DOES THE CONSTITUTION PROTECT TAXPAYERS AGAINST THE MIGHTY SARS? – AN INQUIRY INTO THE CONSTITUTIONALITY OF SELECTED TAX PRACTICES AND PROCEDURES

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This dissertation purports to ascertain whether the Constitution of South Africa provides protection for taxpayers against specific practices and procedures utilised by SARS in order to collect taxes.

The collection of taxes is imperative in ensuring that economical and socio-economical objectives of the government are met. SARS is therefore awarded specific powers to achieve this.

On the other side are taxpayers who are awarded constitutionally enshrined rights. Said rights may only be limited if the limitation is reasonable and just.

Tension between SARS' task and the taxpayers' rights exist. This dissertation endeavours to find a balance where SARS can effectively collect tax whilst the taxpayers' rights are not unreasonably and unjustly limited.

The Constitution affords taxpayers the right to just administrative action. The right entails, amongst others, that when a dispute arises both parties sides must be heard. The right to just administrative action also includes legitimate expectations.

A practice has transpired where SARS denies being bound by its own rulings and notes. A legitimate expectation is, nevertheless, created that SARS will act in accordance with its rulings and notes. The doctrine of legitimate expectations will provide assistance to the taxpayer in this situation.

SARS further has the power to appoint a taxpayer’s agent. This procedure does not provide for the taxpayer to state his case before such an appointment is made. This *prima facie* violates a person's right to just administrative action.
When compared to the civil procedure of garnishee orders valuable differences transpired which will assist in elevating the tension between the taxpayer’s rights and SARS’ duty.

A further right afforded, is the right of access to the court. The statement procedure and the “pay now, argue later” rule appear to be in conflict with said right. The statement procedure, which empowers SARS to file a statement at court to be made a judgment, exceeds the normal recourse available for ordinary litigants, namely the default judgment procedure. This procedure has, however, survived constitutional scrutiny. The “pay now, argue later” rule entails that a taxpayer must first pay the assessed amount before questioning the amount. This procedure is a departure from the general rule utilised in civil proceedings. It was held that this procedure is constitutional. This is, however, questioned due to the fact that at the time this rule is invoked the court’s jurisdiction is excluded.

Furthermore, a taxpayer can rely on his right to property. If SARS unreasonably delays a refund due to the taxpayer this will violate said right. The situation relating to money owed in civil matters and the judgment of Sage Life Ltd indicates that a taxpayer will be entitled to interest and accordingly the violation will not be unreasonable or unjust.

Moreover a taxpayer is afforded the right to privacy. Tension may arise when SARS obtains a warrant to search and seize the taxpayer’s property. This procedure is similar to the procedure of obtaining a warrant in terms of the Criminal Procedure Act. Declaring this procedure unconstitutional is implausible.

Other countries faced with the tension between their revenue service collecting tax and their taxpayers’ rights, are utilising certain measures to reduce this tension. Amongst other a service charter, to provide legal certainty, instituting complaints forums, to deal with poor service, and providing brochures, to educate
the taxpayers is identified. The predominant measure is, however, the office of the ombudsman.

The Constitution, together with other measures, does provide adequate protection for a taxpayer against SARS. Accordingly, the tension between SARS' duty and the taxpayers' rights is balanced with the assistance of the Constitution.
CHAPTER 1
INTRODUCTION

1.1 INTRODUCTION
The levying of taxes has been present for centuries.\(^1\) For instance, the Egyptians, in ancient times, were taxed in accordance with the rise and plunge of the Nile River.\(^2\)

The levying of taxes is imperative for a government to ensure that it achieves its economic objectives.\(^3\) A further objective of taxation is socio-economic in nature and assists in the rearrangement of resources.\(^4\)

South Africa’s government has an implied power to levy tax in terms of provisions of the final Constitution.\(^5\) \(^6\) With the enactment of the South African Revenue Services Act,\(^7\)

\(^1\) Croome BJ Taxpayers’ Rights in South Africa (2010) at 1.
\(^3\) Croome (2010) at 3.
\(^4\) Ibid at 8.
\(^5\) The Constitution of the Republic of South Africa, 1996. Citation of Constitutional Laws Act 5 of 2005 states that no act number must be associated with the Constitution of the Republic of South Africa as this act was not passed by Parliament, but was adopted by the Constitutional Assembly. Hereinafter it will be
the South African Revenue Service\(^8\) was established. SARS, as an organ of state,\(^9\) is empowered to administer taxes in South Africa.\(^10\)

It is clear that SARS is endowed with the duty of collecting taxes, which the government uses to improve the country’s economical development and regulate the levels of employment.\(^11\) For that reason SARS is afforded certain powers by the legislature to effect efficient and speedy collection of taxes.\(^12\) These powers entail, amongst others, that SARS may appoint a third party as an agent of the taxpayer,\(^13\) the “pay now, argue later” rule,\(^14\) the certificate procedure\(^15\) and search and seizure powers.\(^16\)

As the subsequent chapters will reveal in more detail these powers afforded to SARS, in comparison with similar civil procedures and practices, seems almost draconian. The question arises as to whether there is any remedy available for a taxpayer against the extent of these powers?

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\(^7\) Act 34 of 1997. Hereinafter referred to as the SARS Act.

\(^8\) Hereinafter referred to as SARS.

\(^9\) S 2 of the SARS Act.

\(^10\) S 3 and 4 of the SARS Act. These taxes comprise of, *inter alia*, income tax, value added tax, transfer taxation and donations tax. See Muller LLD Thesis (2010) at 15 for a detailed discussion on the development of the various tax bases. See also Croome (2010) at 11 for a discussion on direct and indirect taxation.


\(^12\) Muller LLD Thesis (2010) at 63.


\(^15\) S 91(1) (a) of the Income Tax Act. See par 3.3 below.

\(^16\) S 74 of the Income Tax Act. See par 5.3 below.
Bearing in mind the importance of levying tax it still seems necessary for some balance between SARS’ duties and the interest of an aggrieved taxpayer. The main focus of this dissertation will be to ascertain whether the Constitution can provide the said balance between the duties of SARS and the interest of the taxpayer.

1.2 THE CONSTITUTION

1.2.1 Introduction
The paragraphs below provide an overview of the enactment of the Constitution and the rights enshrined in the Bill of Rights.

1.2.2 The Enactment
During 1994, the Republic of South Africa changed from a parliamentary state\(^{17}\) to a constitutional state.\(^{18}\) This brought on a major shift in the legal policies\(^{19}\) of the country and all laws were subject to the Interim Constitution.\(^{20}\) The Interim Constitution was a temporary measure while the Constitution was being drafted.\(^{21}\) Both constitutions introduced a Bill of Rights\(^{22}\) which had to be adhered to by all organs of state, through its vertical application, and citizens, through its horizontal application.

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\(^{17}\) In a parliamentary state the parliament has the power to enact any law whilst no one, including the courts, has the authority to question the laws. See also Currie I and De Waal J *The Bill of Rights Handbook* (2005) at 3.

\(^{18}\) The Constitution is supreme and no law can be in breach thereof. See also Currie and De Waal (2005) at 11.


\(^{21}\) The Constitution was adopted on 8 May 1996 and implemented on 4 February 1997.

\(^{22}\) Ch 3 of the Interim Constitution and ch 2 of the Constitution.
With the introduction of the Interim Constitution, all statutes, including fiscal statutes, had to be aligned accordingly. This prompted the Minister of Finance, in the budget speech before Parliament on 22 June 1994, to establish a Commission of Enquiry into Certain Aspects of the Tax Structure of South Africa, later referred to as the Katz Commission.

The Katz Commission pointed out that:

The Commission notes that the tax system is subject to the Constitution and must conform to society’s commitment to the Rule of Law. 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.

It was thus clear that the collection of taxes should conform to the rights set out in the Interim Constitution.

In 1996 the Constitution was certified by the Constitutional Court, and replaced the Interim Constitution. In the case of First National Bank of SA Ltd t/a Wesbank v C: SARS the court highlighted that SARS is subject to the Constitution, when the court stated 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.”

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26 2002 (7) JTLR 250.

27 First National Bank of SA Ltd t/a Wesbank v C: SARS at 252.
1.2.3 Overview of Constitutional Rights
As was stated previously,28 the Constitution contains the Bill of Rights. The Bill of Rights stipulates how the State and its organs should interact with people in South Africa.29

Amongst other, the Bill of Rights affords every person, and consequently a taxpayer, the right to just administrative action,30 right to access to the courts,31 right to property,32 and the right to privacy.33

Each of the above rights will, in the context of taxation, be dealt with in the subsequent chapters of this dissertation.

1.2.4 Constitutional Approach
These fundamental rights afforded to taxpayers and contained in the Bill of Rights are not absolute and may be limited if the limitation is a reasonable and justifiable limitation.34 Taxpayers mistakenly assume that a right afforded by the Constitution may not be violated or infringed in any way.35

28 See par 1.2.2.
29 See Croome & Olivier (2010) at 3. Although the authors refer to the Interim Constitution, it is submitted that it is also applicable to the Bill of Rights contained in the Constitution.
30 See s 33 of the Constitution.
31 See s 34 of the Constitution.
32 See s 25 of the Constitution.
33 See s 14 of the Constitution.
34 As contemplated in s 36 of the Constitution. See also Croome PhD Thesis (2008) at 16.
An aggrieved taxpayer has the right to approach a court if he is of the opinion that the powers afforded to SARS unreasonably and unjustifiable limits the taxpayer’s constitutional rights.\textsuperscript{36}

Firstly, it must be proved by the applicant, in this instance a taxpayer, that a constitutional right has been limited.\textsuperscript{37} This would entail that the person would need to show that the situation for which he or she seeks constitutional protection falls within the ambit of the particular constitutional right\textsuperscript{38} and that the right or practice he or she wishes to challenge impedes the exercise of the protected activity.\textsuperscript{39} Only then will the court move to the second stage of the analysis.

Accordingly, if a taxpayer is able to prove that a certain practice or procedure of SARS is impeding one of the taxpayer's constitutional rights the court will move on to the second stage of the analysis.

The second stage examines whether the limitation is a reasonable and justifiable limitation as contained in section 36 of the Constitution. Section 36 states that

\begin{itemize}
\item[(1)] The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
\item[(a)] the nature of the right;
\item[(b)] the importance of the purpose of the limitation;
\item[(c)] the nature and extent of the limitation;
\item[(d)] the relation between the limitation and its purpose; and
\item[(e)] less restrictive means to achieve the purpose.
\end{itemize}

\textsuperscript{36} Croome & Olivier (2010) at 10.


\textsuperscript{38} \textit{Ibid} at 34-4.

\textsuperscript{39} \textit{Ibid} at 34-5.
Therefore, if it is a reasonable and justifiable limitation the impediment will be permitted. In the event that it is not a reasonable and justifiable limitation the practice will be unconstitutional. It is therefore of great importance to understand section 36 of the Constitution.

This section firstly indicates that the impeding practice must be in terms of law of general application. Woolman and Botha identifies four features for a practice to be in terms of law of general application namely parity of treatment, non-arbitrariness, accessibility and clarity.\textsuperscript{40}

Parity of treatment can be defined as “treat similarly situated persons the same.”\textsuperscript{41} Secondly, the practice must be non-arbitrary. This term means that a clear standard must be set of when this section would be applicable which will provide legal certainty.\textsuperscript{42}

For a practice to be law of general application, the practice must also be accessible. This feature refers to the fact that the law must be publicly available.\textsuperscript{43} The minimum standard for a law to be publicly available would be that the law was published.\textsuperscript{44}

The last feature for a practice to be of law of general application is clarity. Clarity indicates that the law must be of such a nature that a society would be able to regulate themselves.\textsuperscript{45}

After the court has been satisfied that a practice is law of general application the court will proceed in evaluating the five factors, provided for in section 36, in order to

\textsuperscript{40} Ibid at 34-61.
\textsuperscript{41} Id.
\textsuperscript{42} Ibid at 34-62.
\textsuperscript{43} Ibid at 34-65.
\textsuperscript{44} Id.
\textsuperscript{45} Ibid at 34-63.
determine whether the practice is a reasonable or justifiable limitation of another right. The factors, as stated above, are the nature of the right, the importance of the purpose of limitation, nature and extent of the limitation, relationship between the limitation and its purpose and less restrictive means.\textsuperscript{46}

The said factors must not be seen as a check-list but rather a balancing act.\textsuperscript{47} When weighing up the factors the following dictum in \textit{S v Bhulwana}\textsuperscript{48} must be remembered:

\begin{quote}
[T]he Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroads into fundamental rights, the more persuasive the grounds of justification must be.\textsuperscript{49}
\end{quote}

Throughout the dissertation the two stage constitutional analysis must be borne in mind regarding the arguments relating to the constitutionality of the practices and procedures.\textsuperscript{50}

The following paragraphs will provide an exposition of this dissertation.

\textbf{1.3 EXPOSITION}

Chapter 2 provides a general discussion regarding the right to just administrative action, as enshrined in section 33 of the Constitution, where after this right relating to the practice whereby SARS is not held bound to its rulings and interpretation notes and the appointment of a taxpayer’s agent will be discussed. This discussion will ascertain whether the doctrine of legitimate expectation, can be applied to force SARS to be

\textsuperscript{46} Due to space constraints the dissertation will not deal with detailed discussion of these factors. For reading in this regard see Woolman \textit{et al} (2007) at 34-70.

\textsuperscript{47} \textit{S v Manamela} 2000 (3) SA 1 (CC) at 19.

\textsuperscript{48} Unreported case CCT12/95, ZACC 11.

\textsuperscript{49} \textit{Bhulwana} at 11.

\textsuperscript{50} Due to space constraints the two stage analysis will not be dealt with individually when discussing the practices and procedures.
bound to its rulings and interpretation notes. In the latter part of the chapter the appointment of a third party as an agent of the taxpayer will be compared with the civil procedure of a garnishee order. It is submitted that this comparison will provide insight regarding the extent of SARS’ power to appoint a taxpayer’s agent.

Chapter 3 focuses on section 34 of the Constitution which affords every person the right to access the courts. Two practices afforded to SARS, namely the certificate procedure and the “pay now, argue later” rule, will be scrutinised to establish whether the procedures constitutes a just and reasonable limitation on a taxpayer’s right to access to the court. During the discussion a comparison will be drawn between the certificate procedure and the civil procedure of obtaining a default judgment. A further comparison will be drawn between the “pay now, argue later” rule and the general rule of civil appeals. These comparisons will reflect the degree of SARS’ powers and assist in determining whether these powers afforded to SARS reasonably and justifiably limits a taxpayer’s right to access to the court.

In chapter four a taxpayer’s right to property, as enshrined in section 25 of the Constitution, will be examined. The discussion will also examine whether an excessive delay by SARS in refunding a taxpayer’s money, breaches the taxpayer’s right to property. In order to establish this, a comparison will be drawn between refunds made by SARS and moneys owed by ordinary civil litigants.

Chapter five will deal with a taxpayer’s right to privacy. An inquiry will be made to examine whether the search and seizure procedure in terms of the Income Tax Act violates the said right. The search and seizure in terms of the Income Tax Act will be compared with the search and seizure procedure provided for in the Criminal Procedure Act.

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51 S 14 of the Constitution.
53 Act 51 of 1977. Hereinafter referred to as the CPA.
The aim of chapter six is to provide a brief discussion regarding measures utilised in other countries to ensure that a taxpayer’s rights and the Revenue Services duty to collect taxes are balanced. This will be done by a short study of other countries’ solutions in this regard, as South Africa is still a young democracy and can only benefit from lessons of other countries.\textsuperscript{54} The OECD Countries, in general, and more specifically New Zealand, United States of America and United Kingdom,\textsuperscript{55} although randomly chosen, will briefly be referred to.

Chapter 7 contains conclusions and recommendations regarding measures that can be implemented to ensure that the Constitution provides a balance between a taxpayer’s rights and SARS’ duty to collect taxes. Each practice and procedure, within the scope of this dissertation will be dealt with. Lessons learned from the comparison between the practice or procedure utilised by SARS with civil procedures will be discussed. Thereafter, solutions from other countries will be examined. It is concluded that the Constitution, together with other measures, does indeed provide protection to taxpayers and therefore ensures that there is a balance between SARS’ duty to collect tax and the taxpayer’s rights.

1.4 LIMITATIONS OF SCOPE

This study focuses on certain practices and procedures afforded to SARS and the effect these practices and procedures have on the taxpayer’s rights, as contained in the Constitution. Other practices or procedures are specifically excluded from this dissertation.

It must furthermore be noted that the practices and procedures identified may also \textit{prima facie} infringe other fundamental rights of the taxpayer. Other rights afforded to the taxpayer are, however, excluded from this dissertation.


