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# Reconsidering the “pay now, argue later” approach of South Africa in relation to disputed taxes – lessons from Canada and Australia\*

## Summary

The Davis Tax Committee has labelled the South African Revenue Service’s (SARS) approach of “pay now, argue later”, when a taxpayer disputes an assessed tax obligation, as controversial. This article first points out the controversy surrounding this approach, by indicating the impact this approach may have on taxpayers’ rights to access to courts, just administrative action and not to be arbitrarily deprived of property. Thereafter, the article contributes to the current discourse by considering the approaches of Canada and Australia in relation to an assessed payment obligation pending dispute resolution. Bearing in mind the approaches in Canada and Australia, it is suggested that, in South Africa, the payment obligation pending dispute resolution should be suspended until the dispute has been adjudicated by an impartial forum. This will ensure that a taxpayer’s right to access to courts is respected. Nonetheless, the South African context, more specifically the overburdened court system, must be considered. Waiting until an impartial forum is able to consider the merits of the dispute may take a substantial amount of time. This will unnecessarily stifle SARS’s collection powers and interest will continue to accrue to the detriment of the taxpayer. Accordingly, it is suggested that 50 per cent of the payment obligation relating to the disputed tax should be suspended, until the matter is adjudicated by an impartial forum.

\* *This article emanates from research relating to the author’s LLD thesis titled “An appraisal of selected tax-enforcement powers of the South African Revenue Service in the South African constitutional context” University of Pretoria, 2017.*

## 1. Introduction

Sec. 164(1) of the *Tax Administration Act* (hereafter TAA)<sup>1</sup> provides that, as a point of departure, a taxpayer who disputes an amount payable to SARS is obliged to pay this amount, even when the taxpayer utilises a dispute resolution procedure. Thus, this “pay now, argue later” approach separates the adjudication of the merits from payment of the tax debt.<sup>2</sup>

The reasoning behind the “pay now, argue later” approach is summarised in *Capstone 556 (Pty) Ltd v Commissioner for SARS*<sup>3</sup> as follows:

The considerations underpinning the ‘pay now, argue later’ concept include the public interest in obtaining full and speedy settlement of tax debts and the need to limit the ability of recalcitrant taxpayers to use objection and appeal procedures strategically to defer payment of their taxes.<sup>4</sup>

Accordingly, this approach rules out frivolous objections that may cause SARS and the South African government to experience dire financial constraints.<sup>5</sup> In the absence of this approach, there would be an incentive for a taxpayer to dispute a tax obligation.

Whilst the rationale behind the “pay now, argue later” approach may be laudable, the Davis Tax Committee reported that it is not sufficient to ignore other possible measures to establish the legitimacy of objections. This report also acknowledged the substantial bias this approach creates in favour of SARS.<sup>6</sup> This bias could possibly refer to the fact that SARS may proceed with enforcement actions. If the taxpayer fails to pay the disputed tax pending dispute resolution, SARS may apply for a civil judgment to recover the disputed tax, by filing a certified statement, indicating the outstanding tax, with the clerk or registrar of a competent court.<sup>7</sup> The filing of this statement has the effect of a civil judgment in favour of SARS for the amount specified in the statement. This civil judgment enables SARS to obtain a writ to attach and sell property of the taxpayer.<sup>8</sup> A civil judgment also has an adverse effect on a person’s credit record. Another enforcement action that SARS may invoke is to appoint a third party to act on behalf of the taxpayer. The third party would then be required to make payment of taxes from money held by the third party on behalf of the taxpayer.<sup>9</sup>

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1 *Tax Administration Act* 28/2011.

2 Standing Committee on Finance 2014:41.

3 *Capstone 556 (Pty) Ltd v Commissioner for SARS* 2011 6 SA 65 (WCC).

4 *Capstone 556 (Pty) Ltd v Commissioner for SARS*:par. 9.

5 *Metcash Trading Ltd v Commissioner for the South African Revenue Service* 2000 2 SA 232 (W):243.

6 Davis Tax Committee 2017:74.

7 *Tax Administration Act*:sec.174. *Tax Administration Act*:sec.172(2) specifically provides that SARS may issue this statement, even if an objection or an appeal has been lodged.

8 *Capstone 556 (Pty) Ltd v Commissioner for SARS*:par. 37.

9 This power is provided for in the *Tax Administration Act*:sec.179.

This article first points out the shortcomings of the “pay now, argue later” approach from a constitutional perspective. This is done to highlight that it is indeed necessary to consider how other jurisdictions deal with a tax payment obligation that is subject to dispute. Thereafter, the article contributes to the current discourse, by considering the approaches in Canada and Australia in relation to an assessed payment obligation pending dispute resolution. Comparative work in this respect is important for two reasons. One, sec. 36(1)(e) of the *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*) requires that, when determining whether an infringement is reasonable and justifiable, it must be taken into account whether there are less invasive means to achieve the purpose of the limiting provision. Two, even if it is found that the limiting provision may be a reasonable and justifiable limitation, *i.e.* constitutionally sound, other alternatives must still be considered to ensure that a better balance is achieved between SARS’s obligations and taxpayers’ rights.

## 2. The South African “pay now, argue later” approach: Constitutional considerations

When considering the “pay now, argue later” approach, there are three constitutional rights that may be impacted on, namely the rights to access to courts, to just administrative action and to not be arbitrarily deprived of property.

### 2.1 Access to courts

Williams declares that

the notion that a person should be obliged to pay a debt that he disputes, and which has not been adjudicated by a court, is fundamentally offensive to ordinary conceptions of justice.<sup>10</sup>

The offensiveness identified by Williams cannot simply be brushed off as sec. 34 of the *Constitution* provides for the right to access to courts. From case law interpreting this right, it has transpired that the right to access to courts prevents a person from taking the law into his/her own hands.<sup>11</sup> Furthermore, sec. 34 of the *Constitution* embodies the *nemo iudex in sua causa*<sup>12</sup> rule.<sup>13</sup> Thus, one of the aims of sec. 34 of the *Constitution* is to prevent a person from being a judge in a matter to which s/he is a party.

The matter of *Metcash Trading Ltd v Commissioner for the South African Revenue Service and the Minister of Finance* and its subsequent appeal case, *Metcash Trading Ltd v Commissioner for the South African Revenue*

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10 Williams “The pay-now-argue-later rule festers in our income tax system (Mobibane case)”, <http://bit.ly/1O5PQ8a> (accessed on 18 April 2019).

11 *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 CC:par. 11.

12 Meaning that “no one may be a judge in his or her own case”. In this regard, see Burns & Beukes 2006:197.

13 *Chief Lesapo v North West Agricultural Bank* 1999 JOL 5319 B:13.

