

**Tax time periods and the
“pay now, argue later” rule:
An analysis of the
effect on taxpayers**

by

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Submitted in partial fulfilment of the requirements for the
degree LLM in Tax Law (Coursework)

In the Faculty of Law, University of Pretoria

December 2018

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ACKNOWLEDGEMENTS

Firstly, I would like to thank my almighty God for giving me the strength to write this dissertation, for guiding me and giving me the knowledge I needed throughout this degree. And mostly, for blessing me with the opportunity to follow my dreams in obtaining my Masters Degree.

Secondly, I would like to thank my parents and grandparents for always believing in me and granting me the opportunity to follow my dreams. Thank you for all the love and support and for all the guidance in becoming the woman I am today.

The next person I would like to thank is the love of my life, Wade. Thank you for always being my rock, for the endless support and love you have given me over the last few years. Thank you for always motivating me in pursuing each of my goals. Thank you for your patience and the love you have shown me over the years. I am ten times the woman I used to be before you came into my life.

Thank you to my supervisor, Dr. Carika Fritz. Thank you for your guidance and your endless patience with me, even when I had no patience with myself. Thank you for pushing me to be more and do more in reaching my goals. I would not have been able to do this without you.

Thank you to my language editor Suzette Grobler for the time and effort you spent on making my dissertation beautiful :).

And lastly, I would just like to thank all my family and friends who have been there and supported me throughout the years of my life. Thank you for your contribution to my success and the love you have shown me.

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SUMMARY

This dissertation analyses the effect that the tax time periods together with the “pay now, argue later” rule has on the taxpayer. In looking at the tax time periods in terms of the Tax Administration Act, I examine whether the tax time periods favour SARS, and if so what affect that has on the taxpayer. In addition, I look at what effect the “pay now, argue later” rule has on the taxpayer. The effect of the rule is found in the various enforcement mechanisms at SARS’ disposal and what their physical impact is on the taxpayer. Therefore, I discuss the various enforcement mechanisms as provided for in the Tax Administration Act as the ‘effect’ that the “pay now, argue later” rule has on taxpayers. I also make submissions about what effects the enforcement mechanisms themselves have on taxpayer. My dissertation concludes that the tax time periods do favour SARS and what the effect thereof together with the “pay now, argue later” rule is the taxpayer. I make the submission that this results in the ‘scale’ being tipped in favour of SARS. In concluding, I make a suggestion as to what needs to be done in order to bring a balance in the relationship between SARS and taxpayers.

CHAPTER 1

INTRODUCTION AND CHAPTER EXPOSITION

The Tax Administration Act 28 of 2011 provides for the tax process applicable to taxpayers in the tax collection process. The Act together with the Rules Promulgated Under Section 103 of the Tax Administration Act 28 of 2011 (hereinafter referred to as individual “rules”) outlines the process followed in the tax process. The TAA further provides for the time periods and limitations applicable to each and every step of this process. The Act also outlines the powers of the South African Revenue Service (hereinafter referred to as “SARS”) in the collection of taxes from the various taxpayers and empowers SARS to use enforcement mechanisms in the collection of taxes.

In the analysis of each step in the tax process and the periods applicable thereto, it will be considered whether these tax time periods are heavily in favour of SARS. This is because these periods may, in certain instances, be extended to such an extent by SARS, where the taxpayer’s time remains limited. The problem does not only arise where the taxpayer’s time is limited, but also where these time periods are too long in which the taxpayer will bear the financial burden. This burden exists where the “pay now, argue later” rule has come into operation and given effect to enforcement mechanisms.

This dissertation will examine the possibility of legislation favouring SARS in this regard. The importance linked thereto is the effect it has on taxpayers. The judgment in *Nondabula v Commissioner: SARS and Another* examined the effect that enforcement mechanisms have on taxpayers.¹ This case and its judgment also illustrate the relationship between taxpayers and SARS during the tax process. My dissertation will discuss and show the effect of the “pay now, argue later” on taxpayers by linking the tax time periods to the rule. In doing so, it will show that legislation already gives SARS such extensive powers in the collection and enforcement of taxes and, therefore, the time

¹ (4062/2016) [2017] ZAECMHC 21; 2018 (3) SA 541 (ECM).

periods in the tax process should not also do so. In analysing the tax time periods, my dissertation will deal with tax process starting with the submission of returns and ends with the taxpayer's choice to proceed with alternative dispute resolution or an appeal to the tax board or tax court.

RESEARCH QUESTION

The research problem that will be addressed in my dissertation is whether the tax time periods favour SARS and if so, what the effects thereof together with the “pay now, argue later” rule, are on taxpayers.

In order to come to a conclusion on the above, I posed the following questions, each of which I will deal with in my dissertation:

1. Who is SARS and what powers are afforded to them in terms of legislation?
2. What is the “pay now, argue later” rule and what is the effect thereof?
3. What are the different time periods during the tax process and how do they favour SARS?
4. What is the link between the “pay now, argue later” rule and the tax time periods?
5. Why should the tax time periods not favour SARS?

Chapter 2 of this dissertation will deal with SARS. It will start by introducing SARS as the tax collecting authority of South Africa.² It will discuss the objectives of SARS in terms of the SARS Act.³ Next, it will discuss the functions asserted to SARS in terms of this Act.⁴ In order to carry out each of its functions, SARS has been given extensive powers in terms of section 5 of the SARS Act. This chapter will discuss these powers afforded to SARS in

² <http://www.sars.gov.za/About/Pages/default.aspx> accessed on 22 April 2018.

³ The objectives of SARS as set out in section 3 of the SARS Act.

⁴ Section 4(1)(a)(i)- (ii) of the SARS Act.

terms of the Act.⁵ This chapter will also illustrate the relationship between the taxpayer and SARS.

Chapter 3 will outline the “pay now, argue later” rule. It will link the “pay now, argue later” rule to the tax time periods by discussing the tax process and the stage at which the rule comes into operation. This chapter will show what effects the rule has on the taxpayer by referring to the different enforcement mechanisms at SARS’ disposal in terms of the TAA. This chapter, therefore, attempts to answer question 2 posed in this dissertation. It will then link the “pay now, argue later” rule to the tax time periods by explaining that the tax time periods should not favour SARS to such an extent, because of the extensive powers it already has in terms of this rule.

Chapter 4 of this dissertation will outline the tax process in terms of the TAA. In doing so it will focus on the time periods afforded both to SARS as well as the taxpayer during this process. This Chapter will attempt to answer the third, fourth and fifth questions posed in this dissertation.

In Chapter 5, I will reach a conclusion on whether tax time periods favour SARS and if so, what the effect together with the “pay now, argue later” rule is on taxpayers. A suggestion will also be made in terms of what can be done to soften the effects on the taxpayer.

⁵ Section 5(d), (f), (i), (j) and (k) of the SARS Act.

