

**A PROBE INTO THE CONSTITUTIONALITY OF RELEVANT SECTIONS OF THE  
TAX ADMINISTRATION ACT**

**by**

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**A dissertation submitted in part fulfilment of the  
requirements for the degree**

**LLM TAX LAW**

**In the**

**FACULTY OF LAW**

**At the**

**University of Pretoria**

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**SEPTEMBER 2014**

## DECLARATION

I, Elizabeth Catharina van Dijk (u26228689), hereby declare that this dissertation is my own, unaided work. It is being submitted in partial fulfilment of the prerequisites for the degree of Masters in Tax Law at the University of Pretoria. It has not been submitted before for any degree or examination in any other University.

.....

Elizabeth Catharina van Dijk

Date: .....

## ACKNOWLEDGEMENTS

I wish to first and foremost thank God for blessing me with the opportunity and ability to partake and complete my Masters Degree in a field that I am passionate about.

To my husband, Rienes van Dijk, for his continuous encouragement and support while I undertook further studies whilst working full-time. Without you I would have never completed this programme, nor would I have been able to produce a thesis that I am proud to call my own. Your love and support is what kept me going and motivated me to finalise my undertakings.

To my parents, Willem and Ina du Plessis, my parents in-law, Michael and Narien van Dijk, and my sister and brother in-law Nadia du Plessis and Drikus van Dijk, my sincere thanks for always supporting and encouraging me in everything that I do. I am thankful for each of your assistance and motivation during my studies, it was a bigger contribution than what you could have imagined.

I also wish to give special thanks to my beloved grandmother, Dora Booyse, she has always been and will always be my inspiration. Without her active role in my life I would not have been the person I am today, nor would I have achieved all that I have thus far.

Without the assistance of my mother, Ina du Plessis, for typing and formatting my thesis, I would have not been able to provide a document that fulfils the desired standard and style.

My appreciation also to my colleagues in the FirstRand Employees' Tax and Benefits Department, for their unconditional support and assistance whilst preparing for and completing this thesis, it is truly appreciated.

The assistance of Nicholas Challis and Niel Erasmus for professional proofreading and editing of my thesis to ensure the correct use of language and format, thank you for taking the time and effort.

To my supervisor, Adv Cornelius Louw, my sincere thanks for your assistance and guidance during the finalisation of this thesis.

Yours thankfully

Carien van Dijk

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## ABSTRACT

Several provisions of the Tax Administration Act infringes on certain constitutional rights of the taxpayers, especially in circumstances where SARS recovers tax debts, but the provisions also places many stringent and administratively burdensome obligations on the appointed third parties.

Although many tax practitioners and academics in the field has taken to the pen on this particular subject, my reason for undertaking this research is in light of the fact that not many research has been conducted in terms of the current provisions of the Tax Administration Act, and that not many research was done taking into account the particular obligations and liabilities of appointed third parties such as banks.

My research is interpretive in nature, as I have interpreted the new provisions of the Tax Administration Act, and thereafter compare it to the old provisions as contained in the Income Tax Act in order to determine whether the limitations on the rights of the taxpayer will also survive the constitutional limitation test. My research is also of a comparative and exploratory nature. I conducted investigations of the laws and applications in other countries, in order to determine if we are in-line with international standards and practices.

I conclude that certain provisions of the newly implemented Tax Administration Act reasonably and justifiably limits the taxpayer's constitutional rights, however other provisions allows for a challenge to the constitutional validity. I also conclude that the actions of SARS officials should be evaluated and challenged under judicial review.



## CHAPTER 1: EXORDIUM

*"In this world nothing is certain but death and taxes"* – Benjamin Franklin, 1789

### 1.1 INTRODUCTION

According to Black's Law Dictionary,<sup>1</sup> a tax is a "pecuniary burden laid upon individuals or property owners to support the government [...] a payment exacted by legislative authority." It is not a voluntary payment or donation, but an enforced contribution, exacted pursuant to legislative authority..."<sup>2</sup>

One of the first known levying of taxes was described in the Bible,<sup>3</sup> where Joseph told the people of Egypt how to divide their crop:

[B]ut when the crop comes in, give a fifth of it to Pharaoh. The other four-fifths you may keep as seed for the fields and as food for yourselves and your households and your children.<sup>4</sup>

In comparison with ancient Mesopotamia, the payment of tax was recorded as being called a "burden."<sup>5</sup> Most owned belongings were subject to tax, but the most burdensome was the labour tax obligation.<sup>6</sup> The head of the household owed the government months of labour services, which could entail anything from harvesting in the fields – to serving in the military.<sup>7</sup> Should this obligation be abandoned or not fulfilled, he would forfeit his family's land and livelihood.<sup>8</sup>

It is evident that for many centuries the levying of taxes formed an important part of a government's macroeconomic management.<sup>9</sup> Today, most taxes payable are regulated by legislation. Many developing countries' core purpose of taxation includes "revenue

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<sup>1</sup> Brian A (1999) *Black's Law Dictionary*. 9<sup>th</sup> ed. St Paul, MN: Thomson West, p 1307.

<sup>2</sup> *Ibid.*

<sup>3</sup> The Bible (1983) *Genesis 47:24*. Nanjing: Amity Printing Press.

<sup>4</sup> Wikipedia (2014) Tax. Available at <http://en.wikipedia.org/wiki/Tax> (accessed 23 June 2014).

<sup>5</sup> Sherlock T (2002) Taxes in the Ancient World. Available at <http://www.upenn.edu/almanac/v48/n28/AncientTaxes.html> (accessed 23 June 2014).

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> Granger H (2013) *Economics Topic Guide: Taxation and Revenue*. UK: EPS Peaks, p 1.

mobilisation, [and] providing resources for National Budgets.”<sup>10</sup> In an article by Magashula (2010),<sup>11</sup> he stated that tax is of imperative importance for a country, mainly for purposes of spurring growth and ensuring development.<sup>12</sup> He further iterates the importance of the administration of taxes, as it plays a vital role in state building and good governance, but also for promoting economic development.<sup>13</sup>

In contrast to the above, many academics oppose the imposition of tax as it is compulsory and enforced by the legal system, thus being viewed as a type of extortion.<sup>14</sup> This also leads to a view of an unequal relationship between a taxpayer and the revenue authority.<sup>15</sup>

While many academics and philosophers question the morality of taxation, it can be said that most such arguments revolve around the method in which tax is collected together with the government’s spending thereof, not on the taxation itself.<sup>16</sup>

## 1.2 OBJECTIVES OF THESIS

South Africa recognised the importance of tax administration, and on 1 October 2012 the South African Revenue Services released the Tax Administration Act,<sup>17</sup> for the purpose of consolidating all the administrative provisions of the various tax Acts, including common procedures and the remedies and rights of taxpayers, into a single body of law.<sup>18</sup> Prior to the Tax Administration Act’s promulgation in South Africa, the Minister of Finance assured the nation that the provisions of this Act will meet the requirements of the Constitution of the Republic of South Africa.<sup>19</sup> The Tax

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<sup>10</sup> See *id* at p 4.

<sup>11</sup> Magashula O (2010) African Tax Administration: A new era. Available at [http://oecdobserver.org/news/archivestory.php/aid/3133/African\\_tax\\_administration\\_A\\_new\\_era.html](http://oecdobserver.org/news/archivestory.php/aid/3133/African_tax_administration_A_new_era.html) (accessed 4 September 2013).

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> Croome BJ (2010) *Taxpayers’ Rights in South Africa*. Claremont: Juta, p 3.

<sup>15</sup> *Ibid.*

<sup>16</sup> Jinyan L (1991) Taxation in the People’s Republic of China. Available at [http://en.wikipedia.org/wiki/Taxation\\_in\\_China](http://en.wikipedia.org/wiki/Taxation_in_China) (accessed 23 June 2014).

<sup>17</sup> Act 28 of 2011. Hereinafter referred to as the Tax Administration Act. See also the South African Revenue Services hereinafter referred to as SARS.

<sup>18</sup> Erasmus D (2011) Tax Administration Bill Available at [https://sait.site-ym.com/store/view\\_product.asp?id=822054](https://sait.site-ym.com/store/view_product.asp?id=822054) (accessed 2 September 2013).

<sup>19</sup> Act 108 of 1996. Hereinafter referred to as the Constitution.

Administration Act awarded numerous powers and duties alike to the officials of SARS and similarly also to the taxpayers and certain third parties.

However, several provisions of the Tax Administration Act infringe on certain constitutional rights of the taxpayers, especially when SARS recovers tax debts, such as the right to property and privacy.<sup>20</sup> The provisions also place many stringent and administratively burdensome obligations on the appointed third parties. The obligations placed on the appointed third parties result in dual liabilities for such third parties against both SARS and the taxpayer. The third parties can, for example, be held liable by their customers by means of a civil action when such third party carries out the action as prescribed by SARS, with little remedy in the Tax Administration Act available for such a third party.

In this dissertation, the researcher will endeavour to uncover the possibility of a successful challenge on the constitutional validity of certain provisions of the Tax Administration Act. The provisions, on which this researcher will focus on mostly, will be the provisions dealing with the recovering of tax from both taxpayers and third parties. Although many tax practitioners and academics in the field have taken to the pen on this particular subject, the reason for undertaking this research is in light of the fact that not much research has been conducted in terms of the current provisions of the Tax Administration Act, and that not much research has been done taking the particular obligations and liabilities of appointed third parties into account.

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<sup>20</sup> Sec 25 and 14 of the Constitution.

## CHAPTER 2: EXPOSITION OF STATUTES

### 2.1 THE CONSTITUTION

#### 2.1.1 Overview

On 10 December 1996, Nelson Mandela signed the Constitution of South Africa into law.<sup>21</sup> The Constitution was drafted in terms of Chapter 5 of the Interim Constitution of the Republic of South Africa.<sup>22</sup>

Section 167 of the Constitution created the Constitutional Court, which was given the power to determine whether any piece of legislation is unconstitutional or not.<sup>23</sup> In the case of *FNB of SA Ltd trading as Wesbank v CSARS*,<sup>24</sup> the court held that SARS was subject to the provisions of the Constitution, where the judge stated that:

[N]o 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 to its normative standards.

The Constitution also created the office of the Public Protector in terms of section 182 of the Constitution, which has the obligation to investigate any conduct of a government sphere, where alleged impropriety or prejudice is suspected.<sup>25</sup>

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<sup>21</sup>Constitution Court (1993) The constitution: The certification process. Available at <http://www.constitutionalcourt.org.za/site/theconstitution/thecertificationprocess.htm> (accessed 24 June 2014).

<sup>22</sup> Act 200 of 1993. Hereinafter referred to as the Interim Constitution The Interim Constitution was first adapted by the Constitutional Assembly on 8 May 1996, thereafter amended to comply with the Constitutional Principles as per its Fourth Schedule and signed into law on 10 December 1996. See *Ex parte Chairperson of the Constitutional Assembly in re: Certification of the Constitution of the Republic of SA 1996* (4) SA 744 (CC).

<sup>23</sup> Friedland EN (2003) Constitutionality and current approach by SARS with reference to collection of taxes. Available at <https://www.saica.co.za/integritax/2003/1093-Constitutionality-and-current-approach-by-SARS-with-reference-to-collection-of-taxes.htm> (accessed 24 June 2013).

<sup>24</sup> 2002 (7) JTLR 250 p 252.

<sup>25</sup> Public Protector Act, 23 of 1994.

Entrenched and part of the core value, as per section 1 of the Constitution, is the important Rule of Law. The purpose of the Rule of Law is to ensure government institutions obey the law and do not exercise power unless permitted under law.<sup>26</sup>

The Rule of Law concept has not yet been defined, but many Constitutional Court cases made use of this concept, such as the case of *New National Party v Government of the Republic of South Africa*.<sup>27</sup> This case involved a matter where voters could only register for the national election if they had a barcoded identity document issued after 1986, or a temporary identity certificate.<sup>28</sup> The question arose whether the latter would violate people's right to vote? The court held that it would not infringe on the fundamental rights, as the process is required in order to identify voters to ensure a free and fair election.<sup>29</sup> The actions of the government institution can be limiting should it be reasonable and have a link with its legitimate governmental purpose.<sup>30</sup>

In the case of *Pharmaceutical Manufacturers Associations of SA: In re ex parte President of the RSA*,<sup>31</sup> the court confirmed that certain Constitutional constraints are placed on a government's powers:

[I]t is a requirement of the Rule of Law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rational related to the purpose for which the power was given; otherwise, they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny, the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.<sup>32</sup>

### 2.1.2 Limitation clause

In terms of section 38 of the Constitution, any person who feels that their fundamental rights have been breached, can approach a court for relief or lodge a formal complaint with the Public Protector. However, section 36 of the Constitution does allow for the

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<sup>26</sup> De Waal J *et al* (2001) *The Bill of Rights Handbook*. 4<sup>th</sup> ed. Landsdowne: Juta, p 10.

<sup>27</sup> 1999 (3) SA 191 (CC). See also De Waal (2001) p 11.

<sup>28</sup> *Ibid.*

<sup>29</sup> See *Id* at p 12.

<sup>30</sup> *Ibid.* See also *New National Party v Government of Republic of South Africa* 1999 (3) SA 191 (CC).

<sup>31</sup> 2000 (2) SA 674 (CC) par 85. See also *op cit* p 12.

<sup>32</sup> *Ibid.*

limitation of a person's fundamental rights, should the limitation be "reasonable and justifiable in an open and democratic society." Section 36 of the Constitution states that:

- 1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:
  - a) the nature of the right;
  - b) the importance of the purpose of the limitation;
  - c) the nature and extent of the limitation;
  - d) the relation between the limitation and its purpose; and
  - e) less restrictive means to achieve the purpose.
  
- 2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

The rights in the Constitution are, therefore, not absolute, and can be limited by SARS or any other organ of state.<sup>33</sup> Should the limitation, *inter alia*, not be reasonable and justifiable, such provision or practice can be declared unconstitutional by the Constitutional Court.

#### **2.1.2.1 Law of general application requirement**

Many would argue that the general practice and legislation of SARS infringes a person's fundamental rights, as the imposition of tax constitutes "a contribution to State revenue compulsorily levied on an individual's property or businesses."<sup>34</sup> The practice and legislation of SARS is a statute of general application, which will also satisfy the limitation requirements of section 36 of the Constitution. Any Interpretation Note or any other SARS publication is not interpreted as being statutory in nature and can, therefore, never be part of the context: "law of general application."<sup>35</sup>

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<sup>33</sup> Croome (2010) p 9.

<sup>34</sup> See also *id* at p 1.

<sup>35</sup> *CIR v SA Mutual Unit Trust Management Co Ltd* 1990 (4) SA 592 (A). See also Klue S *et al* (2009) *Silke on Tax Administration*. South Africa: Lexis Nexis, p 3-11.

However, to determine whether a statute is of general application, four features should be present as described by Woolman (2007),<sup>36</sup> namely; the parity of the treatment, the presence of non-arbitrariness, the accessibility of their law and also the clarity thereof.<sup>37</sup> The court held that these features are to be balanced and weighted against one another in order to determine if a practice is law of general application.<sup>38</sup>

After the court has determined it is a “law of general application”, it will proceed with applying the limitation test, as per section 36 of the Constitution, to determine the reasonableness and justification of the limitation on a taxpayer’s fundamental rights,<sup>39</sup> and to weigh up the impact of the limitation on SARS’ power and duty to collect tax.<sup>40</sup>

### **2.1.2.2 Reasonable and justifiable limitation requirement**

Within this part of the test, it must be determined whether the limitation is acceptable in an open and democratic society, based on human dignity, equality and freedom.<sup>41</sup> Section 36 of the Constitution provides a list of relevant factors to enable a court to indicate if a limitation is reasonable and justifiable.<sup>42</sup>

Each factor must be examined and weighed up in court in order to arrive at a holistic view of the limitation itself. De Waal (2001) stated that to satisfy the limitation test, it must be shown that the legislation imposing the limitation has a “sufficient proportionality” by means of weighing up the harm that the infringement has done, against the actual benefit that the law purposely wants to achieve.<sup>43</sup> The purpose that the limitation wants to achieve must be of such a compelling importance in the view of all reasonable citizens.<sup>44</sup>

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<sup>36</sup>Keulder C (2011) Does the Constitution protect taxpayers against the mighty SARS? – An inquiry into the Constitutionality of selected tax practices and procedures. Unpublished LLM thesis, University of Pretoria p 7.

<sup>37</sup> *Ibid.*

<sup>38</sup> See also *id* at p 8.

<sup>39</sup> *Ibid.*

<sup>40</sup> Croome (2010) p 9.

<sup>41</sup> Section 36(1) of the Constitution. See also De Waal (2001) p 154.

