

**A CONSTITUTIONAL ANALYSIS OF THE SEARCH AND SEIZURE
MECHANISM IN TERMS OF THE TAX ADMINISTRATION ACT 28 OF 2011**

by

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ABSTRACT

This contribution is an analysis of the information gathering powers granted to the SARS officials for the purpose of tax administration and collection of taxes as previously governed in terms of the Income Tax 58 of 1962, and now in terms of the Tax Administration Act 28 of 2011, specifically how the warrantless search and seizure came into force. This will also include a brief overview of the types of assessments which can be issued by SARS as a result of an audit.

This research critically analyses the constitutionality of the audit and information gathering powers of SARS, particularly the search and seizure provisions in terms of the TAA, specifically focusing on what rights are affected and whether any infringement is justifiable in terms of section 36 of the Constitution of South Africa, 1996. This will also include a brief discussion on any remedies available to a taxpayer in case of an infringement of his or her constitutional rights.

The discussion also includes a comparative analysis of search and seizure provisions in the TAA with search and seizure provisions under other areas of law, such as custom and excise, criminal and competition law, from the perspective of the constitutionality and possible infringement of constitutional rights. The discussion will also include a comparative discussion of search and seizure procedures in South Africa with search and seizure procedures in other selected jurisdictions specifically New Zealand, to highlight any lessons available for South Africa.

Naturally, the discussion provided conclusions regarding the constitutionality of SARS audit and information gathering procedures, specifically warrantless search and seizure.

DECLARATION

I **SHARON CHENAI MATOMBO** hereby declare that the dissertation is my own, unaided work. Where other people’s work has been used (either from a printed source, Internet or any other source), this has been properly acknowledged and referenced in accordance with departmental requirements It is being submitted in partial fulfilment of the prerequisites for the degree of Masters of Law in Taxation at the University of Pretoria. It has not been submitted before for any degree or examination in any other university.

Signature:

Date:

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LIST OF ABBREVIATION

SARS	South African Revenue Service
TAA	Tax Administration Act
NZTA	New Zealand Tax Administration Act

CHAPTER 1

INTRODUCTION

1.1. BACKGROUND

Tax administration is of paramount importance in South Africa as it regulates the efficiency of tax compliance by taxpayers and collection of taxes by the South African Revenue Service (referred to as “SARS”). The administrative procedures involved in complying with the tax system in South Africa comprise several distinct requirements, such as the requirement for taxpayers to register for tax and to submit tax returns timeously to the SARS. An assessment is issued in the prescribed form once SARS has received the tax return and the taxpayer has a right to object within the prescribed period if not satisfied with the assessment.¹

The Commissioner for SARS was empowered under the provisions of the Income Tax Act 58 of 1962 (hereafter referred to as “Income Tax Act”) and now in terms of the Tax Administration Act 28 of 2011 (hereafter referred to as the “TAA”), to conduct audits and investigations into the taxpayer’s affairs and vested with various powers to ensure the collection and recovery of tax. It is important that the Commissioner complies with the procedural requirements contained in the TAA and, more importantly, acts in accordance with the principles of administrative justice enshrined in The Constitution of South Africa, 1996 (hereafter referred to as the Constitution).²

Historically, Section 74 of the Income Tax Act governed the information gathering procedures of SARS³. The section did not contain any provisions relating to the time frame for an audit and taxpayers could be requested to furnish documents at any time and on several occasions.

¹ Section 104 of the Tax Administration Act provides that a taxpayer who is aggrieved by an assessment should object within certain time frames. If a taxpayer fails to object within the prescribed period, he/she will be required to provide exceptional circumstances that gave rise to the delay for SARS to consider the objection.

² de Koker & Williams: 2012

³ Section 74A, as it read, the Commissioner or any officer could, for the purposes of the administration of the Act in relation to any taxpayer, require such taxpayer or any other person to furnish such information (whether orally or in writing), documents or things as the Commissioner or such officer required.

The TAA which came into effect on 1 October 2012 provides that it aims “to simplify and consolidate into one Act, a more logical and systematic way of dealing with the administrative law. It eliminates duplication, removes redundant requirements and aligns different requirements that currently exist in different Tax Acts”.⁴

In light of the above, search and seizure powers have been introduced by the TAA as one of the procedures for information gathering by SARS, this thesis will address whether these powers infringe the taxpayer’s constitutional rights and, if they do, whether it be can considered reasonable and justifiable as a law of general application.

1.2. RATIONALE OF THE STUDY

The Constitution contains the Bill of Rights which governs the rights afforded to citizens of the Republic of South Africa.⁵ In this context, it is always important to ensure that the law which govern the country do not impede on the rights afforded. In the context of tax laws, with specific reference to the TAA, it is important to determine whether the powers granted to the Commissioner, or a “senior official” do not violate the rights enshrined in the Constitution.⁶

The principal goal of the research is to assess the constitutionality of the audit and information gathering process followed by SARS in terms of the TAA, with specific reference to the search and seizure procedures introduced in section 74D into the Income Tax Act and now set out in terms of sections 59 – 63 of the TAA.⁷

In addition, this research will provide a comparative analysis of information-gathering procedures from a South African law (i.e. criminal law) and international law perspective to determine consistency and efficiency of the tax information gathering rules.

⁴ SARS Short Guide to Tax Administration Act 2011 (Act 28 of 2011)

⁵ Chapter 2 of the Constitution outlines the rights which the state must “respect, promote and fulfill” for every individual. The Chapter also provides that these rights are subject to limitations contained therein.

⁶ The Tax Administration Act extends powers to a SARS “senior official”, as such, consideration is not only made to powers vested to the Commissioner.

⁷ The new provisions authorise SARS to enter any premises unannounced where relevant material is being kept, conduct a search of a person’s premises and seize all relevant material under a search and seizure warrant issued by a judge or magistrate

1.3. SCOPE AND LIMITATIONS OF THE STUDY

The TAA provides for the procedures in respect of the audit of taxpayers and the information gathering powers of SARS officials. One of the contentious provisions is search and seizure as provided for in the TAA, which was previously governed in terms section 74D of the Income Tax Act. This provision authorised SARS officials to enter a taxpayer's premises and search any person present on the premises for "any information, documents or things that may afford evidence as to the non-compliance by any taxpayer with his obligations and to seize any such information, documents or things without prior notice and at any time."⁸

Search and seizure for tax purposes is now governed by the TAA which provides that SARS may enter any premises unannounced where relevant material is being kept, conduct a search of a person's premises and seize all relevant material under a search and seizure warrant issued by a judge or magistrate.⁹ The difference between the search and seizure procedures as provided for in the Income Tax and the TAA is that the latter introduced a warrantless search and seizure procedure in certain circumstances.¹⁰

With the above in mind, this research will focus on whether the search and seizure provisions survive under the new constitutional dispensation, specifically whether any rights are likely to be affected by this provision. It is common cause that constitutional rights are not absolute, as such, if any infringement arises, it is important that any law that limits any rights must comply with the requirements set out in the Constitution.¹¹ Section 36 of the Constitution provides that constitutional rights can be limited by a law of general application, provided that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.¹²

⁸ Bovijn, S and Van Schalkwyk, L 2012 (23) Issue 3 *Stellenbosch Law Review* 507

⁹ SARS Guide to Tax Administration Act, 2011 at 25

¹⁰ Bovijn, S and Van Schalkwyk, L 2012 (23) Issue 3 *Stellenbosch Law Review* 508

¹¹ Rautenbach 2014 (17) Number 6 *PER/PELJ* 2229 at 2240. The reference to "law of general application" gives effect to the formal aspects of the rule of law or legality, namely that all limitation must be authorised by legal rules. In investigating this element, the factors in section 36(1)(a) to (e) of the Constitution must be taken into account

¹² Williams 1997 (7) Issue 1. Article 2 *Revenue Law Journal* 1 at 7

In the event that the provisions result in an infringement, this research will also address the remedies available for the taxpayers both inside and outside the TAA.¹³

1.3.1. LIMITATIONS

This study will provide an overview of SARS information gathering procedures; however, the discussion will focus mainly on the constitutionality of the warrantless search and seizure provisions. In addition, although reference will be made to rights that may be potentially affected, the study will not deal extensively with the specific rights, but focus mainly on whether there is a possible infringement of a right and if such right can be limited as provided by Constitutional framework of limitation.¹⁴ In addition, the literature which has been used for this study is not extensive and thus limited to selected textbook, case law, legislation and articles on South Africa laws.

1.4. METHODOLOGIES

An interpretative research approach will be adopted for the present research as it seeks to understand and describe the rules governing the audit of taxpayers and gathering information relating to the audit, in the light of the constitutionality of these procedures. The research methodology to be applied can be described as a *doctrinal* research methodology. This methodology provides a systematic exposition of the rules governing a particular legal category (in the present case the legal rules relating to audit and information gathering powers by SARS), analyses the relationships between the rules, explains areas of difficulty and is based purely on documentary data.¹⁵

¹³ Pocock “SARS’ information gathering powers: it’s accrual world” Available: <https://www.withoutprejudice.co.za/free/article/5821/view> (Accessed 28 April 2018). A detailed discussion is provided on the examples of remedies available to taxpayers; an example is section 46 of the Tax Administration Act, which provides the conditions which should be met for a request of information by SARS. Alternatively, a taxpayer has other remedies available outside the Tax Administration Act such as approaching the Tax Ombud or the Public protector in disputing SARS request.

¹⁴ Limitation rules are provided in terms of section 36 of the Constitution.

¹⁵ McKerchar 2008 *eJournal of Tax Research* 1
Available: <http://www.Austrlii.edu.au/au/journals/eJTR/2008/1.html> (accessed 8/11/2017)

The study will also include a comparative analysis of search and seizure provisions as provided in terms of other spheres of South African law. This analysis will assist in determining the consistency of tax rules with other rules as contained in South African law. An example of search and seizure procedures is section 29 of the National Prosecuting Authority Act, 32 of 1998, which authorises the issuing of search warrants for the purposes of a “preparatory investigation” by an investigation officer.

This study will also include an international comparative analysis on the information gathering rules contained in South Africa tax law as compared to those of another jurisdiction. The main purpose is to determine whether the TAA is in line with international practices relating to information gathering. The country which will be used an example is New Zealand. The main reason for choosing this country is that it has information-gathering provisions similar to South Africa.¹⁶ In addition, New Zealand does not have a Constitution, but a New Zealand Bill of Rights Act, 1990 instead.¹⁷ It would be interesting to observe the interplay between information gathering powers by the tax authority versus taxpayer rights.

The documentary data to be used for the research consists of:

- legislation: the Income Tax Act, the Tax Administration Act, the Criminal Procedure Act, the Constitution of South Africa and the United States of America Constitution;
- relevant case law;
- South African Revenue Service Interpretation Notes, Regulations, Notices and Binding Rulings relating to SARS audit procedures;
- articles in accredited journals (where available);
- textbooks and other writings (where applicable).

The research is conducted in the form of a natural argument, supported by documentary evidence. The validity and reliability of the research and the conclusions will be ensured by:

¹⁶ Section 16 of the Tax Administration Act, 1994 provides the Commissioner with authority to gather information from the taxpayers.

¹⁷ Gupta, R. ‘The relevance of taxpayer’s’ constitutional rights in the light of Inland Revenue’s powers of search and seizure’ <https://www.business.unsw.edu.au/About-Site/Schools-Site/Taxation-Business-Law-Site/Documents/25-Ranjana-Gupta-paper.pdf> (Accessed 27 August 2018).

- adhering to the rules of legal interpretation, as established by common law;
- placing greater evidential weight on legislation, case law which creates precedent or which is of persuasive value (primary data) and the writings of acknowledged experts in the field;
- discussing opposing viewpoints and concluding, based on a preponderance of credible evidence; and
- the rigour of the arguments.

As all the documents used are in the public domain, no ethical considerations arise in relation to the use of these documents. The accepted rules for the interpretation of statutes will be adhered to in carrying out the research.