\textsuperscript{55} The Organisation for Economic Co-operation and Development, which is an organisation of the 30 major developed countries of the world, with its headquarters in Paris. See also par 6.2.
For purposes of this dissertation reference to a taxpayer as a man or woman must be construed to include the other gender. In addition, actions taken by SARS in terms of legislation will be referred to as procedures whilst actions taken by SARS as an everyday occurrence will be referred to as a practice.

This dissertation does not take into account any development in law that occurred after 1 June 2011.
CHAPTER 2

THE TAXPAYER’S RIGHT TO JUST ADMINISTRATIVE ACTION

2.1 INTRODUCTION

This chapter considers whether the practice of the SARS not to be bound by their rulings and interpretation notes are justifiable in light of a taxpayer’s right to just administrative action. In addition, the appointment of a taxpayer’s agent by SARS will be discussed with reference to the right to just administrative action.
Before investigating the above mentioned practice and procedure of SARS, with reference to a taxpayer’s right to just administrative action, it would be appropriate to first discuss the right to just administrative action in general.

2.2 JUST ADMINISTRATIVE ACTION

2.2.1 Introduction
Section 33 of the Constitution affords every person the right to just administrative action by proclaiming that:

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

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(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 subsection (1) and (2);
   (c) promote an efficient administration.¹

This right constitutionalises the ancient rules of natural justice namely *audi alteram partem*² and *nemo iudex in propria causa*.³ A dynamic third dimension, the duty to act fairly, was added to these ancient rules.⁴

¹ The history of s 33 of the Constitution and its enactment does not fall within the ambit of this dissertation. See Currie I & Klaaren J *The Promotion of Administrative Justice Act Benchbook* (2001) at 4 for a discussion of the history of s 33 and its enactment.

² Translated to mean “to hear the other side.” See Burns Y *Administrative Law under 1996 Constitution* (2003) at 193.

³ This rule entails that in the exercising of a discretion afforded to an administrative authority it must be exercised without bias or prejudice. See Burns (2003) at 197.

⁴ *Mpande Foodliner CC v Commissioner for South African Revenue Service* 63 SATC 46 at 63.
In accordance with section 33(3) of the Constitution, the Promotion of Administrative Justice Act\(^5\) was enacted. A brief discussion of PAJA will follow and thereafter the requirements for an administrative action.

### 2.2.2 Promotion of Administrative Justice Act

As was stated previously\(^6\) PAJA was enacted to give effect to section 33(3) of the Constitution. Section 33 of the Constitution, and therefore PAJA, has the purpose of reconciling the state system with the necessary measures to govern and regulate these measures in order to prevent abuse.\(^7\)

Although the Parliamentary Justice Portfolio Committee submitted that the provisions of PAJA would hamper SARS in the collection of tax,\(^8\) parliament decided not to exclude any public organs from the ambit of the Act. In the case of *Carlson Investments Shareblock (Pty) Ltd v Commissioner for the SA Revenue Service*\(^9\) it was held that SARS does indeed perform administrative acts as described in Section 33 of the Constitution.

As a result of the aforementioned *ratio decidendi* SARS is subject to section 33 of the Constitution. As was explained previously\(^10\) section 33 of the Constitution encapsulates the *audi alteram partem* rule and the duty to act fairly. Accordingly, SARS has to adhere to the principle of *audi alteram partem* and has to act fairly.

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\(^5\) Act 3 of 2000. Hereafter referred to as PAJA.

\(^6\) Par 2.2.1.


\(^8\) Fine F “Revenue Services Says Bill Threatens its Efficiency” (1 December 1999) *Business Day*.

\(^9\) 2002 (5) BCLR 521 (W) at 531.

\(^10\) See par 2.2.1 above.
This duty entails promoting and maintaining a high standard of professional ethics, effective use of resources, impartiality and transparency.\textsuperscript{11}

From the above it has transpired that SARS is obliged to provide just administrative action to taxpayers. The question arises as to what will be classified as administrative action. Hence a brief discussion on the term “administrative action” will follow.

2.2.3 Administrative Action
The term administrative action is not defined in the Constitution and the courts have not thus far provided a clear definition of this term.\textsuperscript{12}

Section 1 of PAJA defines administrative action as:

\begin{quote}
any decision taken, or any failure to take a decision, by –

(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,
\end{quote}

\textsuperscript{11} Mpande Foodliner CC at 51.

\textsuperscript{12} For a comprehensive discussion of the courts’ attempt to define administrative action see Burns (2003) at 14.
From this definition the following elements can be identified:

- a decision (or failure to make a decision);
- of administrative nature;
- made in terms of an empowering provision;
- by an organ of state or a natural or juristic person;
- which adversely affects the rights of any person;
- and has a direct external legal effect.

For clarification purposes each of these elements will briefly be discussed.

2.2.3.1 Decision
According to PAJA a decision is a decision of an administrative nature intended to be made or required to be made. It is further declared that reference to a failure to take a decision must be construed accordingly. Thus a failure to take a decision would also amount to a decision.

2.2.3.2 Decision of an Administrative Nature
This decision must be of a public law nature where a relationship of inequality exists. In the President of the Republic of South Africa v South African Rugby Football Union matter it was declared that: “the focus of the enquiry as to whether conduct is “administrative action” is not on the arm of the government to

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13 This section lists specific instances which do not constitute administrative action. However, for purposes of this dissertation it is not necessary to discuss this any further.

14 For a full discussion of each of these elements see Currie & Klaaren (2001) at 4, Burns (2003) at 19 and De Ville JR Judicial Review of Administrative Action in South Africa (2005) at 38.

15 S 1(v) of PAJA. The section also contains a list of possible decisions. This, however, does not constitute a numerus clauses. For further reading regarding the term “decision” see De Ville (2005) at 38.


17 2000 (1) SA 1 (CC).
which the relevant actor belongs, but on the nature of the power he or she is exercising.”\textsuperscript{18}

Accordingly, when determining the administrative nature of a decision, the character of the decision should be examined and not the body exercising the decision.

\textbf{2.2.3.3 Empowering Provision}
An empowering provision can be construed as a law, common law rule, customary law, a contract\textsuperscript{19} or any instrument in terms of which administrative action is purportedly taken.\textsuperscript{20}

\textbf{2.2.3.4 By an Organ of State or Natural or Juristic Person}\textsuperscript{21}
In accordance with section 239 of the Constitution an organ of state is, amongst other “any department of state or administration in the national, provincial or local sphere of government.”\textsuperscript{22}

\textbf{2.2.3.5 Adversely Affect the Rights of a Person}
The decision taken must impose a burden on a person in order to qualify as adversely affects.\textsuperscript{23}

\textsuperscript{18} \textit{South African Rugby Football Union} at 142.
\textsuperscript{19} An example of such a contract will be when an outsourcing agreement between a local authority and a private company for refuse removal. Burns (2003) at 22.
\textsuperscript{20} S 1 (iv) of PAJA. See also Burns (2003) at 22 and De Ville (2005) at 51.
\textsuperscript{21} For purposes of this dissertation only an organ of state will be discussed.
\textsuperscript{22} S 239 (a) of the Constitution.
\textsuperscript{23} Burns (2003) at 27.
It must be borne in mind that even though the Act refers to a right, the doctrine of legitimate expectations enlarges the class of interest protected by PAJA to more than mere rights.\(^{24}\)

This doctrine was first introduced in England in the matter of *Schmidt v Secretary of State for Home Affairs*.\(^{25}\) Riggs in an article on this doctrine\(^{26}\) summarised the English Law position as follows:

> English Courts have been in the process of imposing upon administrative decision-makers a general duty to act fairly.... (A) person whose claim falls short of legal right may nevertheless be entitled to some kind of hearing if the interest at stake rises to the level of a “legitimate expectation.”\(^{27}\)

In the matter of *Administrator, Transvaal v Traub*\(^{28}\) it was confirmed that the doctrine of legitimate expectation was adopted in the South African common law. In this matter Corbett agreed with Fraser’s statement in *Council of Civil Service Unions v Minister for the Civil Service*\(^{29}\) in that a legitimate expectation might arise from a promise given on behalf of an entity or a reasonable expectation that a regular practice would continue.\(^{30}\)

Accordingly, if a person has a legitimate expectation, albeit from a regular practice or a reasonable expectation, he will, in accordance with this doctrine, be able to acquire a legal remedy. The effect of this doctrine is that the scope of the

\(^{24}\) Id.

\(^{25}\) \{1969\} 2 CH 149 at 170. For a full discussion of the history of this doctrine in England see *R v Secretary of State for the Home Department and Ex parte Ruddock* \{1987\} 1 WLR 1482 at 1439.


\(^{27}\) Id.

\(^{28}\) 1989 (4) SA 731 (A).

\(^{29}\) [1984] 3 ALL ER 935 (HL) at 944.

\(^{30}\) Traub at 756.
audi alteram partem, namely matters where an individual’s liberty, property or existing rights were affected, was extended A person aspiring to rely on a legitimate expectation would, however, need to indicate that it has a reasonable basis.

2.2.3.6 Direct External Legal Effect
In terms of German Administrative law this requirement demands an “individual right be established, withdrawn, charged or determined.” This phrase indicates that the decision has a “discernable effect on an individual” and seems to be related to the term “adversely affects.”

The right to just administrative action, PAJA and the requirements for administrative action was discussed as a general overview of the right to just administrative justice. A brief discussion regarding SARS' practice of considering itself not bound to its rulings and interpretation notes will follow. Thereafter the principles of administrative justice, as discussed above, will be applied.

2.3 SARS - RULINGS AND INTERPRETATION NOTES

2.3.1 Introduction
Tax laws can be a source of great uncertainty. Yehonatan, rightfully, indicated that negative tax consequences can be limited if legal certainty is present. In

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31 See par 2.2.1 in this regard.
32 Traub at 732.
33 Ibid at 756. See Burns (2003) at 198 for a discussion of case law concerning the application of the doctrine of legitimate expectation.
35 De Ville (2005) at 55. See also Currie & Klaaren (2001) at 79 for a discussion on the origin and meaning of “direct external legal effect.”
an effort to create more certainty tax rulings, as provided for by sections 76P, 76Q, 76R and 76I of the Income Tax Act, can be requested. Further advantages of tax rulings would include greater taxpayer confidence and the establishment of a good working relationship between SARS and the taxpayer. A ruling would entail that a taxpayer can approach SARS for a ruling regarding the tax consequences of a specific scheme the taxpayer intends to implement. Although SARS is not obliged to issue a ruling, it has a discretion to do so.

Previously, SARS used to issue Practice Notes. The name has subsequently changed to Interpretation notes. Such a note indicates how SARS would tax a specific set of facts.

What would happen if SARS denied being bound to these rulings and notes? Could it then be said that SARS is upholding its duty to act fairly, as discussed above? Would a person be able to rely on his right to just administrative action to force SARS to abide by its rulings and notes? These questions will be

37 Croome BJ & Olivier L Tax Administration (2010) at 266. Currently provision is made for the following types of rulings: binding rulings (s 76P), binding private rulings (s 76Q), binding class rulings (s 76R), non-binding private opinions (s 76I). The classification of the different types of rulings does not fall within the scope of this dissertation. For purposes of this dissertation a ruling would refer to a non-binding private opinion. See Croome & Olivier (2010) at 275 for a discussion on the various types of rulings.

38 Ibid at 266.

39 Ibid at 278 for a discussion on the procedure, as contemplated in s 76E and fees, as contemplated in s 76F of the Income Tax Act. See also the three guides issued by SARS regarding this matter, namely “Comprehensive Guide to Advance Tax Rulings”, “Quick Guide to Advance Tax Rulings” and “Guide to Binding Private Rulings.”


41 Editorial “SARS’ Interpretation Notes” (March 2003) The Taxpayer 45 at 45.

42 Id.

43 Id.

44 See par 2.2.2.
answered by referring to the doctrine of legitimate expectation which has emanated from the right to just administrative action.

2.3.2 Ruling and Interpretation Notes - Administrative Action?
Previously it was determined that for an action to be an administrative action, and accordingly to acquire the protection of PAJA, an organ of state needs to make an administrative decision, or fail to make an administrative decision in exercising power in accordance with legislation which adversely affects the rights of a person.

In the event that SARS, as an organ of state, denies being bound to an interpretation note or ruling it will constitute an administrative decision due to the fact that a relationship of inequity existed when making the decision. Said decision would be made in accordance with legislation.

The only elements in question are whether this action has adversely affected a person's rights and has direct external effect. Previously, it was established that the doctrine of legitimate expectations has expanded the definition of an existing right to include a legitimate expectation. If Lord Fraser’s statement in Council of Civil Service Unions is borne in mind, it is possible that this promise by SARS to act in a certain way has given rise to a legitimate expectation.

Can the principle of legitimate expectations be applied in tax law and more specifically in South African tax law? In order to establish whether the last two

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45 See par 2.2.3.
46 See par 2.2.3.5 where it was stated that the term “right” also includes a legitimate expectation.
47 See par 2.3.1 regarding the legislative authorisation to issue, for example, a tax ruling.
48 See par 2.2.3.6 where it was indicated that these two terms are closely related.
49 See par 2.2.3.5.
50 Council of Civil Services Union at 944. See par 2.2.3.5 in this regard.
elements of administrative action has been complied with, and thus affording a taxpayer the right to just administrative action, the doctrine of legitimate expectations in the tax realm will be discussed.

2.3.3 Legitimate Expectations and Tax

In a number of English law cases legitimate expectations and its application to tax law were considered. In *Matrix Securities Ltd v IRC* the House of Lords held that when the Revenue Services acts contrary to an advance ruling it may constitute an abuse of power. It was also held in *R v IRC, Ex Parte Unilever PLC* that the Revenue Services is not permitted to depart from an established practice or procedure without the necessary consideration for the natural justice principles.

It therefore seems that England acknowledges the application of the principle of legitimate expectation in tax related cases. Louw correctly indicates that if England, without a written constitution, places such a strong emphasis on administrative justice and the duty to act fairly, the position in South Africa, who has a written constitution, should at the very least be similar. The discussion below will illustrate that the South African law recognises the doctrine of legitimate expectation in the realm of tax law.

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52 1994 (1) WLR 394 (HL).

53 1996 STC 681 at 695.

54 Davis (January 2002) *The Taxpayer* 5 at 7.

2.3.4 Legitimate Expectations and South African Tax Law

In *ITC 1682* the taxpayer, a university, approached SARS about a “salary sacrifice scheme” it intended to implement. The taxpayer requested a ruling regarding the tax implications of the said scheme. SARS approved the scheme but subsequently taxed the taxpayer contrary to the opinion it provided.

The taxpayer contended that SARS created a legitimate expectation as a result of the ruling SARS issued. The Cape Special Court held that the doctrine of legitimate expectation forms part of the South African law and there is sufficient merit to apply the doctrine where there is a “clear unequivocal statement” apparent in the Commissioner’s practice manual.

However, the court held that it was not necessary to decide this case on the basis of legitimate expectation. Instead, the court found in favour of the taxpayer based on certain provisions of the Income Tax Act.

In *ITC 1675* SARS’ representative argued that Practice Note 31 of 31 October 1994, which the taxpayer relied on, could not assist the taxpayer due to the fact that a practice note cannot override the provisions of the Act. The Gauteng Special Court in its decision warned that it cannot be assumed that SARS will

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56 (62) SATC 380.
57 *ITC 1682* at 382.
58 See par 2.2.3.5.
59 *ITC 1682* at 403.
61 *ITC 1675* (62) SATC 219 at 227.
62 Subsequently known as Interpretation Notes.
63 This view is confirmed in the Zimbabwean cases of *Puzey and Payne* 66 SATC 79 and in *ITC 1674* 62 SATC 116 (appeal). See also Silke J “Legitimate Expectations –Law Unfair to the Taxpayer or Fiscus” (2004) *Tax Planning* 40 at 40.
consider itself bound by its own practice notes. Commentators reacted that it is alarming that SARS, the author of practice notes, does not regard itself bound thereby. The court, nevertheless, held that it was unnecessary to decide the matter on that basis.

The question arises what is the purpose of a ruling or and interpretation note is, if it is not binding on SARS? The whole aim of requesting an opinion or relying on an interpretation note from SARS is to establish legal certainty. This seems to be futile if SARS is not bound to this ruling or interpretation note. In Inland Revenue Commissioner v Frere Radcliff rightfully questioned the procedure of extra-statutory concessions where an organ has the ability to amend its tax code annually.

In ITC 1675 and ITC 1682 the Special Court refrained from concluding their decision on the doctrine of legitimate expectation but acknowledge that the doctrine is applicable in South African Tax law. Accordingly the last two elements of administrative action are present as it is legitimately expected that SARS would tax in accordance with its ruling or interpretation note. Therefore when SARS denies being bound it will adversely affect a person’s right with direct external effect. As a result when SARS acts contrary to its rulings and notes, it will constitute administrative action, as all of the elements for administrative action are present. The taxpayer will be able to rely on his right to just administrative action as enshrined by section 33 of the Constitution.

