taxpayer. The taxpayers argued that the High Court had jurisdiction as its jurisdiction can never be ousted, yet Satchwell J disagreed with the taxpayer’s argument.

The learned judge held that the argument was not conceivable in light of, firstly, with why the legislature would established a Special Tax Court dealing with tax disputes which could still be brought to the High Court by election by the taxpayer; secondly with why the legislature would create competing and concurrent *fora* for the resolution of tax disputes which would still result in confusion as to which forum is to be chosen; thirdly, if different forums adjudicate similar issues, it would hinder the establishment of a body of precedence for the development of the law; fourthly, the role of the High Court in the tax arena has been determined by the ITA as being a court of appeal and not first instance; and fifthly, there are dangers applicable in respect of allowing for forum shopping.

JTLR Editorial Commentary noted on *Rossi, Pera and P and R Construction Civil Engineering v CSARS, JTLR Case No 2010/34417* that the aforesaid decision did not deal with the question as to whether a review application brought under PAJA had to be brought to the Tax Court and in absence thereof the commentary is of the view that based on the authority of *ITC 1806 68 SATC 117*, which had held that the Tax Court only has authority to adjudicate matters allocated to it by the Legislature, an application under PAJA is to be

⁴³³ At paragraphs 17 and 19 the court referred to the Metcash matter.

brought to the High Court. These authorities do not seem to exclude the High Court's inherent jurisdiction in respect of judicial review of the exercise of SARS and the Commissioner's powers constituting administrative action.

5.6.3 Tax Ombud

As discussed, the TAA has established a Tax Ombud.⁴³⁴ It has been discussed that the Tax Ombud may qualify as an available internal remedy which is to be exhausted prior to commencing with judicial review. The question, however, is whether the Tax Ombud can be the final forum having the jurisdiction to finally pronounce on a matter of review.

Although the Tax Ombud's powers include the adjudication of review in respect of certain administrative actions taken by SARS and its delegated officials, it does not exclude the authority of the High Court to adjudicate upon a review in terms of PAJA. S105 of the TAA specifically states that a taxpayer may approach a High Court for the review in respect of a dispute pertaining to a "decision" taken in terms of the TAA.

De Koker further stipulates that the Tax Ombud may not review legislation, tax policy or SARS policy or practise generally prevailing, and may not review a matter subject to the remedy of objection and appeal procedures under the TAA.⁴³⁵ It may only review insofar as it relates to a service, procedural or administrative matter arising from the application of the TAA by SARS and its delegated officials.⁴³⁶

It also needs to be emphasised that currently, as explained above, the Tax Ombud is not yet equipped to adjudicate review as it has not practically been enforced. De Ville comments that when legislation provides for an appeal to a specialised court, but such court is not immediately established, a taxpayer would have to proceed to the High Court.⁴³⁷

⁴³⁴ S14 of the TAA.

⁴³⁵ De Koker, A. *et al.* (2012). *Silke on the South African Income Tax Act*. Service 44. Durban: Lexis Nexis, pp. 18 – 32.

⁴³⁶ De Koker, A. *et al.* (2012). *Silke on the South African Income Tax Act*. Service 44. Durban: Lexis Nexis, pp. 18 – 32.

⁴³⁷ De Ville, J.R. (2006 revised first edition reprint). *Judicial Review of Administrative Action in South Africa*. Durban: Lexis Nexis Butterworths, pp. 386 fn 763. This should be the similar position in respect of an alternative forum as the Tax Ombud being established but not yet practically equipped to function.

Lastly, it is unclear, in light of the provisions of s7(3) to (5) of PAJA in respect of the Rules to regulate judicial review proceedings which have not yet been promulgated, whether the Tax Ombud would be in a position to practically adjudicate upon judicial review in terms of PAJA prior to the Rules required by s7 of PAJA being promulgated.

5.6.4 Conclusion in respect of a forum having jurisdiction to adjudicate upon the remedy of judicial review in tax-related matters

From the above discussion, it is clear that the High Court would, in all circumstances, have the necessary jurisdiction to adjudicate upon the remedy of judicial review, in terms of PAJA in tax-related matters.

There is currently controversy with regard to whether the Tax Court has the jurisdiction to adjudicate upon the remedy of judicial review in respect of tax-related matters and an appeal court judgment is necessary to clear the air in this regard.

Apart from the academic considerations and case law set out above, it may be necessary to consider the tax principles of convenience and cost-effectiveness when determining whether the Tax Court or the High Court should have the jurisdiction to adjudicate upon the remedy of judicial review. The High Court is a court which sits continuously every business day at its specific address, and the High Court consists of a number of judges who have been permanently appointed, have their permanent chambers at the High Court, and who are there on a daily basis.

The Tax Court is a circuit court, being a Court which only sits when there is a tax matter to be heard and is not continuously in session. The Tax court merely sits for short, interrupted periods of time when adjudicating upon a matter specifically enrolled for that particular date. The Tax Court does not consist of permanently appointed judges who are available at the Tax Court on a daily basis. As a result of the aforesaid, it is much easier to obtain a date for a hearing of the matter in the High Court than it is to obtain a date for the hearing of the matter in the Tax Court. Therefore, from a convenience and cost-effectiveness point of view, the High Court is preferred above the Tax Court to adjudicate upon the remedy of judicial review.

5.7 Powers of forum adjudicating upon judicial review⁴³⁸

Review aims to scrutinise administrative action, and the primary remedies provided by it are the setting aside or correcting of the administrative action.⁴³⁹ Sometimes to set aside or correct administrative action is not a sufficient remedy; other additional remedies are necessary.⁴⁴⁰

Forums having judicial review powers are equipped with the powers to make certain orders, and these powers are currently listed in s8 of PAJA which stipulates:

“8 Remedies in proceedings for judicial review

(1) The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders-

(a) directing the administrator-

(i) to give reasons; or

(ii) to act in the manner the court or tribunal requires;

(b) prohibiting the administrator from acting in a particular manner;

(c) setting aside the administrative action and-

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

⁴³⁸ The full scope of the powers conferred upon the forum adjudicating upon judicial review falls outside the ambit of this dissertation, therefore only a summary will be provided. For a complete discussion see De Ville, J.R. (2006 revised first edition reprint). *Judicial Review of Administrative Action in South Africa*. Durban: Lexis Nexis Butterworths, pp. 325 to 397.

⁴³⁹ *Johannesburg Consolidated Investment Co v Johannesburg Town Council 1903 TS 111* as cited by Hoexter, C. (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 518.

⁴⁴⁰ Hoexter, C. (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 519.