<sup>42</sup> These factors were also identifiable in the case of *S v Makwanyane* 1995 (3) SA 391 (CC). See also De Waal (2001) p 155.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

It must be noted that a limitation will not be regarded as reasonable and/or justifiable if any other means could have been applied to achieve the same ends that would have not restricted the rights of the person at all, or to a lesser extent.<sup>45</sup>

## 2.2 THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT

The Constitution provides for the right to administrative justice in section 33 of the Constitution, which reads as follows:

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

Section 33(3) of the Constitution specifically requires the enactment of national legislation and, consequently, the Promotion of Administrative Justice Act was promulgated.<sup>46</sup> The rights enshrined in PAJA can only be utilised should the organ of state have exercised its public powers within the requirements of an “administrative action”. PAJA defined the concept of “administrative action” as follows:<sup>47</sup>

“Administrative Action” means any decision taken, or any failure to take a decision, by:

- (a) an organ of state, when

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<sup>45</sup> See also *id* at p 162.

<sup>46</sup> Act 3 of 2000. Hereinafter referred to as PAJA.

<sup>47</sup> Sec 1 of PAJA.



- (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 affect the rights of any person and which has a direct, external legal effect .

In light of the above definition, it is apparent that most of SARS' conducts could be regarded as being an "administrative action", one which taxpayers will have the right to challenge and take on a judicial review. However, not all of SARS' conducts will be regarded as an administrative action, such as pure investigations conducted by SARS, as it will not always "adversely affect" the rights of any person.<sup>48</sup>

In the case of *Nedbank Ltd v The Master of the High Court (Witwatersrand)*,<sup>49</sup> the applicant contended that the decisions made by the respondent were procedurally unfair, arbitrary and unreasonable.<sup>50</sup> The court had to determine whether the application of section 412 to 416 of the Companies Act constituted an "administrative action" as defined by PAJA. The court held that the application did not fall within the definition of "administrative action" and, therefore, PAJA does not apply, because the application only related to investigative measures to facilitate the winding-up of a company and did not have an adverse effect on the rights of any person.<sup>51</sup>

### **2.2.1 Application of PAJA**

The SARS is an organ of State, but to determine whether their actions will constitute an "administrative action" will have to be established on a case-by-case basis. The Constitutional Court held in the case of *Chirwa v Transnet*,<sup>52</sup> that the following seven requirements must be met for an "administrative action" to fall within the scope of PAJA:

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<sup>48</sup> Klue (2009) p 3-69.

<sup>49</sup> 5619/08 [2008] ZAGPHC 216. See also *op cit ibid*.

<sup>50</sup> *Ibid*.

<sup>51</sup> *Ibid*.

<sup>52</sup> 2008 (4) SA 367 (CC) at [181]. See also *id* at p 3-68.

- (i) it must be a decision;
- (ii) by an organ of State;
- (iii) exercising a public power of performing a public function;
- (iv) in terms of any legislation;
- (v) that adversely affects someone's rights;
- (vi) which has a direct, external, legal effect; and
- (vii) that does not fall under any of the exclusions listed in section 1 of PAJA.

To determine whether the action of the organ of state will be regarded as being a “decision” for purposes of establishing whether it constitutes an “administrative action”, one will need to refer to the definition of “decision” as per section 1 of PAJA, which states the following:

[A]ny decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to:

- (a) making, suspending, revoking or refusing to make an order, award or determination;
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
- (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- (d) imposing a condition or restriction;
- (e) making a declaration, demand or requirement;
- (f) retaining, or refusing to deliver up, an article; or

- (g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision, must be construed accordingly.<sup>53</sup>

Section 3(1) of PAJA further provides that an “administrative action” that affects the rights of a person adversely, must be procedurally fair, which will depend on the circumstances of each case. For the decision to have an adverse effect on a person, the decision must already be a final decision.<sup>54</sup> Should the decision fall within the parameters of an “administrative action” definition, then the person affected will have the right to request reasons for such action.<sup>55</sup>

Before an “administrative action” dispute can be submitted for judicial review,<sup>56</sup> the courts have the discretion to oblige both parties to exhaust all available internal administrative remedies first.<sup>57</sup> Each particular piece of legislation provides internal remedies for the affected party, such as the tax Acts that allow a taxpayer to lodge disputes or seek further remedy from the Ombudsman.<sup>58</sup> Disputes that eventually reach the court or tribunal for judicial review may be granted any order that is regarded just and equitable by them.<sup>59</sup>

### **2.3 OTHER EXTERNAL STATUTORY REMEDIES**

When a taxpayer seeks certain information from SARS, he/she can invoke the provisions of Promotion of Access to Information Act.<sup>60</sup>

The taxpayer will also have additional remedies in terms of the newly promulgated Protection of Personal Information Act.<sup>61</sup> The PoPI aims to protect personal information being processed by public and private bodies.<sup>62</sup> “Personal information” is defined as follows:

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<sup>53</sup> Croome (2010) p 209.

<sup>54</sup> Klue (2009) p 3.72.

<sup>55</sup> Sec 5 of PAJA.

<sup>56</sup> Sec 6 of PAJA.

<sup>57</sup> *Ude v Minister of Home Affairs* 2008 (6) SA 483 par 17. See also Klue (2009) p 3-89.

<sup>58</sup> Sec 18 of the Tax Administration Act.

<sup>59</sup> Sec 8 of PAJA.

<sup>60</sup> Act 2 of 2000. Hereinafter referred to as PAIA.

<sup>61</sup> Act 4 of 2013. Hereinafter referred to as PoPI.

<sup>62</sup> Preamble of PoPI.

“Personal Information” means information relating to an identifiable, living, natural person and where it is applicable, an identifiable, existing juristic person, including, but not limited to:

- (a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person;
- (b) information relating to the education or the medical, financial, criminal or employment history of the person;
- (c) any identifying number, symbol, e-mail address, physical address, telephone number, location information, online identifier or other particular assignment to the person;
- (d) the biometric information of the person;
- (e) the personal opinions, views or preference of the person;
- (f) correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;
- (g) the views or opinions of another individual about the person; and
- (h) the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person.<sup>63</sup>

Section 6 of PoPI expressly excludes from the application of the processing of personal information, any information relating to the investigation and prosecution of criminal matters. It is important to note that this exclusion is only granted to a public body such as SARS, and dependent on whether any adequate safeguards have been established in the relevant legislation permitting the processing of such information.<sup>64</sup> It can be

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<sup>63</sup> Sec 1 of POPI.

<sup>64</sup> Heyink M (2011) *Protection of Personal Information Guidelines for South African Law Firms*. The Law Society of South Africa: Thinkstock, p 5 .

argued that the current tax Acts does not have fully established safeguards as required by PoPI.<sup>65</sup>

PoPI also requires that the information is only to be processed if it is under an obligation imposed by law.<sup>66</sup> The question whether a specific information request will be allowed in terms of PoPI's conditions can only be determined on a case-by-case basis. In the event that compliance is not upheld within the provisions of PoPI, possible penalties or a fine and/or imprisonment of up to a maximum of 12 months can be imposed.<sup>67</sup>

## 2.4 UNRAVELLING THE SOUTH AFRICAN TAX LEGISLATION

### 2.4.1 The Income Tax Act

The Income Tax Act,<sup>68</sup> imposes taxes such as income tax (which the Income tax Act currently refers to as “normal tax”), withholding taxes and turnover tax in South Africa.<sup>69</sup> The Income Tax Act, therefore, consists of direct taxation, which is defined as follows:

“A direct tax is one which is demanded from the very person who it is intended or desired should pay it.”<sup>70</sup>

Historically, the Income Tax Act also regulated the administration of taxes and penalties, but this has since moved to the Tax Administration Act.

### 2.4.2 The Tax Administration Act

The administration provisions of tax were repealed from the other tax Acts and are now governed by the Tax Administration Act. The final draft of the Tax Administration Act was promulgated on 4 July 2012 and came into operation of 1 October 2012.<sup>71</sup>

#### 2.4.2.1 Overview

The external SARS guide explains the purpose of the Tax Administration Act, as also incorporated in section 2 of the Tax Administration Act, as follows:

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<sup>65</sup> Croome BJ & Treurnicht M (2014) Opinion re: Confidentiality of third party appointments and information requested in terms of the Tax Administration Act no. 28 of 2011. Unpublished opinion obtained by BASA members, p 4.

<sup>66</sup> Sec 11 of POPI.

<sup>67</sup> Sec 107 of POPI.

<sup>68</sup> Act 58 of 1962. Hereinafter referred to as the Income Tax Act.

<sup>69</sup> Stiglingh M *et al* (2013) *SILKE: South African Income Tax*. South Africa: Lexis Nexis, p 1.

<sup>70</sup> *Ibid.*

<sup>71</sup> SARS: Legal and Policy Division (2013) *SARS Short Guide to the Tax Administration Act, 2011*, p 4.

The Tax Administration Act only deals with tax administration and seeks to:

- Incorporate into one piece of legislation administrative provisions that are generic to all tax Acts and currently duplicated in the different tax Acts
- Remove redundant administrative provisions
- Harmonise the provisions as far as possible.<sup>72</sup>

Under the control of the Commissioner, SARS is held responsible for the administration of the Tax Administration Act.<sup>73</sup> Whilst exercising its powers in order to achieve the mentioned purpose, the South African Revenue Service Act,<sup>74</sup> provides SARS objectives which are summarised as the “[e]fficient and effective collection of revenue.”<sup>75</sup>

SARS must perform these objectives in terms of the values and principles of the Constitution, which include, *inter alia*, the principle of cost-effective and efficient use of resources.<sup>76</sup>

The Tax Administration Act binds SARS and every person, whether acting in their personal capacity or on behalf of another person, that is and/or will be liable to comply in terms of any other tax Act.<sup>77</sup> In the event that any provision of the Tax Administration Act is inconsistent with another tax Act, then the provisions of the other act will prevail.<sup>78</sup>

#### **2.4.2.2 SARS’ powers in terms of the Tax Administration Act**

With the establishment of the SARS Act, SARS was established as an organ of state, where it was previously only a department.<sup>79</sup> As a result, SARS is subjected to the provisions of numerous acts other than the tax Act alone.<sup>80</sup>

With reference to SARS’ objectives, the Tax Administration Act empowers SARS to properly perform its functions, by means of providing the Commissioner with extensive

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<sup>72</sup> *Ibid.*

<sup>73</sup> Sec 3(1) of the Tax Administration Act.

<sup>74</sup> Act 34 of 1997. Hereinafter referred to as the SARS Act.

<sup>75</sup> SARS: Legal and Policy Division (2013) p 4.

<sup>76</sup> Sec 195(1)(b) of the Constitution. See also sec 4(2) of the SARS Act.

<sup>77</sup> Klue (2009) p 1-3.

<sup>78</sup> Sec 4 of the Tax Administration Act.

<sup>79</sup> Sec 2 of the SARS Act. Also see Klue (2009) p 2-1.

<sup>80</sup> Constitution; PAJA; PAIA; Public Services Act, 103 of 1994; Labour Relations Act, 6 of 1995 and POPI. See also *Ibid.*

statutory powers.<sup>81</sup> Only the Commissioner must exercise these powers unless a SARS official has been rightfully authorised by the Commissioner to act on his/her behalf.<sup>82</sup> Senior SARS officials can perform designated functions without specific written authority from the Commissioner.<sup>83</sup>

It is important to note that all powers and duties of SARS may be exercised for the purpose of the administration of the Tax Administration Act, which will be dealt with in more detail further.<sup>84</sup> It is questionable why the specific term “may” is used within this provision, which creates the assumption that SARS still possesses discretion on how the powers and duties are to be performed. The term: “may” is defined as merely “expressing a possibility”,<sup>85</sup> as opposed to expressing an obligation.

The administration of tax Acts provision already provides a broad spectrum under which SARS can perform its powers and duties.<sup>86</sup> Should the discretion in section 6(1) provide a wider scope, SARS will be able to perform its functions outside the set parameters, or even on the administration of other Acts.

#### **2.4.2.3        *Relevance of the Constitution to the Tax Administration Act***

SARS is first and foremost bound by its constitutional obligations, as mentioned in section 41(1), 195(1) and 237 of the Constitution which is summarised by Erasmus (2013) as follows:

These stipulate that only power conferred by the Constitution should be assumed and public administration must be governed by the democratic values and principles enshrined in the Constitution, including a high standard of professional ethics, impartial, fair and unbiased conduct, efficient, economic and effective use of resources, accountability and transparency, providing the public with timely, accessible and accurate information. In terms of section 4(2) of the SARS Act, SARS is specifically enjoined to perform its functions in the most cost-effective manner and in accordance with the values and principles mentioned in section

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<sup>81</sup> *Ibid.*

<sup>82</sup> Sec 6 of the Tax Administration Act.

<sup>83</sup> Sec 6(3) of the Tax Administration Act.

<sup>84</sup> Sec 6(1) of the Tax Administration Act.

<sup>85</sup> Oxford Dictionaries: Language Matter. Available at <http://www.oxforddictionaries.com/definition/english/may> (accessed 13 July 2014).

<sup>86</sup> Sec 3(2) of the Tax Administration Act.

195 of the Constitution. Failure to adhere to these obligations will entitle taxpayers to approach the courts to declare the conduct of SARS invalid.<sup>87</sup>

The Constitution is the supreme law of South Africa, any law of conduct inconsistent with it can be declared invalid.<sup>88</sup> This is also relevant to all tax legislation as confirmed in the *FNB Constitutional Court* matter.<sup>89</sup>

It is evident from the above mentioned that any provision of the Tax Administration Act and/or any action by SARS that is inconsistent with the Constitution may be declared invalid by the Constitutional Court, whereafter it can also make an order that is just and equitable.<sup>90</sup>

Consequently, when SARS performs its powers and duties, it must be wary of violating the taxpayers' fundamental rights,<sup>91</sup> as all taxpayers are protected by the Bill of Rights, and all organs of states are obliged to adhere to it.<sup>92</sup> However, such rights are not absolute and can be limited in circumstances where the infringement is fair and reasonable, as previously discussed.<sup>93</sup>

The practical implications of the Constitution upon certain provisions of the Tax Administration Act will now be discussed and examined in more detail.

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<sup>87</sup> Erasmus DN (2013) *The Tax Administration Act, Taxpayers' rights and SARS Audits*, 31 January 2013. Available at <http://www.thesait.org.za/news/116517/The-Tax-Administration-Act-Taxpayers-rights-and-SARS-Audits.html> (accessed 14 July 2014).

<sup>88</sup> Sec 2 of the Constitution. See also Klue (2009) p 3-6.

<sup>89</sup> *Ibid.*

<sup>90</sup> Sec 172(1) of the Constitution.

<sup>91</sup> Chapter 2 of the Constitution.

<sup>92</sup> *Manang and Associates (Pty) Ltd v City Manager, City of Cape Town* 2009 (1) SA 645 (EqC). See also *op cit id* p 3-9.

<sup>93</sup> Sec 36 of the Constitution. See also Croome (2010) p 15.



## CHAPTER 3: THIRD PARTY RETURNS

### 3.1 OVERVIEW

The first obligation placed on third parties is the compulsion to submit returns to SARS in a prescribed form and manner.<sup>94</sup> The contents of the return differ between each and every return and is dependent on the information held by the third party.

Third parties are currently submitting the following returns (also known as “certificates”),<sup>95</sup> that includes but are not limited to the following information:

- IT 3(b): Interest from investments, rental income, royalties, dividends and any other income paid or accrued to account holders
- IT 3(c): Proceeds from sale of unit trust and/or other financial instruments
- IT 3(e): Income received or accrued from the sale or shipment of any livestock, produce and also bonuses and interest paid to members of companies.

The compiling and submission of data was and still is a very difficult and expensive procedure for third parties. The rules for the IT3 file layouts and required fields are an astonishing 196 pages.<sup>96</sup> One of the institutions mostly affected by this obligation is data rich third parties such as banks. The banks are required to compile data relating to almost every transaction of an account holder, together with the account holder’s demographic data, which is an enormous task to undertake.

### 3.2 CONSTITUTIONAL ASPECT OF THIRD PARTY RETURNS

It is estimated that the four biggest banks in South Africa have an average of seven million clients each,<sup>97</sup> and an IT3 return approximately costs an average of R6 per

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<sup>94</sup> Sec 26 of Tax Administration Act.

<sup>95</sup>SARS (2014) IT3 Data Submissions. Available at <http://www.sars.gov.za/ClientSegments/Businesses/Mod3rdParty/Pages/IT3-Data-Submission.aspx> (accessed 16 July 2014).

<sup>96</sup> SARS (2013) Business Requirements Specification: IT3s Data Submission, version 1.0.0 20 September 2013. Available at <http://www.sars.gov.za/AllDocs/Documents/3rdPartyData/Business%20Requirement%20Specification%20IT3s%20Data%20Submission.pdf> (accessed 16 July 2014).