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64 ITC 1675 at 229.
65 See Davis (January 2002) The Taxpayer 5 at 5.
66 1965 AC 402 (HL) (E).
67 For example an Interpretation Note.
68 Adversely affected rights and direct external effect.
69 See par 2.2.3.5 where it was concluded that the concept of a right also includes a legitimate expectation.
Will the doctrine of legitimate expectation and the right to just administrative action provide adequate relief for an aggrieved taxpayer faced with this dilemma? Below a discussion regarding the constitutionality of non binding rulings and interpretation notes will follow before discussing the future of legitimate expectation in the South African Tax Law.

2.3.5 The Constitutionality of Non Binding Rulings and Interpretation Notes

Above it was suggested that the doctrine of legitimate expectation, which emanated from the right to just administrative action, would be able to provide relief to a taxpayer relating to rulings and interpretation notes. This relief would provide, at the very least, a hearing before the ruling is reversed.

The question arises whether a taxpayer will be able to rely on substantive relief with the legitimate expectation doctrine as the doctrine of legitimate expectation is traditionally utilised to initiate procedural fairness and not to compel substantive relief. In England, where the doctrine of legitimate expectation originated, the doctrine has expanded to include substantive relief.

In the case of Premier, Mpumalanga v Association of State-Aided Schools the court held that the Government’s effort to cease bursaries, contrary to a prior undertaking without adherence to the principle of audi alteram partem, was invalid. Various commentators were of the opinion that in terms of this case

70 See par 2.3.4.
71 See par 2.2.3.5.
73 See Meyer v Iscor Pension Fund 2003 (2) SA 715 (SCA) at 731.
74 See Ex Parte Unilever PLC at 694, R v North and East Devon Health Authority, Ex parte Coughlan [2001] QB 213 (CA) [2000] 3 ALL ER 850.
75 1999 (2) SA 91 (CC).
76 Premier, Mpumalanga at 108. See also Davis (January 2002) The Taxpayer 5 at 6.
the doctrine of legitimate expectation was extended to include substantive relief.\textsuperscript{78}

In the case of \textit{Meyer} Meyer relied on the doctrine of legitimate expectation relating to substantive relief. In support of this he relied on the case of \textit{Premier, Mpumalanga}.\textsuperscript{79} The court held the opinion that in the \textit{Premier, Mpumalanga} case the court acknowledged “that a legitimate expectation of fair procedure can be induced by a promise that a substantive benefit will be acquired or retained.”\textsuperscript{80} Accordingly the court held that legitimate expectation was not extended in the \textit{Premier, Mpumalanga} case to include substantive relief.\textsuperscript{81}

The court in \textit{Meyer} refrained from pronouncing whether the doctrine of legitimate expectation has expanded in South African Law to include substantive relief.\textsuperscript{82} It was held that even on recognition of the expansion Meyer would still not have a basis for his claim as he unsuccessful in establishing the content of the promise he relies on.\textsuperscript{83}

Hence, it is submitted that the \textit{Meyer} case did not reject the expansion of the doctrine to include substantive relief but indicated that the \textit{Premier, Mpumalanga} matter cannot be seen as authority that the doctrine was expanded. It is further submitted that the courts would first need to confirm that the legitimate

\textsuperscript{77} Id.


\textsuperscript{79} Ibid at 732.

\textsuperscript{80} Id.

\textsuperscript{81} Id.

\textsuperscript{82} Meyer at 733.

\textsuperscript{83} Ibid at 734.
expectation doctrine includes substantive relief, before a taxpayer would be able to rely thereupon.

2.3.6 The Future of Legitimate Expectation and South African Tax Law

Louw and Davis are of the opinion that the doctrine of legitimate expectation, although requiring some refinement will be able to provide relief to an aggrieved taxpayer.

Mention must be made of the Zimbabwean case of *ITC 1674*. In this case the taxpayer acted in accordance with a letter issued by the Principal Tax Examiner which was contrary to legislation. On appeal the court held that actions contrary to legislation by the Revenue Service are null and void as it was a bargain the Commissioner could not make. The court further stated that:

“The question whether or not the principle of legitimate expectation is applicable to a decision of a public body depends upon the particular legislation in terms of which the decision was taken…. The legitimate expectation created in the respondent as a motor dealer would, in the circumstances, be that it should be taxed in according to the law.

I cannot think of legitimate expectation arising out of an error of law to the effect that a tax which is due to revenue should not be collected. The expectation by the [respondent] in that regard would be that it should

\[\text{References}\]


85 Davis (January 2002) *The Taxpayer* 5 at 11.

86 See also Editorial (March 2003) *The Taxpayer* 45 at 45 for a similar view.

remain untaxed by the mistake of law. That surely would not be a legitimate expectation.”

Accordingly it was held that the Revenue Service cannot be held bound to a legitimate expectation that is contrary to the law.

In the English Law case of *R v IRC, Ex Parte MFK Underwriting Agents Ltd* Bingham held that a statement published by Revenue might safely be regarded as binding but an individual's opinion or ruling would be subject to the following:

i) The taxpayer should give full details of the specific transaction on which he seeks an opinion or ruling;

ii) The taxpayer should indicate that he intends on utilising the ruling or opinion;

iii) The opinion or ruling should be unambiguous.

The English Law approach must be borne in mind as the doctrine of legitimate expectation originated in England. Accordingly it is submitted that a South African taxpayer would have to be subject to the conditions held by Bingham before regarding a ruling or note binding on SARS and claiming relief consistent with the doctrine of legitimate expectation and section 33 of the Constitution.

Accordingly the doctrine of legitimate expectation and section 33 of the Constitution would be able to provide relief to aggrieved taxpayers in a situation where SARS denies being bound by its rulings and notes.

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88 *ITC 1674* at 92. See also Silke (2004) *Tax Planning* 40 at 44.

89 1990 (1) ALL ER 91.

90 For example an Interpretation Note.

91 As summarized in Editorial (February 1990) *The Taxpayer* 24 at 26. This approach was also confirmed in De Smith SA *et al De Smith, Woolf and Jowell’s Judicial Review of Administrative Action: Mainwork and Supplement* (1999) at 571. See also Louw (2003) 66 *THRHR* 292 at 296 where the author concludes that SARS should be held bound by its rulings based on the principle of legitimate expectation if the taxpayer acted in accordance with the scheme presented to SARS.
This concludes the discussion regarding rulings and interpretation notes. For the remainder of this chapter the appointment of a taxpayer’s agent by SARS relating to the right to just administrative action will be examined.

2.4 APPOINTMENT OF A TAXPAYER’S AGENT BY SARS

2.4.1 Introduction

Section 99 of the Income Tax Act and section 47 of the VAT Act make provision for the appointment of a taxpayer’s agent. Section 99 of the Income Tax Act states that:

The Commissioner may, if he thinks necessary, declare any person to be the agent of another person, and the person so declared an agent shall be the agent for the purposes of this Act and may be required to make payment of any tax, interest or penalty due from any moneys, including pensions, salary, wages or any other remuneration, which may be held by him for or due by him to the person whose agent he has been declared to be.

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92 In Editorial (March 2003) The Taxpayer 45 at 45 it was also averred that a taxpayer may be able in terms of the principle of *estoppel* to prevent SARS from providing a assessment contrary to a generally prevailing note. This is, however, not within the scope of this dissertation.


94 S 47 of the VAT Act declares that: “The Commissioner may, if he thinks it necessary, declare any person to be the agent of any other person, and the person so declared an agent shall for the purposes of this Act be the agent of such other person in respect of the payment of any amount of tax, additional tax, penalty or interest payable by such other person under this Act and may be required to make payment of such amount from any moneys which may be held by him for or be due by him to the person whose agent he has bee declared to be: Provided that a person so declared an agent who, is unable to comply with a requirement of the notice of appointment as agent, must advise the Commissioner in writing of the reasons for not complying with that notice writing the period specified in the notice.” It is submitted that s 99 of the Income Tax Act and s 47 of the VAT Act contains similar in wording. Mentioned must, however, be made of the added provision in the VAT Act allowing an agent to inform SARS if the agent cannot comply with the notice. See par 2.4.3 in this regard.
This provision bears a strong resemblance to the civil procedure of garnishees. This provision will be compared to a garnishee in order to determine the extent of SARS’ powers. Thereafter the constitutionality of the appointment of a taxpayer’s agent will be discussed as this decision by SARS can be seen as a unilateral appropriation with no notice or opportunity to the taxpayer to state his case which seems to violate the principle of the *audi alteram partem* rule.\(^9^5\)

2.4.2 Garnishee Orders

Before a sensible comparison can be made between the appointment of a taxpayer’s agent and a civil procedure garnishee order, it would be necessary to give attention to the basic principles of a garnishee order.

A judgment creditor has various options in executing a court order sounding in money; one would be a garnishee order. A garnishee order would entail that a judgment creditor would attach money due to the judgment debtor in the hands of a third party.\(^9^6\) The third party in these circumstances is known as a garnishee.\(^9^7\) In the magistrates’ court the judgment creditor must approach the court on an *ex parte*\(^9^8\) basis requesting an order, directing the garnishee to pay the judgment creditor a sufficient amount to satisfy the judgment debt and cost. A supporting affidavit should state:

a) that a court

(i) has granted judgment to the judgment creditor, or

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\(^9^6\) Van Winsen LDV *et al* Herbstein & Van Winsen *The Civil Practice of the Supreme Court of South Africa* (1997) at 768.


\(^9^8\) Joubert WA *et al* *The South African Law of South Africa Civil Procedure Part 1* (2007) at 18 explains that *ex parte* is “where no relief is claimed against any person, and it is neither necessary nor proper to give any person notice of the application, the notice of motion is addressed to the registrar only.”
(ii) has ordered the payment of a debt referred to in s 55 and costs in specific instalments;

b) ....

c) that such judgment or order referred to in subrule (1) (a) is still unsatisfied, stating the amounts still payable thereunder;

d) ...

e) That a debt is at present or in future owing or accruing by or from the garnishee to the judgment debtor and the amount thereof.\(^99\)

A garnishee order will be issued once the magistrates' court is satisfied as to the merits of the application. This order is a rule \textit{nisi} and the garnishee and judgment debtor may on the return date show cause why the debt ought not to be attached.\(^100\) This is, however, not an opportunity for the judgment debtor to question the correctness of the judgment.

The court has an unfettered discretion regarding garnishee orders and may vary or set aside a garnishee order, if it can be proven that the judgment debtor may not be able to maintain himself and his dependants after satisfaction of the garnishee order.\(^101\)

In terms of High Court Rule 45(12) (a) a judgment creditor may, without approaching the court, issue a garnishee order in his favor. In the event that the garnishee does not comply an application to court must be made.\(^102\)

\(^99\) Rule 47(1) of Rules Regulating the Conduct of Proceedings in the Magistrates’ Court. Hereinafter referred to as the Magistrates’ Court Rules. For purposes of this dissertation the following elements are of importance: judgment granted, that such judgment or order is still unsatisfied and that a debt is at present or in future owing or accruing by or from the garnishee to the judgment debtor and the amount thereof.

\(^100\) Paterson (2007) at 273.

\(^101\) S 65J(6) of the Magistrates’ Court Act 32 of 1944.

\(^102\) Van Winsen (1997) at 771. This, however, means that there is already a judgment obtained in favour of the judgment creditor.
The above discussion of a civil garnishee order will be sufficient to compare this order with the appointment of a taxpayer’s agent.

2.4.3 Garnishee Orders Versus Appointment of a Taxpayer’s Agent

It is clear that in both instances\(^{103}\) a third party holding money due to the judgment debtor or taxpayer can be ordered to pay a specified amount of money to the judgment creditor or SARS. There are, however, important differences between these procedures.

Firstly, in obtaining a garnishee order a court order is a prerequisite unlike in the instance of appointing a taxpayer’s agent. Therefore, when a garnishee order is obtained the judgment debtor has had ample opportunities to defend the action before judgment is granted, by for instance filing a notice of intention to defend. The principle of \textit{audi alteram partem}\(^{104}\) has thus been complied with and the garnishee order is the mere execution of the judgment. When SARS appoints a taxpayer’s agent there was never any court participation\(^{105}\) or notification of SARS’ intentions.

Secondly, in the event that a garnishee (or in the magistrates’ court also a judgment debtor) is not satisfied with the garnishee order issued, the reasons must be heard in a court application. When a taxpayer’s agent is appointed, the agent is legally bound to transfer funds in favour of the taxpayer to SARS.\(^{106}\) In terms of section 97 of the Income Tax Act an appointed agent will be held personally liable to the extent that he/she holds funds on behalf of the taxpayer. Accordingly, there is no opportunity for the taxpayer or his agent to provide

\(^{103}\) The appointment of taxpayer’s agent and garnishee orders.

\(^{104}\) See par 2.2 above.

\(^{105}\) The constitutionality of this practice could also be questioned in relation to the right of access to the court as contemplated in s 34 of the Constitution. This does not fall within the scope of this dissertation.

\(^{106}\) As stated in ITAA 88.
reasons not to comply with the appointment. Further, if the agent\textsuperscript{107} notifies the taxpayer after the transfer of money it is merely a matter of courtesy.\textsuperscript{108} Thus with a garnishee order there is an opportunity for the relevant parties to state their case but with an appointed agent there is no such recourse and the agent has to act in accordance with the provided instructions without asking any questions.

Mention should be made to the added provision at the end of section 47 of the VAT Act. This provision affords an agent the opportunity to advise the Commissioner in writing if the agent is unable to comply with the requirements as an agent. In terms of this provision the agent does have an opportunity to state its case but not the judgment debtor.

Thirdly, with the application for a garnishee order, the court has the opportunity to examine the judgment debtor’s financial position and vary (or set aside) the order accordingly. There is no such examination, ascertaining whether the taxpayer has enough money to survive, in appointing a taxpayer’s agent.

Finally, in terms of section 37A (1) of the Pension Fund Act\textsuperscript{109} a pension fund benefit may not be liable to an attachment, for example, of a garnishee order. Whereas section 99 of the Income Tax Act specifically empowers SARS to declare a person an agent even if the money due to the taxpayer is pension.

It is apparent that there are distinguishable differences between these procedures. The procedure of a garnishee order has certain measures build in to provide adherence to the principle of \textit{audi alteram partem}, and by implication to

\textsuperscript{107} In most circumstances it would be the taxpayer’s bank.

\textsuperscript{108} Editorial “The Use by SARS of Section 99 of the Income Tax Act and Section 47 of the Vat Act to Extract Payment of a Tax Amount From a Taxpayer’s Bank Account” (March 2003) \textit{The Taxpayer} 41 at 41. Andhee, a director in the tax department at Ernst & Young is, however, of the opinion that banking institutions must notify taxpayers of instructions from SARS as it would be in the best interest of their customers, the taxpayers. See Temkin S “Analysts Warns SARS Not to Erode Taxpayers’ Rights” (8 July 2010) \textit{Business Day}.

\textsuperscript{109} Act 24 of 1956.
the right to just administrative action.\textsuperscript{110} These measures are, however, absent in the appointment of a taxpayer’s agent. It therefore seems that SARS enjoys almost draconian powers to effect speedy collection of taxes which seems to be to the detriment of the \textit{audi alteram partem}, and likewise to the right to just administrative action. It is submitted that SARS’ powers, when appointing a taxpayer’s agent, exceeds the powers available to other litigants in obtaining a garnishee order.

After examining SARS’ powers to affect speedy collection it can be, rightfully, asked how these practices can be constitutional in light of a person’s right to just administrative action? Before attempting to answer this question it is important to first determine whether the appointment of a taxpayer’s agent constitutes administrative action. Only in the event that it constitutes as administrative action can the taxpayer rely on his right to just administrative action.

\section*{2.4.4 The Constitutionality of the Appointment of a Taxpayer’s Agent\textsuperscript{111}}

Previously\textsuperscript{112} it was established that for an action to be an administrative action there needs to be a decision (or failure to make a decision) of administrative nature made in terms of an empowering provision by and organ of state which adversely affects the rights of any person and has a direct external legal effect.

It is clear that the appointment of a taxpayer’s agent by SARS constitutes a decision. In scrutinising the nature of the decision it is submitted that this decision is made by an organisation which is clearly in an unequal relationship with the taxpayer as he is able to appoint a third party without any notice to the

\footnotesize{\textsuperscript{110} For a general discussion regarding the right to just administrative action and \textit{audi alteram partem} see par 2.2.1.}

\footnotesize{\textsuperscript{111} See par 1.3 regarding the two stage approach which must be borne in mind when determining the constitutionality of a practice or procedure.}

\footnotesize{\textsuperscript{112} See par 2.2.3.}
taxpayer if the taxpayer owes SARS money. Therefore the decision is of an administrative nature.