*Service and the Minister of Finance*,<sup>14</sup> considered the constitutionality of the “pay now, argue later” approach in relation to the right to access to courts. In the High Court, Snyders J held that the “pay now, argue later” approach infringed on this right of a taxpayer, as SARS acts as a substitute for the court by determining every aspect of the vendor’s liability and the enforcement thereof.<sup>15</sup> Further, she held that all interlocutory relief by the court was precluded by this section.<sup>16</sup> Moreover, the possibility of perhaps being successful in an appeal that would overturn the situation, does not sufficiently address the infringement a person has to tolerate until then.<sup>17</sup>

This means that the first stage of the constitutional enquiry was successful, to wit that a constitutional right had been infringed.<sup>18</sup> In the final stage, the court had to establish whether the infringement was reasonable and justifiable as envisaged in sec. 36 of the *Constitution*.<sup>19</sup> As such, this stage required the court to place

the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other.<sup>20</sup>

Considering whether the limitation was reasonable and justifiable, the court held that a delay in paying taxes in the current matter would not be substantial, considering the greater scheme of national tax.<sup>21</sup> Snyders J concluded that the “pay now, argue later” approach in relation to value-added tax (hereafter, VAT) was unconstitutional, as it places an extreme limitation on a person’s right to access to courts that could have a lasting effect, even though the limitation is temporary in nature.<sup>22</sup>

The matter then proceeded, for confirmation, to the Constitutional Court, which held that the “pay now, argue later” approach was not concerned with access to courts and contained no provision ousting

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14 *Metcash Trading Ltd v Commissioner for the South African Revenue Service and the Minister of Finance* 2001 1 SA 1109 (CC). This case is henceforth referred to as “*Metcash Trading Ltd v Commissioner for the South African Revenue Service and the Minister of Finance* 2001”.

15 *Metcash Trading Ltd v Commissioner for the South African Revenue Service and the Minister of Finance* 2000 2 SA 232 (W):242. This case is henceforth referred to as “*Metcash Trading Ltd v Commissioner for the South African Revenue Service and the Minister of Finance* 2000”.

16 *Metcash Trading Ltd v Commissioner for the South African Revenue Service and the Minister of Finance* 2000:242.

17 *Metcash Trading Ltd v Commissioner for the South African Revenue Service and the Minister of Finance* 2000:242.

18 Rautenbach 2018:1A43.

19 Rautenbach 2018:1A43.

20 *S v Bhulwana* 1995 2 SACR 748 (CC):par. 18.

21 *Metcash Trading Ltd v Commissioner for the South African Revenue Service and the Minister of Finance* 2000:244.

22 *Metcash Trading Ltd v Commissioner for the South African Revenue Service and the Minister of Finance* 2000:244.

the court's jurisdiction.<sup>23</sup> Accordingly, the Constitutional Court declared the "pay now, argue later" approach relating to VAT to be in line with the *Constitution*.<sup>24</sup>

Whilst the Constitutional Court's judgment in *Metcash Trading* enjoyed some support,<sup>25</sup> other scholars have voiced their concern. Olivier pointed out that it was not proposed that the court's jurisdiction was completely ousted, but rather that this approach excluded the jurisdiction of the court when it was invoked.<sup>26</sup> From this criticism, it is clear that the question before the court should have rather been whether the taxpayer would have an opportunity to access an impartial forum before being obliged to pay the assessed amount.<sup>27</sup>

The fact that the matter could later be taken on review or appeal does not absolve the legislature from ensuring that provisions are constitutionally sound.<sup>28</sup> In this respect, the Davis Tax Committee pointed out that taxpayers may be discouraged from taking such a matter on review or appeal, as, psychologically, the taxpayer has already "lost" the money.<sup>29</sup> If the taxpayer had to pay the disputed tax, s/he may not have any money left to take the matter on review or appeal.

Olivier also commented that the court failed to consider whether there are less invasive ways to effect speedy collection of tax.<sup>30</sup> This consideration is important, seeing that whether there are less invasive ways to achieve SARS's objective is one of the factors the court had to consider when determining whether a limitation is a reasonable and justifiable restriction on a person's constitutional rights.<sup>31</sup>

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23 *Metcash Trading Ltd v Commissioner for the South African Revenue Service and the Minister of Finance* 2001:1132. The court further elaborated on the functioning of the Tax Court and the fact that it functions like an ordinary court. The taxpayer would, therefore, have access to courts by appealing to the Tax Court.

24 *Metcash Trading Ltd v Commissioner for the South African Revenue Service and the Minister of Finance* 2001:1137, 1145. For a discussion regarding whether the court would have come to the same conclusion if this was an income tax matter as opposed to a VAT matter, see Fritz 2017:164-166. The author concludes that it would have made no difference, as the reasons for differentiating between VAT and income tax as espoused in *Metcash Trading Ltd v Commissioner for the South African Revenue Service and the Minister of Finance* 2001 are unconvincing.

25 Croome 2010:40.

26 Olivier 2001:196.

27 Keulder 2013:140.

28 *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 8 BCLR 837 (CC):par. 48. In this regard, see also Olivier 2001:197.

29 Davis Tax Committee 2017:75.

30 Olivier 2001:199.

31 In this regard, see the *Constitution of the Republic of South Africa* 1996:sec. 36(1)(e).

It is submitted that the arguments advanced by Olivier in this regard may assist in proving that the Constitutional Court erred in the *Metcash* matter. Accordingly, it is not a foregone conclusion that the court, when called upon to adjudicate on the constitutionality of the “pay now, argue later” approach, with specific reference to the right to access to courts, will find that it is constitutionally sound.

## 2.2 Just administrative action

Sec. 164(2) of the *TAA* stipulates that a taxpayer may request a suspension of his/her payment obligation if the taxpayer intends to dispute or disputes the obligation. Once such a suspension request has been made, SARS may only proceed with collection proceedings ten business days after notifying the taxpayer that the request has been denied, except when SARS reasonably believes that there is a risk that the taxpayer may dissipate assets.<sup>32</sup>

Sec. 164(3) of the *TAA* provides factors a senior SARS official<sup>33</sup> could consider in order to grant a request in terms of sec. 164(2). These factors are:

- (a) whether the recovery of the disputed tax will be in jeopardy or there will be a risk of dissipation of assets;
- (b) the compliance history of the taxpayer with SARS;
- (c) whether fraud is *prima facie* involved in the origin of the dispute;
- (d) whether payment will result in irreparable hardship to the taxpayer not justified by the prejudice to SARS or the *fiscus*, if the disputed tax is not paid or recovered, or
- (e) whether the taxpayer has tendered adequate security for the payment of the disputed tax and accepting it is in the interest of SARS or the *fiscus*.

Explicitly providing the factors that a senior SARS official could consider serves several important objectives. One, it provides clear criteria of what would be considered, which could dispose of the notion that the “pay now, argue later” approach is applied selectively. Two, SARS seems to act in a transparent manner, which is a constitutional imperative for SARS in terms of sec. 195(1)(g) of the *Constitution*.<sup>34</sup> Three, listing factors that should be considered curbs what would otherwise have been a broad

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32 *Tax Administration Act*:sec. 164(6).

