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ABSTRACT

This contribution is an analysis of certain provisions of the Tax Administration Act 28 of 2011 (TAA). The TAA is aimed at consolidating all the provisions on tax administration, such as the provisions on search and seizure operations which are administered by the South African Revenue Service, which were in various tax Acts such as the Income Tax Act 58 of 1962, the Value Added Tax Act 89 of 1991, the Transfer Duty Act 40 of 1949 and the Estate Duty Act 45 of 1955. This dissertation examines whether the promulgation of the TAA harmonized the potentially unconstitutional search and seizure provisions that existed prior to the TAA.

This research critically analyses the rights of taxpayers in terms of the 1996 Constitution of The Republic of South Africa against the powers awarded to SARS in terms of the TAA. This dissertation is aimed at establishing whether the promulgation of the TAA protects the taxpayers’ constitutional rights to privacy. Particular reference is made to the powers the Commissioner has in relation to search and seizure with or without a warrant. This research also includes a comparative analysis with the United States, and analyses how this country deals with search and seizure under U.S. income tax law. Specific reference in this regard is made to searches without a warrant. In this comparative analysis it is discovered that in the U.S, the Internal Revenue Service (IRS) is given the powers to conduct search and seizure if a tax crime has been committed and the challenge is finding a balance between the powers given to the IRS and the rights as entrenched in 4th Amendment of the U.S. Constitution.

This research concludes with a finding that the TAA does not adequately protect taxpayers’ rights and the powers conferred to SARS officials place taxpayers in a vulnerable position. In conclusion it is suggested that the recently established Tax Ombudsman must be vigilant in ensuring that the powers given to SARS by the TAA are not abused at the cost of the taxpayers.
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DECLARATION

I, Xolisile Nomasono Khanyile, hereby declare that the work on which this dissertation is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university.
Signature: ______________________________
Date: ______________________________
CHAPTER 1
INTRODUCTION

1.1 BACKGROUND AND INTRODUCTION

The drafting of the Tax Administration Act (herein after referred to TAA) was announced by the Minister of Finance in his Budget Speech in 2005.\(^1\) The Tax Administration Bill\(^2\) was published in 2009 and after intensive consultations and research, the TAA was promulgated on 4 July 2012 with the main objective:

\[
[t]o ensure the effective and efficient collection of tax by aligning the administration of the tax Acts to the extent practically possible, prescribing the rights and obligations of taxpayers and other persons to whom this Act applies, prescribing the powers and duties of persons engaged in the administration of a tax Act; and generally giving effect to the objects and purposes of tax administration.\(^3\)
\]

As indicated in the statement quoted above, the TAA was aimed at consolidating all the provisions on tax administration, such as the provisions on search and seizure, administered by the South African Revenue Service (SARS)\(^4\) which were in various tax Acts such as the Income Tax Act 58 of 1962, the Value Added Tax Act 89 of 1991, the Transfer Duty Act 40 of 1949 and the Estate Duty Act 45 of 1955.

The promulgation of the TAA brought about an overhaul to the provisions on search and seizure operations conducted by SARS in the recovery of tax. These provisions had remained unchanged for a long time.\(^5\) This dissertation examines whether the promulgation of the TAA harmonized the potentially unconstitutional search and seizure provisions that existed prior the TAA. Long before the Interim Constitution of South Africa 1993, the Commissioner was granted powers to search and seize the taxpayers’ premises without the taxpayer’s prior knowledge. This was provided for

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\(^2\) Tax Administration Bill 11 of 2011 introduced 23 June 2011.
\(^3\) Section 2 of the Tax Administration Act 28 of 2011.
\(^4\) Hereinafter SARS.
\(^5\) https://www.saica.co.za/integritax/2011/1982_Search_and_seizure.htm (accessed on 16 January 2016). According to ENS, “[o]nce the Tax Administration Bill becomes law the new provisions on search and seizure will replace, amongst other things, section 74D of the Act and section 57D of the VAT Act. The latest draft of the Tax Administration Bill (Bill 11) of 2011 (TAB) retains the general requirement of a warrant. Provisions that are similar to those in the Act and the VAT Act relate to the application for and issuing of a warrant by a judge, the carrying out of the search, the retention by the Commissioner of the material seized and the return of such material to the taxpayer. Most principles will remain the same under the Tax Administration Bill, but the legislation introduces the somewhat controversial “without a warrant” search and seizure provisions.”
in section 74D of the Income Tax Act 58 of 1962 (ITA). Judicial authorization was not required. This was clearly intrusive and archaic, and, as time went on, change was inevitable. It is clear that SARS’ major function is to collect tax revenue. However, under the current constitutional dispensation, it’s duties and obligations do not exist in isolation and SARS has to take taxpayers’ constitutional rights into consideration. These rights include the rights to just administrative action, to access the courts and to privacy. The right to privacy will be one of the main focuses of this dissertation, due to the fact that it is potentially infringed when search and seizure operations are conducted. While this right is important in so far as it applies to taxpayers, it is not absolute. Section 36 provides that “[t]he rights in the Bill of Rights may be limited, but only in terms of a 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. Furthermore, when limiting a right, a court should take into account all relevant factors, including:

a) the nature of the rights,
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.”

When SARS collects tax from taxpayers, it must do so in a way that strikes a balance between its objectives and the rights of taxpayers. This dissertation examines whether the promulgation of the TAA has overhauled the aforesaid historical constitutional problems associated with searching the taxpayer’s premises without a warrant or judicial authorization. In this regard, the dissertation will examine whether the new provisions of sections 59, 60, 61, and 63 of the TAA have addressed the constitutional problems described above. This dissertation also presents an overview of the scope and purpose of the new provisions as well as an assessment of their potential impact on the powers and duties of SARS and the rights and obligations of affected taxpayers.

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7 Ibid section 34.
8 Ibid section 14.
9 Ibid section 36.
10 Ibid.
In undertaking the reference above reference will be made to recent cases which have significant implications for SARS regarding search and seizure operations in terms of the TAA. Such cases entail *Gaertner and Others v Minister of Finance, the Commissioner of the South African Revenue Service and others*,\(^\text{11}\) where the court provided officials with guidelines on how to conduct warrantless searches in a manner that would balance a taxpayer’s right to privacy with SARS’s interest in the administration of the Act. Reference will also be made to the case of *Huang and Others v Commissioner of the South African Revenue Services*\(^\text{12}\) which shows that even in cases where a search is conducted with a necessary warrant, there is still reason for concern since SARS officials sometimes abuse the court process.\(^\text{13}\)

### 1.2 Research Problem

Generally, search and seizure is defined as the “examination of a person's property by law enforcement officials investigating a crime and the taking of items as potential evidence”\(^\text{14}\). Sometimes if a taxpayer is suspected of having committed a tax offence, SARS will conduct search and seizure at the business premises of the offender or suspected offender as part of the process of information gathering. However, over the years SARS has abused this power, and this led to the introduction of the TAA.\(^\text{15}\) The TAA makes provision for two kinds of search and seizure, namely one where a warrant is obtained and another where search and seizure is conducted without a warrant.\(^\text{16}\) It is submitted that those searches with or without a warrant raise constitutional concerns, including the possible abuse of court processes. Where search and seizure operations without warrants are conducted, remedies sought by affected taxpayers are often fruitless, since the damage would usually have already been done by SARS officials. This dissertation will examine these problems by considering whether the TAA did away with the constitutional problems attached to search and seizure provisions and operations before the TAA was introduced.

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\(^\text{11}\) 2014 (1) SA 442 (CC).


\(^\text{16}\) As provided for by section 61 and section 63 of the TAA.
1.3 RESEARCH QUESTIONS
The purpose of this dissertation is to determine the procedure that the Commissioner or his officials had to follow when conducting search and seizure prior the TAA, as well as those that have to be followed under the current dispensation. In achieving this purpose, the following research questions will be considered and answered:

a) Whether such operations amount to a violation of the right to privacy.

b) Whether the promulgation of the TAA has rectified the violation of right to privacy that was previously caused by such operations.

c) Whether any recommendations and solutions based on the findings from the above.

1.4 OBJECTIVES OF RESEARCH
This dissertation aims to analyse the development of search and seizure from being conducted warrantless under the previous section 74(3) of the ITA, to the requirement of a warrant under section 74D of the ITA, and to a combination of both under the TAA. The study further aims to provide a basic understanding of the warranted search and seizure provisions in South African income tax law and to examine the constitutional problems regarding the operation of a warranted search and seizure.

