CHALLENGES THAT THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE'S INFORMATION GATHERING POWERS POSE TO TAXPAYERS' RIGHTS

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“Challenges that the Commissioner for the South African Revenue Service’s Information Gathering Powers Pose to Taxpayers’ Rights”

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LIST OF ABBREVIATIONS

(5th Cir.)	United States Court of Appeals for the Fifth Circuit
(9th Cir.)	United States Court of Appeals for the Ninth Circuit
(A)	Appellate Division, Bloemfontein
AC	Law Reports, Appeal Cases (Third Series) (UK)
AD	Appellate Division, Bloemfontein; Appellate Division Reports
ADR	Alternative Dispute Resolution
AEOI	Automatic Exchange of Information
AIR	All India Reporter
Acta Jur	*Acta Juridica* (South Africa)
AJCL	*American Journal of Comparative Law*
All ER	All England Law Reports
All South Africa	All South African Law Reports
Alta L Rev	*Alberta Law Review* (Canada)
Am Econ J	*American Economic Journal: Economic Policy*
ATAF	African Tax Administration Forum, Pretoria
ATSCA	Air Travellers Security Charge Act (Canada)
ATO	Australian Tax Office
ATR	Advanced Income Tax Rulings (Canada)
ATSSCA	Administrative Tribunals Support Service of Canada Act
B.C.	British Columbia (Canada)
(BC CA)	Court of Appeal for British Columbia (Canada)

(BG)	Supreme Court of Bophuthatswana, General Division, Mafikeng
BCJ	British Columbia Judgments (Canada)
BCLR	Butterworths Constitutional Law Reports (South Africa)
B.C.L.R. (2d)	British Columbia Law Reports (Second Series) (Canada)
B.C.L.R. (4th)	British Columbia Law Reports (Fourth Series) (Canada)
(BC SC)	Supreme Court of British Columbia (Canada)
BEPS	Base Erosion and Profit Shifting
BLLR	Butterworths Labour Law Reports (South Africa)
BOR	Bill of Rights (South Africa)
(C)	Cape of Good Hope Provincial Division, Cape Town
(CA)	Court of Appeal
CbCR	Country-by-Country Reporting
(CC)	Constitutional Court of South Africa, Johannesburg
CCC	Canadian Criminal Cases
Ch	Law Reports, Chancery Division (Third Series) (UK)
(ChD)	Chancery Division, London
(CJEU)	Court of Justice of the European Union, Luxembourg City
CJCL	*Chinese Journal of Comparative Law*
(Ck)	Supreme Court of the Ciskei, Bisho
CLJ	*Cambridge Law Journal* (UK)
CLR	Commonwealth Law Reports (Australia)
CLWR	*Common Law World Review* (UK)

CMO	SARS Complaints Management Office, Pretoria
CPS	Crown Prosecution Service (UK)
CRA	Canada Revenue Agency
CRAA	Canada Revenue Agency Act
CRCA	Commissioners for Revenue and Customs Act (UK)
Crim LQ	*Criminal Law Quarterly* (Canada)
CRS	OECD's Common Reporting Standard
CTJ	*Canadian Tax Journal*
CTC	Canada Tax Cases
DDS	HMRC Digital Disclosure Service (UK)
DLR (4th)	Dominion Law Reports (Fourth Series) (Canada)
DOTAS	Disclosure of Tax Avoidance Schemes (UK)
DPP	Director of Public Prosecutions (England and Wales)
DTC	Davis Tax Committee (South Africa)
D.T.C.	Dominion Tax Cases (Canada)
(E)	Eastern Cape Provincial Division, formerly Grahamstown, now Makhanda
E&PAJA	*International Journal of Evidence & Proof*
EC	European Community
ECHR	European Convention on Human Rights; European Court of Human Rights: Reports of the Judgments and Decisions
ECtHR	European Court of Human Rights, Strasbourg
ECJ	European Court of Justice, Luxembourg City

EIIR	Enhanced International Information Reporting (Canada)
Env L Rev	*Environmental Law Review* (UK)
EU	European Union
ER	English Reports (UK)
ESAAMLG	Eastern and Southern Africa Anti-Money Laundering Group, Tanzania
ETA	Excise Tax Act (Canada)
EWHC (Admin)	England and Wales High Court (Administrative Court)
EWCA Civ	England and Wales Court of Appeal (Civil Division), London
EWHC KB	England and Wales High Court (King's Bench Division) Decisions
(Ex Ch)	Court of Exchequer Chamber, London
FATF	Financial Action Task Force, Paris
FATCA	Foreign Account Tax Compliance Act (USA)
F.2d	Federal Reporter, Second Series (USA)
FC	Federal Court (Canada)
FCA	Federal Court of Appeal (Canada)
FCJ	Federal Court Judgments (Canada)
(FCTD)	Federal Court Trial Division (Canada)
F.Supp.	Federal Supplement (USA)
FTR	Federal Trial Reports (Canada)
G20	Group of Twenty
GN	Government Notice (South Africa)
(GP)	High Court, Gauteng Division, Pretoria
Gazette	*Government Gazette* (South Africa)
GCHQ	Government Communications Headquarters (UK)
GLJ	*German Law Journal* (Germany)

GST/HST	Goods and Services Tax/Harmonized Sales Tax (Canada)
(HCA)	High Court of Australia, Canberra
(HL)	House of Lords, London
Harv L Rev	*Harvard Law Review* (USA)
HL Cas	Clark & Finnelly's House of Lords Reports New Series (UK)
HMCE	Her Majesty's Customs and Excise (UK)
HMRC	Her Majesty's Revenue and Customs (UK)
HMRC Charter	Her Majesty's Revenue and Custom's Charter (UK)
HRA	Human Rights Act (UK)
IBFD	International Bureau of Fiscal Documentation, Amsterdam
ICON	*International Journal of Constitutional Law*
IFA	International Fiscal Association, Rotterdam
(IH)	Inner House of the Court of Session, Edinburgh
IJLS	*Irish Journal of Legal Studies* (Ireland)
IMF	International Monetary Fund, Washington, DC
Imm LR (2d)	Immigration Law Reports (Second Series) (Canada)
INSC	Supreme Court of India, New Delhi
IRS	United States Internal Revenue Service, Washington, DC
ITA	Income Tax Act (South Africa; Canada)
ITF	Income Tax Folios (Canada)

ITIB	Income Tax Interpretation Bulletins (Canada)
ITIC	Income Tax Information Circulars (Canada)
ITTN	Income Tax Technical News (Canada)
JLSP	*Journal of Law and Social Policy* (Canada)
JOL	Judgments Online (South Africa)
JTLR	Juta's Tax Law Reports (South Africa)
KB	Law Reports, King's Bench Division (UK)
LCA	New Brunswick Liquor Control Act (Canada)
LCBO	Liquor Control Board of Ontario (Canada)
Leg Stud	*Legal Studies* (UK)
LQR	*Law Quarterly Review* (UK)
LR QB	Law Reports, Queen's Bench Cases (UK)
Man R (2d)	Manitoba Reports (Second Series) (Canada)
MAP	OECD's Mutual Agreement Procedure
(MB QB)	Court of Queen's Bench of Manitoba (Canada)
MBChB	Bachelor of Medicine, Bachelor of Surgery (translation)
MCAA	OECD Multilateral Competent Authority Agreement on Country-by-Country Reporting
MEC	Member of the Provincial Executive Council (South Africa)
MNEs	Multinational Enterprises
(N)	Natal Provincial Division, Pietermaritzburg

(NC)	Northern Cape Provincial Division, Kimberley
NILQ	*Northern Ireland Legal Quarterly* (UK)
NPA	National Prosecuting Authority, Pretoria
NR	National Reporter (Canada)
NSR	Nova Scotia Reports (Canada)
(NS SC)	Nova Scotia Supreme Court (Canada)
(O)	Orange Free State Provincial Division, Bloemfontein
OECD	Organisation for Economic Co-operation and Development, Paris
OECD Model	Organisation for Economic Co-operation and Development Model Tax Convention on Income and on Capital
(OH)	Outer House of the Court of Session, Edinburgh
OHCHR	Office of the High Commissioner for Human Rights, Geneva
OHLJ	*Osgoode Hall Law Journal* (Canada)
OJ	Ontario Judgments (Canada)
(Ont CA)	Court of Appeal for Ontario (Canada)
(Ont HCJ)	Ontario High Court of Justice (Canada)
OPTR	IBFD's Observatory on the Protection of Taxpayers' Rights
OR (3d)	Ontario Reports (Third Series) (Canada)
OTO	Office of the Taxpayers' Ombudsman (Canada)
PACA	Proceedings Against the Crown Act (Saskatchewan, Canada)
PAJA	Promotion of Administrative Justice Act (South Africa)

(PC)	Judicial Committee of the Privy Council (UK)
PCA	Parliamentary Commissioner Act (UK)
POPI Act	Protection of Personal Information Act (South Africa)
(Prov Ct)	Provincial Court (Canada)
PWC	PricewaterhouseCoopers
QB	Law Reports, Queen's Bench Division (UK)
(QBD)	Queen's Bench Division, London
(QL)	Lexis Advance Quicklaw (Canada)
Queen's LJ	*Queen's Law Journal* (Canada)
(RA)	High Court of Rhodesia, Appellate Division, Salisbury
RCPO	Revenue and Customs Prosecutions Office
R.S.C.	Revised Statutes of Canada
RSNB	Revised Statutes of New Brunswick (Canada)
RSS	Revised Statutes of Saskatchewan (Canada)
South Africa	South African; South African Law Reports
SACR	South African Criminal Law Reports
SADC	Southern African Development Community
SADC Model Tax Agreement	Southern African Development Community Model Tax Agreement for the Avoidance of Double Taxation
SAHRC	South African Human Rights Commission, Johannesburg
SALRC	South African Law Reform Commission, Pretoria

SAIT	South African Institute of Tax Practitioners, Pretoria
SAJHR	*South African Journal on Human Rights* (South Africa)
SALJ	*South African Law Journal* (South Africa)
SARS	South African Revenue Service, Pretoria
SARS Act	South African Revenue Service Act
Sask R	Saskatchewan Reports (Canada)
SATC	South African Tax Cases Reports
S.C.	Statutes of Canada
(SCA)	Supreme Court of Appeal, Bloemfontein
SCC	Supreme Court of Canada, Ottawa
SCR	Supreme Court Reports (Canada)
(S.D.N.Y.)	United States District Court for the Southern District of New York (USA)
(SE)	South Eastern Cape Local Division, Port Elizabeth
SI	Statutory Instrument (since 1948) (UK)
(SK QB)	The Court of Queen's Bench for Saskatchewan (Canada)
SLPECA	Softwood Lumber Products Export Charge Act (Canada)
SSMO	SARS Service Monitoring Office, Pretoria
StAR	Stolen Asset Recovery Initiative, Washington, DC
STC	Simon's Tax Cases (UK)
St Tr	Howell's State Trials (UK)
(T)	Transvaal Provincial Division, Pretoria
TAA	Tax Administration Act (South Africa)

TALAA	Tax Administration Laws Amendment Act (South Africa)
TB	Tuberculosis
TBR	Taxpayer Bill of Rights (Canada; recommended for South Africa)
TCC	Tax Court of Canada
TCEA	Tribunals, Courts and Enforcement Act (UK)
(T.D.)	Trial Division (Canada)
TGP	Tax Guides and Pamphlets (Canada)
TIEA	Tax Information Exchange Agreement
(TkS)	Supreme Court of the Transkei, Mthatha
TMA	Taxes Management Act (UK)
TS	Transvaal Supreme Court Reports (South Africa)
United Kingdom	The United Kingdom of Great Britain and Northern Ireland
UKIAT	United Kingdom Asylum and Immigration Tribunal, London
UKSC	The Supreme Court of the United Kingdom, London
UN Model	United Nations Model Double Taxation Convention between Developed and Developing Countries
US	United States
U.S.	United States Reports
USA	United States of America
VAT Act	Value-Added Tax Act (South Africa)
VDP	Voluntary Disclosure Programme (South Africa); Voluntary Disclosures Program (Canada)
(W)	Witwatersrand Local Division, Johannesburg

(WCC)	High Court, Western Cape Division, Cape Town
Wits	University of the Witwatersrand, Johannesburg
WLR	Weekly Law Reports (UK)
WWR	Western Weekly Reports (Canada)
WTJ	*World Tax Journal*
ZAECPEHC	Eastern Cape High Court, Port Elizabeth
ZAGPPHC	North Gauteng High Court, Pretoria
ZASCA	Supreme Court of Appeal, Bloemfontein
(ZS)	Supreme Court of Zimbabwe, Harare
ZWSC	Supreme Court of Zimbabwe, Harare

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SUMMARY

This study is about the importance of the duty of the South African Revenue Service ("SARS") to recognise and protect taxpayers' rights. Particular focus is placed on the challenges posed with respect to taxpayers' rights when the Commissioner for SARS ("the Commissioner") exercises his information gathering powers. This study covers the manner in which the gathering of information by SARS is conducted domestically and internationally and the purposes for which SARS uses that gathered information.

The term "information gathering" is not defined in the Income Tax Act 58 of 1962 ("ITA") or the Tax Administration Act 28 of 2011 ("TAA"). It may, however, be understood to mean the way in which the Commissioner gathers or collects information from taxpayers. The purpose of this information gathering may be for the Commissioner to measure taxpayers' compliance with their obligation to pay tax.

The Commissioner may use the following ways or methods to gather information from taxpayers: records and books, tax returns, request for information from taxpayers or third parties, inspection, verification or audit, search and seizure, exchange of information with other countries, Country-by-Country Reporting, the Voluntary Disclosure Programme and the Reportable Arrangements provisions.

The study discusses how taxpayer's constitutional rights may be infringed when the Commissioner uses these various methods to gather information from taxpayers. The study also discusses the effectiveness of the remedies or avenues available to the taxpayers whose rights have been infringed.

The study entails a comparative study of the United Kingdom ("UK") and Canada, and compares the relevant positions in these two countries on the above matters with the position in South Africa. The aim of this comparison is to develop recommendations for solving the challenges identified in South Africa.

KEY TERMS

Audi alteram partem

Audit

Country-by-Country Reporting

Doctrine of finality

Exchange of information in tax matters

Information gathering powers

Judicial review

Legitimate expectations

Locus standi

Mandamus

Nemo iudex in sua causa

Quashing order

Reportable arrangement

Search and seizure

Self-incrimination

Taxpayer

Tax Ombud

Tax Ombudsman

Ubuntu

Ultra vires doctrine

Ultra vires taxation

Voluntary Disclosure Programme

CHAPTER 1

INTRODUCTION: SOUTH AFRICA: THE LEGAL SYSTEM; AND THE INFORMATION GATHERING POWERS OF THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE

1 INTRODUCTION

Most countries collect taxes from their residents and non-residents who transact business within the country's borders, and they use these taxes to finance government expenditures such as building infrastructure and paying for government services in order to ensure economic development. The funding of government expenditures from taxes is often supplemented with loans that governments receive from international bodies such as the International Monetary Fund ("the IMF").[1]

A country usually appoints a body or an agency to collect taxes on its behalf. The relevant agency in South Africa is the South African Revenue Service ("SARS"), which is created by statute under the South African Revenue Service Act ("SARS Act"), the empowering Act.[2]

The agency for the collection of taxes often has a person charged with the responsibility of interpreting the empowering Act, collecting taxes and in extreme circumstances compelling taxpayers to honour their duty to pay tax. This person has different names in different countries. In South Africa this person is referred to as the Commissioner for SARS ("the Commissioner"), who is the head of SARS.

The power wielded by SARS is exercised by the Commissioner himself as a senior SARS official.[3] The Commissioner may delegate his powers to other senior SARS officials.[4] To collect the taxes effectively, the Commissioner may have to gather

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1 International Monetary Fund "About the IMF" http://www.imf.org/en/About (Date of use: 22 May 2018). South Africa joined the IMF on 27 December 1945 (International Monetary Fund "List of members' date of entry" https://www.imf.org/external/np/sec/memdir/memdate.htm (Date of use: 19 April 2020)).

2 South African Revenue Service Act 34 of 1997.

3 Section 9(1) of the SARS Act.

4 Section 10(1)(b) of the SARS Act.

information from taxpayers to measure their compliance. Some of the methods that the Commissioner may use to gather information from taxpayers include information from records and books, tax returns, request for information from taxpayers or third parties, inspection, verification or audit, search and seizure, exchange of information with other countries, Country-by-Country Reporting, the Voluntary Disclosure Programme and the Reportable Arrangements provisions.

However, in performing his duties, the Commissioner must follow the principles laid down by the letter of the law, which essentially comprises the common law, the Constitution of the Republic of South Africa, 1996,[5] administrative principles and various pieces of tax legislation such as the Income Tax Act ("ITA"),[6] the Value-Added Tax Act ("VAT Act")[7] and the Tax Administration Act ("TAA").[8]

Where the Commissioner fails to comply with the laws set out in the above-mentioned provisions, his actions may be considered unfair and unlawful because they may infringe the rights of the taxpayer. The Commissioner's actions may be rendered of no legal force and effect in terms of the Constitution (which is the supreme law of the land)[9] and the afore-mentioned legislation.

This work demonstrates that the Commissioner does not always follow the principles laid down by the common law, the Constitution and the administrative provisions in the various tax Acts. Further, this work focuses on the Commissioner's "information gathering" powers that are necessary to collect taxes on behalf of the state.

It is common cause that the relationship between the Commissioner as the tax-collecting agent and the taxpayers is a vertical public law relationship because it involves the state and its subjects. This relationship is also an unequal one because taxpayers are subordinate to the state and to its organs such as SARS.

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5 The Constitution of the Republic of South Africa, 1996 ("the Constitution").
6 Act 58 of 1962.
7 Act 89 of 1991.
8 Act 28 of 2011.
9 Section 2 of the Constitution.

The consequence is that SARS often has the upper hand and power over taxpayers. This relationship between SARS and the taxpayer is unlike a private law horizontal relationship that is created where there are two or more subjects who are on an equal footing.

This work highlights the constitutional challenges that arise when the Commissioner exercises his information gathering powers as the tax-collecting agent on behalf of the state in relation to the rights of individuals as taxpayers. In addressing the concerns that are analysed in this work, the relevant common law, statutory, constitutional, and administrative principles are discussed. The purpose is to investigate whether the relevant provisions or principles may assist in resolving constitutional rights disputes between taxpayers and the Commissioner that may be posed by the latter's information gathering powers.

The ultimate outcome of this work is to develop recommendations for ensuring that a balance is created between the challenges posed by the information gathering powers given to the Commissioner to the rights entrenched in the Bill of Rights ("BOR") of the Constitution which are enjoyed by taxpayers, in particular.

1.1 THE LEGISLATION THAT EMPOWERS THE COMMISSIONER

The legislation that empowers the Commissioner to gather information about taxpayers, in order to collect taxes due, is the TAA, which was promulgated on 4 July 2012. The drafting of the TAA resulted from the announcement in the 2005 Budget Speech by the then Minister of Finance.[10]

During that Budget Speech, the Minister promised that the TAA would be enacted (as explained in its preamble) to incorporate administrative provisions into one piece of legislation and to eliminate the duplication of provisions found in various tax Acts such as the ITA and the VAT Act. Thus the TAA creates a single, modern framework for common administrative provisions of the tax Acts.

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[10] The Honourable Minister Trevor Manuel delivered the 2005 Budget Speech on 23 February 2005.

The TAA also aims to ensure better service and a lower compliance cost for taxpayers as well as to ensure simplicity and a greater coherence in tax administration which would ensure the seamless administration of South Africa's tax matters in one piece of legislation. The Act is also intended to afford the Commissioner and the taxpayer a speedy resolution to their disputes, which was lacking in the past. However, the TAA has not been without controversy. For example, there are controversies that the legislation contravenes taxpayers' rights. These contraventions are discussed further on in this chapter.

1.2 THE LEGISLATIVE AUTHORITY AND DUTIES OF THE SOUTH AFRICAN REVENUE SERVICE

As stated above, SARS is a body created in terms of the SARS Act to serve as a tax collection agency on behalf of the state.[11] In order to maintain the effective collection of taxes, the TAA gives the Commissioner powers to gather information from taxpayers. More importantly, the SARS Act recognises the collection agency as an "organ of state".[12]

An understanding of the term "organ of state" is of paramount importance because it is actions performed by the relevant "organ of state" that lead to the disputes examined in this work. Section 239 of the Constitution defines an "organ of state" as any department of state or administration in the national, provincial or local sphere of government; or any other functionary or institution exercising a power or performing a function in terms of the Constitution or a provincial constitution; or exercising a public power or performing a public function in terms of any legislation; it does not include a court or a judicial officer.

Having determined that SARS is an "organ of state", one can conceive that the conduct of or an act that is performed by SARS may infringe the rights of the taxpayers and thus prompt the need to find solutions as to how this infringement can be alleviated.

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11 Section 3 of the SARS Act.
12 Section 2 of the SARS Act.

1.3 THE SUPREMACY OF THE CONSTITUTION: HISTORICAL BACKGROUND

A constitution is a thing antecedent to a government; and the government is a creature of the constitution.[13] A government's constitution refers to the collection of rules prescribing the powers of the principal political institutions – Parliament, the government and the courts and the rights and liberties of individuals, whether or not they are incorporated in a single document or in a limited collection of texts.[14] Having a constitution seems to be a matter of self-respect: no state is properly dressed without one.[15] This is the principle of constitutionalism, and it rests on the idea of restraining the government from exercising its powers arbitrarily.

South Africa became a constitutional state when the Constitution of the Republic of South Africa 200 of 1993 ("Interim Constitution") was adopted in 1994.[16] The term "constitutional state" refers to a state where the Constitution is the supreme law of the country.[17] The Constitution of 1996 was the result of a long process of struggle, multiparty political negotiations and democratic deliberations in which politicians, lawyers, representatives of civil society and the people all played a major role.[18]

However, before the Constitution which brought about democracy in South Africa was enacted, the constitutional position was characterised by Parliamentary sovereignty (developed from the Westminster tradition), in that the Parliament was supreme and commanded law. Individuals were expected to obey government

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13 Paine "Rights of Man" 302.

14 Feldman *English Public Law* 3.

15 Ridley "There is no British Constitution" 340.

16 This process illustrated the birth of the concept "constitutionalism" and refers to government in accordance with the constitution *(Rechtsstaat)*. The government derives its powers from and is bound by the constitution. Measures employed to curb the powers of the government include a Bill of Rights, judicial control, and democratic elections. Constitutionalism also prevents the power from being centralised in one office or institution and offers, for the protection of fundamental rights, an independent judiciary and the separation of powers. The term also respects individual rights and upholds and embraces the rule of law (Rautenbach and Malherbe *Constitutional Law* 11).

17 The concept includes a separation of powers, enforceable guarantees in respect of individual rights, the supremacy of the constitution, the principle of legality, legal certainty, access to independent courts and multi-party democracy. In any state without a Bill of Rights, these principles provide a useful framework for analysing positive law. Any democratic constitution with enforceable human rights provisions should contain these principles (Rautenbach and Malherbe *Constitutional Law* 11).

18 Mureinik 1994 *SAJHR* 31.

dictates, and there was little room for individuals to test the validity of an Act of Parliament.[19]

In 1994, South Africa departed wholly from the system of Parliamentary sovereignty which had dominated the legal system.[20] So the laws under Parliamentary sovereignty and the actions of any government body that follow the previous dispensation are invalid if found to be in conflict with the Constitution.[21]

The Constitution is a body of rules which, among other things, governs the exercise of state authority in a particular case and the relationship between citizens and an "organ of the state". Section 2 of the Constitution provides that "the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".

Section 2 of the Constitution sets standards that the bearers of state authority and power are required to meet when exercising state authority. Section 2 also prescribes limits on the exercise of the state authority. In its collection of taxes, SARS must therefore adhere to any national legislation dealing with tax collection and, more importantly, to the values and principles laid down in the Constitution.

Section 3(2) of the Constitution recognises that all citizens are equally entitled to the rights, privileges and benefits of citizenship. They are also equally obliged to fulfil the duties and responsibilities of citizenship. By implication, the state is responsible for protecting its citizens and their rights, and citizens are equally responsible for paying the taxes that they owe to the state.

1.4 MEANING OF "TAX" AND "TAXPAYER"

Section 1 of the ITA defines "tax" as meaning a tax or penalty imposed in terms of this Act. A tax is a compulsory (not optional) levy imposed by a legislature or another competent authority upon the public as a whole or a substantial sector and which is

19 Rautenbach and Malherbe *Constitutional Law* 25.
20 Rautenbach and Malherbe *Constitutional Law* 25.
21 Rautenbach and Malherbe *Constitutional Law* 25.

utilised for the public benefit and to provide a service in the public interest.[22] So, according to section 1 of the ITA, a tax can be referred to as a contribution, payable in money, to a specific taxing authority to fund public expenditure. Sections 228 and 229 of the Constitution mention "taxes, levies and duties" as separate imposts.

In *South African Reserve Bank and Another v Shuttleworth and Another*,[23] the court held that most of the decisions plainly shy away from defining the word "tax" because it defies precise description outside the context of a specific statute and its purpose.[24] The court provided examples in support of its statement by referring to *Permanent Estate and Finance Co Ltd v Johannesburg City Council*[25] which declined to define the term "tax".[26] The case rather listed features that would make a tax easily identifiable: (i) when the money is paid into a general revenue fund for general purposes; and (ii) when no specific service is given in return for payment.[27]

For the purposes of this discussion, however, taxes, duties and levies are treated as synonyms. Examples of taxes are direct taxes (personal income tax, corporate taxes, and property taxes) and indirect taxes (VAT). Examples of South African "duties" or "levies" are estate duty, transfer duty, customs duties, excise duties, stamp duties and the fuel levy. All of these "duties" and "levies" are levied by the national sphere of government for the benefit of the National Revenue Fund.

A taxpayer is a person saddled with the liability of paying over the tax to the tax authority (the *fiscus*). However, the person who pays the tax (the taxpayer) is not necessarily the person who bears the tax burden such as VAT. The taxpayer may also be referred to as a "person". The term "person" consists of the following in terms of section 1 of the ITA:

- natural persons;
- entities such as an insolvent estate, a deceased estate and a trust (referred to as persons other than natural persons elsewhere in the Act);

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22 *Nyambirai v National Social Security Authority and Another* 1996 1 SA 636 (ZS) 643.
23 2015 (5) SA 146 (CC).
24 *South African Reserve Bank and Another v Shuttleworth and Another* para 49.
25 1952 (4) SA 249 (W).
26 *South African Reserve Bank and Another v Shuttleworth and Another* para 49.
27 *South African Reserve Bank and Another v Shuttleworth and Another* para 49.

- a “company” (as defined in section 1 of the Act); and
- juristic persons (outside the scope of “company”, as defined in the Act).

Section 151 of the TAA provides that the term “taxpayer” means—

- a person chargeable to tax;
- a representative taxpayer;
- a withholding agent;
- a responsible third party; or
- a person who is the subject of a request to provide assistance under an international tax agreement.

Section 153 of the TAA defines a “representative taxpayer” to mean a person who is responsible for paying the tax liability of another person as an agent, other than as a withholding agent. Section 155 of the TAA provides that a representative taxpayer is personally liable for tax payable in the representative taxpayer’s representative capacity, while it remains unpaid, the representative taxpayer alienates, charges or disposes of amounts in respect of which the tax is chargeable; or the representative taxpayer disposes of or parts with funds or moneys, which are in the representative taxpayer’s possession or come to the representative taxpayer after the tax is payable, if the tax could legally have been paid from or out of the funds or moneys. Section 156 of the TAA defines “withholding agent” as a person who must under a tax Act withhold an amount of tax and pay it to SARS.

It should be noted that SARS’s information gathering powers apply to all taxable persons. Natural persons pay tax themselves, but persons other than natural persons have representative taxpayers who pay tax on their behalf.

1.5 THE CONSTITUTIONAL RIGHTS OF TAXPAYERS

Section 7 of the Constitution states that the BOR is the cornerstone of democracy in South Africa, and that the state must respect, protect, promote and fulfil the rights in the BOR. Section 8(1) of the Constitution states that the BOR applies to all law and binds the legislature, the judiciary and all organs of state (which would thus

include SARS). A taxpayer may, therefore, question the constitutionality of a taxing statute (or specific sections in that statute) and/or the constitutionality of the administrative actions taken by SARS.

Under section 8, a juristic person is also entitled to the rights entrenched in the BOR to the extent that specific rights could be exercised by such a person. In the sphere of taxation, this provision is important because a juristic person, as a taxpayer, can take the tax authorities to task for possibly unconstitutional administrative action. The BOR has substantially increased the scope for ensuring that the powers of the tax administration are exercised in a fair and reasonable manner. The following rights are important in this regard:

- the right to equality (section 9),
- the right to privacy (section 14),
- the right to just administrative action (section 33),
- the right of access to courts (section 34),
- the right against self-incrimination (section 35(3)(j)), and
- the right to enforce rights (section 38).

At the same time, it must also be remembered that, in terms of sections 7 and 36 of the Constitution, these rights in the BOR may be limited by a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on dignity, equality and freedom.

The impact of SARS's information gathering powers on taxpayers' constitutional rights as set out in the BOR applies mainly to taxpayers who are natural persons. However, persons other than natural persons, as taxpayers, also have rights (for example, to privacy and confidentiality) as well as the protection provided by certain administrative principles. In this context, this work covers rights enjoyed as taxpayers both by natural persons and by persons other than natural persons.

1.6 SOURCES OF SOUTH AFRICAN TAX LAW

The sources of South African tax law over which the Constitution has supremacy and which have a bearing on the topic at hand are set out below.

1.6.1 Statutory legislation

After the Constitution, statutory legislation is the second source in the hierarchy of binding sources of law. The Constitution does not spell out all the activities of the state and its organs. Instead, it mandates the legislature to deal with other issues not expressly provided. As Du Plessis and Corder[28] explain:

> Because its provisions cannot be repealed or amended it [a constitution] must be capable of growth and development over a period of time in order to meet new technological, social, political, and economic realities often unimagined by its framers.

The relevant statutory legislation already referred above includes the various tax Acts such as the ITA, the VAT Act and the TAA.

1.6.2 Common law

The term "common law" refers to the non-statutory rules and laws of South Africa.[29] South African law is a blend of different legal systems, with its origin on the African continent and in the United Kingdom ("UK"). The foundation of South African law is Roman-Dutch law, which is itself a blend of indigenous Dutch customary law and Roman law.

It was this legal system that prevailed in Holland during the 17th and 18th centuries and that was introduced into and applied in South Africa after the southernmost tip of Africa was settled by the Dutch in 1653.[30] The law was retained after the British annexation of the Cape Colony and has remained the common law of the country. Modern judges occasionally consult these old authorities to search and resolve legal rules or doctrines which pose problems.

The adoption of the Constitution in South Africa did not mean that the common law ceased to exist. An example of a common law principle in tax law that is still very important today is the *in dubio contra fiscum* rule. This common law principle, which

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28 Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* 12.
29 Rautenbach and Malherbe *Constitutional Law* 13.
30 Rautenbach and Malherbe *Constitutional Law* 13.

dates back to Roman law, provides that when in doubt, do not tax. If there is a doubt whether a tax law applies, it should therefore be construed in favour of the taxpayer.[31]

Sections 8(3) and 39(2) of the Constitution instruct the courts to develop the common law to bring it into line with the rights in the BOR. So, for example, the common law rules of natural justice and the doctrine of legitimate expectations (all discussed later in this work) have to accord with the Constitution.

1.6.3 Customary law

Customary law has been defined as the system of law which is generally derived from a particular custom.[32] Where a custom or a practice has been observed for a long period, it may acquire the force of law by adoption. The Constitution recognises customary law in section 39(2). Section 211(2) of the Constitution further provides that traditional authorities that observe customary law may function subject to custom, which includes amendments to, or the repeal of, such customs.

For example, in *Bhe v Magistrate, Khayelitsha*,[33] Ngcobo J (as he then was) delivered a dissenting judgment where he held that:

> It is now generally accepted that there are three forms of indigenous law: *(a)* that practised in the community; *(b)* that found in statutes, case law or textbooks on indigenous law (official); and *(c)* academic law that is used for teaching purposes. All of them differ. This makes it difficult to identify the true indigenous

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31 In *Commissioner, South African Revenue Service v Airworld CC and Another* 2008 3 SA 335 (SCA), the court held that in circumstances where more than one meaning could be accorded to the relevant word, a purposive and contextual approach to interpretation may be followed. The court further held that where an enactment is ambiguous, the taxpayer may also rely on the *contra fiscum* rule to require the court to follow the interpretation that favours the taxpayer.

32 South African customary law refers to a usually uncodified legal system developed and practised by the indigenous communities of South Africa. Customary law has been defined as "an established system of immemorial rules [...] evolved from the way of life and natural wants of the people, the general context of which was a matter of common knowledge, coupled with precedents applying to special cases, which were retained in the memories of the chief and his councillors, their sons and their sons' sons until forgotten, or until they became part of the immemorial rules" (Bekker *Seymour's Customary Law* 11).

33 *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 1 SA 580 (CC); 2005 1 BCLR 1 (CC).

> law. The evolving nature of indigenous law only compounds the difficulty of identifying indigenous law.[34]

By recognising customary law, the Constitution has put the customary law on an equal footing with the common law. So, in *Alexkor Ltd and Another v Richtersveld Community and Others*,[35] the Constitutional Court held that:

> While in the past indigenous law was seen through the common-law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. The courts are obliged by section 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. In doing so the courts must have regard to the spirit, purport and objects of the Bill of Rights.[36]

Customary law is, however, not relevant to the topic of this work and is therefore not discussed further in this work.

1.6.4 Case law

Case law is important because it illustrates the practical application of the constitutional principles, rules and values. The entrenched Constitution, which sets out the institutions that bear state authority at the highest levels and which contains a justiciable BOR, constantly leads to numerous constitutional judgments and has already caused a dramatic increase in case law on the constitutionality of the Commissioner's powers.[37]

Generally, courts do not formally make law but interpret legislation and create precedents that are often relied upon in making decisions on successive cases on similar issues.[38] This work discusses a number of cases decided by courts in South

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34 *Bhe v Magistrate, Khayelitsha* para 152.

35 2004 5 SA 460 (CC).

36 *Alexkor Ltd v Richtersveld Community* para 51.

37 Two examples may be mentioned: in *Metcash Trading Ltd v Commissioner, South African Revenue Services, and Another* 2001 1 SA 1109 (CC); 63 SATC 13, the court was faced with the problem of dealing with the Commissioner's power to request the payment of tax irrespective of whether the taxpayer has lodged an objection or an appeal. In *Smartphone SP (Pty) Ltd v Absa Bank Ltd and Another* 2004 3 SA 65 (W), the court had to decide whether the Commissioner's power to appoint an agent (usually a bank) to pay over moneys owed by the taxpayer to SARS.

38 Section 166 of the Constitution provides that the South African courts are-
(a) the Constitutional Court;

Africa (and in other jurisdictions) that have set legal precedents on issues pertaining to the information gathering powers of the Commissioner and their effect on taxpayers' rights.

In most cases, and particularly because of the novelty of the research on South African taxpayers' rights, the cases which are referred to in this work are not all tax cases. They are referred to because they deal with other important principles relevant to this work.

To resolve disputes between the Commissioner and the taxpayer, it is important to choose the correct forum for the resolution of the dispute, otherwise a number of adverse consequences could arise, which makes the ''jurisdiction''[39] of the relevant court of paramount importance. With regard to tax cases, the hierarchy of the court's jurisdiction is discussed below.

1.6.4.1 Tax Board

Where the taxpayer is dissatisfied with an assessment for tax or a decision about his affairs, he may invoke an objection (as fully discussed below) to remedy the assessment or decision. The taxpayer objects directly to the Commissioner, regarding, for example, an incorrect assessment raised or a decision made by the Commissioner.[40]

A further possibility, where the taxpayer is not satisfied with the outcome of an objection, is that he may appeal the outcome.[41] The taxpayer and SARS both have to agree to the jurisdiction of the Tax Board and the board's jurisdiction is limited to

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(b) the Supreme Court of Appeal;
(c) the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from any court of a status similar to the High Court;
(d) the Magistrates' Courts; and
(e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts.

39 The term "jurisdiction" in section 21(1) of the Superior Courts Act 10 of 2013 as used therein means "the power vested in a division of the High Court to hear, adjudicate upon, determine and dispose of the disputes between parties in a matter brought before it" (Van Loggerenberg and Bertelsmann *Erasmus: Superior Court Practice* vol 1, RS 11, 2019, A2-88).

40 Sections 104 to 106 of the TAA.

41 Section 107 of the TAA.

R1 million.[42] The appellant taxpayer appears in person if he is a natural person,[43] and, if not, it is represented by a representative taxpayer.[44]

If the taxpayer's tax return was prepared by someone else, that person may appear.[45] If either the taxpayer or the Commissioner is dissatisfied with the decision of the Tax Board, the dissatisfied party may appeal to the Tax Court.[46] It should, however, be noted that as the Tax Board is not a court of record, its decision is consequently binding only on the parties to the case before it.[47]

1.6.4.2 Tax Court

The Tax Court is constituted in terms of the TAA[48] to hear appeals from the Tax Board.[49] The court is both a creature of statute and an inferior court in that it has similar standing to a Magistrate's Court. This latter court has no inherent jurisdiction, and so its authority and powers are laid down in the provisions of statute. Appeals to the Tax Court from the Tax Board's decisions must be heard *de novo* (afresh).[50]

In *Africa Cash and Carry (Pty) Ltd v Commissioner, South African Revenue Service*[51] it was held that the point of departure is that a tax court is a court of revision, "not a court of appeal in the ordinary sense".[52] The legislature "intended that there could be a re-hearing of the whole matter by the Special Court and that the court could substitute its own decision for that of the Commissioner", if justified on the evidence before it.[53] A tax court accordingly rehears the issues before it and decides afresh whether an estimated assessment is reasonable, and is not bound by what the Commissioner found.[54]

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42 Section 109(1)(a) of the TAA.
43 Section 113(6)(a) of the TAA.
44 Section 113(6)(b) of the TAA.
45 Section 113(7) of the TAA.
46 Section 115(1) of the TAA.
47 Section 113(2) of the TAA.
48 Section 116 of the TAA.
49 Section 115 of the TAA.
50 Section 115(2) of the TAA.
51 2020 2 SA 19 (SCA).
52 *Africa Cash and Carry v Commissioner, South African Revenue Service* para 52.
53 *Africa Cash and Carry v Commissioner, South African Revenue Service* para 52.
54 *Africa Cash and Carry v Commissioner, South African Revenue Service* para 52.

Therefore, the powers of the tax court and its functions are unique.[55] Being a court of revision does not mean that a tax court is free of restrictions. It, too, must observe an administratively fair process.[56] That will entail, *inter alia*, that the dispute must be resolved on the issues raised by the parties and the enquiry confined to the facts placed before court.[57]

1.6.4.3 High Court

Unlike the Tax Courts, which are magistrate's courts, the various divisions of the High Court have inherent jurisdiction, which is wide and unrestricted. Their judgments relating to tax matters are published in the *South African Tax Cases Reports* and frequently also in the *South African Law Reports* or the *All South African Law Reports*.

1.6.4.4 Supreme Court of Appeal

The Supreme Court of Appeal ("SCA") is the successor to the Appellate Division ("AD") and was originally constituted in 1910 as the final South African court of appeal on the establishment of the Union of South Africa.[58] With the creation of the Constitutional Court in 1994, the name of the Court was changed to the Supreme Court of Appeal in terms of section 166 of the Constitution.[59]

Originally the head of the SCA was the Chief Justice, but that changed in 2001 when the head of the Constitutional Court became the Chief Justice.[60] The head of the SCA is now called the President of the SCA. Between 1994 and 2013 the Constitutional Court and the SCA had different areas of jurisdiction, the Constitutional Court in respect of constitutional matters and the SCA in respect of

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55 *Africa Cash and Carry v Commissioner, South African Revenue Service* para 52.
56 *Africa Cash and Carry v Commissioner, South African Revenue Service* para 53.
57 *Africa Cash and Carry v Commissioner, South African Revenue Service* para 53.
58 Supreme court of appeal https://www.supremecourtofappeal.org.za/index.php/history (Date of use: 05 February 2021).
59 Supreme court of appeal https://www.supremecourtofappeal.org.za/index.php/history (Date of use: 05 February 2021).
60 Supreme court of appeal https://www.supremecourtofappeal.org.za/index.php/history (Date of use: 05 February 2021).

all other matters.[61] However, since August 2013 the Constitutional Court's jurisdiction has been extended to deal with matters of general public importance in addition to constitutional matters, making it the highest court in all matters.[62] The SCA exercises general appellate jurisdiction, save in respect of certain labour and competition matters, and is therefore the second highest court in South Africa.[63] In many areas its judgments are definitive of South African law.

The SCA may also deal with constitutional issues, but its decisions in this regard must be confirmed by the Constitutional Court in terms of section 172(2) of the Constitution.

1.6.4.5 Constitutional Court

The Constitutional Court is the highest court in South Africa and was established in 1994.[64] Taxpayers may approach the court directly to have their complaints about the infringement of their constitutional rights resolved.

1.6.4.5 Foreign judgments

Section 39(1)(c) of the Constitution provides that in the interpretation of the Bill of Rights, a court, tribunal or forum may consider foreign law. Decisions of foreign courts are not binding on South African courts, but may be persuasive. This work discusses a number of cases decided by foreign courts which have persuasive value in South Africa and which have been relied on to set legal precedents on issues pertaining to the constitutional powers of the Commissioner and their effect on taxpayers' rights. These foreign cases are referred to because they deal with important principles of this work.

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61 Supreme court of appeal https://www.supremecourtofappeal.org.za/index.php/history (Date of use: 05 February 2021).

62 Supreme court of appeal https://www.supremecourtofappeal.org.za/index.php/history (Date of use: 05 February 2021).

63 Supreme court of appeal https://www.supremecourtofappeal.org.za/index.php/history (Date of use: 05 February 2021).

64 Constitutional Court of South Africa https://www.concourt.org.za/index.php/constitutional-court-of-sa (Date of use: 05 February 2021).

1.6.5 International law

In terms of section 39(1)(b) of the Constitution, courts must consider international law in the determination of constitutional issues. International law refers to international conventions and the creations of other bodies which seek to protect and promote the principles of the BOR, such as United Nations.[65] International law also covers the case law decisions of other countries which are of persuasive value in South Africa.

1.6.6 Other sources of legal principles relevant to the topic

While the sources mentioned above can be regarded as the primary sources of South African law, there are other sources that are of a persuasive nature, and they include the following: domestic and foreign policy documents, reports from institutions such as the South African Human Rights Commission ("SAHRC"), the South African Law Reform Commission ("SALRC"), and the South African Institute of Tax Practitioners ("SAIT"), just to mention a few. Academic writings that have contributed to expounding on the matters pertaining to the topic of this work are also referred to.

1.7 MEANING OF INFORMATION GATHERING POWERS AND THE METHODS USED BY THE COMMISSIONER TO GATHER INFORMATION FROM TAXPAYERS

The concept of "information gathering" is not defined in the ITA and the TAA. It may therefore be understood to mean a situation where the Commissioner collects information from taxpayers. The purpose of this information gathering may be for the Commissioner to measure compliance by taxpayers.

Chapter 5 Part A of the TAA (comprising sections 40 to 44) sets out most of the information gathering powers of the Commissioner. These include, but are not limited to the following: records and books held by the taxpayer, tax returns,

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65 See United Nations "Human Rights" https://www.un.org/en/sections/issues-depth/human-rights/ (Date of use: 24 April 2020): "The Office of the High Commissioner for Human Rights (OHCHR) is the focal point for United Nations human rights activities".

inspection, verification or audit, request for information from the taxpayer or third parties, and search and seizure (all of which are explained in Chapter 2 below).

Over and above the powers in sections 40 to 44 of the TAA, the TAA also contains other information gathering powers that are instrumental in an international tax context, such as the power of exchanging taxpayer information in tax matters with other jurisdictions as set out in section 3(3), the Voluntary Disclosure Programme as set out in sections 225 to 233, and the Reportable Arrangements provisions as set out in sections 34 to 39.

1.8 THE STATEMENT OF THE PROBLEM

The main problem addressed in this work is that the Commissioner's information gathering powers, if left unchecked, can infringe the rights of the taxpayers as entrenched in the Constitution: for example, the rights to equality, privacy, just administrative action and against self-incrimination.

1.8.1 Infringement of taxpayers' rights

As fully explained in Chapter 2, where the Commissioner requests taxpayer information from third parties, this step may infringe the taxpayer's right to privacy. Similarly, this right may also be infringed if the Commissioner exercises his powers of search and seizure of a taxpayer's property. Such infringements can also extend to common law rights of taxpayers enjoyed under, for example, the *audi alteram partem* rule*,* the *nemo iudex in sua causa* rule and the doctrine of legitimate expectations (which are explained in Chapter 4).

1.8.2 The lack of clear parameters as to what constitutes "relevant material" information

Apart from infringements of taxpayers' rights, there is also a problem in delimiting the scope of the information upon which the Commissioner is empowered to exercise his information gathering powers. The TAA provides that the information

requested by the Commissioner must be “relevant”. By implication, the information should assist the Commissioner in executing his duties.

Section 1 of the TAA defines “relevant material” to mean any information, document or thing that in the opinion of SARS is foreseeably relevant for tax risk assessment, assessing tax, collecting tax, showing non-compliance with an obligation under a tax Act or showing that a tax offence was committed.

This definition poses challenges because it is not clear what type of information is to be regarded as relevant. Nor have there been court cases in South Africa to clarify the meaning of the words “relevant material”. Accordingly, Chapter 2 discusses a few of the cases decided in the United States of America (“USA”) which could be of persuasive value in developing the South African jurisprudence on this matter.

1.8.3 Challenges that emanate from referring the taxpayer for criminal investigation after gathering information

The further problem is that there is a lack of clarity in the use of information where, in the process of an inspection, verification or audit by the Commissioner, it is discovered that the taxpayer might have committed an offence and he may be referred to criminal investigation.

A senior SARS official is the one that is required to decide whether to pursue criminal investigation. Where a senior SARS official decides to pursue a criminal investigation, the information gathered from the taxpayer during an inspection, verification or audit must be kept separate and not used.

Where the Commissioner obtains information under compulsion from taxpayers, which may be used to charge the taxpayer with a crime, this step has the potential to transgress the right to a fair trial, which can be detrimental for taxpayers. Hence it is clear that if SARS uses its information gathering powers as set out in the TAA to pursue a criminal investigation, this use may infringe taxpayers’ rights.

The Constitution provides for a single prosecuting authority in South Africa: the National Prosecuting Authority (“NPA”), which has the power to institute criminal

proceedings on behalf of the state and whose power must be exercised without fear, favour or prejudice.[66] It is submitted that the Commissioner, in exercising these prosecutorial powers, usurps the rights and powers of the NPA. This usurpation conflicts with the constitutional principle of the separation of powers.

The challenges stated above are compounded by the fact that the meaning of some terms used is not clear. In terms of the TAA, the words "a senior SARS official" and a "serious tax offence" are defined in a wide and ambiguous manner.

1.8.4 The lack of a clear boundary as to when a civil action becomes a criminal investigation

The TAA is not clear as to when a civil investigation against the taxpayer commences and when it ends. A civil investigation is conducted where a taxpayer is sued by SARS for a matter not related to a criminal offence. A criminal investigation deals with the commission of a serious tax offence, such as tax evasion.

The TAA empowers the Commissioner to prosecute offenders for any tax offence committed. The TAA also empowers the Commissioner to assist in the investigation of a particular offence. However, it is not clear at which stage SARS is expected to conclude a civil investigation and then move into the criminal investigation. Thus a taxpayer runs the risk of being investigated for a lengthy period without a conclusion. In this instance, the SARS powers do not terminate. More importantly, it is not clear at which point the civil investigation becomes a criminal investigation.

1.8.5 The impact of the Commissioner's power to pursue criminal and civil investigations on the taxpayers' rights not to be compelled to give incriminating evidence

The TAA may create a contravention of the taxpayers' rights where the information which the Commissioner requires for use in criminal proceedings incriminates the

66 Section 179 of the Constitution.

taxpayer. This contravention arises even though section 43 of the TAA provides that a taxpayer's information that incriminates him should not be used against him in a criminal prosecution and must be kept separate. The contradiction may, and as stated above, result in a situation where SARS could obtain information under compulsion through inspection, verification or audit, which may compel the taxpayer to incriminate himself.

A further provision that may be contravened is section 35(3)(j) of the Constitution, which provides that everyone has the right to a fair trial, which includes not being compelled to give incriminating evidence (the *nemo tenetur se detergere* principle). This provision relates to accused persons. It is submitted that the taxpayer who is under inspection, verification or audit is essentially put in a position similar to that of an accused person.

For this argument to hold, the taxpayer must prove that some or all of the information required by the Commissioner may lead to the taxpayer's incriminating himself and, as such, must be protected and not be used against him in criminal proceedings.

1.8.6 The lack of effective remedies to resolve violations of taxpayers' rights

This work explains the remedies available to a taxpayer where his common law and constitutional rights have been violated by the Commissioner's information gathering powers. As discussed later in this work, these remedies fall into two main categories: the internal remedies and the external remedies.

Essentially, the remedies are intended to control administrators' actions, in order to ensure that they are valid. As will become clear, however, the remedies available are in certain respects not effective in ensuring that taxpayers' rights are not violated.

1.9 JUSTIFICATION AND PURPOSE OF THE WORK

Few writers in South Africa have focused on the constitutionality of the Commissioner's information gathering powers. A number of authors have, however,

written on the Commissioner's powers in terms of the general infringement on taxpayers' rights. Among the authors is Croome,[67] who in one book explains taxpayers' rights when dealing with SARS and in another[68] explains the tax administration in South Africa and also the rights of taxpayers dealing with the tax authority.

Few articles have also been written on the topic. One is by Corder,[69] which in brief deals with administrative justice under the Constitution. Another is by Hoexter,[70] who discusses judicial review in South Africa, which is one of the control measures to deal with contraventions of taxpayers' rights (as discussed in Chapter 5).

Riggs[71] wrote on the doctrine of legitimate expectations in England, which is a doctrine that taxpayers can rely on when their rights are contravened (as discussed in the content of this work in Chapter 7). It should be noted that Corder, Hoexter and Riggs wrote about administrative law in general and not on how it applies to tax law or to taxpayers specifically.

A number of masters and doctoral dissertations have also been written in South Africa on certain aspects of this topic.[72] These include the doctoral thesis by Croome[73] from the University of Cape Town, which deals with the taxpayers' rights to property, administrative justice, access to information and access to court.

The present work acknowledges the contribution made by academics and practitioners on the topic of dealing with taxpayers' rights. In contributing to the body of knowledge, this work builds on writings about various aspects of this topic but focuses on the Commissioner's information gathering powers and how they may contravene taxpayers' rights.

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67 Croome *Taxpayers' Rights in South Africa.*
68 Croome and Olivier *Tax Administration.*
69 Corder 1997 *SAJHR* 28.
70 Hoexter 2000 *SALJ* 484.
71 Riggs 1988 *AJCL* 395.
72 See, for example, Tshidzumba *Pay Now, Argue Later* and Van der Walt *Contribution of Justice MM Corbett.*
73 Croome *SARS Powers.*

It should also be noted that much of the research by these authors on taxpayers' rights was in general conducted before the promulgation of the TAA. So the present work differs from the research of those authors because it covers aspects in the TAA (after its promulgation) relating to the Commissioner's information gathering powers and how they contravene taxpayers' rights. However, there are publications after the promulgation of the TAA which differ from the present one[74] with respect to the tax principles addressed and references is made to such publications where they are relevant.

It was hoped that the TAA would address the challenges that were pointed out by authors on issues pertaining to taxpayers' rights in general before the TAA was enacted. However, as this work will show, many of the challenges remained unresolved (even those relating to the constitutionality of the Commissioner's information gathering powers), and further challenges have been created by the TAA.

Yet another contribution to the body of knowledge is that this work is not limited to the domestic information gathering powers of the Commissioner. This work takes a holistic approach to the topic of the study, by taking into perspective other international information gathering powers of a Commissioner that are instrumental in increasing tax collection.

Today one cannot write a thorough work on the impact of the Commissioner's information gathering powers without considering the impact of globalisation and the increase of off-shore investments by South African residents in low tax jurisdictions which impacts on tax collection.

Taxpayers often engage in tax evasion and tax avoidance schemes to hide their funds and investments from the tax authorities. To curtail these schemes, South Africa has associated itself with international measures to ensure taxpayer transparency. Over the last few years, South Africa has thus enacted legislation, for

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74 Moosa *The 1996 Constitution and the Tax Administration Act*; Fritz *An Appraisal of Selected Tax-Enforcement Powers*.

instance, with respect to the exchange of information in tax matters, which is pertinent to this work.

The work therefore considers the exchange of information in, for example, double tax treaties, the Organisation for Economic Co-operation and Development ("OECD") standard of automatic exchange of information in tax matters, as well as the 2015 measures to curtail Base Erosion and Profit Shifting ("BEPS"),[75] which can ensure transparency through requiring Country-by-Country Reporting ("CbCR") of taxes paid by multinational enterprises ("MNEs") in the countries in which they transact. The comprehensive approach of this work makes a fresh contribution to this discourse in the light of the current legislation and international developments.

This work also takes into consideration the recommendations of the Davis Tax Committee ("DTC"), which was launched on 17 July 2013 by the South African Minister of Finance. Some of the DTC's terms of reference were to address South Africa's social challenges such as persistent unemployment, poverty and inequality. The DTC also had to review the role of the tax system in ensuring a coherent and effective fiscal policy framework that can address these challenges.

The DTC was also expected to review South Africa's BEPS as identified by the OECD and the Group of Twenty ("G20").[76] This work refers to the DTC's recommendations that are relevant to the protection of taxpayers' rights in South Africa. The relevant DTC recommendations are referred to in various chapters of this work, where they are found relevant.

The work also takes into account the Observatory on the Protection of Taxpayers' Rights ("OPTR"), which was instituted by the International Bureau of Fiscal Documentation ("IBFD").[77] The OPTR deals with minimum standards and best

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75 OECD *Action Plan on Base Erosion and Profit Shifting*. The Action Plan was endorsed by the G20 leaders at the Russia G20 Summit on 6 September 2013.

76 Davis Tax Committee *Tax Administration Report* Chapter 2: Base Erosion and Profit Shifting ("BEPS").

77 International Bureau of Fiscal Documentation "Observatory on the Protection of Taxpayers' Rights" *2015–2017 General Report on the Protection of Taxpayers' Rights* (26 April 2018) (IBFD "OPTR"), which was released on 4 May 2018 and is available at https://www.ibfd.org/sites/ibfd.org/files/content/pdf/OPTR_General-Report.pdf (Date of use: 25 April 2020). The IBFD is a unique centre of expertise, offering high-quality information

practices around the world with regard to guaranteeing and protecting human rights in respect of tax matters that were identified by Professor Pasquale Pistone and Professor Philip Baker at the 2015 International Fiscal Association ("IFA") Congress on "The Practical Protection of Taxpayers' Fundamental Rights".

The IBFD's OPTR provides recommendations as to how taxpayers' rights may be protected in an international arena. Thus the recommendations of the IBFD's OPTR have a bearing on this topic and are dealt with in this work. Although the documents mentioned above are not legally binding and cannot be relied by taxpayers in a court of law, they provide important guidance on how taxpayers' rights may be protected.

In formulating recommendations to resolve the challenges alluded to above, Chapter 5 of this work explores the possibility of applying the principle of *ubuntu* that was discussed at length by Mokgoro J in the Constitutional Court case of *S v Makwanyane and Another*[78] in order to address the constitutional, administrative and common law challenges to taxpayers posed by the information gathering powers of the Commissioner.

In addition, there is a deeper discussion of the principle of legitimate expectations and how this can be applied alongside the *ubuntu* principle to resolve the problems discussed in this work.

1.10 COMPARATIVE STUDY

In order to formulate plausible recommendations to address the challenges that the Commissioner's information gathering powers pose to taxpayers' rights, a comparative study is undertaken of the constitutional, administrative and common law provisions of the legal systems of the UK and Canada. Both these countries are common law countries that embrace the rule of law and constitutional values and whose court decisions are of persuasive value in South Africa.

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78 1995 3 SA 391 (CC).

The comparative study in this work enriches the contribution to the body of knowledge on this topic. The study covers similar challenges in the UK and Canada, and how these countries have endeavoured to resolve them. From the comparative study, recommendations are provided as to how similar challenges can be resolved in South Africa.

1.10.1 The United Kingdom

South Africa's legal environment has been influenced by developments in the UK cases which have persuasive value in the South Africa. In the UK, the office of the tax collection, whose powers are compared in this work, is Her Majesty's Revenue and Customs ("HMRC").

Unlike South Africa, which has a written Constitution, the UK has an unwritten constitution (in that it has no single constitutional document). Constitutional values are nevertheless enshrined, for instance, in Her Majesty's Revenue and Custom's Charter ("HMRC Charter"), which deals with taxpayers' rights and obligations and which also states the duties owed by HMRC towards taxpayers.

In this work, the constitutional rights in the HMRC Charter are compared with the constitutional rights that South African taxpayers have (as explained in Chapter 2). The comparison is intended to ascertain whether and, if so, how the UK faces challenges similar to those in South Africa and whether the measures to contain HMRC's information gathering powers could be emulated in South Africa to prevent the infringement of taxpayers' rights.

1.10.2 Canada

The South African Constitution is rooted in the Canadian model.[79] The Canadian Constitution has a Charter of Rights and Freedoms ("the Charter"), which protects the rights of individuals. The Canadian tax authority is called the Canada Revenue

[79] Davis 2003 *ICON* 187.

Agency (“CRA”). Canada has a Taxpayer Bill of Rights (“TBR”), which deals with the rights and obligations of taxpayers. The rights in the TBR that could be contravened by the CRA’s information gathering powers are compared to the rights of South African taxpayers.

Canada has a rich body of case law which deals with the challenges of the information gathering provision (similar to those that South African taxpayers face). Some court decisions in Canada are discussed in this work to provide recommendations that South Africa could emulate in resolving the problems addressed in this work.

For example, the Supreme Court of Canada delivered a landmark judgment which can be followed in South Africa regarding the distinction between tax audits and criminal investigations in *R v Jarvis*.[80] Canada also applies the concept of *ultra vires* taxation (which could emulated in South Africa) by which taxpayers are allowed to claim the restitution of taxes paid where the legislation that required the payment of taxes is based on an unconstitutional provision.

1.11 HYPOTHESIS

As explained above, this work describes how the powers of the Commissioner for SARS, specifically his information gathering powers, infringe the rights of the taxpayers entrenched in the BOR of the Constitution. For example, the work generally explains that an infringement of the taxpayers’ rights arises where the Commissioner requests information from a taxpayer or a third party under compulsion and such information is used to incriminate the taxpayer and also to charge him with a crime. In addition, it is not clear under the TAA when a civil investigation becomes a criminal investigation and when it terminates.

A further point of concern is the international exchange of information between countries that can impact on taxpayers’ rights. The work also discusses the ineffectiveness of common law and statutory remedies, internal remedies, external

80 [2002] 3 SCR 757.

remedies and the doctrine of legitimate expectations in addressing these challenges.

It is postulated that the above-mentioned challenges can be resolved if the recommendations that emanate from the comparative study of similar challenges in the UK and Canada are emulated in South Africa.

1.12 SCOPE AND DELIMITATIONS OF THE WORK

Although the constitutional challenges are encountered in all the laws administered by the Commissioner for example, the ITA, VAT Act and other tax Acts this work does not discuss the particular aspects that pertain to those laws. It only discusses the provisions that result in the infringement of taxpayers' rights, specifically the Commissioner's information gathering powers that pose challenges to taxpayers' rights.

In the same vein, the comparative study does not cover a detailed discussion of the tax laws of the relevant countries (the UK and Canada) but only the provisions in these countries' tax laws that relate to the Commissioner's information gathering powers and how the exercise of these powers can result in the infringement of taxpayers' rights. It should also be clarified, as stated above, that most of the case law to be discussed in this work does not relate to tax law. The cases are still discussed because of the relevance of the principles discussed by the courts.

1.13 METHODOLOGY

The research in this work is based on reviews of legislation, textbooks, case law, reports and printed and electronic articles on the topic. The discussion entails a summary of the literature relevant to the research in question. It needs to be highlighted that most of the references cited in this work predate the promulgation of the TAA. One other important aspect is that most of the cases and sources are drawn from constitutional law and administrative law, because of the limited tax cases sources on the topic in the field of tax law.

1.14 STRUCTURE OF THE WORK

Chapter 2 of this work analyses the taxpayers' constitutional rights and how these can be violated by the Commissioner's information gathering powers in South Africa. The chapter also discusses challenges that arise when the Commissioner exercises his information gathering powers.

Chapter 3 deals with administrative provisions which can be relied upon to contain the conduct or action emanating from the Commissioner's information gathering powers if they contravene taxpayers' rights. The chapter also deals with the right to just administrative action in section 33 of the Constitution and how this is relevant to protecting taxpayers' rights in South Africa. In this regard, this chapter builds on what was briefly discussed in Chapter 2 and fully examines the administrative aspects of the Commissioner's power of information gathering as set out in sections 40, 43 and 44 of the TAA.

Chapter 4 deals with the common law rules of natural justice, the *ultra vires* doctrine, the doctrine of legitimate expectations and its application in South Africa (particularly with respect to information gathering powers) and how these concepts all assist taxpayers to resolve the infringement of their rights. The chapter also discusses the role of the concept of *ubuntu* in addressing the concerns raised in this work.

Chapter 5 deals with the control measures that can be applied to contain the Commissioner's information gathering powers and the remedies available to taxpayers following the infringement of their rights. The chapter also discusses the effectiveness of these remedies in South Africa.

Chapter 6 deals with the UK's system of government and how the Commissioner's information gathering powers may impact on taxpayers' rights.

Chapter 7 deals with the UK's administrative and common law principles that are important to understanding the Commissioner's information gathering powers and taxpayers' rights. This chapter also discusses the doctrine of legitimate expectations as applied in the UK.

Chapter 8 deals with the UK measures to control administrative actions, the remedies to protect taxpayers' rights, and the effectiveness of these remedies and avenues to enhance the protection of taxpayers' rights.

Chapter 9 deals with the Canadian system of government and how the Commissioner's information gathering powers impact on taxpayers' rights.

Chapter 10 deals with the Canadian administrative and common law principles that are pertinent to understanding taxpayers' constitutional rights. The chapter also discusses the doctrine of legitimate expectations from a Canadian perspective.

Chapter 11 deals with the Canadian measures to control administrative actions, the remedies to protect taxpayers' rights, and the effectiveness of these remedies and other avenues to enhance the protection of taxpayers' rights.

Chapter 12 deals with the comparative analysis of the three legal systems discussed.

Chapter 13 sets out the conclusion and the recommendations of this work.

In this work, for practical reasons the masculine form is used throughout and should be assumed to include the feminine form.

CHAPTER 2

THE METHODS THAT THE COMMISSIONER EMPLOYS TO GATHER INFORMATION FROM SOUTH AFRICAN TAXPAYERS AND HOW THOSE METHODS CAN INFRINGE TAXPAYERS' CONSTITUTIONAL RIGHTS

2 INTRODUCTION

During the apartheid era, basic human rights in South Africa were not protected in the Constitution[1] in the form of a Bill of Rights ("BOR"), as is the case today. As stated in Chapter 1, the Parliament then was sovereign and could pass any law that it deemed fit. Legislation was supreme, and no court of law could set aside any statute or its provisions on the grounds of the infringement of rights.

South Africa now has a Constitution which makes it a constitutional state. As stated in Chapter 1, the term "constitutional state" refers to a state where the constitution is the supreme law of the country.[2] This is so because the country is founded on the recognition and protection of basic human rights. Although this move to a constitutional state constituted a revolutionary change in South Africa, the idea of the recognition and protection of human rights is consistent with the inherited traditional value systems of South Africans in general.

This chapter deals with the constitutional rights that may be contravened when the Commissioner for the South African Revenue Service ("the Commissioner") exercises his information gathering powers to collect taxes on behalf of the state. The chapter also seeks to address and recommend the avenues that taxpayers may invoke in order to remedy these contraventions.

The chapter also discusses other challenges that are posed when the Commissioner exercises his information gathering powers. These challenges relate, first, to the lack of clarity as to when a civil investigation becomes a criminal investigation; and, secondly, to the danger that when the taxpayer is referred for

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1 The Constitution of the Republic of South Africa, 1996 ("the Constitution").

2 Rautenbach and Malherbe *Constitutional Law* 11.

criminal investigation as a result of the gathered information, the taxpayer may incriminate himself in the process.

2.1 THE METHODS USED BY THE COMMISSIONER TO GATHER INFORMATION FROM TAXPAYERS

The Income Tax Act ("ITA")[3] and the Tax Administration Act ("TAA")[4] do not define the term "information gathering". Therefore, the term may be understood to mean that activity by which the Commissioner collects information from taxpayers to measure their compliance with their duty to pay their taxes. In the discussion of the Commissioner's methods of gathering information from taxpayers, those methods employed by the Commissioner include but are not limited to the following:

2.1.1 Gathering information from taxpayers' records and books of accounts

Section 29(1) of the TAA obliges a taxpayer to keep records in the form of books of account and similar documents. Other documents may refer to, for example, invoices, receipts and such similar documents that may be relevant to determine the taxability of the taxpayer. The duty to keep records applies to a taxpayer who has submitted, or is required or not required to submit a return during the tax period.

These records must be kept by the taxpayer for a period of five years from the date of the submission of the return[5] and must be kept or retained in their original form, including electronic form.[6]

2.1.2 Gathering taxpayer information from tax returns

Section 25(1) of the TAA requires a person under a tax Act to submit a return voluntarily. A return must contain the information prescribed by a tax Act or the Commissioner, and it must be a full and true return.[7] Non-receipt by a person of a

3 Act 58 of 1962.
4 Act 28 of 2011.
5 Section 29(3) of the TAA.
6 Section 30(1) of the TAA.
7 Section 25(2) of the TAA.

return form does not affect the obligation to submit a return.[8] The South African Revenue Service ("SARS") may, prior to the issue of an original assessment by SARS, request a person to submit an amended return to correct an undisputed error in a return.[9]

A third party may submit a return on behalf of the taxpayer in terms of section 26 of the TAA. The Commissioner may require a person who employs, pays amounts to, receives amounts on behalf of or otherwise transacts with another person, or has control over assets of another person, to submit a return.[10]

The information contained in a tax return may, for example, relate to the taxpayer's sources of income, fringe benefits (in the case of an employee), exemptions and expenditures, and this information is critical for the Commissioner to assess the taxpayer accordingly.

2.1.3 Gathering taxpayer information directly from taxpayers or third parties

The Commissioner may require and compel the taxpayer, another person or a class of persons to submit, within a reasonable period, relevant material (whether orally or in writing) that the Commissioner requires.[11] The compulsion on the part of the Commissioner is noted by the use of the word "must" in section 46(4) of the TAA.

This means that any person, including third parties, may be required to submit information relating to the taxpayer in an objectively identifiable class of taxpayers:[12] examples include an accountant and members of clubs such as the Vintage Bike Club. The third party information also refers to information supplied by employers, banks and financial services companies, which administer retirement fund and pension schemes, medical savings and insurance schemes that submit tax certificates to taxpayers.

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8 Section 25(4) of the TAA.
9 Section 25(5) of the TAA.
10 Section 26 of the TAA.
11 Section 46(1) of the TAA.
12 Section 46(2) of the TAA.

SARS always emphasises the importance of taxpayers to update and verify their personal information and banking details.[13] Taxpayers must also ensure that their employers and third parties have submitted their IRP5 and other relevant data to SARS, and that it is properly captured.[14] If the bank details with SARS are invalid, SARS will not be able to pay a refund.

A request by the Commissioner for relevant material from a third party is limited to the records maintained or that should reasonably be maintained by the person in relation to the taxpayer. The person must submit the relevant material to SARS at the place and within the time specified in the request.[15] This request is limited to records in the possession of, for instance, the accountant or a legal representative.

Some of the information held by third parties may be protected by the principle of legal privilege, such as are records in the hands of a legal representative. According to the Observatory on the Protection of Taxpayers' Rights ("OPTR"), which was created by the International Bureau of Fiscal Documentation ("IBFD"), "legal privilege" refers to the delicate financial, personal and corporate information that is exchanged between the taxpayer and his tax advisers in order to provide for his defence against a potential tax claim issued by the tax authorities.[16]

In the South African case of *A Company v The Commissioner for the South African Revenue Services*,[17] the court ruled that the right to legal professional privilege is a general rule of common law which provides that communications between a legal advisor and his or her client are protected from disclosure, provided that certain requirements are met.[18] The court made it clear that requirements for legal professional privilege are: (i) the legal advisor must have been acting in a professional capacity at the time; (ii) the advisor must have been consulted in

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13 SARS "Filing Season 2020 for Individuals" https://www.sars.gov.za/TaxTypes/PIT/Tax-Season/Pages/default.aspx (Date of use: 17 August 2020).

14 SARS "Filing Season 2020 for Individuals" https://www.sars.gov.za/TaxTypes/PIT/Tax-Season/Pages/default.aspx (Date of use: 17 August 2020).

15 Section 46(3) and (4) of the TAA.

16 IBFD "Observatory on the Protection of Taxpayers' Rights" *2015–2017 General Report on the Protection of Taxpayers' Rights* 37, https://www.ibfd.org/sites/ibfd.org/files/content/pdf/OPTR_General-Report.pdf (Date of use: 25 April 2020).

17 2014 (4) SA 549 (WCC).

18 *A Company v The Commissioner for the South African Revenue Services* 1.

confidence; (iii) the communication must have been made for the purpose of obtaining legal advice; (iv) the advice must not facilitate the commission of a crime or fraud; and (v) the privilege must be claimed.[19]

In South Africa, "legal professional privilege" consists of two components: legal advice and litigation privilege.[20] The privilege of legal advice protects communications between legal advisers and clients where the legal advisor acted in his professional capacity and the communication was made in confidence, for the purpose of obtaining or giving legal advice, and the advice was not sought for an unlawful purpose.[21]

Litigation privilege protects communications between legal advisors and/or clients and third parties, provided that the legal advisor acted in his professional capacity, the communication was made in confidence and for the purpose of contemplated litigation, and the communication or advice was not for an unlawful purpose.[22]

In *A Company v The Commissioner for the South African Revenue Services*,[23] the court dealt with a claim for legal privilege, legal advice in particular.[24] The court confirmed the Constitutional Court's decision in *Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others*.[25]

In the recent High Court case of *Astral Operations Ltd and Others v Minister for Local Government, Western Cape and Another*,[26] the court had to decide on the scope of legal professional privilege and the circumstances in which such privilege could be waived. The applicants sought to compel the respondents in a review proceeding to produce information that was drafted by one of the respondents'

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19 *A Company v The Commissioner for the South African Revenue Services* 1.
20 DLA Piper "Legal professional privilege: Global guide" https://www.dlapiperintelligence.com/legalprivilege/ (Date of use: 26 November 2019).
21 DLA Piper "Legal professional privilege: Global guide" https://www.dlapiperintelligence.com/legalprivilege/ (Date of use: 26 November 2019).
22 DLA Piper "Legal professional privilege: Global guide" https://www.dlapiperintelligence.com/legalprivilege/ (Date of use: 26 November 2019).
23 2014 (4) SA 549 (WCC).
24 *A Company v The Commissioner for the South African Revenue Services* 1.
25 [2008] ZACC 13; 2008 (2) SACR 421 (CC); 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC).
26 2019 3 SA 189 (WCC).

lawyer.[27] This was a result of the notice served on the respondents in terms of Rule 35(12) of the Uniform Rules of the High Court.[28]

The respondents refused to submit relevant material, claiming that it was protected by legal professional privilege.[29] The applicants argued that the exchange of the information between the respondents' attorneys and the subsequent disclosure thereof resulted in a waiver of privilege by the respondents; alternatively, that a waiver of privilege could be imputed by virtue of the disclosure that had been made of the existence of the memorandum in the court documents.[30] The court first had to decide whether the memorandum was subject to legal professional privilege and, if so, then whether the respondents had waived that privilege.

The court held that legal professional privilege belongs to the litigant and can therefore be waived only by the litigant and not by the legal advisor or third parties.[31] Furthermore, once the confidentiality of the information has been breached, the basis for claiming legal professional privilege falls away.

In determining whether the respondents had expressly or impliedly waived their privilege, or whether a waiver of privilege was to be imputed, the court held that the references to the memorandum in the documents contained in the official court record did not disclose the substance or content of the memorandum to the extent that an intention to abandon the confidentiality of the document might be inferred.[32]

The court also held that a mere reference to a document does not constitute a reliance on that document in the review proceedings. As a result, legal professional privilege had not been waived, and so the court dismissed the application.[33] In effect, this means that legal professional privilege is aimed at protecting the confidential communication between a taxpayer and its legal advisor. This privilege applies to and may be invoked by the taxpayer.

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27 *Astral Operations Ltd v Minister* para 2.
28 *Astral Operations Ltd v Minister* para 2.
29 *Astral Operations Ltd v Minister* para 3.
30 *Astral Operations Ltd v Minister* para 3.
31 *Astral Operations Ltd v Minister* para 7.
32 *Astral Operations Ltd v Minister* para 28.
33 *Astral Operations Ltd v Minister* paras 28, 32.

Brinker and Kotze[34] hold the view that while the matter has yet to be determined decisively by the South African Tax Court, international tax case law has made it clear that tax advice solicited from accountants or tax practitioners who do not qualify as legal advisors will not be subject to legal professional privilege, and that this advice must be disclosed should SARS require such disclosure.

The IBFD's OPTR recommends that, as a best practice, the privilege of non-disclosure should apply to all tax advisors (not only lawyers) who supply advice as lawyers do, and that information imparted in circumstances of confidentiality such as religious confession should be privileged with non-disclosure in all cases.[35]

Section 42A of the TAA provides for the procedure for invoking legal professional privilege. Where the taxpayer invokes legal professional privilege in respect of relevant material required by the Commissioner during an inquiry or during the conduct of a search and seizure (as explained below), the person asserting the privilege must provide the following information:

- a description and purpose of each item of the material in respect of which the privilege is asserted;
- the author of the material and the capacity in which the author was acting;
- the name of the person for whom the author was acting in providing the material;
- confirmation in writing that the person is claiming privilege in respect of each item of the material;
- if the material is not in the possession of the person, an explanation as to the person from whom the person asserting privilege obtained the material; and
- if the person asserting privilege is not the person referred to, then under which circumstances and instructions regarding the privilege the person obtained the material.

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34 Brinker and Kotze "Legal professional privilege protection available to taxpayers too" (2019) *Cliffe Dekker Hofmeyer Tax and Exchange Control Alert* 4, https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2019/Tax/downloads/Tax-and-Exchange-Control-Alert-14-June-2019.pdf (Date of use: 25 June 2019).

35 IBFD "OPTR" 37.

Section 42A(2) of the TAA provides that a person must submit the information required unless the Commissioner extends the period based on reasonable grounds submitted by the person. Section 42A(3) provides for instances where the Commissioner may dispute the assertion of privilege upon receipt of the information. In that case, the following steps must be taken:

- SARS must make arrangements with a practitioner to take receipt of the material;
- the person asserting privilege must seal and hand over the material in respect of which privilege is asserted to the practitioner;
- the practitioner must within 21 business days make a determination of whether the privilege applies;
- if a determination of whether the privilege applies is not made by the practitioner or if a party is not satisfied with the determination, the practitioner must retain the relevant material pending final resolution of the dispute by the parties or an order of court; and
- any application to a High Court must be instituted within 30 days of the expiry of the period of 21 business days, failing which the material must be handed to the party in whose favour the determination was made.

2.1.4 Gathering taxpayer information from inspection, verification or audit procedures

Where a taxpayer's return contains for example, information which may be wrong and insufficient, the Commissioner has the power in terms of section 40 of the TAA to refer the taxpayer for inspection, verification or audit.

2.1.4.1 Inspection

Section 31 of the TAA provides that records, books of account and documents must at all reasonable times during the five-year period prescribed under section 29 of the TAA, be open for inspection by a SARS official for the purpose of (a) determining compliance with the requirements of sections 29 and 30 of the TAA; or (b) an

inspection, audit or investigation under Chapter 5 (on information gathering, and comprising sections 40 to 66 of the TAA).[36]

Section 45(1) of the TAA empowers a SARS official, and without prior notice, to enter a taxpayer's premises to conduct an inspection. In this situation the SARS official reasonably believes that a trade or enterprise is being carried on. The reason for this impromptu visit is to determine the identity of the person occupying the premises, whether that occupant is registered for tax, or whether that occupant is complying with sections 29 and 30 of the TAA.[37]

2.1.4.2 Verification

Where the Commissioner believes that the information contained in the taxpayer's tax returns is not accurate, he may require the taxpayer to submit evidence for verification purposes. This process is normally in the form of documents containing invoices, receipts, logbooks and other relevant documents.

2.1.4.3 Audit

The ITA, TAA and the South African Revenue Service Act ("SARS Act")[38] do not provide guidelines on how the Commissioner must select or identify a taxpayer for an audit. The only guideline provided by section 40 of the TAA is that the Commissioner may select a taxpayer on a random or a risk assessment basis as the criteria to identify taxpayers.

In *Carte Blanche Marketing CC and Others v Commissioner for South African Revenue Service*, the court pointed out that the word "audit" is not defined in the TAA, a gap which could pose interpretation challenges. The court held that the word may mean a wide range of things.[39]

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36 Section 30(a) and (b) of the TAA.
37 Section 45(1)(a), (b) and (c) of the TAA.
38 Act 34 of 1997.
39 *Carte Blanche Marketing CC and Others v Commissioner for South African Revenue Service* (26244/2015) [2017] ZAGPPHC 253 (26 May 2017) para 36.

An audit can be something unobtrusive and simple such as the verification of basic information like medical expenses or travelling expenses,[40] or it could be an extremely invasive process seriously affecting a business's commercial confidentiality and an individual's privacy.[41]

2.1.5 Gathering taxpayer information through search and seizure

Information may be gathered from taxpayers through search and seizure. This procedure may be utilised by SARS by application to court for a warrant and under exceptional circumstances without a warrant. Section 59(1) of the TAA provides that a senior SARS official may authorise an application for a warrant under which SARS may enter premises where relevant material is kept to search the premises and any person present on the premises and to seize relevant material.

Section 59(2) of the TAA provides that SARS must apply *ex parte* (unopposed and without the co-operation of the taxpayer) to a judge for the warrant, and that this application must be supported by information supplied under oath or solemn declaration, establishing the facts on which the application is based.

In *Huang and Others v Commissioner of the South African Revenue Services, In Re; Commissioner of the South African Revenue Services, In Re; Huang and Others*,[42] the court held that if a court finds, when considering the setting aside of a warrant, that the jurisdictional facts were not present at the time of issuing the warrant, then a court will set aside the search warrant.[43]

If the jurisdictional facts were present, then a court will have to consider the exercise of the discretion by the judicial officer to issue the warrant.[44] Such a court may,

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40 *Carte Blanche Marketing CC and Others v Commissioner for South African Revenue Service* para 36.

41 *Carte Blanche Marketing CC and Others v Commissioner for South African Revenue Service* para 36.

42 (SARS 1/2013) [2014] ZAGPPHC 563 (13 August 2014).

43 *Huang v Commissioner, South African Revenue Services* para 34.

44 *Huang v Commissioner, South African Revenue Services* para 34.

however, not interfere with the discretion simply because it would have reached a different conclusion to that reached by the judicial officer issuing the warrant.[45]

Section 62(1) of the TAA provides that if a senior SARS official believes on reasonable grounds that the relevant material or information included in a warrant is at the taxpayer's premises not identified in the warrant and may be removed or destroyed; a warrant cannot be obtained in time to prevent the removal or destruction of the relevant material; and the delay in obtaining a warrant would defeat the object of the search and seizure, a SARS official may enter and search the premises and exercise the powers granted, as if the premises had been identified in the warrant.[46]

Section 63(1) of the TAA provides that a senior SARS official may conduct search and seizure without a warrant, provided that the owner or controller of the premises gives written consent or else the senior SARS official is satisfied that the required circumstances exist for the search without a warrant to take place. In addition, however, if SARS foresees the need to search and seize relevant material that may be alleged to be subject to legal professional privilege, SARS must arrange for an attorney from the panel appointed under section 111 to be present during the execution of the warrant.[47] From search and seizure, a senior SARS official may wish to seize items such as laptops, files, cameras and other documents.

2.1.6 Gathering taxpayer information through exchange of tax information with other countries

Although Chapter 5 Part A of the TAA has a heading dealing with information gathering provisions, it is not the only part in the TAA in which one finds provisions relating to the information gathering powers of SARS. Chapter 2 Part A section 3(3) of the TAA also provides for the power of the Commissioner to exchange taxpayers' information with other countries and to obtain information about investments made by a South African out of the Republic.

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45 *Huang v Commissioner, South African Revenue Services* para 34.
46 Section 62(1)(a), (b) and (c) of the TAA.
47 Section 64(1) of the TAA.

This range of possibilities shows that the Commissioner's information gathering powers extend to taxpayers' international transactions. Dealing with international information gathering powers is paramount to this study, because of the rise of globalisation and the increase in taxpayers' offshore investments in tax havens that greatly impact on tax collection.

The increase in cross-border capital flows resulting from advanced technology and the globalisation of trade and investments means that tax administrators around the world face challenges in enforcing their tax laws.[48] The international exchange of information is thus necessary to ensure that taxpayers do not hide their income and assets in tax havens[49] and low tax jurisdiction countries.[50]

Countries normally require taxpayers to disclose the details of their income and investments to their tax authorities.[51] However, the under-declaration of profits by taxpayers may be very high when it comes to off-shore investments.[52] In an international context, double tax treaties may be used to exchange tax information between tax authorities.

Countries generally do not exchange information for tax purposes unless there is an appropriate legal instrument for doing so.[53] The exchange of information in tax matters may be achieved through the following legal instruments (discussed below):

- Bilateral tax treaties,
- Tax information exchange agreements ("TIEAs"),
- Multilateral agreements,
- Regional instruments, and
- Unilateral domestic legislation dealing with the exchange of information.

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48 Oguttu *International Tax Law* 600.

49 The OECD defines tax-haven jurisdiction as one which actively makes itself available for the avoidance of tax that would have been paid in high-tax countries (OECD *International Tax Avoidance and Evasion* 20). These tax-haven countries include Aruba, Bermuda, Cayman Islands, Cyprus, Isle of Man, Malta, Mauritius, Seychelles and San Marino.

50 Oguttu *International Tax Law* 600.

51 Oguttu *International Tax Law* 600.

52 Oguttu *International Tax Law* 600.

53 Oguttu *International Tax Law* 603.

It should be noted that it is not the purpose of this work to determine which instrument is more effective than the other. This work only demonstrates the different types of international agreements that the Commissioner may employ to gather information about taxpayers, and how the Commissioner's use of these instruments may impact on taxpayers' rights.

2.1.6.1 The exchange of taxpayer information through bilateral tax treaties

In South Africa, section 108 of the ITA (on prevention of or relief from double taxation) provides the following:

> (1) The National Executive may enter into an agreement with the government of any other country, whereby arrangements are made with such government with a view to the prevention, mitigation or discontinuance of the levying, under the laws of the Republic and of such other country, of tax in respect of the same income, profits or gains, or tax imposed in respect of the same donation, or to the rendering of reciprocal assistance in the administration of and the collection of taxes under the said laws of the Republic and of such other country.
>
> (2) As soon as may be after the approval by Parliament of any such agreement, as contemplated in section 231 of the Constitution, the arrangements thereby made shall be notified by publication in the *Gazette* and the arrangements so notified shall thereupon have effect as if enacted in this Act.

Section 108 thus empowers the Commissioner to enter into an arrangement or agreement with any country to assist in the exchange of information and the collection of taxes. Section 231 of the Constitution provides:

> (1) The negotiating and signing of all international agreements is the responsibility of the national executive.
>
> (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
>
> (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
>
> (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

This means that an international agreement is binding and becomes part of the South African law in terms of section 231(2) and (4) of the Constitution. In *Glenister v President of the Republic of South Africa and Others*[54] the court held that:

> The fact that s 231(4) expressly creates a path for the domestication of international agreements may be an indication that s 231(2) cannot, without more, have the effect of giving binding internal constitutional force to agreements merely because Parliament has approved them. It follows that the incorporation of an international agreement creates ordinary domestic statutory obligations. Incorporation by itself does not transform the rights and obligations in it into constitutional rights and obligations.[55]

Currently, the relevant provisions dealing with the exchange of information in South Africa are found in section 3(3) of the TAA, which provides the following:

(3) If SARS, in accordance with-
(a) an international tax agreement-
(i) received a request for, is obliged to exchange or wishes to spontaneously exchange information, SARS may disclose or obtain the information for transmission to the competent authority of the other country as if it were relevant material required for purposes of a tax Act and must treat the information obtained as taxpayer information;
(ii) received a request for the conservancy or the collection of an amount alleged to be due by a person under the tax laws of the requesting country, SARS may deal with the request under the provisions of section 185; or
(iii) received a request for the service of a document which emanates from the requesting country, SARS may effect service of the document as if it were a notice, document or other communication required under a tax Act to be issued, given, sent or served by SARS; or
(b) an international tax standard, obtained information of a person, SARS may retain the information as if it were relevant material required for purposes of a tax Act and must treat the information obtained as taxpayer information.

Section 185 of the TAA (on tax recovery on behalf of foreign governments) provides:

(1) If SARS has, in accordance with an international tax agreement, received-
(a) a request for conservancy of an amount alleged to be due by a person under the tax laws of the other country where there is a risk of dissipation or concealment of assets by the person, a senior SARS official may authorise an application for a preservation order under section 163 as if the amount were a tax payable by the person under a tax Act; or

54 2011 3 SA 347 (CC).
55 *Glenister v President of the Republic of South Africa* para 181.

(b) a request for the collection from a person of an amount alleged to be due by the person under the tax laws of the other country, a senior SARS official may, by notice, call upon the person to state, within a period specified in the notice, whether or not the person admits liability for the amount or for a lesser amount.

The commonest models that have been used in signing South Africa's double tax treaties are the Organisation for Economic Co-operation and Development ("OECD")[56] Model Tax Convention on Income and on Capital ("OECD Model")[57] and the United Nations Model Double Taxation Convention between Developed and Developing Countries ("UN Model").[58]

Article 26 of the OECD Model and the UN Model (which is the same in both model treaties) provides for the exchange of information in tax matters between the contracting parties. Commentaries on the Articles of the Model Tax Convention (more specifically, the Commentary on Article 26) are discussed below.

2.1.6.1.1 Article 26(1) of the OECD Model and the UN Model

Article 26(1) provides that countries shall exchange information of every kind that is foreseeably relevant. At the same time, contracting states are not allowed to embark on "fishing expeditions" or to request information that is irrelevant to the tax affairs of a particular taxpayer.[59] The exchange of information may take three forms: on request, automatic and spontaneous.[60]

When information is exchanged on request, this means that the regular sources of information available under the internal taxation procedure should be relied upon in the first place, before a request for information is made to the other state.[61] When

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56 The mission of the OECD is to promote policies that will improve the economic and social well-being of people around the world (OECD "Who we are" http://www.oecd.org/about/ (Date of use: 23 April 2018)).

57 See OECD *Model Tax Convention on Income and on Capital: Condensed Version 2017* (OECD Paris 2017) http://dx.doi.org/10.1787/mtc_cond-2017-en (Date of use: 6 June 2020).

58 See United Nations Department of Economic and Social Affairs *United Nations Model Double Taxation Convention between Developed and Developing Countries* 2017 Update (United Nations New York 2017) un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf (Date of use: 26 April 2020).

59 Paragraph 5 of the Commentary on Article 26(1).

60 Paragraph 9 of the Commentary on Article 26(1).

61 Paragraph 9(a) of the Commentary on Article 26(1).

the information is exchanged automatically, this means that the information about one category or various categories of income having their source in one contracting state and received in the other contracting state is transmitted systematically to the other state.[62] And when information is exchanged spontaneously, this means that the state has acquired, through certain investigations, information which it supposes to be of interest to the other state.[63]

These three forms of exchange may also be combined,[64] and Article 26(1) does not restrict the exchanging of information to these methods. Contracting states may also use other techniques to obtain information which may be relevant to both contracting states, such as simultaneous examinations, tax examinations abroad and industry-wide exchanges of information.[65]

2.1.6.1.2 Article 26(2) of the OECD Model and the UN Model

Article 26(2) requires contracting states to treat the taxpayer information as secret. The confidentiality rules apply to all types of information received, including both information provided in a request and information transmitted in response to a request.[66]

The domestic laws of contracting states must deal with the maintenance of the secrecy of information.[67] Infringements of this article or the violation of such secrecy in a particular state is governed by its penal laws.[68] This article guarantees that taxpayers' right to privacy is respected and protected.

2.1.6.1.3 Article 26(3) of the OECD Model and the UN Model

Article 26(3) provides a limitation clause because it provides for instances where the taxpayer's information may not be exchanged. There are certain countries' laws that

62 Paragraph 9(b) of the Commentary on Article 26(1).
63 Paragraph 9(c) of the Commentary on Article 26(1).
64 Paragraph 9.1 of the Commentary on Article 26(1).
65 Paragraph 9.1 of the Commentary on Article 26(1).
66 Paragraph 11 of the Commentary on Article 26(2).
67 Paragraph 11 of the Commentary on Article 26(2).
68 Paragraph 11 of the Commentary on Article 26(2).

permit a notice to the person who provided the information and/or the taxpayer that is subject to the enquiry prior to the supply of information.[69] Such notification remains an important aspect of the rights provided under domestic law.

These procedures may help to prevent or reduce mistaken identities. The procedures can also help to facilitate the exchange of information by allowing taxpayers who are notified to co-operate voluntarily with the tax authorities in the requesting state.[70] However, such notification procedures should not be applied in a manner that would frustrate the efforts of the requesting state.[71]

It is important that such notifications should not prevent or unduly delay the effective exchange of information. These notification procedures should be flexible in cases where the request for information is very urgent or the notification is likely to undermine the chances of success of the investigation conducted by the requesting state.[72]

In order to be effective, a country which has a notification procedure under its domestic law is required to notify its treaty partners in writing that it has this requirement and what the consequences are for its obligations in relation to mutual assistance.[73]

A requested state may decline to disclose information that is protected by legal privilege (confidential communications between attorneys, solicitors or other admitted legal representatives) under domestic law.[74] Such protection does not attach to documents or records delivered to an attorney, solicitor or other admitted legal representative in an attempt to protect such documents or records from disclosure required by law.[75] Also, information on the identity of a person such as a

69 Paragraph 14.1 of the Commentary on Article 26(3).
70 Paragraph 14.1 of the Commentary on Article 26(3).
71 Paragraph 14.1 of the Commentary on Article 26(3).
72 Paragraph 14.1 of the Commentary on Article 26(3).
73 Paragraph 14.1 of the Commentary on Article 26(3).
74 Paragraph 19.3 of the Commentary on Article 26(3).
75 Paragraph 19.3 of the Commentary on Article 26(3).

director or beneficial owner of a company is typically not protected as a confidential communication.[76]

Contracting states are not required to supply information that would be contrary to public policy (*ordre public*).[77] However, this limitation should only become relevant in extreme cases: for instance, if a tax investigation in the requesting state was motivated by political, racial, or religious persecution.[78]

2.1.6.1.4 Article 26(4) of the OECD Model and the UN Model

Article 26(4) provides that a contracting state cannot decline to supply information solely because it has no domestic interest in such information. Contracting states often use the special examining or investigative powers provided by their laws for the purposes of levying their domestic taxes even though they do not themselves need the information for these purposes.[79]

2.1.6.1.5 Article 26(5) of the OECD Model and the UN Model

Article 26(5) provides that the request for information is mandatory. The article thus ensures that the limitation in Article 26(3) cannot be used to prevent the exchange of information held by banks and other financial institutions.[80] Consequently, Article 26(5) overrides Article 26(3) if it permits a requested state to decline to supply information on the grounds of bank secrecy.[81]

Therefore, Article 26(5) makes it mandatory to exchange information held by banks, other financial institutions, nominees, agents and fiduciaries as well as ownership information.[82]

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76 Paragraph 19.3 of the Commentary on Article 26(3).
77 Paragraph 19.5 of the Commentary on Article 26(3).
78 Paragraph 19.5 of the Commentary on Article 26(3).
79 Paragraph 19.6 of the Commentary on Article 26(3).
80 Oguttu *International Tax Law* 607.
81 Oguttu *International Tax Law* 607.
82 Paragraph 19.10 of the Commentary on Article 26(3).

2.1.6.2 The practical application of the exchange of taxpayer information through bilateral tax treaties in South Africa

South Africa has signed double tax agreements with a number of countries that contain an article on the exchange of information in tax matters. Matters pertaining to the exchange of information in international matters were, for example, dealt with in the case of *Commissioner, South African Revenue Service v Van Kets*, which arose in the context of the Double Tax Treaty between South Africa and Australia.[83]

SARS received a request from the Australian Tax Office ("ATO") for the exchange of information relating to Mr Saville, an Australian resident. The request was made pursuant to Article 25 on exchange of information of the tax treaty between South Africa and Australia. Mr Saville was under investigation in Australia regarding his income tax affairs and in particular his possible offshore wealth and his involvement with a Labuan (Malaysian) entity known as Republic Life Common Fund Ltd.

The respondent was a resident of South Africa who was in possession of the information required by the ATO. The respondent refused to release the information to SARS, claiming that it was confidential and that he was not so authorised to disclose it. SARS sought a court order declaring that the repealed sections 74A and 74B of the ITA might be invoked for the purpose of obtaining information from the respondent and any other person in South Africa, and so that SARS might comply with its obligations under a tax treaty which contained a provision for the exchange of information.

Two issues arose. The first was whether the provisions of Article 25 of the Double Tax Treaty between South Africa and Australia could be enforced in terms of South African law.[84] The second was whether the words "any taxpayer" used in sections 74A and 74B of the ITA could be interpreted to include a person who was not a taxpayer in South Africa as defined in section 1, but who, in terms of Article 25(1) of

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83 2012 3 SA 399 (WCC).

84 *Commissioner, South African Revenue Service v Van Kets* para 19.

the tax treaty, had been identified as the person who could provide the information pursuant to the request which in this case had been initiated by the ATO.[85]

The High Court granted the application and declared that the term "taxpayer" as contained in sections 74A and 74B of the ITA must be interpreted to be consistent with South Africa's obligations under any double tax agreements for the provision of information or any treaty concluded for the exchange of information.[86]

The court also declared that South African residents are bound by the provisions of the agreement concluded between South Africa and Australia.[87] The court consequently ordered the respondent to disclose the relevant information to the applicant for onward transmission to the Australian tax authorities.[88]

2.1.6.3 The exchange of taxpayer information through Tax Information Exchange Agreements

Tax Information Exchange Agreements ("TIEAs") were developed by the OECD to provide a forum to exchange information even where a double tax treaty is not in place.[89] Few tax havens sign double tax treaties, because most of them do not levy tax on income. So a TIEA may be used to ensure exchange of information between a contracting state and a tax haven.

The provisions for the Model for TIEAs resemble those of Article 26 of the OECD Model. Like the OECD Model and UN Model, the Model TIEA is not a binding instrument.[90] The legal instrument is the treaty itself that is signed by the contracting countries for negotiating bilateral agreements and the other countries for negotiating multilateral agreements.[91]

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85 *Commissioner, South African Revenue Service v Van Kets* para 5.
86 *Commissioner, South African Revenue Service v Van Kets* para 31.
87 *Commissioner, South African Revenue Service v Van Kets* para 31.
88 *Commissioner, South African Revenue Service v Van Kets* para 31.
89 Oguttu *International Tax Law* 613.
90 Oguttu *International Tax Law* 614.
91 Oguttu *International Tax Law* 614.

South Africa's calls to tax havens to sign agreements were ignored for many years.[92] However, tax havens became willing to sign the TIEAs with other countries because of pressure from world leaders. As a result, a number of tax havens who wanted to change their financial regulations became willing to engage and sign TIEAs with South Africa.[93]

Since 2010, South Africa has signed TIEAs with many countries, including the Bahamas, the Cayman Islands, Guernsey, Jersey, and San Marino.[94] These agreements also oblige South Africa to co-operate by providing information to the relevant countries about their residents.

This work is not intended to devote detailed discussion to the articles of TIEAs. Suffice it to note that, as is the case with Article 26 of the OECD and UN Models, so the standard for exchange information in the TIEAs is also "upon request", and countries may also exchange information that is foreseeably relevant. However, Article 5 of the Model for TIEAs is limited to providing the exchange of information upon request. This means that automatic or spontaneous exchange of information is not covered by the Model for TIEAs.

2.1.6.4 Regional agreements that permit information exchange

It should also be noted that the OECD standards on the exchange of information in tax matters have also been incorporated in various other regional treaties. For example, the Southern African Development Community ("SADC"), of which South Africa is a member, promulgated the SADC Model Tax Agreement for the Avoidance of Double Taxation ("SADC Model Tax Agreement") in 2009.

This agreement is now used by all SADC countries in the negotiations of their tax treaties amongst themselves and with other countries outside the African region.[95]

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92 Oguttu *International Tax Law* 627.
93 Oguttu *International Tax Law* 627.
94 OECD "Tax Information Exchange Agreements (TIEAs)" https://www.oecd.org/tax/exchange-of-tax-information/taxinformationexchangeagreementstieas.htm (Date of use: 25 April 2018).
95 Oguttu *International Tax Law* 631.

Article 26 of the SADC Model Tax Agreement is similar to Article 26 of the OECD Model.

The African Tax Administration Forum ("ATAF")[96] also promotes and facilitates mutual co-operation among African tax administrators through the African Agreement on Mutual Assistance in Tax Matters.[97] Article 26 of the ATAF Model Tax Agreement deals with the exchange of information. It is also a carbon copy of Article 26 of the OECD Model. South Africa is the host and a member of ATAF.[98]

2.1.6.5 The exchange of taxpayer information through the OECD Multilateral Convention on Mutual Assistance in Tax Matters

The OECD noted that, over the years, the exchange of information using bilateral tax treaties was gradually overtaken by the Multilateral Convention on Mutual Assistance in Tax Matters ("the Convention").[99] The Convention was initially available to OECD members, and later it was extended to developing countries which wanted to take advantage of the exchange of information resources. The Convention overlaps with and is similar to the OECD Model and the TIEAs.[100] South Africa signed the Convention on 3 November 2011.[101]

Once again, this work is not intended to discuss all the Articles of this Convention; suffice it to note that the standard for exchanging information in the Convention is also with respect to information that is foreseeably relevant, "upon request", or by automatic exchange and spontaneous exchange of information.

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96 African Tax Administration Forum (ATAF) "ATAF Flagship Publication - AFRICAN TAX OUTLOOK (ATO)" https://www.ataftax.org/african-tax-outlook (Date of use: 9 March 2019). The ATAF serves as an African network that aims at improving tax systems in Africa through exchanges, knowledge dissemination, capacity development and active contribution to the regional and global tax agenda. Improved tax systems will increase the accountability of the state to its citizens, enhance domestic resource mobilisation and thereby foster inclusive economic growth.

