

The interrelationship between audit findings and an additional assessment

by

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Submitted in fulfilment of the requirements for the degree

LLM (Tax Law)

In the Faculty of Law,
University of Pretoria

Date

(2022 December)

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Wordcount : 17632 (text and footnotes)

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¹ Annexure G to Postgraduate Administrative Processes for Registered Students – S1834/13 (amended).

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KEY WORDS

Additional assessment

Audit findings

Interrelationship

Lawful

Letter of finalisation of audit

Procedurally fair

Reasonable

Representations

Review

Source of power

Taxpayer

LIST OF ABBREVIATIONS

CCE	Commissioner of Customs and Excise
CPT	Cape Town
CSARS	Commissioner for the South African Revenue Service
DG	Director-General
HC	High Court
PAJA	Promotion of Administrative Justice Act
SARS	South African Revenue Service
SCA	Supreme Court of Appeal
TAA	Tax Administration Act
TALA	Tax Administration Laws Amendment Act
UMK	United Manganese of Kalahari (Proprietary) Limited

DISCLAIMER

This study is limited to the law as at the time of submission.

Furthermore, at the time of this submission the *United Manganese of Kalahari (Pty) Ltd v Commissioner for the South African Revenue Service* (21563/20) [2021] ZAGPPHC (20 October 2021) had not as yet been heard by the Supreme Court of Appeal nor was judgment delivered.

ACKNOWLEDGEMENT

Thank you, Lord, for choosing and walking with me to the top of this mountain. I needed every bit of Your mercy.

I am grateful to Prof. Stephanus van Zyl, my supervisor. Thank you for not only encouraging and supporting me but also listening. The University of Pretoria, I am grateful for how effortlessly organised everything has been. I discovered and received value-added services; I never knew existed. The library team, thank you so much - I didn't need to be in Pretoria to collect and return my reading material. You are magicians!

Mr Bafana Ncube of Ncube Incorporated - I can never thank you enough Sir. The over two years that we spent working together, I discovered the attorney that I was always meant to be. Thank you immensely for your invaluable support. I honestly would not be drafting this paragraph had it not been for your humanity.

To my new corporate family, CMS Tax Department - the short time we have worked together assisted me greatly in unpacking some of the issues in this study.

In the past two years and even longer, there have been many people who have supported me to arrive at this point. The space available is simply not enough to mention you all. However, please know that I am truly grateful to you all and I am forever indebted to you. To my fellow classmates, well done and congratulations!

DEDICATION

I dedicate this dissertation to taxpayers.

I would like to dedicate this dissertation to my parents, Mr David and Mrs Irene Selokela. I can never thank you enough for your unwavering support, love and everything in between. Most of all thank you for making my existence possible.

To my ancestral clan - Bakwena ba Selokela and Batokwa ba Matshipi, thank you for lifting me up each and every time.

Lastly but not least, everyone who has and believes in my cause - you know yourselves; I thank you.

ABSTRACT

SARS'¹ main objective is the collection of revenue. When an incorrect application of a Tax Act occurs, SARS is obliged to correct the prejudice caused to SARS or the fiscus.² Section 92 of the TAA states that SARS' correction entail the issuance of an additional assessment. SARS' notice of assessment contains the tax liability that would have been determined by an application of Tax Acts. A tax liability has an adverse effect. Once the assessment is issued the taxpayer must pay the tax liability due. Section 42 of the TAA empowers SARS to conduct an audit to assess whether a taxpayer's tax position has been completely and accurately declared.

During an audit, adjustments may be identified which then necessitate the raising of an additional assessment.³ This conclusion is contained in an audit findings letter. This study critically analyses this interrelationship between audit findings and an additional assessment. Chief to the enquiry is to determine what the audit procedure envisaged by section 42 entail and to analyse the interface between the rationale of section 42 and the right to just administrative action in terms of section 33(1) of the Constitution. The study argues under what circumstances would SARS' action during and upon the conclusion of an audit be considered procedurally unfair. Particularly, that it is procedurally unfair for SARS to amend the basis of its audit findings and issue an additional assessment on new bases without the taxpayer knowing nor making further representations.

The shortcomings of section 42 are analysed and how these shortcomings may be contributing to the unfettered discretion exercised by SARS during an audit. Various judgment where SARS' statutory powers have been interrogated within the context of procedural fairness and the courts' views in this regard differ. It is hoped that the *Kalahari*⁴ case currently pending appeal in the Supreme Court of Appeal will settle the law on how the prescripts under section 42 should be interpreted.

¹ South African Revenue Service (herein referred to as 'SARS' or 'the Commissioner').

² Section 3 read together with section 5 of the South African Revenue Service Act 34 of 1997 as well as section 92 of the Tax Administration Act 28 of 2011 (herein referred to as 'the TAA').

³ Section 42(2)(b) of the TAA.

⁴ *United Manganese of Kalahari (Pty) Ltd v Commissioner for the South African Revenue Service* (21563/20) [2021] ZAGPPHC (30 September 2021) ('*Kalahari*').

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CHAPTER ONE

INTRODUCTION

1. Introduction

This study is about the procedure followed by the Commissioner for the South African Revenue Service (hereafter referred to as ‘SARS’ or ‘the Commissioner’) during an audit, from commencement to when a taxpayer is issued with an additional assessment. It interrogates through a critical legal analysis what the interrelationship between audit findings and the issuance of an additional assessment is.

The discussions that follow centre around whether, in pursuit of the additional assessment, SARS may change the basis of the assessment from what it had concluded in its audit findings. Specifically, whether when it amends those bases, is SARS obliged to notify a taxpayer before the additional assessment is raised. To further interrogate whether SARS’ actions could be considered to be procedurally unfair within the ambit of section 42 of the Tax Administration Act¹ (hereafter referred to as ‘the TAA’) when a taxpayer is not provided an opportunity to make submissions pursuant to the amendment. In answering these questions, this study takes into consideration the constitutional mandate that an administrative action must be lawful, reasonable and procedural fair.²

The Commissioner is empowered to employ all mechanisms legally permissible in discharging his mandate. The South African Revenue Service Act³ (hereafter referred to as the ‘SARS Act’) states that one of SARS’ main objectives is to collect revenue.⁴

The TAA states that a senior SARS official may select a person for an audit on any basis so long as it is relevant for the proper administration of a Tax Act.⁵ The TAA prescribes only two possible scenarios at the conclusion of an audit. First, an audit may produce an inconclusive

¹ Act 28 of 2011.

² Section 33(1) of the Constitution of the Republic of South Africa, 1996 (hereafter referred to as ‘the Constitution’).

³ 34 of 1997.

⁴ Section 3 read together with section 5 of the SARS Act.

⁵ Section 40-41 of the TAA.

outcome.⁶ Second, possible adjustments may have been identified which are of a material nature.⁷ The second scenario is the focus on this study.

Under the second scenario, SARS is then obligated to inform the taxpayer within 21 days, that based on those possible adjustments SARS proposes/intends to issue an assessment.⁸ SARS is to inform the taxpayer what the grounds of that proposed assessments are.⁹ The TAA is not explicit on whether there is an interrelationship between an audit outcome and the issuance of an additional assessment.

The empowering provision for SARS to conduct an audit is section 42 of the TAA. Section 42 makes no mention of nor does it refer explicitly to the concept of an additional assessment pursuant to an audit. The section outlines the audit process up until the stage where SARS is obliged to afford the taxpayer an opportunity to respond to the audit outcome and/or findings.¹⁰ The issuance of an additional assessment as a consequence of audit findings is not expressly found in section 42 of the TAA.

The study critically analyses the causal link between audit findings and the issuance of additional assessments.

Section 33(1) of the Constitution dictates that an administrative action must be lawful, reasonable and procedurally fair. What is argued in this study is that even when empowered to issue an additional assessment upon the conclusion of its audit, SARS is still constitutionally mandated to do so reasonably and in a procedurally fair manner.

In *Nondabula v Commissioner for the South African Revenue Service and Another*,¹¹ the High Court addressed the doctrine of legality and constitutionality loosely. The Court considered sections 195 and 239 of the Constitution and the doctrine of legality. It concluded that the exercising of public power must be done within the ambit of an empowering legislation and

⁶ Section 42(1) read together with subsection (2)(a) of the TAA.

⁷ Section 42(1) read together with subsection (2)(b) of the TAA.

⁸ Section 42(2)(b) of the TAA.

⁹ Section 42(2)(b) of the TAA.

¹⁰ Section 42(3) of the TAA.

¹¹ *Nondabula v Commissioner for the South African Revenue Service and Another* 2018 (3) SA 541 (ECM) (*'Nondabula v CSARS'*).

any other pieces of legislation.¹² However, the judgment fell short to address SARS' obligation to discharge its functions in a procedurally fair manner within the context of section 33(1) of the Constitution.¹³

The judgment does not give a pronouncement that although an action/decision may have been taken on the basis of empowering legislation, there still remains two other requirements under section 33(1). These are reasonableness and procedural fairness. An element of this study investigates whether an infringement of any of the elements of section 33(1); may warrant a taxpayer to bring a court application through the high court. The aim of the application being to a review whether the decision by SARS pursuant to an audit has infringed the taxpayer's right to just administrative action in accordance with section 6 of the PAJA¹⁴. With the effect that such a decision must then be set-aside on the basis that a procedurally flawed process was followed.

If SARS amends the basis of issuing the additional assessments after a taxpayer had made representations thus effectively amending its initial findings, will additional assessments issued by SARS be considered unlawful and/or procedurally unfair. The argument being that such assessments were underpinned by a process that does not meet the requirements under section 33(1) of the Constitution. Further that the manner in which SARS exercised its powers does not accord with what the empowering provisions intended.

The study therefore determines whether SARS can use its wide and discretionary audit powers to go on a fishing expedition at the cost of unassuming taxpayers. Specifically, whether in the course of its audit and the conclusion thereof, can SARS change its basis for issuing an additional assessment. When the audit findings conclude one thing and the issued additional assessment say another, would the difference justify an argument that SARS ought to have notified the taxpayer before issuing the assessment.

To answer these questions, an assessment of the process envisaged under section 42 against the prescripts of section 33(1) of the Constitution is provided in chapters 3 and 4.

¹² *Nondabula v CSARS* paras. 11-12 pg. 543.

¹³ *Nondabula v CSARS* paras. 14-15 pg. 544.

¹⁴ Promotion of Administrative Justice Act 3 of 2000 (hereafter referred to as 'PAJA').

The High Court in *United Manganese of Kalahari (Pty) Ltd v Commissioner for the South African Revenue Service*¹⁵ held that SARS' action in issuing additional assessments did not infringe section 42 of the TAA. The court did not agree with the taxpayer that the conclusions in the finalisation of audit letter materially differed from SARS' initial audit findings.¹⁶ The Court said that it cannot be said that SARS changed its findings merely because the taxpayer does not agree with the interpretation of what constitutes a connected person relationship.¹⁷

Miller agrees with the judgment.¹⁸ In Miller's view, the Court adopted the correct approach. This she says is because SARS' provided its reasoning for the additional assessments in its letter of audit findings, though it did not employ the same particularity in the finalisation of audit letter.¹⁹ Having not done so does not warrant an infringement of section 42 nor an argument that SARS changed its basis for raising the additional assessments.²⁰ Miller is silent on whether there exists a causal link between audit findings and the additional assessment issued. Further, whether that link has not possibly been broken in circumstances where the grounds for the issuance of an additional assessment are remote from the audit findings letter. Whether this would then mean that the new or amended findings would require SARS to revert to the taxpayer before issuing additional assessments.

2. *Problem statement*

One of the pillars of taxation, is that the taxing authority's processes must promote certainty.²¹ Uncertainty is created when due process is not followed by the taxing authority. It is further exacerbated, when the grounds underpinning the issuance of additional assessment do not

¹⁵ *United Manganese of Kalahari (Pty) Ltd v The Commissioner for the South African Revenue Service* (21563/20) [2021] ZAGPPHC (30 September 2021) ('*Kalahari*').

¹⁶ *Kalahari* paras. 66.21 & 69 pgs. 34 & 36.

¹⁷ *Kalahari* paras. 18 & 31 pgs. 10 & 16.

¹⁸ Miller K 'To object or take SARS on review- that is the question' <https://www.polity.org.za/article/to-object-or-take-sars-on-review-that-is-the-question-2022-02-16> (accessed 29 November 2022).

¹⁹ Miller K 'To object or take SARS on review- that is the question' <https://www.polity.org.za/article/to-object-or-take-sars-on-review-that-is-the-question-2022-02-16> (accessed 29 November 2022).

²⁰ Miller K 'To object or take SARS on review- that is the question' <https://www.polity.org.za/article/to-object-or-take-sars-on-review-that-is-the-question-2022-02-16> (accessed 29 November 2022).

