

# **SARS' POWERS WITH REGARD TO TAX CLEARANCE CERTIFICATES**

by

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## DECLARATION

I, Vusumuzi Frank Msiza, declare that:

### **SARS' POWERS WITH REGARD TO TAX CLEARANCE CERTIFICATES**

is my own work and that all the sources that I have used or quoted from have been indicated and acknowledged by means of complete references.

I further declare that I have not previously submitted this work, or part of it, for examination at Unisa for another qualification or at any other higher education institution.

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**VUSUMUZI FRANK MSIZA**

February 2017

## ACKNOWLEDGMENTS AND DEDICATIONS

I would like to express my gratitude to the University of South Africa for granting me the opportunity to enrol for this thesis and for the general university support.

I dedicate this thesis to:

- i. My late brother, Paulos Marudla Msiza, who passed away very young. He had an affinity for education.
- ii. My parents, Jabula Petrus and Linah Ndosi Msiza, and my wife Clara, who have been a pillar of support. Their words of wisdom and tolerance ensured a very successful academic journey for me.
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## EXTRACT

The study aims to review the regulatory powers exercised by the South African Revenue Services (SARS) with regard to the issuing, decline or revocation of a taxpayer's tax clearance certificate, to highlight any remedial measures and procedures available to the aggrieved taxpayer in order to protect the right of taxpayers to fair administrative action in their dealings with SARS.

Previously, a tax clearance certificate was not issued in terms of any statute or provision of any Tax Act. However, since the introduction of the Tax Administration Act, as amended (TAA), the issuing of the tax clearance certificates are more efficiently regulated. The issuing of tax clearance certificate's must conform to the values and principles prescribed for under current legislation, and more particularly, as espoused under the Constitution of South Africa, 1996 (the Constitution).

However, it has been reported some taxpayer were experiencing unreasonable and incomprehensible delays in obtaining responses to the objections lodged with SARS for assessment. Taxpayers seeking resolution of their disputes with SARS, currently opt to incur litigation costs in order to obtain appropriate relief from the High Courts. Taxpayers must take note that there is nothing in Promotion of Administrative Justice Act (PAJA) or the common law, which empowers a Court to order an administrator to take action, including the making of a decision which the administrator is not lawfully allowed to make.

The study highlights remedial measures and procedures available to the aggrieved taxpayer to prevent the misapplication of fiscal power by SARS in the issuing of the taxpayer's compliance status, thus protecting the right to fair administrative action in their dealings with SARS.

Taxpayers who are aggrieved by a decision taken by the Revenue Authority are encouraged to timeously address their grievances, commencing with the internal dispute resolution remedies provided for within the TAA.

# TABLE OF CONTENTS

	Page
<b>CHAPTER 1: BACKGROUND AND DELINEATION OF THE STUDY .....</b>	<b>1</b>
1.1 INTRODUCTION.....	1
1.2 PROBLEM STATEMENT .....	3
1.3 THESIS STATEMENT.....	3
1.4 RATIONALE.....	4
1.5 IMPORTANCE OF THE STUDY .....	4
1.6 RESEARCH OBJECTIVES .....	5
1.7 LIMITATIONS.....	5
1.8 RESEARCH METHOD.....	5
1.9 ETHICAL CONSIDERATIONS.....	6
1.10 DEFINITION OF TERMS AND CONCEPTS .....	7
1.11 STRUCTURE OF THE STUDY .....	8
1.12 CONCLUSION .....	9
<b>CHAPTER 2: LITERATURE REVIEW .....</b>	<b>10</b>
2.1 INTRODUCTION.....	10
2.2 DISCRETIONARY POWERS OF THE REVENUE AUTHORITY .....	11
2.3 JUST ADMINISTRATIVE ACTION IN TERMS OF PAJA.....	13
2.4 ADVERSE EFFECT ON THE TAXPAYER RIGHTS .....	14
2.5 PROCEDURAL FAIRNESS IN THE DECISION TO CONFIRM A TAXPAYER'S TAX COMPLIANCE STATUS .....	16
2.6 LEGITIMATE EXPECTATION .....	17
2.7 SUMMARY.....	18
<b>CHAPTER 3: MAINSTREAM HIGH COURT RULINGS ON TAX CLEARANCE CERTIFICATES.....</b>	<b>19</b>
3.1 INTRODUCTION.....	19
3.2 BACKGROUND TO THE COURT DECISIONS .....	19
3.2.1 Analysis of the taxpayer's right to judicial review .....	22
3.2.2 Judicial review of the commissioner's decisions .....	23
3.3 DETERMINATION OF THE ADMINISTRATIVE ACTION FOR THE PURPOSES OF JUDICIAL REVIEW .....	24
3.4 'PROCEDURAL FAIRNESS' OF THE ADMINISTRATIVE ACTION .....	25
3.4.1 Analysis of the review proceedings in <i>Zikhulise</i> .....	26
3.4.2 Analysis of the review proceedings in <i>Chittenden</i> .....	27
3.5 SUMMARY.....	29

## TABLE OF CONTENTS (continued)

	Page
<b>CHAPTER 4: TAXPAYER REMEDIES AND ALTERNATIVE DISPUTE (ADR) RESOLUTION MEASURES .....</b>	<b>31</b>
4.1 INTRODUCTION.....	31
4.2 REMEDIES AVAILABLE UNDER THE TAA.....	32
4.2.1 Suspension of payment of tax .....	32
4.2.2 Instalment payment agreement with SARS .....	36
4.2.3 Compromise with SARS with regard to tax monies outstanding.....	38
4.3 INTERNAL DISPUTE RESOLUTION MEASURES CONTAINED IN CHAPTER 9 OF THE TAA .....	39
4.3.1 Objection and appeals remedy .....	40
4.3.2 Appealing to a tax board.....	44
4.3.3 Appealing to a tax court.....	44
4.4 REMEDIES UNDER PAJA.....	46
4.5 REMEDIES UNDER THE CONSTITUTIONAL COURT OF THE REPUBLIC OF SOUTH AFRICA .....	49
4.6 REMEDIES UNDER COMMON LAW .....	49
4.6.1 Delictual claim for damages.....	49
4.6.2 Order for costs.....	50
4.7 THE TAX OMBUD.....	50
4.8 SUMMARY.....	53
<b>CHAPTER 5: SUMMARY, CONCLUSIONS AND RECOMMENDATIONS.....</b>	<b>54</b>
5.1 INTRODUCTION.....	54
5.2 SUMMARY.....	54
5.3 CONCLUSION .....	57
5.4 FINDINGS .....	57
5.5 RECOMMENDATIONS .....	58
<b>REFERENCES .....</b>	<b>59</b>

# CHAPTER 1

## BACKGROUND AND DELINEATION OF THE STUDY

### 1.1 INTRODUCTION

A taxpayer requires a valid tax clearance certificate in order to bid for state contracts. State contracts can provide a regular source of income for small and medium enterprises, as well as offering work opportunities to thousands of people. Before a tax clearance certificate is issued by the South African Revenue Services (SARS), it is important for SARS to establish a taxpayer's tax compliance status. A tax clearance certificate is, in effect, a declaration of a taxpayer's compliance with his or her or its tax obligations under the Tax Acts and confirms good standing with the Revenue Authority (SARS). Good standing means that the bidder is registered as a taxpayer, that all taxes due have been paid or alternative arrangements have been made and that all returns had been submitted (section 256 of the TAA; SARS 2013:10; National Treasury 2014:2).

Until recently, when the Tax Administration Act, 28 of 2011 (TAA) was introduced, tax clearance certificates were not issued in terms of any specific provision of the Income Tax Act or any other statute overseen by the SARS. A number of laws, besides the TAA, specifically require a tax clearance certificate to be submitted to bid for a state contract. Treasury regulation 16A9 (1) (f) of the Public Finance Management Act 1 of 1999 (PFMA), applicable for Departments, Trading Entities, Constitutional Institutions (for example the Auditor General) and Public Entities<sup>1</sup>, provide that a responsible accounting officer or accounting authority must reject a bid by any person who fails to provide written evidence from SARS that the person has no unresolved tax commitments or that the person has made arrangements to pay taxes due. In addition, this provision is stipulated as regulation 16 of the Preferential Procurement Regulations<sup>2</sup> which state that:

‘... no contract may be awarded to a person who has failed to submit an original Tax Clearance Certificate from SARS certifying that the taxes of that person to be in order or that suitable arrangements have been made with SARS’.

<sup>1</sup> GNR225 in GG 27388 of 15 March 2005.

<sup>2</sup> Preferential Procurement Regulations (GN R725 in GG 22549 of 10 August 2001).

In accordance with provisions under the TAA, SARS may confirm or decline to endorse a taxpayer's tax compliance status, subject to certain conditions as contained in section 256 of the TAA. These conditions stipulate that SARS may only provide a declaration of the taxpayer's tax compliance status if the taxpayer is registered for tax purposes and does not have any outstanding tax debts due to SARS. This exclude amounts that are subject to dispute resolution measures and have been suspended under section 164<sup>3</sup> of the TAA or where the taxpayer has entered into an instalment payment agreement with SARS in terms of section 167 of the TAA. In accordance with section 204 of the TAA, tax debts which have been compromised; or if the amount of tax debt does not exceed the amount specified in section 169 (4) (which is R100 or less), are similarly excluded. SARS may decline to issue a tax clearance certificate where a taxpayer has an outstanding return for tax, unless an arrangement acceptable to SARS has been made for the submission of the return.

Under section 256(6) of the TAA, SARS may alter the taxpayer's tax compliance status from compliant to non-compliant if SARS resolves that it had awarded the declaration of the compliance status in error, or if the confirmation was obtained on a fraudulent basis, falsification or misstatement of any material facts. SARS must give at least fourteen (14) days' notice before the decision to revoke the confirmation of the taxpayer's tax compliance status to allow the taxpayer an opportunity to respond to the reasons for withdrawal.

However, it has been reported that some taxpayers have previously experienced unreasonable and incomprehensible delays in obtaining responses to their objections lodged with SARS regarding assessments (Lewis 2009:1). In addition, taxpayers who fail to fulfil their obligations under the TAA, face the imposition of penalties and interest as submitted by Lewis (2009:1). Taxpayers seeking resolution of their disputes with SARS could incur litigation costs if they decide to approach the High Courts for relief.

One of the common complaints reportedly received by the Office of the Tax Ombud includes SARS taking too long to finalise applications submitted by taxpayers for issuing tax clearance certificates (Main 2015:11). This aspect relates directly to a failure by SARS officials to make a decision and to do so within the allotted time provided for under the TAA.

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<sup>3</sup> Provides that a taxpayer may request a senior SARS official to suspend the payment of tax or portion thereof due under an assessment if the taxpayer intends to dispute or disputes to pay that tax under chapter 9 of the TAA.



In order to obtain a tax clearance certificate, a taxpayer must be tax compliant. If SARS rejects an application by a taxpayer for a tax clearance certificate and it is rejected based on an outstanding tax return or unpaid debt, the taxpayer is obliged to either submit the return or pay the tax (section 256 of the TAA). However, if SARS has yet to respond and the taxpayer cannot be issued with a tax clearance certificate due to SARS's failure, the taxpayer must seek independent recourse against such inaction. To ensure taxpayers are treated fairly, SARS officials are obliged to ensure fair administrative actions are taken, which include arriving at a fair decision and due process is followed.

The study therefore aims to review SARS' regulatory powers to act in respect of the issuing, decline or revocation of a confirmation of the taxpayer's compliance status or in order to obtain a tax clearance certificate.

## **1.2 PROBLEM STATEMENT**

Some taxpayer have applied to be issued with or to renew confirmation of their tax compliance status, but had their applications rejected on the grounds that they have unpaid tax debts. These tax debts relate to amounts subject to disputes for which the taxpayers have applied for postponement of payment obligation to which SARS has yet to respond to.

An inability to secure a confirmation of their tax compliance status from SARS can have financial consequences for taxpayers bidding for a state contract. It is submitted that there are taxpayers who are not conscious of their rights in their dealing with SARS and how to protect these rights.

## **1.3 THESIS STATEMENT**

The research question addressed in the study is as follows: given the regulatory powers of SARS to issue, decline or revoke a tax compliance status, how can a taxpayer safeguard his or her rights against an unfair application of regulatory powers by SARS?

The thesis statement derived from the above question is therefore as follows:

SARS' powers with regard to tax clearance certificates.

## 1.4 RATIONALE

In order to prevent misapplication of fiscal powers by SARS in the issuing of the taxpayer's tax compliance status, it is important that taxpayers are made aware of their right to fair administrative action, to be treated fairly in their dealings with SARS, and how to protect their constitutional rights.

Various researchers (Wade & Forsyth 2014; Croome 2010; De Koker 2004; Kruger 2013) and other entities (The Margo Commission 1987; Katz Commission 1993; Davis Tax Committee 2013) conducted research on the powers of SARS versus the rights of taxpayers in respect of the recovery of their tax debts.

Croome (2010:305) states that taxpayers should be aware of their right, with regard to approaching a court for relief (section 34 of the Constitution). In particular, where SARS has abused its fiscal powers or failed to adhere to the requirements of fair administrative procedures in dealing with the taxpayers (section 33 of the Constitution).

This study will interpret relevant legislation and court cases in order to identify problematic issues. It will be used to review the powers of SARS with regard to the confirmation of a taxpayer's tax compliance status, as explained by Smit (1997:20).

It is submitted that one of the main obstacles in achieving a fair result is the time factor when taxpayers are obliged to institute legal action and the delays associated therewith.

## 1.5 IMPORTANCE OF THE STUDY

The study highlights taxpayers' rights to fair administrative procedures by informing taxpayers, tax scholars and the general public to be aware of their rights and obligations when dealing with SARS. The study creates awareness around the limitations imposed on the powers of SARS by legislation and the common law, with particular regard to tax compliance status confirmations.

The study aims to highlight remedial measures and procedures available to the aggrieved taxpayer. Such measures and procedures could prevent SARS from abusing its fiscal power in the issuing of the taxpayer's tax compliance status, thus protecting taxpayer's right to fair administrative action in their dealings with SARS.

The study is both theoretically and practically significant due to the closely related concepts and themes which are discussed and explained below. The study is of theoretical significance in that it takes a stance on the tax issues discussed under the confirmation of a taxpayer's tax compliance status. Such a position can stimulate further debate in both academic circles and the accounting profession, resulting in an enhanced knowledge of the tax body.