Thirdly, the appointment of an agent of the taxpayer is done in terms of an empowering provision, namely section 99 of the Income Tax Act.

Section 2 of the South African Revenue Services Act declares that “the South African Revenue Service is hereby established as an organ of state within the public administration…” It is therefore apparent that SARS is an organ of state and fulfils the condition that the administrative action must be done by an organ of state.

The last two requirements are closely related and deals with the fact that a restriction must be placed on a person are recognised right. Is a right of the taxpayer infringed when SARS withdraws money from his bank account? In terms of section 25 of the Constitution “no person may be deprived of property ...” The question, however arises whether the money, which is taken from the taxpayer’s bank account, can be classified as property?

The Constitution does not define the definition of property but Currie and De Waal are of the opinion that the concept of “property” is very broad. Property does not refer to land only but also corporeal movables, incorporeals, commercial interest and intellectual property. It is thus submitted that the money is property and the attachment of money from a taxpayer’s bank account constitutes the deprivation of property, which is a recognised right.

113 Burns (2003) at 27.

114 S 25 of the Constitutions allows deprivation of property in terms of law of general application. This refers to the expropriation of land and is not applicable when SARS appoints another person an agent of a taxpayer.

The appointment of taxpayer’s agent constitutes an administrative action as it complies with all the essential elements as identified above.\textsuperscript{116} Therefore it is clear that the appointment of an agent of the taxpayer constitutes an administrative action.

From the discussion above\textsuperscript{117} it is apparent that a decision by SARS to appoint a taxpayer’s agent would constitute administrative action and the taxpayer would accordingly be able to rely on his right to just administrative action, which includes the principle of \textit{audi alteram partem}.

A discussion relating to the manner in which the courts have dealt with the appointment of a taxpayer’s agent and a taxpayer’s right to just administrative action will follow.

In the matter of \textit{Hindry v Nedcor Bank Ltd}\textsuperscript{118} the constitutionality of section 99 of the Income Tax Act was tested. SARS realised that they erroneously paid a refund to the taxpayer and issued a notice in terms of section 99 to the taxpayer’s bank declaring him the taxpayer’s agent. The taxpayer applied for an urgent interdict to prevent his bank to affect a transfer to SARS.

The taxpayer argued that section 99 violated the Constitution due to the following reasons:

- a “removed third party” with no knowledge of the taxpayer’s affairs is obliged to pay the Commissioner monies held on behalf of a taxpayer upon the declaration as an agent. This constitutes “an extraordinary mode of obtaining payment;”

\textsuperscript{116} See par 2.2.3.
\textsuperscript{117} See par 2.2.3.
no notification is provided to the taxpayer before the section is brought into operation;
there is no opportunity for representations by the taxpayer;
the prescribed procedure is out of control of the court; and
the agent is obliged to pay on pain of sanction.\footnote{Hindry at 74. See also Silke (2002) \textit{Acta Juridica} 282 at 305.}

It was argued that the above reasons breached the right to privacy,\footnote{See s 14 of the Constitution.} the right to just administrative action\footnote{See s 33 of the Constitution and par 2.1 and 2.2. For purposes of this dissertation only the infringement of the right to just administrative action will be examined.} and the right to access to the courts.\footnote{See s 34 of the Constitution.} The taxpayer’s main argument was that there was a unilateral appropriation with no notice or opportunity to the taxpayer to enable the taxpayer to state his case.\footnote{Hindry at 49. See also Silke (2002) \textit{Acta Juridica} 282 at 306.}

The Commissioner argued, in SARS’ defense, that:

- tax collecting procedures have to be effective as they are essential and the procedure in terms of section 99 of the Income Tax Act is only a type of garnishee procedure to achieve it;
- the procedure enhances voluntary compliance which is essential in the self-assessment tax system;
- in order to perform state functions effectively the prevention of any delays in collecting taxes is of utmost importance;
- due and payable taxes are quickly recovered;
- taxpayers are treated equally and effective taxation is achieved.\footnote{\textit{Ibid} at 58. See also Silke (2002) \textit{Acta Juridica} 282 at 307. See par 2.4.5 below.}

In reaching a decision the court referred to the affidavit of Olivier annexed to the Commissioner’s answering affidavit.\footnote{In the said affidavit reference was made}
to foreign jurisdictions which had provisions similar to section 99 of the Income Tax Act. The court, after examining the similar provisions, stated that

In none of these statutes is the taxing officer required to give the taxpayer advance notice of an attachment to enable him to make representations to avoid it. Once the notice is served the garnishee is at risk (even in the USA) unless the notice is withdrawn or set aside.\textsuperscript{126}

The court held that even though the attachment of a taxpayer's money in his bank account may be regarded as a seizure of property, this form of execution is generally available to enforce a judgment sounding in money\textsuperscript{127} and that it is essential that a taxpayer does not receive notice prior to the issuing of a notice to appoint another person, in this instance a bank, as it would frustrate the Revenue Service's ability to recover due taxes.\textsuperscript{128} The court suggested that, as in America, a taxpayer could receive a 30 day period during which he would be able to make representations to SARS to have the attachment uplifted.\textsuperscript{129}

Wunsh concluded that the Commissioner of Revenue Services provided overwhelming evidence that section 99 of the Income Tax Act is a reasonable and necessary limitation of a taxpayer's right to just administrative action and property and the taxpayer's problems with section 99 of the Income Tax Act was, in this case, purely academic as the taxpayer was informed of the appointment of the agent.\textsuperscript{130} He held that the appointment of a taxpayer's agent is necessary for speedy collection of taxes and a weapon of great importance to the State.\textsuperscript{131}

\textsuperscript{125} Ibid at 53.
\textsuperscript{126} Ibid at 55.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id. See par 6.2.4 for a discussion of the appointment of a taxpayer's agent in the USA.
\textsuperscript{130} Hindry at 59.
In *Contract Support Services (Pty) Ltd v SARS*\(^{132}\) a taxpayer’s agent was appointed\(^{133}\) on the same day a VAT assessment was issued. The taxpayer applied to court for the setting aside of the appointment as this constituted, amongst others, a contravention of the *audi alteram partem* principle.\(^{134}\)

The court, however, agreed with the Commissioner that the obligation to pay tax exists with or without an assessment.\(^{135}\) The court further held that:

> a prior hearing would defeat the very purpose of the notice. It would alert the defaulting VAT-payer to the intention to require payment from the latter’s debtor and to enable the taxpayer to spirit such funds away. Where prior notice and a hearing would render the proposed act nugatory, no such prior notice or hearing is required.\(^{136}\)

Therefore it was concluded that not all administrative actions require adherence to the *audi alteram partem* before effect is given to these actions.\(^{137}\) It should also be borne in mind that “procedurally fair administrative action” must be


\(^{133}\) As contemplated in terms of s 47 of the VAT Act.

\(^{134}\) Editorial “Appointment of Taxpayer’s Agent by SARS” (March 2005) *The Taxpayer* 41 at 42.

\(^{135}\) *Ibid* at 42. This decision is contrary to the decision of Singh v CSARS 2003(4) SA 520 (SCA) where it was decided that a notice should be given prior to the taking of judgment.

\(^{136}\) *Contract Support Services (Pty) Ltd* at 350.

\(^{137}\) *Id.* See also *Hindry* at 63 where Wunsh held that the aggrieved taxpayer could always remedy the situation with administrative relief. An example of administrative relief would be to lodge an objection. For a discussion on the problems regarding the lodgment of an objection, more specific the “pay now, argue later” rule see ch 3 of this dissertation.
determined within the ambit of the specific act. The *audi alteram partem* principle is therefore not absolute.\(^{138}\)

Patel, in the case of *Mpande Foodliner CC v Commissioner For South African Revenue Service*,\(^{139}\) on the other hand, set aside a notice for the appointment of a taxpayer due to the failure to adhere to the principle of *audi alteram partem*. He stated that this failure infringes section 33 of the Constitution. In *Smartphone SP (Pty) Ltd v Absa Bank Ltd*,\(^{140}\) Ponnan disagreed with the decision in *Mpande Foodliner* and indicated that the taxpayer still had other administrative remedies, for example to lodge an objection or an appeal and the notice to appoint a taxpayer's agent does not infringe on a taxpayers right to just administrative action.\(^{141}\)

As the effective and speedy collection of taxes is of the utmost importance to the court, it seems that the court will not easily declare sections, which assist in achieving this, unconstitutional.\(^{142}\)

It has been established that the appointment of a taxpayer’s agent is not unconstitutional. Suggestions regarding the future of appointing a taxpayer’s agent will be discussed below as opinion is held that the appointment of a taxpayer’s agent by SARS can be done in a less intrusive manner.


\(^{139}\) *Mpande Foodliner CC* at 65.

\(^{140}\) 2004 (3) SA 65 (W) 72.

\(^{141}\) *Smartphone SP (Pty) Ltd* at 72. See also ratio decidendi of *Contact Support Services* in par 2.4.3. *Industrial Manpower Projects ((Pty) Ltd v Receiver of Revenue, Vereeniging 63 SATC 393 also rejected the court’s approach in Mpande Foodliner*. See Silke (2002) *Acta Juridica Revenue Law* 282 at 308 for a discussion of the constitutionality of s 99 of the Income Tax Act and the case law relating thereto.

2.4.5 The Future of Appointing a Taxpayer’s Agent

Many commentators believe that the manner in which SARS exercises this power should be the focus of concern.\textsuperscript{143} Tax analysts subsequently have warned that SARS should act reasonable before attaching a taxpayer’s bank account.\textsuperscript{144}

Mr Zulu, on behalf of SARS, indicated that they have various checks and balances in place to ensure that the appointment of a taxpayer’s agent will not be abused.\textsuperscript{145} A taxpayer will first receive written notification of the amount of tax he needs to pay; thereafter several letters of demand will follow as well as a phone call to the taxpayer.\textsuperscript{146} The issuing of a Notice IT 88\textsuperscript{147} is a last resort. The appointed agent should also confirm this notice telephonically.\textsuperscript{148}

At this stage attention must be given to the comparison between the appointment of a taxpayer’s agent and a garnishee order. It is submitted that the comparison provided valuable lessons. As stated above\textsuperscript{149} a garnishee order in the magistrate’s court is a rule \textit{nisi} and the judgment debtor will be notified and has the opportunity to state reasons why the garnishee order should not be made a final order. If a similar situation could be created for a taxpayer the section 99 notice would be less invasive. How can this be achieved? The appointed agent, subject to a caveat on the bank account for example, should be able to inform

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\textsuperscript{143} See Croome available at http://www.saica.co.za/integritax/1093 (accessed on 27 March 2010); Croome & Olivier (2010) at 235; Temkin (8 July 2010) \textit{Business Day} and Editorial (March 2003) \textit{The Taxpayer} 41 at 42.
\end{flushright}

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\textsuperscript{144} Temkin (8 July 2010) \textit{Business Day}.
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\textsuperscript{145} \textit{The Sunday Argus} (20 October 2002).
\end{flushright}

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\textsuperscript{146} \textit{The Sunday Argus} (20 October 2002).
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\textsuperscript{147} In terms whereof a taxpayer’s agent is appointed.
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\textsuperscript{149} See par 2.4.1 and 2.4.2.
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the taxpayer of the notice. This will afford the taxpayer the opportunity to communicate with SARS and avoid severe embarrassment or loss of creditworthiness. This will also provide the agent the opportunity to satisfy himself as to the authenticity of the notice.

2.5 CONCLUSION

The right to administrative justice constitutionalises the *audi alteram partem* and *nemo iudex in sua causa* rules. A further duty to act fairly has transpired.

The practice of SARS not being bound by their own rulings and notes were proven to constitute administrative action and *prima facie* infringes upon a taxpayer’s right to just administrative action as a legitimate expectation was breached. It was established that the doctrine of legitimate expectations is applicable to tax law and will possibly in future provide relief for aggrieved taxpayers. It was, however, identified that the court would need to establish whether the doctrine of legitimate expectation includes substantive relief. There are also certain conditions a taxpayer would need to fulfil before relying on this doctrine.

In the second part of the chapter the procedure of appointing a taxpayer’s agent with specific reference to section 33 of the Constitution was discussed. Said procedure *prima facie* infringes upon a taxpayer’s right to just administrative action as there is no opportunity for the taxpayer to state his case in accordance with the principle of *audi alteram partem*. The court held in *Hindry* that the garnishee procedure is recognised in other countries. It was determined

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150 Editorial (March 2003) *The Taxpayer* 41 at 42.

151 *Id.*


153 *Hindry* at 55.
above\textsuperscript{154} that the appointing of taxpayer’s agents is not completely comparable with the civil procedure of garnishee orders as several differences surfaced.

From the discussion regarding the constitutionality it was determined that the appointment of a taxpayer’s agent is constitutional, even though it seems draconian, due to the fact that the effective collection of taxes are vital. Numerous commentators, however, indicated that several checks and balances should be in place to prevent an abuse of this procedure.

It is submitted that one of these checks and balances, with cognisance of section 36(e) of the Constitution,\textsuperscript{155} should be that SARS, subject to a \textit{caveat} on the bank account for example, inform the taxpayer of the notice.\textsuperscript{156}

In this chapter a taxpayer’s right to just administrative action, in terms of section 33 of the Constitution was discussed with specific reference to the practice of the South African Revenue Service not to be bound to its rulings and interpretation notes as well as the procedure of appointing a taxpayer’s agent with reference to the right to just administrative action. In the following chapter the practice of “pay now, argue later” and certificate procedure will be discussed with reference to the right to access to the courts.

\begin{footnotes}
\item[154] See par 2.4.2.
\item[155] A less intrusive manner in achieving the goal.
\item[156] Editorial (March 2003) \textit{The Taxpayer} 41 at 42.
\end{footnotes}
CHAPTER 3
THE TAXPAYER’S RIGHT TO ACCESS TO THE COURTS

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3.1 INTRODUCTION
The rule of law\(^1\) entails that anyone may question and challenge the legality of any conduct or law.\(^2\) This is enshrined in section 34 of the Constitution which affords the right to access to the courts. In this chapter this right will briefly be discussed to provide a general context to the right to access to the courts. Thereafter the statement procedure and “pay now, argue later” rule utilised by SARS in the collection of tax, with reference to this right, will be considered.

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\(^1\) Or constitutional state, see par 1.1 above.

3.2 ACCESS TO THE COURTS

Section 34 of the Constitution declares that “(e)veryone 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.”

This section guarantees the right of access to a court or other tribunal,\(^3\) the right to a fair public hearing\(^4\) and impartiality and independence by the tribunal or forum.\(^5\) Ackermann in *Bernstein v Bester\(^6\)* rightfully indicated that the purpose of this right was amongst other “the separation of the judiciary from the other arms of the state.”\(^7\)

Another purpose of the right to access to the court was highlighted in the matter of *Chief Lesapo v North West Agricultural Bank\(^8\)* where the court held that the purpose of section 34 of the Constitution was to prevent self-help.\(^9\)

The right of access to courts has been described by Chaskalson as “another right of administrative justice.”\(^10\) Consequently the link between the right of access to courts and administrative justice must be remembered when dealing with the constitutionality of certain practices and procedures.\(^11\)

\(^3\) For purposes of this dissertation, the focus will be on this aspect.

\(^4\) The right ensures that “due process” is followed. See Currie & De Waal (2005) at 704. This right can also be linked to the right to administrative justice. See ch 2 in this regard.

\(^5\) Currie & De Waal (2005) at 704.

\(^6\) 1996 (2) SA 751 (CC).

\(^7\) *Bernstein* at 804.

\(^8\) 2000 (1) SA 409.

\(^9\) *Chief Lesapo* at 415. See also Currie & De Waal (2005) at 709 in this regard.


\(^11\) For purposes of this ch only the constitutionality of practices relating to s 34 of the Constitution will be examined. The constitutionality of these practices can also be examined with reference to s 33 of the Constitution. This is, however, not within the scope of this dissertation.
Bearing the purpose of section 34 of the Constitution in mind the statement procedure of SARS and thereafter the “pay now, argue later” rule will be examined.

