

**The constitutionality of the “pay now, argue later” rule in
terms of the Tax Administration Act.**

by

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SUMMARY

This dissertation endeavors to establish whether the Tax Administration Act, 28 OF 2011 sufficiently addresses the problems experienced by the VAT Act. More specifically, this dissertation will be investigating the taxpayers rights versus the powers afforded to the South African Revenue Service (SARS) in terms of the “pay now, argue later” rule and whether or not a successful balance between the two competing interests have been achieved.

The collection of tax is imperative in ensuring the economic welfare of a country and allows a government to achieve its socio-economic objectives. On the one hand, SARS is afforded certain powers to enable the effective and efficient collection of taxes in terms of the SARS Act, On the other hand the taxpayer is afforded certain constitutionally enshrined rights, which may only be limited, in terms of section 36 of the Constitution of South Africa, 1996 if such limitation is reasonable and justifiable.

One of the constitutional rights afforded to a taxpayer is the right to access to court. This right entails that when a dispute arises, the parties to the dispute have the right for the matter to be heard in an open court. The “pay now, argue later” rule may infringe upon this right as the rule establishes that a taxpayer must first pay an assessed amount before disputing the said amount. This procedure has been held to be constitutional, however this dissertation sets out to highlight certain constitutional problems previously experienced by the rule in terms of the VAT Act, as well as the current constitutional problems being experienced by the rule in terms of the TAX Administration Act.

CHAPTER 1

INTRODUCTION

1.1 INTRODUCTION

1.2 RESEARCH QUESTION

1.3 RESEARCH METHOD

1.4 EXPOSITION

1.5 LIMITATION OF SCOPE

1.1 INTRODUCTION

Taxation is not a new or unique practice, instead it can be seen as an idea that has developed over thousands of years and practiced worldwide. Providing a comprehensive definition of taxation is rather difficult but can be best described as a monetary-based compulsory contribution payable by the public as a whole or a substantial sector thereof to a government.¹ According to Croome, the practice of taxation can be dated back to the ancient Egyptians, where taxes were imposed in accordance with the rise and fall of the Nile River.²

The levying of tax is vital for a government to ensure that it achieves its economic objectives.³ Taxation also helps countries survive by defraying government expenditure as well as allowing a government to achieve socio-economic and political objectives. Taxes are levied in terms of legislation and such legislation should be consistent with that jurisdictions constitution.

The final Constitution of South Africa⁴ gives the South African government implied powers to levy taxes and through the enactment of the South African Revenue

¹ Croome et al. *Tax law an introduction* (2013) 5

² Croome BJ *Taxpayers' Rights in South Africa* (2010) 1.

³ Croome (2010) 3.

⁴ The Constitution of the Republic of South Africa, 1996. Citation of Constitutional Laws Act 5 of 2005 states that no act number must be associated with the Constitution of the Republic of South Africa as this act was not passed by Parliament, but was adopted by the Constitutional Assembly. Hereinafter it will be referred to as the Constitution.

Services Act,⁵ the South African Revenue Service was established.⁶ Along with its establishment SARS was granted certain powers to enable it to effectively retrieve taxes, such powers entail amongst others the ‘pay now, argue later’ rule,⁷ this rule may however infringe upon the right to access to court. It can be seen that there is an unequal relationship between SARS and the taxpayer, as the taxpayer does not freely elect to form part of this relationship. Croome states that;

“if taxpayers enter voluntarily into a relationship with the *fiscus* there might be some justification in arguing that they must simply submit to the Commissioner for SARS powers and accept that they have a few rights.’⁸

From this it can be seen that it is of vital importance that the rights of the taxpayer should be guarded and adhered to by the SARS.

From the outset it must be pointed out that the importance of levying tax cannot be under-stated. It is vital that SARS is given the powers to levy tax effectively and efficiently however of equal importance is that the rights of the taxpayer be protected. In order to accomplish this, a balance between the two competing aspects needs to be achieved. Accordingly, the main focus of this dissertation will be to determine whether the Tax Administration Act is consistent with the Constitution when applying the “pay now, argue later” rule. In doing so this dissertation will attempt to establish if a successful balance between SARS powers and the taxpayers’ rights have been achieved.

1.2 RESEARCH QUESTION

This dissertation endeavors to establish whether the Tax Administration Act sufficiently addresses the problems experienced by the application of VAT Act. More specifically, this dissertation will be investigating the taxpayers rights versus the powers afforded to SARS in terms of the “pay now, argue later” rule and whether or not a successful balance between the two competing interests have been achieved.

⁵ The South African Revenue Services Act Act 34 of 1997. Hereinafter referred to as the SARS Act.

⁶ Hereinafter referred to as SARS.

⁷ S 88 of the Income Tax Act 58 of 1962. Hereinafter referred to as the Income Tax Act.

⁸ Croome BJ *Taxpayers’ Rights in South Africa* (2010) 1.

1.3 RESEARCH METHOD

The research method used is that of a doctrinal type of legal research. This is research that provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and perhaps, predicts future developments of such rules. The different statutes, commentary and judicial decisions are identified, analysed, organised and amalgamated.

1.4 EXPOSITION

Chapter 2 provides a general discussion regarding the Constitution of the Republic of South Africa, 1996. In this chapter the importance of the Constitution will be highlighted as well as its enactment. Following this, a brief discussion on the Bill of Rights⁹ will be included and lastly this chapter will consider how one would go about challenging an infringement of one of the rights in the Bill of rights.

Chapter 3 focuses on the “pay now, argue later” rule as it applied prior to the enactment of the Tax Administration Act.¹⁰ The rule as applied in terms section 36 of the VAT Act will be considered and in doing so a comparison between the “pay now, argue later” rule and general rule in terms of civil appeals will be made. In order to obtain a better understanding of the “pay now, argue later” rule this chapter will examine the practical application of the rule in terms of section 36 of the VAT Act. This chapter also considers the constitutionality of the “pay now, argue later” rule by taking a close look at how the courts approached the question of constitutionality in the case of *Metcash Trading Ltd v Commissioner for the South African Revenue Service*.¹¹ Then academic perspective of the case will be discussed followed by the changes to the rule which, occurred after the case was decided.

⁹ The Bill of Rights are the fundamental right provided for in the Constitution of South Africa, 1996.

¹⁰ The Tax Administration Act 28 of 2011. Herein after referred to as TAA.

¹¹ *Metcash Trading Ltd v Commissioner for the South African Revenue Service* 2001 1 BCLR 1 (CC).

In chapter 4 the focus will shift to the “pay now, argue later” rule as applied in terms of section 164 of the TAA. This chapter will discuss the content of the “pay now, argue later” rule in terms of section 164 of the TAA. Then the chapter will consider the differences between the section 164 rule and the section 36 rule of the VAT Act and determine whether or not the section 164 rule addresses the problems experienced by the section 36 rule. The focus will then turn to the amended 164 rule of the TAA and whether the “pay now, argue later” rule as it now stands is constitutional or not.

The final chapter of this dissertation, Chapter 6, contains conclusions and recommendations regarding measures that can be implemented to ensure that the Constitution provides a balance between a taxpayer’s rights and SARS’ duty to collect taxes.

1.5 LIMITATION OF SCOPE

This study focuses on the powers afforded to SARS in terms of the “pay now, argue later” rule and the effect this procedure has on the taxpayers rights, as contained in the Constitution. It is suggested that the “pay now, argue later” rule seems to infringe upon the right to access to court. Other practices or procedures are specifically excluded from this dissertation.

This dissertation does not take into account any development in law that occurred after 1 June 2015

CHAPTER 2

THE CONSTITUTION

2.1 INTRODUCTION

2.2 ENACTMENT

2.3 THE BILL OF RIGHTS

2.4 CONSTITUTIONAL APPROACH

2.5 CONCLUSION

2.1 Introduction

The Constitution of South Africa is the supreme law of the Republic and all other law needs to be in line with the Constitution. The Constitution of South Africa is the legal backbone of the existence of South Africa and sets out the rights and duties of both the citizen and the government, it also defines the structure of the government. The paragraphs below will provide an overview of the enactment of the Constitution, the rights enshrined in the Bill of Rights as well as the procedure that needs to be followed in order to determine whether or not any of the fundamental rights of taxpayers are being infringed upon.

2.2 Enactment

During 1994, the Republic of South Africa transformed from a parliamentary state to a constitutional state.¹² This brought about a major shift in the legal policies¹³ of the country and all laws had to be consistent with the Interim Constitution.¹⁴ As the name suggests the Interim Constitution was only a temporary measure to be used in the interim until the final Constitutional was drafted. Both constitutions had implemented a Bill of Rights,¹⁵ which would have to be adhered to by all organs of state including SARS.

¹² The Constitution is the supreme law of the land and no other law can be inconsistent with the Constitution.

¹³ Croome BJ “*Constitutional Law and Taxpayer’s Rights in South Africa – An Overview*” (2002) *Acta Juridica* 1 at 2.

¹⁴ The Interim Constitution Act 200 of 1993. Hereinafter referred to as the Interim Constitution. The Interim Constitution came into effect on the 27th of April 1994.

¹⁵ Ch 3 of the Interim Constitution and ch 2 of the Constitution.

With the introduction of the Interim Constitution came the necessity that all legal statutes, including fiscal statutes, be aligned accordingly in order to be consistent with the Interim Constitution.¹⁶ The Minister of Finance appointed a Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa in his 1994 budget speech.¹⁷ This Commission was later referred to as the Katz Commission.

The Katz Commission established the following:

“The Commission notes that the tax system is subject to the Constitution and must conform to society’s commitment to the Rule of Law. This means not only that the system should be effective in the enforcement of all tax laws, equally and irrespective of status but also that citizens’ right to be taxed strictly in accordance with the terms of those laws should be scrupulously protected both in the design of those laws and in their implementation.”¹⁸

From the above it is clear that the collection of taxes needs to conform with the Interim Constitution.

In 1996 the Constitutional Court certified the final Constitution and it subsequently replaced the Interim Constitution. Furthermore, in the case of *First National Bank of SA Ltd t/a Wesbank v C: SARS*¹⁹ the court stated that “no matter how indispensable fiscal statutory provisions were for the economic well-being of the country, they were not immune to the discipline of the Constitution and had to conform with its normative standards.”²⁰ It was therefore established that SARS was subject to the Constitution and had to abide to it.

¹⁶ Croome PhD Thesis (2008) 11. See also Keulder C *Does the Constitution protect taxpayers against the mighty SARS. An inquiry into the constitutionality of selected tax practices and procedures.* (2011) 4.

¹⁷ National Treasury 1994 Budget Speech. See also Croome (2002) *Acta Juridica* 1 3; Croome PhD Thesis (2008) 11; Croome BJ & Olivier L *Tax Administration* (2010) at 2 and Croome (2010) at 5. Keulder (2011) 4.

¹⁸ Katz Commission Interim Report para (e) p 9.

¹⁹ *First National Bank of SA Ltd t/a Wesbank v C: SARS* 2002 (7) JTLR 250.

²⁰ *First National Bank of SA Ltd t/a Wesbank v C: SARS* 252.