1.5. RESEARCH QUESTIONS

This research will respond to the following questions:

1. Is search and seizure as an information gathering means justifiable in a Constitutional democracy?
2. Whether there any remedies available to a taxpayer in case of a possible infringement?
3. Whether search and seizure provisions as provided by tax rules are consistent with other South African law provisions and with other jurisdictions?
4. What lessons, if any, can be learnt from jurisdictions?

1.6. STRUCTURE

To respond adequately to the above questions this research is structured as follows:

Chapter 2 contains definitions and a detailed analysis of audit, information gathering provisions as provided previously in terms of the Income Tax, and now in terms of the TAA, specifically how the warrantless search and seizure came into force. This will also include a brief overview of the types of assessments which can be issued by SARS as a result of an audit.

Chapter 3 contains a discussion on the constitutionality of the audit and information gathering powers of SARS, particularly the search and seizure provisions in terms of the TAA, specifically focusing on what rights are affected and whether any infringement is justifiable in terms of section 36 of the Constitution. This will also include a discussion on any remedies available to a taxpayer in case of an infringement of his or her or its constitutional rights.

Chapter 4 contains a discussion to compare search and seizure provisions in the TAA with search and seizure provisions under other areas of law, such as custom law and criminal law, from the perspective of the constitutionality and possible infringement of constitutional rights. This chapter will also include a comparative discussion of search and seizure procedures in South Africa with search and seizure procedures in other selected jurisdictions, to highlight any differences and reasons for these differences.

Chapter 5 concludes this research by providing conclusions regarding the constitutionality of SARS audit and information gathering procedures, specifically warrantless search and seizure. In addition, what recommendations available for tax administration provisions.

CHAPTER 2

OVERVIEW OF SARS AUDIT AND INFORMATION GATHERING PROCESS

2.1. INTRODUCTION

This chapter provides a detailed analysis of audit, information gathering provisions as provided previously in terms of the Income Tax, and now in terms of the TAA, specifically how the warrantless search and seizure came into force. This will also include a brief overview of the types of assessments that can be issued by SARS as a result of an audit.

2.2. TAX COMPLIANCE IN SOUTH AFRICA

In order to provide context, it is important to understand the South African tax compliance system, and where the audit and information gathering process fits in. For SARS to collect its revenue, taxpayers are required to submit their tax returns¹⁸. When one submits a tax return, an assessment is issued which indicates the amount of tax payable or refundable to the taxpayer as the case may be.¹⁹ However, depending on SARS risk assessment, a submitted tax return may be selected for audit.²⁰ In such case, a SARS official will send notification to the taxpayer to provide certain documentation before a final assessment can be made.

2.3. INFORMATION GATHERING IN TERMS OF THE INCOME TAX ACT

Historically, section 74 of the Income Tax Act governed the information gathering procedures of SARS. Section 74A authorised the Commissioner or an appointed SARS official to request any information from the relevant taxpayer or any other person for the purpose of administration of any tax Act. Section 74B provided that the Commissioner

¹⁸ Section 25 of the TAA provides that any person who is obliged to file a return under a tax Act or at the request of the Commissioner or does so voluntarily must do so in a timely manner.

¹⁹ An assessment is defined in section 1 of the TAA to include both the determination of an amount of a tax liability and a refund by way of self-assessment by the taxpayer or by way of an assessment by SARS.

²⁰ Section 40 of the TAA provides that ‘SARS may select a taxpayer for inspection, verification or audit by relying on any relevant factor for the proper administration of a tax Act, including on a random or risk assessment basis.’

or an appointed SARS official could, prior to giving reasonable notice, request relevant information from the taxpayer or any other person for inspection or examination.²¹ In addition, the Commissioner or appointed SARS official was also authorised to approach any person's premises during business hours for the purpose of inspecting, examining or obtaining relevant information for the purpose of administration under any tax Act.²²

The above sections sparked disputes between SARS and the taxpayers. One of the issues was a question on the legality of SARS actions, specifically whether the Commissioner or an appointed official could access sensitive information from taxpayers.²³ In addition, the sections did not contain any provisions relating to the time frames for an audit and taxpayers could be requested to furnish documents at any time and on several occasions.

Following the legislature's intention to have one Act which deals with the administration of all taxes, the TAA now provides for detailed rules and procedures relating to administration and information gathering by SARS officials.²⁴

2.4. INFORMATION GATHERING IN TERMS OF THE TAA

In order to ensure that taxpayers pay the correct tax due, section 40 read with section 46 of the TAA has vested powers in the Commissioner to collect relevant information pertained to an assessment. This includes the audit of tax returns and raising queries regarding the taxpayer's affairs and search and seizure of documentation.²⁵

²¹ Section 74B(1)

²² Section 74B (2) to (4) – An authorisation letter was required prior to entry at any premises. In addition, the Commissioner or any officer would not enter any dwelling house or domestic premises (except any part thereof as may be occupied or used for the purposes of trade) without the consent of the occupant.

²³ <https://www.saica.co.za/integritax/2012/2116.Information.gathering.by.SARS.htm> “Information gathering by SARS” October 2012 Issue 157 (accessed 18 July 2018)

²⁴ In the 2005 Budget Review, the Minister of Finance announced the intention “to incorporate in one piece of legislation certain generic administrative provisions, which are currently duplicated in the different tax Acts”

²⁵ Croome & Olivier 2015:108. Section 40 of the TAA provides that SARS may select a person for inspection, verification or audit on the basis of any consideration relevant for the proper administration of a tax Act, including on a random or risk basis. Section 46 further authorises that SARS may request relevant material for the purpose of inspection, verification or audit.

Chapter 5 of the TAA provides for the procedures in respect of the audit of taxpayers and the information gathering powers of SARS officials. The relevant parts under this chapter are as follows:

Part A – General Rules for inspection, verification, audit and criminal investigation

Part B – Inspection, request for relevant material, audit and criminal investigation

Part C – Inquiries

Part D – Search and seizure.

This research focuses mainly on Part D of the information gathering procedures.

2.5. AN ANALYSIS OF SEARCH AND SEIZURE PROVISIONS

2.5.1. DEVELOPMENT OF SEARCH AND SEIZURE PROVISIONS

Search and seizure as part of information gathering was initially governed in terms section 74 (3) of the Income Tax Act. This section authorised SARS officials to enter a taxpayer's premises and search any person present on the premises for "*any information, documents or things that may afford evidence as to the non-compliance by any taxpayer with his obligations and to seize any such information, documents or things without prior notice and at any time.*"²⁶

Section 74(3) was reviewed by various courts and the leading case was *Rudolph and Another v CIR and Others NNO*²⁷, where the taxpayer had failed to submit tax returns and SARS officials approached the taxpayer's premises to search and consequently seized certain documentation. The taxpayer contended that search and seizure was unconstitutional in terms of the provisions of the Interim Constitution of South Africa 1993 (hereafter referred to as 'the Interim Constitution') as the warrant, which the Commissioner relied on, was issued before the Interim Constitution came into force²⁸. Goldblatt J in the High Court dismissed the case and held that referred to section 229 of

²⁶ <https://www.saica.co.za/integritax/2012/2116.Information.gathering.by.SARS.htm> "Information gathering by SARS" October 2012 Issue 157 (accessed 18 July 2018)

²⁷ 1994 (3) SA 771 (W)

²⁸ Ibid

the Interim Constitution, which provided that the laws in place prior to the Interim Constitution remained in force and thus section 74 would have to be repealed or amended by the Constitutional Court.²⁹ The Constitutional Court did not deal with the matter since the warrant was issued before the Interim Constitution. As such, the case was referred back to the Supreme Court of Appeal³⁰. On appeal, Rudolph alleged that search was not valid as the Commissioner did not conduct it and secondly the initial warrant could not be relied on a year later.³¹ The court indicated that the taxpayer had failed to conduct himself in relation to his compliance and thus this was the last step the Commissioner had to take to ensure compliance. As such, the court held that the warrant was valid and section 74(3) was not declared unconstitutional.³²

Following the above and various cases, the decision to repeal section 74 (3) was addressed by The Commission of Inquiry into certain Aspects of the Tax Structures of South Africa (Katz Commission).³³ The report provided recommendations, which would resolve the application of search and seizure provisions in light of the constitutional dispensation. The Katz Commission recommended that a judge only and not the Commissioner should issue a warrant.³⁴ In addition, prior to issuing a warrant, the judge must be satisfied by information provided under oath that an offence has been committed and thus collection of the information was justifiable to prove that the offence has been committed.³⁵ This led to the introduction of section 74D of the Income Tax Act.

Section 74D incorporated the recommendations provided by the Katz Commission discussed above. In addition to the recommendations by the Katz Commission, section 74D provided that the application for the warrant had to detail the facts surrounding the

²⁹ 1996 (2) SA 886 (A) – The case was reported in the Appellate Division as Rudolph and Another v CIR and Others

³⁰ 1996 (4 (SA) 552 (CC) – The case was reported in the Constitutional Court as Rudolph and Another v CIR and Others

³¹ Ibid

³² Ibid

³³ Croome & Olivier (2015) 141

³⁴ Interim report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa, The Katz Commission 1994. The Katz Commission enquiry led by Michael Katz was established June 1994. The purpose of the enquiry was to investigate and report whether the tax laws were in line with the provisions of the Interim Constitution.

³⁵ Interim report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa

alleged non-compliance by the taxpayer. The judge had to issue a warrant, which contained the following:

- Details of the alleged non-compliance;
- Premises to be searched;
- Identify the taxpayer;
- Details on the information and documents to be seized³⁶.

Also, when an officer had been issued with a warrant to search certain premises had reason to believe that the information or documentation was held at another location, and, there is a possibility that the information was about to be removed or destroyed, he or she could search such premises as if he were granted by the existing warrant.³⁷

Following the introduction of section 74D, it is important to note that during its application before the TAA, the courts also dealt with cases where taxpayers challenged the issue of the warrants. One of them was when a judge was not provided with all the facts prior to issuing a warrant.³⁸ The taxpayer alleged that the Commissioner had not disclosed material facts to the judge, specifically details regarding a previous investigation between SARS and the taxpayer where the matter was settled.³⁹ The court dismissed the taxpayer's case indicating that the previous investigation dealt with different tax issues and did not have any bearing at the matter at hand. In addition, the court indicated that details of the previous investigation would have supported issue of a warrant⁴⁰.

The Supreme Court of Appeal also had to deal with the application of section 74D in the case of *Shelton v Commissioner for the South African Revenue Service*⁴¹. The taxpayer alleged that prior notice of the warrant application must be given before execution of the warrant. The court held that prior notice to the taxpayer would defeat the purpose of the

³⁶ Section 74D(4)

³⁷ Section 74D(5) of the Income Tax Act

³⁸ *Oberholzer and Others v The Commissioner for The South African Revenue Services* (unreported, High Court of South Africa, Cape of Good Hope Provincial Division Case No 8714/98, judgement delivered 20 May 1999)

³⁹ *Ibid* at paragraph 14

⁴⁰ *Ibid* at paragraph 14

⁴¹ 2002 (2) SA 9 (SCA). Also addressed in *Deutschmann NO and Others v Commissioner for the South African Revenue Service*

application of section 74D. Consequently, the court decided that no notice should be given to the taxpayer when the Commissioner approaches a judge for issue of a warrant.

Due to the introduction of the TAA, section 74D was incorporated in the TAA and thus the information gathering processes are governed by the TAA.

2.5.2. SEARCH AND SEIZURE IN TERMS OF THE TAA

Search and seizure is now administered by sections 59 – 63 of the TAA.