## **1.6 RESEARCH OBJECTIVES**

The objective of the study is to review the regulatory powers of SARS with regard to the issuing, decline or revocation of a taxpayer's tax compliance status. Furthermore, the study reviews remedies available to an aggrieved taxpayer where SARS's actions have exceeded its powers to the detriment of a taxpayer or has failed to apply the principles of fair administrative procedures.

## **1.7 LIMITATIONS**

The study excludes tax clearance certificates relating to foreign investment allowances and immigration requirements. It is limited to a theoretical analysis and interpretation of legislation and case law which deals with taxpayers' tax compliance status with regard to bids for state contracts and confirmation of good standing with the Revenue Authority.

## **1.8 RESEARCH METHOD**

The qualitative research method was used, which is similar to the doctrinal research methodology. The doctrinal research methodology is found within the framework of methodologies of legal research and consists of two processes, namely the identification of legislation and the interpretation of that legislation (Hutchinson & Duncan 2012:20).

Accordingly, the information was collected through material available to the general public in the form of legislation and case law. The review of legislation and case law will, through logical deduction, identify problematic tax compliance status issues experienced by taxpayers. It will

be used as part of the discussion to analyse the regulatory powers of SARS with regard to the confirmation of a taxpayer's compliance status.

The study identifies and evaluates relevant provisions of the TAA, the Constitution, the Promotion of Administrative Justice Act, 3 of 2000 (PAJA) and the common law directly related to the scope of the study; which is SARS' application of its fiscal powers in relation to the issuing of tax clearance certificates. Two High Court cases were interpreted and analysed as these cases are directly linked to SARS' application of its fiscal powers, as stated above.

This review of these two court cases with regard to the confirmation of taxpayer's tax compliance status is underpinned by the purposive approach to statutory interpretation as opposed to a literal approach. To comprehend a provision in a Statute, the literal approach requires that one applies the ordinary grammatical meaning to words (Botha 2001:116; Kellaway 1995:49). According to Botha (2001:114) the purposive approach seeks to ascertain the purpose of the legislation and putting into perspective the goals sought to be accomplished and the connection between specific requirements of the Statute.

The courts and other commentators submitted that a purposive approach should be adapted as it promotes the principles and values of democracy protected in the Constitution (Swanepoel 2012:49; De Ville and Du Plessis 1993: 199 and 356). This study adopted the purposive approach in its statutory interpretation.

The research is of practical significance in that the proposed remedial measures can establish awareness around the protection of taxpayer rights against SARS' inappropriate use of fiscal power in the event that the Revenue Authority refuses to confirm a taxpayer's compliance status. The study gives direction to taxpayers by reducing the probability of tax-return errors occurring and identifies remedies available under the TAA, in order to correct their tax compliance status.

## **1.9 ETHICAL CONSIDERATIONS**

This study was conducted to benefit taxpayers by increasing their awareness with regard to the protection of their rights in obtaining confirmations of their tax compliance status from SARS. The study should therefore be viewed in the context of promoting awareness of remedies available to aggrieved taxpayers and other dispute resolution measures when confirming their

tax compliance status. The analysis conducted in this study is also underpinned by ethical values such as integrity, honesty and objectivity. It is suggested that these ethical values are essential in satisfying the rules of natural justice and the principle of legality.

## 1.10 DEFINITION OF TERMS AND CONCEPTS

For purposes of this study, a number of definitions in the TAA are summarised below in order to make the study more readable. The comprehensive definitions are available in the TAA.

The **South African Revenue Service (SARS)** is an organ of state as established by section 2 of the South African Revenue Act, 34 of 1997.

**Assessment** refers to a notice containing the determination of the amount of a tax liability generated by SARS, based on the return filed by a taxpayer.

**Commissioner for SARS** is defined in section 1 of the TAA as the Commissioner, an employee of SARS or a person contracted or engaged by SARS for purposes of the administration of a tax Act and who carries out the provisions of a tax Act under the control, direction or supervision of the Commissioner.

**Day** refers to any day which is not a Saturday, Sunday or public holiday and for the purposes of dispute resolution, excludes the days between 16 December of each year and 15 January of the following year.

**Return** refers to a form, declaration or other manner of submitting information to SARS that includes a self-assessment or is a basis on which an assessment is to be made by SARS.

**Senior SARS official** refers to a SARS official who has specific written authority from the Commissioner to do so, or a SARS official occupying a post designated by the Commissioner for this purpose.

**Taxpayer** refers to any person chargeable to tax upon whom the liability for tax due under a tax Act is imposed, and who is personally liable for tax.

**Tax compliance**, for the purposes of this study, refers to the accurate completion and timely submission of tax returns and the timely payment of taxes.

**Tax clearance certificate**, refers to a declaration issued by SARS that the person whose details appear on the certificate is registered for tax and does not have any outstanding tax debt or return. (The new provision in the TAA refers to the 'Taxpayer's Compliance Status', by means of a 'Tax Clearance Certificate', which is very similar. Above all, a taxpayer's tax compliance status is required in order to bid for state contracts. As a result, references are made interchangeably to tax compliance status and tax clearance certificate).

**Tax Ombud**, is the person appointed by the Minister of Finance. The Office of the Tax Ombud provides taxpayers with fair, efficient, and impartial remedies to seek a resolution for a service, procedure or administrative dispute which they have already unsuccessfully tried to resolve through SARS. The Office of the Tax Ombud is independent of SARS and acts as a 'Taxpayer's Advocate'.

## 1.11 STRUCTURE OF THE STUDY

The thesis consists of five chapters. Below follows the layout of each chapter:

**Chapter 1** provides a background and the introduction to the study, as well as the rationale, method, importance, research objectives, limitations, definition of terms and concepts and research method.

**Chapter 2** identifies rules and regulations including fiscal statutes conferring powers on SARS that influence a taxpayer's tax compliance status and reviews legislation in respect of procedurally fair administrative action to be taken by SARS.

**Chapter 3** reviews the two opposing or contrasting decisions held by the South African judiciary where SARS exercised its powers in issuing tax clearance certificates.

**Chapter 4** analyses remedies available to aggrieved taxpayers and other available alternative dispute resolution measures with regard to the confirmation of their tax compliance status.

**Chapter 5** contains a summary of the previous chapters, draws an overall conclusion and makes recommendations to taxpayers in reducing the probability of tax-return errors occurring.

## **1.12 CONCLUSION**

The aim of this chapter was to provide an overview of the entire study. The introduction provided background information to the study and set out the context in which the study was conducted. The problem statement, research objective, thesis statement, significance of the study and overview of the next few chapters were, among others, also explained. In the next chapter, SARS' powers that have an impact on the issuing of tax clearance certificates will be identified.

## CHAPTER 2

### LITERATURE REVIEW

#### 2.1 INTRODUCTION

As outlined in chapter 1, this chapter describes the rules and regulations, including fiscal statutes, that confer powers on SARS to confirm or decline a taxpayer's tax compliance status and reviews legislation governing fair administrative action taken by a revenue official.

Taxpayers are within their rights to request and obtain a confirmation from SARS of their tax compliance status (in accordance with the ambit of section 11 of PAJA). In accordance with regulation 16 of the Preferential Procurement Regulations, 2001, a tax clearance certificate confirms that the taxpayer's tax affairs are in order or that an adequate arrangement has been made with SARS to regularise any non-compliance. A taxpayer who requests a tax clearance certificate is required to apply in the prescribed form and manner to a SARS branch. SARS must issue a tax clearance certificate within 21 days from the date of the request or a longer period as deemed necessary, if SARS is convinced that the issue of the tax clearance certificate may obstruct the efficient and effective recovery of taxes<sup>4</sup> (Croome & Olivier 2015:548).

Previously, a tax clearance certificate was issued in paper format (certificate) and could only be created by SARS officials from the tax clearance certificate system. These paper-based certificates were valid for twelve (12) months and were assessed only once a year (BDLive 2016:1). The paper based tax clearance system caused taxpayers to err and deviate from their tax compliance obligations and many failed to maintain their good standing status with the Revenue Authority after the issuing of the tax clearance certificate (Benjamin 2013:1). Other taxpayers overcame the tax clearance certificate's constraint by frequently setting up new companies for tendering (Retief 2012:1). SARS officials were accused of fraudulently overriding the tax clearance certificate system and issuing tax clearance certificate in return for bribes (Retief 2012:1; Sidimba 2014:1).

SARS revamped the old paper based version to an electronic tax compliance system (Visser 2012:1). In order to combat fraud, abuse and tax evasion, SARS has modernised the tax clearance system by migrating most of the tax clearance certificate functions onto the eFiling platform, also known as the 'My Compliance Profile' (MCP) (Sidimba 2014:1; Croome 2015:1). During this transition period, taxpayers are able to apply for a tax clearance certificate via

<sup>4</sup> Section 256(2) of the TAA.



eFiling or at any SARS branch in South Africa (SARS 2016:1). According to SARS (2016:1), taxpayers are able to print a tax clearance certificate through the eFiling system, eliminating the need to visit a SARS branch. The benefits of the new system include the fact that outstanding issues or queries can be resolved electronically rather than having to visit a SARS branch office (Visser 2012:1).

In terms of the new electronic platform, taxpayers who need to verify their tax status will have to request a unique personal identification number (PIN) from SARS (National Treasury 2014:2). For bidding purposes, the PIN is recorded on the tender documentation and is valid for only that specific tender process and its duration (Ernst & Young 2014:2). According to National Treasury (2014:2), the responsible accounting officer at any state entity or department will be able to enquire about the tax compliance status of any person bidding for a state contract, at any time.

## **2.2 DISCRETIONARY POWERS OF THE REVENUE AUHORITY**

SARS was established in terms of the South African Revenue Services Act, 34 of 1997 (the SARS Act) as an organ of the state within the public administration. In carrying out its mandate under the SARS Act, the Commissioner must take into consideration the values and principles enshrined in section 195 of the Constitution, 1996, by providing timeous, accessible and correct information to taxpayers (section 195 (1) (g) of the Constitution). As SARS operates outside the public service to strengthen its independence in administering tax laws, the most important responsibility for SARS is to collect revenue in a manner which is efficient and effective.

To support SARS in carrying out this responsibility, section 2 of the SARS Act further enacts several fiscal statutes, namely the Income Tax Act, 58 of 1962 (as amended); the Value Added Tax Act, 89 of 1991 (as amended); and the Customs and Excise Duties Act, 91 of 1964 (as amended) (Dachs 2014:10; Johannes 2016:27). SARS' mandate is furthermore connected to the public procurement system. The tax compliance status of taxpayers, which is monitored by SARS, is necessary when bidding successfully for state contracts. This function is also supported by section 38(1) of the Public Finance Management Act (PFMA), which states:

'The accounting officer for a department, trading entity or constitutional institution in state—  
a) must ensure that that department, trading entity or constitutional institution has and maintains—

- (i) effective, efficient and transparent systems of financial and risk management and internal control;
- (ii) a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77 of the PFMA.'

Historically, each fiscal statute contains its own administrative provisions. With the enactment of the TAA in 2011, all of the administrative provisions contained in different fiscal statutes, as the particular section in the PFMA highlights above, were converged into a single Act (SAICA 2013a:1). The TAA was enacted to give effect to the efficient and effective collection of tax revenue, align the administration of the tax Acts, to prescribe the rights and obligations of taxpayers impacted by these tax Acts, and to prescribe SARS's accountability in terms of its powers and duties in administering the various tax Acts.

SARS has various discretionary powers, most of which are necessary for the effective functioning of the fiscus. Davis (1972:4) defines 'discretion' as follows:

'A public officer has discretion whenever the effective limit on his power leaves him free to make a choice among possible causes of action or inaction.'

Discretionary powers are easily identifiable by the empowering legal language that confers them: they are identified by the use of words in empowering provisions such as 'may' or 'it shall be lawful' (Wade & Forsyth 1994:391). These powers are characterised by the element of choice that they confer on the public official, the administrator or the holder of such administration (Hoexter 2012:46). De Koker (2004:18-69) elaborated that discretion involves circumstances where the Act provides for a matter to be determined by the 'opinion of the Commissioner'. By taking a decision in respect of an 'opinion', such action would constitute administrative action. SARS, as an organ of the state, acting within the public administration is obliged to adhere to the provisions of just administrative action, as contained in PAJA.

In addition, the exercise of these discretionary powers by SARS makes it difficult for taxpayers to obtain confirmation of their tax compliance status as it is required in the bidding for state contracts, and utilisation of foreign investment allowances or emigration from South Africa (Croome & Olivier 2015:548). State contracts are a lifeline for many businesses in South Africa (National Treasury 2015:9). Croome and Olivier (2015:548), explain that it is only a matter of time before a taxpayer will institute legal proceedings against SARS for losses suffered as a result of inordinate delays faced in obtaining a confirmation of his or her tax compliance status.

The foregoing challenges and impediments highlight the predicament taxpayers may be faced with when they are unable to secure a tax compliance status. If a taxpayer misses out on a bidding for a potential state contract, it could go out of business. Other secondary challenges include the potential loss of revenue to the taxpayer and the fiscus, due to the inability to secure a timeous confirmation of a taxpayer's tax compliance status and social costs such as job losses, the gradual erosion of the tax base becomes inevitable and the potential loss of taxes by the fiscus.

### 2.3 JUST ADMINISTRATIVE ACTION IN TERMS OF PAJA

For the purpose of PAJA, administrative action is described in section 1 of the Act as a decision or failure to make a decision (by an organ of the state) in terms of empowering legislation or performance of a public function that adversely affects the rights of a person and has a legal effect (Erasmus 2013:29). PAJA defines an 'empowering provision' as 'a law, a rule of common law, customary law, or agreement, instrument or other document in terms of which an administrative action was purportedly taken'.<sup>5</sup>

PAJA was enacted because of the right to just administrative action, as prescribed in section 33 of the Constitution. In terms of this section, everyone has a right to administrative action which is lawful, reasonable and procedurally fair (Kotze 2004:10). According to PAJA, every person who has been adversely impacted by an administrative action is entitled to require and to be provided with reasonable written explanations (Jones 2011:1).