2.3 The Bill of Rights

The taxpayers' Constitutional rights are contained in the Bill of Rights.²¹ The Bill of Rights *inter alia* stipulates how state organs should interact with the citizens of South Africa through its vertical application. The Bill of Rights also affords certain fundamental human rights that have been enshrined in the Constitution; *inter alia* the Bill of Rights affords all persons, including the taxpayer the right to access to courts.²² The Constitution provides the State with certain powers, whilst the Bill of Rights instructs the state how it may use these powers so as not to violate the fundamental rights of citizens as well as places an obligation on the state to promote and fulfill the said fundamental rights.²³ Should the state fail to comply with these instructions it will act unconstitutionally and its acts will be considered unlawful.²⁴ The effect thereof would be that the state could be held accountable for its unlawful actions.

2.4 Constitutional Approach

Many taxpayers seem to believe that because the Constitution enshrines certain rights, these rights may not be restricted or violated in any way.²⁵ This nevertheless is not the case as the rights in the Bill of Rights are not absolute and may be limited if such limitation is a reasonable and justifiable limitation.²⁶ It must be kept in mind that an aggrieved taxpayer has the right in terms of section 36 of the Constitution to approach a court if he or she believes that the powers afforded to SARS unreasonably and unjustifiable limits the taxpayer's constitutional rights.²⁷

Section 7(3) of the Constitution specifically provides that the rights in the Bill of Rights are subject to the limitations contained in section 36 of the Constitution. Section 36 of the Constitution is the general limitation provision. The onus on

²¹ Ch 2 of the Constitution.

²² See s 34 of the Constitution.

²³ Currie and De Waal *Bill of Rights Handbook* 23

²⁴ As above.

²⁵ Croome PhD Thesis (2008) 16.

²⁶ As contemplated for in s 36 of the Constitution.

²⁷ Croome & Olivier (2010) 10.

proving that the limitation of a constitutional right is justified, rest on the person invoking the limitation. The onus is not easily discharged and in order for it to be discharged the person will have to explain the purpose of the discharge as well as how the limitation shall achieve such purpose. The limitation must serve an important objective in the interest of a free and democratic society.²⁸

The limitation provision in section 36 of the Constitution provides:

“(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 Constitutional Court follows a two-stage approach to determine whether the limitation of a fundamental right is reasonable and justifiable. In the case of *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development*²⁹ the Constitutional Court explained the two-stage approach as follows:

“The question of whether a right in the Bill of Rights has been violated generally involves a two-pronged enquiry. The first enquiry is whether the ... provision limits a right in the Bill of Rights. If the provision limits a right in the Bill of Rights, this right must be clearly identified. The second enquiry is

²⁸ *Park-Ross and Another v The Director, Office for serious Economic Offences*, 1995 (2) BCLR 198 (C) at 215A. See also *R v Oakes* (1986) 26 DLR (4th) 200 SCC; *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E) at 640H-641C; *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W) at 228D-I; *S v Majavu* 1994 (4) SA 268 (CK) 315I- J; *Phato v Attorney-General, Eastern Cape*, 1995 (1) SA799 (E) at 833D; *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 (2) SA433 (SE) at 453D.

²⁹ *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009 (4) SA 222 (CC).

whether the limitation is reasonable and justifiable under section 36(1) of the Constitution. Courts considering the constitutionality of a statutory provision should therefore adhere to this approach to constitutional adjudication”.³⁰

Accordingly the applicant taxpayer must first prove that a fundamental right has been limited. This implies that the taxpayer must show that the situation for which the taxpayer pursues constitutional protection falls within the bounds of a particular constitutional right. In addition, the taxpayer will also have to show how the particular situation limits the exercise of the protected right.³¹ Only once this has been established will the court move to the second stage. The second stage entails a determination on whether the implied limitation is a reasonable and justifiable limitation as contained in section 36 of the Constitution. If the infringement is reasonable and justifiable according to section 36 then such limitation will be permitted. In the case where the infringement is not reasonable and justifiable, the limitation shall be considered unconstitutional.

Throughout the dissertation the two-stage constitutional analysis should be borne in mind with regards to arguments of the constitutionality of the selected tax practice.

2.5 Conclusion

From this chapter it can be seen that the Constitution of South Africa is the supreme law of the Republic of South Africa, it is the backbone of which all other law has to adhere to. The Constitution provides all citizens of South Africa with certain fundamental rights, which have been enshrined in the Bill of Rights. Section 7 (1) of the Constitution of South Africa states that the “Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”

It is clear that the government and any state organs, including SARS, should not infringe any rights as described in the Bill of Rights, rather they should respect,

³⁰ 2009 (4) SA 222 (CC) at par [41].

³¹ Woolman S & Botha H “Limitations” (ch 34) in Woolman S *et al* (eds) *Constitutional Law of South Africa* (2007) at 34-5

protect, promote and fulfil these fundamental rights.³² These rights may be limited, only if such limitation is reasonable and justifiable in accordance with section 36 of the Constitution. The following chapters will now analyse the “pay now, argue later” rule in order to determine whether or not this rule is a limitation of the right to access to court and if so whether such limitation is reasonable and justifiable.

³² S 7 (2) of the Constitution.

CHAPTER 3

THE “PAY NOW, ARGUE LATER” RULE PRIOR TO THE ENACTMENT OF THE TAX ADMINISTRATION ACT

3.1 INTRODUCTION

3.2 THE RIGHT TO ACCESS TO COURTS

3.3 GENERAL RULE VERSUS THE “PAY NOW, ARGUE LATER” RULE

3.4 SECTION 36 RULE

3.4.1 Content

3.4.2 Practical application of rule 36

3.4.3 Constitutionality of the rule 36

3.4.3.1 Introduction

3.4.3.2 Metcash Trading Ltd

3.4.3.2.1 Facts of the case

3.4.3.2.2 Court a quo

3.4.3.2.3 Constitutional Court

3.4.5 Constitutional perspective

3.4.6 Developments post Metcash Trading Ltd (CC)

3.5 CONCLUSION

3.1 INTRODUCTION

A taxpayer may be informed that he or she owes SARS a substantial amount of money, what is distressing is that in order for SARS to ensure speedy payment, SARS can enforce payment through the “pay now, argue later” rule.³³ The “pay now, argue later” rule refers to a wide power afforded to SARS contained in section 36 of the VAT Act.³⁴

If the taxpayer is dissatisfied with the assessment made by SARS, such a taxpayer may object to the assessment.³⁵ Subsequently the Commissioner for SARS may either alter the assessment or reject the objection and thereafter inform the

³³ Keulder C. *“Does the Constitution protect the taxpayer against the mighty SARS- An inquiry into selected tax practices and procedures.”* (2011) 54

³⁴ A similar provision is provided in the s 88 of the Income Tax Act, which is now governed by section 164 of the TAA.

³⁵ S 32(b) of the VAT Act.

taxpayer of the decision taken.³⁶ If the taxpayer still feels aggrieved such a taxpayer may appeal against the decision taken.³⁷

As previously mentioned in the introduction³⁸, it is of great importance that taxes are collected effectively and efficiently. In order to achieve this SARS has been awarded certain powers to collect tax and to prevent the taxpayer from using objections and appeals to vexatiously delay the payment of their taxes.³⁹ One such power is the “pay now, argue later” rule. The “pay now, argue later” rule stipulates that the payment of tax, additional tax penalties and interest is not suspended, unless the Commissioner decides otherwise, even though an appeal or an objection is lodged.⁴⁰

3.2 The right to access to court

As mentioned in the introduction, South Africa is a constitutional state, the Constitution of South Africa is the supreme law of the republic and all other law must be consistent with it. The right to access to courts is a fundamental right enshrined in the Constitution,⁴¹ which stipulates that “everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”.⁴² An important principle in South African law is expressed in the maxim *ubi ius ubi remedium*- the translation of this is, where there is a right there is a remedy. This means that where there is the existence of a legal rule there must be the existence of a remedy if such a rule is infringed upon.⁴³ Rights in the Bill of Rights may *inter alia* be protected through the right to access to court.

³⁶ S 31(4) of the VAT Act.

³⁷ S 33(1) of the VAT Act.

³⁸ Discussed in 1.1.

³⁹ *Capstone 556 (Pty) Ltd v CSARS* 2011 ZAWCHC 297 para 9 – hereafter “Capstone”.

⁴⁰ See also Olivier (2001) 1 *TSAR* 193 at 194. Keulder C (2011) 54.

⁴¹ S 34 of the Constitution.

⁴² S 34 of the Constitution.

⁴³ Currie and De Waal *Bill of Rights Handbook* (2005) 23.

Currie and De Waal point out that the fundamental principle behind the right to access to court is that anyone may challenge any law or conduct.⁴⁴ With this being said it becomes clear that any taxpayer should be afforded the opportunity to challenge the section 36 rule and any other conduct of SARS. The Constitutional Court also established that another purpose of the right to access to courts that it ensures the separation of the judiciary and other organs of state.⁴⁵

Even more interesting is that in the case of *Chief Lesapo v North West Agricultural Bank*⁴⁶ the Constitutional Court further identified that the right also prevents a party from “self help”. The right to access to court achieves this by ensuring that an open court hears a matter and decides the outcome based on the facts presented to it. The “pay now, argue later” rule seems to disregard this as it allows SARS to be a judge in its own case.⁴⁷

3.3 GENERAL RULE VERSUS THE “PAY NOW, ARGUE LATER” RULE

Before an examination between the “pay now, argue later” rule afforded to SARS and the general rule can be made, a brief discussion regarding the general rule would be sensible in order to better understand why the rule is so peculiar. This is so because section 34 of the Constitution effectively provides for the right to a fair trial. It states “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.” In a country such as South Africa the right to access to court cannot be under stated.

Generally the enforcement of a civil judgment is suspended when an appeal is lodged except in cases where the appeal was not noted timeously⁴⁸ or the magistrate or judge in accordance with his or her discretion, orders otherwise.⁴⁹ It

⁴⁴ Currie and De Waal *Bill of Rights Handbook* (2005) 704.

⁴⁵ *Bernstein v Bester* 1996 2 SA 751 (CC) 804.

⁴⁶ *Chief Lesapo v North West Agricultural Bank* 999 12 BCLR 1420 (CC) 1429 – hereafter “Chief Lesapo”.

⁴⁷ Olivier 2001 TSAR 196.

⁴⁸ *Schmidt v Theron* 1991 (3) SA 126 (K).

⁴⁹ S 78 of the Magistrates Court Act 32 of 1944. See also Keulder (2011) 56.

can be seen that the general rule implies that the civil debtor would not have to perform in terms of a civil judgment until his or her appeal against his judgment has been upheld.⁵⁰

An appeal in a civil matter may occur after judgment has taken place.⁵¹ Therefore an appeal will only be noted once the trial has come to an end. This gives a party to such proceedings profuse opportunity to state his case, in an open court, prior to the final decision or judgment⁵² and accordingly allows the party to the case to exercise his right to access to court.