Section 59 of the TAA provides that a senior SARS official is authorised, if required, to apply for a search warrant to search and seize information or documentation as identified in the warrant. The warrant should be obtained via an *ex parte* application to the court.⁴² The application is made by SARS, with prior notice given to the taxpayer. The SARS official is required to provide the court with relevant information and documentation that the taxpayer has failed to comply with a tax Act or has committed a tax offence.⁴³

Section 60 of the TAA regulates issue of the warrant by the courts. This section provides that a judge or magistrate is authorised to issue a warrant if there are ‘reasonable grounds’ to believe that a person has not complied with an obligation imposed under a tax Act or has committed a tax offence and the relevant material is likely to be found at the taxpayer’s premises.⁴⁴ The warrant must contain the following:

- Identify the non-compliant taxpayer;
- Detailed allegations regarding the non-compliance;
- Details regarding location and address of the premises to be searched; and
- Confirm that relevant material will be identified at the premises.⁴⁵

⁴² Section 59 (2) of the TAA. An *ex parte* application is a court application which is brought before the court by one party, in this case SARS, without the other party i.e. taxpayer and without prior notification being given to the taxpayer.

⁴³ Section 59 (2) of the TAA

⁴⁴ Section 60 (1) of the TAA. The term ‘relevant material’ is defined in section 1 of the TAA and it means any information, document or thing that is foreseeably relevant for the administration of a tax Act.

⁴⁵ Section 60 (2) of the TAA

Section 61 of the TAA provides that when carrying out a search, a SARS official must produce the warrant. If no one is available, the SARS official must attach the warrant on a visible place.⁴⁶ The taxpayer is entitled to refuse entry if the SARS official does not produce a warrant. In addition, this section authorises the SARS official to open or remove any containers, seize and make copies of any documentation, which may be relevant to prove non-compliance by the taxpayer.⁴⁷

Section 62 of the TAA authorises a SARS official to search any premises not identified in the warrant. This will only be applicable if the SARS has reasonable grounds to suspect that;

- the relevant material disclosed in the warrant may be removed or destroyed;
- a warrant cannot be obtained in time to prevent such removal or destruction; and
- the delay in obtaining a warrant would defeat the purpose of the search and seizure.⁴⁸

Section 63 of the TAA authorises a SARS official to conduct a search and seizure without a warrant, if the owner consents in writing or if the SARS official 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 which will be issued; and
- (iii) the delay in obtaining a warrant would defeat the object of the search and seizure.⁴⁹

This section was introduced by the TAA. The rationale for the inclusion of this provision was that SARS would conduct an audit on a taxpayer's affairs, however if they would find information, SARS would be required to withdraw from the premises and apply for a warrant prior to returning to the premises.⁵⁰ As such, SARS sort the power to search and seize information without a warrant to prevent destruction of the

⁴⁶ Section 61 (1) of the TAA

⁴⁷ Section 61 (2) of the TAA

⁴⁸ Section 62 (1) of the TAA

⁴⁹ Section 63 (1) of the TAA

⁵⁰ Croome & Olivier (2015) 157

documents before they could retrieve them.⁵¹ This provision has given rise to constitutional debates and this discussion will be discussed in the subsequent Chapter.

2.6. ASSESSMENTS

An assessment is a notice containing the determination of the amount of a tax liability or refund, generated either by way of a self-assessment by a taxpayer or an assessment made by SARS based on a return filed by a taxpayer.⁵²

The importance of this discussion is that following an audit and information-gathering process by SARS, specifically search and seizure, SARS may issue an assessment that would be to the disadvantage of the taxpayer. In such case, the taxpayer would be required to object and prove otherwise. These assessments have been discussed below.

2.6.1. ADDITIONAL ASSESSMENT

Section 92 of the TAA provides that if SARS is satisfied that the assessment issued to a taxpayer does not correctly reflect the application of a tax Act, to the prejudice of SARS or the fiscus, SARS is obliged to make an additional assessment to rectify the prejudice. It is common practice that SARS may conduct random audits, following which they will issue an additional assessment based on information gathered during an audit.⁵³

2.6.2. JEOPARDY ASSESSMENT

This assessment is not common in South Africa, but used mostly in foreign jurisdictions. A jeopardy assessment is issued where there is reason to believe that the payment of tax is in jeopardy, and thus the taxpayer is not informed about such assessment.⁵⁴

⁵¹ Croome & Olivier (2015) 158

⁵² Section 1 of the TAA – An example of a self-assessment is the submission of PAYE and VAT returns by a taxpayer. On the other hand, an example of an assessment by SARS is an Income Tax Return.

⁵³ Croome & Olivier (2015) 240

⁵⁴ Croome & Olivier (2015) 241

Section 94 provides that SARS is empowered to issue an assessment in advance of the date on which a tax return is normally due, if a senior SARS official is satisfied that it is required to secure the collection of taxes that would otherwise be in jeopardy. The main purpose for jeopardy assessments is to shorten the period within which the tax is payable and not to do away with the requirement to give notice of an assessment.⁵⁵ In this case, a taxpayer may take the jeopardy review on the basis that the amount assessed is excessive or that facts and circumstances do not warrant SARS to issue jeopardy assessment.⁵⁶

2.7. CONCLUSION

This chapter provides an insight into the information gathering procedures as initially introduced by the Income Tax Act, and later incorporated in the TAA. Section 74 (3) of the Income Tax Act provided SARS with authority to gather information from taxpayers, specifically that the Commissioner had authority to issue a warrant for search of the taxpayers' premises and seizure of any relevant documentation. This section had no restrictions as to the period as to when SARS would commence or end with the information gathering process. This led to the *Rudolph saga* where taxpayers challenged the constitutionality of the provision. The said disputes and recommendations by the Katz Commission led to the enactment of section 74D of the Income Tax Act. Section 74D introduced that a warrant would only be issued by a judge, taking into consideration various factors outlined by the Income Tax Act. During its application, the section was also subject to judicial review. However, it was never declared unconstitutional. Following the legislature's intention to have one Act to deal with the administration of taxes, Section 74D was incorporated in the TAA. Chapter 5 specifically deals with information gathering by the Commissioner. However, the TAA introduced a warrantless search and seizure provision. This chapter also addressed the assessments, which may be issued after a SARS audit, that could be to the disadvantage of the taxpayer as he or she will now be required to dispute.

⁵⁵ Croome & Olivier (2015) 242

⁵⁶ Section 94(2) of the TAA

CHAPTER 3

THE CONSTITUTIONAL DEBATE ON SEARCH AND SEIZURE PROVISIONS

3.1. INTRODUCTION

Prior to the introduction of the Interim Constitution, the authority to tax income received by individuals was implied in the 1983 Constitution, where the government had a mandate to provide certain services to taxpayers.⁵⁷ At this stage, taxpayers had a disadvantage, as they could not challenge any decisions made by the revenue authority that infringed their individual rights.⁵⁸ Consequently, the Commissioner could impose any decision on taxpayers without fear of judicial intervention.⁵⁹ An example is the old section 74 of the Income Tax Act where the Commissioner had power to search taxpayers' premises and seize any documents without prior notice given to such taxpayer. Following the recommendations by the Katz Commission and the enactment of the Constitution, powers executed to the Commissioner had to be tested against a person's constitutional rights. This is in order to ensure that a person's constitutional rights are not unduly violated in the process of exercising and enforcing these powers.

This chapter contains a discussion of the constitutionality of the audit and information gathering powers of SARS, particularly the search and seizure provisions in terms of the TAA, specifically focusing on what rights are affected and whether any infringement is justifiable in terms of section 36 of the Constitution. This will also include a discussion on any remedies available to a taxpayer in case of an infringement of his or her constitutional rights.

⁵⁷ Croome (2010) 4. Pre 1994 South Africa was a 'parliamentary state' in which Parliament reigned supreme. Section 8(1) of the Republic of South Africa Constitution provided that "There shall be a State Revenue Fund into which shall be paid all revenues as defined in s1 of the Exchequer and Audit Act, 1975"

⁵⁸ Ibid. No court of law could question the validity of any Act of Parliament and thus cases were never reported where a taxpayer challenged the decisions made in terms of the Income Tax Act.

⁵⁹ Croome (2010) 5

3.2. INTERPLAY BETWEEN THE CONSTITUTION AND TAX ADMINISTRATION

3.2.1. BACKGROUND

As soon as South Africa entered the Constitutional dispensation, the Constitution was the supreme law of the land and all laws had to be in line with constitutional values.⁶⁰ Although the Constitution did not expressly provide the powers to tax, it introduced the establishment of a National Revenue Fund, which would receive all revenue raised by national government.⁶¹ The Interim Constitution also introduced the Bill of Rights, which prescribed how the state should interact with residents. Consequently, all laws, including the provisions of the Income Tax Act had to comply with the Interim Constitution.

Following the Interim Constitution, the discussion around taxpayer rights was addressed by the Katz Commission. The Katz Commission produced a report, which considered various provisions that were inconsistent with the provisions of the Interim Constitution.⁶² The report addressed the following provisions that were not in line with constitutional values:

- Discrimination based on sex or marital status was unconstitutional and a unitary rate had to apply to all persons;⁶³
- The old section 74 of the Income Tax Act was unconstitutional as this violated the right to privacy;⁶⁴
- The Commissioner had authority to file an application with the courts regarding any tax and interest due by a taxpayer. Civil judgement would be obtained in this case and this affected the taxpayer's right to just administrative action;⁶⁵

⁶⁰ Section 4 of the Interim Constitution. This section provided that the Constitution was the supreme law and any law or Act, which was inconsistent with it, would be of no force or effect.

⁶¹ Section 85 of the Interim Constitution

⁶² Chapter 6 of the Katz Interim report entitled 'Implications of the Constitution of the Republic of South Africa, Act 200 of 1993, for the Tax System' 67 - 84

⁶³ Katz Interim report Para 6.3.19. Separate individual rate applied to married or unmarried people. Also, the Section 10(1)(x) of the Income Tax Act made references to different ages depending on the taxpayer's sex.

⁶⁴ Katz Interim report – This section was discussed in Chapter 2. It governed information-gathering processes by SARS.

- The Commissioner was not obliged to provide reasons for their decision and this affected the taxpayer's right to just administrative action;⁶⁶
- Taxpayers did not have access to SARS internal minutes where they would discuss the basis of taxation of certain income or expenditure.⁶⁷

In 1995, the Katz Commission also recommended the introduction of a taxpayers' charter in South Africa, subsequently the Minister of Finance introduced the SARS Client Charter in the 1997 Budget Review.⁶⁸ The Charter provided that the Commissioner had a mandate to understand the taxpayer's rights, protect constitutional rights and apply the law consistently and impartially.⁶⁹ The Commissioner released this Service Charter in 2005.

The Interim Constitution was replaced by the final 1996 Constitution.⁷⁰ The Constitution provides that all laws should be consistent with the provisions of the Constitutions, otherwise it would be considered invalid.

3.2.2. THE RELEVANCE OF BILL OF RIGHTS IN TAX ADMINISTRATION

The South African Revenue Service Act, 1997 (the "SARS Act") established SARS as "an organ of State". Section 4(2) of the SARS Act confirms that, when SARS exercises public power or function, it must do so subject to its constitutional obligations, as stipulated in section 195 of the Constitution.⁷¹

Section 195 of the Constitution provides that SARS must subscribe to the following:

- act with a high standard of professional ethics;

⁶⁵ Katz Interim report Para 6.3.29

⁶⁶ Katz Interim report Paras 6.3.33 – 6.3.36. Before 1994, it was SARS common practice not to provide reasons for an assessment or any decision.

⁶⁷ Katz Interim report Para 6.3.34. This recommendation led to the issue by SARS of Practice Handbooks, Interpretation notes, Media releases, Guides etc

⁶⁸ Third Interim Report of the Katz Commission Chapter 12 at page 130

⁶⁹ 1997 National Treasury, Budget Review 7.2.

⁷⁰ The Constitution was promulgated on 18 December 1996.