The current provisions of the TAA provide that a warrant must be obtained by way of an ex parte application. The issues relating to the ex parte application, the status of a warrant once exercised, as well as the validity of a warrant will be explored in this dissertation. Furthermore, the study aims to provide an understanding of the warrantless search and seizure provisions of the TAA and the new mechanism available to the Commissioner which must be analysed to determine exactly what the Commissioner is supposed to do when conducting search and seizure operations. The provisions of other Acts will be considered in order to determine whether they are in line with what has been approved by our courts in other spheres of the law. Moreover, the study aims to evaluate whether the warranted search and seizure provisions of the ITA and the TAA are constitutional. A further aim is to determine the remedies that are available to a taxpayer who has been subjected to either a warranted or a warrantless search and seizure.
1.5 APPROACH AND RESEARCH METHODS

All the important information required in support of this research will be collected through a literature review and applicable legislation and case law will be analysed. A qualitative approach will be used in this research. A comparative analysis with the United States, this country was elected because its legislations is similar to South Africa, it empowers the IRS to issue a warrant for the seizure of property used or intended to be used in violation of the Internal Revenue laws. However it is also provided that a seizure in violation of the Fourth Amendment will not sustain a forfeiture, unless the property seized is contraband per se. Basically the IRS has to ensure that the rights of a taxpayer are not violated when conducting search and seizure. However there is a concern that when search and seizure operations are conducted at most the taxpayer’s rights are violated in this regard. Due to the powers given to IRS.

1.6 STRUCTURE OF DISSERTATION

The TAA has granted SARS powers to search and seize documents of a taxpayer if the taxpayer is suspected of tax evasion and if taxpayer has committed a crime tax. This dissertation seeks to investigate these powers and to investigate if there are any available remedies to protect taxpayers’ rights in terms of the Constitution.

After this introductory chapter, Chapter 2 looks at the development and history of search and seizure under the South African income tax law. It analyses how taxpayers dealt with search and seizure under the income tax law of South Africa before the promulgation of the Interim Constitution and further how the developments came about in South Africa.

Chapter 3 deals with search and seizure without a warrant. It investigates if the search has an adverse effect more specifically with the taxpayer’s rights to privacy and if the TAA sufficiently protects the rights of taxpayer in this regard.

Chapter 4 deals with search and seizure with a warrant, it investigates the requirements for the application of the warrant and the procedure to be followed when SARS’s is seeking a warrant. It investigates the problems that come about with this form of search and seizure.

Chapter 5 will investigate the search and seizure laws of the U.S. This chapter will focus on how search and seizure operations are dealt with within the constitutional context. Attention will only be paid to search and seizure with a warrant.
Chapter 6 will conclude the dissertation, and recommendations based on the findings made will be presented.
CHAPTER 2
THE DEVELOPMENT OF SEARCH AND SEIZURE UNDER SOUTH AFRICAN INCOME TAX LAW.

2.1 INTRODUCTION

This chapter focuses on the history of search and seizure operations conducted in terms of the ITA. The 1994 election brought about the introduction of the Interim Constitution of South Africa 1993. During the apartheid era, taxpayers could not challenge any statute by government. It only became possible for taxpayers to challenge search and seizure provisions once the Constitution of the Republic of South Africa, 1996 became the highest statute of South Africa. This chapter will examine the provisions of the old section 73(4) of the ITA, as well as the developments thereto; leading up to the amendments and until the promulgation of the TAA.

2.2 PRIOR TO THE INTERIM CONSTITUTION

Prior to 1994 South Africa was a parliamentary state, in which Parliament was supreme. This meant that the legislative body had absolute sovereignty. According to Croome, “[t]he 1983 Constitution did not specifically provide the state with the power to tax its citizens but granted this power by implication, by compelling the state to provide certain services.”18 Chapter 80 of the old Constitution19 provided that “all revenues of the Republic, from whatever source arising, shall vest in the State President” and further provided as follows:

(1) In respect of the State Revenue Fund there shall be

   (a) a State Revenue Account, which shall, subject to the provisions of paragraph (b) and subsection (2), be credited with all revenues and from which shall be defrayed all expenditure and be paid any amounts with which it is charged in terms of this Act or any other law;

   (b) the accounts in connection with the administration of own affairs of the different population groups, which may be prescribed by any general law and which shall be credited with all revenues accruing to them in terms of this Act or any other law and from which shall be defrayed all

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17 Herein after the Interim Constitution.
19 Herein after referred to as the 1983 Constitution.
Sections 80 and 82 were the two main provisions in the 1983 Constitution which regulated the collection of tax revenue in South Africa. Prior to the Interim Constitution of South Africa, taxpayers had limited or no rights. The 1983 Constitution did not have a Bill of Rights and taxpayers had no way of challenging the powers of the Revenue Collector. Section 8(1) of the Republic of South Africa Act 110 of 1983 provided that “there shall be a State Revenue Fund into which shall be paid all revenue as defined in section 1 of the Exchequer and Audit Act, 1975”. This provided the state with significant powers regarding the collection of tax. This left taxpayers vulnerable to unjust tax laws. However, in 1993 an individual taxpayer by the name of Glynn Rudolph took the Commission of Inland Revenue to court to challenge the search and seizure operations that had been conducted on his business premises under section 74(3) of ITA, after being suspected of tax evasion.

2.3 THE RUDOLPH SAGA IN RELATION TO SEARCH AND SEIZURE OPERATIONS

Previously, before it was substituted in 1996, section 74(3) of the ITA provided as follows:

Any officer engaged in carrying out the provisions of this Act who has in relation to the affairs of a particular person been authorized thereto by the Commissioner in writing or by telegram, may, for the purposes of the administration of this Act-

(a) without previous notice, at any time during the day enter any premises whatsoever and on such premises search for any moneys, books, records, accounts or documents;

(b) in carrying out any such search, open or cause to be opened or removed and opened, any article in which he suspects any moneys, books, records, accounts or documents to be contained; (c) seize

20 Section 82 of the 1983 Constitution.
21 Section 14 of the Revenue Laws Amendment Act No 46 of 1996 substituted section 74 of the Act, and added sections 74A, 74B, 74C and 74D. The new sections 74 and 74A-74D came into operation on 30 September 1996.
any such books, records, accounts or documents as in his opinion may afford evidence which may be material in assessing the liability of any person for any tax;

(d) retain any such books, records, accounts or documents for as long as they may be required for any assessment or for any criminal or other proceedings under this Act.\textsuperscript{22}

The search and seizure provisions above were reviewed by the courts. The case discussed below played a major role by getting the attention of the judiciary on search and seizure operations. This where the question of the constitutionality of search and seizure was analysed.

\textit{Rudolph and Another v CIR and Others NNO,\textsuperscript{23} Rudolph v CIR and Others Rudolph v CIR and Others\textsuperscript{24} and Rudolph v CIR and Others\textsuperscript{25}} was a series of cases in which Rudolph appealed to high court after an adverse finding in the lower courts. The facts of the matter are that Rudolph had a business and failed to submit his tax returns in terms of the ITA. On 20 October 1993 the Chief Director of Administration in the Department of Finance, issued fourteen authorizations in terms of section 74(3) of the ITA to a number of officials in the Revenue Department. This authorized the officials to exercise, in relation to the taxpayer and several of his companies and trusts, the powers prescribed in section 74(3) of the ITA. The search of his business property commenced on October 1993,\textsuperscript{26} and the Commissioner seized documents from his business premises without a warrant. The matter went to the courts, including and up to the Supreme Court of Appeal and the Constitutional Court. The Constitutional Court ruled that it did not have jurisdiction to adjudicate the matter based on the fact that the 1996 Constitution could not apply retroactively in the sense that it had not came into operation, it was drafted in 1994 and come to operation in 1996. When the matter went to the Supreme Court of Appeal the Constitution was already operational, but the

\textsuperscript{23} 1994 (3) SA 771 (W).
\textsuperscript{24} 1996 (2) SA 886 (A).
\textsuperscript{25} 1996 (4) SA 552 (CC).
\textsuperscript{26} 1997 (4) SA 391(SCA).
time of the alleged violations took place, the Constitution was not yet operational, which explains the reasoning of the court.

The search and seizure operations in this case had thus taken place prior to the 1996 Constitution coming into force which meant that none of the events which the applicant challenged could be said to have constituted a breach of any of his rights under the Interim Constitution. The Constitutional Court held that “such rights had not yet come into existence when the events took place, nor could the subsequent advent of the Interim Constitution, by affording rights and freedoms which had not existed before, render unlawful actions that were lawful at the time at which they were taken.”

Rudolph then took the matter back to the Supreme Court of Appeal and sought relief by using common law grounds. Unfortunately Rudolph did not succeed.