- (ii) *in exceptional cases-*
 - (aa) *substituting or varying the administrative action or correcting a defect resulting from the administrative action; or*
 - (bb) *directing the administrator or any other party to the proceedings to pay compensation;*
- (d) *declaring the rights of the parties in respect of any matter to which the administrative action relates;*
- (e) *granting a temporary interdict or other temporary relief; or*
- (f) *as to costs.*
- (2) *The court or tribunal, in proceedings for judicial review in terms of section 6 (3), may grant any order that is just and equitable, including orders-*
 - (a) *directing the taking of the decision;*
 - (b) *declaring the rights of the parties in relation to the taking of the decision;*
 - (c) *directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or*
 - (d) *as to costs.”*

Until an administrative action is set aside, it continues to have full force and effect; no matter how illegal or otherwise it appears to be.⁴⁴¹ If the forum is satisfied that the taxpayer

⁴⁴¹ Hoexter, C. (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co, pp. 545.

successfully proved the substantial and procedural requirements, the forum adjudicating the judicial review may grant an order as set out in s8 of PAJA.

Currie expresses the view that the remedies listed in s8 of PAJA are a codification of common law remedies with the addition of a Constitutional remedy of just and equitable.⁴⁴² The list of remedies in s8 of PAJA are public-law remedies; other private-law remedies will still be available in certain circumstances but are not governed by PAJA.⁴⁴³ Some of the remedies listed in s8 of PAJA will be discussed.

S8(1)(a) of PAJA is similar to a *mandamus* available under common law.⁴⁴⁴ S8(1)(b) of PAJA provides for an interdict prohibiting SARS and its delegated officials from conducting themselves in a particular manner.⁴⁴⁵

As under common law, s8(1)(c) of PAJA permits the forum to set the matter aside and refer the matter back to the administrator for reconsideration of the decision in question. S8(1)(c)(ii)(aa) of PAJA confers the forum with the power to substitute the administrator's decision in exceptional circumstances.⁴⁴⁶ Baxter explains that courts are relatively slow to substitute an administrator's decision with its own, as,

"The function of judicial review is to scrutinize the legality of administrative action, not to secure a decision by a judge in place of an administrator. As a general principle, the courts will not attempt to substitute their own decision for that of the public authority; if an administrative decision is found to be ultra vires the court will usually set it aside and refer the matter back to the authority for a fresh decision. To

⁴⁴² Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 190.

⁴⁴³ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 190.

⁴⁴⁴ Croome, B.J. (2008). *Taxpayers' rights in South Africa supra*, pp. 199. Also see Currie, I. & Klaaren, J. (2001). *The Promotion of Administrative Justice Act Benchbook*. Cape Town: Siber Ink CC, pp. 189, para 8.3; Baxter, L. (1984). *Administrative Law*, pp. 687; and Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 193.

⁴⁴⁵ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 193.

⁴⁴⁶ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 194.

*do otherwise 'would constitute an unwarranted usurpation of the powers entrusted [to the public authority] by the Legislature.'*⁴⁴⁷

Currie summarises the four types of circumstances existing under common law where courts would set aside the decision and substitute it with their own decision, namely:

*"First, a court may find that the decision is of a judicial nature and that the court is as well qualified as the administrator to make the decision. Secondly, the correct decision may be obvious and no purpose would be served by remanding the matter to the administrator. Thirdly, there are situations where further delay would be unjustifiable. Fourthly, there may be such bias or incompetence as to disqualify the original decision-maker."*⁴⁴⁸

In *Noupoort Christian Care Centre v Minister of National Department of Social Development and Another* 2005 (10) BCLR 1034 (T) the court held that:

*"As a general point of departure, the court will be slow to substitute its own decision for that of a functionary. Also as a general proposition, a court should not lose sight of the distinction between its function as an appellate tribunal and as a tribunal reviewing decision of an administrative functionary; judicial deference is called for."*⁴⁴⁹

S8(1)(c)(ii)(bb) of PAJA permits the forum to grant compensation to the taxpayer in certain circumstances. Currie points out that factors such as *"prejudice or harm to the applicant, dishonesty or incompetence of the administrator would appear to be relevant factors."*⁴⁵⁰ Croome argues that in circumstances where the taxpayer has to defend himself against the

⁴⁴⁷ Baxter, L. (1984). *Administrative Law*, at pp. 681.

⁴⁴⁸ Baxter, L. (1984). *Administrative Law*, at pp. 489, as cited by Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 194 fn 17.

⁴⁴⁹ See pp. 1049, para 40. Also see *Carephone (Pty) Ltd v Marcus NO* 1999 (3) SA 304 (LAC) for similar views.

⁴⁵⁰ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 194.

unjust administrative action of SARS and its delegated officials, the taxpayer should be awarded the costs of such litigation under this subsection of PAJA.⁴⁵¹

Yet courts are slow to grant such costs orders. In *Olitxki Property Holdings v State Tender Board 2001 (3) SA 1247 (SCA)* the court rejected the Applicant's claim for damages and stated that a more effective remedy than compensation was available; namely, that the applicant could seek an interdict. In *Dunn v Minister of Defence 2006 (2) SA 107 (T)* the court, however, granted an order that compensation be paid in circumstances where there was considerable maladministration of the application for promotion.⁴⁵² S8(d) of PAJA provides for the power that a declaratory order be granted but only to the extent that it affects the rights of the parties involved in the judicial review (no third party's rights) and relates to a matter to which the administrative action related to.⁴⁵³

Under s8(1)(e) of PAJA the Court is conferred with the power to award temporary relief. Currie and Klaaren state that such temporary relief could "*include the striking down of subordinate legislation on the grounds of failure to comply with the provisions of the AJA.*"⁴⁵⁴ According to Hoexter, a court may grant temporary relief when no other relief is available.⁴⁵⁵ S8(1)(f) of PAJA confers the power to grant cost orders. These include legal costs. As to the scale and method of costs to be awarded, Croome and Hoexter are of the view that this includes costs orders *de bonis propriis* as well as costs on an attorney and client scale.⁴⁵⁶

In *Motsepe v Commissioner for Inland Revenue 1997 (2) SA (2) 898 (CC)* the court held that a court should not award costs orders against individuals enforcing their rights against the state; however a court will not hesitate to award costs against a vexatious litigant.⁴⁵⁷

⁴⁵¹ Croome, B.J. (2008). *Taxpayers' rights in South Africa*, *supra*, pp. 200 - 201.

⁴⁵² As cited by Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 194.

⁴⁵³ Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 195.

⁴⁵⁴ Currie, I. & Klaaren, J. (2001). *The Promotion of Administrative Justice Act Benchbook*. Cape Town: Siber Ink CC, at pp. 191, para 8.7.