On the one hand in terms of an objection to an assessment made by SARS the “pay now, argue later” rule becomes operational the moment SARS has issued the assessment. This entails that the taxpayer would have to pay the assessed amount before being given the opportunity to raise his or her arguments⁵³ and before the taxpayer can exercise his or her right to access to court.

From the above it can be seen that only in extraordinary circumstances will the enforcement of civil judgments not be suspended.⁵⁴ It can be said that the point of departure in civil cases would be to allow the suspension of the enforcement of the judgment, pending the appeal.

On the other hand, it can be seen that the practice of SARS is the opposite to that of the general rule, in that the point of departure would be not to allow the suspension of payment upon an objection to the assessment and only in exceptional cases will such payment be suspended. Therefore, it is clear that SARS does not follow the general rule.⁵⁵

⁵⁰ Keulder C (2011) 56.

⁵¹ *Marsay v Dilley* 1992 (3) SA 944 (A).

⁵² Keulder C (2011) 56.

⁵³ Keulder C (2011) 56.

⁵⁴ Keulder C (2011) 56.

⁵⁵ Olivier (2001) *TSAR* 193 at 194

Section 34 of the Constitution provides everyone with the right of access to court and consequently it must be determined whether the “pay now, argue later” rule is constitutional or not, as it seems not to allow access to the court before payment is made. If the “pay now, argue later” rule is not implemented by SARS then this could encourage the taxpayer to dispute an assessment, which the taxpayer would otherwise not have done.⁵⁶ This could lead to frivolous objections,⁵⁷ which in turn would have dire financial consequences for SARS, the South African Government and the South African economy.

A balance between the taxpayers’ rights and SARS’s duty to efficiently and effectively collect tax needs to be achieved. Due to the importance of these competing interests, such a balance is not easily achieved. The Constitutional Court held that such a balance has been attained. In the case of *Metcash Trading Ltd v Commissioner for the South African Revenue Service*,⁵⁸ the court determined that section 36 of the VAT Act was constitutional and due to the fact that South Africa follows the law of precedent such a view will stand. This Constitutional Court decision will also be binding on all courts within the Republic, unless it can be shown that the court had erred.⁵⁹

Previously it was uncertain whether the “pay now, argue later” rule applied to tax matters where an objection was lodged. This is due to the fact that case law had not dealt with the application of the rule in terms of income tax. The TAA is clear on the fact that the “pay now, argue later” rule applies to both VAT as well as income tax matters. Despite the rule being declared constitutional, this chapter will attempt to establish that the rule poses some constitutional and other problems and that there are enough grounds available for the court to deviate from this precedent.

⁵⁶ Arnold opinion.

⁵⁷ Arnold opinion.

⁵⁸ *Metcash Trading Ltd v Commissioner for the South African Revenue Service* 2001 1 BCLR 1 (CC).

⁵⁹ Certification of the Amended Text of the Constitution of the Republic of South Africa 1996 1997 1 BCLR 1 (CC) para 8.

It can be seen that this situation can have dire consequences for the taxpayer, in that it may leave a taxpayer financially crippled, which should not be the object of taxation. It is therefore important to determine the constitutionality of such rule as provided for in section 164 of the TAA. However, in order to fully understand section 164 of the TAA it is essential to critically discuss the rule as applied in section 36 of the VAT Act as section 164 of the TAA replaced section 36.

3.4 SECTION 36 RULE

3.4.1 Content

Section 36 of the VAT Act states “that the payment of tax shall not be suspended pending an objection or an appeal unless the Commissioner directs otherwise. A vendor may however request the Commissioner to suspend the payment of any tax or a portion thereof due under an assessment where the liability to pay tax is disputed.”⁶⁰

If the Commissioner is satisfied that the objection or appeal is frivolous, being used as a delay tactic or because material changes has occurred since a suspension was granted, the Commissioner may reject the taxpayers request, or revoke the decision to suspend.⁶¹

In the case where an objection or appeal is successful, section 36 of the VAT Act stipulates that a due adjustment must be made, amounts paid in excess refunded with interest at the prescribed rate. Keulder⁶² points out that, even though the payment of interest by SARS is a positive, this does not take away from the fact that the taxpayer may still experience financial ruin if such taxpayer had to pay the amount pending an appeal. It is suggested that such financial ruin highlights the dangers of the “pay now, argue later” and not any benefits thereof. If you consider

⁶⁰ S 36 (2) of the Vat Act as amended by way of the Taxation Laws Second Amendment Act 18 of 2009. Hereinafter referred to as the TLSA.

⁶¹ S 36 (4) of the VAT Act.

⁶² Keulder (2013) 129.

the general rule⁶³, the judgment debtor only pays his or her debt once an open court makes a judgment and can find against the judgment debtor accordingly. In the case of the “pay now, argue later” rule, the accused taxpayer is burdened prior to an order of court and on top of that, if such a taxpayer appeal is upheld, he or she may still experience financial ruin, which could have dire consequences, such as being declared insolvent and if the taxpayer is a director of a company the resulting insolvency would lead to the taxpayer no longer being able to be a director of said company.⁶⁴

3.4.2 Practical application of the section rule 36

In order to fully grasp just how peculiar the section 36 rule was, it must be borne in mind that the “pay now, argue later rule was not applied in isolation.⁶⁵ This is due to the fact that the “pay now, argue later” rule would be insignificant if it stood on its own. If a taxpayer feels aggrieved such a taxpayer could merely just withhold payment until a court orders him or her to make the said payment. Therefore SARS was afforded further powers in order to ensure payment and enforce the “pay now, argue later” rule.

Firstly, if a taxpayer did not meet his or her obligation to pay SARS the amount of tax due, pending an objection or an appeal,⁶⁶ SARS could implement section 40 (2)(a) of the VAT Act. This section stipulated that the Commissioner might file a statement indicating the outstanding tax, interest or penalty payable, with the clerk or registrar of a competent court. In the *Capstone* case⁶⁷ the court established that this has the same effect as a civil judgment,⁶⁸ but it is not a judgment in the ordinary sense in that it does not deal with a dispute or contest between the Commissioner and the taxpayer. It does however have the effect of a civil judgment in that the property of

⁶³ Discussed above in 2.1.2.

⁶⁴ This could possibly raise the question of whether or not SARS could be held liable for damages, unfortunately such a question is beyond the scope of this dissertation.

⁶⁵ Keulder (2013) 129.

⁶⁶ S 36 (4) of the VAT Act.

⁶⁷ *Capstone 556 (Pty) Ltd v CSARS* 2011 ZAWCHC 297

⁶⁸ See Silke 2002 *Acta Juridica* 282-334, 293, regarding the filing of a statement by SARS.

the taxpayer could be attached by way of a writ in order to ensure payment.⁶⁹ Secondly Goldswain points out that the statement itself can be seen as a civil judgment lawfully given in that court in favour of the Commissioner for a liquid debt for the amount specified in the statement.⁷⁰ The disconcerting fact about this was that it was declared constitutional in *Metcash Trading Limited v Commissioner for the South African Revenue Service and Another*⁷¹, due to this case the Commissioner could use section 40 (2)(a) to ensure efficient payment by the taxpayer, by enforcing the “pay now, argue later” rule. In the case *Traco Marketing (Pty) Ltd & Another vs Minister of Finance & Others*,⁷² it was pointed out that the taxpayer does have recourse against the statement procedure, as once the taxpayer is informed of a statement against him or her, the taxpayer may apply to a court for its rescission.

Following this, SARS was also allowed to appoint a third party to act as an agent for the taxpayer.⁷³ Section 47 of the VAT Act declares that;

“the Commissioner may, if he thinks it necessary, declare any person to be the agent of any other person, and the person so declared an agent shall for the purposes of this Act be the agent of such other person in respect of the payment of any amount of tax, additional tax, penalty or interest payable by such other person under this Act and may be required to make payment of such amount from any moneys which may be held by him for or be due by him to the person whose agent he has been declared to be: Provided that a person so declared an agent who, is unable to comply with a requirement of the notice of appointment as agent, must advise the Commissioner in writing of the reasons for not complying with that notice writing the period specified in the notice.”⁷⁴

⁶⁹ Keulder (2013) 130.

⁷⁰ Goldswain 2012 145.

⁷¹ *Metcash Trading Ltd v Commissioner for the South African Revenue Service* 2001 1 BCLR 1 (CC). See discussion 2.2.4.3 below.

⁷² *Traco Marketing (Pty) Ltd & Another vs Minister of Finance & Others*, 58 SATC 526.

⁷³ S 47 of the VAT Act.

⁷⁴ Similar provision provided for in 99 of the Income Tax Act.

This section affords the Commissioner the power to appoint banks, employers, pension funds or similar persons as agents in respect of their clients, members or employees, where such entities holds funds on behalf of the taxpayer and such a taxpayer owes taxes, penalties or interest to SARS.⁷⁵ While the power granted to the Commissioner under this section, is discretionary and unlike other discretionary powers, not subject to objection or appeal, a taxpayer could seek judicial review of any declaration made by the Commissioner in terms of section 47.⁷⁶ This section was also declared a reasonable and necessary limitation of the right to access to court.⁷⁷ In the case *Hindry v Nedcor Bank Ltd*,⁷⁸ Wush J⁷⁹ held that the appointment of a taxpayer's agent is necessary for the speedy collection of taxes, it is a weapon of great importance to the state. It is suggested that section 47 of the VAT Act poses problems as if the taxpayers employer is appointed as an agent for SARS then the taxpayer has no say on whether or not to make payment from his or her salary to SARS. Another problem is that the employer would generally be forced into being an agent for SARS because if the employer fails to act, they themselves can become liable to SARS.⁸⁰ It is highly unlikely that any employer would not agree to become an agent as the employer would not want to create any conflict with SARS.

From the above it can be seen that the rules applied along side the section 36 rule, gives SARS wide powers that can be used to ensure immediate payment. Even though it is crucial that SARS has the powers to ensure efficient and effective collection of tax, it does seem to pose a risk that these powers infringe on the fundamental right to access to court.⁸¹

3.4.3 Constitutionality of the section 36 rule.

3.4.3.1 Introduction

⁷⁵ Ntombikayise Baepi 2011 www.moneyweb.co.za (accessed on 04 September 2015).

⁷⁶ Ntombikayise Baepi 2011 www.moneyweb.co.za (accessed on 04 September 2015).

⁷⁷ S 34 of the Constitution.

⁷⁸ *Hindry v Nedcor Bank Ltd*.(1999) 2 All SA 38 (W). See also Keulder (2011) at 33 for discussion on the constitutionality of the appointment of an agent by SARS.

⁷⁹ *Hindry v Nedcor Bank Ltd*.

⁸⁰ Vanek 2011 www.moneyweb.co.za (accessed 04 September 2015).

⁸¹ S 34 of the Constitution.

The right to access to court is a fundamental right contained in the Bill of Rights.⁸² Taxpayers mistakenly assume that a right afforded by the Constitution may not be violated or infringed in any way;⁸³ unfortunately this is not the case. It was pointed out above⁸⁴ that all rights may be limited according to section 36 of the Constitution. The application of section 36 of the Constitution will now be considered.