CHAPTER 2

THE SOUTH AFRICAN REVENUE SERVICE AND ITS RELATIONSHIP TO THE TAXPAYER

2.1 Introduction

This chapter addresses the first question posed in this dissertation: who is SARS and what powers are afforded to it in terms of legislation? This chapter discusses SARS together with its objectives, functions and powers afforded to it in terms of legislation. It will also illustrate the relationship between taxpayers and SARS. This chapter is of importance because it introduces SARS for the role it plays in its relationship with the taxpayer, as well as in the tax process.

2.2 Who is SARS?

In order to fathom this relationship between SARS and taxpayers, it is important to understand who SARS is and what they do. SARS is the tax collecting authority of South Africa.⁶ SARS plays an important role in the Republic of South Africa as it collects revenue for the government of the Republic.⁷ SARS was established in terms of the South African Revenue Service Act 34 of 1997 (hereinafter referred to as the “SARS Act”).⁸ Section 2 of the SARS Act provides for the establishment of SARS as an organ of state. The SARS Act came into operation on 1 October 1997 and provides for the purpose of the Act is as follows:

“To make provision for the efficient and effective administration of the revenue-collecting system of the Republic and the control over the import, export, manufacture, movement, storage or use of certain

⁶ <http://www.sars.gov.za/About/Pages/default.aspx> accessed on 22 April 2018.

⁷ Croome B *et al Tax Administration* (2015) 2nd ed Juta (hereinafter referred to as “Croome”); Speech by Jabulani P Moleketi, Deputy Minister of Finance, at the launch of the new Tax Court accessible at http://www.treasury.gov.za/comm_media/speeches/2005/2005060901.pdf (hereinafter referred to as “Deputy Minister of Finance speech”).

⁸ Croome.

goods; and, for this purpose, to reorganise the South African Revenue Service and to make provision for the establishment of advisory committees; and to provide for incidental matters.”

In order to achieve its objectives, SARS has been asserted certain functions in terms of the SARS Act.⁹ The functions are to secure the enforcement of national tax legislation listed in schedule 1 of the Act as well as any other legislation dealing with the collection of revenue or the control over the issues mentioned above.¹⁰ SARS is also tasked with the function of advising the Minister of Finance on all revenue-related matters as well as the exercise of the Minister’s powers in terms of the legislation contained in schedule 1 of the Act.¹¹ SARS has the function of advising the Minister of Trade and Industry on all matters related to the import, export, manufacture, movement, storage and use of certain goods.¹² It has to carry out each of its functions in the most cost-effective and efficient manner in accordance with section 195 of the Constitution of the Republic of South Africa of 1996.¹³

In order to carry out each of its functions, SARS has been given extensive powers in terms of section 5 of the SARS Act. These powers include *inter alia* the acquisition and disposal of any right in movable and immovable property, including ownership; insuring itself against any loss, damage, risk or liability; performing legal acts which include instituting legal proceedings and defending any legal action in its own name; engaging in any activity to promote proper, effective and efficient tax administration; and doing anything incidental to the exercise of its powers.¹⁴

⁹ Section 4(1)(a)(i)- (ii) of the SARS Act.

¹⁰ Section 4(1)(a)(i)- (ii) of the SARS Act.

¹¹ Section 4(1)(b)(i)- (ii) of the SARS Act; Schedule 1 provides SARS with the powers to enforce *inter alia* the following legislation: Union and Southern Rhodesia Death Duties Act 22 of 1933, Transfer Duty Act 40 of 1949, Estate Duty Act 45 of 1955, Income Tax Act 58 of 1962, Customs and Excise Act 91 of 1964, and Value-Added Tax Act 89 of 1991.

¹² Section 4(2) of the SARS Act.

¹³ Section 4(2) of the SARS Act; Section 195 provides for the basic values and principles governing public administration which include *inter alia* accountability, transparency and a high level of professional ethics.

¹⁴ Section 5(d), (f), (i), (j) and (k) of the SARS Act.

2.3 The relationship between taxpayers and SARS

Former Deputy Minister of Finance, Moleketi, describes this relationship in his speech at the launch of a new tax court as follows:

“... it is necessary for both the tax-gatherer and taxpayer to recognise that they stand in an inherently adversarial relationship to each other, the former wishing to gather as much tax as possible and the latter wishing to pay as little as is legitimately possible.”¹⁵

According to former Finance Minister, Pravin Gordhan, the relationship between SARS, as a member of the government and the taxpayer, is crucial to sustaining the economy as well as the government itself.¹⁶ The relationship between SARS and taxpayers is a contentious one. This is because of the fact that the TAA affords SARS extensive powers that inherently affects the taxpayer.¹⁷

2.3.1 The establishment of the Office of the Tax Ombud

Due to this complex relationship between taxpayers and SARS, in 2013 the Office of the Tax Ombud (hereinafter referred to as the “OTO”) was established in terms of the TAA with the mandate to “review and address any complaint by a taxpayer regarding a service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS.”¹⁸

¹⁵ Deputy Minister of Finance speech.

¹⁶ <https://www.sanews.gov.za/south-africa/taxpayer-govt-relationship-crucial-gordhan> accessed on 8 September 2018.

¹⁷ These extensive powers are the enforcement mechanisms at SARS’ disposal that inherently affects the taxpayer because of the affect it has on the taxpayer. The enforcement mechanisms are dealt with in Chapter 11 of the TAA and includes an application for civil judgment, the institution of sequestration, liquidation and winding-up proceedings and the collection of tax debt from third parties. These enforcement mechanisms are made possible once the “pay now, argue later” rule comes into operation. These enforcement mechanisms are discussed in Chapter 3.

¹⁸ Section 16 of the TAA.

The OTO *inter alia* reviews complaints from taxpayers on the matters mentioned above. But has the establishment of the OTO really resolved any issues faced by taxpayers in their dealings with SARS? After all, the OTO's authority is limited to service matters, procedural and administrative matters. The OTO cannot challenge any tax legislation and the effects it has on taxpayers.¹⁹ It is legislation that imposes extensive powers on SARS, and that is the cause of the scale being tipped in favour of SARS. Reference to the 'scale' being tipped in favour of SARS refers to the balance that should exist in the relationship between taxpayers and SARS, which clearly does not.

The OTO has itself requested SARS to create a Taxpayer Bill of Rights and Service Charter in order to regulate the relationship between SARS and taxpayers.²⁰ The Commissioner promised to have it implemented by 31 March 2017, but this has still not been done.²¹ Although the implementation of a Taxpayer Bill of Rights and Service Charter will not trump legislation authorising SARS' acts, it will help taxpayers navigate their way through their dealings with SARS as well as strengthen the public's confidence in the tax system by giving them a sense of empowerment.²² However, the OTO's powers are limited to those provided for in the same legislation that enables SARS to use the enforcement mechanisms which have adverse effects on taxpayers.²³

2.3.2 *Nondabula* as an illustration of the relationship between taxpayers and SARS

An illustration of this relationship is found in *Nondabula v Commissioner: SARS and Another*.²⁴ In *Nondabula*, SARS made an additional assessment based on an estimate in terms of section 92, read with 95 of the TAA. However, SARS was obliged to comply with section 96 of the TAA, which

¹⁹ Section 17(a) of the TAA.