⁴⁵⁵ Hoexter, C. (2002). *The New Constitutional and Administrative Law*, Volume Two Administrative Law. Durban: Juta, pp. 296 para 8.4.

⁴⁵⁶ As cited by Croome, B.J. (2008). *Taxpayers' rights in South Africa*. *supra*, pp. 202.

⁴⁵⁷ Hoexter, C. (2002). *The New Constitutional and Administrative Law*, Volume Two Administrative Law. Durban: Juta, pp. 300 para 8.4 and De Waal, J. *et al.* (2001). *The Bill of Rights Handbook*. Fourth Edition. Cape Town: Juta and Co Ltd, at pp. 561 para 31.3.

In terms of s8(2)(a) of PAJA, if SARS and its delegated officials fail to take a decision, the court may order them to take the decision. Courts have a wide discretion when considering what would constitute justice between parties.⁴⁵⁸ In respect of taxpayers' rights and remedies under PAJA, Croome points out that SARS indicated that it would prepare a manual setting out how PAJA affects taxpayers in their dealings with SARS. To date SARS has not released same. Croome states that: "*this neglect detrimentally affects taxpayer's awareness of their rights under PAJA.*"⁴⁵⁹

De Koker, who expresses the opinion that the Tax Court has judicial review powers, comments on the extent of such powers as follows: De Koker refers to the judgment of *ITC 1527 (1991) 54 SATC 227 at 235* in which it states that:

*"In the present instance where the court is exercising its powers of review to determine whether the Commissioner applies to his mind to the issue and facts before him, it is clear that the matter must be decided on the facts before him and the knowledge he possessed at the time. To this end and only to this end, in my view, is evidence permissible on appeal. The court is here not concerned with whether the Commissioner was "right or wrong". The question is whether the Commissioner has duly considered the matter."*⁴⁶⁰

De Koker opines that there are two schools of thought in respect of the discretion of the Tax Court when reviewing a type 1 empowering provision. The one school of thought is that, on appeal, the Tax Court has a similar wide discretion as was conferred upon CSARS.⁴⁶¹ The second school of thought is that if CSARS had properly exercise its discretion in a *bona fide* manner, then the Tax Court may only substitute its own decision for that of CSARS "only

⁴⁵⁸ Currie, I. & Klaaren, J. (2001). *The Promotion of Administrative Justice Act Benchbook*. Cape Town: Siber Ink CC, at pp. 192, para 8.9; and Currie, I. (2007). *The Promotion of Administrative Justice Act A Commentary*. Second Edition. Cape Town: Siber Ink, pp. 195.

⁴⁵⁹ Croome, B.J. (2008). Taxpayers' rights in South Africa, *supra*, pp. 203.

⁴⁶⁰ As cited by De Koker, A. *et al.* (2010). *Silke on the South African Income Tax Act*. Durban: Lexis Nexis, at pp. 18 – 71.

⁴⁶¹ De Koker, A. *et al.* (2010). *Silke on the South African Income Tax Act*. Durban: Lexis Nexis, at pp. 18 – 72 – 2 referring to authority at fn 183.

*when there is a significant discrepancy between its own decision and that of the Commissioner.”*⁴⁶²

5.8 Conclusion

Prior to judicial review proceedings being commenced with, certain procedural requirements must first be satisfied. The procedural requirements are imposed by s7 of PAJA and are summarised as *locus standi*, time limitations, the exhaustion of all available internal remedies, and specific procedures to be followed.

Once it has been established that the substantive and procedural requirements for the right of just administrative action and remedy of judicial review have been satisfied, the taxpayer may approach the appropriate forum for relief.

The forum having the necessary jurisdiction to adjudicate upon judicial review in terms of PAJA in tax matters is a controversial topic. The question is whether the judicial review should be brought to the Tax Court or the High Court. There are two schools in this regard, one supporting the jurisdiction of the Tax Court and the other supporting the jurisdiction of the High Court.

The leading authority supporting the jurisdiction of the Tax Court is *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk 1985 (2) SA 668 (T)* and many writers support that matter. The aforesaid case was, however, adjudicated upon in 1985. The Constitution came into effect in 1996 and PAJA in 2000. In light of the change in the Constitutional dispensation, as well as the enactment of PAJA, this matter must be interpreted having regard thereto. There are writers such as De Koker who have expressed the opinion that in the new Constitutional dispensation the Tax Court is not conferred with the jurisdiction to adjudicate upon judicial review proceedings. In a recent unreported VAT case, *Case No VAT 789, unreported decision by the Pretoria Tax Court, delivered 10 September 2012 by Bertelsmann J*, the court supports this interpretation against the jurisdiction of the Tax Court.

⁴⁶² De Koker, A. *et al.* (2010). *Silke on the South African Income Tax Act*. Durban: Lexis Nexis, at pp. 18 – 72 – 2 referring to authority at fn 184.

The High Court has inherent jurisdiction, and furthermore, the provisions of PAJA clearly confer the High Court with the jurisdiction to adjudicate upon judicial review.

The TAA has also provided that a Tax Ombud be established with jurisdiction to adjudicate upon a form of review, yet as the Tax Ombud has currently not been established, it cannot be used. When the Tax Ombud is established, it would have to be considered whether it constitutes a forum having jurisdiction to adjudicate upon judicial review. In light of the aforesaid, it seems that the Tax Ombud would rather constitute an “*available internal remedy*” in terms of s7(2) of PAJA in circumstances where it is applicable than a final forum adjudicating upon judicial review.

It therefore seems that an Appeal Court should reconsider the judgment of *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk 1985 (2) SA 668 (T)* and provide clarity on this aspect. In the meantime, it would be less risky to commence judicial review in the High Court than the Tax Court, and therefore the interpretation that the High Court is the appropriate forum is supported.

S8 of PAJA sets out the powers which the court adjudicating the judicial review has. Therefore, when deciding on judicial review, the High Court should make an order as authorised by s8 of PAJA.

CHAPTER 6: CONCLUSION

6.1 Introduction

This chapter serves as a summation of the salient points made in this thesis. Further, the recommendations for further research are detailed.

An effective, fair, just and equitable tax system is necessary. As government requires more tax to be levied and taxpayers demand that less tax be levied, such tax system could only be established if a balance is obtained between government's and taxpayers' interests. Over the years principles have been laid, which if correctly enforced, achieve the said balance in a tax system. Government must be permitted to exercise its powers to achieve its primary responsibility to collect taxes, but such exercise must not unreasonably and unjustifiably infringe taxpayers' rights.