PAJA defines an 'empowering provision' as 'a law, a rule of common law, customary law, or agreement, instrument or other document in terms of which an administrative action was purportedly taken'.<sup>6</sup> Therefore, a decision taken by SARS will constitute an administrative action as defined in section 1 of PAJA. The term 'decision', as defined in PAJA, includes both the act of taking a decision and failure to take a decision. Thus, in terms of this definition, PAJA similarly regulates SARS and its officials, in both the act of taking a decision or failure to do so.

Section 256 of the TAA regulates the basis or grounds on which a taxpayer's tax compliance status is confirmed or declined. As section 256 of the TAA constitutes an empowering

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<sup>5</sup> Section 1 of PAJA.

<sup>6</sup> Section 1 of PAJA.

provision, SARS may only provide confirmation of the taxpayer's tax compliance status (administrative action) where the taxpayer is registered for tax and does not have any arrears in tax debt or returns due to SARS. It is therefore evident that SARS may only issue confirmation of a taxpayer's tax compliance status under the empowering provisions of section 256 of the TAA.

With regard to the issuing of a tax clearance certificate, a taxpayer may request SARS to postpone the payment of an tax amount that is subject to a dispute as provided for in section 164 of the TAA (SAICA 2013b:1). After concluding an instalment payment agreement with SARS (section 167) or reaching a compromise agreement under section 204 of the TAA in relation to an unpaid tax debt, the taxpayer may still request the Commissioner to exercise his or her discretion to issue a tax clearance certificate. Furthermore, the Commissioner may issue a tax clearance certificate if the taxpayer has arranged with SARS concerning the submission of that return (De Koker 2004:19). SARS may also exercise the power to revoke a tax clearance certificate if satisfied that it was issued in error; or was obtained based on fraud, misrepresentation or non-disclosure of material facts.

In *Dawood v the Minister of Home Affairs*<sup>7</sup>, the court explained that the exercise of discretion by an official is crucial in any system of legislation. It provides for abstract and common regulations to be applied to precise and particular situations in a manner that is fair (Van Schalkwyk 2004:167; Hoexter 2012:47). As discretionary power is also associated with arbitrary power, its incorrect application would therefore be unfair. Van Schalkwyk (2004:168) submitted that discretionary powers are indispensable in modern societies; nonetheless, they must be justifiable and appropriately controlled.

## 2.4 ADVERSE EFFECT ON TAXPAYER' RIGHTS

According to Croome and Olivier (2015:548), some taxpayers who applied for confirmation of their tax compliance status, had their applications rejected on the grounds that they have unpaid or tax debts due. These tax debts related to tax amounts subject to disputes that taxpayers had applied for postponement in terms of section 164<sup>8</sup> of the TAA and to which SARS has not responded (taken a decision or action).

<sup>7</sup> (2000(3) 936(CC)).

<sup>8</sup> Provides that a taxpayer may request a senior SARS official to suspend the payment of tax or portion thereof due under an assessment if the taxpayer intends to dispute or disputes to pay that tax under chapter 9 of the TAA.

A decision or action that adversely affects a person's rights means that such a decision must impose a burden or affect those rights.<sup>9</sup> In terms of regulation 16 of the Preferential Procurement Regulations<sup>10</sup>, it is noted that:

'... no contract may be awarded to a person who has failed to submit an original Tax Clearance Certificate from SARS certifying that the taxes of that person to be in order or that suitable arrangements have been made with SARS'.

A confirmation of a taxpayer's tax compliance status constitutes a declaration that the taxpayer's tax affairs are in order (Klue 2012:1). Accordingly, taxpayers that are not in possession of their tax compliance status confirmation may not engage in the bidding process for state contracts nor will their good standing status with the Revenue Authority be confirmed. Croome and Olivier (2015:548) explained that the inability of taxpayers to obtain such confirmation of their tax compliance status from SARS could be detrimental to their business and, consequently, may stifle their economic activity. Therefore, a decision by SARS not to issue the confirmation of a taxpayer's tax compliance status, will adversely affect the right of the taxpayer to trade freely as supported by section 22 of the Constitution (Palmer 2013:17).

According to a National Treasury Instruction to accounting officers in state entities and departments, any person who conducts business with the state and becomes non-compliant, could have his or her contract with the state cancelled.<sup>11</sup> If the confirmation of the tax compliance status is not issued, a taxpayer will not be able to conduct business freely as prescribed by the Constitution. Therefore, any decision by SARS not to issue a tax clearance certificate may be reviewed and set aside, if it was not lawful, reasonable or procedurally fair to do so.

This follows that a decision by SARS may affect the taxpayer's net worth or right to property. Additionally, the decision by SARS could have an effect on the tax payable by the taxpayer, the time period wherein the payment is due and whether such a liability for tax is chargeable with interest or additional taxes imposed in terms of chapter 16 of the TAA.

<sup>9</sup> Section 5 of PAJA.

<sup>10</sup> Preferential Procurement Regulations (GN R725 in GG 22549 of 10 August 2001).

<sup>11</sup> National Treasury Instruction 3 of 2014/2015 issued pursuant to section 76(4) of the Public Finance Management Act, 1 of 1999.

The above effect may negatively affect the economy, as the state tendering arguably constitute a major portion of the tax base. The multiplier effect would not only diminish the current tax base, but also include social costs such as job losses in the event that tendering businesses are not able to renew or obtain taxpayers' compliance status to access or trade in state contracts, as required by procurement regulations.

This suggested scenario highlights the potential negative consequences for taxpayers bidding for contracts or providing goods and services to the South African state. For this reason, the purpose of the study is to secure a greater awareness among taxpayers, tax scholars and the general public to be aware of their rights to fair administrative action when dealing with SARS.

## **2.5 PROCEDURAL FAIRNESS IN THE DECISION TO CONFIRM A TAXPAYER'S TAX COMPLIANCE STATUS**

Once it has been established that a decision was taken by SARS, it would constitute 'administrative action'. For all administrative actions to be considered fair, it has to be lawful, reasonable and procedurally fair. PAJA sets down compulsory, as well as voluntary steps that have to be taken into account for a decision to constitute fair administrative action. In the case where a person's rights are affected, PAJA prescribes certain mandatory steps to be taken, both before and after a decision is made. Where SARS declines to issue the confirmation of a taxpayer's tax compliance status, the mandatory steps that have to be followed are:

- Sufficient notification to be provided of the nature of the decision proposed; and
- A reasonable opportunity to make representations.

With regard to the confirmation of their tax compliance status, taxpayers often apply for the postponement of the payment of tax under section 164 of the TAA and seldom receive either an acknowledgement from SARS or a decision taken in respect of their request (Croome & Olivier 2015:548).

When issuing an assessment, SARS generally complies with this requirement by issuing a letter of the outcome before it issues the assessment, thereby giving the taxpayer an opportunity to respond to the findings before the issuing of an assessment (Jones 2011:5; Croome & Olivier 2015:581).

After a decision has been taken by SARS, PAJA prescribes that SARS, as an administrator, must:

- Issue an explicit declaration of the administrative action;
- Give sufficient notification of any right of review or internal appeal; and
- Give sufficient reasons of the right to request reasons under section 5 of PAJA.

An assessment issued by SARS usually complies with these requirements as it informs a taxpayer of his or her right to a review and that he or she may request reasons for the assessment (Jones 2011:5; Croome and Olivier 2015:581). A significant right which is conferred upon a taxpayer is the right to request reasons for actions or decision made by SARS.<sup>12</sup> Section 5 of PAJA sets out the procedure to adhere to if a taxpayer wishes to request reasons from the revenue official making the decision.

Almost all of the decisions taken by the Commissioner will constitute administrative actions. Nevertheless, it should however be noted that the fairness of an administrative decision and requisite procedure is influenced by the situations surrounding each case (Hlongwane 2016:32).

## 2.6 LEGITIMATE EXPECTATION

Apart from the fact that legislation infringing upon fundamental human rights will be struck down, section 38 of the Constitution enables a court to give a fitting reprieve to the person whose constitutional rights have been infringed (Croome & Olivier 2015:633). According to Croome and Olivier (2015:634), the high cost of litigation, in South Africa and abroad, is a deterrent to the protection of rights. However, the high costs associated with litigation are not the only deterrent, but is only one of a number of fundamentals that are at play as well.

In 1989, Corbett JA, in *Administrator of Transvaal and Others v Traub and Others* (4/88) [1989] ZASCA 90; [1989] 4 All SA 924 (AD) declared to the South African legislative system the principle of legitimate expectation, which had far-reaching implications on the common law. In this case, the applicants, who were hired as interns and practitioners, had reason to believe that they would be hired on a permanent basis after the completion of their internship. However, their applications for permanency were rejected on the grounds that the applicants had been

<sup>12</sup> Section 3(2)(a)(v) of PAJA.



involved in a circulated letter that harshly condemned the prospective employer. The prospective employer gave no reasons for its decision, nor did it allow representations to be made by the applicants.

In essence, the principle of legitimate expectation is to safeguard a person's expectation that a certain conclusion will be made by the administrator, founded on advice or act from an administrator (Van der Walt 2007:175). Within the tax clearance system, it is purported that taxpayers may be permitted to expect that their tax clearance certificates will be renewed or issued. It is submitted that the Commissioner, as an administrator, be compelled to afford a person, who is or may be adversely impacted by his or her decision, with an opportunity to make representations.

## **2.7 SUMMARY**

Traditionally, the Revenue Authority had never been under any obligation to provide taxpayers with reasons for its decisions. It only had to act in line with its parliamentary powers. Today, the actions of SARS, as the responsible Revenue Authority, must act within the constraints imposed on it by the Constitution. SARS must ensure that its decisions or actions are lawful, reasonable and procedurally fair and in accordance with the provisions of PAJA.

The literature review highlighted various parts of legislation that confer powers on SARS to carry out its mandate of collecting tax revenues due to the state, and maximising tax compliance. Some of these powers include discretionary powers, characterised by the element of choice that they confer on the public official or the administrator. SARS' exercise of discretionary powers, combined with the limited knowledge taxpayers possess regarding their constitutional rights in matters of taxation, often result in significant delays for taxpayers to obtain confirmations of their tax compliance status from SARS. This can be harmful to taxpayers' businesses and may consequently impede economic growth.

Any person unfavourably impacted by an adverse decision ought to be granted an opportunity to state his or her case. This chapter dealt with procedural fairness and the obligations imposed on the Revenue Authority in respect of the Constitution and PAJA. In the next chapter, two opposing court decisions are interpreted and analysed with the view to determine what constitutes procedurally fair administrative action with regard to taxpayer's tax compliance status.



## CHAPTER 3

### MAINSTREAM HIGH COURT RULINGS ON TAX CLEARANCE CERTIFICATES

#### 3.1 INTRODUCTION

It was emphasised in chapters 1 and 2 that the main purpose of this study is to review the regulatory powers of SARS in issuing confirmation of a taxpayer's tax clearance certificate. This purpose is supported by the principle of procedural fairness, when an administrative decision is taken by the Revenue Authority. In order to understand the complicated nature of decisions of an administrative nature, it is necessary to review conduct related to the making of such a decision or failure to do so.

This chapter reviews two opposing but mainstream court decisions that dealt with the conduct of both taxpayers and the Revenue Authority related to making decisions. These are both High Court cases arising from urgent court applications brought by taxpayers that set precedence for both taxpayers and the Revenue Authority when decisions concerning the issuing of tax clearance certificates are taken. The context within which the study is done relates to taxpayers bidding for state contracts and underlines the consequences of decisions taken by the Revenue Authority on taxpayers' businesses.

#### 3.2 BACKGROUND TO THE COURT DECISIONS

In the first case, *Zikhulise Cleaning Maintenance and Transport CC v Commissioner for South African Revenue Services and Another* [2012] ZAGPPHC 91, the court was required to review the manner in which SARS had revoked the confirmation of the applicant's tax compliance status. The facts of the case relate to the Revenue Authority's failure in issuing the taxpayer with a valid tax clearance certificate after tax fraud accusations were linked to the taxpayer and a member of the close corporation. The taxpayer is in the construction business, mainly to build low-income houses for the State. In order to conduct its business and to successfully bid for state contracts, the taxpayer relied on the confirmation of its tax compliance status, which could only be issued by SARS.

In terms of the TAA, SARS may revoke a taxpayer's tax compliance status if it was issued erroneously; or was deceitfully attained, and distortion or omission of material information

(Lubbe 2013:1).<sup>13</sup> If it was allegedly obtained based on deceit, it must be read together with Section 35(3) of the Constitution which provides that:

'Every accused person shall have the right to a fair trial, which shall include the right - ...

(h) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during a trial;'

According to the relevant facts set out in *Zikhulise* supra, the taxpayer was to stand trial on charges of fraud and tax evasion related to the 2008 and 2010 years of assessments (SAPA 2012:1). The taxpayer's resubmitted tax return for 2008 reflected reduced earnings. The return was supported by a fictitious tax invoice which decreased the company's taxable income by R16 million. The company furthermore understated its taxable supplies by at least R4.7 million for the 2010 financial year. In addition, it also under-declared its taxable supplies by over R4.7m for the 2010 financial year (SAPA 2012:1). However, the court proceedings in respect of fraud and tax evasion charges had not been completed at the time the above matter served before the present court.

Judge Wright, in *Zikhulise* supra held that the fact that SARS granted an opportunity to make representations to *Zikhulise* only after the Commissioner had taken and communicated its decision to withdraw the applicant's tax clearance certificate, was not acceptable in law as the taxpayer was not guilty of wrongdoing. Hence the judge ordered that the Commissioner's decision to revoke *Zikhulise*' tax clearance certificate to be invalid, pending the fraud case underway (Louw 2014:1).

The court submitted that *Zikhulise* should have been given a reasonable notification as to the intention of the Commissioner to withdraw its tax clearance certificate and should have been provided with an opportunity to address the Commissioner.

In the second case, *Chittenden N.O and Another v Commissioner for South Africa Revenue Services and Another* [2014] ZAGPPHC 51, the applicant sought an urgent order in the Northern Gauteng High Court compelling SARS to issue it with a tax clearance certificate. According to the facts, the taxpayer had an outstanding tax liability of just under R12 million and had undertaken business rescue proceedings. SARS, a creditor by virtue of the tax liability, had declined to support the business rescue plan.