²¹ B Croome *Taxpayers' Rights in South Africa* (2010) 3.

coincide with the audit findings. For example, in its audit letter, SARS confines itself to the taxpayer's deductions. Yet, during the audit, SARS finds other irregularities. Instead of pursuing a case based on deductions, SARS issues additional assessments based on information obtained outside the audit activities.

Before being selected for an audit, a taxpayer would be of the view that its tax liability for the applicable years of assessment is definitive. When selected for an audit, the taxpayer expects SARS to follow the prescripts of section 42 and the law generally, to engage the taxpayer in a procedurally fair manner. What further negatively affects certainty is that it is common practice for SARS to include a disclaimer in the audit findings that SARS may at any time still issue an additional assessment when new facts come to light. This creates the impression that SARS is not bound by their own audit findings.

Apart from certainty, the issuance of an additional assessment is an administrative action. SARS must exercise public power within the ambit of an empowering legislation, namely the TAA.

The internal administrative steps in conducting an audit are not the issue investigated in this study. But rather SARS' constitutional obligation to issue additional assessments in a lawful, reasonable and procedurally fair manner.

In *Mr A v Commissioner for the South African Revenue Service*,²² the Tax Court held that SARS failed to afford the taxpayer an opportunity to make representations as required by section 42(3) of the TAA.²³ Therefore, flouted the right to procedural fairness and its conduct was unlawful.²⁴ However, this judgment does not set precedent because it was handed down by the Tax Court. It is confined to facts in that specific matter.

²² *Mr A v Commissioner for the South African Revenue Service* (IT13726) (2018) ZATC 8 ('*Mr A v CSARS*').

²³ *Mr A v CSARS* paras 20-22 pgs 7-9.

²⁴ *Mr A v CSARS* paras 20-23 pgs 7-9.

In *F v Commissioner for the South African Revenue Service*,²⁵ the Tax Court held that there was a higher duty on SARS as a state organ to abide by the rule of law.²⁶ Further that where SARS disregards a taxpayer's constitutional entrenched right to fair administrative action, there must be a reasonable justification.²⁷

In *Earthlife v DG, Department of Environmental Affairs*,²⁸ the full bench of the Western Cape Local division held that where the impugned administrative decision was made based on new information, those adversely affected must be afforded a further opportunity for representations.²⁹

In *Brits v Commissioner for the South African Revenue Service*,³⁰ the Court disagreed with SARS that it was inconsequential that a procedurally fair process was not followed. That this is so because, the taxpayer has the objection and appeal processes at its disposal. The Court held that once an assessment is issued a debt is created, and the taxpayer would have to pay as a matter of law. To grant a taxpayer a fair procedure from the onset would circumvent this eventuality.³¹

An appraisal of case law indicates that there is no definitive pronouncement that there is an interrelationship between an audit outcome and an additional assessment. As such this interrelationship requires SARS to notify the taxpayer whenever the basis of an additional assessment changed between the time the audit findings were issued and after representations were made by the taxpayer. Further that where SARS does not notify the taxpayer nor afford further representations, does that amount to an infringement of section 33(1) of the Constitution. To further pronounce that the rationale of section 42(2) of the TAA is that a taxpayer must be informed about aspects of an audit that will materially affects its tax liability so as to make informed representations.

²⁵ *F v Commissioner for the South African Revenue Service* (IT45842) [2022] ZATC (25 February 2022) ('*F v CSARS*').

²⁶ *F v CSARS* para 29 pg 12.

²⁷ *F v CSARS* para 47 pg 17.

²⁸ *Earthlife Africa (Cape Town) v Director-General, Department of Environmental Affairs and Tourism and Another* 2005 (3) SA 156 (C) ('*Earthlife Cpt*').

²⁹ *Earthlife Cpt* paras 61-64 pgs 173-174.

³⁰ *Brits and Others v Commissioner for the South African Revenue Service* (44380/17) [2017] ZAGPJHC (28 November 2017) ('*Brits v CSARS*').

³¹ *Brits v CSARS* paras 7-10 pgs 3-4.

This study argues that there is a *lacuna* because the TAA does not make this interrelationship explicit, but it can be inferred from an interpretation of section 42³² read together with section 92. The judicial decisions do not particularly provide a critique on the interpretation and the purpose of section 42. SARS is a state organ, exercises public power, and as such, its decisions are susceptible to the principle of legality. An analysis of the interrelationship between an audit finding and additional assessment is important within the context discussed above.

3. *Research questions*

Though the interrelationship is not specifically expressed in the TAA, this study argues that the issuance of an additional assessment would be a natural consequence of SARS having identified adjustments under section 42(2)(b). With that context, the central questions in this study are three-fold. When SARS issues an additional assessment on basis that materially differ from the audit findings, would SARS' additional assessment be lawful. Is the correct interpretation of section 42 support an argument that where findings have changed after the taxpayer's representations, SARS must obtain further representations before concluding the audit and issuing an additional assessment. Does procedural fairness as contemplated by the Constitution and the PAJA require that SARS notify the taxpayer that the findings have since changed before proceeding to issue the additional assessment.

To provide answers to above, this study provides an analysis of the following:

- (i) What are SARS' information gathering powers?
- (ii) What is an audit?
- (iii) When does SARS conduct an audit?
- (iv) What are taxpayers' rights during an audit?
- (v) What is considered an audit outcome?
- (vi) Is there a distinction between an 'audit findings letter' and 'finalisation of audit letter'?
- (vii) What is an additional assessment?
- (viii) When can SARS issue an additional assessment?
- (ix) What is the principle of legality?
- (x) Are SARS' powers subject to the Constitution?

³² Specifically by reference to the word 'adjustments' under section 42(2)(b) of the TAA.

(xi) What are the requirements of a just administrative action?

4. *Research argument*

The issuance of an additional assessment is an administrative action. The Constitution demands that administrative actions must be lawful and taken in a procedural fair manner. SARS address the anomalies identified during an audit and contained in audit findings by effecting adjustments to assessments. SARS does this to discharge its mandate of correcting the prejudice caused by an improper application of a Tax Act(s). This is what creates the interrelationship between audit findings and an additional assessment. The purpose of the process envisaged under section 42 is aimed at promoting fairness. The taxpayer is provided a right to know the audit findings and an opportunity to have a say in whether a tax liability is raised against them.³³

What the taxpayer is responding to are the audit findings pronounced by SARS at that particular point. The response serves a purpose - to persuade SARS to reconsider the proposed assessment.³⁴ Should it be that pursuant to a taxpayer's response, SARS amends its initial findings or even come up with new findings - logic and the purpose of section 42 dictates that the taxpayer must be notified. The initial response is futile against new or amended findings. Section 42 is however silent on whether further representations can be made. My view is that a purposive interpretation of the section and procedural fairness support a taxpayer being afforded an opportunity for further representations. If not, the purpose of a taxpayer being afforded the right to be heard in the first instance is lost.

5. *Limitation on the scope of the study*

This study critically analysis the audit process envisaged under section 42 of the TAA, with the view that adverse findings lead to SARS issuing an additional assessment on the basis of its mandate under section 92. The study interrogates SARS' constitutional duty to do so in a manner that is procedurally fair.

³³ Section 42(2)(b) – (3) of the TAA.

³⁴ Section 42(3) of the TAA.

The study has the following limitations:

- (i) Whilst it is common cause that once an assessment is issued, a debt is created against the taxpayer and the taxpayer in turn must satisfy the debt. The study does not attempt to analyse the legal background on what is today commonly known as “pay now and argue later”³⁵ principle, save to outline that the principle is well entrenched and does affect a taxpayer’s rights.
- (ii) The study does not unpack the provisions of any tax Act, which deal with remedies such as refunds that may be due to a taxpayer.
- (iii) A discussion of SARS’ powers of search and seizure falls outside the scope of the study.
- (iv) A thorough analysis of the requirements and process envisaged under section 104 and 107 of the TAA in reference to the objection and appeal processes fall outside the scope of this study. However, for completeness reference to these processes is nonetheless made.
- (v) The Constitution states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. The analysis in this study’s primary focus is the aspect of procedural fairness adopted or not by SARS during an audit process only.

6. Provisional chapter outline

The study is divided into five chapters:

Chapter one provides an introduction to the study, states what the problem statement addressed is, the arguments made throughout the study, outlines and explains the methodology adopted in the collation and interrogation of research material, and briefly set-out the limitation of the study conducted.

³⁵ The ‘pay now and argue later’ as referred to in *Metcash Trading Ltd v Commissioner for the South African Revenue Service 2001* (1) SA 1109 (CC).

Chapter two analyses the legislative framework which informs SARS' functions, powers and the prescripts under which such power is to be exercised during an audit. The key statutes considered is the Constitution, Tax Administration Act and the Promotion of Administrative Justice Act.

Chapter three provides analyses of pertinent judgments where the exercising of power by SARS and by organs of state in general have been interrogated during review applications brought on the basis of the Constitution and/or the PAJA. The focus of the analysis is to derive legal principles and reasoning to support arguments made in respect of the interpretation of section 42 of TAA in chapter 4.

Chapter four analyse the provisions of section 42 and discusses the interface between what is contained in the section and with the requirements found under section 33(1) of the Constitution as interpreted by the judiciary and discussed in chapter 3. The analysis also provides shortcomings of section 42 when one considers the obligation SARS has to hold principles of procedural fairness as contemplated by the Constitution and the PAJA.

Chapter five provides the main conclusions sustained throughout each chapter. The chapter further offers recommendations that may address the shortcomings of section 42.

7. Methodology

This study comprises a legal critical analysis. This entails the review of the legislation and procedure envisaged under section 42 of TAA. It also involves studying and referring to judgments where the constitutional requirement for just administrative justice is interrogated and interpretation as to what constitutes a lawful, reasonable and procedurally fair administrative action is derived. The secondary sources include rules of court, and publications by other practitioners, academics and scholars whether by way of articles on various websites, books and journal articles.

CHAPTER TWO

LEGISLATIVE AND POLICY FRAMEWORK

1. Introduction

This chapter discusses SARS' powers and source thereof in performing an audit on taxpayers' tax affairs. SARS' powers and the exercising thereof are derived from enabling legislation. The discussions commence with the legal framework pertaining to the exercising of public power within the context of a constitutional dispensation. The Constitution¹ is the supreme law, all other laws and conduct must be consistent with it. Particularly, the conduct by and actions of organs of state are subject to the Constitution. One of the rights entrenched in the Constitution is that everyone has a right to just administrative action. Whilst PAJA² gives effect to this right, by providing the framework under which an impugned decision or conduct may be reviewed on the basis of lawfulness, reasonableness and procedural fairness.

Pursuant to an audit SARS may raise an assessment to account for the adjustments identified during an audit. The discussions that follow include a distinction between an original and additional assessments in terms of the TAA.³ Although a discussion on the objection and appealing of assessments fall outside the scope of this study, the discussion is nonetheless provided for completeness.

In the main, the chapter adopts a critical analysis of what the law pertaining to SARS' powers in general is. At times, some of the pertinent court cases in this regard are highlighted to sustain a particular argument(s). Some of these cases are then detailed in chapter 3.

¹ The Constitution of the Republic of South Africa, 1996 (hereafter referred to as 'the Constitution').

² Promotion of Administrative Justice Act 3 of 2000 (herein referred to as the 'PAJA').

³ Act 28 of 2011.

2. *Legal framework underpinning administrative action*

2.1 **Constitutional imperatives: public power**

2.1.1 *The supremacy of the Constitution*

The dawn of democracy in South Africa, ushered in constitutional supremacy. This essentially means that the Constitution is the supreme law in the Republic. Any other law enacted must not only foster but be consistent with the values, rights and principles enshrined in the Constitution.⁴ The functions and obligations in the Constitution are peremptory.⁵ The Constitution prescribes that conduct and law inconsistent with the Constitution is invalid.⁶

2.1.2 *The principle of legality*

The principle of legality, simply put, is that the exercising of public power or execution of functions must find its basis in law. Baxter states that there may be many ways to achieve the objects of a bureaucratic structure which are not necessarily of a legal nature; however, incorporating legal rules brings about various advantages.⁷ He states that the infusion of law creates what he calls a ‘myriad of institutions. These institutes are divided in five parts.⁸ First, the law would establish a particular public office or functionality.⁹ Second, name the designees within that office to be known as officials. Third, grant the said officials powers and duties.¹⁰ Fourth, prescribe their term of office. Finally, frame the scope of their jurisdiction.¹¹ It is, therefore, within these institutions that the task of government must be executed.¹²

In *Fedsure v Greater Johannesburg*,¹³ the Constitutional Court stated that under the constitutional order, all powers exercised by organs of state are subject to a constitutional review, which encompasses a review for legality.¹⁴

⁴ Section 1 read together with section 2 of the Constitution.

⁵ Section 2 of the Constitution.

⁶ Section 2 of the Constitution.

⁷ L Baxter *Administrative Law* (1984) 73.

⁸ L Baxter *Administrative Law* (1984) 73.

⁹ L Baxter *Administrative Law* (1984) 73.