6.1.1 Source and scope of and limitations to government's power to tax, and introduction to taxpayers' procedural rights

It was determined in Chapter 2 that the Constitution conferred the government of the Republic of South Africa with the power to tax, the general scope of which is rather wide, but that the government's power to tax is constrained by certain structural, procedural and substantive limitations contained in the Constitution. The substantive limitations to government's power to tax pertain to the fundamental rights which taxpayers are conferred with to protect them.

Taxpayers have numerous fundamental taxpayers' rights, *inter alia*, as stated in Chapter 1, (i.e. rights of access of information,⁴⁶³ just administrative action,⁴⁶⁴ and access to the courts),⁴⁶⁵ which aim to enforce the values of equity and fairness in South African law. However, taxpayers' rights which are not applied and enforced do not protect a taxpayer.

⁴⁶³ See s32 of the Constitution 108 of 1996.

⁴⁶⁴ See s33 of the Constitution 108 of 1996.

⁴⁶⁵ See s34 of the Constitution 108 of 1996.

Thus the remedy which is available to protect the taxpayers' rights must also be determined and the nature and extent of such remedy must be analysed.⁴⁶⁶ The focus of this research was on the right of just administrative action and remedy of judicial review in the tax arena, as regulated by the Constitution (specifically s33) read with the *Promotion of Administrative Justice Act 3 of 2000* (PAJA) and the common law. However, as with all rights in the Bill of Rights, this right is not absolute and may be limited in terms of s36 of the Constitution. Chapter 2 comprised an analysis of the source and scope of government's power to tax, including the limitations thereof. Chapter 2 explained both the pre-1994 and post-1994 period; the Interim Constitution came into force in that year, and the current Constitution came into effect in 1996.

6.1.2 Right of just administrative action

For the right of just administrative action to be applicable and enforceable, the conduct must fall within the ambit of the definition of "administrative action" and certain substantive and procedural requirements need be complied with.⁴⁶⁷ As the right of just administrative action and the remedy of judicial review form part of the administrative law, Chapter 3 aimed to provide the general principles of administrative law; in essence the central consideration being that that the decision taker may not exceed the power which was conferred upon it by law.

6.1.3 Rationale for PAJA

As analysed in Chapter 3, s33 of the Constitution provides for the right of just administrative action which requires administrative action to be lawful, reasonable and procedurally fair; and further stipulates that everyone has the right to be given written reasons if administrative action adversely affects their rights. S33(3) of the Constitution further requires that national legislation be enacted to give effect to the right of just administrative action, including to provide for a remedy to review administrative action. For this purpose PAJA was enacted in 2000 which provides for the remedy of judicial review. The Constitution and PAJA are not mere codifications of the common law principles relating to fair administrative action.

⁴⁶⁶ Chapter 3 read together with Chapter 4.

⁴⁶⁷ The substantive and procedural requirements are found in the provisions of the Constitution read together with PAJA and the common law. See Chapter 3 read together with Chapter 4.

PAJA is considered to be the primary and default pathway to review and therefore, if it is applicable, it may not be bypassed. Together, s33 of the Constitution and PAJA provide for various substantive and procedural requirements to be complied with in order for it to be applicable and enforceable in the circumstances.

6.1.4 Substantive requirements for right and remedy

The substantive requirements which need to be complied with for the right and remedy to be applicable and enforceable can be summarised as follows: (a) the administrator must be subject to the provisions of PAJA; (b) the conduct of the administrator must constitute “administrative action” as defined in PAJA, (c) the “administrative action” must materially and adversely affect taxpayer’s rights or legitimate expectations and have a “direct, external legal effect”; and (d) the “administrative action” must not be “lawful, reasonable and procedurally fair”, and grounds as contemplated in s6 of PAJA must be applicable.

6.1.5 Administrative action as a substantive requirement

The definition of administrative action is a complex one. It can be summarised as any decision taken, or failure to take a decision, by (a) an organ of state when exercising a power in terms of the Constitution, or a provincial constitution or (b) a natural or juristic person when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include the exercise of certain powers and/or functions or the taking of certain decisions as set out in the definition of “administrative action” in s1 of PAJA.

A decision for this purpose is a decision of an administrative nature made or proposed to be made, or required to be made, under an empowering provision. An empowering provision in this context is a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken. Lastly, failure in this context includes the refusal to take a decision. Preliminary decisions are not seen as administrative action. To determine whether a decision taken amounts to administrative action, it is the function which is analysed and not so much the functionary.

The Constitution and PAJA requires that administrative action be lawful, reasonable and procedurally fair. If administrative action does not amount to the standard, it could be subject to judicial review, and S6 of PAJA sets out various grounds for judicial review.

6.2 Empowering provisions

As discussed in Chapter 3, in the tax arena SARS is conferred with the power to administer, implement, enforce and collect taxes and the TAA directly confers SARS, CSARS, senior SARS officials and other SARS officials with the authority to exercise certain powers in certain circumstances. The empowering provisions conferring SARS and its delegated officials with the power to take decisions/exercise discretions are divided in three categories, namely empowering provisions:

- Expressly providing for the remedy of objection and appeal against decisions taken/discretions exercised (“type 1 empowering provisions”).
- Not expressly including nor excluding the remedy of objection and appeal against decisions taken/discretions exercised (“type 2 empowering provisions”).
- Expressly excluding the remedy of objection and appeal against decisions taken/discretions exercised (“type 3 empowering provisions”).

However, as noted, taxpayers are not automatically conferred with taxpayers’ remedies, and depending on the empowering provision in terms whereof the decision is taken/discretion is exercised by SARS and its delegated officials, taxpayers’ remedies must be analysed. Type 1 empowering provisions confer taxpayers with the remedy of objection and appeal procedures, type 2 empowering provisions do not expressly confer nor expressly exclude the remedy of objection and appeal procedures, and type 3 empowering provisions expressly exclude taxpayers’ remedy of objection and appeal procedures.

The question, however, arises as to whether taxpayers are conferred with the remedy of judicial review in circumstances where the empowering provisions do not expressly include or exclude the remedy of judicial review. The availability of the remedy of judicial review in respect of type 2 empowering provisions is of extreme importance as, without it, it may seem that taxpayers would be left without any remedy to protect their interests.

It was noted that in terms of SARS and its delegated officials' decisions taken/discretions exercised, when properly arrived at, are final and binding and not subject to review or appeal in terms of empowering provisions. Such decisions taken/discretions exercised, even if erroneous, should not lightly be interfered with such were taken/exercised in a *bona fide* manner, properly applying its mind, and not acting contrary to statutory provisions or other decisions of competent courts of law.