3.3 THE STATEMENT PROCEDURE

3.3.1 Introduction
The Commissioner may file a statement, indicating the outstanding tax, interest or penalty payable, with the clerk or registrar of a competent court. The filing of said statement has the effect of an exigible civil judgment.¹²

This procedure was criticized by the Katz Commission as it permits SARS to obtain a civil judgment against a taxpayer in the taxpayer’s absence and it breaches the right to have a justiciable dispute settled by a court of law.¹³

The question arises whether this procedure by SARS constitutes a self-help procedure. If this is indeed the case, may a taxpayer rely on section 34 of the Constitution to have this section declared unconstitutional as one of the purposes of section 34 is to prevent self help?¹⁴

Before this questions can be answered a comparison between the statement procedure and the civil procedure of obtaining a default judgment will be drawn,

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¹² S 40(2)(a) of the VAT Act. S 114(1)(a)(ii) of the Customs Act 91 of 1964 and s 91(1)(a) of the Income Tax Act contains similar provisions. For purposes of this section the focus will be on the VAT and Income Tax Act. This procedure will hereafter be referred to as the statement procedure.


as the statement procedure bears a strong resemblance to the civil procedure of obtaining a default judgment. This will assist in ascertaining the extent of SARS’ powers compared to the powers of other litigants in obtaining default judgment. Thereafter the constitutionality of the statement procedure will be discussed.

3.3.2 Default Judgment

Before a sensible comparison can be made between the civil procedure of obtaining a default judgment and the statement procedure utilised by SARS, it would be necessary to give brief attention to the basic principles of a default judgment.

A default judgment amounts to a civil judgment given against a party without hearing that party’s side. This is awarded against a party when the party defaults in the civil process, for example when the party does not provide a notice of intention to defend.

A plaintiff can obtain default judgment for a liquid claim by filing an application therefore with the registrar or clerk, without notice to the defendant. For a non-liquid claim the plaintiff needs to prove the quantum in an open court.

In general an aggrieved party can apply for rescission of judgment within 20 days after receiving notice of default judgment, if the party can show good cause therefore.

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15 Uniform High Court Rule 31(2) (a) and The Magistrate Court Rule 12(1)(b).
17 There are also other examples of when default judgment will be granted but for purposes of this dissertation this example will suffice.
18 In Fatti’s Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd 1962 (1) SA 736 (T) at 736 a liquid claim was defined as an amount of money that can be determined directly and easily.
19 High Court Rule 31(5)(a) read with section 27A of the High Court Act 59 OF 1959, Magistrate Court Rule 12(1)(a).
20 High Court Rule 31(2)(a) and Magistrate Court Rule 12(4).
The above discussion of the default judgment will be sufficient to compare a default judgment with the statement procedure of SARS.

### 3.3.3 Default Judgment Versus Statement Procedure

Against the basic background of a default judgment, it is clear that in both instances a civil judgment can be obtained by filing a statement or application at the clerk or registrar without notice to the opposing party. In both instances an application for rescission can be brought if good cause can be shown. There is, however, a distinguishable difference between these procedures.

A plaintiff could initiate ordinary civil proceedings by issuing a summons. In the summons his cause of action would be stipulated and the defendant would be requested to give notice of intention to defend within 10 days. If the defendant fails to provide notice of intention to defend, default judgment may be obtained. A default judgment is thus granted when a defendant fails to adhere to the civil procedure. Consequently even if the defendant failed to pay money owed to the plaintiff, default judgment can only be granted if there is an added default, namely default in the civil procedure. For the statement procedure, no default in the procedure from the taxpayer is required as SARS can once the taxpayer owes it money file a statement with the court.

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21 High Court Rule 31(2)(b). In Chetty v Law Society, Transvaal 1985 (2) SA 756 it was determined that good cause consist of a) a reasonable and explanation for default and b) a bona fide defence on the merits that carries some prospect of success. Magistrates’ Court rule 49(3) stipulates that in an application for rescission, where the applicant wishes to defend the proceedings, the grounds for the defendant’s defence must transpire. It is accordingly submitted that in both the High Court and Magistrates’ Court a judgment will only be rescinded if the defendant can show good cause. See also Van Heerden (2007) at 343.

22 Magistrates’ Court Rule 13.

23 High Court Rule 31(2)(a) and Magistrates’ Court Rule 12(1)(b). Default judgment can also be obtained against a plaintiff but for explanation purposes the default judgment was obtained against the defendant.
It is clear that SARS' powers, with reference to this procedure, are significantly stronger than an ordinary civil litigant’s power. In the case of Kommissaris van Binnelandse Inkomste v Van Rooyen⁴⁴ the court held that SARS not only has the statutory powers contained in section 40 of the VAT Act but also the ordinary common law powers.⁵ SARS can therefore utilise the collection powers afforded to it as well as ordinary common law powers. It is thus clear that the extent of SARS' powers in this regard is extremely wide.

Can this procedure be constitutional if the right to access to the courts is borne in mind? In order to answer this question the constitutionality of the statement procedure will be discussed below.

### 3.3.4 The Constitutionality of the Statement Procedure

In several instances aggrieved taxpayers were of the opinion that the statement procedure was unconstitutional.

In Traco Marketing Minister of Finance⁶ a registered vendor omitted to pay VAT to the Commissioner and the Commissioner responded by filing a statement with the registrar of the court⁷ and obtaining a writ of execution. The taxpayer made an urgent application to the High Court to set aside the judgment and writ of execution. The taxpayer contended, amongst other things, that section 40 was contrary to the constitutional rights to equity,⁸ human dignity,⁹ administrative fair action¹⁰ and to have a justiciable dispute settled by court.¹¹ ¹²

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⁴⁴ 58 SATC 117.
⁵ ⁴⁴ Van Rooyen at 128.
⁷ In terms of s 40(2) of the VAT Act.
⁸ S 9 of the Constitution.
⁹ S 10 of the Constitution.
¹⁰ S 33 of the Constitution. See par 2.2.
The matter was referred to the Constitutional Court as it was in the interest of justice. Council for the Commissioner, however, advised the court that they intend on bringing an application for direct access to the Constitutional Court, to test the procedural provisions of the VAT Act against the Constitution. Therefore the court decided that the issues in the Traco Marketing case will stand over until a ruling was made regarding the Commissioner’s application. The Commissioner, unfortunately, never pursued his application to the Constitutional Court.

In the matter of Singh v Commissioner for the South African Revenue Service the question arose whether SARS can file a statement in terms of section 40(2)(a) of the VAT Act even before a taxpayer has been furnished with an assessment? The court a quo was of the opinion that tax becomes due and payable on the particular date of each tax period and not only once an assessment has been furnished. The Supreme Court, however, held that this can only be the situation if the taxpayer includes an amount in his return. In the matter before the court it was not the case and the court overturned the decision of the court a quo. Therefore only when an amount was included in a VAT return does the tax become due and payable on a specific date of each tax period. If no amount was included the payment of VAT will only become due and payable once an assessment has been furnished by SARS.

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31 S 34 of the Constitution. For purposes of this dissertation only the argument of the taxpayer relating to the right to access to courts will be examined.

32 Traco Marketing at 201.

33 In accordance with s 102 of the Constitution.


35 65 SATC 203.

36 Singh at 211.

37 Ibid at 218.
The matter of *Metcash Trading Ltd v Commissioner for the South African Revenue Services*\(^{38}\) provided for a glimmer of, short lived, hope. The applicant conducted business as a wholesaler and distributor of goods and as a liquor retailer. It received formal notice from SARS indicating that SARS was not satisfied with the applicant’s VAT return. SARS alleged that the applicant claimed fictional input tax and therefore served an assessment of R266 million on the applicant.\(^{39}\) The applicant’s objection was subsequently disallowed. The applicant was also notified that if he did not effect payment, SARS would enforce its summary procedure.\(^{40}\)

The applicant, in response, approached the High Court on an urgent basis contending that the collection procedures utilised by SARS are unconstitutional.

In her judgment Snyders referred to *Chief Lesapo v North West Argicultural Bank*\(^{41}\) and stipulated that the infringement of a constitutional right cannot be justified by the merits of a specific case. The test is therefore objective.\(^{42}\)

Snyders held that the summary procedure does infringe upon a taxpayer’s right to access to courts as SARS acts as a substitute for the court by determining every aspect of the vendor’s liability and enforcement thereof.\(^{43}\) Further, she held that all interlocutory relief by the court is precluded by this section.\(^{44}\)


\(^{39}\) This amount included penalties, additional tax and interest.

\(^{40}\) As contained in s 40(2) of the VAT Act.

\(^{41}\) *Chief Lesapo* at 135.

\(^{42}\) *Metcash Trading Ltd* at 238.

\(^{43}\) *Ibid* at 242.
The commissioner argued, amongst others, that the following reasons created a reasonable and justifiable limitation:

- frivolous objection would be made to delay the payment of taxes;
- fraudulent and dishonest tax returns would be encouraged;
- South Africa cannot afford that taxpayers does not pay promptly.\(^{45}\)

The statement procedure\(^{46}\), “pay now, argue later” rule\(^{47}\) and the denial to question the correctness of the assessed amount on the statement\(^{48}\) was declared unconstitutional in the court \textit{a quo} and therefore referred to the Constitutional Court for confirmation.\(^{49}\)

In a unanimous decision the Constitutional Court destroyed the aggrieved taxpayer’s hope by refusing to declare section 40(2)(a), section 36 and section 40(5) unconstitutional.\(^{50}\) It held that section 40(2)(a) involves the court as the execution of the civil judgment necessitates the intervention of court officials.\(^{51}\)

In the matter of \textit{Motsepe v Commissioner for Inland Revenue}\(^{52}\) the Constitutional Court had to consider the constitutionality of section 91(1)(b) of the Income Tax

\(^{44}\) \textit{Id}.

\(^{45}\) \textit{Ibid} at 243.

\(^{46}\) S 40(2) of the VAT Act.

\(^{47}\) S 36 of the VAT Act. See par 3.4 below.

\(^{48}\) S 40(5) of the VAT Act.

\(^{49}\) Metcash Trading Ltd at 245. See Metcash Trading Ltd \textit{v Commissioner for the South African Revenue Services} 2001 (1) SA 1109 (CC). The Constitutional Court matter will hereafter be referred to as \textit{Metcash (CC)}.

\(^{50}\) \textit{Metcash (CC)} at 1145.

\(^{51}\) \textit{Metcash (CC)} at 1138. See Croome BJ “Paying up or Arguing First” (January 2001) \textit{Business Day Professional} at 6 and Silke (2002) \textit{Acta Juridica} 282 at 320 for a discussion whether the same decision would be made if Metcash dealt with another fiscal statute.

\(^{52}\) 9 SATC 245.
Act. This was, however, dismissed as the taxpayer failed to challenge the validity thereof in the court a quo.53

In the matter of *MA Sepataka v Commissioner for the South African Revenue Service*54 the court was also confronted with the filing of a statement by SARS in terms of Section 91(1)(b) of the Income Tax Act. Spilg cautioned SARS by stating that:

> The provision however is draconian and should therefore be exercised with care by properly experienced and suitably qualified personnel since it may otherwise be reduced to an arbitrary guesstimate with grave consequences to the taxpayer. This is so because the Commissioner is entitled, even if there is an objection or an appeal, to seize and realise assets including money standing to the credit of the taxpayer’s bank account notwithstanding that these actions may jeopardise the taxpayer’s cash flow and business.55

Spilg continued by suggesting that certain checks and balances must be in place to satisfy the requirements of constitutional proportionality. The following additional information was deemed necessary to be on the statement:

- whether the assessed amount is an estimate; and if so
- the suitability of the personal who estimated the amount; and


55 *MA Sepataka* at 283.
• that there are no impediment to file the statement.\footnote{Ibid at 284.}

From the analyses of case law it seems as if a taxpayer alleging that the statement procedure in terms of the VAT Act is unconstitutional will have an uphill battle in persuading the Constitutional Court of the unconstitutionality thereof.\footnote{Van Schalkwyk (2001) 9 Meditari Accountancy Research 285 at 297.} It, however, became apparent that the court will not tolerate SARS abusing its powers.

\subsection*{3.3.5 The Future of the Statement Procedure}
From the comparison between the statement procedure and the civil procedure of obtaining a default judgment it transpired that the statement procedure does not provide for notice in advance to the taxpayer, and cannot be seen as a default judgement.\footnote{Olivier (2001) 1 TSAR 193 at 198. See par 3.3.2.}

Croome is of the opinion that the decision in \textit{Metcash (CC)} was correct as a taxpayer may have a right to seek review in terms of his right to just administrative action. It is submitted that Olivier, on the other hand, correctly stated that the conclusion of the Constitutional Court in the matter of \textit{Metcash (CC)} is questionable as the setting in motion of the execution procedure cannot be deemed as access to the court.\footnote{Id.} The execution procedure is simply an enforcement of a judgment.

A point of grave concern regarding a taxpayer’s access to the court has arisen due to clause 105 of the Draft Tax Administration Bill 2010. In terms of this clause SARS is seeking to exclude the High Court’s jurisdiction. The Law
Society of South Africa has indicated its discontent with SARS attempting to oust the limited jurisdiction of the high court as recognised by the court in Metcash.  

Whether this procedure is constitutional will remain a point of debate in the future. SARS' power to collect taxes remains vital and the court will not easily declare practices and procedures to enforce said collection unconstitutional. It is, however, clear that SARS needs to utilise this power cautiously by employing several checks and balances.

The remainder of this chapter will focus on the “pay now, argue later” rule and the constitutionality thereof with specific reference to a taxpayer’s right to access to the courts as stipulated in section 34 of the Constitution.

3.4 “PAY NOW, ARGUE LATER” RULE

3.4.1 Introduction
A taxpayer may receive a phone call on a Friday afternoon informing him that he owes SARS a substantial amount that needs to be paid before the Monday. Even more disconcerting is the fact that the person on the other side will indicate that you need to “pay now, argue later”.

The “pay now, argue later” rule refers to the wide power, contained in section 36 of the VAT Act and section 88 of the Income Tax Act, stipulating that the payment of tax, additional tax penalties and interest is not suspended, unless the Commissioner decides otherwise, even though an appeal is lodged.

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62 See also Olivier (2001) 1 TSAR 193 at 194. Hereafter this will be referred to as the “pay now, argue later” rule.
Previously, it was uncertain whether the “pay now, argue later” rule was applicable in tax matters where an objection has been lodged. The Taxation Laws Second Amendment Bill 2009 stipulates that this practice is also applicable to objections. Even though the said bill does not have any binding effect it is an indication that payment of tax pending an appeal or an objection might not be suspended.

If section 34 of the Constitution is borne in mind, the question arises whether this practice can be constitutional as it clearly does not allow access to the court before payment is made.

To examine the constitutionality of this section the “pay now, argue later” rule will firstly be compared to the general rule of practice dealing with appeals. This comparison will provide valuable insight into the extent of the “pay now, argue later” rule.

Thereafter, a discussion regarding the constitutionality of the “pay now, argue later” rule will emerge with reference to the manner in which the South African courts has dealt with the situation. Lastly the future of the “pay now, argue later” rule will be discussed.

3.4.2 General Rule

Before a sensible evaluation can be made between the “pay now, argue later” rule of SARS and the general rule, a brief discussion regarding the general rule would suffice.

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64 Hereinafter called the general rule.
Generally, the enforcement of a civil judgment is suspended when an appeal is noted. The exceptions to this general rule are:

- when the appeal was not noted timely; or
- the magistrate or judge orders, in accordance with his discretion, otherwise.

Therefore a judgment debtor would not have to perform in terms of a civil judgment until his appeal against the judgment has been upheld.

The above discussion regarding the general rule will be adequate for purposes of comparing it to SARS’ “pay now, argue later” rule.

### 3.4.3 General Rule Versus “Pay Now, Argue Later” Rule

An appeal in a civil matter may be noted after a final decision or judgment is made. Therefore an appeal will be noted after the pleading and trial phase has come to an end. A party to the proceedings would thus have ample opportunity to state his argument, in an open court, prior to the final decision or judgment.

The “pay now, argue later” rule on the other hand, becomes operational when SARS has issued an assessment. The taxpayer would have to pay the assessed amount before given the opportunity to raise his arguments.

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65 In terms of the common law. See also *Reid v Godart 1938 AD 511*. S 78 of the Magistrates’ Court Act 32 of 1944 stipulates that in the event that an appeal is noted, a court may order that a judgment must be executed or suspended pending the decision on the appeal. See Paterson TJM *Eckard’s Principles of Civil Procedure in the Magistrates’ Court* (2005) at 296 where it is submitted that the onus is on the successful party to approach the court for an order allowing executing even though an appeal was noted.

66 *Schmidt v Theron 1991 (3) SA 126 (K).*

67 S 78 of the Magistrates’ Court Act and High Court Rule 49(11).

68 See *Lubambo v Presbyterian Church of African 1994 (3) SA 241 (SOK) at 245.*

69 For purposes of this discussion the application of the “pay now, argue later” rule with reference to the objection of an assessment will be discussed.