⁷¹ <https://www.ensafrica.com/news/tax-administration-SARS-constitutional-obligations-and-taxpayers-rights?Id=2119&STitle=tax%20ENSight> (Accessed 08 August 2018)

- use resources effectively, efficiently and economically;
- act impartially, fairly, equitably and without bias;
- be accountable; and
- be transparent and provide taxpayers with timely and accurate information.⁷²

In addition, section 7 of the Constitution requires SARS to respect, protect, promote and fulfil the rights in the Bill of Rights of the Constitution.

In order to determine whether taxpayer rights can be limited in terms Constitution, two principles should be considered. Firstly, that the entrenched rights are not absolute but that they may be limited after the commencement of the Constitution, and secondly, that those who limit rights must comply with the requirements set out in the Constitution.⁷³

In light of the above, when SARS collects information from taxpayers, particularly conducting warrantless search and seizure, the rights that might likely be infringed are the following:

- the right to privacy, as envisaged in section 14 of the Constitution;
- the right to information, as envisaged in section 32 of the Constitution, read with the Promotion of Access to Information Act, 2000 (“PAIA”);
- the right to just administrative action as envisaged in section 33 of the Constitution, read with the Promotion of Administrative Justice Act, 2000 (“PAJA”);
- the right not to give self-incriminating evidence and the right to a fair trial, as enshrined in section 35(3)(j) of the Constitution.⁷⁴

In addition to the above mentioned rights, warrantless search and seizure also impacts the right to property as envisaged by section 25 of the Constitution.

This research focuses mainly on the impact on the right to privacy.

⁷² *ibid*

⁷³ Rautenbach 2014 (17) Number 6 PER/PELJ 2229 at 2240

⁷⁴ <https://www.ensafrica.com/news/tax-administration-SARS-constitutional-obligations-and-taxpayers-rights?Id=2119&STitle=tax%20ENSight> (Accessed 08 August 2018)

It is common cause that section 36 of the Constitution provides that constitutional rights can be limited by a law of general application, provided that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The reference to "law of general application" gives effect to the formal aspects of the rule of law or legality, namely that all limitation must be authorised by legal rules. In investigating this element, the factors in section 36(1) (a) to (e) of the Constitution must be taken into account. In terms of these provisions, SARS would be entitled to request information and conduct a search and seizure operation, provided that it takes into account all relevant factors, including:

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation
- (d) the relationship between the limitation and its purpose; and
- (e) whether it is the least restrictive means to achieve the purpose.⁷⁵

The elements provided by section 36 seek to achieve a balance between the infringements of a particular right and the purpose that the law serves to achieve in the community.⁷⁶ An infringement should not be more extensive than the purpose that the limitation seeks to achieve. When analysing the relationship between the limitation and its purpose, the main consideration is that, there must be a convincing reason for the infringement.⁷⁷

⁷⁵ *ibid*

⁷⁶ Currie & De Waal (2005) 179 The Constitutional Court in *S v Makwanyane 1995 (3) SA 391 (CC)* adopted the following approach to the application of the general limitation clause: "*The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values and ultimately an assessment based on proportionality.*" The court discussed that different rights have different implications. Thus there is no absolute standard which can be laid down for determining reasonableness and necessity. The court also acknowledged that principles can be established, but, cautions the court "*the application of these principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality, the purpose of which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficiency and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question ...*"

⁷⁷ *ibid*

In such case, an analysis should be done to determine whether an information gathering method that infringes on taxpayers rights is justifiable.

3.3. CONSTITUTIONAL DEBATE ON THE WARRANTLESS SEARCH AND SEIZURE PROVISIONS

As discussed in Chapter 2, section 74D introduced search with a warrant, provided that the application for the warrant had to detail the facts surrounding the alleged non-compliance by the taxpayer. However, the TAA introduced warrantless search and seizure provisions. At the time when the Parliamentary Standing Committee on Finance was considering the Tax Administration Bill (“TAB”), questions arose as to whether section 63 would pass constitutional test, specifically whether it violated the right to privacy in section 14 of the Constitution.⁷⁸ Clause 63 (1) provided that a warrantless search would be permitted if a senior SARS official on reasonable grounds is satisfied that:

- There may be imminent removal or destruction of ‘relevant material’ likely to be found on the premises;
- If SARS applies for a search warrant under its statutory power to do so, a search warrant will be issued; and
- The delay in obtaining a warrant would defeat the object of the search and seizure.

Advocates Gilbert Marcus SC and Steven Budlender assisted with this debate by providing an opinion regarding the constitutionality of Clause 63 of the TAB and now section 63 of the TAA.⁷⁹ In their opinion, Clause 63 of the TAB was constitutional, mainly because a warrantless search and seizure could only be conducted when the requirements of Clause 63(1) have been met.⁸⁰ In addition, warrantless search and seizure exceptions have been applied in other spheres of law, for example criminal law.⁸¹

⁷⁸ Croome & Olivier (2015) 159

⁷⁹ Croome & Olivier (2015) 159

⁸⁰ Croome & Olivier (2015) 159.

⁸¹ Croome & Olivier (2015) 159

Nonetheless, what is of paramount importance in this discussion is that there should be a balance between the needs for SARS to enforce tax compliance with the constitutional right of the taxpayer to privacy when applying the warrantless search and seizure provisions. The question therefore is, do the provisions of section 63 strike the correct balance? Our courts have addressed the impact of search and seizure on the right to privacy and a few of the relevant cases have been discussed below.

One of the landmark cases to discuss the constitutionality of search and seizure is *Gartner and Others v Minister of Finance and Others*⁸². The court dealt with the constitutionality of search and seizure provisions contained in Section 4 of the Customs and Excise Act.⁸³ The facts are as follows: Gartner was one of the directors for Orion Cold Storage (Pty) Ltd (OCS), a company which was an importer of bulk frozen foods. Due to a non-payment dispute between OCS and their foreign supplier, the foreign supplier provided SARS with a copy of the letter of demand for return of a consignment or payment of the purchase price. SARS compared the figures on the application versus the income on the returns submitted by OCS. There was a huge discrepancy and this led to SARS instituting a search. SARS officials conducted a search on the business premises and Gartner's private residence. SARS alleged that there were investigating an under-declaration of custom values of certain imported goods. As a result of the search, said SARS officials seized documentation and made copies thereof. Prior to commencing the search, SARS did not provide any search warrant to the taxpayer. They initially approached the premises as if they were conducting a routine inspection. Gartner alleged that this constituted an infringement on the right to privacy and as such, section 4 of the Customs and Excise Act that gave authority to the SARS official is unconstitutional.

In the High Court, Rogers J found that the sections relating to warrantless search and seizure are inconsistent with the Constitution and should be declared invalid. The Court highlighted the difference between routine and non-routine inspections in terms of the Custom and Excise Act. It held that non-routine inspections are not in the ordinary

⁸² 2014 (1) SA 442 (CC). Also reported in the High Court 2013 (4) SA 87 (WWC)

⁸³ Act 91 of 1964

course of doing business.⁸⁴ As such, the Commissioner should obtain a warrant from the Court before proceeding with non-routine inspections. Consequently, the matter was referred to the Constitutional Court.

In the Constitutional court, the court considered whether the warrantless search and seizure limits any constitutional rights and if so, if it is justifiable. In a unanimous judgment by the Constitutional Court, it was found that section 4 of the Custom and Excise Act infringes on the right to privacy. In addition, the court held that such infringement was not justifiable in terms of section 36 of the Constitution. The court indicated that the section was too broad in its application, it did not define the premises to be searched nor did it prescribe a manner to conduct the inspection. The court also added that less restrictive means were available to achieve the purpose of the Custom and Excise Act.

Consequently, the legislature had to amend section 4 of the Custom and Excise Act to comply with the Constitution.

3.3.1 DOES WARRANTLESS SEARCH AND SEIZURE IN TERMS OF THE TAA LIMIT ANY RIGHT?

3.3.1.1. The right to privacy

It is without doubt a warrantless search and seizure operation has a major impact on the right to privacy.⁸⁵ Section 14 of the Constitution provides as follows:

Everyone has a right to privacy, which includes a right not to have

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized, or
- (d) the privacy of their communications infringed.

The common law right to privacy has been summarised as follows:

⁸⁴ Para 103 The High Court defined a non-routine search as being a search where the premises are selected or targeted for search because of a suspicion or belief that material will be found there, showing or helping to show that there has been a contravention of the Act

⁸⁵ Croome (2015) 191.

The common law recognises the right to privacy as an independent personality right which the courts have considered part of the concept of a person's dignitas. At common law, the breach of a person's privacy constitutes iniuria. It occurs when there is an unlawful intrusion on someone's personal privacy or an unlawful disclosure of private facts about a person.⁸⁶

The leading case on the interpretation of the right to privacy is *Bernstein and Others v Bester and Others NNO*⁸⁷ where Ackerman J explained the meaning of privacy as follows:

Privacy is an individual condition of life characterised by seclusion from the public and publicity. This implies an absence of acquaintance with the individual or his personal affairs in this state... Examples of wrongful intrusion and disclosure which have been acknowledged at common law are entry into a private residence, the reading of private documents, listening into a private conversation, the shadowing of a person, the disclosure of private facts which have been acquired by wrongful act of intrusion, and the disclosure of private facts contrary to the existence of a confidential relationship...

Search and seizure limits the right to privacy as this involves the Commissioner entering the taxpayer's private space, specifically their premises and any personal information held at those premises. However, where the taxpayer is a business, it is inevitable that the right to privacy is compromised as the taxpayer is in the public arena.⁸⁸

This research focuses mainly on the right to privacy and the impact on any infringement. However, for the sake of completeness, the other rights which are also impacted are discussed briefly as follows:

3.3.1.2. The right to information

Section 32 of the Constitution provides as follows:

1. Everyone has a right of access to -
 - a. any information held by the State; and
 - b. any information that is held by another person that is required for the exercise or protection of any right.
2. National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

⁸⁶ Currie & De Waal (2015) 316.

⁸⁷ 1996 (2) SA 751 (CC)

⁸⁸ Ibid para 67

In the context of tax laws, the above section provides taxpayers have a vested right in any of their information which is held by SARS. Consequently, any warrantless search and seizure of taxpayers' documentation would result in an undue infringement of said right.

3.3.1.3. Right to just administrative action

Section 33 of the Constitution specifically provides the following:

1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
2. Everyone whose rights have been adversely affected by administrative action has a right to be given written reasons.
3. National legislation must be enacted to give effect to these rights, and must -
 - a. provide for the review of administrative action by a court or where appropriate, independent and impartial tribunal;
 - b. impose a duty on the state to give effect to the rights contained in sub sections (1) and (2); and
 - c. promote an efficient administration.

Following the above, it is important to consider whether the actions by SARS or their delegated officials constitutes an "administrative action". The Promotion of Administrative Justice Act ("PAJA") defines "administrative action" to include any decision taken or any failure to take a decision by an organ of state when exercising a power in terms of the Constitution which adversely affects the rights of any person and which has a direct external effect⁸⁹.

The decisions made by the Commissioner or SARS delegated officials constitutes administrative action. Examples of such decisions including the issuance of assessments or disallowance of an objection and denial of a refund in terms of any Tax Act⁹⁰. Of importance of this research is a decision to conduct a warrantless search and seizure as an information gathering technique.

It is important that when the Commissioner or SARS delegated officials make a decision, such decisions are subject to the provisions of PAJA which requires that the

⁸⁹ Section 1 of the Promotion of Administrative Justice Act 3 of 2000

⁹⁰ https://www.saica.co.za/integritax/2003/1093_Constitutionality_and_current_approach_by_SARS_with_reference_to_collection_of_taxes.htm

administrative action is procedurally fair and this would depend upon the circumstances of each case⁹¹.

Consequently, when a warrantless search and seizure operation is conducted which might or might not result in an assessment issued, this can be argued to have infringed the taxpayer's right to just administrative action.

3.3.1.4. The right to property

Section 25 of the Constitution provides that no one should be deprived of their right to property unless in terms of a law that applies generally. In addition, the section provides that arbitrary deprivation to property is also prohibited.