However, the taxpayer's complaint against the decision taken/discretion exercised must be analysed, and it must be determined whether it pertains to a dispute in respect of merits (correctness), or the manner in which the executive authority's powers were taken/exercised. However, insofar as the dispute pertains to the manner in which SARS and its delegated officials have taken decisions/exercised discretions in a "*mala fide*" manner, or failed to apply its mind to the matter, the taxpayer has the remedy of judicial review if it satisfies the substantive and procedural requirements for the applicability and enforceability of the remedy of judicial review.

6.3 Substantive requirements for the applicability and enforceability of the right of just administrative action and remedy of judicial review in the tax arena

Decisions taken/discretions exercised by SARS and its delegated officials by virtue of empowering provisions may, in circumstances, amount to administrative action as defined in PAJA. Each individual decision taken/discretion exercised must be analysed against the substantive requirements for the definition of "administrative action" in terms of PAJA. Many decisions taken/discretions exercised by SARS and its delegated officials by virtue of the empowering provisions have in the past been held to constitute "administrative action".

The administrative action exercised by SARS and its delegated officials must materially and adversely affect taxpayers' rights. The individual circumstances under which SARS and its delegated official take decisions/exercise discretions amounting to administrative action must be analysed to determine whether they were taken in a lawful reasonable and procedurally fair manner. If this is not the case, then it must be determined whether any of the grounds set out in s6 of PAJA are applicable in the circumstances.

There are numerous cases where courts have found that the administrative action taken by SARS and its delegated officials did not comply with the norm of lawful, reasonable and procedurally fair thus constituting grounds for a judicial review as contemplated in s6 of PAJA.

6.4 Procedural requirements for the applicability and enforceability of the right of just administrative action and remedy of judicial review in the tax arena

In addition to the substantive requirements which need be met, there are procedural requirements set out in the Constitution read together with PAJA for the right and remedy of judicial review to be applicable and enforceable. There are four main procedural requirements, namely (a) *locus standi* to institute judicial review proceedings; (b) time limitations in which judicial review proceedings must commence with; (c) the exhaustion of all available internal remedies prior to the commence of judicial review proceedings (unless there are exceptional circumstances); (d) that Rules regulating proceedings in terms of PAJA be established and determination of Rules which will regulate judicial review proceedings until new Rules are promulgated. These were discussed at length in Chapter 5.

In Chapter 5 it was also determined that especially the procedural requirement of the exhaustion of all available internal remedies is a controversial topic in respect of the tax arena.

Chapter 5 further noted that no rules pertaining to the regulation of procedures to be followed in terms of PAJA have been promulgated, although PAJA requires such rules to be promulgated. To date judicial review is brought and regulated by Rule 53 of the Uniform Rules of the High Court. Further, the view has been expressed that the procedures available in respect of objection and appeal procedures may be utilised to institute judicial review proceedings in respect of tax related matters. However, it seems that this approach is not consistent with PAJA and cannot be enforced.

6.5 Which forum has jurisdiction?

6.5.1 Introduction

PAJA provides that judicial review may be instituted in a High Court, or court with similar status to a High Court, or in a Magistrates Court which had been designated for that purpose or a tribunal which had been established for that purpose. However, no Magistrates Court has to date been designated to adjudicate upon judicial review proceedings. Furthermore, no tribunal has yet been established in terms of PAJA to adjudicate upon judicial review. Even if a Magistrates Court had been designated and/or a tribunal had been established in terms of PAJA, then as no Rules have yet been promulgated in terms of s7 of PAJA, such Magistrates Court/tribunal would in any event practically not be equipped to adjudicate upon judicial review.

In the tax arena, a special Court, namely the Tax Court, has been established to deal with certain tax related matters. The High Court also, in terms of its inherent jurisdiction, may hear certain tax related matters. The question which arises, however, is which court (i.e. the Tax Court or the High Court) has the jurisdiction to adjudicate upon judicial review in respect of tax related issues? Furthermore, the status of the Tax Ombud must be determined in this regard.

Chapter 5 dealt with the question pertaining to which forum/court has jurisdiction to adjudicate upon judicial review in tax-related matters, and to summarise, the following was determined.

6.5.2 Tax Court

The Tax Court is a creature of statute which was established by s83 of the ITA and will continue under s116 of the TAA. As the Tax Court is a creature of statute, its jurisdiction is defined in s83A of the ITA and s117 of the TAA. The ITA does not provide the Tax Court with the jurisdiction to adjudicate upon review.

Despite no legislation providing the Tax Court with jurisdiction to adjudicate upon reviews, various cases have in the past held that the Tax Court has the power to review matters which related to tax related issues, *alternatively* if not expressly holding same, by implication

adjudicated upon issues which amounted to a judicial review in the circumstances. The leading authority supporting the jurisdiction of the Tax Court is *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk 1985 (2) SA 668 (T)*, however, adjudicated upon in 1985 (prior to the Constitution and PAJA being promulgated).

In light of the change in the Constitutional dispensation, as well as the enactment of PAJA, the aforesaid case law should be interpreted having regard thereto. It is clear that currently only a High Court or a Court having the status of a High Court may adjudicate upon judicial review. It is trite law that the Tax Court does not have the status of a High Court. There are writers such as De Koker⁴⁶⁸ who have expressed the opinion that in the new Constitutional dispensation the Tax Court is not conferred with the jurisdiction to adjudicate upon judicial review proceedings. In a recent unreported VAT case, Case No VAT 789 unreported decision by the Pretoria Tax Court, delivered 10th September 2012 by Bertelsmann J, the court supports this interpretation against the jurisdiction of the Tax Court.

The affect of the TAA on the Tax Court's jurisdiction to adjudicate upon judicial review in tax matters should also be considered. It seems that as the TAA in some sections refers to a type of review as it allows for certain "decisions" taken by SARS and its delegated officials to be subject to objection and appeal.

6.5.3 High Court

PAJA expressly provides that the High Court has jurisdiction to adjudicate upon judicial review, and all judicial review proceedings are currently brought in terms of PAJA. Furthermore the High Court has inherent jurisdiction, which includes the jurisdiction to review administrative action by either setting it aside or correcting it.

There are writers⁴⁶⁹ and case law which acknowledge that the High Court has the jurisdiction to adjudicate upon judicial review proceedings in respect of matters in the tax arena, and in particular where SARS and its delegated officials take decisions/exercise discretions in terms of type 2 empowering provisions, and that neither the availability of the remedies of

⁴⁶⁸ De Koker, A. *et al.* (2010). *Silke on the South African Income Tax Act*. Service 42. Durban: Lexis Nexis.

⁴⁶⁹ Ibid.

objection and appeal in respect of appeals to the Tax Court, nor the finality of assessments or failure to appeal to the Tax Court influence the inherent jurisdiction of the High Court.