97 Oguttu *International Tax Law* 632.

98 African Tax Administration Forum (ATAF) "ATAF Flagship Publication - AFRICAN TAX OUTLOOK (ATO)" https://www.ataftax.org/african-tax-outlook (Date of use: 9 March 2019).

99 Oguttu *International Tax Law* 628. See OECD/Council of Europe *The Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol* (OECD Publishing Paris 2011) https://doi.org/10.1787/9789264115606-en (Date of use: 26 April 2020).

100 Stewart 2012 *WTJ* 164.

101 Croome 2012 *Without Prejudice* 23.

2.1.6.6 Concerns about the standard of information exchange in model treaties and the OECD's development of the Common Reporting Standard

The standard of the exchange of information upon request in double tax treaties and TIEAs has been criticised by Johannesen and Zucman,[102] who argue that to place a request for information after a country has obtained all the specific information about the taxpayer is extremely difficult, and that the volume of information that can be obtained is limited.[103]

Exchange of information upon request is not an effective deterrent to tax evasion, because national taxing procedures have to be adhered to before the information may be requested.[104] This type of exchange of information sets the bar very low and should play a supporting role to other methods, such as spontaneous and automatic exchange of information.[105]

Because of the weaknesses of the "upon request standard", the United States of America ("USA") formulated its Foreign Account Tax Compliance Act ("FATCA"),[106] much of which came into force on 18 March 2010. The FATCA deals with tax reporting of assets held in foreign bank accounts, and it requires foreign financial institutions to report directly to the USA Internal Revenue Service ("IRS") information about financial accounts held by US taxpayers or held by foreign entities in which US taxpayers hold a substantial ownership interest.[107]

This means, for example, that the Standard Bank of South Africa must be able to disclose the information about US taxpayers who have accounts with the bank in South Africa. If these financial institutions fail to comply with the FATCA, a withholding tax of 30 per cent becomes payable on any "withhholdable payment"

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102 Johannesen and Zucman 2014 *Am Econ J* 65–91.
103 Johannesen and Zucman 2014 *Am Econ J* 65–91.
104 Johannesen and Zucman 2014 *Am Econ J* 65–91.
105 Johannesen and Zucman 2014 *Am Econ J* 65–91.
106 Foreign Account Tax Compliance Act 2010.
107 Oguttu *International Tax Law* 641.

made to the accounts of these financial institutions. The South African government has an inter-governmental agreement with the USA in terms of the FATCA.[108]

Following the lead of the USA, in 2014 the OECD developed a new standard for the exchange of information for financial accounts which is referred to as the "Common Reporting Standard" ("CRS"). The CRS was developed in response to the Group of Twenty ("G20") request and approved by the OECD Council on 15 July 2014.[109]

The CRS duty is to call on jurisdictions to obtain information from their financial institutions and automatically exchange that information with other jurisdictions on an annual basis. The CRS sets out the financial account information to be exchanged, the financial institutions required to report, the different types of accounts and taxpayers covered, as well as common due diligence procedures to be followed by financial institutions.[110]

In line with the OECD recommendations, South Africa enacted legislation regarding CRS. In 2015, section 1 of the TAA was amended to provide for a definition of an "international agreement". The latter refers to an agreement entered into with the government of another country in accordance with the tax Act, or any other agreement entered into between the competent authority of South Africa and the competent authority of another country relating to the automatic exchange of information under such agreement.

An "international tax standard" is also defined in section 1 of the TAA to include the OECD Standard for Automatic Exchange of Financial Account Information in Tax

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108 An intergovernmental agreement ("IGA") to improve international tax compliance and to implement the US Foreign Account Tax Compliance Act ("FATCA") was signed by the South African Minister of Finance, Mr Nhlanhla Nene, and the US Ambassador to South Africa, Mr Patrick H Gaspard, on 9 June 2014 (SARS "Update on Implementation of FATCA in South Africa" 26 March 2015, https://www.sars.gov.za/Media/MediaReleases/Pages/26-March-2015---Update-on-implementation-of-FATCA-in-South-Africa.aspx (Date of use: 3 August 2020).

109 OECD Global Forum on Transparency and Exchange of Information for Tax Purposes "Common Reporting Standard (CRS)" http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/ (Date of use: 9 May 2018).

110 OECD Global Forum on Transparency and Exchange of Information for Tax Purposes "Common Reporting Standard (CRS)" http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/ (Date of use: 9 May 2018).

Matters and any other international standard for the exchange of tax-related information between countries specified by the Minister.

2.1.6.7 OECD BEPS Action 13: Country-by-Country Reporting as a means to assist in the exchange of taxpayer information internationally

Even though the OECD developed the CRS, which provides for the automatic exchange of taxpayer information in tax matters that has been legislated in countries such as South Africa, taxpayers, particularly multinational enterprises ("MNEs"), have continued to avoid taxes in the countries in which they do business.

As countries face increasing challenges in preventing the resultant tax avoidance, the G20 commissioned the OECD to develop measures to prevent Base Erosion and Profits Shifting ("BEPS").[111] BEPS refers to instances where the interaction of different tax rules leads to double non-taxation or less than single taxation.[112] BEPS also relates to arrangements that achieve no or low taxation by shifting profits away from the jurisdictions where the activities creating those profits take place.[113]

No or low taxation is not *per se* a cause for concern, but it becomes one when it is associated with practices that artificially segregate taxable income from the activities that generate it.[114] The OECD notes that BEPS is encouraged by the fact that there are gaps in and frictions amongst different countries' tax systems that were not taken into account in designing the existing international tax laws. The global economy requires countries to collaborate on tax matters to be able to protect their tax sovereignty.

The OECD thus developed an Action Plan on BEPS[115] largely for the following reasons: governments cannot cope with less tax and a higher cost to ensure compliance. Moreover, BEPS undermines the integrity of the tax system[116] because

111 OECD *Action Plan on Base Erosion and Profit Shifting.* The Action Plan was endorsed by the G20 leaders at the Russia G20 Summit on 6 September 2013.
112 OECD *Action Plan on Base Erosion and Profit Shifting* 10.
113 OECD *Action Plan on Base Erosion and Profit Shifting* 10.
114 OECD *Action Plan on Base Erosion and Profit Shifting* 10.
115 OECD *Action Plan on Base Erosion and Profit Shifting* 10.
116 OECD *Action Plan on Base Erosion and Profit Shifting* 8.

the public, the media and some taxpayers deem reported low corporate taxes to be unfair.[117] Individual taxpayers are the most affected because tax rules permit businesses to reduce their tax burden by shifting their income away from jurisdictions where income-producing activities are conducted.[118]

A further reason for the development of an Action Plan on BEPS is that fair competition is harmed by the distortions induced by BEPS.[119] What creates tax policy concerns are gaps in the interaction of different tax systems, and in some cases because of the application of bilateral tax treaties, income from cross-border activities may go untaxed anywhere, or be taxed unduly lowly.[120]

The OECD Action Plan is therefore focused on addressing BEPS. While actions to address BEPS will restore both residence[121] and source[122] taxation in a number of cases where cross-border income would otherwise go untaxed or would be taxed at very low rates, these actions are not directly aimed at changing the existing international standards on the allocation of taxing rights on cross-border income.[123]

Under Action 13 of the OECD Action Plan, countries are required to develop legislation on CbCR which requires MNEs to file notifications of their CbCR.[124] Countries are required to adopt a three-tiered standardised approach to transfer

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117 OECD *Action Plan on Base Erosion and Profit Shifting* 8.

118 OECD *Action Plan on Base Erosion and Profit Shifting* 8.

119 OECD *Action Plan on Base Erosion and Profit Shifting* 8.

120 OECD *Action Plan on Base Erosion and Profit Shifting* 8.

121 The concept of residence is fundamental to the residence-based system of taxation. This means that residents are taxed on their worldwide income. In this case, the person's residence is a prerequisite for calculating his taxable income (Stiglingh *Silke: South African Income Tax 2017* 60).

122 Non-residents are taxed only on receipts from sources within a particular country that uses the resident-based system of taxation (Stiglingh *Silke: South African Income Tax 2017* 72).

123 OECD *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report* 13. The Report states that addressing Base Erosion and Profit Shifting ("BEPS") is a key priority of governments. In 2013, the Organisation of Economic Co-operation and Development ("OECD") and the G20 countries, working together on an equal footing, adopted a 15-point Action Plan to address BEPS. This publication is the final report for Action 13.

124 OECD *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report* 13.

pricing[125] documentation, which comprises a master file,[126] a local file[127] and a CbCR.[128]

Under the BEPS Action Plan, the OECD called for further steps towards increasing tax transparency through the implementation package on Country-by-Country Reporting ("CbCR") in Action 13 of the BEPS project, published on 8 June 2015.[129] This innovation provides that tax authorities must automatically exchange MNEs' key indicators (such as profits, taxes paid, employees and assets of each entity) with each other, thus allowing tax authorities to make risk assessments so as to prevent transfer pricing arrangements and BEPS-related risks, which may then serve as a basis for initiating a tax audit.[130]

To protect taxpayers' right to privacy, countries should ensure that CbCR is kept confidential and used appropriately. This requires that countries should have the following:[131]

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125 Transfer pricing refers to the process through which connected persons set the prices at which they transfer goods or services between them (Stiglingh *Silke: South African Income Tax 2019* 847). Taxpayers may use artificial pricing of transactions between related persons to achieve certain tax benefits. In this case, taxable benefits are shifted from a high tax jurisdiction to a lower tax jurisdiction by pricing transactions differently to how they would have priced between independent persons. Transfer pricing rules aim to ensure that the tax implications of international transactions are based on arm's length principles in order to avoid opportunities to shift profits through artificial pricing.

126 SARS "Country-by-Country ("CbC") Financial Data Reporting" https://www.sars.gov.za/TaxTypes/CIT/Pages/Country-by-Country.aspx (Date of use: 22 May 2018). It provides that the master file is generally compiled by a parent or headquartered entity but is available to and may be obtained from all MNE entities. In general, the master file is intended to provide a high-level overview, in order to place the MNE's transfer pricing practices in their global economic, legal, financial and tax context.

127 SARS "Country-by-Country ("CbC") Financial Data Reporting" https://www.sars.gov.za/TaxTypes/CIT/Pages/Country-by-Country.aspx (Date of use: 22 May 2018). It provides that the local file focuses on information relevant to the transfer pricing analysis related to transactions taking place between a local country affiliate and associated enterprises in different countries and which is material in the context of the local country's tax system.

128 SARS "Country-by-Country ("CbC") Financial Data Reporting" https://www.sars.gov.za/TaxTypes/CIT/Pages/Country-by-Country.aspx (Date of use: 22 May 2018).

129 OECD Global Forum on Transparency and Exchange of Information for Tax Purposes "Common Reporting Standard ("CRS")" http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/ (Date of use: 9 May 2018).

130 OECD Global Forum on Transparency and Exchange of Information for Tax Purposes "About Automatic Exchange" http://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/ (Date of use: 9 May 2018).

131 OECD *BEPS Action 13 on Country-by-Country Reporting – Peer Review Documents* (OECD Paris 2017) 15, www.oecd.org › tax › beps-action-13-on-country-by-country-reporting-peer-review-documents.pdf (Date of use: 27 April 2020).

- countries should enter into the international exchange of information agreements which provide for information received to be treated as confidential;
- countries should have domestic rules or procedures to give effect to the restrictions contained in the agreement;
- countries should have in place and enforce legal protections of the confidentiality of the information contained in CbCR;
- countries should have effective penalties for unauthorised disclosures or unauthorised use of confidential information;
- countries should ensure confidentiality in practice, for instance, by putting in place a review and supervision mechanism to identify and resolve any breach of confidentiality.[132]

As a result, in order for countries to obtain these reports, they must not only have enacted domestic legislation to enable this acquisition but also have signed international instruments, such as double tax treaties, TIEAs or the OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters, as discussed above.[133]

In compliance with the OECD recommendations, South Africa has enacted a domestic legal framework that enables SARS to receive and, where relevant, exchange pertinent transfer pricing information provided in the CbCR and/or master files and local files with other jurisdictions.

The TAA was amended during 2015 in order to implement CbCR in South Africa. This amendment included not only a definition of an “international tax standard” in section 1 but also the CbCR Standard for Multinational Enterprises specified by the Minister of Finance, subject to such changes as specified by the Minister in regulations issued under section 257 of the TAA.

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132 OECD *BEPS Action 13 on Country-by-Country Reporting – Peer Review Documents* 15.

133 OECD *Transfer Pricing Documentation and Country-by-Country Reporting Action* 13.

The South African Minister of Finance applauded the importance of CbCR in his 2017 Budget Speech.[134] Domestic law dealing with CbCR is found in the appropriate *Government Gazette* ("the *Gazette*").[135] The relevant preamble to the *Gazette* provides that South Africa has agreed to participate in the joint Base Erosion and Profit Shifting Action Project of the G20 and the OECD.

The *Gazette* contains Regulations regarding CbCR by MNEs Groups having total consolidated group revenue of less than R10 billion (€750 million) beginning on or after 1 January 2016.[136] Each MNE that earns above the threshold and that is resident for tax purposes in South Africa, must file a CbCR with SARS.[137]

Any Constituent Entity of an MNE Group that is resident for tax purposes in South Africa must notify SARS if it is the Ultimate Parent Entity or the Surrogate Parent Entity, no later than 12 months after the last day of the Reporting Fiscal Year of such MNE Group.[138]

The Country-by-Country and Financial Data Reporting[139] document represents a response by SARS to the call by the Action 13 (2015) Final Report. The CbCR must be tabled no later than 12 months after the last day of the Reporting Fiscal Year of the MNE Group.[140] SARS must only use the information in CbCR for the purposes of assessing high-level transfer pricing risks and other base erosion and profit shifting-related risks in South Africa, which will inform case selection and audit.[141]

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134 The Minister of Finance, Pravin Gordhan, in his 2017 Budget Speech delivered on 22 February 2017 stated that the automatic exchange of information between tax authorities would come into operation in September 2017. Multinational companies would be required to file further information with SARS on cross-border activities from the end of the year. South Africa would continue to work actively with the international tax community and within government to modernise customs administration and combat cross-border revenue leakages, money laundering and harmful tax practices.

135 SARS GN No R. 1598 *Government Gazette* 40516 of 23 December 2016.

136 Article 1 para 3 and Article 7 of the *Government Gazette* 40516.

137 Article 2 of the *Government Gazette* 40516.

138 Article 3 of the *Government Gazette* 40516.

139 SARS "Country-by-Country ("CbC") Financial Data Reporting" https://www.sars.gov.za/TaxTypes/CIT/Pages/Country-by-Country.aspx (Date of use: 22 May 2018).

140 Article 5 of the *Gazette* 40516.

141 Article 6 of the *Gazette* 40516.

CbCR will also help to assess the risk of non-compliance by members of the MNE Group that apply transfer pricing rules, and for economic and statistical analysis.[142]

On 11 May 2018, SARS published a Government Notice imposing financial penalties for the non-submission of a CbCR, master file and local file returns.[143] Section 210 of the TAA provides that such non-submission is regarded as non-compliance that is subject to a fixed amount penalty in accordance with section 211 of the TAA.[144] Depending on the taxable income of the entity in question (as well as various other circumstances), the administrative non-compliance penalty ranges from R250 to R16 000 per month.[145]

2.1.7 Gathering taxpayer information through the Voluntary Disclosure Programme

The Commissioner may also gather information about taxpayers through the South African Voluntary Disclosure Programme ("VDP") as set out in Chapter 16 Part B (sections 225 to 233) of the TAA. The VDP invites taxpayers to come forward voluntarily and disclose their tax liabilities that were previously not declared to SARS. This programme provides a tax relief for unpaid outstanding tax debt that could have led to penalties, administration charges, criminal prosecution and imminent imprisonment at the instance of the tax authorities.

The decision to implement a VDP in South Africa was taken in order to align the country with the best practices of most of the developed and developing countries. This choice of voluntary disclosure is always preferred as a form of tax collection, as opposed to costly enforcement methods such as audits, litigation and criminal proceedings.[146]

The VDP was implemented by SARS using a phased approach. It started with a special programme called VDP One, which was implemented over a period of 12 months from 7 November 2010. This special programme was followed by VDP Two,

142 Article 6 of the *Gazette* 40516.
143 SARS GN 597 *Government Gazette* 38983 of 10 July 2015.
144 SARS GN 597 *Government Gazette* 38983 of 10 July 2015.
145 SARS GN 597 *Government Gazette* 38983 of 10 July 2015.
146 Maluleke *Voluntary Compliance* (iii).

through which voluntary disclosure was integrated into South Africa's general law and tax administration practice and culture.[147]

To manage the VDP, SARS established the Voluntary Disclosure Unit ("VDU") located within the Legal and Policy Division of SARS. The mandate of the VDU is to manage the implementation of the VDP in totality. Sections 225 to 233 of the TAA define the principles of VDP Two in detail in terms of what constitutes voluntary disclosure, and the processes to be followed by taxpayers applying for voluntary disclosure relief under this Act.

Section 226 of the TAA defines who qualifies for voluntary disclosure relief in terms of the TAA. The section also describes the conditions under which such an applicant is deemed to be qualified to apply for voluntary disclosure relief under the TAA. A person may apply for VDP relief in a personal capacity or may use a representative or a third party to manage the application process.

Section 226 of the TAA also defines the conditions under which such an application may be made. Where there is an audit or investigation pending against him, which is about the relief which the person is applying for, then the application may not be deemed valid.

Section 226 further stipulates that the applicant is allowed to apply for VDP unless he is aware of an audit or investigation that has commenced but has not yet been finalised, where such an audit or investigation is related to the default which the applicant seeks to disclose.

Voluntary disclosure relief is defined in section 229 of the TAA. SARS is not to pursue criminal prosecution for a statutory offence under this Act. According to this section, SARS may grant the relief in respect of any understatement penalty based on the merit of the case.[148] SARS may grant 100 per cent relief in respect of an

147 Maluleke *Voluntary Compliance* (iii).
148 Maluleke *Voluntary Compliance* (iii).

administrative non-compliance penalty that was or may be imposed under Chapter 15 of the TAA.[149]

The main reason for implementing the VDP was to provide ongoing continuity and a permanent opportunity that can be used at any time by tax evaders to have their tax affairs regularised, thus ensuring that voluntary disclosure in the long term is used to improve tax compliance levels.[150]

The VDP is in line with the recommendations of the OECD.[151] According to the OECD, voluntary disclosure should form part of a country's general law and administration practice because it provides an ongoing opportunity for non-compliant taxpayers to apply for voluntary relief.[152] The OECD recommended that tax authorities should use the opportunity brought about by a profound increase in transparency and information exchange in the international tax environment to fight money laundering and tax evasion through the implementation of voluntary disclosure programmes.[153]

Countries are encouraged to implement voluntary compliance strategies to raise taxes in the short term and increase tax compliance levels in the long term. To ensure that a successful voluntary disclosure programme is implemented, the tax authorities are advised to be clear about the aims and the terms of what the programme should achieve both in the short term and in the long term.

In short, the voluntary compliance programme can be used to augment tax collection and increase the tax base and the levels of tax compliance, as observed from the South African Voluntary Disclosure Programme.[154] It is noteworthy that section 69 of the TAA provides for the secrecy of taxpayer information and general disclosure. In general, therefore, SARS is not allowed to reveal taxpayers' information, but this may be revealed in certain circumstances.[155]

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149 Maluleke *Voluntary Compliance* (iii).
150 Maluleke *Voluntary Compliance* (iii).
151 OECD *Offshore Voluntary Disclosure.*
152 OECD *Offshore Voluntary Disclosure.*
153 OECD *Offshore Voluntary Disclosure.*
154 Maluleke *Voluntary Compliance* (iii).
155 Section 69(2)(b) of the TAA.

In terms of the VDP, the taxpayer provides the information voluntarily, but the legislation imposes legislative obligations on the Commissioner to ensure the protection of taxpayers' rights. Chapter 6, sections 67 to 69 of the TAA provide for the confidentiality of and secrecy regarding the disclosure of the taxpayer information.

To protect the taxpayers' right to privacy, the Commissioner is generally not allowed to reveal taxpayers' information. However, the information may be revealed in certain circumstances.[156] The Constitution in section 14 also guarantees the right to privacy.

2.1.8 Gathering taxpayer information in terms of the Reportable Arrangements rules

Information relating to the taxpayer may also be gathered in terms of the Reportable Arrangements rules set out in sections 34 to 39 of Chapter 4 Part B of the TAA. Section 35(1) of the TAA provides for an "arrangement" as a reportable arrangement if it is listed or if a "tax benefit" is or will be derived or is assumed to be derived by any "participant".

Section 36 of the TAA provides for those arrangements which are excluded, such as a loan, a lease, or exchange regulations in terms of the Securities Services Act.[157] Section 37(1) of the TAA provides that the "promoter"[158] and other participants must disclose the information in respect of a reportable arrangement.

Section 38 provides for the type of information to be submitted or reported. The Commissioner receives all the information relating to the taxpayer.

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156 Section 69(2)(b) of the TAA.

157 Act 36 of 2004.

158 Section 34 of the TAA defines a "promoter" as follows: a promoter, in relation to an 'arrangement', means a person who is principally responsible for organising, designing, selling, financing or managing the reportable arrangement.

2.2 HOW THE COMMISSIONER'S INFORMATION GATHERING POWERS MAY IMPACT ON TAXPAYERS' CONSTITUTIONAL RIGHTS

The BOR in the Constitution protects certain rights of South African taxpayers against violation, and it constitutes the most important check on or restriction of the possible abuse of public or administrative power.[159] Importantly, the Constitution in section 34 provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or another independent and impartial tribunal or forum.

This means that taxpayers may approach courts or independent forums for appropriate relief if their rights have been infringed by the provisions of the tax legislation that deal with the Commissioner's information gathering powers.

When the TAA was enacted in 2012, it was, *inter alia*, intended to remedy the infringement of taxpayers' rights by the Commissioner's powers. However, it is argued in this work that this Act has actually exacerbated the problem. Now follows a discussion of the rights that may be infringed by the Commissioner when exercising his information gathering powers.

2.2.1 The Commissioner's power to gather information from taxpayers' records and books or from third parties may contravene taxpayers' rights to privacy

A taxpayer's right to privacy may be contravened by section 46(2) of the TAA, which provides that the Commissioner has the power to request information from a taxpayer or a class of taxpayers. In addition to the fact that the Commissioner's request for information may infringe the taxpayer's right to privacy, contraventions may also arise when the information is obtained by the Commissioner under compulsion.

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159 Section 7 of the Constitution provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights. Section 8 of the Constitution prescribes that the Bill of Rights applies to all law, legislation, case law, common law and customary law. Below are some of the Constitutional rights that are contravened by the Commissioner.

In *Commissioner for the South African Revenue Services v Brown*,[160] the Commissioner launched semi-urgent proceedings for an order, *inter alia*, directing the respondent to comply with section 46(4) of the TAA. The order required the respondent to submit his response to a lifestyle questionnaire served on him.[161] The respondent was not a registered taxpayer, nor had he ever submitted any tax returns. The respondent opposed the application and argued that he had shown just cause for his refusal to respond to the questionnaire.[162]

The court (*per* Smith J) held:

> I am accordingly of the view that the applicant has established all the requisite jurisdictional facts mentioned in section 46. The respondent's contention that the issuing of the questionnaire was a 'fishing expedition' is thus untenable. The questionnaire was issued against the background of information to the effect that there may have been non-disclosure of relevant information by the respondent, coupled with the fact that he did not register as a taxpayer or submit tax returns. In my view these factors constituted a sound basis for the issuing of the questionnaire and cannot by any stretch of the imagination be regarded as 'a fishing expedition'.

From the quotation above it is clear that the court held that SARS is entitled to litigate in order to enforce the production of information requested from the taxpayer if the provisions of section 46 of the TAA have been complied with.

2.2.1.1 The constitutional right to privacy

Section 14 of the Constitution guarantees the right to privacy. In addition, Chapter 6 of the TAA (sections 67 to 74) and the Protection of Personal Information Act ("POPI Act")[163] protect taxpayers' rights to privacy.

2.2.1.2 Chapter 6 of the Tax Administration Act ("TAA")

Chapter 6 of the TAA (sections 67 to 74) deals with the confidentiality information.[164] Section 67 of the TAA provides for a general prohibition of disclosure by SARS of

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160 (561/2016) [2016] ZAECPEHC 17 (5 May 2016).

161 *Commissioner for the South African Revenue Services v Brown* para 1.

162 *Commissioner for the South African Revenue Services v Brown* para 3.

163 Act 4 of 2013.

164 Section 68(1) of the TAA provides that SARS confidential information means information relevant to the administration of a tax Act that is–

confidential information and taxpayer information.[165] Section 67(3) provides that where there is a disclosure of SARS confidential information or taxpayer information contrary to Chapter 6, the person to whom it was so disclosed may not in any manner disclose, publish or make it known to any other person who is not a SARS official.

Section 67(4) provides that a person who receives information must preserve the secrecy of the information and may only disclose the information to another person if the disclosure is necessary to perform the functions specified in the listed sections.

However, section 67(5) provides that the Commissioner may disclose taxpayer information in order to protect the integrity and reputation of SARS and also to counter or rebut false allegations or information disclosed by the taxpayer.

Section 68(2)(a) to (c) of the TAA provides that a person who is a current or former SARS official may not disclose SARS confidential information to a person who is not a SARS official. Section 68(3)(a) to (e) provides that a person who is a SARS official or former SARS official may disclose SARS confidential information if

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(a) personal information about a current or former SARS official, whether deceased or not;
(b) information subject to legal professional privilege vested in SARS;
(c) information that was supplied in confidence by a third party to SARS the disclosure of which could reasonably be expected to prejudice the future supply of similar information, or information from the same source;
(d) information related to investigations and prosecutions described in section 39 of the Promotion of Access to Information Act;
(e) information related to the operations of SARS, including an opinion, advice, report, recommendation or an account of a consultation, discussion or deliberation that has occurred;
(f) information about research being or to be carried out by or on behalf of SARS, the disclosure of which would be likely to prejudice the outcome of the research;
(g) information, the disclosure of which could reasonably be expected to prejudice the economic interests or financial welfare of the Republic or the ability of the government to manage the economy of the Republic effectively in the best interests of the Republic, including a contemplated change or decision to change a tax or a duty, levy, penalty, interest and similar moneys imposed under a tax Act or the Customs and Excise Act;
(h) information supplied in confidence by or on behalf of another state or an international organisation to SARS;
(i) a computer program, as defined in section 1(1) of the Copyright Act, 1978 (Act No. 98 of 1978), owned by SARS; and
(j) information relating to the security of SARS buildings, property, structures or systems.

165 Section 67(1): This Chapter applies to–
(a) SARS confidential information as referred to in section 68(1); and
(b) taxpayer information, which means any information provided by a taxpayer or obtained by SARS in respect of the taxpayer, including biometric information.

- the information is public information;
- the disclosure is authorised by the Commissioner;
- the disclosure is authorised under any other Act which expressly provides for the disclosure of the information despite the provisions in this Chapter of the TAA;
- access has been granted for the disclosure of the information in terms of the Promotion of Access to Information Act ("PAIA");[166] or
- the disclosure is required by order of a High Court.

Section 69 provides for the preservation of the secrecy of the taxpayer information by a person who is a current or former SARS official. The section provides that such an official must not disclose SARS confidential information to a person who is not a SARS official. The use of the word "must" in section 69 shows that the section is peremptory.

Section 70 of the TAA provides that a senior SARS official may provide to the Director-General of the National Treasury taxpayer information or SARS confidential information relating to the taxpayer and a class of persons. In a nutshell, the senior SARS official may disclose taxpayer information to other entities such as the Statistician-General and a Commission of Enquiry, just to mention the two.

Section 71 of the TAA provides that a judge may order a senior SARS official to disclose the taxpayer information to the South African Police Service and the National Director of Public Prosecutions.

In summary, the confidentiality rules apply not only to "taxpayer information" but also to "SARS confidential information".

2.2.1.3 The Protection of Personal Information Act ("POPI Act")

The POPI Act protects personal information processed by public and private bodies. Its preamble reads:

166 Act 2 of 2000.

> To promote the protection of personal information processed by public and private bodies; to introduce certain conditions so as to establish minimum requirements for the processing of personal information; to provide for the establishment of an Information Regulator to exercise certain powers and to perform certain duties and functions in terms of this Act and the Promotion of Access to Information Act, 2000; to provide for the issuing of codes of conduct; to provide for the rights of persons regarding unsolicited electronic communications and automated decision making; to regulate the flow of personal information across the borders of the Republic; and to provide for matters connected therewith.

This preamble then acknowledges the right to privacy entrenched in section 14 of the Constitution. The preamble goes on to acknowledge that, consistent with the constitutional values of democracy and openness, the need for economic and social progress, within the framework of the information society, requires the removal of unnecessary impediments to the free flow of information, including personal information.

Section 2(a) to (d) of the POPI Act provides, *inter alia*, that the purpose of this Act is to give effect to the constitutional right to privacy, by safeguarding personal information when processed by a responsible party, subject to justifiable limitations that are aimed at balancing the right to privacy against other rights, particularly the right of access to information, and protecting important interests, including the free flow of information within the Republic and across international borders.

Section 4(1)(a) to (h) of the POPI Act sets the conditions for the lawful processing of personal information. Section 5 of the POPI Act provides, *inter alia*, that a data subject[167] has the right to have his, her or its personal information processed in accordance with the conditions for the lawful processing of personal information as referred to, including the right to be notified that personal information about him, her or it is being collected as provided for in terms of section 18; or his, her or its personal information has been accessed or acquired by an unauthorised person as provided for in terms of section 22.

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167 Section 1 of the POPI Act defines a ‘‘data subject’’ to mean the person to whom personal information relates.

Section 13(1) of the POPI Act provides that personal information must be collected for a specific, explicitly defined and lawful purpose related to a function or activity of the responsible party. Section 14(1) provides that records of personal information must not be retained any longer than is necessary for achieving the purpose for which the information was collected or subsequently processed.

Section 16(1) provides that a responsible party must take reasonably practicable steps to ensure that the personal information is complete, accurate, not misleading and updated where necessary. Subsection (2) provides that the responsible party must have regard to the purpose for which personal information is collected or further processed.

Section 19(1) provides that the responsible party must secure the integrity and confidentiality of personal information in its possession or under its control by taking appropriate, reasonable technical and organisational measures to prevent loss of, damage to or unauthorised destruction of personal information; and unlawful access to or processing of personal information.

Section 19(2) provides that the responsible party must take reasonable measures to protect and minimise the risk of the information being leaked to a third party. Section 19(3) provides that the responsible party must have due regard to generally accepted information security practices and procedures which may apply to it generally or be required in terms of specific industry or professional rules and regulations.

Section 39 provides for the establishment of the Information Regulator. As a juristic person, the Information Regulator is independent and is subject only to the Constitution and accountable to the National Assembly.

From the discussion above it is clear that the POPI Act regulates four aspects:

- the constitutional right to privacy;
- the manner in which personal information may be processed;
- the rights and remedies for persons to protect their personal information from processing that is not in accordance with this Act; and

- voluntary and compulsory measures, including the establishment of an Information Regulator.

Hence the protection of taxpayers' right to privacy is taken care of in the Constitution, Chapter 6 of the TAA and the POPI Act – which rights must be respected by the Commissioner when gathering information about taxpayers.

The Davis Tax Committee ("DTC"), which was launched on 17 July 2013 by the South African Minister of Finance, recommends that, at a minimum, the taxpayer's information should be kept confidential by the tax authority. The disclosure within the tax authority depends on what the information is and the purpose for which it would have been obtained.[168] The DTC further recommends that the tax authority's inquiries, examinations or enforcement actions should not be more intrusive than necessary.[169]

The IBFD's OPTR explains that the right to privacy is a fundamental right. Moreover, because of the massive amounts of information that tax administrations possess on their taxpayers and the sensitive nature of the information so collected, it is a general minimum standard of all tax systems that they take measures to provide such information with protection from any breach or misuse.[170]

The IBFD's OPTR further suggests various practical methods that could be applied to protect the taxpayer's right to privacy.[171] First, the IBFD's OPTR recommends that the encryption of taxpayers' information is key to guaranteeing its confidentiality. This is a best practice to ensure an effective firewall to prevent unauthorised access to data held by tax authorities,[172] and should be applied as a minimum standard to guarantee that only authorised officers will have access to the taxpayers' data.[173]

168 Davis Tax Committee *Tax Administration Report* 68.
169 Davis Tax Committee *Tax Administration Report* 68.
170 IBFD "OPTR" 27.
171 IBFD "OPTR" 27.
172 IBFD "OPTR" 30.
173 IBFD "OPTR" 30.

2.2.2 The Commissioner's power to select a taxpayer for inspection, verification or audit may contravene taxpayers' rights to equality

In terms of section 9 of the Constitution, taxpayers are "equal before the law and [have] the right to equal protection and benefit of the law".[174] Section 9 further provides taxpayers with the right not to be unfairly discriminated against.[175] The right requires that no taxpayer should be preferred over another. There should not be any form of discrimination where, for example, one taxpayer is referred for inspection, verification or audit and not another taxpayer.

Section 40 of the TAA empowers the Commissioner to select a taxpayer "on the basis of any consideration relevant for the proper administration of a tax Act, including on a random or a risk assessment basis". The section may lead to abuse of power where, for example, a SARS official exercises such powers to settle a score against a taxpayer or on the members of a select suspected group without justification.

It is submitted that, in such instances, the word "random" is misplaced because taxpayers who are subjected to inspection, verification or audit are often those with a high income and lavish lifestyles. This practice and these criteria applied by the Commissioner could result in the improper administration of the Act and subsequent discrimination against taxpayers.

As such, random selections of taxpayers for inspection, verification or audit may amount to a discrimination based on freedom of trade in section 22 of the Constitution. The Commissioner in this case discriminates against those who make more money than others: hence the discrimination based on the taxpayer's right of freedom of trade in section 22 of the Constitution. Everyone enjoys this right, but when the right advantages others, they are subjected to inspection, verification or audit.

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174 Section 9(1) of the Constitution.
175 Section 9(3) of the Constitution.

There appear to be few court cases challenging SARS's selection of a taxpayer for inspection, verification or audit. This dearth may be because taxpayers are not prepared to pay the hefty costs of litigating against SARS's vast powers. Yet the absence of any established legislated obligations for SARS in selecting and conducting audits remains.

In the case of *Carte Blanche Marketing CC and Others v Commissioner for the South African Revenue Service* in the North Gauteng High Court, Pretoria,[176] the applicants brought review proceedings against SARS in which they sought to set aside the "decision" of SARS to audit them in terms of section 40 of the TAA.

The applicants refused to hand over the documents and, instead, they informed SARS that they sought reasons why SARS sought to perform an audit. The applicants alleged that the decision to audit their financial affairs was prompted by improper motives. The third applicant also alleged that she was being targeted for no good reason other than the animosity that existed as a result of other litigation with SARS.

The court noted that notices in terms of sections 40 and 46 of the TAA are normally combined as one notice in an application. The documents sought which formed the subject of the dispute were quite comprehensive and included all the books of account and the financial statements of the applicants going back for a period of five years.

Section 42 of the TAA (on keeping the taxpayer informed) provides in part:

> (1) A SARS official involved in or responsible for an audit under this Chapter must, in the form and in the manner as may be prescribed by the Commissioner by public notice, provide the taxpayer with a notice of commencement of an audit and, thereafter, a report indicating the stage of completion of the audit.
>
> (2) Upon conclusion of the audit or a criminal investigation, and where-
>
> *(a)* the audit or investigation was inconclusive, SARS must inform the taxpayer accordingly within 21 business days; or
>
> *(b)* the audit identified potential adjustments of a material nature, SARS must within 21 business days, or the further period that may be required based on the complexities of the audit, provide the taxpayer with a document containing the outcome of the

[176] (26244/2015) [2017] ZAGPPHC 253 (26 May 2017).

audit, including the grounds for the proposed assessment or decision referred to in section 104 (2).

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

(4) The taxpayer may waive the right to receive the document.

It should also be noted that taxpayers could be left in limbo as to when an audit may be completed by SARS. However, in terms of Government Notice No. 788, a taxpayer is entitled to a status update of the audit within 90 days after commencement of the audit and within 90-day intervals thereafter.[177]

The Government Notice further provides that the report must include a description of the current scope of the audit, the stage of completion of the audit, and relevant material still outstanding from the taxpayer.

The IBFD's OPTR cautions that since tax audits are administrative procedures that produce effects in the taxpayer's legal sphere by assessing either a balance of taxes owed or the fulfilment of the taxpayer's duties, they may adversely affect the taxpayer's rights if such audits are not conducted lawfully and within certain limits.[178]

The IBFD's OPTR recommends that it remains a taxpayer's right to be notified of the initiation of a tax audit. Moreover, the taxpayer should be informed of the tax administration's arguments and have the opportunity to file his defences and evidence during the procedure (the *audi alteram partem* principle).[179]

The taxpayer should also have the right to be assisted by his legal advisors, especially during any relevant audit meeting with the tax administration. Best practices suggest that the tax administration should hold preliminary meetings with taxpayers to allow for the comprehension of the facts under investigation, as well as the possibility of advantageous arrangements that reduce the litigiousness of tax affairs.[180]

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177 GN No. 288 *Government Gazette* 35733 of 1 October 2012.
178 IBFD "OPTR" 38.
179 IBFD "OPTR" 38.
180 IBFD "OPTR" 38.

The IBFD's OPTR provides that legal certainty should allow the taxpayer to request the initiation of a tax audit. Further, the tax administration should be obliged to publish their tax audit guidelines and create a manual of good practices at a global level.[181]

In addition, taxpayers have the right to insist that all administrative procedures should end with the notification of a formal notice of the results of the investigation. This step may allow the possibility of filing reviews and appeals against such notice.[182]

Furthermore, the IBFD's OPTR recommends that no administrative procedure should oblige taxpayers to make a declaration against themselves, and thus the OPTR implies the recognition of the right to remain silent during all tax audits.[183] Compliance with these principles is essential in any administrative procedure, and their violation renders any administrative action null and void.[184]

2.2.3 The Commissioner's power to conduct an inspection, verification or audit may contravene taxpayers' rights to just administrative action

Section 33 of the Constitution provides for the right to just administrative action (which is fully discussed in Chapter 3). Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. This means that the Commissioner's conduct in performing an inspection, verification or audit must be classified as administrative action in order to be lawful, reasonable and procedurally fair.

This right to just administrative action also includes the right to be provided with written reasons when taxpayers' rights have been adversely affected by the action of the Commissioner. The right promotes the quality of original decision-making and the routes for challenging maladministration.

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181 IBFD "OPTR" 38.
182 IBFD "OPTR" 38–39.
183 IBFD "OPTR" 39.
184 IBFD "OPTR" 38.

Failure to meet these requirements results in the rights of the individual such as a taxpayer being infringed by the Commissioner. However, and as stated in the 2020 case of *Carte Blanche Marketing CC and Others v Commissioner for the South African Revenue Service*,[185] a decision to conduct an inspection, verification or audit does not amount to an administrative action.

By selecting a taxpayer for an audit an investigative process is set in motion, nothing more.[186] It can therefore be concluded that section 40 of the TAA which selects a taxpayer for inspection, verification or audit by the Commissioner does not contravene section 33 of the Constitution.

2.2.4 The Commissioner's power to conduct search and seizure on taxpayers' properties may contravene taxpayers' rights to privacy

Section 14 of the Constitution protects individuals' rights to privacy. As explained above, Chapter 6 of the TAA (sections 67 to 74) protects the confidentiality of the information requested and held by the Commissioner.

In *Bernstein and Others v Bester NO and Others*[187] the court held that in South Africa, the common law right to privacy is recognised as an independent personality right which the courts have included within the concept of *dignitas.*[188] Privacy is an individual condition of life characterised by seclusion from the public and publicity.[189] This implies an absence of acquaintance with the individual or his personal affairs in this state[190]

Section 45 of the TAA empowers the Commissioner to enter the premises of the taxpayer without his consent. A senior SARS official authorises an *ex parte*

185 (26244/2015) [2020] ZAGPJHC 202 (31 August 2020).
186 *Carte Blanche Marketing CC and Others v Commissioner for the South African Revenue Service* para 66.
187 1996 2 SA 751 (CC).
188 *Bernstein and Others v Bester NO and Others* para 68.
189 *Bernstein and Others v Bester NO and Others* para 68.
190 *Bernstein and Others v Bester NO and Others* para 68.

application to a judge for a warrant to enter the premises of the taxpayer to search for and seize the relevant material.[191]

Section 63(1) also grants senior SARS officials the power to conduct search and seizure on the premises of the taxpayer without a warrant. This power could be exercised in instances where the delay in obtaining the warrant may jeopardise the search and seizure because the material required may be removed or destroyed. Taxpayers' rights to privacy may, however, be contravened in this case.

Keulder[192] posits that SARS's power to search and seize does not exist in isolation. The taxpayer's constitutional rights to privacy, among others, must be taken into consideration. This right provides that 'every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property.

Where a senior SARS official conducts search and seizure on the premises of the taxpayer without a warrant, taxpayers' right to privacy may be contravened. Where information about relevant material that is seized is subject to legal privilege, this may also contravene taxpayers' right to privacy. It would be an abuse of this power if a senior SARS official relied on it to fight personal battles with taxpayers.

2.2.5 The impact of the exchange of taxpayer information with other countries on taxpayers' rights

Baker[193] opines that through provisions for the exchange of information or assistance in cross-border collection of taxes, tax treaties can give countries a

191 Section 59(1) and (2) of the TAA.
192 Keulder *What's good for the goose is good for the gander* 820.
193 Baker "Improper Use of Tax Treaties, Tax Avoidance and Tax Evasion" Technical Meeting on Tax Treaty Administration and Negotiation, New York on 30–31 May 2013 in United Nations-ITC Papers on Selected Topics in Administration of Tax Treaties for Developing Countries Paper No. 9-A May 2013 https://www.un.org/esa/ffd/wp-content/uploads/2013/05/20130530_Paper9A_Baker.pdf (Date of use: 5 March 2020).

powerful weapon to detect and counter tax avoidance or tax fraud.[194] This is the case even though the exchange of information has serious effects on taxpayers.

The main concern by various taxpayers in the enforcement of exchange of information measures is whether the rights of taxpayers are protected.[195] Taxpayers' rights appear to have been weakened by the exchange of information between countries. It becomes important to determine whether aggrieved taxpayers may be able to seek remedies when their rights have been contravened.

The second concern is that the exchange of tax information under double tax treaties and TIEAs is not subject to taxpayer notification.[196] The taxpayer is not informed when the other country requires information about his tax affairs. This means that the taxpayer's information might be shared with other countries without the taxpayer's being aware of this conduct.

The justification for not applying notification procedures is that, in the particular circumstances of the request, this notification would frustrate the efforts of the requesting state.[197] In other words, the requested state should not prevent or unduly delay the effective exchange of information.

When treaties become part of the domestic law concerned, taxpayers' rights are protected by national laws.[198] However, it is not clear whether these rights are protected when taxpayer information is exchanged across national borders. The discussion below considers the rights that may be infringed when the Commissioner exchanges information with other countries.

These rights include the right to privacy, the right to just administrative action, the right of participation, and the right against self-incrimination. It should be noted that the discussion below, on the violation of taxpayers' rights in the context of the

194 Baker "Improper Use of Tax Treaties, Tax Avoidance and Tax Evasion" 16 https://www.un.org/esa/ffd/wp-content/uploads/2013/05/20130530_Paper9A_Baker.pdf (Date of use: 5 March 2020).
195 Oguttu *International Tax Law* 637.
196 Oguttu *International Tax Law* 637.
197 Paragraph 14.1 of the Commentary on Article 26(3).
198 Paragraph 14.1 of the Commentary on Article 26(3).

exchange of information internationally, has similar implications for taxpayers domestically.

2.2.5.1 The infringement of the right to privacy

In the light of international efforts to prevent tax avoidance and fiscal evasion, South African legislation has been enacted that permits SARS to exchange information automatically with other countries' tax authorities and assist them with tax matters about taxpayers. The privacy concerns arise because of the lack of a harmonised approach across all instruments regarding the bilateral and multilateral exchange of tax information.[199]

The taxpayer is required to prove that such exchange of information infringes his right to privacy. It is therefore important that SARS must preserve the confidentiality of the information contained in the CbCR.

The automatic exchange of information ("AEOI") requires jurisdictions to obtain non-resident financial account information each year from their financial institutions.[200] The information of a taxpayer may be leaked to third parties, which may contravene the taxpayer's right to privacy under section 14 of the Constitution.

Taxpayers do require legal protection when SARS acts in terms of sections 3(3) and 185 of the TAA (discussed in paragraph 2.1.6.1 above). Section 14 of the Constitution and Chapter 6 of the TAA prohibit the disclosure of information relating to the taxpayer, but the information may be disclosed when the Commissioner is carrying out his duties.[201] This set of rules is also applicable when taxpayer information is shared beyond the borders of South Africa.

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199 Oguttu *International Tax Law* 638.

200 Brunton "Automatic exchange of information – FATCA, CRS, UK CDOT and other ominous acronyms" (2016) *Cliffe Dekker Hofmeyer Tax and Exchange Control Alert* 2, https://www.cliffedekkerhofmeyr.com/en/news/publications/2016/tax/tax-alert-27-may-automatic-exchange-of-information-fatca-crs-uk-cdot-and-other-ominous-acronyms-.html (Date of use: 10 March 2020).

201 Section 68(3) of the TAA.

It should be noted that Chapter 6 of the TAA (discussed in 2.2.1.2 above) requires the maintenance of the confidentiality of information. Section 67 of the TAA thus imposes a general prohibition on disclosure by SARS of confidential information and taxpayer information. It is conceivable that information is illegally obtained and used improperly for criminal and civil proceedings against taxpayers.[202]

In *Commissioner of the South African Revenue Service v Public Protector and Others*,[203] counsel for the Commissioner pointed out in his heads of argument that South African precedents confirm that the concept "just cause" includes at the very least "lawful cause".[204] The court declared that a SARS official is permitted and is required under the provision of "just cause" contained in the TAA to withhold taxpayer information as defined in section 67(1)(a) of the TAA.[205]

A person who receives taxpayer information must preserve the secrecy of the information and may only disclose that information to another person if the disclosure is necessary to perform the functions specified in the Act.[206] Section 67(2) of the TAA prohibits such disclosure by a person who is a current or former SARS official. Such a person must preserve the secrecy of the taxpayer information.[207]

South Africa does not have secrecy laws pertaining to the information held by financial institutions. In terms of common law, the standard terms of a contract between a customer and a financial institution include an obligation on the financial institution to keep the customer's information confidential. Case law confirms that this contractual obligation is not absolute.[208]

The POPI Act (discussed in paragraph 2.2.1.3 above) also protects personal information processed by public and private bodies. Of importance for the present

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202 Oguttu *International Tax Law* 637.
203 2020 2 All SA 427 (GP).
204 *Commissioner of the South African Revenue Service v Public Protector* para 30.
205 *Commissioner of the South African Revenue Service v Public Protector* para 54.
206 Section 67(4) of the TAA.
207 Section 69(1) of the TAA.
208 FATF/ESAAMLG *Mutual Evaluation Report Anti-Money Laundering and Combating the Financing of Terrorism on South Africa* (26 February 2009) para 467 http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20South%20Africa%20full.pdf (Date of use: 30 April 2020).

discussion is section 72(1) of the POPI Act. It provides that a responsible party in South Africa may not transfer personal information about a data subject to a third party who is in a foreign country unless

- the third party who is the recipient of the information is subject to a law, binding corporate rules or binding agreement which provide an adequate level of protection;
- the data subject consents to the transfer;
- the transfer is necessary for the performance of a contract between the data subject and the responsible party;
- the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the responsible party and a third party;
- the transfer is for the benefit of the data subject, and it is not reasonably practicable to obtain the consent of the data subject to that transfer; and
- if it were reasonably practicable to obtain such consent, the data subject would be likely to give it.

Where there is a law or treaty which regulates the binding agreement between the two countries, the two countries may exchange taxpayer information. The taxpayer may also consent to the exchange or transfer. Section 19(2) of the POPI Act provides that the responsible party must take reasonable measures to protect and minimise the risk of the information being leaked to a third party.

In South Africa, Article 6 of *Government Gazette* 40516[209] provides for the use and confidentiality of CbCR Information. This article provides that SARS must only use the CbCR for the purposes of assessing high-level transfer pricing risks and other BEPS-related risks in South Africa, including assessing the risk of non-compliance by members of the MNE Group with applicable transfer pricing rules, and where appropriate for economic and statistical analysis.

[209] SARS GN No R. 1598 *Government Gazette* 40516 of 23 December 2016.

Therefore, from the wording of Article 6 it is clear that taxpayers' privacy concerns are provided for, and it is hoped that SARS ensures that taxpayers' rights to privacy are protected.

2.2.5.2 The infringement of the right to just administrative action

Taxpayers enjoy the protection of the right to administrative justice in section 33 of the Constitution (fully discussed in Chapter 3). Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. Section 33 of the Constitution may thus be relied upon by taxpayers when their information is exchanged with other countries.

This means that the exchange of information in tax matters with other countries must be lawful and procedurally fair. That is, it must be an administrative action (fully discussed in Chapter 3). Taxpayers must be provided with written reasons (fully discussed in Chapter 3) for this exchange of information in tax matters. The exchange must be conducted in terms of the law and not merely be a fishing expedition. Should the Commissioner fail to adhere to this obligation, taxpayers' rights to administrative action are infringed.

2.2.5.3 The infringement of the right to procedural fairness

The right to procedural fairness entitles a person to participate in the decision-making process in relation to administrative decisions that affect that person.[210] The taxpayer must therefore be part of the process of exchanging information in tax matters.[211]

This means that the taxpayer must be notified of an action to exchange his information to other countries. He must be provided with the platform to ask

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210 Klaaren and Penfold "Just Administrative Action" ch63-p80.

211 This right entitles persons to participate in the decision-making process in relation to administrative decisions that affect them. For the process to have been procedurally fair, the taxpayer would have had to have a say in the process which affects his rights before the decision is made (Klaaren and Penfold "Just Administrative Action" ch63-p80).

questions and request reasons relating to the exchange of his information. The taxpayer must be provided with the platform to challenge the exchange of information when he does not agree with the exchange. He must be able to approach the courts or another independent forum to challenge the exchange of information.

The IBFD's OPTR provides that the right to be informed is applicable to the automatic exchange of information. The greater the powers of the tax administration, the greater the protection of taxpayers' rights should be. The OPTR recommends that the taxpayer should be notified of the proposed automatic exchange of information regarding financial information in sufficient time to exercise data protection rights.[212]

2.2.6 The Commissioner's information gathering powers that may contravene taxpayers' rights of access to courts

Section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. This is an overarching right.

Taxpayers must therefore be able to approach the courts and other independent forums to seek relief when their rights have been infringed by the Commissioner. They must be able to do so in order to enforce their rights to challenge the exchange of information in tax matters where they have the status to do so in terms of section 38 of the Constitution.[213]

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212 IBFD "OPTR" 70–71.

213 Section 38 of the Constitution: Enforcement of rights - Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-
(a) anyone acting in their own interest;
(*b*) anyone acting on behalf of another person who cannot acting their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.

The right of access to courts grants taxpayers the right to challenge the Commissioner's information gathering powers, including the following powers: the selection of a taxpayer for inspection, verification or audit, the request of information from the taxpayer or third party, search and seizure, and the exchange of the taxpayer's information with other countries.

2.2.7 The Commissioner's power to refer taxpayers for criminal investigation after gathering information may contravene taxpayers' rights to a fair trial

Section 35(3) of the Constitution guarantees taxpayers right to a fair trial. Where in the process of an inspection, verification or audit by the Commissioner it appears that the taxpayer might have committed an offence, the taxpayer may be subjected to criminal investigation. A senior SARS official decides whether to pursue a criminal investigation or not. Section 43 which relates to the referral for criminal investigation of the taxpayer provides that:

> (1) If at any time before or during the course of an audit it appears that a person may have committed a serious tax offence, the investigation of the offence must be referred to a senior SARS official responsible for criminal investigations for a decision as to whether a criminal investigation should be pursued.
> (2) Relevant material gathered during an audit after the referral, must be kept separate from the criminal investigation.
> (3) If an investigation is referred under subsection (1) the relevant material and files relating to the case must be returned to the SARS official responsible for the audit if—
> *(a)* it is decided not to pursue a criminal investigation;
> *(b)* it is decided to terminate the investigation; or
> *(c)* after referral of the case for prosecution, a decision is made not to prosecute.

In effect, section 43 of the TAA deals with the referral of the gathered information or material to a senior SARS official who makes a decision whether to institute a criminal investigation or not. This referral takes place during an audit where there is reason to believe that the taxpayer has committed a serious tax offence.

Section 43 further provides that relevant material gathered during an audit after the referral must be kept separate from the criminal investigation. This has the result that the information may not be used in the subsequent criminal or civil investigations.

Where the Commissioner obtains information under compulsion from taxpayers, which may be used to charge the taxpayer with a crime, this step has the potential to transgress the right to a fair trial, which can be detrimental for taxpayers. The challenges is compounded by the fact that the meaning of some terms used in section 43 is not clear.

The first unclear term is “a senior SARS official”, who must make a decision whether a criminal investigation against the taxpayer is to be pursued or not”. A senior SARS official includes the Commissioner; a SARS official who has specific written authority from the Commissioner to do so; or a SARS official occupying a post designated by the Commissioner for this purpose.[214]

However, the definition of “a senior SARS official” is general, ambiguous, wide and unsatisfactory. The TAA does not provide guidelines as to who is a senior SARS official for the purposes of administering the Act. This position means that any SARS official with authority may fit the definition.

Moosa[215] argues that reference to “senior SARS official” is a misnomer, because the definition of “SARS official” contains no reference at all to the rank of any other person who may be such an “official”.[216] Accordingly, apart from the Commissioner who occupies a “senior” position, any SARS employee and any outsider may be a “senior SARS official”.[217]

The TAA sets no criteria for rendering any person eligible to be conferred this elevated status.[218] Thus, factors such age, rank, qualification, knowledge, expertise and experience play no role.[219] It is therefore possible for a low-ranking (i.e., junior)

214 Section 1 read with 6(3) of the TAA.
215 Moosa *The power to search and seize without a warrant under the Tax Administration Act* 343-344.
216 Moosa *The power to search and seize without a warrant under the Tax Administration Act* 343-344.
217 Moosa *The power to search and seize without a warrant under the Tax Administration Act* 343-344.
218 Moosa *The power to search and seize without a warrant under the Tax Administration Act* 343-344.
219 Moosa *The power to search and seize without a warrant under the Tax Administration Act* 343-344.

SARS employee to be a "senior SARS official" with all the powers and duties attached to that position under the TAA.[220] It is submitted that this is an unsatisfactory state of affairs that increases the potential for harm to be caused to taxpayers through an inappropriate exercise of the powers.[221]

The second uncertain term used in section 43 is a "serious tax offence".[222] This term has been defined to mean a tax offence for which a person may be liable for conviction to imprisonment for a period exceeding two years without the option of a fine or to a fine exceeding the equivalent amount of a fine under the Adjustment of Fines Act.[223]

As is the case with the definition of a "senior SARS official", the definition of a "serious tax offence" is also general, ambiguous, wide and unsatisfactory. This is despite the fact that Chapter 17 of the TAA lists criminal offences in sections 234 to 238. The chapter refers to criminal offences and not serious tax offences or less serious tax offences. It is important that guidelines should be provided in the legislation or an Interpretation Note as to the parameters of a serious tax offence.

The conduct of criminal investigation is governed by section 44 of the TAA. The section provides the following:

> (1) During a criminal investigation, SARS must apply the information gathering powers in terms of this Chapter with due recognition of the taxpayer's constitutional rights as a suspect in a criminal investigation.
> (2) In the event that a decision is taken to pursue the criminal investigation of a serious tax offence, SARS may make use of relevant material obtained prior to the referral referred to in section 43.
> (3) Relevant information obtained during a criminal investigation may be used for purposes of audit as well as in subsequent civil and criminal proceedings.

Section 44(2) only allows SARS to use the material obtained prior to the referral in criminal proceedings. While section 43(2) provides that only information gathered after the matter has been referred for criminal investigation should be kept separate,

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220 Moosa *The power to search and seize without a warrant under the Tax Administration Act* 343-344.
221 Moosa *The power to search and seize without a warrant under the Tax Administration Act* 343-344.
222 Section 1 of the TAA.
223 Act 101 of 1991.

section 44 gives permission to the Commissioner to use the gathered information in the subsequent criminal and civil investigations.

Although section 44 of the TAA provides for the information to be used for purposes of audit as well as in subsequent civil and criminal proceedings against the taxpayer, section 44(1) recognises the taxpayer's constitutional rights as a suspect in a criminal investigation. This appears to be the only section of the TAA which expressly recognises the taxpayer's constitutional rights. This position is in line with the constitutional right of the taxpayer to be presumed innocent until the contrary is proved.[224]

From the discussion above, where the information obtained prior to the referral in section 43 of the TAA is used in the subsequent criminal investigations against the taxpayer, two aspects need to be highlighted: first, the relevant information regarding a taxpayer who has committed a serious tax offence may be used in contradiction of section 43 of the TAA. Secondly, the taxpayer may be subjected to criminal investigation for a serious tax offence in section 1 of the TAA.

Clearly, this position shows that a taxpayer's information can be used in contradiction of section 43 for a tax offence. Yet there are no criteria or guidelines as to how this is determined. Section 44 further provides that the information obtained from the taxpayer during a criminal investigation may be used for the purposes of an audit as well as in subsequent civil and criminal proceedings.

In a nutshell, the Commissioner's information gathering provisions set out in sections 40, 43 and 44 of the TAA infringe taxpayers' rights to a fair trial.

2.2.8 The lack of a clear boundary as to when a civil action becomes a criminal investigation may contravene taxpayers' rights to a fair trial

As indicated above, the information gathering provisions in section 44 of the TAA permit the information obtained to be used in criminal and civil proceedings. The

224 Section 35(3)(h) of the Constitution.

TAA is not clear as to when a civil investigation against the taxpayer commences and when it terminates. A civil investigation is conducted where a taxpayer is sued by the Commissioner for a matter not related to a criminal offence. As noted above, a criminal investigation deals with the commission of a serious tax offence in terms of sections 43 and 44 of the TAA.

These sections empower the Commissioner to prosecute offenders for any tax offence committed. The sections also empower the Commissioner to assist in the investigation of the particular offence. It is not clear at which stage the Commissioner is expected to conclude an investigation.

Thus a taxpayer runs the risk of being investigated for a lengthy period without conclusion. There is no indication as to when the Commissioner's powers would terminate.

It should be noted, however, that the Constitution provides for a single prosecuting authority in South Africa: the National Prosecuting Authority ("NPA"), which has the power to institute criminal proceedings on behalf of the State, this power to be exercised without fear, favour or prejudice.[225]

It is submitted that where the Commissioner exercises prosecutorial powers, this step usurps the rights and powers of the NPA and conflicts with the constitutional principle of the separation of powers.

The term "separation of powers" refers to a principle which requires all three branches of government (executive, legislative and judicial) to perform the powers specifically given to them.[226] This principle is contravened where one branch of government performs an act intended to be performed by another branch. The NPA is mandated to prosecute offenders on behalf of the state, whereas SARS is mandated to collect taxes on behalf of the state.

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225 Section 179 of the Constitution.

226 Baxter *Administrative Law* 344.

2.2.9 The lack of clear parameters of what constitutes "relevant material" may contravene taxpayers' rights to a fair trial

Section 46 of the TAA provides that the information requested by the Commissioner must be relevant. Section 1 of the TAA provides that "relevant material" means any information, document or thing that in the opinion of SARS is foreseeably relevant for tax risk assessment, assessing tax, collecting tax, showing non-compliance with an obligation under a tax Act or showing that a tax offence was committed.

This definition poses challenges because it is not clear what type of information is to be regarded as relevant. Further, there have not been court cases in South Africa to clarify the meaning of "relevant material". Reference in this regard is made to a few of the cases from the United States of America ("USA") which could be of persuasive value in developing jurisprudence on this matter.

In *United States v Williams*,[227] the Internal Revenue Service ("IRS") agent issued summons to request a list of a taxpayer's patients from a third party. The latter refused and cited doctor-patient privilege and self-incrimination. The court held that the summons issued by the IRS agent was overbroad and unrelated (irrelevant) to the matter under inquiry.[228] This meant that the information was not relevant for the IRS to make any determination against the taxpayer.

In *First Nat'l Bank v United States*,[229] the court held that the IRS agent was empowered to request relevant information from the third party. This implied that the request must specify, with sufficient reasons, the identifiable documents within the statute and not merely be a fishing expedition.

In *Hubner v Tucker*,[230] the third party was charged with contempt for failure to produce relevant material that supported an allegation of the right to privacy. The

227 337 F.Supp. 1114 (S.D.N.Y. 1971).
228 Section 7602 of the Internal Revenue Code of 1986 (26 U.S. Code Title 26) read with the Fourth Amendment to the United States Constitution guards against unreasonable searches and seizures.
229 160 F.2d 532 (5th Cir. 1947).
230 245 F.2d 35 (9 Cir. 1957).

court held that the request for relevant material was too general and not specific, and that there was no connection between the taxpayer and the third party.

In *United States v Powell*,[231] the court held that for the information to be relevant, four factors must be present:

- the investigation must be pursuant to a legitimate purpose;
- the enquiry must be relevant to the purpose;
- the information sought must not be already in the possession of the IRS;
- the required administrative steps must be followed.

In *Local 174, International Brotherhood of Teamsters, etc. v United States*,[232] the issues arose from alleged unlawful employment practices engaged in by an employee and a union. The court had to require relevant information to decide the matter. Pope J in his dissenting judgment held that the only power that was involved was the power to get relevant material from those who best can give it and who are most interested in not doing so.

From a South African perspective, it is submitted that the lack of clarity in the terms used in sections 43 and 44 of the TAA (discussed above) must be rectified to prevent impending litigation such as the US litigation outlined above.

2.2.10 The Commissioner's power to pursue criminal investigation may compel taxpayers to give incriminating evidence that may contravene the right to a fair trial

Section 43 of the TAA provides that any information provided by the taxpayer that incriminates him might not be used against him in a criminal prosecution and must be kept separate. Section 44 of the TAA creates a contravention of taxpayers' rights because the information required by the Commissioner to be used for civil and criminal proceedings may incriminate taxpayers. This is especially so where the information held by SARS is obtained under compulsion.

231 379 U.S. 48 (1964).
232 240 F.2d 387 (9 Cir. 1956).

This result contravenes section 35(3)(j) of the Constitution, which provides that everyone has a right to a fair trial, which includes the right not to be compelled to give incriminating evidence (the *nemo tenetur se detergere* principle).

Section 72 of the TAA provides:

> (1) A taxpayer may not refuse to comply with his or her obligations in terms of legislation to complete and file a return or an application on the grounds that to do so might incriminate him or her, and an admission by the taxpayer contained in a return, application, or other document submitted to SARS by a taxpayer is admissible in criminal proceedings against the taxpayer for an offence under a tax Act, unless a competent court directs otherwise.
>
> (2) An admission by the taxpayer of the commission of an offence under a tax Act obtained from a taxpayer under Chapter 5 is not admissible in criminal proceedings against the taxpayer, unless a competent court directs otherwise.

Section 72 of the TAA, only applies to the taxpayer's obligation to complete and file a return or an application. Thus, a person cannot refuse to file a return, simply because this may incriminate him or her. Section 72(2) specifically protects taxpayers' right against self-incrimination by stating that an admission obtained from the taxpayer under Chapter 5 is not admissible in criminal proceedings, unless a court directs otherwise.

Section 72 guarantees the non-admissibility of the taxpayer's incriminating evidence. An admission of the commission of the offence by the taxpayer is not admissible in criminal proceedings against the taxpayer in terms of subsection (2) unless a competent court directs otherwise.

These sections cause confusion because a line is not drawn as to how and when the information is protected, and this is to the detriment of the taxpayer. Yet section 44 of the TAA provides permission for the use of the gathered information in civil proceedings and criminal proceedings as well.

In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*,[233] the Constitutional Court dealt with the right against self-incrimination at

[233] 1996 2 SA 621 (CC).

length. These cases did not deal with tax issues but with the constitutionality of section 417(2)(b) of the previous Companies Act.[234] The cases are referred in this work because the Constitutional Court ruled on the protection of individuals against self-incrimination in general.

The Constitutional Court held that no incriminating answer may be given which could be used against the person when answering questions in any criminal proceedings against that person. As such, section 417(2)(b) of the Companies Act was declared invalid and unconstitutional.

Section 84(9) of the POPI Act provides that no self-incriminating answer given or statement made to a person who conducts a search in terms of a warrant issued under section 82 is admissible as evidence against the person who gave the answer or made the statement in criminal proceedings, except in criminal proceedings for perjury or in which that person is tried for an offence contemplated in section 102 and then only to the extent that the answer or statement is relevant to prove the offence charged.

Concerns about self-incrimination may also arise where the Commissioner exchanges with other countries a taxpayer's information which may incriminate the taxpayer. For example, the CbCR legislation does not contain protection regarding the right against self-incrimination.

Therefore, reliance is placed on the Constitution, which deals with general protection of the right. It is submitted that measures need to be inserted into the CbCR legislation in order for the protection of the information not to be exchanged when taxpayers are likely to incriminate themselves.

An important matter to mention is that, with the rise of increased aggressive tax planning and secretive schemes in tax havens or low tax jurisdictions, the risk of self-incrimination is high. This is because the lines between legal tax avoidance and illegal tax evasion are blurred. So it is possible that where a taxpayer is being

234 This is the old Companies Act 61 of 1973, which was replaced by the new Companies Act 71 of 2008.

audited for tax avoidance — for example, transfer pricing — the Commissioner may actually find that the taxpayer's structure was in fact more involved in evading taxes rather than in tax planning.

From a tax perspective, it can be reasoned that the taxpayer must prove that some or all of the information required by the Commissioner may incriminate the taxpayer. If that is the case, that information must be protected and not be used against the taxpayer in criminal proceedings.

The IBFD's OPTR provides that the right not to incriminate oneself is one of the fundamental rights that has been acknowledged as such for the longest period. This principle, according to which no one is bound to expose himself to an accusation, can be easily linked to human nature.[235]

2.3 LIMITATION OF TAXPAYERS' RIGHTS UNDER THE CONSTITUTION

The rights of the individuals and taxpayers are not absolute and may be limited in certain circumstances. Where taxpayers enforce their rights against the tax authority such as SARS, they should take note of section 36 of the Constitution which limits their rights.

Section 36 provides the following:

> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
> *(a)* the nature of the right;
> *(b)* the importance of the purpose of the limitation;
> *(c)* the nature and extent of the limitation;
> *(d)* the relation between the limitation and its purpose; and
> *(e)* less restrictive means to achieve the purpose.
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

235 IBFD "OPTR" 108.

Moosa[236] provides that owing to the history and legacy of rights abuses during apartheid era, section 36 anchors the protection of fundamental rights.[237] It safeguards them against encroachment that is not "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".[238]

Fritz[239] provides that when dealing with rights contained in the BOR, two aspects must be borne in mind. First, not all the rights in the Bill of Rights apply to everyone and they are also not afforded to everyone as the wording of the specific section restricts the application of that right to a narrower group of beneficiaries.[240]

Rights are afforded to juristic persons to the extent that the nature of the rights allows it.[241] The second aspect that must be borne in mind is that the rights contained in BOR are not absolute and are subject to limitations.[242]

In *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others*[243] this Court stated:

> We must not lose sight of the fact that rights enshrined in the Bill of Rights must be protected and may not be unjustifiably infringed. It is for the Legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the Legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given. Guidance could be provided either in the legislation itself or, where appropriate, by a legislative requirement that delegated legislation be properly enacted by a competent authority.[244]

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236 Moosa *The 1996 Constitution and the Tax Administration Act*.
237 Moosa *The 1996 Constitution and the Tax Administration Act* 297.
238 Moosa *The 1996 Constitution and the Tax Administration Act* 297.
239 Fritz *An Appraisal of Selected Tax-Enforcement Powers*.
240 Fritz *An Appraisal of Selected Tax-Enforcement Powers* 54.
241 Fritz *An Appraisal of Selected Tax-Enforcement Powers* 54.
242 Fritz *An Appraisal of Selected Tax-Enforcement Powers* 55.

243 2000 3 SA 936 (CC).
244 *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* Para 54.

In cases where the rights of taxpayers may be limited if the requirements of section 36 are met, the Commissioner must be able to provide a justification where the taxpayer alleges infringement. The elements of section 36 are now briefly discussed.

2.3.1 The law of general application

Under section 36, Parliament may limit taxpayers' fundamental rights when it legislates in relation to tax matters within its spheres of competence.[245] Such limitation must be by "law of general application" that satisfies the normative bounds of "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".[246]

A limitation of a fundamental right is permissible under section 36 if it "is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".[247]

2.3.1 The nature and extent of the limitation

In *Gaertner and Others v Minister of Finance and Others,* the court held that the more public the undertaking and the more closely regulated the industry, the more attenuated the right to privacy and the less intense any possible invasion.[248] As a person's privacy interest is more attenuated and as the individual has a lessened reasonable expectation of privacy, the scope of that individual's personal space shrinks and the individual's right to privacy may be diminished further by the rights accruing to other citizens.[249] The degree of privacy that can reasonably be expected by a person may vary significantly depending on the commercial activity that brings one into contact with the state.[250]

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245 Moosa *The 1996 Constitution and the Tax Administration Act* 301.
246 Moosa *The 1996 Constitution and the Tax Administration Act* 301.
247 Moosa *The 1996 Constitution and the Tax Administration Act* 309.
248 76 SATC 69.
249 *Gaertner and Others v Minister of Finance and Others* 76 SATC 69 para 58.
250 *Gaertner and Others v Minister of Finance and Others* 76 SATC 69 para 59.

In a modern society, it is generally accepted that many commercial activities in which individuals may engage must, to a greater or lesser extent and depending on their nature, be regulated by the State to ensure that the individual's pursuit is compatible with the community's interest in the realisation of collective goals and aspirations.[251] How tight the control depends on the nature of the industry.[252]

2.3.2 The relation between the limitation and its purpose

There must be a rational connection between the purpose of the law and the limitation imposed by it.[253] In broad terms, that rational connection does exist between the limitation at issue here and the provision's purpose.[254]

2.3.3 Less restrictive measures to achieve the purpose

In the *Gaertner and Others v Minister of Finance and Others* case, the court found that it is difficult to see how the achievement of the basic purposes of the Customs and Excise Act requires that inspectors be allowed to enter private homes and inspect documents and possessions at will.[255] The fact that the TAA is manifestly in the public interest in no way diminishes the need to protect and uphold the privacy and, indeed, dignity of individuals where – as in the case of private dwellings – these rights are by no means attenuated.[256] The law recognises that there will be limited circumstances in which there will be need for the state to protect the public interest.[257]

2.4 OVERVIEW OF THE CHAPTER

This chapter has discussed the information gathering powers of the Commissioner that are found in the TAA. It explained the different methods used by the Commissioner to gather information from taxpayers, which are information derived

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251 *Gaertner and Others v Minister of Finance and Others* 76 SATC 69 para 60.
252 *Gaertner and Others v Minister of Finance and Others* 76 SATC 69 para 60.
253 *Gaertner and Others v Minister of Finance and Others* 76 SATC 69 para 67.
254 *Gaertner and Others v Minister of Finance and Others* 76 SATC 69 para 67.
255 *Gaertner and Others v Minister of Finance and Others* 76 SATC 69 para 68.
256 *Gaertner and Others v Minister of Finance and Others* 76 SATC 69 para 68.
257 *Gaertner and Others v Minister of Finance and Others* 76 SATC 69 para 70.

from records and books of taxpayers; tax returns; a request for information from the taxpayer or third parties; inspection, verification or audits; search and seizure; exchange of information with other countries; the Voluntary Disclosure Programme and the Reportable Arrangements rules.

The chapter also demonstrates how the constitutional rights of taxpayers may be violated by the Commissioner's information gathering powers. It also discussed how the DTC and the IBFD'S OPTR have responded to the infringements of these rights and how taxpayers' rights may be protected.

In the next chapter, the administrative principles that are important in understanding the Commissioner's information gathering powers and taxpayers' rights are discussed.

CHAPTER 3

ADMINISTRATIVE PRINCIPLES PERTAINING TO THE PROTECTION OF TAXPAYERS' RIGHTS AGAINST THE COMMISSIONER'S INFORMATION GATHERING POWERS

3 INTRODUCTION

This chapter deals with principles of administrative law which can be relied upon to contain the conduct or action of the Commissioner for the South African Revenue Service ("the Commissioner") when gathering information from taxpayers. The aim is to determine whether these principles of administrative law may be relied on by taxpayers when the Commissioner's information gathering powers contravene their rights.

As alluded to in Chapter 1 of this work, it is impossible to discuss the constitutionality of the Commissioner's powers without referring to the principles of administrative law that pertain to taxpayers' rights. Administrative law and public law regulate the relationships between the state and the individuals who are its subjects and also the relations between the different organs of state.[1]

The main objective of administrative principles is to ensure that the powers of government are exercised within certain limits, to protect citizens against abuse of power.[2] These administrative principles govern the performance of the executive and administrative functions, and they regulate the day-to-day running of the state.

3.1 LEGISLATIVE ADMINISTRATIVE PROVISIONS THAT PROTECT TAXPAYERS' RIGHTS

The point of departure relating to the administrative provisions is section 33 of the Constitution, which provides:

> (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

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1 Devenish, Govender and Hulme *Administrative Law and Justice* 22.
2 Devenish, Govender and Hulme *Administrative Law and Justice* 22.

(3) National legislation must be enacted to give effect to these rights, and must

(a) provide for the review of administrative action by a court, or, where appropriate, an independent and impartial tribunal;

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

(c) promote an efficient administration.

Section 33(3) of the Constitution requires that national legislation must ensure the promotion of the values and principles listed in subsection (1). The Promotion of Administrative Justice Act ("PAJA")[3] is the legislation that gives effect to section 33(3) of the Constitution.

The right to just administrative action in section 33 of the Constitution is complemented by section 195 of the Constitution. The section is entitled "Basic values and principles governing [the] public administration" and lists the principles that the public administration must not only take account of but must also comply with. Section 195 provides:

(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) A high standard of professional ethics must be promoted and maintained.

(b) Efficient, economic and effective use of resources must be promoted.

(c) Public administration must be development-oriented.

(d) Services must be provided impartially, fairly, equitably and without bias.

(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

In effect, section 195 promotes and ensures efficient administration and good governance by creating a culture of accountability, openness and transparency.

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[3] Act 3 of 2000.

From a tax perspective, section 195 gives effect to the right to lawful administrative action by providing taxpayers with the means to challenge the actions of the Commissioner if they are found to be unlawful. This implies that the Commissioner is expected to adhere to the principles entrenched in section 195 of the Constitution. These administrative provisions underpin the interaction between the Commissioner and taxpayers to ensure a smooth interaction between the parties.

The principles that underpin the administrative provisions have been incorporated in a document referred to as the South African Revenue Service Charter ("the Charter").[4] The document seeks to regulate relations between the Commissioner and taxpayers, in that the Commissioner commits to providing a service that is in line with the right to just administrative action and section 195 of the Constitution (the Charter is discussed in Chapter 4 of this work).

3.1.1 The meaning of "administrative action"

It is important to determine whether the information gathering powers of the Commissioner fall within the meaning of "administrative action". This is because the right to just administrative action in section 33 of Constitution depends on whether an administrative action has been performed by an "organ of state" or any person exercising public power in terms of legislation. Therefore, the determination of what is an administrative act provides the entrance requirement for a court application for just administrative action.

The Constitution does not define "administrative action", and so PAJA must be referred to in understanding the meaning of the term. Section 1 of PAJA defines "administrative action" to mean any decision taken, or any failure to take a decision, by

> *(a)* an organ of state, when -
> (i) exercising a power in terms of the Constitution or a provincial constitution; or
> (ii) exercising a public power or performing a public function in terms of any legislation; or

[4] See SARS "South African Revenue Service Charter" (2018) https://www.sars.gov.za/AllDocs/Documents/Service%20Charter/SARS%20Service%20Charter%201%20July%202018.pdf (Date of use: 1 June 2020).

> *(b)* a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect….

From this definition it is clear that an administrative action is one performed by the administrator. It is submitted that the definition of administrative action in section 1 of PAJA is broad enough to cover the exercise of public power and any action performed by any person, whether a natural or a juristic person, who performs a public function in terms of any legislation. It should be noted that for one to rely on the right to just administrative action to seek reprieve, it must be proved that the particular administrative action adversely affected the rights of any person.

Before the enactment of PAJA, the Constitutional Court's approach set out what is not administrative action rather than what it is. In the case of *President of the Republic of South Africa v South African Rugby Football Union and Others*,[5] the Constitutional Court had to decide whether the actions of the President in establishing a commission of inquiry amounted to administrative action. The court held that the conduct by the President when he acts as head of state and exercises constitutional functions was considered not to be administrative action.

Although the decision of *President of the Republic of South Africa v South African Rugby Football Union* has wider constitutional and administrative implications than tax law, it is mentioned here to provide guidance on how to determine whether an action qualifies as administrative action.

In the case of *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*,[6] the Supreme Court of Appeal ("SCA") defined administrative action as follows:

> What constitutes administrative action - the exercise of the administrative powers of the State - has always eluded complete definition. The cumbersome definition of that term in PAJA serves not so much to attribute meaning to the term as to limit its meaning by surrounding it within a palisade of qualifications. It is not necessary for present purposes to set out the terms of the definition in full: the following consolidated and abbreviated form of the definition will suffice to convey its principal elements:

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5 2000 1 SA 1 (CC); 1999 7 BCLR 725 (CC).

6 2005 6 SA 313 (SCA).

> 'Administrative action means any decision of an administrative nature made . . . under an empowering provision [and] taken . . . by an organ of State, when exercising a power in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation, or [taken by] a natural or juristic person, other than an organ of State, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect. . . '.[7]

In *Chirwa v Transnet Ltd and Others*,[8] the Constitutional Court had to determine whether the dismissal of an employee amounted to administrative action. The majority decision (*per* Skweyiya J) held that the actions by Transnet to dismiss Ms Chirwa did not amount to administrative action as required by the Constitution in section 33. To that effect, Ngcobo J held:

> However, the fact that the conduct of Transnet in terminating the applicant's employment contract involves the exercise of public power is not decisive of the question whether the exercise of the power in question constitutes administrative action. The question whether particular conduct constitutes administrative action must be determined by reference to s 33 of the Constitution. Section 33 of the Constitution confines its operation to 'administrative action', as does PAJA. Therefore, to determine whether conduct is subject to review under s 33 and thus under PAJA, the threshold question is whether the conduct under consideration constitutes administrative action. PAJA only comes into the picture once it is determined that the conduct in question constitutes administrative action under s 33. The appropriate starting point is to determine whether the conduct in question constitutes administrative action within the meaning of s 33 of the Constitution. The question therefore is whether the conduct of Transnet in terminating the applicant's contract of employment constitutes administrative action under s 33.[9]

The court (*per* Skweyiya J) further held that:

> Only acts of an administrative nature are subject to the administrative justice right in s 33(1) of the Constitution. The focus of the enquiry as to whether conduct constitutes administrative action is not on the position which the functionary occupies but rather on the nature of the power being exercised. This court has held in a number of cases that in this enquiry what matters is not so much the functionary as the function; that the question is whether the task itself is administrative or not and that the focus of the enquiry is not on the arm of government to which the relevant functionary belongs but on the nature of the power such functionary is exercising.[10]

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7 *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* para 21.
8 2008 4 SA 367 (CC).
9 *Chirwa v Transnet* para 139.
10 *Chirwa v Transnet* para 72.

The Constitutional Court in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)*,[11] held that:

> A litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on s 33(1) of the Constitution or the common law. That would defeat the purpose of the Constitution in requiring the rights contained in s 33 to be given effect to by means of national legislation.[12]

The Constitutional Court in *South African National Defence Union v Minister of Defence and Others*[13] and *Gcaba v Minister for Safety and Security and Others*[14] held that:

> Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. This is recognised by the Constitution. Section 23 regulates the employment relationship between employer and employee and guarantees the right to fair labour practices. The ordinary thrust of s 33 is to deal with the relationship between the State as bureaucracy and citizens and guarantees the right to lawful, reasonable and procedurally fair administrative action. Section 33 does not regulate the relationship between the State as employer and its workers. When a grievance is raised by an employee relating to the conduct of the State as employer and it has few or no direct implications or consequences for other citizens, it does not constitute administrative action.[15]

The court in *South African National Defence Union v Minister of Defence* endorsed a very important constitutional principle that if there is a piece of legislation enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution. He must rely on the legislation enacted. In this regard, the court (*per* O'Regan J) in *South African National Defence Union v Minister of Defence* held that:

> The question that arises is whether a litigant may bypass any legislation so enacted and rely directly on the Constitution… In my view, this approach is correct: where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard.[16]

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11 2006 2 SA 311 (CC); 2006 1 BCLR 1 (CC).
12 *Minister of Health v New Clicks SA (Pty) Ltd* para 96.
13 2007 5 SA 400 (CC); 2007 8 BCLR 863 (CC).
14 2010 1 SA 238 (CC); 2009 12 BLLR 1145 (CC).
15 *Gcaba v Minister for Safety and Security* para 64.
16 *South African National Defence Union v Minister of Defence* para 51.

Stacey[17] points out that the way of determining what administrative action is in terms of South Africa's case law is probably narrower than the meaning of administrative action contemplated in section 33 of the Constitution. However, nowhere has this been challenged as unconstitutionally narrow.

According to Devenish, Govender and Hulme,[18] the provisions of section 33 of the Constitution only apply to conduct defined as "administrative action". The words "lawful administrative action" are wide enough to cover an omission to take administrative action where such a duty has been imposed. However, if the action is not classified as "administrative action", it cannot be tested against section 33.

In the tax context, Croome[19] lists a number of decisions by the Commissioner that constitute administrative action; these decisions relate to:

- a request for an extension of time in which to render a tax return;
- a request for the postponement of payment of tax subject to an objection or appeal;
- a plea for mitigation for the imposition of no, or a reduced level of, additional tax;
- a request to waive interest on the underpayment of provisional tax;
- a decision on whether to conduct an audit on the taxpayer's affairs;
- a decision to file a statement at the court where the taxpayer owes assessed income tax; and
- a failure to finalise a refund to a taxpayer.

Croome[20] correctly submits that many acts performed by the Commissioner constitute administrative action and are thus subject to the right to just administrative action.

From the discussion above it can be summarised that the point of departure in defining administrative action is to determine whether the action of the

17 Stacey 2006 *SAJHR* 664.
18 Devenish, Govender and Hulme *Administrative Law and Justice* 145.
19 Croome *Taxpayers' Rights in South Africa* 211.
20 Croome *Taxpayers' Rights in South Africa* 205.

Commissioner constitutes administrative action in terms of section 33 of the Constitution. Once this has been done, the next step is to assess it in terms of the provisions of PAJA. In essence, PAJA only features once it has been determined that the conduct in question meets the requirements of an administrative action under section 33.

Having identified the first hurdle of determining the Commissioner as the administrator and the decisions that he can take, it must then be concluded that the decision to request information from the taxpayer must be in line with the right to just administrative action in section 33. It is the duty of the taxpayer to prove that the actions of the Commissioner or senior SARS official fall within the meaning of the administrative action.

One important aspect laid down in the *South African National Defence Union* case was that where the taxpayer alleges an infringement of his rights, he cannot invoke the Constitution directly without first invoking the provisions of the TAA and PAJA. This is so especially where the TAA or PAJA can regulate such an infringement.

In the tax context, this means that once the decision (administrative action) by the Commissioner to, for example, conduct search and seizure on the taxpayer is unlawful, unreasonable and procedurally unfair, it infringes the right of the taxpayer to just administrative action.

Such conduct by the Commissioner may be reviewed by the court in terms of PAJA. This is the remedy (fully discussed in Chapter 5) that is available to taxpayers who seek relief in the case of the infringement of the right to just administrative action.

3.1.2 The administrator as an organ of state

Section 1 of PAJA defines an “administrator” to mean an “organ of state” or any natural or juristic person taking administrative action. “Organ of state” is defined as any department of state or administration in the national, provincial or local sphere

of government; or any other functionary or institution.[21] It should be noted that PAJA also allows for administrative action to be carried out by persons "other than the defined organs of state": that is, natural or juristic persons.[22]

Natural persons who carry out administrative functions include the President, Premiers, and Ministers, including heads of and officials in state departments, when they act in an administrative capacity. However, not all the functions of "organs of state" constitute administrative action. The action of an "organ of state" qualifies as administrative action when the "organ of state" exercises power in terms of the Constitution or a provincial constitution.[23]

This also includes the situation where an "organ of state" exercises public powers or performs public functions in terms of any legislation.[24] The conditions are, however, that these actions only qualify as administrative action when these persons exercise public power or perform a public function "in terms of an empowering provision".[25]

For tax purposes, the Commissioner or a senior SARS official is regarded as the administrator that is empowered with state authority under the South African Revenue Service Act ("SARS Act")[26] to collect taxes on behalf of the state.[27] State authority is the public power exercised by an "organ of state", natural or juristic person over another person or body in a subordinate position. Therefore, SARS is regarded as an "organ of state".[28]

However, as explained in Chapter 2, the way in which the Commissioner exercises this state authority may affect the rights of taxpayers who are in a subordinate position. This is the case especially when the law is not observed in the exercise of such authority. Certain empowering Acts often prescribe that the administrator must

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21 Section 239 of the Constitution.
22 Section 1(b) of PAJA.
23 Section 1(a)(i) of PAJA.
24 Section 1(a)(ii) of PAJA.
25 Section 1(b) of PAJA.
26 Act 34 of 1997.
27 Section 3 of the SARS Act.
28 Section 2 of the SARS Act.

possess a certain status, qualification, attributes, experience or knowledge to exercise certain powers. Hoexter[29] states that a statute may require members of an administrative body to possess specific professional qualifications.

Where the Commissioner is not qualified, he cannot perform a valid administrative action. This requirement is necessary, even though his actions may meet all the other statutory requirements. The possession of the required qualifications may therefore be said to be the minimum requirement and the threshold requirement for the performance of any valid administrative action. In this regard, it can be concluded that the Commissioner must be properly appointed, properly qualified and properly constituted when he performs administrative action.

However, although the SARS Act and the TAA provide the Commissioner with powers to administer tax Acts for good tax administration, the two Acts are silent on which qualifications the Commissioner should possess. Ideally, it would be important that the Commissioner should possess a qualification in tax matters and a further qualification in public administration matters. This desirable combination will avoid a situation where unqualified politically connected people are appointed to the position of Commissioner, which creates the risk of their creating policies that can ruin SARS as the tax authority.

In *Awumey v Fort Cox Agricultural College*,[30] a college board decided to suspend the principal of a college and eventually to terminate his services. The board's decisions were set aside by the court on review because the board was not properly constituted at the time, because some of its members were unqualified to make that decision.

For tax purposes, this decision implies that taxpayers need to ascertain whether the Commissioner and the relevant senior SARS officials are qualified to perform an administrative action.

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29 Hoexter *Administrative Law in South Africa* 227.

30 2003 8 BCLR 861 (Ck) 869G–870F.

3.1.3 A decision or failure to take a decision by the administrator can amount to administrative action

The word "decision" is defined in section 1 of PAJA to mean any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision. Section 1 of PAJA also classifies a decision into the following:

> *(a)* making, suspending, revoking or refusing to make an order, award or determination;
> *(b)* giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
> *(c)* issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
> *(d)* imposing a condition or restriction;
> *(e)* making a declaration, demand or requirement;
> *(f)* retaining, or refusing to deliver up, an article; or
> *(g)* doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly;

Accordingly, a decision taken or a failure to take the decision amounts to administrative action. A decision also qualifies as administrative action when it involves the administrator's refusal to take a decision. Moreover, the examples are not limited to those given in the section. PAJA also includes a "catch-all" paragraph (g) to the effect that a decision also includes doing or refusing to perform any other act or thing of an administrative nature. This extensive description of a decision may mean that virtually any type of action or conduct of an administrator qualifies as administrative action.

Croome[31] argues that where the taxpayer anticipates that the Commissioner would make a decision, the taxpayer cannot rely on the provisions of PAJA to compel him to make a decision. Croome suggests that the taxpayer can only rely on the provisions of PAJA once the Commissioner has actually taken or failed to take a decision.

However, PAJA is very clear when defining a "decision" and includes instances where a proposal is made and a decision has to be made. Where the Commissioner

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[31] Croome *Taxpayers' Rights in South Africa* 210.

informs the taxpayer that a proposal to refer the taxpayer for criminal investigation has been made and the decision has not been made or would be made in due course. It is submitted, the taxpayer may rely on PAJA to compel the Commissioner to make a decision. It should be clear that where a proposal has been made, that puts the taxpayer in an uncertain situation. It is therefore important that the Commissioner makes a decision whether the taxpayer is referred for criminal investigation or not.

Section 1 of PAJA requires a decision to be "of an administrative nature". This implies that decisions need to relate to the day-to-day business of implementing and administering policy. So, for example, a decision by the Commissioner to refer the taxpayer for search and seizure relates to the day-to-day business of implementing and administering policy.

3.1.3.1 The decision by the administrator must be in terms of an empowering provision

Section 1 of PAJA defines "empowering provision" to mean a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken. This element is one of the most important features of administrative law in general and administrative action in particular.

The exercise of public power or the performance of a public function must have an authoritative foundation of some kind. In other words, the decision by the Commissioner must be permitted by law (not only legislation, but other kinds of "empowering provisions" which have an authoritative basis). With respect to the information gathering powers of the Commissioner, the empowering provisions are in the TAA.

The Constitutional Court held in *Chirwa v Transnet*:[32]

> It would render the requirement that the decision be taken 'in terms of any legislation' meaningless, as all decisions taken by a body created by statute would meet the requirement. If that is what the legislature intended, one would

[32] *Chirwa v Transnet* 2008 4 SA 367 (CC).

> have expected them to have said as much. Instead they chose to distinguish between powers exercised by the same body, including a body created by legislation, according to the source of the power.[33]

Hence it is sufficient for the taxpayer to prove that the Commissioner is empowered by the TAA so that his actions fall within the provisions of section 33 of the Constitution and PAJA. For example, reliance can be placed on section 40 of the TAA, which empowers the Commissioner to conduct an audit on the affairs of the taxpayer.

3.1.3.2 The decision by the administrator must adversely affect the rights of individuals

For an act or conduct of the administrator to qualify as an administrative action, section 1 of PAJA provides that the decision of the administrator must "adversely affect the rights of any person". This particular requirement is closely related to the lawfulness or the "legality" of administrative action.

Thus, only when the action imposes a burden on someone does such action qualify as administrative action. The burden so mentioned means the administrator's performance of the public power or function in terms of the empowering provision, in terms of section 1 of PAJA.

As alluded to in Chapter 2, it can, for example, be argued that the burden placed on the taxpayer or third party to provide any information relating to the affairs of the taxpayer may adversely affect the taxpayer's right to privacy. It needs to be mentioned that the standard used in this case is whether the burden "adversely affects" the taxpayer.[34]

This could be the case where civil or criminal proceedings have been instituted against the taxpayer as a result of an audit conducted in terms of section 40 of the TAA. It can then be determined whether the rights of the taxpayer are adversely

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33 *Chirwa v Transnet* para 183.
34 Section 5 of PAJA.

affected, especially if the investigation continues for a lengthy period without conclusion.

3.1.3.3 The decision by the administrator must have a direct, external legal effect

Just as section 1(b) of PAJA requires that the decision must adversely affect the rights of any person, so the administrative action must also have a "direct, external legal effect" on the person. As stated in *Carte Blanche Marketing CC and Others v Commissioner for the South African Revenue Service*,[35] a decision to select a taxpayer for audit does not adversely affect the rights of any person, and so does not have a "direct, external legal effect" to be classified as administrative action.

In the tax context, the administrative action of the Commissioner may have a direct effect on the affairs of the taxpayer himself if, for example, a request for information from the taxpayer or third party by the Commissioner has a direct effect on the taxpayer. The taxpayer must show the extent of the damage or effect of the administrative action performed by the Commissioner on his rights.

3.1.4 The administrator must exercise a public power or perform a public function

The definition of "administrative action" in section 1 of PAJA requires that the power must be performed in the course of a public function. According to Ngcobo J in *Chirwa v Transnet* (above), determining whether a power or function is "public" is a difficult exercise and there is no simple definition or clear test to be applied. Instead, it is a question that must be answered with regard to all the relevant factors and includes:

- the relationship of coercion or power that the actor has in its capacity as a public institution;
- the impact of the decision on the public;
- the source of the power; and
- whether there is a need for the decision to be exercised in the public interest.[36]

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35 (26244/2015) [2020] ZAGPJHC 202 (31 August 2020) para 61.

36 *Chirwa v Transnet* 2008 4 SA 367 (CC) para 186.

In the *Chirwa v Transnet* case, Transnet conducted work that had a constant and public significant impact. The applicant's job in the company was to administer the Transnet Pension Fund, and this had a very small impact on the public. Although it affected the functioning of the Fund that deals with the future of Transnet employees after retirement, the applicant did not take decisions regarding transport policy or practice. The ultimate effect of her dismissal on the public service provided by Transnet was negligible.[37]

By contrast, decisions of the Commissioner may have a huge public impact. The office of the Commissioner designs policies and decisions on a national and large scale. It is the latter that by and large impacts on the public because the Commissioner performs a public function for the benefit of the state.

3.1.5 Conduct that does not constitute administrative action

It is very important to take note of the fact that not all actions by an "organ of state", whether natural or juristic persons, can be classified as administrative action. What follows below is an exposition of the actions that do not qualify as administrative action in terms of section 1(aa) to (ii) of PAJA. Only the most relevant exclusions in terms of this work will be briefly explained.

3.1.5.1 The executive powers of the executives

The term "administrative action" excludes the executive functions of, for example, the President and the Cabinet Ministers.[38] This was confirmed in *President of the Republic of South Africa v South African Rugby Football Union* (above).[39] Executive functions entail those functions at the highest level which are constitutional in nature. This means that taxpayers cannot invoke the provisions of section 33 of the Constitution to challenge the decision of the Minister of Finance.

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37 *Chirwa v Transnet* para 188.
38 Section 1(aa) of PAJA.
39 2000 1 SA 1 (CC); 1999 7 BCLR 725 (CC) para 147.

In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*,[40] the court held that "administrative action" as contemplated in section 33 of the Constitution does not include, within its ambit, legislative decisions taken by a deliberative and elected legislative body established by the Constitution. Such action is not the action of the public administration, but the action of a constitutionally empowered legislature.

3.1.5.2 The judicial functions of a judicial officer

Officers of the court such as judges and magistrates are excluded from the exercise of an administrative action.[41] So, too, are the judicial functions of traditional leaders exercised under customary law or any other law. Also excluded are the judicial functions of a special tribunal established in terms of section 2 of the Special Investigating Units and Special Tribunals Act.[42]

A decision by the NPA to institute or continue a prosecution is also excluded. It should be noted, as discussed in Chapter 2, that although sections 43 and 44 of the TAA relate to a decision by a senior SARS official to institute criminal proceedings and to use gathered information in the criminal and civil proceedings, this matter should not be confused with the powers of the NPA to institute or continue with a prosecution.

The above-mentioned exclusions from the meaning of "administrative action" do not mean that no rules apply to the actions of the above-mentioned administrators or that the performance of their actions is above the law. In a system of constitutional supremacy like South Africa's, no public action is ever above the law. Therefore, these actions are reviewable under the Constitution and not under the prescripts of review set out in PAJA.

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40 1999 1 SA 374 (CC); 1998 12 BCLR 1458 paras 28–42.
41 Section 1(ee) of PAJA.
42 Act 74 of 1996.

3.2 HOW THE RIGHT TO JUST ADMINISTRATIVE ACTION CAN BE APPLIED TO PROTECT TAXPAYERS' RIGHTS

As discussed in paragraph 3.1 above, once an administrative action has been established on the part of the administrator, the next step is to ascertain whether the particular administrative action is in line with the terms of section 33 of the Constitution. What follows is a discussion of the elements of just administrative action and how taxpayers may rely on them to seek relief from the administrative action (information gathering powers) of the Commissioner that adversely affect their rights.

3.2.1 The decision of the administrator must be lawful

An administrative action must be performed lawfully by public functionaries. This requirement embodies the enactment of the principle of legality and it entails administrative action permitted by the law. The principle of legality constitutes the "obverse facet of the *ultra vires* doctrine".[43]

In that sense, legality is one of the principles used by the courts to determine whether administrative action was authorised and also performed in accordance with the prescripts of the law.[44]

Klaaren and Penfold[45] explain that:

> The right to lawful administrative action therefore constitutionalises the fundamental right of administrative law that a decision-maker must act within his or her powers and must not act *ultra vires*.

The key principle of the rule of law in general is that any exercise of power must be authorised by law. The term "rule of law" refers to constitutionalism, which describes a state in which the law reigns supreme.[46] The state authorities are therefore bound by the law, and are not above it.

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43 Baxter *Administrative Law* 301.
44 Baxter *Administrative Law* 301.
45 Klaaren and Penfold "Just Administrative Action" ch63-p76.
46 Beinart 1962 *Acta Jur* 99; Mathews 1964 *SALJ* 312.

Hence the Commissioner must act within his powers and must not be above the law when invoking the information gathering provisions against the taxpayer. This is referred to as administrative action permitted by the law.[47] When the Commissioner decides, for example, to conduct search and seizure on the affairs of the taxpayer, the conduct must be permitted by law and must be lawful (and so, for example, a warrant might be required in order to conduct the search).

The supremacy of the Constitution sets out the boundaries and standards that must be applied to protect taxpayers against any form of unlawful use of power by any public functionary or "organ of state", including the Commissioner. The fact that the taxpayer is in a subordinate position does not mean that the Commissioner has the licence to abuse his powers.

3.2.2 The decision of the administrator must be reasonable

An administrative action must be "reasonable". The use of this term expressly permits a court to inquire into the justification of administrative action.[48] Administrative action is usually related directly to the exercise of discretion by the administrator.[49] Baxter[50] refers to the doctrine of "symptomatic unreasonableness".

In tax law, where the Commissioner exercises discretion to select a taxpayer for inspection, verification or audit in terms of section 40 of the TAA, it needs to be determined whether the discretion was reasonable or not. Thus, a taxpayer has a right to complain about the unreasonableness of the decision or discretion by the Commissioner if it affects him negatively.

In a nutshell, for the administrative action to be considered reasonable, the Commissioner must exercise his discretion in a proper way by applying his mind to objective facts and circumstances.

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47 Klaaren and Penfold "Just Administrative Action" ch63-p100.

48 Devenish, Govender and Hulme *Administrative Law and Justice* 130.

49 *The Administrator, Transvaal and The Firs Investments (Pty) Ltd v Johannesburg City Council* 1971 1 SA 56 (A) 80; Baxter *Administrative Law* 485.

