



**The disclosure of a taxpayer's tax information held by
SARS: An infringement of the right to privacy.**

By

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Abstract

In recent years, the right to privacy for taxpayers in South Africa has emerged as a sensitive and important issue in the field of taxation. This dissertation delves into the dynamic interplay between taxpayer privacy and the other rights such as the right to freedom of expression. The *Arena Holdings* case, a significant court conflict that highlighted the complexities of tax privacy, serves as the focal point of this investigation. This dissertation aims to shed light on the changing state of taxpayer privacy within the South African tax system by an in-depth analysis of this case and a thorough review of relevant law.

This research looks at how taxpayer privacy rights have evolved over time in South Africa, especially as technology has changed the way we do taxes. It checks how sharing and using tax information might affect people's privacy and rights. It also looks at how the *Arena Holdings* case has influenced the rules SARS uses and what impact this has on South African taxpayers.

This dissertation aims to provide a thorough understanding of taxpayer privacy in South Africa, its significance in fostering trust in the tax system, and the ways in which the law must evolve to protect individual rights while ensuring effective tax administration by tackling these complex and multifaceted issues. By offering a critical examination of the *Arena Holdings* case and its implications, this study contributes to the ongoing discourse surrounding taxpayer privacy in South Africa and provides valuable insights for policymakers, legal professionals, and taxpayers.

Keywords

Privacy

Taxpayer

Confidentiality

Public interest

Disclosure

Data Privacy

Privacy protection

Personal information

Constitution

Invasion of privacy

Legislation

Arena Holdings

Common law

Access to information

Freedom of expression

Charter

Abbreviations

CRA - Canadian Revenue Service

PAIA - Promotion of Access to Information Act 2 of 2000

AIA - Access to Information Act, RSC 1985

AJ - Administrative Judge

SARS - South African Revenue Service

PP - Public Protector

SA - South Africa

CSARS - Commissioner of South African Revenue Service

TAA - Tax Administration Act 28 of 2011

BOR - Bill of Rights

POPIA - Protection of Personal Information Act 4 of 2013.

OECD - Organisation on Economic Co-operation and Development

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Chapter 1: Introduction and Overview

1.1 Background

The tension between the right to privacy of taxpayers, the right of access to information, and the right to freedom of expression has come to the attention of many intellects after the decision in the *Arena Holdings Pty Ltd v CSARS* case.¹ This decision has sparked a lot of discussions around the interplay between the Tax Administration Act 28 of 2011 (TAA), the Promotion of Access to Information Act 2 of 2000 (PAIA), and the Protection of Personal Information Act 4 of 2013 (POPI). These Acts protect taxpayers from having their information disclosed and their right to privacy in general. The TAA deals with the confidentiality of a taxpayer's information together with the PAIA, whilst the POPI Act regulates the processing of personal information.² The TAA protects the taxpayers' right to privacy because section 67(4) of the TAA stipulates that confidentiality of a taxpayer's information must be preserved.³ Section 35(1) of the PAIA further protects a taxpayer's right to privacy as it also regulates confidential information. The PAIA provides that South African Revenue Service (SARS) must not disclose information it holds "for the purpose of enforcing legislation concerning the collection of revenue".⁴ This information includes taxpayers' information thus the Act protects a taxpayer's right to privacy. The POPI Act also protects the taxpayers' right to privacy in that it gives effect to the Constitutional right to privacy, and it regulates the collection, retention, dissemination, and use of personal information.⁵ This personal information referred to in the POPI Act includes that of

¹ *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* 2021 ZAGPPHC 779.

² Carika Fritz 'South African Taxpayers' Right to Privacy in Cross-Border Exchange of Tax Information' Constitutional Court Review 11 (2021) at 412.

³ C Fritz (n 2 above) at 414. section 67, Tax Administration Act 28 of 2011.

⁴ s35(2), Promotion of Access to Information Act 2 of 2000.

⁵ C Fritz (n 2 above) at 415.

taxpayers and the POPI Act also provides for the protection of personal information when it is processed by a responsible party as provided for in section 2(a) of the POPI.⁶

Judge Davis in the *Arena Holdings* case held that the TAA and the PAIA provides “blanket prohibitions” when it comes to the disclosure of taxpayers’ information to the public.⁷ The court read in the public interest override into the legislation, which means that taxpayers’ right to privacy may be limited or infringed if it is in the best interest of the public.⁸ In the judgment the court made reference to the *Johncom Media Investments Ltd v M & Others*⁹ case, in which it was ruled that absolute prohibition in legislation against the publication of information in divorce cases should be struck down.¹⁰ The court used the judgment in the *Johncom Media Investment* case so as to support its reasoning for reading in the public interest override and the fact that taxpayers’ right to privacy should not be absolute.¹¹ The court provided that limiting the right to freedom of speech and access to information using the taxpayers’ right to privacy in this case was not justifiable.¹² The judgment of the High Court in the *Arena Holdings* case has the potential to open the floodgates of further infringement of the right to privacy for taxpayers. It also leaves one wondering where the line is drawn regarding the disclosure of taxpayers’ information.¹³

⁶ s2(a), Promotion of Access to Information Act 2 of 2000.

⁷ *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* 2021 ZAGPPHC 779 [6.2].

⁸ *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* 2021 ZAGPPHC 779 [10.3].

⁹ *Johncom Media Investments Ltd v M and Others* 2009 ZACC 5.

¹⁰ *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* 2021 ZAGPPHC 779 [8.14].

¹¹ *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* 2021 ZAGPPHC 779 [8.12].

¹² *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* 2021 ZAGPPHC 779 [8.14].

¹³ The case has been referred to the Constitutional Court.

1.2 Research Problem

Taxpayers' information should be kept private because it encourages voluntary disclosure of tax information to tax authorities. If the Constitutional Court confirms the High Court's decision in the *Arena Holdings* case, it can have a negative impact on the collection of tax by SARS. The decision in the *Arena Holdings* case presents a problem in that the court seems to have looked at section 69 of the TAA as an absolute ban of the disclosure of taxpayers' information.¹⁴ Section 69(5) of the TAA provides exceptions to the protection offered to taxpayers regarding their information. One of these exceptions provides for a High Court to compel SARS to disclose a taxpayers' information and this in turn trumps the non-disclosure provision in the TAA.¹⁵ It is submitted that the High Court decision in the *Arena Holdings* case regarding the constitutionality of section 67 and 69 of the TAA can be seen as unnecessary and it may have the potential of complicating and creating problems between SARS and taxpayers. I am of the view that this decision is unnecessary because the TAA does not provide a blanket ban but as mentioned above, the secrecy of a taxpayers' information can be limited by the court after looking at the circumstances of the case. The problem is how does one balance the right to privacy of taxpayers and the right to freedom of expression. This dissertation sheds more light on this.

¹⁴ L Botha 'The end of taxpayer confidentiality? Gauteng Division hands down potentially groundbreaking judgment' (2021) Cliffe Dekker Hofmeyr 6. Available at <https://www.cliffedekkerhofmeyr.com/en/news/publications/2021/Tax/Tax-Exchange-Control-Alert-18-November-2021-The-end-of-taxpayer-confidentiality-Gauteng-Division-hands-down-potentially-groundbreaking-judgment-.html> [accessed on 4 October 2022].

¹⁵ s69(5), Tax Administration Act 28 of 2011.

1.3 Research Question

Is it justifiable for the right to privacy for taxpayers to be trumped by the constitutional rights to freedom of expression and access to information?

1.3.1 Sub-questions

1. What does the right to privacy entail in general and what is the common law and the constitutional stance regarding the right to privacy?
2. When can SARS disclose a taxpayer's information in accordance with the TAA?
3. Was the court in *Arena Holdings* case right to include a public interest override in the TAA and are changes in the TAA necessary?
4. What kind of protection is offered by the POPI Act with regards to access to information of taxpayers as well as an individual's right to privacy?
5. What can South Africa learn from foreign jurisdictions regarding taxpayer's information and how do these jurisdictions address the disclosure of taxpayer information?

1.4 Motivation/Rationale

This dissertation seeks to shed some light on the importance of the right to privacy for taxpayers in South Africa. Given the recent High Court decision in the *Arena Holdings* case, there needs to be a discussion about what it means for taxpayers if the

Constitutional court confirms the decision. There is a general acceptance or understanding that all tax records are kept private.¹⁶ Therefore, it is paramount that taxpayers are made aware of the future impacts this case might have on the disclosure of their information. It is also important for taxpayers to be fully aware of the extent in which their information is to be protected by SARS. The findings of the court in the *Arena Holdings* case regarding the current taxpayer information confidentiality provisions have far-reaching consequences than we would like to admit, this dissertation will speak on those consequences as well. My motivation for writing this dissertation is so I can also delve into the right to access to information and freedom of expression and how these can affect SARS as well as taxpayers in exceptional circumstances.

1.5 Literary Overview

1.5.1 The meaning of Privacy

There are several articles and books that have been written on the right to privacy which I use to explain the meaning of privacy in this dissertation.¹⁷ The right to privacy is multidimensional, this means that it has many aspects that it protects and cannot fit in a set box. The right to privacy amongst other things has been said to cover matters such as a person's dignity or moral integrity, the control of personal information, and the freedom from media intrusion.¹⁸ It is quite difficult for one to confine the right to privacy to one simple meaning; this means that when such a right is infringed there are far-reaching consequences than what meets the eye. In general terms the right to privacy can be said to be the right to be left alone

¹⁶ section 69, Tax Administration Act 2 of 2011.

¹⁷ DJ McQuoid-mason (1978) *The law of privacy in South Africa*, R Clayton & H Tomlinson *Privacy and Freedom of Expression* (2010) and S Stockholm *Right to privacy and rights of the personality* (1967) P. A. Norstedt & Sønners förlag.

¹⁸ R Clayton & H Tomlinson (2010) *Privacy and Freedom of Expression* Oxford University Press at 3.

or to be free from misuse or abuse of one's personality, it also includes being free from unwarranted publicity.¹⁹ A lot needs to be considered or looked at before such a right is limited.

Every man has what is called a "natural right" this entails the possession of an unimpaired person, dignity, and reputation.²⁰ This unimpaired person or dignity is afforded protection under the action for invasion of privacy. The South African courts recognise that an impairment of a person's privacy *prima facie* constitutes an impairment of his dignity.²¹ The Oxford English dictionary provides that the word "privacy" means the state or condition of being withdrawn from the society or others or from public interest, seclusion, it also means absence or avoidance of publicity or display of private information or personal relations.²² The above dictionary definition corresponds with the legal interpretation of "privacy" used in different jurisdictions such as the medieval English law and Roman-Dutch law.²³

The common law recognises the right to privacy of individuals. If a person's private information, for example, is released to the public, he or she can sue or has the right to sue. The common law right to privacy in South Africa can be traced back to the 1950's. The right was first recognised in the *O'keefe v Argus Printing*.²⁴ Under the common law right to privacy there are four recognised invasions of privacy which includes intrusion, publication of private information, placing someone in a false light and lastly appropriation.²⁵ The protected interest under

¹⁹ Warren & Brandeis (1890) *The right to privacy* Harvard Law Review 4 at 1. Daniel J Solove (2006) *A Taxonomy of Privacy* 154 *University of Pennsylvania Law Review* 154(3) at 483.

²⁰ McQuoid-mason (n 17 above) at 87.

²¹ Le Roux & Others v Dey 2011 (3) SA 274 (CC) [176].

²² The Oxford English Dictionary Available at <https://www.oed.com/> [accessed on 28 September 2022].

²³ McQuoid-mason (n 17 above) at 13.

²⁴ *O'Keefe v Argus Printing and Publishing (Pty) Ltd* 1954 (3) SA 247 (C).

²⁵ Buthelezi, M. C. (2013). "Let false light (publicity) shine forth in South African Law" *De Jure Law Journal* 46(3): 783 at 1.

the right to privacy is a mental one. When the right to privacy is infringed by a publication for example, it tarnishes an individual's reputation. For one to be able to successfully prove the invasion or infringement of privacy, one has to show the private nature of the information being disclosed and how it has the potential of ruining a person's reputation, from a reasonable person's point of view.²⁶

Furthermore, the Constitution of the Republic of South Africa recognises the right to privacy and it is enshrined in the Bill of Rights. The Constitution provides:

"Everyone has the right to privacy, which includes the right to not have

a) their person or home searched,

b) their property searched;

c) their possessions seized; or

*d) the privacy of their communications infringed."*²⁷

The Constitution is the supreme law in South Africa and everyone, including the government is expected to uphold it. Media houses or any other organisations are also expected to respect a person's right to privacy. The right can be limited through the limitation clause in section 39 of the Constitution, but this limitation should be reasonable and necessary.²⁸ In *Gaertner v Minister of Finance*,²⁹ the court provided that the right to privacy entails being free from intrusions and interference by the state and others in one's personal life.³⁰ The nature of the right to privacy is also closely linked to a person's identity.

²⁶ S Stockholm *Right to privacy and rights of the personality* (1967) P. A. Norstedt & Sønners förlag at 47-48.

²⁷ s14, Constitution of the Republic of South Africa, 1996.

²⁸ s39, Constitution of the Republic of South Africa, 1996

²⁹ *Gaertner & Others v Minister of Finance & Others* 2013 ZACC 38 SA 442 (CC).

³⁰ *Gaertner & Others v Minister of Finance & Others* 2013 ZACC 38 SA 442 (CC) [47].

The *Bernstein and Others v Bester NO and Others*³¹ case provides a rich and comprehensive interpretation as to what the right to privacy comprises of and I delve into this case in my dissertation so as to give an understanding of this right. I discuss in detail the right to privacy in our common law as well as the Constitution in-depth and how it ties in with the decision in the *Arena Holdings* case. This dissertation explains how upholding the decision in the *Arena Holdings* case can infringe taxpayers' right to privacy and negatively impact the voluntary disclosure of information by taxpayers.

1.5.2 Tax Administration Act

The TAA provides for the confidentiality of tax information. One needs to understand that Chapter 6 of the TAA makes a distinction between “SARS confidential information” and “taxpayer information”. It is important to know this because information now falls into different categories which means the persons expected to protect such information differ and how they protect the information is different.³² Section 68(1) of the TAA defines “SARS confidential information” and it includes information provided to SARS by a third party in confidence and disclosure of such information is reasonably expected to hinder the further submission of information from third parties.³³ It also includes “information subject to legal professional privilege vested in SARS”.³⁴

“Taxpayer information” is defined in the TAA in section 68(1)(b). The Act defines it as “any information provided by a taxpayer or obtained by SARS in respect of the

³¹ *Bernstein and Others v Bester NO and Others* 1996 ZACC [2].

³² ‘SARS (2018). SARS Short Guide to the Tax Administration act’ Version 3 (2018) at 35. Available at <https://www.sars.gov.za/wp-content/uploads/Ops/Guides/LAPD-TAdm-G01-Short-Guide-to-the-Tax-Administration-Act-2011.pdf> [accessed 4 October 2022].

³³ s68(1), Tax Administration Act 2 of 2011.

³⁴ s68(1)(b), Tax Administration Act 2 of 2011.

taxpayer, including biometric information”.³⁵ When looking at the definition of the terms “taxpayer information” and “SARS confidential information”, it is clear that the legislature intended the former term to have a wide application whereas the later does not.³⁶ It is also very important to make these distinctions because taxpayer information calls for stricter rules when it comes to the disclosure of such information and the rules pertaining to SARS confidential information not so much.³⁷

Section 69(1) of the TAA provides that SARS officials are obligated to preserve the secrecy of a taxpayer’s information and are not allowed to disclose such information to any person who is not an official of SARS. This however is subject to exceptions set out in section 69(2). I look at what the TAA says about the disclosure of information by SARS in detail, this dissertation also looks at the exceptions and how they were overlooked by the court in the *Arena Holdings* case.

1.5.3 Protection of Personal Information Act

The right to privacy is indeed provided for in the South African Constitution but the POPI Act sets the standard for data protection³⁸ and privacy in South Africa. the POPI Act emanates from section 14 of the Constitution.³⁹ It seeks to strike a

³⁵ s68(1)(b), Tax Administration Act 2 of 2011.

³⁶ ‘SARS confidential information’ is information that SARS considers as confidential, it is not necessarily taxpayer information. This information cannot be disclosed in accordance with s68(2) of the TAA.

³⁷ SARS (n 32 above) at 35.

³⁸ A Roos *Core* (2006) *Principles of data protection law: The comparative and international law journal of southern Africa* Institute of foreign and comparative law at 104. Data protection is “the relationship between the collection and dissemination of data, technology, the public expectation of privacy, contextual information norms, and the legal and political issues surrounding them”.

³⁹ Employment Law ‘The Protection of Personal Information Act 4 of 2013’ (2020) Cliff Dekker and Hofmeyr. Available at <https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/practice->

balance on the right to privacy and the right to access to information; it also regulates how personal information is processed.⁴⁰ The POPI Act defines personal information as “information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person”, this information amongst other things include, information relating to a person’s financial record, private correspondence and a person’s biometric information.”⁴¹

Chapter 3 of the POPI Act provides conditions for the processing of information by a responsible party. It is important to note that SARS is exempted from complying with certain provisions of the POPI Act that may infringe the protection of taxpayers’ information.⁴² The POPI Act regulates the categories of personal information that SARS is allowed to process, it also provides the recipients of the above-mentioned data.

When dealing with the disclosure of a taxpayer’s information, the POPI Act requires safeguards to ensure the protection of information given to SARS.⁴³ The POPI Act sets out the minimum standards regarding accessing and “processing” of any personal information belonging to another. The Act defines “processing” as collecting, receiving, recording, organising, retrieving, or the use, distribution or sharing of any such information.⁴⁴ The POPI Act has provided a progressive privacy framework that has changed the consumer privacy in South Africa.⁴⁵ The POPI Act is going to be important in this dissertation because I discuss what this

[areas/downloads/Employment-Law-The-Protection-of-Personal-Information-Act-4-of-2013-POPI.pdf](#) [accessed on 4 October 2022].

40 s4, Protection of Personal Information Act 4 of 2013.

41 s1, Protection of Personal Information Act 4 of 2013.

42 s12, Protection of Personal Information Act 4 of 2013.

43 M Kamdar (2021) “Tax implications in the light of POPIA” *Sabinet* at 39. section 18, Protection of Personal Information Act 4 of 2013.

44 s1, Protection of Personal Information Act 4 of 2013.

45 R Bateman ‘South African POPI Act’ (2022) TermsFeed. Available at <https://www.termsfeed.com/blog/south-african-popi-act/> [accessed on 2 November 2022].

Act says regarding when private information can be disclosed to the public. It helps in reaching a conclusion as well as making recommendations.