Case law has, however, held that the High Court does not have jurisdiction in all tax-related matters and the argument in this regard is that if the High Court had jurisdiction in all tax related matters, it would defeat the purpose of the establishment of a special court to deal with tax related matters. It has, however, been commented on that the case law referred to does not pertain to the issue of whether the High Court has jurisdiction to adjudicate upon judicial review in the tax arena. Therefore it does not seem that there is any law prohibiting the High Court from adjudicating upon judicial review in the tax arena.

6.5.4 Tax Ombud

The TAA has also provided that a Tax Ombud be established with jurisdiction to adjudicate upon a form of review, but as yet (late 2012) the Tax Ombud has not been established.⁴⁷⁰ When the Tax Ombud is established, it would have to be considered academically whether it constitutes a forum having jurisdiction to adjudicate upon judicial review, especially in light of the Rules required by s7 of PAJA not yet having been promulgated. In light of the aforesaid, it seems that the Tax Ombud would rather constitute an “*available internal remedy*” in terms of s7(2) of PAJA in circumstances where it is applicable than a final forum adjudicating upon judicial review.

6.5.5 Conclusion

In light of the aforesaid controversy in respect of the Tax Court, High Court and Tax Ombud’s jurisdiction to adjudicate upon judicial review proceedings, it seems that an Appeal Court should reconsider the judgment of *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk 1985 (2) SA 668 (T)* in light of the provisions of the Constitution and PAJA and provide clarity on this aspect. In the meantime, it would be less risky to commence judicial review in the High Court than the Tax Court, and therefore the interpretation that the High Court is the appropriate forum is supported.

⁴⁷⁰ S259 of the TAA provide that a Tax Ombud must be appointed by the Minister of Finance within one year of the commencement of the TAA.

6.6 Powers of forum having jurisdiction to adjudicate upon judicial review

S8 of PAJA sets out the powers which the court adjudicating the judicial review has. Therefore, when deciding on judicial review, the High Court should make an order as authorised by s8 of PAJA. Review aims to scrutinise administrative action, and the primary remedies provided by it are the setting aside or correcting of the administrative action.

6.7 Recommendations for further research

As has been emphasised, this dissertation relates to the position prior to 1 October 2012, prior to the coming into force of the TAA, and therefore the entire position may have to be re-evaluated. The TAA would not have an impact on the content of Chapters 2 and 3; however it may impact the content of Chapters 4 and 5 of this dissertation.

The main controversial topic discussed in this dissertation is the question of whether the Tax Court, High Court and/or Tax Ombud has jurisdiction to adjudicate upon judicial review in tax related matters. It is recommended that current case law and legislation be analysed and reconsidered by the Appeal Court in order for an Appeal Court judgment to clear up the current uncertainty.

It has also been pointed out that the availability of proper internal remedies in the tax arena, which amount to a low cost forum, would be welcomed. In this regard, prior to the TAA, no proper internal remedy was made available in the tax arena. The TAA has introduced a Tax Ombud as a possible low cost forum to adjudicate upon the review before the matter goes to the courts. The question which arises now, is whether the Tax Ombud will constitute an available internal remedy in terms of s7(2) of PAJA, which taxpayers first need to comply with prior to commencing judicial review. Firstly, it must be said that although, academically speaking, the Tax Ombud seems to constitute an available internal remedy, practically it is not yet such as no one has yet been appointed to hold the office of the Tax Ombud. In future, once it has been practically equipped to perform its functions, powers and duties, this may become a very relevant aspect to consider in respect of the requirements of s7 of PAJA pertaining to the exhaustion of all available internal remedies.

References

- Baker, P. & Groenhagen, A-M. (2001). *The Protection of Taxpayers' Rights – An International Codification*. London: European Policy Forum.
- Baxter, L. (1984 reprinted in 1991). *Administrative Law*. Cape Town: Juta & Co Ltd.
- Bekink, B. (2006). *Principles of South African Constitutional Law*. Revised Edition. Durban: Lexis Nexis.
- Cachalia, A. *et al.* (1994). *Fundamental Rights in the New Constitution*. Cape Town: Juta and Co Ltd.
- Chaskalson, M. *et al.* (2006). *Constitutional Law of South Africa*. Loose leaf edition, 1996 - 1999. Cape Town: Juta & Co Ltd.
- Clegg, D. & Stretch, R. (March 2012). *Income Tax in South Africa*. Volume 1A. Durban: LexisNexis.
- Corder, H. & Van der Vijver, L. (2002). *Realising Administrative Justice*. Cape Town: Siber Ink CC.
- Croome, B.J. (2008). *Taxpayers' rights in South Africa: An analysis and evaluation of the extent to which the powers of the South African Revenue Service comply with the Constitutional rights to property, privacy, administrative justice, access to information and access to courts*. Unpublished thesis for LLD. Cape Town: UCT.
- Croome, B.J. (2010). *Taxpayer Rights in South Africa*. Cape Town: Juta.
- Currie, I. & Klaaren, J. (2001). *The Promotion of Administrative Justice Act Benchbook*. Cape Town: Siber Ink.
- Currie, I. (2007). *The Promotion of Administrative Justice Act: A Commentary*. Second Edition. Cape Town: Siber Ink.

Currie, L. & De Waal, J. (2005). *The Bill of Rights Handbook*. Fifth Edition. Cape Town: Juta.

Davies, D.M. *et al.* (2011). Bias, the perception of bias, and pay now, argue later. *The Taxpayer*, Vol. 60, No 5, pp. 81-82.

De Koker, A. *et al.* (2010). *Silke on the South African Income Tax Act*. Service 42. Lexis Nexis.

De Koker, A. *et al.* (2012). *Silke on the South African Income Tax Act*. Service 44. Durban: Lexis Nexis.

De Ville, J.R. (2006 revised first edition reprint). *Judicial Review of Administrative Action in South Africa*. Durban: Lexis Nexis Butterworths.

De Waal, J. *et al.* (1999). *The Bill of Rights Handbook*. Second Edition. Cape Town: Juta and Co Ltd.

De Waal, J. *et al.* (2001). *The Bill of Rights Handbook*. Fourth Edition. Cape Town: Juta and Co Ltd.

Fine, F. (1999). *Revenue Service says bill threatens its efficiency*. Business Day Newspaper, 1 December 1999.

Hagen, H. (2001). *The taxman's Huge Bonus Uproar*. The Citizen Newspaper, 20 July 2001.

Hoexter, C (2012). *Administrative law in South Africa*. Second Edition. Cape Town: Juta & Co.

Hoexter, C. (2002). *The New Constitutional and Administrative Law*. Volume Two Administrative Law. Cape Town: Juta.

Hoexter, C. (2007). *Administrative Law in South Africa*. Cape Town: Juta & Co.

Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa RP 1994 (Pretoria: The Government Printer, 1994).

Juta. (2012). *Juta's Income Tax Commentary on the Income Tax Act 58 of 1962*. Available at www.jutalaw.co.za/media/filestore/2012/04/st2012018.pdf (Subscriber subscription service).

Katz Commission of Enquiry into Certain Aspects of the Tax Structure of South Africa, Commission created under the Commissions Act 8 of 1947 and in accordance with Government Gazette 15924, Regulation Gazette 5378 of 1994.

Landman, A.A. (1985). *An Administrative Law Inquiry into the Legal Nature of the Assessment of Normal Tax*. Unpublished LLM thesis. Pretoria: University of South Africa.

LAWSA. Law of South Africa. Second Edition. Volume 5.

Meyerowitz, D. (2007/2008). *Meyerowitz on Income Tax*. Cape Town: The Taxpayer.

Meyerowitz, D.(2002/2003). *Meyerowitz on Income Tax*. Cape Town: The Taxpayer.

Meyerowitz, D.(2004/2005). *Meyerowitz on Income Tax*. Cape Town: The Taxpayer.

OECD. (1990). *Taxpayers Rights and Obligations: A Survey of Legal Situation in OECD Countries* (1990). Available at www.oecd.org/dataoecd/24/52/17851176.pdf.

Plasket, C. (2002). The exhaustion of internal remedies and s7(2) of the Promotion of Administrative Justice Act 3 of 2000. *South African Law Journal*, 50, 119.

Republic of South Africa (2003). *Regulations and Government Notices: Income Tax: Regulations promulgated in Government Gazette 24639* (1 April 2003). Available at <http://www.sars.gov.za/home.asp?pid=3498>.

Republic of South Africa. (1987). Report of the Commission of Inquiry into the Tax Structure of the Republic of South Africa RP 34/1987. Pretoria: The Government Printer.

Republic of South Africa. (1987). White paper on The Report of the Commission of Inquiry into the tax structure of the Republic of South Africa, known as the Margo Commission Report RP34/1987 (1987) Pretoria: Government Printer.

Republic of South Africa. (1995) Third Interim Report of the Commission of Enquiry into certain aspects of the tax structure of South Africa, RP 1995, CI-95. Pretoria: Government Printer.

Republic of South Africa. *Draft Rules of Procedure for Judicial Review of Administrative Action*. Published in Government Gazette GN R966 GG 32622 (9 October 2009). Pretoria: Government Printer.

SARS. (1997). *SARS Client Charter in the 1997 Budget Review*. Available at www.sars.org.za.

Schweitzer, A.G. (1991). Aspects of the Administrative Law Relationship Between the Taxpayer and the Commissioner for Inland Revenue. Unpublished LLM Thesis. Cape Town: University of Cape Town.

Smith, A. (1937). *An Enquiry into the Nature and Causes of the Wealth of Nations*. New York: Random House. (Originally published in 1776).

Theron, L. (1994). *Regsteoretiese ondersoek na 'n landbougrondbelasting vir Suid Afrika*. Unpublished thesis for LLD. Johannesburg: RAU (now University of Johannesburg).

Theron, L. (1994). *Regsteoretiese ondersoek na 'n landbougrondbelasting vir Suid Afrika*. Unpublished thesis for LLD. Johannesburg: RAU (now University of Johannesburg).

Van Niekerk, A. (2008). *Die heffing van inkomstebelasting uit 'n grondwetlike oogpunt*. Unpublished thesis for LLB thesis. Pretoria: University of Pretoria.

CASES

Attorney-General of Trinidad and Tobago v Ramesh Dipraj Kummar Mootoo (1976) 28 WIR 326

Bailey v Commissioner for Inland Revenue 1933 AD 204

Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs & Tourism & Others 2004 (4) SA 490 (CC)

Bernstein and Others v Bester NO and Others 1996 (4) BLCR 449 (CC)

Bernstein and Others v Bester and Others NNO 1996 (2) SA 751 (CC)

BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers' Union and Another 1992 (3) SA 673 (A)

Case No VAT 789, unreported decision by the Pretoria Tax Court, delivered 10 September 2012 by Bertelsmann J

Case No 11641, unreported judgment by the Johannesburg Tax Court, delivered on 4 December 2006 by Boruchowitz J

Case No VAT 304, unreported decision by the Pretoria Tax Court, delivered on 7 November 2005 by Southwood J

Carephone (Pty) Ltd v Marcus NO 1999 (3) SA 304 (LAC)

Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 (Second Certification Judgment) 1997 (2) SA 97 (CC)

Ex Parte Speaker of the Western Cape Provincial Legislature: In Re Certification of the Constitution of the Western Cape 1997, 1997 (4) SA 795 (CC)

CDA Boerdery (Edms) Bpk v Nelson Mandela Metropolitan Municipality 2007 (4) SA 276 (SCA), 69 SATC 199

Chairperson's Association v Minister of Arts and Culture [2007] SCA 44 (RSA)

Chirwa v Transnet Ltd 2008 (4) SA 367 (CC)

Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennies Group Ltd t/a Renfreight 1999 (3) SA 771 (SCA)

Commissioner, South African Revenue Service v Trend Finance (Pty) Ltd 2007 (6) SA 117 (SCA)

Commissioner, South African Revenue Service v Saleem 2008 (3) SA 655 (SCA)

CIR v Da Costa 1985 (3) SA 768 (A)

Commissioner for Inland Revenue v City Deep Limited 1924 AD 298

Crown Mines Ltd v CIR 1922 AD 91

CSARS v Hawker Aviation Service Partnership & Others 2005 (5) SA 283 (T)

CSARS v Hawker Air Services (Pty) Ltd and Hawker Aviation Partnership 2006 (4) SA 292 (SCA)

CSARS v Levue Investments (Pty) Ltd 2007 JDR 0179 (SCA)

Deacon v Controller of Customs & Excise [1999] 2 All SA 405 (SE).