33 In terms of the *Tax Administration Act*:sec. 6(3), a senior SARS official is “the Commissioner, a SARS official who has specific written authority from the Commissioner to do so or a SARS official occupying a post designated by the Commissioner for this purpose”.

34 The *Constitution of the Republic of South Africa* 1996:sec. 195 provides the basic values and principles that public administration, which includes SARS, should adhere to.

discretion, which could have been contrary to the rule of law,<sup>35</sup> a founding value of the *Constitution*.<sup>36</sup>

Due to the fact that this discretion of a senior SARS official to either suspend the payment obligation or not falls within the purview of administrative action,<sup>37</sup> this decision must be lawful, reasonable and procedurally fair, as envisaged in sec. 33 of the *Constitution*. A taxpayer may take this decision on review if s/he opines, *inter alia*, that the decision was taken arbitrarily,<sup>38</sup> irrelevant factors were taken into account or relevant factors were not taken into account.<sup>39</sup> Consequently, it is important that the factors, which the senior SARS official should consider, are certain so that a taxpayer can establish whether one of the grounds of review is present.

Considering the factors contained in sec. 164(3) of the TAA, some appear uncertain or, in some instances, not above constitutional reproach. First, when the recovery of tax will be in jeopardy is not specifically indicated in the TAA. Nonetheless, *The Short Guide to Tax Administration Act 2011* provides some indication of when the recovery of tax may be in jeopardy. Apparently, this will be the case when there is some risk that the tax may be lost, if the collection is delayed.<sup>40</sup> Likewise, there is no indication of when a risk of dissipation would be present. Generally, whenever a person owes money, there would be some risk that the person would not be able to settle it with the passage of time or that s/he might sell assets. It is submitted that this specific listed factor in sec. 164(3) of the TAA requires an objective element indicating more than a risk that would generally be present in relation to debt. If not, this factor would always result in an adverse finding of a taxpayer's request to suspend the payment obligation pending dispute resolution.

Bearing in mind whether fraud is *prima facie* involved in the origin of the dispute, as a factor for suspension, raises some constitutional concerns. This factor is not concerned with whether a person was convicted of fraud, but rather whether there was *prima facie* fraud. As such, a taxpayer would not have had the opportunity to defend him-/herself against the allegation of fraud.<sup>41</sup> Moreover, an adverse finding by SARS, based on the fact that

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35 *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs*:par. 47; Fritz 2017:37-38.

36 *The Constitution of the Republic of South Africa* 1996:sec. 1(c).

37 Croome & Olivier 2015:378.

38 *Promotion of Administrative Justice Act 3/2000*:sec. 6(2)(e)(vi).

39 *Promotion of Administrative Justice Act 3/2000*:sec. 6(2)(e)(iii).

40 SARS 2013:36. This guide deals with jeopardy in terms of jeopardy assessments as envisaged in the *Tax Administration Act*:sec. 94. In terms of this section, SARS may make a jeopardy assessment before a return is due, if the Commissioner is satisfied that it is necessary to secure the collection of tax which would otherwise be in jeopardy. An example of when a jeopardy assessment would be appropriate is when a taxpayer is on the brink of leaving South Africa without paying his/her outstanding taxes. See also Solomon "Pay now argue later" – recent amendments to section 164 of the Tax Administration Act no 28 of 2011", <https://bit.ly/2PjEvcW> (accessed on 18 April 2019).

41 Rood 2009:44.

the taxpayer was accused of an offence, is contrary to sec. 35(3)(h) of the *Constitution*, which provides that an accused person has the right to be presumed innocent until proven guilty.<sup>42</sup>

In relation to the factor contained in sec. 164(3)(d), the question arises as to what would constitute irreparable “hardship”, as this concept is subjective in nature. Moreover, this hardship that the taxpayer may suffer may be justified by the prejudice that SARS or the *fiscus* may suffer, if the tax is not paid.<sup>43</sup> Therefore, a taxpayer’s hardship is weighing up against the interests of SARS and the *fiscus*.<sup>44</sup> It is impossible to understand how SARS can act in an objective manner when weighing the taxpayer’s hardship against SARS’s own interests. This is in conflict with the maxim *nemo iudex in sua causa*.<sup>45</sup>

In addition to this factor drawing attention to a conflict of interest, this factor creates a “catch-22” situation. If the taxpayer argues that the payment of tax would not result in irreparable hardship in all likelihood, SARS would then not suspend the payment of taxes. Conversely, if the taxpayer argued that the payment of the tax pending an objection or appeal would lead to irreparable hardship, SARS could be concerned that the taxpayer would not be able to pay the tax at a later stage and decide not to suspend the payment.<sup>46</sup>

Due to the vagueness and constitutional concerns regarding some factors highlighted above, it would be difficult for a taxpayer to evaluate whether the administrative action was taken arbitrarily, irrelevant factors were taken into account, or relevant factors were not taken into account and should be taken on review.

However, an aspect that is clear when SARS is considering whether to suspend the payment obligation or not is that, once the taxpayer has requested a suspension in terms of sec. 164(2), no enforcement proceedings may be taken until ten days after SARS has delivered its decision to reject a suspension, unless SARS has a reasonable belief that the taxpayer may alienate assets.<sup>47</sup>

Even though a taxpayer is certain that SARS will generally not continue with any collection steps during the time that the collection of tax is stayed, SARS may do its utmost best to reach a decision regarding the request for

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42 Where an adverse finding is made based on an allegation of a crime being committed, the matter is considered by an impartial party. For instance, when a judge or magistrate considers a bail application, the *Criminal Procedure Act 56/1955:sec. 60(5)* permits the presiding officer to consider the crime that has allegedly been committed.

43 *Tax Administration Act:sec. 164(3)(d)*.

44 Louw “Changes to the criteria considered by SARS when suspending payment of tax”, as referred to in Fritz 2017:174.

45 This rule means that “no one may be a judge in his or her own case”.

46 Du Plessis & Dachs “Pay now, argue later”, <https://bit.ly/2Vcbcy0> (accessed on 18 April 2019).

47 *Tax Administration Act:sec. 164(6)*.



suspending the obligation to pay taxes pending dispute resolution as soon as possible to ensure that it is able to continue collecting taxes swiftly. This provides an incentive for SARS to reach a quick decision or find reasons why it believes the taxpayer may alienate assets. Consequently, this may result in senior SARS officials not taking into account all relevant considerations in determining whether payment pending an objection or an appeal may be suspended. If this is indeed the case, taxpayers would have to take the decision on review, in order to have it re-evaluated,<sup>48</sup> which may have severe financial and time implications for the taxpayer.