2.4 THE INTERIM CONSTITUTION
The Interim Constitution, which has been alluded to above came into operation on 27 April 1994. The introduction of this Constitution brought about a number of fundamental changes. It contained a Bill of Rights and “brought an end to the racially-qualified constitutional order that had accompanied three hundred years of colonialism”. The doctrine of parliamentary sovereignty was replaced by the doctrine of constitutional supremacy. Section 185 of the “Interim Constitution provided for the establishment of the National Revenue Fund into which all revenue raised or received by the national government had to be paid, parliament could only appropriate funds from that fund under the Constitution or any applicable Act of Parliament.” Before the enactment of this Constitution, the Commissioner could act as he/she deemed fit without the intervention of the judicial system. The Commissioner could search and seize documents without prior notice to the taxpayer.

In 1996, section 74(3) of the ITA was substituted by section 74 and section 74D which became the law in place regarding the regulation of search and seizure. The new provisions did away with mere authorization of search and seizure by the Commissioner for such to commence. In fact, the new provisions of section 74D required the Commissioner to obtain a warrant from a judge.

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29 Ibid.
Commissioner was thus required by this section to obtain judicial authorization through an *ex parte* application. Later on, the same section was amended and the words *ex parte* were removed.31

### 2.5 KATZ COMMISSION OF ENQUIRY

The Katz Commission of Enquiry was established on 22 June 1994 and was headed by Katz Michael.32 The mandate of the Commission was to investigate the possibility of tax reform in South Africa in the light of the new constitutional dispensation. The establishment of the Commission was an indication that the government was aware of the need for tax laws to aligned with the Constitution. As government noted at the time the Katz Commission was established, a decade had passed since the Report of the Margo Commission33 and much had changed in South Africa and it was “opportune that a comprehensive and fundamental, "holistic", view be taken of the tax structure in South Africa.”34 One the main recommendations by The Katz Commission was “warrants required under section 74 must be authorized in advance of execution by a person acting judicially.”35 The Commission concluded that the Commissioner’s powers of authorization of warrants was invalid under the Interim Constitution.36 It was said to be in violation of the right to privacy. Furthermore the Commission stated that the person authorizing the issuing of the warrant must be satisfied, by information given under oath, that an offense had been committed under the fiscal statute.37

The case of *Mistry v Interim National Medical and Dental Council and Others*38 helps to illustrate the impact of the new constitutional dispensation on search and seizure operations in a tax collection context. In this case, the court had to decide whether the provisions of section 28(1) of the Medicines and Related Substance Control Act 101 of 196 that were similar to the old section

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31 Section 74D (1) of the Act was amended by section 29 of the Income Tax Act No 28 of 1997 and this amendment came into operation on 4 July 1997.
32 The Katz Commission of Inquiry into Taxation.
33 The Margo Commission of Inquiry into the death of President Samora Machel.
35 Ibid.
36 Section 14 of the South African Constitution provides that “Everyone has the right to privacy, which includes the right not to have: their person or home searched; their property searched; their possessions seized; or the privacy of their communications infringed”.
38 1998 (4) SA 1127; 1998 (7) BCLR 880 (29 May 1998)
73(4) of the ITA were constitutional. The Commissioner’s officers had arrived at the premises without a warrant and had seized documents. During the court trial the Commissioner’s counsel argued that the officers were acting in accordance with the provisions of the Value Added Tax Act 89 of 1991 (VAT Act) and that they had written authority to search the premises. The court however held that written authority was no longer sufficient and further stated that section 57(1) of the VAT Act and section 73(4) of the ITA were no longer valid. The documents that were seized were subsequently returned to the taxpayer. The Commissioners actions relied on the above legislations because at that time not all tax laws had been amended to fit the Constitution, this reason was one of the main cause for the promulgation of the TAA. To allow one statute to provide guidance in relation to tax administration more specifically with search and seizure.

2.6 CONCLUSION
This chapter focused on the history and the position of the search and seizure provisions in terms of the tax law prior to the Interim Constitution. It was discussed that the power to collect tax was vested upon the state, which had near absolute powers in this regard. Taxpayers had no rights and had no power to challenge any of the unjust law under the income tax law. Months before the Interim Constitution, the Rudolph Saga, from the Rudolph case, was adjudicated on and this case was one of the first cases that dealt with which the validity of section 73 (4) of the Income Tax Act. As seen earlier, the taxpayer did not succeed in court due to the fact that the Interim Constitution could not apply retrospectively. However it left a precedent that lead to the establishment of the Katz Commission. This chapter discussed that the Katz Commission of Enquiry was established on 22 June 1994 the mandate of the Commission was to investigate the possibility of tax reform in South Africa in the light of the new constitutional dispensation. The establishment of the Commission was an indication that the government was aware of the need for a more systematic approach to tax reform in South Africa. The Commission concluded that the Commissioner’s powers of authorization of warrants was invalid under the Interim Constitution. During this era the TAA was not in the picture yet. It eventually became apparent that that there was a need for single piece legislation to cater for all tax administration provisions scattered in different tax Acts.

39 Croome at 4.
CHAPTER 3
SEARCH AND SEIZURE WITHOUT A WARRANT

3.1 INTRODUCTION.
As alluded to in the previous chapter, the Katz Commission of Enquiry was aimed at reforming South Africa's tax system. The Katz Commission relied on the 1996 Constitution in reforming changes that would promote equality under the tax system of South Africa. This led the Minister of Finance to announce the introduction of the TAA in 2005. The Tax Administration Bill was published in 2009. The consultative process took place and the TAA started on 1 October 2012. Accordingly, the TAA was aimed at promoting a better balance between the powers and duties of SARS and the rights and obligations of taxpayers, and to make the relationship between the two parties more transparent. The TAA took ten years calculating from the promulgation of 1996 Constitution to come to effect because it had significant changes in the administrative provisions regulating the fiscal statutes in South Africa, and it was anticipated that it was going to take long for both taxpayers and SARS to become accustomed thereto. In an effort to accelerate the process SARS had published various documents dealing with the introduction of the Act, particularly the SARS Short Guide to the Tax Administration Act, 2011, as well as various other documents dealing with frequently asked questions, and penalties administration and dispute administration. The question is whether this objective was met or not.

It has been argued that “finding a balance between taxpayers’ rights and SARS’ powers to search premises can prove to be difficult, especially in cases where a tax official does not have a warrant.”\(^{40}\) This chapter will focus on provisions on warrantless search and seizure and the constitutional implications it has on taxpayers. It will further look at the remedies available to taxpayers if they are subjected to such operations. The provisions contained below in different tax legislation will be analyse to see if the conform to the provision stipulated in TAA.

3.2 THE PROVISIONS OF SECTION 63 OF THE TAA
Section 63 of the TAA authorizes search and seizure without a warrant and provides as follows:

(1) A senior SARS official may without a warrant exercise the powers referred to in section 61(3) —
   (a) if the owner or person in control of the premises so consents in writing; or

(b) if the senior SARS official on reasonable grounds is satisfied that—

(i) there may be an imminent removal or destruction of relevant material likely to be found on the premises;

(ii) if SARS applies for a search warrant under section 59, a search warrant will be issued; and

(iii) the delay in obtaining a warrant would defeat the object of the search and seizure.

(2) A SARS official must, before carrying out the search, inform the owner or person in control of the premises.

(a) that the search is being conducted under this section; and

(b) of the alleged failure to comply with an obligation imposed under a tax Act or tax offence that is the basis for the search.

(3) Section 61(4) to (8) applies to a search conducted under this section.

(4) A SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for purposes of trade, under this section without the consent of the occupant.

The provisions of section 63 give discretionary powers to the senior SARS official. It seems that a very limited number of persons will be allowed to conduct the warrantless search. Section 63(1) (a) provides that the person in control of the premises may give consent in writing or a ‘senior SARS official’ on reasonable grounds. To understand the term ‘senior SARS official’ one must understand the term ‘SARS official’ who is defined in the TAA as follows:

(a) the Commissioner,

(b) an employee of SARS; or

(c) a person contracted by SARS for purposes of the administration of a tax Act and who carries out the provisions of a tax Act under the control, direction or supervision of the Commissioner.” The powers that are exercised by the SARS official are provided by section 61(3) which provide that “(3) The SARS official may—(a) open or cause to be opened or removed in conducting a search, anything which the official suspects to contain relevant material;

(b) seize any relevant material;

(c) seize and retain a computer or storage device in which relevant material is stored for as long as it is necessary to copy the material required;

(d) make extracts from or copies of relevant material, and require from a person an explanation of relevant material; and

(e) if the premises listed in the warrant is a vessel, aircraft or vehicle, stop and board the vessel, aircraft or vehicle, search the vessel, aircraft or vehicle or a person found in the vessel, aircraft or vehicle, and question the person with respect to a matter dealt with in a tax Act.”
According to Fareed, “one only qualifies as a ‘SARS official’ if he/she falls within one of the listed categories. The scope of subparagraphs (a) and (b) of the definition of ‘SARS official’ is self-evident. It is clear from this definition of ‘senior SARS official, that the person contemplated by subparagraphs (b) and (c) in the former definition may be appointed to perform those powers and duties reserved for a ‘senior SARS official.” In subparagraph (c) it says ‘a person’. This definition is provided for in the Interpretation Act. Under this definition it is provided that-

“person” includes –
(a) any divisional council, municipal council, village management board, or like authority;
(b) any company incorporated or registered as such under any law;
(c) anybody of persons corporate or unincorporated;

The definition of a person was also given in the case of Commissioner for Inland Revenue v Freidman and Others NN0. This was an appeal against a judgment of McCreath J in the Witwatersrand Local Division granting an application by the respondents in their capacities as trustees of the Phillip Frame Will Trust for a declaratory order against the Commissioner for Inland Revenue as appellant. The court held that in the context of the Income Tax Act, the meaning of the term ‘a person’ should be viewed in the light of the definition provided in the Interpretation Act. Basically the term ‘person’ covers natural and juristic persons. This poses a danger to taxpayers when one considers, for example, whether it includes a lower ranking person who works at SARS. This is because a person holding a lower rank will probably have no information on how to carry out the search, which could harm the taxpayer in cases where privileged information is on the taxpayer’s premises.