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

Du Plessis v De Klerk 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC)

Dunn v Minister of Defence 2006 (2) SA 107 (T)

Earthlife Africa (Cape Town) v Director-General: Department of Environment Affairs and Tourism 2005 (3) SA 156 (C)

Emary NO and Another v Commissioner for Inland Revenue 1959 (2) PH T16 (D)

Estate HM Brownson (deceased) v President and Members of the Income Tax Special Court and CIR 1933 WLD 116

Ewing McDonald & Co Limited v M & M Products Co 1991 (1) SA 252 (A)

Ex Parte Chairperson of the Constitutional Assembly In Re: Certification of the Constitution of the Republic of South Africa 1996 (First Certification Judgment) 1996 (4) SA 744 (CC)

Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 (Second Certification Judgment) 1997 (2) SA 97 (CC)

Ex Parte Speaker of the National Assembly: In re dispute concerning the Constitutionality of certain provisions of the National Education Policy Bill 83 of 1995 1996 (3) SA 289 (CC)

Ex Parte Speaker of the Western Cape Provincial Legislature: In Re Certification of the Constitution of the Western Cape 1997, 1997 (4) SA 795 (CC)

First National Bank of SA LTD t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA LTD t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC)

Fredericks and others v MEC for Education and Training, Eastern Cape 2002 (2) SA 693 (CC)

Friedman and Others NNO v Commissioner of Inland Revenue: In Re Phillip Frame Will Trust v Commissioner of Inland Revenue 1991 (2) SA 340 (W)

Goldfields Ltd v Connellan No & Others [2005] 3 All SA 1442 (W)

Goodman Bros (Pty) Ltd v Transnet Ltd 1998 (4) SA 989 (W)

Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board 1950 (2) SA 420 (A).

Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works 2005 (6) SA 313 (SCA)

Hira and Another v Booyens and Another 1992 (4) SA 69 (A)

ITC 243 (1928) 4 SATC 196; ITC (1930) 5 SATC 260; ITC 297 (1934) 8 SATC 53; ITC 696 (1950) 17 SATC 86; ITC 840 (1957) 21 SATC 424

Income Tax Case 93 (1927) 3 SATC 239

Income Tax Case 132 (1928) 4 SATC 196

Income Tax Case 243 (1928) 4 SATC 196

Income Tax Case 168 (1930) 5 SATC 160

Income Tax Case 297 (1934) 8 SATC 53

Income Tax Case 696 (1950) 17 SATC 86

Income Tax Case 840 (1957) 21 SATC 424

Income Tax Case 921 24 SATC 242

Income Tax Case 936 24 SATC 361

Income Tax Case 1331 (1980) 43 SATC 76

Income Tax Case No 1351 44 SATC 58

Income Tax Case 1378 (1990) 52 SATC 258

Income Tax Case 1400 47 SATC 169

Income Tax Case No 1527 54 SATC 227.

Income Tax Case 1582 (1995) 57 SATC 27

Income Tax Case No 1806 68 SATC 117

Income Tax Case 936 1961 Taxpayer 188, 24 SATC 361

1985 Taxpayer 228, 47 SATC 34

Irvin & Johnson (SA) Ltd v Commissioner for Inland Revenue 1946 AD 483

Johannesburg Stock Exchange v Witwatersrand Nigel Ltd 1988 (3) SA (A)

Koyobe v Minister for Home Affairs 2010 (4) SA 327 (CC)

Khomisenore Petrus Tsoaeli and others v The Minister of Defence and others (TPD Case number 27513/2000 delivered June 2005)

Killian v Gauteng Provincial Legislature 1999 (2) BCLR 225 (T)

Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Beperk 1985 (2) SA 668 (T)

Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Beperk 1987 (2) SA 123 (SCA)

Metcash Trading Ltd v Commissioner, SARS 2001 (1) SAS 1109 (CC)

Minister of Correctional Services v Tobani 2003 (5) SA 126 (E)

Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment action campaign and Another as amici curiae) 2006 (2) SA 311 (CC)

Motsepe v Commissioner for Inland Revenue 1997 (2) SA (2) 898 (CC)

Nichol v Registrar of Pension Funds 2008 (1) SA 383 (SCA)

NNP v Government of the RSA 1999 (3) SA 191 (CC).

Noupoort Christian Care Centre v Minister of National Department of Social Development and Another 2005 (10) BCLR 1034 (T)

Olitxki Property Holdings v State Tender Board 2001 (3) SA 1247 (SCA)

Pepkor Retirement Fund and Another v Financial Services Board 2003 (6) SA 38 (SCA)

Pering Mine (Pty) Ltd v Director-General, Mineral and energy Affairs and Others [2005] 67 SATC 317

Pharmaceutical Manufacturers Association of SA: Ex Parte President of the Republic of South Africa 2000 (2) SA 674 (CC)

President of the Republic of South Africa and Others v South African Football Rugby Union 1999 (4) SA 147 (CC)

President of the Republic of South Africa and Others v SARFU 2000 (1) SA 1 (CC)

Prinsloo v Van der Linde 1997 (3) SA 1012 (CC)

R v Secretary of State for the Home Department, ex parte Swati [1986] 1 All ER 717 (CA)

Rand Ropes (Pty) Ltd v Commissioner for Inland Revenue 1944 AD 142

Rossi, Pera and P and R Construction Civil Engineering v CSARS, JTLR Case No 2010/34417, unreported decision by the South Gauteng High Court, Johannesburg, 22 February 2011)

South African Association of South African Association of Personal Injury Lawyers v Heath 2001 (1) SA 883 (CC)

Sasol Oil (Pty) Ltd and Another v Metcalfe NO 2004 (5) SA 161 (W)

Shidiack v Union Government 1912 AD 652

Spendiff NO v Kolektor (Pty) Ltd 1992 (2) SA 537 (A).

Stanfield v Minister of Correctional Services and Others 2003 (12) BCLR 1384 (C) 1418

S v Lawrence, Negal, Solberg 1997 (4) SA 1176 (CC)

S v Roberts 1999 (4) SA 915 (SCA)

The Speaker, National Assembly: In re National Education Policy Bill 1996 (2) SA 289 (CC) and In re: Certification of the Constitution of the RSA 1996 SA 744 (CC)

Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk 1985 (2) SA 668 (T)

Trend Finance (Pty) Ltd and Another v Commissioner for South African Revenue Service and Another [2005] 67 SATC 334

Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd 1987 (4) SA 883 (A)

Weenen Transitional Local Council v Van Dyk 2002 (4) SA 653 SCA

ACTS

Constitution of the Republic of South Africa 108 of 1996

Constitution of the Republic of South Africa 110 of 1983

Constitution of the Republic of South Africa 200 of 1993

Exchequer Act 66 of 1975

Income Tax Act 31 of 1941

Income Tax Act 40 of 1925

Income Tax Act 41 of 1917

Act 45 of 1949

Income Tax Act 58 of 1962

Promotion of Administrative Justice Act 3 of 2000

Provincial Tax Regulation Process Act 53 of 2001

Public Finance Management Act 1 of 1999

Revenue Laws Amendment Act 45 of 2003

Rules Board for Courts of Law Act 107 of 1985

South African Revenue Service Act 34 of 1997

Supreme Court Act 59 of 1959

Tax Administration Act 28 of 2011

Value Added Tax Act 89 of 1991