<sup>13</sup> Section 256(6) of the TAA

Prior to the enactment of the Companies Act, 71 of 2008 (Companies Act), SARS used to designate itself as a preferred creditor by virtue of the provision of section 99 of the Insolvency Act, 24 of 1936 (Morphet 2012:1). The Companies Act contains no statutory preference of creditors. According to Levenstein (2012:1), this arose because of the clarification brought about by section 145(4)(a) and (b) of the Companies Act. These sections prescribe participation by creditors with regard to any decision, such as for example business rescue proceedings, and allow secured or unsecured creditors to vote in accordance with the value of their claims in respect of the company's unconditional liability. A concurrent creditor would normally be ranked lower in liquidation proceedings but still has a voting right under the new Companies Act, 71 of 2008 (Morphet 2012:1).

Partial clarification to the issue of creditors' ranking was proposed in *Commissioner of South African Revenue Services v Beginsel NO and Others* [2012] ZAWCHC 194; 2013 (1) SA 307 (WCC) where SARS sought to reaffirm its status as a preferent creditor as prescribed in section 99 of the Insolvency Act. This had transpired after the business rescue practitioners had refused to accede to the demands of SARS to cease the business rescue proceedings. The business rescue practitioners had argued that the grouping of creditors in accordance with the Insolvency Act<sup>14</sup>, was not relevant to the Companies Act. The judge concurred with the applicant that if the legislation had intended to confer such a preference on SARS, it would have made such intention clear. The court held SARS was not a preferent creditor by virtue of its preferent status as stated in section 99 of the Insolvency Act and especially in light of business rescue proceedings (Levenstein 2012:1).

In *Chittenden* supra the taxpayer had, prior to its urgent court application for a tax clearance certificate, launched motion proceedings to set aside the result of a negative vote by SARS for failure to adopt a business rescue plan (in accordance with section 153(1)(a)(ii) read together with section 153(7) of the Companies Act). In the meantime the taxpayer had received a notice from SARS that its tax clearance certificate was expiring in a few weeks' time. On receipt of the notice, the taxpayer in *Chittenden* supra subsequently applied to SARS for renewal of its tax clearance certificate which SARS then declined. SARS' decision was based on the fact that the taxpayer had an outstanding tax debt which was greater than an amount prescribed under section 204 of the TAA, which had not been suspended under section 164 of the TAA or for which an instalment payment agreement was concluded with SARS (section 167 of the TAA).

<sup>14</sup> Section 96 to 102 of the Insolvency Act.

The taxpayer was relying on the state contract in its business rescue plan submission; therefore, it could not afford to have the state contract cancelled on the basis that it could not produce a valid confirmation of its tax compliance status as required in the terms and conditions of the state contract.

The taxpayer had just over a week to renew its tax clearance certificate for the purposes of its contract with the state entity. The taxpayer subsequently launched an urgent application in the North Gauteng High Court, in accordance with the provisions of section 8 of PAJA read together with section 34 of the Constitution, for an interim order compelling the Commissioner to renew its tax clearance certificate.

Section 8 of PAJA provides that any taxpayer dissatisfied with a decision by the Commissioner may apply to a High Court for a judicial review of such a decision. PAJA created a right to just administrative action as contained in the Constitution. The Constitution under section 34 confers on taxpayers the right to have any dispute that can be resolved by the application of law, to be decided before a court.

### **3.2.1 Analysis of the taxpayer's right to judicial review**

In terms of PAJA, the procedures for a judicial review prescribe that no court shall review an administrative action unless internal remedies have been first exhausted<sup>15</sup>. However, a taxpayer may be exempt from such an obligation to exhaust the internal remedies if the court deems it in the interest of justice (Kathree-Setiloane 2009:8).

The application for a review in *Chittenden supra* was endorsed by the court as both the taxpayer and the Commissioner acknowledged that the issuance of a tax clearance certificate constituted an administrative action as contemplated by PAJA. Thus the action or decision constituted 'administrative action' and could be reviewed under PAJA.

In both of these cases, the High Court had to be called upon to review the decisions of the Commissioner in carrying out its public function.

<sup>15</sup> Section 7(2)(a) of PAJA.

### 3.2.2 Judicial review of the Commissioner's decisions.

According to Williams (2011:232), an administrator's decision must be final with immediate legal consequences to qualify for a judicial review. The Commissioner's decision to revoke *Zikhulise's* tax clearance certificate was final and had immediate legal consequences from the date of the Commissioner's letter to the taxpayer. To safeguard the rights of taxpayers against the abuse of public power by SARS, a taxpayer may institute judicial review proceedings in terms of section 6 of PAJA (Brynard 2011:102). This section is in line with section 34 of the Constitution that confers a right to anyone to have their dispute resolved in a court of law. According to Brynard (2011:103), the administrative action in dispute will only be reviewed by the High Court if it meets the criteria detailed in section 6(2) of PAJA.

Section 6(2) of PAJA provides for a court to review any administrative action if;

- a) The administrator who took it;
  - i. Was not authorised by an empowering provision;
  - ii. Acted under an unauthorised delegation of power; and
  - iii. Was biased or reasonably suspected of bias.
- b) A mandatory and material procedure or condition prescribed by the empowering provision was not complied with.
- c) The action was procedurally unfair;
- d) The action was materially influenced by an error of law;
- e) The action was taken;
  - i. For a reason not authorised by the empowering provision;
  - ii. For an ulterior motive or purpose;
  - iii. Because irrelevant considerations were taken into account or relevant considerations were not taken into account;
  - iv. Because of the unauthorised or unwarranted dictates of another person or body;
  - v. In bad faith; or
  - vi. Arbitrarily or capriciously;
- f) The action itself
  - i. Contravenes a law or is not authorised by an empowering provision; or
  - ii. Is not rationally connected to
    - A. The purpose for which it was taken;
    - B. The purpose of the empowering provision;
    - C. The information before the administrator; or
    - D. The reason given for it by the administrator;
- g) The action concerned consists of a failure to take a decision;

- h) The exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
- i) The action is otherwise unconstitutional or unlawful.

Section 7(2) of PAJA places an onerous burden on taxpayers wishing to protect their right to just administrative action, as it appears to limit a taxpayer's right to access the court if the internal remedies were not exhausted. In accordance with the court papers, *Chittenden* had only two (2) weeks before the expiry of its tax clearance certificate and its business rescue plan application would fail if it was not sufficiently supported by the creditors of the company.

In *Goldfields Ltd v Connellan and Others* [2005] 3 ALL SA 142 (W), Snyder J submitted that the regulator exhibited biasness towards the applicant which indicated that the use of internal remedies would serve no purpose. An exception was incorporated into PAJA that provides that, where the court believes it to be in the interest of justice, an applicant may be discharged from the requirement to exhaust internal remedies prior to seeking judicial review (Kotze 2004:25).

According to Kotze (2004:25), the courts will act as supervisor to the administrators via the judicial review. Hoexter and Lyster (2002:77) explain that a judicial review is grounded on the provisions of the Constitution, which consist of lawfulness and the duty to uphold the Bill of Rights. As defined in PAJA, SARS' decisions as an administrator are subject to judicial review, provided they satisfy the criterion of administrative action.

### **3.3 DETERMINATION OF THE ADMINISTRATIVE ACTION FOR THE PURPOSES OF JUDICIAL REVIEW**

A confirmation of a taxpayer's tax compliance status is issuable by SARS in accordance with the provisions of section 256 of the TAA. This empowering provision, under the TAA, assists in regulating the conduct of SARS as a public institution, as envisaged in section 1 of the PAJA.

In *Chittenden* supra, SARS's counsel submitted and accepted that the decision on the issuing of a taxpayer's tax compliance status constituted administrative action as contemplated by PAJA. In the case of *Zikhulise* supra, the court noted that SARS exercised a public function and its decision had a direct impact on the applicant.

Confirmation of a taxpayer's tax compliance status has become a mandatory requirement for those bidding for state contracts, those wanting to invest funds offshore, and ordinary South Africans wishing to emigrate from South Africa. The inability to secure a valid tax clearance certificate will affect the right of persons to trade freely or impede freedom of movement and residence as prescribed in the Constitution.

### 3.4 'PROCEDURAL FAIRNESS' OF THE ADMINISTRATIVE ACTION

PAJA provides that a fair administrative procedure depends on the circumstances of each case. Brynard (2011:105) explains that an administrator is mandated to give effect to procedurally fair administrative action by giving a person, who will be materially and adversely affected by their decision, the following factors prior to finalisation of the decision<sup>16</sup>:

- Adequate notice of the nature of the proposed decision;
- A reasonable opportunity to make representation;
- A clear statement of the administrative action;
- Adequate notice of any right of review or internal appeal, where applicable; and
- Adequate notice of the right to request reasons for the administrative action.

In order to give effect to procedurally fair administrative action, an administrator may, in his or her discretion, also give the affected person an opportunity to:

- Obtain assistance and, in serious or complex cases, legal representation;
- Present and dispute information and arguments; and
- Appear in person.

In principle, the administrator must be perceived as having applied his or her mind to the matter at hand and should inform the recipient of his or her rights in respect of the decision taken.

<sup>16</sup> Section 3(2)(a) and (b) of the PAJA.



### 3.4.1 Analysis of the review proceedings in *Zikhulise*

The decision of SARS to revoke its confirmation of the taxpayer's tax compliance status in the case of *Zikhulise* had the effect of incapacitating the taxpayer's continued performance under the state contract (Louw 2012:2). A decision by SARS to revoke a taxpayer's tax compliance status could potentially result in financial hardship for the taxpayer where the state contract awarded to the taxpayer is cancelled due to failure to comply with the requirement to produce a valid tax clearance certificate (National Treasury 2014:4).

In carrying out its mandate, SARS needs to uphold the values and principles, as contained in the Constitution, as SARS exercises a public function and its decisions impact on taxpayers.<sup>17</sup> Section 256(6) of the TAA confers on SARS the power to alter the confirmation of taxpayer's tax compliance status from compliant to non-compliant, where SARS discovers that it had issued a confirmation in error, or if the confirmation was obtained on the basis of fraud, misrepresentation or non-disclosure of material facts.<sup>18</sup>

In *Zikhulise* supra it was alleged that SARS had acted in contravention of section 256(6)(a) and (b) of the TAA which required SARS to give notice of at least fourteen (14) days to allow the affected taxpayer to respond to the proposed revocation of its tax compliance status (Croome & Olivier 2015:549). After the taxpayer wrote to SARS querying the decision, SARS tried to remedy the flaw in its decision by trying to restart the decision-making procedures as set out in the legislative provision of the PAJA. SARS attempted to afford the taxpayer a belated opportunity to make representations after it had clearly taken a decision on the reasons it deemed valid.<sup>19</sup> As stated in PAJA, the opportunity to make representations should have been given prior to the finalisation of the administrative decision, which was to withdraw the confirmation of the taxpayer's tax compliance status.

The court held that SARS' call for explanations from the taxpayer, after it had made a decision, constituted a clear violation of the taxpayer's right to administrative justice as enshrined in section 33 of the Constitution.

<sup>17</sup> Section 195 of the Constitution of South Africa, 1996.

<sup>18</sup> Section 256(6)(a) and (b) of the TAA.

<sup>19</sup> Section 3(2)(b) of the PAJA.



The principle was similarly applied in *SARS v Pretoria East Motors (Pty) Ltd* [2014] ZASCA 91, wherein the Commissioner had imposed additional taxes of 200%, without trying to familiarise itself with the taxpayer's accounting system, even though it was clear that it was a customised system. The court held that SARS was not free to simply adopt a supine attitude and was bound by the principles of fairness to set out the grounds for the disputed assessments. The taxpayer was allowed to respond to the grounds set out by SARS as the basis of its decision.

The court held that SARS should have engaged the taxpayer in an administratively fair manner, as it was obliged to do under the deeming provisions of PAJA. Engaging the taxpayer was the only basis upon which SARS could have provided grounds for raising the assessment to which the taxpayer must then respond by demonstrating that the assessment is wrong.

The court ordered that SARS' decision to withdraw *Zikhulise's* tax compliance status had no force and effect. It is however not clear whether *Zikhulise's* state contract had been cancelled as a result of SARS' decision. The court awarded attorney and client costs to the applicant, often referred to as a punitive cost order.

The importance of this case is that any public institution is obliged to uphold the values and principles as contained in the Constitution, even when it comes to making ordinary administrative decisions.

### **3.4.2 Analysis of the review proceedings in *Chittenden***

As in the case of *Zikhulise*, the applicant in *Chittenden* supra instituted legal proceedings in the Northern Gauteng High Court to set aside the Commissioner's decision in declining the renewal of its tax compliance status. It was similarly accepted in *Chittenden* that the renewal of a taxpayer's tax compliance status constituted administrative action for the purposes of PAJA and that the taxpayer was entitled to challenge the Commissioner's decision in court under those provisions<sup>20</sup>.

In *Koyabe v Minister for Home Affairs and Others* [2010] SA 327 (CC), the Constitutional Court held that the requirement to exhaust all internal remedies was not absolute and was not to be used by the administrator to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny.

<sup>20</sup> Section 6 of the PAJA.

In accordance with the provision of section 7(2)(c) of PAJA, a taxpayer may apply to a court or tribunal to be exempted from the obligation to exhaust internal remedies. Such a request may be considered by a court or tribunal, if exceptional circumstances exist and such a request is deemed to be in the interest of justice.<sup>21</sup>

Taking into consideration the fact that *Chittenden's* business rescue plans were facing a setback due to the negative vote by SARS, the internal remedy would not have been effective and the taxpayer's pursuit in this regard would have been futile. The taxpayer was facing financial hardship and had a pending motion application based on different factual and legal considerations to have the negative vote by SARS regarding its business restructuring, set aside.

The relief sought by the taxpayer in its review application was futile in its design, as the TAA does not provide the Commissioner with the delegation to issue an interim tax clearance certificate. The taxpayer had an outstanding tax liability of just under R12 million which it had not disputed under the normal objection and appeal process. Similarly, the taxpayer had not applied for suspension of its payment obligation to SARS, nor had it entered into a deferred arrangement with SARS or compromise agreement.

The provisions of section 256(3) of the TAA are absolute in that they allow the Commissioner to issue a tax clearance certificate, 'only if satisfied' that the requirements of that section have been met. The court held that the consequence of granting the relief sought by the applicant would set a precedent that would negatively impact on SARS's tax administration system. It would allow every taxpayer whose application for confirmation of their tax compliance status which had been refused, to simply approach a court and, without having to address the merits of the refusal, obtain an order compelling SARS to issue the required documentation.