The term property has been defined to include property in the physical form or the right to property in terms of common law rules and an interest or relationship which could be exchanged in value⁹²

The term deprived is not defined in the Income Tax Act. Ackerman J in *First National Bank of SA Ltd t/a Wesbank v Commissioner for SARS*⁹³ provided that the term "deprivation" should not be given a strict interpretation to only apply to expropriation instances, it also includes interfering with a person's use or enjoyment of their private property.

In the context of search and seizure provisions for tax law, it can be argued that where a warrantless search is conducted, the taxpayer is denied of their right to use or enjoyment of their property. In addition, where any information is seized as a result of the search, the taxpayer ultimately has been limited to use such property.

3.3.2 IS THE INFRINGEMENT OF ANY OF THE RIGHTS JUSTIFIABLE?

⁹¹https://www.saica.co.za/integritax/2003/1093_Constitutionality_and_current_approach_by_SARS_with_reference_to_collection_of_taxes.htm

⁹² Currie & De Waal (2005) 537

⁹³ 2002 (4) SA 768 (CC)

Rights are not absolute and can therefore be limited in terms of Section 36 of the Constitution.⁹⁴ In the context of search and seizure provisions, case law has provided certain parameters, which indicate compliance with section 36 of the Constitution. These are as follows:

- The authorising law must outline precisely the scope of the power to search and seize.
- Prior authorisation by an independent authority is usually required.
- The relevant Act must require the independent authority to be persuaded by evidence on oath that there are reasonable grounds for conducting the search.⁹⁵

These factors have been addressed by case law in determining whether the limitation of right to privacy by the operation of warrantless search and seizure is justifiable.

In *Mistry v Interim National Medical and Dental Council of South Africa*⁹⁶, the court struck down section 28 (1) of the Medicines and Related Substances Control Act⁹⁷ which authorised inspectors to conduct search and seizure of any place including private dwellings. The search for public dwellings was authorised where the inspectors suspected that medicines or any relevant documentation in relation to an investigation would be found. The court indicated that the invasion of privacy was disproportionate to the purpose of the Act. The court specifically indicated that:

The section is so wide and unrestricted and its reach as to authorise any inspector to enter any person's home simply on the basis that aspirins or cough mixture are or are reasonable suspected of being there.⁹⁸

This case reflects that the laws that exert the power to search and seize do not apply in isolation, however, it must be analysed with reference to the purpose of the statute.⁹⁹

⁹⁴ As discussed earlier, Section 36 of the Constitution takes into account the following factors:

- The nature of the right.
- The importance of the limitation
- The nature and extent of the limitation
- The relation between the limitation and its purpose, and
- Less restrictive means to achieve the purpose.

⁹⁵ Currie & De Waal (2005) 325.

⁹⁶ 1998 (4) SA 1127 (CC)

⁹⁷ Act 101 of 1986

⁹⁸ Ibid at para 28

In another case, *Park-Ross v Director, Office for Serious Economic Offences*,¹⁰⁰ the court dealt with the question whether the violation of the right to privacy by section 6 of the Investigation of Serious Economic Offences Act¹⁰¹ was justifiable in terms of the limitation clause. Tebbutt J referred to search and seizure rules as provided in the United States and Canada where the power to search and seize should be authorised by an independent judicial authority who has reasonable grounds to suspect that an offence has been committed.¹⁰² In applying these criteria, the court found that the section was not a justifiable limitation of the right to privacy, as the authority for search and seizure lied with the Directorate who might fail to assess the balance between the interests of the individual vis-à-vis the state.¹⁰³ However, it is important to note that this case is not authority that prior authorisation should always be obtained. There are circumstances in which prior authorisation cannot be obtained, such as it will defeat the purpose of the search.¹⁰⁴

The court in *Investigative Directorate: Serious Economic Offences v Hyundai Motors Distributors (Pty) Ltd*¹⁰⁵ further indicated a limitation of the right to privacy by operation of search and seizure when conducting a preparatory investigation is not justifiable unless there is reasonable suspicion that an offence has been committed.

Another relevant case to this discussion is *Deutschmann NO and Others v Commissioner for the South African Revenue Service; Shelton v Commissioner for the South African Revenue Service*¹⁰⁶ where the court also had to decide whether search and seizure warrants issued in term of section 74D of the Income Tax were valid. The court stated that the right to privacy is limited to individuals and does not extend to business activities.¹⁰⁷ The presiding judges stated as follows:

⁹⁹ Currie & De Waal (2005) 326

¹⁰⁰ 1995 (2) BCLR 198 (C) - This case was in term of the Interim Constitution. As such the limitation clause was provided in term of section 33 (1) of the Interim Constitution.

¹⁰¹ Act 117 of 1991

¹⁰² 1995 (2) BCLR 198 (C) at page 200

¹⁰³ Ibid at page 201

¹⁰⁴ Currie & De Waal (2005) 325

¹⁰⁵ In re *Hyundai Motors Distributors (Pty) Ltd v Smit NO 2001 (1) SA 545 (CC)*. The court had to decide whether search and seizure warrants issued under the National Prosecuting Authority Act 32 of 1998 violated the right to privacy.

¹⁰⁶ 2000 (2) SA 106 (E)

¹⁰⁷ Ibid at para 123

In the context of s14 of the Bill of Rights, privacy has been defined as ‘an individual condition of life categorised by seclusion from the public and publicity. This implies an absence of acquaintance with the individual or his personal affairs in this State.’ It is apparent from the judgement that the concept of privacy does not extend to include the carrying on of business activities ...¹⁰⁸

As such, the court held that the warrant was valid as it stated the documentation and information that had to be seized.¹⁰⁹

To summarise therefore, Price provided an in depth discussion which analyses that in order to safeguard the infringement on the right to privacy, there are three exceptions to the warrant requirement, which are as follows:

- i) where the taxpayer consents to the search;
- ii) where there is demonstrable urgency; and
- iii) where the inspection involves regulatory inspections of commercial premises¹¹⁰

3.3.3 OBSERVATIONS REGARDING CONSTITUTIONALITY

The TAA is legislation of general application that contains provisions which entitle SARS to encroach on a taxpayer’s rights to privacy with the inclusion of warrantless search and seizure rules in section 63. However, the section further provides safeguards, which allow the limitation of such right, specifically that there must be risk of imminent destruction or removal of information, which will defeat the object of the search.

The questions which remains unanswered, is whether these safeguards suffice to fully protect taxpayers from SARS watchdogs, especially that the powers of the Commissioner are delegated to a “senior official”, but who knows what is meant by this term? Taxpayers’ rights are at the mercy of a ‘senior official’ when it comes to warrantless search and seizure. In my view, the right balance between taxpayer rights and the collection of taxes is not struck as the taxpayers have to fight for an unjust infringement because of a ‘senior official’ discretion. In some instances, taxpayers are

¹⁰⁸ Ibid

¹⁰⁹ Ibid at para 120

¹¹⁰ Price, A. ‘Search and Seizure without Warrant’ *Constitution Court Review* Vol VI 245

not at liberty to defend themselves when a ‘senior official’ embarks on a warrantless search and seizure.

Following the above, similar to the provisions of the Medicines and Related Substances Control Act, the warrantless search and seizure infringe on the right to privacy as the SARS officials are allowed into the taxpayer’s private space, which includes their dwelling. This decision is mainly on reasonable grounds by the ‘senior official’, which decision cannot be subject to review as the right to privacy has already been compromised.

In addition, the warrantless search and seizure infringes on the right to administrative justice as provided by the Constitution. The Constitutional Court stated in the judgment of *Chirwa v Transnet Ltd*¹¹¹ that an act must meet the following requirements before it constitutes administrative action:

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

Consequently the decision by an official to conduct a warrantless decision constitutes a decision that adversely affects the right to privacy. This action is to the disadvantage of the taxpayers and thus unfair. The Commissioner is also required to take the common law principle of *audi alteram partem* into account before performing an administrative action. The judgement in *Arepee Industries Ltd v Commissioner for Inland Revenue*¹¹² states that:

According to the rule a party to an administrative proceeding which may lead to action or a decision affecting his rights is entitled to present his case.

¹¹¹ 2008 (4) SA 367 (CC)

¹¹² 1993 (2) SA 216 (N)

According to the rules thereof, a party to an administrative proceeding which may lead to action or a decision affecting his rights is entitled to present his case.

In light of the above, I suggest that the Legislature has the following options to ensure that section 63 is consistent with the Constitution:

- 1) Amend to allow that a warrantless search and seizure would only be conducted on business premises and not private dwellings; or
- 2) Struck down in totality.

3.4. REMEDIES AVAILABLE TO TAXPAYERS

This section analyses the various remedies available in terms of law in the case of an infringement. However, these remedies do not justify the undue infringement which is caused by section 63 as they are only available when the damage has been done.

3.4.1 REMEDIES IN TERMS OF THE TAA

Section 64, 65 and 66 of the TAA provide remedies to taxpayers as discussed below:

Section 64 of the TAA provides that SARS does not have access to relevant material, which is under legal privilege. As such, when a senior SARS official carries out a search and seizure operation on documentation or information subject to legal privilege, he or she must only obtain the information in the presence of an attorney from a panel appointed under section 111 of the TAA.¹¹³ In the event that an attorney is not present during the search and seizure, the senior SARS official should seal the relevant material, and deliver to the attorney for review.¹¹⁴

Section 65 of the TAA provides that a taxpayer who has been subject to a search and seizure process has the right to examine and make copies of the documentation seized by SARS.

¹¹³ Section 64 (1) of the TAA

¹¹⁴ Section 64 (3) of the TAA

Section 66 of the TAA provides that a taxpayer who has been subject to a search and seizure is entitled to order SARS to return seized documentation and request SARS to pay for damages caused as a result of the operation. However, if SARS refuses to cooperate with the request, the taxpayer may approach the High Court for an order to request SARS to comply.¹¹⁵ The court may order a return of the seized documentation to the taxpayer and payment of costs relating to any damage caused.¹¹⁶

3.4.2 REMEDIES UNDER THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT 3 OF 2010 (“PAJA”)

Section 33 of the Constitution confers a right to just administrative action on taxpayers in the following terms:

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must – (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration.

The term administrative action is defined in section 1 of PAJA as follows:

means any decision taken or failure to take a decision by;

- (f) an organ of state, when-
 - (i) exercising power in terms of the Constitution or provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation; or
- (g) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

¹¹⁵ Section 66 of the TAA

¹¹⁶ Section 66 of the TAA

which adversely affects the rights of any person and which has a direct, external legal effect
...

Since SARS is an administrative body, any decision it takes constitute an ‘administrative action’. Taxpayers have the right to object or appeal such decisions as provided by the dispute resolution rules contained in Chapter 9 of the TAA. In the case where SARS exercises a decision, which is not subject to an objection or appeal, the taxpayer has a right to approach the court for a review of SARS decision. In such case, the taxpayer contends that SARS has violated the rules of administrative justice in section 33 of the Constitution and the provisions of the Promotion of Administrative Justice Act.¹¹⁷

3.4.3 CONSTITUTIONAL REMEDIES

As indicated earlier, SARS is a ‘creature of statute’ and this was echoed in the case of *A M Moolla Group Ltd & Others v Commissioner, SARS and Others*¹¹⁸, where the court held as follows:

Clearly it is (SARS) who is entrusted with this task by virtue of the provisions of the Act. Being a creature of statute (SARS) must perform its task as laid down in the Act and not by will.

In the event of non-compliance by SARS, section 38 of the Constitution provides that anyone whose rights has been infringed may approach the court for relief.