¹⁰ L Baxter *Administrative Law* (1984) 73.

¹¹ L Baxter *Administrative Law* (1984) 73.

¹² L Baxter *Administrative Law* (1984) 73.

¹³ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) (*‘Fedsure v GJTM’*).

¹⁴ *Fedsure v GJTM* para 40 pg 394.

In *Commissioner of Customs and Excise v Container Logistics*,¹⁵ the Court stated that the existence and exercising of public power is legitimate when it flows from an empowering statute.¹⁶ However, the manner in which the power was exercised may still be at odds with the Constitution.¹⁷

The following is then deduced - it is not enough to say that the public power was premised by an enactment and the exercising thereof was done in accordance with the enacted law. The relevant law must still pass constitutional muster. There have been instances where impugned legislation or provisions were held unconstitutional, and accordingly, unlawful, invalid and unjustifiable under section 36 of the Constitution.¹⁸

2.1.3 *An accountable and transparent public administration*

In their furtherance of public administration, the Constitution mandates that organs of state do so in a manner that is transparent and on which they can be held accountable.¹⁹ The cornerstone of public power is that the exercising thereof must uphold the democratic values and principles enshrined in the Constitution. The most focal of these democratic values is the codification of the rights afforded under the Bill of Rights' chapter. The peremptory language used in the Bill of Rights not only signifies the importance of such rights and that they are afforded to everyone,²⁰ but also guards against arbitrary actions that may ensue at the behest of organs of state in the administration of their functions.²¹

¹⁵ *Commissioner for Customs and Excise v Container Logistics (Pty) Ltd* 1999 (3) SA 771 (SCA) (‘*CCE v Container Logistics*’).

¹⁶ *CCE v Container Logistics* para 20 pg 785.

¹⁷ *CCE v Container Logistics* para 20 pg 785.

¹⁸ Currie & de Waal *The Bill of Rights Handbook* (2013) 67; *Public Servants Association obo Ubogu v Head, Department Of Health, Gauteng And Others* 2018 (2) SA 365 (CC) (‘*Ubogu v Health Department, Gauteng*’).

¹⁹ Section 195(2) read together with section 195(1)(f) & (g) of the Constitution.

²⁰ I Currie & J de Waal *The Bill of Rights Handbook* (2013) 4; Section 7(1) of the Constitution.

²¹ C Hoexter ‘Just Administrative Action’ in I Currie & J de Waal *The Bill of Rights Handbook* (2013) 646; Section 7(3) of the Constitution states that the limitation of rights must be in accordance with section 36 of the Constitution.

(a) *Just administrative action*

In terms of section 33(1), everyone has the right to administrative action, which is lawful, reasonable and procedurally fair. The PAJA gives effect, in an elaborated manner, to the right and not the right itself. The basis of the right is the Constitution.²²

(b) *Enforceability of the Bill of Rights and the Right to access the courts*

Anyone acting in their own interest, such as a taxpayer, has a right in terms of section 38 of the Constitution to have a competent court adjudicate over an allegation by the said person that their right(s) under the Bill of Rights has been infringed. Furthermore, in terms of section 34 of the Constitution, everyone has the right to bring *any*²³ dispute before a court in instances where the dispute may be resolved by an application of the law and decided in a public hearing.

Under section 38, the Constitution does not state what constitute a ‘competent’ court. However, matters which encompasses the *enforcement*²⁴ and *interpretation*²⁵ of the Constitution are classified constitutional matters.²⁶

2.2 Promotion of Administrative Justice Act

The PAJA gives effect to the right to administrative justice as contemplated under the Constitution.²⁷ It gives effect by formalising the framework that informs what would entail an administrative action, what rights do persons to whom the actions affect have and under what instances can such actions be reviewed.²⁸

The discussions below will not interrogate how the PAJA defines administrative action, save to state that decisions by SARS constitute administrative action, because they are taken in terms

²² C Hoexter ‘Just Administrative Action’ in I Currie & J de Waal *The Bill of Rights Handbook* (2013) 649.

²³ Own emphasis.

²⁴ Own emphasis.

²⁵ Own emphasis.

²⁶ Section 167(7) of the Constitution.

²⁷ Section 33(3) of the Constitution.

²⁸ Preamble of the PAJA.

of enabling legislation.²⁹ Furthermore, as contemplated and defined by section 239 of the Constitution, SARS is an organ of state.

2.2.1 *Procedural fairness*

Section 3 of the PAJA relates to administrative actions which materially and adversely affect the rights or legitimate expectations of individuals. In essence those actions that directly affect a particular person(s). The substance of this section is that it fleshes out what ‘procedurally fairness’ entails. In respect of the auditing procedure envisaged under section 42 of the TAA; the PAJA requires the following:³⁰

- (a) The taxpayer is to be given adequate notice of the pending additional assessment;
- (b) The taxpayer must be given reasonable opportunity to make representations in response to the pending additional assessment, though the act does not prescribe what reasonable is; and
- (c) The taxpayer must be given a clear statement of SARS’ decision to issue an additional assessment.

2.2.2 *Grounds for judicial review*

An administrative action is reviewable under section 6 of the PAJA. The judiciary, including a tribunal (hereafter collectively referred to as the ‘judiciary’), carry-out this task. The judiciary is empowered to adjudicate over the specific grounds of review detailed under section 6 of the PAJA.³¹

The Constitution does not provide definitions on what constitute a lawful, reasonable and procedurally fair administrative action. The grounds of review found under section 6(2) prescripts to litigants to indicate on which bases the impugned action is said to have infringed

²⁹ Section 1 of the PAJA on the definition of administrative action. Within the context of organs of state, an administrative action is defined as taking a decision or failing to take a decision. Provided that in making the decision or exercise its powers, the organs was empowered to do so by legislation including the Constitution or provincial constitution.

³⁰ Section 3(2)(b) (i)-(iii) of the PAJA.

³¹ Section 6(2) of the PAJA.

their rights to just administrative action. The judiciary would then have to decide whether the case made fits into the prescribed grounds of review.

For the purpose of this study the grounds of review have been summarised to provide an overview and their correlation to section 33 of the Constitution. The enquiries under ‘source of power’ below would have to be answered in determining the lawfulness of an administrative action. Whilst the ones under rationality and reasonableness would apply to the question whether the action/decision made is reasonable.

These enquiries are summarised as follows –³²

(a) Source of power

- (i) the existence of the authority to take the decision;
- (ii) whether the absence of authority for the action led to the decision having been taken in bad faith and/or arbitrarily;
- (iii) whether the action/decision contravenes a law;
- (iv) whether the actions/decision is unconstitutional and unlawful; and
- (v) whether a mandatory and material procedure(s) or condition(s) contemplated by the empowering legislation was not followed and therefore led to procedural unfairness.

(b) Rationality

- (i) Whether there is a correlation between the action(s) and the purpose for which it was taken and to that of the empowering legislation;
- (ii) whether the action is aligned to the reasons given for it; and
- (iii) whether irrelevant considerations were favoured over relevant considerations, and information before the administrator was irrationally disconnected from the purposes envisaged by the empowering legislation.

(c) Reasonableness

- (i) whether the manner in which the power and/or performance was executed is void of reasonableness for the purpose on which the action was taken and no

³² A summation of the provisions under section 6(2)(a)-(i) of the PAJA.

reasonable person would have made the decision or would have execute(-d) it in a manner complained of.

The PAJA therefore gives effect to the constitutional right to just administrative action in the following manner: under section 6 where it requires the judiciary to pronounce of the lawfulness and reasonableness of the impugned action. Whilst the legal parameters on what would or not constitute procedural fairness are laid down under section 3.

3. *The administration of revenue collection*

The TAA provides a consolidated scope for the administration of tax acts into a single piece of legislation. The TAA addresses the administrative part of such acts with the ultimate view of upholding SARS' objective for revenue collection.³³ In the broadest sense, the recovery of tax by SARS encompasses the raising of a tax assessment(s), which depicts a taxpayer's tax liability. The TAA makes provision for the creation and type of assessments that may be issued during an assessment period(s). Sometimes and pursuant to such an assessment, an audit may ensue. The audit is conducted by a SARS official authorised to do so.

The legal framework which enables SARS to raise tax assessments is discussed next.

3.1 Assessments

An assessment entails, in the cause of a taxable event, the determination of the tax liability due. This can happen where the taxpayer has self-assessed by way of submitting a tax return or where the assessment has been raised by SARS.³⁴

The determination is succeeded by a notice of assessment wherein the amount which raises the tax liability and the applicable tax levied are disclosed.³⁵ When the notice is communicated to the taxpayer, it means that the assessment has been issued.³⁶ There are various assessment referred to and defined in the TAA, under sections 91-95. For the purpose of this study, the

³³ The preamble to the TAA.

³⁴ Section 1 definition of 'assessment' in the TAA; section 91(1)-(2) of the TAA.

³⁵ Section 96(1) of the TAA

³⁶ Section 96(1) of the TAA.

discussion is limited to an original assessment and additional assessment. A discussion about a discretionary assessment is included.

3.1.1 Original assessment

An assessment is considered ‘original’ on three occasions. First when a taxpayer has submitted tax returns without a determination of a tax liability. Thereafter, SARS is required to raise an assessment based on that return or some other information available to SARS.³⁷ In that instance, the assessment constitute an assessment by SARS itself. Second, when a taxpayer submits a tax return which discloses tax liability, that return is considered a self-assessment.³⁸ Third, when a taxpayer makes payment towards its tax liability without submitting a return.³⁹

3.1.2 Additional assessment

SARS is empowered to ascertain the correctness and completeness of tax returns submitted by taxpayers. SARS is obliged to issue an additional assessment when SARS or the fiscus is prejudiced by an assessment(s) previously issued or submitted.⁴⁰ This prejudice is considered present, when in pursuit of its powers and duties, SARS is of the view that the said assessment(s) does not reflect the correct application of a tax act.⁴¹

Section 91 and 92 of the TAA makes the issuance of original and additional assessments peremptory.

3.1.3 Finality of assessments

The TAA stipulate that when assessments are issued, they are considered final.⁴² However, SARS can still issue additional assessments.⁴³ SARS is limited from issuing additional assessments when a tax liability has been settled between parties in settlement proceedings; or

³⁷ Section 91(1) of the TAA.

³⁸ Section 91(2) of the TAA.

³⁹ Section 91(3) of the TAA.

⁴⁰ Section 91 of the TAA.

⁴¹ Section 92 of the TAA.

⁴² Section 100(1) of the TAA.

⁴³ Section 100(2) of the TAA.

there existed a dispute; or the tax board made a determination without the option of an appeal to the tax court; or the tax court has made a determination without the option of further appeal.⁴⁴

3.2 Information gathering

In the administration of tax legislation, SARS is empowered to solicit information about a taxpayer, whether from the taxpayer or other sources.⁴⁵ The administration of tax acts include determining the accuracy and completeness of a return previously submitted. Information gathering powers include the selection of taxpayers for audits - including field audits.

The discharging of functions and exercising of powers by SARS is legislatively bestowed on the Commissioner, as the chief executive and accounting officer of the institution.⁴⁶ In various parts of the TAA reference is made to a senior SARS official whom certain functions are to be exercised. This senior official, is a SARS official to whom specific authority to perform has been delegated by the Commissioner and such delegation must be in writing.⁴⁷

A taxpayer and/or member of the public has a right to request that the senior official produce the necessary authority on which its powers is based.⁴⁸

3.3 Conducting audits

SARS may select a person for an audit whether at random or based on a risk assessment.⁴⁹ The audit may be conducted by a senior SARS official or SARS official so designated by a senior SARS official in writing.⁵⁰

The conducting of an audit is quite a significant tool at SARS' disposal, this is because one of the effects of an audit is that it may cause an assessment to be issued. This assessment may in

⁴⁴ Section 100(2) read together with ss(1)(d)-(f) of the TAA.

⁴⁵ Sections 3(2)(b).& 40-66 of the TAA.

⁴⁶ Section 9 of the South African Revenue Service Act 34 of 1997 (hereafter referred to as 'the SARS Act').

⁴⁷ Section 6(3) of the TAA.

⁴⁸ Section 41 of the TAA.

⁴⁹ Section 40 of the TAA.

⁵⁰ Section 41 of the TAA.

turn have adverse effects on a taxpayer's tax liability. Oddly enough, as material as an audit is, the TAA does not provide a definition of what constitutes an audit. The definition of an audit is instead found on SARS' website.

In terms of the TAA, 'practice generally prevailing' are practices which are in official publication and are intended to aid in the interpretation or application of a tax act.⁵¹ Official publications under these instances are: binding general rulings, practice notes, interpretation notes and public notices issued by senior SARS officials or the Commissioner.⁵² A definition contained on SARS' website does not form part of what constitute official publication.