The court held that such an order would cause confusion and that the tax administration processes would come to a standstill. Furthermore, the court explained that a refusal by SARS of confirmation of a taxpayer's tax compliance status does not entitle the taxpayer to a *mandamus* compelling the Commissioner to issue such confirmation.

The emphasis of the matter was the fact that the issuing of the confirmation of a taxpayer's tax compliance status was governed by the provisions of section 256 of the TAA, which prohibits the issuing of a tax clearance certificate where the taxpayer is in arrears with his or her tax

<sup>21</sup> Section 7(2)(c) of the PAJA.

payments. Williams and Wilson (2014:4) explain there is nothing in PAJA or the common law that empowers a court to order an administrator in taking any unlawful action.

The review application by the taxpayer was therefore futile from the start, as SARS could not be forced to issue the taxpayer with a tax clearance certificate if the taxpayer had an outstanding tax debt. The court reprimanded the taxpayer for not having regard to its tax affairs for a period of eight months, after experiencing financial difficulties. According to Williams and Wilson (2014:4), the taxpayer could have noticed the imminent expiry of its tax clearance certificate well in advance and should have taken the appropriate steps to remedy the situation. The correct action for the taxpayer would have been to timeously object to the assessment raised by SARS and subsequently to have applied for the suspension of the disputed tax liability (SAICA 2014:1).

If SARS had declined the taxpayer's request to suspend the obligation to pay the disputed tax, then the taxpayer could have taken that decision on review in terms of PAJA, arguing in essence that the decision was irrational given the circumstances of this particular case (Williams and Wilson 2014:4). According to Williams and Wilson (2014:4), the taxpayer could have argued that the decision to refuse to suspend the obligation to pay the tax was tainted by an ulterior motive on the part of SARS to foil a business rescue plan that would have compromised SARS's claim to an outstanding tax liability.

However, success in such a review application could not be guaranteed, but at least the court would have had the power to set aside SARS' adverse decision on the taxpayer's request for suspension of the obligation to pay the tax and substitute it with its own decision. With that suspension granted, the taxpayer could then have made a further application to SARS for a confirmation of its tax compliance status and challenge any negative decision in terms of PAJA (Williams and Wilson 2014:4).

### **3.5 SUMMARY**

This chapter reviewed the outcome of two opposing but mainstream court decisions with regard to the application of SARS' powers in the confirmation, issuing or revocation of a taxpayer's tax compliance status.

On the one hand, the court confirmed that the issuing of a tax clearance certificate is governed by the provisions of the TAA. Furthermore, no taxpayer is simply entitled to approach a court without having exhausted the internal remedies to address the merits of the refusal of its request. The court stated in *Chittenden supra* that the fact that an adverse decision taken by SARS is likely to cause the taxpayer actual or impending harm, does not entitle the taxpayer to an order compelling the Commissioner to take a decision in contravention of the provisions of the TAA.

On the other hand, in the case of *Zikhulise*, the court found against SARS on the basis that its decision was in contravention of PAJA, which provides that the decision of the administrator must be lawful, reasonable and procedurally fair. The court explained that SARS should have engaged with the taxpayer in an administratively fair manner, as it is obliged to do under PAJA. SARS's belated opportunity offer to the taxpayer to make representations was unlawful. Therefore, in carrying out its mandate, SARS needs to uphold the values and principles as contained in the Constitution. SARS is not delegated to issue a tax clearance certificate if the taxpayer has an outstanding tax liability unless relief, as discussed above, has been applied for.

The next chapter contains an analysis of taxpayer remedies and alternative dispute resolution measures available to taxpayers in their dealings with SARS.

## CHAPTER 4

### TAXPAYER REMEDIES AND ALTERNATIVE DISPUTE RESOLUTION (ADR) MEASURES

#### 4.1 INTRODUCTION

It was emphasised in chapter 2 that SARS, in carrying out its mandate of tax collection, must do so in a manner that upholds the values and principles contained in the Constitution. This chapter analyses remedies and alternative dispute resolution measures available to taxpayers in safeguarding their constitutional rights against unfair administrative action by the Revenue Authority in respect of the confirmation of a taxpayer's tax compliance status.

In terms of the section 143 of the TAA, SARS is not permitted to waive any tax that is legally payable by a taxpayer. The TAA prescribes specific circumstances whereby disputes between taxpayers and the Revenue Authority can be settled, where such a settlement may be to the greater benefit to the State. These specific circumstances are aligned with the approach seeking to promote dispute resolutions by means other than through the courts, including objections and appeals, ADR or the Tax Board (Whitehead 2014:248).

SARS may issue confirmation of a taxpayer's tax compliance status if the taxpayer is registered for tax, has settled all his or her tax debts and has no outstanding tax returns (Louw 2014:1). The TAA however provides for exceptions to the requirements stated above, in that a taxpayer who is in arrears, either with the submission of his or her tax return or tax payment, may nonetheless obtain confirmation of his or her tax compliance status.<sup>22</sup>

Taxpayers are required to assume accountability for their tax commitments, taking into consideration the specific circumstances stated above, as well as arranging their tax affairs in such a manner that they are able to discharge their obligations in time, as required in terms of section 102 of the TAA (Whitehead 2014:248). If taxpayers are in doubt about meeting their tax responsibilities, they should contact SARS timeously to discuss their situations and make suitable alternative arrangements prior to the due date for payment (Whitehead 2014:248).

A taxpayer, who has an outstanding tax return, may enter into an arrangement with SARS with regard to the submission thereof (section 25 of the TAA). As prescribed by the TAA, a taxpayer

<sup>22</sup> Section 256(3)(a) of the TAA.

who has an outstanding tax debt may apply to SARS to have his or her obligation to pay the outstanding tax liability suspended if the taxpayer intends to dispute the tax amount in question (section 164 of the TAA). The taxpayer may also approach SARS to conclude an instalment payment agreement (section 167 of the TAA) with regard to the outstanding tax debt, or to enter into a compromise agreement (section 204 of the TAA). The taxpayer must approach a senior SARS official in respect of the outstanding tax liability in order to obtain confirmation of his or her tax compliance status.

These preceding provisions constitute the available internal remedies available to taxpayers. The ambits of section 256 of the TAA are explored in detail below and provide further relief to taxpayers.

## **4.2 REMEDIES AVAILABLE UNDER THE TAA**

### **4.2.1 Suspension of tax payment**

The taxpayer who is in arrears with a tax payment may apply to SARS, as prescribed by section 164 of the TAA, to have his or her obligation to pay an outstanding tax, suspended (Johannes 2016:27). The taxpayer in *Chittenden supra* could have relied on this provision with regard to its tax liability, provided that qualifying grounds to object or appeal such a liability had existed. Section 164 of the TAA caters for taxpayers who are aggrieved by an amount of tax that they are liable to pay and want to dispute such an amount under the normal objection and appeal procedures. However, the liability to pay tax is not spontaneously postponed by an objection or appeal, but can only be postponed by a senior SARS official upon a written application by the taxpayer (Whitehead 2014:247). To be considered for postponement of the obligation to pay a tax debt, as duly assessed by SARS, the taxpayer must lodge a written request in the form and manner prescribed for a valid objection to SARS.

A valid objection must be lodged by the aggrieved taxpayer within thirty (30) days from the date of an issued assessment, using a notice of objection form (NOO1). In the objection, the taxpayer must set out the grounds on which the objection is based and must sign it accordingly.<sup>23</sup> A notice of objection may be lodged via e-filing or at a SARS branch. Taxpayers should take note that their obligation to pay properly assessed taxes will not be suspended by the objection and appeals processes. SARS may decline or revoke such a request if satisfied that:

<sup>23</sup> Rule 7 of the rules governing the procedures to lodge an objection and appeal.

- The objection is frivolous or vexatious;
- The taxpayer is employing dilatory tactics; and / or
- There is a substantial change in the factors on which the decision to suspend the payment was based.

Usually, it would be evident from the objection lodged by a taxpayer, in terms of who disputed the assessment, that such objection is not frivolous or vexatious. Where a taxpayer consulted with a legal adviser or a registered tax practitioner, it should provide further evidence that the taxpayer's objection is not frivolous or vexatious (Kruger 2014:34). Furthermore, the taxpayer could also explain that he or she is not employing dilatory tactics or unjustifiably delaying resolution of the matter. By showing that there are sound and justified reasons for disputing the liability to pay the disputed tax amount. In addition, that the taxpayer holds the reasonable and *bona fide* belief that, for these reasons, it is not liable for the disputed tax (Kruger 2014:34).

In the request for the suspension of the payment of an outstanding tax liability, the compliance history of the taxpayer, as well as the amount of tax in question, play a vital role in the decision to suspend payment thereof (Hlongwane 2016:33; Buttrick & Kotze 2013:1). The fact that the taxpayer in *Chittenden* supra was already undergoing business rescue proceedings, made it unlikely that the taxpayer was compliant with its tax obligations. Its position would have been worse after the enactment of the Tax Administration Laws Amendment Act, 44 of 2014 (TALA). According to Solomon (2015:1), the TALA provides for the following factors to be taken into consideration by a senior SARS official when deciding to suspend the payment of tax or a portion thereof, which include:

- a) The risk of dissipation of assets exist that may jeopardise the recovery of tax;
- b) The taxpayer's record of compliance with SARS;
- c) Whether the origin of the dispute is based on a fraudulent motive;
- d) Whether payment of the tax debt will cause 'irreparable hardship' to the taxpayer; or
- e) Whether adequate security for the payment of the disputed tax is pledged by the taxpayer.

Prior to the above amendment, the major aspect taken into account by a senior SARS official was whether the taxpayer was able to make available adequate security (SAIT 2015:1). The condition has subsequently been revised into an enquiry as to whether the taxpayer has pledged sufficient security in its application.



According to Solomon (2015:1), this is currently a more burdensome requirement for a taxpayer to satisfy, as a real pledge of security will be taken into account by the senior SARS official when evaluating the taxpayer's application. The fact that the legislation does not pronounce on the type of security that will be considered adequate becomes an even more complex constraint to comply with (Solomon 2015:1). However, in order to meet the requirements for the reprieve, the insufficiency of the taxpayer's assets or liquidity must only be momentary, and there must be realistic prospects of an increase in the liquidity in the foreseeable future in order to pay-up the outstanding tax debt (SAIT 2015:1).

With regard to the irreparable hardship (financial suffering) requirement, the term 'irreparable hardship' is not defined in any of the applicable fiscal statutes (Solomon 2015:1). Nevertheless, when taking into consideration the ordinary meaning of hardship, it will be irretrievable if any consequent action would not place a taxpayer in the same position as the position he or she was in prior to enduring such hardship (SAIT 2015:1). Kruger (2014:33) explains that, taking into account the taxpayer's business operations, he or she will suffer financial harm which cannot be compensated for merely by way of interest. Particularly in the case of the disposal of assets, even if SARS refunds the taxpayer, thereby enabling the taxpayer to reacquire the assets in question or assets of a similar nature, the cost of such assets may have increased since the disposal thereof, resulting in irretrievable financial hardship for the taxpayer, since the latter would have suffered damages that cannot be recouped.

The final amendment to consider is the enactment of a condition relating to the collectability of tax being jeopardised, in which case a senior SARS official may be permitted to decline granting a suspension of payment of an outstanding tax debt (SAIT 2015:1). Section 164 of the TAA does not contain any definition or explanation as to when the collection of a disputed tax will be in jeopardy. Although section 94 of the TAA empowers SARS to raise a jeopardy assessment if the Commissioner is satisfied that it is required to secure the collection of tax that would otherwise be in jeopardy, the TAA does not stipulate when the collection of tax would be considered to be 'in jeopardy'. It appears from the SARS Short Guide to the Tax Administration Act (SARS 2013:43), that the Commissioner considers the recovery of tax as being in jeopardy if sufficient proof exists that support a conclusion that a real risk exists that the tax will not be collected. Where a taxpayer is able to demonstrate beyond a reasonable doubt that no real risk exists as to the collection of the outstanding tax liability, this requirement can be easily dealt with by SARS.



The Constitutional Court, in *Metcash Trading Ltd v Commissioner, South African Revenue Service and Another* 2001 (1) SA 1109 (CC), explained its judgment when confirming the legality of the 'pay now argue later' principle, that it is in the public's interest for SARS to obtain full and speedy settlement of tax debts so that the state is not prejudiced by the delays in obtaining finality on objections adjudicated by other tribunals or courts.

As a result, the liability to pay tax rests on the taxpayer and the right of SARS to obtain and recover tax will not be delayed by an objection or appeal lodged by the taxpayer or any impending outcome of a court case with regard to a tax amount in dispute (section 164 of the TAA). This practice is in contrast with similar types of litigations in the commercial space. Johannes (2016:27) explains that, in commerce and industry, where a claim is brought before a court against another party, the responding party is never required to pay an amount specified in a claim until the matter has been adjudicated by the court.

The taxpayer therefore needs to present, in the comprehensive application for suspension of payment, a proper case for the liability to pay the disputed tax to be suspended, pending a decision on the matter by a court approached by the parties (Kruger 2014:34). Making an application in terms of section 164 of the TAA is an important step in managing the financial consequences of not being able to pay an outstanding tax debt or risking prolonged tax litigation. As there is no right of objection, should SARS decline the suspension of payment application, the only relief available to the taxpayer will be in the form of a judicial review as submitted in *Capstone 556 (Pty) Ltd v Commissioner: SARS and Another, Kluh Investments (Pty) Ltd v Commissioner: SARS and Another* [2011] ZAWCHC 297; 2011 (6) SA 65 (WCC).

If SARS declines a request for a postponement, or withdraws a postponement, then SARS cannot take any collection measures for ten (10) days following from when the notification of its resolution or withdrawal has been issued to the taxpayer<sup>24</sup> (Solomon 2015:1). This will afford the taxpayer some time to deliberate on the decision of the Commissioner and, if required, bring an application for judicial review. It is therefore important that the application is completed in full as it would form the basis of the judicial review application.

Where a request for suspension of a tax payment has been granted, the payment will be suspended until the objection has been dealt with (SARS 2013:59). As a result, SARS may issue the confirmation of the taxpayer's tax compliance status.