3.4.3.1. SARS’ SERVICE MONITORING OFFICE (“SSMO”) AND TAX OMBUD

The SSMO was created in October 2002. The main function of this office is to assist taxpayers with the speedy resolution of disputes that remain unresolved through SARS normal channels.¹¹⁹ If a taxpayer is unsuccessful with the SSMO, or is not satisfied with the outcome, he or she can proceed to file a complaint with the Office of the Tax

¹¹⁷ Act 3 of 2000

¹¹⁸ 2005 JOL 15456 (T)

¹¹⁹ Croome & Olivier (2015) 640

Ombud as regulated by section 14 of the TAA.¹²⁰ The Tax Ombud was established in 2013 and its main function is to assist taxpayers to resolve matters with SARS.¹²¹ A taxpayer will follow this route once they have exhausted all internal complaint resolution process without any progress on the matter.

3.4.3.2. PUBLIC PROTECTOR AND HUMAN RIGHTS COMMISSION

The Public Protector Act¹²² provides taxpayers with the right to lodge a complaint with the Public Protector for assistance with investigating SARS conduct which is to the taxpayer's prejudice. Taxpayers may also seek assistance from the Human Rights Commission to dispute SARS conduct, which is in violation with a right enshrined in the Constitution.¹²³

To conclude on taxpayer remedies, the Standing Committee on Finance also mentioned that a taxpayer who has been subject to an abuse of the search and seizure provisions by SARS should seek remedy in terms of the TAB, SARS administrative complaints resolution (SSMO), the Tax Ombud, or under the Promotion of Administrative Justice Act, 2000.¹²⁴

3.5. CONCLUSION

This chapter provides an insight on the interaction between the Constitution and taxpayer rights. Since SARS is an organ of state, it is important that it observe the Constitution and taxpayers' rights when interacting with taxpayers. SARS mandate is to ensure that tax collection is properly administered and that taxpayers comply with the law and meet their obligations. In the same manner, SARS should not exceed its powers.

¹²⁰ Croome & Olivier (2015) 641

¹²¹ The draft version of the TAB which was released on 29 October 2010 stated that "A new framework for a Tax Ombud's Office to provide simple remedies to taxpayers affected by failures by SARS to fully respect taxpayers' rights..."

¹²² Act 23 of 1994

¹²³ Croome & Olivier (2015) 642

¹²⁴ These comments were indicated published in their Tax Administration Bill – Briefing Note: Search without warrant: Clause 63.

The main giveaway is that taxpayers' rights are not absolute, in other words they may be limited if the requirements of section 36 of the Constitution are met. The discussion focused on how the search and seizure operation infringes on the right to privacy as Section 14 of the Constitution confirms that everyone has the right not have his or her property searched. However, the TAA is a law of general application and provides safeguards to ensure that the infringement on the right to privacy is justifiable.

However, one of the issues that arise is the manner in which SARS officials conduct themselves when conducting a warrantless search and seizure operation. In some instances, SARS could be on a 'fishing expedition' and there are no reasonable grounds to justify a warrantless search and seizure operation. In addition, should the power to conduct a warrantless search and seizure operation be granted to a 'senior official'? In my view, this does not strike a right balance when taxpayers' rights are at stake. Consequently section 63 should be struck in totality or amended to only allow warrantless search and seizure to business premises.

This chapter also discussed the various remedies which are available in the case of an unjustifiable infringement of their rights.

CHAPTER 4

A COMPARATIVE ANALYSIS

4.1. INTRODUCTION

This chapter compares search and seizure provisions in the TAA with search and seizure provisions under other areas of law, such as custom law and criminal law, from the perspective of the constitutionality and possible infringement of constitutional rights. This chapter will also include a comparative discussion of search and seizure procedures in South Africa with search and seizure procedures in New Zealand, to highlight any differences and further derive any lessons which South Africa may adapt for tax administration procedures.

4.2. COMPARATIVE ANALYSIS WITH DOMESTIC LAW

4.2.1. INTRODUCTION

Search and seizure is not a foreign concept in our law and thus a common information gathering procedure. This research has been limited to the most common search and seizure provisions as contained in Customs & Excise, Criminal and Competition Law.¹²⁵

¹²⁵ The Standing Committee on Finance Briefing Note on Search without a warrant examined that outlined that power to conduct warrantless searches currently exists in at least 17 statutes, both criminal and non-criminal. These are the:

- Health Professions Act, 1974 - section 41A(h)
- Criminal Procedure Act, 1977 - section 22
- South African Police Service Act, 1995 - section 13(6)
- Counterfeit Goods Act, 1997 - section 5(2)
- National Prosecuting Authority Act, 1998 - section 29(10)
- Inspection of Financial Institutions Act, 1998 - section 4
- National Forest Act, 1998 - section 67
- Competition Act, 1998 - section 47
- National Veld And Forest Fire Act, 1998 - section 27
- Nuclear Energy Act, 1999 - section 38
- Firearms Control Act, 2000 - section 115(4)
- Immigration Act, 2002 - section 33(9)
- International Trade Administration Act, 2002 - section 44
- Explosives Act, 2003 - section 6(6)
- Anti-Personnel Mines Prohibition Act, 2003 - section 19
- Second-Hand Goods Act, 2009 - section 29(5)

4.2.2. SEARCH AND SEIZURE IN TERMS OF THE CUSTOMS AND EXCISE LAW

Prior to its amendment, section 4 of the Custom and Excise Act governed search and seizure for custom purposes. Section 4 provided as follows:

- (a) An officer may, for the purposes of this Act
 - i) without previous notice, at any time enter any premises whatsoever and make such examination and enquiry as he deems necessary;
 - ii) while he is on the premises or at any other time require from any person the production then and there, or at a time and place fixed by the officer, of any book, document or thing which by this Act is required to be kept or exhibited or which relates to or which he has reasonable cause to suspect of relating to matters dealt with in this Act and which is or has been on the premises or in the possession or custody or under the control of any such person or his employee;
 - iii) at any time and at any place require from any person who has or is believed to have the possession or custody or control of any book, document or thing relating to any matter dealt with in this Act, the production thereof then and there, or at a time and place fixed by the officer; and
 - iv) examine and make extracts from and copies of any such book or document and may require from any person an explanation of any entry therein and may attach any such book, document or thing as in his opinion may afford evidence of any matter dealt with in this Act.

This section granted powers to an officer to institute search and seizure processes at any given time and no warrant was required at this stage. Due to the constitutionality debate in the *Gartner* case, this section was repealed and amended.¹²⁶ Section 4 now provides that an officer may enter premises for the purposes of conducting a search after they have obtained a warrant from a magistrate or judge. However, there are certain exceptions when a warrant would not be required and these are:

- i) certain premises specified in the Act; and
- ii) where the office has reasonable grounds to believe that -

· Civil Aviation Act, 2009 - section 34

¹²⁶ *Gartner and Others v Minister of Finance and Others 2014 (1) SA 442 (CC)*. The court held that section was an unjustified infringement on the right to privacy. Section 4 was amended in terms of Tax Administration Law Amendment Act 39 of 2013

- a warrant will be issued by a magistrate or judge if it is applied for; and
- the delay caused by obtaining a warrant would likely defeat the purpose of the search.¹²⁷

Since the commencement of the Customs Control Act¹²⁸, search and seizure for customs purposes is now governed by sections 709 and 714 of the Customs Control Act. Section 709 provides that a customs officer has unrestricted access to a customs controlled area.¹²⁹ However, a warrant is required in the case of an area, facility or premises outside a customs controlled area. A warrantless search and seizure operation may be conducted outside the controlled customs area in the following circumstances:

- when an owner or person in ‘physical’ control of the area, premises or facility consents to access;
- the area, premises or facility is used for business purposes by a registered person or licensee;
- where the public has unrestricted access to the area;
- the customs officer has reasonable grounds to believe that he/she will find any goods, documentation, persons who have information pertaining to a breach of the Customs Control Act; and
- the customs officer has reasonable grounds to believe that he/she will find any counterfeit goods or goods subject to customs control.¹³⁰

Comparison between Customs law and the TAA provisions

The historical search and seizure provisions, in the context of customs law, provide the development of the warrantless search and seizure concept. One of the similarities is contained section 4 of the Custom and Excise Act. This section authorised search and seizure where there are reasonable grounds to believe that a warrant would have been issued if applied for, and, the delay in obtaining one would defeat the purpose of the

¹²⁷ Section 4 of the Customs and Excise Act

¹²⁸ Act 31 of 2014. This Act commenced on 18 December 2017.

¹²⁹ Fritz, C. “Customs searches: Past, present and future” 2016 *Journal for Juridical Science* 41 (1) 19.

¹³⁰ Section 709 of the Customs Control Act.

search. However, unlike the TAA, the Customs and Excise officer did not have to justify that there was a risk for destruction of the information.

With comparison to the TAA, the Customs Control Act has more grounds on which a warrantless search and seizure may be conducted. Another notable difference is also that it specifically provides a distinction between areas a search and seizure operation can be conducted without a warrant. However, one of the similarities is that there should be reasonable grounds that there would be documentation found which is in contravention with the Act. In addition, warrantless search and seizure operation can be conducted when one consents to the search. One of the lessons which the TAA can adopt from the Customs Control Act is to list the various tax infringements which would guarantee a warrantless search and seizure. In such case, that would avoid a SARS ‘fishing expedition’. Also, the TAA can adopt the approach that a warrantless search and seizure is acceptable where there is reason to believe that there is evidence which would prove that the taxpayer has contravened with the a Tax Act. As such, risk of destruction of the information is not sufficient.

4.2.3. SEARCH AND SEIZURE PROVISIONS IN TERMS OF CRIMINAL LAW

An example of search and seizure procedures in criminal law is section 29 of the National Prosecuting Authority Act.¹³¹ This section authorises the issuing of search warrants for the purposes of a “preparatory investigation” by an investigation officer. In addition, this section provides that warrantless search and seizure is acceptable in the following instances:

- i) if the person who is competent to do so consents to such entry, search, seizure and removal; or
- ii) if he or she upon reasonable grounds believes that -
 - (aa) the required warrant will be issued to him or her in terms of subsection if he or she were to apply for such warrant; and
 - (bb) the delay caused by the obtaining of any such warrant would defeat the object of the entry, search, seizure and removal.

¹³¹ Act 32 of 1998

This section was discussed in *Investigating Directorate: Serious Economic Offence v Hyundai Motor Distributors (Pty) Ltd*¹³². The court held that section 29(5) of the National Prosecuting Authority Act provides that before a judicial officer issues a warrant in respect of a search, he or she must be satisfied that there are reasonable grounds to believe that an object which is relevant to the investigation at hand will be found on the premises.¹³³ Regarding the constitutionality thereof, the court stated that a balance has to be struck between the right to privacy in terms of section 14 of the Constitution and the State's constitutional mandate to prevent crime against persons. Although section 29 is an infringement of the right to privacy, the court held it was reasonable and justifiable to safeguard the state against crime. Judicial authorisation is one of the measures that were considered by the court to be reasonable in order to ensure that the right to privacy is not infringed.

Another example of search and seizure procedures is section 22 of the Criminal Procedure Act¹³⁴, which provides as follows:

A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in [section 20](#) -

- (a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or
- (b) if he on reasonable grounds believes –
 - i) that a search warrant will be issued to him under paragraph (a) of [section 21](#) (1) if he applies for such warrant; and
 - ii) that the delay in obtaining such warrant would defeat the object of the search.¹³⁵

In light of the above, criminal law and procedure has accepted that an official can conduct search and seizure with no warrant. Although this infringes on the right to

¹³² 2000 (10) BCLR 1079 (CC) 539

¹³³ Ibid at para 52

¹³⁴ Act 51 of 1977

¹³⁵ Section 22 of the Criminal Procedure Act

privacy, the courts have concluded that such infringement is justifiable as this seeks to obtain evidence related to the commission of a crime.¹³⁶

Another example is sections 13 (6) and (7) and (8) of the South African Police Service Act¹³⁷. Section 13(6) provides that a member of the police service may conduct a search without a warrant ‘where it is reasonably necessary for the purposes of control over the illegal movement of people or goods across the borders of the Republic’. This search can only be conducted within 10 kilometres or reasonable distance from any border between South Africa and another country.¹³⁸

Section 13(7) also authorises search without a warrant in cordoned areas. It states as follows:

- (a) The National or Provincial Commissioner may, where it is reasonable in the circumstances in order to restore public order or to ensure the safety of the public in a particular area, in writing authorise that the particular area or any part thereof be cordoned off.
- (b) ...
- (c) Upon receipt of the written authorisation referred to in paragraph (a), any member may cordon off the area concerned or part thereof, and may, where it is reasonably necessary in order to achieve the object specified in the written authorisation, without warrant, search any person, premises or vehicle, or any receptacle or object of whatever nature, in that area or part thereof and seize any article... found by him or her in the possession of such person or in that area or part thereof: Provided that a member executing a search under this paragraph shall, upon demand of any person whose rights are or have been affected by the search or seizure, exhibit to him or her a copy of the written authorisation.