Fundamental rights can be limited by using the two stage approach as provided for in section 36 of the Constitution.⁸⁵ Firstly, the taxpayer must show that the situation for which he requires protection falls into the ambit of a constitutional right⁸⁶ and that a constitutional right of such taxpayer has indeed been infringed upon.⁸⁷ Only after this has been established will the court move to the next stage.

In terms of the section 36 rule an assessed amount that has been questioned by the taxpayer, by way of objection or an appeal, will still be due and payable and SARS right to claim the amount due will not be stayed. It seems that in this instance the taxpayer's right to access to court will be infringed upon by the section 36 rule as SARS can enforce the payment through the statement procedure or appoint a third person as an agent.⁸⁸ It is clear that in this instance the court may move to the next stage.

The second stage sets out to determine whether the limitation is a reasonable and justifiable limitation based of the values of human dignity equality and freedom.⁸⁹ In the event that it is seen that the limitation is reasonable and justifiable then such limitation will be allowed.⁹⁰ If it is not seen as reasonable and justifiable, then the practice will be seen as unconstitutional.⁹¹ In order to ascertain whether or not the

⁸² S 34 of the Constitution.

⁸³ Croome PhD Thesis (2008) at 16.

⁸⁴ See chapter 2.4 above.

⁸⁵ As above

⁸⁶ Woolman and Botha "*Limitations*" 34-4.

⁸⁷ Limited and infringed have been used as synonyms. See Currie and De Waal *Bill of Rights Handbook*.

⁸⁸ Keulder (2013) 133.

⁸⁹ S 36 (1) of the Constitution. See also Currie and De Waal *Bill of Rights* 185.

⁹⁰ Keulder (2013) 133.

⁹¹ Keulder (2013) 133.

limitation is reasonable and justifiable, the court must consider the nature and extent of the limitation, the importance of the purpose of the limitation, as well as the relation between the limitation and such purpose.⁹² Furthermore to be reasonable and justifiable, a limitation of a fundamental right must achieve benefits that are proportional to the impediment of the limitation.⁹³ The limitation would not be proportionate if other means could be employed to achieve the same effect that will either not restrict the right at all, or not restrict them to the same extent.⁹⁴ If a less restrictive alternative method is available to achieve the purpose of the limitation than the less restrictive method should be preferred.⁹⁵

In determining whether or not a limitation is reasonable and justifiable, section 36 of the Constitution sets out factors that must be taken into consideration. The case of *S v Manamela*⁹⁶ established that these factors must not be seen as comprising a checklist but rather they should be seen as a balancing act.

Therefore a balance between the taxpayers right to access to courts and the need for SARS to effect speedy collection of tax needs to be achieved and this is not an easy task The *Metcash Trading Ltd* case had to deal with this exact dilemma.

3.4.3.2 Metcash trading Ltd (CC)

3.4.3.2.1 Facts of the case

SARS furnished the applicant with an assessment to the amount of R266 million which, included penalties, additional tax and interest, in terms of section 36 (1) of the Vat Act.⁹⁷ The applicant in this instance had objected to the assessment but the

⁹² S 36(1)(a)-(e) of the Constitution. See also Keulder (2013) 133.

⁹³ Currie and De Waal *Bill of Rights handbook* 183.

⁹⁴ Currie and De Waal *Bill of Rights handbook* 183

⁹⁵ Currie and De Waal *Bill of Rights handbook* 183.

⁹⁶ *S v Manamela* 2000 3 SA 1 (CC).

⁹⁷ *Metcash Trading Ltd* (W) 320.

objection was rejected by SARS.⁹⁸ The applicant was then informed that if payment were not affected, SARS would implement its summary procedure.⁹⁹

Consequently in response Metcash approached the High Court on an urgent basis. A consent order was granted by the High Court to the effect that Metcash must lodge an application prior to a specified date to have sections 36, 40(2)(a) and 40(5) of the VAT Act declared unconstitutional in terms of section 25(1) and 34 of the Constitution.¹⁰⁰

3.4.3.2.2 Court *a quo*

The question before the court was whether section 36, 40(2)(a) and 40(5) of the VAT Act infringed on sections 25(1) and 36 of the Constitution. The applicant however did not pursue an arguments with regards to the possible infringement on the person's right to property as contained in section 25(1) of the Constitution¹⁰¹ and only concerned itself with the right to access to courts as contained in section 36 of the Constitution. Accordingly, the court had to deal only with the effect that the sections of the VAT Act had on a person's right of access to the courts.¹⁰²

In her judgment Snyders J identified that the test for an infringement of a constitutional right is an objective one by stipulating that it cannot be justified by reference to a specific case.¹⁰³ Snyders J points out that due to the fact that the summary procedure allows SARS to act as a substitute for the court in that SARS must determine every aspect of the vendor's liability and enforce such liability.¹⁰⁴ This therefore allows SARS to be the judge in its own case and consequently Snyders J found that the summary procedure does indeed infringe on the taxpayers'

⁹⁸ *Metcash Trading Ltd (W)* 321.

⁹⁹ In terms of section 40(2) of the VAT Act. See 2.2.2 above for discussion on the statement procedure.

¹⁰⁰ *Metcash Trading Ltd (W)*. For the purposes of this chapter, the focus is on the "pay now, argue later" rule contained in s 36 of the VAT Act.

¹⁰¹ *Metcash Trading Ltd (W)* 322.

¹⁰² *Metcash Trading Ltd (W)* 322.

¹⁰³ Snyders J made reference at 322 to the *Chief Lesapo* Case.

¹⁰⁴ *Metcash Trading Ltd (W)* 327.

fundamental right.¹⁰⁵ Snyders J also found that this section impedes the interlocutory relief by the court in that the court is unable to provide relief in the stages between the assessment given to the taxpayer by SARS and the final decision of the court.¹⁰⁶

The court was of the opinion that the first stage in the constitutional attack was met and consequently the court moved on to the second stage, which was to examine whether the said infringement could be regarded as reasonable and justifiable.

In response to this, the Commissioner argued that the limitation was indeed reasonable and justifiable due to the following reasons, *inter alia*:

- frivolous objections would be made to delay the payment of taxes;
- fraudulent and dishonest tax returns would be encouraged; and
- South Africa could not afford a situation where taxpayers do not pay swiftly.¹⁰⁷

From the above reasons it can be seen that the Commissioner was most concerned with the delay of payment and the impact thereof. The court was of the opinion that the delay in payment would not have such a big impact on SARS when considering the bigger picture such as national taxation.¹⁰⁸ The court believed that the potential infringement on the taxpayers right to access to court would have a far-reaching impact and therefore weighed heavily against such infringement.¹⁰⁹ The court was of the opinion that even though the infringement on the taxpayers right may only be temporary, the effect of such infringement could be both menacing and permanent.¹¹⁰ The court declared the statement procedure, the "pay now, argue later" rule and denial of the right to access to court invalid and furthermore had the matter referred to the Constitutional Court for confirmation.¹¹¹

¹⁰⁵ S 34 of the Constitution.

¹⁰⁶ *Metcash Trading Ltd (W)* 327.

¹⁰⁷ *Metcash Trading Ltd (W)* 327. See also Keulder (2013) at 136.

¹⁰⁸ *Metcash Trading Ltd (W)* 328.

¹⁰⁹ *Metcash Trading Ltd (W)* 328.

¹¹⁰ *Metcash Trading Ltd (W)* 328.

¹¹¹ *Metcash Trading Ltd (W)* 330. In terms of s 167(5) of the Constitution, the Constitutional Court has to confirm an order declaring legislation invalid before the order comes into effect.

3.4.3.2.3 Constitutional Court

Metcash supported the decision of Snyders J, in the court *a quo*,¹¹² in that it believed that there was not valid opportunity for the taxpayer to have a hearing on the assessment.¹¹³ On the one hand *Metcash* was of the opinion that they were compelled to make the payment and only hope to get the money back at some later point. Furthermore, the applicant also submitted that there were less invasive means available to SARS in order to ensure the speedy payment from taxpayers with out having to restrict their right to access to court these included:

- the imposition of higher interest rates;
- the imposition of time-linked penalties; and
- the furnishing of security.¹¹⁴

The Minister of Finance and the Commissioner for SARS contended that the “pay now, argue later” rule does not infringe upon any of the taxpayer’s constitutional rights and thus opposed the confirmation order granted by the court *a quo*.¹¹⁵ They argued that the limitation was reasonable and justifiable¹¹⁶ as there were four opportunities for a hearing on an assessment, namely:

- an objection to the assessment;
- in exercising the Commissioner’s discretion in determining whether a payment should be suspended pending appeal, the affected party can place facts before the Commissioner;
- if the Commissioner has failed to exercise his discretion properly, as mentioned above, the decision may be taken on review; and
- there is an automatic right of appeal on merits to the Special Tax Court.¹¹⁷

According to the court section 36(1) has two purposes which is, to ensure that the taxpayer obligation to pay the assessed amount is not delayed whilst pursuing and objection or an appeal and secondly, that if so required an amount be paid back to

¹¹² *Metcash Trading Ltd* (CC) 7.

¹¹³ As above.

¹¹⁴ *Metcash Trading Ltd* (W) 329.

¹¹⁵ *Metcash Trading Ltd* (CC) 6.

¹¹⁶ As above.

¹¹⁷ *Metcash Trading Ltd* (CC) 6.

the taxpayer at a later stage. Kriegler J decided that due to this, the “pay now, argue later” rule was not concerned with access to court and that it does not reject the courts’ jurisdiction.¹¹⁸ The court further established that the Special Tax Court functions as an ordinary court and thus the taxpayer has access to the courts by being able to appeal to the Special Tax Court.¹¹⁹ Due to the above the court found in the favour of the Commissioner in that the court *a quo* had erred in its decision in finding that the courts’ jurisdiction had been ousted.¹²⁰ Consequently the court had destroyed the taxpayers hope by refusing to declare sections 36, 40(2)(a) and 40(5) of the VAT Act unconstitutional.¹²¹

The court further established that in the exercise of his discretion in terms of section 36(1) of the VAT Act, the Commissioner’s conduct would be considered to be administrative action and reviewable in terms of administrative law.¹²² As section 36(1) of the VAT Act was considered to be administrative action, the taxpayer may also use the review procedure in terms of the Promotion of Administrative Justice Act.¹²³ Thus even though the “pay now, argue later” rule was declared to be unconstitutional, there is still hope for the taxpayer as the taxpayer may use the review procedure discussed above as an alternative.

3.4.5 Constitutional perspective

The *Metcash Trading Ltd (CC)* case has received attention from academics. The opinions vary in that some are of the opinion that the court had erred in its decision whilst others believe that the court was correct in its decision.

Firstly, Croome agrees with the decision of the Constitutional Court and stipulated that the mere fact that the taxpayer may approach a court on review of the matter indicates that the taxpayer does indeed have the right to access to court.¹²⁴ Croome

¹¹⁸ *Metcash Trading Ltd (CC)* 25.

¹¹⁹ As above

¹²⁰ *Metcash Trading Ltd (CC)* 22.