The term “Commissioner’s authority” gravitates the magnitude of the risk involved and the mere fact that such powers and duties can be delegated in terms of the TAA to a “specific individual” or to “the incumbent of a specific post “is problematic. There is concern that no limitation is placed

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42 Act 33 of 1957.
43 1993 (1) SA 353 (A).
44 Section 6(2) read with section 10.
45 Section 10 (1) (d) (i) of the TAA.
46 Ibid section 10 (1) (d) (ii).
on the person that a Commissioner might delegate his powers and duties. This can lead to abuse of discretionary powers by the Commissioner.

3.3 CASE LAW ON SEARCH AND SEIZURE WITHOUT A WARRANT GAERTNER AND OTHERS V MINISTER OF FINANCE AND OTHERS;\(^{47}\)

As mentioned above there are risk factors in the delegation of powers by the Commissioner, In this case, Orion Cold Storage (herein after referred to as OCS) imported and distributed bulk frozen foodstuffs and held licences for storage warehouses, SARS officials were delegated to do routine inspections of OCS’s storage warehouses, at most annually, to monitor compliance with the s 4 (4) of the Customs and Excise Act.\(^{48}\)During the initial search the director of (OCS) was told by SARS officials that a warrant was not required for purposes of this search. The employees were told not to vacate premises until their cars and belongings were searched. The search continued until the next day where it lasted for a period of 9 hours and where documents were seized and sealed in the presence of an attorney.\(^{49}\) On the third day a search was done at private dwelling of Gaertner, and all the rooms in his house including cellars and store rooms were searched. SARS still come empty handed and did not find anything of value or that was relent to support their suspicion.\(^{50}\)

3.3.1 ANALYSIS OF THE CASE OF GAERTNER AND THE CONSTITUTIONALITY OF SECTION 4 OF THE CUSTOMS AND EXCISE ACT

After the search and seizure operations alluded to above, the taxpayer approached the Western Cape High Court to have section 4 of the Customs and Excise Act 19 of 1964 declared unconstitutional as it violated the taxpayer’s rights to privacy and human dignity. The court held that any form of search conducted in terms of legislation to the taxpayer amounts to the limitation of the right to privacy.\(^{51}\) Therefore when dealing with search and seizure the analyses of section 36 of the Constitution should be dealt with to see if the limitation of the right was reasonable and justifiable.\(^{52}\) The taxpayer further wanted relief which included the return of all items taken during the search. After the proceeding was instituted, SARS entered into bargaining with the taxpayer

\(^{47}\)CCT 56/13) [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC) (14 November 2013).
\(^{48}\)Act 91 of 1964.
\(^{49}\)Ibid para 5.
\(^{50}\)Ibid para 6.
\(^{51}\)Ibid para 59, referred to Gaertner.
\(^{52}\)Majagane para 59-60.
and reached a consensus that all the items taken during the search will be returned. SARS returned these items and further agreed to pay the legal costs incurred by the taxpayer.

From the court’s finding it is evident that section 4 of the Customs and Excise Act gives SARS officials the power to search premises without a warrant and without the consensus of the taxpayer. These provisions have the potential of infringing on a taxpayer’s right to privacy and also the right to human dignity. Entering a taxpayer’s private residence at any time without prior notice, or entering by force undermines the taxpayer’s human dignity. In short, section 4 of the Customs and Excise Act authorises;

a) warrantless searches “at any time”, “at any premises whatsoever”;
b) the demanding of any book, document or thing from any person believed to have it in his or her possession or under his or her control “at any time” and “at any place”;
c) the breaking open of any door or window or breaking through any wall of “any premises” and “at any time”;
d) the breaking up, “at any time”, of any ground or flooring on “any premises” for the purpose of a search; and

e) the opening, in any manner, of any room, place, safe, chest, box or package (and all these refer to “any premises”) if it is locked and the keys are not produced on demand.”

In relation to this section, Judge Rogers stated as follows:

Clearly, “any premises” and “any premises whatsoever” include private homes. The only qualification, if a qualification at all, on the exercise of the search power is that an officer may enter any premises “for the purposes of this Act”. The wording is so broad that it brings within its sweep not only the places of business and homes of people who are players in the customs and excise industry, but also the homes of their clients, associates, service providers, and employees and their relatives. Quite conceivably, the premises – business or homes – of any person who, somehow, may be linked to a player in the customs and excise industry may be the subject of a search in terms of the impugned sections. The breadth of the impugned sections in relation to premises becomes quite plain.

Apart from the concerns raised by Judge Rogers, the court offered guidelines that the SARS officials should adhere to. The court further gave guidelines in ensuring the protection of the suspected tax evader, the following guideline were provided:

a. “entry should take place during ordinary business hours, unless the matter is urgent on reasonable grounds;
b. the persons in charge of the premises should be informed whether it is a routine or non-routine search;
c. if it is a non-routine search for which no warrant is required, the official must inform the person in writing of
   the purpose of the search;
d. where the matter is urgent on reasonable grounds and the person cannot be informed in writing the person
   must be informed orally;
e. only those officials whose presence is reasonably necessary to conduct the search should enter the premises;
f. the person in charge should be entitled to be present and observe all aspects of the search;
g. if anything is removed from the premises the person in charge is entitled to an inventory of the items so
   removed and if anything is copied the person is entitled to a list of all such material copied; and
h. decency and order should be strictly observed during the search. "\textsuperscript{55}

If a search is conducted without a warrant the person being searched must be informed in writing of
the reasons of the search. A search without a warrant must only be conducted in case of in cases of urgency based on reasonable grounds may such a search be conducted. The person whose
property is being search must be present during the search at all material times. According to Croome"The legislature was given eight months to amend the offending provisions so as to comply with the 1996 Constitution."\textsuperscript{56} and the provisions of the TAA. The legislature amended the provision of the Customs and Excise Act to conform to those of the TAA and come to operation on the 14 January 2014.\textsuperscript{57}

3.4 CONCLUSION

The Customs and Excise Act previously allowed search and seizure without a warrant, this included seizure of documents during the search this was to avoid the suspected persons not to hide or destroy the evidence.\textsuperscript{58} In this chapter it was discussed that a searched without a warrant should take place in only limited situations. Especially if it’s a matter of urgency with a reasonable ground and a person being searched must be informed in writing the reasons of the search and must be present at all times during the search. Furthermore, it was discussed in this chapter that if search and seizure occurs without a warrant certain guideline must be followed to ensure that the taxpayer’s rights to dignity, privacy are protected. In the chapter it was observed that certain provisions of Customs and Excise were declared unconstitutional and same was amended by the legislature. It is my submission that the provisions of the TAA are not consistent with those

\textsuperscript{55} Gaertner para 105.
\textsuperscript{56} Beric Croome ‘Customs Search-and-Seize Move Struck Down’ News & Press May 2013.
\textsuperscript{57} Government Notice 14 GG37236 of 16 January 2014.
\textsuperscript{58} Provided by section 4(4) - (6) of the Customs and Excise Act.
provisions in the Customs and Excise Act been though amendments have been made. The two pieces of legislation still have different circumstances in which a search and seizure without a warrant can be conducted.