1.5.4 Promotion of Access to Information Act

The PAIA provides the constitutional right to access to information with legislative effect. It does this by providing access to information per request to any records kept by the state except court records and records that are held by the cabinet or members of parliament.⁴⁶ This study looks at the PAIA because it provides an insight to the scope of the application of the right to access to information.

In terms of the PAIA, members of the public can request information from SARS. This Act defines a requester as any person, or someone acting on their behalf, except certain organs of state or functionaries or institutions exercising powers or performing a duty in terms of the Constitution or a provincial Constitution.⁴⁷ The PAIA reinforces the confidentiality of taxpayers' information by providing that it must not be disclosed in terms of the Act, except to the person to whom it relates or that person's authorised representative.⁴⁸

It is important to note that the PAIA also provides grounds for refusal of requests. Information may not be disclosed to a requester if there are reasonable grounds to warrant such a refusal.⁴⁹ However, the PAIA requires disclosure if the information to be disclosed is in the public's interest and if disclosing the information kept in the records will reveal a breach of law.⁵⁰ This is an important

⁴⁶ I Currie & J Klaaren (2002) "*The Promotion of Access to Information Act Commentary*" (2002) at 1.
⁴⁷ s1, Promotion of Access to Information Act 2 of 2000.

⁴⁸ s35, Promotion of Access to Information Act 2 of 2000.

⁴⁹ s56(3), Promotion of Access to Information Act 2 of 2000.

⁵⁰ Currie & Jonathan (n 45 above) 99. section 46, Promotion of Access to Information Act 2 of 2000.

part of the PAIA because it justifies the request for the publication of former President Jacob Zuma's tax records in the *Arena Holdings* case.

1.6 Research Methodology

This research seeks to shed some light on the impact of the decision in the *Arena Holdings* case. It will also touch on whether the right to privacy is trumped by the right to access to information. In order to answer these questions in this dissertation, I use a descriptive, theoretical, and analytical research methodology. I chose this research method because it will assist me in providing an in-depth understanding of the subject matter in the paper. This research method is also accessible, and I will be able to gather more information on a large scale. The research question needs one to have an extensive knowledge and background of the right to privacy. To understand this right and discuss it in clearer terms I need to use a descriptive method to explain the legislation as well as commentary of the said legislation to give a sound and well-informed opinion. The research also needs an analysis of the current legislation regarding the disclosure of a taxpayer's information, and to whom such information is to be disclosed. One cannot weigh in on the merits or lack thereof of a case without analysing the legislation in question. In this case the legislation will be the Constitution, the TAA, the PAIA, and the POPI Act. I also need to use a theoretical methodology in this paper to substantiate my recommendations as well as views that I will share. I delve into the implications of different theories regarding the right to privacy and what they mean for the taxpayers in South Africa. I look at academic books, cases, journal articles and other secondary sources that will assist in clarifying the law in question as well as assist in making my own recommendations. I will analyse and compare South Africa with the Canadian jurisdiction and draw some lessons from such comparisons as well.

1.7 Chapter Outline

Chapter 1: Introduction

In this chapter, I provide the purpose of the research and a comprehensive explanation of the research problem. This chapter briefly looks at the High Court judgment in the *Arena Holdings* case in order to contextualise the matter that I deal with in this research. The objectives as well as research questions to be answered in the research are outlined in the first chapter.

Chapter 2: The common law and Constitutional right to privacy

The second chapter looks at the right to privacy under common law and what the South African Constitution provides regarding the right to privacy. In this chapter I give a historical background of how the right to privacy was derived under common law and what it was meant to protect. I also look at the *Bernstein v Bester*⁵¹ case whereby the court had to decide whether sections 417 and 418 of the Companies Act infringed a person's right to privacy.⁵² The court confirmed the fact that the right to privacy can be limited by public interest and it also provided that compelling persons to disclose information that is self-incriminating is unconstitutional. I discuss this court's ruling in light of the publication of taxpayers' information in this chapter.

Chapter 3: Taxpayer's right to privacy in the TAA

In the third chapter the study discusses what the South African tax legislation say about the taxpayers' right to privacy. I discuss the TAA as well as the POPI Act regarding taxpayers' privacy and why it is important to ensure that taxpayers'

⁵¹ *Bernstein and Others v Bester NO and Others* (1996) ZACC [2].

⁵² *Bernstein and Others v Bester NO and Others* (1996) ZACC [2].

information is not published. I discuss the *Public Protector v CSARS* case together with the *Arena Holdings* case in this chapter.⁵³

Chapter 4: Comparative analysis

This chapter looks towards foreign jurisdiction, and I look at the Canadian jurisdiction to provide an understanding on how the Canadian government deals with taxpayers' privacy. I look at how Canada strikes a balance between the right to privacy and freedom of speech in its legislative framework. I also look at Canadian caselaw such as the *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* which supported the fact that public interest can override a person's right to privacy.⁵⁴ I have specifically chosen to do a comparative study with Canada because the Canadian tax regime is similar to that of South Africa. The tax regimes are similar in that both nations cater for the protection of privacy in their respective Constitutions, the Canadian's charter of Rights and Freedoms closely resembles the Bill of rights enshrined in the South African Constitution.

Chapter 5: Conclusion and Recommendations

A summary that ties all the chapters of this research together will be provided in this chapter. The chapter will give recommendations drawn from the discussions provided for in the research.

1.8 Limitations and Delimitations

The focus of my research is premised on the taxpayers' right to privacy and legislation is centred around: the TAA, PAIA and the POPI. The research mostly

⁵³ The Public protector v Commissioner of SARS and Others 28 ZACC (2022).

⁵⁴ *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* (2001) 2 S.C.R [281].

focuses on the *Arena Holdings* case, which is not to say there are no cases that deal with a taxpayer's privacy as these are discussed briefly in this study. In order to establish the ambit of taxpayers' information and the privacy thereof, the dissertation uses the Canadian jurisdiction as comparative law but unfortunately the study does not look beyond that.

Chapter 2: Common Law Right to Privacy

2.1 Introduction

Protecting the right to privacy is not a new phenomenon, but it has been in existence since the medieval times. The German tribal law and Anglo-Saxon law provided compensation for the intrusion of one's property and insult.⁵⁵ The concept and meaning of the right to privacy is one that has gradually changed, influenced by factors such as religion and culture.⁵⁶ Thus, it is difficult to define the concept of privacy as it entails different things to different people. Daniel Solove postulated that "privacy seems to encompass everything, and therefore it appears to be nothing itself."⁵⁷

Privacy is a concept that everyone can recognise but it is very difficult to describe as mentioned above.⁵⁸ Sociologists and psychologists agree that a person has a fundamental need for privacy, each individual has an interest in the protection of his or her privacy.⁵⁹ It is, however, important for the concept of privacy to be defined so as to enhance the protection of the right to privacy. Neethling⁶⁰ describes privacy as,

"..a condition of human life characterised by seclusion from the public and publicity. This condition embraces all those personal facts which the person concerned has

⁵⁵ Newell, P.B (1995) "Perspectives on privacy" Journal of Environmental Psychology: 9.

⁵⁶ Ali Alibeigi (2019) 'Right to privacy, a complicated concept to review' University of Nebraska – Lincoln: 1.

⁵⁷ Solove D (2008) 'Understanding Privacy' (Harvard University Press) at 7.

⁵⁸ Young Y. B (1978) 'Privacy' (Cambridge University Press) at 5.

⁵⁹ J Neethling, JM Potgieter & PJ Visser (2005) "Neethling's Law of Personality 2 ed" (LexisNexis Butterworths) at 29.

⁶⁰ Neethling J (2005) "The concept of privacy in South African Law" 122 (1) (SALJ): 20.

*himself determined to be excluded from the knowledge of outsiders and in respect of which he has the will that they be kept private.*⁶¹

Furthermore, the court in *National Media Ltd & Another v Jooste* accepted Neethling's definition of privacy.⁶² In the *National Media Ltd & Another v Jooste* case, the legal issue was whether the publication of an allegedly defamatory article by the appellants constituted *injuria* or not.⁶³ The facts of the case involved the publication of an article in the Sunday Times newspaper by the appellants, which the respondent argued was defamatory and injurious to his reputation.⁶⁴ The appellants argued that the article was not defamatory and that it constituted fair comment on a matter of public interest.⁶⁵ The court held that the article was defamatory and injurious to the respondent's reputation, as it imputed dishonesty and unfitness for office.⁶⁶ The court also found that the defence of fair comment did not apply, as the article was not based on facts that were sufficiently true and accurate to support the comment.⁶⁷

The court confirmed the definition of privacy as proposed by Neethling.⁶⁸ The fact that a legal subject personally determines the private nature of facts is significant under this definition. A legal subject must also demonstrate a desire or intent for information to remain hidden. A person typically has no interest in the legal protection of his privacy if such a will for privacy is lacking.

⁶¹ Neethling J (2005) "The concept of privacy in South African Law" 122 (1) (SALJ): 20.

⁶² *National Media Ltd & Another v Jooste* 1993 (3) SA [787].

⁶³ *National Media Ltd & Another v Jooste* 1993 (3) SA [5].

⁶⁴ *National Media Ltd & Another v Jooste* 1993 (3) SA [5].

⁶⁵ *National Media Ltd & Another v Jooste* 1993 (3) SA [6].

⁶⁶ *National Media Ltd & Another v Jooste* 1993 (3) SA [16].

⁶⁷ *National Media Ltd & Another v Jooste* 1993 (3) SA [17–18].

⁶⁸ *National Media Ltd & Another v Jooste* 1993 (3) SA [79].

2.2 A Brief History of the Right to Privacy

The idea or concept of privacy is a principle that is as old as common law.⁶⁹ Historically, the law only protected the physical interference of a person's life and property as well as trespasses done with force and arms.⁷⁰ In the early times, the right to life only protected a person from battery in its various forms and the right to property protected a person's land and cattle. The scope of these legal rights continued to broaden with time and there came a recognition of a person's intellect, spiritual nature and feelings and now the right to privacy has developed to include the right to enjoy life, right to be let alone, and property has broadened to include all forms of intangible as well as tangible possessions.⁷¹ The protection from battery (actual bodily injury) also grew to encompass the protection against the fear of such injury.⁷² The protection of these legal rights continues to grow because the development of law is inevitable.

Warren and Brandeis refer to the *Mario Menda v Stevens and Meyers*, NY Supreme Court case that was decided in 1890.⁷³ This case raised the question of whether the law must afford a remedy for the unauthorised publications of private persons' portraits in newspapers. This case involved the complainant who was a celebrity and got her picture taken whilst she was playing in the Broadway theatre. The complainant prayed that the defendant be restrained from making use of that picture.⁷⁴ This court case brought the law-makers attention to the idea of recognising and protecting the right to privacy when it comes to the circulation of a person's portraits.

⁶⁹ Warren & Brandeis (1890) "*The right to privacy*" Harvard Law Review (4): 1.

⁷⁰ Warren & Brandeis (1890) "*The right to privacy*" Harvard Law Review (4): 1.

⁷¹ Warren & Brandeis (1890) "*The right to privacy*" Harvard Law Review (4): 1.

⁷² Warren & Brandeis (1890) "*The right to privacy*" Harvard Law Review (4): 2.

⁷³ *Mario Menda v Stevens and Meyers*, NY Supreme Court 1890.

⁷⁴ Warren & Brandeis (1890) "*The right to privacy*" Harvard Law Review (4): 3.

Moreover, Warren and Brandeis provided that:

*“Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery”*⁷⁵

This meant that it became necessary and important for the right to privacy of individuals to be protected. The sensitivity of some of the information that would be publicised would cause “mental pain and distress, far greater than could be inflicted by mere bodily injury”.⁷⁶ Information that may seem harmless when circulated widely and persistently is potent for evil.

In the 1890’s, the common law afforded individuals the ability to determine to what extent their thoughts, emotions and sentiments were to be communicated to others.⁷⁷ An individual is given the power to determine the extent of publicity given to them. The nature of the information of expressions publicised was immaterial, it could be by word, in painting, by signs or even in music.⁷⁸ The existence of the right is not dependent on the nature of the expressions. In any case, the person is entitled to decide what should be publicised and what should not be publicised.⁷⁹ The right to privacy can only be lost when the owner of the information publicises the information themselves. The common law right to privacy is entirely independent from the contents of what is being publicised, it does not matter how the information was expressed, it can still be protected from publications without the owner’s consent by the right to privacy.

There is a belief that privacy is not as advanced in Africa due to the prevalent collectivist culture in African societies.⁸⁰ It is suggested that the western culture, which emphasises individualism, is better suited for protecting an individual's

⁷⁵ *Ibid:* 4.

⁷⁶ *Ibid:*4.

⁷⁷ *Ibid:*6.

⁷⁸ *Ibid:*7.

⁷⁹ *Ibid:* 7.

⁸⁰ Anneliese Roos (2016) “Data protection in South Africa” Springer International Publishing at 192.

privacy rights by allowing them to have a personal space that is distinct from the community.⁸¹ In South Africa, this collectivist culture is exemplified by the principle of *ubuntu*.

2.3 Privacy Within the Ambit of Common Law

The right to privacy falls under personality rights within the ambit of common law.⁸² This means that the invasion of someone's privacy is interpreted as an impairment of a person's personality. The principles of the law of delict provides protection to the common law right to privacy. The Transvaal Supreme court in *R v Umfaan*⁸³ in the 1900s described the right to privacy as a personality right. It provided that the right to privacy includes personality rights that every free man is entitled to.⁸⁴

The right to privacy was first recognised as an independent right in the *O'keefe v Argus Printing*⁸⁵ case. This case is the *locus classicus* for the recognition of the independent right to privacy in South Africa. The court in this case held that the right to dignity includes the right to privacy. Watermeyer AJ⁸⁶ correctly interpreted the word *dignitas* in a broad way to include all personality rights and interests (except reputation and bodily integrity). Privacy is thus an advanced and valuable aspect of personality.

The court in *Bernstein v Bester* reached a similar conclusion to that in *O'keefe v Argus Printing* case, by accepting that common law recognises the right to privacy as an independent personality right.⁸⁷ The constitutional court provided that the concept of privacy is an "*amorphous and elusive*" concept and that the scope of

⁸¹ *Ibid* at 192.

⁸² Neethling J (2005) "Law of Personality 2 ed" (LexisNexis Butterworths): 51.

⁸³ *R v Umfaan* 1908 TS 62.

⁸⁴ *R v Umfaan* 1908 TS 62 [66 – 67].

⁸⁵ *O'Keefe v Argus Printing and Publishing (Pty) Ltd* 1954 (3) SA 247 (C).

⁸⁶ *O'Keefe v Argus Printing and Publishing (Pty) Ltd* 1954 (3) SA 247 (C) [248 -249].

⁸⁷ *Bernstein and Others v Bester NO and Others* 1996 ZACC [2].

the right to privacy is closely related to the concept of one's identity.⁸⁸ Ackerman J provided that with the concept of privacy, what is protected is the "*inner sanctum of a person, such as his or her family life, sexual preference and home environment*".⁸⁹ The court further highlighted that the right to privacy can be limited by other rights especially when a person has to move into communal business and activities.⁹⁰ The applicant in the *Bernstein* case challenged the provisions of the Companies Act. The applicant had to appear as a witness at an enquiry because he argued that being forced to disclose books and documents he wanted to keep private was a violation of the right to privacy.⁹¹ Ackerman J however disagreed with the applicant and provided that the right to privacy exists to protect an individual's autonomy from the community.⁹² Ackerman found that "privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly".⁹³ In other words business activities were decided to be public affairs that need public scrutiny in this case. The court decided that what the applicant sought to protect under the right to privacy was part of public affairs that go beyond the scope of the right to privacy. The court further held that the provisions of section 417 and 418 of the Companies Act were not inconsistent with the Constitution of the Republic of South Africa.

Ackerman J, in the *Bernstein* case referred to *Sage Holdings v Financial Mail*⁹⁴ case which provides that intrusion upon the personal privacy of another or publishing a person's private facts amount to a breach of privacy.⁹⁵ The court held that the infringement of the right to privacy is determined by the courts in

⁸⁸ Ibid [2].

⁸⁹ Ibid [2].

⁹⁰ *Bernstein and Others v Bester NO and Others* 1996 ZACC 2 [68].

⁹¹ *Ibid* [67].

⁹² *Ibid* [67].

⁹³ *Ibid* [67].

⁹⁴ *Sage holdings Ltd v Financial Mail (Pty) Ltd* 1991 (2) SA 117 (W).

⁹⁵ *Bernstein and Others v Bester NO and Others* 1996 ZACC 2 [68].

accordance with the *boni mores*.⁹⁶ This decision has however, faced criticism. Neethling for one criticises the approach in *Bernstein v Bester* by alluding that Ackerman J used a limited approach to the interpretation of the concept of privacy.⁹⁷ He provides that this approach is too narrow because it negates private information that may not be of the most personal nature but is worthy of protection.⁹⁸ Neethling provides that:

“...information collected about a person is often not of a most personal nature, or some of the data taken on their own, are not even private according to the above description of privacy, but the total picture thereof is usually of such a nature that the person concerned determines the destiny of the data to be private and therefore also has the will to keep them private”⁹⁹

In the *Investigating Directorate Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and others: In re Hyundai Motor Distributors (Pty) Ltd and others v Smit NO and others* case, it was held that the right to privacy not only protects an individual and his intimate space but it also applies within an individual’s social capacities.¹⁰⁰ The court thus validated Neethling’s criticism of the *Bernstein v Bester* case and provided that the expectation that a person’s decision not to have their private information disclosed to the public will be respected is a reasonable expectation.¹⁰¹

Neethling further criticises the approach of our courts in general when looking at a person’s private facts. He criticises specifically how courts overlook other factors that are worthy of protection when it comes to publicising a person’s private

⁹⁶ *Ibid* [68].

⁹⁷ Neethling J 'The concept of privacy in South African Law' (2005) 122 (1) SALJ: 20.

⁹⁸ *Ibid*: 20.

⁹⁹ Neethling J (2005) “The concept of privacy in South African Law” 122 (1) SALJ: 20.

¹⁰⁰ *Investigating Directorate Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and others: In re Hyundai Motor Distributors (Pty) Ltd and others v Smit NO and others* 2001 (1) SA 545 (CC) [16].

¹⁰¹ *Ibid* [16].

information, such as, a person's psychological integrity, autonomy, self-realisation, and dignity, to mention just a few.¹⁰²

2.4 The Constitutional Right to Privacy

In South Africa, the right to privacy is protected in terms of the common law as well as the Constitution. The Constitution of the republic is the supreme law of South Africa and if any law is inconsistent with the Constitution, it can be declared unconstitutional. The inclusion of the right to privacy in the Constitution is deeply rooted or linked to the country's history of apartheid. It was included in the Constitution as a result of the abuse of power and violations of privacy rights by the apartheid government.¹⁰³

The right to privacy is enshrined in section 14 of the Constitution. It is however not an absolute right under both the common law and the Constitution therefore it can be limited.