²⁰ Tax Ombud Annual Report 2016/17 (hereinafter referred to as "OTO Report") p9.

²¹ OTO Report p9.

²² OTO Report p9.

²⁴ (4062/2016) [2017] ZAECHMHC 21; 2018 (3) SA 541 (ECM) (hereinafter referred to as "*Nondabula*").

provides the information that must be included in the notice of assessment. Although failing to do so, SARS relied on the provisions of section 179(1) of the TAA and issued a third party notice resulting in closing down the taxpayer's business.²⁵ The court held that SARS should have complied with section 96 and that it has no discretion when it comes to this section.²⁶ Jolwana AJ in his judgment held the following:

“[25] There is no doubt that the first respondent dealt with the applicant in an arbitrary manner contrary not only to the Act, but most importantly the values enshrined in the Constitution were not observed by the first respondent. The applicant is a businessman who employs quite a number of people in our country where the unemployment rate is alarmingly high. The first respondent's actions had the potential to close down the applicant's business with catastrophic results, not only for the applicant and his family, but also for all of his employees in a situation in which unemployment is rampant and reaching crisis proportions. [26] ...the first respondent...acted unlawfully and unconstitutionally.”

The *Nondabula* case and its judgment encapsulates this complex relationship between taxpayers and SARS. From this judgment, it is seen that SARS is sometimes recalcitrant in its dealings with taxpayers. In this case, SARS does not even comply with its own legislation and does not follow the correct procedure in carrying out its functions. The judgment is sympathetic towards the taxpayer and the effects that an act such as this by SARS has on taxpayers in general. The powers with which SARS is entrusted has adverse consequences for taxpayers. Not all taxpayers wilfully fail to pay their taxes. South Africans live in a country in which everyone is struggling to get through financially. It seems that the powers legislation affords SARS, gives it a sense of arrogance that promotes dealings with taxpayers in an arbitrary manner. The only genuine recourse for taxpayers is through court. But before taxpayers get to court, SARS has enforcement mechanisms at their disposal, which have adverse consequences for the taxpayer in the meantime.

²⁵ *Nondabula* [22].

²⁶ *Nondabula* [22].

2.4 Chapter conclusion

Legislation affords SARS powers in order to achieve each of its functions and objectives, and due to these powers, SARS is entitled to certain enforcement mechanisms, which enables it to recover tax from taxpayers. These enforcement mechanisms are the reason SARS is seen as 'mighty' and makes the relationship between taxpayers and SARS a contentious one. In the next chapter, I will discuss the "pay now, argue later" rule as well as all enforcement mechanisms it brings into play.

CHAPTER 3

THE “PAY NOW, ARGUE LATER” RULE AND ITS EFFECT OF TAXPAYERS

3.1 Introduction

This chapter addresses the second question posed in this dissertation, that is what is the “pay now, argue later rule” and the effect it has on taxpayers. In this chapter, I will discuss the “pay now, argue later” rule in the context of the TAA and what it entails. I will show what effect the “pay now, argue later” rule has on taxpayers by discussing the enforcement mechanisms at SARS’ disposal.

3.2 What is the “pay now, argue later” rule?

The “pay now, argue later” rule authorises SARS to use certain enforcement mechanisms to ensure speedy collection of taxes.²⁷ Section 164(1) of the TAA provides as follows:

“Unless a senior SARS official otherwise directs in terms of subsection (3)-

- (a) the obligation to pay tax; and
 - (b) the right of SARS to receive and recover tax,
- will not be suspended by an objection or appeal or pending a decision of a court of law pursuant to an appeal under section 133.”

Essentially, what this rule entails is that once an obligation to pay tax arises and an assessment has been issued, SARS is entitled to enforce the collection of taxes it contends is due to it. So, when does the liability to pay tax arise? Section 162(1) of the TAA provides that tax must be paid on the

²⁷ Keulder C ‘Pay now, argue later’ rule- *Before and after the Tax Administration Act* PER 2013 (16) (hereinafter referred to as “Keulder”) p126.

date and time specified in a tax Act or at such date and time as notified by SARS. Since this section provides no guidance as to when a liability to pay tax arises, attention must be drawn to the case of *Singh v Commissioner of SARS*.²⁸ In this case, the court held that a taxpayer would first have to receive a notice of assessment before he can be considered to have an outstanding tax debt.²⁹

This rule affords SARS the power to ensure the enforcement of taxes by restricting the options of the taxpayer.³⁰ This means that once a certain stage in the tax process is reached – the issuance of an assessment – SARS is entitled to enforcement mechanisms and the taxpayer has no option but to sit back and watch SARS do as it pleases. This is despite the fact that an objection or an appeal to the assessment has been lodged.³¹ Therefore, the rule enables SARS to self-help.³²

Reference should be made to *Metcash Trading Ltd v Commissioner for the South African Revenue Service and Another*.³³ In this case, the “pay now, argue later” rule in terms of section 36 of the VAT Act was constitutionally challenged for violating the applicant’s right to access to court. The Constitutional Court found that the section did not violate the applicant’s right to access to court and found this section to be constitutionally sound.³⁴ However, the court held that the case specifically dealt with VAT and did not relate to income tax.³⁵ Therefore it is submitted that this decision should only be applicable to the “pay now, argue later” rule in the VAT context.³⁶

Regardless of the rule passing constitutional muster, the effect of the rule remains an issue. It is not the rule itself that is problematic, but the effect that

²⁸ 2003 JOL 10815 (SCA) 31 (hereinafter referred to as “*Singh*”).

²⁹ *Singh* as interpreted in Fritz C *Third-party appointments by SARS- A look into the future* 2018 (81) THRHR (hereinafter referred to as “*Third party appointments*”) p90.

³⁰ *Keulder* p126.

³¹ *Keulder* p127.

³² *Keulder*.

³³ 2001 1 SA 1109 (CC) (hereinafter referred to as “*Metcash*”).

³⁴ *Metcash* 33.

³⁵ *Metcash* 9, 10 and 13.

³⁶ *Keulder* p139.

the rule has on the taxpayer.³⁷ The effect of the “pay now, argue later” rule is found in the enforcement mechanisms at SARS’ disposal. These enforcement mechanisms are discussed below.

3.3 Effect of the rule on taxpayers: The enforcement mechanisms

3.3.1 Preservation order

The first enforcement mechanism at SARS’ disposal is a preservation order in terms of section 163 of the TAA. A preservation order is not a recovery mechanism in the sense that it enables SARS to take payment, but it is a remedy in terms of which SARS can ensure that it will receive payment upon the institution of the other enforcement mechanisms mentioned below. What this order entails is an *ex parte* application to the High Court for an order preserving the taxpayer from dealing with his or her assets in any manner that may frustrate the collection of taxes.³⁸ Once the order is granted, the taxpayer may not dispose of the asset until the tax liability is settled in full or where the taxpayer has successfully appealed.³⁹

Before bringing this application to court, SARS may seize any realisable assets of the taxpayer pending the outcome of the application in order to prevent the disposal or removal of any such assets.⁴⁰ This is problematic because this section authorises SARS to take a taxpayer’s assets without his or her permission and without the permission of a court of law. The legislature could not have intended such prejudice to the taxpayer. Despite the fact that the application to court must be made within 24 hours of seizing the assets, this section still allows SARS to take possession of a taxpayer’s property without an order of the court and up until the application is granted.⁴¹ Had the legislature considered the situation where the taxpayer wants to sell off some of his assets in order to make money he needs due to financial hardships, the

³⁷ *Keulder* p129.