The TAA has certain unclear provisions of the search being conducted by a senior official especially when compared to the recent guidelines under the Customs and Excise Act. This is without doubt that different rules will be applicable depending on the tax legislation. It is my submission that the TAA did not amend the provisions of the Customs and Excise Act. This could be risky to taxpayers as the SARS official can rely on any of the tax legislation to conduct a search and seizure without a warrant, because most tax legislation make provision for search and seizure it will easier to rely on any legislation to suit the search. My recommendation is that the TAA and the Customs and Excise Act must be amended to be uniform.
CHAPTER 4
SEARCH AND SEIZURE WITH A WARRANT

4.1 INTRODUCTION

Chapter 3 dealt with search and seizure operations without a warrant. This is not the only form of search and seizure available to the SARS Commissioner. In terms of section 59(1) of the TAA

“a senior SARS official may, if necessary or relevant to administer a tax Act, authorise an application for a warrant under which SARS may enter a premise where relevant material is kept to search the premises and any person present on the premises and seize relevant material.”

Generally one would conclude that it is a suitable form of search and seizure since it is conducted with a warrant. However, this chapter will illustrate that even though a warrant is issued by the judiciary there are still concerns especially with how the warrant is secured and the execution thereto. Section 59 (2) of the TAA provides that the warrant must be applied for ex parte. This chapter deals with the problems encountered during the process of warranted search and seizure. These problems relate to the application for a warrant, as well as the status and validity thereof before and after it has been exercised. This chapter will also analyse the meaning of “reasonable criterion” which is criterion that needs to be certified by the applicant of the warrant before the judiciary grants the warrant.

4.2 APPLICATION FOR A WARRANT

It is clear that a warrant is required by the Commissioner in terms of section 59(1) of the TAA before conducting a warranted search. The previous section 74(3) of the ITA did not allow for the application to the judiciary for authorization of the warrant. This section granted adverse powers to the Commissioners which basically allowed him/her the power to enter premises at any time during the day without notifying a taxpayer. Section 74(3) was repealed and new section 74D come into operation on 30 September 1996. The section 74D provided for judicial intervention and required the warrant to be applied for ex parte by the Commissioner.

59 S 59(1) of TAA.
Section 59 of the TAA provides for the rules used in an application of a warrant by SARS senior official. It stipulates the following

(1) A senior SARS official may, if necessary or relevant to administer a tax Act, authorize an application for a warrant under which SARS may enter a premise where relevant material is kept to search the premises and any person present on the premises and seize relevant material.

(2) SARS must apply ex parte to a judge for the warrant, which application must be supported by information supplied under oath or solemn declaration, establishing the facts on which the application is based.

(3) Despite subsection (2), SARS may apply for the warrant referred to in subsection (1) and in the manner referred to in subsection (2), to a magistrate, if the matter relates to an audit or investigation where the estimated tax in dispute does not exceed the amount determined in the notice issued under section 109 (1) (a).

Furthermore section 60 of the TAA makes provisions for issuing of the warrant by the judge:

(1) A judge or magistrate may issue the warrant referred to in section 59 (1) if satisfied that there are reasonable grounds to believe that—
(a) a person failed to comply with an obligation imposed under a tax Act, or committed a tax offence; and
(b) relevant material likely to be found on the premises specified in the application may provide evidence of the failure to comply or commission of the offence.

(2) A warrant issued under subsection (1) must contain the following—
(a) the alleged failure to comply or offence that is the basis for the application;
(b) the person alleged to have failed to comply or to have committed the offence;
(c) the premises to be searched; and
(d) the fact that relevant material as defined in section 1 is likely to be found on the premises.

Section 59 of the TAA provides that in obtaining the search and seizure warrant, SARS must make an ex parte application to a judge. This application has to be supported by information supplied under oath or a solemn declaration, establishing the facts upon which the application is based.60

Section 60 of the TAA further provides that a judge or magistrate may certain obligations under a tax Act or committed a tax offence. Additionally in the application for a warrant the Commissioner must add possible that relevant material is likely to be found on the premises specified in the application and that such material may provide evidence to prove that the taxpayer has failed to comply with their tax obligations or the actual commission of the offence.

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60Heinrich Louw ‘search and seizure: the extent of SARS's powers’ Cliffer Dekker Hofmeyer Tax. 2014.
4.2.1 WHAT IS AN EX PARTE APPLICATION?

An _ex parte_ is with respect to or in the interests of one side only or of an interested outside party.\(^61\) It is a judicial proceeding conducted for the benefit of only one party. The following are instances where an _ex parte_ application can be sought:

a. if the sought relief affects the rights of the applicant only and not those of anyone else;
b. if the relief sought is preliminary to the main proceedings and is necessary to bring other interested parties before the court. Examples include applications for edictal citation, substituted service, arrests to found or confirm jurisdiction, removal of restrictive conditions and the like;
c. if the nature of the relief sought is such that notice to the respondent may render the relief nugatory;
d. if, due to the urgency of the matter, notice cannot be given to the respondent, for instance, if the harm is imminent; and
e. if the identity of the respondent or respondents is not readily ascertainable.

Regarding search and seizure, the question is, is an _ex parte_ application justifiable within the context of search and seizure under the context of tax crime. From the above only two points can justify, for example if the taxpayer had previously been informed of an impending search there exists a likelihood that the taxpayer might remove the necessary evidence required by SARS. Another justification for an _ex parte_ application is in cases where securing the necessary evidence from the taxpayer is a matter of urgency, and where, if the process is delayed, harm may be caused. The taxpayer may, for example hide or destroy evidence and prior notice could defeat the purpose of a search and seizure operation.

4.2.2 CASE LAW ON EX PARTE APPLICATION OF WARRANT

4.2.2.1 Huang and Others v Commissioner of the South African Revenue Services, In Re; Commissioner of the South African Revenue Services, In Re; Huang and Others\(^62\)

A senior SARS official approached court and made an _ex parte_ application in terms of section 59 and section 60 of the TAA,\(^63\) to obtain a warrant to search Mr Huang and Mpisi Trading 74 (Pty) Ltd. The court granted the warrant and essentially authorizing the search and seizure to take place. The warrant was granted after the Commissioner had given reasonable ground that supported that evidence could be found in the taxpayer business premises that would support that a tax crime had been committed. Mr Huang was suspected on failing to comply with the requirements in terms of

\(^{61}\) http://legal-dictionary.thefreedictionary.com/ex+parte (assessed on 04 November 2016)


\(^{63}\) Huang para 4.
the ITA, VAT Act.\footnote{Ibid para 6.} The purpose of the inquiry (ex parte) was stated in the order as being an investigation into the alleged non-compliances with the provisions of the certain identified tax legislation by the first, second and third applicants and 91 other named juristic persons.\footnote{Ibid para 2.} The searches were carried out on 26 April 2013 and a large number of documents were seized.\footnote{Ibid para 4.} Mr Huang bought the application to the court because he believed that the warrant had been granted unfairly and he challenged the warrant based on the following reasons:

\begin{itemize}
  \item the warrant application did not satisfy the requirements of an \textit{ex parte} application;
  \item the main application did not satisfy the requirements of the TAA; and
  \item the \textit{ex parte} application was an abuse of the court process.
\end{itemize}

\subsection*{4.2.2.2 PROBLEMS WITH \textit{EX PARTE} APPLICATION FOR A WARRANT IN HUANG}

In this case the Mr Huang made an application to the court to determine whether, inter alia, the warrant that was sought by SARS could be set aside, due to misrepresentation and non-disclosure during the application by SARS. Furthermore the reasons that lead to the application for the warrant be set aside was that did not satisfy the requirements of sections 59 and 60 of the TAA. Mr Huang also alleged in his application that the conduct of SARS constituted an abuse of court process, the court held that an \textit{ex parte} application is a serious departure from the ordinary principles applicable to civil proceedings to seek an order in the absence of notice to the respondent party. Furthermore the court stated that an \textit{ex parte} procedure should be followed only where there is good reason for embarking on it, for instance if informing the other party will defeat the purpose of the application. It is important that the applicant during an \textit{ex parte} application acts in good faith. During the application of a warrant SARS added information to that Mr Haung had been charged for murder 1998, this was “vexatious, malicious and completely irrelevant in so far as this matter relates to allegations of income tax and VAT.”\footnote{Haung para 14.} The court further held the application brought by SARS had outstanding material facts which would have assisted the court to come to a better decision in granting the warrant. The judge ruled in favour of SARS and stated that:

\begin{quote}
  In this instance, SARS approached the court by way of \textit{ex parte} proceedings mainly because it was enjoined by s59 (2) of the TAA to apply \textit{ex parte} to a judge for the search and seizure warrant. The provisions of s59
\end{quote}
(2) of the Tax Administration Act are peremptory and SARS was bound thereby to proceed by way of *ex parte* application. The purpose of the section is in any event to avoid giving notice that would hamper the effectiveness, purpose and object of a warrant for search and seizure. Moreover notice to a taxpayer is not a requirement in terms of the section. There was, therefore, no obligation on SARS to put up any evidence that would justify its resort to the *ex parte* proceedings.  