50 Baxter *Administrative Law* 533.

An administrative action is reasonable when it is rational. This means that the decision must be justifiable in the light of the information known to the administrator and the reasons supplied for that decision.[51] It can be argued that the task of a court (in reviewing unreasonableness) is not to determine or question administrative policy or to determine whether a decision by the Commissioner or his officials is correct or not, or even to agree with the decision.

Administrative action has a reasonable effect when the Commissioner or his officials have exercised their discretion in a proper way. In short, reasonable administrative action is justifiable decision-making that is based on reason and not on, for example, the subjective opinion of the administrator.

Consequently, the taxpayer needs to prove that a decision by the senior SARS official constitutes administrative action in order to be in line with section 33 of the Constitution. For example, a taxpayer may need to prove that an administrative action to select him for search and seizure is unreasonable.

Similarly, a taxpayer aggrieved by the Commissioner's information gathering power that permits the Commissioner to select a taxpayer for search and seizure must prove that the administrative action is not only unreasonable, but also infringes the rights of taxpayers.

3.2.3 The decision by the administrator must be procedurally fair

The right to procedural fairness as set out in section 3(1) of PAJA has its origin in common law "rules of natural justice" which are applicable to administrative inquiries and hearings. These rules of natural justice consist of two principles: *audi alteram partem* (hear the other side) and *nemo iudex in sua causa* (no one can be a judge in his own cause). These principles are fully explained in Chapter 4 below.

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51 Croome *Taxpayers' Rights in South Africa* 206.

To answer a question relating to the fairness of an administrative action, one needs to refer to PAJA itself and the requirements which it sets for procedural fairness. Thus PAJA provides the following in section 3:

(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) *(a)* A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) -

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;

(iv) adequate notice of any right of review or internal appeal, where applicable; and

(v) adequate notice of the right to request reasons in terms of section 5.

From the provisions above it is clear that in order to rely on PAJA, the taxpayer must prove that he has been "materially and adversely" affected by the decision of the Commissioner to, for example, refer him for search and seizure. It needs to be highlighted that section 3 of PAJA is peremptory.

Where the taxpayer has been denied a hearing when he was supposed to have had it in terms of the common law rules of natural justice, this denial is a gross irregularity, irrespective of whether or not the Commissioner has a strong case against the taxpayer.

It should be noted that, just as the Constitution provides limitations to the rights in the BOR (as discussed in Chapter 2), so PAJA provides for a limitation to the right to procedural fairness, provided certain conditions are met. Section 3(4) of PAJA provides:

(a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).

(b) In determining whether a departure as contemplated in paragraph *(a)* is reasonable and justifiable, an administrator must take into account all relevant factors, including-

(i) the objects of the empowering provision;

(ii) the nature and purpose of, and the need to take, the administrative action;

(iii) the likely effect of the administrative action;

(iv) the urgency of taking the administrative action or the urgency of the matter; and
(v) the need to promote an efficient administration and good governance.

In *Carlson Investments Share Block (Pty) Ltd v Commissioner, South African Revenue Services*,[52] the taxpayer argued that its right to fair administrative action had been infringed. The alleged infringement was based on the fact that the Commissioner had revised an assessment within the three-year period. This happened after a decision had been taken to allow an objection thereto. The Commissioner had initially disallowed the deduction of interest that had been paid by the taxpayer in terms of section 11(a), but later allowed the deduction.

The taxpayer considered that the action had resulted in unfairness because taxpayers are "entitled" to rely upon the "finality" of a decision that allows an objection. The first feature of the right to procedural fairness is the right of participation. This right entitles persons to participate in the decision-making process in relation to administrative decisions that affect them.[53] For it to have been procedurally fair, the taxpayer would have had to have a say in the process which affects his rights before the decision is made.

The second feature is that the right to procedural fairness is not only concerned with the rightness or correctness of the decision of the Commissioner or his officials, but it also relates to the duty of the Commissioner to act towards the taxpayer in a procedurally fair manner.[54] "Fair procedure" thus refers to the question whether the Commissioner has acted in a fair manner in reaching a decision relating to the information gathered from the taxpayer.

The third feature is that the procedural fairness must "improve the quality of decision making".[55] The better-informed the decision-making is, the less the potential for resentment and anger on the part of the individual against whom a particular decision has gone. It is therefore submitted that the decision by the Commissioner

52 2001 3 SA 210 (W) 213; 2002 5 BCLR 521 (W) 531.
53 Klaaren and Penfold "Just Administrative Action" ch63-p80.
54 Klaaren and Penfold "Just Administrative Action" ch63-p80.
55 Klaaren and Penfold "Just Administrative Action" ch63-p80.

to request information from the taxpayer or a third party must be lawful, reasonable and procedurally fair to be in line with section 33 of the Constitution.

3.2.4 Just administrative action requires individuals to be furnished with written reasons by the administrator

The right to reasons is part of the common law rule of *audi alteram partem* (discussed in Chapter 4) and requires the administrator to give reasons for his decisions. However, in the past this rule was applied inconsistently and was never strictly adhered to, if at all. Administrative functionaries and institutions were traditionally reluctant to provide reasons for the exercise of their discretionary powers.

The courts often adopted the approach that an administrative body exercising a discretionary power makes its own decisions and accordingly need not give reasons. For example, in *B.B. Rajwanshi v State of Uttar Pradesh & Ors*,[56] the Supreme Court of India held that section 6(4) of the Uttar Pradesh Industrial Disputes Act, 1947[57] authorised the State Government to remit an award of a labour court or tribunal for reconsideration of the adjudicating authority and that such authority was to submit the award to the Government after reconsideration.

The court noted that section 6(4) did not require the Government to hear the parties before remitting the award to the adjudicating authority concerned; the Government was not required to give reasons for remitting the award; and the Government was not required to inform the authority of the specific points on which it was to reconsider the award.

However, the cases discussed below demonstrated a move towards the importance of providing reasons by the administrator. In *WC Greyling & Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board and Others*,[58] the administrator had refused the application for a permit and had given no reason for the refusal. The

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56 [1988] INSC 99; AIR 1988 SC 1089.
57 [Act No. XXVIII of 1947].
58 1982 4 SA 427 (A).

court held that the administrator had acted grossly irregularly. The fact that the statute did not expressly require that reasons be given did not dispel the inference that important evidence had been ignored.

In *Moletsane v Premier of the Free State and Another*,[59] the administrative action complained of related to the suspension of a teacher as a preliminary step taken before the teacher was charged with misconduct. The court (*per* Hancke J) held that:

> This, in my view, connotes a correlation between the action taken and the reasons furnished: the more drastic the action taken, the more detailed the reasons which are advanced should be. The degree of seriousness of the administrative act should therefore determine the particularity of the reasons furnished.[60]

The court held further that the administrative action taken (in the form of suspension) was justifiable in relation to the reasons advanced, having regard to the applicant's rights which were affected or threatened.

In *Nomala v Permanent Secretary, Department of Welfare, Eastern Cape and Another*,[61] the termination of a disability grant was at issue where the applicant was requested to re-apply for a disability grant. The court held that:

> the reasons do not educate the beneficiary concerned about what to address specifically in an appeal or a new application. It does not instil confidence in the process, and certainly fails to improve the rational quality of the decisions arrived at.[62]

In their minority judgment in the Constitutional Court case of *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another*,[63] Mokgoro and Sachs JJ summarised the justification for the provision of reasons as follows:

> The duty to give reasons when rights or interests are affected has been stated to constitute an indispensable part of a sound system of judicial review. Unless the person affected can discover the reason behind the decision, he or she may be unable to tell whether it is reviewable or not and so may be deprived of the protection of the law. Yet it goes further than that. The giving of reasons satisfies the individual that his or her matter has been considered and also promotes good administrative functioning because the decision-makers know that they

59 1996 2 SA 95 (O); 1995 9 BCLR 1285 (O).
60 *Moletsane v Premier of the Free State* 1996 2 SA 98; 1995 9 BCLR 1288.
61 2001 8 BCLR 844 (E).
62 *Nomala v Permanent Secretary, Department of Welfare* 856.
63 2002 3 SA 265 (CC); 2002 9 BCLR 891 (CC).

> can be called upon to explain their decisions and thus be forced to evaluate all the relevant considerations correctly and carefully. Moreover, as in the present case, the reasons given can help to crystallise the issues should litigation arise.[64]

In the 2003 case *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd*,[65] the court held that the decision maker needed to explain his decision in a way which enabled a person aggrieved to say, in effect:

> Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error in law, which is worth challenging.[66]

The court further held that:

> [I]t is apparent that reasons are not really reasons unless they are properly informative. They must explain *why* action was taken or not taken; otherwise they are better described as findings or other information.[67]

It is interesting to note that although *Minister of Environmental Affairs and Tourism v Phambili Fisheries* was not a tax case, in 2010, the SCA delivered a judgment in the tax case of *CSARS v Sprigg Investment 117 CC t/a Global Investment*, which followed the same reasoning.[68]

The SCA in *CSARS v Sprigg Investment* heard an appeal by the Commissioner against a judgment by the Tax Court which had ordered the Commissioner to furnish the respondent with adequate reasons. The SCA described the standard of what constitutes adequate reasons for an assessment or decision and quoted with approval the judgment of *Minister of Environmental Affairs and Tourism v Phambili Fisheries*.[69]

In the 2020 case of *ITC 1929*,[70] the Tax Court followed the SCA decision of *CSARS v Sprigg Investment 117 CC t/a Global Investment* in *ITC 1929*.[71] The Tax Court

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64 *Bel Porto School Governing Body v Premier, Western Cape* para 159.

65 *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fisheries (Pty) Ltd* 2003 6 SA 407 (SCA).

66 *Minister of Environmental Affairs and Tourism v Phambili Fisheries* para 40.

67 *Minister of Environmental Affairs and Tourism v Phambili Fisheries* para 40 (original emphasis).

68 [2010] JOL 26547 (SCA).

69 *CSARS v Sprigg Investment 117 CC t/a Global Investment* para 12.

70 82 SATC 264.

71 82 SATC 264.

was tasked with deciding whether SARS had provided adequate reasons for an additional assessment issued in respect of a taxpayer. The taxpayer had requested reasons from SARS for an additional assessment which was made 5 years and had prescribed. The court in assessing the facts, confirmed that SARS had failed to expressly provide reasons that were adequate. The court opined:

> … in order to make an objection, applicant should not be left with uncertainty as to what SARS has given as its reasons substantiating causation. What is to be implied from reasons expressed may be ambiguous and subject to later dispute. Hence SARS should have made express in its correspondence stating its reasons what it has clarified and rendered express in the passages of its answering affidavit in these proceedings to which I have referred.[72]

The furnishing of reasons promotes fairness and proper administrative behaviour. It could therefore be argued that this requirement shows a commitment to openness and transparency in the public administration.

Baxter[73] opines that:

> [t]he good administrator will give reasons even if there is no duty upon him to do so.

Devenish, Govender and Hulme[74] opine that the reasons given must not only be adequate but must also be relevant to the decision in question. Therefore, it is submitted, reasons cannot be perceived as a smoke-screen to disguise the actual process of decision-making and the reasons that motivated the decision maker.

For tax purposes, this implies that the Commissioner or decision maker is required to justify and to provide an explanation for the administrative action that has been taken. This requirement safeguards the taxpayer against any arbitrary or unreasonable administrative decision-making.

Hence the importance of the provision of reasons by the Commissioner, notwithstanding the initial reluctance to provide reasons to taxpayers, cannot be

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72 McFadden C and Coertze J "Court confirms the obligation on SARS to provide taxpayers with ample reasons" (2020) *Fasken Bulletin* https://www.fasken.com/en/knowledge/2020/08/31-court-confirms-the-obligation-on-sars-to-provide-taxpayers-with-ample-reasons/ (Date of use: 05 September 2020).

73 Baxter *Administrative Law* 746.

74 Devenish, Govender and Hulme *Administrative Law and Justice* 133.

over-emphasised.[75] Reasons show how the Commissioner functioned when he took the decision and, in particular, how he performed the action. Providing reasons shows that the Commissioner acted lawfully or unlawfully, rationally or arbitrarily, reasonably or unreasonably.

A taxpayer who wishes to challenge an administrative decision is at a tremendous disadvantage where reasons are not provided. In some instances, the refusal to give reasons may prove detrimental to his case. After all, it remains difficult for a taxpayer to prove that the Commissioner failed to fulfil any of the requirements for just administrative action when no concrete reasons for his decision have been provided.

The question of who is entitled to written reasons should be answered by first considering the provisions of the Constitution. Section 33(2) of the Constitution provides that only a person whose rights have been "adversely affected" by administrative action has a right to written reasons. Through this qualification (that only when rights are adversely affected), the drafters of the Constitution limited the right to written reasons.

Section 5 of PAJA gives the constitutional right to reasons statutory form.[76] The section provides:

> (1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.
> (2) The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action.
> (3) If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.
> (4) *(a)* An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and must forthwith inform the person making the request of such departure.

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75 *B.B. Rajwanshi v State of Uttar Pradesh & Ors* [1988] INSC 99; AIR 1988 SC 1089.
76 Klaaren and Penfold "Just Administrative Action" ch63-p114.

Although PAJA supports the right to reasons, the provision of written reasons is not automatic in terms of PAJA. The administrative action must affect the rights of taxpayers negatively, and the provision of reasons is at the request of the taxpayer. Taxpayers should not miss the opportunity of asking for adequate reasons. Where the taxpayer does not ask for reasons, it would be difficult to know why the administrative action was performed. More importantly, the reasons explain why the administrative action went against the taxpayer.

The taxpayer's exercising this right to request reasons does not imply that he is trying to be difficult. It indicates that the taxpayer can rely on the common law principle of "just cause" to request reasons.[77] After all, this request is in accordance with SARS's obligations to be accountable and transparent at all times (to be discussed fully in the SARS Service Charter in Chapter 4).

3.2.4.1 Instances where reasons may not be provided

Section 5(4)(a) of PAJA provides that the administrator may depart from the requirement of providing written reasons in cases where it is "reasonable and justifiable in the circumstances". These factors as set out in section 5(4) provide that:

> *(a)* An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and must forthwith inform the person making the request of such departure.
>
> *(b)* In determining whether a departure as contemplated in paragraph *(a)* is reasonable and justifiable, an administrator must take into account all relevant factors, including–
>
> (i) the objects of the empowering provision;
> (ii) the nature, purpose and likely effect of the administrative action concerned;
> (iii) the nature and the extent of the departure;
> (iv) the relation between the departure and its purpose;
> (v) the importance of the purpose of the departure; and
> (vi) the need to promote an efficient administration and good governance.

[77] In *Minister of Justice and Constitutional Development and Another v Masingili and Another* 2014 1 SACR 437 (CC); 2014 1 BCLR 101 (CC), it was held that "just cause" means a legally sufficient reason. Just cause is sometimes referred to as good cause, lawful cause or sufficient cause. A litigant must often prove to a court that just cause exists and therefore that the requested action or ruling should be granted.

This means that the Commissioner has a duty to inform the taxpayer that there are justifiable reasons that allow the Commissioner not to provide written reasons to the taxpayer. Thus, section 5(4), like sections 3(4) and 4(4) of PAJA, represents a limitation on the right to be furnished with written reasons.

It is argued that the taxpayer may challenge this limitation by showing that the right to be provided with reasons is critical for the protection of his rights. The refusal to provide reasons on the part of the Commissioner often leads to suspicion, distrust of and misgivings about the public administration on the part of the taxpayer.

3.3 OVERVIEW OF THE CHAPTER

The chapter dealt with administrative principles that are important in ensuring that the Commissioner's information gathering power do not contravene taxpayers' rights. The chapter also provided an understanding of what administrative action means and which actions fit the definition.

The chapter also addressed the fact that administrative action must be subject to section 33 of the Constitution, which refers to just administrative action. The Commissioner's conduct when gathering information about taxpayers must meet the requirements of just administrative action. The conduct must be permitted by an empowering provision and it must materially affect the rights of taxpayers.

This means that the information gathering powers of the Commissioner must be lawful, reasonable and procedurally fair. Reasons must be provided for the action of the Commissioner. The chapter explains the actions which are not regarded as administrative actions. It also explains the actions to be taken against the Commissioner when he has failed to comply with section 33 of the Constitution.

The next chapter deals with the role of the common law and the principle of *ubuntu* that may be relied upon by taxpayers to protect their rights.

CHAPTER 4

THE ROLE OF COMMON LAW RULES OF NATURAL JUSTICE; THE DOCTRINE OF LEGITIMATE EXPECTATIONS AND THE PRINCIPLE OF *UBUNTU* IN PROTECTING TAXPAYERS' RIGHTS

4 INTRODUCTION

This chapter deals with how the common law rules of natural justice, the *ultra vires* doctrine, the doctrine of legitimate expectations and the principle of *ubuntu* can all be relied upon by taxpayers to ensure that the Commissioner's information gathering powers do not violate taxpayers' rights.

4.1 THE COMMON LAW RULES OF NATURAL JUSTICE

According to Devenish, Govender and Hulme,[1] natural justice simply means "the natural sense of what is right and wrong". The two rules of natural justice are *audi alteram partem* (hear the other side) and *nemo iudex in sua causa* (no one can be a judge in his own cause). These rules are contrasted with *ultra vires*, which literally means "to act beyond one's powers" (*vires* means "powers" and *ultra* means "beyond").[2]

The two rules of natural justice do not exhaust the concept and practice of natural justice, but constitute a seminal aspect of administrative law and justice that ensures compliance with the principle of legality.[3] Thus, rules of natural justice refer to common sense, fairness and the proper of use of reason. They are applicable to situations before an administrator has to make a decision. In effect, they deal with the procedure to be followed by an administrator before embarking on an administrative action.

The effect and status of the common law on the control of public power such as the Commissioner's action or conduct can be illustrated by the decision in

1 Devenish, Govender and Hulme *Administrative Law and Justice* 271.
2 Devenish, Govender and Hulme *Administrative Law and Justice* 271.
3 Devenish, Govender and Hulme *Administrative Law and Justice* 282.

Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others.[4] The Constitutional Court (*per* Chaskalson P) held that:

> the control of public power by the Courts through judicial review is and always has been a constitutional matter. [5]

Chaskalson P continued:[6]

> There are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

From this quotation it may be concluded that the common law rules still play a very important role alongside the Constitution[7] to ensure that there are not two separate systems of law, but only one which provides that the common law derives its force from the Constitution.

In tax law, applying the common law rules of natural justice implies that the Commissioner must ensure that the rules of natural justice are adhered to before he makes any decision against the taxpayer. A taxpayer may also rely on these rules to ensure that the procedure followed by the Commissioner does not violate the rights of taxpayers.

4.1.1 Relying on the *audi alteram partem* rule to protect taxpayers' rights

The *audi alteram partem* rule has been interpreted and developed by the courts to consist of three features: the individual must be given an opportunity to state his case on the matter; the individual must be informed of the considerations against him; and reasons must be given by the administrator for any decisions taken.[8]

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4 2000 2 SA 674 (CC); 2000 3 BCLR 241 (CC).
5 *Pharmaceutical Manufacturers Association of South Africa* para 33.
6 *Pharmaceutical Manufacturers Association of South Africa* para 44.
7 Constitution of the Republic of South Africa, 1996.
8 Croome and Olivier *Tax Administration* 21.

These principles demand that the administrator should follow certain procedural requirements. However, Rautenbach and Malherbe[9] argue that the concept "procedurally fair" is not limited to the rules of natural justice. Other principles concerning procedure may also be recognised as constitutionally entrenched principles.[10]

Baxter[11] classifies the rules of natural justice as serving three purposes: they facilitate accurate and informed decision-making; they ensure that decisions are taken in the public interest; and they cater for certain important process values. The discussion below seeks to highlight how the *audi alteram partem* rule may be relied upon to protect taxpayers' rights if they are contravened by the Commissioner's information gathering powers.

4.1.1.1 A taxpayer must be given an opportunity to be heard

From a tax perspective, the *audi alteram partem* rule would require that any taxpayer affected by a decision of the Commissioner must be given an opportunity to be heard (in a fair hearing) before any decision is made against him. The crucial question under these circumstances remains whether the affected taxpayer has been given a proper opportunity to present his case.

The right to present one's case is not restricted to formal administrative enquiries, but applies in any situation where rights, privileges, liberties and even "legitimate expectations" (fully explained below) are at issue.[12] Since the *audi alteram partem* rule requires that one should be given an opportunity to be heard and state one's case, it can be relied upon by the taxpayer whose rights have been violated by the Commissioner when he selects a taxpayer for inspection, verification or audit.

Where this opportunity is denied, the taxpayer's rights under the *audi alteram partem* rule are contravened. It is the duty of the taxpayer to prove that these rights

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9 Rautenbach and Malherbe *Constitutional Law* 233.

10 *Van Huyssteen v Minister of Environmental Affairs and Tourism* 1995 9 BCLR 1191 (C) 1214B-D; *Kotzé v Minister of Health* 1996 3 BCLR 417 (T) 424E.

11 Baxter *Administrative Law* 580.

12 Devenish, Govender and Hulme *Administrative Law and Justice* 282.

have been contravened by the actions of the Commissioner. The rule further ensures protection regarding the manner in which any hearing or inquiry or investigation by the Commissioner is conducted.

In summary, a taxpayer affected by a decision or a proposed decision, for example, to select him for inspection, verification or audit on his affairs must be given an opportunity to be heard in a fair hearing by the Commissioner before any decision is made.

4.1.1.2 A taxpayer must be given proper notice of the intended action

Where, for example, the Commissioner uses his information gathering powers to request information from the taxpayer or his accountant (a third party), the Commissioner must inform the taxpayer of the intended request. The notice enables the taxpayer to ask the relevant questions and to prepare adequately. Where a taxpayer is not given notice of the request, the taxpayer's common law right under the *audi alteram partem* rule is contravened.

4.1.1.3 A taxpayer must be given reasonable and timely notice of the intended action

Where a taxpayer is given reasonable and timely notice of an intended action, the taxpayer will have a reasonable time to prepare. Devenish, Govender and Hulme[13] argue that it is axiomatic that the more complex and involved the issue, the longer the period required.[14]

This means, for example, that the exercise of the Commissioner's powers to exchange taxpayer information with other countries is acceptable where the taxpayer forms part of the process and is provided with reasonable and timely notice of the intended exchange. The Commissioner's failure to include the taxpayer in the process and give him appropriate notice may result in the *audi alteram partem* rule being contravened.

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13 Devenish, Govender and Hulme *Administrative Law and Justice* 284.
14 Devenish, Govender and Hulme *Administrative Law and Justice* 284.

4.1.1.4 A taxpayer must appear in person

In accordance with the *audi alteram partem* rule, the taxpayer must be granted the opportunity to appear in person. The Commissioner, however, has a discretion (which can be arbitrarily exercised) to give the taxpayer so affected an opportunity to appear in person. Where the Commissioner believes that the case is not complicated, then he can request that only documents must be sent.

4.1.1.5 A taxpayer has the right to legal representation

Wiechers[15] argues that the nature of the hearing should prompt the decision whether an individual qualifies for legal representation. A purely factual and simple hearing does not require legal representation, but a highly technical matter affecting the individual's status, way of life and reputation should entitle him to legal representation.

Where the Commissioner conducts search and seizure on the affairs of the taxpayer and privileged documents are seized, the taxpayer may require to be represented by a legal representative, and should be allowed to choose such representation.

4.1.1.6 A taxpayer has a right to lead evidence

Where the Commissioner has requested taxpayer information from a third party, the taxpayer may require that he should be allowed to lead evidence so as to demonstrate how the Commissioner's request for information from the third party has violated the taxpayer's rights.

4.1.1.7 The taxpayer's hearing must be held in public

In the spirit of transparency, taxpayers are given the opportunity of having their hearings held in public. Although there is no absolute right to a public hearing, publicity is an important means by which discretionary power is restrained.[16] It can

15 Wiechers *Administrative Law* 211.
16 Devenish, Govender and Hulme *Administrative Law and Justice* 287.

also be asserted that fairness requires that a hearing should be conducted in the open.[17]

4.1.1.8 A taxpayer is entitled to be furnished with reasons

The Commissioner must provide the affected taxpayer with reasons for his action or conduct. Where the taxpayer has been referred for criminal investigation, the Commissioner must provide reasons why the criminal investigation is to be conducted. Failure to provide reasons on the part of the Commissioner may result in the *audi alteram partem* rule being contravened.

4.1.2 Relying on the *nemo iudex in sua causa* rule to protect taxpayers' rights

The second rule of natural justice which deals with procedural fairness is *nemo iudex in sua causa*. It is also known as the rule against partiality or bias. In *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another*,[18] the Appellate Division ("AD") (*per* Hoexter JA) held:

> I conclude that in our law the existence of a reasonable suspicion of bias satisfies the test; and that an apprehension of a real likelihood that the decision maker will be biased is not a prerequisite for disqualifying bias.[19]

The foundation of the *nemo iudex in sua causa* rule is rooted in the two "common sense rules of good administration": the first is that a decision is more than likely to be sound when the decision maker is unbiased or impartial; and the second is that the public have more faith in the administrative process when "justice is not only done, but seen to be done".[20]

In *Yates v University of Bophuthatswana and Others*,[21] the court held that:

> administrative action must not be vitiated, tainted or actuated by bias.[22]

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17 Devenish, Govender and Hulme *Administrative Law and Justice* 287.
18 1992 3 SA 673 (A).
19 *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers' Union* 693I-J.
20 Hoexter *Administrative Law in South Africa* 405.
21 1994 3 SA 815 (BG).
22 *Yates v University of Bophuthatswana* 836C.

To “vitiate” means to make something less effective, or, in a legal sense, to “destroy or reduce the legal validity of something”, “tainted or actuated by bias”.[23] In effect, the Commissioner and his officials must be, and must be reasonably perceived to be, impartial or unbiased when they exercise information gathering powers.

The Commissioner is expected not to be biased when deciding to select a taxpayer for inspection, verification or audit, refer the taxpayer for search and seizure or to exchange his information with other countries. To invoke this rule, the taxpayer must prove that Commissioner was biased in selecting a taxpayer for inspection, verification or audit, referring him for search and seizure or exchanging his information with other countries without a reasonable explanation. Similarly, the Commissioner is expected not to be biased when requesting taxpayer information from the taxpayer or a third party.

4.1.3 Relying on the *ultra vires* doctrine to protect taxpayers' rights

The *ultra vires* doctrine has always been used under common law to enquire whether the action by the administrator was not performed outside the boundaries of the powers granted to administrators. *Ultra vires* literally means “to act beyond one's powers”. It can therefore be explained to mean to exceed one's powers. The opposite of *ultra vires* is *intra vires* (“within the powers”).

The Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[24] (above) had to decide, amongst other things, whether the President had acted within his powers. The court held that the President's power to bring an Act of Parliament into operation must be exercised within the limits conferred by the Act.[25]

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23 Macmillan Dictionary “VITIATE (Verb) Definition and Synonyms” https://www.macmillandictionary.com/dictionary/british/vitiate (Date of use: 12 March 2019).

24 2000 1 SA 1 (CC).

25 *President of the Republic of South Africa v South African Rugby Football Union* paras 147–148.

It can be deduced that the President was answerable to Parliament, which has the power to correct the particular decision. The finding that the President acted *ultra vires* implied that he acted in a manner that was inconsistent with the Constitution. Hence it may be submitted that the action of a senior SARS official may be deemed invalid where, for example, the official conducts search and seizure without being authorised to do so.

In this conduct, he is said to have gone beyond the powers conferred on him by law or the empowering legislation. The official would be acting beyond his authority and *ultra vires*.

When a SARS official invokes an information gathering power under a tax Act in person, he must produce documentation stating the authorisation for exercising that power.[26] If that official fails to produce such authorisation, a member of the public is entitled to assume that the official is not a SARS official so authorised and that he is acting beyond his powers.[27]

4.1.4 Circumstances where the rules of natural justice do not apply

Nevertheless, in some instances where the Commissioner invokes his information gathering powers, the taxpayer's reliance on the rules of natural justice such as *audi alteram partem* may be excluded.

The legislation may provide the Commissioner with an immunity not to adhere to and observe the rules of natural justice. For example, section 63(1)(b)(i) to (iii) of the TAA provides the Commissioner with the power to conduct search and seizure without a warrant where the Commissioner believes that items on the premises of the taxpayer may be easily flushed down the toilet, burned or destroyed.

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26 Section 8(2) of the TAA.
27 Section 8(3) of the TAA.

4.2 RELYING ON THE DOCTRINE OF LEGITIMATE EXPECTATIONS TO PROTECT TAXPAYERS' RIGHTS

According to Croome,[28] the doctrine of legitimate expectations provides an extension of the applicability of the rules of natural justice. As is shown from the cases discussed below, the doctrine of legitimate expectations can include expectations which go beyond enforceable legal rights, provided that they have some reasonable or legitimate basis to challenge the outcome.

Pretorius[29] argues that legitimate expectations must be founded upon some act, practice or situation which preceded the decision. This means that the application of the doctrine of legitimate expectations is triggered by the existence of an expectation founded upon an act, practice or situation.

The doctrine of legitimate expectations can therefore not be classified as a right *per se*, but as an extension of the rules of natural justice that can be used by individuals as a last resort to advance their rights. However, in *Mokoena and Others v Administrator, Transvaal*,[30] Goldstone J held that the doctrine of legitimate expectations "refers to the rights sought to be taken away and not to the right to a hearing".[31]

The doctrine is relevant to this work because it has been given little recognition in resolving taxpayers' rights in South Africa. The following discussion investigates how the doctrine may be relied upon by taxpayers to protect their rights if they are violated by the Commissioner's information gathering powers.

The application of the doctrine of legitimate expectations may be divided into procedural legitimate expectations and substantive legitimate expectations. Procedural legitimate expectations provide for the expectations created by a past practice, or a promise or representation made by the administrator that a certain

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28 Croome *Taxpayers' Rights in South Africa* 249.
29 Pretorius 2000 *SALJ* 525.
30 1988 4 SA 912 (W).
31 *Mokoena v Administrator, Transvaal* 918E.

procedure will be followed, while substantive legitimate expectations provide that a past practice, or a promise or representation must be fulfilled.

The protection of substantive legitimate expectations, which is discussed fully later in this chapter, is the crux of this concept and has been debated for many years by courts in the United Kingdom ("UK"), Canada and South Africa.

4.2.1 The origin and development of the doctrine of legitimate expectations in South Africa

In South Africa, the doctrine of legitimate expectations was formulated in *Administrator, Transvaal, and Others v Traub and Others*,[32] four years before the Interim Constitution was enacted.[33] However, the doctrine of legitimate expectations had been invoked for the first time in South Africa in the decision of Fagan J (with whom Lategan J concurred) in *Everett v Minister of the Interior.*[34]

In *Everett v Minister of the Interior*, a British citizen by birth applied for permanent residence in South Africa. Her application for an extension of her temporary residence permit for one year was granted and extended until 8 July 1980. On 10 June 1980 her temporary residence was withdrawn with immediate effect by the then Minister of the Interior. Accordingly, she was ordered to leave the country on or before 11 June 1980. No reasons were given to her for her immediate ejectment from South Africa.

The applicant's grounds to set aside the decision of the Minister were, *inter alia*, that it was contrary to the rules of natural justice, because she had not been afforded an opportunity to be heard. She relied on the rule of natural justice *audi alteram partem* (discussed above), which requires the administrator to give the aggrieved party an opportunity to state his case. The court held that the Minister's notice had to be set aside because the *audi alteram partem* rule had not been applied. The court held

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32 1989 4 SA 731 (A).

33 Constitution of the Republic of South Africa 200 of 1993. This Constitution was repealed by the Constitution of the Republic of South Africa, 1996.

34 1981 2 SA 453 (C).

that the applicant had a legitimate expectation of being allowed to stay for the permitted time.

Following the *Everett v Minister of the Interior* case, the AD had an opportunity to deliver a landmark judgment on the doctrine of legitimate expectations (*per* Corbett CJ) in *Administrator, Transvaal and Others v Traub and Others.* The decision is an important milestone in the development of the doctrine of legitimate expectations in South African law with respect to the relationship between the government and its citizens.

The facts in *Administrator, Transvaal and Others v Traub and Others* related to the six respondents who had graduated with medical degrees ("MBChB") from the University of the Witwatersrand ("Wits"). The doctors did their internships at the Baragwanath Hospital (now called Chris Hani Baragwanath Hospital) during 1986.

The doctors were employed as interns and practitioners by the hospital and they were given the impression that they would be offered full-employment contracts upon the completion of their internship. Contrary to that impression, the director of hospital services changed his mind and did not offer such contracts to these prospective employees.

Consequently, they were also considered to be unsuitable for the posts which they had applied for. In the same vein, the director of hospital services did not provide them with reasons for the decision, nor did he permit a hearing at which they could discuss and state their cases.

The doctors felt aggrieved and they approached the Witwatersrand Local Division ("WLD") for relief. The matter came before Goldstone J, who decided in favour of the applicant doctors. Goldstone J held that the decision of the director of hospital services to turn down the applications of the doctors at the hospital was invalid by reason of his failure to accord the respondents a fair hearing before taking the decision.[35]

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35 *Traub and Others v Administrator, Transvaal, and Others* 1989 1 SA 397 (W).

The director of hospital services noted an appeal to the Appellate Division against the whole of the judgment and order. The appeal came before a court presided over by Corbett CJ, who did not hesitate to refer to the common law maxim *audi alteram partem*. He held that the maxim provides a principle of natural justice which is part of South African law. Corbett CJ also referred to the doctrine of legitimate expectations, which, he noted, was imported from England and first applied there in the case of *Schmidt and Another v Secretary of State for Home Affairs*.[36]

The judgment in *Schmidt and Another v Secretary of State for Home Affairs* is discussed fully in Chapter 7, which deals with English law. However, for the purposes of the issue at hand, Corbett CJ noted that the respondents in *Administrator, Transvaal and Others v Traub and Others* were not given a fair hearing. In answering the question of whether they were entitled to have that fair hearing, the chief justice held that:

> The law should in such cases be made to reach out and come to the aid of persons prejudicially affected. At the same time, whereas the concepts of liberty, property and existing rights are reasonably well defined, that of legitimate expectation is not. Like public policy, unless carefully handled it could become an unruly horse. And, in working out, incrementally, on the facts of each case, where the doctrine of legitimate expectation applies and where it does not, the Courts will, no doubt, bear in mind the need from time to time to apply the curb. A reasonable balance must be maintained between the need to protect the individual from decisions unfairly arrived at by public authority (and by certain domestic tribunals) and the contrary desirability of avoiding undue judicial interference in their administration.[37]

In its simple form, the doctrine of legitimate expectations provides that when a statute empowers an administrator or body to decide on a matter that would prejudicially affect an individual's liberty, property or existing rights, that individual has a right to be heard and state his case before the decision is taken.[38]

It was alleged by the doctors that because of their qualifications, previous service, and recommendations, they had legitimate expectations to be appointed. As a result, a decision refusing their confirmation of employment affected their legal rights

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36 [1969] 2 Ch 149 (CA) 170.
37 *Administrator, Transvaal and Others v Traub and Others* 761.
38 *Administrator, Transvaal and Others v Traub and Others* 748.

and interests. The doctors also argued that they had legitimate expectations to be heard before any decision was made. Corbett CJ confirmed the decision of Goldstone J in the court *a quo* and found in favour of the doctors.

From a tax perspective, the Commissioner or a senior SARS official may be bound to give a taxpayer who is affected by the decision to refer him for inspection, verification or audit an opportunity to make representations. It all depends on whether the taxpayer concerned has some right or interest, or some legitimate expectations, of which it would not be fair to deprive him without hearing what he has to say.

Where a taxpayer is, for example, promised that he will not be required to provide information or will not be subject to search and seizure, the Commissioner may not deviate from this practice without the taxpayer having been granted the opportunity to be heard. This is the case because an expectation could have been created by a practice in the past which must be followed for the benefit of the taxpayer. This concept is what underpins the doctrine of legitimate expectations.

4.2.2 The requirements of the doctrine of legitimate expectations

In *South African Veterinary Council v Szymanski*,[39] the Supreme Court of Appeal ("SCA") dealt with a substantive claim of the applicant doctor who wished to be registered as a veterinary surgeon in South Africa. Dr Szymanski obtained a veterinary degree in Poland in 1978 before immigrating to South Africa in 1989 and becoming a citizen by naturalisation in 1994.

The South Africa Veterinary Council ("the Council") conducts a special examination for South African citizens holding foreign veterinary degrees before they may be registered to practise in South Africa. Dr Szymanski wrote the examination in 1988 and was awarded a combined mark of 45.25%. The Council regarded this as a failure because it recognised 50% to be the pass mark. As a result, the Council refused to register him as a veterinary surgeon.

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[39] 2003 4 SA 42 (SCA).

Dr Szymanski subsequently launched an application to the High Court for an order setting aside the Council's decision and an order requiring the Council to register him as a veterinary surgeon in South Africa. He argued that he had a legitimate expectation that the pass mark was 40% and not 50%. This expectation was created by numerous statements by the Council and its officials.

The High Court agreed with Dr Szymanski, and set aside the Council's decision and ordered the Council to register him as a veterinary surgeon. The High Court granted Dr Szymanski substantive relief based on his legitimate expectations. The Council appealed to the SCA, and the court (*per* Cameron JA) endorsed the formulation of the four requirements for the protection of legitimate expectations. These requirements are as follows:[40]

> (i) The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification'….
> (ii) The expectation must be reasonable….
> (iii) The representation must have been induced by the decision-maker….
> (iv) The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate….

The SCA held that Dr Szymanski's case was defective from the outset and that the applicant did not have legitimate expectations on the facts of the case. Further, Dr Szymanski might subjectively have had an expectation, but his expectation failed to meet criteria (i) and (ii) of the requirements.

The court found that there was no representation that the pass mark was 40%. It also found that there was no clear, unambiguous and unqualified representation; nor was Dr Szymanski's expectation to that effect reasonable.[41] As a result, the appeal by the Council was upheld.

Now follows a discussion of the requirements of the doctrine of legitimate expectations in the tax context, with respect to the Commissioner's information gathering powers.

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40 *South African Veterinary Council v Szymanski* para 19.
41 *South African Veterinary Council v Szymanski* para 20.

4.2.2.1 The representation underlying the expectation must be "clear, unambiguous and devoid of relevant qualification"

The requirement that the representation underlying the expectation must be "clear, unambiguous and devoid of relevant qualification" ensures fairness to both the administration and the subject. The requirement protects public officials against the risk that their ambiguous statements could create legitimate expectations. The statement could also be unfair to those who choose to rely on such statements.

In the tax context, where the Commissioner makes a statement that the taxpayer will not be requested to provide any information, that taxpayer may rely on such statements to claim relief for legitimate expectations against the Commissioner. Similarly, a taxpayer may invoke the doctrine of legitimate expectations where the Commissioner has made representations regarding the request for information or has created a practice that taxpayers requested to supply information are given an opportunity to state their cases. Legitimate expectations may be relied on when the Commissioner deviates from the above pattern of behaviour.

4.2.2.2 The expectation created must be reasonable

If an expectation seems to have been created by the Commissioner that the taxpayer will not be requested to provide any information, then that expectation must be reasonable. It must also be reasonable for the taxpayer to rely on the representations made by the Commissioner that the taxpayer will not be subjected to search and seizure. The taxpayer must be able to convince the court that the expectation created by the Commissioner was reasonable.

4.2.2.3 The representation must have been induced by the decision maker

In the tax field, the representation that the taxpayer relies upon must have been made by the Commissioner who has the power to make the relevant decision. Taxpayers must be able to rely on statements made by the Commissioner. So, for example, the taxpayer may invoke the doctrine of legitimate expectations where the

Commissioner has created a practice that audited taxpayers are given an opportunity to state their cases.

4.2.2.4 The representation must be lawful

The representation by the Commissioner must be lawful. The lawful representation must be made where the taxpayer's reliance on it is legitimate: for example, where the taxpayer relies on the statement to protect his rights.

4.2.3 The benefits of relying on the doctrine of legitimate expectations for taxpayers

Hlophe[42] explains that the concept "legitimate expectations" entitles the complainant to be heard before an adverse decision is made against him.[43] Hlophe further summarises the benefits of the doctrine of legitimate expectations into five aspects, which are discussed below in the context of the taxpayer and the topic at hand.

4.2.3.1 The doctrine may be invoked by the courts

The doctrine of legitimate expectations may be invoked by the courts themselves.[44] This means that the doctrine of legitimate expectations is to be considered as a remedy that may be invoked by taxpayers when they approach the court and request a review of the conduct or action of the Commissioner when he gathers information from taxpayers.

4.2.3.2 Taxpayers are not required to have pre-existing rights to invoke the doctrine

The doctrine of legitimate expectations does not require the existence of any pre-existing rights.[45] In relation to this work, a taxpayer is not required to convince the court that he had other rights which are being infringed.[46]

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42 Hlophe 1987 *SALJ* 165.
43 Hlophe 1987 *SALJ* 165.
44 Hlophe 1987 *SALJ* 181.
45 Hlophe 1987 *SALJ* 181.
46 Hlophe 1987 *SALJ* 181.

4.2.3.3 The doctrine advances South African law

Although the doctrine of legitimate expectations was formulated in the United Kingdom, it has been accepted and applied in South Africa to reflect a domestic practice.[47]

4.2.3.4 The doctrine extends the concept of locus standi

The concept of legitimate expectations extends the right to *locus standi* (a right to institute an action and be a party to proceedings — discussed in Chapter 5) so as to cover taxpayers who may have been previously regarded as having no right to claim the protection of the doctrine.[48]

4.2.4 Instances where taxpayers may not rely on the doctrine of legitimate expectations

Pretorius[49] explains that the doctrine cannot be enforced under certain circumstances as set out below:

4.2.4.1 Where an act giving rise to the expectation lies within the legal powers of the administrator

A taxpayer may not rely on the doctrine of legitimate expectations unless the Commissioner's conduct, such as search and seizure, that raised expectations from the taxpayer, lies within the powers of the Commissioner.[50]

4.2.4.2 Where an expectation relates to national security, public policy or the public interest

The doctrine of legitimate expectations cannot be enforced where considerations of national security, public policy or public interest prevail over the individual's

47 Hlophe 1987 *SALJ* 182.
48 Hlophe 1987 *SALJ* 182.
49 Pretorius 2000 *SALJ* 536.
50 Pretorius 2000 *SALJ* 536.

expectation.[51] For example, where the Commissioner must invoke his information gathering powers and refer the taxpayer for search and seizure, the taxpayer may not rely on the doctrine where the search and seizure relates to matters that threaten national security.

4.2.4.3 Where an expectation is contrary to the law

A taxpayer may not claim the protection of his legitimate expectations if he is involved in an illegal act that prevents the Commissioner from discharging the latter's statutory duty.[52] A court may also find on the facts that an expectation is not sufficiently compelling in the circumstances to justify its enforcement, or that there are good reasons for not giving effect to it.

4.2.5 The reliance on the doctrine of legitimate expectations under the Promotion of Administrative Justice Act ("PAJA")

By 1996, a South African court (in *Jenkins v Government of the Republic of South Africa and Another*)[53] had already ruled on the doctrine of legitimate expectations even though no reference is made to it in section 33 of the 1996 Constitution. However, a reading of section 3(1) of PAJA shows that the words "legitimate expectations" are used in the section.

The section provides that administrative action that materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. This provision demonstrates the recognition of the doctrine of legitimate expectations by PAJA.

Because the term "legitimate expectations" was not included in section 33 of the 1996 Constitution and there is no definition of or reference to legitimate expectations in section 1 of PAJA, much reliance has to be placed on the common law to provide a definition and guidelines on how the doctrine applies.

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51 Pretorius 2000 *SALJ* 536.
52 Pretorius 2000 *SALJ* 536–537.
53 1996 3 SA 1083 (TkS).

O'Regan ADCJ held in *Walele v City of Cape Town and Others*[54] as follows:

> A straightforward reading of these two provisions [s 1, which contains the definition of "administrative action", and s 3(1), which "gives effect to the right entrenched in s 33(1)" (see paragraph 123)] produces the enigma that administrative action is, as defined, not action which affects legitimate expectations, yet s 3(1) suggests that there is administrative action which will affect legitimate expectations and which must accordingly be procedurally fair. … In this case a more general provision (the definition) is in conflict with a specific provision (s 3(1)). The specific provision is aimed at giving direct effect to the constitutional right to administrative action that is procedurally fair. The apparent contradiction between the two provisions should be resolved by giving effect to the clear language of s 3(1) which expressly states that administrative action which affects legitimate expectations must be procedurally fair. Thus, the narrow definition of 'administrative action' in s 1 must be read to be impliedly supplemented for the purposes of s 3(1) by the express language of s 3(1). If this were not to be done, the clear legislative intent to afford a remedy to those whose legitimate expectations that are materially and adversely affected would be thwarted.[55]

However, the court in *South African National Defence Union v Minister of Defence*[56] (discussed in Chapter 3) held that where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard.[57] This means that section 3(1) of PAJA offers taxpayers more protection. Taxpayers can simply invoke that section without invoking the provisions of the Constitution, which do not mention anything about legitimate expectations.

4.2.6 The relevance of the doctrine of legitimate expectations for taxpayers

According to Watkin,[58] the doctrine of legitimate expectations could be applied by the court to review administrative action performed by SARS. She states the following:

> As a doctrine, it takes its place beside such principles as rules of natural justice, rule of law, non-arbitrariness, reasonableness, fairness, promissory estoppel, fiduciary duty and proportionality to check the abuse of the exercise of administrative power. The principle at the root of the doctrine is Rule of Law which requires regularity, predictability and certainty regarding the government's dealing with the public.[59]

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54 2008 6 SA 129 (CC); 2008 11 BCLR 1067 (CC).
55 *Walele v City of Cape Town* paras 125–126.
56 2007 5 SA 400 (CC); 2007 8 BCLR 863 (CC).
57 *South African National Defence Union v Minister of Defence* para 51.
58 Watkin 2009 *TAXtalk* 18.
59 Watkin 2009 *TAXtalk* 18.

The doctrine applies in the public sector, and taxpayers are becoming aware of its usefulness.[60] As discussed above, an expectation could be based on an express promise, or a representation or an established past action or settled conduct. It could be a representation to the individual or generally to a class of persons.

4.2.7 The application of substantive as compared to procedural legitimate expectations in South African law

A deliberation about legitimate expectations requires one to consider the distinction between procedural and substantive expectations. The discussion that follows seeks to establish whether the South African courts apply the doctrine of legitimate expectations to give a substantive or procedural relief to individuals, in particular, taxpayers. The discussion also relates to the protection of legitimate expectations and what relief a court may be entitled to confer in those situations.

As stated above, procedural legitimate expectations provide a protection of expectations created by a past practice, or a promise or representation made by the administrator that a certain procedure will be followed, while substantive legitimate expectations provide a protection that a past practice, or a promise or representation must be fulfilled.

The doctrine of substantive legitimate expectations (explained below) has not been universally accepted in all Commonwealth jurisdictions. In some Commonwealth jurisdictions such as England, however, the doctrine of legitimate expectations has been developing beyond the procedural context for a number of years.[61]

In South Africa, Corbett CJ stated the following in the case of *Administrator, Transvaal and Others v Traub and Others*:[62]

> The legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such person without ... a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the

60 Watkin 2009 *TAXtalk* 18.
61 Quinot 2004 *GLJ* 66.
62 1989 4 SA 731 (A).

> interests of the person concerned is taken.... In practice, the two forms of expectation may be interrelated and even tend to merge. Thus, the person concerned may have a legitimate expectation that the decision by the public authority will be favourable, or at least that before an adverse decision is taken he will be given a fair hearing.[63]

From the quotation above it is clear that Corbett CJ favoured the view that a legitimate expectation referred to a protection in the form of substantive legitimate expectations as opposed to the traditional procedural legitimate expectations which grant an individual a procedural expectation.[64]

Thus, relying on the doctrine of legitimate expectations, a court may rule in favour of the taxpayer and compel the Commissioner to stop the exchange of taxpayer information with other countries so that the taxpayer may have a say in the exchange of information.

The first part of the court order relates to the doctrine of substantive expectations, while the latter part relates to the doctrine of procedural expectations. The discussion that follows seeks to demonstrate the usage and application of the doctrine of substantive legitimate expectations by South Africa's various courts.

In *Contract Support Services and Others v Commissioner of Inland Revenue and Others*,[65] the Commissioner obtained a search warrant against the taxpayer. The purpose of the warrant was to determine whether there had been non-compliance by any person with the obligations imposed on that person by the Value-Added Tax Act ("VAT Act").[66]

The taxpayer applied for interim orders for the review and setting aside of the decision to issue notices in terms of section 47 of the VAT Act (now section 179 of the TAA). In the application, the taxpayer contended, with reference to the doctrine of legitimate expectations, that the principle of *audi alteram partem* should have

63 *Administrator, Transvaal and Others v Traub and Others* 758.
64 *Administrator, Transvaal and Others v Traub and Others* 758.
65 1999 3 SA 1133 (W); 61 SATC 338.
66 Act 89 of 1991.

been observed by all the decision makers and that the appointment of the bank as the agent in terms of section 47 was *ultra vires*.

It is clear from this application that the applicant relied on the doctrine of substantive legitimate expectations to set aside the section 47 notices. The court held that section 47 excludes the *audi alteram partem* principle and that the notice was therefore not *ultra vires*.[67] Therefore, a taxpayer could not rely on the doctrine of substantive legitimate expectations. The appointment notice of an agent by the Commissioner in terms of section 47 provides an exception to the application of the doctrine of substantive legitimate expectations.

The court in *Durban Add-Ventures Ltd v Premier, KwaZulu-Natal, and Others (No 2)*[68] dealt with a change of policy regarding applications for gambling licences. The court (*per* Booysen J) rejected, without providing authority for its decision, the substantive claim based on legitimate expectations. The judge held:

> The applicant, however, seems to wish to use the doctrine of legitimate expectation in an effort to generate substantive rather than procedural rights. Such a strategy is not permissible in South African law.[69]

In *National Director of Public Prosecutions v Phillips and Others*,[70] the applicant had successfully applied *ex parte* (in an unopposed application) for a restraint order in terms of section 26 of the Prevention of Organised Crime Act.[71] Heher J held that:

> Furthermore it seems to me that the claim of the first respondent to exemption from prosecution to all past offences committed in relation to offences involving prostitution at the Ranch amounts to a claim to a substantive right. But a legitimate expectation does not give rise to such a right.[72]

In *Carlson Investments Share Block (Pty) Ltd v Commissioner, South African Revenue Service*,[73] the Commissioner had revised an assessment within the three-year period. Accordingly, the taxpayer argued that the revised assessment created

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67 *Contract Support Services (Pty) Ltd v Commissioner for SARS* 1999 3 SA 1133 (W) 1146C-D/E and 1147A-B.
68 2001 1 SA 389 (N).
69 *Durban Add-Ventures Ltd v Premier, Kwazulu-Natal* 408E.
70 2002 4 SA 60 (W).
71 Act 121 of 1998.
72 *National Director of Public Prosecutions v Phillips* para 30; *Durban Add-Ventures v Premier of KwaZulu-Natal* 408E.
73 2001 3 SA 210 (W).

a legitimate expectation because taxpayers were "entitled" to rely upon the "finality" of a decision that allowed an objection.

The Commissioner had initially disallowed the deduction of interest that had been paid by the taxpayer in terms of section 11(a), but later allowed the deduction. However, in the light of a (separate) decision of the SCA, the Commissioner later reversed his decision to allow the deduction of interest. The applicant argued the following regarding the doctrine of substantive legitimate expectations:

> every taxpayer in the applicant's position has a legitimate expectation that once an objection has been allowed by the relevant official, pursuant to the provisions of s 81 of the Act and the tax has been paid, the taxpayer's obligations to the *fiscus* have been fulfilled, provided there has been no fraud or misrepresentation or non-disclosure of material facts by the taxpayer.[74]

The applicant further argued that a legitimate expectation may exist in regard to the substantive content of the action taken by an administrative functionary rather than simply in regard to the procedure followed in reaching such conclusion.[75] The respondent argued that it was important to understand that what the applicant was claiming was a substantive and not merely a procedural benefit.

Therefore, there can be no question of a legitimate expectation in circumstances where what is claimed is an unfair tax advantage, and no one could have a legitimate expectation that the law will not change.[76] The court (*per* Navsa J) held:

> I agree with the submission by counsel for the respondent that the applicant seeks a substantive advantage and not procedural relief. It seeks to be freed from paying the assessed taxation. There was no general or particular communication or practice identified by the applicant from which it could be deduced that when the respondent made a decision upholding an objection, neither the respondent nor any of the officials in the respondent's employ would, during the three-year period stipulated by the legislation, revisit that decision.[77]

The court further held that:

> To sum up: I conclude that the application is misconceived. The applicant's reliance on the doctrine of legitimate expectation is without substance. There is

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74 *Carlson Investments Share Block (Pty) Ltd v Commissioner, South African Revenue Service* 222.

75 *Carlson Investments Share Block (Pty) Ltd v Commissioner, South African Revenue Service* 236.

76 *Carlson Investments Share Block (Pty) Ltd v Commissioner, South African Revenue Service* 238.

77 *Carlson Investments Share Block (Pty) Ltd v Commissioner, South African Revenue Service* 239.

> an express power and obligation to revisit a tax assessment and this power is provided in the national interest. There is no justifiable charge of an abuse of power.[78]

The court in *Carlson Investments Share Block* held that the taxpayer's reliance on the principle of legitimate expectations was without substance. The Commissioner had an express power to revisit a tax assessment.[79]

Clearly, in the above-mentioned High Court decisions the application of the doctrine of substantive legitimate expectations was rejected. These decisions expressly held that the substantive protection cannot be upheld in South Africa. In the tax field, these decisions indicate that taxpayers may not rely on the doctrine of substantive legitimate expectations to advance their rights against the Commissioner's information gathering powers.

In *Meyer v Iscor Pension Fund*,[80] Meyer argued in the SCA that he had a legitimate expectation that any amendment to the rules, which resulted in increased pension benefits as part of the rationalisation scheme, would be implemented with retrospective effect. He claimed that the substantive benefit should be afforded to him.

The SCA acknowledged the position in English law which accepted the doctrine of substantive legitimate expectations. The court also noted the rejection of this doctrine in other Commonwealth jurisdictions such as Canada. Accordingly, the court in *Meyer* expressly refused to either accept or reject the doctrine of substantive legitimate expectations as applicable in South African law. Hence the SCA did not address the question of substantive legitimate expectations.

The debate about substantive legitimate expectations came twice before the Constitutional Court. However, on neither occasion was it necessary for the Constitutional Court to decide the question. In *Premier, Mpumalanga, and Another*

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78 *Carlson Investments Share Block (Pty) Ltd v Commissioner, South African Revenue Service* 239–240.

79 Section 92 of the TAA.

80 2003 2 SA 715 (SCA); 2003 1 All SA 40 (SCA).

v Executive Committee, Association of State-Aided Schools, Eastern Transvaal,[81] the Member of the Provincial Executive Council ("MEC") responsible for education terminated bursaries paid to certain state schools for needy students. These bursaries were paid to schools educating mainly white students as part of the apartheid education system.

The respondent challenged the second applicant's decision to terminate bursaries paid to certain pupils on the grounds that it was procedurally unfair and unjustifiable and therefore in breach of section 24 of the Interim Constitution.[82] The respondent sought an order setting aside the decision as well as an order requiring the applicants to pay the bursaries.

The court had to decide whether the respondents could show a "right" as contemplated by section 24(b). The respondents also argued that the school governing bodies had "legitimate expectations" as contemplated by section 24(b) which gave rise to a right to procedurally fair administrative action.

The court (*per* O'Regan J) held that it was not necessary to decide whether legitimate expectations might entitle an applicant to substantive relief. According to the justice, the reason for this conclusion was that a claim based on legitimate expectations was clearly restricted to a procedural remedy.[83] In the present case, the court found that the legitimate expectations of the schools entitled them to a fair procedure before the bursaries were terminated and that no such procedure was followed.

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81 1999 2 BCLR 151 (CC).

82 Section 24 of the Constitution of the Republic of South Africa 200 of 1993 provided:
"Every person shall have the right to —
(a) lawful administrative action where any of his or her rights or interests
is affected or threatened;
(b) procedurally fair administrative action where any of his or her rights
or legitimate expectations is affected or threatened;
(c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and
(d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened."

83 *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 2 SA 91 (CC); 1999 2 BCLR 151 (CC) para 36.

In *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another*,[84] the governing bodies of a number of schools challenged certain decisions taken by the provincial education department as part of a rationalisation scheme. Upon the department's refusal to implement the rationalisation programme, the schools instituted review proceedings.

In their application the schools argued that a number of their constitutional rights had been infringed by the department's actions and so they applied for substantive relief in the form of an order compelling the department to employ the special assistants on the schools' own payroll. The schools required a remedy in the form of substantive legitimate expectations.

The Constitutional Court narrowly dismissed an appeal from the High Court. The importance of this case is that the divided court provided differing opinions on a number of issues related to substantive legitimate expectations. Mokgoro and Sachs JJ filed a joint judgment, while Madala and Ngcobo JJ each filed their own judgments.

Madala J was prepared to accede to the substantive legitimate expectations where he held that the doctrine comprised both procedural and substantive dimensions. He further held that legitimate expectations should be vindicated unless doing so was statutorily precluded or against some "pressing public interest".

Chaskalson CJ delivered the majority judgment and held that:

> Substantive legitimate expectation is a contentious issue on which there is no clear authority in our law. As the foundation for such a claim has not been laid, I do not consider it appropriate to consider that issue in the present case. My failure to deal specifically with that issue should not be understood as an acceptance of the proposition apparently accepted by Madala J, that substantive legitimate expectation is part of our law. I leave that question open for decision in a case when the issue is properly raised and the factual foundation for such a contention is established.[85]

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84 2002 3 SA 265 (CC); 2002 9 BCLR 891 (CC).

85 *Bel Porto School Governing Body v Premier, Western Cape* para 96. The approach of both the Supreme Court of Appeal and the Constitutional Court to this question has been confirmed in *Abbott v Overstrand Municipality and Others* (99/2015) [2016] ZASCA 68 (20

From the quotation above it is clear that the majority of the court (*per* Chaskalson CJ) explicitly distanced itself from the minority remarks by Madala J. The majority held that a fair procedure was followed vis-à-vis the schools and specifically left the matter open because they declined to express an opinion on substantive legitimate expectations.

This analysis of relevant case law seems to suggest that there is considerable resistance to a wholesale reception of the doctrine of substantive legitimate expectations into the South African law. However, the Constitutional Court is prepared to leave the matter open for future decisions.

Campbell[86] points out that whether or not the doctrine of legitimate expectations could be substantively protected is a difficult question. Pretorius[87] further argues that the debate in South Africa has moved in favour of substantive protection, considering the position years back in the *Administrator, Transvaal v Traub* case (referred to above) that dealt with the limitations on the enforceability of this doctrine.

So this means that the highest courts' pronouncement on the concept of substantive legitimate expectations in South African law would be most welcome in view of the demands regarding the protection of taxpayers' rights. It would be preferable if the importance of the concept were recognised by the Supreme Court of Appeal and the Constitutional Court.

Hence it may be concluded that there seems to be hope for the acceptance of the doctrine of substantive legitimate expectations in South Africa. Thus, it is argued that there is hope for taxpayers that their rights could be protected substantively against the Commissioner's powers in future.

May 2016) para 33 and *Minister of Home Affairs and Others v Saidi and Others* 2017 4 SA 435 (SCA); 2017 2 All SA 755 (SCA) para 33.

86 Campbell 2003 *SALJ* 292.

87 Pretorius 2000 *SALJ* 536.

The doctrine of substantive legitimate expectations could help taxpayers to invoke the doctrine in order to set aside the decision by the Commissioner, for example, to conduct search and seizure on their affairs. Courts would then be able to exercise a discretion to invoke the doctrine and order a substantive remedy to protect taxpayers' rights against the actions of the Commissioner.

As it stands, taxpayers are in a disadvantaged position. The only stumbling-block is the reluctance by the Supreme Court of Appeal and the Constitutional Court finally to accept the doctrine as part of South African law.

4.2.8 Recommendation to extend the doctrine of legitimate expectations to cover taxpayers' substantive relief

The analysis below considers whether taxpayers may be able to rely on substantive relief under the doctrine of legitimate expectations against the Commissioner's information gathering powers. It is clear from the discussion above that the SCA and the Constitutional Court are not yet prepared to provide taxpayers with substantive relief which could offer remedies to taxpayers.

Yet these courts do acknowledge that the doctrine of legitimate expectations is applicable to South Africa tax law. The relief provided to taxpayers in terms of the doctrine of legitimate expectations would at most be a hearing before a decision could be reversed. That is a procedural relief only.

Watkin[88] addressed the issue of whether the doctrine can be used as a substantive relief rather than an entitlement that a due process is to be followed. She states:

> There is now increasing support for the view that the traditional approach is unjustifiably restrictive and that there is no reason why the doctrine cannot be successfully invoked so as to declare a person entitled, in an appropriate case, not simply to fair procedures, but to the benefit which he was seeking in the particular case.[89]

This work agrees with the sentiments of Watkin that taxpayers' rights may be appropriately protected where their legitimate expectations could give them

88 Watkin 2009 *TAXtalk* 18.
89 Watkin 2009 *TAXtalk* 18.

substantive relief. It is high time that the SCA and the Constitutional Court rule on the substantive protection of legitimate expectations.

Just as the doctrine of legitimate expectations applies to everyone, so it may safely be argued that it applies equally to taxpayers. The issue is whether the doctrine of legitimate expectations may assist taxpayers to advance their rights against the Commissioner's information gathering powers.

This question may be whether a taxpayer may apply for a relief that would stop the Commissioner from conducting an audit, rather than to apply for the correct procedure to be followed. The former refers to the substantive relief, while the latter refers to the procedural relief.

It is submitted that the current South African position allows taxpayers to seek procedural relief against the Commissioner but that taxpayers cannot claim substantive relief. This is the position followed by the SCA and the Constitutional Court. Although Watkin (above) argued that the doctrine of substantive legitimate expectations is applicable to taxpayers, the matter is not yet finalised by the SCA and the Constitutional Court.

4.3 RELYING ON THE NOTION OF *UBUNTU* TO PROTECT TAXPAYERS' RIGHTS

The post-amble to the Interim Constitution of the Republic of South Africa[90] refers to the term *ubuntu*, noting that:

> there is a need for understanding but not vengeance, and for reparation but not for retaliation, a need for *ubuntu* but not victimisation.

The notion of *ubuntu* is included in this work to highlight one of the most important indigenous concepts in South Africa that does not enjoy the recognition it deserves. This notion can be helpful in determining how the Commissioner should perform his duties and conduct his relationship with taxpayers.

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90 Section 251 of the Constitution of the Republic of South Africa 200 of 1993.

The notion of *ubuntu* was discussed at length by the justices of the Constitutional Court in *S v Makwanyane.*[91] In this case, the two accused were sentenced to death and to a long term of imprisonment. After South Africa became a constitutional state, the two accused appealed to the Appellate Division ("AD") against their convictions and sentences. The AD dismissed the appeals.

The Constitutional Court was then approached to consider whether the sentences were consistent with the Interim Constitution of 1993, which had come into force after the conviction and sentence by the trial court. Langa, Madala, Mahomed and Mokgoro JJ wrote different judgments on the meaning of *ubuntu*. Langa J held that an outstanding feature of *ubuntu* in a community sense was the value it put on life and human dignity.[92] According to the justice, treatment that is cruel, inhumane or degrading is bereft of *ubuntu*.[93]

Madala J held that the notion of *ubuntu* appeared for the first time in the post-amble of the Interim Constitution and carried in it the ideas of humaneness, social justice and fairness.[94] Mahomed J held that "the need for *ubuntu*" expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women.[95]

A very interesting description of what the notion of *ubuntu* means was delivered by Mokgoro J. According to the justice, South Africans have a history of deep divisions characterised by strife and conflict.[96] The value of *ubuntu* runs like a golden thread across cultural lines.[97] This notion is now coming to be generally articulated in this country. Mokgoro J held further that the Constitution must be seen as a bridge between a history of gross violations of human rights and humanitarian principles, and a future of reconstruction and reconciliation.[98]

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91 1995 3 SA 391 (CC).
92 *S v Makwanyane* para 224.
93 *S v Makwanyane* para 225.
94 *S v Makwanyane* para 237.
95 *S v Makwanyane* para 263.
96 *S v Makwanyane* para 307.
97 *S v Makwanyane* para 307.
98 *S v Makwanyane* para 307.

Generally, *ubuntu* can mean *humaneness*. In its most fundamental sense, it translates as *personhood* and *morality*. Metaphorically, it expresses itself in the saying "*umuntu ngumuntu ngabantu*" (you are what you are because of the people around you). The term describes the significance of group solidarity on survival issues so central to the survival of communities. It is part of our *rainbow* heritage, though it might have operated and still operates differently in diverse community settings.[99]

Mokgoro J held that even the most evil offender "remains a human being possessed of a common human dignity".[100] The learned justice noted that it was common cause that the legal system in South Africa and the socio-political system within which it operated had for decades traumatised the human spirit. In many ways, they trampled on the basic humanity of citizens.

Therefore, it may be submitted that the notion of *ubuntu* may be resuscitated and used to restore the dignity and to protect the human rights which were trampled by the apartheid system. Thus the Constitutional Court, in *Everfresh Market Virginia* (*Pty*) *Ltd v Shoprite Checkers* (*Pty*) *Ltd*,[101] held that *ubuntu* should be applied broadly so that it, and other values inspiring the constitutional compact, is infused into the law of contract.

In the recent case of *Beadica 231 CC and Others v Trustees for the Time Being of the Oregon Trust and Others*, the Constitutional Court referred to the judgment by Moseneke DCJ in *Everfresh Market Virginia* (*Pty*) *Ltd v Shoprite Checkers*.[102] The Deputy Chief Justice held that:

> Indeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of *ubuntu*, which inspire much of our constitutional compact. On a number of occasions in the past this Court has had regard to the meaning and content of the concept of *ubuntu*.[103]

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99 *S v Makwanyane* para 308.

100 *S v Makwanyane* para 309, quoting Brennan J in *Furman v Georgia* 408 U.S. 238, 273 (1972).

101 2012 1 SA 256 (CC) para 71.

102 *Beadica 231 CC and Others v Trustees for the Time Being of the Oregon Trust and Others* (CCT109/19) [2020] ZACC 13 (17 June 2020); [2020] JOL 47440 (CC) para 205.

103 *Beadica 231 CC and Others v Trustees for the Time Being of the Oregon Trust and Others* para 205.

Victor AJ in *Beadica 231 CC and Others v Trustees for the Time Being of the Oregon Trust and Others* held that *ubuntu* is an important value that stands alongside values such as good faith, fairness, justice, equity and reasonableness.[104] Characterising *ubuntu* as a substantive constitutional value in the law of contract leads to a more context-sensitive basis in its adjudication and facilitates a constitutionally transformative result.[105]

From a tax point of view, the notion is applicable to the relationship between the Commissioner and taxpayers. It requires that the Commissioner should treat taxpayers as human beings; that he should respect, embrace and uphold their dignity by protecting their rights. This includes being courteous towards taxpayers and providing them with feedback and reasons for his decisions or failure to make decisions.

Where the Commissioner conducts an unjustifiable and biased act (for example, in a search and seizure) or denies a taxpayer reasons for any conduct performed, this is against the values and principles of the notion of *ubuntu*. The notion indicates that the obligation to contribute to the cost of governance through tax is not simply a legal duty but a moral, ethical, patriotic, civic duty arising from a person's membership of a broader societal group or social structure.[106]

It can be argued that the notion is reciprocal in nature. This means that taxpayers ought to contribute to the state expenditure. As such, *ubuntu* advances voluntary tax compliance. So it is also against the spirit and purport of *ubuntu* for taxpayers to neglect or refuse to pay taxes, because the state is thereby deprived of the finances which are necessary for it to fulfil its constitutional mandate.

Ubuntu serves to encourage taxpayers to contribute their equitable share of the cost of financing public expenditure by the state. It should be noted, however, that *ubuntu* does not operate to replace the legal authorities in statutes, common law or

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104 *Beadica 231 CC and Others v Trustees for the Time Being of the Oregon Trust and Others* para 206.

105 *Beadica 231 CC and Others v Trustees for the Time Being of the Oregon Trust and Others* para 206.

106 *Commissioner of Taxes v Ferera* 1976 2 SA 653 (RA) 656F.

constitutional rights. It can be used as an aspect to be considered when applying a particular provision and also to regulate relationship between the state and its subjects. It can also be used to regulate relationship between individuals.

The notion of *ubuntu* encourages the treatment of taxpayers in a manner that is courteous, decent, dignified, ethical, fair, humane, lawful and respectful. The SARS Service Charter ("the Charter") (discussed at length in Chapter 5) contains words like "courteous", something to which the Commissioner has often referred. The question is whether this attitude and conduct are so in practice.

Therefore, when applied to tax administration, *ubuntu* inculcates a tax administration culture that ensures that all taxpayers, irrespective of the degree of their tax compliance, receive quality service from SARS and its officials. A requirement for SARS to adhere to the notion of *ubuntu* is complementary to the constitutional provisions and would play a large role in ensuring that the information gathering powers of the Commissioner are properly and humanely applied and not misused to the detriment of taxpayers.

4.4 OVERVIEW OF THE CHAPTER

The chapter discussed how the common law rules of natural justice (*audi alteram partem* and *nemo iudex in sua causa*) and the *ultra vires* doctrine can be relied upon to protect taxpayers' rights when the Commissioner's information gathering powers contravene those rights. The chapter also demonstrated how, applying the *nemo iudex in sua causa* rule, the Commissioner can be prohibited from acting with bias towards a taxpayer where, for example, he selects a taxpayer for search and seizure.

The chapter discussed how the doctrine of legitimate expectations can be relied upon to protect taxpayers' rights from the Commissioner's information gathering powers. It demonstrated how the doctrine of substantive legitimate expectations as compared to the doctrine of procedural legitimate expectations may be applied by the courts to protect taxpayers' rights.

The chapter also demonstrated the resistance provided by the South African courts in applying the doctrine of substantive legitimate expectations. Finally, the chapter discussed how the notion of *ubuntu* can be applied to regulate the relationships between the Commissioner and the taxpayers, and ensures good quality of service by the Commissioner to them.

The next chapter considers the remedies available to protect taxpayers' rights when they are contravened by the Commissioner's information gathering powers

CHAPTER 5

REMEDIES TO CONTROL THE COMMISSIONER'S INFORMATION GATHERING POWERS SO AS TO PROTECT TAXPAYERS' RIGHTS

5 INTRODUCTION

In addressing the challenges that the Commissioner's information gathering powers pose to taxpayers, it is necessary to consider the control measures in South Africa that provide some remedies where taxpayers' rights have been violated. This chapter explains these control measures and discusses whether the available remedies are effective in protecting taxpayers' rights against the Commissioner's information gathering powers.

The term "remedy" must, however, be distinguished from the term "control". Baxter[1] explains the distinction between the two terms, noting that "control" refers to a review of the legality of the action and "remedy" refers to the granting of the appropriate order when the action is found to be unlawful.

5.1 FORMS OF CONTROL OVER THE CONDUCT OF THE ADMINISTRATOR

Forms of control over administrative actions fall into two main categories: internal control and external control. Internal control of administrative action is aimed at rectifying an irregularity between the administrator and the individual. External control is normally in the form of judicial control over administrative acts which is exercised by courts.[2]

Judicial control exists side by side with internal control. As a general rule, courts hear applications for judicial control based on allegations of excess of power and irregularity, regardless of whether internal remedies were exhausted or not.[3]

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1 Baxter *Administrative Law* 350.
2 Devenish, Govender and Hulme *Administrative Law and Justice* 440.
3 Devenish, Govender and Hulme *Administrative Law and Justice* 440.

5.2 INTERNAL CONTROL MEASURES AVAILABLE TO TAXPAYERS

Internal control measures exist within the institution to remedy a grievance between the administrator and individuals.[4] Internal remedies are granted by the internal control measures. A higher reviewing administrative authority not only remedies the alleged excess of power or irregularity, but also considers the merits of the case and the action itself.[5] Internal remedies can ensure that infringements of the taxpayers' rights as a result of the Commissioner's conduct are rectified.

Under the internal control measures, the superiors of the relevant administrators may reprimand those administrators or require them to explain their decisions. The consequence is that an internal forum can be constituted to adjudicate on the legality of the administrative action and to provide an appropriate remedy should that forum find the administrative action to be unlawful. The forum also ensures that administrative decisions are thoroughly re-evaluated.

The discussion below covers the internal control within the South African Revenue Service ("SARS") and the procedure to resolve problems between the Commissioner and taxpayers. An evaluation is then made as to whether these remedies are effective in providing taxpayers with solutions to protect their rights if they have been violated by the Commissioner's information gathering powers.

5.2.1 SARS documents

SARS has issued certain documents on the practices which it adopts regarding the relationship between itself and taxpayers, which can be referred to by taxpayers to seek an internal remedy against SARS. These documents are as follows:

4 Devenish, Govender and Hulme *Administrative Law and Justice* 440.
5 Devenish, Govender and Hulme *Administrative Law and Justice* 440.

5.2.1.1 SARS Service Charter

In 1997, the Minister of Finance released a draft SARS "Client Charter" which was published for the first time in South Africa.[6] The Charter included levels of service that taxpayers could expect in their dealings with SARS. An updated Charter was loaded on the SARS website on 19th October 2005 and was referred to as the SARS Service Charter ("the Charter"). It applied between 2005 and 2007.[7]

The Charter was almost a carbon copy of section 195 of the Constitution[8] (discussed in Chapter 2 above) because its principles were incorporated therein. The purpose of the Charter was to regulate relations between the Commissioner and taxpayers, and its preamble stated the commitment towards taxpayers.

The Charter was directory, as compared to section 195 of the Constitution, which is peremptory. This is evident from the use of the word "shall" in the Charter as opposed to the word "must" in section 195 of the Constitution. The Charter's preamble provides that SARS shall:

(1) be courteous and professional service at all times;
(2) provide clear, accurate and helpful responses;
(3) make clear what action you need to take and by when;
(4) to be fair by expecting you to pay only what is due under law;
(5) respect your constitutional rights and privacy by, *inter alia*, furnishing you with reasons for decision taken and by applying the law consistently and impartially. If the taxpayer is not satisfied, he may exercise the right of objection and appeal in terms of the Alternative Dispute Resolution ('ADR') procedures. The taxpayer may also lodge a complaint with the SARS Service Monitoring Office ('SSMO').

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6 Croome and Olivier *Tax Administration* 286.

7 The SARS Service Charter was launched in October 2005 and set certain "clearly defined deliverables" which had to be implemented by 2007. The Charter was also intended to be a "statement of intent through which SARS undertakes to uphold and respect the rights of taxpayer". Furthermore, the Charter would be the yardstick against which "compliant taxpayers can judge the quality of SARS' processes, its integrity and its conduct" (Van der Walt and Botha "Complaints to the Tax Ombud and the fear of reprisal? Canada gives its taxpayers comfort" 2, https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2013/tax/downloads/Tax-Alert---20-September-2013.pdf (Date of use: 23 November 2019)). See also SARS "Press statement: Launch of the SARS Service Charter", https://www.ftomasek.com/archive/p191005a.html (Date of use: 19 April 2020) and SARS "Review of SARS Service Charter & Standards, Version 1" (2005) 76.

8 The Constitution of the Republic of South Africa, 1996.

The Charter complemented section 195 of the Constitution in that it recognised taxpayers' constitutional rights. It provided a promise to taxpayers on how the Commissioner should treat them. It also provided the comfort that the taxpayers could hold SARS liable using their own document.

When the Davis Tax Committee ("DTC") issued its Tax Administration Report in 2018, it recommended the development of a Taxpayer Bill of Rights ("TBR").[9] The TBR would protect taxpayers' rights in their interactions with SARS. It would also make SARS responsible in its dealings with taxpayers, and it would regulate the interactions and expectations of the relationship between SARS and taxpayers.[10]

It is thus commendable that on 1 July 2018, SARS implemented a new South African Revenue Service Charter ("the new SARS Charter"). However, the SARS Charter contains a disclaimer which provides:

> This Charter (including any time periods stipulated herein) is subject to any applicable Act of Parliament. Should any aspect of this Charter be in conflict with the applicable legislation, the applicable legislation will take precedence.[11]

The new SARS Charter is similar in some respects to the old SARS Charter. However, one recognisable difference is that the old SARS Charter contained promises while the new SARS Charter contains rights and obligations. Another difference is that the new SARS Charter encourages the resolution of taxpayers' disputes with SARS by means of Alternative Dispute Resolution ("ADR") in the Tax Administration Act ("TAA").[12]

Importantly, the new SARS Charter requires SARS to respect taxpayers' constitutional rights and privacy. Other rights of taxpayers covered in the new SARS Charter are the following:

- the right to keep tax affairs strictly confidential;

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9 Davis Tax Committee *Tax Administration Report* 73.

10 Davis Tax Committee *Tax Administration Report* 73.

11 SARS "South African Revenue Service Charter" (2018) 1, https://www.sars.gov.za/AllDocs/Documents/Service%20Charter/SARS%20Service%20Charter%201%20July%202018.pdf (Date of use: 1 June 2020).

12 Act 28 of 2011.

- the right to be furnished with reasons for decisions taken regarding the taxpayer's tax and customs affairs;
- the right to have the law applied consistently and impartially;
- the right to object and appeal against an assessment or qualifying decision;
- the right to lodge an administrative complaint via eFiling, at a SARS branch or via the SARS Contact Centre; and
- the right, having exhausted all administrative complaints processes within SARS, to lodge a complaint with the Office of the Tax Ombud.[13]

The obligations on the part of taxpayers in terms of the Charter are the following:

- to be honest;
- to submit full and accurate information on time;
- to comply with all prescribed administrative processes and time frames;
- to pay tax and/or duties on time and in full;
- to encourage others to pay their tax and/or duties on time and in full;
- not to encourage or be party to any corrupt activity or fraud in any form;
- to ensure that SARS has the taxpayer's correct personal information and payment details;
- to take responsibility for the taxpayer's tax affairs; and
- to show SARS staff respect just as they are expected to respect the taxpayer; if someone else acts on the taxpayer's behalf, SARS expects the same respect from that person.[14]

The binding nature of the new SARS Charter may be found in the disclaimer, which provides that in cases where there is a conflict between the Charter and an Act of Parliament, the latter shall prevail. Therefore, the Charter remains a statement of intent by SARS and cannot be relied upon or used as an authority in a court of law.

13 SARS "Service Charter" (2018) 2.
14 SARS "Service Charter" (2018) 2–3.

The effectiveness of the SARS Service Charter in protecting taxpayers' rights against the Commissioner's information gathering powers

Although the old SARS Charter complemented section 195 of the Constitution, it did not remain relevant for long, because it was removed from the SARS website. The Tax Ombud, the Honourable Mr Justice BM Ngoepe, called for the implementation of the Service Charter and the Taxpayer Bill of Rights during the Tax Indaba in 2015.[15] The new SARS Charter was implemented on 1 July 2018 as a result.

As alluded to above, the new SARS Charter contains rights and obligations of taxpayers. The Charter also provides a disclaimer that gives preference to any other legislation dealing with taxpayers' rights. A Taxpayer Bill of Rights ("TBR") is still recommended which deals specifically with the protection of taxpayers' rights. This TBR must have binding effect to be relied upon in a court of law.

Legitimate expectations that may be created by the new SARS Service Charter

Although the new SARS Service Charter does not create a binding commitment on the Commissioner, it creates legitimate expectations for taxpayers. Taxpayers expect SARS to perform its duties according to the provisions of the document.

5.2.1.2 SARS Interpretation Notes and Explanatory Memorandums

Previously, SARS issued documents referred to as Practice Notes. The name was changed, and they are now referred to as Interpretation Notes. Their purpose is to provide guidelines and clarity on the interpretation and application of the legislation administered by the Commissioner. These Notes replace the General Notes and Practice Notes, as well as internal circular minutes that deal with the interpretation of the various pieces of legislation.[16]

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15 Tax Indaba held on 8–12 June 2015, Sandton Convention Centre, South Africa.

16 SARS "Interpretation Notes" https://www.sars.gov.za/Legal/Interpretation-Rulings/Interpretation-Notes/Pages/default.aspx (Date of use: 9 September 2019).

The National Treasury's Explanatory Memorandums to revenue laws provide background on proposed legislation, reasons for proposed changes to existing legislation and further explanations or examples where necessary.[17]

The effectiveness of Interpretation Notes and Explanatory Memorandums in protecting taxpayers' rights against the Commissioner's information gathering powers

Regarding the control of administrative action, it is important to note that SARS's Interpretation Notes documents contain an exclusion of liability clause. This warning is based on the fact that it has been expressly stated that the Interpretation Notes do not bind SARS.[18]

An important question may, however, arise whether a decision by SARS to exclude the binding effect of the Interpretation Notes amounts to administrative action. Should that be the case, this means that a taxpayer may rely on the right to just administrative action in section 33 of the Constitution where the decision of the Commissioner adversely affects and has a direct external effect on the rights of the taxpayers.

However, Interpretation Notes do have important statutory implications for taxpayers. Section 1 of the TAA, as read with section 5(1) of the TAA, refers to a "practice generally prevailing" as "a practice set out in an official publication regarding the application or interpretation of a tax Act".[19]

This means that an Interpretation Note could set out a "practice generally prevailing" and could have an impact on the rights of taxpayers under the TAA. In the case of *Commissioner, South African Revenue Service v Marshall NO and Others*,[20] the

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17 SARS "Interpretation Notes" https://www.sars.gov.za/Legal/Interpretation-Rulings/Interpretation-Notes/Pages/default.aspx (Date of use: 9 September 2019).

18 Strauss "Status of SARS interpretation notes" https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Tax/tax-alert-4-may-status-of-sars-interpretation-notes (Date of use: 10 October 2018).

19 Strauss "Status of SARS interpretation notes" https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Tax/tax-alert-4-may-status-of-sars-interpretation-notes (Date of use: 10 October 2018).

20 2017 1 SA 114 (SCA).

Supreme Court of Appeal ("SCA") had to interpret certain provisions of the Value-Added Tax Act.[21] In its judgment, the court referred with approval to certain sections of SARS's Interpretation Note No 39 issued on 8 February 2013. The court held as follows:

> These interpretation notes, though not binding on the courts or a taxpayer, constitute persuasive explanations in relation to the interpretation and application of the statutory provisions in question. Interpretation Note 39 has been in circulation for years and has not been brought into contention until now.[22]

On appeal by the taxpayer in the *Marshall* case to the Constitutional Court,[23] the court asked:

> Why should a unilateral practice of one part of the executive arm of government play a role in the determination of the reasonable meaning to be given to a statutory provision? It might conceivably be justified where the practice is evidence of an impartial application of a custom recognised by all concerned, but not where the practice is unilaterally established by one of the litigating parties. In those circumstances it is difficult to see what advantage evidence of the unilateral practice will have for the objective and independent interpretation by the courts of the meaning of legislation, in accordance with constitutionally compliant precepts. It is best avoided.[24]

In summary, courts should not have regard to SARS's Interpretation Notes when interpreting legislation. However, courts may have regard to Interpretation Notes where the practice of SARS is evidenced by an Interpretation Note which has been recognised by SARS and the taxpayer.

From the discussion above it is clear that SARS Interpretation Notes cannot be relied upon by taxpayers to advance their rights against the Commissioner's information gathering powers. This conclusion puts taxpayers in an awkward position because they should be able to rely on SARS Interpretation Notes to hold SARS accountable. These documents may also assist in preventing disputes between the Commissioner and taxpayers.

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21 Act 89 of 1991.

22 *Commissioner, South African Revenue Service v Marshall NO* para 33.

23 *Marshall NO and Others v Commissioner, South African Revenue Service* 2019 6 SA 246 (CC).

24 *Marshall NO v Commissioner, South African Revenue Service* para 10.

Similarly, since National Treasury's Explanatory Memorandums only serve as guidelines on the changes in existing legislation and reasons for the change, they cannot be referred to in court in disputes between taxpayers and SARS.[25]

Legitimate expectations that may be created by SARS Interpretation Notes

The question may be posed whether taxpayers' reliance on SARS's practices in its Interpretation Notes may warrant legitimate expectations. In *ITC 1682*,[26] a taxpayer approached SARS to obtain advice regarding the tax implications of the scheme which it intended to implement.

SARS approved the non-taxability of the scheme, but later taxed the taxpayer on the scheme. The taxpayer argued in its application to court that the advice provided by SARS triggered legitimate expectations. The Cape Special Tax Court endorsed the doctrine as applicable in South Africa.

In *ITC 1675*,[27] SARS argued that Practice Note 31 (released on 3 October 1994), which the taxpayer relied on, was not binding because the Note could not override the Act. This was confirmed in *Commissioner of Taxes v Astra Holdings (Private) Ltd t/a Puzey & Payne*,[28] where the Supreme Court of Zimbabwe held that the representations made in the letter were made in error of law and as such could not be regarded as having created a reliance on an expectation.

5.2.1.3 SARS Advance Rulings

Section 75 of the TAA defines "advance ruling" to mean "binding general ruling", a "binding private ruling" or a "binding class ruling". Section 76 of the TAA provides

25 Strauss "Status of SARS interpretation notes" https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Tax/tax-alert-4-may-status-of-sars-interpretation-notes (Date of use: 10 October 2018).
26 62 SATC 380.
27 62 SATC 219; 2000 6 JTLR 219.
28 66 SATC 79; (254/2000) [2003] ZWSC 68 (27 March 2003).

that the purpose of the "advance ruling" system is to promote clarity, consistency and certainty regarding the interpretation and application of a tax Act.[29]

Section 77 of the TAA provides that SARS may make an "advance ruling" on any provision of a tax Act. So the scope of advance rulings is not limited. This means that a taxpayer may approach SARS to clarify and provide a ruling on a particular scheme of events. The application in itself prompts a taxpayer to provide more information relating to the scheme of events that he wishes clarity on.

The effectiveness of the SARS advance rulings in protecting taxpayers' rights against the Commissioner's information gathering powers

The critical question may be raised whether these rulings are binding and may be effective in protecting taxpayers' rights against the Commissioner's information gathering powers. Section 80(1) of the TAA provides that SARS may reject an application for an advance ruling based on the rendering of an opinion, conclusion or determination regarding the constitutionality of a tax Act.[30] This provides a negative aspect of the advance ruling.

Section 82 of the TAA deals with the binding effect of advance rulings. Section 82(2) provides that an advance ruling does not have binding effect upon SARS unless it applies to the person in accordance with section 83. Section 82(3) provides that a binding general ruling may be cited by SARS or a person in any proceedings, including court proceedings.

Section 82(4) of the TAA provides that a "binding private ruling" or "binding class ruling" may not be cited in any proceeding, including court proceedings, other than a proceeding involving an applicant or a class member, as the case may be. Section 82(5) provides that a publication or other written statement issued by SARS does not have "binding effect" unless it is an advance ruling.

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29 SARS *South African Revenue Service Comprehensive Guide to Advance Tax Rulings* (2013) https://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-TAdm-G02%20-%20Comprehensive%20Guide%20to%20Advance%20Tax%20Rulings.pdf (Date of use: 11 March 2020).

30 Section 80(1)(a)(iv) of the TAA.

Section 89(3) of the TAA provides that a binding general ruling may be issued as an Interpretation Note or in another form prescribed by the Commissioner. This means that an Interpretation Note may only be binding if it is issued in terms of an advance ruling.

Advance rulings may only be effective in clarifying a particular scheme or schemes embarked by the taxpayer. An application by the taxpayer for an advance ruling to seek an opinion, conclusion or determination regarding the constitutionality of a tax Act cannot be handled by SARS in terms of section 80(1)(a)(iv) of the TAA. Protection of taxpayers' rights is mostly based on the Constitution. Therefore, the advanced rulings are not effective in protecting taxpayers' rights.

5.2.2 Objection to an assessment or decision by the Commissioner

Where the Commissioner has issued an assessment or made a decision to request information from the taxpayer or the third party, the taxpayer may dispute the assessment or the decision. This dispute is called an objection. Section 104 of the TAA clearly provides that the taxpayer may raise an objection against an assessment or decision by the Commissioner.

In effect, an objection in terms of section 104 of the TAA is an internal process against the Commissioner himself and not a court process. A taxpayer may lodge an objection, for example, against a decision by the Commissioner or senior SARS official to exchange taxpayers' information with other countries or to conduct search and seizure on the affairs of the taxpayer.

Section 106 of the TAA provides that a taxpayer's objection to the decision by the Commissioner may be disallowed or allowed either in whole or in part. When the objection is allowed, the taxpayer wins the objection, and relief may be available to him. When the objection is disallowed, the taxpayer must honour the obligations required of him.

For example, the taxpayer's objection may have to be allowed because the Commissioner's decision (to exchange taxpayers' information with other countries or to conduct search and seizure on the affairs of the taxpayer) did not comply with the requirements of just administrative action in section 33 of the Constitution. The taxpayer may also invoke the common law principles of procedural fairness and the doctrine of legitimate expectations to protect his rights.

The effectiveness of an objection in protecting taxpayers' rights against the Commissioner's information gathering powers

As indicated above, in an objection process a dissatisfaction is lodged against the Commissioner who issued the assessment or performed an administrative action. Administrative decisions in this case are thoroughly re-evaluated through objection.

This process helps to bring inefficient administrators to book and remind them of their duties and responsibilities. Through internal control, such administrators can be reprimanded or required to give an explanation of their decisions. Internal control may be effective because it is less expensive, less cumbersome and less time-consuming.

However, it may not be easy for the Commissioner to reconsider or re-examine his own decision (for example, the request for information from the taxpayer or a third party). It may be easier for him to review and reconsider the action performed by another senior SARS official.

It is, however, important to note that an objection does not have binding effect. As a result, the same matter may be easily raised again in an appeal process within the same departmental hierarchy.

The International Bureau for Fiscal Documentation ("IBFD") Observatory on the Protection of Taxpayers' Rights ("OPTR")[31] provides that taxpayers should be

[31] IBFD "Observatory on the Protection of Taxpayers' Rights" *2015–2017 General Report on the Protection of Taxpayers' Rights* https://www.ibfd.org/sites/ibfd.org/files/content/pdf/OPTR_General-Report.pdf (Date of use: 25 April 2020).

granted the right to request a review or to appeal an assessment notice. This recommendation allows taxpayers to seek the correction or the annulment of the assessment, decision, the penalties or the interest calculated, due to either violations within the administrative procedure, false perception of the facts or any other reason that could produce the partial or total repeal of the tax audit report.[32]

5.2.3 The internal appeal procedure within SARS

Section 107 of the TAA provides that in cases where a taxpayer's objection has been disallowed, the taxpayer may appeal against the Commissioner's decision by instituting internal appeal procedures within SARS. The assumption is usually that the hearing of the objection was correctly conducted but that the result was incorrect.

Section 107 of the TAA recognises the Tax Board or Tax Court (referred to in Chapter 1) as the two forums where an appeal may be entertained. The Tax Board represents an internal appeal mechanism, while the Tax Court represents an external appeal mechanism.

Section 108 of the TAA established the Tax Board as the body to hear appeals against an assessment or a decision by the Commissioner.[33] In effect, the Tax Board hears an appeal regarding the refusal (decision) of an objection by the Commissioner. The taxpayer and SARS both have to agree to the jurisdiction of the Tax Board and the board's jurisdiction is limited to R1 million.[34]

The Chairperson of the Tax Board prepares the Tax Board's decision in writing,[35] and this includes the Tax Board's findings on the facts of the case and the reasons

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32 IBFD "Observatory on the Protection of Taxpayers' Rights" *2015–2017 General Report on the Protection of Taxpayers' Rights* 52, https://www.ibfd.org/sites/ibfd.org/files/content/pdf/OPTR_General-Report.pdf (Date of use: 25 April 2020).

33 Section 109 of the TAA.

34 Section 109(1)(a) of the TAA.

35 Section 114(2) of the TAA.

for its decision. The decision must be supplied within 60 business days after the conclusion of the hearing.[36]

If a taxpayer or the Commissioner is dissatisfied with the Tax Board's decision or if the Chairperson fails to deliver the decision within the prescribed period, section 114(2) of the TAA provides that the taxpayer or the Commissioner may require, in writing, that the appeal be referred to the Tax Court (an external control which is discussed below) for hearing.[37] The Tax Court must hear the referral of an appeal from the Tax Board's decision *de novo*.[38]

The effectiveness of the Tax Board in protecting taxpayers' rights against the Commissioner's information gathering powers

It is submitted that the Tax Board may be effective in assisting the taxpayer to advance his rights against the Commissioner's information gathering powers where the dispute is under R1 million. It is cheaper for taxpayers to approach the Tax Board before they can approach the Tax Court where the dispute is under R1 million. Where the dispute is over the limit, the taxpayer may approach a Tax Court that would then require the assistance of a legal representative. This has the consequence to deter taxpayers from pursuing their disputes.

5.2.4 The SARS Complaints Management Office

According to the 2002 South African Revenue Service Media Release ("the Media Release"), the office of the SARS Service Monitoring Office ("the SMO") was launched on 3 October 2002 by the Minister of Finance.[39] The SMO was situated in Hatfield, Pretoria and was an independent monitoring office to which taxpayers might turn as a last resort to challenge service failures within SARS.

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36 Section 114(2) of the TAA.
37 Section 115(1) of the TAA.
38 Section 115(2) of the TAA.
39 The Honourable Minister Trevor Manuel delivered the 2002 Budget Speech on 20 February 2002. See SARS "Launch of SARS Service Monitoring Office: Media Release Number 15 of 2002" https://www.ftomasek.com/archive/m031002a.html (Date of use: 25 July 2020).

The reason for the launch of the SMO was to assist taxpayers who had difficulties in resolving problems of a procedural nature with SARS. The establishment of this office symbolised SARS's commitment to improve service delivery and to fast-track and follow up on complaints of a procedural nature that had not been resolved.

In effect, the SMO addressed two important issues: difficulties in respect of administrative processes and procedures; and disagreements in respect of substantive matters. For example, where the Commissioner had commenced an audit process and had not informed the taxpayer about when the process would end, a taxpayer might approach the office to compel the Commissioner to conclude the process and update the taxpayer.

The office did not feature anywhere when the TAA was promulgated in 2012. It is not clear whether this omission was deliberate or unintentional. However, SARS introduced a new mechanism allowing aggrieved persons the opportunity to lodge complaints with or without the help of tax consultants.

The new mechanism, known as the Complaints Management Office ("CMO"), replaces the previous SARS Service Monitoring Office ("SSMO").[40] The CMO has made it possible for taxpayers to lodge a wider scope of complaints while also increasing the avenues through which those complaints may be lodged.

The following are examples of issues taxpayers may wish to raise with the CMO: rude SARS staff, lost supporting documents, refunds taking too long to be paid, or SARS taking too long to respond to a query.[41] The complaints may be lodged at the nearest SARS branch, by telephonically contacting the CMO at 0860 12 12 16, or via e-filing. With regard to the latter, SARS has designed a Guide which will give taxpayers simple step-by-step guidance on how to send a complaint.

It has been stated:

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40 ANDISA "Lodging a Complaint at SARS" 19 May 2016 https://andisacasa.co.za/tax-consultant-lodging-a-complaint-at-sars/ (Date of use: 25 July 2020).

41 SARS "South African Revenue Service Annual Report 2015/2016" 6, https://www.gov.za/sites/default/files/gcis_document/201610/sarsannualreport2015-2016.pdf (Date of use: 25 July 2020).

> The establishment of the new SARS Complaints Management Office ('CMO') during the 2015/16 financial year demonstrates our commitment to improving SARS' handling of taxpayer complaints and will help us resolve service and process inadequacies highlighted by taxpayers. This office addresses all complaints regarding SARS and engages with the Tax Ombud, the Public Protector, the President's office and members of the public to ensure effective monitoring and resolution of complaints.[42]

The effectiveness of the Complaints Management Office in protecting taxpayers' rights against the Commissioner's information gathering powers

Hence, disputes relating to matters of law, such as an infringement of the right to just administrative action (discussed in Chapter 2), are not handled by the SARS CMO. The office benefits taxpayers by improving SARS's internal processes and speeding up the clarification of uncertainties in the law.

The effectiveness of the CMO lies in rectifying the procedure which is flawed. The office is not a forum of last resort because a complaint is still referred to the Tax Ombud should the taxpayer remain dissatisfied.

5.3 GENERAL OVERVIEW OF THE EFFECTIVENESS OF THE INTERNAL REMEDIES TO PROTECT TAXPAYERS AGAINST THE COMMISSIONER'S INFORMATION GATHERING POWERS

One expects, when dealing with the internal control measures, that either the TAA or the SARS Act ought to contain a provision that, in the first place, allows or empowers the Commissioner to reconsider or re-examine the decision made by a senior SARS official regarding the referral of a tax case for an inspection, verification or audit or search and seizure on the affairs of the taxpayer.

The purpose of this reconsideration should be to ensure that the Commissioner can "review" the decision, confirm it, set it aside or vary it. When a decision is varied, it can be substituted by another decision. Secondly, one also expects the Commissioner to consider the validity, desirability or efficacy of the administrative

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42 SARS "South African Revenue Service Annual Report 2015/2016" 6, https://www.gov.za/sites/default/files/gcis_document/201610/sarsannualreport2015-2016.pdf (Date of use: 25 July 2020).

action in question. In this case, the Commissioner may also take policy into consideration. Thirdly, it is expected that formal control would be exercised in examining the manner in which the decision was reached. Fourthly, it is expected that the internal control measure in the form of an internal appeal would give rise to a final and binding decision.

If this were done, the likelihood that the same matter would be raised again within the same departmental hierarchy would be limited.

5.4 EXTERNAL CONTROL MEASURES AVAILABLE TO TAXPAYERS

The external remedies ensure that taxpayers can make use of measures outside SARS to seek redress for the infringement of their rights by the Commissioner's information gathering powers, where those measures and remedies would be sought by taxpayers approaching a court or other tribunal.

Section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

5.4.1 The Office of the Tax Ombud

Section 14 of the TAA gives the Minister of Finance the power to appoint a Tax Ombud. This office is a model adopted from the United States of America's ("USA's") Internal Revenue Service ("IRS"). The Tax Ombudsman in the USA is called the Taxpayer Advocate.[43] According to Silke,[44] the Office of the Tax Ombud is modelled on the Tax Ombud systems of Canada, the USA and the UK.

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43 The USA Taxpayer Advocate Service is set out in the Taxpayer Bill of Rights (Internal Revenue Service "Taxpayer Bill of Rights" https://www.irs.gov/taxpayer-bill-of-rights (Date of use: 14 March 2020)). The Taxpayer Advocate Service has its own website: "The Taxpayer Advocate Service is your voice at the IRS" https://taxpayeradvocate.irs.gov/ (Date of use: 14 March 2020). For the website of the South African Office of the Tax Ombud, see The Tax Ombud "Home" http://www.taxombud.gov.za/Pages/default.aspx (Date of use: 4 June 2020).