Section 14 of the Constitution provides that;

"Everyone has the right to privacy, which includes the right to not have

a) their person or home searched,

b) their property searched;

c) their possessions seized; or

*d) the privacy of their communications infringed."*¹⁰⁴

Privacy is recognised as a fundamental right in South Africa, and it is protected by other legislation such as the POPIA that I will also discuss below. There are quite

¹⁰² Neethling J (2005) "The concept of privacy in South African Law" 122 (1) SALJ: 19.

¹⁰³ McQuoid-Mason in Chaskalson et al (1996) "Constitutional Law of South Africa" (Juta, Kenwyn) at 18.

¹⁰⁴ s14, Constitution of the Republic of South Africa, 1996.

a number of cases that have provided precedent for the protection of the constitutional right to privacy. The *S v Thebus* case for example strengthened the protection of the right to privacy in South Africa.¹⁰⁵ The court held that the protection of personal information is included in the right to privacy. This also includes taxpayers' information. It was reiterated in this case that the collection, use and dissemination of individuals' personal information by the state must be in accordance with the law and should be done so necessarily and for a legitimate purpose.¹⁰⁶

The Constitution in section 36 provides for the limitation clause which says;

“36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- (a) the nature of the right;*
- (b) the importance of the purpose of the limitation;*
- (c) the nature and extent of the limitation;*
- (d) the relation between the limitation and its purpose; and*
- (e) less restrictive means to achieve the purpose.*

Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”¹⁰⁷

The right to privacy as enshrined in the Constitution focuses on protecting the dignity of citizens and to ensure that they enjoy their space and way of living

¹⁰⁵ *S v Thebus & Another* 2003 ZACC [12].

¹⁰⁶ *S v Thebus & Another* 2003 ZACC [12].

¹⁰⁷ s36 Constitution of the Republic of South Africa, 1996.

without unwarranted invasion by the state or others.¹⁰⁸ However, it is necessary to establish if the infringement of that right will be justifiable under the limitation clause mentioned above.¹⁰⁹ Ackerman J in *Bernstein* mentioned that the right to privacy must always be balanced with the other rights and the interest of the community. According to Ackerman:

“The truism that no right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.”¹¹⁰

In theory, one should consider and defend what they want to conduct in their house as being private. However, if a citizen's behaviour breaches national laws or disturbs their fellow citizens, their right to privacy does not cover that behaviour.¹¹¹ Additionally, since the citizen has deliberately chosen to enter the public arena by engaging in commerce or practising a profession that is regulated, these actions will limit the citizen's right to privacy. In this situation, the individual's right to privacy is less pronounced than it would be for someone who does not communicate with the general public.

¹⁰⁸ B Croome (2010) “Taxpayers’ rights in South Africa” (Juta & co) at 123.

¹⁰⁹ *Ibid* at 123.

¹¹⁰ *Bernstein and Others v Bester NO and Others* 1996 ZACC 2 [67].

¹¹¹ MH Cheadle et al (2002) “South African Constitutional Law: The Bill of rights” (Butterworths) at 18.

According to section 8(2) of the Constitution, legal persons are entitled to the Bill of Rights' protections to the extent that those protections are permitted by the nature of those rights.¹¹² In *Sage Holdings Limited and Another v Financial Mail*, a newspaper received information from a private memorandum and illegal tape recordings. Devenish cites this case as an example of when a legal person was able to file a lawsuit for invasion of privacy.¹¹³ This highlights how important protecting the right to privacy has become, with the technological advances that makes it easier for the transferal of information from third parties to the Commissioner for example.¹¹⁴

Taxpayer's information is included under the right to privacy protected by the South African Constitution. There are cases that show that the Constitution indeed protects the privacy of taxpayers' information. In *Minister of Finance v Van Heerden*,¹¹⁵ the court ruled in favour of Van Heerden and provided that the publication of taxpayer's personal information violated taxpayer's right to privacy and was unconstitutional.¹¹⁶ The above case demonstrates how taxpayers have the right to protect their personal and financial information from public disclosure. South African courts have consistently shown that taxpayers' right to privacy is important and protected in our Constitution.¹¹⁷

The constitutional right to privacy can be divided into three groups as it seeks to protect three related concerns namely, the protection of privacy against disclosures of private facts, protecting privacy against intrusions and interferences with private life and lastly, protecting privacy against infringement of autonomy.¹¹⁸

¹¹² GE Devenish (1999) "A Commentary on the South African Bill of Rights" (Butterworths) at 156 and 157. *Sage Holdings Limited and Another v. Financial Mail (Pty) Ltd 1991 (2) SA 117 (W)*.

¹¹³ GE Devenish (1999) "A Commentary on the South African Bill of Rights" (Butterworths) at 156 and 157

¹¹⁴ B Croome (2010) "Taxpayers' rights in South Africa" (Juta & co) at 124.

¹¹⁵ *Minister of Finance v Van Heerden* 2004 ZACC 3.

¹¹⁶ *Minister of Finance v Van Heerden* 2009 (6) SA [121].

¹¹⁷ *Bernstein and Others v Bester NO and Others* 1996 ZACC 2 [69].

¹¹⁸ SALRC 'Privacy and data protection' Oct 2005 [61].

In this dissertation, what is of importance is the protection of privacy against the disclosure of private facts. Section 14 of the Constitution also protects taxpayers against the disclosure of their private information. It limits the ability of people to publish, gain or disclose taxpayers' information without their consent.¹¹⁹

It is important to note that section 14 of the Constitution has two parts, it firstly offers a general right to privacy and the second part protects individuals against the infringement of specific rights such as searches and seizures of someone's person, property or possessions and infringements of the privacy of communications.¹²⁰

The court in *Bernstein v Bester* warned against the use of common law to interpret the constitutional right to privacy. However common law can be used as a starting point in understanding the constitutional right to privacy even though it will not end the enquiry.¹²¹ The Constitution is wider than the common law conception. Under the Constitution there is a two staged enquiry to determine whether the right to privacy has been infringed upon or not.¹²² The first step is to establish the scope of the right to determine whether conduct or law has infringed the right. If indeed the right has been infringed, the second step would be to determine if the infringement is justifiable under the limitation clause. Ackerman J, concluded that it is sensible "to say that the scope of a person's privacy extends *a fortiori* only to those aspects in regard to which a legitimate expectation of privacy can be harboured"¹²³ The "legitimate expectation of privacy" mentioned in the *Bernstein* case has two components "a subjective expectation of privacy...that the society has recognised...as objectively reasonable..."¹²⁴ The subjective component refers

¹¹⁹ SALRC 'Privacy and data protection' Oct 2005 [61].

¹²⁰ Ian Currie (2013) "Bill of rights handbook 6th edition" (Juta & Co) at 294.

¹²¹ *Ibid* at 295.

¹²² *Ibid* at 295.

¹²³ *Bernstein and Others v Bester NO and Others* 1996 ZACC 2 [68].

¹²⁴ *Bernstein and Others v Bester NO and Others* 1996 ZACC 2 [69]. Ian Currie (2013) "Bill of rights handbook 6th edition" (Juta & Co) at 298.

to what an individual deems as private and the objective component explains the reasonableness of one's privacy expectations for them to warrant protection under the right to privacy.¹²⁵

2.5 Invasion of Privacy

The common law provides for, four forms of the invasion of privacy such as publication of private facts, intrusions, appropriation and lastly placing someone in a false light.¹²⁶ The common forms of invasion in South Africa are, the publication of private facts and intrusions, but the other two forms have gained popularity in recent years.¹²⁷

In Anglo-American law, Fleming¹²⁸ provides that the invasion of privacy may be divided into the invasion of a person's a) interest in seclusion, b) interest in name, likeness and life history, and c) interest in personal dignity and self-respect. South African law has similar categories and Joubert¹²⁹ provides that the categories for the concept of the invasion of privacy to include a) intrusion into a person's private life b) public disclosure of a person's private life and c) disruption of a person's peaceful existence. Both perspectives on the classification of invasion of privacy include disclosure of private facts as an invasion of privacy which is what I will be looking at in this study.

The public disclosure of private facts is a form of invasion of privacy that seeks to cover public disclosures of personal information that do not fall within the scope of defamation.¹³⁰ In Anglo-American law, publishing a picture of a woman who did

¹²⁵ Ian Currie (2013) "Bill of rights handbook 6th edition" (Juta & Co) at 298.

¹²⁶ Buthelezi M 'Placing someone in a false light (publicity) shine fourth in SA law' de jure: 783.

¹²⁷ Buthelezi M 'Placing someone in a false light (publicity) shine fourth in SA law' de jure: 784.

¹²⁸ Fleming J.G (1971) "The law of Torts 4 ed" (Sweet & Maxwell) at 526.

¹²⁹ Joubert & Faris (1999) "Personality infringement" LAWSA: 431.

¹³⁰ McQuoid -Mason (1973) "Invasion of Potency" 90 SALJ: 26.

not have teeth was held to be an invasion of privacy.¹³¹ Public disclosure of taxpayer information thus falls under the invasion of privacy in this category. The publication of private facts was recognised in the South African law in *Kidson & others v SA Associated Newspaper Ltd*¹³² case, the court recognised that the action was based on invasion of privacy.¹³³ In the *Kidson* case, the court dealt with the publication of pictures of three female nurses in the newspaper. The pictures were published under the heading '97 Lonely Nurses Want Boyfriends'. Among the nurses in the picture was one Calitz, who was engaged to be married and got married subsequently, before the article was published. The court had to decide whether the publication was an intentional infringement of Calitz' right to personal privacy and if it was unjustified hostility upon her dignity. In its decision, the court did not separate dignity from privacy and it decided that the action was indeed an invasion of privacy.¹³⁴ In *Mhlongo v Bailey*,¹³⁵ the court clearly decided on the basis of invasion of privacy.¹³⁶ The court in this case decided that the plaintiff had suffered an aggression upon his *dignitas* and he was awarded damages for the invasion of privacy.¹³⁷

Neethling distinguishes between two situations when privacy is violated through an intrusion or knowledge of private facts. Situations whereby the confidential information that the person accessed in the first instance was only made available to a select group of people.¹³⁸ This would be the case if a taxpayer shares his or her information with SARS and has reason to believe that the information will only be accessed by SARS. In the second case, an unknown number of people have access to the personal information and if an outsider gets access to such

131 McQuoid -Mason (1973) "Invasion of Potency" 90 SALJ: 26.
132 *Kidson & others v SA Associated Newspaper Ltd* 1957 (3) SA.
133 *Kidson & others v SA Associated Newspaper Ltd* 1957 (3) SA [461].
134 *Kidson & others v SA Associated Newspaper Ltd* **1957 (3) SA [468-469]**
135 *Mhlongo v Bailey* 1958 (1) SA.
136 *Mhlongo v Bailey* 1958 (1) SA [370].
137 *Mhlongo v Bailey* 1958 (1) SA [370].
138 Neethling, Potgieter & Visser (1996) "*Law of Personality*" (Butterworths) at 221.

information, it will be regarded as an infringement of the right to privacy. It is a form of infringement when outsiders become aware of true personal facts about a person against their will.

2.6 An Overview of the Types of Privacy

Clark provides categories of privacy that can assist in classifying the types of privacy. He outlined four categories of privacy; privacy of the person, privacy of personal data, privacy of personal behaviour and privacy of personal communication.¹³⁹ The concept of personal privacy, also known as "bodily privacy", is closely tied to the protection of a person's physical integrity. This includes safeguards against physical invasions such as torture, forced medical procedures, and the compelled collection of bodily fluids and tissues for analysis.¹⁴⁰ Additionally, it encompasses the right to refuse to submit to biometric measurements. According to Clarke, personal privacy is intertwined with numerous medical and surveillance technologies and practices.¹⁴¹

Personal privacy also includes the protection of sensitive matters such as religious practices, sexual behaviour, and political activities, with a spatial component that recognises an individual's right to carry out private activities and be free from systematic monitoring in public spaces.¹⁴² Personal communication privacy is about limiting the monitoring of all forms of communication, including telephone calls, emails, virtual messages, and in-person conversations through hidden microphones. Finally, personal data privacy involves safeguarding personal

¹³⁹ Roger Clarke, "Introduction to Dataveillance and Information Privacy, and Definitions of Terms," Xamax Consultancy, Aug 1997. <http://www.rogerclarke.com/DV/Intro.html> [accessed 12 April 2023].

¹⁴⁰ R Finn (2012) "Seven types of privacy" in *Privacy Impact Assessment* David Wright, Paul De Hert, and Serge Gutwirth (eds) at 7.

¹⁴¹ *Ibid* at 7.

¹⁴² *Ibid* at 7.

information. Clarke notes that due to the increasing integration of computing and communications since the 1980s, the last two aspects are closely connected and commonly referred to as "information privacy."¹⁴³

I will mostly focus on information privacy in this dissertation. The *Hyundai* case provides that the right to privacy is implicated whenever a person has the ability to decide what they wish to disclose to the public and the reasonable expectation that such a decision will be respected.¹⁴⁴ The right to privacy should be interpreted as protecting an individual's interest in what has been called "informational self-determination". This is an interest in restricting the collection, use of and disclosure of personal information. It also includes "having access to personal information that has been collected by others in order to ascertain its content and to check its accuracy"¹⁴⁵

The constitutional court in *Mistry*¹⁴⁶ provided factors to look at when considering the informational aspect of the right to privacy, "whether the information is about intimate aspects of the applicant's personal life, whether the information was obtained in an intrusive manner; whether it involved data provided by the applicant for one purpose which was then used for another; or whether it was disseminated to the press or the general public or persons from whom the applicant could reasonably expect such as private information would be withheld."¹⁴⁷

In the *Mistry* case, a person from the public informed the Medical Council about a potential breach of the law by the applicant. The Council then shared this information with an authorised official responsible for conducting regulatory inspections to safeguard public health. Additionally, all officials handling this

¹⁴³ *Ibid* at 7.

¹⁴⁴ Investigating Directorate Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and others: In re Hyundai Motor Distributors (Pty) Ltd and others v Smit NO and others 2001 (1) SA 545 (CC) [16].

¹⁴⁵ Ian Currie (2013) "Bill of rights handbook 6th edition" (Juta & Co) at 303.

¹⁴⁶ *Mistry v Interim National Medical & Dental Council* SA (1998) (4) SA 1127 (CC).

¹⁴⁷ Ian Currie (2013) "Bill of rights handbook 6th edition" (Juta & Co) at 303.

information were obligated to maintain confidentiality.¹⁴⁸ The court concluded that the applicant's privacy rights were not violated. The court provided that it was not necessary for the case at hand to decide whether or not regulatory inspections are to be regarded as search and seizures in terms of section 13 of the Constitution.¹⁴⁹ The court reasoned that “periodic inspections of the business premises of health professionals” provided for in section 28(1) of the Medicines and Related Substances Control Act (“the Medicines Act”) do not qualify as invasions of privacy.¹⁵⁰

The right to privacy of the person includes the ability to keep bodily functions and characteristics, such as genetic codes and biometrics, private. It has been noted that the human body has cultural significance due to the integration of the physical body and mind.¹⁵¹ The privacy of the person contributes to individual feelings of freedom and supports a healthy, democratic society, which is in line with Clarke's classification.

Expanding on Clarke's *privacy of personal behaviour*, the concept of privacy of behaviour and action includes sensitive issues like sexual preferences, political activities, and religious practices.¹⁵² It concerns activities in both public and private spaces, and Clarke distinguishes between casual observation and systematic recording and storage of information.¹⁵³ The ability to behave freely without being monitored by others promotes autonomy and freedom of thought and action.

Privacy of communication is also another type of privacy and it aims to prevent the interception of communications, including mail interception, bugs, directional

¹⁴⁸ Mistry v Interim National Medical & Dental Council of SA (1998) [51].

¹⁴⁹ Section 13 Constitution of the Republic of South Africa, 1996.

¹⁵⁰ Mistry v Interim National Medical & Dental Council of SA (1998) [28].

¹⁵¹ Emilio Mordini, (2011) “Whole Body Imaging at airport checkpoints: the ethical and political context,” in *Towards Responsible Research and Innovation in the Information and Communication Technologies and Security Technologies Fields*, René von Schomberg (eds) (2011) (Luxembourg: Publications Office of the European Union) at 7.

¹⁵² *Ibid* at 7.

¹⁵³ *Ibid* at 7.

microphones, telephone or wireless communication interception or recording, and access to email messages.¹⁵⁴ Many governments recognise this right and require that communication interception be overseen by a judicial or other authority.¹⁵⁵ This aspect of privacy allows for open discussion of diverse views and encourages growth in the communications sector.

Adding on to Clarke's privacy of personal data, the capturing of images is also considered personal data by the European Union as part of the 1995 Data Protection Directive.¹⁵⁶ This *privacy of data and images* includes ensuring that individuals' data is not automatically available to others and that people can control their data's use. Having control over personal data builds self-confidence and empowers individuals. Like *privacy of thought and feelings*, this aspect of privacy addresses the balance of power between the state and the individual.¹⁵⁷ People ought to be free to think whatever they want as it affects the balance of power between the state and the individual, such creative freedom benefits society.¹⁵⁸ This type of privacy however seems to be under threat with the emergence of new technologies.

In addition, another type of privacy is the *privacy of location and space*.¹⁵⁹ People possess the right to travel in public or partially public areas without being recognised, trailed, or watched. This idea of confidentiality also comprises the right to seclusion and secrecy in domains like residences, vehicles, or workplaces.¹⁶⁰ This type of privacy is beneficial to society as it provides a sense of democracy and independence to individuals when they move about public spaces without any

¹⁵⁴ *Ibid* at 8.

¹⁵⁵ *Ibid* at 8.

¹⁵⁶ *Ibid* at 8.

¹⁵⁷ *Ibid* at 8.

¹⁵⁸ C Goold, (2008) "Surveillance and the Political Value of Privacy" *The Journal of Political Philosophy*: 9.

¹⁵⁹ *Ibid*: 9.

¹⁶⁰ *Ibid*: 9.

fear of identification, surveillance, or monitoring. These emotions have a positive impact on democracy and encourage diversity of opinions and the right to assemble, both of which are crucial for a thriving democracy.¹⁶¹

The final type of privacy that can be identified, is the *privacy of association (including group privacy)*.¹⁶² This type of privacy is concerned with people's right to associate with whoever they want to associate with, without being watched. In a democratic society, it has been acknowledged as essential to have privacy as it promotes various freedoms like freedom of expression, religious beliefs, and other forms of gatherings. The society gains advantages from this privacy by nurturing a diverse range of interest groups, which may aid in giving voice to underrepresented individuals. These voices may push for more significant political or economic changes.