This shows that the court acknowledged the secrecy surrounding the *ex parte* application as a further weapon at the Commissioner’s disposal that could be used to prevent the taxpayer from destroying or removing evidence that would be the subject of the search and seizure. It is clear that SARS still has considerable powers when it comes to exercising its powers to collect tax.

### 4.3 Concerns Regarding Legal Professional Privilege

The TAA also deals with the search and seizure of information that is subject to legal professional privilege. Section 64 of the TAA provides the following:

1. If SARS foresees the need to search and seize relevant material that may be alleged to be subject to legal professional privilege, SARS must arrange for an attorney from the panel appointed under section 111 to be present during the execution of the warrant.
2. An attorney with whom SARS has made an arrangement in terms of subsection (1) may appoint a substitute attorney to be present on the appointing attorney’s behalf during the execution of a warrant.
3. If, during the carrying out of a search and seizure by SARS, a person alleges the existence of legal professional privilege in respect of relevant material and an attorney is not present under subsection (1) or (2), SARS must seal the material, make arrangements with an attorney from the panel appointed under section 111 to take receipt of the material and, as soon as is reasonably possible, hand over the material to the attorney.
4. An attorney referred to in subsections (1), (2) and (3)
   a. is not regarded as acting on behalf of either party; and
   b. must personally take responsibility—
      i. in the case of a warrant issued under section 60, for the removal from the premises of relevant material in respect of which legal privilege is alleged;
      ii. in the case of a search and seizure carried out under section 63, for the receipt of the sealed information; and
      iii. if a substitute attorney in terms of subsection (2), for the delivery of the information to the appointing attorney for purposes of making the determination referred to in subsection (5).

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68 *Huang para* 63.
Evidently the TAA seeks to protect information covered by legal privilege. Nevertheless, the procedure still remains questionable whether the recourse under section 64 of TAA is justifiable. In terms of section 64 (1) of the TAA, SARS has to arrange the presence of an attorney during a search if SARS foresees that there might be an allegation of legal professional privilege, the material is sealed by the attorney, and the attorney has to be given 21 days to decide by considering representations by parties whether the alleged legal professional privilege does exist. Section 64(3) of the TAA further provides that if the attorney is not present during the search, SARS must seal off the information and it must be received by the attorney for purposes of determining the alleged privilege.

It is submitted that this is not in protection of the fundamental rights to the taxpayer, and it can be asked whether this constitutes a fair and effective process. There exists a lot of short falls with section 64, especially if the search is conducted without a warrant. If information is sealed and delivered, what certainty does the taxpayer have in that the information have not been tempered with, or that the envelope will only be opened by a neutral attorney who will make a determination?

In such situations, there could be a serious breach of legal professional privilege if SARS is exposed to this information to begin with, and that the rights of the taxpayer are not taken as a fundamental cornerstone in such a judicial process. Another concern of the taxpayers is that they might perceive the attorney appointed by SARS not to be independent.

4.4 “REASONABLE GROUND CRITERION”

In order for SARS to give effect to its information gathering powers, it applies to the magistrate or judge for a warrant in order to search the premises of the taxpayers or to enter the premises unannounced in the instance where it is suspected that applying for a warrant might lead to the search becoming a futile exercise.

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69 Thint (Pty) Ltd  National Director of Public Prosecutions and Others ;Zuma and Another v National Director of Public Prosecutions and Others 2009 (1) (CC) at 78-79;Jeeva and Others v Receiver of Revenue , Port Elizabeth and Others 1995 (2) SA 433 (SE) at 453-D; S v Safatsa and Others 1988 (1) 868 (A) at 885E-886G; Bogoshi v Van Viuren NO and Others; Bogoshi and Another v Director, Office for Serious Economic Offences and Others 1996 (1) SA 785 (A) at 793D–E.
Section 59 of the TAA provides that if SARS wishes to apply for a warrant it must be done by using an *ex parte* application route. The application must be made before a judge, and must be supported by information supplied under oath or solemn declaration upon which the said application is to be based. The TAA stipulates that the only time that SARS senior official can make an *ex parte* application the application must be based on reasonable grounds. It is my humble concern with this requirement as required by the TAA can be manipulated by SARS in order to get the warrant granted. There is a loop hole in that the application on *ex parte* basis can be based on unduly averments in order to create a situation that would convince the judiciary that the reasonable ground criterion as required by the TAA are met. It is submitted recommendation is that the legislature should be specify that the application of a warrant on *ex parte* should only contain averments that and offences under the Customs and Excise Act, ITA and VAT Act. All offenses outside the jurisdiction of tax should not form part and parcel of the application of the warrant. Collateral issues should be left out. SARS officials should act in good faith. This will should assist in the protection of the taxpayer’s rights to privacy.

**4.4.1 CASE LAW ON REASONABLE GROUNDS CRITERION: HAYNES V COMMISSIONER FOR INLAND REVENUE.**

In this case, the court had an opportunity to interpret the meaning of the phrase ‘reasonable criterion’ in relation to the application for a search and seizure warrant. This phrase is duly provided in section 60(1) of the TAA. The court held that when deciding if the warrant should be set aside, the courts looks at the objective jurisdictional facts if they are present and whether the discretion is exercised judicially. It is a requirement that the discretion must be exercised in good faith and rationally and not arbitrary. The general meaning of “reasonable grounds” depends on which context it is used this terms has been subject to a number of scrutiny in other legislations and their construction for an example in the Criminal Procedure Act where this phrase authorises police to arrant without a warrant and make forcible entry to arrest. The Commissioner and his official have to submit sufficient reasons as why they wish to search the premises of the taxpayer. Mere speculation or suspicion that is not founded can result in the warrant application being refused. However, it is submitted that this still does not protect the taxpayer completely as the

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70 2000 (6) BCLR 596 (Tk).
71 Haung para 32.
Commissioner has a lower threshold to satisfy, namely reasonable grounds which can be established on a balance of probabilities, not beyond a reasonable doubt.

### 4.5 CONCLUSION

This chapter illustrated that the provisions of search and seizure with a warrant requires the Commissioner and his officials to bring an *ex parte* application before a judge. It was shown in this chapter that an *ex parte* application is permissible under section 60 of the TAA. In this chapter it was also shown with reference to case law that an *ex parte* application is still not an ideal method because the judge only hears one side of the story, and has to make a ruling based on the submissions made by SARS and history has shown that SARS officials do not act in good faith when applying for the warrant and the taxpayer’s right to privacy is then exploited in the hands of SARS and its officials.

It was further submitted that the application procedure favours SARS and only requires that SARS must have reasonable grounds of suspicion that the taxpayers has committed an offense under the income tax legislation. It was however also acknowledged in this chapter that an *ex parte* application does make sense because if notice was given to the taxpayer it might render the search and seize a futile exercise. This chapter also discussed what happens if the taxpayer alleges professional privilege during the execution of a warrant. It was further submitted that the processes might not be ideal since the appointment of the attorney might not be completely neutral. However, it concluded that a better method of securing or precluding legal profession privilege could be used.

It is suggested is that the taxpayer must be granted an opportunity to bring an attorney of choice to be present during the seizure of legal professional privilege information. Further to this the legislature must put a measure where a body that can be responsible for receiving submissions of both from SARS and the taxpayer and a decision if the information is privilege should be ruled by that body not by an attorney appointed by SARS who is likely to be bias and rule that the information is not privilege. This will be tantamount to an infringement of the taxpayer’s rights to privacy under the context of legal profession privilege. The chapter ended by discussing the meaning of reasonable ground criterion, by making reference to case law, it was concluded that it can be regarded as an objective criterion.
CHAPTER 5

SEARCH AND SEIZURE IN TERMS OF INCOME TAX LAW IN AMERICA, A COMPARATIVE ANALYSIS.

5.1 INTRODUCTION

In South Africa SARS is responsible for collection of tax and the administration of tax is overseen by the TAA. In United States of America (U.S.) Internal Revenue Service (IRS), a bureau of the U.S. charged with the administration of the tax laws passed by Congress. It is submitted that;

[the mission of the Internal Revenue Service’s (IRS) Criminal Investigation (CI) is “to serve the American public by investigating potential criminal violations of the Internal Revenue Code and related financial crimes in a manner that fosters confidence in the tax system and compliance with the law.” CI’s general authority derives from Title 26 United States Code1 (U.S.C.) Section (§) 7608(b), which provides the initial authority for investigating crimes arising under the Internal Revenue laws. In addition to Title 26 U.S.C., CI also has enforcement responsibilities with regard to Title 18 U.S.C. and Title 31 U.S.C., which deal with money laundering and the Bank Secrecy Act, 2 respectively.]