¹²¹ *Metcash Trading Ltd (CC)* 33.

¹²² *Metcash Trading Ltd (CC)* 21

¹²³ Promotion of Administrative Justice Act 3 of 2000 – hereafter "PAJA".

¹²⁴ Croome Taxpayer's Rights 40.

further points out that section 88 of the Income Tax Act¹²⁵ would also be considered to be constitutional if challenged.¹²⁶

However, Keulder¹²⁷ points out that the court in *Metcash Trading Ltd (CC)* specifically drew a clear distinction between Income Tax and VAT and elaborated that the matter that was before it was a VAT matter and no other fiscal matter.¹²⁸ Firstly the court emphasized the difference between VAT and tax in that VAT arise on a continuous basis where as payment of income tax only arises at the end of the tax year, secondly in the situation of VAT the taxpayer acts as an agent for SARS.¹²⁹ Further to this Williams¹³⁰ disagrees with Croome in that the reality is that the Constitutional Court declared the “pay now, argue later” rule with regards to the VAT Act to be constitutional but said nothing about the constitutionality of the rule in relation to the Income Tax Act.¹³¹ Furthermore, Williams points out that the decision made by the court is by no means an inescapable conclusion as there are decisive differences between Income Tax and Vat and that the chances of Income Tax succeeding with a decision by the Constitutional Court is greater than the VAT Act had. This is due to the fact that the calculation of income tax is far more complex than calculating VAT and thus leaves greater room to challenge the constitutionality thereof.¹³²

Keulder¹³³ further points out that the *Metcash Trading Ltd (CC)* judgment was only concerned with the application of the “pay now, argue later” rule in connection with VAT and thus has no binding effect on any other tax legislation. Keulder therefore believes that the considerations taken into account in this decision won’t necessarily be the same in regards to income tax.

¹²⁵ Similar provision as section 36(1) of the VAT Act.

¹²⁶ Croome Taxpayer’s Rights 226.

¹²⁷ Keulder (2013) at 139.

¹²⁸ *Metcash Trading Ltd (CC)* 9.

¹²⁹ As above.

¹³⁰ Williams 2012 *SYNOPSIS* 4–4.

¹³¹ Williams 2012 *Synopsis* 4–4.

¹³² Williams 2012 *Synopsis* 4-5.

¹³³ Keulder (2013) at 139.

It is suggested that due to the great emphasis the Constitutional Court placed on the need for efficient and effective collection of tax and the similarity between the rule in the VAT Act and the Income Tax Act, the court will be reluctant to go against the *Metcash Trading Ltd (CC)* decision. It is submitted that although the court wont declare the “pay now, argue later” rule unconstitutional in relation to income tax, the rule poses constitutional dilemmas which will have to be corrected by the legislator.

Olivier¹³⁴ also disagrees with Croome in that she believes that the Constitutional Court had erred in its decision. Firstly, Olivier disagrees with the court’s decision that the “pay now, argue later” rule does not oust the courts jurisdiction as the taxpayer may appeal to the Special Tax Court. Olivier stipulates that the applicants’ argument was not that the courts jurisdiction is completely ousted just that the court does not have jurisdiction the moment the rule is invoked.¹³⁵ Keulder¹³⁶ agrees with Olivier in this regard as Keulder points out that the constitutional attack of the rule was against section 34 of the Constitution and more specifically the aim of the right, which is to prevent “self-help”. Therefore, the argument is not that the rule prevents the jurisdiction of the court entirely but rather that the rule allows SARS to be the judge in its own case. It is suggested that the court should not have been concerned with whether or not the taxpayer was able to approach the court at some stage but rather that the taxpayer should be allowed access to court prior to being forced to pay the objected amount.¹³⁷

Keulder and Olivier point out that the “pay now, argue later” rule deviates drastically from the general rule.¹³⁸ It is suggested that the court erred in that it was not argued that the courts jurisdiction is completely ousted but rather that SARS can act as the judge in its own case to the extent that the taxpayer is forced to make the payment prior to an order of court. If compared to the general rule this can be equated to the

¹³⁴ Olivier 2001 TSAR 193.

¹³⁵ Olivier 2001 TSAR 196.

¹³⁶ Keulder (2013) at 140.

¹³⁷ As above.

¹³⁸ See discussion on differentiation between the general rule vs the ‘pay now, argue later’ rule in 2.1.2 above.

taxpayer being punished without a court making a decision against such a taxpayer. It is a well-known concept in South African law that you are “Innocent until proven guilty,” which begs the question why the taxpayer must pay prior to an order of court.

Keulder¹³⁹ also points out that although the court established that the decision made by the Commissioner in terms of section 36(1) of the VAT Act is an administrative action, the ability of the courts to overturn the Commissioner’s decision is rather limited.¹⁴⁰ This can be seen in section 8 of PAJA which stipulates that if this review procedure is used the courts may ask the Commissioner to provide reasons for his decision not to allow the objection. However the main concern is that section 8 of PAJA does not allow the court to overturn the Commissioner’s decision and the Commissioner is still the judge in his or her own case. Furthermore, Keulder highlights that the importance of the review procedure is further weakened if the Commissioner invokes section 40(2)(a) of the VAT Act as the taxpayer may not challenge the correctness of the statement procedure in legal proceedings.¹⁴¹

Olivier highlights the fact that even though a decision can be taken on review, it does not take away the legislators constitutional duty to ensure that all provisions are constitutional.¹⁴² Accordingly Olivier refers to *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs*¹⁴³ where the court held that:

“the exercise of a discretionary power may subsequently be successfully challenged on administrative grounds, for example that it was not reasonable, does not relieve the legislature of its constitutional obligation to promote, protect and fulfil the rights entrenched in the Bill of Rights.”

¹³⁹ Keulder (2013) at 140.

¹⁴⁰ As above.

¹⁴¹ S 40(2)(a) of the VAT Act. See also *Metcash Trading Ltd (CC) 27* here the court discussed the limitation of the nature of the relief available to the taxpayer in terms of section 40(5) of the VAT Act.

¹⁴² According to section 7(2) of the Constitution the state has a duty to respect, protect, promote and fulfill the rights in the Bill of Rights.

¹⁴³ *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 8 BCR 837 (CC).

Olivier establishes that in both the High Court as well as the Constitutional Court it was pointed out that the practice of the “pay now, argue later” rule was also used in other countries.¹⁴⁴ The problem is that the countries that were considered was not established, which does not allow for proper comparison, even so the High Court was of the opinion that due to this the court still did not find the rule constitutional. The Constitutional Court¹⁴⁵ disagreed with the High Court on this matter and held it to be Constitutional. It must be submitted that even though other countries may use the same practice, this can only be seen as a persuasive factor as foreign laws do not bind South African Courts¹⁴⁶.

Lastly, Olivier concludes that the court did not consider the argument of the applicant, that there are less invasive ways to ensure effective and efficient collection of tax at SARS’ disposal.¹⁴⁷ In order to determine whether or not the limitation of a fundamental right is reasonable and justifiable¹⁴⁸ the possibility of less invasive ways is a factor that the court should take into account when dealing with section 36 of the Constitution.

It is submitted that the *court a quo* was correct in that the limitation is not a reasonable and justifiable limitation. In order for a court to determine a limitation to be a reasonable and justifiable the court must consider the nature and extent of the limitation, the importance of the purpose of the limitation, as well as the relation between the limitation and such purpose.¹⁴⁹ It is submitted that the purpose of the pay now argue later rule does not outweigh the importance of the right to access to court. The minority of taxpayers would appeal to the courts for intervention as such a process would prove to be both time consuming and expensive. Allowing the taxpayer access to court would not be unreasonably burdensome on SARS if the bigger picture, national taxation, is considered.

¹⁴⁴ *Metcash Trading Ltd (W)* 329 and *Metcash Trading Ltd (CC)* 30.

¹⁴⁵ In *Metcash Trading Ltd (CC)*

¹⁴⁶ In terms of section 39 of the Constitution of South Africa

¹⁴⁷ Olivier 2001 TSAR 199. As discussed in 2.2.3.1 above.

¹⁴⁸ S 36 of the Constitution.

¹⁴⁹ S 36(1)(a)-(e) of the Constitution.

3.4.5.6 Developments *Post Metcash Trading Ltd (CC)*

Olivier indicated that there would be less constitutional dispute with regards to the “pay now, argue later” rule if grounds for which the Commissioner could exercise his or her discretion not to suspend payment pending an appeal, were clearly defined by the legislator.¹⁵⁰

After the Constitutional Courts judgment SARS released Media Release 27.¹⁵¹ According to this Media Release, the Commissioner has the discretion to suspend the payment of tax pending an appeal. When exercising his or her discretion the Commissioner must take the following factors into account:

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

After this the Second Taxation Law Amendment Act 2009 brought even more clarity to the “pay now, argue later” rule by amending section 88 of the Income Tax Act and section 36 of the VAT Act. The amendments to the sections had the effect of introducing factors that the Commissioner must take into consideration when deciding whether or not to suspend payment pending appeal. These included:

- the amount involved;
- the taxpayer's compliance history;
- whether the taxpayer might alienate his or her assets during the postponement of payment;
- whether the taxpayer is able to provide adequate security for the payment of the assessed amount;

¹⁵⁰ Olivier 2001 TSAR 199.

¹⁵¹ See SARS *Media Release*.

- whether payment of the amount would cause irreparable financial hardship to the taxpayer;
- whether there are impending sequestration or liquidation proceedings;
- whether the taxpayer has failed to furnish requested information; and
- whether fraud is present.¹⁵²

It can be seen that even though the Constitutional Court declared the “pay now, argue later” rule constitutional, there was still a need for greater clarity. SARS and the legislator tried to achieve this however this brought about more confusion to the matter. SARS did not indicate what weight must be given to each factor and the relevance of some of the factors was questioned.¹⁵³

Furthermore, in the cases *Mokoena v CSARS*¹⁵⁴ and *Capstone*¹⁵⁵, the respective courts came to conflicting judgments upon a relevant aspect of the “pay now, argue later” rule. In *Mokoena* the court decided that SARS is allowed to enforce payment of tax pending an objection or an appeal, but is not entitled to a judgment in the interim.¹⁵⁶ This was criticised in *Capstone* as the court was of the view that the filing of a statement has the same effect as a judgment because even though it was not a judgment in the ordinary sense, SARS was still able to obtain a writ of execution.¹⁵⁷

3.5 CONCLUSION

From this chapter it can be seen that the “pay now, argue later” rule in terms of section 36 of the VAT Act was held to be constitutional due the *Metcash trading Ltd* decision. This however does not detract from the fact that the rule poses a few constitutional dilemma due to the fact that it seems to infringe upon the right to access to court.

¹⁵² S 88 of the Income Tax Act 58 of 1962 and s 36 of the VAT Act. See also Pato and Spira 2009 www.saica.co.za ; Croome 2011 www.bericcroome.com; Edward Nathan Sonnenbergs 2009 www.saica.co.za; Williams 2012 *Synopsis* 6; Keulder (2013) 143.

¹⁵³ Williams 2012 *Synopsis* 6.