<sup>97</sup> Clark J (2012) How FNB is coping with its 1.7 million client influx 18 June 2012. Available at <http://www.moneyweb.co.za/moneyweb-financial/how-fnb-is-coping-with-its-17m-client-influx> (accessed 17 July 2014).

return, due to administrative fees and system altercations.<sup>98</sup> Therefore, if a bank has to submit an IT3 return on each accountholder, it will amount to a staggering R42 million cost per filing season.<sup>99</sup>

The first question that comes to mind, in light of the above, is whether it is reasonable and procedurally fair for SARS to obligate third parties to submit such data, given the costs involved and the administrative burden placed on such third parties, viewed against the ongoing likelihood that SARS does not optimally utilise the information received.<sup>100</sup>

Before the rights enshrined in PAJA can be utilised, it has to be determined whether third party returns would constitute an “administrative action” as defined. Demanding a third party to submit a return within a prescribed manner and format would constitute a decision taken by an organ of state in terms of a legislative provision. However, to determine whether the request for third party returns will have an adverse effect on the third party’s right to administrative action, in terms of section 33 of the Constitution, it has to be determined whether the action was “lawful, reasonable and procedurally fair.”<sup>101</sup>

Section 3 of PAJA expressly requires an administrator to give adequate notice of the administrative action, together with a reasonable opportunity to make its representations in order to have a fair administrative procedure.<sup>102</sup> It further requires criteria of “reasonableness and rationality” when an administrator exercises its powers.<sup>103</sup>

The court held in the case of *Thebe Ya Bophelo Healthcare v NBS Road Freight Industry*,<sup>104</sup> that it is very difficult for an applicant to succeed for a judicial review if the applicant had to prove that the administrative act “was so unreasonable that no reasonable person should have to exercise the power or perform the function.”<sup>105</sup>

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<sup>98</sup> BASA Interview (2014) Personal interview with a member of Banking Associations South Africa (hereinafter referred to as BASA) held on January 2014.

<sup>99</sup> Seligsen MC (2012) Opinion re: SARS Third Party IT3 Data Submission Requirements. Unpublished opinion obtained by a member of BASA p 11.

<sup>100</sup> See also *id* at p 31.

<sup>101</sup> Section 33(1) of the Constitution.

<sup>102</sup> Klue (2009) p 3-73.

<sup>103</sup> See also *id* at p 3-80. Also see Section 33 of the Constitution.

<sup>104</sup> 2009 (3) SA 187 (W) at 199C–201E.

<sup>105</sup> See also *op sit id* p 3-81.

The concept of reasonableness was further recognised in the Constitutional Court in the case of *Carephone (Pty) Ltd v Marcus*,<sup>106</sup> where the court had to evaluate the reasonableness of a decision made. The Court redirected their test, instead of determining if it was reasonable, they questioned whether it was justifiable, and concluded that if a decision is supported by logic and has persuasive reasons, then it will have been a reasonable decision by the administrator. The Court held that the following three factors are important to consider if the decision is/was justifiable:<sup>107</sup>

- The decision-maker has considered all the serious objections to the decision taken and has answers which plausibly meet them
- The decision-maker has considered all the serious alternatives to the decision taken and has discarded them for plausible reasons
- There is a rational connection between the information (evidence and argument) before the decision-maker and the decision taken.

In light of the above, it would be difficult to prove that section 26 of the Tax Administration Act was so unreasonable that no reasonable person would have taken such action. SARS stated that it required the information submitted in the IT3 returns “to verify accuracy of taxpayers’ disclosures” as it would assist SARS with their “risk assessment environment” development.<sup>108</sup>

SARS is likely to succeed based on the justifiability of third party returns, especially also given the wide powers conferred to SARS in the administration of a tax Act to obtain such information.<sup>109</sup>

Therefore, it can be stated that the statutory provision under which SARS is acting is not procedurally unfair or unreasonable in terms of PAJA, as such actions will not have a truly adverse effect on the affected third party.<sup>110</sup> The provision will also most likely not be regarded as unconstitutional, as it will satisfy the reasonable and justifiable limitation on section 33 of the Constitution.<sup>111</sup>

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<sup>106</sup> 1999 (3) SA 304 (LAC) par 35-37. See also De Waal (2001) p 518.

<sup>107</sup> See also *id* at p 518-519.

<sup>108</sup> SARS: Legal and Policy Division (2013) p 20.

<sup>109</sup> Sec 3(2) of the Tax Administration Act. See also Seligsen (2012) p 35.

<sup>110</sup> Klue (2009) p 3-82.

<sup>111</sup> Sec 36 of the Constitution.

### 3.3 OVERVIEW OF APPLICATION IN OTHER JURISDICTIONS

On 6 November 2013, the Australian Taxation Office announced the proposed improvement of compliance by implementing third party reporting, combined with data matching.<sup>112</sup> The ATO does not only intend to merely verify the accuracy of disclosures made by taxpayers, but also to improve the pre-filing of tax returns and to strengthen the ATO's analysis and reporting systems.<sup>113</sup> The data being reported is also limited to only government grants and sale transaction of real property, shares and units and merchant credit and debit services.<sup>114</sup>

To improve the pre-filing of tax returns, the ATO will utilise the information obtained *via* the third party return submissions by adding it directly in the relevant fields on the tax return. This has significantly reduced compliance costs for taxpayers and it will also assist with the prevention of taxpayers omitting or under-reporting their income.<sup>115</sup>

The only noteworthy comment submitted to the ATO on behalf of the Australian Bankers Association Incorporated, related to the size of the data files, whereby the ATO should ensure that its transfer channels are capable of receiving large data files in order to reduce compliance costs of third parties.<sup>116</sup>

Otherwise, in general, the proposal for third party returns was widely accepted within Australia as they see the potential thereof within the tax administration arena.

The practice of utilising third party data in order to pre-populate tax returns has been implemented already in the past decade in countries within the Nordic region.<sup>117</sup> The countries with these types of arrangements have realised the potential of third party

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<sup>112</sup> Australian Taxation Office (2014) Tax compliance: Improving compliance through third party reporting and data matching 27 June 2014. Available at <https://www.ato.gov.au/general/new-legislation/in-detail/direct-taxes/income-tax-for-businesses/tax-compliance--improving-compliance-through-third-party-reporting-and-data-matching/> (accessed 15 July 2014). Hereinafter referred to as the ATO.

<sup>113</sup> *Ibid.*

<sup>114</sup> The Australian Government the Treasury (2014) *Improving tax compliance – enhanced third party reporting, pre-filing and data matching*. Langton Crescent: Parkes ACT, p 1.

<sup>115</sup> See also *id* at p 2.

<sup>116</sup> Australian Bankers Association Inc (2014) Comment: Enhanced Third Party Reporting, pre-filing and data matching 11 March 2014. Available at [http://www.treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/Consultations/2014/Improving%20tax%20compliance/Submissions/PDF/Australian\\_Bankers\\_Association.ashx](http://www.treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/Consultations/2014/Improving%20tax%20compliance/Submissions/PDF/Australian_Bankers_Association.ashx) (accessed 15 July 2014).

<sup>117</sup> Organisation for Economic Co-operation and Development (2006) Information Note: Using Third Party Information Reports to Assist Taxpayers meet their Return Filing Obligations - Country Experiences with the Use of Pre-populated Personal Tax Returns. Available at <http://www.oecd.org/tax/administration/36280368.pdf> (accessed 15 July 2014) p 6.

reports, especially in detecting unreported income and, as a consequence, collecting substantially more tax revenue.<sup>118</sup>

### 3.4 CONCLUSION

The above mentioned indicates that it is general practice for revenue authorities to obtain taxpayer related data from third parties, but it is also crucial that such revenue authorities utilise the data in an effective and efficient manner in order to reach the purpose or goal that it is intended for. In this researcher's view, the actual statutory provision that imposes the requirement on third parties in South Africa is consistent with the Constitution.

However, practically one is not seeing SARS' application and utilisation of the data received. Due to the already costly and onerous task on third parties to collate and submit all the required data to SARS, and noticing that SARS is not optimally using the data as per its intended purpose, it can be argued that SARS' conduct in this regard is inconsistent with PAJA and the Constitution.

It is, however, doubtful that an opposing party would succeed in a judicial review, as SARS is constantly building and upgrading its systems to improve the analysis and reporting of data, but one could ask how long the third party will still have to endure such high compliance costs and administrative burdens without seeing the effective use of such data submitted.

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<sup>118</sup> *Ibid.*

## CHAPTER 4: INFORMATION REQUESTS

### 4.1 OVERVIEW

Historically, SARS could request information from taxpayers or third parties in terms of section 74 A-D of the Income Tax Act. Since the enactment of the Tax Administration Act, the SARS information request function has been laid down in the new section 46 of the Tax Administration Act, which reads as follows:

- 1) SARS may, for the purposes of the administration of a tax Act in relation to a taxpayer, whether identified by name or otherwise objectively identifiable, require the taxpayer or another person to, within a reasonable period, submit relevant material (whether orally or in writing) that SARS requires.
- 2) A senior SARS official may require relevant material in terms of subsection (1) in respect of taxpayers in an objectively identifiable class of taxpayers.
- 3) A request by SARS for relevant material from a person other than the taxpayer is limited to the records maintained or that should reasonably be maintained by the person in relation to the taxpayer.
- 4) A person receiving from SARS a request for relevant material under this section must submit the relevant material to SARS at the place and within the time specified in the request.
- 5) SARS may extend the period within which the relevant material must be submitted on good cause shown.
- 6) Relevant material required by SARS under this section must be referred to in the request with reasonable specificity.
- 7) A senior SARS official may direct that relevant material be provided under oath or solemn declaration.
- 8) A senior SARS official may request relevant material that a person has available for purposes of revenue estimation.

*Prima facie* this section provides SARS with increased and extremely broad information gathering powers,<sup>119</sup> whereby SARS can request information relating to any individual. However, whilst applying the provisions of section 46 of the Tax Administration Act, it is important to note that there are three interpretations present.<sup>120</sup>

Firstly, it is the duty of SARS to perform its functions as an organ of state, which entails the “efficient and effective collection of revenue.”<sup>121</sup> Section 3(1) of the Tax Administration Act also holds SARS responsible for the administration of the Tax Administration Act, but SARS is compelled to perform all such functions in term of the values and principles of the Constitution.

Secondly, it is the taxpayers’ right to privacy in terms of section 14 of the Constitution and to only allowing any limitation of such fundamental right if it is justifiable in terms of section 36 of the Constitution. The right to privacy is also extended by the PoPI, whereby only personal information of an individual can be processed if it is consistent with the provisions contained in PoPI.<sup>122</sup> Section 11 of PoPI expressly allows for the processing of personal information in the event that it is in terms of a statutory obligation imposed on a responsible party.<sup>123</sup>

Lastly, it is the third parties’ confidentiality obligation in their relationship with their tax paying customers. In cases such as banks, the Code of Banking Practice places an emphasis on each bank’s obligation to safeguard confidential information of all its customers.<sup>124</sup> In the case of *Tournier v National Provincial and Union Bank of England*,<sup>125</sup> the court held that there is a duty on a bank to keep all confidential information relating to its customers secret and not to disclose such information, unless in circumstances where:

- Disclosure is under compulsion of law

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<sup>119</sup> Trengove W & Goodman I (2014) Opinion re: Section 46 of the Tax Administration Act 28 of 2011 for the Banking Association of South Africa. Unpublished opinion obtained by a member of BASA p 5.

<sup>120</sup> *Ibid.*

<sup>121</sup> Sec 3 of the SARS Act.

<sup>122</sup> Please refer to Chapter 2.2 above for a detailed discussion on the application of processing personal information in terms of POPI.

<sup>123</sup> ‘Responsible party’ is defined in section 1 of POPI as follows “means a public or private body or any other person which, alone or in conjunction with others, determines the purpose of and means for processing personal information”.

<sup>124</sup> BASA (2011) The Code of Banking Practice. Available at <https://www.fnb.co.za/downloads/legal/Code-of-Banking-Practice-2011.pdf> (accessed 18 July 2014) p 9.

<sup>125</sup> 1924 (1) KB 461 (CA) at 473.

- There is a duty to the public to disclose
- The interest of the bank requires disclosure
- Disclosure is made by the express or implied consent of the customer.

The bank's customers have a legal right to confidentiality in terms of their relationship with the bank, as confirmed in the case of *FirstRand Bank Ltd v Chaucer Republications (Pty) Limited and Another*.<sup>126</sup> The bank (including any other third party) has imposed "pecuniary burdens" by the application of section 46 of the Tax Administration Act, whereas the provision also has the added potential of infringing the taxpayer's fundamental right to privacy.<sup>127</sup>

It is evident that the working of section 46 of the Tax Administration Act must be interpreted by means of incorporating the three mentioned interpretations, and to, furthermore, breakdown the framework of the provisions into eight separate crucial portions, each entailing its own requirements, interpretations and applications. The breakdown will assist in determining whether any portion of section 46 of the Tax Administration Act, will be regarded as being inconsistent with the fundamental rights provided for in the Constitution or any other relevant legislation.

#### **4.2 "[F]or the purposes of the administration of a tax Act..."**

Information requests must be for the administration of a tax Act, which is defined according to section 3(2) of the Tax Administration Act as follows:

- 2) Administration of a tax Act means to
  - a) obtain full information in relation to:
    - i) anything that may affect the liability of a person for tax in respect of a previous, current or future tax period;
    - ii) a taxable event; or
    - iii) the obligation of a person (whether personally or on behalf of another person) to comply with a tax Act;

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<sup>126</sup> 2008 (2) SA 92 (C) par 18-19.

<sup>127</sup> Trengove (2014) p 6.



- b) ascertain whether a person has filed or submitted correct returns, information or documents in compliance with the provisions of a tax Act;
- c) establish the identity of a person for purposes of determining liability for tax;
- d) determine the liability of a person for tax;
- e) collect tax and refund tax overpaid;
- f) investigate whether an offence has been committed in terms of a tax Act, and, if so,
  - i) to lay criminal charges; and
  - ii) to provide the assistance that is reasonably required for the investigation and prosecution of tax offences or related common law offences;
- g) enforce SARS' powers and duties under a tax Act to ensure that an obligation imposed by or under a tax Act is complied with;
- h) perform any other administrative function necessary to carry out the provisions of a tax Act; and
- i) give effect to the obligation of the Republic to provide assistance under an international tax agreement.

SARS will, therefore, only be allowed to obtain information in this regard by stating to the third party which specific administrative action(s) it is exercising its powers at the time of issuing such information requests.<sup>128</sup> Trengove (2014) has stated that “[i]t is not sufficient for it generically to state that it is engaged in the administration of a tax Act.”<sup>129</sup>

In the case of *Pharmaceutical Manufacturers Association of SA and Another: in re Ex parte President of the RSA and others*,<sup>130</sup> the court had to determine whether it has the power to review and to set aside (if necessary) a decision made by the President of

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<sup>128</sup> See also *id* at p 8.

<sup>129</sup> *Ibid.*

<sup>130</sup> 2000 (2) SA 674 (CC). See also *Ibid.*

South Africa to bring the Medicines and Medical devices Regulatory Authority Act 1998 into operation.<sup>131</sup> The Court held that the decision was not an administrative function, but more closely linked to a legislative function. However, regardless of the nature, any exercise of a power is still subject to judicial review as it must always be consistent with the Constitution's Rule of Law.<sup>132</sup> The most important requirement of any decision is that it must be "rationally related to the purpose for which the power given" otherwise the decision can be invalid, even if it was made in good faith.<sup>133</sup>

In light of the above, it confirms that SARS is an organ of the state and is, therefore, required to use its powers and make its decisions on a rational basis, with a clear nexus to the purpose provided for in the Tax Administration Act.<sup>134</sup>

#### **4.2.1 Will it constitute an "administrative action" in terms of PAJA if SARS uses its powers to request information without stating the administrative purpose for which the information is required in terms of the Tax Administration Act?**

When SARS issues an information request in terms of section 46 of the Tax Administration Act, they are making a demand to a third party or taxpayer for the submission of specific information. As previously confirmed, SARS can only use an information request in order to perform one or more administration functions. Trengove (2014) also stated in this regard that:<sup>135</sup>

Moreover, because the powers conferred on SARS under section 46 are invasive, SARS may only employ these powers where it, on reasonable grounds, believes that the administration function will be served by the information requested.<sup>136</sup>

The above principle was also confirmed in several of court cases. *Inter alia* in the case of *A M Moolla Group Limited v The Commissioner for SARS*,<sup>137</sup> the Court dealt with the

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<sup>131</sup> The Pharmaceutical Manufacturer's Association of SA and Another In Re: The Ex parte application of the President of the Republic of South Africa and others CC 731/99. Available at <http://www.saflii.org/za/cases/ZACC/2000/1media.pdf> (accessed 16 July 2014).

<sup>132</sup> See also *id* at p 2.

<sup>133</sup> *Ibid.*

<sup>134</sup> Trengove (2014) p 8.