<sup>24</sup> Section 164(6) of the TAA.

Certain taxpayers have launched an objection to an assessment raised by SARS, but forgot to apply for the postponement of payment of their taxes in dispute (Croome 2013a:1). There is no automatic right provided to a taxpayer for the postponement of a disputed tax. A taxpayer may request a senior SARS official to postpone the payment of tax disputed under an assessment. The deadline for the payment of tax under an assessment is usually before the due date for lodging an objection and a postponement application may be brought prior to the lodging of an objection.

SARS follows the 'pay now, argue later' principle which is firmly embedded in section 164(1) of the TAA. This has the effect that, should taxpayers dispute a portion of their tax liability by objecting to their assessment as calculated by SARS, they would still have to pay the disputed tax while waiting for the dispute to be finalised. However, in a recent High Court decision, ENSafrica was able to successfully challenge the 'pay now, argue later' principle on the behalf of their client and obtained an urgent interdict against SARS, precluding the Commissioner from collecting over R1 billion of tax, pending judicial review of the matter (ENSafrica 2015:1). The matter remains sub-judice.

In addition, a taxpayer may also conclude an instalment payment agreement with SARS with regard to the payment of the outstanding tax liability as discussed below.

#### **4.2.2 Instalment payment agreement with SARS**

As discussed, a taxpayer who is in arrears with his or her tax debts may be issued with a tax clearance certificate if they successfully concluded an instalment payment agreement with the Commissioner with regard to the payment of the tax debt in arrears.

An instalment payment agreement allows a struggling taxpayer to settle his or her tax debt at a future date (Solomon 2015:1). Such an arrangement is governed by the provisions of section 167 of the TAA. Only a senior SARS official may, at his or her discretion, allow the taxpayer to pay the outstanding tax debt in either a series of instalments or in one lump sum at a specified future date (Belle 2015:1). The criteria for an instalment payment agreement are prescribed in section 168 of the TAA, which states that:

'SARS may enter into an instalment payment agreement if:

- a) The taxpayer suffers from a deficiency of assets or liquidity which is reasonably certain to be remedied in the future;
- b) The taxpayer anticipates income or other receipts which can be used to satisfy the tax debt;
- c) Prospects of immediate collection activity are poor and uneconomical but are likely to improve in the future;
- d) Collection activity would be harsh in the particular case and the deferral or instalment agreement is unlikely to prejudice tax collection; or
- e) The taxpayer provides the security as may be required by the SARS official.'

Croome and Olivier (2015:384) explain that a taxpayer must be able to satisfy SARS that a temporary cash flow problem exist and he or she is unable to settle the tax debt in one payment and that his or her financial position is likely to improve in the near future. Furthermore, a taxpayer must satisfy SARS that he or she anticipates an improvement in his or her cash flow which will allow the taxpayer to settle the tax debt over a reasonable period of time.

In the case where a taxpayer is certain that business is unlikely to pick up in the foreseeable future, the taxpayer may be requested to provide security for the outstanding tax debt before SARS would be willing to enter into the instalment payment agreement (Bell 2015:1). Should SARS enter into an instalment payment arrangement with a taxpayer, non-adherence to the conditions of the agreement could lead to SARS terminating the agreement and instituting collection procedures for the tax debt.

The underlying principle of the instalment payment agreement is to afford taxpayers, who are in financial distress, reprieve from the imposition of immediate tax recovery measures. It is, therefore, an option only when the taxpayer's financial position is anticipated to improve.

An instalment agreement must set out all the applicable terms and conditions, including the dates on which instalments are to be paid. Compliance with the terms and conditions will then be monitored on a regular basis by SARS. In practise, SARS sets a very high threshold which must be met by the taxpayer before he or she can secure a deferred payment arrangement. Typically, this arrangement will not exceed three months at a time (Croome & Olivier 2015:385). Once the taxpayer has concluded an instalment payment agreement, the taxpayer may obtain his or her tax compliance status, despite an outstanding tax liability. The taxpayer may also consider a compromise arrangement as a settlement in order to obtain his or her tax compliance status and is discussed below.

### 4.2.3 Compromise with SARS with regard to an outstanding tax debt

In terms of the TAA, SARS may not issue a tax clearance certificate to any person who has an outstanding tax debt. SARS may compromise a tax debt by entering into an agreement with the 'debtor' (taxpayer) as provided for under section 204 of the TAA.

SARS may permit the compromise of a tax debt portion when requested to do so by a taxpayer.<sup>25</sup> The aim of a compromise arrangement is to obtain maximum return from a tax debt and such an arrangement must be in line with good governance values of the tax revenue structure and organisational efficiency.<sup>26</sup>

According to Croome and Olivier (2015:451), SARS will only consider a compromise agreement if it is commercially attractive and yields a larger amount of tax than what would otherwise be the case. An application for a compromise by a taxpayer must be supported by a comprehensive declaration setting out the information specified in section 201(1)(a) to (h) of the TAA as follows:

- a) The assets and liabilities of the taxpayer are reflective of their current fair market value;
- b) The amounts received by or accrued to, and expenditure incurred by the taxpayer during the 12 months immediately preceding the request;
- c) The assets which have been disposed of in the preceding three (3) years or such a longer period a senior SARS official may deem appropriate, together with their value, the consideration received or accrued, the identity of the person who acquired the assets and their relationship to the taxpayer;
- d) The taxpayer's future interest in any assets, whether certain or contingent or subject to the exercise of a discretionary power by another person;
- e) The assets over which the taxpayer, either alone or with other persons, has a direct or indirect power of appointment or disposal, whether as trustees or otherwise;
- f) Details of any connected person in relation to the taxpayer;
- g) The taxpayer's present financial sources, level of income and anticipated sources of income for the next three (3) years, with an outline of the taxpayer's financial plans for the future; and
- h) The taxpayer's reasons for seeking a 'compromise'.

<sup>25</sup> Section 200(a) of the TAA.

<sup>26</sup> Section 200(b) of the TAA.

It should be noted that, although section 201 (1)(a) to (h) sets out all of the required information to be submitted by the taxpayer, an application for compromise must contain evidence substantiating the taxpayer's contention that he or she is unable to settle the full amount of tax debt to SARS.<sup>27</sup> Finally, the taxpayer must declare, by means of a sworn declaration or affidavit that the information supplied to SARS in the application is accurate and complete.<sup>28</sup>

It is imperative that the taxpayer is up to date with the submission of all other tax returns, including VAT and Pay As You Earn (PAYE), and that there are no other amounts due to SARS other than the tax debt for which the compromise is requested.<sup>29</sup> SARS may not consider a request for a compromise if it will cause harm to other creditors, unless the impacted creditor agrees to the compromise (section 203(d) of the TAA).

Where the application to compromise is successful, both the taxpayer and SARS must sign the agreement.<sup>30</sup> The agreement must set out the undertaking by SARS not to pursue the recovery of the amount of the tax debt which has been compromised and the undertaking by the taxpayer to pay the tax debt in the manner prescribed by SARS.<sup>31</sup>

The confirmation of a taxpayer's tax compliance status may be issued by SARS where all requirements have been met. However, SARS may disregard the agreement where the taxpayer fails to adhere to a provision or conditions set out in the agreement and revoke the confirmation of that taxpayer's tax compliance status.

#### **4.3 INTERNAL DISPUTE RESOLUTION MEASURES CONTAINED IN CHAPTER 9 OF THE TAA**

The TAA sets out various procedures in chapter 9 of the TAA to facilitate the resolution of certain disputes between SARS and the taxpayer outside the judicial system. A taxpayer is encouraged to exhaust any internal remedies available within the tax system before proceeding with a judicial review (Hoexter 2012:538; Croome & Olivier 2010:55).

<sup>27</sup> Section 201(2) of the TAA.

<sup>28</sup> Section 201(3) of the TAA.

<sup>29</sup> Section 203(b) of the TAA.

<sup>30</sup> Section 204(1) of the TAA.

<sup>31</sup> Section 204(1)(a) to (c) of the TAA.

In accordance with the internal remedies contained in chapter 9 of the TAA, a taxpayer not satisfied by an assessment received from SARS, is entitled to lodge an objection and appeal against such as an assessment in terms of section 104 of the TAA. As discussed in the preceding chapter, the decision of the Commissioner to issue or revoke an application of confirmation of the taxpayer's tax compliance status constitutes an administrative action, and thus it can only be reviewed in a High Court.

Chapter 9 of the TAA sets out the procedures for taxpayers dissatisfied by an assessment or the making of a decision by the Commissioner, to resolve a dispute. These procedures are regulated by 'the rules enacted under section 103 of the TAA' (the Rules). In order to properly formulate the basis on which the taxpayer expects to object to an assessment or decision by the Commissioner, the taxpayer is entitled to request the reasons in terms of rule 6 of the 'Rules' on which the assessment or decision was based from the Commissioner (Jones 2011:1). This rule is supported by section 5 of PAJA, which also provides administrators, including SARS, to give reasons for their administrative actions or decisions upon request by the taxpayers (Van Schalk 2015:1). Otherwise, the taxpayer may, within 30 days of the date of the notice of assessment, object to an assessment in terms of section 104 of the TAA (Louw 2016:1; Van Schalk 2015:1). According to O'Halloran (2015:32), an exception is made for the condonation of objection lodged after the expiry of thirty (30) day prescribed period, provided reasonable explanations exist to support the late objection.

Any taxpayer, whose application to SARS for a confirmation of a taxpayer's tax compliance status has been declined by the Commissioner, is permitted to call for reasons as to how the decision was reached (Jones 2011:1). The reasons will provide the affected taxpayer with an opportunity to plan his or her objection or appeal against the Commissioner's decision to the application.

#### **4.3.1 Objection and appeals remedy**

The TAA provides for a number of measures aimed at resolving disputes that may arise between SARS and taxpayers. One of these measures provides that, where the taxpayer is aggrieved by the decision of SARS on an assessment, the taxpayer may lodge an objection to such an assessment (section 104 of the TAA).

Before the taxpayer can object to an assessment, the taxpayer must understand the basis for SARS' decision and thereafter determine if it is worth challenging such an assessment by way of an objection (Croome & Olivier 2015:286). According to Croome and Olivier (2015:285), the taxpayer could elect to request reasons prior to lodging an objection in order to understand what has been decided and on what factual or legal basis (section 5 of PAJA, section 96(2)(1)(a) of the TAA).

Under rule 7 of the Rules<sup>32</sup> governing the objection and appeals processes, the taxpayer is required to deliver the notice of objection within thirty (30) days of receiving reasons from SARS or the date of assessment. Where the taxpayer receives a notice disallowing the objection, he or she is entitled to appeal against that decision under rule ten (10) of the abovementioned Rules and must deliver the notice of appeal within thirty (30) days from the date of the disallowance notice (SARS 2014:1).

Taxpayers are required to specify in detail the grounds on which they are appealing, and these grounds may not constitute a new objection against the amount of the disputed assessment (Croome & Olivier 2015:286). It is important that emphasis be placed on the importance of carefully drafting an objection, in that all aspects in the dispute are dealt with (Croome & Olivier 2015:286). This follows that a taxpayer cannot raise new disputes later and from this point onwards the taxpayer may request that the matter be referred for Alternative Dispute Resolution (ADR).

SARS (2014:2) defines ADR as a form of dispute resolution other than litigation, or adjudication through the courts. It is less formal, less cumbersome and less adversarial and a more cost-effective and speedier process of resolving a dispute with SARS.

Either SARS or the taxpayer may initiate an ADR procedure in terms of section 107 of the TAA. However, it is the Commissioner that makes a final determination if a matter is suitable for an ADR procedure (Geldenhuis 2013:1). Where the taxpayer requests an ADR procedure, SARS must inform the taxpayer by notice, within twenty (20) days of receipt of the appeal notice, where SARS agrees that the matter is suitable for ADR and that it may be decided by way of the ADR procedures. An ADR procedure will only continue if the taxpayer consents to the ADR terms and conditions by responding accordingly in the notice of appeal (Geldenhuis 2013:1).

<sup>32</sup> Rules promulgated under section 103 in Notice 550 on 11 July 2014 (GG 37819).



The ADR process must be concluded within ninety (90) days, or such further period as SARS may agree to. The period within which the ADR proceeding is conducted commences twenty (20) days after the receipt date by SARS of the notice of appeal, and ends on the date of proceedings termination in the manner provided for in the terms governing the ADR procedures.

SARS will appoint a facilitator, who must abide by a Code of Conduct as prescribed in the ADR rules under section 103 of the TAA. The object of the facilitator is to obtain an impartial, reasonable and lawful resolution of the disagreement between the taxpayer and SARS (Geldenhuys 2013:1). According to Whitehead (2014:248), the facilitator must record the terms of any agreement or settlement reached at the conclusion of the ADR process. If no agreement or settlement is reached, it must also be recorded.

The ADR proceedings may not be recorded electronically and any representation made or document tendered in the course of the proceedings may not be tendered in any subsequent proceedings as evidence by any other party (Whitehead 2014:248). Should SARS or the taxpayer not be agreeable to the proposed settlement or agreement, the matter may still proceed to the Tax Court.

Where the taxpayer has not raised new disputes, the taxpayer is entitled to have the matter heard by the Tax Board, where the amount of tax in dispute does not exceed R500 000 (SARS 2014:2), until replaced by a Public Notice. Both SARS and the taxpayer must agree that the matter should proceed to the Tax Board. The benefit of approaching the Tax Board is that it is less costly and less formal than the proceedings in the Tax Court.

Croome and Olivier (2015:263) advise that taxpayers should consider what evidence is available to support their legal arguments at the time that the objection is filed and not when the matter proceeds on appeal to the Tax Court. This is because the credibility of a taxpayer's evidence under oath and that of its witnesses are properly considered by a court (Croome and Olivier 2015:263).

Owing to SARS's duty to collect tax, it is afforded certain statutory powers by the legislature to effect efficient and speedy collection of taxes and restrict taxpayer's ability to use the objection or appeal procedures to vexatiously delay the payment of their taxes. In accordance with the 'pay now, argue later' rule, a taxpayer who disputes the assessed amount payable to SARS, will still be obliged to pay this amount despite lodging an objection to the assessment. The 'pay



now, argue later' rule was originally provided for in terms of section 36 of the VAT Act and is currently provided for in terms of section 164 of the TAA (Keulder 2013:128).