### 2.3 Right to not be arbitrarily deprived of property

The matter of *Metcash Trading* initially also challenged the “pay now, argue later” approach contained in the *VAT Act* on the ground that it violated the taxpayer’s sec. 25(1) constitutional right.<sup>49</sup> This right entails that “[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property”.<sup>50</sup>

*Metcash* did not pursue an argument regarding the possible infringement of a person’s right to not be arbitrarily deprived of property and, accordingly, the court did not deal with this aspect apart from indicating that the “pay now, argue later” approach is not arbitrary.<sup>51</sup> Croome also shared this view.<sup>52</sup> The reason for this could be that, although a taxpayer has been deprived of the use and enjoyment of his/her money, there is a good reason for the “pay now, argue later” approach, as it ensures the effective collection of taxes. Furthermore, there is a rational link between the reason for this approach and the deprivation caused by it.<sup>53</sup>

Nonetheless, the Davis Tax Committee stated that the “pay now, argue later” approach does infringe on a person’s sec. 25(1) constitutional right.<sup>54</sup> Unfortunately, the Committee failed to substantiate this statement. Does this mean that the Committee considers the “pay now, argue later” approach as one of those instances where the purpose of the deprivation

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48 In terms of the *Promotion of Administrative Justice Act*:sec. 6(e)(iii), this will constitute a ground for judicial review.

49 *Metcash Trading Ltd v Commissioner for the South African Revenue Service and the Minister of Finance* 2000:237.

50 *The Constitution of the Republic of South Africa* 1996:sec. 25(1).

51 *Metcash Trading Ltd v Commissioner for the South African Revenue Service and the Minister of Finance* 2000:238.

52 Croome 2008:39.

53 See *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC):par. 66, where the court identified that, in some instances, establishing whether a deprivation of property was arbitrary would simply require whether there is “a rational connection between means and ends”.

54 Davis Tax Committee 2017:75.

needs to be much more compelling than the deprivation it causes, in order for it not to be arbitrary?<sup>55</sup>

Establishing whether the “pay now, argue later” approach constitutes an arbitrary deprivation of property requires that

[a] complexity of relations must be considered in testing whether there is sufficient reason for the regulatory deprivation. These include the relationship between the means employed and the ends sought by the legislative scheme; the relationship between the purpose of the deprivation and the nature of the property; as well as the extent of the deprivation in respect of that property. The more extensive the deprivation and the stronger the property interest, the more compelling the state’s purpose has to be for having the regulatory deprivation at question in place.<sup>56</sup>

Consequently, future in-depth research must be conducted to establish whether the “pay now, argue later” approach does strike a proportionate balance between the taxpayer and the public interest.<sup>57</sup>

## 2.4 Concluding remarks regarding the South African “pay now, argue later” approach

From the discussion above, it is clear that the “pay now, argue later” approach does not leave a taxpayer’s rights to access to courts, to just administrative action, and not to have property arbitrarily deprived unscathed. Considering whether there are lessons to be learned from other jurisdictions in this respect is important for the reasons expressed in the introduction to this article.

## 3. Lessons from other jurisdictions

### 3.1 Introduction

In this section, Canada’s and Australia’s approach to a taxpayer’s payment obligation pending dispute resolution is considered. This comparative work points towards solutions for the concerns identified in respect of South Africa’s current approach.

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55 *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance*:par. 66.

56 *National Credit Regulator v Opperman and Others* 2013 2 SA 1 (CC):par. 68.

57 *National Credit Regulator v Opperman and Others*:par. 65.

## 3.2 Canada

### 3.2.1 Approach in relation to payment obligation pending dispute resolution

The Canadian *Income Tax Act*<sup>58</sup> provides that a taxpayer, who is aggrieved with an income tax assessment, may file an objection, which is then considered by the Canadian Revenue Authority's (hereafter, CRA) Appeal Branch.<sup>59</sup> If the taxpayer is dissatisfied with the outcome of the objection, the matter may be taken on appeal. A taxpayer may file an appeal with the Tax Court once the Minister of National Revenue has made a decision relating to the objection, or if ninety days have lapsed after the taxpayer has served a notice of objection and the Minister has failed to inform the taxpayer that the assessment has been confirmed, reassessed, or abandoned.<sup>60</sup> A further appeal to the Federal Court of Appeal is available in the event that the taxpayer is aggrieved by the decision of the Tax Court.

Sec. 225.1 of the *Income Tax Act* places certain restrictions on CRA collections. Sec. 225.1(1) restricts collections before a dispute is initiated. This section prevents the Minister from proceeding with collection actions before the collection commencement day. This means that, until ninety days have lapsed after the notice of assessment has been sent,<sup>61</sup> no court proceedings may be initiated and no tax debt<sup>62</sup> may be certified and registered with the Federal Court.<sup>63</sup> Moreover, the Minister may not require a person or institution to pay money it holds, or will hold on behalf of a taxpayer over to the CRA.<sup>64</sup> Sec. 225.1(1) consequently creates a ninety-day grace period before the CRA may start with collection proceedings. Wintermute<sup>65</sup> indicates that, during this period, a taxpayer may contemplate whether s/he wants to dispute the assessed amount or not.

If a taxpayer lodges an objection, the CRA may not institute collection proceedings until ninety days have lapsed since the Minister sent a notice to the taxpayer to confirm or vary the assessment.<sup>66</sup> Similarly, if a taxpayer has taken a matter on appeal to the Tax Court of Canada, the collection of the disputed amount may not commence before the earlier of either the

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58 *Income Tax Act RSC 1985, c 1 (5<sup>th</sup> Supp).*

59 *Income Tax Act:sec. 165(1).*

60 *Income Tax Act:sec. 169.*

61 "Collection-commencement day", as defined in the *Income Tax Act:sec. 225.1(1.1)(c).*

62 In terms of the *Income Tax Act:sec. 222(1)*, tax debt relates to any amount that is payable by a taxpayer in terms of the *Income Tax Act*.

63 *Income Tax Act:sec. 223(2)* provides that the Minister may certify a tax debt owed as payable by the debtor, and, in terms of the *Income Tax Act:sec. 223(3)*, once this is registered with the Federal Court, it will be regarded as a judgment.

64 *Income Tax Act:secs. 224(1), 224(1.1), 224.3(1).*

65 Wintermute "Tax appeals: how to deal with an income tax, GST or payroll assessment", 22 <http://bit.ly/1OQeKK2> (accessed on 18 April 2019).

66 *Income Tax Act:sec. 225.1(2).*

day a copy of the decision of the court is mailed to the taxpayer or the day on which the taxpayer withdraws the appeal.<sup>67</sup>

It is interesting to note that the *Income Tax Act* does not provide that the obligation to pay an assessed amount is suspended whilst the taxpayer takes the matter on further appeal to the Supreme Court of Canada. In this regard, the CRA indicates that, once the Tax Court of Canada’s decision is mailed to the taxpayer, the taxpayer must immediately settle the full, outstanding amount. The reason why the obligation to pay is not suspended when appealing to the Supreme Court of Canada may be that the dispute has, at that stage, already been heard by an impartial forum, that is, the Tax Court of Canada.