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

<sup>137</sup> Case No 139/2002 at 26 March 2003. Available at [http://www.justice.gov.za/sca/judgements%5Czca\\_2003/2002\\_139.pdf](http://www.justice.gov.za/sca/judgements%5Czca_2003/2002_139.pdf) (accessed 16 July 2014). See also Van der Walt J (2014) Tax Administration Act, No 28 of 2011 ("Tax Administration Act"): Tax Indaba held on 10 June 2014.

interpretation issue, for Custom and Excise purposes, on garments in the trade agreement entered into between SA and Malawi. Upon entering the borders, SARS held that it will not claim duty on the garments being imported, however, the government realised that it could claim duty and wants to “enforce the right it had purported to abandon.”<sup>138</sup> The appeal was dismissed as the legislation and relevant rules must be applied accordingly, but the Court held that “being a creature of statute the first respondent must perform his task as laid down in the Act and not by will.”<sup>139</sup>

Based on various discussions with a member of the BASA,<sup>140</sup> SARS occasionally requests information from the banks wherein the SARS official does not expressly identify the particular administration function under which it is exercising its information gathering powers.<sup>141</sup> Information-rich institutions such as banks are custodians of highly confidential information and as such they are constantly facing the risk of disclosing such information in an unlawful manner to a third party, such as SARS.

As discussed earlier, banks are only allowed to provide access to its customers’ personal information to third parties, such as SARS, when compelled by law.<sup>142</sup> The relationship between a bank and its customers is contractually based and is one where the bank becomes the owner of the money in the account, but is obliged to pay cheques drawn on it by the client.<sup>143</sup>

The bank has a duty of secrecy, which was first recognised in the case of *Abrahams v Burns*.<sup>144</sup> The banking secrecy is also found in several statutory provisions and within the terms and conditions in the contractual agreement entered into between the bank and its customers.<sup>145</sup>

Consequently, in the event that the bank breaks its duty of secrecy outside the justifiable limits,<sup>146</sup> the bank will be held liable by its customers by means of a civil action and also in terms of the protection of personal information provision provided for

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<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.*

<sup>140</sup> BASA Interview (2014).

<sup>141</sup> *Ibid.*

<sup>142</sup> BASA (2011) p 9.

<sup>143</sup> Neate & Godfrey (2011) *Bank Confidentiality*. 5<sup>th</sup> ed. UK: Bloomsbury Professionals, p 721.

<sup>144</sup> 1914 CPD 452.

<sup>145</sup> Reserve Bank Act, 90 of 1989; Banks Act, 94 of 1990; Consumer Protection Act, 68 of 2008 and National Credit Act, 34 of 2005.

<sup>146</sup> As discussed in Chapter 4.1 above. Also see *Tournier v National Provincial and Union Bank of England* 1924 (1) KB 461 (CA) at 473.

in PoPI.<sup>147</sup> On the other hand, should SARS be of the view that the bank wilfully and without just cause refused or neglected to furnish, produce or make available the information and/or document, the bank shall be guilty of an offence and liable for conviction in terms of section 234 of the Tax Administration Act.

It is evident that when SARS requests information without stating the administrative function that they are fulfilling, that such an information request will fall within the PAJA definition of an “administrative function”, as it constitutes a decision by SARS which has an adverse effect on the taxpayer and possibly also on the third party, should they act upon such an invalid information request. The adverse effect on the taxpayer is due to the fact that his/her right to privacy has been infringed upon by SARS’ actions without a reasonable or justifiable cause,<sup>148</sup> because SARS seems to be requesting the information for an unknown, and possibly an ulterior purpose other than administering the Tax Administration Act.

In such circumstances, the taxpayer will be able to take SARS’ decision on judicial review and will also be allowed to hold the third party liable under the provisions of PoPI. In this researcher’s opinion, the application of section 46 of the Tax Administration Act in this regard does not only infringe an individual’s fundamental right to privacy, more so it has placed the third party in a very obstinate position. The third party will have to balance its statutory obligations to comply with SARS’ information requests, whilst ensuring that the information requests complies with the requirements of the Tax Administration Act in that, for example, the bank does not break its duty of secrecy to its customers outside the justifiable limits.<sup>149</sup>

#### **4.2.2 Will it constitute an “administrative action” in terms of PAJA if SARS uses the information gathered for an ulterior purpose?**

BASA has, on occasions, held discussions with SARS, whereby it was suggested by SARS that the information gathered by them be utilised as part of information sharing with other Government departments.<sup>150</sup> When approaching Trengove (2014) on this issue, he stated that:

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<sup>147</sup> As discussed in Chapter 4.1.

<sup>148</sup> As required by section 36 of the Constitution.

<sup>149</sup> As discussed in Chapter 4.1.

<sup>150</sup> BASA Interview (2014).

[W]here SARS requests information for an ulterior purpose other than to discharge an administration function, its request will be *ultra vires* and the bank can refuse to comply with it.<sup>151</sup>

In such circumstances, the third party will also have the right to utilise the provisions of PAJA in the event that the third party can prove that an information request from SARS is an “administrative action” that has an adverse effect, *inter alia*, due to an underlined ulterior motive other than the administration of a tax Act.<sup>152</sup> The action will constitute an infringement on the principle of legality,<sup>153</sup> whereby the Constitutional Court has affirmed in the case of *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* that “the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful.”<sup>154</sup>

The onus is, however, on the third party to show that the ulterior purpose truly exists; otherwise the bank will still be liable for non-compliance with the information request should it not provide the requested information accordingly.<sup>155</sup> For the individual concerned, SARS has a statutory duty to ensure that taxpayers comply with relevant tax legislation, however, it should never result in the violation of an individual’s fundamental right to privacy.<sup>156</sup>

Furthermore, when applying the Constitutional limitation test of section 36 of the Constitution to this portion of section 46 of the Tax Administration Act, the provision will be deemed consistent with the Constitution provided that SARS clearly states the administrative action under which the information is being requested, and there is a clear link between the information requested and the administrative action being acted upon. Although the conduct of SARS will most likely not be reasonable and/or justifiable should an ulterior purpose be present.

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<sup>151</sup> Trengove W & Goodman I (2014) Supplementary Opinion re: Information Gathering under the Tax Administration Act, 2011 for the Banking Association of South Africa. Unpublished opinion obtained by a member of BASA p 10.

<sup>152</sup> Trengove Supplementary (2014) p 11.

<sup>153</sup> *NDPP v Zuma* (2009) ZASCA 1 p 36. See also Klue (2009) p3-67.

<sup>154</sup> 2011 (4) SA 113 (CC) at 146F. See also *op cit id* p3-67.

<sup>155</sup> *Ibid.*

<sup>156</sup> Croome (2010) p 125.

Trengove (2014) suggests that section 46 of the Tax Administration Act will have to be restrictively interpreted, in other words, to be construed in favour of the taxpayer, and not SARS.<sup>157</sup>

#### **4.3 “[I]n relation to a taxpayer, whether identified by name or otherwise objectively identifiable...”**

These provisions require the third party to submit the information requested in relation to a taxpayer, who must be identified or “objectively identifiable.”<sup>158</sup>

It was provided during the commenting phase of the Tax Administration Act that the term “objectively identifiable” can be interpreted too vaguely and must, therefore, be defined.<sup>159</sup> In contrast, Trengove (2014) was of the view that the term “objectively identifiable” rather constrained SARS’ powers, as this would not allow SARS to seek taxpayers’ information in general as part of a fishing expedition.<sup>160</sup> He further mentions that “by contrast, SARS could not, in our view, call on a bank to produce information relating to all taxpayers on its books that hold mortgage bonds worth more than R5 million. Such a request would not sufficiently link the identity of the class of taxpayers, to the function that SARS sought to fulfil.”<sup>161</sup>

Similar to this view was SARS’ response to the earlier comment raised, whereby they indicated that no definition is required as the ordinary meaning of the term will suffice in the context which it is used. There is, therefore, no ambiguity in this term.<sup>162</sup> SARS’ statement was further elaborated upon as follows:

As is evident from the context, if SARS does not have the name of the taxpayer, there could be other factors that indicate such person exists. As stated in paragraph 2.2.5.3 of the Memorandum of Objects of the Bill, the term ‘objectively identifiable’ includes, for example, where a taxable event demonstrates that a taxpayer exists, but SARS does not have such a person’s name or other details.

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<sup>157</sup> Trengove (2014) p 7. See also *NST Ferrochrome (Pty) Ltd v Commissioner for Inland Revenue* 2000 (3) SA 1040 (SCA) par 17.

<sup>158</sup> See also *id* at p.10.

<sup>159</sup> Standing Committee on Finance (2011) Tax Administration Bill 11 of 2011: Response Document. Available at <http://www.sars.gov.za/AllDocs/LegalDoclib/RespDocs/LAPD-LPrep-Resp-2011-02%20-%20Response%20Document%20Tax%20Administration%20Bill%202011.pdf> (accessed 16 July 2014) p 4.

<sup>160</sup> Trengove (2014) p 10.

<sup>161</sup> *Ibid.*

<sup>162</sup> Standing Committee on Finance (2011) p 5.

For this purpose, ‘taxable event’ is defined in clause 1 to mean on occurrence which affects or may affect the liability of a person to tax. For example, SARS may be aware of a financing transaction entered into between a financial institution and may accordingly request the financial institution to provide the names of the clients involved and they are objectively identifiable given the occurrence of a ‘taxable event’, i.e. the receipt of interest.<sup>163</sup>

Taking into account the ordinary meaning of the term, the Oxford Dictionary provides the definition for “objective” as meaning “(of a person or their judgement) not influenced by personal feelings or opinions in considering and representing facts”, and the term “identifiable” as meaning “able to be recognised, distinguishable.”<sup>164</sup> The limitation set by the provision will not infringe any individual’s fundamental right on an unreasonable or unjustifiable basis.

However, the conduct of SARS could have a different result. During discussions with members of BASA, one of the many practical issues faced was regarding the fact that SARS has a template information request letter that is forwarded to third parties, and attached thereto is a list of the taxpayers of whom they require information, but not all of them had clear identifiable information other than a name.<sup>165</sup> There has only been a minimal amount of information requests that have been customised for a specific taxpayer, and as a result, many of the bulk information requests have been declined by the banks as being invalid should the taxpayers listed therein not be clearly identifiable.<sup>166</sup>

SARS’ conduct in this regard could very likely be regarded as inconsistent with PAJA’s provisions, as the third party could be adversely affected should it have acted on such invalid information requests. SARS must ensure that they take reasonable care when issuing information request and identifying taxpayers, as this does not only place additional administration on the third parties, but it also places SARS in a position for judicial review.

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<sup>163</sup> Standing Committee on Finance (2011) p 5.

<sup>164</sup> Oxford Dictionary.

<sup>165</sup> BASA Interview (2014).

<sup>166</sup> *Ibid.*

#### **4.4 “[R]equire the taxpayer or another person ...”**

SARS can issue the information request to either the taxpayer or another person. The term “another person” has not been defined in the Tax Administration Act, therefore, the intention of the legislature was to attach the ordinary meaning thereto. The Oxford Dictionary defines “another” as meaning “used to refer to an additional person or thing of the same type as one already mentioned or known about” and “person” as meaning “a human being regarded as an individual.”<sup>167</sup>

When interpreting this provision in the strict sense, as mostly done by third parties in my experience to avoid any legal suits from the affected individuals, SARS seems to maintain the discretion of whether it wants to approach the taxpayer or third party first for the information and, furthermore, it leaves the reference to the third party open to include almost anyone of a human nature.

##### **4.4.1 Will SARS be in violation of the taxpayers’ personal information protection rights provided for by the PoPI when it approaches the third party before approaching the taxpayer with information requests?**

The PoPI states that its provision must be interpreted in a manner “that does not prevent any public or private body from exercising or performing its powers, duties and functions in terms of the law as far as such powers, duties and functions relate to the processing of personal information and such processing is in accordance with this Act or any other legislation ...”<sup>168</sup> This provision will, therefore, allow SARS to request the information from a third party, as long as the request and processing of the information is not inconsistent with the provisions of PoPI and is, therefore, lawful in nature. Section 4(1) of PoPI further explains lawful processing, which reads as follows:

4(1) The conditions for the lawful processing of personal information by or for a responsible party are the following:

- (a) “Accountability”, as referred to in section 8;
- (b) “Processing limitation”, as referred to in section 9 to 12;
- (c) “Purpose specification”, as referred to in section 13 and 14;
- (d) “Further processing limitation”, as referred to in section 15;

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<sup>167</sup> Oxford Dictionary.

<sup>168</sup> Sec 3(3)(b) of POPI. See also Croome (2010) p 4.



- (e) “Information quality”, as referred to in section 16;
- (f) “Openness”, as referred to in section 17 and 18;
- (g) “Security safeguards”, as referred to in section 19 to 22; and
- (h) “Data subject participation”, as referred to in section 23 to 25.

Heyink (2011) stated that: “It is important to understand that the conditions do not stand in isolation. They constitute a collection of conditions which interact with one another, sometimes overlapping and sometimes complementing and supplementing one another which need to be applied holistically.”<sup>169</sup> They can be applied as follows in relating to SARS’ information gathering powers, with specific reference to their power to approach a third party before approaching the taxpayer:

#### **4.4.1.1 Condition 1: Accountability**

Section 8 of the PoPI provides that a responsible party, which is the person who determines the purpose of the means of processing the personal information, like the third party and SARS, must ensure that all the measures that gave effect to the conditions of the PoPI have been complied with during the processing itself.

This condition would entail that the provisions of the PoPI have been adapted within the procedures and practices of the responsible party, laid down in a policy and governed by an Information Officer as provided for in Part B of the PoPI.<sup>170</sup> SARS has not been exclusively exempt from the provisions of the PoPI and is, therefore, compelled to incorporate the conditions of lawful processing accordingly.<sup>171</sup>

#### **4.4.1.2 Condition 2: Processing limitation**

The information must be processed lawfully and in a reasonable manner that does not violate the fundamental right to privacy of the taxpayer.<sup>172</sup> Furthermore, given the purpose for which it is being processed, it (the information) must be “adequate, relevant and not excessive.”<sup>173</sup>

These provisions can be tied back to paragraph 4(2) of the thesis, where the specific purpose requirement was dealt with in detail. To determine if SARS’ information

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<sup>169</sup> Heyink (2011) p 12.

<sup>170</sup> Sec 55-56 of POPI.

<sup>171</sup> Sec 37 of POPI.

<sup>172</sup> Sec 9 of POPI.

<sup>173</sup> Sec 10 of POPI.

request violated the privacy of the taxpayer will be determined later on in this thesis by applying the Constitutional limitation test.

Section 11(1) (c) of the PoPI, furthermore, allows the processing of personal information in the event that it complies with a statutory obligation of the responsible party. It is, therefore, clear that the processing of information without the consent of the taxpayer will be allowed should it be a compelled processing by law, or even where it is necessary for the legitimate interest of a responsible party. It is evident that the PoPI is not “consent-driven”, but at any stage the taxpayer will be able to object to the processing of personal information, whereby SARS will be forced to immediately cease any further processing of the information relating to that specific taxpayer.<sup>174</sup>

With regards to the issue of whether the PoPI will allow SARS to directly request the personal information of a taxpayer from a third party as its first point of collection, section 12(1) and 12(2)(d)(ii) of the PoPI states that:

- (1) Personal information must be collected from the data subject, except as otherwise provided for in subsection (2).
- (2) It is not necessary to comply with subsection (1) if:
  - (d) collection of the information from another source is necessary:
    - (ii) to comply with an obligation imposed by law or to enforce legislation concerning the collection of revenue as defined in section 1 of the South African Revenue Services Act, 1997 (Act No 34 of 1997)<sup>175</sup>

In this researcher’s view it is evident that SARS will also be able to comply with a statutory obligation if the information is collected from the taxpayer directly, and in most circumstances SARS will have an even better opportunity of fulfilling its purpose when requesting directly from the taxpayer, as many third parties will only have information or documentation relating to a single transaction. In practice, many of the banks were in receipt of information requests relating to audits conducted by SARS on a specific taxpayer, whereby SARS specifically requested that the contents of the information request is not to be made known to the taxpayer concerned.<sup>176</sup> Section 42 of the Tax

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<sup>174</sup> Sec 11(3) of POPI. Heyink (2011) p 12.

<sup>175</sup> Croome (2010) p 5.

<sup>176</sup> BASA Interview (2014).

Administration Act provides that a taxpayer must duly be kept informed if SARS is conducting an audit on his/her tax affairs, the only exception to this will be in the case of a criminal investigation.<sup>177</sup>

Heyink (2011) agrees that the purpose of this provision only relates to scenarios where the information collected from a data subject would “defeat the legitimate purpose of the collection of the information. For instance, the purpose of the collection for information relating to criminal activities or those of national security would be subverted if the consent of the data subject needed to be obtained.”<sup>178</sup>

Consequently to the above, SARS will in all other circumstances, excluding criminal investigations, still be able to comply with its statutory obligation if such information is directly requested from the taxpayer, and only if and when the information is not obtainable from the taxpayer, may the request be redirected to a relevant third party.