Section 13(8)(c) provides that after receiving written approval from the Commissioner, a member of the police service is authorised set up a roadblock or roadblocks on any public road in a particular area or to set up a checkpoint or checkpoints at any public place in a particular area. This section read together with section 13(8)(g)(i) also authorises a member of the police service to conduct a search without a warrant ‘of any

¹³⁶ Basdeo 2009 (12) 4 PER 307 at 314

¹³⁷ Act 68 of 1995

¹³⁸ Section 13(6) of the South African Police Service Act

person, vehicle or object of whatever nature and seize any article that may afford evidence of the commission of an offence.’

Another relevant provision is section 13(8)(d) which gives authority to a police service official to set up a roadblock or check point without obtaining written approval where such official has ‘reasonable suspicion that a person, object or witness who is concerned in the commission of an offence is being transported in a motor vehicle’.¹³⁹ In addition, this provision read together with section 13(8)(g)(ii) authorises police service official to search any person or vehicle stopped at a roadblock or checkpoint, if there is reason to believe that a warrant would be obtained in terms of section 21(1) of the Criminal Procedure Act.¹⁴⁰

Comparison between Criminal law and the TAA provisions

The criminal law provisions echo a main requirement that a warrantless search and seizure operation should be conducted where the competent person consents to it or where there are reasonable grounds to believe that a warrant would have been obtained and delay in obtaining such warrant would defeat the purpose of the search. This is similar to the provisions of the TAA.

Another notable difference is contained in the South Africa Police Service Act where the officers are authorised to conduct warrantless search and seizure in certain areas or of people and vehicles for the purpose of conducting their duties. In addition, officers are authorised to conduct a warrantless search and seizure if this will assist to obtain evidence which relates to the commission of an offence. Finally, unlike the TAA, there should be no imminent risk for destruction.

However, warrantless search and seizure has been adopted in criminal law and applies specifically where crime has been or is suspected to have been committed. Such operation would allow police officers to obtain evidence for justification of a crime. In

¹³⁹ Section 13(8) of the South African Police Service Act

¹⁴⁰ Ibid

tax cases thereof, the TAA could adopt that warrantless search and seizure should only be allowed in cases which involve crime such as tax evasion or tax fraud.

4.2.4. SEARCH AND SEIZURE IN TERMS OF THE COMPETITION LAW

Section 47 of the Competition Act¹⁴¹ provides that an inspector may conduct a search and seizure operation without a warrant if:

- The person in control of the premises gives permission; or
- He/she has reasonable grounds to believe that a warrant would have been issued if applied for in advance, however the delay in obtaining such warrant would defeat the object or purpose of the search and seizure operation.

Comparison between Competition Law and the TAA provisions

Competition law has similar provisions to the TAA when it comes to warrantless search and seizure. However, the main difference is that there is no requirement that there should be a risk of destruction.

4.2.5. OVERALL OBSERVATIONS REGARDING COMPARATIVE ANALYSIS WITH DOMESTIC LAW

The sections above highlight that warrantless search and seizure is common in our law. The most common factor is that there should be reasonable grounds to believe that a warrant would have been obtained, however the delay in obtaining such warrant would defeat the purpose of the search and seizure operation. This is also the same with the provisions of the TAA.¹⁴² In the same manner, the South African Police Service Act allows for warrantless search and seizure in the interests of public protection or in order to obtain information relating to an offence. However, in comparison to the provisions of the TAA, all the sections above do not include that the person instituting search and

¹⁴¹ Act 89 of 1998

¹⁴² Basdeo 2009 (12) 4 PER 307 at 314

seizure processes should have reason grounds to believe that there is an imminent threat of removal or destruction of relevant material likely to be found on the premises.

The main giveaway for the TAA is that warrantless search and seizure should be adopted mainly in cases where tax crime i.e. tax evasion or fraud. Also it would be beneficial for the TAA to have a list, which is not exhaustive, of instances where warrantless search and seizure by SARS officials is acceptable. In addition, the fact that there is risk of destruction of the information is not sufficient to justify a warrantless search and seizure.

4.3. COMPARATIVE ANALYSIS TO NEW ZEALAND

4.3.1. SEARCH AND SEIZURE PROVISIONS IN NEW ZEALAND

Similar to South Africa, New Zealand has in place a Tax Administration Act¹⁴³ in place, which contains the rules and processes that govern how Inland Revenue should operate when collecting and distributing tax and other payments.¹⁴⁴

Section 16 of the New Zealand Tax Administration Act (hereafter referred to as NZTA) governs the search and seizure operation by the Commissioner. It provides as follows:

Notwithstanding anything in any other Act, the Commissioner or any officer of the department authorised by the Commissioner in that behalf shall at all times have full and free access to all lands, buildings, and places, and to all documents, whether in the custody or under the control of a public officer or a body corporate or any other person whatever, for the purpose of inspecting any documents and any property, process, or matter which the Commissioner or officer considers necessary or relevant for the purpose of collecting any tax or duty under any of the Inland Revenue Acts or for the purpose of carrying out any other function lawfully conferred on the Commissioner, or considers likely to provide any information otherwise required for the

¹⁴³ 1994 No 166

¹⁴⁴ Gupta R “*The relevance of taxpayers’ constitutional rights in the light of Inland Revenue’s powers of search and seizure*” <https://www.business.unsw.edu.au/About-Site/Schools-Site/Taxation-Business-Law-Site/Documents/25-Ranjana-Gupta-presentation.pdf> (Accessed 27 August 2018)

purposes of any of those Acts or any of those functions, and may, without fee or reward, make extracts from or copies of any such documents.¹⁴⁵

The above section provides the Commissioner authority to conduct a warrantless search and seizure from the outset. However, Section 16(3) provides an exception in respect of search of private dwellings. The section states as follows:

Notwithstanding subsection (1), the Commissioner, an authorised officer, or a person accompanying the Commissioner or the authorised officer, shall not enter any private dwelling except with the consent of an occupier or pursuant to a warrant issued under subsection (4).

Consequently, failure to obtain a search warrant in respect of a non-consensual search of private premises is likely to render the search unreasonable.¹⁴⁶

In light of the provisions above, it is important to analyse how the NZTA interact with the taxpayer rights in New Zealand.

New Zealand does not have an entrenched constitution, as such, the constitution is drawn of various statutes, the relevant one in this instance being the Bill of Rights Act 1990 (BORA).¹⁴⁷ Section 21 of the BORA provides as follows:

Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

The Commissioner's powers to request information and documentations for the purposes of collecting taxes is subject to the interaction with the BORA. In order not to violate the right to privacy, the BORA provides that the search must not be unreasonable, thus the determining test is that of reasonability. The court in *R v Jefferies*¹⁴⁸, Richardson J provided the basis of what would be regarded as an unreasonable search:

¹⁴⁵ Section 16 of the New Zealand Tax Administration Act, 1994

¹⁴⁶ Gupta "*The relevance of taxpayers' constitutional rights in the light of Inland Revenue's powers of search and seizure*" refer to Footnote 134

¹⁴⁷ Ibid

¹⁴⁸ [1994] 1 NZLR 290 at 304-305

A search will be unreasonable if the circumstances giving rise to the search make the search itself unreasonable or if an otherwise reasonable search is carried out in an unreasonable manner. Section 21 is a negative provision in that it is a restraint on governmental action and confers no powers on the government. In particular it does not empower a reasonable search.

Furthermore, the court explained that the enquiry provided in terms section 21 demands a balancing of state interests vis-à-vis the taxpayer interest.¹⁴⁹ In addition, the courts have accepted that the test for reasonability and illegality are not the yard stick under section 21, in other words, a search might be unlawful in terms of the law but it does not automatically qualify as unreasonable.¹⁵⁰

4.3.2. COMPARISON BETWEEN NEW ZEALAND TAA AND SOUTH AFRICA TAA WARRANTLESS SEARCH AND SEIZURE PROVISIONS

Unlike the TAA, the NZTA grants the Commissioner with the right to conduct a warrantless search and seizure. However, there is a restriction in respect of private dwellings. The Commissioner does not have authority to conduct a warrantless search and seizure operation in private spaces unless there is consent by the occupier. The TAA on the other hand requires that a warrant is obtained in all circumstances, and there is no distinction made between commercial premises and private dwellings. One of the lesson for South Africa is to adapt a similar approach where warrantless search and seizure is restricted in respect to private dwellings. This would reduce the impact of the infringement of the taxpayers' right to privacy

Another important consideration to note is the interaction between the tax administration and Bill of Rights in New Zealand. Although there is no written Constitution in New Zealand, it is interesting to note that consideration is given to the rights contained the BORA, specifically the right to privacy. One of the main differences noted is the tests adopted in respect of the infringement on the taxpayer's

¹⁴⁹ Ibid

¹⁵⁰ Richardson J further stated that "Even though it transpired that a search made in good faith lacks lawful authority, the nature and manner of the intrusion may nevertheless not be unreasonable. A search not expressly authorised by statute may meet the reasonable standard in circumstances where a search violating an express statutory requirement would fail."

right to privacy. New Zealand has adopted the test reasonability, in other words a search must be reasonable in the manner in which it is conducted to ensure that it does not violate the right to privacy. However in South Africa the test adopted is that of justifiability, in other words, is the infringement on the right to privacy justifiable taking into consideration various factors listed in section 36 of the Constitution.¹⁵¹In addition, New Zealand also considers that there must be a balance between the state interests vis-à-vis taxpayer rights. This is also similar to the South African interaction between the Commissioner's duty to collect tax and the taxpayer rights.

In light of the above, South Africa can learn to adopt a similar approach whereby it is not only justifiable that a warrantless search and seizure be conducted, but to ensure that it is reasonable in the way that it is conducted. To ensure that the search is reasonable, the Commissioner must have regard to the facts of the matter before allowing an official to embark on the search. Currently, this discretion is entirely dependent on a 'senior official', which decision could be subject to abuse for example 'fishing expeditions' by SARS officials.

4.4. CONCLUSION

This Chapter analysed the search and seizure provisions contained in South Africa law and New Zealand. In South African, the discussion was focused on a comparative analysis on warrantless search and seizure provisions in Customs & Excise, criminal and competition law. One of the similarities noted is that a warrantless search and seizure will be conducted when there are reasonable grounds to believe that a warrant would have been issued and the delay in obtaining a warrant would defeat the purpose of the search. The discussion goes on to show that the warrantless search and seizure provisions are not new to South African law and have been accepted, taking into consideration the constitutional debate around them. This chapter also provided a

¹⁵¹ The factors include the following;

- The nature of the right.
- The importance of the limitation
- The nature and extent of the limitation
- The relation between the limitation and its purpose, and
- Less restrictive means to achieve the purpose.

comparison of South Africa search and seizure to the international space, i.e. New Zealand. New Zealand also has a TAA which authorises warrantless search and seizure from the outset. However, these searches have to respect the right to privacy and must not be unreasonable. Similar to South Africa, a balancing exercise is important where one should weigh the Commissioner's mandate to collect taxes versus the taxpayers' rights which might be infringed in that process. South Africa provides that such infringement must be justifiable, whereas New Zealand provides that the search must be reasonable.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1. INTRODUCTION

This research aimed at providing an analysis on the information gathering powers as introduced by the Income Tax Act, and now regulated by the Tax Administration Act which has become one of the most relevant Acts governing tax compliance by taxpayers.