### 3.2.2 Exceptions

In general, sec. 225.1 of the *Income Tax Act* “offers seamless protection from collection of claimed tax arrears up to the conclusion of a Tax Court appeal”.<sup>68</sup> However, there are exceptions to this “seamless protection” that a taxpayer enjoys. Sec. 225.1(6) of the *Income Tax Act* provides that, when the amount in dispute was required to be deducted or withheld, for example a payroll deduction, there is no restriction placed on the Minister with regard to collections actions.<sup>69</sup> This exception may be problematic if the aspect in dispute is whether the deduction is subject to withholding tax.

Furthermore, sec. 225.1(7) provides an exception if the taxpayer is a large corporation.<sup>70</sup> In terms of this section, the Minister may then collect half of the assessed amount even before ninety days have lapsed after the notice of assessment has been sent, irrespective of whether an objection has been raised.<sup>71</sup> Similarly, after the ninety-day period, the Minister may proceed with collecting the remaining amount. However, if the large corporation disputes a portion of the assessed amount, only half of the amount in dispute may be collected in total.<sup>72</sup> The Canadian Chamber of Commerce<sup>73</sup> has criticised this exception. According to it, the payment of half of the disputed taxes by a large corporation is punitive and unfairly impedes the corporation’s ability to conduct business, as its cash flow is limited.

Sec. 225.2(2) of the *Income Tax Act* provides for another instance where the payment of taxes is not suspended, as envisaged in sec. 225.1. In terms of sec. 225.2(2), a judge may authorise the Minister to proceed

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67 *Income Tax Act*:sec. 225.1(3).

68 *Alessandro v Canada* 2006 FC 895:par. 5.

69 *Income Tax Act*:sec. 225.1(6)(b).

70 A taxpayer will be classified as a large corporation when the amount by which the corporation’s capital exceeds its investment allowance for that year is more than \$10 million.

71 *Income Tax Act*:sec. 225.1(7)(a).

72 *Income Tax Act*:sec. 225.1(7)(b).

73 Canadian Chamber of Commerce “Interest on overpaid taxes”, as referred to in Fritz 2017:195.

with collection, if the Minister satisfies the judge by way of *ex parte*<sup>74</sup> application that there are reasonable grounds to believe that the collection of the assessed amount is in jeopardy, owing to the delay in collection. If an order is granted in terms of sec. 226.2(2), a taxpayer will not enjoy the benefit of collection proceedings being deferred.

In *Canada v Cormier-Imbeault*,<sup>75</sup> the court identified some factors that could justify the authorisation envisaged by sec. 225.2 of the *CITA*. These are, *inter alia*, whether the taxpayer begins, or continues to sell off or transfer his/her assets; whether the taxpayer is evading his/her tax obligations; whether the taxpayer's assets have the potential to depreciate in value, and whether there are reasonable grounds to believe that the taxpayer has acted in a fraudulent manner.<sup>76</sup>

To curb the possible impact of a jeopardy order, it must be served on the taxpayer within seventy-two hours after it has been granted, unless the judge orders otherwise.<sup>77</sup> The taxpayer is afforded further protection, as s/he may apply to have the order reviewed.<sup>78</sup> This allows the taxpayer to make representations relating to the assessed tax.<sup>79</sup> A judge reviewing the authorisation may confirm, set aside, or alter the authorisation to proceed with collection.<sup>80</sup>

### 3.2.3 Deterrence measures

Even though the *Income Tax Act* provides that, generally, the obligation to pay taxes is suspended pending an objection, the vast majority of taxpayers seem to pay the amount in dispute.<sup>81</sup> This is due to the fact that, even though a taxpayer's obligation to pay taxes is suspended whilst disputing the amount, interest on the outstanding amount will continue to accrue.<sup>82</sup> Wintermute,<sup>83</sup> therefore, advises taxpayers to pay the disputed amount, in

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74 With an *ex parte* application, the person against whom relief is sought does not receive notice of the application and the relief is also sought in this person's absence.

75 *Canada v Cormier-Imbeault* 2009 6 CTC 45.

76 *Canada v Cormier-Imbeault*:par. 7.

77 *Income Tax Act*:sec. 225.2(5).

78 *Income Tax Act*:sec. 225.2(8).

79 Alpert Law Firm "Defending jeopardy assessments", <http://bit.ly/1UudsFD> (accessed on 18 April 2019).

80 *Income Tax Act*:sec. 225.2(11).

81 Simard "How to object to assessment in Canada", <http://bit.ly/1PMSI05> (accessed on 18 April 2019). Wintermute "Tax appeals: How to deal with an income tax, GST or payroll assessment", 22 <http://bit.ly/1OQeKK2> (accessed on 18 April 2019) indicates that the payment of a disputed amount does not constitute an admission of liability.

82 In terms of the *Income Tax Act*:sec. 161, interest accrues on assessed tax debts. The prescribed interest rate may be amended every three months. The interest will run from the date the taxes had to be paid until payment is, in fact, made.

83 Wintermute "Tax appeals: How to deal with an income tax, GST or payroll assessment", 22 <http://bit.ly/1OQeKK2> (accessed on 18 April 2019).

order to stop interest from accruing. Simard<sup>84</sup> indicates that an objection is usually assigned to an objection officer to consider the objection within three to twelve months after the objection has been filed. In view of the approximate time lapse before the objection – which is lodged at the onset of resolving the dispute – is even considered, the interest that may accrue during dispute resolution could be substantial.<sup>85</sup>

In addition to interest continuing to accrue, Canada has other measures in place to prevent a taxpayer from simply delaying his/her payment obligation by disputing the assessment. As indicated earlier, the Minister can approach the court if s/he is of the opinion that the delay in disputing the assessed amount would result in the collection thereof being placed in jeopardy.<sup>86</sup>

Furthermore, sec. 179.1 of the *CITA* provides that, if the Tax Court of Canada dismisses an appeal of a taxpayer with regard to an amount payable, or if the appeal is withdrawn, it is within the court’s discretion to order the taxpayer to pay the CRA a penalty not exceeding 10 per cent of the amount which the taxpayer disputed. The court may make such an order, if it concludes that there were no reasonable grounds for the appeal or if the court opines that one of the main reasons for disputing the assessed amount was to postpone the payment of any amount payable relating to income tax.

### 3.2.4 Comparison with SARS’s powers

When comparing how the two countries deal with the obligation to pay taxes pending a dispute, there is a clear disparity. As a starting point, taxpayers in South Africa would be obliged to fulfil this obligation, while Canada allows collection actions to be stayed, if the assessed amount is disputed.

The difference in point of departure means that, in South Africa, a taxpayer needs to request a suspension and provide evidence as to how his/her specific case relates to the factors that must be considered by SARS.<sup>87</sup> In Canada, the obligation is on the CRA to show that it falls within one of the exceptions, in terms of which the payment obligation should not be suspended.<sup>88</sup> It is submitted that it is fairer to place the burden on the revenue authority, as the revenue authority will have more resources at its

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84 Simard “How to object to assessment in Canada”, <http://bit.ly/1PMSI05> (accessed on 18 April 2019).