³⁸ Section 163(1) of the TAA.

³⁹ Section 163(10) of the TAA; *Croome* p363.

⁴⁰ Section 163(2)(a) of the TAA.

⁴¹ *Ibid.*

position would be different. The reason SARS brings an application for a preservation order is exactly that – the taxpayer is unable to pay his or her tax debt.

Obtaining a preservation order in order to prevent the taxpayer from disposing of his or her assets in order to avoid taxes, is nevertheless reasonable, but whether it is reasonable for legislation to afford SARS such an extensive power in terms of which it can seize a taxpayer's asset without an order of court, is questionable. *Croome* and *Olivier* suggest that the 24-hours limit in this section will probably result in the section being found constitutional.⁴² I, however, disagree – government should not be entitled to such abusive powers. The preservation order is an effective enforcement mechanism, but SARS should not be able to seize the assets in anticipation of applying for such an order.

Furthermore, subsection 3 provides that a preservation order may be made in respect of realisable assets held by SARS or the taxpayer.⁴³ The section allows for a preservation order to be made in respect of any of the taxpayer's assets, irrespective of whether the assets are specified in the order or not.⁴⁴ The wording of this section is vague in that it is unclear whether SARS will be allowed to seize assets other than those mentioned in the preservation order. If this is the case, the section entitles SARS to go to court where after it will, in any case, do as it pleases. How can a preservation order apply to an asset not mentioned therein?

Section 163(4)(b) provides that a court may grant a rule *nisi* in terms of which the taxpayer must appear on the day specified to show why the preservation order should not be made final. However, SARS would have already seized the assets and the effect on the taxpayer remains the same. A notice of the preservation order must be served on the taxpayer, and even where the taxpayer is absent from the country for 21 business days, affixing it to the

⁴² *Croome* p365.

⁴³ Section 163(3)(a) and (b).

⁴⁴ Section 163(3)(c).

outside of the court and publishing it in the *Government Gazette* would be considered sufficient notice.⁴⁵ This is not only unreasonable, but degrading for any human being.

The only possible remedy for the taxpayer is to bring a separate application to the court for an order rescinding the preservation order should the court be satisfied that the applicant will suffer undue hardship and that such hardship will outweigh the risk of the assets being destroyed, concealed or transferred.⁴⁶

3.3.2 Judgment procedure

Section 172 of the TAA provides for an application for civil judgment for the recovery of tax. Section 172(1) provides as follows:

“if a person fails to pay tax when it is payable, SARS may, after giving the person at least 10 business days’ notice, file with the clerk or registrar of a competent court a certified statement setting out the amount of tax payable and certified by SARS as correct.”

SARS may file the statement irrespective of whether the amount is subject to an objection or appeal, which is in essence what the “pay now, argue later” rule entails.⁴⁷ The only instance in which the judgment procedure may not be invoked, is in the case where the payment of tax has been suspended in terms of section 164 of the TAA.⁴⁸ Furthermore, the notice required in terms of subsection (1) would not be necessary if SARS is satisfied that such notice would prejudice the collection of tax.⁴⁹ *Croome* and *Olivier* are of the opinion that this could have devastating implications for the taxpayer’s credit standing in the event where the Commissioner made an error on the assessment.⁵⁰

⁴⁵ Section 163(5) and (6) of the TAA.

⁴⁶ Section 163(9) of the TAA.

⁴⁷ Section 172(2) of the TAA.

⁴⁸ Section 172(2) of the TAA.

⁴⁹ Section 172(3) of the TAA.

⁵⁰ *Croome* p392.

This is so because there would be no recourse for damaging the taxpayer's credit record unnecessarily.

This section was tested by the courts in *Mokoena v CSARS* and *CSARS v Capstone*.⁵¹ In *Mokoena* the court held that although SARS is entitled to enforce payment in terms of the "pay now, argue later" rule, it may not obtain a judgment in the interim.⁵² The court in *Capstone* criticised this decision and held that the filing of the statement in terms of section 40(2)(a) of the Value Added Tax Act 89 of 1991 (the old section 164) has the effect of a judgment due to the fact that SARS is able to obtain a writ of execution.⁵³

Therefore, the effect of the statement filed is that of a "civil judgment lawfully given in the relevant court in favour of SARS for a liquid debt for the amount specified in the statement."⁵⁴ This means that the filing of a simple statement has the effect of a civil judgment without judicial intervention. The result is that, once SARS has filed the statement, it can ensure the execution of the judgment in terms of the provisions of the TAA.⁵⁵

The provisions relating to this enforcement mechanism does not allow for any remedy in terms of which the taxpayer may apply for withdrawal, but only allows SARS to withdraw its statement by notice thereof to the registrar or clerk of the court.⁵⁶ The use of this enforcement mechanism could have drastic implications for the taxpayer's credit record if used incorrectly, and the taxpayer would not be able to reverse the effects thereof.

⁵¹ *Mokoena v CSARS* 2011 2 SA 556 (GSJ) (hereinafter referred to as "*Mokoena*"); *CSARS v Capstone 556 (Pty) Ltd* 2016 2 All SA 21 (SCA) (hereinafter referred to as "*Capstone*").

⁵² *Mokoena*.

⁵³ *Capstone* para 37.

⁵⁴ Section 174 of the TAA.

⁵⁵ *Croome* p393.

⁵⁶ Section 176(1) of the TAA provides for withdrawal of the statement by SARS; *Croome* p393.

3.3.3 Sequestration, liquidation and winding-up proceedings

SARS may institute proceedings for the sequestration, liquidation or winding-up of a person liable for tax debt in terms of section 177(1) of the TAA. This is possible whether or not the taxpayer is present in the Republic.⁵⁷ This means that SARS may apply for the liquidation, sequestration or winding-up of the taxpayer even if the taxpayer is not aware of it. Furthermore, the provisions of this section do not require for SARS to notify the taxpayer of SARS' intention to apply for the institution of such proceedings.

The only prerequisite of this enforcement mechanism is that where the tax debt is subject to an objection or appeal, leave of the court is required before the institution of these proceedings.⁵⁸ This is the only enforcement mechanism that is subject to judicial intervention before the institution thereof where the taxpayer disagrees with the assessment issued by the Commissioner. In the event where no objection or appeal is lodged, SARS may proceed with this enforcement mechanism without judicial intervention.