70 *Marsay v Dilley 1992 (3) SA 944 (A).*
Further, only in exceptional circumstances will the enforcement of civil judgments not be suspended whilst the “pay now, argue” rule has as a point of departure that the payment will not be suspended. The general rule is therefore clearly not applicable to tax debt.\footnote{CIR v NCR Corporation of SA (Pty) Ltd 1988 2 SA 765 (A). See also Olivier (2001) TSAR 193 at 194.}

The point of departure in the “pay now, argue later” rule seems peculiar if one takes into account that there is no judgment and SARS has the power not to suspend the payment by the taxpayer pending the outcome of the objection.

It is clear that this practice of SARS is not similar to the general rule. The question arises whether the “pay now, argue later” rule can be constitutional as there is no opportunity for the taxpayer to approach a court or tribunal with his objection prior to paying the debt?

In order to answer this question a discussion relating to the constitutionality of the “pay now, argue later” rule will be dealt with below.

### 3.4.4 Constitutionality of the “Pay Now, Argue Later” Rule

As was indicated above\footnote{See par 3.3.3.} the court a quo in the Metcash matter held that the “pay now, argue later” rule was unconstitutional as it does not reasonable and justifiable limit a taxpayer’s right to access to the court.

The Commissioner contended that the “pay now, argue later” rule does not infringe upon any of the taxpayer’s constitutional rights. The Commissioner indicated that there were four opportunities for a hearing on an assessment, namely:

- objection to the assessment;
• in exercising the Commissioner’s discretion\textsuperscript{73} in determining whether a payment should be suspended pending appeal, the affected party can place facts before the commissioner;
• if the Commissioner has failed to exercise his discretion properly, as mentioned above, the decision may be taken on review;
• there is an automatic right of appeal on merits to the Special Tax Court.\textsuperscript{74}

Kriegler in the Constitutional Court held that section 36 of the VAT Act was not an appeal against a judgment\textsuperscript{75} but a legislative revision of an administrative decision.\textsuperscript{76} This procedure was therefore not concerned with access to the court and contained no provision ousting the court’s jurisdiction.\textsuperscript{77} The said provision was therefore held to be constitutional.

Olivier, correctly, indicated that the taxpayer never argued that the jurisdiction of the court is completely excluded but purely that the “pay now, argue later” rule excludes the jurisdiction of the court when the rule is invoked.\textsuperscript{78}

It is therefore submitted that the court mistakenly held section 36 to be constitutional as it excludes the taxpayer from approaching the courts at the time the rule is invoked. The question arises whether there is any remedy for a taxpayer faced, in the future, with the “pay now, argue later” situation?

\textsuperscript{73} In terms of s 36(1) of the VAT Act.


\textsuperscript{75} Unlike the situation of the general rule.

\textsuperscript{76} Metcash (CC) at 1132. Also see Silke (2002) Acta Juridica 282 at 315.

\textsuperscript{77} Id.

\textsuperscript{78} Olivier (2001) 1 TSAR 193 at 196.
3.4.5 The Future of the “Pay Now, Argue Later” Rule

As a result of the Metcash (CC) judgment the Commissioner: SARS issued Media Release 27. In terms of the said Media Release the Commissioner has a discretion to suspend payment of tax pending an appeal. When exercising his discretion the Commissioner must take the following factors into consideration:

- if payment of the whole amount would cause irreversible damage if the taxpayer’s appeal were to be successful, and circumstances of the matter creates reasonable doubt;
- other appropriate circumstances, for example, assurance that the disputed amount will be paid if the appeal failed.

The Second Taxation Law Amendment Act 2009 has further clarified the “pay now, argue later” rule by amending section 88 of the Income Tax Act and section 36 of the VAT Act. Provision is made for the suspension of the payment of tax, awaiting the outcome of an objection or an appeal. The following factors will be considered, amongst others:

- the amount involved;
- taxpayer’s compliance history;
- whether the taxpayer might alienate his assets during the postponement of payment;
- the merits of the taxpayer’s case;
- whether fraud was present. 

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Hence since the *Metcash (CC)* judgment guidelines has been set for taxpayers. This has resulted in legal certainty regarding whether you would have to “pay now, argue later” or whether payment has been suspended pending an appeal. The introduction of even more specific criteria will provide for greater consistency in the handling of taxpayers and lead to a better understanding by the taxpayers.\(^81\)

Croome recommends that when the taxpayer will experience financial ruin, paying the tax pending an appeal, his right and his obligation to pay tax should be balanced.\(^82\) The introduction of a tax ombudsman might assist in restoring said balance.\(^83\)

### 3.5 CONCLUSION

The right of access to the court is of utmost importance in a constitutional state such as South Africa.

The statement procedure and the “pay now, argue later” rule were scrutinised in light of a taxpayer’s right to access to the courts. It should, however, be borne in mind that SARS is awarded these powers to administer the collection of tax which is essential to ensure that the government functions properly.\(^84\)

The statement procedure was compared to a default judgment. Clearly this power of SARS exceeds the ordinary civil remedies and practices available to other litigants.

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\(^{81}\) Croome BJ “Court Decision Gives Some Hope to Objecting Taxpayers” (August 2009) *Business Day* at 12.

\(^{82}\) Croome (January 2001) *Business Day Professional* at 6.

\(^{83}\) *Id*. See ch 6 for a discussion regarding a tax ombudsman.

Accordingly, the constitutionality of the statement procedure was questioned. Except for the glimmer of hope in the *Metcash* matter the statement procedure was held to be constitutional in the other cases discussed. Criticism arose regarding the ratio of the court in the *Metcash (CC)* matter as the enforcing of a judgment by the courts can hardly be seen as access to the courts. Whether this criticism would be enough to sway a judge faced with the same question in another direction, namely to declare the statement procedure unconstitutional, is, however, unlikely. Nevertheless the court will not tolerate SARS abusing its powers.

Mention was also made of clause 105 of the Draft Tax Administration Bill 2010. The said clause attempts to eliminate the High Court’s jurisdiction. In the event that the bill is promulgated in its current form, this will surely be, in context of the taxpayer’s rights, a step in the wrong direction.

The latter part of this chapter focussed on the “pay now, argue later” rule. In a comparison of this rule with the general rule utilised in civil proceedings it became evident that the “pay now, argue later” rule is a clear departure from the general rule. SARS thus possesses wider powers to enforce the collection of taxes than an ordinary civil litigant in obtaining judgment against another.

In discussing the constitutionality of the “pay now, argue later” rule reference was made to the *Metcash (CC)* matter. In concurrence with Olivier, it was submitted that this rule excludes the jurisdiction of the court at the time the rule is invoked and accordingly it is submitted that the constitutionality of the “pay now, argue later” rule may in future be decided differently.

Attention was further given to the guidelines issued by SARS of instances when the payment of tax will be suspended, awaiting the outcome of an objection or an appeal.

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85 See par 3.3.4.
It is advisable, when SARS is enforcing payment pending appeal, for an aggrieved taxpayer to rather approach the court on the grounds of administrative review than on a violation of the right to access to court as the court has indicated in the Metcash (CC) judgment that enforcing payment pending appeal calls for legislative revision of an administrative decision.\(^{86}\)

In this chapter a taxpayer’s right to access to the courts was dealt with. In the following chapter a taxpayer’s right to property will be discussed.

CHAPTER 4
THE TAXPAYER’S RIGHT TO PROPERTY

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4.1 INTRODUCTION
Section 25 of the Constitution declares that "(n)o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.” In this chapter the aforementioned right will briefly be discussed. Thereafter refunds by SARS, with reference to the right to property, will be examined.

4.2 RIGHT TO PROPERTY
The aim of section 25 of the Constitution is twofold; firstly, to protect existing property rights and secondly, allowing legislative opportunities to correct the historical uneven distribution of property in South Africa.¹ The second aim of this section is envisioned by allowing deprivation in terms of law of general application.²

² This is, however, not of relevance in this dissertation.
This section provides a negative protection of property and not a right to obtain hold and alienate property.³ The concept of “property” in this section is very broad. Property does not refer to land only but also corporeal movables, incorporeals, commercial interest and intellectual property.⁴

With the aims of the right to property in mind, a discussion relating to the refunds owed by SARS to the taxpayer will follow.

4.3 REFUNDS BY SARS

4.3.1 Introduction
Section 102 of the Income Tax Act permits a refund for a taxpayer who has overpaid on income tax.⁵ A person, who paid an amount in terms of this Act, is entitled to a refund to the extent that the payment exceeded either the amount contained in the assessment or the amount chargeable under the Act.⁶

A problem transpires when SARS delays this refund as the taxpayer is entitled to receive the refund within a reasonable time.⁷ Will the taxpayer be entitled to interest due to said delay? Section 89 quat of the Income Tax Act provides that a taxpayer is only entitled to interest in certain circumstances.⁸ These

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³ First National Bank of SA LTD t/a Wesbank v Commissioner, South African Revenue Services; First National Bank of SA LTD t/a Wesbank v Minister of Finance 2002 (7) JTLR 250 (CC) at 253.


⁵ S 40 and s 47 of the VAT Act contains similar provisions.


circumstances will arise where the refund exceeds R 20 000 or the taxpayer’s taxable income exceeds R 50 000.\textsuperscript{9} This interest will serve as compensation for the delay in receiving the refund.\textsuperscript{10} There are, however, situations where the Commissioner shall not authorise a refund,\textsuperscript{11} for instance when a period of 3 years has lapsed.

A refund due to a taxpayer in terms of the VAT Act is dealt with as follows. If the Commissioner fails to refund the taxpayer within 21 business days after receiving the taxpayer’s VAT return, interest at the prescribed rate of 11,5\% per annum will be charged. If the VAT return is, however, incomplete or defective the period of 21 business days will be suspended until rectification of the VAT return by the taxpayer.\textsuperscript{12} The taxpayer will also need to satisfy the Commissioner in writing that the incompleteness of the return does not affect the refundable amount.\textsuperscript{13}

As indicated above,\textsuperscript{14} in terms of the Income Tax Act, there will be certain instances where a taxpayer does not qualify for interest. What about the taxpayers who does not qualify for interest? Are their right to property infringed as they can not earn interest from SARS or a bank on their overpayment? In order to answer these questions a refund due by SARS will be compared with a

\textsuperscript{9} The taxable income of R 50 000 is applicable to taxpayers other than a company. A company’s taxable income must exceed R 20 000 before a tax refund can be claimed. See Author unknown “Interest on Overpayment” Integritax available at http://www.saica.co.za/integritax/1072_Interest_on_Overpayment_of_STC.htm. (accessed on 26 September 2010).

\textsuperscript{10} Author unknown “What Remedy Does a Taxpayer Have When SARS Unduly Delays a Refund” Integritax available at http://www.saica.co.za/integritax/1324_what_remedy_does_a_taxpayer_have_when_SARS_unduly_delays_a_refund? (accessed on 27 March 2010). See also Croome & Olivier (2010) at 215.

\textsuperscript{11} See s 102 (2) of the Income Tax Act.

\textsuperscript{12} S 45 of the VAT Act. See also Author unknown “Interest on Refunds” available at http://www.saica.co.za/integritax/1218_interest_on_refunds.htm (Accessed on 27 March 2010).

\textsuperscript{13} Author unknown Integritax available at http://www.saica.co.za/integritax/1218_interest_on_refunds.htm (accessed on 27 March 2010).

\textsuperscript{14} See par 4.3.1.
civil claim for money owed. Thereafter the constitutionality of this practice will be addressed.

4.3.2 Civil Claim for Money
Before comparing a civil claim for money with a refund due by SARS a short discussion regarding a civil claim for money would be necessary.

In a civil matter money due to a person\(^{15}\) can be collected by demanding it from the relevant party.\(^{16}\) If this attempt is not successful legal proceedings may be, amongst other, instituted by way of summons.

Interest on the outstanding money may be claimed. The date from which interest is calculated will be the earliest of the date payment was demanded with a letter of demand or summons issued, thus placing the person in *mora*.\(^{17}\) The rate of *mora* interest is currently 15,5%.\(^{18}\)

If summons was not served within three years of this debt arising, the claim has prescribed and the claim has thus lapsed.\(^{19}\)

With these basic principles in mind a comparison between a civil claim for money and refunds due by SARS will be dealt with below.

\(^{15}\) Albeit natural or juristic.

\(^{16}\) It is suggested that this be done by a letter of demand.

\(^{17}\) See s 2A (2)(a) of the Prescribed Rate of Interest Act 55 of 1975. Hereinafter referred to as the “Prescribed Rate of Interest Act.”

\(^{18}\) *Mora* interest is interest payable in accordance with the common law. In terms of Sect 1(3) of the Prescribed Rate of Interest Act the percentage interest will be published in the Government Gazette from time to time. In terms of GNR1814 in GG15143 of October 1993 the percentage *mora* interest to be charged is 15,5 percent. Editorial “SARS’ Liability under Common Law to Pay Interest” (September 2002) *The Taxpayer* 161 at 161.

\(^{19}\) S 10(1) and s 11(d) of the Prescription Act 68 of 1969. Hereafter referred to as the Prescription Act.
4.3.3 Civil Claim For Money Versus Refunds by SARS

In both instances money is due to a person. Since the person does not have the money that is rightfully his, he is entitled to receive interest as compensation. The differences between these two instances will be highlighted underneath.

In all civil matters interest may be charge while interest on refunds by SARS will, only be charged in specific circumstances.\textsuperscript{20}

In civil matters the \textit{mora} interest rate is 15.5\% whereas with refunds by SARS\textsuperscript{21} the prescribed interest rate is currently 11.5\%. Gordon avers that the reason for the lower interest rate is to discourage taxpayers from saving at SARS.\textsuperscript{22} This seems to be logical.

Prescription is regulated by The Prescription Act. This Act stipulates prescription periods for the different types of debt.\textsuperscript{23} Section 11 indicates that debt for taxation will prescribe after 30 years\textsuperscript{24} and debt for civil matters, which falls within another category, will prescribe after 3 years.\textsuperscript{25}

Does debt for taxation only refer to debt owed by the taxpayer to SARS or also to debt owed by SARS to the taxpayer? It is submitted that debt for taxation includes debt owed to and by SARS. It is further submitted that the prescription of refunds by SARS cannot be regulated by any fiscal legislation and the prescription period of 30 years, as indicated by the Prescription Act, is applicable as this is debt in terms of taxation.\textsuperscript{26}

\begin{itemize}
\item \textsuperscript{20} See par 4.3.1 in this regard.
\item \textsuperscript{21} Refunds for income and value added tax purposes.
\item \textsuperscript{22} Thuronyi \textit{V Tax Law: Design and Drafting} (1999) at 110.
\item \textsuperscript{23} S 11 of the Prescription Act.
\item \textsuperscript{24} S 11(a)(iii) of the Prescription Act.
\item \textsuperscript{25} S 11(d) of the Prescription Act.
\item \textsuperscript{26} See par 4.3.3 in this regard.
\end{itemize}
It is clear that the extent of SARS’ power relating to the paying of refunds is greater than those of other civil litigants. The constitutionality of this practice will, for that reason, be discussed below.

4.3.4 The Constitutionality of Refunds by SARS

Legislation does not provide any reference to whether the SARS has a general duty to pay interest. In the case of CIR v First National Industrial Bank the court determined that the fiscus is not immune from a claim of mora interest. Therefore, when fiscal legislation does not provide for interest at a prescribed rate, mora interest at 15.5% per annum will be applicable.

In the case of Sage Life Ltd v Minister of Finance secondary tax on companies was paid. After a retrospective amendment to the Income Tax Act a claim for refund arose. Sage Life Ltd demanded the refund by letter and SARS refunded the capital payments. Consequently, the matter of interest was taken to court. SARS defended the claim as the Income Tax Act was silent as to whether there is any interest payable for the overpayment of secondary tax of companies.

The court referred to the First National Industrial Bank case and consequently held that SARS had to pay mora interest if there is no statutory duty on SARS to pay interest.

27 See par 1.3 on s 36 of the Constitution.
29 1990 (3) SA 641 (A).
30 First National Industrial Bank at 647. See also Editorial (September 2002) The Taxpayer 161 at 161.
32 66 SATC 181.
33 See s 64B of the Income Tax Act.
SARS further argued that the claim for interest has prescribed as the debt constituted a normal debt with a prescription period of three years. SARS was of the opinion that the prescription period of thirty years relating to tax debts applied only to debt owed to SARS and not to debt owed by SARS. The court held that the claim for interest would only prescribe after thirty years and accordingly the prescription period for tax debt relates to debt owed to SARS and debt owed by SARS.

Two very important questions were addressed in the case of Sage Life Ltd. Firstly, when a taxpayer’s tax refund is delayed and he is not entitled to interest under the Act, he can claim *mora* interest, provided that he did place SARS in *mora*. Secondly, it was established that the prescription period for refunds and interest thereupon is three years.