¹⁵⁴ *Mokoena v CSARS* 2011 2 SA 556 (GSJ) – hereafter “Mokoena”.

¹⁵⁵ *Capstone* 297

¹⁵⁶ *Mokoena* 559.

¹⁵⁷ *Capstone* 297 para 37.

The court *a quo* in the *Metcash trading Ltd (CC)* found that the application of the section 36 rule was not a reasonable and justifiable limitation. It is submitted that the court *a quo* as the purpose of the limitation does not seem to outweigh its infringement on the right to access to court. Keulder and Olivier were of the opinion that the rule poses constitutional problems in that SARS is able to be a judge in its own case if the rule is applied. Olivier is also of the opinion that there are less invasive means available to SARS that would enable SARS to ensure speedy collection of tax.

After the *Metcash Trading Ltd (CC)* case the TSLA brought about guidelines which the Commission would have to consider when using his or her discretion to suspend the payment of tax pending an appeal. Even though guidelines were provided, the application of the “pay now, argue later” rule was still problematic and begged for intervention by the legislator. The legislator did so through the introduction of the TAA. The “pay now, argue later rule” is now governed by section 164 of the TAA. It must be determined whether or not the TAA has addressed the problems experienced by section 36 of the VAT Act and in order to do so chapter four will now focus on section 164 of the TAA .

CHAPTER 4

THE “PAY NOW, ARGUE LATER” IN TERMS OF SECTION 164 OF THE TAX ADMINISTRATION ACT

4.1 THE TAX ADMINISTRATION ACT 28 OF 2011

4.2 SECTION 164 OF THE TAA

4.2.1 INTRODUCTION

4.2.2 CONTENT OF 164 RULE

4.2.3 SECTION 36 RULE v THE SECTION 164 RULE

4.3 Section 164 of the TAA- addressing the problems

4.3.1 Constitutional problems

4.3.2 Guideline problems

4.5 Problems experienced with the 164 rule

4.6 AMENDED SECTION 164

4.7 AMENDED SECTION 164

4.1 THE TAX ADMINISTRATION ACT 28 OF 2011

The Minister of Finance in his 2005 budget review announced the drafting of the TAA. The first draft of the Tax Administration Bill was published in 2009, which was followed by a widespread public consultation process and the Tax Administration Act, 28 of 2011 was promulgated on 4 July 2012 and came into effect on 1 October 2012.

In a press release issued by SARS on 1 October, 2012 it was stated “that the Act is intended to simplify and provide greater coherence in South African tax administration law. It eliminates duplication, removes redundant requirements and aligns disparate requirements that had previously existed in a number of different tax Acts. It was further pointed out “The Act creates a single, modern framework for the common administrative provisions of the tax Acts. It also aligns the SARS’s practice with international best practice and modern tax administration practices. Crucially, the TAA seeks to achieve a balance of rights and obligations between the South African taxpayer and SARS itself.”

It can thus be seen that the legislator intended to ensure greater balance between the rights of the taxpayer and the powers afforded to SARS. Consequently the TAA aims to address the problems experienced by previous tax legislation as it aims to better protect the taxpayers' fundamental rights. This can be seen by the fact that "This new legislation aspires to do more than merely collate and consolidate the administrative provisions of the various tax acts into a single statutory instrument, for it also attempts to make substantive changes to various administrative processes."¹⁵⁸

4.2 SECTION 164 OF THE TAA

4.2.1 INTRODUCTION

One of the aims of the TAA is to ensure the efficient and effective collection of tax.¹⁵⁹ The way in which the TAA aims to achieve this purpose is to align existing tax administration legislation into a single, more comprehensive statute, which will, hopefully, ensure that tax administration is managed more efficiently and effectively.¹⁶⁰ It is therefore clear that the TAA aims to assist SARS in the collection of tax.

It must be pointed out that the TAA applies to all taxes administered by the Commissioner.¹⁶¹ The TAA specifically provides for the payment of tax pending an objection or appeal in terms of section 164¹⁶² and the "pay now, argue later" rule is applicable to both income tax matters as well as VAT matters, as of the 1 October 2012.

4.2.2 CONTENT OF 164 RULE

Section 164 of the TAA stipulates that the obligation of the taxpayer to pay tax will not be suspended pending an objection or an appeal unless a senior SARS official decides otherwise. However, a taxpayer is entitled to request a senior SARS official

¹⁵⁸ Klue *et al.* "Silke on Tax Administration." (2012).

¹⁵⁹ S 2 of the TAA

¹⁶⁰ Croome 2013 www.bericcroome.com.

¹⁶¹ Croome 2013 www.bericcroome.com. With the exception of customs and excise tax.

¹⁶² Of the TAA.

to suspend payment if such a taxpayer intends to lodge an objection or is going to appeal the assessed amount. When deciding whether or not to accept the request from the taxpayer the senior SARS official must take the following into consideration:

- the amount involved;
- the taxpayer's compliance history;
- whether the taxpayer might alienate his or her assets during the postponement of payment;
- the taxpayer's ability to furnish security;
- whether the payment pending an objection or an appeal would cause irreparable financial hardship; and
- if there are any imminent sequestration or liquidation proceedings pending.¹⁶³

It is worth noting that the factors above are identical to the guidelines provided for in terms of the section 36 rule. The senior SARS official will also take into account whether or not the taxpayer has failed to furnish required information or if any fraud is involved.

Keulder¹⁶⁴ points out that in terms of section 164(6) of the TAA SARS is prohibited from invoking recovery proceedings for a period commencing on the day SARS receives a request for suspension, or a previously granted suspension is revoked, and ending ten business days after a notice of SARS's decision regarding suspension or revocation is issued. Accordingly this means that once the taxpayer has requested suspension of an outstanding tax liability in accordance with section 164(2) of the TAA, the enforcement proceedings are stayed for a period of ten days after SARS has rejected the request or has revoked the suspension. At this point it must be noted that a taxpayer's request may be rejected or a suspension may be revoked if it is seen that the request is frivolous or merely used as a delay tactic.¹⁶⁵ The suspension may also be revoked if a material change has occurred after the official had granted

¹⁶³ S 164(3) of the TAA.

¹⁶⁴ Keulder (2013) at 146.

¹⁶⁵ S 164(5) of the TAA.

such suspension. SARS may also continue the enforcement procedures with out adhering to the ten day period if there is a reasonable believe that the taxpayer may alienate his assets.¹⁶⁶

Consequently it can be seen that the “pay now, argue later” rule is still applied by SARS, it is just now applied in accordance with section 164 of the TAA. In the case where the senior SARS official rejects the objection or the appeal and after the ten day waiting period, section 164 like the section 36 rule, affords SARS certain powers in order to enforce payment. Section 179 of the TAA allows SARS to appoint a third person to act as an agent for the taxpayer,¹⁶⁷ where as section 172(2) of the TAA allows SARS to proceed with a statement procedure¹⁶⁸. It is worthy to note that section 172(2) specifically stipulates that unless SARS has accepted the suspension of payment, SARS may apply the statement procedure even though an objection or an appeal has been lodged. The section 164 rule establishes that, if the taxpayers obligation to make payment pending an objection or an appeal is not suspended, SARS can take positive steps to ensure the payment thereof.¹⁶⁹

In order to determine if the section 164 rule addresses any of the problem that arose from the section 36 rule, an important question to ask is whether there is any substantial difference between the two rules?

4.2.3 Section 36 Rule v The Section 164 Rule

Both sections deal with the “pay now, argue later” rule and are worded very similar however there are differences which shall now be discussed.

Firstly, in terms of the section 164 rule, any senior SARS official has the power to suspend the payment from the taxpayer pending an objection or an appeal where as

¹⁶⁶ S 164(6) of the TAA.

¹⁶⁷ This section is similar to the s 47 procedure in terms of the VAT Act.

¹⁶⁸ This is similar to section 40(2)(a) of the VAT Act

¹⁶⁹ Keulder (2013) at 147.

with regards to the section 36 rule only the Commissioner was afforded such power.¹⁷⁰

Secondly, the section 164 rule of the TAA contains a provision (section 164(6)) which stipulates that a SARS is prohibited from taking collection steps during the period of considering a suspension request and ten days after issuing a notice of denial or revocation of the suspension. A similar rule is not provided for in terms of the section 36 rule.¹⁷¹

It now needs to be determined whether or not the above changes address the problems that were experienced with the section 36 rule.

4.3 Section 164 of the TAA- addressing the problems.

The problem experienced by section 36 of the VAT Act was discussed when considering the constitutionality of the “pay now, argue later” rule in terms of the section 36 rule. Further problems were also highlighted in the discussion of the guidelines that were released after the *Metcash Trading Ltd (CC)* case. It is these problems that will be considered when determining whether or not the 164 rule addresses the problems that existed.

4.3.1 Constitutional problems

The first problem to be dealt with comes from the criticism of Olivier and Keulder. They criticize that SARS becomes the judge in its own case in that SARS can enforce its collection procedures despite an objection or an appeal being lodged. Olivier was of the opinion that at the time the rule is invoked, the jurisdiction of the court is ousted. Keulder’s viewpoint was that the taxpayer should be allowed access to court prior to being forced to make payment. In both these criticism’s the fact that the section 36 rule infringes on the aim of section 34 of the Constitution, which is to prevent “self-help”, is pointed out.¹⁷² Following this, Olivier also believes that there

¹⁷⁰ See Keulder (2013) at 148.

¹⁷¹ As above.

¹⁷² See 3.3.5 herein. As these criticisms are similar, they will be dealt with together.

is less invasive means to ensure speedy collection of tax at the disposal of SARS that could achieve a better balance between the rights of the taxpayer and the need to ensure speedy collection of tax.¹⁷³

Section 164(1) of the TAA stipulates that a senior SARS official, instead of the Commissioner for SARS, may suspend the taxpayer's obligation to pay tax pending an objection or an appeal. The effect of this section is merely that the Commissioners powers have been delegated.¹⁷⁴ It could be argued that due to this change there could be a rise in suspensions due to the fact that more SARS personnel have the power to decide and attend to such matters. However section 164(1) of the TAA does not deal with the matter that SARS can enforce payment prior to the taxpayer being able to appear in court. Furthermore, authorising a senior SARS official to consider the suspension of payment does not make this procedure any less invasive. It can be said that the first change to the "pay now, argue later" rule does not address any of the problems rather it is submitted that it can actually create more problems. The fact that the Commissioners powers have been delegated could lead to matters not given the required attention as would be the case if the Commissioner had to consider them. This could rather lead to a situation where more taxpayers requests to suspend payment being denied as more officials may do so. It could also lead to a lack of consistency, as different officials will interpret each situation differently.

Keulder¹⁷⁵ also points out that the change in terms of section 164(6) of the TAA brings about greater legal certainty for the taxpayer, as the taxpayer is guaranteed that SARS will not continue with any enforcement procedures for a certain period, as the collection of tax is stayed for such a period. Due to this it will encourage SARS to reach a decision regarding the request for suspending the payment pending an objection or an appeal as soon as possible in order to ensure that SARS can collect taxes as speedily as possible. Section 164(6) thus has both positive and negative

¹⁷³ See 3.3.5 herein.