3.3.1 *Defining an audit*

A SARS audit is an interrogation of the financial and accounting records of taxpayers. It includes a consideration of the accompanying documentation to determine whether the tax position of a taxpayer has been completely and accurately declared and accounted for.⁵³ Where there was no such declaration, an audit then entails determining whether the taxpayer has complied with the provisions of applicable tax acts.⁵⁴

3.3.2 *Notification of an audit*

The TAA states that:⁵⁵

- (1) A SARS official involved in or responsible for an audit under this Chapter must, in the form and in the manner as may be prescribed by the Commissioner by public notice, provide the taxpayer with a notice of commencement of an audit and, thereafter, a report indicating the stage of completion of the audit.

⁵¹ Section 5(1) of the TAA.

⁵² Section 1 of the TAA– definition of 'official publication'.

⁵³ SARS 'Being audited or selected for verification' available at <https://www.sars.gov.za/individuals/what-if-i-do-not-agree/being-audited-or-selected-for-verification/> (accessed on 29 November 2022) (hereafter referred to as 'SARS Website Audit Guidelines').

⁵⁴ SARS Website Audit Guidelines.

⁵⁵ Section 42(1) of the TAA.

The requirement that a taxpayer must be notified was only inserted to the TAA in 2019 pursuant to various tax reforms.⁵⁶ In January 2019, the Tax Administration Laws Amendment Act,⁵⁷ was promulgated and the words 'provide the taxpayer with a notice of commencement of an audit and, thereafter'⁵⁸ were inserted.⁵⁹ This amendment was to ensure that a taxpayer is indeed informed.⁶⁰

In respect of the envisaged audit reporting, the Commissioner on 1 October 2012 prescribed the form and manner thereof.⁶¹ Every 90 days from the commencement of the audit, the SARS official must report the stage of the audit completeness to the taxpayer.⁶² The 90 days' report intervals are required until the completion of the audit.⁶³

Each report must detail the following:

- (a) A description of the current scope of the audit;
- (b) The audit's stage of completion; and
- (c) Any relevant material requested from the taxpayer that remain outstanding.

To date, the Commissioner has only prescribed and published the form and manner of the report but not of the notice to be issued at the commencement of an audit. The content of an audit notice is only found on SARS' website. The problem this creates is that only binding general rulings, practice notes, interpretation notes and public notices are considered official publications.⁶⁴

According to the SARS website the notice of audit must, among others, state the following:⁶⁵

⁵⁶ Ministry for Finance, Republic of South Africa *Budget Review* (2018) Department of National Treasury pgs 37-38 (hereafter referred to as '*Treasury Budget Review* 2018').

⁵⁷ Act 22 of 2018 (hereafter after referred to as 'TALA').

⁵⁸ Own emphasis.

⁵⁹ Section 16 of the TALA.

⁶⁰ *Treasury Budget Review* 2018 pg137.

⁶¹ Form and Manner of a Report to a taxpayer on the stage of completion of an audit in terms of section 42(1) of the Tax Administration Act, 2011 (Act No. 28 of 2011) GN 788 GG 35733 of 1 October 2012 available at <https://www.sars.gov.za/wpcontent/uploads/Legal/SecLegis/LAPD-LSec-TAdm-PN-2012-02-Notice-788-GG-35733-1-October-2012.pdf> (accessed 28 November 2022) (hereafter referred to as 'Form and Manner Gazette').

⁶² Form and Manner Gazette Schedule Item 2.

⁶³ Form and Manner Gazette Schedule Item 3.

⁶⁴ Section 1 of the TAA.

⁶⁵ SARS Website Audit Guidelines.

- (a) The scope of the audit; and
- (b) The requested material, as envisaged by sections 46 and 47 of the TAA and due date.

The website is silent on whether a taxpayer may anticipate the scope of audit to expand from what was initially contained in the notice of audit. Nor, whether the taxpayer will be informed whenever the scope is extended. However, if one has regard to the Forms and Manner Gazette it is probable that the scope of audit may expand during the course of the audit. This is because, the Forms and Manner Gazette state that in its progress reports, SARS must indicate ‘the description of the *current*⁶⁶ scope of audit’.⁶⁷

3.3.3 Concluding an audit

The TAA does not provide what happens during an audit. What is derived from section 42 are the essentials that there be a notification and progress reports submitted by SARS at intervals. From thereon, what follows is the conclusion of an audit. There appears to be no guidance as to what the audit protocols are generally.

In terms of the TAA at the conclusion of the audit, either of the following occurs -⁶⁸

- (2) Upon conclusion of the audit or a criminal investigation, and where -
 - (a) the audit or investigation was inconclusive, SARS must inform the taxpayer accordingly within 21 business days; or
 - (b) the audit identified potential adjustments of a material nature, SARS must within 21 business days, or the further period that may be required based on the complexities of the audit, provide the taxpayer with a document containing the outcome of the audit, including the grounds for the proposed assessment or decision referred to in section 104 (2).

⁶⁶ Own emphasis.

⁶⁷ Form and Manner Gazette Schedule Item 3.

⁶⁸ Section 42(2) of the TAA.

The SARS website mention that where there are no findings and *to conclude the audit*,⁶⁹ SARS must issue a taxpayer with the finalisation of audit letter.⁷⁰

The conclusion of an audit may produce findings of a material nature, which may necessitate and sustain the basis for the issuance of an assessment(s). In such instance SARS is then required to inform the affected taxpayer(s) what those audit findings are and how such findings inform the grounds on which an assessment may be raised. At that stage the envisaged assessment(s) is a proposal, therefore the reasoning behind informing the taxpayer is to afford the taxpayer an opportunity to respond to the findings and the grounds for the proposed assessment.⁷¹ The SARS website indicate that the proposed assessment would ordinarily disclose the tax amount due as well as any applicable interest and penalties to be levied. The TAA state that the response by the taxpayer must be received within a period of 21 business days.

The TAA under section 42(2)(b) does not indicate whether the proposed assessment would constitute an original or additional assessment. Although reference is made to SARS having ‘identified potential adjustments...’, thereafter these adjustments would then warrant the issuance of an assessment. To adjust something generally means to make changes or modification to something which was already there.

SARS must issue an additional assessment when SARS is of the view that an incorrect application of a tax act has led to SARS or the fiscus having suffered prejudice.⁷² Therefore, to rectify this prejudice the additional assessment must be issued. One of the ways of rectifying something is to adjust. In my opinion it is plausible to deduce that the envisaged assessment pursuant to an audit as referred to under section 42(2)(b), is an additional assessment. There is, therefore, an interrelationship between the audit findings and issuance of an additional assessment within the context of an audit.

⁶⁹ Own emphasis.

⁷⁰ SARS Website Audit Guidelines.

⁷¹ Section 42(2)(b) read together with ss(3) of the TAA.

⁷² Section 92 of the TAA.

(a) *Distinction between an audit findings letter and the finalisation of audit letter*

In section 42(2)(b) it is stated that a ‘document’ detailing the proposed assessment(s) and the audit findings must be provided to the taxpayer. The TAA does not define what constitutes the document referred to. However, the SARS Website Audit Guidelines refer to this document as an audit findings letter.⁷³

Where a taxpayer was afforded an opportunity to respond to the audit findings,⁷⁴ and SARS is not persuaded to concede to the taxpayer’s response, SARS concludes the audit by issuing a finalisation of audit letter.⁷⁵ The finalisation of audit letter would then include the issued additional assessment and grounds for such an assessment.⁷⁶

(b) *Limitation of taxpayers’ rights*

SARS may issue an assessment even where the taxpayer was not afforded an opportunity to respond, nor given progress reports, or a notification about the commencement of an audit.⁷⁷ These limitations apply, if the SARS official assigned to the audit is of the reasonable belief that an adherence to the above legislative prescripts will impede the ‘purpose, progress or outcome of the audit’.⁷⁸

4. *Adjudication of SARS’ procedural [un]fairness*

The objection and appeal procedures fall outside the scope of this study. The procedures are simply highlighted below for completeness. When an additional assessment is raised and taxpayer is aggrieved, section 104 of the TAA requires that a taxpayer lodge an objection with SARS. The subject of the objection is either disputing the actual assessment⁷⁹ or the decision not to allow the lodging of an objection against the assessment.⁸⁰

⁷³ SARS Website Audit Guidelines.

⁷⁴ Section 42(2)(b) of the TAA.

⁷⁵ SARS Website Audit Guidelines.

⁷⁶ SARS Website Audit Guidelines.

⁷⁷ Section 42(6) of the TAA.

⁷⁸ Section 42(5) of the TAA.

⁷⁹ Section 104 (1) of the TAA.

⁸⁰ Section 104 (2)(b) of the TAA.

When the objection is disallowed by SARS,⁸¹ a taxpayer would then have an option to ‘appeal’ to the tax court.⁸² For a taxpayer to bring their contestation within the purview of the tax court, the envisaged appeal would first have to be preceded by the lodging of an objection.

The rules promulgated in accordance with section 103 of the TAA, provide the procedure for the lodging of an objection with SARS and subsequent appeal to the tax court.⁸³

Rule 7(2) indicate that it is a requirement that the grounds for an objection to an assessment must deal largely with the substance of the assessment. There appears to be nothing in section 104 and rule 7 which affords a taxpayer an opportunity to challenge how the assessment came into being, not necessarily whether the assessment is mathematically or substantively correct. The law appears to be that a taxpayer must first attack the merits of the assessment itself and in pursuit thereto mention the issue of procedural fairness - if at all.

The analysis, arguments and views made in the succeeding chapters of this study, centre on the basis that an assessment raised pursuant to a flawed procedure cannot exist outside the procedure which brought it to life.

5. *Conclusion*

SARS is a state organ and the Constitution mandates that it - be accountable, uphold the law and ensure transparency among other things, when it exercises public power. The sources of SARS’ powers to select taxpayers for an audit, conduct the audit and issue an additional assessment is statute -namely the SARS Act and the TAA.

When SARS makes a decision pursuant to an audit, the decision constitute an administrative action. SARS’ audit findings may state that there were adjustments identified during the audit which would necessitate the raising of an additional assessment. SARS is obligated to issue an additional assessment when it holds a view that an incorrect application of a tax act prejudiced

⁸¹ Section 106 of the TAA.

⁸² Section 107(1) of the TAA.

⁸³ Rules Promulgated Under Section 103 of The Tax Administration Act, 2011 GN 550 GG 37819 of 11 July 2014 available at <https://www.sars.gov.za/wp-content/uploads/Legal/SecLegis/LAPD-LSec-TAdm-PN-2014-05-Notice-550-GG-37819-11-July-2014.pdf> (hereafter referred to as ‘the Rules’) (accessed 28 November 2022).

SARS or the fiscus. One way of correcting this prejudice is through the additional assessment. There is therefore an interrelationship between audit findings and an additional assessment within the context of an audit. The decision to issue the additional assessment must in terms of the Constitution be lawful, reasonable and procedurally fair

During an audit the TAA affords the taxpayer three entitlements. To be notified of the commencement of the audit, to be given audit progress reports and to be afforded an opportunity to respond to the audit findings letter before the audit is finalised and an additional assessment(s) is issued. However, it would appear that these entitlements may be suspended at SARS' instance, where there is a reasonable belief that upholding those entitlements will impede the audit and its outcome. SARS' powers during an audit are therefore wide and discretionary.

Adjudging SARS' conduct against the constitutional standard of lawfulness, reasonableness and procedural fairness is by way of a judicial review. In this chapter, I demonstrated that the route to such a review is not limited to just the internal remedies provided for in the TAA. The remedies in the TAA are only triggered when the taxpayer objects to an assessment. A taxpayer's main objection would essentially be challenging the substance of the issued assessment. This route does not appear to provide the procedure to challenge an assessment solely on the basis that the taxpayer is aggrieved by the procedure that underpinned the issuance of an assessment.

In chapter 3, I provide an analysis of how courts during review applications have interpreted the exercising of public power generally and when it involves powers exercised by SARS.

CHAPTER THREE

A LAWFUL, REASONABLE AND PROCEDURALLY FAIR DECISION

1. Introduction

In chapter two, the legal framework and practice underpinning SARS' audit process is outlined. Behind such a process are the legislative powers given to SARS in the execution of its mandate. Although the TAA does in some instance state what specific powers are afforded to SARS and under which circumstances, SARS may also do *all that is necessary*¹ to execute its mandate - primarily being the collection of revenue.² Legislation does not always state how such powers are to be exercised. Specifically, legislation may at times not provide a step-by-step process. When legislation is not explicit SARS would then be executing its mandate discretionarily.³

The Constitution mandates that an administrative action must be lawful, reasonable and procedurally fair.⁴ Administrative actions can be challenged by way of instituting a review application in court. This chapter interrogates what it entails for an administrative action to be lawful, reasonable and procedurally fair. This is done by analysing some of the judicial interpretation of what constitutes a just administrative action within the context of the Constitution and by extension the PAJA.