2.7 Conclusion

The concept of privacy is difficult to define under the common law but, Neethling provides a definition that seems to encompass all the important elements that the right to privacy seeks to protect. The right to privacy in South Africa is an important component of an individual's autonomy and dignity. As discussed above, the common law right to privacy protects people from unreasonable intrusions into their private lives whilst the constitutional right to privacy provides broader protection of privacy which encompasses personal autonomy, dignity, and identity.

The state is obliged to protect South African citizens' rights including the right to privacy enshrined in section 14 of the Constitution. It is however important to mention that the right to privacy as provided by the Constitution is not an absolute

¹⁶¹ *Ibid*: 9.

¹⁶² *Ibid*: 9.

right. The right can be limited by competing interests such as prevention of crime or public safety. The limitation must, however, be justifiable in an open and democratic society based on human dignity, equality, and freedom.

Clarke's taxonomy of privacy provides a comprehensive framework for understanding the various types of privacy that individuals value and seek to protect. The four types of privacy, namely, solitude, intimacy, anonymity, and reserve, are interrelated yet distinct concepts that capture the essence of what it means to have a private life.

Solitude refers to the ability to be alone and free from external observation, while intimacy involves the ability to share personal information and experiences with trusted others. Anonymity is the ability to maintain control over one's identity and personal information, while reserve refers to the ability to limit access to oneself and one's personal space.

Understanding these types of privacy is crucial in navigating the complex privacy issues that arise in today's digital age. As more and more of our personal information is shared and stored online, it is important to recognise the value of privacy and to actively work to protect it. Furthermore, by recognising the importance of different types of privacy, individuals, organisations, and governments can work together to establish policies and practices that respect and protect privacy rights. Clarke's taxonomy serves as a valuable tool for this endeavour and will continue to be relevant as technology and society evolve.

In addition, courts clearly recognise the publication of private facts as an invasion of privacy. Therefore, when one publishes a person's private facts there must be reasonable grounds for the publication of such facts. Overall, it is important that the right to privacy is respected and protected to ensure that individuals can fully participate in society and exercise their fundamental human rights without fear of unreasonable interference.

Chapter 3: Taxpayers Right to Privacy in South Africa

3.1 Introduction

Benjamin Franklin once provided that “*nothing is certain except for death and taxes*”.¹⁶³ Taxes have been and will always be a part of human existence for centuries. It is thus important that we understand the rights and protection offered to taxpayers in general. When SARS administers taxes, it is paramount to know that it is important for taxpayers’ rights to be protected.

Taxpayers’ right to privacy is also protected and provided for in South Africa’s legislation, such as the TAA and POPI Act. Confidentiality is an essential aspect of the tax system, and as such, taxpayer information must be safeguarded against unauthorised access or disclosure. In South Africa, the TAA and the POPI Act are the primary legislation governing the confidentiality of taxpayers’ information. This chapter examines the provisions of these Acts and their implications for taxpayers’ confidentiality.

The chapter also explores two notable cases, namely the *Arena Holdings* case and the *Public Protector v CSARS* case, which have implications for the protection of taxpayers’ personal information. The *Arena Holdings* case addressed SARS accessing and using taxpayers’ confidential information without authorisation. The *Public Protector v CSARS* case involved the disclosure of former President Zuma’s tax information to the Public Protector.

I analyse these cases and their impact on the interpretation and application of the TAA’s provisions regarding the confidentiality of taxpayers’ information. I also examine the legal and ethical considerations surrounding the protection of

¹⁶³ Edward Ward (1724) *The Dancing Devils*.

taxpayer information, including the rights of taxpayers and the obligations of tax authorities.

The chapter aims to provide a comprehensive understanding of the legal and ethical frameworks governing taxpayer confidentiality in South Africa, and to highlight the importance of safeguarding this information in ensuring a fair and effective tax system. Ultimately, it is hoped that this chapter will contribute to the ongoing discussion and debate surrounding the protection of taxpayers' information and promote greater transparency and accountability in the tax system.

3.2 TAA

The TAA took effect on the 1st of October 2012. The Act's purpose is to provide a more stable relationship between the powers and duties of SARS and the obligations and rights of taxpayers.¹⁶⁴ One of the goals of the TAA, according to the preamble, is *"to ensure the confidentiality of information"*.¹⁶⁵ The TAA also provides a detailed guideline on the administration of taxes to ensure effective and efficient tax collection.¹⁶⁶ In this dissertation, I dwell on what the TAA says about the disclosure of taxpayer information. The TAA provides rules governing the disclosure of taxpayer information. Section 69(1) of the TAA provides that a current or former SARS official *"must preserve the secrecy of taxpayer information and may not disclose taxpayer information to a person who is not a SARS official"*.¹⁶⁷ The TAA further provides a definition for *"official"* and according to the Act, an

¹⁶⁴ South African Revenue Service. (2018). Guide 4: Tax Administration Act. <https://www.sars.gov.za/wp-content/uploads/Ops/Guides/LAPD-TAdm-G01-Short-Guide-to-the-Tax-Administration-Act-2011.pdf> [accessed on 15 May 2023] 8.

¹⁶⁵ Tax Administration Act 28 of 2011.

¹⁶⁶ South African Revenue Service. (2018). Guide 4: Tax Administration Act. <https://www.sars.gov.za/wp-content/uploads/Ops/Guides/LAPD-TAdm-G01-Short-Guide-to-the-Tax-Administration-Act-2011.pdf> [accessed on 15 May 2023] 4.

¹⁶⁷ S69(1), Tax Administration Act 28 of 2011.

“official” is any person employed by or acting on behalf of SARS, who has been authorised by SARS to perform functions under the TAA or any other law.¹⁶⁸ Therefore, disclosure of taxpayer information to anyone who is not an authorised official at SARS would be a violation of the TAA.

However, the TAA provides an exception to section 69(1). Section 69(2) provides circumstances in which SARS may disclose taxpayer information. Section 69(2) of the TAA provides:

"(a) in the course of performance of duties under a tax Act or customs and excise legislation, such as

(i) to the South African Police Service or the National Prosecuting Authority, if the information relates to, and constitutes material information for the proving of, a tax offence;

(ii) as a witness in civil or criminal proceedings under a tax Act; or

(iii) the taxpayer information necessary to enable a person to provide such information as may be required by SARS from that person;

(b) under any other Act which expressly provides for the disclosure of the information despite the provisions in this Chapter;

(c) by order of a High Court; or

(d) if the information is public information."¹⁶⁹

In this dissertation, section 69(2)(c) is significant because it provides that the disclosure of taxpayer information can take place by order of a High Court.¹⁷⁰ Section 67(4) of the TAA provides that SARS must preserve the confidentiality of

¹⁶⁸ S1, Tax Administration Act 28 of 2011.

¹⁶⁹ S69(2), Tax Administration Act 28 of 2011.

¹⁷⁰ S69(2)(c), Tax Administration Act 28 of 2011.

taxpayer information and may only disclose this information in limited circumstances.¹⁷¹ It is a peremptory obligation on everyone who may get hold of taxpayer information not to disclose such information to any other person.¹⁷² The protection of taxpayer information is supposed to encourage taxpayers to accurately disclose their income.¹⁷³ An accurate disclosure by taxpayers will thus be unlikely if there is a possibility that information will be available to the public or media. If a taxpayer's information does not relate to a "tax offence"¹⁷⁴ the information may only be disclosed to the South African Police Service ("SAPS") or the National Prosecuting Authority ("NPA") when a court order authorising the disclosure is granted.¹⁷⁵

There is thus a balance between the administration of tax legislation and taxpayer's privacy in this respect, as a judge needs to approve of the disclosure of taxpayer information that does not relate to a tax offence.¹⁷⁶ Taxpayer information can be disclosed if a judge approves of it, thus the protection of taxpayer information is not absolute. Section 35(1) of the PAIA also deals with confidentiality of taxpayer information. It provides that SARS "*must refuse a request for access to a record of that service if it contains information which was obtained or is held by that service for the purposes of enforcing legislation concerning the collection of revenue...*".¹⁷⁷ Section 35(1) of the PAIA recognises and acknowledges the

¹⁷¹ S67(4), Tax Administration Act 28 of 2011.

¹⁷² F Moosa (2020) 'Protecting Taxpayer Information from the Public Protector- 'A just cause?'' *JCCL&P*: 191.

¹⁷³ Carika Fritz (2011) 'South African taxpayer's right to privacy in cross border exchange of tax information' *Constitutional court review* Vol 11: 4.

¹⁷⁴ Defined as an offence in terms of the Tax Act, fraud committed against SARS in respect of the administration of tax, or theft of money that is due or paid to SARS. S1, Tax Administration Act 28 of 2011.

¹⁷⁵ S69(2), Tax Administration Act 28 of 2011.

¹⁷⁶ Carika Fritz (2011) 'South African taxpayer's right to privacy in cross border exchange of tax information' *Constitutional court review* Vol 11: 5.

¹⁷⁷ S35(1), Promotion of Access to Information Act 2 of 2000.

provision in section 67(4) of the TAA, which prohibits SARS from disclosing taxpayer information to anyone other than the taxpayer themselves.¹⁷⁸

To further protect taxpayer information, section 67(3) of the TAA provides that if taxpayers' information is disclosed contrary to what the Act stands for, *“the person to whom it was so disclosed may not in any manner disclose, publish or make it known to any other who is not a SARS official”*.¹⁷⁹ In accordance with section 236 of the TAA, non-compliance with sections 67(2), (3) and (4) is an offence punishable by imprisonment for a period not exceeding 2 years or a fine.¹⁸⁰ This goes to show how important it is for taxpayer information to be kept secret.

The TAA in chapter 5, deals with information gathering powers that SARS has.¹⁸¹ Section 40 of the Act allows a person to access taxpayer information for inspection or audit purposes.¹⁸² SARS, in accordance with section 46(1), can also obtain information from a taxpayer through an inquiry, warranted and unwarranted searches as well as inspections.¹⁸³ In the *Welz v Hall* case, it was said that the maintenance of confidentiality of taxpayer information by SARS is a matter concerning public policy.¹⁸⁴ The public trusts SARS and one of the basis for that trust is that their information will be kept confidential. Moosa provides that the policy of confidentiality pre-dates the Constitution and that in Chapter 6 of the TAA, parliament protects this policy.¹⁸⁵ *“The veil of secrecy conferred upon SARS will not be lightly pierced”*.¹⁸⁶

¹⁷⁸ M Croome & J Olivier (2015) 'Tax Administration' *Juta & Co Ltd*: 620.

¹⁷⁹ S67(3), Tax Administration Act 28 of 2011.

¹⁸⁰ S236, Tax Administration Act 28 of 2011.

¹⁸¹ Chapter 5, Tax Administration Act 28 of 2011.

¹⁸² S40, Tax Administration Act 28 of 2011.

¹⁸³ Ss 52, 63 & 45, Tax Administration Act 28 of 2011.

¹⁸⁴ *Welz v Hall* 1996 (4) SA 1073 (C) 1076G.

¹⁸⁵ F Moosa (2020) 'Protecting Taxpayer Information from the Public Protector- 'A just cause'?' *JCCL&P*: 198. *Greenspan v R* 1944 SR (149) 155-156.

¹⁸⁶ *Lebowa v De Meyer* No 1993 (4) SA 13 26A. *Ibid*: 198.

3.3 POPI Act

Cross-border information protection principles and the constitutional right to privacy formed the basis of the POPI Act.¹⁸⁷ Personal information is protected through the right to privacy.¹⁸⁸ According to the POPI Act, personal information comprises *“information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person, including, but not limited to:*

a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person;

b) information relating to the education or the medical, financial, criminal or employment history of the person;

c) any identifying number, symbol, e-mail address, physical address, telephone number, location information, online identifier or other particular assignment to the person;

d) the biometric information of the person;

e) the personal opinions, views or preferences of the person;

f) correspondence sent by the person that is implicitly or explicitly of a private or confidential nature, or further correspondence that would reveal the contents of the original correspondence;

g) the views or opinions of another individual about the person; and

¹⁸⁷ DP Van der Merwe and PFG Roodt (2014) *Information protection legislation in South Africa* (LexisNexis South Africa) at 45.

¹⁸⁸ S1, Protection of Personal Information Act 4 of 2013.

h) the name of the person if it appears with other personal information relating to the person, or if the disclosure of the name itself would reveal information about the person.”¹⁸⁹

The POPI Act applies to everyone who processes personal information. The Act regulates how individuals must handle, store and secure that information.¹⁹⁰ It is therefore important, for purposes of this study, to understand what the POPI Act says about the handling of personal information. Personal information also includes taxpayer information as discussed above in the first chapter. The POPI Act provides that personal information should be processed in a fair and lawful manner.¹⁹¹ SARS’s refusal to publish taxpayer information is thus warranted in that it will ensure that taxpayer’s information will be processed fairly and lawfully. The POPI Act emphasises the importance of the right to privacy in South Africa in that it promotes the protection of personal information.¹⁹²

Furthermore, the POPI provides that “*the public or private body or any other person which, alone or in conjunction with others, determines the purpose of and the means for processing personal information*” is the responsible party that determines the purpose of and the means for processing personal information.¹⁹³ SARS being the responsible party in this study, is authorised to process taxpayer information for purposes of tax administration. The POPI Act also provides that information must be processed in accordance with the purpose it was collected for.¹⁹⁴ The POPI Act allows further processing of information in its section 15(3), if the processing of that information would be necessary to “comply with an obligation imposed by law or to enforce legislation concerning the collection of revenue as

¹⁸⁹ S1, Protection of Personal Information Act 4 of 2013.

¹⁹⁰ S18, Protection of Personal Information Act 4 of 2013.

¹⁹¹ S4, Protection of Personal Information Act 4 of 2013.

¹⁹² Carika Fritz (2011) ‘*South African taxpayer’s right to privacy in cross border exchange of tax information*’ *Constitutional court review* Vol 11: 1.

¹⁹³ S16, Protection of Personal Information Act 4 of 2013.

¹⁹⁴ S15(3)(c) POPI Act.

defined in section 1 of the South African Revenue Service Act 1997 (Act 34 of 1997)”¹⁹⁵ as stated above processing information for such a reason would be lawful and compatible with the purpose of collection.¹⁹⁶

Section 12(2)(d) of the POPI Act allows for information to be obtained from another or a different source other than the data subject if it is necessary to “*comply with an obligation imposed by law or to enforce legislation concerning the collection of revenue as defined in section 1 of the SARS Act*”.¹⁹⁷ Lastly section 18 of the POPI Act regulates notifying the data subject when collecting personal information with an exception.¹⁹⁸ Section 18(4)(c) is the exception and it provides that it is not necessary to notify the subject in order to comply with an obligation imposed by law or to enforce legislation concerning the collection of revenue as defined in section 1 of the SARS Act.¹⁹⁹

The above provisions in the POPI Act are thus important because they provide exceptions when it comes to accessing taxpayer information. Information can therefore be provided to a third party if it ensures compliance with the SARS Act. This however infringes taxpayer rights to privacy and there should be a balance between compliance with the SARS Act regulations and taxpayers right to privacy. If a third party wants to access taxpayer information, they can thus rely on the above exceptions provided for in the POPI Act.

3.4 The Public Protector case

In the *Public Protector v CSARS* case, the Commissioner of SARS resisted compliance with a subpoena issued by the Public Protector for access to the

¹⁹⁵ section 1 of the South African Revenue Service Act 1997 (Act 34 of 1997).
¹⁹⁶ section 1 of the South African Revenue Service Act 1997 (Act 34 of 1997).
¹⁹⁷ Section 1 of the South African Revenue Service Act 1997 (Act 34 of 1997).
¹⁹⁸ Section 18 SARS Act.
¹⁹⁹ Section 18(4)(c) SARS Act.

records of the former President, Jacob Zuma.²⁰⁰ SARS relied on the general prohibition against the disclosure of taxpayer information in section 69(1) of the TAA, to reject the demands of the Public Protector's subpoena.²⁰¹ The Public Protector however threatened the CSARS with criminal sanction and argued that section 69(1) of the TAA does not constitute "just cause" for purposes of section 11(3) of the Public Protector Act 23 of 1994 (PPA).²⁰² SARS then approached the courts for relief in this regard. The court had to decide whether the Public Protector has the right to have access to taxpayer information in SAR's possession.²⁰³ In *casu*, the court balanced the Public Protector's right to access to information with the taxpayers right to privacy. ²⁰⁴

In section 1(c) of the Constitution, the values of constitutional supremacy and the rule of law are listed as being relevant for establishing what constitutes "just cause," according to Mabuse J. Their application has the result that a person would have a "just cause" if their motivation for acting or refusing to act was based on or in accordance with a duty derived from the Constitution or any other legislation, whether it be a statute, regulation, or rule.²⁰⁵ Thus, Mabuse J ruled that a "just cause" can be any "valid reason" that is recognised by the law.²⁰⁶

Mabuse J, in the *Public Protector* case further held that except in circumstances expressly provided for by the TAA, dissemination of taxpayer information is prohibited by section 69(1) of the TAA. A reading of section 69(1) and the TAA read holistically makes it evident how peremptory this restriction is and the

²⁰⁰ Public Protector v Commissioner for the South African Revenue Service and Others 2020 (CCT63/20) ZACC 28.

²⁰¹ *Ibid* [9].

²⁰² F Moosa (2020) 'Protecting Taxpayer Information from the Public Protector- 'A just cause'?' *JCCL&P*: 206.

²⁰³ *Ibid*: 196.

²⁰⁴ *Ibid*: 196.

²⁰⁵ Public Protector v Commissioner for the South African Revenue Service and Others 2020 (CCT63/20) ZACC 28 [28].

²⁰⁶ *Ibid*: [29]

repercussions of non-compliance.²⁰⁷ Section 69(1) and Chapter 6 of the TAA, both serve to protect the confidentiality of information that taxpayers give to SARS.²⁰⁸ The only way to actualise the intent of section 69(1) and the harm it seeks to prevent is to interpret it in a way that it creates a mandatory obligation that must be met under penalty of nullity. The word "*must*" in section 69 of the TAA strongly suggests that the obligation to safeguard and maintain taxpayer privacy is one that must be fulfilled.²⁰⁹ The importance of complying with this provision is emphasised by the inclusion of section 236 of the TAA which provides that non-compliance is punishable.²¹⁰ "*By virtue of s 8(1) of the Constitution, taxpayers' rights in the Bill of Rights apply to the PPA and TAA. Also, the Public Protector, SARS and the CSARS are, as constitutional organs of state, duty-bound to respect and protect taxpayers' fundamental rights (such as, to privacy and just administrative action)*".²¹¹

In this case, the court found that the confidentiality requirements of SARS did not supersede the Public Prosecutor's authority under section 7(4)(a) of the PPA to summon a person to deliver a requested document.²¹² In essence, Mabuse J acknowledged that, despite the public protector's role as an institution that supports democracy in South Africa, there are instances in which her authority may be used in a way that, if approved, would undermine democracy.²¹³

According to the court's ruling in the case of *Public Protector v CSARS*, SARS and the CSARS are required by law to protect taxpayer confidentiality "*for the benefit*

²⁰⁷ F Moosa (2020) 'Protecting Taxpayer Information from the Public Protector- 'A just cause'?' *JCCL&P*: 208.