#### **4.4.1.3 Condition 3: Purpose specification**

As already covered in paragraph 4.2 above, section 13 of the PoPI requires that the information must be “collected for a specific, explicitly defined and lawful purpose” which relates to the activity of the responsible party, requesting such responsible party to retain and restrict the records kept, which is similar to the provisions of the Tax Administration Act.<sup>179</sup>

#### **4.4.1.4 Condition 4: Further limitations**

This condition requires that any further processing of the information must be compatible with the purpose to which it related to during initial collection,<sup>180</sup> unless it is required in terms of an obligation of law among other things such as provided for in the exemption clause of section 11 of the PoPI.<sup>181</sup>

#### **4.4.1.5 Condition 5: Information quality**

Section 16 of the PoPI requires that the responsible party “must take reasonable practicable steps to ensure that the personal information is complete, accurate, not misleading and updated where necessary.”

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<sup>177</sup> Sec 43 of the Tax Administration Act.

<sup>178</sup> Heyink (2011) p 12.

<sup>179</sup> Sec 14 of POPI.

<sup>180</sup> Heyink (2011) p 12.

<sup>181</sup> Sec 15 of POPI.

#### **4.4.1.6 Condition 6: Openness**

This condition iterates the obligation on the responsible party collecting the personal information to ensure transparency and fairness in the processing of the information.<sup>182</sup>

Section 18 of the PoPI also further mentions that the responsible party will have to ensure that the taxpayer is aware that the information being collected, where the information is collected from a third party, as well as the purpose of the collection. Exception to this condition is allowed should compliance with this provision, as an example, disable SARS from complying with its statutory obligations.<sup>183</sup> The application of this exception will only apply in circumstances relating to criminal investigation or national security as discussed in Condition 2 above.

#### **4.4.1.7 Condition 7: Security safeguards**

Section 19 to 22 of the PoPI underlines the obligations of the responsible party to ensure that there are appropriate safeguards in place at all times to protect the information gathered against loss, destruction or unlawful access. A lot of that type of information is obtained electronically these days. The responsible party should ensure that all laws governing the electronic storage and sharing of the information should be incorporated and adhered to.<sup>184</sup> The same will also apply to paper-based information, especially if it is kept by another third party, the responsible party should be satisfied that the third party is compliant with the relevant statutory provisions.<sup>185</sup>

#### **4.4.1.8 Condition 8: Data subject participation**

This condition aligns the requirements in terms of PAIA, where it provides the taxpayer with the right to confirm whether a responsible third party, like SARS, holds any personal information about him/her.<sup>186</sup> Section 24 and 25 of the PoPI allows the taxpayer to request that the personal information be edited or destroyed if certain requirements are met and to iterate that all these requests must be done as per the provisions of PAIA.

In light of the above conditions, it is evident that each and every information request's compliance with the conditions of PoPI will have to be determined on a case-by-case

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<sup>182</sup> Sec 18 of POPI.

<sup>183</sup> Sec 18(4)(c)(ii) of POPI.

<sup>184</sup> Heyink (2011) p 12.

<sup>185</sup> Sec 20 of POPI.

<sup>186</sup> Sec 23 of POPI. Heyink (2011) p 12.

basis. However, regarding the posed question of whether SARS is violating a taxpayer's rights in terms of PoPI specifically when information is requested from a third party before approaching the taxpayer, Condition 2 of PoPI expressly implies that it will infringe a taxpayer's right in the event that SARS did not approach the taxpayer first, or in the event that SARS did not inform the taxpayer fully that a third party had been approached.

As previously mentioned, SARS will be allowed (in terms of PoPI) to approach the third party before it approaches the taxpayer only in circumstances such as criminal investigations or national security as per Condition 6 above.

#### **4.4.2 Will SARS' action to approach the third party before approaching the taxpayer with information requests constitute an "administrative action" in terms of PAJA?**

It was already established that this approach by SARS will be inconsistent with the provisions of PoPI. Croome (2014) also suggests that this will be similar in determining whether such action has an adverse effect on a taxpayer:

...several cases have in the past accepted the principle that, where there is less intrusive means to an end, that option should be chosen, as this principle accords with the Constitution.<sup>187</sup>

The case of *Kristen Carla Burchell v Barry Grant Burchell*,<sup>188</sup> the court accepted that: "when there is a procedure that is less intrusive on a person's Constitutional right, such as the right to a fair trial under section 35(3) of the Constitution, the less intrusive possibility is to be preferred." This principle was also confirmed in the case of *D v K*.<sup>189</sup>

De Waal (2001) iterates the importance of enforcing the right to privacy relating to the personal information of an individual, by stating:

It guarantees the right of a person to have control over the use of private information. The right is closely related to the right to dignity since the publication of embarrassing information, or information which places a person in a false light, is most often damaging to the dignity of the person, but the right to privacy

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<sup>187</sup> Croome (2014) p 5.

<sup>188</sup> Unreported case no 364/2005 in the High Court of SA (Eastern Cape Division) par 26.

<sup>189</sup> 1997 (3) BCLR 209(N). See also Croome (2014) p 5.

guarantees control over all private information and it does not matter whether the information is potentially damaging to a person's dignity or not.<sup>190</sup>

Considering all the aspects, for the right of privacy to be truly violated or infringed upon, one has to determine whether there is a "reasonable expectation of privacy", as per the case of *Mistry v Interim Medical and Dental Council of SA*,<sup>191</sup> where a member of the public provided information to the Medical Council regarding a possible violation by the applicant.<sup>192</sup> The court held that this did not infringe on the applicant's fundamental right to privacy.<sup>193</sup> It is evident that certain limitations on the fundamental right will be condoned by the courts.

When one considers the limitation provision of section 36 of the Constitution and whether the right to privacy will be reasonably and justifiably limited when SARS approaches the third party before approaching the taxpayer to gather personal information, the Constitutional Court case of *Bernstein v Bester NO* has to be taken into account.<sup>194</sup> In this case, the court had to determine the constitutionality of section 417 and 418 of the Companies Act, as a company undergoing liquidation can be subpoena and examined by the Commissioner and also be compelled to produce certain documents.<sup>195</sup> Whilst determining the constitutionality of the provisions, the court had to firstly analyse the source of the compulsion, by means of determining whether a more restrictive interpretation can be applied to the provision.<sup>196</sup> If this is the case, then the more restrictive interpretation should be applied and the provision will not be unconstitutional.<sup>197</sup>

In terms of the issue at hand, a more restrictive interpretation can be applied and the provision will uphold the constitutional validity test. However, regarding the specific conduct of SARS when issuing the information requests, Croome (2014) is of the view that SARS' action will not survive the limitation test of section 36 of the Constitution in that their conduct is not a reasonable or justifiable limitation.<sup>198</sup> He stated that:

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<sup>190</sup> De Waal (2001) p 276.

<sup>191</sup> 1998 (4) SA 1127 (CC) par 61. See also De Waal (2001) p 276.

<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid.*

<sup>194</sup> 1996 (2) SA 751 (CC), See also De Waal (2001) p 272.

<sup>195</sup> *Ibid.*

<sup>196</sup> Bernstein case par 59.

<sup>197</sup> *Ibid.*

<sup>198</sup> Croome (2014) p 6.

In our view, the failure by SARS to approach the taxpayer first and, only if the taxpayer refuses or fails to provide the information, to approach a third party, breaches the taxpayers' right to privacy. It is, further, not SARS' only remedy in such an instance and creates an administrative burden on third parties. In our view, this results in a breach of section 195 of the Constitution, which states that public administration must be governed by the democratic values and principles enshrined in the Constitution, including, *inter alia*, efficient, economic and effective use of resources.<sup>199</sup>

Section 36 of the Constitution requires that a law of general application must infringe a person's fundamental right, as a first requirement.<sup>200</sup> As determined earlier, the Tax Administration Act is legislation that is regarded as a law of general application on all taxpayers, whereby a specific portion of section 46 of the Tax Administration Act has infringed on a taxpayer's right to privacy, in that the taxpayer is not aware nor given the opportunity to provide SARS with his/her own personal information as required by an information request.<sup>201</sup>

The second requirement of section 36 of the Constitution, to determine whether the infringement constitutes a legitimate limitation of the taxpayer's right to privacy, is to establish if the infringement was reasonable and justifiable; in other words, whether it was an infringement that had a "compelling good reason" that would serve a purpose that is considered being legitimate by "all reasonable citizens in a constitutional democracy".<sup>202</sup> De Waal (2001) gives further explanation to this above requirements by stating:

This will be the case where a law infringes rights that are of great importance in the constitutional scheme in the name of achieving benefits that are of comparatively less importance. It will also be the case where the law does unnecessary damage to fundamental rights, damage which could be avoided or minimised by using the means to achieve the same purpose.<sup>203</sup>

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<sup>199</sup> Croome (2014) p 6.

<sup>200</sup> De Waal (2001) p 162.

<sup>201</sup> Information Requests can only be issued by a SARS official acting with a purpose of administering a Tax Act in terms of section 3(2) of the Tax Administration Act. SARS can therefore request information for numerous of reasons other than only for criminal investigations. See also earlier discussion on the limitation of Information Requests on criminal investigations and national security in Chapter 4.4.1.

<sup>202</sup> De Waal (2001) p 162.

<sup>203</sup> *Ibid.*

SARS could have avoided this infringement on the taxpayer's right to privacy, by issuing the information request to the taxpayer as the first point of engagement, in circumstances where the purpose of the information request will not be nullified due to criminal investigations or national security. SARS have the full right to approach the taxpayer for the information before approaching the third party, as suggested by the discretion provided in the provision of section 46 of the Tax Administration Act. SARS can also minimise the infringement by just informing or making the taxpayer aware of the information request issued to a third party, before approaching the taxpayer and in addition also not prohibiting the third party to inform the taxpayer should the purpose of the information request not relate to a matter of criminal investigation or national security.

In this researcher's view, such action by SARS would fall within the definition of an "administrative action" as the conduct of SARS would infringe on the taxpayer's right to privacy, of which such limitation of the right is not legitimate in terms of section 36 of the Constitution. The taxpayer will be allowed to utilise the rights enshrined in PAJA and take SARS' decision on judicial review.

#### **4.5 "[W]ithin a reasonable period..."**

Section 46(1) of the Tax Administration Act specifies that the information should be provided to SARS within a "reasonable period" and at the place and within the time specified by SARS.<sup>204</sup> In the event that the third party or taxpayer, whoever was in receipt of the request, requires an extension of the period, they may request an extension if reasonable ground(s) exist.<sup>205</sup> In the Draft Tax Administration Laws Amendment Bill issued on 17 July 2014, SARS proposed to amend section 46(1) of the Tax Administration Act by also including the term "specified format."<sup>206</sup> This negates that SARS will in future be able to request the information in any format required, and the third party or taxpayer will be obliged to adhere, regardless of the associated costs and/or administrative burden that it might place on the affected party.

SARS has broad powers of discretion in this regard, especially given the fact that the term "reasonable period" is not defined in any of the tax Acts. This concern was also raised in SARS' response document on comments made to the Tax Administration

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<sup>204</sup> Sec 46(4) of the Tax Administration Act.

<sup>205</sup> Sec 46(5) of the Tax Administration Act.

<sup>206</sup> Hereinafter referred to as the TLAB 2014.



Bill.<sup>207</sup> SARS responded by stating that a definition would not be fair on either SARS or taxpayers, as each information request's extent of information requested will be different which will inherently also determine how long a third party or taxpayer will need to collate and submit such information.<sup>208</sup>

It, therefore, begs the question on whether it will constitute an "administrative action" in terms of PAJA if SARS provides only a 48-hour period within the information request, which is in most circumstances impossible to meet given the extent of the information requested.

Firstly, it has to be determined if such a limited period will be regarded as a "reasonable period" or whether it will have an adverse effect on the affected party. Some court cases have considered this term, such as the case of *Amalgamated Beverage Industries Ltd v Rand Vista Wholesalers* where the court had to determine if a notice period for termination of a contractual agreement was within a reasonable period.<sup>209</sup> The court held that a determination of a "reasonable period" must be determined with reference to the circumstances at the time that the notice was given, and whether enough time was given to the receiving party to sufficiently regulate its affairs.<sup>210</sup>

Given the question raised earlier, it is evident that the test will be whether the receiving party perceives the period to be reasonable or not. With reference to the wording of this provision and the fact that section 46(5) of the Tax Administration Act provides a remedy to the third party or taxpayer, it is highly unlikely that SARS' period provided in the information request can be regarded as an "administration action" that has an adverse effect on the party from whom the information is requested.

However, if in such circumstances SARS decides not to grant the extension in terms of section 46(5) of the Tax Administration Act, the position can change significantly. Such an action of SARS will fall within the ambit of "administrative action" as defined in section 1 of PAJA, as this decision taken by SARS in terms of the Tax Administration Act, adversely affects the rights of the third party or taxpayer that received the information request in terms of section 33 of the Constitution, as it will not be able to

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<sup>207</sup> Bill 11 of 2011. Hereinafter referred to as the TAB 2011. Standing Committee on Finance (2011) p 30.

<sup>208</sup> *Ibid.*

<sup>209</sup> 2003 4 All SA 95 (SCA) par 1. See also Croome (2014) p 8.

<sup>210</sup> See also *id* at par 18. See also *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and Other relates* 1985 (4) SA 809 (A) at 828 A-B.

supply the information requested within the time limit and can, therefore, be held liable for non-compliance with the Tax Administration Act.<sup>211</sup> The affected third party or taxpayer will, as a result, be able to utilise the provisions of PAJA accordingly as a remedy.

#### **4.6 “[S]ubmit relevant material (whether orally or in writing) that SARS requires.”**

SARS, finally, requires the submission of only relevant material in terms of section 46(1) of the Tax Administration Act. Section 46(6) of the Tax Administration Act places a further restriction on SARS by requesting that the relevant material requested, be reasonably specified within the information request. The Tax Administration Act also provides one with a definition of “relevant” material”, which provides that:

“Relevant material” means any information, document or thing that is foreseeably relevant for the administration of a tax Act as referred to in section 3.”<sup>212</sup>

Within the Draft Tax Administration Laws Amendment Bill 2014,<sup>213</sup> SARS proposed that the above definition be amended as “... or thing that in the opinion of SARS is [forseeably] foreseeably relevant ...”<sup>214</sup>

It is clear from the above that SARS wants to align the wording of the provision with their underlying intention, which is to maximise their arbitrary discretion in determining whether a specific document or piece of information will be regarded as “relevant material” and to enforce the same concept such as the “pay-now-argue-later” concept.<sup>215</sup> In order to determine if a document or information will be relevant in terms of the request, a clear nexus has to be present between the information requested and the particular administrative function that SARS is acting under in terms of section 3(2) of the Tax Administration Act.<sup>216</sup>

In the case of *R v Katz*, the court held that:

Relevant means that any two facts to which it is applied are so related to each other that according to the common course of events are, either taken by itself, or

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<sup>211</sup> Sec 236 of the Tax Administration Act.

<sup>212</sup> Sec 1 of the Tax Administration Act.

<sup>213</sup> Issued 17 July 2014. Hereinafter referred to as the TALAB 2014.

<sup>214</sup> TALAB 2014 p 35.

<sup>215</sup> Van der Walt (2014)

<sup>216</sup> Trengove (2014) p 9.

in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other.<sup>217</sup>

Trengove (2014) stated that: “the requirements to determine foreseeability is to determine the relevance of the information requested in an objective manner, in other words, the question is whether a reasonable person would also foresee the information as being relevant and related to the administration of the tax Act under which SARS is acting, should such a relevant person been placed in SARS’ position.”<sup>218</sup> The test is not whether the information requested will be relevant in SARS’ opinion, as this will constitute a subjective test that is arbitrary in nature and can open the application of this provision to possible “fishing expeditions” being undertaken by SARS.

The same concern was also raised during the commenting phase of the Tax Administration Bill.<sup>219</sup> SARS discarded the comment by stating that: “It is simply misconceived and is used in the context of overbroad demands for discovery in civil matters or criminal matters where there is an endeavour not to obtain evidence to support a case, but to discover whether there is a case at all.”<sup>220</sup>

SARS is, therefore, of the view that broad information gathering powers are a necessity for revenue authorities, but what is then actually the difference between this and a “fishing expedition?”