2. Distinction between a review and appeal

The challenge facing some litigants would be how they classify their tax dispute, for the high court to have jurisdiction. This is because ordinarily tax disputes are to be heard by the tax court. However, the view I express throughout this study and specifically under chapter 4 is that when the basis of the dispute is that a flawed procedure was followed, in my opinion the high court has jurisdiction.

¹ Own emphasis.

² Section 5(1) of the South African Revenue Service Act 34 of 1997 (hereafter referred to as 'the SARS Act').

³ Section 5(1)(k) of the SARS Act.

⁴ Section 33(1) of the Constitution of the Republic of South Africa, 1996 (hereafter referred to as 'the Constitution').

A tax court is dubbed a court of appeal, where the merits of the impugned assessment are in dispute. Whereas, when one concerns themselves with only the procedural aspect of the assessment, that would constitute a review. A review court interprets the law and apply the law to the facts. The question that would have to be answered is whether SARS' decision was reached in a lawful, reasonable and procedurally fair manner as demanded by the Constitution and amplified by the PAJA.⁵

An appeal court decides whether the decision itself is the correct one to make. In order to ascertain whether the merits support the decision made, the appeal court assumes the role of the administrator.⁶ The appeal court would then say whether the merits underpinning the issuance of an assessment is justified. Whereas a court of review would either dismiss the review or set the decision aside on procedural aspects alone and not the merits.⁷ This is so even where the decision may have been the correct one based on merits. A flawed procedure can taint an otherwise correct conclusion.

3. *Lawful*

3.1 **Defining lawfulness**

Law and conduct inconsistent with the Constitution are invalid.⁸ When considering whether a decision was lawful, the PAJA provides the framework to guide an enquiry as to what constitutes a lawful decision.⁹ The courts interpret the provisions of PAJA¹⁰ and apply them to review an administrative action judicially within the context of what the Constitution mandates under section 33.¹¹

⁵ M Kidd 'Reasonableness' in G Quinot (ed) *Administrative Justice in South Africa An Introduction* (2017) 169-170.

⁶ M Kidd 'Reasonableness' in G Quinot (ed) *Administrative Justice in South Africa An Introduction* (2017) 169-170.

⁷ C Hoexter *Administrative Law in South Africa* (2012) 108-111.

⁸ Section 2 of the Constitution.

⁹ Section 33(3) of the Constitution and the Preamble to the Promotion of Administrative Justice Act 3 of 2000 (herein referred to as 'the PAJA').

¹⁰ Section 6 of the PAJA.

¹¹ *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (C) para 30 pg 33 ('Gijima').

Hoexter states the lawfulness of a decision encompasses three broad themes - authority, jurisdiction and discretion.¹²

3.2 Authority, Jurisdiction and Discretion

The power exercised by public officials are generally not inherent.¹³ Legislation must form the basis from which the power to act or make a decision flow.

The Constitutional court in *Fedsure v Greater Johannesburg*,¹⁴ held that to act outside the parameters of the Interim Constitution and statutes would be unconstitutional and, therefore, unlawful.¹⁵

If the exercising of power is only triggered upon a precondition being met, the authority is then suspended until such fulfilment. The Supreme Court of Appeal (hereafter referred to as 'the SCA') in *Paulo v Jeeva NO*,¹⁶ held that the municipality's power to approve building plans is incapacitated in absence of a building control officer first making recommendations.¹⁷

In *Commissioner for the South African Revenue Service v Hawker Aviation Services Partnership*,¹⁸ the Commissioner imposed penalties exceeding the 200 percent allowed in the Value-added Tax Act 89 of 1991 ('VAT Act').¹⁹ The Court held because there was no such allowance in law, a 300% penalty levied by the Commissioner was unlawful.²⁰

¹² C Hoexter *Administrative Law in South Africa* (2012) 254.

¹³ C Hoexter *Administrative Law in South Africa* (2012) 255.

¹⁴ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) ('*Fedsure*').

¹⁵ *Fedsure* para 56 pg 399.

¹⁶ *Paola v Jeeva No and Others* 2004 (1) SA 396 (SCA) ('*Paola v Jeeva*').

¹⁷ *Paola v Jeeva* 6-7 pgs 400-401.

¹⁸ *Commissioner for the South African Revenue Service v Hawker Aviation Services Partnership and Others* 2005 (5) SA 283 (T) ('*CSARS v Hawker*').

¹⁹ *CSARS v Hawker* para 60-61 pg 307.

²⁰ C Hoexter *Administrative Law in South Africa* (2012) 282-283.

The methodology on how administrators make their decisions is sometimes at their discretion.²¹ The exercising of all public power by the executive and other functionaries must still be exercised in an objectively rational manner.²²

Unfettered discretion may produce undesirable consequences. The Constitutional Court in *Dawood v Minister of Home Affairs*,²³ held that where necessary delegated legislation must be enacted to provide the guidance that will curtail the discretion.²⁴ However, the legislation must not be so stringent as to inhibit the administrator from adequately exercising their discretion.²⁵

4. Reasonableness

4.1 Defining reasonableness

The overarching principle is to determine whether a decision-maker in a similar position would have taken the decision in a similar manner.²⁶

De Ville, Hoexter and Kidd appear to suggest that elements of reasonableness are rationality and proportionality.²⁷

²¹ G Quinot 'Lawfulness' in G Quinot (ed) *Administrative Justice in South Africa An Introduction* (2017) 123 and 317.

²² *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of The Republic Of South Africa and Others*, 2000 (2) SA 674 (CC) para 89 pg 709 ('Pharmaceutical').

²³ *Dawood v Minister of Home Affairs Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister Of Home Affairs and Others* 2000 (3) SA 936 (CC) ('Dawood').

²⁴ *Dawood* paras 48, 54 pgs 967 & 969.

²⁵ C Hoexter *Administrative Law in South Africa* 319-321. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (2004) SA 490 (CC) ('Bato Star') paras 57-58 pgs 517-518 and *Foodcorp (Pty) Ltd v Deputy Director-General of Environmental Affairs and Tourism, Marine Branch and Coastal Management and Others* 2006 (2) SA 191 (SCA) ('Foodcorp SCA') paras 9, 18-19 pgs 195 & 198.

²⁶ Section 6(2)(h) of the PAJA; M Kidd 'Reasonableness' in G Quinot (ed) *Administrative Justice in South Africa An Introduction* (2017) 174; C Hoexter *Administrative Law in South Africa* (2012) 340.

²⁷ JD de Ville *Judicial Review of Administrative Action in South Africa* (2003) 212; C Hoexter *Administrative Law in South Africa* (2012) 342-344; M Kidd 'Reasonableness' in G Quinot (ed) *Administrative Justice in South Africa An Introduction* (2017) 177&180.

4.2 Rationality and proportionality

Under section 6(2)(f)(ii) of the PAJA the purpose of the empowering provision or statute must rationally correlate with the decision taken.²⁸ In *Bato Star (Pty) Ltd v Minister of Environmental Affairs and Tourism*,²⁹ the Constitutional Court held that the judiciary must respect the executive arm of government's jurisdiction based on the principle of separation of powers.³⁰ However, that does not exclude the judiciary to intervene when called to determine whether the actions of an administrator are reasonable.³¹

Proportionality requires that in the exercising of its power, an administrator must strike a balance between its functions and the rights that could potentially be infringed.³² The case in *Ferucci v Commissioner for the South Africa Revenue Service*³³ concerned SARS' search and seizure powers. SARS secured a warrant in the course of the administration of tax acts.³⁴ The Court held a view that the extent of the warrant was open-ended and offered SARS carte blanche, and that where less restrictive means exists to achieve the objective, those should be employed.

5. Procedural fairness

5.1 Context

Section 33(1) of the Constitution requires administrative actions to be procedurally fair. Within this context two broad Latin maxima come to mind. These are *audi alteram partem* and *nemo iudex in sua*.³⁵ The discussion hereunder focuses on the first maxim, *audi alteram partem*, which simply is that the party affected must be given an opportunity to be part of a decision.

²⁸ Section 6(2)(f)(ii)(bb) read with (aa) of the PAJA. *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* 2004 (3) SA 346 (SCA) ('Trinity') paras 36, 43, 46-47 pgs 358-360.

²⁹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (2004) SA 490 (CC) ('Bato Star').

³⁰ *Bato Star* para 48 pg 514.

³¹ *Bato Star* para 48 pg 514.

³² C Hoexter *Administrative Law in South Africa* (2012) 344.

³³ *Ferucci and Other v Commissioner for the South Africa Revenue Service* 2002 (6) SA 219 (C) ('Ferucci').

³⁴ *Ferucci* 223F-G.

³⁵ M Murcott 'Procedural Fairness' in G Quinot (ed) *Administrative Justice In South Africa An Introduction* (2017) 145.

Nemo iudex in sua causa means that one cannot be the judge and executor in a matter they have an interest.³⁶

Section 42 of the TAA is premised on the ethos that a taxpayer must be informed. The taxpayer must be ‘in the know’ what is it that SARS intends to do, under what circumstances and how (and when) does the taxpayer participate in the decision-making process.³⁷

The discussions are also be limited to requirements under section 3 of the PAJA and not section 4, because the inquiry under study is that of decision(s) that may adversely affect a specific taxpayer(s) pursuant to being selected for an audit.³⁸ Specifically, only three requirements are discussed, which are to be given notice, an opportunity to make representations and a clear statement of the decision taken.

5.2 Requirements of a procedurally fair decision or conduct

The right to procedural fairness *mandates*³⁹ that a person that is (or can be) materially and adversely affected by an administrative action must be given a notice, right to reply and a clear statement once a decision is made.⁴⁰

5.2.1 Notice

There is no clarification nor guidance from the PAJA itself regarding the information to be contained in the envisaged notice. In respect of the particularity of a notice, Croome quotes Bentley, who commented on an audit notification as follows:⁴¹

³⁶ M Murcott ‘Procedural Fairness’ in G Quinot (ed) *Administrative Justice In South Africa An Introduction* (2017) 145.

³⁷ M Murcott ‘Procedural Fairness’ in G Quinot (ed) *Administrative Justice In South Africa An Introduction* (2017) at 146.

³⁸ Section 4 of the PAJA focuses on decisions which adversely affect the general public and not just a specific rightsholder as in the case under section 3.

³⁹ Own emphasis.

⁴⁰ Section 3(2)(b)(i)-(v) of the PAJA; C Hoexter *Administrative Law in South Africa* (2012) 376.

⁴¹ B Croome *Taxpayers’ Rights in South Africa* (2010) 224.

Taxpayers should be given prior notification of an audit ... as in any administrative decision, the tax authority should explain to taxpayer why they are chosen for an audit, what taxes and what years the audit will cover, what documents, books and other records will be required, how the audit will proceed.⁴²

The High Court in *Trend Finance v Commissioner for the South African Revenue Service*⁴³ stated that the evidence before court indicated that the taxpayers were not informed what exactly they were accused of, prior to the provisional payment being demanded.⁴⁴ The taxpayers had thought the case was their liability for the underpayment of import duty and VAT.⁴⁵ They were not aware nor informed that the decision being contemplated was the determination of the payment *in lieu* of forfeiture.⁴⁶ Nonetheless, that determination was made in absence of the taxpayers' knowing or making their representations. In those circumstances, the Court held that SARS' conduct infringed the PAJA mandatory requirements regarding notice and an opportunity to make representations.⁴⁷

In *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools*,⁴⁸ the Constitutional Court held that the public must have confidence in the certainty of government policies that a reasonable notice would be given when the policies are altered and in a way that will or threaten to adversely affect their rights.⁴⁹ The public must also be placed in position where they can make representations accordingly.⁵⁰

5.2.2 Representations

A procedurally fair process requires that the affected person(s) be given a reasonable opportunity to make representations regarding the proposed administrative action. The

⁴² Quotation by D Bentley in D Bentley *Taxpayers' Rights: An International Perspective* (1998) referred to in B Croome *Taxpayers' Rights in South Africa* (2010) 224.

⁴³ *Trend Finance (Pty) Ltd and Another v Commissioner for South African Revenue Service and Another* 2006 (2) BCLR 304 (C) (*Trend Finance HC*).

⁴⁴ *Trend Finance HC* para 81.3 pg 339.

⁴⁵ *Trend Finance HC* para 84 pg 341.

⁴⁶ *Trend Finance HC* para 84 pg 341.

⁴⁷ *Trend Finance HC* para 84 pg 341.

⁴⁸ *Premier, Mpumalanga and Another v Executive Committee, Association of State-Aided School, Eastern Transvaal* 1999(2) SA 91 (CC) ('*Association of State-Aided Schools*').

⁴⁹ *Association of State-Aided Schools* para 41 pg 109.