²⁰⁸ *Ibid.*

²⁰⁹ S69, Tax Administration Act 28 of 2011. F Moosa (2020) 'Protecting Taxpayer Information from the Public Protector- 'A just cause'?' *JCCL&P*: 208.

²¹⁰ S236, Tax Administration Act 28 of 2011.

²¹¹ F Moosa (2020) 'Protecting Taxpayer Information from the Public Protector- 'A just cause'?' *JCCL&P*: 210.

²¹² *Public Protector v Commissioner for the South African Revenue Service and Others* 2020 (CCT63/20) ZACC 28 [69].

²¹³ *Ibid.*

of all the taxpayers".²¹⁴ This exemplifies how taxpayers have a fundamental right to equality in the manner that the Constitution's section 9 envisions it, namely, "*the right to equal protection and benefit of the law*".²¹⁵ Like all other fundamental rights, the right to privacy of taxpayers is not absolute.

The Public Protector *in casu* argued that because of her office's constitutional origins and constitutional powers vested in it by virtue of her office, her authority trumps the authority of SARS and the CSARS.²¹⁶ The Public Protector based this argument on the fact that the TAA is subservient to the Constitution in terms of section 2 of the Constitution and that refusing to give her information pertaining to the former President Jacob Zuma was inconsistent with the Constitution.²¹⁷ The court however provided that:

"The powers of the Public Protector can only be limited by the Constitution. The Constitution is the superior law to the TAA [Tax Administration Act] and the Public Protector may accordingly subpoena taxpayer records from SARS if such is in pursuance of her investigation. This statement is not entirely true".²¹⁸

Mabuse J correctly rejected the Public Protector's argument that the TAA cannot be used to limit the Public Protector's subpoena powers since they derive, like all other authorities granted to her office, directly from the Constitution.²¹⁹ While some of the Public Protector's authority comes from the Constitution, others come from national laws that are taken into consideration under section 182(2) of the Constitution.²²⁰

²¹⁴ *Ibid.* [39].

²¹⁵ S9, Constitution of the Republic of South Africa, 1996.

²¹⁶ Public Protector v Commissioner for the South African Revenue Service and Others 2020 (CCT63/20) ZACC 28 [34].

²¹⁷ *Ibid.*

²¹⁸ *Ibid.* [35].

²¹⁹ *Ibid.*

²²⁰ Constitution of the Republic of South Africa, 1996.

I agree with the judgment in the *Public Protector* case because the Public Protector is indeed required to act in line with the law. The court also protected the taxpayer against the disclosure of his tax records, this sets a good precedent as ordinary taxpayers will not be negatively affected and have their records protected from being disclosed by the Public Protector. I also agree with this court's decision because the court highlighted that if the Public Protector urgently needed to access Mr J Zuma's records, there were other more direct ways to access such information as provided for in the TAA.²²¹

3.5 Arena Holdings v SARS

In *Arena Holdings* case, the North Gauteng High Court had to decide whether, freedom of expression and the right of access to information trump the right to privacy. The facts of this case are as follows; an investigative journalist in his book *The President's keepers* raised a number of claims regarding the tax affairs of the former President Jacob Zuma.²²² Allegations against him included failing to file tax reports while he served as President, failing to pay tax on "security upgrades" at his home, and receiving gifts from questionable sources.²²³ These allegations were verified by the evidence that was heard during the Nugent Commission, and the evidence that was led at the Commission of Enquiry into the State Capture. In addition, a report titled "*Secure in Comfort*" by the Public Protector also corroborated some of the above-mentioned allegations.²²⁴

The legitimacy of SARS's legal prohibition against disclosing the taxpayer's information was contested by Arena Holdings (Pty) Ltd operating as the *Financial*

²²¹ S67(4), Tax Administration Act 28 of 2011.

²²² J Pauw 2017 *The President's Keepers* (NB Publishers South Africa).

²²³ *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* 2021 ZAGPPHC 779 [5.1].

²²⁴ *Ibid*: [5.2].

Mail, the Amabhungane Centre for Investigative Journalism, and Thompson, an employee of the *Financial Mail*.²²⁵ They argued that they are entitled to access the taxpayer's tax records since doing so would serve the public interest and reveal "a *substantial contravention of the law*" on the part of the taxpayer and other parties involved.²²⁶

SARS, in this case, relied on section 67(4) of the TAA which reiterates the duty placed upon SARS to protect taxpayers' information.²²⁷ In addition, section 35(1) of the PAIA also prevents the disclosure of information obtained or held by SARS for purposes of tax collection.²²⁸ Moreover, SARS referenced section 34(1) of the PAIA, which stipulates that a request for access to records must be denied if disclosure will result in an unreasonable disclosure of personal information regarding a third party.²²⁹

Importantly in this case, is section 46 of the PAIA which provides for a public interest override under which certain records must be revealed. The public interest override, however, only applies to the records listed in section 46 of the PAIA. Examples of records mentioned are commercial information²³⁰ and police dockets.²³¹ Other than being specifically listed in section 46, certain requirements must be met before the record is disclosed:

"(a) the disclosure of the record would reveal evidence of-

(i) a substantial contravention of, or failure to comply with, the law; or

²²⁵ *Ibid*: [1-2].

²²⁶ *Ibid*.

²²⁷ S67(4), Tax Administration Act 28 of 2011.

²²⁸ C. Fritz & S. P. van Zyl 2022 "Tax Administration, Confidentiality of Information, the Promotion of Access to Information Act 2 of 2000, and Public Figures: Arena Holdings (Pty) Ltd t/a Financial Mail v SARS (88359/2019) [2021] (ZAGPPHC) (16 November 2021), 85 THRHR 586" :4.

²²⁹ Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others 2021 ZAGPPHC 779 [4.10 – 4.11].

²³⁰ S36, Promotion of Access to Information Act 2 of 2000.

²³¹ S39, Promotion of Access to Information Act 2 of 2000.

(ii) *an imminent and serious public safety or environmental risk; and*
(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question."²³²

The applicants in the *Arena Holdings* case could not rely on the public interest override as provided above because section 35(1) of the Promotion of Administrative Justice Act (PAJA) is not included in the list of records that are subject to the public interest override provided in section 46 of the PAIA.²³³ They contended that disclosing information about a former President's suspected tax violations is in the public interest.²³⁴ They claimed that the restriction on sharing taxpayer information resulted in a general ban that entirely violated their constitutional rights to access to information and freedom of expression.²³⁵ The applicants further argued that the current position was unlawful because there were less intrusive options available, such as exercising the public interest override.²³⁶

SARS, on the other hand, argued that the current rules strike the right balance between the competing interests.²³⁷ SARS cited the significance and intent of the confidentiality rules and stated that, as an exchange for full disclosure from taxpayers, it commits to keep the taxpayers' affairs private.²³⁸ Highlighting the importance of this, the CSARS provided that:

"The guarantee of confidentiality is what the taxpayer gets in return for the compulsion to provide full information to SARS. Without this statutory guarantee

²³² S46, Promotion of Access to Information Act 2 of 2000.

²³³ *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* 2021 ZAGPPHC 779 [5.6].

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* 2021 ZAGPPHC 779 [6.3].

²³⁷ *Ibid.* [3.4].

²³⁸ *Ibid.* [7.1].

*of confidentiality, the expectation that the taxpayer will be candid and accurate with SARS diminishes. The compact, written into law, between a tax authority and the public is the foundation of the tax system, without which the tax system cannot properly function*²³⁹

SARS relied on foreign jurisdictions such as that of New Zealand, Canada and Germany and reasoned that there is an absence of a public interest disclosure provision with regards to taxpayer information in these jurisdictions thus the disclosure of taxpayer information for purposes of public interest should be prohibited.

In addition, SARS also argued that taxpayers' information should not be published on the basis that there are international treaties that South Africa is a signatory to, that contain provisions similar to section 69(1) of the TAA.²⁴⁰ SARS further stated that the secrecy provisions are important in protecting taxpayers', as a taxpayer may not refuse to make a disclosure based on the disclosure being self-incriminating.²⁴¹ Taxpayers thus need the protection provided by the TAA. Lastly, SARS argued that, section 69(1) of the TAA is not an absolute ban of the disclosure of taxpayers' information, instead there are exceptions to section 69 of the TAA.²⁴² The High Court, for example, can give an order for the disclosure of a taxpayer's information as discussed above,²⁴³ or the disclosure of taxpayers' information for the protection of SARS' integrity and reputation so as to rebut false accusations made by the taxpayer.²⁴⁴

The court in *Arena Holdings* considered whether limiting the right to privacy will be reasonable and justifiable in terms of section 36 of the Constitution. In this instance

²³⁹ Ibid: [7.2].

²⁴⁰ Ibid: [7.3-7.4].

²⁴¹ Ibid: [7-6].

²⁴² Ibid: [7.7].

²⁴³ S69(2)(c), Tax Administration Act 28 of 2011.

²⁴⁴ S67(5), Tax Administration Act 28 of 2011.

the court held that the public interest override is applicable in “*extraneously sensitive’ or otherwise confidential information and that these types of information might affect more people than just the person whose right to privacy is limited*”.²⁴⁵ The court also held that, the fact that the information in question is that of the former President Jacob Zuma and not information of any other person,²⁴⁶ should be taken into considering when deciding the limitation on the rights of access to information and freedom of expression and when looking at the nature of these rights as required by section 36(1)(a) of the Constitution.²⁴⁷ The fact that Jacob Zuma was a member of the executive branch of the government means that the publication of this information would be far greater with regards to public interest than that of an ordinary taxpayer.²⁴⁸ Furthermore, the court provided that “*the claim [is] that free access to official (state held) information is a prerequisite for public accountability and an essential feature for participatory democracy*”.²⁴⁹

According to the court, studies have shown that tax systems in other countries that permit less taxpayer confidentiality than in South Africa did not jeopardise those systems' ability to administer taxes.²⁵⁰ Furthermore, the court held “*that there might be far weightier compulsions to voluntary tax compliance than the guarantee of confidentiality*”.²⁵¹ In view of complete disclosure or voluntary compliance, the court determined that there is no connection between the confidentiality restrictions and efficient tax administration.²⁵²

²⁴⁵ Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others 2021 ZAGPPHC 779 [8.8].

²⁴⁶ *Ibid*: [8.10].

²⁴⁷ C. Fritz & S. P. Van Zyl 2022 “Tax Administration, Confidentiality of Information, the Promotion of Access to Information Act 2 of 2000, and Public Figures: Arena Holdings (Pty) Ltd t/a Financial Mail v SARS (88359/2019) [2021] (ZAGPPHC) (16 November 2021), 85 THRHR 586” :6.

²⁴⁸ Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others 2021 ZAGPPHC 779 [8.11].

²⁴⁹ *Ibid*: [8.14].

²⁵⁰ *Ibid*: [8.1].

²⁵¹ *Ibid*: [8.4].

²⁵² *Ibid*: [8.6].

The court held that SARS was silent about other international jurisdictions that support different positions other than that of South Africa, thus their argument to leave the current disclosure provisions was not persuasive.²⁵³ The court also provided that the public interest override would be the most less restrictive way of achieving the desired purpose.²⁵⁴ The High Court, thus concluded that sections 67 and 69 of the TAA are unconstitutional in so far as the public interest override does not apply. The “blanket ban” on disclosure of taxpayer information was said to be unreasonable and unjustifiable in terms of section 36 of the Constitution.

3.6 Comments on Arena Holdings High Court decision

SARS’ argument of striking a bargain by keeping taxpayer secrets and taxpayers voluntarily complying has not been scientifically proven yet and has been criticised. Fritz and Van Zyl postulates that the decision by taxpayers to comply is made based on various factors.²⁵⁵ Compliance cannot be attributed to a single factor such as a guarantee from SARS that their information will be kept confidential. Majority of studies have shown that economic factors dominate that decision-making process to be tax-compliant.²⁵⁶ Taxpayers tend to weigh the repercussions of non-compliance to being tax-compliant and then they choose to comply.²⁵⁷ It will thus not be difficult to comply when one looks at the costs of non-compliance.²⁵⁸ Adding on, another factor that causes taxpayers to comply is a guilty conscience.

²⁵³ *Ibid*: [8.13].

²⁵⁴ *Ibid*: [8.10].

²⁵⁵ C. Fritz & S. P. Van Zyl 2022 “Tax Administration, Confidentiality of Information, the Promotion of Access to Information Act 2 of 2000, and Public Figures: Arena Holdings (Pty) Ltd t/a Financial Mail v SARS (88359/2019) [2021] (ZAGPPHC) (16 November 2021), 85 THRHR 586” :8.

²⁵⁶ Sandmo 2005 "The theory of tax evasion: A retrospective review" *National Tax Journal* :643-663.

²⁵⁷ Alm & Beck 1991 "Tax Amnesties and Compliance in the Long Run: A Time Series Analysis" *Southern Economic Journal* :1043-1053.

²⁵⁸ Uslaner 2010 "Tax evasion, corruption, and the social contract in transition" in Alm et al (eds) *Developing alternative frameworks for explaining tax compliance* at 175.

For some taxpayers, it is not the idea of getting caught that persuades them to comply but it is guilt.²⁵⁹ An individual's social structures or reference group can also influence whether the individual is tax-compliant or not.²⁶⁰ Some people pay their taxes on time because they value the services given by the government and realise that by doing the same, others will follow their lead.²⁶¹

Fritz and Van Zyl²⁶² have demonstrated that tax compliance motivations are complicated, and it is unlikely that reliable predictions of taxpayer behaviour can be made. The available data, however, demonstrates that secrecy does not have a significant impact on the choice to comply.²⁶³ Therefore, scientific study does not corroborate SARS's claim that the secrecy provisions are the foundation and pillar of tax compliance in South Africa. In South Africa, it is therefore unlikely that a public interest override will result in a sharp drop in tax compliance. I, however, disagree with Fritz and Van Zyl with regards to the public interest override having no impact on tax compliance. I believe it may seem like secrecy does not have any effect on tax compliance because it is expected and insinuated by the revenue authorities. If this is to change and people are made fully aware that their information will be publicised, we might see a sharp drop in compliance. Generally, individuals shy away from sharing their income and e-filing details to 3rd parties which is something tax practitioners face in practice daily. I believe that adding non-secrecy to the scepticism that already exists will not have a positive impact on tax compliance. It might not be scientifically proven as mentioned by Fritz and Van

²⁵⁹ C. Fritz & S. P. Van Zyl 2022 "Tax Administration, Confidentiality of Information, the Promotion of Access to Information Act 2 of 2000, and Public Figures: Arena Holdings (Pty) Ltd t/a Financial Mail v SARS (88359/2019) [2021] (ZAGPPHC) (16 November 2021), 85 THRHR 586" :8.

²⁶⁰ Vihanto 2003 "Tax evasion and the psychology of the social contract" *Journal of Socio Economics* :112.

²⁶¹ Alm et al 1992 "Determinants of local government tax effort: Evidence from Illinois" *Journal of Public Economics* :36.

²⁶² C. Fritz & S. P. Van Zyl 2022 "Tax Administration, Confidentiality of Information, the Promotion of Access to Information Act 2 of 2000, and Public Figures: Arena Holdings (Pty) Ltd t/a Financial Mail v SARS (88359/2019) [2021] (ZAGPPHC) (16 November 2021), 85 THRHR 586" :8.

²⁶³ *Ibid.*

Zyl but, generally, people reluctantly disclose their income and intricate personal details when asked to, so one can assume that if the guarantee of secrecy is off the table people will less likely give out their information willingly.

Moving on, I also look at whether it was necessary for the court to 'read in' a public interest override in the *Arena Holdings* case. Section 69(2) of the TAA provides instances in which SARS may disclose taxpayer information to a third party. The TAA stipulates that taxpayer information may be disclosed when performing duties in terms of tax legislation, when another statute expressly provides for the disclosure of such information and when a High Court grants an order to disclose.²⁶⁴ The disclosure of taxpayer information to the SAPS and NPA in connection with a tax offence is one of the situations indicated and doing so would be in the course of SARS's obligations under section 69(2)(a) of the TAA. Thus, SARS is not prohibited from providing information to the SAPS or NPA when a taxpayer has committed an offence involving fraud against SARS or theft of money owed to or paid to SARS.²⁶⁵

Section 71 of the TAA allows SARS, the SAPS, or the NPA to approach the court on an *ex parte* basis to disclose information that may reveal evidence of an offence other than a tax offence being committed. The offence should be one in which a court may impose an imprisonment period of at least five years, or that may be relevant in investigating or prosecuting such an offence, when the alleged offence does not fall within the parameters of what constitutes a tax offence.²⁶⁶ Therefore, the TAA's sections 69(2) and 71 make sure that the SAPS and the NPA can carry out their respective missions without being hindered by SARS secrecy rules.²⁶⁷

²⁶⁴ S69, Tax Administration Act 28 of 2011.

²⁶⁵ C. Fritz & S. P. Van Zyl 2022 "Tax Administration, Confidentiality of Information, the Promotion of Access to Information Act 2 of 2000, and Public Figures: *Arena Holdings (Pty) Ltd t/a Financial Mail v SARS* (88359/2019) [2021] (ZAGPPHC) (16 November 2021), 85 THRHR 586" :10.

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*

It should be noted that the TAA does not allow for the disclosure of a taxpayer's information because of allegations of an offence being committed hence why the applicants in the *Arena Holdings* case could not obtain access to the taxpayer's information.²⁶⁸

Access to information can also be afforded in terms of the PAIA. The *Arena Holdings* case held that the TAA's provisions were unlawful and unconstitutional and ordered that the words be read into the provisions of the TAA to refer to disclosures as authorised disclosures under the PAIA.²⁶⁹ Fritz and Van Zyl argue that the reading in is unnecessary in light of section 69(2)(a)(ii) of the TAA.²⁷⁰ This is because the prohibition imposed by the TAA would be superseded by any Act (including the PAIA) that provided for access to the specific information.²⁷¹ Therefore, the reading in merely repeats or reiterates what is already provided for by the TAA. In terms of the PAIA, it would have been sufficient to merely list taxpayer information as one of the instances in which the public interest has priority.