44 Arendse *et al Silke on Tax Administration* § 2.42.

In South Africa, the mandate of the Office of the Tax Ombud is enunciated in section 16 of the TAA. That is to review and address any complaint by a taxpayer regarding a service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS.[45]

As such, the Tax Ombud has limited authority because he may not review legislation or tax policy, SARS policy, or a practice generally prevailing. Section 20(2) of the TAA provides that recommendations by the Tax Ombud are not binding on taxpayers or SARS.[46]

The TAA was amended in 2016, and the term of office of the Tax Ombud was extended from three to five years.[47] The Tax Administration Laws Amendment Act ("the TALAA")[48] now provides for different rules that increase the independence of the Office of the Tax Ombud: (i) the Tax Ombud may appoint his own staff without involving the Commissioner of SARS;[49] (ii) the Office of the Tax Ombud is financed by funds to be provided by the National Treasury and not from the funds of SARS;[50] and (iii) the Office of the Tax Ombud may request the Minister of Finance to agree to investigate systemic issues in the tax system.[51] These measures enhance the independence of the Office of the Tax Ombud from SARS in South Africa.

More importantly, it was proposed that when recommendations are not accepted by a taxpayer or the tax administration ("the Commissioner"), reasons for such a decision must be provided to the Tax Ombud within 30 days of notification of the recommendation.

In 2017, the Tax Ombud received authorisation from the Minister of Finance to investigate the alleged undue delay in tax refunds generally experienced by

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45 Section 16 of the TAA.
46 Davis Tax Committee *Tax Administration Report* 87.
47 Tax Ombud "Tax Ombud Annual Report 2015/2016" http://www.taxombud.gov.za/Publications/Pages/Annual-Reports.aspx (Date of use: 3 May 2020); s 14(1) of the TALAA.
48 Tax Administration Laws Amendment Act 16 of 2016, promulgated on 19 January 2017.
49 Section 15(1) of the TALAA.
50 Section 15(4) of the TALAA.
51 Section 16(1)(b) of the TALAA.

taxpayers.[52] This development signifies a move towards the protection of taxpayers' rights.

The DTC recommended in Chapter 5 of its Tax Administration Report that the Tax Ombud should be given the powers to enforce the TBR.[53]

The effectiveness of the Tax Ombud in protecting taxpayers' rights against the Commissioner's information gathering powers

From the discussion above it is clear that the Office of the Tax Ombud may not deal with infringements of taxpayers' rights. Further, the office does not and cannot be able to handle common law infringements such as failure to comply with the principle of *audi alteram partem* (discussed in Chapter 4).

The Office of the Tax Ombud can only deal with procedural aspects and complaints relating to, for example, whether the date set for the objection or appeal was reasonable. The office does not provide wholesale protection and an answer to infringements of the taxpayers' rights by the Commissioner's information gathering powers.

5.4.2 Judicial review of the Commissioner's information gathering powers

Judicial review involves the supervision of the manner in which the organs of the administration observe and apply the statutory prescripts of the legislature, the Constitution and the common law.[54] Thus judicial review is an external form of control of an administrative action. It could be applied, for example, where the Commissioner's conduct regarding the exchange of taxpayer information with other countries results in an infringement of the rights of taxpayers.

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52 Office of the Tax Ombud "Media" 4 September 2017 http://www.taxombud.gov.za/Media/Pages/default.aspx (Date of use: 23 April 2020). The Tax Ombud was to investigate SARS relating to among other issues, the non-adherence to dispute resolution time frames.

53 Davis Tax Committee *Tax Administration Report* 87.

54 Devenish, Govender and Hulme *Administrative Law and Justice* 216.

Judicial review is external because taxpayers can resort to the courts to find a remedy, if, for example, the Commissioner infringes their rights through the exercise of information gathering powers. Normally, the procedure of judicial review is preceded by a dispute being raised within SARS (objection and appeal).

For tax purposes, in seeking judicial review, the taxpayer approaches the court to seek relief where the Commissioner, in gathering information from taxpayers, fails to adhere to the Constitution, the common law principles and the doctrine of legitimate expectations. These remedies can be backed up by the principle of *ubuntu* (discussed in Chapter 4 above), which was introduced by the Constitutional Court in *S v Makwanyane.*[55]

5.4.2.1 Common law grounds of review of the Commissioner's information gathering powers

Even before 1994 (under the old Westminster dispensation characterised by Parliamentary supremacy), and under the common law, the various divisions of the Supreme Court (now called the "High Courts") had an inherent power of judicial review of administrative action. This meant that the jurisdiction of the Supreme Court was wide and not restricted.

In *Pharmaceutical Manufacturers Association of South Africa*,[56] the Constitutional Court held that the common law rules still play a very important role alongside the Constitution to ensure that there are not two separate systems of law, but only one in which the common law derives its force from the Constitution.[57]

In *Johannesburg Consolidated Investment Company Ltd v Johannesburg Town Council*,[58] Innes CJ described the common law power of review as follows:

> Whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the

55 1995 3 SA 391 (CC).
56 2000 2 BCLR 241 (CC); 2000 2 SA 674 (CC).
57 *Pharmaceutical Manufacturers Association of South Africa* para 44.
58 1903 TS 111.

> proceedings complained of and set aside or correct them. This is no special machinery created by the Legislature; it is a right inherent in the Court....[59]

To succeed with a claim for judicial review in terms of the common law, the applicant is required to prove the illegality, irregularity or invalidity of the administrative action in question. To do so, the applicant (for example, the taxpayer) must rely on any of the recognised common law grounds of illegality, irregularity or invalidity, such as the Commissioner's failure to comply with the rules of natural justice (discussed in Chapter 4) or failure to comply with the correct procedure.

Hence it is clear that High Courts have always had an inherent jurisdiction to review administrative action. Judicial review of administrative action is a constitutional matter. This means that taxpayers whose rights have been infringed by the Commissioner's information gathering powers may still ensure that those powers are regulated through judicial review by the courts.

Taxpayers then need to convince the court that grounds for review exist which necessitated the application. The discussion below clarifies when a taxpayer may rely on common law grounds to review the information gathering powers of the Commissioner when the taxpayer's rights are contravened.

5.4.2.1.1 The Commissioner fails to adhere to the rules of natural justice

Where the Commissioner fails to provide the taxpayer with an opportunity to state his case; does not provide reasons for the decision; or where there is a reasonable suspicion of bias on the part of the Commissioner, the taxpayer may approach the court to review the Commissioner's conduct.[60] The expectation is that the Commissioner ought to have applied the rules of natural justice before information gathering in the form of a decision to conduct search and seizure on the affairs of the taxpayer took place.

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59 *Johannesburg Consolidated Investment Company Ltd v Johannesburg Town Council* 115.

60 The two rules of natural justice (as discussed in Chapter 3) consist of the *audi alteram partem* rule (hear the other side) and the *nemo iudex in sua causa* rule (no one can be a judge in his own cause).

The courts have accepted the principle that where the administrator's decision fails to comply with the rules of natural justice, that decision is voidable, not void *ab initio* (from the beginning).[61] A voidable decision means that the decision is void where the innocent party elects to challenge the particular decision. However, the decision remains valid where the innocent party elects to uphold the decision.[62]

Therefore, it may be submitted that where the taxpayer is successful in relying on a failure to adhere to the rules of natural justice as a ground for review against a decision or an administrative action by the Commissioner, that decision or action is rendered void when the taxpayer decides to challenge it. The decision or action by the Commissioner is rendered voidable, however, where the taxpayer does not challenge it.[63]

Examples of decisions that can be rendered voidable (when the taxpayer does not challenge the decision) are where the taxpayer does not request reasons for the referral for search and seizure or where the taxpayer does not raise any complaints where he suspects bias on the part of the Commissioner. It should be noted that the decision by the Commissioner shall be rendered void where the taxpayer elects to challenge the decision.

5.4.2.1.2 The conduct of the Commissioner is *ultra vires*

As discussed in Chapter 4, the *ultra vires* doctrine emerged as a ground of judicial review under common law, necessitating an inquiry as to whether or not the action by the administrator was performed outside the boundaries of the powers granted to administrators.[64]

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61 *Maris en Andere v Verkiesingsbeampte, Galeshewe Munisipaliteit, en Andere* 1990 2 SA 531 (NC) 540G–H, citations including *Jockey Club of South Africa and Others v Feldman* 1942 AD 340 at 359 and *Rajah & Rajah (Pty) Ltd and Others v Ventersdorp Municipality and Others* 1961 4 SA 402 (A) 407–408; *Coalcor (Cape) (Pty) Ltd and Others v Boiler Efficiency Services CC and Others* 1990 4 SA 349 (C) 355H–356B, 360A-B.

62 Schulze *et al General Principles of Commercial Law* 59.

63 Schulze *et al General Principles of Commercial Law* 59.

64 Devenish, Govender and Hulme *Administrative Law and Justice* 215.

The other ground of review is where the administrator was not properly qualified to perform certain tasks. In the tax context, this can be a ground of review, for example, where a senior SARS official relies on his information gathering powers to conduct an audit on the affairs of the taxpayer without being duly authorised to do so, and taxpayers' rights are affected.

The taxpayer must prove an irregularity on the part of the official: for example, that the latter acted beyond the scope of his authority. It should be noted that the common law grounds of review are incorporated in the Promotion of Administrative Justice Act ("PAJA")[65] (as discussed below), thus giving them statutory backing.

The effectiveness of the common law grounds of review in protecting taxpayers' rights against the Commissioner's information gathering powers

An irregularity in the conduct of the Commissioner when gathering information from taxpayers may be regarded as a ground of judicial review. The courts recognise illegality, irregularity or invalidity as grounds for common law review. That could be the case where the Commissioner fails to comply with the rules of natural justice. Another ground for judicial review is where the action or conduct of the Commissioner is beyond the scope of his authority.

Of importance in judicial review is that the taxpayer has a choice to either challenge the decision of the Commissioner or uphold it. Where the taxpayer decides to challenge the Commissioner's decision, it may be rendered void (null and void) by the court. Where the taxpayer decides to uphold the Commissioner's decision, it remains valid.

5.4.2.2 Grounds of review in terms of the Promotion of Administrative Justice Act ("PAJA")

Section 6(1) of PAJA provides that any person may institute proceedings in a court or tribunal for the review of administrative action. The section is not specific and relates to any person. "Any person" within the meaning of section 6 of PAJA means

65 Act 3 of 2000.

a person whose rights have been materially and adversely affected by an administrative decision.

A taxpayer qualifies as any person within the meaning of the section and may institute judicial review to protect his rights against the Commissioner's information gathering powers. Section 6 of PAJA provides for grounds of judicial review of an administrative action; these are set out in section 6(2) as follows:

(2) A court or tribunal has the power to judicially review an administrative action if–

(*a*) the administrator who took it–
- (i) was not authorised to do so by the empowering provision;
- (ii) acted under a delegation of power which was not authorised by the empowering provision; or
- (iii) was biased or reasonably suspected of bias;

(*b*) a mandatory and material procedure or condition prescribed by an 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 purpose or motive;
- (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
- (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 the empowering provision; or
- (ii) is not rationally connected to–
  - (*aa*) the purpose for which it was taken;
  - (*bb*) the purpose of the empowering provision;
  - (*cc*) the information before the administrator; or
  - (*dd*) the reasons 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.

In terms of section 6(2), the nine grounds upon which judicial review may be instituted fall into three categories: those that relate to the decision maker, the manner in which the decision was taken, and the decision (the administrative action)

itself. Only the grounds that are relevant to the Commissioner's information gathering powers will be discussed here.

In *Carte Blanche Marketing CC and Others v Commissioner for the South African Revenue Service*,[66] the court held that in an application for judicial review, administrative law demands that litigants and courts start with PAJA.[67] Only when PAJA does not apply, they should look at the principle of legality and other permissible grounds of review lying outside PAJA.[68]

5.4.2.2.1 The administrator's (the Commissioner's) decision was biased

A decision by the administrator can be considered biased if it cannot be justified. As a decision by an administrator, the Commissioner's request for information from a third party may be biased where, for example, the Commissioner selects the particular taxpayer without a good reason.

In that regard, a taxpayer could argue that the decision was biased and that the Commissioner was pursuing a personal vendetta against the taxpayer.

5.4.2.2.2 The administrator's (the Commissioner's) decision was procedurally unfair; influenced by error in law; or in bad faith or arbitrary

Section 6(2)(b) of PAJA deals with the situation where the administrator (the Commissioner) fails to comply with the requirements for performing the administrative action. A ground for review arises when a mandatory and material procedure or condition prescribed by an empowering provision was not complied with.

That could be the case where the administrator was supposed to have followed a certain procedure and did not. An example is where the Commissioner does not

66 (26244/2015) [2020] ZAGPJHC 202 (31 August 2020).
67 *Carte Blanche Marketing CC and Others v Commissioner for the South African Revenue Service* para 33.
68 *Carte Blanche Marketing CC and Others v Commissioner for the South African Revenue Service* para 33.

comply with section 43(2) of the TAA, which provides that relevant information gathered must be kept separate and may not be used in subsequent criminal and civil proceedings.

For tax purposes, it is expected that the Commissioner's action must be lawful, reasonable and procedurally fair. A taxpayer must be given an opportunity to make representations before a decision that affects his rights negatively is made, otherwise the administrative action may be ruled procedurally unfair.

5.4.2.2.3 The administrator's (the Commissioner's) decision was *ultra vires* and unconstitutional

Where the administrator (the Commissioner) performs an action that is not authorised by the empowering provision, the action is known as being *ultra vires* at common law (paragraph 5.5.1.1(b) discussed above). A review may therefore be conducted where the decision by the Commissioner or a senior SARS official regarding the information gathering powers is in excess of his powers or if he lacked authority to exercise those powers.

Another ground for review is where the Commissioner or a SARS official had to make a decision within a specified time and failed to do so. The concern here is that the taxpayer could be misled or misinformed by the Commissioner and his officials that the matter was still being investigated or reviewed, or being decided upon, whereas it is not. Section 6(3)(a) of PAJA provides that judicial review may be applied for where there is an unreasonable delay in the taking of the decision by the administrator (the Commissioner).

An administrative action may be reviewed and rendered invalid if it is inconsistent with the Constitution. Section 172 of the Constitution provides for the powers of the court and the procedure to follow when declaring a conduct or an act to be unconstitutional for its inconsistency. The section provides:

(1) When deciding a constitutional matter within its power, a court-
(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
(b) may make any order that is just and equitable, including-
(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

(2) *(a)* The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

5.4.2.2.4 The administrator's (the Commissioner's) decision was unreasonable

PAJA provides a further ground of review where the administrator's decision was unreasonable. Despite this remedy, South African courts have been hesitant to pronounce on the reasonableness or unreasonableness of administrative action. To illustrate this view, in *Union Government (Minister of Mines and Industries) v Union Steel Corporation (SA) Ltd*,[69] the AD (*per* Stratford JA) held:

> There is no authority that I know of, and none has been cited, for the proposition that a court of law will interfere with the exercise of a discretion on the mere ground of its unreasonableness. It is true the word is often used in the cases on the subject, but nowhere has it been held that unreasonableness is sufficient ground for interference; emphasis is always laid upon the necessity of the unreasonableness being so gross that something else call be inferred from it, either that it is 'inexplicable except on the assumption of *mala fides* or ulterior motive,' … or that it amounts to proof that the person on whom the discretion is conferred, has not applied his mind to the matter.[70]

In *National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd*,[71] Holmes JA held that the court intervenes only in cases where the administrative decision was grossly unreasonable. The unreasonableness of the administrative action must be of such a nature as to warrant the inference that the authority had failed to apply its mind to the matter. From a tax perspective, it is

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69 1928 AD 220.

70 *Union Government (Minister of Mines and Industries) v Union Steel Corporation (SA) Ltd* 236–237 (original emphasis).

71 1972 3 SA 726 (A) 735.

unreasonable for the Commissioner to request information from a taxpayer who is hospitalised.

The effectiveness of the PAJA grounds of review in protecting taxpayers' rights against the Commissioner's information gathering powers

In summary, PAJA has codified the following principles as the common law grounds of review: illegality, irregularity or invalidity. In the context of taxation, this could be the case where the decision or conduct of the Commissioner is biased in that it does not comply with a legal provision, is procedurally unfair, influenced by error in law, is in bad faith or arbitrary, *ultra vires*, unreasonable or unconstitutional.

These grounds, it is argued, are comprehensive enough to allow aggrieved taxpayers an opportunity to seek judicial relief from the courts. Where the taxpayer is aggrieved by the administrative action of the Commissioner with respect to his information gathering powers, the taxpayer may seek judicial review in terms of section 6 of PAJA.

The taxpayer must be able to prove that the administrative action by the Commissioner falls foul of the provisions of section 6 of PAJA. Section 6 of PAJA could also cover a situation where an administrative action performed by the administrator is vague and ambiguous.

Such action could possibly be covered by the general review power found in this particular section. The court or other independent tribunal may review such an action by granting orders or remedies recognised by section 8 of PAJA (fully discussed below).

5.4.2.3 The time limit set by the Promotion of Administrative Justice Act to apply for a judicial review

Section 7(1) of PAJA reads as follows:

> Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date–

(a) Subject to subsection 2*(c)*, on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)*(a)* have been concluded; or

(b) Where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

The review proceedings under PAJA are required to be instituted without unreasonable delay and not later than 180 days (6 months) after internal remedies have been exhausted.

The effectiveness of the PAJA review time limits in protecting taxpayers' rights against the Commissioner's information gathering powers

It is submitted that section 7(1) of PAJA has the potential to encourage lawyers to institute legal proceedings as soon as possible because the section requires the individual to institute an action without unreasonable delay. However, section 7(2) provides that no court shall review an administrative action unless internal remedies have first been exhausted.

Section 7(2), which provides for the internal formalities to be complied with, may weaken the provisions of section 7(1), which provides for instituting an action without delay. However, section 7(2)(c) provides that a court or tribunal may in exceptional circumstances, and on application by the taxpayer, exempt such taxpayer from complying with the internal formalities.

This can be effective if the taxpayer can prove that exceptional circumstances exist which allow him to approach the court or tribunal without compliance with section 7(2).

5.4.3 Remedies available under judicial review

The court or tribunal, in proceedings for judicial review by the taxpayer, may grant any order that is just and equitable.[72] High Courts have the power to make orders

[72] Section 8(1) of PAJA.

and to order a remedy. Magistrates' Courts have similar powers as well. However, section 170 of the Constitution limits the jurisdiction of the Magistrates' Courts, in that they may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.

Section 8 of PAJA provides that the court may impose any of the following remedies:

(1) The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders-
- *(a)* directing the administrator-
  - (i) to give reasons; or
  - (ii) to act in the manner the court or tribunal requires;
- *(b)* prohibiting the administrator from acting in a particular manner;
- *(c)* setting aside the administrative action and-
  - (i) remitting the matter for reconsideration by the administrator, with or without directions; or
  - (ii) in exceptional cases-
    - *(aa)* substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
    - *(bb)* directing the administrator or any other party to the proceedings to pay compensation;
- *(d)* declaring the rights of the parties in respect of any matter to which the administrative action relates;
- *(e)* granting a temporary interdict or other temporary relief; or
- *(f)* as to costs.

Section 8 of PAJA is in line with section 172(1) of the Constitution, which provides that where the High Court, the Supreme Court of Appeal ("SCA") or the Constitutional Court declares administrative action unconstitutional, such court may make an order that is just and equitable.

5.4.3.1 An order for the administrator (the Commissioner) to provide the taxpayer with reasons

Section 8 of PAJA entitles an aggrieved party to request reasons for the administrative action performed by the administrator. The court or tribunal, in a proceeding for judicial review, may order that the administrator must provide reasons to the aggrieved party,[73] in line with the common law principle of *audi alteram partem* (discussed in Chapter 4).

[73] Section 8(1)(a)(i) of PAJA.

The Constitution also provides for the request for reasons under the right to just administrative action in section 33. In tax law, the court or tribunal may order that the Commissioner must provide the taxpayer with reasons where, for example, the Commissioner conducted a search and seizure on the affairs of the particular taxpayer.

Where a judicial proceeding is instituted by the taxpayer because no reasons were given, section 5(3) of PAJA provides for a rebuttable presumption that the administrative action was taken without a good reason. For tax purposes, the presumption, rebuttable at the instance of the Commissioner, is that the failure to provide reasons was taken without a good reason.

The effectiveness of an order to request reasons in protecting taxpayers' rights against the Commissioner's information gathering powers

Section 8 of PAJA entitles the court to order that the taxpayer be provided with reasons. It is argued that although the taxpayer is entitled to reasons, he is at a disadvantage because the remedy is not automatic. The taxpayer may have to appoint a legal representative to approach the court on judicial review to request reasons. This approach may not be feasible for most taxpayers, as engaging the services of a legal representative has negative financial implications for the taxpayer.

5.4.3.2 An interdict to stop the administrator's (the Commissioner's) decision and **mandamus** *to fulfil a statutory obligation*

Wiechers[74] explains interdict and *mandamus* as judicial review remedies. He distinguishes between the two, noting that interdict prevents an unauthorised conduct or action, whereas *mandamus* demands compliance with a duty. By *mandamus*, the administrative body is not prohibited by the court from performing a particular action, but is compelled to fulfil a statutory obligation and execute a particular action.[75]

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74 Wiechers *Administrative Law* 55.
75 Wiechers *Administrative Law* 240.

The remedy of *mandamus* may be employed to fulfil two purposes: first, to compel the performance of a specific statutory duty and, secondly, to remedy the consequence of unlawful action already performed.[76] In *Mahambehlala v MEC for Welfare, Eastern Cape, and Another*,[77] a *mandamus* was granted. The court found that the nine months' period taken to process the applicant's disability grant was unreasonable. It further held that three months would have been more than sufficient to deal with her application.

An interdict may be ordered by the court or tribunal to restrain the administrator from infringing the rights of individuals.[78] In *Vereniging van Advokate (TPA) en 'n Ander v Moskeeplein (Edms) Bpk en 'n Ander*,[79] building operations caused noise and disturbance at the advocates' chambers. This group of advocates successfully applied for an interdict prohibiting the builders from continuing with building operations during normal working hours.

In the tax context, the court may impose an interdict for the Commissioner not to proceed with an inspection, verification or audit or search and seizure on the affairs of the taxpayer if that action contravenes the rights of the taxpayer.

The effectiveness of an interdict or *mandamus* in protecting taxpayers' rights against the Commissioner's information gathering powers

While an interdict may help the taxpayer, in that the Commissioner may be stopped from infringing his rights, the taxpayer must first approach the courts for this remedy. This remedy also does not provide taxpayers with comfort because they need to spend money to appoint a legal representative who approaches the court for an interdict.

76 Devenish, Govender and Hulme *Administrative Law and Justice* 436.
77 2002 1 SA 342 (SE); 2001 9 BCLR 890 (SE).
78 Section 8(1)(b) of PAJA.
79 1982 3 SA 159 (T).

5.4.3.3 An order to set aside the conduct of the administrator (the Commissioner)

The court may set aside the decision of the administrator and remit it to the administrator for reconsideration.[80] In exceptional circumstances, the court may set aside the decision and substitute, vary or correct any defect resulting from the administrative action.[81] It may also order a payment of compensation.[82] When the court or tribunal orders that an administrative action be set aside, it cancels it. The administrative action, in this case, is regarded as never having existed or been performed.

Hence the court may, on application by the taxpayer, set aside the referral for an audit or search and seizure on the affairs of the taxpayer and remit it to the Commissioner for reconsideration. In exceptional circumstances, the court may correct any defect resulting from the referral. In a nutshell, the court may change the decision or the conduct of the Commissioner.

At common law, the courts did not lightly change the decision of the administrative body unless compelling reasons existed for the courts to do so. What the courts did was only to refer the matter back to the administrator for his reconsideration. However, in *Nel v Suid-Afrikaanse Geneeskundige en Tandheelkundige Raad*,[83] the court held that the case necessitated the imposition of a lighter sentence.

The court found that the sentence which had been imposed by the Council was shockingly inappropriate. In a nutshell, the court substituted its own decision for that of an administrative body. This step signifies a departure from the established standard of the court's not substituting its judgment for that of the administrative body.

From a tax perspective, this implies that the court can set aside a decision and remit the matter for reconsideration by the Commissioner or in exceptional circumstances

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80 Section 8(1)(c) of PAJA.
81 Section 8(1)(c)(ii)(aa) of PAJA.
82 Section 8(1)(c)(ii)(bb) of PAJA.
83 1996 4 SA 1120 (T). The respondent was the South African Medical and Dental Council.

substitute or vary or correct a defect in the administrative action in terms of section 8(1)(c) of PAJA.

The effectiveness of setting aside the Commissioner's action in protecting taxpayers' rights against the Commissioner's information gathering powers

In the tax context, when courts set aside the administrator's (the Commissioner's) action, this is an ideal remedy for the taxpayer. However, the courts are very reluctant to order this remedy and can order it only in exceptional circumstances.[84]

The courts prefer to refer the matter back to the Commissioner to reconsider the decision. When this approach is applied in the case of a taxpayer, it is argued that this may result in the Commissioner's arriving at another decision that may still infringe the rights of the taxpayer. Where, for example, the court sets aside and orders the reconsideration by the Commissioner of a referral for an audit on the taxpayer, the Commissioner may conduct search and seizure in the alternative.

5.4.3.4 An order for the declaration of rights

A remedy regarding the declaration of rights provides a platform for the court to set out the rights and duties of the parties. In effect, it sets out what is expected from them. It is argued that this is not a remedy *per se*, but clarifies what is expected from the parties.[85]

In *Coin Operated Systems (Pty) Ltd and Another v Johannesburg City Council*,[86] the court held that the remedy may also be used to determine whether actual or pending administrative action is lawful. It is a simple means of curing illegal activity, even where other remedies, such as review, may also be relied upon.

This remedy can be used to ensure that the rights of the affected taxpayers and the Commissioner are clearly set out. A declaration of rights may be requested if there

84 Section 8(1)(c)(ii) of the TAA.
85 Section 8(1)(d) of PAJA.
86 1973 3 SA 856 (W).

is a legal dispute or uncertainty about a particular administrative action.[87] Although the remedy regarding the declaration of rights provides a platform for the court to set out the rights and duties of the parties, it is, however, argued that this is not a remedy *per se*, as it only clarifies what is expected from the parties.

5.4.3.5 An order for costs

Section 8(2)(d) of PAJA provides a remedy where the administrator fails to make a decision, by ordering the administrator to pay costs. Thus, the Commissioner may be ordered to pay the aggrieved taxpayer costs. However, the remedy as to costs is not complete and may not be considered to be a stand-alone remedy. It must accompany the main remedy. For example, where the court orders the setting aside of the decision by the Commissioner, it may also order the costs in addition.

5.5 THE TAXPAYER'S *LOCUS STANDI* (LEGAL STANDING)

The person affected by an administrative action must have *locus standi* ("legal standing") to be able to institute an action against an administrator. Standing in law determines the right to sue or seek judicial redress in respect of an alleged unlawful administrative action.[88]

Therefore, *locus standi* refers to the capacity of a person to bring a matter to court as an aggrieved person. It is a basic rule of all legal systems of the world that a person may take a matter to court only if he has an identifiable interest in the outcome, that is, when he has sustained loss or damage. The fact that the administrative action by the Commissioner's information gathering powers may adversely affect the rights of the taxpayer is sufficient to grant him *locus standi*.

Before 1994 and the introduction of the new constitutional order, the requirement was that financial/pecuniary or material/patrimonial loss was regarded as sufficient to establish legal standing. The courts held that a potential for economic gain was

87 Rautenbach and Malherbe *Constitutional Law* 240.
88 Devenish, Govender and Hulme *Administrative Law and Justice* 455.

accepted as a sufficient interest.[89] The determination of *locus standi* was also affected by the type of administrative relationship involved: whether it was a general or an individual relationship.

Currently, section 38 of the Constitution[90] on the enforcement of rights provides that anyone listed in this section has the right to approach a competent court, on the ground that a right in the Bill of Rights ("BOR") has been infringed or threatened. The court may then grant appropriate relief, including a declaration of rights. The listed persons who may approach the court are the following:

(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.

The first four categories of persons cover "anyone", and the last one applies to "an association" representing its members. *Locus standi* of individuals in terms of section 38 of the Constitution has broadened the scope of individuals and groups to seek relief in matters involving fundamental rights, including the right to just administrative action.

This means that more people who have identifiable interests in the outcome of a decision may now approach the court as a group. In South Africa, the tax cases discussed above have shown that individual taxpayers have brought actions against the Commissioner, but it is yet to be seen that a class of taxpayers can act together to bring an application against the Commissioner.

It is submitted that this position is inevitable and imminent, considering the fact that the TAA poses many challenges to taxpayers' rights against the Commissioner's information gathering powers.

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89 *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange and Others* 1983 3 SA 344 (W).

90 The Constitution of the Republic of South Africa, 1996.

5.6 THE COURT OR FORUM THAT THE TAXPAYER MUST APPROACH

Having discussed the *locus standi* of the aggrieved person in the previous paragraph, it is important to examine the question of which court may review administrative action. Taxpayers need to know which court or forum to approach when their rights have been infringed by the Commissioner's information gathering powers.

As explained in Chapter 1, the High Court has inherent powers of review. Section 1 of PAJA provides that the courts which may review administrative actions are the Constitutional Court,[91] a High Court or another court of similar status. This means that the courts identified as having jurisdiction to review administrative action are no longer the superior courts only.

Magistrates' Courts are also designated by section 1 of PAJA to review administrative action, which is an important departure from the common law dispensation when the review of administrative action took place at the level of the High Court only. Section 1 of PAJA includes in the definition of "court" the fact that a Magistrate's Court will have jurisdiction:

> either generally or in respect of a specified class of administrative actions, designated by the Minister by notice in the *Gazette* and presided over by a magistrate or an additional magistrate designated in terms of section 9A, [s 9A deals with the "designation and training of presiding officers" and was inserted by s 2 of the 2002 amending Act] within whose area of jurisdiction the administrative action occurred or the administrator has his or her or its principal place of administration or the party whose rights have been affected is domiciled or ordinarily resident or the adverse effect of the administrative action was, is or will be experienced….

5.7 USE OF MUTUAL AGREEMENT PROCEDURE TO RESOLVE TAXPAYER RIGHTS TREATY DISPUTES RELATING TO EXCHANGE OF INFORMATION IN TAX MATTERS

Article 25 on the Mutual Agreement Procedure ("MAP")[92] deals with dispute resolution between countries and taxpayers.

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91 Acting in terms of s 167(6)(a) of the Constitution.

92 *OECD Model Tax Convention on Income and on Capital: Condensed Version 2017.*

Article 25(1) of the Organisation for Economic Co-operation and Development ("OECD") and the United Nations Model Tax Conventions ("UN MTC") permits a taxpayer who considers that the actions of one or both of the contracting states result or will result in taxation not in accordance with the provisions of the treaty to present its case to the contracting state of which it is a resident.[93] The phrase "in taxation not in accordance with the provisions of the treaty" may be interpreted to mean where rights are of taxpayers are infringed by the actions of one or both of the contracting states.

Article 25(1) further provides that the MAP procedure is available to a taxpayer irrespective of any judicial and administrative remedies available under the domestic law of the contracting states.[94] This means that the MAP procedure does not prevent taxpayers from using the domestic remedies.

In some countries, if a domestic court has decided on a case, the competent authority is bound by the decision and may not engage in MAP with another contracting state.[95] In other countries, even though the right to apply for domestic remedies and for MAP is available to the taxpayer, taxpayers may be required to waive all their rights under the domestic law before a competent authority can accept a MAP case.[96] In other states a taxpayer is required to suspend the domestic law remedies when they apply for MAP.[97] Where the taxpayer is provided with an opportunity to be part of the exchange of the information, the taxpayer must also be afforded an opportunity to challenge the tax authority's decision to exchange the particular information.

Article 25(2) of both the OECD and the UN MTCs highlights the following regarding the duties of the competent authorities of the contracting states: the MAP is

93 Oguttu 2015 *SA Yearbook of International Law* 163.
94 Oguttu 2015 *SA Yearbook of International Law* 163.
95 Oguttu 2015 *SA Yearbook of International Law* 163.
96 Oguttu 2015 *SA Yearbook of International Law* 163.
97 Oguttu 2015 *SA Yearbook of International Law* 163.

unilateral. The competent authority of the taxpayer's country of residence must first determine 'if the objection appears to be justified'.[98]

Since the above determination gives wide discretion to the competent authority, some countries tend to deny access to the MAP where the transaction in question is covered by a domestic anti-avoidance provision.[99] Access to MAP has also been denied where there are violations of domestic law which involve significant penalties.[100] However, article 25 requires that if the taxpayer's objection appears to be justified, the competent authority should first endeavour to resolve the case unilaterally, for example, by granting a tax credit or giving an exemption in case of double taxation.

Another important point that article 25(2) of both the OECD and the UN MTCs highlights regarding the duties of the competent authorities of the contracting states is that MAP is bilateral as well. If a unilateral resolution is not successful, the competent authority of the taxpayer's country of residence shall contact the competent authority of the other contracting state to begin bilateral discussions so as to resolve the case by mutual agreement.[101]

From the above, one can conclude that most disputes that arise under tax treaties involve "taxation not in accordance with the provisions of the Convention". A MAP procedure can be referred to as the mechanism that contracting states use to resolve any disputes or difficulties that arise in the course of implementing and applying the treaty.

Article 25(3) provides that competent authorities shall endeavour to resolve taxpayers' challenges in accordance with the application and interpretation of the Model Tax Convention on Income and Capital ("Model Tax Convention") by mutual agreement.[102] The article allows competent authorities of the countries to consult

98 Oguttu 2015 *SA Yearbook of International Law* 164.
99 Oguttu 2015 *SA Yearbook of International Law* 164.
100 Oguttu 2015 *SA Yearbook of International Law* 164.
101 Oguttu 2015 *SA Yearbook of International Law* 166-7.
102 OECD *Model Tax Convention on Income and on Capital: Condensed Version 2017* para 2 of Article 25.

with each other and to appoint a body specifically for that purpose. This means that competent authorities are not required to resolve the dispute, but to lay the foundation or level the playing field so that disputes may be resolved amicably.

Article 25(4) permits the competent authorities to consult each other to resolve any difficulties or doubts arising from the interpretation or application of the treaty. The taxpayer has the right to accept the results of the MAP and give up the domestic remedies or to reject the MAP and seek judicial relief under the domestic legal system.[103]

Where the matter remains unresolved, Article 25(5) allows the taxpayer to request the arbitration of unresolved issues that have prevented competent authorities from reaching mutual agreement within two years.[104] Article 25(5) provides for arbitration as an extension of the MAP.

The function of the arbitration provision: Arbitration is not intended to decide the case itself but to provide resolution for only the specific issues that prevent the competent authorities from reaching a satisfactory resolution of the case. This distinguishes arbitration under MAP from commercial or government-private party arbitration where the jurisdiction of the arbitral panel extends to resolving the whole case.[105]

Where a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both contracting states and shall be implemented, notwithstanding any time limits in the domestic laws of these states.[106] The competent authorities of the contracting states shall by mutual agreement settle the mode of application of the relevant paragraph 5 of Article 25.

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103 Oguttu 2015 *SA Yearbook of International Law* 168.

104 OECD *Model Tax Convention on Income and on Capital: Condensed Version 2017* para 5 of Article 25.

105 Oguttu 2015 *SA Yearbook of International Law* 168-9.

106 OECD *Model Tax Convention on Income and on Capital: Condensed Version 2017* para 5 of Article 25.

The importance of this discussion lies in whether the MAP assists taxpayers to resolve their disputes. As a point of departure, it is therefore important for taxpayers to understand the relationship between domestic remedies and MAP in their countries.[107]

In terms of paragraphs 31 and 34 of the OECD Commentary on article 25, to apply for MAP the taxpayer must be a resident of one of the contracting states.[108] The taxpayer has to establish that an action by one or both of the states' results, or will result, in taxation not in accordance with the treaty.[109] This means, and according to the purpose of this research, the taxpayer has to establish that an action by one or both of the states' results, or will result in the infringement of his rights.

Thus, the taxpayer can apply for MAP not only where the tax is charged but also if the actions of the states 'will result' in inappropriate taxation, for example, if an enacted law would result in inappropriate taxation for the taxpayer which infringes the rights of the taxpayer. MAP can also be applied for if a taxpayer becomes aware that the tax authority is going to impose tax not in accordance with the treaty, for example, the denial of a claim for refund or the issuance of a notice of liability.[110]

The request for MAP has to be made in the state in which the taxpayer is a resident even if the claim relates to taxation imposed by the other state.[111] The domestic legislation of some states requires that tax be paid before applying for MAP. For example, in South Africa the "pay now argue later"[112] principle applies, in that payment of an assessed tax is not suspended by an objection, appeal or a pending decision of a court of law. However, article 25 does not require the taxpayer to have paid tax before requesting MAP. The OECD and the UN MTC recommend that the obligation to pay tax be suspended or deferred during the MAP process.[113]

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107 Oguttu 2015 *SA Yearbook of International Law* 163.
108 Oguttu 2015 *SA Yearbook of International Law* 163-4.
109 Oguttu 2015 *SA Yearbook of International Law* 164.
110 Oguttu 2015 *SA Yearbook of International Law* 164.
111 Oguttu 2015 *SA Yearbook of International Law* 165.
112 Oguttu 2015 *SA Yearbook of International Law* 164.
113 Oguttu 2015 *SA Yearbook of International Law* 164.

Data on MAP in non-OECD countries is not often made public and the general impression is that MAP is not widely used in these countries.[114] The secrecy built into the MAP process makes it difficult to get data on the number of MAP cases globally. Individual countries know the number of cases in which they are involved but these figures are not made public.[115]

The OECD released its sixth round of BEPS Action 14 peer review reports on improving tax dispute resolution mechanisms on 24 October 2019.[116] Under Action 14, countries have committed to implementing a minimum standard to strengthen the effectiveness and efficiency of the MAP.[117] The Action 14 minimum standard has been translated into specific terms of reference and a methodology for the peer review and monitoring process.[118]

The minimum standard is complemented by a set of best practices. The peer review process is conducted in two stages.[119] Stage 1 assesses countries against the terms of reference of the minimum standard, according to an agreed schedule of review. Stage 2 focuses on monitoring the follow-up of any recommendations resulting from jurisdictions' stage 1 peer review report.

South Africa's peer review on stage 1 was launched on 31 August 2018. The second stage peer review was launched in May 2020.[120] The Stage 2 report had not yet been published when this study was finalised.

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114 Oguttu 2015 *SA Yearbook of International Law* 168.

115 Oguttu 2015 *SA Yearbook of International Law* 175.

116 OECD "OECD releases sixth round of BEPS Action 14 peer review reports on improving tax dispute resolution mechanisms" https://www.oecd.org/tax/beps/oecd-releases-sixth-round-of-beps-action-14-peer-review-reports-on-improving-tax-dispute-resolution-mechanisms-october-2019.htm (Date of use: 4 December 2019).

117 OECD "OECD releases sixth round of BEPS Action 14 peer review reports on improving tax dispute resolution mechanisms" https://www.oecd.org/tax/beps/oecd-releases-sixth-round-of-beps-action-14-peer-review-reports-on-improving-tax-dispute-resolution-mechanisms-october-2019.htm (Date of use: 4 December 2019).

118 OECD "OECD releases sixth round of BEPS Action 14 peer review reports on improving tax dispute resolution mechanisms" https://www.oecd.org/tax/beps/oecd-releases-sixth-round-of-beps-action-14-peer-review-reports-on-improving-tax-dispute-resolution-mechanisms-october-2019.htm (Date of use: 4 December 2019).

119 OECD "OECD releases sixth round of BEPS Action 14 peer review reports on improving tax dispute resolution mechanisms" https://www.oecd.org/tax/beps/oecd-releases-sixth-round-of-beps-action-14-peer-review-reports-on-improving-tax-dispute-resolution-mechanisms-october-2019.htm (Date of use: 4 December 2019).

120 BEPS Action 14: "Peer Review and Monitoring" OECD" https://www.oecd.org/tax/beps/beps-action-14-peer-review-assessment-schedule.pdf (Date of use: 22 August 2020).

The effectiveness of the MAP in protecting taxpayers' rights against the Commissioner's information gathering powers

Where a dispute arises between the tax authority and the taxpayer regarding the exchange of information in terms of Article 26 of the OECD Model and the UN MTC, MAP provisions under Article 25 can be applied to resolve the dispute.

It should however be noted that Article 25(3) does not compel the competent authority to resolve disputes, it only requires them to endeavour to resolve disputes by mutual agreement.[121] The competent authority might delay, prevent or disregard the taxpayer from raising a dispute.

Article 25(5) which allows for unresolved issued to be sent for arbitration, may not also be effective in resolving disputes as there are no clear guidelines for appointing arbitrators. There is also lack transparency in reaching arbitration decisions as the default approach for reaching a decision does not require that detailed reasons for decisions made.[122]

Most importantly, for purposes of this study is that, as the MAP procedure allow competent authorities to deal with taxpayer disputes, this opens up a room for bias, unfairness and abuse of powers. Therefore, the MAP may not be effective in dealing with disputes related to taxpayers' rights.

5.8 OVERVIEW OF THE CHAPTER

This chapter dealt with forms of control, which are divided into internal and external forms of control. Internal control may be exercised by the superiors of junior officials, Parliament and public bodies. External control is exercised by courts. These controls provide internal and external remedies.

121 Oguttu 2015 *SA Yearbook of International Law* 167.
122 Oguttu 2015 *SA Yearbook of International Law* 167.

Internal control can be in the form of an objection raised by the taxpayer when dissatisfied with the decision of the Commissioner. It can also be in the form of an internal appeal procedure to the Tax Board, which may be approached by a dissatisfied taxpayer or the Commissioner. Other internal control measures are SARS documents which may be helpful in minimising the infringement of taxpayers' rights. These documents include the SARS Charter and the Interpretation Notes.

The chapter also discussed other avenues available to taxpayers such as the Advance Rulings. It also discussed how the SARS Monitoring Office ("SSMO") was replaced by the Complaints Management Office ("CMO").

The external control measure discussed in this chapter pertains to the Tax Ombud and judicial review by a court which the taxpayer may employ to advance his rights. The chapter explained the common law grounds of judicial review and the legislative grounds in PAJA. The chapter also investigated whether remedies pronounced by the common law and PAJA grounds of judicial review are effective in resolving taxpayers' complaints.

The chapter also included a discussion of how the DTC and OPTR recommend the protection of some taxpayers' rights.

The next chapter is a comparative study of the tax authority's information gathering powers in the UK and whether these powers infringe the rights of UK taxpayers.

CHAPTER 6

THE UNITED KINGDOM: THE LEGAL SYSTEM; AND HER MAJESTY'S REVENUE AND CUSTOM'S INFORMATION GATHERING POWERS THAT MAY INFRINGE TAXPAYERS' RIGHTS

6 INTRODUCTION

Before discussing the powers of the United Kingdom's tax authority's information gathering powers and whether these may infringe United Kingdom ("UK") taxpayers' rights, it is first of all important to summarise the UK's legal system so as to provide the context in which taxpayers' rights may be protected.

In the eighteenth century, the two respective Acts of Union[1] created the United Kingdom of Great Britain and Scotland. Subsequently, the Acts of Union in 1800 created the United Kingdom of Great Britain and Ireland;[2] and Northern Ireland was retained as part of the United Kingdom in the partition of Ireland by the Government of Ireland Act 1920.[3]

The UK, as it is known, is thus made up of different countries: namely, England and Wales, Scotland and Northern Ireland. These countries represent three distinct legal jurisdictions, each with its own legal system, distinct history and origins.[4] This work, however, deals with only a comparative study of English law which applies in England and Wales.

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1 Union with Scotland Act 1706 c. 11 (6 Ann), of the English Parliament; Union with England Act 1707 c. 7, of the Old Scottish Parliament. For these old statutes, see the electronic versions available at http://www.legislation.gov.uk/ (Date of use: 4 June 2020).

2 Union with Ireland Act 1800 c. 67 (Regnal. 39_and_40_Geo_3), of the Parliament of Great Britain; Act of Union (Ireland) 1800 c. 38 (Regnal. 40 Geo 3), Acts of the Old Irish Parliament. For these old statutes, see the electronic versions available at http://www.legislation.gov.uk/ (Date of use: 4 June 2020).

3 Government of Ireland Act 1920 c. 67 (10 and 11 Geo 5).

4 For the maintenance of Scots law as a system of law with its courts in Scotland, for example, see Articles 18 and 19 of the Union with Scotland Act 1706 c. 11 (6 Ann), of the English Parliament, and Articles 18 and 19 of the Union with England Act 1707 c. 7, of the Old Scottish Parliament.

6.1 SOURCES OF UNITED KINGDOM LAW

The sources of English law are the following:

6.1.1 Common law

English law covers common law principles that govern disputes in private law (between two or more persons) and public law (between an individual and a public body or official).[5]

6.1.2 Statute

The most important statutes on tax matters are the Commissioners for Revenue and Customs Act ("CRCA")[6] and the Taxes Management Act ("TMA")[7] and Schedule 36 to the Finance Act 2008.[8]

6.1.3 Case law

The English law legal system is administered by the courts in England and Wales. English courts follow the principle of *stare decisis* which means that later cases should follow the judgments decided by the earlier cases unless they can be proved to be wrong.[9]

In effect, the precedent system applies to judges and requires them to treat certain previous decisions of superior courts as binding reason.[10] These court decisions are important especially in tax cases, as most tax principles are derived from court decisions.

The courts of England and Wales are headed by the Senior Courts of England and Wales. They consist of the Court of Appeal, the High Court of Justice (for civil cases)

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5 Feldman *English Public Law* 333–334.
6 Commissioners for Revenue and Customs Act 2005 (c. 11).
7 Taxes Management Act 1970 (c. 9).
8 Finance Act 2008 (c. 9).
9 Feldman *English Public Law* 91.
10 Feldman *English Public Law* 91.

and the Crown Court (for criminal cases). The Crown refers to the sovereign acting in a public or official capacity. In law, the sovereign has two personalities, one natural and the other corporate. In its corporate capacity, the Crown is a corporation sole.[11]

The Supreme Court is the highest court for both criminal and civil appeal cases in England, Wales, and Northern Ireland.[12] Any decision which this court makes is binding on every other court in the same jurisdiction, and often has persuasive effect in other jurisdictions. An example of the persuasive value of these decisions from England and Wales may be found in South Africa.

6.1.4 The relevance of European Community Law and matters relating to Brexit

European Law refers to the law developed by the European Court of Justice ("ECJ"). The UK became a member of the European Community ("EC")[13] when it acceded to the Treaty of Rome in 1972. As a result, British courts apply parts of the EC Law which is said to take direct effect.[14]

As long as the UK still formed part of the European Union ("EU"), EC Law was a source of law in the UK to which statutory authority had been given.[15] On 23 June 2016 the United Kingdom European Union membership referendum was held; 51.9 per cent of the votes cast were in favour of withdrawing from the EU (the process being referred to as Brexit). The UK Government, formed by the Conservative Party, respected the outcome of the referendum.

A change of Prime Minister occurred, followed by many months of negotiations between the UK and the EU and within the UK itself, and by a further change of Prime Minister and several important court decisions, until eventually the European

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11 Wade and Forsyth *Administrative Law* 819.

12 Section 1 of the Supreme Court Act 1981 (c. 54), which "may be cited as the Senior Courts Act 1981" (1.10.2009) by virtue of the Constitutional Reform Act 2005 (c. 4), ss. 59, 148, Sch. 11 para. 1(1); S.I. 2009/1604, art. 2(d)" (http://www.legislation.gov.uk/ukpga/1981/54 (Date of use: 4 June 2020).

13 See *R v Secretary of State for Transport, ex parte Factortame Ltd (No 3)* [1992] QB 680; [1991] 3 All ER 769 (CJEU)).

14 Stevens *Constitutional and Administrative Law* 13.

15 Feldman *English Public Law* 59.

Union (Withdrawal Agreement) Act,[16] which received the Royal Assent on 23 January 2020, ratified the Brexit Withdrawal Agreement with the EU[17] and rendered that agreement part of UK domestic law.

The United Kingdom of Great Britain and Northern Ireland left the EU on 31 January 2020. Negotiations between the UK and the EU on the further details of their post-Brexit relationship were scheduled to continue for the remainder of 2020, with Prime Minister Boris Johnson having set an ambitious target for completing them by the end of the year. The COVID-19 coronavirus pandemic has since created massive problems and uncertainty in the UK and the EU.[18] The negotiations between the UK and the EU about their relationship are also not making progress.

The research for this work was completed before the events of January 2020 took place. Aspects of this work that pertain to EC law will need to be reconsidered, both in the UK and further afield. For the purposes of this work, though, the relevant position that will be discussed is the one that pertained in England and Wales before the events of January 2020 took place.

6.1.5 Custom

Customary law does not play a major role in the field of public law in the UK.[19]

6.1.6 Literary sources

Where the law could not be ascertained with reference to statutes and decided cases, the courts have resorted to the writings of academics and practitioners. It

16 European Union (Withdrawal Agreement) Act 2020 (c. 1).

17 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community OJ L 29, 31.1.2020, p. 7–187.

18 World Health Organization "Rolling Updates on Coronavirus Disease (COVID-19)" https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen (Date of use: 22 August 2020. The novel coronavirus disease was named COVID-19 by the World Health Organisation ("WHO") on 11 February 2020. It was characterised as a pandemic by WHO on 11 March 2020.

19 Feldman *English Public Law* 70.

should be clear that these works remain subordinate in nature and can only be used as a last resort.

6.2 THE UNITED KINGDOM PARLIAMENT

The Parliament of the UK, unlike the legislatures of many other democracies, does not derive its powers from a written Constitution, but from rules known as the law and custom of Parliament (*lex et consuetudo parliamenti*).[20] The Parliament is bicameral in nature because it consists of two houses — the House of Lords (the upper house) and the House of Commons (the lower house).[21]

The Queen in Parliament is the supreme legislature for the whole of the UK.[22] The UK is a constitutional monarchy, and succession to the British throne is hereditary.[23] Monarchy refers to a system of government where the head of the state is a monarch. The Queen in the UK is the Monarch and the head of state but not the head of the government.[24]

The position of the head of the government is occupied by the Prime Minister who is appointed by the Monarch.[25] When the Monarch swore to uphold the "laws and customs" of the people of the UK at her Coronation in 1953, those "laws and customs" include common law.

6.3 CONSTITUTIONALISM IN THE UNITED KINGDOM

Unlike South Africa, which has a written Constitution, the UK does not have a written or codified constitution.[26] However, the absence of a written constitution in the UK has not meant that rights are without some legal protection.[27] Both common law and statute provide substantial protection, albeit at varying levels of adequacy at

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20 Feldman *English Public Law* 97.
21 Stevens *Constitutional and Administrative Law* 75.
22 Feldman *English Public Law* 98.
23 Article 2 of the Union with England Act 1707.
24 Feldman *English Public Law* 110.
25 Feldman *English Public Law* 110.
26 Brazier R "How near Is a Written Constitution?" 3.
27 Emery *Administrative Law* 1.

different times and in a changing social and political context.[28] The discussion below deals with the principles that underpin UK constitutionalism.

6.3.1 Parliamentary sovereignty

"Supremacy" means a body which is hierarchically above all others or has an authority greater than its rivals, while "sovereignty" means the ability to do anything.[29] Parliament in the UK is sovereign and is the supreme law-making body. According to Wade and Forsyth,[30] Parliamentary sovereignty means that judges may not invalidate legislation.

According to Dicey,[31] the principle of Parliamentary sovereignty means that Parliament thus defined has, under the English Constitution, the right to make or unmake any law whatever, and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of the Parliament.[32]

Thus individuals cannot test the validity of an Act of Parliament. This is because Parliamentary sovereignty bars the courts from questioning any Act of Parliament. One consequence of the principle of Parliamentary sovereignty is that there is no hierarchy among Acts of Parliament: all Parliamentary legislation is, in principle, of equal validity and effectiveness. However, this principle has not been without its dissidents and critics over the centuries.[33]

6.3.2 The principle of legality

Dicey[34] explains a useful point of departure: "Parliamentary sovereignty has favoured the rule of law and … the supremacy of the law of the land both calls forth

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28 Emery *Administrative Law* 1.
29 Feldman *English Public Law* 142–143.
30 Wade and Forsyth *Administrative Law* 32.
31 Dicey *Lectures on the Constitution* 66; Dicey "Introduction to the Study of the Law of the Constitution" 39.
32 Dicey *Lectures on the Constitution* 36.
33 *R (Jackson and others) v Attorney General* [2006] 1 AC 262 (HL).
34 Dicey *Lectures on the Constitution* 340.

the exertion of Parliamentary sovereignty, and leads to its being exercised in a spirit of legality".[35] This quotation was referred to by Lord Steyn in one of the seminal modern cases on the principle of legality, *R v Secretary of State for the Home Department, ex parte Pierson*.[36] In that case, Lord Browne-Wilkinson held that:

> A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.[37]

The most famous explanation of the principle of legality was provided by Lord Hoffmann in *R v Secretary of State for the Home Department, Ex parte Simms and Another*,[38] where the court held that:

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. … The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.[39]

From the summary above it can be concluded that even though Parliament is sovereign in the UK, the principle of legality must also be respected. The courts may not invalidate legislation but they can question the legality of an Act of Parliament that infringes the rights of taxpayers.

6.3.3 The rule of law

Dicey's third premise of the rule of law is that a judge-made Constitution and the general principles of British constitutional law are the result of judicial decisions confirming the common law.[40]

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35 Dicey *Lectures on the Constitution* 340.
36 [1998] AC 539 (HL).
37 *R v Secretary of State for the Home Department, ex parte Pierson* 575.
38 [2000] 2 AC 115 (HL).
39 *R v Secretary of State for the Home Department, Ex parte Simms* 131.
40 Dicey *Lectures on the Constitution* 208–209.

In *Ridge v Baldwin and Others*,[41] the House of Lords held that a person who has been dismissed from public office was entitled to know the reasons for his dismissal and be given an opportunity to challenge them. The decision confirmed one important aspect of the common law: that is, the provision of reasons to individuals such as taxpayers.

According to Stevens,[42] there is one feature of the rule of law which was not addressed by Dicey: that is, for the rule of law to work, it is necessary that individuals have access to courts. He summarises that:

> When we say that no one was above the law, and that no one should be punished except in accordance with the law, we must assume that a system existed whereby an individual can challenge the conduct of government or appeal against treatment at the hands of the authorities.[43]

This requires that every government authority which does some act which would otherwise be wrong, or which infringes a man's liberty, must be able to justify its action as authorised by law. This means authorised by an Act of Parliament.[44]

Raz[45] summarises the basic principles of the rule of law as follows: all laws should be prospective, open and clear.[46] The laws should be stable and guided by open, stable, clear and general rules; the independence of the judiciary must be guaranteed;[47] the principles of natural justice must be observed;[48] the courts should have review powers over the implementation of other principles; the courts should be easily accessible; and the discretion of crime-preventing agencies should not be allowed to pervert the law.[49]

In summary, then, the rule of law is one of the fundamental doctrines of the Constitution of the UK which is founded on the idea of the rule of law. The primary meaning of the rule of law is that everything must be done according to the law, and

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41 [1964] AC 40 (HL).
42 Stevens *Constitutional and Administrative Law* 16.
43 Stevens *Constitutional and Administrative Law* 16.
44 Stevens *Constitutional and Administrative Law* 16.
45 Raz *The Rule of Law and Its Virtue* Abstract DOI: 10.1093/acprof:oso/9780198253457.001.0001 (Date of use: 20 June 2020).
46 Raz *The Rule of Law and Its Virtue* 214.
47 Raz *The Rule of Law and Its Virtue* 216–217.
48 Raz *The Rule of Law and Its Virtue* 217.
49 Raz *The Rule of Law and Its Virtue* 218.

every act of governmental power which affects the legal rights, duties or liberties of individuals must be shown to have a legal pedigree.[50]

The affected individual may resort to the courts of law, and if the legal pedigree of the act is not found to be perfectly in order, the court will invalidate the act.[51] In effect, the rule of law is concerned with the allocation of power and the control of governmental exercise of power.

6.4 THE LEGISLATION THAT EMPOWERS HER MAJESTY'S REVENUE AND CUSTOMS TO COLLECT TAXES ON BEHALF OF THE STATE

The Commissioners for Revenue and Customs Act ("CRCA")[52] established Her Majesty's Revenue and Customs Office. In its preamble, the CRCA provides that it is:

> An Act to make provision for the appointment of Commissioners to exercise functions presently vested in the Commissioners of Inland Revenue and the Commissioners of Customs and Excise; for the establishment of a Revenue and Customs Prosecutions Office; and for connected purposes.

In the UK, the office of the tax collection, whose powers are compared to those of the Commissioner for the South African Revenue Service ("the Commissioner") in South Africa, is called Her Majesty's Revenue and Customs ("HMRC"). For many years the tax authority consisted of two separate departments.

The Inland Revenue dealt with direct taxes, while Her Majesty's Customs and Excise ("HMCE") dealt with indirect taxes. However, in March 2004, because of the O'Donnell Report recommendations, the two offices were consolidated into a single integrated department[53] known as Her Majesty's Revenue and Customs ("HMRC").[54]

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50 Wade *Administrative Law* 22.
51 Wade *Administrative Law* 22.
52 Commissioners for Revenue and Customs Act 2005 (c. 11).
53 Shah, Malik and Yaqub 2010 *European Journal of Economics, Finance and Administrative Sciences* 122.
54 Section 4 of the CRCA provides that the Commissioners and officials of the Revenue and Customs should together be known as Her Majesty's Revenue and Customs.

6.5 THE LEGISLATIVE AUTHORITY AND DUTIES OF HER MAJESTY'S REVENUE AND CUSTOMS ("HMRC")

Section 1 of the CRCA provides for the appointment of the Commissioner. The functions and the collection of taxes on behalf of the state are exercised by two or more Commissioners.[55] Section 1 of the CRCA also provides that the Commissioners exercise their functions on behalf of the Crown. These Commissioners act as the Revenue and Customs[56] and collect taxes on behalf of the state. These Commissioners are also empowered to appoint officers of the tax authority.[57]

Section 5 of the CRCA provides for the functions of the Commissioners as the following:

> (1) The Commissioners shall be responsible for—
> *(a)* the collection and management of revenue for which the Commissioners of Inland Revenue were responsible before the commencement of this section,
> *(b)* the collection and management of revenue for which the Commissioners of Customs and Excise were responsible before the commencement of this section.

Apart from the CRCA, the Taxes Management Act ("TMA")[58] serves as another piece of legislation which empowers the Commissioner to collect tax on behalf of the state. In its preamble, the Act seeks:

> To consolidate certain of the enactments relating to income tax, capital gains tax and corporation tax, including certain enactments relating also to other taxes.

Section 1 of the TMA provides that the Commissioners for Her Majesty's Revenue and Customs shall be responsible for the collection and management of—

> (a) income tax,
> (b) corporation tax, and
> (c) capital gains tax.

Section 60 of the TMA provides that every tax collector shall, when the tax becomes due and demand notes payable, make demand of the respective sums given to him

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55 Section 2 of the CRCA.
56 Section 17(3) of the CRCA.
57 Section 2 of the CRCA.
58 Taxes Management Act 1970 (c. 9).

in charge to collect. In a nutshell, the TMA deals with the administrative provisions relating to the collection of the taxes by HMRC.

6.6 THE METHODS USED BY THE COMMISSIONER TO GATHER INFORMATION FROM TAXPAYERS IN THE UNITED KINGDOM

The methods used by the Commissioner in the UK to gather information from taxpayers may be, but are not limited to the following:

6.6.1 Gathering taxpayer information from taxpayers' records and books of accounts

Section 113 of the Finance Act 2008 on information and inspection powers provides that Schedule 36 governs the inspection of records and books of taxpayers. HMRC previously also had investigation powers under the provisions of the TMA which were not specific to self-assessment enquiries and which were not dependent on the existence of any assessment or appeal. These were generally used by Special Investigations in connection with investigations carried out by them. Powers to enter premises with a warrant to obtain documents, formerly contained in the TMA, were repealed as well.[59]

Part 1 of the Schedule 36 provides that an officer of Revenue and Customs may by notice in writing require the taxpayer to provide information, or to produce a document, if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position.[60]

In *R (on the application of JJ Management LLP and others) v Revenue and Customs Commissioners and another*,[61] Nugee J held that the statutory scheme entrusted the collection of tax to HMRC.[62] That imposed both a power and a duty on HMRC not just to collect the tax that taxpayers told them about, but (so far as possible) the

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59 Gunn and Whiting *Simon's Taxes* para A6.301A Integration of information and inspection powers.

60 Paragraph (1)(a) and (b) of Schedule 36 to the Finance Act 2008 (c. 9).

61 [2019] STC 1772 (QBD).

62 *R (on the application of JJ Management LLP and others) v Revenue and Customs Commissioners* para 47.

tax that taxpayers did not tell them about. For that purpose, they had a range of tools to enable them to investigate, discover and collect tax that had not been (as it should have been) declared by way of self-assessment. That included the power to open an enquiry into a return under section 9A of the TMA and the issuing of information notices under Schedule 36 to the Finance Act 2008, but it was not limited to that.[63]

Schedule 36 was not drafted so as to confer power on HMRC to check tax returns by way of conducting investigations or enquiries; it proceeded on the basis that HMRC had power to check tax returns, and conferred power to obtain information and documents by compulsion for that purpose. Since that was the statutory scheme, there was nothing inconsistent with it in HMRC's having power to ask a taxpayer for information and documents on a voluntary basis.[64]

6.6.2 Gathering taxpayer information from inspection procedures

Section 27 of the CRCA provides the Commissioner with a power to carry out an inspection into the affairs of the taxpayer. It is from these inspections that information about the taxpayer can be collected.

Part 2 of Schedule 36 to the Finance Act 2008 provides that an officer of Revenue and Customs may enter a person's business premises and inspect the premises, business assets that are on the premises, and business documents that are on the premises, if the inspection is reasonably required for the purpose of checking that person's tax position. [65]

6.6.3 Gathering taxpayer information from tax returns

Section 8(1) of the TMA provides that any person may be required by a notice given to him to deliver a return of his income specifying separate sources of income.

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63 *R (on the application of JJ Management LLP and others) v Revenue and Customs Commissioners* para 47.

64 *R (on the application of JJ Management LLP and others) v Revenue and Customs Commissioners* paras 49–50.

65 Paragraph (1)(a), (b) and (c) of Part 2 of Schedule 36 to the Finance Act 2008.

Section 8(2) provides that every return under this section shall include a declaration by the person making the return that the return is to the best of his knowledge correct and complete.

Section 29(1) of the TMA further provides that if an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed,[66] or that an assessment to tax is or has become insufficient,[67] or that any relief which has been given is or has become excessive,[68] the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

6.6.4 Gathering taxpayer information through audit procedures

The strategy often used by Commissioners to enforce and analyse tax compliance behaviour of taxpayers is by gathering information for the purpose of conducting audits on them. The approach of the Commissioners is that the taxpayer is viewed and treated as a potential criminal. The rationale for this approach is to prevent illegal behaviour, and this is done through frequent audits and the imposition of stiff penalties.

The Commissioner may request information from taxpayers for the purpose of conducting audits. Audits may be conducted where the Commissioner believes that a taxpayer has not disclosed all the information required in the return. This belief may be based on, for example, a tip-off to HMRC, regular mistakes in the return, years of unprofitability, directors' earning less than employees, or the omission of income.[69]

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66 Section 29(1)(a) of the TMA.
67 Section 29(1)(b) of the TMA.
68 Section 29(1)(c) of the TMA.
69 Small Business UK "HMRC Tax Investigations: Eight reasons HMRC might audit your business" https://smallbusiness.co.uk/hmrc-tax-investigations-2538484/ (Date of use: 23 October 2018).

The reason for the Commissioners to conduct audits and issue penalties is that the failure to report one's full income to the tax authorities does not automatically lead to penalties. The taxpayer has a choice between two main strategies: first, he may declare his actual income or, secondly, he may declare less than his actual income.[70]

Braithwaite[71] argues that the perception is that tax authorities are treated as "cops", eager to catch tax evaders and punish them. Taxpayers are "robbers", unwilling to pay taxes and hiding from the authorities.[72] The use of coercive power by the tax authority breeds suspicion and mistrust.

As a result, there is a vicious cycle where tax authorities increase their use of coercion while taxpayers increase their use of evasion or avoidance schemes.[73] Ultimately, the increased use of evasion by the taxpayer increases the use of coercive powers of the authority, and the cycle continues.[74]

Having noted the above, a pertinent question to be asked may be who is eligible for an audit. The system used by many countries such as South Africa is not cast in stone. Even in the UK there are no clear guidelines as to who is to be audited, and this may result in one person being audited and others not.

6.6.5 Gathering information directly from a taxpayer or third parties

The Commissioner in executing his duties may request information from the taxpayer from time to time. The Commissioner relies on the information provided by the taxpayer to determine whether, for example, a particular provision has been breached or whether to conduct an audit on the affairs of the taxpayer.

70 Allingham and Sandmo 1972 *Journal of Public Economics* 323–338.
71 Braithwaite *Dancing with Tax Authorities* 1.
72 Braithwaite *Dancing with Tax Authorities* 11.
73 Braithwaite *Dancing with Tax Authorities* 11.
74 Braithwaite *Dancing with Tax Authorities* 11.

Part 1 of the Schedule 36 provides that an officer of Revenue and Customs may by notice in writing require a person ("the taxpayer") to provide information, or to produce a document, if the information or document is reasonably required by the officer for the purpose of checking the tax position of another person whose identity is known to the officer ("the taxpayer").[75]

A third party notice must name the taxpayer to whom it relates, unless the First-tier Tribunal has approved the giving of the notice and disapplied this requirement under paragraph 3.[76] Paragraph 3 provides that an officer of Revenue and Customs may not give a third party notice without the agreement of the taxpayer, or the approval of the tribunal.[77]

This provision sets the tone for information to be requested by the Commissioner from the third party. The information required may be in the form of books, accounts and documents which contain information as to transactions of the taxpayer's trade, profession or vocation. This means that third parties may be required by the Commissioner to provide information relating to the taxpayer; an example would be an accountant.

In *R (on the application of Derrin Brother Properties Ltd and others) v Revenue and Customs Commissioners (HSBC Bank plc and another, interested parties)*,[78] an appeal was noted which concerned the powers of the Commissioners for HMRC pursuant to Schedule 36 to the Finance Act 2008. The power in question was the one which requires a third party to provide information and documents for checking the tax position of a resident or overseas taxpayer by way of assistance to another country, in the present case Australia.

The court held that Schedule 36 replaced the information powers of HMRC formerly in section 20 of the TMA.[79] Under the TMA regime a third party notice could not be

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75 Paragraph 2(1)(a) and (b) of Part 1 of Schedule 36 to the Finance Act 2008.
76 Paragraph 2(2) of Part 1 of Schedule 36 to the Finance Act 2008.
77 Paragraph (3)(a) and (b) of Part 1 of Schedule 36 to the Finance Act 2008.
78 [2016] STC 1081 (CA).
79 *R (on the application of Derrin Brother Properties Ltd and others) v Revenue and Customs Commissioners* para 11.

given except with the consent of a general or special commissioner.[80] The court further held that judicial review enables an independent and impartial tribunal to review compliance with the statutory preconditions for judicial approval of third party notices under Schedule 36, both in relation to law and fact.[81]

Finally, if the issue is simply whether the Schedule 36 powers have been applied in a proportionate way, then judicial review is a perfectly apt process for carrying out that judicial assessment.[82]

6.6.6 Gathering taxpayer information through search and seizure

Information may be gathered by the Commissioner through search and seizure. Section 61(1) of the TMA provides that if a person neglects or refuses to pay the sum charged, upon demand made by the collector, the collector may distrain upon the goods and chattels of the person charged.

Subsection (2) provides that for the purpose of levying any such distress, a justice of the peace, on being satisfied by information on oath that there is reasonable ground for believing that a person is neglecting or refusing to pay a sum charged, may issue a warrant in writing authorising a collector to break open, in the daytime, any house or premises, calling to his assistance any constable.

Every such constable shall, when so required, aid and assist the collector in the execution of the warrant and in levying the distress in the house or premises. However, this information may be protected by legal professional privilege and litigation privilege, as discussed below.[83]

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80 *R (on the application of Derrin Brother Properties Ltd and others) v Revenue and Customs Commissioners* para 11.

81 *R (on the application of Derrin Brother Properties Ltd and others) v Revenue and Customs Commissioners* para 116.

82 *R (on the application of Derrin Brother Properties Ltd and others) v Revenue and Customs Commissioners* para 121.

83 DLA Piper "Legal professional privilege: Global guide" https://www.dlapiperintelligence.com/legalprivilege/ (Date of use: 26 November 2019).

6.6.7 Gathering taxpayer information through exchange of taxpayer information with other countries

The UK commenced its exchange of information with other countries, beginning with Switzerland in 1872.[84] There was an initial reluctance by countries to exchange information until the late 1990s after the Organisation of Economic Co-operation and Development ("OECD") issued the 1998 report on Harmful Tax Competition.[85]

In this report, the OECD pointed out that harmful tax practices are encouraged by the lack of transparency and effective exchange of information with other countries.[86] This situation called for both a concerted effort to curb the harmful tax practices and the innovation of the effective exchange of information programme.

6.6.7.1 Exchange of taxpayer information through the United Kingdom's treaties

Article 26 of the OECD Model Tax Convention ("OECD Model"), upon which most of the UK treaties are based (since the UK is an OECD member country), provides for the exchange of information in tax matters. The UK has also signed a number of Tax Information Exchange Agreement ("TIEAs") with low tax jurisdictions to provide a forum to exchange information even where a double tax treaty is not in place.[87] So, for instance, the UK assigned a TIEA with the Government of the Kingdom of the Netherlands in respect of the Netherlands Antilles on 10 September 2010.[88] The UK also signed TIEAs with Grenada and Dominica on 31 March 2010.[89]

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84 Oguttu *International Tax Law* 601.

85 OECD *Harmful Tax Competition.*

86 Oguttu *International Tax Law* 602.

87 Oguttu *International Tax Law* 613.

88 UK/Netherlands Antilles (Curaçao, Sint Maarten and Bes Islands) Tax Information Exchange Agreement signed on 10 September 2010, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/656498/uk-nl-antilles.pdf (Date of use: 19 March 2020).

89 Agreement between the United Kingdom of Great Britain and Northern Ireland and Grenada for the Exchange of Information relating to Tax Matters, signed on 31 March 2010 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/238193/8311.pdf (Date of use: 19 March 2020); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Commonwealth of Dominica on the Exchange of Information with respect to Taxes and Tax Matters, signed on 31 March 2012 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/236090/8418.pdf (Date of use: 19 March 2020).

As explained in Chapter 2, previously the standard of exchange of information was only upon request, but the OECD introduced a new standard of automatic exchange of information. As a member of the OECD, the UK also acceded to the OECD's standard of automatic exchange of information.

6.6.7.2 Exchange of taxpayer information through Country-by-Country Reporting in the United Kingdom

The OECD implemented the package on Country-by-Country Reporting ("CbCR") for Action 13 of the Base Erosion and Profit Shifting ("BEPS") project, published on 8 June 2015.[90] This approach provides that tax authorities shall automatically exchange information relating to profits, taxes paid, employees and assets of each entity of Multinational Enterprise Groups ("MNEs") with each other. The purpose is to allow tax authorities to make risk assessments as to the transfer pricing arrangements and BEPS-related risks, which may then serve as a basis for initiating a tax audit.[91]

Under Action 13 of the OECD Action Plan, countries were required to develop domestic legislation on CbCR which required MNEs to file notifications of their CbCR by 31 December 2016.[92] In the UK, section 122(1) of the Finance Act[93] introduced legislation on CbCR and provides that the Treasury may make regulations for implementing the OECD's Guidance on CbCR. Subsection (4) provides the following:

> (4) Regulations under this section may in particular—
> (a) require persons specified for the purposes of this paragraph ('reporting entities') to provide an officer of Revenue and Customs with information of specified descriptions;
> (b) require reporting entities to provide the information—

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90 OECD Global Forum on Transparency and Exchange of Information "About Automatic Exchange" http://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/ (Date of use: 9 May 2018).

91 OECD Global Forum on Transparency and Exchange of Information "About Automatic Exchange" http://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/ (Date of use: 9 May 2018).

92 OECD *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report* 13. The Report stated that addressing Base Erosion and Profit Shifting ("BEPS") was a key priority of governments (74). In 2013, the Organisation of Economic Co-operation and Development ("OECD") and G20 countries, working together on an equal footing, adopted a 15-point Action Plan to address BEPS. This publication is the final report for Action 13.

93 Finance Act 2015 (c. 11).

(i) at specified times,
(ii) in relation to specified periods of time, and
(iii) in the specified form and manner;

(c) impose obligations on reporting entities (including obligations to obtain information from specified persons for the purposes of complying with requirements imposed by virtue of paragraph (a));

(d) make provision (including provision imposing penalties) about contravention of, or non-compliance with, the regulations; (e) make provision about appeals in relation to the imposition of any penalty.

…

'Specified' means specified in the regulations.

The Policy Paper ("the Policy")[94] on CbCR introduced a new statutory requirement for UK headed MNEs, or UK sub groups of MNEs. The Policy requires the MNEs to make an annual CbCR to HMRC showing, for each tax jurisdiction in which they do business, the amount of tax, profit before income tax and income tax paid and accrued and their total employment, capital, retained earnings and tangible assets.[95]

According to the Policy, this measure helps HMRC better assess international tax avoidance risks. It is intended that the information reported by MNEs be shared with other relevant tax jurisdictions so that they too can identify when MNEs have engaged in certain forms of base erosion or profit shifting activity. The measure applies only to MNEs, and does not impact on individuals or households, nor on family formation, stability or breakdown.[96]

The Commissioners may give a general or specific direction to a reporting entity requiring it to provide HMRC with such information (including copies of any relevant books, documents or other records) as may be specified in the direction for the purposes of determining whether information contained in a CbCR filed by that entity is accurate.[97]

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94 HM Revenue & Customs "Policy Paper: Country by Country Reporting – Updated" 30 March 2017, https://www.gov.uk/government/publications/country-by-country-reporting-updated (Date of use: 19 March 2020). The government announced on 20 September 2014 that it would implement the Country-by-Country Reporting ("CbCR") template developed by the Organisation for Economic Co-operation and Development ("OECD") as part of its project to strengthen international standards on Base Erosion and Profit Shifting ("BEPS").

95 HM Revenue & Customs "Policy Paper: Country by Country Reporting – Updated" 30 March 2017, https://www.gov.uk/government/publications/country-by-country-reporting-updated (Date of use: 19 March 2020).

96 HM Revenue & Customs "Policy Paper: Country by Country Reporting – Updated" 30 March 2017, https://www.gov.uk/government/publications/country-by-country-reporting-updated (Date of use: 19 March 2020).

97 Regulation 11 of the Taxes (Base Erosion and Profit Shifting) (Country-by-Country Reporting) Regulations 2016 (SI 2016/237).

6.6.8 Gathering taxpayer information from the Digital Disclosure Service

The UK also has the HMRC Digital Disclosure Service ("DDS"), which provides individuals and companies with an opportunity to bring their affairs up to date in a simple, straightforward way. Section 1.1 provides that the DDS can be used by individuals and companies who have a disclosure to make about:[98]

- Income tax
- Capital gains tax
- National Insurance contributions
- Corporation tax

Examples include a business that has not declared all of its income or has not registered with HMRC for one or more taxes. Section 1.2 provides that where a taxpayer wants to make use of this system, he should:[99]

- tell HMRC that he wants to make a disclosure;
- tell HMRC about all income, gains, tax and duties not disclosed and about to be disclosed;
- make a formal offer;
- pay what is owed; and
- help HMRC where they request more information.

6.6.9 Gathering taxpayer information from Disclosure of Tax Avoidance Schemes

In the UK the Disclosure of Tax Avoidance Schemes ("DOTAS")[100] is used to obtain early information about tax arrangements.[101] A tax arrangement should be disclosed

98 HM Revenue & Customs "Disclosure of tax avoidance schemes" https://www.gov.uk/government/publications/hmrc-your-guide-to-making-a-disclosure/your-guide-to-making-a-disclosure (Date of use: 20 June 2019).

99 HM Revenue & Customs "Disclosure of tax avoidance schemes" https://www.gov.uk/government/publications/hmrc-your-guide-to-making-a-disclosure/your-guide-to-making-a-disclosure (Date of use: 20 June 2019).

100 HM Revenue & Customs "Disclosure of tax avoidance schemes" 17, https://www.gov.uk/government/publications/hmrc-your-guide-to-making-a-disclosure/your-guide-to-making-a-disclosure (Date of use: 20 June 2019).

101 HM Revenue & Customs "Disclosure of tax avoidance schemes" 17, https://www.gov.uk/government/publications/hmrc-your-guide-to-making-a-disclosure/your-guide-to-making-a-disclosure (Date of use: 20 June 2019).

where it will or might be expected to enable any person to obtain a tax advantage; further, that tax advantage is the main benefit or one of the main benefits of the arrangement, and it is a hallmarked scheme by being a tax arrangement that falls within any description prescribed in the relevant regulations.

Where disclosure is required, it must be made by the scheme "promoter" within 5 days of one of three trigger events.[102] However, the scheme user may need to make the disclosure where the promoter is based outside the UK; the promoter is a lawyer and legal professional privilege prevents him from providing all or part of the prescribed information to HMRC; or there is no promoter, such as when a person designs and implements their own scheme.[103]

The disclosure of a tax arrangement has no effect on the tax position of any person who uses it. However, a disclosed tax arrangement may be used by the Commissioner but can be rendered ineffective by Parliament with retrospective effect.[104]

6.7 HOW THE COMMISSIONER'S INFORMATION GATHERING MAY IMPACT ON TAXPAYERS' CONSTITUTIONAL RIGHTS

The discussion below analyses how the Commissioner's gathering powers may impact on taxpayers' constitutional rights. Although the UK does not have a separate Bill of Rights in a Constitution (as South Africa has), still, as a constitutional monarchy, it adheres to the protection of various internationally recognised constitutional rights which are set out in various statutes as discussed below.

These rights are:

- the right to equality

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102 HM Revenue & Customs "Disclosure of tax avoidance schemes" 17, https://www.gov.uk/government/publications/hmrc-your-guide-to-making-a-disclosure/your-guide-to-making-a-disclosure (Date of use: 20 June 2019).

103 HM Revenue & Customs "Disclosure of tax avoidance schemes" 17, https://www.gov.uk/government/publications/hmrc-your-guide-to-making-a-disclosure/your-guide-to-making-a-disclosure (Date of use: 20 June 2019).

104 HM Revenue & Customs "Disclosure of tax avoidance schemes" 17, https://www.gov.uk/government/publications/hmrc-your-guide-to-making-a-disclosure/your-guide-to-making-a-disclosure (Date of use: 20 June 2019).

- the right to privacy
- the right to a fair trial
- the right against self-incrimination
- the right of access to courts
- the right to reasons

6.7.1 The Commissioner's power to select a taxpayer for an audit may contravene the taxpayers' rights to equality

As a member of the EU (before Brexit officially happened), the UK acceded to the European Convention on Human Rights ("ECHR"), which provides for the enjoyment of certain rights and freedoms without discrimination on any grounds such as race, colour, sex, language, and religion. Article 14 of Part I of the First Schedule to the Human Rights Act ("HRA"),[105] which gives effect to the ECHR, prohibits discrimination and emphasises that everyone must be treated equally.

Sections 13 and 14 of the Equality Act[106] provide that a person discriminates against another if, because of a protected characteristic, a person treats the other less favourably than another person treats or would treat others. The relevant protected characteristics are age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race, religion or belief; sex; and sexual orientation. So, in the tax field, this right is infringed where one person is selected for an audit because of the above-mentioned factors.

It is argued in this work that the selection of a taxpayer for an audit may result in the contravention of the right to equality. This is because, as discussed above, not all taxpayers are audited. The process of selecting taxpayers for an audit may be biased and arbitrary because there are no clear guidelines on how audits should be conducted.

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105 Human Rights Act 1998 (c. 42). In its preamble, the Act is to give further effect to the rights and freedoms guaranteed under the European Convention on Human Rights ("ECHR").

106 Equality Act 2010 (c. 15).

6.7.2 The Commissioner's power to request information from the taxpayer or third party may contravene taxpayers' rights to privacy

Article 8 of Part I of the First Schedule to the HRA provides that everyone has the right to respect for his private and family life, his home and his correspondence. The right to privacy may be tested where the Commissioner requests information from a third party.

Paragraph 3 of Part 1 of Schedule 36 to the Finance Act 2008 provides that an officer of Revenue and Customs may not give a third party notice without the agreement of the taxpayer, or the approval of the tribunal.[107] Third parties such as accountants, banks and lawyers may receive such a request for information, which is usually wide and vague, to include the balance sheet, books, accounts and documents relating to the trade or profession of the taxpayer.

It is argued that paragraph 3 requires the co-operation of the taxpayer regarding the disclosure of his information held by a third party. It allows the taxpayer to refuse the disclosure of information if that could be prejudicial to the taxpayer when disclosed. Therefore, it cannot be concluded that paragraph 3 contravenes the taxpayer's right to privacy.

Section 18 of the CRCA provides that the tax authority officials may not disclose information held by them relating to a particular taxpayer unless, for example, it is for the purposes of a function of the tax authority, civil proceedings or criminal investigations and proceedings. Section 19 provides that it is an offence where the information of a person is disclosed unlawfully.

The disclosure of the information requested by the Commissioner may also be prevented because of the legal professional privilege between a legal representative and his client. The principle of legal professional privilege protects from disclosure certain documents which if unprivileged would have to be disclosed to the other side in litigation prior to trial or could be seized or inspected, or could be relied on as

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107 Paragraph 3(a) and (b) of Part 1 of Schedule 36 to the Finance Act 2008.

evidence at a trial. The law of England and Wales recognises two main types of privileges:

- legal advice privilege; and
- litigation privilege.[108]

Legal professional privilege is a substantive legal right which enables a person to refuse to disclose certain documents. It should be noted that no adverse inference may be drawn from a valid legal professional privilege. It protects documents which are confidential. Documents that are already in the public domain or shared with third parties cannot be protected by this privilege.

Legal professional privilege belongs to the client, not the lawyer, and does not depend upon the document being in the lawyer's custody. Privileged documents can (and frequently are) held by the client.[109] Litigation privilege is wider than legal advice privilege because it protects communications with third parties as well as the lawyer and his client.[110]

If no adversarial proceedings are in contemplation, legal professional privilege attaches to documents which constitute communication between the lawyer and his client made with the purpose of obtaining legal advice.[111]

6.7.3 The Commissioner's power of search and seizure may contravene taxpayers' rights to privacy

Section 61(1) of the TMA provides that if a person neglects or refuses to pay the sum charged, upon demand made by the collector, the collector may distrain upon the goods and chattels of the person charged. Subsection (2) provides that for the purpose of levying any such distress, a justice of the peace, on being satisfied by

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108 DLA Piper "Legal professional privilege: Global guide" https://www.dlapiperintelligence.com/legalprivilege/ (Date of use: 26 November 2019).

109 DLA Piper "Legal professional privilege: Global guide" 1, https://www.dlapiperintelligence.com/legalprivilege/ (Date of use: 26 November 2019).

110 DLA Piper "Legal professional privilege: Global guide" 1, https://www.dlapiperintelligence.com/legalprivilege/ (Date of use: 26 November 2019).

111 DLA Piper "Legal professional privilege: Global guide" 1, https://www.dlapiperintelligence.com/legalprivilege/ (Date of use: 26 November 2019).

information on oath that there is reasonable ground for believing that a person is neglecting or refusing to pay a sum charged, may issue a warrant in writing authorising a collector to break open, in the daytime, any house or premises, calling to his assistance any constable.

This power may contravene a taxpayer's right to privacy because computers and documents belonging to the taxpayer may be seized to obtain information required. This is especially the case where information is not protected by legal professional privilege and litigation privilege.[112]

6.7.4 The Commissioner's power to exchange taxpayer information with other countries may impact on taxpayers' rights

The BEPS Action Inclusive Framework, in particular Action 13 that deals with CbCR, fosters the exchange of information and ensures that the profits of MNEs are reported where the economic activities that generate them are carried out and where value is created. However, the implementation of CbCR may contravene the following taxpayers' rights.

6.7.4.1 Contravention of taxpayers' rights to privacy

Automatic exchange of information and CbCR have the potential to erode the rights of taxpayers. Article 8 of the ECHR provides that everyone has the right to respect for his private and family life, his home and his correspondence. This article can be contravened where a taxpayer's information is exchanged without the knowledge and the co-operation of the taxpayer.

6.7.4.2 Contravention of taxpayers' rights of access to courts

According to Stevens,[113] one feature of the rule of law (discussed above) is that it is necessary that individuals should have access to courts. Automatic exchange of

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112 DLA Piper "Legal professional privilege: Global guide" https://www.dlapiperintelligence.com/legalprivilege/ (Date of use: 26 November 2019).

113 Stevens *Constitutional and Administrative Law* 16.

information deprives taxpayers of the right to seek access to courts to challenge the exchange of information where they do not agree with the exchange.

6.7.4.3 Contravention of taxpayers' privilege against self-incrimination and the right to a fair trial

Article 6 of Part I of the First Schedule to the HRA protects taxpayers from incriminating themselves. Incriminating information could be exchanged with other countries to the detriment of the taxpayer. According to Andoh,[114] the privilege against self-incrimination (the *nemo tenetur se detergere* principle) is deemed a human right although it is not among the rights and freedoms explicitly protected by the HRA.

The privilege against self-incrimination is one of the rules of criminal procedure and means that a suspect cannot be required to provide the authorities with information that might be used against him in a criminal trial.[115] This privilege places a restriction on criminal investigation.

This means, for example, that a suspect cannot be punished or held in contempt of court for failing to answer questions or provide documents to a prosecuting authority.[116] However, legislation on the exchange of information needs to be implemented that deals with the protection of the right against self-incrimination when tax authorities exchange taxpayer information with each other.

6.7.5 The Commissioner's power to use taxpayer information to charge a taxpayer with a crime may contravene taxpayers' rights to a fair trial

Prior to 27 March 2014, the Attorney General appointed an individual as the Director of Revenue and Customs Prosecutions and staff.[117] The Director and his staff were together referred to as the Revenue and Customs Prosecutions Office (RCPO).[118]

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114 Andoh 2005 *Business Law Review* 9.
115 Redmayne 2007 *OJLS* 209.
116 Redmayne 2007 *OJLS* 209.
117 Commissioners for Revenue and Customs Act 2005 ss 34–39, 35, 36, Schedule 3 (repealed by SI 2014/834).
118 Commissioners for Revenue and Customs Act 2005 s 34(3).

On 27 March 2014, the office of the Director of Revenue and Customs Prosecutions was abolished and the functions of the Director of Revenue and Customs Prosecutions were transferred to the Director of Public Prosecutions ("DPP").[119]

Section 1 of the Prosecution of Offences Act[120] provides for a prosecuting service for England and Wales that is known as the Crown Prosecution Service ("CPS") consisting of–

> (a) the Director of Public Prosecutions, who shall be head of the Service;
> (b) the Chief Crown Prosecutors, designated under subsection (4) below, each of whom shall be the member of the Service responsible to the Director for supervising the operation of the Service in his area; and
> (c) the other staff appointed by the Director under this section.

Section 2(1) provides that the DPP shall be appointed by the Attorney General. Section 3 provides for the duties of the DPP as follows:

> (2) It shall be the duty of the Director [F1, subject to any provisions contained in the Criminal Justice Act 1987] —
> (a) to take over the conduct of all criminal proceedings, other than specified proceedings, instituted on behalf of a police force (whether by a member of that force or by any other person);
> (aa) to take over the conduct of any criminal proceedings instituted by an immigration officer (as defined for the purposes of the Immigration Act 1971) acting in his capacity as such an officer;
> (ab) to take over the conduct of any criminal proceedings instituted in England and Wales by the Revenue and Customs;
> (ac) to take over the conduct of any criminal proceedings instituted on behalf of the National Crime Agency;
>
> (b) to institute and have the conduct of criminal proceedings in any case where it appears to him that—

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119 The Public Bodies (Merger of the Director of Public Prosecutions and the Director of Revenue and Customs Prosecutions) Order 2014, SI 2014/834, Art 3. Any legal proceedings which on 27 March 2014 were in the process of being done by or in relation to the Director of Revenue and Customs Prosecutions could be continued by or in relation to the Director of Public Prosecution: see Art 5(3). Where the Director of Public Prosecution has conduct of proceedings by virtue of Art 5(3), the Director of Public Prosecution is to be treated, notwithstanding the repeals and amendments made by Public Bodies (Merger of the Director of Public Prosecutions and the Director of Revenue and Customs Prosecutions) Order 2014, SI 2014/834: (1) as acting under the enactment under which the Director of Revenue and Customs Prosecutions was acting on 27 March 2014; and (2) as having the same powers to take steps in relation to those proceedings as the Director of Revenue and Customs Prosecutions would have had: Art 6(1). A reference to the Director of Revenue and Customs Prosecutions includes a reference to a Revenue and Customs Prosecutor and a person appointed under the Commissioners for Revenue and Customs Act 2005 s 38, and a reference to the Director of Revenue and Customs Prosecutions is to be read, so far as is necessary or appropriate, as being a reference to a Crown Prosecutor or a person appointed under the Prosecution of Offences Act 1985 s 5: Art 6(2).

120 Prosecution of Offences Act 1985 (c. 23).

(i) the importance or difficulty of the case makes it appropriate that proceedings should be instituted by him; or

(ii) it is otherwise appropriate for proceedings to be instituted by him;

…

(e) to give, to such extent as he considers appropriate, advice to police forces on all matters relating to criminal offences;

Section 3A provides that a reference to the Revenue and Customs is a reference to the Commissioners for HMRC; an officer of Revenue and Customs; or a person acting on behalf of the Commissioners or an officer of Revenue and Customs.

It is argued that where the Commissioner does not use the information in the way it was intended to be used, the rights of taxpayers could be contravened. It is not clear from the tax Acts as to how and when the Commissioner should use the information obtained from the taxpayer.

There is one prosecuting office in England and Wales called the DPP. The latter is responsible for instituting criminal proceedings, including those by HMRC. The result is that the Commissioner may not be able to use the information gathered from the taxpayer or a third party to settle a score with the taxpayer.

6.7.6 A clear boundary between criminal investigations and civil investigations in the United Kingdom

As noted above, the DPP office is responsible for instituting criminal proceedings against taxpayers in England and Wales. This means that the DPP takes over the prosecution of criminal proceedings of taxpayers. It is important, however, to determine when a civil investigation becomes a criminal investigation or whether there is a distinction between civil and criminal investigations in England and Wales.

It is common cause that the criminal proceedings concerned should be tax-related offences. Section 25 of the CRCA provides that a reference to civil proceedings is a reference to proceedings other than proceedings in respect of an offence.[121]

[121] Section 25(5)(b) of the CRCA.

Section 25 of the CRCA further provides that an officer of HMRC or a person authorised by the Commissioners may conduct civil proceedings, in a magistrates' court or in the sheriff court, relating to a function of HMRC.[122]

From the discussion above it is clear that the UK tax law makes a distinction between referrals for criminal and civil proceedings.

6.7.7 The Commissioner's power to pursue criminal investigations may cause taxpayers to incriminate themselves and impact on the rights to privacy and a fair trial

The Commissioner's power to request information may result in taxpayers' incriminating themselves. This may be the case where a taxpayer is forced to supply information or is compelled to answer questions that incriminate himself and thus he may be charged with a crime.

Self-incrimination involves the giving up of a particular type of information that may lead to an infringement of one's privacy.[123] The forced revelation of "self-knowledge" is seen as being problematic. This is because an individual's self-knowledge and inner workings of the mind are generally seen as being areas in which the law should not compulsorily intervene.[124] Accordingly, the right to silence protects privacy which is important in protecting personal identity and autonomy.[125]

Hence, the privilege against self-incrimination constitutes a part of the right to a fair trial and a fair hearing granted to any person under criminal investigation. The privilege comprises the right not to contribute to self-incrimination and the right to remain silent.

To summarise: what constitutes an infringement of the privilege against self-incrimination is, first, the nature and the degree of compulsion used to obtain relevant information from the taxpayer; secondly, the existence of other relevant

122 Section 25(1) of the CRCA.
123 MacCulloch 2006 *Leg Stud* 216.
124 MacCulloch 2006 *Leg Stud* 216.
125 MacCulloch 2006 *Leg Stud* 216.

procedural guarantees in the particular proceedings; and, thirdly, the use of obtained evidence and material.

In the light of the fact that the privilege against self-incrimination is not recognised as one of the rights in the HRA, the European Court of Human Rights ("ECtHR") cases, as compared to domestic ones, provide a good illustration of the application of the principle in practice.

The privilege against self-incrimination was recognised for the first time in *Funke v France*.[126] Funke was suspected of tax evasion, and as such was requested by the tax authority to provide details of his bank account. When he did not do so, he was fined 50 francs per day. The ECtHR found that this infringed Article 6 of the ECHR and held that:

> the special features of customs law ... cannot justify such an infringement of anyone 'charged with a criminal offence' ... to remain silent and not to contribute to incriminating himself.[127]

The ECtHR held that the concept of fair trial in Article 6 of the ECHR, which is granted to persons facing a criminal charge, includes the right to silence and the right against self-incrimination.

Butler[128] summarises his observations on the *Funke v France* case (above) into four categories: first, the right against self-incrimination relates not only to oral testimony, but to documentary material as well.[129] At no stage was Funke required by the customs authorities to give oral testimony. The authorities' actions were directed solely at uncovering copies of documents that they believed would reveal breaches of the customs and exchange control legislation.[130] This means that taxpayers' statements are also protected in respect of statements made in a document.

126 [1993] ECHR 7.
127 *Funke v France* para 44.
128 Butler 2000 *Crim Law Forum* 461.
129 Butler 2000 *Crim Law Forum* 465–466.
130 Butler 2000 *Crim Law Forum* 466.

The second observation by Butler[131] is that the right against self-incrimination applies to the forced disclosure of the existence and location of pre-existing documents.[132] This refers to documentation that is in existence prior to the order to produce it. The order for production must not require the creation of new evidence against the taxpayer; rather, it requires the taxpayer to produce already existing evidence.[133]

The third observation by Butler is that the privilege against self-incrimination applies at the investigation stage, not at a trial or at the stage of the initiation of formal prosecution mechanisms.[134] The obligation to produce documents is part of the customs investigation of various suspicions as to breaches of the customs and exchange control laws. Even though no charges for breach of the substantive rules on customs and exchange control were brought, the right still applied.[135]

The fourth observation by Butler is that the privilege against self-incrimination protects all of those subjected to investigation where there are penalties for non-compliance, regardless of whether the person being investigated complies or not.[136]

It should be noted that case law decided by the European authorities restricts the applicability of the privilege against self-incrimination only to a person charged with a criminal offence. It is important to mention that Article 6 of the ECHR does not explicitly refer to the right against self-incrimination. However, the decisions of the ECtHR held that:

> the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair trial.[137]

In the case of *Saunders v United Kingdom*,[138] the court held:

> The Court recalls that, although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself are

131 Butler 2000 *Crim Law Forum* 466.
132 Butler 2000 *Crim Law Forum* 466.
133 Butler 2000 *Crim Law Forum* 466.
134 Butler 2000 *Crim Law Forum* 466.
135 Butler 2000 *Crim Law Forum* 466.
136 Butler 2000 *Crim Law Forum* 466.
137 *John Murray v United Kingdom* [1996] ECHR 3 para 45; *O'Halloran and Francis v United Kingdom* [2007] ECHR 544 para 46; *Bykov v Russia* [2009] ECHR 441.
138 [1996] ECHR 65.

> generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 (art 6) … The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6(2) of the Convention.
>
> …
>
> The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.[139]

The ECtHR held that, regardless of the character of the questions addressed to the applicant during the investigation, statements made in the course of this investigation were subsequently used in a manner which led to the conviction of the applicant. The court in effect held that the right not incriminate oneself was infringed.[140] The ECtHR, therefore, held that the applicant was deprived of a fair trial, in violation of Article 6 of the ECHR.

In the case of *R v Hertfordshire County Council, ex parte Green Environmental Industries Ltd and Another*,[141] Lord Hoffmann delivered a landmark judgment on the privilege against self-incrimination. The lord of appeal held:

> There are also associated principles which confer a right to silence or privilege against self-incrimination during the pre-trial investigation, such as the exclusion of involuntary confessions and the prohibition on the questioning of suspects without caution or after charge. These latter prohibitions are prophylactic rules designed to inhibit abuse of power by investigatory authorities and to preserve the fairness of the trial by preventing the eliciting of confessions which may have doubtful probative value… There is also a general privilege not to be compelled to answer questions from people in authority….[142]

Hence the privilege against self-incrimination was allowed only to natural persons charged with criminal offence and not to legal entities. It was also held by the Privy

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139 *Saunders v United Kingdom* paras 68–69.
140 *Saunders v United Kingdom* para 76.
141 [2000] 2 AC 412 (HL).
142 *R v Hertfordshire County Council, ex parte Green Environmental Industries Ltd* 419.

Council in *Brown v Stott (Procurator Fiscal, Dunfermline) and Another*[143] that the privilege against self-incrimination was not absolute and might be limited.

In *King v United Kingdom (No 2)*,[144] the applicant was threatened with a fine for not providing information to the tax authorities. Mr King appealed to the High Court against interest and penalty determinations. The court dismissed the appeals and also refused him leave to appeal to the Court of Appeal. He therefore appealed to the ECtHR in Strasbourg.

The ECtHR held that the Inland Revenue (HMRC) penalties for negligence were criminal for the purposes of Article 6 of the ECHR. The criminal proceedings which Mr King faced resulted from a refusal to provide information so that his tax liability could be calculated, rather than a refusal to co-operate with a prosecution. As a result, this was held not to infringe Article 6 of the ECHR.

Accordingly, the use of the information requested by the Commissioner against the taxpayer during the investigation stage could contravene the principle against self-incrimination. Article 6 of the ECHR provides a protection to taxpayers not to incriminate themselves.

According to Redmayne,[145] the ECtHR found the privilege to be an implicit requirement of the right to a fair trial in Article 6 of the ECHR. Redmayne[146] further explains that the ECtHR case law above proved that when the state puts pressure on a taxpayer to provide information, the state may make it easier to prove its case. The author explains the following four aspects regarding the principle against self-incrimination.

First, the purpose of the high standard of proof is simply to protect the innocent taxpayer, not to make it difficult for the state to prove its case. Another interpretation of the presumption of innocence, according to Redmayne,[147] is that the state should

143 [2003] 1 AC 681 (PC).
144 [2004] STC 911 (ECtHR).
145 Redmayne 2007 *OJLS* 210.
146 Redmayne 2007 *OJLS* 218.
147 Redmayne 2007 *OJLS* 218.

have to make its case without help from the defendant (the "'no assistance' principle").[148] According to this principle, the defendant is neither expected nor compelled to help the state to prove its case.[149]

The second view by Redmayne[150] is that the privilege prevented miscarriages of justice by protecting suspects from improper compulsion.[151] The third view is that it was cruel to face a defendant with the following trilemma: to be sanctioned for refusing to co-operate, to provide the authorities with incriminating information, or to lie and risk prosecution for perjury.[152] The fourth view refers to the fact that the act/omission distinction is part of the common currency of the criminal law (as a rule, it was acts, not omissions that were criminalised).[153]

MacCulloch[154] explains that the historical background of the principle lies in the generally accepted view that the privilege developed from two maxims of the *ius commune* (common law): "No one is punished in the absence of the accuser" and "no one is bound to reveal his own shame".[155]

An issue that arises is whether defendants who do not admit their guilt really do cause harm.[156] If the harm envisaged is a public harm, relating to undermining state institutions, it is not clear in what way those who do not confess do actually undermine such institutions.[157]

What is clear is that the privilege against self-incrimination protects the taxpayer for oral and documentary material; against forced disclosure of pre-existing information; at an investigation stage (not trial stage) and where there are penalties for non-compliance.