Previously in the U.S. around 1791 to 1802 the U.S. government was supported by internal taxes however this was done away with by the Congress and the government relied on tariffs on imported goods. In 1862 the Congress enacted the first income tax law. The Act 1862 established the office of the Commissioner of Internal Revenue. Similar to the South African Commissioner, the U.S. “Commissioner was given power to assess, levy and collection of taxes and the right to enforce the tax through seizure of property and income and through prosecution.” In 1913, the 16th Amendment of the Constitution became the cornerstone of income tax and became a permanent fixture in the U.S. tax system. This chapter will demonstrate that the Commissioner in U.S. has difficulty in striking the balance between the rights of taxpayers as afforded by the 4th Amendment of the Constitution of U.S. and the execution of duties more specifically bringing tax evaders to justice. This chapter will illustrate that U.S. has attempted to eradicate unlawful search and seizure and the legislature did so by initiating Treasury Inspector General for Tax Administration (TIGTA)

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74 Ibid.
75 Ibid.
audit. This chapter will further scrutinise if the TIGTA was successful and if its recommendation were able to harmonise the search and seizure problems under the context of income tax law and the Constitutional challenges that come with search and seizure operation.

5.2 SEARCH AND SEIZURE WITH A WARRANT

U.S legislation authorizes the IRS to seize with a warrant in a commission of tax related crime. It is submitted that “the seizure of books and record in a tax fraud investigations poses a drastic threat to the protection that has been accorded by the Bill of Rights”. The 4th Amendment protects individuals from “unreasonable” search and seizure. However, the statutory mandate empowering the IRS to compel the production of documents and to examine a taxpayer’s books and records is so broad that the courts have found little in the actions of the IRS that can be classified as “unreasonable.” It is common cause that there is world challenge in application of the Constitution in a world where technology is evolving rapidly more especially the application of the Fourth Amendment of the U.S. Constitution provides,

“[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

The aim of this provision is to protect people’s right to privacy and freedom from arbitrary governmental intrusions. It is submitted that (IRS) does not follow all procedures to ensure that evidence it seizes is properly stored and controlled, according to a report released publicly today by the Treasury Inspector General for Tax Administration (TIGTA).

The “TIGTA’s audit was initiated to determine whether CI is properly processing search and/or seizure warrants and following the policies for maintaining the chain of custody for any evidence obtained.” The promulgation of the TIGTA was ensure that seizure warrants are executed correctly and to

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76 Paul P. Lipton ‘Search Warrant in Tax Fraud Investigations ‘(1970) America Bar Associate Journal 56 at 941.
80 Ibid.
determine whether the IRS is following established legal requirements to prevent the abuse of taxpayer rights.\(^81\) During the audit of the TIGTA it found the following issues:

   a) Errors were made on a few warrant documents.
   b) Signed affidavits were not in closed case files.
   c) Special Agents Are Sometimes Not Maintaining Proper Case Documentation.
   d) Documentation of the Criminal Tax Counsel’s post-search warrant inventory reviews were missing from some case files.
   e) Evidence was not always properly stored.

5.2.1 CASE LAW ON SEARCH AND SEIZURE WITH A WARRANT

*U.S. v. ASAD, 739 F. Supp. 2d 1127 (2010).*

On September 9, 2009. The defendant filed a Motion to Suppress Evidence and Quash Warrant. The defendant also filed a Memorandum in support of his Motion. In his Motion and Memorandum, the defendant stated that he is "an owner/operator" of Price Rite Food and Liquor Store and has standing to challenge the search and seizure of documentary evidence from that location. The defendant argued that the search warrant authorizing the search of Price Rite was unconstitutionally deficient because it authorized law enforcement personnel to conduct a general search of Price Rite. The defendant contended that the search warrant was too overbroad because it should have instructed police officers to seize only those items associated with or indicating activity associated with the illegal possession of cannabis and falsifying tax returns. The defendant argued that all evidence and fruits of evidence obtained or secured as the result of the search should be suppressed because the search warrant failed to describe with particularity the items to be seized.

On the 29 January 2010 "the Government filed its Memorandum in Opposition to Qattoum's Motion to Suppress (# 81). The Government first argued that Qattoum, an employee of Price Rite, did not establish that he had a reasonable expectation of privacy both in the documents seized and the premises searched."\(^82\) It is submitted that the use of "the word 'standing' in the context of Fourth Amendment rights" is "shorthand to refer to a defendant's ability to challenge a search or

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\(^{82}\) ASAD para 1132.
seizure based on a reasonable expectation of privacy in the property."  

A defendant must show that he had a reasonable expectation of privacy because the Fourth Amendment's protection against illegal searches and seizures is "a personal right" that can only be invoked by the individual whose rights are violated.  

"A reasonable expectation of privacy is present when the defendant exhibits an actual or subjective expectation of privacy, and the expectation is one that society is prepared to recognize as reasonable." In determining whether the defendant held a subjective expectation of privacy, the court looks at the defendant's efforts to conceal and keep private that which was the subject of the search.

However the court did not find in favor of the defendant and said that “it agrees with the Government that, even if there are some problems with the search warrant in this case, the good faith exception applies here.” In such instance

"[a ]defendant may rebut the prima facie evidence of good faith by presenting evidence to establish that the issuing judge wholly abandoned his judicial role and failed to perform his neutral and detached function; the affidavit supporting the warrant was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or the issuing judge was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth."  

The court ruled in favor of the government and found that the warrant was valid under exceptions of good faith. I am the opinion that this judgement was unfair that the scope of the warrant was too wide to a point where even the employees of ASAD were also subject to search and seizure by this warrant. This was in violation of their rights as afforded by the 4th Amendment. This in contrary to the requirements of a warrant, which requires that all items to be seized must be specified in the warrant.

**5.2.2 REQUIREMENTS OF WARRANT**

In South Africa (SA) provisions of search and seizure with a warrant requires the Commissioner and his officials to bring an *ex parte* application before a judge. It was shown in this dissertation that an *ex parte* application has to be brought under section 60 of the TAA. In chapter of this

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83 *United States v. Crowder*, 588 F.3d 929, 934 n. 5 (7th Cir. 2009).
84 *United States v. Swift*, 220 F.3d 502, 510 (7th), also see ASAD para 1132.
85 *United States v. Amaral-Estrada*, 509 F.3d 820, 827 (7th Cir.2007) and *United States v. Marrocco*, 578 F.3d 627, 631 n. 4 (7th Cir.2009).
86 ASAD para 1141.
87 *Pappas*, 592 F.3d at 802.
dissertation it was also shown with reference to case law that an *ex parte* application is still not an ideal method because the judge only hears one side of the story, and has to make a ruling based on the submissions made by SARS and history has shown that SARS officials do not act in good faith when applying for the warrant and the taxpayer’s right to privacy is then exploited in the hands of SARS and its officials. In U.S. requirement for a valid search warrant,

It must be prepared by the special agent. It is the job of the special agent to proof all documents prepared by the government attorney. The court listens to the arguments by the government lawyer and the search warrant is returned by the court giving the special agent the legal authority to execute the warrant at the particular place and time, and to seize the specific items or person(s) described. It is important that the special agent review the prepared search warrant to ensure all the needed information from the Application and “Affidavit for Search Warrant is stated in the search warrant issued by the court. The warrant must be sufficient on its face or refer to an affidavit that is sufficiently incorporated therein, and specifically set forth.”

- a) the violations being investigated
- b) a description of the person/premises to be searched
- c) a description of the items to be seized

In the case of *Groh v. Ramirez*, *124 S. Ct. 1284* (February 24, 2004), in a Supreme ruled a search warrant that did not to describe fully and clearly the persons or things to be seized was invalid on its face value, notwithstanding that the requisite particularized description was provided in the search warrant application. *United States v. Bridges*, *344 F.3d 1010* (2003), “clearly highlights the need for a warrant to contain on its face or in an incorporated and attached search warrant application, sufficient information to instruct both the executing officer and the occupant of the place to be searched of the nature of the alleged violation(s) and the description of the items to be seized.”

5.3 PROBABLE CAUSE (U.S.) v “REASONABLE GROUND CRITERION” (SA)

In South Africa the TAA stipulates that the only time that SARS senior official can make an *ex parte* application the application must be based on “reasonable grounds”. It is submitted “a judge or magistrate may issue a warrant if satisfied that there are reasonable grounds to believe certain

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89 *Bridges* para 9.
things as set out in section 74D(3)(a)-(c) of the Act.”

In the U.S. “if there is a reasonable expectation of privacy and the warrant requirement applies, applications for computer-related warrants must be evaluated for probable cause, in general, the probable cause analysis for computer related searches is no different from the analysis for other search.”

In a case of Illinois v. Gates, 462 U.S. 213,238 (1983) "The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, there is a fair probability that contraband or evidence of a crime will be found in a particular place." In a nutshell probable cause is the same as reasonable ground criterion and that in U.S. the judge only hears the side of the IRS when issuing the warrant and the taxpayer is not given an opportunity to counter urge against the warrant.