Section 69(2)(c) provides that a High Court can order for the disclosure of taxpayers' information. It provides that before the court makes such an order it must be satisfied of the following:

*"(a) the information cannot be obtained elsewhere; (b) the primary mechanisms for procuring evidence under an Act or rule of court will yield or yielded no or disappointing results; (c) the information is central to the case; (d) the information does not constitute biometric information" (s 69(5) of the TAA)*²⁷²

²⁶⁸ *Ibid.*: 11.

²⁶⁹ *Arena Holdings (Pty) Ltd t/a Financial Mail v SARS (88359/2019) [2021] (ZAGPPHC) (16 November 2021)*, 85 THRHR 586 [33].

²⁷⁰ C. Fritz & S. P. Van Zyl 2022 "Tax Administration, Confidentiality of Information, the Promotion of Access to Information Act 2 of 2000, and Public Figures: *Arena Holdings (Pty) Ltd t/a Financial Mail v SARS (88359/2019) [2021] (ZAGPPHC) (16 November 2021)*, 85 THRHR 586" :11.

²⁷¹ *Ibid.*

²⁷² S69(2)(c), Tax Administration Act 28 of 2011.

Looking at the facts in *Arena Holdings*, one can note that the information required by the applicants could not have been obtained from elsewhere, the information was also central to the case so given the above the court would have ordered for the disclosure of such information, instead of going through the trouble of reading into the provisions of the TAA.

SARS now has the authority to determine whether information sought by a third party is in the public interest thanks to the interpretation of the public interest override in sections 46 of the PAIA and 67 and 69 of the TAA.²⁷³ Fritz and Van Zyl do not believe that the typical SARS employee is qualified to make such a value judgment and suggests that a court would be better suited to handle this.²⁷⁴ While the public override may be seen as a positive move, the TAA's secrecy rules need to be completely revised in order to guarantee that the disclosure of information decision-making is subject to court review.²⁷⁵

3.7 Arena Holdings Constitutional Court decision

The minority judgment in the *Arena Holdings* case disagreed with the notion of declaring section 35 and 46 of the PAIA as well as section 67 and 69 of the TAA unconstitutional in so far as the sections preclude access to tax records by a person other than the taxpayer (a requester) even in circumstances where the requirements set out in subsections 46(a) and (b) of the PAIA are met.²⁷⁶ The minority judgment by Mhlantla J provided that it would not have confirmed the

²⁷³ C. Fritz & S. P. Van Zyl 2022 "Tax Administration, Confidentiality of Information, the Promotion of Access to Information Act 2 of 2000, and Public Figures: *Arena Holdings (Pty) Ltd t/a Financial Mail v SARS* (88359/2019) [2021] (ZAGPPHC) (16 November 2021), 85 THRHR 586" :12.

²⁷⁴ *Ibid.*

²⁷⁵ *Ibid.*

²⁷⁶ *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* [2023] ZACC 13 [63]

constitutional invalidity of the above-mentioned sections of the PAIA and TAA.²⁷⁷ The minority reiterated on the importance of the right to access to information and provided that in *My Vote Counts* a link between the right to vote and access to information was established.²⁷⁸ The court reasoned that the right to vote is largely dependent on information. The right to access to information is therefore central to the exercise of other rights such as the right to public participation, right to freedom of expression, the freedom of the press and other media and the right to receive or import information or ideas.²⁷⁹

The reasoning for the minority judgment is that the limitation of accessing and disclosure of taxpayer information by anyone other than the taxpayer was justifiable.²⁸⁰ This limitation ensures that there is a balance between the right to access to information and right to privacy of individuals. Mhlanta J also reasoned that the TAA already provided measures that can be used for purposes of striking a balance between the access to taxpayer information and maintaining taxpayer secrecy.²⁸¹

In addition, the minority judgment also provided that the “public interest override” would not only affect Mr J Zuma, but it would have far-reaching consequences in that it will also be applicable to normal or ordinary taxpayers.²⁸² The minority held that tax records of ordinary citizens that can potentially prove “a substantial contravention of, or failure to comply with, the law” or “an imminent and serious

²⁷⁷ Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others [2023] ZACC 13 [114]

²⁷⁸ My Vote Counts NPC v Minister of Justice and Correctional Services [2018] ZACC 17; 2018 (5) SA 380 (CC); 2018 (8) BCLR 893 (CC) [20]

²⁷⁹ Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others [2023] ZACC 13 [66]

²⁸⁰ Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others [2023] ZACC 13 [114]

²⁸¹ Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others [2023] ZACC 13 [113]

²⁸² Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others [2023] ZACC 13 [112]

public safety or environmental risk” and where this disclosure would potentially be in the public interest will be affected by the public interest override.²⁸³ This will have dire consequences on the privacy rights of such individuals and also has the potential of dismantling their social standings and reputations of taxpayers if their records are accessed and published.

The majority judgment by Kollapen J, however disagreed with the minority judgment, and provided that the prohibition on access to taxpayer records provided for in section 35(1), read with section 46 of the PAIA was indeed absolute.²⁸⁴ The majority held that these provisions did not meet the limitation test in section 36 of the Constitution and were thus unconstitutional.²⁸⁵ The court reiterated the importance of balancing the right to privacy, access to information and freedom of expression as these rights are competing rights. In this instance the court emphasised the importance of balancing taxpayers right to privacy and the public interest as well as the right to access taxpayer records if they will be able to potentially expose serious criminal activities or a risk to public safety.²⁸⁶

The majority held that the effect of the section 46 mandatory “public interest override” was to continue to maintain a high level of confidentiality (when it comes to taxpayers’ tax records), but whilst providing a carefully crafted and restrained basis for the lifting of confidentiality of said records in the public interest.²⁸⁷ The majority provided that section 35(1) of the PAIA protected all taxpayer information regardless of who the taxpayer is and whether they needed to be protected. The

²⁸³ Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others [2023] ZACC 13 [140]

²⁸⁴ Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others [2023] ZACC 13 [125]

²⁸⁵ Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others [2023] ZACC 13 [125]

²⁸⁶ Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others [2023] ZACC 13 [129]

²⁸⁷ Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others [2023] ZACC 13 [144]

court provided that taxpayer information was “totally immunised from the section 46 override that applied to all other types of information protected in terms of Chapter 4 of the PAIA.²⁸⁸ The court thus rules that J Zuma’s tax records should be published based on the above reasons.

I agree with the minority judgment’s reasoning because I believe tax information held by the state does not receive absolute protection from disclosure under the PAIA. The TAA catered for situations whereby there will be a need to strike a balance between taxpayer secrecy and access to taxpayer information by providing an exception in section 69(2)(b) of the TAA. I, however, also agree with the majority judgment’s ruling regarding the publication of J Zuma’s tax records. The fact that J Zuma’s tax information should be published is important as it is indeed in the public interest, but I do not believe this would warrant declaring provisions in the TAA and PAIA to be unconstitutional. In addition, a viable solution to the case brought before the court, that would not implicate ordinary taxpayers I believe, would be to rule that if an individual hold or once held a higher office (such as that of a President) they have given up their right to privacy as a taxpayer by virtue of being in office. It becomes the interest of the country to know if the President is also subject to the law and is being held accountable when he or she deviated from the law whilst performing their duties. If this case was brought before the court by an ordinary citizen, it may not have led to the declaration of invalidity of sections that protect taxpayer secrecy in the PAIA and TAA, so the court should have decided bearing in mind that the taxpayer in question is a former President and thus different from an ordinary taxpayer.

²⁸⁸ Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others [2023] ZACC 13 [144]

3.8 Conclusion

The issue of taxpayer privacy in South Africa is a complex phenomenon that is still evolving. It is shaped by various pieces of legislation as discussed above such as the TAA and the POPI Act as well as various policy developments. The *Public Protector v CSARS* and *Arena Holdings v SARS* cases have helped to establish the parameters of state access to such information, while the TAA and POPIA have both incorporated provisions aimed at protecting taxpayer information.

Despite these advancements, there are still concerns about the possibility of state and non-state entities abusing taxpayer information. Taxpayers must therefore be cautious in protecting their privacy rights and holding the government and other organisations responsible for any violations. I provide that the findings of the High Court in the *Arena Holdings* case regarding the unconstitutionality of TAA provisions was unnecessary as the TAA already provides for exceptions to the prohibition of accessing taxpayer information in section 69.

It will be vital going forward for decision-makers and other stakeholders to keep having thorough discussions about how to strike a balance between taxpayer privacy and government transparency and accountability. By doing this, it might be possible to create a more sophisticated and successful strategy for safeguarding the privacy of taxpayers that satisfies the demands of all parties concerned while still being legally sound.

Chapter 4: A Comparative Study of Taxpayers' Right to Privacy in Canada

4.1 Introduction

The goal of this chapter is to examine the institutional and legislative systems in other foreign jurisdictions namely the Canadian jurisdiction, that uphold taxpayers' right to privacy.

A key component of all tax systems around the world is the right to privacy of taxpayers. This right assists in safeguarding taxpayers' private information and keeps it confidential. The right to privacy is enshrined in the Constitution of many countries, including South Africa and Canada.²⁸⁹ A comparison will be provided between South Africa and Canada specifically because Canada's Charter of Rights and Freedoms ("Charter") closely resembles the Bill of Rights enshrined in the South African Constitution.²⁹⁰ However, these two nations' tax administration systems take different approaches to defending taxpayers' right to privacy, thus there are lessons that can be drawn.

This chapter sets out to determine the legal and institutional frameworks that protect taxpayers' right to privacy in Canada. The chapter will specifically look at whether the protection of the taxpayers' right to privacy encourages compliance, as well as how Canada strikes a balance between the right to privacy and freedom of speech in their legislative framework. The data protection frameworks will be compared to that of South Africa in order to determine and draw lessons that may be useful in ensuring the protection of taxpayer information in South Africa as well as encourage tax compliance in South Africa. The rationale behind this comparison

²⁸⁹ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

²⁹⁰ Carika Fritz (2017) *An appraisal of selected tax-enforcement powers of the South African Revenue Service in the South African Constitutional context* at 12.

is due to the fact that, amongst other things, from a South African perspective, this comparison is helpful because the South African Constitution's Bill of Rights is very similar to the Charter.²⁹¹ In addition, Canada has had more time than South Africa to consider how constitutional rights and taxation should be balanced since the Charter's implementation in 1982. As a result, Canada has important legal precedents and academic dialogue that could help South Africa strike a balance between taxpayer rights and SARS' obligations. I have also specifically chosen to do a comparative study with Canada because the Canadian tax regime is similar to that of South Africa.

This chapter will be divided into three sections. The first section will describe the institutional and legal frameworks that protect taxpayers' right to privacy in Canada. The second section will provide a comprehensive comparison between South Africa and Canadian tax frameworks, whilst highlighting the strengths and weaknesses in both frameworks. The third and final section will conclude and provide recommendations for improving the protection of taxpayers' right to privacy in both Canada and South Africa.

4.2 Canadian Legislation

The Charter provides constitutional protection for privacy. According to the Supreme Court of Canada, privacy is "essential for the individual's well-being"²⁹² and "[grounded] in man's physical and moral autonomy."²⁹³ Maintaining a democratic state requires limiting the government's access to its citizens' personal

²⁹¹ Goldswain (2012) *The winds of change - an analysis and appraisal of selected constitutional issues affecting the rights of taxpayers* (LLD dissertation, University of South Africa) at 223.

²⁹² Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982.

²⁹³ *Ibid.*

information. Nevertheless, some communal objectives compel people to give up their right to privacy.²⁹⁴

There are different types of privacy, sources of privacy, and the contextual basis of privacy protection have all been established by the Charter privacy laws.²⁹⁵ Human rights are constitutionally protected by the Charter. Sections 7 and 8 of the Charter are the two parts that relate to taxpayer privacy the most. The right to life, liberty, and personal security is safeguarded under Section 7. Unreasonable searches and seizures are prohibited under Section 8.²⁹⁶ Section 7 only applies in the criminal context whilst Section 8 of the Charter applies in both the criminal and regulatory context.²⁹⁷ The Charter recognises three primary types of private interests that should be protected.²⁹⁸ These interests are personal privacy, territorial privacy, and informational privacy.²⁹⁹ The type of private interest that mostly relates to taxpayers is informational privacy.

Informational privacy protects personal information. It has been defined as “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.”³⁰⁰ Informational privacy in Canada, like South Africa, protects an individual's inner lifestyle, personal decisions, and dignity from official inspection by granting them authority over what can be referred to as a "biographical core of personal information."³⁰¹ The type of privacy that is most frequently violated in the tax context is informational privacy as mentioned above, this is because numerous

²⁹⁴ *Ibid.*

²⁹⁵ Robert Stephen Hawkshaw (2014) *Tax information exchange and the erosion of taxpayer privacy rights* (LLM dissertation, The University of British Columbia) at 32.

²⁹⁶ R v Jarvis, 2002 SCC 73, 219 DLR (4th) 233 [88].

²⁹⁷ Robert Stephen Hawkshaw (2014) *Tax information exchange and the erosion of taxpayer privacy rights* The University of British Columbia at 32.

²⁹⁸ R v Tessling, 2004 3 SCR 432 [20].

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid* [22].

³⁰¹ R v Plant, 1993 3 SCR 281 [293].

personal details can be found in tax documents, and tax audits and inquiries can be both highly intrusive and revealing:

“Simply put...an investigation into all cash received and all cash spent is necessarily, in today's modern world, a window into most of a person's private life”³⁰²

Audits include more than simply money coming in and going out. A comprehensive inquiry into a person's lifestyle may be included in an investigation, as well as searches of computers, emails, and phone records. Thus, they can be intrusive in a taxpayer's life and infringe their informational privacy.

Section 7 of the Charter provides that:

*“Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”.*³⁰³

Self-incrimination and compelled testimony are protected under Section 7. A criminal inquiry in the context of taxes requires the taxpayers' section 7 rights to be applied.³⁰⁴

In *R v Jarvis* the court established that the Income Tax Act's³⁰⁵ use of regulatory information gathering powers after a criminal inquiry had started was against Charter rights.³⁰⁶ In this case the Canadian Revenue Authority ('CRA') learned of a taxpayer who had concealed revenue from the sale of his late wife's paintings. The CRA audited the taxpayer and the estate of the taxpayer's wife after acting on

³⁰² Del Zotto v Canada, 1997 3 FC 40, 147 DLR (4th) 457 [37].

³⁰³ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982.

³⁰⁴ Robert Stephen Hawkshaw (2014) *Tax information exchange and the erosion of taxpayer privacy rights* (LLM dissertation, the University of British Columbia) at 34.

³⁰⁵ Income Tax Act (RSC 1985 (5th Supp) c 1.

³⁰⁶ *R v Jarvis*, 2002 SCC 73, 219 DLR (4th) 233 [88].

a tip.³⁰⁷ The CRA gathered data throughout the audit from interviews with the taxpayer and data from outside sources. Throughout the interviews, the taxpayer received no warnings.³⁰⁸ It was discovered during the audit that the taxpayer had a sizeable amount of undeclared income.³⁰⁹ The auditor gave the Special Investigations Section of Revenue Canada, which oversees looking into tax evasion, access to her file.³¹⁰ The transfer of the taxpayer's case from the audit branch to the Special Investigations Section of Revenue Canada was not disclosed to him.³¹¹ On one occasion, the auditor received bank information that had been previously sought during the audit and forwarded it to the Special Investigations Section of Revenue Canada. The auditor was told to delay if the taxpayer got in touch and to not let the taxpayer know that his file had been reassigned. The auditor did stall and informed the taxpayer that nothing new had happened and that his file was still in a holding pattern.³¹² The special investigator carried out search warrants, and the taxpayer was then accused of tax evasion.³¹³

The judge ruled during the trial that the search warrants violated the taxpayer's rights under section 7 of the Charter and that a large portion of the data gathered during the audit process would not be admissible.³¹⁴ The trial court concluded that the auditor's primary goal shifted from an audit to an investigation after a particular point in the audit. To be able to pass the case forward to the Special Investigations department, the auditor's main objective was to find evidence of tax evasion.³¹⁵ These decisions were challenged, and the Supreme Court of Canada eventually heard the case. The appeal's key concern was the extent to which Charter rights

307 *Ibid* [6].

308 *Ibid* [8].

309 *Ibid* [21].

310 *Ibid* [22].

311 *Ibid* [23].

312 *Ibid* [26].

313 *Ibid* [35].

314 *Ibid* [40].

315 *Ibid* [87].

were violated when audit powers were used to create a criminal case against a taxpayer.³¹⁶ The court provided that to answer the question of when a regular audit turns into a criminal investigation is to use the contextual “predominant purpose” test.³¹⁷ The court then listed the following factors that one must look at in order to determine whether it is a regular audit at play or a criminal investigation:

- “1. Did the authorities have reasonable grounds to lay a charge?*
- 2. Does the record indicate that the authorities could have made a decision to proceed with a criminal investigation?*
- 3. Was the general conduct of the authorities consistent with the pursuit of a criminal investigation?*
- 4. Had the audit files been transferred to investigators?*
- 5. Was the auditor effectively acting as an agent for the investigators?*
- 6. Does it appear that the auditor was used as an agent in the collection of evidence?*
- 7. Was the evidence sought relevant to taxpayer liability generally, or was it relevant only to penal liability?*
- 8. Are there any other factors that lead to the conclusion that a compliance audit had become a criminal investigation?”³¹⁸*

The court further highlighted the importance of applying this test with caution.³¹⁹ The court also established that data from an audit that was found before the criminal inquiry started might be used in that investigation. Concurrent criminal investigations and audits can occur; however, the criminal investigation is not

³¹⁶ *Ibid* [43].

³¹⁷ *Ibid* [38].

³¹⁸ *Ibid* [89].

³¹⁹ *Ibid* [91].

permitted to use any of the data obtained via the use of audit authorities.³²⁰ The court thus clearly distinguishes between audits and criminal investigations done on a taxpayer and prohibits the sharing of information between auditors and investigative teams or authorities. This case emphasises how Canadian authorities protect the taxpayers' right to privacy.

4.3 Taxpayers' Confidentiality in Canada

The right to confidentiality in Canada encompasses the fact that tax returns and other information obtained by the Minister of National Revenue (the Minister) can only be used for the purposes of the administration and enforcement of the Canadian Income Tax Act.³²¹ The Canadian income tax collecting system has historically considered maintaining the privacy of taxpayer information as being crucial:

*“Parliament recognised that to maintain the confidentiality of income tax returns and other obtained information is to encourage the voluntary tax reporting upon which our tax system is based By instilling confidence in taxpayers that the personal information they disclose will not be communicated in other contexts, Parliament encourages voluntary disclosure of this information. The opposite is also true: if taxpayers lack this, confidence, they may be reluctant to voluntarily disclose all of the required information.”*³²²

Except in certain circumstances, Section 241 of the Income Tax Act forbids the CRA from revealing taxpayer information.³²³ The Supreme Court of Canada identified the following as the aim of section 241:

³²⁰ *Ibid* [97].