¹⁷⁴ Keulder (2013) at 149.

¹⁷⁵ Keulder (2013) at 149.

elements to it. On the one hand it is to the taxpayer's advantage, as SARS will try coming to a decision as soon as possible and consequently not leaving the taxpayer in the dark for a long period of time. On the other hand, due to this very fact, SARS may try make a decision too swiftly and thus not properly consider all the relevant facts. However if this is the case the taxpayer can take the decision on review in terms of PAJA and the decision will be considered an administrative action. The fact however is that section 164(6) of the TAA does not prevent SARS from "self-help" and can also not be seen as a less invasive way to ensure efficient and effective collection of tax.¹⁷⁶

4.3.2 Guideline problems

The guidelines as provided for in the TLSA was also criticised by academics on a few aspects including that there was no weight attached to each factor as well as the relevance of some of the factors.¹⁷⁷ Unfortunately section 164 of the TAA does not deal with any of these problems as the guidelines provided in TLSA are mirrored in section 164(3) of the TAA. Thus any problems experienced with the guidelines will still be experienced now.

The TAA does however deal with the confusion, which arose, in the *Mokoena* and *Capstone* cases with regards to whether or not SARS may proceed with collective procedures even though an objection or an appeal has been lodged.¹⁷⁸ This was dealt with by section 172(2) of the TAA, which now specifically stipulates that SARS may proceed with the statement procedure even though an objection or an appeal is lodged, provided that the obligation has not been suspended in terms of section 164 of the TAA. Consequently it is clear now that SARS may proceed with a statement procedure provided suspension of payment has not been granted.¹⁷⁹

¹⁷⁶ Keulder (2013) at 150.

¹⁷⁷ See 4.2.2 herein.

¹⁷⁸ Keulder (2013) at 150.

¹⁷⁹ Keulder (2013) at 150.

4.5 Problems experienced with the section 164 rule

As the section 164 rule has been compared to the section 36 rule and that the context in which the section 164 rule is applied, it is now worth noting the problems experienced with the section 164 rule.

As mentioned before, if a taxpayer receives an assessment and fails to make payment within the time period allowed, the Commissioner may file a statement with the court, which will have the same effect as a civil judgment against the taxpayer and the Commissioner can enforce the payment of the tax on the strength of such statement if it has been obtained.¹⁸⁰ This is one of the draconian powers available to SARS. However according to section 172 (1) of the TAA, SARS is required to give the taxpayer at least ten business days' notice of the intention to file a statement procedure at the Court. The only situation in which SARS would not have to give the 10 days notice is if SARS is satisfied that giving the notice would prejudice the collection of tax.¹⁸¹ However, as Croome¹⁸² points out, since the 1 October 2012¹⁸³ the Commissioner has unfortunately proceeded to take judgment against the taxpayer without affording him or her the ten business days stay period. The problem with this is that the only recourse for the taxpayer in this situation is to ask for the Commissioners assistance to withdraw the certified statement filed at the court under section 172 of the TAA. Alternatively, the taxpayer would have to approach the High Court for an order to rescind the judgment.¹⁸⁴ The significance of this is that the 10 business days' allows the taxpayer some sort of relief in terms of the "pay now, argue later" rule as it gives the taxpayer a grace period before payment is required.

As mentioned the *Metcash Trading Ltd (CC)* case established that the "pay now, argue later" rule is constitutional.¹⁸⁵ However, section 164 of the TAA allows the taxpayer to request postponement on the payment of outstanding taxes. The

¹⁸⁰ S 172 of the TAA.

¹⁸¹ Where the taxpayer might alienate his assets.

¹⁸² Croome 2013 www.bericcroome.com.

¹⁸³ The date when the TAA became enforceable.

¹⁸⁴ Croome 2013 www.bericcroome.com.

¹⁸⁵ See 3.3.4 herein.

problem with this is that the taxpayer is required to draft a well motivated letter in order for the suspension to be granted and even if the suspension is granted, if the taxpayers objection or appeal is not successful, interest on the amount may be calculated in the favour of SARS.¹⁸⁶ This is extremely worrying as the matter may take years to decide and thus the interest may be exuberant.

Croome also point out that where a taxpayer disputes an assessment from SARS not all matters end up going to the Tax Court for deliberation. Many dispute are now resolved through Alternative Dispute Resolution procedure,¹⁸⁷ here the taxpayer and SARS come to an agreement and settle the matter. Once the matter is settled the parties enter into a settlement agreement and the taxpayer is deemed to have removed his or her objection or appeal against the assessment and SARS must send the taxpayer the new assessment in terms of the settlement agreement.¹⁸⁸ Croome points out that there have been cases in which the taxpayer pays the settlement agreement but after doing so SARS issues them with another assessment in order to obtain the full amount, which was originally in dispute. The only recourse for the taxpayer here is to apply for an application to the High Court ordering that SARS adheres to the settlement agreement, which would not have been the case had SARS done so from the start.¹⁸⁹

Section 164(3) of the TAA gives a list of factors that a senior SARS official will have to take into account when considering whether or not to allow the suspension upon request of the taxpayer. Goldswain¹⁹⁰ points out that most of these factors take into consideration the “cleanliness of the taxpayers hands” and whether or not the taxpayer can provide good evidence to suggest that the suspension should be granted. It is also pointed out that should the senior SARS official not take some of the factors into consideration or not even the factors in their entirety into

¹⁸⁶ Croome 2013 www.bericcroome.com.

¹⁸⁷ S 103 of the TAA.

¹⁸⁸ Croome 2013 www.bericcroome.com.

¹⁸⁹ Croome 2013 www.bericcroome.com.

¹⁹⁰ Goldswain 2012 at 147.

consideration then the taxpayer can get the decision set aside by an application to court.¹⁹¹

In the case of *Singh v CSARS*¹⁹² the court found in the favour of a taxpayer and protected him from the “pay now, argue later” rule by taking into consideration the factors which are now provided in section 164(3) of the TAA. It seems that the court is willing to protect the taxpayer if they have “clean hands”. Firstly the problem with this is that even though the factors gives the taxpayer a better chance to have the payment of tax suspended pending an objection or an appeal, is that regardless of how “clean the taxpayers hands” are should be irrelevant. A senior SARS official should not determine the innocence of the taxpayer but rather a court of law should. Secondly, it should also be a question of fact. The question should be does the taxpayer owe the amount to SARS or not and if this is in dispute than a court of law should decide the matter upon the relevant evidence presented to the court.

Therefore it can be seen from the above that just as the section 36 rule had problems with its application, the section 164 rule also has problems with its application. The legislator has subsequently amended the section 164 rule and consequently the focus of this chapter shall now shift to the amended section 164 rule.

4.6 AMENDED SECTION 164

Section 164 of the TAA provides that a taxpayer should request a senior SARS official to suspend the payment of tax pending an objection or an appeal. The taxpayer is required to motivate his or her request by satisfying the factors provided for in section 164(3) of the TAA.¹⁹³ It is thus important that when the taxpayer drafts his or her request he or she does so with great care and ensures that all the factors to be considered have been met, as this is the document upon which the senior SARS official will decide whether or not to grant the suspension.

¹⁹¹ Goldswain 2012 147.

¹⁹² *Singh v CSARS* 65 SATC 203.

¹⁹³ See 4.2.2 herein.

This list of factors in section 164(3) of the TAA has recently been amended in section 50 of the Tax Administration Laws Amendment Act,¹⁹⁴ which amendment took effect on 20 January 2015. Accordingly section, 164(3) of TAA now stipulates that a senior SARS official may suspend payment of the disputed tax or a portion thereof having regard to relevant factors, including:

- the compliance history of the taxpayer;
- the amount of tax involved;
- the risk of dissipation of assets by the taxpayer concerned during the period of suspension;
- whether the taxpayer is able to provide adequate security for the payment of the amount involved;
- whether payment of the amount involved would result in irreparable financial hardship to the taxpayer;
- whether sequestration or liquidation proceedings are imminent;
- whether fraud is involved in the origin of the dispute; or
- whether the taxpayer has failed to furnish information requested under this Act for purposes of a decision under this section.

From the above list it can be seen that some of the factors that were in section 163(3) prior to its amendments have now been removed. It also appears if the amended section 163(3) makes it more difficult for the taxpayer to be granted a suspension by a senior SARS official as there are less factors that can be considered.

However a benefit that can be identified from the amendment can be seen from the use of the word “including” before going on to list the factors. The significance of this is that when a senior SARS official is considering a suspension pending an appeal or objection, all relevant factors¹⁹⁵ must be considered. Thus the circumstances of the taxpayer should also be considered, which may be beneficial to such taxpayer.

¹⁹⁴ Tax Administration Laws Amendment Act 44 of 2014.-hereinafter referred to as TALAA.

¹⁹⁵ Including those factors listed in section 164(3) prior to its amendment as well as after its amendment.

What further factors SARS will consider relevant remains to be seen and will most likely depend on the specific circumstances and facts of each matter.¹⁹⁶

The next amended factor that seems to be to the taxpayer's benefit is the "irreparable hardship" requirement. The term "irreparable hardship" has not been defined in the TAA. Consequently if one is to consider the ordinary meaning of hardship,¹⁹⁷ "irreparable hardship" would entail that, should the taxpayer be successful upon appeal, any subsequent action that does not place a taxpayer in the same position as the position he or she was in prior to suffering such hardship can be identified as irreparable hardship.¹⁹⁸ The importance of the amendment however is that the word "financial" has been left out. Thus the requirement has been widened in the favour of the taxpayer as now it seems that the legislator has acknowledge that the taxpayer may experience hardship that is not of a financial later due to the "pay now, argue later" rule being applied. It now seems that the senior SARS official must take into account any relevant hardship that the taxpayer may experience due to the suspension not being granted.

The next aspect to be considered is the security requirement. Before the amendment one of the factors that a senior SARS official would have to consider was whether or not the taxpayer was able to provide adequate security. Now however due to the amendment the security requirement is whether or not the taxpayer has tendered adequate security. It is clear from this that the amendment places a greater burden on the taxpayer to meet this factor, as now the taxpayer must actually offer security¹⁹⁹ and such offer will be a factor that the senior SARS official will take into consideration.²⁰⁰

¹⁹⁶ See Author unknown "Changes to criteria considered by SARS when suspending payment of tax" <http://www.cliffedekkerhofmeyr.com> (accessed on 29 July 2015).

¹⁹⁷ *Longman Dictionary of Contemporary English* (1995) sv "hardship". a condition that is difficult to endure; suffering; deprivation; oppression.

¹⁹⁸ See Solomon " 'Pay now, argue later' rule- recent amendments to section 164 of the Tax Administration Act 28 of 2011" <http://www.ens.co.za> (accessed on 29 July 2015).

¹⁹⁹ As opposed to the mere ability to provide security.

²⁰⁰ See Solomon (2015).