3.3.4 Third party appointments

Another enforcement mechanism at SARS' disposal is third party appointments as provided for in terms of section 179 of the TAA. Section 179(1) provides as follows:

“A senior SARS official may, by notice to a person who holds or owes or will hold or owe any money, including a pension, salary, wage or other remuneration, for or to a taxpayer, require the person to pay the money to SARS in satisfaction of the taxpayer's tax debt.”

This enforcement mechanism is generally used by SARS to enforce banks (as the third party) to pay over money it holds on behalf of the taxpayer.⁵⁹

⁵⁷ Section 177(2) of the TAA.

⁵⁸ Section 177(3) of the TAA.

⁵⁹ *Croome* p397.

Subsection (2) provides for some form of relief for the third party in that a third party can notify SARS of its inability to comply with the notice and the reason therefore.⁶⁰ These reasons would include that the money is not the taxpayer's or that the debt is not yet due. Although the third party will most likely be able to prove that it does not yet hold money on behalf of the taxpayer (because the debt is not yet due to the taxpayer), a bank would not be able to show that the money held in its account is not the taxpayer's.

This is especially so in the case where money is paid from a client of the taxpayer to the taxpayer's business account. It is normal in the business world that clients would pay over a deposit towards the work that a business (being the taxpayer) would do for them. If SARS were to take the client's money out of the taxpayer's account in accordance with a successful third party appointment, the taxpayer would bear the consequences. These consequences are not only financial, but in most instances where the taxpayer is unable to bear the financial burden, the taxpayer would be subject to theft charges. It will not be SARS' problem, but the taxpayer's, due to the contractual relationship that exists between the taxpayer and the client.

According to *Croome*, the enforcement mechanism has in the past been used where the taxpayer is in overdraft and SARS instructs the bank (as the third party) to pay over funds to the limit of the taxpayer's overdraft facility.⁶¹ However, *Croome* is of the opinion that this would be an invalid application of the section because the bank would not actually "hold" money on behalf of the taxpayer.⁶² The reality is that this is one of the dangerous consequences that could arise as a result of the application of this enforcement mechanism. The only known restriction of this section was that held by the court in *Pestana v Nedbank*.⁶³ In this case, it was held that "section 99 (now section 179) cannot be used to freeze a taxpayer's account."⁶⁴ This section could therefore not be

⁶⁰ Section 179(2) of the TAA.

⁶¹ *Croome* p401.

⁶² *Ibid.*

⁶³ 71 SATC 1.

⁶⁴ *Croome* p402.

used to reverse the transfer of funds out of the taxpayer's account, as was the case in *Pestana*.

Furthermore, *Fritz* opines that section 179 is unclear as to whether the third party would be liable to comply with the notice despite the fact that the third party does not yet hold money on behalf of the taxpayer.⁶⁵ If the third party is obliged to comply with such notice despite not being liable to pay the taxpayer, this would lead to dire financial consequences for the third party.⁶⁶ This would mean that third parties served with this notice would have to comply where the third party could possibly hold money on behalf of the taxpayer in the future.⁶⁷ A third party should not be expected to satisfy the taxpayer's tax debt where he himself does not owe the taxpayer anything.⁶⁸ There is also the situation where a third party simply cannot afford to pay the taxpayer himself. Nevertheless, failure to comply with a third party notice constitutes an offence that is subject to a fine or imprisonment of up to two years.⁶⁹ This is because the third party will be held personally liable for the tax debt due by the original taxpayer.⁷⁰

What makes the application of this enforcement mechanism even more dangerous is that it also provides SARS with the power to attach a third party's assets in the way it could attach the taxpayer's.⁷¹ Therefore, the application of this provision could lead to the attachment of the assets of a person (the third party) that might be liable to pay the taxpayer in the future, who in turn is liable to pay SARS. The only remedy is for the third party to notify SARS that he or she is unable to comply with the notice in terms of section 179(2) of the TAA. However, where banks are required to comply with the notice on behalf of taxpayers that hold money on behalf of someone else, the provisions of this section fall short on protecting the taxpayer.

⁶⁵ *Third party appointments* p91.

⁶⁶ *Ibid.*

⁶⁷ *Third party appointments.*

⁶⁸ *Third party appointments* p92.

⁶⁹ Section 234(n) of the TAA.

⁷⁰ Section 179(3).

⁷¹ Section 184(1) of the TAA.

Another problem with this provision is that there is no limitation on the duration of the third party notice.⁷² *Fritz* opines that section 179(2) indicates that the duration of a third party notice is restricted to that in the notice.⁷³ This could lead to a situation where, upon the expiration of a third party notice, SARS could issue another one in terms of which the third party would be liable. Therefore, the TAA should not only provide for restriction on the duration of the notice, but should also restrict the number of times the notice should be allowed.⁷⁴ Without these restrictions, SARS would be entitled to continuously issue third party notices until the day the third party possibly holds money on behalf of the taxpayer. This places an onerous administrative burden on the third party who must keep track of taxpayers (that are under an obligation to pay SARS) to whom it could owe money to in the future.⁷⁵

The most imminent effect of this enforcement mechanism is its link to the “pay now, argue later” rule. As soon as the “pay now, argue later” rule comes into operation, SARS is entitled to rely on this enforcement mechanism, despite the fact that the money may not actually be due to SARS, and despite the fact that the third party does not actually (or yet) hold money on behalf of the taxpayer.

3.4 Possible remedy?

The only possible remedy or halt to the tax process is to request a senior SARS official for the suspension of payment of the tax debt SARS contends due to it in terms of section 164(2) of the TAA. It is within the senior SARS official’s discretion to grant the suspension of payment after taking into account the following:⁷⁶

“(3)(a) whether the recovery of the disputed tax will be in jeopardy or there will be a risk of dissipation of assets (b) the compliance history of

⁷² *Third party appointments* p93.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ Section 164(3)(a)-(h) of the TAA.

the taxpayer; (c) whether fraud is *prima facie* involved in the origin of the dispute ; c) the risk of dissipation of assets; (d) whether payment will result in irreparable financial hardship to the taxpayer not justified by the prejudice to SARS or the *fiscus* if the disputed tax is not paid or recovered; (e) whether the taxpayer has tendered adequate security for the payment of the disputed tax and accepting it is in the interest of SARS or the *fiscus*.”

Factors such as ‘whether sequestration or liquidation proceedings are imminent’, ‘the amount of tax involved’, and ‘whether the taxpayer has failed to furnish information requested under this Act (the TAA) for purposes of a decision under this section’ have been removed and replaced with those mentioned above.⁷⁷

Keulder opines that these guidelines provide some certainty to the taxpayer in deciding whether to “pay now and argue later on or whether payment should be suspended pending an appeal”.⁷⁸ She further mentions that these factors that must be considered in suspending the payment of tax, allow for the SARS official to be the “judge in a dispute to which he or she is a party”.⁷⁹ Therefore, the senior SARS official can decide whether he or she is of the opinion that the taxpayer will dissipate his assets and proceed with the enforcement mechanisms discussed above.⁸⁰

Keulder provides further problems about the guidelines set in determining whether to suspend the payment of tax debt.⁸¹ Firstly, the Act is silent regarding the weight attached to each of the guidelines or factors mentioned in section 164(3) of the TAA.⁸² She also questions the relevance of some of the factors mentioned in this subsection.⁸³ For example, she questions whether the ‘amount of tax involved’ should be a factor in considering whether

⁷⁷ The amendment of this section has taken effect from 20 January 2015.