148 Redmayne 2007 *OJLS* 219.
149 Redmayne 2007 *OJLS* 219.
150 Redmayne 2007 *OJLS* 219.
151 Redmayne 2007 *OJLS* 219.
152 Redmayne 2007 *OJLS* 221.
153 Redmayne 2007 *OJLS* 225.
154 MacCulloch 2006 *Leg Stud* 211–237.
155 MacCulloch 2006 *Leg Stud* 213.
156 Redmayne 2007 *OJLS* 227.
157 Redmayne 2007 *OJLS* 227.

According to Andoh,[158] the privilege against self-incrimination may be withdrawn by statute.[159] For example, section 14(3) of the Civil Evidence Act[160] relates to a limitation of the privilege and provides:

> In so far as any existing enactment provides (in whatever words) that in any proceedings other than criminal proceedings a person shall not be excused from answering any question or giving any evidence on the ground that to do so may incriminate that person, that enactment shall be construed as providing also that in such proceedings a person shall not be excused from answering any question or giving any evidence on the ground that to do so may incriminate the husband or wife of that person.

It should be noted that the limitation of the privilege relates to criminal activities. Section 31 of the Theft Act[161] removed the privilege against self-incrimination for Theft Act offences and provides:

> No statement or admission made by a person in answering a question put or complying with an order made as aforesaid shall, in proceedings for an offence under this Act, be admissible in evidence against that person or (unless they [married or became civil partners after the making of the statement or admission) against the spouse or civil partner] of that person.

Since conspiracy to commit an offence under the Act was not an ‘‘offence under this Act’’, the privilege has not been removed in the case of such conspiracy.[162] In addition, section 72 of the Senior Courts Act[163] abolished the privilege where it becomes clear that the person’s conduct amounts to prosecution for a ‘‘related offence’’. Section 72(3) protects the witness by rendering any statement made by virtue of the section inadmissible in proceedings for any related offence such as tax evasion.

6.7.8 The Commissioner’s non-provision of written reasons for gathering information from taxpayers may contravene the taxpayers’ rights to a fair hearing

According to Craig,[164] there is no general duty to give reasons for a decision by the administrator in English law. This means, for example, that the Commissioner is not

158 Andoh 2005 *Business Law Review* 10.
159 Andoh 2005 *Business Law Review* 10.
160 Civil Evidence Act 1968 (c. 64).
161 Theft Act 1968 (c. 60).
162 Andoh 2005 *Business Law Review* 10.
163 Senior Courts Act 1981 (c. 54).
164 Craig *Administrative Law* 436.

expected to give reasons to the taxpayer for conducting an audit on his affairs. Craig[165] explains that a number of cases have nevertheless held that the general trend has been for the courts to accept that the duty to provide reasons existed.[166]

Craig[167] further explains a number of advantages of providing reasons for decisions: First, reasons assist the court in its supervisory function.[168] Secondly, an obligation to provide reasons demonstrates that the decision has been thought through by the administrator.[169] Thirdly, the provision of reasons assists administrators in ensuring that other aspects of administrative law are not frustrated.[170] Fourthly, the provision of reasons engenders public confidence in the administrators.[171] When the Commissioner provides reasons to taxpayers when gathering information, the above-mentioned advantages as articulated by Craig can be achieved.

6.8 OVERVIEW OF THE CHAPTER

This chapter commenced by explaining the legal system in the UK and the legislation that empowers the Commissioner to collect taxes on behalf of the state.

The chapter also explained the various methods of gathering information from taxpayers, which are keeping of records, tax returns, information from third parties, audits, search and seizure, exchange of information with other countries, voluntary disclosure programme and reportable arrangements. The chapter discussed how the Commissioner's information gathering powers may infringe taxpayers' rights to equality, privacy, self-incrimination, and a fair hearing.

The next chapter discusses the administrative principles that are important in understanding the Commissioner's information gathering powers and taxpayers' rights.

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165 Craig *Administrative Law* 441.
166 Craig *Administrative Law* 441.
167 Craig *Administrative Law* 436.
168 Craig *Administrative Law* 436.
169 Craig *Administrative Law* 436.
170 Craig *Administrative Law* 436.
171 Craig *Administrative Law* 436.

CHAPTER 7

ADMINISTRATIVE, COMMON LAW AND LEGITIMATE EXPECTATION ASPECTS THAT CAN PROTECT TAXPAYERS IN THE UNITED KINGDOM

7 INTRODUCTION

Where the Commissioner for Her Majesty's Revenue and Customs ("the Commissioner") in the United Kingdom ("UK") contravenes taxpayers' rights, in the exercise of his information gathering powers, the UK has administrative provisions, common law doctrines and the doctrine of legitimate expectations that can be used to protect taxpayers' rights.

7.1 ADMINISTRATIVE PROVISIONS THAT CAN BE USED TO PROTECT THE RIGHTS OF TAXPAYERS

When discussing tax administrative provisions in the UK, it is important to determine whether the action or conduct of the Commissioner is in accordance with the law. In the UK, the administrator is guided by the principles which regulate relations between the branches of government and individuals. This means that the conduct of the administrator must meet the requirements laid down by the administrative justice system (as discussed below).

Failure to meet these requirements may result in the rights of the individual (for example, a taxpayer) being infringed by the Commissioner. In the following paragraphs, the relationship between the action or conduct of the Commissioner when gathering information and the administrative justice system is discussed to ensure that it is valid.

It should be noted that the concept of "administrative action" as used in South Africa (discussed in Chapter 3) does not bear the meaning that it does in the UK. In the UK the concept of administrative action refers to an action taken to safeguard or

restore the operational effectiveness and efficiency of the administrators exercising their command authority.[1] It refers to the action taken by army officials.[2]

7.1.1 Requirements to be met by administrators under the administrative justice system

The administrative justice system encompasses a broad group of bodies, functions and processes which allow individuals to raise their grievances.[3] The system also lays down guidelines on how to challenge and resolve disputes against administrative or executive decisions made by or on behalf of the state.[4] In a nutshell, the system promotes the quality of original decision-making and the routes for challenging maladministration.[5]

The key principles to be followed in the administrative justice system are fairness, information, accessibility, consistent reasons and efficiency.[6] The success of the administrative system is measured against these principles.[7] This means that bodies in the administrative justice and tribunals system should adhere to these principles.[8]

In tax law, the conduct of the Commissioner when gathering information from taxpayers should meet the requirements of the administrative justice system to be

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1 Administrative action "AEL073, Part 1 - Introduction", para 67.003 b. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/492532/AGAI_067.pdf (Date of use: 9 July 2020).

2 Administrative action "AEL073, Part 1 - Introduction", para 67.003 b. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/492532/AGAI_067.pdf (Date of use: 9 July 2020).

3 Ministry of Justice "Administrative Justice and Tribunals: A Strategic Work Programme 2013–16" 7 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/217315/admin-justice-tribs-strategic-work-programme.pdf (Date of use: 26 July 2020).

4 Ministry of Justice "Administrative Justice and Tribunals: A Strategic Work Programme 2013–16" 7.

5 Ministry of Justice "Administrative Justice and Tribunals: A Strategic Work Programme 2013–16" 7.

6 Ministry of Justice "Administrative Justice and Tribunals: A Strategic Work Programme 2013–16" 9.

7 Ministry of Justice "Administrative Justice and Tribunals: A Strategic Work Programme 2013–16" 9.

8 Ministry of Justice "Administrative Justice and Tribunals: A Strategic Work Programme 2013–16" 9.

valid. Failure to meet these requirements may result in the contravention of taxpayers' rights, against which the taxpayer can lodge a grievance.

7.1.1.1 The administrative justice system must be fair

To ensure fairness, it is expected of the Commissioner, for example, to provide impartial and timely routes of compliance and redress which uphold the law.[9] Fairness should be employed in all decision-making and dispute resolution processes.[10]

It should also be easier and cheaper for a taxpayer to seek redress through either a tribunal or a court. In a nutshell, the Commissioner is expected to treat taxpayers with fairness. If the taxpayer lodges a grievance against the Commissioner, he must prove that the Commissioner's conduct of information gathering was unfair.

7.1.1.2 The administrative justice system must be accessible

The decisions of the administrators should be correct from the very beginning. When poor decisions are made, it should be easier for individuals, such as taxpayers, to seek redress. This means that systems should uphold justice in administrative decision-making and should also be accessible to taxpayers.

Taxpayers should be allowed to complain or appeal to another person or forum other than the original decision maker. It is important that structures and procedures within administrative justice and tribunals recognise these needs.[11]

7.1.1.3 The administrative justice system requires that reasons must be provided

In the context of tax, ensuring that individuals are informed of administrative process may require that taxpayers are informed by the Commissioner about the information

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9 Ministry of Justice "Administrative Justice and Tribunals: A Strategic Work Programme 2013–16" 9.

10 Ministry of Justice "Administrative Justice and Tribunals: A Strategic Work Programme 2013–16" 9.

11 Ministry of Justice "Administrative Justice and Tribunals: A Strategic Work Programme 2013–16" 9.

gathering process. This means that taxpayers should be given the reasons for decisions in plain and unambiguous language.

Taxpayers should be provided with a platform that allows them to understand the processes followed and decisions taken by the Commissioner. All the processes that seek to provide accessible justice should, as far as possible, be understandable and navigable by the layperson. Most importantly, bodies with the task of resolving disputes should be able to resolve them as quickly as possible.[12]

7.1.1.4 The administrative justice system must be efficient

It is important that the administrative justice system aims to be efficient. This means that decision-making bodies should make correct and soundly based decisions without bias or discrimination.[13] The process of dealing with taxpayers' cases should be straightforward and explained to them clearly.

Decisions should be consistent with others made in similar situations. This ensures a system of control that is efficient. Taxpayers should expect that the system for handling their disputes with the Commissioner is efficient.[14]

7.1.2 Use of the administrative justice system to protect taxpayers' rights from the Commissioner's information gathering powers

Taxpayers' right to administrative justice is contravened where the Commissioner does not follow the principles relating to fairness, information, accessibility, consistent reasons and efficiency. Thus the administrative justice system should promote the quality of original decision-making by the Commissioner and the routes for taxpayers to challenge maladministration.

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12 Ministry of Justice "Administrative Justice and Tribunals: A Strategic Work Programme 2013–16" 9.

13 Ministry of Justice "Administrative Justice and Tribunals: A Strategic Work Programme 2013–16" 9.

14 Ministry of Justice "Administrative Justice and Tribunals: A Strategic Work Programme 2013–16" 9.

Where the Commissioner's conduct of audits and referrals for criminal investigation of the taxpayer do not meet the required principles, such conduct can be regarded as unfair, inaccessible, inconsistent and inefficient. The taxpayer may thus approach an appropriate forum in order to enforce his rights.

7.2 THE COMMON LAW RULES OF NATURAL JUSTICE

The UK is a common law country that embraces and applies the principles laid down by the common law.[15] The most important common law principles that form the crux of this work are the "rules of natural justice".

These rules deal with a number of common law principles applicable to administrative inquiries and hearings that have been developed by the courts[16] and can be applied to disputes between the Commissioner and taxpayers. The rules of natural justice consist of two principles: *audi alteram partem* and *nemo iudex in sua causa.*[17]

According to O'Brien,[18] natural justice is the source from which procedural fairness flows under the title of "constitutional justice".[19] Constitutional justice consists of two fundamental procedural rules: first, the decision maker must not be biased or *nemo iudex in sua causa*. Secondly, anyone who may be adversely affected by a decision should not be condemned or unheard but should have the best possible chance to put forward his side of the case or *audi alteram partem.*[20]

These two common law principles of *audi alteram partem* and *nemo iudex in sua causa* are important in this work because they can assist taxpayers to protect their rights when faced with disputes relating to the conduct of the Commissioner. The two principles also guide the Commissioner on how to conduct himself in his dealings with taxpayers.

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15 Craig 1992 *LQR* 411.
16 Craig 1992 *LQR* 408.
17 Churches 2015 *CJCL* 29–30.
18 O'Brien 2011 *IJLS* 26.
19 O'Brien 2011 *IJLS* 27.
20 O'Brien 2011 *IJLS* 27.

7.2.1 The *audi alteram partem* rule can be relied upon to protect taxpayers' rights

In the UK, a basic requirement of the process of administrative adjudication is that a person who would be adversely affected by an act or a decision of the administration should be granted a hearing before he suffers detriment.[21]

The *audi alteram partem* rule as interpreted and developed by UK courts consists of three features: the individual must be given an opportunity to state his case on the matter; the individual must be informed of the considerations against him; and reasons must be given by the administrator for any decisions taken.[22]

In *Board of Education v Rice and Others*,[23] it was held (*per* Lord Loreburn LC) in relation to the appellate functions of a government department that:

> Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds . . . In such cases . . . they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial . . . They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.[24]

The best-known statement of the *audi alteram partem* rule in English administrative law was formulated by the House of Lords in *Ridge v Baldwin and Others*.[25] The court (*per* Lord Reid) held that:

> We do not have a developed system of administrative law - perhaps because until fairly recently we did not need it.[26]

It should be noted that, in tax law, the right to be heard not only guarantees every taxpayer the opportunity to make his views known during an administrative act with the Commissioner, but it also allows the taxpayer to communicate his views on the seriousness and relevance of the facts, charges and circumstances claimed by the

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21 De Smith 1955 *Harv L Rev* 569.
22 Churches 2015 *CJCL* 29.
23 [1911] AC 179 (HL).
24 *Board of Education v Rice* 182.
25 [1964] AC 40 (HL).
26 *Ridge v Baldwin* 72.

Commissioner. It also requires the Commissioner to pay due attention to all submissions by the taxpayer concerned.

The Commissioner must examine carefully and impartially all the relevant aspects of the taxpayer's case and provide detailed reasons for his decision. In a nutshell, the right to be heard can be linked to the obligation, in an administrative decision, to state concrete reasons in order to allow the person concerned to understand the rationale behind that decision.

The Commissioner can contravene the common law *audi alteram partem* right of the taxpayer when he gathers information from taxpayers without giving them an opportunity to state their cases. This is also the case where the Commissioner refers taxpayers for search and seizure without an opportunity to state their cases. The taxpayer must prove that the Commissioner contravened his common law right of natural justice.

7.2.1.1 Instances where the audi alteram partem principle may be excluded

In the UK, the right to notice or hearing in terms of the principle of *audi alteram partem* may be excluded by the presence of any of the following factors, or by a combination of two or more of them:

7.2.1.1.1 Executive functions of the administrator (the Commissioner)

Where the functions of the authority are executive (not judicial), the principle of *audi alteram partem* may be excluded.[27] In English law (as stated in Chapter 6), the making of subordinate legislation is the responsibility of the executive. However, the making of subordinate legislation need not be preceded by notice or hearing unless an Act of Parliament so provides.[28] The Commissioner does not make laws: he administers the law. As such, this exclusion is not applicable to the Commissioner.

27 De Smith 1955 *Harv L Rev* 582.
28 De Smith 1955 *Harv L Rev* 582.

7.2.1.1.2 Where the administrator (the Commissioner) vested with the power to decide is entrusted with a wide discretion

Where the authority vested with the power to decide is entrusted with a wide discretion, the principle of *audi alteram partem* may be excluded.[29] It does not follow automatically that, because an authority was empowered to make an action, it was therefore impliedly exempted from the duty to afford a party prejudicially affected by its decision an opportunity to put his case.[30]

Where, for example, the Commissioner is given wide powers to decide on how to request information from the taxpayer or third party, the common law principles may be excluded.

7.2.1.1.3 Where the legislation expressly requires the administrator (the Commissioner) to provide notice and a hearing for certain purposes

Where the legislation expressly provides for notice and hearing but imposes no procedural requirements for other purposes, the principle of *audi alteram partem* may be excluded.[31] This phrase is informed by the maxim *expressio unius est exclusio alterius* (a principle in law: when one or more things of a class are expressly mentioned, others of the same class are excluded) which may be invoked by the Commissioner to deny taxpayers a right to notice and a hearing in the context where the statute or rules are silent.[32]

7.2.1.1.4 Where imposing an obligation to disclose relevant information to the party affected would be prejudicial to the public interest

Where the Commissioner imposes an obligation on the taxpayer to disclose information, for example, about how he earned money from cash heists, this information may be prejudicial to the public when disclosed. In such a case, the common law principle of *audi alteram partem* may be excluded.

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29 De Smith 1955 *Harv L Rev* 583.
30 De Smith 1955 *Harv L Rev* 583.
31 De Smith 1955 *Harv L Rev* 584.
32 De Smith 1955 *Harv L Rev* 584.

7.2.1.1.5 Where an obligation to give notice and a hearing would obstruct prompt preventive or remedial action

The purpose of conferring upon the executive statutory powers to detain security risks would plainly be frustrated if the suspect were entitled to prior notice of government intentions.[33] In tax law, the giving of notice of the intended search and seizure to the taxpayer would pose a risk that the taxpayer might destroy certain information. In this case the giving of notice could be dispensed with.

7.2.1.1.6 Where the conduct of the party affected makes it impractical to give him notice or an opportunity to be heard

Clearly, one who has obstructed the service of notice of impending action cannot afterwards be heard to complain that he did not receive actual notice.[34] Where the Commissioner conducted search and seizure without a warrant because the taxpayer refused to allow the Commissioner to show the warrant, the taxpayer cannot claim that he was not heard after the Commissioner took a decision against him.

7.2.1.1.7 Where the matter in issue or the monetary value of the interest at stake was too trivial

Where the matter in issue or the monetary value of the interest at stake was too trivial to justify an implication that an opportunity to be heard should be afforded before action was taken, the principle of *audi alteram partem* may be excluded. Moreover, even where the *audi alteram partem* rule was held to apply and was broken, a court may decide not to intervene if the remedy sought was discretionary and the conduct of the applicant disentitles him to relief.[35]

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33 De Smith 1955 *Harv L Rev* 586.
34 De Smith 1955 *Harv L Rev* 587.
35 De Smith 1955 *Harv L Rev* 588.

7.2.2 The *nemo iudex in sua causa* rule can be relied upon to protect taxpayers' rights

Nemo iudex in sua causa literally means that "no one may be a judge in his own cause". Decisions should be made free from bias or partiality.[36]

Craig[37] explains two scenarios where bias and impartiality may be entertained: first, the decision maker might have some interest of a pecuniary nature (financial interest) and, secondly, an interest of a personal nature in the outcome of the proceedings.[38] There is always a problem where the decision maker is interested in the outcome, whether personal or pecuniary.

The courts in England have held that any pecuniary interest automatically disqualifies the decision maker.[39] In *Dimes v The Proprietors of the Grand Junction Canal*,[40] Lord Campbell held:

> No one can suppose that Lord Cottenham [the Lord Chancellor of England] could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest. Since I have had the honour to be Chief Justice of the Court of Queen's Bench, we have again and again set aside proceedings in inferior tribunals because an individual, who had an interest in a cause, took a part in the decision. And it will have a most salutary influence on these tribunals when it is known that this high Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence.[41]

It was also held in *R v Rand and Others*[42] that a judge with an interest in a case, or who was a party to it, would be disqualified from hearing it. Blackburn J held:

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36 Galligan *Due Process and Fair Procedures* 437.
37 Craig *Administrative Law* 457.
38 Craig *Administrative Law* 457.
39 Craig *Administrative Law* 457.
40 (1852) 3 HL Cas 759; (1852) 10 ER 301.
41 *Dimes v The Proprietors of the Grand Junction Canal* (1852) 3 HL Cas 793–794; (1852) 10 ER 315.
42 (1866) LR 1 QB 230.

> There is no doubt that any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter.[43]

Craig[44] argues that "other personal interests" refer to those interests that produce a reasonable suspicion of bias. Examples of other personal interests included a family relationship, business connections and commercial ties.[45] In the case of a taxpayer, he has to prove that the Commissioner had a personal interest in the matter which disqualified him from making any decision on the taxpayer's affairs.

In summary, for example, once it has been established that the Commissioner has some pecuniary or personal interest, the Commissioner is automatically disqualified. To disqualify the Commissioner (as an administrator) from acting in an authoritative position where there is an interest (other than pecuniary or proprietary) in the subject matter of the proceeding, a taxpayer must show a real likelihood of bias.

The Commissioner may have personal interest in the taxpayer (for example, a grudge against an old school friend) being subjected to an information gathering process in order for him to be referred for an audit. In the discussion that follows, the two scenarios leading to bias and the test for bias are discussed.

7.2.2.1 The test to determine bias by the administrator (the Commissioner)

Craig[46] argues that the test for bias has been controversial over the years. The courts used two tests for bias: "real likelihood of bias" and "reasonable suspicion of bias".[47] In *R v Sussex Justices, ex parte McCarthy*,[48] the court held that the difference between the two ("real likelihood of bias" and "reasonable suspicion of bias") depends not upon what actually was done but upon what might appear to be done.

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43 *R v Rand* 232.
44 Craig *Administrative Law* 459.
45 Craig *Administrative Law* 459.
46 Craig *Administrative Law* 461.
47 Craig *Administrative Law* 461.
48 [1924] 1 KB 256 (CA) 259.

In *R v Gough*[49] the House of Lords held that a direct pecuniary interest automatically disqualifies a decision maker from hearing a case.[50] Lord Goff held that there was a "compelling need" to set out "some readily understandable and easily applicable principles"[51] and declared that there was no rule that an interest that falls short of a direct pecuniary interest automatically disqualifies the decision maker from sitting.[52]

The court further held that the test for the degree of bias should be, first, whether there was a "real danger of bias" on the part of the relevant member of the tribunal;[53] and, secondly, whether the degree of bias might unfairly regard or disfavour the case of the party under consideration by him.[54]

In *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 2)*,[55] the court held that the House of Lords has a duty to correct an injustice which it has itself created. Although no financial interest was involved, the court held that Lord Hoffmann was an officer of the charitable arm of Amnesty International which was sufficient to make him a party to the case.

The court also reasoned that the fact that a person had the necessary training and qualifications to resist any tendency towards bias was not relevant when considering whether there was an appearance of bias. Therefore, the decision was set aside. Lord Browne-Wilkinson held:

> My Lords, in my judgment, although the cases have all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification. The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties. [56]

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49 [1993] AC 646 (HL).
50 *R v Gough* 673.
51 *R v Gough* 659.
52 *R v Gough* 662.
53 Craig *Administrative Law* 462.
54 Craig *Administrative Law* 462.
55 [2000] 1 AC 119 (HL).
56 *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 2)* 135.

The court confirmed the extension of the automatic disqualification requirement to a case of non-pecuniary interest. So in tax law it is a contravention where the Commissioner has some pecuniary or personal interest. This may be a situation where the Commissioner conducts an audit or refers the taxpayer for search and seizure because of some personal vendetta.

7.2.2.2 Criticism of the test for bias

The test for bias laid down above was, however, criticised and a modified test was adopted in *Porter v Magill*.[57] The adopted test was whether, having regard to the relevant circumstances as ascertained by the court, a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.[58]

The court modified the test in *R v Gough* (above) by deleting the reference to a "real danger".[59] This modified test was followed in *Taylor and Another v Lawrence and Another*.[60] The court held that the test in cases of apparent bias was whether, in all the circumstances, a fair-minded and informed observer would see a real possibility that the tribunal was biased.[61]

If the above approach were applied in the tax context, the initial test would require one to ask whether there was a real possibility that the Commissioner was biased, if, for example, having considered the facts, he referred a taxpayer who wore expensive Italian clothes and drank an expensive champagne for an audit.

Applying the modified test to a similar situation, one only has to consider whether a fair-minded and informed observer would see a real possibility that the Commissioner was biased.

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57 [2002] 2 AC 357 (HL).
58 *Porter v Magill* paras 102–103.
59 *Porter v Magill* para 103.
60 [2003] QB 528 (CA).
61 *Taylor v Lawrence* para 60.

7.2.2.3 Instances where bias could be dispensed with

Having discussed the test to determine bias, it is also important to determine whether there could be instances where rules against bias could be dispensed with. This relates to the following instances:

7.2.2.3.1 Where the administrator (the Commissioner) is the only person empowered to perform a particular act

In *Phillips v Eyre*[62] it was held that the governor of a colony could validly assent to an Act of Indemnity which protected his own actions because the Act had to receive the particular signature. In tax law, there may be a situation where the administrator (the Commissioner or duly authorised official of HMRC) is the only one empowered by the statute to make a decision to refer a family member or a friend for an audit.

7.2.2.3.2 Where the statute allows the administrator (the Commissioner) with an interest to decide on a particular matter

The statute may allow decision makers with an interest to decide on specific issues. The statute, for example, may provide the Commissioner with powers to be exercised by him alone even where he has an interest in the outcome of the matter. In such a situation, the Commissioner may have a personal vendetta against the taxpayer and refer the taxpayer for search and seizure.

7.2.2.3.3 Where the courts waive the interests of the administrator (the Commissioner)

The courts have allowed individuals in cases of bias to waive the interests of an administrator. This could happen where the aggrieved taxpayer waives his rights to rely on the *nemo iudex in sua causa* rule against an alleged bias by the Commissioner who is pursuing a personal vendetta against the taxpayer.

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62 (1870) LR 6 QB 1 (Ex Ch).

7.2.3 The use of the *ultra vires* doctrine to protect taxpayers' rights

Craig[63] opines that the principle of Parliamentary sovereignty in the UK requires an institution to police the boundaries of the Parliament.[64] The *ultra vires* doctrine has been used to achieve this purpose.

Craig[65] further argues that the doctrine could be expressed in two related ideas: in the narrow sense, the doctrine provides the idea that those to whom power has been granted should only exercise that power within their designated area.[66] For example, in tax law the Commissioner may only use his information gathering powers to determine compliance in collecting taxes.

In a broader sense, the doctrine provides the justification for constraints upon the way in which the power given to the administrative agency is exercised.[67] In tax law the Commissioner must comply with the rules of fair procedure. He must exercise his discretion to attain only proper and not improper purposes. He must act on relevant and not irrelevant considerations and must not act unreasonably.[68]

In summary, administrators and persons acting in a position of authority must act within the confines of their authority. Should they act beyond their authority, they would be acting *ultra vires*. Thus, in tax law the Commissioner when requesting information from taxpayers or third parties must act within the confines of the law. To do this, the Commissioner must act within the rules of fair procedure based on relevant factors.

7.2.4 The common law right of taxpayers to be provided with reasons

Generally, taxpayers prefer to be provided with reasons from the Commissioner for any action taken. They, for instance, prefer the Commissioner to provide them with reasons when gathering information from them.

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63 Craig *Administrative Law* 5.
64 Craig *Administrative Law* 5.
65 Craig *Administrative Law* 5.
66 Craig *Administrative Law* 5.
67 Craig *Administrative Law* 5.
68 Craig *Administrative Law* 5.

Although, as explained below, the courts formerly ruled that no duty to provide reasons arose, it will be demonstrated that the courts have more recently moved towards accepting that this duty exists. The absence of a duty to provide reasons renders any right or makes the exercise of a right to reasons more difficult.[69]

Although the cases to be discussed in this part do not deal with tax issues, they are discussed because they are relevant to the provision of reasons. In *R v Civil Service Appeal Board, ex parte Cunningham*,[70] Lord Donaldson MR held that there is no general duty to provide reasons. However, contrary to this statement, he imposed a duty to provide reasons on the Civil Service Appeal Board.

In *R v Parole Board and Another, Ex parte Wilson*,[71] the court followed the reasoning set out in *R v Civil Service Appeal Board, ex parte Cunningham* (above) and held that the applicant was entitled to know the reasons why the Parole Board was not recommending his release on the grounds of natural justice.

In *R v Secretary of State for the Home Department, ex parte Doody and Others*,[72] the court based its reasoning on the principles of transparency and openness in the making of administrative decisions, and held that the statutory scheme should be implemented fairly and one should ask whether the refusal to provide reasons was fair.

However, not all the cases have supported the notion of the provision of reasons. For example, in *R v Higher Education Funding Council, Ex parte Institute of Dental Surgery*[73] the court rejected the appellant's application on the ground that fairness alone did not justify requiring reasons to be provided. The court held that it was not necessary to establish that failure to provide reasons established a reason for review.

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69 Craig *Administrative Law* 5.
70 [1991] 4 All ER 310 (CA).
71 [1992] QB 740 (CA).
72 [1994] 1 AC 531 (HL).
73 [1994] 1 WLR 242 (QBD).

In *R v Ministry of Defence, ex parte Murray*[74] the court held that no general duty to provide reasons existed. The court held further that public interest might outweigh the advantages of giving reasons in a particular case.

Although the common law and some cases do not specifically provide for a duty to provide reasons, they do provide for methods to assist in the provision of reasons. Some statutes also provide for the provision of reasons: so, for example, Article 253 of the Treaty establishing the European Community[75] provides:

> Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty.

In tax law, taxpayers may rely on the common law right to be provided with reasons when the Commissioner did not do so. It is in line with the principles of transparency and openness in the making of administrative decisions that taxpayers be provided with reasons by the Commissioner.

7.3 THE ROLE OF THE DOCTRINE OF LEGITIMATE EXPECTATIONS IN PROTECTING TAXPAYERS' RIGHTS AGAINST THE COMMISSIONER'S INFORMATION GATHERING POWERS

In English law, the doctrine of legitimate expectations arose from administrative law, which is a branch of public law.[76] The doctrine of legitimate expectations as discussed in the South African Chapter 4 of this work developed from the UK. It was also discussed in Chapter 4 that the doctrine of legitimate expectations can be categorised into procedural legitimate expectations and substantive legitimate expectations.

Procedural legitimate expectations provide for the expectations created by a past practice, promise or representation made by the administrator that a certain

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74 [1998] COD 134 (QBD); [1997] Lexis Citation 4798.

75 Official Journal C 325, 24/12/2002 P. 0033 – 0184; Official Journal C 340, 10/11/1997 P. 0173 - Consolidated version.

76 Forsyth 1988 *CLJ* 238.

procedure will be followed, while substantive legitimate expectations provide that a past practice, promise or representation must be fulfilled.

This work discusses the origin and development of the doctrine in the UK and how the doctrine of substantive legitimate expectations can be relied upon as a remedy by taxpayers to review the conduct of the Commissioner and to compel him to fulfil his promises or representations.

7.3.1 The origin and development of the doctrine of legitimate expectations in the United Kingdom

The origin and development of the doctrine of legitimate expectations arose from the case law,[77] which provides the test on how the doctrine should be applied in the UK. The phrase "legitimate expectations" is not defined by any statutory law currently in force.[78] Yet the doctrine of legitimate expectations has been fashioned by the courts to review the administrative action.[79] A case of legitimate expectations arises when a body, by representation or by past practice, arouses an expectation which would be within its power to fulfil.[80]

A person who invokes the doctrine of legitimate expectations must prove that he has *locus standi* to make such a claim.[81] Legitimate expectations may come in various forms, for example, cases of promotions which are expected in the normal course.[82] In tax law, legitimate expectations may be relied on by taxpayers in the courts.[83]

The first appearance of the doctrine of legitimate expectations in the UK is said to have been in the judgment of Lord Denning MR in the case of *Schmidt v Secretary of State for Home Affairs.*[84] Thus, this case is regarded as the foundation of the

77 *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149 (CA).
78 Srivastava 1995(2) *Judicial Training & Research Institute Journal* 1.
79 Srivastava 1995(2) *Judicial Training & Research Institute Journal* 1.
80 Srivastava 1995(2) *Judicial Training & Research Institute Journal* 1–2.
81 Srivastava 1995(2) *Judicial Training & Research Institute Journal* 1–2.
82 Srivastava 1995(2) *Judicial Training & Research Institute Journal* 2.
83 Freedman and Vella 2012 *LQR* 194.
84 [1969] 2 Ch 149 (CA) 170–171.

doctrine of legitimate expectations in English law.[85] The Home Office had a policy of providing aliens studying at a "recognised educational establishment"[86] with a permit to live in the UK.

The applicants in this case applied for the renewal of their permits to live in the UK, but were denied. On refusal, they approached the courts and alleged that the decision constituted a denial of natural justice because they were not given a hearing before the decision was made.

Lord Denning MR held that the duty to allow representations to be made (at a hearing) "depends on whether the plaintiff has some right or interest, or … some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say".[87] However, Lord Denning MR held that there was no legitimate expectation in this case because the permits were for a limited time, which had expired.

Lord Denning MR in an *obiter dictum* held that the plaintiffs would have been entitled to a hearing had their permits been revoked before they expired.[88] This means that had this been the case, they would have had a legitimate expectation of being allowed to remain in the country for the time specified, and this would have entitled them to a hearing.[89]

The most important decision on the application of the doctrine of legitimate expectations came in the House of Lords decision in *Council of Civil Service Unions and Others v Minister for the Civil Service*.[90] The case, which is generally considered the leading case on legitimate expectations, involved employees of Government Communications Headquarters ("GCHQ"), who were responsible for communications and intelligence functions for the government.

85 Hadfield 1988 *NILQ* 104.
86 *Schmidt v Secretary of State for Home Affairs* 153.
87 *Schmidt v Secretary of State for Home Affairs* 170.
88 *Schmidt v Secretary of State for Home Affairs* 171.
89 *Schmidt v Secretary of State for Home Affairs* 171.
90 [1985] AC 374 (HL).

As a result of concerns that their jobs had an effect on national security, Prime Minister Thatcher, who was also the Minister for the Civil Service, announced that the workers at GCHQ would no longer be entitled to belong to the national unions, such as an approved staff association. This step was taken without any consultation with the unions and despite the fact that, in the past, changes in the civil servants' conditions of employment had been the subject of consultation. The unions' demand that the decision of the Prime Minister be set aside was rejected because the government had demonstrated that national security was at issue.

The unions argued that they had a legitimate expectation which arose from the practice of consultation that had existed since the establishment of GCHQ whenever changes to "conditions of service" were made.[91] Lord Diplock held that legitimate expectations arose when a government body deprives a person

> of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him the opportunity of advancing reasons for contending that they should not be withdrawn.[92]

The following extracts from the speeches of Lord Fraser and Lord Roskill are of particular relevance. Lord Fraser held:

> But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law. … Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.[93]

Lord Roskill held:

> The particular manifestation of the duty to act fairly which is presently involved is that part of the recent evolution of our administrative law which may enable an aggrieved party to evoke judicial review if he can show that he had 'a reasonable expectation' of some occurrence or action preceding the decision complained of and that that 'reasonable expectation' was not in the event fulfilled.[94]

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91 *Council of Civil Service Unions v Minister for the Civil Service* 401.
92 *Council of Civil Service Unions v Minister for the Civil Service* 408.
93 *Council of Civil Service Unions v Minister for the Civil Service* 401.
94 *Council of Civil Service Unions v Minister for the Civil Service* 415.

Ruling in favour of GCHQ, Lord Roskill further held, regarding a reasonable expectation, that:

> The principle may now be said to be firmly entrenched in this branch of the law. As the cases show, the principle is closely connected with 'a right to be heard'. Such an expectation may take many forms. One may be an expectation of prior consultation. Another may be an expectation of being allowed time to make representations especially where the aggrieved party is seeking to persuade an authority to depart from a lawfully established policy adopted in connection with the exercise of a particular power because of some suggested exceptional reasons justifying such a departure.[95]

In *R v Inland Revenue Commissioners, Ex parte MFK Underwriting Agents Ltd and Others*,[96] the claimant applied to court, claiming that a change of practice by the tax authority was contrary to a legitimate expectation. The court (*per* Bingham LJ) held:

> In so stating these requirements I do not, I hope, diminish or emasculate the valuable, developing doctrine of legitimate expectation. If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it. If in private law a body would be in breach of contract in so acting or estopped from so acting a public authority should generally be in no better position. The doctrine of legitimate expectation is rooted in fairness. But fairness is not a one-way street. It imports the notion of equitableness, of fair and open dealing, to which the authority is as much entitled as the citizen.[97]

From the discussion above it can be submitted that from the judgment of the English decision of *Council of Civil Service Unions v Minister for the Civil Service*, the doctrine of legitimate expectations may now be firmly grounded and entrenched in the administrative law of the UK. A legitimate expectation could arise at least either from an express promise given by the authoritative body (the public authority), or from a regular practice which the claimant of a legitimate expectation reasonably expects to continue.[98]

This means that, in tax law, taxpayers may claim the protection of the doctrine from an express promise given by the Commissioner; or from a regular practice which

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95 *Council of Civil Service Unions v Minister for the Civil Service* 415.
96 [1990] 1 WLR 1545 (QBD).
97 *R v Inland Revenue Commissioners, Ex parte MFK Underwriting Agents Ltd* 1569–1570.
98 *Council of Civil Service Unions v Minister for the Civil Service* 401.

the taxpayer as the claimant of a legitimate expectation reasonably expects to continue.

7.3.2 The requirements for the application of the doctrine of legitimate expectations

Based on the discussion in Chapter 4, the following are the requirements for the application of the doctrine of legitimate expectations in the UK: first, any practice or promise by the administrator must be established evidentially and must be "clear, unambiguous and devoid of relevant qualification" where it is said to give rise to a substantive benefit.

Secondly, the reliance by individuals on the representation by the administrator should be present in order to establish unfairness (or abuse of power) arising from the administrator's reneging on its previous practice or promise. The absence of detrimental reliance, where the claim is successful, will be very much the exception.[99] The individual must prove that he has relied on the promise by the administrator.

Thirdly, not all legitimate expectations must be honoured. Such expectations may be overridden in the public interest.[100] Where public interest requires that the administrator should act without following the common law rules of natural justice, the legitimate expectations would not be honoured.

Fourthly, a promise cannot operate to create legitimate expectations where that would require the public body to act contrary to its powers or otherwise unlawfully.[101] In this case the legitimate expectations would not apply where the expectations created by the administrator require him to act unlawfully to fulfil the promise.

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99 *R v Department of Education and Employment, Ex parte Begbie* [2000] 1 WLR 1115 (CA) 1124.

100 *R v North and East Devon Health Authority, Ex parte Coughlan* [2001] QB 213 (CA), *per* Lord Wolfe MR (para 57) suggests that the public body must satisfy a test of proportionality.

101 *AA and Others (Highly skilled migrants: legitimate expectation) Pakistan* [2008] UKAIT 3 para 68.

Craig[102] describes the three situations regarding the doctrine of legitimate expectations as follows: first, the legitimate expectation arises where the nature of the interest is such that the person has a right to expect the privilege to continue.[103] In this case a hearing is required before the benefit can be withdrawn.

Secondly, a legitimate expectation arises where the decision maker has made a representation that a procedure in accordance with natural justice should be followed and is to be respected.[104] In addition, if there is a regular practice of according a hearing or other procedure, this procedure would be accorded in the future.

Finally, where a representation is made that a certain decision would be made or certain criteria would be applied, the agency would be bound to accord natural justice to a person before applying different criteria or making a different decision.[105] In a nutshell, legitimate expectations are present or triggered by an expectation of the continuance of a privilege, a practice and a promise made by the person in a position of authority.

De Smith, Woolf and Jowell[106] explain that a legitimate expectation "arises where a person responsible for taking a decision has created a reasonable expectation that he will receive or attain a benefit or that he will be granted a hearing before the decision is taken".[107] Such an expectation may arise "either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimants can reasonably expect to continue".[108]

Srivastava[109] explains that legitimate expectations may arise under the following circumstances: if there is an express promise given by a public authority; or because

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102 Craig 1992 *LQR* 79.
103 Craig 1992 *LQR* 79–82.
104 Craig 1992 *LQR* 79–82.
105 Craig 1992 *LQR* 79–82.
106 De Smith, Woolf and Jowell *Judicial Review of Administrative Action* 417.
107 De Smith, Woolf and Jowell *Judicial Review of Administrative Action* 417.
108 De Smith, Woolf and Jowell *Judicial Review of Administrative Action* 417.
109 Srivastava 1995(2) *Judicial Training & Research Institute Journal* 1.

of the existence of a regular practice which the claimant can reasonably expect to continue; and such an expectation must be reasonable.[110]

From this discussion of case law and academic writings, in tax law the doctrine of legitimate expectations may be invoked by taxpayers to review the administrative act where the Commissioner employed a practice or made a promise that is “clear, unambiguous and devoid of relevant qualification”.

Where a taxpayer expects a hearing before an audit, if that is how it has been done in the past, the taxpayer may invoke the doctrine of legitimate expectations to compel the Commissioner to fulfil the practice.

Where a taxpayer expects a hearing before an audit by the Commissioner, the taxpayer needs to be informed in the form of a hearing, before the benefit can be withdrawn. Similarly, where a taxpayer was promised that a hearing would be held regarding the audit, the Commissioner is bound to fulfil the promise before another decision is taken.

The reliance by taxpayers on the representation by the Commissioner should be present in order to establish unfairness (or abuse of power) arising from the Commissioner’s reneging on his previous practice or promise. A taxpayer must have relied on the promise by the Commissioner, for example, where the Commissioner has made a promise that information gathering procedures or audits would not be conducted on the taxpayer.

In *R v Inland Revenue Commissioners, Ex parte MFK Underwriting Agents Ltd and Others*,[111] the Commissioner decided to levy tax on the income of the taxpayers contrary to the advice which they received from the tax authority. The applicant taxpayers invoked legitimate expectations to hold the tax authority accountable to a ruling or statement in respect of their fiscal affairs if on their part they approached the tax authority.

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110 Srivastava 1995(2) *Judicial Training & Research Institute Journal* 3.

111 [1990] 1 WLR 1545.

The court held that the taxpayers' only legitimate expectations in this case were that the taxpayers were taxed according to statute, and not according to a concession or wrong view of the law. The onus was on the taxpayer who relied on legitimate expectations to justify that claim by pointing to a set of facts that show that HMRC conducted itself so as to give rise to a reasonable expectation on the part of the taxpayer that he would be treated in a particular way. Bingham LJ held:

> a statement formally published by the Revenue to the world might safely be regarded as binding, subject to its terms, in any case falling clearly within them.[112]

From the discussion above it is clear that a published statement by the Commissioner setting out his views as to the interpretation and application of tax legislation is binding. The statement was within the scope of the Commissioner's tax-collecting discretion and this furthers the public interest in the efficient collection of taxes.

Therefore, taxpayers may rely on the published statement by the Commissioner when the latter has contravened the information gathering provisions. This is because the document is binding. However, he may not rely on the published statement based on the fact that the statement created legitimate expectations.

7.3.3 Procedural legitimate expectations and substantive legitimate expectations

Procedural legitimate expectations relate to a situation where an individual expects that a decision is to be made by the authority after the individual is afforded an opportunity to be heard. An individual in this case expects the court to order that the administrator should grant him a hearing before a decision is made.

By contrast, substantive legitimate expectations provide that where a public body makes a representation that an individual would receive, or continue to receive, a substantive benefit of some kind, the individual expects the court to order the administrator to fulfil the promise.

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112 [1990] 1 WLR 1569.

The discussion that follows seeks to determine whether the doctrine of legitimate expectations can afford protection to taxpayers in the form of the substantive legitimate expectations in the UK and what relief a court can pronounce in those situations. The issue here is whether a court can compel the Commissioner to grant a substantive benefit to a taxpayer based on his legitimate expectations of receiving such benefit.

The discussion also deals with the cases that contributed immensely towards the development and application of the doctrine of substantive legitimate expectations. The aim of the discussion is to ascertain whether the doctrine still applies, whether it is no longer in use or whether there is a move towards its acceptance.

The substantive legitimate expectations commonly arise in two scenarios: the first is when a person who enjoys a benefit or advantage argues that he expects the benefit or advantage to continue. In this instance, the substantive legitimate expectations preclude a decision maker from exercising a discretionary power to revoke the benefit or advantage.

This means that where the taxpayer enjoys a benefit of promises by the Commissioner that he will not be subjected to search and seizure, for example, the taxpayer expects the benefit to continue without being revoked by the Commissioner.

The second scenario is when a person does not yet enjoy a benefit or advantage but argues that he rightfully expects that it will be granted. In this instance, the substantive legitimate expectations can effectively compel decision makers to grant the benefit or advantage because the court can require decision makers to take account of both the substantive legitimate expectations and the circumstances upon which they are based.[113]

[113] Groves 2008 *MULR* 475.

Where the taxpayer being subjected to search and seizure does not enjoy a benefit which he expects to be granted, the taxpayer may invoke the doctrine to compel the Commissioner to grant the benefit.

In *R v Secretary of State for the Home Department, Ex parte Asif Mahmood Khan*,[114] Parker LJ held that expanding the doctrine of legitimate expectations to protect a substantive element was not necessarily inconsistent with the principle underlying the doctrine. The idea of substantive legitimate expectations remained unsettled in *Khan*. However, the doctrine was further developed in *R v Ministry of Agriculture Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd*.[115] The court held that:

> [i]t is difficult to see why it is any less unfair to frustrate a legitimate expectation that something will or will not be done by the decision-maker than it is to frustrate a legitimate expectation that the applicant will be listened to before the decision-maker decides whether to take a particular step.[116]

Sedley J attempted to widen the court's protection of legitimate expectations by rejecting the proposition that legitimate expectations were limited to procedural grounds.

7.3.4 The protection of taxpayers' rights using the doctrine of substantive legitimate expectations: the categorical approach

Taxpayers may rely on the doctrine of substantive legitimate expectations to protect their rights against the Commissioner when the latter is gathering information in particular. The application of the substantive protection of legitimate expectations would imply that taxpayers may bring an action to the court on review to set aside the conduct or action of the Commissioner. The taxpayer must also prove that he has *locus standi* to institute that action.

The UK's major development of the doctrine of substantive legitimate expectation is found in *R v North and East Devon Health Authority, Ex parte Coughlan*.[117] The applicant, Ms Pamela Coughlan, was a long-term patient in Mardon House. The

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114 [1984] 1 WLR 1337 (CA) 1344.

115 [1995] 2 All ER 714 (QBD).

116 *R v Ministry of Agriculture Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd* 724.

117 *R v North and East Devon Health Authority, Ex parte Coughlan* [2001] QB 213 (CA).

health authority made a promise that Mardon House would be the patients' "home for life". However, in 1998, the cost of running the facility became "prohibitively expensive", and the authority decided to close it. Ms Coughlan, who relied on the promise that the health authority made, challenged the authority's decision in court.

The Court of Appeal held that Ms Coughlan had a substantive legitimate expectation that needed protection. The court recognised the substantive legitimate expectations where individuals expected to be treated in one way by a public body, but were treated in a way that was contrary to their expectations. In its judgment, the court formulated a categorical approach (explained below) to categorise substantive legitimate expectations based on the circumstances of each individual case:

7.3.4.1 Category (a): Protection of substantive legitimate expectations against decisions that are unreasonable

In the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*,[118] the court explained unreasonable decisions. The court held that in order to make the decision based on grounds of unreasonableness, a decision would be unreasonable if "no reasonable authority could ever have come to it".[119] The court also described unreasonableness as

> something so absurd that no sensible person could ever dream that it lay within the powers of the authority.[120]

This definition is important in determining how the court should protect an individual's substantive legitimate expectations against decisions that are unreasonable. The court in *Ex parte Coughlan* held:

> [W]e do not consider it necessary to explain the modern doctrine in *Wednesbury* terms, helpful though this is in terms of received jurisprudence (cf. Dunn L.J. in *R. v Secretary of State Ex p Asif Mahmood Khan*…: 'an unfair action can seldom be a reasonable one'). We would prefer to regard the *Wednesbury* categories themselves as the major instances (not necessarily the sole ones: see *Council of Civil Service Unions v Minister for the Civil Service* … per Lord Diplock) of how public power may be misused. Once it is recognised that conduct which is

118 [1948] 1 KB 223 (CA).
119 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* 230.
120 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* 229.

> an abuse of power is contrary to law its existence must be for the court to determine.[121]

As appears from the quotation above, the *Ex parte Coughlan* case rejected the *Wednesbury* test as the only ground to challenge the decision of the public official (the administrator). The *Ex parte Coughlan* decision favoured an approach that supported the substantive protection of legitimate expectations. This means that where expectations are generated by promises or representations made by an administrator, such promises and representations must be fulfilled.[122]

The *Ex parte Coughlan* case also provides for instances where administrators abuse their powers. The decision obliges the courts to determine whether the conduct of the administrator which is an abuse of power is contrary to the law. In this case the court must protect individuals against such decision.

7.3.4.2 Category (b): Protection of substantive legitimate expectations against decisions that are procedurally unfair

According to *Ex parte Coughlan*, the court may decide that the promise or practice by a lawful authority induced legitimate expectations of, for example, being consulted before a particular decision can be taken.[123] In this case, the courts require an opportunity for consultation to be given to the aggrieved person before a decision by the administrator can be performed. This should be the case unless there was a reason to detract from that promise. The substantive legitimate expectations also protect the procedural element of the doctrine of legitimate expectations.

In terms of the substantive protection laid down in *Ex parte Coughlan*, the court determines whether a breach was procedurally fair. Should the decision that brought about the breach be unfair, the substantive protection of legitimate expectations would protect an individual against such a procedurally unfair decision. This means that such an unfair procedure would be set aside or quashed.

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121 *R v North and East Devon Health Authority, Ex parte Coughlan* para 81.
122 Groves 2008 *MULR* 477.
123 *R v North and East Devon Health Authority, Ex parte Coughlan* para 57.

7.3.4.3 Category (c): Protection of a substantive legitimate expectation — the balancing exercise

The court in *Ex parte Coughlan* considered that where a lawful promise or practice has induced legitimate expectations of a benefit which is substantive, not simply procedural, the court would decide whether to frustrate the expectation would be so unfair that to take a new and different course would amount to an abuse of power.[124]

Once the expectation is present, the court would have the task of weighing the requirements of fairness against any overriding interest relied upon for the change in policy.[125] The court must decide if there was "a sufficient overriding interest to justify a departure from what has been previously promised".[126]

The *Ex parte Coughlan* case left no doubt that an expectation falling within this last category could be recognised when individuals challenge the decision of the public official.[127] This is because the court referred to an enforceable expectation of substantive benefit.[128] In effect, when a public official has created an expectation of a substantive benefit and then acted contrary to that expectation, the court could find that conduct to be an abuse of power and, therefore, unlawful.

Clayton[129] posits that the decision of *Ex parte Coughlan* resolved two issues about legitimate expectations: first, it affirmed substantive legitimate expectations, although controversial, as a mainstream principle of the UK administrative law, and it was highly improbable that the House of Lords would repudiate the principle in future.[130]

Secondly, the jurisprudential basis for the doctrine was resolved. Although the principle of legitimate expectations was rooted in the doctrine of fairness, there was

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124 *R v North and East Devon Health Authority, Ex parte Coughlan* para 57.
125 *R v North and East Devon Health Authority, Ex parte Coughlan* para 57.
126 *R v North and East Devon Health Authority, Ex parte Coughlan* para 57.
127 *R v North and East Devon Health Authority, Ex parte Coughlan* para 59.
128 *R v North and East Devon Health Authority, Ex parte Coughlan* para 59.
129 Clayton 2003 *CLJ* 93.
130 Clayton 2003 *CLJ* 94.

some support for the view that it should be explained as an aspect of *Wednesbury* unreasonableness (which was refuted in *Ex parte Coughlan*); and should be treated as a *mandatory* relevant consideration when discretion came to be exercised.[131]

In summary, the categorical approach in (a) and (c) dealt with in *Ex parte Coughlan* streamlined the means of protection for substantive legitimate expectations while category (b) dealt with the procedural protection of individuals. Under category (a), the court is not restricted to the decision of the administrator on *Wednesbury* grounds (unreasonableness). That is whether the unreasonableness of the administrator's decision can be used as the only aspect to quash the particular decision and has been given proper weight in respect of the implications of not fulfilling the promise.

If the above reasoning applies in tax, category (a) ensures that the court is not restricted to the decision of the Commissioner to refer the taxpayer for an audit or search and seizure on grounds of unreasonableness: that is, whether the Commissioner has given proper weight to the implications of not fulfilling the promise made to the taxpayer that the latter will not be referred to an audit or his affairs being searched and seized.

Category (b) provides for the procedural protection of individuals by administrators. This means that the administrator is expected to engage with an individual before he can make any decision, for example, to provide the individual with a hearing. The Commissioner is thus expected to engage with the taxpayer before a decision to refer him for an audit or search and seizure is taken.

Category (c) is employed, first, where the court found it "necessary to determine whether there is a sufficient overriding interest to justify a departure from what has been previously promised".[132] Secondly, it is applied to check whether there has been an abuse of power by the administrator.

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131 Clayton 2003 *CLJ* 94.

132 *R v North and East Devon Health Authority, Ex parte Coughlan* para 58.

The categorical approach advocated in *Ex parte Coughlan* demonstrated that in order for the substantive legitimate expectations to be protected, they had to fit into one of three separate categories. However, a month after *Ex parte Coughlan*, an important refinement of the doctrine of substantive legitimate expectations came to the fore in *R v Secretary of State for Education and Employment, Ex parte Begbie*.[133]

In that case, Laws LJ held that the controversial point of *Ex parte Coughlan* was not whether the substantive legitimate expectations doctrine ought to be accepted, but how the concept should be articulated within the wider rubric of abuse of power. Laws LJ explained:

> The difficulty, and at once therefore the challenge, in translating this root concept or first principle into hard clear law is to be found in this question, to which the court addressed itself in the *Coughlan* case: where a breach of a legitimate expectation is established, how may the breach be justified to this court? In the first of the three categories given in *Ex parte Coughlan*, the test is limited to the *Wednesbury* principle. But in the third (where there is a legitimate expectation of a substantive benefit) the court must decide 'whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power.' … However the first category may also involve deprivation of a substantive benefit. What marks the true difference between the two?[134]

7.3.5 Protection of substantive legitimate expectations created by the practice of Her Majesty's Revenue and Customs

Taxpayers may wish to arrange their affairs not only on the basis of the law but also on the basis of the relevant HMRC practice, which may not always correspond precisely to the current state of the law. Although HMRC's guidance cannot as a rule be taken as binding in every circumstance (precisely because the circumstances of individual cases will differ), it may nevertheless provide a measure of comfort to those who intend to save tax by undertaking a type of transaction expressly envisaged as effective by published HMRC guidance.

In certain circumstances the published position of HMRC can give rise to a legitimate and enforceable expectation on the part of the taxpayer that his

133 [2000] 1 WLR 1115 (CA).

134 *R v Secretary of State for Education and Employment, Ex parte Begbie* 1129–1130.

circumstances will be treated by HMRC in accordance with their published guidance.[135]

In *R (on the application of Davies and another) v Revenue and Customs Commissioners); R (on the application of Gaines-Cooper) v Revenue and Customs Commissioners*,[136] the applicants contended that assessments were unfair because they were inconsistent with guidance in HMRC's booklet IR20 concerning residence.

HMRC accepted that they would be bound by representations in the booklet[137] but denied that the booklet gave the specific assurances which the applicants had claimed. The Supreme Court found in favour of HMRC. It held that the contents of the booklet were too vague to give rise to a legitimate representation. Discussing the representations in the booklet, Lord Wilson reasoned that:

> …. the judgement about their clarity must be made in the light of an appraisal of all relevant statements in the booklet when they are read as a whole; and that, in that the clarity of a representation depends in part upon the identity of the person to whom it is made, the hypothetical representee is the 'ordinarily sophisticated taxpayer' irrespective of whether he is in receipt of professional advice.[138]

The Supreme Court also rejected arguments that there was any evidence of a settled practice that made HMRC's conduct unfair. The court further held that:

> it is more difficult for the appellants to elevate a practice into an assurance to taxpayers from which it would be abusive for the Revenue to resile and to which under the doctrine it should therefore be held… The result is that the appellants need evidence that the practice was so unambiguous, so widespread, so well-established and so well-recognised as to carry within it a commitment to a group of taxpayers including themselves of treatment in accordance with it.[139]

However, in *R (on the application of Cameron and another) v Revenue and Customs Commissioners; R (on the application of Palmer) v Revenue and Customs*

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135 Gunn and Whiting *Simon's Taxes* para A2.124 HMRC practice and the principle of "legitimate expectation".

136 [2011] STC 2249 (UKSC).

137 *R (on the application of Davies and another) v Revenue and Customs Commissioners); R (on the application of Gaines-Cooper) v Revenue and Customs Commissioners* paras 26–27 *per* Lord Wilson.

138 *R (on the application of Davies and another) v Revenue and Customs Commissioners); R (on the application of Gaines-Cooper) v Revenue and Customs Commissioners* para 29.

139 *R (on the application of Davies and another) v Revenue and Customs Commissioners); R (on the application of Gaines-Cooper) v Revenue and Customs Commissioners* para 49.

Commissioners,[140] a legitimate expectation was held to apply. HMRC rejected two claims of seafarers' earnings deduction. The claimants appealed, contending that a Revenue publication entitled "Seafarers – Notes on Claims for 100% Foreign Earnings Deductions", which had originally been published in 1993 and was colloquially known as "the Blue Book", had given them a legitimate expectation that they would be entitled to the relief. The Queen's Bench accepted this contention and allowed their applications.

In *R (on the application of Hely-Hutchinson) v Revenue and Customs Commissioners*,[141] the Court of Appeal found that HMRC had been entitled to change their policy, thus overturning the decision of the High Court to quash closure notices in which HMRC had rejected the taxpayer's claim for capital losses for 1999 to 2002. The taxpayer had asserted a legitimate expectation to claim those losses based on reliance on guidance published by HMRC in 2003 (which was subsequently withdrawn in 2009).

7.3.6 Protection of substantive legitimate expectations created by the promise or representation by the Commissioner

It should be noted that the promise by the Commissioner must be "clear, unambiguous and devoid of relevant qualification" to guarantee the invoking of the doctrine of substantive legitimate expectations by a taxpayer.

Where a taxpayer has been promised or representations have been made by the Commissioner that he will not be referred for an audit or that his affairs will not be searched and seized, the taxpayer may invoke the substantive protection of the doctrine of legitimate expectations to compel the Commissioner to fulfil the promise.

Similarly, where a taxpayer has been promised or representations have been made by the Commissioner that a hearing before information gathering will be conducted, the taxpayer needs to be informed of the form of a hearing before the benefit can be withdrawn.

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140 [2012] STC 1691 (QBD).
141 [2017] STC 2048 (CA).

Thus, the principal idea is that, once a public authority makes a promise, this effectively amounts to a contract and to go back upon it is a breach and it is unfair for the public authority to do so. Protection of substantive legitimate expectations requires that the Commissioner must be compelled to fulfil the promise made.

When taxpayers rely on a representation by the Commissioner that they will not be referred for an audit, the court must establish unfairness (or abuse of power) where the Commissioner reneges on a previous practice or promise. In effect, when the Commissioner has created an expectation of a substantive benefit and then acted contrary to that expectation, the court could find the conduct to be an abuse of power and, therefore, unlawful.

7.4 OVERVIEW OF THE CHAPTER

This chapter discussed the administrative and common law principles that the Commissioner must adhere to when gathering information from a taxpayer. The chapter also discussed the common law principles of natural justice (*audi alteram partem* and *nemo iudex in sua causa*) and the *ultra vires* doctrine which can protect taxpayers' rights against the Commissioner's information gathering powers.

The chapter also discussed the origin, development and application of the doctrine of legitimate expectations in the UK and it distinguished between procedural legitimate expectations and substantive legitimate expectations. More importantly, it discussed whether the principle of substantive legitimate expectations is applicable when taxpayers' rights are contravened by the Commissioner's information gathering powers.

The next chapter discusses the measures to control administrative actions; the remedies to protect taxpayers' rights; and the effectiveness of those remedies and avenues to enhance the protection of taxpayers' rights against the Commissioner's information gathering powers in the UK.

CHAPTER 8

THE EFFECTIVENESS OF THE UNITED KINGDOM CONTROL MEASURES AND REMEDIES TO PROTECT TAXPAYERS' RIGHTS AGAINST THE COMMISSIONER

8 INTRODUCTION

This chapter deals with measures to control the actions of the Commissioner ("the Commissioner") of Her Majesty's Revenue and Customs ("HMRC") when he exercises information gathering powers against taxpayers, as well the effectiveness of the remedies and other avenues to enhance the protection of taxpayers' rights in the United Kingdom ("UK").

The measures to control the Commissioner's powers fall into two main categories: the internal[1] control measures and the external[2] control measures. These control measures provide remedies that can be used to satisfy claims by aggrieved persons.

8.1 INTERNAL CONTROL MEASURES AVAILABLE TO RESOLVE INFRINGEMENTS OF TAXPAYERS' RIGHTS

Internal control measures in the UK involve the taxpayers' relying on commitments by HMRC to ensure that taxpayers' rights are protected. Examples of internal avenues within HMRC that may be used to resolve disputes between taxpayers and the Commissioner include Her Majesty's Revenue and Custom's Charter ("HMRC Charter"), an appeal by the taxpayer, the use of administrative tribunals and the Parliamentary Commissioner for Administration (commonly referred to as "the Parliamentary Ombudsman").

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1 Internal control measures are those forms of domestic appeal and control of administrative acts.

2 External control measures are those avenues where the one party, normally the taxpayer, seeks a remedy for the infringement of his rights from the courts.

8.1.1 Her Majesty's Revenue and Customs Charter

In its preamble, the HMRC Charter ("Your Charter") provides the following:

> We want to give you a service that is fair, accurate and based on mutual trust and respect. We also want to make it as easy as we can for you to get things right.[3]

Your Charter was issued on 12 January 2016 and it is an updated version of the HMRC Charter which was initiated in 2008.[4] Just like its predecessor, it is reciprocal in nature because it contains rights to be enjoyed by taxpayers and also their obligations towards HMRC. Paragraph 1.7 of the 2008 HMRC Charter contained the following words:

> The new Charter will not be set in legislation. The wording of an accessible and useful charter is not intended to be that of legislation but a guide to the law. The use of statutory wording in a charter will compromise the intention of creating a simple statement of the basic rights of taxpayers/customers in their relationship with HMRC.[5]

Baker[6] argues that since the 2008 HMRC Charter is referred to in correspondence between taxpayers, their advisers and HMRC, it can be raised in litigation before tax tribunals and the courts. However, there is no clear statement of the legal effect of the Charter, until a court decides what effects, if any, the Charter has.[7]

If a court decides that the Charter has no legal effect and that it is simply an aspirational statement, then the whole exercise of producing it is pointless, and it rebounds on HMRC as they are perceived as not being serious about protecting taxpayers' rights.[8]

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3 Her Majesty's Revenue & Customs: Corporate Report: Your Charter https://www.gov.uk/government/publications/your-charter/your-charter#more-information-about-hmrc (Date of use: 10 July 2020).

4 Her Majesty's Revenue and Customs: Corporate Report: Your Charter https://www.gov.uk/government/publications/your-charter/your-charter#more-information-about-hmrc (Date of use: 10 July 2020).

5 HMRC Consultation Document "A new Charter for HMRC and its Customers" (2008) published on 19 June 2008.

6 Baker "The charter and the law" https://www.taxation.co.uk/Articles/2008-09-10-6852-charter-and-law (Date of use: 10 July 2020).

7 Baker "The charter and the law" https://www.taxation.co.uk/Articles/2008-09-10-6852-charter-and-law (Date of use: 10 July 2020).

8 Baker "The charter and the law" https://www.taxation.co.uk/articles/2008-09-10-6852-charter-and-law (Date of use: 10 July 2020).

If the court concludes that the Charter is legally binding on HMRC when exercising any discretion, and might even hold individual tax officers to be personally responsible for any breaches of the Charter, that would be a desirable outcome for taxpayers.[9]

Baker suggests that the legislation should deal with the legal effect of the Charter in three ways: first, it should state that officers of HMRC must take account of the rights (and obligations) in the Charter in carrying out their functions. Secondly, any breach of the provisions of the Charter should not give rise to any disciplinary action or other action against an officer of HMRC or any other person. Thirdly, it would seem appropriate to provide that a tribunal, a court, the Adjudicator and the Ombudsman should take the Charter into account as they consider appropriate in the circumstances of a particular case.[10]

Until a court makes an appropriate decision, the Charter does not have legislative effect, but is merely a guide to basic rights relating to taxpayers in their relationship with HMRC. According to Baker, the binding effect of the Charter is not supported and the courts may not rule the Charter to be binding in their relationship with HMRC. Even though the Charter refers to rights which are contained in the non-binding document, these rights are merely aspirations which are referred to in this work as rights. The following discussion deals with the rights in the Charter.

8.1.1.1 The right of a taxpayer to be treated with respect and honesty

In terms of the Charter, taxpayers have the right to be treated even-handedly with respect, courtesy and consideration.[11] The Commissioner must, when referring the taxpayer for an audit on the affairs of the taxpayer, treat him with respect and courtesy. This can only be achieved when the HMRC listens to taxpayers' concerns

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9 Baker "The charter and the law" https://www.taxation.co.uk/articles/2008-09-10-6852-charter-and-law (Date of use: 10 July 2020).

10 Baker "The charter and the law" https://www.taxation.co.uk/Articles/2008-09-10-6852-charter-and-law (Date of use: 10 July 2020).

11 Her Majesty's Revenue & Customs: Corporate Report "Your Charter" https://www.gov.uk/government/publications/your-charter/your-charter#more-information-about-hmrc (Date of use: 10 July 2020).

and answers their questions. The HMRC has to understand taxpayers' circumstances and make taxpayers aware of their rights.

Taxpayers have the right to be treated with honesty by HMRC unless HMRC has a good reason not to treat them in this way. The Commissioner must, when referring the taxpayer for search and seizure on his affairs, treat him with honesty. The Commissioner must be honest in referring the taxpayer and his decision must not be clouded by bias.

8.1.1.2 The right of a taxpayer to be provided with helpful, efficient and effective service

Taxpayers have the right to be provided with accurate information.[12] Taxpayers have the right to be provided with information which includes and explains taxes, duties, exemptions, allowances, reliefs and tax credits that HMRC is responsible for. This means that the Commissioner must, when requesting information from the taxpayer or third party, provide him with accurate information on why and how the information must be submitted by the taxpayer.

8.1.1.3 The right of a taxpayer to be treated with professionalism and integrity

Taxpayers have the right to be treated with professionalism.[13] HMRC must act with integrity to make sure that taxpayers are served by people who have the right level of expertise.[14] HMRC must also make decisions in accordance with the law and explain these decisions clearly to taxpayers. HMRC must respond to taxpayer's enquiries and resolve any problems as soon as possible.

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12 Her Majesty's Revenue & Customs: Corporate Report "Your Charter" https://www.gov.uk/government/publications/your-charter/your-charter#more-information-about-hmrc (Date of use: 10 July 2020).

13 Her Majesty's Revenue & Customs: Corporate Report "Your Charter" https://www.gov.uk/government/publications/your-charter/your-charter#more-information-about-hmrc (Date of use: 10 July 2020).

14 Her Majesty's Revenue & Customs: Corporate Report "Your Charter" https://www.gov.uk/government/publications/your-charter/your-charter#more-information-about-hmrc (Date of use: 10 July 2020).

8.1.1.4 The right of a taxpayer to privacy

Taxpayers have the right to privacy.[15] HMRC must uphold this right by protecting information which the office obtains, receives or holds. HMRC must give taxpayers the information which they hold, share or release information about taxpayers when the law permits, and respect taxpayers' legal rights when visiting the premises of the taxpayer.[16]

8.1.1.5 The right of a taxpayer to be represented by someone

Taxpayers have a right to be represented by someone else, such as an accountant or a relative. To protect the right to privacy, the HMRC shall only deal with representatives if they have been authorised to represent taxpayers.[17]

8.1.1.6 The right of a taxpayer to have complaints dealt with quickly and fairly

In order to achieve this, HMRC shall provide information that helps taxpayers understand what they have to do and when to do it.[18] HMRC also needs to process the information which the taxpayer provides as quickly and accurately as possible and put mistakes right as soon as possible.[19]

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15 Her Majesty's Revenue & Customs: Corporate Report "Your Charter" https://www.gov.uk/government/publications/your-charter/your-charter#more-information-about-hmrc (Date of use: 10 July 2020).

16 Her Majesty's Revenue & Customs: Corporate Report: Your Charter https://www.gov.uk/government/publications/your-charter/your-charter#more-information-about-hmrc (Date of use: 10 July 2020).

17 Her Majesty's Revenue & Customs: Corporate Report: Your Charter https://www.gov.uk/government/publications/your-charter/your-charter#more-information-about-hmrc (Date of use: 10 July 2020).

18 Her Majesty's Revenue & Customs: Corporate Report: Your Charter https://www.gov.uk/government/publications/your-charter/your-charter#more-information-about-hmrc (Date of use: 10 July 2020).

19 Her Majesty's Revenue & Customs: Corporate Report: Your Charter https://www.gov.uk/government/publications/your-charter/your-charter#more-information-about-hmrc (Date of use: 10 July 2020).

8.1.1.7 The right of a taxpayer to be free from unlawful activities

Taxpayers have the right to be protected from unlawful activities by HMRC.[20] At the same time, HMRC must challenge taxpayers who engage in avoidance, deliberately bending the rules.[21]

8.1.1.8 Taxpayers' duties towards Her Majesty's Revenue and Customs

In as much as taxpayers enjoy the rights in the Charter, taxpayers have a corresponding duty to be honest with HMRC staff which includes the duties to be truthful, open and act within the law; to work with HMRC staff to get things right; to keep the HMRC staff informed of mistakes made by the taxpayer; give HMRC accurate information about relevant facts; know what the taxpayer's representative is doing and to respond in good time.[22]

Taxpayers are expected to respect HMRC. In the case where the taxpayer is represented by, for example, a legal representative or tax practitioner, the latter is also expected to respect HMRC. This duty includes being polite and refraining from rude or abusive behaviour.

A person acting on behalf of the taxpayer is also expected to take reasonable care when dealing with HMRC. If there is anything that the taxpayer is not sure about or if he is having difficulty meeting obligations, he must inform HMRC and keep adequate records.

<u>The effectiveness of the HMRC Charter in protecting taxpayers' rights</u>

The effectiveness of the Charter lies in its binding effect. One expects that the Charter, being a document that deals with the rights of taxpayers, must have binding

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20 Her Majesty's Revenue & Customs: Corporate Report: Your Charter https://www.gov.uk/government/publications/your-charter/your-charter#more-information-about-hmrc (Date of use: 10 July 2020).

21 Her Majesty's Revenue & Customs: Corporate Report: Your Charter https://www.gov.uk/government/publications/your-charter/your-charter#more-information-about-hmrc (Date of use: 10 July 2020).

22 HM Revenue & Customs "Your Charter" https://www.gov.uk/government/publications/your-charter/your-charter#more-information-about-hmrc (Date of use: 10 July 2020).

effect. However, as Baker argued above, the Charter is not binding on the parties and only serves as a guideline.

Your Charter does not seem to differ from the 2008 HMRC Charter. However, there is currently a move to update the HMRC Charter. A document was sent for public comment on 24 February 2020. However, submissions were extended to 15 August 2020 because of the COVID-19 coronavirus.[23]

8.1.2 Appeal against the Commissioner's conduct in gathering information from taxpayers

Section 48 of the Taxes Management Act ("TMA")[24] provides the following:

> (1) In the following provisions of this Part of this Act, unless the context otherwise requires—
> (a) 'appeal' means any appeal under the Taxes Acts;
> (b) a reference to notice of appeal given, or to be given, to HMRC is a reference to notice of appeal given, or to be given, under any provision of the Taxes Acts.
> (2) In the case of—
> (a) an appeal other than an appeal against an assessment, the following provisions of this Part of this Act shall, in their application to the appeal, have effect subject to any necessary modifications, including the omission of section 56 [sections 54A to 54C and 56] below;
> (b) any proceedings other than an appeal which, under the Taxes Acts, are to be subject to the relevant provisions of this Part of this Act, the relevant provisions—
> (i) shall apply to the proceedings as they apply to appeals;
> (ii) but shall, in that application, have effect subject to any necessary modifications, including (except in the case of applications under section 55 below) the omission of section 56 below.

In the UK an appeal is the first step to challenge the Commissioner and forms part of the internal control measures. Section 48 of the TMA provides that an appeal other than an appeal relating to assessment may be brought by the taxpayer against the Commissioner. Section 54(1) provides that the taxpayer and the Commissioner may agree that the decision be upheld or varied in order to settle the dispute.

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23 HM Revenue & Customs "Open Consultation HMRC Charter" https://www.gov.uk/government/consultations/hmrc-charter (Date of use: 10 July 2020).

24 Taxes Management Act 1970 (c. 9).

From the discussion above it is observed that the UK does not refer to objection as a starting point of the dispute by the taxpayer (as is the case in South Africa). Instead, the UK refers to an appeal from the beginning, and a taxpayer appeals against the decision of the Commissioner.

This means that the taxpayer may appeal directly to the Commissioner when the taxpayer's rights are infringed during the exercise of the Commissioner's information gathering powers.

The effectiveness of the internal appeal against the Commissioner's conduct

The internal appeal procedure is the first step in resolving disputes between the taxpayer and the Commissioner. In this procedure, the taxpayer and the Commissioner may agree to settle the matter without a hearing. The agreement may be reduced to writing or otherwise.

This procedure may prove to be effective especially when the parties can sit down and agree without a hearing. The appeal procedure imposes only limited financial strain on taxpayers, so it is effective and fast in resolving the dispute between the taxpayer and Commissioner.

8.1.3 Administrative tribunals may assist taxpayers in resolving disputes with the Commissioner

Tribunals are categorised as non-departmental public bodies and are established by an Act of Parliament under the Tribunals, Courts and Enforcement Act ("TCEA").[25] The tribunals represent another form of internal control and they follow what is called a presidential system.[26] Under this system there is a president in each particular area responsible for the general administration of the tribunals.[27] Tribunals have a chairman who is assisted by lay members. The tribunal is made up of a

25 Tribunals, Courts and Enforcement Act 2007 (c. 15).
26 Craig *Administrative Law* 258.
27 Craig *Administrative Law* 258.

tribunal panel, including a judge and, in some cases, a tax expert and a tribunal clerk.[28]

In its preamble, the TCEA provides the following about the purpose of tribunals:

> to establish an Administrative Justice and Tribunals Council; to amend the law relating to judicial appointments and appointments to the Law Commission; to amend the law relating to the enforcement of judgments and debts; to make further provision about the management and relief of debt; to make provision protecting cultural objects from seizure or forfeiture in certain circumstances; to amend the law relating to the taking of possession of land affected by compulsory purchase; to alter the powers of the High Court in judicial review applications; and for connected purposes.

The effect of this legislation is that tribunals do not form part of the administration of government. As such, they are independent from interference by government officials.

Tribunals require expertise particularly in fields such as tax law. The tribunal chairperson must be legally qualified as required by the statute. The quality of independence is the same in both tribunals and courts.[29] The tribunal system alleviates the load of courts in dispensing administrative justice.

Craig[30] explains that tribunals are preferred to the courts because they are fast, cheap and informal.[31] Courts might not be sympathetic to the protection of individual interests contained in the legislation.[32] The creation of tribunals was a symbolic means of giving the appearance of legality and benefits to individuals.[33]

According to Craig, the most important procedural norm which applies before the hearing is that an individual must know of the right to apply to a tribunal.[34] The UK tribunal system follows the adversarial system for the basis of adjudication in the superior courts.[35] The reason behind the adversarial system is that the two

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28 Craig *Administrative Law* 258.
29 Section 2 of the Tribunals and Inquiries Act 1992 (c. 53).
30 Craig *Administrative Law* 253.
31 Craig *Administrative Law* 253.
32 Craig *Administrative Law* 253.
33 Craig *Administrative Law* 253.
34 Craig *Administrative Law* 262.
35 Craig *Administrative Law* 264.

opponents are equal, save for the natural inequalities of intellect and experience.[36] Battle is waged, and the judge, filling the position of an umpire, decides the matter.[37] The system also allows the use of the terms “plaintiff” and “defendant”.[38]

8.1.3.1 Appeal to the First-tier Tribunal by the taxpayer

Section 3 of the TCEA provides for the establishment of a Tax Chamber comprising a two-tier system: the First-tier Tribunal and the Upper Tribunal.[39] The First-tier Tribunal is responsible for handling appeals against some decisions made by the Commissioner. A taxpayer may lodge an application to the First-tier Tribunal when he is unhappy about the decision of the appeal by HMRC.

8.1.3.2 Decision of the First-tier Tribunal

The decision of the First-tier Tribunal may be in writing if the taxpayer did not have a hearing.[40] The decision may be in writing within one month and if the taxpayer had a “basic” case — the taxpayer gets a decision on the day. The decision may be in writing within two months if the taxpayer had a “standard” or “complex” hearing. A basic case is a simple one as compared to a more complex hearing.

8.1.3.3 Review of the decision of the First-tier Tribunal

Section 9(1) and (2) of the TCEA provides that when the First-tier Tribunal has decided an appeal by the Commissioner or taxpayer, and it is dissatisfied with the outcome or of its own initiative, the First-tier Tribunal may review the decision in terms of section 9 of the TCEA. The review may be made by the First-tier Tribunal itself or on application by the taxpayer or the Commissioner having a right to appeal the decision.

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36 Craig *Administrative Law* 264.
37 Craig *Administrative Law* 264.
38 Craig *Administrative Law* 264.
39 Section 3 of the TCEA.
40 Rule 35 of the Tribunal Procedure (“First-tier Tribunal”) (“Tax Chamber”) Rules 2009 (SI 2009/273).

8.1.3.4 Review by the First-tier Tribunal

In terms of section 9 of the TCEA, the First-tier Tribunal may review a decision, to correct accidental errors in the decision; amend reasons given for the decision; and set the decision aside. Where the First-tier Tribunal sets the decision aside, it must either re-decide the matter or refer it to the Upper Tribunal.[41] Where a matter is referred to the Upper Tribunal under subsection (5)(b), the Upper Tribunal must re-decide the matter.[42]

8.1.3.5 Appeal to the Upper Tribunal

Where the taxpayer or the Commissioner loses the case in the First-tier Tribunal, he may request an appeal to the Upper Tribunal in terms of section 11 of the TCEA. It should be noted that the taxpayer may ask for a decision to be "set aside" (cancelled) on appeal only if he thought that there was a mistake in the process.[43] The decision may also be referred to the Upper Tribunal by the First-tier Tribunal in terms of section 9(5) of the TCEA.

Further, the taxpayer may ask for permission to appeal against the decision if the First-tier Tribunal made a legal mistake, for example, it did not apply the law correctly or fully explain its decision.[44] In this case, the taxpayer is entitled to request full written reasons, and the decision notice must explain this to the taxpayer. The taxpayer or the Commissioner in this case files an appeal from the First-tier Tribunal to the Upper Tribunal in terms of section 11 of the TCEA. The section provides:

> (1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision.
> (2) Any party to a case has a right of appeal, subject to subsection (8).
> (3) That right may be exercised only with permission (or, in Northern Ireland, leave).
> (4) Permission (or leave) may be given by—
> (a) the First-tier Tribunal, or
> (b) the Upper Tribunal, on an application by the party.

41 Section 9(5) of the TCEA.
42 Section 9(8) of the TCEA.
43 Section 9(4)(c) of the TCEA.
44 Section 11(1) of the TCEA.

It should be noted that an appeal is lodged with the Upper Tribunal and not a review. In deciding the appeal, the Upper Tribunal may (but need not) set aside the decision of the First-tier Tribunal.[45] If it does set the decision aside, it must either remit the case to the First-tier Tribunal with directions for its reconsideration[46] or re-make the decision.[47]

From the discussion above it is clear that a taxpayer may note an appeal with the Upper Tribunal to challenge the decision of the First-tier Tribunal.

The effectiveness of the administrative tribunals in resolving taxpayers' infringements

One important positive point is that tribunals, as a form of internal control, are cheap, informal, fast and effective. Taxpayers may be able to use this system effectively to solve their disputes with the Commissioner without having to worry about approaching the courts. In that case, the latter are approached in exceptional circumstances.

Another effective positive point is that a First-tier Tribunal may review on appeal a notice given by the Commissioner to request information from the taxpayer. The First-tier Tribunal may also review its own decision in order to correct any error or re-decide the matter.

The Upper Tribunal may, on appeal, set aside the decision of the First-tier Tribunal.[48] If it does set the decision aside, it must either remit the case to the First-tier Tribunal with directions for its reconsideration or re-make the decision. The decisions of the First-tier and the Upper Tribunals are binding.

In summary, one of the features of tribunals is that their decisions may be the subject of appeal to a superior court on a question of law or judicial review by the High Court

45 Section 12(2)(a) of the TCEA.
46 Section 12(2)(b)(i) of the TCEA.
47 Section 12(2)(b)(ii) of the TCEA.
48 Section 9(5) of the TCEA.

(the Court of Appeal as referred to in the TCEA). Tribunals represent a departure from the previous norm that the determination of questions of law in disputes between citizen and government belonged exclusively to the courts. Interestingly, in the UK the use of tribunals occurs mainly within the sphere of HMRC's collection.

8.2 EXTERNAL CONTROL MEASURES AVAILABLE TO RESOLVE INFRINGEMENTS OF TAXPAYERS' RIGHTS

External remedies refer to those avenues where the one party, normally the taxpayer, seeks a remedy for the infringement of his rights from the courts. This procedure is normally engaged in when the taxpayer has exhausted all the internal formalities and he is still dissatisfied with either the decision of the tribunals or the conduct of the Commissioner when gathering information from the taxpayer.

The external control and remedies may be provided by the Adjudicator, the Parliamentary Ombudsman, appeal to the High Court or judicial review.

8.2.1 The Adjudicator

Where the taxpayer remains dissatisfied after approaching the First-tier Tribunal and the Upper Tribunal, he can approach the Adjudicator for a review.[49] The complaint is then investigated to draw together a full and impartial summary of details from the taxpayer and the Commissioner. The Adjudicator provides an independent review of the details and makes a recommendation to resolve the complaint.[50]

The Adjudicator deals with complaints about mistakes, unreasonable delays, poor or misleading advice, inappropriate staff behaviour and the use of discretion. He cannot consider, amongst other things, matters of government or departmental policy, or complaints where there is a specific right of determination by any court or tribunal.[51]

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49 The Adjudicator's Office "The Role of the Adjudicator" http://www.adjudicators.gov.uk/pdf/ao1.pdf (Date of use: 27 August 2018).

50 The Adjudicator's Office "The Role of the Adjudicator" http://www.adjudicators.gov.uk/pdf/ao1.pdf (Date of use: 27 August 2018).

51 The Adjudicator's Office "The Role of the Adjudicator" http://www.adjudicators.gov.uk/pdf/ao1.pdf (Date of use: 27 August 2018).

This means that the Adjudicator may not assist taxpayers because he cannot deal with contraventions of taxpayers' rights by the Commissioner's information gathering powers.

The effectiveness of the Adjudicator in resolving infringements of taxpayers' rights

This office is not effective in protecting taxpayers' constitutional rights against the Commissioner's information gathering powers. It is only effective where taxpayers complain about the delays during the engagements between taxpayers and the Commissioner.

8.2.2 The Office of the Parliamentary Ombudsman

The Office of the Parliamentary Ombudsman in the UK represents an external procedure and it is governed by the Parliamentary Commissioner Act ("PCA").[52] In the UK there is no office within HMRC but a general Parliamentary Office that deals with all complaints about government departments (including HMRC) and public bodies that have not acted properly or have provided a poor service.[53]

The Ombudsman may investigate any action taken by HMRC in the exercise of their administrative functions in any case where a written complaint is made to a Member of Parliament by a member of the public, provided that the complainant has first pursued his complaint through HMRC's complaints procedure and has received a final response from the department.[54] Complaints to the Ombudsman must be referred through Members of Parliament with a request for investigation.[55]

In order to be able to begin an investigation, the Ombudsman must be satisfied that there is some evidence of administrative fault or of service failure and that the complainant has suffered injustice or hardship as a result. [56] The Ombudsman

52 Parliamentary Commissioner Act 1967 (c. 13).
53 Section 4(1) of the PCA.
54 Section 5(1)(a) and (b) of the PCA.
55 Section 5(1)(a) and (b) of the PCA.
56 Section 5(1)(a) of the PCA.

cannot enforce his decisions, but can only make recommendations, which may include the payment of compensation where a complaint has been wholly or partly upheld. In practice, HMRC are unlikely not to accept and act upon the Ombudsman's recommendations.[57]

The effectiveness of the Parliamentary Ombudsman in resolving infringements of taxpayers' rights

The office deals with general complaints and not with infringements or the constitutionality of the rights of taxpayers. The findings of the Parliamentary Ombudsman are also not enforceable by the complainant against the respondent.[58] One may ask why a taxpayer must endure the pain of approaching the Parliamentary Ombudsman if the latter's decision is not enforceable against the respondent.

8.2.3 Appeal of the Commissioner's decision to the High Court

A taxpayer who is dissatisfied with the decision of the Commissioner on appeal (the first instance) as being erroneous in law may declare his dissatisfaction with the Commissioner who heard the appeal.[59]

Tax is payable or repayable in accordance with the determination of the court or tribunal on the initial appeal, despite the further appeal having been made (this is called the "pay now, argue later" principle in South Africa).[60] It is clear from the wording of the TMA that the appeal may be raised with the High Court where the Commissioner made an error in law.

The taxpayer has a choice to appeal to the High Court and may choose one of two options: first, section 56(1) of the TMA provides for an appeal of the Commissioner's decision when the taxpayer is dissatisfied with the determination as being erroneous

57 Section (3A)(a) and (b) of the PCA.
58 Section 5(1)(a) of the PCA.
59 Section 56(1) of the TMA.
60 Section 56(2) of the TMA.

in point of law. In this case, the taxpayer declares his dissatisfaction to the Commissioners who heard the initial appeal.

Secondly, the taxpayer may approach the relevant appellate court in terms of section 13 of the TCEA. The relevant appellate court in known as the Court of Appeal.[61] The Court of Appeal shall hear and determine the appeal on any question or questions of law arising on the case arising from the decision made by the Upper Tribunal.[62]

The Court of Appeal may (but need not) set aside the decision of the Upper Tribunal, remit the case to the Upper Tribunal for its reconsideration or re-make the determination in respect of which the case has been stated.[63] It may also make a finding of fact as it considers appropriate.[64]

From the summary above it is clear that the taxpayer may choose between one or two appeal procedures: the taxpayer may appeal in terms of section 56(1) of the TMA based on an error in law to the High Court and section 13 of the TCEA on any point of law from a decision of the Upper Tribunal to the relevant appellate court.

The effectiveness of the appeal in the Court of Appeal in resolving taxpayers' infringements

This appeal procedure is effective because taxpayers have double-barrelled options to raise appeals in the High Court against the decision of the Commissioner. Taxpayers may raise their appeals against the decision of the Commissioner (in the first instance) in the High Court where there is an error in law.

Taxpayers may also appeal from the Upper Tribunal to the Court of Appeal on any point of law. The Court of Appeal shall set aside, remit or re-make the determination in respect of which the case has been stated.

61 Section 13(6) of the TCEA.
62 Section 13(1) of the TCEA.
63 Section 14(2)(a) and (b)(i) and (ii) of the TCEA.
64 Section 14(4)(b) of the TCEA.

It is argued that these remedies provided by the Court of Appeal are effective. Taxpayers want to have the decision of the Commissioner reversed, amended or referred back for reconsideration to the Commissioner.

8.2.4 Judicial review of the Commissioner's decision

Judicial review is concerned with ensuring that actions of public bodies are lawful.[65] A taxpayer who feels that an exercise of public power by the Commissioner is unlawful because it has violated the taxpayer's rights may apply to the court for judicial review of the decision.

In this case the aggrieved taxpayer applies to court to have the decision of the Commissioner set aside (quashed) and possibly obtain damages. A court may also make orders to compel the Commissioner to do his duty or to stop him from acting illegally.

Judicial review provides the means by which the judicial control of administrative action is exercised.[66] The subject matter of every judicial review is a decision made by some person or a refusal by him to make a decision. The decision must have consequences which affect some person (or body of persons) other than the decision maker, although it may affect him too.[67]

Judicial review is by no means perfect, as its primary focus on legality is not generally useful in reviewing the merits of a case.[68] Common law constitutionalists believe that a principal function of judicial review is to enforce fundamental rights and the higher order of law of which they form a part.[69]

Hence a court with the power of judicial review may annul the act or conduct of the administrator (the Commissioner) when it finds it incompatible with a higher authority (such as the terms of the Constitution). Judicial review is an example of the checks

65 Feldman *English Public Law* 715.
66 Srivastava 1995(2) *Judicial Training & Research Institute Journal* 4.
67 Srivastava 1995(2) *Judicial Training & Research Institute Journal* 4.
68 Stech 2013 *Env L Rev* 141.
69 Poole 2005 *OJLS* 703.

and balances of the governmental system. The judiciary checks the other branches of government.

8.2.4.1 Common law judicial review of the administrator's (the Commissioner's) decision

Over the years, common law judges were seen as sources of law because they could create new legal principles and reject those that were outdated or no longer valid. Most modern legal systems allow the courts to review administrative acts (such as the Commissioner's decisions to conduct search and seizure on a taxpayer's affairs).

It is quite common and very important that before a request for the judicial review of an administrative act can be entertained by a court, certain preliminary conditions (such as a complaint to the authority itself) must be fulfilled. This simply means that the internal control measures as discussed above must have been fulfilled first.

The liability of the Commissioner for judicial review as an administrator in English law is an area of law concerning the liability of public bodies. A claimant or an aggrieved taxpayer has to fit his case into one of the recognised causes of action to be able to claim damages. The areas of liability may be categorised into private law liability and public law liability.

However, this work deals with the public law liability of the Commissioner when he exercises his information gathering powers on taxpayers. An application for judicial review is made *ex parte* (and thus by one party alone without the involvement of the other party during the application stage). *Ex parte* does not therefore mean "in camera" or privately.

In *R v East Berkshire Health Authority, ex parte Walsh*[70] the court held that a public law could not be used by an individual as a method of appeal and redress for breach of contract by his employers when they sacked him. This is because the claim is a

[70] [1985] QB 152 (CA).

private law infringement and there is an employment tribunal to deal with such complaints.

This therefore means that taxpayers may not apply for judicial review and rely on public law when they seek redress for the infringement of their rights by other taxpayers. That claim must be based on private law infringement. However, they can rely on judicial review based on public law when they seek redress for infringement of their rights by the Commissioner.

In *Council of Civil Service Unions v Minister for the Civil Service*,[71] Lord Diplock distinguished between three categories of public law judicial reviews: illegality, irrationality and procedural impropriety. Later, the test was further developed with the inclusion of the proportionality test.

These terms are merely aids for analysing various types of test that are used by the courts in determining whether the actions of public bodies conform to the principle of legality.[72] The categories are discussed briefly below:

8.2.4.1.1 The illegality of the administrator's (the Commissioner's) decision

The public administrator, such as the Commissioner, must correctly understand the law that regulates his decision-making power and must give effect to it.[73] In effect, the Commissioner must be authorised or empowered by a provision which guides him on how to execute the decision-making power.

If the decision made by the Commissioner fails to meet the court's required standard of fairness and legality, the decision is struck down on the basis that it was reached in a flawed manner.[74] Decisions by the Commissioner who is not empowered and authorised by the law to gather information against taxpayers may be rendered illegal by the court.

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71 [1985] AC 374 (HL) 410.
72 Feldman *English Public Law* 716.
73 Feldman *English Public Law* 716.
74 Elliott 2001 *CLJ* 302.

When assessing whether HMRC is acting lawfully, a series of cases have placed considerable reliance upon HMRC's general duties of "care and management" to justify actions which have not been expressly sanctioned by specific statutory powers.[75]

This duty has been held to be the foundation of HMRC's power to give guidance to taxpayers, to grant amnesties, to grant extra-statutory concessions, to conduct non-statutory enquiries and to enter into back duty settlements with taxpayers. These cases illustrate a desire by the courts not to fetter HMRC's powers when this would be in the interests of good administration.

However, HMRC's powers of "care and management" do not give HMRC a completely unfettered discretion. In *Al Fayed and others v Advocate General for Scotland (representing the Inland Revenue Commissioners)*,[76] the Inner House of the Court of Session in Scotland held that it was clear that HMRC had a managerial discretion and this might enable them to enter into agreements that result in less than the full amount of tax being paid.[77]

8.2.4.1.2 The irrationality of the administrator's (the Commissioner's) decision

In *Council of Civil Service Unions v Minister for the Civil Service* (above), Lord Diplock held that a decision may be irrational if it "is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it".[78]

This means that a decision by the Commissioner against taxpayers must be sensible. The Commissioner must also reach his decisions after applying his mind, otherwise they will be rendered irrational and outrageous.

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75 Gunn and Whiting *Simon's Taxes* para A5.302 Grounds of judicial review.
76 [2002] STC 910 (OH) and [2004] STC 1403 (IH).
77 *Al Fayed and others v Advocate General for Scotland* [2004] STC paras 69–82.
78 *Council of Civil Service Unions v Minister for the Civil Service* 410.

8.2.4.1.3 The unreasonableness of the administrator's (the Commissioner's) decision

Traditionally, the principle of unreasonableness was derived from *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*.[79] In this decision, it was held that a court could only set aside the decision by the decision maker if it is "so unreasonable that no reasonable authority could ever have come to it".[80]

The Court of Appeal in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (*per* Lord Greene MR) applied the term "unreasonable" in two senses: the first has to do with things that must not be done by public bodies exercising discretionary powers.[81] The second sense deals with the meaning of "unreasonableness". The court held it to mean "something so absurd that no sensible person could ever dream that it lay within the powers of the authority".[82]

Decisions of the Commissioner must be reasonable, based on the proper exercise of his discretion. Where the discretion was exercised to conduct fishing expeditions on taxpayers, the decision may be rendered unreasonable. The taxpayer has to prove that the infringement of his rights by the Commissioner falls within the public law sphere and that it is illegal, irrational and unreasonable.

8.2.4.1.4 The proportionality test to review the administrator's (the Commissioner's) decision

The proportionality test in judicial review was developed in *R v Ministry of Defence, Ex parte Smith*.[83] An interesting test is the one laid down by Sir Thomas Bingham MR in the Court of Appeal to the effect that:

> The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will

79 [1948] 1 KB 223 (CA).
80 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* 230.
81 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* 228–231.
82 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* 229.
83 [1996] QB 517 (CA).

> require by way of justification before it is satisfied that the decision is reasonable….[84]

Based on this reasoning, it can be concluded that English courts have been moving towards a proportionality test to review the administrator's decision rather than the unreasonableness principle developed in the *Wednesbury* decision.[85] Where the court, for example, is satisfied that the Commissioner's decision is unreasonable beyond the responses open to a reasonable decision maker, the court may interfere and invalidate the action or conduct.

It has been argued that the test of unreasonableness may cease to operate as an independent test in its own right,[86] and that the proportionality test might even replace the unreasonableness test.[87]

The effectiveness of the common law grounds of review in protecting taxpayers' rights

Common law judicial review protects taxpayers at public law against a public body such as the Commissioner. The three categories of public law judicial reviews discussed above are illegality, irrationality and procedural impropriety of the administrator. Later, the test was further developed with the inclusion of the proportionality test.

This can be effective for taxpayers because the Commissioner may be held liable on judicial review for decisions which are illegal, irrational and unreasonable. Although the UK is a common law country, it still has a strong attachment to the idea of legislative supremacy.

Consequently, judges in the UK do not have the power to strike down legislation. As such, the common law judicial review may be hampered. Therefore, taxpayers may not be able to invoke judicial review of any legislation.

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84 *R v Ministry of Defence, Ex parte Smith* 554.
85 *R v Ministry of Defence, Ex parte Smith* 554.
86 Craig *Administrative Law* 652.
87 Craig *Administrative Law* 652.

8.2.4.2 Judicial review of the administrator's (the Commissioner's) decision by the High Court

Section 31 of the Senior Courts Act 1981[88] provides that an application for judicial review may be made to the High Court. The court may pronounce one or more of the following forms of relief, namely: mandatory, prohibiting or quashing order; a declaration or an injunction.[89]

The High Court may refuse to grant relief on an application for judicial review, and may not make an award on such an application if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.[90]

The court may disregard these requirements if it considers that it is appropriate to do so for reasons of exceptional public interest.[91] Unless the High Court otherwise directs, a decision substituted by it has effect as if it were a decision of the relevant court or tribunal.[92]

The effectiveness of the judicial review through the High Court in protecting taxpayers' rights

The High Court may refuse to grant relief on application for judicial review where it is unclear that the outcome of the court will benefit the applicant. This is beneficial to aggrieved taxpayers because the High Court entertains judicial review applications where there will be success.

This means that the High Court may not entertain applications for judicial review if taxpayer will be disadvantaged. However, this requirement may be disregarded if

88 Senior Courts Act 1981 (c. 54).
89 Section 31(1) of the Senior Courts Act.
90 Section 31(2(A)) of the Senior Courts Act.
91 Section 31(2(B)) of the Senior Courts Act.
92 Section 31(5(B)) of the Senior Courts Act.

the court considers that it is appropriate to do so for reasons of exceptional public interest.

8.2.5 Remedies in terms of judicial review

The remedies available to the aggrieved party are governed by section 15(1)(a) to (e) of the TCEA,[93] section 31(1) to (2) of the Senior Courts Act[94] and Rules 54.2 and 54.3 of Part 54 of the Civil Procedure Rules 1998.[95] The remedies in these provisions are the same. It should be noted that these remedies under judicial review must be in respect of public law infringement of taxpayers' rights.

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93 See s 15(1) of the TCEA: The Upper Tribunal has power, in cases arising under the law of England and Wales or under the law of Northern Ireland, to grant the following kinds of relief—
(a) a mandatory order;
(b) a prohibiting order;
(c) a quashing order;
(d) a declaration;
(e) an injunction.

94 See s 31(1) of the Senior Courts Act: An application to the High Court for one or more of the following forms of relief, namely—
(a) a mandatory, prohibiting or quashing order;
(b) a declaration or injunction under subsection (2); or
(c) an injunction under section 30 restraining a person not entitled to do so from acting in an office to which that section applies,
shall be made in accordance with rules of court by a procedure to be known as an application for judicial review.
(2) A declaration may be made or an injunction granted under this subsection in any case where an application for judicial review, seeking that relief, has been made.

95 See rule 54.2: Judicial review procedure must be used in a claim for judicial review where the claimant is seeking –
(a) a mandatory order;
(b) a prohibiting order;
(c) a quashing order; or
(d) an injunction under section 30 of the Senior Courts Act 1981 (restraining a person from acting in any office in which he is not entitled to act).

Rule 54.3: (1) The judicial review procedure may be used in a claim for judicial review where the claimant is seeking –
(a) a declaration; or
(b) an injunction.
(Section 31(2) of the Senior Courts Act 1981 sets out the circumstances in which the court may grant a declaration or injunction in a claim for judicial review.)
(Where the claimant is seeking a declaration or injunction in addition to one of the remedies listed in rule 54.2, the judicial review procedure must be used.)
(2) A claim for judicial review may include a claim for damages, restitution or the recovery of a sum due but may not seek such a remedy alone.
(Section 31(4) of the Senior Courts Act sets out the circumstances in which the court may award damages, restitution or the recovery of a sum due on a claim for judicial review.)