85 Simard “How to object to assessment in Canada”, <http://bit.ly/1PMSI05> (accessed on 18 April 2019). In terms of the *Income Tax Act*:sec. 164(1.1), if a taxpayer has paid a disputed amount of tax and the Minister has not provided the taxpayer with a decision relating to the objection within 120 days after the taxpayer has served the notice of objection, or if the taxpayer appeals to the Tax Court of Canada, the taxpayer may apply, in writing, to have the amount repaid. The *Income Tax Act*:sec. 164(3)(e) stipulates that this repayment amount must include interest.

86 See 3.2.2 above.

87 See 2.2. above.

88 See 3.2.2. above.

disposal to discharge the burden compared with a taxpayer. Furthermore, the Canadian approach allows a taxpayer access to an impartial forum before s/he has to perform in accordance with the income tax assessment. In the South African context, this would mean that a taxpayer's right of access to the courts is respected.

Moreover, most of the exceptions relating to when the obligation to pay taxes will not be suspended in Canada can be objectively determined, for instance when it relates to a large corporation or to withholding taxes.<sup>89</sup> The one subjective exception, when there are reasonable grounds to believe that the delay in collecting the disputed amount could place collection in jeopardy, requires an impartial person, to wit a judge, to be satisfied that the collection will reasonably be in jeopardy. In South Africa, on the other hand, SARS exercises the discretion whether the obligation to pay may be suspended. This discretion is exercised based on subjective factors, of which some raise constitutional concerns.<sup>90</sup>

Although the TAA provides that enforcement actions may only commence ten business days after SARS has indicated that the obligation to pay taxes is not suspended,<sup>91</sup> the manner in which Canada deals with grace periods should be considered for South Africa. The effect of the Canadian grace period is that enforcement actions are stayed until the dispute is heard by an impartial forum, that is, the Supreme Court of Canada. A similar provision in South Africa would, it is argued, result in a taxpayer's right of access to the courts being respected, whilst ensuring that SARS's obligation to collect taxes is not deferred indefinitely.

Although Canada, when compared to South Africa, seems quite accommodating to taxpayers when a dispute arises, the CRA does not necessarily have the short end of the stick as regards the grace period. Some taxpayers in Canada pay disputed taxes, in order to prevent interest from accruing while the dispute is being resolved. It may be asked what the significance of legislation prohibiting collection actions pending dispute resolution is if taxpayers proceed to pay the disputed tax in any event. The significance is that the decision whether to pay disputed taxes is made by the taxpayer. It is for the taxpayer to decide whether s/he wants to restrict the accrual of interest by paying the disputed tax or take the chance of interest accruing until the end of the dispute resolution procedure, if the taxpayer is unsuccessful. This is fairer than legislation providing that, as a point of departure, the obligation to pay taxes is not suspended, as is the case in South Africa.

Apart from the accrual of interest pending dispute resolution urging taxpayers to pay the amount in dispute, as the Canadian Tax Court may

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89 It must, however, be noted that the mere fact that these exceptions appear to be objectively verified does not mean that there will not be a dispute relating to whether a specific taxpayer falls within one of these exceptions.

90 See 2.2. above.

91 *Tax Administration Act*:sec. 164(6).

penalise a taxpayer for bringing a vexatious appeal, it may urge taxpayers to re-evaluate whether they have a legitimate dispute.

In Canada, the right not to pay income tax while a dispute is pending is further curbed, as collection actions are only stayed until an appeal is heard by the Tax Court of Canada. This allows for the taxpayer’s dispute to be heard by an independent forum. The suspension of the payment obligation does not continue in perpetuity, as the Minister may thereafter proceed with collection actions, if the taxpayer is unsuccessful. As such, the taxpayer has a clear understanding of when the CRA may proceed with collection actions. This stands in contrast to South Africa where a taxpayer has to request to have the obligation to pay suspended, and the suspension may be revoked at any stage in the discretion of a senior SARS official. As indicated earlier,<sup>92</sup> the fact that a senior SARS official has to consider the merits of the matter, in order to determine whether the objection or appeal is frivolous or just, is unsatisfactory as the SARS official cannot be deemed to make an impartial decision.

### 3.3 Australia

#### 3.3.1 Approach in relation to payment obligation pending dispute resolution

Sec. 14ZZM of the Australian *Taxation Administration Act*<sup>93</sup> (hereafter *TAA*) provides that “[t]he fact that a review is pending in relation to a taxation decision does not in the meantime interfere with, or affect, the decision and any tax, additional tax or other amount may be recovered as if no review were pending”. Moreover, sec. 14ZZR of the *TAA* provides that “[t]he fact that an appeal is pending in relation to a taxation decision does not in the meantime interfere with, or affect, the decision and any tax, additional tax or other amount may be recovered as if no appeal were pending”.

Wyatt and Gumley emphasise that secs. 14ZZM and 14ZZR provide the Commissioner with a discretion to recover a tax debt pending a review or appeal, as the sections indicate that the tax “may” be instead of “must” be recovered.<sup>94</sup> They submit that secs. 14ZZM and 14ZZR are to be used in cases where taxpayers have lodged a review or an appeal to delay paying taxes.<sup>95</sup>

Wyatt and Gumley’s submission is in line with the court’s interpretation of the predecessor of secs. 14ZZM and 14ZZR of the *TAA*, namely sec. 201 of the *Income Tax Assessment Act*.<sup>96</sup> In *Deputy Commissioner of*

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92 See 1. above.

93 *TAA* 1953.

94 Wyatt & Gumley 1995:32.

95 Wyatt & Gumley 1995:34.

96 *Income Tax Assessment Act* 1997.



*Taxation v Roma Industries Pty Ltd*,<sup>97</sup> Bowen CJ remarked that sec. 201 of the *Income Tax Assessment Act* ensured

protection against that class of taxpayer who might withhold payment and use the money as sinews of war to conduct appeals against the Commissioner who being finally unsuccessful, was found to be unable to meet his tax liability having spent his money on the litigation.<sup>98</sup>

### 3.3.2 Exceptions

Although the *TAA* does not explicitly provide for any exceptions or discretions, in terms of which the payment of taxes pending a review or an appeal is suspended, it may be possible for a taxpayer to have his/her obligation suspended by reaching a so-called “50-50 arrangement”. In terms of such an agreement, the taxpayer pays at least half of the amount in dispute<sup>99</sup> and the Commissioner defers the collection of the other half.