Black’s law dictionary defines a fishing expedition as “[a]n attempt, through broad discovery requests or random questions, to elicit information from another party in the hope that something relevant might be found.”<sup>221</sup> According to the case of *Free State Steam & Electrical CC v Minister of Public Works*, the court had the task of determining whether the request for documents constituted a “fishing expedition.”<sup>222</sup> The court held that a request for specific documents does not constitute a “fishing expedition”, as opposed to a request for discovery in general.<sup>223</sup>

However, in the case of *Woodlands Dairy (Pty) Ltd v Competition Commission*, the appellant purchased raw milk from dairy farmers which they then processed and

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<sup>217</sup> 1946 AD 71 at 78. See also *Ibid.*

<sup>218</sup> Trengove (2014) p 9. See also *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA) par 7.

<sup>219</sup> Standing Committee on Finance (2011) p 30.

<sup>220</sup> *Ibid.*

<sup>221</sup> Brian (1999) p 668.

<sup>222</sup> 2008 JOL 22432 (T) p 1.

<sup>223</sup> See also *id* at p 14.

resold.<sup>224</sup> They were accused by the Competition Tribunal of Contravening, section 4(1) of the Competition Act 89 of 1998.<sup>225</sup> During the course of the proceedings, the court held that: “the Commissioner could not use its “far-reaching invasive powers” in a fishing expedition without possessing a valid and reasonable suspicion, otherwise the powers exercised will be unrestricted as the affected party will not have a “prior judicial scrutiny.”<sup>226</sup> Trengove (2014) also underlined the importance of this case within the tax context, by stating that:

It [SARS] cannot engage in a fishing expedition to gather as much information as possible about a taxpayer or class of taxpayers. Where it does so, its request may be amenable to challenge as oppressed or vexatious.

In light of the above, it is evident that there is a fine line between a “fishing expedition” and broad, information-gathering powers. Taking into account the guidelines provided in the case law above, SARS will always have to ensure that the information request is issued and indicates the purpose under which they are administering a tax Act. The information being requested must be closely linked to such purpose, in such a way that any reasonable person in SARS’ position will also regard it to be relevant.

Practically, it has been confirmed that SARS has issued, on numerous occasions, information requests that requested information under the specific purpose of determining the tax liability of the taxpayer, but the documents requested under this purpose included the internal communication of the third party’s staff which could never assist in determining a taxpayer’s tax liability.<sup>227</sup>

When the bank declined the request by stating that the documents requested were not relevant under the purpose which SARS is acting, no response or amended request was ever received from SARS regarding this taxpayer.<sup>228</sup> This has happened on numerous occasions, and it indicates that SARS either had an ulterior motive or they bluntly ignored or misunderstood the requirements set out by section 46 of the Tax Administration Act.

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<sup>224</sup> 2010 (6) SA 108 (SCA) par.1. See also Trengove (2014) p 8.

<sup>225</sup> *Ibid.*

<sup>226</sup> See also *id* at par 20.

<sup>227</sup> BASA Interview (2014).

<sup>228</sup> *Ibid.*

#### 4.6.1 Can SARS request information from a third party, relating to a specific taxpayer, but in addition include a request for information relating to the third party itself?

This can happen, for example, in the case where the taxpayer had a separate contractual agreement with a third party which forms part of the taxpayer's tax affairs, like having a bank account with a bank and SARS request the bank's internal meeting minutes or other communications including transactions relating to the taxpayer.

Section 46(3) of the Tax Administration Act limits SARS to request only relevant material that is "in relation to the taxpayer."<sup>229</sup> Any third party can only refuse to provide the internal documents, if it has any cognisable grounds to do so, due to the documents being "privileged or irrelevant."<sup>230</sup> Any other internal documents or information requested by SARS and regarded as being relevant, which relates to the taxpayer directly or indirectly, must be provided by the third party.<sup>231</sup>

South African law recognises two main forms of privilege attached to information:

- Legal professional privilege that is found between communication of legal advisors and their clients, subject to advice that is not related to the facilitation of the communication of a crime or fraud<sup>232</sup>
- Litigation privilege which involves all communications between a litigant and his or her legal advisor in relation to a pending or ongoing litigation.<sup>233</sup>

In the tax arena, and when dealing with information requests, we only have application of the legal professional privilege. This type of privilege belongs to the person in receipt of the legal advice and is, therefore, the only rightful person to waive such privilege.<sup>234</sup> In practice, the privilege relates to the information within the document, therefore, if certain information in a document is subject to legal professional privilege, such privilege will not protect the whole document but only the specific information.

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<sup>229</sup> Trengove supplementary (2014) p 3.

<sup>230</sup> See also *id* at p 6. See also *A company and others v CSARS* case number 15360/2013 (unreported judgement at the Western Cape Division, 17 March 2014) at par 13.

<sup>231</sup> Trengove supplementary (2014) p 3.

<sup>232</sup> Trengove (2014) p 16. See also *Competition Commission v Arcelormittal SA Ltd* 2013(5) SA 538 (SCA) par 20-21.

<sup>233</sup> *Ibid.*

<sup>234</sup> See also *id* at p 17. See also *Bogashi v Van Vuurren: Bogashi v Director, Office for Serious Economic Offences* 1996 (1) SA 785 (A) p 793 H-J.

There is an academic debate stating that privilege protection should also be extended to confidential information relating to communications between relationships such as an accountant and his client, or a banker and its client.<sup>235</sup> In the case of *Bernstein*, the Constitutional Court held that such confidential information constitutes commercial information and will not be subject to privilege due to the necessity of effective administration.<sup>236</sup>

In light of the above, this researcher considers that information truly subject to legal professional privilege is protected from disclosure to SARS. It would constitute an infringement of the right to privacy should privileged information be provided, without the rightful person having waived the privilege accordingly.

**4.7 “A request by SARS for relevant material from a person other than the taxpayer is limited to relevant information related to the records maintained or that should reasonably be maintained by the person in relation to the taxpayer.”**

Section 46(3) of the Tax Administration Act further limits SARS in that they will only be able to request information that is currently maintained, or that should be reasonably maintained by the third party. This begs the question of what information would SARS regard as information that should reasonably be maintained? Trengove (2014) is of the opinion that such information will be dependent on the nature of the relationship between the third party and the taxpayer.<sup>237</sup>

Can it then be said that third parties should start adapting a practice of destroying or returning information to their clients to avoid the above? When there is a statutory obligation on a third party to keep certain documents, the third party is obliged to comply with said legislation, but SARS will never be able to request a third party to retrieve any other type of information that was returned to a client.<sup>238</sup>

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<sup>235</sup> Trengove (2014) p 18.

<sup>236</sup> *Ibid.* See also *Mistry v Interim Medical and Dental Council of SA* 1998 (4) SA 1127 (CC) par 27.

<sup>237</sup> Trengove (2014) p 13.

<sup>238</sup> Trengove supplementary (2014) p 4.

## 4.8 APPLICATION OF INFORMATION REQUESTS IN OTHER JURISDICTIONS

The Organisation for Economic Co-Operation and Development,<sup>239</sup> has internationally recognised the need for revenue authorities to improve access to bank information for tax purposes, specifically to enable such authorities to prevent and combat illegal activities and tax avoidance.<sup>240</sup> It is also an international standard for banks to protect the confidentiality of their clients' financial affairs, and to not disclose any customer's information that might "potentially endanger the commercial and financial wellbeing of the accountholder."<sup>241</sup>

Many of the OECD members have already enforced a type of information sharing with their revenue authorities, provided that stringent safeguards are in place and maintained to ensure that the information provided is only used for the statutory purpose under which it was acquired.<sup>242</sup> For example, in Germany the revenue authority is not allowed to request information of their clients' bank accounts for purposes of only verifying whether interest has been reported correctly or not.<sup>243</sup> In Belgium the bank secrecy is strictly applied, whereby information relating to tax can only be requested should the revenue authority already have conducted an audit and have found a reasonable suspicion of non-compliance or fraud by the taxpayer.<sup>244</sup>

It is evident that from the above survey conducted by the OECD, that many countries allow the sharing of information with their revenue authorities, but they still strictly apply bank secrecy and only allow access to information should it be obliged by a statutory provision and where there are safeguards to ensure that the information is not used for ulterior purposes.

## 4.9 CONCLUSION

Section 46 of the Tax Administration Act gives SARS very broad information gathering powers. This provision itself is necessary to enable SARS to administer the Tax Administration Act as provided for in section 3(2) of the Tax Administration Act. However, SARS' application of the provision is somewhat questionable at times.

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<sup>239</sup> Hereinafter referred to as the OECD.

<sup>240</sup> OECD (2000) *Improving Access to Bank information for tax purposes*. Paris: OECD Publication Services, p 9.

<sup>241</sup> *Ibid.*

<sup>242</sup> See also *id* at p 21.

<sup>243</sup> See also *id* at p 55.

<sup>244</sup> *Ibid.*

As confirmed and discussed above, SARS has on numerous occasions requested information without adherence to their own statutory information request provision. Many of the requests did not state the specific administrative function that they were acting under in terms of the Tax Administration Act, nor were some of the requests a clear link between the information requested and the administrative function that SARS was wanting to fulfil. SARS also does not clearly identify the taxpayer(s) within all the information requests received, as it seems that they are attempting to lessen their information gathering administration by rather approaching a third party that can provide all the information, than approaching each taxpayer separately.

In events such as mentioned above, the taxpayer (together with the third party in certain instances) will be able to utilise the rights enshrined by PAJA against the actions of SARS, and the rights of the PoPI against the processing of the information done by both SARS and the relevant third parties. However, the burden placed on third parties is not only pecuniary in nature,<sup>245</sup> but also seems unmanageable given the constant increasing amount of information requests received annually.<sup>246</sup> The banks, and any other third party, are tasked with balancing the rights of both SARS and its customers, but it seems that one of the few rights that the third party can enforce in itself is the right to inform SARS that it is not able to comply with an information request, and the right to oppose any claim submitted by its customer, all of which requires additional administration and possible legal costs by the third party to enforce.

In summary, in the event that SARS ensures that the information requests are consistent with the requirements of section 46 of the Tax Administration Act, the information request will be “valid and enforceable.”<sup>247</sup>

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<sup>245</sup> Trengove (2014) p 6.

<sup>246</sup> BASA Interview (2014).

<sup>247</sup> Standing Committee on Finance (2011) p 30.



## CHAPTER 5: PRESERVATION ORDERS

### 5.1 OVERVIEW

The Tax Administration Act allows SARS to obtain a preservation order from a court in the event that SARS needs to prevent any asset disposal that can frustrate the collection of tax. This is allowed per section 163 of the Tax Administration Act, which states the following:

- (1) A senior SARS official may, in order to prevent any realisable assets from being disposed of or removed which may frustrate the collection of the full amount of tax that is due or payable or the official on reasonable grounds is satisfied may be due or payable, authorise an ex parte application to the High Court for an order for the preservation of any assets of a taxpayer or other person prohibiting any person, subject to the conditions and exceptions as may be specified in the preservation order, from dealing in any manner with the assets to which the order relates.
- (2)
  - (a) SARS may, in anticipation of the application under subsection (1) seize the assets pending the outcome of an application for a preservation order, which application must commence within 24 hours from the time of seizure of the assets or the further period that SARS and the taxpayer or other person may agree on.
  - (b) Until a preservation order is made in respect of the seized assets, SARS must take reasonable steps to preserve and safeguard the assets including appointing a curator *bonis* in whom the assets vest.
- (3) A preservation order may be made if required to secure the collection of the tax referred to in subsection (1) and in respect of:
  - (a) realisable assets seized by SARS under subsection (2);
  - (b) the realisable assets as may be specified in the order and which are held by the person against whom the preservation order is being made;

- (c) all realisable assets held by the person, whether it is specified in the order or not; or
  - (d) all assets which, if transferred to the person after the making of the preservation order, would be realisable assets.
- (4) The court to which an application for a preservation order is made may:
- (a) make a provisional preservation order having immediate effect;
  - (b) simultaneously grant a rule nisi calling upon the taxpayer or other person upon a business day mentioned in the rule to appear and to show cause why the preservation order should not be made final;
  - (c) upon application by the taxpayer or other person, anticipate the return day for the purpose of discharging the provisional preservation order if 24 hours" notice of the application has been given to SARS; and
  - (d) upon application by SARS, confirm the appointment of the curator *bonis* under subsection (2)(a) or appoint a curator *bonis* in whom the seized assets vest.
- (5) A preservation order must provide for notice to be given to the taxpayer and a person from whom the assets are seized.
- (6) For purposes of the notice or rule required under subsection (4)(b) or (5), if the taxpayer or other person has been absent for a period of 21 business days from his or her usual place of residence or business within the Republic, the court may direct that it will be sufficient service of that notice or rule if a copy thereof is affixed to or near the outer door of the building where the court sits and published in the Gazette, unless the court directs some other mode of service.
- (7) The court, in granting a preservation order, may make any ancillary orders regarding how the assets must be dealt with, including:
- (a) authorising the seizure of all movable assets;
  - (b) if not appointed under subsection (4)(d), appointing a curator *bonis* in whom the assets vest;

- (c) realising the assets in satisfaction of the tax debt;
  - (d) making provision as the court may think fit for the reasonable living expenses of a person against whom the preservation order is being made and his or her legal dependants, if the court is satisfied that the person has disclosed under oath all direct or indirect interests in assets subject to the order and that the person cannot meet the expenses concerned out of his or her unrestrained assets; or
  - (e) any other order that the court considers appropriate for the proper, fair and effective execution of the order.
- (8) The court making a preservation order may also make such further order in respect of the discovery of any facts including facts relating to any asset over which the taxpayer or other person may have effective control and the location of the assets as the court may consider necessary or expedient with a view to achieving the objects of the preservation order.
- (9) The court which made a preservation order may on application by a person affected by that order vary or rescind the order or an order authorising the seizure of the assets concerned or other ancillary order if it is satisfied that:
- (a) the operation of the order concerned will cause the applicant undue hardship; and
  - (b) the hardship that the applicant will suffer as a result of the order outweighs the risk that the assets concerned may be destroyed, lost, damaged, concealed or transferred.
- (10) A preservation order remains in force:
- (a) pending the setting aside thereof on appeal, if any, against the preservation order; or
  - (b) until the assets subject to the preservation order are no longer required for purposes of the satisfaction of the tax debt.
- (11) In order to prevent any realisable assets that were not seized under subsection (2) from being disposed of or removed contrary to a preservation order under this section, a senior SARS official may seize the

assets if the official has reasonable grounds to believe that the assets will be so disposed of or removed.

- (12) Assets seized under this section must be dealt with in accordance with the directions of the High Court which made the relevant preservation order.

Recently, the High Court was approached to determine the application of section 163 of the Tax Administration Act preservation order. In the unreported case of *SARS v Van der Merwe*,<sup>248</sup> the daughter of a Cape Town business man received a monetary gift to the value of R143 million and two luxury cars worth R2,75 million from an unknown Arabian man.<sup>249</sup> SARS suspected that the gifts were actually intended for her father, which SARS had to collect in order to satisfy his current tax debt.<sup>250</sup> The court had to determine when SARS would be allowed to prevent any asset disposal, as the common law historically only allowed a preservation order if SARS already provided proof that the asset would be disposed, which is in contrast with a preservation order in terms of section 163 of the Tax Administration Act as it allows the order based on a reasonable suspicion of SARS.<sup>251</sup>

The court held that the story of the respondent was very “far-fetched” and the preservation order was, therefore, confirmed, even though it was only based on a reasonable suspicion by SARS.<sup>252</sup> The judge further stated that:

Whilst the grant of a preservation order may be considered harsh, there are compelling reasons within the context of our constitutional democracy why steps which assist the fiscus securing the collection of tax are required, which include court orders to preserve assets so as to secure the collection of tax. Had it been intended by the legislature that the court infuse the requirement of necessity to prevent dissipation into a determination as to whether a preservation order should be granted in terms of section 163(3), as much would have apparent from the statute.<sup>253</sup>

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<sup>248</sup> 2014 ZAQCHC 59 (Western Cape Division, 28 February 2014).

<sup>249</sup> PwC (2014) Synopsis: Tax Today. Available at [http://www.pwc.co.za/en\\_ZA/za/assets/pdf/synopsis-may-2014.pdf](http://www.pwc.co.za/en_ZA/za/assets/pdf/synopsis-may-2014.pdf) (accessed on 20 July 2014) p 4.

<sup>250</sup> *Ibid.*

<sup>251</sup> See also *id* at p 5.

<sup>252</sup> *Ibid.*

<sup>253</sup> Van der Merwe case.

SARS is, therefore, able to make use of the preservation in terms of section 163 of the Tax Administration Act if they have a reasonable suspicion that the assets will be disposed of which could hamper their collection of tax. This legislative intention is also evident in section 163(2) of the Tax Administration Act, where SARS can seize and revoke the assets, in a matter of urgency, up to 24 hours prior to obtaining a preservation order.”<sup>254</sup>

When the assets are held by a third party, it is of utmost importance that the third party clearly understands which assets are part of the preservation order and in circumstances where section 163(2) of the Tax Administration Act is applicable, to closely monitor the 24-hour period. Should the third party not take care, it can open a window for civil suits from the taxpayer, because assets are then seized or removed without a valid statutory obligation laid upon the third party.