³²¹ Jinyan Li (1997) *Taxpayers' Rights in Canada* University of Western Ontario Volume 7 | Issue 1 at 89.

³²² *Slattery (Trustee of) v Slattery* 1993 2 CTC 243 at 247-248; 93 DTC [5443] at 5445-5446.

³²³ S241, Income Tax Act (R.S.C., 1985, c. 1 (5th Supp.)).

“Section 241 involves a balancing of competing interests: the privacy interest of the taxpayer with respect to his or her financial information, and interest of the Minister in being allowed to disclose taxpayer information to the extent necessary for the effective administration and enforcement of the Income Tax Act and other federal statutes referred to in s 241(4) [A]ccess to financial and related information about taxpayers is to be taken seriously, and such information can only be disclosed in prescribed situations. Only in those exceptional situations does the privacy interest give way to the interest of the state.”³²⁴

The scope of confidentiality under s241 is limited to "taxpayer information", which is defined as:

“information of any kind and in any form relating to one or more taxpayers that is (a) obtained by or on behalf of the Minister for the purposes of this Act, or (b) prepared from information referred to in paragraph (a_) but does not include information that does not directly or indirectly reveal the identity of the taxpayer to whom it relates.”³²⁵

Sections 241(1) and 241(2) prohibit the disclosure of taxpayer information. The Income Tax Act forbids the CRA from knowingly disclosing taxpayer information to anyone, knowingly granting anyone access to such information, or knowingly using it for any other purpose other than those listed in this provision or while performing administrative or enforcement duties related to the Income Tax Act.³²⁶ The prohibition only applies to "officials" of the government. Violations of the confidence are punishable by a fine of up to \$5,000, a maximum of one year in jail, or both, according to section 239(2.2).³²⁷

³²⁴ Slattery (Trustee of) v Slattery 1993 2 CTC 243 at 247-248; 93 DTC [248] and 5446.

³²⁵ S241(10), Income Tax Act (R.S.C., 1985, c. 1 (5th Supp.)).

³²⁶ *Ibid*, sections 241(1) & 241(2).

³²⁷ S239(2.2), Income Tax Act (R.S.C., 1985, c. 1 (5th Supp.)).

To further emphasise the protection of taxpayer's confidentiality in Canada, the court in *Re Glover v Glover*³²⁸ interpreted section 241(2) and provided that the information acquired by the Minister for Act-related objectives, such information might only be disclosed to individuals with a need to know pursuant to exceptions in section 241.³²⁹ In this case, the court determined that section 241(2) was an "all-embracing section" that extended to all judicial procedures, excluding criminal and income tax cases.³³⁰ Mrs. Glover received custody of her two young children in a divorce proceeding, but Mr. Glover fled with them. When the *decree nisi* was granted, a Supreme Court of Ontario judge issued an order mandating, among other things, that the CRA inform the court with specifics regarding Mr. Glover's addresses. The Minister objected to the order to turn over the tax information on the basis that "*the disclosure of any information received in connection with the administration or enforcement of the Income Tax Act would be prejudicial to the public interest.*"³³¹ The appeal of the Minister was accepted.

The Ontario Court of Appeal ruled that a taxpayer's address is a necessary and integral part of the information received by the Minister for the purposes of the Canadian Income Tax Act.³³² Even in the face of an extremely compelling need for information, at this point in time the Minister was willing to argue, and the court was willing to rule that taxpayer privacy was more important than reuniting Mrs. Glover and her children.³³³ Section 241 exists to protect Canadian taxpayers' information from disclosure to third parties and to prevent tax information collected for the purposes of administering or enforcing the Income Tax Act from being used in any other context.³³⁴ *Glover* is the high-water mark of taxpayer information

328 Re Glover v Glover, 1981 2 SCR [561].

329 *Ibid.*

330 *Ibid.*

331 *Ibid.*

332 *Ibid.*

333 Robert Stephen Hawkshaw (2014) *Tax information exchange and the erosion of taxpayer privacy rights* (LLM dissertation, The University of British Columbia) at 29.

334 *Ibid.*

confidentiality provided by the Income Tax Act. Section 241 remains a powerful legal impediment for Canadian citizens who want access to taxpayer information.³³⁵ This case demonstrates how the Canadian legislation, values and protects taxpayer information at all costs, which is something that the South African authorities can learn from.

Moving on, the Canadian Income Tax Act provides exceptions to the non-disclosure of taxpayer's information.³³⁶ The Act authorises the Minister to disclose taxpayer information where a taxpayer's interest in privacy is outweighed by the public interest in administering the criminal justice system, the Act, or government programs.³³⁷ The exception under section 241(3) applies only where the criminal proceedings were commenced by the laying of an information or charge. Any disclosure of taxpayer information before a criminal charge is laid is prohibited.³³⁸ In other words, it is prohibited to start a criminal investigation using confidential information. The confidential information may then be utilised to support the case after the proceedings have begun and a charge has been made using independently obtained evidence.³³⁹ Information on taxpayers may be disclosed in court proceedings involving the administration or enforcement of the Income Tax Act under subsection 241(3).³⁴⁰

Additionally, section 241(4)(b) allows for the disclosure of taxpayer information, stating that *"an official may provide to any person, taxpayer information that can reasonably be regarded as necessary for the purposes of determining any tax, interest, penalty, or other amount that is or may become payable by the person, or any refund or tax credit to which the person is or may become entitled under the*

³³⁵ Ibid.

³³⁶ S241(3) Income Tax Act Canada s241.

³³⁷ Jinyan Li (1997) *Taxpayers' Rights in Canada* University of Western Ontario Volume 7 | Issue 1 at 91.

³³⁸ *Ibid* at 93.

³³⁹ *Ibid* at 92.

³⁴⁰ S241(3) Canadian Income Tax Act.

*Act, or any other amount that is relevant for the purposes of that determination.*³⁴¹ Accordingly, section 241(4)(b) allows CRA to reveal specific information collected from one taxpayer (third party information) to another taxpayer if the information relates to the reason behind the other taxpayer's assessment.³⁴² Such disclosure is however, not mandatory.

Section 241 represents a balance between the privacy interest of the taxpayer and the interest of the Minister to be allowed to disclose taxpayer information "to the extent necessary for the effective administration and enforcement of the Income Tax Act and other federal statutes referred to in subsection 241(4)."³⁴³ The section was intended to allow information to be disclosed to third parties only in "*exceptional*"³⁴⁴ and "*prescribed situations*".³⁴⁵

Canada additionally protects taxpayers' privacy in its Privacy Act which was enacted in 1985.³⁴⁶ Its goal is to "*expand the existing Canadian laws that protect individuals' privacy with regard to personally identifiable information about themselves held by a government institution and that provide individuals with a right of access to that information.*"³⁴⁷ In other words, the Privacy Act serves two purposes: first, to specify the conditions and requirements under which the government may gather and store information about citizens and residents of Canada; and second, to give Canadian citizens and residents access to this personal data. It stands to reason that the Privacy Act preserves the fundamental right of access as there is no charge for requesting information under this Act.

³⁴¹ Jinyan Li (1997) *Taxpayers' Rights in Canada* University of Western Ontario Volume 7 | Issue 1 at 93.

³⁴² *Ibid* at 93.

³⁴³ *Slattery (Trustee of) v Slattery* 1993 2 CTC 243 at 247-248; 93 DTC [444].

³⁴⁴ *Ibid*.

³⁴⁵ *Ibid*.

³⁴⁶ Privacy Act, RSC 1985, c P-21.

³⁴⁷ S2, Privacy Act.

Sections 4 to 6 of the Privacy Act, strictly limits when and how the government can obtain and keep Canadians' personal information, and it governs the gathering of information.³⁴⁸ Sections 7 through 11 outlines the government's responsibilities to safeguard personal information.³⁴⁹ A broad warning is contained in section 8 which states that, "[p]ersonal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section."³⁵⁰ The list of situations in which personal information may be disclosed is provided in this section. These situations include when it is necessary to comply with a subpoena or warrant, when statistical analysis is required, and when "*the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure.*"³⁵¹

The Privacy Act prohibits third parties, whether from the commercial sector or from other government agencies, from generally accessing personal information gathered by any branch of government. The guidelines under which the head of a government institution may or may not refuse to disclose personal information are set forth in sections 19-22.1 of the Privacy Act.³⁵² For instance, disclosure must be refused if the requested material was obtained under non-disclosure agreements from a variety of governmental or similar institutional sources, such as the government of a foreign country, a coalition of states, or a provincial government.³⁵³ In contrast, disclosure may be refused if the requested information "*could reasonably be expected to be injurious to the conduct by the Government of Canada of federal-provincial affairs,*" "*to the conduct of international affairs,*"³⁵⁴ to "*the efforts of Canada toward detecting, preventing or suppressing subversive*

348 Sections 4-6, Privacy Act.

349 Sections 7-11, Privacy Act.

350 S8, Privacy Act.

351 S8(2), Privacy Act.

352 Sections 19-22.1, Privacy Act.

353 A Christiaans (2013) *Tax Secrecy and Tax Transparency – The Relevance of Confidentiality in Tax Law Country Report: Canada* Bruxelles at 8. S19(1), Privacy Act.

354 S20, Privacy Act.

or hostile activities,"³⁵⁵ or even "could reasonably be expected to threaten the safety of individuals."³⁵⁶ It is unknown to what extent requests for information regarding tax information are denied using this more or less broad grant of discretionary authority.

Similar to South Africa, the Privacy Act generally prevents third party access to personal information collected by the government, hence another statute is needed to ensure a balance between the individual's right to privacy and the citizen's right to a transparent and accountable government.³⁵⁷ The Access to Information Act (AIA)³⁵⁸ attempts to strike this balance by providing individuals a means of requesting access to information from the government in certain circumstances."³⁵⁹ The AIA allows for Canadian citizens to request for access to information that is held by government institutions in section 4. Section 24 of the AIA, however, provides an exception to the dissemination of taxpayer information. It stipulates that the head of a government institution may refuse to disclose any record requested under the AIA that contains information, which is prohibited from disclosure by or pursuant to any provision set out in Schedule II.³⁶⁰ Schedule II includes a reference to Income Tax Act section 241, which in turn presents a formidable barrier to the dissemination of tax information under the AIA.³⁶¹

In addition, currently the Canadian AIA does not contain a general public interest override that is similar to the South African PAIA. The public interest override would require that information be disclosed in all cases where the general public interest

³⁵⁵ S21, Privacy Act.

³⁵⁶ S25, Privacy Act.

³⁵⁷ A Christiaans (2013) *Tax Secrecy and Tax Transparency – The Relevance of Confidentiality in Tax Law Country Report: Canada* Bruxelles at 9.

³⁵⁸ Access to Information Act, RSC 1985, c. A-1.

³⁵⁹ A Christiaans (2013) *Tax Secrecy and Tax Transparency – The Relevance of Confidentiality in Tax Law Country Report: Canada* Bruxelles at 9.

³⁶⁰ *Ibid.*

³⁶¹ *Ibid.*

in disclosure outweighs the specific public interest or other (third party) interest which is intended to be protected by the exempting provision. Rather, the public interest in disclosure is addressed on a case-by-case basis and only in connection with two exemptions in the AIA.³⁶² These are limited to situations where the information is that of a third party.

Paragraph 19(2)(c) of the AIA incorporates the provisions of section 8 of the Canadian Privacy Act which includes, in subparagraph 8(2)(m)(i), a discretionary provision for the release of personal information in circumstances where the head of the institution forms the opinion that "*the public interest in disclosure of the personal information in issue clearly outweighs the invasion of privacy.*"³⁶³ Section 20(6) of the AIA provides for the disclosure of third party information, other than a trade secret, "*if that disclosure would be in the public interest as it relates to public health, public safety or protection of the environment and, if the public interest in disclosure clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of or interference with contractual or other negotiations of a third party.*"³⁶⁴

As discussed in the previous chapters, section 35(1) of the PAIA provides mandatory protection of certain records held by SARS. Similarly, the Canadian Personal Information Protection and Electronic Documents Act (PIPEDA) also contains provisions that allow organisations such as the CRA to refuse access to information upon request. Section 9(3) to subsection (5) of the PIPEDA provides instances in which organisations can refuse access to personal information.³⁶⁵ This is similar to section 35 of the PAIA.

³⁶² Section 13 & 28, Access to Information Act (R.S.C., 1985, c. A-1).

³⁶³ Section 19(2)(C), Access to Information Act (R.S.C., 1985, c. A-1).

³⁶⁴ Section 20(6), Access to Information (R.S.C., 1985, c. A-1)

³⁶⁵ Section 9(3) – (5), Personal Information Protection and Electronic Documents Act (S.C. 2000, c. 5).

Similar to the POPI, the Canadian PIPEDA also provides that information must be processed in accordance with the purpose it was collected for and this encompasses taxpayer information.³⁶⁶ Section 8 of the PIPEDA provides that, except with the individual's consent or as required by law, personal information should not be used or disclosed for purposes other than those for which it was obtained.³⁶⁷ The protection of personal information is also covered in this section, as it provides for the protection of taxpayer confidentiality.

Section 7(3) the PIPEDA provides that:

“ ...an organisation may disclose personal information without the knowledge or consent of the individual only if the disclosure is

(d.1) made to another organisation and is reasonable for the purposes of investigating a breach of an agreement or a contravention of the laws of Canada or a province that has been, is being or is about to be committed and it is reasonable to expect that disclosure with the knowledge or consent of the individual would compromise the investigation;

(d.2) made to another organisation and is reasonable for the purposes of detecting or suppressing fraud or of preventing fraud that is likely to be committed and it is reasonable to expect that the disclosure with the knowledge or consent of the individual would compromise the ability to prevent, detect or suppress the fraud;”³⁶⁸

Section 7 of the PIPEDA further protects and deals with the collection of taxpayer information and provides that the collection of personal information must be limited to what is necessary for the purposes identified by the organisation as noted

³⁶⁶ Section 15(3)(c) POPI Act.

³⁶⁷ Section 8, PIPEDA.

³⁶⁸ Section 7(3) PIPEDA.

above. Information must be collected by fair and lawful means. This is also similar to the South African POPI Act.

The Taxpayer Bill of Rights in Canada provides taxpayers with the right to privacy and confidentiality, under this right, one can expect the CRA to protect and manage the confidentiality of their personal and financial information according to the laws they administer, such as the Income Tax Act, the Excise Tax Act, the Excise Act (2001) and the Privacy Act. Canadian taxpayers, by virtue of the Taxpayer's Bill of Rights, have the right to expect their information to be kept private by the CRA. The Bill also provides the right to be informed. This right entitles Canadian taxpayers to be notified about how their personal information will be handled and what it will be used for. The right to access and rectify also indirectly emphasises the importance of protecting taxpayer's information and ensuring that it is not easily accessible to third parties. The right to service in the Bill of Rights also ensures that the CRA provides accurate information to taxpayers, whilst protecting their right to privacy and confidentiality.

4.4 Lessons that can be drawn

The rights of the taxpayers in Canada are specifically protected by law and independent bodies. The effectiveness of their service to taxpayers in protecting the rights of taxpayers is good compared to the poor rate in South Africa in protecting the rights of taxpayers.³⁶⁹ The CRA has the authority to levy, manage, and impose all taxes on behalf of all Canadian governments.³⁷⁰

In Canada, the Declaration of Taxpayer Rights was developed in 1985 by the Minister. The Taxpayer Bill of Rights officially replaced the Declaration when it was

³⁶⁹ A Matthews (2021) *Taxpayer' rights to just administrative action under tax audits: A South African perspective* (LLM dissertation, Northwest University) at 1.

³⁷⁰ Library of Parliament, 2016 at 6.

introduced in 2007.³⁷¹ In order to help taxpayers understand what to expect when dealing with the CRA and to hold the CRA more accountable, the Taxpayer Bill of Rights, which consists of sixteen rights, governs the relationship between taxpayers and the CRA.³⁷² Eight of these rights are referred to as "service rights," which specify the level of fairness and service taxpayers can expect from the CRA.³⁷³ The Taxpayer Bill of Rights outlines the remedies available to taxpayers in situations when the CRA has treated them unfairly or infringed upon their rights. Although not legally binding because it is not part of legislation, the Taxpayer Bill of Rights is a formal document that outlines the CRA's duties to taxpayers.³⁷⁴

The SARS's Service Charter in South Africa is not legally binding and aligns with the provisions of Canada.³⁷⁵ The Charter is a declaration of SARS's intentions, through which it commits to upholding and respecting taxpayer rights, educating taxpayers about their tax responsibilities, and positively influencing South Africa's compliance culture by upholding these service standards.³⁷⁶ In terms of the SARS Service Charter taxpayers have the right to be treated without fear, favour, or prejudice by SARS in a confidential manner, within the relevant legislative framework and this includes the prohibition of unlawful disclosure of declared information by taxpayers.³⁷⁷ The Charter thus protects the taxpayer's rights to privacy. The Charter aligns with the provisions of the Canadian legislation in that it also emphasises on the importance of transparency and data protection just like the Canadian Taxpayer's Bill of Rights discussed above. In South Africa, there are not any official declarations or statements that are comparable to the CRA,

³⁷¹ A Matthews (2021) *Taxpayer' rights to just administrative action under tax audits: A South African perspective* (LLM dissertation, Northwest University) at 68.

³⁷² *Ibid.*

³⁷³ *Ibid.*

³⁷⁴ *Ibid* at 69.

³⁷⁵ *Ibid* at 74.

³⁷⁶ *Launch of the Service Charter* (2002) The University of the Free State SA Media [at 1].

³⁷⁷ <https://www.sars.gov.za/about/service-charter/> Accessed 28 July 2023

therefore neither taxpayers nor SARS employees are informed of their rights.³⁷⁸ South Africa can thus learn from Canada in this regard.

Canadian courts also hold taxpayers' information in high regard, which is something that cannot be said for South African courts. Considering the Constitutional Court decision in the *Arena Holdings* case, the courts' ruling will affect all taxpayers (if the taxpayer's information is in the public interest) and how their personal information will be handled, instead of just affecting the one taxpayer as discussed in the previous chapter. I believe South Africa can learn from Canada on the importance of non-disclosure of taxpayers' information as it usually has far-reaching implications. The TAA, like the Canadian Income Tax Act, provides exceptions to the non-disclosure of taxpayers' personal information and it is a system that works in Canada. South African courts should take into consideration such exceptions before declaring certain provisions in its legislation as unconstitutional especially when it has the potential of impacting all the taxpayers in the country. There may not be any statistical data to show that the disclosure of taxpayers' information will discourage the voluntary disclosure of tax information but if taxpayers were to be informed in lay-man's terms that there is a possibility that their information will be published to the public, I believe we would see a decline in tax compliance in South Africa.