⁵⁰ *Association of State-Aided Schools* para 42 pg 110.

administrator would not necessarily be bound by the representations made.⁵¹ However, the principle is his or her decision ought to be made upon a consideration of all views and evidence necessary.⁵²

A real opportunity logically means that proper representations can only be made upon an appraisal of the information on which the administrator's proposed actions is reliant.⁵³ This will ensure that the representation matches or counters such information. In *Brits and Others v Commissioner for the South African Revenue Service*,⁵⁴ the High Court held that the taxpayers' ability to make a meaningful response to the audit findings letter, is dependent on having sight of the documents on which the audit and findings are reliant.⁵⁵ SARS argued that the absence of such information and documentation is inconsequential because the taxpayers have an option to object to the additional assessments raised.⁵⁶ The Court disagreed and stated that by then the documentation would be of little use because the additional assessments would have been raised absent the taxpayers' representations.⁵⁷ Furthermore, the taxpayers would now have found themselves being indebted to SARS for taxes caused by a flawed procedure.⁵⁸ The Court thus held that the interlocutory relief sought was for the simple reason that once the assessments are issued, the debt is created. The taxpayer would then have to pay the debt as a matter of law.⁵⁹

A similar approach was taken by the Tax Court in *Mr A v Commissioner for the South African Revenue Service*.⁶⁰ The Tax court stated SARS' failure to notify the taxpayer that his tax affairs were being audited also took away the opportunity to make representations.⁶¹ The evidence indicated that had representation been made then the taxpayer would have explained away what

⁵¹ M Murcott 'Procedural Fairness' in G Quinot (ed) *Administrative Justice In South Africa An Introduction* (2017) 155-56 .

⁵² M Murcott 'Procedural Fairness' in G Quinot (ed) *Administrative Justice In South Africa An Introduction* (2017) 155.

⁵³ C Hoexter *Administrative Law in South Africa* (2012) 372-374.

⁵⁴ *Brits and Others v Commissioner for the South African Revenue Service* (44380/17) [2017] ZAGPJHC (28 November 2017) ('*Brits v CSARS*').

⁵⁵ *Brits v CSARS* paras 7-9 pgs 3-4.

⁵⁶ *Brits v CSARS* para 11 pg 4.

⁵⁷ *Brits v CSARS* para 11 pg 4.

⁵⁸ *Brits v CSARS* paras 9-10 pg 4.

⁵⁹ *Brits v CSARS* para 11 pg 4.

⁶⁰ *Mr A v Commissioner for the South African Revenue Service* (IT13726) [2018] ZATC 8 ('*Mr v CSARS*').

⁶¹ *Mr v CSARS* paras 20-22 pgs 7-9.

appeared to SARS as tax anomalies. Specifically, the Court held that the taxpayer would have explained that the lump sum was a severance benefit and not part of normal taxable income.⁶² This explanation would have assisted to influence SARS' decision on whether to issue additional assessments.⁶³ Ultimately, SARS failed to follow the procedure under section 42 of the TAA. Its conduct not only flouted the right to a procedurally fair procedure but also the principle of legality.⁶⁴ This is because the empowering legislation outlined the procedure to be followed and SARS failed to do so. The Tax court found that the additional assessment(s) raised pursuant to a violation of the empowering provisions, is invalid.⁶⁵

5.2.3 *A clear statement*

The statement of the decision is the actual administrative decision taken, as the first steps relates to 'a proposed administrative action'.⁶⁶ The statement is meant to give all the necessary details on which the decision is made and by whom it is being made.⁶⁷ Upon receiving the statement, the person(s) adversely affected would then be enabled to have all that is necessary to challenge the decision, whether by launching a review application or internal remedies.⁶⁸

5.3 **Caveat to procedural fairness**

A deviation from the procedural requirements under section 3(2)(b) is permissible, under two scenarios. One, where a fair but different process is chosen by the administrator. Here there is a still a process followed and similar to that of the PAJA.⁶⁹ Second, a complete deviation is allowed where little to no process is followed.⁷⁰ Under the second scenario, the PAJA allows for a deviation under exceptional circumstances informed by listed criteria.⁷¹ These

⁶² *Mr A v CSARS* paras 23&26 pgs 9&12.

⁶³ *Mr A v CSARS* para 28 pg 18.

⁶⁴ *Mr A v CSARS* paras 20-23 pgs 7-9.

⁶⁵ *Mr A v CSARS* para 30 pg 14.

⁶⁶ C Hoexter *Administrative Law in South Africa* (2012) 376.

⁶⁷ C Hoexter *Administrative Law in South Africa* (2012) 376.

⁶⁸ M Murcott 'Procedural Fairness' in G Quinot (ed) *Administrative Justice In South Africa An Introduction* (2017) 156.

⁶⁹ Section 3(5) of the PAJA.

⁷⁰ Section 3(4)(a) of the PAJA.

⁷¹ Section 3(4)(b)(i)-(v) of the PAJA.

circumstances must be reasonable and justifiable. The effect of which would mean that the right to fair and just administrative action is justifiably limited.⁷²

The decisions for deviation are to be informed by the following:⁷³

- (i) The objects of the empowering provisions;
- (ii) The nature and purpose of, and the need to take, the administrative action;
- (iii) The likely effect of the administrative action;
- (iv) The urgency of taking the administrative action or the urgency of the matter; and
- (v) The need to promote an efficient administration and good governance.

The case in *Magingxa v National Commissioner of South Africa Police Service* concerned the withdrawing of the applicant's license to deal with arms and ammunition.⁷⁴ No prior notification was given to the applicant, nor a chance to make representations before the withdrawal.⁷⁵ The applicant had not been informed what his contraventions were. The Court held that there was nothing to show that an adherence to the requirement of procedural fairness would impede the promotion of an efficient administration and good governance. There was also no urgency to withdraw the license, this was evident by the applicant being afforded a temporary license.⁷⁶ The Court held that the applicant was not entitled to material information during the investigative stages but once the evidence was compiled, the applicant is to know the charges and make representations accordingly.⁷⁷ The respondents did not meet the factors justifying a deviation under section 3(4)(b) of the PAJA.

The decision in *Earthlife v Director-General Department of Environmental Affairs*⁷⁸ is closely related to this study in respect of the interrelationship between audit findings and the final decision by SARS to raise an additional assessment. In this case, the full court of the Cape Provincial division held that further representations by those affected was required where new

⁷² B Croome *Taxpayers' Rights in South Africa* (2010) 217.

⁷³ Section 3(4)(b)(i)-(v) of the PAJA.

⁷⁴ *Magingxa v National Commissioner, South Africa Police Service and Others* 2003 (4) SA 101 (TkH) ('*Magingxa*').

⁷⁵ *Magingxa* 104F-H.

⁷⁶ *Magingxa* 112E-H.

⁷⁷ *Magingxa* 112D-E & 113D-G.

⁷⁸ *Earthlife Africa (Cape Town) v Director-General, Department of Environmental Affairs and Tourism and Another* 2005 (3) SA 156 (C) ('*Earthlife Cpt*').

information was added to the initial report. Especially, where the amended environmental impact report is or would be the basis of the ultimate decision by the decision-maker.⁷⁹ The Court said that it was unsound for the respondents to make an argument that earlier representation was allowed, therefore, subsequent representation was not necessary.⁸⁰

A process is unfair where it allows for a decision that adversely affects others to be made on new information being made available to the decision-maker but disallows further representations.⁸¹ Furthermore, the whole purpose of seeking representations was part of a public participation process as required by the empowering provisions. This is to allow the Director-General to consider all information and views in the course of making the decision to grant the approval for the construction of the nuclear reactor.⁸²

Having found it unnecessary to afford the applicants this chance is contrary to section 3(4)(b)(ii) of the PAJA.⁸³ The decision was set aside and remitted for reconsideration whilst affording further representations to be made.⁸⁴

6. Conclusion

The lawfulness of an administrative action entail that an empowering statute has designated that the particular action be taken by the administrator. The powers exercised by SARS must be backed by empowering legislation or else they are unlawful. An enquiry whether a decision or conduct is reasonable requires a determination on whether the decision rationally correlates to the purpose of the empowering provision. Being reasonable requires the balancing of competing interests and the administrator is required to employ less intrusive and infringing means to achieve its functions. The Constitutional Court has held that it is improper for a review court to encroach within an area reserved for the executive. Nonetheless, a court will intervene, not to overtake the legislative power, but to interpret and apply the law.

⁷⁹ *Earthlife Cpt* para 61 pg 173.

⁸⁰ *Earthlife Cpt* paras 59-61 pgs 172-173.

⁸¹ *Earthlife Cpt* paras 62-64 pgs 173-174.

⁸² *Earthlife Cpt* paras 4-6 & 9-11 pgs 161-162.

⁸³ *Earthlife Cpt* paras 66-69 pgs 174-175.

⁸⁴ *Earthlife Cpt* para 82 pg 178.

Section 3(2)(b) of the PAJA, among others, mandates that an adverse decision, must be preceded by a notice, and a reasonable opportunity to make representations. One can only make representations when they know what to respond to. A notice must place the taxpayer 'in the know'. It must be clear from the notice what is and the extent of the proposed administrative action. The taxpayer must almost anticipate what an audit would cover and what it would likely reveal. The Constitutional Court has held that the public must have confidence in the certainty of public administration. One way of doing that is by affording the affected persons reasonable and clear notice on matters that may adversely affect them. Thereafter, a clear statement of what the decision is.

A High Court, in *Bits v CSARS*, ruled that objecting to an additional assessment that was based on a flawed procedure gives a taxpayer little comfort. The issuing of the additional assessment has created a debt. Had procedure been followed the debt could have been averted.

A full bench of the High Court, in *Earthlife Cpt*, ruled that a process is unfair when the information that the decision-maker was to consider changed along the process. It was unfair because the affected persons were not afforded a chance to make representations on the new information but instead their involvement was confined to the former information. The ultimate decision made by the decision-maker was reliant on the new information, which had not been challenged.

In the next chapter, an analysis of section 42 of the TAA is advanced within the purview of the judicial pronouncements discussed in this chapter. Given the interrelationship between an audit outcome and the issuance of additional assessment under discussion, *Kalahari*⁸⁵ which is pending appeal, forms the basis of the discussion.

⁸⁵ *United Manganese of Kalahari (Pty) Ltd v Commissioner for the South African Revenue Service* (21563/20) [2021] ZAGPPHC (30 September 2021).

CHAPTER 4
THE INTERFACE BETWEEN THE TAX ADMINISTRATION ACT AND
ADMINISTRATIVE JUSTICE

1. *Introduction*

This chapter interrogates the audit process envisaged under section 42 of the TAA.¹ It does so by providing a critical analysis of the interface between the prescripts under section 42 and the right to just administrative action foreshadowed by the Constitution and PAJA. The analysis does not only cover what the provision requires SARS to do but also the shortcomings of section 42. The arguments presented are anchored on whether SARS may extend the scope of the audit after its audit findings were issued and having received the taxpayer's representations. Specifically, to provide an analysis on how the right to procedurally fairness may be affected when SARS issues an additional assessment based on amended audit findings without the taxpayer making further representations.

In the discussions, reference is made to the *United Manganese of Kalahari (Pty) Ltd v Commissioner for the South African Revenue Service*,² which is currently pending appeal at the Supreme Court of Appeal (hereafter referred to as 'the SCA'). This case is significant as it is hoped that it will provide an authoritative pronouncement on what would entail a compliance to section 42 by SARS and section 33(1) of the Constitution.

2. *Notice of an audit*

2.1 *Section 42(1)*

Section 42(1) of the TAA states as follows:

A SARS official involved in or responsible for an audit under this Chapter must, in the form and in the manner as may be prescribed by the Commissioner by public notice, provide the taxpayer with a notice of commencement of an audit and, thereafter, a report indicating the stage of completion of the audit.

¹ Act 28 of 2011.

² *United Manganese of Kalahari (Pty) Ltd v The Commissioner for the South African Revenue Service* (21563/20) [2021] ZAGPPHC (30 September 2021) ('*Kalahari*').

2.2 Prescripts of lawfulness

Section 42 empowers SARS to conduct an audit. Being an empowering provision, the process of audit must be informed by this section.³ The SCA in *Paola*⁴ held that should there be preconditions before the power is evoked those must be discharged first.⁵ As such, the commencement of audit must be preceded by a notice.⁶

2.2.1 Scope of audit - shortcomings

Section 42(1) is silent on the details to be contained in the notice. Notably, whether the scope of the audit must be specifically detailed from the onset. However, the Commissioner may issue a public notice, in which the form and manner of the notice are prescribed. Despite having the power to issue this notice, the Commissioner has to date not done so. The only public notice recorded in this regard was in 2012 in respect of the content of the audit report required at different stages during an audit.⁷ My opinion is that in absence of the Commissioner's public notice with respect to an audit notice, the content thereof is then at SARS' discretion.⁸

It was held in *Dawood*, that discretion can be curtailed by the enactment of delegated legislation.⁹ In not publishing the notice to inform the content of a notice of audit, my view is

³ *Sasol Oil (Pty) Ltd and Another v Metcalfe No 2004 (5) SA 161 (W)* ('*Sasol Oil*') at paras 9-10 pgs 167-168; *Commissioner for the South African Revenue Service v Hawker Aviation Services Partnership and Others 2005 (5) SA 283 (T)* ('*CSARS v Hawker*') paras 60-61 pg 307.