⁷⁸ *Keulder* p143.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Keulder* p144.

⁸³ *Ibid.*

to grant or refuse suspension of payment.⁸⁴ The fact that a large amount of tax is involved should not be a determining factor in deciding to suspend payment.⁸⁵

The factor 'whether payment will result in irreparable financial hardship to the taxpayer not justified by the prejudice to SARS or the *fiscus* if the disputed tax is not paid or recovered' is of utmost importance.⁸⁶ However, the Commissioner will still be the judge to a case in which he himself is a party, and will have the discretion of deciding the relevance of this factor. In most instances, this factor will not be decisive, regardless of the importance of this factor. This is clear by looking at case law such as *Nondabula*, as discussed above.

Nevertheless, the SARS official may deny a request for suspension, or revoke a suspension of payment if he or she is satisfied that:⁸⁷

“the objection or appeal is frivolous or vexatious; the taxpayer is employing a dilatory tactic in conducting the objection or appeal; on further consideration of the factors in subsection (3), the suspension should not have been given; or there is a material change in any of the factors referred to in subsection (3), upon which the decision to suspend the amount involved was based.”

Subsection (5) also affords the SARS official the discretion to decide the relevance of and the weight attached to each of these factors. It also allows the SARS official to reconsider and retract the granting of a suspension of payment already allowed. Therefore, it is submitted that the chances of a suspension of payment are slim because SARS will always be the judge to a case in which it is a party.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ Section 164(5)(a)- (d) of the TAA.

Subsection (6) provides the taxpayer with an opportunity to catch his or her breath, even though it may be for a limited period. Section 164(4) of the TAA provides as follows:

“During the period commencing on the day that-

(a) SARS receives a request for suspension under subsection (2); or

(b) a suspension is revoked under subsection (5),

and ending ten business days after notice of SARS’ decision or revocation has been issued to the taxpayer, no recovery proceedings may be taken unless SARS has a reasonable belief that there is a risk of dissipation of assets by the person concerned.”

As a result of this section, SARS will promptly make a decision on whether to suspend payment or not. This is because after notice of decision and after ten business days, SARS will be entitled to continue with enforcement procedures if it were to deny the request. This also means that the senior SARS official may not carefully consider each of the factors listed in subsection (3) because it would want to notify the taxpayer of the denial of suspension to enable it to continue with enforcement mechanisms as soon as possible.

An easier route for SARS would be to follow the proviso in this section of ‘unless SARS has a reasonable belief that there is a risk of dissipation of assets by the person concerned.’ How would a taxpayer ever disprove such a belief by the SARS official? The taxpayer could possibly take the matter on review on the grounds that the SARS official incorrectly made a decision in terms of this subsection,⁸⁸ or alternatively approach the OTO to lay a complaint. Nevertheless, the “pay now, argue late” would already have come into operation and SARS will still be entitled to enforce payment.

⁸⁸ The taxpayer may take the decision on review in terms of section 7 of PAJA.

3.4 Chapter conclusion

The “pay now, argue later” rule itself does not have devastating consequences for the taxpayer, but rather the effect of the rule. The effect of the rule is seen in the different enforcement mechanisms it brings into operation without certainty as to the correctness of the assessment issued by SARS. The effects of the rule are different, depending on the type of enforcement mechanisms used by SARS. However, the financial impact on the taxpayer remains the same. The operation of this rule, together with the enforcement mechanisms discussed above, have drastic and irreversible effects on the taxpayer.

In the next chapter, I will outline the different steps in the tax process as well as the time periods applicable to each step in order to illustrate this relationship between taxpayers and SARS and how this affects the taxpayer.

The problem is not with these enforcement mechanisms only, but arises where the tax time periods, together with the “pay now argue later” rule, tip the scale in favour of SARS.

CHAPTER 4

THE TAX PROCESS AND TIME PERIODS APPLICABLE THERETO

4.1 Introduction

This chapter attempts to answer the third, fourth and fifth questions posed in this dissertation. These questions are what the different steps in the tax process are and the different time periods applicable to each step, how they favour SARS, how they are linked to the “pay now, argue later” rule and why they should not favour SARS. In this chapter, I will discuss the submission of returns, assessments, requests for reasons, objections, request for further documentation, decisions on objections and appeals, as well as the time periods applicable to each step. The importance of this chapter links to not only the tax process itself and whether it favours SARS, but at which stage of the process the “pay now, argue later” rule comes into operation.

4.2 Submission of returns

The tax process starts with the submission of a return by the taxpayer, being either a natural or juristic person. Section 25(1) of the TAA provides that a return submitted either voluntarily or in terms of any tax Act, must be filed in the prescribed manner and form. There are different procedures in place for the submission of returns for the different taxes such as Income Tax or Value-Added Tax. There is also a difference in the date of submission in the case of a natural or juristic person. The return must be filed by the date specified in the relevant tax Act or by the date determined by the Commissioner.⁸⁹ For example, section 47F of the Income Tax Act 58 of 1962 (hereinafter referred to as the “ITA”) deals with the submission of returns for income tax and obliges taxpayers to submit a return to the Commissioner. In the case of a natural person, it provides that a return must be submitted for a period of

⁸⁹ Section 25(2) of the TAA; Croome B *et al Tax Administration* (2015) 2nd ed Juta (hereinafter referred to as “Croome”) p89.

twelve months, being the year of assessment, ending on the last day of the year of assessment.⁹⁰ In the case of a company, it stipulates that a return must be submitted in respect of the financial year of that company.⁹¹ The date and time periods in which to file returns in the case of individuals, are determined by SARS on a yearly basis and can be found on the SARS website.⁹² In the case of companies, the date on which a return must be filed depends on the date to which its financial year runs.

4.3 Assessments

The next step in the tax process is the issuance of an assessment by SARS or self-assessment by the taxpayer. Depending on the circumstances of each case, SARS is either *obliged* to issue an assessment or *may* do so within its discretion. For example, SARS is obliged to issue an original assessment every time the taxpayer submits a return that does not include the taxpayer's liability for tax.⁹³

There are different types of assessments that may or should be issued by SARS, which deserve mentioning:

- An *original assessment* must be issued by SARS where a return was submitted by that taxpayer which does not include a determination of the amount of tax liability.⁹⁴
- Where such a return includes a determination of tax liability, the submission of the return is an *original self- assessment* of tax liability by the taxpayer.⁹⁵
- An *additional assessment* must be made by SARS if, at any time, prejudice to SARS or the *fiscus* is suspected or where there is in fact prejudice.⁹⁶

⁹⁰ Section 66(13)(a) of the ITA.

⁹¹ Section 66(13)(b) of the ITA.

⁹² <http://www.sars.gov.za/ClientSegments/Individuals/How-Send-Return/Pages/default.aspx> accessed on 5 September 2018.