## **5.2 DOES A PRESERVATION ORDER INFRINGE A TAXPAYER’S RIGHT TO JUST ADMINISTRATIVE ACTION AS PROVIDED FOR IN PAJA?**

Determination has to be made on whether a SARS’ application for a preservation order in terms of section 163 of the Tax Administration Act will constitute on “administrative action” as defined in section 1 of PAJA. When utilising section 163 of the Tax Administration Act, SARS makes a decision to approach the court for a preservation order in order to preserve certain assets related to the taxpayer. The preservation order granted will have an extreme adverse effect on a taxpayer’s right to property, *inter alia*, and it is not specifically excluded from the application of PAJA.<sup>255</sup>

In order for the administrative action to be procedurally fair in terms of section 3(2)(b) of the PAJA, SARS is required to give the taxpayer the following:

- (2)(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1):
- (i) adequate notice of the nature and purpose of the proposed administrative action;
  - (ii) a reasonable opportunity to make representations;

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<sup>254</sup> SARS: Legal and Policy Division (2013) p 58.

<sup>255</sup> Sec 2 of PAJA.

- (iii) a clear statement of the administrative action;
- (iv) adequate notice of any right of review or internal appeal, where applicable; and
- (v) adequate notice of the right to request reasons in terms of section 5.<sup>256</sup>

However, if there are reasonable and justifiable reasons, SARS will not be compelled to meet the latter requirements.<sup>257</sup>

SARS should, therefore, ensure that the taxpayer is informed of the preservation order at the appropriate time, “as the taxpayer must be given the opportunity to oppose the preservation order” as provided for in section 163(4)(b) of the Tax Administration Act. Should the taxpayer not be afforded this opportunity without reasonable and justifiable reasons from SARS or the court, it would constitute a procedurally unfair administration action.

### **5.3 WILL THE THIRD PARTY, WHICH HAS TO ACTION THE PRESERVATION ORDER, BE ALLOWED TO INFORM THE TAXPAYER?**

Especially in circumstances where a bank has been approached to place a hold on all funds and accounts of the taxpayer as per the preservation order, the affected taxpayer will approach the bank and demand an explanation for not being able to access accounts, may at times, alongside his/her attorney, threaten legal action.<sup>258</sup>

In the event that the third party informs the taxpayer before the preservation order has been actioned, thus giving the taxpayer an opportunity to withdraw funds, the third party will be held liable in its personal capacity or guilty of an offence in terms of section 234(i) or (p) of the Tax Administration Act, which states that:<sup>259</sup>

A person who wilfully or without just cause:

- (i) fails to comply with a directive or instruction issued by SARS to the person under the tax Act;
- (ii) fails on neglects to withhold and pay to SARS an amount of tax as and when required under the tax Act;

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<sup>256</sup> Sec 3(2)(b) of PAJA.

<sup>257</sup> Sec 3(4)(a) of PAJA.

<sup>258</sup> BASA Interview (2014).

<sup>259</sup> Croome (2014) p 18.

- (iii) is guilty of an offence and, upon conviction, is subject to a fine or imprisonment for a period not exceeding two years.

On the other side, it seem apparent that the third party will be able to inform the taxpayer only after application of the preservation order and only in cases where it does not relate to a criminal matter.<sup>260</sup> The difficulty in this lies in determining whether the preservation order relates to a criminal matter or not, therefore, to avoid any possible offences being imposed, it is advised that the third party does not inform the taxpayer and rather refer them directly to SARS or the appointed curator, as they ultimately have the duty to inform the taxpayer accordingly.

#### **5.4 CONCLUSION**

SARS can obtain a preservation order on a reasonable suspicion that the taxpayer will dispose of assets or funds, which will hamper SARS' collection of tax.

When a court provides a preservation order in terms of section 163 of the Tax Administration Act, it is safest for any third party concerned to let SARS or the appointed curator inform the affected taxpayer of the preservation order sought and obtained against him/her, to ensure that the taxpayer is in no way put in a position by the third party whereby it can withdraw the funds or dispose of the assets in question.

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<sup>260</sup> Sec 67 and 68(i)(d) of Tax Administration Act. See also *id* at p 19.

## CHAPTER 6: AGENT APPOINTMENT

### 6.1 OVERVIEW

SARS has been given the power to appoint any third party as an agent for collection of outstanding SARS tax debts from the taxpayer. This power is governed by section 179 of the Tax Administration Act, which states the following:

- (1) A senior SARS official may by notice to a person who holds or owes or will hold or owe any money, including a pension, salary, wage or other remuneration, for or to a taxpayer, require the person to pay the money to SARS in satisfaction of the taxpayer's outstanding tax debt.
- (2) A person that is unable to comply with a requirement of the notice, must advise the senior SARS official of the reasons for the inability to comply within the period specified in the notice and the official may withdraw or amend the notice as is appropriate under the circumstances.
- (3) A person receiving the notice must pay the money in accordance with the notice and, if the person parts with the money contrary to the notice, the person is personally liable for the money.
- (4) SARS may, on request by a person affected by the notice, amend the notice to extend the period over which the amount must be paid to SARS, to allow the taxpayer to pay for the basic living expenses of the taxpayer and his or her dependants.

SARS can, therefore, appoint a bank to pay funds over into the taxpayer's bank account.<sup>261</sup> In practice, it has been found that SARS resorts to this invasive debt collecting method as their first collecting method, as opposed to only a measure implemented where the taxpayer failed to respond to previous demands.<sup>262</sup> It is possible that the application of this provision can potentially infringe on a taxpayer's fundamental right to property.

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<sup>261</sup> Croome (2010) p 42.

<sup>262</sup> *Ibid.*



This researcher will do a breakdown of the framework of the provision to determine whether any portion of section 179 of the Tax Administration Act could be regarded as being inconsistent with the Constitution or other related legislation.

#### 6.1.1 “A senior SARS official may by notice...”

The agent appointment can only be submitted to a third party by a senior SARS official. The issue lies in the fact that no-one has an indication of who such senior SARS officials are, as SARS has on several occasions mentioned that they are a limited group.<sup>263</sup>

In the event that the agent appointment is not signed by a designated senior SARS official, it cannot be accepted by the third party, because any actions done by the third party under a such notice will be inconsistent with the Tax Administration Act and will be open for implementation of civil actions by the affected taxpayer.

During this researcher’s discussions with regular appointed third parties, an issue was raised where SARS would occasionally forward agent appointments which were signed by a regular SARS official on behalf of a senior SARS official.<sup>264</sup> The third party should be weary of acting on such a request should evidence, for example a power of attorney, not have been provided to confirm the SARS official’s right to act on behalf of the senior SARS official.

In light of the above, even though the third party could face possible civil actions from the taxpayer when acting on a notice that does not meet the requirements of section 179 of the Tax Administration Act, certain contrasting judgements state otherwise. In the case of *Smartphone SP (Pty) Ltd v ABSA Bank Ltd and Another*,<sup>265</sup> the court held that the third party appointed as an agent, is obligated to only act according to the notice and to not determine or query the validity of such notice. Should the third party not comply with the notice, certain sanctions can be applied.<sup>266</sup>

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<sup>263</sup> SARS (2013) An employer’s guide to the Third Party Appointment (AA88) process. Available at <http://www.sars.gov.za/AllDocs/OpsDocs/Guides/EMP-ELEC-02-G03%20-%20An%20Employers%20Guide%20to%20the%20AA88%20Third%20Party%20Appointment%20Process%20-%20External%20Guide.pdf> (accessed 03 August 2014) p 4.

<sup>264</sup> BASA Interview (2014).

<sup>265</sup> 2004 (3) SA 65 (W). See also Klue (2009) p 9-35.

<sup>266</sup> *Ibid.* The case dealt with agent appointments made in terms of sec 47 of the Value Added Tax Act, 89 of 1991.

This principle was also confirmed in the case of *Shaik v Standard Bank of SA Ltd*,<sup>267</sup> where it was provided that legislation gives the power of SARS to appoint an agent, whether the notice itself refers to an incorrect provision, it will not invalidate the “legislative or administrative act.”<sup>268</sup>

It appears that the courts and SARS are of the view that the third party can be held responsible for not applying the notice, regardless of whether the notice adheres to the legislative requirements of the Tax Administration Act or not. The third party seems to be liable whether it acts on the invalid notice or whether it does not act. It places the third party in a very unfair position, with fewer remedies than that of the taxpayer and SARS, as the third party can still be held liable by the affected taxpayer if it acted on an invalid request.

#### **6.1.2 “[B]y notice to a person who holds or owes or will hold or owe any money including a pension, salary, wage or other remuneration, for or to a taxpayer...”**

This part of the provision allows SARS to appoint any third party that has or will have any hold of money or debt with the taxpayer. This can, therefore, include a broad spectrum of possible third parties, including employers, any debtors of the taxpayer, financial institution(s), holders of any insurance funds such as retirement benefits and even attorneys holding trust accounts on behalf of the taxpayer.<sup>269</sup> The application is very wide and it could be extended even further.

An example of such appointments includes when SARS issued a bank with an AA88 requesting, in general, that a certain amount be paid to SARS in relation to a specified taxpayer.<sup>270</sup> The bank advised SARS that the bank account contained no funds, whereby SARS then confirmed that they were aware of a lease agreement between the bank and the taxpayer.<sup>271</sup> The bank then had to divert their lease payments to SARS in order to satisfy the taxpayer’s tax debt.<sup>272</sup>

The practical issues with the latter scenario is, firstly, the fact that the appointed third party may struggle to obtain updated information on the tax debt remaining, therefore, the possibility of paying more to SARS than actually required. This can place the third

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<sup>267</sup> 2007 (SCA) 70 SATC 21. See also Klue (2009) p 9-35.

<sup>268</sup> Klue (2009) p 9-36.

<sup>269</sup> SARS AA88 (2013) p 4.

<sup>270</sup> BASA Interview (2014).

<sup>271</sup> *Ibid.*

<sup>272</sup> *Ibid.*

party in a difficult predicament as the third party has a contractual agreement with the taxpayer in terms of the rental of a building, which placed an obligation on the bank to pay a monthly rental amount. This obligation was, however, legally limited by the application of section 179 of the Tax Administration Act, but this obligation only lasted for as long as the tax debt remained.

In other words, should the third party pay more to SARS than what is due, they will be acting outside the parameters of the agent appointment and be in contravention of the terms of the contractual agreement, thus triggering a possible civil issue between the taxpayer and third party. The third party should, therefore, ensure that they obtain updated account statements monthly before making payment, as the taxpayer could also settle the debt unknowingly to the third party, which can also result in the above mentioned scenario.

The second practical issue relates to the lay-out and wording of the agent appointment itself. SARS is currently issuing a general notice in terms of section 179 of the Tax Administration Act and with such notices they require the third party to always establish whether they hold or owe any money to each and every taxpayer. The notice does not distinguish when the third party has to determine if it only holds or owes any money.<sup>273</sup> This will make the already administrative intensive task of applying, *inter alia*, agent appointments even more laborious.

Many institutions, such as banks, have separate departments dealing with different transactions which are not interlinked with one another, and do not have the resources to deal specifically with SARS' demands whilst having to keep their business running. In order for the bank to determine if they owe any money or hold any money per taxpayer on each agent appointment, they will have to appoint resources in almost ten different departments to understand and search the systems for the taxpayer accordingly.

Banks receive an average of 800 agent appointments per month relating to their clients and employees.<sup>274</sup> To administer and monitor these vast, and ever increasing, amounts of agent appointments is extremely costly and a burdensome administrative task. This raises the question of whether SARS, in actual fact, applies the basic values and principles governing the public administration as provided for in section 195 of the

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<sup>273</sup> *BASA Interview (2014)*.

<sup>274</sup> *Ibid.*

Constitution, which states that SARS must promote the principle of “efficient, economic and effective use of resources.”

The constitutionality of agent appointments, previously governed by section 99 of the Income Tax Act before the enactment of the Tax Administration Act, was addressed in the case of *Hindy v Nedcor Bank Ltd*,<sup>275</sup> whereby SARS erroneously refunded a taxpayer approximately R70 000 relating to the 1988 and 1990 tax years. Some years later, SARS discovered its error and took steps to recover this money. This was despite the Income Tax Act which does not allow actual assessments to be re-opened after a prescription period of three years has lapsed. The taxpayer objected to SARS’ actions. However, in March 1997, SARS appointed the taxpayer’s bank as an agent in terms of section 99 of the Tax Administration Act, without advising the taxpayer, instructing the bank to pay over the amount in dispute to SARS from the taxpayer’s account. The taxpayer took the matter to court seeking, *inter alia*, an order to declare SARS’ action to be unconstitutional. The court held, however, that section 99 of the Income Tax Act was not unconstitutional, as it is necessary to enhance and facilitate SARS’ ability to recover tax debts that were outstanding.<sup>276</sup>

## **6.2 DOES SARS’ APPLICATION OF SECTION 179 OF THE TAX ADMINISTRATION ACT INFRINGE A TAXPAYER’S RIGHT TO JUST ADMINISTRATIVE ACTION AS PROVIDED FOR IN PAJA?**

As previously established, for a taxpayer to rely on PAJA’s remedies, it must be proven that SARS’ actions falls within the definition of “administrative action” as defined in section 1 of PAJA.<sup>277</sup> Section 2 of the SARS Act defines SARS as being an organ of state as per section 239 of the Constitution; therefore, PAJA will apply to any decisions made by SARS officials and/or the Commissioner of SARS.<sup>278</sup> The issuing of an agent appointment will constitute a decision as SARS is essentially making a demand for the enactment of a certain action. The decision has been made by SARS in the exercising of its public power in terms of section 179 of the Tax Administration Act.

As a final determination for PAJA to apply, the decision must have an adverse effect on the rights of the taxpayer.<sup>279</sup> In terms of section 25 of the Constitution “no person may

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<sup>275</sup> 1999 2 All SA 38 (W). See also Klue (2009) p 9-34.

<sup>276</sup> *Ibid.*

<sup>277</sup> Croome (2010) p 209.

<sup>278</sup> *Ibid.*

<sup>279</sup> See also *id* at p 211.

be deprived of property ....” Elaboration of the term “property” is required in order to determine whether the taxpayer, in this case, will have been infringed upon for his/her right to property. De Waal (2001) describes the term “property” as follows:

Property is a word with such a wide variety of meanings that it is almost impossible to define accurately or exhaustively. For this reason, lawyers in the Roman-Dutch legal tradition prefer to conceptualise property as a legal relationship between persons and corporeal (physically tangible) things. Property is then narrowly defined as the object of this relationship, the physical object of a real right.<sup>280</sup>

In terms of the above, the funds within a bank account or investment account, as example, will constitute property. Therefore, the deprivation of a person’s money will have an adverse effect on the taxpayer’s fundamental rights to property. SARS’ actions in terms of section 179 of the Tax Administration Act will constitute an administrative action and the taxpayer can rely on the remedies of PAJA. However, before a court will allow a judicial review of SARS’ decision, it has to be established whether the Tax Administration Act provides any remedies to the taxpayer for the adverse effect caused by section 179 of the Tax Administration Act, as the parties will be required to exhaust all internal remedies beforehand. Section 179(2) of the Tax Administration Act gives a person the opportunity to advise a senior SARS official should they not be able to comply with the agent appointment. SARS will then have the power to withdraw or amend the notice, depending on the circumstances for the non-compliance by that person.

This provision, therefore, provides a remedy to the appointed third party, and should SARS not provide, withdraw or amendment the notice accordingly, the third party will be able to request reasons for such administrative action.<sup>281</sup> However, what about the affected taxpayer’s right to oppose the application of such a notice? Section 179 of the Tax Administration Act provides no remedies for the affected taxpayer to request any withdrawal or amendment of the notice, and in practice, the notice will usually request the third party not to inform the taxpayer of such notice. PAJA provides the taxpayer with the right to administrative action, which is underwritten with the principle of *audi alteram partem*. This principle provides that “no person should be judged without a fair

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<sup>280</sup> De Waal (2001) p 413.