The Australian Tax Office (hereafter, ATO) conducts a risk assessment to determine whether a 50-50 agreement may be reached.<sup>100</sup> In determining the risk associated, and consequently whether a 50-50 agreement may be appropriate, the ATO considers, among other factors, the nature of the debt, the taxpayer’s attributes, and relevant policy issues.<sup>101</sup> When dealing with the nature of the debt, the ATO considers whether the debt arose due to aggressive tax planning,<sup>102</sup> the age of the debt,<sup>103</sup> and whether the debt was voluntarily disclosed or established by an audit.<sup>104</sup> The consideration of a taxpayer’s attributes includes investigating his/her compliance history, financial position, and the taxpayer’s truthfulness.<sup>105</sup> From a policy perspective, the ATO will also bear in mind that the legislation prioritises the recovery of revenue above the finalisation of a dispute.<sup>106</sup> A taxpayer may mitigate the risk associated with deferring a payment, and consequently making a 50-50 agreement more appropriate, by furnishing acceptable security.<sup>107</sup>

Apart from entering into a 50-50 agreement, the Commissioner may also defer the payment of disputed taxes if s/he is of the opinion that a

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97 *Deputy Commissioner of Taxation v Roma Industries Pty Ltd* 1976 76 ATC 4113.

98 *Deputy Commissioner of Taxation v Roma Industries Pty Ltd*:4116.

99 The taxpayer has to pay all the taxes that are not in dispute.

100 Australian Tax Office 2015:par. 26.

101 Australian Tax Office 2013:par. 34.

102 Australian Tax Office 2013:par. 22.

103 Australian Tax Office 2013:par. 34. The older the debt, the higher the risk of not being able to collect it.

104 Australian Tax Office 2013:par. 34.

105 Australian Tax Office 2013:par. 34.

106 Australian Tax Office 2015:par. 8.

107 Australian Tax Office 2015:par. 52.

genuine dispute exists in relation to the amount.<sup>108</sup> There is no definition of, or factors indicating what would be considered as a genuine dispute in this context.<sup>109</sup> However, the ATO indicates that it expects a taxpayer who has filed a *bona fide* objection to co-operate by furnishing the necessary information, in order to have the dispute resolved as soon as possible. If a taxpayer is considered to delay the dispute resolution process, the ATO would, in all probability, continue to recover the tax in dispute, as it would then consider the taxpayer not to have a genuine dispute.<sup>110</sup> Thus, establishing whether there is a genuine dispute is left for the Commissioner to determine.<sup>111</sup>

Deferring payment, either due to a 50-50 agreement or because it relates to a genuine dispute, is within the ATO’s discretion. This is problematic. The Inspector-General of Taxation states that the ATO’s approach to collecting disputed debts seems to be inconsistent in respect of large businesses and high-wealth individuals.<sup>112</sup> The Inspector-General of Taxation mentions that, in some instances, the ATO is willing to make payment arrangements, while, in other similar instances, it proceeds with collection actions.<sup>113</sup>

Another alternative to prevent the ATO from proceeding with enforcement actions pending dispute resolution would be to approach the courts. First, in terms of sec. 15(1) of the *Administrative Decisions (Judicial Review) Act*,<sup>114</sup> the court may stay the ATO’s decision to proceed with collections pending dispute resolution when a taxpayer has applied to have this decision reviewed, until the court has finalised the review of such a decision.<sup>115</sup> An application for the review, in this instance, does

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108 Australian Tax Office 2015:par. 43.

109 In *DCT v Neutral Bay Pty Ltd; DCT v MA Howard Racing Pty Ltd; DCT v Broadbeach Pty Ltd* 2008 HCA 41:par. 22, the Commissioner contended that a genuine dispute does not refer to an objection, review or appeal being lodged. The court upheld this contention. This matter dealt with the meaning of “genuine dispute” in the *Corporations Act* 2001 (Cth):sec. 459. This section provides that a statutory demand (in terms of sec. 459E) made by a creditor to a company may be set aside (in terms of sec. 459G(1)) if there is a genuine dispute between the company and the respondent regarding the existence of a debt to which the demand relates.

110 Australian Tax Office 2015:paras.12-13.

111 Australian Tax Office 2015:par. 43.

112 Inspector General of Taxation 2015:par. 5.4. According to Australian Tax Office “How we identify wealthy individuals and their businesses”, <http://bit.ly/2b5rMWR> (accessed on 18 April 2019), a person would be classified as a high wealth individual when his/her net wealth is equal to or exceeds \$30 million.

113 Inspector General of Taxation 2015:par. 5.4.

114 *Administrative Decisions (Judicial Review) Act* 1997.

115 *Administrative Decisions (Judicial Review) Act*:sec. 15(1) read with sec. 5(1). In terms of *Administrative Decisions (Judicial Review) Act*:sec. 5(1), a decision would be subject to review when it relates to “a decision of an administrative character made, proposed to be made, or required to be made ... under an enactment”. For a discussion of when a decision would be subject to review,

not automatically suspend the taxpayer's payment obligation.<sup>116</sup> The ATO is only restricted from proceeding with enforcement actions pending a review when the Federal Court of Australia or judge of that court sitting in chambers<sup>117</sup> deems it fit to stay the ATO's decision.<sup>118</sup>

Secondly, a taxpayer may approach the courts for a stay in enforcement proceedings in terms of sec. 23 of the *Federal Court of Australia Act*. The court in *Deputy Federal Commissioner of Taxation v Mackey*<sup>119</sup> indicated that, when considering whether to suspend recovery proceedings of the ATO, it has to take into account various factors. This consideration is not limited to whether an appeal is pending or whether there appears to be an arguable case. The Commissioner's right to collect assessed taxes must also be considered. Moreover, the nature of the liability and the nature of the dispute should be taken into account.<sup>120</sup>

In *Mackey*, the court remarked that the Commissioner has the right to collect taxes pending an objection or appeal. The court will only order otherwise if a special ground is present. The court held that there is no list of these special grounds and that it, therefore, has an open-ended discretion.<sup>121</sup> Glass J commented that, on a scale of one to one hundred, the needle is close to one hundred in favour of the Commissioner, and it would require a substantial case by the taxpayer to reduce this needle below the halfway mark for the collection actions to be stayed.<sup>122</sup> The court indicated that, if the Commissioner abuses its position,<sup>123</sup> or if the payment of the disputed tax would cause the taxpayer extreme personal hardship, it would be a substantial ground to stay the collection actions.<sup>124</sup>

### 3.3.3 Comparison with SARS's powers

Australia, like South Africa, does not stay the obligation to pay taxes from the onset, pending an objection or an appeal. However, upon closer analysis, it emerges that, in some instances, the ATO suspends the

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see Carbone 1996:110. See *Ahern v Deputy Federal Commissioner of Taxation* 1983 ATC 4698:4704; 4709, where the court indicated that the Australian Tax Office's decision not to suspend the payment obligation constitutes a decision to which the *Administrative Decisions (Judicial Review) Act* applies.

116 *Administrative Decisions (Judicial Review) Act*:sec. 5(1).

117 *Administrative Decisions (Judicial Review) Act*:sec. 15(3) read with the *Federal Court of Australia Act* 1976:sec. 4.

118 *Administrative Decisions (Judicial Review) Act*:sec. 15(1).

119 *Deputy Federal Commissioner of Taxation v Mackey* 1982 82 ATC 4571. This matter also dealt with the *Taxation of Assessment Act*:sec. 201.

120 *Deputy Federal Commissioner of Taxation v Mackey*:4574. In this matter, the dispute related to what the court classified as a "contrived scheme to avoid tax".