5.4 CONCLUSION

This chapter only focused on search and seizure with a warrant operations conducted by the IRS in the U.S. It was established that U.S taxpayer are not please with way that IRS executes a warrant if the taxpayer is suspected of evading the tax. The U.S taxpayer are protected from being subjected to unlawful and unfair searches. This is confirmed by the 4th Amendment. However same as in SA the constitutional guarantees are trampled on by the powers that are given to the IRS. There is concerns regard the search and seizure with a warrant under the income tax law. This chapter also looked the requirements of a valid warrant and it was discussed that a warrant must the premises to be search and the items to be seized. In a case of U.S. v. ASAD, 739 F. Supp. 2d 1127 (2010).

It was shown that the basic requirements of the warrant were not followed, this lead to a wide scope of the warrant, which I am of the opinion that that this was unconstitutional. My suggestion is that when the special agent are making an application of a warrant through the government lawyer notice must be given to the tax payer. This allow the taxpayer to argue his case and this ensure that if the warrant is granted it meets all the requirements. This might seem unfair to the IRS because the taxpayer might use the window of opportunity to clear out the necessary evidence. My suggestion is that the property to be searched must be held in trust until the warrant is issued or is not issued. At least if the property is held in trust that the suspected taxpayer would not have a chance to destroy the potential evidence. This chapter further compared the probable cause and

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90 Silke Bovijn at page 71.
91 Edward F. Cronin Search Warrant Handbook 2009 at 56.
reasonable ground criterion it was concluded that both of these requirements both U.S and SA are similar. The constitutional challenges that SA has are the same as U.S. In order to eradicate this problems the powers of IRS must reviewed under the light of the 4th Amendment.
CHAPTER 6
CONCLUSION AND RECOMMENDATIONS

6.1 INTRODUCTION
This dissertation aimed to establish whether the promulgation TAA did harmonized the unconstitutionality of search and seizure operations. This dissertation further aimed to determine whether procedure as followed by the Commissioner or his officials during their search and seizure amounts to the violation of the taxpayers’ right to privacy - this was determined whether by considering both the time before as well as after the TAA. The dissertation focused on the rights conferred on taxpayers in terms of the Constitution versus the powers awarded to SARS in terms of the TAA and the Income Tax Act. The dissertation included other relevant statutes, books, case law, websites and articles and the search and seizure operations under the Canadian law.

Further aims were, to provide an understanding of the warranted search and seizure provisions in South African income tax law. The issues related to the ex parte application, the status of a warrant once exercised and provisions of other acts were considered in order to determine whether they are in line with what has been approved by our courts in other spheres of the law. This dissertation also did a comparative analysis of search and seizure with a warrant in the U.S.

6.2 FINDINGS
This research paper illustrated that after the promulgation of the TAA, the search and seizure operations remained unconstitutional and brought more questions than answers, with the first focus on the search and seizure with a warrant. This can be seen in case of Huang and Others v Commissioner of the South African Revenue Services93 where it was found that the provisions in the TAA provided that an application of the warrant should be done ex parte. SARS followed the required procedure however it was found that an ex parte application is a serious departure from the ordinary principles applicable to civil proceedings to seek an order in the absence of notice to the respondent party. As per normal court practice an ex parte procedure should be invoked only where there is good cause or reason for the procedure such as when the giving of notice would defeat the very object for which the order is sought. It is, therefore, our law that an applicant in an ex parte application bears a duty of utmost good faith in placing before the court all the relevant

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93 (SARS 1/2013) [2014] ZAGPPHC 563.
material facts. Of which SARS failed to do but the warrant was granted and resulted to a conclusion that *ex parte* application not justifiable within the context of search and seizure.

Section 64 of the TAA makes provisions for information under professional privilege which SARS may encounter during the execution of a warrant granted *ex parte*, it was shown that the provision under section 64 has a potential of resulting to a conflict of interest because the attorney that protects and processes the information is appointed by SARS under section 111 of the TAA. It is my opinion that the attorney might not be objective. There are no guarantees that the information might not be tempered with.

This research also illustrated that the provisions of the TAA regarding search and seizure without a warrant are grossly unconstitutional as it violates the rights to dignity, this was illustrated in the case of *Gartner and others v Minister of Finance and Others*[^94], one of the main objectives of the TAA was is to regulate other statutes under the law of income tax in South Africa this case illustrated that a taxpayer’s business premises as well as his private dwelling were searched without a warranted which the court found in the taxpayers favour and gave guideline in conducting search and seizure without a warrant which further emphases that the TAA did not harmonized constitutional concerns regarding search and seizure operation under the income tax law. In the U.S it was also established that there is constitutional concerns regarding search and seizure operations conducted by the IRS.

6.3 THE CONSTITUTIONALITY OF THE SEARCH AND ZEIZURE PROVISIONS

It should further be noted that the powers conferred have been challenged in court as illustrated in this research paper. It was found though, that the Commissioner would easily authorize search and seizure because he is convinced that his actions are above the law. These powers have been conferred to the Commissioner via the TAA. Taxpayers’ are therefore subjected to these powers on a regular basis which is unconstitutional under the democratic South Africa.

6.4 RECOMMENDATIONS

6.4.1 *EX PARTE* APPLICATIONS OF A WARRANT

The search and seizure provisions will only be justifiable if conducted in a reasonable and fair manner. This means that the taxpayer must be informed if the Commissioner wished to apply for

[^94]: CCT 56/13) [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC) (14 November 2013).
a warrant, as this will allow the taxpayer to also prepare submissions to the contrary in front of the judge. The *audi alteram partem* rule should be applied when it comes to searches that involved a warrant. This will limit SARS abusing court processes and also “fishing expeditions”. *Ex parte* applications should be removed from act.

6.4.2 PROFESSIONAL PRIVILEGE

Once professional privilege alleged, the taxpayer must be allowed to appoint the attorney of his choice to guard against the information being tempered with. The taxpayers attorney must be allowed to do due diligence on the information in custody of SARS. During the time of representation both parties must be satisfied that the decision maker has no interest in the matter and must be impartial.

6.4.3 POWERS OF THE COMMISSIONER AND POWERS OF IRS

The appointed tax ombudsman is cost effective and will be mostly costly in challenging the powers of SARS since the abuse of power is likely to increase since in future. A solution is to minimize the powers of the Commissioner because history has shown that it leads to an abuse of court processes and leads to infringement of Constitutional right more especially right to privacy and dignity, the discretionary powers of the Commissioner must be minimise greatly through the amendment of the TAA. In the U.S the powers of IRS must revised in order to conform with the 4th Amendment and their powers must be limited because their scope is too wide and that puts taxpayers at risk of their rights to privacy being tramped upon.

6.4.4 SEARCH AND SEIZURE WITHOUT A WARRANT

The guideline given in case *Gaertner and others v Minister of Finance and Others*[^95] are fully considered. ‘Entry should take place during ordinary business hours, unless the matter is urgent on reasonable grounds; the persons in charge of the premises should be informed whether it is a routine or non-routine search. If it is a non-routine search for which no warrant is required, the official must inform the person in writing of the purpose of the search. Where the matter is urgent

[^95]: CCT 56/13) [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC).
on reasonable grounds and the person cannot be informed in writing the person must be informed orally. Only those officials whose presence is reasonably necessary to conduct the search should enter the premises. The person in charge should be entitled to be present and observe all aspects of the search. If anything is removed from the premises the person in charge is entitled to an inventory of the items so removed and if anything is copied the person is entitled to a list of all such material copied; and decency and order should be strictly observed during the search.

6.5 OVERALL RECOMMENDATIONS

It is submitted that in order for SARS fulfil its duties, information gathering procedures are necessary. However, it is also submitted that there are lesser intrusive methods available that SARS can implement. If SARS already has a reasonable suspicion that the taxpayer has not disclosed or has fabricated tax returns, SARS may call upon the offending taxpayer and mediate and see whether the taxpayer might not be willing to settle. It is submitted that if the evidence is overwhelming the chances are that the taxpayer will be willing to settle or come to some agreement with SARS. Evidently not all taxpayers will be in a position to quickly admit liability of fault, in which case the Commissioner can use more aggressive means to bring the defaulting taxpayer to payback what is owed to the state. It is submitted that the taxpayer’s rights to privacy not be considered in isolation, the state still has its own obligation to fulfil, for which tax is necessary. Furthermore the rights as provided for by the Constitution are not absolute and an infringement may be justifiable where it is in the interest of a democratic society. It is provided in Section 7(3) of the Constitution that the rights in the Bill of Rights are subject to the limitations clause in Section 36 of the Constitution. In conclusion the right to privacy is not absolute and the infringement of this right may be justifiable under section 36 of the Constitution.
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