⁹³ Section 91 of the TAA; *Croome* p234.

⁹⁴ Section 91(1) of the TAA.

⁹⁵ Section 91(2) of the TAA.

- A *reduced assessment* is made where an assessment has been successfully disputed by a taxpayer or in any other case where the assessment should be reduced.⁹⁷
- A *jeopardy assessment* is one made before the submission of a return is due and must be made by SARS if the Commissioner has reason to believe the collection of tax is in jeopardy.⁹⁸
- If or when SARS issues an assessment, it must notify the taxpayer assessed thereof by issuing a notice of assessment.⁹⁹

Section 99 of the TAA prescribes limitations for the issuance of assessments depending on the type of assessment to be issued. Section 99 provides as follows:

“(1) SARS may not make an assessment in terms of this Chapter-

- (a) three years after the date of an original assessment by SARS;
- (b) in the case of a self-assessment for which a return is required, five years after the date of an original assessment-
 - (i) by way of self-assessment by the taxpayer; or
 - (ii) if no return is received by SARS;
- (c) in the case of a self-assessment for which no return is required, after the expiration of five years from the-
 - (i) date of the last payment of tax for the tax period; or
 - (ii) effective date, if no payment was made in respect of the tax for the tax period.”

Croome is of the opinion that the TAA prescribes no time limit for when an additional assessment itself must be issued.¹⁰⁰ The SARS Service Charter previously provided that 80% of returns will be assessed within working 90 days from July to February and within 34 working days from March to June.¹⁰¹

⁹⁶ Section 92 of the TAA.

⁹⁷ Section 93(1) and (2) of the TAA.

⁹⁸ Section 94(1) of the TAA.

⁹⁹ Section 96(1) of the TAA.

¹⁰⁰ *Croome* p234.

¹⁰¹ *Croome* p234.

Croome and *Olivier* submit that the section is vague in that a taxpayer will never be able to determine whether they fall within the 80%.¹⁰²

The time limits in section 99 are different with respect to each type of assessment, but is typically between 3 to 5 years. Section 99 of the TAA affords SARS a relatively long time within which it can issue further assessments. This is problematic because it is at this stage of the tax process – after the issuance of an assessment – that the “pay now, argue later” rule comes into operation.¹⁰³ This means that SARS will be entitled to enforce payment of tax it contends is due to it. The only way in which a taxpayer can stop the effect of this provision in order to buy him-/herself time, is by requesting a suspension of the payment of tax, which may not even be granted or if so granted, may be revoked.¹⁰⁴

Therefore, SARS could make an additional assessment up to three years after the date of the original assessment and the “pay now, argue later” rule will come into operation up to three years after the date of the original assessment, thus, making the taxpayer liable to pay tax debt, which may not even be due, years after SARS issued the original assessment. Surely the legislature thought of the consequences of affording SARS such a long time to issue assessments. The taxpayer could be in a completely different space financially, but SARS will be entitled to an immediate collection of the tax it contends is due to it.

4.4 Request for reasons

After SARS has issued an assessment, but before objecting thereto, the taxpayer may request reasons for the assessment.¹⁰⁵ This request must be delivered to SARS within 30 days of the date of the assessment.¹⁰⁶ The

¹⁰² *Croome* p234.

¹⁰³ Section 164(1) of the TAA.

¹⁰⁴ Section 164(2) of the TAA.

¹⁰⁵ Rule 6(1).

¹⁰⁶ Rule 6(2)(c).

period may be extended up to 45 days if reasonable grounds exist.¹⁰⁷ This is problematic because it does not consider situations in which the taxpayer could find himself, such as being in an accident, being hospitalised for a long period due to severe medical conditions or where the taxpayer is out of the country. The taxpayer is entitled to sufficient reasons for the assessment issued by SARS, to enable him to formulate an objection.¹⁰⁸ If SARS is of the opinion that it has been provided, it has 30 days in which to notify the taxpayer that sufficient reasons have been provided.¹⁰⁹ Where SARS is of the opinion that sufficient reasons have not been provided to the taxpayer, it must provide the taxpayer with such reasons within 45 days.¹¹⁰ The period in which SARS must provide reasons may not extend beyond 45 days.¹¹¹ SARS may also have the same amount of time the taxpayer has, but SARS has many staff members employed and will never have a situation where the absence of one person disrupts the whole tax process, such as it would in situations where the taxpayer is unable to respond within the prescribed time.

4.5 Objection

The taxpayer may then object to the assessment should he choose to do so.¹¹² The taxpayer must deliver a notice of objection within 30 days after SARS delivered the reasons, or the date of assessment if no reasons were requested.¹¹³ The taxpayer then has 30 days in which to deliver the objection.¹¹⁴ The period in which to lodge an objection may be extended by 21 business day unless *exceptional circumstances* exist, in which case it may be extended further.¹¹⁵ This is the first stage in the tax process where the legislature considers that 'exceptional circumstances' may occur preventing the taxpayer from responding in a timely manner. Why is this not done at

¹⁰⁷ Rule 6(3).

¹⁰⁸ https://www.saica.co.za/integritax/2006/1387_What_constitutes_adequate_reasons_for_an_assessment_.htm accessed on 19 November 2018.

¹⁰⁹ Rule 6(4).

¹¹⁰ Rule 6(5).

¹¹¹ Rule 6(7).

¹¹² Section 104(1) of the TAA.

¹¹³ Rule 7(1)(a) and (b).

¹¹⁴ Rule 7(2)(e).

¹¹⁵ Section 104(5)(a).

every step in the tax process? Can 'exceptional circumstances' not exist in the time the taxpayer has to request reasons? Even if there were such circumstances, SARS would still be entitled to exercise its powers in terms of the "pay now, argue later" rule. Even though it gives the taxpayer an opportunity to request reasons, an extension of this time period does not suspend or extend the liability to pay tax, and the taxpayer could be liable to pay tax without even understanding the basis on which SARS levied such tax. This is the effect of the "pay now, argue later" rule and the tax time periods in terms of the TAA only help tip the scale in favour of SARS.

4.6 Request for additional documentation

Once the taxpayer delivers the objection, and SARS is of the opinion that it needs additional documents to decide on the objection, it must notify the taxpayer within 30 days after receiving such an objection.¹¹⁶ At this point in the tax process, enforcement mechanisms could already have been invoked and tax recovered from the taxpayer. The extra 30 days in which SARS can decide to request further documentation, has an effect on the finances of an individual or a company, given that the tax has already been recovered. Given the tax has already been recovered, there would be no reason for SARS not to utilise this time and the taxpayer would have to wait. SARS would anyway not want to allow the objection, but rather run the course of the tax process, using every possible avenue to keep the recovered tax. Upon receiving such a request, the taxpayer will have 30 days or maximum 50 days to deliver the substantiating documents upon which SARS will decide to allow or disallow the objection.¹¹⁷

The problem with the tax time periods is not only the fact that the taxpayer has limited and sometimes extremely short periods in which to perform certain acts, but also that the time periods together with the "pay now, argue later" rule can create an extremely lengthy period in which the taxpayer will have to

¹¹⁶ Rule 8(1).