121 *Deputy Federal Commissioner of Taxation v Mackey*:4575.

122 *Deputy Federal Commissioner of Taxation v Mackey*:4575.

123 An example of such abuse is when the Commissioner proceeds to collect tax in defiance of a court order.

124 *Deputy Federal Commissioner of Taxation v Mackey*:4575.

obligation to pay taxes, or half of the assessed taxes. Therefore, the ATO has a discretion to suspend the obligation to pay taxes, even though the legislation does not explicitly specify when the discretion may be exercised in favour of the taxpayer. In South Africa, it is much clearer what SARS would consider when exercising its discretion to suspend a tax obligation, as this aspect has received substantial legislative attention. Although there are difficulties with some of the South African factors,<sup>125</sup> they are provided for in legislation, which provides certainty to taxpayers of what SARS will consider when exercising its discretion. The fact that legislation does not include the factors to consider when exercising its discretion to suspend the payment of taxes is not an approach that should be considered in South Africa. The absence of factors may result in an inconsistent application of the discretion and creates legal uncertainty in this regard, which is inimical to the rule of law, a founding constitutional value.

In both South Africa and Australia, a court may intervene regarding the question as to whether the obligation to pay taxes may be suspended. In South Africa, a taxpayer may take SARS's decision not to suspend the payment obligation pending an objection or an appeal on review in terms of the *Promotion of Administrative Justice Act*.<sup>126</sup> Australian taxpayers, by the same token, may apply to have the ATO's decision not to suspend the payment of taxes reviewed in terms of the *Administrative Decisions (Judicial Review) Act*. In addition, sec. 15 of this *Act* provides the court with a discretion to suspend the obligation, in this instance to pay disputed taxes, pending the review application. A similar discretion is not provided for in the *Promotion of Administrative Justice Act* and a taxpayer in South Africa would need to reach an agreement with SARS or apply for an interdict.

#### 4. Lessons to learn from Canada and Australia

It may be argued that, in South Africa, a taxpayer's right to access to courts is respected, as a taxpayer may request SARS to suspend his/her tax obligation while a dispute is pending. However, a taxpayer is burdened with proving his/her situation in relation to the factors that SARS has to consider. In addition to imposing this burden on a taxpayer before s/he can obtain the protection that the right to access to courts brings about, some of the factors that SARS has to consider are problematic, as they require SARS to weigh its interests against those of the taxpayer. This conflict of interest is contrary to the *nemo iudex in sua causa* rule, which is encapsulated in the right to access to courts.

Another aspect to consider when determining whether the “pay now, argue later” approach is a reasonable and justifiable limitation on a taxpayer's rights, is whether there are less invasive measures to

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<sup>125</sup> See 2.2. above.

<sup>126</sup> *Promotion of Administrative Justice Act* 3/2000.

achieve the purpose of the limiting provision.<sup>127</sup> Consequently, it should be considered whether there are other ways to ensure that tax debts are paid swiftly and that frivolous objections and appeals are avoided. It is submitted that the approaches of Canada and Australia have shown that there are other deterrent measures that may be used to achieve the purpose envisaged by the “pay now, argue later” approach. For instance, if the rate of interest, which is deferred, but continues to accrue pending dispute resolution, is higher than the interest rates a taxpayer would be able to secure by investing the money, the taxpayer would probably be deterred from lodging frivolous objections and appeals. Another deterrent would be to empower a court to impose a penalty on a taxpayer if it finds that a dispute was frivolous.<sup>128</sup>

In addition to the fact that the “pay now, argue later” approach infringes on a person’s right to access to the courts, this approach may have dire financial consequences for the taxpayer. Even if the matter is decided in favour of the taxpayer, if s/he remained out of pocket until the dispute was resolved, it could severely prejudice him/her.

However, a situation where a taxpayer would be able to continue disputing an amount of tax until all dispute resolution avenues have been exhausted, would not suffice, as it may be detrimental to both taxpayers and SARS. It could be detrimental to taxpayers, in the event of an unsuccessful objection and appeal, to have the payment obligation suspended as the inevitable, paying the tax, is only prolonged in addition to interest accruing. On the other hand, it could be detrimental to SARS, as it may be more difficult to collect the larger amount (tax and interest) than the initial assessed amount. In this regard, it is proposed that a provision similar to the one in Canada be used where the payment obligation is only suspended until an impartial forum has heard the matter. This will also ensure that a taxpayer’s right to access to courts is respected.<sup>129</sup>

Although an approach similar to that of Canada is advocated, the specific South African context must be borne in mind. As the South African courts are overburdened,<sup>130</sup> waiting until an impartial forum is able to consider the merits of the dispute may take a substantial amount of time. This will still result in SARS’s collection powers being unnecessarily stifled and interest continuing to accrue. Accordingly, it is suggested that 50 per cent of the payment obligation relating to the disputed tax be suspended. This is in line with Australia’s “50-50 arrangement” and Canada’s approach relating to large corporations. However, a 50 per cent payment/suspension

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127 See *Constitution of the Republic of South Africa* 1996:sec. 36(1)(e).

128 Considering the cost implications of the court’s decision to impose a penalty on the taxpayer for lodging a frivolous appeal, taxpayers would probably not consider taking the matter further on appeal.

129 Obviously, if the taxpayer decides not to pay an outstanding tax that has been confirmed by the impartial forum, the interest period would not be limited to the period from when the liability arose until the matter was heard by an impartial forum.

130 In this regard, see Maclons 2014:1.

in relation to all payment obligations is recommended for two reasons. First, a more complex calculation may result in unnecessary confusion and room for dispute. Second, the 50 per cent payment/suspension should apply in all instances and not only to specific taxpayers, as only applying it to certain taxpayers, for instance large corporations, could be viewed as penalising a certain type of taxpayer for no apparent justifiable ground.

In instances where the delay in collecting the entire disputed tax may jeopardise the collection of all or any part of the assessed amount, a senior SARS official ought to then be able to approach the court on an *ex parte* basis. If a judge or magistrate is satisfied that there are reasonable grounds to believe that there is a delay in collecting the entire assessed tax pending dispute, s/he may order that SARS may proceed with collecting the disputed tax. This recommendation provides recourse to SARS where, according to an impartial forum, SARS's collection ability would be seriously impeded by suspending the payment obligation.

When an appeal is decided against a taxpayer, the court should have the power to order the taxpayer to pay a penalty to SARS, if the court determines that there were no reasonable grounds for the appeal. The court should only make such an order if it is of the opinion that one of the main purposes for instituting or maintaining any part of the appeal was to defer the payment of any amount payable. The possibility of taxpayers being penalised for lodging frivolous appeals may deter them from doing so.

Adopting the lessons put forward in this article would ensure that taxpayers' rights are adequately protected and that SARS is able to fulfil its duty of effective and efficient collection of taxes. As a result, it is suggested that sec. 164 of the TAA be amended to adopt these lessons.

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