### 4.3.5 The Future of Tax Refunds

The taxpayer is entitled to interest, either at a prescribed interest rate or *mora* interest, until the refund is obtained. The taxpayer must therefore make a careful calculation to ensure that SARS is paying the correct amount of interest. It must be borne in mind, however, that the interest received from a refund by SARS must be declared for tax purposes.

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34 *First National Industrial Bank* at 647.
35 *Sage Life Ltd* at 187.
36 S 11(a)(iii) of the Prescription Act.
37 *Sage Life Ltd* at 190. See also Editorial (September 2002) *The Taxpayer* 161 at 162.
38 SARS can be placed in *mora* by serving a letter demanding the refund before a specific date.
39 For example in accordance with s 89 *quat* of the Income Tax Act and s 45 of the VAT Act.
41 *Id.*
Croome expresses concern regarding unreasonable delays in refunding taxpayers who do not qualify for interest.\textsuperscript{43} He, rightfully, submits that failure to pay interest on an unduly delayed refund poses a violation of a taxpayer’s right to property.\textsuperscript{44} The valuable conclusion in the \textit{Sage Life Ltd} case might, however, provide an answer for Croome’s concern. In accordance with this case the taxpayer, who does not qualify for interest in terms of the fiscal legislation, can demand \textit{mora} interest.

In light of the \textit{Sage Life Ltd} case it is not necessary to determine whether the unreasonable delay in refunding a taxpayer constitutes a deprivation of a taxpayer’s property as a taxpayer may, either in terms of fiscal legislation or in terms of \textit{mora} interest, claim interest as compensation thereof.

4.4 CONCLUSION
With cognisance of our country’s history of uneven distribution of property, section 25 of the Constitution is of vital importance.\textsuperscript{45}

The comparison between money owed in civil matters and the refunds payable provided distinguishable differences. Said comparison indicated that SARS experiences greater power regarding the delaying of paying refunds than an ordinary litigant. These differences can, however, be justified by SARS’ duty to administer the collection of tax.\textsuperscript{46}

\begin{itemize}
\item \textsuperscript{42} \textit{Id}.
\item \textsuperscript{43} Croome PhD Thesis (2008) at 41.
\item \textsuperscript{44} \textit{Id}.
\item \textsuperscript{45} Currie & De Waal (2005) at 533.
\item \textsuperscript{46} Croome BJ “Constitutional Law and Taxpayer’s Rights in South Africa – an Overview” (2002) \textit{Acta Jurídica} 1 at 8.
\end{itemize}
It is thus submitted, with reference to the case of *Sage Life Ltd* that a delay to reimburse a taxpayer will be subject to interest. Therefore the delay will not constitute an unreasonable violation of section 25 of the Constitution.

In this chapter a taxpayer’s right to property, in terms of section 25 of the Constitution, was examined. In the subsequent chapter a taxpayer’s right to privacy will be dealt with.
CHAPTER 5
THE TAXPAYER’S RIGHT TO PRIVACY

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5.1 INTRODUCTION
In accordance with section 14 of the Constitution every person has the right to
privacy. This right includes for a person not to have his/her person, home or
property searched and not to have his/her possessions seized.\(^1\) This chapter will
briefly discuss the right to privacy and thereafter the search and seizure
procedures of SARS, as contemplated in section 74 of the Income Tax Act.

5.2 RIGHT TO PRIVACY
The right to privacy has been long recognised by the common law.\(^2\) This right is
an independent personality right that is considered part of a person’s “\(dignitas\)”\(^3\)

\(^1\) S 14 (a) to (c) of the Constitution.


\(^3\) Dignitas is a person’s dignity. See Currie & De Waal (2005) at 316 in this regard.
Firstly, section 14, affords a general right to privacy and secondly, protects a person against specific instances, amongst others not to have his/her person, home or property searched. The protection of section 14 can only be triggered once there has been infringement on the general right to privacy when a person's person, home or property was searched, due to the fact that the right against search and seizure is subordinate to the general right to privacy.

With reference to a person’s right to privacy the search and seizure procedure in terms of the Income Tax Act will be discussed.

5.3 SEARCH AND SEIZURE IN TERMS OF THE INCOME TAX ACT

5.3.1 Introduction
Section 74(3) of the Income Act, before amendment, afforded the Commissioner the power to authorise members of his staff to conduct a search and seizure without a warrant from a judge.

The Katz Commission scrutinised this section and indicated that section 74 violates section 13 of the Interim Constitution and may only remain intact if the search and seizure practices is a just and reasonable infringement. The Katz Commission suggested that:

\[4\] Id.
\[5\] Id. Also see Bernstein v Bester 1996 (2) 751 (CC).
\[6\] S 74(3) was amended by s 14 of the Revenue Laws Amendment Act 46 of 1996.

\[8\] S 13 of the Interim Constitution afforded everyone a right to privacy. This right is encapsulated in s 14 of the Constitution.

\[9\] In terms of s 33 of the Interim Constitution. The limitation clause is encapsulated in s 36 of the Constitution.
a) where feasible, prior authorisation must be obtained in order to execute a valid search and seizure;

b) authorisation must be granted by neutral and impartial persons capable of acting judicially, which implies that authorisation provided in terms of s 74 from the Commissioner is not constitutionally valid; and

c) the minimum standard requires that the person issuing the warrant, must on reasonable and proper grounds, establish by information given under oath, believe that an offence has been committed and that evidence will be found at the place of the search.  

Reference was also made to the Canadian case of Hunter et al v Southam. In this case the Supreme Court declared provisions similar to section 74 of the Income Tax Act unconstitutional.

In the case of Rudolph v CIR the taxpayer argued that the search carried out by the Commissioner was unconstitutional. It was, however, held that the warrant was issued before the Constitution and the constitutionality thereof could not be evaluated. Section 74 was thereafter repealed and substituted with a new section 74 and section 74A to D.

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13 See also Park-Ross v Director: Office for Serious Economic Offences 1995 (2) SA148 (C) at 172 where the court held a similar provision of the Investigation of Serious Economic Offences Act 117 of 1991 unconstitutional.

14 1994 (3) SA771 (W).

15 As the focus of this dissertation is on the Constitution, the discussion of Rudolph v Commissioner for Inland Revenue 1994 (3) SA 771 (W), Rudolph v Commissioner for Inland Revenue 1996 (2) SA 886 (A), Rudolph v Commissioner for Inland Revenue 1996 (4) SA 552 (CC) and Rudolph v Commissioner for Inland Revenue 1997 (4) SA 391 (SCA) does not fall within the scope of this dissertation. See Olivier L “The New Search and Seizure Provisions of
Section 74D, *inter alia*, provides that:

(1) For the purposes of the administration of this Act, a Judge may, on application by the Commissioner or any officer contemplated in s74(4), issue a warrant, authorising the officer named therein to, without prior notice and at anytime—

(a)(i) enter and search any premises; and

(ii) search any person present on the premises, provided that such search is conducted by an officer of the same gender of the person being searched, for any information, documents or things, that may afford evidence as to the non-compliance by any taxpayer with his obligations in terms of this Act;

(b) seize any such information, documents or things; and

(c) in carrying out any such search, open or caused to be opened or removed and opened, anything in which such officer suspects any information, documents or things to be contained.

(2) An application under subsection (1) shall be supported by information supplied under oath or solemn declaration, establishing the facts on which the application is based.

(3) A judge may issue the warrant referred to in subsection (1) if he is satisfied that there are reasonable grounds to believe that—

(a)(i) there has been non-compliance by any person with his obligations in terms of this Act; or

(ii) an offence in terms of this Act has been committed by any person;

(b) information, documents or things are likely to be found which may afford evidence of-

(i) such non-compliance; or

(ii) the committing of such offence; and


16 For purposes of this dissertation only section 74 D will be discussed.
(c) the premises specified in the application are likely to contain such information, documents or things.

(4) A warrant under subsection (1) shall –

(a) refer to the alleged non-compliance or offence in relation to which it is issued;
(b) identify the premises to be searched;
(c) identify the person alleged to have failed to comply with the provisions of the Act or to have committed the offence; and
(d) be reasonably specific as to any information, documents or things to be searched for and seized.

Therefore evidence of the non-compliance of the fiscal legislation, and a detailed warrant containing the premises, person and property that SARS intends to search and seize should be adduced.\textsuperscript{17}

The new sections has the effect that SARS is no longer the judge and jury in concluding whether a warrant would be issued to enable SARS to search a taxpayer’s premises.\textsuperscript{18} A warrant will only be granted once a judge is satisfied, on a balance of probabilities, that an offence against the fiscal statutes has transpired.\textsuperscript{19}

The search and seizure procedure in terms of the Income Tax Act bears a strong resemblance to the search and seizure procedure in terms of the CPA, whereby police officers are authorised to search and seize property of people. In view of this, the search and seizure procedure in terms of the Income Tax Act will be compared with the search and seizure procedure in terms of the CPA. This comparison will be useful in determining the extent of SARS’ powers. Thereafter, the relevant South African case law will be examined to ascertain the


\textsuperscript{19} S 74 D (3)of the Income Tax Act.
constitutionality of this section. Lastly, the future of SARS’ search and seizure procedure will be discussed.

5.3.2 Search and Seizure in terms of the CPA
Before comparing the search and seizure procedure in terms of the Income Tax Act with the procedure provided for in the CPA, a brief discussion of the procedure in terms of the CPA is necessary.

Section 21 of the CPA states that the search and seizure should, whenever possible, be concluded with a warrant. The warrant will be issued by a magistrate when the information, which is provided under oath, provides reasonable grounds for the magistrate to believe that a certain object is at the premises. The warrant must identify the purpose of the search and the objects or premises to be searched. If the warrant is in general terms, it would be regarded that the magistrate did not pay attention in establishing whether reasonable grounds were present. The warrant may only be executed during the day, unless specifically authorised otherwise, and is in force until it is withdrawn by the magistrate.

The issuing of a warrant by a magistrate ensures that the magistrate, as judicial officer, protects citizens from unnecessary violation of their rights by law enforcers. Are there measures in place to protect a taxpayer against unnecessary violation by SARS? Before attempting to answer this question a

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20 In accordance with s 22 of the CPA, a search may be conducted without a warrant when the person consents to be searched, or when the police officer has reasonable grounds to believe that a warrant would be issued but the delay in obtaining the warrant would diminish the purpose of the search.


22 Smith, Tabata and Van Heerden v Minister of Law and Order 1989 (3) SA 627 (W).

23 S 21(3)(a) of the CPA.

24 S 21(3)(b) of the CPA.

25 Park-Ross v Director: Office for Serious Economic Offences at 172.
comparison between the search and seizure provided for in the Income Tax Act and the CPA will be drawn.

5.3.3 Search and Seizure in terms of the Income Tax Act Versus Search And Seizure in terms of the CPA

The two procedures are similar in various ways. Firstly, in both instances a warrant is issued by a magistrate. It is therefore clear that the jurisdiction of the courts are not oust and that these procedures are subject to judicial scrutiny. Secondly, the supporting information used to substantiate the application for a warrant is supplied under oath. Furthermore, the magistrate has to be satisfied that there are reasonable grounds present before issuing a warrant. Lastly, both warrants need to contain specific details and should thus not be in general terms.

A warrant to search and seize, issued in accordance with the Income Tax Act, may, however, be executed at any time whilst a warrant, in accordance with the CPA, may only be executed during the day. It seems to be illogical to afford SARS the opportunity to execute the warrant at anytime while in a criminal matter a police officer, who might be acting in live threatening circumstances, is restricted to daytime only.

This is, however, the only significant difference from the search and seizure practice in terms of the CPA and may be justifiable if the purpose of SARS, namely the collection of taxes, is bore in mind.

The discussion below will focus on the constitutionality of the search and seizure practice in terms of the Income Tax Act.
5.3.4 The Constitutionality of Search and Seizure in terms of the Income Tax Act

In Deutschmann, Shelton v Commissioner for the South African Revenue Service the applicants approached the court as they contended that the search and seizure conducted at their business premises violated their right to privacy and the right against arbitrary deprivation of property. The applicants requested an order directing SARS to return the seized goods. Even though this was not an attack on the constitutionality of section 74D the court still had to scrutinise SARS’ behaviour relating to section 74D. The court determined that the warrant, authorised in terms of section 74D, was reasonably specific. The court further held that the notion of “privacy” does not incorporate the business activities of a person. Lastly, the court concluded that reliance on the Constitution was unsubstantiated.

In the matter of Ferucci v Commissioner, South African Revenue Service the warrant did not specify the documents subject to the search and seizure. The

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26 See par 1.3 regarding the limitation of constitutional rights in terms of s 36 of the Constitution. See also Croome PhD Thesis (2008) at 91, Croome (2010) at 144 and Croome & Olivier (2010) at 126 for a discussion of case law relating to search and seizure provision other than in fiscal legislation.


28 S 14 of the Constitution.

29 S 25 of the Constitution. For purposes of this ch only the right to privacy will be discussed. For a discussion regarding a person’s right to property, ch 4 can be consulted.

30 Deutschmann at 200.


32 Deutschmann at 203.

33 Deutschmann at 211. This was also decided in Bernstein at 789.


35 Ferucci at 416.
court subsequently held that a *nexus* between the documents seized and the non-compliance of the taxpayer must exist and the documents subject to the search and seizure must be specified.\(^{36}\) The court continued by stating that if a warrant does not clearly specify the applicable documents, the violation can not be seen as constitutionally justifiable.\(^{37}\) Therefore an unspecified warrant is unconstitutional.\(^{38}\)

In the case of *Haynes v Commissioner for Inland Revenue*\(^ {39}\) the court once again had to determine the validity of a search and seizure authorised in terms of section 74D. Lock held that section 74D provides a “draconian remedy” and therefore SARS needs to comply strictly with the relevant sections.\(^ {40}\) It was further held that section 74D would not be a reasonable and just limitation of a taxpayer’s right to privacy if the other remedies in terms of section 74A and 74B had not been exhausted.\(^ {41}\) It was further stipulated that the taxpayer must receive a copy of the court order and the application of the warrant.\(^ {42}\) Croome indicated that this is the correct approach as the taxpayer must be aware of the circumstances under which the warrant was granted, in order to challenge it.\(^ {43}\)

In the matter of *Shelton v Commissioner for South African Revenue Service*\(^ {44}\) the court, however, held that SARS is not under an obligation to inform the taxpayer of the application for a search warrant as it would defeat the purpose of the

\(^{36}\) *Ibid* at 415.

\(^{37}\) *Ibid* at 416.

\(^{38}\) *Id.* See *Ferucci* at 414 for a discussion on the details that must be provided in a warrant. Also see Croome (2010) at 148 and Croome & Olivier (2010) at 127.

\(^{39}\) 2000 (6) BCLR 596 (TK).

\(^{40}\) *Haynes* at 630.

\(^{41}\) *Ibid* at 644.


\(^{44}\) 2002 (3) JTLR 94 (SCA).
warrant.\textsuperscript{45} It is therefore submitted that the taxpayer must only be made aware of the warrant after the warrant has been executed. The purpose would be to challenge the validity of the warrant and procedure followed. If the warrant did not comply with the relevant provisions the documentation seized may not be utilised.\textsuperscript{46}

In the matter of \textit{Oberholzer v The Commissioner of the South African Revenue Service}\textsuperscript{47} the validity of a warrant was challenged as the Commissioner did not disclose all relevant information to the judge in seeking the warrant.\textsuperscript{48} The court held that the failure to disclose previous outstanding tax, interest and penalties was not material as it would only have strengthened the Commissioner’s case. Therefore the warrant was valid.

From the discussion of the relevant case law it is apparent that the procedure provided for in section 74D of the Income Tax Act to search and seize a taxpayer’s property complies with the constitutional requirements. It is, however, important that SARS follows and complies with the statutory requirements.

\textbf{5.3.5 The Future of Search and Seizure in terms of the Income Tax Act}

It is uncertain why a warrant in terms of the Income Tax Act can be executed at anytime. It is submitted that the reason a warrant in terms of the CPA can only be executed during the day is to not violate a person’s right to privacy unreasonably.\textsuperscript{49}


\textsuperscript{46} This can be handled in the same way as evidence unlawfully obtained in criminal matters.

\textsuperscript{47} Unreported decision Case no 8714/98 of the Cape of Good Hope Provincial Division judgment delivered on the 20\textsuperscript{th} of May 1999. Also see Croome PhD Thesis (2008) at 88, Croome & Olivier (2010) at 124 and Croome (2010) at 143.

\textsuperscript{48} \textit{Oberholzer} at par 4.