Therefore, a declaration order and injunction order[96] may not be claimed by taxpayers because they involve private law duty — which is outside the scope of the relationship between the Commissioner and taxpayers. More importantly, failure to heed the court ordering these remedies has consequences in the form of contempt of the proceedings, and the Commissioner may be punished for not following the order.[97]

8.2.5.1 Mandatory order

This is an order in the form of *mandamus* which mandates and orders the public body, for example, the Commissioner, to carry out its public duty.[98] Where the Commissioner has made a decision to request the information from the taxpayer or third party and does not provide reasons to the taxpayer, the latter may approach the court by way of judicial review to order the Commissioner to provide reasons in the form of a mandatory order. The courts only compel public authorities to perform duties that are intended to be legally enforceable.[99]

However, the mandatory order may be refused in the discretion of the courts.[100] The courts have been cautious when deciding to order public authorities to fulfil the substantive legitimate expectations of applicants.[101] In awarding complete protection of an applicant's substantive legitimate expectation, the court is effectively mandating the outcome of a public body's decision-making process.

The effectiveness of a mandatory order in protecting taxpayers' rights

The *mandamus* order is an effective remedy because it orders the Commissioner to fulfil his duties. The drawback of this order is that it does not compel the authority

96 In *Attorney-General v Guardian Newspapers Ltd and Others (No 2)* [1990] 1 AC 109 (HL), the Crown was not entitled to a permanent injunction against certain newspapers, as the information they contained was neither damaging to the public interest nor in breach of any duty of confidentiality since the information was already in the public domain.

97 Craig *Administrative Law* 769.

98 Feldman *English Public Law* 921.

99 Feldman *English Public Law* 921.

100 Craig *Administrative Law* 769.

101 Craig *Administrative Law* 769.

regarding how to fulfil the order. It also cannot be granted where it is impossible to enforce it.

8.2.5.2 Prohibitory order

The prohibitory order prohibits a public body from acting unlawfully or implementing an unlawful decision.[102] The order can also be imposed on an inferior court or body acting in a judicial capacity (for example, the Tax Tribunals), telling it to stop exceeding its jurisdiction or to stop breaching the rules of natural justice, or to refrain from carrying out a proposed course of action. It is generally accepted that the order may be sought if it appears that the Tax Tribunals lack jurisdiction.[103]

The aim of the prohibition can, for example, be to prevent the Commissioner from exchanging taxpayer information with other countries where that exchange is continuing or is about to be carried out.

The effectiveness of a prohibitory order in protecting taxpayers' rights

This remedy is effective because the taxpayer may request the High Court by way of judicial review to prevent the Commissioner or the First-tier Tribunal or Upper Tribunal (the Tax Tribunals) from breaching the rules of natural justice by denying the taxpayer a hearing to be conducted before the taxpayer's information may be exchanged with other countries. As such, by way of a prohibitory order the Commissioner or the Tax Tribunal may be stopped or prevented from infringing taxpayers' rights.

8.2.5.3 Quashing order

This order quashes or sets aside an unlawful decision of a public authority, thereby confirming that it is a nullity having no effect.[104] This means that the higher court orders the actions of a lower court or body acting in a judicial manner to be undone.

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102 Craig *Administrative Law* 769.
103 Craig *Administrative Law* 769.
104 Craig *Administrative Law* 765.

An example may be where the court orders the First-tier Tribunal or the Upper Tribunal decisions to be null and void where they were found to be bad.

The quashing order may also be applied to protect substantive legitimate expectations. The order effectively sets aside the decision that frustrated the promise and leaves the public authority bound to its earlier representation — a substantive outcome for an applicant.[105]

The effectiveness of a quashing order in protecting taxpayers' rights

The order is effective because it allows a higher authority to quash the decision of the lower authority where it is found to be unlawful or does not comply with the legislation that empowered the authority.

8.2.5.4 Damages or restitution

Damages involve an action where the court orders the public authority or body to compensate the aggrieved for his loss. The Commissioner, for example, can be ordered to compensate the taxpayer for having infringed his rights. This could be a case where the Commissioner in gathering information seized a laptop which got damaged.

However, damages are not available to compensate the actions of the aggrieved party that are unlawful in the public law sense, unless one or more of the following situations arise:[106]

- if the claimant can show that the defendant is in breach of the contractual duty owed to the claimant;[107]
- if the defendant acts contrary to the European Community Law rule conferring the rights on the claimant;[108]

105 Craig *Administrative Law* 765.
106 Craig *Administrative Law* 948.
107 Craig *Administrative Law* 948.
108 Craig *Administrative Law* 949.

- if the defendant public authority's action is incompatible with the claimant's rights and the court considers the award of damages necessary to afford justification.[109]

Restitution is a court order which requires that the aggrieved party's property is reinstated. This can arise in a situation where, for example, the court orders the Commissioner to return documents and a laptop that were seized by HMRC. However, this order may be made in proceedings other than judicial review against a public authority.[110] This can be in a situation where an action for unjust enrichment has been instituted.

The effectiveness of damages or restitution in protecting taxpayers' rights

An order for damages is normally awarded in respect of the private law relationship (the dispute between two taxpayers). However, damages may be ordered in exceptional circumstances in the court's discretion.

Damages are effective when ordered in addition to another order (but not alone); for example, where the court orders a prohibitory order against the Commissioner, it may also order him to pay the taxpayer damages.

An order for restitution, just like damages, may also be made against a public authority in addition to another remedy (but not alone). Where, for example, the court orders a prohibitory order against the Commissioner for having seized documents and laptops, it may also order him to return the documents and laptops to the taxpayer.

Therefore, the two actions of damages and restitution may be effective as remedies in judicial review when they are ordered in addition to another remedy.

109 Craig *Administrative Law* 949.
110 Craig *Administrative Law* 949.

8.3 THE *LOCUS STANDI* OF THE AGGRIEVED PERSON

Locus standi is concerned with whether the particular claimant is entitled to invoke the jurisdiction of the court.[111] In *McInnes v Onslow Fane and Another*,[112] it was held that purely administrative actions not affecting individual rights are not sufficient to provide or clothe a person with *locus standi*.

An applicant taxpayer must have sufficient interest in a case in order to apply for judicial review of the lawfulness of the exercise of power or discretion by the Commissioner. Standing or interest means that the legal interests of the individual must have been affected. That is, the taxpayer must be personally affected by the Commissioner's decision in order to challenge it.

In *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd*,[113] the court provided two requirements in relation to *locus standi*: one is with respect to the application itself and the other is with respect to the hearing of the application. The court held that there was no sufficient interest in the case where the Federation wished to challenge an assessment of tax, which followed a compromise, of some newspaper employees who had been involved in tax evasion.

Each taxpayer's relationship with HMRC is personal, and others do not have sufficient interest simply as contributors to the national purse.

8.4 TIME LIMITS TO INSTITUTE AN ACTION

Applications for judicial review must be made within three months after the grounds to make the claim first arose; and the court has a discretion to extend the limit, but this is very rare.[114] This could prevent applicants from challenging the actions of the authorities long after the event.

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111 Craig *Administrative Law* 717.

112 [1978] 1 WLR 1520 (ChD).

113 [1982] AC 817 (HL).

114 Rule 54.5(1)(b) of Part 54 Rules & Practice Directions, Judicial Review and Statutory Review, of the Civil Procedure Rules 1998.

Accordingly, it can be submitted that the institution of an action rests on three main criteria: first, whether or not there is a public law issue; secondly, whether the application has been received on time; and, thirdly, whether there is an arguable case brought by the applicant with sufficient standing (*locus standi*). It remains the duty of the taxpayer to prove these three requirements.

8.5 USE OF MUTUAL AGREEMENT PROCEDURE TO RESOLVE TAXPAYER RIGHTS TREATY DISPUTES RELATING TO EXCHANGE OF INFORMATION IN TAX MATTERS IN THE UK

Mutual Agreement Procedure ("MAP") in double tax treaties was discussed in Chapter 5 in paragraph 5.7. The UK's double tax treaties which are largely based on the OECD Model Tax Convention contain Article 25 which covers the MAP. The effectiveness of MAP as a forum for resolving treaty disputes regarding taxpayers' was discussed in chapter 5 so it will not be repeated here.

As discussed in Chapter 5 BEPS Action 13 set out a minimum standard regarding MAP and countries like the UK which are part of the OECD Inclusive Framework are expected to undergo a peer review of their implementation of the minimum standard.[115]

Stage 1 assessed countries against the terms of reference of the minimum standard. Stage 2 focused on monitoring the follow-up of any recommendations resulting from jurisdictions' stage 1 peer review report. The UK's peer review on stage 1 was launched on 5 December 2016. The second stage peer review was launched during September 2018.[116] The UK was found compliant with the minimum standard.[117]

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115 OECD "OECD releases sixth round of BEPS Action 14 peer review reports on improving tax dispute resolution mechanisms" https://www.oecd.org/tax/beps/oecd-releases-sixth-round-of-beps-action-14-peer-review-reports-on-improving-tax-dispute-resolution-mechanisms-october-2019.htm (Date of use: 4 December 2019).

116 BEPS Action 14: "Peer Review and Monitoring" OECD" https://www.oecd.org/tax/beps/beps-action-14-peer-review-assessment-schedule.pdf (Date of use: 22 August 2020).

117 OECD/G20 Base Erosion and Profit Shifting Project: "Making Dispute Resolution More Effective – MAP Peer Review Report, United Kingdom (Stage 2)" https://www.oecd.org/tax/beps/making-dispute-resolution-more-effective-map-peer-review-report-united-kingdom-stage-2-33e2bf3d-

8.6 OVERVIEW OF THE CHAPTER

This chapter dealt with the measures to control administrative actions in the UK; the remedies to protect taxpayers' rights; and the effectiveness of those remedies and avenues to enhance the protection of taxpayers' rights. The chapter distinguished between internal and external controls and the remedies available to taxpayers if the Commissioner infringes their rights during the information gathering process.

The internal control measures that were discussed were the HMRC Charter, which contains rights that can be enjoyed by taxpayers; and the appeal process by taxpayers to the administrative tribunals in the form of the First-tier Tribunal and the Upper Tribunal.

The external control measures that were discussed were the Adjudicator and the Parliamentary Ombudsman, as well as judicial review at common law and in statute.

The next chapter (another comparative study) provides an introduction to the Canadian system of the law applicable in this work and a discussion of the Commissioner's information gathering powers and taxpayers' rights in Canada.

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en.htm#:~:text=The%20peer%20review%20process%20is,stage%201%20peer%20review%20report. (Date of use: 25 August 2020).

CHAPTER 9

CANADA: THE LEGAL SYSTEM; AND THE MINISTER'S INFORMATION GATHERING POWERS THAT MAY INFRINGE TAXPAYERS' RIGHTS

9 INTRODUCTION

This chapter deals with the challenges that the Canada Revenue Agency's ("CRA") information gathering powers may pose to taxpayers' rights. The importance of comparing Canada's situation with that of South Africa is that Canada is one of the common law countries, just like the United Kingdom ("UK") and South Africa. Most importantly, the South African Constitution has its roots in the Canadian constitutional model.[1]

Accordingly, these features make it worthwhile to compare the CRA's information gathering powers with its South African counterpart's. It is, first of all, important to discuss the Canadian legal system so as to provide the context in which the taxpayer's rights can be protected if they are infringed.

9.1 THE CANADIAN PARLIAMENT

The Parliament of Canada is bicameral in structure because it is categorised into the Upper and the Lower Houses. It consists of the Queen, the appointed Senate (Upper House), and the elected House of Commons (Lower House).[2] The Parliament is located in the national capital, Ottawa.[3]

9.2 CONSTITUTIONALISM IN CANADA

Canada is a constitutional monarchy. This means that the Crown is the foundation of the executive (the Cabinet, a Committee of the Queen's Privy Council for Canada), legislative (the Parliament of Canada), and judicial (various Federal

1 Davis 2003 *ICON* 187.
2 Section 17 of the Constitution Act, 1867.
3 Section 16 of the Constitution Act, 1982.

Courts) branches of the Canadian government.[4] The Crown is a corporation sole, with the Monarch vested with all powers of state.[5] As such, the role of the reigning sovereign is both legal and practical, but not political.[6] The executive is thus formally called the Queen-in-Council, the legislature is called the Queen-in-Parliament, and the courts are referred to as the Queen on the Bench.[7]

The Constitution of Canada ("the Constitution")[8] is the supreme law of Canada. Any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.[9] The Canadian Constitution forms the legal basis for the Canadian state because it incorporates the Charter of Rights and Freedoms ("the Charter").[10]

The Charter entrenches the legal, social, and political rights of Canadian citizens and minority groups, which in effect covers taxpayers. For the purposes of this work, the Constitution shall be understood in the context of the Charter. The Preamble to the Constitution Act, 1982 introduces the concept of the rule of law and provides:

> Canada is founded upon principles that recognize the supremacy of God and the rule of law.

The Constitution curtails the power of Parliament in this regard. Since the inception of the Constitution, Parliament is constitutionally obliged to conform to the principles of fundamental justice.[11] With the advent of the Constitution, the Canadian legal system did away, though not completely, with Parliamentary sovereignty, and substituted it with constitutional supremacy.

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4 MacLeod *Crown of Maples* XVII.
5 Canada, Privy Council Office *Accountable Government* 45
6 MacLeod *Crown of Maples* XVII.
7 MacLeod *Crown of Maples* XVII.
8 The Constitution Acts, 1867 to 1982, accessible at https://www.laws-lois.justice.gc.ca/eng/Const/index.html (Date of use: 27 May 2020).
9 Section 52(1) of the Constitution Act, 1982.
10 The Canadian Charter of Rights and Freedoms is entrenched in Part I of the Constitution Act, 1982 (Odujirin 2003 *CLWR* 161).
11 Odujirin 2003 *CLWR* 172.

9.2.1 The role of the courts in terms of the Constitution

The government of Canada is responsible for rendering justice for all subjects, and is thus deemed the *fount of justice* (fundamental justice). However, the judicial functions of the Royal Prerogative are performed in the Queen's name by officers of Her Majesty's Courts.

The Supreme Court of Canada ("SCC") is the country's highest court and the court of last resort.[12] The court has nine justices led by the Chief Justice of Canada.[13] The SCC hears appeals from decisions handed down by the various appellate courts of provinces and territories, as well as by the Federal Court of Appeal.

Below the SCC is the Federal Court, which hears cases arising under certain areas of federal law.[14] The SCC also works in conjunction with the Federal Court of Appeal and Tax Court of Canada.[15] These courts play an integral role in upholding Charter rights.

Taxpayers who believe that a law or government action has violated their Charter rights may apply to the courts for a ruling on its validity. The government must show that any violation of the rights of an individual or minority group constitutes a limitation of the particular right (under the limitation clause discussed below).[16] Judges have the power to strike down any law that violates the Constitution, or they may order the government to amend the law to make it consistent with the Constitution.

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12 Government of Canada "How the courts are organized - Canada's court system" https://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/02.html (Date of use: 24 October 2018).

13 Supreme Court of Canada "Judges of the Court" https://www.scc-csc.ca/judges-juges/index-eng.aspx (Date of use: 24 October 2018).

14 Government of Canada "How the courts are organized - Canada's court system" https://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/02.html (Date of use: 24 October 2018).

15 Government of Canada "How the courts are organized - Canada's court system" https://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/02.html (Date of use: 24 October 2018).

16 Section 1 of the Constitution Act, 1982 provides that the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

9.3 THE LEGISLATION THAT EMPOWERS THE CANADIAN REVENUE AGENCY TO COLLECT TAXES ON BEHALF OF THE STATE

The Income Tax Act ("the Act")[17] is the primary legislation which provides for the duties and powers of the Minister of National Revenue ("the Minister")[18] and is binding on Her Majesty.[19] The Minister is responsible for the administration of the Canada Revenue Agency Act ("CRAA").[20] The Minister may delegate his duties and powers to the Commissioner of the Revenue Agency.[21] The Minister is referred to as the administrator responsible for the administration of the tax Acts in Canada.

9.4 THE OFFICE RESPONSIBLE FOR THE COLLECTION OF REVENUE

The Canada Revenue Agency ("CRA") is a body corporate empowered to collect taxes on behalf of Canada.[22] The CRA is for all purposes an agent of Her Majesty in right of Canada.[23] The headquarters of the CRA is a place in Canada as may be designated by the Governor in Council.[24] Tax debts are debts due to Her Majesty.[25]

9.4.1 The responsibilities of the Canada Revenue Agency

The responsibilities of the CRA include supporting the administration and enforcement of the program legislation,[26] and implementing agreements between the stakeholders (the Government of Canada or the CRA and the government of a province or other public body).[27]

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17 Income Tax Act (1985, c. 1 (5th Supp.)).

18 Section 220(1) of the Income Tax Act provides that the Minister shall administer and enforce this Act and that the Commissioner of Revenue may exercise all the powers and perform the duties of the Minister under this Act.

19 Section 3 of the Canada Revenue Agency Act (1999, c. 17) ("CRAA") provides that this Act is binding on Her Majesty in right of Canada or a province.

20 Section 6 of the CRAA.

21 Section 8 of the CRAA.

22 Section 4(1) of the CRAA. Section 150(1) of the Income Tax Act provides that subject to subsection (1.1), a return of income that is in prescribed form and that contains prescribed information shall be filed with the Minister, without notice or demand for the return, for each taxation year of a taxpayer.

23 Section 4(2) of the CRAA.

24 Section 4(3) of the CRAA.

25 Section 222(2) of the Income Tax Act.

26 Section 5(1)(a) of the CRAA.

27 Section 5(1)(b) of the CRAA.

These stakeholders perform the functions of government in Canada to carry out an activity or administer a tax or program.[28] They implement agreements or arrangements between the CRA and the departments or agencies of the Government of Canada.[29] They also implement agreements between the Government of Canada and an aboriginal government to administer a tax.[30]

9.4.2 Matters under the authority of the Canada Revenue Agency

The CRA has authority over all matters relating to general administrative policy in the CRA;[31] the organisation of the CRA;[32] CRA real property;[33] human resources management, including the determination of the terms and conditions of employment of persons employed by the CRA;[34] and internal audit in the CRA.[35]

Canada subscribes to the concept of soft law. This is a generally recognised term for official instruments of various forms which are non-binding and seek to guide, clarify or affect administrative action.[36] Soft law is most often distinguished from "hard law" such as statutes and regulations which are binding and set out legally enforceable standards, duties and powers.[37] Soft law in the context of tax administration may include the following:

- Income Tax Folios ("ITF");
- Income Tax Information Circulars ("ITIC");
- Income Tax Interpretation Bulletins ("ITIB");
- Income Tax Technical News ("ITTN");
- Tax Guides and Pamphlets ("TGP"); and
- Advanced Income Tax Rulings ("ATR").[38]

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28 Section 5(1)(b) of the CRAA.
29 Section 5(1)(c) of the CRAA.
30 Section 5(1)(d) of the CRAA.
31 Section 30(1)(a) of the CRAA.
32 Section 30(1)(b) of the CRAA.
33 Section 30(1)(c) of the CRAA.
34 Section 30(1)(d) of the CRAA.
35 Section 30(1)(e) of the CRAA.
36 Ansari and Sossin *Legitimate Expectations in Canada: Soft Law and Tax Administration* 293.
37 Ansari and Sossin *Legitimate Expectations in Canada: Soft Law and Tax Administration* 293.
38 Ansari and Sossin *Legitimate Expectations in Canada: Soft Law and Tax Administration* 298.

This soft law is used in the course of giving effect to the statutory rights granted and obligations imposed by the Income Tax Act, which is complex and convoluted.[39] The legal instruments of soft law guide the decisions of various CRA employees involved in determining the existence of and the outcome of disputes between taxpayers and the state that arise in the ordinary course of administering the Income Tax Act.[40]

Therefore, soft law plays an important role in the smooth functioning of a self-assessment system, the exercise of discretion by CRA officials and the compliance efforts of taxpayers.[41]

9.5 THE METHODS USED BY THE MINISTER TO GATHER INFORMATION FROM TAXPAYERS IN CANADA

As stated in Chapter 2, the various pieces of legislation in different countries do not define "information gathering". In Canada, information gathering can therefore be understood to mean a process whereby the tax authority gathers information from taxpayers.

The purpose of the information is to maintain compliance and also to ensure that taxpayers are honest in their dealings with the tax authority. Below is a discussion of some of the methods used by the Minister in Canada to gather information from taxpayers.

9.5.1 Gathering taxpayer information from records and books

Section 230.1(1) of the Act provides that every person carrying on business and who is required by the Act to pay taxes shall keep records and books of account in

39 Ansari and Sossin *Legitimate Expectations in Canada: Soft Law and Tax Administration* 296.

40 Ansari and Sossin *Legitimate Expectations in Canada: Soft Law and Tax Administration* 296.

41 Ansari and Sossin *Legitimate Expectations in Canada: Soft Law and Tax Administration* 297.

the prescribed manner. When taxpayers keep their records, this could assist the Minister to access relevant taxpayer information when it is required.

9.5.2 Gathering taxpayer information from tax returns

In Canada, a self-assessment tax system is followed.[42] Taxpayers assess themselves by regular submission of tax returns. Section 231.2(1) of the Act provides that the Minister may require that any person provide, within such reasonable time as is stipulated in the notice, any information or additional information, including a return of income or a supplementary return; or any document.

Section 233(1) of the Act provides that every person shall, on written demand from the Minister, whether or not the person has filed an information return as required by this Act or the regulations, file with the Minister, within such reasonable time as is stipulated in the demand, the information return if it has not been filed or such information as is designated in the demand.

9.5.3 Gathering taxpayer information directly from taxpayers or third parties

Section 231.2(1) of the Act refers to a request for information from any person. This means that the Minister may gather information from any person other than a taxpayer, and it includes third parties. These people may be the secretary, an accountant or a legal representative of the taxpayer.

It needs to be noted that section 237.3(17) of the Act provides for the protection of taxpayers' information held by their legal practitioners. This is the called solicitor-client privilege in Canada. The section provides that a lawyer who is an advisor is not required to disclose in an information return any information in respect of which the lawyer, on reasonable grounds, believes that a client of the lawyer has solicitor-client privilege. This includes a communication and records by the solicitor.

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42 Government of Canada Information Circular 71-14R3 "The Tax Audit" June 18, 1984 para 4, https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic71-14/tax-audit.html (Date of use: 6 April 2020).

Section 23 of the Access to Information Act[43] in addition to section 237.17 of the Act provides that the head of a government institution may refuse to disclose any record requested under Part 1 of the Access to Information Act (dealing with access to government records) that contains information that is subject to solicitor-client privilege.

9.5.4 Gathering taxpayer information through inspection and audit procedures

Section 231.1 of the Act provides that an authorised person may inspect, audit or examine the affairs of the taxpayer. The person so authorised may also examine the property belonging to the taxpayer. It follows that where the information provided by the taxpayer in the return is insufficient or fraudulent, the Minister is empowered by this provision to conduct audits on taxpayers.

When taxpayers assess themselves and submit their regular tax returns, they may submit incorrect or inadequate information. In this case, the Minister may gather further information in order to inspect, audit or examine their true affairs. The primary purpose of the tax audit is to monitor and maintain the self-assessment system.[44] As such, inspection, audit or examination of taxpayers' affairs play an important role in the achievement of the objectives of the CRA.

9.5.4.1 The selection criteria employed by the Minister to audit taxpayers

The selection of taxpayers' returns to be audited under Canadian law is greatly facilitated by computer records.[45] The other common means of selection are audit projects, leads and secondary files.

Where the compliance of a particular group of taxpayers is tested, the results may

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43 Access to Information Act (R.S.C., 1985, c. A-1).

44 Government of Canada Information Circular 71-14R3 "The Tax Audit" June 18, 1984 para 2, https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic71-14/tax-audit.html (Date of use: 6 April 2020).

45 Government of Canada Information Circular 71-14R3 "The Tax Audit" June 18, 1984 para 14, https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic71-14/tax-audit.html (Date of use: 6 April 2020).

indicate that there is significant non-compliance within the group.[46] Its members may come under audit on a project basis.[47] Where the Minister finds that a certain group of taxpayers do not comply with the tax Act, an audit shall be conducted on the group.

Information from files, audits or investigations or from outside sources including informers may lead to the selection of a particular file for audit.[48] A taxpayer shall be audited based on the leads and information provided from outside leads.

A file may be selected for audit because of its association with another file previously selected.[49] For example, if several taxpayers share a single place of business and are under the same control, and one of their files has been selected for audit, it is usually more convenient both for the CRA and the taxpayers to have all the records examined during the same audit engagement. In addition, the affairs of such taxpayers are often so interwoven as to require the auditor to examine them together.[50]

The audit process allows returns to be sorted into various groupings in order that the selection criteria can be applied.[51] In some cases, sophisticated comparisons are made of selected financial information of current and prior years and between taxpayers engaged in similar businesses or occupations. These systems generate lists of returns for potential audit selection from which specific returns are chosen by

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46 Government of Canada Information Circular 71-14R3 "The Tax Audit" June 18, 1984 para 16, https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic71-14/tax-audit.html (Date of use: 6 April 2020).

47 Government of Canada Information Circular 71-14R3 "The Tax Audit" June 18, 1984 para 16, https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic71-14/tax-audit.html (Date of use: 6 April 2020).

48 Government of Canada Information Circular 71-14R3 "The Tax Audit" June 18, 1984 para 16, https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic71-14/tax-audit.html (Date of use: 6 April 2020).

49 Government of Canada Information Circular 71-14R3 "The Tax Audit" June 18, 1984 para 16, https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic71-14/tax-audit.html (Date of use: 6 April 2020).

50 Government of Canada Information Circular 71-14R3 "The Tax Audit" June 18, 1984 para 16, https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic71-14/tax-audit.html (Date of use: 6 April 2020).

51 Government of Canada Information Circular 71-14R3 "The Tax Audit" June 18, 1984 para 14, https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic71-14/tax-audit.html (Date of use: 6 April 2020).

supervisors in each District Office.[52]

9.5.4.2 Types of audit activities conducted by the Minister

The Minister may embark on a field audit or an industry-wide audit. The field audit is the most common audit undertaken by the CRA[53] and the main tool in the audit program. Field audits require time (a few hours to several weeks), depending on the nature of the examination and/or the size and complexity of the taxpayer's operations. The audit usually entails a detailed examination of books and records and is ordinarily conducted at the taxpayer's place of business.

The industry-wide audit involves coordinated audits of a number of corporations within one industry.[54] Specialists are usually available to assist auditors in situations concerning valuations and appraisals of equities and various properties respectively.[55]

9.5.4.3 The completion of an audit

When an audit is completed, the auditor may propose reassessment,[56] which involves a method to adjust the tax payable by reassessing the taxpayer's return. Initially the proposal to conduct a reassessment is discussed with the taxpayer and/or his representative.[57] If the taxpayer agrees with the changes, the auditor may

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52 Government of Canada Information Circular 71-14R3 "The Tax Audit" June 18, 1984 para 14, https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic71-14/tax-audit.html (Date of use: 6 April 2020).

53 Government of Canada Information Circular 71-14R3 "The Tax Audit" June 18, 1984 para 20, https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic71-14/tax-audit.html (Date of use: 6 April 2020).

54 Government of Canada Information Circular 71-14R3 "The Tax Audit" June 18, 1984 para 20, https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic71-14/tax-audit.html (Date of use: 6 April 2020).

55 Government of Canada Information Circular 71-14R3 "The Tax Audit" June 18, 1984 para 20, https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic71-14/tax-audit.html (Date of use: 6 April 2020).

56 Government of Canada Information Circular 71-14R3 "The Tax Audit" June 18, 1984 para 31, https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic71-14/tax-audit.html (Date of use: 6 April 2020).

57 Government of Canada Information Circular 71-14R3 "The Tax Audit" June 18, 1984 para 31, https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic71-14/tax-audit.html (Date of use: 6 April 2020).

proceed with the reassessment without a written proposal.[58]

9.5.5 Gathering taxpayer information through search and seizure

The gathering of information using search and seizure methods may be made following an *ex parte* application (the co-operation of the other party is not required) to a judge by the Minister in terms of section 231.3(1). The person named in the resultant search warrant may then enter the property belonging to the taxpayer and seize information in the form of documents or things (such as computer equipment). It should be noted that the information seized may be subject to solicitor-client privilege.

9.5.6 Gathering taxpayer information through exchange of taxpayer information with other countries

In Chapter 2 of this work, it was discussed how the increase in cross-border capital flows resulting from advanced technology and the globalisation of trade and investments has led tax administrators around the world to face challenges in enforcing their tax laws.[59] As a result, tax administrators agreed to exchange information with each other to ensure that taxpayers do not hide their income and assets in tax havens and low tax jurisdiction countries.[60]

As discussed in Chapter 2, the exchange of information may be made through tax treaties such as double tax treaties; Tax Information Exchange Agreements ("TIEAs"); and Multilateral Agreements and Regional Agreements. Normally, once such treaties are signed, they become part of countries' domestic law. Countries need to enact domestic legislation to enable the exchange of information.

In Canada, section 231.6(1) of the Act provides that "foreign-based information or document" means any information or document that is available or located outside

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58 Government of Canada Information Circular 71-14R3 "The Tax Audit" June 18, 1984 para 31, https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic71-14/tax-audit.html (Date of use: 6 April 2020).

59 Oguttu *International Tax Law* 600.

60 Oguttu *International Tax Law* 600.

Canada and that may be relevant to the administration or enforcement of the Act. Subsection (2) provides that the Minister may, by notice served personally or by registered or certified mail, require that a person resident in Canada or a non-resident person carrying on business in Canada provide any foreign-based information or document.

9.5.6.1 Country-by-Country Reporting in Canada

Section 233.8 of the Act gives effect to the implementation of the CbCR legislation in Canada. Therefore, Canada passed legislation that formally implemented Country-by-Country Reporting ("CbCR") for large multinationals in December 2016.[61]

Article 26 of the Organisation for Economic Co-operation and Development ("OECD")[62] Model Tax Convention on Income and on Capital ("OECD Model"), on which most of Canada's treaties are based, provides for the exchange of information in tax matters between the contracting parties. Canada has signed 92 double tax treaties.[63] Canada has also signed 22 TIEAs which allow for the exchange of information with other countries.[64]

In terms of Canada's Guidance on Country-By-Country Reporting ("the Guidance") which was promulgated in 2017, CbCRs which are filed with the CRA are automatically exchanged with other jurisdictions, provided that, in each case:

- the other jurisdiction has implemented CbCR;

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61 PWC "Canada issues proposed legislation on country-by-country reporting" https://www.pwc.com/gx/en/tax/newsletters/pricing-knowledge-network/assets/pwc-TP-Canada-final-CbCR-legislation.pdf (Date of use: 19 May 2018).

62 OECD "Who we are" http://www.oecd.org/about/ (Date of use: 23 April 2018).

63 House of Commons Canada "The Canada Revenue Agency, Tax Avoidance and Tax Evasion: Recommended Actions" (2016) Report of the Standing Committee on Finance 42nd Parliament, 1st Session 17, https://www.ourcommons.ca/Content/Committee/421/FINA/Reports/RP8533424/finarp06/finarp06-e.pdf (Date of use: 6 April 2020).

64 House of Commons Canada "The Canada Revenue Agency, Tax Avoidance and Tax Evasion: Recommended Actions" (2016) Report of the Standing Committee on Finance 42nd Parliament, 1st Session 17, https://www.ourcommons.ca/Content/Committee/421/FINA/Reports/RP8533424/finarp06/finarp06-e.pdf (Date of use: 6 April 2020).

- the two jurisdictions have a legal framework in place for automatic exchange of information; and
- they have entered into a competent authority agreement relating to CbCR.[65]

The first exchanges between jurisdictions of CbCR commenced on June 2018.[66] Canada is committed to using information provided on CbCR in accordance with the OECD Base Erosion and Profit Shifting ("BEPS")[67] Action 13 Final Report.[68] It should be noted that where there are differences between the OECD recommendations in Action 13 and the Canadian CbCR legislation, the Canadian CbCR legislation takes precedence.[69]

CbCR is intended to improve transparency and the consistency of transfer pricing documentation on a worldwide basis. This is an important tool to assist in Canada's efforts to promote compliance and minimise opportunities to shift taxable profits away from the jurisdiction where the underlying economic activity has taken place.[70]

For example, on 7 June 2017, Canada and the United States of America ("USA") signed an agreement on the exchange of CbCR.[71] The agreement provides that information exchanged is subject to the confidentiality and other provisions of the

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65 CRA "Guidance on Country-By-Country Reporting in Canada" 3, https://www.canada.ca/content/dam/cra-arc/formspubs/pub/rc4651/rc4651-20e.pdf (Date of use: 6 April 2020).

66 CRA "Guidance on Country-By-Country Reporting in Canada" 3, https://www.canada.ca/content/dam/cra-arc/formspubs/pub/rc4651/rc4651-20e.pdf (Date of use: 6 April 2020).

67 OECD *Action Plan on Base Erosion and Profit Shifting*. The Action Plan was endorsed by the G20 leaders at the Russia G20 Summit on 6 September 2013.

68 OECD *Action Plan on Base Erosion and Profit Shifting* 14.

69 CRA "Guidance on Country-By-Country Reporting in Canada" 4, https://www.canada.ca/content/dam/cra-arc/formspubs/pub/rc4651/rc4651-20e.pdf (Date of use: 6 April 2020).

70 CRA "Guidance on Country-By-Country Reporting in Canada" 4, https://www.canada.ca/content/dam/cra-arc/formspubs/pub/rc4651/rc4651-20e.pdf (Date of use: 6 April 2020).

71 Government of Canada "Canada-US Tax Convention – Arrangement signed on the exchange of Country-by-Country Reports" https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/competent-authority-agreements-notices/canada-us-tax-convention-arrangement-signed-exchange-country-reports.html (Date of use: 19 May 2018).

Convention between Canada and the USA with Respect to Taxes on Income and on Capital, signed on 26 September 1980.[72]

This arrangement implements the CbCR standard that the OECD developed in connection with the BEPS Action Plan adopted by the OECD and Group Twenty ("G20") countries.[73] Canada's CRA and the USA's Internal Revenue Service ("IRS") will exchange information between themselves on the global allocation of the income, the taxes paid, and certain indicators of the location of economic activity among tax jurisdictions that multinational enterprise groups operate in.

This co-operation will provide each tax administration with information to assess high-level transfer pricing and other risks related to BEPS.[74] To facilitate these exchanges, countries are given the option to sign a Multilateral Competent Authority Agreement ("MCAA") on CbCR. Canada has already signed the MCAA and is committed to continued collaboration with treaty partners.[75]

It should be noted that Canada also passed legislation in Part XIX of the Income Tax Act, which deals with the Common Reporting Standard ("CRS"). The legislation requires Canadian financial institutions to gather tax residency information from account holders for the purpose of identifying reportable accounts.[76] This

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72 Government of Canada "Canada-US Tax Convention – Arrangement signed on the exchange of Country-by-Country Reports" https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/competent-authority-agreements-notices/canada-us-tax-convention-arrangement-signed-exchange-country-reports.html (Date of use: 19 May 2018).

73 Government of Canada "Canada-US Tax Convention – Arrangement signed on the exchange of Country-by-Country Reports" https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/competent-authority-agreements-notices/canada-us-tax-convention-arrangement-signed-exchange-country-reports.html (Date of use: 19 May 2018).

74 Government of Canada "Canada-US Tax Convention – Arrangement signed on the exchange of Country-by-Country Reports" https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/competent-authority-agreements-notices/canada-us-tax-convention-arrangement-signed-exchange-country-reports.html (Date of use: 19 May 2018).

75 Government of Canada "Canada-US Tax Convention – Arrangement signed on the exchange of Country-by-Country Reports" https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/competent-authority-agreements-notices/canada-us-tax-convention-arrangement-signed-exchange-country-reports.html (Date of use: 19 May 2018).

76 Canadian Bankers Association "Understanding how the Common Reporting Standard (CRS) and Foreign Account Tax Compliance Act (FATCA) affect you – an FAQ"

requirement commenced on 1 July 2017. Information relating to reportable accounts and account holders had to be reported annually to the CRA from May 2018. Importantly, the CRA exchanges this information with countries with which Canada has an agreement.

9.5.7 Gathering taxpayer information through the Voluntary Disclosures Program

Canada's Voluntary Disclosures Program ("VDP") is found in the Income Tax Information Circular ("ITIC").[77] The ITIC states that, in this information circular, the term "taxpayer" includes an individual, an employer, a corporation, a partnership, a trust, a Goods and Services Tax/Harmonized Sales Tax ("GST/HST") registrant/claimant or a registered exporter of softwood lumber products.[78]

Through the VDP, taxpayers can make disclosures to correct inaccurate or incomplete information, or to disclose information not previously reported. For example, taxpayers may not have met their tax obligations if they claimed ineligible expenses, failed to remit source deductions or the GST/HST, or did not file an information return.[79]

The ITIC provides information on the discretionary authority of the Minister of National Revenue under the Income Tax Act ("ITA"), the Excise Tax Act ("ETA"),[80]

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https://cba.ca/understanding-the-common-reporting-standard?l=en-us (Date of use: 22 October 2019).

77 Government of Canada "Income Tax Information Circular IC00-1R5, Voluntary Disclosures Program" (2017): see now Government of Canada "IC00-1R5 ARCHIVED - Voluntary Disclosures Program" https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic00-1r5.html (Date of use: 4 June 2020). This was before this publication was changed to Income Tax Information Circular IC00-1R6, Voluntary Disclosures Program for applications on and after 1 March 2018: see Government of Canada "IC00-1R6 Voluntary Disclosures Program" https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic00-1.html (Date of use: 27 May 2020), where the information is distributed among paragraphs bearing different paragraph numbers from those in the "IC00-1R5 ARCHIVED - Voluntary Disclosures Program".

78 Government of Canada "Income Tax Information Circular IC00-1R5, Voluntary Disclosures Program" (2017) para 2: see now Government of Canada "IC00-1R5 ARCHIVED - Voluntary Disclosures Program" https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic00-1r5.html (Date of use: 12 July 2020).

79 Government of Canada "Income Tax Information Circular IC00-1R5, Voluntary Disclosures Program" (2017) para 4: see now Government of Canada "IC00-1R5 ARCHIVED - Voluntary Disclosures Program" https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic00-1r5.html (Date of use: 12 July 2020).

80 Excise Tax Act (R.S.C., 1985, c. E-15).

the Excise Act, 2001 ("EA, 2001")[81] as well as the Air Travellers Security Charge Act ("ATSCA")[82] and the Softwood Lumber Products Export Charge Act, 2006 ("SLPECA")[83] to grant relief to taxpayers in accordance with specific legislative provisions.

The ITIC explains how a taxpayer may make a disclosure, including the proper information and documentation needed to support such a disclosure. In addition, it outlines the administrative guidelines which the CRA will follow in making a decision whether to accept the disclosure as valid.[84]

Most importantly, the ITIC states that the information provided on the VDP process is only a guideline, is not intended to be exhaustive, and is not meant to restrict the spirit or intent of the legislation.[85]

9.5.8 Gathering taxpayer information through Reportable Transactions

On 26 June 2013, the Government of Canada passed legislation requiring the disclosure of reportable transactions to the CRA. This legislation deals with the concerns about how aggressive tax avoidance transactions affect the fairness of the income tax system.[86] Section 237.3(1) of the Act provides that reportable transactions are entered into by, or for the benefit of, a person and they have at least two of the following three features or "hallmarks":

- The promoter or advisor, including any non-arm's-length party (referred to collectively as a "promoter or advisor"), is entitled to a fee that is based on the amount of the tax benefit from the transaction,

81 Excise Act, 2001 (S.C. 2002, c. 22).
82 Air Travellers Security Charge Act (2002, c. 9, s. 5).
83 Softwood Lumber Products Export Charge Act, 2006 (S.C. 2006, c. 13).
84 Government of Canada "Income Tax Information Circular IC00-1R5, Voluntary Disclosures Program" (2017) para 5: see now Government of Canada "IC00-1R5 ARCHIVED - Voluntary Disclosures Program" https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic00-1r5.html (Date of use: 12 July 2020).
85 Government of Canada "Income Tax Information Circular IC00-1R5, Voluntary Disclosures Program" (2017) para 7: see now Government of Canada "IC00-1R5 ARCHIVED - Voluntary Disclosures Program" https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic00-1r5.html (Date of use: 12 July 2020).
86 A "tax avoidance transaction" means any transaction that would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit (s 245 of the Act).

contingent upon obtaining a tax benefit that results from the transaction, or attributable to the number of persons participating in the transaction (or similar transaction) or who have been provided access to advice from the promoter or advisor about the tax consequences of the transaction (or similar transaction).

- The promoter or advisor of the transaction obtains "confidential protection" for the transaction.[87]
- The taxpayer, the person who entered into the transaction on behalf of the taxpayer (including any non-arm's-length party), or the promoter or advisor has or had "contractual protection" for the transaction (other than as a result of a fee described in the first hallmark).

A reportable transaction does not include a transaction that is, or is part of a series of transactions that includes, the acquisition of a tax shelter or the issuance of a flow-through share for which an information return has been filed with the Minister. The new legislative requirements apply to reportable transactions entered into after 31 December 2010 and reportable transactions that are part of a series of transactions entered into before 1 January 2011 and completed after 31 December 2010.[88]

Section 237.3(4) of the Act provides that if any person is required to file an information return in respect of a reportable transaction under that subsection, the filing by any such person of an information return with full and accurate disclosure in prescribed form in respect of the transaction is deemed to have been made by each person to whom subsection (2) applies in respect of the transaction. Section 237.3(8) of the Act provides that every person who fails to file an information return in respect of a reportable transaction as required under subsection (2) is liable to a penalty.

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87 "Confidential protection", in respect of a transaction or series of transactions, means anything that prohibits the disclosure, to any person or to the Minister, of the details or structure of the transaction or series under which a tax benefit results (not the same as client-solicitor privilege).

88 Government of Canada "New reporting requirements: Reportable transactions – Canada" https://www.canada.ca/en/revenue-agency/news/newsroom/fact-sheets/fact-sheets-2013/new-reporting-requirements-reportable-transactions.html (Date of use: 25 October 2018).

The Enhanced International Information Reporting ("EIIR") is found in section 266(1) of the Act, which provides that every reporting Canadian financial institution shall file with the Minister an information return in prescribed form relating to each US reportable account maintained by the institution at any time during the immediately preceding calendar year.

9.6 HOW THE MINISTER'S INFORMATION GATHERING POWERS MAY IMPACT ON TAXPAYERS' CONSTITUTIONAL RIGHTS

The discussion below analyses how the Minister's information gathering powers discussed above may impact on taxpayers' rights. Although Canada does have a Charter of Rights and Freedoms ("Charter") in the Constitution and a separate Taxpayer Bill of Rights, taxpayers' rights may still be infringed by the Minister despite the protection. The rights that could be infringed include:

- the right to equality
- the right to privacy
- the right to a fair trial
- the right against self-incrimination
- the right of access to courts
- the right to reasons

9.6.1 How taxpayers' rights to equality may be infringed by the Minister's power to inspect and audit taxpayers' affairs

Section 15 of the Charter provides that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The right of a taxpayer to equality may be contravened by the Minister when he selects one taxpayer for an audit over another. The selection of taxpayers by categorising them for audit purposes should be made on a rational and impartial

basis.[89] Taxpayers, for example, should be satisfied that the audit program is based on fair and non-discriminatory criteria.

The system used to select taxpayers for inspection, audits and examination of taxpayers' affairs in Canada is fair and reasonable. This is because taxpayers that are to be audited are chosen by a computer program.[90] The program cannot be biased or embark on a fishing expedition. Therefore, it may be difficult to argue an infringement of the right to equality. This is because the computer system may only pick a suspect taxpayer to account for the discrepancy.

However, where the main purpose of the Minister's investigation, inspection, audit or examination of a taxpayer's affairs is seeking evidence for use in a possible criminal prosecution, the Charter rights for the taxpayer may be infringed. The infringement in this case may relate to the position where the audit is used by the Minister to gather information for a possible criminal investigation. This is discussed later in this chapter.

9.6.2 The Minister's power to request information from the taxpayer and a third party may contravene taxpayers' rights to privacy

The Charter does not specifically mention privacy or the protection of personal information, but it is implied in the Charter. Section 7 of the Charter provides for the right to life, liberty and the security of a person. The right to privacy in relation to taxpayers may be in the form of protection of records, books etc. relating to the taxpayer's business or personal affairs.

The Minister's request of information from third parties and how it may contravene the right to privacy may be illustrated by the case of *R v McKinlay Transport Ltd.*[91] During the course of an income tax audit, the CRA, pursuant to subsection 231(3)

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89 Government of Canada Information Circular 71-14R3 "The Tax Audit" June 18, 1984 para 15, https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic71-14/tax-audit.html (Date of use: 6 April 2020).

90 Government of Canada Information Circular 71-14R3 "The Tax Audit" June 18, 1984 para 14, https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic71-14/tax-audit.html (Date of use: 6 April 2020).

91 [1990] 1 SCR 627.

of the Act, served the appellants with letters demanding information and the production of certain documents in terms of section 231(3) (the current section 231.2 of the Act). The appellants failed to comply with the demand and were charged accordingly with "failure to comply" pursuant to subsection 238(2) of the Act.

The majority decision of the SCC delivered by Wilson J (Lamer J concurring, L'Heureux-Dubé and La Forest JJ concurring in separate judgments, and Sopinka J concurring with the result for different reasons) focused largely on the taxpayer's right to privacy. Wilson J held that section 231(3) envisaged the compelled production of a wide array of documents and was not limited to those documents required to be prepared by the taxpayer under the legislation.

The court further held that the legislation permitted the Minister to compel production of information from a person who might not even be a party to the audit. These considerations led Wilson J to conclude that:

> [The] compelled production reaches beyond the strict filing and maintenance requirements of the Act and may well extend to information and documents in which the taxpayer has a privacy interest in need of protection under s. 8 of the Charter although it may not be as vital an interest as that obtaining in a criminal or quasi criminal context. I would therefore conclude that the application of section 231(3) of the Income Tax Act to the appellants constitutes a 'seizure' since it infringes on their expectations of privacy.[92]

In *R v Caswell*,[93] the accused was charged under section 238(1) of the Act for failing to provide information and documentation as required by subsection 231.2(1). At issue was whether the taxpayer, in the light of the rights to life, liberty and security of the person under section 7 of the Charter, could be compelled by statute to produce information demanded by the CRA under subsection 231.2(1). Doherty J held:

> The *McKinlay* case represents the purely administrative approach to the use of section 231 because a taxpayer's privacy interest is low in relation to the taxation authority. . . *McKinlay*, however, does not purport to answer the type of issue raised in the case at bar.[94]

92 *R v McKinlay Transport Ltd* 642 (original emphasis).
93 [1994] BCJ 437 (QL) (Prov Ct).
94 *R v Caswell* para 22.

Hence the *McKinlay Transport* decision provides that the compelled production of information extends to information that infringes the taxpayer's right to privacy. The information may also be from a person other than the taxpayer. As such, the compulsion constitutes seizure and an infringement of the right to privacy. This means that taxpayers may rely on the decision of *McKinlay Transport* in order to advance their rights to privacy.

However, the *R v Caswell* decision demonstrates that the taxpayer's right to privacy may be limited and ranks lower than the information gathering power of the Minister. Section 231.2(3) of the Act provides that the court can authorise the Minister's request for information where the unnamed person or group is ascertainable and the purpose of collecting the information is to verify the taxpayer's compliance with tax obligations. However, where seeking to compel information about unidentified taxpayers from a third party, the Minister needs prior judicial authorisation.

The *R v Caswell* decision dealt with the Minister's scope to compel information about unnamed taxpayers from third parties under section 231.2 of the Act. In this context, the court held that it will strictly interpret the Minister's powers and exercise its discretion in appropriate cases in order to protect taxpayers from unjustified intrusions by the government and to prevent abusive fishing expeditions.[95] The court made a strong statement against an interpretation of the CRA's powers that allow unlimited invasions of taxpayer privacy.[96] This is subject to the solicitor-client privilege.

9.6.3 The Minister's power to conduct search and seizure may contravene taxpayers' rights to privacy

Section 8 of the Charter provides that individuals have the right to be secure against unreasonable search or seizure. As stated above, the right to privacy in relation to taxpayers may be in the form of protection of records, books etc. relating to the taxpayer's business or personal affairs.

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95 *R v Caswell* paras 36 and 37.
96 *R v Caswell* para 100.

In the recent (2018) decision by the Federal Court in *Canada (National Revenue) v Hydro-Québec*,[97] the Minister sought to obtain from Hydro-Québec a list of all of its business customers, including their names; their addresses; and certain other details.[98] The court held that the request was beyond the scope of the Act and did not pertain to compliance with tax laws. The court was more concerned about protecting taxpayers against abusive state action that would violate taxpayers' right to be free from unreasonable search and seizure under section 8 of the Charter.[99]

The court held that the Minister's request was "a fully-fledged fishing expedition" of "unprecedented magnitude" and "practically unlimited scope" with "a complete lack of consideration for the invasion of privacy and the consequences for all taxpayers involved in the request".[100] Roy J held:

> I will say it again. *McKinlay* recognized the constitutionality of the requirement under the former subsection 231(3) (which is essentially the current subsection 231.2(1)) thanks, in good measure, to the limited scope of subsection 231(3) in the application of common law rules on statutory interpretation by requiring that the application or enforcement of the Act be demonstrated by the existence of a genuine and serious inquiry. The Federal Court of Appeal replaced that requirement with the tax audit conducted in good faith with a genuine factual basis, the audit serving to confirm compliance with the Act. In my view, these requirements must be strictly followed. The sole fact of the applicant being interested in an ordinary phenomenon, such as the transfer of currency abroad (*Fédération des Caisses*) or the underground market is not a tax audit. Perhaps there could be a genuine tax audit conducted in good faith eventually. However, it would be a mischaracterization of the tax audit and would eliminate the conditions in subsection 231.2(3) to pretend that it may include a list of business clients of a public utility.[101]

The court held that the Minister's request did not meet the requirements of section 231.2 of the Act because the business customers of Hydro-Québec did not constitute an ascertainable group, and the information sought did not pertain to compliance with tax laws.

It needs to be noted that the right to privacy in section 7 of the Charter is linked to section 8 of the Charter and that they may both be invoked by taxpayers at once to protect the privacy of their information. The information may also be protected under the solicitor-client privilege discussed above.

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97 2018 FC 622.
98 *Canada (National Revenue) v Hydro-Québec* para 12.
99 *Canada (National Revenue) v Hydro-Québec* para 39.
100 *Canada (National Revenue) v Hydro-Québec* para 102.
101 *Canada (National Revenue) v Hydro-Québec* para 100.

9.6.4 The exchange of taxpayer information with other countries may impact on taxpayers' rights

Although the CbCR can be exchanged via a multilateral agreement, automatic exchange of CbCR information is made on a bilateral basis.[102] Contracting states are allowed to retain control over which jurisdictions they agree to exchange CbCR information with.[103] The rights that can be contravened by the Minister in this case relate to privacy, access to courts, and the right against self-incrimination.

9.6.4.1 Contravention of taxpayers' right to privacy

The Guidance on Country-by-Country Reporting ("the Guidance")[104] provides that section 241 of the Act guarantees taxpayers' rights to privacy. The section provides that all taxpayer information is confidential and may only be disclosed in accordance with the law. The Guidance confirms that the information contained in CbCR reports is treated in the same manner as all other taxpayer information in the CRA's possession.

The Guidance provides that Canada automatically exchanges CbCR information only with jurisdictions that are committed to using the information appropriately and preserving its confidentiality.[105] The information must be treated as secret and only

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102 Government of Canada "Guidance on Country-By-Country Reporting in Canada" 14 https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc4651/guidance-on-country-country-reporting-canada.html (Date of use: 27 May 2020).

103 Government of Canada "Guidance on Country-By-Country Reporting in Canada" 14 https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc4651/guidance-on-country-country-reporting-canada.html (Date of use: 27 May 2020).

104 Government of Canada "Guidance on Country-By-Country Reporting in Canada" 13 https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc4651/guidance-on-country-country-reporting-canada.html (Date of use: 27 May 2020).

105 Government of Canada "Guidance on Country-By-Country Reporting in Canada" 14 https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc4651/guidance-on-country-country-reporting-canada.html (Date of use: 27 May 2020).

used by tax officials for tax purposes.[106] It can therefore be concluded that taxpayers' rights to privacy are protected in this case.

9.6.4.2 Contravention of taxpayers' rights of access to courts

Where taxpayers are provided with an opportunity to be part of the exchange of information, they will also have an opportunity to challenge the decision to exchange their information. In the absence of the legislation, taxpayers' rights of access to courts or an independent impartial forum are contravened in terms of section 11(d) of the Charter.

9.6.4.3 Contravention of taxpayers' privilege against self-incrimination and the right to a fair trial

Section 11 of the Charter implies a right to a fair trial and provides that any person charged with an offence has the right:

(*a*) to be informed without unreasonable delay of the specific offence;
(*b*) to be tried within a reasonable time;
(*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence;
(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
(*e*) not to be denied reasonable bail without just cause….

Section 13 of the Charter provides that a witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

In the absence of CbCR legislation that protects taxpayers' rights against self-incrimination, taxpayers may rely on the general protection of the rights found in sections 11 and 13 of the Charter. It thus appears that legislation is required to bar

106 Government of Canada "Guidance on Country-By-Country Reporting in Canada" 14 https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc4651/guidance-on-country-country-reporting-canada.html (Date of use: 27 May 2020).

the exchange of information where taxpayers are suspected to have incriminated themselves.

9.6.5 The Minister's power to use information to pursue a taxpayer with criminal or civil investigations may contravene the taxpayers' rights to a fair trial

Section 231.2 of the Act provides that the taxpayer must produce information, additional information or any document when required to do so by the CRA. This information may be used by the Minister to charge the taxpayer with crime. However, it needs to be highlighted that the Income Tax Act does not specifically empower the Minister to refer the taxpayer for criminal investigation.

The taxpayers' right to fair trial may be infringed by the Minister when he turns an audit investigation into a criminal investigation against a taxpayer. The SCC delivered a landmark judgment regarding the distinction between tax audits and criminal investigations in *R v Jarvis*.[107] The facts of the case were briefly as follows: Mr Jarvis was charged with offences relating to tax evasion (which the court treated as criminal in nature). Evidence of the offences was obtained during an audit of his tax returns.

During the review, the auditor relied upon provisions of the Income Tax Act that granted auditors access to taxpayer records and required the taxpayer to answer relevant questions. When Mr Jarvis was questioned by the auditor, his answers were later used to help obtain a search warrant for records.

Mr Jarvis did not attack the constitutionality of sections 231.1(1) and 231.2(1),[108] but he applied to the court to exclude the seized records, arguing that the use of, *inter alia*, his compelled statements to further the tax evasion (criminal) investigation violated his rights under sections 7 and 8 of the Charter. The court considered the difference between the audit and investigative functions of the Minister and held that:

> Although the taxpayer and the [CRA] are in opposing positions during an audit, when the [CRA] exercises its investigative function they are in a more traditional

107 [2002] 3 SCR 757.
108 *R v Jarvis* para 65.

> adversarial relationship because of the liberty interest that is at stake. In these reasons, we refer to the latter as the adversarial relationship. It follows that there must be some measure of separation between the audit and investigative functions within the [CRA].[109]

The court further held that to determine when an audit has crossed the line and becomes a criminal investigation, one must look at all factors, including but not limited to such questions as:

(a) Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation *could have* been made?
(b) Was the general conduct of the authorities consistent with the pursuit of a criminal investigation?
(c) Had the auditor transferred his or her files and materials to the investigators?
(d) Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?
(e) Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?
(f) Is the evidence sought relevant to taxpayer liability generally? Or, as is the case with evidence as to the taxpayer's *mens rea*, is the evidence relevant only to criminal liability?
(g) Are there any other circumstances or factors that can lead the trial judge to the conclusion that the audit had in reality become a criminal investigation?[110]

In summary, section 7 of the Charter implies that when the purpose of an inquiry is the determination of criminal liability, the "full panoply" of Charter rights are engaged for the taxpayer's protection.[111] The consequences are as follows: first, no further statements may be compelled from the taxpayer by the Minister for the purpose of advancing the criminal investigation. Similarly, no documents may be required, from the taxpayer or any third party, for the purpose of advancing the criminal investigation.[112]

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109 *R v Jarvis* para 84.
110 *R v Jarvis* para 94.
111 *R v Jarvis* para 96.
112 *R v Jarvis* para 96.

This is no less true where the investigations into criminal liability and tax liability are in respect of the same tax period. So long as the predominant purpose of the parallel investigation actually is the determination of tax liability, the auditors may continue to resort to sections 231.1(1) and 231.2(1).[113] Section 231.2 was introduced in an effort to temper the scope of the Minister's powers and to prevent him from infringing taxpayers' right to a fair trial. The CRA could not use section 231.3 to embark on a "fishing expedition".

However, there may be circumstances in which CRA officials or the Minister conducting the tax liability inquiry desires to inform the taxpayer that a criminal investigation also is under way. In this case, the taxpayer is not obliged to comply with the requirement powers of sections 231.1(1) and 231.2(1) for the purposes of the criminal investigation.[114]

The court in *R v Jarvis* suggested a distinction between the audit and investigative functions within the CRA. In so doing, where the "predominant purpose" of an inquiry was a criminal investigation, the audit powers could not be used.[115] If they were, the information collected could not be used in a prosecution, because of the Charter of Rights protection of the right to a fair trial.

More importantly, *R v Jarvis* laid down guidelines for taxpayers to consider whether to comply with the Minister's conduct that turns the audit into a criminal investigation. This judgment is a classic example of whether evidence obtained during an audit (under information gathering provisions) could be used to further investigation or prosecution of offences under section 239(1) of the Act without violating a taxpayer's Charter rights.[116]

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113 *R v Jarvis* para 97.

114 *R v Jarvis* para 97.

115 *R v Jarvis* para 88.

116 Section 239 provides:

"(1) Every person who has

(a) made, or participated in, assented to or acquiesced in the making of, false or deceptive statements in a return, certificate, statement or answer filed or made as required by or under this Act or a regulation,

(b) to evade payment of a tax imposed by this Act, destroyed, altered, mutilated, secreted or otherwise disposed of the records or books of account of a taxpayer,

(c) made, or assented to or acquiesced in the making of, false or deceptive

9.6.6 The Minister's power to pursue criminal and civil investigations may cause taxpayers to incriminate themselves and impact on the right to privacy and fair trial

It may happen that taxpayers, in providing the information, could provide information that may incriminate them. Incriminating evidence means something from which a trier of fact may infer that an accused is guilty of the crime charged.[117] Section 13 of the Charter (stated in paragraph 9.6.4.3 above) provides protection against self-incrimination.

In *R v S (R J)*,[118] Iacobacci J held that:

> The principle against self-incrimination may mean different things at different times and in different contexts.[119]

In *R v F (S)*,[120] Finlayson JA held that the privilege against self-incrimination is not a constitutional right at all. It is one of the principles of fundamental justice which are qualifiers or modifiers of those rights which are enshrined in section 7 of the Charter. These rules do not prohibit the Crown from compelling the production of evidence, or even compelling the suspect to assist in its production.[121] They control the manner in which this evidence may be obtained.[122]

In *R v Jones*,[123] Lamer CJ defined self-incrimination as:

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entries, or omitted, or assented to or acquiesced in the omission, to enter a material particular, in records or books of account of a taxpayer,

(d) wilfully, in any manner, evaded or attempted to evade compliance with this Act or payment of taxes imposed by this Act, or

(e) conspired with any person to commit an offence described in paragraphs 239(1)(a) to 239(1)(d),

is guilty of an offence and, in addition to any penalty otherwise provided, is liable on summary conviction to

(f) a fine of not less than 50%, and not more than 200%, of the amount of the tax that was sought to be evaded, or

(g) both the fine described in paragraph 239(1)*(f)* and imprisonment for a term not exceeding 2 years."

117 *R v Henry* [2005] 3 SCR 609 para 25.

118 [1995] 1 SCR 451.

119 *R v S (R J)* 517.

120 (2000) 141 CCC (3d) 225 (Ont CA) para 17.

121 Stuesser 2004 *Alta L Rev* 549.

122 Stuesser 2004 *Alta L Rev* 549.

123 *R v Jones* [1994] 2 SCR 229.

> Any state action that coerces an individual to furnish evidence against him- or herself in a proceeding in which the individual and the state are adversaries violates the principle against self-incrimination. Coercion, it should be noted, means the denial of free and informed consent.[124]

In *Stanfield v Canada (Minister of National Revenue)*,[125] the Minister requested an audit of information from the taxpayer between August and October 2002. The court held that it was not within the parameters of the audit functions as contained in section 231.1(1) of the Act for the Minister to issue the letters and questionnaires in issue,[126] because their predominant purpose in this case was a criminal investigation involving the applicants. Therefore, the applicants' rights to remain silent and to avoid self-incrimination in the Charter were infringed.[127]

Innes and Williams[128] argue that in the case of audits and criminal investigations, the courts have held that the onus is on CRA investigators to caution a taxpayer against possible self-incrimination.[129] However, Sherrin[130] argues that individuals have constitutional rights against self-incrimination and to privacy.[131] As a result, they could not be compelled by law to provide pre-trial statements to police that can later be used against them at trial.[132] Dale[133] argues that protection in terms of section 13 of the Charter falls away in cases for the prosecution of perjury.[134]

In summary, the privilege against self-incrimination is not regarded as a constitutional right but as a principle of fundamental justice. These rules do not prohibit the CRA from compelling the production of evidence or compelling the taxpayer to assist in its production. They only control how it may be obtained. The core idea of the principle is that when the state uses its power to prosecute the taxpayer for a criminal offence, the taxpayer ought not to be required to assist the Minister in the investigation or trial of the offence.

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124 *R v Jones* 249.
125 2005 FC 1010.
126 *Stanfield v Canada (Minister of National Revenue)* paras 4, 74.
127 *Stanfield v Canada (Minister of National Revenue)* para 73.
128 Innes and Williams 2001 *CTJ* 1459.
129 Innes and Williams 2001 *CTJ* 1460–1461.
130 Sherrin 2010 *Alta L Rev* 93.
131 Sherrin 2010 *Alta L Rev* 94.
132 Sherrin 2010 *Alta L Rev* 94.
133 Ives 2006 *E&P* 212.
134 Ives 2006 *E&P* 212.

The privilege against self-incrimination does not mean that a taxpayer, for instance, is prohibited from providing incriminating statements to the Minister. It means that the state cannot require individuals to incriminate themselves. This means that a taxpayer may not be incriminated by his own evidence if that is used in the subsequent proceedings.

Where a taxpayer freely chooses to co-operate with the state's investigation and admits the crime, the principle against self-incrimination is not infringed.[135] However, it remains the responsibility of the tax official to warn a taxpayer of a possible self-incrimination.

The Parliament in Canada adopted the privilege against self-incrimination by enacting section 5(1) of the Canada Evidence Act,[136] which requires witnesses to answer potentially self-incriminating questions. Section 5(2) of the Act, however, prevents the state from adducing those answers in later criminal proceedings against those witnesses, as long as they were under compulsion and claimed the Act's protection at a previous proceeding. The exception is a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence.

A further protection is found in the Criminal Code ("the Code"),[137] which provides for the protection of statements made by an accused person. Section 672.21(2) of the Code provides that no protected statement or reference to a protected statement made by an accused is admissible in evidence, without the consent of the accused, in any proceeding before a court, tribunal, body or person with jurisdiction to compel the production of evidence.

In summary, a taxpayer has the right not to answer questions that might incriminate him under common law and section 13 of the Charter. Sections 5(1) and 5(2) of the Canada Evidence Act compel the taxpayer to answer potentially incriminating

135 Penney 2004 *CLQ* 474–532.
136 Canada Evidence Act (R.S.C., 1985, c. C-5).
137 Criminal Code (R.S.C., 1985, c. C-46).

questions. However, the same incriminating evidence cannot be used against the particular taxpayer in any other proceedings.

Therefore, taxpayers cannot incriminate themselves because the information cannot be further relied on against them. This is so, irrespective of whether incriminating statements were provided by the taxpayer or not.

9.7 LIMITATION OF RIGHTS UNDER THE CONSTITUTION

Rights of individuals and taxpayers in Canada are not absolute and may be limited under certain circumstances. The Constitution of Canada contains four limitations of rights provided or entrenched in the Charter.

First, section 1 of the Charter provides that the rights and freedoms are subject to reasonable limits prescribed by law in a free and democratic society. Secondly, section 7 of the Charter provides for the protection of an individual's rights to life, liberty and security of the person except in accordance with the principles of fundamental justice.

Thirdly, section 26 of the Charter provides that the guarantee in the Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada. Fourthly, section 33 of the Constitution provides that Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of the Charter.

9.8 OVERVIEW OF THE CHAPTER

This chapter dealt with a comparative study of Canada with respect to the challenges to a taxpayer's rights posed by the Minister's information gathering powers. The chapter commenced by outlining the constitutional and the Parliamentary system in Canada. It identified the CRA as the office that collects

taxes on behalf of the state from taxpayers, and the Minister of Finance as the person responsible for the administration of the office and the tax legislation.

The chapter also dealt with the constitutional relationship between the CRA and taxpayers. The chapter identified the various methods that the Minister may employ to gather information from taxpayers. These include selection for inspection, audits, examination of books and records, tax returns, inspections and audits, request of information from the taxpayer and third parties, search and seizure, the exchange of taxpayers' information with other countries, the Voluntary Disclosure Program and Reportable Transactions. The chapter explains how these information gathering powers may contravene the constitutional rights of taxpayers.

The next chapter deals with the administrative and common law principles in Canada that may be relied upon by taxpayers to protect their rights if they are contravened by the Minister's information gathering powers.

CHAPTER 10

ADMINISTRATIVE, COMMON LAW AND LEGITIMATE EXPECTATION ASPECTS THAT CAN PROTECT TAXPAYERS' RIGHTS IN CANADA

10 INTRODUCTION

This chapter demonstrates how administrative law and common law principles in Canada can be used to protect taxpayers' rights against the Minister of National Revenue's ("Minister's") information gathering powers. The chapter also deals with how the doctrine of legitimate expectations may be relied upon to protect taxpayers against the Minister's information gathering powers.

10.1 ADMINISTRATIVE PROVISIONS THAT CAN PROTECT TAXPAYERS' RIGHTS: THE COMMON LAW PRINCIPLE OF FINALITY

Generally speaking, administrative principles regulate the relationships between the government and the governed. Thus, administrative principles can protect individual taxpayers' rights and provide remedies for decisions which are beyond the power of the Minister or which are an abuse of the legislative scheme.

Administrative principles also ensure the effective performance of tasks and duties assigned by the statute to public bodies. These principles allow a certain flexibility but, in turn, must also ensure governmental accountability in the decision-making process.[1]

The Canadian administrative principles are largely based on common law. The most important common law principle, for the purpose of this work, is the "doctrine of finality", which is crucial in dispute resolution matters. In *Toronto (City) v C.U.P.E., Local 79,* Arbour J in the Supreme Court of Canada ("SCC") quoted Doherty JA in the Court of Appeal for Ontario to the effect that "finality concerns must be given

[1] Régimbald *et al* "Administrative Law".

paramountcy over [a] claim to an entitlement to relitigate […] culpability".[2] Arbour J further held that:

> In light of the above, it is apparent that the common law doctrines of issue estoppel, collateral attack and abuse of process adequately capture the concerns that arise when finality in litigation must be balanced against fairness to a particular litigant. There is therefore no need to endorse, as the Court of Appeal did, a self-standing and independent 'finality principle' either as a separate doctrine or as an independent test to preclude relitigation.[3]

In *British Columbia (Workers' Compensation Board) v Figliola*,[4] the SCC (per Cromwell J) held that:

> The common law has consistently seen these finality doctrines as being concerned with striking an appropriate balance between the important goals of finality and fairness, more broadly considered. Finality is one aspect of fairness, but it does not exhaust that concept or trump all other considerations. As for s. 27(1)(f), it confers, in very broad language, a flexible discretion on the Human Rights Tribunal to enable it to achieve that balance in the multitude of contexts in which another tribunal may have dealt with a point of human rights law. In my view, both the common law and in particular s. 27(1)(f) of the *Code* are intended to achieve the necessary balance between finality and fairness through the exercise of discretion. It is this balance which is at the heart of both the common law finality doctrines and the legislative intent in enacting s. 27(1)(f). In my respectful view, a narrow interpretation of the Tribunal's discretion under s. 27(1)(f) does not reflect the clear legislative intent in enacting the provision.
> ...
>
> I conclude that the Court's jurisprudence recognizes that, in the administrative law context, common law finality doctrines must be applied flexibly to maintain the necessary balance between finality and fairness. This is done through the exercise of discretion, taking into account a wide variety of factors which are sensitive to the particular administrative law context in which the case arises and to the demands of substantial justice in the particular circumstances of each case. Finality and requiring parties to use the most appropriate mechanisms for review are of course important considerations. But they are *not* the *only*, or even the most important considerations.[5]

From the discussion above it is clear that the doctrine of finality is one aspect of fairness and that it is firmly entrenched in Canadian common law. The courts recognise that, in the administrative law context, the common law doctrine of finality must be applied flexibly to maintain the necessary balance between finality and fairness.[6]

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2 [2003] 3 SCR 77 para 10. The CUPE is the Canadian Union of Public Employees.
3 *Toronto (City) v C.U.P.E., Local 79* para 55.
4 [2011] 3 SCR 422.
5 *British Columbia (Workers' Compensation Board) v Figliola* paras 58, 65 (original emphasis).
6 *British Columbia (Workers' Compensation Board) v Figliola* paras 58, 65.

This can be done through the exercise of discretion, by taking into account a variety of factors which are relevant to the particular administrative law context in the circumstances of each case. The doctrine assists administrators to consider and maintain finality and fairness in executing their duties.

Where the Minister takes time to decide whether to refer the taxpayer for an audit that is prolonged, taxpayers' rights to finality may be infringed. It needs to be noted from the above that the doctrine of finality is not regarded separately, because it is one of the aspects to test whether a fair trial has been administered.

Thus, taxpayers in Canada may rely on the doctrine of common law finality to compel the Minister to finalise the grievance or dispute as soon as possible. This entails compelling the Minister to maintain a balance between finality and fairness. The doctrine may also be relied on to determine whether the taxpayer has received a fair hearing.

10.2 COMMON LAW PRINCIPLES OF NATURAL JUSTICE THAT CAN PROTECT TAXPAYERS' RIGHTS

As a common law country, Canada applies the "principle of natural justice", which deals with a number of common law principles applicable to administrative inquiries and hearings. In a nutshell, the common law principles deal with the procedure which the Minister is expected to follow when executing the powers granted by the empowering Act.

Natural justice is the first limb of the common law principles.[7] It comprises the open fair hearing rule *(audi alteram partem)* and the requirement that a person hearing the matter must be unbiased *(nemo iudex in sua causa)* and also the *ultra vires* doctrine.[8]

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7 Churches 2015 *CJCL* 29–30.
8 Churches 2015 *CJCL* 29–30.

10.2.1 The *audi alteram partem* rule

The common law rule of *audi alteram partem* literally means that where the rights of a person are at stake, he should be given an opportunity to be heard.[9] The aggrieved person must state his case in response to allegations levelled against him.

The *audi alteram partem* rule can protect taxpayers' rights where those rights are contravened and the Minister does not listen to the taxpayer before a decision is made to refer him for criminal investigation. That could be the case where a taxpayer might want to raise some issues to the Minister but is not listened to.

The *audi alteram partem* rule may also be contravened where the Minister does not provide the taxpayer with the opportunity to state his case regarding a decision made to request information from him or from a third party or to refer him for search and seizure. The taxpayer may rely on this principle and must prove that the Minister contravened the taxpayer's common law right to natural justice.

10.2.2 The *nemo iudex in sua causa* rule

The maxim *nemo iudex in sua causa* means that no man should be a judge in his own case. The rule is widely thought to be the backbone of the principle of natural justice and constitutionalism.[10] In *Newfoundland Telephone Co. v Newfoundland (Board of Commissioners of Public Utilities)*,[11] one of the Commissioners, Mr Andy Wells, made comments to the press describing the executive benefits package of the appellant as "ludicrous" and "unconscionable" before the Board of Commissioners of Public Utilities could conduct the hearings.

The appellant objected to the participation of Mr Wells as one of the Board members, arguing that his statements were made with a reasonable apprehension of bias. However, the Board rejected the appellant's submissions and found that the Board could not remove one of its own members.

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9 Churches 2015 *CJCL* 29–30.

10 The principle was classically formulated in the Justinian *Codex* (Blume *Annotated Justinian Code* 3.5.1.).

11 [1992] 1 SCR 623.

The appellant appealed to the Court of Appeal for Newfoundland, claiming that the Board's orders were void. The court decided in favour of the Board, but the decision was further appealed to the SCC. The latter court held that Mr Wells's statements during and after the hearings showed a reasonable apprehension of bias, rendering the decision void. The court further held that once bias was present, the decision made by the administrative body could not stand.

In *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*,[12] the lawyer was acting as a prosecutor and as an adjudicator. The SCC held that the overlapping of functions may be permissible, but that there must be some separation. The court found that there was a reasonable apprehension of bias because the lawyer was acting as a prosecutor and an adjudicator at the same time.

In the tax context, the Minister may be considered biased where he requests information in the course of an audit on the affairs of the taxpayer because the latter drives an expensive car. The Minister could also be considered biased if he refers the taxpayer for search and seizure in order to settle a score with that taxpayer.

In such cases the Minister could be considered as merely embarking on a fishing expedition. A taxpayer needs to prove that the Minister exercised the above-mentioned powers because he is biased.

10.2.3 The *ultra vires* doctrine

Ultra vires in general refers to a situation where the administrator acts beyond the scope of his work. In Canada, *ultra vires* taxation refers to the collection of fees or taxes by the government when those moneys were levied in terms of an unconstitutional statute, regulation, or order-in-council, or by a statutory authority acting outside the bounds of its enabling legislation.[13]

12 [1996] 3 SCR 919.
13 Pal 2008 *UT Fac L Rev* 65.

Thus, the *ultra vires* taxation ground may be invoked by taxpayers where the Minister applies an unconstitutional provision or regulation or where he acts beyond the scope of the legislation to exercise his information gathering powers. The law on *ultra vires* taxation is said to be on the border between public and private law.[14]

As a result, cases of *ultra vires* taxation are mainly about justice between the opposing parties in a private law action for the restoration of those moneys paid to the government by taxpayers.[15]

The *ultra vires* doctrine ensures the separation of powers between the judiciary, legislatures and the executive; the division of powers between the federal and provincial governments; and the rule of law. The levying of *ultra vires* taxes can also ensure that taxpayers seek recovery for moneys unconstitutionally collected by the state.[16]

The SCC dealt with *ultra vires* taxes on a number of occasions in 1977. Thus, in the case of *Amax Potash Ltd. v Government of Saskatchewan*,[17] for example, the province of Saskatchewan imposed a tax on potash producers. Section 92(2) of the Constitution Act, 1867, provides that provinces may only levy direct taxes. Indirect taxation was under the exclusive purview of the Federal Government under section 91(3) of the Constitution Act, 1867.

The province of Saskatchewan enacted the Proceedings Against the Crown Act ("PACA")[18] to deal with the restitution of *ultra vires* taxes. Section 5(7) of the PACA prevented the recovery of the moneys paid to the province of Saskatchewan in the event that the tax was found to be *ultra vires.* This legislation was specifically enacted to prevent the recovery of *ultra vires* taxation by the potash producers.

The question decided by the SCC was whether the PACA was unconstitutional for barring the potential recovery of *ultra vires* taxes and not whether the potash tax

14 Pal 2008 *UT Fac L Rev* 68.
15 Pal 2008 *UT Fac L Rev* 68.
16 Pal 2008 *UT Fac L Rev* 68.
17 [1977] 2 SCR 576.
18 Proceedings against the Crown Act, RSS 1965, c 87.

itself was *ultra vires*. Dickson J held that the court was faced with a novel legal problem but that barring the recovery of taxes collected pursuant to an *ultra vires* statute was impermissible. The justice held that:[19]

> To allow moneys collected under compulsion, pursuant to an *ultra vires* statute, to be retained would be tantamount to allowing the provincial Legislature to do indirectly what it could not do directly, and by covert means to impose illegal burdens.

Therefore, the provisions of the PACA barring the restitution of the taxes were struck down.

In 1989 the decision in *Air Canada v British Columbia*[20] exacerbated much of the confusion in the lower courts on the law regarding *ultra vires* taxes. In this case, several airlines claimed the restitution of moneys paid under a gasoline tax since 1974. The SCC held that the tax was a direct tax validly enacted by the provincial government. The majority judgment of Lamer, La Forest and L'Heureux-Dubé JJ was delivered by La Forest J, Beetz J concurring, McIntyre J agreeing with La Forest J's reasons but subject to Beetz J's qualifications, and Wilson J dissenting in part. Le Dain J took no part in the judgment.

The law had previously barred restitution in cases of mistake of law, but La Forest J criticised the "mistake of law" rule as being so replete with technicality and difficulty that it should not be extended to the constitutional plane. The court held that allowing recovery by a few private individuals or corporations would jeopardise the protection of the public interest.

The prior inconsistency related to the common law bar to the recovery of *ultra vires* taxes, the existence of the defence of passing on, and the policy concern with fiscal chaos which stemmed from the case of *Air Canada v British Columbia.*[21] The defence of passing on provides a defence that the court may deny restitution because the surcharge or moneys paid by the plaintiff have already passed on to

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19 *Amax Potash Ltd. v Government of Saskatchewan* 590.
20 [1989] 1 SCR 1161.
21 Pal 2008 *UT Fac L Rev* 73.

consumers.[22] As a result, the plaintiff does not suffer any loss. The court prevented specific statutory bars to recovery, though the principles favoured recovery as articulated in *Air Canada*.

In *Air Canada v Ontario (Liquor Control Board)*,[23] the SCC ordered the restitution of gallonage fees collected by the Liquor Control Board of Ontario ("LCBO") from airlines selling alcohol on airplanes. According to the court, the provincial statute authorising such fees had been misapplied to include the gallonage fees charged to the airlines. This was an important judgment because it demonstrated the context of fees levied by a misapplied statute. Rather than being *ultra vires* in a constitutional sense, such fees were held to be invalid according to administrative law principles.

The current state of the law in Canada on the restitution of *ultra vires* taxes is founded in the SCC's decision in *Kingstreet Investments Ltd. v New Brunswick (Finance)*.[24] This decision is in many ways a reaction to the incoherence and inconsistency of the Canadian law prior to *Kingstreet*, which lacked a clear framework.[25]

The decision of the SCC in *Kingstreet* changed the position of the law regarding *ultra vires* taxes levied on taxpayers. In this case, several bar and night club owners in the province of New Brunswick instituted an application to recover fees charged by the New Brunswick Liquor Corporation. These owners bought alcohol from the provincial liquor retail stores operated by the corporation. They were required to pay the retail price, and an additional user charge under regulation in terms of the New Brunswick Liquor Control Act ("LCA").[26]

The user charge ranged between 5 and 11 per cent of the retail price since the bar owners began operating in 1988. The total amount of money paid was said to be over $1 million. It was also agreed at the trial that the user fee far exceeded the

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22 In *British Columbia v Canadian Forest Products Ltd.* [2004] 2 SCR 74, the dissenting judgment of Bastarache, LeBel and Fish JJ delivered by LeBel J rejected the defence in part because it is inconsistent with the basic principles of restitution law.

23 [1997] 2 SCR 581.

24 [2007] 1 SCR 3.

25 Pal 2008 *UT Fac L Rev* 73.

26 Liquor Control Act, RSNB 1973, c. L-10.

amount needed by the province to recoup the costs of administering the licensing scheme.

The respondent argued that the night club owners did not suffer any loss and relied on the defence of passing on. Therefore, restitution of the taxes paid by the night club owners must be denied because the surcharge paid by them had already been passed on to consumers.

The SCC on appeal in *Kingstreet* rejected in its entirety the defence of passing on accepted by the Court of Appeal for New Brunswick. Giving the judgment of the SCC, Bastarache J critiqued the defence of passing on for three reasons: first, it is inconsistent with the law of restitution; secondly, it is "economically misconceived"; and, thirdly, it is too difficult in practice to ascertain whether passing on has occurred or not.[27] Therefore, the SCC in *Kingstreet* found it inappropriate to deny relief on the basis of passing on in cases of *ultra vires* taxation.

In other words, Bastarache J rejected the defence "as generally inapplicable in the context of *ultra vires* taxes".[28] The passing-on defence was also severely criticised in case law. Bastarache J rejected the defence in part because it is inconsistent with the basic principles of restitution law and was created to prevent windfalls to the plaintiff.[29]

Two months after *Kingstreet*, the SCC delivered judgment in *Canada (Attorney General) v Hislop.*[30] This decision severely hindered claimants in actions for restitution of unjust enrichment by the state under government benefit programs.[31] The court distinguished *Kingstreet* and held that:

> The difference between the result in *Kingstreet* and the type of situation in the present case may be understood in terms of the basic distinction between cases involving moneys collected by the government and benefits cases. Where the government has collected taxes in violation of the Constitution, there can be only one possible remedy: restitution to the taxpayer. In contrast, where a

27 *Kingstreet Investments Ltd. v New Brunswick (Finance)* para 44.
28 *Kingstreet Investments Ltd. v New Brunswick (Finance)* para 52.
29 In *Kingstreet Investments Ltd. v New Brunswick (Finance)* paras 47–48, Bastarache J referred to *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 (HCA) and *British Columbia v Canadian Forest Products Ltd.*
30 [2007] 1 SCR 429.
31 Pal 2008 *UT Fac L Rev* 94.

> scheme for benefits falls afoul of the s. 15 guarantee of equal benefit under the law, we normally do not know what the legislature would have done had it known that its benefits scheme failed to comply with the *Charter.* In benefits cases, a range of options is open to government. … In our political system, choosing between those options remains the domain of governments.[32]

In tax law, the Minister may apply a wrong or incorrect provision to gather information from taxpayers, for example, in the form of audits, getting information from third parties or through search and seizure. In this case, and according to *Kingstreet*, the taxpayer may recoup the taxes, penalties and fees incurred if the Minister misapplied a provision or if it is an unconstitutional provision. Taxpayers would need to prove that the Minister applied an unconstitutional statute when exercising his information gathering powers.

It is important to note that the significance of this discussion lies in the fact that Canadian law recognises the *ultra vires* taxation principle. Taxpayers can invoke this principle or remedy to claim back taxes paid as a result of the unconstitutional statute. Although the concept underwent changes over the years, it is also important to highlight that the *Kingstreet* and *Hislop* cases continue to be the points of reference when dealing with the concept of *ultra vires* taxation.

The government of New Brunswick subsequently amended the LCA to retroactively impose a "direct" tax on the purchaser of alcohol in an amount equal to the indirect tax previously imposed on licensees.[33] The legislation deems the purchaser to have paid the "new" tax at the time that he purchased alcohol from a licensee, and deems the licensee to have collected the tax as an agent and to have remitted it to the province.[34]

The amendments further deem any moneys paid on account of the prior invalid tax to have been collected and retained by the province as payment for the new tax, "notwithstanding any judgment obtained by any person for recovery of any of the money, whether the judgment is obtained before, on or after the enactment" of the

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32 *Canada (Attorney General) v Hislop* para 108.
33 Thang 2010 *CTJ* 616.
34 Thang 2010 *CTJ* 616–617.

amendments.[35] The amendments are deemed to have come into force on 1 March 1998 and are "retroactive to the extent necessary to give it effect on and after that date".[36]

The net effect of these enactments is essentially to allow the government to retain the moneys paid on account of the invalid fee imposed on the licensees under the prior legislation and to offset those amounts against the purchaser's liability for the new tax under the amended provision, which the licensee is deemed to have collected. Since the new tax is in the same amount as the prior fee and the purchaser is deemed to have paid the tax, no additional liability arises.[37] The enactments, however, effectively preclude recovery of the prior fee by the licensees notwithstanding any judgment obtained at any time for the recovery of the fee.[38]

This puts the taxpayer in a position that he is not able to recover the tax paid. His rights to invoke the *ultra vires taxation* and recover tax are limited by the amendment to the LCA.

10.3 THE DOCTRINE OF LEGITIMATE EXPECTATIONS AND HOW IT CAN BE RELIED ON TO PROTECT TAXPAYERS' RIGHTS IN CANADA

This part of the work deals with the role of the doctrine of legitimate expectations in protecting the rights of taxpayers when the Minister gathers information from them in a way that infringes those rights.

As discussed in Chapters 4 and 7, the application of the doctrine covers two aspects: procedural legitimate expectations and substantive legitimate expectations. Procedural legitimate expectations provide for the expectations created by a past practice, or a promise or representation made by the administrator that a certain procedure will be followed. Substantive legitimate expectations provide that a past practice, or a promise or representation must be fulfilled.

35 Thang 2010 *CTJ* 617.
36 Thang 2010 *CTJ* 617.
37 Thang 2010 *CTJ* 617.
38 Thang 2010 *CTJ* 617–618.

For the purposes of this work, it needs to be determined whether the doctrine of legitimate expectations is still effective in advancing the substantive remedies available to aggrieved taxpayers.

The requirements of the doctrine of legitimate expectations in South Africa and the United Kingdom ("UK") are somewhat similar. So where, for example, a taxpayer is, promised that he will not be subjected to an audit or his property is searched and seized as was previously the case, the Minister may not deviate from this practice without the taxpayer's having the opportunity to be heard. The reason is that an expectation would have been created by a practice in the past, such that the situation does not warrant that the taxpayer should be audited and the property searched and seized.

The discussion now turns to the doctrine of legitimate expectations in Canadian law. In Chapter 9, the concept of soft law was discussed. The Canada Revenue Agency ("CRA") itself promulgates the guidelines to clarify the particular provisions of the Income Tax Act ("the Act").[39] It is therefore reasonable for taxpayers and tax preparers to expect the CRA to rely and make decisions based on their contents.[40] It should be noted that the guidelines themselves are not intended to replace the law and that they are not binding.[41]

The discussion above should drive the discussion relating the application and reliance of taxpayers to the doctrine of legitimate expectations.

10.3.1 The origin, application and development of the doctrine of legitimate expectations in Canada based on soft law

The doctrine of legitimate expectations in Canadian law originated in the UK case law which provides the test on how the doctrine should be applied.[42] The reason may be that statutes neither define nor explain "legitimate expectations". It is against

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39 Income Tax Act (1985, c. 1 (5th Supp.))

40 Ansari and Sossin *Legitimate Expectations in Canada: Soft Law and Tax Administration* 300.

41 Ansari and Sossin *Legitimate Expectations in Canada: Soft Law and Tax Administration* 300.

42 *Schmidt v Secretary of State for Home Affairs* [1989] 2 Ch 149 (CA).

this background that a discussion of the cases dealing with the origin and development of the doctrine in Canada is undertaken.

Most of the Canadian cases dealing with legitimate expectations are on immigration law. These cases on that subject are important for this work because of the principles which they laid down. This work considers whether taxpayers may rely on the same principles in dealing with the Minister.

The doctrine of legitimate expectations was first discussed at length by the SCC in the context of soft law in *Martineau v Matsqui Institution Disciplinary Bd*.[43] An inmate in a federal penitentiary challenged a conviction for a disciplinary offence, relying in part on departures from a Commissioner's directive providing procedural safeguards/rights. The SCC relied on *Schmidt v Secretary of State for Home Affairs*[44] and held that natural justice and fairness are principles of judicial process deemed by the common law to be annexed to legislation, with a view to bringing statutory provisions in conformity with the common law requirements of justice.[45]

In the case of *Sunshine Coast Parents for French v Board of School (Trustees of School District No. 46)*,[46] Spencer J held that the rule of legitimate expectations formed part of Canadian law, but implied that legitimate expectations could only arise from a promise or practice of consultation. However, the judge further held that the administrator was making a legislative decision, and that fairness did not apply to legislative functions.[47]

The most important and most often cited early Canadian case on the doctrine of legitimate expectations is *Bendahmane v Canada (Minister of Employment and Immigration).*[48] Bendahmane came to Canada on a visitor's visa, but was denied entry to Canada by an immigration officer who believed that he was not a "genuine

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43 [1980] 1 SCR 602.
44 [1989] 2 Ch 149 (CA).
45 *Martineau v Matsqui Institution Disciplinary Bd* 627.
46 (1990) 49 B.C.L.R. (2d) 252 (BC SC).
47 In *Brink's Canada Ltd. v Canada Council of Teamsters et al.* [1995] FCJ 1114 (QL) (CA); (1995) 185 NR 299 (FCA), the Federal Court of Appeal held that a practice must be regularly followed over an extended period of time in order to trigger the doctrine.
48 [1989] 3 FC 16 (FCA).

visitor". An inquiry confirmed this finding, which Bendahmane appealed. Although the special criteria did not apply to Bendahmane (since an inquiry had already been held in his case), he applied for refugee status. The Minister refused to consider his application.

Bendahmane argued that the representation that his application would be handled like the other applications created a legitimate expectation. As a result, he was entitled to a hearing like other claimants (who had made the request at the proper time). In the Federal Court of Appeal, Hugessen JA held that the Minister had not fulfilled the duty to act fairly.

The judge ruled that the Minister was obliged to consider Bendahmane's application, because the representations which the Minister had made in the letter gave rise to an expectation that the applicant's application would be considered. In this case the doctrine of legitimate expectations applied so as to warrant the finding that a duty of fairness existed.

The SCC attempted to bring Canadian and English principles together in *Old St. Boniface Residents Assn. Inc. v Winnipeg (City).*[49] The city councillors had promised the association that it would be consulted as part of the process of developing a plan for the area, but this consultation did not happen. This situation, according to the plaintiffs, created a legitimate expectation preventing the city from approving the rezoning without the consultation taking place. Sopinka J held:

> It appears, however, that at bottom the appellant's submission is that the conduct of the committee created a legitimate expectation of consultation. … The principle developed in these cases is simply an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity. The court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation.[50]

According to the justice, the doctrine of legitimate expectations was used as a device that led to the implication of a duty of fairness. However, the judgment does not explain how the duty of fairness was extended, or in what situations legitimate

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49 [1990] 3 SCR 1170; (1990) 75 DLR (4th) 385.

50 *Old St. Boniface Residents Assn. Inc.* [1990] 3 SCR 1203–1204; (1990) 75 DLR (4th) 414.

expectations led to a duty of fairness where there would otherwise be none. The court's wording suggests that legitimate expectations only arose from conduct giving rise to an expectation of consultation.[51]

The court further held that the doctrine is an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity.[52]

Eight months later, the doctrine of legitimate expectations was further limited by the SCC in *Reference Re Canada Assistance Plan (B.C.)*.[53] The federal government decided to cut expenditures and limit the growth of payments made to financially stronger provinces under the Canada Assistance Plan ("the Plan").[54] The reason was to reduce the federal budget deficit.

The court had to answer two constitutional questions: one question which is relevant for this work was whether the terms of the agreement, the subsequent conduct of the Government of Canada pursuant to the agreement, and the provisions of the Plan gave rise to a legitimate expectation. The expectation was based on whether the Government of Canada would not introduce a bill into Parliament to limit its obligation under the agreement or the Plan without the consent of the province of British Columbia.

The SCC held that the doctrine of legitimate expectations should be regarded as "an extension of the rules of natural justice and procedural fairness" which may afford "a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity".[55]

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51 *Old St. Boniface Residents Assn. Inc.* [1990] 3 SCR 1203–1204; (1990) 75 DLR (4th) 414.
52 *Old St. Boniface Residents Assn. Inc.* [1990] 3 SCR 1203–1204; (1990) 75 DLR (4th) 414.
53 [1991] 2 SCR 525.
54 Canada Assistance Plan (R.S.C., 1985, c. C-1).
55 *Reference Re Canada Assistance Plan (B.C.)* 557.

Sopinka J held that the doctrine was not applicable because of the nature of the Minister's decision that was being challenged, which was the introduction of a bill into Parliament. The introduction of legislation, he held, is a fundamental part of the legislative process, and using the doctrine of legitimate expectations to restrict it would interfere with Parliamentary sovereignty.[56]

The substantive review of the reasonableness of the Immigration Officer's exercise of discretion was at stake in *Baker v Canada (Minister of Citizenship and Immigration)*.[57] L'Heureux-Dubé J in her reasons for judgment described how a party's legitimate expectations may determine his entitlement to procedural fairness:

> As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: (...) Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded: (...). Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the 'circumstances' affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.[58]

From the decision above, this doctrine, as applied in Canada, is based on the principle that procedural fairness takes into account the promises or regular practices of administrative decision-makers. The court addressed the legitimate expectations in the context of soft law and held that the failure of a decision-maker to follow the applicable guideline or applicable international agreements did not render the exercise of discretion unfair.[59]

In *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*,[60] the Mount Sinai Hospital Center was established as a long-term treatment facility dealing primarily with patients suffering from tuberculosis ("TB"). In 1984,

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56 *Reference Re Canada Assistance Plan (B.C.)* 558.
57 [1999] 2 SCR 817.
58 *Baker v Canada (Minister of Citizenship and Immigration)* para 26.
59 *Baker v Canada (Minister of Citizenship and Immigration)* para 29.
60 [2001] 2 SCR 281.

negotiations between the Center and the Ministry of Health and Social Services were held to move the Center to Montreal.

Throughout those negotiations the Minister made a promise to alter the permit once the Center moved to Montreal. Without giving the Center an opportunity to make submissions on the issue, the Minister informed the Center that it would not receive the promised permit and would have to operate under the old unaltered permit.

The applicant invoked legitimate expectations to compel the Minister of Health to fulfil a statutory obligation and execute a particular action. In effect, the Center based an argument on substantive legitimate expectations for the court to order the Minister to issue the promised permit.

The Minister's decision was set aside through the application of the ordinary rules of procedural fairness. The court held that the Minister's decision was patently unreasonable and was reached by a process that was demonstrably unfair and, therefore, an abuse of discretion.[61] The minority addressed the respondent's argument that legitimate expectations can give rise to substantive relief. The minority noted the differences between the Canadian and the English context (which was developing beyond the procedural means).[62]

It is clear from the discussion above that promises that a certain procedure is to be followed give rise to legitimate expectations in Canada. This is the law that Canada copied from the UK, and this was the most accepted manner in which expectations arose. The expectation could be in the form of soft law such as statements made to the plaintiff, or representations contained in pamphlets, policy documents, or resolutions.[63] Many courts have held that the promise must be very clearly set out: if there was doubt that a promise was being made, it was sometimes held that there was no expectation.[64]

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61 *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* para 66.

62 *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* para 24.

63 *Qi v Canada (Minister of Citizenship & Immigration)* (1995) 33 Imm LR (2d) 57 (FCTD); *Gaw v Commissioner of Corrections* (1986) 2 FTR 122 (FCTD).

64 *Thin Ice et al. v. Winnipeg (City)* 105 Man R (2d) 297 (MB QB); *Saskatchewan Government Employees' Union et al. v. Saskatchewan et al.* (1991) 96 Sask R 22 (SK QB); Wright 1997 *OHLJ* 179.

Finally, it is important to note that in Canada, as in the UK, the person making the promise must have authority to do so, and that the promise made must not conflict with a statutory duty; otherwise the legitimate expectation was not protected.[65] The cases also generally recognise that a regular practice of a certain procedure being followed could give rise to legitimate expectations.[66]

From the discussion above, the requirements of the doctrine of legitimate expectations may be summarised as follows: a promise or practice of consultation; representations made by the administrator and conduct giving rise to the expectation of consultation. These are discussed below.

10.3.1.1 A promise or practice of consultation by the administrator

In *Sunshine Coast Parents for French v Board of School Trustees District No. 46*,[67] the court held that a legitimate expectation could only arise from a promise or practice of consultation. With respect to taxpayers, this means for practical purposes that where, for example, the Minister has made a promise that the taxpayer shall not be subjected to search and seizure, a legitimate expectation arises where the Minister departs from the promise and commences with search and seizure procedures on the affairs of the taxpayer.

Legitimate expectations may also arise where the Minister, for instance, creates a practice that all taxpayers are given notice of an impending audit. In such a case, the Minister may not depart from that practice without affording the taxpayer an opportunity to state his case.

10.3.1.2 Representations made by the administrator

In *Reference Re Canada Assistance Plan (B.C.)*,[68] the court recognised representations by the administrator as constituting legitimate expectations and as

65 Wright 1997 *OHLJ* 180.
66 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL).
67 (1990) 49 B.C.L.R. (2d) 252 (BC SC).
68 [1991] 2 SCR 525.

an extension of the rules of natural justice and procedural fairness which may afford an individual an opportunity to make representations in circumstances where no such opportunity existed.[69]

10.3.1.3 Conduct of the administrator that may give rise to an expectation of consultation

In *Old St. Boniface Residents Assn. Inc. v Winnipeg (City)*,[70] the court held that legitimate expectations only arise from conduct that gives rise to an expectation of consultation. The conduct of the public official may lead a party to believe that his rights would not be affected without consultation. For example, a taxpayer could have an expectation that he would not be denied a consultation regarding an audit on his affairs without being afforded an opportunity to consult with the Minister.

10.3.2 The application of the substantive over procedural legitimate expectations based on soft law

The discussion that follows seeks to establish whether the Canadian courts apply the doctrine of legitimate expectations to give substantive or procedural relief to individuals and, in particular, taxpayers. In other words, it needs to be determined whether a court could compel an administrator (the Minister of National Revenue) to grant a substantive benefit to an individual (the taxpayer) based on that individual's legitimate expectation of receiving such benefit. In most Commonwealth jurisdictions, the doctrine of legitimate expectations has been developing beyond the procedural context for a number of years.[71]

As indicated above, most cases have held that the legal result of applying the principle of legitimate expectations was to compel a body to keep a promise which it had made as to the procedure which it would follow, or to continue following a practice which it had already followed.

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69 *Reference Re Canada Assistance Plan (B.C.)* 557.
70 [1990] 3 SCR 1170.
71 Quinot 2004 *GLJ* 66.

The decision in *Reference re Canada Assistance Plan (B.C.)* (above) made it clear that a body could not be compelled to uphold its promise about a substantive result.[72] However, it was not always clear what the difference was between "procedural" and "substantive".[73] The court further held that the door was shut only against substantive relief.[74] This means that the doctrine of procedural legitimate expectations still applies to grant individuals relief based on representations made by administrators.