⁴ *Paola v Jeeva No and Others 2004 (1) SA 396 (SCA)* ('*Paola*').

⁵ *Paola* paras 6-7 pgs 400-401; C Hoexter *Administrative Law in South Africa* (2012) 253.

⁶ SARS 'Being audited or selected for verification' available at <https://www.sars.gov.za/individuals/what-if-i-do-not-agree/being-audited-or-selected-for-verification/> (accessed on 30 November 2022) (hereafter referred to as 'SARS Website Audit Guidelines').

⁷ Items 2 & 3 of the Schedule of the Form and Manner of a Report to a taxpayer on the stage of completion of an audit in terms of section 42(1) of the Tax Administration Act, 2011 (Act No. 28 of 2011) GN 788 GG 35733 of 1 October 2012 available at <https://www.sars.gov.za/wp-content/uploads/Legal/SecLegis/LAPD-LSec-TAdm-PN-2012-02-Notice-788-GG-35733-1-October-2012.pdf> (accessed 30 November 2022) (hereafter referred to as 'Form and Manner Gazette').

⁸ W Pocock 'The SARS Audit; 50 Shades of Pay' (2018) Without Prejudice The Law Magazine, available on <https://www.withoutprejudice.co.za/free/article/6168/view> (accessed 30 November 2022).

⁹ *Dawood v Minister of Home Affairs Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC)* ('*Dawood*') para 90 pg 709.

that the Commissioner has failed to exercise its powers, the result of which is that SARS discretion is unfettered.

SARS' actions must be rationally connected to the purpose which underpin its powers.¹⁰ The purpose of the section 42 is that the taxpayer must be informed at the commencement of, and during an audit. It will be irrational for SARS to opt not to inform the taxpayer of its pending audit.

2.2.2 *Significance of the scope of audit*

The scope of audit is significant because, when the taxpayer is aware of the initial scope, they are then placed better to know when and if the scope has been altered during the audit process. When adjustments are only made known upon the finalisation of an audit the opportunity to make representations against such an alteration would have passed.

In *Brits v CSARS*, the Court stated that once an additional assessment(s) is issued, a debt is created.¹¹ My argument is that had the scope, audit findings and any alterations thereto been known at all material times,¹² the issuance of an additional assessment may have been averted by a taxpayer.

3. *Audit findings*

3.1 **Section 42(2) and Section 42(3)**

Section 42(2)(b) of the TAA states as follows:

Upon conclusion of the audit or a criminal investigation, and where –

¹⁰ Section 6(2)(f)(ii) of the PAJA.

¹¹ *Brits and Others v Commissioner for the South African Revenue Service* (44380/17) [2017] ZAGPJHC (28 November 2017) (*'Brits v CSARS'*) paras 9-11 pg 4. Sections 104-105 read together with Rule 7 of the TAA.

¹² N Theron & W Swart 'Verifications or Audits; What if SARS Does Not Comply' (2019) News Press TaxTalk, available at <https://www.thesait.org.za/news/477731/Verifications-or-Audits--What-If-SARS-Does-Not-Comply.htm> (accessed 30 November 2022).

- (b) the audit identified *potential adjustments*¹³ of a material nature, SARS must within 21 business days, or the further period that may be required based on the complexities of the audit, provide the taxpayer with a document containing the outcome of the audit, including the grounds for the *proposed assessment*¹⁴ or decision referred to in section 104 (2).

Whilst section 42(3) of the TAA states as follows:

Upon receipt of the document described in subsection (2)(b), the taxpayer must within 21 business days of delivery of the document, or the further period requested by the taxpayer that may be allowed by SARS based on the complexities of the audit, respond in writing to the facts and conclusions set out in the document.

3.2 Interpretation of procedural fairness

The High Court in both *Trend Finance HC* and *Brits v CSARS*, held that a taxpayer must be placed in a position to make effective representations.¹⁵ This will entail knowing what taxes were being audited, for which assessment years and what findings were concluded by SARS.¹⁶ Further, where adjustments are imminent, the taxpayer must know what is it that they are being accused of, to justify the adjustment proposed.¹⁷

3.2.1 Representations - shortcomings

There is currently nothing in the TAA which affords a taxpayer a right to make ‘interim representations’ whenever progress reports are issued and before the proposed adjustments are made. Furthermore, the TAA is unclear whether a taxpayer has a right to request all the material that informed the audit findings. If there is such an allowance, it would be at the behest of the

¹³ Own emphasis.

¹⁴ Own emphasis.

¹⁵ *Trend Finance (Pty) Ltd and Another v Commissioner for the South African Revenue Service and Another* 2006 (2) BCLR 304 (C) (*Trend Finance HC*) para 84 pg 341; *Brits v CSARS* paras 7-9 pgs 3-4.

¹⁶ B Croome *Taxpayers’ Rights in South Africa* (2010) 224.

¹⁷ *Trend Finance HC* para 81.3 pg 339.

SARS official in charge of the audit. This limitation, again, indicates the extent of SARS' discretionary powers during an audit. In comparison, section 80J of the Income Tax Act,¹⁸ requires the Commissioner to afford a taxpayer an opportunity to reply to a notice that the Commissioner suspects that a taxpayer has engaged in an impermissible tax avoidance arrangement.¹⁹ The purpose of the representations are meant to assist the Commissioner in determining whether to determine the liability or withdraw its notice.²⁰

3.2.2 *Significance of representations*

The submission of representations does not necessarily mean that SARS is bound by those representations. The aim is for SARS to comprehend the effect of its pending administrative action being the additional assessment.²¹ It can only comprehend such an effect when all information and evidence necessary is considered. This also gives a taxpayer an opportunity to influence SARS' decision by presenting evidence denouncing the issuance of an additional assessment.²²

3.2.3 *Representations - interrelationship between an audit findings letter, audit finalisation letter and the issuance of an additional assessment*

In terms of section 42(2)(b), an audit findings letter must present grounds on which the proposed additional assessment is based. A taxpayer is then given an opportunity to respond. My argument is that, should it be that pursuant to the representations, SARS is prompted to effect further adjustments, then it ought to again issue another findings letter. It would be procedurally unfair for SARS to continue to conclude the audit and issue an audit finalisation letter. This is so especially where the finalisation letter is coupled with a revised assessment under circumstances where further representations were not sought. The taxpayer's initial representations would have been confined to what SARS presented in its initial findings letter.

¹⁸ Income Tax Act 58 of 1962 (hereafter referred to as 'the Income Tax Act').

¹⁹ Section 80J(1)-(2) of the Income Tax Act.

²⁰ Section 80J(3) of the Income Tax Act.

²¹ M Murcott 'Procedural Fairness' in G Quinot (ed) *Administrative Justice In South Africa An Introduction* (2017) 155.

²² M Murcott 'Procedural Fairness' in G Quinot (ed) *Administrative Justice In South Africa An Introduction* (2017) 155; *Mr A v Commissioner for the South African Revenue Service* (IT13726) [2018] ZATC 8 ('*Mr A v CSARS*').

In *Earthlife Cpt*, the Court held that should things change in the course of an administrative action, procedural fairness requires an administrator to revert to the affected person.²³

SARS' process would be unfair when it uses new information to either issue an entirely new revised assessment or amend the grounds it would have had in the initial audit findings letter.²⁴ Taking cognizance of the Court's reasoning in *Earthlife Cpt*, my view is that such a decision by SARS may be set aside on review.

Section 42 does not refer to the concept of an audit finalisation letter, there is no mention as to what happens after representations have been made. This then leaves SARS with unfettered leeway on matters that may adversely affect a taxpayer. The prevalence of a deviation from the grounds of assessment as captured in the audit findings letter then becomes imminent.

4. SARS' caveat for a deviation from a fair process

4.1 Section 42(5) and Section 42(6)

Section 42(5) of the TAA states as follows:

Subsections (1) and (2)(b) do not apply if a senior SARS official has a reasonable belief that compliance with those subsections would impede or prejudice the purpose, progress or outcome of the audit.

Whilst section 42(6) of the TAA states as follows:

SARS may under the circumstances described in subsection (5) issue the assessment or make the decision referred to in section 104 (2) resulting from the audit and the grounds of the assessment or decision must be provided to the taxpayer within 21 business days of the assessment or the decision, or the further period that may be required based on the complexities of the audit or the decision.

²³ *Earthlife Africa (Cape Town) v Director-General, Department of Environmental Affairs and Tourism and Another* 2005 (3) SA 156 (C) ('*Earthlife Cpt*') paras 59-64 pgs 172-174.

²⁴ N Theron & W Swart 'Verifications or Audits; What if SARS Does Not Comply' (2019) News Press TaxTalk, available at <https://www.thesait.org.za/news/477731/Verifications-or-Audits--What-If-SARS-Does-Not-Comply.htm> (accessed 29 November 2022).

4.2 Effects of the limitation to the requirement for procedural fairness

Section 42(5) and (6) of the TAA read together empowers SARS to not issue notices of audit, nor to provide a taxpayer an opportunity to make representations. Section 3(4)(a) of the PAJA allows for a deviation, *albeit* it must be reasonable and justifiable. On these bases, an additional assessment may be issued and come as a surprise to a taxpayer.

4.3 Caveat -shortcomings

The deviation applies when SARS has a reasonable belief that to follow a fair procedure would hinder its audit. There is nothing in the subsections that gives guidance as to what determines a reasonableness belief. Nor, how under these circumstances would a taxpayer be able to hold SARS to account. The TAA is silent on whether a taxpayer can request the grounds of this ‘reasonable belief’ to be provided before an additional assessment is raised.

Once the assessment has been issued, a tax debt is created against a taxpayer. In terms of *Brits v CSARS*, the taxpayer may only now object to the assessment. Yet, in accordance with the pay-now-argue-later principle, the taxpayer must pay the tax debt despite the pending objection. This could have been avoided, if due process was followed.²⁵ The SCA held in *Singh v Commissioner for the South African Revenue Service* that the issuance of an assessment is for payment to be made and not for the possibility that an objection or appeal may be instituted.²⁶

In my view the effect of the subsections is that the administrative justice mandated by the Constitution and the PAJA would not be achieved. The right to an administrative action that is reasonable and procedurally fair would be infringed.

²⁵ *Brits v CSARS* at paras 9-10 pg 4; *Mr A v CSARS* at para 28 pg 18.

²⁶ *Singh v Commissioner for the South African Revenue Service* 2003 (4) SA 520 (SCA) (‘Singh’) paras 14-17 pg 526.

5. *United Manganese of Kalahari (Pty) Ltd v Commissioner for the South African Revenue Service (21563/20)*

5.1 **Summary of the pertinent issues**

The Applicant, United Manganese of Kalahari (hereafter referred to as ‘UMK’) launched a review application to have the additional assessments raised by SARS pursuant to an audit set aside. Its ground was that SARS changed the findings that a connected person relationship existed between UMK and its offshore connected parties. This change is allegedly evidenced by what had been contained in the initial audit findings in April 2019 and the January 2020 finalisation letter. Between August 2017 and March 2019, SARS had requested and collated additional information.²⁷

In addition to the initial findings, SARS, in July 2019, supplemented its findings of what constitutes being ‘controlled and managed’. In August 2019, UMK made representations as required by section 42(3) of the TAA.²⁸ In January 2020, the audit was finalised, and additional assessments raised.²⁹ The contention by UMK is that the basis of the additional assessment changed fundamentally between April, July 2019 collectively and January 2020. As such, SARS was to revert and afford UMK an opportunity to respond to the findings that were supplemented after August 2019.³⁰ This argument is based on the right to procedural fairness as mandated by the Constitution and the PAJA.

On this contention, UMK launched review proceedings in the high court. UMK held a view that its challenge was procedural and did not deal with the substance of the assessments.³¹

The Court disagreed and held that because the application was riddled with material disputes of facts, the high court had no jurisdiction to settle the dispute, and the matter would be better

²⁷ *Kalahari* para 36 pg 17.

²⁸ *Kalahari* para 42 pg 20.

²⁹ *Kalahari* para 43 pg 20.

³⁰ *Kalahari* paras 48-50 pgs 22-23.