The research further analysed whether the warrantless search and seizure provisions as introduced in terms of section 74D of the Income Tax Act and now regulated in term of section 63 of the TAA infringes on the rights to taxpayers, mainly the right to privacy. Furthermore, the research aimed at analysing whether the infringement justifiable in terms of the parameters set in terms of section 36 of the Constitution.

Lastly, this research provided a comparative analysis of warrantless search and seizure provisions in terms of other spheres of South African law to better understand how such provisions have been accepted or challenged by the courts, taking into consideration the infringement on the right to privacy. In addition, an international comparison is discussed of the search and seizure provisions in terms of the New Zealand Tax Administration Act and the interaction with the taxpayers' rights to privacy.

5.2. FINDINGS ON CONSTITUTIONALITY OF WARRANTLESS SEARCH AND SEIZURE

This research demonstrated that the warrantless search and seizure provisions regulated by the TAA are unconstitutional as they violate the taxpayers' right to privacy. However, such violation should be analysed in terms of the limitation rules provided in terms of section 36 of the Constitution.

This research illustrated that the violation to the right to privacy by the taxpayer is not justifiable as the taxpayers are at the mercy of SARS 'senior official' when an infringement of their rights are concerned. The main issue in this regard is whether the senior SARS official fully understands the constitutional framework within which their actions are governed. In my view, the right balance between taxpayer rights and the collection of taxes is not struck as the taxpayers have to fight for an unjust infringement because of a 'senior official' discretion. In some instances, taxpayers are not at liberty to defend themselves when a 'senior official' embarks on a warrantless search and seizure. Although there are various remedies available to the taxpayer as addressed in this research, it is unfortunate that these are available once the unjustified infringement has occurred. In addition, an ordinary taxpayer would not have the financial ability or knowledge to fully utilise the remedies available. In other words, the damage would already have been done and the remedies do not justify an infringement on the right.

From a comparative analysis with domestic law, South Africa has accepted the warrantless search and seizure provisions. The main requirement is that the person conducting the search must have reasonable ground to believe that obtaining a warrant would defeat the purpose of the search and seizure. Although it could be justifiable in the criminal law sphere, to use the same measure for taxpayers who are not necessarily involved in crime would not, in my view, be justifiable. I am of the view that the measure for criminal cases is not the same that should be applied in civil cases. In addition, warrantless search and seizure provisions in terms of South Africa domestic laws do not provide that the person instituting search and seizure processes should have reason grounds to believe that there is an imminent threat of removal or destruction of relevant material likely to be found on the premises.

This research also illustrated a comparative analysis with New Zealand's warrantless search and seizure as an information gathering method. New Zealand provides a restriction that the Commissioner is not allowed to conduct search and seizure in private dwelling, and this is to ensure that the right to privacy is not unjustifiably infringed.

5.3. RECOMMENDATIONS

The duty of the Commissioner to collect taxes, including information gathering processes, is of paramount importance in tax matters. However, as this duty involves interaction with individuals, the actions of the Commissioner should be measured against the provisions of the Constitution to avoid any undue infringements of individual rights. This research illustrated that taxpayer rights are not absolute and cannot be limited in terms of section 36 of the Constitution. In addition, the right balance should be struck between the duty to collect taxes and the taxpayer rights. To achieve this balance, the Commissioner must endeavour to fully utilise the less strenuous means and engage the taxpayer in order to conduct information gathering procedures. Although this might not be easily achievable in some instances, in cases where the taxpayer rights are at stake, the decision should not be left in the hands of a SARS 'senior official'.

5.3.1. AMENDING SECTION 63 OF THE TAA TO LIMIT WARRANTLESS SEARCH AND SEIZURE TO PRIVATE DWELLINGS

In order to limit the infringement of the taxpayers' right to privacy by the warrantless search and seizure, one of the recommendations is to adopt an approach similar to the New Zealand TAA and amend section 63 to include that warrantless search and seizure should not be allowed on private dwellings, unless an individual consents to such search. This would mean that the SARS officials have unlimited access to commercial premises and this approach is similar to the South African Customs and Excise provisions where there is a list of scenarios where a warrantless search and seizure operation is allowed.

5.3.2. WARRANTLESS SEARCH AND SEIZURE TO BE OPERATED IN CASES OF TAX CRIME

Another recommendation, which is similar to the South African criminal law, is for the TAA to include in section 63 that a warrantless search and seizure operation is

acceptable is tax cases which involves criminal activities, specifically acts which involve tax evasion, tax fraud or impermissible tax arrangements. In such case, the evidence to be obtained would be necessary to justify a tax crime which has been committed by the taxpayer. In such case, it would be necessary that the Commissioner to have a list of cases which are classified as criminal cases.

5.3.3. EX PARTE APPLICATION

Further to the above, another recommendation would be an ex parte application should be considered in cases of search and seizure operations for individuals. In other words, the matter should be brought before the court and the judge should authorise the search. This will give taxpayers the right to just administrative action and at the same time limit the invasion of privacy which is currently at the discretion of a SARS 'senior official'.

5.3.4. LIST TAX INFRINGEMENTS WHICH GUARANTEE WARRANTLESS SEARCH AND SEIZURE

One of the lessons which the TAA can adopt from the Customs Control Act is to list the various tax infringements which would guarantee a warrantless search and seizure. In such case, that would avoid a SARS 'fishing expedition'. Also, the TAA can adopt the approach that a warrantless search and seizure is acceptable where there is reason to believe that there is evidence which would prove that the taxpayer has contravened with the a Tax Act. As such, risk of destruction of the information is not sufficient

5.3.5. WARRANT TO BE ISSUED IN PREPARATORY INVESTIGATIONS

Similar to the National Prosecuting Authority Act section 29 of the National Prosecuting Authority Act.¹⁵², the TAA should incorporate that a search warrants can be issued in the case of a preparatory investigation. In such case, the Commissioner or senior SARS official would present to the judge the reasons why they believe a search should be conducted. This would limit the impact on the taxpayer's rights to privacy. In

¹⁵² Act 32 of 1998

addition, SARS officials would be limited is conducting ‘fishing expeditions’ which could have an impact on the taxpayers’ rights.

BIBLIOGRAPHY

LEGISLATION

1. The Constitution of South Africa, 1996
2. The Competition Act, 89 of 1998
3. The Customs Excise Act, 91 of 1964
4. The Custom Control Act, 31 of 2014
5. The Criminal Procedure Act, 51 of 1977
6. The Income Tax Act, 58 of 1962
7. The National Prosecuting Authority Act, 32 of 1998
8. The Public Protector Act, 23 of 1994
9. The Promotion of Administrative Justice Act, 3 of 2000
10. The South African Police Service Act, 68 of 1995
11. The South African Revenue Service Act, 68 of 1997
12. The Tax Administration Act, 28 of 2011

BOOKS

1. Croome, B and Olivier, L. Tax Administration 2nd Edition 2015, Juta & Co. Cape Town South Africa.
2. Croome, B. Taxpayers' Rights in South Africa 1st Edition 2010, Juta & Co. Cape Town South Africa.
3. Currie, I. and De Waal, J. The Bill of Rights Handbook. 5th Edition 2005, Juta & Co. Cape Town South Africa
4. De Koker, A.P. and Williams, R.C. Silke on South African Income Tax December 2012 (Updated annually – Service Issue 47) Durban: Lexis Nexis.

JOURNALS

1. Basdeo, V. "The Constitutional Validity of Search and Seizure powers in South Africa" 2009 (12) 4 *PER* 307

2. Bovijn, S and Van Schalkwyk, L. “Concerns regarding new search and seizure powers granted to the SARS in terms of the Tax Administration Act” *Stellenbosch Law Review* 2012 (23) Issue 3 507
3. Price, A. ‘Search and Seizure without Warrant’ *Constitution Court Review* Vol VI 245
4. Fritz, C. “ Customs searches: Past, present and future” 2016 *Journal for Juridical Science* 41 (1) 19.
5. Rautenbach, IM “Proportionality and the limitation clauses of the South African Bill of Rights” 2014 (17) Number 6 PER/PELJ 2229
6. Williams, B. “Taxpayers’ Rights in South Africa” 1997 (7) Issue 1. Article 2 *Revenue Law Journal* 1.

INTERNET ARTICLES

1. “Constitutionality and current approach by SARS with reference to collection of taxes” Available: https://www.saica.co.za/integritax/2003/1093_Constitutionality_and_current_approach_by_SARS_with_reference_to_collection_of_taxes.htm (Accessed 15 June 2019).
2. Croome, B. “Taxpayer’s rights in South Africa” Available: <http://www.thesait.org.za/news/96606/Taxpayers-Rights-In-South-Africa.htm> (accessed 23/01/2018)
3. McKerchar, M. 2008. “Philosophical Paradigms, Inquiry Strategies and Knowledge Claims: Applying the Principles of Research Design and Conduct to Taxation” *eJournal of Tax Research* 1 - 21 Available: <http://www.Austrlii.edu.au/au/journals/eJTR/2008/1.html> (accessed 8/11/2017).
4. SARS Short Guide to Tax Administration Act 2011 (Act 28 of 2011) Available: <http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-TAdm-G01%20-%20Short%20Guide%20to%20the%20Tax%20Administration%20Act%202011%20-%20External%20Guide.pdf> (Accessed 13/05/2018)
5. Pocock, W. “SARS’ information gathering powers: it’s accrual world” Available: <https://www.withoutprejudice.co.za/free/article/5821/view> (Accessed 28 April 2018).

6. <https://www.saica.co.za/integritax/2012/2116>. Information gathering by SARS.htm “Information gathering by SARS” October 2012 Issue 157 (accessed 18 July 2018)
7. Myburgh, A. “Tax administration: SARS’ constitutional obligations and taxpayers’ rights” Available:<https://www.ensafrica.com/news/tax-administration-SARS-constitutional-obligations-and-taxpayers-rights?Id=2119&STitle=tax%20ENSight> (Accessed 08 August 2018)
8. Gupta, R. ‘The relevance of taxpayer’s’ constitutional rights in the light of Inland Revenue’s powers of search and seizure’ <https://www.business.unsw.edu.au/About-Site/Schools-Site/Taxation-Business-Law-Site/Documents/25-Ranjana-Gupta-paper.pdf> (Accessed 27 August 2018).

CASE LAW

1. *A M Moolla Group Ltd & Others v Commissioner, SARS and Others* 2005 JOL 15456 (T)
2. *Arepee Industries Ltd v Commissioner for Inland Revenue* (1993) 2 SA 216 (N)
3. *Bernstein and Others v Bester and Others* NNO 1996 (2) SA 751 (CC)
4. *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC)
5. *Deutschmann NO and Others v Commissioner for the South African Revenue Service; Shelton v Commissioner for the South African Revenue Service* 2000 (2) SA 106 (E).
6. *First National Bank of SA Ltd t/a Wesbank v Commissioner for SARS* 2002 (4) SA 768 (CC)
7. *Gartner and Others v Minister of Finance and Others* 2014 (1) SA 442 (CC).
8. *Investigative Directorate: Serious Economic Offences v Hyundai Motors Distributors (Pty) Ltd: In re Hyundai Motors Distributors (Pty) Ltd v Smit* NO 2001 (1) SA 545 (CC).
9. *Mistry v Interim National Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC).
10. *Park-Ross v Director, Office for Serious Economic Offences* 1995 (2) BCLR 198 (C).

11. *Rudolph and Another v CIR and Others NNO 1994 (3) SA 771 (W).*
12. *Shelton v Commissioner for the South African Revenue Service 2002 (2) SA 9 (SCA).*

GOVERNMENT PUBLICATIONS

1. Tax Administration Bill, B11 – 2011 Standing Committee on Finance Briefing
Note: Search without warrant: Clause 63.