In *Baker v Canada (Minister of Citizenship and Immigration)* it was held that the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.[75]

In *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* the court held that there was no need to expand either the availability or the content of procedural fairness.[76] In short, there was no need to resort to the doctrine of legitimate expectations to achieve substantive relief, and substantive relief was not available under this doctrine. The minority considered that *Reference re Canada Assistance Plan (B.C.)* and *Old St. Boniface Residents Assn. Inc. v Winnipeg (City*) closed the door on substantive relief.[77]

In *Therrien v The Queen*[78] the two appellants appealed an assessment made by the Minister of National Revenue pursuant to section 160(2) of the Income Tax Act. The Minister assessed each of the appellants in respect of dividends that they received

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72 *Canada (Attorney General) v Canada (Commissioner of the Inquiry on the Blood System) (T.D.)* [1996] 3 FC 259 (TD).
73 Wright 1997 *OHLJ* 182.
74 *Reference Re Canada Assistance Plan (B.C*.) 557.
75 *Baker v Canada (Minister of Citizenship and Immigration)* para 26.
76 *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* para 38.
77 *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* para 26.
78 *Therrien v The Queen* [2005] 5 CTC 2287; [2005] 59 D.T.C. 191.

from Les Habitations Pierre Therrien Inc. ("the company") on the basis that the company had a tax liability under the Act at the time that it paid those dividends.

The issues to be decided by the Tax Court of Canada were as follows: what was the amount of the company's tax liability at the time that the dividends were paid out; was the company's alleged tax liability overestimated because of errors made by the Minister in reassessing the company for the taxation years 1991 to 1994 when it computed the income and expenses and allocated non-capital losses carried back from the 1995 taxation year; was the Minister bound by the settlement offer that it made to the company, pursuant to which it would reduce the amount owing for the years in question, even though the company declined the offer; and did the appellants provide consideration for the payment of the dividends.

The appellants relied on the doctrine of substantive legitimate expectation in their appeal. The court held that:

> In any event, it is difficult to envisage how the doctrine of legitimate expectation could apply to the case at bar. … It is part of the rules of procedural fairness and attaches 'to the conduct of a public authority in the exercise of a discretion'. It is a procedural principle, and creates no substantive rights. The Supreme Court has held that the doctrine of legitimate expectations ... affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity. The court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation ... and that '[w]here it is applicable, it can create a right to make representations or to be consulted'.[79]

There were several reasons that the doctrine of substantive legitimate expectations did not apply to the case.[80] First of all, the act of assessing the appellants was not discretionary. Rather, it was one of the Minister's duties, so the doctrine could not override the Act.[81] Secondly, the procedural fairness of assessments was guaranteed by the procedures set out in the Act, which enable any taxpayer to contest an assessment. By filing an appeal in the court, the appellants availed themselves of these procedural rights.[82] Finally, the doctrine contemplated administrative action giving rise to reasonable expectations of fair procedure before

79 *Therrien v The Queen* para 10.
80 *Therrien v The Queen* para 11.
81 *Therrien v The Queen* para 11.
82 *Therrien v The Queen* para 11.

the contested decision was made.[83]

In *Agraira v Canada (Public Safety and Emergency Preparedness)*,[84] the SCC discussed the legitimate expectations which related to soft law. The appellant argued that the Minister took a narrow approach to determine the "national interest" and failed to meet a legitimate expectation that certain procedures would be followed and certain factors taken into account.[85] The SCC considered the reasonableness of the Minister's decision and referred to the guidelines as part of the reasonableness assessment.[86]

The SCC held that the guidelines contained a set of factors which appeared to be relevant and reasonable for the exercise of the particular discretion. However, the Minister was not required to apply them strictly, but they should have guided the exercise of his discretion and assisted him in framing a fair administrative process.[87]

Most importantly, the SCC held that legitimate expectations cannot provide substantive rights; courts are limited to granting procedural relief only.[88] The SCC further held that the guidelines, which were publicly available, met the threshold requirements to give rise to a legitimate expectation[89] and the expectation was fulfilled.[90]

In summary, the SCC confirmed that the doctrine of legitimate expectations does create rights to fairness or natural justice and also partly substantive rights. The rules of procedural fairness can only create a right to make representations or to be consulted.[91]

In effect, the doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or

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83 *Therrien v The Queen* para 11.
84 [2013] 2 SCR 559.
85 *Agraira v Canada (Public Safety and Emergency Preparedness)* para 2.
86 *Agraira v Canada (Public Safety and Emergency Preparedness)* para 85.
87 *Agraira v Canada (Public Safety and Emergency Preparedness)* para 60.
88 *Agraira v Canada (Public Safety and Emergency Preparedness)* para 97.
89 *Agraira v Canada (Public Safety and Emergency Preparedness)* para 98.
90 *Agraira v Canada (Public Safety and Emergency Preparedness)* para 101.
91 *Baker v Canada (Minister of Citizenship and Immigration)* para 26.

regular practices of administrative decision makers.[92] Thus, it would generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.[93]

It is important to note that although taxpayers in Canada can rely on the doctrine of legitimate expectations to advance their procedural rights, the grey area still remains whether the taxpayers may use the doctrine to advance substantive rights.

10.3.3 Commentators' views on the application of the substantive over procedural legitimate expectations

According to Young,[94] legitimate expectations provide an emerging legal doctrine which has developed out of English law. The concept finds application as follows:

> [W]here a public authority or an official exercising a power involving discretion creates by words or conduct a legitimate expectation in the minds of person capable of being prejudicially affected by the power..., a Court may at the very least require reasonable notice and an opportunity to be heard or respond before the power is exercised contrary to the legitimate expectation induced.[95]

Shapiro[96] argues that the doctrine of legitimate expectations has not been confined to English law but that it has also been invoked in Canada even though the Canadian courts have been more hesitant to apply the doctrine.[97] Wright[98] posits that legitimate expectations should be seen as a part of fairness, rather than as an "add-on" to it.[99] When, as in these cases, it was used as a threshold concept, the danger arises that the general duty of fairness would be restricted and that interests and privileges would be defined more narrowly.[100]

Within the tax context, commentators agree that the doctrine of legitimate expectations is an extension of the rules of natural justice.[101] This is because the

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92 *Baker v Canada (Minister of Citizenship and Immigration)* para 26.
93 *Baker v Canada (Minister of Citizenship and Immigration)* para 26.
94 Young 1986 *The Advocate* 814.
95 Young 1986 *The Advocate* 814.
96 Shapiro 1992 *JLSP* 288.
97 Shapiro 1992 *JLSP* 288.
98 Wright 1997 *OHLJ* 174.
99 Wright 1997 *OHLJ* 174.
100 Wright 1997 *OHLJ* 174.
101 Young 1986 *The Advocate* 814; Shapiro 1992 *JLSP* 288; and Wright 1997 *OHLJ* 174.

doctrine provides taxpayers with an opportunity to be heard and to be consulted where no such right existed. They also agree that the doctrine encompasses a general duty of fairness.

It has been argued by academics in Canada that the doctrine of legitimate expectations is a UK concept, designed for the UK administrative law.[102] As such, its confused application in Canada has shown that it could not be easily transplanted in Canada.[103] It has been applied without much consideration for the Canadian context, leading to ambiguity about the role of the doctrine and its legal effects. [104]

It is for these reasons that the doctrine of legitimate expectations could not be imported from British cases without changes or be used as a tool to expand upon the duty of fairness. Instead, its place in Canadian administrative law should be clearly defined, distinguished from the British concept, and limited.[105]

As noted by Elias,[106] the doctrine of substantive expectations is more extensive than an actual benefit or other advantage that would be conferred on or continued to the aggrieved person. The procedural concept offers a more limited expectation, namely, that the decision affecting the individual will not be taken until he has had the chance to make representations. In that situation, the expectation is not that the benefit itself would be conferred.[107]

Wright[108] opines that although the judgment in *Old St. Boniface Residents Assn. Inc. v Winnipeg (City)*[109] purports to apply the British and Canadian cases, it in fact severely restricted the doctrine and leads to even more confusion.[110] This decision imported the doctrine but without even considering its place in the different Canadian context.[111]

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102 Wright 1997 *OHLJ* 141.
103 Wright 1997 *OHLJ* 141.
104 Wright 1997 *OHLJ* 141.
105 Wright 1997 *OHLJ* 141.
106 Elias “Legitimate Expectation and Judicial Review” 39.
107 Elias “Legitimate Expectation and Judicial Review” 39.
108 Wright 1997 *OHLJ* 165.
109 [1990] 3 SCR 1170; 75 DLR (4th) 385; [1991] 2 WWR 145.
110 Wright 1997 *OHLJ* 165–166.
111 Wright 1997 *OHLJ* 166.

Therefore, the use of the doctrine to give a "substantive content" to the duty of fairness was not appropriate. In that sense, Canada was not to follow the UK down the road to using the doctrine as a device to hold governments to the substantive elements of their promises.[112]

As alluded to above, Canadian academics and commentators agree that the doctrine of substantive legitimate expectations is a British concept and cannot be applied in Canada. There is evidence that when the doctrine is applied in Canada without changes, this step leads to ambiguity and confusion.

In the tax context, it is a contravention of the doctrine of legitimate expectations where the Minister in Canada, contrary to representations or past practice, requests information from the third party (for example, the secretary of the club of which the taxpayer is a member) or where the taxpayer is also not provided with an opportunity to state his case. Where it is established that a contravention of the doctrine of legitimate expectations exists, the procedural remedies for the breach may be invoked by aggrieved taxpayers.

10.3.4 The effectiveness of the doctrine of legitimate expectations in the protection of taxpayers' rights

From the discussion above it can be said that the Canadian courts could still struggle with the following questions: whether legitimate expectation is synonymous with a right; whether it is substantive or procedural; what kind of remedy or protection it offers; and whether it is a form of administrative control which binds public authorities.[113]

In *Reference Re Canada Assistance Plan (B.C.)* (above), the SCC confirmed that the doctrine of legitimate expectations did not create substantive rights but was part of the rules of procedural fairness. In that sense, it can only create a right to make representations or to be consulted. Therefore, the Canadian courts do not follow the

112 Wright 1997 *OHLJ* 166.
113 Shapiro 1992 *JLSP* 283.

UK courts down the road to using the doctrine as a device to hold governments to the substantive elements of their promises.[114]

As a result, taxpayers in Canada can only rely on the doctrine of legitimate expectations to claim procedural relief but not substantive relief. Based on this finding, it is argued in this work that the doctrine is not effective to advance taxpayers' rights in Canada. The effectiveness of this doctrine, according to this work, lies in its substantive element. The position in Canada is similar to the position in South Africa.

10.4 OVERVIEW OF THE CHAPTER

This chapter dealt with the administrative and common law principles in Canada and how they may be invoked to protect taxpayers' rights against the Minister's information gathering powers.

The chapter also considered how the doctrine of legitimate expectations is applied in Canada, since it has links to the common law principle of natural justice. The discussion focused on the origin and development of the doctrine, how the SCC has dealt with the doctrine with respect to taxpayers, and whether the doctrine can be relied on to advance the substantive or procedural remedies for aggrieved taxpayers.

The next chapter deals with remedies available to taxpayers when their rights have been contravened by the Minister's information gathering powers. The discussion also investigates the effectiveness of those remedies.

114 Wright 1997 *OHLJ* 165–166.

CHAPTER 11

THE EFFECTIVENESS OF THE CANADIAN CONTROL MEASURES AND REMEDIES TO PROTECT TAXPAYERS' RIGHTS AGAINST THE MINISTER'S INFORMATION GATHERING POWERS

11 INTRODUCTION

When taxpayers' rights are infringed by the information gathering powers of the Minister of National Revenue ("the Minister"), taxpayers can challenge this infringement and claim remedies for relief. It is important that these remedies should be effective in order to satisfy aggrieved taxpayers.

It is in this context that this chapter deals with the control measures and various remedies available in Canada to protect taxpayers whose rights could be infringed by the Minister's information gathering powers. The chapter also addresses the effectiveness of the available remedies in protecting taxpayers' rights.

In Chapter 5, the term "control" was distinguished from the term "remedy", in that "control" refers to a review of the legality of the action, and "remedy" refers to the granting of the appropriate order when the action is found to be unlawful.[1]

Forms of control over actions by administrators fall into two main categories: internal control and external control. The internal control of the administrative action is aimed at rectifying an irregularity between the administrator and the individual. External control is normally in the form of judicial control over actions by administrators and is exercised by courts.[2]

Judicial control exists side by side with internal control. As a general rule, courts hear applications for judicial control based on allegations of excess power and irregularity, regardless of whether internal remedies were exhausted or not.[3]

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1 Baxter *Administrative Law* 350.
2 Devenish, Govender and Hulme *Administrative Law and Justice* 440.
3 Devenish, Govender and Hulme *Administrative Law and Justice* 440.

11.1 INTERNAL CONTROL MEASURES AVAILABLE TO RESOLVE TAXPAYERS' INFRINGEMENTS

Examples of internal control measures within the Canada Revenue Agency ("CRA") that may be invoked by taxpayers to resolve disputes between taxpayers and the CRA include the Taxpayer Bill of Rights Guide ("TBR"), an objection by the taxpayer, the use of administrative tribunals, and the Tax Ombudsman (all discussed below).

11.1.1 The Taxpayer Bill of Rights Guide

Apart from the Canadian Constitution,[4] which contains the Charter on Rights and Freedoms ("the Charter") discussed in Chapter 9, taxpayers enjoy a separate protection in their dealings with the CRA. The TBR contains a set of sixteen rights that aim to protect and guarantee taxpayers' relationship with the CRA.

The rights in the TBR demonstrate and confirm the commitment by the CRA to serve taxpayers with professionalism, courtesy and fairness.[5] The CRA also commits to ensuring that the interactions of taxpayers with the office of the CRA are effective and efficient. Taxpayers who seek a remedy or relief under the TBR must be able to prove that a right in the TBR has been infringed.

The TBR further provides for Alternative Dispute Resolution ("ADR") mechanisms. This means that taxpayers may contact the CRA when they feel that one of the rights in the TBR has been infringed, by lodging the objections and appeals in order to remedy the infringement. It should be noted that not all the rights in the TBR are relevant for this work: only those that are relevant for the protection against the Minister's information gathering powers are discussed in this chapter.

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4 The Constitution Act, 1982.

5 Government of Canada "RC17 Taxpayer Bill of Rights Guide: Understanding your rights as a taxpayer" 4, https://www.canada.ca/content/dam/cra-arc/formspubs/pub/rc17/rc17-19e.pdf (Date of use: 15 April 2020).

11.1.1.1 The right to service in both official languages

The Official Languages Act[6] provides taxpayers with the right to communicate with and receive services from the Federal Government in English or French. This means that the Minister must invoke his information gathering powers with respect to taxpayers in the language that taxpayers understand. The CRA must provide services in both official languages.[7]

11.1.1.2 The right to privacy and confidentiality

Taxpayers have the right to have the confidentiality of personal and financial information protected in accordance with the laws of the country such as the Income Tax Act,[8] the Excise Act,[9] and the Privacy Act.[10] Only CRA employees are empowered to request information from taxpayers and take steps to protect taxpayer information and ensure that it is kept confidential.[11]

11.1.1.3 The right to a formal review and a subsequent appeal

Taxpayers have the right to a formal review of their affairs.[12] This happens when the taxpayer believes that he has not received his full entitlements under the law, or when he has not been able to reach an agreement with the CRA on a tax or penalty matter.

The office encourages taxpayers to contact the office before they file an objection or an appeal where they believe that the Minister's information gathering powers

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6 Official Languages Act (R.S.C., 1985, c. 31 (4th Supp.)).

7 Government of Canada "RC17 Taxpayer Bill of Rights Guide: Understanding your rights as a taxpayer" 4, https://www.canada.ca/content/dam/cra-arc/formspubs/pub/rc17/rc17-19e.pdf (Date of use: 15 April 2020).

8 Income Tax Act (1985, c. 1 (5th Supp.)).

9 Excise Act 2001 (2002, c. 22).

10 Privacy Act (R.S.C., 1985, c. P-21).

11 Government of Canada "RC17 Taxpayer Bill of Rights Guide: Understanding your rights as a taxpayer" 5, https://www.canada.ca/content/dam/cra-arc/formspubs/pub/rc17/rc17-19e.pdf (Date of use: 15 April 2020).

12 Government of Canada "RC17 Taxpayer Bill of Rights Guide: Understanding your rights as a taxpayer" 5, https://www.canada.ca/content/dam/cra-arc/formspubs/pub/rc17/rc17-19e.pdf (Date of use: 15 April 2020).

have contravened taxpayers' rights.[13] After contacting the CRA, and if the taxpayer is not satisfied with the explanation, or if he thinks that the office has misinterpreted the facts or has not applied the law correctly, the taxpayer has a right to object, appeal, or request a second-level review of his dispute.[14]

11.1.1.4 The right to be treated professionally, courteously, and fairly

Taxpayers have the right to be treated courteously and with consideration at all times. Integrity, professionalism, respect, and collaboration are the core values of the CRA, and they reflect the office's commitment to giving taxpayers the best possible service.[15] It remains the duty of the taxpayer to prove that the Minister has not treated him professionally, courteously, and fairly when gathering information from him.

11.1.1.5 The right to have the law applied consistently

Taxpayers have the right to have the law applied to them consistently and impartially.[16] The Minister must not discriminate against taxpayers and must be consistent at all times. Where the Minister decides to conduct audits on certain taxpayers and not all, that may amount to discrimination, and the rights of taxpayers might be infringed.

11.1.1.6 The right to lodge complaints and to be provided with reasons

Taxpayers have the right to raise complaints and the CRA must deal with the complaint promptly and in confidence. Taxpayers have the right to raise complaints

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13 Government of Canada "RC17 Taxpayer Bill of Rights Guide: Understanding your rights as a taxpayer" 5, https://www.canada.ca/content/dam/cra-arc/formspubs/pub/rc17/rc17-19e.pdf (Date of use: 15 April 2020).

14 Government of Canada "RC17 Taxpayer Bill of Rights Guide: Understanding your rights as a taxpayer" 5–6, https://www.canada.ca/content/dam/cra-arc/formspubs/pub/rc17/rc17-19e.pdf (Date of use: 15 April 2020).

15 Government of Canada "RC17 Taxpayer Bill of Rights Guide: Understanding your rights as a taxpayer" 6, https://www.canada.ca/content/dam/cra-arc/formspubs/pub/rc17/rc17-19e.pdf (Date of use: 15 April 2020).

16 Government of Canada "RC17 Taxpayer Bill of Rights Guide: Understanding your rights as a taxpayer" 7, https://www.canada.ca/content/dam/cra-arc/formspubs/pub/rc17/rc17-19e.pdf (Date of use: 15 April 2020).

when the Minister contravenes their rights.[17] More importantly, the CRA must explain its findings, for example, in the form of written reasons to taxpayers regarding the complaint. Taxpayers have the right to an explanation of the decisions (written reasons) by the Minister regarding the gathered information.

11.1.1.7 The right to expect the Canada Revenue Agency to be accountable

Taxpayers have the right to expect the CRA to be accountable for the decisions which it makes.[18] Accountability may be achieved when the Minister explains the decision and the laws regarding information gathering to taxpayers in language that is plain, clear and understandable (in English and French) to them.

11.1.1.8 The right to be represented by a person of their choice

Taxpayers are free to choose a person to represent them when challenging the Minister's information gathering powers that have infringed their rights.[19] The person so authorised to represent the taxpayer shall deal directly with the CRA regarding the taxpayer's affairs.

11.1.1.9 The right to lodge a complaint and request a formal review

Where taxpayers' rights are contravened by the Minister's information gathering powers, taxpayers may lodge a complaint and request a review. The CRA must be effective and efficient.[20] For that reason it needs to conduct itself ethically and honestly.[21] This may be where the Minister conducts himself in a manner contrary

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17 Government of Canada "RC17 Taxpayer Bill of Rights Guide: Understanding your rights as a taxpayer" 7, https://www.canada.ca/content/dam/cra-arc/formspubs/pub/rc17/rc17-19e.pdf (Date of use: 15 April 2020).

18 Government of Canada "RC17 Taxpayer Bill of Rights Guide: Understanding your rights as a taxpayer" 8, https://www.canada.ca/content/dam/cra-arc/formspubs/pub/rc17/rc17-19e.pdf (Date of use: 15 April 2020).

19 Government of Canada "RC17 Taxpayer Bill of Rights Guide: Understanding your rights as a taxpayer" 10, https://www.canada.ca/content/dam/cra-arc/formspubs/pub/rc17/rc17-19e.pdf (Date of use: 15 April 2020).

20 Government of Canada "RC17 Taxpayer Bill of Rights Guide: Understanding your rights as a taxpayer" 10, https://www.canada.ca/content/dam/cra-arc/formspubs/pub/rc17/rc17-19e.pdf (Date of use: 15 April 2020).

21 The CRA employees are expected to act in accordance with the CRA Code of Ethics and Conduct and the Values and Ethics Code for the Public Sector (Government of Canada "RC17 Taxpayer Bill of Rights Guide: Understanding your rights as a taxpayer" 10,

to the provisions of the TBR. Taxpayers have to prove that one or more of the rights in the TBR are contravened.

The effectiveness of the TBR to protect taxpayers' rights against the Minister's information gathering powers

It should be noted that the TBR is not merely a guide that refers to taxpayers' rights. The TBR is effective because, where these rights are infringed by the Minister, the TBR provides for alternative resolution mechanisms in the form of formal review and a subsequent appeal. Taxpayers may lodge a service complaint and they are entitled to reasons from the Minister for his findings.

However, Krishna[22] argues that the TBR has no legal force because it allows taxpayers to engage in legitimate tax reduction, but without any constitutional protections. Krishna further argues that Canadians who do not understand tax law may not benefit from the protections which it offers.[23]

It should be noted that the TBR refers to the rights of taxpayers specifically. This means that taxpayers are protected in this document against the Minister's information gathering powers. The concern is that it is not clear from the TBR itself and the website whether taxpayers can rely on the document in a court of law to advance their rights.

In tax, the internal control of the Minister's information gathering powers is aimed at rectifying an irregularity against the taxpayer. This internal control also aims to provide the taxpayer with a cheap, fast and efficient measure to resolve disputes between taxpayers and the CRA. It is argued in this work that the TBR is suitable

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https://www.canada.ca/content/dam/cra-arc/formspubs/pub/rc17/rc17-19e.pdf (Date of use: 15 April 2020). These codes are terms and conditions of employment and they reinforce the CRA commitment to serving the public with integrity, professionalism, respect, and co-operation. The CRA Code of Ethics and Conduct was replaced by the CRA Code of Integrity and Professional Conduct (Government of Canada "Code of integrity and professional conduct: How we work" https://www.canada.ca/content/dam/cra-arc/migration/cra-arc/crrs/wrkng/cdtgrtyprfcndct-eng.pdf (Date of use: 19 April 2020)).

22 Krishna "Canada needs a Charter of taxpayer rights" https://financialpost.com/legal-post/vern-krishna-canada-needs-a-charter-of-taxpayer-rights (Date of use: 25 August 2018).

23 Krishna "Canada needs a Charter of taxpayer rights" https://financialpost.com/legal-post/vern-krishna-canada-needs-a-charter-of-taxpayer-rights (Date of use: 25 August 2018).

only in that regard and that it has no force and effect that can be brought to bear in a court of law.

11.1.2 Objection to the Minister's decision or conduct within the Canada Revenue Agency

Objection is another form of internal control measure within the CRA which can be used to resolve disputes arising from the infringements of taxpayers' rights by the Minister. The objection is a process whereby the taxpayer raises his dissatisfaction with an assessment or decision and dispute with the administrator (the Minister).

In effect, an objection is an internal process against the administrator himself (the Minister) and it is not a court process. Section 165 of the Income Tax Act ("the Act")[24] provides for the objection to an assessment and not a decision or the conduct of the Minister — such as the information gathering powers. Therefore, the objection is not relevant and will not be discussed further for the purpose of this work.

The effectiveness of the objection procedure in protecting taxpayers' rights

An important step by the Auditor General of Canada is that disputes between the Minister and taxpayers about the infringement of their rights may be resolved without an objection being filed or before the objection may be filed. The "Report 2—Income Tax Objections—Canada Revenue Agency"[25] provides guidelines to the best practices relating to a dispute concerning a decision by the Minister.

This means that where the Minister requests information from the taxpayer and a dispute arises, the parties may resolve their dispute even before an objection may be filed. This can be effective in protecting taxpayer's rights. It is also not time-consuming and it poses minimum costs to taxpayers.

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

25 Auditor General of Canada "Report 2—Income Tax Objections—Canada Revenue Agency" https://www.oag-bvg.gc.ca/internet/English/parl_oag_201611_02_e_41831.html (Date of use: 16 April 2020).

11.1.3 The administrative tribunals as an internal control measure

In Canadian law, provision is made for administrative tribunals in terms of the Administrative Tribunals Support Service of Canada Act ("ATSSCA").[26] These forums are under the Minister of Justice and the Attorney General of Canada.[27] They assist litigants to seek a quicker and cheaper resolution of their disputes. The ATSSCA provides for the establishment of the Administrative Tribunals Support Service of Canada.[28]

In the case of *Penner v Niagara (Regional Police Services Board)*[29] the SCC discussed the purpose of administrative tribunals and approvingly quoted *Rasanen v Rosemount Instruments Ltd.*:[30]

> [Administrative tribunals] were expressly created as independent bodies for the purpose of being an alternative to the judicial process, including its procedural panoplies. Designed to be less cumbersome, less expensive, less formal and less delayed, these impartial decision-making bodies were to resolve disputes in their area of specialization more expeditiously and more accessibly, but no less effectively or credibly. ... The methodology of dispute resolution in these tribunals may appear unorthodox to those accustomed only to the court-room's topography, but while unfamiliar to a consumer of judicial justice, it is no less a form and forum of justice to *its* consumers.[31]

Hence administrative tribunals are created as alternatives to judicial control (in courts). These forums are designed to be less cumbersome, less expensive, less formal and less delayed.

It needs to be determined whether taxpayers may use this avenue to resolve their disputes with the CRA. The tax Acts do not mention a referral of the disputes to the administrative tribunals. One can simply assume that the administrative tribunals do not play a role in resolving taxpayers' disputes with the CRA.

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26 Administrative Tribunals Support Service of Canada Act (S.C. 2014, c. 20, s. 376).

27 Government of Canada "Administrative Tribunals Support Service of Canada" https://www.canada.ca/en/administrative-tribunals-support-service.html (Date of use: 23 August 2020).

28 Section 3 of the ATSSCA.

29 [2013] 2 SCR 125.

30 (1994) 17 OR (3d) 267 (Ont CA) 279–280 (original emphasis).

31 *Penner v Niagara (Regional Police Services Board)* para 102.

The effectiveness of administrative tribunals in protecting taxpayers' rights

Since administrative tribunals are not mentioned in the tax Acts or by the CRA, they do not have jurisdiction to hear disputes between taxpayers and the CRA. Therefore, administrative tribunals are ineffective in assisting taxpayers when their rights are infringed by the Minister's information gathering powers.

11.1.4 The Tax Ombudsman

The Office of the Taxpayers' Ombudsman ("OTO") enhances the CRA's accountability in its service to, and treatment of, taxpayers through independent and impartial reviews of service-related complaints and systemic issues.[32]

The Taxpayers' Ombudsman may initiate an examination when complaints or questions are raised about a service issue that may impact on a large number of taxpayers or a segment of the population. Recommendations arising from these examinations are aimed at improving the service provided to taxpayers by the tax authority.[33] The Taxpayers' Ombudsman also reviews individual complaints and matters related to taxpayer service rights.

The effectiveness of the Taxpayers' Ombudsman in protecting taxpayers' rights

The effectiveness of the Taxpayers' Ombudsman lies in the fact that the office deals with and upholds the rights contained in the TBR. It ensures that taxpayers are not disadvantaged when the process of invoking their rights takes a long time. Therefore, it may be effective for taxpayers to rely on and invoke to compel the Minister to deal with allegations of infringements speedily and effectively.

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32 Government of Canada "Office of the Taxpayers' Ombudsman" https://www.canada.ca/en/taxpayers-ombudsman.html (Date of use: 25 August 2018).

33 Government of Canada "Examining systemic issues" https://www.canada.ca/en/taxpayers-ombudsman/programs/examining-systemic-issues.html (Date of use: 25 August 2018).

11.2 EXTERNAL CONTROL MEASURES AVAILABLE TO RESOLVE TAXPAYERS' INFRINGEMENTS

External remedies are provided by the courts as an external control measure that may be approached by dissatisfied taxpayers to deal with the infringement of their rights by the Minister's information gathering powers. The taxpayer resorts to the external control measures after he has exhausted the internal control measures and they have proved to be ineffective in resolving the dispute. The taxpayer may not lodge re-objection proceedings because that remedy does not exist. The external control measures do include an appeal by the taxpayer to the Tax Court and judicial review.

11.2.1 Appeal to the Tax Court

The taxpayer can appeal directly to the Tax Court of Canada in terms of section 169 of the Act. However, it is important to determine whether this section affords taxpayers help when the Minister's information gathering powers have infringed taxpayers' rights.

The effectiveness of the appeal procedure in protecting taxpayers' rights

It is clear from the wording of section 169 of the Act that an appeal to the Tax Court by the taxpayer relates only to assessments. Therefore, the appeal process to the Tax Court is not relevant to this work, which deals with the infringement of taxpayers' rights by the Minister's information gathering powers.

11.2.2 Judicial review to address infringements of taxpayers' rights by the Minister's information gathering powers

Judicial review is, in broad terms, a mechanism for enforcing legality in the statutory decision-making process and to preserve the rule of law.[34] Judicial review relates to the courts' control of the action or conduct of the Minister in executing his duties.

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34 *Speckling v British Columbia (Labour Relations Board)* (2008) 77 B.C.L.R. (4th) 44 (BC CA) para 17.

Dyzenhaus[35] argues that judicial review is inherently controversial.[36] This is because it confers on unelected officials the power to question decisions which were arrived at through the democratic process. He further opines that:

> For this reason, in my view, *as a matter of constitutional principle* that power must be reserved to the courts and should not be given over to bodies that are mere creatures of the legislature, whose members are usually vulnerable to removal with every change of government, and whose decisions in some circumstances are made within the parameters of guidelines established by the executive branch of government.[37]

The function of judicial review is to "ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes".[38] In a tax context, the decision or conduct of the Minister is evaluated to ensure legality, reasonableness and fairness.

11.2.3 Different forms of judicial review

Daly[39] opines that Canadian courts have been inconsistent in the principles which they apply when reviewing the conduct of the administrator. The SCC differentiates between substantive review (review of interpretations of law and exercises of discretion) and procedural review (review of the adequacy of procedural safeguards in administrative decision-making processes).[40]

Daly[41] further opines that the law on the independence of administrative decision makers (consistent with the court's general approach to procedural review) represents a third type of review of the conduct of the administrator in addition to the substantive and procedural reviews enunciated by the SCC. He opines that:

> In describing Canada's administrative law as bipolar, I do not mean to suggest either that the approach is necessarily incoherent or that there is a tenable distinction between substance and procedure as a theoretical matter. Rather, the argument of this article is that substantive and procedural review should be

35 Dyzenhaus 2002 *Queen's LJ* 445.
36 Dyzenhaus 2002 *Queen's LJ* 446.
37 Dyzenhaus 2002 *Queen's LJ* 446 (original emphasis).
38 *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 28.
39 Daly 2014 *Queen's LJ* 214.
40 Daly 2014 *Queen's LJ* 215, 216.
41 Daly 2014 *Queen's LJ* 216.

> treated similarly, or, in other words, that the two poles of Canadian administrative law ought to be fused.[42]

However, Canadian courts have been hesitant to pronounce on the substantive review by refusing to overturn reasonable decisions made by administrative decision makers.[43] They have refused to substitute their own judgment even on questions of law.[44] However, on matters of procedure, courts have no qualms about stepping into the shoes of administrative decision makers.[45]

From the discussion above it appears that Canadian courts cannot easily set aside the decision of the Minister to request information from the taxpayer or third party. However, the courts can decide aspects relating to procedure: for example, where the Minister did not follow the correct procedure in his decision to request the particular information.

11.2.3.1 Substantive judicial review to set aside the administrator's decision

Substantive review is engaged when the Minister's interpretation of the law or exercise of discretion is challenged.[46] The SCC has developed a multi-factor test to determine the appropriate standard of review of administrative action by the administrator.[47]

In applying the test, a court considers the following factors: the statutory language; the expertise of the decision maker; the purpose of the relevant statutory provisions; and the nature of the question at issue.[48]

This multi-factor test is applied by the courts to determine whether the appropriate standard of review is correct or reasonable. Where the correctness of the decision is at issue, the court undertakes its own analysis of the relevant issue or issues to

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42 Daly 2014 *Queen's LJ* 216.
43 Daly 2014 *Queen's LJ* 214.
44 Daly 2014 *Queen's LJ* 214.
45 Daly 2014 *Queen's LJ* 214.
46 Daly 2014 *Queen's LJ* 217.
47 Daly 2014 *Queen's LJ* 217.
48 Daly 2014 *Queen's LJ* 217.

determine whether the correct decision was reached.[49] Where the reasonableness of the decision is the governing standard, the court determines whether the administrative decision maker made a reasonable decision.[50]

In tax law, taxpayers may resort to substantive judicial review when they challenge the decision made by the Minister. The courts take the following into account: first, the courts consider the statutory language of the information gathering provisions.[51] It needs to be determined whether the language used enabled the Minister to interpret and apply it correctly to make a decision.

Second, the expertise of the Minister is taken into account in order to check whether he was properly qualified to made a particular decision.[52] Third, the purpose of the relevant statutory information gathering provisions is determined, to check whether the Minister has fulfilled the purpose.[53] Fourth, the nature of the decision made by the Minister is determined,[54] to check whether the decision by the Minister has contravened the rights of taxpayers.

If it needs to be determined in an application for judicial review whether the correct result was reached by the Minister's decision to request information from the taxpayer or his accountant, the court makes a determination. It does this by making its own analysis of the relevant issues at play to determine whether the correct result was reached by the Minister when requesting the particular information.

Where the court finds the decision by the Minister to be reasonable, it must uphold and respect the Minister's decision if it agrees with the Minister. However, the courts are hesitant and do not easily change the decision of the Minister.

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49 Daly 2014 *Queen's LJ* 217.
50 Daly 2014 *Queen's LJ* 217.
51 Daly 2014 *Queen's LJ* 217.
52 Daly 2014 *Queen's LJ* 217.
53 Daly 2014 *Queen's LJ* 217.
54 Daly 2014 *Queen's LJ* 217.

11.2.3.2 Procedural judicial review of the administrator's decision

Daly argues that the Canadian courts have developed the common law judicial review of procedural fairness with little regard to legislative intent.[55] This means that where statutory provisions explicitly oust the common law, legislation becomes important and forms the context for the application principles of procedural fairness developed by case law.[56]

In the case of *Knight v Indian Head School Division No 19*,[57] the SCC held that the existence of a common law right to procedural fairness and the general duty of fairness on the administrative decision maker depend on a consideration of three factors: the nature of the decision to be made by the administrative body; the relationship that exists between that body and the individual; and the effect of that decision on the individual's rights.[58]

In tax law, this means that the reviewing court needs to consider the following factors to determine whether a right to procedural fairness ought to exist: first, the court investigates the nature of the decision by the Minister.[59] The court investigates whether the decision by the Minister to exchange taxpayer information with other countries is in line with common law procedural fairness. Where it finds it not to be in line, the court must intervene.

Secondly, the court also investigates the relationship between the Minister and the taxpayer.[60] This simply means that the court needs to determine whether the Minister is authorised or is the person required to make the decision to refer the taxpayer for search and seizure.

Thirdly, the court investigates the consequence of the Minister's decision to exchange taxpayer information with other countries.[61] Should the decision of the

55 Daly 2014 *Queen's LJ* 224.
56 Daly 2014 *Queen's LJ* 224.
57 [1990] 1 SCR 653.
58 *Knight v Indian Head School Division No 19* 669.
59 *Knight v Indian Head School Division No 19* 669.
60 *Knight v Indian Head School Division No 19* 669.
61 *Knight v Indian Head School Division No 19* 669.

Minister to exchange taxpayer information with other countries actively affect taxpayers' rights, then the court will intervene and ensure that rights of taxpayers are protected.

11.2.3.3 Independence of the decision maker

This aspect of review relates to the independence of the decision maker when making a decision against an individual. In tax law, this implies that the Minister needs to be independent when making a decision against the taxpayer.

The concern is to ensure that the Minister is not influenced in any way or that his decision-making structures do not give rise to a reasonable apprehension of bias when making the decision, for instance, to conduct search and seizure on the affairs of the taxpayer.

In this regard, the common law requires that administrative decision makers must be free from external pressure, especially from elected members of the executive branch of the government.[62] Daly, referring to the SCC decision in *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*,[63] concludes that:

> Administrative decision makers' independence, then, depends entirely on legislative intent. There is no room for administrative common law. Statutes reign supreme.[64]

Accordingly, the independence of the Minister may be challenged by the taxpayer relying on one of the rules of natural justice, *nemo iudex in sua causa* (discussed in Chapter 10 above). The Minister's independence requires that he must make the decision to conduct search and seizure on the affairs of the taxpayer, dependent on the legislative intent and free from any influence.

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62 Daly 2014 *Queen's LJ* 231.
63 [2001] 2 SCR 781.
64 Daly 2014 *Queen's LJ* 231.

11.2.4 Legislative judicial review of the decision by the administrator

Section 24(1) of the Charter provides that anyone whose rights or freedoms, as guaranteed by the Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Section 18.1(1) of the Federal Courts Act[65] provides that an application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

The statement that anyone directly affected by the decision of the administrator may approach the courts to seek relief means that, in tax law, it is not only the taxpayer who may make an application, but also his family members who are affected who may seek relief. The grounds for the application of judicial review are the following:

11.2.4.1 The administrator acts without or beyond his jurisdiction or refuses to exercise his jurisdiction

It is a ground of judicial review where the aggrieved person can prove that the administrator acted without or beyond his jurisdiction or refused to exercise his jurisdiction.[66] This may be the case where the Minister is not empowered to request information from the taxpayer and merely embarks on a fishing expedition on the affairs of the taxpayer. The court may grant appropriate relief to the aggrieved taxpayer.

11.2.4.2 The administrator fails to observe a principle of natural justice

It is a ground of review where the administrator does not adhere to the principles of natural justice.[67] As discussed in Chapter 10, these principles refer to an open fair

65 Federal Courts Act (R.S.C., 1985, c. F-7).
66 Section 18.1(4)(a) of the Federal Courts Act.
67 Section 18.1(4)(b) of the Federal Courts Act.

hearing rule (*audi alteram partem*) and the requirement that a person hearing the matter must be unbiased (*nemo iudex in sua causa*).[68]

In tax law, judicial review may be invoked where the Minister does not provide an aggrieved taxpayer with a hearing before a decision to refer him for an audit is made or the Minister was biased when the decision was made. This is a codification of the common law forms of judicial review, and the aggrieved taxpayer needs to prove that the Minister failed to follow the common law rules of natural justice.

11.2.4.3 The administrator errs in law in making a decision or an order

It is a ground of review where the administrator errs in making a decision or an order.[69] An example is where the Minister does not interpret the law properly as to how and when to conduct an audit on a taxpayer and makes a decision based on that incorrect interpretation. In such a case, the taxpayer must prove that his rights were infringed as a result of the actions of the Minister.

11.2.4.4 The administrator bases his decision or order on an erroneous finding of fact

Where the administrator does not take into account material facts before him but makes a decision, the individual may apply for judicial review.[70] Where the Minister, for example, based his decision to conduct an audit on the taxpayer on incorrect facts that the taxpayer committed fraud, the taxpayer may apply for judicial review. The aggrieved taxpayer must prove that the Minister disregarded the true and material facts before him.

11.2.4.5 The administrator acts, or fails to act, by reason of fraud or perjury

It is a ground of review where the administrator acts or fails to act by reason of fraud or perjured evidence.[71] For example, where the Minister decides to request information from a third party who submits fraudulent or perjured material which the

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68 Churches 2015 *CJCL* 29–30.
69 Section 18.1(4)(c) of the Federal Courts Act.
70 Section 18.1(4)(d) of the Federal Courts Act.
71 Section 18.1(4)(e) of the Federal Courts Act.

Minister acts on, the aggrieved taxpayer may apply for a judicial review regarding the Minister's reliance on such fraudulent or perjured material.

11.2.4.6 The administrator acts in any other way contrary to law

Where the administrator acts contrary to the law, this could be a ground for review.[72] This is a "catch-all" ground for review and it includes all or a number of the grounds referred to above. An example may be where the law states that the taxpayer needs to be provided with written reasons, but the Minister acts contrary to this provision.

11.2.5 Relief granted by the Federal Court

The court may, on an application for a judicial review, order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing.[73] The relief granted by the court may be the following:

11.2.5.1 Declare an act or conduct invalid or unlawful, or quash, set aside and refer it back for determination

The court has the power to declare an act or conduct of the administrator invalid and may also order that the act or conduct be quashed and set aside.[74] The court may also refer the matter back to the administrator for determination.[75]

It is worth noting, as stated above, that, at common law, the courts are hesitant to set aside the decision of the administrator.[76] However, the legislation clearly provides for setting the decision aside and declaring it invalid.

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72 Section 18.1(4)(f) of the Federal Courts Act.
73 Section 18(1)(3)(a) of the Federal Courts Act.
74 Section 18(1)(3)(b) of the Federal Courts Act.
75 Section 18(1)(3)(b) of the Federal Courts Act.
76 Daly 2014 *Queen's LJ* 216.

11.2.5.2 Prohibit, restrain a decision, order, act or proceeding of a federal board, commission or other tribunal

Section 18.1(a) of the Federal Courts Act provides that the Federal Court may issue an injunction.[77] The Federal Court may also issue writ of *certiorari*,[78] writ of prohibition,[79] writ of *mandamus* or writ of *quo warranto*,[80] or grant declaratory relief,[81] against any federal board, commission or other tribunal.

The effectiveness of the relief provided by the Federal Court

It is submitted that the relief provided by the court is effective. The relief and remedies provided by the court provide comprehensive protection for the aggrieved taxpayer.

Most importantly, the court is empowered to restrain and also to set aside the act or conduct of the Minister when exercising information gathering powers that have infringed on the rights of taxpayers.

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77 A mandatory injunction is a situation in which the court orders a party to act to do something; this can be contrasted with a prohibitory injunction in which a court orders a party to refrain from doing something. Mandatory interlocutory injunctions are a pre-trial form of relief that require a party to do something which is enforceable until the conclusion of the trial (*R v Canadian Broadcasting Corp*. [2018] 1 SCR 196).

78 *Certiorari* is a type of common law writ where the applicant seeks judicial review of a judge's decision by a higher court. It can only be issued when the reviewable court has exceeded its jurisdiction or otherwise committed a breach of the rules of natural justice, fraud, or an error of law so fundamental in character that it constitutes a defect amounting to a failure or excess of jurisdiction (*Re Madden et al. and The Queen* (1977) 35 CCC (2d) 381 (Ont HCJ)).

79 An order of prohibition is a common law "prerogative writ" power of a superior court to order a lower court or government agent from prohibiting the performance of certain duties. A court granting the order will "prevent [the inferior judicial body] from exercising a jurisdiction it is not legally entitled to" (*R v MPS* (2013) 298 CCC (3d) 458 (BC SC) para 16).

80 An order of *mandamus* is a common law "prerogative writ" power of a superior court to order a lower court or government agent to perform a mandatory duty correctly. It is a discretionary remedy to compel a lower court to exercise jurisdiction where it has incorrectly refused to do so (*R v MacDonald* (2007) NSR (2d) 11 (NS SC) 17).

81 Declaratory judgments are typically sought as a means of preventing a dispute by removing "legal uncertainty" as to the applicable law and the rights and obligations of the parties (Shelton *Remedies in International Human Rights Law* 255–256).

11.3 USE OF MUTUAL AGREEMENT PROCEDURE TO RESOLVE TAXPAYER RIGHTS TREATY DISPUTES RELATING TO EXCHANGE OF INFORMATION IN TAX MATTERS

Mutual Agreement Procedure ("MAP") in double tax treaties was discussed in Chapter 5 in paragraph 5.7. Canada has signed double tax treaties which are largely based on the OECD Model Tax Convention and contain article 26 which covers the MAP.

The effectiveness of MAP as a forum for resolving treaty disputes regarding taxpayers' was discussed in chapter 5 so it will not be repeated here. As discussed in Chapter 5 BEPS Action 13 set out a minimum standard regarding MAP and countries like Canada which are part of the OECD Inclusive Framework are expected to undergo a peer review of their implementation of the minimum standard.[82]

Stage 1 assessed countries against the terms of reference of the minimum standard. Stage 2 focused on monitoring the follow-up of any recommendations resulting from jurisdictions' stage 1 peer review report. The Canadian peer review on stage 1 was launched on 5 December 2016. The second stage peer review was launched during September 2018.[83] Canada was found compliant with the MAP minimum standard.[84]

11.4 DECLARATION OF UNCONSTITUTIONALITY OF THE CONDUCT OF THE ADMINISTRATOR

One of the remedies available where taxpayers' rights are infringed is to test the constitutionality of the conduct or the provision that brought about the infringement

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82 OECD "OECD releases sixth round of BEPS Action 14 peer review reports on improving tax dispute resolution mechanisms" https://www.oecd.org/tax/beps/oecd-releases-sixth-round-of-beps-action-14-peer-review-reports-on-improving-tax-dispute-resolution-mechanisms-october-2019.htm (Date of use: 4 December 2019).

83 BEPS Action 14: "Peer Review and Monitoring" OECD" https://www.oecd.org/tax/beps/beps-action-14-peer-review-assessment-schedule.pdf (Date of use: 22 August 2020).

84 OECD "Inclusive Framework on BEPS: Action 14 Making Dispute Resolution More Effective MAP Peer Review Report Stage 2 BEST PRACTICES Canada" http://www.oecd.org/tax/beps/beps-action-14-peer-review-stage-2-best-practices-canada.pdf (Date of use: 25 August 2020).

of taxpayers' rights. This is where, for example, the constitutionality of the provision that empowers the Minister to request information from the third party is tested. This is supported by the case below (albeit not a tax case) in which a Canadian court decided that a particular action or conduct was unconstitutional.

In *Millen et al v Manitoba Hydro-Electric Board et al*,[85] the plaintiffs instituted an action seeking a declaration of unconstitutionality with respect to the provisions of two collective agreements that created union shops for major hydro-electric projects in the province of Manitoba. The court held, first, that administrative tribunals with the power to decide questions of law and from whom constitutional jurisdiction has not been clearly withdrawn have the authority to resolve constitutional questions that are linked to matters properly before them.[86] Secondly, they must act consistently with the Charter and its values when exercising their statutory functions.[87]

From the discussion above it is clear that the courts in Canada are prepared to hear matters relating to the constitutional invalidity of a provision. They are also prepared to declare a particular provision to be of no force and effect if it is not justified by the limitation clause in section 1 of the Charter. This means that taxpayers may approach courts to declare a particular provision (for example, the information gathering provisions) of the Income Tax to be unconstitutional.

11.5 OVERVIEW OF THE CHAPTER

This chapter dealt with the effectiveness of the remedies availed to taxpayers where their rights are infringed by the Minister's information gathering powers. The chapter discussed the internal and the external control measures and the remedies available to taxpayers when the Minister has infringed their rights during the information gathering process.

The internal control measures discussed are the TBR, which contains rights to be enjoyed by taxpayers; objection by taxpayers; the Taxpayers' Ombudsman; and the

85 (2015) 317 Man R (2d) 276 (MB QB).
86 *Millen v Manitoba Hydro-Electric Board* para 78.
87 *Millen v Manitoba Hydro-Electric Board* para 78.

administrative tribunals. The external control measures discussed are the appeal process and the judicial review process (which is in the form of common law judicial review and statutory judicial review).

The next chapter brings together the provisions and principles applied in all the three countries covered in this work in protecting taxpayers' rights from the tax authorities' information gathering powers. The chapter demonstrates how these countries differ in applying the provisions and principles analysed and it demonstrates which country provides better solutions to the aggrieved taxpayer in advancing his rights.

CHAPTER 12

COMPARATIVE ANALYSIS OF THE PROTECTION OF TAXPAYERS' RIGHTS AGAINST THE INFORMATION GATHERING POWERS OF TAX AUTHORITIES IN THE UNITED KINGDOM, CANADA AND SOUTH AFRICA

12 INTRODUCTION

In Chapter 1 of this work it was submitted that the common law, constitutional principles, and tax administrative principles in the United Kingdom ("UK") and Canada could provide lessons for South Africa on how taxpayers' rights could be protected against the information gathering powers of the Commissioner for the South African Revenue Service ("the Commissioner").

The position in the UK and Canada will assist in finding a balance between the information gathering powers granted to the Commissioner in South Africa and the rights of taxpayers entrenched in the Constitution.[1] The protection of taxpayers' rights also requires a concerted effort at both the national and international levels.

This chapter summarises the preceding chapters and analyses how the UK, Canada and South Africa have responded to the challenges posed by the tax authorities' information gathering powers which could infringe taxpayers' rights. The analysis is then followed by a comment on the effectiveness of the methods available to protect taxpayers' rights against the tax authorities' information gathering powers.

More importantly, the analysis also covers how South Africa may follow a particular principle from the countries compared (the UK and Canada) to assist in the protection of taxpayers' rights. These rights are limited in terms of section 36 of the South African Constitution.

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1 The Constitution of the Republic of South Africa, 1996.

12.1 THE CONSTITUTIONAL SYSTEMS OF GOVERNMENTS

The constitutional system of a government dictates how individuals, in particular, taxpayers, are protected when infringements of their rights by the tax authority take place. The system of government also demonstrates the mechanisms and procedures to be followed by aggrieved taxpayers when those infringements take place and it ensures whether there are effective remedies that could satisfy taxpayers.

In a nutshell, to determine whether the rights of taxpayers are adequately protected, one needs to consider the constitutionality of the government of a particular country.

12.1.1 The United Kingdom

The UK is ruled by the Monarch, and the Queen is the head of state. The Constitution of the UK is unwritten and uncodified.[2] The Constitution embodies two principles in the British Constitution: the rule of law and the supremacy of Parliament.[3]

The rule of law rests on three premises: the absence of arbitrary power,[4] equality before the law,[5] and a judge-made constitution together with the general principles of British constitutional law that are the result of judicial decisions which confirm the common law.[6]

Parliamentary sovereignty means that judges cannot invalidate legislation.[7] It also means that Parliament under the English Constitution has the right to make or unmake any law.[8] No person or body has a right to override or set aside the legislation of the Parliament.[9]

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2 Brazier "How near Is a Written Constitution?" 3–5.
3 Dicey *Lectures on the Constitution* 332, 340.
4 Dicey *Lectures on the Constitution* 215.
5 Dicey *Lectures on the Constitution* 215.
6 Dicey *Lectures on the Constitution* 209.
7 Wade and Forsyth *Administrative Law* 32.
8 Dicey *Lectures on the Constitution* 36.
9 Dicey *Lectures on the Constitution* 36.

Thus, individuals cannot test whether an Act of Parliament is valid or not. This is because Parliamentary sovereignty bars the courts from questioning any Act of Parliament. There is also no hierarchy among Acts of Parliament, and all Parliamentary legislation is therefore of equal validity and effectiveness.[10]

12.1.2 Canada

Canada is constitutional monarchy. The Constitution of Canada[11] is the supreme law of Canada[12] and incorporates the Charter of Rights and Freedoms ("the Charter"), which entrenches the legal, social, and political rights of Canadian citizens and minority groups. The Preamble to the Charter introduced the rule of law. Taxpayers may rely on the provisions of the Charter to protect their rights against the tax authority's information gathering powers when those rights are infringed.

12.1.3 South Africa

South Africa became a constitutional state with the adoption of the Constitution after 1994.[13] The position before the passing of the interim Constitution was characterised by Parliamentary sovereignty (which is the position in the UK). The Constitution has entrenched the Bill of Rights ("BOR"), which protects the rights of individuals. Taxpayers may therefore rely on the BOR to protect their rights against the Commissioner's information gathering powers when those rights are infringed.

12.1.4 Comments

The constitutional systems of government (monarchy) of the UK and Canada are similar in their form. Even though the UK Constitution is unwritten, the country embraces the rule of law, which protects citizens, and taxpayers in particular. Canada is also like a constitutional democracy like South Africa. In Canada, the Constitution is the supreme law of the country and it can overturn the legislation

10 *Regina (Jackson and others) v Attorney General* [2006] 1 AC 262 (HL).
11 The Constitution Acts, 1867 to 1982.
12 Section 52(1) of the Constitution Act, 1982.
13 See the Constitution of the Republic of South Africa 200 of 1993, followed by the Constitution of the Republic of South Africa, 1996.

passed by Parliament. The Canadian Charter and the South African BOR protect the rights of taxpayers against the tax authority's information gathering powers when they infringe those rights.

12.2 THE OFFICES RESPONSIBLE FOR THE COLLECTION OF TAXES

The offices responsible for the collection of taxes on behalf of the state, in the compared countries, are pointed out below. When in the process of collecting taxes, the tax authorities must recognise, respect and protect the rights of taxpayers.

12.2.1 The United Kingdom

In the UK the Commissioners for Revenue and Customs Act ("CRCA")[14] established the office responsible for the collection of taxes, known as Her Majesty's Revenue and Customs ("HMRC").[15] The term "Commissioner" is referred to throughout the research to reflect the person who is responsible for the administration of the tax Acts and the collection of taxes in the UK.

12.2.2 Canada

The Canada Revenue Agency ("CRA") is responsible for the collection of taxes in Canada.[16] The Minister of National Revenue ("the Minister") is responsible for the administration of the tax Acts, while the Commissioner of the CRA is responsible for the day-to-day management and direction of the CRA.[17]

12.2.3 South Africa

The South African Revenue Service ("SARS") is responsible for collecting taxes on behalf of the state.[18] The Commissioner for SARS ("the Commissioner") is the head of SARS and is responsible for the administration of the tax Acts and the collection of taxes.

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14 Commissioners for Revenue and Customs Act 2005 (c. 11).
15 Section 4 of the CRCA.
16 Section 4(1) of the Canada Revenue Agency Act (S.C. 1999, c. 17) ("CRAA").
17 Section 36 of the CRAA.
18 South African Revenue Service Act 34 of 1997.

12.2.4 Comments

The three countries have similar types of offices that collect taxes on behalf of the state. The responsible administrator in the UK and South Africa is the Commissioner, while the Minister is the administrator responsible in Canada. These are the offices that taxpayers must approach when their rights have been infringed in the process of information gathering by the Commissioner or Minister.

12.3 METHODS USED TO GATHER INFORMATION FROM TAXPAYERS

The three countries use similar methods to gather information from taxpayers. These methods include, but are not limited to, the following: taxpayer information from records and books of accounts held by taxpayers, tax returns, inspection, verification and audits, search and seizure, gathering information from the taxpayer or third parties, exchange of information with other countries, Country-by-Country reporting, the Voluntary Disclosure Programme and the Reportable Arrangements rules.

The UK has the HMRC Digital Disclosure Service ("DDS"), which is equivalent to the South African Voluntary Disclosure Programme ("VDP") and provides individuals and companies with an opportunity to bring their affairs up to date. Canada's Voluntary Disclosures Program ("VDP") is found in the Income Tax Information Circular ("ITIC").[19] The ITIC provides information on the discretionary authority of the Minister of National Revenue under the Income Tax Act ("ITA"), the Excise Tax Act ("ETA"),[20] the Excise Act, 2001 ("EA, 2001")[21] as well as the Air

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19 Government of Canada "Income Tax Information Circular IC00-1R5, Voluntary Disclosures Program" (2017): see now Government of Canada "IC00-1R5 ARCHIVED - Voluntary Disclosures Program" https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic00-1r5.html (Date of use: 4 June 2020). This was before this publication was changed to Income Tax Information Circular IC00-1R6, Voluntary Disclosures Program for applications on and after 1 March 2018: see Government of Canada "IC00-1R6 Voluntary Disclosures Program" https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic00-1.html (Date of use: 27 May 2020), where the information is distributed among paragraphs bearing different paragraph numbers from those in the "IC00-1R5 ARCHIVED - Voluntary Disclosures Program".

20 Excise Tax Act (R.S.C., 1985, c. E-15).

21 Excise Act, 2001 (S.C. 2002, c. 22).

Travellers Security Charge Act ("ATSCA")[22] and the Softwood Lumber Products Export Charge Act, 2006 ("SLPECA")[23] to grant relief to taxpayers in accordance with specific legislative provisions.

The UK's Disclosure of Tax Avoidance Schemes ("DOTAS")[24] is equivalent to the Reportable Arrangements rules in South Africa, which are used to obtain early information about tax arrangements, how they work and who has used them.[25] In Canada, the Reportable Arrangements rules are known as Reportable Transactions.

12.4 THE PROTECTION OF TAXPAYERS' CONSTITUTIONAL RIGHTS

This part of the discussion focuses on the protection of the constitutional rights of the taxpayers (subject to a limitation in section 36 of the South African Constitution) from infringements by the actions arising from the power of the Commissioner (in the UK and in South Africa) or the Minister (in Canada) when gathering information from taxpayers.

In South Africa, not all information gathering provisions are found in Chapter 5 of the Tax Administration Act ("TAA"),[26] but are scattered throughout the TAA.

12.4.1 Protection of taxpayers' rights to equality against the power to conduct an audit

The right to equality requires that no taxpayer should be preferred over another and that there should not be any form of discrimination by the tax authority. This right to equality protects taxpayers in cases where the tax authority conducts an audit on specific taxpayers and not on others.

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22 Air Travellers Security Charge Act (2002, c. 9, s. 5).

23 Softwood Lumber Products Export Charge Act, 2006 (S.C. 2006, c. 13).

24 HM Revenue & Customs "Disclosure of tax avoidance schemes" 16, https://www.gov.uk/government/publications/hmrc-your-guide-to-making-a-disclosure/your-guide-to-making-a-disclosure (Date of use: 20 June 2019).

25 HM Revenue & Customs "Disclosure of tax avoidance schemes" 16, https://www.gov.uk/government/publications/hmrc-your-guide-to-making-a-disclosure/your-guide-to-making-a-disclosure (Date of use: 20 June 2019).

26 Tax Administration Act 28 of 2011.

12.4.1.1 The United Kingdom

Article 14 of the European Convention on Human Rights ("ECHR")[27] prohibits discrimination and emphasises that everyone must be treated equally. It provides that the enjoyment of rights and freedoms shall be secured without discrimination on any grounds such as race, colour, sex, language, or religion.

Sections 13 and 14 of the Equality Act[28] provide that a person discriminates against another if a person treats the other less favourably than another person treats or would treat others. The protected characteristics are age; disability; gender reassignment; marriage and civil partnership; race; religion or belief; sex; and sexual orientation. It is discrimination where one taxpayer is audited because of the above-mentioned factors. In the UK there are no guidelines to be used by the Commissioner to conduct audits on taxpayers.

12.4.1.2 Canada

Section 15 of the Charter guarantees the protection of the individual's right to equality. An individual has the right to equal protection and equal benefit of the law without discrimination.

However, guidelines are set in Canada on how the selection of taxpayers for audits is conducted by the Minister in order to prevent bias and discrimination. The selection of taxpayers' returns to be audited under Canadian law is determined by the computer records of all returns filed.[29] The other selection criteria involve audit projects, leads and secondary files.

The audit usually involves an examination of books and records of accounts and is

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27 The Convention Rights and Freedoms Form Part I of Schedule 1 to the Human Rights Act 1998 (c. 42).

28 Equality Act 2010 (c. 15).

29 Government of Canada Information Circular 71-14R3 "The Tax Audit" June 18, 1984 para 14, https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic71-14/tax-audit.html (Date of use: 6 April 2020).

conducted at the taxpayer's place of business. The industry-wide audit involves the co-ordinated audits of a number of corporations within one industry.[30] Specialists are usually available to assist auditors in situations concerning valuations and appraisals of equities and various properties respectively.[31]

12.4.1.3 South Africa

Section 9 of the Constitution provides that taxpayers have the right to be treated "equally before the law and [have] the right to equal protection and benefit of the law"[32] and must not to be unfairly discriminated against.[33]

It must still be remembered that section 36 of the Constitution provides for the limitation of rights by a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on dignity, equality and freedom. Just as in the UK, guidelines are also required when the selection of taxpayers for audit is conducted by the Commissioner.

12.1.4.4 Comments

All three countries recognise and embrace the right to equality. The three countries gather information through audits in order to measure compliance by taxpayers. It is therefore suggested in this work that in order to protect the right to equality effectively, guidelines are required on how the Commissioner must select taxpayers for audits.

However, only Canada provides a good lesson on how audits can be conducted while protecting taxpayers' rights, because there are guidelines on how taxpayers are selected for audits. Following Canada's example in this respect may prevent the

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30 Government of Canada Information Circular 71-14R3 "The Tax Audit" June 18, 1984 para 20, https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic71-14/tax-audit.html (Date of use: 6 April 2020).

31 Government of Canada Information Circular 71-14R3 "The Tax Audit" June 18, 1984 para 20, https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic71-14/tax-audit.html (Date of use: 6 April 2020).

32 Section 9(1) of the Constitution of the Republic of South Africa, 1996.

33 Section 9(3) of the Constitution.

infringement of the right to equality when the Commissioner exercises his information gathering powers.

12.4.2 Protection of taxpayers' rights to privacy regarding information in their records and books as well as taxpayer information requested from third parties

The right to privacy extends to taxpayers' records and books of accounts that may be inspected or required from time to time by the Commissioner or Minister. The right may also be invoked where the taxpayer or a third party is compelled to provide information to the tax authority.

Related to the matter of the right of privacy is legal professional privilege. Taxpayers may invoke this privilege in order to protect the information held by them or a third party, for example, a lawyer or an attorney.

12.4.2.1 The United Kingdom

Article 8 of the ECHR[34] protects the right to privacy, family life, home and correspondence. The article implies that the taxpayer's right to privacy protects his family, home and information which may be required or requested by the Commissioner. In the UK, the law recognises the legal advice privilege and litigation privilege.[35]

Litigation privilege provides a wider protection than legal advice privilege because it protects communications with third parties as well as communications between a lawyer and his client.[36] Legal advice privilege provides for a substantive legal right which enables a person to refuse to disclose certain documents.[37]

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34 Article 8 of the ECHR is in Part I of Schedule 1 to the Human Rights Act 1998.

35 DLA Piper "Legal professional privilege: Global guide" https://www.dlapiperintelligence.com/legalprivilege/ (Date of use: 26 November 2019).

36 DLA Piper "Legal professional privilege: Global guide" 1, https://www.dlapiperintelligence.com/legalprivilege/ (Date of use: 26 November 2019).

37 DLA Piper "Legal professional privilege: Global guide" 1, https://www.dlapiperintelligence.com/legalprivilege/ (Date of use: 26 November 2019).

12.4.2.2 Canada

Section 3 of the Taxpayer Bill of Rights ("TBR") protects the personal and financial information of the taxpayer. Section 7 of the Charter does not expressly provide for the protection of privacy, but this is implied. The section provides that everyone has the right to life, liberty and security of the person.

Section 237.3(17) of the Income Tax Act ("the Act")[38] provides for the protection of taxpayers' information held by their legal practitioners in terms of the solicitor-client privilege. The section provides that a lawyer who is an advisor in respect of a reportable transaction is not required to disclose information in respect of which the lawyer, on reasonable grounds, believes that a client of the lawyer has solicitor-client privilege. This includes a communication and records held by the solicitor.

Section 23 of the Access to Information Act[39] in addition to section 237.3(17) of the Act provides that the head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.

12.2.4.3 South Africa

Section 14 of the Constitution provides that everyone has the right to privacy, which includes the right not to have their person or home searched; their property searched; their possessions seized; or the privacy of their communications infringed. However, this right to privacy is subject to the limitation of rights in section 36 of the Constitution.

A taxpayer's right to privacy may be contravened by section 46(2) of the TAA, which provides that the Commissioner may request information from a taxpayer or a class of taxpayers. In addition to the fact that the request for information by the Commissioner may infringe the right to privacy of the taxpayer, contraventions may arise when the information is obtained by the Commissioner under compulsion.

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38 Income Tax Act (R.S.C., 1985, c. 1 (5th Supp.)).
39 Access to Information Act (R.S.C., 1985, c. A-1).

The court held that the Commissioner is entitled to launch proceedings directing the respondent to comply with section 46(4) of the TAA.[40] This means that the Commissioner is entitled to litigate to enforce the production of requested information from the taxpayer if the provisions of section 46 of the TAA have been complied with.

It should be noted that records in the hands of accountants are not protected by the principle of legal privilege as is the case with records in the hands of a legal representative. As is the case in the UK, in South Africa the term "legal profession privilege" consists of two components: legal advice and litigation privilege.

The privilege of legal advice protects communications between legal advisers and clients where the legal adviser acted in a professional capacity and the communication was made in confidence, for the purpose of obtaining or giving legal advice, and the advice was not sought for an unlawful purpose.

In a recent High Court decision, the court had to decide on the scope of legal professional privilege and the circumstances in which such privilege could be waived.[41] The court held that legal professional privilege belongs to the litigant and can therefore only be waived by the litigant and not by the legal advisor or third parties.[42]

While the matter has yet to be decisively determined by the South African Tax Court, international tax case law has made it clear that tax advice solicited from accountants or tax practitioners – who do not qualify as legal advisors will not be subject to legal professional privilege and will have to be disclosed should SARS require such disclosure.[43]

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40 *Commissioner for the South African Revenue Services v Brown* (561/2016) [2016] ZAECPEHC 17 (5 May 2016).

41 *Astral Operations Ltd and Others v Minister for Local Government, Western Cape and Another* 2019 3 SA 189 (WCC).

42 *Astral Operations Ltd v Minister for Local Government* para 7.

43 Brinker and Kotze "Legal professional privilege protection available to taxpayers too" (2019) *Cliffe Dekker Hofmeyer Tax and Exchange Control Alert* 2, https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2019/Tax/downloads/Tax-and-Exchange-Control-Alert-14-June-2019.pdf (Date of use: 25 June 2019).

Litigation privilege protects communications between legal advisers and clients or third parties, provided that the legal advisor acted in a professional capacity and that the communication was made in confidence, for the purpose of a contemplated litigation and not for any unlawful purpose.[44]

A taxpayer could seek tax advice for the purposes of its disclosure to SARS in order to safeguard the taxpayer against the imposition of understatement penalties by SARS in terms of section 223 of the TAA. Section 42A of the TAA provides for the procedure for invoking legal professional privilege.

Chapter 6 of the TAA protects the confidentiality of the taxpayer's information by providing a general prohibition of disclosure in section 67 of the TAA relating to SARS confidential information and taxpayer information (both defined in paragraph 2.2.1.2 above).

In the event of a disclosure by SARS of confidential information or taxpayer information contrary to Chapter 6 of the TAA, the person to whom it was so disclosed may not in any manner disclose, publish or make it known to any other person who is not a SARS official.[45]

The Protection of Personal Information Act ("POPI Act")[46] protects personal information processed by public and private bodies. The POPI Act in its preamble acknowledges the right to privacy entrenched in section 14 of the Constitution. The POPI Act further acknowledges the constitutional values of democracy and openness, and the need for economic and social progress, within the framework of the information society which requires the removal of unnecessary impediments to the free flow of information, including personal information.

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44 DLA Piper "Legal professional privilege: Global guide" https://www.dlapiperintelligence.com/legalprivilege/ (Date of use: 26 November 2019).

45 Section 67(3) of the TAA.

46 Protection of Personal Information Act 4 of 2013.

12.4.2.4 Comments

It is clear from all three countries that a taxpayer may be compelled to provide information and that information may be requested from taxpayers or from third parties. However, in the UK Article 8 of the ECHR, in Canada section 3 of the TBR and, in South Africa, section 14 of the Constitution, Chapter 6 of the TAA and the POPI Act all protect taxpayers' right to privacy against the tax authorities' powers to request information from taxpayers or third parties.

Although South Africa's section 67 of the TAA and the POPI Act provide for the protection of the right to privacy, this does not mean that tax authorities cannot obtain information from taxpayers or third parties. SARS must obtain information if it is to carry out its duties effectively.

The important point is that, where the tax authority obtains such information, it is expected to ensure its confidentiality and treat that information as taxpayer information. This is what section 67 of the TAA and the POPI Act insist on. If SARS obtains a taxpayer's personal information, it must use it in such a way as to prevent disclosure. Although a taxpayer's privacy must be protected, the Constitution also provides for the limitation of rights such as privacy.

In addition to the protection of privacy, the three countries provide for the further protection of privileged information held by legal professionals. In the UK there is protection in the form of legal professional privilege and litigation privilege.[47] In Canada, section 237.17 of the Income Tax Act provides for solicitor-client privilege. In South Africa, section 64 of the TAA provides for legal professional privilege.

12.4.3 Protection of taxpayers' rights to privacy against the tax authority's power of search and seizure of taxpayers' properties

Information may be gathered by the tax authority through search and seizure of the taxpayer's property. The tax officer may (with or without a warrant) enter the

[47] DLA Piper "Legal professional privilege: Global guide" https://www.dlapiperintelligence.com/legalprivilege/ (Date of use: 26 November 2019).

property belonging to the taxpayer in order to seize property such as computers and documents containing information. The idea behind this procedure is that those properties and documents may contain crucial information that is required in order to assess the compliance status of the taxpayer.

12.4.3.1 The United Kingdom

Section 61(2) of the Taxes Management Act ("TMA")[48] provides that a warrant on *ex parte* application (the co-operation of the other party is not required) must be obtained to break open, in the daytime, any house or premises, the collector calling to his assistance any constable. Computers and documents belonging to the taxpayer may be seized to obtain information required. It should be noted that this information may be protected by legal professional privilege and litigation privilege.[49]

12.4.3.2 Canada

Gathering of information through search and seizure may be made through *ex parte* (unopposed and without the co-operation of the taxpayer) application in terms of section 231.3(1) of the Income Tax Act. Just as in the UK, so in Canada section 237.17 of the Income Tax Act provides for the protection of taxpayers' information held by their legal practitioners.

The solicitor-client privilege provides for the protection of information between a lawyer who is an advisor and his taxpayer client. This includes communications and records of accounts held by the solicitor.

12.4.3.3 South Africa

The procedure for search and seizure of the property belonging to the taxpayer may be utilised by the Commissioner upon application for a warrant and under exceptional circumstances without a warrant. Section 59(1) of the TAA provides that a senior SARS official may authorise an application for a warrant under which SARS

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48 Taxes Management Act 1970 (c. 9).

49 DLA Piper "Legal professional privilege: Global guide" https://www.dlapiperintelligence.com/legalprivilege/ (Date of use: 26 November 2019).

may enter premises where relevant material is kept to search the premises and any person present on the premises and seize relevant material. Section 59(2) of the TAA provides that SARS must apply *ex parte* (unopposed and without the co-operation of the taxpayer) to a judge for the warrant.

Section 62(1) of the TAA provides that if a senior SARS official has reasonable grounds to believe that the relevant material included in a warrant is at premises not identified in the warrant and may be removed or destroyed, and a warrant cannot be obtained in time to prevent the removal or destruction of the relevant material and the delay in obtaining a warrant would defeat the object of the search and seizure, a SARS official may enter and search the premises and exercise the powers granted as if the premises had been identified in the warrant.[50]

In addition, section 63(1) of the TAA provides that a senior SARS official may conduct search and seizure without a warrant.

12.4.3.4 Comments

It is clear that in all three countries, search and seizure is activated by the tax authority by an *ex parte* application to a judge for the issuance of the warrant. This procedure may also be carried out with or without a warrant. It may involve a process where the tax officer breaks open doors in order to gain entry, especially when he suspects that the information may be easily destroyed by the taxpayer.

Article 8 of the ECHR (in the UK), section 3 of the TBR (in Canada), section 14 of the Constitution, Chapter 6 of the TAA and the POPI Act (in South Africa) all protect the right to privacy of taxpayers in cases of search and seizure by the tax authority. In the UK the legal professional privilege and litigation privilege protects taxpayers' information held by lawyers or attorneys. The solicitor-client privilege provides protection in Canada. Section 64 of the TAA provides for the legal professional privilege in South Africa.

[50] Section 62(1)(a), (b) and (c) of the TAA.

Although taxpayers have a right to privacy, this right is limited by the Constitution for the public good, for example, where the Commissioner may conduct search and seizure. However, section 67 of the TAA, the POPI Act and section 64 of the TAA dealing with legal professional privilege are in place in South Africa to ensure that SARS acts within the law to protect confidential information which may be searched and seized. In this way, taxpayers' rights are not absolutely infringed.

12.4.4 Protection of taxpayers' rights to privacy when taxpayer information is exchanged with other countries

The tax authority may gather information about taxpayers and exchange it with other countries. Article 26 of the Organisation for Economic Co-operation and Development Model Tax Convention ("OECD Model") and of the United Nations Model Tax Convention ("UN Model") provides for the exchange of information between contracting states.

A Tax Information Exchange Agreement ("TIEA") was also developed by the OECD to provide a forum to exchange information even where a double tax treaty is not in place.[51] The OECD Common reporting standards also enable automatic exchange of financial accounts information.

In most cases of information exchange, no issue of trade, business or other secret will arise.[52] Financial information, including books and records, does not by its nature constitute a trade, business or other secret.[53] However, the disclosure of financial information may reveal a trade, business or other secret. The protection of such information may also extend to information in the possession of third persons.[54]

A requested state may decline to disclose information relating to confidential communications between attorneys, solicitors or other admitted legal

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51 Oguttu *International Tax Law* 613.

52 OECD *Model Tax Convention on Income and on Capital: Condensed Version 2017* para 19.2 of the Commentary on Article 26(3).

53 Paragraph 19.2 of the Commentary on Article 26(3).

54 Paragraph 19.2 of the Commentary on Article 26(3).

representatives which is protected from disclosure under domestic law.[55] However, such protection does not attach to documents or records delivered to an attorney, solicitor or other admitted legal representative in an attempt to protect such documents or records from disclosure required by law.[56] Also, information on the identity of a person such as a director or beneficial owner of a company is typically not protected as a confidential communication.[57]

Contracting states do not have to supply information contrary to public policy (*ordre public*).[58] However, this limitation should only become relevant in extreme cases.[59] For instance, such a case could arise if a tax investigation in the requesting state were motivated by political, racial, or religious persecution.[60]

Under Action 13 of the OECD Base Erosion and Profit Shifting ("BEPS") project published on 8 June 2015,[61] Country-by-Country Reporting ("CbCR") reporting was introduced. Countries that enact legislation to enable CbCR and have signed up to international agreements to enable CbCR must automatically exchange information relating to profits, taxes paid, employees and assets of Multinational Enterprise ("MNE") Groups with other countries.

Under Action 13 of the OECD Action Plan, countries are required to develop legislation on CbCR which requires MNEs to file notifications of their CbCR.[62] The action requires countries to adopt a three-tiered standardised approach to transfer pricing documentation, which consists of a master file, a local file and a CbCR.[63] Countries should ensure that CbCRs are kept confidential and used appropriately.[64]

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55 Paragraph 19.3 of the Commentary on Article 26(3).
56 Paragraph 19.3 of the Commentary on Article 26(3).
57 Paragraph 19.3 of the Commentary on Article 26(3).
58 Paragraph 19.5 of the Commentary on Article 26(3).
59 Paragraph 19.5 of the Commentary on Article 26(3).
60 Paragraph 19.5 of the Commentary on Article 26(3).
61 OECD Global Forum on Transparency and Exchange of Information "About Automatic Exchange" http://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/ (Date of use: 9 May 2018).
62 OECD *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report* 13.
63 SARS "Country-by-Country (CbC) Financial Data Reporting" https://www.sars.gov.za/TaxTypes/CIT/Pages/Country-by-Country.aspx_ (Date of use: 22 May 2018).
64 OECD *BEPS Action 13 on Country-by-Country Reporting – Peer Review Documents* 15.

12.4.4.1 The United Kingdom

Article 8 of the ECHR provides that everyone has the right to respect for his private and family life, his home and his correspondence.

The UK has signed double tax treaties based on the OECD Model Tax Convention which can enable exchange of information in tax matters, under article 26. It has also signed Tax Information Exchange Agreements (TIEAs) which enable exchange of information in tax matters and has enacted legislation that can enable automatic exchange of financial accounts information. These measures contain provisions to protect the privacy of taxpayer information.

Section 122(1) of the Finance Act[65] provides for the implementation of regulations by the Treasury of the OECD Guidance on Country-by-Country Reporting. However, the Act does not provide for confidentiality issues.

The Policy Paper ("the Policy")[66] on CbCR introduced a new statutory requirement for UK headed Multinationals ("MNEs"), or UK sub groups of MNEs. The Policy requires the MNEs to make an annual CbCR to HMRC showing for each tax jurisdiction in which they do business the following information: the amount of tax, profit before income tax and income tax paid and accrued and their total employment, capital, retained earnings and tangible assets.[67]

12.4.4.2 Canada

Section 3 of the Taxpayer Bill of Rights ("TBR") protects the personal and financial information of the taxpayer. Section 7 of the Charter does not expressly provide for

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65 Finance Act 2015 (c. 11).

66 HM Revenue & Customs "Policy Paper: Country by Country Reporting – Updated" 30 March 2017, https://www.gov.uk/government/publications/country-by-country-reporting-updated (Date of use: 19 March 2020).

67 HM Revenue & Customs "Policy Paper: Country by Country Reporting – Updated" 30 March 2017, https://www.gov.uk/government/publications/country-by-country-reporting-updated (Date of use: 19 March 2020).

the protection of privacy, but impliedly does so. Section 7 provides that everyone has the right to life, liberty and security of the person.

Canada has signed double tax treaties based on the OECD Model Tax Convention which can enable exchange of information in tax matters, under article 26. It has also signed Tax Information Exchange Agreements (TIEAs) which enable exchange of information in tax matters and has enacted legislation that can enable automatic exchange of financial accounts information. These measures contain provisions to protect the privacy of taxpayer information.

The Canada's CbCR legislation is contained in section 233.8 of the Income Tax Act. The section empowers the Minister to automatically exchange information relating to the taxpayer with other jurisdictions that have implemented CbCR. For this exchange to happen, the two jurisdictions must have a legal framework in place for the automatic exchange of information, and they must have entered into a competent authority agreement relating to CbCR.

Section 233.8 of the Act provides that Canada will automatically exchange CbCR information only with jurisdictions that are committed to using the information appropriately and preserving its confidentiality. This means that the information must be treated as secret and only be used by tax officials for tax purposes.

The Guidance on Country-by-Country Reporting in Canada[68] provides that section 241 of the Income Tax Act guarantees taxpayers' rights to privacy. This protection relates to all taxpayer information and treats it as confidential so that it should only be disclosed in accordance with the law.

12.4.4.3 South Africa

Section 14 of the Constitution protects the right to privacy which is subject to the limitation clause in section 36 of the Constitution.

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[68] CRA "Guidance on Country-By-Country Reporting in Canada" 13, https://www.canada.ca/content/dam/cra-arc/formspubs/pub/rc4651/rc4651-20e.pdf (Date of use: 6 April 2020).

South Africa has signed double tax treaties based on the OECD Model Tax Convention which can enable exchange of information in tax matters, under article 26. It has also signed Tax Information Exchange Agreements (TIEAs) which enable exchange of information in tax matters and has enacted legislation that can enable automatic exchange of financial accounts information. These measures contain provisions to protect the privacy of taxpayer information.

South Africa has issued a *Government Gazette*[69] which provides that the country has agreed to participate in the joint OECD and Group Twenty ("G20") BEPS Project.

The Country-by-Country and Financial Data Reporting[70] document represents a response by SARS to implement the OECD BEPS measures in Action 13 (2015) Final Report. The CbCR must be tabled no later than 12 months after the last day of the Reporting Fiscal Year of the MNE Group.[71] SARS must only use the information in CbCR for the purposes of assessing high-level transfer pricing risks and other base erosion and profit shifting related risks in South Africa, which will inform case selection and audit.[72]

On 11 May 2018, SARS published a Government Notice imposing financial penalties for the non-submission of a CbCR, master file and local file returns.[73] Section 210 of the TAA provides that such non-submission is regarded as non-compliance that is subject to a fixed amount penalty in accordance with section 211 of the TAA.[74] Section 67(2) of the TAA prohibits the disclosure of taxpayer information by a person who is a current or former SARS official. Such a person must preserve the secrecy of the taxpayer information.[75]

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69 SARS GN No R. 1598 *Government Gazette* 40516 of 23 December 2016.

70 SARS "Country-by-Country (CbC) Financial Data Reporting" https://www.sars.gov.za/TaxTypes/CIT/Pages/Country-by-Country.aspx (Date of use: 22 May 2018).

71 Article 5 of SARS GN No R. 1598 *Government Gazette* 40516 of 23 December 2016.

72 Article 5 of SARS GN No R. 1598 *Government Gazette* 40516 of 23 December 2016.

73 SARS GN 597 *Government Gazette* 38983 of 10 July 2015.

74 SARS GN 597 *Government Gazette* 38983 of 10 July 2015.

75 Section 69(1) of the TAA.

Article 6 of the relevant *Government Gazette* provides for the use and confidentiality of CbCR information.[76] The article provides that SARS must only use the CbCR for the purposes of assessing high-level transfer pricing risks and other BEPS related risks in South Africa. Section 64 of the TAA provides for the search and seizure of the relevant material that may be alleged to be subject to legal professional privilege.

Section 72(1) of the POPI Act provides that a responsible party in South Africa may not transfer personal information about a data subject to a third party who is in a foreign country. Where there is a law or treaty which regulates the binding agreement between the two countries, the two countries may still exchange taxpayer information. The taxpayer may also consent to the exchange or transfer.

12.4.4.4 Comments

All three countries have signed double tax treaties based on the OECD Model Tax Convention which can enable exchange of information in tax matters. All three countries have also signed Tax Information Exchange Agreements (TIEAs) which also enable exchange of information in tax matters. The countries have also enacted legislation regarding common reporting standards that can enable automatic exchange of financial accounts information.

All three countries have implemented the legislation on CbCR. The CbCR rules recommend that countries should implement legislation for the protection of taxpayers' confidential information. However, the three countries rely on their general protection of confidential information: that is, Article 8 of the ECHR in the UK, section 3 of the TBR in Canada, and section 14 of the Constitution, Chapter 6 of the TAA and the POPI Act in South Africa.

It should be noted that even if the taxpayers' right to privacy may seem adequately protected by the confidentiality provisions embedded in the CbCR rules, information relating to taxpayers may be leaked to the wrong people during this exchange. Taxpayers may therefore invoke this right when it appears to have been infringed,

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76 SARS GN No R. 1598 *Government Gazette* 40516 of 23 December 2016.

and to do so may rely on the obligation of confidentiality laid down by the CbCR rules.

12.4.5 Protection of taxpayers' rights to just administrative action against the tax authority's power to conduct an audit

The conduct of an audit by the tax authority must meet the requirements laid down by the administrative justice system. This is the system that promotes the quality of original decision-making and the routes for challenging maladministration. Failure to meet these requirements results in the rights of the individual such as the taxpayer being infringed by the tax authority.

12.4.5.1 The United Kingdom

In the UK, the right to just administrative action is not constitutionally entrenched. The key principles to be followed in the administrative justice system in the UK are fairness, information, accessibility, consistent reasons and efficiency. In tax law, this means that decisions by the Commissioner must be fair, based on the correct information which is accessible to taxpayers. Taxpayers must also be provided with accurate reasons for those decisions.

Academics are of the view that there is no general duty to give reasons for a decision by the administrator in English law.[77] Yet the general trend has been for the courts to accept that the duty to provide reasons does exist.[78]

The advantages of providing reasons for decisions are stated as the following: first, reasons assist the court in its supervisory function; secondly, an obligation to provide reasons demonstrates that the decision has been thought through by the administrator; thirdly, the provision of reasons assists administrators in ensuring that other aspects of administrative law are not frustrated; and, fourthly, the provision of reasons provides public confidence in the administrators.[79]

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77 Craig *Administrative Law* 436.
78 Craig *Administrative Law* 441.
79 Craig *Administrative Law* 436.

When the Commissioner provides reasons to taxpayers during the gathering information, the above advantages can be fulfilled.

12.4.5.2 Canada

Just as in the UK, so in Canada the right to just administrative action is not constitutionally entrenched. Taxpayers may rely on the common law doctrine of finality to compel the Minister to finalise the audit as soon as possible.

In *British Columbia (Workers' Compensation Board) v Figliola*,[80] the Supreme Court of Canada ("SCC") held that the doctrine may also be invoked to maintain a balance between finality and fairness.[81] This means that the doctrine may also be used to determine whether the taxpayer received a fair hearing.

12.4.5.3 South Africa

Section 33 of the Constitution entrenched the right to just administrative action. This means that the Commissioner's conduct in performing an audit must be classified as administrative action in order to be lawful, reasonable and procedurally fair. This right under section 33 of the Constitution includes the right to be provided with written reasons when taxpayers' rights have been adversely affected by the conduct of the audit.

12.4.5.4 Comments

The South African provisions on just administrative action seem to be more effective than those of the UK and Canada. This is because the principle of just administrative action is constitutionally entrenched in South Africa as contrasted with the position in the UK and Canada.

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80 [2011] 3 SCR 422.

81 *British Columbia (Workers' Compensation Board) v Figliola* paras 58, 65.

In South African tax law, it is argued that the conduct of the Commissioner when gathering information through audits must meet the requirements of section 33 of the Constitution to be valid. Failure to meet these requirements may result in the infringement of taxpayers' rights to just administrative action.

12.4.6 Protection of taxpayers' right to be provided with reasons

One important aspect of the right to just administrative action is the right to be provided with reasons by the administrator. The tax officer must explain himself as to why a particular decision was made against a taxpayer.

12.4.6.1 The United Kingdom

As stated in paragraph 12.4.5 above, in English law there is no general duty to give reasons for a decision by the administrator. This means, for example, that the Commissioner is not expected to give reasons to the taxpayer for conducting an audit on his affairs.

The UK Parliament has also been reluctant, except on a few occasions, to impose a duty to provide reasons. An example of such a duty is found in Article 253 of the Treaty Establishing the European Community[82] which provides for the stating of reasons.

12.4.6.2 Canada

The Taxpayer Bill of Rights ("TBR") provides that the CRA promises to deal with all taxpayer complaints promptly and in confidence. Section 9 of the TBR provides that the CRA shall explain its findings. This means that the Minister must explain the findings (in written reasons) why he exercised his information gathering powers on the taxpayer.

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82 Official Journal C 325, 24/12/2002 P. 0033 – 0184; Official Journal C 340, 10/11/1997 P. 0173 - Consolidated version.

12.4.6.3 South Africa

Section 33(2) of the Constitution provides for and guarantees the provision of reasons by the administrator. The section further provides that the taxpayer must be adversely affected by the administrative action of the Commissioner before reasons may be provided.

The Commissioner must be able to explain himself when, for example, he decided to conduct an audit on the affairs of the taxpayer. The Supreme Court of Appeal ("SCA") and the Tax Court has ruled that the reasons to be provided by the Commissioner must be adequate.[83] Through this qualification (that reasons must be provided only when rights are adversely affected), the drafters of the Constitution limited the right to written reasons. Section 5 of PAJA (stated in paragraph 3.2.4 above) gives the constitutional right to reasons statutory form.[84]

12.4.6.4 Comments

The right to be provided with reasons is entrenched in all the countries discussed in this work. This means that the tax authority must be able to explain why information gathering must be performed.

In South Africa, the Constitution and section 5 of PAJA provides that the taxpayer must request reasons. Section 5 of PAJA provides that for reasons to be provided, the taxpayer must have been adversely affected by the conduct of the Commissioner. In the UK and Canada there are instances where reason must be provided to taxpayers.

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83 *CSARS v Sprigg Investment 117 CC t/a Global Investment* [2010] JOL 26547 (SCA); *ITC 1929* 82 SATC 264.

84 Klaaren and Penfold "Just Administrative Action" ch63-p114.

12.4.7 Protection of taxpayers' right of access to courts to institute an action against the tax authority

Taxpayers' right of access to courts is an overarching right. Taxpayers must be able to approach the courts and other independent forums to seek relief when their rights have been infringed by the tax authority.

12.4.7.1 The United Kingdom

An important feature of the rule of law is that individuals must have access to courts.[85] Article 6 of the ECHR[86] provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

12.4.7.2 Canada

Section 24(1) of the Charter provides that anyone whose rights or freedoms guaranteed by the Charter have been infringed or denied may apply to a court of competent jurisdiction to obtain relief as the court considers appropriate. Taxpayers' rights of access to courts or independent impartial forums are also protected in section 11(d) of the Charter, in terms of which any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

12.4.7.3 South Africa

Section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

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85 Stevens *Constitutional and Administrative Law* 16.

86 Article 6 of the ECHR is in Part I of Schedule 1 to the Human Rights Act 1998.

12.4.7.4 Comments

All three countries provide for a platform to allow taxpayers to approach courts or independent forums to resolve their disputes where the information gathering powers of the tax authority infringe their rights. Taxpayers must also be able to satisfy their claims in the form of remedies.

12.4.8 Protection of taxpayers' rights to a fair hearing or trial where the tax authority pursues criminal or civil investigations against the taxpayer

The right to a fair hearing or trial protects a taxpayer in instances where he has been referred for criminal investigation as a result of the gathered information. Yet there is no clear boundary as to when a civil investigation becomes a criminal investigation. This change normally happens where the tax authority decides to refer the taxpayer for criminal investigation after conducting an audit or search and seizure.

It needs to be clarified when an audit becomes a criminal investigation and whether there is a distinction between civil and criminal investigations. This clarity would eliminate situations where the taxpayer may be investigated for a lengthy period without being referred for criminal investigations.

12.4.8.1 The United Kingdom

Prior to 27 March 2014, the Attorney General appointed an individual as the Director of Revenue and Customs Prosecutions and staff.[87] The Director and his staff were together referred to as the Revenue and Customs Prosecutions Office.[88] On 27 March 2014, the office of the Director of Revenue and Customs Prosecutions was abolished and the functions of the Director of Revenue and Customs Prosecutions were transferred to the Director of Public Prosecutions ("DPP").[89]

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87 Commissioners for Revenue and Customs Act 2005 ss 34–39, 35, 36, Schedule 3 (repealed by SI 2014/834).

88 Commissioners for Revenue and Customs Act 2005 s 34(3).

89 The Public Bodies (Merger of the Director of Public Prosecutions and the Director of Revenue and Customs Prosecutions) Order 2014, SI 2014/834, Art 3. Any legal proceedings which on 27 March 2014 were in the process of being done by or in relation to the Director

Section 1 of the Prosecution of Offences Act[90] provides for a prosecuting service for England and Wales that is known as the Crown Prosecution Service ("CPS") consisting of–

> (a) the Director of Public Prosecutions, who shall be head of the Service;
> (b) the Chief Crown Prosecutors, designated under subsection (4) below, each of whom shall be the member of the Service responsible to the Director for supervising the operation of the Service in his area; and
> (c) the other staff appointed by the Director under this section.

While section 2 provides for the appointment of the DPP by the Attorney General, section 3 provides for the duties of the DPP.

It is common cause that the criminal proceedings concerned are concerned with tax-related offences. Section 25 of the CRCA provides that a reference to civil proceedings is not a reference to proceedings in respect of an offence.[91] Section 25 of the CRCA further provides that an officer of HMRC or a person authorised by the Commissioners may conduct civil proceedings in a Magistrates' Court or in the Sheriff Court, relating to a function of HMRC.[92]

12.4.8.2 Canada

The SCC provided a distinction between tax audits and investigations.[93] The court provided factors to be used to determine when an audit has crossed the line and

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of Revenue and Customs Prosecutions could be continued by or in relation to the Director of Public Prosecution: see Art 5(3). Where the Director of Public Prosecution has conduct of proceedings by virtue of Art 5(3), the Director of Public Prosecution is to be treated, notwithstanding the repeals and amendments made by Public Bodies (Merger of the Director of Public Prosecutions and the Director of Revenue and Customs Prosecutions) Order 2014, SI 2014/834: (1) as acting under the enactment under which the Director of Revenue and Customs Prosecutions was acting on 27 March 2014; and (2) as having the same powers to take steps in relation to those proceedings as the Director of Revenue and Customs Prosecutions would have had: Art 6(1). A reference to the Director of Revenue and Customs Prosecutions includes a reference to a Revenue and Customs Prosecutor and a person appointed under the Commissioners for Revenue and Customs Act 2005 s 38, and a reference to the Director of Revenue and Customs Prosecutions is to be read, so far as is necessary or appropriate, as being a reference to a Crown Prosecutor or a person appointed under the Prosecution of Offences Act 1985 s 5: Art 6(2).

90 Prosecution of Offences Act 1985.

91 Section 25(5)(b) of the CRCA.

92 Section 25(1) of the CRCA.

93 *R v Jarvis* [2002] 3 SCR 757.

becomes a criminal matter.[94] Section 7 of the Charter implies that when the purpose of an inquiry is the determination of penal liability, the full panoply of Charter rights are engaged for the taxpayer's protection.[95]

No further statements may be compelled from the taxpayer by the Minister for the purpose of advancing the criminal investigation. Similarly, no documents may be required from the taxpayer or any third party for the purpose of advancing the criminal investigation.[96]

12.4.8.3 South Africa

Criminal investigation deals with the investigation of the apparent commission of a "serious tax offence" in terms of sections 43 and 44 of the TAA. These sections empower the Commissioner to refer tax offenders for the prosecution of any tax offence committed. The sections also empower the Commissioner to assist in the investigation of the particular offence.

It is still not clear at which stage the Commissioner is expected to conclude an investigation. Thus, a taxpayer runs the risk of being investigated for a lengthy period without conclusion. In this instance, the Commissioner's powers do not terminate.

Section 44 of the TAA permits the information obtained during criminal investigations referred to in terms of section 43 to be used in criminal and civil proceedings. It is upon this aspect that the second part of the problem may be that it is not clear at which point the civil investigation becomes a criminal investigation.

In South Africa, the National Prosecuting Authority ("NPA") is the single prosecuting authority. It has the power to institute criminal proceedings on behalf of the state, and this power must be exercised without fear, favour or prejudice.[97]

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94 *R v Jarvis* para 94.
95 *R v Jarvis* para 96.
96 *R v Jarvis* para 96.
97 Section 179 of the Constitution.

It is submitted that the Commissioner, in exercising these prosecutorial powers, usurps the rights and powers of the NPA. This usurpation conflicts with the constitutional principle of the separation of powers, which requires that all three branches of government — executive, legislative and judicial — perform the powers specifically given to them.[98]

12.4.8.4 Comments

Section 25 of the CRCA in the UK makes a distinction between referrals for criminal and civil proceedings. In Canada, there is a distinction between the audit and investigative functions of the Minister. Audit powers of the Commissioner could not be used where the main purpose of an inquiry was a criminal investigation.[99] If they were, the information collected could not be used in a prosecution, because of the Charter of Rights protections of the right to a fair hearing.

More importantly, guidelines were laid down for taxpayers to consider whether to comply with the Minister's conduct that turns the civil matter (the audit) into a criminal investigation. This is a classic example of whether evidence obtained during an audit could be used to further investigation or prosecution of offences under section 239(1) of the Income Tax Act without violating the taxpayer's Charter rights.

In South Africa, the principle of the separation of powers is contravened where one branch of government performs an act meant to be performed by another branch. The NPA in South Africa is mandated to prosecute offenders on behalf of the state, whereas SARS is mandated to collect taxes on behalf of the state.

South Africa would have to follow the UK with regard to the office that prosecutes offenders. Just as the DPP is responsible for the prosecution of offences in the UK, the NPA in South Africa is equally expected to be responsible for the prosecution of offenders.

98 Baxter *Administrative Law* 344.
99 *R v Jarvis* para 88.

12.4.9 Protection of taxpayers' rights against self-incrimination where the tax authority pursues criminal or civil investigations against the taxpayer

The right to a fair hearing or trial in the context of a taxpayer protects him in instances where, in the process of the tax authority's gathering information, the taxpayer is compelled to answer questions put to him in a self-incriminating position where the information is later used to charge him for a criminal offence.

12.4.9.1 The United Kingdom

The privilege against self-incrimination in the UK is deemed a human right although it is not among the rights and freedoms explicitly protected by the ECHR.[100] It is also one of the rules of criminal procedure under which the suspect is not required to provide the authorities with information that might be used against him in a criminal trial.[101]

The privilege against self-incrimination relates to both oral and documentary information.[102] It also relates to the forced disclosure of the documents that existed before the investigation and where there are penalties for non-compliance.[103] This privilege is an implicit requirement of the right to a fair hearing in Article 6 of the ECHR.[104] Therefore, the privilege against self-incrimination constitutes a part of the right to a fair hearing or trial granted to any person under criminal investigation. In a nutshell, the privilege comprises the right not to contribute to self-incrimination and the right to remain silent.

12.4.9.2 Canada

Section 13 of the Charter provides protection to a witness who testifies in any proceedings not to incriminate himself. This is so except in a prosecution for perjury or for the giving of contradictory evidence.

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100 Andoh 2005 *Business Law Review* 9.
101 Redmayne 2007 *OJLS* 209.
102 Redmayne 2007 *OJLS* 209.
103 Redmayne 2007 *OJLS* 209.
104 Redmayne 2007 *OJLS* 210.

In Canada, the principle against self-incrimination is not a constitutional right[105] but one of the principles of fundamental justice. The Crown is not prohibited from compelling the production of evidence, or even compelling the suspect to assist in its production.[106] Thus the Crown controls the manner in which this evidence may be obtained.[107]

Section 5(1) of the Canada Evidence Act[108] provides that witnesses are required to answer potentially self-incriminating questions. Section 5(2) of the Act, however, prevents the state from adducing answers in later criminal proceedings against witnesses, as long as they were under compulsion and claimed the Act's protection at the previous proceeding.

12.4.9.3 South Africa

Section 35(3)(j) of the Constitution protects taxpayers against self-incrimination. The section also provides that every accused person has the right to a fair trial, which includes the right not to be compelled to give self-incriminating evidence.

Section 43 of the TAA provides that any information provided by the taxpayer that incriminates him may not be used against him in a criminal prosecution and must be kept separate.

In South Africa, the court decided before the TAA that no incriminating answer may be given which could be used against the person when answering questions in any criminal proceedings against that person.[109]

105 *R v F (S)* (2000) 141 CCC (3d) 225 (Ont CA).
106 Stuesser 2004 *Alta L Rev* 549.
107 Stuesser 2004 *Alta L Rev* 549.
108 Canada Evidence Act (R.S.C. 1985, c. C-5).
109 *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 2 SA 621 (CC).

12.4.9.4 Comments

What constitutes an infringement of the right against self-incrimination comprises three aspects: first, the nature and the degree of compulsion used to obtain relevant information from the taxpayer; secondly, the existence of other relevant procedural guarantees in the particular proceedings; and, thirdly, the use of the obtained information.

The three countries protect a taxpayer's right to a fair trial or hearing in instances when the taxpayer is suspected to have incriminated himself in the process of gathering information. However, the UK and the Canada do not consider the right as a constitutional right, in contrast to South Africa, which does. This means that South Africa must be commended for providing individual with the right against self-incrimination.