³¹ *Kalahari* para 85 pg 43.

settled by the Tax Court.³² UMK has since been granted leave to appeal to the SCA, and SARS did not oppose its application for leave to appeal.³³

5.2 The issues pending to be argued and decided in the SCA

In its application for leave to appeal, the UMK challenges the court a quo's ruling that:³⁴

- 5.2.1. the court a quo erred by classifying the application as one which constitutes a challenge on the correctness of SARS' additional assessments.³⁵ The issue was rather SARS flouted sections 42(2)(b) and (3) by supplementing the audit findings after representations were made and did not afford a chance for further representations.³⁶
- 5.2.2. the court a quo ought to have upheld that the application by UMK was to review the unlawfulness of an administrative action by SARS in issuing the additional assessments. Particularly, under circumstances where procedural fairness was not observed.³⁷
- 5.2.3. the application itself nor the relief sought fell squarely within the jurisdiction of the tax court. That in fact, the issues raised were that of an application of the law.³⁸ Therefore section 105 of the TAA is not applicable. The cause of action is not one capable of adjudication under the dispute resolution mechanisms afforded in the TAA³⁹. Further that the TAA does not preclude the jurisdiction of the court a quo. That in fact under section 11 thereof it recognises the institution of civil disputes.⁴⁰

³² *Kalahari* paras 83-85 pgs 42-45.

³³ Pursuant to the High Court judgment on 30 September 2021, UMK lodged its application for leave to appeal the judgment at the SCA. The argument highlighted herein are obtained from the Notice for its application for leave to Appeal, as filed on 20 October 2021. The court a quo granted leave to appeal unopposed on 8 November 2021.

³⁴ *United Manganese of Kalahari (Pty) Ltd v Commissioner for the South African Revenue Service* (21563/20) [2021] ZAGPPHC (20 October 2021) ('*Kalahari Leave to Appeal*').

³⁵ *Kalahari Leave to Appeal* para 47.3 pg 27.

³⁶ *Kalahari Leave to Appeal* para 37 pg 20; para 40-41 pgs 22-24.

³⁷ *Kalahari Leave to Appeal* para 37 pg 20; para 40-41 pgs 22-24.

³⁸ *Kalahari Leave to Appeal* para 8.2. pg 4; paras 19.5-19.6 pg 11; para 21.3 pg 12. para 31 pgs 16-17; para 50 pg 28.

³⁹ *Kalahari Leave to Appeal* paras 33.2-33.3 pg 18; para 29 pg 16.

⁴⁰ *Kalahari Leave to Appeal* para 27 pgs 14-15.

5.3 Significance of the SCA pending ruling

In *Mr A v CSARS*, the Tax Court held that SARS failed to afford the taxpayer an opportunity to make representations as required under section 42(3) of the TAA.⁴¹ Therefore, SARS flouted the right to procedural fairness and its conduct was unlawful.⁴² However, this judgment does not set precedent because it was handed down by the Tax Court. It is confined to facts in that specific matter.

In *Brits v CSARS*, the Court disagreed with SARS that it was inconsequential that procedural fairness process was flouted. That this is so because, the taxpayer has the objection and appeal processes at its disposal. The Court held that once an assessment is issued, a debt is created, and the taxpayer would have to pay as a matter of law. To grant a taxpayer a fair procedure from the onset would circumvent this eventuality.⁴³

In *F v Commissioner for the South African Revenue Service*,⁴⁴ the Tax Court held that there was a higher duty on SARS as a state organ to abide by the rule of law.⁴⁵ Further, that where SARS disregards a taxpayer's constitutionally entrenched right to fair administrative action, there must be a reasonable justification.⁴⁶ Decisions taken arbitrarily and without reasons nor explanation being advanced, are at odds with such a right.

In *Earthlife Cpt*, the full bench of the Western Cape Local division held that where the impugned administrative decision was made based on new information, those adversely affected must be afforded a further opportunity to make representations.⁴⁷

In *Absa Bank v Commissioner for the South African Revenue Service*,⁴⁸ the Court held that when the issue in contention relates to an application of the law, a taxpayer may approach the

⁴¹ *Mr A v CSARS* paras 20-22 pgs 7-9.

⁴² *Mr A v CSARS* paras 20-23 pgs 7-9.

⁴³ *Brits v CSARS* paras 7-10 pgs 3-4.

⁴⁴ *F v Commissioner for the South African Revenue Service* (IT45842) [2022] ZATC (25 February 2022) ('*F v CSARS*').

⁴⁵ *F v CSARS* para 29 pg 12.

⁴⁶ *F v CSARS* para 47 pg 17.

⁴⁷ *Earthlife Cpt* paras 61-64 pgs 173-174.

⁴⁸ *ABSA Bank Ltd and Another v Commissioner for the South African Revenue Service* 2021 (3) SA513 (GP) ('*Absa v CSARS*').

High Court to review a decision taken by SARS.⁴⁹ It was also held that SARS is bound by its grounds of assessments once issued. SARS cannot after issuance want to amend the basis of the assessments.⁵⁰ The court held further that an accurate interpretation of section 105 of the TAA does not require permission to be obtained first before a matter is brought for review in the High Court.⁵¹ The request for permission may be heard simultaneously with and in the review.⁵²

In *Forge Packaging v Commissioner for the South African Revenue Service*,⁵³ the taxpayer had in the *court a quo* sought to review the issued additional assessments. Thereafter, it sought to appeal, but its leave to appeal was dismissed. The Western Cape Local division held that the issues that can raise on judicial review can be competently decided by the tax court *within the context of an appeal*.⁵⁴ Further, that review proceedings in the high court may only be brought when permission has been granted in terms of section 105 of the TAA.⁵⁵ The route to challenge an assessment must be in accordance with the prescripts in chapter 9 of TAA, being to object then later appeal in the tax court.⁵⁶

In view of the multifaceted judicial views and some in conflict with one another, it is hoped that the SCA will settle the law. The conclusions reached in the aforementioned cases, involves the basis of the questions raised in UMK's leave to appeal. The Tax Court's judgments are limited to the case that is heard before the court and cannot set precedent. While High Court divisions may come to different conclusions, and all having equal precedential status. It is, therefore, crucial that an authoritative court settle these issues to set precedent for the lower courts.

⁴⁹ *Absa v CSARS* para 47 pg 525.

⁵⁰ *Absa v CSARS* paras 33-38 pgs 522-523.

⁵¹ *Absa v CSARS* paras 25-28 pg 520.

⁵² *Absa v CSARS* paras 25-28 pg 520.

⁵³ *Forge Packaging v Commissioner for the South African Revenue Service* (21634/21) [2021] ZAWCHC (26 August 2022) ('*Forge v CSARS*').

⁵⁴ *Forge v CSARS* paras 9-10 pg 3.

⁵⁵ As above para 8 pg 3.

⁵⁶ *Forge v CSARS* para 12 pg 4.

These issues are crystalised as -

- (a) Is SARS obliged to notify a taxpayer that an audit will be conducted on its tax affairs and to what extent?
- (b) Is SARS permitted to change the basis of its audit? If so, is SARS permitted not to inform the taxpayer about the change?
- (c) Is SARS obliged to notify a taxpayer about the audit findings? Is the absence thereof procedurally defective and, therefore, unlawful in terms of section 42(2)(b) of the TAA and section 33(1) of the Constitution?
- (d) Is SARS permitted to change its audit findings after representations have been made? If so, does an application of the law dictate that the taxpayer must be given a further opportunity to make representations?
- (e) If further representations are not allowed by SARS, is the disallowance unconstitutional in view of section 33(1) of the Constitution?
- (f) Can the unconstitutionality be cured under section 36 of the Constitution read together with section 42(5) of the TAA when SARS is able to explain that it is justifiable and reasonable to limit a constitutionally protected right?
- (g) Is a taxpayer obliged to first evoke the dispute mechanisms provided for in the TAA before approaching a court of review? If so, does that restraint apply when the taxpayer is not challenging the correctness of the impugned assessments, but the procedure followed in the issuance thereof?

Furthermore, the significance of the pending ruling is hoped to provide the required certainty in the application of tax laws. It has been said that one of the canons of taxation is that good tax systems must create certainty in the application of law and assessment of tax liability.⁵⁷

6. Conclusion

SARS is an organ of state. It is, therefore, required to uphold the law. The standard placed on SARS is higher because of SARS being a creature of statute. The Constitution mandates that taxpayers have a right to administrative actions that are lawful, reasonable and procedurally fair. It will be unlawful for SARS to commence an audit without first notifying the taxpayer of the pending audit.

⁵⁷ B Croome *Taxpayers' Rights in South Africa* (2010) 3.

There is no guidance in the TAA as to what should be contained in the notice of audit. The scope would assist a taxpayer to detect whether the scope of audit was altered from inception to end.

Procedural fairness is achieved when a taxpayer is given an opportunity to make representations. The representations are only meaningful when the taxpayer knows what the audit findings are and what informed them.

Section 42 does not mention whether SARS may alter the audit findings after representations are made. The TAA is in fact silent as to what happens after representations have been made. I argue that to proceed to raise an additional assessment on new information in absence of further representations being made will be procedurally unfair, as per the *ratio* in *Earthlife*.

SARS is empowered not to follow a procedurally fair procedure when it has a reasonable belief that to do so will hinder the audit. Unfortunately, section 42(5) read with subsection (6) do not provide guidance as to what would entail a justifiable and reasonable limitation of the taxpayer's right to procedural fairness.

There are currently several judicial pronouncements both by the Tax Court and High Court on the aspects of procedural fairness during an audit process. It is hoped that SCA in *Kalahari* will settle the law.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

1. Main findings

The Constitution mandates that an administrative action must be lawful, reasonable and procedurally fair. The functions and obligations in the Constitution are peremptory. When SARS makes a decision pursuant to an audit, the decision constitute an administrative action. The procedure followed by SARS must be procedurally fair, failing which it will be inconsistent with the Constitution. The Constitution states that any conduct and law inconsistent with the Constitution is invalid.

There is an interrelationship between audit findings and an additional assessment. The interrelationship is occasioned by the adjustments SARS would have identified during an audit. Before an assessment is raised, taxpayers have three entitlements - to be notified of the audit, given progress reports during the course of the audit and be afforded a chance to respond to the audit findings. Despite this, there is nothing in the TAA that informs the content of the audit notice. The rationale of section 42 of the TAA is that a taxpayer must be informed about what is it that SARS is probing, be kept informed during the audit and upon conclusion be informed of the findings.

Should SARS act outside the prescripts of section 42, its actions will be unlawful. SARS is only allowed to deviate from keeping a taxpayer informed and/or affording the taxpayer a chance to make representation if there is a reasonable belief the audit will be hindered. The 'reasonable belief' must be justifiable. The decision to deviate must not be disproportionate from the taxpayer's rights that could be infringed. It must further meet the criteria set out under section 3(4) of the PAJA.

The internal remedies available to a taxpayer to object to an additional assessment do not negate SARS' obligation to follow a fair procedure. Once an additional assessment is issued, a debt is created against a taxpayer. The issuance of the additional assessment can be avoided when SARS affords a taxpayer a fair procedure. Whilst a review of the impugned action concerns only the procedure that gave rise to the action.

Internal remedies require a taxpayer to first object and then appeal an assessment. It is a process that may take long whilst the tax liability remains payable. The nature of an objection and appeal is that the substance of the assessment must be challenged.

A procedure is fair when a taxpayer is given a chance to respond to SARS' audit findings as envisaged by section 42 of the TAA. A response is only effective when SARS has disclosed the findings it relies on to justify the issuance of an additional assessment.

The information considered and available to SARS at the time the administrative action is taken is relevant for the purpose of a taxpayer making informed representations.

The TAA is silent as to what must happen after the 21 days within which the taxpayer must make representations. Nor does the TAA make provision for the amendment of audit findings after representations have been made.

An interrogation of the interpretation of section 42 appears limited in caselaw. The *Kalahari* offers an opportunity where it is hoped that an authoritative court, the SCA, will engage in that exercise and settle the law.

2. Recommendations

The scope of audit must be disclosed in the notice of audit. It must also be disclosed in all audit progress reports if and to what extent has the scope of audit been extended at each interval until completion. This will aid a taxpayer to detect whether the scope of audit has amended from inception to what is contained in the audit findings. The Commissioner must, therefore, publish the public notice that will prescribe the content of an audit notice to ensure strict compliance and consistency in how notices are given.

TAA should make provision that the finalisation letter must precede the notice of an additional assessment and not for the two documents to be conjoined. Should the finalisation letter reveal new findings then the process under section 42(2)(b) and (3) of the TAA must start afresh.

3. *Conclusion*

The representations that are made in absence of knowing the basis of the additional assessment are not representations for the purposes of section 42 nor section 3 of PAJA.

The overall argument made in this study is that SARS is not prohibited from issuing an additional assessment upon the conclusion of an audit. Section 92 of the TAA allows for SARS to remedy an incorrect application of a tax act. However, the purpose of allowing representations before an additional assessment is made is to allow SARS to have all relevant information and facts before taking an adverse decision. This study argues that after representations have been made, it is procedurally unfair for SARS to change the basis of the issuance of an additional assessment without affording the affected taxpayer an opportunity to respond to SARS' revised audit findings.

A complaint of procedural unfairness strictly defined relates to the procedure to take an administrative decision. Taxpayers must be allowed to challenge SARS non-compliance with the principles underpinning procedural fairness. To do this by lodging an application to review the issuance of an additional assessment in the high court, without first having to follow the internal remedies provided for in the TAA.

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