Alternatively, the taxpayer, whose objection was disallowed by SARS, is entitled to request that the dispute be referred to ADR. The reason it is termed 'alternate' is that it is a dispute resolution method perceived to be an alternative to the traditional system of court procedures. Therefore, it is clear that the taxpayer may appeal the disallowed objection under both PAJA or through ADR. SARS has a 'Tax Appeal Committee' which reviews a matter in dispute before the matter can be referred to the Tax Court (Croome & Olivier 2015:597).

Croome and Olivier (2015:597) noted that SARS could frustrate the taxpayer's attempt to finalise a dispute, using the objection and appeal procedures, by failing to comply with the time frames specified in the rules governing the objection and appeal procedures.<sup>33</sup> In terms of PAJA, the taxpayer must commence judicial review proceedings within one hundred and eighty (180) days of becoming aware of the failed administrative action or the reasons for it.<sup>34</sup> However, the TAA provides for thirty (30) days from the date of the assessment within which to lodge an objection. If, however, the taxpayer cannot meet the deadline, he or she may apply to SARS for an extension.<sup>35</sup> If a SARS official is satisfied that reasonable grounds exist for an extension, the thirty (30) day period may be extended for a period not exceeding forty five (45) days.

A taxpayer may also request reasons for an assessment in terms of section 5 of PAJA. If reasons for an assessment are requested in terms of PAJA, SARS must provide its reasons or grounds for the assessment as explained in section 96(2)(1) of the TAA, where the assessment was not fully based on a return submitted by the taxpayer. SARS is required, within ninety (90) days after receiving a request from the affected taxpayer, to provide adequate written reasons with regard to an assessment or decision made by it.<sup>36</sup> This will enable the taxpayer to determine if the decision can be reviewed under PAJA based on error in law, fact or irrationality. If a request is lodged in terms of PAJA, the period within which the taxpayer must lodge an objection is not extended, unless a court order to this effect is obtained.

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<sup>33</sup> Section 103 of the TAA.

<sup>34</sup> Section 7 of the PAJA.

<sup>35</sup> Section 104(5) of the TAA.

<sup>36</sup> Section 5(2) of the PAJA.

### 4.3.2 Appealing to a Tax Board

The Tax Board is constituted in terms of section 108 of the TAA and comprises of an advocate or an attorney as chairperson. Such an advocate or attorney is appointed to a panel of suitable qualified legal practitioners by the Minister of Finance in consultation with the Judge President of the relevant provincial judiciary. The Tax Board hears tax appeals in disputes involving tax that does not exceed R500 000, until replaced by a Public Notice (Haupt 2016:13; SARS 2014:2).

The Tax Board hearings are not open to the public and the Tax Board's decisions are not published by SARS. The parties to a Tax Board hearing are bound by the decision of the Tax Board; however, such a decision will not have any precedent value. As a result, a decision of a Tax Board will not be binding on future tax cases. The unsuccessful party in a Tax Board hearing may appeal to the Tax Court.

### 4.3.3 Appealing to a Tax Court

The Tax Court is not a 'court' as described in section 166 of the Constitution, but it is submitted to be an administrative tribunal established by the President of South Africa in terms of section 116 of the TAA. The Tax Court has jurisdiction over tax appeals and may also hear interlocutory applications relating to objections and appeals lodged by taxpayers.

The sittings of the Tax Court are generally open to the public, although the president of the Tax Court may, in exceptional circumstances, allow a sitting to be private. The Tax Court consists of a judge of the High Court as well as an accountant member and a member from commerce, selected from a panel of members appointed by the President of South Africa.

The Tax Court may also, in disputes involving tax in excess of 50 million rand, comprise of three (3) judges of the High Court and two (2) members. The decisions of the Tax Court must be published for general information. Where the hearing of a Tax Court was not public, the resolution of the court may be published but in such a way that the taxpayer's identity is not revealed (Lamprecht 2013:1).

A Tax Court has jurisdiction over appeals with regard to assessment grievances and the following objections:

- a) A decision by SARS rejecting a request for an extension of the period for objection or appeal;
- b) Any decision that may be objected to or appealed under a tax Act;
- c) A decision disallowing a refund; and
- d) A decision disallowing a remission of an administrative non-compliance penalty, or an understatement penalty.

All parties to the proceedings in the Tax Court may appeal against the judgement of the Tax Court, as provided in section 133 of the TAA. The appeal may be made to the full bench of the provincial division of the High Court or to the Supreme Court of Appeal (SCA). The judgments of the Tax Court are binding on the parties in the matter and of persuasive value in other Tax Courts, and the High Courts.

A taxpayer not satisfied by a decision of the Tax Court, which is the ultimate internal dispute resolution remedy contained in Chapter nine (9) of the TAA, may either surrender and settle the tax liability as assessed, or apply to have such a decision reviewed in the High Court, which is outside the Tax Court system as prescribed in section 133 of the TAA.

Section 33 of the TAA also provides that, in cases where the Tax Court may not have jurisdiction, a taxpayer may apply to have such matters reviewed in the High Court, as prescribed in section 133 of the TAA. In High Court proceedings, a taxpayer initiating the application is referred to as the 'applicant', compared to the 'appellant' in the objection and appeal to the Tax Court.

SARS has often successfully argued in some of the cases referred to the High Court that, they were within the jurisdiction of the Tax Court (SAIT 2014:1). In *Medox Limited v Commissioner for South African Revenue Services* [2014] ZAGPPHC 98, the taxpayer sought to obtain an order from the North Gauteng High Court to declare certain income tax assessments null and void on the basis that the assessments had prescribed. The taxpayer refused to engage available internal remedies within the tax system and argued that the Tax Court had no power to issue declaratory orders in this regard.

The court dismissed the application on the basis that the merits of an assessment fall within the jurisdiction of the Tax Court. Therefore, any matters of lawfulness and correctness of disputed assessments must be dealt with by the Tax Court and thus taxpayers cannot circumvent the

internal remedies by applying for a hearing directly to the High Court (SAIT 2014:1). The TAA provides that, for any party who seeks to lodge an appeal against a decision of a Tax Court, to give an opposite party a ten (10) day notice of their intention to appeal such a decision (section 134).

In terms of PAJA, any administrative action that can significantly and harmfully impact on the rights or legitimate expectations of any person must be procedurally fair. Procedural fairness will depend on the circumstances of each case, but SARS must give effect to the right of procedurally fair administrative action and must give a person:

- a) Sufficient notification of the nature and purpose of the intended administrative action; and
- b) A reasonable opportunity to make representations.

It is suggested that the SARS Act<sup>37</sup> does not contain a provision which excludes SARS from liability for wrongful acts. Therefore, taxpayers who suffer damages or losses by reason of SARS' decision or failure to make a decision may launch court proceedings to obtain appropriate relief against SARS (section 8 of PAJA read together with section 34 of the Constitution).

#### **4.4 REMEDIES UNDER PAJA**

The main remedy under section 8 of PAJA is to take the decision by SARS on review, which will be reviewed on the grounds provided for in the Act (Croome & Olivier 2015:632). According to Wade and Forsyth (2014:26), the judicial review of administrative actions is concerned with whether an administrative decision was lawful or not. A judicial review is a fundamental mechanism to safeguard against abuse of public power by public institutions, including SARS (Tomlinson & Clayton 1997:31; Wade & Forsyth 2014:26).

As discussed above, only decisions of public bodies may be subject to a judicial review process. Judicial reviews with regard to administrative action may be instituted in the High Court in terms of section 7(4) of PAJA. In terms of section 133 of the TAA, a taxpayer or SARS may appeal against the Tax Court's judgment to the full bench of the provincial division of the High Court that has jurisdiction in the area in which the Tax Court sitting was held. The sittings of the High Courts are public and its judgments are published for general information. The judgments of the

<sup>37</sup> 34 of 1997.

High Court are binding on all lower courts and tribunals and have persuasive value in other High Courts, the Supreme Court of Appeal and the Constitutional Court (Kohn 2013:26; SAICA 2015:1).

Section 7(2)(c) of PAJA provides that litigation by a taxpayer against SARS may be heard in the High Court without the taxpayer having first exhausted any internal dispute resolution measures if the court deems it to be in the interest of justice.

The High Court has provincial divisions throughout South Africa. The court has jurisdiction over all persons residing in the defined provincial area in which the court is located (Department of Justice). These courts can adjudicate cases that are of such a serious nature that the junior courts would not be competent to make an appropriate judgment or to levy a penalty, including the cases referred to them by law.

In *Koyabe* supra the applicant sought to set aside the decision of the Director General of Home Affairs to revoke the applicant's permanent residency status. The Court declined to review the application on the basis that the applicant had not exhausted all internal remedies as required in terms of section 7(2)(a) of PAJA and that no exceptional circumstance existed to exempt the applicant from this requirement (Kathree-Setiloane 2009:8).

The applicant contended that it could not exhaust all internal remedies as the Home Affairs official had refused to give reasons for their decision to revoke the applicant's residence permit. As a result, the applicant was prohibited from significantly challenging the decision by means of remedies provided internally (PWC 2016:1). It is suggested that the applicant in *Chittenden supra* could have argued that the outcome of the internal remedies could potentially have been tainted by the applicant's lawsuit in respect of the Commissioner's vote in respect of the business rescue plan already underway at the time.

In terms of rule 9(1) of the Rules<sup>38</sup> read together with section 106(4) of the TAA, SARS is required to advise the taxpayer on the allowance or disallowance of the objection and the grounds thereof (SAICA 2014b:1). In the *Commissioner: SARS v Sprigg Investments* 117 CC [2010] ZASCA 172, the court explained that the 'letter of findings' by SARS and the responses to this letter constituted adequate reasons to enable the taxpayer to make an informed decision (Jones 2011:1).

<sup>38</sup> Rules promulgated under section 103 of the TAA.

In accordance with the internal remedies contained in the tax system to resolve disputes, a taxpayer, if not satisfied by an assessment received from SARS, is entitled to lodge an objection and appeal against such as an assessment in terms of section 104 of the TAA.

According to Judge Makgoro, in *Koyabe* supra, internal remedies provide quick and cheap resolution of disputes besides litigation. Furthermore, the judge explained that resorting to litigation without exhausting internal remedies weakens the self-sufficiency of the administrative process and may reduce the justice process, effectively assuming administrative role and occupation (Kathree-Setiloane 2009:8).

The court held in *Koyabe* supra that internal remedies are valuable and essential in law, and that they should not be utilised by the Commissioner to frustrate the efforts of the distressed taxpayer nor to safeguard the administrative practise from legal scrutiny (Kathree-Setiloane 2009:8).

The affected taxpayer may also seek appropriate reprieve against an adverse action or decision of the Commissioner in accordance with the provision of section 34 of the Constitution (Kohn 2013:30).

It was accepted both in *Zikhulise* and *Chittenden* supra that the Commissioner's decision on whether or not to issue the confirmation of a taxpayer's tax compliance status is an administrative action as defined in section 1 of PAJA. Therefore, any taxpayer, who is adversely affected by such a decision, may take such a decision on judicial review.

It is important to note that where such a review is successful, a taxpayer will not necessarily be compensated for damages suffered. The taxpayer is most likely to have the decision by SARS set aside. However, a court would not be precluded from making an order of costs, including the legal cost of the proceedings and may also include damages suffered due to the administrative decision taken by SARS.

PAJA does provide for exceptional cases, where the court may direct 'the administrator or any party to the proceedings to pay compensation'.<sup>39</sup> PAJA however, does not define what would constitute 'exceptional circumstances'. In the matter of *MEC for the Department of Welfare v Kate* [2006] ZASCA 49, the court held that a disregard of public statutory responsibilities

<sup>39</sup> Section 8(1)(c)(ii)(bb) of PAJA.

constituted 'exceptional circumstances' for the purposes of whether compensation should be paid.

#### **4.5 REMEDIES UNDER THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA**

PAJA cannot be used to evaluate whether a constitutional guaranteed right has been infringed (Croome & Olivier 2015:633). Only the Constitutional Court has the power to evaluate the infringement of a right guaranteed in the Constitution. The Constitutional Court is the Supreme Court for hearing all constitutional matters. The Constitutional Court makes the final decision on whether an Act of Parliament, a provincial Act or the conduct of the President is unconstitutional. The Constitutional Court has the power to strike down any rule or regulation that infringes on fundamental human rights as endorsed by the Constitution.

#### **4.6 REMEDIES UNDER COMMON LAW**

In theory, a taxpayer who suffers damages or loss due to actions by SARS may claim damages under PAJA. However, these damages are only awarded under exceptional circumstances and the taxpayer is most likely to only succeed with a delictual claim against SARS (Croome & Olivier 2015:634).

##### **4.6.1 Delictual claim for damages**

A delictual claim for damages may result from poor service delivery by SARS officials. This may include damages suffered by a taxpayer as a result of not being able to bid for a state contract due to a failure by SARS to issue timeous confirmation of a taxpayer's tax compliance status or where a taxpayer's reputation is tarnished by an over-hostile audit investigation undertaken by SARS or in the cases where SARS failed to make a decision (Goldswain 2012:152; Croome & Olivier 2015:634).

In order for the taxpayer to succeed with a delictual claim for damages, he or she must demonstrate the unlawful or culpable illegal action or inaction of SARS and the suffering damages as a consequence (Van der Walt 2013:1). The fact that a taxpayer can demonstrate



that he or she suffered damages or loss as a result of a decision or failure to make a decision by SARS, will not be adequate (Croome & Olivier 2015:634).

Croome and Olivier (2015:634) explain that, in the South African common law, there is no general duty of care not to cause harm to another person. It is only when a public institution has a duty of care towards the person who suffered the damages that the public institution could be held liable (Croome & Olivier 2015:634).

#### **4.6.2 Order for costs**

The general rule is that a cost order is issued by a judge, following the result of litigation. Thus, the unsuccessful party has to pay the costs, depending on the judgment. It does not however mean that the successful party will be able to claim all of his or her legal costs. The legal costs may be recovered by a party upon application to a judge (as confirmed in *Chittenden supra*) and are determined according to a tariff prescribed by the rules of court.