<sup>281</sup> Sec 5 of PAJA.

hearing in which each party is given the opportunity to respond to the evidence against them.”<sup>282</sup>

As mentioned, section 179 of the Tax Administration Act does not expressly provide any notification to the taxpayer of the agent appointment issued against his/her funds, which was one of the main differences noticed between the Tax Administration Act agent appointment and the civil procedure of a garnishee order. A garnishee order is made by a court, ordering the payment of money by a third party to the judgement creditor to satisfy the “judgement debt and cost.”<sup>283</sup> Tax specialist, Van der Walt (2012), summarised the main differences as follows:

- To obtain a garnishee order a court order is a prerequisite. A third party appointment under section 179 requires no court order
- Where the garnishee is dissatisfied with the garnishee order being issued, he/she could approach the court for redress. A third party appointed under section 179 is legally obliged to transfer funds held in favour of the taxpayer to SARS, otherwise such agent could face personal liability for the outstanding amount (see above), whereas the debtor can beforehand contest the issuing of a garnishee order if this is impossible with regard to section 179 since the taxpayer will often be oblivious that SARS intends making a third party appointment
- On application for a garnishee order, the court could examine the debtor’s financial position and vary, or set-aside the order accordingly. The section 179 third party appointment does not provide for such an examination – effectively there is no *audi alteram partem* chance for the impacted taxpayer. There is only an *ex post facto* examination of affordability under section 179(4) of the Tax Administration Act (see above).<sup>284</sup>

It is clear from the above that SARS has been awarded wide powers in terms of Tax Administration Act, which does not necessarily provide a taxpayer the right to fairly respond to the evidence held against him/her, thus not affording the taxpayer fair and just administration.

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<sup>282</sup> Klue (2009) p 9-35.

<sup>283</sup> Keulder (2011) p 29.

<sup>284</sup> Van der Walt J (2012) Third party appointments by SARS under the Tax Administration Act 16 November 2012. Available at <http://www.thesait.org.za/news/10884/Third-party-appointments-by-SARS-under-the-Tax-Administration-Act.html> (accessed 04 August 2014).

However, in the case of *Gardener v East London Transitional Local Council*,<sup>285</sup> the court held that the *audi alteram partem* principle is not absolute. This was also established in the case of *Smartphone*, where it was provided that an agent appointment does not infringe a taxpayer's right to administrative action, because the taxpayer still has other administrative remedies, such as to lodge an objection or appeal.<sup>286</sup> As stated previously, the speedy and effective collection of taxes must be enhanced and facilitated; therefore, such provisions will be limited in a reasonable and justifiable manner and will, therefore, be unconstitutional.<sup>287</sup>

In the light of the above, it is uncertain whether a taxpayer would succeed in a judicial review in terms of section 6 of PAJA for purposes of opposing the administrative action. SARS also stated in its response to the Standing Financial Committee's comments, that section 179 of the Tax Administration Act has two mechanisms which will provide assistance to taxpayers.<sup>288</sup> Firstly, the appointed third party can advise SARS if it is unable to comply with the notice, whereafter SARS can withdraw or amend the notice.<sup>289</sup> Lastly, should the affected taxpayer request it, SARS can amend the notice to allow for a gradual repayment of the amount over a period of time.<sup>290</sup>

It is, in this researcher's opinion, uncertain how this would work in practice, as the third party is directly instructed in each notice not to inform the taxpayer of such notices, and many taxpayers will only realise after a period that money has been taken from their accounts, depending on the size of the amount. Usually, the taxpayer will bombard the third party with queries and threatening legal actions, whereafter they will approach SARS and then only be able to oppose the administrative action. This will require the affected taxpayer to spend an extensive amount of their own time and effort just to be able to utilise their remedies.

### 6.3 APPLICATION OF AGENT APPOINTMENTS IN OTHER JURISDICTIONS

According to the government of Canada, the Canadian Revenue Agency,<sup>291</sup> has the "highest rate of collection compliance in the world."<sup>292</sup> The CRA has numerous

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<sup>285</sup> 1996 (3) SA 99 (E) at 116. See also Keulder (2011) p 39.

<sup>286</sup> *Ibid.*

<sup>287</sup> *Hindy case.*

<sup>288</sup> Standing Committee on Finance (2011) p 51.

<sup>289</sup> *Ibid.*

<sup>290</sup> *Ibid.*

<sup>291</sup> Hereinafter referred to as the CRA.

collection actions, dependent on the level of intervention that CRA anticipates being necessary. Their first level is mainly based on automated responses and normal payment arrangements.<sup>293</sup> When such steps fail or if it is anticipated that a higher level of intervention is required, the extra steps will include a search for assets or implementation of legal action, and only thereafter will the CRA initiate jeopardy orders and further legal actions which will allow the CRA to begin collection action immediately.<sup>294</sup>

The legal actions referred to includes the collection from third parties, but such collections can only be applied after 90 days of date that the CRA mailed the notice of assessment or reassessment.<sup>295</sup> The 'third parties' referred to by the CRA will only include those that owe money to the taxpayer, and do not expressly apply to any third party that holds money on behalf of the taxpayer.<sup>296</sup> In the event that the CRA wishes to seize any property or goods of the taxpayer, the CRA must provide the taxpayer with a 30 day notice.<sup>297</sup>

In Australia however, the collection of tax debts is done by external collection agencies, whereby one will be notified and be able to reach a payment agreement accordingly.<sup>298</sup> Only in the event that an agreement can't be reached between the taxpayer and external collection agency, stronger collection methods will be taken, including garnishee orders and other legal actions.<sup>299</sup> The only utilisation of third parties to collect and pay the tax debt on behalf of the taxpayer is in terms of the garnishee order obtained from a court.<sup>300</sup>

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<sup>292</sup> Canada Revenue Agency (2014) When you owe money – collections at the CRA. Available at <http://www.cra-arc.gc.ca/gncy/clctns/menu-eng.html> (accessed 6 August 2014).

<sup>293</sup> Office of the Auditor General of Canada (2013) Spring Report of the Auditor General of Canada. Available at [http://www.oag-bvg.gc.ca/Internet/English/parl\\_oag\\_201304\\_e\\_38212.html](http://www.oag-bvg.gc.ca/Internet/English/parl_oag_201304_e_38212.html) (accessed 11 August 2014).

<sup>294</sup> *Ibid.*

<sup>295</sup> *Ibid.*

<sup>296</sup> *Ibid.* See also sec 224(1) of the Income Tax Act (R.S.C, 1985, C.1 (5<sup>th</sup> Supp.) hereinafter the CRA Income Tax Act.

<sup>297</sup> Sec 225 of the CRA Income Tax Act.

<sup>298</sup> Australian Taxation Office (2013) Managing your tax debt 05 July 2013. Available at <https://www.ato.gov.au/General/Managing-your-tax-debt/Help-with-paying-your-tax-debt/> (accessed 11 August 2014).

<sup>299</sup> *Ibid.*

<sup>300</sup> *Ibid.*



## 6.4 CONCLUSION

SARS has wide collection powers as awarded, *inter alia*, in terms of section 179 of the Tax Administration Act. The collection method of appointing any agent who will or currently does hold or owe any money related to the taxpayer is seen as an extremely invasive collection method on both the third party and the taxpayer.

Although both the third party and taxpayer can access the remedies set forth in the Tax Administration Act and PAJA, the third party seems to be held liable in certain circumstances regardless if such third party acts on the notice or not, and regardless of whether the notice was valid in terms of the requirements set-out in section 179 of the Tax Administration Act or not. There is also no remedy for the third party in such circumstances, without having to undergo legal expenses and long-winded court procedures.

Even though that it has been concluded that section 179 of the Tax Administration Act will most likely satisfy the reasonable and justifiable constitutional limitation test, an affected party can still oppose the administrative action based on the *obiter dicta* as in the *Burchell* case, where the court held that the less intrusive procedure should always be followed. In this researcher's opinion, and per the international trend as discussed above, SARS will still be able to reach the same result if automated responses were used as their actual first attempt, and garnishee orders only used in the event that the first collection method has been unsuccessful together with third party appointments that only allow the seizure of debt due to the taxpayer. This will allow the taxpayer to still afford his/her basic living expenses, and allow most taxpayers not being dishonoured by their banks and remain creditworthy.

## CHAPTER 7: REFUNDS OF EXCESS PAYMENTS

### 7.1 OVERVIEW

A taxpayer is entitled to receive a refund from SARS if such a refund is properly reflected in an assessment, or in the event that the taxpayer erroneously paid more to SARS than the amount provided in the assessment.<sup>301</sup> However, if SARS pays a refund to a taxpayer in error, the taxpayer will not be entitled to such an amount and, furthermore, section 190 of the Tax Administration Act states that:

- (1) A person is entitled to a refund of:
  - (a) an amount properly refundable under a tax Act and if so reflected in an assessment; or
  - (b) the amount erroneously paid in respect of an assessment in excess of the amount payable in terms of the assessment.
- (2) SARS need not authorise a refund as referred to in subsection (1) until such time that a verification, inspection or audit of the refund in accordance with Chapter 5 has been finalised.
- (3) SARS must authorise the payment of a refund before the finalisation of the verification, inspection or audit if security in a form acceptable to a senior SARS official is provided by the taxpayer.
- (4) A person is entitled to a refund under subsection (1) (b) only if the refund is claimed by the person within three years, in the case of an assessment by SARS, or five years, in the case of self-assessment, from the date of the assessment.
- (5) If SARS pays to a person by way of a refund any amount which is not properly payable to the person under a tax Act, the amount is regarded as an outstanding tax debt from the date on which it is paid to the person.
- (6) A decision not to authorise a refund under this section is subject to objection and appeal.

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<sup>301</sup> Sec 190(1) of the Tax Administration Act.

If SARS pays to a person by way of a refund any amount which is not properly payable to the person under a Tax Act, the amount is regarded as an outstanding tax debt from the date on which it is paid to the person.

This provision provides SARS the power to recover the improperly paid refund by means of using the Tax Administration Act provided collection mechanisms for outstanding tax debts, such as utilising an agent appointment.<sup>302</sup> However, in practice the collection of such refunds has been extended by SARS, in that they request for a taxpayer's account to be placed on hold or for the funds to be frozen until the collection of such funds can be done accordingly by means of submitting an agent appointment to the third party.<sup>303</sup>

The latter is done by SARS for purposes of protecting the fiscus, as SARS is constantly dealing with high quantities of refund claims annually.<sup>304</sup> Section 190 of the Tax Administration Act is, therefore, an important provision to enhance and facilitate SARS in ensuring that they collect refunds erroneously paid to taxpayers. It is likely that most parts of this section will pass the constitutional validity test as placing a reasonable and justifiable limitation on a taxpayer's fundamental rights.<sup>305</sup> However, the same cannot be said about SARS' application and actions arising from section 190(5) of the Tax Administration Act specifically.

## **7.2 WOULD SARS' ACTION TO FREEZE A TAXPAYER'S FUNDS BE AN "ADMINISTRATIVE ACTION" IN TERMS OF PAJA?**

In order for SARS to collect the erroneously paid refund, they must appoint the bank that holds the applicable account as an agent in terms of section 179 of the Tax Administration Act.<sup>306</sup> When probing the wording of section 179 of the Tax Administration Act, it in no way suggests that the appointed third party can place the taxpayer's account on hold or freeze the funds and not allow the taxpayer to access his/her accounts nor the funds therein for an undefined period. To the furthest extent,

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<sup>302</sup> SARS: Legal and Policy Division (2013) p 69.

<sup>303</sup> BASA Interview (2014).

<sup>304</sup> Standing Committee on Finance (2011) p 55. SARS stated that "in the 2009/10 year SARS processed corporate income tax refunds to the value of R10.9 billion, personal income tax refunds of R14.8 billion and value-added tax refunds of R117.4 billion".

<sup>305</sup> Sec 36 of the Constitution.

<sup>306</sup> Refer to discussions regarding the validity requirements of sec 179 of the Tax administration Act in Chapter 6 above.

this section merely allows the third party to “pay the money to SARS in satisfaction of the taxpayer’s outstanding tax debt.”<sup>307</sup>

Should the third party, such as a bank, place the account on hold and/or freeze the funds without acting under an express legislative obligation or contractual right, the affected taxpayer can implement a civil action against such third party for any loss obtained during such period. Neither section 190(5) nor section 179 of the Tax Administration Act provides the necessary legislative obligation to require the third party to place a hold on the taxpayer’s account or to freeze his/her funds until the amount outstanding can be safely returned to SARS. Furthermore, the contractual agreement between the bank and its tax paying customers only allows for such invasive actions in the event that the bank found fraud or has a suspicion of fraud on such account.<sup>308</sup>

The request from SARS to place a hold on a taxpayer’s account and/or funds is a decision made in exercising its public power under its own interpretation of section 190 and 179 of the Tax Administration Act. The decision has an extreme adverse effect on a taxpayer’s right to property, as the right to access their account and/or funds has been deprived.<sup>309</sup> The action can, therefore, be regarded as an “administrative action” and the taxpayer will be able to rely on the provisions and remedies of PAJA, including approaching a court for a judicial review and setting aside the notice due to administrative justice grounds.<sup>310</sup>

In this researcher’s view, for the refund to be repaid to SARS correctly, a correct assessment should be raised whereafter SARS then appoints a third party to pay the erroneously refund amount over as per the correct assessment. However, some judgements provide otherwise, such as in the case of *Oceanic Trust Co. Ltd. v SARS*.<sup>311</sup> In this case, the court had to determine the term “due” as per the repealed section 99 of the Income Tax Act, had the same meaning as “due and payable” in the equivalent section 47 of VAT Act.<sup>312</sup> The facts of the case were summarised by Klue (2009) as follows:

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<sup>307</sup> Sec 179 of the Tax Administration Act.

<sup>308</sup> BASA (2011) p 9.

<sup>309</sup> Sec 25 of the Constitution. This has been confirmed as falling within the definition of “property” as per Chapter 6 above.

<sup>310</sup> Sec 6 of PAJA.

<sup>311</sup> 74 SATC 127. See also Klue (2009) p 9-34.

<sup>312</sup> *Ibid.*

SARS had raised an assessment of the taxpayer on 20 July 2009, with the due date for payment being 1 September 2009. The taxpayer filed an objection to the assessment on 28 August 2009. On 23 July 2009, SARS appointed the taxpayer's bank as an agent in terms of section 99 which required the bank to pay R20 million from the taxpayer's bank account to SARS as part payment of the total amount assessed. The taxpayer lodged an urgent application for a declaratory order requiring SARS to repay this amount on the basis that it was taken from the taxpayer's bank account before the due date for payment. The court denied the application, and by the time the application was launched in October 2009, the tax had become payable and it would, therefore, save the purpose to issue the declaratory order.

In light of the above, it appears that SARS will be able to request the repayment of the erroneously paid refund without having to issue the correct assessment or inform the taxpayer, so as to ensure that the outstanding tax debt is collected in an efficient manner. Practically speaking, SARS will in any event need to issue a correct assessment to determine the exact amount that was improperly paid. Similar to the opposing of section 179 of the Tax Administration Act in Chapter 6 above, the affected taxpayer will be able to approach the court for a judicial review as the affected taxpayer has not been awarded with any internal remedies in the Tax Administration Act to oppose such "administrative action" by SARS.

### 7.3 CONCLUSION

This method of tax collection is extremely invasive, especially given the fact that it is due to errors on SARS' side. The Tax Administration Act Guide mentions that only when the taxpayer refuses to pay a tax debt, or is "recalcitrant, evasive or deceptive" will SARS utilise the recovery processes under section 179 of the Tax Administration Act.<sup>313</sup> This essentially requires that the taxpayer firstly be informed of the tax debt that is due and payable, in other words, SARS will comply with the *audi alteram partem* principle before issuing the notices.<sup>314</sup>

However, as established previously, in practice many taxpayers confirmed that they were not informed of such tax debts before SARS imposed the tax collection provisions and, furthermore, many of them had already made payment arrangements with SARS

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<sup>313</sup> SARS: Legal and Policy Division (2013) p 50.

<sup>314</sup> This principle was elaborated on and discussed in Chapter 6 above.

just to discover that it was ignored by SARS and other collection methods had been applied in conjunction.<sup>315</sup> Based on such circumstances, the affected taxpayer would most likely succeed in an application for a judicial review in terms of section 6 of PAJA.

Given the international trend as discussed in Chapter 6, the best and least intrusive process which will need to be followed by SARS in order to be able to legally oblige a third party to prohibit an account holder from accessing their funds, is proposed as follows (in this specific order):

- SARS needs to issue a revised assessment to the taxpayer, informing the taxpayer duly of the tax debt that is due and payable
- Only if the taxpayer refuses (for example) to pay such debt, can SARS initiate the process of obtaining a preservation order<sup>316</sup>
- If it is anticipated that the assets might be disposed or removed which may frustrate the collection,<sup>317</sup> SARS may then issue the third party with an Agent Appointment.<sup>318</sup>

Therefore, if SARS wishes to recover the tax debt from the third party's customers, the above process must be followed as banks, for example, are only allowed to provide access of its customers' accounts to third parties when compelled by law.<sup>319</sup> This will also lessen the burden on the appointed third parties, as they will not be inundated with queries from their clients relating to the application of the agent appointment notices.

[Words 24 094]

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<sup>315</sup> BASA Interview (2014).

<sup>316</sup> Sec 163 of the Tax Administration Act.

<sup>317</sup> Sec 163(2) of the Tax Administration Act.

<sup>318</sup> As per the requirements set out in either sec 179 or 190(5) of the Tax Administration Act.

<sup>319</sup> BASA (2011) p 9.

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