\textsuperscript{49} \textit{Ibid} at par 14.
In concurrence with Croome, it is submitted that that the legislature should incorporate a provision from section 46(3) of the Competition Act\textsuperscript{50} into the Income Tax Act. This provision entails that a warrant will remain valid until it is executed, cancelled, utilised, or a period of one month has expired.\textsuperscript{51} Particularly the one month period will provide protection to the taxpayer as SARS would have to execute the warrant within a specific time period.

Even though the cases discussed above did not formally attack section 74D, it can be concluded that in attacking section 74D certain guidelines should be followed. A taxpayer would have to prove that SARS did not comply with section 74A and 74B. Furthermore the taxpayer would have to prove that section 74D does not provide a just and reasonable limitation on his right to privacy.\textsuperscript{52}

It is submitted that the office of the tax ombudsman would provide valuable assistance for an aggrieved taxpayer who is of the opinion that SARS' did not act within the ambit of its search and seizure powers.

The Tax Administration Bill\textsuperscript{53} awards a further power to SARS, which entails that SARS can conduct a search and seizure without a warrant. This would be in circumstances where there is not enough time to obtain the warrant as there is an imminent risk that the taxpayer would remove or destroy the goods.\textsuperscript{54} The question arises whether this power can be constitutional, given that taxpayers has the right to privacy?\textsuperscript{55}

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\textsuperscript{54} Clause 55 of the Tax Administration Bill 2009.

\textsuperscript{55} Becatti “SARS Doesn’t Want Your Money” (13 November 2010) Tax Bulletin
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It should be borne in mind that only senior SARS officials will have the power to search and seize without a warrant. In addition SARS can only search your premises if they believe that you will destroy the goods before they can obtain a warrant the regular way. This means that SARS will have to prove that they had reasonable grounds to exercise this power and it must also obtain a search warrant 24 hours after they carried out the search and seizure.

This power seems similar to the power afforded to the police whereby they can search premises if they have reasonable grounds and obtain a warrant afterwards. Accordingly the search and seizure procedure in terms of the Income Tax Act will survive constitutional scrutiny.

5.4 CONCLUSION
The right to privacy is a constitutionally protected right, that may only be reasonably limited. The original section 74 was problematic as the Commissioner could authorise members of his staff to conduct a search of the taxpayer’s premises. The new section 74 has the effect that the Commissioner cannot simply interrogate people, search premises and confiscate documents as he pleases. Therefore the Commissioner’s subjective view does not count but rather the objective opinion of the magistrate. These amendments are currently aligned with the right to privacy.

56 Id.
57 Id.
58 Id.
59 As stipulated in s 36 of the Constitution.
60 Olivier L “The Bill of Rights and the Collection of Taxes” (March 1997) De Rebus 105 at 106.
61 Id.
After comparing the warrant for search and seizure in terms of the Income Tax Act with the warrant in terms of the CPA it is clear that these provisions are very similar.

It is thus submitted that a taxpayer would experience difficulty in convincing a court to have section 74D of the Income Tax Act declared unconstitutional on the basis that it violates the taxpayer’s right to privacy.\textsuperscript{63} It is, however, submitted that if SARS does not comply with the provisions for search and seizure, for example utilising section 74A and B, or obtaining an unspecified warrant, the warrant will be declared invalid.\textsuperscript{64}

In this and previous chapters a South African taxpayer’s rights to just administrative action, access to the courts, property and privacy were discussed and whether these rights would be able to protect a taxpayer against certain practices and procedures of SARS. In the following chapter the protection of taxpayers in other countries will be discussed.


\textsuperscript{64} Croome (2010) at 152.
6.1 INTRODUCTION

It is apparent from the previous chapters that SARS is awarded certain powers to enable it to collect taxes from the taxpayers. What can be done to ensure that these powers do not violate the taxpayers' rights? In order to answer this question, this chapter will briefly point to certain measures utilised in some countries to protect taxpayers.

South Africa is still a young democracy compared to its worldwide trading associates.\(^1\) The collection of taxes and problems associated with it is not unique to South Africa. Therefore it would be useful to consider the measures some other countries take to protect the taxpayers' rights as this may provide valuable lessons.\(^2\) The measures utilised in the OECD\(^3\) countries will be discussed.

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2 Id.
6.2 OECD COUNTRIES

6.2.1 Introduction
For purposes of this discussion a general survey regarding the OECD countries will be discussed, in brief, before focusing on the specific measures utilised in New Zealand, the United States of America and the United Kingdom.

6.2.2 OECD Countries in General
During 1990 a survey was published regarding the legal position relating to taxpayers’ rights and obligations in OECD countries. According to this survey Germans could refer tax problems to a parliamentary commission and Belgium's could utilise the services of a tax commission. Belgium and France were the only countries with a formal taxpayers' charter. These charters also enjoy remarkable legislative support.

The majority of the OECD countries had an ombudsman who dealt with the tax complaints. Eight of these countries’ ombudsmen were authorised to initiate investigations and react to grievances of taxpayers.

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3 Organisation for Economic Co-Operation and Development. The following countries form part of the OECD: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, South Korea, Luxembourg, Mexico, New Zealand, Norway, Poland, Portugal, Republic of Slovak, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States.

4 Taxpayer’s Rights and Obligations – A Survey of the Legal Situation in OECD Countries (1990) at 76.

5 Ibid at 77.


7 Taxpayer’s Rights and Obligations (1990) at 76.
The situation regarding a tax ombudsman in South African must be noted at this stage. The Katz Commission made, amongst others, the following recommendations regarding a South African tax ombudsman:

- The ombudsman must be an independent office;
- The ombudsman must be accessible to taxpayers and have unfettered access to SARS.

The Joint Standing Committee on Finance (JSCOF) evaluated these comments by the Katz Commission and found that a separate tax ombudsman was not viable at that stage. Instead a Service Monitoring Office was established in 2002 to handle administrative complaints. Even though the SMO functions separately from the SARS branch office, this office still reports directly to the Commissioner. It is submitted that the SMO does not effectively assist in the protection of a taxpayer’s constitutional rights. It is therefore understandable that the lobbying for a tax ombudsman continued.

The revised Tax Administration Bill fortunately includes a bid for a tax ombudsman. The tax ombudsman “will have more teeth than the service

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8 Third Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa at 138 par 12.3.7.
10 Hereinafter referred to as a SMO.
14 See s 14-21 of The Tax Administration Bill which creates the legal framework for a tax ombudsman. See also Author Unknown “Legislation: Tax Ombudsman’s Office to be Set up” (2 November 2010) Legal Brief Today, Temkin S “New Way to Resolve Taxpayer Grievances” (2
monitoring office to deal with taxpayers’ complaints.\textsuperscript{15} Croome warns that this may nevertheless take some time to set up.\textsuperscript{16} It is encouraging to see the legislature is taking positive steps in protecting the taxpayer’s constitutional entrenched rights.

While South African developed more measures to protect taxpayers, the countries in the OECD survey acted similarly.\textsuperscript{17} Measures implemented by New Zealand, the United States of America and the United Kingdom, who form part of the OECD countries, to protect taxpayers’ rights will be discussed below.

6.2.3 New Zealand
New Zealanders does not have a written constitution to rely on.\textsuperscript{18} There are, however, several avenues that can be approached when a taxpayer is confronted with tax problems.\textsuperscript{19}

Firstly, in terms of the Official Information Act of 1982, a taxpayer has the right to request official information.\textsuperscript{20} This request can, however, be denied, for example, when legal privilege is applicable.\textsuperscript{21}

\textsuperscript{15} Temkin S (2 November 2010) \textit{Business Day Report}.
\textsuperscript{16} Id.
\textsuperscript{17} See Sawyer 32 \textit{Vanderbilt Journal of Transnational Law} 1345 at 1356.
\textsuperscript{18} Id. See also Croome BJ \textit{Taxpayer’s Rights in South Africa} (2010) at 279.
\textsuperscript{19} See Croome (2010) at 278 for a detailed discussion of these platforms.
\textsuperscript{20} Harley G J “National Report for New Zealand” In Protection of Confidential at 460. See also Media Release 4 August 1999.
\textsuperscript{21} Id. This seems to be similar to the South African right to just administrative action and the right to information. See ch 2 for a discussion on the right to just administrative action.
Secondly, in 1986 the Statement of Principles was established.\textsuperscript{22} This statement provided for rights and obligation of the taxpayer. Sawyer indicated that this statement did not provide taxpayers with any rights and was merely principles to encourage voluntary tax compliance.\textsuperscript{23} This document was revised and a taxpayer’s charter was published in 1992.\textsuperscript{24} This represents the Inland Revenue’s commitment to comply with its obligations towards the taxpayers.\textsuperscript{25} The charter orchestrates the relationship between the Revenue Service and the taxpayer.\textsuperscript{26}

Mention must be made to the fact that South Africa also has a charter, which emerged in 1997.\textsuperscript{27} Even though the charter does not provide a right of recourse to an aggrieved taxpayer\textsuperscript{28} it is submitted that the charter provides a taxpayer with legal certainty and create trust in the revenue service. It is further submitted that the SARS Service Charter should be brought to the taxpayer’s attention as it cannot provide legal certainty if the taxpayers are unaware of its existence. In an effort to inform taxpayers of SARS practices the Commissioner has fortunately published the \textit{Income Tax Assessing Handbook}.\textsuperscript{29}

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\textsuperscript{23} Sawyer 32 \textit{Vandberlt Journal of Transnational Law} 1345 at 1345.
\textsuperscript{24} Croome (2002) \textit{Acta Juridica} 1 at 22.
\textsuperscript{25} \textit{Id}.
\textsuperscript{26} \textit{Id}.
\textsuperscript{28} Croome (1999) 13 \textit{Tax Planning} 80 at 82.
\textsuperscript{29} Croome PhD Thesis (2008) at 240.
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Thirdly, New Zealand created a Complaints Management Service to deal with complaints regarding poor and ineffective service of the Revenue Service.\textsuperscript{30} The Revenue Service keeps record of the complaints received to improve the Complaints Management Service.\textsuperscript{31}

The penultimate medium utilised by New Zealand is the distribution of an assortment of brochures. These brochures provide explanations on specific taxpayer rights.\textsuperscript{32} It is submitted that this is a valuable tool to keep taxpayers informed and educated.

Lastly, the Office of the Ombudsman\textsuperscript{33} is available to handle problems that could not be resolved through other mediums. If the Office of the Ombudsman is of the opinion that the taxpayer was treated unfairly, it can be reported to the Prime Minister.\textsuperscript{34} There is, however, no specified tax ombudsman.\textsuperscript{35}

Mention should be made of the search and seizure procedure in New Zealand. This procedure does not seem to provide protection to a taxpayer as no warrant is required. It must nevertheless be borne in mind that this procedure is usually utilised only in serious cases.\textsuperscript{36}

\textsuperscript{30} Croome (2010) at 280.


\textsuperscript{32} Sawyer 32 Vanderbilt Journal of Transnational Law 1345 at 1356.

\textsuperscript{33} The term “ombudsman” can be translated from Swedish as “grievance person”. See Author unknown “New Zealand History” available at http://www.nzhistory.net.nz/timeline/30/09 (accessed on 6 October 2010).

\textsuperscript{34} Walpole M “Taxpayer Rights and Recourses – Australia, New Zealand and China” (2001) \textit{ATAX} at 37. See also Croome (2010) at 281.

\textsuperscript{35} Croome (2010) at 281.

\textsuperscript{36} \textit{Taxpayers’ Rights and Obligations} (1990) at 16. See also Croome BJ & Olivier L \textit{Tax Administration} (2010) at 132.
6.2.4 United States of America

The need to protect taxpayer’s rights in America was identified by Keating in stating that:

While everyone supports the goal of improving service to citizens, I’m sure many, if not most, taxpayers certainly don’t feel like they are customers. Real customers have a choice about the products and services they buy. Yet taxes are, after all, involuntary payments, and there’s no choice about which IRS to use. That’s one reason why taxpayers’ rights are so important.\[37\]

American taxpayers acquired explicit rights by means of the Taxpayer’s Bill of Rights I Act.\[38\] This Act stipulated, amongst other, the following: the criteria for evaluating the performance of IRS employees, taxpayers should be informed of their rights before the commencement of an audit and rulings will be binding on the Revenue Service.\[39\]

In 1996 certain amendments followed and The Office of the Taxpayer Advocate was instituted.\[40\] The purpose of this office is to resolve complaints of the taxpayer against the Internal Revenue Service.\[41\] These complaints would comprise of administrative problems.\[42\]

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42 Id.
The practice of using a taxpayer assistance order was created in the United States of America. The Taxpayer’s ombudsman can issue these orders when the taxpayer has suffered unjust deprivation in the application of tax law. The taxpayer advocate on the other hand is allowed to issue taxpayer advocate directives. The difference between a taxpayer assistance order and a taxpayer advocate directive is that the assistance order affords a specific taxpayer with relief while the latter afford relief to a group of taxpayers.

Croome, it is submitted correctly, is of the opinion that the taxpayer assistance order could be a valuable measure in protecting a taxpayer’s rights. It is submitted that the taxpayer advocate directive could also provide additional support in South Africa.

In the South African matter of *Hindry v Nedcor Bank* specific reference was made to the appointment of a taxpayer’s agent in America. Section 6331 of the 1986 US Internal Revenue Code indicates that a tax may be levied through a garnishee order or other third party. There must, however, be a written notice to the taxpayer indicating that tax will be levied in this manner 30 days after this notice. It must be remembered that once this notice is served the garnishee is at risk. During the required 30 day period the taxpayer could make representations to the secretary in order to prevent the attachment of his salary.

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44 *Id.*
45 Taxpayer Advocate’s Annual Report to Congress.
46 *Id.*
47 Croome (2010) at 296.
49 S 6331(d) 1 and S 6331 (d) 2 of the US Internal Revenue Code.
50 *Hindry* at 180.
or money held by a third party. It therefore seems that the United States of America provides protection to the taxpayer in their tax legislation.

The USA also provides advanced tax rulings regarding tax effects in terms of legislation or transactions. The taxpayer needs to present adequate information regarding his personal information, the specific transaction and his business. The taxpayer may also request to have a conference pertaining to this ruling. He may rely on the tax ruling provided that he has proceeded with the transaction as intended.

It is apparent that the United States of America provides plenty of protection to its taxpayers. It is submitted that some of these protective measures could provide valuable assistance to aggrieved South African taxpayers.

6.2.5 United Kingdom
The United Kingdom created an independent parliamentary ombudsman as well as a tax ombudsman, the tax adjudicator. This adjudicator acts entirely independent from the parliamentary ombudsman and acts as an objective referee. The adjudicator will only be used as a last resort and will mainly look at complaints comprising of mistakes, excessive delays and impoliteness.

51 Id.
53 Id.
54 Id.
55 Id.
60 Id.
A charter for taxpayers has also seen the light in 1999.61 The levels of expected services and taxpayers’ rights are encapsulated in this charter.62 In the event that the taxpayer experiences discontent regarding his rights or the service level, he can direct a complaint against the Inland Revenue Service to the Member of Parliament.63 The Member of Parliament will then refer the complaint to either the ombudsman or the tax adjudicator.64

The United Kingdom also has specific guidelines in affording the taxpayers protection. For instance, a search warrant must be executed within 14 days.65

6.3 CONCLUSION
From the discussion above it is clear that a few solutions can be found from other countries.

Firstly, most of the countries have established a service charter. Although a service charter does not aim to afford the taxpayer with additional rights it is submitted that a charter provides the taxpayer with confidence in the tax system as well as certainty. Legal certainty can be further enhanced by providing binding tax ruling for taxpayers. A conference pertaining to this ruling would also further the relationship between the revenue service and the taxpayer.

61 Id. See par 6.2.3 where it was indicated that South Africa also has a charter.
62 Id.
63 Id.
64 Id.
Legislative amendments affording specific guidelines will also enhance the certainty in a country.

Further, the office of the ombudsman seems to be an acknowledged mechanism to assist taxpayers over the world. The ombudsman’s predominant purpose would be to handle particular matters brought to his attention by the taxpayers.66 The ombudsman also has the ability to suggest changes to the Revenue Services’ practice codes and refer problems to the Public Protector.67

Thirdly, the majority of the countries also established a complaints forum to deal with poor service.

Penultimately, it seems that the countries aim to keep the communication path between the revenue service and the taxpayer open. This is achieved by permitting a conference pertaining to advance rulings made68 and affording a taxpayer the opportunity to make representations before his money is attached.69

Lastly, it is also of great importance to educate the taxpayer. This can be achieved by an assortment of brochures concerning taxpayers’ rights and obligations.70

The subsequent chapter will conclude this dissertation by applying the solutions mentioned above, to the practice and procedures identified previously.71

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67 Id.
68 See par 6.4 in this regard.
69 Id.
70 See par 6.2 in this regard.
71 See ch 2,3,4 and 5 regarding the practices and procedures identified.
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