However, this general rule does not apply to tax disputes adjudicated by the Tax Court. Croome and Olivier (2015:639) explain that the Tax Court generally will not make any order for costs and as a result, each party to a tax dispute will pay his or her own costs. However, in ITC 1821 [2007] 69 SATC 194, the Tax Court awarded costs in favour of the taxpayer on the attorney and client basis as a show of its displeasure at the manner in which the taxpayer had been treated by the Commissioner. This followed the Commissioner's mere reliance on suspicion in raising an assessment on a taxpayer and the regulation is fairly embedded by the provisions found in section 130 of the TAA.

#### **4.7 THE TAX OMBUD**

One of the remedies available to taxpayers aggrieved by a process, service or administrative matter in obtaining confirmation of their tax compliance status may approach the Office of the Tax Ombud and register a complaint. The Tax Ombud is appointed by the Minister of Finance in terms of the TAA (section 14 of the TAA) and can be approached by all tax-paying entities, businesses and individuals (Botha 2014:4).



The mandate of the Tax Ombud is to evaluate and address any grievance by a taxpayer regarding a service, procedural or administrative matter arising from the application of the provisions of a tax Act by SARS.<sup>40</sup> The Tax Ombud may only review a request if the requester has exhausted the available complaint resolution measures within SARS, unless there are persuasive circumstances for not doing so.<sup>41</sup> According to Botha (2014:4), the compelling circumstances are determined by factors such as a request that raises systemic issues and whether exhausting complaint resolution measures may cause undue hardship for the requester. Also included in the factors is where the exhaustion of available complaint resolution measures is unlikely to produce a result within a specific period of time that the Tax Ombud considers reasonable (Main 2015:11).

Taxpayers should take note that disagreeing with an assessment does not constitute a complaint for the purpose of referral to the Office of the Tax Ombud (Carstens 2016:22). In cases of disagreement concerning assessments, a taxpayer should follow the normal dispute resolution process of submitting a Notice of Objection (NOO) or Alternative Dispute Resolution (ADR1).

According to Carstens (2016:22), SARS has overhauled their complaints facility in order to streamline the objection system and to improve the manner in which taxpayer complaints are lodged, tracked and resolved through electronic channels. The Complaints Management Office (CMO) allows a person to submit any complaint at any SARS offices, mobile tax unit or by conveniently submitting an electronic form on eFiling.

SARS undertakes to resolve a complaint within a maximum of twenty one (21) days after the complaint was lodged (Lamprecht 2014:1). If the complainant remains unresolved, the next step would be to lodge a complaint with the Office of the Tax Ombud. According to Lamprecht (2014:1) it is envisaged that the Tax Ombud should offer a remedy to taxpayers not satisfied with the complaints resolution measures available in the tax system, without the need to escalate the matter to a court at great cost and time delay. The Office of the Tax Ombud undertakes to resolve valid taxpayer complaints within fifteen (15) days on average (Main 2015:11; Lamprecht 2014:1).

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<sup>40</sup> Section 16(1) of the TAA.

<sup>41</sup> Section 18(4) of the TAA.

The Tax Ombud will always maintain a neutral position and recommend corrective action where appropriate and necessary (section 16(2) of the TAA). The Tax Ombud may not review the following types of complaints:

- Legislation or tax policy.
- SARS policy or practice generally prevailing, other than to the extent that it relates to a service, procedural or administrative matter arising from the application of the provisions of a tax Act by SARS.
- A matter subject to objection and appeal under a tax Act, except for an administrative matter relating to such objection and appeal.
- A decision of, proceeding in or matter before the Tax Court.
- Review the application of the provisions of the Act or procedural or administrative provisions of a tax Act, unless when requested by the Minister.

It is important to note that the Tax Ombud's recommendations are not binding on SARS or the taxpayer, but the party disagreeing with the Tax Ombud's findings must provide a written response in respect thereof, setting out the reasons for doing so.<sup>42</sup> Lodging a complaint with the Tax Ombud, the taxpayer may visit their website or through a prescribed OTO 01 form. The Office of the Tax Ombud will then decide whether or not the taxpayer's complaint is valid and falls within the Tax Ombud's mandate.

If the taxpayer's complaint falls outside the mandate of the Tax Ombud, the taxpayer will be informed of the reason for rejection of the complaint and alternative for dispute resolution measures may be suggested (Main 2015:11). For a valid complaint, the Tax Ombud aims to resolve the problem within fifteen (15) business days of receiving the complaint (Carstens 2016:23; Lamprecht 2014:1).

If the taxpayer has exhausted all available options and is not satisfied with the Tax Ombud's ruling, the matter may be pursued by means of other redress channels (Lamprecht 2014:2). According to Carstens (2016:23), the taxpayer is then able to escalate the complaint all the way to the Public Protector. Carstens (2016:23) suggests that, with the implementation of the SARS Complaints Monitoring Office, grievances will hopefully not reach that level. It is suggested that SARS is more open to feedback due to the number of available dispute resolution measures within the tax system, provided the correct procedure is followed.

<sup>42</sup> Section 20(2) of the TAA.

## 4.8 SUMMARY

This chapter analysed remedies and other dispute resolution measures available to taxpayers in safeguarding their rights against the misapplication of SARS's powers in respect of the confirmation of a taxpayer's tax compliance status. Furthermore, the ambit of the procedurally fair administrative action principle was analysed in terms of PAJA and the Constitution of South Africa.

In terms of the Tax Administration regulations, SARS is not permitted to waive any tax that is legally payable by a taxpayer. The TAA prescribes the conditions under which the Commissioner may resolve disagreement or a dispute with a taxpayer by means other than through the judicial system. Internal remedies provide quicker and cheaper resolution of disputes outside litigation. In addition, it is submitted that resorting to court action without exhausting internal remedies weakens the self-sufficiency of established administrative processes.

In *Koyabe supra*, the court held that internal remedies are valuable and an essential requisite in law, and that they should not be utilised by the Commissioner to frustrate the efforts of a distressed taxpayer nor to safeguard the administrative practises from legal scrutiny. Any administrative decision taken by SARS may be taken on review (by the taxpayer in terms of PAJA) to the High Court. A judicial review is ultimately concerned with whether an administrative decision is lawful or unlawful. It is a fundamental mechanism to safeguard against the abuse of public power by public institutions, including SARS.

A taxpayer is encouraged to exhaust any internal remedies available within the tax system before proceeding with the judicial review of the dispute. An aggrieved taxpayer may also approach the Office of the Tax Ombud, who is mandated to evaluate and address any grievance by a taxpayer regarding a service, procedural or administrative matter arising from the application of the provisions of a tax Act by SARS. This is a less costly and more time efficient approach than a full-fledged judicial review.

The next chapter contains summaries, conclusions and recommendations from the previous chapters.

## CHAPTER 5

### SUMMARY, CONCLUSION AND RECOMMENDATION

#### 5.1 INTRODUCTION

The aim of the final chapter is to combine and summarise all of the analyses from the previous chapters, to draw conclusions and to make recommendations, where applicable. The aim of this thesis, as indicated in Chapter 1, was to review the regulatory powers exercised by SARS with regard to the issuing, decline or revocation of a taxpayer's tax compliance status. In addition, it highlighted remedial measures and procedures available to the aggrieved taxpayer in order to prevent the misapplication of SARS' fiscal power.

#### 5.2 SUMMARY

Traditionally, the Revenue Authority had never been under any obligation to provide taxpayers with reasons for its decisions. It only had to act in line with its regulatory powers. Today, all actions of SARS, as the responsible Revenue Authority, must measure up to the fundamental values imposed on it by the Constitution. Accordingly, SARS must ensure that its actions are lawful, reasonable and procedurally fair and taken in accordance with the provisions of PAJA. Equally, this would include all decisions taken by SARS. Hereafter a summary of each chapter follows.

#### CHAPTER 1

This Chapter provided background information on the purpose and use of tax clearance certificates. This is particularly so in respect of providing taxpayers with confirmation of their good standing with the Revenue Authority and in order for them to bid for state contracts. Until recently, when the TAA was introduced, tax clearance certificates were not issued in terms of any specific provision of the Income Tax Act or any tax Act overseen by SARS. The Chapter also sets out the context and the method in which the study was conducted. The Chapter discussed the problem statement, research objective, thesis statement, and the significance of the study.

## CHAPTER 2

This Chapter encompassed a literature review on taxpayer's compliance status with regard to the confirmation of their good standing with the Revenue Authority. This aspect concerned the requirements for issuing a valid tax clearance certificate or the decline and revocation of a taxpayer's good standing by the Revenue Authority. A number of laws, besides the TAA, such as the National Treasury Regulations and PFMA, specifically require a tax clearance certificate to be attached to a bid for a state contract. A responsible accounting officer or accounting authority must reject a bid by any person who fails to provide written evidence (a valid tax clearance certificate) from SARS that the person has no unresolved tax commitments or has made arrangements to pay any taxes due. The requirements for just administrative action to be taken by the Revenue Authority, as required in terms of PAJA and the Constitution, were examined.

## CHAPTER 3

Two mainstream court cases were interpreted and analysed in this Chapter, namely *Chittenden* and *Zikhulise* supra. These decisions held by the High Court dealt specifically with the issuing of tax clearance certificates by the Revenue Authority. The court confirmed in *Chittenden* supra that the issuing of a tax clearance certificate was governed by legislation encapsulated in the TAA. Furthermore, that no taxpayer is simply entitled to approach a court without having exhausted the internal remedies to address the merits of the refusal of its request. The court stated in *Chittenden* supra that the fact that an adverse decision taken by SARS is likely to cause the taxpayer actual or impending harm, does not entitle the taxpayer to an order compelling the Commissioner to take a decision in contravention of the TAA provisions.

In *Zikhulise* supra, the court found against SARS on the basis that its decision was in contravention of PAJA, which provides that the decision of a revenue official must be lawful, reasonable and procedurally fair. The court explained that SARS should have engaged with the taxpayer in an administratively fair manner, as it was obliged to do under PAJA. SARS's belated offer of providing an opportunity to the taxpayer to make representations was unlawful. A taxpayer should accordingly be provided with an opportunity to state a case before an adverse decision is taken by the Revenue Authority. Therefore, in carrying out its mandate, SARS is obliged to uphold the values and principles as contained in the Constitution, by allowing the taxpayer whose rights are about to be impeded by a decision, an opportunity to present a case

beforehand. However, if the taxpayer has an outstanding tax liability, relief cannot be granted by SARS.

## CHAPTER 4

An analysis of the remedies and other dispute resolution measures available to taxpayers in safeguarding their rights against the misapplication of SARS's powers in respect of the confirmation of a taxpayer's tax compliance status, was conducted. In addition, the ambit of the procedurally fair administrative action principle was analysed in terms of PAJA and the Constitution of South Africa.

In terms of the Tax Administration regulations, SARS is not permitted to waive any tax that is legally payable by a taxpayer. The TAA prescribes the conditions under which the Commissioner may resolve a dispute with a taxpayer by means other than through the judicial system. Internal remedies provide quicker and cheaper resolution of disputes besides litigation. Furthermore, it is suggested that resorting to court action without exhausting internal remedies weakens the self-sufficiency of established administrative processes.

In *Koyabe supra*, the court held that internal remedies are a valuable and essential requisite in law, and that they should not be utilised by the Commissioner to frustrate the efforts of a distressed taxpayer nor to safeguard the administrative practises from legal scrutiny. Any administrative decision taken by SARS may be reviewed by the High Court (in terms of PAJA). A judicial review is ultimately concerned with whether an administrative decision is lawful or unlawful. It is a fundamental mechanism which safeguards against the abuse of public power by public institutions such as the Revenue Authority.

A taxpayer is encouraged to exhaust any internal remedies available within the tax system before proceeding with the judicial review of a dispute. An aggrieved taxpayer may also approach the Office of the Tax Ombud who is mandated to evaluate and address any grievance by a taxpayer regarding a service, procedural or administrative matter arising from the application of the provisions of a tax Act by SARS. This is a less costly and a more time efficient approach than a full-fledged judicial review.

### 5.3 CONCLUSION

The research question posed from the onset was: given the regulatory powers of SARS to issue, decline or revoke a taxpayer's tax clearance certificate, how can a taxpayer safeguard his or her rights against an unfair application of regulatory powers by SARS?

The study was confined to the confirmation of a taxpayer's tax compliance status for 'Good Standing' and for 'Tenders' issuable by SARS on application by any person registered under any tax Act. SARS's decisions have a direct impact on taxpayers and therefore it is imperative for revenue officials to engage the taxpayer in an administratively fair manner, as prescribed under the provisions of PAJA. Thus, in carrying out its mandate, SARS must uphold the values and principles as contained in the Constitution.

Certain disputes may be resolved speedily and cost effectively using the ADR measures available under the TAA. Aggrieved taxpayers are encouraged to make use of the internal dispute resolution measures provided for in the TAA before resorting to Court for relief.

Taxpayers ought to give adequate regard to their tax affairs. They should do so timeously and allow themselves ample reaction time in the face of financial adversity, which could negate the need for an urgent court application. Any taxpayer, whose constitutional rights have been seriously prejudiced by SARS, has the right to do so under the Constitution. However, the cost of litigation and the time factor are considered the main obstacles for taxpayers wishing to institute an action against SARS in the High Court.

### 5.4 FINDINGS

Subsequent to the outcome of *Zikhulise supra*, the TAA was amended to include a provision which states that SARS is required to give a fourteen (14) day notice in order to allow the affected taxpayer an opportunity to respond to the allegations prior to the finalisation of the Commissioner's decision regarding the withdrawal of the confirmation of the taxpayer's tax compliance status. Taxpayers must take note that there is nothing in PAJA or the common law, which empowers a Court to order an administrator to take action, including the making of a decision which the administrator is not lawfully allowed to take.

## 5.5 RECOMMENDATION

Taxpayers aggrieved by an adverse decision taken by the Revenue Authority are encouraged to timeously address their grievances. Commencing with the internal dispute resolution remedies provided for within the TAA. Internal dispute resolution processes are less formal, less cumbersome and less confrontational. It provides an opportunity for the aggrieved taxpayer to engage revenue officials directly without the need for lengthy litigation. It is a much more cost-effective and a speedier process of resolving a dispute with SARS. For the purposes of protecting the integrity and reputation of SARS as an organisation, disputes resolved outside the jurisdiction of a Court, is arguable a more sensible solution for the Revenue Authority as well. The study did not include the tax clearance certificates relating to foreign investment allowances and immigration, which could be explored further.



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## **LEGISLATION**

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