“SARS should formally document a Service Charter within the TAA or provide for a Taxpayers Bill of Rights similar to that of Canada to make SARS officials more aware of their obligation to treat taxpayers fairly and justly and to elaborate the rights that are available to taxpayers.³⁷⁹ This might improve taxpayer's perception of the tax system and could contribute to voluntary and cooperative tax compliance by taxpayers.³⁸⁰ This will provide clarity to taxpayers and SARS officials without

³⁷⁸ A Matthews (2021) *Taxpayer' rights to just administrative action under tax audits: A South African perspective* (LLM dissertation, Northwest University) at 74.

³⁷⁹ *Ibid* at 74.

³⁸⁰ *Ibid* at 74.

having to refer to the Constitution and PAJA.³⁸¹ By formally documenting taxpayer's rights and making it available to SARS officials and taxpayers will promote that the tax system is just.”³⁸²

4.4 Conclusion

In conclusion, the comparison of the tax law systems in South Africa and Canada with regard to taxpayers' rights to privacy shows significant insights and lessons for preserving personal privacy in tax affairs. To establish a balance between tax administration and taxpayers' privacy rights, both nations display distinctive approaches and practices. This provides politicians, tax professionals, and researchers with important lessons.

South Africa has put in place a number of procedures to preserve the taxpayers' constitutionally guaranteed right to privacy.³⁸³ South Africa places a strong emphasis on the privacy of taxpayer information and restricts disclosure without the appropriate legal authorisation as discussed in the previous chapters. In order to increase safeguards, improve data protection measures, and build reliable procedures to ensure adherence to privacy rules, policymakers can learn from Canada's experience.

Similarly, Canada places a high value on taxpayers' privacy rights and has established comprehensive legal frameworks to protect taxpayer information. The country adheres to strict guidelines for gathering, using, and releasing taxpayer data as demonstrated by the cases discussed in this chapter. To protect the confidentiality of taxpayer information, the Canadian tax authorities have established rules and standards and put strong sanctions in place for unauthorised access or publication. However, ongoing developments in technology and

³⁸¹ *Ibid* at 74.

³⁸² *Ibid* at 74.

³⁸³ Constitution of the Republic of South Africa, 1996.

digitalisation present new challenges, necessitating continuous evaluation and adaptation of privacy regulations.³⁸⁴

The lessons to be drawn from the South African and Canadian experiences highlight how crucial it is to strike a balance between the administration of taxes and the preservation of taxpayers' right to privacy. The complexity brought on by technological breakthroughs and changing privacy issues must be addressed by policymakers. This entails increasing data protection regulations, updating legislation to handle new privacy concerns, and promoting confidence between tax authorities and taxpayers. It is also important that policymakers strike a balance between protecting taxpayer's information and facilitating access to information in circumstances where it is in the interest of the public.

In conclusion, the comparison of the tax legislative frameworks in South Africa and Canada with regard to the right to privacy of taxpayers provides significant lessons for striking a balance between tax administration and privacy protection. Policymakers may provide strong privacy protections, make adjustments for technology improvements, and promote a culture of trust between taxpayers and tax officials by taking into account the advantages and disadvantages of each nation's approach.

³⁸⁴ The increasing use of Artificial Intelligence and machine learning raises concerns regarding the privacy consequences of such technologies. The law must thus adapt in order to address issues related to profiling and bias of such AI systems. Currently most of the public focus is on privacy issues and digital security given the emergence of IoT (Internet of Things). This means that the law has to be more adaptable than ever as we are facing privacy challenges that were never accounted for by our privacy regulations.

Chapter 5: Conclusion and Recommendations

5.1 Introduction

In this study, I set out to examine the legal tax framework of South Africa when it comes to the protection of taxpayer's rights. I investigate the TAA to understand the provisions that protect taxpayer's information, and I also highlighted the exceptional cases, as provided for by the TAA, when it comes to the prohibition of the disclosure of taxpayer's information. A very important objective in this dissertation was to conduct a comprehensive analysis of the *Arena Holdings* case, including its background, the legal arguments presented, and the judgments rendered by both the High Court and the constitutional Court. In examining the case, I also set out to provide an opinion and comments on the decision and reasoning of the court in the case. Additionally, the objective of this dissertation was to assess the constitutional implications of the *Arena Holdings* case, particularly in relation to the right to privacy and the right to freedom of expression as guaranteed by the South African Constitution.

Furthermore, the objective of this dissertation was to provide an examination of Canada's tax framework and how it protects taxpayer's privacy. I set out to provide an insight on how other foreign jurisdictions balance the right to privacy and the need to access taxpayer's information in exceptional circumstances.

5.2 Findings

Prior to determining the appropriate balance between taxpayers' rights to privacy and access to information, which is the main goal of this dissertation, it is necessary to first highlight the key issues that have been raised throughout the dissertation and succinctly respond to the research sub-questions outlined in the first chapter.

5.2.1 What does the Right to Privacy entail in general and what is the Common Law and the Constitutional stance regarding the Right to Privacy?

The first sub-question in this dissertation is to determine what the right to privacy entails and what the common law and the Constitution say about this right. This question was answered in detail in chapter 2 of this dissertation. However, there are certain points that should be re-emphasised to provide a better understanding in relation to the question. The right to privacy is multidimensional and can thus not be limited to a single definition: the right protects a person's moral integrity, the control of personal information as well as the freedom from media intrusion.³⁸⁵

It is important to highlight the fact that the common law recognises the right to privacy. This right was first recognised in common law in the *O'keefe v Argus Printing* case³⁸⁶ and under the common law, the right to privacy recognises four types of invasion of privacy which is intrusion, publication of private information, placing someone in a false light and lastly appropriation.³⁸⁷ Most importantly, the common law recognises that the publication of a person's private information is an invasion of the person's right to privacy.

The South African Constitution recognises the right to privacy as well. Section 14 of the Constitution protects individuals from having their property searched, possessions seized, their person searched or the privacy of individual's communications to be infringed. It is thus important for this right to be upheld as the Constitution is the supreme law in South Africa. The *Bernstein v Bester* case provides that with the concept of privacy,

³⁸⁵ R Clayton & H Tomlinson (2010) *Privacy and Freedom of Expression* Oxford University Press at 3.

³⁸⁶ *O'Keefe v Argus Printing and Publishing (Pty) Ltd* 1954 (3) SA 247 (C).

³⁸⁷ Buthelezi, M. C. (2013). "Let false light (publicity) shine forth in South African Law" *De Jure Law Journal* 46(3): 783 at 1.

what is protected is the “*inner sanctum of a person, such as his or her family life, sexual preference and home environment*”.³⁸⁸ Notably, the court highlights the fact that the right to privacy can be limited by other rights especially when a person must move into communal business and activities.³⁸⁹

5.2.2 When can SARS disclose a Taxpayer’s Information in accordance with the TAA?

The second sub-question in this dissertation is determining when SARS is allowed to disclose information in accordance with the TAA. This question was sufficiently answered in chapter 3 of this dissertation as well. In answering this question, I highlight section 69 of the TAA (before it was declared unconstitutional in the *Arena Holdings* case), which provided protection to taxpayer’s information as well as gave a guideline to when said information can be disclosed by SARS officials. The TAA gives institutions and anyone who may get hold of taxpayer information, a peremptory obligation to not disclose taxpayer’s information. Section 69(2) to be exact, provided instances in which a SARS official can disclose a taxpayers’ information such as in the course and performance of duties under a tax Act or customs and excise legislation, under any other Act which expressly provides for the disclosure of the information, by order of the High Court and if the information is public information.³⁹⁰

The importance of section 69(2)(c) of the TAA should be re-emphasised as it served the purpose of providing an exception to the non-disclosure of taxpayer’s information. The TAA catered for situations whereby there will be a need to strike a balance between taxpayer secrecy and access to taxpayer information by providing this exception. One cannot look at section 69 as a whole and disregard section 69(2)(c). The subsection

³⁸⁸ Bernstein and Others v Bester NO and Others 1996 ZACC [2].

³⁸⁹ *Ibid.*

³⁹⁰ S69(2), Tax Administration Act 28 of 2011.

highlighted the fact that when an individual or institution tries to access a taxpayer's information they can do so by applying for an order of a High Court. This should be the first point of departure before exploring any other options to access a taxpayer's information.

5.2.3 Was the court in *Arena Holdings* case right to include a public interest override in the TAA and are changes in the TAA necessary?

The third research sub-question in this dissertation is to determine whether the decision of the Constitutional court in the *Arena Holdings* case in deciding that section 67 and 69 of the TAA is unconstitutional was necessary. This question is answered in chapter 3 of this dissertation. I will reiterate the fact that, in my opinion, it was unnecessary as there was an exception in the TAA already. I believe the intention of the legislature when drafting the TAA was not to include an absolute ban to the non-disclosure of taxpayer's information as that is evidenced by the inclusion of section 69(2)(c) as discussed above.

It is notable to mention the fact that access to information can also be afforded in terms of the PAIA. The *Arena Holdings* case held that the TAA's provisions were unlawful and unconstitutional and ordered that the words be read into the provisions of the TAA to refer to disclosures as authorised disclosures under the PAIA.³⁹¹ I believe that the reading in is unnecessary in light of section 69(2)(a)(ii) of the TAA. This is because the prohibition imposed by the TAA would be superseded by any Act (including the PAIA) that provided for access to the specific information. The court could have gained access to the taxpayer's tax records by relying on the PAIA.³⁹² The reading in, therefore, merely repeats or reiterates what is already provided for by the TAA. In terms of the PAIA, it would have

³⁹¹ *Arena Holdings (Pty) Ltd t/a Financial Mail v SARS* (88359/2019) [2021] (ZAGPPHC) (16 November 2021), 85 THRHR 586 [33].

³⁹² C. Fritz & S. P. Van Zyl 2022 "Tax Administration, Confidentiality of Information, the Promotion of Access to Information Act 2 of 2000, and Public Figures: *Arena Holdings (Pty) Ltd t/a Financial Mail v SARS* (88359/2019) [2021] (ZAGPPHC) (16 November 2021), 85 THRHR 586" :11.

been sufficient to merely list taxpayer information as one of the instances in which the public interest has priority. This would have enabled the court to access the taxpayer's details without changing any provisions in the TAA.

I believe the TAA provided the correct balance between the access to taxpayer information and maintaining taxpayer secrecy hence there was no need for the public interest override. Notably, the public interest override will not affect Mr J Zuma only, but it will affect all the other ordinary taxpayers that have never held public offices before. If one can prove that an ordinary taxpayer's information has the "*potential*" of being in the public interest, they will have access to such records because of the public interest override.³⁹³ In my opinion the word "*potential*" on its own opens up the possibility of being widely interpreted, because it will be difficult for one to determine the level in which the "*potential*" has to result into actual public interest before they can gain access to taxpayer's information. This just emphasises how unnecessary it was for the court in the *Arena Holdings* case to add in the public interest override.

However, it is also important to highlight that I do not disagree with the accessing of Mr J Zuma's tax records specifically as he once held a public office. Taking the facts in the *Arena Holdings* case into account, I believe that accessing his tax records was indeed in the public interest. I am just of the opinion that it should not have warranted the changes that the court decided should be done to the TAA.

³⁹³ *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* [2023] ZACC 13 [140]

5.2.4 What kind of Protection is offered by the POPI Act with regards to Access to Information of Taxpayers as well as an individual's Right to Privacy?

The fourth question in this dissertation is to determine how the POPI Act provides protection when it comes to accessing taxpayer's information. This sub-question was answered in chapter 3 of this dissertation. Section 1 of the POPI Act provides a definition of personal information and amongst that is taxpayer information.³⁹⁴ The POPI Act provides guidelines as to how information should be processed, and according to the Act, information must be processed in accordance with the reason and purpose it was collected for.³⁹⁵

Importantly, section 12(2)(d) of the POPI Act provides that private information can be accessed or disclosed by a third party if such disclosure will ensure the compliance with an obligation imposed by law or to enforce legislation concerning the collection of revenue as provided for in the SARS Act.³⁹⁶ This is important because the court in the *Arena Holdings* could have used this provision to access the taxpayer's tax records instead of reading in a public interest override.

5.2.5 What can South Africa learn from foreign jurisdictions regarding Taxpayer's Information and how do these jurisdictions address the disclosure of Taxpayer Information?

³⁹⁴ S1, Protection of Personal Information Act 4 of 2013.

³⁹⁵ S15(3)(c), Protection of Personal Information Act 4 of 2013.

³⁹⁶ Section 1 of the South African Revenue Service Act 1997 (Act 34 of 1997).

The final research question in this dissertation is to determine the position of the CRA and its stance when it comes to taxpayer secrecy as well the right to access information. This question was answered in the fourth chapter of the dissertation.

In conclusion, I will reemphasise some of the points that were highlighted in chapter 4. Canada, unlike South Africa, hold taxpayers' information in high regard as demonstrated in the country's case law, which is something that cannot be said for South African courts. The effectiveness of Canada's law and independent bodies' services to taxpayers in protecting the rights of taxpayers is good compared to the poor rate in South Africa in protecting the rights of taxpayers.³⁹⁷

5.3 Recommendations

The first recommendation is for SARS to establish an official Service Charter in the TAA or introduce a Taxpayers Bill of Rights comparable to Canada's model. This would serve to enhance the consciousness of SARS officials regarding their responsibility to treat taxpayers with equity and impartiality, while also elaborating on the rights accessible to taxpayers.³⁹⁸ In my opinion this may in turn improve taxpayer's perception of the tax system and could contribute to voluntary and cooperative tax compliance by taxpayers. This will provide clarity to taxpayers and SARS officials without having to refer to the Constitution and PAJA.³⁹⁹ In addition, I would also recommend that formally documenting taxpayer's rights and making it available to SARS officials and taxpayers will promote the fact that the tax system is just.⁴⁰⁰

Taxpayers' privacy and information exchange have received very little attention from critical researchers. One author, Arthur Cockfield, has proposed two major solutions, one

³⁹⁷ A Matthews (2021) *Taxpayer' rights to just administrative action under tax audits: A South African perspective* (LLM dissertation, Northwest University) at 1.

³⁹⁸ *Ibid* at 74.

³⁹⁹ *Ibid*.

⁴⁰⁰ *Ibid*.

technological and the other treaty-based, for resolving some of the privacy issues mentioned in this dissertation.⁴⁰¹ First, according to Cockfield, advancements in data processing, IT systems, and encryption will assist in safeguarding taxpayers' privacy rights. Encryption and updated IT systems will aid in preventing unintentional leakage of taxpayer data during both international data transmission and storage by revenue agencies. Additionally, it will aid in preventing outside hackers from acquiring taxpayer data.⁴⁰² However, when looking at Cockfield's proposals, one must consider the costs involved in introducing or using these proposed solutions or systems. Information technology systems take time to implement and can be very costly. I believe Cockfield in his proposal, underestimated the consequences of a lack of funding to implement such systems, as well as the maintenance and post-implementation costs. The lack of funding can result in failure to deploy new functionalities associated with such IT systems, failure to update core systems and overall failure to utilise the IT systems.⁴⁰³

I believe that the sharing of information by revenue authorities would be reduced with improved data processing and handling. The present trend is to share all that is collected, especially with automatic information exchange, which for most taxpayers is far more information than is necessary.⁴⁰⁴

I would also recommend that SARS use the Canadian Taxpayer Bill of Taxpayer rights discussed above to fill in the missing gaps from our legislation. If such as Charter is adopted by SARS, it would ensure a stricter protection of taxpayer's information which is done by the CRA as discussed in chapter 4 of this dissertation. SARS should also, in my opinion, draft a declaration of taxpayers' rights similar to the Canadian declaration. This declaration may not have legal status, but I believe such a declaration will provide guidance and will shape the attitude of SARS towards its liaison with taxpayers including

⁴⁰¹ A Cockfield, (2010) "Protecting Taxpayer Privacy under Enhanced Cross-border Tax Information Exchange: Toward a Multilateral Taxpayer Bill of Rights" 42 UBC L Rev 419 at 36, 39

⁴⁰² Robert Stephen Hawkshaw (2014) *Tax information exchange and the erosion of taxpayer privacy rights* (LLM dissertation, The University of British Columbia) at 18.

⁴⁰³ J Blame & M Bott (2015) "Information Technology in Tax Administration systems" at 97.

⁴⁰⁴ *Ibid*

how SARS will deal with the protection and disclosure of taxpayers' information.⁴⁰⁵ The Declaration of Taxpayer Rights asserts that when interacting with the CRA regarding income tax issues, taxpayers have the entitlement to receive comprehensive and precise information about tax laws. They also have the right to be treated with politeness and respect, and there is an assumption of their honesty, unless there is substantiated evidence suggesting otherwise. I believe such an addition would help South African taxpayers as well as improve the handling of information submitted to SARS.

Finally, I would also recommend that the courts remove the word "potential" in its reading in of section 69(2)(a)(ii) of the TAA. This word in my opinion leaves room for uncertainty and innocent taxpayers may get their information accessed by opportunist because there is a potential that the information will be in the public interest.

5.4 Concluding Remarks

Taxpayers' information should be kept private because it encourages voluntary disclosure of tax information to tax authorities. Taxpayers turn in their information to SARS and in turn they expect the information to be kept confidential.

This dissertation has focused on the *Arena Holdings* case and what impact this case has on the privacy rights that taxpayers are entitled to. In discussing this, I provided a comprehensive discussion of the right to privacy as well as South African legislation that protects taxpayer rights. It is clear that the right to privacy in South Africa is an important component of an individual's autonomy and dignity. The state is thus obliged to protect taxpayers' right to privacy as enshrined in section 14 of the Constitution and the South African courts recognises the publication of private information as an invasion of the right

⁴⁰⁵ S Butler (1995) "Charter Challenges to Income Tax Provisions", *The Report of Proceedings of the Forty-Sixth Tax Conference*, 1994 Conference Report (Canadian Tax Foundation 1995) at 29.

to privacy. It is thus important that the right to privacy be respected and protected to ensure that individuals can exercise their fundamental rights and be able to participate in society without fear of unreasonable interference.

Moving on, as discussed above, the Constitutional decision of the *Arena Holdings* case has the potential of negatively impacting innocent taxpayers. It is thus vital going forward that decision-makers and other stakeholders keep having discussions about how to strike a balance between taxpayer privacy, transparency, and accountability. This may help in safeguarding the privacy of taxpayers.

This dissertation provides a comparison of the tax law systems in South Africa and Canada. It is apparent that South Africa can draw lessons from the Canadian jurisdiction when it comes to the protection of taxpayer's rights. Canada highly regards the rights to privacy of taxpayers and has implemented robust legal structures to safeguard taxpayer information. Canada strictly follows protocols for collecting, utilising, and disclosing taxpayer data, as exemplified by the instances detailed in chapter 4.

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