¹¹⁷ Rule 8(2) and (3). Sub-rule 2 provides that the documents must be delivered within 30 days, but sub-rule (3) allows for the taxpayer to apply for an extension for no more than 20 days.

bear the financial burden of recovered tax that might not even be due to SARS.

4.7 Decision of objection

At this stage of the tax process, SARS will either allow or disallow the taxpayer's objection. SARS must notify the taxpayer of its decision within 60 days after the taxpayer delivered the objection, or within 45 days after delivery of the substantiating documents where requested, or if not so, delivered after the expiry of such period.¹¹⁸ SARS may further extend this period by 45 days should they need more time to make a decision due to "exceptional circumstances, the complexity of the matter or the principle or amount involved."¹¹⁹ Here again, SARS is given such an extensive time period which may be extended even further. Again, the problem is that the taxpayer will have to bear the financial burden even longer where tax has already been recovered. Even if tax has not at this stage been recovered by SARS or the taxpayer is unable to pay, interest accrues on the outstanding tax debt from the effective date until the debt is paid.¹²⁰ Therefore, irrespective of whether the tax debt is recovered, the taxpayer will bear the financial burden because it will never be able to show the circumstances referred to in Rule 9(2) are not present and the "pay now, argue later" rule has come into operation.

In the event that SARS disallows the taxpayer's objection, either partially or in full, if the taxpayer wishes to appeal against the assessment, it must deliver a notice of appeal within 30 days after being notified of the disallowance of the objection.¹²¹ An appeal may be made to either the tax board or tax court.¹²²

¹¹⁸ Rule 9(1)(a) and (b).

¹¹⁹ Rule 9(2).

¹²⁰ Fritz C 'An appraisal of selected tax-enforcement powers of the South African Revenue Service in the South African Constitutional Context' (2017) [https://repository.up.ac.za/handle/2263/62233;section 187\(1\) read with section 188\(1\) of the TAA](https://repository.up.ac.za/handle/2263/62233;section%20187(1)%20read%20with%20section%20188(1)%20of%20the%20TAA). The 'effective date' depends on the kind of assessment in consideration, the type of tax levied and other circumstances as provided for in Chapter 12 of the TAA.

¹²¹ Rule 10(1)(a).

¹²² Rule 11.

The dispute may also be resolved by way of alternative dispute resolution, which intention must be stated in the notice of appeal.¹²³

4.8 Appeal

At this stage of the tax process, the taxpayer has a choice of which way the matter is to be resolved. If alternative dispute resolution mechanisms are pursued, SARS has 30 days to inform the appellant whether these procedures are appropriate for the current matter or whether it should be used, if the taxpayer does not indicate such willingness.¹²⁴ The taxpayer has a further 30 days to agree or disagree with such a suggestion.¹²⁵ There is a 90-day limit within which alternative dispute resolution procedures must be finalised, which may be extended.¹²⁶ If alternative dispute resolution (ADR) mechanisms are used, Part C of the rules prescribes the procedures to be followed. If no dispute resolution mechanisms are pursued, and the matter will be dealt with by the tax board, the taxpayer must, within 35 days of delivery of the notice of appeal, request the clerk to set down the matter before the tax board.¹²⁷ The matter will then be dealt with in terms of Part D of the rules. Where the matter is dealt with by the tax court, Part E of the rules prescribes the procedures to be followed.

4.9 Chapter conclusion

The link between the tax periods and the “pay now, argue later” rule is simply that, together they have adverse consequences for the taxpayer. This dissertation has come to the conclusion that, not only the tax time periods, but the tax process itself, favours SARS. Because of this and in conjunction with the “pay now, argue later” rule, they tip the scale in favour of SARS. As mentioned before, I am not challenging the “pay now, argue later” rule itself,

¹²³ Rule 10(2)(e) and Section 107(5) of the TAA.

¹²⁴ Rule 13(1).

¹²⁵ Rule 13(2)(b).

¹²⁶ Rule 25(1).

¹²⁷ Rule 11(2).

but rather the effect that the rule, together with the tax time periods, has on the taxpayer because these time periods are heavily in favour of SARS.

CHAPTER 5

CONCLUSION

The relationship between SARS and the taxpayer is a fairly complex one. SARS is entitled to wide powers and enforcement mechanisms in terms of the relevant legislation, while the taxpayer has no equal protection. In analysing each step of the tax process, it is evident that legislation unfairly favours SARS in its entirety. This is because SARS is entitled to extensive time periods during each step where the taxpayer may not be. These extensive time periods are not only problematic in the sense that SARS has more time than the taxpayer, but also in that the taxpayer would already suffer financial hardship due to the operation of the “pay now, argue later” rule.

The tax time periods that unfairly favour SARS should not be viewed in isolation because they are linked to the “pay now, argue later” rule. The link between the tax time periods and the “pay now, argue later” rule is that the former determines when the latter comes into operation,¹²⁸ and that together they have adverse consequences for the taxpayer. The “pay now, argue later” rule should also not be viewed in isolation because it is not the rule itself that is problematic, but the effect that the rule has on taxpayers. These effects are found in the different enforcement mechanisms at SARS’ disposal.¹²⁹ These enforcement mechanisms have different effects or implications for the taxpayer, but remain the same in its financial consequences for the taxpayer. Some of these enforcement mechanisms have been found to pass constitutional muster. However, both the “pay now, argue later” rule and the enforcement mechanisms have adverse consequences. The former because it brings the latter into operation, and the latter because of the effects it has on taxpayers.

¹²⁸ Section 164 of the TAA.

¹²⁹ The enforcement mechanisms discussed in Chapter 3 of this dissertation and found in the relevant sections of the TAA.

Due to the fact that legislation affords SARS such extensive powers and enforcement mechanisms, the tax time periods should also not favour SARS to such an extent. The length of each of the steps in the tax process should be considered to ensure fairness to the taxpayer. Perhaps the “pay now, argue later” rule will be challenged on new constitutional grounds, such as property or equality, and then not pass constitutional muster.

Regardless of what is done, a balance must be achieved between the taxpayer’s rights and SARS’ obligation to collect taxes. The best solution might be the implementation of a taxpayer bill of rights as suggested by the Davis Tax Committee and the OTO.¹³⁰ This will regulate the relationship between SARS and the taxpayer to ensure that a balance is achieved.¹³¹ However, it will not be enough to simply implement a taxpayer bill of rights, but these rights should be included in the TAA and all other relevant legislation. Along with the inclusion of the taxpayer bill of rights in legislation, current legislation should be reconsidered and changed to ensure promotion and protection of these rights. This will ensure that a balance is achieved and the “pay now, argue later” rule might be removed from all legislation. Without such removal, difficulty is foreseen in reaching a balance on the scale between the taxpayer and SARS.

¹³⁰ Davis Tax Committee: Tax Administration Report: September 2017.

¹³¹ *Ibid.*

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