This will thus ensure payment by the taxpayer, however it is submitted that this factor unreasonably burdens the taxpayer as if the taxpayer does not succeed with his objection or appeal SARS may merely enforce the statement procedure. This will have the same effect as from the statement procedure writ of execution and consequently get any property attached anyhow. Therefore this factor just makes applying for suspension more difficult and due to this less taxpayers will attempt such procedures.

The last amendment to be considered, is the inclusion allowing SARS to recover taxes that are in jeopardy. Unfortunately however “jeopardy” is not defined or explained in section 164 of the TAA. Furthermore the TAA stipulates that SARS may make a jeopardy assessment in advance of the date on which the return is normally due, if the Commissioner is satisfied that it is required to secure the collection of tax that would otherwise be in jeopardy,²⁰¹ unfortunately however, this section does not establish exactly when the collection of tax is in jeopardy.²⁰² This is more burdensome on the taxpayer, if one considers that the new jeopardy assessment is read with the “pay now, argue later” rule, than SARS would be able to collect taxes on the basis of an assessment for which no return has been submitted.²⁰³ It must however be pointed out that the TAA does offer the taxpayer some sort of relieve in this instance as the taxpayer may have a jeopardy assessment reviewed by the High Court on the ground that it is excessive or that circumstances justifying a jeopardy assessment do not exist.²⁰⁴ Even though there is some sort of relieve for the taxpayer this does not take away from the fact the jeopardy requirement provided in the amendment does indeed make applying for suspension more onerous.

4.7 CONCLUSION

As can be seen the developments in the “pay now, argue later” rule have been very little. The wording of the rule is extremely similar to that of the original section 36

²⁰¹ S 94 of the TAA.

²⁰² See Solomon (2015) discussion on the recovery of taxes in jeopardy.

²⁰³ See Buttrick “ *When wrong or right, pay now*” <http://www.thesait.org.za> (accessed on 29 July 2015).

²⁰⁴ As above.

rule. The rule still poses a few constitutional problems, as has been identified, because the taxpayers' right to court still seems to still be infringed upon. At best it can be said that the amended section 164 rule provides a little more clarity for the taxpayer, however it can also be seen that the amendment has also given SARS greater opportunity to reject the request to suspend payment pending an appeal or objection.

The introduction of the TAA was a chance for the legislator to correct the problems faced by the "pay now, argue later" rule. It is rather disappointing that this opportunity was not taken. It can actually be seen that the rule in terms of section 164 of the TAA seems to offer greater power to SARS. Instead of improving the "pay now, argue later" rule, the legislator rather created more areas that could be problematic in the future.

CHAPTER 5

In this dissertation the constitutionality of the “pay now, argue later” rule was dealt with, in essence one cannot say that the rule is unconstitutional as in the *Metcash Trading Ltd (CC)* case the Constitutional Court came to the conclusion that the “pay now, argue later” rule does stand up to constitutional muster. It was pointed out that the “pay now, argue later” rule may indeed pose a few constitutional problems. In order for the rule to be considered unconstitutional it will have to be shown dilemmas that the court had erred in the *Metcash Trading Ltd (CC)* case. Critisims on the court’s decision by Olivier and Keulder may help prove that the court had indeed made an error.²⁰⁵

It must however be remembered that the court had declared the “pay now, argue later” rule constitutional with regards to VAT and that this therefore does not automatically mean that the decision also applies to the case of Income Tax. A court may decide the rule is unconstitutional in cases of income tax, however this seems unlikely as the court seems to place heavy weight on the importance of SARS being able to speedily collect taxes.²⁰⁶

Since October 2012 the rule is applied in terms of section 164 of the TAA and the question arose whether the TAA addresses the problems experienced by section 36 of the VAT Act. The two main areas that presented constitutional problems was the fact that SARS can act as a judge to its own case and that there are less invasive means for SARS to achieve efficient and effective collection of taxes. It was established that due to the fact that the rule is worded so similarly in both Acts, that the key problems in section 36 of the VAT Act were not address by the introduction of the TAA. What is even more distressing is the fact that section 164 of the TAA may

²⁰⁵ As discussed in 3.4.5

²⁰⁶ As discussed in 3.3

have brought about even more problems to the situation rather than rectifying the ones that were previously being experienced.

It was once again hoped that the taxpayers' problems would be addressed with the amendment of section 164 of the TAA by the TLAA. This however was not the case as it would seem that the amended section 164 seems to actually benefit SARS more. This is worrying, as it seems that the pattern emerging is that the legislator is giving SARS wider powers in this regard, rather than protecting the taxpayers' fundamental rights. It can therefore be said that it is unlikely that the TAA addresses the problems that had previously been experienced, which is indeed unfortunate.

More clarity with regards to the "pay now, argue later" rule needs to be provided by the legislator. It is also submitted that a better balance between the powers of SARS and the rights of the taxpayer is urgently needed. A better balance would lead to better co-operation by taxpayers and would result in more funds for the *fiscus*. It however seems apparent that the legislator is not willing to do this and one can only hope that the matter is brought before a court so that the court can show that it had erred in its decision in the *Metcash Trading Ltd (CC)*. It may be left up to the court to decide the rule is unconstitutional as it infringes on the very important right of access to court.

BIBLIOGRAPHY

BOOKS AND CHAPTERS THESIS'	
	MODE OF CITATION
Croome BJ <i>Taxpayers' Rights in South Africa</i> (2010) Juta & Co Ltd: Cape Town.	Croome (2010)
Croome BJ et al " <i>Tax law, an introduction</i> " 1 st Edition (2013) Juta & Co Ltd: Cape Town.	Croome et al (2013)
Currie I & De Waal J <i>The Bill of Rights Handbook</i> (2005) 5th edition Juta & Co Ltd: Cape Town.	Currie & De Waal (2005)
Croome BJ <i>Taxpayers' Rights in South Africa: An Analysis and Evaluation of the Extent to Which the Powers of the South African Revenue Service Comply with the Constitutional Rights to Property, Privacy, Administrative Justice, Access to Information and Access to Courts.</i>	Croome Phd Thesis (2008)
Croome BJ & Olivier L <i>Tax Administration</i> (2010) Juta & Co Ltd: Cape Town.	Croome & Olivier (2010)
Currie I & De Waal J <i>The Bill of Rights Handbook</i> (2005) 5th edition Juta & Co Ltd: Cape Town.	Currie & De Waal (2005)
Goldswain GK " <i>The winds of change-an analysis and appraisal of selected constitutional issues affecting the rights of taxpayers</i> ".	Goldswain (2012)
Keulder C " <i>Does the Constitution protect the taxpayer against the mighty SARS- An inquiry into selected tax practices and procedures.</i> "	Keulder C (2011)
Woolman S & Botha H "Limitations" (chapter 34) in <i>Woolman S et al</i> (eds) <i>Constitutional Law of South Africa</i> (2007) Student edition Juta & Co Ltd: Cape Town.	Woolman <i>et al</i> (2007)

STATUTE
Citation of Constitutional Law Act 5 of 2005
Income Tax Act 58 of 1962 (as amended)
South African Revenue Services Act 34 of 1997
Second Taxation Law Amendment Act 18 of 2009
Tax Administration Act 28 of 2011
The Constitution of the Republic of South Africa, 1996
Value Added Tax Act 89 of 1991 (as amended)

CASES
<i>Capstone 556 (Pty) Ltd v CSARS</i> 2011 ZAWCHC 297.
<i>Chief Lesapo v North West Agricultural Bank</i> 999 12 BCLR 1420 (CC).
<i>Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs</i> 2000 8 BCR 837 (CC).
<i>Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development</i> 2009 (4) SA 222 (CC).
<i>Hindry v Nedcor Bank Ltd.</i> (1999) 2 All SA 38 (W).
<i>Marsay v Dilley</i> 1992 (3) SA 944 (A).
<i>Metcash Trading Ltd v Commissioner for the South African Revenue Service</i> 2001 1 BCLR 1 (CC).
<i>Metcash Trading Ltd v Commissioner for the South African Revenue Services</i> (2000) 2 SA 232 (W).
<i>Schmidt v Theron</i> 1991 (3) SA 126 (K).
<i>Singh v CSARS</i> 65 SATC.
<i>S v Manamela</i> 2000 3 SA 1 (CC).
<i>Mokoena v CSARS</i> 2011 2 SA 556 (GSJ).
<i>Traco Marketing (Pty) Ltd & Another vs Minister of Finance & Others</i> , 58 SATC 526.

WEBSITES
<p>Author Unknown www.thesait.org.za 2013</p> <p>http://www.thesait.org.za/news/116115/Wheter-wrong%20-or-right-pay-now.htm. [Accessed on: 25 April 2015]</p>
<p>Author Unknown http://www.cliffedekkerhofmeyr.com 2015</p> <p>https://www.cliffedekkerhofmeyr.com/en/news/publications/2015/tax/30-january-changes-to-criteria-considered-by-sars-when-suspending-payment-of-tax.html [Accessed on: 15 September 2015]</p>
<p>Croome 2013 http://www.bericcroome.com 2013</p> <p>http://www.bericcroome.com/2013/04/one-way-traffic-with-sars.html [Accessed on: 15 September 2015]</p>
<p>Vanek 2012 www.moneywebtax.co.za</p> <p>Vanek M 2012 Big Tax Changes You Should be Aware Of www.moneywebtax.co.za/moneywebtax/view/moneywebtax/en/page1/page34677?oid=71806&sn=Detail&pid=1 [date of use 22 Mar 2012]</p>
<p>Pato and Spira 2009 www.saica.co.za</p> <p>https://www.saica.co.za/News/NewsArticlesandPressmediareleases/tabid/695/itemid/1867/language/en-US/Default.aspx [Accessed on 23 March 2015]</p>
<p>Solomon www.ens.co.za 2015</p> <p>https://www.ensafrika.com/news/Taxpayers-rights-in-respect-of-a-suspension-of-payment-of-tax?Id=1113&STitle=tax%20ENSight [Accessed on: 15 September 2015]</p>
<p>Solomon www.ens.co.za Date Unknown</p> <p>https://www.ensafrika.com/news/pay-now-argue-later-recent-amendments-to-section-164-of-the-Tax-Administration?Id=1772&STitle=tax%20ENSight [Accessed on: 16 September 2015]</p>

OFFICIAL DOCUMENTS
<p>Arnold BJ Opinion Prepared for the Commissioner for Inland Revenue (Attached as Annexure H to the Affidavit of the Commissioner for Inland Revenue in an Application to the Constitutional Court, CCT/22/96)</p>
<p>SARS Media Release 27 of 2000</p>

JOURNALS	
	MODE OF CITATION
Croome BJ "Constitutional Law and Taxpayer's Rights in South Africa – An Overview" (2002) <i>Acta Juridica</i> 1	Croome (2002)
Olivier L "Tax Collection and the Bill of Rights" (2001) <i>TSAR</i> 193-200	Olivier (2001) <i>TSAR</i>
Keulder C "Pay now, argue later" rule- before and after the tax administration Act." <i>P.E.R. Volume 16 No 4</i> (2013)	Keulder (2013)
Williams RC "Unresolved aspects of the 'pay now later' rule" January 2012 Synopsis 4–6	Williams 2012 Synopsis