12.5 PROTECTION OF TAXPAYERS' RIGHTS BY APPLYING THE COMMON LAW RULES OF NATURAL JUSTICE

The countries discussed in this work — the UK, Canada and South Africa — share an origin in the common law. The rules of natural justice (*audi alteram partem* and *nemo iudex in sua causa*) employed in these countries and discussed below refer to common sense, fairness and the proper use of reasons. These rules of natural justice are applicable to the procedure to be followed before the tax authority can gather information from the taxpayer and they can be invoked by taxpayers to protect their rights. These rules refer to the following:

12.5.1 Protection of taxpayers' rights in terms of the *audi alteram partem* rule

This common law rule means that an individual is entitled to a fair hearing or trial, which means the right to appear in person, the right to lead evidence, and the right to be furnished with reasons.[110] In a nutshell, the taxpayer has the right to be afforded an opportunity to respond to the action against him.

110 Croome and Olivier *Tax Administration* 21.

12.5.1.1 The United Kingdom

The *audi alteram partem* rule in the UK is described by this statement: "We do not have a developed system of administrative law perhaps because until fairly recently we did not need it".[111] A basic requirement of the process of administrative adjudication is that a person who would be adversely affected by an act or a decision of the administration should be granted a hearing before he suffers detriment.[112]

12.5.1.2 Canada

The SCC held that express words were necessary to displace the presumption that the *audi alteram partem* rule had to be observed in the exercise of judicial functions.[113]

12.5.1.3 South Africa

The principle of *audi alteram partem* has been interpreted and developed by the courts to consist of three features: the individual must be given an opportunity to state his case on the matter; the individual must be informed of considerations against him; and reasons must be given by the administrator for any decisions taken.[114]

12.5.1.4 Comments

All three countries recognise and apply the *audi alteram partem* rule. Taxpayers may invoke this rule to advance their rights where the tax authority exercises its information gathering powers. Taxpayers must be provided with the opportunity to state their cases. Failure do so may result in the infringement of the *audi alteram partem* rule.

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111 *Ridge v Baldwin and Others* [1964] AC 40 (HL) 72.
112 De Smith 1955 *Harv L Rev* 569.
113 *Alliance des Professeurs Catholiques de Montréal v Quebec Labour Relations Board* [1953] 2 SCR 140 at 153, 156–157, 161 and 166.
114 Croome and Olivier *Tax Administration* 21.

12.5.2 Protection of taxpayers' rights in terms of the *nemo iudex in sua causa* rule

This common law rule protects individuals from decisions that are made with bias.[115] "Both parties must be given an equal opportunity to present their cases, and consequently administrative action must not be vitiated, tainted or actuated by bias."[116]

In effect, the tax authority must be impartial or unbiased when exercising its information gathering powers. The rule protects taxpayers from decisions by the tax authority which are, for example, made with bias.

12.5.2.1 The United Kingdom

In the UK, bias and impartiality may be determined by examining whether the decision maker has a pecuniary interest (financial interest) or a personal interest in the outcome of the proceedings.[117]

12.5.2.2 Canada

The further the progression of stages (investigative to hearing), the greater the requirement for no apprehension of bias**.**[118] A reasonable apprehension of bias may be present where, for example, the lawyer acted as a prosecutor and an adjudicator.

12.5.2.3 South Africa

The Appellate Division held that "the existence of a reasonable suspicion of bias satisfies the test; and … an apprehension of a real likelihood that the decision maker will be biased is not a prerequisite for disqualifying bias".[119]

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115 Churches 2015 *CJCL* 29.

116 *Yates v University of Bophuthatswana and Others* 1994 (3) SA 815 (BG) 836C *per* Friedman J.

117 Craig *Administrative Law* 457.

118 *Newfoundland Telephone Co. v Newfoundland (Board of Commissioners of Public Utilities)* [1923] 1 SCR 623.

119 *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another* 1992 3 SA 673 (A) 693I-J.

The application of the *nemo iudex in sua causa* principle is rooted in the two "common-sense rules of good administration": the first is that a decision is more than likely to be sound when the decision maker is unbiased or impartial; and the second is that the public have more faith in the administrative process when "justice is not only done, but seen to be done".[120]

12.5.2.4 Comments

All the countries recognise the principle of *nemo iudex in sua causa*. Taxpayers may be protected by this rule where it is proved that the tax authority has been biased, for example, in selecting a taxpayer for an audit or when requesting information about a taxpayer from a third party. Where that is the case, the tax authority's conduct or decision may be declared null and void.

12.5.3 Protection of taxpayers' rights in terms of the *ultra vires* doctrine

The *ultra vires* doctrine does not form part of the common law rules of natural justice but it can be used under the common law in situations where an action by the administrator was performed outside the boundaries of the powers granted to administrators, in that the administrators are considered as having exceeded their powers.

This means that the tax authority acting in a position of authority must act within the confines of its authority when gathering information from taxpayers. Should the tax authority act beyond its authority, it would be acting *ultra vires*.

12.5.3.1 The United Kingdom

The principle of Parliamentary sovereignty in the UK requires that the boundaries of the Parliament should be policed.[121] The *ultra vires* doctrine has been used to

120 Hoexter 2000 *SALJ* 405.
121 Craig *Administrative Law* 5.

achieve this purpose. The doctrine provides the idea that those to whom power has been granted should only exercise that power within their designated area.[122]

12.5.3.2 Canada

In Canada, *ultra vires* taxation refers to the collection of fees or taxes by the government when those fees or taxes were levied pursuant to an unconstitutional statute, regulation, or order-in-council, or by a statutory authority acting outside the bounds of its enabling legislation.[123]

The current position on the application of the *ultra vires* taxation is that the restitution of *ultra vires* taxes was considered an aspect of constitutional law, rather than a branch of the law of restitution, or entirely within the private law model.[124] The law had previously barred the restitution of taxes paid in cases of mistake of law.[125]

The importance of this discussion lies in the fact that in Canada, though the concept underwent changes over the years, taxpayers can invoke the principle or remedy of *ultra vires* taxation to claim back taxes paid as a result of the unconstitutional statute.

12.5.3.3 South Africa

The President is answerable to Parliament, which has the power to correct the particular decision.[126] The finding that the President acted *ultra vires* implied that he acted in a manner that was inconsistent with the Constitution.

12.5.3.4 Comments

The Canadian *ultra vires* taxation provision seems to be a good lesson to be learnt and followed by the relevant South African courts. If this provision were adopted, taxpayers would be allowed to claim the restitution of taxes paid where the

122 Craig *Administrative Law* 5.
123 Pal 2008 *UT Fac L Rev* 68.
124 *Kingstreet Investments Ltd. v New Brunswick (Finance)* [2007] 1 SCR 3.
125 *Air Canada v British Columbia* [1989] 1 SCR 1161.
126 *President of the Republic of South Africa v South African Rugby Football Union and Others* 2000 1 SA 1 (CC).

legislation that required the payment of taxes is based on an unconstitutional statute, regulation, or by a statutory authority acting outside the bounds of its enabling legislation. This approach implies that a public law remedy would be granted to ensure the return of unconstitutionally collected taxes.

For example, let us suppose that the Commissioner applied an incorrect provision to gather information from a taxpayer which resulted in an audit on the taxpayer. The question to be posed is whether the taxpayer may claim restitution where it is found that the application of the wrong provision by the Commissioner, or that the Commissioner was not authorised and therefore acted *ultra vires*, resulted in the taxpayer's incurring additional taxes.

12.6 PROTECTION OF TAXPAYERS' CONSTITUTIONAL RIGHTS BY USING INTERNAL CONTROL MEASURES

Internal control measures exist within the tax authority to resolve a taxpayer's grievance with the tax authority.[127] The aim is to control an alleged act or conduct of the tax authority that infringed the right of a taxpayer.

Internal remedies are sought if it is found that the alleged act or conduct infringed the particular right. It should be noted that the tax authority assesses the alleged infringement, excess of power or irregularity or the merits of the action and makes a decision in favour of or against the taxpayer.

12.6.1 Protection of taxpayers' rights by objecting to the tax authority's decision

This is the first step that aggrieved taxpayers must take to resolve their disputes with the tax authority. Taxpayers can invoke the objection provision to challenge a decision by the tax authority when exercising its information gathering powers which contravene taxpayers' rights.

127 *President of the Republic of South Africa v South African Rugby Football Union*.

12.6.1.1 The United Kingdom

The UK does not provide for an objection: instead, an appeal is provided for as the first step by the taxpayer to lodge a grievance regarding an assessment.

12.6.1.2 Canada

Section 165 of the Income Tax Act deals with an objection to an assessment and not to a decision by the Minister to gather information from the taxpayer or a third party. Therefore, taxpayers cannot raise an objection against a decision made by the Minister to gather information from taxpayers.

12.6.1.3 South Africa

Section 104 of the TAA provides that the taxpayer may raise an objection against an assessment or decision by the Commissioner. In this procedure, the taxpayer does not agree with the assessment or decision of the Commissioner.

This means that taxpayers may be able to object to the decision of the Commissioner to gather information from taxpayers which may infringe their rights.

12.6.1.4 Comments

Disputes between taxpayers and tax authorities in Canada and South Africa commence with an objection. However, an objection in Canada only relates to a dispute regarding an assessment, and that aspect is not relevant for this work, which deals with challenges posed by the decision of the tax authority to gather information from taxpayers.

In South Africa, taxpayers may be able to object to the Commissioner's decision in terms of section 104 of the TAA. As an internal control measure, the objection procedure is advantageous to taxpayers because it saves time and costs.

12.6.2 Protection of taxpayers' rights through administrative tribunals

The use of administrative tribunals is another example of an internal control measure that is essentially a dispute resolution process that should be used as a middle ground between the tax authority and the courts.

In effect, such tribunals are a middle ground between the internal and external dispute resolution processes and may be employed by taxpayers to resolve their disputes after the internal dispute resolution processes have been completed. These forums give taxpayers another opportunity to resolve their disputes before approaching the courts.

12.6.2.1 The United Kingdom

The tribunal system in the UK forms part of the system of administrative justice established in terms of the Tribunals, Courts and Enforcement Act ("TCEA").[128] The government has allocated to administrative tribunals the task of determining a large number of disputes between individuals and authorities.

Schedule 3 to the TCEA provides for the establishment of a Tax Chamber comprising a two-tier system: the First-tier Tribunal and the Upper Tribunal.[129] These tribunals deal specifically with tax matters. The effect of this legislation is that tribunals do not form part of the administration of government. As such, they are independent from interference by government officials.

128 Tribunals, Courts and Enforcement Act 2007 (c. 15).

129 Section 3 of the TCEA led to the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273), which came into operation on 1 April 2009.

12.6.2.2 Canada

In Canadian law, provision is made for administrative tribunals in terms of the Administrative Tribunals Support Service of Canada Act ("ATSSCA").[130] These forums are under the Minister of Justice and the Attorney General of Canada.[131]

In the case of *Penner v Niagara (Regional Police Services Board)*[132] the SCC discussed the purpose of administrative tribunals and approvingly quoted *Rasanen v Rosemount Instruments Ltd.*:[133]

> [Administrative tribunals] were expressly created as independent bodies for the purpose of being an alternative to the judicial process, including its procedural panoplies. Designed to be less cumbersome, less expensive, less formal and less delayed, these impartial decision-making bodies were to resolve disputes in their area of specialization more expeditiously and more accessibly, but no less effectively or credibly ...[134]

However, the Canadian tax Act do not deal with referral of the disputes to the administrative tribunals. One may therefore assume that the administrative tribunals do not play a role in resolving taxpayers' disputes with the CRA.

12.6.2.3 South Africa

South Africa does not follow the administrative tribunal system in tax law, and instead has Tax Courts established in terms of section 116 of the TAA. Tax Court judgments apply *inter partes* (are binding on the parties before the court) and are only of persuasive value in respect of other tax cases.[135]

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130 Administrative Tribunals Support Service of Canada Act (S.C. 2014, c. 20, s. 376).

131 Government of Canada "Administrative Tribunals Support Service of Canada" https://www.canada.ca/en/administrative-tribunals-support-service.html (Date of use: 23 August 2020).

132 [2013] 2 SCR 125.

133 (1994) 17 OR (3d) 267 (Ont CA) 279–280 (original emphasis).

134 *Penner v Niagara (Regional Police Services Board)* para 102.

135 SARS "Tax Court" https://www.sars.gov.za/Legal/DR-Judgments/Tax-Court/Pages/default.aspx (Date of use: 18 September 2019).

12.6.2.4 Comments

The UK tribunal system is the more effective than the Canadian one. The UK's Tax Tribunal is specifically designed to deal with disputes of taxpayers while the Canadian one does not deal with disputes of taxpayers. Further, tribunals are independent and do not form part of the administration of government.

As such, they are independent from interference by government officials. So the UK's tribunal system is an excellent initiative that South Africa can follow to provide additional protection for taxpayers' constitutional rights. Taxpayers' use of these tribunals rather than approaching tax courts may alleviate the burden of the courts, and these tribunals also provide a cheaper and faster means for taxpayers to resolve their disputes with the Commissioner.

12.7 PROTECTION OF TAXPAYERS' CONSTITUTIONAL RIGHTS BY USING EXTERNAL CONTROL MEASURES

External remedies refer to those avenues where the one party, normally the taxpayer, seeks a remedy for the infringement of his rights from the courts. This procedure normally follows a dispute which was initiated within the tax authority (internally).

12.7.1 Protection of taxpayers' rights by appealing the tax authority's decision

The appeal procedure follows an objection by the taxpayer. An appeal follows a situation where the taxpayer is still dissatisfied with the decision arising from an objection.

12.7.1.1 The United Kingdom

The appeal procedure in the UK is the first step that must be taken by taxpayers to raise a grievance with the Commissioner. An appeal must relate to an assessment.[136]

[136] Section 31(5) of the TMA.

12.7.1.2 Canada

The taxpayer appeals directly to the court where an objection has been decided against the taxpayer.[137] The Tax Court of Canada can hear an appeal by a dissatisfied party and may make the following orders: to dismiss the application; or allow it; and vacate, vary or refer the assessment back to the Minister for reconsideration and reassessment.[138]

In cases where the Tax Court has dismissed the application, the taxpayer may approach the Federal Court of Appeal.[139] The decision of the Federal Court is binding on the taxpayer.[140]

This means that the Tax Court can hear an appeal lodged by a dissatisfied taxpayer against the decision or conduct of the Minister. The Tax Court may dismiss the application when there are no merits in the taxpayer's application. The court may also allow the application by deciding in favour of the taxpayer. This means that the court would have found an infringement of the taxpayer's rights by the Minister.

12.7.1.3 South Africa

The Tax Board or the Tax Court (referred to in Chapter 1) are the two avenues where an appeal may be entertained.[141] However, the jurisdiction of the Tax Board is subject to R1 million.[142] The two bodies hear an appeal regarding the refusal of an objection by the Commissioner. The Tax Court must hear *de novo* (afresh) a referral of an appeal from the Tax Board's decision.[143]

Taxpayers in South Africa have a double-barrelled appeal relief. A taxpayer may thus appeal to the Tax Board or the Tax Court when the Commissioner has dealt

137 Section 169(1) of the Income Tax Act.
138 Section 171(1) of the Income Tax Act.
139 Section 171(4) of the Income Tax Act.
140 Section 174(4.2) of the Income Tax Act.
141 Section 107 of the TAA.
142 Section 109(1)(a) of the TAA.
143 Section 115(2) of the TAA.

with a dispute within the tax authority and the taxpayer is still dissatisfied with the outcome.

12.7.1.4 Comments

South Africa, as compared to the UK and Canada, is the only country that provides an option to the taxpayer to approach either the Tax Board or the Tax Court. Taxpayers may decide to approach the Tax Board (subject to R1 million jurisdiction) because it is cheaper to do so. Where a dispute is over the jurisdiction of the Tax Board, the taxpayer may approach the Tax Court which would require the assistance of the legal representative. This may deter taxpayers in pursuing their disputes.

12.7.2 Protection of taxpayers' rights by the Office of the Tax Ombudsman

The role of the Tax Ombudsman is reactive and triggered by a complaint or a "claim" from an aggrieved party. The task of the Tax Ombudsman is to adjudicate upon the issues arising between the tax authority and the taxpayer, making judgments that are informed by evidence and principle, and, more importantly, to secure an appropriate and just remedy. An important aspect of this office that needs to be determined is whether it can deal with infringements of taxpayers' rights.

12.7.2.1 The United Kingdom

There is no specialist Tax Ombudsman in the UK. However, the UK has an overall Ombudsman whose role covers performing functions similar to those of the courts and tribunals and who is referred to as the Parliamentary Commissioner for Administration (commonly referred to as "the Parliamentary Ombudsman").

There is therefore no office of a Tax Ombudsman within HMRC, but the UK has a general Parliamentary Office that deals with all complaints, including constitutional issues, about government departments and public bodies. This office is an external control measure.

This means that where the taxpayer is dissatisfied with the information gathering powers of the Commissioner, he may approach the Parliamentary Ombudsman. The taxpayer may approach that office to invoke the infringement of taxpayers' constitutional rights as well.

12.7.2.2 Canada

The Office of the Taxpayers' Ombudsman ("OTO") in Canada enhances the CRA's accountability in its service to, and treatment of, taxpayers through independent and impartial reviews of service-related complaints and systemic issues.[144] The OTO may initiate an examination when complaints or questions are raised about a service issue that may impact a large number of taxpayers or a segment of the population.

The service issue addressed by the OTO may be about addressing concerns regarding a delay in finalising an audit. Recommendations arising from the examinations of concerns raised by taxpayers are aimed at improving the service provided to taxpayers by the CRA.[145]

12.7.2.3 South Africa

The TAA provides the Minister of Finance with power to appoint a Tax Ombud. The Office of the Tax Ombud was established under section 14 of the TAA, using a model adopted from the United States of America's Internal Revenue Service. The Tax Ombudsman in the United States is called the Taxpayer Advocate.[146] According to Silke,[147] the Office of the Tax Ombud is modelled on the Tax Ombud systems of Canada, the United States of America and the United Kingdom.

The mandate of the Office of the Tax Ombud is enunciated in section 16 of the TAA. It is to review and address any complaint by a taxpayer regarding a service matter or a procedural or administrative matter arising from the application of the provisions

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144 Government of Canada "Office of the Taxpayers' Ombudsman" https://www.canada.ca/en/taxpayers-ombudsman.html (Date of use: 25 August 2018).

145 Government of Canada "Examining systemic issues" https://www.canada.ca/en/taxpayers-ombudsman/programs/examining-systemic-issues.html (Date of use: 25 August 2018).

146 The USA Taxpayer Advocate Service is set out in the Taxpayer Bill of Rights.

147 Arendse *et al Silke on Tax Administration* § 2.42.

of a tax Act by SARS.[148] As such, the Tax Ombud has limited authority because he may not review legislation or tax policy, SARS policy or a practice generally prevailing.

The TAA was amended in 2016. This resulted in the term of office of the Tax Ombud being extended from 3 to 5 years.[149] In terms of the Tax Administration Laws Amendment Act ("the TALAA"),[150] the Act now provides for the independence of the Office of the Tax Ombud in that, first, the office can appoint its own staff without involving the Commissioner for SARS.[151]

Secondly, the office is financed by funds to be provided by the National Treasury and not from the funds of SARS.[152] Thirdly, the Office of the Tax Ombud can request the Minister of Finance to agree to investigate systemic issues in the tax system.[153]

These measures should enhance the independence of the Office of the Tax Ombud in South Africa. During 2017, the Tax Ombud received authorisation from the Minister of Finance to investigate the alleged undue delay in tax refunds generally experienced by taxpayers.[154] This step signifies a move towards the protection of taxpayers' rights.

12.7.2.4 Comments

The Parliamentary Ombudsman in the UK is used as an external remedy. The Parliamentary Ombudsman in the UK is too general an office as compared to the specialised offices of the Tax Ombudsmen in South Africa and Canada.

148 Section 16 of the TAA.
149 Section 14(1) of the TAA.
150 Tax Administration Laws Amendment Act 16 of 2016, promulgated on 19 January 2017.
151 Section 15(1) of the TAA.
152 Section 15(4) of the TAA.
153 Section 16(1)(b) of the TAA.
154 Office of the Tax Ombud "Media" 4 September 2017 http://www.taxombud.gov.za/Media/Pages/default.aspx (Date of use: 23 April 2020). The Tax Ombudsman was to investigate SARS relating to, among other issues, the non-adherence to dispute resolution time frames.

The amendment to the TAA in South Africa made changes to the Office of the Tax Ombud which signified its independence from SARS. What is still required now is for the South African Tax Ombud to deal with and decide infringements of taxpayers' constitutional rights. However, the amendment signifies a move in the right direction towards the protection of taxpayers' rights in South Africa.

12.7.3 Protection of taxpayers' rights by means of judicial review of the decision or conduct of the tax authority

Judicial review involves the supervision of the manner in which the organs of the administration observe and apply the statutory prescripts of the legislature, the Constitution and the common law.[155] It is, in broad terms, a mechanism for enforcing legality in the statutory decision-making process and to preserve the rule of law.[156]

Judicial review is concerned with ensuring that actions of public bodies are lawful.[157] It is normally engaged when the taxpayer has exhausted all the internal formalities and he is still dissatisfied with either the decision of the tribunals or the conduct of the Commissioner.

12.7.3.1 The United Kingdom

The liability of the Commissioner as an administrator in English law falls into an area of law concerning the liability of public bodies. A claimant or an aggrieved taxpayer must fit his claim into one of the recognised causes of action to be able to claim damages. These areas of liability may be categorised into private law and public law liability.

This work deals with the public law liability of the Commissioner when he exercises his information gathering powers by, for example, requesting information on a taxpayer from the taxpayer or a third party. It should be noted that an application for judicial review is made *ex parte*: by one party alone without the involvement of the

155 Devenish, Govender and Hulme *Administrative Law and Justice* 216.
156 *Speckling v British Columbia (Labour Relations Board)* (2008) 77 B.C.L.R. (4th) 44 (BC CA) para 17.
157 Feldman *English Public Law* 715.

other party during the application stage. *Ex parte* does not therefore mean "in camera" or privately.

A distinction is made between three categories of public law judicial reviews: illegality, irrationality and procedural impropriety.[158] Later, the test was further developed with the inclusion of the proportionality test.

These terms are merely aids for analysing various types of test that are used by the courts in determining whether the actions of public bodies conform to the principle of legality.[159] The statutory judicial review is instituted in the form of Part 54 of the Civil Procedure Rules 1998.

This means that where, for example, a taxpayer's rights have been infringed by the Commissioner's information gathering powers, he can apply to the court for a judicial review.

12.7.3.2 Canada

In Canada, common law judicial review has been categorised by the court as substantive review (review of interpretations of law and exercises of discretion) and procedural review (review of the adequacy of procedural safeguards in administrative decision-making processes).[160]

Taxpayers in Canada may approach the court for judicial review on the grounds of the infringement of their rights by the Minister when he interprets a provision wrongly or abuses his discretion. Taxpayers may also approach the court for judicial review alleging the infringement of their rights by the Minister when he does not follow the correct procedure when, for example, conducting a search and seizure on the affairs of the taxpayers.

158 *Council of Civil Service Unions v Minister for the Civil Service* 1985 AC 374 (HL).
159 Feldman *English Public Law* 716.
160 Feldman *English Public Law* 716.

Section 18.1(1) of the Federal Courts Act[161] provides for a statutory judicial review. Anyone directly affected by the information gathering powers of the Minister that contravene section 18.1(1) may bring an action for judicial review.

The Federal Courts Act provides for the following grounds of review: the administrator acts without or beyond jurisdiction or refuses to exercise his jurisdiction; the administrator fails to observe a principle of natural justice; the administrator errs in law in making a decision or an order; the administrator bases his decision or order on an erroneous finding of fact; the administrator acts, or fails to act, by reason of fraud or perjury; or the administrator acts contrary to law.

12.7.3.3 South Africa

In South Africa, in order to succeed with a claim for judicial review in terms of the common law, the applicant must prove the illegality, irregularity or invalidity of the administrative action in question.[162] This means that where the Commissioner in requesting information from the taxpayer or third party acted illegally, irregularly or invalidly, the taxpayer may apply for a common law judicial review.

Section 6 of the Promotion of Administrative Justice Act ("PAJA")[163] provides for statutory judicial review of administrative action. The grounds for judicial review could be that the administrator was biased, the administrator did not comply with the relevant provision or that the administrative action was *ultra vires* and unconstitutional.

Taxpayers may approach the courts for judicial review when the Commissioner, for example, selects the taxpayer for an audit because of a personal grudge against the taxpayer, or where the Commissioner applies a wrong provision to conduct search and seizure on the taxpayer.

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161 Federal Courts Act (R.S.C., 1985, c. F-7).

162 *Johannesburg Consolidated Investment Company Ltd v Johannesburg Town Council* 1903 TS 111 at 115.

163 Act 3 of 2000.

12.7.3.4 Comments

All the countries recognise common law and statutory judicial review. These countries also concern themselves with the illegality, irregularity and invalidity of the actions of the Commissioner or Minister. The UK and South Africa further provide for judicial review because of the unreasonableness of the action by the Commissioner.

In the UK, a court could only set aside the decision by the decision maker if it is "so unreasonable that no reasonable authority could ever have come to it".[164] If it thus appears that the Commissioner's decision to select a taxpayer for audit was "so unreasonable that no reasonable authority could ever have come to it", the court may set the decision aside.

The requirement of the unreasonableness of the action by the Commissioner has been codified in South Africa in terms of section 6(2)(h) of PAJA. The conduct or decision of the Commissioner to request information from the third party may be set aside if it is so unreasonable that no reasonable man could ever have come to it.

12.7.4 The *locus standi* of the taxpayer to institute an action against the tax authority

Locus standi is concerned with whether the particular claimant is entitled to invoke the jurisdiction of the court.[165] An applicant taxpayer must be able to invoke the jurisdiction of the court. He must have a sufficient interest in order to apply for judicial review of the lawfulness of the exercise of power or discretion by a public body.

12.7.4.1 The United Kingdom

Administrative actions not affecting individual rights are not sufficient to provide or clothe a person with *locus standi*.[166] Only affected taxpayers may invoke protection

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164 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA) 234.

165 Craig *Administrative Law* 717.

166 *Mclnnes v Onslow Fane and Another* [1978] 1 WLR 1520 (ChD).

and claim relief when their rights have been infringed by the Commissioner's information gathering powers.

12.7.4.2 Canada

A taxpayer litigant should be able to prove his justiciable issue which establishes his public interest standing to pursue the action.[167] It also should be obvious that a taxpayer with *locus standi* will succeed in his action against the Minister.

12.7.4.3 South Africa

Currently, section 38 of the Constitution provides that anyone listed in this section has the right to approach a competent court, on the ground that a right in the BOR has been infringed or threatened. Taxpayers and third parties may thus approach the courts for relief against the information gathering powers of the Commissioner. In South Africa, *locus standi* is determined by considering the potential for economic gain.[168]

12.7.4.4 Comments

All three countries recognise and require that the applicant taxpayer must have *locus standi* before instituting an action to obtain relief. The South African legislation recognises the *locus standi* of individuals and has provided guidelines in the Constitution.

This means that once a taxpayer meets one of the guidelines mentioned, this is sufficient to clothe him with legal standing. Therefore, a person affected by the conduct of the Commissioner to select him for an audit which contravenes one of his rights has *locus standi* and may institute an action to obtain relief.

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167 *Harris v Canada* [2000] 4 FC 37.

168 *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange and Others* 1983 3 SA 344 (W).

12.8 REMEDIES PRONOUNCED ON JUDICIAL REVIEW TO PROTECT AND PROVIDE RELIEF TO TAXPAYERS

Remedies refer to avenues provided by the common law through the courts and those by legislation applied to protect taxpayers' rights against infringement by the tax authority's information gathering powers.

12.8.1 The United Kingdom

The remedies under judicial review must be in respect of a public law infringement of taxpayers' rights. The remedies available to the aggrieved party, such as a taxpayer, are a mandatory order; a prohibiting order; a quashing order; a declaration order or an injunction order and damages, restitution and recovery. Failure to comply with the court ordering these remedies has consequences in the form of contempt of the proceedings.

This means that the Commissioner may be punished for not following the court order.[169] However, a declaration order and an injunction order[170] may not be claimed by taxpayers because they involve a private law duty — which is outside the scope of the relationship between the Commissioner and taxpayers.

12.8.2 Canada

The Federal Court may prohibit or restrain a decision or an act or proceeding of a federal board, commission or other tribunal.[171] This means that the court may, for example, prohibit or restrain a decision of the Minister to request information from a third party. The court also has the power to declare an act or conduct of the Minister invalid, quash it, set it aside and refer the matter back to the Minister for determination.

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169 Craig *Administrative Law* 769.

170 *Attorney-General v Guardian Newspapers Ltd and Others (No. 2)* [1990] 1 AC 109 (HL).

171 Section 18(1) of the Federal Courts Act.

Section 18(1) of the Federal Courts Act provides that the Federal Court has exclusive jurisdiction to pronounce the following remedies on application by the taxpayer when alleging the infringement of his rights by the information gathering powers of the Minister: (a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

12.8.3 South Africa

The court or tribunal, in proceedings for judicial review by the taxpayer, may grant any order that is just and equitable.[172] High Courts and Magistrates' Courts have the power to make orders and to order a remedy.[173]

Section 8 of PAJA provides for the following remedies: an order for provision of reasons; interdict or *mandamus*; setting aside of the administrative action; declaration of rights; and costs or damages.

However, section 8(1)(c)(ii) of the TAA provides that only in exceptional cases may the court or tribunal substitute or vary the administrative action or correct a defect resulting from the administrative action, or direct the administrator or any other party to the proceedings to pay compensation.

This means, for example, that conduct by the Commissioner to exchange taxpayer information with other countries which infringes the rights of taxpayer without complying with the confidentiality requirements in Chapter 6 of the TAA may be interdicted and set aside. The Commissioner may be ordered to provide reasons for his conduct and may also be ordered to pay costs or damages to the taxpayer.

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172 Section 8(1) of PAJA.
173 Section 1 of PAJA.

12.8.4 Comments

All three countries provide for adequate relief in terms of the remedies they provide. A blemish is found in South Africa regarding the setting aside of the administrative action by the Commissioner.

The position is that the remedy of setting aside the Commissioner's action may be granted only in exceptional circumstances and may not always be available to the taxpayer. It is, however, not clear what would constitute such exceptional circumstances.

12.9 THE RECOGNITION AND PROTECTION OF TAXPAYERS' RIGHTS THROUGH THE TAX AUTHORITY'S DOCUMENTS

Tax authorities draft documents dealing with specific practices which aim to regulate their dealings with taxpayers. These documents may be relied upon by taxpayers to protect their rights against the information gathering powers of the tax authority.

12.9.1 The United Kingdom

HMRC Charter ("Your Charter")[174] was issued on 12 January 2016 and it is an updated version of the HMRC Charter which was initiated in 2008.[175] Just like its predecessor, Your Charter is reciprocal in nature because it contains rights to be enjoyed by taxpayers and also their obligations towards HMRC.

Paragraph 1.7 of the 2008 HMRC Charter contained the following words:

> The new Charter will not be set in legislation. The wording of an accessible and useful charter is not intended to be that of legislation but a guide to the law. The use of statutory wording in a charter will compromise the intention of creating a simple statement of the basic rights of taxpayers/customers in their relationship with HMRC.[176]

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174 HM Revenue & Customs "Your Charter" https://www.gov.uk/government/publications/your-charter/your-charter#more-information-about-hmrc (Date of use: 10 July 2020).

175 HM Revenue & Customs "Your Charter" https://www.gov.uk/government/publications/your-charter/your-charter#more-information-about-hmrc (Date of use: 10 July 2020).

176 HMRC Consultation Document "A new Charter for HMRC and its Customers" (2008) published on 19 June 2008.

Your Charter can be referred to in correspondence between taxpayers, their advisers and HMRC, and can be raised in litigation before Tax Tribunals and the courts.[177] There is, however, no clear statement of the legal effect of the Charter, whether it has binding effect or is merely a guide to the law. A court needs to decide on its legal effect, if any.[178]

If a court decides that the HMRC Charter has no legal effect and that it is simply an aspirational statement, then the whole exercise of producing it is pointless, and it rebounds on HMRC being perceived as not being serious about protecting taxpayers' rights.[179] If it has no legal effect, taxpayers may not be able to rely on it where the Commissioner's information gathering powers infringe taxpayers' rights.

12.9.2 Canada

Apart from the Canadian Constitution,[180] which contains the Charter on Rights and Freedoms ("the Charter") discussed in Chapter 9, taxpayers enjoy further protection in the Taxpayer Bill of Rights ("TBR"), which contains a set of 16 rights that aim to protect and guarantee taxpayers' relationship with the CRA.

These rights demonstrate and confirm the commitment by the CRA to serve taxpayers with professionalism, courtesy and fairness.[181] The CRA also commits to ensuring that the interactions of small business with the office are effective and efficient. Taxpayers who seek a remedy or relief under the TBR must be able to prove that a right in the TBR has been infringed.

The TBR further provides for alternative resolution mechanisms when the Minister requests taxpayer's information from third parties in contravention of the rights in

177 Baker "The charter and the law" https://www.taxation.co.uk/Articles/2008-09-10-6852-charter-and-law (Date of use: 25 August 2018).

178 Baker "The charter and the law" https://www.taxation.co.uk/Articles/2008-09-10-6852-charter-and-law (Date of use: 25 August 2018).

179 Baker "The charter and the law" https://www.taxation.co.uk/Articles/2008-09-10-6852-charter-and-law (Date of use: 25 August 2018).

180 The Constitution Acts 1867 to 1982.

181 Government of Canada "RC17 Taxpayer Bill of Rights Guide: Understanding your rights as a taxpayer" 4, https://www.canada.ca/content/dam/cra-arc/formspubs/pub/rc17/rc17-19e.pdf (Date of use: 15 April 2020).

the TBR. Taxpayers may approach the CRA when they feel that the rights in the TBR have been infringed, by lodging an objection or appeal in order to remedy the infringement. However, the TBR has no legal force because it allows taxpayers to engage in legitimate tax reduction, but without any constitutional protections.[182] Canadians who do not understand tax law may not benefit from the protections which it offers.[183]

It should be noted that the TBR refers to the rights of taxpayers specifically. This means that taxpayers are protected in this document against the Minister's information gathering powers. The concern is that it is not clear from the TBR itself and the CRA website whether taxpayers can rely on the document in a court of law to advance their rights.

12.9.3 South Africa

In 1997, the Minister of Finance released a draft SARS "Client Charter" which was published for the first time in South Africa.[184] The Charter included levels of service that taxpayers could expect in their dealings with SARS. An updated Charter was loaded on the SARS website on 19th October 2005 and was referred to as the SARS Service Charter ("the Charter"). It applied between 2005 and 2007.[185]

On 1 July 2018, SARS implemented the new South African Revenue Service Charter ("the new SARS Charter"). However, this new SARS Charter contains a disclaimer which provides that the "Charter is subject to any applicable Act of Parliament. Should any aspect of this Charter be in conflict with the applicable legislation, the applicable legislation will take precedence".[186]

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182 Krishna "Canada needs a Charter of taxpayer rights" https://financialpost.com/legal-post/vern-krishna-canada-needs-a-charter-of-taxpayer-rights (Date of use: 25 August 2018).

183 Krishna "Canada needs a Charter of taxpayer rights" https://financialpost.com/legal-post/vern-krishna-canada-needs-a-charter-of-taxpayer-rights (Date of use: 25 August 2018).

184 Croome and Olivier *Tax Administration* 286.

185 Van der Walt and Botha "Complaints to the Tax Ombud and the fear of reprisal? Canada gives its taxpayers comfort" 2, https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2013/tax/downloads/Tax-Alert---20-September-2013.pdf (Date of use: 23 November 2019).

186 SARS "South African Revenue Service Charter" (2018) 1, https://www.sars.gov.za/AllDocs/Documents/Service%20Charter/SARS%20Service%20Charter%201%20July%202018.pdf (Date of use: 1 June 2020).

This means that the SARS Charter may not be relied upon when there is a statute that deals with, for example, the right to privacy. Therefore, taxpayers may not be able to rely on the SARS Charter for protection against the Commissioner's power to request information from a third party if it contravenes the right to privacy, because other statutes such as the Constitution and the TAA deal with its protection.

12.9.4 Comments

The effectiveness of the HMRC Charter lies in its binding effect. One expects that the HMRC Charter, being a document that deals with rights of taxpayers, must have binding effect. However, as Baker argued above, the HMRC Charter is not intended to have a binding effect. Be that as it may, it appears that the Charter only serves as a guideline and is not binding on the parties.

It should be noted that the TBR in Canada is not just a guide that refers to taxpayers' rights. The TBR is effective because it provides for alternative resolution mechanisms in the form of formal review and a subsequent appeal, where taxpayers' rights are infringed by the Minister.

Taxpayers may lodge a service complaint and they are entitled to reasons from the Minister on his findings. However, as argued by academics, the TBR has no legal force because it allows taxpayers to engage in legitimate tax reduction, but without any constitutional protections.[187]

In tax law, the internal control of the Minister's information gathering powers is aimed at rectifying an irregularity against the taxpayer. The internal control also aims to provide the taxpayer with a cheap, fast and efficient measure to resolve disputes between taxpayers and the CRA. It is argued in this work that the TBR is suitable only in that regard and has no force and effect that can be enforced in a court of law.

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187 Krishna "Canada needs a Charter of taxpayer rights" https://financialpost.com/legal-post/vern-krishna-canada-needs-a-charter-of-taxpayer-rights (Date of use: 25 August 2018).

It is a recommendation of this work that the legislature in South Africa should follow the example of the Canadian TBR. A protection in the form of a Taxpayer Bill of Rights in South Africa would ensure that taxpayers' rights against the Commissioner's powers are recognised and protected, and provide remedies where those rights are infringed.

12.10 PROTECTION UNDER THE MUTUAL AGREEMENT PROCEDURE TO RESOLVE TAXPAYER RIGHTS TREATY DISPUTES RELATING TO EXCHANGE OF INFORMATION IN TAX MATTERS

Article 25 on the Mutual Agreement Procedure ("MAP")[188] deals with dispute resolution between countries and taxpayers. A MAP procedure can be referred to as the mechanism that contracting states use to resolve any disputes or difficulties that arise in the course of implementing and applying the treaty.

Article 25(1) permits a taxpayer who considers that the actions of one or both of the contracting states result or will result in taxation not in accordance with the provisions of the treaty to present its case to the contracting state of which it is a resident.[189]

Article 25(1) further provides that the MAP procedure is available to a taxpayer irrespective of any judicial and administrative remedies available under the domestic law of the contracting states.[190] This means that the use of the MAP procedure does not prevent taxpayers from using the domestic remedies.

A MAP procedure can be referred to as the mechanism that contracting states use to resolve any disputes or difficulties that arise in the course of implementing and applying the treaty.

Article 25 provides that competent authorities shall resolve taxpayers' challenges in accordance with the application and interpretation of the Model Tax Convention on

188 *OECD Model Tax Convention on Income and on Capital: Condensed Version 2017.*
189 Oguttu 2015 *SA Yearbook of International Law* 163.
190 Oguttu 2015 *SA Yearbook of International Law* 163.

Income and Capital ("Model Tax Convention") by mutual agreement.[191] Article 25 allows competent authorities of the countries to consult with each other and to appoint a body specifically for that purpose.

Where the matter remains unresolved, Article 25(5) allows the taxpayer to request the arbitration of unresolved issues that have prevented competent authorities from reaching mutual agreement within two years.[192] Where the taxpayer is provided with an opportunity to be part of the exchange of the information, the taxpayer must also be afforded an opportunity to challenge the tax authority's decision to exchange the information.

The OECD released its sixth round of BEPS Action 14 peer review reports on improving tax dispute resolution mechanisms on 24 October 2019.[193] Under Action 14, countries have committed to implementing a minimum standard to strengthen the effectiveness and efficiency of the MAP.[194] The Action 14 Minimum Standard has been translated into specific terms of reference and a methodology for the peer review and monitoring process.[195]

The minimum standard is complemented by a set of best practices. The peer review process is conducted in two stages.[196] Stage 1 assesses countries against the terms of reference of the minimum standard, according to an agreed schedule of review.

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191 OECD *Model Tax Convention on Income and on Capital: Condensed Version 2017* para 2 of Article 25.

192 OECD *Model Tax Convention on Income and on Capital: Condensed Version 2017* para 5 of Article 25.

193 OECD "OECD releases sixth round of BEPS Action 14 peer review reports on improving tax dispute resolution mechanisms" https://www.oecd.org/tax/beps/oecd-releases-sixth-round-of-beps-action-14-peer-review-reports-on-improving-tax-dispute-resolution-mechanisms-october-2019.htm (Date of use: 4 December 2019).

194 OECD "OECD releases sixth round of BEPS Action 14 peer review reports on improving tax dispute resolution mechanisms" https://www.oecd.org/tax/beps/oecd-releases-sixth-round-of-beps-action-14-peer-review-reports-on-improving-tax-dispute-resolution-mechanisms-october-2019.htm (Date of use: 4 December 2019).

195 OECD "OECD releases sixth round of BEPS Action 14 peer review reports on improving tax dispute resolution mechanisms" https://www.oecd.org/tax/beps/oecd-releases-sixth-round-of-beps-action-14-peer-review-reports-on-improving-tax-dispute-resolution-mechanisms-october-2019.htm (Date of use: 4 December 2019).

196 OECD "OECD releases sixth round of BEPS Action 14 peer review reports on improving tax dispute resolution mechanisms" https://www.oecd.org/tax/beps/oecd-releases-sixth-round-of-beps-action-14-peer-review-reports-on-improving-tax-dispute-resolution-mechanisms-october-2019.htm (Date of use: 4 December 2019).

Stage 2 focuses on monitoring the follow-up of any recommendations resulting from jurisdictions' stage 1 peer review report.

12.10.1 The United Kingdom

The UK's peer review on stage 1 was launched on 5 December 2016. The second stage peer review was launched during September 2018.[197] The UK was found compliant with the minimum standard.[198]

12.10.2 Canada

The Canadian peer review on stage 1 was launched on 5 December 2016. The second stage peer review was launched during September 2018.[199] Canada was found compliant with the MAP minimum standard.[200]

12.10.3 South Africa

South Africa's peer review on stage 1 was launched on 31 August 2018. The second stage peer review was supposed to be launched during May 2020.[201] The Stage 2 report has not been published yet. One may assume that the COVID-19 coronavirus pandemic delayed the process.

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197 BEPS Action 14: "Peer Review and Monitoring" OECD" https://www.oecd.org/tax/beps/beps-action-14-peer-review-assessment-schedule.pdf (Date of use: 22 August 2020).

198 OECD/G20 Base Erosion and Profit Shifting Project: "Making Dispute Resolution More Effective – MAP Peer Review Report, United Kingdom (Stage 2)" https://www.oecd.org/tax/beps/making-dispute-resolution-more-effective-map-peer-review-report-united-kingdom-stage-2-33e2bf3d-en.htm#:~:text=The%20peer%20review%20process%20is,stage%201%20peer%20review%20report. (date of use: 25 August 2020).

199 BEPS Action 14: "Peer Review and Monitoring" OECD" https://www.oecd.org/tax/beps/beps-action-14-peer-review-assessment-schedule.pdf (Date of use: 22 August 2020).

200 OECD "Inclusive Framework on BEPS: Action 14 Making Dispute Resolution More Effective MAP Peer Review Report Stage 2 BEST PRACTICES Canada" http://www.oecd.org/tax/beps/beps-action-14-peer-review-stage-2-best-practices-canada.pdf (Date of use: 25 August 2020).

201 BEPS Action 14: "Peer Review and Monitoring" OECD" https://www.oecd.org/tax/beps/beps-action-14-peer-review-assessment-schedule.pdf (Date of use: 22 August 2020).

12.10.4 Comments

Where a dispute arises between the tax authority and the taxpayer regarding the exchange of information in terms of Article 26 of the OECD Model and the UN Model, Article 25 of MAP is important.

It should be noted that Article 25(3) does not compel the competent authority to resolve disputes, it requires them to endeavour to resolve disputes by mutual agreement.[202] The arbitration in Article 25(5) does not provide clear guidelines for appointing arbitrators and the procedure lacks transparency as the default format for providing arbitral decisions does not entail providing detailed reasons as to how the decision made.

Since the MAP procedure allows competent authorities to deal with taxpayer disputes, it opens up a room for bias, unfairness and abuse of powers. The process may not be effective to protect taxpayers' rights.

12.11 PROTECTION OF TAXPAYERS' RIGHTS THROUGH THE DOCTRINE OF LEGITIMATE EXPECTATIONS

The doctrine of legitimate expectations is quite an old doctrine which is part of the UK, Canadian and South African law. The *locus standi* of individuals is extended to cover instances where no rights existed before but only expectations. The discussion in Chapters 4, 7 and 10 demonstrates that the doctrine applies in three situations: a promise or practice of consultation, a representation by the administrator and the conduct of the administrator that gives rise to an expectation of consultation.

The doctrine is relevant to this work because once it has been established that the tax authorities' documents discussed above (the HMRC Charter, the SARS Service Charter and the TBR) do not provide standing or are not binding, taxpayers may rely on the doctrine to obtain relief.

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202 Oguttu 2015 *SA Yearbook of International Law* 167.

This means that the doctrine of legitimate expectations may be invoked as a last resort by taxpayers to obtain relief against the information gathering powers of the tax authority which infringed their rights. The application of the doctrine of legitimate expectations may be divided into procedural and substantive legitimate expectations.

Procedural legitimate expectations provide for the expectations created by a past practice, a promise or a representation made by the administrator that a certain procedure will be followed, while substantive legitimate expectations provide that a past practice, a promise or a representation must be fulfilled.

It should be noted that the substantive protection is the crux of this concept and has been the subject of debate for many years by courts in the UK, Canada and South Africa.

12.11.1 The United Kingdom

The position regarding substantive legitimate expectations is that where a lawful promise or practice has induced a legitimate expectation of a benefit which was substantive, not simply procedural, the court decides whether to frustrate the expectation is so unfair that to take a new and different course would amount to an abuse of power.[203]

The court formulated three distinct categories to classify and treat substantive legitimate expectations: the doctrine protects substantive legitimate expectations against decisions that are unreasonable; it protects procedural fairness; and it protects substantive legitimate expectations — the balancing exercise.[204]

This means that the doctrine can protect taxpayers against a decision by the Commissioner to conduct an audit on the affairs of the taxpayer if that decision is unreasonable. The conduct can be considered unreasonable if “no reasonable

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203 *R v North and East Devon Health Authority, Ex parte Coughlan* [2001] QB 213 (CA) para 57.

204 *R v North and East Devon Health Authority, Ex parte Coughlan* para 57.

authority could ever have come to it".[205] The application of the doctrine would require that before an audit can be performed, the taxpayer must be consulted before that particular decision can be taken.[206]

12.11.2 Canada

The doctrine of legitimate expectations was accepted in Canada and can be used as a device that leads to the implication of a duty of fairness.[207] The SCC's wording suggests that legitimate expectations only arose from conduct giving rise to an expectation of consultation which is a form of procedure.[208]

The SCC regarded the doctrine of legitimate expectations as "an extension of the rules of natural justice and procedural fairness".[209] It affords "a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity".[210]

The doctrine of legitimate expectations is classified as soft law in Canada. This is a generally recognised term for official instruments of various forms of which are non-binding and seek to guide, clarify or affect administrative action.[211] The concept of legitimate expectations was first discussed at length by the SCC in the context of soft law in *Martineau v Matsqui Disciplinary Bd.*[212]

The SCC confirmed that the doctrine of legitimate expectations does create rights to fairness or natural justice and also partly substantive rights. The rules of

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205 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* para 7.
206 *R v North and East Devon Health Authority, Ex parte Coughlan* para 57.
207 *Old St. Boniface Residents Assn. Inc.* [1990] 3 SCR 1170 at 1203–1204; (1990) 75 DLR (4th) 385 at 414.
208 *Old St. Boniface Residents Assn. Inc.* [1990] 3 SCR 1170 at 1203–1204; (1990) 75 DLR (4th) 385 at 414. See *also Sunshine Coast Parents for French v Board of School Trustees District No. 46* (1990) 49 B.C.L.R. (2d) 252 (BC SC).
209 *Old St. Boniface Residents Assn. Inc.* [1990] 3 SCR 1170 at 1203–1204; (1990) 75 DLR (4th) 385 at 414; *Reference Re Canada Assistance Plan (B.C.)* [1991] 2 SCR 525 at 557.
210 *Old St. Boniface Residents Assn. Inc.* [1990] 3 SCR 1170 at 1203–1204; (1990) 75 DLR (4th) 385 at 414; *Reference Re Canada Assistance Plan (B.C.)* [1991] 2 SCR 525 at 557.
211 Ansari and Sossin *Legitimate Expectations in Canada: Soft Law and Tax Administration* 293.
212 *Martineau v Matsqui Disciplinary Bd* [1980] 1 SCR 602.

procedural fairness can only create a right to make representations or to be consulted.[213]

In summary, Canadian law does not recognise the concept of substantive legitimate expectations.[214] Therefore, the doctrine of legitimate expectations does not create substantive rights to taxpayers in Canada,[215] but only procedural rights.[216]

12.11.3 South Africa

The doctrine of legitimate expectations was introduced into and is part of the South African law.[217] The debate about substantive legitimate expectations has come before the Supreme Court of Appeal ("SCA")[218] and the Constitutional Court[219] several times but these courts have still not decided the question. This means that, just as in Canada, taxpayers in South Africa may only rely on the doctrine of procedural legitimate expectations (consultation).

12.11.4 Comments

In all three countries, the doctrine of legitimate expectations may be activated by three situations: a promise or practice of consultation, a representation by the administrator and the conduct of the administrator that gives rise to an expectation of consultation. However, Canada and South Africa still rely on the procedural aspect of the doctrine of legitimate expectations.

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213 *Baker v Canada (Minister of Citizenship and Immigration)* para 26.

214 *Reference Re Canada Assistance Plan (B.C.*) 557; *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281 para 38.

215 *Edison v MNR* (2001) 208 FTR 58 (TD); 2001 FCT 734. The respondent was the Minister of National Revenue.

216 *Edison v MNR* para 21.

217 *Administrator, Transvaal and Others v Traub and Others* 1989 (4) SA 731 (A).

218 *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA); 2003 1 All SA 40 (SCA).

219 *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 2 SA 91 (CC); 1999 2 BCLR 151 (CC); *Bel Porto Governing Body v Premier of the Province, Western Cape* 2002 3 SA 265 (CC); 2002 9 BCLR 891 (CC). See also *Abbott v Overstrand Municipality and Others* (99/2015) [2016] ZASCA 68 (20 May 2016) para 33 and *Minister of Home Affairs and Others v Saidi and Others* 2017 4 SA 435 (SCA); 2017 2 All SA 755 (SCA) para 33.

In the UK the categorical approach decided in *R v North and East Devon Health Authority, Ex parte Coughlan* recognises the substantive element of the doctrine. In South Africa, there seems to be hope for the acceptance of the doctrine of substantive legitimate expectations. The only stumbling block is the reluctance by the SCA and the Constitutional Court finally to accept the doctrine as part of the law.

It is argued in this work that, once the doctrine of substantive legitimate expectations is accepted in South Africa, taxpayers would be able to rely on it to resolve their disputes with the Commissioner. After this acceptance, the doctrine of substantive legitimate expectations in South Africa could be invoked to compel the Commissioner to fulfil the promise which he made, for example, that the taxpayer would not be referred for search and seizure. The Commissioner's decision to conduct search and seizure could be set aside.

12.12 PROTECTION OF TAXPAYERS' RIGHTS THROUGH THE PRINCIPLE OF *UBUNTU* AS A SOUTH AFRICAN CONCEPT

The post-amble to the South African Interim Constitution in section 251 entrenches the principle of *ubuntu*. The principle was discussed at length by the Constitutional Court in *S v Makwanyane*[220] to mean humaneness, personhood and morality. Metaphorically, it expresses itself in the saying "*umuntu ngumuntu ngabantu*" (you are what you are because of the people around you). The term describes the significance of group solidarity on survival issues so central to the survival of communities.

The term is a South African concept but not a constitutional right nor creative of legitimate expectations, but may still be applied in South Africa to determine and measure the actions of administrators against the values and principles that govern the society or community. It may be used to protect the rights of taxpayers against the information gathering powers of the Commissioner.

220 1995 3 SA 391 (CC).

The principle requires that the Commissioner should treat taxpayers as human beings, and that he should respect, embrace and uphold their dignity by protecting their rights. This protection includes being courteous towards taxpayers and providing them with feedback and reasons for his decisions or failure to make decisions.

Therefore, it may be submitted that the notion of *ubuntu* may be resuscitated and used to restore the dignity and to protect the human rights which were trampled by the apartheid system. The concept of *ubuntu* was recognised by the Constitutional Court in *Everfresh Market Virginia* (*Pty*) *Ltd v Shoprite Checkers* (*Pty*) *Ltd*,[221] where the court held that *ubuntu* should be applied broadly so that it, and other values inspiring the constitutional compact, is infused into the law of contract.

The concept was later given widespread recognition in the recent Constitutional Court case of *Beadica 231 CC and Others v Trustees for the Time Being of the Oregon Trust and Others*.[222] The court held that *ubuntu* is an important value that stands alongside values such as good faith, fairness, justice, equity and reasonableness.[223] Characterising *ubuntu* as a substantive constitutional value in the law of contract leads to a more context-sensitive basis in its adjudication and facilitates a constitutionally transformative result.[224]

In this case, for example, one needs to determine whether the decision by the Commissioner to conduct an audit because the taxpayer drinks expensive champagne may be “lawful” in the eyes of society. Similarly, it is not in the spirit of *ubuntu* where the Commissioner, in the exercise of search and seizure, breaks the doors in order to gain entry into the taxpayer’s premises.

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221 2012 1 SA 256 (CC) para 71.
222 (CCT109/19) [2020] ZACC 13 (17 June 2020); [2020] JOL 47440 (CC).
223 *Beadica 231 CC and Others v Trustees for the Time Being of the Oregon Trust and Others* para 206.
224 *Beadica 231 CC and Others v Trustees for the Time Being of the Oregon Trust and Others* para 206.

12.13 CONCLUDING REMARKS

This chapter contained a summary of the discussion relating to the challenges posed by the information gathering powers of the tax authorities, and how these challenges are dealt with in the UK, South Africa and Canada.

The chapter provided recommendations on how South Africa could emulate the UK and Canada in their approach to those challenges. It also needs to be noted and commended that there are situations where South Africa deals with its challenges better than the UK and Canada do. This situation will be discussed clearly in the next chapter.

In the light of the discussion above relating to the infringements of taxpayers' rights and how they can be protected, recommendations will follow in the next chapter.

CHAPTER 13

CONCLUSIONS AND RECOMMENDATIONS

13 RECAP

In Chapter 1 of this work, it was stated that in order for the South African Revenue Service ("SARS") to collect taxes effectively, the Commissioner for SARS (as the person appointed to administer tax legislation in South Africa) may have to gather information from taxpayers to determine their compliance.

The methods which the Commissioner may use to gather information from taxpayers include taxpayer information from records and books, tax returns, request for information from taxpayers or third parties, inspection, verification or audit, search and seizure, exchange of information with other countries, Country-by-Country reporting, the Voluntary Disclosure Programme and the Reportable Arrangements rules.

Where the Commissioner fails to comply with the laws set out in the Income Tax Act ("ITA")[1] and the Tax Administration Act ("TAA"),[2] the actions of the Commissioner may be considered unfair and unlawful because they may infringe the rights of the taxpayer. These actions may be rendered of no legal force and effect in terms of the Constitution (which is the supreme law of the land)[3] and the afore-mentioned legislation.

The main challenge that was discussed in this work is that the Commissioner's information gathering powers, if left unchecked, can infringe the rights of the taxpayers as entrenched in the Constitution, such as the rights to equality, privacy, just administrative action and against self-incrimination.

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1 Act 58 of 1962.
2 Act 28 of 2011.
3 Section 2 of the Constitution of the Republic of South Africa, 1996.

So, where the Commissioner, for example, requests taxpayer information from third parties (as explained in Chapter 2), this step may infringe the taxpayer's right to privacy. Similarly, if the Commissioner exercises his power of search and seizure of a taxpayer's property, this step may infringe the taxpayer's right to privacy.

These infringements can also extend to the common law rights of taxpayers, such as the *audi alteram partem* rule, the *nemo iudex in sua causa* rule and the doctrine of legitimate expectations (which are explained in Chapter 4).

Apart from infringements of taxpayers' rights, a problem was also addressed in understanding exactly the scope of the information upon which the Commissioner is empowered to exercise the information gathering powers. The TAA provides that the information requested by the Commissioner must be relevant.

The definition of the words "relevant material" in section 1 of the TAA poses a challenge because it is not clear what type of information is to be regarded as relevant. Further, there have not been court cases in South Africa to clarify the meaning of the words "relevant material".

The other challenge discussed was the lack of clarity in the use of information where, in the process of an inspection, verification or audit by the Commissioner, it is discovered that the taxpayer might have committed a "serious tax offence" and the taxpayer may be referred for criminal investigation. In this regard it is not clear who is a "senior SARS official" and what is a "serious tax offence". These terms are defined by the TAA in a wide and ambiguous manner.

Sections 43 and 44 of the TAA empower the Commissioner or a senior SARS official to make a decision to pursue criminal investigation, to investigate and also to institute criminal proceedings against the taxpayer. This position conflicts with the constitutional principle of the separation of powers because the Commissioner, in exercising these prosecutorial powers, usurps the rights and powers of the National Prosecuting Authority ("NPA"), which is the single prosecuting authority in South Africa.

Another challenge identified is that it is not clear at which stage SARS is expected to conclude a civil investigation and then move into the criminal investigation. Thus, a taxpayer runs a risk of being investigated for a lengthy period without conclusion. In this instance, SARS's powers do not terminate. More importantly, it is not clear at which point the civil investigation becomes a criminal investigation.

The TAA may create a contravention of the taxpayers' rights where the information required by the Commissioner to be used for criminal proceedings incriminates the taxpayer. The contravention may result in a situation where SARS could obtain information under compulsion through inspection, verification or audit, which may compel the taxpayer to incriminate himself. This is a contravention of section 35(3)(j) of the Constitution, which provides that everyone has a right to a fair trial which includes not being compelled to give incriminating evidence (the *nemo tenetur se detergere* principle).

This work explained the remedies available to a taxpayer where his common law and constitutional rights have been violated by the Commissioner's information gathering powers. These remedies were categorised into the internal remedies and the external remedies. However, the discussion in this work clearly demonstrated that the available remedies are in certain respects not effective in ensuring that taxpayers' rights are not violated.

In this chapter recommendations are provided that are in line with the findings of the Davis Tax Committee ("DTC")[4] and the International Bureau of Fiscal Documentation ("IBFD") Observatory on the Protection of Taxpayers' Rights ("OPTR").[5] The DTC supports the implementation by SARS of its strategic initiatives pertaining to Base Erosion and Profit Shifting ("BEPS") while taking taxpayers' rights into consideration.[6]

4 Davis Tax Committee *Tax Administration Report* (2017).

5 International Bureau of Fiscal Documentation "Observatory on the Protection of Taxpayers' Rights" *2015–2017 General Report on the Protection of Taxpayers' Rights* (26 April 2018) (IBFD "OPTR").

6 Davis Tax Committee *Tax Administration Report* 34.

The IBFD's OPTR acknowledges the work done by the IBFD in their publication dealing with the protection of taxpayers' rights. The IBFD created the OPTR to monitor the observance of the BEPS standards and best practices around the world while guaranteeing and protecting human rights pertaining to tax matters.[7]

This chapter makes recommendations to address the challenges to the rights of taxpayers arising from the Commissioner's exercise of his information gathering powers. The chapter also provides recommendations on how taxpayers may effectively seek relief when their rights have been infringed.

The comparative study of the information gathering powers of the tax authorities in the United Kingdom ("UK") and Canada demonstrates how these countries have measures in place that can avert the infringement of taxpayers' rights. This chapter mainly points out the weaknesses that South Africa has in this regard and provides recommendations regarding how the relevant strengths in Canada and the UK can be emulated where South Africa is found wanting.

Before the recommendations to remedy the weaknesses in South Africa are discussed, it is important to highlight that there are certain aspects relating to challenges posed by the tax authority's information gathering powers where South Africa must be commended for providing better solutions than the UK and Canada do. There are also aspects where South Africa is on par with the UK and Canada and with international standards.

13.1 ASPECTS WHERE SOUTH AFRICA IS ON PAR WITH THE UNITED KINGDOM AND CANADA AND WITH INTERNATIONAL STANDARDS REGARDING ADDRESSING THE CHALLENGES POSED BY THE TAX AUTHORITY'S INFORMATION GATHERING POWERS

This part of the discussion demonstrates the aspects in which South Africa is on par with its UK and Canadian counterparts and with international standards.

7 IBFD "OPTR" 5.

13.1.1 The rule of law

South Africa, just like the UK and Canada, subscribes to the principle of the rule of law. Even though the UK has an unwritten and uncodified Constitution, the British Constitution embodies two principles: the rule of law and the supremacy of Parliament.[8] South Africa is also on par with Canada because its Constitution was derived from Canada.

13.1.2 The tax authority

In South Africa, the South African Revenue Service ("SARS") collects taxes on behalf of the state. In the UK, Her Majesty's Revenue and Customs ("HMRC") is responsible for the collection of taxes. In Canada, the Canada Revenue Agency ("CRA") is the office responsible for the collection of taxes in Canada.

Although the three countries have similar types of offices that collect taxes on behalf of the state, the administrator responsible is different. In South Africa and the UK, the administrator responsible to administer the tax Acts is the Commissioner, while the Minister of National Revenue ("the Minister") is responsible in Canada.

13.1.3 Methods used to gather information from taxpayers

South Africa, the UK and Canada use similar methods to gather information from taxpayers. These methods include, but are not limited to, the following: taxpayer information from records and books of accounts held by taxpayers, tax returns, inspection, verification and audits, search and seizure, gathering information from the taxpayer or third parties, exchange of information with other countries, Country-by-Country reporting, the Voluntary Disclosure Programme and the Reportable Arrangements rules.

8 Dicey *Lectures on the Constitution* 332, 340.

13.1.4 Protection of taxpayers' right of access to courts

All three countries provide for a platform to allow taxpayers to approach courts or independent forums to resolve their disputes where the information gathering powers of the tax authority infringe their rights. For example, in South Africa there is section 34 of the Constitution, in the UK, Article 6 of the European Convention on Human Rights ("ECHR") and in Canada, section 24(1) of the Charter of Rights and Freedoms.

13.1.5 Protection of taxpayers' *locus standi*

All three countries recognise and require that the applicant taxpayer must have *locus standi* before instituting an action to obtain relief. The taxpayer's right of access to courts is determined by his *locus standi*. This means that an applicant taxpayer must be able to invoke the jurisdiction of the court. He must have a sufficient interest in order to approach the courts or independent impartial forums.

In the UK, purely administrative actions not affecting individual rights are not sufficient to provide or clothe a person with *locus standi*.[9] In Canada, taxpayer litigants should be able to prove their justiciable issue which establishes their public interest standing to pursue the action.[10]

It also should be obvious that a taxpayer with *locus standi* will succeed in his action against the Minister. In South Africa, section 38 of the Constitution provides who must be able to institute an action in order to obtain relief.

13.1.6 Protection in terms of the common law rules

The common law protection in South Africa consists of the rules of natural justice and the *ultra vires* doctrine. As a common law country, it is easier for South Africa to follow the trend set by other common law countries such as the UK and Canada. It should be noted that South Africa, just like the UK and Canada, adheres to the

9 *McInnes v Onslow Fane and Another* [1978] 1 WLR 1520 (ChD).
10 *Harris v Canada* [2000] 4 FC 37.

common law rules of natural justice: *audi alteram partem* and *nemo iudex in sua causa*.

13.2 ASPECTS WHERE SOUTH AFRICA LAGS BEHIND THE UNITED KINGDOM, CANADA AND INTERNATIONAL STANDARDS REGARDING ADDRESSING THE CHALLENGES POSED BY THE TAX AUTHORITY'S INFORMATION GATHERING POWERS

In the discussion that follows, recommendations are made on aspects that South Africa can still learn from and emulate the UK and Canada, taking into consideration South Africa's unique historical circumstances, her heritage and diversity.

Before the discussion moves on to propose recommendations of how South Africa could learn from and emulate the UK and Canada, it may be noted that in one respect those countries could learn from and emulate South Africa. A principle that takes into account South Africa's unique historical circumstances and diversity is the right to just administrative action in section 33 of the Constitution. This provision requires that the conduct of the Commissioner when gathering information from taxpayers must meet the requirements of the administrative justice system to be valid: to be lawful, reasonable and procedurally fair.

The discussion now proceeds to survey sixteen recommendations for the improvement of South African tax law by learning from and emulating UK and Canadian tax law. Finally, the discussion closes with a recommendation to advance and strengthen a South African concept to make the administration of tax law more humane.

13.3 RECOMMENDATION ON HOW TO DEFINE CERTAIN TERMS: "SENIOR SARS OFFICIAL" AND "SERIOUS TAX OFFENCE"

Chapter 5 of the TAA refers to terms such as a "senior SARS official" and a "serious tax offence". These terms appear general, ambiguous, wide and unsatisfactory. This is despite the fact that Chapter 17 of the TAA listed criminal offences in sections 234 to 238. The chapter refers to criminal offences and not serious tax offences or

less serious tax offences. It is important that guidelines should be provided in the legislation or an Interpretation Note as to the parameters of a serious tax offence. The definitions of the terms tend to confuse taxpayers who may be affected by the information gathering powers of the Commissioner. In effect, the definition of the term “serious tax offence” seems to suggest that there are less serious crimes that will not bring about consequences for the taxpayer.

- *To avoid misinterpretations, it is therefore recommended that lessons from the UK and Canada be imported into our legislation because, in both countries, such terms are not used to deal with taxpayer issues. There is also no use of concepts such as “serious” or “less serious tax crime”.*

13.4 RECOMMENDATION ON HOW AN AUDIT MUST BE CONDUCTED BY THE COMMISSIONER

As stated in Chapter 2, the challenge posed by an audit conducted by the Commissioner on South African taxpayers is that there are no clear guidelines with respect to the persons on whom and the process of how the audit is conducted. Canada provides a good lesson on how audits can be conducted while protecting taxpayers’ rights, because there are guidelines on how taxpayers are selected for audits.

Following Canada’s example in South Africa may prevent the infringement of the right to equality when the Commissioner exercises his information gathering powers. It is therefore recommended that a provision be inserted in the TAA which provides for guidelines to be followed when the Commissioner conducts audits on taxpayers. This will fulfil what section 9 of the Constitution requires: that taxpayers are to be treated equally, subject to the limitation in section 36 of the Constitution.

- *It is therefore recommended that section 40 of the TAA be amended to include a provision dealing with guidelines on how an audit must be conducted on taxpayers by the Commissioner*. The amended section could be redrafted as follows (recommendations in italics):
  40. (1)...

(2) The selection of taxpayers shall be made by a computer system.
(3) The computer system shall identify taxpayers who might be suspected to have contravened the tax Act or committed a criminal act and taxpayers with inconsistent returns on a three-year cycle.
(4) The selection of taxpayers shall consist of audit projects, leads and secondary files.
(5) The conduct of an audit shall consist of a field audit and an industry-wide audit.

These recommendations are also in line with the IBFD's OPTR best practice recommendations, which provide that a taxpayer should be allowed to request the initiation of a tax audit. The IBFD's OPTR further recommends that a tax administration should be compelled to publish tax audit guidelines and to create a manual of good practices at a global level.[11]

In addition, taxpayers should have the right to have all administrative procedures end with the notification of the results of the investigation. This step may allow taxpayers to file for reviews and appeals against such notice.[12]

According to the IBFD's OPTR, an important innovation for the protection of taxpayers' rights under tax audits is the regulation of their time limits. This prevents the tax authority from continuously extending an ongoing audit, which may create excessive burdens for taxpayers that also affect legal certainty.[13]

The IBFD's OPTR further recommends that no administrative procedure shall compel taxpayers to declare against themselves. This implies the recognition of the right to remain silent during all tax audits.[14] Compliance with these principles is important in any administrative procedure, and their infringement makes any administrative action null and void.[15]

- *In line with the IBFD's OPTR recommendations, it is therefore recommended that South African taxpayers be informed whether an audit is to be conducted on them by the Commissioner. They also need to know how the audit system*

11 IBFD "OPTR" 38.
12 IBFD "OPTR" 38–39.
13 IBFD "OPTR" 47.
14 IBFD "OPTR" 39.
15 IBFD "OPTR" 39.

affects their rights and what measures they need to take to protect their rights.

13.5 RECOMMENDATION TO PROTECT TAXPAYERS' RIGHTS TO PRIVACY REGARDING INFORMATION IN THEIR RECORDS, BOOKS AND INFORMATION REQUESTED FROM THIRD PARTIES

The protection of taxpayers' rights to privacy deals with how taxpayers' information may be gathered and processed by the tax authority without infringing taxpayers' rights to privacy. Section 14 of the South African Constitution provides that everyone has the right to privacy. The right to privacy extends to taxpayers' records and books of accounts that may be inspected or required from time to time by the Commissioner.

It should also be borne in mind that the right to privacy is not absolute. The Constitution provides for a limitation of rights for public purposes. For example, the right could be limited where SARS is expected to obtain information from taxpayers or third parties to perform its tax collection duties effectively. It is important that in carrying out its duties, SARS it is expected to ensure confidentiality and treat taxpayers' information accordingly.

The right to privacy may be infringed where in terms of section 46(4) of the TAA the taxpayer or a third party is compelled to provide information to the tax authority. Section 46(4) of the TAA compels a person to submit the information requested by the Commissioner. This is the position especially where this information is sourced from the third party such as the secretary of a club.

- *It is therefore recommended that the compulsion in section 46(4) be amended by replacing the word "must" with "may".* The amended section could read as follows (recommendation in italics):

  46. (4) A person receiving from SARS a request for relevant material under this section *may* submit the relevant material to SARS at the place and within the time specified in the request.

- *With such amendment that removes the peremptory "must" and replaces it with "may", the taxpayer is afforded an opportunity to exercise his rights by invoking an infringement of the right to privacy, and taxpayers have an opportunity to protect their rights.*

The above recommendation is in line with the DTC's recommendations which provide that, since the right to privacy and confidentiality are entitlements that are contained both in the South African Constitution and in the TAA, the elaboration of this right serves as a convenient reminder to taxpayers that their privacy rights are not to be violated by SARS.[16]

As discussed in Chapter 2, the IBFD's OPTR recommends that the right to privacy be widely acknowledged as a fundamental right.[17] Because of the extensive information that tax administrations possess on their taxpayers and the sensitive nature of the information so collected, the IBFD's OPTR recommends that all tax systems must take measures to protect taxpayers' private information from any breach or misuse if it is accessed by tax administration officials or by third parties.[18]

The IBFD's OPTR suggests various practical methods that could be applied to protect the right to privacy:[19] first, taxpayers' information must be encrypted to guarantee its confidentiality. This ensures an effective firewall to prevent unauthorised access to data held by tax authorities.[20]

- *It is therefore recommended that this approach be adopted in South Africa.*

Related to the matter of the right of privacy, is the right to legal professional privilege. Section 64 of the TAA, which deals with legal professional privilege in South Africa, ensures that SARS acts within the law to protect confidential information which may be searched and seized. Taxpayers may invoke this privilege in order to protect the information held by them or a third party, for example, a lawyer or an attorney.

16 Davis Tax Committee *Tax Administration Report* 74.
17 IBFD "OPTR" 27.
18 IBFD "OPTR" 27.
19 IBFD "OPTR" 27.
20 IBFD "OPTR" 30.

- *It is therefore recommended that South Africa adopts the IBFD's OPTR best practice that the privilege of non-disclosure should apply to all tax advisors (not only lawyers) who supply advice as lawyers do and that information imparted in circumstances of confidentiality — such as religious confession — should be privileged with non-disclosure in all cases.*[21]

13.6 RECOMMENDATION TO PROTECT TAXPAYERS' RIGHTS WHEN TAXPAYER INFORMATION IS EXCHANGED WITH OTHER COUNTRIES

It should be noted that taxpayers' right to privacy may seem to be protected by the confidentiality provisions embedded in the Country-by-Country Reporting ("CbCR") rules. However, the risk still exists that information relating to taxpayers may be leaked to the wrong people during this exchange, as happened, for example, with the Panama[22] and Paradise Papers.[23]

Section 72(1) of the Protection of Personal Information Act ("POPI Act")[24] prevents a person in South Africa from transferring personal information to a third party who is in a foreign country. Taxpayers may thus invoke this right when it appears to have been infringed, as a further safeguard in addition to the confidentiality guaranteed by the CbCR rules.

The IBFD's OPTR recommends that taxpayers should have the right to be informed of any kind of limitation measures from all states involved and to be safeguarded in all tax procedures, which include the exchange of information.[25] Therefore, the requesting state should notify the taxpayer of cross-border requests for information, unless that state has specific grounds for considering that this step would prejudice the process of investigation.

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21 IBFD "OPTR" 30.

22 Kenton "The Panama Papers: What you should know" https://www.investopedia.com/terms/p/panama-papers.asp (Date of use: 17 October 2019).

23 Chavkin "Paradise Papers connection sparks massive bitcoin lawsuit" https://www.icij.org/investigations/paradise-papers/paradise-papers-connection-sparks-massive-bitcoin-lawsuit/ (Date of use: 17 October 2019).

24 Act 4 of 2013.

25 IBFD "OPTR" 67.

The requested state should also inform the taxpayer of any request for his information by a foreign state unless it has a reasoned request from the requesting state that the taxpayer not be informed on the grounds that it would prejudice the investigation. Otherwise, the taxpayer should generally be informed that a cross-border request for information is to be made.[26] The greater the powers of the tax administration, the greater the protection of taxpayers' rights should be.

It is therefore recommended that, a taxpayer should be notified of the proposed exchange of information relating to his financial information in sufficient time to exercise his data protection rights.[27] *Where the taxpayer has an opportunity to be part of the information exchange, it is recommended that the taxpayer must also be afforded an opportunity to challenge the tax authority's decision to exchange the information.*

13.7 RECOMMENDATION TO PROTECT TAXPAYERS' RIGHTS TO A FAIR HEARING OR TRIAL WHERE THE TAX AUTHORITY PURSUES CRIMINAL OR CIVIL INVESTIGATIONS AGAINST THE TAXPAYER

As discussed in Chapter 6, in the UK section 1 of the Prosecution of Offences Act[28] provides for a prosecuting service for England and Wales that is known as the Crown Prosecution Service ("CPS") consisting of—

(a) the Director of Public Prosecutions, who shall be head of the Service;
(b) the Chief Crown Prosecutors, designated under subsection (4) below, each of whom shall be the member of the Service responsible to the Director for supervising the operation of the Service in his area; and
(c) the other staff appointed by the Director under this section.

Section 2 provides that the DPP shall be appointed by the Attorney General. Section 3 provides for the duties of the DPP. Section 25 of the CRCA empowers an officer of HMRC to conduct civil proceedings in a Magistrates' Court or in the Sheriff Court.[29] This means that a distinction is drawn between criminal and civil investigations.

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26 IBFD "OPTR" 67.
27 IBFD "OPTR" 70–71.
28 Prosecution of Offences Act 1985 (c. 23).
29 Section 25(1) of the CRCA.

In Chapter 9, it was discussed that in Canada there is also a distinction between criminal and civil investigations.[30] There are factors provided by the court to be used to determine when an audit has crossed the line and becomes a criminal matter.[31] The position in the UK and Canada shows that there is a distinction between the criminal investigation and the civil investigation.

As stated in Chapter 1, one of the challenges provided by the information gathering powers of the Commissioner in South Africa is that it is not clear when a criminal proceeding becomes a civil proceeding and when it ends.

- *It is therefore recommended that lessons from the UK and Canada be followed to ensure a distinction between criminal and civil proceedings. This may be accomplished by inserting a provision in section 43 of the TAA. The amended section could read as follows* (recommendation in italics)*:*

  43. (4) Where the Commissioner has decided not to pursue the criminal investigation against the taxpayer, the latter may be referred for civil investigation.

  (5) The civil investigation shall commence when the Commissioner decides to pursue the investigation and it shall end when:

  (a) the Commissioner decides not to pursue the investigation;

  (b) the Commissioner decides to pursue the investigation and the taxpayer is not found liable; and

  (c) the Commissioner decides to pursue the investigation and the taxpayer is found liable and has paid in full and final settlement.

In Chapter 1, another challenge provided by the information gathering powers of the Commissioner is that SARS usurps the functions of the NPA. This is because section 44 of the TAA provides that a senior SARS official can pursue and investigate the commission of a "serious tax offence". This position conflicts with the constitutional principle of the separation of powers.

- *To resolve this conflict, it is therefore recommended that a special tax unit within the NPA be established and be mandated to perform tax criminal*

30 *R v Jarvis* [2002] 3 SCR 757.

31 *R v Jarvis* para 94.

investigations. This means that section 44 of the TAA would no longer have value and must be repealed.

This amendment is in line with the position in England and Wales. The prosecution of offences, including tax-related ones, falls within the ambit of the single prosecuting authority, the DPP.

13.8 RECOMMENDATION ON INFORMATION INCRIMINATING THE TAXPAYER

One of the challenges posed by the South African Commissioner's information gathering powers is that taxpayers may incriminate themselves when providing the information to the Commissioner. Incriminating information about a taxpayer may also be obtained from third parties and through search and seizure by the Commissioner.

As discussed in Chapter 2, the South African case law and the Constitution the principle against self-incrimination protects individuals from incriminating themselves. No incriminating answer may be given which could be used against the person when answering questions in any criminal proceedings against that person.[32]

Section 35(3)(j) of the Constitution protects every accused person from incriminating himself, which encourages a fair trial. This is a positive measure in South Africa, unlike the position in the UK and Canada where self-incrimination is not constitutionally protected.

- *It is recommended that the Canadian decision in R v Jarvis*[33] *that was discussed in Chapter 9 be considered because it may have persuasive value in South Africa. The Supreme Court of Canada in Jarvis held that where an inquiry relates to a criminal investigation, the audit powers cannot be used. If*

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32 *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 2 SA 621 (CC).

33 [2002] 3 SCR 757.

they were used, the information collected could not be used in a prosecution because of the Charter protections of the right to a fair trial.

13.9 RECOMMENDATION ON THE USE OF TAX AUTHORITY DOCUMENTS AS EFFECTIVE INTERNAL CONTROL MEASURES

Unlike the UK and South Africa, which have Charters (the HMRC Charter and the SARS Service Charter), Canada has a separate protection of taxpayers' rights which takes the form of the Taxpayer Bill of Rights ("TBR"). Although South Africa's Service Charter was updated in 2018, it does not provide a separate protection of taxpayers' rights. However, what is important is whether these documents provide adequate protection to taxpayers. The issue is whether they are binding on the tax authority and whether they can be referred to in court.

In Canada, the TBR has no legal force. Even though, as discussed in Chapter 11, it allows taxpayers to engage in legitimate tax reduction, it does not provide constitutional protections, and so Canadians who do not understand tax law may not benefit from the protections which it offers.[34]

In the UK, the Charter is referred to in correspondence between taxpayers, their advisers and HMRC, and it can be raised in litigation before tax tribunals and the courts.[35] However, there is no clear statement of the legal effect of the UK Charter, until a court decides what effects, if any, the Charter has.[36]

In South Africa, the DTC acknowledges that in balancing the powers of tax authorities and the rights of taxpayers, there is a disproportionate bias of power and entitlement in favour of tax authorities.[37] This bias often overrides taxpayers' rights, which are in most instances unknown to the taxpayers.

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34 Krishna "Canada needs a Charter of taxpayer rights" https://financialpost.com/legal-post/vern-krishna-canada-needs-a-charter-of-taxpayer-rights (Date of use: 25 August 2018).

35 Baker "The charter and the law" https://www.taxation.co.uk/Articles/2008-09-10-6852-charter-and-law (Date of use: 25 August 2018).

36 Baker "The charter and the law" https://www.taxation.co.uk/Articles/2008-09-10-6852-charter-and-law (Date of use: 25 August 2018).

37 Davis Tax Committee *Tax Administration Report* 63.

The DTC recommends that South Africa should develop a Taxpayer Bill of Rights ("TBR").[38] This TBR will not only guarantee taxpayers' rights in their interactions with the SARS but it will also make SARS responsible in its dealings with taxpayers and regulate the interactions and expectations of the relationship between SARS and taxpayers.[39]

It is important that the envisaged TBR should be enforceable and carry legal effect. The DTC highlights the fact that rights are of no value if they cannot be enforced. Beneficiaries of rights need to know that rights afforded to them can be enforced and also how to enforce those rights.[40]

- *It is therefore recommended that South Africa follow the Canadian approach and establish a TBR. South Africa should, however, go beyond the Canadian TBR and ensure that the South African TBR is given binding legal effect to protect taxpayers' rights in South Africa properly.*

13.10 RECOMMENDATION ON THE USE OF THE TAX BOARD AND ADMINISTRATIVE TRIBUNALS AS EFFECTIVE INTERNAL APPEAL MEASURES

In Chapter 2, it was discussed that South Africa has an internal appeal in the form of the Tax Board. A taxpayer can lodge an appeal with the Tax Board or the Tax Court. The Tax Board is more advantageous to taxpayers because it is cheaper and less restrictive than the Tax Court. However, it is subject to the jurisdiction of R1 million.

It was discussed in Chapter 8 that the UK has a Tax Tribunal which is responsible for handling appeals against some decisions made by HMRC relating to, amongst other things, income tax and PAYE tax. The tribunal is independent and does not form part of the administrative of the government.

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38 Davis Tax Committee *Tax Administration Report* 73.
39 Davis Tax Committee *Tax Administration Report* 73.
40 Davis Tax Committee *Tax Administration Report* 71.

It was discussed in Chapter 11 that Canadian law made a provision for administrative tribunals in terms of the Administrative Tribunals Support Service of Canada Act ("ATSSCA").[41] It was also mentioned that the bodies are independent and under the responsibility of the Minister of Justice and the Attorney General of Canada.

These forums could assist litigants to seek a quicker and cheaper resolution of their disputes. Although the ATSSCA provided for the establishment of the Administrative Tribunals Support Service of Canada,[42] the tax Acts do not mention a referral of the disputes to the administrative tribunals. One can simply assume that the administrative tribunals do not play a role in resolving taxpayers' disputes with the CRA.

- *It is recommended that South Africa follow the approach of the UK's Tax Tribunal: that is, each tribunal should include a tax specialist who deals exclusively with tax matters. These tribunals must also be empowered to deal with and decide tax matters on the basis of common law and the Constitution. It is further recommended that there must be one tax tribunal per province in order to alleviate the pressure put on one tribunal.*

- *The most important observation that comes from the recommendation to institute a Tax Tribunal is that it should exist side by side with the Tax Board. However, the Tax Tribunal should be approached after the Tax Board and may be used as an extra appeal procedure after an appeal to the Tax Board has failed and taxpayers still want to pursue the matter before approaching the courts. The Tax Tribunal may also be important where the dispute of the taxpayer is over the limit (R1 million). In such a case, the taxpayer will still be able to appeal to the Tax Tribunal instead of approaching the Tax Court. This recommendation provides another cheaper and faster solution to taxpayers. The recommendation to have a Tax Tribunal is also in line with international standards.*

41 Administrative Tribunals Support Service of Canada Act (S.C. 2014, c. 20, s. 376).
42 Section 3 of the ATSSCA.

- *Having a Tax Tribunal headed by an independent or retired judge experienced in tax law, with all the tribunal resources derived from and staff reporting to the Minister of Finance, would go a long way to persuading taxpayers to trust the system.*

13.11 RECOMMENDATION ON THE USE OF THE TAX OMBUD

The Parliamentary Ombudsman in the UK is a general office that does not specialise in tax matters and is used as an external remedy, as compared to the specialised Tax Ombudsmen in South Africa and Canada. The amendment to the TAA in 2016 in South Africa made changes to the Office of the Tax Ombud which confirmed its independence from SARS.

Chapter 5 of the DTC's *Tax Administration Report* deals with recommendations on the Office of the Tax Ombud.[43] Section 20(2) of the TAA provides that recommendations by the Tax Ombud are not binding on taxpayers or SARS.[44] The DTC recommends that the Tax Ombud be given the powers to enforce the TBR.[45]

- *It is therefore recommended that the South African Tax Ombud should be empowered to deal with infringements of taxpayers' constitutional rights. The amendment to the TAA in 2016 which made changes to the Office of the Tax Ombud confirmed its independence from SARS and signified a move in the right direction towards the protection of taxpayers' rights.*

13.12 RECOMMENDATION ON THE EFFECTIVENESS OF THE JUDICIAL REVIEW OF THE COMMISSIONER'S DECISION OR CONDUCT

As discussed in Chapter 5 of this work, the South African common law principles of judicial review of an administrative action have been codified in section 6 of the Promotion of Administrative Justice Act ("PAJA").[46] The effectiveness of the judicial review lies in the remedies expressed in section 8 of PAJA.

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43 Davis Tax Committee *Tax Administration Report* 87.
44 Davis Tax Committee *Tax Administration Report* 87.
45 Davis Tax Committee *Tax Administration Report* 87.
46 Act 3 of 2000.

In effect, the section provides that courts may substitute, vary or correct a defect of the administrative action only "in exceptional circumstances". The meaning of the phrase "in exceptional circumstances" is not clear. It seems to imply that courts are not given full authority to provide remedies to the reasonable satisfaction of aggrieved individuals.

- *It is therefore recommended that, apart from prohibiting, setting aside and remitting the administrative action of the Commissioner, the court must also be able to substitute, vary or correct the administrative action concerned. It is therefore recommended that section 8 of PAJA should be amended by removing the phrase "in exceptional circumstances" in section 8(1)(c)(ii) so that the provision would then read as follows:*

  ~~(ii) in exceptional cases~~
  (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
  (bb) directing the administrator or any other party to the proceedings to pay compensation; or

13.13 RECOMMENDATION ON THE USE OF MAP TO RESOLVE TAXPAYER RIGHTS TREATY DISPUTES RELATING TO EXCHANGE OF INFORMATION IN TAX MATTERS

It was discussed in Chapter 5 that Article 25 on the Mutual Agreement Procedure ("MAP")[47] deals with dispute resolution between countries and taxpayers. The Article provides that competent tax authorities shall resolve taxpayers' disputes in accordance with the application and interpretation of the Model Tax Convention on Income and Capital ("Model Tax Convention"), by mutual agreement.[48]

Article 25 empowers the Commissioners to settle taxpayers' disputes among themselves. It confers all the powers on the competent tax authorities to decide the

47 OECD *Model Tax Convention on Income and on Capital.*
48 OECD *Model Tax Convention on Income and on Capital.*

matter. This exercise leaves much room for the competent authorities to exercise and abuse their powers in deciding the taxpayer's case.

- *It is therefore recommended that the Organisation for Economic Development and Co-operation ("OECD") set up a body that deals with dispute resolution between the Commissioner and taxpayers. This exercise will then alleviate the burden on taxpayers and limit the exercise of the powers given to Commissioners. The latter will also not have the opportunity to abuse their powers when deciding disputes relating to taxpayers. This improvement will foster the impartiality and fairness that are required when resolving disputes relating to taxpayers. The latter will also be able to litigate with the tax authority without fear, favour and prejudice.*

- *Where information incriminates a taxpayer, it must not be exchanged with other countries. Alternatively, the information may be exchanged but not be used in any criminal proceedings to the detriment of taxpayers.*

The OECD released its sixth round of BEPS Action 14 peer review reports on improving tax dispute resolution mechanisms on 24 October 2019.[49] Under Action 14, countries have committed to implementing a minimum standard to strengthen the effectiveness and efficiency of the MAP.[50]

South Africa's peer review on stage 1 was launched on 31 August 2018. The second stage peer review was launched in May 2020.[51] The Stage 2 report had yet not been published by the time this study was finalised. However, what the peer reviews show is that South Africa in on track for meeting these international standards.

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49 OECD "OECD releases sixth round of BEPS Action 14 peer review reports on improving tax dispute resolution mechanisms" https://www.oecd.org/tax/beps/oecd-releases-sixth-round-of-beps-action-14-peer-review-reports-on-improving-tax-dispute-resolution-mechanisms-october-2019.htm (Date of use: 4 December 2019).

50 OECD "OECD releases sixth round of BEPS Action 14 peer review reports on improving tax dispute resolution mechanisms" https://www.oecd.org/tax/beps/oecd-releases-sixth-round-of-beps-action-14-peer-review-reports-on-improving-tax-dispute-resolution-mechanisms-october-2019.htm (Date of use: 4 December 2019).

51 BEPS Action 14: "Peer Review and Monitoring" OECD" https://www.oecd.org/tax/beps/beps-action-14-peer-review-assessment-schedule.pdf (Date of use: 22 August 2020).

13.14 RECOMMENDATION ON ADHERENCE TO THE DOCTRINE OF FINALITY

In Chapter 10, it was discussed that one important common law principle not forming part of the common law rules of natural justice in South Africa but that can be imported from Canada is the doctrine of finality. The doctrine is not formally entrenched and emphasised in South Africa as it is in Canada.

In Canada, the doctrine of finality is used to balance fairness to the parties with the protection of the administrative decision-making process.[52] The position is that the "finality principle" is not regarded as independent. Neither can it be regarded as a separate doctrine or as an independent test.[53] It may still be effectively used under the banner of the common law.

In South Africa, the DTC recommended that one of the rights to be included in the TBR is the right to finality.[54] This right entails the right to know the time frames for reviews and audits. It also involves the right to be informed of the response times for SARS to revert to taxpayers or respond to their queries, objections and appeals.[55]

This recommendation could mean that the taxpayer is given the benefit of concluding the matter where the tax authority fails to abide by such time frames. More importantly, taxpayers will not be investigated for a lengthy period without conclusion.

- *It is therefore recommended that the Canadian common law principle of finality be imported into South Africa just as the DTC recommended. It is also important that the principle be legislated to increase its authority and power.*

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52 *Danyluk v Ainsworth Technologies Inc*. [2001] 2 SCR 460 par 21;*Toronto (City) v C.U.P.E., Local 79* [2003] 3 SCR 77.
53 *Toronto (City) v C.U.P.E., Local 79* para 55.
54 Davis Tax Committee *Tax Administration Report* 71.
55 Davis Tax Committee *Tax Administration Report* 71.

13.15 RECOMMENDATION ON THE PROTECTION OF TAXPAYERS' RIGHTS TO REASONS

In Chapter 3, section 33(2) of the Constitution was discussed in relation to the right to written reasons. Through this qualification (only when rights are adversely affected), the legislature limited the right to written reasons.

Section 5 of PAJA gives the constitutional right to reasons statutory form. Although PAJA supports the right to reasons, this provision of written reasons is not automatic in terms of PAJA. This is because, first, the action performed by the Commissioner must be classified as an administrative action which affects the rights of taxpayers negatively. Secondly, the provision of reasons must be at the request of the aggrieved taxpayer. However, in the UK and Canada, no such qualifications are required.

In South Africa, the DTC recommended that the right to know must be protected.[56] This includes the right of access to information about new laws, SARS practices and information about procedures and decisions taken by SARS in relation to a taxpayer.[57] This right to know also entails the entitlement to explanations and reasons why particular decisions have been taken. This improvement will ensure that taxpayers' rights are treated fairly.

- *It is therefore recommended that section 5 of PAJA needs to be amended to include an automatic provision of reasons by the administrator. The amended provision could read as follows* (recommendation in italics)*:*

  (1) Any person whose rights have been materially and adversely affected by administrative action shall, within 90 days after the date on which the administrative action was performed, *be furnished with written reasons for the action by the administrator.*

  (2) *The administrator who performed the administrative action must, within 90 days after performing the administrative action, provide that person adequate reasons in writing for the administrative action.*

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56 Davis Tax Committee *Tax Administration Report* 74.

57 Davis Tax Committee *Tax Administration Report* 74.

Once the provision of reasons is automatic, what needs to follow is the standard of reasons to be provided by the Commissioner. The Supreme Court of Appeal ("SCA") and the Tax Court has ruled that the reasons to be provided by the Commissioner must be adequate.[58] It needs to be noted that PAJA does not apply to taxpayers only. Therefore, the consequence will be that the proposed amendment will apply to everyone aggrieved by the administrative action performed the administrator.

13.16 RECOMMENDATION ON ADHERENCE TO THE DOCTRINE OF *ULTRA VIRES* TAXATION BY THE COMMISSIONER

In Chapter 10 it was discussed that the Canadians apply the doctrine of *ultra vires* taxation. This means that taxpayers are allowed to claim the restitution of taxes paid where the legislation that required payment of taxes is based on an unconstitutional statute, regulation, or by a statutory authority acting outside the bounds of its enabling legislation. This approach implies that a public law remedy would be granted to ensure the return of unconstitutionally collected taxes.

- *It is therefore recommended that the Canadian doctrine of ultra vires taxation be followed and emulated in South Africa. Taxpayers should be allowed to claim the restitution of taxes paid where the information was gathered by the Commissioner as a result of an unconstitutional statute or the Commissioner was not properly authorised to do so. The gathering of relevant information by the Commissioner must have resulted in the taxpayers' having to pay more tax.*

13.17 RECOMMENDATION ON THE RECOGNITION AND APPLICATION OF THE DOCTRINE OF SUBSTANTIVE LEGITIMATE EXPECTATIONS

The doctrine of substantive legitimate expectations is a thorny issue worth resolving. It has been discussed in the previous chapters that Canada and South African do not recognise the doctrine of substantive legitimate expectations.

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58 *CSARS v Sprigg Investment 117 CC t/a Global Investment* [2010] JOL 26547 (SCA); *ITC 1929* 82 SATC 264.

However, in the UK (as discussed in Chapter 7) the doctrine of substantive legitimate expectations is well entrenched to provide effect to the rights of individuals such as taxpayers. *The doctrine of substantive legitimate expectations as compared to the doctrine of procedural legitimate expectations requires that the Commissioner must fulfil continued practices, promises and representations made to taxpayers.*

- *It is therefore recommended that the doctrine of substantive legitimate expectations be adopted in South Africa because it can be used by taxpayers in South Africa to advance their rights effectively. Taxpayers can thus be entitled to hold the Commissioner and SARS liable for continued practices, promises and representations made to taxpayers.*

The best way that this development can be achieved would be if the Supreme Court of Appeal and the Constitutional Court could pronounce on the recognition and application of the doctrine in South Africa.

13.18 RECOMMENDATION ON THE RECOGNITION AND APPLICATION OF *UBUNTU* TO RESOLVE INFRINGEMENTS OF TAXPAYERS' RIGHTS

Finally, the principle of *ubuntu* as discussed in Chapter 4 can be relied upon by taxpayers to argue that the conduct of the Commissioner's information gathering powers are invalid. This is because the principle has been recognised by the Constitutional Court.[59] This is so even though the concept of *ubuntu* is not legislated. For example, if the Commissioner exchanges information belonging to the taxpayer with foreign tax authorities but without informing him, this action is against *ubuntu*.

In principle, what this implies is that, even if the action of the Commissioner may be valid in terms of the TAA, if it still contravenes the spirit and purport of ubuntu, that concept may be invoked to invalidate the action of the Commissioner. Ubuntu could be relied upon more easily to invalidate the actions of the Commissioner if it were

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59 *Everfresh Market Virginia* (*Pty*) *Ltd v Shoprite Checkers* (*Pty*) *Ltd* 2012 1 SA 256 (CC) and *Beadica 231 CC and Others v Trustees for the Time Being of the Oregon Trust and Others* (CCT109/19) [2020] ZACC 13 (17 June 2020); [2020] JOL 47440 (CC).

legislated, and so this recommendation should receive urgent attention from Parliament.

13.19 CONCLUDING REMARKS

A number of masters and doctoral dissertations have been written on certain aspects of this topic, such as taxpayers' rights to property, administrative justice, access to information, and access to court. This work acknowledged the contribution made by academics and practitioners on the topic dealing with taxpayers' rights.

This work contributes to the body of knowledge and builds on what all these and other authors have written on the various aspects of this topic; but it has focussed mainly on the Commissioner's information gathering powers and how they may contravene taxpayers' rights.

It should be noted that much of the research by these authors on taxpayers' rights in general was conducted before the promulgation of the TAA. This work differs from other research because it covers aspects in the TAA (after promulgation) relating to the Commissioner's information gathering powers.

Another contribution to the body of knowledge is that this work is not limited to the domestic information gathering powers of the Commissioner. This work has taken a holistic approach to the topic of the study, by taking into perspective other international information gathering powers of the tax authority that are instrumental in increasing tax collection.

Today one cannot write a thorough work on the impact of the Commissioner's information gathering powers without considering the impact of globalisation and the increase of off-shore investments by South African residents in low tax jurisdictions which impacts on tax collection. Taxpayers often engage in tax evasion and tax avoidance schemes whereby they hide their funds and investment from the tax authorities.

The work has demonstrated how South Africa has associated itself with international measures to ensure taxpayer transparency and to curtail tax evasion schemes. Over the last few years, South Africa has enacted legislation — for instance, with respect to the exchange of information in tax matters — which is pertinent to this work.

The work has considered the exchange of information in, for example, double tax treaties, the OECD standard of automatic exchange of information in tax matters, as well as measures to curtail BEPS which can ensure transparency through requiring CbCR of taxes paid by multinational entities in the countries they transact in. The comprehensive approach of this work has made a fresh contribution to this discourse in the light of the current legislation and international developments.

The work has discussed the recognition of the doctrine of substantive legitimate expectations in South Africa which could augment the protection of taxpayers' rights discourse. There is also a recommendation on how *ubuntu* may be relied upon by taxpayers to protect their rights.

The work has also taken into account recent developments in the protection of taxpayers' rights. The DTC's recommendations and the IBFD's OPTR best practices have provided much insight on the topic which augments the recommendations provided in this chapter.

South Africa is governed by the Constitution as the supreme law. The Constitution recognises that all citizens are equally entitled to the rights, privileges and benefits of citizenship. They are also equally obliged to fulfil the responsibilities of citizenship. This implies that as much as the state is responsible for protecting its citizens and their rights, so citizens are equally obliged to pay taxes due to the state.

Recognising the above-mentioned considerations, the recommendations in this work regarding the protection of taxpayer's rights will go a long way to encouraging international investment in South Africa and affirming taxpayers' confidence in the fairness of the tax system — which work together to enhance voluntary compliance and increased revenue collection. It should be noted that the recommendations

imported from the UK and Canada should be tailored to meet South Africa's unique economic circumstances, demographics and political history that have shaped her.

This work recognises the fact that most of the recommendations made regarding the protection of taxpayers' rights will benefit those who have money. This happens everywhere in the world. Only the rich are the ones that can be able to litigate and enforce their rights. However, and as a comfort, section 38 of the Constitution provides for almost everyone to approach the court when their rights have been infringed.

In terms of section 38 of the Constitution, the following people may institute an action to advance their rights: anyone acting in their own interest; anyone acting on behalf of another person who cannot acting their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members.

There are interest groups in South Africa which are prepared to assist individuals who cannot afford the resources for litigation. Therefore, everyone has an opportunity to enjoy and be able to advance the protection of their rights.

The topic of the protection of taxpayers' rights poses challenges not only in South Africa, but internationally as well. Although South Africa's Constitution has made significant strides towards the protection of taxpayers' rights, more needs to be done as recommended in this work to ensure that South Africa's approach is in line with international standards.

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